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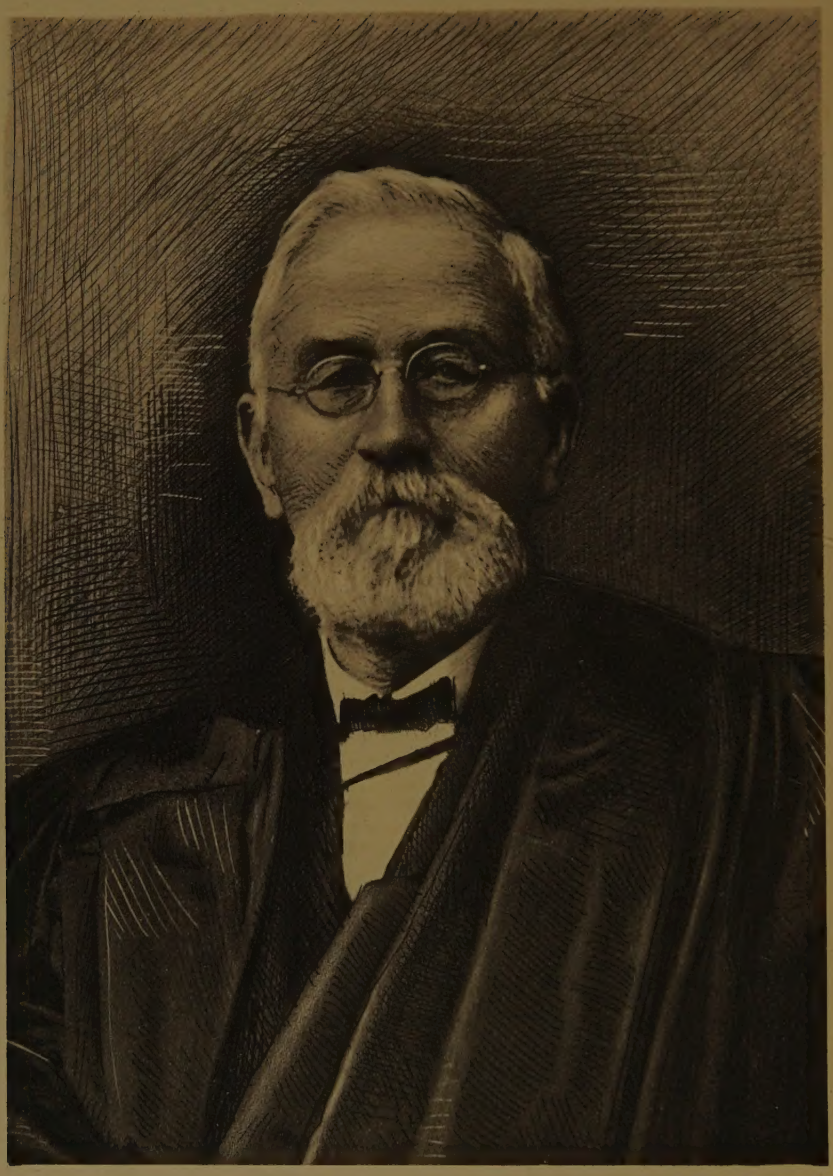

R. O. Dunbar

STATE OF WASHINGTON SUPREME COURT ASSOCIATE JUSTICE

1889-1910 1911-1912

CORPUS JURIS

BEING

A COMPLETE AND SYSTEMATIC STATEMENT
OF
THE WHOLE BODY OF THE LAW

AS EMBODIED IN AND
DEVELOPED BY

ALL REPORTED DECISIONS

EDITED BY

WILLIAM MACK, LL.D.

Editor-in-Chief of the Cyclopedia of Law and Procedure

AND

DONALD J. KISER, LL.D.

Contributing Editor of the Cyclopedia of Law and Procedure

The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled.

GREENE, C. J., in *1 R. I. 356.*

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TO

CHARLES WALTER DUMONT, LL.D.

January 1, 1860—January 1, 1928

the author of the plan of the Cyclopedia of Law and Procedure, the inspiration of the organization which brought that work to completion, and whose creative genius evolved the plan of Corpus Juris, these volumes are dedicated.

192783

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* The Civil Law material, including Spanish words and phrases, in this volume, was prepared by CHARLES SUMNER LOBINGIER, J.D., D.C.L., Ph.D., member Nebraska Supreme Court (Commission), 1902–1903; Judge, Court of First Instance, Philippines, 1904–1914; Judge, United States Court for China, 1914–1924; Chief Attorney, U. S. Department of Justice, 1925– ; detailed for survey of Cuban Laws, 1926; Professor of Law, University of Nebraska, 1900–1903; Professorial Lecturer in Law, University of the Philippines, 1910– ; Member faculty, Comparative Law School of China, 1915– ; Professor of Civil and Comparative Law, National University, Washington, D. C., 1925– ; Vice-Chairman, Comparative Law Bureau, American Bar Association, 1919– ; Author "Philippine Practice" (1907); "The People's Law" (The Macmillan Co., 1909); "The Evolution of the Roman Law" (2d ed., 1923); "Alevosia" 2 C. J. 1030; "Arrendamiento" 5 C. J. 375; "Autor" (Crim. L.) 6 C. J. 868; "Bastardo" 7 C. J. 934, "Beneficio de Inventario" 7 C. J. 1135; "Bienes" 7 C. J. 1154; "Bona Paraphernalia" 8 C. J. 1149; "Cadena" 9 C. J. 1115; "Calumnia" 9 C. J. 1119; "Censo" 11 C. J. 67; "Code" 11 C. J. 940; "Codicillii" 11 C. J. 944; "Cohecho" 11 C. J. 953; "Collatio Bonorum" 11 C. J. 962; "Commodatum" 12 C. J. 151; "Compensatio" 12 C. J. 224; "Confusio" 12 C. J. 488; "Contratos" 13 C. J. 802; "Culpa" 17 C. J. 393; "Damnum" 17 C. J. 1123; "Derecho" 18 C. J. 785; "Desacato" 18 C. J. 789; "Desheredacion" 18 C. J. 969; "Divortium" 19 C. J. 379; "Hæres" 29 C. J. 202; "Modern Civil Law" 40 C. J. and other civil law titles in this work as well as many other articles in this and other legal encyclopedias.

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CORPUS JURIS

VOLUME FORTY-EIGHT

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Unfair competition with respect to patented articles see **Trade-Marks, Trade-Names, and Unfair Competition** [38 Cyc 827].
United States, right of to use patented invention see **United States** [39 Cyc 754].

I. DEFINITIONS

[By Chas. W. Riley]

[§ 1] Patent rights are those rights or privileges which governments grant to inventors with reference to their inventions.[1] The term "patent" is commonly used to designate either the instrument by which patent rights are evidenced,[2] or the patent right itself.[3] Using the term in the latter sense, a patent granted by the United States may be defined as a grant to an inventor, his heirs or assigns, of the exclusive right to make, use, and vend his invention for a definite period of time.[4]

1. U. S.—Avery v. Wilson, 20 Fed. 856.
Ind.—Ullman v. Thompson, 57 Ind. A. 126, 106 NE 611.
Md.—Crown Cork, etc., Co. v. State, 87 Md. 687, 40 A 1074, 67 AmSR 371, 53 LRA 417 [writ of error dism 20 SCt 1026 mem, 44 L. ed. 1220 mem, 1221 mem].
Mass.—Vose v. Singer, 4 Allen 226, 81 AmD 696.
Pa.—Com. v. Central Dist., etc., Tel. Co., 145 Pa. 121, 22 A 841, 27 AmSR 677.
Meaning of phrase "patents and patent rights" as used in Bankruptcy Act see Bankruptcy § 199 note 86 [a].

2. Trane Co. v. Nash Engineering Co., 25 F. (2d) 267; Minneapolis, etc., R. Co. v. Barnett, 257 Fed. 302, 168 CCA 386; Société Anonyme Pour la Transmission De la Force Par L'Electricité v. General Electric Co., 97 Fed. 604; McHenry v. Royal Neighbors of America, 211 Mo. A. 230, 242 SW 147 [quot Webster D.].

3. Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 646, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem].
"The word 'patent,' originally a qualifying adjective applied to the 'open letters' by which a sovereign grants an estate or privilege, has come to mean, in connection with the so-called patent laws of the United States, as well as in common parlance, the exclusive privilege itself granted by the sovereign authority to an inventor with respect to his invention." Atlas Glass Co. v. Simonds Mfg. Co., supra.

4. Minnesota v. Barber, 136 U. S. 313, 10 SCt 862, 34 L. ed. 455; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; U. S. v. Standard Sanitary Mfg. Co., 191 Fed. 172 [aff 226 U. S. 20, 33 SCt 9, 57 L. ed. 107]; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 CCA 594; Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem]; Société Anonyme Pour la Transmission De la Force Par L'Electricité v. General Electric Co., 97 Fed. 604; Eclipse Wind Engine Co. v. Zimmerman Mfg. Co., 16 Ind. A. 496, 44 NE 1115; Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322.
"Public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and

The term "letters patent" is used to designate the instrument by which patent rights are evidenced.[5]

II. COMMON-LAW RIGHTS

[By Chas. W. Riley]

[§ 2] An inventor has a natural right separate from, and independent of, any patent grant to make, use, and vend his invention,[6] and to deprive the public of the benefits of his invention by keeping it a secret.[7] But the making of an invention or discovery does not of itself confer upon the inventor or discoverer any exclusive right with respect to the production, use, or sale of his invention.[8] Such rights can be acquired only by grant of a sovereign authority.[9] Subject to the right of the inventor to be protected against disclosure or use by one who obtained knowledge through fraud or breach of faith,[10] the public has a natural right at common law to make, use, and sell anything of which it has sufficient knowledge,[11] and the exclusive right of an inventor in his invention is not recognized.[12]

III. STATUTORY AND CONSTITUTIONAL PROVISIONS

[By Chas. W. Riley]

[§ 3] **A. In General.** In the United States, congress is empowered by the constitution "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[13] The power conferred by the constitution upon congress to secure to inventors the exclusive right to their inventions is general,[14] and is subject to but one limitation, namely, that the period during which the privilege may be enjoyed shall be for a limited time.[15] Congress may exercise the power or refrain from so doing,[16] and it is within the discretion of that body to say when, for what length of time, and under what circumstances a patent for an invention shall be granted.[17] Congress may confer the patent privilege either by special grant to individuals,[18] or by general acts providing for the issue of grants to any person coming within their terms.[19] Except where vested rights are impaired,[20] it may exercise its power by retro-

the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress." Seymour v. Osborne, 11 Wall. (U. S.) 516, 533, 20 L. ed. 33.

[a] **Other definitions.**—(1) "A grant made by the government to an inventor, conveying and securing to him the exclusive right to make and sell his invention for a term of years." Black L. D. (2) "The exclusive liberty conferred by letters patent from the sovereign on an inventor or his alienee of making and vending articles according to his invention." Avery v. Wilson, 20 Fed. 856, 858. (3) "A privilege granted by the Government to the first inventor of a new and useful discovery or mode of manufacture, that he also shall be entitled, during a limited period, to the exclusive use and benefit thereof." Crown Cork, etc., Co. v. State, 87 Md. 687, 698, 699, 40 A 1074, 67 AmSR 371, 53 LRA 417 [writ of error dism 20 SCt 1026 mem, 44 L. ed. 1220 mem, 1221 mem]. (4) "The right, protected by letters patent, to use the process, combination, or appliance, discovered by the patentee, for the production of a certain result." Com. v. Central Dist., etc., Tel. Co., 145 Pa. 121, 127, 22 A 841, 27 Am SR 677. (5) "The right to make, use or vend a patented invention, or inventions claimed to be patented." State v. Peck, 25 Oh. St. 26, 28. (6) A right which is said to "resemble a franchise in being a privilege which concerns, and is intended to benefit the public, which depends for existence and preservation upon the authority which confers it." Crown Cork, etc., Co. v. State, supra; Com. v. United Gas Impr. Co., 7 Pa. Co. 116, 118. (7) "A writing securing to an inventor for a term of years the exclusive right to his invention." McHenry v. Royal Neighbors of America, 211 Mo. A. 230, 235, 242 SW 147 [quot Webster D.]. (8) "A patent is a grant of a right to exclude all others from making, using, or selling the invention covered by it." U. S. v. Standard Sanitary Mfg. Co., 191 Fed. 172, 190 [aff 226 U. S. 20, 33 SCt 9, 57 L. ed. 107].

5. Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem]; Ullman v. Thompson, 57 Ind. A. 126, 106 NE 611.

6. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Bloomer v. McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532; Nye Tool, etc., Works v. Crown Die, etc., Co., 276 Fed. 376 [rev 270 Fed. 587, and certiorari granted 257 U. S. 632 mem, 42 SCt 185 mem, 66 L. ed. 407 mem]; Swindell v. Youngstown Sheet, etc., Co., 230 Fed. 438, 144 CCA 580; Pegram v. American Alkali Co., 122 Fed. 1000 [aff 125 Fed. 577, 60 CCA 383]; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845 [mod on other grounds 101 Fed. 826, 42 CCA 43]; Bell, etc., Co. v. Spoor, 216 Ill. A. 221; Eclipse Wind Engine Co. v. Zimmerman Mfg. Co., 16 Ind. A. 496, 44 NE 1115.

7. Westcott Chuck Co. v. Oneida Nat. Chuck Co., 122 App. Div. 260, 106 NYS 1016; Rosenthal v. Goldstein, 112 Misc. 606, 183 NYS 582.

8. Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293, 78 A 698.

9. Pomeroy Ink Co. v. Pomeroy, supra.

10. See Injunctions §§ 210–216.

11. Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 286 Fed. 358; Wireless Specialty Apparatus Co. v. Mica Condenser Co., 239 Mass. 158, 131 NE 307, 16 ALR 1170; Elaterite Paint, etc., Co. v. S. E. Frost Co., 105 Minn. 239, 117 NW 388.

12. Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Curtiss Aeroplane, etc., Corp. v. United Aircraft Engine Corp., 266 Fed. 71; Fair, etc., Supply Co. v. Shapiro, 257 Fed. 558; In re Dann, 129 Fed. 495; Rein v. Clayton, 37 Fed. 354, 3 LRA 78; American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 78 Off. Gaz. (U. S.) 171; American Stay Co. v. Delaney, 211 Mass. 229, 97 NE 911, AnnCas1913B 509; Dudley v. Mayhew, 3 N. Y. 9; Watson Mfg. Co. v. Watson, 29 Pa. Dist. 296.

"The exclusive right of an inventor in his invention was not recognized by the common law, which conferred no such monopoly upon him." Curtiss Aeroplane, etc., Corp. v. United Aircraft Engine Corp., 266 Fed. 71, 76.

13. U. S. Const. art 1 § 8 cl 8.

[a] **In England** (1) the common law and the statute of monopolies permit the crown, within reasonable limits, to grant the exclusive right to trade in a new invention. Reg. v. Prosser, 11 Beav. 306, 50 Reprint 834; Caldwell v. Vanvlissengen, 9 Hare 415, 41 EngCh 415, 68 Reprint 571. (2) The judicial committee of the privy council may confirm the grant of a patent. Re Card, 6 Moore P. C. 207, 13 Reprint 663; In re Honiball, 9 Moore P. C. 378, 14 Reprint 340; In re Robinson, 5 Moore P. C. 65, 13 Reprint 414. (3) The Statute for Monopolies § 6 permitted the granting of patents for the term of fourteen years to the true and first inventor. St. 21 Jac. I c 3.

14. Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535.

15. Fire-Extinguisher Case, 21 Fed. 40.

16. Bird v. Elaborated Roofing Co., 256 Fed. 366, 167 CCA 536 [certiorari dism 250 U. S. 647 mem, 63 L. ed. 1188 mem, 39 SCt 490 mem].

17. Bird v. Elaborated Roofing Co., supra; Fire-Extinguisher Case, 21 Fed. 40; Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Evans v. Robinson, 8 F. Cas. No. 4,571, Brunn. Coll. Cas. 400; Owen v. Heimann, 56 App. (D. C.) 232, 12 F. (2d) 173 [certiorari den 271 U. S. 685 mem, 46 SCt 637 mem, 70 L. ed. 1151 mem]; Kling v. Haring, 56 App. (D. C.) 153, 11 F. (2d) 202 [certiorari den 271 U. S. 671 mem, 46 SCt 485 mem, 70 L. ed. 1143 mem].

18. Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433; Fire-Extinguisher Case, 21 Fed. 40; Bloomer v. Stolley, 3 F. Cas. No. 1,559, Fish. Pat. R. 376, 5 McLean 158; Evans v. Robinson, 8 F. Cas. No. 4,571, Brunn. Coll. Cas. 400.

19. Fire-Extinguisher Case, 21 Fed. 40.

20. McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; U. S. v. United Shoe Mach. Co., 264 Fed. 138 [app dism 254 U. S. 666 mem, 41 SCt

spective action,[21] as where an invention is already in public use.[22] Congress cannot, however, take away the right of a party to use an article previously purchased by him.[23]

State grants. The federal constitution does not in terms prohibit the several states from exercising the power to grant patents to inventors,[24] or grant the power exclusively to the United States,[25] and, while no state can interfere with the exercise of the power granted to congress,[26] the grant of a patent by a state is not repugnant to the power granted to congress,[27] although, of course, the operation of the grant would be confined to the limits of the state granting the privilege.[28]

[§ 4] **B. Federal Statutes.** The first patent law enacted by congress pursuant to the power conferred by the constitution was that of April 10, 1790,[29] which was supplemented and extended by the act of February 21, 1793,[30] the act of April 17, 1800,[31] and the act of February 15, 1819.[32] Subsequent complete revisions were the patent acts of July 4, 1836,[33] and of July 8, 1870.[34] The latter act was confirmed and reënacted in the revision of 1874,[35] and, with its amendments,[36] is the present law.[37] In addition to these general laws, congress has from time to time granted patents to individuals by special act.[38] Special acts are considered as engrafted on the general act,[39] and are construed with the provisions of the general patent law.[40]

Purpose of patent acts. The purpose of congress in granting and authorizing the grant of patents is to stimulate inventors,[41] and to encourage the disclosure of inventions and discoveries to the public,[42] seeking thereby the object for which the power was conferred, namely, the promotion of the progress of science and useful arts.[43]

[§ 5] **C. Extent of Operation.** The monopoly of a patent does not extend beyond the jurisdiction of the government granting it.[44] Subject to this limitation the rights conferred extend to all territory covered by the grant.[45] The monopoly conferred by the present patent law of the United States extends throughout the United States, and the territories thereof,[46] and the rights of the patentee are not operative beyond those limits.[47] While the rights extend to American vessels on the high seas,[48] they do not extend to foreign vessels in our ports.[49] In accord with the general rule that the constitution and the laws of the United States do not of their own inherent force pass to, and become operative in, territory belonging to the United States and subject to its jurisdiction,[50] the patent rights conferred thereby do not extend to such territory in the absence of action by congress.[51]

217 mem, 65 L. ed. 465 mem, and aff 258 U. S. 451, 42 SCt 363, 66 L. ed. 708].

21. McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102.

22. McClurg v. Kingsland, supra; Page v. Holmes Burglar Alarm Tel. Co., 1 Fed. 304, 17 Blatchf. 485; Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535.

[a] **Consent of the inventor to the public use of his invention, or the withdrawal of his application for a patent,** does not vest any right of property in the general public, in the sense of the fifth amendment to the constitution of the United States, so as to prevent the subsequent allowance of a patent for such invention, by act of congress, unless there was, in a particular case, a reduction of the invention to use and practice, by its embodiment in some apparatus prior to the issue of such patent. Page v. Holmes Burglar Alarm Tel. Co., 1 Fed. 304, 17 Blatchf. 485.

23. Bloomer v. McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532.

24. Livingston v. Van Ingen, 9 Johns. (N. Y.) 507.

25. Livingston v. Van Ingen, supra.

26. U. S.—Ball v. Coker, 168 Fed. 304; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336 [certiorari granted 207 U. S. 589 mem, 28 SCt 255 mem, 52 L. ed. 354 mem, and certiorari dism 210 U. S. 439 mem, 28 SCt 764 mem, 52 L. ed. 1138 mem]; Woollen v. Banker, 30 F. Cas. No. 18,030, 2 Flipp. 33.

Ill.—Hollida v. Hunt, 70 Ill. 109, 22 AmR 63.

Ky.—Patterson v. Com., 11 Bush 311, 21 AmR 220.

Mich.—Peo. v. Russell, 49 Mich. 617, 14 NW 568, 43 AmR 478.

Minn.—Crittenden v. White, 23 Minn. 24, 23 AmR 676.

Nebr.—Wilch v. Phelps, 14 Nebr. 134, 15 NW 361.

Tenn.—State v. Butler, 3 Lea 222.

Tex.—Coca-Cola Co. v. State, (Civ. A.) 225 SW 791.

27. Livingston v. Van Ingen, 9 Johns. (N. Y.) 507.

28. Livingston v. Van Ingen, supra.

29. 1 St. at L. 109.

30. 1 St. at L. 318.

31. 2 St. at L. 37.

32. 3 St. at L. 481.

33. 5 St. at L. 117.

34. 16 St. at L. 198.

35. Rev. St. §§ 4883-4936.

36. See U. S. Code tit 35.

37. U. S. Code tit 35.

38. Fire-Extinguisher Case, 21 Fed. 40.

39. Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433.

40. Bloomer v. McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532.

41. Dr. Miles Medical Co. v. Park, etc., Co., 220 U. S. 373, 31 SCt 376, 55 L. ed. 502; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336 [certiorari granted 207 U. S. 589 mem, 28 SCt 255 mem, 52 L. ed. 354 mem, and certiorari dism 210 U. S. 439 mem, 28 SCt 764 mem, 52 L. ed. 1138 mem].

42. Gayler v. Wilder, 11 How. (U. S.) 477, 13 L. ed. 504; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 286 Fed. 358; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336 [certiorari granted 207 U. S. 589 mem, 28 SCt 255 mem, 52 L. ed. 354 mem, and certiorari dism 210 U. S. 439 mem, 28 SCt 764 mem, 52 L. ed. 1138 mem]; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, Wall. Jr. 356; Dieckmann v. Brune, 37 App. (D. C.) 399.

43. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 19, 7 L. ed. 327; Vanore v. Improta, 25 F. (2d) 918; Macbeth-Evans Glass Co. v. General Electric Co., 246 Fed. 695, 158 CCA 651.

"While one great object was, by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius; the main object was 'to promote the progress of science and useful arts.'" Per Story, J., in Pennock v. Dialogue, supra.

[a] **Reward of inventor not the primary purpose.**—"The primary purpose of conferring on Congress the power to pass patent laws and to grant for a limited time patent rights to inventors was not to help or reward the inventor, but to promote the progress of science and the useful arts, for the benefit of the public and organized society." Vanore v. Improta, 25 F. (2d) 918, 923.

44. Boesch v. Graff, 133 U. S. 697, 10 SCt 378, 33 L. ed. 787; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 164 Fed. 869; Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co., 129 Fed. 105, 63 CCA 607 [certiorari den 194 U. S. 636 mem, 24 SCt 859 mem, 48 L. ed. 1160 mem].

45. Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595.

46. U. S. Code tit 35 § 40.

[a] **An English patent** is effective throughout the United Kingdom and the Isle of Man. Act (1883) § 16 (46 & 47 Vict. c 57).

47. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]; Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595; Herman v. William B. Pierce Co., 105 App. Div. 16, 93 NYS 413.

48. Gardiner v. Howe, 9 F. Cas. No. 5,219, 2 Cliff. 462.

49. Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595.

50. See Territories [38 Cyc 202].

51. Op. Atty.-Gen., 113 Off. Gaz. (U. S.) 2503 (the doctrine being applied in respect of the Panama Canal zone).

IV. NATURE AND EXTENT OF RIGHT CONFERRED

[By Chas. W. Riley]

[§ 6] **A. In General.** The granting of patent rights is an act of sovereignty,[52] and how the sovereign authority of a country shall speak depends upon the constitution and settled scheme of government in that country,[53] as does also the nature and extent of the rights granted to the inventor.[54] In the United States, the nature and extent of a patent right are entirely dependent upon the provisions of the acts of congress providing for and regulating such grants.[55] The present law authorizes the granting to inventors, their heirs and assigns, of an exclusive privilege to "make, use, and vend" their inventions for a definite period of time.[56] The right granted consists in a limited monopoly for the benefit of the public with reference to the production, use, and sale of the invention.[57]

Patent right an exclusionary right merely. The grant of a patent does not create in the patentee the right to make, use, and vend the thing patented;[58] that right he possesses at common law without special authority from the government.[59] The right granted is only a negative right of exclusion.[60] A patentee is merely given for a limited time the right to exclude others having knowledge of the invention from making, using, or selling it.[61]

[§ 7] **B. Patent as a Contract.** Courts have regarded a patent as a contract between the inventor and the government.[62] The instrument containing

52. Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem].

53. Atlas Glass Co. v. Simonds Mfg. Co., supra.

[a] **Denmark.**—(1) Prior to 1894, patents or "enerets" were granted and issued by the king, in the exercise of the royal prerogative, and the term for which they were granted was determined according to what seemed to be the exigency of each case. Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem]. (2) The Danish Patent Act of 1894 changed the procedure and the method of granting an "eneret" or patent, although under this act the extent of the monopoly is about the same as it was according to custom and usage under the royal grants. Atlas Glass Co. v. Simonds Mfg. Co., supra.

[b] **England.**—In England patents for inventions have always been the subject of royal grants. Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem].

54. Atlas Glass Co. v. Simonds Mfg. Co., supra.

55. Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Bird v. Elaborated Roofing Co., 256 Fed. 366, 167 CCA 536 [certiorari dism 250 U. S. 647 mem, 63 L. ed. 1188 mem, 39 SCt 490 mem]; Ball v. Coker, 168 Fed. 304; Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 646, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem]; U. S. v. American Bell Tel. Co., 32 Fed. 591 [rev on other grounds 128 U. S. 315, 9 SCt 90, 32 L. ed. 450]; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Owen v. Heimann, 56 App. (D. C.) 232, 12 F. (2d) 173 [certiorari den 271 U. S. 685 mem, 46 SCt 637 mem, 70 L. ed. 1151 mem]; In re Ellis, 37 App. (D. C.) 203.

"What the nature and extent of the exclusive privilege thus granted by the constitution and laws of the United States may be depends upon the terms of the act of congress providing for and regulating the same." Atlas Glass Co. v. Simonds Mfg. Co., supra.

56. U. S. Code tit 35 § 40.

Term of United States patent see infra §§ 294-306.

57. U. S.—Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; Bement v. National Harrow Co., 186 U. S. 70, 22 SCt 747, 46 L. ed. 1058; Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836; Crystal Percolator Co. v. Landers, 258 Fed. 28; Schrade v. Camillus Cutlery Co., 242 Fed. 523; Patterson v. U. S., 222 Fed. 599, 138 CCA 123 [rev 201 Fed. 697, and certiorari den 238 U. S. 635 mem, 35 SCt 939 mem, 59 L. ed. 1499 mem]; National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 CCA 594; Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. 594 [rev on other grounds 127 Fed. 691, 62 CCA 447].

Cal.—Braun v. McGuire, 201 Cal. 134, 255 P 808.

D. C.—Derr v. Gleason, 49 App. 69, 258 Fed. 969; Fulton Waterworks Co. v. Bear Lithia Springs Co., 47 App. 437.

Ill.—West Disinfecting Co. v. U. S. Sanitary Specialties Corp., 221 Ill. A. 372.

Kan.—Bolte v. Sparks, 85 Kan. 13, 16, 116 P 224 [cit Cyc].

Mass.—Vose v. Singer, 4 Allen 226, 81 AmD 696.

Minn.—Deane v. Hodge, 35 Minn. 146, 27 NW 917, 59 AmR 321.

Mo.—National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 SW 561.

N. Y.—Gilbert El. R. Co. v. Henderson, 70 N. Y. 361, 3 AbbNCas 434; Gilbert El. R. Co. v. Kobbe, 70 N. Y. 361; King v. Platt, 37 N. Y. 155, 4 Transcr. A. 19, 3 AbbPrNS 434, 35 HowPr 23; Rosenthal v. Goldstein, 112 Misc. 606, 183 NYS 582.

Tex.—American Refining Co. v. Gasoline Products Co., (Civ. A.) 294 SW 967.

58. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 286 Fed. 358; Bird's-Eye Veneer Co. v. Franck-Philipson, 259 Fed. 266, 170 CCA 334; Crystal Percolator Co. v. Landers, 258 Fed. 28; Webster Electric Co. v. Podlesak, 255 Fed. 907; Swindell v. Youngstown Sheet, etc., Co., 230 Fed. 438, 144 CCA 580; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; Pegram v. American Alkali Co., 122 Fed. 1000 [aff 125 Fed. 577, 60 CCA 383]; Jewett v. Atwood Suspender Co., 100 Fed. 647, 648; Western Electric Co. v. Sperry Electric Co., 59 Fed. 295, 8 CCA 129; Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

"A patent does not confer even the right to use the invention. The inventor had that right before. It is merely an incorporeal right to exclude others from using the invention throughout the United States conferred by the government upon compliance with certain requirements." Jewett v. Atwood Suspender Co., supra.

59. See supra § 2.

60. Minnesota v. Barber, 136 U. S. 313, 10 SCt 862, 34 L. ed. 455; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 286 Fed. 358; Webster Electric Co. v. Podlesak, 255 Fed. 907.

61. U. S.—Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; United Shoe Mach. Corp. v. U. S., 258 U. S. 451, 42 SCt 363, 66 L. ed. 708; Bauer v. O'Donnell, 229 U. S. 1, 33 SCt 616, 57 L. ed. 1041; Virtue v. Creamery Package Mfg., etc., Co., 227 U. S. 8, 33 SCt 202, 57 L. ed. 393; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Seymour v. Osborne, 11 Wall. 516, 20 L. ed. 33; Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532; Victory Bottle Capping Mach. Co., Inc. v. O. & J. Mach. Co., 280 Fed. 753; U. S. v. United Shoe Mach. Co., 264 Fed. 138 [app dism 254 U. S. 666 mem, 41 SCt 217 mem, 65 L. ed. 465 mem, and aff 258 U. S. 451, 42 SCt 363, 66 L. ed. 708]; Bird's-Eye Veneer Co. v. Franck-Philipson, 259 Fed. 266, 170 CCA 334; Crystal Percolator Co. v. Landers, 258 Fed. 28; Schrade v. Camillus Cutlery Co., 242 Fed. 523; Swindell v. Youngstown Sheet, etc., Co., 230 Fed. 438, 144 CCA 580; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; U. S. v. Standard Sanitary Mfg. Co., 191 Fed. 172 [aff 226 U. S. 20, 33 SCt 9, 57 L. ed. 107]; Pegram v. American Alkali Co., 122 Fed. 1000 [aff 125 Fed. 577, 60 CCA 383]; Jewett v. Atwood Suspender Co., 100 Fed. 647.

Ill.—West Disinfecting Co. v. U. S. Sanitary Specialties Corp., 221 Ill. A. 372.

Ind.—Tousey v. Indianapolis, 175 Ind. 295, 94 NE 225, 228 [cit Cyc]; Eclipse Wind Engine Co. v. Zimmerman Mfg. Co., 16 Ind. A. 496, 44 NE 1115.

Md.—Crown Cork, etc., Co. v. State, 87 Md. 687, 40 A 1074, 67 AmSR 371, 53 LRA 417 [writ of error dism 20 SCt 1026 mem, 44 L. ed. 1220 mem, 1221 mem].

Mo.—National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 SW 561.

N. Y.—Dr. Jaegers Sanitary Woolen System Co. v. Le Boutillier, 15 NY St 117.

Or.—Temple v. Portland, 77 Or. 559, 151 P 724.

"The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all he obtains by the patent." Bloomer v. McQuewan, 14 How. (U. S.) 539, 549, 14 L. ed. 532.

[a] **Title to article made in violation of patent** not vested in patentee. Haupt v. Wright, 32 App. (D. C.) 408.

62. H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311; Luten v. Kansas City Bridge Co., 285 Fed. 840 [rev 272 Fed. 533]; I. T. S.

the grant of a patent right evidences such a contract.[63] This contract consists of mutual, interrelated considerations moving from each party to the other for such contract.[64] The consideration given on the part of the patentee is the disclosure of the invention.[65] The consideration on the part of the government is the grant of the exclusive right to make, use, and vend the invention throughout the United States, and the territories thereof, for a definite period of time.[66]

[§ 8] **C. Patent Right as Property.**[67] A patent gives the patentee title to an intangible, incorporeal right,[68] in the nature of a privilege or franchise,[69] a title which continues to exist until divested by a voluntary grant or other legal means of divestment.[70] The right granted is property[71]—property of the patentee[72]—which, in so far as its incorporeal nature permits, is subject to the general laws relating to such property,[73] and is surrounded by the same rights and sanctions which attend all other property.[74]

Situs. The right or privilege, however, is personal to the owner thereof,[75] has no situs separate from the individual holding it,[76] and can be reached by the courts only by securing jurisdiction of him.[77] In the United States, a patent right has no definite situs within the territorial jurisdiction of any state court but is coexistent in every state.[78]

Rubber Co. v. Essex Rubber Co., 270 Fed. 593 [app dism 257 U. S. 664 mem, 42 SCt 45 mem, 66 L. ed. 424 mem]; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev on other grounds 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148]; Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Denning Wire, etc., Co. v. American Steel, etc., Co., 169 Fed. 793, 95 CCA 259; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 CCA 304; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 701, 45 CCA 544; Atty.-Gen. v. Rumford Chemical Works, 32 Fed. 608; Harris v. Allen, 15 Fed. 106; Rosenthal v. Goldstein, 112 Misc. 606, 183 NYS 582; Barter v. Smith, 2 Can. Exch. 455.

"A patent is a contract by which the government secures to the patentee the exclusive right to vend and use his invention for a few years in consideration of the fact that he has perfected and described it and has granted its use to the public forever after." National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., supra.

"A patent is a bargain between the sovereign and the inventor." H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311, 313.

"A 'patent' is a contract between the government on behalf of the people and the patentee." Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 274, 138 CCA 23 [rev on other grounds 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148].

Construction and interpretation of patents see infra §§ 335–363.

63. Minneapolis, etc., R. Co. v. Barnett, 257 Fed. 302, 168 CCA 386.

64. Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem].

65. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159; Dr. Miles Medical Co. v. Park, etc., Co., 220 U. S. 373, 31 SCt 376, 55 L. ed. 502; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930; Minneapolis, etc., R. Co. v. Barnett, 257 Fed. 302, 168 CCA 386; Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336; International Tooth Crown Co. v. Hanks' Dental Assoc. 111 Fed. 916 [rev on other grounds 130 Fed. 1022 mem, 63 CCA 684 mem]; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Rosenthal v. Goldstein, 112 Misc. 606, 183 NYS 582; Liardet v. Johnson, Buller N. P. 76; Newbery v. James, 2 Meriv. 446, 35 Reprint 1011.

"The public gets the advantage of a disclosure of something new, which the inventor might otherwise have kept secret." Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930, 938.

66. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159; Dr. Miles Medical Co. v. Park, etc., Co., 220 U. S. 373, 31 SCt 376, 55 L. ed. 502; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930; Minneapolis, etc., R. Co. v. Barnett, 257 Fed. 302, 168 CCA 386; Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336 [certiorari granted 207 U. S. 589 mem, 28 SCt 255 mem, 52 L. ed. 354 mem, and certiorari dism 210 U. S. 439 mem, 28 SCt 764 mem, 52 L. ed. 1138 mem]; Rosenthal v. Goldstein, 112 Misc. 606, 183 NYS 582.

67. Passing to trustees in bankruptcy see Bankruptcy § 198.

Subjection to:

Payment of debts in creditors' suits see Creditors' Suits § 84.

Seizure and sale by execution see Executions § 57.

68. Waterman v. Mackenzie, 138 U. S. 252, 260, 11 SCt 334, 34 L. ed. 923; Jewett v. Atwood Suspender Co., 100 Fed. 647; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845 [mod on other grounds 101 Fed. 826, 42 CCA 43]; P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 NW 417; Com. v. Central Dist., etc., Tel. Co., 145 Pa. 121, 22 A 841, 27 AmSR 677; Whitcomb v. Whitcomb, 85 Vt. 76, 81 A 97, AnnCas1913E 1015.

69. Swindell v. Youngstown Sheet, etc., Co., 230 Fed. 438, 144 CCA 580.

70. Wahl v. N. E. Norstrom Electric Mfg. Co., 19 F. (2d) 544 [aff 27 F. (2d) 635].

71. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; McCormick Harvesting Mach. Co. v. Aultman-Miller Co., 169 U. S. 606, 18 SCt 443, 42 L. ed. 875; De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; U. S. v. Palmer, 128 U. S. 262, 9 SCt 104, 32 L. ed. 442; Cammeyer v. Newton, 94 U. S. 225, 24 L. ed. 72; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Concrete Appliances Co. v. Gomery, 284 Fed. 518 [mod on other grounds 291 Fed. 486 (aff 269 U. S. 177, 46 SCt 42, 70 L. ed. 222)]; U. S. v. United Shoe Mach. Co., 264 Fed. 138 [app dism 254 U. S. 666 mem, 41 SCt 217 mem, 65 L. ed. 465 mem, and aff 258 U. S. 451, 42 SCt 363, 66 L. ed. 708]; Swindell v. Youngstown Sheet, etc., Co., 230 Fed. 438, 144 CCA 580; National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 CCA 594; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845 [mod on other grounds 101 Fed. 826, 42 CCA 43]; Freeman v. Lowell Specialty Co., 174 Mich. 59, 140 NW 572; Coca-Cola Co. v. State, (Tex. Civ. A.) 225 SW 791.

72. McCormick Harvesting Mach. Co. v. Aultman-Miller Co., 169 U. S. 606, 18 SCt 443, 42 L. ed. 875; U. S. v. Winner, 28 F. (2d) 295.

73. De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Ideal Wrapping Mach. Co. v. George Close Co., 23 F. (2d) 848 [aff 29 F. (2d), 533]; Swindell v. Youngstown Sheet, etc., Co., 230 Fed. 438, 144 CCA 580; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 78 Off. Gaz. (U. S.) 171.

74. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Densmore v. Scofield, 102 U. S. 375, 26 L. ed. 214; Swindell v. Youngstown Sheet, etc., Co., 230 Fed. 438, 144 CCA 580; Freeman v. Lowell Specialty Co., 174 Mich. 59, 140 NW 572; Whitcomb v. Whitcomb, 85 Vt. 76, 81 A 97, AnnCas 1913E 1015.

[a] **Partnership** may hold patent rights. Freeman v. Lowell Specialty Co., 174 Mich. 59, 140 NW 572; Whitcomb v. Whitcomb, 85 Vt. 76, 81 A 97, AnnCas1913E 1015.

75. Jewett v. Atwood Suspender Co., 100 Fed. 647; Dick v. Oil Well Supply Co., 25 Fed. 105; Dick v. Struthers, 25 Fed. 103; Adams v. Howard, 22 Fed. 656, 23 Blatchf. 27; Elmendorf v. American Combustion Co., 80 N. J. Eq. 461, 85 A 199.

76. Standard Gas Power Co. v. Standard Gas Power Co., 224 Fed. 990; P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 NW 417; Elmendorf v. American Combustion Co., 80 N. J. Eq. 461, 85 A 199; Whitcomb v. Whitcomb, 85 Vt. 76, 81 A 97, AnnCas1913E 1015.

[a] **A patent right cannot have a situs in a particular district,** within Judicial Code § 57, so that a court may acquire jurisdiction of a nonresident defendant by publication in a suit to establish title thereto. Standard Gas Power Co. v. Standard Gas Power Co., 224 Fed. 990.

77. Ager v. Murray, 105 U. S. 126, 26 L. ed. 942; Stevens v. Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Jewett v. Atwood Suspender Co., 100 Fed. 647; P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 NW 417; Elmendorf v. American Combustion Co., 80 N. J. Eq. 461, 85 A 199.

78. Ager v. Murray, 105 U. S. 126, 26 L. ed. 942; Wilson v. Martin-Wilson Automatic Fire Alarm Co., 52 Off. Gaz. (U. S.) 901; Carver v. Peck, 131 Mass. 291; Elmendorf v. American Combustion Co., 80 N. J. Eq. 461, 85 A 199.

V. PATENTABILITY[79]

[By CHAS. W. RILEY]

[§ 9] **A. In General.** Since the grant of a patent is purely a statutory creation,[80] a patent may be obtained and enjoyed only in respect of subject matter specified by congress.[81] Congress has provided that a patent may be obtained, under and subject to certain exceptions and conditions, by any person who has discovered or invented any new and useful art, machine, manufacture, composition of matter, or any new and useful improvement thereof, not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof.[82] A patent can be obtained, therefore, only for an art or instrument falling within the enumerated classes or divisions and possessing the attributes of invention, novelty, and utility.[83]

[§ 10] **B. Classes of Patentable Subject Matter—1. In General.** Under the present patent laws in the United States, the classes of patentable subject matter include "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof,"[84] and "any new, original, and ornamental design for an article of manufacture."[85] The classification of mechanical patentable subject matter has been adhered to by congress continuously since 1793,[86] and the division or classification so made has been recognized as constitutional.[87] Unless the subject matter of a discovery or invention falls within one or the other of the divisions enumerated or described by the statute, no patent may be obtained.[88]

[§ 11] **2. Art or Process—a. In General.** One of the divisions of patentable subject matter specifically enumerated or described in the statute is that of any new and useful "art."[89] A new and useful art or process[90] is just as patentable as a machine, manufacture, or any other of the statutory classes of patentable subject matter.[91]

[§ 12] **b. Definitions and Distinctions.** An art or

79. Conclusiveness and effect of decision in patent office as to patentability of invention see infra §§ 258–264.

80. See supra § 6.

81. Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; U. S. v. American Bell Tel. Co., 32 Fed. 591 [rev on other grounds 128 U. S. 315, 9 SCt 90, 32 L. ed. 450]; Morton v. New York Eye Infirmary, 17 F. Cas. No. 9,865, 5 Blatchf. 116, 2 Fish. Pat. Cas. 320.

82. U. S. Code tit 35 § 31.

83. Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Von Eberstein v. Chambliss, 166 Fed. 463, 467.

"Three elements are essential to constitute a valid and effective patent, viz.: (1) Creation, by the exercise not merely of mechanical skill, but of the inventive faculties, or, in the language of Mr. Justice Matthews, 'that intuitive faculty of the mind, put forth in search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision' (Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 72, 5 SCt 717, 28 L. ed. 901); (2) the result must be so distinct an advance in the prior art, machine, or process as to have the feature of novelty, accomplishing by a new method, through the substitution or addition of a new whole, a new part or parts, or through the combination of old parts in a new way, a similar effect in a new and different way; and (3) the thing or process must be of utility—that is to say, practicable and capable of performing its specified functions to produce an advantageous or useful result." Von Eberstein v. Chambliss, supra.

84. U. S. Code tit 35 § 31.

85. U. S. Code tit 35 § 73.

[a] **In England** designs are copyrighted and not patented. Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515; Holdsworth v. McCrea, L. R. 2 H. L. 380; Windover v. Smith, 32 Beav. 200, 55 Reprint 78; Dalglish v. Jarvie, 2 Hall & T. 437, 47 Reprint 1754, 2 Macn. & G. 231, 48 EngCh 178, 42 Reprint 89; Pierce v. Worth, 18 L. T. Rep. N. S. 710; St. 5 & 6 Vict. c 100.

86. In re Frasch, 27 App. (D. C.) 15.

87. In re Frasch, supra.

88. Fond du Lac County v. May, 137 U. S. 395, 11 SCt 98, 34 L. ed. 714; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Guthrie v. Curlett, 10 F. (2d) 725; Milligan, etc., Glue Co. v. Upton, 17 F. Cas. No. 9,607, 1 Bann. & A. 497, 4 Cliff. 237 [aff 97 U. S. 3, 24 L. ed. 985]; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558.

89. U. S. Code tit 35 § 31.

90. See infra § 12 text and note 19.

91. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103; Tilgham v. Proctor, 102 U. S. 707, 26 L. ed. 279; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Providence Rubber Co v Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; American Chemical Paint Co. v. C. R. Wilson Body Co., 298 Fed. 310; Buffalo Forge Co. v. Buffalo, 246 Fed. 135; Ball v. Coker, 210 Fed. 278, 127 CCA 126; Minerals Separation, Ltd. v. Hyde, 207 Fed. 956; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Boyd v. Cherry, 50 Fed. 279; French v. Rogers, 9 F. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Roberts v. Dickey, 20 F. Cas. No. 11,899, 4 Fish. Pat. Cas. 532; Smith v. Downing, 22 F. Cas. No. 13,036, 1 Fish. Pat. Cas. 64; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; In re Tallmadge, 37 App. (D. C.) 590; Badische Anilin, etc., Fabrik v. Levinstein, 12 App. Cas. 710, 20 ERC 639; Cornish v. Keene, 3 Bing. N. Cas. 570, 32 ECL 265, 132 Reprint 530; Boulton v. Bull, 2 H. Bl. 463, 126 Reprint 651, 20 ERC 10; Booth v. Kennard, 1 H. & N. 527, 156 Reprint 1311, 20 ERC 125; Hills v. Liverpool United Gas Light Co., 9 Jur. N. S. 140; Crane v. Price, 4 M. & G. 580, 43 ECL 301, 134 Reprint 239, 20 ERC 136; Otto v. Linford, 46 L. T. Rep. N. S. 35; Hornblower v. Boulton, 8 T. R. 95, 101 Reprint 1285, 20 ERC 45.

"The inventor of a new and useful art is distinctly entitled to the benefit of the statute as well as he who invents a machine, manufacture, or composition of matter." Expanded Metal Co. v. Bradford, 214 U. S. 366, 382, 29 SCt 652, 53 L. ed. 1034.

[a] **Patentable processes.**—(1) New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103; Downton v. Yeager Milling Co., 108 U. S. 466, 3 SCt 10, 27 L. ed. 789; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; American Wood Paper Co. v. Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 131; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Mowry v. Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; North American Chemical Co. v. Dexter, 252 Fed. 148; One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343]; Miami Copper Co. v. Minerals Separation, Ltd., 244 Fed. 752, 157 CCA 200; Moore Filter Co. v. Tonopah-Belmont Dev. Co., 201 Fed. 532, 119 CCA 626; U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. 103; American Fibre-Chamois Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 CCA 662; Travers v. American Cordage Co., 64 Fed. 771; Uhlman v. Arnholdt, etc., Brewing Co., 53 Fed. 485; Union Paper-Bag Mach. Co. v. Waterbury, 39 Fed. 389; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 30 Fed. 63; Buchanan v. Howland, 4 F. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Roberts v. Dickey, 20 F. Cas. No. 11,899, 4 Fish. Pat. Cas. 532; Carnegie Steel Co. v. Cambria Iron Co., 99 Off. Gaz. (U. S.) 1866; John R. Williams Co. v. Miller, etc., Mfg. Co., 97 Off. Gaz. (U. S.) 2308; Thomas v. Electric Porcelain, etc., Co., 97 Off. Gaz. (U. S.) 1838; Welsbach Light Co. v. Union Incandescent Light Co., 91 Off. Gaz. (U. S.) 2574; Western Mineral Wool, etc., Co. v. Globe Mineral Wool Co., 77 Off. Gaz. (U. S.) 1127; Imperial Chemical Mfg. Co. v. Stein, 75 Off. Gaz. (U. S.) 1551; Covert v. Travers Bros. Co., 75 Off. Gaz. (U. S.) 349; Tannage Patent Co. v. Zahn, 74 Off. Gaz. (U. S.) 143; Hoke v. Brown, Dec. Com. Pat. (1889) 470; Neilson v. Harford, 8 M. & W. 806, 151 Reprint 1266. (2) Method of transmitting speech by electricity. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863. (3) Process of incubation. Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Buckeye Incubator Co. v. Cooley, 17 F. (2d) 453. (4) Method of manufacturing plaster board. U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704. (5) Process of effecting a mixture of cheese. P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655. (6) A method of heating and humidifying air. Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411. (7) Method of desiccating blood, milk, etc. Merrell-Soule Co. v. Natural Dry Milk Co., 217 Fed. 578. (8) Method of producing "indoin blue." Badische Anilin, etc., Fabrik v. Kalle, 94 Fed. 163 [aff 104 Fed. 802, 44 CCA 201]. (9) Process of rolling metal forgings. Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co., 90 Fed. 201 [mod on other grounds 93 Fed. 958, 36 CCA 24]. (10) Copperplate printing process. Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9. (11) Method of producing artificial honey. In re Cor-

process has been defined as an act, or mode of acting;[92] a mode of treatment of certain materials to produce a given result;[93] an act, or series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing;[94] a connected series of steps or operations for accomplishing a physical result;[95] an operation done by rule to secure a result;[96] the application or operation of some element or power of nature, or of one subject to another;[97] a definite combination of new or old elements, ingredients, operations, ways, or means to produce a result;[98] the subjection of a specific object to the influence of a specific force through a specific mode of application.[99] That certain things should be done with certain substances, and in a certain way is said to be required.[1] It has also been said that an art or process must consist of a series of steps or sequence of operations,[2] and that this is so, even though the operation is continuous and leads to a single result.[3] An art or process is not a machine,[4] a thing,[5] or a result,[6] but simply a method of doing things.[7] It is a conception of the mind, seen only by its effects when being executed or performed.[8] In patent law the term "art" has a different and more restricted meaning than it has in ordinary usage.[9] It is used in the sense of the employment of means to a desired end; the adaptation of powers in the natural world to the uses of life.[10] It has reference to the steps followed or successive acts performed in producing some desired physical effect.[11] Any method or means of producing a physical result which is independent of particular mechanism or mechanical combination for producing it may be patented as an art or process.[12] It is im-

bin, 6 F. Cas. No. 3,224, 1 McA. Pat. Cas. 521. (12) Method of refining mineral lubricating oil. Texas Co. v. McAfee, 299 Fed. 718. (13) Method of reproducing pictures and designs. Selectasine Patents Co. v. Prest-O-Graph Co., 282 Fed. 223. (14) Method of making moccasins. Merrill v. W Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]. (15) Process of making yeast. Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]. (16) Process for making bottle closures. International Cork Co. v. New Process Cork Co., 6 F. (2d) 420. (17) Method of producing lace effects. Weil v. Steiners, Inc., 296 Fed. 185. (18) Method of preparing steel for painting. American Chemical Paint Co. v. C. R. Wilson Body Co., 298 Fed. 310. (19) Method of cementing oil wells. Perkins Oil Well Cementing Co. v. Owen, 293 Fed. 455. (20) Process of reinforcing hollow trees. Davey Tree Expert Co. v. Van Billiard, 248 Fed. 718 [rev on other grounds 255 Fed. 781, 167 CCA 125]. (21) Process for making mineral wool. General Insulating Mfg. Co. v. Union Fibre Co., 261 Fed. 389.

92. Tilghman v. Proctor, 102 U. S. 707, 728, 26 L. ed. 279; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552].

93. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868; Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; North American Chemical Co. v. Dexter, 252 Fed. 148; Ball v. Coker, 210 Fed. 278, 127 CCA 126; General Subconstr. Co. v. Netcher, 167 Fed. 549 [aff 174 Fed. 236, 98 CCA 144]; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [rev on other grounds 96 Fed. 850, 37 CCA 593 (rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968)]; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552]; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 413, 9 CCA 42; New Process Fermentation Co. v. Maus, 20 Fed. 725, 728 [rev on other grounds 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103].

"A patentable process is a method of treatment of certain materials to produce a particular result or product." Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 255, 48 SCt 474, 72 L. ed. 868.

94. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Cochrane v. Deener, 94 U. S. 780, 788, 24 L. ed. 139; Ball v. Coker, 210 Fed. 278, 127 CCA 126; Melvin v. Potter, 91 Fed. 151; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [rev on other grounds 96 Fed. 850, 37 CCA 593 (rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968)]; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; Hogg v. Thurman, 90 Ark. 93, 97, 117 SW 1070, 17 AnnCas 383 [cit Cyc].

95. Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411.

96. General Sub-constr. Co. v. Netcher, 167 Fed. 549 [aff 174 Fed. 236, 98 CCA 144].

97. Boyd v. Cherry, 50 Fed. 279, 282.

98. Minerals Separation, Ltd. v. Hyde, 207 Fed. 956.

99. American Chemical Paint Co. v. C. R. Wilson Body Co., 298 Fed. 310.

1. Cochrane v. Deener, 94 U. S. 780, 788, 24 L. ed. 139.

2. Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333].

3. Buckeye Incubator Co. v. Blum, supra.

4. Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; O'Reilly v. Morse, 56 U. S. 62, 14 L. ed. 601; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Rohm v. Martin Dennis Co., 263 Fed. 106 [aff 263 Fed. 388]; General Sub-constr. Co. v. Netcher, 167 Fed. 549 [aff 174 Fed. 236, 98 CCA 144]; Kirchberger v. American Acetylene Burner Co., 124 Fed. 764 [aff 128 Fed. 599, 64 CCA 107].

[a] **"Process" and "machine" distinguished.**—(1) A machine is a thing; a process is an act or mode of acting. The one is visible to the eye, an object of perpetual observation; the other is a conception of the mind seen only by its effects when being executed or performed. Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; O'Reilly v. Morse, 56 U. S. 62, 14 L. ed. 601; Kirchberger v. American Acetylene Burner Co., 124 Fed. 764 [aff 128 Fed. 599, 64 CCA 107]. (2) A "new process" is usually the result of a discovery, as distinguished from "machine" which is an invention. Corning v. Burden, 15 How. (U. S.) 252, 267, 14 L. ed. 683.

5. Rohm v. Martin Dennis Co., 263 Fed. 106 [aff 263 Fed. 388].

6. Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Rohm v. Martin Dennis Co., 263 Fed. 106 [aff 263 Fed. 388].

7. General Sub-constr. Co. v. Netcher, 167 Fed. 549 [aff 174 Fed. 236, 98 CCA 144].

8. Tilghman v. Proctor, 102 U. S. 707, 728, 26 L. ed. 279; Tannage Patent Co. v. Zahn, 66 Fed. 986, 992 [rev on other grounds 70 Fed. 1003, 17 CCA 552].

9. Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683.

10. Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721, 754 [rev on other grounds 96 Fed. 850, 37 CCA 593 (rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968)]; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301, 316; New Process Fermentation Co. v. Maus, 20 Fed. 725, 728 [rev on other grounds 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103]; MacKay v. Jackman, 12 Fed. 615, 20 Blatchf. 466; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; Smith v. Downing, 22 F. Cas. No. 13,036, 1 Fish. Pat. Cas. 64.

"So, where any judge speaks of patenting an art, it is not an art in the abstract, without a specification of the manner in which it is to operate, as a manufacture or otherwise. But it is the art thus explained in the specification, and illustrated by a machine, or model, or drawings, when of a character to be. It is the art so represented or exemplified, like the principle thus embodied, which alone the patent laws ever are designed to protect." Smith v. Downing, supra.

11. Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; Royer v. Coupe, 146 U. S. 524, 13 SCt 166, 36 L. ed. 1073; International Tooth-Crown Co. v. Gaylord, 140 U. S. 55, 11 SCt 716, 35 L. ed. 347; Lawther v. Hamilton, 124 U. S. 1, 8 SCt 342, 31 L. ed. 325; New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 40 L. ed. 1103; Downton v. Yeager Milling Co., 108 U. S. 466, 27 L. ed. 789; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; American Wood Paper Co. v. Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 31; Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; American Fibre-Chamois Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 CCA 662; Wall v. Leck, 66 Fed. 552, 13 CCA 630; Boyd v. Cherry, 50 Fed. 279; In re Weston, 17 App. (D. C.) 431.

12. Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704; North American Chemical Co. v. Dexter, 252 Fed. 148; Buffalo Forge Co. v. Buffalo, 246 Fed. 135; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; New Process Fermentation Co. v. Maus, 20 Fed. 725, 728 [rev on other grounds 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103]; In re Tallmadge, 37 App. (D. C.) 590.

"If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at

material whether the result is produced by chemical agency or combination;[13] or by the application of discoveries or principles in natural philosophy;[14] or by machinery acting altogether on mechanical principles.[15]

The mere function or effect of an operation or instrument is not an art or process.[16]

"Art" and "process" used as synonyms. The word "process" is not used in the statute,[17] but, while an art may require several processes to produce a given result,[18] the term "process" has been brought into the decisions, and used in the language of the patent law, as an equivalent form of expression of the statutory term "art."[19]

[§ 13] **c. Physical Result Essential.** An art or process is not a mere abstraction.[20] An art or process includes only such operations as are capable of producing a tangible product or of accomplishing a change in the character or quality of some material object.[21] The physical result, however, need not be a permanent condition of the article or substance acted upon, but may be temporary, as in the case of transmitting speech by certain regulated undulations of the electric current in the telephone.[22] It is not essential that a change in the chemical substance of the subject matter be accomplished;[23] a new product may be created merely from the mechanical readjustments,[24] or a new juxtaposition of parts.[25]

Mental theories, ideas, or plans of action. A mere mental theory, idea, or plan of action is not an art or process.[26]

[§ 14] **d. Process and Instrumentalities of Process Distinguished.** A process and the instrumentalities employed in its exercise are distinct things.[27] Patentability may exist as to either, neither, or

all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill." Cochrane v. Deener, 94 U. S. 780, 787, 24 L. ed. 139.

13. O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601.

14. O'Reilly v. Morse, supra.

15. O'Reilly v. Morse, supra.

16. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Busch v. Jones, 184 U. S. 598, 22 SCt 511, 46 L. ed. 707; Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; Wicke v. Ostrum, 103 U. S. 461, 26 L. ed. 409; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 7 F. (2d) 284; United Shoe Mach. Co. v. L. Q. White Shoe Co., 270 Fed. 650 [aff 279 Fed. 35]; Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 260 Fed. 841, 171 CCA 567; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 251 Fed. 897 [aff 260 Fed. 841, 171 CCA 567]; Tompkins v. St. Regis Paper Co., 226 Fed. 744 [aff 236 Fed. 221, 149 CCA 411]; Ball v. Coker, 210 Fed. 278, 127 CCA 126; Siemund v. Enderlin, 206 Fed. 283 [aff 212 Fed. 410, 129 CCA 604]; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; A. B. Dick Co. v. Henry, 160 Fed. 690; Cleveland Fdy. Co. v. Detroit Vapor Stove Co., 131 Fed. 740 [mod on other grounds 131 Fed. 853, 68 CCA 233]; Stokes Bros. Mfg. Co. v. Heller, 96 Fed. 104 [aff 101 Fed. 266, 41 CCA 335]; American Strawboard Co. v. Elkhart Egg-Case Co., 84 Fed. 960; Gindorff v. Deering, 81 Fed. 952; Wells Glass Co. v. Henderson, 67 Fed. 930, 15 CCA 84; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; Gage v. Kellogg, 23 Fed. 891; Brainard v. Cramme, 12 Fed. 621, 20 Blatchf. 530; MacKay v. Jackman, 12 Fed. 615, 20 Blatchf. 466; Matthews v. Shoneberger, 4 Fed. 635, 18 Blatchf. 357; Piper v. Brown, 19 F. Cas. No. 11,180 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; In re Tallmadge, 37 App. (D. C.) 590; In re Harris, 37 App. (D. C.) 374; In re White, 31 App. (D. C.) 607; In re Cunningham, 21 App. (D. C.) 29; In re Weston, 17 App. (D. C.) 431.

"A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, for the function of a machine." Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 77, 15 SCt 745, 39 L. ed. 899.

[a] **"The term process is often used in a more vague sense,** in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered, or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine." Corning v. Burden, 15 How. (U. S.) 252, 268, 14 L. ed. 683.

[b] **Illustrations.**—(1) The liberation or expansion of steam into radiating pipes at a rate controlled by the expansion of a thermostatic device under the heat of discharging steam is the mere function of the thermostat and the valve operated by it, and such operations are not patentable as a process. Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 7 F. (2d) 284. (2) In a system or process for storing power, involving the use of tanks or reservoirs, the locating of the lower reservoirs in a deep pit adds nothing to the patentability of the invention, that being merely a structural, and not a process, idea. In re Fessenden, 45 App. (D. C.) 21. (3) The placing of a debit and credit sheet in such a position that the debit and credit entry can be made at the same time by a single operating device does not constitute an inventive idea so as to entitle a person conceiving the idea to a process patent, as distinct from a patent for a machine for achieving such a result. In re Tallmadge, 37 App. (D. C.) 590.

17. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301; Piper v. Brown, 19 F. Cas. No. 11,180 [rev on other grounds 91 U. S. 37, 23 L. ed. 200].

18. Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; Piper v. Brown, 19 F. Cas. No. 11,180 [rev on other grounds 91 U. S. 37, 23 L. ed. 200].

19. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Ball v. Coker, 210 Fed. 278, 127 CCA 126; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [rev on other grounds 96 Fed. 850, 37 CCA 593 (rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968)]; Piper v. Brown, 19 F. Cas. No. 11,180 [rev on other grounds 91 U. S. 37, 23 L. ed. 200].

[a] **"Process" or "methods"** are terms which, when used to represent the means of producing a beneficial result, are in law synonymous with "art," provided the means are not effected by mechanism or mechanical combinations. Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200].

20. Berardini v. Tocci, 190 Fed. 329 [aff 200 Fed. 1021 mem, 118 CCA 659 mem]; Hotel Security Checking Co. v. Lorraine Co., 160 Fed. 467, 87 CCA 451, 24 LRANS 665.

21. Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; U. S. Credit System Co. v. American Credit Indemn. Co., 53 Fed. 818 [aff 59 Fed. 139, 8 CCA 49]; Ex p. Dixon, 7 F. Cas. No. 3,927; Smith v. Downing, 22 F. Cas. No. 13,036, 1 Fish. Pat. Cas. 64.

22. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863.

23. David E. Kennedy, Inc. v. Beaver Tile, etc., Co., 232 Fed. 477.

24. David E. Kennedy, Inc. v. Beaver Tile, etc., Co., supra.

25. David E. Kennedy, Inc. v. Beaver Tile, etc., Co., supra.

[a] **Rule applied.**—The method of making a floor by laying cork tiles under pressure is patentable as a process. David E. Kennedy, Inc. v. Beaver Tile, etc., Co., 232 Fed. 477.

26. Jacobs v. Baker, 7 Wall. (U. S.) 295, 19 L. ed. 200; Guthrie v. Curlett, 10 F. (2d) 725; Berardini v. Tocci, 190 Fed. 329 [aff 200 Fed. 1021 mem, 118 CCA 659 mem]; Hotel Security Checking Co. v. Lorraine Co., 160 Fed. 467, 87 CCA 451, 24 LRANS 665; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; U. S. Credit System v. American Credit Indemn. Co., 53 Fed. 818 [aff 59 Fed 139, 8 CCA 49]; Ex p. Dixon, 7 F. Cas. No. 3,927; Smith v. Downing, 22 F. Cas. No. 13,036, 1 Fish. Pat. Cas. 64; In re Moeser, 27 App. (D. C.) 307.

[a] **A system of devising code messages** is a mere abstraction, and is unpatentable as an art or process. Berardini v. Tocci, 190 Fed. 329 [aff 200 Fed. 1021 mem, 118 CCA 659 mem].

[b] **An architectural plan** for the building of a house is not an art or process. Jacobs v. Baker, 7 Wall. (U. S.) 295, 19 L. ed. 200.

[c] **Form of contract.**—A form of proposed contract to be entered into with individuals desiring the benefit of burial insurance or guaranty, with blanks, attached and readily separable therefrom, which, in addition to the ordinary draft for payment, show the several certificates required in order to provide, as far as practicable, against the perpetration of frauds on insurer or the guarantor, is not patentable as an art. In re Moeser, 27 App. (D. C.) 307.

27. Leeds v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39

both.[28] The fact that a process cannot be used without the apparatus, or the apparatus without the process, does not make them the same invention.[29] However, an art or process and a machine or apparatus may be so connected in their design and operation as to constitute unitary invention.[30]

[§ 15] **e. Mechanical Processes.** The mere fact that the use of machinery may be necessary in carrying out the process does not render it unpatentable.[31] In some of the earlier decisions it was apparently assumed, although not actually decided, that a process, in order to be the subject of the patent, must involve chemical or other similar elemental action.[32] But it is now well settled that a process is not rendered unpatentable by the mere fact that it consists of mechanical operations and does not involve chemical or other similar elemental action.[33] Operations which consist entirely of mechanical transactions, but which may be performed by hand or by any of the several mechanisms or machines, other than those exhibited, may be patented as an art or process,[34] even though they may not be so performed with equal efficiency.[35]

[§ 16] **f. Processes Involving Chemical or Elemental Action.** Processes producing their results by chemical action, by the operation or application of some element or power of nature, or of some property in matter, are included within the subject matter described or designated by the statutory term "art."[36] A process may consist in the mixing of certain substances together,[37] or in the heating of a substance to a certain temperature.[38]

[§ 17] **3. Machines.** Machines constitute another of the divisions or classes of patentable subject matter specifically enumerated or described by the statute.[39] A "machine" has been defined as an instrument composed of one or more of the mechanical powers, and capable, when set in motion, of producing, by its own operation, certain predetermined physical effects.[40] A "machine" has also been defined as a definite combination of definite elements to accomplish a given result.[41] The term "machine" includes every mechanical device or combination of devices to perform some function and produce a certain effect or result.[42] New combinations as well as new organizations of mechanism are included in

L. ed. 899; Heald v. Rice, 104 U. S. 737, 26 L. ed. 910; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Nestle Patent Holding Co. v. E. Frederics, Inc., 261 Fed. 780; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; Buffalo Forge Co. v. Buffalo, 246 Fed. 135; Moore Filter Co. v. Tonapah-Belmont Dev. Co., 201 Fed. 532, 119 CCA 626; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Gindorff v. Deering, 81 Fed. 952; Wells Glass Co. v. Henderson, 67 Fed. 930, 15 CCA 84; Burr v. Cowperthwait, 4 F. Cas. No. 2,188, 4 Blatchf. 163; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; In re Creveling, 117 Off. Gaz. (U. S.) 1167; U. S. Repair, etc., Co. v. Assyrian Asphalt Co., 98 Off. Gaz. (U. S.) 582; Vermont Farm Mach. Co. v. Gibson, 56 Off. Gaz. (U. S.) 1566; In re Weston, 17 App. (D. C.) 431.

28. Leeds v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 796, 19 L. ed. 566.

"Patentability may exist as to either, neither, or both, according to the fact of novelty, or the opposite. The patentability, or the issuing of a patent as to one, in nowise affects the rights of the inventor or discoverer in respect to the other. They are wholly disconnected and independent facts." Providence Rubber Co. v. Goodyear, supra.

29. Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8.

30. Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; In re Rowe, 40 App. (D. C.) 423; In re Frasch, 27 App. (D. C.) 25.

31. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279 [overr Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125]; Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; North American Chemical Co. v. Dexter, 252 Fed. 169; Buffalo Forge Co. v. Buffalo, 246 Fed. 135; Uhlman v. Arnholdt, etc., Brewing Co., 53 Fed. 485; In re Weston, 17 App. (D. C.) 431; Busch v. Jones, 16 App. (D. C.) 23 [rev on other grounds 184 U. S. 598, 22 SCt 511, 46 L. ed. 707].

32. Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Dodge Mfg. Co. v. Ohio Valley Pulley Works, 101 Fed. 584; Stokes Bros. Mfg. Co. v. Heller, 96 Fed. 104 [aff 101 Fed. 266 mem, 41 CCA 335 mem]; American Strawboard Co. v. Elkhart Egg-Case Co., 84 Fed. 960; Wells Glass Co. v. Henderson, 67 Fed. 930, 15 CCA 84.

33. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; Melvin v. Potter, 91 Fed. 151; Travers v. American Cordage Co., 64 Fed. 771; Union Paper-Bag Mach. Co. v. Waterbury, 39 Fed. 389; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 30 Fed. 63; Detroit Lubricator Mfg. Co. v. Renchard, 9 Fed. 293; Wilton v. Railroad Co., 30 F. Cas. No. 17,856; In re Weston, 17 App. (D. C.) 431.

34. Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 7 F.(2d) 284 [aff 296 Fed. 201]; Melvin v. Potter, 91 Fed. 151; Travers v. American Cordage Co., 64 Fed. 771; Union Paper-Bag Mach. Co. v. Waterbury, 39 Fed. 389; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 30 Fed. 63; In re Weston, 17 App. (D. C.) 431.

35. In re Weston, supra.

36. Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Hazeltine Corp. v. Electric Service Engineering Corp., 18 F. (2d) 662; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 7 F. (2d) 284 [aff 296 Fed. 201]; American Chemical Paint Co. v. C. R. Wilson Body Co., 298 Fed. 310; Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 86 CCA 483 [certiorari den 209 U. S. 548 mem, 28 SCt 759 mem, 52 L. ed. 921 mem]; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301, 316; Boyd v. Cherry, 50 Fed. 279; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; In re Weston, 17 App. (D. C.) 431.

[a] **A method of treating steel for painting,** consisting in treating it with an admixture of alcohol and phosphoric acid, is patentable as an art or process. American Chemical Paint Co. v. C. R. Wilson Body Co., 298 Fed. 310.

[b] **A process of treating sewage** by means of which the natural capacity of the anaërobic colony for its natural work was increased to such an extent that it became capable of disposing of sewage without accumulating such a deposit of sludge as would require removal is a utilization of a process of nature and is patentable as an art or process. Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 86 CCA 483 [certiorari den 209 U. S. 548 mem, 28 SCt 759 mem, 52 L. ed. 921 mem].

37. New Process Fermentation Co. v. Maus, 20 Fed. 725 [rev on other grounds 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103].

38. New Process Fermentation Co. v. Maus, supra.

39. U. S. Code tit 35.

40. Robinson Patents § 173 [quot Stearns v. Russell, 85 Fed. 218, 225, 29 CCA 121].

41. Card v. Colby, 64 Fed. 594, 598, 12 CCA 319.

42. Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; Stearns v. Russell, 85 Fed. 218, 29 CCA 121; Chicago Sugar-Refining Co. v. Charles Pope Glucose Co., 84 Fed. 977, 28 CCA 594; Pratt v. Thompson, etc., Spice Co., 83 Fed. 516; Carter Mach. Co. v. Hanes, 70 Fed. 859; Card v. Colby, 64 Fed. 594, 12 CCA 319; Appleton Mfg. Co. v. Star Mfg. Co., 60

the term.[43] A machine is not a mere principle or idea,[44] but a concrete thing consisting of parts, or of certain devices or combinations of devices.[45] It is said that a machine differs from all other mechanical instruments in that its rule of action resides within itself.[46] However, it has been held that a machine need not be automatic;[47] and that the term "machine" may include devices which are incapable of use except in connection with other mechanisms.[48]

The "principle of a machine" is defined as its mode of operation,[49] or that peculiar combination of devices which distinguishes it from other machines.[50] The term "machine" does not include the principle of a machine.[51] While the principle of a machine and its mode of operation are required to be set forth in the specifications,[52] no patent as for a machine can be obtained therefor.[53]

The function of a machine is that power or property of the machine of acting in the specific manner designed or intended by its construction;[54] that which the machine is designed to do as distinguished from itself, and from the product of its action upon something external to itself.[55] A machine patent cannot be obtained for the mere function of a machine.[56]

[§ 18] **4. Manufactures.**[57] Another division or class of patentable subject matter specifically enumerated or described by the statute is that of manufactures.[58] The primary meaning of the word "manufacture" is something made by hand as distinguished from a natural growth;[59] but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote anything made from raw materials by hand, by machinery, or by art.[60] As used in the statute, the term "manufacture" embraces whatever is made by the art or industry of man, not being a machine, a composition of matter, or a design.[61] A manufacture is distinguished from machines by not having any rule of action,[62] and from compositions of matter by not involving the relation of ingredients.[63] The term "manufacture" does not include natural products[64] or natural elements;[65] nor does it include a mere method of doing things.[66] The function of a method or device is not included in the term "manufacture."[67] A manufacture is distinct from the method

Fed. 411, 9 CCA 42; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301; Central Trust Co. v. Sheffield, etc., Iron, etc., Co., 42 Fed. 106, 9 LRA 67; MacKay v. Jackman, 12 Fed. 615, 20 Blatchf. 466; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; In re Weston, 17 App. (D. C.) 431.

43. Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

44. Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259].

45. Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; Kirchberger v. American Acetylene Burner Co., 124 Fed. 764 [aff 128 Fed. 599, 64 CCA 107]; Carter Mach. Co. v. Hanes, 70 Fed. 859.

"Process" and "machine" distinguished see supra § 12 note 4 [a].

46. Robinson Patents § 175 [quot Stearns v. Russell, 85 Fed. 218, 225, 29 CCA 121].

47. Coupe v. Weatherhead, 16 Fed. 673 [rev on other grounds 147 U. S. 322, 13 SCt 312, 37 L. ed. 188].

48. Parham v. American Buttonhole, etc., Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1.

49. Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234.

50. Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234.

51. Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234.

52. See infra § 154.

53. Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Mastoras v. Hildreth, 263 Fed. 571 [rev on other grounds 257 U. S. 27, 66 L. ed. 112, 42 SCt 20]; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; American Crayon Co. v. Sexton, 139 Fed. 564, 71 CCA 548.

54. American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259].

55. American Steel, etc., Co. v. Denning Wire, etc., Co., supra.

56. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Chicago Pneumatic Tool Co. v. Keller Pneumatic Tool Co., 293 Fed. 945; Dudlo Mfg. Co. v. Varley Duplex Magnet Co., 253 Fed. 745, 165 CCA 339; Union Special Mach. Co. v. Singer Mfg. Co., 215 Fed. 598 [rev 227 Fed. 858, 142 CCA 382]; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259].

57. Manufactures generally see Manufactures 38 C. J. p 963.

58. U. S. Code tit 35.

59. Riter-Conley Mfg. Co. v. Aiken, 203 Fed. 699, 121 CCA 655.

60. Riter-Conley Mfg. Co. v. Aiken, supra.

61. International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569; Cincinnati Tract. Co. v. Pope, 210 Fed. 443, 127 CCA 175; Benjamin Menu Card Co. v. Rand, 210 Fed. 285; Aiken v. Riter, etc., Mfg. Co., 205 Fed. 531; Riter-Conley Mfg. Co. v. Aiken, 203 Fed. 699, 121 CCA 655; Johnson v. Johnston, 60 Fed. 618.

[a] **A book having a novel construction** is a patentable article, and the relative arrangement of printed matter and blank spaces may be considered an element of structure. Thomson v. Citizens' Nat. Bank, 53 Fed. 250, 3 CCA 518; Munson v. New York, 3 Fed. 338, 5 Bann. & A. 486, 18 Blatchf. 237 [rev 124 U. S. 601, 8 SCt 622, 31 L. ed. 586]; Hawes v. Antisdel, 11 F. Cas. No. 6,234, 2 Bann. & A. 10; Hawes v. Cook, 11 F. Cas. No. 6,236; Hawes v. Washburne, 11 F. Cas. No. 6,242.

[b] **Products embraced in term "manufacture."**—(1) Acetylene gas tanks consisting of a tank containing acetone as a solvent supersaturated with acetylene gas. Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 Fed. 907. (2) Advertising device made of cardboard. Mitchell v. International Tailoring Co., 170 Fed. 91. (3) Aspirin. Kuehmsted v. Farbenfabriken of Elberfeld Co., 179 Fed. 701, 103 CCA 243 [aff 171 Fed. 887, and certiorari den 220 U. S. 622 mem, 31 SCt 724 mem, 55 L. ed. 613 mem]. (4) Crystalline calcium carbide. Union Carbide Co. v. American Carbide Co., 181 Fed. 104, 104 CCA 522. (5) Magdolite, a material for use in making up, replacing, and repairing linings of metallurgical furnaces. Baker Co. v. Kennedy Refractories Co., 253 Fed. 739, 165 CCA 333. (6) Street railroad transfer ticket. Cincinnati Tract. Co. v. Pope, 210 Fed. 443, 127 CCA 175. (7) Teaching chart with slitted leaves. In re Snyder, 10 App. (D. C.) 140. (8) Tool or implement used by hand. Coupe v. Weatherhead, 16 Fed. 673 [rev on other grounds 147 U. S. 322, 13 SCt 312, 37 L. ed. 188]. (9) A paper vessel, the walls of which are held together by fused cement. In re Harbeck, 39 App. (D. C.) 555. (10) A flexible bracelet. Payton v. Ideal Jewelry Mfg. Co., 7 F. (2d) 113. (11) A baseball mask. P. Goldsmith Co. v. Johnstone, 294 Fed. 756. (12) A golf practicing device. Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655. (13) A semisoft collar. Van Heusen Products, Inc. v. Earl, 300 Fed. 922; Van Heusen Products, Inc. v. Cluett, Peabody & Co., Ltd., 300 Fed. 922. (14) Rack and egg trays for incubator. Wolf v. Buckeye Incubator Co., 296 Fed. 680. (15) A talking doll. Lloyd v. Spalletta, 290 Fed. 537. (16) A hat lining. Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277. (17) A bottle cap. American Metal Cap Co. v. Anchor Cap, etc., Corp., 278 Fed. 670. (18) A disappearing bed. Perfection Disappearing Bed Co., Inc. v. Murphy Wall Bed Co., 266 Fed. 698. (19) A nursing bottle. Decker v. Smith, 234 Fed. 646, 148 CCA 412.

Building structures as manufactures see cases infra notes 70–79.

62. Cornish v. Keene, 3 Bing. N. Cas. 570, 32 ECL 265, 132 Reprint 530.

63. Cornish v. Keene, supra.

64. General Electric Co. v. De Forest Radio Co., 28 F. (2d) 641; Armstrong Seatag Corp. v. Smith's Island Oyster Co., 254 Fed. 821, 166 CCA 267.

[a] **A tagged oyster** is not a manufacture. Armstrong Seatag Corp. v. Smith's Island Oyster Co., 254 Fed. 821, 166 CCA 267.

65. General Electric Co. v. De Forest Radio Co., 28 F. (2d) 641.

66. Guthrie v. Curlett, 10 F. (2d) 725; Moore v. U. S., 50 Ct. Cl. 120.

67. Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Chester N. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372 [certiorari den 273 U. S. 699 mem, 47 SCt 94 mem, 71 L. ed. 847 mem]; Chicago Film Exch. v.

or device by which it is produced.[68] Either or both may be patentable.[69]

Building structures. Although the supreme court has employed language indicating that building structures are not included within the statutory term "manufacture,"[70] it has been asserted that it did not expressly so decide,[71] and it now seems settled that building structures are "manufactures" within the meaning of the patent law.[72] Thus it has been held that the term "manufacture" may embrace a roof structure by which light and ventilation are secured;[73] a concrete arch of a bridge in combination with abutments;[74] a sarcophagus monument;[75] an improvement in mausoleum construction;[76] an improvement in steel skeleton concrete construction;[77] or various parts of a railroad car.[78] A mere form of construction, however, is not patentable as a manufacture.[79]

[§ 19] **5. Compositions of Matter.** Compositions of matter constitute another of the classes or divisions of patentable subject matter specifically enumerated or described by the statute,[80] and the inventor of a new and useful composition of matter has the same right to a patent as the inventor of any new and useful art, machine, or manufacture.[81] A composition of matter is a compound produced or resulting from the intermixture of two or more specific ingredients and possessing properties different from, or in addition to, those possessed by the several ingredients in common.[82] Except that novelty, utility, and invention are required,[83] there is no restriction as to the nature of the composition which may be patented.[84] Such compounds may be patentable irrespective of whether they are produced by mechanical[85] or chemical[86] operations, or both.[87] A composition of matter is distinct from the method by which it is produced.[88] Either or both may be patentable.[89]

[§ 20] **6. Improvements.** An "improvement" is an addition to, or change in, a known art, machine, manufacture, or composition of matter which produces a useful result.[90] A change in an old art or

Motion Picture Patents Co., 39 App. (D. C.) 285.

68. James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Sewall v. Jones, 91 U. S. 171, 23 L. ed. 275; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Fulton Co. v. Janesville Laboratories, 21 F. (2d) 428; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655; Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326; Procter, etc., Co. v. Berlin Mills Co., 256 Fed. 23, 167 CCA 295 [rev on other grounds 254 U. S. 156, 41 SCt 75, 65 L. ed. 196]; General Electric Co. v. Laco-Philips Co., 233 Fed. 96, 147 CCA 166; Durand v. Green, 60 Fed. 392 [aff 61 Fed. 819, 10 CCA 97]; In re Hawkins, 57 App. (D. C.) 262, 20 F. (2d) 278; Chicago Film Exch. v. Motion Picture Patents Co., 39 App. (D. C.) 285 [quot Robinson Patents § 184].

69. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 796, 19 L. ed. 566; Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326.

"A machine may be new, and the product or manufacture proceeding from it may be old. In that case the former would be patentable and the latter not. The machine may be substantially old and the product new. In that event the latter, and not the former, would be patentable. Both may be new, or both may be old. In the former case, both would be patentable; in the latter neither." Providence Rubber Co. v. Goodyear, supra.

70. Fond du Lac v. May, 137 U. S. 395, 11 SCt 98, 34 L. ed. 714; Jacobs v. Baker, 7 Wall. (U. S.) 295, 19 L. ed. 200.

71. International Mausoleum Co. v. Sievert, 213 Fed. 225, 228, 129 CCA 569; Riter-Conley Mfg. Co. v. Aiken, 203 Fed. 699, 121 CCA 655.

"We think these cases not decisive. In Jacobs v. Baker, 7 Wall. (U. S.) 295, 19 L. ed. 200, Justice Grier, who wrote the opinion, was inclined to the view that an improvement in the plan of constructing a jail was not within the patent statute. The point, however, was not expressly decided; the bill being dismissed on the ground that the patentee was not the first inventor. In the May Case, Jacobs v. Baker was said to have held that: 'An improvement in the construction of a jail did not come under the denomination of a machine, or a manufacture, or a composition of matter; and that it was doubtful whether it could be classed as an art.' But this proposition was passed without reaffirming it, and the case apparently decided upon another ground." International Mausoleum Co. v. Sievert, supra.

72. Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Turner v. Quincy Market Cold Storage, etc., Co., 225 Fed. 41, 140 CCA 367; Thacher v. Baltimore, 219 Fed. 909 [aff 230 Fed. 1022 mem, 144 CCA 659]; International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569 [rev 197 Fed. 936]; Aiken v. Riter, etc., Mfg. Co., 205 Fed. 531; Riter-Conley Mfg. Co. v. Aiken, 203 Fed. 699, 121 CCA 655; Crier v. Innes, 170 Fed. 324, 95 CCA 508; McKeen v. Jerdone, 34 App. (D. C.) 163.

[a] **Rule accords with patent office construction.**—It seems that the patent office has construed the word "manufacture" to cover buildings, and has issued large numbers of patents accordingly. Thus, class No. 20 of the patent office covers wooden buildings, and under modern development has been extended to include steel framed structures, and includes ninety-seven different subclasses, under which patents are issued for doors, windows, floors, supporting columns, wall construction, and other parts of buildings. Roofs form a separate class, No. 108, and under this head we find numerous subclasses of roofs, under the various subheads of adjustable, fabric lined, metal lined, composite, fireproof, lap joints, shingle, observatory domes, portable, skylight, slate, trusses, etc. Riter-Conley Mfg. Co. v. Aiken, 203 Fed. 699, 121 CCA 655.

73. Riter-Conley Mfg. Co. v. Aiken, supra.

74. Thacher v. Baltimore, 219 Fed. 909 [aff 230 Fed. 1022 mem, 144 CCA 659].

75. Crier v. Innes, 170 Fed. 324, 95 CCA 508.

76. International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569 [rev 197 Fed. 936].

77. Turner v. Quincy Market Cold Storage, etc., Co., 225 Fed. 41, 140 CCA 367.

78. McKeen v. Jerdone, 34 App. (D. C.) 163.

[a] **The roof, doors, floor, side, draft rigging, etc.,** of a railroad car may be patentable as manufactures. McKeen v. Jerdone, 34 App. (D. C.) 163.

79. American Disappearing Bed Co. v. Arnaelsteen, 182 Fed. 324, 105 CCA 40 [certiorari den 220 U. S. 622 mem, 31 SCt 724 mem, 55 L. ed. 613 mem].

[a] **An apartment house with a disappearing bed** is not patentable as a manufacture. American Disappearing Bed Co. v. Arnaelsteen, 182 Fed. 324, 105 CCA 40 [certiorari den 220 U. S. 622 mem, 31 SCt 724 mem, 55 L. ed. 613 mem].

80. U. S. Code tit 35 § 31.

81. P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655; Treibacher Chemische Werke v. Roessler, etc., Chemical Co., 214 Fed. 410 [aff 219 Fed. 210, 135 CCA 108]; Cahill v. Brown, 4 F. Cas. No. 2,291, 3 Bann. & A. 580.

82. Cochrane v. Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 SCt 455, 28 L. ed. 433; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655; Holliday v. Schultze-Berge, 78 Fed. 493; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Rogers v. Ennis, 20 F. Cas. No. 12,010, 3 Bann. & A. 366, 15 Blatchf. 47; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312; Lane v. Levi, 21 App. (D. C.) 168, 104 Off. Gaz. 1898.

83. See infra §§ 26–99.

84. Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655.

85. Keasbey, etc., Co. v. Philip Carey Mfg. Co., 139 Fed. 571.

[a] **In Canada** the words "composition of matter" used in the Patent Act include all composite matter, whether the result of chemical reaction or of mechanical mixture, and the latter may therefore be the subject matter of a patent. Electric Fire-Proofing Co. v. Electric Fire-Proofing Co., 34 Que. Super. 388.

86. Badische Anilin, etc., Fabrik v. Hamilton Mfg. Co., 2 F. Cas. No. 721, 3 Bann. & A. 235; Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 15 Blatchf. 290, 3 Bann. & A. 462; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312.

87. P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655.

88. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868; Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868]; P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655; Maurer v. Dickerson, 113 Fed. 870, 51 CCA 494; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356.

89. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868; Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868].

90. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Gross v.

instrument may consist alone of a new and useful combination of the several parts of which it is composed,[91] or it may consist of a material alteration or modification of one or more of the several devices which enter into its construction,[92] or it may consist in adding new devices.[93] An "improvement" has essential reference to a subject matter to be improved.[94] It is not original, but embraces and either adds to or alters the original.[95] An invention is an independent invention and not a mere "improvement" of an original invention if its essential characteristics are different,[96] or if the idea of means in which it consists cannot be applied to the original without destroying the identity of the latter.[97] An "improvement" on a patent or invention, if it possesses the usual requirements of patentability, is patentable.[98] The improvement may be upon the patentee's own invention.[99] The right to a patent is, of course, limited to the improvement, and does not include the art, machine, or article improved.[1]

[§ 21] **7. Designs.** Designs constitute another of the classes or divisions of patentable subject matter specifically enumerated or described by congress.[2] A "design," in the view of the patent law, is that characteristic of a physical substance which, by means of lines, images, configuration and the like, taken as a whole, make an impression, through the eye, upon the mind of the observer, with respect to the thing observed, of uniqueness and character.[3] In other words, it is that which gives a peculiar or distinctive appearance to the article to which it may be applied, or to which it may give form.[4] Appearance is the essential consideration.[5] As used in the acts of congress, the term embraces only designs applied,[6] or to be applied,[7] to an article of manufacture. A mere abstract impression or picture is not a design such as the law has in view.[8] No patent can be had for a design which in itself is incapable of

Frank, 293 Fed. 702; Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. 542; Thomson-Houston Electric Co. v. Bullock Electric Co., 101 Fed. 587 [mod on other grounds 107 Fed. 277, 46 CCA 263]; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845; Wales v. Waterbury Mfg. Co., 59 Fed. 285; Bray v. Hartshorn, 4 F. Cas. No. 1,820, 1 Cliff. 538; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A 847; Allison Bros. Co. v. Allison, 70 Hun 27, 23 NYS 1065 [rev on other grounds 144 N. Y. 21, 38 NE 956].

91. Bray v. Hartshorn, 4 F. Cas. No. 1,820, 1 Cliff. 538.

92. Bray v. Hartshorn, supra; McKeen v. Jerdone, 34 App. (D. C.) 163.

93. Bray v. Hartshorn, 4 F. Cas. No. 1,820, 1 Cliff. 538.

94. Bray v. Hartshorn, supra; Evans v. Eaton, 8 F. Cas. No. 4,560, 1 Robb Pat. Cas. 193, 3 Wash. C. C. 443.

95. Bray v. Hartshorn, 4 F. Cas. No. 1,820, 1 Cliff. 538; Stitzer v. Withers, 122 Ky. 181, 91 SW 277, 28 KyL 1076.

96. American Cone, etc., Co. v. Consolidated Wafer Co., 247 Fed. 335, 159 CCA 429; McFarland v. Stanton Mfg. Co., 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647; Allison Bros. Co. v. Allison, 144 N. Y. 21, 38 NE 956; McAuley v. Chaplin-Fulton Mfg. Co., 217 Pa. 477, 66 A 750.

97. American Cone, etc., Co. v. Consolidated Wafer Co., 247 Fed. 335, 159 CCA 429; McAuley v. Chaplin-Fulton Mfg. Co., 217 Pa. 477, 66 A 750.

98. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Leeds v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647; Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 5 SCt 941, 29 L. ed. 210; Blake v. San Francisco, 113 U. S. 679, 28 L. ed. 1070; Clough v. Gilbert, etc., Mfg. Co., 106 U. S. 178, 1 SCt 198, 27 L. ed. 138; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Whiteley v. Swayne, 7 Wall. (U. S.) 685, 19 L. ed. 199; Phillips v. Page, 24 How. (U. S.) 164, 16 L. ed. 639; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Federal Yeast Corp. v. Fleischmann Co., 13 F. (2d) 570 [aff 8 F. (2d) 186]; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Gross v. Frank, 293 Fed. 702; Jay v. Weinberg, 250 Fed. 469 [aff 262 Fed. 973]; Meccano, Ltd. v. Wagner, 234 Fed. 912 [mod on other grounds 246 Fed. 603, 158 CCA 573]; Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115; Wright's Automatic Tobacco Packing Mach. Co. v. American Tobacco Co., 220 Fed. 163; Underfeed Stoker Co. v. Riley, 214 Fed. 799; Pope Mfg. Co. v. H. P. Snyder Mfg. Co., 139 Fed. 49; Wessel v. United Mattress Mach. Co., 139 Fed. 11, 71 CCA 423; Loew Supply, etc., Co. v. Fred Miller Brewing Co., 138 Fed. 886, 71 CCA 266; Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553; Fries v. Leeming, 131 Fed. 765; Bechtold v. Nowacke, 131 Fed. 275; Diamond Stone Sawing Mach. Co. v. Brown, 130 Fed. 896 [aff 137 Fed. 910, 70 CCA 248]; McCarthy v. Westfield Plate Co., 129 Fed. 128, 63 CCA 630; Weston Electrical Instrument Co. v. Jewell, 128 Fed. 939; American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307; Windle v. Parks, etc., Mach. Co., 128 Fed. 58 [rev on other grounds 134 Fed. 381, 67 CCA 363]; Dececo Co. v. George E. Gilchrist Co., 125 Fed. 293, 60 CCA 207; Scriven v. North, 124 Fed. 894 [mod on other grounds 134 Fed. 366, 67 CCA 348]; Brookfield v. Novelty Glass Mfg. Co., 124 Fed. 551; Canda v. Michigan Malleable Iron Co., 124 Fed. 486, 61 CCA 194; Merrimac Mattress Mfg. Co. v. Schlesinger, 124 Fed. 237; Aquarama Co. v. Old Mill Co., 124 Fed. 229; Marcus v. Sutton, 124 Fed. 74; Drake Castle Pressed Steel Lug Co. v. Brownell, 123 Fed. 86, 59 CCA 216; L. E. Waterman Co. v. Forsyth, 121 Fed. 107 [aff 128 Fed. 926, 63 CCA 648]; Davis v. Perry, 120 Fed. 941, 57 CCA 231; Schreiber, etc., Mfg. Co. v. Adams Co., 117 Fed. 830, 54 CCA 128; U. S. Envelope Co. v. Sherman Envelope Co., 116 Fed. 200 [aff 122 Fed. 464, 58 CCA 624]; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; American Ordnance Co. v. Driggs-Seabury Gun, etc., Co., 114 Fed. 936, 52 CCA 556; Wilfley v. Denver Engineering Works Co., 111 Fed. 760; Diamond Stone Sawing Mach. Co. v. Dean, 111 Fed. 380; General Electric Co. v. Winsted Gas Co., 110 Fed. 963; Burnham v. Union Mfg. Co., 110 Fed. 765, 49 CCA 163; Walker Patent Pivoted Bin Co. v. Brown, 110 Fed. 649; Goss Printing-Press Co. v. Scott, 110 Fed. 402, 49 CCA 97; Goodyear Shoe Mach. Co. v. Spaulding, 110 Fed. 393, 49 CCA 88; General Electric Co. v. Star Brass Works, 109 Fed. 950; Pelzer v. Dale Co., 106 Fed. 989, 46 CCA 83; Wales v. Waterbury Mfg. Co., 59 Fed. 285; Coupe v. Weatherhead, 16 Fed. 673 [rev on other grounds 147 U. S. 322, 13 SCt 312, 37 L. ed. 188]; Starrett v. Athol Mach. Co., 14 Fed. 910; Bray v. Hartshorn, 4 F. Cas. No. 1,820, 1 Cliff. 538; Evans v. Robinson, 8 F. Cas. No. 4,571, Brunn. Coll. Cas. 400; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A 847; McKeen v. Jerdone, 34 App. (D. C.) 163; In re Chase, 33 App. (D. C.) 441; In re Sheldon, 31 App. (D. C.) 201; Losh v. Hague, Web. Pat. Cas. 200.

99. O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Otis El. Co. v. Kaestner, etc., Co., 234 Fed. 926; Gilmore v. Vaughn, 216 Fed. 356, 132 CCA 500; Grimes v. Allen, 102 Fed. 606, 42 CCA 559.

1. Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Robertson v. Blake, 94 U. S. 728, 24 L. ed. 245; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Evans v. Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Federal Yeast Corp. v. Fleischmann Co., 13 F. (2d) 570 [aff 8 F. (2d) 186]; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351.

2. U. S. Code tit 35 § 73.

3. Bayley v. Braunstein Bros. Co., 246 Fed. 314; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Pelouze Scale, etc., Co. v. American Cutlery Co., 102 Fed. 916, 918, 43 CCA 52.

4. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Try-Me Beverage, etc., Co. v. Metropole, 25 F. (2d) 138.

[a] **Other definitions.** (1) "A thing of distinct and fixed individuality of appearance—a representation, a picture, a delineation, a device." New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 137 U. S. 445, 450, 11 SCt 193, 34 L. ed. 741. (2) Something in the nature of a drawing, picture, or diagram, applicable to the ornamentation of some article of manufacture, such as pottery ware, linen or woolen fabrics, paper hangings, carpets, etc. Harrison v. Taylor, 4 H. & N. 815, 157 Reprint 1064.

5. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Try-Me Beverage, etc., Co. v. Metropole, 25 F. (2d) 138; Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75; Smith v. Peck, etc., Co., 262 Fed. 415 [mod 258 Fed. 40]; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317.

"It is the appearance itself . . . that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense." Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 525, 20 L. ed. 731.

6. Gorham Mfg. Co. v. White, supra; Harmon Paper Co. v. Kimberly Clark Co., 289 Fed. 501.

7. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731.

8. Gorham Mfg. Co. v. White, supra.

reproduction.[9] The characteristic feature of a design may reside in the symmetry and proportion of the manufacture,[10] or in its decorative design,[11] or in the combination of the two.[12] In other words the impression produced may be the result of peculiarity of configuration,[13] or of ornament alone,[14] or of both conjointly.[15] The essence of a design resides in the appearance of the design as a whole,[16] not in the elements individually,[17] or in their method of arrangement.[18] A design may include movable parts.[19]

Design patents and other patents distinguished. A design patent relates to different subject matter than other patents.[20] The appearance of an article is the subject matter dealt with rather than its structure, uses, or functions.[21] The fact that a design is for a patentable mechanical device does not disqualify it from the protection of a patent for a design.[22]

[§ 22] **8. Effect or Result Accomplished by a Method or Device.** Patentable subject matter does include a mere effect, end, or result to be accomplished by a method or device.[23] It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect that a patent is granted, and not the result itself.[24] Anyone is free to devise a new method to accomplish the same effect or result.[25]

[§ 23] **9. Function of Method or Device.** The mere function of a method or device is not patentable.[26] Patentable subject matter as defined by

9. Harmon Paper Co. v. Kimberly Clark Co., 289 Fed. 501; Harmon Paper Co. v. Prager, 286 Fed. 267 [aff 287 Fed. 841].

10. Coca-Cola Co. v. Whistle Co., 20 F. (2d) 955; Young v. Grand Rapids Refrigerator Co., 268 Fed. 966; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515; Theodore W. Foster, etc., Co. v. Tilden-Thurber Co., 200 Fed. 54, 118 CCA 282; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Ashley v. Samuel C. Tatum Co., 181 Fed. 840 [rev on other grounds 186 Fed. 339, 108 CCA 539 (certiorari den 225 U. S. 707 mem, 32 SCt 839 mem, 56 L. ed. 1266 mem)]; Crier v. Innes, 170 Fed. 324, 95 CCA 508; Britton v. White Mfg. Co., 61 Fed. 93; In re Hadden, 57 App. (D. C.) 259, 20 F. (2d) 275; Grigsby's Application, 55 App. (D. C.) 294, 5 F. (2d) 117.

"It is a mistake to assume that a patent for a design applies only to certain ornamentation upon an article of manufacture, and that it cannot properly apply to the article of manufacture itself as that article of manufacture is designed and produced." Mygatt v. Schaffer, 218 Fed. 827, 830, 134 CCA 515.

[a] **A grandstand** is an article of manufacture within the meaning of the statute, and is a proper subject for a design patent. In re Hadden, 57 App. (D. C.) 259, 20 F. (2d) 275.

11. Coca-Cola Co. v. Whistle Co., 20 F. (2d) 955; Inflexible Co. v. Megibow, 251 Fed. 924; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621.

12. Coca-Cola Co. v. Whistle Co., 20 F. (2d) 955; Zidell v. Dexter, 259 Fed. 582; General Gaslight Co. v. Matchless Mfg. Co., 129 Fed. 137; Simpson v. Davis, 12 Fed. 144, 20 Blatchf. 413.

13. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317.

14. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317.

15. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317.

16. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515; Pelouze Scale, etc., Co. v. American Cutlery Co., 102 Fed. 916, 43 CCA 52.

17. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515; Pelouze Scale, etc., Co. v. American Cutlery Co., 102 Fed. 916, 43 CCA 52.

18. Pelouze Scale, etc., Co. v. American Cutlery Co., supra.

19. Chandler Adjustable Chair, etc., Co. v. Heywood Bros., etc., Co., 91 Fed. 163.

20. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898].

21. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Wilson v. Haber Bros., Inc., 275 Fed. 346; Knapp v. Will, etc., Co., 273 Fed. 380; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; West Disinfecting Co. v. Frank, 146 Fed. 388 [aff 149 Fed. 423, 79 CCA 359]; Bradley v. Eccles, 126 Fed. 945, 61 CCA 669; Eaton v. Lewis, 115 Fed. 635 [aff 127 Fed. 1018, 61 CCA 562]; Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co., 114 Fed. 362; Rowe v. Blodgett, etc., Co., 103 Fed. 873 [aff 112 Fed. 61, 50 CCA 120]; Pelouze Scale, etc., Co. v. American Cutlery Co., 102 Fed. 916, 43 CCA 52; Braddock Glass Co. v. Macbeth, 64 Fed. 118, 12 CCA 70; Redway v. Ohio Stove Co., 38 Fed. 582; Untermeyer v. Freund, 37 Fed. 342; Wood v. Dolby, 7 Fed. 475, 19 Blatchf. 214; Northrup v. Adams, 18 F. Cas. No. 10,328, 2 Bann. & A. 567; Perry v. Starrett, 19 F. Cas. No. 11,012, 3 Bann. & A. 485; In re Hadden, 57 App. (D. C.) 259, 20 F. (2d) 275; In re Tournier, 17 App. (D. C.) 481; Miller v. Young, 33 Ill. 354.

"Whether the problem be of validity, scope, or infringement, the prime difference between patents for other inventions and those for designs is that in the first class the inquiry is, 'What will it do?' whereas in respect of design one always asks, 'How does it look?'" Wilson v. Haber Bros., Inc., 275 Fed. 346, 347.

22. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Boyle v. Rousso, 16 F. (2d) 666; Baker v. Hughes-Evans Co., 270 Fed. 97; Bayley v. Standard Art Glass Co., 249 Fed. 478, 161 CCA 436; Dietz Co. v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Flomerfelt v. Newwitter, 88 Fed. 696 [aff 95 Fed. 1006 mem, 37 CCA 356 mem].

23. Minerals Separation, Ltd. v. Butte, etc., Min. Co., 250 U. S. 336, 39 SCt 496, 63 L. ed. 1019; National Cash-Register Co. v. Boston Cash Indicator, etc., Co., 156 U. S. 502, 15 SCt 434, 39 L. ed. 511; Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Knapp v. Morse, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Le Roy v. Tatham, 14 How. (U. S.) 156, 14 L. ed. 367; Carver v. Hyde, 16 Pet. (U. S.) 513, 10 L. ed. 1051; Johnson v. Duquesne Light Co., 29 F. (2d) 784; Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Flint v. Leonard, 27 F. (2d) 215; Elliott Co. v. H. S. B. W.-Cochrane Corp., 26 F. (2d) 815; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Guthrie v. Curlett, 10 F. (2d) 725; Harmon Paper Co. v. Prager, 287 Fed. 841 [aff 286 Fed. 267]; Luten v. Marsh, 254 Fed. 701; General Electric Co. v. Sundh Electric Co., 251 Fed. 283, 163 CCA 439; Simplex Lith. Co. v. Renfrew Mfg. Co., 250 Fed. 863, 163 CCA 177; Sundh Electric Co. v. General Electric Co., 235 Fed. 708; Hotel Security Checking Co. v. Lorraine Co., 160 Fed. 467, 87 CCA 451, 24 LRANS 665; Ries v. Barth Mfg. Co., 136 Fed. 850, 69 CCA 528; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; National Meter Co. v. Neptune Meter Co., 122 Fed. 82 [aff 129 Fed. 124, 63 CCA 626]; Hickory Wheel Co. v. Frazier, 100 Fed. 99, 40 CCA 296; Union Gas-Engine Co. v. Doak, 88 Fed. 86; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367 [aff 69 Fed. 408]; New Process Fermentation Co. v. Maus, 20 Fed. 725 [rev on other grounds 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1193]; American Pin Co. v. Oakville Co., 1 F. Cas. No. 313, 3 Blatchf. 190; Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Burr v. Cowperthwait, 4 F. Cas. No. 2,188, 4 Blatchf. 163; Case v. Brown, 5 F. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268 [aff 2 Wall. 320, 17 L. ed. 817]; Evarts v. Ford, 8 F. Cas. No. 4,574, 6 Fish. Pat. Cas. 587; Marsh v. Dodge, etc., Mfg. Co., 16 F. Cas. No. 9,115, 6 Fish. Pat. Cas. 562; Sickles v. Falls Co., 22 F. Cas. No. 12,834, 4 Blatchf. 508, 2 Fish. Pat. Cas. 202; In re Gardner, 32 App. (D. C.) 249; Matter of Merrill, 8 D. C. 301; Waterous v. Bishop, 20 U. C. C. P. (Ont.) 29.

[a] **Reason for rule.**—"A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing by any means whatsoever. This, by creating monopolies, would discourage arts and manufactures, against the avowed purpose of the patent laws." Le Roy v. Tatham, 14 How. (U. S.) 156, 175, 14 L. ed. 367.

24. Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Corning v. Burden, 15 How. (U. S.) 252, 268, 14 L. ed. 683; Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Siemund v. Enderlin, 206 Fed. 283 [aff 212 Fed. 410, 129 CCA 604]; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13.

25. Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333].

26. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Busch v. Jones, 184 U. S. 598, 22 SCt 511, 46 L. ed. 707; Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39

the statute is confined to the idea of means embodied in the art or instrument by which the function is performed.[27] Anyone is free to devise new means capable of realizing the same functions.[28]

[§ 24] **10. Principle or Law of Nature.** An idea of means whereby a principle or law of nature is utilized to effect a practical result may be the subject of a patent[29] whether it is by chemical agency or combination, or by utilizing principles of natural philosophy or mechanics,[30] but no patent can be obtained for the discovery of an abstract principle,[31] or what is sometimes called a "law of nature."[32] A principle in the abstract is a fundamental truth; an original cause; a motive; these cannot be patented, because no one can claim in any of them an exclusive right.[33] Nor can an exclusive right exist to a new power, should one be discovered in addition to those already known.[34] The elements of the power exist; invention is not in discovering them, but in applying them to useful objects.[35] The principle or law of nature must be embodied in some practical mode of carrying the principle or law of nature into effect.[36]

[§ 25] **11. Ideas, Mental Theories, and Plans of**

L. ed. 899; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Wicke v. Ostrum, 103 U. S. 461, 26 L. ed. 409; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661, Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Linville v. Milberger, 29 F. (2d) 610; Claude Neon Lights v. Machlett, 21 F. (2d) 846 [mod on other grounds 27 F. (2d) 702 (certiorari den 49 SCt 327)]; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Chester N. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372 [mod 1 F. (2d) 590, and certiorari den 273 U. S. 699 mem, 47 SCt 94 mem, 71 L. ed. 847 mem]; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 7 F. (2d) 284 [aff 296 Fed. 201]; Chicago Pneumatic Tool Co. v. Keller Pneumatic Tool Co., 293 Fed. 945; United Shoe Mach. Co. v. L. Q. White Shoe Co., 270 Fed. 650 [aff 279 Fed. 35]; Mastoras v. Hildreth, 263 Fed. 571 [rev on other grounds 257 U. S. 27, 66 L. ed. 112, 42 SCt 20]; Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 260 Fed. 841, 171 CCA 567; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; Dudlo Mfg. Co. v. Varley Duplex Magnet Co., 253 Fed. 745, 165 CCA 339; Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 251 Fed. 897 [aff 260 Fed. 841, 171 CCA 567]; Luten v. Whittier, 251 Fed. 590, 163 CCA 584; Tompkins v. St. Regis Paper Co., 226 Fed. 744 [aff 236 Fed. 221, 149 CCA 411]; Union Special Mach. Co. v. Singer Mfg. Co., 215 Fed. 598 [rev 227 Fed. 858, 142 CCA 382]; Ball v. Coker, 210 Fed. 278, 127 CCA 126; Siemund v. Enderlin, 206 Fed. 283 [aff 212 Fed. 410, 129 CCA 604]; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; Denning Wire, etc., Co. v. American Steel, etc., Co., 169 Fed. 793, 95 CCA 259; Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 Fed. 47; A. B. Dick Co. v. Henry, 160 Fed. 690; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; Cleveland Fdy. Co. v. Detroit Vapor Stove Co., 131 Fed. 740 [mod on other grounds 131 Fed. 853, 68 CCA 233]; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 99 Fed. 758 [rev on other grounds 106 Fed. 693, 45 CCA 544]; Stokes Bros. Mfg. Co. v. Heller, 96 Fed. 104 [aff 101 Fed. 266, 41 CCA 335]; American Strawboard Co. v. Elkhart Egg-Case Co., 84 Fed. 960; Gindorff v. Deering, 81 Fed. 952; Wells Glass Co. v. Henderson, 67 Fed. 930, 15 CCA 84; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 411, 9 CCA 42; Chicopee Folding-Box Co. v. Rogers, 32 Fed. 695; Excelsior Needle Co. v. Union Needle Co., 32 Fed. 221, 23 Blatchf. 147; Gage v. Kellogg, 23 Fed. 891; Albany Steam Trap Co. v. Felthousen, 20 Fed. 633, 22 Blatchf. 169; Hatch v. Moffitt, 15 Fed. 252; Goss v. Cameron, 14 Fed. 576, 11 Biss. 389; Brainard v. Cramme, 12 Fed. 621, 20 Blatchf. 530; MacKay v. Jackman, 12 Fed. 615, 20 Blatchf. 466; Matthews v. Shoneberger, 4 Fed. 635, 18 Blatchf. 357; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; Sickels v. Falls Co., 22 F. Cas. No. 12,834, 4 Blatchf. 508, 2 Fish. Pat. Cas. 202; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; Carnegie Steel Co. v. Cambria Iron Co., 99 Off. Gaz. (U. S.) 1866; Busch v. Jones, 99 Off. Gaz. (U. S.) 229; New v. Warren, 22 Off. Gaz. (U. S.) 587; In re Fessenden, 45 App. (D. C.) 21; In re Tallmadge, 37 App. (D. C.) 590; In re Harris, 37 App. (D. C.) 374; In re White, 31 App. (D. C.) 607; In re McNeil, 28 App. (D. C.) 461; In re Cunningham, 21 App. (D. C.) 29; In re Weston, 17 App. (D. C.) 431.

"Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others, it does not authorize a patent for 'a mode of operation as exhibited by the machine.'" Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 556, 18 SCt 707, 42 L. ed. 1136.

27. Denning Wire, etc., Co. v. American Steel, etc., Co., 169 Fed. 793, 95 CCA 259 [aff 160 Fed. 108].

28. Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333].

29. Le Roy v. Tatham, 22 How. (U. S.) 132, 16 L. ed. 366; Bake-Rite Mfg. Co. v. Tomlinson, 16 F. (2d) 556; Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584; Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 Fed. 907; Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 86 CCA 483 [certiorari den 209 U. S. 548 mem, 28 SCt 759 mem, 52 L. ed. 921 mem]; Cameron Septic Tank Co. v. Saratoga Springs, 151 Fed. 242 [rev on other grounds 159 Fed. 453, 86 CCA 483 (certiorari den 209 U S. 548 mem, 28 SCt 759 mem, 52 L. ed. 921 mem)]; Brush Electric Co. v. Electric Impr. Co., 52 Fed. 965; Boyd v. Cherry, 50 Fed. 279; Brush Electric Co. v. Ft. Wayne Electric Light Co., 40 Fed. 826; Hammerschlag v. Scamoni, 7 Fed. 584; Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307; Burr v. Cowperthwait, 4 F. Cas. No. 2,188, 4 Blatchf. 163; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Tatham v. Le Roy, 23 F. Cas. No. 13,761; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; In re Tallmadge, 37 App. (D. C.) 590.

"There can be no patent for a principle; but, 'for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects, in any trade, mystery, or manual occupation, there may be a patent.'" Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307, 312.

30. Le Roy v. Tatham, 22 How. (U. S.) 132, 16 L. ed. 366.

31. Le Roy v. Tatham, 14 How. (U. S.) 156, 14 L. ed. 367, 22 How. (U. S.) 132, 16 L. ed. 366; George Haiss Mfg. Co. v. Link Belt Co., 27 F. (2d) 397; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; U. S. v. E. W. Bliss Co., 224 Fed. 325, 139 CCA 633 [mod on other grounds 248 U. S. 37, 39 SCt 42, 63 L. ed. 112]; National Electric Signaling Co. v. Telefunken Wireless Tel. Co., 209 Fed. 856; Cameron Septic Tank Co. v. Saratoga Springs, 151 Fed. 242 [rev on other grounds 159 Fed. 453, 86 CCA 483 (certiorari den 209 U. S. 548 mem, 28 SCt 759 mem, 52 L. ed. 921 mem)]; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; American Strawboard Co. v. Elkhart Egg-Case Co., 84 Fed. 960; Boyd v. Cherry, 50 Fed. 279; Steam-Gauge, etc., Co. v. St. Louis R. Supplies Mfg. Co., 25 Fed. 491; Bean v. Smallwood, 2 F. Cas. No. 1,173, 2 Robb Pat. Cas. 133, 2 Story 408; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Foote v. Silsby, 9 F. Cas. No. 4,919, 2 Blatchf. 260 [mod on other grounds 20 How. 378, 15 L. ed. 953]; Shaw, etc., Co. v. Lovejoy, 21 F. Cas. No. 12,727, 7 Blatchf. 232; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Smith v. Ely, 22 F. Cas. No. 13,043, Fish. Pat. R. 339, 5 McLean 76 [rev on other grounds 15 How. 137, 14 L. ed. 634]; Stone v. Sprague, 23 F. Cas. No. 13,487, 2 Robb Pat. Cas. 10, 1 Story 270; Whitney v. Carter, 29 F. Cas. No. 17,583; Wintermute v. Redington, 30 F. Cas. No. 17,-896, 1 Fish. Pat. Cas. 239; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

[a] **Application of rule.**—A claim for the art of cutting ice by an apparatus worked by any power other than human is a claim for an abstract principle and is void. Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

32. Hazeltine Corp. v. Electric Serv. Engineering Corp., 18 F. (2d) 662; Treibacher Chemische Werke v. Roessler, etc., Chemical Co., 214 Fed. 410 [aff 219 Fed. 210, 135 CCA 108]; Boyd v. Cherry, 50 Fed. 279; In re Kemper, 14 F. Cas. No. 7,687, Cranch Pat. Dec. 89, McA. Pat. Cas. 1; Morton v. New York Eye Infirmary, 17 F. Cas. No. 9,865, 5 Blatchf. 116, 2 Fish. Pat. Cas. 320; Roberts v. Dickey, 20 F. Cas. No. 11,899, 4 Fish. Pat. Cas. 532; Smith v. Pearce, 22 F. Cas. No. 13,089, 2 McLean 176, 2 Robb Pat. Cas. 13.

[a] **A discovery that inhaling ether produces insensibility to pain** is not a patentable invention. Morton v. New York Eye Infirmary, 17 F. Cas. No. 9,865, 5 Blatchf. 116, 2 Fish. Pat. Cas. 320.

[b] **The measurement of time or expansion of steam** is not patentable but only the means for utilizing it. Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

[c] **Fumigating trees in absence of the sun's rays** is not patentable. Wall v. Leck, 66 Fed. 552, 13 CCA 630 [aff 61 Fed. 291].

33. Le Roy v. Tatham, 14 How. (U. S.) 156, 14 L. ed. 367; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

34. Le Roy v. Tatham, 14 How. (U. S. 156, 14 L. ed. 367.

35. Le Roy v Tatham, supra; Boyd v. Cherry, 50 Fed. 279.

36. Steam-Gauge, etc., Co. v. St.

Action. While the means by which an idea may be made practically useful may be the subject of a patent,[37] an idea, of itself, is not patentable.[38] The mere existence of an intellectual notion that a certain thing could be done, and, if done, might be of practical utility, does not furnish a basis for a patent.[39] Mere mental theories[40] or plans of action[41] are not comprehended within the subject matter described by congress.

[§ 26] **C. Novelty and Anticipation[42]—1. In General.** Congress has provided for the granting of patents to inventors or discoverers of any "new" and useful art or instrument "not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof."[43] And, to be patentable, an invention must be "new."[44] This is equally the case whether the invention consists of an entire machine or improvement of a machine, or a combination of several mechanical powers.[45] Absolute novelty is not required.[46] The term "new" is explained or limited by the words subsequently used in the statute.[47] An invention is "new," within the meaning of the statute, if it was not known or used in this country prior to the inventor's invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof.[48] If the invention lacks "novelty," as so defined, it is said to be anticipated.[49]

[§ 27] **2. Anticipatory Methods or Devices[50]—a. In General.** "Anticipation" means the disclosure in the prior art of a thing substantially identical with the art or instrument for which a patent is sought.[51] An invention is anticipated only if the invention already known or used by others in this country, or patented or described in a printed publication in this or any foreign country, is identical in substance with it.[52] The complete and operative invention must

Louis R. Supplies Mfg. Co., 25 Fed. 491.

37. Rubber Tip Pencil Co. v. Howard, 20 Wall. (U. S.) 498, 22 L. ed. 410.

38. Rubber Tip Pencil Co. v. Howard, supra; Æolian Co. v. Cunningham Piano Co., 251 Fed. 301 [aff 255 Fed. 897, 167 CCA 217]; McEwan Bros. Co. v. McEwan, 91 Fed. 787; Wheaton v. Kendall, 85 Fed. 666.

39. Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514]; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367 [aff 69 Fed. 408]; Foote v. Silsby, 9 F. Cas. No. 4,919, 2 Blatchf. 260 [mod on other grounds 20 How. 378, 15 L. ed. 953]; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Sloat v. Spring, 22 F. Cas. No. 12,948a; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440.

40. Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 103 CCA 479 [certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem]; Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307; Detmold v. Reeves, 7 F. Cas. No. 3,831, 1 Fish. Pat. Cas. 127; Ex p. Dixon, 7 F. Cas. No. 3,927; Draper v. Potomska Mills Corp., 7 F. Cas. No. 4,072, 3 Bann. & A. 214; Judson v. Bradford, 14 F. Cas. No. 7,564, 3 Bann. & A. 539; Smith v. Downing, 22 F. Cas. No. 13,036, 1 Fish. Pat. Cas. 64.

41. Munson v. New York, 124 U. S. 601, 8 SCt 622, 31 L. ed. 586; Guthrie v. Curlett, 10 F. (2d) 725; U. S. Credit System Co. v. American Credit Indemn. Co., 53 Fed. 818 [aff 59 Fed. 139, 8 CCA 49]; Moore v. U. S., 50 Ct. Cl. 120.

42. **"Patentable novelty" defined** see infra § 67.

43. U. S. Code tit 35 § 31.

44. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139; Richards v. Chase El. Co., 159 U. S. 477, 16 SCt 53, 40 L. ed. 225; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Weiser v. Portable El. Mfg. Co., 11 F. (2d) 918; Hammond v. Marmon Auto. Co., 300 Fed. 803; Luten v. Kansas City Bridge Co., 272 Fed. 533 [rev on other grounds 285 Fed. 840]; Luten v. Allen, 263 Fed. 986; Luten v. Wilson Reinforced Concrete Co., 263 Fed. 983; Luten v. Scott, 263 Fed. 721; Van Dorn Iron Works Co. v. Mathis Bros. Co., 260 Fed. 400, 171 CCA 266; Crystal Percolator Co. v. Landers, 258 Fed. 28; Luten v. Marsh, 254 Fed. 701; Luten v. Young, 254 Fed. 591; Luten v. Allen, 254 Fed. 587 [aff 263 Fed. 986]; Luten v. Wilson Reinforced Concrete Co., 254 Fed. 107 [mod on other grounds 263 Fed. 983]; Luten v. Washburn, 253 Fed. 950, 165 CCA 392; Luten v. Whittier, 251 Fed. 590, 163 CCA 584; Iceless Ice Box Co. v. Mitchell, 240 Fed. 418, 153 CCA 344; Luten v. Sharp, 234 Fed. 880, 148 CCA 478; Werk v. Parker, 231 Fed. 121, 145 CCA 309 [aff 249 U. S. 130, 39 SCt 197, 63 L. ed. 514]; Colorado Tent, etc., Co. v. Parks, 195 Fed. 275, 115 CCA 245; Louden Mach. Co. v. Strickler, 186 Fed. 522 [rev on other grounds 195 Fed. 751, 115 CCA 551]; Shaw v. Royersford Fdy., etc., Co., 185 Fed. 113, 107 CCA 329; Langan v. Warren Axe, etc., Co., 184 Fed. 720, 107 CCA 631; Lumber Anti-Stain Co. v. Nester, 178 Fed. 927, 102 CCA 299; Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 Fed. 880 [aff 173 Fed. 1019, 98 CCA 640]; Westrumite Co. v. Lincoln Park Comrs., 164 Fed. 989 [rev on other grounds 174 Fed. 144, 98 CCA 178 (certiorari den 215 U. S. 610 mem, 30 SCt 411 mem, 54 L. ed. 347 mem)]; Roth v. Harris, 162 Fed. 160 [mod on other grounds 168 Fed. 279, 93 CCA 581]; Smyth Mfg. Co. v. Sheridan, 149 Fed. 208, 79 CCA 166; Sellers v. Cofrode, 35 Fed. 131; Celluloid Mfg. Co. v. Tower, 26 Fed. 451 [aff 136 U. S. 633, 10 SCt 1066, 34 L. ed. 551]; Gardner v. Herz, 12 Fed. 491, 20 Blatchf. 538 [aff 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158]; Bean v. Smallwood, 2 F. Cas. No. 1,173, 2 Robb Pat. Cas. 133, 2 Story 408; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Conover v. Roach, 6 F. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; In re Henry, 11 F. Cas. No. 6,371, McA. Pat. Cas. 467; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024]; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Roberts v. Ward, 20 F. Cas. No. 11,918, 4 McLean 565, 2 Robb Pat. Cas. 746; Seligman v. Day, 21 F. Cas. No. 12,643, 2 Bann. & A. 467, 14 Blatchf. 72; Stanley v. Whipple, 22 F. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Thompson v. Haight, 23 F. Cas. No. 13,957; Winans v. New York, etc., R. Co., 30 F. Cas. No. 17,863, 1 Fish. Pat. Cas. 213 [aff 21 How. 88, 16 L. ed. 68]; In re Stolp, 44 App. (D. C.) 451; In re Schutte, 44 App. (D. C.) 299; In re Higgins, 40 App. (D. C.) 29; In re Morgan, 38 App. (D. C.) 274; In re Luten, 37 App. (D. C.) 379; In re Faber, 31 App. (D. C.) 531; In re Moeser, 27 App. (D. C.) 307; In re Carpenter, 24 App. (D. C.) 110; Durham v. Seymour, 6 App. (D. C.) 78 [app dism 161 U. S. 235, 16 SCt 452, 40 L. ed. 682].

45. Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432.

46. Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433.

Knowledge or use prior to grant but subsequent to date of invention see infra § 36.

Knowledge or use abroad see infra § 35.

47. Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433.

48. In re Butz, 30 F. (2d) 878; Beldam v. Garlock Packing Co., 29 F. (2d) 673; Schiller v. Robertson, 28 F. (2d) 301; Foltz's Application, 26 F. (2d) 983; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651; U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Wellman-Seaver-Morgan Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 3 F. (2d) 531; Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; Straub v. Campbell, 259 Fed. 570, 170 CCA 532; Davey Tree Expert Co. v. Van Billiard, 248 Fed. 718 [rev on other grounds 255 Fed. 781, 167 CCA 125]; Pittsburgh Iron, etc., Foundries Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Vally Iron Works v. T. B. Wood's Sons Co., 196 Fed. 780, 116 CCA 46; Oehring v. Gardam, 180 Fed. 476 [rev on other grounds 202 Fed. 753, 121 CCA 119]; Underfeed Stoker Co. v. American Ship Windlass Co., 165 Fed. 65; Lincoln Iron Works v. W. H. McWhirter Co., 142 Fed. 967, 74 CCA 229; Chittenden v. Mallory, 41 Fed. 215; Byerly v. Cleveland Linseed Oil Works, 31 Fed. 73; Batten v. Clayton, 2 F. Cas. No. 1,105; Chapman v. Beede, 54 App. (D. C.) 209, 296 Fed. 956; In re Zenk, 50 App. (D. C.) 25, 267 Fed. 327; De Kando v. Armstrong, 37 App. (D. C.) 314.

49. Lumber Anti-Stain Co. v. Nester, 178 Fed. 927, 102 CCA 299; Chapman v. Beede, 54 App. (D. C.) 209; 296 Fed. 956.

50. **Conclusiveness and effect of decision of patent office as to identity of invention in reissue proceedings** see infra §§ 314-318.

Identity of invention as showing right of patentee to reissue see infra § 325.

51. Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Detroit Lubricator Mfg. Co. v. Renchard, 9 Fed. 293.

52. Gordon v. Warder, 150 U. S. 47, 14 SCt 32, 37 L. ed. 992; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; Cantrell v. Wal-

have been disclosed[53]—the same idea of means in the same stage of development.[54] Mere identity of form or structure is not sufficient;[55] nor is mere identity of description.[56] Two inventions are identical in substance if they perform substantially the same function or office in substantially the same way, and produce substantially the same result.[57] They are not identical in substance if they accomplish

lick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Coffin v. Ogden, 8 Wall. (U. S.) 120, 21 L. ed. 821; Schlaich v. Robertson, 26 F. (2d) 681; In re Bliss, 26 F. (2d) 524; Griswold v. Buckle Proof Shingle Co., 26 F. (2d) 466; Elkon Works, Inc. v. Welworth Automotive Corp., 25 F. (2d) 968; Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196; Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Beldam v. Garlock Packing Co., 24 F. (2d) 852 [rev on other grounds 29 F. (2d) 673]; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Burch Plow Co. v. Butler, 23 F. (2d) 15; Permutit Co. v. Paige, etc., Chemical Co., 22 F. (2d) 916; Brick v. Namm, 22 F. (2d) 693; Detroit v. Kahn, 22 F. (2d) 613; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 22 F. (2d) 259; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27; Westinghouse Electric, etc., Co. v. De Forest Radio Tel., etc., Co., 21 F. (2d) 918 [aff 49 SCt 34 mem]; Hazeltine Corp. v. Grebe, 21 F. (2d) 643; Kulp v. Bridgeport Hardware Mfg. Corp., 19 F. (2d) 659; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Perey v. Perey Mfg. Co., 17 F. (2d) 774; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Deppe v. General Motors Corp., 15 F. (2d) 419; Hewes v. Gay, 11 F. (2d) 165; American Stainless Steel Co. v. Ludlum Steel Co., 290 Fed. 103; Individual Drinking Cup Co. v. Sanitary Products Corp., 267 Fed. 196 [rev on other grounds 271 Fed. 241]; Rodman Chemical Co. v. Deeds Commercial Laboratories, 261 Fed. 189; U. S. Rubber Co. v. I. T. S. Rubber Co., 260 Fed. 947, 171 CCA 589; Fetzer, etc., Leather Co. v. I. T. S. Rubber Co., 260 Fed. 939, 171 CCA 581; Munson Mfg. Co. v. Deere, 257 Fed. 318, 168 CCA 402; Minneapolis, etc., R. Co. v. Barnett, 257 Fed. 302, 168 CCA 386; Todd Protectograph Co. v. Hedman Mfg. Co., 254 Fed. 829 [aff 265 Fed. 273]; Solva Waterproof Glue Co. v. Perkins Glue Co., 251 Fed. 64, 163 CCA 314; Blackburn v. Bonita Mfg. Co., 248 Fed. 743 [rev on other grounds 251 Fed. 890, 164 CCA 106]; Williamson v. Electric Serv. Supplies Co., 236 Fed. 353 [aff 242 Fed. 873, 155 CCA 461]; Hamilton Beach Mfg. Co. v. P. A. Geier Co., 230 Fed. 430, 144 CCA 572; Pieper v. S. S. White Dental Mfg. Co. 228 Fed. 30, 142 CCA 486 [writ of certiorari dism 241 U. S. 690 mem, 36 SCt 553 mem, 60 L. ed. 1237 mem]; Greenwald v. La Vogue Petticoat Co., 226 Fed. 448, 141 CCA 278; Merrell-Soule Co. v. Powdered Milk Co., 222 Fed. 911, 138 CCA 391; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Holton v. Pepper, 216 Fed. 368; Merrell-Soule Co. v. Powdered Milk Co., 215 Fed. 922 [rev on other grounds 7 F. (2d) 297]; Johns-Pratt Co. v. Snow, 212 Fed. 173 [aff 214 Fed. 110]; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Stebler v. Riverside Heights Orange Growers' Assoc., 205 Fed. 735, 124 CCA 29; Patents Selling, etc., Co. v. Dunn, 204 Fed. 99 [rev on other grounds 213 Fed. 40, 129 CCA 634]; General Knit Fabric Co. v. Steber Mach. Co., 194 Fed. 99, 114 CCA 177; Thompson, etc., Co. v. Moxie Nerve Food Co., 189 Fed. 911; Parke-Davis v. H. K. Mulford Co., 189 Fed. 95 [mod on other grounds 196 Fed. 496, 116 CCA 262]; Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co., 184 Fed. 620; Waterbury Buckle Co. v. Aston, 183 Fed. 120, 105 CCA 410; Sayre v. Bonney Vehslage Tool Co., 180 Fed. 772; H. C. Cook Co. v. Boettinger, 166 Fed. 762, 92 CCA 442; Thomson-Houston Electric Co. v. Traction Equipment Co., 164 Fed. 425; Roth v. Harris, 162 Fed. 160 [mod on other grounds 168 Fed. 279, 93 CCA 581]; Thayer v. Wold, 142 Fed. 776 [aff 148 Fed. 227, 78 CCA 350]; Greene v. United Shoe Mach. Co., 132 Fed. 973, 66 CCA 43; Canda v. Michigan Malleable Iron Co., 124 Fed. 486, 61 CCA 194; Simonds Rolling Mach. Co. v. Hathorn Mfg. Co., 93 Fed. 958, 36 CCA 24; American Graphophone Co. v. Leeds, 87 Fed. 873; Diamond State Iron Co. v. Goldie, 84 Fed. 972, 28 CCA 589; Hanifen v. E. H. Godshalk Co., 84 Fed. 649, 28 CCA 507; Matheson v. Campbell, 77 Fed. 280 [rev on other grounds 78 Fed. 910, 24 CCA 334]; Chase v. Fillebrown, 58 Fed. 374; Jonathan Mills Mfg. Co. v. Whitehouse, 56 Fed. 589; Edison Electric Light Co. v. Westinghouse, 55 Fed. 490 [rev on other grounds 63 Fed. 588, 11 CCA 342]; Winchester Repeating Arms Co. v. American Buckle, etc., Co., 54 Fed. 703; Sawyer Spindle Co. v. W. G. & A. R. Morrison Co., 54 Fed. 693; Ricker v. Crocker-Wheeler Motor Co., 54 Fed. 519; Roberts v. H. P. Nail Co., 53 Fed. 916; Tibbe, etc., Mfg. Co. v. Heineken, 43 Fed. 75; Brush Electric Co. v. Julien Electric Co., 41 Fed. 679; Norton v. Cary, 39 Fed. 544; O'Brien Bros. Mfg. Co. v. Peoria Plow Co., 34 Fed. 786; Enterprise Mfg. Co. v. Sargent, 34 Fed. 134; Hammerschlag Mfg. Co. v. Bancroft, 32 Fed. 585; Starling v. St. Paul Plow Works, 32 Fed. 290; Cincinnati Ice-Mach. Co. v. Foss-Schneider Brewing Co., 31 Fed. 469; Fryer v. Mutual L. Ins. Co., 30 Fed. 787; Adams, etc., Mfg. Co. v. Rathbone, 26 Fed. 262; Hicks v. Otto, 19 Fed. 749; Bruce v. Marder, 10 Fed. 750, 20 Blatchf. 355; Crandal v. Walters, 9 Fed. 659, 20 Blatchf. 97; Robinson v. Sutter, 8 Fed. 828, 10 Biss. 100 [rev on other grounds 119 U. S. 530, 7 SCt 376, 30 L. ed. 492]; Watkins v. Cincinnati, 8 Fed. 325; Hobbs v. King, 8 Fed. 91; Zinn v. Weiss, 7 Fed. 914; Pennington v. King, 7 Fed. 462; Adams v. Edwards, 1 F. Cas. No. 53, 1 Fish. Pat. Cas. 1; Ex p. Barstow, 2 F. Cas. No. 1,063; Blake v. Rawson, 3 F. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200; Bullock Printing Press Co. v. Jones, 4 F. Cas. No. 2,132, 3 Bann. & A. 195; Cooke v. New York Cent., etc., R. Co., 6 F. Cas. No. 3,176, 4 Bann. & A. 398; Decker v. Grote, 7 F. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143; Gibbs v. Johnson, 10 F. Cas. No. 5,384; Ex p. Hayden, 11 F. Cas. No. 6,256; In re Hebbard, 11 F. Cas. No. 6,314, 1 McA. Pat. Cas. 543; Ex p. Leach, 15 F. Cas. No. 8,155; Locomotive Engine Safety Truck Co. v. Erie R. Co., 15 F. Cas. No. 8,452, 10 Blatchf. 292, 6 Fish. Pat. Cas. 187; Masury v. Tiemann, 16 F. Cas. No. 9,271, 8 Blatchf. 426, 4 Fish. Pat. Cas. 524; Platt v. U. S. Patent Button, etc., Mfg. Co., 19 F. Cas. No. 11,222, 9 Blatchf. 342, 5 Fish. Pat. Cas. 265; Reeves v. Keystone Bridge Co., 20 F. Cas. No. 11,660, 5 Fish. Pat. Cas. 456; Schillinger v. Gunther, 21 F. Cas. No. 12,458, 17 Blatchf. 66; In re Smith, 22 F. Cas. No. 12,982, 1 McA. Pat. Cas. 255; Tilghman v. Morse, 23 F. Cas. No. 14,044, 9 Blatchf. 421, 5 Fish. Pat. Cas. 323; Yale, etc., Mfg. Co. v. North, 30 F. Cas. No. 18,123, 5 Blatchf. 455, 3 Fish. Pat. Cas. 279; In re Sheldon, 31 App. (D. C.) 201; In re Weiss, 21 App. (D. C.) 214; In re Marsden, 14 App. (D. C.) 223; In re McCreery, 12 App. (D. C.) 517; In re Green, 20 D. C. 237; Matter of Merrill, 8 D. C. 301.

[a] **Lack of identity in woven fabrics.**—Hoyle v. Kerr, 58 Fed. 395, 7 CCA 269.

[b] **Lack of identity in materials.**—Tibbe, etc., Mfg. Co. v. Lamparter, 51 Fed. 763; Shuter v. Davis, 16 Fed. 564; Simons v. Blackinton, 22 F. Cas. No. 12,866, 3 Bann. & A. 481.

[c] **Lack of identity in the structure of books.**—Hawes v. Cook, 11 F. Cas. No. 6,236; Hawes v. Gage, 11 F. Cas. No. 6,237; Hawes v. Washburne, 11 F. Cas. No. 6,242.

[d] **Reversal of mode of operation.**—A process for pasteurizing beer in bottles by moving the bottles through heated water which is stationary is not anticipated by a patent for a process involving the moving of heated water around stationary bottles containing the liquor to be pasteurized. In re Wagner, 22 App. (D. C.) 267.

53. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713.

54. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Electric R. Signal Co. v. Hall R. Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713; Merrill v. W. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; Wagner v. Mt. Carmel Iron Works, 244 Fed. 818; Williamson v. Electric Serv. Supplies Co., 236 Fed. 353 [aff 242 Fed. 873, 155 CCA 461]; Holton v. Pepper, 216 Fed. 368; New American File Co. v. Nicholson File Co., 31 Fed. 289.

55. Wilson v. Coon, 6 Fed. 611, 18 Blatchf. 532 [rev on other grounds 113 U. S. 268, 5 SCt 537, 28 L. ed. 963]; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; In re Marshutz, 13 App. (D. C.) 228.

56. General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; U. S. Metal Cap, etc., Co. v. American Keyless Kap Corp., 250 Fed. 857, 163 CCA 171; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev on other grounds 241 Fed. 72, 154 CCA 72]; Benthall Mach. Co. v. Virginia-Carolina Peanut Picker Co., 222 Fed. 918 [rev on other grounds 241 Fed. 89, 154 CCA 89]; Benthall Mach. Co. v. Debnam, 222 Fed. 918 [rev on other grounds 241 Fed. 103, 154 CCA 103]; Poupard v. Fardell, 18 Wkly. Rep. 127.

57. Brill v. Washington R., etc., Co., 215 U. S. 527, 30 SCt 177, 54 L. ed. 311; Giles v. Heysinger, 150 U. S. 627, 14 SCt 211, 37 L. ed. 1204; Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251; Rohm v. Martin Dennis Co., 263 Fed. 106 [aff 263 Fed. 388]; Union Special Mach. Co. v. Quaker City Flour Mills Co., 236 Fed. 246; Apple v. American Shoe Mach., etc., Co., 232 Fed. 603, 146 CCA 561; Elliott Mach. Co. v. Rothschild, 224 Fed. 502 [aff 235 Fed. 896, 149 CCA 208]; Ideal Stopper Co. v. Crown Cork, etc., Co., 131 Fed. 244, 65 CCA 436 [certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co., 125 Fed. 761, 60 CCA 529; U. S. Peg-Wood, etc., Board Co. v. B. F. Sturtevant Co., 125 Fed. 378, 60 CCA 244; Eames v. Worcester Polytechnic Inst., 123 Fed. 67, 60 CCA 37; Bryant Electric Co. v. Electric Protection Co., 110 Fed. 215; Johnston v. Woodbury, 109 Fed. 567, 48 CCA 550; Harmon v. Struthers, 57 Fed. 637; Sayre v. Scott, 55 Fed. 971, 5 CCA 366; Root v. Third-Ave. R. Co., 43 Fed. 73; Berryman v. Ainsworth Boiler, etc., Covering Co., 40 Fed. 879; Norton v. Cary, 39 Fed.

substantially different results,[58] or perform different functions,[59] or if they perform the same function in a different way.[60] The two inventions need not be identical in form or structure.[61] A mere colorable variation will not confer novelty.[62] It is sufficient if the difference is only such as would suggest itself to any person skilled in the art to which the later invention relates.[63] Identity need extend no further than to matter claimed.[64] And mere superiority of the invention for which a patent is sought does not prevent anticipation.[65]

Infringe if later test. Speaking generally, that which would infringe a patent, if later, will anticipate, if earlier.[66] What would not infringe cannot anticipate.[67]

[§ 28] **b. Processes.** Generally speaking, a process can only be anticipated by a similar process.[68] It is not necessary, however, that the two processes should be identical in all particulars.[69] It is sufficient if in general aspects they are the same, and the difference in minor matters is only such as would suggest itself to a person possessing ordinary skill in the art.[70] It is not necessary that the thing produced shall be new.[71] A process may be anticipated by a machine which fully discloses the process.[72] But the mechanical means by which the result is attained may be old provided the result has not been attained by such means before.[73] To anticipate a process patent, it is necessary, not only to show that the prior patent might have been used to carry out the process, but that such use was contemplated, or that it would have occurred to an ordinary mechanic operating the device.[74]

[§ 29] **c. Products.** A product is not anticipated

544; Wight Fire-Proofing Co. v. Chicago Fire-Proof Co., 35 Fed. 582 [app dism 149 U. S. 790 mem, 13 SCt 1054 mem, 37 L. ed. 966 mem]; Sox v. Taylor Iron Works, 30 Fed. 835 [aff 149 U. S. 785, 13 SCt 1051, 37 L. ed. 964]; Dodds v. Stoddard, 17 Fed. 645; Matteson v. Caine, 17 Fed. 525, 8 Sawy. 498; Crandall v. Richardson, 8 Fed. 808; Blackman v. Hibbler, 3 F. Cas. No. 1,471, 4 Bann. & A. 641, 17 Blatchf. 333; Gould v. Ballard, 10 F. Cas. No. 5,635, 3 Bann. & A. 324; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; Richardson v. Lockwood, 20 F. Cas. No. 11,787, 6 Fish. Pat. Cas. 454; In re Bliss, 39 App. (D. C.) 453; In re Scharf, 37 App. (D. C.) 339; In re Hodges, 28 App. (D. C.) 525; In re McNeil, 28 App. (D. C.) 461; In re Hoey, 28 App. (D. C.) 416; In re Welch, 28 App. (D. C.) 362; Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609 mem, 27 SCt 307 mem, 51 L. ed. 645 mem]; In re Weber, 26 App. (D. C.) 29; McBerty v. Cook, 16 App. (D. C.) 133; In re Marshutz, 13 App. (D. C.) 228.

58. Trico Products Corp. v. Perfection Products Co., 19 F. (2d) 173; Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838]; Perey v. Perey Mfg. Co., 17 F. (2d) 774; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [rev on other grounds 28 F. (2d) 641]; Zip Mfg. Co. v. Pusch, 2 F. (2d) 828; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713; Pittsburgh Iron, etc., Foundries Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Stumpf v. A. Schreiber Brewing Co., 242 Fed. 72; Economy Locomotive Sander Co. v. American Locomotive Sander Co., 162 Fed. 683, 89 CCA 475; Robbins v. Columbus Watch Co., 50 Fed. 545; Stuart v. Thorman, 37 Fed. 90; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; Putnam v. Weatherbee, 20 F. Cas. No. 11,485, 2 Bann. & A. 78; Putnam v. Yerrington, 20 F. Cas. No. 11,486, 2 Bann. & A. 237; Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; Willimantic Linen Co. v. Clark Thread Co., 30 F. Cas. No. 17,763, 4 Bann. & A. 133 [rev on other grounds 140 U. S. 481, 11 SCt 846, 35 L. ed. 521].

59. Submarine Signal Corp. v. General Radio Co., 14 F. (2d) 179; Star Brass Works v. General Electric Co., 131 Fed. 78, 65 CCA 316; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; In re Johnson, 54 App. (D. C.) 182, 295 Fed. 1003.

60. Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 SCt 295, 38 L. ed. 103; Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682; Adams v. Joliet Mfg. Co., 1 F. Cas. No. 56, 3 Bann. & A. 1; Barnes v. Straus, 2 F. Cas. No. 1,022, 9 Blatchf. 553, 5 Fish. Pat. Cas. 531; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; Miller v. Androscoggin Pulp Co., 17 F. Cas. No. 9,559, 5 Fish. Pat. Cas. 340, Holmes 142; Pike v. Providence, etc., R. Co., 19 F. Cas. No. 11,163, 1 Bann. & A. 560, Holmes 445; Potter v. Muller, 19 F. Cas. No. 11,334, 2 Fish. Pat. Cas. 465; Putnam v. Hickey, 20 F. Cas. No. 11,480, 3 Biss. 157, 5 Fish. Pat. Cas. 334; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149; Watson v. Cunningham, 29 F. Cas. No. 17,280, 4 Fish. Pat. Cas. 528; Hubbell v. U. S., 20 Ct. Cl. 354 [aff 171 U. S. 203, 18 SCt 828, 43 L. ed. 136]; Hutchison Vapor Heating Corp. v. Mouat, 48 App. (D. C.) 388.

61. Kahn v. Starrells, 135 Fed. 532, 68 CCA 82; A. B. Dick Co. v. Wichelman, 105 Fed. 629; Sagendorph v. Hughes, 95 Fed. 478; In re Bedford, 14 App. (D. C.) 376.

62. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Millner v. Voss, 48 Fed. 832, 4 Hughes 262.

63. Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., 190 Fed. 573, 111 CCA 389 [certiorari den 223 U. S. 732 mem, 32 SCt 528 mem, 56 L. ed. 634 mem]; In re Bedford, 14 App. (D. C.) 376.

64. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Roemer v. Newmann, 132 U. S. 103, 10 SCt 12, 33 L. ed. 277; Burns v. Meyer, 100 U. S. 671, 25 L. ed. 738; Merrell v. Yeomans, C. D. (1877) 279; Keystone v. Phoenix, C. D. (1877) 384; Sutter v. Robinson, C. D. (1885) 155; Lehigh Valley v. Mellon, C. D. (1881) 485.

65. Daniel v. Restein, 131 Fed. 469 [aff 146 Fed. 74, 76 CCA 536]; Waterman v. Thomson, 29 F. Cas. No. 17,260, 2 Fish. Pat. Cas. 461.

66. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Grant v. Walter, 148 U. S. 547, 13 SCt 699, 37 L. ed. 552; Peters v. Active Mfg. Co., 129 U. S. 530, 9 SCt 389, 32 L. ed. 738; Thatcher Heating Co. v. Burtis, 121 U. S. 286, 7 SCt 1034, 30 L. ed. 942; William Carter Co. v. Earnshaw Knitting Co., 25 F. (2d) 981; Kil-Nock Co. v. Chicago Plating Co., 10 F. (2d) 536; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Heitler v. Brooklyn Shield, etc., Co., 295 Fed. 333; Crystal Percolator Co. v. Landers, 258 Fed. 28; F. N. Burt Co., Ltd. v. Ritchie, 251 Fed. 909; Imperial Brass Mfg. Co. v. Nelson, 203 Fed. 484, 121 CCA 606; Hillard v. Fisher Book Typewriter Co., 195 Fed. 932, 115 CCA 620; Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., 190 Fed. 573, 111 CCA 389 [certiorari den 223 U. S. 732 mem, 32 SCt 528 mem, 56 L. ed. 634 mem]; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; Eames v. Worcester Polytechnic Inst., 123 Fed. 67, 60 CCA 37; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 99 Fed. 758 [rev on other grounds 106 Fed. 693, 45 CCA 544]; Electric Accumulator Co. v. Julien Electric Co., 38 Fed. 117; Peters v. Active Mfg. Co., 21 Fed. 319 [aff 129 U. S. 530, 9 SCt 389, 32 L. ed. 738].

67. Stainthorp v. Elkinton, 22 F. Cas. No. 13,278, 1 Fish. Pat. Cas. 349.

68. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Johnson v. Foos Mfg. Co., 141 Fed. 73, 72 CCA 105.

69. Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., 190 Fed. 573, 111 CCA 389 [certiorari den 223 U. S. 732 mem, 32 SCt 528 mem, 56 L. ed. 634 mem].

70. Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., supra.

71. Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Cohn v. Hickey-Freeman Co., 246 Fed. 256; Minerals Separation, Ltd. v. Hyde, 207 Fed. 956; Victor Talking Mach. Co. v. American Graphophone Co., 189 Fed. 359 [aff 190 Fed. 1023 mem, 111 CCA 675 mem].

72. Dunkley Co. v. California Packing Corp., 277 Fed. 989 [aff 277 Fed. 996 (certiorari den 256 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)]; Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., 190 Fed. 573, 111 CCA 389 [certiorari den 223 U. S. 732 mem, 32 SCt 528 mem, 56 L. ed. 634 mem]; Johnson v. Chisholm, 115 Fed. 625, 53 CCA 123 [certiorari den 187 U. S. 644 mem, 23 SCt 844 mem, 47 L. ed. 346 mem].

73. Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683.

74. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 48 L. ed. 968 [rev 96 Fed. 850, 37 CCA 593 (rev 89 Fed. 721)]; Schiller v. Robertson, 28 F. (2d) 301; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Deppe v. General Motors Corp., 15 F. (2d) 419; H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85.

[a] **Reason for rule.**—"The mere possession of an instrument or piece of mechanism contains no suggestion whatever of all the possible processes to which it may be adapted. New Process Fermentation Co. v. Maus, 122 U. S. 413, 428, 7 SCt 1304, 30 L. ed. 1103. If the mere fact that a prior device might be made effective

merely because the method or device by which it is produced is old.[75] Nor is a product new merely because made by a new process or machine.[76] The method or device may be new, and the product proceeding from it may be old. In that case, the former may be patentable, and the latter not.[77] The method or device may be old and the product new. In that event the latter and not the former would be patentable.[78] Both may be new or both may be old. In the former case both would be patentable, and in the latter neither.[79]

[§ 30] **d. Combinations.**[80] A combination is identical in substance with what is already known or used, patented, or described in a printed publication, if it consists of the same elements, or their mechanical equivalents, combined in substantially the same way to produce substantially the same result.[81] The mere fact that the various elements of a combination are old will not anticipate a claim to the combination.[82] To find in the prior art each element in isolation is not to anticipate the work of an inventor who first evolves a new combination of those elements which by their conjoined functions produce a new result.[83] It is indispensable that all of them, or their mechanical equivalents, be found in the same description, method, or device, where they have been combined in substantially the same way to produce substantially the same result as that accomplished by the combination of the invention.[84] A combination of all the elements but one will not anticipate.[85]

[§ 31] **e. Inoperative Methods or Devices.** An art or instrument is not effective as an anticipation if it is wholly incapable of performing the function of the later invention,[86] or if change or modification, reorganization, or combination, involving the exer-

for the carrying on of a particular process were sufficient to anticipate such process, the absurd result would follow that, if the process consisted merely of manipulation, it would be anticipated by the mere possession of a pair of hands." Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 424, 22 SCt 698, 46 L. ed. 968.

75. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [rev on other grounds 28 F. (2d) 641]; Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326; Blumenthal v. Burrell, 43 Fed. 667 [aff 53 Fed. 105, 3 CCA 462]; Kiesele v. Haas, 32 Fed. 794.

76. Cochrane v. Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 SCt 455, 28 L. ed. 433; American Wood Paper Co. v. Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 31.

77. P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655.

78. American Wood Paper Co. v. Fiber Disintegrating Co., 23 Wall. (U. S.) 566, 23 L. ed. 31; P. E. Sharpless Co. v. Crawford Farms, Inc., 287 Fed. 655.

79. P. E. Sharpless Co. v. Crawford Farms, Inc., supra; Griffith v. Murray, 46 Fed. 660; In re Marsden, 14 App. (D. C.) 223.

80. Combination or aggregation as involving invention see infra § 86.

81. Seamless Rubber Co. v. Stall, etc., Mfg. Co., 23 F. (2d) 820; General Manifold, etc., Co. v. Simple Account Sales Book Co., 246 Fed. 125, 158 CCA 351; American Box Mach. Co. v. Day, 32 Fed. 585.

82. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885; Perey v. Perey Mfg. Co., 17 F. (2d) 774; Minneapolis, etc., R. Co. v. Barnett, 257 Fed. 302, 168 CCA 386; Barber v. Otis Motor Sales Co., 240 Fed. 723, 153 CCA 521; Benjamin Menu Card Co. v. Rand, 210 Fed. 285; Colman v. Byrd Mfg. Co., 200 Fed. 59 [aff 205 Fed. 904, 124 CCA 248]; Moore Carving Mach. Co. v. Clemons Mach. Co., 192 Fed. 122 [rev on other grounds 198 Fed. 90, 117 CCA 276]; German American Filter Co. v. Erdrich, 98 Fed. 300; Allen v. Grimes, 89 Fed. 869; Western Electric Co. v. Millheim Electric Tel. Co., 88 Fed. 505 [aff 95 Fed. 152, 37 CCA 38]; Heap v. Tremont, etc., Mills, 82 Fed. 449, 27 CCA 316; Railway Register Mfg. Co. v. North Hudson County R. Co., 26 Fed. 411; Yale Lock Mfg. Co. v. Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Booth v. Parks, 3 F. Cas. No. 1,648, 1 Bann. & A. 225, 1 Flipp. 381 [aff 102 U. S. 96, 26 L. ed. 54]; In re Boughton, 3 F. Cas. No. 1,696, McA. Pat. Cas. 278; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Child v. Boston, etc., Iron Works, 5 F. Cas. No. 2,675, 6 Fish. Pat. Cas. 606, Holmes 303, 5 Off. Gaz. 61; Christman v. Rumsey, 5 F. Cas. No. 2,704, 4 Bann. & A. 506, 17 Blatchf. 148; Crosby v. Lopouraille, 6 F. Cas. No. 3,424, Taney 374; Emigh v. Chicago, etc., R. Co., 8 F. Cas. No. 4,448, 1 Biss. 400, 2 Fish. Pat. Cas. 387; Evans v. Eaton, 8 F. Cas. No. 4,559, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Forbush v. Cook, 9 F. Cas. No. 4,931, 2 Fish. Pat. Cas. 668; Forsyth v. Clapp, 9 F. Cas. No. 4,949, 6 Fish. Pat. Cas. 528, Holmes 528; Hailes v. Van Wormer, 11 F. Cas. No. 5,904, 7 Blatchf. 443 [aff 20 Wall. 353, 22 L. ed. 241]; In re Halsey, 11 F. Cas. No. 5,963, McA. Pat. Cas. 459; Kelleher v. Darling, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 424; Kerosene Lamp Heater Co. v. Littell, 14 F. Cas. No. 7,724, 3 Bann. & A. 312; Munson v. Gilbert, etc., Mfg. Co., 17 F. Cas. No. 9,934, 3 Bann. & A. 595; Pennock v. Dialogue, 19 F. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 2 Wash. C. C. 538 [aff 2 Pet. 1, 7 L. ed. 327]; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Tatham v. LeRoy, 23 F. Cas. No. 13,761; In re Wagner, 28 F. Cas. No. 17,038, McA. Pat. Cas. 510; Willimantic Linen Co. v. Clark Thread Co., 30 F. Cas. No. 17,763, 4 Bann. & A. 133 [rev on other grounds 140 U. S. 481, 11 SCt 846, 35 L. ed. 521]; Winans v. Schenectady, etc., R. Co., 30 F. Cas. No. 17,865, 2 Blatchf. 279.

83. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Brick v. Namm, 22 F. (2d) 693; Hazeltine Corp. v. Grebe, 21 F. (2d) 643; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48 [aff 299 Fed. 822]; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Minneapolis, etc., R. Co. v. Barnett, 257 Fed. 302, 168 CCA 386; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Barber v. Otis Motor Sales Co., 240 Fed. 723, 153 CCA 521 [aff 231 Fed. 755]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; Kryptok Co. v. Stead Lens Co., 207 Fed. 85; Force v. Bates Mach. Co., 169 Fed. 647 [aff 173 Fed. 1023 mem, 97 CCA 671 mem]; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561; Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co., 139 Fed. 312, 71 CCA 442.

"Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and still another part in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement." Imhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. ed. 945.

[a] **Reason for rule.**—"Common justice forbids such a defence, as it would work a virtual repeal of so much of the Patent Act as gives to inventors the right to a patent consisting of old elements, where the combination itself is new and produces a new and useful result." Parks v. Booth, 102 U. S. 96, 104, 26 L. ed. 54.

84. Hubbell v. U. S., 179 U. S. 86, 21 SCt 28, 45 L. ed. 100; Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; Read Mach. Co. v. Jaburg, 212 Fed. 951 [aff 218 Fed. 989 mem, 133 CCA 672 mem]; Williams v. Sutton, 188 Fed. 439; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561; St. Louis St. Flushing Mach. Co. v. American St. Flushing Mach. Co., 156 Fed. 574, 84 CCA 340; Milwaukee Carving Co. v. Brunswick-Balke Collender Co., 126 Fed. 171, 61 CCA 175; Stilwell-Bierce, etc., Co. v. Eufaula Cotton Oil Co., 117 Fed. 410, 54 CCA 584; Brill v. Third Ave. R. Co., 103 Fed. 289; Gormully, etc., Mfg. Co. v. Stanley Cycle Mfg. Co., 90 Fed. 279; Packard v. Lacing-Stud Co., 70 Fed. 66, 16 CCA 639; American Automaton Weighing Mach. Co. v. Blauvelt, 50 Fed. 213; Ross v. Montana Union R. Co., 45 Fed. 424; Bell v. U. S. Stamping Co., 19 Fed. 312; Worswick Mfg. Co. v. Steiger, 17 Fed. 250; Clark Patent Steam, etc., Regulator Co. v. Copeland, 5 F. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,270, 3 Biss. 66, 3 Fish. Pat. Cas. 330; Watson v. Cunningham, 29 F. Cas. No. 17,280, 4 Fish. Pat. Cas. 528.

"It is no defense to a claim of an infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent or publication, and others in another, and still others in a third. It is indispensable that all of them, or their mechanical equivalents, be found in the same description or machine, where they do the same work by substantially the same means." J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 265, 93 CCA 561.

85. Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; Watson v. Cunningham, 29 F. Cas. No. 17,280, 4 Fish. Pat. Cas. 528.

86. Whitely v. Swayne, 7 Wall. (U. S.) 685, 19 L. ed. 199; In re Coyken-

cise of more than mere mechanical skill is required to render it capable of performing such function.[87] But an art or instrument is not deprived of anticipatory effect by the fact that changes or modifications involving the exercise of mere mechanical skill are necessary in order to render it capable of performing the function of the invention,[88] or of performing it

dall, 29 F. (2d) 868; Foltz's Application, 26 F. (2d) 983; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [rev 17 F. (2d) 815]; In re Bliss, 26 F. (2d) 524; Star Can Opener Co. v. Ace Mfg. Co., 22 F. (2d) 977; Lathrop v. Rice, etc., Corp., 21 F. (2d) 124 [aff 24 F. (2d) 1021 mem]; Marr Oil Heat Mach. Corp. v. Hardinge Bros., Inc., 20 F. (2d) 241 [aff 27 F. (2d) 779]; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868]; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Babcock, etc., Co. v. Springfield Boiler Co., 16 F. (2d) 964 [rev 8 F. (2d) 618]; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Triumph Trap Co. v. Oneida Community Co., 279 Fed. 142; Carnes Artificial Limb Co. v. Dilworth Arm Co., 273 Fed. 838; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; Okmulgee Window Glass Co. v. Window Glass Mach. Co., 265 Fed. 626; Union Tool Co. v. Wilson, 263 Fed. 567; Kurtz v. Blatt, 263 Fed. 392; Imperial Mach., etc., Corp. v. Blakeslee, 262 Fed. 419; Consolidated Window Glass Co. v. Window Glass Mach. Co., 261 Fed. 362 [certiorari den 251 U. S. 558 mem, 40 SCt 179 mem, 64 L. ed. 413 mem]; Auto Pneumatic Action Co. v. Otto Higel Co., 260 Fed. 950, 171 CCA 592; Corrugated Fiber Co. v. Paper Working Mach. Co., 259 Fed. 283; Edmands v. Perlman, 255 Fed. 564, 166 CCA 632; Union Special Mach. Co. v. Quaker City Flour Mills Co., 253 Fed. 557, 165 CCA 227; U. S. Metal Cap, etc., Co. v. American Keyless Kap Corp., 250 Fed. 1024; U. S. Metal Cap, etc., Co. v. American Keyless Kap Corp., 250 Fed. 857, 163 CCA 171; Chicago Towel Co. v. Rousso, 248 Fed. 693, 160 CCA 593; Lyon Non-Skid Co. v. Edward V. Hartford, Inc., 247 Fed. 524 [aff 250 Fed. 1021 mem, 162 CCA 664]; U. S. Fire Escape Counterbalance Co. v. Joseph Halsted Co., 246 Fed. 947 [mod on other grounds 257 Fed. 95]; Mayer v. Mutschler, 237 Fed. 654; General Electric Co. v. Laco-Philips Co., 233 Fed. 96, 147 CCA 166; Chadeloid Chemical Co. v. Wilson Remover Co., 224 Fed. 481, 140 CCA 189; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev on other grounds 241 Fed. 72, 154 CCA 72]; Benthall Mach. Co. v. Virginia-Carolina Peanut Picker Co., 222 Fed. 918 [rev on other grounds 241 Fed. 89, 154 CCA 89]; Benthall Mach. Co. v. Debnam, 222 Fed. 918 [rev on other grounds 241 Fed. 103, 154 CCA 103]; Merrell-Soule Co. v. Natural Dry Milk Co., 222 Fed. 913, 138 CCA 393; Merrell-Soule Co. v. Powdered Milk Co., 222 Fed. 911, 138 CCA 391; Merrell-Soule Co. v. Powdered Milk Co., 215 Fed. 922 [rev on other grounds 7 F. (2d) 297]; General Electric Co. v. Dunkirk, 211 Fed. 658; General Electric Co. v. Dunkirk, 211 Fed. 657, 128 CCA 575; Charles Hunnicutt Co. v. A. B. Gaston Co., 207 Fed. 585 [aff 218 Fed. 176, 134 CCA 56]; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Gillette Safety Razor Co. v. Clark Blade, etc., Co., 187 Fed. 149 [aff 194 Fed. 421, 114 CCA 383]; Kings County Raisin, etc., Co. v. U. S. Consolidated Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; Welsbach Light Co. v. Cohn, 181 Fed. 122; Forest City Fdy., etc., Co. v. Barnard, 176 Fed. 561, 100 CCA 197; Electric Candy Mach. Co. v. Morris, 156 Fed. 972; Farmers' Mfg. Co. v. Spruks Mfg. Co., 127 Fed. 691, 62 CCA 447; Crown Cork, etc., Co. v. Ideal Stopper Co., 123 Fed. 666 [aff 131 Fed. 244, 65 CCA 436 (certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem)]; Streator Cathedral Glass Co. v. Wire-Glass Co., 97 Fed. 950, 38 CCA 573; Potts v. Creager, 97 Fed. 78, 38 CCA 47; Bowers v. San Francisco Bridge Co., 91 Fed. 381 [app dism 105 Fed. 1005 mem, 44 CCA 685 mem]; Harwood v. Mill River Woolen Mfg. Co., 11 F. Cas. No. 6,187, 3 Fish. Pat. Cas. 526; Hitchcock v. Tremaine, 12 F. Cas. No. 6,538, 8 Blatchf. 440, 4 Fish. Pat. Cas. 508; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,270, 3 Biss 66, 3 Fish. Pat. Cas. 330; Carr's Application, 57 App. (D. C.) 112, 17 F. (2d) 959; Kolinski v. Thompson Voting Mach. Co., 55 App. (D. C.) 378, 6 F. (2d) 681; In re Rowell, 48 App. (D. C.) 238; In re Heath, 45 App. (D. C.) 370; Murray v. Clayton, L. R. 7 Ch. 570.

[a] **Illustration.**—Claims in an application for a patent for a building wall constructed of hollow blocks provided with longitudinal hollow spaces or voids are not anticipated by patents for various forms of building blocks, by means of none of which could a wall of any desired width be constructed, where the voids and webs would be in perfect alinement, as disclosed in applicant's invention. In re Heath, 45 App. (D. C.) 370.

87. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Trico Products Corp. v. Ace Products Corp., 30 F. (2d) 688; Wisconsin-Minnesota Gas, etc., Household Appliance Co. v. Hirschy, 28 F. (2d) 838 [aff 18 F. (2d) 347]; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [rev 17 F. (2d) 815]; Nelson Mfg. Co. v. F. E. Myers, etc., Co., 25 F. (2d) 659; Trane Co. v. Nash Engineering Co., 25 F. (2d) 267; Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196; Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Goodbody v. Firestone Steel Products Co., 23 F. (2d) 625; Wensel v. Gold Hill Hardware Mfg. Co., 21 F. (2d) 974; Gordon Form Lathe Co. v. Walcott Mach. Co., 20 F. (2d) 673; Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 267]; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311; Marr Oil Heat Mach. Corp. v. Hardinge Bros., Inc., 20 F. (2d) 241 [aff 27 F. (2d) 779]; Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885; Kulp v. Bridgeport Hardware Mfg. Corp., 19 F. (2d) 659; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16; Babcock, etc., Co. v. Springfield Boiler Co., 16 F. (2d) 964 [rev 8 F. (2d) 618]; Deppe v. General Motors Corp., 15 F. (2d) 419; Mohr v. Alliance Securities Co., 14 F. (2d) 799; Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Blake Automotive Equipment Co. v. Cross Mfg. Co., 13 F. (2d) 30; Block v. Nathan Anklet Support Co., 9 F. (2d) 311; Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682; Carson v. American Smelting, etc., Co., 4 F. (2d) 463; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Wellman-Seaver-Morgan Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 3 F. (2d) 531; Line Material Co. v. Brady Electric, etc., Co., 299 Fed. 822 [aff 7 F. (2d) 48]; E. Frederics, Inc. v. Eugene, Ltd., 298 Fed. 633 [rev on other grounds 3 F. (2d) 543]; Triumph Trap Co. v. Oneida Community Co., 279 Fed. 142; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Beitman v. Strater, 262 Fed. 443; Smith v. Peck, etc., Co., 262 Fed. 415; U. S. Metal Cap, etc. Co. v. American Keyless Kap Corp., 250 Fed. 1024; U. S. Metal Cap, etc., Co. v. American Keyless Kap Corp., 250 Fed. 857, 163 CCA 171; Johnston v. Tvedt, 244 Fed. 189; Rousso v. City Towel Supply Co., 242 Fed. 655; Wm. F. Goessling Box Co. v. Gumb, 241 Fed. 674, 154 CCA 432; Holton v. Pepper, 216 Fed. 368; Read Mach. Co. v. Jaburg, 212 Fed. 951 [aff 218 Fed. 989 mem, 133 CCA 672 mem]; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Stebler v. Riverside Heights Orange Growers Assoc., 205 Fed. 735, 124 CCA 29; Patents Selling, etc., Co. v. Dunn, 204 Fed. 99 [rev on other grounds 213 Fed. 40, 129 CCA 634]; Waterbury Buckle Co. v. Aston, 183 Fed. 120, 105 CCA 410 [aff 172 Fed. 672]; Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 CCA 446; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; Canda v. Michigan Malleable Iron Co., 124 Fed. 486, 61 CCA 194; Consolidated Car Heating Co. v. West End St. R. Co., 85 Fed. 662, 29 CCA 386; Wilson's Application, 49 App. (D. C.) 76, 258 Fed. 976.

88. Bone v. Marion County, 251 U. S. 134, 40 SCt 96, 64 L. ed. 188 [aff 249 Fed. 211, 161 CCA 247]; In re Berry, 26 F. (2d) 1012; Black, etc., Mfg. Co. v. Baltimore Truck Tire Serv. Corp., 26 F. (2d) 686; In re Kaplan, 26 F. (2d) 565; Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Hayes Pump, etc., Co. v. Friend Mfg. Co., 8 F. (2d) 33; Cutler Hammer Mfg. Co. v. Beaver Mach., etc., Tool Co., 5 F. (2d) 457; Supreme Mfg. Corp. v. Security Mfg. Co., 299 Fed. 65 [certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 469 mem]; Parker's Application, 289 Fed. 607; Schultheiss Co. v. Phillips, 264 Fed. 971; Scott v. Hemphill Mfg. Co., 262 Fed. 968; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Peters v. Chicago Biscuit Co., 215 Fed. 724, 132 CCA 134; Standard Mach. Co. v. Rambo, 181 Fed. 157 [aff 188 Fed. 323, 110 CCA 301]; Edison v. American Mutoscope Co., 114 Fed. 926, 52 CCA 546 [certiorari den 186 U. S. 486 mem, 22 SCt 944 mem, 46 L. ed. 1261 mem]; Ryan v. Newark Spring Mattress Co., 96 Fed. 100 [rev on other grounds 102 Fed. 693, 42 CCA 594]; Western Electric Co. v. Home Tel. Co., 85 Fed. 649; Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 449; Livingston v. Jones, 15 F. Cas. No. 8,413, 1 Fish. Pat. Cas. 521; In re Keller, 51 App. (D. C.) 395, 278 Fed. 395; In re Sunderland, 47 App. (D. C.) 234; In re Minor, 45 App. (D. C.) 555; In re Pratt, 44 App. (D. C.) 462; In re Gray, 44 App. (D. C.) 15; In re Havens, 39 App. (D. C.) 465; In re Cake, 39 App. (D. C.) 425; In re French, 39 App. (D. C.) 413; In re Maas, 39 App. (D. C.) 142; In re Luten, 37 App. (D. C.) 379; In re Scharf, 37 App. (D. C.) 339; Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co., 12 App. (D. C.) 201.

with the same degree of perfection.[89]

[§ 32] **f. Methods or Devices Used for Other Purposes.**[90] An art or instrument used for one purpose may be effective as an anticipation of an invention consisting of the use of a substantially identical art or instrument for another purpose if the new use be so nearly analogous to the former one that the applicability of the means to its new use would be obvious to persons skilled in the art to which the invention relates.[91] That the new use was not before contemplated is immaterial.[92] But it is otherwise if the relations between the old use and the new be so remote that persons skilled in the art would not understand, without the benefit of the teaching of the later invention, that the function performed by it could be accomplished by the means employed,[93] or by means requiring but slight changes or modifications, not involving invention, to be ren-

[a] **Illustrations.**—(1) Claims in an application for a patent for an improvement in water-miscible oils as a vehicle for therapeutical agents, which show that the object sought was not a solution of a medicinal preparation in a mineral oil, but a vehicle which would carry the medicinal agent to a moistened surface or mucous membrane to be treated, were anticipated by a patent differing only from that of applicant by reason of the fact that the patentee used medicaments insoluble in mineral oils while applicant used medicaments soluble in such oils. In re Pratt, 44 App. (D. C.) 462. (2) Claims for a porcelain outlet box for electric wires, with slightly raised portions around the screw holes, so that the cover touches at such points only, and intended to prevent the cover from being broken by transverse strains caused by unevenness in the surface of the box, are anticipated by a patent covering the same idea, except that in it the raised portions are around each screw hole on the cover instead of on the box. In re Havens, 39 App. (D. C.) 465. (3) An alleged improvement in bottle caps, consisting of a metallic cap having a projection of a length substantially equal to the height of the cap depending from the side thereof and used to facilitate removal of the cap, is anticipated by prior patents in which the same elements are disclosed, but having longer projections, used, however, in the same way to accomplish the same result. In re Cake, 39 App. (D. C.) 425. (4) A product claim for a stock food in a comminuted form, incorporating all the nutritious parts of a food plant which can be conveniently harvested, is not patentable, being anticipated by an Austrian patent disclosing a cattle food consisting of an entire plant, comminuted and dried. In re French, 39 App. (D. C.) 413. (5) A claim for the combination of means in a linotype machine to sustain "a magazine in operative position upon the machine, and storage means for an idle magazine directly above the machine, whereby the positions of the operative magazine and the idle magazine may be interchanged by the operator without necessitating his leaving the machine," is anticipated by a patent in which the same elements are disclosed, but the storage device is located at one side of, instead of above, the main frame of the machine. In re Scharf, 37 App. (D. C.) 339, 340.

89. Pickering v. McCollough, 104 U. S. 310, 26 L. ed. 749; Toledo Scale Co. v. Barnes Scale Co., 18 F. (2d) 965; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Kil-Nock Co. v. Chicago Plating Co., 10 F. (2d) 536; Universal Rim Co. v. Firestone Steel Products Co., 289 Fed. 884 [aff 7 F. (2d) 24]; Barber v. Otis Motor Sales Co., 271 Fed. 171 [rev 265 Fed. 675 (certiorari den 256 U. S. 693 mem, 41 SCt 535 mem, 65 L. ed. 1175 mem)]; Crompton, etc., Loom Works v. Stafford Co., 218 Fed. 841, 134 CCA 613; Biddle v. Hodge, etc., Co., 205 Fed. 932; Chicago Grain Door Co. v. National Malleable Castings Co., 173 Fed. 918, 97 CCA 324; Roth v. Harris, 162 Fed. 160 [mod on other grounds 168 Fed. 279, 93 CCA 581]; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 Fed. 362 [aff 176 Fed. 96, 100 CCA 26]; Westinghouse Air Brake Co. v. Christensen Engineering Co., 128 Fed. 437, 63 CCA 179; Herbener's Application, 57 App. (D. C.) 42, 16 F. (2d) 538; In re Gold, 45 App. (D. C.) 294; In re Wright, 34 App. (D. C.) 199; In re McNeil, 28 App. (D. C.) 461; In re Hoey, 28 App. (D. C.) 416; In re Lowry, 14 App. (D. C.) 473.

[a] **Illustrations.**—(1) Claims in an application for a patent for a combination in a bed couch are anticipated by a patent wherein the same structure is found except that the projections to the end of the seat extend from the upper instead of the lower side thereof, and project just beyond the back, instead of to a point just within the box, although so changing the seat projections may give a better balance to the box and seat. In re Hoey, 28 App. (D. C.) 416. (2) An applicant for a patent for a process for the hardening of cast iron by adding to the molten metal on its way to the mold a powdered material, by means of a specific machine or device also invented by applicant, and for which he has filed a separate application for a patent, is anticipated by a patent for a similar process, but which does not cover any means to make the mixture, as applicant merely secures a better result from the use of the old process, by means of his mechanical device. In re Wright, 34 App. (D. C.) 199.

90. Application to new use as involving invention see infra § 84.

91. Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275; Concrete Mixing, etc., Co. v. Storrie, 27 F. (2d) 838 [aff 23 F. (2d) 131, and certiorari granted 49 SCt 95 mem]; Dwight, etc., Sintering Co. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Dunham Co. v. Cobb, 19 F. (2d) 328; C. B. Cottrell, etc., Co. v. Claybourn Process Corp., 17 F. (2d) 279 [aff 24 F. (2d) 1014 mem]; Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Paul J. Kalman Co. v. Goldsmith Metal Lath Co., 1 F. (2d) 969; Standard Oil Co. v. Oklahoma Natural Gas Co., 284 Fed. 469; Thomson Spot Welder Co. v. Ford Motor Co., 281 Fed. 680 [aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098]; In re Smith, 262 Fed. 717; Riter-Conley Mfg. Co. v. Atlanta Gaslight Co., 246 Fed. 840, 159 CCA 142 [aff 234 Fed. 896]; Tiffany v. Paper Products Co., 244 Fed. 178; Jackson Fence Co. v. Peerless Wire Fence Co., 228 Fed. 691, 143 CCA 213 [aff 226 Fed. 774]; Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., 190 Fed. 573, 111 CCA 389 [certiorari den 223 U. S. 732 mem, 32 SCt 528 mem, 56 L. ed. 634 mem]; Mershon v. Bay City Box, etc., Co., 189 Fed. 741; Conley v. King Bridge Co., 175 Fed. 79 [mod on other grounds 187 Fed. 137, 109 CCA 412]; In re Birkigt, 48 App. (D. C.) 378; In re Palmer, 48 App. (D. C.) 1; In re Duncan, 46 App. (D. C.) 57; In re Russell, 36 App. (D. C.) 444; In re Lyon, 33 App. (D. C.) 501; In re McNeil, 28 App. (D. C.) 461; In re Lowry, 14 App. (D. C.) 473.

[a] **Rule applied.**—(1) Claims for a process for protecting the interior of an aluminum water jacket of an internal combustion engine from corrosion by applying thereto a liquid medium under pressure sufficient to cause it to penetrate the walls of the jacket, and, after removing the surplus liquid, heating the jacket to dry the coating, are anticipated by references cited calling for forming protective coatings on iron vessels by brushing or dipping and by pressure, as it was neither asserted nor shown that there is more difficulty involved in protecting an aluminum surface than in protecting an iron surface. In re Birkigt, 48 App. (D. C.) 378. (2) Claims for a can of sheet iron or steel coated with a suitable lacquer or enamel, the composition of which is not specified, to form a tight connection for the lock joints, are anticipated by a patent for a tin plate can coated with aluminum lining applied over a coat of size or varnish, intended to accomplish the same result. In re Russell, 36 App. (D. C.) 444. (3) An advertising device used in connection with a telephone, and automatically operated by the removal of the receiver from its hook, is anticipated by a similar device in connection with a cigar lighter, and operated in the same way by the lifting of the lighter from its hook, and by a device for utilizing in a different way a telephone for the display of advertisements. In re Lyon, 33 App. (D. C.) 501.

92. In re Smith, 262 Fed. 717; Riter-Conley Mfg. Co. v. Atlanta Gaslight Co., 246 Fed. 840, 159 CCA 142 [aff 234 Fed. 896]; Codman v. Amia, 70 Fed. 710 [aff 74 Fed. 634, 20 CCA 566]; Wright, etc., Wire-Cloth Co. v. Clinton, 67 Fed. 790, 14 CCA 646; In re McNeil, 28 App. (D. C.) 461.

93. Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275; Ansonia Brass, etc., Co. v. Electrical Supply Co., 144 U. S. 11, 12 SCt 601, 36 L. ed. 327; Clough v. Gilbert, etc., Mfg. Co., 106 U. S. 166, 1 SCt 188, 27 L. ed. 134; In re Bliss, 26 F. (2d) 524; Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Deppe v. General Motors Corp., 15 F. (2d) 419; Walker v. Lakewood Engineering Co., 14 F. (2d) 333; Wellman-Seaver-Morgan Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 3 F. (2d) 531; Godwin v. International Steel Tie Co., 2 F. (2d) 198; H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Fulton Co. v. Bishop, etc., Co., 284 Fed. 774; Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co., 269 Fed. 144; Eibel Process Co. v. Minnesota, etc., Paper Co., 267 Fed. 847 [rev on other grounds 274 Fed. 540 (rev on other grounds 261 U. S. 45, 43 SCt 322, 67 L. ed. 523)]; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Bisight Co. v. Onepiece Bifocal Lens Co., 259 Fed. 275, 170 CCA 343 [mod 246 Fed. 450]; Vacuum Cleaner Co. v. Thompson Mfg. Co., 258 Fed. 239 [app dism 272 Fed. 1023 mem]; Otto Coking Co. v. Koppers Co., 258 Fed. 122, 169 CCA 208; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Beckwith Box Toe Co. v. Gowdy, 244 Fed. 805; Munger v. Perlman Rim Corp., 244 Fed. 799; Wm. F. Goessling Box Co. v. Gumb, 241 Fed. 674, 154 CCA 432; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; U. S. Metallic Packing Co. v. Hewitt

dered capable of performing the same function.[94]

Inefficient substitutes. An invention of a successful machine is not anticipated because a prior machine intended for a different purpose may possibly be capable of use as an efficient substitute for the later machine.[95]

[§ 33] **3. Prior Knowledge or Use—a. In General.** No valid patent can be obtained by an inventor for his invention if it was known or used by others in this country before his invention or discovery thereof.[96] This is true of both domestic and foreign in-

Co., 236 Fed. 739, 150 CCA 71; Munising Paper Co. v. American Sulphite Pulp Co., 228 Fed. 700, 143 CCA 222; Mosler v. Lurie, 209 Fed. 364, 126 CCA 290; Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301; Patents Selling, etc., Co. v. Dunn, 204 Fed. 99 [rev on other grounds 213 Fed. 40, 129 CCA 634]; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; Gray Tel. Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 CCA 353; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; Westmoreland Specialty Co. v. Hogan, 167 Fed. 327, 93 CCA 31; Warren Bros. Co. v. Owosso, 166 Fed. 309, 92 CCA 227 [certiorari den 214 U. S. 525 mem, 29 SCt 703 mem, 53 L. ed. 1067 mem]; Thomson-Houston Electric Co. v. Traction Equipment Co., 164 Fed. 425; O'Rourke Engineering Constr. Co. v. McMullen, 160 Fed. 933, 88 CCA 115 [certiorari den 210 U. S. 435 mem, 28 SCt 763 mem, 52 L. ed. 1136 mem]; Young v. Wolfe, 130 Fed. 891, 65 CCA 199; Canda v. Michigan Malleable Iron Co., 124 Fed. 486, 61 CCA 194; National Meter Co. v. Neptune Meter Co., 122 Fed. 75 [rev on other grounds 127 Fed. 563, 62 CCA 345]; Durfee v. Bawo, 118 Fed. 853; Moore v. Schaw, 118 Fed. 602; Daylight Prism Co. v. Marcus Prism Co., 110 Fed. 980; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Brill v. Third Avenue R. Co., 103 Fed. 289; Potts v. Creager, 97 Fed. 78, 38 CCA 47; Diamond State Iron Co. v. Goldie, 84 Fed. 972, 28 CCA 589; Kinnear, etc., Co. v. Capital Sheet-Metal Co., 81 Fed. 491 [rev on other grounds 87 Fed. 333, 31 CCA 3]; Lublin v. Stewart, etc., Co., 77 Fed. 303, 23 CCA 176; Wilson's Application, 49 App. (D. C.) 76, 258 Fed. 976; In re Weiss, 21 App. (D. C.) 214.

[a] **Illustrations.**—(1) An angle iron used to protect the edge of a concrete or asphalt pavement is not anticipated by an angle iron used to protect the edge of a wooden pavement. Godwin v. International Steel Tie Co., 2 F. (2d) 198. (2) A celluloid cap for saltcellars is not anticipated by a celluloid cap for talcum bottles. Westmoreland Specialty Co. v. Hogan, 167 Fed. 327, 93 CCA 31. (3) A metal dome, driven into the bottom end of chair legs to take the place of castors, is not anticipated by a similar device used on the bottom of travelers' grips. Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301. (4) A shipping case for bottled goods having protected handholes for lifting the cases is not anticipated by finger holes in mortise locks for sliding doors. Wm. F. Goessling Box Co. v. Gumb, 241 Fed. 674, 154 CCA 432.

94. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 48 L. ed. 968; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 SCt 295, 38 L. ed. 103; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Consolidated Safety-Valve Co. v. Crosby Steam Gauge, etc., Co., 113 U. S. 157, 5 SCt 513, 28 L. ed. 939; Clough v. Gilbert, etc., Mfg. Co., 106 U. S. 166, 1 SCt 188, 27 L. ed. 134; In re Murray, 29 F. (2d) 863; Linville v. Milberger, 29 F. (2d) 610; Lakewood Engineering Co. v. Walker, 23 F. (2d) 623; Marr Oil Heat Mach. Corp. v. Hardinge Bros., Inc., 20 F. (2d) 241 [aff 27 F. (2d) 779]; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Radio Corp. of America v. Twentieth Century Radio Corp., 19 F. (2d) 290; Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16; Wallace, etc., Co. v. LeRoy, 17 F. (2d) 593; Blake Automotive Equipment Co. v. Cross Mfg. Co., 13 F. (2d) 30; Block v. Nathan Anklet Support Co., 9 F. (2d) 311; Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Acme Motor Shield Corp. v. Roberts Mfg. Co., 288 Fed. 127; Eiermann's Application, 287 Fed. 1016; Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co., 269 Fed. 144; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Bird v. Elaborated Roofing Co., 256 Fed. 366, 167 CCA 536 [certiorari dism 250 U. S. 647 mem, 63 L. ed. 1188 mem, 39 SCt 490 mem]; Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 149 CCA 345; Holton v. Pepper, 216 Fed. 368; General Knit Fabric Co. v. Steber Mach. Co., 194 Fed. 99, 114 CCA 177; Electric Candy Mach. Co. v. Morris, 156 Fed. 972; Gunn v. Bridgeport Brass Co., 148 Fed. 239 [rev on other grounds 152 Fed. 434, 81 CCA 576]; Wold v. Thayer, 148 Fed. 227, 78 CCA 350; Binns v. Zucker, etc., Chemical Co., 70 Fed. 711; In re Katzenberger, 46 App. (D. C.) 539; In re Hodges, 28 App. (D. C.) 525.

"While it is possible that the Stringfellow and Surles patent might, by a slight modification, be made to perform the function of equalizing the springs which it was the object of the Augur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer; but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions." Topliff v. Topliff, 145 U. S. 156, 161, 12 SCt 825, 36 L. ed. 658.

[a] **Illustration.**—Claims for an interheater for a compound compressed air engine, using atmospheric air to impart heat to the compressed air within the interheater, are not anticipated by a patent for such an interheater using a liquid substance for the same purpose. In re Hodges, 28 App. (D. C.) 525.

95. United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [aff 138 Fed. 136, and certiorari den 205 U. S. 547 mem, 27 SCt 795 mem, 51 L. ed. 924 mem].

96. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610; Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, 46 SCt 324, 70 L. ed. 651; Anderson v. Miller, 129 U. S. 70, 9 SCt 224, 32 L. ed. 635; Forncrook v. Root, 127 U. S. 176, 8 SCt 1247, 32 L. ed. 97; Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384; Steel Wheel Corp. v. B. F. Goodrich Rubber Co., 27 F. (2d) 427; William Carter Co. v. Earnshaw Knitting Co., 25 F. (2d) 981; Lambert v. Phillips-Lafitte Co., 23 F. (2d) 818; Wessels v. Chicago Granitine Mfg. Co., 23 F. (2d) 781; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Bellis Heat Treating Co. v. Heatbath Corp., 23 F. (2d) 239; Concrete Mixing, etc., Co. v. Sporrie, 23 F. (2d) 131; Crozier-Straub, Inc. v. Graham, 22 F. (2d) 310 [rev on other grounds 28 F. (2d) 321 (certiorari den 49 U. S. 253)]; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Freydberg v. Hamburger, 17 F. (2d) 300; Western Wilite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Cartridge Mach. Corp. v. National Collapsible Tube Co., 13 F. (2d) 859; Dovan Chemical Corp. v. Corona Cord Tire Co., 10 F. (2d) 598; Bristol Co. v. Brown Instrument Co., 291 Fed. 403; Monitor Stove Co. v. Williamson Heater Co., 282 Fed. 910 [aff 299 Fed. 1]; Ficklen v. Harding, 273 Fed. 179; Luten v. Kansas City Bridge Co., 272 Fed. 533 [rev on other grounds 285 Fed. 840]; Enameled Metals Co. v. Western Conduit Co., 269 Fed. 620; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680 (aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098)]; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Hudepohl Brewing Co. v. Hehle, 259 Fed. 232, 170 CCA 300; Double Fabric Tire Co. v. General Tire, etc., Co., 258 Fed. 932; Luten v. Marsh, 254 Fed. 701; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; Crone v. John J. Gibson Co., 247 Fed. 503, 160 CCA 13; Riter-Conley Mfg. Co. v. Atlanta Gaslight Co., 246 Fed. 840, 159 CCA 142 [aff 234 Fed. 896]; Tiffany v. Paper Products Co., 244 Fed. 178; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; National Mach. Corp. v. Benthall Mach. Co., 241 Fed. 72, 154 CCA 72; Adams v. Boston Store, 237 Fed. 371, 150 CCA 385; Safety Gas Lighter Co. v. Fischer, 236 Fed. 955 [aff 247 Fed. 1005 mem, 159 CCA 652]; De Laski, etc., Circular Woven Tire Co. v. U. S. Tire Co., 235 Fed. 290, 149 CCA 6; De Laski, etc., Circular Woven Tire Co. v. U. S. Tire Co., 232 Fed. 884 [aff 235 Fed. 290, 149 CCA 6]; Werk v. Parker, 231 Fed. 121, 145 CCA 309 [aff 249 U. S. 130, 39 SCt 197, 63 L. ed. 514]; Standard Sanitary Mfg. Co. v. Iron City Sanitary Mfg. Co., 222 Fed. 671, 138 CCA 219; Elliott Co. v. Robertson, 219 Fed. 899 [mod on other grounds 230 Fed. 614, 145 CCA 24]; Belsteel Co. v. Lorain Steel Co., 217 Fed. 412 [aff 227 Fed. 240, 142 CCA 30]; Adams v. Boston Store, 216 Fed. 626 [aff 237 Fed. 370, 150 CCA 385]; Lagonda Mfg. Co. v. Elliott Co., 214 Fed. 581, 131 CCA 423; McClave-Brooks Co. v. M. H. Treadwell Co., 212 Fed. 442 [rev on other grounds 220 Fed. 144, 136 CCA 98]; Ohio Varnish Co. v. Glidden Varnish Co., 211 Fed. 676 [aff 215 Fed. 902, 132 CCA 140]; Milton Chemical Co. v. Jordan Marsh Co., 208 Fed. 569; Charles Hunnicutt Co. v. A. B. Gaston Co., 207 Fed. 585 [aff 218 Fed. 176, 134 CCA 56]; Lagonda Mfg. Co. v. Elliott Co., 205 Fed. 149 [aff 214 Fed. 581, 131 CCA 423]; Exchange Scrip Book Co. v. Rand, 203 Fed. 278, 121 CCA 318; American Optical Co. v. Bay State Optical Co., 202 Fed. 221, 120 CCA 621; De Laski, etc., Circular Woven Tire Co. v. Fisk Rubber Co., 198 Fed. 125 [aff 203 Fed. 986, 122 CCA 286]; Baetz v. Schoenlau-Kukkuck Trunk Top, etc., Co., 197 Fed. 40, 116 CCA

ventions.[97] It is immaterial that the earlier invention was not the subject of a patent,[98] or of description in any printed publication.[99] The mere fact that the inventor was ignorant of the anticipatory matter is likewise immaterial.[1] It is not essential in order to anticipate an invention that there be both prior knowledge and prior use; prior knowledge alone is sufficient.[2] However, "knowledge or use," as those words are used in the statute, means knowledge or use accessible to the public.[3] Actual knowledge or use is insufficient as an anticipation unless and until the public acquires, or has opportunity to acquire therefrom, such knowledge as would enable one skilled in the art to which the invention relates to practice it without exercising further invention of his own.[4] The earlier invention must have been complete[5] and capable of performing the function performed by the subsequent invention.[6] The mere mental conception of the desirability of doing a thing, and of the means of doing it, will not suffice.[7] An invention is not anticipated by mere surmises,[8] theories,[9] suggestions,[10] or speculations as to what might be done.[11] Before an invention can be anticipated by prior knowledge or use, the complete operative invention must have been reduced to practice.[12]

588 [certiorari den 231 U. S. 746 mem, 34 SCt 320 mem, 58 L. ed. 464 mem]; Colorado Tent, etc., Co. v. Parks, 195 Fed. 275, 115 CCA 245; Imperial Brass Mfg. Co. v. Nelson, 194 Fed. 165 [aff 203 Fed. 484, 121 CCA 606]; Sarfert Co. v. Chipman, 194 Fed. 113, 114 CCA 191; Electro-Dynamic Co. v. Westinghouse Electric, etc., Co., 191 Fed. 506 [aff 202 Fed. 224, 120 CCA 661]; H. Krantz Mfg. Co. v. Altman, 187 Fed. 603, 109 CCA 433; Shaw v. Royersford Fdy., etc., Co., 185 Fed. 113, 107 CCA 329; Langan v. Warren Axe, etc., Co., 184 Fed. 720, 107 CCA 631; Charles E. Tayntor Granite Co. v. Goethchius, 183 Fed. 130, 105 CCA 420; Sarfert Co. v. Chipman, 181 Fed. 518 [aff 194 Fed. 113, 114 CCA 191]; Shaw v. Royersford Fdy., etc., Co., 181 Fed. 168 [aff 185 Fed. 113, 107 CCA 329]; Lumber Anti-Stain Co. v. Nester, 178 Fed. 927, 102 CCA 299; Renton v. Reilly, 175 Fed. 96; Casein Co. v. A. M. Collins Mfg. Co., 172 Fed. 237 [aff 174 Fed. 341, 98 CCA 213]; Hillard v. Remington Typewriter Co., 170 Fed. 73, 95 CCA 349; Moyer v. Metal Stamping Co., 169 Fed. 825 [rev on other grounds 178 Fed. 830, 102 CCA 504]; Trumbull Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 168 Fed. 709 [aff 178 Fed. 1005 mem, 101 CCA 442 mem]; Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 Fed. 880 [aff 173 Fed. 1019 mem, 98 CCA 640 mem]; Von Eberstein v. Chambliss, 166 Fed. 463; Westrumite Co. v. Lincoln Park Comrs., 164 Fed. 989 [rev on other grounds 174 Fed. 144, 98 CCA 178 (certiorari den 215 U. S. 610 mem, 30 SCt 411 mem, 54 L. ed. 347 mem)]; Buser v. Novelty Tufting Mach. Co., 151 Fed. 478, 81 CCA 16 [certiorari den 210 U. S. 432 mem, 28 SCt 761 mem, 52 L. ed. 1135 mem]; American Can Co. v. Morris, 142 Fed. 166, 73 CCA 384; U. S. Peg-Wood, etc., Board Co. v. B. F. Sturtevant Co., 122 Fed. 470 [aff 125 Fed. 378, 60 CCA 244]; Bannerman v. Sanford, 99 Fed. 294, 39 CCA 534; Indiana Novelty Mfg. Co. v. Crocker Chair Co., 90 Fed. 488 [aff 103 Fed. 496, 43 CCA 287]; American Roll-Paper Co. v. Weston, 59 Fed. 147, 8 CCA 56; Sellers v. Coffrode, 35 Fed. 131; Seligman v. Day, 21 F. Cas. No. 12,643, 2 Bann. & A. 467, 14 Blatchf. 72; Chapman v. Beede, 54 App. (D. C.) 209, 296 Fed. 956; In re Blackmore, 33 App. (D. C.) 434.

97. Welsbach Light Co. v. American Incandescent Lamp Co., 98 Fed. 613, 39 CCA 185.

98. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 330, 72 L. ed. 610; Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; De Laski, etc., Circular Woven Tire Co. v. U. S. Tire Co., 235 Fed. 290, 149 CCA 6; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 124, 136 CCA 72; Sarfert Co. v. Chipman, 181 Fed. 518 [aff 194 Fed. 113, 114 CCA 191]; Colt v. Massachusetts Arms Co., 6 F. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Whipple v. Baldwin Mfg. Co., 29 F. Cas. No. 17,514, 4 Fish. Pat. Cas. 29.

"If prior invention is shown to have existed and been in use, it is clearly of no consequence whether it was patented or not." Boyce v. Stewart-Warner Speedometer Corp., supra.

99. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 330, 72 L. ed. 610; Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501.

1. Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433; Freydberg v. Hamburger, 17 F. (2d) 300; Monitor Stove Co. v. Williamson Heater Co., 282 Fed. 910 [aff 299 Fed. 1]; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Brown Portable El. Co. v. Interior Warehouse Co., 234 Fed. 649; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79; Daylight Glass Mfg. Co. v. American Prismatic Light Co., 142 Fed. 454, 73 CCA 570; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Millett v. Allen, 27 App. (D. C.) 70; Patterson v. Gas Light, etc., Co., 3 App. Cas. 239; In re Honiball, 9 Moore P. C. 378, 14 Reprint 340.

"It may be that the patentee had no knowledge of this previous use or previous description; still, his patent is void; the law supposes he may have known it." Per Marshall, C. J., in Evans v. Eaton, 3 Wheat. (U. S.) 454, 514, 4 L. ed. 433.

2. Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; Dovan Chemical Co. v. Corona Cord Tire Co., 10 F. (2d) 598; Imperial Brass Mfg. Co. v. Nelson, 194 Fed. 165 [aff 203 Fed. 484, 121 CCA 606]; Buser v. Novelty Tufting Mach. Co., 151 Fed. 478, 81 CCA 16 [certiorari den 210 U. S. 432 mem, 28 SCt 761 mem, 52 L. ed. 1135 mem]; Stitt v. Eastern R. Co., 22 Fed. 649.

3. Gayler v. Wilder, 10 How. (U. S.) 477, 497, 13 L. ed. 504; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Carson v. American Smelting, etc., Co., 11 F. (2d) 766; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; Boyd v. Cherry, 50 Fed. 279.

"By knowledge and use the legislature meant knowledge and use . . . accessible to the public." Gayler v. Wilder, supra.

4. Gayler v. Wilder, supra; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; Welsbach Light Co. v. Cohn, 181 Fed. 122; Anthracite Separator Co. v. Pollock, 175 Fed. 108; Ajax Metal Co. v. Brady Brass Co., 155 Fed. 409 [rev on other grounds 160 Fed. 84, 87 CCA 240 (certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem)]; Acme Flexible Clasp Co. v. Cary Mfg. Co., 96 Fed. 344; Boyd v. Cherry, 50 Fed. 279.

5. Buffalo Forge Co. v. Buffalo, 246 Fed. 135; Stitt v. Eastern R. Co., 22 Fed. 649.

6. Stitt v. Eastern R. Co., supra.

7. T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; Howe v. Underwood, 12 F. Cas. No. 6,775, 1 Fish. Pat. Cas. 160; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,415, 3 Biss. 52, 4 Fish. Pat. Cas. 584 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; De Kando v. Armstrong, 37 App. (D. C.) 314; Cobb v. Goebel, 23 App. (D. C.) 75.

[a] **Mere drawing of plans will not anticipate.**—Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386.

8. American Graphophone Co. v. Leeds, 87 Fed. 873.

9. National Co. v. Belcher, 71 Fed. 876, 18 CCA 375; Cox v. Griggs, 6 F. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Judson v. Bradford, 14 F. Cas. No. 7,564, 3 Bann. & A. 539; Parkhurst v. Kinsman, 18 F. Cas. No. 10,757, 1 Blatchf. 488, Fish. Pat. R. 161, 8 NYLegObs 146 [aff 18 How. 289, 15 L. ed. 385]; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Stephens v. Felt, 22 F. Cas. No. 13,368a; Teese v. Phelps, 23 F. Cas. No. 13,819, McAll. 48; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Riley v. Emerson, 41 App. (D. C.) 497; Emerson v. Riley, 41 App. (D. C.) 480.

10. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Camp v. Portable Wagon Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem]; National Co. v. Belcher, 71 Fed. 876, 18 CCA 375; Diamond Match Co. v. Schenck, 71 Fed. 521 [aff 77 Fed. 208, 23 CCA 122]; Foote v. Silsby, 9 F. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. R. 268 [aff 14 How. 218, 14 L. ed. 394]; Graham v. Gammon, 10 F. Cas. No. 5,668, 3 Bann. & A. 7, 7 Biss. 490.

[a] **Suggestion of result** but not of means will not anticipate. Graham v. Gammon, 10 F. Cas. No. 5,668, 3 Bann. & A. 7, 7 Biss. 490.

11. Gordon v. Warder, 150 U. S. 47, 14 SCt 32, 37 L. ed. 992; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Sickles v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535.

12. Dashiell v. Grosvenor, 162 U. S. 425, 16 SCt 805, 40 L. ed. 1025; Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Block v. Nathan Anklet Support Co., 9 F. (2d) 311; Victor Talking Mach. Co. v. John Wanamaker, 275 Fed. 448; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680 (aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098)]; Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., 268 Fed. 257; Pittsburgh Water Heater Co. v. Beler Water Heater Co., 228 Fed. 674, 143 CCA 196 [certiorari den 241 U. S. 667 mem, 36 SCt 551 mem, 60 L. ed. 1229 mem]; Pieper v. S. S. White Dental Mfg. Co., 228 Fed. 30, 142 CCA 486

Necessity of actual construction or use. The requirement of previous reduction to practice is satisfied if the invention has been so far completed as to remove it from the state of mere theory.[13] Actual construction, embodiment, or use of the prior method or thing is not necessary if its discovery has been so manifested publicly that one skilled in the particular art would be able to reproduce it.[14] Ordinarily, however, the invention must have been tested and found satisfactory,[15] although some devices are so simple that no test is necessary to demonstrate their success.[16] It has been asserted that if the identity of the alleged anticipation with the invention can only be known by actual use, actual use is necessary;[17] but if the identity is apparent on inspection, it is not.[18] Commercial use is not necessary.[19]

[§ 34] **b. Extent of Knowledge or Use.** Subject to the rules applicable in the case of concealed inventions,[20] the extent of prior knowledge or use is immaterial.[21] An invention is anticipated if it was known or used by some members of the public in this country,[22] and knowledge by a single member of the public is sufficient.[23] In order that an invention may be anticipated, it is not necessary that the earlier invention be known or used generally.[24] An invention is not anticipated by knowledge or use by the inventor which he does not disclose to others.[25]

Knowledge or use by a joint inventor is knowledge or use by others.[26]

[§ 35] **c. Knowledge or Use Abroad.** Under the first patent statute a "new" invention, as described by congress, was one "not before known or used,"[27] thus making it essential that the invention be new to all the world.[28] By force of subsequent enactments, knowledge or use of an unpatented and unthing of itself demonstrates that it is within the principle of the patent, then, perhaps, no use need be established, for it might be said to prove itself." Stitt v. Eastern R. Co., supra.

17. Stitt v. Eastern R. Co., supra.

18. Stitt v. Eastern R. Co., supra.

19. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610; Dovan Chemical Corp. v. Corona Cord Tire Co., 10 F. (2d) 598; Wyman v. Donnelly, 21 App. (D. C.) 81.

20. See infra § 42.

21. Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251; Freydberg v. Hamburger, 17 F. (2d) 300; American Roll-Paper Co. v. Weston, 59 Fed. 147, 8 CCA 56; Simmond v. Morrison, 44 Fed. 757; In re Hillard, 48 App. (D. C.) 493.

[a] **Thus** (1) a single machine, built and used prior to the date a subsequent inventor entered the field, and embodying the invention, will constitute a sufficient anticipation. In re Hillard, 48 App. (D. C.) 493. (2) Prior use need not extend beyond a single factory to be public. Freydberg v. Hamburger, 17 F. (2d) 300. (3) Use of a single machine for a term of only two months and a half is sufficient. Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251.

22. Standard Sanitary Mfg. Co. v. Iron City Sanitary Mfg. Co., 222 Fed. 671, 138 CCA 219; Daniel v. Restein, 131 Fed. 469 [aff 146 Fed. 74, 76 CCA 536]; Stitt v. Eastern R. Co., 22 Fed. 649; Miller v. Foree, 9 Fed. 603 [aff 116 U. S. 22, 6 SCt 204, 29 L. ed. 552]; Evans v. Hettick, 8 F. Cas. No. 4,562, 1 Robb Pat. Cas. 166, 3 Wash. C. C. 408 [aff 7 Wheat. 453, 5 L. ed. 496]; Larabee v. Cortlan, 14 F. Cas. No. 8,084, 3 Fish. Pat. Cas. 5, Taney 180.

23. Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; Boston Elastic Fabrics Co. v. East Hampton Rubber Thread Co., 3 F. Cas. No. 1,675, 2 Bann. & A. 268; Packard v. Gilbert, 18 F. Cas. No. 10,651; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Stephens v. Felt, 22 F. Cas. No. 13,368, 2 Blatchf. 37, Fish. Pat. R. 144.

24. Standard Sanitary Mfg. Co. v. Iron City Sanitary Mfg. Co., 222 Fed. 671, 138 CCA 219 [aff 213 Fed. 638]; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148.

25. Eck v. Kutz, 132 Fed. 758.

26. Dwight, etc., Co. v. Greenwalt, 27 F. (2d) 823; Bannerman v. Sanford, 99 Fed. 294, 39 CCA 534.

27. Act April 10, 1790 (1 St. at L. 109).

28. Dawson v. Follen, 7 F. Cas. No. 3,670, 1 Robb Pat. Cas. 9, 2 Wash. C. C. 311.

[certiorari dism 241 U. S. 690 mem, 36 SCt 553 mem, 60 L. ed. 1237 mem]; Wayman v. Louis Lipp Co., 222 Fed. 679; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; Emerson, etc., Co. v. Simpson Bros. Corp., 202 Fed. 747, 121 CCA 113 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 435 mem]; National Binding Mach. Co. v. Eisler, 197 Fed. 175; Ransome Concrete Co. v. German American Button Co., 197 Fed. 172 [rev on other grounds 201 Fed. 528, 119 CCA 622]; Anthracite Separator Co. v. Pollock, 175 Fed. 108; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Buser v. Novelty Tufting Mach. Co., 151 Fed. 478, 81 CCA 16 [certiorari den 210 U. S. 432 mem, 28 SCt 761 mem, 52 L. ed. 1135 mem]; Voightmann v. Perkinson, 138 Fed. 56, 70 CCA 482; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Kirchberger v. American Acetylene Burner Co., 128 Fed. 599, 64 CCA 107; Standard Scale, etc., Co. v. McDonald, 127 Fed. 709; Diamond Match Co. v. Ruby Match Co., 127 Fed. 341; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; National Meter Co. v. Neptune Meter Co., 122 Fed. 82 [aff 129 Fed. 124, 63 CCA 626]; Fowler v. New York, 121 Fed. 747, 58 CCA 113; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 289; Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514]; Acme Flexible Clasp Co. v. Cary Mfg. Co., 96 Fed. 344; McEwan Bros. Co. v. McEwan, 91 Fed. 787; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Wheaton v. Kendall, 85 Fed. 666; Front Rank Steel Furnace Co. v. Wrought Iron Range Co., 63 Fed. 995; American Automaton Weighing Mach. Co. v. Blauvelt, 50 Fed. 213; Torrant v. Duluth Lumber Co., 30 Fed. 830; Hood v. Boston Car-Spring Co., 21 Fed. 67; Allis v. Buckstaff, 13 Fed. 879; Putnam v. Hollender, 6 Fed. 882, 19 Blatchf. 48; Coleman v. Liesor, 6 F. Cas. No. 2,984; Draper v. Potomska Mills Corp., 7 F. Cas. No. 4,072, 3 Bann. & A. 214; Ellithorp v. Robertson, 8 F. Cas. No. 4,408, 4 Blatchf. 307, 2 Fish. Pat. Cas. 83; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; McCormick v. Seymour, 15 F. Cas. No. 8,725; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Roberts v. Dickey, 20 F. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 4 Brewst. (Pa.) 260; Roberts v. Reed Torpedo Co., 20 F. Cas. No. 11,910, 3 Fish. Pat. Cas. 629; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; De Kando v. Armstrong, 37 App. (D. C.) 314; Feinberg v. Cowan, 29 App. (D. C.) 80; Wickers v. Upham, 29 App. (D. C.) 30; Wickers v. Albert, 29 App. (D. C.) 23; Wickers v. McKee, 29 App. (D. C.) 4; Robinson v. Thresher, 28 App. (D. C.) 22; Seeberger v. Russel, 26 App. (D. C.) 344; Lindemeyr v. Hoffman, 18 App. (D. C.) 1; Griffin v. Swenson, 15 App. (D. C.) 135; Mason v. Hepburn, 13 App. (D. C.) 86; Stevens v. Seher, 11 App. (D. C.) 245; Porter v. Louden, 7 App. (D. C.) 64.

13. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Imperial Brass Mfg. Co. v. Nelson, 194 Fed. 165 [aff 203 Fed. 484, 121 CCA 606]; Heath v. Hildreth, 11 F. Cas. No. 6,309, Cranch Pat. Dec. 96,132, McA. Pat. Cas. 12.

[a] **Rule applied.**—It is a sufficient reduction to practice of the idea of rolls for cutting expanded metal, relative to anticipation of patented rolls, that they were worked only by hand, being intended as part of a machine which should cut and expand, and the expanding part not being ready, there being no necessary connection between the two parts. Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501.

14. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Dovan Chemical Corp. v. Corona Cord Tire Co., 10 F. (2d) 598; Coffin v. Ogden, 5 F. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [aff 18 Wall. 120, 21 L. ed. 821]; Farley v. National Steam-Gauge Co., 8 F. Cas. No. 4,648, McA. Pat. Cas. 618; Perry v. Cornell, 19 F. Cas. No. 11,002, Cranch Pat. Dec. 132, McA. Pat. Cas. 68.

[a] **Lecture.**—Actual disclosure may be by lecture. Dovan Chemical Corp. v. Corona Cord Tire Co., 10 F. (2d) 598.

[b] **Application for patent.**—The filing of an allowable application for a patent is sufficient reduction to practice on the question of prior use. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641].

15. Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; Fefel v. Stocker, 94 Off. Gaz. (U. S.) 433; Kelly v. Fynn, 92 Off. Gaz. (U. S.) 1237; Croskey v. Atterbury, 76 Off. Gaz. (U. S.) 163; Dashiell v. Tasker, 21 App. (D. C.) 64.

16. Stitt v. Eastern R. Co., 22 Fed. 649, 651; Coffin v. Ogden, 5 F. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [aff 18 Wall. 120, 21 L. ed. 821]; Parker v. Ferguson, 18 F. Cas. No. 10,733, 1 Blatchf. 407, Fish. Pat. R. 260; Lindemeyr v. Hoffman, 18 App. (D. C.) 1; Mason v. Hepburn, 13 App. (D. C.) 86.

"If the construction of the prior

published invention in a foreign country was deprived of its anticipatory effect.[29] The present statute specifically provides that, whenever it appears that a patentee, at the time of making his application, believed himself to be the original and first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof having been known or used in a foreign country, before his invention or discovery thereof, if it had not been patented or described in a printed publication.[30] By force of this provision, reduction to practice of the same idea of means in a foreign country does not operate as an anticipation of an invention made and reduced to practice here, however widely known such foreign reduction to practice may be, either among foreigners or among persons living here, if the invention is not patented or described in a printed publication.[31] If, however, an inventor has notice thereof, he cannot obtain a patent even though the invention or discovery had not been patented or described in any printed publication abroad.[32]

[§ 36] **d. Knowledge or Use Subsequent to Date of Invention.** The earliest patent act provided for the granting of patents for inventions "not before known or used."[33] No patent was authorized under that statute if the invention was known or used at any time prior to the application for a patent.[34] Under the present statute, however, the question of novelty is to be determined by the knowledge possessed by people in the United States at the time that the patentee makes the invention,[35] and not at the time that he secures his patent or files his application.[36] Prior knowledge or use sufficient to constitute anticipation is to be distinguished from the prior public use by which the right to a patent for an invention may be abandoned,[37] and, to anticipate, the earlier invention need not have been "known or used" more than two years before the patent date.[38]

[§ 37] **e. Inoperative Methods or Devices.** An invention is not anticipated by knowledge or use of an art or instrument wholly incapable of performing the same function,[39] or which is capable of performing the same function only when subjected to modifications or changes involving the exercise of further invention.[40] However, the fact that such a method or thing is incapable of producing the same result does not prevent it from anticipating the invention where such incapacity is curable without invention.[41] If the cause of its failure to work is obvious to a person skilled in the art, and remediable by the exercise of mere mechanical skill, it may nevertheless constitute anticipation.[42] The fact that the application of mere "mechanical skill" as distinguished from "inventive skill" is required in order that the earlier method or thing may perform the function of the later art or instrument with the same degree of perfection does not deprive it of its anticipatory effect.[43]

[§ 38] **f. Accidental or Unintentional Productions.** Anticipatory prior knowledge or use of an invention cannot arise from a prior accidental production of the same thing, when the operator does

29. Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Hurlbut v. Schillinger, 130 U. S. 456, 9 SCt 584, 32 L. ed. 1011; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Southern Electro-Chemical Co. v. Du Pont De Nemours, 20 F. (2d) 97; Permutit Co. v. Wadham, 13 F. (2d) 454; Badische Anilin, etc., Fabrik v. Kalle, 104 Fed. 802, 44 CCA 201; American Sulphite Pulp Co. v. Howland Falls Pulp Co., 70 Fed. 986 [rev on other grounds 80 Fed. 395, 25 CCA 500]; Doyle v. Spaulding, 19 Fed. 744; Worswick Mfg. Co. v. Steiger, 17 Fed. 250; Cornely v. Marckwald, 17 Fed. 83, 21 Blatchf. 367; Bartholomew v. Sawyer, 2 F. Cas. No. 1,070, 4 Blatchf. 347, 1 Fish. Pat. Cas. 516; Coleman v. Liesor, 6 F. Cas. No. 2,984; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Roemer v. Logowitz, 20 F. Cas. No. 11,996; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

[a] **In Canada** prior public use abroad is a bar. Vannorman v. Leonard, 2 U. C. Q. B. (Ont.) 72.

30. U. S. Code tit 35 § 72.

31. Westinghouse Mach. Co. v. General Electric Co., 207 Fed. 75, 126 CCA 575 [rev 199 Fed. 907]; De Kando v. Armstrong, 37 App. (D. C.) 314.

32. Forbush v. Cook, 9 F. Cas. No. 4,931, 2 Fish. Pat. Cas. 668.

33. Act April 10, 1790 (1 St. at L. 109).

34. Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327.

35. Anderson v. Collins, 122 Fed. 451, 58 CCA 669; Bannerman v. Sanford, 85 Fed. 448 [aff 99 Fed. 294, 39 CCA 534]; American Sulphite Pulp Co. v. Howland Falls Pulp Co., 80 Fed. 395, 25 CCA 500; Von Schmidt v. Bowers, 80 Fed. 121, 25 CCA 323 [certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem]; Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323]; Wilcox v. Bookwalter, 31 Fed. 224; Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 449; Yale Lock Mfg. Co. v. Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; Comstock v. Sandusky Seat Co., 6 F. Cas. No. 3,082, 3 Bann. & A. 188; Dixon v. Moyer, 7 F. Cas. No. 3,931, 1 Robb Pat. Cas. 324, 4 Wash. C. C. 68; National Spring Co. v. Union Car Spring Mfg. Co., 17 F. Cas. No. 10,051, 1 Bann. & A. 240, 12 Blatchf. 80; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; U. S., etc., Salamander Felting Co. v. Haven, 28 F. Cas. No. 16,788, 2 Bann. & A. 164.

36. Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419; Bartholomew v. Sawyer, 2 F. Cas. No. 1,070, 4 Blatchf. 347, 1 Fish. Pat. Cas. 516; Brodie v. Ophir Silver Min. Co., 4 F. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Nichols v. Pearce, 18 F. Cas. No. 10,246, 7 Blatchf. 5; Treadwell v. Bladen, 24 F. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. C. C. 703; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440.

37. Block v. Nathan Anklet Support Co., 9 F. (2d) 311.

Abandonment by prior public use see infra § 122.

38. Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Imperial Brass Mfg. Co. v. Nelson, 194 Fed. 165 [aff 203 Fed. 484, 121 CCA 606]; Eastman v. New York, 134 Fed. 844, 69 CCA 628; Wilson v. Townley Shingle Co., 125 Fed. 491, 60 CCA 327.

39. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Electrical Engineers' Equipment Co. v. Champion Switch Co., 23 F. (2d) 600; Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., 268 Fed. 257; Okmulgee Window Glass Co. v. Window Glass Mach. Co., 265 Fed. 626; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; Wright Co. v. Herring-Curtiss Co., 204 Fed. 597 [aff 211 Fed. 654, 128 CCA 58]; National Binding Mach. Co. v. Eisler, 197 Fed. 175; Loew Filter Co. v. German-American Filter Co., 164 Fed. 855, 90 CCA 637; Timolat v. Philadelphia Pneumatic Tool Co., 131 Fed. 257; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 129 Fed. 598; Farmers' Mfg. Co. v. Spruks Mfg. Co., 127 Fed. 691, 62 CCA 447; Kirchberger v. American Acetylene Burner Co., 124 Fed. 764 [aff 128 Fed. 599, 64 CCA 107]; Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 498, 53 CCA 230; Bowers v. San Francisco Bridge Co., 91 Fed. 381; Gormully, etc., Mfg. Co. v. Stanley Cycle Mfg. Co., 90 Fed. 279.

40. Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Block v. Nathan Anklet Support Co., 9 F. (2d) 311; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; General Knit Fabric Co. v. Steber Mach. Co., 194 Fed. 99, 114 CCA 177; Truax v. George F. Childs Adjustable Parlor Chair Co., 162 Fed. 907.

41. Electrical Engineers' Equipment Co. v. Champion Switch Co., 23 F. (2d) 600.

42. Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251; Merrimac Mattress Mfg. Co. v. Feldman, 133 Fed. 64; Patent Button Co. v. Scovill Mfg. Co., 92 Fed. 151; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Pitts v. Wemple, 19 F. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Jenner v. Dickinson, 117 Off. Gaz. (U. S.) 600; Gallagher v. Hien, 115 Off. Gaz. (U. S.) 1330; Bechman v. Wood, 89 Off. Gaz. (U. S.) 2459; Hein v. Buhaup, 81 Off. Gaz. (U. S.) 2088; Bromley Bros. Carpet Factory v. Stewart, 61 Off. Gaz. (U. S.) 1481.

43. Freydberg v. Hamburger, 17 F. (2d) 300; Charles Hunnicutt Co. v. A. B. Gaston Co., 207 Fed. 585 [aff 218 Fed. 176, 134 CCA 56]; Sellers v. Cofrode, 35 Fed. 131.

not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of their employment, is derived from the prior use by anyone until the date of the invention.[44] It has been held, however, that to constitute anticipation of a later patent it is enough that such a construction had been in well established use, whether it originated in design or by accident.[45] An invention may be anticipated by prior knowledge or use even though the scientific principle of its operation was not understood,[46] and even though all of its advantages were not appreciated.[47] It has also been held immaterial that the new form of result had not been before contemplated.[48]

[§ 39] **g. Experiments.** An invention is not anticipated by earlier experimental efforts abandoned before fully accomplishing the result achieved by the invention.[49] It is otherwise, however, if the

44. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; General Electric Co. v. DeForest Radio Co., 23 F. (2d) 698; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Lenk v. Hunt-Lasher Co., 14 F. (2d) 335; Carson v. American Smelting, etc., Co., 11 F. (2d) 766; United Verde Copper Co. v. Pierce-Smith Converter Co., 7 F. (2d) 13; Standard Envelope Sealer Mfg. Co. v. Graywood Mfg. Co., 1 F. (2d) 667; Van Heusen Products, Inc. v. Earl, 300 Fed. 922; Boyce v. Pyrene Mfg. Co., 290 Fed. 998 [aff 292 Fed. 480 (certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem)]; Fulton Co. v. Bishop, etc., Co., 284 Fed. 774; Vacuum Cleaner Co. v. Thompson Mfg. Co., 258 Fed. 239 [app dism 272 Fed. 1023]; Pittsburgh Iron, etc., Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Toch v. Zibell Damp Resisting Paint Co., 233 Fed. 993, 148 CCA 3; Byerley v. Barber Asphalt Pav. Co., 230 Fed. 995; Munising Paper Co. v. American Sulphite Pulp Co., 228 Fed. 700, 143 CCA 222; Doble v. Pelton Water Wheel Co., 186 Fed. 526 [aff 190 Fed. 760, 111 CCA 488]; Welsbach Light Co. v. Cohn, 181 Fed. 122; Anthracite Separator Co. v. Pollock, 175 Fed. 108; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; Edison Electric Light Co. v. Novelty Incandescent Lamp Co., 167 Fed. 977, 93 CCA 387 [certiorari den 215 U. S. 596 mem, 30 SCt 399 mem, 54 L. ed. 342 mem]; Karfiol v. Rothner, 165 Fed. 923; Hillard v. Fisher Book Typewriter Co., 159 Fed. 439, 86 CCA 469 [certiorari den 208 U. S. 617 mem, 28 SCt 569 mem, 52 L. ed. 647 mem]; Western Tube Co. v. Rainear, 156 Fed. 49 [aff 159 Fed. 431, 86 CCA 411]; Ajax Metal Co. v. Brady Brass Co., 155 Fed. 409 [rev on other grounds 160 Fed. 84, 87 CCA 240 (certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem)]; Chisholm v. Johnson, 106 Fed. 191; German-American Filter Co. v. Erdrich, 98 Fed. 300; Tannage Patent Co. v. Donallan, 93 Fed. 811; Wickelman v. A. B. Dick, 88 Fed. 264, 31 CCA 530; Taylor Burner Co. v. Diamond, 72 Fed. 182; Pittsburg Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301; Boyd v. Cherry, 50 Fed. 279; Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307; Colgate v. Western Union Tel. Co., 6 F. Cas. No. 2,995, 4 Bann. & A. 36, 15 Blatchf. 365 [quot Wickelman v. A. B. Dick Co., 88 Fed. 264, 31 CCA 530]; Pelton v. Waters, 19 F. Cas. No. 10,913, 1 Bann. & A. 599; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; J. E. Hanger, Inc. v. J. F. Rowley Co., 54 App. (D. C.) 336, 298 Fed. 359.

"A chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to practical and intelligent use, first makes it available to man." Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307, 323.

"Accidental results, not intended and not appreciated, do not constitute anticipation." Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 66, 43 SCt 322, 67 L. ed. 523.

45. National Harrow Co. v. Quick, 74 Fed. 236, 20 CCA 410.

46. Toch v. Zibell Damp Resisting Paint Co., 233 Fed. 993, 148 CCA 3 [aff 231 Fed. 711, 145 CCA 597].

47. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610; Merrimac Mattress Co. v. Feldman, 133 Fed. 64; Soehner v. Favorite Stove, etc., Co., 84 Fed. 182, 28 CCA 317; Woodbury Patent Planing Mach. Co. v. Keith, 30 F. Cas. No. 17,970, 4 Bann. & A. 100 [aff 101 U. S. 479, 25 L. ed. 939].

48. Ansonia Brass, etc., Co. v. Electrical Supply Co., 144 U. S. 11, 12 SCt 601, 36 L. ed. 327 [aff 32 Fed. 81, 35 Fed. 68]; American Sales Book Co. v. Carter-Crume Co., Ltd., 150 Fed. 333, 80 CCA 339.

49. T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045; Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 SCt 295, 38 L. ed. 103; Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251; Marsh v. Seymour, 97 U. S. 348, 24 L. ed. 963; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Whiteley v. Swayne, 7 Wall. (U. S.) 685, 19 L. ed. 199; Finley v. MacDougald Constr. Co., 23 F. (2d) 204, 206 [cit Cyc]; Winget Kickernick Co. v. Kenilworth Mfg. Co., 11 F. (2d) 1; General Electric Co. v. Nitrogon Electric Co., 292 Fed. 384; Boyce v. Pyrene Mfg. Co., 290 Fed. 998 [aff 292 Fed. 480 (certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem)]; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; American Metal Cap Co. v. Anchor Cap, etc., Corp., 278 Fed. 670; Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., 268 Fed. 257; Camp v. Portable Wagon Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem]; Featheredge Rubber Co. v. Miller Rubber Co., 250 Fed. 255; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132; Parkin v. Locomobile Co. of America, 226 Fed. 800 [rev on other grounds 231 Fed. 980, 146 CCA 176]; Holton v. Pepper, 216 Fed. 368; Smith Metal Window Hardware Co. v. Yates, 216 Fed. 361; Robinson v. American Fruit Mach. Co., 216 Fed. 179 [rev on other grounds 219 Fed. 225, 135 CCA 340]; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 212 Fed. 192 [rev on other grounds 216 Fed. 146, 132 CCA 240; Interurban R. etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298; Kings County Raisin, etc., Co. v. U. S. Cons. Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; Wright Co. v. Herring-Curtiss Co., 177 Fed. 257 [rev on other grounds 180 Fed. 110, 103 CCA 31]; Warren Bros. Co. v. Owosso, 166 Fed. 309, 92 CCA 227 [certiorari den 214 U. S. 525 mem, 29 SCt 703 mem, 53 L. ed. 1067 mem]; United Shoe Mach. Co. v. Greenman, 153 Fed. 283, 82 CCA 581 [aff 145 Fed. 538]; Standard Sanitary Mfg. Co. v. J. L. Mott Iron Works, 152 Fed. 635 [app dism 159 Fed. 135, 86 CCA 325]; American Caramel Co. v. Mills, 149 Fed. 743, 79 CCA 449; Arrott v. Standard Sanitary Mfg. Co., 131 Fed. 457 [aff 135 Fed. 750, 68 CCA 388]; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; General Electric Co. v. Wise, 119 Fed. 922; R. Thomas, etc., Co. v. Electric Porcelain, etc., Co., 111 Fed. 923; Westinghouse Electric, etc., Co. v. Beacon Lamp Co., 95 Fed. 462; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367; Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 61 Fed. 948, 10 CCA 184; American Bell Tel. Co. v. American Cushman Tel. Co., 35 Fed. 734, 1 LRA 60; International Tooth-Crown Co. v. Richmond, 30 Fed. 775; Hutchinson v. Everett, 26 Fed. 531; Hoyt v. Slocum, 26 Fed. 329; American Bell Tel. Co. v. People's Tel. Co., 25 Fed. 725 [aff 126 U. S. 1, 8 SCt 778, 31 L. ed. 863]; Fay v. Allen, 24 Fed. 804; Phillips v. Carroll, 23 Fed. 249; Whittlesey v. Ames, 13 Fed. 893, 9 Biss. 225; Albright v. Celluloid Harness Trimming Co., 1 F. Cas. No. 147, 2 Bann. & A. 629; Allen v. Hunter, 1 F. Cas. No. 225, 6 McLean 303; Aultman v. Holley, 2 F. Cas. No. 656, 11 Blatchf. 317, 6 Fish. Pat. Cas. 534; Blake v. Rawson, 3 F. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 379; Gallahue v. Butterfield, 9 F. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86; Hitchcock v. Shoninger Melodeon Co., 12 F. Cas. No. 6,537; Hitchcock v. Tremaine, 12 F. Cas. No. 6,538, 8 Blatchf. 440, 4 Fish. Pat. Cas. 508; Howe v. Underwood, 12 F. Cas. No. 6,775, 1 Fish. Pat. Cas. 160; La Baw v. Hawkins, 14 F. Cas. No. 7,960, 1 Bann. & A. 428; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; McCormick v. Howard, 15 F. Cas. No. 8,719, McA. Pat. Cas. 238; Many v. Jagger, 16 F. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. R. 222; Many v. Sizer, 16 F. Cas. No. 9,056, 1 Fish. Pat. Cas. 17 [writ of error dism 16 How. 98, 14 L. ed. 861]; Murphy v. Eastham, 17 F. Cas. No. 9,949, 5 Fish. Pat. Cas. 306, Holmes 113; Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,337; Parham v. American Buttonhole, etc., Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Roberts v. Dickey, 20 F. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 4 Brewst. (Pa.) 260; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Sloat v. Spring, 22 F. Cas. No. 12,948a; Smith v. Fay, 22 F. Cas. No. 13,045, 6 Fish. Pat. Cas. 446; Smith v. Glendale Elastic Fabrics Co., 22 F. Cas. No. 13,050, 1 Bann. & A. 58, Holmes 340 [aff in 100 U. S. 110, 25 L. ed. 547]; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Union Paper Bag Co. v. Pultz, etc., Co., 24 F. Cas. No. 14,-

experiment is successful.[50] Successful use of an art or instrument is not experimental use.[51] An invention or discovery is not to be considered an abandoned experiment merely because it was not applied to commercial use,[52] or because its use was abandoned.[53] Nor is an invention or discovery to be considered as an abandoned experiment merely because the earlier inventor did not apply for a patent for it.[54] On the other hand, the mere fact that an unsuccessful application for a patent was made does not give anticipatory effect to an abandoned experiment.[55]

[§ 40] **h. Abandoned Inventions.** An invention is anticipated by prior knowledge or use even though the earlier art or instrument may have been abandoned.[56]

[§ 41] **i. Lost Arts.** Prior knowledge or use will not negative novelty, if that use had ceased when the patent was granted, and that knowledge was forgotten until called to mind by a reinvention.[57] It is not necessary in order to deprive a method or thing of its anticipatory effect that it should have been buried and unknown for any particular length of time.[58] But it is essential that the knowledge should have completely disappeared.[59] It must at least have been so far forgotten that its inventor, if living, or others who may have witnessed its use, would not be able to recall it to memory and reproduce it without the assistance of the description of the subsequent invention.[60]

[§ 42] **j. Secret Knowledge or Use.** There is authority to the effect that a subsequent invention is not anticipated where the earlier inventor conceals or suppresses the fact of his knowledge or use until the subsequent invention is made.[61] Expressions of a contrary view appear in some of the decisions,[62] and it has been asserted that the rule, in any event, must be confined within narrow limits.[63] In order to come within this rule the first inventor must have determined to practice his invention secretly,[64] and his efforts to keep the invention secret must have been successful.[65] A use is not strictly secret where

392, 3 Bann. & A. 403, 15 Blatchf. 160; United Nickel Co. v. Anthes, 24 F. Cas. No. 14,406, 5 Fish. Pat. Cas. 517, Holmes 155; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Winans v. Danforth, 30 F. Cas. No. 17,859; Winans v. New York, etc., R. Co., 30 F. Cas. No. 17,-864, 4 Fish. Pat. Cas. 1; Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866]; Wilson's Application, 49 App. (D. C.) 76, 258 Fed. 976; Lemp v. Mudge, 24 App. (D. C.) 282; Smith v. Brooks, 24 App. (D. C.) 75; Quist v. Ostrom, 23 App. (D. C.) 69; Dashiell v. Tasker, 21 App. (D. C.) 64; Tripler v. Linde, 21 App. (D. C.) 32; Traver v. Brown, 14 App. (D. C.) 34; Hunter v. Stikeman, 13 App. (D. C.) 214; Glidden v. Noble, 5 App. (D. C.) 480; Coffee v. Guerrant, 3 App. (D. C.) 497.

[a] **Mere laboratory experiments** will not anticipate. Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636.

50. Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680 (aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098)]; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Waterman v. Thomson, 29 F. Cas. No. 17,-260, 2 Fish. Pat. Cas. 461; In re Travilla, 46 App. (D. C.) 36.

Effect of knowledge or use of abandoned inventions see infra § 40.

51. Freydberg v. Hamburger, 17 F. (2d) 300; Ficklen v. Harding, 273 Fed. 179; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; National Mach. Corp. v. Benthall Mach. Co., 241 Fed. 72, 154 CCA 72.

[a] **Thus** an alleged anticipating device which has been in practical use for years without change in the principle of operation, although other parts of the machine have been changed, cannot be deemed an abandoned experiment. National Mach. Corp. v. Benthall Mach. Co., 241 Fed. 72, 154 CCA 72 [mod 222 Fed. 918].

52. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 330, 72 L. ed. 610; Enameled Metals Co. v. Western Conduit Co., 269 Fed. 620; Buser v. Novelty Tufting Mach. Co., 151 Fed. 478, 492, 81 CCA 16 [certiorari den 210 U. S. 432 mem, 28 SCt 761 mem, 52 L. ed. 1135 mem]; McNish v. Everson, 2 Fed. 899; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; Shoup v. Henrici, 22 F. Cas. No. 12,814, 2 Bann. & A. 249; Waterman v. Thomson, 29 F. Cas. No. 17,260, 2 Fish. Pat. Cas. 461.

"If, however, the machine or other thing is complete, and capable of producing the result sought to be accomplished, it has passed the experimental stage and becomes an invention; and, in order that it may constitute an anticipation, it is immaterial how well it becomes known or how much it is used." Buser v. Novelty Tufting Mach. Co., supra.

53. United Shoe Mach. Co. v. Greenman, 153 Fed. 283, 82 CCA 581 [aff 145 Fed. 538]; Buser v. Novelty Tufting Mach. Co., 151 Fed. 478, 81 CCA 16 [certiorari den 210 U. S. 432 mem, 28 SCt 761 mem, 52 L. ed. 1135 mem].

54. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 330, 72 L. ed. 610.

55. Brown v. Guild, 23 Wall. (U. S.) 181, 23 L. ed. 161.

56. Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251; Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; Enameled Metals Co. v. Western Conduit Co., 269 Fed. 620; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Standard Sanitary Mfg. Co. v. Iron City Sanitary Mfg. Co., 222 Fed. 671, 138 CCA 219; Buser v. Novelty Tufting Mach. Co., 151 Fed. 478, 81 CCA 16 [certiorari den 210 U. S. 432 mem, 28 SCt 761 mem, 52 L. ed. 1135 mem]; United Shoe Mach. Co. v. Greenman, 145 Fed. 538 [aff 153 Fed. 283, 82 CCA 581]; Merrimac Mattress Mfg. Co. v. Feldman, 133 Fed. 64; Clisby v. Reese, 88 Fed. 645, 32 CCA 80; Stephenson v. Brooklyn Cross-Town R. Co., 14 Fed. 457, 19 Blatchf. 473; Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,-337; Packard v. Gilbert, 18 F. Cas. No. 10,651; Pitts v. Wemple, 19 F. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Shoup v. Henrici, 22 F. Cas. No. 12,814, 2 Bann. & A. 249; Waterman v. Thomson, 29 F. Cas. No. 17,-260, 2 Fish. Pat. Cas. 461; Smith v. Brooks, 24 App. (D. C.) 75.

57. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., 268 Fed. 257; Hall v. Bird, 11 F. Cas. No. 5,926, 6 Blatchf. 438, 3 Fish. Pat. Cas. 595; Taylor v. Wood, 23 F. Cas. No. 13,808, 1 Bann. & A. 270, 12 Blatchf. 110; J. E. Hanger, Inc. v. J. F. Rowley Co., 54 App. (D. C.) 336, 298 Fed. 359.

[a] **Reason for rule.**—"It is well known that centuries ago discoveries were made in certain arts the fruits of which have come down to us, but the means by which the work was accomplished are at this day unknown. The knowledge has been lost for ages. Yet it would hardly be doubted, if any one now discovered an art thus lost, and it was a useful improvement, that, upon a fair construction of the act of Congress, he would be entitled to a patent. Yet he would not literally be the first and original inventor. But he would be the first to confer on the public the benefit of the invention. He would discover what is unknown, and communicate knowledge which the public had not the means of obtaining without his invention." Gayler v. Wilder, 10 How. (U. S.) 477, 497, 13 L. ed. 504.

58. Gayler v. Wilder, supra; Converse v. Matthews, 58 Fed. 246; Hall v. Bird, 11 F. Cas. No. 5,926, 6 Blatchf. 438, 3 Fish. Pat. Cas. 595; Taylor v. Wood, 23 F. Cas. No. 13,808, 1 Bann. & A. 270, 12 Blatchf. 110; Mason v. Hepburn, 13 App. (D. C.) 86.

59. Mason v. Hepburn, supra.

60. Mason v. Hepburn, supra.

61. Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; Welsbach Light Co. v. Cohn, 181 Fed. 122; Davis, etc., Temperature Controlling Co. v. National Steam Specialty Co., 164 Fed. 191; Acme Flexible Clasp Co. v. Cary Mfg. Co., 96 Fed. 344, 347; Zinsser v. Kremer, 39 Fed. 111; Mason v. Hepburn, 13 App. (D. C.) 86.

"I therefore understand the law on this subject to be that the mere secret practice of a process or the mere physical presence of a product or manufacture in this country is insufficient as an anticipation unless and until the public acquires, or has opportunity to acquire, therefrom such knowledge as would enable one skilled in the art to practice the invention." Acme Flexible Clasp Co. v. Cary Mfg. Co., supra.

62. Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; Macbeth Evans Glass Co. v. General Electric Co., 231 Fed. 183; Bannerman v. Sanford, 99 Fed. 294, 39 CCA 534; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590, 596.

"If the invention is perfected, and put into actual use by the first and original inventor, it is of no consequence, whether the invention is extensively known or used, or whether the knowledge or use thereof is limited to a few persons, or even to the first inventor." Reed v. Cutter, supra (per Story, J.).

63. E. W. Bliss Co. v. Southern Can Co., 265 Fed. 1018 [aff 251 Fed. 903].

64. E. W. Bliss Co. v. Southern Can Co., supra.

65. E. W. Bliss Co. v. Southern Can Co., supra.

one or more persons are permitted to witness the anticipatory method or thing in operation without pledge of secrecy,[66] or even if they might have seen it had they used their opportunity.[67] The persons who witness the use of an anticipating method or thing need not understand or appreciate its method of operation[68] or be interested in practicing it.[69] Nor is it essential that they be skilled in the art to which the use appertained.[70] If an invention was actually used, such use is not deprived of its anticipatory effect by the fact that the thing embodying the invention was hidden from view.[71]

[§ 43] **k. Disclosures of Prior Applications.**[72] Subject to the exception which exists with reference to earlier applications of the same inventor,[73] an invention may be anticipated by disclosures contained in an earlier application for a United States patent.[74] The anticipatory effect of such a disclosure is not affected by the fact that the anticipatory matter was not made the basis of a claim,[75] or by the fact that the application was abandoned.[76] However, in order that an invention may be anticipated, the disclosures of the prior application must be such as would enable any person skilled in the art to practice the invention without exercising inventive skill of his own.[77]

[§ 44] **4. Prior Patents**[78]**—a. In General.** No valid patent can be obtained by an inventor for his invention if it was patented in this or any foreign country before his invention or discovery thereof.[79]

66. Grasselli Chemical Co. v. National Aniline, etc., Co., 26 F. (2d) 305; Standard Automatic Mach. Co. v. Karl Kiefer Mach. Co., 18 F. (2d) 326 [aff 18 F. (2d) 331]; Freydberg v. Hamburger, 17 F. (2d) 300; E. W. Bliss Co. v. Southern Can Co., 265 Fed. 1018 [aff 251 Fed. 903]; Mayer v. Mutschler, 237 Fed. 654; Perkins v. Nashua Card, etc., Co., 2 Fed. 451.

67. Perkins v. Nashua Card, etc., Co., supra.

68. Standard Automatic Mach. Co. v. Karl Kiefer Mach. Co., 18 F. (2d) 326 [aff 18 F. (2d) 331].

69. Perkins v. Nashua Card, etc., Co., 2 Fed. 451.

70. Standard Automatic Mach. Co. v. Karl Kiefer Mach. Co., 18 F. (2d) 326 [aff 18 F. (2d) 331].

71. Brush v. Condit, 132 U. S. 39, 10 SCt 1, 33 L. ed. 251; Freydberg v. Hamburger, 17 F. (2d) 300; Spring v. Packard, 22 F. Cas. No. 13,260, 1 Bann. & A. 531.

72. Applications as printed publications see infra § 53.

73. See infra § 49.

74. Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, 46 SCt 324, 70 L. ed. 651 [rev 1 F. (2d) 227]; Naceskid Service Chain Co. v. Perdue, 1 F. (2d) 924; Lemley v. Dobson-Evans Co., 243 Fed. 391, 156 CCA 171.

75. Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, 46 SCt 324, 70 L. ed. 651.

76. Hommel Mfg. Co. v. East Side Mfg. Co., 16 F. (2d) 1008. Contra Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298.

77. Brown v. Guild, 23 Wall. (U. S.) 181, 23 L. ed. 161; Camp v. Portable Wagon Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem]; Wright Co. v. Paulhan, 177 Fed. 261 [rev 180 Fed. 112, 103 CCA 32]; Wright Co. v. Herring-Curtiss Co., 177 Fed. 257 [rev on other grounds 180 Fed. 110, 103 CCA 31]; Hillard v. Fisher Book Typewriter Co., 159 Fed. 439, 86 CCA 469 [certiorari den 208 U. S. 617 mem, 28 SCt 569 mem, 52 L. ed. 647 mem].

78. Unclaimed disclosures of prior patents as publications see infra § 53.

79. Bone v. Marion County, 251 U. S. 134, 40 SCt 96, 64 L. ed. 188 [aff 249 Fed. 211, 161 CCA 247]; Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; In re Coffey, 30 F. (2d) 877; Weil v. Fund, 30 F. (2d) 712; R. Hoe & Co., Inc. v. Goss Printing Press Co., 30 F. (2d) 271; Magma Copper Co. v. Minerals Separation North American Corp., 30 F. (2d) 67; McCloskey v. Toledo Pressed Steel Co., 30 F. (2d) 12; In re Taylor, 29 F. (2d) 878; In re Dreyfus, 29 F. (2d) 875; In re Nissen, 29 F. (2d) 870; Johnson v. Duquesne Light Co., 29 F. (2d) 784; Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Concrete Mixing, etc., Co. v. Storrie, 27 F. (2d) 838 [aff 23 F. (2d) 131, and certiorari den 49 SCt 95 mem]; In re Berry, 26 F. (2d) 1012; Schlaich v. Robertson, 26 F. (2d) 681; In re Kaplan, 26 F. (2d) 565; In re Hammond, 25 F. (2d) 359; In re Moulton, 24 F. (2d) 903; In re Lucke, 24 F. (2d) 279; Seamless Rubber Co. v. Stall, etc., Mfg. Co., 23 F. (2d) 820; General Electric Co. v. DeForest Radio Co., 23 F. (2d) 698; Bellis Heat Treating Co. v. Heatbath Corp., 23 F. (2d) 239; Buckeye Incubator Co. v. Hillpot, 22 F. (2d) 855 [aff 24 F. (2d) 341]; Watertown Table-Slide Co. v. Perfection Table-Slide Mfg. Co., 22 F. (2d) 798; Crozier-Straub, Inc. v. Graham, 22 F. (2d) 310 [rev on other grounds 28 F. (2d) 321 (certiorari den 49 U. S. 253)]; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Kennedy v. Allis-Chalmers Mfg. Co., 21 F. (2d) 530 [aff 25 F. (2d) 619]; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Cottrell, etc., Co. v. Claybourn Process Corp., 17 F. (2d) 279 [aff 24 F. (2d) 1014 mem]; Schiller's Application, 17 F. (2d) 209; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Great Western Mfg. Co. v. Lowe, 13 F. (2d) 880; Cartridge Mach. Corp. v. National Collapsible Tube Co., 13 F. (2d) 859; Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Hayes Pump, etc., Co. v. Friend Mfg. Co., 8 F. (2d) 33; White v. Peerless Motor Car Co., 1 F. (2d) 10; Hammond v. Marmon Auto. Co., 300 Fed. 803; Sparks-Withington Co. v. E. A. Laboratories, 295 Fed. 534; Miller v. Monarch Printing Co., 285 Fed. 364; Monitor Stove Co. v. Williamson Heater Co., 282 Fed. 910 [aff 299 Fed. 1]; Arkell Safety Bag Co. v. Safepack Mills, 272 Fed. 1; Schultz v. Jackson Cushion Spring Co., 271 Fed. 665; Barber v. Otis Motor Sales Co., 271 Fed. 171 [certiorari den 256 U. S. 693 mem, 41 SCt 535 mem, 65 L. ed. 1175 mem]; Chipman Chemical Engineering Co. v. Reade Mfg. Co., 270 Fed. 677 [aff 278 Fed. 520]; Laclede Christy Clay Products Co. v. St. Louis, 270 Fed. 338 [aff 280 Fed. 83]; Duryea Mfg. Co. v. Agrippa Mfg. Corp., 270 Fed. 224 [aff 273 Fed. 522]; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680 (aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098)]; Kauffman v. Sodemann Heat, etc., Co., 267 Fed. 435; Schultheiss Co. v. Phillips, 264 Fed. 971; Eureka Smokeless Furnace Co. v. Consumers' Co., 263 Fed. 390; Scott v. Hemphill Mfg. Co., 262 Fed. 968; Freeman Electric Co. v. Webber Electric Co., 262 Fed. 769 [aff 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162]; Dunkley Co. v. Pasadena Canning Co., 261 Fed. 203; Van Dorn Iron Works Co. v. Mathis Bros. Co., 260 Fed. 400, 171 CCA 266; Adt v. Kirstein Sons Co., 259 Fed. 277 [aff 259 Fed. 561, 170 CCA 523]; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Sandusky Fdy., etc., Co. v. De Lavaud, 258 Fed. 640; Nelson v. Lloyd Mfg. Co., 257 Fed. 738, 169 CCA 26; Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co., 257 Fed. 314, 168 CCA 398; Luten v. Marsh, 254 Fed. 701; Ballardvale Springs Co. v. United Metal Steel Co., 253 Fed. 432, 165 CCA 174; Riter-Conley Mfg. Co. v. Atlanta Gaslight Co., 246 Fed. 840, 159 CCA 142 [aff 234 Fed. 896]; One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; Arnold-Creager Co. v. Barkwill Brick Co., 246 Fed. 441; General Manifold, etc., Co. v. Simple Account Sales Book Co., 246 Fed. 125, 158 CCA 351; Barber v. Reo Motor Car Sales Co., 245 Fed. 938; LeRoy v. Nicholas Power Co., 244 Fed. 955; Barrett Co. v. Ewing, 242 Fed. 506, 155 CCA 282 [certiorari den 244 U. S. 661 mem, 37 SCt 746 mem, 61 L. ed. 1376 mem]; Safe-Cabinet Co. v. Globe-Wernicke Co., 242 Fed. 497, 155 CCA 273; Safety Gas Lighter Co. v. Fischer, 236 Fed. 955 [aff 247 Fed. 1005 mem, 159 CCA 652]; Skinner v. Campbell, 236 Fed. 358 [aff 237 Fed. 1020 mem, 150 CCA 659]; Watson Fireproof Window Co. v. Biersach, etc., Co., 236 Fed. 346, 149 CCA 478; American Graphophone Co. v. Gimbel, 234 Fed. 344; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 231 Fed. 194; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 231 Fed. 190; Werk v. Parker, 231 Fed. 121, 145 CCA 309 [aff 249 U. S. 130, 39 SCt 197, 63 L. ed. 514]; Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; U. S. Slicing Mach. Co. v. Blakeslee, 227 Fed. 442, 142 CCA 138; Gear v. Fairmount Electric, etc., Co., 225 Fed. 61 [rev on other grounds 231 Fed. 728, 146 CCA 12]; Standard Typewriter Co. v. Standard Folding Typewriter Sales Co., 223 Fed. 779, 139 CCA 599; Pittsburgh Water Heater Co. v. Beler Water Heater Co, 222 Fed. 950; Twentieth Century Motor Car, etc., Co. v. Holcomb, 220 Fed. 669, 136 CCA 311; Universal Draft Gear Attachment Co. v. Bush, 220 Fed. 300, 136 CCA 134; Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 CCA 91 [certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem]; Elliott Co. v. Robertson, 219 Fed. 899 [mod on other grounds 230 Fed. 614, 145 CCA 24]; Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 219 Fed. 234 [rev on other grounds 236 Fed. 731, 150 CCA 63]; Karl Kiefer Mach. Co. v. Unionwerke, 218 Fed. 847 [aff 231 Fed. 733, 146 CCA 17]; Adams, etc., Co. v. Peter Gray & Sons, Inc., 218 Fed. 173, 134 CCA 53; Peters v. Chicago Biscuit Co., 215 Fed. 724, 132 CCA 134; Murphy v. Metal Stamping Co., 214 Fed. 382; D'Arcy v. Sheffield Car Co., 213 Fed. 483, 130 CCA 83; McClave-Brooks Co. v. M. H. Treadwell Co., 212 Fed. 442 [rev on other grounds 220 Fed. 144, 136

It has been asserted that this is true regardless of whether the prior patent is valid or not.[80] Nor does the fact that a patent has been allowed to lapse for nonpayment of annual fees deprive it of anticipatory effect.[81] To give a prior patent effect as an anticipation it is not necessary that the invention patented should be generally known,[82] that its existence should have been known to the later inventor,[83] or that the art or instrument of the patent should be commercially successful.[84] The form in which a prior patent issued is immaterial.[85] It is not essential that the description and claims should be printed.[86]

Prior patent of wider scope. The fact that the art or instrument of the earlier patent was intended to, and will, accomplish more than the art or instrument of the later invention does not prevent its being an anticipation of the latter.[87] It is sufficient that in part it was intended to, and will, accomplish the same result in the same way.[88]

[§ 45] **b. Actual Issuance Prior to Date of Invention Essential.** In order that a patent may have effect as an anticipation, it must have issued anterior to the making of the invention or discovery in question.[89] It is not enough that it is anterior to the date upon which the inventor secured the issuance

CCA 98]; Berns v. Schaefer, 211 Fed. 973, 128 CCA 471; Spirella Co. v. Nubone Corset Co., 210 Fed. 453; Biddle v. Hodge, 205 Fed. 932; American Automotoneer Co. v. Porter, 205 Fed. 105 [mod on other grounds 232 Fed. 456, 146 CCA 450]; Fowler, etc., Mfg. Co. v. McCrum-Howell Co., 202 Fed. 964; Electro-Dynamic Co. v. Westinghouse Electric, etc., Co., 202 Fed. 224, 120 CCA 661; Baetz v. Schoenlau-Kukkuck Trunk Top, etc., Co., 197 Fed. 40, 116 CCA 588 [certiorari den 231 U. S. 746 mem, 34 SCt 320 mem, 58 L. ed. 464 mem]; Carmichael v. Jackson, 192 Fed. 937, 113 CCA 327; Century Electric Co. v. Wagner Electric Mfg. Co., 192 Fed. 564, 113 CCA 36; Electro-Dynamic Co. v. Westinghouse Electric, etc., Co., 191 Fed. 506 [aff 202 Fed. 224, 120 CCA 661]; Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., 190 Fed. 573, 111 CCA 389 [certiorari den 223 U. S. 732 mem, 32 SCt 528 mem, 56 L. ed. 634 mem]; Excelsior Drum Works v. Bortel, 190 Fed. 10 [aff 200 Fed. 1022, 118 CCA 649]; Beekman Sanitary Specialty Co. v. Bernz, 189 Fed. 630; Royden Marble Mach. Co. v. Davis, 189 Fed. 622; Davis v. A. H. Reid Creamery, etc., Supply Co., 187 Fed. 157 [aff 195 Fed. 80, 115 CCA 112]; Tilt Shoe Co. v. Westinghouse Electric, etc., Co., 185 Fed. 110, 107 CCA 326; Consolidated Loops Co. v. Miner, 182 Fed. 211, 104 CCA 648; Standard Mach. Co. v. Rambo, 181 Fed. 157 [aff 188 Fed. 323, 110 CCA 301]; Oehring v. Gardam, 180 Fed. 476 [rev on other grounds 202 Fed. 753, 121 CCA 119]; Lumber Anti-Stain Co. v. Nester, 178 Fed. 927, 102 CCA 299; Renton v. Reilly, 175 Fed. 96; Potthoff v. Hanson, etc., Co., 174 Fed. 983, 98 CCA 595; Chicago Grain Door Co. v. National Malleable Castings Co., 173 Fed. 918, 97 CCA 324; George L. Vose Mfg. Co. v. G. C. Hudson Co., 173 Fed. 622; Boyer v. Cleveland Pneumatic Tool Co., 171 Fed. 105 [aff 185 Fed. 808, 108 CCA 40]; Neider v. Higgin Mfg. Co., 167 Fed. 128, 92 CCA 580; Kilbourn Knitting Mach. Co. v. Liveright, 165 Fed. 902, 91 CCA 580; Time-Saver Co. v. Stamford Trust Co., 165 Fed. 348; Knapp v. Atlantic Mach. Works, 163 Fed. 531; Ridgway Dynamo, etc., Co. v. Phœnix Iron Works, 163 Fed. 527; Roth v. Harris, 162 Fed. 160 [mod on other grounds 168 Fed. 279, 93 CCA 581]; Bullock Electric Mfg. Co. v. General Electric Co., 162 Fed. 28, 89 CCA 68; Colt's Patent Firearms Mfg. Co. v. Wesson, 127 Fed. 333, 62 CCA 167; McNeely v. Williames, 96 Fed. 978, 37 CCA 641; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 469, 19 CCA 534; Gardner v. Herz, 12 Fed. 491, 20 Blatchf. 538; Kelleher v. Darling, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 424; In re Ayers, 57 App. (D. C.) 346, 23 F. (2d) 767; In re Brewster, 57 App. (D. C.) 268, 20 F. (2d) 284; Snyder's Application, 57 App. (D. C.) 180, 18 F. (2d) 830; In re Boyce, 57 App. (D. C.) 93, 17 F. (2d) 681; In re Merton, 56 App. (D. C.) 251, 12 F. (2d) 192; In re Mulford, 56 App. (D. C.) 244, 12 F. (2d) 185; In re Rundell, 56 App. (D. C.) 237, 12 F. (2d) 178; In re Sweetland, 56 App. (D. C.) 222, 12 F. (2d) 163; In re Malocsay, 55 App. (D. C.) 51, 299 Fed. 1021; In re Myers, 55 App. (D. C.) 50, 299 Fed. 1020; Ruths' Application, 53 App. (D. C.) 270, 288 Fed. 270; Peters' Application, 53 App. (D. C.) 239, 289 Fed. 637; Talley's Application, 53 App. (D. C.) 99, 288 Fed. 453; In re Borger, 51 App. (D. C.) 227, 277 Fed. 862; Pruden's Application, 50 App. (D. C.) 398, 273 Fed. 362; In re Hurt, 48 App. (D. C.) 590; In re Palmer, 48 App. (D. C.) 1; In re Sunderland, 47 App. (D. C.) 234; In re Herber, 46 App. (D. C.) 524; In re Vreeland, 46 App. (D. C.) 451; In re Bond, 44 App. (D. C.) 262; In re Gray, 44 App. (D. C.) 15; In re Braemer, 43 App. (D. C.) 190; In re Heeren, 42 App. (D. C.) 216; In re Pein, 41 App. (D. C.) 586; In re Fleuss, 41 App. (D. C.) 520; In re Cooper, 41 App. (D. C.) 511; In re Chapman, 41 App. (D. C.) 258; In re Moulton, 40 App. (D. C.) 160; In re Havens, 39 App. (D. C.) 465; In re French, 39 App. (D. C.) 413; In re Maas, 39 App. (D. C.) 142; In re Gold, 38 App. (D. C.) 544; In re Welsbach, 38 App. (D. C.) 518; In re Madden, 38 App. (D. C.) 94; In re Harris, 37 App. (D. C.) 374; In re Worst, 37 App. (D. C.) 341; In re Scharf, 37 App. (D. C.) 339; In re Wright, 34 App. (D. C.) 199; In re Lyon, 33 App. (D. C.) 501; In re Faber, 31 App. (D. C.) 531; In re Pearsall, 31 App. (D. C.) 265; In re Droop, 30 App. (D. C.) 334; In re Adams, 24 App. (D. C.) 275; In re Carpenter, 24 App. (D. C.) 110; In re Locke, 17 App. (D. C.) 314; In re Mond, 16 App. (D. C.) 351; In re Bedford, 14 App. (D. C.) 376; Durham v. Seymour, 6 App. (D. C.) 78 [app dism 161 U. S. 235, 16 SCt 452, 41 L ed. 682]; In re Heroult, 5 App. (D. C.) 90; Muntz v. Foster, 8 Jur. 206.

[a] **In Canada** the same rule obtains. Fada Radio, Ltd. v. Canadian Gen. Electric Co., Ltd., [1928] Can. S. C. 239, [1928] 2 DomLR 193.

Anticipatory effect of disclosures of design patents on mechanical inventions see infra § 53.

80. One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)].

Void patents as printed publications see infra § 53.

Anticipatory effect of disclosures of prior applications see supra § 43.

81. Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 CCA 91 [certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem].

[a] **Thus** a French patent, lapsed by reason of failure to pay an annual tax necessary to keep it alive, is nevertheless effective as an anticipation. Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 CCA 91 [certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem].

82. Cottrell, etc., Co. v. Claybourn Process Corp., 17 F. (2d) 279 [aff 24 F. (2d) 1014 mem]; Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 CCA 91 [certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem].

83. Sanders v. Hancock, 128 Fed. 424, 63 CCA 166; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 469, 473, 19 CCA 534.

"The statutes authorize the granting of patents only for such inventions as have not been patented or described in any printed publication in this or any foreign country before the applicant's embodiment of his own conception. It may be a hardship to meritorious inventors, who, at the expenditure of much time and thought, have hit upon some ingenious combination of mechanical devices, which, for aught they know, is entirely novel, to find that, in some remote time and place, some one else, of whom they never heard, has published to the world, in a patent or a printed publication, a full description of the very combination over which they have been puzzling; but in such cases the act, none the less, refuses them a patent." New Departure Bell Co. v. Bevin Bros. Mfg. Co., supra.

84. Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 CCA 91 [certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem]; In re Brewster, 57 App. (D. C.) 268, 20 F. (2d) 284.

Paper patents see infra § 48.

85. Safety Gas Lighter Co. v. Fischer, 236 Fed. 955 [aff 247 Fed. 1005 mem, 159 CCA 652]; Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem].

[a] **German gebrauchmuster.**—(1) The instrument known under the German law as a "gebrauchmuster" is somewhat similar to a United States design patent. It protects a new construction, without relation to its technical effect. In distinction from a United States design patent, a German gebrauchmuster protects not only the outer appearance or shape or artistic design of the model, but also the construction of the inner parts thereof. In examining a gebrauchmuster in the German patent office, as to whether the same is to be registered or not, the title of the gebrauchmuster only is considered, since the latter only is made officially public by printing it in the proper German publication. Steiner v. Schwarz, 148 Fed. 868. (2) Whether a "gebrauchmuster" is to be given the effect of a patent as an anticipation seems to be in doubt. Permutit Co. v. Wadham, 13 F. (2d) 454. (3) In one case such effect was claimed and denied. Steiner v. Schwarz, supra. (4) In a later case the contrary view was taken. Safety Gas Lighter Co. v. Fischer, 236 Fed. 955 [aff 247 Fed. 1005 mem, 159 CCA 652].

86. Safety Gas Lighter Co. v. Fischer, supra; Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 CCA 91 [certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem].

87. Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622, 78 CCA 394.

88. Columbus Chain Co. v. Standard Chain Co., supra.

89. Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; A. Schrader's Son, Inc. v. Wein Sales Corp., 3

of a patent,[90] or the date upon which he made application for a patent.[91] An invention is "patented," as that term is used in our statutes, when a patent investing the patentee with the grant of a monopoly is actually issued,[92] provided it is then made accessible to the public.[93] The term does not mean the preliminary proceedings.[94]

United States patents. While a different rule sometimes obtains where the issue is whether the inventor is the first inventor of the art or instrument for which a patent is claimed,[95] a United States patent speaks as an anticipation from the date of its issue rather than from the date of the application.[96]

English patents. An invention is not "patented" in England until the enrollment or sealing of the complete specifications,[97] and an English patent becomes effective as an anticipation only from the date of the enrollment of the complete specification.[98] If a provisional specification is filed, the invention so described is not "patented" until the complete specification has been filed and accepted.[99]

Canadian patents. A Canadian patent is effective as an anticipation from its date of issue.[1] The date upon which the patent is delivered to the patentee is immaterial.[2]

French patents. The date upon which a French patent becomes effective as an anticipation is the date of its issue.[3]

German patents. Under the patent laws of Germany, a patent granted becomes operative from the day following the filing of the application.[4] The publication or "ausgegeben" date is the date upon which the patent is actually issued,[5] and it is upon this latter date that a German patent becomes effective as an anticipation.[6]

Where a patent is issued in a foreign country and afterward in the United States, the date of the foreign application controls in determining anticipation.[7]

[§ 46] **c. Sufficiency of Disclosure.** In order that an invention may be anticipated by a prior patent the latter must disclose the complete and operative invention in such full, clear, and exact terms as to enable any person skilled in the art to which the invention relates, or is most nearly connected, to prac-

F. (2d) 999 [aff 9 F. (2d) 306]; Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655; Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; Barber v. Otis Motor Sales Co., 265 Fed. 675 [rev on other grounds 271 Fed. 171]; Starch Bros. Co. v. Hinman, 259 Fed. 222, 170 CCA 290; Perlman v. Standard Welding Co., 231 Fed. 453 [aff 231 Fed. 734, 146 CCA 18]; Miner v. T. H. Symington Co., 229 Fed. 730, 144 CCA 140 [rev on other grounds 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045]; Autosales Gum, etc., Co. v. Ryede Specialty Works, 222 Fed. 956 [aff 223 Fed. 1021 mem, 138 CCA 648]; Thatcher v. Baltimore, 219 Fed. 909 [aff 230 Fed. 1022, 144 CCA 659]; Rembusch v. Bennethum, 214 Fed. 257; Johns-Pratt Co. v. E. H. Freeman Electric Co., 201 Fed. 356 [aff 204 Fed. 288, 122 CCA 512]; Louden Mach. Co. v. Strickler, 186 Fed. 522 [rev on other grounds 195 Fed. 751, 115 CCA 551]; Single Tube Auto., etc., Tire Co. v. Continental Rubber Works, 174 Fed. 50 [aff 178 Fed. 452, 101 CCA 436]; Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622, 78 CCA 394; Eck v. Kutz, 132 Fed. 758; Anderson v. Collins, 122 Fed. 451, 58 CCA 669; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 282 [aff 123 Fed. 882, 59 CCA 370 (certiorari den 198 U. S. 584 mem, 25 SCt 802 mem, 49 L. ed. 1173 mem)]; Von Schmidt v. Bowers, 80 Fed. 121, 25 CCA 323; American Roll-Paper Co. v. Weston, 45 Fed. 686, 51 Fed. 237 [aff 59 Fed. 147]; Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586.

90. Du Bois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895; Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655 [aff 292 Fed. 249]; Wolf v. National Parlor Suit Co., 244 Fed. 470 (prior patent issued on later application); Hamilton Beach Mfg. Co. v. P. A. Geier Co., 230 Fed. 430, 144 CCA 572; Miner v. T. H. Symington Co., 229 Fed. 730, 144 CCA 140 [rev on other grounds 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045]; Alvord v. Smith, etc., Ironworks, 216 Fed. 150; Patents Selling, etc., Co. v. Dunn, 214 Fed. 1023; E. H. Freeman Electric Co. v. Johns-Pratt Co., 204 Fed. 288, 122 CCA 512 [aff 201 Fed. 356]; Gray Tel. Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 CCA 353; Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622, 78 CCA 394; Anderson v. Collins, 122 Fed. 451, 58 CCA 669; Von Schmidt v. Bowers, 80 Fed. 121, 25 CCA 323; National Spring Co. v. Union Car Spring Mfg. Co., 17 F. Cas. No. 10,051, 1 Bann. & A. 240, 12 Blatchf. 80; Carr's Application, 57 App. (D. C.) 112, 17 F. (2d) 959; Doble v. Scott, 54 App. (D. C.) 97, 295 Fed. 238.

91. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Von Schmidt v. Bowers, 80 Fed. 121, 25 CCA 323; Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440.

92. Elkon Works v. Welworth Automotive Corp., 25 F. (2d) 968; Edison Electric Light Co. v. Waring Electric Co., 59 Fed. 358; American Bell Tel. Co. v. Cushman, 57 Fed. 842; Schoerken v. Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209. And see cases infra notes 93–7.

93. Schoerken v. Swift, etc., Co., supra.

Secret patents see infra § 47.

94. Edison Electric Light Co. v. Waring Electric Co., 59 Fed. 358; American Bell Tel. Co. v. Cushman, 57 Fed. 842.

95. See infra § 128.

96. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Sparks-Withington Co. v. E. A. Laboratories, 295 Fed. 534; Perfection Disappearing Bed Co., Inc. v. Murphy Wall Bed Co., 266 Fed. 698 [certiorari den 254 U. S. 652 mem, 41 SCt 149 mem, 65 L. ed. 458 mem]; Camp v. Portable Wagon Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem]; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Hamilton Beach Mfg. Co. v. P. A. Geier Co., 230 Fed. 430, 144 CCA 572; Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168; Sundh Electric Co. v. Interborough Rapid Transit Co., 222 Fed. 334; Alvord v. Smith, etc., Ironworks, 216 Fed. 150; Vacuum Engineering Co. v. Dunn, 209 Fed. 219, 126 CCA 313; Turner Brass Works v. Appliance Mfg. Co., 203 Fed. 1001; General Electric Co. v. Allis-Chalmers Co., 190 Fed. 165; Gray Tel. Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 CCA 353; Eck v. Kutz, 132 Fed. 758; Anderson v. Collins, 122 Fed. 451, 58 CCA 669; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 282 [aff 123 Fed. 882, 59 CCA 370 (certiorari den 198 U. S. 584 mem, 25 SCt 802 mem, 49 L. ed. 1173 mem)].

97. Alvord v. Smith, etc., Ironworks, 216 Fed. 150; Turner Brass Works v. Appliance Mfg. Co., 203 Fed. 1001; Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co., 168 Fed. 73; Appert v. Brownsville Plate Glass Co., 144 Fed. 115; Edison Electric Light Co. v. Waring Electric Co., 59 Fed. 358; American Bell Tel. Co. v. Cushman, 57 Fed. 842; Rousseau v. Brown, 21 App. (D. C.) 73.

Prior applications as anticipations see supra § 43.

98. Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; A. Schrader's Son, Inc. v. Wein Sales Corp., 3 F. (2d) 999 [aff 9 F. (2d) 306]; Barber v. Otis Motor Sales Co., 265 Fed. 675 [rev on other grounds 271 Fed. 171]; Ireson v. Pierce, 39 Fed. 795; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117; Bliss v. Merrill, 33 Fed. 39; Railway Register Mfg. Co. v. Broadway, etc., R. Co., 26 Fed. 522 [app dism 149 U. S. 783 mem, 13 SCt 1051 mem, 37 L. ed. 958 mem]; Coburn v. Schroeder, 11 Fed. 425, 20 Blatchf. 392; Lorillard v. Carroll, 9 Fed. 509, 20 Blatchf. 63; Schoerken v. Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209; Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; Willimantic Linen Co. v. Clark Thread Co., 30 F. Cas. No. 17,763, 4 Bann. & A. 133 [rev on other grounds 140 U. S. 481, 11 SCt 846, 35 L. ed. 521]; American Bell Tel. Co. v. Cushman, 65 Off. Gaz. (U. S.) 135.

99. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Parsons v. Colgate, 15 Fed. 600, 21 Blatchf. 171; Coburn v. Schroeder, 11 Fed. 425, 20 Blatchf. 392; Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586.

1. Bate Refrigerating Co. v. Gillett, 13 Fed. 553.

2. Bate Refrigerating Co. v. Gillett, supra.

3. A. Schrader's Son, Inc. v. Wein Sales Corp., 3 F. (2d) 999 [aff 9 F. (2d) 306]; Barber v. Otis Motor Sales Co., 265 Fed. 675 [rev on other grounds 271 Fed. 171]; Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co., 168 Fed. 73; Appert v. Brownsville Plate Glass Co., 144 Fed. 115.

4. Queen v. Friedlander, 149 Fed. 771.

5. Queen v. Friedlander, supra.

6. A. Schrader's Son, Inc. v. Wein Sales Corp., 3 F. (2d) 999 [aff 9 F. (2d) 306]; Merrell-Soule Co. v. Powdered Milk Co., 222 Fed. 911, 138 CCA 391 [aff 215 Fed. 922]; Queen v. Friedlander, 149 Fed. 771.

7. Jay v. Weinberg, 250 Fed. 469 [aff 262 Fed. 973].

tice the invention without the exercise of inventive skill of his own.[8] It has been asserted that this rule is enforced with particular strictness with respect to foreign patents.[9] Every element or attribute of the invention not obvious to those skilled in the art must be disclosed.[10] Prior patents are considered

8. De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; Griswold v. Buckle Proof Shingle Co., 26 F. (2d) 466; Schuricht v. McNutt, 26 F. (2d) 388; Universal Oil Products Co. v. Skelly Oil Co., 20 F. (2d) 995, Radio Corp. of America v. E. J. Edmond & Co., Inc., 20 F. (2d) 929; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; James Heddon's Sons v. South Bend Bait Co., 14 F. (2d) 805 [certiorari den 273 U. S. 737 mem, 47 SCt 245 mem, 71 L. ed. 867 mem]; Permutit Co. v. Wadham, 13 F. (2d) 454; Parker Rust Proof Co. v. Ford Motor Co., 6 F. (2d) 649; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [rev 293 Fed. 771, and certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Atlantic, etc., Co. v. Wood, 288 Fed. 148; H. Ward Leonard, Inc. v. Maxwell Motor Sales Co., 288 Fed. 62; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [aff 274 Fed. 937, and certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co., 269 Fed. 144; Bruckman v. Stephens, 268 Fed. 374; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; Whitlock Coil Pipe Co. v. Mayo Radiator Co., 266 Fed. 215; Electro Bleaching Gas Co. v. Miller, 264 Fed. 429 [rev on other grounds 276 Fed. 379]; Beitman v. Strater, 262 Fed. 443; Consolidated Window Glass Co. v. Window Glass Mach. Co., 261 Fed. 362 [certiorari den 251 U. S. 558 mem, 40 SCt 179 mem, 64 L. ed. 413 mem]; Chicago v. Strauss Bascule Bridge Co., 261 Fed. 358; Williams v. Kaufmann, 259 Fed. 859, 170 CCA 659; Vacuum Cleaner Co. v. Thompson Mfg. Co., 258 Fed. 239 [app dism 272 Fed. 1023]; Pittsburgh Iron, etc., Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464, 140 CCA 150; Johns-Pratt Co. v. Snow, 212 Fed. 173 [aff 214 Fed. 110, 130 CCA 484]; American Graphophone Co. v. Leeds, etc., Co., 170 Fed. 327, 95 CCA 511; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; Warren Bros. Co. v. Owosso, 166 Fed. 309, 92 CCA 227 [certiorari den 214 U. S. 525 mem, 29 SCt 703 mem, 53 L. ed. 1067 mem]; Underwood Typewriter Co. v. Elliott-Fisher Co., 165 Fed. 927; Pettibone v. Pennsylvania Steel Co., 133 Fed. 730 [rev on other grounds 141 Fed. 95, 72 CCA 97]; Kirchberger v. American Acetylene Burner Co., 128 Fed. 599, 64 CCA 107; Goss Printing-Press Co. v. Scott, 110 Fed. 402, 49 CCA 97 [certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem]; Springfield Furnace Co. v. Miller Down-Draft Furnace Co., 96 Fed. 418; Badische Anilin, etc., Fabrik v. Kalle, 94 Fed. 163 [aff 104 Fed. 802, 44 CCA 201]; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [rev on other grounds 96 Fed. 850, 37 CCA 593 (rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968)]; Hanifen v. E. H. Godschalk Co., 84 Fed. 649, 28 CCA 507 [rev 78 Fed. 811]; Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 59 Fed. 902; Shannon v. Bruner, 33 Fed. 289 [aff 149 U. S. 767 mem, 13 SCt 1043 mem, 37 L. ed. 930]; U. S. Bung Mfg. Co. v. Independent Bung, etc., Co., 31 Fed. 76, 24 Blatchf. 406; Nathan v. New York El. R. Co., 2 Fed. 225; Atlantic Giant-Powder Co. v. Parker, 2 F. Cas. No. 625, 4 Bann. & A. 292, 16 Blatchf. 281; Goff v. Stafford, 10 F. Cas. No. 5,504, 3 Bann. & A. 610; Jenkins v. Walker, 13 F. Cas. No. 7,275, 5 Fish. Pat. Cas. 347, Holmes 120; Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866]; In re Ek, 57 App. (D. C.) 203, 19 F. (2d) 677; In re Haskell, 51 App. (D. C.) 243, 278 Fed. 326; In re Zenk, 50 App. (D. C.) 25, 267 Fed. 327; Matter of McCloskey, 10 D. C. 14.

"The documents relied upon must teach the art; must be such that the world has knowledge of the art; must be such that qualified persons, without the exercise of the inventive genius, may produce the device from the disclosures." Vacuum Cleaner Co. v. Thompson Mfg. Co., 258 Fed. 239, 240 [app dism 272 Fed. 1023].

9. Schuricht v. McNutt, 26 F. (2d) 388; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260].

10. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; In re Deli, 26 F. (2d) 1008; Foltz's Application, 26 F. (2d) 983; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [rev 17 F. (2d) 815, and certiorari den 49 SCt 32 mem]; In re Bliss, 26 F. (2d) 524; Griswold v. Buckle Proof Shingle Co., 26 F. (2d) 466; N. O. Nelson Mfg. Co. v. F. E. Meyers, etc., Co., 25 F. (2d) 659; Alumino-Thermic Corp. v. Goldschmidt Thermit Co., 25 F. (2d) 206; Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196; Butler v. Burch Plow Co., 23 F. (2d) 15; Radio Corp. of America v. J. H. Bunnelly Co., Inc., 22 F. (2d) 847 [certiorari den 269 U. S. 565 mem, 46 SCt 24 mem, 70 L. ed. 414 mem]; Haynes Stellite Co. v. Chesterfield, 22 F. (2d) 635; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 22 F. (2d) 259; Wensel v. Gold Hill Hardware Mfg. Co., 21 F. (2d) 974; Simplex Piston Ring Co. v. Hamilton, 21 F. (2d) 196 [aff 25 F. (2d) 1022 mem]; Radio Corp. of America v. E. J. Edmond & Co., Inc., 20 F. (2d) 929; Kulp v. Bridgeport Hardware Mfg. Corp., 19 F. (2d) 659; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Heinke v. Chipman Knitting Mills, 19 F. (2d) 384; Trico Products Corp. v. Perfection Products Co., 19 F. (2d) 173; Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868]; Bakelite Corp. v. Brunswick-Balke-Collender Co., 18 F. (2d) 384; Bankers' Utilities Co., Inc. v. Pacific Nat. Bank, 18 F. (2d) 16 [certiorari den 275 U. S. 529 mem, 48 SCt 21 mem, 72 L. ed. 409 mem]; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Deppe v. General Motors Corp., 15 F. (2d) 419; Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Hewes v. Gay, 11 F. (2d) 165; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Sparks-Withington Co. v. E. A. Laboratories, 295 Fed. 534; Backstay Mach., etc., Co. v. Zenite Metal Co., 293 Fed. 23; Miller v. Monarch Printing Co., 285 Fed. 364; Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584; Triumph Trap Co. v. Oneida Community Co., 279 Fed. 142; Seager v. Stewart-Warner Speedometer Corp., 277 Fed. 824; Tucker v. Universal Auto Co., 277 Fed. 469 [aff 284 Fed. 1022 mem]; Travers Co. v. Mecky Co., 270 Fed. 775; Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co., 269 Fed. 144; Cutler Hammer Co. v. Pawling, etc., Co., 267 Fed. 980; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49]; Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; I. T. S. Rubber Co. v. United Lace, etc., Mfg. Co., 266 Fed. 375; Burgess Battery Co. v. Solar Light Co., 266 Fed. 368; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Hedman Mfg. Co. v. Todd Protectograph Co., 265 Fed. 273; Nisbet v. Perkins, 264 Fed. 974; Electro Bleaching Gas Co. v. Miller, 264 Fed. 429 [rev on other grounds 276 Fed. 379]; Safety Car Heating, etc., Co. v. Gould Coupler Co., 263 Fed. 970; Beitman v. Strater, 262 Fed. 443; Baltzley v. Spengler Loomis Mfg. Co., 262 Fed. 423; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Reed v. Hughes Tool Co., 261 Fed. 192 [certiorari den 251 U. S. 561 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; Auto Pneumatic Action Co. v. Otto Higel Co., 260 Fed. 950, 171 CCA 592; Hutchins Car Roofing Co. v. Standard R. Equipment Co., 259 Fed. 226, 170 CCA 294; U. S. Gypsum Co. v. Bestwall Mfg. Co., 258 Fed. 647 [aff 270 Fed. 542]; Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co., 257 Fed. 314, 168 CCA 398; Edmands v. Perlman, 255 Fed. 564, 166 CCA 632; Stafford Co. v. Draper Corp., 255 Fed. 548, 166 CCA 616; Featheredge Rubber Co. v. Miller Rubber Co., 250 Fed. 255; General Electric Co. v. Cooper-Hewitt Electric Co., 249 Fed. 61, 161 CCA 121 [certiorari den 246 U. S. 668 mem, 38 SCt 336 mem, 63 L. ed. 930 mem]; Chicago Towel Co. v. Rousso, 248 Fed. 693, 160 CCA 593; Buffalo Forge Co. v. Buffalo, 246 Fed. 135; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Foster v. T. L. Smith Co., 244 Fed. 946, 157 CCA 296; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Perlman v. Standard Welding Co., 231 Fed. 453 [aff 231 Fed. 734, 146 CCA 18]; Hamilton Beach Mfg. Co. v. P. A. Geier Co., 230 Fed. 430, 144 CCA 572; Miner v. T. H. Symington Co., 229 Fed. 730, 144 CCA 140 [rev on other grounds 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045]; Pittsburgh Water Heater Co. v. Beler Water Heater Co., 228 Fed. 674, 143 CCA 196 [certiorari den 241 U. S. 667 mem, 36 SCt 551 mem, 60 L. ed. 1229 mem]; General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464, 140 CCA 150; Sundh Electric Co. v. Interborough Rapid Transit Co., 222 Fed. 334; Thatcher v. Baltimore, 219 Fed. 909 [aff 230 Fed. 1022, 144 CCA 659]; Merrell-Soule Co. v. Powdered Milk Co., 215 Fed. 922 [aff 222 Fed. 911, 136 CCA 391]; Read Mach. Co. v. Jaburg, 212 Fed. 951; Macomber, etc., Rope Co. v. Hazard Mfg. Co., 211 Fed. 976, 128 CCA 474; Charles Hunnicutt Co. v. A. B. Gaston Co., 207 Fed. 585 [aff 218 Fed. 176, 134 CCA 56]; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Baltimore City Crown Cork, etc., Co. v. Brooklyn Bottle Stopper Co., 201 Fed. 344; Valley Iron Works v. T. B. Wood's Sons Co., 196 Fed. 780, 116 CCA 46; Thompson, etc., Co. v. Moxie Nerve Food Co., 189 Fed. 911; Gillette Safety Razor Co. v. Clark Blade, etc., Co., 187 Fed. 149 [aff 194 Fed. 421, 114 CCA 383]; Hartford v. Moore, 181 Fed. 132; Forest City Fdy., etc., Co. v. Barnard, 176 Fed. 561, 100 CCA 197; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; General Electric Co. v. Smith, 173 Fed. 790, 97 CCA 514; Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 CCA 446; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; Thomson-Houston Electric Co. v. Traction Equipment Co., 164 Fed. 425; Crown Cork, etc., Co. v. Ideal Stopper Co.,

as part of the prior art only as to what they disclose on their face,[11] unaided by extrinsic evidence,[12] except where extrinsic evidence is necessary to elucidate and make clear what is disclosed.[13] This, it has been asserted, is particularly true if the prior patent contains no suggestion that it was designed for the performance of the functions of the subsequent invention and was in fact never adapted or actually used for that purpose.[14] Extrinsic evidence is not admissible to show that a word having a sensible meaning in the context was erroneously used for another word.[15] Nor can a patent have implied into it, from necessity, more than it fairly shows, to make it represent an operative structure.[16] An alleged anticipating patent is not to be extended beyond its fair meaning and scope,[17] or reconstructed in the light of the subsequent invention and then used as an anticipation.[18] The invention disclosed by the specifications and drawings, and not the language of the claims of the patent, controls.[19] The sufficiency of the disclosures of prior patents must be tested by what was known by persons skilled in the art before the date of the later invention.[20] An invention is not anticipated by the earlier issuance of a patent containing mere suggestion or prophecy of what may be done,[21] what ought to be accomplished,[22] mere conjectural allusions,[23] or vague, indefinite, general, or ambiguous references to the subject matter of the invention.[24] The prior patent must disclose how the desired result can be ob-

123 Fed. 666 [aff 131 Fed. 244, 65 CCA 436 (certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem)]; National Electrical Supply Co. v. U. S., 64 Ct. Cl. (U. S.) 617; Carr's Application, 59 App. (D. C.) 112, 17 F. (2d) 959; Kolinski v. Thompson Voting Mach. Co., 55 App. (D. C.) 378, 6 F. (2d) 681; In re Haskell, 51 App. (D. C.) 243, 278 Fed. 326; In re Glafcke, 51 App. (D. C.) 204, 277 Fed. 603; In re Lower, 50 App. (D. C.) 159, 269 Fed. 675; In re Zenk, 50 App. (D. C.) 25, 267 Fed. 327; In re Huff, 48 App. (D. C.) 258.

[a] **Illustrations.**—(1) A process patent for purifying water, by treating with chlorin a minor body, was not anticipated by mere reference in an earlier patent to the method of indirect chlorination, without description, and coupled with the declaration that it was inefficient. Electro Bleaching Gas Co. v. Miller, 264 Fed. 429 [rev on other grounds 276 Fed. 379]. (2) Claims for a welt having longitudinal parallel beads connected to a body so as to permit the beads to be spread apart for the insertion of tacks and then to resume their close together positions, and thus to conceal the tacks, are not anticipated by the disclosed product of a patented machine wherein two colored welts are sewed into a seam in close together positions, and only one of them is capable of being swung back and then resuming its former position. Backstay Mach., etc., Co. v. Zenite Metal Co., 293 Fed. 23. (3) A patent for a post for loose leaf blank books having the two cardinal characteristics of resiliency and confinement to one plane was not anticipated by rigid posts, or by a spiral spring post affording resiliency, but not confined to one plane. Miller v. Monarch Printing Co., 285 Fed. 364.

11. Schuricht v. McNutt, 26 F. (2d) 388; N. O. Nelson Mfg. Co. v. F. E. Meyers, etc., Co., 25 F. (2d) 659; Wensel v. Gold Hill Hardware Mfg. Co., 21 F. (2d) 974; Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; Simplex Piston Ring Co. v. Hamilton, 21 F. (2d) 196 [aff 25 F. (2d) 1022 mem]; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F.(2d) 1006]; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Deppe v. General Motors Corp., 15 F. (2d) 419; Mohr v. Alliance Securities Co., 14 F. (2d) 799; Blake Automotive Equipment Co. v. Cross Mfg. Co., 13 F. (2d) 30; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Fulton Co. v. Bishop, etc., Co., 284 Fed. 774; Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Munising Paper Co. v. American Sulphite Pulp Co., 228 Fed. 700, 143 CCA 222; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; New England Motor Co. v. B. F. Sturtevant Co., 140 Fed. 866 [rev on other grounds 150 Fed. 131, 80 CCA 85]; Westinghouse Air-Brake Co. v. Great Northern R. Co., 88 Fed. 258, 31 CCA 525; In re Ek, 57 App. (D. C.) 203, 19 F. (2d) 677.

12. Davis-Bournonville Co. v. Alexander Milburn Co., 1 F. (2d) 227 [rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651].

13. Eschenbach v. Miller Saw Trimmer Co., 23 F. (2d) 145; Davis-Bournonville Co. v. Alexander Milburn Co., 1 F. (2d) 227 [rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651].

14. Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Electro Bleaching Gas Co. v. Miller, 264 Fed. 429 [rev on other grounds 276 Fed. 379]; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638].

15. Badische Anilin, etc., Fabrik v. Kalle, 94 Fed. 163 [aff 104 Fed. 802, 44 CCA 201].

16. Wirt v. Farrelly, 84 Fed. 891 [aff 104 Fed. 1005 mem, 44 CCA 262 mem].

17. Respro, Inc. v. Sydeman, 11 F. (2d) 779 [aff 14 F. (2d) 1023].

18. Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 439]; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Mohr v. Alliance Securities Co., 14 F. (2d) 799; Blake Automotive Equipment Co. v. Cross Mfg. Co., 13 F. (2d) 30; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; In re Haskell, 51 App. (D. C.) 243, 278 Fed. 326.

19. General Electric Co. v. Cooper-Hewitt Electric Co., 249 Fed. 61, 161 CCA 121 [certiorari den 246 U. S. 668 mem, 38 SCt 336 mem, 63 L. ed. 930 mem].

20. Johns-Pratt Co. v. Snow, 212 Fed. 173 [aff 214 Fed. 110, 130 CCA 484]; Bowers v. San Francisco Bridge Co., 91 Fed. 381 [app dism 105 Fed. 1005 mem, 44 CCA 685 mem].

21. Griswold v. Buckle Proof Shingle Co., 26 F. (2d) 466; Schuricht v. McNutt, 26 F. (2d) 388; Butler v. Burch Plow Co., 23 F. (2d) 15; Haynes Stellite Co. v. Chesterfield, 22 F. (2d) 635; Kulp v. Bridgeport Hardware Mfg. Corp., 19 F. (2d) 659; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; American Stainless Steel Co. v. Ludlum Steel Co., 290 Fed. 103; Rodman Chemical Co. v. Deeds Commercial Laboratories, 261 Fed. 189; Todd Proctectograph Co. v. Hedman Mfg. Co., 254 Fed. 829 [aff 265 Fed. 273]; General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464, 140 CCA 150; Merrell-Soule Co. v. Powdered Milk Co., 215 Fed. 922 [aff 222 Fed. 911, 136 CCA 391]; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 212 Fed. 192 [rev on other grounds 216 Fed. 146, 132 CCA 240]; Mosler v. Lurie, 209 Fed. 364, 126 CCA 290; Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co., 184 Fed. 620; American Graphophone Co. v. Leeds, etc., Co., 170 Fed. 327, 95 CCA 511; Canda v. Michigan Malleable Iron Co., 124 Fed. 486, 492, 61 CCA 194; Westinghouse Air-Brake Co. v. Great Northern R. Co., 88 Fed. 258, 81 CCA 525; Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 59 Fed. 902.

"Nor can we think that the existence in the Patent Office of something which might merely supply a hint, but was not specifically described or claimed as intended to be covered by a patent, ought to be held as an anticipation of an otherwise valid invention. Inventors are not precluded by the embryonic and shapeless ideas found in former patents, any more than they are by such undeveloped matter existing elsewhere." Canda v. Michigan Malleable Iron Co., supra.

22. Gordon v. Warder, 150 U. S. 47, 14 SCt 32, 37 L. ed. 992; American Stainless Steel Co. v. Ludlum Steel Co., 290 Fed. 103; A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309.

23. American Graphophone Co. v. Leeds, etc., Co., 170 Fed. 327, 95 CCA 511.

24. Bone v. Marion County, 251 U. S. 134, 40 SCt 96, 64 L. ed. 188 [aff 249 Fed. 211, 161 CCA 247]; De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [rev 17 F. (2d) 815, and certiorari den 49 SCt 32 mem]; Schuricht v. McNutt, 26 F. (2d) 388; Butler v. Burch Plow Co., 23 F. (2d) 15; Haynes Stellite Co. v. Chesterfield, 22 F. (2d) 635; Radio Corp. of America v. E. J. Edmond & Co., Inc., 20 F. (2d) 929; Permutit Co. v. Wadham, 13 F. (2d) 454; Parker Rust Proof Co. v. Ford Motor Co., 6 F. (2d) 649; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Atlantic, etc., Co. v. Wood, 288 Fed. 148; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464, 140 CCA 150; Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co., 184 Fed. 620; American Graphophone Co. v. Leeds, etc., Co., 170 Fed. 327, 95 CCA 511; Warren Bros. Co. v. Owosso, 166 Fed. 309, 92 CCA 227 [certiorari den 214 U. S. 525 mem, 29 SCt 703 mem, 53 L. ed. 1067 mem]; Cimiotti Unhairing Co. v. Comstock Unhairing Co., 115 Fed. 524; In re Haskell, 51 App. (D.

tained.[25] Mere reference to the method comprising an invention without description and coupled with the declaration that such a method is inefficient does not amount to anticipation.[26] Prior patents, however, must be read in the light of the knowledge possessed by persons skilled in the art to which the invention relates,[27] including the teaching of earlier patents,[28] and publications;[29] and an invention is anticipated if, by the aid of such disclosures, they could have made and used it.[30] In other words, a patent is not deprived of its effect as an anticipation by the rule requiring full, clear, and exact description where the variation between what is described in it and the later invention consists only in matters not requiring inventive skill.[31] A patent is not rendered ineffective as an anticipation

C.) 243, 278 Fed. 326.

[a] **Illustration.**—Claims for a process for making a cement from a mixture of black albumen and disodium silicate, substantially, although not actually, in the proportions specified, whereby the mixture is given a syrupy consistency, and for the product of such process, are not anticipated by a patent dated twenty-two years before the filing of the application, which stated generally that all albumens acted as acids toward alkalis and formed double salts, especially where, ten years after the earlier patent, an expert had stated that the mixture disclosed thereby had not been used with good results. In re Haskell, 51 App. (D. C.) 243, 278 Fed. 326.

25. Gordon v. Warder, 150 U. S. 47, 14 SCt 32, 37 L. ed. 992; Kulp v. Bridgeport Hardware Mfg. Corp., 19 F. (2d) 659; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Deppe v. General Motors Corp., 15 F. (2d) 419; American Stainless Steel Co. v. Ludlum Steel Co., 290 Fed. 103; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; Individual Drinking Cup Co. v. Sanitary Products Corp., 267 Fed. 196 [rev on other grounds 271 Fed. 241]; Johns-Pratt Co. v. Snow, 212 Fed. 173 [aff 214 Fed. 110, 130 CCA 484]; Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co., 184 Fed. 620; Graham v. Gammon, 10 F. Cas. No. 5,668, 3 Bann. & A. 7, 7 Biss. 490; Kolinski v. Thompson Voting Mach. Co., 55 App. (D. C.) 378, 6 F. (2d) 681.

"We do not regard the patent of Watson, Renwick and Watson, dated May 13, 1851, as an anticipation of Gordon, although the specification in that case did contain a paragraph stating that it might be advantageous, in some cases, to make the binder adjustable in respect to the cutting apparatus. No means were there provided, or method pointed out, whereby such a desirable result could be obtained." Gordon v. Warder, 150 U. S. 47, 50, 14 SCt 32, 37 L. ed. 992.

26. Electro Bleaching Gas Co. v. Miller, 264 Fed. 429 [rev on other grounds 276 Fed. 379].

27. American Stainless Steel Co. v. Ludlum Steel Co., 290 Fed. 103; Crone v. John J. Gibson Co., 247 Fed. 503, 160 CCA 13; In re Travilla, 46 App. (D. C.) 36.

28. Reflectolyte Co. v. Luminous Unit Co., 20 F. (2d) 607; Van Dorn Iron Works Co. v. Mathis Bros. Co., 260 Fed. 400, 171 CCA 266; Vacuum Cleaner Co. v. Thompson Mfg. Co., 258 Fed. 239 [app dism 272 Fed. 1023]; Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; Peters v. Chicago Biscuit Co., 215 Fed. 724, 132 CCA 134; Royden Marble Mach. Co. v. Davis, 189 Fed. 622; Bullock Electric Mfg. Co. v. General Electric Co., 162 Fed. 28, 89 CCA 68; Voightmann v. Weis, etc., Cornice Co., 133 Fed. 298 [aff 148 Fed. 848, 78 CCA 538]; In re Ayers, 57 App. (D. C.) 346, 23 F. (2d) 767; Peters' Application, 53 App. (D. C.) 239, 289 Fed. 637; In re Zenk, 50 App. (D. C.) 25, 267 Fed. 327; In re Stadeker, 50 App. (D. C.) 20, 267 Fed. 322; In re Sunderland, 47 App. (D. C.) 234; In re Gold, 45 App. (D. C.) 294; In re Heeren, 42 App. (D. C.) 216; In re Harris, 37 App. (D. C.) 374; In re Faber, 31 App. (D. C.) 531; In re Droop, 30 App. (D. C.) 334; In re Adams, 24 App. (D. C.) 275; In re Mond, 16 App. (D. C.) 351.

[a] **Illustrations.**—(1) If, in an application for a patent for a process for preparing, storing, and dispensing beverages (for the apparatus for carrying out which process applicant has been granted a patent), each step of the process covered by its own claims is complete in itself and independent of the other, the claims covering the successive steps are in the nature of an aggregation of unrelated functions performed by applicant's apparatus, even though the beverage produced by the process may be a beverage superior to others; and such claims are not allowable if the several steps of the process are found in different patents, although the entire process is not anticipated in any single reference. In re Harris, 37 App. (D. C.) 374. (2) The claims of an application for a patent for a surgical dressing, comprising a binding impregnated with an ointment having an oleaginous base, are anticipated by two patents, one disclosing an antiseptic dressing without such a base, and the other a liniment having such a base. In re Faber, 31 App. (D. C.) 531.

29. Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; Ruths' Application, 53 App. (D. C.) 64, 288 Fed. 270.

30. Pickering v. McCullough, 104 U. S. 310, 26 L. ed. 749; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Supreme Mfg. Corp. v. Security Mfg. Co., 299 Fed. 65 [certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 469 mem]; In re Scheib, 290 Fed. 343; Universal Rim Co. v. Firestone Steel Products Co., 289 Fed. 884 [mod on other grounds 7 F. (2d) 24]; Fulton Co. v. Bishop, etc., Co., 284 Fed. 774; Barber v. Otis Motor Sales Co., 271 Fed. 171 [certiorari den 256 U. S. 693 mem, 41 SCt 535 mem, 65 L. ed. 1175 mem]; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680 (aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098)]; Barber v. Otis Motor Sales Co., 265 Fed. 675 [rev on other grounds 271 Fed. 171]; In re Smith, 262 Fed. 717; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Riter-Conley Mfg. Co. v. Atlanta Gaslight Co., 246 Fed. 840, 159 CCA 142; General Manifold, etc., Co. v. Simple Account Sales Book Co., 246 Fed. 125, 158 CCA 351; Barber v. Reo Motor Car Sales Co., 245 Fed. 938; Safety Gas Lighter Co. v. Fischer, 236 Fed. 955 [aff 247 Fed. 1005 mem, 159 CCA 652]; Meccano, Ltd. v. Wagner, 234 Fed. 912 [reopening authorized in Dist. Ct. 235 Fed. 890, 149 CCA 202]; American Graphophone Co. v. Gimbel, 234 Fed. 344; Merrell-Soule Co. v. Powdered Milk Co., 222 Fed. 911, 138 CCA 395 [aff 215 Fed. 922]; Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 CCA 91 [certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem]; Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 CCA 576 [rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286]; Model Bottling Mach. Co. v. Anheuser-Busch Brewing Assoc., 190 Fed. 573, 111 CCA 389 [certiorari den 223 U. S. 732 mem, 32 SCt 528 mem, 56 L. ed. 634 mem]; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 Fed. 362 [aff 176 Fed. 96, 100 CCA 26]; Westinghouse Air Brake Co. v. Christensen Engineering Co., 128 Fed. 437, 63 CCA 179; Edison v. American Mutoscope Co., 114 Fed. 926, 52 CCA 546 [certiorari den 186 U. S. 486 mem, 22 SCt 944 mem, 46 L. ed. 1261 mem]; Edison Electric Light Co. v. Waring Electric Co., 59 Fed. 358; Ireson v. Pierce, 39 Fed. 795; Bliss v. Merrill, 33 Fed. 39; Coburn v. Schroeder, 11 Fed. 425, 20 Blatchf. 392; Schoefken v. Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209; Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866]; Chapman v. Beede, 54 App. (D. C.) 209, 296 Fed. 956; Peters' Application, 53 App. (D. C.) 239, 289 Fed. 637; Parker's Application, 53 App. (D. C.) 209, 289 Fed. 607; Talley's Application, 53 App. (D. C.) 99, 288 Fed. 453; In re Keller, 51 App. (D. C.) 254, 278 Fed. 395; In re Zenk, 50 App. (D. C.) 25, 267 Fed. 327; In re Duncan, 46 App. (D. C.) 57; In re Braemer, 43 App. (D. C.) 190; Baltimore, etc., R. Co. v. Murphy, 38 App. (D. C.) 582; In re Wright, 34 App. (D. C.) 199; In re Lyon, 33 App. (D. C.) 501; In re Williams, 30 App. (D. C.) 117; In re Hodges, 28 App. (D. C.) 525; In re Welch, 28 App. (D. C.) 362; In re Bedford, 14 App. (D. C.) 376; De Florez v. Raynolds, 17 Off. Gaz. (U. S.) 503; Ullman v. Thompson, 57 Ind. A. 126, 106 NE 611.

[a] **Illustrations.**—(1) A claim for a gear of self-sustaining molded material, which is consolidated on a metal hub by heat and pressure, was anticipated by previous patents showing gear wheels made entirely of the same material, and showing such material consolidated with a metal hub by pressure without heat. Talley's Application, 53 App. (D. C.) 99, 288 Fed. 453. (2) A fluid cooler for the water jacket of a gas engine, made by nesting a number of small tubes having their ends expanded and shaped so as to fit closely together and entirely fill and close the side faces of the cooler is anticipated by a patent for a similar device in which the tubes are fastened together by a wire so as to permit the passage of the warm water between them, where in the patentee's specification it is set forth that, instead of using wire, the tubes may be flanged at either end and secured together so as to form narrow channels between the pipes, thus providing a means for expanding the tubes. In re Welch, 28 App. (D. C.) 362. (3) An invention relating to burial caskets, and particularly to means for sealing them, showing an elliptical space to receive liquid cement around the edge of the casket, made by an outwardly facing groove, is anticipated by a patent to another showing the same invention, except that the space in question is rectangular. In re Williams, 30 App. (D. C.) 117. (4) Claims for an interheater for a compound compressed air engine, using atmospheric air to impart heat to the compressed air within the interheater, are anticipated by a patent which shows that one body of air may impart heat to another body flowing in a coil, and by this imparting heat they increase the expansive power of the inclosed body of air. In re Hodges, 28 App. (D. C.) 525.

31. Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; Toledo Scale Co. v. Barnes Scale Co., 18 F. (2d) 965; Carson Inv. Co. v. Anaconda Copper Min. Co., 17 F. (2d) 815 [rev on other grounds 26 F. (2d) 651]; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L.

by the fact that its disclosures would not have enabled persons unskilled in the art to which the invention relates to make and use the invention.[32]

Advantages need not be described. The fact that a prior patent contains no description of the advantages of using the art or instrument which it discloses in the way pointed out by the later invention does not deprive it of effect as an anticipation.[33]

Identity of language unnecessary. It is not essential that the language used in describing the earlier invention be identical with the language by which the later inventor described his invention.[34]

Description of article of manufacture. A patent which describes an article of manufacture by enumerating its essential characteristics is not deprived of its effect as an anticipation by the fact that it does not describe the method of its manufacture.[35]

Drawings. Drawings attached to a prior patent may be used to explain any obscurity in the specification;[36] they are usually considered a part thereof,[37] and may even be relied upon to some extent to ascertain the form and position of some of the parts of a mechanism.[38] Anticipation is not disclosed by a drawing which only incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention and was not adopted and used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor.[39] The fact that a drawing, through error of the draftsman, shows a construction contrary to the reading of the patent does not give it effect as an anticipation in that particular.[40] Where there is a conflict between the drawings of a patent and the specifications, as a rule the specifications must govern.[41]

[§ 47] **d. Secret Patents.** In order that an invention may be anticipated by a prior patent, the disclosures contained in the patent must be accessible to the public.[42] Patents are sometimes, for public and special reasons, kept secret.[43] Such patents, although issued, are not effective as anticipations.[44]

[§ 48] **e. Paper Patents.** The mere fact that the subject matter of a prior patent has not been perfected into a practical and commercially successful art or instrument does not deprive it of effect as an anticipation.[45] As in other cases,[46] the test of anticipation is whether the disclosure of the patent is sufficient to enable persons skilled in the art to which the invention relates to make and use the invention without the exercise of further invention.[47] A "paper patent" is inoperative as an anticipation if it fails to make such disclosure,[48] but not otherwise.[49] It has been asserted, however, that anticipatory matter which has never gone into practical

ed. 1317 mem]; Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Kil-Nock Co. v. Chicago Plating Co., 10 F. (2d) 536; A. Schrader's Son, Inc. v. Wein Sales Corp., 3 F. (2d) 999 [aff 9 F. (2d) 306].

32. American Stainless Steel Co. v. Ludlum Steel Co., 290 Fed. 103; Talley's Application, 53 App. (D. C.) 99, 288 Fed. 453; Anglo-American Brush Electric Light Corp. v. King, [1892] A. C. 367; Pickard v. Prescott, [1892] A. C. 263; Betts v. Neilson, L. R. 3 Ch. 429.

[a] **Rule applied.**—The disclosures of prior patents for stainless steel are not to be measured by what a cutler would learn from them, but by what they would mean to one accustomed to the art of making steel, or to a metallurgist. American Stainless Steel Co. v. Ludlum Steel Co., 290 Fed. 103.

33. Consolidated Bunging Apparatus Co. v. Metropolitan Brewing Co., 60 Fed. 93, 8 CCA 485.

34. Bellis Heat Treating Co. v. Heatbath Corp., 23 F. (2d) 239 [cit Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566]; Poupard v. Fardell, 18 Wkly. Rep. 127.

35. One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; In re Decker, 36 App. (D. C.) 104.

36. Barber v. Reo Motor Car Sales Co., 245 Fed. 938.

37. Barber v. Reo Motor Car Sales Co., supra.

38. Barber v. Reo Motor Car Sales Co., supra.

39. Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Fulton Co. v. Bishop, etc., Co., 284 Fed. 774; U. S. Metallic Packing Co. v. Hewitt Co., 236 Fed. 739, 150 CCA 71 [rev 220 Fed. 171, and certiorari den 242 U. S. 651 mem, 37 SCt 243 mem, 61 L. ed. 545 mem]; Munising Paper Co. v. American Sulphite Pulp Co., 228 Fed. 700, 143 CCA 222; Mosler v. Lurie, 209 Fed. 364, 126 CCA 290 [rev 200 Fed. 433]; Gray Tel. Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 CCA 353.

40. Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Edison Electric Light Co. v. Novelty Incandescent Lamp Co., 167 Fed. 977, 93 CCA 387 [certiorari den 215 U. S. 596 mem, 30 SCt 399 mem, 54 L. ed. 342 mem].

41. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [certiorari den 49 SCt 32 mem].

42. Brooks v. Norcross, 4 F. Cas. No. 1,957, 2 Fish. Pat. Cas. 661.

43. Schoerken v. Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

Right of commissioner of patents to order invention to be kept secret during period of war see infra § 178.

44. Schoerken v. Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209; Brooks v. Norcross, 4 F. Cas. No. 1,957, 2 Fish. Pat. Cas. 661.

45. Beldam v. Garlock Packing Co., 24 F. (2d) 852 [rev on other grounds 29 F. (2d) 673]; Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Wellman-Seaver-Morgan Co. v. William Cramp, etc., Bldg. Co., 3 F. (2d) 531; Atlantic, etc., Co. v. Wood, 288 Fed. 148; Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co., 272 Fed. 386; General Electric Co. v. Philadelphia Electric, etc., Co., 226 Fed. 488 [aff 232 Fed. 722, 146 CCA 648]; Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 CCA 576 [rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286]; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 Fed. 362 [aff 176 Fed. 96, 100 CCA 26]; Van Epps v. United Box Board, etc., Co., 143 Fed. 869, 75 CCA 77 [certiorari den 202 U. S. 617 mem, 26 SCt 764 mem, 50 L. ed. 1173 mem]; Ironclad Mfg. Co. v. Dairyman's Mfg. Co., 143 Fed. 512, 74 CCA 372 [certiorari den 202 U. S. 623 mem, 26 SCt 767 mem, 50 L. ed. 1175 mem]; Ideal Stopper Co. v. Crown Cork, etc., Co., 131 Fed. 244, 246, 65 CCA 436 [certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Westinghouse Air Brake Co. v. Christensen Engineering Co., 128 Fed. 437, 63 CCA 179; National Chemical, etc., Co. v. Swift, 104 Fed. 87, 43 CCA 421.

"A paper patent, if it fully describes an invention, whether it be a machine, device, or process, is just as effective to show anticipation as a patent which describes an invention which has gone into extensive use." Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 105, 130 CCA 576 [rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286].

"In determining the question of identity of the inventive idea, it is not a sufficient answer to say of any alleged anticipation that it was a mere paper patent, and that the same had not been operative or commercially successful; for prior existing conditions might not have stimulated full development." Ideal Stopper Co. v. Crown Cork, etc., Co., supra.

46. See infra § 46.

47. Tashjian v. Forderer Cornice Works, 14 F. (2d) 414, 415; Ideal Stopper Co. v. Crown Cork, etc., Co., 131 Fed. 244, 65 CCA 436 [certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Dececo Co. v. George E. Gilchrist Co., 125 Fed. 293, 60 CCA 207.

"To the argument that but one or two of the prior patents ever went into actual use in any structure built in concordance therewith, and that they are but paper patents, it is to be said that the question here is not that of the adaptability of a machine to operate successfully. It is the question whether or not the structures described in the prior art are such that they could be used in the precise manner in which the appellant's structure is used. Even in the case of machines, it is held that the fact that no commercial use has been made of a patented device does not affect its weight as anticipatory of a later patent, so far as concerns the inventive ideas it discloses." Tashjian v. Forderer Cornice Works, supra.

48. Union Special Mach. Co. v. Quaker City Flour Mills Co., 253 Fed. 557, 165 CCA 227; Lagonda Mfg. Co. v. Elliott Co., 214 Fed. 581, 131 CCA 423; Lagonda Mfg. Co. v. Elliott Co., 205 Fed. 149 [aff 214 Fed. 581, 131 CCA 423]; Kings County Raisin, etc., Co. v. U. S. Cons. Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 CCA 461; Ideal Stopper Co. v. Crown Cork, etc., Co., 131 Fed. 244, 65 CCA 436 [aff 123 Fed. 666, and certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Thomson-Houston Electric Co. v. Winchester Ave. R. Co., 71 Fed. 192; Packard v. Lacing-Stud Co., 70 Fed. 66, 16 CCA 639.

49. Pickering v. McCullough, 104 U. S. 310, 26 L. ed. 749; Beldam v.

use is to be narrowly construed,[50] or, at least, used with great caution.[51]

[§ 49] **f. Patents to Same Inventor—(1) In General.** Subject to the exception which obtains with respect to inventions previously patented in a foreign country,[52] no valid patent can be obtained by an inventor for an invention actually claimed and secured to him in a prior patent,[53] nor for an essential element of an invention secured by a former patent without which that invention would not have been patentable.[54] The reason is that the power to create a monopoly is exhausted by the first patent, and that a new and later patent for the same invention would operate to extend or prolong the monopoly beyond the period allowed by law.[55] The earlier patent avoids the later even though issued on a later application.[56] The issue date of the patents, and not the application date, controls.[57] If both patents are issued on the same day, it seems that the patentee may elect which patent he shall rely upon as vesting the monopoly in him.[58] But while an earlier patent avoids a later patent to the same patentee for the invention claimed and secured by the former, a valid later patent may be obtained where the invention claimed is clearly distinct from, and independent of, the one previously patented.[59]

Garlock Packing Co., 24 F. (2d) 852 [rev on other grounds 29 F. (2d) 673]; Tashjian v. Forderer Cornice Works, 14 F. (2d) 414; Atlantic, etc., Co. v. Wood, 288 Fed. 148; General Electric Co. v. Philadelphia Electric, etc., Co., 226 Fed. 488 [aff 232 Fed. 722, 146 CCA 648]; Standard Typewriter Co. v. Standard Folding Typewriter Sales Co., 223 Fed. 779, 139 CCA 599; Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 CCA 576 [rev 207 Fed. 956, and rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286]; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 Fed. 362 [aff 176 Fed. 96, 100 CCA 26]; Van Epps v. United Box Board, etc., Co., 143 Fed. 869, 75 CCA 77 [certiorari den 202 U. S. 617 mem, 26 SCt 764 mem, 50 L. ed. 1173 mem]; Ironclad Mfg. Co. v. Dairyman's Mfg. Co., 143 Fed. 512, 515, 74 CCA 372 [certiorari den 202 U. S. 623 mem, 26 SCt 767 mem, 50 L. ed. 1175 mem]; Westinghouse Air Brake Co. v. Christensen Engineering Co., 128 Fed. 437, 63 CCA 179; Universal Winding Co. v. Willimantic Linen Co., 80 Off. Gaz. (U. S.) 1273; Miller v. Meriden Bronze Co., 79 Off. Gaz. (U. S.) 1520.

"It may be true, as is asserted by the complainant, that the patented can is the first which was ever actually manufactured and put upon the market which had a neck of double layers connected by a flush joint, or in which there was no soldered surface upon the inside. But whether such cans as are described in the prior patents were ever actually made, or not, is an immaterial consideration. These patents show so plainly what they purport to show that he who runs can read; and their effect in negativing the novelty of the claim cannot be impaired by any argument that they are impracticable structures." Ironclad Mfg. Co. v. Dairyman's Mfg. Co., supra.

50. Wellman-Seaver-Morgan Co. v. William Cramp, etc., Bldg. Co., 3 F. (2d) 531, 532; Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co., 90 Fed. 201 [mod on other grounds 93 Fed. 958, 36 CCA 24].

"We do not doubt that a patent which was never manufactured at all may serve as a complete anticipation, if it sufficiently discloses identity; but cases like the present give the proper field for the full effect which can rightly be carried by the deprecatory designation 'paper patents.' If earlier patents show a close analogy, with differences which, according to our present light, hardly seem material, and yet it appears that such a patent, or a succession of them, never found any commercial favor, this fact has evidential force to indicate that the differences are more important than they seem, and that the relatively slight later changes and adaptation to a different demand have a valid claim to inventive character." Wellman-Seaver-Morgan Co. v. William Cramp, etc., Bldg. Co., supra.

51. Draper Co. v. American Loom Co., 161 Fed. 728, 88 CCA 588.

52. See infra § 51.

53. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Underwood v. Gerber, 149 U. S. 224, 13 SCt 854, 37 L. ed. 710; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 SCt 40, 35 L. ed. 817; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 SCt 150, 34 L. ed. 719; Mosler Safe, etc., Co. v. Mosler, 127 U. S. 354, 8 SCt 1148, 32 L. ed. 182; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; American Steel Foundries v. Laughlin, 30 F. (2d) 137; In re Creveling, 24 F. (2d) 282; Cottrell, etc., Co. v. Claybourn Process Corp., 17 F. (2d) 279 [aff 24 F. (2d) 1014 mem]; Toledo Scale Co. v. Computing Scale Co., 9 F. (2d) 823; Sparks-Withington Co. v. E. A. Laboratories, 295 Fed. 534; Nagy v. International Cork Co., 290 Fed. 223 [aff 298 Fed. 931]; Van Kannel Revolving Door Co. v. Winton Hotel Co., 263 Fed. 988; St. Clair Fdy. Co. v. Union Jack Co., 203 Fed. 279, 121 CCA 483; U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 202 Fed. 915, 121 CCA 273; Washburne v. Consolidated Safety Pin Co., 197 Fed. 552; Gold v. Gold, 187 Fed. 273, 109 CCA 615; Louden Mach. Co. v. Strickler, 186 Fed. 522 [rev on other grounds 195 Fed. 751, 115 CCA 551]; Union Typewriter Co. v. Smith, 173 Fed. 288 [aff 181 Fed. 966, 104 CCA 430]; Underfeed Stoker Co. v. American Ship Windlass Co., 165 Fed. 65; Western Electric Co. v. Galesburg Union Tel. Co., 148 Fed. 857; McCaslin v. Link Belt Mach. Co., 139 Fed. 393 [aff 147 Fed. 243, 77 CCA 385]; Otis El. Co. v. Portland Co., 127 Fed. 557, 62 CCA 339; Industrial Mfg. Co. v. Wilcox, etc., Sewing Mach. Co., 112 Fed. 535, 50 CCA 387; Western Electric Co. v. Williams-Abbott Electric Co., 108 Fed. 952, 48 CCA 159; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Grimes v. Allen, 102 Fed. 606, 42 CCA 559 [certiorari den 180 U. S. 640 mem, 21 SCt 922 mem, 45 L. ed. 711 mem]; Willcox, etc., Sewing-Mach. Co., v. Merrow Mach. Co., 93 Fed. 206, 35 CCA 269; Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 CCA 255; Palmer v. John E. Brown Mfg. Co., 84 Fed. 454; Thomson-Houston Electric Co. v. Hoosick R. Co., 82 Fed. 461, 27 CCA 419; Thomson-Houston Electric Co. v. Western Electric Co., 70 Fed. 69, 16 CCA 642; Russell v. Kern, 69 Fed. 94, 16 CCA 154; Westinghouse v. New York Air-Brake Co., 63 Fed. 962, 11 CCA 342; Fassett v. Ewart Mfg. Co., 62 Fed. 404, 10 CCA 441; Barnes Automatic Sprinkler Co. v. Walforth Mfg. Co., 60 Fed. 605, 9 CCA 154; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; Brush Electric Co. v. Julien Electric Co., 41 Fed. 679; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 25; McMillan v. Rees, 1 Fed. 722; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Morris v. Huntington, 17 F. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448; In re Hutter, 55 App. (D. C.) 210, 4 F. (2d) 176; Taylor's Application, 52 App. (D. C.) 249, 285 Fed. 983; In re Meyer, 48 App. (D. C.) 580; In re Isherwood, 46 App. (D. C.) 507; In re Rowe, 40 App. (D. C.) 423; In re Griffith, 39 App. (D. C.) 456; In re Roselius, 36 App. (D. C.) 130; In re Pearsall, 31 App. (D. C.) 265; In re Wickers, 29 App. (D. C.) 71; Hill v. Patent Comr., 15 D. C. 266; Jackson v. Lawton, 10 Johns. (N. Y.) 23, 6 AmD 311.

[a] **The rights of an assignee of the first patent** cannot be defeated by the granting of a second patent to the same patentee for the same invention. American Steel Foundries v. Laughlin, 30 F. (2d) 137.

54. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121.

55. Miller v. Eagle Mfg. Co., supra; Driver-Harris Co. v. Hardite Metals, Inc., 28 F. (2d) 413; Odiorne v. Amesbury Nail Factory, 2 Mason (U. S.) 28, 1 Robb Pat. Cas. 300.

56. Gerrard v. Cary, 9 F. (2d) 949 [aff 9 F. (2d) 957]; Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. 841, 69 CCA 200; McMillan v. Rees, 1 Fed. 722.

57. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Driver-Harris Co. v. Hardite Metals, Inc., 28 F. (2d) 413; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem].

[a] **Rule applied.**—Where applications for two patents for essentially the same invention were filed by the same applicant on the same day, the date of issue determines the priority, and the fact that the application for the later patent bears the lower serial number is immaterial. Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem].

58. H. W. Johns Mfg. Co. v. Robertson, 89 Fed. 504; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682.

59. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Claude Neon Lights v. Machlett, 27 F. (2d) 702 [mod 21 F. (2d) 846, and certiorari den 49 SCt 32 mem]; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 22 F. (2d) 259; Schute v. Hildreth, 8 F. (2d) 131; H. Ward Leonard, Inc. v. Maxwell Motor Sales Co., 288 Fed. 62 [rev 252 Fed. 584, 164 CCA 500]; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; Pittsburgh Plate Glass Co. v. American Window Glass Co., 276 Fed. 197 [aff 276 Fed. 849]; Nestle Patent Holding Co. v. E. Fredericks, Inc., 261 Fed. 780 [aff 258 Fed. 627]; Otis El. Co. v. Kaestner, etc., Co., 234 Fed. 926; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Adrian Wire Fence Co. v. Jackson Fence Co., 190 Fed. 195; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 71 Fed. 396, 18 CCA 145; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; McMillan v. Rees, 1 Fed. 722; In re Marsden, 14 App. (D. C.) 223.

"Where the second patent covers matter described in the prior patent, essentially distinct and separable

This is so whether the invention subsequently patented is generic or specific,[60] or an original machine or process, or both, or an improvement thereon.[61] But it must distinctly appear that the invention for which the later patent is claimed was a separate invention, distinctly different from that covered by the first patent;[62] in other words, it must be something substantially different from that comprehended in the first patent.[63] It must consist in something more than mere distinction of the breadth or scope of the claims of each patent[64] or a mere difference in the terms in which the claims are couched.[65] The question to be decided is whether the claims of the later patent are for a separate invention from the claims allowed upon the first application,[66]—whether the power to create a monopoly has been invoked twice for the same thing,[67]—and the test is whether the claims of both patents define essentially the same things.[68] A process and the apparatus by which it is performed may be the subject of different patents.[69] So likewise may a machine or process and its product,[70] and different parts of the same machine.[71] An inventor may also obtain a separate patent for an improvement on a method or device previously patented by him.[72] But the mere function of the invention of the first patent cannot be made the subject of another patent.[73] The defense of double patenting does not apply between two independent inventors merely because one has taken an assignment of the other invention.[74] The assignment makes no difference, each patent standing precisely as though no assignment had been made.[75] The earlier invention prevails if the inventions patented are the same;[76] if they are different, both are valid.[77]

Design patents. The rule with respect to double patenting applies to design patents.[78] Double patenting, however, does not result where the invention covered by the subsequent patent is entirely distinct, different, and separable from the invention patented earlier.[79] There is some authority to the effect that the defense of double patenting may apply in the case of a design and of a mechanical patent applicable to the same device.[80] It has been asserted, however, that it is difficult to understand how double patenting can arise in such cases.[81] In any event, a mechanical patent is not void for double patenting where the prior design patent fails to show every essential feature of the article which the mechanical patent covers.[82] There is some authority also for the proposition that the defense of double patenting would not be affected by the invalidity of the earlier design patent.[83] It has been held, however, that, assuming double patenting may arise, the mechanical patent is not invalid if the prior design patent is void for want of patentability.[84]

[§ 50] **(2) Unclaimed Disclosures of Patents Issued on Copending Applications.** While the description by an inventor in a patent granted to him may operate as a disclaimer or abandonment of matter not claimed,[85] where each of several applications made by the same inventor describes the same in-

from the invention claimed thereby and claims made thereunder, its validity may be sustained." Miller v. Eagle Mfg. Co., 151 U. S. 186, 198, 14 SCt 310, 38 L. ed. 121.

60. Cookingham v. Warren Bros. Co., 3 F. (2d) 899; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8.

61. Century Electric Co. v. Westinghouse Electric, etc., Co., supra.

62. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 251 Fed. 897 [aff 260 Fed. 841, 171 CCA 567]; Otis El. Co. v. Portland Co., 127 Fed. 557, 62 CCA 339 [aff 119 Fed. 928]; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 71 Fed. 396, 18 CCA 145 [certiorari den 163 U. S. 685 mem, 16 SCt 1201 mem, 41 L. ed. 315 mem]; Root v. Sioux City Cable R. Co., 42 Fed. 412.

63. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121.

64. Miller v. Eagle Mfg. Co., supra; Gold v. Gold, 187 Fed. 273, 109 CCA 615; Union Typewriter Co. v. Smith, 173 Fed. 288 [aff 181 Fed. 966, 104 CCA 430]; Morse Chain Co. v. Link Belt Mach. Co., 164 Fed. 331, 90 CCA 650; Otis El. Co. v. Portland Co., 127 Fed. 557, 62 CCA 339; Fassett v. Ewart Mfg. Co., 62 Fed. 404, 10 CCA 441; In re Woodsome, 56 App. (D. C.) 138, 10 F. (2d) 1003; In re Creveling, 25 App. (D. C.) 530.

65. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Cadwell v. Firestone Tire, etc., Co., 13 F. (2d) 483; Pittsburgh Plate Glass Co. v. American Window Glass Co., 276 Fed. 197 [aff 276 Fed. 849]; In re Rowe, 40 App. (D. C.) 423.

66. Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 22 F. (2d) 259; Pittsburgh Plate Glass Co. v. American Window Glass Co., 276 Fed. 197 [aff 276 Fed. 849].

67. Driver-Harris Co. v. Hardite Metals, Inc., 28 F. (2d) 413.

68. Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930.

69. Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [aff 274 Fed. 937, and certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; Nestle Patent Holding Co. v. E. Fredericks, Inc., 261 Fed. 780 [aff 258 Fed. 627]; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411.

70. In re Burt, 24 F. (2d) 273; American Optical Co. v. Shur-On Optical Co., 16 F. (2d) 1013 mem [aff 9 F. (2d) 932, and certiorari den 274 U. S. 742 mem, 47 SCt 587 mem, 71 L. ed. 1321 mem]; General Electric Co. v. Mallory, 298 Fed. 579 [aff 294 Fed. 562, 567, and certiorari den 266 U. S. 609 mem, 45 SCt 94 mem, 69 L. ed. 466 mem]; Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co., 90 Fed. 201 [mod on other grounds 93 Fed. 958, 36 CCA 24]; McKay v. Dibert, 5 Fed. 587; Goodyear v. Providence Rubber Co., 10 F. Cas. No. 5,583, 2 Cliff. 351, 2 Fish. Pat. Cas. 499 [aff 9 Wall. 788, 19 L. ed. 566]; Goodyear v. Wait, 10 F. Cas. No. 5,587, 5 Blatchf. 468, 3 Fish. Pat. Cas. 242; Merrill v. Yeomans, 17 F. Cas. No. 9,472, 1 Bann. & A. 47, Holmes 331 [aff 94 U. S. 568, 24 L. ed. 235].

71. Thomson-Houston Electric Co. v. Black River Tract. Co., 135 Fed. 759, 68 CCA 461; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 71 Fed. 396, 18 CCA 145 [certiorari den 163 U. S. 685 mem, 16 SCt 1201 mem, 41 L. ed. 315 mem]; Cahn v. Wong Town On, 19 Fed. 424, 9 Sawy. 630; McMillan v. Rees, 1 Fed. 722; Ex p. Hayden, 11 F. Cas. No. 6,256; Hayden v. James, 11 F. Cas. No. 6,260.

72. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Pittsburgh Plate Glass Co. v. American Window Glass Co., 276 Fed. 197 [aff 276 Fed. 849]; Otis El. Co. v. Kaestner, etc., Co., 234 Fed. 926; Ryan v. Newark Spring Mattress Co., 96 Fed. 100 [rev on other grounds 102 Fed. 693, 42 CCA 594]; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Mathews v. Flower, 25 Fed. 830 [app dism 131 U. S. 441 mem, 9 SCt 800 mem, 33 L. ed. 219 mem].

73. Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 251 Fed. 897 [aff 260 Fed. 841, 171 CCA 567].

74. Van Heusen Products, Inc. v. Earl, 300 Fed. 922; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930.

75. Van Heusen Products, Inc. v. Earl, 300 Fed. 922.

76. Van Heusen Products, Inc. v. Earl, supra.

77. Van Heusen Products, Inc. v. Earl, supra; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930.

78. Faris v. Patsy Frok, etc., Co., 273 Fed. 900.

79. Herzog v. Lesser, 29 F. (2d) 996; Graff v. Webster, 189 Fed. 902 [aff 195 Fed. 522, 115 CCA 432].

[a] **Illustration.**—Where an earlier patent was for an ornamental design for a finger ring consisting principally in the side portions and edge and showing no particular design for the face of the ring, and a later patent was for a definite flower design on the face of the ring, there was no double patenting, and the earlier patent did not anticipate the later one. Herzog v. Lesser, 29 F. (2d) 996.

80. Luminous Unit Co. v. Freeman-Sweet Co., 249 Fed. 876 [mod on other grounds 264 Fed. 107]; Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. 210 [aff on other grounds 145 Fed. 928, 76 CCA 466].

81. Gross v. Norris, 18 F. (2d) 418 [mod 26 F. (2d) 898].

82. Dallas Brass, etc., Co. v. Faries Mfg. Co., 1 F. (2d) 930; Luminous Unit Co. v. Freeman-Sweet Co., 249 Fed. 876 [mod on other grounds 264 Fed. 107].

83. Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. 210 [aff 145 Fed. 928, 76 CCA 466].

84. H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem].

85. See infra § 53.

vention, but no one of the applications claim any invention claimed in the others, and they are all pending at the same time, a patent issued on one of them cannot be used to anticipate the right to a patent on another.[86] This is true regardless of the date upon which the applications were filed.[87] The issuance of the first patent does not abandon the unclaimed matter in its disclosure, the pendency of the second application rebutting any such inference.[88]

A patent granted on a divisional application relates back to the original application date,[89] and a patent granted on the latter does not anticipate the other.[90]

[§ 51] **(3) Inventions Previously Patented Abroad.** Congress has expressly provided that no person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for such foreign patent was filed more than twelve months prior to the filing of the application in this country in cases of mechanical patents, and four months in cases of designs.[91]

[§ 52] **5. Prior Description in Printed Publications—a. In General.** With respect to anticipatory effect, prior patents and prior publications rest upon the same ground.[92] No valid patent can be obtained by an inventor for his invention if it was described in a printed publication in this or any foreign country before his invention or discovery thereof.[93] This is true even though the publication was unknown in this country[94] and to the subsequent inventor.[95] A prior description in a printed publication is not deprived of its effect as an anticipation by the fact that the art or instrument described was not reduced to practice commercially,[96] by the mere fact that it has not been in use,[97] or by the mere fact that the art or instrument described would require changes or additions if it was to be commercially successful.[98] Nor is the anticipatory effect of a patent destroyed by the fact that it was made for the purpose of giving the result of a series of tests.[99]

A printed publication put out by the inventor has the same effect as though it was put out by a stranger.[1]

[§ 53] **b. What Constitutes a Printed Publication.** A printed publication, in the view of the Patent Law,

86. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Driver-Harris Co. v. Hardite Metals, Inc., 28 F. (2d) 413; Ward v. Gibbs, 27 F. (2d) 466 [aff 19 F. (2d) 613, and certiorari den 49 SCt 29 mem]; Gibbs v. Triumph Trap Co., 26 F. (2d) 312 [certiorari den 49 SCt 21]; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 22 F. (2d) 259; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Cookingham v. Warren Bros. Co., 3 F. (2d) 899; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 296 Fed. 188; Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Deister Concentrator Co. v. Deister Mach. Co., 263 Fed. 706; Higgin Mfg. Co. v. Watson, 263 Fed. 378; Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, 130 CCA 117; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Benjamin Electric Mfg. Co. v. Dale Co., 158 Fed. 617, 85 CCA 439; Victor Talking Mach. Co. v. American Graphophone Co., 145 Fed. 350, 76 CCA 180; Kinnear Mfg. Co. v. Wilson, 142 Fed. 970, 74 CCA 232; Cleveland Fdy. Co. v. Detroit Vapor Stove Co., 131 Fed. 853, 68 CCA 233; Badische Anilin, etc., Fabrik v. Klipstein, 125 Fed. 543; Anderson v. Collins, 122 Fed. 451, 58 CCA 669; Ide v. Trorlicht, Dunker, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Westinghouse Electric, etc., Co. v. Dayton Fan, etc., Co., 106 Fed. 724 [aff 118 Fed. 562, 55 CCA 390]; Allington, etc., Mfg. Co. v. Globe Co., 89 Fed. 865; Allington, etc., Mfg. Co. v. Glor, 83 Fed. 1014; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 CCA 107; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 71 Fed. 396, 18 CCA 145; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; Eagle Mfg. Co. v. Bradley, 35 Fed. 295; Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co., 33 Fed. 254; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39; Graham v. Geneva Lake Crawford Mfg. Co., 11 Fed. 138; McMillan v. Rees, 1 Fed. 722; Singer v. Braunsdorf, 22 F. Cas. No. 12,897, 7 Blatchf. 521; Independent Electric Co. v. Jeffrey Mfg. Co., 78 Off. Gaz. (U. S.) 797; National Mach. Co. v. Wheeler, etc., Mfg. Co., 74 Off. Gaz. (U. S.) 1588; Railway Register Mfg. Co. v. Broadway, etc., R. Co., 30 Off. Gaz. (U. S.) 180; Swift v. Jenks, 27 Off. Gaz. (U. S.) 621; Graham v. Geneva Lake Crawford Mfg. Co., 21 Off. Gaz. (U. S.) 1536; Graham v. McCormick, 21 Off. Gaz. (U. S.) 1533; In re Zenk, 50 App. (D. C.) 25, 267 Fed. 327.

87. Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 22 F. (2d) 259; Higgin Mfg. Co. v. Watson, 263 Fed. 378; Toledo Plate, etc., Co. v. Kawneer Mfg. Co., 237 Fed. 364, 150 CCA 378 [aff 232 Fed. 362]; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Welsbach Light Co. v. Cohn, 181 Fed. 122.

88. Ward v. Gibbs, 27 F. (2d) 466 [aff 19 F. (2d) 613, and certiorari den 49 SCt 29 mem]; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 22 F. (2d) 259; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 71 Fed. 396, 18 CCA 145.

89. H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197.

90. H. J. Heinz Co. v. Cohn, supra; Brill v. North Jersey St. R. Co., 124 Fed. 778 [rev on other grounds 134 Fed. 580, 67 CCA 380].

91. U. S. Code tit 35 § 32.

Failure to make timely application see infra § 107.

Limitation of term of patent for invention previously patented abroad see infra §§ 298–302.

92. Thacher v. Falmouth, 235 Fed. 151 [aff 241 Fed. 869, 154 CCA 571]; Equitable Asphalt Maintenance Co. v. Parker-Washington Co., 197 Fed. 920 [rev on other grounds 211 Fed. 1019 mem, 127 CCA 663 mem].

93. Bone v. Marion County, 251 U. S. 134, 40 SCt 96, 64 L. ed. 188 [aff 249 Fed. 211, 161 CCA 247]; Rosenwasser v. Berry, 129 U. S. 47, 9 SCt 229, 32 L. ed. 628; Steel Wheel Corp. v. B. F. Goodrich Rubber Co., 27 F. (2d) 427; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Bellis Heat Treating Co. v. Heatbath Corp., 23 F. (2d) 239; Crozier-Straub, Inc. v. Graham, 22 F. (2d) 310 [rev on other grounds 28 F. (2d) 321 (certiorari den (U. S.) 49 SCt 253)]; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Claude Neon Lights v. Machlett, 21 F. (2d) 846 [mod on other grounds 27 F. (2d) 702 (certiorari den 49 SCt 32)]; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]; Sparks-Withington Co. v. Jay, 270 Fed. 449 [aff 258 Fed. 45]; Vandenburgh v. Electric Welding Co., 259 Fed. 579; Luten v. Marsh, 254 Fed. 701; Davey Tree Expert Co. v. Van Billiard, 248 Fed. 718 [rev on other grounds 255 Fed. 781, 167 CCA 125]; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 246 Fed. 834, 159 CCA 136; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573; One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; American Steel Fdys. v. Bettendorf Axle Co., 245 Fed. 571; Thacher v. Falmouth, 235 Fed. 151 [aff 241 Fed. 869, 154 CCA 571]; Werk v. Parker, 231 Fed. 121, 145 CCA 309 [aff 249 U. S. 130, 39 SCt 197, 63 L. ed. 514]; Anatomik Footwear Co. v. Coward, 220 Fed. 342; Bassett v. Erickson Constr. Co., 213 Fed. 810, 130 CCA 468; Electro-Dynamic Co. v. Westinghouse Electric, etc., Co., 202 Fed. 224, 120 CCA 661; Lumber Anti-Stain Co. v. Nester, 178 Fed. 927, 102 CCA 299; Britton v. White Mfg. Co., 61 Fed. 93; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Woven-Wire Mattress Co. v. Whittlesey, 30 F. Cas. No. 18,058, 8 Biss. 23; Chapman v. Beede, 54 App. (D. C.) 209, 296 Fed. 956; Ruths' Application, 53 App. (D. C.) 64, 288 Fed. 270; In re Borger, 51 App. (D. C.) 227, 277 Fed. 862.

94. Bone v. Marion County, 251 U. S. 134, 40 SCt 96, 64 L. ed. 188 [aff 249 Fed. 211, 161 CCA 247]; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570].

95. Bone v. Marion County, 251 U. S. 134, 40 SCt 96, 64 L. ed. 188 [aff 249 Fed. 211, 161 CCA 247]; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570].

96. Fleischman Yeast Co. v. Federal Yeast Corp., supra.

97. Thacher v. Falmouth, 235 Fed. 151 [aff 241 Fed. 869, 154 CCA 571]; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Ex p. Seeley, 21 F. Cas. No. 12,627; Smith v. Higgins, 22 F. Cas. No. 13,058.

98. Sparks-Withington Co. v. Jay, 270 Fed. 449 [aff 258 Fed. 45].

99. Thacher v. Falmouth, 235 Fed. 151 [aff 241 Fed. 869, 154 CCA 571].

1. King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem.

is anything that is printed and made accessible to any part of the public,[2] such as a book,[3] magazine article,[4] trade paper,[5] trade magazine,[6] catalogue,[7] scientific journal,[8] or journal of a learned society.[9] Mere printing in itself does not amount to publication.[10] Measures must be taken to render the thing containing the description accessible to some part of the public.[11] It is sufficient, of course, if copies are sold or distributed generally to the public,[12] or if copies are available in libraries.[13] It has been held, however, that a single copy of a book published in a foreign country not entered in the list of books contained in a library is not a publication.[14] It has been held that a description in a printed publication is not deprived of effect as an anticipation by the fact that the publication was intended for circulation among a particular class, and was not made accessible to the whole body of the public.[15] The contrary has also been held.[16] Under a former statute which called for prior description in a "public work" instead of in a "printed publication,"[17] it was held to be essential that the publication should be one intended for general use.[18]

Drawings unaccompanied by verbal description. A published drawing unaccompanied by verbal description is a description in a printed publication within the meaning of the statute.[19]

Void patents. A description contained in a void patent is a description in a printed publication.[20]

Unclaimed disclosures of prior patents. An invention is described in a printed publication if it is fully disclosed, although not claimed, in a United States patent,[21] and, subject to the exception which exists with reference to patents issued to the same inventor on copending applications,[22] an invention is anticipated if, at the date of its invention, it has already been so disclosed.[23] The failure of the patentee to include the device among the claims of his own invention implies either that he abandoned it to the public or that he regarded it as well-known.[24] The patent is evidence of the state of the art at the time the drawings and specifications upon which it was afterward granted were made, and it is the state of the art and not the patent which constitutes anticipation.[25]

Patent applications. A description contained in an application for a patent is not a description in a printed publication.[26] This is so, even though the application has been abandoned.[27] Abandoned or forfeited applications are not cited as references in the patent office.[28] The disclosures of a prior application may, however, establish prior knowledge or use.[29]

Design patents. The disclosures of a design patent may give such information of the character of the article to which it is attached that it will anticipate the claims of an inventor of a mechanical structure pertaining to it.[30]

English provisional specifications. A provisional specification published in England amounts to publication.[31]

German gebrauchmuster. It has been held that German gebrauchmuster are not publications.[32]

[§ 54] **c. Sufficiency of Description.** The suffi-

59 L. ed. 434 mem].

2. Imperial Glass Co. v. Heisey, 294 Fed. 267.

[a] **Other definition.**—"A printed publication is anything which is printed, and, without any injunction of secrecy, is distributed to any part of the public in any country." Thacher v. Falmouth, 235 Fed. 151, 153 [quot Walker Patents (4th ed) § 56].

3. Rosenwasser v. Berry, 129 U. S. 47, 9 SCt 229, 32 L. ed. 628; Bassett v. Erickson Constr. Co., 213 Fed. 810, 130 CCA 468.

4. Ruths' Application, 53 App. (D. C.) 64, 288 Fed. 270.

5. Sparks-Withington Co. v. Jay, 270 Fed. 449.

6. Britton v. White Mfg. Co., 61 Fed. 93.

7. Jockmus v. Leviton, 28 F. (2d) 812; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573.

8. Anatomik Footwear Co. v. Coward, 220 Fed. 342.

9. Thacher v. Falmouth, 235 Fed. 151 [aff 241 Fed. 869, 154 CCA 571].

10. Cottier v. Stimson, 20 Fed. 906; Reeves v. Keystone Bridge Co., 20 F. Cas. No. 11,660, 5 Fish. Pat. Cas. 456.

11. Jockmus v. Leviton, 28 F. (2d) 812; Camp v. Portable Wagon Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem]; Cottier v. Stimson, 20 Fed. 906; Reeves v. Keystone Bridge Co., 20 F. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 9 Phila. (Pa.) 368.

12. Lang v. Gisborne, 31 Beav. 133, 54 Reprint 1088; Stead v. Williams, 7 M. & G. 818, 49 ECL 818, 135 Reprint 332.

13. Truman v. Carvill Mfg. Co., 87 Fed. 470; Harris v. Rothwell, 35 Ch. D. 416; Plimpton v. Spiller, 6 Ch. D. 412; British Tanning Co. v. Groth, 60 L. J. Ch. 235.

14. Plimpton v. Spiller, 6 Ch. D. 412.

15. Jockmus v. Leviton, 28 F. (2d) 812; Imperial Glass Co. v. Heisey, 294 Fed. 267.

[a] **Manufacturers' catalogues,** circulated among the trade and containing illustrations of designs, are "printed publications," within the meaning of the patent statute. Imperial Glass Co. v. Heisey, 294 Fed. 267.

16. Union Tool Co. v. Wilson, etc., Mfg. Co., 237 Fed. 837 [rev on other grounds 249 Fed. 729, 161 CCA 639 (certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem)] (manufacturers' catalogues); Britton v. White Mfg. Co., 61 Fed. 93 (trade circulars).

17. Act July 4, 1836 (5 St. at L. 117).

18. New Process Fermentation Co. v. Koch, 21 Fed. 580; Parsons v. Colgate, 15 Fed. 600, 21 Blatchf. 171; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Pennock v. Dialogue, 19 F. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. C. C. 538 [aff 2 Pet. 1, 7 L. ed. 327]; Atterbury's App., 9 Off. Gaz. (U. S.) 640.

19. Wright v. Yuengling, 155 U. S. 47, 15 SCt 1, 39 L. ed. 64; American Steel Fdys. v. Bettendorf Axle Co., 245 Fed. 571; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; American Writing Mach. Co. v. Wagner Typewriter Mach. Co., 151 Fed. 576, 81 CCA 120; Britton v. White Mfg. Co., 61 Fed. 93; Webb v. Quintard, 29 F. Cas. No. 17,324, 9 Blatchf. 352, 5 Fish. Pat. Cas. 276; In re Millett, 18 App. (D. C.) 186.

20. American Steel Fdys. v. Bettendorf Axle Co., 245 Fed. 571.

21. Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587.

22. See supra § 50.

23. Lambert v. Phillips-Lafitte Co., 23 F. (2d) 818; Equitable Asphalt Maintenance Co. v. Parker-Washington Co., 197 Fed. 920 [rev on other grounds 211 Fed. 1019 mem, 127 CCA 663 mem]; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 Fed. 362 [aff 176 Fed. 96, 100 CCA 26]; Saunders v. Allen, 60 Fed. 610, 9 CCA 157; In re Millet, 18 App. (D. C.) 186.

24. Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; In re Millett, 18 App. (D. C.) 186.

25. In re Millett, supra.

26. Davis-Bournonville Co. v. Alexander Milburn Co., 1 F. (2d) 227 [rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651]; Davis-Bournonville Co. v. Alexander Milburn Co., 297 Fed. 846 [aff 1 F. (2d) 227 (certiorari granted 266 U. S. 596, 45 SCt 93, 69 L. ed. 459, and rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651)]; Camp v. Portable Wagon Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem]; Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,337, 1 Bann. & A. 177, 10 Phila. (Pa.) 227.

[a] **Illustration.**—Where an application for patent is filed and a division of specifications ordered, the patent being issued on the specifications as divided, matter contained in the original specification cannot be deemed disclosed, for only the file wrapper would indicate its existence. Camp v. Portable Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem].

27. Brown v. Guild, 23 Wall. (U. S.) 181, 23 L. ed. 161.

28. Patent Office Rules, Oct. 1, 1927, rule 177.

29. See supra § 43.

30. H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Gross v. Norris, 18 F. (2d) 418 [mod 26 F. (2d) 898]; President Suspender Co. v. Macwilliam, 233 Fed. 433 [aff 238 Fed. 159, 151 CCA 235]; Lein v. Myers, 105 Fed. 962, 45 CCA 148.

31. Cohn v. U. S. Corset Co., 6 F. Cas. 2,969, 1 Bann. & A. 340, 12 Blatchf. 225 [aff 93 U. S. 366, 23 L. ed. 907].

32. Permutit Co. v. Wadham, 13

ciency of a description in a printed publication is tested by the same rules as those applicable to the disclosures of prior patents.[33] In order that an invention may be anticipated by a description contained in a printed publication, the latter must disclose the complete and operative invention in such full, clear, and exact terms as to enable any person skilled in the art to which the invention relates, or is most nearly connected, to practice the invention without the exercise of inventive skill of his own.[34] It has been asserted that this rule is enforced with particular strictness with respect to foreign publications.[35] A description in a prior publication must be given effect as an anticipation only to the extent that it actually gives information to the public with respect to the art or instrument in question.[36] Descriptions contained in a printed publication are considered as part of the prior art only as to what they disclose on their face,[37] unaided by extrinsic evidence,[38] except in so far as extrinsic evidence is necessary to elucidate and make clear what is disclosed.[39] Essential elements not obvious to those skilled in the art cannot be read into a description.[40] The question is, What does the prior publication say? not what it might have said, or what it should have said.[41] Published descriptions cannot be supplemented by proof that devices which are now said to be the embodiments of the publications were actually constructed and were operative.[42] An invention is not anticipated by mere suggestions which require further invention to reduce to practical use and operation,[43] or by vague, indefinite, general, or ambiguous references to the subject matter of the invention.[44] Nor is a mere assertion in a printed publication that a certain result had been accomplished, without describing the means which produced it, suf-

F. (2d) 454; Safety Gas Lighter Co. v. Fischer, 236 Fed. 955 [aff 247 Fed. 1005 mem, 159 CCA 652].

33. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Sparks-Withington Co. v. Jay, 270 Fed. 449 [aff 258 Fed. 45].

Sufficiency of disclosures of prior patents see supra § 46.

34. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Florsheim v. Schilling, 137 U. S. 64, 11 SCt 20, 34 L. ed. 574; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Downton v. Yeager Milling Co., 108 U. S. 466, 3 SCt 10, 27 L. ed. 789; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Cohn v. U. S. Corset Co., 93 U. S. 366, 23 L. ed. 907; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Permutit Co. v. Wadham, 13 F. (2d) 454; Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., Inc., 285 Fed. 73 [rev on other grounds 290 Fed. 625 (certiorari den 263 U. S. 708 mem, 44 SCt 36 mem, 68 L. ed. 517 mem)]; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co., 269 Fed. 144; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; Chicago v. Strauss Bascule Bridge Co., 261 Fed. 358; Vacuum Cleaning Co. v. Thompson Mfg. Co., 258 Fed. 239 [app dism 272 Fed. 1023]; General Electric Co. v. Continental Fibre Co., 256 Fed. 660, 168 CCA 54; Pittsburgh Iron, etc., Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 246 Fed. 834, 159 CCA 136; Snook-Roentgen Mfg. Co. v. Philadelphia Stetson Hospital, 237 Fed. 204 [aff 245 Fed. 654, 158 CCA 82]; Ransome Concrete Co. v. German American Button Co., 197 Fed. 172 [rev on other grounds 201 Fed. 528, 119 CCA 622]; National Electric Signaling Co. v. United Wireless Tel. Co., 189 Fed. 727 [rev on other grounds 198 Fed. 386, 117 CCA 262]; Thomson-Houston Electric Co. v. Traction Equipment Co., 164 Fed. 425; Kirchberger v. American Acetylene Burner Co., 128 Fed. 599, 64 CCA 107; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; Dececo Co. v. George E. Gilchrist Co., 125 Fed. 293, 60 CCA 207; Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514]; Western Electric Co. v. Millheim Electric Tel. Co., 88 Fed. 505; Am Ende v. Seabury, 36 Fed. 593 [aff 152 U. S. 561, 14 SCt 683, 38 L. ed. 553]; New Process Fermentation Co. v. Koch, 21 Fed. 580; Hood v. Boston Car-Spring Co., 21 Fed. 67; Nathan v. New York El. R. Co., 2 Fed. 225; Coleman v. Liesor, 6 F. Cas. No. 2,984; Colgate v. Gold, etc., Tel. Co., 6 F. Cas. No. 2,991, 4 Bann. & A. 415, 16 Blatchf. 503; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Roberts v. Dickey, 20 F. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 4 Brewst. (Pa.) 260; In re Blackmore, 33 App. (D. C.) 434.

"The description in the prior publication must amount to a substantial representation of the patented article in such full, clear, and exact terms as to enable any person skilled in the art or science to which it pertains to make, construct, and practice the invention to the same practical extent as he would be enabled to do if the information were derived from a prior patent." General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90, 100 [mod on other grounds 28 F. (2d) 641].

35. Permutit Co. v. Wadham, 13 F. (2d) 454 [rev 294 Fed. 370, and reh den 15 F. (2d) 20].

"The rule is firmly established that an earlier foreign language publication must be clear and explicit in the extreme." Permutit Co. v. Wadham, 13 F. (2d) 454, 456.

36. Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; Loew Filter Co. v. German-American Filter Co., 164 Fed. 855, 90 CCA 637.

37. Loew Filter Co. v. German-American Filter Co., supra; Badische Anilin, etc., Fabrik v. Kalle, 104 Fed. 802, 44 CCA 201.

38. Loew Filter Co. v. German-American Filter Co., 164 Fed. 855, 90 CCA 637; Badische Anilin, etc., Fabrik v. Kalle, 104 Fed. 802, 44 CCA 201.

[a] **Reason for rule.**—"If prior patents and publications can be reconstructed by extrinsic evidence to fit the exigencies of the case, the inquiry will no longer be confined to what the publication communicates to the public, but it will be transferred to an endeavor to ascertain what its author intended to communicate." Badische Anilin, etc., Fabrik v. Kalle, 104 Fed. 802, 808, 44 CCA 201.

39. Loew Filter Co. v. German-American Filter Co., 164 Fed. 855, 90 CCA 637.

40. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Carson Inv. Co. v. Anaconda Min. Co., 26 F. (2d) 651 [certiorari den 49 SCt 32 mem]; Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]; Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., Inc., 285 Fed. 73 [rev on other grounds 290 Fed. 625 (certiorari den 263 U. S. 708 mem, 44 SCt 36 mem, 68 L. ed. 517 mem)]; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [aff 274 Fed. 937, and certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co., 269 Fed. 144; Cutler Hammer Co. v. Pawling, etc., Co., 267 Fed. 980; Pittsburgh Iron, etc., Co. v. Seaman-Sleeth, 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Williamson v. Electric Serv. Supplies Co., 236 Fed. 353 [aff 242 Fed. 873, 155 CCA 461]; Ransome Concrete Co. v. German American Button Co., 197 Fed. 172 [rev on other grounds 201 Fed. 528, 119 CCA 622]; Schmertz Wire Glass Co. v. Western Glass Co., 178 Fed. 977 [mod on other grounds 185 Fed. 788, 109 CCA 1]; Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514].

[a] **A description of an experiment which failed** cannot be said to anticipate an invention for a later successful apparatus. Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem].

41. Badische Anilin, etc., Fabrik v. Kalle, 104 Fed. 802, 44 CCA 201.

42. Permutit Co. v. Wadham, 13 F. (2d) 454.

[a] **Reason for rule.**—"Such proof is self-destructive. There can be no need for it unless upon the theory that the actual construction shows precisely what was intended by the published description; and, if the description is ambiguous enough to need this kind of support, it is fatally deficient." Permutit Co. v. Wadham, 13 F. (2d) 454, 456.

43. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Truax v. George F. Childs Adjustable Parlor Chair Co., 162 Fed. 907.

44. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Permutit Co. v. Wadham, 13 F. (2d) 454; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]; General Electric Co. v. Continental Fibre Co., 256 Fed. 660, 168 CCA 54; Ransome Concrete Co. v. German American Button Co., 197 Fed. 172 [rev on other grounds 201 Fed. 528, 119 CCA 622]; Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 86 CCA 483 [certiorari den 209 U. S. 548 mem, 28 SCt 759 mem, 52 L. ed. 921 mem].

[a] **Illustration.**—A statement in a publication that a firm had sent out a catalogue of a silent gear made of fiber of prepared cotton is too vague to enable an expert to carry the device into practical use, and does not invalidate a subsequent patent for a gear made of compressed cotton fibers. General Electric Co. v. Continental Fibre Co., 256 Fed. 660,

ficient as an anticipation.[45] The prior publication must disclose how the desired result can be obtained.[46] Descriptions in prior printed publications, however, must be read in the light of the knowledge possessed by persons skilled in the art to which the invention relates,[47] including the disclosures of earlier publications,[48] and a description is sufficient if such persons are enabled by its disclosures to make and use the invention without exercising more than mere mechanical skill, even though it is in some respects incomplete[49] or obscure.[50]

Article of manufacture. Where a claim is for an article of manufacture the process of manufacture need not be described in the publication.[51] It is sufficient if the thing claimed is clearly and accurately described.[52]

[§ 55] **6. Evidence—a. Burden of Proof.** The burden of proving that a method or device substantially identical with the method or device for which a patent is shown to have issued was known or used by others in this country, or was patented or described in a printed publication before the patentee or his assignor made his invention or discovery, and was consequently anticipated, is upon the party asserting it.[53] This rule is not altered by the fact that a patent office reference to a paper covering the subject matter of the patent, but which was not printed until less than two years before the application, was not attacked by the patentee.[54] If the date upon which application for the patent in suit was made is not in evidence, this burden is sustained prima facie when it is shown by evidence sufficiently clear and convincing that such method or device was made accessible to the public in any of the ways enumerated before the date of the patent.[55] If the date of application is in evidence, anticipation is made out prima facie by proof of disclosure to the public before that date.[56] Anticipation having been made out prima facie, the party seeking to maintain the validity of the patent has the burden of producing proof that the patentee or his assignor made the invention or discovery at an earlier date.[57]

[§ 56] **b. Admissibility.** The rules governing the admissibility of evidence generally[58] are applicable in determining whether a method or device for which a patent has been issued has been anticipated.[59] Competent evidence of any fact bearing upon the question of identity of the alleged anticipation with the method or device of the patent, or upon whether it was made accessible to the public before the patentee or his assignor made his invention or discovery, is admissible.[60] Where a patent is offered

168 CCA 54.

45. American Graphophone Co. v. Leeds, etc., Co., 170 Fed. 327, 95 CCA 511.

46. Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570].

47. Ruths' Application, 53 App. (D. C.) 64, 288 Fed. 270.

48. Vacuum Cleaner Co. v. Thompson Mfg. Co., 258 Fed. 239 [app dism 272 Fed. 1023].

49. American Steel Fdys. v. Bettendorf Axle Co., 245 Fed. 571; Pope Mfg. Co. v. Arnold, 177 Fed. 419 [aff 193 Fed. 649, 113 CCA 517]; Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514]; Ruths' Application, 53 App. (D. C.) 64, 288 Fed. 270.

[a] **Illustrations.**—(1) Two claims covering the utilization of waste gas from blast furnaces in internal combustion engines and in generating steam and storing it are anticipated by an article suggesting every point specified in the claims, except the storage of the steam generated, which was covered by other patents. Ruths' Application, 53 App. (D. C.) 64, 288 Fed. 270. (2) A published illustration and description of a bicycle, showing every detail of a part subsequently patented by another, except that it did not show that a tube for containing the pedal shaft, shown by the patent to be without perforations, and so appearing in the illustration, may not have been perforated or cut away on the bottom or the opposite side not seen, there being, however, nothing to indicate that such was the fact, fulfills all the conditions of the rule, even conceding that there was a patentable difference between a perforate and imperforate tube used for such purpose. Pope Mfg. Co. v. Arnold, 177 Fed. 419 [aff 193 Fed. 649, 113 CCA 517].

50. Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514].

51. One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; In re Schaeffer, 2 App. (D. C.) 1.

52. One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)].

53. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610; Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; West v. Premier Register Table Co., 27 F. (2d) 653 [aff 21 F. (2d) 762]; Smalley v. Auto Specialists, Inc., 7 F. (2d) 710; Atlantic, etc., Co. v. Wood, 288 Fed. 148; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Eddy v. Kramer, 247 Fed. 962; A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; Crone v. John J. Gibson Co., 237 Fed. 637 [rev on other grounds 247 Fed. 503, 160 CCA 13]; Warren Bros. Co. v. Evans, 234 Fed. 657 [rev on other grounds 240 Fed. 696, 153 CCA 494]; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; T. B. Wood's Sons Co. v. Valley Iron Works, 191 Fed. 196 [aff 196 Fed. 780, 116 CCA 46]; Greenwald v. Weiss, 180 Fed. 474; Victor Talking Mach. Co. v. Duplex Phonograph Co., 177 Fed. 248; Parker v. Stebler, 177 Fed. 210, 101 CCA 380; Hancock v. Boyd, 170 Fed. 600 [rev on other grounds 184 Fed. 61, 107 CCA 79]; Roberts v. Pittsburgh Wire Co., 69 Fed. 624 [aff 71 Fed. 706, 18 CCA 302]; Roberts v. H. P. Nail Co., 53 Fed. 916; Cohansey Glass Mfg. Co. v. Wharton, 28 Fed. 189; Thayer v. Spaulding, 27 Fed. 66; Duffy v. Reynolds, 24 Fed. 855; Albany Steam Trap Co. v. Felthousen, 20 Fed. 633; Green v. French, 11 Fed. 591; Shirley v. Sanderson, 8 Fed. 905; Brodie v. Ophir Silver Min. Co., 4 F. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Crouch v. Speer, 6 F. Cas. No. 3,438, 1 Bann. & A. 145; Fisk v. Church, 9 F. Cas. No. 4,826, 5 Fish. Pat. Cas. 540; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [aff 3 Wall. 315, 18 L. ed. 76]; Hoffheins v. Brandt, 12 F. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Taylor v. Wood, 23 F. Cas. No. 13,808, 1 Bann. & A. 270, 12 Blatchf. 110; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

54. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610 [rev 16 F. (2d) 419 (rev 10 F. (2d) 598)].

55. Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Wing v. Richardson, 30 F. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

56. Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Wing v. Richardson, 30 F. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

57. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Columbus Dental Mfg. Co. v. Ideal Interchangeable Tooth Co., 294 Fed. 422; Barber v. Otis Motor Sales Co., 271 Fed. 171 [certiorari den 256 U. S. 693 mem, 41 SCt 535 mem, 65 L. ed. 1175 mem]; National Mach. Corp. v. Benthall Mach. Co., 241 Fed. 72, 154 CCA 72; American Graphophone Co. v. Gimbel, 234 Fed. 344; Charles Hunnicutt Co. v. A. B. Gaston Co., 218 Fed. 176, 134 CCA 56; Moline Plow Co. v. Rock Island Plow Co., 212 Fed. 727, 129 CCA 337; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79; Corbett Bros. Co. v. Reinhardt-Meding Co., 166 Fed. 767; Consolidated R. Electric Lighting, etc., Co. v. Adams, etc., Co., 161 Fed. 343, 88 CCA 355; New England Motor Co. v. B. F. Sturtevant Co., 150 Fed. 131, 80 CCA 85; Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622, 78 CCA 394; Wilson v. Townley Shingle Co., 125 Fed. 491, 60 CCA 327; Rogers v. Fitch, 81 Fed. 959, 27 CCA 23; Untermeyer v. Freund, 58 Fed. 205, 7 CCA 183; Johnson v. Root, 13 F. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Webster Loom Co. v. Higgins, 29 F. Cas. No. 17,342, 4 Bann. & A. 88, 15 Blatchf. 446 [rev on other grounds 105 U. S. 580, 26 L. ed. 1177]; Wing v. Richardson, 30 F. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

58. See Evidence § 89 et seq.

59. See cases infra this section.

60. Barber v. Otis Motor Sales Co., 265 Fed. 675 [rev on other grounds 271 Fed. 171]; and cases infra this note.

[a] **Evidence held admissible to show alleged anticipation inoperative.** —Harwood v. Mill River Woolen Mfg. Co., 11 F. Cas. No. 6,187, 3 Fish. Pat. Cas. 526.

[b] **Evidence held admissible to**

in evidence to show anticipation, the court must first construe it,[61] and, if by its true construction it has a tendency to support the issue, it is admissible,[62] but, if it has no such tendency, it must be excluded.[63] In determining whether one invention anticipates another, evidence may be, and in a difficult case ought to be, heard concerning the construction and actual operation of the devices respectively.[64] The fact that the alleged anticipation was known to persons who experimented to produce the subsequent invention but failed to do so is admissible to show lack of identity.[65] The fact that the later method or device superseded the earlier is also admissible for that purpose.[66] Negative testimony of persons whose business and experience were adapted to bring to them a knowledge of all improvements therein to the effect that no such improvement as that covered by the patent in suit had previously come to their knowledge is admissible in contradiction of evidence tending to show prior knowledge or use.[67] Evidence of an acknowledgment that the patentee was the original inventor is also admissible.[68] A drawing, unaccompanied by any evidence that it was actually published or otherwise made accessible to the public, is not admissible to show that the method or device shown was described in a printed publication,[69] but a drawing is not rendered inadmissible by the mere fact that it is not accompanied by a written description of the method or device represented.[70] Evidence of prior use in foreign countries not shown to be known by the patentee and not patented or described in any printed publication is not admissible.[71] Evidence of such character as to be rendered incompetent under the general rules with respect to hearsay evidence is likewise inadmissible.[72] A mere statement, printed at the head of an application for a patent, that the original application was filed at a prior date, cannot be considered as evidence to carry the date of invention back to the time stated.[73]

[§ 57] **c. Weight and Sufficiency.** The burden of proving anticipation of a method or device for which a patent has been granted must be sustained by clear and convincing proof[74]—proof frequently characterized as sufficiently clear, certain, and precise as to satisfy beyond reasonable doubt.[75] The evi-

show earlier conception, reduction to practice, or diligence by patentee.— Barber v. Otis Motor Sales Co., 265 Fed. 675 [rev on other grounds 271 Fed. 171].

[c] **Date of prior application abroad** may be shown by patentee to establish his inventive act as earlier than the alleged anticipation. Welsbach Light Co. v. American Incandescent Lamp Co., 98 Fed. 613, 39 CCA 185; Hanifen v. Price, 96 Fed. 435 [rev on other grounds 102 Fed. 509, 42 CCA 484 (aff 186 U. S. 481 mem, 22 SCt 944 mem, 46 L. ed. 1260 mem)]; Hanifen v. E. H. Godschalk Co., 78 Fed. 811.

61. Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397.

62. Barber v. Reo Motor Car Sales Co., 245 Fed. 938; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Delano v. Scott, 7 F. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700.

63. Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397.

64. Thomson-Houston Electric Co. v. Western Electric Co., 72 Fed. 530, 19 CCA 1; Emerson v. Riley, 41 App. (D. C.) 480.

65. Many v. Jagger, 16 F. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. R. 222.

66. Stebler v. Riverside Heights Orange Growers' Assoc., 205 Fed. 735, 134 CCA 29 [certiorari den 231 U. S. 748 mem, 34 SCt 320 mem, 58 L. ed. 465 mem].

67. Hitchcock v. Shoninger Melodeon Co., 12 F. Cas. No. 6,537.

68. Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433].

69. Britton v. White Mfg. Co., 61 Fed. 93.

70. Britton v. White Mfg. Co., supra.

71. Hurlbut v. Schillinger, 130 U. S. 456, 9 SCt 584, 32 L. ed. 1011; Southern Electro-Chemical Co. v. Du Pont de Nemours, 20 F. (2d) 97 [rev 9 F. (2d) 69]; Permutit Co. v. Wadham, 13 F. (2d) 454; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397.

72. See cases infra this note.

[a] **File wrappers** of patents alleged to anticipate are not competent as evidence to show the reduction to practice and use of the inventions therein claimed at a date prior to the invention of the patent in suit. Howes v. McNeal, 4 Fed. 151, 17 Blatchf. 396.

[b] **A certificate of the commissioner of patents of a copy or translation of a French volume** in the patent office is inadmissible to prove the existence of an invention prior to the patent in suit. The production of the book itself or a duly sworn and proved translation is the only way its contents can be shown. Gaylord v. Case, 5 Oh. Dec. (Reprint) 413, 5 Am LRec 494.

73. Twentieth Century Motor Car, etc., Co. v. Holcomb Co., 220 Fed. 669, 136 CCA 311 [aff 208 Fed. 155].

74. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523 [rev 274 Fed. 540 (rev 267 Fed. 847)]; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154 [rev 33 Fed. 261]; A. B. Dick Co. v. Simplicator Corp., 30 F. (2d) 713; Porcelain Appliance Corp. v. Trenle Porcelain Co., 28 F. (2d) 870; Douglas Pectin Corp. v. Armour, 27 F. (2d) 814 [mod 14 F. (2d) 768, and reh den 21 F. (2d) 584]; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Carson v. American Smelting, etc., Co., 11 F. (2d) 766; International Cork Co. v. New Process Cork Co., 6 F. (2d) 420 [rev 295 Fed. 539]; Line Material Co. v. Brady Electric, etc., Co., 299 Fed. 822 [aff 7 F. (2d) 48]; Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem]; Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Merrill v. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; Eddy v. Kramer, 247 Fed. 962; Friedley-Voshardt Co. v. Reliance Metal Spinning Co., 238 Fed. 800; Thacher v. Polk County, 235 Fed. 724; Parkin v. Locomobile Co. of America, 226 Fed. 800 [rev on other grounds 231 Fed. 980, 146 CCA 176]; Greenwald v. La Vogue Petticoat Co., 226 Fed. 448, 141 CCA 278; Taigman v. Forsberg, 223 Fed. 787, 139 CCA 607; Wayman v. Louis Lipp Co., 222 Fed. 679; Wright v. Brownlee, 212 Fed. 157, 129 CCA 13; Perfection Cooler Co. v. Cordley, 207 Fed. 769; De Laski, etc., Circular Woven Tire Co. v. Fisk Rubber Co., 203 Fed. 986, 122 CCA 286 [aff 198 Fed. 125]; Emerson, etc., Co. v. Simpson Bros. Corp., 202 Fed. 747, 121 CCA 113 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 435 mem]; Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 717 [aff 195 Fed. 763, 115 CCA 462 (certiorari den 225 U. S. 709 mem, 32 SCt 840 mem, 56 L. ed. 1267 mem)]; Greenwald v. Weiss, 180 Fed. 474; Ajax Metal Co. v. Brady Brass Co., 155 Fed. 409 [rev on other grounds 160 Fed. 84, 87 CCA 240 (certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem)]; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117; Donoughe v. Hubbard, 27 Fed. 742; Thayer v. Spaulding, 27 Fed. 66; Zane v. Peck, 9 Fed. 101; Woven-Wire Mattress Co. v. Wire-Web Bed Co., 8 Fed. 87; Rogers v. Beecher, 3 Fed. 639; Magic Ruffle Co. v. Douglas, 16 F. Cas. No. 8,948, 2 Fish. Pat. Cas. 330; Taylor v. Wood, 23 F. Cas. No. 13,808, 1 Bann. & A. 270, 12 Blatchf. 110; Hopkins v. Peters, 41 App. (D. C.) 302; La Flare v. Chase, 8 App. (D. C.) 83.

75. Adamson v. Gilliland, 242 U. S. 350, 37 SCt 169, 61 L. ed. 356; Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154 [rev 33 Fed. 261]; Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. ed. 821; West v. Premier Register Table Co., 27 F. (2d) 653 [aff 21 F. (2d) 762]; Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272]; Lathrop v. Rice, etc., Corp., 21 F. (2d) 124 [aff 24 F. (2d) 1021 mem]; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Wilkie v. Manhattan Rubber Mfg. Co., 14 F. (2d) 811; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Heim Grinder Co. v. Fafnir Bearing Co., 13 F. (2d) 408; Mead-Morrison Mfg. Co. v. Hauck Mfg. Co., 10 F. (2d) 834; Rousso v. New Ideal Laundry Co., 9 F. (2d) 1012; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Rousso v. Boyle, 2 F. (2d) 299; Ideal Jewelry Co. v. Payton, 300 Fed. 422 [aff 7 F. (2d) 113]; Earles v. A. W. Drake Mfg. Co., 300 Fed. 265 [aff 289 Fed. 137, and certiorari den 266 U. S. 616 mem, 45 SCt 96 mem, 69 L. ed. 470 mem]; Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., Inc., 285 Fed. 73 [rev on other grounds 290 Fed. 625 (certiorari den 263 U. S. 708 mem, 44 SCt 36 mem, 68 L. ed. 517 mem)]; Townsend v. Lorraine, 283 Fed. 806 [rev on other grounds 290 Fed. 54]; Permutit Co. v. Harvey Laundry Co., 274 Fed. 937 [aff 279 Fed. 713 (certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem)]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff

dence must so satisfy not only as to the time when the earlier method or device was made accessible to the public,[76] but also as to its substantial identity with the method or device of the patent.[77] Where the proof is contradictory, a mere preponderance is not sufficient to sustain the burden of establishing anticipation.[78] Nor will a patent be held invalid where the evidence is sufficient only to raise a doubt as to whether the method or device covered was anticipated.[79] Every reasonable doubt must be resolved against the party raising the question.[80] The testimony must be weighed as in other causes,[81] and the testimony of reliable witnesses is not to be rejected arbitrarily because of mistakes and differences in nonessentials.[82] As a general rule, mere oral evidence depending upon the memory of the witness or witnesses, uncorroborated by contemporary records or memoranda, physical exhibits, or definitely proved circumstances is insufficient to overcome the presumption of novelty arising from the grant of the patent.[83] Such evidence is properly regarded with

276 Fed. 260]; Smith v. Peck, etc., Co., 258 Fed. 40; North American Chemical Co. v. Dexter, 252 Fed. 169; Inflexible Co. v. Megibow, 251 Fed. 924; Ferd Messmer Mfg. Co. v. Pick, 251 Fed. 894, 164 CCA 110; A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; Crone v. John J. Gibson Co., 237 Fed. 637 [rev on other grounds 247 Fed. 503, 160 CCA 13]; Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115; Taigman v. Forsberg, 223 Fed. 787, 139 CCA 607; Wayman v. Louis Lipp Co., 222 Fed. 679; Peele Co. v. Rashkin, 222 Fed. 293, 138 CCA 19; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem]; Electric Storage Battery Co. v. Philadelphia Storage Battery Co., 211 Fed. 154; Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 717 [aff 195 Fed. 763, 115 CCA 462 (certiorari den 225 U. S. 709 mem, 32 SCt 840 mem, 56 L. ed. 1267 mem)]; De Laval Separator Co. v. Iowa Dairy Separator Co., 194 Fed. 423, 114 CCA 385; T. B. Wood's Sons Co. v. Valley Iron Works, 191 Fed. 196 [aff 196 Fed. 780, 116 CCA 46]; H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 CCA 613; Parker v. Stebler, 177 Fed. 210, 101 CCA 380; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; Underwood Typewriter Co. v. Elliott-Fisher Co., 165 Fed. 927; Albright v. Longfeld, 131 Fed. 473; Timolat v. Philadelphia Pneumatic Tool Co., 131 Fed. 257; Durfee v. Bawo, 118 Fed. 853; Loew Filter Co. v. German-American Filter Co., 107 Fed. 949, 47 CCA 94; Brown v. Zaubitz, 105 Fed. 242; Flomerfelt v. Newwitter, 88 Fed. 696 [aff 95 Fed. 1006 mem, 37 CCA 356 mem]; Dodge v. Post, 76 Fed. 807; Binns v. Zucker, etc., Chemical Co., 70 Fed. 711; Oval Wood Dish Co. v. Sandy Creek Wood Mfg. Co., 60 Fed. 285; Converse v. Matthews, 58 Fed. 246; Francis v. Kirkpatrick, 52 Fed. 824; Haughey v. Meyer, 48 Fed. 679; Zinsser v. Kremer, 39 Fed. 111; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117; Cohansey Glass Mfg. Co. v. Wharton, 28 Fed. 189; Wetherell v. Keith, 27 Fed. 364; Dreyfus v. Schneider, 25 Fed. 481; Duffy v. Reynolds, 24 Fed. 855; Everest v. Buffalo Lubricating Oil Co., 20 Fed. 848; Doubleday v. Beatty, 11 Fed. 729; Shirley v. Sanderson, 3 Fed. 905; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, 1 Holmes 503; Campbell v. James, 4 F. Cas. No. 2,361, 4 Bann. & A. 456, 17 Blatchf. 42; Hawes v. Antisdel, 11 F. Cas. No. 6,234 2 Bann. & A. 10; Konold v. Klein, 14 F. Cas. No. 7,925, 3 Bann. & A. 226; Treadwell v. Bladen, 24 F. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. C. C. 703; In re Grieve, 45 App. (D. C.) 524; In re Chapman, 41 App. (D. C.) 258; Saunders v. Miller, 33 App. (D. C.) 456.

[a] **Evidence held sufficient to show prior knowledge or use.**—Freydberg v. Hamburger, 17 F. (2d) 300; Cottrell, etc., Co. v. Claybourn Process Corp., 17 F. (2d) 279 [aff 24 F. (2d) 1014 mem]; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Wilkie v. Manhattan Rubber Co., 8 F. (2d) 785 [aff 14 F. (2d) 811]; Schram's Application, 4 F. (2d) 958; In re Scheib, 290 Fed. 343; General Electric Co. v. Ohio Brass Co., 277 Fed. 917; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680 (aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098)]; Safe-Cabinet Co. v. Globe-Wernicke Co., 242 Fed. 497, 155 CCA 273; Standard Sanitary Mfg. Co. v. Iron City Sanitary Mfg. Co., 222 Fed. 671, 138 CCA 219; Moyer v. Metal Stamping Co., 169 Fed. 825 [rev on other grounds 178 Fed. 830, 102 CCA 504]; Simmond v. Morrison, 44 Fed. 757; Gibson v. Scribner, 22 Fed. 840; Doubleday v. Beatty, 11 Fed. 729; Parker v. Ferguson, 18 F. Cas. No. 10,733, 1 Blatchf. 407, Fish. Pat. R. 260; Snyder's Application, 57 App. (D. C.) 180, 18 F. (2d) 830; Parker's Application, 53 App. (D. C.) 209, 289 Fed. 607; In re Hillard, 48 App. (D. C.) 493; Boynton v. Taggart, 40 App. (D. C.) 82.

[b] **Evidence held insufficient to show prior knowledge or use.**—Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523 [rev 274 Fed. 540 (rev 267 Fed. 847)]; T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045 [aff 230 Fed. 821, 145 CCA 131 (reh den 234 Fed. 343, 148 CCA 245, and rev 222 Fed. 517)]; Concrete Mixing, etc., Co. v. Powers-Kennedy Contracting Corp., 27 F. (2d) 668 [certiorari granted 49 SCt 95]; Copley Plaza Operating Co. v. Schaum, 269 Fed. 140; Merrell-Soule Co. v. Rico Milk Products Co., 268 Fed. 366; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Perfection, etc., Bed Co. v. Murphy, etc., Bed Co., 266 Fed. 698 [certiorari den 254 U. S. 652 mem, 41 SCt 149 mem, 65 L. ed. 458 mem]; Kurtz v. Blatt, 263 Fed. 392; Merrill v. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; Smith v. Peck, etc., Co., 258 Fed. 40; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; Automatic Pencil Sharpener Co. v. Stewart Mfg. Co., 249 Fed. 52, 161 CCA 112; Eddy v. Kramer, 247 Fed. 962; Buffalo Forge Co. v. Buffalo, 246 Fed. 135; Thacher v. Polk County, 235 Fed. 724; Wakefield Sheet Piling Co. v. New Orleans, 177 Fed. 214, 101 CCA 384 [certiorari den 219 U. S. 585 mem, 31 SCt 470 mem, 55 L. ed. 347 mem]; Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 498, 53 CCA 230; Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 61 Fed. 948, 10 CCA 184; Lalance, etc., Mfg. Co. v. Haberman Mfg. Co., 55 Fed. 292, 5 CCA 111 [aff 53 Fed. 375]; Edison Electric Light Co. v. Beacon Vacuum Pump, etc., Co., 54 Fed. 678; Smith v. Davis, 34 Fed. 783; Wetherell v. Keith, 27 Fed. 364; Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 26 Fed. 104 [mod on other grounds 135 U. S. 342, 10 SCt 884, 34 L. ed. 168]; Field v. Rugh, 48 App. (D. C.) 589; In re Huff, 48 App. (D. C.) 258.

[c] **Evidence held sufficient to establish the public character of a patent.**—As against an objection that it did not appear from the copy of a foreign patent, introduced to show prior invention, whether it was an open or a secret one, it has been held that, since only public records are provable by copy certified merely, and as the authorities of a foreign government would not have a patent in a condition to be certified if it was secret, the fact that it is certified shows it to be public. Schoerken v. Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 269.

76. Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Hewes v. Gay, 11 F. (2d) 165; Greenwald v. La Vogue Petticoat Co., 226 Fed. 448, 141 CCA 278; Ajax Metal Co. v. Brady Brass Co., 155 Fed. 409 [rev on other grounds 160 Fed. 84, 87 CCA 240 (certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem)].

77. Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; James Heddon's Sons v. South Bend Bait Co., 14 F. (2d) 805 [certiorari den 273 U. S. 737 mem, 47 SCt 245 mem, 71 L. ed. 867 mem]; Hewes v. Gay, 11 F. (2d) 165; Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., Inc., 285 Fed. 73 [rev on other grounds 290 Fed. 625 (certiorari den 263 U. S. 708 mem, 44 SCt 36 mem, 68 L. ed. 517 mem)]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Featheredge Rubber Co. v. Miller Rubber Co., 250 Fed. 255; Greenwald v. La Vogue Petticoat Co., 226 Fed. 448, 141 CCA 278; Ajax Metal Co. v. Brady Brass Co., 155 Fed. 409 [rev on other grounds 160 Fed. 84, 87 CCA 240 (certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem)].

78. Hawes v. Antisdel, 11 F. Cas. No. 6,234, 2 Bann. & A. 10.

79. Rousso v. New Ideal Laundry Co., 9 F. (2d) 1012; Block v. Nathan Anklet Support Co., 9 F. (2d) 311; Shipman v. Frank, 237 Fed. 395; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504.

80. Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Universal Oil Products Co. v. Skelly Oil Co., 20 F. (2d) 995; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [aff 290 Fed. 998, and certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem]; Atlantic, etc., Co. v. Wood, 283 Fed. 148; Eddy v. Kramer, 247 Fed. 962; A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; Victor Talking Mach. Co. v. Duplex Phonograph Co., 177 Fed. 248.

81. Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 103 CCA 479 [rev 173 Fed. 69, and certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem].

82. Corrington v. Westinghouse Air Brake Co., supra.

83. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523 [rev 274 Fed. 540 (rev 267 Fed. 847)]; T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045 [aff 230 Fed. 821, 145 CCA 131 (reh den 234 Fed. 343, 148 CCA 245, and rev 222 Fed. 517)];

grave suspicion,[84] and must be closely scrutinized.[85] But this rule is not inflexible.[86] Oral testimony, although lacking such corroboration, may be so definite, specific, and worthy of credence as to satisfy a court of the fact of prior knowledge or use.[87] Prior knowledge or use cannot be said to have been proved beyond a reasonable doubt by oral testimony where other and conclusive proof in the form of the alleged anticipatory device exists and no effort was made to produce it or to excuse the omission.[88] In determining the weight to be given the testimony of witnesses who speak from personal recollection only, the length of time elapsed since the alleged prior use is to be considered.[89] So also is the complexity or simplicity of the method or device involved.[90] The presumption of validity is not overcome by oral testimony which is indefinite and contradictory.[91] Prior use may be established by the testimony of a single witness.[92]

Earlier invention or discovery, when it is sought to be shown, must also be established by satisfactory and convincing proof,[93] so cogent as to leave no reasonable doubt in the mind of the trier of fact.[94] The evidence must satisfactorily show both earlier conception and reasonable diligence in reduction to practice.[95]

[§ 58] **D. Utility—1. In General.** The purpose declared by the constitution as the motive for conferring the power upon congress to grant patents, and the language employed by congress in prescribing the conditions upon which these rights are given, both place emphasis upon usefulness.[96] The power is conferred "for the purpose of promoting the progress of science and the useful arts,"[97] and the right to obtain a patent is given to one whose invention or discovery is "useful."[98] Furthermore, the commissioner of patents is authorized to issue letters patent only if it shall appear "that the same is sufficiently useful and important."[99] In order that a valid patent may be obtained an invention must not only be new,[1] but it must also possess the attribute of utility.[2]

Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; D. W. Bosley Co. v. Wirfs, 30 F. (2d) 667; Douglas Pectin Corp. v. Armour, 27 F. (2d) 814 [mod 14 F. (2d) 768, and reh den 21 F. (2d) 584]; Tinsel Corp. v. Haupt, 25 F. (2d) 318; Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Carson v. American Smelting, etc., Co., 4 F.(2d) 463 [rev 293 Fed. 771, and certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Collins v. Hupp Motor Corp., 4 F. (2d) 272; Jockmus v. Gale, 295 Fed. 208; Kalamazoo Loose Leaf Binder Co. v. Wilson Jones Loose Leaf Co., 286 Fed. 715; Pittsburgh Plate Glass Co. v. American Window Glass Co., 276 Fed. 197 [aff 276 Fed. 849]; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Inflexible Co. v. Megibow, 251 Fed. 924; Eddy v. Kramer, 247 Fed. 962; Shipman v. Frank, 237 Fed. 395; Stead Lens Co. v. Kryptok Co., 214 Fed. 368, 131 CCA 144 [aff 207 Fed. 85]; Hopewell v. Linscott Supply Co., 205 Fed. 757; Emerson, etc., Co. v. Simpson Bros. Corp., 202 Fed. 747, 121 CCA 113 [rev 188 Fed. 808, and certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 435 mem]; United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [aff 138 Fed. 136, and certiorari den 205 U. S. 547 mem, 27 SCt 795 mem, 51 L. ed. 924 mem]; Wickes v. Lockwood, 65 Fed. 610; Lalance, etc., Mfg. Co. v. Habermann Mfg. Co., 53 Fed. 375; Mack v. Spencer Optical Mfg. Co., 52 Fed. 819; Caverly v. Deere, 52 Fed. 758; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117; Smith v. Davis, 34 Fed. 783; Woven-Wire Mattress Co. v. Wire-Web Bed Co., 8 Fed. 87; Blake v. Eagle Works Mfg. Co., 3 F. Cas. No. 1,494, 3 Biss. 77, 4 Fish. Pat. Cas. 591; Blake v. Rawson, 3 F. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200; Potter v. Fuller, 19 F. Cas. No. 11,327, 2 Fish. Pat. Cas. 251; Thatcher Heating Co. v. Carbon Stove Co., 23 F. Cas. No. 13,864, 4 Bann. & A. 68; Montgomery v. U. S., 65 Ct. Cl. (U. S.) 526.

84. T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045 [aff 230 Fed. 821, 145 CCA 131 (reh den 234 Fed. 343, 148 CCA 245, and rev 222 Fed. 517)]; Deering v. Winona Harvester Works, 155 U. S. 286, 300, 15 SCt 118, 39 L. ed. 153; Townsend v. Lorraine, 283 Fed. 806 [rev on other grounds 290 Fed. 54].

"As we have had occasion before to observe, oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented is, in the nature of the case, open to grave suspicion. Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154. Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, are such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used." Deering v. Winona Harvester Works, supra.

85. Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Ely v. Monson, etc., Mfg. Co., 8 F. Cas. No. 4,431, 4 Fish. Pat. Cas. 64.

86. Crone v. John J. Gibson Co., 247 Fed. 503, 160 CCA 13 [rev 237 Fed. 637]; United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [certiorari den 205 U. S. 547 mem, 27 SCt 795 mem, 51 L. ed. 924 mem]; Sipp Electric, etc., Co. v. Atwood-Morrison Co., 142 Fed. 149, 73 CCA 367.

87. Crone v. John J. Gibson Co., 247 Fed. 503, 160 CCA 13; Grupe Drier, etc., Co. v. Geiger, 215 Fed. 110, 131 CCA 418; Sipp Electric, etc., Co. v. Atwood-Morrison Co., 142 Fed. 149, 73 CCA 367; American Roll-Paper Co. v. Weston, 59 Fed. 147, 8 CCA 56; Rochester Coach Lace Co. v. Schaefer, 46 Fed. 190 [aff 50 Fed. 106, 1 CCA 488]; Lee v. Upson, etc., Co., 43 Fed. 670; Riley v. Daniels, 20 F. Cas. No. 11,837.

88. H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 CCA 613.

89. Pittsburgh Plate Glass Co. v. American Window Glass Co., 276 Fed. 197 [aff 276 Fed. 849]; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Emerson, etc., Co. v. Simpson Bros. Corp., 202 Fed. 747, 121 CCA 113 [rev 188 Fed. 808, and certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 435 mem].

90. National Casket Co. v. Stolts, 157 Fed. 392; Lee v. Upson, etc., Co., 43 Fed. 670; Riley v. Daniels, 20 F. Cas. No. 11,837.

91. Untermeyer v. Freund, 58 Fed. 205, 7 CCA 183; Shirley v. Sanderson, 8 Fed. 905; Hawes v. Antisdel, 11 F. Cas. No. 6,234, 2 Bann. & A. 10.

92. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610 [rev 16 F. (2d) 419 (rev 10 F. (2d) 598)].

93. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Williamson Heater Co. v. Monitor Stove Co., 282 Fed. 906 [aff 299 Fed. 1]; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; Charles Hunnicutt Co. v. A. B. Gaston Co., 218 Fed. 176, 134 CCA 56 [aff 207 Fed. 585]; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79; Corbett Bros. Co. v. Reinhardt-Meding Co., 166 Fed. 767; New England Motor Co. v. B. F. Sturtevant Co., 150 Fed. 131, 80 CCA 85; Untermeyer v. Freund, 58 Fed. 205, 7 CCA 183.

94. Barber v. Otis Motor Sales Co., 271 Fed. 171 [rev 265 Fed. 675, and certiorari den 256 U. S. 693 mem, 41 SCt 535 mem, 65 L. ed. 1175 mem]; Moline Plow Co. v. Rock Island Plow Co., 212 Fed. 727, 129 CCA 337; Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622, 78 CCA 394.

[a] **Evidence held sufficient.**—Corrugated Paper Patents Co. v. Paper Working Mach. Co., 237 Fed. 380; Perlman v. Standard Welding Co., 231 Fed. 453 [aff 231 Fed. 734, 146 CCA 18].

[b] **Evidence held insufficient.**—Columbus Dental Mfg. Co. v. Ideal Interchangeable Tooth Co., 294 Fed. 422 [aff 282 Fed. 896]; Williamson Heater Co. v. Monitor Stove Co., 282 Fed. 906 [aff 299 Fed. 1]; Universal Rim Co. v. Firestone Steel Products Co., 289 Fed. 884 [mod on other grounds 7 F. (2d) 24]; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; National Mach. Corp v. Benthall Mach. Co., 241 Fed. 72, 154 CCA 72; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79 [rev 170 Fed. 600].

95. Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Christie v. Seybold, 55 Fed. 69, 5 CCA 33.

96. Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787.

97. U. S. Const. art 1 § 8.

98. U. S. Code tit 35 § 31.

99. U. S. Code tit 35 § 36.

1. See supra § 26.

2. U. S.—Densmore v. Scofield, 102 U. S. 375, 26 L. ed. 214; Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Lovejoy v. Shultz, 26 F. (2d) 562; Sprague v. Dodge, 24 F. (2d) 283; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Terkelsen Mach. Co. v. Pierce Wrapping Mach. Co., 5 F. (2d) 294 [rev 300 Fed. 147, and certiorari den 269 U. S. 566 mem, 46 SCt 24 mem, 70 L. ed. 415 mem]; Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 274 Fed. 964; Tiffany v. Paper Products Co., 244 Fed. 178, 182 [aff 253 Fed. 953, 165 CCA 395, and quot Cyc]; Besser v. Merrilat Culvert Core Co., 243 Fed. 611, 156 CCA 309; Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787; Closz, etc., Mfg. Co. v. J. I. Case Threshing Mach. Co., 216 Fed. 937; Eastman v. New York, 134 Fed.

[§ 59] **2. What Constitutes Patentable Utility.** An invention is "useful," as that term is used in the statute, if it is capable of performing some beneficial function claimed for it.[3] A method or device lacks utility if it is wholly inoperative so far as its claimed functions are concerned.[4] Total incapacity with respect to part only of the functions claimed for an invention does not amount to lack of utility within the meaning of the statute.[5] An invention is "useful" if it is capable of accomplishing one of the functions claimed, although not others.[6] Language is to be found in some of the decisions indicating that the requirement of utility is satisfied if the invention is useful for any beneficial purpose,[7] but this expression is to be taken in a general sense as applicable to all patents, and not as implying in a particular case, where the thing invented is worthless for the purpose intended, but of possible useful application to some other, that a patent may, nevertheless, be obtained.[8] It has been held that the usefulness of an invention need not flow directly from the art or instrument itself considered apart from any connection with, or application to, other devices or instrumentalities.[9] Expression, however, has been given to a contrary view.[10]

[§ 60] **3. Degree of Utility Required.** The word "useful" is to be given a practical and not a specula-

844, 69 CCA 628; Higgin Mfg. Co. v. Murdock, 132 Fed. 810, 65 CCA 466; Burdon Wire, etc., Co. v. Williams, 128 Fed. 927; Shannon v. Bruner, 33 Fed. 289 [aff 149 U. S. 767 mem, 786 mem, 13 SCt 1043 mem, 1052 mem, 37 L. ed. 930 mem, 961 mem]; Adams v. Loft, 1 F. Cas. No. 61, 4 Bann. & A. 495; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Coleman v. Liesor, 6 F. Cas. No. 2,984; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; In re Corbin, 6 F. Cas. No. 3,224, McA. Pat. Cas. 521; Cox v. Griggs, 6 F. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Crouch v. Speer, 6 F. Cas. No. 3,438, 1 Bann. & A. 145; Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Hoffheins v. Brandt, 12 F. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Jones v. Wetherill, 13 F. Cas. No. 7,508, McA. Pat. Cas. 409; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024], 15 F. Cas. No. 8,727, 3 Blatchf. 209 [aff 19 How. 96, 15 L. ed. 557]; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Roemer v. Logowitz, 20 F. Cas. No. 11,996; Ross v. Wolfinger, 20 F. Cas. No. 12,081; Sloat v. Spring, 22 F. Cas. No. 12,948a; In re Smith, 22 F. Cas. No. 12,982, McA. Pat. Cas. 255; Thompson v. Haight, 23 F. Cas. No. 13,957; Westlake v. Carter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Wilbur v. Beecher, 29 F. Cas. No. 17,634, 2 Blatchf. 132; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

D. C.—Gathmann v. Clarke, 45 App. 512; In re Klemm, 21 App. 186.

Mass.—Dickinson v. Hall, 14 Pick. 217, 25 AmD 390.

N. J.—Welling v. Crane, 7 N. J. L. J. 338.

Pa.—Street v. Silver, Brightly 96.

[a] **In England** it is also essential that the invention be capable of performing a claimed function. Bloxam v. Elsee, 6 B. & C. 169, 13 ECL 88, 108 Reprint 415, 1 C. & P. 558, 12 ECL 320, 171 Reprint 1316.

3. Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; U. S. Gypsum Co. v. Bestwall Mfg. Co., 258 Fed. 647 [aff 270 Fed. 542]; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)]; Munger v. Perlman Rim Corp., 244 Fed. 799; Besser v. Merrilat Culvert Core Co., 243 Fed. 611, 156 CCA 309 [aff 226 Fed. 783]; Engineer Co. v. Hotel Astor, 226 Fed. 779; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; National Mfg. Co. v. Sharon Hardware Mfg. Co., 192 Fed. 130; Force v. Bates Mach. Co., 170 Fed. 446; Diamond Stone Sawing Mach. Co. v. Brown, 130 Fed. 896 [aff 137 Fed. 910, 70 CCA 248]; Strobridge v. Lindsay, 2 Fed. 692, 5 Bann. & A. 411.

[a] **"Patentable utility" distinguished from "invention."**—"The phrase 'patentable utility' is sometimes perhaps rather inaccurately used to denote the function of being useful plus the skill of the inventor as distinguished from that of the mechanic. . . . When some courts, and this among them, have, in the course of denying patentability, thrown doubts upon utility, doubtless they have intended, as we have, to refer to the lack of any useful function or new result serving to give inventive character to the slight step which the patentee had taken, in differentiation from the prior art. See, for example, Naceskid Serv. Chain Co. v. Perdue, 1 F. (2d) 924." Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655, 656.

4. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 263; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Pacific States Electric Co. v. Wright, 277 Fed. 756; Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 274 Fed. 964; Beitman v. Strater, 262 Fed. 443; Besser v. Merrilat Culvert Core Co., 243 Fed. 611, 156 CCA 309; Schmidt v. Central Fdy. Co., 229 Fed. 157, 143 CCA 433, AnnCas 1917C 258; Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787; Lagonda Mfg. Co. v. Elliott Co., 214 Fed. 581, 131 CCA 423 [aff 205 Fed. 149]; Lagonda Mfg. Co. v. Elliott Co., 205 Fed. 149 [aff 214 Fed. 581, 131 CCA 423]; Computing Scale Co. v. Standard Computing Scale Co., 195 Fed. 508, 115 CCA 418; Loggie v. Puget Sound Mills, etc., Co., 194 Fed. 158; Thomson-Houston Electric Co. v. Lorain Steel Co., 103 Fed. 641 [rev on other grounds 107 Fed. 711, 46 CCA 593]; Carter Mach. Co. v. Hanes, 70 Fed. 859; Torrant v. Duluth Lumber Co., 30 Fed. 830; Bliss v. Brooklyn, 3 F. Cas. No. 1,546, 10 Blatchf. 521, 6 Fish. Pat. Cas. 289; Brown v. Whittemore, 4 F. Cas. No. 2,033, 5 Fish. Pat. Cas. 524; In re Cushman, 6 F. Cas. No. 3,513, McA. Pat. Cas. 569; Ex p. Sanders, 21 F. Cas. No. 12,292; In re Mattullath, 46 App. (D. C.) 143; In re Creveling, 25 App. (D. C.) 530; Burrall v. Jewett, 2 Paige (N. Y.) 134; Rowe v. Blanchard, 18 Wis. 441, 86 AmD 783.

Imperfectly operating inventions see infra § 62.

Inoperativeness curable by mechanical skill see infra § 61.

5. Scovill Mfg. Co. v. Satler, 21 F. (2d) 630, 634; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Eames v. Cook, 8 F. Cas. No. 4,239, 2 Fish. Pat. Cas. 146.

"When this defense is relied upon, the evidence must show a total incapacity of the invention to do anything claimed for it, because neither imperfect operation nor a total failure to perform part of the claimed functions will sustain the defense of want of utility." Scovill Mfg. v. Satler, supra.

6. Scovill Mfg. Co. v. Satler, supra; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Phillips v. Risser, 26 Fed. 308; Eames v. Cook, 8 F. Cas. No. 4,239, 2 Fish. Pat. Cas. 146.

7. Gillett v. Bate, 86 N. Y. 87; Tod v. Wick, 36 Oh. St. 370; Rowe v. Blanchard, 18 Wis. 441, 86 AmD 783.

8. Rowe v. Blanchard, supra.

9. Menzer v. Kenworthy, 275 Fed. 649; Clark Blade, etc., Co. v. Gillette Safety Razor Co., 194 Fed. 421, 114 CCA 383 [aff 187 Fed. 149]; Kenney Mfg. Co. v. J. L. Mott Iron Works, 137 Fed. 431; Roberts v. H. P. Nail Co., 53 Fed. 916; Wells v. Jacques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1.

[a] **Reason for rule.**—"Patents for simple devices, and patents for parts of machines, are almost numberless, of which it may be truly said, that it is only by connection with other devices or instrumentalities, to which they are intended to be applied, that they can be made to produce any result whatever. True, the patentee is bound to disclose a mode in which they may be rendered practically useful, and it may be one of many modes, and it may necessarily involve the use of many other known devices which are required in order to [effect] the useful result. Patents may be granted for combinations, in which some of the parts are old and some are new, and whatever in the several parts is new may be separately secured to the inventor; and yet it may be true that only in the combination described, or in some similar combination, is the new part thus secured to the inventor of any practical use whatever." Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 185, 6 Fish. Pat. Cas. 1.

10. Terkelsen Mach. Co. v. Pierce Wrapping Mach. Co., 5 F. (2d) 294 [rev 300 Fed. 147, and certiorari den 269 U. S. 566 mem, 46 SCt 24 mem, 70 L. ed. 415 mem].

[a] **Rule applied.**—Claims for a wrapping consisting of a continuous strip of paper wound spirally about an annular object and a strip of tape adhesively applied to folds of the first strip to hold them in fixed relation are invalid as claiming a distinct article, a wrapping, which could not be manufactured or exist apart from the object wrapped. Terkelsen Mach. Co. v. Pierce Wrapping Mach. Co., 5

tive meaning.[11] It is used in contradistinction to "frivolous."[12] Even though an invention possesses capacity to produce a claimed result, it lacks patentable utility if that result is of no possible advantage to the public.[13] The commissioner of patents may refuse to issue a patent for such an invention,[14] and, while there are expressions in some of the decisions indicating the contrary,[15] a patent issued for such an invention cannot be sustained.[16] It has been held that, even if the invention can be made to accomplish the purpose intended, it is not useful, if from its inherent nature it will accomplish the purpose only to such a restricted extent as to make its use in industry prohibitive.[17] But any degree of advantage, however slight, is sufficient.[18] Such advantage may reside in mere simplicity[19] or cheapness of construction.[20] An invention need not be of such general utility as to supersede all other existing means of accomplishing the same object.[21] It is not required that an invention be a commercial success,[22] or even that it be commercially practical.[23] Nor is it essential that the invention should be the best of its kind or incapable of improvement.[24] Every patent as to utility depends on the state of the art at the time of the claim made or patent issued;[25] and if the invention was useful when the patent was granted, the fact that it has become useless since by the discovery of some other method which dispenses with it gives no right to others to use it.[26]

[§ 61] **4. Inoperativeness Curable by Mechanical Skill.** The necessity for the correction of minor structural defects before an invention will work at all does not necessarily establish a false inventive concept.[27] Imperfections of this character, not affecting the substance of the invention, and which are

F. (2d) 294 [rev 300 Fed. 147, and certiorari den 269 U. S. 566 mem, 46 SCt 24 mem, 70 L. ed. 415 mem].

11. Besser v. Merrilat Culvert Core Co., 243 Fed. 611, 156 CCA 309.

12. Adams v. Edwards, 1 F. Cas. No. 53, 1 Fish. Pat. Cas. 1; Coleman v. Liesor, 6 F. Cas. No. 2,984; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Winans v. Schenectady, etc., R. Co., 30 F. Cas. No. 17,865, 2 Blatchf. 279.

13. Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Schulte v. Colorado Tire, etc., Co., 259 Fed. 562, 170 CCA 524; Schmidt v. Central Fdy. Co., 229 Fed. 157, 143 CCA 433, AnnCas1917C 258; Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. 210 [aff 145 Fed. 928, 76 CCA 466]; In re Cushman, 6 F. Cas. No. 3,513, McA. Pat. Cas. 569.

14. In re Cushman, supra.

Examination and issuance of patent by commissioner in general see infra §§ 175–242.

15. In re Cushman, 6 F. Cas. No. 3,513, McA. Pat. Cas. 569; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567.

16. Schulte v. Colorado Tire, etc., Co., 259 Fed. 562, 170 CCA 524; Schmidt v. Central Fdy. Co., 229 Fed. 157, 143 CCA 433, AnnCas1917C 258.

[a] **Illustration.**—An infringement suit cannot be maintained upon a patent consisting only in covering the inner rivet heads of a belt for use on a particular groove-shaped pulley where, because the belt passes over the grooved wheels without the rivet heads being touched, no protection is needed for them, and they serve no other purpose. Schulte v. Colorado Tire, etc., Co., 259 Fed. 562, 170 CCA 524.

17. Besser v. Merrilat Culvert Core Co., 243 Fed. 611, 156 CCA 309.

18. Nestle Patent Holding Co. v. Gem Permanent Wave Co., 6 F. (2d) 1013; Victor Talking Mach. Co. v. Wanamaker, 275 Fed. 448; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 CCA 36; Boynton Co. v. Morris Chute Co., 82 Fed. 440 [aff 87 Fed. 225, 30 CCA 617]; Gibbs v. Hoefner, 19 Fed. 323; Collender v. Griffith, 2 Fed. 206, 18 Blatchf. 110; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493; Conover v. Roach, 6 F. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Crouch v. Speer, 6 F. Cas. No. 3,438, 1 Bann. & A. 145; Doherty v. Haynes, 7 F. Cas. No. 3,963, 1 Bann. & A. 289, 4 Cliff. 291; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Simmons v. Blackington, 22 F. Cas. No. 12,866; Tilghman v. Werk, 23 F. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [rev on other grounds 1 Black 427, 17 L. ed. 168]; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536.

[a] **Superiority of tone indistinguishable to ordinary hearer.**—That an ordinary hearer could not distinguish between the sounds from a tapered tone arm and those from one having parallel sides does not establish lack of utility in the former if a talking machine having a tapering tone arm does in fact have superiority of tone, capable of being demonstrated by careful experiments or of being detected by well trained musicians. Victor Talking Mach. Co. v. Wanamaker, 275 Fed. 448.

[b] **Devices for amusement** are useful and patentable. Boynton Co. v. Morris Chute Co., 82 Fed. 440 [aff 87 Fed. 225, 30 CCA 617].

[c] **Artificial food that is not deleterious.**—In re Corbin, 6 F. Cas. No. 3,224, McA. Pat. Cas. 521.

19. Hills v. Hamilton Watch Co., 248 Fed. 499.

[a] **Illustration.**—Simplicity of construction resulting in a gain in the facility with which a mainspring barrel of a watch may be disassembled and reassembled. Hills v. Hamilton Watch Co., 248 Fed. 499.

20. Collender v. Griffith, 2 Fed. 206, 18 Blatchf. 110.

21. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Westinghouse Electric, etc., Co. v. Beacon Lamp Co., 95 Fed. 462; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 185, 1 Robb Pat. Cas. 131; Poppenhusen v. New York Gutta Percha Comb. Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Rowe v. Blanchard, 18 Wis. 441, 86 AmD 783.

"The defendant, however, has asserted a much more broad and sweeping doctrine; and one, which I feel myself called upon to negative in the most explicit manner. He contends, that it is necessary for the plaintiff to prove, that his invention is of general utility; so that in fact, for the ordinary purposes of life, it must supersede the pumps in common use. In short, that it must be, for the public, a better pump than the common pump; and that unless the plaintiff can establish this position, the law will not give him the benefit of a patent, even though in some peculiar cases his invention might be applied with advantage. I do not so understand the law. The Patent Act [Act Febr. 21, 1793, c 11 (1 St. at L. 318)] uses the phrase 'useful invention' merely incidentally; it occurs only in the first section, and there it seems merely descriptive of the subject matter of the application, or of the conviction of the applicant. The language is, 'when any person or persons shall allege, that he or they have invented any new and useful art, machine,' &c., he or they may, on pursuing the directions of the Act, obtain a patent. Neither the oath required by the second section, nor the special matter of defence allowed to be given in evidence by the sixth section of the act, contains any such qualification or reference to general utility, to establish the validity of the patent. Nor is it alluded to in the tenth section as a cause, for which the patent may be vacated. To be sure, all the matters of defence or of objection to the patent are not enumerated in these sections. Whitemore v. Cutter, 29 F. Cas. No. 17,600, Gall. 429, 435, 1 Robb Pat. Cas. 28. But if such an one as that now contended for, had been intended, it is scarcely possible to account for its omission. In my judgment the argument is utterly without foundation. All that the law requires is, that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society." Per Story, J., in Lowell v. Lewis, supra.

22. Reed v. Hughes Tool Co., 261 Fed. 192 [certiorari den 251 U. S. 561 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; Fair v. Shelton, 128 N. C. 105, 38 SE 290.

23. Electro-Dynamic Co. v. U. S. Light, etc., Corp., 278 Fed. 80 [aff 246 Fed. 127]; Melling v. Gordon, 55 App. (D. C.) 273, 4 F. (2d) 945.

24. Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Lamb Knit Goods Co. v. Lamb Glove, etc., Co., 120 Fed. 267, 56 CCA 547; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Westinghouse v. Boyden Power Brake Co., 66 Fed. 997; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Blake v. Smith, 3 F. Cas. No. 1,502; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493; Many v. Jagger, 16 F. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. R. 222; Mix v. Perkins, 17 F. Cas. No. 9,677; Parkhurst v. Kinsman, 18 F. Cas. No. 10,757, 1 Blatchf. 488, Fish. Pat. R. 161 [aff 18 How. 289, 15 L. ed. 385]; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1; Wilbur v. Beecher, 29 F. Cas. No. 17,634, 2 Blatchf. 132, Fish Pat. R. 401.

25. U. S., etc., Salamander Felting Co. v. Haven, 28 F. Cas. No. 16,788, 2 Bann. & A. 164; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1.

26. Westinghouse Electric, etc., Co. v. Beacon Lamp Co., 95 Fed. 462; National Hat-Pouncing Mach. Co. v. Thom, 25 Fed. 496; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62.

27. Dashiell v. Grosvenor, 162 U.

curable by mechanical skill, do not render an invention inoperative,[28] and the fact that certain changes, within the realm of the skill of the mechanic experienced in the particular art, are necessary to successful operation will not support a claim that the invention lacks utility.[29] It is sufficient if one skilled in the art could produce the result from the means described.[30]

[§ 62] **5. Inventions Operating Imperfectly.** Mere imperfections not affecting the substance of an invention do not render it lacking in patentable utility.[31] The invention may be imperfect in its operation; but if it embodies the generic principle, and works, that is, if it actually and mechanically performs, although only in a crude way, the important function by which it makes the substantial change claimed for it in the art, it is enough.[32] In other words, it is sufficient if the result claimed can be produced by the means disclosed, even though not the most efficient,[33] and even though an improvement may be necessary to commercial success.[34] This rule, it has been asserted, applies with particular force to generic inventions.[35] Nor is it always essential that an invention be so perfect as never to fail in the production of the result claimed for it.[36] Such failure is fatal if it is due to a defect in the principle of the invention,[37] or to the absence of some necessary element,[38] but not otherwise.[39]

[§ 63] **6. Harmful Inventions.** The term "useful" is employed in contradistinction to "mischievous" or "immoral."[40] An invention capable only of

S. 425, 16 SCt 805, 40 L. ed. 1025; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422].

28. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Dashiell v. Grosvenor, 162 U. S. 425, 16 SCt 805, 40 L. ed. 1025; Pickering v. McCullough, 104 U. S. 310, 26 L. ed. 749; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

29. Remington Cash Register Co. v. National Cash Register Co., supra; Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242]; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422].

[a] **Rule applied.**—Where the claims on which a patent was granted were operable, but disallowed claims were inoperable, and not mechanically separable, and rendered the whole machine inoperable as disclosed, but known elements were available, which could be substituted by a skilled artisan for the disallowed elements, so as to make the machine operable, the patent is valid. Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242].

30. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Radio Corp. of America v. Edmond, 20 F. (2d) 929, 931; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496.

"A patent is addressed to men who know the art, and if such men can build and operate the device, so that it functions as the patent says it will, although imperfectly and only after trial and error, that is enough." Radio Corp. of America v. Edmond, supra.

31. Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112; Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Radio Corp. of America v. Edmond, 20 F. (2d) 929; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)]; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Mergenthaler Linotype Co. v. Press Pub. Co., 57 Fed. 502.

[a] **Reason for rule.**—"The proposition upon which they appear to lay the greatest stress is that neither patent describes or claims an operative machine because neither is capable of 'perfect justification,' viz.: making lines of exactly the same length. Their contention proceeds upon the untenable proposition that the machine which produced the 'linotype' was valueless because it did not produce an absolutely perfect 'linotype.' Such a proposition, if sustained, would condemn to obscurity some of the greatest works of human genius. A great poem may be marred because the meter halts at times, but it is a great poem still. Even the masterpiece of Rubens was improved by the touch of his pupil, Van Dyck. . . . Concede that the machine when first produced was not perfect and that to Schuckers belongs the credit of producing the spacers which made it perfect. Cui bono? It would certainly be a novel doctrine to deny to an inventor the fruits of a broad invention because the machine which first embodied it was rudimentary in character and failed to do as good work as improved machines made subsequently. None of the great inventions could survive such a test. Ten years after the invention of Howe, the machine first made by him would hardly have satisfied the least exacting sewing woman. The Dodds and Stephenson locomotive would, only a short time after its construction, have been discarded as behind the age even by the savages of Tasmania. The telephone of Bell is not the perfected telephone of commerce, the Morse telegraph is looked upon to-day as an interesting antique. And yet, it would be an unheard of proposition to withhold from these illustrious men the credit they deserve because their machines were crude at first and were improved afterwards." Mergenthaler Linotype Co. v. Press Pub. Co., 57 Fed. 502, 505.

32. Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112; Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; McDonough v. Johnson-Wentworth Co., 30 F. (2d) 375; Montgomery Ward & Co., Inc. v. Gibbs, 27 F (2d) 466; Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (rev on other grounds 257 U. S. 27, 42 SCt 20 66 L. ed 112)]; Mergenthaler Linotype Co. v. Press Pub. Co., 57 Fed. 502.

33. Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496.

34. Hildreth v. Mastoras, 257 U S. 27, 42 SCt 20, 66 L. ed. 112 [rev 263 Fed. 571]; Union Sulphur Co. v Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Melling v. Gordon, 55 App (D. C.) 278, 4 F. (2d) 945.

35. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Scott v. Fisher Knitting Mach. Co., 145 Fed. 915, 76 CCA 447.

"Generic invention" defined see infra § 355.

36. Radio Corp. of America v. Edmond, 20 F. (2d) 929; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Engineer Co. v. Hotel Astor, 226 Fed. 779.

37. Carlin v. Crumpton, 45 App. (D. C.) 166.

[a] **A calculating machine** giving a wrong result when certain combinations of figures are introduced into the machine, unless the operator applies certain rules at irregular and uncertain intervals, lacks patentable utility where the failure to give the correct result without the intervention of the rules is due to the construction of the machine and the principle of its operation. Carlin v. Crumpton, 45 App. (D. C.) 166.

38. McKenzie v. Cummings, 24 App. (D. C.) 137.

[a] **A voting machine** whose registering mechanism would fail to register as often as once in one hundred times is lacking in patentable utility where such defect is not due merely to crude workmanship, but to the absence of some necessary element. McKenzie v. Cummings, 24 App. (D. C.) 137.

39. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242]; Engineer Co. v. Hotel Astor, 226 Fed. 779; Scott v. Fisher Knitting Mach. Co., 145 Fed. 915, 76 CCA 447; Western Tel. Mfg. Co. v. American Electric Tel. Co., 131 Fed. 75, 65 CCA 313; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72.

[a] **An adding and recording machine** that does not operate correctly one hundred per cent of the time is not lacking in patentable utility where its failure to do so is due to the fact that the machine needs adjustment or repair and not to any false theory of operation or to the absence of some necessary element. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

40. Boyce v. Stewart-Warner Speedometer Co., 220 Fed. 118, 136 CCA 72; Fuller v. Berger, 120 Fed. 274, 56 CCA 588, 65 LRA 381 [certiorari den 193 U. S. 668 mem, 24 SCt 852 mem, 48 L. ed. 839 mem]; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Cox v. Griggs, 6 F. Cas. No. 3,302, 1 Biss. 262, 2 Fish. Pat. Cas. 174; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Roemer v. Logowitz, 20 F. Cas. No. 11,996; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Winans v. Schenectady, etc., R. Co., 30 F. Cas. No. 17,865, 2 Blatchf.

a use considered harmful to the body politic lacks patentable utility,[41] as, for example, one useful only for the purpose of perpetrating fraud,[42] or for the purpose of accomplishing an immoral[43] or unlawful[44] result. Likewise, no invention can be regarded as useful within the meaning of the patent law if its use constantly exposes the operator to risk of great bodily injury.[45] However, if an invention is capable of producing a beneficial result it may be patentable, notwithstanding it may also be used for some mischievous or immoral purposes.[46] But, in an action to restrain infringement, a court may refuse to grant an injunction pendente lite where the evidence shows that the only use to which the invention has ever been put is illegal and no evidence is produced to support the claim that it may be used for some proper purpose.[47]

[§ 64] **7. Evidence of Utility—a. Presumptions and Burden of Proof.** In accord with the general rule that the issuance of a patent gives rise to a presumption that the qualities essential to patentability are present in the subject matter,[48] a presumption that an invention possesses utility arises upon the issuance of a patent.[49] The burden of proving that an invention lacks utility is on the party asserting it.[50] In other words, a patent is at least prima facie evidence that the invention for which it issued possesses utility.[51] Expression has been given to the view that the issuance of a patent should carry with it something more than a bare prima facie.[52]

[§ 65] **b. Admissibility.** Utility or lack of utility in an invention may be evidenced by inspection or physical demonstration of the method or instrument in which it is embodied,[53] by opinions of persons skilled in the particular art,[54] by testimony showing the results of experiments conducted for the pur-

279; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

41. Mitchell v Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Brewer v. Lichtenstein, 278 Fed. 512; Twentieth Century Motor Car, etc., Co. v. Holcomb Co., 220 Fed. 669, 136 CCA 311; Rickard v. Du Bon, 103 Fed. 868, 43 CCA 360; Shultze v. Holtz, 82 Fed. 448; Reliance Novelty Co. v. Dwarzek, 80 Fed. 902; National Automatic Device Co. v. Lloyd, 40 Fed. 89, 5 LRA 784; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Ex p. Sanders, 21 F. Cas. No. 12,292.

42. Scott v. Aristo Hosiery Co., 7 F. (2d) 1003; Rickard v. Du Bon, 103 Fed. 868, 43 CCA 360.

[a] **Spotting tobacco leaves to deceive users** is not a useful invention and the patent is void. Rickard v. Du Bon, 103 Fed. 868, 43 CCA 360.

[b] **A seamless stocking** having at the back of the leg a structural variation of the knit fabric imitating the narrowing marks occurring in seamed or other narrowed stockings for the purpose of deception lacks utility. Scott v. Aristo Hosiery Co., 7 F. (2d) 1003.

43. Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Dunbar v. Marden, 13 N. H. 311.

44. Brewer v. Lichtenstein, 278 Fed. 512; Schultze v. Holtz, 82 Fed. 448.

[a] **Devices used for gambling.**—Where a patented device can be used only for gambling purposes, the patent is void for want of utility. Schultze v. Holtz, 82 Fed. 448.

[b] **A punch board** intended for use as a lottery device lacks utility. Brewer v. Lichtenstein, 278 Fed. 512.

45. Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Twentieth Century Motor Car, etc., Co. v. Holcomb Co., 220 Fed. 669, 136 CCA 311; Page v. Ferry, 6 F. Cas. No. 3,302, 1 Biss. 262, 1 Fish. Pat. Cas. 298; Ex p. Sanders, 21 F. Cas. No. 12,292.

[a] **Illustration.**—A windshield for use, principally, in motor cars, which does not enable the driver, going at an ordinary rate of speed, to detect obstacles, moving or stationary, in time to prevent collision, lacks patentable utility. Twentieth Century Motor Car, etc., Co. v. Holcomb Co., 220 Fed. 669, 136 CCA 311.

46. Koppe v. Burnstingle, 29 F. (2d) 923; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; Fuller v. Berger, 120 Fed. 274, 56 CCA 588, 65 LRA 381 [certiorari den 193 U. S. 668 mem, 24 SCt 852 mem, 48 L. ed. 839 mem]; In re Corbin, 6 F. Cas. No. 3,224, McA. Pat. Cas. 521.

[a] **Golf dice** normally and naturally adapted to a lawful use do not lack utility because they may be put to an illegal purpose or because the outcome of their manipulation is wholly a matter of chance. Koppe v. Burnstingle, 29 F. (2d) 923.

[b] **A bogus coin detector** for coin-operated vending machines, which is adapted to be used with any coin-operated machine, is not void for lack of utility because it was assigned by the inventor to a manufacturer of gambling machines and has been used solely in connection with such machines. Fuller v. Berger, 120 Fed. 274, 56 CCA 588, 65 LRA 381 [certiorari den 193 U. S. 668 mem, 24 SCt 852 mem, 48 L. ed. 839 mem].

[c] **Artificial honey** is useful, and not a fraud. In re Corbin, 6 F. Cas. No. 3,224, McA. Pat. Cas. 521.

47. Reliance Novelty Co. v. Dworzek, 80 Fed. 902; National Automatic Device Co. v. Lloyd, 40 Fed. 89, 5 LRA 784.

48. See infra § 258.

49. See infra § 261.

50. Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Churchward International Steel Co. v. Bethlehem Steel Co., 260 Fed. 962; Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)]; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860; Foster v. T. L. Smith Co., 244 Fed. 946, 157 CCA 296; Meccano, Ltd. v. Wagner, 234 Fed. 912 [mod on other grounds 246 Fed. 603, 158 CCA 573]; Closz, etc., Mfg. Co. v. J. I. Case Threshing Mach. Co., 216 Fed. 937; Superior Hay Stacker Mfg. Co. v. Dain Mfg. Co., 208 Fed. 549, 125 CCA 551; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Patent Button Co. v. Scovill Mfg. Co., 92 Fed. 151; McKay-Copeland Lasting Mach. Co. v. Copeland Rapid Laster Mfg. Co., 77 Fed. 306 [aff 80 Fed. 518, 25 CCA 611]; Mesker v. Thuener, 42 Fed. 329; Huber v. N. O. Nelson Mfg. Co., 38 Fed. 830 [aff 148 U. S. 270, 13 SCt 603, 37 L. ed. 447]; Kirk v. Du Bois, 33 Fed. 252 [aff 158 U. S. 58, 15 SCt 729, 39 L. ed. 895]; Strobridge v. Lindsay, 2 Fed. 692, 5 Bann. & A. 411; Adams v. Loft, 1 F. Cas. No. 61, 4 Bann. & A. 495; Batten v. Clayton, 2 F. Cas. No. 1,105; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Coleman v. Liesor, 6 F. Cas. No. 2,984; In re Fultz, 9 F. Cas. No. 5,156, McA. Pat. Cas. 178; Geier v. Goetinger, 10 F. Cas. No. 5,299, 1 Bann. & A. 553; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Miller, etc., Mfg. Co. v. Du Brul, 17 F. Cas. No. 9,597, 2 Bann. & A. 618; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No 11,283, 2 Fish. Pat. Cas. 62; Potter v. Holland, 19 F. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; Serrell v. Collins, 21 F. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Smith v. Woodruff, 22 F. Cas. No. 13,128a, 6 Fish. Pat. Cas. 476; Tilghman v. Werk, 23 F. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [rev on other grounds 1 Black 427, 17 L. ed. 168]; Waymire v. Shipley, 52 Or. 464, 97 P 807.

51. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653; Dashiell v. Grosvenor, 162 U. S. 425, 16 SCt 805, 40 L. ed. 1025; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242]; Southern Textile Mach. Co. v. Fay Stocking Co., 259 Fed. 243, 170 CCA 311; Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)]; Hills v. Hamilton Watch Co., 248 Fed. 499; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Corvallis Fruit Co. v. Curran, 8 Fed. 150, 7 Sawy. 270; Miller, etc., Mfg. Co. v. Du Brul, 17 F. Cas. No. 9,597, 2 Bann. & A. 618; Potter v. Holland, 19 F. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; Rollhaus v. McPherson, 20 F. Cas. No. 12,026.

52. Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787.

53. Beitman v. Strater, 262 Fed. 443; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787; Gaisman v. Gillette, 36 App. (D. C.) 440.

[a] **Thus** the mere making of a device consisting of a clamp for holding in position the blade of a safety razor amounts to a demonstration of utility where it is apparent from an inspection of the device that it will hold the blade in substantially the same relation to the guard as was accomplished by the old means, it being well-known that a blade thus held can be operated successfully. Gaisman v. Gillette, 36 App. (D. C.) 440.

[b] **A model embodying the invention** is admissible on the question of utility. Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787.

54. Churchward International Steel Co. v. Bethlehem Steel Co., 260

pose of determining the question of the invention's utility,[55] the state of the art at the time of the invention,[56] or any other fact from which capability or incapability to perform the functions claimed for the invention may be inferred.[57] Testimony that the invention has actually been used for the purpose intended is, of course, evidence of utility.[58] On the other hand, lack of utility may be evidenced by the fact that a person skilled in the art to which the invention relates has endeavored, in good faith, to make the invention work, and has been unable to do so.[59] Such evidence is, of course, overthrown if it is demonstrated by practical experiments made by several persons that they have succeeded in producing the results claimed for the invention.[60] Utility may be evidenced by sales or commercial demand.[61] No implication of inutility arises from the mere fact that an invention has never been tried out,[62] from the mere fact of failure to manufacture,[63] or from mere nonuse.[64] Nor does such an inference arise from the mere fact of cessation of manufacture.[65] However, an inference of inutility may arise from nonuse, long continued and unexplained by lack of means or opportunity.[66] It is otherwise where the utility of the invention is indicated by success of an infringement.[67]

Infringement as evidence of utility. Infringement is evidence of utility.[68] It is fair to presume that the person using an invention would not do so if he thought it of no utility.[69] While some criticism of the rule has been expressed,[70] an infringer, ordinarily, is estopped to deny the utility of an invention.[71] It is otherwise, however, where the acts of infringement were committed by the patentee

Fed. 962; One-Piece Bifocal Lens Co. v. Bisight. Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)].

55. Victor Talking Mach. Co. v. Wanamaker, 275 Fed. 448.

56. Klein v. Russell, 19 Wall. (U. S.) 433, 22 L. ed. 116; Westinghouse Electric, etc., Co. v. Beacon Lamp Co., 95 Fed. 462.

57. Churchward International Steel Co. v. Bethlehem Steel Co., 260 Fed. 962.

[a] **Paying tribute.**—That a large manufacturer, through its officers, having the fullest knowledge of the science and art and having at their command the best experts, paid a large sum for infringement and right to use is strong evidence of utility. Churchward International Steel Co. v. Bethlehem Steel Co., 260 Fed. 962.

58. Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Blake v. California Fruit Growers' Exch., 14 F. (2d) 756 [rev on other grounds 19 F. (2d) 467]; Parker Rust Proof Co. v. Ford Motor Co., 6 F. (2d) 649; Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655; Churchward International Steel Co. v. Bethlehem Steel Co., 260 Fed. 962; Petroleum Rectifying Co v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Southern Textile Mach. Co. v. Fay Stocking Co., 259 Fed. 243, 170 CCA 311; Dunham v. Kelley-Koett Mfg. Co., 246 Fed. 845, 159 CCA 147; One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; Adams v. Edwards, 1 F. Cas. No. 53, 1 Fish. Pat. Cas. 1; Schaum v. Baker, 21 F. Cas. No. 12,440; Melling v. Gordon, 55 App. (D. C.) 278, 4 F. (2d) 945.

59. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

60. Remington Cash Register Co. v. National Cash Register Co., supra.

61. Parker Rust Proof Co. v. Ford Motor Co., 6 F. (2d) 649; Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655; Victor Talking Mach. Co. v. Wanamaker, 275 Fed. 448; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Davey Tree Expert Co. v. Van Billiard, 248 Fed. 718 [rev on other grounds 255 Fed. 781, 167 CCA 125]; Arnold-Creager Co. v. Barkwill Brick Co., 246 Fed. 441; Holton v. Pepper, 216 Fed. 368; Burdon Wire, etc., Co. v. Williams, 128 Fed. 927; Newbury v. Fowler, 28 Fed. 454.

[a] **Rule applied.**—The testimony of complainant's expert to the effect that the ordinary hearer could not distinguish between the sounds from a tapering tone arm and those from one with parallel sides, is not sufficient to defeat a patent covering the tapering tone arm for want of utility, where the tapered tone arm achieved commercial success as soon as it was put on the market, and the nontapering tone arm was apparently abandoned. Victor Talking Mach. Co. v. Wanamaker, 275 Fed. 448; Melling v. Gordon, 55 App. (D. C.) 278, 4 F. (2d) 945.

62. Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787.

63. Hammond v. Benzer Corp., 6 F. (2d) 760 [rev 295 Fed. 908].

64. Hammond v. Benzer Corp., supra; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330].

65. Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787.

66. Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682 [certiorari den 269 U. S. 571 mem, 46 SCt 26 mem, 70 L. ed. 417 mem]; Hammond v. Benzer Corp., 6 F. (2d) 760 [rev 295 Fed. 908].

67. Hammond v. Benzer Corp., supra.

68. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Williams Bros. Aircraft Corp. v. Gould-Mersereau Co., 10 F. (2d) 44 [certiorari granted 270 U. S. 638 mem, 46 SCt 350 mem, 70 L. ed. 774 mem]; White v. Goodrich-Lenhart Mfg. Co., 271 Fed. 336 [rev on other grounds 279 Fed. 741]; Southern Textile Mach. Co. v. Fay Stocking Co., 259 Fed. 243, 170 CCA 311; Arnold-Creager Co. v. Barkwill Brick Co., 246 Fed. 441; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23; American Caramel Co. v. Glen Rock Stamping Co., 201 Fed. 363 [rev on other grounds 209 Fed. 619, 126 CCA 579]; Coffield Motor Washer Co. v. A. D. Howe Mach. Co., 190 Fed. 42 [aff 197 Fed. 541, 117 CCA 37]; International Tooth Crown Co. v. Hanks' Dental Assoc., 111 Fed. 916 [aff 122 Fed. 74, 58 CCA 180]; Goss Printing-Press Co. v. Scott, 108 Fed. 253, 47 CCA 302; Niles Tool Works v. Betts Mach. Co., 27 Fed. 301; Hancock Inspirator Co. v. Jenks, 21 Fed. 911; Foye v. Nichols, 13 Fed. 125, 8 Sawy. 201; Tyler v. Crane, 7 Fed. 775; Coleman v. Liesor, 5 F. Cas. No. 2,984; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Simpson v. Mad River R. Co., 22 F. Cas. No. 12,885, 6 McLean 603; Smith v. Glendale Elastic Fabrics Co., 22 F. Cas. No. 13,050, 1 Bann. & A. 58, Holmes 340 [aff 100 U. S. 110, 25 L. ed. 547]; Smith v. Prior, 22 F. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,270, 3 Biss. 66, 3 Fish. Pat. Cas. 330; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [rev on other grounds 1 Black 427, 17 L. ed. 168]; Whitney v. Mowrey, 29 F. Cas. No. 17,594, 4 Fish. Pat. Cas. 207 [rev on other grounds 14 Wall. 620, 20 L. ed. 860].

69. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Davey Tree Expert Co. v. Van Billiard, 248 Fed. 718 [rev on other grounds 255 Fed. 781, 167 CCA 125]; Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115; Coleman v. Liesor, 6 F. Cas. No. 2,984.

70. Tolfree v. Wetzler, 22 F. (2d) 214, 215 [rev on other grounds 25 F. (2d) 553].

"Having admitted infringement (imitation), the issue of utility seems to be foreclosed. Du Bois v. Kirk, 158 U. S. 58, 64, 15 SCt 729, 39 L. ed. 895. That this should be so seems to this court an anomaly. A patented article may be lacking in utility in either one of two senses: It may be useful, but capable only of a use considered harmful to the body politic, viz. gambling (National Automatic Device Co. v. Lloyd, 40 Fed. 89, 5 LRA 784), or counterfeiting (Rickard v. Du Bon, 103 Fed. 868, 43 CCA 360). On the other hand, it may be actually useless, either because it will not work (Ex p. Sanders, 21 F. Cas. No. 12,292), or because, even if it has the capacity to produce the result, that result is of no advantage to the public (Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787)." Tolfree v. Wetzler, supra.

71. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 52 L. ed. 1222, 41 LRANS 653; Du Bois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895; Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655; White v. Goodrich-Lenhart Mfg. Co., 271 Fed. 336 [rev on other grounds 279 Fed. 741]; Morgan Constr. Co. v. Donner Steel Co., 269 Fed. 389 [rev on other grounds 277 Fed. 221]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Beitman v. Strater, 262 Fed. 443; Churchward International Steel Co. v. Bethlehem Steel Co., 260 Fed. 962; Dunham v. Kelley-Koett Mfg. Co., 246 Fed. 845, 159 CCA 147; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330]; Meccano, Ltd. v. Wagner, 234 Fed. 912 [mod on other grounds 246 Fed. 603, 158 CCA 573]; Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; International Tooth Crown Co. v. Hanks Dental Assoc., 111 Fed. 916 [rev on other grounds 130 Fed. 1022 mem, 63 CCA 684 mem]; Coleman v. Liesor, 6 F. Cas. No. 2,984; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Hays

while acting for the infringer as one of its responsible agents.[72]

[§ 66] **c. Weight and Sufficiency.** It has been asserted that it requires but slight evidence of successful operation to establish utility.[73] Lack of utility, however, must be shown by clear and satisfactory evidence.[74] This, it has been asserted, is particularly true of primary or generic inventions.[75] The presumption of utility which arises upon the issuance of the patent is not negatived by the fact that the invention is susceptible of improvement,[76] or that like inventions are so far superior to it that they may entirely supersede the use of it.[77] Nor is it negatived by the fact that it is found desirable to use additional apparatus in connection with the invention,[78] or that certain changes within the realm of the skill of a person skilled in the art are necessary to successful operation.[79] The fact that the invention has been infringed is ordinarily sufficient to establish its utility,[80] at least as against the infringer.[81] Doubts relative to the question of utility should be resolved against infringers.[82] Proof of substantial commercial demand is ordinarily sufficient to establish the utility of an invention,[83] but the fact that an invention is not commercially developed does not establish lack of utility.[84] Continued use over a period of time is rather conclusive evidence of utility.[85]

Ex parte experiments, conducted for the purpose of proving the inutility of an invention, cannot overcome the inference of utility which arises from proof that the invention has attained wide acceptance in the trade.[86]

[§ 67] **E. Invention—1. Necessity for Invention.** Congress has authorized the grant of a patent to any person who has "invented or discovered" any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof.[87] No valid patent can be obtained for a method or device which lacks invention.[88] Invention or discovery is the requirement which constitutes the

v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9 [rev on other grounds 1 Black 427, 17 L. ed. 168]; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483.

72. Schmidt v. Central Fdy Co., 229 Fed. 157, 143 CCA 433, AnnCas 1917C 258.

73. Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Thayer v. Wold, 142 Fed. 776 [aff 148 Fed. 227, 78 CCA 350].

74. Blake v. California Fruit Growers' Exch., 14 F. (2d) 756 [rev on other grounds 19 F. (2d) 467]; American Wood-Paper Co. v. Fibre Disintegrating Co., 1 F. Cas. No. 320, 6 Blatchf. 27, 3 Fish. Pat. Cas. 362 [aff 23 Wall. 566, 23 L. ed. 31].

75. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422].

76. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

77. Remington Cash Register Co. v. National Cash Register Co., supra; Superior Hay Stacker Mfg. Co. v. Dain Mfg. Co., 208 Fed. 549, 125 CCA 551; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72.

78. Dunham v. Kelley-Koett Mfg. Co., 246 Fed. 845, 159 CCA 147.

79. Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242].

80. Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Kearney v. Lehigh Valley R. Co., 32 Fed. 320 [rev on other grounds 158 U. S. 461, 15 SCt 871, 39 L. ed. 1055]; Niles Tool-Works v. Betts Mach. Co., 27 Fed. 301; Megraw v. Carroll, 16 F. Cas. No. 9,393b, 5 Bann. & A. 324; Simpson v. Mad River R. Co., 22 F. Cas. No. 12,885, 6 McLean 603; Smith v. Glendale Elastic Fabrics Co., 22 F. Cas. No. 13,050, 1 Bann. & A. 58, Holmes 340 [aff 100 U. S. 110, 25 L. ed. 547]; Smith v. Prior, 22 F. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,270, 3 Biss. 66, 3 Fish. Pat. Cas. 330.

81. Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Western Electric Co. v. La Rue, 139 U. S. 601, 11 SCt 670, 35 L. ed. 294 [aff 31 Fed. 80, 24 Blatchf. 392]; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Fryer v. Mutual L. Ins. Co., 30 Fed. 787; Newbury v. Fowler, 28 Fed. 454; Hancock Inspirator Co. v. Jenks, 21 Fed. 911; Coleman v. Liesor, 6 F. Cas. No. 2,984; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb. Pat. Cas. 140; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483; Whitney v. Mowry, 29 F. Cas. No. 17,594, 4 Fish. Pat. Cas. 207 [rev on other grounds 14 Wall. 620, 20 L. ed. 860].

82. Scovill Mfg. Co. v. Satler, 21 F. (2d) 630.

83. Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Blake v. California Fruit Growers' Exch., 14 F. (2d) 756 [rev on other grounds 19 F. (2d) 467]; Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655.

84. Reed v. Hughes Tool Co., 261 Fed. 192 [certiorari den 251 U. S. 561 mem, 40 SCt 342 mem, 64 L. ed. 415 mem].

85. Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 SCt 850, 37 L. ed. 707; Grant v. Walter, 148 U. S. 547, 13 SCt 699, 37 L. ed. 552; Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Magowan v. New York Belting, etc., Co., 141 U. S. 332, 12 SCt 71, 35 L. ed. 781; Robertson v. Blake, 94 U. S. 728, 24 L. ed. 245; Rumford Chemical Works v. New York Baking Powder Co., 134 Fed. 385, 67 CCA 367; Van Epps v. International Paper Co., 124 Fed. 542; Bryant Electric Co. v. Buchanan, 124 Fed. 537 [aff 128 Fed. 922, 63 CCA 534]; McKay-Copeland Lasting Mach. Co. v. Copeland Rapid Laster Mfg. Co., 77 Fed. 306 [aff 80 Fed. 518, 25 CCA 611]; Shannon v. Bruner, 33 Fed. 289 [aff 149 U. S. 767 mem, 786 mem, 13 SCt 1043 mem, 1052 mem, 37 L. ed. 930 mem, 961 mem]; Fryer v. Mutual L. Ins. Co., 30 Fed. 787; Newbury v. Fowler, 28 Fed. 454; Roberts v. Schreiber, 8 Fed. 855, 5 Bann. & A. 491; Strobridge v. Lindsay, 2 Fed. 692, 5 Bann. & A. 411; Adams v. Edwards, 1 F. Cas. No. 53, 1 Fish. Pat. Cas. 1; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Megraw v. Carroll, 16 F. Cas. No. 9,393b, 5 Bann. & A. 324; Smith v. Prior, 22 F. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461; Kolinski v. Thompson Voting Mach. Co., 55 App. (D. C.) 378, 6 F. (2d) 681.

86. Chadeloid Chemical Co. v. Wilson Remover Co., 220 Fed. 681 [aff 224 Fed. 481, 140 CCA 189].

87. U. S. Code tit 35 § 31.

88. Thomson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098; John E. Thropp's Sons' Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708; Vandenburgh v. Truscon Steel Co., 261 U. S. 6, 43 SCt 331, 67 L. ed. 507; Berlin Mills Co. v. Proctor, etc., Co., 254 U. S. 156, 41 SCt 75, 65 L. ed. 196; New York Scaffolding Co. v. Liebel-Binney Constr. Co., 254 U. S. 24, 41 SCt 18, 65 L. ed. 112; Werk v. Parker, 249 U. S. 130, 39 SCt 197, 63 L. ed. 514; Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148; Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Sargent v. Covert, 152 U. S. 516, 14 SCt 676, 38 L. ed. 536; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500; Haughey v. Lee, 151 U. S. 282, 14 SCt 331, 38 L. ed. 162; Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Patent Clothing Co. v. Glover, 141 U. S. 560, 12 SCt 79, 35 L. ed. 858; Fond du Lac County v. May, 137 U. S. 395, 11 SCt 98, 34 L. ed. 714; Marchand v. Emken, 132 U. S. 195, 10 SCt 65, 33 L. ed. 332; Brown v. District of Columbia, 130 U. S. 87, 9 SCt 437, 32 L. ed. 863; Peters v. Hanson, 129 U. S. 541, 9 SCt 393, 32 L. ed. 742; Peters v. Active Mfg. Co., 129 U. S. 530, 9 SCt 389, 32 L. ed. 738; Peters v. Active Mfg. Co., 130 U. S. 626, 9 SCt 643, 32 L. ed. 1057; Holland v. Shipley, 127 U. S. 396, 8 SCt 1089, 32 L. ed. 185; Mosler Safe, etc., Co. v. Mosler, 127 U. S. 354, 8 SCt 1148, 32 L. ed. 182; Clark Pomace-Holder Co. v. Ferguson, 119 U. S. 335, 7 SCt 382, 30 L. ed. 406; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 SCt 846, 29 L. ed. 952; Thompson v. Boisselier, 114 U. S. 1, 5 SCt 1042, 29 L. ed. 76; Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Union Paper Collar Co. v. Van Deusen, 23 Wall. (U. S.) 530, 23 L. ed. 128; Rubber Tip Pencil Co. v. Howard, 20 Wall. (U. S.) 498, 22 L. ed. 410; Stimpson v. Woodman, 10 Wall. (U. S.) 117, 19 L. ed. 866; Allen Filter Co. v. Star Metal Mfg. Co., 30 F. (2d) 693; Koppe v. Burnstingle, 29 F. (2d) 923; Linville v. Milberger, 29 F. (2d) 610; Marvel Equipment Co. v. Merit Oil Equipment Co., 29 F. (2d) 308 [aff 29 F. (2d) 313]; St. Louis v. Prendergast, 29 F. (2d) 188; Stueb-ing-Cowan Co. v. Semple, 29 F. (2d) 150 [aff 29 F. (2d) 152]; Schiller v. Robertson, 28 F. (2d) 301; Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948; Lektophone Corp. v. Rola Co., 27 F. (2d) 758; George Haiss Mfg. Co. v. Link Belt Co., 27 F. (2d) 397, Connelly v. Anderson, 27 F. (2d) 330; Pierson's Application, 26 F. (2d) 1010; In re Nyman, 26 F. (2d) 558 [foll 26 F. (2d) 559]; Guardian Trust Co. v. Downingtown Mfg. Co., 25

F. (2d) 878; Wirebounds Patents Co. v. H. R. Gibbons Box Co., 25 F. (2d) 363; In re Hammond, 25 F. (2d) 359; Eskimo Pie Corp. v. Honeymoon Pie Corp., 25 F. (2d) 154; In re Riedel, 24 F. (2d) 1006; In re Erickson, 24 F. (2d) 904; Eskimo Pie Corp. v. Levous, 24 F. (2d) 599; Hewes v. Deiches, 24 F. (2d) 503; In re Richards, 24 F. (2d) 471; Lambert v. Phillips-Lafitte Co., 23 F. (2d) 818; Wessels v. Chicago Granitine Mfg. Co., 23 F. (2d) 781; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Hammond v. Paige-Ohio Co., 23 F. (2d) 320; Bellis Heat Treating Co. v. Heatbath Corp., 23 F. (2d) 239; Finley v. MacDougald Constr. Co., 23 F. (2d) 206; Eschenbach v. Miller Saw Trimmer Co., 23 F. (2d) 145; Concrete Mixing, etc., Co. v. Storrie, 23 F. (2d) 131; Pries v. Union R. Equipment Co., 22 F. (2d) 943; Buckeye Incubator Co. v. Hillpot, 22 F. (2d) 855 [aff 24 F. (2d) 341]; Watertown Table-Slide Co. v. Perfection Table-Slide Mfg. Co., 22 F. (2d) 798; S. & S. Paper Products Co. v. Oswego Falls Corp., 22 F. (2d) 617; Richardson Co. v. Hood Rubber Co., 22 F. (2d) 501; Crozier-Straub, Inc. v. Graham, 22 F. (2d) 310 [rev on other grounds 28 F. (2d) 321 (certiorari den 49 SCt 253 mem)]; Bourke v. Buegeleisen, 22 F. (2d) 208; Macomb Mfg. Co. v. Mantle Lamp Co., 22 F. (2d) 93; Ford Motor Co. v. Parks, 21 F. (2d) 943; Claude Neon Lights v. Machlett, 21 F. (2d) 846 [mod on other grounds 27 F. (2d) 702 (certiorari den 49 SCt 32 mem)]; Fulton Iron Works Co. v. Farrel Fdy., etc., Co., 21 F. (2d) 831; Murray Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 21 F. (2d) 822 [certiorari den 276 U. S. 616 mem, 48 SCt 207 mem, 72 L. ed. 733 mem]; Northern Trailer Co. v. La Plant, 21 F. (2d) 686; Carbide, etc., Chemicals Corp. v. Texas Co., 21 F. (2d) 199; Peerless Roll Leaf Co. v. Lange, 20 F. (2d) 801; Gear Grinding Mach. Co. v. Reo Motor Car Co., 20 F. (2d) 702; Reflectolyte Co. v. Luminous Unit Co., 20 F. (2d) 607; Forchheimer v. Franc, Strohmenger & Cowan, Inc., 20 F. (2d) 553 [certiorari den 277 U. S. 597 mem, 48 SCt 560 mem, 72 L. ed. 1007 mem]; Barber-Colman Co. v. Withnell, 20 F. (2d) 373; General Electric Co. v. Eisler, 20 F. (2d) 33; Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; California Fruit Growers' Exch. v. Blake, 19 F. (2d) 467; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Dunham Co. v. Cobb, 19 F. (2d) 328; Cincinnati Cadillac Co. v. English, etc., Co., 18 F. (2d) 542; Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; Dupont v. Dennison Mfg. Co., 18 F. (2d) 317; Goodyear Tire, etc., Co. v. Michelin Tire Co., 18 F. (2d) 216; R. W. Clark Mfg. Co. v. Tablet, etc., Co., 18 F. (2d) 91; Window Glass Mach. Co. v. Pittsburgh Sheet Glass Co., 18 F. (2d) 63; Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Carson Inv. Co. v. Anaconda Copper Min. Co., 17 F. (2d) 815 [rev on other grounds 26 F. (2d) 651]; Barkis v. California Almond Growers' Exch., 17 F. (2d) 327; C. B. Cottrell, etc., Co. v. Claybourn Process Corp., 17 F. (2d) 279 [aff 24 F. (2d) 1014 mem]; Air Reduction Co. v. Carbo-Oxygen Co., 17 F. (2d) 138 [aff 19 F. (2d) 1014 mem]; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Hommel Mfg. Co. v. East Side Mfg. Co., 16 F. (2d) 1008; Lektophone Corp. v. Brandes Products Corp., 16 F. (2d) 934 [mod on other grounds 20 F. (2d) 155]; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 797; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797]; Stedman v. Puritan Rubber Mfg. Co., 16 F. (2d) 742; Shawmut Engineering Co. v. Crompton,' etc., Loom Works, 16 F. (2d) 685; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Gladding-McBean Corp. v. Clark, 16 F. (2d) 50; Rip Van Winkle Wall Bed Co. v. Holmes, 15 F. (2d) 950; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Barber Colman Co. v. Withnell, 14 F. (2d) 780; Bituminous Products Co. v. Headley Good Roads Co., 14 F. (2d) 667; Church v. Alabastine Co., 14 F. (2d) 663; Milliken v. Aermotor Co., 14 F. (2d) 513; Jorgenson v. Hawkins, 14 F. (2d) 409; Kauffman Engineering Co. v. Sodemann Heat, etc., Co., 14 F. (2d) 396; Brush v. Lexington-Chicago Co., 14 F. (2d) 108; Sutherland Paper Co. v. Michigan Carton Co., 13 F. (2d) 884 [mod on other grounds 29 F. (2d) 179]; Great Western Mfg. Co. v. Lowe, 13 F. (2d) 880 [aff 26 F. (2d) 857]; Cartridge Mach. Corp. v. National Collapsible Tube Co., 13 F. (2d) 859; Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796; Excelso Products Co. v. Presto Color Co., 13 F. (2d) 575; Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Naceskid Serv. Chain Co. v. Perdue, 1 F. (2d) 924; White v. Peerless Motor Car Co., 1 F. (2d) 10; Diamond Mfg. Co. v. Dallas Brass, etc., Co., 295 Fed. 250; Monitor Stove Co. v. Williamson Heater Co., 282 Fed. 910 [aff 299 Fed. 1]; Williamson Heater Co. v. Monitor Stove Co., 282 Fed. 906; Johnson v. Lit Bros., Inc., 278 Fed. 279 [aff 284 Fed. 259]; Boston Pencil Pointer Co. v. Automatic Pencil Sharpener Co., 276 Fed. 910; National Safety Lift Co. v. Anderson, 276 Fed. 696; Knapp v. Will, etc., Co., 273 Fed. 380; J. B. Monette Co. v. Kurtzon, 272 Fed. 687; Westinghouse Electric, etc., Co. v. Formica Insulation Co., 272 Fed. 667; Arkell Safety Bag Co. v. Safepack Mills, 272 Fed. 1; Nielson v. Libby, 271 Fed. 317 [aff 285 Fed. 353]; Hill Rubber Heel Co. v. I. T. S. Rubber Co., 269 Fed. 270; Copley Plaza Operating Co. v. Schaum & Uhlinger, Inc., 269 Fed. 140 [aff 260 Fed. 197]; Bruckman v. Stephens, 268 Fed. 374; General Electric Co. v. Independent Lamp, etc., Co., Inc., 267 Fed. 824; Juengst v. Hill Pub. Co., 267 Fed. 435 [aff 267 Fed. 428]; Juengst v. Hill Pub. Co., 267 Fed. 428 [aff 267 Fed. 435]; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015]; Hedman Mfg. Co. v. Todd Protectograph Co., 265 Fed. 273 [aff 254 Fed. 829]; Minneapolis Knitting Works v. Field, 263 Fed. 987; Homer Brooke Glass Co. v. Hartford-Fairmont Co., 262 Fed. 427; Getty v. Layne, 262 Fed. 141; Davey Tree Expert Co. v. Van Billiard, 261 Fed. 996; Merrill v. W. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; Nestle Patent Holding Co., Inc. v. E. Frederics, Inc., 258 Fed. 627 [aff 261 Fed. 780]; Armstrong Seatag Corp. v. Smith's Island Oyster Co., 254 Fed. 821, 166 CCA 267; Luten v. Washburn, 253 Fed. 950, 165 CCA 392; Knapp v. Will, etc., Co., 253 Fed. 191 [rev on other grounds 273 Fed. 380]; Blackburn v. Bonita Mfg. Co., 248 Fed. 743 [rev in part on other grounds 251 Fed. 890, 164 CCA 106]; Berry v. Fuel Economy Engineering Co., 248 Fed. 736 [aff 254 Fed. 988 mem, 166 CCA 668 mem]; Pittsburgh Iron, etc., Foundries Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Shrauger v. Phillip Bernard Co., 247 Fed. 547; U. S. Drainage, etc., Co. v. Manahan, 246 Fed. 446, 158 CCA 510 [aff 236 Fed. 144]; Arnold-Creager Co. v. Barkwill Brick Co., 246 Fed. 441; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Foster v. T. L. Smith Co., 244 Fed. 946, 157 CCA 296; Beckwith Box Toe Co. v. Gowdy, 244 Fed. 805; Butterick Pub. Co. v. Peerless Pattern Co., 244 Fed. 458, 157 CCA 98; Tiffany v. Paper Products Co., 244 Fed. 178 [aff 253 Fed. 953, 165 CCA 395]; Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291; American Graphophone Co. v. Gimbel, 240 Fed. 971, 153 CCA 657; Iceless Ice Box Co. v. Mitchell, 240 Fed. 418, 153 CCA 344; Aliano v. Eagle Lock Co., 239 Fed. 905, 153 CCA 33; Turner v. Deere-Webber Bldg. Co., 238 Fed. 377; Fetzer v. Dempster Mill Mfg. Co., 238 Fed. 368, 151 CCA 384; Stahlbrodt Co. v. Ford Motor Co., 238 Fed. 365, 151 CCA 381; U. S. Column Co. v. Benham Column Co., 238 Fed. 200, 151 CCA 276; Minneapolis v. Jewell, 238 Fed. 197, 151 CCA 273; Vulcan Soot Cleaner Co. v. Diamond Power Specialty Co., 237 Fed. 818, 151 CCA 60; Hall Printing Press Co. v. George Mann & Co., Ltd., 237 Fed. 662 [aff 241 Fed. 990 mem, 154 CCA 662 mem]; Adams v. Boston Store, 237 Fed. 371, 150 CCA 385; U. S. Drainage Co. v. Manahan, 236 Fed. 144 [aff 246 Fed. 446, 158 CCA 510]; Lovell-McConnell Mfg. Co. v. General Auto. Supply Co., 235 Fed. 169; Marshall v. Wirt, 232 Fed. 606, 146 CCA 564; Rice v. Palisades Realty, etc., Co., 231 Fed. 997, 146 CCA 353; Locomobile Co. v. Parkin, 231 Fed. 980, 146 CCA 176; Hutten v. Frank Krementz Co., 231 Fed. 973, 146 CCA 169; Karl Kiefer Mach. Co. v. Unionwerke A. G., 231 Fed. 733, 146 CCA 17; General Electric Co. v. Sundh Electric Co., 231 Fed. 725, 146 CCA 9; Safety Car Heating, etc., Co. v. U. S. Light, etc., Co., 229 Fed. 990, 144 CCA 272; Gale Mfg. Co. v. May, 229 Fed. 575, 143 CCA 613; Allen Auto Specialty Co. v. Baker, 229 Fed. 424, 143 CCA 544; Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 407, 143 CCA 527 [certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem]; Central R. Signal Co. v. Metallic Shell, etc., Co., 228 Fed. 909 [aff 237 Fed. 197, 151 CCA 3]; Independent Die Co. v. Savels, 228 Fed. 45, 142 CCA 501; Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; U. S. Slicing Mach. Co. v. Blakeslee, 227 Fed. 442, 142 CCA 138; Belsteel Co. v. Lorain Steel Co., 227 Fed. 240, 142 CCA 30; North American Chemical Co. v. Keno Supply Co., 227 Fed. 63, 141 CCA 611; Conrader v. Judson Governor Co., 226 Fed. 207; Elliott Co. v. Lagonda Mfg. Co., 222 Fed. 946 [rev on other grounds 230 Fed. 604, 145 CCA 14]; Safety Car Heating, etc., Co. v. U. S. Light, etc., Co., 222 Fed. 318; Wysong, etc., Co. v. Oakley, etc., Co., 221 Fed. 682; Wysong, etc., Co. v. Stiles Fdy., etc., Co., 221 Fed. 680; McMillan Book Co. v. Irving-Pitt Mfg. Co., 220 Fed. 345; Edison v. Alsen's American Portland Cement Works, 219 Fed. 895, 135 CCA 559; Van Kannel Revolving Door Co. v. Revolving Door, etc., Co., 219 Fed. 741, 135 CCA 439; Belsteel Co. v. Lorain Steel Co., 217 Fed. 412 [aff 227 Fed. 240, 142 CCA 30]; Outlook Envelope Co. v. Sherman Envelope Co., 216 Fed. 754, 132 CCA 575; Ohio Varnish Co. v. Glidden Varnish Co., 215 Fed. 902, 132 CCA 140; Adrian Wire Fence Co. v. Milwaukee Wire Fence Co., 215 Fed. 727; Independent Die Co. v. Savels, 215 Fed. 122; Cowen v. Boston Woven Hose, etc., Co., 214 Fed. 806; Prepayment Car Sales Co. v. Orange County Tract. Co., 214 Fed. 402 [aff 214 Fed. 576, 131 CCA 156 (certiorari den 238 U. S. 626 mem, 35 SCt 664 mem, 59 L. ed. 1495 mem)]; Positive Lock Washer Co. v. Reliance Mfg. Co., 214 Fed. 134; Railroad Supply Co. v. Elyria Iron, etc., Co., 213 Fed. 789, 130 CCA 447 [aff 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136]; W. F. & John Barnes Co. v. Vandyck Churchill Co., 213 Fed. 636, 130 CCA 300; D'Arcy v. Sheffield Car Co., 213 Fed. 433, 130 CCA 83; Standard Electric Works v.

foundation of the right to obtain a patent.[89] It is not enough that a thing shall be new in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful.[90] The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a

Manhattan Electrical Supply Co., 212 Fed. 944; Whitehead, etc., Co. v. Kortz, 212 Fed. 736, 129 CCA 346; Linscott Supply Co. v. Hopewell, 212 Fed. 403, 129 CCA 79; Bernz v. Schaefer, 211 Fed. 973, 128 CCA 471; Outlook Envelope Co. v. Sherman Envelope Co., 210 Fed. 630; American Bank Protection Co. v. Electric Protection Co., 209 Fed. 845, 126 CCA 569; Fischer v. Automobile Supply Mfg. Co., Inc., 209 Fed. 225, 126 CCA 319; Lawson v. Metal Products Corp., 209 Fed. 51, 126 CCA 193; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 208 Fed. 564, 125 CCA 566; Brunswick-Balke-Collender Co. v. Passow, 206 Fed. 468; Simmons Mfg. Co. v. Kinney, etc., Co., 206 Fed. 68; Biddle v. Hodge, etc., Co., 205 Fed. 932; Ruud Mfg. Co. v. Pittsburg Water Heater Co., 205 Fed. 372, 123 CCA 394; Stevenson v. Shalcross, 205 Fed. 286, 123 CCA 438; National Casket Co. v. Stolts, 204 Fed. 983, 123 CCA 305; Burrowes v. Ferguson Bros. Mfg. Co., 204 Fed. 614; J. H. Sager Co. v. Emil Grossman Co., 203 Fed. 996, 122 CCA 296; Morgan Constr. Co. v. Forter-Miller Engineering Co., 203 Fed. 496 [rev on other grounds 213 Fed. 451, 130 CCA 97 (certiorari den 235 U. S. 698 mem, 35 SCt 199 mem, 59 L. ed. 431)]; Lawson v. Metal Products Corp., 203 Fed. 284 [aff 209 Fed. 51, 126 CCA 193]; Krauth v. Carter-Crume Co., Ltd., 202 Fed. 217, 120 CCA 617; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 201 Fed. 926 [aff 208 Fed. 564, 125 CCA 566]; Utica Drop Forge, etc., Co. v. C. E. Bonner Mfg. Co., 201 Fed. 924, 120 CCA 262; Nurnberger Metall und Lackierwarenfabrik Vormals Gebruder Bing, Aktiengesellschaft v. New Toy Mfg. Co., 201 Fed. 527, 119 CCA 621; Cardwell v. E. J. Wilkins Co., 201 Fed. 525, 119 CCA 619; Leonhardt v. Lynch, 199 Fed. 790; Voigtmann v. Seely, 198 Fed. 485, 119 CCA 386; Wood v. Kahn, 198 Fed. 403, 117 CCA 193; American Patent Diamond Dop Co. v. Wood, 198 Fed. 401, 117 CCA 288; Gilbert v. Watzelhan, 197 Fed. 315, 116 CCA 661; Gilbert Mfg. Co. v. Post, etc., Co., 197 Fed. 56; Sweet v. Lauterbach, 195 Fed. 776; Westinghouse Air Brake Co. v. New York Air Brake Co., 195 Fed. 282; Sarfert Co. v. Chipman, 194 Fed. 113, 114 CCA 191; Hover v. Atherton Mach. Co., 193 Fed. 73; Faultless Rubber Co. v. Star Rubber Co., 191 Fed. 982 [rev on other grounds 202 Fed. 927, 121 CCA 285]; Dilg v. Borgfeldt, 189 Fed. 588, 110 CCA 568; Wood v. Kahn, 189 Fed. 399 [aff 198 Fed. 403, 117 CCA 193]; Ashley v. Tatum, 189 Fed. 357, 111 CCA 279 [certiorari den 225 U. S. 707 mem, 32 SCt 839 mem, 56 L. ed. 1266 mem]; Underwood Typewriter Co. v. Victor Typewriter Co., 188 Fed. 82, 110 CCA 152; General Electric Co. v. Winona Interurban R. Co., 188 Fed. 77, 110 CCA 147; Chamberlin Metal Weather Strip Co. v. Monarch Weather Strip, etc., Co., 187 Fed. 837, 109 CCA 597; Hayward v. Ellis Lacer Co., 187 Fed. 123, 109 CCA 46; Parson Mfg. Co. v. Coe, 185 Fed. 522, 107 CCA 628; General Electric Co. v. Duncan Electric Mfg. Co., 183 Fed. 415, 105 CCA 649; Murray v. Seattle Cedar Lumber Mfg. Co., 181 Fed. 843; Sarfert Co. v. Chipman, 181 Fed. 518 [aff 194 Fed. 113, 114 CCA 191]; Wysong, etc., Co. v. Oakley, 181 Fed. 492, 104 CCA 240; Johnson v. Columbia Cotton Oil Mill Mfg. Co., 179 Fed. 231, 102 CCA 483; Victor Talking Mach. Co. v. Hawthorne, etc., Mfg. Co., 178 Fed. 455, 101 CCA 439; Coldren v. Empire Rubber Mfg. Co., 175 Fed. 361; Renton v. Reilly, 175 Fed. 96; Ohl v. Falstrom, etc., Co., 175 Fed. 67, 99 CCA 89; Browning v. Funke, 174 Fed. 151, 98 CCA 490; Tyssowski v. Thayer, 174 Fed. 43, 98 CCA 29; Morton Trust Co. v. Standard Steel Car Co., 171 Fed. 672 [rev on other grounds 177 Fed. 931, 101 CCA 211]; Lorain Steel Co. v. Paige Iron Works, 171 Fed. 648, 96 CCA 392; Morton Trust Co. v. American Car, etc., Co., 169 Fed. 109, 94 CCA 588; De Long Hook, etc., Co. v. Francis Hook, etc., Co., 168 Fed. 900, 94 CCA 240; Victor Talking Mach. Co. v. Hawthorne, etc., Mfg. Co., 168 Fed. 554 [aff 178 Fed. 455, 101 CCA 439]; Bethlehem Steel Co. v. Niles-Bement-Pond Co., 166 Fed. 880 [aff 173 Fed. 1019 mem, 98 CCA 640 mem]; Arrowsmith Mfg. Co. v. E. T. Gilbert Mfg. Co., 166 Fed. 118, 92 CCA 44; Kilbourn Knitting Mach. Co. v. Liveright, 165 Fed. 902, 91 CCA 580; Brunswick-Balke-Collender Co. v. Rosatto, 165 Fed. 56, 91 CCA 142; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310; Cleveland Pneumatic Tool Co. v. Chicago Pneumatic Tool Co., 163 Fed. 846; American Locomotive Sander Co. v. Economy Locomotive Sander Co., 162 Fed. 684, 89 CCA 476; Weissenthanner v. Dodge Metallic Cap Co., 161 Fed. 915, 88 CCA 388; Consolidated Loops Co. v. Barnum & Bailey, Ltd., 161 Fed. 915; Williams v. Syracuse, etc., R. Co., 161 Fed. 571; Pieper v. Electro Dental Mfg. Co., 160 Fed. 930, 88 CCA 112; General Electric Co. v. Corliss, 160 Fed. 672, 87 CCA 560; Lauman v. Urschel White Lime Co., 136 Fed. 190, 69 CCA 206; National Tube Co. v. Spang, 135 Fed. 351, 68 CCA 59; Regensberg v. American Exch. Cigar Co., 130 Fed. 549; Felt, etc., Mfg. Co. v. Mechanical Accountant Co., 129 Fed. 386; Buchanan v. Bryant Electric Co., 128 Fed. 922, 63 CCA 534; Heekin v. Baker, 127 Fed. 828 [rev on other grounds 138 Fed. 63, 70 CCA 559]; Standard Scale, etc., Co. v. McDonald, 127 Fed. 709; Neptune Meter Co. v. National Meter Co., 127 Fed. 563, 62 CCA 345; Fay v. Mason, 127 Fed. 325, 62 CCA 159; National Casket Co. v. Stoltz, 127 Fed. 158 [aff 135 Fed. 534, 68 CCA 84]; Bradley v. Eccles, 126 Fed. 945, 61 CCA 669; Jones v. Cyphers, 126 Fed. 753, 62 CCA 21; Standard Computing Scale Co. v. Computing Scale Co., 126 Fed. 639, 61 CCA 541; Mallon v. Gregg, 126 Fed. 377 [aff 137 Fed. 68, 69 CCA 48]; Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co., 125 Fed. 761, 60 CCA 529; L. E. Waterman Co. v. Lockwood, 125 Fed. 497, 60 CCA 333; Wilson v. Townley Shingle Co., 125 Fed. 491, 60 CCA 327; Chisholm, etc., Co. v. Anderson Fdy., etc., Works, 123 Fed. 427, 59 CCA 467; Wolff v. Du Pont de Nemours, 122 Fed. 944 [aff 134 Fed. 862, 67 CCA 488]; Regent Mfg. Co. v. Penn Electrical, etc., Co., 121 Fed. 80, 57 CCA 334; Calhoun v. Southern Cotton Oil Co., 120 Fed. 513; Johnson Co. v. Toledo Tract. Co., 119 Fed. 885, 56 CCA 415; Hocke v. New York Cent., etc., R. Co., 117 Fed. 320 [aff 122 Fed. 467, 58 CCA 627 (certiorari den 191 U. S. 569 mem, 24 SCt 842 mem, 48 L. ed. 306 mem)]; Galvin v. Grand Rapids, 115 Fed. 511, 53 CCA 165 [certiorari den 188 U. S. 741 mem, 23 SCt 848 mem, 47 L. ed. 677 mem]; Morrison v. Sonn, 111 Fed. 172; Lettelier v. Mann, 91 Fed. 909; J. J. Warren Co. v. Rosenblatt, 80 Fed. 540, 25 CCA 625 [certiorari den 168 U. S. 710 mem, 18 SCt 943 mem, 42 L. ed. 1211 mem]; Johnson Co. v. Tidewater Steel Works, 56 Fed. 43, 5 CCA 412 [aff 50 Fed. 90]; Enterprise Mfg. Co. v. Sargent, 28 Fed. 185; May v. Fond du Lac, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Welling v. Crane, 14 Fed. 571; Barry v. Gugenheim, 2 F. Cas. No. 1,061, 5 Fish. Pat. Cas. 452; Carter v. Messinger, 5 F. Cas. No. 2,478, 11 Blatchf. 34; Smith v. Frazer, 22 F. Cas. No. 13,048, 5 Fish. Pat. Cas. 543; Farnham v. U. S., 49 Ct. Cl. 19 [mod 240 U. S. 537, 36 SCt 427, 60 L. ed. 786]; Farnham v. U. S., 47 Ct. Cl. 207; In re Smith, 57 App. (D. C.) 350, 23 F. (2d) 771; In re Brewster, 57 App. (D. C.) 268, 20 F. (2d) 284; In re Smith, 57 App. (D. C.) 204, 19 F. (2d) 678; Bard's Application, 57 App. (D. C.) 147, 18 F. (2d) 189; Ballman's Application, 57 App. (D. C.) 146, 18 F. (2d) 188; Herbener's Application, 57 App. (D. C.) 42, 16 F. (2d) 538; In re Vissering, 56 App. (D. C.) 145, 10 F. (2d) 1010; In re Budd, 54 App. (D. C.) 49, 293 Fed. 1016; In re Stolp, 44 App. (D. C.) 451; In re O'Connor, 42 App. (D. C.) 219; In re Taylor, 31 App. (D. C.) 529; In re Milans, 31 App. (D. C.) 269; In re Volkmann, 28 App. (D. C.) 441; In re Schraubstadter, 26 App. (D. C.) 331; In re Weber, 26 App. (D. C.) 29; Patterson v. Gaslight, etc., Co., 2 Ch. D. 812; Penn v. Bibby, L. R. 2 Ch. 127, 20 ERC 110; Parkes v. Stevens, L. R. 8 Eq. 358; Jordan v. Moore, L. R. 1 C. P. 624; Pirrie v. York St. Flax Spinning Co., [1894] 1 Ir. 417; Saunders v. Aston, 3 B. & Ad. 881, 23 ECL 384, 110 Reprint 324; Kay v. Marshall, 8 Cl. & F. 245, 8 Reprint 96; Ormson v. Clarke, 14 C. B. N. S. 475, 108 ECL 475, 143 Reprint 531; Ormson v. Clarke, 13 C. B. N. S. 337, 106 ECL 337, 143 Reprint 134 [aff 14 C. B. N. S. 475, 108 ECL 475, 143 Reprint 531]; Horton v. Mabon, 12 C. B. N. S. 437, 104 ECL 437, 142 Reprint 1213 [aff 16 C. B. N. S. 141, 111 ECL 141, 143 Reprint 1079]; Ralston v. Smith, 9 C. B. N. S. 117, 99 ECL 117, 142 Reprint 45 [aff 11 C. B. N. S. 471, 103 ECL 471, 142 Reprint 881]; Patent Bottle Envelope Co. v. Seymer, 5 C. B. N. S. 164, 94 ECL 164, 141 Reprint 65; Tetley v. Easton, 2 C. B. N. S. 706, 89 ECL 706, 140 Reprint 593; Harwood v. Great Northern R. Co., 11 H. L. Cas. 654, 11 Reprint 1488, 20 ERC 90; Ralston v. Smith, 11 H. L. Cas. 223, 11 Reprint 1318, 20 ERC 772; Bush v. Fox, 5 H. L. Cas. 707, 10 Reprint 1080; Nicoll v. Swears, 69 L. T. Rep. N. S. 110; White v. Toms, 37 L. J. Ch. 204; Detroit Rubber Products, Inc. v. Republic Rubber Co., [1928] Can. Exch. 29, [1928] 3 DomLR 81; Copeland-Chatterson Co. v. Paquette, 38 Can. S. C. 451; Kemp v. Chown, 7 Can. Exch. 306; Yates v. Great Western R. Co., 2 Ont. A. 226; Waterous v. Bishop, 20 U. C. C. P. (Ont.) 29.

"No matter how novel, no matter how useful, a device may be, without evidence that the designer has exhibited some degree of skill or ingenuity in contriving something new, which surpasses a showing of mechanical skill, are we permitted to say that he has invented something and hold a patent valid. In the absence of this element of invention, the patent, if issued, must be held invalid, no matter how novel or useful it may be." Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948, 951.

89. Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34.

90. Hill v. Wooster, 132 U. S. 693, 10 SCt 228, 33 L. ed. 502; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 SCt 846, 29 L. ed. 952; Thompson v. Boisselier, 114 U. S. 1, 5 SCt 1042, 29 L. ed. 76; Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948; Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944; Air Reduction Co. v. Carbo-Oxygen Co., 17 F. (2d) 138 [aff 19 F. (2d) 1014 mem]; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Boston Pencil Pointer Co. v. Automatic Pencil Sharpener Co., 276 Fed. 910; Robins Conveying Belt Co. v. Link Belt Co., 233 Fed. 1005, 148 CCA 15.

step in advance in the useful arts.[91] It was never the object of the patent laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacture.[92] A method or device which is the product of mere mechanical skill is not patentable.[93] This is true no matter how new or use-

91. Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; Tiffany v. Paper Products Co., 253 Fed. 953, 165 CCA 395 [aff 244 Fed. 178].

92. Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Tiffany v. Paper Products Co., 253 Fed. 953, 165 CCA 395 [aff 244 Fed. 178].

93. Concrete Appliances Co. v. Gomery, 269 U. S. 177, 46 SCt 42, 70 L. ed. 222; Thomson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098; John E. Thropp's Sons' Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708; Vandenburgh v. Truscon Steel Co., 261 U. S. 6, 43 SCt 331, 67 L. ed. 507; Berlin Mills Co. v. Proctor, etc., Co., 254 U. S. 156, 41 SCt 75, 65 L. ed. 196; New York Scaffolding Co. v. Liebel-Binney Constr. Co., 254 U. S. 24, 41 SCt 18, 65 L. ed. 112; Werk v. Parker, 249 U. S. 130, 39 SCt 197, 63 L. ed. 514; Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148; Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Black Diamond Coal-Min. Co. v. Excelsior Coal Co., 156 U. S. 611, 15 SCt 482, 39 L. ed. 553; Giles v. Heysinger, 150 U. S. 627, 14 SCt 211, 37 L. ed. 1204; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 SCt 28, 37 L. ed. 989; Patent Clothing Co. v. Glover, 141 U. S. 560, 12 SCt 79, 35 L. ed. 858; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; French v. Carter, 137 U. S. 239, 11 SCt 90, 34 L. ed. 664; Butler v. Steckel, 137 U. S. 21, 11 SCt 25, 34 L. ed. 582; Royer v. Roth, 132 U. S. 201, 10 SCt 58, 33 L. ed. 322; Aron v. Manhattan R. Co., 132 U. S. 84, 10 SCt 24, 33 L. ed. 272; Munson v. New York, 124 U. S. 601, 8 SCt 622, 31 L. ed. 586; Clark Pomace-Holder Co. v. Ferguson, 119 U. S. 335, 7 SCt 382, 30 L. ed. 406; Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Estey v. Burdett, 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058; Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; Pearce v. Mulford, 102 U. S. 112, 26 L. ed. 93; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683; Koppe v. Burnstingle, 29 F. (2d) 923; Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948; Lektophone Corp. v. Rola Co., 27 F. (2d) 758; Grand Rapids Refrigerator Co. v. Stevens, 27 F. (2d) 243; Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; In re Kaplan, 26 F. (2d) 565; In re Owen, 25 F. (2d) 776; In re Richards, 24 F. (2d) 471; Buckeye Incubator Co. v. Hillpot, 22 F. (2d) 855 [aff 24 F. (2d) 341]; Watertown Table-Slide Co. v. Perfection Table-Slide Mfg. Co., 22 F. (2d) 798; Richardson Co. v. Hood Rubber Co., 22 F. (2d) 501; Bourke v. Buegeleisen, 22 F. (2d) 208; Macomb Mfg. Co. v. Mantle Lamp Co., 22 F. (2d) 93; Carbide, etc., Chemicals Corp. v. Texas Co., 21 F. (2d) 199; General Electric Co. v. Eisler, 20 F. (2d) 33; Lektophone Corp. v. Brandes Products Corp., 16 F. (2d) 934 [mod on other grounds 20 F. (2d) 155]; Gladding-McBean Corp. v. Clark, 16 F. (2d) 50; Rip Van Winkle Wall Bed Co. v. Holmes, 15 F. (2d) 950; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Barber Colman Co. v. Withnell, 14 F. (2d) 780; Milliken v. Aermotor Co., 14 F. (2d) 513; Kauffman Engineering Co. v. Sodemann Heat, etc., Co., 14 F. (2d) 396; Great Western Mfg. Co. v. Lowe, 13 F. (2d) 880 [aff 26 F. (2d) 857]; Cartridge Mach. Corp. v. National Collapsible Tube Co., 13 F. (2d) 859; Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796; Hitchcock v. Valley Camp Coal Co., 10 F. (2d) 381; Terkelsen Mach. Co. v. Pierce Wrapping Mach. Co., 5 F. (2d) 294 [certiorari den 269 U. S. 566 mem, 46 SCt 24 mem, 70 L. ed. 415 mem]; Criterion Adv. Co., Inc. v. Seeley, 4 F. (2d) 932; E. Fredericks, Inc. v. Eugene, Ltd., 3 F. (2d) 543 [rev 298 Fed. 633]; Naceskid Serv. Chain Co. v. Perdue, 1 F. (2d) 924; Peelle Co. v. Morrison, etc., Co., 293 Fed. 370; Kalamazoo Loose Leaf Binder Co. v. Wilson Jones Loose Leaf Co., 286 Fed. 715; Advance Auto. Accessories Corp. v. Reflex Auto Accessory Co., 284 Fed. 117; Lehman v. Ripley, 283 Fed. 661 [aff 3 F. (2d) 518]; Albrecht Mfg. Co. v. Blum, 283 Fed. 413; Columbus Dental Mfg. Co. v. Ideal Interchangeable Tooth Co., 282 Fed. 896 [aff 294 Fed. 422]; Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502; Beecroft v. Rooney, 280 Fed. 543; Ball, etc., Bearing Co. v. F. C. Sanford Mfg. Co., 280 Fed. 415; Jessurun v. Peerless Light Co., 280 Fed. 113; Condron Co. v. Corrugated Bar Co., 279 Fed. 867; National Safety Lift Co. v. Anderson, 276 Fed. 696; Luten v. Kansas City Bridge Co., 272 Fed. 533 [rev on other grounds 285 Fed. 840]; National Safety Gas Cock Co., Inc. v. New York Cons. Gas Co., 271 Fed. 539 [aff 271 Fed. 539]; Treat v. Redtop Electric Co., Inc., 271 Fed. 307 [certiorari den 256 U. S. 697 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem]; Charles T. Wilt Co. v. William Bal Co., 271 Fed. 73; Duryea Mfg. Co. v. Agrippa Mfg. Corp., 270 Fed. 224 [aff 273 Fed. 522]; Baker v. Hughes-Evans Co., 270 Fed. 97; Enameled Metals Co. v. Western Conduit Co., 269 Fed. 620; Morgan Constr. Co. v. Donner Steel Co., 269 Fed. 389 [rev on other grounds 277 Fed. 221]; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680]; Bryant Electric Co. v. Harvey Hubbell, Inc., 267 Fed. 572; Bellows v. New York Cent. R. Co., 266 Fed. 532; Bellows v. New York Cent. R. Co., 266 Fed. 530; Jennison-Wright Co. v. Hempy, 266 Fed. 372; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 229; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; American Optical Co. v. Universal Optical Corp., 265 Fed. 925; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015]; Walker Mfg. Co. v. Illinois Brass Mfg. Co., 265 Fed. 279; Rosenwasser Bros., Inc. v. B. E. Mfg. Co., 264 Fed. 114; George D. Mayo Mach. Co. v. Hemphill Mfg. Co., 262 Fed. 435 [aff 247 Fed. 536]; Smith v. Peck, etc., Co., 262 Fed. 415 [certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem]; Backstay Mach., etc., Co. v. Hamilton, 262 Fed. 411 [certiorari den 253 U. S. 488 mem, 40 SCt 485 mem, 64 L. ed. 1026 mem]; Vandenburgh v. Electric Welding Co., 259 Fed. 579; Double Fabric Tire Co. v. General Tire, etc., Co., 258 Fed. 932; Union Sulphur Co. v. Freeport Texas Co., 255 Fed. 961, 167 CCA 253 [certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem]; Armstrong Seatag Corp. v. Smith's Island Oyster Co., 254 Fed. 821, 166 CCA 267; Luten v. Marsh, 254 Fed. 701; Luten v. Allen, 254 Fed. 587 [aff 263 Fed. 986, and foll Luten v. Young, 254 Fed. 591 (aff 263 Fed. 986)]; Sternau v. Borgfeldt, 254 Fed. 582; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Matteawan Mfg. Co. v. Emmons Bros. Co., 253 Fed. 372, 165 CCA 154; Willamette Iron, etc., Works v. Columbia Engineering Works, 252 Fed. 594, 164 CCA 510; Wright v. Eight Hour Tobacco Co., 252 Fed. 146, 164 CCA 258; Luten v. Whittier, 251 Fed. 590, 163 CCA 584; General Electric Co. v. Sundh Electric Co., 251 Fed. 283, 163 CCA 439; Individual Drinking Cup Co. v. Public Serv. Cup Co., 250 Fed. 620, 162 CCA 636; Sturm v. Wm. E. Dee Co., 249 Fed. 244; National Sweeper Co. v. Bissell Carpet Sweeper Co., 249 Fed. 196, 161 CCA 232; Motion Picture Patents Co. v. Calehuff Supply Co., Inc., 248 Fed. 724 [aff 251 Fed. 598, 163 CCA 592]; Joseph Lay Co. v. American Brush, etc., Co., 248 Fed. 513; Shrauger v. Phillip Bernard Co., 247 Fed. 547; Scott & Williams, Inc. v. Hemphill Mfg. Co., 247 Fed. 540 [aff 262 Fed. 968]; Cutler Mail Chute Co. v. American Mailing Device Corp., 247 Fed. 508, 160 CCA 18; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573; Package Mach. Co. v. Johnson Automatic Sealer Co., 246 Fed. 598, 158 CCA 568; Cohn v. Hickey-Freeman Co., 246 Fed. 256; Westinghouse Mach. Co. v. C. & G. Cooper Co., 245 Fed. 463, 157 CCA 625; Beckwith Box Toe Co. v. Gowdy, 244 Fed. 805; Butterick Pub. Co. v. Peerless Pattern Co., 244 Fed. 453, 157 CCA 93; Tiffany v. Paper Products Co., 244 Fed. 178 [aff 253 Fed. 953, 165 CCA 395]; Universal Draft Gear Attachment Co. v. Buckeye Steel Castings Co., 244 Fed. 174, 156 CCA 602; Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 239 Fed. 909; Porter Safety Seal Co. v. Brooks, 235 Fed. 289, 149 CCA 5; President Suspender Co. v. Macwilliam, 233 Fed. 433 [aff 238 Fed. 159, 151 CCA 235 (certiorari den 243 U. S. 636 mem, 37 SCt 399 mem, 61 L. ed. 941 mem)]; Ft. Pitt Supply Co. v. Ireland, etc., Mfg. Co., 232 Fed. 871, 147 CCA 65; Apple v. American Shoe Mach., etc., Co., 232 Fed. 603, 146 CCA 561; Hansen v. Slick, 230 Fed. 627, 145 CCA 37; Simmons Mfg. Co. v. Kinney-Rodier Co., 224 Fed. 959, 140 CCA 651; Computing Scale Co. v. Toledo Computing Scale Co., 224 Fed. 500, 140 CCA 208; McClave-Brooks Co. v. M. H. Treadwell Co., 212 Fed. 442 [rev on other grounds 220 Fed. 144, 136 CCA 98]; Greenwald v. Enochs, 180 Fed. 478 [rev on other grounds 183 Fed. 583, 106 CCA 351]; Duner Co. v. Grand Rapids R. Co., 171 Fed. 863, 96 CCA 531; Wysong, etc., Co. v. Oakley, 169 Fed. 640 [aff 181 Fed. 492, 104 CCA 240]; Gates Iron Works v. Overland Gold Min. Co., 147 Fed. 700, 78 CCA 88; Fenton Metallic Mfg. Co. v. Chase, 73 Fed. 831; Office Specialty Mfg. Co. v. Cooke, etc., Co., 73 Fed. 684; New York v. American Cable R. Co., 70 Fed. 853, 17 CCA 467 [rev 56 Fed. 149, 68 Fed. 227]; Covert v. Travers Bros. Co., 70 Fed. 788; Union Paper-Bag Mach. Co. v. Waterbury, 70 Fed. 240, 17 CCA 84 [aff 58 Fed. 566]; Andrews v. Thum, 67 Fed. 911, 15 CCA 67 [rev 53 Fed. 84]; Philadelphia Novelty Mfg. Co. v. Weeks, 61 Fed. 405, 9 CCA 555 [aff 52 Fed. 816]; Butte City St. R. Co. v. Pacific Cable R. Co., 60 Fed. 410, 9 CCA 41 [rev 55 Fed. 760]; Green v. Lynn, 55 Fed. 516; National Surface Guard Co. v. Merrill, 49 Fed. 157, 1 CCA 214; Root v. Sontag, 47 Fed. 309; Davis v. Parkman, 45 Fed. 693 [aff 71 Fed. 961, 18 CCA 398]; Delvin v. Heise, 43 Fed. 795 [aff 159 U. S. 251, 15 SCt 1038, 40 L. ed. 138]; Consolidated Roller-Mill Co. v. Barnard, 43 Fed. 527 [aff 156 U. S. 261, 15 SCt 333, 39 L. ed. 417]; Williams Mfg. Co. v. Franklin, 41 Fed. 393; Hurd v. Snow,

ful that product may be.[94] To authorize the allowance of a patent there must be a substantial difference in principle from prior inventions.[95]

[§ 68] **2. Degree of Invention Required.** An inventor's right to a patent is not affected by the fact that his invention is small and simple, requiring no high degree of imagination, where a distinct advance in the art is achieved.[96] But if there is invention to any extent it is sufficient.[97] The extent of advance in the art which the inventor makes is immaterial.[98]

Where an art has been advanced step by step by a series of inventions, so that no one inventor can claim the complete whole, each inventor is entitled to the specific form of device which he produces, so far as it differs from those of his competitors.[99]

The extent of the mental process is immaterial.[1] The mere fact that study, effort, and experience were required for the production of the device or method is not sufficient.[2] The right to a patent does not depend upon the quantity of thought, ingenuity, skill, labor, or experiment which was bestowed upon the production.[3] The result may come out of long consideration,[4] or it may be the revelation of a flash of thought.[5]

[§ 69] **3. Degree of Physical Change Immaterial.** The fact that the physical changes from other devices were slight is immaterial if they were essential to the purpose sought to be accomplished.[6]

[§ 70] **4. Nature and Character of an Invention—a. In General.** An invention is a new idea of means created by the exercise of the inventive faculty for

35 Fed. 423; Puetz v. Bransford, 31 Fed. 458; Celluloid Mfg. Co. v. Zylonite Novelty Co., 30 Fed. 617; Muller v. Ellison, 27 Fed. 456; Arnold v. Pettee, 1 F. Cas. No. 561b; Walker v. Rawson, 29 F. Cas. No. 17,083, 4 Bann. & A. 128; In re Smith, 57 App. (D. C.) 350, 23 F. (2d) 771; In re Visserring, 57 App. (D. C.) 46, 16 F. (2d) 542; In re Davidson, 56 App. (D. C.) 279, 12 F. (2d) 814; In re Glafcke, 51 App. (D. C.) 204, 277 Fed. 603; Moore's Application, 49 App. (D. C.) 312, 265 Fed. 462; In re McNeal, 47 App. (D. C.) 600; In re Gray, 44 App. (D. C.) 15; In re O'Connor, 42 App. (D. C.) 219; In re Pein, 41 App. (D. C.) 536; In re Havens, 39 App. (D. C.) 465; In re French, 39 App. (D. C.) 413; In re Maas, 39 App. (D. C.) 142; In re Morgan, 38 App. (D. C.) 274; In re Tallmadge, 37 App. (D. C.) 590; In re Fessenden, 36 App. (D. C.) 425; In re Chase, 33 App. (D. C.) 441; In re Blackmore, 33 App. (D. C.) 434; In re Berger, 32 App. (D. C.) 358; In re Orcutt, 32 App. (D. C.) 345; In re White, 31 App. (D. C.) 607; In re Faber, 31 App. (D. C.) 531; In re Taylor, 31 App. (D. C.) 529; In re Chase, 31 App. (D. C.) 154; In re Hayes, 27 App. (D. C.) 393; Millett v. Allen, 27 App. (D. C.) 70; In re Garrett, 27 App. (D. C.) 19; In re Baker, 26 App. (D. C.) 363; In re Scott, 25 App. (D. C.) 307; In re Seabury, 23 App. (D. C.) 377; In re McNeill, 20 App. (D. C.) 294; In re Iwan, 17 App. (D. C.) 566; In re Musgrave, 10 App. (D. C.) 164; National Cash Register Co. v. Remington Arms Co., 122 Misc. 234, 202 NYS 691; Gerrard Wire Tying Mach. Co., Ltd. v. Laidlaw Bale-Tie Co., Ltd., [1926] Can. Exch. 193, [1926] 4 DomLR 5; Canadian Raybestos Co., Ltd. v. Brake Service Corp., Ltd., [1926] Can. Exch. 187, [1926] 3 DomLR 497; Yates v. Great Western R. Co., 2 Ont. A. 226 [allowing app 24 Grant Ch. 495].

[a] **Illustrations.**—(1) Making a device adjustable. Peters v. Hanson, 129 U. S. 541, 9 SCt 393, 32 L. ed. 742; Barkis v. California Almond Growers' Exch., 17 F. (2d) 327; Kalamazoo Loose Leaf Binder Co. v. Wilson Jones Loose Leaf Co., 286 Fed. 715; Positive Lock Washer Co. v. Reliance Mfg. Co., 214 Fed. 134; Houser v. Starr, 203 Fed. 264, 121 CCA 462 [mod 194 Fed. 730]; Stevens v. Rodgers Boiler, etc., Co., 186 Fed. 681, 108 CCA 495; Smyth Mfg. Co. v. Sheridan, 149 Fed. 208, 79 CCA 166; Sipp Electric, etc., Co. v. Atwood-Morrison Co., 142 Fed. 149, 73 CCA 367; Doig v. Morgan Mach. Co., 122 Fed. 460, 59 CCA 616. (2) Making one of two coacting parts stationary and the other movable, where before the first had been movable and the second stationary, does not amount to invention. Duner Co. v. Grand Rapids R. Co., 171 Fed. 863, 96 CCA 531; Abbott Mach. Co. v. Bonn, 51 Fed. 223. (3) Placing sheets of flypaper face to face. Andrews v. Thum, 67 Fed. 911, 15 CCA 67 [rev 53 Fed. 84]. (4) Making parts match or fit each other. Delvin v. Heise, 43 Fed. 795 [app dism 159 U. S. 251 mem, 15 SCt 1038 mem, 40 L. ed. 138 mem]. (5) Putting an old article in a convenient receptacle. Hurd v. Snow, 35 Fed. 423. (6) Placing handholds on book shelves. Fenton Metallic Mfg. Co. v. Chase, 73 Fed. 831.

94. Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 SCt 846, 29 L. ed. 952; Thompson v. Boisselier, 114 U. S. 1, 5 SCt 1042, 29 L. ed. 76; Milligan, etc., Glue Co. v. Upton, 97 U. S. 3, 24 L. ed. 985; Lord, etc., Co. v. Payne, 190 Fed. 172 [rev on other grounds 195 Fed. 75, 115 CCA 107]; Wills v. Scranton Cold Storage Co., 147 Fed. 525 [aff 153 Fed. 181]; Dunbar v. Eastern Elevating Co., 81 Fed. 201, 26 CCA 330; Baldwin v. Haynes, 28 Fed. 99 [app dism 136 U. S. 629 mem, 10 SCt 1065 mem, 34 L. ed. 552 mem]; May v. Fond du Lac County, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Perry v. Coöperative Fdy. Co., 12 Fed. 436, 20 Blatchf. 498; In re Colton, 21 App. (D. C.) 17.

95. Smith v. Pearce, 22 F. Cas. No. 13,089, 2 McLean 176, 2 Robb Pat. Cas. 13.

96. Frick Co. v. Lindsay, 27 F. (2d) 59; Sandusky v. Brooklyn Box Toe Co., 13 F. (2d) 238; Lane v. Craftsmen Film Laboratories, 7 F. (2d) 283; Poole v. Isaac H. Blanchard Co., 204 Fed. 285, 122 CCA 470; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 182 Fed. 991, 105 CCA 545; Smith, etc., Co. v. Stearns, 166 Fed. 760, 92 CCA 440; Howard v. Grist, 165 Fed. 211; Gould Coupler Co. v. Platt, 70 Fed. 622; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Clark Patent Steam, etc., Co. v. Copeland, 5 F. Cas. No. 2,866, 2 Fish. Pat. Cas. 221.

97. Merrill v. W. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; Valvona v. D'Adamo, 135 Fed. 544; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 124 Fed. 514; H. Tibbe, etc., Mfg. Co. v. Lamparter, 51 Fed. 763; H. Tibbe, etc., Mfg. Co. v. Heineken, 43 Fed. 75; Fryer v. Mutual L. Ins. Co., 30 Fed. 787; Teese v. Phelps, 23 F. Cas. No. 13,819, McAll. 48; In re Snyder, 10 App. (D. C.) 140.

98. Bestwall Mfg. Co. v. U. S. Gypsum Co., 270 Fed. 542 [aff 258 Fed. 647]; Nestle Patent Holding Co. v. Gem Permanent Wave Co., 6 F. (2d) 1013; Superior Mach. Tool Co. v. Cincinnati Lathe, etc., Co., 259 Fed. 273, 170 CCA 341; Chain Belt Co. v. New York Scaffolding Co., 245 Fed. 747, 158 CCA 149 [rev on other grounds 254 U. S. 32, 41 SCt 21, 65 L. ed. 116].

99. Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Jay v. Sparks-Withington Co., 258 Fed. 45 [aff 270 Fed. 449]; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573.

1. Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Stewart v. Mahoney, 5 Fed. 302; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Magic Ruffle Co. v. Douglas, 16 F. Cas. No. 8,948, 2 Fish. Pat. Cas. 330; Many v. Sizer, 16 F. Cas. No. 9,056, 1 Fish. Pat. Cas. 17; In re Snyder, 10 App. (D. C.) 140.

2. Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797]; Butler v. Steckel, 27 Fed. 219 [aff 137 U. S. 21, 11 SCt 25, 34 L. ed. 582].

3. Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Clark Patent Steam, etc., Co. v. Copeland, 5 F. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Magic Ruffle Co. v. Douglas, 16 F. Cas. No. 8,948, 2 Fish. Pat. Cas. 330; Middleton Tool Co. v. Judd, 17 F. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Potter v. Holland, 19 F. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382.

4. Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; In re Snyder, 10 App. (D. C.) 140.

5. Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Badische Anilin, etc., Fabrik v. Cochrane, 2 F. Cas. No. 719, 4 Bann. & A. 215, 16 Blatchf. 155; In re Everson, 8 F. Cas. No. 4,580, McA. Pat. Cas. 406; Stephens v. Salisbury, 22 F. Cas. No. 13,369, McA. Pat. Cas. 379; In re Snyder, 10 App. (D. C.) 140.

6. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 SCt 295, 38 L. ed. 103; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Concrete Mixing, etc., Co. v. Powers-Kennedy Contracting Corp., 27 F. (2d) 668 [certiorari granted 49 SCt 95 mem]; Southern Electro-Chemical Co. v. Du Pont de Nemours, 20 F. (2d) 97; Hazeltine Corp. v. Electric Serv. Engineering Corp. 18 F. (2d) 662; Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Household Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838]; Smith-Lee Co. v. Plympton Paper Products Co., 18 F. (2d) 153 [aff 18 F. (2d) 154]; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66 [certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem]; Atlantic Gulf, etc., Co. v. Wood, 288 Fed. 148; Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115; Mead Morrison Mfg. Co. v. Exeter Mach. Works, 196 Fed. 789; Parke-Davis v. H. K. Mulford Co., 189 Fed. 95 [mod on other grounds 196 Fed. 496, 116 CCA 262]; Stewart v. Mahony, 5 Fed.

the attainment of some useful purpose.[7] It is a mental result,[8] a concept,[9] a thing evolved from the mind,[10] a product of the intellect,[11] a new idea of means generated by the mind of the inventor,[12] the embodiment of the inventive idea.[13] Considered in itself, an invention is neither an end, nor a combination of both means and end, but is a means for the attainment of an end.[14] The act of invention, that is, the exercise of the inventive faculty resulting in the creation of a new idea of means,[15]—the finding out, the contriving, the creating of something which did not exist before, by an operation of the intellect,[16]—is primarily a mental act,[17] consisting of the conception of the idea and of means for putting it in practice and producing the desired result.[18] It is not a revelation of something existing but unknown,[19] but is the creation of something which did not exist before, possessing the elements of novelty and utility in kind and measure different from, and greater than, what the art might expect from its skilled workers.[20] One has not made an invention merely because he was the first to see the occasion or appreciate the advisability of doing the thing.[21] Merely to avail of the store of accumulated and accessible knowledge is not invention.[22] There must be some addition to the common stock of knowledge.[23] The mere exercise of good judgment is not an act of invention.[24]

Merely to perceive the end desired is not invention.[25] The act of invention must conclude a conception of the means by which the desired result may be attained.[26] This conception must be complete and

302; Treadwell v. Fox, 24 F. Cas. No. 14,156.

[a] **Illustration.**—A substance extracted from animal tissue for medicinal use, which is new, practically and therapeutically may be patentable, although it differs from previous preparations only in its degree of purity from other portions of the tissue. Parke-Davis v. H. K. Mulford Co., 189 Fed. 95 [mod on other grounds 196 Fed. 496, 116 CCA 262].

7. Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; National Safety Lift Co. v. Anderson, 276 Fed. 696; International Curtis Mar. Turbine Co. v. William Cramp, etc., Co., 211 Fed. 124, 127 CCA 522 [certiorari den 234 U. S. 755 mem, 34 SCt 674 mem, 58 L. ed. 1578 mem]; Phillips v. Faber Sulky Co., 160 Fed. 966 [aff 173 Fed. 1021 mem, 97 CCA 668 mem]; Peters v. Union Biscuit Co., 120 Fed. 679 [rev on other grounds 125 Fed. 601, 60 CCA 337]; Cleveland Faucet Co. v. Vulcan Brass Co., 72 Fed. 505; Muller v. Ellison, 27 Fed. 456; Rosenwasser v. Berry, 22 Fed. 841 [aff 129 U. S. 47, 9 SCt 229, 32 L. ed. 628]; Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866]; Matter of Gould, 8 D. C. 410.

8. Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566.

9. Hookless Fastener Co. v. H. L. Rogers Co., 26 F. (2d) 264 [rev on other grounds 28 F. (2d) 814]; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem]; Klauder-Weldon Dyeing Mach. Co. v. Weldon, 87 Misc. 95, 150 NYS 273.

10. Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem].

11. Pyrene Mfg. Co. v. Boyce, supra; Lord, etc., Co. v. Payne, 190 Fed. 172 [rev on other grounds 195 Fed. 75, 115 CCA 107].

12. E. W. Bliss Co. v. U. S., 248 U. S. 37, 39 SCt 42, 63 L. ed. 112; National Cash-Register Co. v. Boston Cash Indicator, etc., Co., 156 U. S. 502, 15 SCt 434, 39 L. ed. 511; Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Electric Railroad Signal Co. v. Hall Railroad Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Hazeltine Corp. v. Electric Serv. Engineering Corp., 18 F. (2d) 662; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; A. Kimball Co. v. Noesting Pin Ticket Co., 262 Fed. 148; Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 86 CCA 483 [certiorari den 209 U. S. 548 mem, 28 SCt 759 mem, 52 L. ed. 921 mem]; Head v. Porter, 70 Fed. 498; Boyd v. Cherry, 50 Fed. 279; Earle v. Sawyer, 8 F. Cas. No. 4,247, 4 Mason 1, 1 Robb. Pat. Cas. 490; Klauder-Weldon Dyeing Mach. Co. v. Weldon, 87 Misc. 95, 150 NYS 273.

13. A. Kimball Co. v. Noesting Pin Ticket Co., 262 Fed. 148.

14. Kohler v. Cline Electric Mfg. Co., 28 F. (2d) 405 [aff 27 F. (2d) 638].

15. Richmond Screw Anchor Co. v. U. S., 275 U. S. 331, 48 SCt 194, 72 L. ed. 303; Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Magowan v. New York Belting, etc., Co., 141 U. S. 332, 12 SCt 71, 35 L. ed. 781; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799].

[a] **"Inventive faculty" defined.**—"That intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision." Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 72, 5 SCt 717, 28 L. ed. 901.

16. Conover v. Roach, 6 F. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Leidersdorf v. Flint, 15 F. Cas. No. 8,219, 8 Biss. 327; Ransom v. New York, 20 F. Cas. No. 11,593, 1 Fish. Pat. Cas. 252.

17. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641].

18. U. S. Metallic Packing Co. v. Hewitt Co., 236 Fed. 739, 150 CCA 71 [certiorari den 242 U. S. 651 mem, 37 SCt 243 mem, 61 L. ed. 545 mem]; General Electric Co. v. Sangamo Electric Co., 174 Fed. 246, 98 CCA 154; Eck v. Kutz, 132 Fed. 758; Rose v. Hirsch, 77 Fed. 469, 23 CCA 246; Marder v. Dey, 32 App. (D. C.) 593; Burson v. Vogel, 29 App. (D. C.) 388, 395.

"Invention consists of the conception of the idea and of means for putting it in practice and producing the desired result." Burson v. Vogel, supra.

[a] **"Invention, in the nature of improvements,** is the double mental act of discerning, in existing machines or processes or articles, some deficiency, and pointing out the means of overcoming it." General Electric Co. v. Sangamo Electric Co., 174 Fed. 246, 251, 98 CCA 154.

19. Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem]; Earle v. Sawyer, 8 F. Cas. No. 4,247, 4 Mason 1, 1 Robb Pat. Cas. 490.

20. Koppe v. Burnstingle, 29 F. (2d) 923; Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem].

21. Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Couse v. Johnson, 6 F. Cas. No. 3,288, 4 Bann. & A. 501; King v. Frostel, 14 F. Cas. No. 7,794, 4 Bann. & A. 236, 8 Biss. 510 [aff 109 U. S. 99, 3 SCt 85, 27 L. ed. 870]; In re Stadeker, 50 App. (D. C.) 20, 267 Fed. 322.

[a] **Putting several articles in one package** is not patentable. King v. Frostel, 14 F. Cas. No. 7,794, 4 Bann. & A. 236, 8 Biss. 510 [aff 109 U. S. 99, 3 SCt 85, 27 L. ed. 870.

22. Lambert v. Phillips-Lafitte Co., 23 F. (2d) 818; Wessels v. Chicago Granitine Mfg. Co., 23 F. (2d) 781; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Hammond v. Paige-Ohio Co., 23 F. (2d) 320; Bellis Heat Treating Co. v. Heatbath Corp., 23 F. (2d) 239; Crozier-Straub, Inc. v. Graham, 22 F. (2d) 310 [rev on other grounds 28 F. (2d) 321 (certiorari den 49 SCt 253 mem)]; Claude Neon Lights v. Machlett, 21 F. (2d) 846 [mod on other grounds 27 F. (2d) 702 (certiorari den 49 SCt 32 mem)]; Gear Grinding Mach. Co. v. Reo Motor Car Co., 20 F. (2d) 702; Lektophone Corp. v. Brandes Products Corp., 20 F. (2d) 155; Lektophone Corp. v. Western Electric Co., 20 F. (2d) 150; Air Reduction Co. v. Carbo-Oxygen Co., 17 F. (2d) 138 [aff 19 F. (2d) 1014 mem]; Church v. Alabastine Co., 14 F. (2d) 663; Sutherland Paper Co. v. Michigan Carton Co., 13 F. (2d) 884 [mod on other grounds 29 F. (2d) 179]; In re Kohler, 47 App. (D. C.) 373; In re Heeren, 42 App. (D. C.) 216; In re Faber, 31 App. (D. C.) 531.

23. Earle v. Sawyer, 8 F. Cas. No. 4,247, 4 Mason 1, 1 Robb Pat. Cas. 490.

24. Estey v. Burdett, 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058.

25. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83]; Hookless Fastener Co. v. H. L. Rogers Co., 26 F. (2d) 264 [rev on other grounds 28 F. (2d) 814]; George v. Perkins, 1 F. (2d) 978; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Voightmann v. Perkinson, 138 Fed. 56, 70 CCA 482; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367; Forgie v. Oil-Well Supply Co., 58 Fed. 871, 7 CCA 551; Pembroke v. Sulzer, 49 App. (D. C.) 356, 265 Fed. 996; McKeen v. Jerdone, 34 App. (D. C.) 163.

[a] **Thus** it is not invention to conceive the idea that a metal railway car is a thing to be desired; but there must be conception of the means by which the desired result can be obtained. McKeen v. Jerdone, 34 App. (D. C.) 163.

26. Hookless Fastener Co. v. H. L. Rogers Co., 26 F. (2d) 264 [rev on other grounds 28 F. (2d) 814]; George v. Perkins, 1 F. (2d) 978; Forgie v. Oil-Well Supply Co., 58 Fed. 871, 7 CCA 551.

ready to be put in some practical form.[27] There must be a definite idea of the complete and operative invention as it is thereafter to be applied in practice.[28] The inventive act is not complete if the exercise of further invention is required to enable the method or device conceived to perform its functions in the manner proposed by the inventor.[29] The idea must have been so far perfected as to require only mechanical skill successfully to apply it in practice.[30] Invention cannot be predicated of mere speculation or conjecture;[31] it must be based upon something ascertained,[32] something definite and certain.[33]

"Invention" and "discovery" synonymous. There is no distinction between the terms "invention" and "discovery" as they are used in the patent law.[34]

[§ 71] **b. Unrecognized Productions.** The mere fact that the discovery made by the inventor was accidental does not deprive the method or device of its character as an invention.[35] Invention, however, necessarily involves a conscious element,[36] and mere accidental production without conscious recognition of the result or the mode of producing it is not invention.[37] But the mere failure of the inventor to appreciate all the benefits and possibilities of his invention does not deprive him of protection therefor.[38] The inventor is entitled to the benefit of the uses to which his invention can be applied, and every way in which it can be utilized to perform its function, whether or not he was aware of all of these uses or methods of use or not.[39] If there be in the concept an actual advantage and the structure embodying the concept discloses invention, a patent will not fail merely because the principal advantages of the invention prove to be different from the one chiefly in the inventor's mind.[40]

Inventor's ignorance of underlying principles. An inventor's right to a patent is not affected by the fact that he did not understand the scientific theory or the natural laws underlying his invention.[41] It is sufficient if he generated the idea of means whereby the application of the abstract principle is brought about.[42]

[§ 72] **5. Invention and Attainment of Improved Result Distinguished.** Not every improvement is invention.[43] While superior utility is a circumstance to be considered in determining the question of invention,[44] the attainment of comparative superiority or greater excellence in that which is already known does not of itself amount to invention.[45] There must be something more than a mere carrying forward or more extended application of an original idea of an-

27. Westinghouse Mach. Co. v. General Electric Co., 199 Fed. 907; Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514]; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367; Marder v. Dey, 32 App. (D. C.) 593; Burson v. Vogel, 29 App. (D. C.) 388.

28. Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454; Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 103 CCA 479 [certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem]; Wheaton v. Kendall, 85 Fed. 666; Merganthaler v. Scudder, 11 App. (D. C.) 264.

29. Wheaton v. Kendall, 85 Fed. 666; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367.

30. Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367 [aff 69 Fed. 408]; Ransom v. New York, 20 F. Cas. No. 11,593, 1 Fish. Pat. Cas. 252.

31. Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514].

32. Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., supra.

33. Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., supra.

34. In re Kemper, 14 F. Cas. No. 7,687, Cranch Pat. Dec. 89, McA. Pat. Cas. 1.

35. Byerley v. Sun Co., 184 Fed. 455, 106 CCA 537.

36. De Laski, etc., Circular Woven Tire Co. v. U. S. Tire Co., 232 Fed. 884 [aff 235 Fed. 290, 149 CCA 6].

37. Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem]; De Laski, etc., Circular Woven Tire Co. v. U. S. Tire Co., 232 Fed. 884, 888 [aff 235 Fed. 290, 149 CCA 6]; Libbey v. Mt. Washington Glass Co., 26 Fed. 757; Maxheimer v. Mayer, 9 Fed. 460, 20 Blatchf. 17; Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307; Pelton v. Waters, 19 F. Cas. No. 10,913, 1 Bann. & A. 599.

"The fortuitous juxtaposition of the elements without any conscious recognition of some pragmatic relation is sterile and valueless." De Laski, etc., Circular Woven Tire Co. v. U. S. Tire Co., supra.

38. Jackson Fence Co. v. Peerless Wire Fence Co., 228 Fed. 691, 143 CCA 213; Westmoreland Specialty Co. v. Hogan, 167 Fed. 327, 93 CCA 31.

39. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610 [rev 16 F. (2d) 419 (rev 10 F. (2d) 598)]; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Western Electric Co. v. La Rue, 139 U. S. 601, 11 SCt 670, 35 L. ed. 294; Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; Kohler v. Cline Electric Mfg. Co., 28 F. (2d) 405 [aff 27 F. (2d) 638]; Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83]; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; Acme Truck, etc., Co. v. Meredith, 183 Fed. 124, 105 CCA 414; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem]; Goshen Sweeper Co. v. Bissell Carpet Sweeper Co., 72 Fed. 67, 19 CCA 13; Fieux v. Coppus, 48 App. (D. C.) 422; In re Gold, 45 App. (D. C.) 294.

40. Kuhlman Electric Co. v. General Electric Co., 147 Fed. 709, 78 CCA 97.

41. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Crozier-Straub, Inc. v. Graham, 28 F. (2d) 321 [rev 22 F. (2d) 310, and certiorari den 49 SCt 253 mem]; Knick v. Bowes "Seal Fast" Corp., 25 F. (2d) 442; U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629 [aff 25 F. (2d) 387]; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Marconi Wireless Tel. Co. v. De Forest Radio Tel., etc., Co., 243 Fed. 560, 156 CCA 258 [aff 236 Fed. 942]; Minerals Separation, Ltd. v. Miami Copper Co., 237 Fed. 609; Andrews Wire, etc., Works v. Wilson Mfg. Co., 199 Fed. 798; Coffield Motor Washer Co. v. A. D. Howe Mach. Co., 190 Fed. 42 [aff 197 Fed. 541, 117 CCA 37]; Hogan v. Westmoreland Specialty Co., 163 Fed. 289 [aff 167 Fed. 327, 93 CCA 31]; Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 138 Fed. 54, 70 CCA 480 [certiorari den 199 U. S. 608 mem, 26 SCt 750 mem, 50 L. ed. 331 mem]; Andrews v. Horey, 16 Fed. 387 [aff 123 U. S. 267, 18 SCt 101, 31 L. ed. 160]; Andrews v. Cross, 8 Fed. 269, 19 Blatchf. 294; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; St. Louis Stamping Co. v. Quinby, 21 F. Cas. No. 12,240, 4 Bann. & A. 192; Treadwell v. Parrott, 24 F. Cas. No. 14,158, 5 Blatchf. 369, 3 Fish. Pat. Cas. 124; Wilton v. Railroad Co., 30 F. Cas. No. 17,856.

42. Andrews v. Horey, 16 Fed. 387 [aff 123 U. S. 267, 8 SCt 101, 31 L. ed. 160].

43. Duplex Envelope Co. v. A. S. Kratz Co., 225 Fed. 68, 70; American Laundry Mach. Mfg. Co. v. Troy Laundry Mach. Co., 171 Fed. 870 [aff 177 Fed. 1001 mem, 100 CCA 513 mem]; In re O'Connor, 42 App. (D. C.) 219; In re Barratt, 11 App. (D. C.) 177; Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A. 847.

"Every simple improvement in an article is not patentable. It must involve an original conception; that is, of what is new, of what is useful, and not something of which the public theretofore had knowledge, and to which it was entitled." Duplex Envelope Co. v. A. S. Kratz Co., supra.

44. See infra § 91.

45. Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; American Road-Mach. Co. v. Pennock, etc., Co., 164 U. S. 26, 17 SCt 1, 41 L. ed. 337; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 SCt 472, 37 L. ed. 307; French v. Carter, 137 U. S. 239, 11 SCt 90, 34 L. ed. 664; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683; Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948; Flint v. Leonard, 27 F. (2d) 215; Carson Inv. Co. v. Anaconda Copper Min. Co., 17 F. (2d) 815 [rev on other grounds 26 F. (2d) 651]; Freydberg Bros., Inc. v. Hamburger, 17 F. (2d) 300; David Belais, Inc. v. Goldsmith Bros. Smelting, etc., Co., 10 F. (2d) 673 [certiorari den 271 U. S. 687 mem, 46 SCt 639 mem, 70 L. ed. 1152 mem]; Lehman v. Ripley, 283 Fed. 661 [aff 3 F. (2d) 518]; Gilchrist v. F. B. Mallory Co., 281 Fed. 350; Boston Pencil Pointer

other,[46] a better doing of that which has already been done,[47] the attainment of a more perfect result by the same methods,[48] or the correction of a more or less obvious defect or fault, such as might be expected of a skilled mechanic in the particular art.[49] An advance step which would occur to one skilled in the art when investigating and considering the subject is not invention.[50] An improvement of an

Co. v. Automatic Pencil Sharpener Co., 276 Fed. 910; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Marshall v. Wirt, 232 Fed. 606, 146 CCA 564; Winston v. Croton Falls Constr. Co., 194 Fed. 123, 114 CCA 201; American Laundry Mach. Mfg. Co. v. Troy Laundry Mach. Co., 171 Fed. 870 [aff 177 Fed. 1001 mem, 100 CCA 513 mem]; Shoe v. Gimbel, 96 Fed. 96; Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; Smith v. Nichols, 22 F. Cas. No. 13,084, 6 Fish. Pat. Cas. 61, Holmes 172 [aff 21 Wall. 112, 22 L. ed. 566]; Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193; Chicago Film Exch. v. Motion Picture Patents Co., 39 App. (D. C.) 285; In re Mason, 31 App. (D. C.) 539; In re Milans, 31 App. (D. C.) 269; Huntington v. Lutz, 13 U. C. C. P. (Ont.) 168.

"Though we accept the full meaning of the constitutional provision in respect to inventions as one intended to promote the progress of the sciences and the useful arts, by giving to inventors and authors exclusive rights for a limited time, we cannot disregard the rules of public policy which enter into all cases of this kind. Reasonable consideration of such rules rejects the idea of accepting every ingenious and beneficial mechanical device as involving invention or discovery within the meaning of the Constitution and the statutes." Marshall v. Wirt, 232 Fed. 606, 608, 146 CCA 564.

46. Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Market St. Cable R. Co. v. Rowley, 155 U. S. 621, 15 SCt 224, 39 L. ed. 284; Belding Mfg. Co. v. Challenge Corn-Planter Co., 152 U. S. 100, 14 SCt 492, 38 L. ed. 370; Ansonia Brass, etc., Co. v. Electrical Supply Co., 144 U. S. 11, 12 SCt 601, 36 L. ed. 327; Consolidated Roller-Mill Co. v. Walker, 138 U. S. 124, 11 SCt 292, 34 L. ed. 920; Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647; Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Reflectolyte Co. v. Luminous Unit Co., 20 F. (2d) 607; Forchheimer v. Franc, Strohmenger & Cowan, Inc., 20 F. (2d) 553 [certiorari den 277 U. S. 597 mem, 48 SCt 560 mem, 72 L. ed. 1007 mem]; Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; California Fruit Growers' Exch. v. Blake, 19 F. (2d) 467; Goodyear Tire, etc., Co. v. Michelin Tire Co., 18 F. (2d) 216; Freydberg Bros., Inc. v. Hamburger, 17 F. (2d) 300; Bituminous Products Co. Headley Good Roads Co., 14 F. (2d) 667; Lehman v. Ripley, 3 F. (2d) 518; A. S. Kratz Co. v. Double Envelope Corp., 288 Fed. 971; Lehman v. Ripley, 283 Fed. 661 [aff 3 F. (2d) 518]; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573; Wise Soda Apparatus Co. v. Bishop-Babcock-Becker Co., 240 Fed. 733, 153 CCA 531; Corona Chemical Co. v. Latimer Chemical Co., 240 Fed. 423; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 239 Fed. 909; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; Star Hame Mfg. Co. v. U. S. Hame Co., 227 Fed. 876, 142 CCA 400; Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 CCA 576 [rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286]; Young v. Burley, 200 Fed. 258, 118 CCA 368; Dilg v. Borgfeldt, 189 Fed. 588, 110 CCA 568; Neureuther v. Mineral Point Zinc Co., 179 Fed. 850, 103 CCA 336 [certiorari den 220 U. S. 612 mem, 31 SCt 716 mem, 55 L. ed. 609 mem]; Sieber, etc., Mfg. Co. v. Chicago Binder, etc., Co., 177 Fed. 439 [aff 184 Fed. 930, 107 CCA 252]; Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409, 79 CCA 229; Voigtmann v. Weis, etc., Cornice Co., 148 Fed. 848, 78 CCA 538; Sloan Filter Co. v. Portland Gold Min. Co., 139 Fed. 23, 71 CCA 460; Voigtmann v. Weis, etc., Cornice Co., 133 Fed. 298 [aff 148 Fed. 848, 78 CCA 538]; Galvin v. Grand Rapids, 115 Fed. 511, 53 CCA 165 [certiorari den 188 U. S. 741 mem, 23 SCt 848 mem, 47 L. ed. 677 mem]; Soehner v. Favorite Stove, etc., Co., 84 Fed. 182, 28 CCA 317; P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co., 70 Fed. 491 [aff 76 Fed. 965, 22 CCA 658]; Steiner Fire-Extinguisher Co. v. Adrian, 59 Fed. 132, 8 CCA 44; Double-Pointed Tack Co. v. Two Rivers Mfg. Co., 3 Fed. 26, 9 Biss. 258 [aff 109 U. S. 117, 3 SCt 105, 27 L. ed. 877]; In re Minor, 45 App. (D. C.) 555; In re Hodkinson, 39 App. (D. C.) 155; In re Blackmore, 33 App. (D. C.) 434; In re Taylor, 31 App. (D. C.) 529.

47. Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; Carbide, etc., Chemicals Corp. v. Texas Co., 21 F. (2d) 199; Lehman v. Ripley, 283 Fed. 661 [aff 3 F. (2d) 518]; Cover v. American Thermo-Ware Co., 188 Fed. 670; Harder v. U. S. Steel Piling Co., 149 Fed. 434; Baker v. Duncombe Mfg. Co., 146 Fed. 744, 77 CCA 234; Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. 594 [rev on other grounds 127 Fed. 691, 62 CCA 447]; National Folding-Box, etc., Co. v. Stecher Lith. Co., 81 Fed. 395, 26 CCA 448; Hake v. Brown, 37 Fed. 783; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Arnold v. Pettee, 1 F. Cas. No. 561b; In re Fultz, 9 F. Cas. No. 5,156, McA. Pat. Cas. 178; Isaacs v. Abrams, 13 F. Cas. No. 7,095, 3 Bann. & A. 616; Meyer v. Pritchard, 17 F. Cas. No. 9,517, 1 Bann. & A. 261, 12 Blatchf. 101 [app dism 131 U. S. Appendix ccix, 23 L. ed. 961]; Wooster v. Calhoun, 30 F. Cas. No. 18,035, 11 Blatchf. 215, 6 Fish. Pat. Cas. 514; In re McNeil, 41 App. (D. C.) 516.

"Thus, if it had been customary to make an article of unpolished metal, it does not involve invention to polish it. If a telescope has been made with a certain degree of power, it involves no invention to make one which differs from the other only in its having greater power. If boards had heretofore been planed by hand, a board better planed by machinery would not be patentable." Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 81, 15 SCt 745, 39 L. ed. 899.

48. Risdon Iron, etc., Works v. Medart, supra; Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647; Pickering v. McCullough, 104 U. S. 310, 26 L. ed. 749; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Stedman v. Puritan Rubber Co., 11 F. (2d) 278; Lehman v. Ripley, 283 Fed. 661 [aff 3 F. (2d) 518]; Miner v. T. H. Symington Co., 247 Fed. 515, 160 CCA 25; Spirella Co. v. Nubone Corset Co., 216 Fed. 898, 133 CCA 102; Birmingham Cement Mfg. Co. v. Gates Iron Works, 78 Fed. 350, 24 CCA 132; Schwarzwaelder v. Detroit, 77 Fed. 886; Andrews v. Thum, 67 Fed. 911, 15 CCA 67; In re Stadeker, 50 App. (D. C.) 20, 267 Fed. 322; In re Draper, 10 App. (D. C.) 545.

49. Carson Inv. Co. v. Anaconda Copper Min. Co., 17 F. (2d) 815 [rev on other grounds 26 F. (2d) 651]; Freydberg Bros., Inc. v. Hamburger, 17 F. (2d) 300; Gerrard v. Cary, 9 F. (2d) 949 [aff 9 F. (2d) 957]; Lehman v. Ripley, 283 Fed. 661 [aff 3 F. (2d) 518]; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304, 166 CCA 44]; Hansen v. Slick, 230 Fed. 627, 145 CCA 37 [aff 216 Fed. 164]; Glen Rock Co. v. American Caramel Co., 209 Fed. 619, 126 CCA 579; Bernz v. Schaefer, 205 Fed. 49 [aff 211 Fed. 973, 128 CCA 471].

[a] **Cheapening the cost of an article by simplifying its construction.**—Bernz v. Schaefer, 205 Fed. 49 [app 211 Fed. 973, 128 CCA 471].

[b] **Changes in machine resulting in increased speed in production.**—Gerrard v. Cary, 9 F. (2d) 949 [aff 9 F. (2d) 957].

50. Thomson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098; Berlin Mills Co. v. Proctor, etc., Co., 254 U. S. 156, 41 SCt 75, 65 L. ed. 196; New York Scaffolding Co. v. Liebel-Binney Constr. Co., 254 U. S. 24, 41 SCt 18, 65 L. ed. 112; Werk v. Parker, 249 U. S. 130, 39 SCt 197, 63 L. ed. 514; Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Finley v. MacDougald Constr. Co., 23 F. (2d) 206; Eschenbach v. Miller Saw Trimmer Co., 23 F. (2d) 145; S. & S. Paper Products Co. v. Oswego Falls Corp., 22 F. (2d) 617; Macomb Mfg. Co. v. Mantle Lamp Co., 22 F. (2d) 93; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629 [aff 25 F. (2d) 387]; Panay Horizontal Show Jar Co. v. Aridor Co., 292 Fed. 858; Hug v. Lakewood Engineering Co., 291 Fed. 892 [aff 7 F. (2d) 98]; Ball, etc., Bearing Co. v. F. C. Sanford Mfg. Co., 291 Fed. 442, 280 Fed. 415 [rev on other grounds 297 Fed. 163]; Lehman v. Ripley, 283 Fed. 661 [aff 3 F. (2d) 518]; Williamson Heater Co. v. Monitor Stove Co., 282 Fed. 906; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; Eddy v. Kramer, 256 Fed. 227, 167 CCA 443; Luten v. Allen, 254 Fed. 587 [aff 263 Fed. 986, and foll Luten v. Young, 254 Fed. 591 (aff 263 Fed. 986)]; Tiffany v. Paper Products Co., 253 Fed. 953, 165 CCA 395 [aff 244 Fed. 178]; Crone v. John J. Gibson Co., 247 Fed. 503, 160 CCA 13; Edward G. Budd Mfg. Co. v. England Mfg. Co., 240 Fed. 415, 153 CCA 341; Lovell-McConnell Mfg. Co. v. Oriental Rubber, etc., Co., 231 Fed. 719, 146 CCA 3 [rev 225 Fed. 74]; General Electric Co. v. Sutter, 195 Fed. 280, 115 CCA 250; Winston v. Croton Falls Constr. Co., 194 Fed. 123, 114 CCA 201; D. W. Fuse Co. v. Chase-Shawmut Co., 178 Fed. 707, 102 CCA 207; Corser v. Brattleboro Overall Co., 93 Fed. 809; Way v. McClarin, 91 Fed. 663 [aff 96 Fed. 416, 37 CCA 516]; Fraser v. Gates Iron Works, 85 Fed. 441, 29 CCA 261 [certiorari den 171 U. S. 687 mem, 18 SCt 942 mem]; Griswold v. Wagner, 68 Fed. 494, 15 CCA 525; In re Brewster, 57 App. (D. C.) 268, 20 F. (2d) 284; In re Bronson, 56 App. (D. C.) 150, 10 F. (2d) 1015; Baxter's Application, 52 App. (D. C.) 283, 285 Fed. 1017; In re Bush, 46 App. (D. C.) 141; Gathmann v. Clarke, 45 App. (D. C.) 512; In re Gray, 44 App. (D. C.) 15; In re O'Connor, 42 App. (D. C.) 219; In re Capron, 41 App. (D. C.) 299; In re Ferres, 40 App. (D. C.) 584; In re Morgan, 38 App. (D. C.) 274; In re Chase, 31 App. (D. C.) 154; Rolfe v. Hoffman, 26 App. (D. C.) 336; Fay v. Duell, 90 Off. Gaz. (U. S.) 1157; Ypsilanti Dress Stay Mfg. Co. v. Van Valkenburg, 76 Off. Gaz. (U. S.) 333;

old device or method is not patentable merely because it can be produced more cheaply,[51] because it is more merchantable[52] or more attractive in appearance.[53] Nor is simplicity alone the test of invention.[54] A thing must be new in itself and not merely in workmanship.[55] A machine-made article is not patentable over one which is handmade or rough.[56]

[§ 73] **6. Invention and the Exercise of Mechanical Skill Distinguished.** Mechanical skill is the suggestion of common experience which arises spontaneously and by necessity of human reasoning in the minds of those acquainted with the circumstances with which they have to deal.[57] It is but the display of the expected skill of the calling, involving only the exercise of the ordinary faculties of reasoning upon the material supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice;[58] the doing of no more than anyone skilled in the art would do in the ordinary and natural development of the art;[59] the production of what a skilled mechanic would produce upon suggestion of what was required.[60] Mere mechanical skill can never rise to the sphere of invention.[61] The latter involves higher thought and brings into activity a different faculty.[62] The lowest order of invention is something more than mechanical skill,[63] and the highest degree of mechanical skill is something less than invention.[64] It has been asserted that no entirely satisfactory test has ever been found by which a line can be drawn between the product of inventive skill and the results of mechanical skill.[65] The test generally applied in distinguishing invention from mechanical skill is whether what was produced was obvious to persons skilled in the art and acquainted with the common knowledge in that art at the date the art or instrument

Dalby v. Lynes, 71 Off. Gaz. (U. S.) 1317; Shenfield v. Nashawannuck Mfg. Co., 53 Off. Gaz. (U. S.) 1093.

[a] **Illustrations.**—(1) Increasing number of sides on cap for tire valve. In re Bronson, 56 App. (D. C.) 150, 10 F. (2d) 1015. (2) Putting wheels under a subgrading machine used in road making to make it portable. Hug v. Lakewood Engineering Co., 291 Fed. 892 [aff 7 F. (2d) 98]. (3) The substitution in an electrical transformer of eccentric for concentric coil mounting did not involve patentable invention. General Electric Co. v. Sutter, 195 Fed. 280, 115 CCA 250. (4) The addition of a slot and key for connecting the hooded end of a yoke for draft gearing with the coupler. In re Bush, 46 App. (D. C.) 141. (5) Notching a support to anchor anything supported thereon. In re Gray, 44 App. (D. C.) 15. (6) Attachment, to transparent jar for display of candies, of legs for elevation of front end of the jar. Penay Horizontal Show Jar Co. v. Aridor Co., 292 Fed. 858. (7) Leaving a joint in a circular track for a revoluble drum, so that its size can be slightly altered. In re Capron, 41 App. (D. C.) 299.

51. Bernz v. Schaefer, 205 Fed. 49 [aff 211 Fed. 973, 128 CCA 471]; Cover v. American Thermo-Ware Co., 188 Fed. 670; Greist Mfg. Co. v. Parsons, 125 Fed. 116, 60 CCA 34; Birmingham Cement Mfg. Co. v. Gates Iron Works, 78 Fed. 350, 24 CCA 132; Schwarzwaelder v. Detroit, 77 Fed. 886.

52. Scott & Williams, Inc. v. Aristo Hosiery Co., 7 F. (2d) 1003 [aff 300 Fed. 622]; Andrews v. Thum, 67 Fed. 911, 15 CCA 67; Milligan, etc., Glue Co. v. Upton, 17 F. Cas. No. 9,607, 1 Bann. & A. 497, 4 Cliff. 237 [aff 97 U. S. 3, 24 L. ed. 985]; In re Hoey, 28 App. (D. C.) 416.

53. Stedman v. Puritan Rubber Co., 11 F. (2d) 278; Rapp v. Central Fireproof Door, etc., Co., 166 Fed. 430, 92 CCA 182; Baker v. F. A. Duncombe Mfg. Co., 146 Fed. 744, 77 CCA 234; Langdon v. DeGroot, 14 F. Cas. No. 8,059, 1 Paine 203, 1 Robb Pat. Cas. 433; In re Hoey, 28 App. (D. C.) 416.

[a] **Illustration.**—Granulated coffee is not patentable as an article of manufacture merely because the process used may produce granules which are more uniform and attractive in appearance than those otherwise produced. Baker v. F. A. Duncombe Mfg. Co., 146 Fed. 744, 77 CCA 234.

54. Jensen-Salsbery Laboratories, Inc. v. Salt Lake Stamp Co., 28 F. (2d) 99.

55. Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 15 SCt 745, 39 L. ed. 899; Continental Fibre Co. v. Formica Insulation Co., 287 Fed. 455; Blakesley Novelty Co. v. Connecticut Web Co., 78 Fed. 480; McDonald v. McLean, 38 Fed. 328, 13 Sawy. 635 [app dism 149 U. S. 781 mem, 18 SCt 1050 mem, 37 L. ed. 960 mem]; Holly v. Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Smith v. Elliott, 22 F. Cas. No. 13,041, 9 Blatchf. 400, 5 Fish. Pat. Cas. 315.

"In short, this is a patent only for superior workmanship, and within all the authorities is invalid. This court has repeatedly stated that all improvement is not invention. If a certain device differs from what precedes it only in superiority of finish, or in greater accuracy of detail, it is but the carrying forward of an old idea, and does not amount to invention." Risdon Iron, etc., Works v. Medart, 158 U. S. 68, 81, 15 SCt 745, 39 L. ed. 899.

56. Boyd v. Janesville Hay-Tool Co., 37 Fed. 887 [aff 158 U. S. 260, 15 SCt 837, 39 L. ed. 973]; U. S. Bung Mfg. Co. v. Independent Bung, etc., Co., 31 Fed. 76, 24 Blatchf. 406; MacKay v. Jackman, 12 Fed. 615, 20 Blatchf. 466; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Draper v. Hudson, 7 F. Cas. No. 4,069, 6 Fish. Pat. Cas. 327, Holmes 208; Miller's Falls Co. v. Backus, 17 F. Cas. No. 9,598, 5 Bann. & A. 53; In re Nutting, 18 F. Cas. No. 10,385, McA. Pat. Cas. 455; Wooster v. Calhoun, 30 F. Cas. No. 18,035, 11 Blatchf. 215, 6 Fish. Pat. Cas. 514.

57. Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901.

58. Hollister v. Benedict, etc., Mfg. Co., supra; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Beecroft & Blackman, Inc. v. Rooney, 280 Fed. 543 [rev 268 Fed. 545].

59. Yablick v. Protecto Safety Appliance Corp., 21 F. (2d) 885; Toledo Scale Co. v. Barnes Scale Co., 18 F. (2d) 965; Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; R. W. Clark Mfg. Co. v. Tablet, etc., Co., 18 F. (2d) 91; Stedman v. Puritan Rubber Mfg. Co., 16 F. (2d) 742.

60. New York Scaffolding Co. v. Liebel-Binney Constr. Co., 254 U. S. 24, 41 SCt 18, 65 L. ed. 112; Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Wirebounds Patents Co. v. H. R. Gibbons Box Co., 25 F. (2d) 363; Pries v. Union R. Equipment Co., 22 F. (2d) 943; Northern Trailer Co. v. La Plant, 21 F. (2d) 686; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797]; Shawmut Engineering Co. v. Crompton, etc., Loom Works, 16 F. (2d) 685; Pfeffer v. Western Doll Mfg. Co., 271 Fed. 124; Armstrong Seatag Corp. v. Smith's Island Oyster Co., 254 Fed. 821, 166 CCA 267; Moline Plow Co. v. Omaha Iron Store Co., 235 Fed. 519, 149 CCA 65 [certiorari den 242 U. S. 649 mem, 37 SCt 242 mem, 61 L. ed. 545 mem]; Ross v. Dowden Mfg. Co., 157 Fed. 681, 85 CCA 449 [cit Tiemann v. Kraatz, 85 Fed. 437, 29 CCA 257]; De Lamar v. De Lamar Min. Co., 117 Fed. 240, 54 CCA 272; Tiemann v. Kraatz, 85 Fed. 437, 29 CCA 257; In re Volkmann, 28 App. (D. C.) 441.

"It cannot be considered invention to describe and claim a process, or to produce a machine, or formulate a method which any successful mechanic would produce when required to effectuate a given result." Wirebounds Patents Co. v. H. R. Gibbons Box Co., 25 F. (2d) 363, 365.

[a] **Illustration.**—Although the specific detail claimed in an application for an improvement in a stem-setting timepiece of gears connecting the pinion of the minute hand with the second hand does not appear in a reference cited as anticipating the alleged invention, where it is apparent that no more is required than the skill of a mechanic familiar with clock and watchmaking to provide the needed pinions and gears of proper size, and the necessary number of teeth, arranged in relation to each other, so as to include the mechanism within the desired dimensions, there is no invention. In re Volkmann, 28 App. (D. C.) 441.

61. Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609.

62. Blandy v. Griffith, supra.

63. Johnson Co. v. Pennsylvania Steel Co., 67 Fed. 940 [aff 70 Fed. 244, 17 CCA 88].

64. Johnson Co. v. Pennsylvania Steel Co., supra.

65. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Pyrene Mfg. Co. v. Boyce, 292 Fed. 480 [certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem]; E. A. McMillin Co. v. Androscoggin Pulp Co., 291 Fed. 134; A. S. Kratz Co. v. Double Envelope Corp., 288 Fed. 971; New Jersey Zinc Co. v. American Zinc, etc., Co., 276 Fed. 733 [aff 284 Fed. 305]; Bonnie-B Co. v. Giguet, 269 Fed. 275 [aff 269 Fed. 1021 mem]; A. Kimball Co. v. Noesting Pin Ticket Co., 262 Fed. 148; Hanifen v. Armitage, 117 Fed. 845; Beer v. Waldridge, 100 Fed. 465, 40 CCA 496.

[a] **Definition an impracticable test.**—"The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a given case we may be able to say that there is present invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill. Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition." McClain v. Ort-

was created.[66] The alleged inventor is conclusively presumed to have known what was then known to such persons,[67] and if the solution of the problem demonstrated by the method or device which he claims to have invented was obvious to those skilled in the art to which it relates at the time of his conception, its production is held to involve only mechanical skill.[68] On the other hand, if those skilled in the art did not then know how to achieve the result accomplished by the method or device conceived by him, his solution of the problem is held to involve invention.[69] The fact that the invention seems simmayer, 141 U. S. 419, 427, 12 SCt 76, 35 L. ed. 800.

66. Hendy v. Golden State, etc., Iron Works, 127 U. S. 370, 8 SCt 1275, 32 L. ed. 207; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221, 227 [aff 266 Fed. 229]; Landesmann v. Jonassen, 32 Fed. 590 [app dism 140 U. S. 686 mem, 11 SCt 1023 mem, 35 L. ed. 601 mem].

"Doubtless it is always a difficult question to say, when any step is taken in art, what degree of imagination it required. Possibly judges are not well qualified to restate to themselves the stage in the technique of the art reached when the step was taken, or try to put themselves in the position of those who took it, yet the settled law requires them to do so, and, if not, novelty and invention would be synonymous. I know of no objective test which will serve to answer that question, which arises in nearly every case; it must be solved by an attempt to reconstruct the scope and limits of imagination of the ordinary skilled man." Wire Wheel Corp. v. C. T. Silver, Inc., supra.

67. Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 SCt 850, 37 L. ed. 707; Derby v. Thompson, 146 U. S. 476, 13 SCt 181, 36 L. ed. 1051; Sewall v. Jones, 91 U. S. 171, 23 L. ed. 275; Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433; Black, etc., Mfg. Co. v. Baltimore Truck Tire Serv. Corp., 26 F. (2d) 686; Health Products Corp. v. Ex-Lax Mfg. Co., 24 F. (2d) 245 [aff 22 F. (2d) 286]; Ford Motor Co. v. Parks, 21 F. (2d) 943; Fezzy v. Bemis Bros. Bag Co., 1 F. (2d) 116; Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Beatman v. Strater, 262 Fed. 443; Crystal Percolator Co. v. Landers, 258 Fed. 28; Cunningham Piano Co. v. Æolian Co., 255 Fed. 897, 167 CCA 217; Joseph Lay Co. v. American Brush, etc., Co., 248 Fed. 513; American Steel Foundries v. Bettendorf Axle Co., 245 Fed. 571; Warren Bros. Co. v. Evans, 234 Fed. 657; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79; Lettelier v. Mann, 91 Fed. 909; Fry v. Rookwood Pottery Co., 90 Fed. 494; Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem]; Crompton v. Knowles, 7 Fed. 199; Dawson v. Follen, 7 F. Cas. No. 3,670, 1 Robb Pat. Cas. 9, 2 Wash. C. C. 311; Hovey v. Henry, 12 F. Cas. No. 6,742; Larabee v. Cortlan, 14 F. Cas. No. 8,084, 3 Fish. Pat. Cas. 5, Taney 180; Roemer v. Simon, 20 F. Cas. No. 11,997, 1 Bann. & A. 138 [aff 95 U. S. 214, 24 L. ed. 384]; Spain v. Gamble, 22 F. Cas. No. 13,199, McA. Pat. Cas. 358; Millett v. Allen, 27 App. (D. C.) 70.

68. Black Diamond Coal-Min. Co. v. Excelsior Coal Co., 156 U. S. 611, 15 SCt 482, 39 L. ed. 553; Giles v. Heysinger, 150 U. S. 627, 14 SCt 211, 37 L. ed. 1204; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; French v. Carter, 137 U. S. 239, 11 SCt 90, 34 L. ed. 664; Shenfield v. Nashawannuck Mfg. Co., 137 U. S. 56, 11 SCt 5, 34 L. ed. 573; Royer v. Roth, 132 U. S. 201, 10 SCt 58, 33 L. ed. 322; Aron v. Manhattan R. Co., 132 U. S. 84, 10 SCt 24, 33 L. ed. 272; Clark Pomace-Holder Co. v. Ferguson, 119 U. S. 335, 7 SCt 382, 30 L. ed. 406; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 SCt 846, 29 L. ed. 952; Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Morris v. McMillin, 112 U. S. 244, 5 SCt 218, 28 L. ed. 702; Phillips v. Detroit, 111 U. S. 604, 4 SCt 580, 28 L. ed. 532; Slawson v. Grand St., etc., R. Co., 107 U. S. 649, 2 SCt 663, 27 L. ed. 576; Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683; Concrete Mixing, etc., Co. v. Storrie, 27 F. (2d) 838 [certiorari granted 49 SCt 95 mem]; Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823; In re Hammond, 25 F. (2d) 359; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Concrete Mixing, etc., Co. v. Storrie, 23 F. (2d) 131; Pries v. Union R. Equipment Co., 22 F. (2d) 943; Perey v. Perey Mfg. Co., 22 F. (2d) 928; Richardson Co. v. Hood Rubber Co., 22 F. (2d) 501; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Murray Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 21 F. (2d) 822 [certiorari den 276 U. S. 616 mem, 48 SCt 207 mem, 72 L. ed. 733 mem]; Carbide, etc., Chemicals Corp. v. Texas Co., 21 F. (2d) 199; Dupont v. Dennison Mfg. Co., 18 F. (2d) 317; Goodyear Tire, etc., Co. v. Michelin Tire Co., 18 F. (2d) 216; Stedman v. Puritan Rubber Mfg. Co., 16 F. (2d) 742; National Electric Ticket Register Co. v. Automatic Ticket Register Corp., 15 F. (2d) 257 [certiorari den 273 U. S. 764 mem, 47 SCt 477 mem, 71 L. ed. 880 mem]; Elyria Iron, etc., Co. v. American Welding, etc., Co., 15 F. (2d) 111; Elyria Iron, etc., Co. v. American Welding, etc., Co., 15 F. (2d) 106; Jorgenson v. Hawkins, 14 F. (2d) 409; Cartridge Mach. Corp. v. National Collapsible Tube Co., 13 F. (2d) 859; Excelso Products Co. v. Presto Color Co., 13 F. (2d) 575; Naceskid Serv. Chain Co. v. Perdue, 1 F. (2d) 924; Henry L. Hughes Co., Inc. v. Monarch Brush Co., 294 Fed. 674; Panay Horizontal Show Jar Co. v. Aridor Co., 292 Fed. 858; American Chain Co. v. Cox Brass Mfg. Co., 292 Fed. 624 [aff 295 Fed. 32]; Ball, etc., Bearing Co. v. F. C. Sanford Mfg. Co., 280 Fed. 415; National Safety Gas Cock Co., Inc. v. New York Cons. Gas Co., 271 Fed. 539 [aff 271 Fed. 539]; Charles T. Wilt Co. v. William Bal Co., 271 Fed. 73; Baker v. Hughes-Evans Co., 270 Fed. 97; Enameled Metals Co. v. Western Conduit Co., 269 Fed. 620; Bonnie-B Co. v. Giguet, 269 Fed. 275 [aff 269 Fed. 1021 mem]; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680]; Bellows v. New York Cent. R. Co., 266 Fed. 532; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 229; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015]; A. Schrader's Son, Inc. v. Dill Mfg. Co., 262 Fed. 504; George D. Mayo Mach. Co. v. Hemphill Mfg. Co., 262 Fed. 435; Backstay Mach., etc., Co. v. Hamilton, 262 Fed. 411 [certiorari den 253 U. S. 488 mem, 40 SCt 485 mem, 64 L. ed. 1026 mem]; Dunkley Co. v. Pasadena Canning Co., 261 Fed. 203 [aff 261 Fed. 386 (certiorari den 253 U. S. 485 mem, 40 SCt 481 mem, 64 L. ed. 1025 mem)]; Carr School v. James, 261 Fed. 200; Vandenburgh v. Electric Welding Co., 259 Fed. 579; Adt v. E. Kirstein Sons Co., 259 Fed. 277 [aff 259 Fed. 561, 170 CCA 523]; Double Fabric Tire Co. v. General Tire, etc., Co., 258 Fed. 932; Zimmerman v. Advance Mach. Co., 232 Fed. 866, 147 CCA 60; Smyth Mfg. Co. v. Sheridan, 149 Fed. 208, 79 CCA 166; Gates Iron Works v. Overland Gold Min. Co., 147 Fed. 700, 78 CCA 88; Felt, etc., Mfg. Co. v. Mechanical Accountant Co., 129 Fed. 386; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., 125 Fed. 378, 60 CCA 244; Stanley Rule, etc., Co. v. Ohio Tool Co., 115 Fed. 813 [aff 125 Fed. 947, 60 CCA 185]; Consolidated Store-Service Co. v. Siegel-Cooper Co., 103 Fed. 489; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 99 Fed. 758; Yale, etc., Mfg. Co. v. Sargent, 97 Fed. 106; Davey Pegging-Mach. Co. v. Prouty, 96 Fed. 336; Ingraham Co. v. E. N. Welch Mfg. Co., 92 Fed. 1019, 35 CCA 163; Thomson-Houston Electric Co. v. Union R. Co., 87 Fed. 379; Tiemann v. Kraatz, 85 Fed. 437, 29 CCA 257; Gormully, etc., Mfg. Co. v. Western Wheel Works, 84 Fed. 968, 28 CCA 586; National Harrow Co. v. Wescott, 84 Fed. 671; Buck v. Timony, 78 Fed. 487 [aff 84 Fed. 887, 28 CCA 561]; National Folding-Box, etc., Co. v. Stecher Lith. Co., 77 Fed. 828 [aff 81 Fed. 395, 26 CCA 448]; Clune v. Madden, 77 Fed. 205 [aff 82 Fed. 227, 27 CCA 115]; Schreiber, etc., Co. v. Grimm, 72 Fed. 671, 19 CCA 67; Union Paper-Bag Mach. Co. v. Waterbury, 70 Fed. 240, 17 CCA 84; Smith v. Macbeth, 67 Fed. 137, 14 CCA 241; Westinghouse v. Edison Electric Light Co., 63 Fed. 588, 11 CCA 342; Johnson Co. v. Pennsylvania Steel Co., 62 Fed. 156; Merritt v. Middleton, 61 Fed. 680, 10 CCA 10; Northrop v. Keighley, 48 Fed. 455; Davis v. Parkman, 45 Fed. 693 [aff 71 Fed. 962, 18 CCA 398]; Facer v. Midvale Steel-Work Co., 38 Fed. 231; Rosenwasser v. Berry, 22 Fed. 841 [aff 129 U. S. 47, 9 SCt 229, 32 L. ed. 628]; Yale Lock Mfg. Co. v. Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; Perfection Window Cleaner Co. v. Bosley, 2 Fed. 574, 9 Biss. 385; Belt v. Crittenden, 2 Fed. 82, 1 McCrary 209; Barry v. Gugenheim, 2 F. Cas. No. 1,061, 5 Fish. Pat. Cas. 452; Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Flood v. Hicks, 9 F. Cas. No. 4,877, 2 Biss. 169, 4 Fish. Pat. Cas. 156; Teese v. Phelps, 23 F. Cas. No. 13,819, McAll. 48; Templeton's Application, 57 App. (D. C.) 99, 17 F. (2d) 687; In re Anderson, 56 App. (D. C.) 139, 10 F. (2d) 1004; Heany's Application, 54 App. (D. C.) 290, 297 Fed. 685; In re Volkmann, 28 App. (D. C.) 441; In re Hayes, 27 App. (D. C.) 393; In re Baker, 26 App. (D. C.) 363; Saxby v. Gloucester Waggon Co., 7 Q. B. D. 305 [aff 75 L. T. J. 167].

"Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this court, more than a quarter of a century ago, that unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention. Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683." Dunbar v. Meyers, 94 U. S. 187, 197, 24 L. ed. 34.

[a] **Merely broadening the flange of a mail bag** and increasing the number of rivets used in attaching it to the bag require no invention. Thompson v. U. S., 27 Ct. Cl. 61.

69. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Schlaich v. Robertson, 26 F. (2d) 681; In re Bliss, 26 F. (2d) 524; In re Burt, 24

ple after it is made does not determine the ques- | tion.[70] It is immaterial that, after the conception

F. (2d) 273; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Star Can Opener Co. v. Ace Mfg. Co., 22 F. (2d) 977; Brick v. Namm, 22 F. (2d) 693 [aff 22 F. (2d) 697]; Haynes Stellite Co. v. Chesterfield, 22 F. (2d) 635; Overland Motor Co. v. Packard Motor Co., 22 F. (2d) 566; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27; Fiber Conduit Co. v. Bankameric Corp., 21 F. (2d) 756 [mod on other grounds 27 F. (2d) 708]; Lathrop v. Rice, etc., Corp., 21 F. (2d) 124 [aff 24 F. (2d) 1021 mem]; Brogdex Co. v. American Fruit Growers, Inc., 21 F. (2d) 110; Universal Oil Products Co. v. Skelly Oil Co., 20 F. (2d) 995; Radio Corp. of America v. Edmond, 20 F. (2d) 929; Gordon Form Lathe Co. v. Walcott Mach. Co., 20 F. (2d) 673; Malina v. Grisman, 20 F. (2d) 406 [aff 20 F. (2d) 409]; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Marr Oil Heat Mach. Corp. v. Hardinge Bros., Inc., 20 F. (2d) 241 [aff 27 F. (2d) 779]; Byron Weston Co. v. L. L. Brown Paper Co., 20 F. (2d) 183; Lektophone Corp. v. Brandes Products Corp., 20 F. (2d) 155; Lektophone Corp. v. Western Electric Co., 20 F. (2d) 150; Southern Electro-Chemical Co. v. Du Pont de Nemours, 20 F. (2d) 97; Tully v. Robertson, 19 F. (2d) 954; Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944; Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Radio Corp. of America v. Twentieth Century Radio Corp., 19 F. (2d) 290; Fischer v. Ostrofsky, 18 F. (2d) 964 [aff 18 F. (2d) 965]; American Adamite Co. v. Mesta Mach. Co., 18 F. (2d) 538; Gross v. Norris, 18 F. (2d) 418 [rev on other grounds 26 F. (2d) 898]; Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [certiorari granted 275 U. S. 512 mem, 48 SCt 28 mem, 72 L. ed. 400 mem, and rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868]; Bakelite Corp. v. Brunswick-Balke-Collender Co., 18 F. (2d) 384; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Hitchcock v. Valley Camp Coal Co., 16 F. (2d) 383; Star Can Opener Co. v. Owen Dyneto Co., 16 F. (2d) 353; Deppe v. General Motors Corp., 15 F. (2d) 419 [rev on other grounds 21 F. (2d) 44 (certiorari den 275 U. S. 572 mem, 48 SCt 204 mem, 72 L. ed. 433 mem)]; Grand Rapids Brass Co. v. Winters, 15 F. (2d) 129; James Heddon's Sons, Inc. v. South Bend Bait Co., 14 F. (2d) 805 [certiorari den 273 U. S. 737 mem, 47 SCt 245 mem, 71 L. ed. 867 mem]; Mohr v. Alliance Securities Co., 14 F. (2d) 799; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Blake v. California Fruit Growers' Exch., 14 F. (2d) 756 [rev on other grounds 19 F. (2d) 467]; Inland Mfg. Co. v. American Wood Rim Co., 14 F. (2d) 657; Radio Corp. of America v. Splitdorf Electrical Co., 14 F. (2d) 643; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629 [aff 25 F. (2d) 387]; Sodemann Heat, etc., Co. v. Kauffman, 14 F. (2d) 393; Sutherland Paper Co. v. Michigan Carton Co., 13 F. (2d) 884 [mod on other grounds 29 F. (2d) 179]; Federal Yeast Corp. v. Fleischmann Co., 13 F. (2d) 570; Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Permutit Co. v. Wadham, 13 F. (2d) 454; Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Sandusky v. Brooklyn Box Toe Co., 13 F. (2d) 238; Blake Automotive Equipment Co. v. Cross Mfg. Co., 13 F. (2d) 30; Ball, etc., Bearing Co. v. F. C. Sanford Mfg. Co., 297 Fed. 163; Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; Rosenberg's Application, 290 Fed. 350; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Hess-Bright Mfg. Co. v. Pennsylvania Bearings Co., 271 Fed. 350; White v. Goodrich-Lenhart Mfg. Co., 271 Fed. 336 [rev on other grounds 279 Fed. 741]; Gear Grinding Mach. Co. v. Studebaker Corp., 270 Fed. 934 [certiorari den 257 U. S. 653 mem, 42 SCt 93 mem, 66 L. ed. 418 mem]; George W. Travers Co. v. A. Mecky Co., 270 Fed. 775; United Shoe Mach. Co. v. L. Q. White Shoe Co., 270 Fed. 650 [aff 279 Fed. 35]; Bestwall Mfg. Co. v. U. S. Gypsum Co., 270 Fed. 542 [aff 258 Fed. 647]; Sparks-Withington Co. v. Jay, 270 Fed. 449; Copley Plaza Operating Co. v. Scharum & Uhlinger, Inc., 269 Fed. 140 [aff 260 Fed. 197]; McCallum v. Pittsburgh, etc., Coal Co., 268 Fed. 831; Beecroft & Blackman, Inc. v. Rooney, 268 Fed. 545; Meurer Steel Barrel Co. v. Cleveland Steel Barrel Co., 268 Fed. 536; Merrell-Soule Co. v. Rico Milk Products Co., 268 Fed. 366; Eibel Process Co. v. Minnesota, etc., Paper Co., 267 Fed. 847 [rev on other grounds 274 Fed. 540]; Juengst v. Hill Pub. Co., 267 Fed. 428 [aff 267 Fed. 435]; Tweedie v. Royal Co., 267 Fed. 224 [rev on other grounds 276 Fed. 351]; Wire Wheel Corp. v. Madison Motor Car Co., 267 Fed. 220; Beitman v. Strater, 262 Fed. 443; Davey Tree Expert Co. v. Van Billiard, 261 Fed. 996; Rodman Chemical Co. v. Deeds Commercial Laboratories, 261 Fed. 189; Æolian Co. v. Schubert Piano Co., 261 Fed. 178; U. S. Rubber Co. v. I. T. S. Rubber Co., 260 Fed. 947, 171 CCA 589 [foll Fetzer, etc., Leather Co. v. I. T. S. Rubber Co., 260 Fed. 939, 171 CCA 581]; Fetzer, etc., Leather Co. v. I. T. S. Rubber Co., 260 Fed. 939, 171 CCA 581; I. T. S. Rubber Co. v. Panther Rubber Mfg. Co., 260 Fed. 934, 171 CCA 576; Straub v. Campbell, 259 Fed. 570, 170 CCA 532; Bisight Co. v. Onepiece Bifocal Lens Co., 259 Fed. 275, 170 CCA 343 [certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem]; Superior Mach. Tool Co. v. Cincinnati Lathe, etc., Co., 259 Fed. 273, 170 CCA 341; Hutchins Car Roofing Co. v. Standard R. Equipment Co., 259 Fed. 226, 170 CCA 294; U. S. Gypsum Co. v. Bestwall Mfg. Co., 258 Fed. 647 [aff 270 Fed. 542]; Solva Waterproof Glue Co. v. Perkins Glue Co., 251 Fed. 64, 163 CCA 314; Individual Drinking Cup Co. v. Public Serv. Cup Co., 250 Fed. 620, 162 CCA 636; Johnson v. Tvedt, 244 Fed. 189; Excelsior Steel Furnace Co. v. F. Meyer, etc., Co., 244 Fed. 172, 156 CCA 600; American Caramel Co. v. White, 234 Fed. 328, 148 CCA 230; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev on other grounds 241 Fed. 72, 154 CCA 72]; Rand v. Exchange Scrip-Book Co., 187 Fed. 984, 110 CCA 322; Yost Electric Mfg. Co. v. Perkins Electric Switch Mfg. Co., 179 Fed. 511, 103 CCA 116; Bertels v. Trethaway, 175 Fed. 971 [rev on other grounds 180 Fed. 730, 104 CCA 96]; Rose v. Hirsch, 77 Fed. 469, 23 CCA 246 [rev 71 Fed. 881]; Farnham v. U. S., 47 Ct. Cl. 207; In re Hawkins, 57 App. (D. C.) 262, 20 F. (2d) 278; In re Ek, 57 App. (D. C.) 203, 19 F. (2d) 677; In re Klausmeyer, 56 App. (D. C.) 89, 10 F. (2d) 654; In re Pupin, 55 App. (D. C.) 14, 299 Fed. 697; In re Johnson, 54 App. (D. C.) 182, 295 Fed. 1003; Sheffield's Application, 53 App. (D. C.) 109, 288 Fed. 463; Westcott's Application, 53 App. (D. C.) 32, 287 Fed. 1009; In re Glafcke, 51 App. (D. C.) 204, 277 Fed. 603; In re Katzenberger, 46 App. (D. C.) 539; In re Harbeck, 39 App. (D. C.) 555.

70. Richmond Screw Anchor Co. v. U. S., 275 U. S. 331, 48 SCt 194, 72 L. ed. 303; Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Frick Co. v. Lindsay, 27 F. (2d) 59; U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387; Tinsel Corp. v. Haupt, 25 F. (2d) 318; In re Burt, 24 F. (2d) 273; Brick v. Namm, 22 F. (2d) 693 [aff 22 F. (2d) 697]; Hazeltine Corp. v. Grebe, 21 F. (2d) 643; Brogdex Co. v. American Fruit Growers, Inc., 21 F. (2d) 110; Universal Oil Products Co. v. Skelly Oil Co., 20 F. (2d) 995; Malina v. Grisman, 20 F. (2d) 406 [aff 20 F. (2d) 409]; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Marr Oil Heat Mach. Corp. v. Hardinge Bros., Inc., 20 F. (2d) 241 [aff 27 F. (2d) 779]; Southern Electro-Chemical Co. v. Du Pont de Nemours, 20 F. (2d) 97; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Worthington Pump, etc., Corp. v. Clark Bros. Co., 17 F. (2d) 189; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Blake v. California Fruit Growers' Exch., 14 F. (2d) 756 [rev on other grounds 19 F. (2d) 467]; Inland Mfg. Co. v. American Wood Rim Co., 14 F. (2d) 657; Radio Corp. of America v. Splitdorf Electrical Co., 14 F. (2d) 643; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629 [aff 25 F. (2d) 387]; Sandusky v. Brooklyn Box Toe Co., 13 F. (2d) 238; Emery v. George H. Bowman Co., 11 F. (2d) 525; Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; Krauth v. Autographic Register Co., 285 Fed. 199; New Jersey Zinc Co. v. American Zinc, etc., Co., 276 Fed. 733 [aff 284 Fed. 305]; Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co., 269 Fed. 144; Beecroft & Blackman, Inc. v. Rooney, 268 Fed. 545; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Rodman Chemical Co. v. Deeds Commercial Laboratories, 261 Fed. 189; Proctor, etc., Co. v. Berlin Mills Co., 256 Fed. 23, 167 CCA 295 [rev on other grounds 254 U. S. 156, 41 SCt 75, 65 L. ed. 196]; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev on other grounds 241 Fed. 72, 154 CCA 72]; Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Ferro Concrete Constr. Co. v. Concrete Steel Co., 206 Fed. 666, 124 CCA 466; Doble v. Pelton Water Wheel Co., 186 Fed. 526 [aff 190 Fed. 760, 111 CCA 488]; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 182 Fed. 991, 105 CCA 545; National Malleable Casting Co. v. American Steel Foundries Co., 182 Fed. 626; Beryle v. San Francisco Cornice Co., 181 Fed. 692 [aff 195 Fed. 516, 115 CCA 426]; General Electric Co. v. Hill-Wright Electric Co., 174 Fed. 996, 98 CCA 566; Hancock v. Boyd, 170 Fed. 600 [rev on other grounds 184 Fed. 61, 107 CCA 79]; Crane v. Bartelstone, 169 Fed. 830; Hall Signal Co. v. General R. Signal Co., 168 Fed. 62 [aff 169 Fed. 290, 94 CCA 580]; United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [aff 138 Fed. 136]; Johnson v. Brooklyn Heights R. Co., 75 Fed. 668; Gould Coupler Co. v. Platt, 70 Fed. 622; Ross v. Montana Union R. Co., 45 Fed. 424; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480; 14 L. ed. 1024]; Many v. Sizer, 16 F. Cas. No. 9,056, 1 Fish. Pat. Cas. 17 [app dism 16 How. 98, 14 L. ed. 861]; Teese v. Phelps, 23 F. Cas. No. 13,819, McAllister 48; In re Pupin, 55 App. (D. C.) 14, 299 Fed. 697; In re Coffield, 50 App. (D. C.) 259, 270 Fed. 695;

is announced, the skilled mechanic readily understands it,[71] or with slight or no difficulty builds the new device by practices or means well-known to his trade.[72] The question is, Was it simple or obvious before it was done?[73] Another test is whether some new result is brought about by new means, or by a new arrangement of old ones.[74] The latter is an objective test.[75] Measured by it invention is involved if the result of an idea is a method or thing involving a new function,[76] or an old function arrived at by new means.[77]

[§ 74] **7. Change of Form, Proportions, or Degree.** A mere change in an existing means involving a difference only in form, proportions, or degree, and resulting in doing substantially the same thing in the same way, by substantially the same means, but with better results, is not invention.[78] Such changes amount only to a mere carrying forward or more extended application of an original idea of another.[79] It is otherwise, however, if a change in form produces a new and useful result.[80] Where the need therefor is obvious, there is no invention in mere enlarging[81] or strengthen-

In re Moore, 38 App. (D. C.) 276; In re Snyder, 10 App. (D. C.) 140; Yates v. Great Western R. Co., 24 Grant Ch. (Ont.) 495; Sumner v. Abell, 15 Grant Ch. (Ont.) 532; Powell v. Begley, 13 Grant Ch. (Ont.) 381.

"In the light of the present knowledge, it may have been a simple matter for defendant's expert, from a reading of the earlier patents, to create a product identical with that of the process in suit and by the same means; this, however, is no demonstration that the product or method would have been obvious to one skilled in the art but ignorant of the patent in suit." Rodman Chemical Co. v. Deeds Commercial Laboratories, 261 Fed. 189, 191.

71. Wire Wheel Corp. v. Madison Motor Car Co., 267 Fed. 220; General Electric Co. v. Hartman, 187 Fed. 131, 109 CCA 49.

72. Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; Wire Wheel Corp. v. Madison Motor Car Co., 267 Fed. 220.

73. U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem].

74. Hiler Audio Corp. v. General Radio Co., 26 F. (2d) 475; Submarine Signal Corp. v. General Radio Co., 14 F. (2d) 178; Cannington v. Nuttall, L. R. 5 H. L. 205; Curtis v. Platt, L. R. 1 H. L. 337; Proctor v. Bennis, 36 Ch. D. 740; Thompson v. Moore, L. R. 23 Ir. 599.

75. Submarine Signal Corp. v. General Radio Co., 14 F. (2d) 178.

76. Submarine Signal Corp. v. General Radio Co., supra.

77. Submarine Signal Corp. v. General Radio Co., supra.

78. Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; American Road-Mach. Co. v. Pennock, etc., Co., 164 U. S. 26, 17 SCt 1, 41 L. ed. 337; Wright v. Yuengling, 155 U. S. 47, 15 SCt 1, 39 L. ed. 64; Belding Mfg. Co. v. Challenge Corn-Planter Co., 152 U. S. 100, 14 SCt 492, 38 L. ed. 370; Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; Butler v. Steckel, 137 U. S. 21, 11 SCt 25, 34 L. ed. 582 [aff 27 Fed. 219]; Ansonia Brass, etc., Co. v. Electrical Supply Co., 144 U. S. 11, 12 SCt 601, 36 L. ed. 327; International Tooth-Crown Co. v. Gaylord, 140 U. S. 55, 11 SCt 716, 35 L. ed. 347; Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647; Guidet v. Brooklyn, 105 U. S. 550, 26 L. ed. 1106; Milligan, etc., Glue Co. v. Upton, 97 U. S. 3, 24 L. ed. 985; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Eskimo Pie Corp. v. Honeymoon Pie Corp., 25 F. (2d) 154; Eskimo Pie Corp. v. Levous, 24 F. (2d) 599; In re Richards, 24 F. (2d) 471; Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; California Fruit Growers' Exch. v. Blake, 19 F. (2d) 467; David Belais, Inc. v. Goldsmith Bros. Smelting, etc., Co., 10 F. (2d) 673 [certiorari den 271 U. S. 687 mem, 46 SCt 639 mem, 70 L. ed. 1152 mem]; Kil-Nock Co. v. Chicago Plating Co., 10 F. (2d) 536; Hayes Pump, etc., Co. v. Friend Mfg. Co., 8 F. (2d) 33; E. Fredericks, Inc. v. Eugene, Ltd., 3 F. (2d) 543 [rev 298 Fed. 633]; A. S. Kratz Co. v. Double Envelope Corp., 288 Fed. 971; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Willamette Iron, etc., Works v. Columbia Engineering Works, 252 Fed. 594, 164 CCA 510; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654]; Miner v. E. H. Symington Co., 247 Fed. 515, 160 CCA 25; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573; Marshall v. Wirt, 232 Fed. 606, 146 CCA 564; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; Spirella Co. v. Nubone Corset Co., 216 Fed. 898, 133 CCA 102; Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 CCA 576 [rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286]; Young v. Burley, 200 Fed. 258, 118 CCA 368; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79; Neureuther v. Mineral Point Zinc Co., 179 Fed. 850, 103 CCA 336 [certiorari den 220 U. S. 612 mem, 31 SCt 716 mem, 55 L. ed. 609 mem]; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co., 161 Fed. 362 [aff 176 Fed. 96, 100 CCA 26]; Brunswick-Balke-Collender Co. v. Rosatto, 159 Fed. 729 [aff 165 Fed. 56, 91 CCA 142]; Sloan Filter Co. v. Portland Gold Min. Co., 139 Fed. 23, 71 CCA 460; Eames v. Worcester Polytechnic Inst., 123 Fed. 67, 60 CCA 37; Dodge Mfg. Co. v. Ohio Valley Pulley Works, 101 Fed. 584; Johnston v. Woodbury, 96 Fed. 421 [aff 109 Fed. 567, 48 CCA 550]; Crosby Steam Gage, etc., Co. v. Ashton Valve Co., 94 Fed. 516, 36 CCA 335; Lappin Brake-Shoe Co. v. Corning Brake-Shoe Co., 94 Fed. 162 [aff 99 Fed. 1004, 40 CCA 215]; Corser v. Brattleboro Overall Co., 93 Fed. 809; Solvay Process Co. v. Michigan Alkali Co., 90 Fed. 818, 33 CCA 285; Talbot v. Fear, 89 Fed. 197, 32 CCA 186; Lovell v. Johnson, 82 Fed. 206 [aff 91 Fed. 160, 33 CCA 426]; Gibbon v. Loewer Sole-Rounder Co., 79 Fed. 325, 24 CCA 612; Eastman Co. v. Getz, 77 Fed. 412 [aff 84 Fed. 458, 28 CCA 459]; Ferris v. Batcheller, 70 Fed. 714; Caverly v. Deere, 66 Fed. 305, 13 CCA 452 [aff 52 Fed. 758]; American Roll-Paper Co. v. Weston, 59 Fed. 147, 8 CCA 56; Steiner Fire-Extinguisher Co. v. Adrian, 59 Fed. 132, 8 CCA 44 [aff 52 Fed. 731]; Curtis v. Overman Wheel Co., 58 Fed. 784, 7 CCA 493 [rev 53 Fed. 247]; D. E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., 49 Fed. 61; Peoria Target Co. v. Cleveland Target Co., 47 Fed. 725; Syracuse Chilled Plow Co. v. Robinson, 35 Fed. 502 [app dism 145 U. S. 655 mem, 12 SCt 988 mem, 36 L. ed. 856 mem]; West v. Rae, 33 Fed. 45; Spill v. Celluloid Mfg. Co., 21 Fed. 631, 22 Blatchf. 441; Theberath v. Rubber, etc., Harness Trimming Co., 15 Fed. 246; Sawyer v. Miller, 12 Fed. 725, 4 Woods 472; Perry v. Co-operative Fdy. Co., 12 Fed. 149, 20 Blatchf. 505; Beatty v. Hodges, 8 Fed. 610, 19 Blatchf. 381; Ex p. Chatfield, 5 F. Cas. No. 2,631a; Dane v. Chicago Mfg. Co., 6 F. Cas. No. 3,557, 3 Biss. 380, 6 Fish. Pat. Cas. 130; Day v. Bankers', etc., Tel. Co., 7 F. Cas. No. 3,672, 9 Blatchf. 345, 5 Fish. Pat. Cas. 268; Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Evans v. Robinson, 8 F. Cas. No. 4,571, Brunn. Col. Cal. 400; Parkhurst v. Kinsman, 18 F. Cas. No. 10,757, 1 Blatchf. 488, Fish. Pat. R. 161, 8 NYLegObs 146 [aff 18 How. 289, 15 L. ed. 385]; Smith v. American Bridge Co., 22 F. Cas. No. 13,002, 3 Bann. & A. 565, 8 Biss. 312; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Latham v. Le Roy, 23 F. Cas. No. 13,760, 2 Blatchf. 474; Wilson Packing Co. v. Clapp, 30 F. Cas. No. 17,851, 4 Bann. & A. 355, 8 Biss. 545, 8 Reporter 262 [aff 105 U. S. 566, 26 L. ed. 1172]; Thomson v. U. S., 27 Ct. Cl. 61; In re Davidson, 56 App. (D. C.) 279, 12 F. (2d) 814; In re Tufford, 55 App. (D. C.) 18, 299 Fed. 704; In re Bond, 44 App. (D. C.) 262; In re Pein, 41 App. (D. C.) 586; In re McNeil, 41 App. (D. C.) 516; In re Heinz, 34 App. (D. C.) 187; In re Schraubstadter, 26 App. (D. C.) 331; In re Iwan, 17 App. (D. C.) 566; In re Beswick, 16 App. (D. C.) 345; Hien v. Buhoup, 11 App. (D. C.) 293.

"It has been held that a mere change in form, proportions, or degree, substitution of equivalents doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent." Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791, 794.

[a] **Substitution of electrical for mechanical power.**—In re Davidson, 56 App. (D. C.) 279, 12 F. (2d) 814.

79. Voightmann v. Weis, etc., Cornice Co., 133 Fed. 298 [aff 148 Fed. 848]; Galvin v. Grand Rapids, 115 Fed. 511, 53 CCA 165 [certiorari den 188 U. S. 741 mem, 23 SCt 848 mem, 47 L. ed. 677 mem]; Dodge Mfg. Co. v. Ohio Valley Pulley Works, 101 Fed. 584; Soehner v. Favorite Stove, etc., Co., 84 Fed. 182, 28 CCA 317; Troy Laundry Mach. Co. v. Ap Rees, 67 Fed. 336, 14 CCA 405; Hill v. Houghton, 12 F. Cas. No. 6,493, 1 Bann. & A. 291; Smith v. Nichols, 22 F. Cas. No. 13,084, 6 Fish. Pat. Cas. 61, Holmes 172 [aff 21 Wall. 112, 22 L. ed. 566]; In re Klemm, 21 App. (D. C.) 186; In re Iwan, 17 App. (D. C.) 566.

80. Winans v. Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Schlaich v. Robertson, 26 F. (2d) 681; Huston v. Barrett, 23 F. (2d) 907; Hills v. Hamilton Watch Co., 248 Fed. 499; Wolf v. National Parlor Suit Co., 244 Fed. 470; Excelsior Supply Co. v. Weed Chain Tire Grip Co., 192 Fed. 35, 113 CCA 1 [certiorari den 223 U. S. 727 mem, 32 SCt 526 mem, 56 L. ed. 632 mem]; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Davis v. Palmer, 7 F. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Union Paper Collar Co. v. White, 24 F. Cas. No. 14,396, 2 Bann. & A. 60.

81. Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Murray Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 21 F. (2d) 822 [certiorari den 276 U. S. 616 mem, 48 SCt 207 mem, 72 L. ed. 733 mem]; Bonnot Co. v. Lopulco Systems, 15 F. (2d) 848 [aff 24 F. (2d)

ing,[82] or in increasing the weight of a device.[83] The same is true with respect to mere diminution in size[84] or reduction in quantity.[85] In an earlier statute it was expressly provided that simply changing the form or proportions of any machine or composition of matter in any degree should not be deemed a discovery.[86]

[§ 75] **8. Substitution of Materials.** Whether the substitution of one material for another in making one or more or all the parts of a machine or manufacture amounts to invention depends upon whether what was obvious to persons skilled in the art was gone beyond in so doing.[87] No invention is involved in making a substitution where the desirability of doing so would be obvious to the skilled in the art,[88] as where the article when made performs the same function in substantially the same way, having no advantages over the old structure other than those attributable solely to the known qualities of the substituted material.[89] The rule applies even where the material is new and was invented by the one

510]; Westinghouse Electric, etc., Co. v. Pittsburgh Transformer Co., 10 F. (2d) 593; Kil-Nock Co. v. Chicago Plating Co., 10 F. (2d) 536; D. J. Murray Mfg. Co. v. Sumner Iron Works, 300 Fed. 911; American Chain Co. v. Cox Brass Mfg. Co., 295 Fed. 32; American Chain Co. v. Cox Brass Mfg. Co., 292 Fed. 624 [aff 295 Fed. 32]; Central Brass Mfg. Co. v. Sterling Brass Co., 285 Fed. 135; Willamette Iron, etc., Works v. Columbia Engineering Works, 252 Fed. 594, 164 CCA 510; Miner v. T. H. Symington Co., 247 Fed. 515, 160 CCA 25; Edison v. Alsen's American Portland Cement Works, 208 Fed. 20 [aff 219 Fed. 895, 135 CCA 559]; In re Shaffer, 54 App. (D. C.) 282, 297 Fed. 541; Pruden's Application, 50 App. (D. C.) 398, 273 Fed. 362.

[a] **Illustrations.**—(1) There was no invention in increasing the thickness of a washer in a compression bib water faucet, to prevent bending or dishing upward when the upper face of the enlarged threaded portion of the stem came in contact with the washer. Central Brass Mfg. Co. v. Sterling Brass Co., 285 Fed. 135. (2) Claims of application for a patent comprising a slip socket designed to recover broken sucker rods from well tubing, which was substantially the same as that disclosed by a prior patent, except that the opening in the lower end of the slips is larger, thus making it possible to grip coupling, as well as pin or shank of rod. In re Shaffer, 54 App. (D. C.) 282, 297 Fed. 541. (3) Widening an automobile bumper to protect a wider area of the automobile. American Chain Co. v. Cox Brass Mfg. Co., 292 Fed. 624 [aff 295 Fed. 32]. (4) The fact that applicant for a patent for a device for mixing comminuted fuel and air shows an elongated mixing chamber, while that in the anticipating patent was short, does not establish invention. Pruden's Application, 50 App. (D. C.) 398, 273 Fed. 362.

82. Crouch v. Roemer, 103 U. S. 797, 26 L. ed. 426; Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; D. J. Murray Mfg. Co. v. Sumner Iron Works, 300 Fed. 911; Bellows v. New York Cent. R. Co., 266 Fed. 530; Luten v. Scott, 263 Fed. 721; Turner v. Lauter Piano Co., 248 Fed. 930, 161 CCA 48 [certiorari den 248 U. S. 560 mem, 39 SCt 7 mem, 63 L. ed. 421 mem]; Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304, 166 CCA 44]; Moline Plow Co. v. Omaha Iron Store Co., 235 Fed. 519, 149 CCA 65 [certiorari den 242 U. S. 649 mem, 37 SCt 242 mem, 61 L. ed. 545 mem]; Parson Mfg. Co. v. Coe, 185 Fed. 522, 107 CCA 628; Spill v. Celluloid Mfg. Co., 21 Fed. 631, 22 Blatchf. 441 [app dism 140 U. S. 698 mem, 11 SCt 1028 mem, 35 L. ed. 593 mem].

[a] **Illustrations.**—(1) Reinforcing a plowshare by a patch of soft metal welded into the inner face. Moline Plow Co. v. Omaha Iron Store Co., 235 Fed. 519, 149 CCA 65 [certiorari den 242 U. S. 649 mem, 37 SCt 242 mem, 61 L. ed. 545 mem]. (2) Placing a stiffening rib upon the under surface of a grate bar. Parson Mfg. Co. v. Coe, 185 Fed. 522, 107 CCA 628. (3) Placing a strip of steel upon a horizontal leather part of a shank strip for the purpose of stiffening it. Crouch v. Roemer, 103 U. S. 797, 26 L. ed. 426.

[b] **Change in strength of solution used** is not invention. Spill v. Celluloid Mfg. Co., 21 Fed. 631, 22 Blatchf. 441 [aff 140 U. S. 698, 11 SCt 1028, 35 L. ed. 593].

83. American Road-Mach. Co. v. Pennock, etc., Co., 164 U. S. 26, 17 SCt 1, 41 L. ed. 337.

84. Cutler Hammer Mfg. Co. v. Beaver Mach., etc., Co., 5 F. (2d) 457; Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co., 251 Fed. 288, 163 CCA 444 [certiorari den 248 U. S. 579 mem, 39 SCt 20 mem, 63 L. ed. 430 mem]; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 239 Fed. 909.

85. Linde Air Products Co. v. Morse Dry Dock, etc., Co., supra.

86. Act Febr. 21, 1793 (1 St. at L. 321 c 9 § 2).

87. Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275; Tolfree v. Wetzler, 22 F. (2d) 214 [rev 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Crawford, etc., Co. v. Wilson, 297 Fed. 617; Union Hardware Co. v. Selchow, 112 Fed. 1006.

88. Underwood v. Gerber, 149 U. S. 224, 13 SCt 854, 37 L. ed. 710; Ryan v. Hard, 145 U. S. 241, 12 SCt 919, 36 L. ed. 691; Hoff v. Iron Clad Mfg. Co., 139 U. S. 326, 11 SCt 580, 35 L. ed. 179; Florsheim v. Schilling, 137 U. S. 64, 11 SCt 20, 34 L. ed. 574 [aff 26 Fed. 256]; Shenfield v. Nashawannuck Mfg. Co., 137 U. S. 56, 11 SCt 5, 34 L. ed. 573; Brown v. District of Columbia, 130 U. S. 87, 9 SCt 437, 32 L. ed. 863; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Pickering v. McCullough, 104 U. S. 310, 26 L. ed. 749; Terhune v. Phillips, 99 U. S. 592, 25 L. ed. 293; Dunbar v. Myers, 94 U. S. 187, 24 L. ed. 34; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683; McCloskey v. Toledo Pressed Steel Co., 30 F. (2d) 12; Bellows v. New York Cent. R. Co., 266 Fed. 532; Columbia Metal Box Co. v. Halper, 220 Fed. 912, 136 CCA 478; Ambrusen Hydraulic Constr. Co. v. Hydraulic Properties Co., 211 Fed. 982, 128 CCA 480; Union Hardware Co. v. Selchow, 112 Fed. 1006; Dodge v. Ohio Valley Pulley Works, 101 Fed. 581; Plastic Fireproof Constr. Co. v. San Francisco, 97 Fed. 620; Strom Mfg. Co. v. Weir Frog Co., 83 Fed. 170, 27 CCA 502; National Folding-Box, etc., Co. v. Stecher Lith. Co., 81 Fed. 395, 26 CCA 448; Strom Mfg. Co. v. Weir Frog Co., 75 Fed. 279 [aff 83 Fed. 170, 27 CCA 502]; Kilbourne v. W. Bingham Co., 47 Fed. 57 [aff 50 Fed. 697, 1 CCA 617]; American Split-Feather Duster Co. v. Levy, 43 Fed. 381; Brigham v. Coffin, 37 Fed. 688 [aff 149 U. S. 557, 13 SCt 939, 37 L. ed. 845]; Post v. T. C. Richards Hardware Co., 26 Fed. 618 [app dism 131 U. S. 444 mem, 9 SCt 802 mem, 33 L. ed. 218 mem]; Carter v. Messinger, 5 F. Cas. No. 2,478, 11 Blatchf. 34; Holbrook v. Small, 12 F. Cas. No. 6,595, 2 Bann. & A. 396; Mahn v. Harwood, 16 F. Cas. No. 8,966, 3 Bann. & A. 515 [aff 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665]; In re Maynard, 16 F. Cas. No. 9,352, McA. Pat. Cas. 536; Putnam v. Yerrington, 20 F. Cas. No. 11,486, 2 Bann. & A. 237; Durham v. Seymour, 6 App. (D. C.) 78 [app dism 161 U. S. 235, 16 SCt 452, 40 L. ed. 682].

89. Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 SCt 472, 37 L. ed. 307; Brinkerhoff v. Aloe, 146 U. S. 515, 13 SCt 221, 36 L. ed. 1068; Ryan v. Hard, 145 U. S. 241, 12 SCt 919, 36 L. ed. 691; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Dupont v. Dennison Mfg. Co., 18 F. (2d) 317; Stoehrer, etc., Corp. v. Lusse, 7 F. (2d) 87 [aff 1 F. (2d) 793]; Outlook Co. v. Malco Products Corp., 299 Fed. 996; Harmon Paper Co. v. Prager, 286 Fed. 267 [aff 287 Fed. 841]; Luten v. Kansas City Bridge Co., 272 Fed. 533 [rev on other grounds 285 Fed. 840]; Jennison-Wright Co. v. Hempy, 266 Fed. 372; G. Reis & Bros., Inc. v. Reform Initial Co., 266 Fed. 219; A. Schrader's Son, Inc. v. Dill Mfg. Co., 262 Fed. 504; Columbia Metal Box Co. v. Halper, 220 Fed. 912, 136 CCA 478; Ambursen Hydraulic Constr. Co. v. Hydraulic Properties Co., 211 Fed. 982, 128 CCA 480; American Thermos Bottle Co. v. American Ever-Ready Co., 202 Fed. 508; Houghton v. Whitin Mach. Works, 153 Fed. 740, 83 CCA 84; New York Belting, etc., Co. v. Sierer, 149 Fed. 756 [aff 158 Fed. 819]; American Acetylene Burner Co. v. Kirchberger, 142 Fed. 745, 74 CCA 77, 147 Fed. 253, 77 CCA 392; Drake Castle Pressed Steel Lug Co. v. Brownell, 123 Fed. 86, 59 CCA 216; National Tooth Crown Co. v. Macdonald, 117 Fed. 617; Union Hardware Co. v. Selchow, 112 Fed. 1006; Billings, etc., Co. v. Van Wagoner, etc., Hardware Co., 98 Fed. 732; Kilbourne v. W. Bingham Co., 50 Fed. 697, 1 CCA 617 [aff 47 Fed. 57]; Vulcanized Fiber Co. v. Taylor, 49 Fed. 744; Tibbe, etc., Mfg. Co. v. Heineken, 37 Fed. 686; National Sheet-Metal Roofing Co. v. Garwood, 35 Fed. 658; Mott Iron-Works v. Cassidy, 31 Fed. 47, 24 Blatchf. 289; Forschner v. Baumgarten, 26 Fed. 858; Welling v. Crane, 21 Fed. 707; American Iron Co. v. Anglo-American Roofing Co., 16 Fed. 915, 21 Blatchf. 324; Palmenbing v. Buchholz, 13 Fed. 672, 21 Blatchf. 162; McKloskey v. Du Bois, 8 Fed. 710, 19 Blatchf. 205; Carter v. Messinger, 5 F. Cas. No. 2,478, 11 Blatchf. 34; Holbrook v. Small, 12 F. Cas. No. 6,595, 2 Bann. & A. 396; Mannie v. Everett, 16 F. Cas. No. 9,039; Phillips v. Detroit, 19 F. Cas. No. 11,100, 4 Bann. & A. 347 [aff 111 U. S. 604, 4 SCt 580, 28 L. ed. 532]; In re Lobdell, 56 App. (D. C.) 91, 10 F. (2d) 656; In re Capron, 41 App. (D. C.) 299; In re Higgins, 40 App. (D. C.) 29; Rushton v. Crawley, L. R. 10 Eq. 522; Ball v. Compton Corset Co., 13 Can. S. C. 469.

[a] **Illustrations.**—(1) Substitution of clay for metal or wood in a door knob. Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683. (2) Making the old and conventional dress shield out of crepe paper instead of rubber or cloth. Dupont v. Dennison Mfg. Co., 18 F. (2d) 317. (3) Substitution of wooden spokes for those of other material in a steering wheel. In re Lobdell, 56 App. (D. C.) 91, 10 F. (2d) 656. (4) Substituting rubber for unyielding materials in the construction of interlocking tiles for floors, walls, or the decks of ships. New York Belting, etc., Co. v. Sierer, 149 Fed. 756 [aff 158 Fed. 819, 86 CCA 79]. (5) Substituting concrete for masonry in dam construction. Ambursen Hydraulic Constr. Co. v. Hydraulic Properties Co., 211 Fed. 982,

claiming the substitution as his invention.[90] There may be invention, however, where the substitution involved a new mode of construction,[91] or if it developed new properties and uses of the article made,[92] or where it produces a new mode of operation,[93] or results in a new function,[94] or when it is the first practical success in the art in which the substitution is made,[95] or where the practice shows its superiority to consist not only in greater cheapness and greater utility, but also in more efficient action.[96] And substitution may be considered on the issue of invention where it makes possible changes in other elements of a combination to produce improved operation.[97] Invention may reside in substitution of a material for a particular purpose, even though other materials of the same class have been used before for the same purposes,[98] and even though a patent has been previously granted for the use of the whole class.[99] It is immaterial also that the inventor stumbled upon the discovery.[1] But it must appear not only that there is a special advantage attached to the use of the particular substance claimed,[2] but also that its use is not the result of judgment and skill in the selection of materials,[3] nor a probable consequence of the natural development of the art.[4] The substitution of one material for another does not amount to an invention merely because it permits the article to be made or sold more cheaply,[5] or merely because it renders the article otherwise comparatively superior.[6]

128 CCA 480. (6) Substitution of wrought for cast metal in the construction of a single-piece seamless metal water-tube boiler header. In re Higgins, 40 App. (D. C.) 29. (7) Substitution of wood for stone in pavement blocks. Phillips v. Detroit, 19 F. Cas. No. 11,100, 4 Bann. & A. 347 [aff 111 U. S. 604, 4 SCt 580, 28 L. ed. 532].

90. Brigham v. Coffin, 149 U. S. 557, 13 SCt 939, 37 L. ed. 845; Underwood v. Gerber, 149 U. S. 224, 13 SCt 854, 37 L. ed. 710; Low v. McMaster, 266 Fed. 518.

91. Tolfree v. Wetzler, 22 F. (2d) 214 [rev 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Low v. McMaster, 266 Fed. 518.

92. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Tolfree v. Wetzler, 22 F. (2d) 214 [rev 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Low v. McMaster, 266 Fed. 518; Ajax Metal Co. v. Brady Brass Co., 155 Fed. 409 [rev on other grounds 160 Fed. 84, 87 CCA 240 (certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem)]; Spill v. Celluloid Mfg. Co., 21 Fed. 631, 22 Blatchf. 441 [app dism 140 U. S. 698 mem, 11 SCt 1028 mem, 35 L. ed. 593 mem]; Shuter v. Davis, 16 Fed. 564.

93. Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Tolfree v. Wetzler, 22 F. (2d) 214 [rev 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Low v. McMaster, 266 Fed. 518.

94. Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275; Ansonia Brass, etc., Co. v. Electrical Supply Co., 144 U. S. 11, 12 SCt 601, 36 L. ed. 327; Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Van Heusen Products, Inc. v. Earl, 300 Fed. 922; Low v. McMaster, 266 Fed. 518; General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464, 140 CCA 150 [aff 212 Fed. 422]; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315; Western Tube Co. v. Rainear, 156 Fed. 49 [aff 159 Fed. 431, 86 CCA 411]; George Frost Co. v. Cohn, 119 Fed. 505, 56 CCA 185 [aff 112 Fed. 1009]; King v. Anderson, 90 Fed. 500; Fairbanks Wood Rim Co. v. Moore, 78 Fed. 490; Perkins v. Interior Lumber Co., 51 Fed. 286 [rev on other grounds 80 Fed. 528, 25 CCA 613]; Clarke v. Johnson, 4 Fed. 437, 18 Blatchf. 450; Spill v. Celluloid Mfg. Co., 2 Fed. 707, 18 Blatchf. 190; Ex p. Adams, 1 F. Cas. No. 38a; Goodyear Dental Vulcanite Co v. Willis, 10 F. Cas. No. 5,603, 1 Bann. & A. 568, 1 Flipp. 388.

95. Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Toledo Rex Spray Co. v. California Spray Chemical Co., 268 Fed. 201; Low v. McMaster, 266 Fed. 518; Toledo Computing Scale Co. v. Computing Scale Co., 208 Fed. 410, 125 CCA 662; Protector Last Re-enforcing Co. v. Pell, 204 Fed. 453 [aff 210 Fed. 167, 127 CCA 25]; George Frost Co. v. Cohn, 112 Fed. 1009 [aff 119 Fed. 505, 56 CCA 185]; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83.

[a] **Illustrations.**—(1) The use of a rubber button in place of a metal button in hose supporters is sufficient to constitute invention where it appears that the former was not successful, that an army of inventors and skilled mechanics had been at work to remedy the defect, and that, unless a metal button with a rubber check had been substituted no success had been obtained. George Frost Co. v. Cohn, 112 Fed. 1009 [aff 119 Fed. 505, 56 CCA 185]. (2) Substitution of carbon filament for platinum. Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83.

96. Hicks v. Kelsey, 18 Wall. (U. S.) 670, 21 L. ed. 852; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Tolfree v. Wetzler, 22 F. (2d) 214 [rev 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Yablick v. Protecto Safety Appliance Corp., 21 F. (2d) 885; Low v. McMaster, 266 Fed. 518; Protector Last Re-enforcing Co. v. Pell, 204 Fed. 453 [aff 210 Fed. 167, 127 CCA 25]; George Frost Co. v. Samstag, 180 Fed. 739, 105 CCA 37 [certiorari den 225 U. S. 711 mem, 32 SCt 841 mem, 56 L. ed. 1268 mem]; Hogan v. Westmoreland Specialty Co., 163 Fed. 289 [aff 167 Fed. 327, 93 CCA 31].

[a] **Illustration.**—A dredge for salt or pepper, having a celluloid cap, discloses invention, although the only new feature of the device is the substitution of celluloid for other materials previously used in making the cap, it being shown that celluloid possesses a property which prevents the salt from absorbing moisture and becoming caked. Hogan v. Westmoreland Specialty Co., 163 Fed. 289 [aff 167 Fed. 327, 93 CCA 31].

97. Houghton v. Whitin Mach. Works, 153 Fed. 740, 83 CCA 84.

98. General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; General Electric Co. v. Laco-Philips Co., 233 Fed. 96, 147 CCA 166.

99. General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698.

1. Yablick v. Protecto Safety Appliance Corp., 21 F. (2d) 885.

2. General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698.

3. General Electric Co. v. De Forest Radio Co., supra; Forchheimer v. Franc Strohmenger & Cowan, Inc., 20 F. (2d) 553 [certiorari den 277 U. S. 597 mem, 48 SCt 560 mem, 72 L. ed. 1007 mem]; Continental Fibre Co. v. Formica Insulation Co., 287 Fed. 455.

4. General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Peerless Roll Leaf Co. v. Lange, 20 F. (2d) 801; Archer v. Imperial Mach. Co., 207 Fed. 81, 124 CCA 638 [aff 202 Fed. 962 (rearg den 209 Fed. 206, 126 CCA 300, and certiorari den 231 U. S. 754 mem, 34 SCt 323 mem, 58 L. ed. 467 mem)].

5. Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683; Marvel Equipment Co. v. Merit Oil Equipment Co., 29 F. (2d) 308 [aff 29 F. (2d) 313]; Dupont v. Dennison Mfg. Co., 18 F. (2d) 317, 318; Cover v. American Thermo-Ware Co., 188 Fed. 670; Marshall v. Pettingell-Andrews Co., 153 Fed. 579 [aff 164 Fed. 862, 91 CCA 8]; Lafferty Mfg. Co. v. Acme R. Signal, etc., Co., 138 Fed. 729, 71 CCA 285.

"It does not involve invention to make an old article of a material which has no other advantage than to permit it to be made or sold cheaper." Dupont v. Dennison Mfg. Co., supra.

[a] **Substitution of paper for tin** as material for the cap of a railway torpedo. Lafferty Mfg. Co. v. Acme R. Signal, etc., Co., 138 Fed. 729, 71 CCA 285.

6. Gates Iron Works v. Fraser, 153 U. S. 332, 14 SCt 883, 38 L. ed. 734 [aff 42 Fed. 49]; Florsheim v. Schilling, 137 U. S. 64, 11 SCt 20, 34 L. ed. 574; Hicks v. Kelsey, 18 Wall. (U. S.) 670, 21 L. ed. 852; Hotchkiss v. Greenwood, 11 How. (U. S.) 248, 13 L. ed. 683; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Tolfree v. Wetzler, 22 F. (2d) 214 [rev 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Edward G. Budd Mfg. Co. v. C. R. Wilson Body Co., 21 F. (2d) 803 [certiorari den 276 U. S. 632 mem, 48 SCt 325 mem, 72 L. ed. 742 mem]; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446, 448 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Chicago Pneumatic Tool Co. v. Keller Pneumatic Tool Co., 293 Fed. 945; Westinghouse Electric, etc., Co. v. Formica Insulating Co., 270 Fed. 632 [aff 272 Fed. 667]; Low v. McMaster, 266 Fed. 518; W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 254 Fed. 436, 166 CCA 68; Wise Soda Apparatus Co. v. Bishop-Babcock-Becker Co., 240 Fed. 733, 153 CCA 531; Milwaukee Bronze Casting Co. v. Avery, 209 Fed. 616, 126 CCA 572; Archer v. Imperial Mach. Co., 207 Fed. 81, 124 CCA 638 [rearg den 209 Fed. 206, 126 CCA 300, and certiorari den 231 U. S. 754 mem, 34 SCt 323 mem, 58 L. ed. 467 mem]; Cover v. American Thermo-Ware Co., 188 Fed. 670; A. B. Dick Co. v. Wichelman, 105 Fed. 629; Dodge Mfg. Co. v. Ohio Valley Pulley Works, 101 Fed. 584; Plastic Fireproof Constr. Co. v. San Francisco, 97 Fed. 620; Strom Mfg. Co. v. Weir Frog Co., 83 Fed. 170, 27 CCA 502; Buckan v. McKesson, 7 Fed. 100, 18 Blatchf. 485; Hotchkiss v. Greenwood, 12 F. Cas. No. 6,718, 4 McLean 456, 2 Robb Pat. Cas. 730 [aff 11 How. 248, 13 L. ed. 683]; In re Maynard, 16 F. Cas. No. 9,352, McA. Pat. Cas. 536; In re De Van Horning, 54 App. (D. C.) 271, 296 Fed. 1013; In re Cheneau, 5 App. (D. C.) 197.

"It is not invention to substitute superior for inferior materials, in making one or more of the parts of a

[§ 76] **9. Changing Proportions of Ingredients of a Composition.** While invention may reside in changing the proportions of the ingredients of a composition,[7] simply to change the proportions of the ingredients of a known composition is not invention.[8] The act of 1793 expressly so declared.[9] To amount to invention the new characteristics of the composition must be other than, and not confined to, the mere augmentation or diminution of the known characteristics of the several ingredients, which is in correlation with the increased or diminished amount of the respective ingredients entering into the composition.[10] There must be shown new results from the new proportions, developing a new product,[11] or an old product with new characteristics of structure or performance.[12] The mere fact that a better result is attained is not enough.[13]

[§ 77] **10. Change of Location of Parts.** Ordinarily changes of the relative location of parts without changing the functions performed is not invention,[14] even though better results are thereby attained.[15] But a change of mechanism from one position to another, whereby a problem is solved and new and useful results are obtained, is an indication of invention.[16]

Mere reversal of parts, producing no new result, does not constitute invention.[17] It may be otherwise, however, if, by reversal of parts, a new result is produced.[18]

[§ 78] **11. Duplication of Parts.**[19] While duplication of parts may constitute invention if the plurality of parts produces a new result,[20] mere duplication of well-known devices, each working in an old and well-known way, and no new result being obtained, is not invention.[21] The test is not whether duplication exists, but whether duplication produces not mere duplication of product or function, but a new result, and not a mere aggregate of prior sep-

machine or manufacture." Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523, 525.

[a] **Use of pure chemicals in place of impure** is not invention. Buckan v. McKesson, 7 Fed. 100, 18 Blatchf. 485.

"Invention" and "improvement" distinguished see supra § 72.

7. Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868].

8. Finley v. MacDougald Constr. Co., 23 F. (2d) 206; Tolfree v. Wetzler, 22 F. (2d) 214 [rev 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Carbide, etc., Chemicals Corp. v. Texas Co., 21 F. (2d) 199; Bituminous Products Co. v. Headley Good Roads Co., 14 F. (2d) 667 [aff 2 F. (2d) 83]; Nailcrete Corp. v. Paul Mende, Inc., 11 F. (2d) 678; David Belais, Inc. v. Goldsmith Bros. Smelting, etc., Co., 10 F. (2d) 673 [certiorari den 271 U. S. 687 mem, 46 SCt 639 mem, 70 L. ed. 1152 mem]; Brady Brass Co. v. Ajax Metal Co., 160 Fed. 84, 87 CCA 240 [certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem]; In re Chase, 31 App. (D. C.) 154.

9. Act Febr. 21, 1893 § 2 (1 St. at L. 318).

10. Bituminous Products Co. v. Headley Good Roads Co., 2 F. (2d) 83 [aff 14 F. (2d) 667].

11. David Belais, Inc. v. Goldsmith Bros. Smelting, etc., Co., 10 F. (2d) 673 [certiorari den 271 U. S. 687 mem, 46 SCt 639 mem, 70 L. ed. 1152 mem]; Bethlehem Steel Co. v. Churchward International Steel Co., 268 Fed. 361 [certiorari den 255 U. S. 572 mem, 41 SCt 376 mem, 65 L. ed. 792 mem].

12. David Belais, Inc. v. Goldsmith Bros. Smelting, etc., Co., 10 F. (2d) 673 [certiorari den 271 U. S. 687 mem, 46 SCt 639 mem, 70 L. ed. 1152 mem]; Bethlehem Steel Co. v. Churchward International Steel Co., 268 Fed. 361 [certiorari den 255 U. S. 572 mem, 41 SCt 376 mem, 65 L. ed. 792 mem].

13. Brady Brass Co. v. Ajax Metal Co., 160 Fed. 84, 87 CCA 240 [certiorari den 210 U. S. 433 mem, 28 SCt 762 mem, 52 L. ed. 1136 mem].

14. Ide v. Ball Engine Co., 149 U. S. 550, 13 SCt 941, 37 L. ed. 843; Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 7 SCt 421, 30 L. ed. 539; Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; Swain Turbine, etc., Co. v. Ladd, 102 U. S. 408, 26 L. ed. 184; United Mfg., etc., Co. v. Evans, 22 F. (2d) 936; Coffield v. Sunny Line Appliance, 297 Fed. 609; Scott v. Harris Automatic Press Co., 284 Fed. 778; Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502; Vulcan Soot Cleaner Co. v. Amoskeag Mfg. Co., 255 Fed. 88, 166 CCA 416; U. S. Hoffman Co. v. Becker, etc., Co., 224 Fed. 484, 140 CCA 192; Smyth Mfg. Co. v. Sheridan, 149 Fed. 208, 79 CCA 166; Pennsylvania Globe Gaslight Co., v. Best, 137 Fed. 940; National Automatic Weighing Mach. Co. v. Daab, 136 Fed. 891; Parramore v. Stein, 125 Fed. 19 [aff 133 Fed. 228, 66 CCA 282 (certiorari den 196 U. S. 641 mem, 25 SCt 796 mem, 49 L. ed. 631 mem)]; Tripold v. Myers, 120 Fed. 301; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 Fed. 136, 55 CCA 86 [certiorari den 187 U. S. 644 mem, 23 SCt 843 mem, 47 L. ed. 346 mem]; Goss Printing-Press Co. v. Scott, 108 Fed. 253, 47 CCA 302 [reh den 110 Fed. 402, 49 CCA 97 (certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem)]; Lettelier v. Mann, 91 Fed. 909; Stevenson Co. v. McFassell, 88 Fed. 278 [rev on other grounds 90 Fed. 707, 33 CCA 249]; Olmsted v. Andrews, 77 Fed. 835, 23 CCA 488; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 459, 19 CCA 534; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Reed v. Pomeroy, 71 Fed. 299; Stutz v. Robson, 54 Fed. 506; Haughey v. Lee, 48 Fed. 382 [aff 151 U. S. 282, 14 SCt 331, 38 L. ed. 162]; Davis v. Parkman, 45 Fed. 693 [aff 71 Fed. 961, 18 CCA 398]; Gorse v. Parker, 35 Fed. 129; Hancock Inspirator Co. v. Lelly, 27 Fed. 88 [app dism 140 U. S. 683 mem, 11 SCt 1021 mem, 35 L. ed. 600 mem]; Dederick v. Whitman Agricultural Co., 26 Fed. 755; Phipps v. Yost, 26 Fed. 447; Dane v. Illinois, 6 F. Cas. No. 3,558, 3 Biss. 374, 6 Fish. Pat. Cas. 124 [aff 131 U. S. appendix cxxvi, 23 L. ed. 82]; Gilbert, etc., Mfg. Co. v. Walworth Mfg. Co., 10 F. Cas. No. 5,418, 2 Bann. & A. 271; Kirby v. Beardsley, 14 F. Cas. No. 7,837, 5 Blatchf. 438, 3 Fish. Pat. Cas. 265; Marsh v. Dodge, etc., Mfg. Co., 16 F. Cas. No. 9,115; In re Garrett, 27 App. (D. C.) 19; Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645 mem]; Fraser v. Kent, 194 App. Div. 742, 185 NYS 746; Taylor v. Brandon Mfg. Co., 21 Ont. A. 361; Owens v. Taylor, 29 Grant Ch. (Ont.) 210.

[a] **Illustrations.**—(1) Where, in the prior art, ribbon mechanisms of the same general type had been mounted on the carriage of a typewriter, and the ribbon had been mounted on a folding carriage, but without feeding mechanism, no invention was involved in transferring the ribbon mechanism from the stationary to the folding carriage. Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502. (2) It does not involve invention to put a screw (mud fan) at the bow of a dredge boat, when prior thereto dredge boats had been backed stern on for their propellers to act in the same way. Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438.

15. Condron Co. v. Corrugated Bar Co., 279 Fed. 867 [aff 256 Fed. 672]; Luten v. Allen, 254 Fed. 587 [aff 263 Fed. 986, and foll Luten v. Young, 254 Fed. 591 (aff 263 Fed. 986)]; Ryan Car Co. v. Live Poultry Transp. Co., 195 Fed. 525, 115 CCA 435; Plumb v. New York, etc., R. Co., 97 Fed. 645.

16. Eclipse Mach. Co. v. Harley-Davidson Motor Co., 252 Fed. 805, 164 CCA 645 [certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem].

17. Hamilton Beach Mfg. Co. v. P. A. Geier Co., 230 Fed. 430, 144 CCA 572; Penfield v. Chambers Bros. Co., 92 Fed. 630, 34 CCA 579; Sax v. Taylor Iron Works, 30 Fed. 835 [aff 149 U. S. 485, 13 SCt 1051, 37 L. ed. 964]; In re Iwan, 17 App. (D. C.) 566.

18. Grever v. U. S. Hoffman Co., 202 Fed. 923, 121 CCA 281.

19. Duplication or combination of parts as infringement see infra § 506.

20. Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., 268 Fed. 257; U. S. Metallic Packing Co. v. Hewitt, 236 Fed. 739, 150 CCA 71 [certiorari den 242 U. S. 651 mem, 37 SCt 243 mem, 61 L. ed. 545 mem]; Goss Printing-Press Co. v. Scott, 108 Fed. 253, 47 CCA 302 [reh den 110 Fed. 402, 49 CCA 97 (certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem)]; Gindorff v. Deering, 81 Fed. 952; Brush Electric Co. v. Ft. Wayne Electric Light Co., 40 Fed. 826; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44.

21. Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Slawson v. Grand St., etc., R. Co., 107 U. S. 649, 2 SCt 663, 27 L. ed. 576; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Fulton Iron Works Co. v. Farrel Fdy., etc., Co., 21 F. (2d) 831; Nathan Anklet Support Co., Inc. v. Cammeyer, Inc., 264 Fed. 968; Neureuther v. Mineral Point Zinc Co., 179 Fed. 850, 103 CCA 336 [certiorari den 220 U. S. 612 mem, 31 SCt 716 mem, 55 L. ed. 609 mem]; Goss Printing-Press Co. v. Scott, 103 Fed. 650 [rev on other grounds 108 Fed. 253, 47 CCA 302 (certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem)]; Maier v. Bloom, 95 Fed. 159; Interior Lumber Co. v. Perkins, 80 Fed. 528, 25 CCA 613; Shaw Electric Crane Co. v. Worthington, 77 Fed. 992; Office Specialty Mfg. Co. v. Globe Co., 77 Fed. 465, 23 CCA 242; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 469, 19 CCA 534; Troy Laundry Mach. Co. v. Ap Rees, 67 Fed. 337, 14 CCA 405; Thomson v. U. S., 27 Ct. Cl. 61; In re Volkmann, 28 App. (D. C.) 441; In re Scott, 25 App. (D. C.) 307; In re Klemm, 21 App. (D. C.) 186; McBerty v. Cook, 16 App. (D. C.) 123.

[a] **Illustrations.**—(1) Where the

arate parts.[22]

[§ 79] **12. Omission of Parts.**[23] While the omission of an element in a combination may constitute invention if the result of the new combination be the same as before,[24] yet if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention, if the elements retained perform the same function as before.[25]

[§ 80] **13. Reversal of Movement of Parts.** A mere reversal of movement of the same parts of an old device does not constitute invention.[26] This is true, however, only when the reversal can be made without change of parts or the functions of parts.[27] It is not a mere reversal of movement if the reversal involves the addition or subtraction or modification of parts,[28] or if any of the movements essential to the old device must give way to different movements.[29]

[§ 81] **14. Making Parts Integral or Separate.** Ordinarily no more than mechanical skill, as distinguished from invention, is involved in uniting several parts of an existing device into an integral construction,[30] or in making in several parts what was formerly in one.[31] Whether what was done amounted to making into two parts what was single, or vice versa, is, of course, no absolute test of want of invention.[32] Such change may constitute invention.[33] The question in each case is whether the change involved a new display of ingenuity beyond the compass of the routinist.[34]

[§ 82] **15. Making Device Portable.** There is no invention in merely making an old device in such form that it is portable.[35]

[§ 83] **16. Supplanting Manual Operation.** Invention may be found in mechanism that supplants

use of one deflecting plate in a lumber sawing machine was old, there is no invention in using two such plates. Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34. (2) Putting additional pane of glass in fare box. Slawson v. Grand St., etc., R. Co., 107 U. S. 649, 2 SCt 663, 27 L. ed. 576. (3) Insertion of an additional gear and pinion wheel in a train of such wheels arranged to transmit motion is not invention. New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 469, 19 CCA 534; In re Volkmann, 28 App. (D. C.) 441.

22. Goss Printing Press Co. v. Scott, 108 Fed. 253, 47 CCA 302 [reh den 110 Fed. 402, 49 CCA 97 (certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem)].

23. Omission of elements in infringing combination see infra § 506.

24. Lawther v. Hamilton, 124 U. S. 1, 8 SCt 342, 31 L. ed. 325; Hitchcock v. Valley Camp Coal Co., 10 F. (2d) 381; Standard Envelope Sealer Mfg. Co. v. Graywood Mfg. Co., 1 F. (2d) 667; Aronson v. Toy Devices, 1 F. (2d) 91; Dunn Mfg. Co. v. Standard Computing Scale Co., 163 Fed. 521, 90 CCA 331; Brown v. Huntington Piano Co., 134 Fed. 735, 67 CCA 639 [aff 131 Fed. 273]; Eck v. Kutz, 132 Fed. 758; Dececo Co. v. George E. Gilchrist Co., 125 Fed. 293; American Graphophone Co. v. Leeds, 87 Fed. 873; Coupe v. Weatherhead, 16 Fed. 673 [rev on other grounds 147 U. S. 322, 13 SCt 312, 37 L. ed. 188]; Stow v. Chicago, 23 F. Cas. No. 13,512, 3 Bann. & A. 83, 8 Biss. 47 [aff 104 U. S. 547, 26 L. ed. 816]; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312.

25. Richards v. Chase El. Co., 159 U. S. 477, 16 SCt 53, 40 L. ed. 225; Magin v. Karle, 150 U. S. 387, 14 SCt 153, 37 L. ed. 1118; Dececo Co. v. George E. Gilchrist Co., 125 Fed. 293, 60 CCA 207; Gormully, etc., Mfg. Co. v. Sager Mfg. Co., 87 Fed. 945; Ferguson v. Ed. Roos Mfg. Co., 71 Fed. 416, 18 CCA 162; Needham v. Washburn, 17 F. Cas. No. 10,082, 1 Bann. & A. 537, 4 Cliff. 254; Stow v. Chicago, 23 F. Cas. No. 13,512, 3 Bann. & A. 83, 8 Biss. 47 [aff 104 U. S. 547, 26 L. ed. 816]; In re Pein, 41 App. (D. C.) 586; In re Butterfield, 23 App. (D. C.) 84.

[a] **Illustration.**—There is nothing patentable in making unobstructed the supply and discharge pipes connected to the cups of a liquid measuring device, by omitting, with a corresponding loss of function, floats which in a prior patented device are placed in the cups and so connected with locking devices as to prevent the manipulation of the valves in the supply and discharge pipes until one cup is entirely empty and the other is entirely full, and which are capable of removal by mere mechanical skill. In re Pein, 41 App. (D. C.) 586.

26. Bryant Electric Co. v. Electric Protection Co., 110 Fed. 215.

27. Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 267 Fed. 422; Clark v. Doll, 202 Fed. 960.

28. Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 267 Fed. 422.

29. Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., supra.

30. Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; Kirsch Mfg. Co. v. Gould Mersereau Co., 6 F. (2d) 793; Fezzey v. Bemis Bros. Bag Co., 1 F. (2d) 116; D. J. Murray Mfg. Co. v. Sumner Iron Works, 300 Fed. 911; Outlook Co. v. Malco Products Corp., 299 Fed. 996; Cordley v. Richardson Corp., 278 Fed. 683 [aff 280 Fed. 515]; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573; Kawneer Mfg. Co. v. Detroit Showcase Co., 240 Fed. 737 [mod on other grounds 250 Fed. 234, 162 CCA 370]; Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 Fed. 521, 152 CCA 399; Herzog v. Keller, 234 Fed. 85, 148 CCA 101; Ft. Pitt Supply Co. v. Ireland, etc., Mfg. Co., 232 Fed. 871, 147 CCA 65; Enterprise Mfg. Co. v. William Shakespeare, Jr., Co., 220 Fed. 304, 136 CCA 138; Milwaukee Bronze Casting Co. v. Avery, 209 Fed. 616, 126 CCA 572; Bernz v. Schaefer, 205 Fed. 49 [aff 211 Fed. 973, 128 CCA 471]; Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 116 CCA 322; Gould v. Cincinnati Shaper Co., 194 Fed. 680, 115 CCA 74; Edward Hilker Mop Co. v. U. S. Mop Co., 191 Fed. 613, 112 CCA 176; Keepers v. American Electric Fuse Co., 177 Fed. 442; H. Mueller Mfg. Co. v. McDonaly, etc., Mfg. Co., 164 Fed. 991; D'Arcy v. Staples, etc., Co., 161 Fed. 733, 88 CCA 606; Schweichler v. Levinson, 147 Fed. 704, 78 CCA 92; General Electric Co. v. Yost Electric Mfg. Co., 131 Fed. 874 [aff 139 Fed. 568, 71 CCA 552]; Eames v. Worcester Polytechnic Inst., 123 Fed. 67, 60 CCA 37; Lay v. Indianapolis Brush, etc., Mfg. Co., 120 Fed. 831, 57 CCA 313; Standard Caster, etc., Co. v. Caster Socket Co., 113 Fed. 162, 51 CCA 109; Strom Mfg. Co. v. Weir Frog Co., 75 Fed. 279 [aff 83 Fed. 170, 27 CCA 502]; Consolidated Electric Mfg. Co. v. Holtzer, 67 Fed. 907, 15 CCA 63; Johnson v. Hero Fruit-Jar Co., 55 Fed. 659; Williams v. Goodyear Metallic Rubber Shoe Co., 54 Fed. 498, 4 CCA 485; Kilbourne v. W. Bingham Co., 50 Fed. 697, 1 CCA 617 [aff 47 Fed. 57]; Bothe v. Paddock-Hawley Iron Co., 50 Fed. 536, 1 CCA 575; In re Bush, 46 App. (D. C.) 141; In re Seabury, 23 App. (D. C.) 377; In re Locke, 17 App. (D. C.) 314.

31. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; Outlook Co. v. Malco Products Corp., 299 Fed. 996; Diamond Mfg. Co. v. Dallas Brass, etc., Co., 295 Fed. 250; Rockford Peerless Furniture Co. v. Abramson, 284 Fed. 356; Laclede-Christy Clay Products Co. v. St. Louis, 280 Fed. 83; Laclede Christy Clay Products Co. v. St. Louis, 270 Fed. 338 [aff 280 Fed. 83]; Avery-Loeb Electric Co. v. Markel, 247 Fed. 109, 159 CCA 327; Dunham v. Kelley-Koett Mfg. Co., 246 Fed. 845, 159 CCA 147; Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 Fed. 521, 152 CCA 399; Wirtalla v. Hall, 235 Fed. 306; Enterprise Mfg. Co. v. William Shakespeare, Jr., Co., 220 Fed. 304, 136 CCA 138; Bernz v. Schaefer, 205 Fed. 49 [aff 211 Fed. 973, 128 CCA 471]; General Electric Co. v. Butler Light, etc., Co., 205 Fed. 42; Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 116 CCA 322; Edward Hilker Mop Co. v. U. S. Mop Co., 191 Fed. 613, 112 CCA 176; H. Mueller Mfg. Co. v. McDonaly, etc., Mfg. Co., 164 Fed. 991; D'Arcy v. Staples, etc., Co., 161 Fed. 733, 88 CCA 606; Roehr v. Bliss, 82 Fed. 445; Ferguson v. Ed. Roos Mfg. Co., 71 Fed. 416, 18 CCA 162; Johnson Co. v. Pacific Rolling Mills Co., 59 Fed. 242; Kidd v. Horry, 33 Fed. 712 [app dism 145 U. S. 643 mem, 12 SCt 983 mem, 36 L. ed. 857 mem].

32. Kirsch Mfg. Co. v. Gould Mersereau Co., 6 F. (2d) 793; Davis-Bournonville Co. v. Alexander Milburn Co., 297 Fed. 846, 851 [aff 1 F. (2d) 227 (certiorari granted 266 U. S. 596 mem, 45 SCt 93 mem, 69 L. ed. 459 mem)].

"It is, indeed, sometimes said that there can be no invention in making into two parts what was single, or vice versa. So far as such statements explain any given situation, they are very well; but they should not be taken as positive rules of general application. It is often an invention of considerable merit to combine into one part what every one had theretofore thought must be in two." Davis-Bournonville Co. v. Alexander Milburn Co., supra.

33. Krementz v. S. Cottle Co., 148 U. S. 556, 13 SCt 719, 37 L. ed. 558 [rev 39 Fed. 323]; Davis-Bournonville Co. v. Alexander Milburn Co., 297 Fed. 846 [aff 1 F. (2d) 227 (certiorari granted 266 U. S. 596 mem, 45 SCt 93 mem, 69 L. ed. 459 mem)]; McMichael, etc., Mfg. Co. v. Stafford, 105 Fed. 380.

34. Kirsch Mfg. Co. v. Gould Mersereau Co., 6 F. (2d) 793.

35. Hendy v. Golden State, etc., Iron Works, 127 U. S. 370, 8 SCt 1275, 32 L. ed. 207; Thompson v. Boisselier, 114 U. S. 1, 5 SCt 1042, 29 L. ed. 76; Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; Olmsted v. Andrews, 77 Fed. 835, 23 CCA 488; Black Diamond Coal Min. Co. v. Excelsior Coal Co., 70 Off. Gaz. (U. S.) 1797.

a hand operation,[36] particularly where the mechanism, in a way of its own, dispenses with the human element.[37] But where there has been no substantial change in the mechanics or method of making a product and the steps are the same and the succession from one to the other is the same as those in the manual art, the general rule of the patent law is against invention.[38]

[§ 84] **17. Application to New Use.** The application of an old method or device to a similar or analogous subject with no change in the manner of applying it and no result substantially distinct in its nature is not invention.[39] This is true, even if the new form of result has not before been contemplated,[40] and regardless of how remote the new use may be from the old if no changes or modifications in the old device are necessary to adapt it to the new use.[41] Invention is not involved in the mere conception of applying an old method or device to a new use.[42] Even though changes or modifications are essential to the practical application of the method or device to the new use, invention is not involved if the new use is so analogous to the old that the thought of adapting the device and applying it to the new use would occur to a person skilled in the art and seeking to devise means to perform the desired function.[43] The adaptation of the new device does

36. Thropp's Sons Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708; Murray Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 21 F. (2d) 822 [certiorari den 276 U. S. 616 mem, 48 SCt 607 mem, 72 L. ed. 733 mem]; French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem].

37. Murray Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 21 F. (2d) 822 [certiorari den 276 U. S. 616 mem, 48 SCt 607 mem, 72 L. ed. 733 mem]; Schute v. Hildreth, 8 F. (2d) 131.

38. Thropp's Sons Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708; Marchand v. Emken, 132 U. S. 195, 10 SCt 65, 33 L. ed. 332; Murray Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 21 F. (2d) 822 [certiorari den 276 U. S. 616 mem, 48 SCt 607 mem, 72 L. ed. 733 mem]; General Electric Co. v. Eisler, 20 F. (2d) 33; Jones v. General Fireproofing Co., 254 Fed. 97, 165 CCA 507.

39. Miller v. Foree, 116 U. S. 22, 6 SCt 204, 29 L. ed. 552; Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 SCt 220, 28 L. ed. 222; Weir Frog Co. v. Porter, 206 Fed. 670, 124 CCA 470; National Meter Co. v. Neptune Meter Co., 122 Fed. 75 [rev on other grounds 127 Fed. 563, 62 CCA 345]; Johnson Co. v. Toledo Tract. Co., 119 Fed. 885, 56 CCA 415; Standard Caster, etc., Co. v. Caster Socket Co., 113 Fed. 162, 51 CCA 109; Thomson-Houston Electric Co. v. Nassau Electric R. Co., 107 Fed. 277, 46 CCA 263; Edison Electric Light Co. v. E. G. Bernard Co., 88 Fed. 267; U. S. Repair, etc., Co. v. Standard Paving Co., 87 Fed. 339 [aff 95 Fed. 137, 37 CCA 28]; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Young v. Baltimore County Hedge, etc., Fence Co., 51 Fed. 109; Union Paper-Collar Co. v. Leland, 24 F. Cas. No. 14,394, 1 Bann. & A. 491, Holmes 427; Millett v. Allen, 27 App. (D. C.) 70; In re Butterfield, 23 App. (D. C.) 84; In re Verley, 19 App. (D. C.) 597; In re Nimmy, 13 App. (D. C.) 565.

40. Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 11 SCt 292, 34 L. ed. 920; St. Germain v. Brunswick, 135 U. S. 227, 10 SCt 822, 34 L. ed. 122; Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 10 SCt 570, 33 L. ed. 963; Blake v. San Francisco, 113 U. S. 679, 5 SCt 692, 28 L. ed. 1070; Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 SCt 220, 28 L. ed. 222; American Graphophone Co. v. Gimbel, 234 Fed. 344 [aff 240 Fed. 971, 153 CCA 657]; In re Noyes, 35 App. (D. C.) 107.

41. Weir Frog Co. v. Porter, 206 Fed. 670, 124 CCA 470; Voightmann v. Perkinson, 138 Fed. 56, 70 CCA 482; Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem].

42. Grand Rapids Refrigerator Co. v. Stevens, 27 F. (2d) 243; Surrell v. Pierce, etc., Mfg. Corp., 11 F. (2d) 432 [aff 11 F. (2d) 441]; Southern Electro-Chemical Co. v. Du Pont de Nemours, 9 F. (2d) 69 [rev on other grounds 20 F. (2d) 97]; Lionne Co. v. Cushman-Hollis Co., 7 F. (2d) 83 [aff 299 Fed. 983]; Fezzey v. Bemis Bros. Bag Co., 1 F. (2d) 116; Luten v. Whittier, 251 Fed. 590, 163 CCA 584; David E. Kennedy, Inc. v. Beaver Tile, etc., Co., 232 Fed. 477; Weir Frog Co. v. Porter, 206 Fed. 670, 124 CCA 470; Voightmann v. Perkinson, 138 Fed. 56, 70 CCA 482.

43. U. S.—Concrete Appliances Co. v. Gomery, 269 U. S. 177, 46 SCt 42, 70 L. ed. 222 [aff 291 Fed. 486 (rev 284 Fed. 518)]; Thomson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098; Vandenburgh v. Truscon Steel Co., 261 U. S. 6, 43 SCt 331, 67 L. ed. 507 [aff 277 Fed. 345]; Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Market St. Cable R. Co. v. Rowley, 155 U. S. 621, 15 SCt 224, 39 L. ed. 284; Gates Iron Works v. Fraser, 153 U. S. 332, 14 SCt 883, 38 L. ed. 734; Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Leggett v. Standard Oil Co., 149 U. S. 287, 13 SCt 902, 37 L. ed. 737; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 SCt 472, 37 L. ed. 307; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 SCt 150, 34 L. ed. 719; Fond du Lac County v. May, 137 U. S. 395, 11 SCt 98, 34 L. ed. 714; St. Germain v. Brunswick, 135 U. S. 227, 10 SCt 822, 34 L. ed. 122; Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 10 SCt 570, 33 L. ed. 963; Royer v. Roth, 132 U. S. 201, 10 SCt 58, 33 L. ed. 322; Marchand v. Emken, 132 U. S. 195, 10 SCt 65, 33 L. ed. 332; Day v. Fair Haven, etc., R. Co., 132 U. S. 98, 10 SCt 11, 33 L. ed. 265; Aron v. Manhattan R. Co., 132 U. S. 84, 10 SCt 24, 33 L. ed. 272; Peters v. Hanson, 129 U. S. 541, 9 SCt 393, 32 L. ed. 742; Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 9 SCt 83, 32 L. ed. 390; Holland v. Shipley, 127 U. S. 396, 8 SCt 1089, 32 L. ed. 185; Dreyfus v. Searle, 124 U. S. 60, 8 SCt 390, 31 L. ed. 352; Thatcher Heating Co. v. Burtis, 121 U. S. 286, 7 SCt 1034, 30 L. ed. 942; Miller v. Foree, 116 U. S. 22, 6 SCt 204, 29 L. ed. 552; Blake v. San Francisco, 113 U. S. 679, 5 SCt 692, 28 L. ed. 1070; Morris v. McMillin, 112 U. S. 244, 5 SCt 218, 28 L. ed. 702; Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 SCt 220, 28 L. ed. 222; Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; Heald v. Rice, 104 U. S. 737, 26 L. ed. 910; Vinton v. Hamilton, 104 U. S. 485, 26 L. ed. 807; Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Tucker v. Spalding, 13 Wall. 453, 20 L. ed. 515; Phillips v. Page, 24 How. 164, 16 L. ed. 639; In re Erickson, 24 F. (2d) 904; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Concrete Mixing, etc., Co. v. Storrie, 23 F. (2d) 131; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553]; Ford Motor Co. v. Parks, 21 F. (2d) 943; Gear Grinding Mach. Co. v. Reo Motor Car Co., 20 F. (2d) 702; Kil-Nock Co. v. Chicago Plating Co., 10 F. (2d) 536; Stoehrer, etc., Corp. v. Lusse, 7 F. (2d) 87 [aff 1 F. (2d) 793]; E. Fredericks, Inc. v. Eugene, 3 F. (2d) 543 [rev 298 Fed. 633]; Standard Oil Co. v. Oklahoma Natural Gas Co., 284 Fed. 469; Ball, etc., Bearing Co. v. F. C. Sanford Mfg. Co., 280 Fed. 415; St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49]; Bellows v. New York Cent. R. Co., 266 Fed. 532; American Can Co. v. Mulkey Salt Co., 264 Fed. 977; J. H. Day Co. v. Mountain City Mill Co., 264 Fed. 963 [aff 257 Fed. 561]; Troy Wagon Works Co. v. Ohio Trailer Co., 264 Fed. 347; Berger Mfg. Co. v. Trussed Concrete Steel Co., 257 Fed. 741, 169 CCA 29; Jackson v. Enid Fdy., etc., Shops, 257 Fed. 323, 168 CCA 407; Armstrong Seatag Corp. v. Smith's Island Oyster Co., 254 Fed. 821, 166 CCA 267; Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 239 Fed. 909 [aff 246 Fed. 834, 159 CCA 136]; American Graphophone Co. v. Gimbel, 234 Fed. 344 [aff 240 Fed. 971, 153 CCA 657]; Rausch, etc., Carriage Co. v. Hanlon, 233 Fed. 673, 147 CCA 481; Æolian Co. v. Wanamaker, 221 Fed. 666 [aff 234 Fed. 90, 148 CCA 106]; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Houser v. Starr, 203 Fed. 264, 121 CCA 462; Myers v. Fairbanks, 194 Fed. 971, 114 CCA 546; Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 703 [aff 194 Fed. 696, 115 CCA 118]; Mershon v. Bay City Box, etc., Co., 189 Fed. 741; Stevens v. Rodgers Boiler, etc., Co., 186 Fed. 631, 108 CCA 495; Lorain Steel Co. v. White Mfg. Co., 184 Fed. 326, 106 CCA 356; Webster v. C. A. Dunham Co., 181 Fed. 836, 104 CCA 346; Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175; Excelsior Drum Works v. Sheip, 180 Fed. 980, 103 CCA 592 [aff 173 Fed. 312]; Jacobs Mfg. Co. v. T. R. Almond Mfg. Co., 177 Fed. 935, 101 CCA 215; Ransome Concrete Mach. Co. v. United Concrete Mach. Co., 177 Fed. 413, 101 CCA 217 [rev 165 Fed. 914, and certiorari den 217 U. S. 607 mem, 30 SCt 697 mem, 54 L. ed. 900 mem]; Lewis Constr. Co. v. Semple, 177 Fed. 407, 101 CCA 411; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310; Bullock Electric Mfg. Co. v. General Electric Co., 162 Fed. 28, 89 CCA 68; National Regulator Co. v. Powers Regulator Co., 160 Fed. 460, 87 CCA 444; Baker v. F. A. Duncombe Mfg. Co., 146 Fed. 744, 77 CCA 234; Voightmann v. Perkinson, 138 Fed. 56, 70 CCA 482; Mallon v. Gregg, 137 Fed. 68, 69 CCA 48; Voightmann v. Weis, etc., Cornice Co., 133 Fed. 298 [aff 148 Fed. 848, 78 CCA 538]; Jones v. Cyphers, 126 Fed. 753, 62 CCA 21; Bettendorf Patents Co. v. J. R. Little Metal Wheel Co., 123 Fed. 433, 59 CCA 473 [certiorari den 195 U. S. 628 mem, 25 SCt 787 mem, 49 L. ed. 351 mem]; Antisdel v. Bent, 122 Fed. 811; Johnson Co. v. Toledo Tract. Co., 119 Fed. 885, 56 CCA 415; Indiana Novelty Mfg. Co.

not constitute invention, even though advantages not | otherwise procurable are attained.[44] On the other

v. Crocker Chair Co., 103 Fed. 496, 43 CCA 287; Fry v. Rookwood Pottery, 101 Fed. 723, 41 CCA 634; Thomson-Houston Electric Co. v. Nassau Electric R. Co., 98 Fed. 105 [aff 107 Fed. 277, 46 CCA 263]; Chatillon v. Forschner, 96 Fed. 342; Thomson-Houston Electric Co. v. Rahway Electric Light, etc., Co., 95 Fed. 660; Briggs v. Duell, 93 Fed. 972, 36 CCA 38; Gaitley v. Greene, 92 Fed. 367; Falk Mfg. Co. v. Missouri R. Co., 91 Fed. 155 [aff 103 Fed. 295, 43 CCA 240]; Solvay Process Co. v. Michigan Alkali Co., 90 Fed. 818, 33 CCA 285; Clisby v. Reese, 88 Fed. 645, 32 CCA 80; Union Gas-Engine Co. v. Doak, 88 Fed. 86; Capital Sheet-Metal Co. v. Kinnear, etc., Co., 87 Fed. 333, 31 CCA 3; Safeguard Account Co. v. Wellington, 86 Fed. 146; Bannerman v. Sanford, 85 Fed. 448 [aff 99 Fed. 294, 39 CCA 534]; Fraser v. Gates Iron Works, 85 Fed. 441, 29 CCA 261 [certiorari den 171 U. S. 687 mem, 18 SCt 942 mem]; Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem]; Rynear Co. v. Evans, 83 Fed. 696; Paul Boynton Co. v. Morris Chute Co., 82 Fed. 440 [aff 87 Fed. 225, 30 CCA 617]; Interior Lumber Co. v. Perkins, 80 Fed. 528, 25 CCA 613 [rev 51 Fed. 286]; Shaw Electric Crane Co. v. Worthington, 77 Fed. 992; Office Specialty Mfg. Co. v. Globe Co., 77 Fed. 465, 23 CCA 242 [aff 65 Fed. 599]; McKay-Copeland Lasting Mach. Co. v. Copeland Rapid-Laster Mfg. Co., 77 Fed. 306 [aff 80 Fed. 518, 25 CCA 611]; Griswold v. Wagner, 68 Fed. 494, 15 CCA 525; Potts v. Creager, 77 Fed. 454; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Eastman Co. v. Getz, 77 Fed. 412 [aff 84 Fed. 458, 28 CCA 459]; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 469, 19 CCA 534; Inman Mfg. Co. v. Beach, 71 Fed. 420, 18 CCA 165; Codman v. Amia, 70 Fed. 710 [aff 74 Fed. 634, 20 CCA 566]; Thomson Meter Co. v. National Meter Co., 65 Fed. 427, 12 CCA 67; Dalby v. Lynes, 64 Fed. 376; Saunders v. Allen, 60 Fed. 610, 9 CCA 157; Steiner Fire-Extinguisher Co. v. Adrian, 59 Fed. 132, 8 CCA 44; Forgie v. Oil-Well Supply Co., 57 Fed. 742 [aff 58 Fed. 871, 7 CCA 551]; Zinsser v. Krueger, 48 Fed. 296, 1 CCA 73 [aff 45 Fed. 572]; Whitcomb v. Spring Valley Coal Co., 47 Fed. 652; Simmond v. Morrison, 44 Fed. 757; Grinnell v. Walworth Mfg. Co., 43 Fed. 590; McCarty v. Lehigh Valley R. Co., 43 Fed. 384 [aff 160 U. S. 110, 16 SCt 240, 40 L. ed. 358]; Smith v. Partridge, 42 Fed. 57; Royer v. Schultz Belting Co., 40 Fed. 160 [foll Royer v. Chicago Mfg. Co., 20 Fed. 853]; Busby v. Ladd, 39 Fed. 551; Hale, etc., Mfg. Co. v. Hartford Woven Wire Mattress Co., 36 Fed. 762; Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co., 34 Fed. 130; Byerly v. Cleveland Linseed Oil Works, 31 Fed. 73; Scheidler v. Tustin, 23 Fed. 887; Royer v. Chicago Mfg. Co., 20 Fed. 853; Clark Pomace-Holder Co. v. Ferguson, 17 Fed. 79, 21 Blatchf. 376 [aff 119 U. S. 335, 7 SCt 382, 30 L. ed. 406]; New York Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; Gottfried v. Crescent Brewing Co., 9 Fed. 762; Crandal v. Walters, 9 Fed. 659, 20 Blatchf. 97; Griffiths v. Holmes, 8 Fed. 154; Rowell v. Lindsay, 6 Fed. 290, 10 Biss. 217 [aff 113 U. S. 97, 5 SCt 507, 28 L. ed. 906]; American Whip Co. v. Hampden Whip Co., 1 Fed. 87; Bean v. Smallwood, 2 F. Cas. No. 1,173, 2 Robb Pat. Cas. 133, 2 Story 408; Ex p. Berry, 3 F. Cas. No. 1,353; In re Blandy, 3 F. Cas. No. 1,528, McA. Pat. Cas. 552; Couse v. Johnson, 6 F. Cas. No. 3,288, 4 Bann. & A. 501; Dennis v. Cross, 7 F. Cas. No. 3,792, 3 Biss. 389, 6 Fish. Pat. Cas. 138; Hazard v. Green, 11 F. Cas. No. 6,277; Jones v. Hodges, 13 F. Cas. No. 7,469, Holmes 37; Judson v. Moore, 14 F. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Mahn v. Harwood, 16 F. Cas. No. 8,966, 3 Bann. & A. 515 [aff 112 U. S. 354, 6 SCt 451, 28 L. ed. 665]; Northrup v. Adams, 18 F. Cas. No. 10,328, 2 Bann. & A. 567; Piper v. Moon, 19 F. Cas. No. 11,182, 10 Blatchf. 264, 6 Fish. Pat. Cas. 180 [aff 91 U. S. 44, 23 L. ed. 202]; Richardson v. Lockwood, 20 F. Cas. No. 11,787, 6 Fish. Pat. Cas. 454; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Tyler v. Deval, 24 F. Cas. No. 14,307; U. S., etc., Salamander Felting Co. v. Haven, 28 F. Cas. No. 16,788, 2 Bann. & A. 164; Winans v. Boston, etc., R. Co., 30 F. Cas. No. 17,858, 2 Robb Pat. Cas. 136, 2 Story 412; Woven-Wire Mattress Co. v. Whittlesey, 30 F. Cas. No. 18,058, 8 Biss. 23; Millett, etc., Steam Gage, etc., Co. v. Allen, 115 Off. Gaz. 1586; In re Adams, 114 Off. Gaz. 2093.

D. C.—In re Braselton, 51 App. 32, 273 Fed. 759; In re Carey, 48 App. 431; In re Birkigt, 48 App. 378; Hendler v. Hansen, 48 App. 146; In re Gold, 45 App. 294; In re Morgan, 38 App. 274; In re Mason, 31 App. 539; In re McNeil, 28 App. 461; In re Welch, 28 App. 362; In re Hill, 26 App. 318; In re Thurston, 26 App. 315; In re Klemm, 21 App. 186; In re Bedford, 14 App. 376; In re Smith, 14 App. 131; In re Briggs, 9 App. 478.

Eng.—Lane Fox v. Kensington Electric Co., [1892] 3 Ch. 424, 20 ERC 236; Parkes v. Stevens, L. R. 5 Ch. 36; Jordan v. Moore, L. R. 1 C. P. 624; Reg. v. Cutler, 14 Q. B. 372 note, 68 ECL 373, 117 Reprint 147, 3 C. & K. 215, 1 Stark. 354, 2 ECL 133, 171 Reprint 495; Thompson v. James, 32 Beav. 570, 55 Reprint 224; Window Cleanot Co. v. Bosley, 15 Brodix Am. & Eng. Pat. Cas. 64; Ralston v. Smith, 20 C. B. N. S. 28, 144 Reprint 1013, 11 H. L. Cas. 223, 11 Reprint 1318, 20 ERC 772; Ormson v. Clarke, 13 C. B. N. S. 337, 106 ECL 337, 143 Reprint 134 [aff 14 C. B. N. S. 475, 108 ECL 475, 143 Reprint 531]; Horton v. Mabon, 12 C. B. N. S. 437, 104 ECL 437, 142 Reprint 1213 [aff 16 C. B. N. S. 141, 111 ECL 141, 143 Reprint 1079]; Patent Bottle Envelope Co. v. Seymer, 5 C. B. N. S. 164, 94 ECL 164, 141 Reprint 65; Tetley v. Easton, 2 C. B. N. S. 706, 89 ECL 706, 140 Reprint 593; Steiner v. Heald, 6 Exch. 607, 155 Reprint 686; Young v. Fernie, 4 Giffard 577, 66 Reprint 836; Brook v. Aston, 5 Jur. N. S. 1025 [aff 8 E. & B. 478, 92 ECL 478, 120 Reprint 178, 20 ERC 82].

Can.—Clark v. Northern Shirt Co., 57 Can. S. C. 607; Pope Alliance Corp. v. Spanish River Pulp & Paper Mills, Ltd., [1926] 3 DomLR 902; Bergeon v. De Kermor Electric Heat Co., Ltd., [1927] Can. Exch. 181 [1927] 3 Dom LR 99; Meldrum v. Wilson, 7 Can. Exch. 198.

Ont.—Durable Electric Appliance Co., Ltd. v. Renfrew Electric Products, Ltd., 59 Ont. L. 527, [1926] 4 DomLR 1004; Abell v. McPherson, 17 Grant Ch. 23 [app dism 18 Grant Ch. 437].

"It is only when the new use is so recondite and remote from that to which the old device has been applied, or for which it was conceived, that its application to the new use would not occur to the mind of the ordinary mechanic, skilled in the art, seeking to devise means to perform the desired function, with the old machine or combination present before him, that its conception rises to the dignity of invention." Mallon v. Gregg, 137 Fed. 68, 77, 69 CCA 48.

[a] **Rule applied.**—(1) Employment, for the purpose of preserving fish, of a process previously used for preserving corpses. Brown v. Piper, 91 U. S. 37, 23 L. ed. 200. (2) Adaptation of devices used for centuries for raising and distributing water and other mobile substances to use in transferring wet concrete from a source of supply to working points on a building or other structure in the course of construction. Concrete Appliances Co. v. Gomery, 269 U. S. 177, 46 SCt 42, 70 L. ed. 222. (3) Adaptation of device previously used in lap-welding, to use in plane-face welding. Thomson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098. (4) Use in the concrete reinforcing art as a means of attaching the spiral coils to the reinforcing bar of the kerf and spur, old in the metal arts there used for a similar purpose. Vandenburgh v. Truscon Steel Co., 261 U. S. 6, 43 SCt 331, 67 L. ed. 507 [aff 277 Fed. 345]. (5) Employing, as the forward truck of a locomotive engine with fixed driving wheels, a truck already in use on railroad cars. Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 SCt 220, 28 L. ed. 222. (6) Adapting internal gearing previously used for converting a rotary into a reciprocating motion in sewing machines, harvesters, and wood sawyers, to use for the same purpose in a windmill. Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856. (7) Transfer of well-known fuel magazine from its use in a base-burning stove to a fireplace heater. Thatcher Heating Co. v. Burtis, 121 U. S. 286, 7 SCt 1034, 30 L. ed. 942. (8) Adapting a slidably detachable ear used on a brake band in a screw machine, and applying it to an automobile brake band. Ford Motor Co. v. Parks, 21 F. (2d) 943. (9) Use of a process previously employed in coating metal, fabric, glass, and other substances, to coat or impregnate shoes with metal. In re Braselton, 51 App. (D. C.) 32, 273 Fed. 759. (10) Application of existing devices for the rectification of alternating electrical currents to the production of direct currents for charging storage batteries. St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49]. (11) Adaptation of the steering apparatus, developed in the automobile art, to the steering of motor truck trailers. Troy Wagon Works Co. v. Ohio Trailer Co., 264 Fed. 347. (12) Adaptation of means already employed in the brickmaking art, in connection with the cutting of plastic clay, to the cutting of biscuit dough. J. H. Day Co. v. Mountain City Mill Co., 264 Fed. 963 [aff 257 Fed. 561]. (13) Adaptation to metal mechanical toys of previously disclosed inventions used in wooden toy building blocks. Wagner v. Meccano, Ltd., 246 Fed. 603, 158 CCA 573 [mod 234 Fed. 912]. (14) Use of old music cabinet for phonograph record holder. American Graphophone Co. v. Gimbel, 234 Fed. 344 [aff 240 Fed. 971, 153 CCA 657]. (15) Application to a closed car of the form of wind shield known on open cars. Rauch, etc., Carriage Co. v. Hanlon, 233 Fed. 673, 147 CCA 481. (16) Transfer of a device used in photography to the making of blue prints. Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175 [rev 173 Fed. 315]. (17) Application of old process of tempering watch springs to the tempering of furniture springs. Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 SCt 472, 37 L. ed. 307 [rev 31 Fed. 344]. (18) Preserving corn by process old for other vegetables. Jones v. Hodges, 13 F. Cas. No. 7,469, Holmes 37. (19) Use in gloves of a welt, old in shoes. Busby v. Ladd, 39 Fed. 551. (20) Adaptation of an old device for lifting paper, to use in lifting pills. Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem].

44. Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; American Grapho-

hand, invention is involved where the new use is so remote from that to which the method or device has been applied, or for which it was conceived, that the thought of making the necessary modifications and changes and applying it to the new use would not occur to a person skilled in the art and seeking means by which the desired function could be performed.[45] It is immaterial that, once given the thought of applying the old method or device to the new use, the changes or modifications necessary to make the thought practical are obvious.[46] It is immaterial also that the physical changes are slight so long as they are essential to the purpose.[47]

phone Co. v Gimbel, 234 Fed. 344 [aff 240 Fed. 971, 153 CCA 657]; Gottfried v. Crescent Brewing Co., 9 Fed. 762; In re Welch, 28 App. (D. C.) 362.

45. Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275; Western Electric Co. v. La Rue, 139 U. S. 601, 11 SCt 670, 35 L. ed. 294; Lakewood Engineering Co. v. Walker, 23 F. (2d) 623; A. J. Deer Co., Inc. v. U. S. Slicing Mach. Co., 21 F. (2d) 812; Radio Corp. v. Edmond, Inc., 20 F. (2d) 929; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Byron Weston Co. v. L. L. Brown Paper Co., 20 F. (2d) 183; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66 [rev 16 F. (2d) 495, and certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem]; Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Inland Mfg. Co. v. American Wood Rim Co., 14 F. (2d) 657; Walker v. Lakewood Engineering Co., 14 F. (2d) 333; Eiermann's Application, 287 Fed. 1016; Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., 268 Fed. 257; Concrete Appliances Co. v. Meinken, 262 Fed. 958; Otto Coking Co. v. Koppers Co., 258 Fed. 122, 169 CCA 208; Globe Knitting Works v. Segal, 248 Fed. 495, 160 CCA 505 [rev 239 Fed. 322]; Beckwith Box Toe Co. v. Gowdy, 244 Fed. 805; Rousso v. City Towel Supply Co., 242 Fed. 655; American Ball Bearing Co. v. Finch, 239 Fed. 885, 153 CCA 13; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418 [aff 243 Fed. 895, 156 CCA 407]; Tate v. Baltimore, etc., R. Co., 229 Fed. 141, 143 CCA 417; Brown, etc., Mfg. Co. v. L. S. Starrett Co., 225 Fed. 993; Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 CCA 105; Reed v. Cropp Concrete Mach. Co., 225 Fed. 764, 140 CCA 90 [aff 255 Fed. 91, 166 CCA 419]; Perkins Glue Co. v. Solva Waterproof Glue Co., 223 Fed. 792 [mod on other grounds 251 Fed. 64, 163 CCA 314]; Fitchburg Duck Mills v. Barrell, 214 Fed. 777, 131 CCA 189, General Electric Co. v. Dunkirk, 211 Fed. 658 [aff 211 Fed. 657, 128 CCA 575]; Barry v. Harpoon Castor Co., 209 Fed. 207, 126 CCA 301; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; Dunn Mfg. Co. v. Standard Computing Scale Co., 204 Fed. 617, 123 CCA 111; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; Combustion Utilities Corp. v. Worcester Gaslight Co., 190 Fed. 155 [aff 194 Fed. 1023, 114 CCA 643]; General Electric Co. v. E. H. Freeman Electric Co., 190 Fed. 34 [aff 191 Fed. 168, 111 CCA 646]; Rand v. Exchange Scrip-Book Co., 187 Fed. 984, 110 CCA 322; Live Poultry Transp. Co. v. Lemac Carriers Co., 182 Fed. 841 [rev on other grounds 195 Fed. 525, 115 CCA 435]; Webster v. C. A. Dunham Co., 181 Fed. 836, 104 CCA 346; Hartford v. Moore, 181 Fed. 132; Bossert Electric Constr. Co. v. Pratt Chuck Co., 179 Fed. 385, 103 CCA 45; Basch v. Bernstein, 171 Fed. 434; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559]; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114; General Electric Co. v. Bullock Electric Mfg. Co., 152 Fed. 427, 81 CCA 569; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 124 Fed. 514; National Meter Co. v. Neptune Meter Co., 122 Fed. 75 [rev on other grounds 127 Fed. 563, 62 CCA 345]; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 289; Durfee v. Bawo, 118 Fed. 853; Moore v. Schaw, 118 Fed. 602; R. Thomas, etc., Co. v. Electric Porcelain, etc., Co., 111 Fed. 923; Wilfley v. Denver Engineering Works Co., 111 Fed. 760; Star Brass Works v. General Electric Co., 111 Fed. 398, 49 CCA 409; Daylight Prism Co. v. Marcus Prism Co., 110 Fed. 980; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; American Well Works v. F. C. Austin Mfg. Co., 98 Fed. 992 [aff 121 Fed. 76, 57 CCA 330]; Dodge v. Porter, 98 Fed. 624 [mod on other grounds 112 Fed. 423, 50 CCA 317]; Potts v. Creager, 97 Fed. 78, 38 CCA 47; Reynolds v. Buzzell, 96 Fed. 997, 37 CCA 656; Tannage Patent Co. v. Donallen, 93 Fed. 811 [app dism 96 Fed. 1004 mem, 37 CCA 664 mem]; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [rev on other grounds 96 Fed. 850, 37 CCA 593 (rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968)]; Diamond State Iron Co. v. Goldie, 84 Fed. 972, 28 CCA 589; Kinnear, etc., Co. v. Capital Sheet-Metal Co., 81 Fed. 491 [rev on other grounds 87 Fed. 333, 31 CCA 3]; Hanifen v. E. H. Godshalk Co., 78 Fed. 811 [rev on other grounds 84 Fed. 649, 28 CCA 507]; Rose v. Hirsh, 77 Fed. 469, 23 CCA 246; A. B. Dick Co. v. Henry, 75 Fed. 388; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203; A. B. Dick Co. v. Wichelman, 74 Fed. 799; Codman v. Amia, 74 Fed. 634, 20 CCA 566; Tannage Co. v. Zahn, 70 Fed. 1003, 17 CCA 552 [rev 66 Fed. 986]; Binns v. Zucker, etc., Chemical Co., 70 Fed. 711; Taws v. Laughlins, 70 Fed. 102; Consolidated Brake-Shoe Co. v. Chicago, etc., R. Co., 69 Fed. 412; Edison Electric Light Co. v. Westinghouse, 55 Fed. 490 [rev on other grounds 63 Fed. 588, 11 CCA 342]; Pacific Contracting Co. v. Southern California Bituminous Pav. Co., 48 Fed. 300; Peninsular Novelty Co. v. American Shoe-Tip Co., 39 Fed. 791; Bell v. U. S. Stamping Co., 32 Fed. 549; Coburn v. Schroeder, 8 Fed. 519, 19 Blatchf. 377; Moffitt v. Rogers, 8 Fed. 147 [aff 106 U. S. 423, 1 SCt 70, 27 L. ed. 76]; Yale Lock Co. v. Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; Barnes v. Straus, 2 F. Cas. No. 1,022, 9 Blatchf. 553, 5 Fish. Pat. Cas. 531; In re Boughton, 3 F. Cas. No. 1,696, McA. Pat. Cas. 278; Burden v. Corning, 4 F. Cas. No. 2,144 [rev on other grounds 15 How. 252, 14 L. ed. 683]; Clark Patent Steam, etc., Regulator Co. v. Copeland, 5 F. Cas. No. 2,866, 2 Fish. Pat. Cas. 221; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Grosjean v. Peck, etc. Co., 11 F. Cas. No. 5,841, 11 Blatchf. 54; Ex p. Mackay, 16 F. Cas. No. 8,836; Plastic Slate-Roofing Joint-Stock Co. v. Moore, 19 F. Cas. No. 11,209, Holmes 167; Rubber Step Mfg. Co. v. Metropolitan R. Co., 20 F. Cas. No. 12,101, 3 Bann. & A. 252; Treadwell v. Parrott, 24 F. Cas. No. 14,158, 5 Blatchf. 369, 3 Fish. Pat. Cas. 124; Union Paper Collar Co. v. White, 24 F. Cas. No. 14,396, 2 Bann. & A. 60; Winans v. Schenectady, etc., R. Co., 30 F. Cas. No. 17,865, 2 Blatchf. 279; Waite v. U. S., 63 Ct. Cl. 438; Templeton's Application, 57 App. (D. C.) 99, 17 F. (2d) 687; In re Weiss, 21 App. (D. C.) 214; Penn v. Bibby, L. R. 2 Ch. 127, 20 ERC 110; Lane Fox v. Kensington Electric Lighting Co., [1892] 3 Ch. 424, 20 ERC 236; Higgs v. Goodwin, E. B. & E. 529, 96 ECL 529, 120 Reprint 606; Newton v. Vaucher, 6 Exch. 859, 155 Reprint 794; Hills v. London Gas Light Co., 5 H. & N. 312, 157 Reprint 1202, 20 ERC 528; Crane v. Price, 4 M. & G. 580, 43 ECL 301, 134 Reprint 239; Gadd v. Manchester, 67 L. T. Rep. N. S. 569; Dangerfield v. Jones, 13 L. T. Rep. N. S. 142; Bicknell v. Peterson, 24 Ont. A. 427.

[a] **Rule applied.**—(1) Adaptation of a device, used in polishing wood, to use in disintegrating clay. Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275. (2) Application of a torsion spring, previously used in clocks, doors, and perhaps other articles of domestic furniture, to telegraph instruments. Western Electric Co. v. La Rue, 139 U. S. 601, 11 SCt 670, 35 L. ed. 294. (3) Use of guide strips, previously used in laying street pavements, in laying terrazzo mosaic. Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66 [rev 16 F. (2d) 495, and certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem]. (4) Taking an element from a water hose coupling and using it in an automobile grease gun. Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]. (5) The transfer of elastic features, previously used in drawers or overalls, to union suits. Globe Knitting Works v. Segal, 248 Fed. 495, 160 CCA 505 [rev 239 Fed. 322]. (6) Use of a construction similar to "spots" or ornaments for Mexican saddles, harness, and other like purposes, and "domes" used on the bottom of traveling bags, as an antifriction tip for furniture to take the place of castors. Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301. (7) Application of a device used to bolt a bedstead together, or to secure a wooden covering to an iron pulley, to fastening of laminated pole pieces of a field magnet to the solid yoke thereof. General Electric Co. v. Bullock Electric Mfg. Co., 152 Fed. 427, 81 CCA 569. (8) Employment of a process, used in dyeing and printing on fabrics and the treatment of wools, in tanning hides and skins. Tannage Patent Co. v. Zahn, 70 Fed. 1003, 17 CCA 552. (9) Use of a combination of paper and muslin, previously used for making maps, in the making of collars. Union Paper Collar Co. v. White, 24 F. Cas. No. 14,396, 2 Bann. & A. 60.

[b] **"Analogous" and "nonanalogous" arts distinguished.**—"If the elements and purposes in one art are related and similar to those in another art, and because and by reason of that relation and similarity make an appeal to the mind of a person having mechanical skill and knowledge of the purposes of the other art, then we are of opinion that such arts must be said to be analogous, and, if the converse is true, they are nonanalogous arts." A. J. Deer Co., Inc. v. U. S. Slicing Mach. Co., 21 F. (2d) 812, 813.

46. Lakewood Engineering Co. v. Walker, 23 F. (2d) 623; Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., 268 Fed. 257; Perkins Glue Co. v. Solva Waterproof Glue Co., 223 Fed. 792 [mod on other grounds 251 Fed. 64, 163 CCA 314].

47. Lakewood Engineering Co. v. Walker, 23 F. (2d) 623; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66 [rev 16 F. (2d) 495, and certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem]; Rousso v. City Towel Supply Co., 242 Fed.

[§ 85] **18. Substitution of Equivalents.**[48] The substitution of an "equivalent" for any element of a method or device is not invention.[49] This is true, even though the substitution produces a better result,[50] and even though the act or thing substituted performs some new and additional function.[51] It is immaterial that the act or thing substituted is unlike the act or thing for which it is substituted in name[52] or form,[53] or that it has more or less parts.[54] An "equivalent" of an act or thing is, in the sense of the patent law, an act or thing known by persons skilled in the art to be capable of performing the same function in substantially the same way.[55] It is

655; Dunn Mfg. Co. v. Standard Computing Scale Co., 204 Fed. 617, 123 CCA 111; Hartford v. Moore, 181 Fed. 132.

"If the thing itself be new, very slight structural changes may be enough to support a patent, when they presuppose a use not discoverable without inventive imagination. We are to judge such devices, not by the mere innovation in their form or material, but by the purpose which dictated them and discovered their function." Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66, 68 [certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem].

48. Substitution of equivalents as infringement see infra § 509.

49. Lehigh Valley R. Co. v. Kearney, 158 U. S. 461, 15 SCt 871, 39 L. ed. 1055; Du Bois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895; Sargent v. Covert, 152 U. S. 516, 14 SCt 676, 38 L. ed. 536; Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; Hoyt v. Horne, 145 U. S. 302, 12 SCt 922, 36 L. ed. 713; Marchand v. Emken, 132 U. S. 195, 10 SCt 65, 33 L. ed. 332 [aff 26 Fed. 629, 23 Blatchf. 435]; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 7 SCt 421, 30 L. ed. 539; Stephenson v. Brooklyn Cross-Town R. Co., 114 U. S. 149, 5 SCt 777, 29 L. ed. 58; Hall v. Macneale, 107 U. S. 90, 2 SCt 73, 27 L. ed. 367; Heald v. Rice, 104 U. S. 737, 26 L. ed. 910; Crouch v. Roemer, 103 U. S. 797, 26 L. ed. 426; Hyndman v. Roots, 97 U. S. 224, 24 L. ed. 975; Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; Robertson v. Blake, 94 U. S. 728, 24 L. ed. 245; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Stimpson v. Woodman, 10 Wall. (U. S.) 117, 19 L. ed. 866; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Osteen v. Ansco Photoproducts, Inc., 27 F. (2d) 688; U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387 [certiorari den 49 SCt 12 mem]; Edward G. Budd Mfg. Co. v. C. R. Wilson Body Co., 21 F. (2d) 803 [certiorari den 276 U. S. 632 mem, 48 SCt 325 mem, 72 L. ed. 742 mem]; Barber-Colman Co. v. Withnell, 20 F. (2d) 373; Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; Cincinnati Cadillac Co. v. English, etc., Co., 18 F. (2d) 542; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Miller v. Monarch Printing Co., 285 Fed. 364; Gilchrist v. F. B. Mallory Co., 281 Fed. 350; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015 mem]; Union Sulphur Co. v. Freeport Texas Co., 255 Fed. 961, 167 CCA 253 [certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem]; Butler v. Pratt, 253 Fed. 654, 165 CCA 280; Dunham v. Kelley-Koett Mfg. Co., 246 Fed. 845, 159 CCA 147; Specialty Mach. Co. v. Ashcraft Mfg. Co., 205 Fed. 760 [rev on other grounds 213 Fed. 35, 129 CCA 629]; Lord Baltimore Press v. Labombarde, 197 Fed. 739, 118 CCA 481 [rev 190 Fed. 184]; General Electric Co. v. Sutter, 195 Fed. 280, 115 CCA 250; Boss Mfg. Co. v. Thomas, 182 Fed. 811, 105 CCA 243; Neureuther v. Mineral Point Zinc Co., 179 Fed. 850, 103 CCA 336 [certiorari den 220 U. S. 612 mem, 31 SCt 716 mem, 55 L. ed. 609 mem]; Yost Electric Mfg. Co. v. Perkins Electric Switch Mfg. Co., 179 Fed. 511, 103 CCA 116; Tubelt Co. v. Friedman, 158 Fed. 430; Kuhn v. Lock Stub Check Co., 157 Fed. 235 [aff 165 Fed. 445, 91 CCA 389]; Lourie Impl. Co. v. Lenhart, 130 Fed. 122, 64 CCA 456; U. S. Peg Wood, etc., Co. v. B. F. Sturtevant Co., 125 Fed. 378, 60 CCA 244; Seiler v. Fuller, etc., Mfg. Co., 121 Fed. 85, 57 CCA 339 [certiorari den 190 U. S. 558 mem, 23 SCt 854 mem, 47 L. ed. 1183 mem]; Alaska Packers' Assoc. v. Letson, 119 Fed. 599 [mod on other grounds 130 Fed. 129, 64 CCA 463]; Lane v. Welds, 99 Fed. 286, 39 CCA 528; Potts v. Creager, 97 Fed. 78, 38 CCA 47; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; Parsons v. Seelye, 92 Fed. 1005 [rev on other grounds 100 Fed. 455, 40 CCA 486]; Shaw Electric Crane Co. v. Shriver, 86 Fed. 466, 30 CCA 196; Boynton Co. v. Morris Chute Co., 82 Fed. 440 [aff 87 Fed. 225, 30 CCA 617]; Forgie v. Duff Mfg. Co., 81 Fed. 865, 26 CCA 654; New Departure Bell Co. v. Hardware Specialty Co., 69 Fed. 152; Oval Wood Dish Co. v. Sandy Creek Wood Mfg. Co., 60 Fed. 285; Geo. L. Thomson Mfg. Co. v. Walbridge, 60 Fed. 91 [aff 67 Fed. 1021, 15 CCA 166]; Saunders v. Allen, 53 Fed. 109 [aff 60 Fed. 610, 9 CCA 157]; Root v. Sontag, 47 Fed. 309; McCarty v. Lehigh Valley R. Co., 43 Fed. 384 [aff 160 U. S. 110, 16 SCt 240, 40 L. ed. 358]; American Split-Feather Duster Co. v. Levy, 43 Fed. 381; May v. Fond du Lac County, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Sawyer v. Miller, 12 Fed. 725, 4 Woods 472; Perry v. Co-op. Fdy. Co., 12 Fed. 436, 20 Blatchf. 498; Crompton v. Knowles, 7 Fed. 204; Holly v. Vergennes Mfg. Co., 4 Fed. 74, 18 Blatchf. 327; Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. R. 184; Conover v. Roach, 6 F. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Ex p. Dietz, 7 F. Cas. No. 3,902; In re Everson, 8 F. Cas. No. 4,580, McA. Pat. Cas. 406; Fisher v. Craig, 9 F. Cas. No. 4,817, 1 Bann. & A. 365, 3 Sawy. 69; King v. Louisville Cement Co, 14 F. Cas. No. 7,798, 6 Fish. Pat. Cas. 336; Potter v. Thayer, 19 F. Cas. No. 11,340, 6 Fish. Pat. Cas. 603, Holmes 293; Spain v. Gamble, 22 F. Cas. No. 13,199, McA. Pat. Cas. 358; Treadwell v. Fox, 24 F. Cas. No. 14,156; Woodbury Patent Planing-Mach. Co. v. Keith, 30 F. Cas. No. 17,970, 4 Bann. & A. 100 [aff 101 U. S. 479, 25 L. ed. 939]; Millett v. Allen, 115 Off. Gaz. (U. S.) 1586; Bard's Application, 57 App. (D. C.) 147, 18 F. (2d) 189; In re Sweetland, 56 App. (D. C.) 222, 12 F. (2d) 163, In re Carey, 48 App. (D. C.) 431; In re Pratt, 44 App. (D. C.) 462; Re Hogan, 42 App. (D. C.) 337; Re Pein, 41 App. (D. C.) 586; Re Ferres, 40 App. (D. C.) 584; Re Taylor, 40 App. (D. C.) 279; In re Bliss, 39 App. (D. C.) 453; In re Russell, 36 App. (D. C.) 444; In re Noyes, 35 App. (D. C.) 107; In re Hodges, 28 App (D. C.) 525; In re Hawley, 26 App. (D. C.) 324; In re Thurston, 26 App. (D. C.) 315; In re McNeill, 20 App. (D. C.) 294; In re Iwan, 17 App. (D. C.) 566, Wisner v. Coulthard, 22 Can. S. C. 178; Hunter v. Carrick, 11 Can. S. C. 300; Smith v. Goldie, 9 Can. S. C. 46; Woodward v. Clement, 10 Ont. 348.

[a] **Rule applied.**—(1) Substitution of screw for hand operated paddles. Marchand v. Emken, 132 U. S. 195, 10 SCt 65, 33 L. ed. 332 [aff 26 Fed. 629, 23 Blatchf. 435]. (2) Substitution of glycerine and litharge for plaster of Paris in lining blower cases of a rotary blower. Hyndman v. Roots, 97 U. S. 224, 24 L. ed. 975. (3) Substitution for an oil reservoir in a pulley block, which was made separately and riveted onto the side of the block, of a similar reservoir functioning in the same way, but made by casting it with the side of the block. Gilchrist v. F. B. Mallory Co., 281 Fed. 350. (4) Substitution of dehydrated ethyl alcohol and acetone for commercial methyl alcohol as a solvent in making an artificial fuel, the principal constituents of which are alcohol and nitrocellulose. U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387 [certiorari den 49 SCt 12 mem]. (5) Substitution of eccentric for concentric coil mounting in an electrical transformer. General Electric Co. v. Sutter, 195 Fed. 280, 115 CCA 250. (6) Substituting a "four-way" valve in the vent pipe of a liquid measuring device, for a structurally similar "two-way" valve employed to perform the same function in a prior patented device. In re Pein, 41 App. (D. C.) 586. (7) Substitution of a bolt for a screw. Root v. Sontag, 47 Fed. 309.

50. National Hat-Pouncing Mach. Co. v. Hedden, 148 U. S. 482, 13 SCt 680, 37 L. ed. 529; Stimpson v. Woodman, 10 Wall. (U. S.) 117, 19 L. ed. 866; Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Specialty Mach. Co. v. Ashcraft Mfg. Co., 205 Fed. 760 [rev on other grounds 213 Fed. 35, 129 CCA 629]; General Electric Co. v. Sutter, 195 Fed. 280, 115 CCA 250; Tubelt Co. v. Friedman, 158 Fed. 430; Lyons v. Bishop, 95 Fed. 154; Parsons v. Seelye, 92 Fed. 1005 [rev on other grounds 100 Fed. 455, 40 CCA 486]; Kelly v. Springfield R. Co., 81 Fed. 617 [aff 92 Fed. 614, 34 CCA 570]; National Folding-Box, etc., Co. v. Stecher Lith. Co., 81 Fed. 395, 26 CCA 448; Codman v. Amia., 74 Fed. 634, 20 CCA 566; Puetz v. Bransford, 31 Fed. 458; Hutchinson v. Meyer, 12 F. Cas. No. 6,957; In re Sweetland, 56 App. (D. C.) 222, 12 F. (2d) 163; In re Berger, 32 App. (D. C.) 358; In re Orcutt, 32 App. (D. C.) 345; In re McNeill, 20 App. (D. C.) 294.

51. Crouch v. Roemer, 103 U. S. 797, 26 L. ed. 426; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Atlantic Giant-Powder Co. v. Goodyear, 2 F. Cas. No. 623, 3 Bann. & A. 161.

52. Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935.

53. Union Paper Bag Mach. Co. v. Murphy, supra; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Graham v. Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

54. Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Strobridge v. Lindsay, 6 Fed. 510.

55. Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Shevenell v. George J. Kelly, Inc., 19 F. (2d) 791; Gilcrist v. F. B. Mallory Co., 281 Fed. 350; Butler v. Pratt, 253 Fed. 654, 165 CCA 280; Lord Baltimore Press v. Labombarde, 197 Fed. 739, 118 CCA 481 [rev 190 Fed. 184]; Tubelt Co. v. Friedman, 158 Fed. 430; May v. Fond du Lac County, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt

regarded as being the same as the thing itself.[56] An "equivalent" is something different from a substitute.[57] To be the "equivalent" of an element of a method or device an act or thing must not only perform the same function in the method or device,[58] but it must also perform that function in substantially the same manner,[59] and its capability for that purpose must be obvious to persons skilled in the art.[60] An act or thing is not an "equivalent" if it varies in any manner the idea of means,[61] or affects it in any degree.[62]

Chemical equivalents. While the reactions and phenomena of chemistry may sometimes dictate a rule as to equivalents, which is at variance to the rule as applied to mere physical or mechanical equivalents,[63] it has been asserted that there is no reason for applying a different rule in a case where the known effect produced by one chemical element is in all respects similar to the effects produced by other elements already used,[64] especially when operating in combination upon substances possessing well-known characteristics.[65] It is only when the reactions and phenomena of chemistry are latent and undeveloped that the rule has application.[66]

[§ 86] **19. Combinations—a. In General.** There may be invention in selecting and combining or uniting two or more simple methods or devices into a unitary method or device,[67] or in introducing an ad-

98, 34 L. ed. 714]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351.

[a] **Other definitions.**—(1) "A thing which performs the same function, and performs that function in substantially the same manner, as the thing of which it is alleged to be an equivalent." Walker Patents (4th ed) § 354 [quot Maunula v. Sunell, 155 Fed. 535, 539]. (2) "An equivalent, in the law of patents, is defined to be 'any act or substance which is known in the arts as a proper substitute for some other act or substance, employed already as an element in an invention, whose substitution for that other act or substance does not in any manner vary the idea of means. It possesses three characteristics: (1) It must be capable of performing the same office in the invention as the act or substance whose place it supplies; (2) it must relate to the form of embodiment alone, and not affect in any degree the idea of means; (3) it must have been known in the arts, at the date of the patent, as endowed with this capability.'" Duff Mfg. Co. v. Forgie, 59 Fed. 772, 775, 8 CCA 261 [quot 1 Robinson Patents § 247.

56. Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935.

57. McCaskey Register Co. v. Mantz, 217 Fed. 415 [aff 224 Fed. 495, 140 CCA 203].

58. Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; Duff Mfg. Co. v. Forgie, 59 Fed. 772, 8 CCA 261; Piper v. Shedd, 26 Fed. 151.

59. Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Keller v. Adams-Campbell Co., 287 Fed. 838 [certiorari granted 262 U. S. 741 mem, 43 SCt 702 mem, 67 L. ed. 1209 mem, and certiorari dism 264 U. S. 314, 44 SCt 356, 68 L. ed. 705]; H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 500; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Conover v. Roach, 6 F. Cas. No. 3,125, 4 Fish. Pat. Cas. 12.

60. Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Duff Mfg. Co. v. Forgie, 59 Fed. 772, 8 CCA 261.

61. Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Westinghouse Mach. Co. v. C. & G. Cooper Co., 245 Fed. 463, 157 CCA 625; Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co., 154 Fed. 372, 83 CCA 350; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Westinghouse Electric, etc., Co. v. New England Granite Co., 103 Fed. 951 [aff 110 Fed. 753, 49 CCA 151]; Bray v. U. S. Net, etc., Co., 70 Fed. 1006; Mosher v. Joyce, 31 Fed. 557; La Rue v. Western Electric Co., 31 Fed. 80, 24 Blatchf. 392 [aff 139 U. S. 601, 11 SCt 670, 35 L. ed. 294]; Woodward v. Dinsmore, 30 F. Cas. No. 18,003, 4 Fish. Pat. Cas. 163.

[a] **Illustration.**—The substitution of a torsional spring for a fulcrum and coil spring in a telegraph instrument is an invention. La Rue v. Western Electric Co., 31 Fed. 80, 24 Blatchf. 392 [aff 139 U. S. 601, 11 SCt 670, 35 L. ed. 294].

[b] **Substitution of single element performing function of several.**—Where three separate elements in a patented device, each performing an individual function, are supplanted in another device by a single element which itself performs the functions of all three, the threefold capacity of the single element is not the equivalent of the three separate elements. Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co., 154 Fed. 372, 83 CCA 350 [mod 150 Fed. 364].

62. Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Duff Mfg. Co. v. Forgie, 59 Fed. 772, 8 CCA 261.

63. De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem].

64. Western Willite Co. v. Trinidad Asphalt Mfg. Co., supra.

65. Western Willite Co. v. Trinidad Asphalt Mfg. Co., supra.

66. De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem].

67. U. S.—Temco Electric Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 48 SCt 170, 72 L. ed. 298; U. S. v. Berdan Firearms Mfg. Co., 156 U. S. 552, 15 SCt 420, 39 L. ed. 530; Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Ward, Inc. v. Gibbs, 27 F. (2d) 466 [certiorari den 49 SCt 29 mem]; Hiler Audio Corp. v. General Radio Co., 26 F. (2d) 475; Salvage Process Co. v. Shewan, 26 F. (2d) 258; N. O. Nelson Mfg. Co. v. F. E. Myers, etc., Co., 25 F. (2d) 659, 29 F. (2d) 968; U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387 [certiorari den 49 SCt 12 mem]; Wirebounds Patents Co. v. H. R. Gibbons Box Co., 25 F. (2d) 363; Allington v. Forest Box, etc., Co., 25 F. (2d) 141; In re Burt, 24 F. (2d) 273; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Finley v. MacDougald Constr. Co., 23 F. (2d) 204; Brick v. Namm, 22 F. (2d) 693 [aff 22 F. (2d) 697]; Detroit v. Kahn, 22 F. (2d) 613; Craft-Stone, Inc. v. Zenitherm Co., Inc., 22 F. (2d) 401; Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Claude Neon Lights v. Machlett, 21 F. (2d) 846 [mod 27 F. (2d) 702 (certiorari den 49 SCt 32 mem)]; Hazeltine Corp. v. Grebe, 21 F. (2d) 643; Brinkman v. Laurette Mfg. Co., 21 F. (2d) 607; Lathrop v. Rice, etc., Corp., 21 F. (2d) 124 [aff 24 F. (2d) 1021 mem (certiorari granted 49 SCt 10 mem)]; Universal Oil Products v. Skelly Oil Co., 20 F. (2d) 995; Forchheimer v. Franc, Strohmenger & Cowan, Inc., 20 F. (2d) 553 [certiorari den 277 U. S. 597 mem, 48 SCt 560 mem, 72 L. ed. 1007 mem]; Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 257]; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; Lektophone Corp. v. Western Electric Co., 20 F. (2d) 150; Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939; Kulp v. Bridgeport Hardware Mfg. Corp., 19 F. (2d) 659; Judelson v. Hill Laundry Equipment Co., 18 F. (2d) 594 [aff 22 F. (2d) 262]; Morgan Constr. Co. v. Wellman-Seaver-Morgan Co., 18 F. (2d) 395; Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Household Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838]; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16 [certiorari den 275 U. S. 529 mem, 48 SCt 21 mem, 72 L. ed. 409 mem]; Perey v. Perey Mfg. Co., 17 F. (2d) 774; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Babcock, etc., Co. v. Springfield Boiler Co., 16 F. (2d) 964 [certiorari den 275 U. S. 528 mem, 48 SCt 21 mem, 72 L. ed. 408 mem]; Gustav J. Gruendler Mfg. Co. v. Harry L. Hussman Refrigerator, etc., Co., 16 F. (2d) 571; Grand Rapids Brass Co. v. Winters, 15 F. (2d) 129; Mohr v. Alliance Securities Co., 14 F. (2d) 799; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Sodemann Heat, etc., Co. v. Kauffman, 14 F. (2d) 393; Lenk v. Hunt-Lasher Co., 14 F. (2d) 335; Heim Grinder Co. v. Fafnir Bearing Co., 13 F. (2d) 408; Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; Abrahams v. Universal Wire Co., 10 F. (2d) 838; Conway v. White, 9 F. (2d) 863 [rev 300 Fed. 866]; Diamond Match Co. v. Sun Match Corp., 9 F. (2d) 695 [aff 16 F. (2d) 1]; Johnson Auto. Lock Co. v. Noser Instant Auto Lock Co., 9 F. (2d) 265, Meurer Steel Barrel Co. v. Boyle Mfg. Co., 9 F. (2d) 92; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Turner v. Spinner, 6 F. (2d) 172; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Zip Mfg. Co. v. Pusch, 2 F. (2d) 828; Pray v. Copes, 1 F. (2d) 927; D. J. Murray Mfg. Co. v. Sumner Iron Works, 300 Fed. 911, E. Frederics, Inc. v. Eugene, Ltd., 298 Fed. 633 [rev on other grounds 3 F. (2d) 543]; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717; James L. Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Ward Baking Co. v. Hazleton Baking Co., 292 Fed. 202; Luten v. Kansas City Bridge Co., 285 Fed. 840 [rev 272 Fed. 533]; Krauth v. Autographic Register Co., 285 Fed.

199 [rev on other grounds 286 Fed. 470]; Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 284 Fed. 193 [certiorari den 261 U. S. 613 mem, 43 SCt 359 mem, 67 L. ed. 827 mem]; Reed v. Hughes Tool Co., 282 Fed. 807 [certiorari den 260 U. S. 741 mem, 43 SCt 99 mem, 67 L. ed. 491 mem]; Lacledé-Christy Clay Products Co. v. St. Louis, 280 Fed. 83 [aff 270 Fed. 338]; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; Tucker v. Universal Auto Co., 277 Fed. 469 [aff 284 Fed. 1022 mem]; Morgan Constr. Co. v. Donner Steel Co., 277 Fed. 221 [rev 269 Fed. 389]; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593 [rev 267 Fed. 435]; Carnes Artificial Limb Co. v. Dilworth Arm Co., 273 Fed. 838; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Sanitary Products Corp. v. Individual Drinking Cup Co., 271 Fed. 241; Sparks-Withington Co. v. Jay, 270 Fed. 449; Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; Morgan Constr. Co. v. Donner Steel Co., 269 Fed. 389 [rev on other grounds 277 Fed. 221]; Merrell-Soule Co. v. Rico Milk Products Co., 268 Fed. 366; Cutler Hammer Co. v. Pawling, etc., Co., 267 Fed. 980; American Steel Foundries v. Damascus Brake Beam Co., 267 Fed. 574; St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49]; Roberts Cone Mfg. Co. v. Bruckman, 266 Fed. 986 [certiorari den 254 U. S. 649 mem, 41 SCt 63 mem, 65 L. ed. 457 mem]; Ohio Rake Co. v. Bucher, etc., Plow Co., 266 Fed. 891; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; A. J. Lindemann, etc., Co., Inc. v. J. Rose & Co., Inc., 264 Fed. 983; S. S. Stafford, Inc. v. Thaddeus Davids Ink Co., Inc., 264 Fed. 111; Concrete Appliances Co. v. Meinken, 262 Fed. 958; Beitman v. Strater, 262 Fed. 443; General Electric Co. v. Nitro-Tungsten Lamp Co., 261 Fed. 606 [aff 266 Fed. 994]; Consolidated Window Glass Co. v. Window Glass Mach. Co., 261 Fed. 362 [certiorari den 251 U. S. 558 mem, 40 SCt 179 mem, 64 L. ed. 413 mem]; Æolian Co. v. Schubert Piano Co., 261 Fed. 178; Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery Co., 260 Fed. 572; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289; Meurer Steel Barrel Co. v. Draper Mfg. Co., 260 Fed. 410; Merrill v. W. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; Williams v. Kaufmann, 259 Fed. 859, 170 CCA 659; Straub v. Campbell, 259 Fed. 570, 170 CCA 532; Hutchins Car Roofing Co. v. Standard R. Equipment Co., 259 Fed. 226, 170 CCA 294; Starch Bros. Co. v. Hinman, 259 Fed. 222, 170 CCA 290, 247 Fed. 346, 159 CCA 101; U. S. Gypsum Co. v. Bestwall Mfg. Co., 258 Fed. 647 [aff 270 Fed. 542]; Peck, etc., Co. v. Smith, 258 Fed. 40 [mod on other grounds 262 Fed. 415]; Edwards v. Dayton Mfg. Co., 257 Fed. 980, 169 CCA 130; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; Disc Grader, etc., Co. v. Austin-Western Road Mach. Co., 254 Fed. 430, 166 CCA 62; Union Special Mach. Co. v. Quaker City Flour Mills Co., 253 Fed. 557, 165 CCA 227; Liquid Carbonic Co. v. Gilchrist Co., 253 Fed. 54, 165 CCA 652; H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 500; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [rev on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Wilson, etc., Mfg. Co. v. Union Tool Co., 249 Fed. 729, 161 CCA 639 [certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem]; Simplex Window Co. v. Hauser Reversible Window Co., 248 Fed. 919, 161 CCA 37; Porterville Citrus Assoc. v. Stebler, 248 Fed. 916; Pittsburgh Iron, etc., Fdys. Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Lyon Non-Skid Co. v. Edward V. Hartford, Inc., 247 Fed. 524 [aff 250 Fed. 1021 mem, 162 CCA 164 mem]; Dunham v. Kelley-Koett Mfg. Co., 246 Fed. 845, 159 CCA 147; Bayley & Sons, Inc. v. Braunstein Bros. Co., 246 Fed. 314; Barber v. Reo Motor Car Sales Co., 245 Fed. 938; Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co., 245 Fed. 762 [aff 257 Fed. 314, 168 CCA 314]; Safety Car Heating, etc., Co. v. Gould Coupler Co., 245 Fed. 755; Philadelphia Stetson Hospital v. Snook-Roentgen Mfg. Co., 245 Fed. 654, 158 CCA 82 [aff 237 Fed. 204]; Foster v. T. L. Smith Co., 244 Fed. 946, 157 CCA 296; Munger v. Perlman Rim Corp., 244 Fed. 799 [mod on other grounds 257 Fed. 21 (certiorari den 257 U. S. 645 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)]; Wolf v. National Parlor Suit Co., 244 Fed. 470; Eclipse Mach. Co. v. Harley-Davidson Motor Co., 244 Fed. 463 [rev on other grounds 252 Fed. 805, 164 CCA 65 (certiorari den 262 U. S. 743 mem, 43 SCt 520 mem, 67 L. ed. 1210 mem)]; Stumpf v. A. Schreiber Brewing Co., 242 Fed. 72; Barber v. Otis Motor Sales Co., 240 Fed. 723, 153 CCA 521; American Ball Bearing Co. v. Finch, 239 Fed. 885, 153 CCA 13; Neill v. Kinney, 239 Fed. 309, 152 CCA 297; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; Mayer v. Mutschler, 237 Fed. 654 [rev on other grounds 248 Fed. 911, 161 CCA 29 (certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem)]; Corrugated Paper Patents Co. v. New York Paper Working Mach. Co., 237 Fed. 380; Toledo Plate, etc., Glass Co. v. Kawneer Mfg. Co., 237 Fed. 364, 130 CCA 378; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; United Electric Co. v. Creamery Package Mfg. Co., 236 Fed. 746; Union Special Mach. Co. v. Quaker City Flour Mills Co., 236 Fed. 246; Meccano, Ltd., v. Wagner, 234 Fed. 912 [reopening authorized in Dist. Ct. 235 Fed. 890, 149 CCA 202]; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418 [aff 243 Fed. 895, 156 CCA 407]; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132; Horace L. Winslow Co. v. National Boiler Washing Co., 226 Fed. 951; Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 CCA 105; Mead-Morrison Mfg. Co. v. Exeter Mach. Works, 225 Fed. 489, 140 CCA 531; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Stockland v. Russell Grader Mfg. Co., 222 Fed. 906, 138 CCA 386; Newton Washing Mach. Co. v. Grinnell Washing Mach. Co., 222 Fed. 512, 138 CCA 112; Otis El. Co. v. Interborough Rapid Transit Co., 222 Fed. 501, 138 CCA 97; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev on other grounds 244 U. S 294 mem, 37 SCt 506 mem, 61 L. ed. 1148 mem]; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Enterprise Mfg. Co. v. William Shakespeare, Jr., Co., 220 Fed. 304, 136 CCA 138; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Bliss v. Spangler, 217 Fed. 394, 133 CCA 210; Holton v. Pepper, 216 Fed. 368; Hohlfeld v. Patterson, 216 Fed. 183 [rev on other grounds 219 Fed. 207, 135 CCA 93]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; Hassam Pav. Co. v. Consolidated Contract Co., 215 Fed. 114 [aff 227 Fed. 436, 142 CCA 132]; Fitchburg Duck Mills v. Barrell, 214 Fed. 777, 131 CCA 189 [aff 207 Fed. 371, and reh den 216 Fed. 594, 132 CCA 598]; International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569; Read Mach. Co. v. Jaburg, 212 Fed. 951 [aff 218 Fed. 989 mem, 133 CCA 672 mem]; Seegar Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333]; Coal, etc., By-Products Co. v. Roessing-Ernst Co., 212 Fed. 434 [aff 219 Fed. 898, 135 CCA 562]; United Gas Impr. Co. v. Gas Mach. Co., 211 Fed. 672 [rev on other grounds 228 Fed. 684, 143 CCA 206]; Bucher, etc., Plow Co. v. International Harvester Co., 211 Fed. 473; Benjamin Menu Card Co. v. Rand, 210 Fed. 285; Ball v. Coker, 210 Fed. 278, 127 CCA 126; Grinnell Washing Mach. Co. v. Woodrow, 209 Fed. 621; Bush, etc., Piano Co. v. Becker, 209 Fed. 233, 126 CCA 112 [rev on other grounds 222 Fed. 902, 138 CCA 382]; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; Hagan v. Swindell, 204 Fed. 442, 122 CCA 628; Poole v. Isaac H. Blanchard Co., 204 Fed. 285, 122 CCA 470; Clark v. Doll, 202 Fed. 960; Grever v. U. S. Hoffman Co., 202 Fed. 923, 121 CCA 281; Oehring v. Gardam, 202 Fed. 753, 121 CCA 119; Edison Mfg. Co. v. Banks Electric, etc., Co., 202 Fed. 223, 120 CCA 623; Submarine Rock Breaking Co. v. Submarine Co., 201 Fed. 524, 119 CCA 618; Eggleston v. Milwaukee Heater Mfg. Co., 199 Fed. 147, 117 CCA 629; Burdett-Rowntree Mfg. Co. v. Standard Plunger El. Co., 196 Fed. 43 [aff 197 Fed. 743, 117 CCA 206]; Gould v. Cincinnati Shaper Co., 194 Fed. 680, 115 CCA 74; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 194 Fed. 430 [rev on other grounds 200 Fed. 144, 118 CCA 474]; Lavigne Mfg. Co. v. John F. McCanna Co., 194 Fed. 112, 114 CCA 190; National Mfg. Co. v. Sharon Hardware Mfg. Co., 192 Fed. 130; Moore Carving Mach. Co. v. Clemons Mach. Co., 192 Fed. 122 [rev on other grounds 198 Fed. 90, 117 CCA 276]; U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 191 Fed. 850 [aff 202 Fed. 915, 121 CCA 273]; U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 191 Fed. 846 [aff 202 Fed. 915, 121 CCA 273]; E. H. Freeman Electric Co. v. General Electric Co., 191 Fed. 168, 111 CCA 646; Boutell Mfg. Co. v. Hunt Mfg. Co., 185 Fed. 525; Warner Instrument Co. v. Stewart, etc., Mfg. Co., 185 Fed. 507, 107 CCA 607; Beryle v. San Francisco Cornice Co., 181 Fed. 692 [aff 195 Fed. 516, 115 CCA 426]; McDuffee v. Hestonville, etc., R. Co., 181 Fed. 503 [rev on other grounds 185 Fed. 798, 109 CCA 606 (certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem)]; Eagle Wagon Works v. Columbia Wagon Co., 181 Fed. 148 [aff 183 Fed. 771, 106 CCA 137]; Greenwald v. Weiss, 180 Fed. 474; Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831; Carlson Motor, etc., Co. v. Maxwell-Briscoe Motor Co., 178 Fed. 458 [aff 197 Fed. 309, 117 CCA 55]; Sheffield Car Co. v. Buda-Fdy., etc., Co., 177 Fed. 713 [aff 187 Fed. 847, 109 CCA 646]; John F. McCanna Co. v. Lavigne Mfg. Co., 177 Fed. 709 [aff 194 Fed. 112, 114 CCA 190]; Electric Vehicle Co. v. Duerr, 172 Fed. 923 [rev on other grounds 184 Fed. 893, 107 CCA 215]; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; Denning Wire, etc., Co. v. American Steel, etc., Co., 169 Fed. 793, 95 CCA 259; Naylor v. Alsop Process Co., 168 Fed. 911, 94 CCA 315, Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573; Edison Electric Light Co. v. Novelty Incandescent Lamp Co., 167 Fed. 977, 93 CCA 387 [certiorari den 215 U. S. 596 mem, 30 SCt 399 mem, 54 L. ed. 342 mem]; E. J. Manville Mach. Co. v. Excelsior Needle Co., 167 Fed. 538, 93 CCA 216; Cooper v. Otis Co., 166 Fed. 861, 92 CCA 608; Leona Garment Co. v. Jenks, 164 Fed. 188, 90 CCA 496; Cramer v. 1900 Washer Co., 163 Fed. 296 [aff 169 Fed. 629, 95 CCA 157]; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; St. Louis St. Flushing

ditional element into a recognized combination.[68] But some new and useful result must be produced which is due to the joint and coöperating action of all of the elements.[69] To accomplish a new and useful result within the meaning of this rule it is not necessary that a result before unknown should be brought about;[70] it is sufficient if an old result is accomplished in a new and more effective way.[71]

Mach. Co. v. American St. Flushing Mach. Co., 156 Fed. 574, 84 CCA 340; Blake, etc., Steam Pump Works v. Warren Steam Pump Co., 155 Fed. 285 [aff 163 Fed. 263, 91 CCA 19]; Louden Mach. Co. v. Janesville Hay Tool Co., 141 Fed. 975 [aff 148 Fed. 686, 78 CCA 548]; Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553; Spear v. Keystone Lantern Co., 131 Fed. 879 [rev on other grounds 136 Fed. 595, 69 CCA 369]; Perkins Electric Switch Mfg. Co. v. Buchanan, 129 Fed. 134 [aff 135 Fed. 90, 67 CCA 564]; L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co., 127 Fed. 698, 62 CCA 454; Brill v. North Jersey St. R. Co., 124 Fed. 778 [rev on other grounds 134 Fed. 580, 67 CCA 380]; Peters v. Union Biscuit Co., 120 Fed. 679 [rev on other grounds 125 Fed. 601, 60 CCA 337]; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 295; Moore v. Schaw, 118 Fed. 602; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 Fed. 136, 55 CCA 86 [certiorari den 187 U. S. 644 mem, 23 SCt 843 mem, 47 L. ed. 346 mem]; Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 116 Fed. 629; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 CCA 36; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Nelson v. A. D. Farmer, etc., Type-Founding Co., 95 Fed. 145, 37 CCA 32; American Graphophone Co. v. Leeds, 87 Fed. 873; Deere v. Rock Island Plow Co., 84 Fed. 171, 28 CCA 308; Muller v Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 CCA 357; Western Wheel-Scraper Co. v. Doinnin, 77 Fed. 194 [rev 86 Fed. 646]; American Soda-Fountain Co. v. Green, 75 Fed. 680 [rev 78 Fed. 119]; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203; Fisher v. American Pneumatic Tool Co., 71 Fed. 523, 18 CCA 235 [aff 69 Fed. 331]; U. S. Printing Co. v. American Playing-Card Co., 70 Fed. 50; Municipal Signal Co. v. Gamewell Fire-Alarm Tel. Co., 52 Fed. 459; Johnson v. Forty Second St., etc., R. Co., 33 Fed. 499; Niles Tool Co. v. Betts Mach. Co., 27 Fed. 301; McKesson v. Carnrick, 9 Fed. 44, 19 Blatchf. 158; Brickill v. New York, 7 Fed. 479, 18 Blatchf. 273; McMillan v. Rees, 1 Fed. 722; Ames v. Howard, 1 F. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Bailey Washing, etc., Mach. Co. v. Lincoln, 2 F. Cas. No. 750, 4 Fish. Pat. Cas. 379; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish Pat. Cas. 294; Gallahue v. Butterfield, 9 F. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203; Herring v. Nelson, 12 F. Cas. No. 6,424, 3 Bann. & A. 55, 14 Blatchf. 293 [rev on other grounds sub nom. Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601]; Many v. Sizer, 16 F. Cas. No. 9,056, 1 Fish. Pat. Cas. 17 [writ of error dism 16 How. (U. S.) 98, 14 L. ed. 861]; Pitts v. Whitman, 19 F. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609; Roemer v. Logowitz, 20 F. Cas. No. 11,996; Russell, etc., Mfg. Co. v. Mallory, 21 F. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Woodward v. Dinsmore, 30 F. Cas. No. 18,003, 4 Fish. Pat. Cas. 163.

D. C.—Clark's Application, 57 App. 103, 17 F. (2d) 862; Foltz's Application, 57 App. 92, 17 F. (2d) 680; McClaire's Application, 57 App. 11, 16 F. (2d) 351; In re Stevenson, 56 App. 143, 10 F. (2d) 1008; Kolinski v. Thompson Voting Mach. Co., 55 App. 378, 6 F. (2d) 681; Drew's Application, 55 App. 291, 4 F. (2d) 958; Rosenberg's Application, 53 App. 375, 290 Fed. 350; In re Prescott, 51 App. 281, 278 Fed. 590; In re Kusterer, 51 App. 250, 278 Fed. 333; In re Lower, 50 App. 159, 269 Fed. 675; In re Sorum, 49 App. 360, 265 Fed. 1000; In re Buchanan, 46 App. 517; In re Handschuck, 46 App. 155; In re Willard, 45 App. 549; In re Heath, 45 App. 370; Clulee v. Adt, 44 App. 300; In re Eastwood, 33 App. 291; In re Thomson, 26 App. 419.

Eng.—Clark v. Adie, 2 App. Cas. 315 [aff 23 Wkly. Rep. 898]; Harrison v. Anderson Fdy. Co., 1 App. Cas. 574; Murray v. Clayton, L. R. 7 Ch. 570; Adie v. Clark, 3 Ch. D. 134; Daw v. Eley, L. R. 3 Eq. 496; Newton v. Grand Junction R. Co., 5 Exch. 331 note, 155 Reprint 144; Lukie v. Robson, 2 Jur. 201; In re Martin, 3 Wkly. Rep. 433.

Can.—Dansereau v. Bellemare, 16 Can. S. C. 180.

Ont.—Canadian Steam Boiler Equipment Co. v. MacGilchrist, 16 OntWN 37; Hunter v. Carrick, 28 Grant Ch. 489 [rev on other grounds 10 Ont. A. 449 (aff 11 Can. S. C. 300)]; Yates v. Great Western R. Co., 24 Grant Ch. 495.

"Invention of a combination does not lie in gathering up the elements that are employed, but consists in first conceiving that a new and desirable result may be attained by bringing about a relationship of elements which no one has before perceived and then going forth to find the things that may be utilized in the new required relationship." Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 273, 138 CCA 23 [rev on other grounds 244 U. S. 294 mem, 37 SCt 506 mem, 61 L. ed. 1148 mem].

68. Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797]; Bake-Rite Mfg. Co. v. Tomlinson, 16 F. (2d) 556; William H. Lutton Co. v. Lord, etc., Co., 16 F. (2d) 490 [aff 19 F. (2d) 1023 mem]; Star Can Opener v. Owen Dyneto Co., 16 F. (2d) 353; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; Taggart Baking Co. v. Green, 257 Fed. 87, 168 CCA 299; Westinghouse Mach. Co. v. C. & G. Cooper Co., 245 Fed. 463, 157 CCA 625, G. W. J. Murphy Co. v. Metal Stamping Co., 214 Fed. 382; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; Buck v. Hermance, 4 F. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. R. 251; Frink v. Petry, 9 F. Cas. No. 5,128, 1 Bann. & A. 1, 11 Blatchf. 422; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433; In re Coffield, 50 App. (D. C.) 259, 270 Fed. 695.

69. Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 31 L. ed. 1059; Kil-Nock Co. v. Chicago Plating Co., 10 F. (2d) 536; Gerrard v. Cary, 9 F. (2d) 949 [aff 9 F. (2d) 957]; Scherzer Rolling Lift Bridge Co. v. Chicago, 2 F. (2d) 601 [aff 11 F. (2d) 605]; Coffield v. Sunny Line Appliance, 297 Fed. 609; Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 284 Fed. 193 [certiorari den 261 U. S. 613 mem, 43 SCt 359 mem, 67 L. ed. 827 mem]; Gilchrist v. F. B. Mallory Co., 281 Fed. 350; Muser v. Bell, 278 Fed. 904; National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72 [mod 222 Fed. 918]; Becker v. Miller Pasteurizing Mach. Co., 240 Fed. 420, 153 CCA 346; Mitchell v. Connellsville Cent. Coke Co., 231 Fed. 131, 145 CCA 319; Star Hame Mfg. Co. v. U. S. Hame Co., 227 Fed. 876, 142 CCA 400; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132; Stuber v. Central Brass, etc., Co., 224 Fed. 712, 140 CCA 252; Knight v. Rieger, 212 Fed. 935, 129 CCA 455; Borland v. Northern Trust Safe Deposit Co., 212 Fed. 178 [aff 228 Fed. 1019 mem, 142 CCA 665 mem]; Turner v. Moore, 211 Fed. 466, 128 CCA 138; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 116 CCA 322; Anton v. Grier Bros. Co., 185 Fed. 796, 108 CCA 173; Warner Instrument Co. v. Stewart, etc., Mfg. Co., 185 Fed. 507, 107 CCA 607; Fellows v. Borden's Condensed Milk Co., 180 Fed. 421 [aff 187 Fed. 1005, 109 CCA 535]; Yost Electric Mfg. Co. v. Perkins Electric Switch Mfg. Co., 179 Fed. 511, 103 CCA 116; Safety Car Heating, etc., Co. v. Consolidated Car Heating Co., 174 Fed. 658, 98 CCA 412; Gaines v. Alabama Cons. Coal, etc., Co., 173 Fed. 303; West Coast Safety Faucet Co. v. Jackson Brewing Co., 117 Fed. 295, 54 CCA 533; Goss Printing-Press Co. v. Scott, 103 Fed. 650 [rev on other grounds 108 Fed. 253, 47 CCA 302 (certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem)]; Hammer's Application, 52 App. (D. C.) 275, 285 Fed. 1009; In re Shollenberger, 51 App. (D. C.) 332, 279 Fed. 314; In re Minor, 45 App. (D. C.) 555; In re Faber, 31 App. (D. C.) 531; Durable Electric Appliance Co., Ltd. v. Renfrew Electric Products, Ltd., 59 Ont. L. 527, [1926] 4 DomLR 1004.

"To sustain a patent on a combination of old devices it is well settled that a new result must be obtained which is due to the joint and coöperating action of all the old elements." Brinkerhoff v. Aloe, 146 U. S. 515, 516, 13 SCt 221, 36 L. ed. 1068 [quot West Coast Safety Faucet Co. v. Jackson Brewing Co., 117 Fed. 295, 298, 54 CCA 533].

Mere aggregation and combination involving invention distinguished see infra § 88.

70. Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646; Beryle v. San Francisco Cornice Co., 181 Fed. 692 [aff 195 Fed. 516, 115 CCA 426].

71. Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196 [aff 231 Fed. 988, 146 CCA 184]; Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885; Morgan Constr. Co. v. Wellman-Seaver-Morgan Co., 18 F. (2d) 395; Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Household Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838]; Babcock, etc., Co. v. Springfield Boiler Co., 16 F. (2d) 964 [certiorari den 275 U. S. 528 mem, 48 SCt 21 mem, 72 L. ed. 408 mem]; Gustav J. Gruendler Mfg. Co. v. Harry L. Hussman Refrigerator, etc., Co., 16 F. (2d) 571; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Zip Mfg. Co. v. Pusch, 2 F. (2d) 828; D. J. Murray Mfg. Co. v. Sumner Iron Works, 300 Fed. 911 [aff 296 Fed. 491]; Luten v. Kansas City Bridge Co., 285 Fed. 840 [rev 272 Fed. 533]; Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49]; Juengst v. Hill Pub. Co., 267 Fed. 435 [aff 267 Fed. 428]; Ohio Rake Co. v. Bucher, etc., Plow Co., 266 Fed. 891; Meurer Steel Barrel Co. v. Draper Mfg. Co., 260 Fed. 410; Disc Grader, etc., Co. v. Austin-Western Road Mach. Co., 254 Fed. 430, 166 CCA 62; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646; Alvey-Ferguson Co. v. Pe-

Whether a combination amounts to invention depends on whether or not it was an obvious one for attaining the advantage proposed, and one which would occur to any person skilled in the art to which it relates.[72] If mechanical skill is adequate to make the selection of elements from methods or devices in the prior art and their union or combination in a new method or device, there is, of course, no invention.[73] No invention is involved in combining known elements or their mechanical equivalents in substantially the same way as in a prior method or device to produce substantially the same

ter Schoenhofen Brewing Co., 245 Fed. 762 [aff 257 Fed. 314, 168 CCA 314]; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418 [aff 243 Fed. 895, 156 CCA 407]; Stuber v. Central Brass, etc., Co., 224 Fed. 712, 140 CCA 252; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; G. W. J. Murphy Co. v. Metal Stamping Co., 214 Fed. 382; Borland v. Northern Trust Safe Deposit Co., 212 Fed. 178 [aff 228 Fed. 1019 mem, 142 CCA 665 mem]; Pelton Water Wheel Co. v. Doble, 190 Fed. 760, 111 CCA 488; Warner Instrument Co. v. Stewart, etc., Mfg. Co., 185 Fed. 507, 107 CCA 607; Beryle v. San Francisco Cornice Co., 181 Fed. 692 [aff 195 Fed. 516, 115 CCA 426]; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; St. Louis St. Flushing Mach. Co. v. American St. Flushing Mach. Co., 156 Fed. 574, 84 CCA 340; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544.

"It is sufficient if an old result be produced in a more 'facile, economical, or efficient way.'" Willard v. Union Tool Co., 253 Fed. 48, 54, 165 CCA 646.

72. Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Thomson Spot Welder Co. v. Ford Motor Co., 281 Fed. 680 [certiorari den 260 U. S. 718 mem, 43 SCt 96 mem, 67 L. ed. 479 mem, and aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098]; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Concrete Appliances Co. v. Meinken, 262 Fed. 958; Corrugated Paper Patents Co. v. New York Paper Working Mach. Co., 237 Fed. 380; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev on other grounds 244 U. S. 294 mem, 37 SCt 506 mem, 61 L. ed. 1148 mem]; Rapp v. Central Fire-Proof Door, etc., Co., 158 Fed. 440 [aff 166 Fed. 430, 92 CCA 182]; Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553; L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co., 127 Fed. 698, 62 CCA 454; Buck v. Hermance, 4 F. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. R. 251; Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866].

"A mere aggregation of old and well-known devices may or may not be patentable, depending upon the circumstances of the particular case. If the combination claimed is an obvious one for attaining the advantages proposed, and one which would occur to any mechanic skilled in the art, it would not be patentable; and, if otherwise, it may be." Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424, 434.

"Whether a combination of several elements requires invention is the commonest issue in patent causes, and depends upon the degree of originality which the court chooses to set up to protect the public against the monopolization of what ordinary artisans with ordinary incentives would have accomplished anyway." Corrugated Paper Patents Co. v. New York Paper Working Mach. Co., 237 Fed. 380, 394.

[a] **The true test** is not whether an ordinary mechanic can make the combination, if it is suggested, but whether he would make the combination without suggestion, by means of his ordinary knowledge. Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866].

73. Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Florsheim v. Schilling, 137 U. S. 64, 11 SCt 20, 34 L. ed. 574; Barkis v. California Almond Growers Exch., 17 F. (2d) 327; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Great Western Mfg. Co. v. Lowe, 13 F. (2d) 880; Cartridge Mach. Corp. v. National Collapsible Tube Co., 13 F. (2d) 859; Hug v. Lakewood Engineering Co., 7 F. (2d) 98 [aff 291 Fed. 892]; Cutler Hammer Mfg. Co. v. Beaver Mach., etc., Co., 5 F. (2d) 457; Fezzey v. Bemis Bros. Bag Co., 1 F. (2d) 116; E. Frederics, Inc. v. Eugene, Ltd., 298 Fed. 633 [rev on other grounds 3 F. (2d) 543]; Ball, etc., Bearing Co. v. F. C. Sanford Mfg. Co., 291 Fed. 442 [rev on other grounds 297 Fed. 163]; Central Brass Mfg. Co. v. Sterling Brass Co., 285 Fed. 135; Thomson Spot Welder Co. v. Ford Motor Co., 281 Fed. 680 [aff 268 Fed. 836, certiorari granted 260 U. S. 718 mem, 43 SCt 96 mem, 67 L. ed. 479 mem, and aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098]; Muser v. Bell, 278 Fed. 904; Arkell Safety Bag Co. v. Safepack Mills, 272 Fed. 1; Kauffman v. Sodemann Heat, etc., Co., 267 Fed. 435 [rev on other grounds 275 Fed. 593]; Kohn v. Eimer, 265 Fed. 900; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015 mem]; Rosenwasser Bros., Inc. v. B. E. Mfg. Co., 264 Fed. 114; Concrete Appliances Co. v. Meinken, 262 Fed. 958; Nestle Patent Holding Co. v. E. Frederics, Inc., 261 Fed. 780; Edwards v. Dayton Mfg. Co., 257 Fed. 980, 169 CCA 130; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; Luten v. Marsh, 254 Fed. 701; Windsor v. Mercier, 253 Fed. 448, 165 CCA 190; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Motion Picture Patents Co. v. Calehuff Supply Co., 251 Fed. 598, 163 CCA 592 [aff 248 Fed. 724]; Turner v. Lauter Piano Co., 248 Fed. 930, 161 CCA 48 [aff 236 Fed. 252]; Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304, 166 CCA 44]; Joseph Lay Co. v. American Brush, etc., Co., 248 Fed. 513; Cutler Mail Chute Co. v. American Mailing Device Corp., 247 Fed. 508, 160 CCA 18; Le Roy v. Nicholas Power Co., 244 Fed. 955; Universal Draft Gear Attachment Co. v. Buckeye Steel Castings Co., 244 Fed. 174, 156 CCA 602; Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 Fed. 521, 152 CCA 399; Union Special Mach. Co. v. Quaker City Flour Mills Co., 236 Fed. 246; Elite Mfg. Co. v. Ashland Mfg. Co., 235 Fed. 893, 149 CCA 205; Herzog v. Keller, 234 Fed. 85, 148 CCA 101; Ft. Pitt Supply Co. v. Ireland, etc., Mfg. Co., 232 Fed. 871, 147 CCA 65; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; Gear v. Fairmount Electric, etc., Co., 225 Fed. 61 [rev on other grounds 231 Fed. 728, 146 CCA 12]; Adrian Wire Fence Co. v. United Fence Co., 223 Fed. 342, 138 CCA 604; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev 193 Fed. 418, and rev on other grounds 244 U. S. 294 mem, 37 SCt 506 mem, 61 L. ed. 1148 mem]; William B. Scaife, etc., Co. v. Falls City Woolen Mills, 194 Fed. 139 [rev on other grounds 209 Fed. 210, 126 CCA 304]; Redington v. Office Equipment Co., 189 Fed. 635 [aff 200 Fed. 57, 118 CCA 285]; Fellows v. Borden's Condensed Milk Co., 180 Fed. 421 [aff 187 Fed. 1005, 109 CCA 535]; Lewis Constr. Co. v. Semple, 177 Fed. 407, 101 CCA 411; American Laundry Mach. Mfg. Co. v. Troy Laundry Mach. Co., 171 Fed. 870 [aff 177 Fed. 1001 mem, 100 CCA 513 mem]; Duner Co. v. Grand Rapids R. Co., 171 Fed. 863, 96 CCA 531; Jacobs Mfg. Co. v. T. R Almond Mfg. Co., 169 Fed. 134 [aff 177 Fed. 935, 101 CCA 215]; Rapp v. Central Fire-Proof Door, etc., Co., 158 Fed. 440 [aff 166 Fed. 430, 92 CCA 182]; L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co., 127 Fed. 698, 62 CCA 454; J. L. Mott Iron Works v. Hoffmann, etc., Mfg. Co., 110 Fed. 772 [aff 120 Fed. 1019, 56 CCA 151]; Goss Printing-Press Co. v. Scott, 103 Fed. 650 [rev 108 Fed. 253, 47 CCA 302 (certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem)]; Bard's Application, 57 App. (D. C.) 147, 18 F. (2d) 189; In re Vissering, 57 App. (D. C.) 46, 16 F. (2d) 542; Dayton's Application, 53 App. (D. C.) 353, 290 Fed. 328; Ruths' Application, 53 App. (D. C.) 64, 288 Fed. 270; In re Lower, 49 App. (D. C.) 226, 263 Fed. 478; In re Minor, 45 App. (D. C.) 555; Re Pein, 41 App. (D. C.) 586; In re Groves, 41 App. (D. C.) 316; In re French, 39 App. (D. C.) 413; In re Luten, 37 App. (D. C.) 379; In re Mason, 31 App. (D. C.) 539; In re Faber, 31 App. (D. C.) 531; In re Volkmann, 28 App. (D. C.) 441; In re Hawley, 26 App. (D. C.) 324; In re Hill, 26 App. (D. C.) 318; Bergeon v. De Kermor Electric Heat Co., Ltd., [1927] Can. Exch. 181, [1927] 3 Dom LR 99; Durable Electric Appliance Co., Ltd. v. Renfrew Electric Products, Ltd., 59 Ont. L. 527, [1926] 4 DomLR 1004.

[a] **Illustrations.**—(1) Putting an old form of electric switch into an old form of casing is not invention. Cutler Hammer Mfg. Co. v. Beaver Mach., etc., Co., 5 F. (2d) 457. (2) Claims for improvements in dispensing and measuring pumps, which broadly covered the operation of such pumps either by compressed air or manually, the manual operation being intended for use only in emergencies, did not disclose a patentable novelty, in view of the prior art, covering pumps which could be operated either by power or manually. Dayton's Application, 53 App. (D. C.) 353, 290 Fed. 328. (3) No patentable novelty or improvement over the prior art is shown by a claim reciting a road pavement comprising in combination a described concrete base and a semielastic, impervious, carpet coat, wearing surface of substantially pure bitumen, in direct and permanent physical union with the concrete, and having superficially applied inert granular material imbedded therein. In re Groves, 41 App. (D. C.) 316. (4) Putting two well-known devices together, such as combining an ordinary tool or blade in common use in caulking the seams of ships with oakum, with an automatically operating pneumatic hammer, which is adapted to be controlled and adjusted by hand is not invention. In re Mason, 31 App. (D. C.) 539. (5) There is no invention in adding, in a stemsetting timepiece, a setting mechanism, such as is shown in one patent, to the clock mechanism as shown in another patent. In re Volkmann, 28 App. (D. C.) 441.

result,[74] or in the mere extension of the use of an old combination, where no new result is produced and no new method is found for producing the old result.[75] Nor is it invention to combine old devices into a new article without producing a new mode of operation.[76] The test of the presence of invention in a combination is sometimes said to be whether a new result is accomplished.[77] It has been asserted, however, that this is often not a helpful rule because its application involves definition of the phrase "new result," and this, it is said, opens the original difficulty.[78] Within a narrow definition, every new combination of elements gets a new result;[79] but this is not the sense in which the phrase is rightfully used as indicative of invention.[80] There must be a new result involving the exercise of the creative faculties.[81] As in other cases,[82] the fact that a combination produces a beneficial result never before attained may be evidence of invention,[83] but the fact of invention is not necessarily established by the fact that the combination obtains a better result.[84]

[§ 87] **b. Novelty of Elements Immaterial.** Where there is no direct anticipation,[85] invention is not negatived by the mere fact that some[86] or all[87] of the elements of the combination are old.

"Invention" and "mechanical skill" distinguished see supra § 73.

74. Concrete Appliances Co. v. Gomery, 269 U. S. 177, 46 SCt 42, 70 L. ed. 222; S. & S. Paper Products Co. v. Oswego Falls Corp., 22 F. (2d) 617; Reflectolyte Co. v. Luminous Unit Co., 20 F. (2d) 607; Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16 [certiorari den 275 U. S. 529 mem, 48 SCt 21 mem, 72 L. ed. 409 mem]; E. Fredericks, Inc. v. Eugene, 3 F. (2d) 543 [rev 298 Fed. 633]; Hug v. Lakewood Engineering Co., 291 Fed. 892 [aff 7 F. (2d) 98]; Excelsior Steel Furnace Co. v. Williamson Heater Co., 286 Fed. 131; Troy Wagon Works Co. v. Ohio Trailer Co., 274 Fed. 612; Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; Edwards v. Dayton Mfg. Co., 257 Fed. 980, 169 CCA 130; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; General Manifold, etc., Co. v. Simple Account Sales Book Co., 246 Fed. 125, 158 CCA 351; Elite Mfg. Co. v. Ashland Mfg. Co., 235 Fed. 893, 149 CCA 205; Archer v. Imperial Mach. Co., 202 Fed. 962 [aff 207 Fed. 81, 124 CCA 638 (rearg den 209 Fed. 206, 126 CCA 300, and certiorari den 231 U. S. 754 mem, 34 SCt 323 mem, 58 L. ed. 467 mem)]; Burnham v. Union Mfg. Co., 110 Fed. 765, 49 CCA 163; Overweight Counterbalance El. Co. v. Henry Vogt Mach. Co., 102 Fed. 957, 43 CCA 80; In re Kusterer, 51 App. (D. C.) 250, 278 Fed. 333; Moore's Application, 49 App (D. C.) 312, 265 Fed. 462; In re Taylor, 40 App. (D. C.) 279; In re Bliss, 39 App. (D. C.) 453; In re Hawley, 26 App. (D. C.) 324; Durable Electric Appliance Co., Ltd. v. Renfrew Electric Products, Ltd., 59 Ont. L. 527, [1926] 4 DomLR 1004.

[a] **Illustrations.**—(1) An electropneumatic regulating system, differing from an old one only in the substitution of one well-known form of motion for another, presents no novelty; and one who merely improves an existing regulating system by bodily substituting for the motor therein that of another system, which is also old, is not entitled to a combination patent, as it involves no invention to make such substitution. In re Bliss, 39 App. (D. C.) 453. (2) No invention warranting a combination patent is involved in the substitution, for a tape used by applicant in his prior patent for an improvement, in the sweat band of hats, of an elastic cord utilized by another patentee to perform a similar function in a different construction. In re Taylor, 40 App. (D. C.) 279. (3) Transferring wheels, crank axle, tongue lever attachments, and retaining latch from other road-making machines to a particular subgrader, when used for precisely the same purpose and accomplishing substantially the same result, did not involve invention. Hug v. Lakewood Engineering Co., 291 Fed. 892 [aff 7 F. (2d) 98].

75. H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; Voightmann v. Weis, etc., Cornice Co., 148 Fed. 848, 78 CCA 538 [aff 133 Fed. 298]; Schweichler v. Levinson, 147 Fed. 704, 78 CCA 92.

76. Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791; E. E. Johnson Co. v. Grinnell Washing Mach. Co., 231 Fed. 988, 146 CCA 184 [certiorari den 242 U. S. 627 mem, 37 SCt 13 mem, 61 L. ed. 535 mem, and aff 247 U. S. 426 mem, 38 SCt 547 mem, 62 L. ed. 1196 mem].

77. Muser v. Bell, 278 Fed. 904, 910. "To constitute invention, the inquiry is, has there been produced a new and useful result?" Muser v. Bell, supra.

78. Concrete Appliances Co. v. Meinken, 262 Fed. 958.

79. Concrete Appliances Co. v. Meinken, supra.

80. Concrete Appliances Co. v. Meinken, supra.

81. Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Concrete Appliances Co. v. Meinken, 262 Fed. 958; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 269, 138 CCA 23 [rev 193 Fed. 418, and rev on other grounds 244 U. S. 294 mem, 37 SCt 506 mem, 61 L. ed. 1148 mem]; Fellows v. Borden's Condensed Milk Co., 180 Fed. 421 [aff 187 Fed. 1005, 109 CCA 535]; In re Faber, 31 App. (D. C.) 531.

"The real test is whether the mental concepts that are distinctly disclosed in and by the laws of the prior nonanticipatory patents and publications left no room for a new and independent mental conception in bringing into working form the new machine or product or process under investigation." Railroad Supply Co. v. Hart Steel Co., supra.

82. See infra § 91.

83. Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Wensel v. Gold Hill Hardware Mfg. Co., 21 F. (2d) 974; Hazeltine Corp. v. Grebe, 21 F. (2d) 643; Emery v. George H. Bowman Co., 11 F. (2d) 525; Abrahams v. Universal Wire Co., 10 F. (2d) 838; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [aff 274 Fed. 937, and certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem]; Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery Co., 260 Fed. 572; Lyon Non-Skid Co. v. Edward V. Hartford, Inc., 247 Fed. 524 [aff 250 Fed. 1021 mem, 162 CCA 164 mem]; Neill v. Kinney, 239 Fed. 309, 152 CCA 297; Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 CCA 105; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114; De la Vergne Refrigerating Mach. Co. v. Featherstone, 67 Fed. 937.

84. Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Westinghouse Electric, etc., Co. v. Pittsburgh Transformer Co., 10 F. (2d) 593; Adrian Wire Fence Co. v. United Fence Co., 223 Fed. 342, 138 CCA 604.

85. See supra § 26.

86. Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Brinkman v. Laurette Mfg. Co., 21 F. (2d) 607; Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; Carnes Artificial Limb Co. v. Dilworth Arm Co., 273 Fed. 838; Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery Co., 260 Fed. 572; In re Willard, 45 App. (D. C.) 549.

87. U. S.—Temco Electric Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 48 SCt 170, 72 L. ed. 298; New York Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Hailes v. Van Wormer, 20 Wall. 353, 22 L. ed. 241; N. O. Nelson Mfg. Co. v. F. E. Myers, etc., Co., 25 F. (2d) 659, 29 F. (2d) 968; U. S. Industrial Chemical Co. v. Theroz, 25 F. (2d) 387 [certiorari den 49 SCt 12 mem]; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Finley v. MacDougald Constr. Co., 23 F. (2d) 204; Detroit v. Kahn, 22 F. (2d) 613; Craft-Stone, Inc. v. Zenitherm Co., Inc., 22 F. (2d) 401; Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Hazeltine Corp. v. Grebe, 21 F. (2d) 643; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; Lektophone Corp. v. Western Electric Co., 20 F. (2d) 150; Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939; Galvin Electric Mfg. Co. v. Emerson Mfg. Co., 19 F. (2d) 885; Judelson v. Hill Laundry Equipment Co., 18 F. (2d) 594 [aff 22 F. (2d) 262]; Morgan Constr. Co. v. Wellman-Seaver-Morgan Co., 18 F. (2d) 395; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Grand Rapids Brass Co. v. Winters, 15 F. (2d) 129; Mohr v. Alliance Securities Co., 14 F. (2d) 799; Alliance Securities Co. v. Mohr, 14 F. (2d) 799]; Heim Grinder Co. v. Fafnir Bearing Co., 13 F. (2d) 408; Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; Johnson Automobile Lock Co. v. Noser Instant Auto Lock Co., 9 F. (2d) 265; Meurer Steel Barrel Co. v. Boyle Mfg. Co., 9 F. (2d) 92; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Turner v. Spinner, 6 F. (2d) 172; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717; Permutit Co. v. Harvey Laundry Co., 274 Fed. 937 [aff 279 Fed. 713 (certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem)]; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Sparks-Withington Co. v. Jay, 270 Fed. 449 [aff 258 Fed. 45]; American Steel Foundries v. Damascus Brake Beam Co., 267 Fed. 574; St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49]; Ohio Rake Co. v. Bucher, etc., Plow Co., 266 Fed. 891; Zidell v. Dexter, 262 Fed. 145; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289; Edwards v. Dayton Mfg. Co., 257 Fed. 980, 169 CCA 130; H. Ward Leonard, Inc. v. Maxwell

The question is whether they have been newly combined so as to effect new and useful results.[88] On the other hand, novelty in one or more of the separate elements does not justify a claim to the collection of those elements unless there is coaction between them producing a new result.[89] A combination is distinct from its separate elements.[90] The separate elements, if new, may be the subject of a patent,[91] or may be covered by claims in the same patent with the combination.[92]

[§ 88] **20. Aggregation.** Aggregation is the mere bringing together of separate elements without changing the functions performed by them, or producing any result other than the added result of the separate operation of the elements.[93] In an aggregation there is a mere adding together of separate contributions, each operating independently of the other.[94] If the various elements coact with each other in a new and unitary organization so as to produce a different result from that produced by their separate operation, a combination results.[95] But if they do not so coact there is only aggrega-

Motor Sales Corp., 252 Fed. 584, 164 CCA 500; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [rev on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654, and certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; Bayley & Sons, Inc. v. Braunstein Bros. Co., 246 Fed. 314; Barber v. Reo Motor Car Sales Co., 245 Fed. 938; Chain Belt Co. v. New York Scaffolding Co., 245 Fed. 747, 158 CCA 149 [rev on other grounds 254 U. S. 32, 41 SCt 21, 65 L. ed. 116]; Foster v. T. L. Smith Co., 244 Fed. 946, 157 CCA 296; Stumpf v. A. Schreiber Brewing Co., 242 Fed. 72; Barber v. Otis Motor Sales Co., 240 Fed. 723, 153 CCA 521; Mayer v. Mutschler, 237 Fed. 654 [rev on other grounds 248 Fed. 911, 161 CCA 29 (certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem)]; Toledo Plate, etc., Glass Co. v. Kawneer Mfg. Co., 237 Fed. 364, 150 CCA 378 [aff 232 Fed. 362]; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418 [aff 243 Fed. 895, 156 CCA 407]; Smith v. Beckford, etc., Belting Co., 224 Fed. 962, 140 CCA 454; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev on other grounds 241 Fed. 72]; Benthall Mach. Co. v. Virginia-Carolina Peanut Picker Co., 222 Fed. 918 [rev on other grounds 241 Fed. 89, 154 CCA 89]; Benthall Mach. Co. v. Debnam, 222 Fed. 918 [rev on other grounds 241 Fed. 103, 154 CCA 103]; Newton Washing Mach. Co. v. Grinnell Washing Mach. Co., 222 Fed. 512, 138 CCA 112; Grelle v. Eugene, 221 Fed. 68, 137 CCA 18 [certiorari den 23 U. S. 647 mem, 36 SCt 219 mem, 60 L. ed. 484 mem]; G. W. J. Murphy Co. v. Metal Stamping Co., 214 Fed. 382; Bucher, etc., Plow Co. v. International Harvester Co., 211 Fed. 473; Benjamin Menu Card Co. v. Rand, 210 Fed. 285; Grinnell Washing Mach. Co. v. Woodrow, 209 Fed. 621; Bush, etc., Piano Co. v. Becker, 209 Fed. 233 [rev on other grounds 222 Fed. 902, 138 CCA 382]; Oshkosh Grass Matting Co. v. Waite Grass Carpet Co., 207 Fed. 937, 125 CCA 385; Ferro Concrete Constr. Co. v. Concrete Steel Co., 206 Fed. 666, 124 CCA 466; Freeman Electric Co. v. Johns-Pratt Co., 204 Fed. 288, 122 CCA 512; Weber Electric Co. v. National Gas, etc., Fixture Co., 204 Fed. 79 [aff 212 Fed. 948, 129 CCA 468]; Edison Mfg. Co. v. Banks Electric, etc., Co., 202 Fed. 223, 120 CCA 623; Johns-Pratt Co. v. E. H. Freeman Electric Co., 201 Fed. 356 [aff 204 Fed. 288, 122 CCA 512]; Colman v. Byrd Mfg. Co., 200 Fed. 59 [aff 205 Fed. 904, 124 CCA 248]; Burdett-Rowntree Mfg. Co. v. Standard Plunger El. Co., 196 Fed. 43 [aff 197 Fed. 743, 117 CCA 206], Graff v. Webster, 195 Fed. 522, 115 CCA 432; National Mfg. Co. v. Sharon Hardware Mfg. Co., 192 Fed. 130; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; Ludington Cigarette Mach. Co. v. Anargyros, 188 Fed. 318, 110 CCA 296; Van Auken v. Monash-Younker Co., 187 Fed. 141 [aff 199 Fed. 123, 117 CCA 605 (certiorari den 226 U. S. 610 mem, 33 SCt 217 mem, 57 L. ed. 381 mem)]; Automatic Switch Co. v. J. L. Schureman Co., 183 Fed. 776; Tyden v. Rosenbaum, 183 Fed. 593; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626; Beryle v. San Francisco Cornice Co., 181 Fed. 692 [aff 195 Fed. 516, 115 CCA 426]; Eagle Wagon Works v. Columbia Wagon Co., 181 Fed. 148 [aff 183 Fed. 771, 106 CCA 137]; Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831; Electric Vehicle Co. v. Duerr, 172 Fed. 923 [rev on other grounds 184 Fed. 893, 107 CCA 215]; Hall Signal Co. v. General R. Signal Co., 168 Fed. 62 [aff 169 Fed. 290, 94 CCA 580]; Louden Mach. Co. v. Janesville Hay Tool Co., 141 Fed. 975 [aff 148 Fed. 686, 78 CCA 548]; Eck v. Kutz, 132 Fed. 758; Lowrie v. H. A. Meldrum Co., 124 Fed. 761 [rev on other grounds 130 Fed. 886, 65 CCA 194]; Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co., 116 Fed. 974; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 CCA 369; American Tobacco Co. v. Streat, 83 Fed. 700, 28 CCA 18; U. S. Printing Co. v. American Playing-Card Co., 70 Fed. 50; Buck v. Hermance, 4 F. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. R. 251; Ryan v. Goodwin, 21 F. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519; Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866].

D. C.—Rosenberg's Application, 53 App. 375, 290 Fed. 350; In re Buchanan, 46 App. 517; In re Willard, 45 App. 549; In re Heath, 45 App. 370; In re Eastwood, 33 App. 291; Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co., 12 App. 201 [rev on other grounds 174 U. S. 492, 19 SCt 641, 43 L. ed. 1058].

Eng.—Spencer v. Jack, 3 De G. J. & S. 346, 68 EngCh 262, 46 Reprint 669; Lister v. Leather, 8 E. & B. 1004, 92 ECL 1004, 120 Reprint 373; Bovill v. Moore, 2 Marsh. 211, 4 ECL 481.

Can.—Smith v. Goldie, 9 Can. S. C. 46; Griffin v. Toronto R. Co., 7 Can. Exch. 411; Mitchell v. Nancock Inspirator Co., 2 Can. Exch. 539; Toronto Tel. Mfg. Co. v. Bell Tel. Co., 2 Can. Exch. 495.

Ont.—Yates v. Great Western R. Co., 24 Grant. Ch. 495; Patric v. Sylvester, 23 Grant Ch. 573; Emery v. Iredale, 11 U. C. C. P. 106.

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made." Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 368, 22 L. ed. 241.

[a] **Illustration.**—While the skull-cracking or metal-breaking art and the art of transporting finished iron products are somewhat analogous, the combination of a skull or metal-cracking weight with a lifting magnet and a traveling crane is new, and the inventor of such device is entitled to a patent, where it is of great practical utility, and, although there are patents from ten to twenty-three years old covering the use of magnets for lifting articles and lifting cranes for metal-breaking devices, no one ever combined the two. In re Eastwood, 33 App. (D. C.) 291.

[b] **Process.**—Invention consisting of a connected series of steps or operations is not negatived by the fact that the various steps or operations considered separately are old. U. S. Industrial Chemical Co. v. Therox Co., 25 F. (2d) 387 [certiorari den 49 SCt 12 mem]; Craft-Stone, Inc. v. Zenitherm Co., Inc., 22 F. (2d) 401; Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [rev on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)].

88. Eck v. Kutz, 132 Fed. 758.

89. Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Batten v. Clayton, 2 F. Cas. No. 1,105; In re McNeill, 20 App. (D. C.) 294.

90. Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 318, 29 SCt 495, 53 L. ed. 805.

"A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But whether new or old, the combination is a means—an invention—distinct from them." Leeds, etc., Co. v. Victor Talking Mach. Co., supra.

91. Leeds, etc., Co. v. Victor Talking Mach. Co., supra.

92. Leeds, etc., Co. v. Victor Talking Mach. Co., supra.

93. Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48 [aff 299 Fed. 822]; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114; In re Smith, 57 App. (D. C.) 204, 19 F. (2d) 678, 679 [quot Cyc].

94. Mead Morrison Mfg. Co. v. Exeter Mach. Works, 215 Fed. 731 [rev on other grounds 225 Fed. 489, 140 CCA 531]; Ball v. Coker, 210 Fed. 278, 127 CCA 126.

95. Seiberling v. John E. Thropp's Sons Co., 284 Fed. 746 [certiorari granted 260 U. S. 720 mem, 43 SCt 251 mem, 67 L. ed. 480 mem, and rev on other grounds 264 U. S. 320, 44 SCt 346, 68 L. ed. 708]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; Ohio Rake Co. v. Bucher, etc., Plow Co., 266 Fed. 891; Miami Copper Co. v. Minerals Separation, Ltd., 244 Fed. 752, 157 CCA 200; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132; Benjamin Menu Card Co. v. Rand, 210 Fed. 285; Houser v. Starr, 203 Fed. 264, 121 CCA 462; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114 [aff 157 Fed. 691].

[a] **Illustration.**—The connection of an in-throw set of disk harrows with an out-throw set in one machine, so that they operate together to give the desired results, is a combination, not a mere aggregation. Ohio Rake

tion.[96] A mere aggregation of old elements falls short of invention.[97] Mere superiority does not make aggregation patentable.[98] No one, by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination.[99] To escape being a mere aggregation it is essential that a different force or effect or result be produced in the combined method or device from that given by the separate parts or elements.[1]

Co. v. Bucher, etc., Plow Co., 266 Fed. 891.

96. Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Lundie Engineering Co. v. Railroad Supply Co., 8 F. (2d) 995; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Smithey v. Robertson, 299 Fed. 248; Bryant Electric Co. v. Harvey Hubbell, Inc., 267 Fed. 572; E. W. Bliss Co. v. Southern Can Co., 251 Fed. 903 [aff 265 Fed. 1018 mem]; Moore v. Saunders, 247 Fed. 314, 159 CCA 408; National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72; Gas Mach. Co. v. United Gas Impr. Co., 228 Fed. 684, 143 CCA 206 [rev 211 Fed. 672]; Krell Auto Grand Piano Co. v. Story, etc., Co., 207 Fed. 946, 125 CCA 394; Condit Electrical Mfg. Co. v. Westinghouse Electric, etc., Co., 200 Fed. 144, 118 CCA 474 [rev 194 Fed. 430]; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; American Chocolate Mach. Co. v. Helmstetter, 142 Fed. 978, 74 CCA 240.

[a] **Illustration.**—A mere measuring device, which does nothing except to give the operator information as to how much material is going into a machine, is no part of a true combination of the operative elements of the machine. Gas Mach. Co. v. United Gas Impr. Co., 228 Fed. 684, 143 CCA 206 [rev 211 Fed. 672].

97. Grinnell Washing Mach. Co. v. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196; Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 492, 19 SCt 641, 43 L. ed. 1058; Richards v. Chase El. Co., 159 U. S. 477, 16 SCt 53, 40 L. ed. 225; Richards v. Chase El. Co., 158 U. S. 299, 15 SCt 831, 39 L. ed. 991; Palmer v. Corning, 156 U. S. 342, 15 SCt 381, 39 L. ed. 445; Wright v. Yuengling, 155 U. S. 47, 15 SCt 1, 39 L. ed. 64; Giles v. Heysinger, 150 U. S. 627, 14 SCt 211, 37 L. ed. 1204; Ide v. Ball Engine Co., 149 U. S. 550, 13 SCt 941, 37 L. ed. 843; Brinkerhoff v. Aloe, 146 U. S. 515, 13 SCt 221, 36 L. ed. 1068; Derby v. Thompson, 146 U. S. 476, 13 SCt 181, 36 L. ed. 1051; Patent Clothing Co. v. Glover, 141 U. S. 560, 12 SCt 79, 35 L. ed. 858; Adams v. Bellaire Stamping Co., 141 U. S. 539, 12 SCt 66, 35 L. ed. 849; Cluett v. Claflin, 140 U. S. 180, 11 SCt 725, 35 L. ed. 385; Union Edge-Setter Co. v. Keith, 139 U. S. 530, 11 SCt 621, 35 L. ed. 261; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 SCt 150, 34 L. ed. 719; Fond du Lac County v. May, 137 U. S. 395, 11 SCt 98, 34 L. ed. 714; Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647; Hendy v. Golden State, etc., Iron Works, 127 U. S. 370, 8 SCt 1275, 32 L. ed. 207; Thatcher Heating Co. v. Burtis, 121 U. S. 286, 7 SCt 1034, 30 L. ed. 942; Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 523, 5 SCt 1007, 29 L. ed. 232; Bussey v. Excelsior Mfg. Co., 110 U. S. 131, 4 SCt 38, 28 L. ed. 95; Double-Pointed Tack Co. v. Two Rivers Mfg. Co., 109 U. S. 117, 3 SCt 105, 27 L. ed. 877; Pickering v. McCullough, 104 U. S. 310, 26 L. ed. 749; Rubber-Coated Harness Trimming Co. v. Welling, 97 U. S. 7, 24 L. ed. 942; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Lektophone Corp. v. Rola Co., 27 F. (2d) 758; Harry L. Hussman Refrigerator, etc., Co. v. Warren, 27 F. (2d) 450; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 797; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797]; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Morrow v. Oelschlager, 11 F. (2d) 524; Benzer Corp. v. Dresner, 10 F. (2d) 620; Lundie Engineering Co. v. Railroad Supply Co., 8 F. (2d) 995; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Universal Rim Co. v. Firestone Tire, etc., Co., 7 F. (2d) 24 [mod on other grounds 289 Fed. 884]; Excella Pattern Co. v. McCall Co., 5 F. (2d) 61; Hammond v. Marmon Auto. Co., 300 Fed. 803; Smithey v. Robertson, 299 Fed. 248; In re Cranmer, 285 Fed. 991; Muser v. Bell, 278 Fed. 904; Gross v. Frank, 278 Fed. 846 [rev on other grounds 293 Fed. 702]; Bryant Electric Co. v. Harvey Hubbell, Inc., 267 Fed. 572; Crystal Percolator Co., Inc. v. Landers, 258 Fed. 28; J. H. Day Co. v. Mountain City Mill Co., 257 Fed. 561 [aff 264 Fed. 963]; Firestone Tire, etc., Co. v. Seiberling, 257 Fed. 74, 168 CCA 286; E. W. Bliss Co. v. Southern Can Co., 251 Fed. 903 [aff 265 Fed. 1018 mem]; Moore v. Saunders, 247 Fed. 314, 159 CCA 408; E. E. Johnson Co. v. Grinnell Washing Mach. Co., 231 Fed. 988, 146 CCA 184 [certiorari den 242 U. S. 627 mem, 37 SCt 13 mem, 61 L. ed. 535 mem, and aff 247 U. S. 426 mem, 38 SCt 547 mem, 62 L. ed. 1196 mem]; Jackson Skirt, etc., Co. v. Rosenbaum, 225 Fed. 531, 140 CCA 515; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; Condit Electrical Mfg. Co. v. Westinghouse Electric, etc., Co., 200 Fed. 144, 118 CCA 474 [rev 194 Fed. 430]; Alexander v. De Moulin, 199 Fed. 145, 117 CCA 627; Anton v. Grier Bros. Co., 185 Fed. 796, 108 CCA 173; National Phonograph Co. v. American Graphophone Co., 184 Fed. 75; Parson Mfg. Co. v. Coe, 180 Fed. 742 [aff 185 Fed. 522, 107 CCA 628]; American Car, etc., Co. v. Mortòn Trust Co., 175 Fed. 568, 99 CCA 190; Bullock Electric Mfg. Co. v. General Electric Co., 162 Fed. 28, 89 CCA 68; National Regulator Co. v. Powers Regulator Co., 160 Fed. 460, 87 CCA 444; Self-Sealing Can Co. v. Hocker, 136 Fed. 418; Cameron Septic Tank Co. v. Saratoga Springs, 151 Fed. 242 [rev on other grounds 159 Fed. 453]; Rich v. Baldwin, 133 Fed. 920, 66 CCA 464; West Coast Safety Faucet Co. v. Jackson Brewing Co., 117 Fed. 295, 54 CCA 533; Wellman v. Midland Steel Co., 106 Fed. 221; Gast v. New York Asbestos Mfg. Co., 105 Fed. 68; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 101 Fed. 282, 41 CCA 351 [certiorari den 183 U. S. 696 mem, 22 SCt 933 mem, 46 L. ed. 394 mem]; Maier v. Bloom, 95 Fed. 159; Smith v. Maxwell, 93 Fed. 466; Antisdel v. Chicago Hotel Cabinet Co., 89 Fed. 308, 32 CCA 216; Clisby v. Reese, 88 Fed. 645, 32 CCA 80; Osgood Dredge Co. v. Metropolitan Dredging Co., 75 Fed. 670, 21 CCA 491; Office Specialty Mfg. Co. v. Globe Co., 65 Fed. 599 [aff 77 Fed. 465, 23 CCA 242]; Deere v. J. I. Case Plow Works, 56 Fed. 841, 6 CCA 157; Standard Oil Co. v. Southern Pac. Co., 54 Fed. 521, 4 CCA 491 [aff 48 Fed. 109]; Mott Iron Works Co. v. Standard Mfg. Co., 53 Fed. 819, 4 CCA 28; Campbell v. Bailey, 45 Fed. 564 [aff 63 Fed. 463, 11 CCA 284]; National Progress Bunching Mach. Co. v. John R. Williams Co., 44 Fed. 190, 12 CCA 107; Young v. Jackson, 43 Fed. 387 [app dism 154 U. S. 525 mem, 14 SCt 1156 mem, 38 L. ed. 1077 mem]; Rapid Service Store R. Co. v. Taylor, 43 Fed. 249; Richards v. Michigan Cent. R. Co., 40 Fed. 165 [aff 158 U. S. 299, 15 SCt 831, 39 L. ed. 991]; Jones v. Clow, 39 Fed. 785; Schmid v. Scovill Mfg. Co., 37 Fed. 345; Tower v. Bemis, etc., Hardware, etc., Co., 19 Fed. 498; Perry v. Co-op. Fdy. Co., 12 Fed. 436, 20 Blatchf. 498; Doubleday v. Roess, 11 Fed. 737; Moffitt v. Rogers, 8 Fed. 147 [aff 106 U. S. 423, 1 SCt 70, 27 L. ed. 76]; Double-Pointed Tack Co. v. Two Rivers Mfg. Co., 3 Fed. 26, 9 Biss. 258 [aff 109 U. S. 117, 3 SCt 105, 27 L. ed. 877]; Alcott v. Young, 1 F. Cas. No. 149, 4 Bann. & A. 197, 16 Blatchf. 134; King v. Frostel, 14 F. Cas. No. 7,794, 4 Bann. & A. 236, 8 Biss. 510 [aff 109 U. S. 99, 3 SCt 85, 27 L. ed. 870]; Sarven v. Hall, 21 F. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415; Griswold v. Seymour, 78 Off. Gaz. (U. S.) 482; In re Smith, 57 App. (D. C.) 204, 19 F. (2d) 673; Schiller's Application, 57 App. (D. C.) 57, 17 F. (2d) 209; Ludwick's Application, 55 App. (D. C.) 292, 4 F. (2d) 959; In re Smithey, 49 App. (D. C.) 374, 265 Fed. 1014; In re Smith, 49 App. (D. C.) 203, 262 Fed. 717; In re Merrill, 41 App. (D. C.) 294; In re Harris, 37 App. (D. C.) 374; In re Merritt, 36 App. (D. C.) 122; In re Lyon, 33 App. (D. C.) 501; In re Scott, 25 App. (D. C.) 307; In re Seabury, 23 App. (D. C.) 377; In re Davenport, 23 App. (D. C.) 370; In re Griswold, 9 App. (D. C.) 496; In re Forg, 2 App. (D. C.) 58; In re Gould, 8 D. C. 410; Durable Electric Appliance Co., Ltd. v. Renfrew Electric Products, Ltd., 59 Ont. L. 527, [1926] 4 DomLR 1004.

[a] **Reason for rule.**—"The usefulness of each element has been disclosed. A skilled mechanic is all that is needed to assemble. There is no change in function, or in results, except possibly it may work more efficiently or safely, or less expensively, but that which has been 'discovered' has already been disclosed." Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789, 792 [aff 16 F. (2d) 797].

[b] **Illustrations.**—(1) Placing rubber eraser on the end of a lead pencil. Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Rubber Tip Pencil Co. v. Howard, 20 F. Cas. No. 12,102, 9 Blatchf. 490, 5 Fish. Pat. Cas. 377 [aff 20 Wall. 498, 22 L. ed. 410]. (2) Placing oil tank and other receptacles on one car. Standard Oil Co. v. Southern Pac. Co., 54 Fed. 521, 4 CCA 491 [aff 48 Fed. 109]. (3) Placing within the casing of an ordinary speedometer and odometer a manually operated register as an independent unit to record the quantity of gas and oil supplied to the automobile. In re Smithey, 49 App. (D. C.) 374, 265 Fed. 1014.

98. Grinnell Washing Mach. Co. v. E. E. Johnson Co., 247 U. S. 426, 38 SCt 547, 62 L. ed. 1196 [aff 231 Fed. 988, 146 CCA 184]; Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 492, 19 SCt 641, 43 L. ed. 1058; Muser v. Bell, 278 Fed. 904; Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co., 245 Fed. 762 [aff 257 Fed. 314, 168 CCA 314]; Crier v. Innes, 160 Fed. 103 [mod on other grounds 170 Fed. 324, 95 CCA 508]; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 53 CCA 583 [certiorari den 187 U. S. 641 mem, 23 SCt 842 mem, 47 L. ed. 345 mem]; In re Merritt, 36 App. (D. C.) 122; In re Ratican, 36 App. (D. C.) 95.

99. Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241.

1. Reckendorfer v. Faber, 92 U. S.

There must be a new result produced by their union.[2] A result must be produced which is not the mere aggregate of several results, each the complete product of one of the combined elements, but is due to the joint and coöperating activities of all of the elements.[3] That elements of the combination may usefully function separately, when not in combination, does not show mere aggregation.[4] It is not necessary that the action of the elements be simultaneous,[5] or that one or all of the constituent elements so enter into the combination as to coact all the time with all the others,[6] or change the mode of connection with every other.[7] It is sufficient if there be some joint operation performed by the elements producing a result due to their coöperative action.[8] Nor is it necessary that the mutual interaction of the elements should be constant;[9] the modification of one element by another during one of the successive steps of the unitary operation is sufficient.[10] It is not necessary that the coaction between the elements be direct.[11] It is sufficient if the coaction producing the unitary result comes through the mediation of an operator or the operating force.[12] A device designed for what is in a fair sense a unitary work does not become an aggregation merely because it involves successive steps under manual control.[13] But the manual use of a tool or an unattached movable device cannot be made an element of a combination claim,[14] nor can the material upon which a device operates.[15]

Multiplicity of elements. Unless a combination accomplishes some new result, a mere multiplicity of elements does not make it patentable.[16] Multiplicity of elements may go on indefinitely without creating a patentable combination unless, by their

347, 23 L. ed. 719; Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co., 245 Fed. 762 [aff 257 Fed. 314, 168 CCA 314]; Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 116 CCA 322.

2. Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Muser v. Bell, 278 Fed. 904.

3. Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 492, 19 SCt 641, 43 L. ed. 1058; Adams v. Bellaire Stamping Co., 141 U. S. 539, 12 SCt 66, 35 L. ed. 849; Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 523, 5 SCt 1007, 29 L. ed. 232; Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Scherzer Rolling Lift Bridge Co. v. Chicago, 2 F. (2d) 601 [aff 11 F. (2d) 605]; In re Cranmer, 285 Fed. 991; Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 284 Fed. 193 [certiorari den 261 U. S. 613 mem, 43 SCt 359 mem, 67 L. ed. 827 mem]; Muser v. Bell, 278 Fed. 904; E. E. Johnson Co. v. Grinnell Washing Mach. Co., 231 Fed. 988, 146 CCA 184 [certiorari den 242 U. S. 627 mem, 37 SCt 13 mem, 61 L. ed. 535 mem, and aff 247 U. S. 426 mem, 38 SCt 547 mem, 62 L. ed. 1196 mem]; Lovell-McConnell Mfg. Co. v. Oriental Rubber, etc., Co., 231 Fed. 719, 146 CCA 3; Stuber v. Central Brass, etc., Co., 224 Fed. 712, 140 CCA 252; Autosales Gum, etc., Co. v. Caille Bros. Co., 224 Fed. 473, 140 CCA 159; Mead-Morrison Mfg. Co. v. Exeter Mach. Works, 215 Fed. 731 [rev on other grounds 225 Fed. 489, 140 CCA 531]; Borland v. Northern Trust Safe Deposit Co., 212 Fed. 178 [aff 228 Fed. 1019 mem, 142 CCA 665 mem]; Turner v. Moore, 211 Fed. 466, 128 CCA 138; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; Anton v. Grier Bros. Co., 185 Fed. 796, 108 CCA 173; Elliott-Fisher Co. v. Donning, 171 Fed. 96; Voightman v. Perkinson, 133 Fed. 934 [aff 138 Fed. 56, 70 CCA 482]; Diamond Match Co. v. Ruby Match Co., 127 Fed. 341; J. L. Mott Iron Works v. Hoffman, etc., Mfg. Co., 120 Fed. 1019, 56 CCA 151 [aff 110 Fed. 772]; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 53 CCA 583 [certiorari den 187 U. S. 641 mem, 23 SCt 842 mem, 47 L. ed. 345 mem]; Parsons v. Minneapolis Threshing-Mach. Co., 106 Fed. 941; St. Louis Car-Coupler Co. v. National Malleable Castings Co., 87 Fed. 885, 31 CCA 265; Hanifen v. E. H. Godshalk Co., 84 Fed. 649, 28 CCA 507; Deere v. Rock Island Plow Co., 84 Fed. 171, 28 CCA 308; Beach v. Hobbs, 82 Fed. 916 [mod on other grounds 92 Fed. 146, 34 CCA 248 (aff 180 U. S. 383, 21 SCt 409, 45 L. ed. 586)]; American Soda-Fountain Co. v. Green, 75 Fed. 680 [rev on other grounds 78 Fed. 119, 24 CCA 41]; Heath Cycle Co. v. Hay, 67 Fed. 246 [rev on other grounds 71 Fed. 411, 18 CCA 157]; Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)]; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Brickill v. Hartford, 49 Fed. 372; Railway Register Mfg. Co. v. North Hudson Co. R. Co., 24 Fed. 793; Peard v. Johnson, 23 Fed. 507; Stutz v. Armstrong, 20 Fed. 843; Clark Pomace-Holder Co. v. Ferguson, 17 Fed. 79, 21 Blatchf. 376 [aff 119 U. S. 335, 7 SCt 382, 30 L. ed. 406]; Western Electric Mfg. Co. v. Chicago Electric Mfg. Co., 14 Fed. 691, 11 Biss. 427; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; Gallahue v. Butterfield, 9 F. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Dayton's Application, 53 App. (D. C.) 353, 290 Fed. 328; In re Shollenberger, 51 App. (D. C.) 332, 333, 279 Fed. 314; In re Merrill, 41 App. (D. C.) 294.

"It seems to be the settled law that, to constitute a combination, as distinguished from an aggregation, it is essential that there should be some joint operation performed by the combination, which produces a new and useful result." In re Shollenberger, supra.

4. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Reckendorfer v. Faber, 20 F. Cas. No. 11,625, 12 Blatchf. 68, 1 Bann. & A. 229 [aff 92 U. S. 347, 23 L. ed. 719].

5. Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646; Krell Auto Grand Piano Co. v. Story, etc., Co., 207 Fed. 946, 125 CCA 394; Burdett-Rowntree Mfg. Co. v. Standard Plunger El. Co., 196 Fed. 43 [aff 197 Fed. 743, 117 CCA 206]; Pelton Water Wheel Co. v. Doble, 190 Fed. 760, 111 CCA 488; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; E. J. Manville Mach. Co. v. Excelsior Needle Co., 167 Fed. 538, 93 CCA 216; Heath Cycle Co. v. Hay, 67 Fed. 246 [rev on other grounds 71 Fed. 411, 18 CCA 157]; Hoffman v. Young, 2 Fed. 74; Birdsall v. McDonald, 3 F. Cas. No. 1,434, 1 Bann. & A. 165; Forbush v. Cook, 9 F. Cas. No. 4,931, 2 Fish. Pat. Cas. 668.

6. Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev on other grounds 244 U. S. 294 mem, 37 SCt 506 mem, 61 L. ed. 1148 mem]; International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569; Pelton Water Wheel Co. v. Doble, 190 Fed. 760, 111 CCA 488; Dayton Malleable Iron Co. v. Forster, 153 Fed. 201; Sanders v. Hancock, 128 Fed. 424, 63 CCA 166; American St. Car Advertising Co. v. Newton St. R. Co., 82 Fed. 732 [rev on other grounds 88 Fed. 795, 32 CCA 122]; National Cash-Register Co. v. American Cash-Register Co., 53 Fed. 367, 3 CCA 559; Wood v. Packer, 17 Fed. 650; Strobridge v. Landers, 11 Fed. 880, 20 Blatchf. 73; Fitch v. Bragg, 8 Fed. 588 [rev on other grounds 121 U. S. 478, 7 SCt 978, 30 L. ed. 1008].

7. Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258.

8. Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516.

9. Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Dunham v. Kelley-Koett Mfg. Co., 246 Fed. 845, 159 CCA 147.

10. Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289; Oshkosh Grass Matting Co. v. Waite Grass Carpet Co., 207 Fed. 937, 125 CCA 385.

11. Krell Auto Grand Piano Co. v. Story, etc., Co., 207 Fed. 946, 125 CCA 394; Dayton Malleable Iron Co. v. Forster, 153 Fed. 201.

12. Dudlo Mfg. Co. v. Varley Duplex Magnet Co., 253 Fed. 745, 165 CCA 658; Krell Auto Grand Piano Co. v. Story, etc., Co., 207 Fed. 946, 125 CCA 394.

13. Concrete Appliances Co. v. Meinken, 262 Fed. 958; Dudlo Mfg. Co. v. Varley Duplex Magnet Co., 253 Fed. 745, 165 CCA 658; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646.

14. Willard v. Union Tool Co., supra; Gas Mach. Co. v. United Gas Impr. Co., 228 Fed. 684, 143 CCA 206 [rev 211 Fed. 672].

15. F. N. Burt Co. v. Ritchie, 251 Fed. 909; Union Paper Bag Mach. Co. v. Advance Bag Co., 194 Fed. 126, 114 CCA 204; American Tobacco Co. v. Streat, 83 Fed. 700, 28 CCA 18. And see Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500 (where the rule is indicated).

16. Richards v. Chase El. Co., 158 U. S. 299, 15 SCt 831, 39 L. ed. 991, 159 U. S. 477, 16 SCt 53, 40 L. ed. 225; Florsheim v. Schilling, 137 U. S. 64, 11 SCt 20, 34 L. ed. 574; Muser v. Bell, 278 Fed. 904; Condit Electrical Mfg. Co. v. Westinghouse Electric, etc., Co., 200 Fed. 144, 118 CCA 474

collocation a new result is produced.[17]

[§ 89] **21. Facts Evidencing Invention or Lack of Invention[18]—a. In General.** The question of whether invention was involved in the production of a method or device is one of fact to be answered in the light of all pertinent considerations.[19] The entire prior art is to be taken into consideration,[20] including not only disclosures of anticipatory patents, publications, and uses,[21] but any other facts showing the character, condition, and progress of the art.[22] It is proper to consider the nature of the want supplied,[23] and how far and by what means it

[rev 194 Fed. 430]; Overweight Counterbalance El. Co. v. Henry Vogt Mach. Co., 102 Fed. 957, 43 CCA 80; Interior Lumber Co. v. Perkins, 80 Fed. 528, 25 CCA 613; Campbell v. H. T. Conde Impl. Co., 74 Fed. 745; Fuller, etc., Mfg. Co. v. Bender, 69 Fed. 999 [aff 77 Fed. 1007, 23 CCA 607]; Sugar Apparatus Mfg. Co. v. Yaryan Mfg. Co., 43 Fed. 140; Buck v. Hermance, 4 F. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. R. 251; In re Hill, 26 App. (D. C.) 318; In re Davenport, 23 App. (D. C.) 370.

17. Fuller, etc., Mfg. Co. v. Bender, 69 Fed. 999 [aff 77 Fed. 1007, 23 CCA 607]; In re Hill, 26 App. (D. C.) 318.

18. Cross references:

Burden of proof in infringement suits on issue of lack of invention see infra § 574.

Evidence as to originality and priority of invention see infra § 575.

Presumption of invention arising from issuance of patent see infra § 258 et seq.

Weight and sufficiency of evidence in infringement suits on issue of lack of invention see infra § 577.

19. Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; James L. Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; E. A. McMillin Co. v. Androscoggin Pulp Co., 291 Fed. 134; Acme Motor Shield Corp. v. Roberts Mfg. Co., 288 Fed. 127; Gilchrist v. F. B. Mallory Co., 281 Fed. 350; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Baker v. Hughes-Evans Co., 270 Fed. 97; Bonnie-B. Co. v. Giguet, 269 Fed. 275 [aff 269 Fed. 1021 mem]; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Ft. Pitt Supply Co. v. Ireland, etc., Mfg. Co., 232 Fed. 871, 147 CCA 65; Zimmerman v. Advance Mach. Co., 232 Fed. 866, 147 CCA 60; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418 [aff 243 Fed. 895, 156 CCA 407]; Ferro Concrete Constr. Co. v. Concrete Steel Co., 206 Fed. 666, 124 CCA 466; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; Connors v. Ormsby, 148 Fed. 13, 78 CCA 181; Holmes v. Truman, 67 Fed. 542, 14 CCA 517.

20. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; New York Scaffolding Co. v. Liebel-Binney Constr. Co., 254 U. S. 24, 41 SCt 18, 65 L. ed. 112; Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 25 SCt 697, 49 L. ed. 1100; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 SCt 150, 34 L. ed. 719 [aff 28 Fed. 575]; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Barkis v. California Almond Growers Exch., 17 F. (2d) 327; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Fezzey v. Bemis Bros. Bag Co., 1 F. (2d) 116; Gilchrist v. F. B. Mallory Co., 281 Fed. 350; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; Kauffman v. Sodemann Heat, etc., Co., 267 Fed. 435 [rev on other grounds 275 Fed. 593]; Kurtz v. Blatt, 263 Fed. 392; Davey Tree Expert Co. v. Van Billiard, 261 Fed. 996; Æolian Co. v. Schubert Piano Co., 261 Fed. 178; Vandenburgh v. Electric Welding Co., 259 Fed. 579; Straub v. Campbell, 259 Fed. 570, 170 CCA 532; Adt v. E. Kustein Sons Co., 259 Fed. 277 [aff 259 Fed. 551, 170 CCA 523]; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; Ft. Pitt Supply Co. v. Ireland, etc., Mfg. Co., 232 Fed. 871, 147 CCA 65; Zimmerman v. Advance Mach. Co., 232 Fed. 866, 147 CCA 60; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; Republic Rubber Co. v. Morgan, 197 Fed. 549, 117 CCA 45 [certiorari den 226 U. S. 608 mem, 33 SCt 113 mem, 57 L. ed. 379 mem]; Holt Mfg. Co. v. Best Mfg. Co., 172 Fed. 409, 97 CCA 107; Ironclad Mfg. Co. v. Dairymen's Mfg. Co., 138 Fed. 123 [rev on other grounds 143 Fed. 512, 74 CCA 372 (certiorari den 202 U. S. 623 mem, 26 SCt 767 mem, 50 L. ed. 1175 mem)]; Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 138 Fed. 54, 70 CCA 480 [certiorari den 199 U. S. 608 mem, 26 SCt 750 mem, 50 L. ed. 331 mem]; Pennsylvania Globe Gaslight Co. v. Best, 137 Fed. 940; Mica Insulator Co. v. Union Mica Co., 137 Fed. 928; American Electric Novelty, etc., Co. v. Howard Electric Novelty Co., 137 Fed. 913, 70 CCA 251; Van Epps v. United Box Bd., etc., Co., 137 Fed. 418 [rev on other grounds 143 Fed. 869, 75 CCA 77 (certiorari den 202 U. S. 617 mem, 26 SCt 764 mem, 50 L. ed. 1173 mem)]; Shepard v. Excelsior Steel Furnace Co., 137 Fed. 399, 69 CCA 591; Universal Winding Co. v. Foster Mach. Co., 136 Fed. 889; Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. 199 [rev on other grounds 136 Fed. 841, 69 CCA 200]; Kahn v. Starrells, 135 Fed. 532, 68 CCA 82; Decker v. Sanford, 135 Fed. 112; Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553; J. Stevens Arms, etc., Co. v. Davenport, 134 Fed. 869, 67 CCA 495; North Jersey St. R. Co. v. Brill, 134 Fed. 580, 67 CCA 380; Weston Electrical Instrument Co. v. Stevens, 134 Fed. 574, 67 CCA 374; U. S. Whip Co. v. Hassler, 134 Fed. 398; Parsons v. New Home Sewing Mach. Co., 134 Fed. 394, 67 CCA 392; Brown v. Crane Co., 133 Fed. 235, 66 CCA 676; Western Electric Co. v. Rochester Tel. Co., 132 Fed. 814 [aff 145 Fed. 41, 75 CCA 313]; Fries v. Leeming, 131 Fed. 765; Cook v. Heywood Bros., etc., Co., 131 Fed. 755; American Electrical Novelty, etc., Co. v. Howard Electrical Novelty Co., 131 Fed. 495 [rev on other grounds 137 Fed. 913, 70 CCA 251]; Oehrle v. William H. Horstmann Co., 131 Fed. 487 [aff 138 Fed. 561, 70 CCA 638]; New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co., 131 Fed. 265 [aff 135 Fed. 1021 mem, 68 CCA 672]; Ideal Stopper Co. v. Crown Cork, etc., Co., 131 Fed. 244, 65 CCA 436 [certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Western Tel. Mfg. Co. v. American Electric Tel. Co., 131 Fed. 75, 65 CCA 313; Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. 542; American Soda Fountain Co. v. Sample, 130 Fed. 145, 64 CCA 497 [certiorari den 195 U. S. 634 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307; Folger v. Dow Portable Electric Co., 128 Fed. 45 [aff 133 Fed. 295, 68 CCA 551]; Westinghouse Mach. Co. v. Press Pub. Co., 127 Fed. 822 [rev on other grounds 135 Fed. 767, 68 CCA 469]; Jones v. Cyphers, 126 Fed. 753, 62 CCA 21; Evans v. Newark Rivet Works, 126 Fed. 492, 61 CCA 474; Milwaukee Carving Co. v. Brunswick-Balke Collender Co., 126 Fed. 171, 61 CCA 175; Ajax Forge Co. v. Pettibone, 125 Fed. 748, 60 CCA 516; Brookfield v. Novelty Glass Mfg. Co., 124 Fed. 551; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 CCA 369; Smidth v. Gates Iron Works, 110 Fed. 751; Featherstone v. George R. Bidwell Cycle Co., 53 Fed. 113 [rev on other grounds 57 Fed. 631, 6 CCA 487]; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 30 Fed. 63; Adams v. Bellaire Stamping Co., 28 Fed. 360 [aff 141 U. S. 539, 12 SCt 66, 35 L. ed. 849]; Foote v. Silsby, 9 F. Cas. No. 4,919, 1 Blatchf. 542, Fish. Pat. R. 391 [mod on other grounds 20 How. 378, 15 L. ed. 953]; In re Adams, 24 App. (D. C.) 275; Stapleton v. Kinney, 18 App. (D. C.) 394; In re Millett, 18 App. (D. C.) 186; Servis Railroad Tie Plate Co. v. Hamilton Steel, etc., Co., Ltd., 8 Can. Exch. 381.

[a] **"State of the art" defined.**— (1) The state of the art consists of proof of what was old and in general use at the time of the alleged invention. Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Barkis v. California Almond Growers Exch., 17 F. (2d) 327; Kauffman v. Sodemann Heat, etc., Co., 267 Fed. 435 [rev on other grounds 275 Fed. 593]. (2) That body of information upon the subject with which the inventor and all the world is chargeable. Saunders v. Allen, 60 Fed. 610, 9 CCA 157; Adams v. Bellaire Stamping Co., 28 Fed. 360 [aff 141 U. S. 539, 12 SCt 66, 35 L. ed. 849].

21. National Electric Ticket Register Co. v. Automatic Ticket Register Corp., 15 F. (2d) 257; Panay Horizontal Show Jar Co. v. Aridor Co., 292 Fed. 858; Aluminum Goods Mfg. Co. v. Buckeye Aluminum Co., 291 Fed. 806; Bonnie-B. Co. v. Giguet, 269 Fed. 275 [aff 269 Fed. 1021 mem]; Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680]; McCallum v. Pittsburgh, etc., Coal Co., 268 Fed. 831; Meurer Steel Barrel Co. v. Cleveland Steel Barrel Co., 268 Fed. 536; Merrell-Soule Co. v. Rico Milk Products Co., 268 Fed. 366; Cutler Hammer Co. v. Pawling, etc., Co., 267 Fed. 980; St. Louis Electrical Works v. Fore Electric Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49]; Kauffman v. Sodemann Heat, etc., Co., 267 Fed. 435 [rev on other grounds 275 Fed. 593]; Bellows v. New York Cent. R. Co., 266 Fed. 532; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015 mem]; Concrete Appliances Co. v. Meinken, 262 Fed. 958; A. Schrader's Son, Inc. v. Dill Mfg. Co., 262 Fed. 504; Beitman v. Strater, 262 Fed. 443; George D. Mayo Mach. Co. v. Hemphill Mfg. Co., 262 Fed. 435; Backstay Mach., etc., Co. v. Hamilton, 262 Fed. 411 [certiorari den 253 U. S. 488 mem, 40 SCt 485 mem, 64 L. ed. 1026 mem]; Getty v. Layne, 262 Fed. 141; Consolidated Window Glass Co. v. Window Glass Mach. Co., 261 Fed. 362 [certiorari den 251 U. S. 558 mem, 40 SCt 179 mem, 64 L. ed. 413 mem]; Dunkley Co. v. Pasadena Canning Co., 261 Fed. 203 [aff 261 Fed. 386]; Carr School v. James, 261 Fed. 200; Williams v. Kaufmann, 259 Fed. 859, 170 CCA 659; Hutchins Car Roofing Co. v. Standard R. Equipment Co., 259 Fed. 226, 170 CCA 294; Double Fabric Tire Co. v. General Tire, etc., Co., 258 Fed. 932; Hansen v. Slick, 216 Fed. 164 [aff 230 Fed. 627, 145 CCA 37].

22. Adams v. Bellaire Stamping Co., 28 Fed. 360 [aff 141 U. S. 539, 12 SCt 66, 35 L. ed. 849].

23. A. Kimball Co. v. Noesting Pin Ticket Co., 262 Fed. 148.

had theretofore been satisfied.[24] It is proper also to consider the condition of the trade, as well as the art to which the patent is allied.[25]

[§ 90] **b. Novelty.** The fact that the method or device in question accomplishes a result never before attempted or thought of is admissible to show that its production required the exercise of the inventive faculties.[26] The same is true of the fact that the materials employed were not so used before.[27]

[§ 91] **c. Utility.** While the mere attainment of desirable results is not invention,[28] the fact that a method or device produces a new and beneficial result, never attained before, is as a general rule evidence of invention,[29] and, where the other facts leave the question in doubt, may be sufficient to determine the doubt in favor of invention.[30] Thus evidence is admissible to show the increased efficiency of the method or device over those previously used for the same or analogous purposes.[31] The same is true with respect to its simplicity,[32] economy,[33] or

24. A. Kimball Co. v. Noesting Pin Ticket Co., supra.

25. Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277.

26. Concrete Appliances Co. v. Meinken, 262 Fed. 958.

27. Franc-Strohmenger v. Arthur Siegman, Inc., 27 F. (2d) 785 [aff 25 F. (2d) 108].

28. See supra §§ 58–66.

29. Richmond Screw Anchor Co. v. U. S., 275 U. S. 331, 48 SCt 194, 72 L. ed. 303; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Ward, Inc. v. Gibbs, 27 F. (2d) 466; Overland Motor Co. v. Packard Motor Co., 22 F. (2d) 566; Southern Electro-Chemical Co. v. Du Pont De Nemours, 20 F. (2d) 97; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Bake-Rite Mfg. Co. v. Tomlinson, 16 F. (2d) 556; Dovan Chemical Co. v. Corona Cord Tire Co., 16 F. (2d) 419 [certiorari granted 273 U. S. 692 mem, 47 SCt 570 mem, 71 L. ed. 843 mem, and rev on other grounds 276 U. S. 358, 48 SCt 380, 72 L. ed. 610]; Hitchcock v. Valley Camp Coal Co., 16 F. (2d) 383; Star Can Opener Co. v. Owen Dyneto Co., 16 F. (2d) 353; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Permutit Co. v. Wadham, 13 F. (2d) 454; Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682 [certiorari den 269 U. S. 571 mem, 46 SCt 26 mem, 70 L. ed. 417 mem]; Lane v. Craftsmen Film Laboratories, 7 F. (2d) 288; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; United Verde Copper Co. v. Peirce-Smith Converter Co., 7 F. (2d) 13 [aff 298 Fed. 763]; American Cone, etc., Co. v. Denaro, 297 Fed. 913 [certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 468 mem]; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326; Fligel v. Sears, 254 Fed. 698, 166 CCA 196; Guiterman v. Finch, 246 Fed. 255, 158 CCA 415; Marconi Wireless Tel. Co., v. De Forest Radio Tel., etc., Co., 243 Fed. 560, 156 CCA 258; Neill v. Kinney, 239 Fed. 309, 152 CCA 297; Fonseca v. Suarez, 232 Fed. 155, 145 CCA 347; Thropp, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 226 Fed. 941, 141 CCA 545; Mead-Morrison Mfg. Co. v. Exeter Mach. Works, 225 Fed. 489, 140 CCA 531 [rev 215 Fed. 731]; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev on other grounds 241 Fed. 72, 154 CCA 72]; Benthall Mach. Co. v. Virginia-Carolina Peanut Picker Co., 222 Fed. 918 [rev on other grounds 241 Fed. 89, 154 CCA 89]; Benthall Mach. Co. v. Debnam, 222 Fed. 918 [rev on other grounds 241 Fed. 103, 154 CCA 103]; Woerheide v. H. W. Johns-Manville Co., 220 Fed. 674, 136 CCA 316; Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301; Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Allis-Chalmers Co. v. Westinghouse Electric, etc., Co., 184 Fed. 722, 107 CCA 541; Columbia Wagon Co. v. Eagle Wagon Works, 183 Fed. 771, 106 CCA 137; Greenwald v. Enochs, 183 Fed. 583, 106 CCA 351; Bossert Electric Constr. Co. v. Pratt Chuck Co., 179 Fed. 385, 103 CCA 45; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023 mem, 104 CCA 669 mem]; Warren Steam Pump Co. v. Blake, etc., Steam Pump Works, 163 Fed. 263, 91 CCA 19; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114; J. L. Mott Iron Works v. Standard Sanitary Mfg. Co., 159 Fed. 135, 86 CCA 325; Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co., 151 Fed. 237, 80 CCA 589; American Caramel Co. v. Mills, 149 Fed. 743, 79 CCA 449; Hunt v. Milwaukee Hay Tool Co., 148 Fed. 220, 78 CCA 116; Union Biscuit Co. v. Peters, 125 Fed. 601, 60 CCA 337; George Frost Co. v. Cohn, 119 Fed. 505, 56 CCA 185; Dodge v. Porter, 98 Fed. 624 [mod on other grounds 112 Fed. 423, 50 CCA 317]; Bray v. U. S. Net, etc., Co., 70 Fed. 1006; Ballard v. McCluskey, 58 Fed. 880; Hill v. Biddle, 27 Fed. 560; Wood v. Packer, 17 Fed. 650; In re Sorum, 49 App. (D. C.) 360, 265 Fed. 1000; In re Harbeck, 39 App. (D. C.) 555.

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention." Krementz v. S. Cottle Co., 148 U. S. 556, 561, 13 SCt 719, 37 L. ed. 558.

"Undoubtedly, the results or consequences of a process or manufacture may in some cases be regarded as of importance when the inquiry is, whether the process or manufacture exhibits invention, thought, and ingenuity." Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 495, 23 L. ed. 952.

"While it is always admitted and stated that the mere attainment of such desirable results is not invention, they always have been and must be used as evidence or indicia of invention." Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277, 281.

30. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 27 SCt 307, 51 L. ed. 645; Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 5 SCt 717, 28 L. ed. 901; Boyce v. Pyrene Mfg. Co., 290 Fed. 998 [aff 292 Fed. 480 (certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem)]; Acme Motor Shield Corp. v. Roberts Mfg. Co., 288 Fed. 127; Fligel v. Sears, 254 Fed. 698, 166 CCA 196; Neill v. Kinney, 239 Fed. 309, 152 CCA 297; Greenwald Bros., Inc. v. La Vogue Petticoat Co., 226 Fed. 448, 141 CCA 278; Woerheide v. H. W. Johns-Manville Co., 220 Fed. 674, 136 CCA 316; Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301; Burdett-Rowntree Mfg. Co. v. Standard Plunger El. Co., 196 Fed. 43 [aff 197 Fed. 743, 117 CCA 206]; Greenwald v. Enochs, 183 Fed. 583, 106 CCA 351; Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co., 151 Fed. 237, 80 CCA 589; Union Biscuit Co. v. Peters, 125 Fed. 601, 60 CCA 337; Regent Mfg. Co. v. Penn Electrical, etc., Co., 121 Fed. 80, 57 CCA 334; George Frost Co. v. Cohn, 119 Fed. 505, 56 CCA 185; Sawyer Spindle Co. v. Taylor, 69 Fed. 337 [aff 75 Fed. 301, 22 CCA 203]; Ex p. Arthur, 1 F. Cas. No. 563a; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Many v. Sizer, 16 F. Cas. No. 9,056, 1 Fish. Pat. Cas. 17 [writ of error dism 16 How. 98, 14 L. ed. 861]; Seymour v. Marsh, 21 F. Cas. No. 12,687, 6 Fish. Pat. Cas. 115 [aff 97 U. S. 348, 24 L. ed. 963].

"Such an increased utility, beyond what had been attained by devices previously in use, in cases of doubt, is usually regarded as determining the question of invention." Hollister v. Benedict, etc., Mfg. Co., 113 U. S. 59, 72, 5 SCt 717, 28 L. ed. 901.

31. Richmond Screw Anchor Co. v. U. S., 275 U. S. 331, 48 SCt 194, 72 L. ed. 303; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Dovan Chemical Co v. Corona Cord Tire Co., 16 F. (2d) 419 [certiorari granted 273 U. S. 692 mem, 47 SCt 570 mem, 71 L. ed. 843 mem, and rev on other grounds 276 U. S. 358, 48 SCt 380, 72 L. ed. 610]; Hitchcock v. Valley Camp Coal Co., 16 F. (2d) 383; Star Can Opener Co. v. Owen Dyneto Co., 16 F. (2d) 353; United Verde Copper Co. v. Peirce-Smith Converter Co., 7 F. (2d) 13 [aff 298 Fed. 763]; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114; American Caramel Co. v. Mills, 149 Fed. 743, 79 CCA 449; J. L. Mott Iron Works v. Standard Sanitary Mfg. Co., 159 Fed. 135, 86 CCA 325.

[a] **Increasing work performed by machine one fourth** shows invention. Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177.

32. Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Gaertner v. Dragich, 8 F. (2d) 568; Lane v. Craftsmen Film Laboratories, 7 F. (2d) 288; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Consolidated Window Glass Co. v. Window Glass Mach. Co., 261 Fed. 362 [certiorari den 251 U. S. 558 mem, 40 SCt 179 mem, 64 L. ed. 413 mem]; Hills v. Hamilton Watch Co., 248 Fed. 499; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [certiorari granted 238 U. S. 621 mem, 35 SCt 603 mem, 59 L. ed. 1493 mem, and rev on other grounds 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148]; Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301; Beryle v. San Francisco Cornice Co., 181 Fed. 692 [aff 195 Fed. 516, 115 CCA 426]; Hunt v. Milwaukee Hay Tool Co., 148 Fed. 220, 78 CCA 116; Regent Mfg. Co. v. Penn Electrical, etc., Co., 121 Fed. 80, 57 CCA 334; Gindorff v. Deering, 81 Fed. 952; King v. Hammond, 14 F. Cas. No. 7,797, 4 Fish. Pat. Cas. 488; Ryan v. Goodwin, 21 F. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514.

33. Southern Electro-Chemical Co. v. Du Pont De Nemours, 20 F. (2d) 97; Hitchcock v. Valley Camp Coal Co., 16 F. (2d) 383; Star Can Opener Co. v. Owen Dyneto Co., 16 F. (2d) 353; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed.

other advantage over known methods or devices.[34] Proof of marked superiority over other methods or devices, however, is not conclusive evidence that its production involved invention,[35] even though coupled with proof of novelty.[36] Utility is allowed to turn the scale in favor of patentability only in those instances where the question whether the inventive faculty has been exercised is balanced with doubt and uncertainty.[37] It is of no value where the superior utility is dependent upon factors unconnected with the method or device itself, such as the efficiency of the methods pursued in its production,[38] the adaptability of the machinery,[39] or the skill of the workman employed in producing it.[40] Proof of utility is insufficient of itself to create a doubt as to invention.[41] It cannot serve both as creator and solver of doubt.[42]

[§ 92] **d. Commercial Success.** Commercial success attributable to the novelty and utility of the art or instrument in question is admissible to show that its production involved the exercise of the inventive faculties,[43] and, where the other facts leave

277; Greenwald Bros., Inc. v. La Vogue Petticoat Co., 226 Fed. 448, 141 CCA 278; Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301; National Tube Co. v. Aiken, 163 Fed. 254, 91 CCA 114; Hunt v. Milwaukee Hay Tool Co., 148 Fed. 220, 78 CCA 116.

34. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Hitchcock v. Valley Camp Coal Co., 16 F. (2d) 383; Star Can Opener Co. v. Owen Dyneto Co., 16 F. (2d) 353; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48; Greenwald Bros., Inc. v. La Vogue Petticoat Co., 226 Fed. 448, 141 CCA 278; Mead-Morrison Mfg. Co. v. Exeter Mach. Works, 225 Fed. 489, 140 CCA 531 [rev 215 Fed. 731]; J. L. Mott Iron Works v. Standard Sanitary Mfg. Co., 159 Fed. 135, 86 CCA 325.

35. Gerrard v. Cary, 9 F. (2d) 949 [aff 9 F. (2d) 957]; Gaertner v. Dragich, 8 F. (2d) 568; Wills v. Scranton Cold Storage Co., 147 Fed. 525 [aff 153 Fed. 181, 82 CCA 355]; Olmsted v. Andrews, 77 Fed. 835, 23 CCA 488; Johnson Co. v. Pennsylvania Steel Co., 67 Fed. 940 [aff 70 Fed. 244, 17 CCA 88].

36. Bourke v. Buegeleisen, 22 F. (2d) 208.

37. National Hat Pouncing Mach. Co. v. Heddon, 148 U. S. 482, 13 SCt 680, 37 L. ed. 529; Carroll-Thomson Co. v. Central Brass, etc., Co., 22 F. (2d) 253; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Fonseca v. Suarez, 232 Fed. 155, 146 CCA 347; Republic Rubber Co. v. G. & J. Tire Co., 212 Fed. 170, 129 CCA 26; Lord, etc., Co. v. Payne, 190 Fed. 172 [rev on other grounds 195 Fed. 75, 115 CCA 107]; Tubelt Co. v. Friedman, 158 Fed. 430; Voigtmann v. Weis, etc., Cornice Co., 148 Fed. 848, 78 CCA 538; Falk Mfg. Co. v. Missouri R. Co., 103 Fed. 295, 43 CCA 240; Vulcan Iron Works v. Smith, 62 Fed. 444, 10 CCA 493 [certiorari den 165 U. S. 518, 17 SCt 407, 41 L. ed. 810]; In re Sherman, 35 App. (D. C.) 100.

"It is only when the mind is in doubt upon the consideration of the evidence affecting the question of invention as against mechanical suggestion, without regard to the thing being new and useful, that such latter qualities are available to throw the balance in favor of invention." Lord, etc., Co. v. Payne, 190 Fed. 172, 179 [rev on other grounds 195 Fed. 75, 115 CCA 107].

38. Goodyear Tire, etc., Co. v. Michelin Tire Co., 18 F. (2d) 216.

39. Goodyear Tire, etc., Co. v. Michelin Tire Co., supra.

40. Goodyear Tire, etc., Co. v. Michelin Tire Co., supra.

41. Republic Rubber Co. v. G. & J. Tire Co., 212 Fed. 170, 129 CCA 26; Lord, etc., Co. v. Payne, 195 Fed. 75, 115 CCA 107.

"The resort to novelty and utility, however, is not to be made to create a doubt." Lord, etc., Co. v. Payne, 190 Fed. 172, 179 [rev on other grounds 195 Fed. 75, 115 CCA 107].

42. Lord, etc., Co. v. Payne, supra.

43. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527 [aff 162 Fed. 892, 89 CCA 582]; Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Olin v. Timken, 155 U. S. 141, 15 SCt 49, 39 L. ed. 100; Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 SCt 295, 38 L. ed. 103; Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 SCt 850, 37 L. ed. 707; Krementz v. S. Cottle Co., 148 U. S. 556, 13 SCt 719, 37 L. ed. 558; Grant v. Walter, 148 U. S. 547, 13 SCt 699, 37 L. ed. 552; Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 SCt 40, 35 L. ed. 817; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Magowan v. New York Belting, etc., Co., 141 U. S. 332, 12 SCt 71, 35 L. ed. 781; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Allen Filter Co. v. Star Metal Mfg. Co., 30 F. (2d) 693; Linville v. Milberger, 29 F. (2d) 610; Franc-Strohmenger v. Arthur Siegman, Inc., 27 F. (2d) 785 [aff 25 F. (2d) 108]; Ward, Inc. v. Gibbs, 27 F. (2d) 466; Brick v. A. I. Namm & Sons, Inc., 22 F. (2d) 693 [aff 22 F. (2d) 697]; Overland Motor Co. v. Packard Motor Co., 22 F. (2d) 566; Bake-Rite Mfg. Co. v. Tomlinson, 16 F. (2d) 556; Grand Rapids Brass Co. v. Winters, 15 F. (2d) 129; James Heddon's Sons, Inc. v. South Bend Bait Co., 14 F. (2d) 805; Douglas Pectin Corp. v. Armour, 14 F. (2d) 768; Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Heim Grinder Co. v. Fafnir Bearing Co., 13 F. (2d) 408; Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Sandusky v. Brooklyn Box Toe Co., 13 F. (2d) 238; Wellman-Seaver-Morgan Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 3 F. (2d) 531; Harmon Paper Co. v. Prager, 286 Fed. 267 [aff 287 Fed. 841]; Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 284 Fed. 193 [certiorari den 261 U. S. 613 mem, 43 SCt 359 mem, 67 L. ed. 827 mem]; Advance Auto. Accessories Corp. v. Reflex Auto Accessory Co., 284 Fed. 117; Johnson v. Lit Bros., Inc., 278 Fed. 279 [aff 284 Fed. 259]; Sandusky Fdy., etc., Co. v. De Lavaud, 274 Fed. 607; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Shapiro, etc., Inc. v. Franklin Brass Fdy., 272 Fed. 176 [mod on other grounds 278 Fed. 435]; Medusa Concrete Waterproofing Co. v. Ceresit Waterproofing Co., 271 Fed. 122; McCallum v. Pittsburgh, etc., Coal Co., 268 Fed. 831; Shapiro, etc., Inc. v. Franklin Brass Fdy., 268 Fed. 551 [mod on other grounds 278 Fed. 435]; Merrell-Soule Co. v. Rice Milk Products Co., 268 Fed. 366; Toledo Rex Spray Co. v. California Spray Chemical Co., 268 Fed. 201; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; American Steel Foundries v. Damascus Brake Beam Co., 267 Fed. 574; St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49 (certiorari den 260 U. S. 736 mem, 43 SCt 9 mem, 67 L. ed. 488 mem)]; Tweedie v. Royal Co., 267 Fed. 224 [rev on other grounds 276 Fed. 351]; Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; W. W. Sly Mfg. Co. v. Pangborn Corp., 263 Fed. 394; Beitman v. Strater, 262 Fed. 443; Smith v. Peck, etc., Co., 262 Fed. 415 [mod 258 Fed. 40, and certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem]; A. Kimball Co. v. Noesting Pin Ticket Co., 262 Fed. 148; Zidell v. Dexter, 262 Fed. 145; Davey Tree Expert Co. v. Van Billiard, 261 Fed. 996; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Æolian Co. v. Schubert Piano Co., 261 Fed. 178; Straub v. Campbell, 259 Fed. 570, 170 CCA 532; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; Weber Electric Co. v. E. H. Freeman Electric Co., 253 Fed. 657 [mod on other grounds 262 Fed. 769 (certiorari granted 253 U. S. 481 mem, 42 SCt 483 mem, 64 L. ed. 1023 mem, and aff 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162)]; Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co., 251 Fed. 288, 163 CCA 444 [certiorari den 248 U. S. 579 mem, 39 SCt 20 mem, 63 L. ed. 430 mem]; Luminous Unit Co. v. Freeman-Sweet Co., 249 Fed. 876 [mod on other grounds 264 Fed. 107 (certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem)]; Globe Knitting Works v. Segel, 248 Fed. 495, 160 CCA 505; Philadelphia Stetson Hospital v. Snook-Roentgen Mfg. Co., 245 Fed. 654, 158 CCA 82, 237 Fed. 204; Westinghouse Mach. Co. v. C. & G. Cooper Co., 245 Fed. 463, 157 CCA 625; Miami Copper Co. v. Minerals Separation, Ltd., 244 Fed. 752, 157 CCA 200; Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 Fed. 521, 152 CCA 399; Union Tool Co. v. Wilson, etc., Mfg. Co., 237 Fed. 837 [rev on other grounds 249 Fed. 729, 161 CCA 639 (certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem)]; Meccano, Ltd. v. Wagner, 234 Fed. 912 [reopening authorized in Dist. Ct. 235 Fed. 890, 149 CCA 202, and mod on other grounds 246 Fed. 603, 158 CCA 573]; Vacuum Cleaner Co. v. American Rotary Valve Co., 227 Fed. 998; Todd v. J. Whitaker Mfg. Co., 226 Fed. 791 [aff 232 Fed. 714, 146 CCA 640]; Nicholas Power Co. v. Baird, 222 Fed. 933; Columbia Metal Box Co. v. Halper, 220 Fed. 912, 136 CCA 478; Individual Drinking Cup Co. v. U. S. Drinking Cup Co., 220 Fed. 331; Holton v. Pepper, 216 Fed. 368; Sherman-Clay v. Searchlight Horn Co., 214 Fed. 86, 130 CCA 562; United Gas Impr. Co. v. Gas Mach. Co., 211 Fed. 672 [rev on other grounds 228 Fed. 684, 143 CCA 206]; Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 CCA 301; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Protector Last Re-enforcing Co. v. Pell, 204 Fed. 453 [aff 210 Fed. 167, 127 CCA 25]; Standard Asphalt, etc., Co. v. American Asphaltum, etc., Co., 203 Fed. 508; Grever v. U. S. Hoffman Co., 202 Fed. 923, 121 CCA 281; Ely Mfg. Co. v. Fritsch, 200 Fed. 424, 118 CCA 576; Tilden-Thurber Co. v. Theodore W. Foster, etc., Co., 195 Fed. 538 [aff 200 Fed. 54, 118 CCA 282]; Charles Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 CCA 617; Rand v. Exchange Scrip-Book Co., 187 Fed. 984, 110 CCA 322; Eagle Wagon Works v. Columbia Wagon Co., 181 Fed. 148 [aff 183 Fed. 771, 106 CCA 137]; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023 mem, 104 CCA 669

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the question in doubt, may be sufficient to resolve the doubt in favor of invention.[44] Increased weight is to be given to proof of commercial success where it is achieved in an old and crowded art;[45] where the existing means have for some time been unsatisfactory;[46] where prior efforts to fill the want supplied are shown;[47] or where the degree of success achieved is unusual.[48] Increased weight is also to be given such evidence where the alleged invention displaced either wholly or in a large degree methods or devices previously used for the same or analogous purposes,[49] especially if its acceptance in preference

mem]; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; Electric Controller, etc., Co. v. Westinghouse Electric, etc., Co., 171 Fed. 83, 96 CCA 187; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; Stafford v. Morris, 161 Fed. 113; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 53 CCA 583 [certiorari den 187 U. S. 641 mem, 23 SCt 842 mem, 47 L. ed. 345 mem]; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 CCA 369; Kalamazoo R. Supply Co. v. Duff Mfg. Co., 113 Fed. 264, 51 CCA 221; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Christy v. Hygeia Pneumatic Bicycle Saddle Co., 93 Fed. 965, 36 CCA 31; Stevenson Co. v. McFassell, 90 Fed. 707, 33 CCA 249; Morrin v. Lawler, 90 Fed. 285 [mod on other grounds 99 Fed. 977, 40 CCA 204]; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 982; Allington, etc., Mfg. Co. v. Globe Co., 89 Fed. 865; Consolidated Car Heating Co. v. American Electric Heating Corp., 82 Fed. 993 [mod on other grounds 85 Fed. 662, 29 CCA 386]; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203 [aff 69 Fed. 837]; Dueber Watch-Case Mfg. Co. v. Robbins, 75 Fed. 17, 21 CCA 198; Brownson v. Dodson-Fisher-Brockmann Co., 71 Fed. 517; National Co. v. Belcher, 68 Fed. 665 [mod 71 Fed. 876, 18 CCA 375]; Holmes v. Truman, 67 Fed. 542, 14 CCA 517; Miller v. Handley, 61 Fed. 100; Saunders v. Allen, 60 Fed. 610, 9 CCA 157; Lalance, etc., Mfg. Co. v. Habermann Mfg. Co., 53 Fed. 375; Featherstone v. George R. Bidwell Cycle Co., 53 Fed. 113 [rev on other grounds 57 Fed. 631, 6 CCA 487]; Fox v. Perkins, 52 Fed. 205, 3 CCA 32; Watson v. Stevens, 51 Fed. 757, 2 CCA 500; Electrical Accumulator Co. v. New York, etc., R. Co., 50 Fed. 81; Stearns v. Phillips, 43 Fed. 792; Chicopee Folding-Box Co. v. Nugent, 41 Fed. 139 [aff 51 Fed. 229, 2 CCA 165]; Parker v. Dickinson, 38 Fed. 413; Palmer v. Johnston, 34 Fed. 336; Good v. Bailey, 33 Fed. 42 [app dism 140 U. S. 681 mem, 11 SCt 1021 mem, 35 L. ed. 602 mem]; Hill v. Biddle, 27 Fed. 560; Miller v. Pickering, 16 Fed. 540; Western Electric Mfg. Co. v. Chicago Electric Mfg. Co., 14 Fed. 691, 11 Biss. 427; Gottfried v. Crescent Brewing Co., 13 Fed. 479 [rev on other grounds 128 U. S. 158, 9 SCt 83, 32 L. ed. 390]; Lindsay v. Stein, 10 Fed. 907, 20 Blatchf. 370; Shedd v. Washburn, 9 Fed. 904; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Strobridge v. Lindsay, 2 Fed. 692; Adams v. Edwards, 1 F. Cas. No. 53, 1 Fish. Pat. Cas. 1; Birdsall v. McDonald, 3 F. Cas. No. 1,434, 1 Bann. & A. 165; Eames v. Cook, 8 F. Cas. No. 4,239, 2 Fish. Pat. Cas. 146; Judson v. Moore, 14 F. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Lorillard v. McDowell, 15 F. Cas. No. 8,510, 2 Bann. & A. 531; Schaum v. Baker, 21 F. Cas. No. 12,440; Stanley Works v. Sargent, 22 F. Cas. No. 13,289, 8 Blatchf. 344, 4 Fish. Pat. Cas. 443; McClaire's Application, 57 App. (D. C.) 11, 16 F. (2d) 351; In re Shollenberger, 51 App. (D. C.) 332, 279 Fed. 314; Wilson's Application, 49 App. (D. C.) 76, 258 Fed. 976; In re Thurston, 26 App. (D. C.) 315; Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co., 12 App. (D. C.) 201; Durable Electric Appliance Co., Ltd. v. Renfrew Electric Products, Ltd., 59 Ont. L. 527, [1926] 4 DomLR 1004.

44. Temco Electric Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 48 SCt 170, 72 L. ed. 298; Trico Products Corp. v. Ace Products Corp., 30 F. (2d) 688; Skelton v. Igoe, 29 F. (2d) 837; Tropic-Aire, Inc. v. Jumper, 28 F. (2d) 631; Brunswick-Balke-Collender Co. v. Seamless Rubber Co., 27 F. (2d) 925; Guardian Trust Co. v. Downingtown Mfg. Co., 25 F. (2d) 878; N. O. Nelson Mfg. Co. v. F. E. Meyers, etc., Co., 25 F. (2d) 659; Tinsel Corp. v. Haupt, 25 F. (2d) 318; Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Einson Freeman Co. v. International Folding Paper Box Co., 21 F. (2d) 701; Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 267]; Hazeltine Corp. v. Electric Service Engineering Corp., 18 F. (2d) 662; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16 [certiorari den 275 U. S. 529 mem, 48 SCt 21 mem, 72 L. ed. 409 mem]; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Lyon v. Boh, 10 F. (2d) 30 [rev 1 F. (2d) 48]; Gross v. Frank, 293 Fed. 702; Mt. Vernon Car Mfg. Co. v. Pressed Steel Mfg. Co., 291 Fed. 321 [certiorari den 263 U. S. 710 mem, 44 SCt 36 mem, 68 L. ed. 518 mem]; Boyce v. Pyrene Mfg. Co., 290 Fed. 998 [aff 292 Fed. 480 (certiorari den 263 U. S. 723 mem, 44 SCt 231 mem, 68 L. ed. 525 mem)]; Atlantic, etc., Co. v. Wood, 288 Fed. 148; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Bonnie-B Co., Inc., v. Giguet, 269 Fed. 272 [aff 269 Fed. 1021 mem]; Beitman v. Strater, 262 Fed. 443; Meurer Steel Barrel Co. v. Draper Mfg. Co., 260 Fed. 410; Fligel v. Sears, 254 Fed. 698, 166 CCA 196; Luminous Unit Co. v. Freeman-Sweet Co., 249 Fed. 876 [mod on other grounds 264 Fed. 107 (certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem)]; Union Tool Co. v. Wilson, etc., Mfg. Co., 237 Fed. 837 [rev on other grounds 249 Fed. 729, 161 CCA 639 (certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem)]; Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 148 CCA 390; Kawneer Mfg. Co. v. Toledo Plate, etc., Glass Co., 232 Fed. 362 [aff 237 Fed. 364, 150 CCA 378]; O'Rourke Engineering Constr. Co. v. McMullen, 160 Fed. 933, 88 CCA 115 [certiorari den 210 U. S. 435 mem, 28 SCt 763 mem, 52 L. ed. 1136 mem]; Regent Mfg. Co. v. Penn Electrical, etc., Co., 121 Fed. 80, 57 CCA 334; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 CCA 36; In re Rowell, 48 App. (D. C.) 238; In re Willard, 45 App. (D. C.) 549.

45. Goodbody v. Firestone Steel Products Co., 23 F. (2d) 625; Wellman-Seaver-Morgan Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 3 F. (2d) 531; Tweedie v. Royal Co., 267 Fed. 224 [rev on other grounds 276 Fed. 351]; Luminous Unit Co. v. Freeman-Sweet Co., 249 Fed. 876 [mod on other grounds 264 Fed. 107 (certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem)]; Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 148 CCA 390 [rev 226 Fed. 766].

46. Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; In re Willard, 45 App. (D. C.) 549.

47. Boston Pencil Pointer Co. v. Automatic Pencil Sharpener Co., 276 Fed. 910; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229].

48. Nicholas Power Co. v. C. R. Baird Co., 222 Fed. 933; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516.

49. Richmond Screw Anchor Co. v. U. S., 275 U. S. 331, 48 SCt 194, 72 L. ed. 303; Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Magowan v. New York Belting, etc., Co., 141 U. S. 332, 12 SCt 71, 35 L. ed. 781; New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Frick Co. v. Lindsay, 27 F. (2d) 59; Wensel v. Gold Hill Hardware Mfg. Co., 21 F. (2d) 974; Yablick v. Protecto Safety Appliance Corp., 21 F. (2d) 885; Dubilier Condenser Corp. v. New York Coil Co., 20 F. (2d) 723; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; Dovan Chemical Co. v. Corona Cord Tire Co., 16 F. (2d) 419 [certiorari granted 273 U. S. 629 mem, 47 SCt 570 mem, 71 L. ed. 843 mem, and rev on other grounds 276 U. S. 358, 48 SCt 330, 72 L. ed. 610]; Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682 [certiorari den 269 U. S. 571 mem, 46 SCt 26 mem, 70 L. ed. 417 mem]; United Verde Copper Co. v. Peirce-Smith Converter Co., 7 F. (2d) 13 [aff 298 Fed. 763]; Collins v. Hupp Motor Car Corp., 4 F. (2d) 272; Davis-Bournonville Co. v. Alexander Milburn Co., 297 Fed. 846 [aff 1 F. (2d) 227 (certiorari granted 266 U. S. 596 mem, 45 SCt 93 mem, 69 L. ed. 459 mem)]; Sparks-Withington Co. v. E. A. Laboratories, 295 Fed. 534 [mod on other grounds 3 F. (2d) 539]; Mt. Vernon Car Mfg. Co. v. Pressed Steel Mfg. Co., 291 Fed. 321 [certiorari den 263 U. S. 710 mem, 44 SCt 36 mem, 68 L. ed. 518 mem]; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; W. W. Sly Mfg. Co. v. Pangborn Corp., 263 Fed. 394; Thropp, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 226 Fed. 941, 141 CCA 545; Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Rand v. Exchange Scrip-Book Co., 187 Fed. 984, 110 CCA 322; Eagle Wagon Works v. Columbia Wagon Co., 181 Fed. 148 [aff 183 Fed. 771, 106 CCA 137]; Morgan Engineering Co. v. Alliance Mach. Co., 176 Fed. 100, 100 CCA 30; Morton v. Llewellyn, 164 Fed. 693, 90 CCA 514; Stafford v. Morris, 161 Fed. 113; St. Louis St. Flushing Mach. Co. v. American St. Flushing Mach. Co., 156 Fed. 574, 84 CCA 340; Heywood Bros., etc., Co. v. Syracuse Rapid Transit R. Co., 152 Fed. 453; Goss Printing Press Co. v. Scott, 108 Fed. 253, 47 CCA 302; Holmes v. Truman, 67 Fed. 542, 14 CCA 517; Watson v. Stevens, 51 Fed. 757, 2 CCA 500; Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 47 Fed. 894; In re Sorum, 49 App. (D. C.) 360, 265 Fed. 1000; In re Huff, 48 App. (D. C.) 258; In re Rowell, 48 App. (D. C.)

to the old methods or devices was immediate or prompt,[50] and unaided by puffing or business exploitation.[51] And the fact that earlier methods or devices for attaining the same or analogous purposes never went into general use enhances the weight to be given proof of acceptance and general use of the alleged invention.[52] Commercial success, however, is not in all cases controlling,[53] even though coupled with proof of superior utility;[54] and it has been asserted that commercial success must be scrutinized with the utmost caution before it is accepted as indicating invention,[55] and that commercial success alone is an unsafe guide,[56] especially where no prior efforts to fill the want satisfied are shown.[57] It must be weighed in the light of all the circumstances.[58] Commercial success is of no value as evidence where it clearly appears from other facts that the step taken by the patentee did not involve invention,[59]

238; In re Thomson, 26 App. (D. C.) 419.

50. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Magowan v. New York Belting, etc., Co., 141 U. S. 332, 12 SCt 71, 35 L. ed. 781; New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 30 L. ed. 1103; Luminous Unit Co. v. Freeman-Sweet Co., 249 Fed. 876 [mod on other grounds 264 Fed. 107 (certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem)]; United Gas Impr. Co. v. Gas Mach. Co., 211 Fed. 672 [rev on other grounds 228 Fed. 684, 143 CCA 206]; Eagle Wagon Works v. Columbia Wagon Co., 181 Fed. 148 [aff 183 Fed. 771, 106 CCA 137]; Morgan Engineering Co. v. Alliance Mach. Co., 176 Fed. 100, 100 CCA 30; Holmes v. Truman, 67 Fed. 542, 14 CCA 517.

51. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286.

52. Frick Co. v. Lindsay, 27 F. (2d) 59; Worthington Pump, etc., Corp. v. Clark Bros. Co., 17 F. (2d) 189; Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co., 272 Fed. 386; Troy Carriage Sunshade Co. v. Kinsey Mfg. Co., 247 Fed. 672, 159 CCA 574; Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 498, 53 CCA 230 [aff 198 U. S. 399, 25 SCt 697, 49 L. ed. 1100].

53. John E. Thropp's Sons' Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Trane Co. v. Nash Engineering Co., 25 F. (2d) 267; Edward G. Budd Mfg. Co. v. C. R. Wilson Body Co., 21 F. (2d) 803 [certiorari den 276 U. S. 632 mem, 48 SCt 325 mem, 72 L. ed. 742 mem]; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 797; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789; Elyria Iron, etc., Co. v. American Welding, etc., Co., 15 F. (2d) 106 [aff 15 F. (2d) 111]; Witten v. Oak Rubber Co., 11 F. (2d) 774; Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; Gerrard v. Cary, 9 F. (2d) 949 [aff 9 F. (2d) 957]; Stillwell v. McPherson, 207 Fed. 837 [rev 218 Fed. 839, 134 CCA 611]; Fernald v. Oneida Nat. Chuck Co., 167 Fed. 559 [aff 174 Fed. 1020 mem, 98 CCA 664 mem]; Ypsilanti Dress-Stay Mfg. Co. v. Van Valkenburg, 72 Fed. 277 [aff 78 Fed. 926 mem, 24 CCA 416]; In re Smith, 57 App. (D. C.) 204, 19 F. (2d) 678; Talley's Application, 53 App. (D. C.) 99, 288 Fed. 453, Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645]; Charlesworth v. British Thomson-Houston Co., Ltd., 41 T. L. R. 259.

"Commercial success alone is no safe guide." Trane Co. v. Nash Engineering Co., 25 F. (2d) 267, 269.

54. Tubelt Co. v. Friedman, 158 Fed. 430.

55. Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785].

56. McClain v. Ortmayer, 141 U. S. 419, 428, 12 SCt 76, 35 L. ed. 800; David Belais, Inc. v. Goldsmith Bros. Smelting, etc., Co., 10 F. (2d) 673 [aff 6 F. (2d) 930 (certiorari den 271 U. S. 687 mem, 46 SCt 639 mem, 70 L. ed. 1152 mem)]; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Apple v. American Shoe Mach., etc., Co., 232 Fed. 603, 146 CCA 561.

"That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility, is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market and large commissions to dealers, as by the intrinsic merit of the articles themselves." McClain v. Ortmayer, supra.

57. Boston Pencil Pointer Co. v Automatic Pencil Sharpener Co., 276 Fed. 910; National Sweeper Co. v. Bissell Carpet Sweeper Co., 249 Fed. 196, 161 CCA 232 [aff 242 Fed. 947].

58. John E. Thropp's Sons' Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708 [rev 284 Fed. 746]; Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326.

[a] **Illustration.**—Although bricks of a certain type, which had gone on the market and had a large sale, are the product of the patentee's patented machine, which had been manufactured by him and sold to brickmakers, such credit and such presumption of inventive novelty as arise from public use should be given to the product, the bricks, and not to the machine. Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326.

59. U. S.—Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Olin v. Timken, 155 U. S. 141, 15 SCt 49, 39 L. ed. 100; Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 SCt 850, 37 L. ed. 707 [aff 37 Fed. 338]; Krementz v. S. Cottle Co., 148 U. S. 556, 13 SCt 719, 37 L. ed. 558; Adams v. Bellaire Stamping Co., 141 U. S. 539, 12 SCt 66, 35 L. ed. 849; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 113 U. S. 157, 5 SCt 513, 28 L. ed. 939; Hookless Fastener Co. v. H. L. Rogers Co., Inc., 28 F. (2d) 814 [rev 26 F. (2d) 264]; Tropic-Aire, Inc. v. Jumper, 28 F. (2d) 631; George Haiss Mfg. Co. v. Link Belt Co., 27 F. (2d) 397; Eskimo Pie Corp. v. Honeymoon Pie Corp., 25 F. (2d) 154; Eskimo Pie Corp. v. Levous, 24 F. (2d) 599; Hewes v. Dieches, 24 F. (2d) 503 [certiorari den 49 SCt 9 mem]; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; California Fruit Growers Exch. v. Blake, 19 F. (2d) 467; Universal Rim Co. v. Firestone Tire, etc., Co., 7 F. (2d) 24 [mod 289 Fed. 884]; U. S. Sanitary Specialties Corp. v. West Disinfecting Co., 3 F. (2d) 997; Coffield v. Sunny Line Appliance, 297 Fed. 609; Trimble v. Woodstock Mfg. Co., 297 Fed. 524 [aff 297 Fed. 529]; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 296 Fed. 201 [aff 7 F. (2d) 284 (certiorari den 268 U. S. 705 mem, 45 SCt 639 mem, 69 L. ed. 1167 mem)]; American Chain Co. v. Cox Brass Mfg. Co., 295 Fed. 32; Harmon Paper Co. v. Kimberly Clark Co., 289 Fed. 501; Gilchrist v. F. B. Mallory Co., 281 Fed. 350; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Bonnie-B Co., Inc. v. Giguet, 260 Fed. 275 [aff 269 Fed. 1021 mem]; Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 Fed. 435, 165 CCA 177; Package Mach. Co. v. Johnson Automatic Sealer Co., 246 Fed. 598, 158 CCA 568; Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co., 245 Fed. 762 [aff 257 Fed. 314, 168 CCA 398]; Nash v. Miner, 245 Fed. 349, 157 CCA 541; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 CCA 587; Star Hame Mfg. Co. v. U. S. Hame Co., 227 Fed. 876, 142 CCA 480; Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 CCA 576 [rev 207 Fed. 956, certiorari den 235 U. S. 701 mem, 35 SCt 202 mem, 59 L. ed. 432 mem, and rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286]; Republic Rubber Co. v. G. & J. Tire Co., 212 Fed. 170, 129 CCA 26; Stillwell v. McPherson, 207 Fed. 837 [rev on other grounds 218 Fed. 839, 134 CCA 611]; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79; Boss Mfg. Co. v. Thomas, 182 Fed. 811, 105 CCA 243; Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175; Schmertz Wire Glass Co. v. Western Glass Co., 178 Fed. 977 [mod on other grounds 185 Fed. 788, 109 CCA 1]; Voightmann v. Weis, etc., Cornice Co., 148 Fed. 848, 78 CCA 538 [aff 133 Fed. 298]; General Electric Co. v. Yost Electric Mfg. Co., 131 Fed. 874 [aff 139 Fed. 568, 71 CCA 552]; American Salesbook Co. v. Carter-Crume Co., 125 Fed. 499 [rev on other grounds 129 Fed. 1004, 62 CCA 679]; American Sales Book Co. v. Bullivant, 117 Fed. 255, 54 CCA 287 [certiorari den 190 U. S. 560 mem, 23 SCt 855 mem, 47 L. ed. 1184 mem]; Standard Caster, etc., Co. v. Caster Socket Co., 113 Fed. 162, 51 CCA 109; Goss Printing-Press Co. v. Scott, 103 Fed. 650 [rev on other grounds 108 Fed. 253, 47 CCA 302 (certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem)]; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 99 Fed. 758 [rev on other grounds 106 Fed. 693, 45 CCA 544]; Lane v. Welds, 99 Fed. 286, 39 CCA 528; Ingraham Co. v. E. N. Welch Mfg. Co., 92 Fed. 1019, 35 CCA 163; Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co., 91 Fed. 978; McEwan Bros. Co. v. McEwan, 91 Fed. 787; Perry v. Revere Rubber Co., 86 Fed. 633; Michigan Stove Co. v. Fuller-Warren Co., 81 Fed. 376 [rev on other grounds 86 Fed. 463, 30 CCA 193 (certiorari den 172 U. S. 647 mem, 19 SCt 886 mem, 43 L. ed. 1181 mem)]; Schwarzwaelder v. Detroit, 77 Fed. 886; Klein v. Seattle, 77 Fed. 200, 23 CCA 114 [aff 63 Fed. 702]; Consolidated Electric Mfg. Co. v. Holtzer, 67 Fed. 907, 15 CCA 63; Saunders v. Allen, 60 Fed. 610, 9 CCA 157; Washburn, etc., Mfg. Co. v. Grinnell Wire Co., 24 Fed. 23; Wilson Packing Co. v. Chicago Packing, etc., Co., 9 Fed. 547, 10 Biss. 559 [aff 105 U. S. 566, 26 L. ed. 1172].

D. C.—Talley's Application, 53 App. 99, 288 Fed. 453; In re Garrett, 27 App. 19; In re Thurston, 26 App. 315; In re Smith, 14 App. 181; Durham v. Seymour, 6 App. 78.

Can.—Guettler v. Canadian International Paper Co., [1928] Can. S. C. 438, [1928] 2 DomLR 801; Detroit Rubber Products, Inc. v. Republic Rubber Co., [1928] Can. S. C. 29, [1928] 3 DomLR 81; Bergeon v. De Kermor Electric Heat Co., Ltd., [1927] Can. Exch. 181, [1927] 3 Dom LR 99.

Ont.—Durable Electric Appliance Co., Ltd. v. Renfrew Electric Products, Ltd., 59 Ont. L. 527, [1926] 4 DomLR 1004.

and will be given weight only in doubtful cases.[60] To be entitled to consideration as evidence of invention, commercial success must result directly from the merit of the art or instrument and be attributable to the claims in suit.[61] It is of no evidential value where due entirely to good business methods,[62] efficient advertising,[63] the workmanship bestowed on the article,[64] the position of the manufacturer in the trade,[65] connection with another device,[66] cheapness[67] or beauty[68] of the product, popular demand for products of the same general kind or class,[69] or to any other circumstances peculiar to the course of trade.[70] The value of commercial success as an evidential fact is lessened by the fact that other circumstances contributed thereto,[71] but it may nevertheless have weight in doubtful cases,[72] especially where it surpassed that achieved by similar devices having all the other aids to success.[73] Obviously, evidence showing use by a large number of users is entitled to less weight than evidence of use by a large majority of users.[74] The burden of proof to show that commercial success was due to the method or device in question and not to other methods or devices used in connection with it is upon the one asserting it,[75] and the weight to be accorded evidence of commercial success is weakened by the absence of explanation of the part played by the other methods or devices.[76] The burden of proving that commercial success of a method or device which followed a long history of failure was due to advertising or exploitation is upon the party who challenges the inference of invention.[77]

Lack of commercial success. The fact that an art or instrument has achieved no success in the field of the practical art is a circumstance that may be considered in determining the question of invention.[78] But the fact that a patentee was not sufficiently satisfied that the manufacture of his device would be

Que.—Dion v. Dupuis, 12 Que. Super. 465.

"The mere fact that a patented article is popular and meets with large and increasing sales is unimportant when the alleged invention is clearly without patentable novelty." Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 SCt 850, 37 L. ed. 707.

"Commercial success cannot create the doubt as well as resolve a doubtful case in favor of the patentee." Hewes v. Dieches, 24 F. (2d) 503, 505 [certiorari den 49 SCt 9 mem].

60. Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Jackson Skirt, etc., Co. v. Rosenbaum, 225 Fed. 531, 140 CCA 515; Fernald v. Oneida Nat. Chuck Co., 167 Fed. 559 [aff 174 Fed. 1020 mem, 98 CCA 664 mem]; Voigtmann v. Weis, etc., Cornice Co., 148 Fed. 848, 78 CCA 536; Falk Mfg. Co. v. Missouri R. Co., 103 Fed. 295, 43 CCA 240; Millett v. Allen, 27 App. (D. C.) 70.

61. John E. Thropp's Sons' Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Forcheimer v. Franc, Strohmenger, etc., Inc., 20 F. (2d) 553 [certiorari den 277 U. S. 597 mem, 48 SCt 560 mem, 72 L. ed. 1007 mem]; Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem]; Bonnot Co. v. Lopulco Systems, 15 F. (2d) 848; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; Kleinert Rubber Co. v. Polkase Mfg. Co., 10 F. (2d) 399; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Harmon Paper Co. v. Prager, 286 Fed. 267 [aff 287 Fed. 841]; Standard Oil Co. v. Oklahoma Natural Gas Co., 284 Fed. 469; Advance Auto. Accessories Corp. v. Reflex Auto Accessory Co., 284 Fed. 117; Staso Laminated Slate Co. v. Stowell Mfg. Co., 280 Fed. 107; Bonnie-B Co., Inc. v. Giguet, 269 Fed. 275 [aff 269 Fed. 1021 mem]; Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; Troy Wagon Works Co. v. Ohio Trailer Co., 264 Fed. 347; Sternau v. Borgfeldt, 254 Fed. 582, 166 CCA 192; Butler v. Pratt, 253 Fed. 654, 165 CCA 280; National Sweeper Co. v. Bissell Carpet Sweeper Co., 249 Fed. 196, 161 CCA 232; Cohn v. Hickey-Freeman Co., 246 Fed. 256; Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 Fed. 521, 152 CCA 399; Johnson v. Lambert, 234 Fed. 886, 148 CCA 484; Apple v. American Show Mach., etc., Co., 232 Fed. 603, 146 CCA 561; Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 CCA 576 [certiorari den 235 U. S. 701 mem, 35 SCt 202 mem, 59 L. ed. 432 mem (rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286)]; Doig v. Morgan Mach. Co., 122 Fed. 460, 59 CCA 616; Dowagiac v. Superior Drill Co., 115 Fed. 886, 53 CCA 36; Dueber Watch Case Co. v. Robbins, 75 Fed. 17, 21 CCA 198 [rev 71 Fed. 186]; Consolidated Electric Mfg. Co. v. Holtzer, 67 Fed. 907, 15 CCA 63; Copeland-Chatterson Co. v. Paquette, 38 Can. S. C. 451 [dism app 10 Can. Exch. 410].

"It is generally recognized that commercial success, to be of consequence in this respect, must result directly from the merit of the article and be attributable to the claims in suit." Western Willite Co. v. Trinidad Asphalt Mfg. Co., 16 F. (2d) 446, 450 [certiorari den 274 U. S. 737 mem, 47 SCt 575 mem, 71 L. ed. 1317 mem].

[a] **Thus** the commercial success of complainant's motor truck trailers does not aid the validity and scope of its patent where most of the trucks sold differed from the construction shown by the patent, and the success was largely due to the general growth of the industry. Troy Wagon Works Co. v. Ohio Trailer Co., 264 Fed. 347.

62. Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Standard Oil Co. v. Oklahoma Natural Gas Co., 284 Fed. 469; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; Ypsilanti Dress-Stay Mfg. Co. v. Van Valkenburg, 72 Fed. 277 [aff 78 Fed. 926 mem, 24 CCA 416 mem]; Peoria Target Co. v. Cleveland Target Co., 47 Fed. 725.

63. Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Tolfree v. Wetzler, 22 F. (2d) 214 [rev on other grounds 25 F. (2d) 553 (certiorari den 49 SCt 28 mem)]; Wolf Mineral Process Corp. v. Minerals Separation North American Corp., 18 F. (2d) 483 [certiorari den 275 U. S. 558 mem, 48 SCt 118 mem, 72 L. ed. 425 mem]; David Belais, Inc. v. Goldsmith Bros. Smelting, etc., Co., 6 F. (2d) 930 [aff 10 F. (2d) 673 (certiorari den 271 U. S. 687 mem, 46 SCt 639 mem, 70 L. ed. 1152 mem)]; International Flatstub Check Book Co. v. Young & Selden Co., 284 Fed. 831 [aff 278 Fed. 835]; Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Butler v. Pratt, 253 Fed. 654, 165 CCA 280; Johnson v. Lambert, 234 Fed. 886, 148 CCA 484; Consolidated Car Heating Co. v. American Electric Heating Co., 82 Fed. 993 [mod on other grounds 85 Fed. 662, 29 CCA 386]; Ypsilanti Dress-Stay Mfg. Co. v. Van Valkenburg, 72 Fed. 277 [aff 78 Fed. 926 mem, 24 CCA 416 mem].

64. Ypsilanti Dress-Stay Mfg. Co. v. Van Valkenburg, supra.

65. Goodyear Tire, etc., Co. v. Michelin Tire Co., 18 F. (2d) 216.

66. Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]; Kalamazoo Loose Leaf Binder Co. v. Wilson Jones Loose Leaf Co., 286 Fed. 715; De Mayo Coaling Co. v. Michener Stowage Co., 231 Fed. 736, 146 CCA 20 [rev 227 Fed. 895], Dueber Watch-Case Mfg. Co. v. Robbins, 75 Fed. 17, 21 CCA 198.

67. Stedman v. Puritan Rubber Co., 11 F. (2d) 278; Herzog v. Keller, 234 Fed. 85, 148 CCA 101.

68. Stedman v. Puritan Rubber Co., 11 F. (2d) 278.

69. Stedman v. Puritan Rubber Co., supra; Kleinert Rubber Co. v. Polkase Mfg. Co., 10 F. (2d) 399; Johnson v. Lit Bros., Inc., 278 Fed. 279 [aff 284 Fed. 259]; Johnson v. Lambert, 234 Fed. 886, 148 CCA 484; Nieblo Mfg. Co. v. Standard Co., [1927] 4 DomLR 785.

70. John E. Thropp's Sons' Co. v. Seiberling, 264 U. S. 320, 44 SCt 346, 68 L. ed. 708; Bonnie-B Co., Inc. v. Giguet, 269 Fed. 275 [aff 269 Fed. 1021 mem]; Wire Wheel Corp. v. C. T. Silver, Inc., 266 Fed. 221 [aff 266 Fed. 229]; Johnson v. Lambert, 234 Fed. 886, 148 CCA 484; Epstein v. Dryfoos, 229 Fed. 756; Peoria Target Co. v. Cleveland Target Co., 47 Fed. 725.

"The speedy and general adoption by the public of a patented device is not conclusive on the question of novelty and utility, where it can be accounted for on grounds peculiar to the course of trade." Peoria Target Co. v. Cleveland Target Co., supra.

71. Todd v. Whitaker Mfg. Co., 226 Fed. 791 [aff 232 Fed. 714, 146 CCA 640].

72. E. Fredericks, Inc. v. Eugene, Ltd., 298 Fed. 633 [rev on other grounds 3 F. (2d) 543]; Todd v. Whitaker Mfg. Co., 226 Fed. 791 [aff 232 Fed. 714, 146 CCA 640]; Peters v. Union Biscuit Co., 120 Fed. 679 [rev on other grounds 125 Fed. 601, 60 CCA 337].

73. Todd v. Whitaker Mfg. Co., 226 Fed. 791 [aff 232 Fed 714, 146 CCA 640]; Stahl v. Williams, 64 Fed. 121; Fox v. Perkins, 52 Fed. 205, 3 CCA 32.

74. Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; Sperry Mfg. Co. v. J. L. Owens Co., 111 Fed. 388, 49 CCA 399.

75. Fleischman Yeast Co. v Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570].

76. Fleischman Yeast Co. v. Federal Yeast Corp., supra.

77. Auto Pneumatic Action Co. v. Kindler, 247 Fed. 323, 159 CCA 417.

78. Sturm v. Wm. E. Dee Co., 249

profitable to impel him to engage in efforts to interest the necessary capital to manufacture and push the invention has no substantial tendency to show that the device was not an invention.[79]

[§ 93] **e. Satisfaction of Long Felt Want.** Evidence of a long felt want and unsupplied need for means accomplishing the results of the patented art or instrument is admissible to show that its production called for an exercise of the inventive faculties.[80] It has been held, however, that such evidence is admissible only in doubtful cases.[81]

[§ 94] **f. Unsuccessful Efforts of Others.** The success of an art or instrument in meeting a general demand that others had tried unsuccessfully to supply is a true indication of invention,[82] and proof of prior successful efforts of others to accomplish the results obtained by the method or device in question is admissible to show that its production involved invention.[83] A thing is not obvious if the problem of attaining the result achieved by it long puzzled those skilled in the art to which it relates.[84] It has been held, however, that evidence of this character is admissible in doubtful cases only.[85] When success of a patented art or instrument follows a long history of failure, the burden of showing that success arose from some cause that had nothing to do with the difficulties of attaining the desired result is upon one challenging its validity on the ground that it lacks invention.[86]

[§ 95] **g. Public Acquiescence in Validity.** Long and continuous recognition of the validity of a patent by that part of the public interested in denying it is some evidence that the method or device patented is the product of invention.[87] Thus it may be shown that licenses have been taken out and royalties paid by those interested in making, using, or selling the method or device in question,[88] or that infringement has been discontinued on the failure to negotiate licenses.[89] The weight to be given to evidence of acquiescence is, of course, lessened if there are

Fed. 244; Adt v. Bay State Optical Co., 226 Fed. 925, 141 CCA 529.

79. Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co., 272 Fed. 386.

80. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 SCt 295, 38 L. ed. 103 [rev 35 Fed. 579]; Krementz v. S. Cottle Co., 148 U. S. 556, 13 SCt 719, 37 L. ed. 558; Guardian Trust Co. v. Downington Mfg. Co., 25 F. (2d) 878 [mod on other grounds 29 F. (2d) 887]; Trane Co. v. Nash Engineering Co., 25 F. (2d) 267; Goodbody v. Firestone Steel Products Co., 23 F. (2d) 625; Wensel v. Gold Hill Hardware Mfg. Co., 21 F. (2d) 974; Yablick v. Protecto Safety Appliance Corp., 21 F. (2d) 885; Brogdex Co. v. American Fruit Growers, Inc., 21 F. (2d) 110; Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 267]; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Lenk v. Hunt-Lasher Co., 14 F. (2d) 335; Respro, Inc. v. Sydeman, 11 F. (2d) 779 [aff 14 F. (2d) 1023]; Sparks-Withington Co. v. E. A. Laboratories, 295 Fed. 534 [mod on other grounds 3 F. (2d) 539]; Morgan Engineering Co. v. Alliance Mach. Co., 176 Fed. 100, 100 CCA 30; Maunula v. Sunell, 155 Fed. 535; Brill v. North Jersey St. R. Co., 124 Fed. 778 [rev on other grounds 134 Fed. 580, 67 CCA 380]; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 124 Fed. 514; Peters v. Union Biscuit Co., 120 Fed. 679 [rev on other grounds 125 Fed. 601, 60 CCA 337]; Brunswick-Balke-Collender Co. v. Thum, 111 Fed. 904, 50 CCA 61; Hallock v. Davison, 107 Fed. 482; Celluloid Co. v. Arlington Mfg. Co., 85 Fed. 449; Steel-Clad Bath Co. v. Davison, 77 Fed. 736; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203 [aff 69 Fed. 837]; Taylor Burner Co. v. Diamond, 72 Fed. 182; Davis v. Parkman, 71 Fed. 961, 18 CCA 398; Horn v. Bergner, 68 Fed. 428 [aff in 72 Fed. 687]; Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 59 Fed. 902; Watson v. Stevens, 51 Fed. 757, 2 CCA 500 [rev 47 Fed. 117]; Electrical Accumulator Co. v. New York, etc., R. Co., 50 Fed. 81; Guarantee Trust, etc., Co. v. New Haven Gas-Light Co., 39 Fed. 268; Asmus v. Alden, 27 Fed. 684 [rev on other grounds 145 U. S. 226, 12 SCt 939, 36 L. ed. 685]; In re Davidson, 56 App. (D. C.) 279, 12 F. (2d) 814; In re Willard, 45 App. (D. C.) 549; In re Heinz, 34 App. (D. C.) 187; Matter of Pennock, 8 D. C. 531.

81. Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641.

82. Wirebounds Patents Co. v. H. R. Gibbons Box Co., 25 F. (2d) 363; American Graphophone Co. v. Universal Talking Mach. Mfg. Co., 151 Fed. 595, 81 CCA 139 [rev 145 Fed. 636].

83. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Marr Oil Heating Mach. Corp. v. Hardinge Bros., Inc., 20 F. (2d) 241 [aff 27 F. (2d) 779]; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Lenk v. Hunt-Lasher Co., 14 F. (2d) 335; United Verde Copper Co. v. Peirce-Smith Converter Co., 7 F. (2d) 13 [aff 298 Fed. 763]; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Protector Last Re-enforcing Co. v. Pell, 204 Fed. 453 [aff 210 Fed. 167, 127 CCA 25]; Submarine Rock-Breaking Co. v. Submarine Co., 193 Fed. 63 [aff 201 Fed. 524, 119 CCA 618]; Electric Controller, etc., Co. v. Westinghouse Electric, etc., Co., 171 Fed. 83, 96 CCA 187; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; American Graphophone Co. v. Universal Talking Mach. Mfg. Co., 151 Fed. 595, 81 CCA 139 [rev 145 Fed. 636, 643]; American Caramel Co. v. Mills, 149 Fed. 743, 79 CCA 449; Albright v. Langfeld, 131 Fed. 473; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; George Frost Co. v. Cohn, 119 Fed. 505, 56 CCA 185; Hanifen v. Armitage, 117 Fed. 845; Star Brass Works v. General Electric Co., 111 Fed. 398, 49 CCA 409; Tannage Patent Co. v. Donallan, 93 Fed. 811 [app dism 96 Fed. 1004 mem, 37 CCA 664 mem]; Thomson-Houston Electric Co. v. Winchester Ave. R. Co., 71 Fed. 192; Binns v. Zucker, etc., Chemical Co., 70 Fed. 711; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod 63 Fed. 962, 11 CCA 528]; Columbia Chemical Works v. Rutherford, 58 Fed. 787; Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 47 Fed. 874; Niles Tool-Works v. Betts Mach. Co., 27 Fed. 301; Ward v. Grand Detour Plow Co., 14 Fed. 696; Pearl v. Ocean Mills, 19 F. Cas. No. 10,876, 2 Bann. & A. 469; Terry Clock Co. v. New Haven Clock Co., 23 F. Cas. No. 13,840, 4 Bann. & A. 121; Parker's Application, 53 App. (D. C.) 209, 289 Fed. 607; Canadian General Electric Co. v. Dalyte Electric, Ltd., (Ont.) [1925] 4 DomLR 874. Compare Butler v. Steckel, 27 Fed. 219 [aff 137 U. S. 21, 11 SCt 25, 34 L. ed. 582].

84. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Frick Co. v. Lindsay, 27 F. (2d) 59; Trane Co. v. Nash Engineering Co., 25 F. (2d) 267; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523, 525; James Heddon's Sons, Inc. v. South Bend Bait Co., 14 F. (2d) 805; Inland Mfg. Co. v. American Wood Rim Co., 14 F. (2d) 657; In re Pupin, 55 App. (D. C.) 14, 299 Fed. 697.

"If a particular result was frequently sought and never attained, want of invention cannot be predicated upon a device or process which first reached that result, merely because the simplicity of the means appears to be such that many believe they could have readily produced it, if they had tried to do so." Acme Card System Co. v. Globe-Wernicke Co., supra.

85. Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641.

86. Auto Pneumatic Action Co. v. Kindler, 247 Fed. 323, 159 CCA 417.

87. New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 SCt 1304, 13 L. ed. 1103; Guardian Trust Co. v. Downington Mfg. Co., 25 F. (2d) 878 [mod on other grounds 29 F. (2d) 887]; Bituminous Products Co. v. Headley Good Roads Co., 14 F. (2d) 677; Collins v. Hupp Motor Car Corp., 4 F. (2d) 272; Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co., 251 Fed. 288, 163 CCA 444 [certiorari den 248 U. S. 579 mem, 39 SCt 20 mem, 63 L. ed. 430 mem]; Duncan v. Cincinnati Butchers' Supply Co., 171 Fed. 656, 96 CCA 400; Wolff v. Du Pont de Nemours, 134 Fed. 862, 67 CCA 488; Westinghouse Electric, etc., Co. v. Stanley Instrument Co., 133 Fed. 167, 68 CCA 523 [certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Tyler v. Crane, 7 Fed. 775.

"No court will follow its judgment to deny invention in face of the common judgment that invention is present, when the common judgment is of those skilled in the art, and who are selfishly interested to deny it, if it does not exist." Guardian Trust Co. v. Downington Mfg. Co., 25 F. (2d) 878, 883.

88. Elyria Iron, etc., Co. v. American Welding, etc., Co., 15 F. (2d) 106 [aff 15 F. (2d) 111]; Blake v. California Fruit Growers' Exch., 14 F. (2d) 756; Inland Mfg. Co. v. American Wood Rim Co., 14 F. (2d) 657; Vortex Mfg. Co. v. F. N. Burt Co., 297 Fed. 513; Morgan Constr. Co. v. Fortner-Miller Engineering Co., 213 Fed. 451, 130 CCA 97; Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175; Thomson v. Citizens' Nat. Bank, 53 Fed. 250, 3 CCA 518.

89. Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175.

other patents within whose scope an infringement of the one in question would come.[90] It has been asserted that acquiescence in the validity of the patent as evidenced by the taking out of licenses and the payment of royalties is admissible upon the question of invention only in cases of doubt.[91] The mere fact that licenses have been taken out and paid has no value as evidence where lack of invention clearly appears.[92]

[§ 96] **h. Imitation.** The fact that a method or device has been copied or imitated by others after its disclosure is admissible to show that invention was involved in its production.[93]

[§ 97] **i. Experimentation.** The fact that a series of experiments was required before the result was arrived at may be evidence of invention.[94] Such evidence, it has been asserted, raises a strong inference that the result was not obvious but constituted a real addition to public knowledge.[95] But for such experiments to have much value as evidence it is essential that the patentee should have started his experiments with knowledge of the state of the art.[96] Evidence of experiments has no weight on the question of invention if they have enabled the experimenter to disclose only what was already known.[97] Increased weight is given evidence of experimentation by proof that the method or device in question promptly came into general use, displacing other methods or devices previously used.[98] But every result obtained by deliberate reflection and experimentation with well-known appliances, or parts thereof, is not necessarily invention,[99] and evidence of the difficulties encountered by the alleged inventor will be permitted to turn the scale in favor of invention only where the issue is otherwise in doubt.[1]

[§ 98] **j. Expert Opinion.** The opinion of persons who by reason of professional, scientific, or technical training, or practical experience, may be regarded as experts in the particular art to which the method or device relates, may be received on the issue whether the exercise of invention was required for its production.[2] It has been asserted that a defense of lack of invention should be supported by the testimony of expert witnesses where the patent relates to a complex subject.[3]

[§ 99] **k. Independent Production by Others.** The existence of inventive genius may be negatived by proof that different mechanics when confronted with the same problem solved it in the same way, even though that way may be a novel one.[4] But the fact that another mechanic offered a somewhat similar solution does not conclusively negative invention.[5] It is a fact to be taken into consideration together with all the other factors in the case.[6] The mere fact that an infringing structure was produced without knowledge of the patentee's disclosure does not negative invention.[7] The infringing structure may itself have been the product of inventive ingenuity.[8]

[§ 100] **F. Designs—1. In General.** By virtue of express statutory provision,[9] any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, may obtain a patent therefor upon compliance with the regulations and conditions applicable to obtaining patents.[10] To be patentable,

90. Elyria Iron, etc., Co. v. American Welding, etc., Co., 15 F. (2d) 106 [aff 15 F. (2d) 111]; Bituminous Products Co. v. Headley Good Roads Co., 14 F. (2d) 667 [aff 2 F. (2d) 83].

91. Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641.

92. Lektophone Corp. v. Brandes Products Corp., 16 F. (2d) 934 [aff 20 F. (2d) 155]; Elyria Iron, etc., Co. v. American Welding, etc., Co., 15 F. (2d) 106 [aff 15 F. (2d) 111]; Thomson Spot Welder Co. v. Ford Motor Co., 281 Fed. 680 [certiorari granted 260 U. S. 718 mem, 43 SCt 96 mem, 67 L. ed. 479 mem, and aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098]; Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175 [rev 173 Fed. 315].

93. Linville v. Milberger, 29 F. (2d) 610; Ward, Inc. v. Gibbs, 27 F. (2d) 466; Brick v. A. I. Namm & Sons, Inc., 22 F. (2d) 693 [aff 22 F. (2d) 697]; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16 [certiorari den 275 U. S. 529 mem, 48 SCt 21 mem, 72 L. ed. 409 mem]; Dovan Chemical Co. v. Corona Cord Tire Co., 16 F. (2d) 419 [certiorari granted 273 U. S. 692 mem, 47 SCt 570 mem, 71 L. ed. 843 mem, and rev on other grounds 276 U. S. 358, 48 SCt 380, 72 L. ed. 610]; Sandusky v. Brooklyn Box Toe Co., 13 F. (2d) 238; Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co., 295 Fed. 748 [rev on other grounds 1 F. (2d) 673]; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Smith v. Peck, etc., Co., 262 Fed. 415 [certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem]; Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115, 117; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197; David v. Harris, 206 Fed. 902, 124 CCA 477; Grever v. U. S. Hoffman Co., 202 Fed. 923, 121 CCA 281; Thomson v. Citizens' Nat. Bank, 53 Fed. 250, 3 CCA 518.

"If an infringer has seen fit to depart from the many articles and methods open to his use, and to adopt that of the patentee, there is a strong indication that the patent marks a distinct and useful advance in the progress of the art." Salt's Textile Mfg. Co. v. Tingue Mfg. Co., supra.

Estoppel of infringer to deny utility see infra § 285.

94. General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Lektophone Corp. v. Brandes Products Corp., 20 F. (2d) 155; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; American Caramel Co. v. Mills, 149 Fed. 743, 79 CCA 449; Campbell v. James, 4 F. Cas. No. 2,-361, 17 Blatchf. 42 [rev on other grounds 104 U. S. 356, 26 L. ed. 786].

95. General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698.

96. General Electric Co. v. De Forest Radio Co., supra.

97. General Electric Co. v. De Forest Radio Co., supra.

98. Lorillard v. McDowell, 15 F. Cas. No. 8,510, 2 Bann. & A. 531.

99. Lord, etc., Co. v. Payne, 190 Fed. 172 [rev on other grounds 195 Fed. 75, 115 CCA 107].

1. Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641; Lord, etc., Co. v. Payne, 190 Fed. 172 [rev on other grounds 195 Fed. 75, 115 CCA 107].

2. Dunbar v. Myers, 94 U. S. 187, 24 L. ed. 34; Ideal Stopper Co. v. Crown Cork, etc., Co., 131 Fed. 244, 65 CCA 436 [certiorari den 195 U. S. 633 mem, 25 SCt 791 mem, 49 L. ed. 354 mem].

3. Malignani v. Hill-Wright Electric Co., 177 Fed. 430; Dececo Co. v. George E. Gilchrist Co., 125 Fed. 293, 60 CCA 207.

4. Concrete Appliances Co. v. Gomery, 269 U. S. 177, 46 SCt 42, 70 L. ed. 222; Wall Pump, etc., Co. v. Gardner Governor Co., 28 F. (2d) 334; Overland Motor Co. v. Packard Motor Co., 22 F. (2d) 566; Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175 [rev 173 Fed. 315]; Thomson-Houston Electric Co. v. Lorain Steel Co., 117 Fed. 249, 54 CCA 281; Haslem v. Pittsburg Plate-Glass Co., 68 Fed. 479; Bromley Bros. Carpet Co. v. Stewart, 51 Fed. 912.

5. Overland Motor Co. v. Packard Motor Co., 22 F. (2d) 566.

6. Overland Motor Co. v. Packard Motor Co., supra.

7. Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262; Juengst v. Hill Pub. Co., 267 Fed. 428 [aff 267 Fed. 435].

8. Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262.

9. U. S. Code tit 35 § 73.

10. New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 137 U. S. 445, 11 SCt 193, 34 L. ed. 741; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Gross v. Norris, 26 F. (2d) 898 [mod 18 F. (2d) 418]; Young v. Grand Rapids Refrigerator Co., 268 Fed. 966; Shapiro, etc., Inc. v. Franklin Brass Fdy. Co., 268 Fed. 551 [mod on other grounds 278 Fed. 435]; Borgfeldt v. Weiss, 265 Fed. 268; Bayley v. Krich, 264 Fed. 978; Zidell v. Dexter, 259 Fed. 582; Inflexible Co. v. Megibow, 251 Fed. 924; Bayley & Sons, Inc. v. Braunstein Bros. Co., 246 Fed. 314; Friedley-Voshardt Co. v. Reliance Metal Spinning Co., 238 Fed. 800; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317; Ashley v. Samuel C. Tatum Co., 186 Fed. 339, 108 CCA 539 [certiorari den 225 U. S. 707 mem, 32 SCt 839 mem, 56 L. ed. 1266 mem]; Phœnix Knitting Works v. Grushlaw,

however, a design must be new,[11] original,[12] ornamental,[13] and the result of invention.[14] Generally speaking, the law relating to such patents does not materially differ from that which governs as to mechanical patents,[15] and all the regulations and provisions which apply to the obtaining and protection of patents for inventions or discoveries not inconsistent with those dealing specifically with design patents are made applicable to them.[16] As in the case of mechanical patents,[17] there springs from the grant of a design patent a presumption of validity,[18] and the burden of proving invalidity is upon him who asserts it.[19] But the fact of such grant does not of itself give binding legal force to claims for patentability.[20]

The object of the statutes authorizing patents for designs is to encourage the decorative arts;[21] the origination of objects which give pleasure through the sense of sight.[22]

[§ 101] **2. Novelty and Anticipation.** To be patentable, a design must be new.[23] An invention of a design is anticipated if it was known or used in this country prior to the inventor's invention or discovery thereof,[24] or if it was patented[25] or described in any printed publication in this or any foreign country[26] before his invention thereof. As in the case of mechanical inventions,[27] a design is not anticipated, however, merely because the same design was known or used in this country, or had been patented or described in a printed publication here or abroad before the date upon which the inventor obtained a patent.[28] In order that a design may be anticipated it is essential that what was known or used, patented, or described in a printed publication should be substantially identical with it in appearance.[29] The test is the effect that the design produces, visualized by the ordinary observer giving such attention as a purchaser usually gives.[30] In determining the sameness of effect upon the eye of the observer, the viewpoint of the expert is inapplicable,[31] although expert testimony with respect to the effect imparted to the ordinary observer may be received.[32] Two designs are substantially identical if such a person would mistake one for the other;[33] but not otherwise.[34] Anticipation is not avoided merely because the later design can be distinguished from the earlier one.[35] Differences in detail and in nonessential matters will not confer novelty where the designs are so much alike that an ordinary observer might readily mistake one for the other.[36] A design is not anticipated merely because each of its elements considered separately is old.[37] It is sufficient if the design as a whole produces a new impression upon

181 Fed. 166 [aff 183 Fed. 222, 105 CCA 484]; Phœnix Knitting Works v. Bradley Knitting Co., 181 Fed. 163; General Gaslight Co. v. Matchless Mfg. Co., 129 Fed. 137; Caldwell v. Powell, 73 Fed. 488, 19 CCA 592 [rev 71 Fed. 970]; Britton v. White Mfg. Co., 61 Fed. 93; Stewart v. Smith, 58 Fed. 580, 7 CCA 380; Smith v. Stewart, 55 Fed. 481 [aff 58 Fed. 580, 7 CCA 380]; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 48 Fed. 556 [rev on other grounds 53 Fed. 810, 4 CCA 21]; Anderson v. Saint, 46 Fed. 760; Eclipse Mfg. Co. v. Adkins, 44 Fed. 280; Foster v. Crossin, 44 Fed. 62; Simpson v. Davis, 12 Fed. 144, 20 Blatchf. 413; Miller v. Smith, 5 Fed. 359.

11. See infra § 101.

12. See infra § 102.

13. See infra § 103.

14. See infra § 104.

15. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; R. E. Dietz Co. v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290; Northrup v. Adams, 18 F. Cas. No. 10,328, 2 Bann. & A. 567.

[a] **The leading case** with respect to patents for designs is Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606. Crystal Percolator Co., Inc. v. Landers, 258 Fed. 28.

16. U. S. Code tit 35 § 73.

17. See infra § 258 et seq.

18. Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Macbeth-Evans Glass Co. v. Rosenbaum Co., 199 Fed. 154; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621.

19. Macbeth-Evans Glass Co. v. Rosenbaum Co., 199 Fed. 154.

20. Follen v. Lambert Tire, etc., Co., 8 F. (2d) 303.

21. Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Knapp v. Will, etc., Co., 273 Fed. 380; Smith v. Peck, etc., Co., 262 Fed. 415 [certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem].

22. Shapiro, etc., Inc. v. Franklin Brass Fdy. Co., 268 Fed. 551 [mod on other grounds 278 Fed. 435]; R. E. Dietz v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem]; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317.

"The obvious motive for the enactment of the law authorizing the grant of patents such as that held by the plaintiff, is to encourage, and by the promise of a monopoly as a commercial reward to stimulate, efforts to produce results in manufacture which appeal to the artistic sense." Shapiro, etc., Inc. v. Franklin Brass Fdy., supra.

23. Smith v. Whitman Saddle Co., 148 U. S. 674. 13 SCt 768, 37 L. ed. 606; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 137 U. S. 445, 11 SCt 193, 34 L. ed. 741; Blumenthal v. Salt's Textile Mfg. Co., 21 F. (2d) 470; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; Knapp v. Will, etc., Co., 273 Fed. 380; Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; Charles Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 CCA 617; Phœnix Knitting Works v. Grushlaw, 181 Fed. 166 [aff 183 Fed. 222, 105 CCA 484]; Wooster v. Crane, 30 F. Cas. No. 18,036, 5 Blatchf. 282, 2 Fish. Pat. Cas. 583.

24. King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Aluminum Goods Mfg. Co. v. Buckeye Aluminum Co., 291 Fed. 806; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Baker, etc., Co. v. N. D. Cass Co., 220 Fed. 918, 136 CCA 484; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Williams v. Syracuse, etc., R. Co., 161 Fed. 571.

25. King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Follen v. Lambert Tire, etc., Co., 8 F. (2d) 303; Aluminum Goods Mfg. Co. v. Buckeye Aluminum Co., 291 Fed. 806; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; In re Forsyth, 57 App. (D. C.) 100, 17 F. (2d) 688; In re Warren, 30 App. (D. C.) 308.

26. Follen v. Lambert Tire, etc., Co., 8 F. (2d) 303; Aluminum Goods Mfg. Co. v. Buckeye Aluminum Co., 291 Fed. 806; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Britton v. White Mfg. Co., 61 Fed. 93.

[a] **Drawings unaccompanied by a written description** may amount to an anticipation of a design patent. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Britton v. White Mfg. Co., 61 Fed. 93.

27. See supra § 33 et seq.

28. Bayley v. Krich, 264 Fed. 978.

29. Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; Inflexible Co. v. Megibow, 251 Fed. 924; Britton v. White Mfg. Co., 61 Fed. 93.

30. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; Crystal Percolator Co. v. Landers, 258 Fed. 28; Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; Sagendorph v. Hughes, 95 Fed. 478; Frank v. Hess, 84 Fed. 170; Braddock Glass Co. v. Macbeth, 64 Fed. 118, 12 CCA 70; Britton v. White Mfg. Co., 61 Fed. 93; In re Schraubstadter, 26 App. (D. C.) 331.

31. Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; In re Schraubstadter, 26 App. (D. C.) 331.

32. Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem].

33. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Jennings v. Kibbe, 10 Fed. 669, 20 Blatchf. 353.

34. Macbeth-Evans Glass Co. v. Rosenbaum Co., 199 Fed. 154.

35. In re Freeman, 23 App. (D. C.) 226.

36. Sagendorph v. Hughes, 95 Fed. 478; In re Freeman, 23 App. (D. C.) 226.

37. Try-Me Beverage, etc., Co. v. Metropole, 25 F. (2d) 138; Whiting

the eye of the ordinary observer.[38] There is nothing new about a design if it is a mere copy of an old form, whether natural[39] or artificial.[40] However, the mere fact that a natural product is suggestive of a design does not show want of novelty.[41]

Prior patents to same inventor. As in the case of mechanical patents,[42] a prior patent for a design is not deprived of effect as an anticipation by the fact that it was granted to the inventor of the later design.[43]

Anticipatory mechanical patents. A design may be anticipated by the disclosures contained in a prior mechanical patent.[44]

A design which has been copyrighted cannot also be patented.[45]

Oral evidence of prior use. Where prior use of a design is sought to be established by oral testimony only, the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt.[46]

[§ 102] **3. Originality.** To be patentable, a design must be original.[47] The words "new" and "original" are not synonymous.[48] A design may be new in the novelty sense, as a specific design, and yet possess nothing of what is termed "originality."[49] To be "original" a design must impart to the mind of the observer a sense of uniqueness and character.[50] The essence of the thought intended to be conveyed by the word "original" is of something originated—of something created,[51] that is, having its primary conception in the mind of the inventor.[52] Originality is, among other things, the converse of the common-place and of the stereotyped.[53]

[§ 103] **4. Ornamentality.** The present statute dealing with designs authorizes the grant of a patent to the inventor of a new, original, and ornamental design.[54] An invented design, in addition to being new[55] and original,[56] must be ornamental.[57] The design must render the article to which it is applied pleasing, attractive, and beautiful.[58] No design patent can be obtained for a thing that is plainly utilitarian, presenting no pleasing or ornamental effect to the eye.[59] Something must be exhibited which appeals to the æsthetic faculty of the observer.[60] It is not enough that the device may be arresting, and hence desirable for advertising purposes.[61] A design patent cannot be obtained to protect a mechanical function[62] or to cover an article whose configuration affects its utility alone.[63] Nor can a design patent be obtained merely for the purpose of identifying an article of manufacture, there-

Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486. mem]; Bayley & Sons, Inc. v. Braunstein Bros. Co., 246 Fed. 314; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem]; Graff v. Webster, 195 Fed. 522, 115 CCA 432.

38. Try-Me Beverage, etc., Co. v. Metropole, 25 F. (2d) 138; Inflexible Co. v. Megibow, 251 Fed. 924; Bayley & Sons, Inc. v. Braunstein Bros. Co., 246 Fed. 314; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem]; Graff v. Webster, 195 Fed. 522, 115 CCA 432; Matthews, etc., Mfg. Co. v. American Lamp, etc., Co., 103 Fed. 634; Britton v. White Mfg. Co., 61 Fed. 93; Stewart v. Smith, 58 Fed. 580, 7 CCA 380; Untermeyer v. Freund, 58 Fed. 205, 7 CCA 183; Smith v. Stewart, 55 Fed. 481 [aff 58 Fed. 580, 7 CCA 380]; Anderson v. Monroe, 55 Fed. 396; Streat v. Simpson, 53 Fed. 358; Paine v. Snowden, 50 Fed. 776, 1 CCA 661 [aff 46 Fed. 189]; Ripley v. Elson Glass Co., 49 Fed. 927; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 48 Fed. 556 [rev on other grounds 53 Fed. 810, 4 CCA 21]; Anderson v. Saint, 46 Fed. 760; Stearns v. Beard, 46 Fed. 193; Condé v. Valkenburgh, 39 Fed. 788; Whitman Saddle Co. v. Smith, 38 Fed. 414 [rev on other grounds 148 U. S. 674, 13 SCt 768, 37 L. ed. 606]; Untermeyer v. Freund, 37 Fed. 342; Eclipse Mfg. Co. v. Adkins, 36 Fed. 554; Kraus v. Fitzpatrick, 34 Fed. 39; Meers v. Kelly, 31 Fed. 153; Foster v. Crossin, 23 Fed. 400; Collender v. Griffith, 6 F. Cas. No. 3,000, 11 Blatchf. 212; Perry v. Starrett, 19 F. Cas. No. 11,012, 3 Bann. & A. 485.

39. Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291 (a watermelon); Denton v. Fulda, 225 Fed. 537, 140 CCA 521 (a butterfly).

40. Blumenthal v. Salt's Textile Mfg. Co., 21 F. (2d) 470.

41. Blumenthal v. Salt's Textile Mfg. Co., supra; Britton v. White Mfg. Co., 61 Fed. 93.

42. See supra § 49.

43. Aluminum Goods Mfg. Co. v. Buckeye Aluminum Co., 291 Fed. 806.

44. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Metallic Industries, Inc. v. Brauning, 279 Fed. 856.

45. De Jonge v. Breuker, etc., Co., 182 Fed. 150 [aff 191 Fed. 35, 111 CCA 567 (aff 235 U. S. 33, 35 SCt 6, 59 L. ed. 113)].

46. Inflexible Co. v. Megibow, 251 Fed. 924.

47. In re Owen, 25 F. (2d) 776; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 703 [aff 194 Fed. 696, 115 CCA 118]; Phœnix Knitting Works v. Grushlaw, 181 Fed. 166 [aff 183 Fed. 222, 105 CCA 484].

48. Shapiro, etc., Inc. v. Franklin Brass Fdy. Co., 268 Fed. 551 [mod on other grounds 278 Fed. 435].

49. Shapiro, etc., Inc. v. Franklin Brass Fdy. Co., supra.

50. Shapiro, etc., Inc. v. Franklin Brass Fdy. Co., supra; Bayley v. Krich, 264 Fed. 978; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Pelouze Scale, etc., Co. v. American Cutlery Co., 102 Fed. 916, 43 CCA 52.

51. Shapiro, etc., Inc. v. Franklin Brass Fdy. Co., 268 Fed. 551 [mod on other grounds 278 Fed. 435].

52. Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676.

53. Shapiro, etc., Inc. v. Franklin Brass Fdy. Co., 268 Fed. 551 [mod on other grounds 278 Fed. 435].

54. U. S. Code tit 35 § 73.

55. See supra § 101.

56. See supra § 102.

57. In re Stimpson, 24 F. (2d) 1012; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936; Smith v. Peck, etc., Co., 262 Fed. 415 [mod 258 Fed. 40, and certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem]; Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 201 Fed. 926 [aff 208 Fed. 564, 125 CCA 566]; Cooper's Application, 57 App. (D. C.) 353, 23 F. (2d) 774; In re Sherman, 35 App. (D. C.) 100.

58. In re Owen, 25 F. (2d) 776; In re Stimpson, 24 F. (2d) 1012; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; Smith v. Peck, etc., Co., 262 Fed. 415 [mod 258 Fed. 40, and certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem].

59. In re Willis, 26 F. (2d) 567; In re Stimpson, 24 F. (2d) 1012; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Pashek v. Dunlop Tyre, etc., Co., 8 F. (2d) 640; Follen v. Lambert Tire, etc., Co., 8 F. (2d) 303; North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936; Smith v. Peck, etc., Co., 262 Fed. 415 [mod 258 Fed. 40, and certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem]; Ferd Messmer Mfg. Co. v. Pick, 251 Fed. 894, 164 CCA 110; R. E. Dietz Co. v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290; Mygatt v. M. Schauffer-Flaum Co., 191 Fed. 836, 112 CCA 350; Williams v. Syracuse, etc., R. Co., 161 Fed. 571; Williams Calk Co. v. Kemmerer, 145 Fed. 928, 76 CCA 466.

60. H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Pashek v. Dunlop Tyre, etc., Co., 8 F. (2d) 640; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; R. E. Dietz Co. v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 201 Fed. 926 [aff 208 Fed. 564, 125 CCA 566]; Bolte, etc., Co. v. Knight Light Co., 180 Fed. 412, 103 CCA 558; Williams Calk Co. v. Kemmerer, 145 Fed. 928, 76 CCA 466 [aff 136 Fed. 210]; Rowe v. Blodgett, etc., Co., 112 Fed. 61, 50 CCA 120.

61. Cooper's Application, 57 App. (D. C.) 353, 23 F. (2d) 774.

62. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; In re Mygatt, 39 App. (D. C.) 432.

63. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276

by in effect operating as a trade-mark.[64] It is not necessary that the article of manufacture to which the design is applied should have been made for the purpose of ornament.[65] Nor is it a fatal objection that the design itself is exhibited upon a mechanical product devoted to utilitarian purposes.[66] It is sufficient that a useful article has been made in such a way as to make it ornamental.[67] But the invention must relate to the design and be distinguishable from that which contrived the mechanical product for commercial purposes.[68] If the article was not intended for display but merely for an obscure use, no patent can be obtained.[69] But while expression has been given to a contrary view,[70] it has been held to be immaterial that the novel element in a design is visible only when the article to which it pertains is not being used for the purpose for which the article, as distinguished from the design, was intended.[71] A design is ornamental if it imparts a pleasing, attractive impression to the eye.[72] It is not necessary that the design should be a work of the fine arts,[73] or that it should impart a pleasing impression to the eyes of artists[74] or experts in design.[75] The test is an affirmative answer to the question: Does the design impart a pleasing impression to the eyes of ordinary persons?[76] A design, to be patentable, need not be useful in the popular sense.[77] Utility in a design depends upon the pleasing effect imparted to the eye, and not upon any new function.[78] It was not otherwise under an earlier form of the statute in which the word "useful" appeared and the word "ornamental" did not.[79] It was held that the word "useful" was inserted merely to indicate that things which were vicious and had a tendency to corrupt were not to be the subject of a patent.[80]

Commercial success is some indication that a design is ornamental.[81]

[§ 104] 5. **Invention.** The exercise of the inventive faculty is just as essential to the validity of a design patent as it is to that for any other kind.[82] The inventor must have done something which the

Fed. 676; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 208 Fed. 564, 125 CCA 566; Buffalo Specialty Co. v. Art Brass Co., 202 Fed. 760.

64. North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936.

65. Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem].

66. North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936; R. E. Dietz Co. v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290.

67. Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem].

68. North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 201 Fed. 926 [aff 208 Fed. 564, 125 CCA 566].

69. Williams v. Syracuse, etc., R. Co., 161 Fed. 571; Wagner Typewriter Co. v. F. S. Webster Co., 144 Fed. 405; Bradley v. Eccles, 126 Fed. 945, 61 CCA 669; Eaton v. Lewis, 115 Fed. 635 [aff 127 Fed. 1018 mem, 61 CCA 562 mem (certiorari den 194 U. S. 636 mem, 24 SCt 859 mem, 48 L. ed. 1161 mem)]; Rowe v. Blodgett, etc., Co., 112 Fed. 61, 50 CCA 120.

[a] **Rule applied.**—(1) A horseshoe calk. Rowe v. Blodgett, etc., Co., 112 Fed. 61, 50 CCA 120. (2) A washer for thill couplings. Bradley v. Eccles, 126 Fed. 945, 61 CCA 669. (3) A metal ribbon spool for use in a typewriter. Wagner Typewriter Co. v. F. S. Webster Co., 144 Fed. 405. (4) An insulating plug for electric light supports. Williams v. Syracuse, etc., R. Co., 161 Fed. 571.

70. Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 696, 115 CCA 118.

71. Franklin Knitting Mills, Inc. v. Gropper Knitting Mills, Inc., 15 F. (2d) 375.

[a] **Illustration.**—A novel design of a knitted necktie, useful, ornamental, and pleasing, is patentable, notwithstanding the novel element of the design is hidden if a waistcoat is worn. Franklin Knitting Mills, Inc. v. Gropper Knitting Mills, Inc., 15 F. (2d) 375.

72. Boyle v. Rousso, 16 F. (2d) 666; Borgfeldt v. Weiss, 265 Fed. 268; Zidell v. Dexter, 259 Fed. 582; Ashley v. Samuel C. Tatum Co., 186 Fed. 339, 108 CCA 539 [certiorari den 225 U. S. 707 mem, 32 SCt 839 mem, 56 L. ed. 1266 mem]; Ashley v. Samuel C. Tatum Co., 181 Fed. 840 [rev on other grounds 186 Fed. 339, 108 CCA 539 (certiorari den 225 U. S. 707 mem, 32 SCt 839 mem, 56 L. ed. 1266 mem)]; Phœnix Knitting Works v. Grushlaw, 181 Fed. 166 [aff 183 Fed. 222, 105 CCA 484]; General Gaslight Co. v. Matchless Mfg. Co., 129 Fed. 137.

73. In re Stimpson, 24 F. (2d) 1012.

74. Boyle v. Rousso, 16 F. (2d) 666.

75. Boyle v. Rousso, supra; Phœnix Knitting Works v. Grushlaw, 181 Fed. 166 [aff 183 Fed. 222, 105 CCA 484].

76. Boyle v. Rousso, 16 F. (2d) 666; Phœnix Knitting Works v. Grushlaw, 181 Fed. 166 [aff 183 Fed. 222, 105 CCA 484].

77. Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317.

78. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Pashek v. Dunlop Tyre, etc., Co., 8 F. (2d) 640; Westinghouse Electric, etc., Co. v. Triumph Electric Co., 97 Fed. 99, 38 CCA 65; Rowe v. Blodgett, etc., Co., 98 Off. Gaz. (U. S.) 1286.

79. Goudy v. Hansen, 247 Fed. 782, 783, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Westinghouse Electric, etc., Co. v. Triumph Electric Co., 97 Fed. 99, 38 CCA 65; In re Tournier, 17 App. (D. C.) 481.

"The amendment of May 9, 1902, to section 4929 of the Revised Statutes of the United States (Comp. St. 1916, § 9475), provides that any person who has invented any new, original, and ornamental design for an article of manufacture may, subject to certain conditions and limitations stated in the statute, obtain a patent therefor. The original section 4929 provided that any person who, by his own industry, genius, efforts, and expense, had invented and produced any new and original design, etc., should, under certain limitations, be protected. The amended section differs from the original section in using the word 'ornamental' to specify and characterize the features which every design must have, and in omitting the word 'useful' from its enumeration. But the presence of usefulness did not impart patentability to a design, and the absence of usefulness did not take patentability from it." Goudy v. Hansen, supra.

80. Westinghouse Electric, etc., Co. v. Triumph Electric Co., 97 Fed. 99, 38 CCA 65.

81. Shapiro, etc., Inc. v. Franklin Brass Fdy., 272 Fed. 176 [mod on other grounds 278 Fed. 435]; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem].

82. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Eloesser-Heynemann Co. v. Bayly-Underhill Mfg. Co., 29 F. (2d) 305; King Ventilating Co. v. St. James Ventilating Co., 26 F. (2d) 357; In re Owen, 25 F. (2d) 776; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Pashek v. Dunlop Tyre, etc., Co., 8 F. (2d) 640; Follen v. Lambert Tire, etc., Co., 8 F. (2d) 303; Imperial Glass Co. v. Heisey, 294 Fed. 267; Aluminum Goods Mfg. Co. v. Buckeye Aluminum Co., 291 Fed. 806; Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Metallic Industries, Inc. v. Brauning, 279 Fed. 856; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593; Faris v. Patsy Frok, etc., Co., 273 Fed. 900; Knapp v. Will, etc., Co., 273 Fed. 380; Pfeffer v. Western Doll Mfg. Co., 271 Fed. 124; Smith v. Peck, etc., Co., 262 Fed. 415 [mod 258 Fed. 40, and certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem]; Crystal Percolator Co. v. Landers, 258 Fed. 28; F. I. A. T. v. A. Elliott Ranney Co., 249 Fed. 973, 162 CCA 171; Bayley & Sons, Inc. v. Standart Art Glass Co., 249 Fed. 478, 161 CCA 436; Goudy v. Hansen, 247 Fed. 782, 159 CCA 642 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; R. E. Dietz Co. v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290; Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291; Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. 126, 148 CCA 620; Steffens v. Steiner, 232 Fed. 862, 147 CCA 56; Baker, etc., Co. v. N. D. Cass Co., 220 Fed. 918, 136 CCA 484; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem]; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 208 Fed. 564, 125 CCA 566; Buffalo Specialty Co. v. Art Brass Co., 202 Fed. 760; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 201 Fed. 926 [aff 208 Fed. 564, 125 CCA 566]; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Star Bucket Pump Co. v. Butler Mfg. Co., 198 Fed. 857; Charles Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 CCA 617; Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 703 [aff 194 Fed. 696, 115 CCA 118]; General Gaslight Co. v. Matchless Mfg. Co., 129 Fed. 137; Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co., 114 Fed. 362; Rowe v. Blodgett, etc., Co., 112 Fed. 61, 50 CCA 120; Cary Mfg. Co. v. Neal, 98 Fed. 617, 39 CCA 189; Westinghouse Electric, etc., Co. v. Triumph Electric Co., 97 Fed. 99, 38 CCA 65; Soehner v. Favorite Stove, etc., Co., 84 Fed. 182, 28 CCA 317; Hammond v. Stockton

ordinary person skilled in the art would not know how to do, if occasion for it arose.[83] No patent can be obtained for a design within the range of the ordinary routine observer[84] or designer.[85] While it has been said that a design patent must relate to subject matter comparatively trivial,[86] bringing into play a different set of faculties from those required in producing other classes of inventions,[87] and that courts have looked with greater leniency upon them than upon patents for other inventions,[88] it has also been asserted that design patents require as high a degree of exercise of the inventive or original faculty as utility patents.[89] Something more than ordinary skill in arrangement of common features must be exercised.[90] No design patent should be granted for "every shadow of a shade of an idea."[91] The test of invention is the same as for mechanical patents.[92] There must be present a creative mental conception, as distinguished from the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice.[93] The state of the art and the room left for invention when the design was produced must be considered in respect of both.[94] Mere mechanical skill is not sufficient.[95] Where the peculiarities of an applicant's design do not rise to the dignity of invention, the design is not patentable, although the peculiarities are such as to prevent the design from being regarded in the trade as a substitute for a design already patented.[96] In determining whether invention was required to produce a design the change in the appearance of the article as an entirety is to be considered,[97] and not merely the change in the elements which create the changed appearance.[98] Invention may reside in a new combination of old elements,[99] or in the adaptation of old devices or forms to new purposes.[1] But there is no invention if no more is involved than the exercise of mere mechanical skill in assembling the old elements,[2] or in selecting and adapting the old forms and devices to the new use.[3] Invention is not negatived by the mere fact that the design is simple,[4] or by the mere fact that it does not show a wide departure from other designs.[5]

Commercial success or widespread use. As in the case of mechanical inventions,[6] invention may be in-

Combined Harvester, etc., Works, 70 Fed. 716, 17 CCA 356; Eclipse Mfg. Co. v. Holland, 62 Fed. 465 [aff 79 Fed. 993 mem, 25 CCA 676 mem]; Krick v. Jansen, 61 Fed. 847, 10 CCA 114; Paine v. Snowden, 46 Fed. 189 [aff 50 Fed. 776, 1 CCA 661]; Foster v. Crossin, 44 Fed. 62; Post v. T. C. Richards Hardware Co., 26 Fed. 618 [app dism 131 U. S. 444 mem, 9 SCt 802 mem, 33 L. ed. 218 mem]; Pratt v. Rosenfeld, 3 Fed. 335, 18 Blatchf. 234; Adams, etc., Mfg. Co. v. St. Louis Wire-Goods Co., 1 F. Cas. No. 72, 3 Bann. & A. 77; Collender v. Griffith, 6 F. Cas. No. 3,000, 11 Blatchf. 212; Northrup v. Adams, 18 F. Cas. No. 10,328, 2 Bann. & A. 567; In re Mygatt, 39 App. (D. C.) 432; In re Freeman, 23 App. (D. C.) 226; Niedringhaus v. Patents Comr., 9 App. (D. C.) 149.

83. Pfeffer v. Western Doll Mfg. Co., 271 Fed. 124.

84. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898].

85. Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. 126, 148 CCA 620.

86. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317.

87. Dominick v. R. Wallace, etc., Mfg. Co., supra.

88. Gross v. Norris, 26 F. (2d) 898 [mod 18 F. (2d) 418]; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621.

Construction of design patents see infra § 363.

89. Knapp v. Will, etc., Co., 273 Fed. 380; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621; Perry v. Hoskins, 111 Fed. 1002; Myers v. Sternheim, 97 Fed. 625, 38 CCA 345; Western Electric Mfg. Co. v. Odell, 18 Fed. 321.

[a] **Laxity in this respect criticized.**—"It is, of course, extremely difficult to clearly mark the line at which symmetry and attractiveness cease to be mere matters of good taste and become touched with a spark of inventive genius. Indeed, a glance at the decisions which have sustained design patents seems to suggest that there may be often more inventive genius displayed by the court in finding invention in design patents than the inventor disclosed in placing it there." Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 141, 117 CCA 621 (per Kohlsaat, J.).

90. King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Imperial Glass Co. v. Heisey, 294 Fed. 267; Steffens v. Steiner, 232 Fed. 862, 147 CCA 56; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem]; Charles Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 CCA 617.

91. Mygatt v. Schaffer, 218 Fed. 827, 835, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem.

92. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Majestic Electric Dev. Co. v. Westinghouse Electric, etc., Co., 276 Fed. 676; F. I. A. T. v. A. Elliott Ranney Co., 249 Fed. 973, 162 CCA 171; R. E. Dietz Co. v. Burr, etc., Co., 243 Fed. 592, 156 CCA 290; Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. 126, 148 CCA 620.

93. King Ventilating Co. v. St. James Ventilating Co., 26 F. (2d) 357.

94. Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; F. I. A. T. v. A. Elliott Ranney Co., 249 Fed. 973, 162 CCA 171; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621.

95. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; In re Owen, 25 F. (2d) 776; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Aluminum Goods Mfg. Co. v. Buckeye Aluminum Co., 291 Fed. 806; Smith v. Peck, etc., Co., 262 Fed. 415 [mod 258 Fed. 40, and certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem]; Crystal Percolator Co. v. Landers, 258 Fed. 28; F. I. A. T. v. A. Elliott Ranney Co., 249 Fed. 973, 162 CCA 171.

96. In re Schraubstadter, 26 App. (D. C.) 331.

97. North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936; Bayley & Sons, Inc. v. Standart Art Glass Co., 249 Fed. 478, 161 CCA 436; Macbeth-Evans Glass Co. v. Rosenbaum Co., 199 Fed. 154; Grigsby's Application, 55 App. (D. C.) 294, 5 F. (2d) 117.

98. North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936; Braddock Glass Co. v. Macbeth, 64 Fed. 118, 12 CCA 70; Grigsby's Application, 55 App. (D. C.) 294, 5 F. (2d) 117.

99. American Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365; Protex Signal Co. v. Feniger, 11 F. (2d) 43; Knapp v. Will, etc., Co., 273 Fed. 380; Inflexible Co. v. Megibow, 251 Fed. 924; Steffens v. Steiner, 232 Fed. 862, 147 CCA 56; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Graff v. Webster, 195 Fed. 522, 115 CCA 432; Phœnix Knitting Works v. Bradley Knitting Co., 181 Fed. 163; General Gaslight Co. v. Matchless Mfg. Co., 129 Fed. 137; Matthews, etc., Mfg. Co. v. American Lamp, etc., Co., 103 Fed. 634; Untermeyer v. Freund, 58 Fed. 205, 7 CCA 183; Simpson v. Davis, 12 Fed. 144, 20 Blatchf. 413.

"The reassembling or regrouping of familiar forms and decorations, if the result be a design of originality and beauty, may constitute a patentable design." American Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365, 367.

1. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Phœnix Knitting Works v. Grushlaw, 181 Fed. 166 [aff 183 Fed. 222, 105 CCA 484].

2. Imperial Glass Co. v. Heisey, 294 Fed. 267; Knapp v. Will, etc., Co., 273 Fed. 380; Steffens v. Steiner, 232 Fed. 862, 147 CCA 56.

3. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 137 U. S. 445, 11 SCt 193, 34 L. ed. 741; Follen v. Lambert Tire, etc., Co., 8 F. (2d) 303; Pfeffer v. Western Doll Mfg. Co., 271 Fed. 124; Baker, etc., Co. v. N. D. Cass Co., 220 Fed. 918, 136 CCA 484; Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 703 [aff 194 Fed. 696, 115 CCA 118]; Kline Chair Co. v. Kochs, 138 Fed. 90; Perry v. Hoskins, 111 Fed. 1002; Untermeyer v. Freund, 58 Fed. 205, 7 CCA 183; Cahoone Barnet Mfg. Co. v. Rubber, etc., Harness Co., 45 Fed. 582; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 30 Fed. 785; Miller v. Young, 33 Ill. 354.

4. Inflexible Co. v. Megibow, 251 Fed. 924; Phœnix Knitting Works v. Bradley Knitting Co., 181 Fed. 163.

5. Inflexible Co. v. Megibow, 251 Fed. 924; Phœnix Knitting Works v. Bradley Knitting Co., 181 Fed. 163; Redway v. Ohio Stove Co., 38 Fed. 582; Kraus v. Fitzpatrick, 34 Fed. 39.

6. See supra § 92.

dicated by commercial success of the design,[7] or by its widespread use.[8] But they are never determinative of the fact of invention.[9] It is only in doubtful cases that they alone are sufficient to turn the scale in favor of invention.[10]

[§ 105] **G. Loss of Right To Obtain Patent—1. In General.** A person who has invented or discovered a new and useful method or device not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, may lose the right to obtain a patent therefor either by failure to make timely application,[11] or by conduct amounting to abandonment.[12]

[§ 106] **2. Failure To Make Timely Application—a. Inventions Patented or Described in Printed Publications—(1) In General.** Congress has in express terms limited the inventions for which a patent may be obtained by an inventor to those "not patented or described in any printed publication in this or any foreign country . . . more than two years prior to his application."[13] To bar the right of an inventor to obtain a patent by reason of this provision, it is essential that the earlier patent should have issued more than two years before the later application,[14] and that what was in use or on sale more than two years prior to the application be identical in substance with the invention claimed.[15] The issuance of a patent during the two years immediately preceding the application has no such effect.[16] No distinction exists with respect to this matter between an original and a later or divisional application.[17] The right of a sole inventor to obtain a patent is not barred by a prior patent issued more than two years prior to his application, but not more than two years before the date of a joint application filed by mistake by the sole inventor and another.[18] The subsequent application in such case is properly considered as a continuation of the earlier joint application.[19] Identity in substance is all that is required.[20] The right of an inventor to obtain a patent is barred if the difference between the method or device for which a patent is sought and the method or device which was the subject of prior public use or sale is only such as would suggest itself to any person skilled in the art to which the invention relates.[21] The effect of the statute is not avoided by the fact that alterations are made where the principle of the organization and operation of the invention is not changed or affected.[22] Identity of substance does not mean that the machine embodying it must have been perfect, but merely that it shall be sufficiently perfect to be practically applied to its intended purpose.[23] The mere fact that an invention has been improved since its original embodiment does not demonstrate that it was embryonic or incomplete.[24] Questions relating to when an invention is patented or described in any printed publication within the meaning of the statute are discussed elsewhere in this article.[25]

[§ 107] **(2) Inventions Previously Patented Abroad.** Congress has provided that, where the invention for which a patent is sought was first patented or caused to be patented by the inventor or his legal repesentatives or assigns in a foreign country, no patent shall be granted in this country if the application for the foreign patent was filed more than twelve months prior to the filing of the application in this country, in the case of mechanical patents, or more than four months, in the case of design patents.[26] Earlier statutes fixed different periods within which the application had to be filed.[27] In order that the right to obtain a patent may be barred by failure to make application within the time fixed by statute, the invention patented abroad must be the same as the invention for which application is made here.[28] Thus, while the right to obtain a patent for a product may be barred by the fact that a patent for the process used as the means of creating and developing it had been obtained in a foreign country beyond the time made permissible by the statute, if the patent describes the product,[29] the right is not barred where the process described in the foreign patent is incapable of producing the product for which the United States patent is sought.[30] Nor is the right barred by a foreign patent which discloses, but does not claim, the invention.[31] The time of fil-

7. Grigsby's Application, 55 App. (D. C.) 294, 5 F. (2d) 117.

8. Grigsby's Application, supra; Bayley v. Krich, 264 Fed. 978; Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621.

9. Charles Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 CCA 617.

10. Grigsby's Application, 55 App. (D. C.) 294, 5 F. (2d) 117.

11. See infra §§ 106–119.

12. See infra §§ 120–125.

13. U. S. Code tit 35 § 31.

14. Chapman v. Wintroath, 252 U. S. 126, 40 SCt 234, 64 L. ed. 491.

15. Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 210 Fed. 164, 127 CCA 22; Campbell v. New Idea Arc Light Co., 175 Fed. 115; Huntington Dry-Pulverizer Co. v. Newell Universal Mill Co., 109 Fed. 269; Peeney v. Lakeview, 35 Fed. 586; Newark Mach. Co. v. Hargett, 28 Fed. 567; Lyman v. Maypole, 19 Fed. 735; American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, 1 Holmes 503; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39 [rev on other grounds sub nom. McCormick v. Whitmer, 129 U. S. 1, 9 SCt 213, 32 L. ed. 593]; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167; Henry v. Francestown Soapstone Co., 17 Off. Gaz. (U. S.) 569; J. E. Hanger, Inc. v. J. F. Rowley Co., 54 App. (D. C.) 336, 298 Fed. 359.

16. Chapman v. Wintroath, 252 U. S. 126, 40 SCt 234, 64 L. ed. 491.

17. Chapman v. Wintroath, supra.

18. In re Roberts, 49 App. (D. C.) 250, 263 Fed. 646.

19. In re Roberts, supra.

20. Schieble Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; International Tooth-Crown Co. v. Richmond, 30 Fed. 775.

21. Callahan v. Nesbitt, 1 F. (2d) 75; Star Mfg. Co. v. Crescent Forge, etc., Co., 179 Fed. 856, 103 CCA 342; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540.

22. Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598 [aff 239 Fed. 555].

23. Standard Sanitary Mfg. Co. v. Iron City Sanitary Mfg. Co., 222 Fed. 671, 138 CCA 219; Newark Mach. Co. v. Hargett, 28 Fed. 567; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167.

24. Eastman v. New York, 134 Fed. 844, 69 CCA 628.

25. See supra §§ 26–32, 44–54.

26. U. S. Code tit 35 § 32.

[a] **Retrospective operation.**—Act Congr. March 3, 1903 (32 U. S. St. at L. 1225, c 1019), extending the time from seven to twelve months within which an application must be filed in this country, after the filing of a foreign application for the same invention, does not operate retroactively, and therefore does not apply to applications pending at the date of its passage. Gueniffet v. Wictorsohn, 30 App. (D. C.) 432; De Ferranti v. Lyndmark, 30 App. (D. C.) 417.

[b] **Evidence held sufficient to establish authorization of foreign application.**—American Casting Mach. Co. v. Pittsburgh Coal Washer Co., 237 Fed. 590, 150 CCA 472.

27. Act March 3, 1839 (5 St. at L. 353) (six months); Act March 3, 1897 (29 St. at L. 692) (seven months).

[a] **Retrospective operation.**—The act of March 3, 1897 by its terms became effective Jan. 1, 1898, and had no application to patents granted prior to that date. Rubber Tire Wheel Co. v. Davie, 100 Fed. 85.

[b] **Under Act July 8, 1870 (16 U. S. St. at L. 201),** an existing foreign patent issued to the same inventor did not bar the right to a patent unless the invention had been in public use in this country for more than two years prior to the date of making application here. Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; Vogeley v. Noel, 18 Fed. 827.

28. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290]; Westinghouse Electric, etc., Co. v. Stanley Instrument Co., 138 Fed. 823, 71 CCA 189.

29. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290].

30. General Electric Co. v. Alexander, supra

31. General Electric Co. v. Alex-

ing an application in the British patent office must be taken as the date of the application for a foreign patent within the meaning of the statute, given though such application was accompanied only by a provisional specification.[32] It is immaterial in such case that the invention was not fully disclosed until the complete specification was filed.[33] An inventor is not debarred from obtaining a patent by virtue of the provisions of the statute by the fact that some intermeddler has previously caused his invention to be patented in a foreign country.[34]

[§ 108] **b. Inventions in Public Use or on Sale**[35] **—(1) In General.** Congress has further limited the inventions for which a patent may be obtained by an inventor to those "not in public use or on sale in this country for more than two years prior to his application."[36] If an invention has been in public use or on sale in this country more than two years prior to the application the right to obtain a patent is lost.[37] The fact that the inventor did not intend to abandon his right to a patent is immaterial in such cases,[38] as is also the fact that he was prevented from making an earlier application by causes beyond his control.[39] In order that the right to obtain a patent may be barred by the fact that the invention was in public use or on sale, it must have been in public use or on sale earlier than two years before the application.[40] The fact that the invention was in pub-

ander, supra; Westinghouse Electric, etc., Co. v. Stanley Instrument Co., 138 Fed. 823, 71 CCA 189.

32. Ex p. Smith, 85 Off. Gaz. (U. S.) 2091; In re Bastian, 44 App. (D. C.) 425; In re Swinburne, 19 App. (D. C.) 565.

33. In re Bastian, 44 App. (D. C.) 425.

34. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 U. S. 586.

35. **Prior knowledge or use as anticipation** see supra §§ 33–43.

36. U. S. Code tit 35 § 31.

[a] **"The purpose of these provisions** was and is to compel an inventor who seeks the monopoly afforded by the patent statutes to act with promptitude. An inventor who has regard for his invention will not delay applying for protection. The laws give him ample time. If he permit the public to use that which he has invented and stand by for years while they use it, he loses the right to take it back from the public. If he chooses to sell the machine embodying his invention without the protection of a patent, it will be presumed that he does not desire it. The exclusive privileges given by the patent laws are coupled with the corresponding obligations to rely upon those laws and to seek their protection early." National Cash Register Co. v. American Cash Register Co., 178 Fed. 79, 81, 101 CCA 569.

37. Root v. Third Ave. R. Co., 146 U. S. 210, 13 SCt 100, 36 L. ed. 946; Andrews v. Hovey, 123 U. S. 267, 8 SCt 101, 31 L. ed. 160; Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 41; Manning v. Cape Ann Isinglass, etc., Co., 108 U. S. 462, 2 SCt 860, 27 L. ed. 793; Hall v. Macneale, 107 U. S. 90, 2 SCt 73, 27 L. ed. 367; Worley v. Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821; Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755; Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Grand Rapids Showcase Co. v. Measuregraph Co., 28 F. (2d) 497; Westinghouse Electric, etc., Co. v. Jeffrey-DeWitt Insulator Co., 22 F. (2d) 277; Allinson Mfg. Co. v. Ideal Filter Co., 21 F. (2d) 22; Wilkie v. Manhattan Rubber Mfg. Co., 14 F. (2d) 811; Cartridge Mach. Corp. v. National Collapsible Tube Co., 13 F. (2d) 859; Denivelle v. MacGruer, 4 F. (2d) 329; Callahan v. Nesbitt, 1 F. (2d) 75; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654, and certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598; Le Roy v. Nicholas Power Co., 244 Fed. 955; Eclipse Mach. Co. v. Harley-Davidson Motor Co., 244 Fed. 463 [rev on other grounds 259 U. S. 414, 42 SCt 527, 66 L. ed. 996]; Excelsior Steel Furnace Co. v. F. Meyer, etc., Co., 244 Fed. 172, 156 CCA 600; Guy v. Stein, 239 Fed. 729, 152 CCA 563; Monroe v. Bresee, 239 Fed. 727, 152 CCA 561; Campbell v. Skinner, 236 Fed. 359; Williamson v. Electric Serv. Supplies Co., 236 Fed. 353 [aff 242 Fed. 873, 155 CCA 461]; Toch v. Zibell Damp Resisting Paint Co., 231 Fed. 711, 145 CCA 597; Macbeth Evans Glass Co. v. General Electric Co., 231 Fed. 183; David E. Kennedy, Inc. v. United Cork Cos., 225 Fed. 371, 140 CCA 395; American Ballast Co. v. Davy Burnt Clay Ballast Co., 220 Fed. 887, 136 CCA 453; Schieble Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Horsey v. Consumers' Auto Supply Co., 202 Fed. 756, 121 CCA 122; Handy Things Co. v. Tucker, etc., Mfg. Co., 188 Fed. 68, 110 CCA 138; Dittgen v. Racine Paper Goods Co., 181 Fed. 394; Star Mfg. Co. v. Crescent Forge, etc., Co., 179 Fed. 856, 103 CCA 342; National Cash Register Co. v. American Cash Register Co., 178 Fed. 79, 101 CCA 569; Hentschel v. Carthage Sulphite Pulp Co., 169 Fed. 114; National Phonograph Co. v. Lambert Co., 142 Fed. 164, 73 CCA 382; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Bradley v. Eccles, 138 Fed. 911 [aff 144 Fed. 90, 75 CCA 248]; Eastman v. New York, 134 Fed. 844, 69 CCA 628; Thomson-Houston Electric Co. v. Lorain Steel Co., 117 Fed. 249, 54 CCA 281; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265 [certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem]; Covert v. Covert, 106 Fed. 183 [aff 115 Fed. 493, 53 CCA 225]; Swain v. Holyoke Mach. Co., 102 Fed. 910 [aff 109 Fed. 154, 48 CCA 265 (certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem)]; Lettelier v. Mann, 91 Fed. 917; Front Rank Steel Furnace Co. v. Wrought Iron Range Co., 63 Fed. 995; Smith, etc., Mfg. Co. v. Mellon, 58 Fed. 705, 7 CCA 439; U. S. Electric Lighting Co. v. Edison Lamp Co., 58 Fed. 692, 7 CCA 435; Delemater v. Heath, 54 Fed. 414, 7 CCA 279; Knox Rock-Blasting Co. v. Drake, 53 Fed. 790 [app dism 154 U. S. 501 mem, 14 SCt 1145 mem, 38 L. ed. 1083 mem]; De Lamater v. Deeley, 53 Fed. 380; Smith, etc., Mfg. Co. v. Mellon, 52 Fed. 149 [aff 58 Fed. 705, 7 CCA 439]; McGill v. Universal Paper-Fastener Co., 48 Fed. 229; Hiller v. Levy, 41 Fed. 627; Seibert Cylinder Oil-Cup Co. v. Newark Lubricator Mfg. Co., 35 Fed. 509 [app dism sub nom. Hedges v. Seibert Cylinder Oil Cup Co., 50 Fed. 643, 1 CCA 594]; Campbell v. New York, 35 Fed. 504, 1 LRA 48; Hershey v. Blakesley, 33 Fed. 922 [app dism 145 U. S. 641 mem, 12 SCt 982 mem, 36 L. ed. 853 mem]; Cross v. Union Metallic Fastening Co., 29 Fed. 293; Hutchinson v. Everett, 26 Fed. 531; Duffy v. Reynolds, 24 Fed. 855; McFarland v. Deere, etc., Mfg. Co., 22 Fed. 781; Lockwood v. Cutter Tower Co., 18 Fed. 653; Lockwood v. Cleveland, 18 Fed. 37; Clark Pomace-Holder Co. v. Ferguson, 17 Fed. 79 [aff 119 U. S. 335, 7 SCt 382, 30 L. ed. 406]; Driven Well Cases, 16 Fed. 387, 5 McCrary 181 [aff 123 U. S. 267, 8 SCt 101, 31 L. ed. 160]; Union Paper-Bag Mach. Co. v. Atlas Bag Co., 6 Fed. 398; Perkins v. Nashua Card, etc., Co., 2 Fed. 451; Arnold v. Bishop, 1 F. Cas. No. 552, Cranch Pat. Dec. 103, McA. Pat. Cas. 27; Blackinton v. Douglass, 3 F. Cas. No. 1,470, McA. Pat. Cas. 622; Carroll v. Gambrill, 5 F. Cas. No. 2,454, McA. Pat. Cas. 581; Child v. Adams, 5 F. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20; Cleveland v. Towle, 5 F. Cas. No. 2,888, 3 Fish. Pat. Cas. 525; Cowperwaithe v. Gill, 6 F. Cas. No. 3,298; Ellithorp v. Robertson, 8 F. Cas. No. 4,410, McA. Pat. Cas. 634; Henry v. Providence Tool Co., 11 F. Cas. No. 6,384, 3 Bann. & A. 501; Hunt v. Howe, 12 F. Cas. No. 6,891, McA. Pat. Cas. 366; Justice v. Jones, 13 F. Cas. No. 7,588, McA. Pat. Cas. 635; Kelleher v. Darling, 14 F. Cas. No. 7,653, 4 Cliff. 424, 3 Bann. & A. 438; Lovering v. Dutcher, 15 F. Cas. No. 8,553, 2 Hayw. & H. 367; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189; Manning v. Cape Ann Isinglass, etc., Co., 16 F. Cas. No. 9,041, 4 Bann. & A. 612 [aff 108 U. S. 462, 2 SCt 860, 27 L. ed. 793]; Monce v. Woodworth, 17 F. Cas. No. 9,706, 4 Bann. & A. 307; Rugg v. Haines, 20 F. Cas. No. 12,114, McA. Pat. Cas. 420; Sisson v. Gilbert, 22 F. Cas. No. 12,912, 9 Blatchf. 185, 5 Fish. Pat. Cas. 109; Tappan v. National Bank-Note Co., 24 F. Cas. No. 14,100; Federal Mfg., etc., Co. v. U. S., 42 Ct. Cl. 479; Chapman v. Beede, 54 App. (D. C.) 209, 296 Fed. 956; In re Plumly, 52 App. (D. C.) 106, 281 Fed. 1018; Power's Application, 52 App. (D. C.) 71, 281 Fed. 431; Boynton v. Taggart, 40 App. (D. C.) 82; In re Mills, 25 App. (D. C.) 377; In re Drawbaugh, 3 App. (D. C.) 236.

Experimental use see infra § 114.

Secret use see infra § 115.

38. Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609.

39. Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Sisson v. Gilbert, 22 F. Cas. No. 12,912, 9 Blatchf. 185, 5 Fish. Pat. Cas. 109.

40. Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Abrahams v. Universal Wire Co., Inc., 10 F. (2d) 838; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306; Tiffany v. Paper Products Co., 253 Fed. 953, 165 CCA 395 [aff 244 Fed. 178]; Newhall v. Shannon, 189 Fed. 396; Babcock v. Degener, 2 F. Cas. No. 698, McA. Pat. Cas. 607; Ellithorp v. Robertson, 8 F. Cas. No. 4,409, McA. Pat. Cas. 585; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024]; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Mellus v. Silsbee, 16 F. Cas. No. 9,404, 4 Mason 108, 1 Robb Pat. Cas. 506; Root v. Ball, 20 F. Cas. No. 12,035, 4 McLean 177, 2 Robb Pat. Cas. 513; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167; Sicles v. Pacific Mail SS. Co., 22 F. Cas. No. 12,842.

[a] **Under earlier statutes** authorizing the grant of a patent only for an invention which had not been used before the application was made, an inventor could not obtain a patent for

lic use or on sale during the two years immediately preceding the application has no such effect;[41] nor does the fact that it was in public use or on sale in the intermediate time between the application and the grant of the patent.[42] The use or sale of the invention need not, however, have been continued during the two-year period.[43] The phrase "for more," as used in the statute, is to be understood as if the language were "earlier than two years prior," or as if "for" were omitted.[44] If the invention was in public use or on sale more than two years prior to the application, it is immaterial that no use or sale occurred during the two years immediately preceding the application.[45] The inventor cannot relieve himself of the consequences of prior public use of his invention by assigning an interest in his invention to the person by whom the invention was used.[46] Insanity of the inventor does not stop the running of the two-year period.[47]

Design patents. The statute is applicable to designs as well as to mechanical inventions.[48]

[§ 109] **(2) Inventions in Public Use or on Sale Abroad.** The prohibition of the present statute is limited in express terms to inventions in public use or on sale "in this country" more than two years prior to the date of application.[49] An earlier statute did not contain any restriction as to the place or country of use or placing on sale,[50] but it was held that congress had by other provisions manifested an intent to limit the restrictive effect of the statute to a use or sale in this country.[51]

[§ 110] **(3) Application Date—(a) In General.** In determining whether an invention has been in public use or on sale more than two years prior to the application for a patent, the date upon which the application is filed or otherwise made is controlling.[52] The date upon which the application, considered as an instrument, was executed is immaterial.[53]

[§ 111] **(b) Successive Applications.** Where an application is one which may properly be considered as a substitute for, and continuation of, a prior application, the original filing date controls in determining whether the invention was in public use or on sale beyond the time permitted by statute.[54] The continuity of two applications is a question of fact, to be determined by the circumstances of each case.[55] An application cannot be considered as a substitute for, or continuation of, an earlier application where it claims a different invention.[56] Nor can an application be considered as a continuation of an earlier abandoned application.[57]

Divisional applications. In the absence of laches, estoppel, or intervening rights, a divisional application relates back to the original from which it is carved, and questions with respect to prior use or sale of the invention claimed by it are to be determined with reference to the date of the original application.[58] But, of course, where the right to have the application considered as a continuance of the original application is lost by laches, estoppel, or intervening rights, the date of the later application controls.[59] Where a patent has issued on an application amended in conformity to a ruling of the patent office so as to exclude one of two inventions originally claimed, a subsequent application seeking a patent for the invention not claimed in the amended application cannot be regarded as a divisional application giving applicant the benefit of the filing date

his invention if it was known or used at any time, however short, before his application. Andrews v. Hovey, 123 U. S. 267, 8 SCt 101, 31 L. ed. 160; Manning v. Cape Ann Isinglass, etc., Co., 108 U. S. 462, 2 SCt 860, 27 L. ed. 793; Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327.

41. Friedley-Voshardt Co. v. Reliance Metal Spinning Co., 238 Fed. 800; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024].

42. Ryan v. Goodwin, 21 F. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514.

43. Andrews v. Hovey, 123 U. S. 267, 8 SCt 101, 31 L. ed. 160; Allison Mfg. Co. v. Ideal Filter Co., 21 F. (2d) 22; Flomerfelt v. Newwitter, 88 Fed. 696 [aff 95 Fed. 1006 mem, 37 CCA 356 mem]; Clisby v. Reese, 88 Fed. 645, 32 CCA 80.

44. Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68.

45. Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265.

46. Worley v. Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821.

47. Jenner v. Bowen, 139 Fed. 556, 71 CCA 540.

48. Young v. Clipper Mfg. Co., 121 Fed. 560 [aff 130 Fed. 150, 64 CCA 502]; Anderson v. Monroe, 55 Fed. 407 [aff 58 Fed. 401, 7 CCA 275]; Anderson v. Eiler, 46 Fed. 777 [aff 50 Fed. 775, 1 CCA 659]; Theberath v. Rubber, etc., Harness Trimming Co., 15 Fed. 246; In re Tournier, 17 App. (D. C.) 481.

49. U. S. Code tit 35 § 31.

50. U. S. Rev. St. § 4886.

51. Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Worswick Mfg. Co. v. Steiger, 17 Fed. 250.

52. Campbell v. New York, 35 Fed. 504, 1 LRA 48.

53. Campbell v. New York, supra.

54. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Stimpson v. West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; General Electric Co. v. Continental Fibre Co., 256 Fed. 660, 168 CCA 54; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 103 CCA 479 [certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem]; Union Carbide Co. v. American Carbide Co., 172 Fed. 120 [rev on other grounds 181 Fed. 104, 104 CCA 522]; L. E. Waterman Co. v. McCutcheon, 127 Fed. 1020, 61 CCA 653; L. E. Waterman Co. v. Forsyth, 121 Fed. 103 [aff 127 Fed. 1020 mem, 61 CCA 653 mem]; Stirling Co. v. St. Louis Brewing Assoc., 79 Fed. 80; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 328; International Tooth-Crown Co. v. Richmond, 30 Fed. 775; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39 [rev on other grounds 129 U. S. 1, 9 SCt 213, 32 L. ed. 593]; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Colgate v. Western Union Tel. Co., 6 F. Cas. No. 2,995, 15 Blatchf. 365, 4 Bann. & A. 36; Dental Vulcanite Co. v. Wetherbee, 7 F. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Goodyear Dental Vulcanite Co. v. Root, 10 F. Cas. No. 5,597, 1 Bann. & A. 384; Goodyear Dental Vulcanite Co. v. Smith, 10 F. Cas. No. 5,598, 1 Bann. & A. 201, Holmes 354 [aff 93 U. S. 486, 23 L. ed. 952]; Hayden v. James, 11 F. Cas. No. 6,260; Henry v. Francestown Soapstone Stove Co., 11 F. Cas. No. 6,382, 2 Bann. & A. 221; Howe v. Newton, 12 F. Cas. No. 6,771, 2 Fish. Pat. Cas. 531; Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Singer v. Braunsdorf, 22 F. Cas. No. 12,897, 7 Blatchf. 521; Smith v. Prior, 22 F. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447; Patric v. Sylvester, 23 Grant Ch. (Ont.) 573.

55. Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447.

56. Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1.

57. U. S. Rifle, etc., Co. v. Whitney Arms Co., 118 U. S. 22, 6 SCt 950, 30 L. ed. 53; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 130 Fed. 900; Lay v. Indianapolis Brush, etc., Mfg. Co., 120 Fed. 881, 57 CCA 313; Lindsay v. Stein, 10 Fed. 907, 20 Blatchf. 370; Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645.

58. American Laundry Mach. Co. v. Prosperity Co., 295 Fed. 819 [rev 294 Fed. 144]; Aurora Mantle, etc., Co. v. Kaufmann, 243 Fed. 911, 156 CCA 423; Edison v. Allis-Chalmers Co., 191 Fed. 837; Stirling Co. v. St. Louis Brewing Assoc., 79 Fed. 80; Dederick v. Fox, 56 Fed. 714; Frankfort Whisky Process Co. v. Mill Creek Distilling Co., 37 Fed. 533; Graham v. Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

59. Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823; Westinghouse Electric, etc., Co. v.

of the earlier application.[60]

Renewal of application forfeited for failure to pay final fee. Where a timely application is made for the issuance of a patent allowed on an earlier application, but withheld for nonpayment of the final fee within the time prescribed, the filing date of the original application controls in determining whether the invention was in public use or on sale beyond the time fixed by the statute.[61] But to obtain the benefit of the original date, the renewal must be in accordance with the terms of the law.[62]

[§ 112] **(c) Inventions Previously Applied for Abroad.** Congress has expressly provided that an application, filed in this country by any person who has previously filed an application for a patent for the same invention, discovery, or design in a foreign country which by treaty, convention, or law affords similar privileges to citizens of the United States, shall have the same force and effect as the same application would have if filed in this country on the date on which the application was first filed in such foreign country, provided the application in this country is filed within four months, in cases of designs, from the earliest date on which any such foreign application was filed, and within twelve months, in other cases.[63]

[§ 113] **(4) Nature and Extent of Use—(a) In General.** Any use of the complete and operative invention in its natural and intended way is a use in public within the meaning of the statute,[64] provided the use was not merely experimental,[65] and was not a secret use by the inventor or others under his direction and control.[66] Where the use was neither experimental nor secret, the fact that it was by the inventor himself is immaterial.[67] This is so, even though the inventor derived no profit from the use of the invention.[68] Whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known.[69] The phrase "public use" does not mean use by the public generally.[70] An invention may be in public use, even though the use and knowledge of the use is confined to one person.[71] To constitute the public use of an invention it is not necessary that more than one of the devices should be publicly used.[72] A single use is just as effectual as many to bar the right to a patent.[73]

[§ 114] **(b) Experimental Use.** Use of an invention by or under the control of the inventor for the purpose of determining whether the invention is complete or requires modification or change before final adoption does not place the invention in public use within the meaning of the statute.[74] This is true, even though the invention upon experiment prove

Jeffrey-DeWitt Insulator Co., 22 F. (2d) 277.

60. In re Spitteler, 31 App. (D. C.) 271.

61. Detroit Iron, etc., Co. v. Carey, 236 Fed. 924, 150 CCA 186 [certiorari den 242 U. S. 649 mem, 37 SCt 242 mem, 61 L. ed. 545 mem]; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 328.

62. Ostergren v. Tripler, 17 App. (D. C.) 557; Christensen v. Noyes, 90 Off. Gaz. (U. S.) 223.

63. U. S. Code tit 35 § 32.

64. Manning v. Cape Ann Isinglass, etc., Co., 108 U. S. 462, 2 SCt 860, 27 L. ed. 793; Worley v. Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821; Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Le Roy v. Nicholas Power Co., 244 Fed. 955; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Eastman v. New York, 134 Fed. 844, 69 CCA 628; Young v. Clipper Mfg. Co., 121 Fed. 560 [aff 130 Fed. 150, 64 CCA 502]; Thomson-Houston Electric Co. v. Lorain Steel Co., 110 Fed. 654 [aff 117 Fed. 249, 54 CCA 281]; Lettelier v. Mann, 91 Fed. 917; Dalby v. Lynes, 64 Fed. 376; Perkins v. Nashua Card, etc., Co., 2 Fed. 451; In re Tournier, 17 App. (D. C.) 481.

[a] **Use in employer's factory.**— Worley v. Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821; In re Tournier, 17 App. (D. C.) 481.

[b] **Use of completed article as samples.**—Dalby v. Lynes, 64 Fed. 376.

[c] **Exhibition of a design.**— Young v. Clipper Mfg. Co., 121 Fed. 560 [aff 130 Fed. 150, 64 CCA 502].

65. See infra § 114.

66. See infra § 115.

67. Root v. Third Ave. R. Co., 146 U. S. 210, 13 SCt 100, 36 L. ed. 946; Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; Allinson Mfg. Co. v. Ideal Filter Co., 21 F. (2d) 22; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306 [aff 3 F. (2d) 999]; Thomson-Houston Electric Co. v. Lorain Steel Co., 117 Fed. 249, 54 CCA 281; Campbell v. New York, 35 Fed. 504, 1 LRA 48; Jones v. Barker, 11 Fed. 597; Pennock v. Dialogue, 19 F. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. C. C. 538 [aff 2 Pet. 1, 7 L. ed. 327]; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229; Sisson v. Gilbert, 22 F. Cas. No. 12,912, 9 Blatchf. 185, 5 Fish. Pat. Cas. 109.

68. Le Roy v. Nicholas Power Co., 244 Fed. 955; Thomson-Houston Electric Co. v. Lorain Steel Co., 117 Fed. 249, 54 CCA 281.

69. Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Daniel v. Restein, 131 Fed. 469 [aff 146 Fed. 74, 76 CCA 536].

70. Flomerfelt v. Newwitter, 88 Fed. 696 [aff 95 Fed. 1006 mem, 37 CCA 356 mem]; Clisby v. Reese, 88 Fed. 645, 32 CCA 80; Blackinton v. Douglass, 3 F. Cas. No. 1,470, McA. Pat. Cas. 622; Ellithorp v. Robertson, 8 F. Cas. No. 4,409, McA. Pat. Cas. 585; Henry v. Providence Tool Co., 11 F. Cas. No. 6,384, 3 Bann. & A. 501; Hunt v. Howe, 12 F. Cas. No. 6,891, McA. Pat. Cas. 366.

71. Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540.

72. Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755.

73. Egbert v. Lippmann, supra; Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Le Roy v. Nicholas Power Co., 244 Fed. 955; Toch v. Zibell Damp Resisting Paint Co., 231 Fed. 711, 145 CCA 597; Bradley v. Eccles, 138 Fed. 911 [aff 144 Fed. 90, 75 CCA 248]; Clark Pomace-Holder Co. v. Ferguson, 17 Fed. 79 [aff 119 U. S. 335, 7 SCt 382, 30 L. ed. 406]; Jones v. Barker, 11 Fed. 597; American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Egbert v. Lippmann, 8 F. Cas. No. 4,306, 3 Bann. & A. 468, 15 Blatchf. 295 [aff 104 U. S. 333, 26 L. ed. 755]; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229; Dalby v. Lynes, 71 Off. Gaz. (U. S.) 1317; Worley v. Loker Tobacco Co., 21 Off. Gaz. (U. S.) 559; Household Coal, etc., Co. v. Neilson, 9 Cl. & F. 788, 8 Reprint 616, 20 ERC 512; Hessin v. Coppin, 19 Grant Ch. (Ont.) 629; Abell v. McPherson, 17 Grant Ch. (Ont.) 23.

74. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Beedle v. Bennet, 122 U. S. 71, 7 SCt 1090, 30 L. ed. 1074; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Grand Rapids Showcase Co. v. Measuregraph Co., 28 F. (2d) 497; Cline Electric Mfg. Co. v. Kohler, 27 F. (2d) 638; Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306 [aff 3 F. (2d) 999]; Southern Novelty Co. v. Economy Cone, etc., Co., 294 Fed. 717; Los Angeles Lime Co. v. Nye, 270 Fed. 155; Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery, 260 Fed. 572; General Electric Co. v. Continental Fibre Co., 256 Fed. 660, 168 CCA 54; Eclipse Mach. Co. v. Harley-Davidson Motor Co., 252 Fed. 805, 164 CCA 163 [rev 244 Fed. 463, and rev on other grounds 259 U. S. 414, 42 SCt 527, 66 L. ed. 996]; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; David Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 205 Fed. 745 [mod on other grounds 210 Fed. 164, 127 CCA 22]; Edison v. Allis-Chalmers Co., 191 Fed. 837; Union Carbide Co. v. American Carbide Co., 181 Fed. 104, 104 CCA 522 [rev 172 Fed. 120]; International Tel. Mfg. Co. v. Kellogg Switch Board, etc., Co., 171 Fed. 651, 96 CCA 395; Penn Electric, etc., Co. v. Conroy, 159 Fed. 943, 87 CCA 149; American Caramel Co. v. Mills, 149 Fed. 743, 79 CCA 449 [rev 138 Fed. 142]; Comptograph Co. v. Universal Accountant Mach. Co., 142 Fed. 539 [rev on other grounds 146 Fed. 981, 77 CCA 227]; Bryce Bros. Co. v. Seneca Glass Co., 140 Fed. 161; Thomson-Houston Electric Co. v. Lorain Steel Co., 117 Fed. 249, 54 CCA 281; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514]; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191; Pacific Cable R. Co. v. Butte City St. R. Co., 55 Fed. 760 [rev 60 Fed. 410, 9 CCA 41]; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 30 Fed. 63; Railway Register Mfg. Co. v. Broadway, etc., R. Co., 22 Fed. 655, 26 Fed. 522 [app dism 149 U. S. 783 mem, 13 SCt 1051 mem, 37 L. ed. 958 mem]; Lyman v. Maypole, 19 Fed. 735; Birdsall v. McDonald, 3 F. Cas. No. 1,434, 1 Bann. & A. 165;

complete.[75] It is immaterial that such use was in public.[76] To come within this rule the main purpose of the use must be to enable the inventor to determine whether the invention is complete, or requires modification or change before final adoption.[77] The rule has no application where such purpose is merely incidental or subsidiary to some other purpose.[78] Thus the rule has no application where the invention is placed in use for the sole purpose of satisfying the public that the method or device is adapted to meet a public want,[79] or where the use, although originally for the purpose of experiment, is continued for a longer period than is reasonably necessary to determine whether the invention is complete or requires further modification or change.[80] In determining the proper extent of experimental use the subject matter of the invention is to be considered.[81] A use mainly for the purpose of trade and profit and incidentally for experiment is within the prohibition of the statute,[82] but the mere fact that, as incident to the use of a method or device for the purpose of experiment, the inventor derives some profit does not render the invention in public use within the meaning of the statute.[83] The mere fact that the product of the method or device was in public use or on sale does not establish that the use was not experimental.[84] To come within the protection of the rule under consideration the ex-

Jennings v. Pierce, 13 F. Cas. No. 7,283, 3 Bann. & A. 361, 15 Blatchf. 42; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., 15 F. Cas. No. 8,453, 1 Bann. & A. 470, 10 Blatchf. 292; Morris v. Huntington, 17 F. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; Stanley v. Hewitt, 22 F. Cas. No. 13,285; U. S. Rifle, etc., Co. v. Whitney Arms Co., 28 F. Cas. No. 16,793, 2 Bann. & A. 493, 14 Blatchf. 94 [aff 118 U. S. 22, 6 SCt 950, 30 L. ed. 53]; Winans v. Schenectady, etc., R. Co., 30 F. Cas. No. 17,865, 2 Blatchf. 279; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; Saunders v. Miller, 33 App. (D. C.) 456; In re Mills, 25 App. (D. C.) 377; Morgan v. Seaward, 2 M. & W. 544, 150 Reprint 874; Conway v. Ottawa Electric R. Co., 8 Can. Exch. 432.

"The use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as such a use." Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 134, 24 L. ed. 1000.

75. Elizabeth v. American Nicholson Pav. Co., supra.

76. Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755; Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Los Angeles Lime Co. v. Nye, 270 Fed. 155; Eclipse Mach. Co. v. Harley-Davidson Motor Co., 252 Fed. 805 [rev 244 Fed. 463, 164 CCA 163, and rev on other grounds 259 U. S. 414, 42 SCt 527, 66 L. ed. 996]; Edison v. Allis-Chalmers Co., 191 Fed. 837; Victor Talking Mach. Co. v. American Graphophone Co., 140 Fed. 860 [aff 145 Fed. 350, 76 CCA 180]; Railway Register Mfg. Co. v. Broadway, etc., R. Co., 26 Fed. 522 [app dism 149 U. S. 783 mem, 13 SCt 1051 mem, 37 L. ed. 958 mem]; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39 [rev on other grounds sub nom. McCormick v. Whitmer, 129 U. S. 1, 9 SCt 213, 32 L. ed. 593]; Campbell v. New York, 9 Fed. 500 [rev on other grounds 134 Fed. 844, 69 CCA 628]; Andrews v. Cross, 8 Fed. 269, 19 Blatchf. 294; Sinclair v. Backus, 4 Fed. 539; In re Newall, 4 C. B. N. S. 269, 93 ECL 269, 140 Reprint 1087; Bentley v. Fleming, 1 C. & K. 587, 47 ECL 587; Hills v. London Gas Light Co., 5 H. & N. 312, 157 Reprint 1202, 20 ERC 528.

"A use necessarily open to public view, if made in good faith solely to test the qualities of the invention, and for the purpose of experiment, is not a public use within the meaning of the statute." Egbert v. Lippmann, 104 U. S. 333, 336, 26 L. ed. 755.

[a] **Exhibition of an experimentally constructed machine by the inventor to a nonpaying audience** is not a public use. Victor Talking Mach. Co. v. American Graphophone Co., 140 Fed. 860 [aff 145 Fed. 350, 76 CCA 180].

77. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540.

78. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540.

79. Guy v. Stein, 239 Fed. 729, 152 CCA 563; Swain v. Holyoke Mach. Co., 102 Fed. 910 [aff 109 Fed. 154, 48 CCA 265 (certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem)].

80. Root v. Third Ave. R. Co., 146 U. S. 210, 13 SCt 100, 36 L. ed. 946; Manning v. Cape Ann Isinglass, etc., Co., 108 U. S. 462, 2 SCt 860, 27 L. ed. 793; Hall v. Macneale, 107 U. S. 90, 2 SCt 73, 27 L. ed. 367; Worley v. Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821; Guy v. Stein, 239 Fed. 729, 152 CCA 563; National Phonograph Co. v. Lambert Co., 142 Fed. 164, 73 CCA 382; Eastman v. New York, 134 Fed. 844, 69 CCA 628; Perkins v. Nashua Card, etc., Co., 2 Fed. 451.

81. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306 [aff 3 F. (2d) 999]; Guy v. Stein, 239 Fed. 729, 152 CCA 563; Eastman v. New York, 134 Fed. 844, 859, 69 CCA 628; Henry v. Francestown Soapstone Stove Co., 11 F. Cas. No. 6,382, 2 Bann. & A. 221; Saunders v. Miller, 33 App. (D. C.) 456.

"Invention, in so far as it relates to machines, may, for the purposes of illustration, be divided into two general classes: First, where the invention is the result of a happy creative thought; and, second, where it is developed by arduous and patient toil. To the first class belong the safety lamp and the driven well; to the second the 'Linotype' and the typewriter. The moment the idea of surrounding the lamp with wire gauze occurred to Davy and its practicability was demonstrated by a simple test, the invention stood revealed. Mergenthaler, on the other hand, was not rewarded so much for the inspiration and originality of his idea as for the ingenuity and skill with which he built up his intricate and marvelous machine. The invention of Knibbs belongs to the first class. Undoubtedly his conception showed the genius of the inventor as distinguished from that of the mechanic. It did not, however, require a long series of laborious experiments to prove its efficacy. As soon as the two sections of the pump were connected by a hole on the inside or a tube on the outside and satisfactory tests demonstrated that the old difficulties were thus obviated, the invention was in a condition for patenting." Eastman v. New York, supra.

[a] **Thus,** since the durability of a pavement can only be determined by long use, its use on a public street for six years did not deprive the use of its character as an experiment. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000.

82. Root v. Third Ave. R. Co, 146 U. S. 210, 13 SCt 100, 36 L. ed. 946; Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141 [rev 12 Fed. 721]; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; American Ballast Co. v. Davy Burnt Clay Ballast Co., 220 Fed. 887, 136 CCA 453; Star Mfg. Co. v. Crescent Forge, etc., Co., 179 Fed. 856, 103 CCA 342; Newark Mach. Co. v. Hargett, 28 Fed. 567.

83. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265; Jennings v. Pierce, 13 F. Cas. No. 7,283, 3 Bann. & A. 361, 15 Blatchf. 42.

84. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Southern Novelty Co. v. Economy Cone, etc., Co., 294 Fed. 717; Mayer v. Mutschler, 237 Fed. 654 [rev on other grounds 248 Fed. 911, 161 CCA 29 (certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem)]; American Ballast Co. v. Davy Burnt Clay Ballast Co., 220 Fed. 887, 136 CCA 453; Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 205 Fed. 745 [mod on other grounds 210 Fed. 164, 127 CCA 22]; Penn Electric, etc., Co. v. Conroy, 159 Fed. 943, 87 CCA 149; American Caramel Co. v. Mills, 149 Fed. 743, 79 CCA 449; Bryce Bros. Co. v. Seneca Glass Co., 140 Fed. 161, 172; Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co., 108 Fed. 221 [aff 113 Fed. 884, 51 CCA 514]; Saunders v. Miller, 33 App. (D. C.) 456.

"A clear distinction must be drawn between the experimental use allowed of a machine sought to be patented, designed to produce articles, and that of a mere patented article itself, designed for general use or consumption. In the latter case, a presumption arises that, when the inventor issues to the public the article, he regards it as a finished product, and, in case he does not apply for patent within two years after, abandonment of his purpose to so do may well be assumed. In the case of a machine designed to manufacture articles, on the contrary, reason and common experience teach us that in most cases such machine will not come at once a perfect product from the first castings. Almost inexplicable defects will generally be found to mar the perfect operation. These defects must frequently be remedied, often by long study and much experimentation. The article itself may be produced by the machine in perfect state or nearly so, yet not quickly, effectively, and practically by reason of the defects in the machine. It seems to me that it would not be in accord with equity and sound sense to say that such produced articles must not be used, but needlessly destroyed in order to save the inventor from the charge of prior public use of the machine. Sale of the product of such machine may, in a secondary sense, be considered profit derived from the machine; but a fair construction of the principles of the law, it seems to me, should and does require that such profits should be derived in the primary sense from the sale of the

periments conducted must be for the purpose of testing and perfecting the invention claimed.[85] If a device has passed the experimental stage its use thereafter is a "public use," even though the machine or combination of which it is an element had not passed the stage of experiment.[86]

[§ 115] **(c) Secret Use.** It has been said that the phrase "public use" means use in public as distinguished from secret use,[87] and expression has been given to the view that a secret use by the inventor does not affect his right to obtain a patent, regardless of the duration of such use unless another in the meantime has made the invention and secured the exclusive right to make, use, and vend it by patent.[88] This general proposition, however, has no application to cases of deliberate delay.[89] A use is not strictly secret where one or more persons are permitted to witness the invention in operation without pledge of secrecy,[90] or even if they might have seen it had they used their opportunity.[91] The persons who witness the use need not understand or appreciate the invention's method of operation,[92] or be interested in practicing it.[93] Nor is it essential that they be skilled in the art to which the invention relates.[94] If an inventor uses or permits his invention to be used without restriction of any kind, the use is a public one, even though the thing embodying the invention was hidden from view while in use.[95]

[§ 116] **(d) Consent of Inventor.** Early statutes authorized the grant of a patent only for an invention which had not been known or used before the application was made.[96] Prior knowledge or use, however, was held to be operative as a bar only where the use was with the consent and allowance of the inventor.[97] In a later statute this limitation was made in express terms.[98] In a subsequent statute the clause containing the limitation was omitted,[99] and it does not appear in the present statute.[1] Notwithstanding the omission of this limitation, some of the earlier decisions were to the effect that if the right to a patent was to be barred the use must be with the knowledge and consent of the inventor,[2] but it is now settled that public use may bar the right to a patent regardless of whether it was with the inventor's knowledge, consent, or allowance,[3] except where knowledge of the invention was fraudulently, surreptitiously, or piratically obtained.[4] It has been asserted that the question what constitutes a "fraudulent," "surreptitious," or "piratical" use has been left in obscurity by the authorities,[5] but it is entirely clear that, when courts have used these words in patent cases, they intended them to apply to acts done mala fide, clandestinely, treacherously, and by means of falsehood, fraud, or breach of trust.[6] It is equally clear that they have never been used to characterize knowledge obtained openly in the due course of business,[7] or applied to an act which is neither malum prohibitum nor malum in se.[8] Use without the knowledge or consent of the inventor is not fraudulent, surreptitious, or piratical merely because the user, under no injunction of secrecy, derived his knowledge from the inventor.[9] It has been so held even where the knowledge was obtained in using the invention in experiments at the request of the inventor.[10]

[§ 117] **(5) On Sale—(a) In General.** An invention ready to be delivered to any purchaser as a complete and perfect method or device fit to be used without modification or change is on sale when the method or device is sold or offered for sale,[11] provided it is sold or offered for sale without any right

machine itself before the inventor should be barred by this defense." Bryce Bros. Co. v. Seneca Glass Co., supra.

85. Eastman v. New York, 134 Fed. 844, 69 CCA 628.

86. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Worley v. Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306; Eastman v. New York, 134 Fed. 844, 69 CCA 628; Thomson-Houston Electric Co. v. Lorain Steel Co., 117 Fed. 249, 54 CCA 281.

87. Adams v. Edwards, 1 F. Cas. No. 53, 1 Fish. Pat. Cas. 1; Blackinton v. Douglass, 3 F. Cas. No. 1,470, McA. Pat. Cas. 622; Henry v. Providence Tool Co., 11 F. Cas. No. 6,384, 3 Bann. & A. 501; Hunt v. Howe, 12 F. Cas. No. 6,891, McA. Pat. Cas. 366.

88. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Bates v. Coe, 98 U. S. 31, 46, 25 L. ed. 68; Eck v. Kutz, 132 Fed. 758; Mason v. Hepburn, 13 App. (D. C.) 86.

"Inventors may, if they can, keep their invention secret; and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the mean time has made the invention, and secured by patent the exclusive right to make, use, and vend the patented improvement." Bates v. Coe, supra.

89. See infra § 121.

90. Allinson Mfg. Co. v. Ideal Filter Co., 21 F. (2d) 22; Le Roy v. Nicholas Power Co., 244 Fed. 955; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Perkins v. Nashua Card, etc., Co., 2 Fed. 451; In re Plumly, 52 App. (D. C.) 106, 281 Fed. 1018.

91. Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Perkins v. Nashua Card, etc., Co., 2 Fed. 451.

92. Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Perkins v. Nashua Card, etc., Co., 2 Fed. 451.

93. Perkins v. Nashua Card, etc., Co., supra.

94. Perkins v. Nashua Card, etc., Co., supra.

95. Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755.

96. Act Febr. 21, 1793 (1 St. at L. 318).

97. Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

98. Act July 4, 1836 (5 St. at L. 119).

99. Act March 3, 1839 (5 St. at L. 354).

1. U. S. Code tit 35 § 31.

2. Davis v. Fredericks, 19 Fed. 99, 21 Blatchf. 556; Emery v. Cavanagh, 17 Fed. 242; Campbell v. New York, 9 Fed. 500, 35 Fed. 504, 1 LRA 48; Draper v. Wattles, 7 F. Cas. No. 4,073, 3 Bann. & A. 618; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Russell, etc., Mfg. Co. v. Mallory, 21 F. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567.

3. Andrews v. Hovey, 123 U. S. 267, 8 SCt 101, 31 L. ed. 160; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Toch v. Zibell Damp Resisting Paint Co., 231 Fed. 711, 145 CCA 597; Eastman v. New York, 134 Fed. 844, 69 CCA 628; Campbell v. New York, 35 Fed. 504, 1 LRA 48; Kelleher v. Darling, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 424; In re Drawbaugh, 3 App. (D. C.) 236.

4. Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Pierson v. Eagle Screw Co., 19 F. Cas. No. 11,156, 2 Robb Pat. Cas. 268, 3 Story 402.

5. Eastman v. New York, 134 Fed. 844, 69 CCA 628.

6. Eastman v. New York, supra.

7. Eastman v. New York, supra.

8. Eastman v. New York, supra.

9. Andrews v. Hovey, 124 U. S. 694, 8 SCt 676, 31 L. ed. 557; Eastman v. New York, 134 Fed. 844, 69 CCA 628.

10. Campbell v. New York, 35 Fed. 504, 1 LRA 48.

11. Root v. Third Ave. R. Co., 146 U. S. 210, 13 SCt 100, 36 L. ed. 946; International Tooth Crown Co. v. Gaylord, 140 U. S. 55, 11 SCt 716, 35 L. ed. 347; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; Westinghouse Electric, etc., Mfg. Co. v. Jeffrey-DeWitt Insulator Co., 22 F. (2d) 277; Denivelle v. MacGruer, 4 F. (2d) 329; Callahan v. Nesbitt, 1 F. (2d) 75; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654, and certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; Monroe v. Bresee, 239 Fed. 727, 152 CCA 561; David E. Kennedy, Inc. v. United Cork Cos., 225 Fed. 371, 140 CCA 395; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265 [certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem]; Covert v. Covert, 106 Fed. 183 [aff 115 Fed. 493, 53 CCA 225]; Smith, etc., Mfg. Co. v. Mellon, 58 Fed. 705, 7 CCA 439; Delemater v. Heath, 58 Fed. 414, 7 CCA 279; Plimpton v. Winslow, 14 Fed. 919; Kells v. McKenzie, 9 Fed. 284; Burton v. Greenville, 3 Fed. 642; Federal Mfg., etc., Co. v. U. S., 42 Ct. Cl. 479; In re Mills, 117 Off. Gaz. (U. S.) 904; Smith, etc., Mfg. Co. v. Mellon, 66 Off. Gaz. (U. S.) 173; Henry v. Francestown Soapstone Co., 17 Off. Gaz. (U. S.) 569.

[a] **Where the inventor for pay**

of experimentation or substitution being reserved.[12] A single unrestricted sale is sufficient to constitute the invention on sale.[13] That the invention is sold embraced in another without notice does not deprive the statutory provision of effect.[14] The statute does not require a "sale" but only a placing "on sale."[15] A completed sale, either with or without delivery, is not necessary.[16] If the art or instrument embodying the invention is on hand ready to be delivered to any purchaser, it is on sale if offered for sale without restriction, even though no actual sale is made.[17] But the combination of words used in the statute indicates that the sale contemplated is such as creates an opportunity for present public use.[18] The method or device must have existed as a complete article of sale, not on paper, but in fact,[19] and if it is not on hand and ready for delivery the invention cannot be said to be on sale within the meaning of the act.[20] This is true, even though the invention has passed the experimental stage and is complete,[21] even though it has been advertised for sale,[22] and even though a contract for sale and delivery has been made.[23] But where some articles have in fact been manufactured and delivered more than two years prior to the application, the right to obtain a patent is lost, even though the articles were not made until after they were ordered.[24] If an inventor sells his invention, the fact that the device embodying the invention was hidden from view while in use does not deprive the sale of its effect as a bar to his right to obtain a patent.[25]

An assignment of the right to secure a patent is not placing the invention on sale.[26]

[§ 118] **(b) Experimental Sales.** There may be an actual sale without placing the invention on sale within the meaning of the law where the sale is primarily for the purpose of securing an adequate test of the invention.[27] A sale which, although otherwise complete, reserves to the inventor a right of experimentation and substitution does not place the invention "on sale."[28] But the main purpose of the sale must be to enable the inventor to determine whether the invention is complete or requires further modification or change before final adoption.[29] There is a clear distinction between sales for the purpose of testing the market and sales to test the invention itself. The former is a trader's and not an inventor's experiment and does not carve an exception out of the statute.[30] To bring a use or sale within the exception made in favor of experimental use or sale there must be evidence both of the need and the fact of experimentation.[31] A sale is not

teaches others to use the invention, it is public use. International Tooth-Crown Co. v. Gaylord, 140 U. S. 55, 11 SCt 716, 35 L. ed. 347.

[b] **Sale made for purpose of defeating rights of creditors.**—Although an inventor transferred by formal bill of sale an experimental machine, merely for the purpose of defeating his creditors, he cannot, where a patent subsequently issued was questioned on the ground of prior use, contend, for the purpose of defeating the rights of the public, that the bill of sale was in reality a mortgage. Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654, and certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem].

12. See infra § 118.

13. Andrews v. Hovey, 123 U. S. 267, 8 SCt 101, 31 L. ed. 160; Hall v. Macneale, 107 U. S. 90, 2 SCt 73, 27 L. ed. 367; Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; Westinghouse Electric, etc., Co. v. Jeffrey-DeWitt Insulator Co., 22 F. (2d) 277; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654, and certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; Monroe v. Bresee, 239 Fed. 727, 152 CCA 561; National Cash Register Co. v. American Cash Register Co., 178 Fed. 79, 101 CCA 569; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265 [certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem]; Covert v. Covert, 106 Fed. 183 [aff 115 Fed. 493, 53 CCA 225]; Swain v. Holyoke Mach. Co., 102 Fed. 910 [aff 109 Fed. 154, 48 CCA 265 (certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem)]; Delemater v. Heath, 58 Fed. 414, 7 CCA 279; Schneider v. Thill, 21 F. Cas. No. 12,470a, 5 Bann. & A. 565; In re Mills, 117 Off. Gaz. (U. S.) 904; Henry v. Francestown Soapstone Co., 17 Off. Gaz. (U. S.) 569; Power's Application, 52 App. (D. C.) 71, 281 Fed. 431; Hessen v. Coppin, 19 Grant Ch. (Ont.) 629; Abell v. McPherson, 17 Grant Ch. (Ont.) 23.

14. Egbert v. Lippmann, 104 U. S. 333, 26 L. ed. 755

15. Wende v. Horine, 225 Fed. 501, 140 CCA 543.

16. Wende v. Horine, supra.

17. Wende v. Horine, supra; Dittgen v. Racine Paper Goods Co., 181 Fed. 394; Covert v. Covert, 106 Fed. 183 [aff 115 Fed. 493, 53 CCA 225], Mack v. Spencer Mfg. Co., 52 Fed. 819; Wright v. Postel, 44 Fed. 352; Cluett v. Claflin, 30 Fed. 921, 24 Blatchf. 412 [aff 140 U. S. 180, 11 SCt 725, 35 L. ed. 385]; Burton v. Greenville, 3 Fed. 642; Plimpton v. Winslow, 14 Fed. 919; Washburn v. Gould, 29 F. Cas. No. 17,214, 3 Story 122, 2 Robb Pat. Cas. 206; Waterman v. Thomson, 29 F. Cas. No. 17,260, 2 Fish. Pat. Cas. 461; Mullins v. Hart, 3 C. & K. 297.

18. Burke Electric Co. v. Independent Pneumatic Tool Co., 234 Fed. 93, 148 CCA 109, 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; McCreery Engineering Co. v. Massachusetts Fan Co., 195 Fed. 498, 115 CCA 408.

19. McCreery Engineering Co. v. Massachusetts Fan Co., supra.

20. Burke Electric Co. v. Independent Pneumatic Tool Co., 234 Fed. 93, 148 CCA 109, 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; McCreery Engineering Co. v. Massachusetts Fan Co., 195 Fed. 498, 115 CCA 408; Sparkman v. Higgins, 22 F. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. R. 110, 5 NYLegObs 122; In re Mills, 117 Off. Gaz. (U. S.) 904.

21. Burke Electric Co. v. Independent Pneumatic Tool Co., 234 Fed. 93, 148 CCA 109, 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem].

22. Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 205 Fed. 745 [mod on other grounds 210 Fed. 164, 127 CCA 22].

23. Burke Electric Co. v. Independent Pneumatic Tool Co., 234 Fed. 93, 148 CCA 109, 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; McCreery Engineering Co. v. Massachusetts Fan Co., 195 Fed. 498, 115 CCA 408.

24. Dittgen v. Racine Paper Goods Co., 181 Fed. 394; National Cash Register Co. v. American Cash Register Co., 178 Fed. 79, 101 CCA 569.

[a] **Illustration.**—Where the inventor of a cigar pocket for more than two years before applying for a patent therefor made and sold such pockets in the regular course of his business, such articles were in "public use" and "on sale," and defeated his right to a patent, although they were not kept by him in stock, but were made up only on orders received, it being the custom of the trade to take such orders by sample. Dittgen v. Racine Paper Goods Co., 181 Fed. 394.

25. Hall v. Macneale, 107 U. S. 90, 2 SCt 73, 27 L. ed. 367.

26. U. S. Electric Lighting Co. v. Consolidated Electric Light Co., 33 Fed. 869.

27. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265 [certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem]; Delemater v. Heath, 58 Fed. 414, 7 CCA 279; Harmon v. Struthers, 43 Fed. 437, 57 Fed. 637; Innis v. Oil City Boiler Works, 22 Fed. 780; Graham v. Geneva Lake Crawford Mfg. Co., 11 Fed. 138; National Electrical Supply Co. v. U. S., 64 Ct. Cl. 617; In re Mills, 117 Off. Gaz. (U. S.) 904; Henry v. Francestown Soapstone Co., 17 Off. Gaz. (U. S.) 569.

28. Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697; Mershon v. Bay City Box, etc., Co., 189 Fed. 741; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265 [certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem]; Delemater v. Heath, 58 Fed. 414, 7 CCA 279; Innis v. Oil City Boiler Works, 22 Fed. 780; In re Mills, 117 Off. Gaz. (U. S.) 904; Henry v. Francestown Soapstone Co., 17 Off. Gaz. (U. S.) 569.

29. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Wilkie v. Manhattan Rubber Co., 14 F. (2d) 811; Denivelle v. MacGruer, 4 F. (2d) 329; Jenner v. Bowen, 139 Fed. 556, 71 CCA 540.

[a] **Illustration.**—Where a patentee, more than two years before his application, used the process and product which were the basis of the patent in the construction of a large building on a bid made in competition with others, and received a large sum in payment therefor, the experimental character of the use, if any, was merely incidental, and not the substantial purpose of the transaction. Denivelle v. MacGruer, 4 F. (2d) 329.

30. Jenner v. Bowen, 139 Fed. 556, 71 CCA 540; Smith, etc., Mfg. Co. v. Mellon, 58 Fed. 705, 7 CCA 439; Consolidated Fruit-Jar Co. v. Wright, 6 F. Cas. No. 3,135, 1 Bann. & A. 320, 12 Blatchf. 149 [aff 94 U. S. 92, 24 L. ed. 68].

31. Wilkie v. Manhattan Rubber Co., 14 F. (2d) 811; Callahan v. Nes-

experimental merely because what the purchaser got was imperfect and subsequently greatly improved,[32] or merely because the inventor regarded the method or device sold as incomplete or experimental.[33] Nor is a sale experimental merely because the purchaser is allowed a period of use after delivery, in which to determine whether the invention will satisfactorily meet his requirements.[34] Whether a sale was primarily for experimental purposes is a question of fact.[35] That the sale was principally for the purpose of experimentation must be evidenced by some affirmation of the fact,[36] or by some act from which it may be inferred.[37] A secret purpose to test the invention is not sufficient.[38] Failure to follow up and watch the performance of the method or device may be considered in determining whether a sale was in fact experimental.[39] But the mere fact that the inventor inspected the device sold from time to time does not prove the sale to be experimental.[40] If an inventor gets the manufacturers to make a machine for him, with which he may experiment and test his invention, the transaction does not make the invention "on sale" at the moment of delivery of the machine, even though, as between the parties, it is a sale.[41] It is not otherwise if the inventor takes in a partner in the ownership of the machine.[42]

[§ 119] **(6) Evidence.** Whether an invention was in public use or on sale and for a longer period than permissible under the statute is a question of fact.[43] It may be established by the testimony of a single witness.[44] Where a patent has issued to an inventor, the burden of proof on the issue of public use or sale is upon the party assailing the right of the inventor to a patent.[45] This burden must be sustained by the clearest proof,[46]—proof characterized by some courts as sufficiently clear to satisfy beyond reasonable doubt.[47] The evidence must so satisfy not alone as to the time,[48] but also as to the identity of the thing in public use or on sale with the invention subsequently claimed.[49] As a general proposition, mere oral evidence, depending upon the memory of the witness or witnesses, should be corroborated by contemporary records or memoranda, physical exhibits, or definitely proved circumstances.[50] This, however, is not an inflexible rule.[51] Oral testimony, although lacking such corroboration, may be so definite and specific as to satisfy a court beyond a reasonable doubt that the invention was in public use or on sale beyond the permissible period.[52]

Experimental use or sale. The presumption is

bitt, 1 F. (2d) 75.

32. Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654, and certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598.

33. Monroe v. Bresee, 239 Fed. 727, 152 CCA 561.

34. Swain v. Holyoke Mach. Co., 102 Fed. 910, 916 [aff 109 Fed. 154, 48 CCA 265 (certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem)]; Kells v. McKenzie, 9 Fed. 284; Henry v. Francestown Soapstone Co., 2 Fed. 78; Federal Mfg., etc., Co. v. U. S., 42 Ct. Cl. 479.

"Experimental use is of two sorts: (1) In order to enable the inventor to test the practicability or utility of his invention, and to prove and perfect the same. Experiments of this sort cannot, in the nature of things, always be made by an inventor alone, but must sometimes be carried out by placing the invented article in the hands of others. A use solely for experiment of this sort to satisfy the inventor, and, perhaps, as Judge Lowell suggests, to satisfy some one from whom the inventor hopes to receive aid in patenting the invention, is not deemed a public use, within the meaning of the statute. (2) In order to satisfy the public that the article invented is adapted to meet a public need. To secure public favor for the invention, the inventor commonly desires to secure, even at some pecuniary sacrifice, a considerable amount of this sort of experimental use, but, in my opinion, an experiment of this sort, when carried out by means of an unrestricted sale to and unrestricted use by a stranger, is not the less a public use, within the meaning of the statute." Swain v. Holyoke Mach. Co., supra.

35. Wilkie v. Manhattan Rubber Co., 14 F. (2d) 811; National Electrical Supply Co. v. U. S., 64 Ct. Cl. 617.

36. Wilkie v. Manhattan Rubber Co., 14 F. (2d) 811; Callahan v. Nesbitt, 1 F. (2d) 75.

37. Wilkie v. Manhattan Rubber Co., 14 F. (2d) 811; Callahan v. Nesbitt, 1 F. (2d) 75.

38. Wilkie v. Manhattan Rubber Co., 14 F. (2d) 811; Callahan v. Nesbitt, 1 F. (2d) 75; Monroe v. Bresee, 239 Fed. 727, 152 CCA 561.

39. Wilkie v. Manhattan Rubber Co., 14 F. (2d) 811.

40. Callahan v. Nesbitt, 1 F. (2d) 75.

41. Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697.

42. Austin Mach. Co. v. Buckeye Tract. Ditcher Co., supra.

43. Covert v. Covert, 106 Fed. 183 [aff 115 Fed. 493, 53 CCA 225].

44. Covert v. Covert, supra.

45. Grand Rapids Showcase Co. v. Measuregraph Co., 28 F. (2d) 497; Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306 [aff 3 F. (2d) 999]; Southern Novelty Co. v. Economy Cone, etc., Co., 294 Fed. 717; Los Angeles Lime Co. v. Nye, 270 Fed. 155; Taignam v. Desure, 253 Fed. 364, 165 CCA 146; Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598 [aff 239 Fed. 555]; American Bank Protection Co. v. Electric Protection Co., 181 Fed. 350 [mod on other grounds 184 Fed. 916, 107 CCA 238 (certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem)]; Covert v. Covert, 106 Fed. 183 [aff 115 Fed. 493, 53 CCA 225]; Anderson v. Monroe, 55 Fed. 398 [rev on other grounds 58 Fed. 398, 7 CCA 272]; Adams, etc., Mfg. Co. v. Rathbone, 26 Fed. 262; American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Brown v. Whittemore, 4 F. Cas. No. 2,033, 5 Fish. Pat. Cas. 524; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Parker v. Remhoff, 18 F. Cas. No. 10,747, 3 Bann. & A. 550, 17 Blatchf. 206; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.

46. Grand Rapids Showcase Co. v. Measuregraph Co., 28 F. (2d) 497; Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697; Southern Novelty Co. v. Economy Cone, etc., Co., 294 Fed. 717; Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 205 Fed. 745 [mod on other grounds 210 Fed. 164, 127 CCA 22]; Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298; Kraatz v. Tieman, 79 Fed. 322 [rev on other grounds 85 Fed. 437, 29 CCA 257]; Adams, etc., Mfg. Co. v. Rathbone, 26 Fed. 262.

47. Grand Rapids Showcase Co. v. Measuregraph Co., 28 F. (2d) 497; Cline Electric Mfg. Co. v. Kohler, 27 F. (2d) 638; General Insulating Mfg. Co. v. Union Fibre Co., 261 Fed. 389; Taigman v. Desure, 253 Fed. 364, 165 CCA 146; Guy v. Stein, 239 Fed. 729, 152 CCA 563; American Bank Protection Co. v. Electric Protection Co., 181 Fed. 350 [mod on other grounds 184 Fed. 916, 107 CCA 238 (certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem)]; Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 103 CCA 479 [rev 173 Fed. 69, and certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem]; Covert v. Covert, 106 Fed. 183 [aff 115 Fed. 493, 53 CCA 225]; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191.

[a] **Evidence held sufficient.**— Marchese Sisters Embroidery Corp. v. Gotham Silk Hosiery Co., 282 Fed. 1005 [aff 282 Fed. 1007]; Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598; In re Plumly, 52 App. (D. C.) 106, 281 Fed. 1018.

[b] **Evidence held insufficient.**— Taigman v. Desure, 253 Fed. 364, 165 CCA 146.

48. Cline Electric Mfg. Co. v. Kohler, 27 F. (2d) 638.

49. Cline Electric Mfg. Co. v. Kohler, supra; Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 205 Fed. 745 [mod on other grounds 210 Fed. 164, 127 CCA 22]; Kraatz v. Tieman, 79 Fed. 322 [rev on other grounds 85 Fed. 437, 29 CCA 257]; Anderson v. Monroe, 55 Fed. 398 [rev on other grounds 58 Fed. 398, 7 CCA 272].

50. Cline Electric Mfg. Co. v. Kohler, 27 F. (2d) 638; General Insulating Mfg. Co. v. Union Fibre Co., 261 Fed. 389; Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191; Kraatz v. Tieman, 79 Fed. 322 [rev on other grounds 85 Fed. 437, 29 CCA 257]; Adams, etc., Mfg. Co. v. Rathbone, 26 Fed. 262.

"Where the evidence is that of persons testifying from memory upon incidents remote in time, without corroboration by contemporaneous records, or writings, or definitely proved circumstances, the proof quite generally fails to establish with sufficient certainty the alleged prior use." Cline Electric Mfg. Co. v. Kohler, 27 F. (2d) 638, 641.

51. Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298.

52. General Insulating Mfg. Co. v. Union Fibre Co., 261 Fed. 389; Daniel Green Felt Shoe Co. v. Dolgeville

that a use or sale was not experimental;[53] and where an actual use or sale beyond the two-year period is proved by evidence sufficiently clear, the party seeking to sustain the patent has the burden of producing evidence to establish that such use or sale was primarily or principally experimental,[54] and this fact must be established by evidence that is full, clear, unequivocal, and convincing.[55] It being once shown, however, that the use was experimental, then, upon the question of its reasonableness in point of duration, every presumption should be made in favor of the inventor.[56]

[§ 120] **3. Abandonment—a. In General.** The statute granting to an inventor the right to obtain a patent for his invention expressly excludes inventions proved to have been abandoned.[57] An invention may be abandoned at any time before or after application;[58] and the right to obtain a patent once abandoned cannot be resumed.[59] The inventor may make his application within two years of any public use or sale in this country or the publication of any patent or description in a printed publication, and yet, if within that period he has relinquished all claim to his discovery, his right to obtain a patent is lost.[60] The benefit of the abandonment, however, inures to the public and not to a later inventor.[61] Abandonment to the public is not confined to reissues, but the statute applies to all patents.[62]

Design patents. The right to obtain a patent for a design may be lost by abandonment.[63]

[§ 121] **b. What Constitutes Abandonment—(1) In General.** Abandonment occurs where the inventor voluntarily relinquishes his inchoate right to secure a patent and dedicates the invention to the free and unlimited use of the public.[64] Whether or not an invention has been abandoned is a question of fact.[65] In determining whether an invention has been abandoned the intention of the inventor governs.[66] The intention of the inventor to abandon the invention may be expressly declared,[67] or it may be implied from conduct inconsistent with an intention to claim a patent.[68] A person is sometimes

Felt Shoe Co., 205 Fed. 745 [mod on other grounds 210 Fed. 164, 127 CCA 22].

53. American Ballast Co. v. Davy Burnt Clay Ballast Co., 220 Fed. 887, 136 CCA 453.

54. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Cline Electric Mfg. Co. v. Kohler, 27 F. (2d) 638; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306 [aff 3 F. (2d) 999]; Southern Novelty Co. v. Economy Cone, etc., Co., 294 Fed. 717; Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598 [aff 239 Fed. 555]; Guy v. Stein, 239 Fed. 729, 152 CCA 563; American Ballast Co. v. Davy Burnt Clay Ballast Co., 220 Fed. 887, 136 CCA 453; Thomson-Houston Electric Co. v. Lorain Steel Co., 117 Fed. 249, 54 CCA 281; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265, 111 Fed. 408, 49 CCA 419 [certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem]; Lettelier v. Mann, 91 Fed. 917; In re Mills, 117 Off. Gaz. (U. S.) 904; Henry v. Francestown Soapstone Co., 17 Off. Gaz. (U. S.) 569.

55. Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 8 SCt 122, 31 L. ed. 141; Wilkie v. Manhattan Rubber Mfg. Co., 14 F. (2d) 811 [aff 8 F. (2d) 785]; A. Schrader's Sons, Inc. v. Wein Sales Corp., 9 F. (2d) 306 [aff 3 F. (2d) 999]; Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598 [aff 239 Fed. 555]; Williamson v. Electric Serv. Supplies Co., 236 Fed. 353 [aff 242 Fed. 873, 155 CCA 461]; American Ballast Co. v. Davy Burnt Clay Ballast Co., 220 Fed. 887, 136 CCA 453.

"In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing." Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 264, 8 SCt 122, 31 L. ed. 141.

56. Innis v. Oil City Boiler Works, 22 Fed. 780.

57. U. S. Code tit 35 § 31.

58. Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.

59. Gill v. U. S., 160 U. S. 426, 16 SCt 322, 40 L. ed. 480; Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Mast v. Dempster Mill Mfg. Co., 71 Fed. 701 [rev on other grounds 82 Fed. 327, 27 CCA 191]; Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co., 33 Fed. 254; American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Batten v. Taggert, 2 F. Cas. No. 1,107, 2 Wall. Jr. 101; Colt v. Massachusetts Arms Co., 6 F. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Mellus v. Silsbee, 16 F. Cas. No. 9,404, 4 Mason 108, 1 Robb Pat. Cas. 506; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Whipple v. Baldwin Mfg. Co., 29 F. Cas. No. 17,514, 4 Fish. Pat. Cas. 29; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40; Duncan v. Shelly, 49 App. (D. C.) 243, 263 Fed. 639; Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427; McCay v. Burr, 6 Pa. 147, 47 AmD 441.

60. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Allinson Mfg. Co. v. Ideal Filter Co., 21 F. (2d) 22; Mast v. Dempster Mill Mfg. Co., 71 Fed. 701 [rev on other grounds 82 Fed. 327, 27 CCA 191]; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241.

61. Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Pickering v. McCullough, 19 F. Cas. No. 11,121, 3 Bann. & A. 279, 6 Reporter 101 [aff 104 U. S. 310, 26 L. ed. 749]; Sturtevant v. Greenough, 23 F. Cas. No. 13,579; Saunders v. Miller, 33 App. (D. C.) 456; In re Millett, 18 App. (D. C.) 186.

62. Railway Register Mfg. Co. v. Broadway, etc., R. Co., 26 Fed. 522 [app dism 149 U. S. 783 mem, 13 SCt 1051 mem, 37 L. ed. 958 mem].

63. Anderson v. Eiler, 46 Fed. 777 [aff 50 Fed. 775, 1 CCA 659].

64. U. S. Rifle, etc., Co. v. Whitney Arms Co., 118 U. S. 22, 6 SCt 950, 30 L. ed. 53; Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Consolidated Fruit Jar Co. v. Bellaire Stamping Co., 27 Fed. 377; American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503.

65. Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Victor Talking Mach. Co. v. American Graphophone Co., 140 Fed. 860 [aff 145 Fed. 350, 76 CCA 180]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72.

66. Beedle v. Bennett, 122 U. S. 71, 7 SCt 1090, 30 L. ed. 1074; U. S. Rifle, etc., Co. v. Whitney Arms Co., 118 U. S. 22, 6 SCt 950, 30 L. ed. 53; Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Victor Talking Mach. Co. v. Duplex Phonograph Co., 177 Fed. 248; International Tel. Mfg. Co. v. Kellogg Switch Board, etc., Co., 171 Fed. 651, 96 CCA 395; Burdon Wire, etc., Co. v. Williams, 128 Fed. 927; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191; Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; Saunders v. Miller, 33 App. (D. C.) 456.

67. U. S. Rifle, etc., Co. v. Whitney Arms Co., 118 U. S. 22, 6 SCt 950, 30 L. ed. 53; Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Squier v. American Tel., etc., Co., 21 F. (2d) 147; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191; Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427.

68. U. S. Rifle, etc., Co. v. Whitney Arms Co., 118 U. S. 22, 6 SCt 950, 30 L. ed. 53; Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191; Duncan v. Skelley, 49 App. (D. C.) 243, 263 Fed. 639; Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427;

said to have abandoned his invention when he gives up the idea; relinquishes the intention of perfecting his idea, so that another may take up the same thing and become the original and first inventor.[69] But an invention can be abandoned, within the meaning of the statutory provision under consideration, only when the invention is complete and operative, and available for immediate use.[70] Abandonment of experiments upon an incomplete and imperfect invention is not a dedication of the complete and operative invention to the public.[71] Description of the invention in a printed publication bars the right to obtain a patent for it if the publication was made more than two years before the application,[72] but abandonment is not to be inferred from the mere fact that the inventor described the invention in a printed publication before making application for a patent.[73] Mere delay in applying for a patent is not abandonment,[73½] but an inventor may forfeit his right to obtain a patent by a willful or negligent postponement of his claims,[73⅛] or by otherwise attempting to withhold the benefit of his invention from the public until a similar or the same invention should have been made and introduced by others.[73¼] This is sometimes called "abandonment," although there is in fact no intention on the part of the inventor to relinquish his inchoate rights to the public.[73⅜] Mere forbearance to apply for a patent during the progress of experiments looking to the perfection of the invention affords no ground for inferring abandonment;[73⅜] nor is abandonment to be inferred from delay in making an application where the delay is due entirely to the poverty of the inventor.[73½]

Mere nonuser is not abandonment.[74]

[§ 122] **(2) Acquiescence in Public Use.** An intent to abandon the right to obtain a patent for an invention may be inferred from the conduct of the inventor in permitting the invention to be placed in public use or on sale under circumstances denoting an intention on his part to dedicate it to the public.[75] And, of course, no patent can be obtained for an invention if it was in public use or on sale in this country more than two years before the application.[76] But the mere fact that the inventor permitted the invention to be in public use or on sale before making application for a patent does not of itself show an intention to abandon the right to a patent.[77]

Saunders v. Miller, 33 App. (D. C.) 456; Richards v. Burkholder, 29 App. (D. C.) 485.

[a] **Voluntary destruction of a device** without intending to rebuild it is a fact from which abandonment may be inferred. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

69. American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503.

70. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Ross v. Montana Union R. Co., 45 Fed. 424; Miller v. Smith, 5 Fed. 359; Babcock v. Degener, 2 F. Cas. No. 698, McA. Pat. Cas. 607.

71. Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164; Dederick v. Fox, 56 Fed. 714.

72. See supra § 52.

73. Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Goodyear v. Day, 10 F. Cas. No. 5,566.

73½. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; International Tel. Mfg. Co. v. Kellogg Switch Board, etc., Co., 171 Fed. 651, 96 CCA 395; Appert v. Brownsville Plate Glass Co., 144 Fed. 115; Eck v. Kutz, 132 Fed. 758; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164; U. S. Electric Lighting Co. v. Consolidated Electric Light Co., 33 Fed. 869; Miller v. Smith, 5 Fed. 359; Birdsall v. McDonald, 3 F. Cas. No. 1,434, 1 Bann. & A. 165; Heath v. Hildreth, 11 F. Cas. No. 6,309; Knox v. Lowerее, 14 F. Cas. No. 7,910, 1 Bann. & A. 589; Perry v. Cornell, 19 F. Cas. No. 11,002, McA. Pat. Cas. 68; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Russell, etc., Mfg. Co. v. Mallory, 21 F. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193; McGrath v. Burke, 56 App. (D. C.) 220, 12 F. (2d) 161; J. E. Hanger, Inc. v. J. F. Rowley Co., 54 App. (D. C.) 336, 298 Fed. 359.

73½. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. ed. 68; Kindall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Allinson Mfg. Co. v. Ideal Filter Co., 21 F. (2d) 22; Victor Talking Mach. Co. v. Starr Piano Co., 281 Fed. 60; E. W. Bliss Co. v. Southern Can Co., 265 Fed. 1018 [aff 251 Fed. 903]; Macbeth-Evans Glass Co. v. General Electric Co., 246 Fed. 695, 158 CCA 651 [aff 231 Fed. 183, and certiorari den 246 U. S. 659 mem, 38 SCt 316 mem, 62 L. ed. 926 mem]; Universal Adding Mach. Co. v. Comptograph Co., 146 Fed. 981, 77 CCA 227; Fefel v. Stocker, 17 App. (D. C.) 317; In re Mower, 15 App. (D. C.) 144.

[a] **Reason for rule.**—"If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what would be derived under it, during his fourteen years; it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries." Pennock v. Dialogue, 2 Pet. (U. S.) 1, 19, 7 L. ed. 327.

[b] **Thus** an inventor of a process who used it in secret for nearly ten years, placing the product on public sale, cannot thereafter obtain a patent thereon. Macbeth-Evans Glass Co. v. General Electric Co., 246 Fed. 695, 158 CCA 651 [aff 231 Fed. 183, and certiorari den 246 U. S. 659 mem, 38 SCt 316 mem, 62 L. ed. 926 mem].

73¼. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159 [aff 55 Ct. Cl. 234].

[a] **Illustration.**—Where an inventor's application for a patent for a cannon ring was approved and ordered to issue on April 15, 1852, but, under Act July 4, 1836 § 8, at the inventor's request and for the admitted purpose of making the term of the monopoly square with the period when the commercial profit would be highest, the application was filed in the secret archives of the patent office and allowed to remain there nine and one-half years, in derogation of the rights of subsequent inventors, the inventor forfeited his right to a patent. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159 [aff 55 Ct. Cl. 234].

73⅛. Allinson Mfg. Co. v. Ideal Filter Co., 21 F. (2d) 22.

73⅜. Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Eck v. Kutz, 132 Fed. 758; Von Schmidt v. Bowers, 80 Fed. 121, 25 CCA 323.

73½. Celluloid Mfg. Co. v. Crofut, 24 Fed. 796; Ayling v. Hull, 2 F. Cas. No. 686, 2 Cliff. 494; Sprague v. Adriance, 22 F. Cas. No. 13,248, 3 Bann. & A. 124.

74. Doran Chemical Corp. v. Corona Cord Tire Co., 10 F. (2d) 598.

[a] **Thus** abandonment cannot be based on the fact that no commercial use followed discovery and disclosure of the chemical value of an article, where this was merely because no method was known for its cheap manufacture. Dovan Chemical Corp. v. Corona Cord Tire Co., 10 F. (2d) 598.

75. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Universal Adding Mach. Co. v. Comptograph Co., 146 Fed. 981, 77 CCA 227 [rev 142 Fed. 539]; Mast v. Dempster Mill Mfg. Co., 71 Fed. 701 [rev on other grounds 82 Fed. 327, 27 CCA 191]; Craver v. Weyhrich, 31 Fed. 607; American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Carroll v. Gambrill, 5 F. Cas. No. 2,454, McA. Pat. Cas. 581; Mellus v. Silsbee, 16 F. Cas. No. 9,404, 4 Mason 108, 1 Robb Pat. Cas. 506; Pennock v. Dialogue, 19 F. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. C. C. 538 [aff 2 Pet 1, 7 L. ed. 327]; U. S. Rifle, etc., Co. v. Whitney Arms Co, 28 F. Cas. No. 16,793, 2 Bann. & A. 493, 14 Blatchf. 94 [aff 118 U. S. 22, 6 SCt 950, 30 L. ed. 53]; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645; Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427.

76. See supra §§ 113–116.

77. Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191 [rev 71 Fed. 701]; Bartlette v. Crittenden, 2 F. Cas. No. 1,082, 4 McLean 300; Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev in part 16 How. 480, 14 L. ed. 1024]; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; Saunders v. Miller, 33 App. (D. C.) 456; McCay v. Burr, 6 Pa. 147, 47 AmD 441.

The intention to abandon must be expressed,[78] or necessarily implied from the circumstances of the case.[79] Such an inference can arise only where the inventor had knowledge of the use.[80] Knowledge on his part, however, may be inferred from circumstances.[81] An inventor is not to be considered as having dedicated his invention to the public because he licensed a few persons to use it for the purpose of ascertaining its utility,[82] or by permitting any use consistent with an intention to claim the exclusive privilege of making, selling, or using the invention.[83]

An invention patented under the statute remitting payment of any fee, where applicant expressly states in his application that the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any person in the United States, without the payment to him of any royalty thereon,[84] is abandoned so far as the right to protection in this country is concerned.[85] Abandonment does not occur, however, unless the patent was granted under the statute.[86] Thus one who has made application thereunder is not held to have dedicated the invention to the public where he amends his application before issuance of the patent by withdrawing the stipulation for public use.[87]

[§ 123] **(3) Failure To Claim Disclosures at Prior Application.** Where an inventor makes an application for a patent for an invention and claims certain specific inventions, but fails to claim other inventions which are fully disclosed in the application, it will be presumed that he intended to abandon the right to obtain a patent for the invention which he omitted to claim,[88] unless the unclaimed invention is separate and distinct from the invention claimed.[89] The presumption, however, is rebutted if the patentee has another application pending in the patent office claiming it,[90] or if he files such application promptly.[91] Matter erased from one application and presented in a second after grant of a patent is not abandoned.[92] Acceptance of a patent with claims narrowed to exclude matter cited by the patent office as an anticipation is an abandonment thereof to the public;[93] and one who retires from an interference proceeding and withdraws his claim for the specific element forming the subject of the interference is thereafter precluded from claiming such element under his patent.[94]

[§ 124] **(4) Abandonment of Application.** A party may abandon a particular application for a patent without abandoning the intent to secure a patent at some time and therefore without abandoning the invention claimed therein. He may file a subsequent application and secure a patent.[95] There may be abandonment of an invention to the public, however, as well after an application has been rejected or withdrawn as before any application is made.[96] An intention so to abandon may be inferred either from express declarations of the inventor,[97] or by conduct inconsistent with any other conclusion,[98] such as the omission of the inventor, without substantial reason or excuse, to take any step to reinstate or renew his application for a long period of time.[99] Intention on the part of the inventor to abandon his invention

78. Bartlette v. Crittenden, 2 F. Cas. No. 1,082, 4 McLean 300; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.

79. Bartlette v. Crittenden, 2 F. Cas. No. 1,082, 4 McLean 300; Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.

80. Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689.

81. Shaw v. Cooper, supra.

82. Mellus v. Silsbee, 16 F. Cas. No. 9,404, 4 Mason 108, 1 Robb Pat. Cas. 506.

83. Mellus v. Silsbee, supra.

84. See infra § 174.

85. Squier v. American Tel., etc., Co., 21 F. (2d) 147.

86. Hazeltine Corp. v. Electric Service Engineering Corp., 18 F. (2d) 662.

87. Hazeltine Corp. v. Electric Service Engineering Corp., supra.

88. Richards v. Chase El. Co., 159 U. S. 477, 16 SCt 53, 40 L. ed. 225; Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 SCt 884, 34 L. ed. 168; Parker, etc., Co. v. Yale Clock Co., 123 U. S. 87, 8 SCt 38, 31 L. ed. 100; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Bantz v. Frantz, 105 U. S. 160, 26 L. ed. 1013; Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Gladding-McBean Corp. v. Clark, 16 F. (2d) 50; Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co., 1 F. (2d) 673 [rev 295 Fed. 748, and certiorari den 267 U. S. 594 mem, 45 SCt 231 mem, 69 L. ed. 804 mem]; Ball, etc., Bearing Co. v. F. C. Sanford Mfg. Co., 297 Fed. 163 [rev 280 Fed. 415, 291 Fed. 442]; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Campbell v. H. T. Conde Impl. Co., 74 Fed. 745; McBride v. Kingman, 72 Fed. 968 [aff 97 Fed. 217, 38 CCA 123]; Wells v. Curtis, 66 Fed. 318, 13 CCA 494; Fassett v. Ewart Mfg. Co., 58 Fed. 360 [aff 62 Fed. 404, 10 CCA 441]; Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co., 33 Fed. 254; Swift v. Jenks, 19 Fed. 641; Rowell v. Lindsay, 6 Fed. 290, 10 Biss. 217 [aff 113 U. S. 97, 5 SCt 507, 28 L. ed. 906]; Batten v. Taggert, 2 F. Cas. No. 1,107, 2 Wall. Jr. 101 [rev on other grounds 17 How. 74, 15 L. ed. 37]; In re Millett, 18 App. (D. C.) 186.

"The claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed." Miller v. Bridgeport Brass Co., 104 U. S. 350, 352, 26 L. ed. 783.

89. Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Brush Electric Co. v. Julien Electric Co., 41 Fed. 679; Eastern Paper-Bag Co. v. Nixon, 35 Fed. 752; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 30 Fed. 63; Railway Register Mfg. Co. v. Broadway, etc., R. Co., 26 Fed. 522 [app dism 149 U. S. 783 mem, 13 SCt 1051 mem, 37 L. ed. 958 mem]; Cahn v. Wong Town On, 19 Fed. 424, 9 Sawy. 630; Vermont Farm Mach. Co. v. Marble, 19 Fed. 307; Hatch v. Moffitt, 15 Fed. 252; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39 [rev on other grounds 129 U. S. 1, 9 SCt 213, 32 L. ed. 593]; McMillan v. Rees, 1 Fed. 722; Saunders v. Miller, 33 App. (D. C.) 456.

[a] **Description of process in machine patent** is not abandonment. Eastern Paper-Bag Co. v. Nixon, 35 Fed. 752; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 30 Fed. 63.

90. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Victor Talking Mach. Co. v. Duplex Phonograph Co., 177 Fed. 248; Kinnear Mfg. Co. v. Wilson, 142 Fed. 970, 74 CCA 232; Victor Talking Mach. Co. v. American Graphophone Co., 140 Fed. 860 [aff 145 Fed. 350, 76 CCA 180]; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; Vermont Farm Mach. Co. v. Marble, 19 Fed. 307; Graham v. Geneva Lake Crawford Mfg. Co., 11 Fed. 138; Singer v. Braunsdorf, 22 F. Cas. No. 12,897, 7 Blatchf. 521; Saunders v. Miller, 33 App. (D. C.) 456.

91. Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Dederick v. Fox, 56 Fed. 714; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39 [rev on other grounds 129 U. S. 1, 9 SCt 213, 32 L. ed. 593]; Saunders v. Miller, 33 App. (D. C.) 456.

92. Sugar Apparatus Mfg. Co. v. Yaryan Mfg. Co., 43 Fed. 140.

93. Melber v. Pittsburgh School Dist., 243 Fed. 196, 156 CCA 62; Maier v. Bloom, 95 Fed. 159.

94. Dodge Needle Co. v. Jones, 159 Fed. 715, 86 CCA 191 [aff 153 Fed. 186]; Shoemaker v. Merrow, 61 Fed. 945, 10 CCA 181 [rev 59 Fed. 120].

95. Rosenwasser Bros., Inc. v. B. E. Mfg. Co., 264 Fed. 114; Aurora Mantle, etc., Co. v. Kaufmann, 243 Fed. 911, 156 CCA 423; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, 70 CCA 1 [certiorari den 199 U. S. 609 mem, 26 SCt 750 mem, 50 L. ed. 332 mem]; Edison v. American Mutoscope Co., 110 Fed. 660 [rev 114 Fed. 926, 52 CCA 546 (certiorari den 186 U. S. 486 mem, 22 SCt 944 mem, 46 L. ed. 1261 mem)]; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164; Dederick v. Fox, 56 Fed. 714; Lindsay v. Stein, 10 Fed. 907, 20 Blatchf. 370.

96. U. S. Rifle, etc., Co. v. Whitney Arms Co., 118 U. S. 22, 6 SCt 950, 30 L. ed. 53.

97. U. S. Rifle, etc., Co. v. Whitney Arms Co., supra.

98. U. S. Rifle, etc., Co. v. Whitney Arms Co., supra.

99. U. S. Rifle, etc., Co. v. Whitney Arms Co., supra; Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Stromberg Motor Devices Co. v. Benecke, etc., Mfg. Co., 10 F. (2d) 405 [certiorari den 271 U. S. 672 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem]; French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem]; Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 8 F. (2d)

is not to be inferred from delay in prosecuting his claim in the patent office if action is taken within the time fixed by law.[1] Nor is abandonment to be inferred from delay in prosecuting a rejected claim where the delay is due to circumstances beyond the inventor's control,[2] including the rules of the patent office,[3] extreme poverty,[4] or protracted illness.[5] The right to obtain a patent for a process is not affected by abandonment of an application for a patent for a machine for practicing the process;[6] nor is the right to obtain a patent for a process affected by abandonment of an application for a patent for its product.[7]

[§ 125] **c. Evidence.** Abandonment is never presumed.[8] The burden of proving abandonment of an invention is upon the party asserting it.[9] This burden must be sustained by clear and convincing evidence.[10] All reasonable doubt must be resolved against abandonment.[11] Evidence which rests upon doubtful inferences is not sufficient.[12] Proof of facts from which abandonment may be inferred may be rebutted by showing acts assertive of the inventor's right to a monopoly,[13] such as the filing of drawings in the patent,[14] or the carrying on of experiments looking toward improvement and perfection of his discovery.[15] Where the undisputed acts of an inventor furnish evidence of abandonment, his testimony that he did not intend to abandon his invention is not entitled to much weight.[16]

VI. PERSONS ENTITLED TO PATENTS[17]

[By Chas. W. Riley]

[§ 126] **A. In General.** Congress has been empowered by the constitution to secure to "inventors" the exclusive right to their inventions, and, in pursuance of that authority, it has granted the right to obtain a patent, subject to certain limitations and conditions, to "any person who has invented or discovered" any art, machine, manufacture, composition of matter, or any improvement thereof.[18] The right to obtain a patent for an invention arises in favor of an original inventor only.[19] A patent granted upon the application of one who is not the inventor is void.[20] This is true, even though the application is made at the direction and for the benefit of the true inventor,[21] and even though applicant bought and paid for the surrender or concession by the real inventor of his rights in the invention.[22] Abandonment of the right to a patent by the original inventor does not entitle another to obtain a patent therefor.[23] To entitle one to a patent, however, he must be not only an original, but the first, inventor of the

41 [aff 290 Fed. 565, and certiorari granted 269 U. S. 547 mem, 46 SCt 106 mem, 70 L. ed. 405 mem]; Van Heusen Products, Inc. v. Earl, 300 Fed. 922; Consolidated Fruit-Jar Co. v. Bellaire Stamping Co., 27 Fed. 377, 381; Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 26 Fed. 104 [mod on other grounds 135 U. S. 342, 10 SCt 884, 34 L. ed. 168]; Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Ex p. Dedericks, 7 F. Cas. No. 3,734; Ex p. Raymond, 20 F. Cas. No. 11,592a.

"If it appears that the inventor, after perfecting his invention and applying for a patent, and thereby irretrievably committing himself to the proposition that his invention is ripe for introduction to the public, accept the decision rejecting his application, and cast aside his invention as of no longer any value to him, he thereby makes it forever public property, and it is not in his power to take it back and make it again his own." Consolidated Fruit Jar Co. v. Bellaire Stamping Co., supra.

1. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Adams v. Jones, 1 F. Cas. No. 57, 1 Fish. Pat. Cas. 527, 2 Pittsb. (Pa.) 73; U. S. v. American Bell Tel. Co., 79 Off. Gaz. (U. S.) 1362.

2. U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952.

3. U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144.

4. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952.

5. Smith v. Goodyear Dental Vulcanite Co., supra.

6. Crucible Steel Co. v. Heller Bros. Co., 291 Fed. 175.

7. Mica Insulator Co. v. Commercial Mica Co., 166 Fed. 440, 92 CCA 292 [certiorari den 215 U. S. 604 mem, 30 SCt 405 mem, 54 L. ed. 345 mem].

8. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Virginia-Carolina Peanut Picker Co. v. Benthall Mach. Co., 241 Fed. 89, 154 CCA 89; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; W. W. Sly Mfg. Co. v. Russell, 189 Fed. 61, 110 CCA 625; American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138; Hubbard v. Berg, 40 App. (D. C.) 577; Saunders v. Miller, 33 App. (D. C.) 456; Rolfe v. Hoffman, 26 App. (D. C.) 336; Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645].

9. Abrahams v. Universal Wire Co., Inc., 10 F. (2d) 838; Kellogg Switchboard, etc., Co. v. International Tel. Mfg. Co., 158 Fed. 104 [aff 171 Fed. 651, 96 CCA 395]; Victor Talking Mach. Co. v. American Graphophone Co., 140 Fed. 860 [aff 145 Fed. 350, 76 CCA 180]; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024]; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Hoenig v. Parker, 50 App. (D. C.) 21, 267 Fed. 323; Hubbard v. Berg, 40 App. (D. C.) 577; Saunders v. Miller, 33 App. (D. C.) 456; Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645].

10. Virginia-Carolina Peanut Picker Co. v. Benthall Mach. Co., 241 Fed. 89, 154 CCA 89 [rev 222 Fed. 918]; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; McDuffee v. Hestonville, etc., R. Co., 181 Fed. 503 [rev 185 Fed. 798, 109 CCA 606, and certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem]; Kellogg Switchboard, etc., Co. v. International Tel. Mfg. Co., 158 Fed. 104 [aff 171 Fed. 651, 96 CCA 395]; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191; De Forest v. Meissner, 54 App. (D. C.) 391, 298 Fed. 1006; Schwalbenberg v. Dowell, 54 App. (D. C.) 177, 295 Fed. 998; Wells v. Honigmann, 50 App. (D. C.) 99, 267 Fed. 743; Hathaway v. Field, 48 App. (D. C.) 369; Hackley v. Henemier, 48 App. (D. C.) 233; Saunders v. Miller, 33 App. (D. C.) 456; Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645].

11. Abrahams v. Universal Wire Co., Inc., 10 F. (2d) 838; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Victor Talking Mach. Co. v. Duplex Phonograph Co., 177 Fed. 248.

12. Victor Talking Mach. Co. v. American Graphophone Co., 140 Fed. 860 [aff 145 Fed. 350, 76 CCA 180].

13. Saunders v. Miller, 33 App. (D. C.) 456.

14. Emerson v. Hogg, 8 F. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. R. 77.

15. Saunders v. Miller, 33 App. (D. C.) 456.

16. Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23.

17. Const. art 1 § 8 cl 8.

18. U. S. Code tit 35 § 31.

19. Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641 (certiorari den 49 SCt 180 mem)]; Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; Sparkman v. Higgins, 22 F. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. R. 110; Stearns v. Davis, 22 F. Cas. No. 13,338, McA. Pat. Cas. 696; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

[a] **In Canada** applicant must be the original inventor. Smith v. Goldie, 9 Can. S. C. 46; American Dunlop Tire Co. v. Goold Bicycle Co., 6 Can. Exch. 223.

20. Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576.

21. Kennedy v. Hazelton, supra.

22. Tyler v. Kelch, 19 App. (D. C.) 180; Hunt v. McCaslin, 10 App. (D. C.) 527.

23. Evans v. Eaton, 8 F. Cas. No. 4,559 Pet. C. C. 322, 1 Robb Pat. Cas.

invention claimed.[24] As between two original inventors of the same thing, the first inventor only is entitled to a patent.[25] This is so, even though the first inventor falsely concedes priority.[26]

Importation. No valid patent can be obtained by one who merely imports and introduces a method or device known or used abroad, even though it was not before known or used in this country.[27]

[§ 127] **B. Originality of Invention.** In order that one may be an original inventor of a method or device it is essential that he himself should have conceived the idea embodied in it.[28] The idea embodied in the method or device claimed must be the product of his mind and genius and not of another.[29] The conception of an invention consists in the complete performance of the mental part of the inventive act.[30] It is the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice.[31] But while it is essential in order that one may be entitled to a patent that he himself should have conceived the idea embodied in the method or device claimed,[32] a mental operation alone, however definite and valuable may be the result, is not a complete inventive act.[33] Except as modified by the doctrine of diligence,[34] an invention, in the sense of the statute, is a completed invention,[35] that is, an invention which is perfected and adapted to use,[36] or, as otherwise expressed, reduced to practice.[37] One who has conceived the idea of an invention has not made an invention until he has perfected the idea and adapted it to use.[38] A conception of the mind is not an invention, or a completed invention, until given expression through and by some physical means which demonstrate its practical efficiency and utility.[39] In other words, one has not made an invention in the legal sense until he has reduced his idea to practice.[40] Mere suggestion of means without disclosure of a method of accomplishment is not invention.[41] One is not an orig-

68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Pickering v. McCullough, 19 F. Cas. No. 11,121, 3 Bann. & A. 279, 6 Reporter 101 [aff 104 U. S. 310, 26 L. ed. 749].

24. Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, 46 SCt 324, 70 L. ed. 651; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187, 195 [aff 264 Fed. 103]; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev 241 Fed. 72, 154 CCA 72]; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590.

"There may be real invention in the sense of originality, and yet not patentable invention, because the law gives the patent, not to the inventor, but to the first inventor." Dayton Engineering Laboratories Co. v. Kent, supra.

25. Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Bedford v. Hunt, 3 F. Cas. No. 1,217, 1 Mason 302, 1 Robb Pat. Cas. 148; Eames v. Richards, 8 F. Cas. No. 4,240; Gibbs v. Johnson, 10 F. Cas. No. 5,384; Goodyear v. Day, 10 F. Cas. No. 5,569, 2 Wall. Jr. 283; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [aff 3 Wall. 315, 18 L. ed. 76]; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Woodcock v. Parker, 30 F. Cas. No. 17,971, 1 Gall. 438, 1 Robb Pat. Cas. 37; Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193.

[a] **First inventor and not the first applicant** for a patent is the one entitled to the patent. Pacific Cable R. Co. v. Butte City St. R. Co., 58 Fed. 420.

[b] **In England** the first to secure a patent is the first inventor, although the last to file application. Ex p. Bates, L. R. 4 Ch. 577.

26. New Departure Bell Co. v. Corbin, 88 Fed. 901; Hammond v. Pratt, 16 Off. Gaz. (U. S.) 1235.

27. American Sulphite Pulp Co. v. Howland Falls Pulp Co., 70 Fed. 986 [rev on other grounds 80 Fed. 395, 25 CCA 500]; Livingston v. Van Ingen, 9 Johns. (N. Y.) 507.

[a] **In England** (1) one who imports knowledge of an invention from abroad is entitled to a patent. In re Worth, 12 Ch. D. 303; Plimpton v. Malcolmson, 3 Ch. D. 531; Nickels v. Ross, 8 C. B. 679, 65 ECL 679, 137 Reprint 674; Ipswich Clothworkers Case, Godb. 252, 78 Reprint 147; Stead v. Williams, 7 M. & G. 818, 49 ECL 818, 135 Reprint 332, 20 ERC 502; In re Claridge, 7 Moore P. C. 394, 13 Reprint 932; Darcy v. Allin, Noy 178, 74 Reprint 1131, 11 Coke 84, 77 Reprint 1260; Edgeberry v. Stephens, 2 Salk. 447, 91 Reprint 387. (2) This is so even though he acts as the agent of the foreign inventor and takes the patent for his benefit. Beard v. Egerton, 3 C. B. 97, 54 ECL 97, 136 Reprint 39. (3) But where a patent is taken out as for an original invention on an invention communicated from abroad, it is void. Milligan v. Marsh, 2 Jur. N. S. 1083; Steedman v. Marsh, 2 Jur. N. S. 391.

[b] **In Canada** (1) no patent can be obtained for a mere importation. Dominion Chain Co. v. McKinnon Chain Co., 58 Can. S. C. 121. (2) But a process may be patented even though the machine for making one of the agents of the process was an importation. Friesen v. Alsop Process Co., 57 Can. S. C. 606.

28. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641 (certiorari den 49 SCt 180 mem)].

29. General Electric Co. v. De Forest Radio Co., supra; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.

30. Wheaton v. Kendall, 85 Fed. 666.

"The conception of the invention consists in the complete performance of the mental part of the inventive act." Mergenthaler v. Scudder, 11 App. (D. C.) 264, 276.

31. Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454, 456; Wheaton v. Kendall, 85 Fed. 666; Mergenthaler v. Scudder, 11 App. (D. C.) 264.

"As for the word 'conceived,' it means that the inventor 'formed a distinct and correct notion of' whatever he thought he invented." Curtiss Aeroplane, etc., Corp. v. Janin, supra.

[a] **Foreign inventors** applying for a patent here, and who are placed in interference, are entitled under the law to claim the date they communicated their invention here as the date of their conception. Harris v. Stern, 22 App. (D. C.) 164.

32. See supra note 28.

33. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641 (certiorari den 49 SCt 180 mem)]; Westinghouse Mach. Co. v. General Electric Co., 199 Fed. 907 [aff 207 Fed. 75].

34. See infra § 131.

35. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206.

36. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra.

37. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra.

38. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Davis-Bournonville Co. v. Alexander Milburn Co., 1 F. (2d) 227 [certiorari granted 266 U. S. 596 mem, 45 SCt 93 mem, 69 L. ed. 459 mem (rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651)]; Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 103 CCA 479 [certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem]; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590.

39. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Æolian Co. v. Cunningham Piano Co., 251 Fed. 301 [aff 255 Fed. 897, 167 CCA 217]; Moline Plow Co. v. Rock Island Plow Co., 212 Fed. 727, 129 CCA 337; National Meter Co. v. Neptune Meter Co., 122 Fed. 82 [aff 129 Fed. 124, 63 CCA 626]; McEwan Bros. Co. v. McEwan, 91 Fed. 787; Andrews v. Carman, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307; Detmold v. Reeves, 7 F. Cas. No. 3,831, 1 Fish. Pat. Cas. 127; Draper v. Potomska Mills Corp., 7 F. Cas. No. 4,072, 3 Bann. & A. 214; Judson v. Bradford, 14 F. Cas. No. 7,564, 3 Bann. & A. 539; Funk v. Haines, 20 App. (D. C.) 285, 288.

"The law requires, not conjecture, but certainty; and where, as in the present case, the question relates to a machine, the conception must have been clothed in substantial form, which demonstrates at once its practical efficiency and utility." Funk v. Haines, supra.

"The mere thought could not, of course, be given the protection of a patent. It must first be given expression through and by some physical means." Æolian Co. v. Cunningham Piano Co., 251 Fed. 301, 302 [aff 255 Fed. 897, 167 CCA 217].

"A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments or projects, abandoned by the inventor, are equally destitute of that character." Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 489, 11 SCt 846, 35 L. ed. 521.

40. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641 (certiorari den 49 SCt 180 mem)]; Moline Plow Co. v. Rock Island Plow Co., 212 Fed. 727, 129 CCA 337; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Detmold v. Reeves, 7 F. Cas. No. 3,831; Draper v. Potomska Mills Corp., 7 F. Cas. No. 4,072, 3 Bann. & A. 214; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440.

41. Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103].

"An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufac-

inal inventor who merely reduces to practice an idea conceived by another.[42] But the mere fact that he availed himself of all knowledge known to the skilled in the art does not deprive him of the right to be considered an original inventor.[43] In order to have that effect the knowledge so obtained must have been so complete as to embrace the whole of the idea claimed, leaving nothing to be created by the inventive faculties.[44] That another suggested the desirability of the result, but not the means by which it is attained, is not sufficient.[45]

Evidence. The burden of proof on the issue whether one to whom a patent has issued is an original inventor of the method or device claimed is on the party asserting the contrary.[46] In order to sustain this burden, lack of originality must be clearly established by satisfactory evidence.[47] A fair preponderance of the credible evidence is essential.[48] There are no artificial rules regulating the determination of the question of original inventorship,[49] and the testimony of a single witness may be sufficient to establish it.[50] It has been asserted that every inference of originality may properly be drawn against a patentee who fails to answer credible testimony that that which he claimed to have invented had been previously disclosed to him by another.[51]

[§ 128] **C. Priority of Invention—1. In General.** In determining which of two or more inventors of the same thing is entitled to be considered the first inventor the dates of their patents is first to be considered;[52] second, the dates of their applications,[53] provided the application sufficiently describes the invention;[54] third, the dates of actual reduction to practice;[55] fourth, the dates of conception;[56] with this qualification, that, if any inventor seeks to carry the date of his invention back to the date of his conception, he must show reasonable diligence in adapting and perfecting his invention, either by actual reduction to practice or by filing his application.[57] Speaking generally, he is the first inventor, and entitled to a patent for his invention, who has first perfected and adapted the same to use.[58] The party

ture, or composition of matter, is not, and indeed cannot be, patentable under our Patent Acts; since it is utterly impossible, under such circumstances, to comply with the fundamental requisites of those acts." Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590, 599.

42. Atlantic Works v. Brady, 107 U. S. 192, 2 SCt 225, 27 L. ed. 438; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641 (certiorari den 49 SCt 180 mem)]; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367; Alden v. Dewey, 1 F. Cas. No. 153, 2 Robb Pat. Cas. 17, 1 Story 336; Burrows v. Wetherill, 4 F. Cas. No. 2,208, McA. Pat. Cas. 315; Stearns v. Davis, 22 F. Cas. No. 13,338, McA. Pat. Cas. 696; Rinehart v. Gibson, 39 App. (D. C.) 358; Greenwood v. Dover, 23 App. (D. C.) 251; Sole v. Hebbard, 5 App. (D. C.) 99.

43. Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 113 U. S. 157, 5 SCt 513, 28 L. ed. 939; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Inland Mfg. Co. v. American Wood Rim Co., 14 F. (2d) 657; A. Kimball Co. v. Noesting Pin Ticket Co., 262 Fed. 148; Corser v. Brattleboro Overall Co., 93 Fed. 807; Smith v. Stewart, 55 Fed. 481 [aff 58 Fed. 580, 7 CCA 380]; Eclipse Mfg. Co. v. Adkins, 44 Fed. 280; Yoder v. Mills, 25 Fed. 821; National Feather Duster Co. v. Hibbard, 9 Fed. 558, 11 Biss. 76; Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Pennock v. Dialogue, 19 F. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. C. C. 538 [aff 2 Pet. 1, 7 L. ed. 327]; Sparkman v. Higgins, 22 F. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. R. 110, 5 NYLegObs 122; Watson v. Bladen, 29 F. Cas. No. 17,277, 1 Robb Pat. Cas. 510, 4 Wash. C. C. 580; McKellof v. Fetzer, 31 App. (D. C.) 586; Huebel v. Bernard, 15 App. (D. C.) 510; Allen v. Rawson, 1 C. B. 551, 50 ECL 551, 135 Reprint 656; Milligan v. Marsh, 2 Jur. N. S. 1083; Steadman v. Marsh, 2 Jur. N. S. 391.

44. Watson v. Belfield, 26 Fed. 536 [app dism 149 U. S. 790 mem, 13 SCt 1054 mem, 37 L. ed. 964 mem]; Celluloid Mfg. Co. v. Chrolithion Collar, etc., Co., 23 Fed. 397, 23 Blatchf. 205 [reh den 25 Fed. 482]; Worden v. Fisher, 11 Fed. 505; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; Union Paper-Bag Mach. Co. v. Pultz, etc., Co., 24 F. Cas. No. 14,392, 3 Bann. & A. 403, 15 Blatchf. 160; McKeen v. Jerdone, 34 App. (D. C.) 163.

[a] **The true test** to determine whether suggestions made to an inventor should deprive him of the claim to originality in the invention is to inquire whether enough has been communicated to enable him to apply it without the exercise of invention. Watson v. Belfield, 26 Fed. 536 [app dism 149 U. S. 790 mem, 13 SCt 1054 mem, 37 L. ed. 964 mem].

45. Streat v. White, 35 Fed. 426; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Judson v. Moore, 14 F. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544.

46. American Brake Shoe, etc., Co. v. Hoadley Brake Shoe Co., 222 Fed. 327 [aff 227 Fed. 90, 141 CCA 638]; Locke v. Lane, etc., Co., 35 Fed. 289 [rev on other grounds 150 U. S. 193, 14 SCt 78, 37 L. ed. 1049]; Duffy v. Reynolds, 24 Fed. 855; Brady v. Atlantic Works, 3 F. Cas. No. 1,794, 2 Bann. & A. 436, 4 Cliff. 408.

47. Roberti v. Jonas, 300 Fed. 181; American Brake Shoe, etc., Co. v. Hoadley Brake Shoe Co., 222 Fed. 327 [aff 227 Fed. 90, 141 CCA 638].

[a] **Evidence held sufficient.**— Monitor Stove Co. v. Williamson Heater Co., 282 Fed. 910 [aff 299 Fed. 1].

[b] **Evidence held insufficient.**— Smalley v. Auto Specialists, Inc., 7 F. (2d) 710; United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem].

48. Proctor, etc., Co. v. Berlin Mills Co., 256 Fed. 23, 167 CCA 295 [rev on other grounds 254 U. S. 156, 41 SCt 75, 65 L. ed. 196].

49. C. F. Mueller Co. v. Zeregas, 12 F. (2d) 517.

50. C. F. Mueller Co. v. Zeregas, supra.

51. Union Special Mach. Co. v. Quaker City Flour Mills Co., 236 Fed. 246.

52. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206.

53. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra.

54. See infra § 130.

55. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206.

56. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra.

57. See infra note 65.

58. St. Paul Plow-Works v. Starling, 140 U. S. 184, 11 SCt 803, 35 L. ed. 404; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Whitely v. Swayne, 7 Wall. (U. S.) 685, 19 L. ed. 199; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Browne v. Harrison, 26 F. (2d) 1006; Hayde v. Boynton, 26 F. (2d) 978; Conover v. Wohl, 26 F. (2d) 566; Waern v. Carter, 26 F. (2d) 561; Downs v. Andrews, 26 F. (2d) 522; Scott v. Weiss, 25 F. (2d) 924; Knight v. Fischer, 24 F. (2d) 900; Sprague v. Dodge, 24 F. (2d) 284; Smith v. Pritchard, 24 F. (2d) 274; Humiston v. Voorhees, 23 F. (2d) 765; Winkley v. Cogswell, 19 F. (2d) 680; Wagner Typewriter Co. v. Wyckoff, 151 Fed. 585, 81 CCA 129; Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 Fed. 657; Letson v. Alaska Packers' Assoc., 130 Fed. 129, 64 CCA 463; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 129 Fed. 598; Van Epps v. International Paper Co., 124 Fed. 542; Kalamazoo R. Supply Co. v. Duff Mfg. Co., 113 Fed. 264, 51 CCA 221; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 328; International Tooth-Crown Co. v. Richmond, 30 Fed. 775; Berg v. Thistle, 3 F. Cas. No. 1,337; Bullock Printing-Press Co. v. Jones, 4 F. Cas. No. 2,132, 3 Bann. & A. 195; Consolidated Fruit-Jar Co. v. Wright, 6 F. Cas. No. 3,135, 12 Blatchf. 149, 1 Bann. & A. 320 [aff 94 U. S. 92, 24 L. ed. 68]; Marcy v. Trotter, 16 F. Cas. No. 9,063; Snowden v. Pierce, 22 F. Cas. No. 13,151, 2 Hayw. & H. 386; Spear v. Belson, 22 F. Cas. No. 13,223, McA. Pat. Cas. 699; U. S. Rifle, etc., Co. v. Whitney Arms Co., 28 F. Cas. No. 16,793, 2 Bann. & A. 493, 14 Blatchf. 94 [aff 118 U. S. 22, 6 SCt 950, 30 L. ed. 53]; Walker v. Forbes, 29 F. Cas. No. 17,069; Winans v. New York, etc., R. Co., 29 F. Cas. No. 17,864, 4 Fish. Pat. Cas. 1; Matthes v. Burt, 114 Off. Gaz. (U. S.) 764; Barber v. Winter, 57 App. (D. C.) 349, 23 F. (2d) 770; Barber v. Forsyth, 57 App. (D. C.) 348, 23 F. (2d) 769; Mitchell v. Beach, 56 App. (D. C.) 247, 12 F. (2d) 188; Schwalbenberg v. Dowell, 54 App. (D. C.) 177, 295 Fed. 998; Smith v. Warnock, 50 App. (D. C.) 329, 271 Fed. 559; Fieux v. Coppus, 48 App. (D. C.) 422; Crabill v. Teeter, 43 App. (D. C.) 10; Stewart v. Thomas, 42 App. (D. C.) 222; Hubbard v. Berg, 40 App. (D. C.) 577; Dunkley v. Beekhuis, 39 App. (D. C.) 494; Henderson v. Gilpin, 39 App. (D. C.) 428; Rinehart v. Gibson, 39 App. (D. C.) 358; Rice v. Schutte, 38 App. (D. C.) 175; Midgley v. Ward, 37 App. (D. C.) 595; Brown v. Blood, 22 App. (D. C.) 216; Thomson v. Weston, 19 App. (D. C.) 373; Warner v. Smith, 13 App. (D. C.) 111; Mason v. Hepburn, 13 App. (D. C.) 86.

"It is also a settled principle in patent law, that whoever first perfects a machine is entitled to the

first to reduce to practice is prima facie the first inventor.[59] However, the statutory provision, permitting a defendant in an action upon a patent to set up that plaintiff had "surreptitiously or unjustly obtained his patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same,"[60] qualifies this general principle.[61] By virtue of this provision, the first conceiver, if he was using reasonable diligence in adapting and perfecting his invention, is regarded as the first inventor notwithstanding the invention was first reduced to practice by another.[62] In other words, he who first conceives and in a mental sense first invents a machine, art, or composition of matter may date his particular invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part so that they are substantially one continuous act.[63] This rule applies to all inventors, whether patentees or otherwise.[64] But one who was first to conceive but last to perfect and adapt the invention to practical use is not entitled to be considered the first inventor if he fails to connect the conception with its reduction to practice by reasonable diligence so that they are substantially one continuous act.[65] It has been held that this is true, even though he fully disclosed his conception by description,[66] drawings,[67] or even by a model.[68] When the inventor who is first to conceive the invention is also the first to reduce it to practice, he is entitled to be considered the first inventor, even though a subsequent conceiver may anticipate him in applying for[69] or obtaining[70] a patent. In such cases the question of diligence is immaterial.[71] Where both

patent therefor, and is the real inventor, although others may have previously had the idea and made some experiments towards putting it in practice; subject, however, to this qualification, that if the party who first conceives the invention was, at the time of a second invention by another party, using reasonable diligence in perfecting the same, he is entitled to be recognized as the first inventor, although the second to conceive may have been the first to reduce to practice, either actual or constructive." Funk v. Haines, 20 App. (D. C.) 285, 288.

59. Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367 [aff 69 Fed. 408]; Warner v. Goodyear, 29 F. Cas. No. 17,183, Cranch Pat. Dec. 125, McA. Pat. Cas. 60.

60. U. S. Code tit 35 § 69.

61. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Henderson v. Gilpin, 39 App. (D. C.) 428.

62. Scott v. Weiss, 25 F. (2d) 924; Chubb v. Short, 24 F. (2d) 469; Kotaro Honda v. Brace, 24 F. (2d) 466; Taub v. Jehle, 24 F. (2d) 287; Pyzel v. Black, 24 F. (2d) 281; Walser v. Scott, 285 Fed. 966; Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454; Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (certiorari granted 254 U. S. 622 mem, 41 SCt 6 mem, 65 L. ed. 443 mem, and rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)]; Evans v. Associated Automatic Sprinkler Co., 241 Fed. 252, 154 CCA 172; Continental Rubber Works v. Single Tube Auto., etc., Tire Co., 178 Fed. 452, 101 CCA 436 [aff 174 Fed. 50]; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Laas v. Scott, 161 Fed. 122; Westinghouse Electric, etc., Co. v. Roberts, 125 Fed. 6; Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Electric R. Signal Co. v. Hall R. Signal Co., 6 Fed. 603 [aff in 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96]; Kneeland v. Sheriff, 2 Fed. 901; Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493; Davidson v. Lewis, 7 F. Cas. No. 3,606, McA. Pat. Cas. 599; Draper v. Potomska Mills Corp., 7 F. Cas. No. 4,072, 3 Bann. & A. 214; Heath v. Hildreth, 11 F. Cas. No. 6,309, Cranch Pat. Dec. 96, 132, McA. Pat. Cas. 12; Hicks v. Shaver, 12 F. Cas. No. 6,462; Hill v. Dunklee, 12 F. Cas. No. 6,489, McA. Pat. Cas. 475; Marshall v. Mee, 16 F. Cas. No. 9,129, McA. Pat. Cas. 229; Mix v. Perkins, 17 F. Cas. No. 9,677; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Stephens v. Salisbury, 22 F. Cas. No. 13,369, McA. Pat. Cas. 379; Taylor v. Archer, 23 F. Cas. No. 13,778, 18 Blatchf. 315, 4 Fish. Pat. Cas. 449; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Bickhart v. Crissey, 55 App. (D. C.) 18, 299 Fed. 703; Callaghan v. Gouverneur, 54 App. (D. C.) 140, 295 Fed. 961; Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Cadman v. Hudson, 51 App. (D. C.) 7, 273 Fed. 735; Jenks v. Geiger, 50 App. (D. C.) 396, 273 Fed. 360; Dunham v. Dyson, 50 App. (D. C.) 338, 272 Fed. 206; Smith v. Warnock, 50 App. (D. C.) 326, 271 Fed. 556; Olson v. Pospeshil, 50 App. (D. C.) 182, 269 Fed. 698; Sargent v. Vetter, 48 App. (D. C.) 582; Burnett v. Utsman, 46 App. (D. C.) 407; Stevenson v. Parker, 46 App. (D. C.) 303; Aufiero v. Monnot, 46 App. (D. C.) 297; Saurer v. Groebli, 45 App. (D. C.) 298; Braun v. Wahl, 45 App. (D. C.) 291; Deakin v. Schwartz, 44 App. (D. C.) 258; Bettendorf v. McKeen, 41 App. (D. C.) 580; Hopkins v. Peters, 41 App. (D. C.) 302; Kitchen v. Smith, 39 App. (D. C.) 500; Henderson v. Gilpin, 39 App. (D. C.) 428; Lederer v. Walker, 39 App. (D. C.) 122; Schartow v. Schleicher, 35 App. (D. C.) 347; Oakes v. Young, 34 App. (D. C.) 434; Davis v. Horton, 31 App. (D. C.) 601; Mead v. Davis, 31 App. (D. C.) 590; Woods v. Poor, 29 App. (D. C.) 397; Davis v. Garrett, 28 App. (D. C.) 9; Shuman v. Beall, 27 App. (D. C.) 324; O'Connell v. Schmidt, 27 App. (D. C.) 77; Fowler v. McBerty, 27 App. (D. C.) 41; Hillard v. Brooks, 23 App. (D. C.) 526; Liberman v. Williams, 23 App. (D. C.) 223; Paul v. Johnson, 23 App. (D. C.) 187; Funk v. Haines, 20 App. (D. C.) 285; Silverman v. Hendrickson, 19 App. (D. C.) 381; Yates v. Huson, 8 App. (D. C.) 93.

"The man who first conceives, and, in a mental sense, first invents, a machine, art, or composition of matter, may date his patentable invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part, so that they are substantially one continuous act." Christie v. Seybold, 55 Fed. 69, 76, 5 CCA 33 [quot Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454, 457].

"He who first conceives and gives expression to the idea of an invention in such clear and intelligible manner that a person skilled in the business could construct the thing, is entitled to a patent, provided he uses reasonable diligence in perfecting it." McCormick Harvesting Mach. Co. v. Minneapolis Harvester Works, 42 Fed. 152, 155 [app dism 140 U. S. 689 mem, 11 SCt 1024 mem, 35 L. ed. 598 mem].

63. Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; In re Mattullath, 38 App. (D. C.) 497.

64. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206.

65. Martin v. Curtiss Aeroplane, etc., Co., 26 F. (2d) 701; Willoughby v. Rogers, 20 F. (2d) 981; Twentieth Century Mach. Co. v. Loew Mfg. Co., 243 Fed. 373, 156 CCA 153; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367; Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73; Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Hubel v. Dick, 28 Fed. 132; Cox v. Griggs, 6 F. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Ellithorp v. Robertson, 8 F. Cas. No. 4,409, McA. Pat. Cas. 585; Reeves v. Keystone Bridge Co., 20 F. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 9 Phila. (Pa.) 368; Ross v. Burke, 57 App. (D. C.) 143, 19 F. (2d) 717; Fagan v. Whitmore, 57 App. (D. C.) 140, 18 F. (2d) 182; Smith v. Brixey, 56 App. (D. C.) 238, 12 F. (2d) 179; Hambuechen v. Schorger, 56 App. (D. C.) 141, 10 F. (2d) 1006; Petersen v. Thomas, 56 App. (D. C.) 113, 10 F. (2d) 908; Travers v. Foote, 55 App. (D. C.) 225, 4 F. (2d) 301; Automatic Electric Co. v. Dyson, 52 App. (D. C.) 82, 281 Fed. 586; Clement v. Roberts, 51 App. (D. C.) 29, 273 Fed. 757; Smith v. Warnock, 50 App. (D. C.) 329, 271 Fed. 559; Bissell v. Phelps, 50 App. (D. C.) 38, 270 Fed. 697; Duncan v. Shelly, 49 App. (D. C.) 243, 263 Fed. 639; Reichel v. Dorset, 49 App. (D. C.) 198, 262 Fed. 652; Hill v. Allen, 46 App. (D. C.) 446; Conrad v. Kraus, 44 App. (D. C.) 256; Givens v. Warren, 44 App. (D. C.) 10; Grabowsky v. Gallaher, 39 App. (D. C.) 548; Hawkins v. Ward, 38 App. (D. C.) 90; Storer v. Barr, 34 App. (D. C.) 178; Moore v. Hewitt, 31 App. (D. C.) 577; McArthur v. Mygatt, 31 App. (D. C.) 514; Rose v. Clifford, 31 App. (D. C.) 195; Gordon v. Wentworth, 31 App. (D. C.) 150; Feinberg v. Cowan, 29 App. (D. C.) 80; Wickers v. McKee, 29 App. (D. C.) 4; Parkes v. Lewis, 28 App. (D. C.) 1; Fowler v. Boyce, 27 App. (D. C.) 48; Fowler v. McBerty, 27 App. (D. C.) 41; Laas v. Scott, 26 App. (D. C.) 354; Dashiell v. Tasker, 21 App. (D. C.) 64; Oliver v. Felbel, 20 App. (D. C.) 255; Marvel v. Decker, 13 App. (D. C.) 562; Platt v. Shipley, 11 App. (D. C.) 576; Yates v. Huson, 8 App. (D. C.) 93.

[a] **Filing caveat** will not excuse diligence. Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351.

66. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 298, 92 CCA 206.

"The authorities seem to be conclusive upon the point that a conception evidenced by disclosure and drawings does not constitute an invention under the patent laws." Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra.

67. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra.

68. Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra.

69. Laas v. Scott, 161 Fed. 122.

70. Laas v. Scott, supra.

71. White v. Hartley, 56 App. (D. C.) 109, 10 F. (2d) 904; De Forest v. Hartley, 56 App. (D. C.) 108, 10 F. (2d) 903; Erben v. Yardley, 50 App. (D. C.) 43, 267 Fed. 345; Brown v. McIntosh, 49 App. (D. C.) 371, 265 Fed. 1011; Bayer v. Bradley, 46 App. (D. C.) 7; Stewart v. Thomas, 42 App. (D. C.) 222; Hubbard v. Berg, 40

parties to an interference reduced to practice at the same time, the one first to conceive the invention must be regarded as the first inventor, irrespective of the question of diligence.[72]

[§ 129] **2. Reduction to Practice—a. In General.** An invention is reduced to practice when the inventor's conception is embodied in such form as to render it capable of practical and successful use.[73] Thus a process is reduced to practice when it is successfully performed.[74] A machine is reduced to practice when it is assembled, adjusted, and used.[75] A manufacture is reduced to practice when it is completely manufactured.[76] A composition of matter is reduced to practice when it is completely composed.[77] What constitutes a reduction to practice is a matter, the determination of which must largely depend upon the nature and purpose of the method or device in the particular case.[78] The same act, or set of acts, may or may not constitute a reduction to practice, modified, as they may be, by the special circumstances of the particular case.[79] Actual construction, embodiment, or use of the invention is not necessary if it has been so far disclosed as to enable one skilled in the art to which it belongs to make and use it.[80] The requirement of reduction to practice is satisfied if the inventor has shown operative means to persons skilled in the art.[81] Ordinarily, however, the invention must have been tested and found satisfactory,[82] although some inventions are so simple that no test is necessary to demonstrate their success.[83] Where an invention is designed to perform a definite purpose, a construction embodying it must be capable, when operated, of accomplishing that purpose.[84] Mechanical perfection, however, is not necessary.[85] If the operative means accomplish the desired end, reduction to practice is established,[86] although it appears on inspection that the elements of the device should have been made stronger,[87] or given a better shape,[88] arrangement,[89] or adjustment.[90] The fact that improvement obvious to the skilled in the art may be made to perfect the operation of the means or to increase its practical efficiency does not justify the conclusion that the invention was without practical utility[91] or that its reduction to practice was a failure.[92] A construction which fails to embody an essential element of the invention is not a reduction to practice.[93] Nor is reduction to practice accomplished by a test which fails to demonstrate the capability of the method or device for performing its intended function.[94] Where necessary to demonstrate the utility of the method or device, reduction to practice must be by test under actual working conditions.[95] This rule does not apply, however, where it is impossible for the inventor to make his tests under service conditions,[96] or where, because of government control or the pledges to the government, the inventor is denied

App. (D. C.) 577; Rolfe v. Hoffman, 26 App. (D. C.) 336.

72. McParland v. Beall, 45 App. (D. C.) 162.

73. Rogers v. Willoughby, 1 F. (2d) 824; American Chain Co. v. Chester N. Weaver Co., 1 F. (2d) 590 [mod on other grounds 9 F. (2d) 372]; Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454; Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493; Farley v. National Steam-Gauge Co., 8 F. Cas. No. 4,648, McA. Pat. Cas. 618; Heath v. Hildreth, 11 F. Cas. No. 6,309, Cranch Pat. Cas. 96, 132, McA. Pat. Cas. 12; Lyman Ventilating, etc., Co. v. Chamberlain, 15 F. Cas. No. 8,631, 2 Bann. & A. 433; Lyman Ventilating, etc., Co. v. Lalor, 15 F. Cas. No. 8,632, 1 Bann. & A. 403, 12 Blatchf. 303; Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,337, 1 Bann. & A. 77, 10 Phila. (Pa.) 227; Roberts v. Reed Torpedo Co., 20 F. Cas. No. 11,910, 3 Fish. Pat. Cas. 629, 3 Brewst. (Pa.) 558; Smith v. Prior, 22 F. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461; Clark v. Buffum, 51 App. (D. C.) 212, 277 Fed. 611; Cox v. Headley, 49 App. (D. C.) 341, 265 Fed. 981; Hamilton v. Dunn, 46 App. (D. C.) 157; Neckerman v. Saunders, 46 App. (D. C.) 10; Bayer v. Bradley, 46 App. (D. C.) 7; Slingluff v. Sweet, 45 App. (D. C.) 302; Pierman v. Chisholm, 44 App. (D. C.) 460; Creveling v. Jepson, 44 App. (D. C.) 445; Becker v. Bird, 44 App. (D. C.) 432; Astrom v. Weimer, 42 App. (D. C.) 550; Stewart v. Thomas, 42 App. (D. C.) 222; Gilman v. Hinson, 26 App. (D. C.) 409.

74. Corona Cord Tire Co. v. Dovan Chemical Corp., 275 U. S. 358, 48 SCt 389, 72 L. ed. 610.

75. Corona Cord Tire Co. v. Dovan Chemical Corp., supra; Schneider v. Driggs, 36 App. (D. C.) 116.

76. Corona Cord Tire Co. v. Dovan Chemical Corp., 275 U. S. 358, 48 SCt 380, 72 L. ed. 610.

77. Corona Cord Tire Co. v. Dovan Chemical Corp., supra.

78. Jobski v. Johnson, 47 App. (D. C.) 230.

79. Andrews v. Nilson, 27 App. (D. C.) 451; Rolfe v. Hoffman, 26 App. (D. C.) 336.

80. Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454; Sherwood v. Drewson, 29 App. (D. C.) 161; Hillard v. Brooks, 23 App. (D. C.) 526; Herman v. Fullman, 23 App. (D. C.) 259; Howard v. Hey, 18 App. (D. C.) 142; Latham v. Armat, 17 App. (D. C.) 345.

81. Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454, 456.

"Reduction to practice is not merely a matter of construction, building and trial, but may consist in the disclosure of the idea by any kind of description, pictorial, verbal, or written, which will enable one skilled in the art to make and use that which is disclosed. We think a drawing may possibly be a sufficient reduction to practice, and an experimental machine insufficient, for the question is one of degree, and the ultimate test is always whether the inventor has shown operative means to that theoretically omnipresent person, the man skilled in the art." Curtiss Aeroplane, etc., Corp. v. Janin, supra.

82. Ocumpaugh v. Norton, 115 Off. Gaz. (U. S.) 1850; Paul v. Hess, 115 Off. Gaz. (U. S.) 251; Smith v. Warnock, 50 App. (D. C.) 326, 271 Fed. 556; Reichel v. Dorset, 49 App. (D. C.) 198, 262 Fed. 652; Wickers v. McKee, 29 App. (D. C.) 4; Macdonald v. Edison, 21 App. (D. C.) 527; Latham v. Armat, 17 App. (D. C.) 345; Kelly v. Fynn, 16 App. (D. C.) 573; Appert v. Schmertz, 13 App. (D. C.) 117; Croskey v. Atterbury, 9 App. (D. C.) 207.

83. Rolfe v. Hoffman, 26 App. (D. C.) 836; Couch v. Barnett, 23 App. (D. C.) 446; Loomis v. Hauser, 19 App. (D. C.) 401; Lindemeyr v. Hoffman, 18 App. (D. C.) 1; Mason v. Hepburn, 13 App. (D. C.) 86.

84. Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Pelton v. Waters, 19 F. Cas. No. 10,913, 1 Bann. & A. 599; Janin v. Curtiss, 45 App. (D. C.) 362; Carlin v. Crumpton, 45 App. (D. C.) 166; Blackstone v. Wild, 43 App. (D. C.) 392; McKenzie v. Cummings, 24 App. (D. C.) 137.

85. Downs v. Andrews, 25 F. (2d) 218 [aff 26 F. (2d) 522]; American Chain Co. v. Chester N. Weaver Co., 1 F. (2d) 590 [mod on other grounds 9 F. (2d) 372]; Brunswick-Balke-Collender Co. v. Backus Automatic Pin Setter Co., 153 Fed. 288; Rogers Typograph Co. v. Mergenthaler Linotype Co., 64 Fed. 799, 12 CCA 422; Mergenthaler Linotype Co. v. Press Pub. Co., 57 Fed. 502; Jenner v. Dickinson, 117 Off. Gaz. (U. S.) 600; Hope v. Voight, 115 Off. Gaz. (U. S.) 1585; Gallagher v. Hien, 115 Off. Gaz. (U. S.) 1330; National Cash Register Co. v. Lamson Cons. Store Serv. Co., 67 Off. Gaz. (U. S.) 680; Cheatham v. Collins, 43 App. (D. C.) 16; Lowrie v. Taylor, 27 App. (D. C.) 522; Coffee v. Guerrant, 3 App. (D. C.) 497.

[a] **Later improvements.**—Success is not negatived by later improvements. Wyman v. Donnelly, 21 App. (D. C.) 81; Hien v. Buhoup, 11 App. (D. C.) 293.

86. Downs v. Andrews, 25 F. (2d) 218 [aff 26 F. (2d) 522]; American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Burson v. Vogel, 29 App. (D. C.) 388; Coffee v. Guerrant, 3 App. (D. C.) 497.

87. Downs v. Andrews, 25 F. (2d) 218 [aff 26 F. (2d) 522].

88. Downs v. Andrews, supra.

89. Downs v. Andrews, supra.

90. Downs v. Andrews, supra.

91. Downs v. Andrews, supra; Wright v. Halle, 50 App. (D. C.) 391, 273 Fed. 355.

92. Downs v. Andrews, 25 F. (2d) 218 [aff 26 F. (2d) 522].

93. Dowell v. Doman, 51 App. (D. C.) 375, 279 Fed. 1013; Liebmann v. Newcomb, 50 App. (D. C.) 185, 269 Fed. 701; Jobski v. Johnson, 47 App. (D. C.) 230; Bijur v. Rushmore, 46 App. (D. C.) 395; Storck v. Reichhelm, 44 App. (D. C.) 438; Ruggles v. Ash, 44 App. (D. C.) 435; Eastwood v. Rowell, 40 App. (D. C.) 280; Bourn v. Hill, 27 App. (D. C.) 291.

94. Bissell v. Phelps, 50 App. (D. C.) 38, 270 Fed. 697; Jobski v. Johnson, 47 App. (D. C.) 230; Janin v. Curtiss, 45 App. (D. C.) 362.

95. Malcom v. Richards, 47 App. (D. C.) 582; Gilman v. Hinson, 26 App. (D. C.) 409.

96. Rogers v. Willoughby, 1 F. (2d) 824.

information as to the experiments actually made.[97] Commercial use of a method or device is not essential to reduction to practice.[98] It has been asserted that reduction to practice may consist in the disclosure of the idea by any kind of description which will enable one skilled in the art to make and use that which is disclosed,[99] and that a drawing may possibly be a sufficient reduction to practice.[1] It has been held, however, that an invention is not reduced to practice by the mere making of sketches or drawings, no matter how fully they may disclose the invention.[2] An invention is not reduced to practice by the construction of a model,[3] unless the practicability of the invention is thereby fully demonstrated.[4] The reduction to practice must be by applicant himself, or by his authorized agent, and not by some other third party.[5] It is not enough to entitle an applicant to a patent that some one else has shown the practicability of the invention by reducing it to practice. The work of such third party will not be taken as sufficient to relieve applicant of the consequences of his own want of diligence.[6]

Construction and use abroad cannot be taken advantage of in this country as actual reduction to practice.[7]

[§ 130] **b. Filing Application for Patent.** The filing of an allowable application for a patent is a constructive reduction to practice of the invention at the date when it was filed.[8] In other words, an application for a patent, if it sufficiently describes the invention, is conclusive evidence that the invention was made at least as early as that date.[9] There is no reduction to practice by filing an application, however, if the method or device described therein is inoperative.[10]

Unclaimed disclosures. It is now settled that what was disclosed in an application duly filed is reduction to practice, and evidences a completed invention at that date, even though it was not then claimed.[11]

Foreign applications. By virtue of the express statutory provision according to United States applications the same force and effect as they would have if filed on the date upon which a prior foreign application was filed,[12] the filing of an application in a foreign country having the requisite treaty relations, disclosing the invention in question, constitutes a constructive reduction to practice.[13] This is true, even though the application, although containing a claim broad enough to include the particular method or device in question, did not claim it specifically.[14] But the benefit of this provision does not extend to those who filed foreign applications prior to the date upon which the requisite treaty relations were entered into.[15]

[§ 131] **3. Diligence.** While an inventor who seeks to carry the date of his invention back to the date of his conception must show reasonable diligence in adapting and perfecting his invention,[16] reasonable diligence is all that is required.[17] Whether the inventor has used reasonable diligence is a question to be determined not by any fixed standard, but by taking into consideration all the circum-

97. Rogers v. Willoughby, supra.

98. Corona Cord Tire Co. v. Dovan Chemical Corp., 275 U. S. 358, 48 SCt 380, 72 L. ed. 610 [rev 16 F. (2d) 419 (rev 10 F. (2d) 598)]; Wyman v. Donnelly, 21 App. (D. C.) 81; Wurts v. Harrington, 10 App. (D. C.) 149.

99. Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454.

1. Curtiss Aeroplane, etc., Corp. v. Janin, supra.

2. McCreery Engineering Co. v. Massachusetts Fan Co., 195 Fed. 498, 115 CCA 408; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367; Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Uhlman v. Bartholomæ, etc., Brewing Co., 41 Fed. 132; Pennsylvania Diamond-Drill Co. v. Simpson, 29 Fed. 288; Detroit Lubricator Mfg. Co. v. Renchard, 9 Fed. 293; Electric R. Signal Co. v. Hall R. Signal Co., 6 Fed. 603 [aff 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96]; Draper v. Potomska Mills Corp., 7 F. Cas. No. 4,072, 3 Bann. & A. 214; Ellinthorp v. Robertson, 8 F. Cas. No. 4,408; Reeves v. Keystone Bridge Co., 20 F. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 9 Phila. (Pa.) 368; Stillwell, etc., Mfg. Co. v. Cincinnati Gaslight, etc., Co., 23 F. Cas. No. 13,453, 1 Bann. & A. 610; Winans v. New York, etc., R. Co., 30 F. Cas. No. 17,864, 4 Fish. Pat. Cas. 1; Howell v. Hess, 30 App. (D. C.) 194; Guilbert v. Killinger, 13 App. (D. C.) 107; McCormick v. Cleal, 12 App. (D. C.) 335; Porter v. Louden, 7 App. (D. C.) 64.

3. Stainthorp v. Humiston, 22 F. Cas. No. 13,281, 4 Fish. Pat. Cas. 107; Howell v. Hess, 30 App. (D. C.) 194; Hunter v. Stikeman, 13 App. (D. C.) 214; Mason v. Hepburn, 13 App. (D. C.) 86; Porter v. Louden, 7 App. (D. C.) 64.

4. Heath v. Hildreth, 11 F. Cas. No. 6,309, Cranch Pat. Dec. 96, 132, McA. Pat. Cas. 12; Perry v. Cornell, 19 F. Cas. No. 11,002, Cranch Pat. Cas. 132, McA. Pat. Cas. 68; Robinson v. Thresher, 28 App. (D. C.) 22; O'Connell v. Schmidt, 27 App. (D. C.) 77.

[a] **Later manufacture on larger scale.**—If an experimental machine completely embodies the invention, and is capable of testing its efficiency to the full extent of its power, the mere fact that later manufactures to fill orders may be on a larger scale cannot impair its effect as constituting reduction to practice. Robinson v. Thresher, 28 App. (D. C.) 22.

5. Robinson v. McCormick, 29 App. (D. C.) 98; Hunter v. Stikeman, 13 App. (D. C.) 214; Burgess v. Wetmore, 16 Off. Gaz. (U. S.) 765.

6. Hunter v. Stikeman, 13 App. (D. C.) 214.

7. Lorimer v. Erickson, 44 App. (D. C.) 503; De Kando v. Armstrong, 37 App. (D. C.) 314.

8. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454; Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co., 272 Fed. 386; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Dane v. Chicago Mfg. Co., 6 F. Cas. No. 3,557, 3 Biss. 380, 6 Fish. Pat. Cas. 130; Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138; Johnson v. Root, 13 F. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; New England Screw Co. v. Sloan, 18 F. Cas. No 10,158, McA. Pat. Cas. 210; Wheeler v. Clipper, Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1; Bonine v. Bliss, 49 App. (D. C.) 93, 259 Fed. 989; Becker v. Bird, 44 App. (D. C.) 432; Dalton v. Wilson, 44 App. (D. C.) 249; Davis v. Garrett, 28 App. (D. C.) 9; Cobb v. Goebel, 23 App. (D. C.) 75; Dashiell v. Tasker, 21 App. (D. C.) 64; Lindemeyr v. Hoffman, 18 App. (D. C.) 1; Hulett v. Long, 15 App. (D. C.) 284; McCormick v. Cleal, 12 App. (D. C.) 335; Dodge v. Fowler, 11 App. (D. C.) 592; Croskey v. Atterbury, 9 App. (D. C.) 207; Porter v. Louden, 7 App. (D. C.) 64.

9. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Prindle v. Brown, 155 Fed. 531, 84 CCA 45; Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co., 51 Fed. 88 [aff 60 Fed. 605, 9 CCA 154]; Kearney v. Lehigh Valley R. Co., 32 Fed. 320 [rev on other grounds 158 U. S. 461, 15 SCt 871, 39 L. ed. 1055].

"The presumption in respect to the invention described in the patent in suit, if it is accompanied by the application for the same, is that it was made at the time the application was filed; and the complainant or plaintiff may, if he can, introduce proof to show that it was made at a much earlier date." Bates v. Coe, 98 U. S. 31, 34, 25 L. ed. 68.

10. Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454; Lindstrom v. Ames, 37 App. (D. C.) 365.

11. Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, 46 SCt 324, 70 L. ed. 651; Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; Grasselli Chemical Co. v. National Aniline, etc., Co., 26 F. (2d) 305.

12. U. S. Code tit 35 § 32.

[a] **Act prospective and not retrospective.**—The rights of an applicant whose application was pending at the time of the passage of the last act are to be governed by the original, and not the amendatory, act, and his priority of invention will relate only from the date of the filing of his application here, and not from the date of the filing of his foreign application. De Ferranti v. Lyndmark, 30 App. (D. C.) 417.

13. Kisovitz v. Rosenberg, 50 App. (D. C.) 214, 269 Fed. 866; Aufiero v. Monnot, 46 App. (D. C.) 297; National Metallurgic Co. v. Whitman, 35 App. (D. C.) 420; Von Recklinghausen v. Dempster, 34 App. (D. C.) 474; De Ferranti v. Lyndmark, 30 App. (D. C.) 417.

14. Kisovitz v. Rosenberg, 50 App. (D. C.) 214, 269 Fed. 866.

15. Von Recklinghausen v. Dempster, 34 App. (D. C.) 474.

16. See supra § 128.

17. Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Dickinson v. Swinehart, 49 App. (D. C.) 222, 263

stances of the particular case.[18] Thus it is proper to consider the nature of the invention,[19] the situation of the inventor,[20] including his health[21] and means,[22] and the length of time between conception and reduction to practice.[23] A reasonable time is allowed for experiments;[24] but only a reasonable time.[25] It is not necessary that an inventor should give all his time to the development of his invention[26] or abandon his ordinary means of livelihood.[27] But while it is proper to consider the situation of the inventor,[28] poverty and illness will not excuse indefinite delays.[29] And delay due to a mistake in supposing the invention to be covered by a prior patent is not excusable.[30] Diligence in applying for a patent is effective.[31] Diligence in working on other inventions, however, is not.[32] Lack of diligence in prosecuting an application after it has been filed is of no consequence.[33] Ordinarily the mere making of drawings is not diligence.[34] Diligence is required in the reduction of the invention to practice rather than in exploiting it commercially.[35] The question of due diligence is not a matter of comparative diligence as between the two parties,[36] or, as it is sometimes called, a "race of diligence."[37] If the second to conceive is the first to reduce to practice, his claim is founded upon that fact, and derives no support from previous efforts.[38] Knowledge of the entry of the rival in the field is not necessary in order to impose the duty of diligence.[39] Effective diligence must commence before a rival inventor entered the field, and continue thereafter.[40]

[§ 132] **4. Evidence.** The burden of proof on the issue whether one to whom a patent has been issued is the first inventor of the invention claimed is on the party asserting the contrary,[41] unless, of course, priority has been awarded to a patent issued later,

Fed. 474; Mead v. Davis, 31 App. (D. C.) 590; Garrels v. Freeman, 21 App. (D. C.) 207.

18. Walser v. Scott, 285 Fed. 966; Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Burnett v. Utsman, 46 App. (D. C.) 407; Kitchen v. Smith, 39 App. (D. C.) 500; Storer v. Barr, 34 App. (D. C.) 178; Mead v. Davis, 31 App. (D. C.) 590; Woods v. Poor, 29 App. (D. C.) 397; O'Connell v. Schmidt, 27 App. (D. C.) 77; De Wallace v. Scott, 15 App. (D. C.) 157; McCormick v. Cleal, 12 App. (D. C.) 335.

[a] **Diligence shown.**—McCormick Harvesting Mach. Co. v. Minneapolis Harvester Works, 42 Fed. 152 [app dism 140 U. S. 689 mem, 11 SCt 1024 mem, 35 L. ed. 598 mem]; Hubel v. Dick, 28 Fed. 132; Appleton v. Chambers, 1 F. Cas. No. 497a; Mix v. Perkins, 17 F. Cas. No. 9,677; New England Screw Co. v. Sloan, 18 F. Cas. No. 10,158, McA. Pat. Cas. 210; Phelps v. Brown, 19 F. Cas. No. 11,072, 4 Blatchf. 362, 1 Fish. Pat. Cas. 479; Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Cadman v. Hudson, 51 App. (D. C.) 7, 273 Fed. 735; Dunham v. Dyson, 50 App. (D. C.) 338, 272 Fed. 206; Olson v. Pospeshil, 50 App. (D. C.) 182, 269 Fed. 698; Sargent v. Vetter, 48 App. (D. C.) 582; Burnett v. Utsman, 46 App. (D. C.) 407; Stevenson v. Parker, 46 App. (D. C.) 303; Aufiero v. Monnot, 46 App. (D. C.) 297; Saurer v. Groebli, 45 App. (D. C.) 298; Braun v. Wahl, 45 App. (D. C.) 291; Kitchen v. Smith, 39 App. (D. C.) 500; Schartow v. Schleicher, 35 App. (D. C.) 347; Oakes v. Young, 34 App. (D. C.) 434; Howard v. Bowes, 31 App. (D. C.) 619; Davis v. Horton, 31 App. (D. C.) 601; Mead v. Davis, 31 App. (D. C.) 590; O'Connell v. Schmidt, 27 App. (D. C.) 77; Roe v. Hanson, 19 App. (D. C.) 559; Christensen v. Ellis, 17 App. (D. C.) 498; Newton v. Woodward, 17 App. (D. C.) 34; Shellaberger v. Sommer, 8 App. (D. C.) 3.

[b] **Diligence not shown.**—Colman v. Hathaway, 285 Fed. 602; Wright v. Postel, 44 Fed. 352; Pennsylvania Diamond Drill Co. v. Simpson, 29 Fed. 288; Johnson v. Root, 13 F. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Reeves v. Keystone Bridge Co., 20 F. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 9 Phila. (Pa.) 368; Savary v. Lauth, 21 F. Cas. No. 12,389, McA. Pat. Cas. 691; Gallagher v. Hien, 115 Off. Gaz. (U. S.) 1330; Paul v. Hess, 115 Off. Gaz. (U. S.) 251; Seeberger v. Dodge, 114 Off. Gaz. (U. S.) 2382; Ross v. Burke, 57 App. (D. C.) 143, 19 F.(2d) 717; Hambuechen v. Schorger, 56 App. (D. C.) 141, 10 F.(2d) 1006; Travers v. Foote, 55 App. (D. C.) 225, 4 F.(2d) 301; Clement v. Roberts, 51 App. (D. C.) 29, 273 Fed. 757; Duncan v. Shelly, 49 App. (D. C.) 243, 263 Fed. 639; Hill v. Allen, 46 App. (D. C.) 446; Givens v. Warren, 44 App. (D. C.) 10; Storer v. Barr, 34 App. (D. C.) 178; Kinsman v. Kentner, 31 App. (D. C.) 293; Gordon v. Wentworth, 31 App. (D. C.) 150; Bliss v. McElroy, 29 App. (D. C.) 120; Parkes v. Lewis, 28 App. (D. C.) 1; Turnbull v. Curtis, 27 App. (D. C.) 567; Anderson v. Wells, 27 App. (D. C.) 115; Liberman v. Williams, 23 App. (D. C.) 223; Paul v. Johnson, 23 App. (D. C.) 187; Harris v. Stern, 22 App. (D. C.) 164; Wyman v. Donnelly, 21 App. (D. C.) 81; Hallwood v. Lalor, 21 App. (D. C.) 61; Petrie v. De Schweinitz, 19 App. (D. C.) 386; Stapleton v. Kinney, 18 App. (D. C.) 394; Miehle v. Read, 18 App. (D. C.) 128; Austin v. Johnson, 18 App. (D. C.) 83; Locke v. Boch, 17 App. (D. C.) 75; Darnell v. Grant, 16 App. (D. C.) 589; Jackson v. Getz, 16 App. (D. C.) 343; Jackson v. Knapp, 16 App. (D. C.) 338; Marvel v. Decker, 13 App. (D. C.) 562; Dodge v. Fowler, 11 App. (D. C.) 592; Arnold v. Tyler, 10 App. (D. C.) 175; Porter v. Louden, 7 App. (D. C.) 64.

19. Walser v. Scott, 285 Fed. 966; Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Cragg v. Strickland, 47 App. (D. C.) 433; Hopkins v. Peters, 41 App. (D. C.) 302; Woods v. Poor, 29 App. (D. C.) 397.

20. Callaghan v. Gouverneur, 54 App. (D. C.) 140, 295 Fed. 961; Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Dickinson v. Swinehart, 49 App. (D. C.) 222, 263 Fed. 474; Schartow v. Schleicher, 35 App. (D. C.) 347; Woods v. Poor, 29 App. (D. C.) 397; Davis v. Garrett, 28 App. (D. C.) 9.

[a] **Thus** (1) an inventor of a complicated device, who attempts to construct a completed machine with his own hands during a period of over a year, and finally abandons the effort from lack of time and money, and immediately makes a model and drawings, is exercising due diligence. Davis v. Garrett, 28 App. (D. C.) 9. (2) In an interference proceeding, in which the invention related to an electrical furnace of the heat-treating type, evidence that a junior party, a subinspector of naval ordnance, was forbidden by government regulations from seeking outside aid with which to develop his invention, had no financial resources of his own, and was constantly engaged in the performance of his official duties, shows that he exercised due diligence in reducing his invention to practice. Callaghan v. Gouverneur, 54 App. (D. C.) 140, 295 Fed. 961.

21. Dickinson v. Swinehart, 49 App. (D. C.) 222, 263 Fed. 474.

22. Callaghan v. Gouverneur, 54 App. (D. C.) 140, 295 Fed. 961; Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Dickinson v. Swinehart, 49 App. (D. C.) 222, 263 Fed. 474; Davis v. Garrett, 28 App. (D. C.) 9.

23. Woods v. Poor, 29 App. (D. C.) 397.

24. Dietz v. Wade, 7 F. Cas. No. 3,903; De Wallace v. Scott, 15 App. (D. C.) 157.

25. Conrad v. Kraus, 44 App. (D. C.) 256.

26. Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931; Kitchen v. Smith, 39 App. (D. C.) 500.

27. Joy v. Morgan, 54 App. (D. C.) 110, 295 Fed. 931.

28. See supra note 20.

29. Griffin v. Swenson, 15 App. (D. C.) 135.

30. Platt v. Shipley, 11 App. (D. C.) 576.

31. Odell v. Stout, 22 Fed. 159; Jones v. Cooke, 117 Off. Gaz. (U. S.) 1493; Bickhart v. Crissey, 55 App. (D. C.) 18, 299 Fed. 703; Newton v. Woodward, 17 App. (D. C.) 34.

32. Automatic Electric Co. v. Dyson, 52 App. (D. C.) 82, 281 Fed. 586; Bliss v. McElroy, 29 App. (D. C.) 120; Lotterhand v. Hanson, 23 App. (D. C.) 372; Croskey v. Atterbury, 9 App. (D. C.) 207.

[a] **Rule applied.**—Delay by an inventor of six months after conception of the invention during which attention was deliberately given to another invention in no way imperiled by interference or otherwise is such want of diligence as to defeat the right of the inventor to claim the invention in interference proceedings. Automatic Electric Co. v. Dyson, 52 App. (D. C.) 82, 281 Fed. 586.

33. Miehle v. Read, 18 App. (D. C.) 128.

34. Watson v. Thomas, 23 App. (D. C.) 65.

35. Seeberger v. Dodge, 114 Off. Gaz. (U. S.) 2382; Petersen v. Thomas, 56 App. (D. C.) 113, 10 F. (2d) 908; Howell v. Hess, 30 App. (D. C.) 194; Laas v. Scott, 26 App. (D. C.) 354.

36. Electric R. Signal Co v. Hall R. Signal Co., 6 Fed. 603 [aff 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96]; Cragg v. Strickland, 47 App. (D. C.) 433.

37. Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Paul v. Johnson, 23 App. (D. C.) 187.

38. Electric R. Signal Co. v. Hall R. Signal Co., 6 Fed. 603 [aff 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96].

39. Platt v. Shipley, 11 App. (D. C.) 576.

40. Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; McArthur v. Mygatt, 31 App. (D. C.) 514; De Wallace v. Scott, 15 App. (D. C.) 157; Griffin v. Swenson, 15 App. (D. C.) 135; Platt v. Shipley, 11 App. (D. C.) 576; Yates v. Huson, 8 App. (D. C.) 93.

41. Gibbs v. Montgomery Ward & Co., Inc., 19 F.(2d) 613 [aff 27 F. (2d) 466 (certiorari den 49 SCt 29 mem)]; Chester N. Weaver Co. v. American Chain Co., 9 F. (2d) 372 [mod 1 F. (2d) 590]; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646; Evans v. Associated Automatic

in which case the burden is upon the first patentee.[42] Ordinarily this burden must be sustained by evidence that is clear, positive, and unequivocal,[43] leaving nothing to speculation and conjecture.[44] Where a claim of priority is first made many years after the issuance of the patent and is supported by oral evidence only, the proof must satisfy beyond a reasonable doubt.[45] It has been held, however, that as between rival inventors whose applications were pending at the same time, the junior applicant is required to establish priority only by a fair preponderance of the evidence and not by proof conclusive in character, or beyond a reasonable doubt.[46] When it is shown that another made the invention prior to the date of the patentee's application, the burden of producing evidence to show an earlier date is upon the party seeking to maintain the patent,[47] and such earlier date must be established by satisfactory evidence[48]—evidence characterized by some courts as proof beyond a reasonable doubt,[49] and by others as evidence at least equal in quality to that establishing invention earlier than the application.[50] While it is true that uncorroborated testimony of an inventor is to be accepted with caution,[51] yet there is no rule of law that requires the rejection of the uncorroborated testimony of an inventor as to the date of his conception.[52] The court must be satisfied as to the fact of demonstration and that the conception was complete.[53] A mere assertion of the inventor at a given time, unaccompanied by contemporaneous acts or words indicating its existence, is not sufficient evidence;[54] but if a court is satisfied of the good faith, and the truth of the apprehension of the invention is definite enough to have enabled him to reduce it to practice without a further exercise of inventive skill, that is sufficient.[55] In other words an earlier conception, when alleged, is a matter of fact, and must be established by sufficient proof.[56] Where there has been disclosure to others, or embodiment of the invention in some clearly perceptible form, such as a drawing, with sufficient proof of identity in point of law, that is sufficient.[57] While the mere unsupported evidence of the alleged inventor on an issue of priority, as to the fact of conception and time, cannot be received as sufficient proof of prior conception,[58] any full and accurate description of the invention, either in words[59] or drawings[60] or by model,[61] will suffice, although the attempt to represent it may have failed.[62] All that the law requires is that the drawings exhibited and relied on as evidence of the conception of the invention must show a complete conception, free from

Sprinkler Co., 241 Fed. 252, 154 CCA 172 [aff 229 Fed. 1007]; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [rev 209 Fed. 854]; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; Consolidated R. Electric Lighting, etc., Co. v. Adams, etc., Co., 161 Fed. 343, 88 CCA 355 [rev 153 Fed. 193]; Hall Signal Co. v. Union Switch, etc., Co., 115 Fed. 638; Cohansey Glass Mfg. Co. v. Wharton, 28 Fed. 189; Donoughe v. Hubbard, 27 Fed. 712; Duffy v. Reynolds, 24 Fed. 855; Rogers v. Beecher, 3 Fed. 639; Campbell v. James, 4 F. Cas. No. 2,-361, 4 Bann. & A. 456, 17 Blatchf. 42, 8 Reporter 455 [rev on other grounds 104 U. S. 356, 6 L. ed. 786]; Cox v. Griggs, 6 F. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Fisk v. Church, 9 F. Cas. No. 4,826, 5 Fisn. Pat. Cas. 540; Hawes v. Antisdel, 11 F. Cas. No. 6,234, 2 Bann. & A. 10; Konold v. Klein, 14 F. Cas. No. 7,-925, 3 Bann & A. 226, 5 Reporter 427.

42. West Coast Roofing, etc., Co. v. Elaborated Ready Roofing Co., 249 Fed. 221, 161 CCA 257.

43. Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196 [mod on other grounds 25 F. (2d) 206]; American Optical Co. v. Shur-On Optical Co., 16 F. (2d) 1013 [certiorari den 274 U. S. 742 mem, 47 SCt 587 mem, 71 L. ed. 1321 mem]; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [rev 209 Fed. 854]; Consolidated R. Electric Lighting, etc., Co. v. Adams, etc., Co., 161 Fed. 343, 88 CCA 355 [rev 153 Fed. 193]; Cornell v. Hyatt, 6 F. Cas. No. 3,237, McA. Pat. Cas. 423.

[a] **Evidence held sufficient.**—Myers v. Hadfield-Penfield Steel Co., 10 F. (2d) 56; National Co. v. Belcher, 71 Fed. 876, 18 CCA 375; Uhlman v. Arnholdt, etc., Brewing Co., 53 Fed. 485; Bliss v. Merrill, 33 Fed. 39; Atkinson v. Boardman, 2 F. Cas. No. 608, Cranch Pat. Dec. 139, McA. Pat. Cas. 80; Babcock v. Degener, 2 F. Cas. No. 698, McA. Pat. Cas. 607; Collins v. White, 6 F. Cas. No. 3,019; Jillson v. Winsor, 13 F. Cas. No. 7,-321, McA. Pat. Cas. 136; Sherwood v. Sherman, 21 F. Cas. No. 12,780.

[b] **Evidence held insufficient.**—Hayes v. Crouse, 24 F. (2d) 470; Gibbs v. Montgomery Ward & Co., Inc., 19 F. (2d) 613 [aff 27 F. (2d) 466 (certiorari den 49 SCt 29 mem)]; Armstrong v. De Forest Radio Tel., etc., Co., 279 Fed. 445 [aff 280 Fed. 584]; United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem. 44 SCt 33 mem. 68 L. ed. 515 mem]; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; Gillette v. Sendelbach, 146 Fed. 758, 77 CCA 55; Ashe v. Mutual Lasting Co., 42 Fed. 840; Lamson Cash R. Co. v. Osgood Cash Car Co., 29 Fed. 210; Hutchinson v. Everett, 26 Fed. 531; Beach v. Tucker, 2 F. Cas. No. 1,153; Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388; Clarke v. Cramer, 5 F. Cas. No. 2,848, McA. Pat. Cas. 473; Cornell v. Hyatt, 6 F. Cas. No. 3,237, McA. Pat. Cas. 423; Warner v. Goodyear, 29 F. Cas. No. 17,183, Cranch Pat. Dec. 125, McA. Pat. Cas. 60.

[c] **Acknowledgment or admission of priority.**—(1) On a question of priority between two inventors, the fact that one of them participated in the application of the other would seem to constitute a conclusive acknowledgment of priority. National Co. v. Belcher, 71 Fed. 876, 18 CCA 375. (2) But the fact that one who claims to be the first and original inventor of a device has taken into partnership with himself the assignees of another, who also claims to be the original inventor, instead of litigating with them the question of priority, is not to be regarded as an admission by the former patentee of the validity of the patent claimed by the latter, if the arrangement was induced either directly or indirectly by fraud or misrepresentation. Sloat v. Spring, 22 F. Cas. No. 12,948a.

44. American Optical Co. v. Shur-On Optical Co., 16 F. (2d) 1013 [certiorari den 274 U. S. 742 mem, 47 SCt 587 mem, 71 L. ed. 1321 mem].

45. Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [rev 209 Fed. 854].

46. American Chain Co. v. Chester N. Weaver Co., 1 F. (2d) 590 [mod on other grounds 9 F. (2d) 372]; Willard v. Union Tool Co., 253 Fed. 48, 165 CCA 646.

47. Chester N. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372; Evans v. Associated Automatic Sprinkler Co., 241 Fed. 252, 154 CCA 172; Otis El. Co. v. Interborough Rapid Transit Co., 222 Fed. 501, 138 CCA 97; Consolidated R. Electric Lighting, etc., Co. v. Adams, etc., Co., 161 Fed. 343, 88 CCA 355 [rev 153 Fed. 193]; Thayer v. Hart, 20 Fed. 693.

48. Consolidated R. Electric Lighting, etc., Co. v. Adams, etc., Co., 161 Fed. 343, 88 CCA 355 [rev 153 Fed. 193].

49. Chester N. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372; Otis El. Co. v. Interborough Rapid Transit Co., 222 Fed. 501, 138 CCA 97.

50. Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843.

51. Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584 [aff 279 Fed. 445].

52. Armstrong v. De Forest Radio Tel., etc., Co., supra.

53. Armstrong v. De Forest Radio Tel., etc., Co., supra; Richardson v. Hicks, 20 F. Cas. No. 11,783, McA. Pat. Cas. 335.

[a] **Rule applied.**—Conversations and declarations by one of the parties describing a device by which he has already constructed a model is inadmissible, if such model is not produced or its nonproduction accounted for. Richardson v. Hicks, 20 F. Cas. No. 11,783, McA. Pat. Cas. 335.

54. Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584 [aff 279 Fed. 445].

55. Armstrong v. De Forest Radio Tel., etc., Co., supra; Stephens v. Salisbury, 22 F. Cas. No. 13,369, McA. Pat. Cas. 379.

56. Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584 [aff 279 Fed. 445].

57. U. S. v. De Forest Radio Tel., etc., Co., 18 F. (2d) 338 [aff 21 F. (2d) 918 (certiorari granted 276 U. S. 610 mem, 48 SCt 302 mem, 72 L. ed. 730 mem [aff 49 SCt 35 mem])]; Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584 [aff 279 Fed. 445].

58. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584 [aff 279 Fed. 445]; Eck v. Kutz, 132 Fed. 758; Knapp v. U. S., 46 Ct. Cl. 601.

59. Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584 [aff 279 Fed. 445]; Gibbs v. Johnson, 10 F. Cas. No. 5,384; Stephens v. Salisbury, 22 F. Cas. No. 13,369, McA. Pat. Cas. 379.

60. Armstrong v. De Forest Radio Tel., etc., Co., 280 Fed. 584 [aff 279 Fed. 445].

61. Armstrong v. De Forest Radio Tel., etc., Co., supra.

62. Armstrong v. De Forest Radio Tel., etc., Co., supra.

ambiguity or doubt, and such as would enable the inventor or others skilled in the art to reduce the conception to practice without any further exercise of inventive skill.[63] It has been held that a rejected application is not sufficient to establish priority of invention.[64] However, it is now settled that what was disclosed in an application duly filed is reduction to practice, and evidences a completed invention at that date, even though it was not then claimed.[65]

[§ 133] **D. Joint Inventors—1. In General.** Joint inventors may properly obtain a patent for a joint invention.[66] No one of them, however, can obtain a valid patent therefor as the sole inventor.[67] This is so, even though he is the assignee of all interest of the others in the invention.[68] On the other hand, a patent issued to two or more persons as joint inventors is invalid where one of them is the sole inventor.[69]

[§ 134] **2. What Constitutes Joint Invention.** The question whether an invention is a joint invention or not is a question of fact to be determined in view of all the circumstances,[70] including the relations of the parties[71] and their method of work.[72] A joint invention is the result of the mutual contributions and united efforts of the parties,[73] and no one can be a joint inventor of a method or device unless he had some share in its conception;[74] but it may be considered as settled that, in order to constitute persons joint inventors, it is not necessary that exactly the same idea should have occurred to each at the same time, and that they should work out together the embodiment of that idea in a perfected machine.[75] One may be a joint inventor, even though the conception of the entire device may be due to another if he makes suggestions of practical value which assisted in working out the main idea and making it operative,[76] or contributes an independent part of the entire invention, which is united with the parts produced by the other and creates the whole.[77] One is not a joint inventor if his conception or contribution covers a distinct and independent part of the method or device, and is not an element which contributes to the operativeness

63. Armstrong v. De Forest Radio Tel., etc., Co., supra.

64. Brown v. Guild, 23 Wall. (U. S.) 181, 23 L. ed. 161; Lyman Ventilating, etc., Co. v. Lalor, 15 F. Cas. No. 8,632, 1 Bann. & A. 403, 12 Blatchf. 303; Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,337, 1 Bann. & A. 177, 10 Phila. (Pa.) 227.

65. Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, 46 SCt 324, 70 L. ed. 651; Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; Naceskid Service Chain Co. v. Perdue, 1 F. (2d) 924; Westinghouse Electric, etc., Co. v. Formica Insulating Co., 270 Fed. 632 [aff 272 Fed. 667]; Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; Lemley v. Dobson-Evans Co., 243 Fed. 391, 156 CCA 171; Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co., 60 Fed. 605, 9 CCA 154; Western Electric Co. v. Sperry Electric Co., 59 Fed. 295, 8 CCA 129.

66. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286; Scherzer Rolling Lift Bridge Co. v. Chicago, 2 F. (2d) 601 [aff 11 F. (2d) 605]; Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587; Cheshire v. Cox Multi-Mailer Co., 229 Fed. 415, 143 CCA 535; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484; Quincey Min. Co. v. Krause, 151 Fed. 1012, 81 CCA 290; Priestly v. Montague, 47 Fed. 650; Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 449; Butler v. Bainbridge, 29 Fed. 142; Hoe v. Kahler, 25 Fed. 271, 23 Blatchf. 354, 12 Fed. 111, 20 Blatchf. 430 [app dism 131 U. S. 439 mem, 9 SCt 799 mem, 33 L. ed. 218 mem]; Worden v. Fisher, 11 Fed. 505; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447; Gottfried v. Philip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Wilson v. Singer, 30 F. Cas. No. 17,835; Lemp v. Randall, 33 App. (D. C.) 430; Piper v. Piper, 3 OntWR 451.

"There is no difficulty in supposing in point of fact, that a complicated invention may be the gradual result of the combined mental operations of two persons acting together, pari passu, in the invention. And if this be true, then as neither of them could justly claim to be the sole inventor in such a case, it must follow, that the invention is joint, and that they are jointly entitled to a patent." Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 472 (per Story, J.).

67. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; George v. Perkins, 1 F. (2d) 978; Ross v. Wigder, 290 Fed. 788; McKinnon Chain Co. v. American Chain Co., 268 Fed. 353; Smart v. Wright, 227 Fed. 84, 141 CCA 632; Arnold v. Bishop, 1 F. Cas. Nos. 552, 553, McA. Pat. Cas. 27, 36; Thomas v. Weeks, 23 F. Cas. No. 13,914, Fish. Pat. R. 5, 2 Paine 92; Slemmer's App., 58 Pa. 155, 98 AmD 248.

[a] **In Canada,** a court may properly direct an assignment of the patent to a trustee for the joint inventors with such necessary provisions for the protection of the rights of each as are usual. Piper v. Piper, 3 OntWR 451.

68. 2 Op. Atty.-Gen. 571.

69. De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; De Laval Separator Co. v. Vermont Farm Mach. Co., 126 Fed. 536 [aff 135 Fed. 772, 68 CCA 474]; Welsbach Light Co. v. Cosmopolitan Incandescent Light Co., 104 Fed. 83, 43 CCA 418 [aff 100 Fed. 648]; Bannerman v. Sanford, 99 Fed. 294, 39 CCA 534; Stewart v. Tenk, 32 Fed. 665; Royer v. Coupe, 29 Fed. 358; Ashcroft v. Cutter, 2 F. Cas. No. 578, 6 Blatchf. 511; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Hotchkiss v. Greenwood, 12 F. Cas. No. 6,718, 4 McLean 456, 2 Robb Pat. Cas. 730 [aff 11 How. 248, 13 L. ed. 683]; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Slemmer's App., 58 Pa. 155, 98 AmD 248.

70. McKinnon Chain Co. v. American Chain Co., 268 Fed. 353; General Electric Co. v. Steinberger, 208 Fed. 699; Sieber, etc., Mfg. Co. v. Chicago Binder, etc., Co., 177 Fed. 439 [aff 184 Fed. 930, 107 CCA 252].

71. Minerals Separation, Ltd. v. Hyde, 207 Fed. 956 [rev on other grounds 214 Fed. 100, 130 CCA 576 (certiorari granted 235 U. S. 701 mem, 35 SCt 202 mem, 59 L. ed. 432 mem, and rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286)]; Sieber, etc., Mfg. Co. v. Chicago Binder, etc., Co., 177 Fed. 439 [aff 184 Fed. 930, 107 CCA 252]; Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587; Piper v. Piper, 3 OntWR 451.

72. Minerals Separation, Ltd. v. Hyde, 207 Fed. 956 [rev on other grounds 214 Fed. 100, 130 CCA 576 (certiorari granted 235 U. S. 701 mem, 35 SCt 202 mem, 59 L. ed. 432 mem, and rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286)]; Sieber, etc., Mfg. Co. v. Chicago Binder, etc., Co., 177 Fed. 439 [aff 184 Fed. 930, 107 CCA 252]; Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587; Piper v. Piper, 3 OntWR 451.

73. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286; McKinnon Chain Co. v. American Chain Co., 268 Fed. 353; Worden v. Fisher, 11 Fed. 505; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587.

[a] **Thus,** where an invention was the result of experiments made by an employee under instructions given by his employers, after consultation between themselves, to which each contributed suggestions, from time to time observing the employee's work and obtaining reports thereof, the employers are joint inventors. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286.

74. Welsbach Light Co. v. Cosmopolitan Incandescent Light Co., 104 Fed. 83, 43 CCA 418.

75. Scherzer Rolling Lift Bridge Co. v. Chicago, 2 F. (2d) 601 [aff 11 F. (2d) 605]; De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484; Worden v. Fisher, 11 Fed. 505.

76. De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484; Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 449; Worden v. Fisher, 11 Fed. 505, 508; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Piper v. Piper, 3 OntWR 451.

"To constitute two persons joint inventors it is not necessary that exactly the same idea should have occurred to each at the same time, and that they should work out together the embodiment of this idea in a perfected machine. Such a coincidence of ideas would scarcely ever occur to two persons at the same time. If an idea is suggested to one, and he even goes so far as to construct a machine embodying this idea, but it is not a completed and working machine, and another person takes hold of it, and by their joint labors, one suggesting one thing and the other another, a perfect machine is made, a joint patent may properly issue to them." Worden v. Fisher, supra.

77. Scherzer Rolling Lift Bridge Co. v. Chicago, 2 F. (2d) 601 [aff 11 F. (2d) 605]; Cheshire v. Cox Multi-Mailer Co., 229 Fed. 415, 143 CCA 535; De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; American Patent Diamond Dop Co. v. Wood, 189 Fed. 391 [rev on other grounds 198 Fed. 401, 117 CCA 288]; Quincey Min. Co. v. Krause, 151

of the completed device,[78] or is not included in the claims covering a combination of elements,[79] or is the subject of a separate claim in the same patent.[80]

[§ 135] **3. Evidence.** A presumption that an invention is a joint invention arises from the filing of a joint application.[81] This presumption is strengthened by the issuance of a joint patent.[82] To overcome the presumption clear and convincing proof is required.[83] Similarly, clear and convincing evidence is required to establish that a patent issued to one as sole inventor covered a joint invention.[84] A contention that one of the persons who made application for a patent as joint inventors was the sole inventor of the invention claimed is regarded as technical and is not favored either in infringement suits[85] or in interference proceedings.[86] In infringement actions the issuance of a patent to two persons as joint inventors constitutes prima facie proof that the invention was joint,[87] and in an interference proceeding a joint application is prima facie evidence of that fact.[88] In an action for the infringement of a patent, the burden of showing as a defense that the patentee was a joint inventor with some other person, of the thing invented, is on defendant.[89] Unless there is a preponderance of evidence to the contrary, joint invention may be established in an interference proceeding by the uncorroborated testimony of one of the parties.[90]

[§ 136] **E. Employer and Employee.**[91] One who has conceived the general principle or plan of an invention is not deprived of the right to be regarded as the inventor of the method or device embodying his conception by the fact that other persons employed by him for the purpose reduced or assisted in reducing his conception to practice;[92] and, in general, he may properly claim as his own invention any modification, change, improvement, or discovery, not in itself a complete and independent invention, suggested or made by the employee with respect to the means of realizing the conception communicated to him by the employer.[93] The rule just stated is applicable only if the relation between the parties is substantially that of employer and employee.[94] It is not applicable merely because the parties are engaged in the work of a common employer.[95] It is otherwise, however, if the coemployees bear to each other the relation of principal and assistant.[96] Employees, as much as employers, are entitled to their

Fed. 1012, 81 CCA 290; Wilson v. Singer, 30 F. Cas. No. 17,835.

78. De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; De Laval Separator Co. v. Vermont Farm Mach. Co., 126 Fed. 536 [aff 135 Fed. 772, 68 CCA 474]; Worden v. Fisher, 11 Fed. 505.

79. De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545].

80. De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., supra.

81. Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587; Lemp v. Randall, 33 App. (D. C.) 430.

82. Cheshire v. Cox Multi-Mailer Co., 229 Fed. 415, 143 CCA 535; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484, 186 Fed. 495, 108 CCA 502.

83. Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Cheshire v. Cox Multi-Mailer Co., 229 Fed. 415, 143 CCA 535; De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484; Quincey Min. Co. v. Krause, 151 Fed. 1012, 81 CCA 290; Page Woven Wire Fence Co. v. Land, 49 Fed. 936; Priestly v. Montague, 47 Fed. 650; Schlicht, etc., Co. v. Chicago Sewing-Mach. Co., 36 Fed. 585; Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 449; Hoe v. Kahler, 25 Fed. 271, 23 Blatchf. 354, 12 Fed. 111, 20 Blatchf. 430 [app dism 131 U. S. 439 mem, 9 SCt 799 mem, 33 L. ed. 218 mem]; Worden v. Fisher, 11 Fed. 505; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4.

[a] **The testimony of one of two joint patentees** and alleged joint inventors, that he was in fact the sole inventor, is neutralized by his former oath, taken for the purpose of obtaining the patent. Schlicht, etc., Co. v. Chicago Sewing-Mach. Co., 36 Fed. 585.

84. United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [certiorari den 205 U. S. 547 mem, 27 SCt 795 mem, 51 L. ed. 924 mem].

85. De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; Sieber, etc., Mfg. Co. v. Chicago Binder, etc., Co., 177 Fed. 439 [aff 184 Fed. 930, 107 CCA 252]; Metz v. Johnson, 112 Fed. 1014; Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 449; Butler v. Bainbridge, 29 Fed. 142; Worden v. Fisher, 11 Fed. 505.

86. Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587.

87. Page Woven Wire Fence Co. v. Land, 49 Fed. 936.

88. Lemp v. Randall, 33 App. (D. C.) 430.

89. Ashcroft v. Cutter, 2 F. Cas. No. 578, 6 Blatchf. 511.

90. Lemp v. Randall, 33 App. (D. C.) 430.

Insufficiency of uncorroborated testimony to establish time of conception see supra § 132.

91. Cross references:

Rights of employer and employee with respect to inventions of employees see Master and Servant §§ 167–171.

Rights of government employees to obtain patent see infra § 137.

92. Union Paper Collar Co. v. Van Deusen, 23 Wall. (U. S.) 530, 563, 23 L. ed. 128; United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [aff 138 Fed. 136]; Sparkman v. Higgins, 22 F. Cas. No. 13,208, 1 Blatchf. 205, 1 Fish. Pat. Cas. 110; Wellman v. Blood, 29 F. Cas. No. 17,385, McA. Pat. Cas. 432.

"Where a person has discovered a new and useful principle in a machine, manufacture, or composition of matter, he may employ other persons to assist in carrying out that principle." Union Paper Collar Co. v. Van Deusen, supra.

93. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286 [rev 214 Fed. 100, 130 CCA 576]; Union Paper Collar Co. v. Van Deusen, 23 Wall. (U. S.) 530, 23 L. ed. 128; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; Young v. Grand Rapids Refrigerator Co., 268 Fed. 966; Minerals Separation, Ltd. v. Hyde, 207 Fed. 956 [rev on other grounds 214 Fed. 100, 130 CCA 576 (certiorari granted 235 U. S. 701 mem, 35 SCt 202 mem, 59 L. ed. 432 mem, and rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286)]; Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 Fed. 47; Dental Vulcanite Co. v. Wetherbee, 7 F. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Goodyear v. Day, 10 F. Cas. No. 5,566; King v. Gedney, 14 F. Cas. No. 7,795, McA. Pat. Cas. 443; Watson v. Bladen, 29 F. Cas. No. 17,277, 1 Robb Pat. Cas. 510, 4 Wash. C. C. 580; Wellman v. Blood, 29 F. Cas. No. 17,385, McA. Pat. Cas. 432; Huebel v. Bernard, 90 Off. Gaz. (U. S.) 751; Myers v. Myers, 55 App. (D. C.) 281, 4 F. (2d) 948; Widmer v. Sipp, 51 App. (D. C.) 386, 280 Fed. 460; Laughlin v. Burry, 50 App. (D. C.) 273, 270 Fed. 1013; Gammeter v. Neidich, 45 App. (D. C.) 170; Moody v. Colby, 41 App. (D. C.) 248; Broadwell v. Long, 36 App. (D. C.) 418; McKillop v. Fetzer, 31 App. (D. C.) 586; Neth v. Ohmer, 30 App. (D. C.) 478; Braunstein v. Holmes, 30 App. (D. C.) 328; Larkin v. Richardson, 28 App. (D. C.) 471; Kreag v. Green, 28 App. (D. C.) 437; Orcutt v. McDonald, 27 App. (D. C.) 228; Gallagher v. Hastings, 21 App. (D. C.) 88; Gedge v. Cromwell, 19 App. (D. C.) 192; Tyler v. Kelch, 19 App. (D. C.) 180; Miller v. Kelley, 18 App. (D. C.) 163; Huebel v. Bernard, 15 App. (D. C.) 510; Hunt v. McCaslin, 10 App. (D. C.) 527; Milton v. Kingsley, 7 App. (D. C.) 531; Allen v. Rawson, 1 C. B. 551, 50 ECL 551, 135 Reprint 656.

"Where the employer has conceived the plan of an invention and is engaged in experiments to perfect it, no suggestions from an employee, not amounting to a new method or arrangement, which, in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement." Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 603, 19 L. ed. 177.

"The law is well settled that when one conceives the principle or plan of an invention, and employs another to perfect the details and realize his conception, though the latter may make valuable improvements therein, such improved result belongs to the employer." Kreag v. Geen, 28 App. (D. C.) 437, 440.

[a] **Rule applied.**—A claim that patentees were not the original discoverers of the process patented because an employee of theirs made the analyses and observations which resulted immediately in the discovery cannot be allowed where the proof establishes that the patentees planned the experiments in progress when the discovery was made, directed the investigations day by day, conducting them in large part personally, and that they interpreted the results. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286.

94. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; Young v. Grand Rapids Refrigerator Co., 268 Fed. 966.

95. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem].

96. Ladoff v. Dempster, 36 App. (D. C.) 520; Braunstein v. Holmes, 30 App. (D. C.) 328; Robinson v. McCor-

own independent inventions;[97] and where the suggestions of the employee go to make up a complete and perfect method or device, embracing the substance of all that is embodied in a patent issued subsequently to the party to whom suggestions were made, the patent is invalid.[98] The rule that one who employs another to perfect the details of an invention of which he has conceived the general principle or plan is entitled to the benefit of the other's work does not apply where the general principle was not conceived by the employer,[99] or, if it was, was not communicated to the employee.[1] Nor can an employer be regarded as the actual inventor where he merely suggested the desirability of a certain result without communicating any suggestions as to the means by which it could be attained.[2] This is true, even though the employee made the invention or discovery while making experiments at the request and expense of the employer.[3] The communication made by the employer must be sufficiently full and clear with respect to the essential elements of the invention to enable the employee to give it practical form and effect without the exercise of invention on his part.[4] In other words, the work of the employee in giving form and effect to the invention communicated must be nothing more than the exercise of mechanical skill as applied to the subject matter.[5] The original conception as disclosed by the employer need not be identical in all respects with the method or device finally adopted.[6] If the generic invention was communicated to the employee, the employer is not deprived of the right to obtain a patent for the specific method or device produced by the employee by the fact that a slightly different embodiment was disclosed to the employee.[7]

Presumptions and burden of proof. Where the relation of employer and employee is established, a presumption arises that the employer is the inventor of the thing produced by their joint effort,[8] and he who asserts that the invention is the independent invention of the employee has the burden of establishing that fact by clear and satisfactory proof.[9] The presumption in favor of the employer is, of course, strengthened by a decision of the patent office awarding him priority over the employee in interference proceedings.[10] Before any such presumption arises, it must appear that the employee was engaged in perfecting the device under the general directions of the employer,[11] or, at least, that the broad idea was disclosed to the employee by the employer.[12]

[§ 137] **F. Government Employees.** Government employees other than employees of the patent office have the same right to obtain a patent for an invention as persons not engaged in the government service.[13]

Officers and employees of patent office. Congress has expressly provided that all officers and employees of the patent office shall be incapable, during the period for which they hold their appointments, to acquire or take directly or indirectly, except by inheritance or bequest, any right or interest in any patent issued by the office.[14] A person taking employment in the patent office does not thereby forfeit, or dedicate to the public, any invention previously made by him.[15] The statute merely prevents him from acquiring an interest in a patent while he remains an employee of the office.[16] When his employment ceases, he may obtain a patent for an invention made either before his employment commenced,[17] or during his term of office.[18] If made during his term of office, the patent dates from the time the invention was made.[19]

[§ 138] **G. Assignees.**[20] By authority of express statutory provision,[21] patents may be granted and issued to the assignee of the inventor.[22] The statute provides that the assignment must first be entered of record in the patent office.[23] But recording at any time before the patent is issued is sufficient.[24] If they are first entered of record in the patent office, it is immaterial that the assignee holds

mick, 29 App. (D. C.) 98, 10 AnnCas 548.

97. Union Paper Collar Co. v. Van Deusen, 23 Wall. (U. S.) 530, 23 L. ed. 128; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Damon v. Eastwick, 14 Fed. 40; Berdan Fire Arms Mfg. Co. v. Remington, 3 F. Cas. No. 1,336; Widmer v. Sipp, 51 App. (D. C.) 386, 280 Fed. 460; Eshleman v. Shantz, 39 App. (D. C.) 434; Ladoff v. Dempster, 36 App. (D. C.) 520; Smith v. Phelps, 35 App. (D. C.) 358; McKeen v. Jerdone, 34 App. (D. C.) 163; Robinson v. McCormick, 29 App. (D. C.) 98, 10 AnnCas 548; Sendelbach v. Gillette, 22 App. (D. C.) 168; Ex p. Scott, L. R. 6 Ch. 274; Bloxam v. Elsee, 6 B. & C. 169, 13 ECL 88, 108 Reprint 415, 1 C. & P. 558, 12 ECL 320, 171 Reprint 1316; Matter of Russell, 2 De G. & J. 130, 59 EngCh 104, 45 Reprint 937.

"Persons employed, as much as employers, are entitled to their own independent inventions." Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 603, 19 L. ed. 177.

98. Union Paper Collar Co v. Van Deusen, 23 Wall. (U. S.) 530, 23 L. ed. 128; Agawam Woolen Co v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177.

99. Lewis v. Strom, 285 Fed. 985; Ladoff v. Dempster, 36 App. (D. C.) 520.

1. Lewis v. Strom, 285 Fed. 985.

2. Union Paper Collar Co v. Van Deusen, 23 Wall. (U. S.) 530, 23 L. ed. 128; Streat v. Simpson, 53 Fed. 358; Damon v. Eastwick, 14 Fed. 40; Eshleman v. Shantz, 39 App. (D. C.) 434; Ladoff v. Dempster, 36 App. (D. C.) 520; Smith v. Phelps, 35 App. (D. C.) 358; McKeen v. Jerdone, 34 App. (D. C.) 163; Robinson v. McCormick, 29 App. (D. C.) 98, 10 AnnCas 548.

3. Damon v. Eastwick, 14 Fed. 40.

4. Ladoff v. Dempster, 36 App. (D. C.) 520; Smith v. Phelps, 35 App. (D. C.) 358; Robinson v. McCormick, 29 App. (D. C.) 98, 10 AnnCas 548; Sendelbach v. Gillette, 22 App. (D. C.) 168.

5. Sendelbach v. Gillette, supra.

6. Laughlin v. Burry, 50 App. (D. C.) 273, 270 Fed. 1013.

7. Laughlin v. Burry, supra.

8. United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [certiorari den 205 U. S. 547 mem, 27 SCt 795 mem, 51 L. ed. 924 mem]; Miller v. Kelley, 18 App. (D. C.) 163.

9. Larson v. Crowther, 1 F.(2d) 761 [certiorari den 267 U. S. 593, 45 SCt 230, 69 L. ed. 804]; Laughlin v. Burry, 50 App. (D. C.) 273, 270 Fed. 1013; Thibodeau v. Hildreth, 25 App. (D. C.) 320; Corry v. McDermott, 25 App. (D. C.) 305; Gallagher v. Hastings, 21 App. (D. C.) 88; Gedge v. Cromwell, 19 App. (D. C.) 192; Miller v. Kelley, 18 App. (D. C.) 163.

[a] **Rule applied to attorney and client.**—Goodrum v. Clement, 51 App. (D. C.) 184, 277 Fed. 586, 279 Fed. 304; Baumgardner v. Hudson, 51 App. (D. C.) 150, 277 Fed. 552.

10. United Shirt, etc., Co v. Beattie, 149 Fed. 736, 79 CCA 442 [certiorari den 205 U. S. 547 mem, 27 SCt 795 mem, 51 L. ed. 924 mem].

11. Jameson v. Ellsworth, 40 App. (D. C.) 164; Duff v. Latshaw, 31 App. (D. C.) 235.

12. Jameson v. Ellsworth, 40 App. (D. C.) 164.

13. Gill v. U. S., 160 U. S. 426, 16 SCt 322, 40 L. ed. 480; Solomons v. U. S., 137 U. S. 342, 11 SCt 88, 34 L. ed. 667.

Rights of employees generally to obtain patent see supra § 136.

14. U. S. Code tit 35 § 4.

15. Page v. Holmes Burglar Alarm Tel. Co., 1 Fed. 304, 17 Blatchf. 485.

16. Page v. Holmes Burglar Alarm Tel. Co., supra.

17. Page v. Holmes Burglar Alarm Tel. Co., supra.

18. Foote v. Frost, 9 F. Cas. No. 4,910, 3 Bann. & A. 607.

19. Foote v. Frost, supra.

20. Suit to obtain issuance of patent see infra § 247.

21. U. S. Code tit 35 § 44.

22. Hendrie v. Sayles, 98 U. S. 546, 25 L. ed. 176; De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; Elliott-Fisher Co. v. Underwood Typewriter Co., 176 Fed. 372; Wright v. Randel, 8 Fed. 591, 19 Blatchf. 495; Harrison v. Morton, 76 Off. Gaz. (U. S.) 1275.

Right of assignee to obtain a reissue patent see infra §§ 309, 393.

Title of assignee in patent issued to patentee see infra § 375.

23. U. S. Code tit 35 § 44.

24. Gay v. Cornell 10 F. Cas. No. 5,280, 1 Blatchf. 506, Fish. Pat. R. 312.

through mesne assignments from the inventor.[25] Whether the patent shall issue to the inventor or to the assignee is left to the discretion of the patent office.[26] A patent may issue jointly to the inventor and his assignee where the assignee holds an undivided part interest.[27] A valid patent may issue to an assignee of two applicants who applied for the patent as joint inventors, even though one of the applicants was the sole inventor.[28]

Patent office rules. The rules of the patent office provide that, in order that a patent may issue to an assignee, the assignment must be entered not later than the date of the payment of the final fee,[29] and require the assignment, if given subsequently to the execution of the application, to give the date of execution of the application, or the date of filing, or the serial number, so that there can be no mistake as to the particular invention intended.[30] The rules also provide that, in case of an assignment of the whole interest in the invention, or of the whole interest in the patent to be granted, the patent will issue to the assignee; and if the assignee holds an undivided part interest, the patent will issue jointly to the inventor and the assignee.[31]

[§ 139] **H. Personal Representatives of Deceased Inventor—1. In General.** Congress has expressly provided that, when any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve upon the executor or administrator, in trust for the heirs at law of decedent. in case he should have died intestate, or, if he shall have left a will disposing of the same, then in trust for his devisees in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime.[32] This provision is applicable not only when the inventor dies before filing his application,[33] but also when death transpires after the application has been filed.[34] The statute under consideration does not prescribe the form of the letters patent to be issued,[35] and while the rules of the patent office now provide that the letters patent may issue to the executor or administrator upon proper intervention,[36] the validity of the patent is not affected by the fact that the letters patent were issued in the name of the deceased inventor.[37] Nor is it essential to the validity of the letters patent that they contain words creating a trust in favor of the heirs or devisees,[38] or that such beneficiaries be named upon the face of the patent.[39]

[§ 140] **2. Foreign Executors or Administrators.** By express statutory provision the executor or administrator duly authorized by the law of any foreign country to administer upon the estate of a deceased inventor shall, in case such inventor was not domiciled in the United States at the time of his death, have the right to apply for and obtain the patent.[40] The authority of such foreign executor or administrator is required to be proved by certificate of a diplomatic or consular officer of the United States.[41]

[§ 141] **I. Guardians of Insane Persons.** Congress has expressly provided that, when any person having made any new invention or discovery for which a patent might have been granted becomes insane before a patent is granted, the right of applying for and obtaining the patent shall devolve upon his legally appointed guardian, conservator, or representative in trust for his estate in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him while sane.[42]

[§ 142] **J. Married Women.** The right of a married woman to obtain a patent is the same as that of a feme sole.[43]

[§ 143] **K. Infants.** The right of an inventor to obtain a patent is not affected by the fact that he is an infant.[44] This is so, even though he is under guardianship.[45]

[§ 144] **L. Nonresidents.** The present statute contains no limitation on the right of an inventor to obtain a patent by reason of his being a nonresident of the United States.[46]

[§ 145] **M. Aliens.** An early statute limited the right to obtain a patent to citizens of the United States.[47] By a subsequent act, all the rights and privileges given to citizens of the United States were extended to aliens, who, at the time of petitioning, had resided for two years within the United States.[48] The present statute granting the right to obtain a patent to "any person who has invented or discovered" any patentable invention contains no limitation with respect to the citizenship of the inventor.[49]

In England, the statute specifically provides that any person, whether a British subject or not, may make an application for a patent.[50]

VII. APPLICATION AND PROCEEDINGS THEREON*[51]

[§ 146] **A. In General.** The procedure by which a patent for an invention may be obtained is prescribed by statute[52] and the rules of the patent office.[53] The right to obtain a patent being entirely statutory,[54] it is essential that all the requirements relating to the application and to the proceedings thereon be complied with.[55]

[§ 147] **B. Necessity of Application.** By virtue

25. Elliott-Fisher Co. v. Underwood Typewriter Co., 176 Fed. 372.
26. Elliott-Fisher Co v. Underwood Typewriter Co., supra.
27. Wright v. Randel, 8 Fed. 591, 19 Blatchf. 495.
28. De Laski, etc., Circular Woven Tire Co. v. William R. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545].
29. Patent Office Rules Oct. 1, 1927, rule 26.
Payment of final fee see infra § 174.
30. Patent Office Rules Oct. 1, 1927, rule 26.
31. Patent Office Rules Oct. 1, 1927, rule 26.
32. U. S. Code tit 35 § 46.
[a] **In England** the executor or administrator must apply for patent within six months. Act (1883) § 34 (46 & 47 Vict. c. 57).
Right of executor or administrator to obtain a reissue patent see infra § 309.
33. De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.
34. De la Vergne Refrigerating Mach. Co. v. Featherstone, supra.
35. De la Vergne Refrigerating Mach. Co. v. Featherstone, supra.
36. Patent Office Rules Oct. 1, 1927, rule 25.
37. See infra § 271.
38. See infra § 271.
39. See infra § 271.
40. U. S. Code tit 35 § 46.
41. U. S. Code tit 35 § 46.
42. U. S. Code tit 35 § 46.
Right of guardian of insane person to secure a reissue patent see infra § 309.
43. Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.
44. Fetter v. Newhall, supra.
45. Fetter v. Newhall, supra.
46. U. S. Code tit 35 § 31.
47. Act Febr. 21, 1793 (1 St. at L. 318).
48. Act April 17, 1800 (2 St. at L. 37).
49. U. S. Code tit 35 § 31.
50. Act (1883) § 34 (46 & 47 Vict. c 57).
51. **Application for:**
Extension of patent see infra § 304.
Reissue see infra § 320.
52. U. S. Code tit 35 §§ 33–56.
53. See infra § 242.
54. See supra § 2.
55. Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576; Roemer

*By Chas. W. Riley (§§ 146–174).

of express statutory provision,[56] the right to obtain a United States patent for an invention depends on an application made and pending for that purpose.[57]

[§ 148] **C. Requisites of Application—1. In General.** Applications for letters patent of the United States must be made to the commissioner of patents.[58] They must be in writing,[59] and signed by the inventor,[60] or, in the event of his death or insanity, by his executor or administrator or his legally appointed guardian, conservator, or representative.[61] The application must be in the English language,[62] and must include a petition, specification, and oath, and drawings when required.[63] Every application must conform to these requirements.[64] The patent office has no power to dispense with any of them.[65] Until all the parts of the application and the first fee of twenty dollars and one dollar for each claim in excess of twenty has been received, the application will not be placed upon the files for examination.[66]

[§ 149] **2. The Petition.** An applicant for a patent must file a petition requesting the grant of a patent.[67] The petition must be addressed to the commissioner of patents,[68] it must be in the English language,[69] and must state the name, residence, and post-office address of the petitioner,[70] designate by title the invention sought to be patented,[71] contain a reference to the specifications for a full disclosure of such invention,[72] and must be signed by the inventor,[73] or, in case of his death or insanity, by his personal representative.[74] It need not describe the invention except by reference to the specification.[75]

[§ 150] **3. The Specification—a. In General.** An applicant for a patent is required by statute to file a written description of his invention or discovery, and of the manner and process of making, constructing, compounding, and using it, and particularly to point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery.[76] The written description and the claim, taken together, constitute what is known in the language of the patent law as the "specification."[77] The term "specification" is sometimes used in a limited sense, excluding the claim, and including only the description.[78] The filing of the required specification forms the consideration for the issuance of the patent,[79] being regarded as a condition precedent to the right of the commissioner to grant the application;[80] and no valid patent can be obtained if this requirement is not complied with.[81] The specification must be in the English language.[82]

The object of the specification is to make the invention accessible to the public,[83] and to define the limits of the monopoly given by the public to the patentee.[84] Another purpose of this requirement is to enable the patent office and the courts to determine whether the subject matter claimed as invention is new or old.[85]

[§ 151] **b. Description of Invention—(1) In General.** Applicant must describe the invention itself,[86]

v. Simon, 95 U. S. 214, 24 L. ed. 384; Jost v. Borden Stove Co., 262 Fed. 163.

Presumption of compliance from issuance of patent see infra § 257.

56. U. S. Code tit 35 § 33.

57. Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 SCt 593, 28 L. ed. 493; Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505; Railway Register Mfg. Co. v. Broadway, etc., R. Co., 26 Fed. 522 [app dism 149 U. S. 783 mem, 13 SCt 1051 mem, 37 L. ed. 958 mem].

58. U. S. Code tit 35 § 33.

59. U. S. Code tit 35 § 33.

60. U. S. Code tit 35 § 33; Patent Office Rules Oct. 1, 1927, rule 30.

61. Patent Office Rules Oct. 1, 1927, rule 30.

62. Patent Office Rules Oct. 1, 1927, rule 30.

63. Patent Office Rules Oct. 1, 1927, rule 30.

Cross references:

Drawings, when required see infra §.

Requisites of:

Drawings see infra § 171.

Oath see infra § 170.

Petition see infra § 149.

Specification see infra §§ 150–169.

Specimens of ingredients of a composition of matter, when required see infra § 173.

64. Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 SCt 593, 28 L. ed. 493; Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Brewer-Titchener Corp. v. American Forging, etc., Co., 300 Fed. 335; In re Drawbaugh, 9 App. (D. C.) 219.

[a] **Illustration.**—The provisions of Rev. St. § 4888, that an application for a patent "shall be signed by the inventor," and of § 4892 that "the applicant shall make oath that he does verily believe himself to be the original and first inventor," are mandatory, and compliance with them is a requisite condition precedent to issuance of a valid patent. Brewer-Titchener Corp. v. American Forging, etc., Co., 300 Fed. 335.

65. Henry v. Francestown Soapstone Co., 2 Fed. 78, 5 Bann. & A. 108.

66. Pract. Rules, rule 31.

67. Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505.

68. Patent Office Rules Oct. 1, 1927, rule 33.

69. Patent Office Rules Oct. 1, 1927, rule 30.

70. Patent Office Rules Oct. 1, 1927, rule 33.

71. Patent Office Rules Oct. 1, 1927, rule 33.

72. Patent Office Rules Oct. 1, 1927, rule 33.

73. Patent Office Rules Oct. 1, 1927, rule 33.

74. Patent Office Rules Oct. 1, 1927, rule 33.

75. Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505.

76. U. S. Code tit 35 § 33.

Necessity of explaining principle of machine and best mode of application thereof see infra § 154.

77. Wilson v. Coon, 6 Fed. 611, 18 Blatchf. 532 [rev on other grounds 113 U. S. 268, 5 SCt 537, 28 L. ed. 963]; Badische Anilin, etc., Fabrik v. Higgins, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290.

78. Wilson v. Coon, 6 Fed. 611, 18 Blatchf. 532.

79. Beidler v. U. S., 253 U. S. 447, 40 SCt 564, 64 L. ed. 1006; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Rohm v. Martin Dennis Co., 263 Fed. 388; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552].

80. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

81. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Rohm v. Martin Dennis Co., 263 Fed. 388 [aff 263 Fed. 106].

82. Patent Office Rules Oct. 1, 1927, rule 30.

83. Beidler v. U. S., 253 U. S. 447, 40 SCt 564, 64 L. ed. 1006; Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Metals Recovery Co. v. Anaconda Copper Min. Co., 26 F. (2d) 736; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585, 620; Rohm v. Martin Dennis Co., 263 Fed. 388 [aff 263 Fed. 106]; National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72; Valvona-Marchiony Co. v. Perella, 212 Fed. 168, 129 CCA 24; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 53 CCA 583 [certiorari den 187 U. S. 641 mem, 23 SCt 842 mem, 47 L. ed. 345 mem]; Judson v. Moore, 14 F. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

"A disclosure is necessary in order to give the public the benefit of the invention after the patent shall expire." Beidler v. U. S., 253 U. S. 447, 453, 40 SCt 564, 64 L. ed. 1006.

84. Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Evans v. Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Metals Recovery Co. v. Anaconda Copper Min. Co., 26 F. (2d) 736; National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72; Valvona-Marchiony Co. v. Perella, 212 Fed. 168, 129 CCA 24; Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409, 79 CCA 229; Ross-Moyer Mfg. Co. v. Randall, 104 Fed. 355, 43 CCA 578; Judson v. Moore, 14 F. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

85. Steel Wheel Corp. v. B. F. Goodrich Rubber Co., 27 F. (2d) 427.

86. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 SCt 593, 28 L. ed. 493; Skinner Irr. Co. v. March Automatic Irr. Co., 9 F. (2d) 751; General Electric Co. v. Nitro Tungsten Lamp Co., 266 Fed. 994; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215; Windle v. Parks, etc., Mach. Co., 134 Fed. 381, 67 CCA 363; Gunn v. Savage, 30 Fed. 366; Knox v. Quicksilver Min. Co., 4 Fed. 809; Huggins v. Hubby, 12 F. Cas. No. 6,-

some practical method of carrying it into effect,[87] and some practical use to which it may be applied.[88] The applicant is required not only to describe some practical method of carrying his invention into effect,[89] but to describe what he conceives to be the best mode.[90] However, he need not describe all possible ways of carrying the invention into effect.[91] Nor is he required to specify all possible methods of using the invention.[92] While the description must be complete in itself,[93] it may be read in connection with the models or drawings which accompany it.[94]

[§ 152] **(2) Sufficiency of Description—(a) In General.** The statute expressly provides that the description which applicant must file shall be in such full, clear, concise, and exact terms as to enable any person skilled in the art and science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the invention or discovery.[95] A description possessing such a degree of fullness, clarity, and exactitude is essential to the validity of a patent.[96] No valid patent can be obtained where the description is so vague or in-

839; Neuberth v. Lizotte, 32 App. (D. C.) 329.

[a] **In England** applicant must distinguish between what is original and what was communicated from abroad. Renard v. Levinstein, 10 L. T. Rep. N. S. 177.

87. Beidler v. U. S., 253 U. S. 447, 40 SCt 564, 64 L. ed. 1006; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Skinner Irr. Co. v. March Automatic Irr. Co., 9 F. (2d) 751; Lyon v. Boh, 1 F. (2d) 48 [rev on other grounds 10 F. (2d) 30]; Electro-Dynamic Co. v. U. S. Light, etc., Corp., 278 Fed. 80; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Hudepohl Brewing Co. v. Hehle, 259 Fed. 232, 170 CCA 300; H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 500; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 53 CCA 583 [certiorari den 187 U. S. 641 mem, 23 SCt 842 mem, 47 L. ed. 345 mem]; In re Blackmore, 32 App. (D. C.) 338.

88. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215.

89. See supra text and note 87.

90. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289; Grier v. Castle, 17 Fed. 523.

[a] **In England** (1) the rule is the same. Wood v. Zimmer, Holt N. P. 58, 3 ECL 32, 171 Reprint 161, 20 ERC 497; Neilson v. Harford, 8 M. & W. 806, 151 Reprint 1266. (2) But a patentee is not required to include in his final specifications a description of a better mode of application not discovered by him until after the filing of the provisional specifications. Edison, etc., Electric Light Co. v. Woodhouse, 32 Ch. D. 520.

91. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Abrahams v. Universal Wire Co., 10 F. (2d) 838; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; International Time Recording Co. v. Dey, 142 Fed. 736, 74 CCA 68; In re Ellis, 37 App. (D. C.) 203.

92. Diamond Rubber Tire Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; I. T. S. Rubber Co. v. Panther Rubber Co., 260 Fed. 934, 171 CCA 576; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Warren Steam Pump Co. v. Blake, etc., Steam Pump Works, 163 Fed. 263, 91 CCA 19; General Electric Co. v. Bullock Electric Mfg. Co., 152 Fed. 427, 81 CCA 569; Scott v. Fisher Knitting Mach. Co., 145 Fed. 915, 76 CCA 447; Sanitary Fireproofing, etc., Co. v. Sprickerhoff, 139 Fed. 801, 71 CCA 565; Stilwell-Bierce, etc., Co. v. Eufaula Cotton Oil Co., 117 Fed. 410, 54 CCA 584 [certiorari den 189 U. S. 509 mem, 23 SCt 850 mem, 47 L. ed. 923 mem]; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 53 CCA 583 [certiorari den 187 U. S. 641 mem, 23 SCt 842 mem, 47 L. ed. 345 mem]; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 CCA 36; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 545, 19 CCA 13, 25; McCormick Harvesting Mach. Co. v. Aultman, 69 Fed. 371, 16 CCA 259; Blanchard v. Eldridge, 3 F. Cas. No. 1,509; Pike v. Potter, 19 F. Cas. No. 11,162, 3 Fish. Pat. Cas. 55.

"It is objected that there is no reference in the specification to the fact that the object of the invention was to produce a fabric capable of being fleeced. But it is well settled that the patentee is not obliged to state all the objects of his invention, and that he is protected in all the beneficial uses thereof within its scope; and here no statement as to fleecing was necessary." Scott v. Fisher Knitting Mach. Co., 145 Fed. 915, 918, 76 CCA 447.

[a] **Illustration.**—It is not necessarily improper for a patentee, believing himself to be the inventor of a new process, so to frame his claims and specification as to anticipate and cut off attacks in the patent office that may be based upon a prior art which he considers irrelevant, and for this purpose to omit mention of a substance capable of use in the practice of his process which may have been described in prior patents. Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442.

93. Gunn v. Savage, 30 Fed. 366.

94. Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505; Windle v. Parks, etc., Mach. Co., 134 Fed. 381, 67 CCA 363; American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83; Holt v. Kendall, 26 Fed. 622 [app dism 127 U. S. 784 mem, 32 L. ed. 330 mem]; Earle v. Sawyer, 8 F. Cas. No. 4,247, 4 Mason 1; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Washburn v. Gould, 29 F. Cas. No. 17,214, 3 Story 122.

95. U. S. Code tit 35 § 33.

96. Beidler v. U. S., 253 U. S. 447, 40 SCt 564, 64 L. ed. 1006; Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; Bene v. Jeantet, 129 U. S. 683, 9 SCt 428, 32 L. ed. 803; Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Steel Wheel Corp. v. B. F. Goodrich Rubber Co., 27 F. (2d) 427; George Haiss Mfg. Co. v. Link Belt Co., 27 F. (2d) 397; De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; Trane Co. v. Nash Engineering Co., 25 F. (2d) 267 [aff 20 F. (2d) 439]; Health Products Corp. v. Ex-Lax Mfg. Co., 22 F. (2d) 286 [aff 24 F. (2d) 245]; R. H. Comey Co. v. Monte Christi Corp., 17 F. (2d) 910; U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Westinghouse Electric, etc., Co. v. Metropolitan Electric Mfg. Co., 290 Fed. 661; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Featheredge Rubber Co. v. Miller Rubber Co., 259 Fed. 565, 170 CCA 527; H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 500; Solva Waterproof Glue Co. v. Perkins Glue Co., 251 Fed. 64, 163 CCA 314; Hemming Mfg. Co. v. Cutler-Hammer Mfg. Co., 243 Fed. 595, 156 CCA 293; Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; U. S. Column Co. v. Benham Column Co., 225 Fed. 55; Karl Kiefer Mach. Co. v. Unionwerke, 218 Fed. 847 [aff 231 Fed. 733, 146 CCA 17]; American Steel Foundries v. Scullin-Gallagher Iron, etc., Co., 197 Fed. 49, 116 CCA 576; Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; Hestonville, etc., R. Co. v. McDuffee, 185 Fed. 798, 109 CCA 606 [certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem]; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215; Donner v. American Sheet, etc., Co., 165 Fed. 199, 91 CCA 233; Panzl v. Battle Island Paper Co., 138 Fed. 48, 70 CCA 474 [mod 132 Fed. 607]; Windle v. Parks, etc., Mach. Co., 134 Fed. 381, 67 CCA 363; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., 125 Fed. 378, 60 CCA 244; De Lamar v. De Lamar Min. Co., 117 Fed. 240, 54 CCA 272; Miller v. Mawhinney Last Co., 105 Fed. 523, 44 CCA 581; Rickard v. Du Bon, 97 Fed. 96 [aff 103 Fed. 868, 43 CCA 360]; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Davis v. Parkman, 71 Fed. 961, 18 CCA 398; Michigan Cent. R. Co. v. Consolidated Car-Heating Co., 67 Fed. 121, 14 CCA 232, 69 Fed. 1, 16 CCA 106; Smith v. Murray, 27 Fed. 69; Grier v. Castle, 17 Fed. 523; Allen v. Hunter, 1 F. Cas. No. 225, 6 McLean 303; Ames v. Howard, 1 F. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Burr v. Cowperthwait, 4 F. Cas. No. 2,188, 4 Blatchf. 163; Emerson v. Hogg, 8 F. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. R. 77; Evans v. Hettick, 8 F. Cas. No. 4,562, 1 Robb Pat. Cas. 166, 3 Wash. C. C. 408 [aff 7 Wheat. 453, 5 L. ed. 496]; Forbes v. Barstow Stove Co., 9 F. Cas. No. 4,923, 2 Cliff. 379; Judson v. Moore, 14 F. Cas. No. 7,569, 1 Bond 285, 1 Fish. Pat. Cas. 544; Lippincott v. Kelly, 15 F. Cas. No. 8,381; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Mabie v. Haskell, 15 F. Cas. No. 8,653, 2 Cliff. 507; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Parker v. Stiles, 18 F. Cas. No. 10,749, 1 Fish. Pat. Cas. 319, 5 McLean 44; Schneider v. Thill, 21 F. Cas. No. 12,470a, 5 Bann. & A. 565; Sullivan v. Redfield, 23 F. Cas. No. 13,597, Paine 441, 1 Robb Pat. Cas. 477; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond

definite that persons skilled in the art are unable to make and use the invention,[97] or where such inability results from incompleteness of description.[98] It has been asserted that nothing should be left to experiment.[99] The specification, however, is addressed to persons skilled in the art,[1] and a description is sufficient if it will enable any person skilled in the art to make and use the invention.[2] This is true, even though the description is to some extent inaccu-

115, 3 Fish. Pat. Cas. 343; Teese v. Phelps, 23 F. Cas. No. 13,819, McAll. 48; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397; Vogler v. Semple, 28 F. Cas. No. 16,987, 2 Bann. & A. 556, 7 Biss. 382; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20; Webster Loom Co. v. Higgins, 29 F. Cas. No. 17,342, 4 Bann. & A. 88, 15 Blatchf. 446 [rev on other grounds 105 U. S. 580, 26 L. ed. 1177]; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Whitney v. Mowry, 29 F. Cas. No. 17,592, 2 Bond 45, 3 Fish. Pat. Cas. 157; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; In re Blackmore, 32 App. (D. C.) 338; Stevens v. Seher, 11 App. (D. C.) 245; Wegmann v. Corcoran, 13 Ch. D. 65; Stevens v. Keating, 2 Exch. 772, 154 Reprint 702.

"Ever since Grant v. Raymond, 6 Pet. 218, 247, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent." Beidler v. U. S., 253 U. S. 447, 453, 40 SCt 564, 64 L. ed. 1006.

97. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139; Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; Tyler v. Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Reflectolyte Co. v. Luminous Unit Co., 20 F. (2d) 607; R. H. Comey Co. v. Monte Christi Corp., 17 F. (2d) 910; U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704; Featheredge Rubber Co. v. Miller Rubber Co., 259 Fed. 565, 170 CCA 527; Shrauger v. Phillip Bernard Co., 247 Fed. 547; Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; U. S. Column Co. v. Benham Column Co., 225 Fed. 55; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215; American Lava Co. v. Kirschberger, 155 Fed. 740, 84 CCA 166 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; American Lava Co. v. Steward, 155 Fed. 731, 84 CCA 157 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; Germer Stove Co. v. Art Stove Co., 150 Fed. 141, 80 CCA 9; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., 125 Fed. 378, 60 CCA 244; De Lamar v. De Lamar Min. Co., 117 Fed. 240, 54 CCA 272; In re Blackmore, 32 App. (D. C.) 338; In re Duncan, 28 App. (D. C.) 457.

"The teaching of the specifications and the disclosure by the patentee must be such that, after the patent has expired, a user thereof shall not be left to the blind groping of experimental work, but by the plain teaching of the specification be enabled to use the process with certainty." U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704, 705.

98. Beidler v. U. S., 253 U. S. 447, 40 SCt 564, 64 L. ed. 1006; Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; Health Products Corp. v. Ex-Lax Mfg. Co., 22 F. (2d) 286 [aff 24 F. (2d) 245]; Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; R. H. Comey Co. v. Monte Christi Corp., 17 F. (2d) 910; Manton-Gaulin Mfg. Co. v. Wright-Ziegler Co., 271 Fed. 391; Rohm v. Martin Dennis Co., 263 Fed. 388; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Featheredge Rubber Co. v. Miller Rubber Co., 259 Fed. 565, 170 CCA 527; Hudepohl Brewing Co. v. Hehle, 259 Fed. 232, 170 CCA 300; H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 500; Hemming Mfg. Co. v. Cutler-Hammer Mfg. Co., 243 Fed. 595, 156 CCA 293; Karl Kiefer Mach. Co. v. Unionwerke, 218 Fed. 847 [aff 231 Fed. 733, 146 CCA 17]; American Steel Foundries v. Scullin-Gallagher Iron, etc., Co., 197 Fed. 49, 116 CCA 576; Wolff Truck Frame Co. v. American Steel Foundries, 195 Fed. 940, 115 CCA 628; Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; L. H. Gilmer Co. v. Geisel, 187 Fed. 941, 109 CCA 620; Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409, 79 CCA 229 [rev 146 Fed. 549]; Neptune Meter Co. v. National Meter Co., 127 Fed. 563, 62 CCA 345.

99. Béné v. Jeantet, 129 U. S. 683, 9 SCt 428, 32 L. ed. 803; Tyler v. Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Head v. Stevens, 19 Wend. (N. Y.) 411.

1. Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Douglas Pectin Corp. v. Armour, 14 F. (2d) 768; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Goldschmidt Thermit Co. v. Primos Chemical Co., 292 Fed. 362 [certiorari den 263 U. S. 719 mem, 44 SCt 181 mem, 68 L. ed. 523 mem]; Goldschmidt Thermit Co. v. American Vanadium Co., 291 Fed. 81; Westinghouse Electric, etc., Co. v. Metropolitan Electric Mfg. Co., 290 Fed. 661; A. B. Dick Co. v. Barnett, 288 Fed. 799; Thomas A. Edison, Inc. v. Waterbury Battery Co., 281 Fed. 254 [aff 287 Fed. 320]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552]; Celluloid Mfg. Co. v. Russell, 37 Fed. 676; Mark v. Greenawalt, 32 App. (D. C.) 253.

2. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286; Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Lawther v. Hamilton, 124 U. S. 1, 8 SCt 342, 31 L. ed. 325; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Cohn v. U. S. Corset Co., 93 U. S. 366, 23 L. ed. 907; Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; Sewall v. Jones, 91 U. S. 171, 23 L. ed. 275; Mowry v. Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Power Specialty Co. v. Connecticut Light, etc., Co., 27 F. (2d) 928; Douglas Pectin Corp. v. Armour, 27 F. (2d) 814 [mod 14 F. (2d) 768, and reh den 21 F. (2d) 584]; Franc-Strohmenger v. Arthur Siegman, Inc., 27 F. (2d) 785 [aff 25 F. (2d) 108]; U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387 [aff 14 F. (2d) 629, and certiorari den 49 SCt 12 mem]; Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196; Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Parker Rust Proof Co. v. Ford Motor Co., 6 F. (2d) 649; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Miehle Printing Press, etc., Co. v. Miller Saw-Trimmer Co., 2 F. (2d) 744 [aff 6 F. (2d) 417]; Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680]; Goldschmidt Thermit Co. v. American Vanadium Co., 291 Fed. 81; A. B. Dick Co. v. Barnett, 288 Fed. 799; Atlantic, Gulf, etc., Co. v. Wood, 288 Fed. 148; Thomas A. Edison, Inc. v. Waterbury Battery Co., 281 Fed. 254 [aff 287 Fed. 320]; Pittsburgh Iron, etc., Foundries Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 148 CCA 390; Burke Electric Co. v. Independent Pneumatic Tool Co., 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 229 Fed. 150, 143 CCA 426; Conrader v. Judson Governor Co., 226 Fed. 207; Clark Blade, etc., Co. v. Gillette Safety Razor Co., 194 Fed. 421, 114 CCA 383 [aff 187 Fed. 149]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023 mem, 104 CCA 669 mem]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Victor Talking Mach. Co. v. American Graphophone Co., 145 Fed. 189 [aff 151 Fed. 601, 81 CCA 145]; Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 131 Fed. 483 [aff 138 Fed. 54, 70 CCA 480 (certiorari den 199 U. S. 608 mem, 26 SCt 750 mem, 50 L. ed. 331 mem)]; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 CCA 36; De Lamar v. De Lamar Min. Co., 110 Fed. 538 [aff 117 Fed. 240, 54 CCA 272]; Hensel-Colladay Co. v. Rosenau, 105 Fed. 968; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552]; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83; Maryland Hominy, etc., Co. v. Dorr, 46 Fed. 773; Am Ende v. Seabury, 36 Fed. 593 [aff 152 U. S. 561, 14 SCt 683, 38 L. ed. 553]; Michaelis v. Roessler, 34 Fed. 325; Burrows v. Wetherill, 4 F. Cas. No. 2,208, McA. Pat. Cas. 315; Dorsey Harvester Revolving Rake Co. v. Marsh, 7 F. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; Goodyear v. Wait, 10 F. Cas. No. 5,587, 5 Blatchf. 463, 3 Fish. Pat. Cas. 242; St. Louis Stamping Co. v. Quinby, 21 F. Cas. No. 12,240, 4 Bann. & A. 192; Stanley v. Whipple, 22 F. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Stephens v. Salisbury, 22 F. Cas. No. 13,369, McA. Pat. Cas. 379; Valentine v. Marshall, 28 F. Cas. No. 16,812a; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1; Wilbur v. Beecher, 29 F. Cas. No. 17,634, 2 Blatchf. 132, 1 Fish. Pat. Cas. 401; Société Anonyme des Anciens Etab-

rate,[3] indefinite,[4] or incomplete.[5] A description is not rendered insufficient by the fact that it is unintelligible to the unskilled,[6] or by the mere fact that persons skilled in the art might find it necessary to make several tests or trials in order to achieve the desired result,[7] or to ascertain the best working conditions.[8] The certainty of description which the statute requires is not greater than is reasonable, having regard for the subject matter.[9] That which is common and well-known need not be described.[10] Nor is it necessary to describe that which contributes only to the degree of benefit to be derived from the invention.[11] Whether a description is sufficient to enable a person of ordinary skill to make and use it is a question of fact;[12] in determining the question, all the surrounding circumstances are to be considered,[13] including the art to which the invention belongs,[14] its relation to other arts,[15] and the nature of the invention itself.[16] In general, the phrase "skilled in the art" refers to those of ordinary skill rather than the very expert.[17] But the phrase is always

lissements Cail v. U. S., 43 Ct. Cl. 25 [aff 224 U. S. 309, 32 SCt 479, 56 L. ed. 778]; Mark v. Greenawalt, 32 App. (D. C.) 253; Hopkins v. Newman, 30 App. (D. C.) 402.

"If a description is sufficiently full, clear, and exact so as to be effectually understood by any person skilled in the subject-matter of the patent, or the art to which it relates, that is all that is required to meet and overcome the defense of insufficient disclosure." Scovill Mfg. Co. v. Satler, 21 F. (2d) 630, 633.

[a] **That description is in terms of performance and result** is not fatal to the patent, if an ordinary artisan can follow the disclosure. Franc-Strohmenger v. Arthur Siegman, Inc., 27 F. (2d) 785 [aff 25 F. (2d) 108].

3. Parker Rust Proof Co. v. Ford Motor Co., 6 F. (2d) 649; Westinghouse Electric, etc., Co. v. Metropolitan Electric Mfg. Co., 281 Fed. 528; Barber v. Otis Motor Sales Co., 231 Fed. 755; International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569; Kupper v. Westinghouse Electric, etc., Co., 212 Fed. 184 [aff 222 Fed. 1023, 137 CCA 430]; Westrumite Co. v. Lincoln Park Comrs., 174 Fed. 144, 98 CCA 178 [certiorari den 215 U. S. 610 mem, 30 SCt 411 mem, 54 L. ed. 347 mem]; Electric Smelting, etc., Co. v. Carborundum Co., 102 Fed. 618, 42 CCA 537 [certiorari den 179 U. S. 684 mem, 27 SCt 916 mem, 45 L. ed. 385 mem]; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552].

[a] **Illustration.**—The misnomer of a thing plainly shown and described in the patent will not defeat the patent unless it is misleading and so confusing that a person skilled in the art could not, or naturally would not, understand and be able to avoid infringement. Barber v. Otis Motor Sales Co., 231 Fed. 755.

4. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286; Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 113 U. S. 157, 5 SCt 513, 28 L. ed. 939; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Franc-Strohmenger v. Arthur Siegman, Inc., 25 F. (2d) 108 [aff 27 F. (2d) 785]; Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Burke Electric Co. v. Independent Pneumatic Tool Co., 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023 mem, 104 CCA 669 mem]; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552]; Lalance, etc., Mfg. Co. v. Haberman Mfg. Co., 55 Fed. 292, 5 CCA 111; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83; Mark v. Greenawalt, 32 App. (D. C.) 253.

5. Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Webster Loom Co. v. Higgins, 105 U. S. 580, 27 L. ed. 1177; Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; Featheredge Rubber Co. v. Miller Rubber Co., 250 Fed. 255 [aff 259 Fed. 565, 170 CCA 527]; Conrader v. Judson Governor Co., 226 Fed. 207; Malignani v. Jasper March Cons. Electric Lamp Co., 180 Fed. 442; Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 CCA 446; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Expanded Metal Co. v. General Fireproofing Co., 164 Fed. 849, 90 CCA 611 [aff 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034]; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; McCormick Harvesting Mach. Co. v. Aultman, 69 Fed. 371, 16 CCA 259; Tannage Patent Co. v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552]; Gold v. Gold, 34 App. (D. C.) 152; Mark v. Greenawalt, 32 App. (D. C.) 253; Kilbourn v. Hirner, 29 App. (D. C.) 54.

6. Webster Loom Co. v. Higgins, 105 U. S. 580, 27 L. ed. 1177; Douglas Pectin Corp. v. Armour, 14 F. (2d) 768; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Thomas A. Edison, Inc. v. Waterbury Battery Co., 281 Fed. 254 [aff 287 Fed. 320]; Pittsburgh Iron, etc., Foundries Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605 [aff 236 Fed. 756]; Wolff v. Du Pont de Nemours, 134 Fed. 862, 67 CCA 488; Lalance, etc., Mfg. Co. v. Haberman Mfg. Co., 55 Fed. 292, 5 CCA 111; Celluloid Mfg. Co. v. Russell, 37 Fed. 676.

[a] **Reason for rule.**—"When an astronomer reports that a comet is to be seen with the telescope in the constellation of Auriga, in so many degrees of declination, and so many hours and minutes of right ascension, it is all Greek to the unskilled in science; but other astronomers will instantly direct their telescopes to the very point in the heavens where the stranger has made his entrance into our system. They understand the language of their brother scientist. If a mechanical engineer invents an improvement on any of the appendages of a steam-engine, such as the valve-gear, the condenser, the steam-chest, the walking-beam, the parallel motion, or what not, he is not obliged, in order to make himself understood, to describe the engine, nor the particular appendage to which the improvement refers, nor its mode of connection with the principal machine. These are already familiar to others skilled in that kind of machinery. He may begin at the point where his invention begins, and describe what he had made that is new, and what it replaces of the old." Webster Loom Co. v. Higgins, 105 U. S. 580, 585, 27 L. ed. 1117.

7. Franc-Strohmenger v. Arthur Siegman, Inc., 27 F. (2d) 785 [aff 25 F. (2d) 108]; A. B. Dick Co. v. Barnett, 288 Fed. 799; Featheredge Rubber Co. v. Miller Rubber Co., 259 Fed. 565, 170 CCA 527; Burke Electric Co. v. Independent Pneumatic Tool Co., 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442.

[a] **Rule applied.**—That a manufacturer, seeking to follow patent teachings, must exercise a choice in the selection of material, is not fatal to disclosure. Franc-Strohmenger v. Arthur Siegman, Inc., 27 F. (2d) 785 [aff 25 F. (2d) 108].

8. Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492; A. B. Dick Co. v. Barnett, 288 Fed. 799; Toledo Rex Spray Co. v. California Spray Chemical Co., 268 Fed. 201; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 260 Fed. 197 [aff 269 Fed. 140]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295.

9. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286.

10. A. B. Dick Co. v. Barnett, 288 Fed. 799; American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Davis v. Palmer, 7 F. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Tompkins v. Gage, 24 F. Cas. No. 14,088, 5 Blatchf. 268, 2 Fish. Pat. Cas. 577; Union Paper-Bag Co. v. Nixon, 24 F. Cas. No. 14,386, 6 Fish. Pat. Cas. 402; Mark v. Greenawalt, 32 App. (D. C.) 253, 267.

11. Sewall v. Jones, 91 U. S. 171, 185, 23 L. ed. 275.

"The principle is this: The omission to mention in the specification something which contributes only to the degree of benefit, providing the apparatus would work beneficially and be worth adopting without it, is not fatal, while the omission of what is known to be necessary to the enjoyment of the invention is fatal." Sewall v. Jones, supra.

12. Wood v. Underhill, 5 Wall. (U. S.) 1, 12 L. ed. 23; Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; A. B. Dick Co. v. Barnett, 288 Fed. 799; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Carver v. Braintree Mfg. Co., 5 F. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Davis v. Palmer, 7 F. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298.

13. A. B. Dick Co. v. Barnett, 288 Fed. 799.

14. Lawther v. Hamilton, 124 U. S. 1, 8 SCt 342, 31 L. ed. 325; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; A. B. Dick Co. v. Barnett, 288 Fed. 799, 801.

"It is upon the difficulty, obscurity, or even novelty of the art concerned that depends the kind and degree of skill or knowledge which must be possessed by those who assume to apply it." A. B. Dick Co. v. Barnett, supra.

15. A. B. Dick Co. v. Barnett, supra.

16. Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; A. B. Dick Co. v. Barnett, 288 Fed. 799.

17. Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Tannage Patent Co.

relative.[18]

Statement of scientific theory underlying invention. If the inventor does not know the philosophical principles upon which his invention works or what takes place during its operation, the failure to describe them does not render the patent void so long as the description is sufficient to enable those skilled in the art to practice the invention and get the results desired.[19]

[§ 153] **(b) Methods or Processes.** The description of an art or process must be such as to enable persons skilled in the art to use it without the necessity of making experiments or changes involving invention.[20] No valid patent can be obtained where persons skilled in the art are unable to do so by reason of the failure of applicant to describe the acts which constitute the process,[21] or the means or instrumentalities employed in their performance,[22] or where such inability results from the fact that the description is vague or indefinite[23] or incomplete.[24] A description of the result of an art or process is not a description of the art or process itself.[25] As in other cases, however,[26] the description of an art or process is read in the light of the prior art,[27] and that which is common or well-known to persons skilled in the art need not be described.[28] A description is sufficient if it enables persons skilled in the art to use it, even though it is to some extent vague or indefinite,[29] inaccurate,[30] or incomplete,[31] and even though it is not intelligible to persons unskilled in the art to which the invention appertains.[32] Thus a specification is sufficient if it discloses enough to indicate to those skilled in the art the instrumentalities employed in its exercise, even though no specific instrumentalities are described,[33] and even though some experiment may be required to produce the

v. Zahn, 66 Fed. 986 [rev on other grounds 70 Fed. 1003, 17 CCA 552]; Simpson v. Holliday, L. R. 1 H. L. 315; Beard v. Egerton, 8 C. B. 165, 65 ECL 165, 137 Reprint 471; Neilson v. Harford, 8 M. & W. 806, 151 Reprint 1266.

18. A. B. Dick Co. v. Barnett, 287 Fed. 573.

[a] **Thus,** in the art of manufacturing stencils the term "person skilled in the art" is not to be limited to merely uneducated artisans, but means a skilled chemist, so that the disclosure was sufficient if it enabled a chemist to make the stencil, although others were unable to do so. A. B. Dick Co. v. Barnett, 287 Fed. 573.

19. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 SCt 444, 55 L. ed. 527; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Permutit Co. v. Wadham, 13 F. (2d) 454; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Conrader v. Judson Governor Co., 226 Fed. 207; Combustion Utilities Corp. v. Worcester Gaslight Co., 190 Fed. 155 [aff 194 Fed. 1023 mem, 114 CCA 643 mem]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Commercial Acetylene Co. v. Avery Portable Lighting Co., 166 Fed. 907; Van Epps v. United Box Board, etc., Co., 143 Fed. 869, 75 CCA 77 [certiorari den 202 U. S. 617 mem, 26 SCt 764 mem, 50 L. ed. 1173 mem]; Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 138 Fed. 54, 70 CCA 480 [certiorari den 199 U. S. 608 mem, 26 SCt 750 mem, 50 L. ed. 331 mem]; National Meter Co. v. Thomson Meter Co., 106 Fed. 531; Emerson Co. v. Nimocks, 99 Fed. 737, 40 CCA 87; Knickerbocker Co. v. Rogers, 61 Fed. 297; Dixon-Woods Co. v. Pfeifer, 55 Fed. 390, 5 CCA 148; Maryland Hominy, etc., Co. v. Dorr, 46 Fed. 773; Haffcke v. Clark, 46 Fed. 770 [rev on other grounds 50 Fed. 531, 1 CCA 570]; Andrews v. Cross, 8 Fed. 269, 19 Blatchf. 294; St. Louis Stamping Co. v. Quinby, 21 F. Cas. No. 12,240, 4 Bann. & A. 192.

"It is well settled that when a patent contains a sufficient disclosure of the claimed invention, it will not be invalidated either by the failure of the patentee to state the causes which produce the operation, or by a mistaken statement as to the reasons therefor. The sufficiency of the disclosure and the novelty and utility of the result are the sufficient considerations for the grant." Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 138 Fed. 54, 55, 70 CCA 480 [certiorari den 199 U. S. 608 mem, 26 SCt 750 mem, 50 L. ed. 331 mem].

20. Mowry v. Whitney, 14 Wall. (U. S.) 434, 620, 20 L. ed. 858, 860; De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704; Featheredge Rubber Co. v. Miller Rubber Co., 259 Fed. 565, 170 CCA 527 [aff 250 Fed. 255]; One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Cerealine Mfg. Co. v. Bates, 101 Fed. 272, 41 CCA 341; Matheson v. Campbell, 78 Fed. 910, 24 CCA 284.

21. Electro-Dynamic Co. v. U. S. Light, etc., Corp., 278 Fed. 80 [aff 246 Fed. 127]; One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; Hemming Mfg. Co. v. Cutler-Hammer Mfg. Co., 243 Fed. 595, 156 CCA 293; Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Cerealine Mfg. Co. v. Bates, 101 Fed. 272, 41 CCA 341.

22. Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Rohm v. Martin Dennis Co., 263 Fed. 388 [aff 263 Fed. 106]; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Featheredge Rubber Co. v. Miller Rubber Co., 259 Fed. 565, 170 CCA 527; Hudepohl Brewing Co. v. Hehle, 259 Fed. 232, 170 CCA 300; Hemming Mfg. Co. v. Cutler-Hammer Mfg. Co., 243 Fed. 595, 156 CCA 293.

23. Finley v. MacDougald Constr. Co., 23 F. (2d) 206; Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; Eisenstein v. Fibiger, 160 Fed. 686; De Lamar v. De Lamar Min. Co., 117 Fed. 240, 54 CCA 272; Tannage Patent Co. v. Zahn, 70 Fed. 1003, 17 CCA 552; In re Blackmore, 32 App. (D. C.) 338.

24. De Lore v. St. Louis Lithopone Co., 26 F. (2d) 864; Rohm v. Martin Dennis Co., 263 Fed. 388 [aff 263 Fed. 106].

25. Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 5 SCt 941, 29 L. ed. 210.

26. See supra § 152.

27. Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442.

28. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442.

29. Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680]; Minerals Separation, Ltd. v. Hyde, 207 Fed. 956 [rev on other grounds 214 Fed. 100, 130 CCA 576 (certiorari granted 235 U. S. 701 mem, 35 SCt 202 mem, 59 L. ed. 432 mem, and rev on other grounds 242 U. S. 261, 37 SCt 82, 61 L. ed. 286)]; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Lalance, etc., Mfg. Co. v. Haberman Mfg. Co., 55 Fed. 292, 5 CCA 111; Michaelis v. Roessler, 34 Fed. 325.

[a] **Rule applied.**—(1) Claims in a patent for a method of incubation are not void for indefiniteness, because they do not prescribe the exact proportions or exact temperatures to be employed, if those proportions and temperatures can be ascertained by one skilled in the art, who attempts to practice the method. Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680]. (2) That the claim of a patent for a method of exhausting incandescent electric lamps contains no limitation as to the extent to which the bulb must be exhausted before sealing, and the specification only states it approximately, would not render the disclosure of the patent insufficient to enable one skilled in the art to practice the process, although it might be necessary to make several tests to determine with exactness what the patentee meant by the expression "exhausted to the extent of about two millimeters of mercury." Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442, 454.

30. Westrumite Co. v. Lincoln Park Comrs., 174 Fed. 144, 98 CCA 178 [certiorari den 215 U. S. 610 mem, 30 SCt 411 mem, 54 L. ed. 347 mem]; Electric Smelting, etc., Co. v. Carborundum Co., 102 Fed. 618, 42 CCA 537 [certiorari den 179 U. S. 684 mem, 27 SCt 916 mem, 45 L. ed. 385 mem].

31. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680]; Featheredge Rubber Co. v. Miller Rubber Co., 250 Fed. 255 [aff 259 Fed. 565, 170 CCA 527]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Expanded Metal Co. v. General Fireproofing Co., 164 Fed. 849, 90 CCA 611 [aff 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034]; Maryland Hominy, etc., Co. v. Dorr, 46 Fed. 773; Mark v. Greenawalt, 32 App. (D. C.) 253.

32. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Wolff v. Dupont de Nemours, 134 Fed. 862, 67 CCA 488.

33. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Feather-

best results.[34] So, likewise, variations in treatment required by the nature of the subject matter to which the process is applied need not be described where the description given is sufficiently definite to guide those skilled in the art to its successful application.[35] All possible instrumentalities which may be employed in practicing the invention need not be described.[36] It is immaterial that the particular mode or apparatus described is not the best or the one generally in use.[37]

The naming of nonessential conditions by a patentee, so long as the essential conditions of a process to accomplish the desired results are set forth in the patent, is immaterial, it not appearing that the patentee describes as essential a condition which would defeat the successful performance of the process, or omits an essential condition not implied by a familiar knowledge of the art.[38]

Scientific principle. If the description of an art or process is sufficient to enable persons skilled in the art to use it with certainty, it is not rendered insufficient by the fact that it omitted to describe the scientific principle underlying the process,[39] or by the fact that it contained an erroneous statement of the principle.[40]

[§ 154] **(c) Machines.** An applicant for a machine patent must explain the principle thereof,[41] and the best mode in which he has contemplated applying that principle.[42] Nonessential elements need not be described,[43] and, as in other cases,[44] absolute accuracy of description is not required.[45] A description of a machine is sufficient if persons skilled in the art are enabled thereby to make and use it without exercising further invention.[46] This is true, even though the description is to some extent vague or indefinite[47] or incomplete,[48] and even though the scientific principle upon which the machine operates is omitted[49] or misstated.[50] However, no valid patent can be obtained if persons skilled in the art to which the new machine relates are unable to make and use it by reason of the failure of the description to disclose every element essential to its practical working and use.[51] Details supplied by knowledge of those skilled in the art need not be described,[52] but unless so supplied every part must be described,[53] together with its location,[54] form,[55] size,[56] composition,[57] relation to other parts,[58] or any other characteristic essential to the practical operation of the machine.[59] That experiment may be necessary in order that persons skilled in the art may success-

edge Rubber Co. v. Miller Rubber Co., 250 Fed. 255 [aff 259 Fed. 565, 170 CCA 527]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295.

"But it is said that the patent in suit discloses no means of practically operating the method shown, and therefore, as said by the learned judge in the Third Circuit, 'it is but the expression of a happy thought,' but the requirement of the patent law, in order to make a method or process patentable, is that the patent shall indicate to those skilled in the art the adaptation of means to put it into practice. We think this record amply discloses, while no complete mechanism is pointed out in the specifications, enough to indicate to those skilled in such matters a mechanism whereby the method of the patent can be put into operation." Expanded Metal Co. v. Bradford, 214 U. S. 366, 380, 29 SCt 652, 53 L. ed. 1034.

34. Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Toledo Rex Spray Co. v. California Spray Chemical Co., 268 Fed. 201; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 260 Fed. 197 [aff 269 Fed. 140].

35. 'Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286; Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Chadeloid Chemical Co. v. Wilson Remover Co., 224 Fed. 481, 140 CCA 189; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575].

36. Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Mowry v. Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Burdon Wire, etc., Co. v. Williams, 128 Fed. 927; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Buchanan v. Howland, 4 F. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Tilghman v. Werk, 23 F. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229; In re Musgrave, 10 App. (D. C.) 170.

37. Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279.

38. Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442.

39. Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [rev 260 Fed. 183, and certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem].

40. Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442.

41. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54.

42. Parks v. Booth, supra.

43. Johns-Pratt Co. v. Snow, 212 Fed. 173 [aff 214 Fed. 110, 130 CCA 484].

44. See supra § 152.

45. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

46. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Miehle Printing Press, etc., Co. v. Miller Saw-Trimmer Co., 2 F. (2d) 744 [aff 6 F. (2d) 417]; Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 148 CCA 390; Conrader v. Judson Governor Co., 226 Fed. 207.

47. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 148 CCA 390.

[a] **Illustration.**—A specification for an improvement in a paper-making machine is not too indefinite, where it stated the improvement to consist in elevating one end of the wire in such machine, without specifying the degree of elevation, except by stating that it was high and substantial, where the purpose to be accomplished by the elevation was stated, and a different elevation would be necessary under varying circumstances to accomplish that purpose, especially where the immediate and successful use of the invention showed that the description was sufficient to disclose the improvement. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523 [rev 274 Fed. 540 (rev 267 Fed. 847)].

48. Conrader v. Judson Governor Co., 226 Fed. 207; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; Gold v. Gold, 34 App. (D. C.) 152; Hopkins v. Newman, 30 App. (D. C.) 402; Kilbourn v. Hirner, 29 App. (D. C.) 54.

49. Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Permutit Co. v. Wadham, 13 F. (2d) 454 [rev 294 Fed. 370, and reh den 15 F. (2d) 454]; Conrader v. Judson Governor Co., 226 Fed. 207; Dixon-Woods Co. v. Pfeifer, 55 Fed. 390, 5 CCA 148.

50. National Meter Co. v. Thomson Meter Co., 106 Fed. 531.

51. H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 500; Karl Kiefer Mach. Co. v. Unionwerke, 218 Fed. 847 [aff 231 Fed. 733, 146 CCA 17]; Wolff Truck Frame Co. v. American Steel Foundries, 195 Fed. 940, 115 CCA 628; American Lava Co. v. Steward, 155 Fed. 731, 84 CCA 157 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., 125 Fed. 378, 60 CCA 244; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

52. Miehle Printing Press, etc., Co. v. Miller Saw-Trimmer Co., 2 F. (2d) 744 [aff 6 F. (2d) 417]; Burke Electric Co. v. Independent Pneumatic Tool Co., 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307; Société Anonyme des Anciens Établissements Cail v. U. S., 43 Ct. Cl. 25 [aff 224 U. S. 309, 32 SCt 479, 56 L. ed. 778].

53. American Lava Co. v. Kirschberger, 155 Fed. 740, 84 CCA 166 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; American Lava Co. v. Steward, 155 Fed. 731, 84 CCA 157 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

54. American Lava Co. v. Kirschberger, 155 Fed. 740, 84 CCA 166 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; American Lava Co. v. Steward, 155 Fed. 731, 84 CCA 157 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139].

55. American Lava Co. v. Kirschberger, 155 Fed. 740, 84 CCA 166 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; American Lava Co. v. Steward, 155 Fed. 731, 84 CCA 157 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139].

56. American Lava Co. v. Kirschberger, 155 Fed. 740, 84 CCA 166 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; American Lava Co. v. Steward, 155 Fed. 731, 84 CCA 157 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409, 79 CCA 229.

57. Bullock Electric Mfg. Co. v. General Electric Co., supra.

58. Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185.

59. American Lava Co. v. Kirschberger, 155 Fed. 740, 84 CCA 166 [aff 215 U. S. 161, 30 SCt 46, 54 L. ed. 139]; American Lava Co. v. Steward, 155 Fed. 731, 84 CCA 157 [aff 215 U. S.

fully use the machine is not fatal where the exercise of further invention is not required.[60] Where an invention does not embrace an entire machine, the part claimed should be specified and pointed out so that persons may use the machine without the invention if they see fit,[61] and it is not necessary to describe the entire machine.[62]

[§ 155] **(d) Manufactures.** A manufacture may be described by enumerating its essential characteristics,[63] or by a description of the mode of manufacture.[64] However, the description of a manufacture must identify it so that it can be recognized aside from the description of the process of making it.[65] The mode of manufacture need not be described when the manufacture is sufficiently described by enumerating its essential characteristics.[66] If the article is described by enumerating its essential characteristics, the description must be sufficiently clear, accurate, and complete to disclose them to any person skilled in the art.[67] And, if described by a description of the mode of manufacture, the method of production must be disclosed in terms sufficiently clear, accurate, and complete to enable such persons to produce the article.[68] A description which meets this test, however, is sufficient.[69] This is true, even though the description is to some extent indefinite,[70] inaccurate,[71] or incomplete.[72]

[§ 156] **(e) Compositions of Matter.** An applicant for a patent for a composition of matter must describe the composition,[73] its ingredients,[74] and the method of their intermixture,[75] including the proportions of the several ingredients.[76] The description must be in such full, clear, and exact terms as to enable anyone skilled in the art to which it appertains to compound and use it,[77] or, as more often expressed, to compound and use it without making any experiments of his own.[78] As in the case of a manufacture,[79] the composition itself may be described either by enumerating its essential characteristics,[80] or by describing the method by which it may be produced.[81] A description is insufficient which describes a composition of matter, not in terms of its own physical characteristics or chemical properties, but wholly in terms of its use or function.[82] A de-

161, 30 SCt 46, 54 L. ed. 139]; Neptune Meter Co. v. National Meter Co., 127 Fed. 563, 62 CCA 345.

60. Burke Electric Co. v. Independent Pneumatic Tool Co., 232 Fed. 145, 146 CCA 337 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem].

61. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

62. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 486.

63. Hide-ite Leather Co. v. Fiber Products Co., 226 Fed. 34, 141 CCA 142; Maurer v. Dickerson, 113 Fed. 870, 51 CCA 494; Pickhardt v. Packard, 22 Fed. 530, 23 Blatchf. 23; Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290.

64. Rajah Auto Supply Co. v. Belvidere Screw, etc., Co., 275 Fed. 761; Hide-ite Leather Co. v. Fiber Products Co., 226 Fed. 34, 141 CCA 142; Pickhardt v. Packard, 22 Fed. 530, 23 Blatchf. 23; Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290.

65. Cochrane v. Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 SCt 455, 28 L. ed. 433.

66. Cohn v. U. S. Corset Co., 93 U. S. 366, 23 L. ed. 907.

67. Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Health Products Corp. v. Ex-Lax Mfg. Co., 22 F. (2d) 286 [aff 24 F. (2d) 245]; R. H. Comey Co. v. Monte Christi Corp., 17 F. (2d) 910; U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704; Hemming Mfg. Co. v. Cutler-Hammer Mfg. Co., 243 Fed. 595, 156 CCA 293; Karl Kiefer Mach. Co. v. Unionwerke, 218 Fed. 847 [aff 231 Fed. 733, 146 CCA 17].

68. Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; Shrauger & Johnson v. Phillip Bernard Co., 247 Fed. 547; Hemming Mfg. Co. v. Cutler-Hammer Mfg. Co., 243 Fed. 595, 156 CCA 293; U. S. Column Co. v. Benham Column Co., 225 Fed. 55.

69. Cohn v. U. S. Corset Co., 93 U. S. 366, 23 L. ed. 907; Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196; A. B. Dick Co. v. Barnett, 288 Fed. 799; Pittsburgh Iron, etc., Foundries Co. v. Seaman-Sleeth Co., 248 Fed. 705, 160 CCA 605; Victor Talking Mach. Co. v. American Graphophone Co., 145 Fed. 189 [aff 151 Fed. 601, 81 CCA 145]; Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 131 Fed. 483 [aff 138 Fed. 54, 70 CCA 480 (certiorari den 199 U. S. 608 mem, 26 SCt 750 mem, 50 L. ed. 331 mem)].

70. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 113 U. S. 157, 5 SCt 513, 28 L. ed. 939; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023 mem, 104 CCA 669 mem]; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83.

71. International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569.

72. Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325].

73. Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290; Goodyear v. New York Gutta Percha, etc., Co., 10 F. Cas. No. 5,580, 2 Fish. Pat. Cas. 312; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356.

74. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868; Howard v. Detroit Stove Works, 150 U. S. 164, 14 SCt 68, 37 L. ed. 1039; Béné v. Jeantet, 129 U. S. 683, 9 SCt 428, 32 L. ed. 803; Tyler v. Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868]; R. H. Comey v. Monte Christi Corp., 17 F. (2d) 910; Panzl v. Battle Island Paper Co., 138 Fed. 48, 70 CCA 474 [mod 132 Fed. 607]; Badische Anilin, etc., Fabrik v. Kalle, 94 Fed. 163 [aff 104 Fed. 802, 44 CCA 201]; Jenkins v. Walker, 13 F. Cas. No. 7,275, Holmes 120, 5 Fish. Pat. Cas. 347; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312; Keith v. Hobbs, 69 Mo. 84; Sturz v. De La Rue, 5 Russ. 323, 5 EngCh 322, 38 Reprint 1048; Savory v. Price, R. & M. 1, 21 ECL 365, 171 Reprint 921; Bickford v. Skewes, 1 Q. B. 938, 41 ECL 848, 113 Reprint 1391; Turner v. Winter, 1 T. R. 602, 99 Reprint 1274, 20 ERC 222.

"There can be no description of a composition of matter without some designation of its ingredients." Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 255, 48 SCt 474, 478, 72 L. ed. 868.

75. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553 [aff 36 Fed. 593]; Health Products Corp. v. Ex-Lax Mfg. Co., 22 F. (2d) 286 [aff 24 F. (2d) 245]; R. H. Comey Co. v. Monte Christi Corp., 17 F. (2d) 910; Hemming Mfg. Co. v. Cutler-Hammer Mfg. Co., 243 Fed. 595, 156 CCA 293; Jenkins v. Walker, 13 F. Cas. No. 7,275, 5 Fish. Pat. Cas. 347, Holmes 120; Lane v. Levi, 21 App. (D. C.) 168.

76. Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553; Tyler v. Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; R. H. Comey v. Monte Christi Corp., 17 F. (2d) 910; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Panzl v. Battle Island Paper Co., 138 Fed. 48, 70 CCA 474 [mod 132 Fed. 607]; Badische Anilin, etc., Fabrik v. Kalle, 94 Fed. 163 [aff 104 Fed. 802, 44 CCA 201]; Bowker v. Dows, 3 F. Cas. No. 1,734, 3 Bann. & A. 518; Francis v. Mellor, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 8 Phila. (Pa.) 157; Goodyear v. Wait, 10 F. Cas. No. 5,587, 5 Blatchf. 468, 3 Fish. Pat. Cas. 242; Jenkins v. Walker, 13 F. Cas. No. 7,275, 5 Fish. Pat. Cas. 347, Holmes 120; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312; Patent Type-Founding Co. v. Richard, Johns. 381, 70 Reprint 470.

77. Jenkins v. Walker, 13 F. Cas. No. 7,275, 5 Fish. Pat. Cas. 347, Holmes 120; Moody v. Fiske, 17 F. Cas. No. 9,745, 2 Mason 112, 1 Robb Pat. Cas. 312.

78. Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Health Products Corp. v. Ex-Lax Mfg. Co., 22 F. (2d) 286 [aff 24 F. (2d) 245]; Panzl v. Battle Island Paper Co., 138 Fed. 48, 70 CCA 474 [mod 132 Fed. 607]; Badische Anilin, etc., Fabrik v. Kalle, 94 Fed. 163 [aff 104 Fed. 802, 44 CCA 201]; Matheson v. Campbell, 69 Fed. 597 [rev on other grounds 78 Fed. 910, 24 CCA 384].

79. See supra § 155.

80. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868; Ex p. Tweddle, 10 Off. Gaz. (U. S.) 747.

81. Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290.

82. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868; Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868].

scription of a composition of matter is sufficient if intelligible to persons skilled in the art to which the invention relates.[83] The claim for a composition is not void because the exact proportions are not stated, where the proportions may be varied.[84] A description which gives a certain proportion as the general rule is not ambiguous because it also states exceptions to the general rule, applicable where the ingredients used differ in quality from those ordinarily used,[85] unless the qualities of the ingredients vary so widely that the specification of the proportions stated are of no value.[86]

[§ 157] **(f) Improvements.** The general rule governing the sufficiency of description of the thing for which a patent is asked[87] applies in the case of improvements.[88] The description must show clearly, accurately, and fully in what the improvement consists.[89] It should be confined to the specific improvement and such parts of the old mechanism as necessarily coöperate with it.[90] It should distinguish between the old and the new,[91] and for this purpose some reference to the method or device improved must be made.[92] It is usually unnecessary to describe the old machine in detail,[93] a general reference thereto being sufficient,[94] unless a description of the whole machine as it operates with the improvement is essential to make the description understood by a person skilled in the art to which it belongs.[95] A description of the improvement claimed is sufficient if it will enable those skilled in the art to make and use it.[96] If the description is sufficiently clear, accurate, and complete to enable any person skilled in the art to make and use the improvement, it is immaterial that the terms used are unintelligible to unskilled persons[97] or that the improvement is not in all respects completely described.[98]

[§ 158] **(g) Combinations.** The requirement of full, clear, concise, and exact description applies with as much force to applications for inventions consisting merely of a new combination of old elements as to any other inventions.[99] All the essential elements of the combination must be described,[1] together with the method of combining them.[2] A claim for a combination which embraces an element only in case it is made capable of being employed in the combination and without disclosing means of adapting it discloses nothing definite.[3] An invention consisting merely of a new combination of old elements or devices is sufficiently described if the devices of which it is composed are specifically named, their mode of operation given, and the new and useful result to be accomplished is pointed out, in terms sufficiently full, clear, concise, and exact as to enable those skilled in the art to which the invention relates to make and use the combination.[4] Applicant need not point out what elements are or are not new in the combination claimed.[5] Nor is it necessary to describe all parts of the method or device of which the combination is a part, except so far as they enter into the mode of combining and arranging the elements of the combination claimed.[6]

[§ 159] **(h) Designs.** An application for a design patent must describe the design in terms sufficiently full, clear, concise, and exact as to enable persons skilled in the art to make and use it.[7] A description so vague and indefinite that persons

83. Kupper v. Westinghouse Electric, etc., Co., 212 Fed. 184 [aff 222 Fed. 1023, 137 CCA 430]; Matheson v. Campbell, 69 Fed. 597 [rev on other grounds 78 Fed. 910, 24 CCA 384].

[a] **Rule applied.**—The use of the word "to" instead of "for" in the phrase "triturated to a paste" in a description of a solder did not invalidate the patent for want of sufficient description. Kupper v. Westinghouse Electric, etc., Co., 212 Fed. 184, 185 [aff 222 Fed. 1023, 137 CCA 430].

84. Klein v. Russell, 19 Wall. (U. S.) 433, 22 L. ed. 116.

85. Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23.

86. Wood v. Underhill, supra.

87. See supra § 152.

88. Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118.

89. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Evans v. Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Dixon v. Moyer, 7 F. Cas. No. 3,931, 4 Wash. C. C. 68, 1 Robb Pat. Cas. 324; Dangerfield v. Jones, 13 L. T. Rep. N. S. 142.

90. Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Sargent v. Carter, 21 F. Cas. No. 12,362, 1 Fish. Pat. Cas. 277; Sullivan v. Redfield, 23 F. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

91. Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Cerealine Mfg. Co. v. Bates, 101 Fed. 272, 41 CCA 341; Alexandria Bank v. Wilson, 2 F. Cas. No. 856, 2 Cranch C. C. 5; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Dixon v. Moyer, 7 F Cas. No. 3,931, 4 Wash. C. C. 68, 1 Robb Pat. Cas. 324; Hovey v. Stevens, 12 F. Cas. No. 6,746, 2 Robb Pat. Cas. 567, 3 Woodb. & M. 17; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Clark v. Adie, 2 App. Cas. 315; Foxwell v. Bostock, 4 De G. J. & S. 298, 69 EngCh 231, 46 Reprint 934; Macfarlane v. Price, 1 Stark. 199, 2 ECL 82, 171 Reprint 446.

92. Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Evans v. Eaton, 8 F. Cas. No. 4,560, 1 Robb Pat. Cas. 193, 3 Wash. C. C. 443; Isaacs v. Cooper, 13 F. Cas. No. 7,096, 1 Robb Pat. Cas. 332, 4 Wash. C. C. 259; Sullivan v. Redfield, 23 F. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477.

93. Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; Thomson-Houston Electric Co. v. Black River Tract. Co., 135 Fed. 759, 68 CCA 461; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Emerson v. Hogg, 8 F. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. R. 77; Gibbs v. Ellithorp, 10 F. Cas. No. 5,383, McA. Pat. Cas. 702; Winans v. New York, etc., R. Co., 30 F. Cas. No. 17,863, 1 Fish. Pat. Cas. 213 [aff 21 How. 88, 16 L. ed. 68].

94. Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118.

95. Emerson v. Hogg, 8 F. Cas. No. 4,439, 2 Blatchf. 1; Many v. Jagger, 16 F. Cas. No. 9,055, 1 Blatchf. 372, 1 Fish. Pat. Cas. 222; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Harmar v. Playne, 11 East 101, 103 Reprint 943.

[a] **Distinction between improvements on patented and unpatented machines.**—"As to the supposed distinction between an improvement on a machine patented, and one not so, there is nothing in it. In both cases, the improvement must be described; but with this difference—that, in the former case, it may be sufficient to refer to the patent, and specification, for a description of the original machine; and then to state in what the improvements on such original machine consist;—whereas, in the latter case, it would be necessary to describe the original machine, and also the improvement. The reason for this distinction is too obvious to require explanation." Evans v. Eaton, 8 F. Cas. No. 4,560, 1 Robb Pat. Cas. 193, 3 Wash. C. C. 443, 454.

96. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523; Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Atlantic, Gulf, etc., Co. v. Wood, 288 Fed. 148; Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 CCA 446.

97. Webster Loom Co. v. Higgins, 105 U. S. 580, 27 L. ed. 1117; Thomas A. Edison, Inc. v. Waterbury Battery Co., 281 Fed. 254 [aff 287 Fed. 320].

98. Webster Loom Co. v. Higgins, 105 U. S. 580, 27 L. ed. 1117; Goldschmidt Thermit Co. v. American Vanadium Co., 291 Fed. 81.

99. Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699.

1. Gill v. Wells, supra; Electro-Dynamic Co. v. U. S. Light, etc., Corp., 278 Fed. 80 [aff 246 Fed. 127]; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Schneider v. Thill, 21 F. Cas. No. 12,470a, 5 Bann. & A. 565.

2. Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

3. Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215.

4. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Gould v. Rees, 15 Wall. (U. S.) 187, 21 L. ed. 39; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

5. Brown v. Guild, 90 U. S. 181, 23 L. ed. 161.

6. Temple Pump Co. v. Goss Pump, etc., Mfg. Co., 30 Fed. 440; Forbush v. Cook, 9 F. Cas. No. 4,931, 2 Fish. Pat. Cas. 668; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

7. Phœnix Knitting Works v. Rich, 194 Fed. 708 [app dism 202 Fed. 1022 mem, 120 CCA 663 mem]; James E. Tompkins Co. v. New York Woven

skilled in the art are unable to determine in what the design consists will not support a design patent.[8] The application need not in all cases contain a detailed written description of the design.[9] If there be some writing to indicate upon what character of goods the design is to be applied, a photograph or drawing may be substituted.[10] This is the rule adopted by the patent office.[11] A detailed verbal description is not necessarily improper,[12] and is in fact required if without it the design cannot be understood.[13]

Under the rules of the patent office, the design must be represented by a drawing made to conform to the rules applicable to drawings of mechanical inventions.[14] When the design can be sufficiently represented by drawings, a model will not be required.[15]

[§ 160] **(3) Concealment and Deception.**[16] A patent is void where, for the purpose of deceiving the public, the description or specification was made to contain less than the whole truth relative to the invention or more than is necessary to produce the desired effect.[17] To invalidate the patent on this ground, however, the omissions must have been made with intent to deceive.[18] Omissions due to mistake or error of judgment are not sufficient.[19] Nor is a patent fatally defective for its omission to describe a feature which the patentee did not claim as his invention and which is not an essential element of what he did claim.[20]

[§ 161] **c. Claim or Claims[21]—(1) In General.** The statute requires an applicant for a patent not only to describe the invention for which he seeks a patent, but also that he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery,[22] and the rules of the patent office require that the specification must conclude with a specific and distinct claim or claims of the part, improvement, or combination which applicant regards as his invention or discovery.[23] This part of the specification is technically called the "claim,"[24] and its office is to define the limits of the exclusive privilege sought.[25] No patent can be obtained for an invention not claimed.[26] The object of this requirement is not only to secure to the inventor all to which he is entitled, but to apprise the public of what is still open to it.[27] It was not intended to secure to the inventor his whole invention unless he claimed the whole.[28] If he claims only a part, or some particular form, such part or particular form only is secured to him.[29] On the other hand, the fact that the inven-

Wire Mattress Co., 159 Fed. 133, 86 CCA 323.

8. James E. Tompkins Co. v. New York Woven Wire Mattress Co., supra.

9. Harmon Paper Co. v. Prager, 286 Fed. 267 [aff 287 Fed. 841]; Ashley v. Samuel C. Tatum Co., 186 Fed. 339, 108 CCA 539 [rev 181 Fed. 840, and certiorari den 225 U. S. 707 mem, 32 SCt 839 mem, 56 L. ed. 1266 mem]; National Casket Co. v. New York, etc., Casket Co., 185 Fed. 533; Cheney v. Weinreb, 185 Fed. 531.

10. Dobson v. Dornan, 118 U. S. 10, 6 SCt 946, 30 L. ed. 63; Dobson v. Bigelow Carpet Co., 114 U. S. 439, 5 SCt 945, 29 L. ed. 177; Bush, etc., Piano Co. v. Becker, 209 Fed. 233 [rev on other grounds 222 Fed. 902, 138 CCA 382]; Cheney v. Weinreb, 185 Fed. 531; In re Schraubstadter, 26 App. (D. C.) 331; In re Freeman, 23 App. (D. C.) 226.

11. Cheney v. Weinreb, 185 Fed. 531.

12. Harmon Paper Co. v. Prager, 286 Fed. 267 [aff 287 Fed. 841]; In re Mygatt, 26 App. (D. C.) 366.

13. Harmon Paper Co. v. Prager, 286 Fed. 267 [aff 287 Fed. 841]; In re Mygatt, 26 App. (D. C.) 366.

14. Patent Office Rules Oct. 1, 1927, rule 84.

15. Patent Office Rules Oct. 1, 1927, rule 83.

16. Necessity of describing best method conceived by inventor for carrying invention into effect see supra § 151 note 90.

17. Carlton v. Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517; Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Philadelphia, etc., R. Co. v. Dubois, 12 Wall. (U. S.) 47, 20 L. ed. 265; Evans v. Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Electric Boot, etc., Finishing Co. v. Little, 75 Fed. 276 [aff 138 Fed. 732, 71 CCA 270]; Child v. Adams, 5 F. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20; Delano v. Scott, 7 F. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Ex p. Sanders, 21 F. Cas. No. 12,292; Davis v. Bell, 8 N. H. 500, 31 AmD 202; Simpson v. Holliday, L. R. 1 H. L. 315.

18. Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Featherstone v. George R. Bidwell Cycle Co., 53 Fed. 113 [rev on other grounds 57 Fed. 631, 6 CCA 487]; Celluloid Mfg. Co. v. Russell, 37 Fed. 676; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 328; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Park v. Little, 18 F. Cas. No. 10,715, 1 Robb Pat. Cas. 17, 3 Wash. C. C. 196; Whittemore v. Cutter, 29 F. Cas. No. 17,000, 1 Gall. 478, 1 Robb Pat. Cas. 40.

19. [a] **Contemporaneous disclosure negatives deceptive intent.**—Where a patentee both before and soon after the date of the patent fully described the invention, including the matter claimed to have been fraudulently omitted, in scientific papers, and the invention was practiced on a large scale in various establishments under license, such publicity is so inconsistent with an intention to reserve any secret advantage that it negatives an attempt to deceive. Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442.

19. Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 138 Fed. 54, 70 CCA 480 [aff 131 Fed. 483]; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Michaelis v. Roessler, 34 Fed. 325; McKesson v. Carnrick, 9 Fed. 44, 19 Blatchf. 158; Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. R. 184; Grant v. Mason, 10 F. Cas. No. 5,701; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Lowell v. Lewis, 15 F. Cas. No. 8,568, 1 Mason 182, 1 Robb Pat. Cas. 131; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Whitney v. Carter, 29 F. Cas. No. 17,583.

20. Johns-Pratt Co. v. Snow, 212 Fed. 173 [aff 214 Fed. 110, 130 CCA 484].

21. Cross references:
Construction of claims in letters patent see infra §§ 349–363.
Correction and amendment of claims on reissue see infra § 315.

22. U. S. Code tit 25 § 33.

[a] **In England** the same requirement is made. Lister v. Leather, 8 E. & B. 1004, 92 ECL 1004, 120 Reprint 373.

23. Patent Office Rules Oct. 1, 1927, rule 37.

24. Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639.

25. Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294.

26. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Roemer v. Neumann, 132 U. S. 103, 10 SCt 12, 33 L. ed. 277; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 7 SCt 421, 30 L. ed. 539; Sutter v. Robinson, 119 U. S. 530, 7 SCt 376, 30 L. ed. 492; White v. Dunbar, 119 U. S. 47, 7 SCt 72, 30 L. ed. 303; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 SCt 846, 29 L. ed. 952; Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 5 SCt 941, 29 L. ed. 210; Thompson v. Boisselier, 114 U. S. 1, 5 SCt 1042, 29 L. ed. 76; Fay v. Cordesman, 109 U. S. 408, 3 SCt 236, 27 L. ed. 979; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; Union Water Meter Co. v. Desper, 101 U. S. 332, 25 L. ed. 1024; Burns v. Meyer, 100 U. S. 671, 25 L. ed. 738; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Schumacher v. Cornell, 96 U. S. 549, 24 L. ed. 676; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. ed. 344; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Westinghouse Electric, etc., Co. v. Stanley Instrument Co., 138 Fed. 823, 71 CCA 189; Lanyon Zinc Co. v. Brown, 129 Fed. 912, 64 CCA 344; Morgan v. Pennsylvania Rubber Co., 126 Fed. 952, 62 CCA 126; Morrison v. Sonn, 111 Fed. 172; Coburn Trolley-Track Mfg. Co. v. Chandler, 91 Fed. 260 [aff 97 Fed. 333, 38 CCA 201]; Wells v. Curtis, 66 Fed. 318, 13 CCA 494; Stirrat v. Excelsior Mfg. Co., 61 Fed. 980, 10 CCA 216; Calkins v. Bertrand, 4 F. Cas. No. 2,317, 2 Bann. & A. 215, 6 Biss. 494; Cimiotti Unhairing Co. v. American Fur Refining Co., 116 Off. Gaz. (U. S.) 1452; Lehigh Valley R. Co. v. Mellon, 20 Off. Gaz. (U. S.) 1891; Masury v. Anderson, 4 Off. Gaz. (U. S.) 55.

27. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593 [rev on other grounds 281 Fed. 5 (app dism 257 U. S. 664 mem, 42 SCt 45 mem, 66 L. ed. 424 mem)]; Plimpton v. Spiller, 6 Ch. D. 412; Hinks v. Safety Lighting Co., 4 Ch. D. 607.

28. American Pin Co. v. Oakville Co., 1 F. Cas. No. 313, 3 Blatchf. 190; In re Seabury, 23 App. (D. C.) 377.

29. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. ed. 344; Haynes Stellite Co. v. Chesterfield, 8 F. (2d)

tor does not claim all he has invented does not affect his right to be secured in what he has claimed.[30] A valid patent may issue, however much narrower the claim than what applicant might have obtained.[31] An applicant need not claim every advantage which may reside in his invention.[32]

[§ 162] **(2) Vague and Indefinite, Ambiguous, or Incomplete Claims.** In making a claim, applicant is at liberty to use any form of expression.[33] But whatever the form, the claim must be stated in terms sufficiently definite and clear to inform the public with certainty just what it is that the patentee secures as a monopoly.[34] No valid patent can be obtained if the true meaning of the claim cannot be made out without resorting to conjecture, as where the language of the claim is vague or indefinite,[35] ambiguous,[36] or incomplete.[37] Claims are addressed to those skilled in the particular art or science,[38] and a claim is not objectionable if such persons are able to understand what is claimed, even though it may be in some respects vague or indefinite[39] or incomplete.[40] A claim for a machine or for a combination of mechanical devices is not insufficient because it does not include mechanical devices for uniting and operating the elements of the combination or machine which would readily suggest themselves to persons skilled in the art.[41] Unless the peculiar nature of the subject matter requires it, the claim need not be expressed with technical exactness.[42] A patent should not be held invalid merely because its language may be too vague for application to some possible future case.[43] Whether a claim is vague and uncertain is a question of law to be determined by the rules of construction applied in the light of

765; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593 [rev on other grounds 281 Fed. 5 (app dism 257 U. S. 664 mem, 42 SCt 45 mem, 66 L. ed. 424 mem)]; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Houser v. Starr, 203 Fed. 264, 121 CCA 462; Harder v. U. S. Piling Co., 160 Fed. 463, 87 CCA 447; Avery v. J. I. Case Plow Works, 148 Fed. 214, 78 CCA 110; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., 122 Fed. 470 [aff 125 Fed. 378, 60 CCA 244]; Ingham v. Pierce, 31 Fed. 822; Untermeyer v. Jeannot, 20 Fed. 503; Toohey v. Harding, 1 Fed. 174, 4 Hughes 253; American Pin Co. v. Oakville Co., 1 F. Cas. No. 313, 3 Blatchf. 190; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Ex p. Tillman, 23 F. Cas. No. 14,050.

"What is not claimed distinctly in the invention, the public possesses. A patent is sustained, not for what the inventor may have done in effect, but what is pointed out clearly and distinctly in his open letter." Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 931, 170 CCA 125.

Failure to claim invention disclosed as abandonment see supra § 123.

30. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Jones v. General Fireproofing Co., 254 Fed. 97, 165 CCA 507 [reh den 254 Fed. 970, 165 CCA 662, and certiorari den 250 U. S. 643 mem, 39 SCt 494 mem, 63 L. ed. 1186 mem]; Russell, etc., Mfg. Co. v. Mallory, 21 F. Cas. No. 12,166, 10 Blatchf. 140, 147, 5 Fish. Pat. Cas. 632.

31. Russell, etc., Mfg. Co. v. Mallory, supra.

"Nothing in the cases cited forbids an inventor of a new device from taking a patent under a claim narrowed as closely as he sees fit, and, however much narrower than he might have claimed, the patent is valid." Russell, etc., Mfg. Co. v. Mallory, supra.

32. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 SCt 472, 37 L. ed. 307; Stow v. Chicago, 104 U. S. 547, 26 L. ed. 816; Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; Mead-Morrison Mfg. Co. v. Exeter Mach. Works, 225 Fed. 489, 140 CCA 531 [rev 215 Fed. 731]; General Electric Co. v. Bullock Electric Mfg. Co., 152 Fed. 427, 81 CCA 569 [rev 146 Fed. 552]; Briggs v. Kaisling, 53 App. (D. C.) 49, 288 Fed. 254.

33. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 25 SCt 697, 49 L. ed. 1100; Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; Skinner Irr. Co. v. March Automatic Irr. Co., 9 F. (2d) 751; H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717.

[a] **Claims in mathematical terms.**—A patent for a mechanical or electrical device is not invalid because the claims are in mathematical terms. Scovill Mfg. Co. v. Satler, 21 F. (2d) 630.

34. Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 10 SCt 570, 33 L. ed. 963; White v. Dunbar, 119 U. S. 47, 7 SCt 72, 30 L. ed. 303; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Johnson Automatic Scale Co. v. Ginn, 10 F. (2d) 793; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Stumpf v. A. Schreiber Brewing Co., 252 Fed. 142, 164 CCA 254; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; In re Creveling, 117 Off. Gaz. (U. S.) 1167; In re Creveling, 117 Off. Gaz. (U. S.) 1161; In re Dilg, 115 Off. Gaz. (U. S.) 1067; In re Bechman, 47 App. (D. C.) 446; Ridd Milking Mach. Co., Ltd. v. Simplex Milking Mach. Co., Ltd., [1916] 2 A. C. 550.

[a] **In designs** a claim to "the design shown" is sufficient. Dobson v. Dorman, 118 U. S. 10, 6 SCt 946, 30 L. ed. 63.

35. Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Shrauger v. Phillip Bernard Co., 247 Fed. 547; Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 Fed. 623 [mod on other grounds 241 Fed. 108, 154 CCA 108]; Brickill v. Baltimore, 50 Fed. 274; Brickill v. Hartford, 49 Fed. 372; Albany Steam Trap Co. v. Felthousen, 20 Fed. 633, 22 Blatchf. 169; Edgarton v. Furst, etc., Mfg. Co., 9 Fed. 450, 10 Biss. 402; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; In re Davis, 7 F. Cas. No. 3,617, McA. Pat. Cas. 628; Ex p. Paige, 40 Off. Gaz. (U. S.) 807; In re Duncan, 49 App. (D. C.) 372, 265 Fed. 1012; In re Perlman, 39 App. (D. C.) 447.

36. Shrauger v. Phillip Bernard Co., 247 Fed. 547; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; In re Dilg, 25 App. (D. C.) 9; Natural Color Kinematograph Co., Ltd. v. Biashemes, Ltd., 31 T. L. R. 324.

37. Rodman Chemical Co. v. Deeds Commercial Laboratories, 261 Fed. 189; Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 210 Fed. 164, 127 CCA 22; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215 [rev 172 Fed. 923]; Schroeder v. Brammer, 98 Fed. 880 [aff 106 Fed. 918, 46 CCA 41]; American Automaton Weighing Mach. Co. v. Blauvelt, 50 Fed. 213; Doubleday v. Beatty, 11 Fed. 729; Stewart v. Mahoney, 5 Fed. 302; McMillan v. Rees, 1 Fed. 722; American Pin Co. v. Oakville Co., 1 F. Cas. No. 313, 3 Blatchf. 190; Vogler v. Semple, 28 F. Cas. No. 16,987, 2 Bann. & A. 556, 7 Biss. 382; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1; Ex p. Emerson, 17 Off. Gaz. (U. S.) 1451; Ex p. Cornell, 1 Off. Gaz. (U. S.) 573; In re Creveling, 25 App. (D. C.) 530.

38. Société Anonyme Des Anciens Établissements Cail v. U. S., 43 Ct. Cl. 25 [aff 224 U. S. 309, 32 SCt 479, 56 L. ed. 778].

39. Eibel Process Co. v. Minnesota, etc., Paper Co., 267 Fed. 847 [rev on other grounds 274 Fed. 540 (certiorari granted 257 U. S. 628 mem, 42 SCt 57 mem, 66 L. ed. 405 mem, and rev on other grounds 261 U. S. 45, 43 SCt 322, 67 L. ed. 523)]; General Electric Co. v. Nitro Tungsten Lamp Co., 266 Fed. 994; Woerheide v. H. W. Johns-Manville Co., 215 Fed. 604 [aff 220 Fed. 674, 136 CCA 316]; Hohmann, etc., Mfg. Co. v. Charles J. Tagliabue Mfg. Co., 175 Fed. 87; Société Anonyme Des Anciens Établissements Cail v. U. S., 43 Ct. Cl. 25 [aff 224 U. S. 309, 32 SCt 479, 56 L. ed. 778].

[a] **Rule applied.**—(1) Claims in a patent for a nitrogen filled tungsten lamp, which merely specify that the filament shall be of large effective diameter and the gas in the bulb of greater than stated minimum pressures, are not too indefinite to be valid, where the relative sizes and pressures of the elements vary in lamps of different size. General Electric Co. v. Nitro Tungsten Lamp Co., 266 Fed. 994. (2) The use of the words "sufficient abruptness" and "arched transversely" in claims for a cleat to secure prepared roofing do not render the claims defective as vague and indefinite. Woerheide v. H. W. Johns-Manville Co., 215 Fed. 604 [aff 220 Fed. 674, 136 CCA 316].

40. Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Sturm v. Wm. E. Dee Co., 249 Fed. 244; Waterloo Cement Mach. Corp. v. Engel, 240 Fed. 976, 153 CCA 662 [aff 230 Fed. 169]; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; Shepherd v. Deitsch, 138 Fed. 83 [rev on other grounds 146 Fed. 756, 77 CCA 246]; Thomson-Houston Electric Co. v. Black River Tract. Co., 135 Fed. 759, 68 CCA 461; Chicago Wooden Ware Co. v. Miller Ladder Co., 133 Fed. 541, 66 CCA 517; Schroeder v. Brammer, 98 Fed. 880 [aff 106 Fed. 918, 46 CCA 41]; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203; American Automaton Weighing Mach. Co. v. Blauvelt, 50 Fed. 213; Wells v. Jacques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60.

41. Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Hancock Inspirator Co. v. Jenks, 21 Fed. 911; Forbush v. Cook, 9 F. Cas. No. 4,931, 2 Fish. Pat. Cas. 668; Parham v. American Buttonhole, etc., Sewing Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

42. Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294.

43. Faultless Rubber Co. v. Star

the state of the art.[44]

Alternative claims. Claims should not seek to include two elements by referring to them in the alternative but should use some broad term of description applicable to both.[45]

[§ 163] **(3) Excessive Claims[46]—(a) In General.** An applicant should draw his claims to cover his actual invention only.[47] Thus, where the invention is for an improvement, the patentee must lay claim only to his improvement and not to the improved method or device.[48] A claim which is so broad as to include what is old as well as what is new cannot be sustained.[49] This is true whether the old matter was claimed purposely or by mistake.[50] The fact that the patent claims too much is the test, and not the motive or circumstance in which the excessive claim originated.[51] Whether a claim includes that which is old as well as what is new is a question of law to be determined by the rules of construction applied in the light of the state of the art.[52]

Exaggeration of advantages. Where the statements are not made fraudulently, exaggerated or unwarranted statements as to the capabilities of the invention do not affect the validity of the claim.[53]

[§ 164] **(b) Functional Claims.** A claim for the function of a method or device, as distinguished from the method or device itself, is properly rejected,[54] and is void if allowed.[55] Thus, if the invention is a machine, a claim not only for the mechanism but for the mode of operation generally cannot be sustained.[56] But a claim is not invalid as functional, if it is not beyond the broadest equivalency which the real invention permitted.[57]

[§ 165] **(c) Claims for an Effect or Result.** A claim which includes the mere effect or result of a method or device, as distinguished from the method or device itself, is properly rejected as too broad,[58] and, if allowed, cannot be sustained.[59]

Rubber Co., 202 Fed. 927, 121 CCA 285 [rev 191 Fed. 982].

44. Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294.

45. Burr v. Smith, 4 F. Cas. No. 2,196; Union Paper-Bag Co. v. Nixon, 24 F. Cas. No. 14,386, 6 Fish. Pat. Cas. 402; Wheeler v. Simpson, 29 F. Cas. No. 17,500, 1 Bann. & A. 420.

46. Cross references:
Disclaimer of excessive claims see infra § 329 et seq.
Necessity of description to support claim see supra §§ 151–159.
Right to obtain reissue excluding excessive claims see infra § 308.

47. Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304, 166 CCA 44]; In re Carr, 54 App. (D. C.) 283, 297 Fed. 542; Kirby v. Clements, 44 App. (D. C.) 12; Leonard v. Horton, 40 App. (D. C.) 22; Lindmark v. Hodgkinson, 31 App. (D. C.) 612; In re Hoey, 28 App. (D. C.) 416.

48. Blake v. Sperry, 3 F. Cas. No. 1,503, 2 NYLegObs 251; Bergeon v. De Kermor Electric Heating Co., Ltd., [1927] Can. Exch. 181, [1927] 3 DomLR 99.

49. U. S.—Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 10 SCt 570, 33 L. ed. 963; Carlton v. Bokee, 17 Wall. 463, 21 L. ed. 517; Vance v. Campbell, 1 Black 427, 17 L. ed. 168; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Heitler v. Brooklyn Shield, etc., Co., 295 Fed. 333; Miller v. Monarch Printing Co., 285 Fed. 364; Monitor Stove Co. v. Williamson Heater Co., 282 Fed. 910 [aff 299 Fed. 1]; Rosemary Mfg. Co. v. Halifax Cotton Mills, 257 Fed. 321, 168 CCA 405; Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304, 166 CCA 44]; Hinman v. Starch Bros. Co., 247 Fed. 346 [aff 259 Fed. 222, 170 CCA 290]; U. S. Drain, etc., Co. v. Manahan, 246 Fed. 446, 158 CCA 510 [aff 236 Fed. 144]; Weber Electric Co. v. National Gas, etc., Co., 240 Fed. 965, 153 CCA 651; Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 407, 143 CCA 527 [certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem]; Hildreth v. Lauer, etc., Co., 213 Fed. 788, 130 CCA 446; National Cash Register Co. v. Gratigny, 213 Fed. 463, 130 CCA 109; Weber Electric Co. v. National Gas, etc., Co., 212 Fed. 950, 129 CCA 470; International Curtis Mar. Turbine Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 211 Fed. 124, 127 CCA 522 [certiorari den 234 U. S. 755 mem, 34 SCt 674 mem, 58 L. ed. 1578 mem]; Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 210 Fed. 164, 127 CCA 22; Hildreth v. Lauer, etc., Co., 208 Fed. 1005 [aff 219 Fed. 753, 135 CCA 451]; Wheeler v. James, 189 Fed. 896; Oehrle v. William H. Horstmann Co., 131 Fed. 487 [aff 138 Fed. 561, 70 CCA 638]; American Bell Tel. Co. v. National Tel. Mfg. Co., 109 Fed. 976; Milligan v. Lalance, etc., Mfg. Co., 21 Fed. 570; Adjustable Window Screen Co v. Boughton, 1 F. Cas. No. 81, 1 Bann. & A. 327, 10 Phila. (Pa.) 251; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Hopkins, etc., Mfg. Co. v. Corbin, 12 F. Cas. No. 6,695, 3 Bann. & A. 199, 14 Blatchf. 396 [aff 103 U. S. 786, 26 L. ed. 610]; Hovey v. Stevens, 12 F. Cas. No. 6,746, 2 Robb Pat. Cas. 567, 3 Woodb. & M. 17; Odiorne v. Winkley, 18 F. Cas. No. 10,432, 2 Gall. 51, 1 Robb Pat. Cas. 52; Stanley v. Hewitt, 22 F. Cas. No. 13,285; Stanley v. Whipple, 22 F. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Stanley Rule, etc., Co. v. Davis, 22 F. Cas. No. 13,288; Turner v. Johnson, 24 F. Cas. No. 14,261, 2 Cranch C. C. 287, Fish. Pat. R. 4; Tyler v. Deval, 24 F. Cas. No. 14,307, 1 CodeRep (N. Y.) 30; Watson v. Bladen, 29 F. Cas. No. 17,277, 1 Robb Pat. Cas. 510, 4 Wash. C. C. 580; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

D. C.—In re Carr, 54 App. 283, 297 Fed. 542; Clulee v. Adt, 44 App. 300; Rotter v. Hodgkinson, 43 App. 254; In re Cottrell, 37 App. 370; In re Milans, 31 App. 269; In re Sheldon, 31 App. 201.

N. H.—Davis v. Bell, 8 N. H. 500, 31 AmD 202.

Pa.—Holliday v. Rheem, 18 Pa. 465, 57 AmD 628.

Eng.—Minter v. Mower, 6 A. & E. 735, 33 ECL 387, 112 Reprint 282; Kay v. Marshall, 5 Bing. N. Cas. 492, 35 ECL 266, 132 Reprint 1189 [aff 8 Cl. & F. 245, 8 Reprint 96, West 682, 9 Reprint 643]; Campion v. Benyon, 3 B. & B. 5, 7 ECL 574, 129 Reprint 1184; Foxwell v. Bostock, 4 De G. J. & S. 298, 46 Reprint 934; Hill v. Thompson, Holt N. P. 636, 3 ECL 249, 171 Reprint 367; Morgan v. Seaward, 2 M. & W. 544, 150 Reprint 874; Moore Filter Co. v. Great Boulder, etc., Gold Mines, Ltd., 38 R. P. C. 239; Cochrane v. Smethurst, 1 Stark. 205, 2 ECL 84, 171 Reprint 448.

Can.—Bergeon v. De Kermor Electric Heating Co., Ltd., [1927] Can. Exch. 181, [1927] 3 DomLR 99.

50. Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294.

51. Blake v. Stafford, supra.

52. Blake v. Stafford, supra.

Construction of patent claims see infra §§ 349–363.

53. Burke Electric Co. v. Independent Pneumatic Tool Co., 232 Fed. 145, 146 CCA 337, 234 Fed. 93, 148 CCA 109 [certiorari den 241 U. S. 682 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; Universal Tobacco Mach. Co. v. Borgfeldt Stripping Mach. Co., 215 Fed. 715, 132 CCA 125.

54. In re Perlman, 39 App. (D. C.) 447; In re Gardner, 32 App. (D. C.) 249; In re White, 31 App. (D. C.) 607.

55. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139 [aff 155 Fed. 731, 740, 84 CCA 157, 166]; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Excelsior Needle Co. v. Union Needle Co., 32 Fed. 221, 23 Blatchf. 147; Gage v. Kellogg, 23 Fed. 891 [reh den 26 Fed. 242]; Reay v. Raynor, 19 Fed. 308; Hatch v. Moffit, 15 Fed. 252; Matthews v. Shoneberger, 4 Fed. 635, 18 Blatchf. 357; Wheeler v. Simpson, 29 F. Cas. No. 17,500, 1 Bann. & A. 420.

56. Hatch v. Moffitt, 15 Fed. 252; In re White, 31 App. (D. C.) 607.

57. Jackson Fence Co. v. Peerless Wire Fence Co., 228 Fed. 691, 143 CCA 213 [aff 226 Fed. 774].

58. In re Cartlidge, 56 App. (D. C.) 346, 13 F. (2d) 317; In re Gardner, 32 App. (D. C.) 249.

59. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610; Consolidated Electric Light Co. v. McKeesport Light Co., 159 U. S. 465, 16 SCt 75, 40 L. ed. 221; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Apco Mfg. Co. v. Temco Electric Motor Co., 11 F. (2d) 109 [certiorari granted 271 U. S. 653 mem, 46 SCt 483 mem, 70 L. ed. 1134 mem]; Skinner Irr. Co. v. March Automatic Irr. Co., 9 F. (2d) 751; Heidbrink v. McKesson, 290 Fed. 665 [certiorari den 263 U. S. 723 mem. 44 SCt 231 mem, 68 L. ed. 525 mem]; Harmon Paper Co. v. Kimberly Clark Co., 289 Fed. 501; Hunt v. C. A. Libbey Co., 283 Fed. 58; One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; Hildreth v. Lauer, etc., Co., 204 Fed. 792 [aff 213 Fed. 788, 130 CCA 446]; Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; American Crayon Co. v. Sexton, 139 Fed. 564, 71 CCA 548; Manhattan General Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Diamond Match Co. v. Ruby Match Co., 127 Fed. 341; National Meter Co. v. Neptune Meter Co., 122 Fed. 82 [aff 129 Fed. 124, 63 CCA 626]; Boyden Power-Brake Co. v.

[§ 166] **(4) Duplicitous Claims.** Only one single and distinct invention may be included in a single claim.[60] Several distinct inventions, each complete in itself, must be separately claimed.[61] Thus one who has invented a process by which an article of manufacture is produced must make them the subject of separate and distinct claims.[62]

[§ 167] **(5) Multiplicity of Claims.** There is nothing improper in including a number of claims in a single application.[63] Thus it is not objectionable for an applicant first to make as broad a claim as he can in good faith and follow it with narrower claims differentiated from each other to protect himself against possible anticipations.[64] The claims must contain in themselves material differences[65] and should not consist of mere repetition in varying phraseology of the same thing.[66] If carried to the extent of creating ambiguity, the patent may be rendered invalid.[67]

[§ 168] **(6) Joinder of Claims—(a) In General.** There is nothing in the language of the statutes relating to patents which necessarily precludes the joinder of claims for two or more inventions in the same application,[68] and it is well established that several distinct inventions may be claimed in one application if they are dependent upon each other and mutually contribute to produce a single result.[69] Refusal by the patent office to consider an application containing claims for a process and the apparatus by which the process is performed, without determining whether the inventions are related and dependent, is not the exercise of discretion but a determination not to hear,[70] and a rule of the patent office, in so far as it requires a division between such claims if they are related and dependent inventions, is invalid.[71] Inventions, however, are distinguished into arts, machines, manufactures, and compositions of matter,[72] and it is also well established that the joinder of two or more independent inventions in a single application is improper.[73] The foregoing rules are embodied in the rules of the patent office,[74] and while it has been asserted that the inclusion of two or more independent inventions in a single patent is fatal to the validity of the patent,[75] it now seems settled that the discretion of the patent office in the application of the rules with respect to joinder of claims will not be reviewed by the courts,[76] except in cases of clear abuse.[77] The practice is firmly established that a single patent may contain the generic and relatively generic claims and a specific claim to one form only of the concrete embodiment.[78] Accordingly, where the application presents specific claims to alternative forms, applicant is required to confine his claims in that application to one form.[79]

Division of application. The rules of the patent office provide that if several inventions claimed in a single application be of such a nature that a single patent may not be issued to cover them, the inventor will be required to limit the description, drawing,

Westinghouse, 70 Fed. 816, 17 CCA 430 [aff 66 Fed. 997 (aff 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136)]; Hoke Engraving Plate Co. v. Schraubstadter, 47 Fed. 506.

60. Dukes v. Bauerle, 41 Fed. 778.

61. Britton v. White Mfg. Co., 61 Fed. 93; United Nickel Co. v. California Electrical Works, 25 Fed. 475; Merrill v. Yeomans, 17 F. Cas. No. 9,472, 1 Bann. & A. 47, Holmes 331 [aff 94 U. S. 568, 24 L. ed. 235]; Celluloid Mfg. Co. v. Zylonite Brush, etc., Co., 35 Off. Gaz. (U. S.) 1228.

62. Merrill v. Yeomans, 17 F. Cas. No. 9,472, 1 Bann. & A. 47, Holmes 331 [aff 94 U. S. 568, 24 L. ed. 235].

63. Carlton v. Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517; A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 69 Fed. 257 [rev on other grounds 71 Fed. 396 (certiorari den 163 U. S. 685 mem, 16 SCt 1201 mem, 41 L. ed. 315 mem)]; Britton v. White Mfg. Co., 61 Fed. 93; Brush Electric Co. v. Electrical Accumulator Co., 47 Fed. 48; Tompkins v. Gage, 24 F. Cas. No. 14,088, 5 Blatchf. 268, 2 Fish. Pat. Cas. 577; Computing Scale Co. v. Automatic Scale Co., 119 Off. Gaz. (U. S.) 1586; In re Carpenter, 24 App. (D. C.) 110.

64. A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; Parke-Davis v. H. K. Mulford Co., 189 Fed. 95 [aff 196 Fed. 496, 116 CCA 262]; Badische Anilin, etc., Fabrik v. Klipstein, 125 Fed. 543; Britton v. White Mfg. Co., 61 Fed. 93.

65. A. B. Dick Co. v. Underwood Typewriter Co., 246 Fed. 309; Parke-Davis v. H. K. Mulford Co., 189 Fed. 95 [aff 196 Fed. 496, 116 CCA 262]; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 69 Fed. 257 [rev on other grounds 71 Fed. 396, 18 CCA 145 (certiorari den 163 U. S. 685 mem, 16 SCt 1201 mem, 41 L. ed. 315 mem)].

66. Thomson-Houston Electric Co. v. Elmira, etc., R. Co., supra; Norden v. Spaulding, 24 App. (D. C.) 286; In re Carpenter, 24 App. (D. C.) 110.

Construction of claims as affected by needless multiplicity see infra § 349.

67. Carlton v. Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517.

68. U. S. v. Allen, 192 U. S. 543, 24 SCt 416, 48 L. ed. 555.

69. Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Steinmetz v. Allen, 192 U. S. 543, 24 SCt 416, 48 L. ed. 555; Dobson v. Bigelow Carpet Co., 114 U. S. 439, 5 SCt 945, 29 L. ed. 177 [rev 10 Fed. 385]; Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505; Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680]; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 212 Fed. 192 [rev 216 Fed. 146, 132 CCA 240 (rev on other grounds 235 U. S. 383, 35 SCt 132, 59 L. ed. 282)]; Hohmann, etc., Mfg. Co. v. Charles J. Tagliabue Mfg. Co., 175 Fed. 87; Sanitas Nut Food Co. v. Voigt, 139 Fed. 551, 71 CCA 535; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 982; Fire-Extinguisher Case, 21 Fed. 40; Maxheimer v. Meyer, 9 Fed. 460, 20 Blatchf. 17; Holly v. Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Adams v. Jones, 1 F. Cas. No. 57, 1 Fish. Pat. Cas. 527, 2 Pittsb. (Pa.) 73; American Nicholson Pav. Co. v. Elizabeth, 1 F. Cas. No. 311, 6 Fish. Pat. Cas. 424 [mod 97 U. S. 126, 24 L. ed. 1000]; Densmore v. Scofield, 7 F. Cas. No. 3,809, 4 Fish. Pat. Cas. 148 [aff 102 U. S. 375, 26 L. ed. 214]; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Hayden v. James, 11 F. Cas. No. 6,260; Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Morris v. Barrett, 17 F. Cas. No. 9,827, 1 Bond 254, 1 Fish. Pat. Cas. 461; Root v. Ball, 20 F. Cas. No. 12,035, 4 McLean 177, 2 Robb. Pat. Cas. 513; Stevens v. Pritchard, 23 F. Cas. No. 13,407, 2 Bann. & A. 390, 4 Cliff. 417; Welling v. Rubber-Coated Harness Trimming Co., 29 F. Cas. No. 17,383, 2 Bann. & A. 1; In re Hawkins, 57 App. (D. C.) 262, 20 F. (2d) 278.

[a] **Rule applied.**—(1) Machine and separate parts. Holly v. Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31. (2) Process and product. Welling v. Rubber-Coated Harness Trimming Co., 29 F. Cas. No. 17,383, 2 Bann. & A. 1; In re Hawkins, 57 App. (D. C.) 262, 20 F. (2d) 278. (3) Process, and apparatus by which it is performed. Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Steinmetz v. Allen, 192 U. S. 543, 24 SCt 416, 48 L. ed. 555; Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680]; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 212 Fed. 192 [rev on other grounds 216 Fed. 146, 132 CCA 240 (rev on other grounds 235 U. S. 383, 35 SCt 132, 59 L. ed. 282)]. (4) Different but equivalent parts of a patentable device. Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., supra. (5) Entire design and parts may be claimed. Dobson v. Bigelow Carpet Co., 114 U. S. 439, 5 SCt 945, 29 L. ed. 177 [rev 10 Fed. 385].

70. U. S. v. Allen, 192 U. S. 543, 24 SCt 416, 48 L. ed. 555.

71. U. S. v. Allen, supra.

72. See supra §§ 10–25.

73. Window Glass Mach. Co. v. Pittsburgh Sheet Glass Co., 18 F. (2d) 63; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Root v. Ball, 20 F. Cas. No. 12,035, 4 McLean 177, 2 Robb Pat. Cas. 513; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

74. Patent Office Rules Oct. 1, 1927, rule 41.

75. Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

Correction of patent by disclaimer of independent inventions see infra § 330.

76. U. S. v. Allen, 192 U. S. 543, 24 SCt 416, 48 L. ed. 555; Bennett v. Fowler, 8 Wall. (U. S.) 445, 19 L. ed. 431; American Laundry Mach. Co. v. Prosperity Co., 295 Fed. 819 [rev 294 Fed. 144]; McKay v. Dibert, 5 Fed. 587; In re Frasch, 27 App. (D. C.) 25.

77. U. S. v. Allen, 192 U. S. 543, 24 SCt 416, 48 L. ed. 555; In re Frasch, 27 App. (D. C.) 25.

78. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27.

79. Wagenhorst v. Hydraulic Steel Co., supra.

and claim of the pending application to whichever invention he may elect.[80] The other inventions may be made the subjects of separate applications, which must conform to the rules applicable to original applications.[81] These applications are known as "divisional applications."[82] If the independence of the inventions be clear, such limitation will be made before any action upon the merits;[83] otherwise it may be made at any time before final action thereon, in the discretion of the examiner.[84] Division under these rules may be required where the structures are unrelated[85] or where the claims relate only to species under a general genus.[86] Division may be, and often is, required years after the application is filed.[87] A requirement of division will not be repeated without the written approval of the examiner of classification.[88] After a final requirement of division, applicant may elect to prosecute one group of claims, retaining the remaining claims in the case with the privilege of appealing from the requirement of division after final action by the examiner on the group of claims prosecuted.[89] A divisional application is a form of amendment.[90] If new matter is embodied in it, the application takes its filing date only from that embodiment.[91] As to anything which is not new matter, the application has the benefit of the filing date of the parent application.[92]

[§ 169] **(b) Effect of Inclusion of Void Claim.** Some claims made in a patent may be invalid without invalidating the entire patent, since each claim is separately considered and is a separate statement of the field intended to be covered.[93]

[§ 170] **4. Oath.** It is provided by statute that applicant shall make oath that he believes himself to be the first inventor of the method or thing for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used; and shall state of what country he is a citizen.[94] If the inventor is dead, the oath must be made by the executor or administrator;[95] and in case the inventor is insane, by his legally appointed representative.[96] Such oath may be made in the United States before any officer authorized to administer oaths; and, if made abroad, before any diplomatic or consular officer of the United States or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths, where authority of the foreign officer shall be proved by a certificate of a diplomatic or consular officer of the United States.[97] It has been held that the statute is directory only, that the making of the oath is but a prerequisite to the granting of the patent, and in no degree essential to its validity.[98] But it has been asserted that this doctrine has been overruled and a contrary doctrine established.[99] A patent which is not supported by the oath of the inventor, his executor or administrator, or his legally appointed representative, but is applied for by one who is not the inventor, is unauthorized by law and void.[1] No right as against the public is conferred by a patent issued on the sworn application of one not the inventor whether the patent is taken out in the name of applicant[2] or of any of his assignees.[3] Mere formal defects in the oath do not affect the validity of the patent.[4] The statement of allegiance of applicant is no longer required to be included in the oath but should be stated in the body of the application.[5] It has been held that a misstatement of the citizenship of applicant will not invalidate a patent issued thereon where it does not appear that applicant was guilty of any fraud or that his oath was willfully false.[6] This decision was expressly put upon the ground that a mistake as to applicant's citizenship operated neither to his advantage nor to the detriment of the public, and was a mere formal defect.[7]

Rules of the patent office require that in every original application applicant must distinctly state under oath that to the best of his knowledge and belief the invention has not been in public use or on sale in the United States for more than two years prior to his application, or patented or described in any printed publication in any country before his invention or more than two years prior to his application, or patented in any foreign country on an application filed by himself or his legal representatives

80. Patent Office Rules Oct. 1, 1927, rule 42.
81. Patent Office Rules Oct. 1, 1927, rule 42.
82. American Laundry Mach. Co. v. Prosperity Co., 295 Fed. 819 [rev 294 Fed. 144].
83. Patent Office Rules Oct. 1, 1927, rule 42.
84. Patent Office Rules Oct. 1, 1927, rule 42.
85. In re Isherwood, 46 App. (D. C.) 507.
86. In re Isherwood, supra.
87. American Laundry Mach. Co. v. Prosperity Co., 295 Fed. 819 [rev 294 Fed. 144].
88. Patent Office Rules Oct. 1, 1927, rule 42.
89. Patent Office Rules Oct. 1, 1927, rule 42.
90. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27.
91. Wagenhorst v. Hydraulic Steel Co., supra.
92. Wagenhorst v. Hydraulic Steel Co., supra.
93. Seymour v. McCormick, 19 How. (U. S.) 96, 15 L. ed. 557; Smith v. Ely, 15 How. (U. S.) 137, 14 L. ed. 634; Weber Electric Co. v. National Gas, etc., Co., 212 Fed. 950, 129 CCA 470; Hake v. Brown, 37 Fed. 783; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Kelleher v. Darling, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 124; Peterson v. Wooden, 19 F. Cas. No. 11,038, 3 McLean 248, 2 Robb Pat. Cas. 116; Rumford Chemical Works v. Lauer, 20 F. Cas. No. 12,135, 10 Blatchf. 122, 5 Fish. Pat. Cas. 615; Stephens v. Felt, 22 F. Cas. No. 13,368, 2 Blatchf. 37, Fish. Pat. R. 144; Hotchkiss v. Oliver, 5 Den. (N. Y.) 314; Frearson v. Loe, 9 Ch. D. 48; Plimpton v. Spiller, 6 Ch. D. 412.
94. U. S. Code tit 35 § 35.
95. Patent Office Rules Oct. 1, 1927, rule 25.
96. Patent Office Rules Oct. 1, 1927, rule 26.
97. U. S. Code tit 35 § 35.
98. Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Whittemore v. Cutter, 29 F. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28; Dyer v. Rich, 1 Metc. (Mass.) 180.
99. Heller Bros. Co. v. Crucible Steel Co., 297 Fed. 39.
1. Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576; U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704; Brewer-Titchener Corp. v. American Forging, etc., Co., 300 Fed. 335; Heller Bros. Co. v. Crucible Steel Co., 297 Fed. 39; Paul v. Collins, 191 Mich. 113, 157 NW 400.
2. U. S. Gypsum Co. v. Bestwall Mfg. Co., 15 F. (2d) 704.
3. U. S. Gypsum Co. v. Bestwall Mfg. Co., supra.
4. American Hoist, etc., Co. v. Nancy Hanks Hay Press, etc., Co., 216 Fed. 785 [reh den 224 Fed. 524]; Empire Cream Separator Co. v. Sears, 157 Fed. 238 [rev on other grounds 160 Fed. 668, 87 CCA 556].
[a] **A verbal error** in the oath attached to the application on which a patent was granted constitutes no defense to a suit for infringement. American Hoist, etc., Co. v. Nancy Hanks Hay Press, etc., Co., 216 Fed. 785 [reh den 224 Fed. 524].
[b] **Variance between venue and jurat.**—A patent will not be declared invalid by a court because the venue of the affidavit to the application was laid in one state and the jurat was made by a notary in another, where such application was accepted by the patent office and no fraud is shown. Empire Cream Separator Co. v. Sears, 157 Fed. 238 [rev on other grounds 160 Fed. 668, 87 CCA 556].
[c] **Omission from the jurat of any date** does not affect the validity of a patent, there being no requirement that the jurat be dated. French v. Rogers, 9 F. Cas. No. 5,103, 1 Fish. Pat. Cas. 133.
5. Van Heusen Products, Inc. v. Earl, 300 Fed. 922.
6. Tonduer v. Chambers, 37 Fed. 333.
7. Tonduer v. Chambers, supra.
[a] **In an earlier case,** decided under a statute which imposed upon an alien other and different requirements than were placed upon a citizen, it was held that an innocent mis-

or assigns more than twelve months prior to his application in this country.[8] If any application for a patent has been filed in any foreign country by applicant, or by his legal representatives or assigns, prior to his application in this country, he is required by the rules to state the country or countries in which such application has been filed, giving the date of such application, and stating that no application has been filed in any other country or countries than those mentioned.[9] He is also required so to state if no application has been filed in any foreign country.[10] The oath must be in the English language,[11] and must be subscribed to by affiant.[12] If the application be made by an executor or administrator of a deceased person or the guardian, conservator, or representative of an insane person, the oath must allege the relationship of affiant to the inventor,[13] and, upon information and belief, the facts to which the inventor is required by the rules to make oath.[14]

[§ 171] **5. Drawings.**[15] The statute governing applications requires applicant to furnish a drawing of his invention whenever the nature of the case admits of it.[16] The drawing may be signed by the inventor or his attorney in fact,[17] or, in case of the inventor's death or insanity, by his proper representative.[18] The drawings must show every feature of the invention covered by the claims.[19] Patent office drawings are not required to be working drawings.[20] They are merely illustrative,[21] and are to be read in the light of the description and claims,[22] and the prior art.[23] Their object is to aid in conveying the idea of the inventor to the skilled in the art.[24] And if, read in connection with the description and claims, they are sufficient for that purpose, it is immaterial so far as the validity of a patent is concerned that they are in some respects inaccurate,[25] incomplete,[26] or otherwise defective.[27] The drawings may be corrected by the patent office to show correctly the invention described in the specification.[28] The rules of the patent office prescribe in detail the size, materials, arrangement, lettering and other matters pertaining to the execution of the drawing.[29]

Improvements. When the invention consists of an improvement of an old machine the drawing must exhibit, in one or more views, the invention itself, disconnected from the old structure, and also, in another view, so much only of the old structure as will suffice to show the connection of the invention therewith.[30]

[§ 172] **6. Models.** The statute governing applications provides that in all cases which admit of representation by model, applicant, if required by the commissioner, shall furnish a model of convenient size to exhibit advantageously the several parts of his invention or discovery.[31] This requirement must be complied with.[32] The patent office rules provide that a model will be required or admitted as a part of the application only when, on examination of the case in its regular order, the primary examiner shall find it to be necessary or useful.[33] When a model is required, the examination of the application may be suspended until it shall have been filed.[34] The requisites of the model are the subject of patent office rules.[35]

statement of applicant's citizenship rendered the patent void. Child v. Adams, 5 F. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20.

8. Patent Office Rules Oct. 1, 1927, rule 46.

9. Patent Office Rules Oct. 1, 1927, rule 46.

[a] **Effect of statement of foreign application.**—A statement in the oath of applicant for a patent that a prior French patent for the invention was taken out by him as inventor makes the French application a part of the United States application, and gives the patentee the advantage of the French filing date, under the international convention, without further proof. Michelin v. Hayes Wheel Co., 300 Fed. 458.

10. Patent Office Rules Oct. 1, 1927, rule 46.

11. Patent Office Rules Oct 1, 1927, rule 30.

12. Patent Office Rules Oct. 1, 1927, rule 46.

13. Patent Office Rules Oct. 1, 1927, rule 46.

14. Patent Office Rules Oct. 1, 1927, rule 46.

15. Cross references:
As limiting claims see infra § 350.
As reduction to practice see supra § 129.

16. U. S. Code tit 35 § 34.

17. U. S. Code tit 35 § 34; Patent Office Rules Oct. 1, 1927, rule 50.

18. Patent Office Rules Oct. 1, 1927, rule 50.

19. Patent Office Rules Oct. 1, 1927, rule 50.

20. Toledo Scale Co. v. Barnes Scale Co., 18 F. (2d) 965; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 274 Fed. 964; Wold v. Thayer, 148 Fed. 227, 78 CCA 350; Western Tel. Mfg. Co. v. American Electric Tel. Co., 131 Fed. 75, 65 CCA 313; Johnston v. Woodbury, 97 Off. Gaz. (U. S.) 402; Gold v. Gold, 34 App. (D. C.) 152.

21. Wold v. Thayer, 148 Fed. 227, 78 CCA 350.

22. Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Wold v. Thayer, 148 Fed. 227, 78 CCA 350; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co., 147 Fed. 266; Western Tel. Mfg. Co. v. American Electric Tel. Co., 131 Fed. 75, 65 CCA 313; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Gold v. Gold, 34 App. (D. C.) 152; Phillips v. Sensenich, 31 App. (D. C.) 159; Poupard v. Fardell, 18 Wkly. Rep. 127.

23. Gold v. Gold, 34 App. (D. C.) 152.

24. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co., 147 Fed. 266; American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307; Gold v. Gold, 34 App. (D. C.) 152.

25. Van Meter v. Irving Air Chute Co., 27 F. (2d) 170; Toledo Scale Co. v. Barnes Scale Co., 18 F. (2d) 965; Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 204 Fed. 286, 122 CCA 440; Wold v. Thayer, 148 Fed. 227, 78 CCA 350; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co., 147 Fed. 266; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Moore v. U. S., 40 App. (D. C.) 201.

26. Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 204 Fed. 286, 122 CCA 440; Hillard v. Fisher Book Typewriter Co., 151 Fed. 34 [aff 159 Fed. 439, 86 CCA 469, and certiorari den 208 U. S. 617 mem, 28 SCt 569 mem, 52 L. ed. 647 mem]; Western Tel. Mfg. Co. v. American Electric Tel. Co., 131 Fed. 75, 65 CCA 313; American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307; Pullman Palace-Car Co. v. Wagner Palace-Car Co., 38 Fed. 416; Cosper v. Gold, 36 App. (D. C.) 302.

[a] **Illustrations.**—(1) A patent for a machine for delinting cotton seed, which shows that the seed is to be fed into the machine at one end and discharged at the other, is not invalidated by the failure to specify or show in the drawings a feed screw or other device for assisting to move the seed through the machine, the machine being operative without it, but it being obvious that some such device would aid the passage of the seed through the machine, and when in fact it was used in the construction of the first machine. American Delinter Co. v. American Mach., etc., Co., 128 Fed. 709, 63 CCA 307. (2) Where a skilled mechanic could construct the three forms of buffers described from the specifications and drawings, the specification in that respect is sufficient, although but one form is shown in the drawings. Pullman Palace-Car Co. v. Wagner Palace-Car Co., 38 Fed. 416.

27. Hallock v. Babcock Mfg. Co., 124 Fed. 226.

[a] **Irregularities in the signing of the drawings,** or in witnessing the signature thereto, cannot avail to defeat a suit for infringement where they did not operate as a fraud upon the patent office. Hallock v. Babcock Mfg. Co., 124 Fed. 226.

28. Hinman v. Visible Milker Co., 231 Fed. 174 [aff 239 Fed. 896, 153 CCA 24].

29. Patent Office Rules Oct. 1, 1927, rule 55.

30. Patent Office Rules Oct. 1, 1927, rule 50.

31. U. S. Code tit 35 § 34.

32. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Seymour v. Osborne, 11 Wall. (U. S.) 516; McCormick v. Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505; Barry v. Gugenheim, 2 F. Cas. No. 1,061, 5 Fish. Pat. Cas. 452; Draper v. Wattles, 7 F. Cas. No. 4,073, 3 Bann. & A. 618.

33. Patent Office Rules Oct. 1, 1927, rule 56.

34. Patent Office Rules Oct. 1, 1927, rule 56.

35. Patent Office Rules Oct. 1, 1927, rules 57–59.

[§ 173] **7. Specimens of Ingredients and of Composition.** The statute provides that, when the invention or discovery is a composition of matter, applicant, if required by the commissioner, shall furnish specimens of ingredients and of the composition, sufficient in quantity for the purpose of experiment.[36] Whether specimens of ingredients and of the composition shall be required or not is discretionary with the patent office.[37]

[§ 174] **8. Fees.**[38] The fees to be paid upon making application for any action by the United States patent office are fixed by statute[39] and by the rules of the patent office.[40] Payment in advance of any action by the patent office is required both by statute[41] and by the rules of the patent office.[42] The final fee is required to be paid not later than six months from the time at which the application was passed and allowed and notice thereof sent to applicant or his agent.[43] This means six calendar months, and not six lunar months.[44] The statute provides that the patent shall be withheld if the final fee is not paid within that period.[45] The patent, however, is not subject to collateral attack upon the ground that the final fee was not paid.[46]

Invention dedicated to the public. Provision has been made by congress for the issuance of patents without the payment of any fee where applicant in his application states that the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any other person in the United States, without the payment to him of any royalty thereon, which stipulation shall be included in the patent;[47] and the validity of this provision has been sustained.[48]

[§ 175] **D. Examination and Proceedings in Patent Office*—1. In General.** Upon an application for a patent being properly made,[49] and the required fees being paid,[50] the commissioner of patents is required by statute to cause an examination to be made of the alleged new invention or discovery, and to determine whether claimant is entitled to a patent under the law, and whether it is sufficiently useful and important to warrant the grant of a patent.[51] The commissioner has the only original initiatory jurisdiction that exists up to the granting and delivering of a patent;[52] and it is his duty to decide whether the patent is new, and whether it is the proper subject of a patent;[53] and his action in awarding or refusing a patent is a judicial function[54] which he cannot transfer to those selected to assist in the examination;[55] nor can he constitute them a board of examiners known in law as such.[56] In passing on an application the commissioner should decide not only questions of law, but also of fact,[57] including abandonment or neglect,[58] and whether there had been a prior public use or sale of the article invented.[59]

Effect of examiner's decision. The decision of the examiner or board of examiners is not conclusive upon the commissioner, so as to deprive him of the general power conferred upon him by statute, to satisfy himself, before issuing a patent, that claimant is justly entitled to a patent;[60] and he may refuse a patent allowed by the examiner.[61]

[§ 176] **2. Evidence.**[62] In uncontested cases, the evidence upon questions of fact involved in the application is ex parte,[63] and the patent office is not

36. U. S. Code tit 35 § 34.

37. Badische Anilin, etc., Fabrik v. Cochrane, 2 F. Cas. No. 719, 4 Bann. & A. 215, 16 Blatchf. 155 [rev on other grounds 111 U. S. 293, 4 SCt 455, 28 L. ed. 433].

38. Payment of renewal fees as affecting term of patent see infra § 295.

39. U. S. Code tit 35 § 78.

40. Patent Office Rules Oct. 1, 1927, rule 191.

41. U. S. Code tit 35 § 36.

42. Patent Office Rules Oct. 1, 1927, rule 191.

43. U. S. Code tit 35 § 41.

44. Economy Feed Water-Heater Co. v. Lamprey Boiler Furnace-Mouth Protector Co., 65 Fed. 1000, 13 CCA 271 [aff 62 Fed. 590]; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

45. U. S. Code tit 35 § 41.

Renewal of application for patent withheld for nonpayment of final fee see infra § 191.

46. Lamprey Boiler Furnace Mouth Protector Co. v. Economy Feed Water Heater Co., 62 Fed. 590 [aff on other grounds 65 Fed. 1000, 13 CCA 271]; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

47. U. S. Code tit 35 § 45.

48. Willoughby v. Rogers, 20 F. (2d) 981.

49. See supra §§ 146-173.

50. See supra § 174.

51. U. S. Code tit 35 § 36. And see cases infra this note.

[a] **Statutes.**—(1) "By the patent act of 1793 . . . no examination was made by persons qualified to judge whether the alleged invention was new or useful, or had been patented before. That rested wholly on the oath of the applicant. . . . But the act of 4th of July, 1836, introduced a new system, and an entire change in the mode of granting patents. It provided for a new officer, styled a commissioner of patents, to 'superintend, execute, and perform all acts and things touching and respecting the granting and issuing of patents, etc.' The commissioner was authorized to appoint a chief clerk, and three examining clerks, machinist, and other officers. On the filing of an application the commissioner is required to make, or cause to be made, an examination of the alleged invention, in order to ascertain whether the same had been invented or discovered by any other person in this country, prior to the application; or whether it had been patented in this or any foreign country, or had been on public use or sale, with the applicant's consent, prior to his application; and if the commissioner shall find that the invention is new and useful, or important, he is authorized to grant a patent for the same." Corning v. Burden, 15 How. (U. S.) 252, 269, 14 L. ed. 683. (2) The present statute requires the commissioner to "cause an examination to be made of the alleged new invention or discovery; and, if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the commissioner shall issue a patent therefor." U. S. Code tit 35 § 36.

[b] **Order of examination.**—Applications filed are classified according to the various arts, and are taken up for examination in the regular order of filing, those in the same class of invention being examined and disposed of, as far as practicable, in the order in which the respective applications are completed. Patent Office Rules Oct. 1, 1927, rule 63.

[c] **Particular officer.**—It is not incumbent upon the commissioner to have the examination made by any particular officer. Hull v. Patents Comr., 9 D. C. 90.

[d] **In England** the application is referred by the comptroller to an examiner to determine its sufficiency. Act (1883) c 57 § 6. If complete application is accepted it is advertised (Act [1883] c 57 § 10), and anyone may oppose the grant within two months after publication (Act [1883] c 57 § 11).

52. Hunt v. Howe, 12 F. Cas. No. 6,891, McA. Pat. Cas. 366.

[a] **A patent when issued** becomes the property of the patentee (see supra § 8), free from the control and jurisdiction of the patent office. Knight v. Rite Shoe Co., 23 F. (2d) 903.

53. In re Wagner, 28 F. Cas. No. 17,038, McA. Pat. Cas. 510.

54. Butterworth v. U. S., 112 U. S. 50, 5 SCt 25, 28 L. ed. 656; U. S. v. Duell, 86 Off. Gaz. (U. S.) 995.

55. In re Aiken, 1 F. Cas. No. 107, McA. Pat. Cas. 126.

56. In re Aiken, supra.

57. Marcy v. Trotter, 16 F. Cas. No. 9,063.

58. See infra §§ 192-195.

59. Mowry v. Barber, 17 F. Cas. No. 9,892, McA. Pat. Cas. 563.

Prior public use or sale as bar to patent see supra §§ 33-43.

60. Moore v. U. S., 40 App. (D. C.) 591 [app dism 237 U. S. 197, 35 SCt 571, 59 L. ed. 913, and certiorari den 239 U. S. 630, 35 SCt 941, 59 L. ed. 1497]; Hull v. Patents Comr., 9 D. C. 90.

Conclusiveness of decisions in patent office generally see infra §§ 254-269.

61. See infra § 179.

62. Evidence of:
Invention see supra §§ 89-99.
Novelty and anticipation see supra §§ 55-57.
Utility see supra §§ 64-66.
In interference cases see infra § 216.

63. Shaw v. Cooper, 7 Pet. (U. S.)

*By HENRY H. SKYLES (§§ 175-253).

confined to technical evidence in rejecting or allowing applications, but may base its action upon anything which shows the facts with reasonable certainty.[64] The commissioner may take notice of facts adjudicated in the supreme court,[65] and he may also act upon knowledge derived from a search of the records and decisions made in his own department.[66] The attendance of witnesses may be compelled.[67]

Burden of proof. It is incumbent upon applicant to make it appear that he is justly entitled to a patent under the law, and that the invention is sufficiently useful and important to justify the issue of such patent therefor;[68] and where he claims that two statutory inventions constitute one unitary invention, the burden is upon him to prove that fact.[69]

Presumptions. The oath of applicant is prima facie evidence of the invention,[70] and where applicant has complied with all formal requirements, and the commissioner does not find that the invention falls within any of the conditions mentioned in the law as fatal to the grant of a patent, he cannot require additional evidence as to the practical result of the invention;[71] but the commissioner has power and it is his duty to resort to any circumstances legitimately in his possession for the purpose of repelling the presumption.[72]

[§ 177] **3. Suspension of Action.** The commissioner may temporarily suspend action on a pending application for what he deems a sufficient reason,[73] and so long as such suspension does not interfere with a positive legal right, the wisdom of the commissioner's action will not be inquired into by the courts.[74]

[§ 178] **4. Allowance of Application.** An act of congress expressly provides that if, on examination, it shall appear that claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the commissioner shall issue a patent therefor,[75] except that in case of war the granting of the patent may be withheld until the termination of the war, if the disclosure of the patent might, in the opinion of the commissioner, be detrimental to the public safety or defense, or might assist the enemy or endanger the successful prosecution of the war.[76] And where a substantial and presumably meritorious contribution to a given art is made by an applicant for a patent,[77] and the question of patentability is close, any doubt which arises, whether in the appellate court,[78] or in the patent office, as to the patentability of an invention should be resolved in favor of applicant,[79] especially where his claims are specific.[80] Where, however, applicant has prolonged the prosecution of his application for such a period of years as to indicate a design to delay final action upon it, knowing that the device covered by the application has gone into public use, the commissioner is justified in reversing the ordinary rule by resolving any reasonable doubt against applicant.[81]

[§ 179] **5. Rejection of Application and Notification.** If upon such examination it is determined that applicant is not entitled to a patent as claimed, the commissioner should reject the application;[82] and if there is within his knowledge or cognizance any

292, 8 L. ed. 689.

In contested cases see infra § 216.

64. Ex p. Spence, 22 F. Cas. No. 13,228; In re Drawbaugh, 9 App. (D. C.) 219.

[a] **A microscope** may be used as a basis for a conclusion. Flora v. Powrie, 23 App. (D. C.) 195.

[b] **Exhibition of experiments.**—The commissioner is not compelled to submit to an exhibition of experiments at the discretion of applicant. Ex p. Spence, 22 F. Cas. No. 13,228.

[c] **The testimony of practical men** as to the utility of the invention is entitled to consideration. Hayden v. James, 11 F. Cas. No. 6,260.

65. In re Marconi, 38 App. (D. C.) 286; In re Drawbaugh, 9 App. (D. C.) 219.

66. In re Marconi, 38 App. (D. C.) 286.

[a] **Judicial notice.**—The commissioner may take judicial notice of his own records. Cain v. Park, 14 App. (D. C.) 42.

67. Hunt v. Howe, 12 F. Cas. No. 6,801, McA. Pat. Cas. 366; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645.

68. In re Jackson, 13 F. Cas. No. 17,126, McA. Pat. Cas. 485; Durham v. Seymour, 71 Off. Gaz. (U. S.) 601; In re Drawbaugh, 9 App. (D. C.) 219; Durham v. Seymour, 6 App. (D. C.) 78 [app dism 161 U. S. 235, 16 SCt 452, 40 L. ed. 682].

Burden of proof of:

Novelty and anticipation see supra § 55.

Utility see supra § 64.

69. In re Frasch, 27 App. (D. C.) 25.

70. In re Seely, 21 F. Cas. No. 12,632, McA. Pat. Cas. 248; In re Wagner, 28 F. Cas. No. 17,038, McA. Pat. Cas. 510.

71. In re Seely, 21 F. Cas. No. 12,632, McA. Pat. Cas. 248.

Presumption of utility see supra § 64.

72. In re Wagner, 29 F. Cas. No. 17,038, McA. Pat. Cas. 510.

73. Moore v. U. S., 32 App. (D. C.) 243.

74. Moore v. U. S., supra.

75. U. S. Rev. St. (1878) § 4893; U. S. Code tit 35 § 36.

[a] **In Australia,** under Patents Act (1903–1909) § 46, a refusal to accept an application and specification is erroneous where the device is new, useful, effective, and convenient in use, and involves some substantial exercise of the inventive faculty. McDonald v. Patents Comr., 15 Austr. C. L. R. 713.

76. Act Oct. 6, 1917 (40 St. at L. 394 c 95).

77. Sheffield's Application, 53 App. (D. C.) 109, 288 Fed. 463; In re Katzenberger, 46 App. (D. C.) 539. And see cases infra note 79.

[a] **Illustration.**—Claims for an improved method of visually indicating the structure and meaning of a sentence by printing in type of different kinds, so as to make visible the syntactic structure, is a patentable improvement over printing in different colors the different parts of speech, or the use of different type to show in a translation words emphasized in the original, under the rule to resolve any doubt in favor of applicant who has made a substantial and presumably meritorious contribution to the art. Sheffield's Application, 53 App. (D. C.) 109, 288 Fed. 463.

78. Review by court generally see infra §§ 232–236.

79. In re Coykendall, 29 F. (2d) 868; Parr's Application, 26 F. (2d) 1009; McClaire's Application, 57 App. (D. C.) 11, 16 F. (2d) 351; In re Davidson, 56 App. (D. C.) 279, 12 F. (2d) 814; In re Stevenson, 56 App. (D. C.) 143, 10 F. (2d) 1008; In re Henry, 55 App. (D. C.) 396, 6 F. (2d) 699; Drew's Application, 55 App. (D. C.) 291, 4 F. (2d) 958; In re Levy, 55 App. (D. C.) 137, 2 F. (2d) 939; In re Pupin, 55 App. (D. C.) 14, 299 Fed. 697; In re Johnson, 54 App. (D. C.) 182, 295 Fed. 1003; In re Shollenberger, 51 App. (D. C.) 332, 279 Fed. 314; In re Prescott, 51 App. (D. C.) 281, 278 Fed. 590; In re Kusterer, 51 App. (D. C.) 250, 278 Fed. 333; In re Glafcke, 51 App. (D. C.) 204, 277 Fed. 603; In re Coffield, 50 App. (D. C.) 259, 270 Fed. 695; In re Sorum, 49 App. (D. C.) 360, 265 Fed. 1000; Wilson's Application, 49 App. (D. C.) 76, 258 Fed. 976; In re Huff, 48 App. (D. C.) 258; In re Rowell, 48 App. (D. C.) 238; In re Katzenberger, 46 App. (D. C.) 539; In re Handschuck, 46 App. (D. C.) 155; In re Willard, 45 App. (D. C.) 549; In re Heath, 45 App. (D. C.) 370; In re Harbeck, 39 App. (D. C.) 555; In re Moore, 38 App. (D. C.) 276; In re Ellis, 37 App. (D. C.) 203; In re Eastwood, 33 App. (D. C.) 291; In re Schraubstadter, 26 App. (D. C.) 331. But see In re Kemper, 14 F. Cas. No. 7,687, Cranch Pat. Dec. 89, McA. Pat. Cas. 1, 11 (where the court said: "This rule, I suppose, must have been adopted when the applicant had no remedy if the commissioner rejected his claim and the decision of the commissioner was affirmed by the board of examiners, under the seventh and sixteenth sections of the act of July 4th, 1836, which last-mentioned section gave the applicant a remedy by bill in equity only in case the patent was refused on the ground that it would interfere with an unexpired patent previously granted. In all other cases of refusal the applicant had no remedy, whereas, if the patent should be granted, its validity might be at all times questioned in the courts of law. It was reasonable, therefore, to adopt such a rule. But now, by the tenth section of the act of March 3d, 1839, if the patent be refused for any cause either by the commissioner or the judge the applicant may still establish his right to a patent by a bill in equity. The reason of the rule, therefore, fails, and I should not think myself bound by it if I thought this to be a case of doubt, which I do not").

"In case of ordinary doubt, the policy of the patent system, as customarily maintained in the Patent Office, has been to give the applicant the benefit thereof, because no absolute right of property is conferred by the grant of a patent." In re Thomson, 26 App. (D. C.) 419, 425.

80. In re Katzenberger, 46 App. (D. C.) 539.

81. In re Pope, 44 App. (D. C.) 427.

82. In re Drawbaugh, 9 App. (D.

substantial or reasonable ground why a patent should not issue, it is his duty to refuse the patent, whether the specific objection has been raised and acted upon by the examiners or not,[83] and especially is it his duty to do so where the primary examiner and the examiners-in-chief have found such ground for refusal to exist.[84] The application may be rejected for want of diligence and abandonment[85] where other patents for the same invention are disclosed;[86] where, on amendment,[87] applicant broadens his claims beyond the scope of his original disclosures;[88] or where it is determined that there has been a prior public use or sale of the invention.[89] But an application should not be rejected on the ground of prior public use and sale, merely upon the ex parte affidavits of persons adverse in interest.[90] Twice returning the specifications and drawings to applicant for nonconformity to the rules of the patent office does not constitute a rejection of the claims.[91]

Notice and reasons. Upon rejection the commissioner must notify applicant thereof, giving him briefly the reasons for such rejection, together with such information and references as may be useful in judging of the propriety of renewing his application or of altering his specifications;[92] but this requirement, as to giving reasons and information, is directory merely and the commissioner's action in the premises is not reviewable.[93]

Reëxamination. If, after receiving notice of rejection, applicant persists in his claim for a patent, either with or without altering his specifications, the commissioner must order a reëxamination of the case.[94]

[§ 180] **6. Amendment of Application[95]—a. Right and Power To Amend—(1) In General.** Under the patent office rule that an applicant may amend his application before or after the first rejection or action,[96] and subject to the limitations that the amendment is within the requirements of the statutes and the rules of the patent office,[97] is seasonably made,[98] and is within the scope of the original application,[99] amendments of an application may be made voluntarily and without suggestion of the commissioner or examiner.[1]

By attorney after applicant's death. Where an inventor files an application in his lifetime, an amendment to it within the scope of the original specifications may be made after his death by his attorney without filing a new power of attorney,[2] unless the attorney's authority ceases at applicant's death.[3]

Effect of assignment. An applicant for a patent, although he has assigned his rights under the application, may amend the claims within the scope of the specification;[4] and a formal omission from the specification may be supplied by the assignee.[5]

Correction by patent office. The patent office itself may and should correct a drawing filed, and make it accord with the actual invention as shown by a photograph of the original device.[6]

[§ 181] **(2) Where Application Rejected.**[7] Where the application has been rejected with a notification thereof giving reasons and objections and citing references,[8] amendments may be made to avoid the references cited or reasons for rejection given;[9] and amendments so made are binding upon applicant in all subsequent proceedings,[10] because if he does

C.) 219. And see cases infra notes 83–89.

83. In re Drawbaugh, supra.

[a] **Reasons for rule.**—"The law has provided certain official agencies to aid and advance the work of the Patent Office, such as the primary examiners, the examiners of interferences, and the examiners-in-chief; but they are all subordinate, and subject to the official direction of the Commissioner of Patents, except in the free exercise of their judgments in the matters submitted for their examination and determination. The Commissioner is the head of the bureau and he is responsible for the general issue of that bureau. If, therefore, there be any substantial, reasonable ground within the knowledge or cognizance of the Commissioner why the patent should not issue, whether the specific objection be raised and acted upon by the examiners or not, it is his duty to refuse the patent; and especially is it so, when the primary examiner and the examiners-in-chief have found such ground for refusal to exist." In re Drawbaugh, 9 App. (D. C.) 219, 240.

84. In re Drawbaugh, supra.

85. Hunt v. Howe, 12 F. Cas. No. 6,891, McA. Pat. Cas. 366; Marcy v. Trotter, 16 F. Cas. No. 9,063; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645; In re Fritts, 45 App. (D. C.) 211.

[a] **Where the element of diligence or good faith is lacking,** there is no valid reason for such a construction of the patent laws as will effect an extension of the limited monopoly granted upon prescribed conditions which include these very elements. In re Fritts, 45 App. (D. C.) 211.

Abandonment generally see infra §§ 192–195.

86. In re Carr, 54 App. (D. C.) 270, 296 Fed. 1017; In re Cottrell, 37 App. (D. C.) 370.

[a] **Where claim in application is no different from applicant's prior patent,** the application is properly rejected. In re Carr, 54 App. (D. C.) 270, 296 Fed. 1017.

Prior patents as affecting patentability generally see supra §§ 44–51.

87. See generally infra §§ 180–187.

88. In re Dosselman, 37 App. (D. C.) 211.

89. Mowry v. Barber, 17 F. Cas. No. 9,892, McA. Pat. Cas. 563; In re Drawbaugh, 9 App. (D. C.) 219; Sement-Solvay Co. v. Patents Comr., [1927] Can. Exch. 218, [1927] 3 Dom LR 385.

As bar to patent generally see supra §§ 108–119.

90. In re Alteneck, 11 D. C. 353.

91. Wickersham v. Singer, 29 F. Cas. No. 17,610, McA Pat. Cas. 645.

92. U. S. Rev. St. (1878) § 4903; U. S. Code tit 35 § 51.

And see cases infra this note.

[a] **Sufficiency of notice.**—In re Mattullath, 38 App. (D. C.) 497.

[b] **In England** (1) the crown may refuse a patent at any time before sealing. In re Schlumberger, 2 Eq. Rep. 36, 14 Reprint 197. (2) A sealing will not be refused for formal defacts. In re Wirth, 12 Ch. D. 303.

93. Ex p. Munson, 17 F. Cas. No. 9,933; Ex p. Spence, 22 F. Cas. No. 13,228.

94. U. S. Rev. St. (1878) § 4903; U. S. Code tit 35 § 51.

95. Amendment as limiting claims see infra § 184.

96. Patent Office Rules Oct. 1, 1927, rule 68.

97. In re Dilg, 25 App. (D. C.) 9.

98. See infra § 183.

99. See infra §§ 184, 185.

1. De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Singer v. Braunsdorf, 22 F. Cas. No. 12,897, 7 Blatchf. 521; In re Dilg, 25 App. (D. C.) 9.

2. De La Vergne Refrigerating Mach Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Wirt v. Hicks, 45 Fed. 256.

3. Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 SCt 593, 28 L. ed. 493.

4. Individual Drinking Cup Co. v. Public Service Cup Co., 226 Fed. 465 [mod on other grounds 250 Fed. 620, 162 CCA 636].

5. Van Heusen Products, Inc. v. Earl, 300 Fed. 922.

[a] **Statement of citizenship.**—An omission from the specification in an application of a statement of the citizenship of applicant may be supplied by an assignee. Van Heusen Products, Inc. v. Earl, 300 Fed. 922, 935 (where the court said: "This statement since 1870 is no longer made in the oath, but in the body of the specifications. The oath does not verify the truth of the specifications in this respect, nor incorporate them in itself. . . . The question is whether a true statement of the inventor's allegiance, not required to be under oath, may be inserted by the assignee, when he has reasonable ground to suppose that the inventor will not make the amendment").

6. Hinman v. Visible Milker Co., 231 Fed. 174 [aff 239 Fed. 896, 153 CCA 24].

7. Rejection generally see supra § 179.

8. See supra § 179.

9. Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Edison v. American Mutoscope Co., 110 Fed. 660 [rev on other grounds 114 Fed. 926, 52 CCA 546 (certiorari den 186 U. S. 486 mem, 22 SCt 944 mem, 46 L. ed. 1261 mem)]; Brill v. St. Louis Car Co., 90 Fed. 666, 33 CCA 213; Norton v. Jensen, 90 Fed. 415, 33 CCA 141; Hillborn v. Hale, etc., Mfg. Co., 69 Fed. 958, 16 CCA 569; Collins v. White, 6 F. Cas. No. 3,019; Ostergren v. Tripler, 95 Off. Gaz. (U. S.) 837; U. S. v. Moore, 37 App. (D. C.) 493; McBerty v. Cook, 16 App. (D. C.) 133; Croskey v. Atterbury, 9 App. (D. C.) 207.

10. Lehigh Valley R. Co. v. Kearney, 158 U. S. 461, 15 SCt 871, 39 L.

not choose to make the amendment he has a remedy by appeal.[11] In making such amendment, applicant must clearly point out all the patentable novelty which he thinks the case presents in view of the state of the art disclosed by the references cited or the objections made;[12] and must also show how the amendments avoid such references or objections.[13]

Effect of acquiescence in rejection. An applicant who acquiesces in the rejection of his claim upon references cited and accepts a patent on an amended claim is thereby estopped from maintaining that the amended claim covers the combinations and devices shown in those references, or that it has the breadth of the rejected claim,[14] but he is not estopped from claiming and securing by an amended claim every improvement and combination he has invented that was not disclosed by the references on which his original claim was rejected.[15]

[§ 182] **b. Number of Amendments.** Under a rule of the patent office which gives an applicant the right to amend as often as the examiner presents new references or reasons for rejection,[16] whether an applicant, after amending several times, has a further right to amend is a question of practice exclusively within the jurisdiction of the commissioner to determine.[17]

[§ 183] **c. Time of Amendment.**[18] The application is always open to amendment until the matter is finally disposed of by the patent office by the issuance of a patent,[19] or by a final order of rejection.[20] Mere delay not amounting to an abandonment[21] is no ground for rejecting an amendment,[22] and in the absence of intervening rights does not create an estoppel.[23] But unreasonable delay in making an amendment is a circumstance tending to show that the subject matter of the amendment was not part of the original invention;[24] and where the amendment introduces new matter, it should be carefully scrutinized;[25] and in the absence of an excuse therefor the delay may render the claims, presented by the amendment, invalid on the ground of laches.[26]

[§ 184] **d. Scope of Amendment—(1) In General.** An application may be amended to set forth more clearly or accurately the invention originally applied for and described,[27] provided the amendment is within the general scope of the claims and specifications as originally disclosed;[28] and such an amendment does not invalidate a patent issued on the amended application.[29] The specifications or drawing may be amended by insertions and changes which

ed. 1055; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 SCt 28, 37 L. ed. 989; Royer v. Coupe, 146 U. S. 524, 13 SCt 166, 36 L. ed. 1073; Electric Gas-Lighting Co. v. Boston Electric Co., 139 U. S. 481, 11 SCt 586, 35 L. ed. 250; Dobson v. Lees, 137 U. S. 258, 11 SCt 71, 34 L. ed. 652; Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 SCt 884, 34 L. ed. 168; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 10 SCt 409, 33 L. ed. 663; Roemer v. Peddie, 132 U. S. 313, 10 SCt 98, 33 L. ed. 382; Watson v. Cincinnati, etc., R. Co., 132 U. S. 161, 10 SCt 45, 33 L. ed. 295; Crawford v. Heysinger, 123 U. S. 589, 8 SCt 399, 31 L. ed. 269; Sutter v. Robinson, 119 U. S. 530, 7 SCt 376, 30 L. ed. 492; Shepard v. Carrigan, 116 U. S. 593, 6 SCt 493, 29 L. ed. 723; Sargent v. Hall Safe, etc., Co., 114 U. S. 63, 5 SCt 1021, 29 L. ed. 67; New York Belting, etc., Co. v. Sibley, 15 Fed. 386.

11. See infra §§ 225–227.

12. Patent Office Rules Oct 1, 1927, rule 68.

13. Patent Office Rules Oct 1, 1927, rule 68; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559].

14. See infra § 202.

15. Drum v. Turner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561; National Hollow Brake Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544.

16. Patent Office Rules Oct. 1, 1927, rule 68.

17. U. S. v. Moore, 37 App. (D. C.) 493.

[a] **Thus,** where after two amendments of his claims rejected on certain references, an applicant amends the third time, and his claim as so amended is rejected on some of the references previously cited, two of which, although stated on the first rejection, were not stated on the second rejection, and the last rejection is made final, whether applicant has a further right to amend is for the commissioners to determine. U. S. v. Moore, 37 App. (D. C.) 493.

18. On interference see infra §§ 206–208.

19. Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Gibson v. Smoot Engineering Corp., 28 F. (2d) 123; Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)]; Railway Register Mfg. Co. v. North Hudson Co. R. Co., 24 Fed. 793; Singer v. Braunsdorf, 22 F. Cas. No. 12,897, 7 Blatchf. 521.

20. In re Dilg, 115 Off. Gaz. (U. S.) 1067.

21. Abandonment generally see infra §§ 192–195.

22. McMillin v. Barclay, 1 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Ex p. Hayden, 11 F. Cas. No. 6,256.

[a] **Thus,** where a patent application is prosecuted strictly as required by the statutes and rules of the patent office, applicant's rights may not be diminished or denied on the ground that delay in connection therewith may have been prejudicial to either public or private interests. Chapman v. Wintroath, 252 U. S. 126, 40 SCt 234, 64 L. ed. 491 [rev 47 App. (D. C.) 428].

Rejection of application for want of diligence and abandonment see infra §§ 192, 193.

23. Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337.

24. Chicago, etc., R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053.

25. Lopulco Systems v. Bonnot Co., 24 F. (2d) 510 [aff 15 F. (2d) 848]; Hestonville, etc., R. Co. v. McDuffee, 185 Fed. 798, 109 CCA 606 [certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem].

Introducing new matter by amendment generally see infra § 185.

26. Dwight, etc., Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; In re Allsop, 26 F. (2d) 559.

27. Gibson v. Smoot Engineering Corp., 28 F. (2d) 123; Heller Bros. Co. v. Crucible Steel Co., 297 Fed. 39, 43 [rev 291 Fed. 175]; Railway Register Mfg. Co. v. North Hudson Co. R. Co., 24 Fed. 793; Parham v. American Buttonhole, etc., Sewing Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 474.

"If an inventor comes to better understand the principles of his invention while his application for patent is pending, an amendment of his claim to conform thereto does not introduce any original matter nor enlarge his invention, and is within his legal rights." Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179, 184.

"An inventor is entitled to secure by a patent his actual invention as fairly indicated . . . as suggested . . . or disclosed by his original drawings and specifications; that while his application is pending he may make such amendments to his claims, without regard to the nature or scope of the claims originally made, as will secure that end." Heller Bros. Co. v. Crucible Steel Co., supra.

[a] **Principles discerned or new uses discovered** pending the application may be included in an amendment. Cleveland Fdy. Co. v. Detroit Vapor Stove Co., 131 Fed. 853, 68 CCA 233.

28. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Ficklen v. Baker, 47 App. (D. C.) 587; Manly v. Williams, 37 App. (D. C.) 194; Cosper v. Gold, 36 App. (D. C.) 302; Phillips v. Sensenich, 31 App. (D. C.) 159; In re Duncan, 28 App. (D. C.) 457. And see cases infra note 43.

[a] **Illustration.**—The fact that the original application for a patent contained only claims for the method of producing an article does not preclude applicant from introducing by amendment claims covering the apparatus by which such method is carried out, as well as the product, where both the apparatus and product are described in the specification and constitute a part of the actual invention. Edison v. American Mutoscope Co., 110 Fed. 660 [rev on other grounds 114 Fed. 926, 52 CCA 546 (certiorari den 186 U. S. 486 mem, 22 SCt 944 mem, 46 L. ed. 1261 mem)].

[b] **In England** (1) a complete specification may amplify but cannot change the invention disclosed in provisional specification. Vickers v. Siddell, 15 App. Cas. 496, 20 ERC 428; Bailey v. Robertson, 3 App. Cas. 1055, 20 ERC 199; Lane Fox v. Kensington Electric Lighting Co., [1892] 3 Ch. 424, 20 ERC 236; Nuttall v. Hargreaves, [1892] 1 Ch. 23, 20 ERC 450; United Tel. Co. v. Harrison, 21 Ch. D. 720; Hills v. London Gaslight Co., 5 H. & N. 312, 157 Reprint 1202, 20 ERC 528; Gadd v. Manchester, 67 L. T. Rep. N. S. 569. (2) A complete specification may include additional details not departing from the general nature of the invention. Siddell v. Vickers, 39 Ch. D. 92 [aff 15 App. Cas. 496, 20 ERC 428]; Thomas v. Welch, L. R. 1 C. P. 192; Moseley v. Victoria Rubber Co., 57 L. T. Rep. N. S. 142; Woodward v. Sansum, 56 L. T. Rep. N. S. 347.

29. Diamond Power Specialty

are only in amplification and explanation of what already has been reasonably indicated in the disclosure of the invention,[30] even though the change is made with reference to another patent which has been applied for and issued while the application is pending, but subsequent to applicant's invention;[31] and this rule applies with special force where the insertion is required by the patent office.[32] Claims which are too broad may be properly limited by amendment,[33] such as to conform to what, in the opinion of the patent office, is considered patentable.[34] In the absence of intervening rights, claims that are too narrow may be enlarged, and even new claims added, so as to embrace all that was included in the original specifications or drawings;[35] and, under this rule, a claim for a specific device may be broadened by amendment into a generic claim.[36]

Division of claims. By virtue of a rule of the patent office,[37] if a single application claims several inventions and the independence of the inventions is clear, a division of such claims will be required before any action on the merits;[38] and under this rule claims to another invention cannot be inserted in the original application by amendment, but a new and divisional application must be filed.[39]

[§ 185] **(2) New Matter.** Amendments which enlarge the scope of the original application are generally regarded with jealousy and disfavor,[40] unless they are made before the rights of other parties have intervened.[41] Therefore an amendment which introduces new matter involving a material departure from the invention described in the original specifications, or enlarging the scope of the application, with a view of having it relate back to the original filing date,[42] is generally regarded as invalid and will not be allowed,[43] unless such amendment is supported

Corp. v. Bayer Co., 13 F. (2d) 337; General Electric Co. v. Cooper Hewitt Electric Co., 249 Fed. 61, 161 CCA 121 [certiorari den 246 U. S. 668 mem, 38 St 336 mem, 62 L. ed. 930 mem.]

Validity of patents generally see infra §§ 270–293.

30. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; General Electric Co. v. Cooper Hewitt Electric Co., 249 Fed. 61, 161 CCA 121 [certiorari den 246 U. S. 668 mem, 38 SCt 336 mem, 62 L. ed. 930 mem]; Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. 853, 68 CCA 233; Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)]; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164 [reh den 59 Fed. 295, 8 CCA 129]; Beach v. Inman Mfg. Co., 74 Off. Gaz. (U. S.) 379.

[a] **Illustrations.**—(1) Where an applicant for a patent is the original and first inventor of a form of device, but his original specification does not sufficiently describe it so as to entitle it to be claimed therein, he may amend his specification so as to include it. Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)]. (2) Where the specification in an application described a "fabric material," claims later substituted, more specific and limited to "a sheet of flexible material," are within the description. Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co., 276 Fed. 834. (3) Changing "cement" to "hydraulic cement" is not new matter. National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co., 75 Off. Gaz. (U. S.) 1361.

[b] **Conformity to subsequent structures.**—An amendment may be made, even though it be to conform specifications to subsequently appearing structures. Individual Drinking Cup Co. v. Errett, 300 Fed. 955 [mod 250 Fed. 620, 162 CCA 636].

31. Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)]; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164 [reh den 59 Fed. 295, 8 CCA 129].

32. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; General Electric Co. v. Cooper Hewitt Electric Co., 249 Fed. 61, 64, 161 CCA 121 [certiorari den 246 U. S. 668 mem, 38 SCt 336 mem, 62 L. ed. 930 mem].

"The Patent Office has a strict rule on this subject. It fully recognizes that new matter must not be permitted, and it is constantly engaged in defining what is and what is not new matter. The application of the rule must, of necessity, be more or less arbitrary, and the presumption of correctness which attends Patent Office rulings must apply with especial force to this class of ruling; and most peculiarly is that true when the applicant has only complied with the demands which the Patent Office made." General Electric Co. v. Cooper Hewitt Electric Co., supra.

33. Arnold v. Pettee, 1 F. Cas. No. 561b; Collins v. White, 6 F. Cas. No. 3,919.

34. Motion Picture Patents Co. v. Calehuff Supply Co., Inc., 248 Fed. 724 [aff 251 Fed. 598, 163 CCA 592]; Collins v. White, 6 F. Cas. No. 3,019.

[a] **There is no objection** to an applicant for a patent acquiescing in a rejection of his broad claims to novelty and being allowed a narrow claim to a specific construction, which was substituted by amendment. Motion Picture Patents Co. v. Calehuff Supply Co., Inc., 248 Fed. 724 [aff 251 Fed. 598, 163 CCA 592].

[b] **In Australia** an application opposed on the ground of want of novelty may be refused unless applicant applies for and obtains leave to amend the specifications, and the time for sealing the patent may be extended accordingly. Griffith v. Neilsen, 13 Austr. C. L. R. 131.

35. Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Auto Pneumatic Action Co. v. Kindler, 247 Fed. 323, 159 CCA 417; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418; Individual Drinking Cup Co. v. Public Service Cup Co., 226 Fed. 465 [mod on other grounds 250 Fed. 620, 162 CCA 636]; Railway Register Mfg. Co. v. North Hudson Co. R. Co., 24 Fed. 793; Singer v. Braunsdorf, 22 F. Cas. No. 12,897, 7 Blatchf. 521; Lotz v. Kenney, 31 App. (D. C.) 205; In re Scott, 25 App. (D. C.) 307; Bechman v. Wood, 15 App. (D. C.) 484.

[a] **Illustration.**—An applicant for a patent for an automatic pastry-making machine may make his claim for his extraction method more specific, and restate his claim. American Cone, etc., Co. v. Denaro, 297 Fed. 913 [rev 283 Fed. 1011].

36. Bechman v. Wood, 15 App. (D. C.) 484.

37. Patent Office Rules Oct. 1, 1927, rule 42.

38. American Laundry Mach. Co. v. Prosperity Co., 295 Fed. 819 [rev 294 Fed. 144].

39. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; Lotz v. Kenney, 31 App. (D. C.) 205.

[a] **Thus,** where the invention of the issue in an interference is disclosed in a prior application to one of the parties, but no specific claim is made therefor until after the issue of a patent to the other party, the claims cannot be inserted by amendment, but applicant must file a new and divisional application or abandon that part of his invention. Lotz v. Kenney, 31 App. (D. C.) 205.

[b] **Alternative forms.**—Where an application presents specific claims to alternative forms, an amendment must confine the claims to one form, with divisional applications filed for other forms. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27.

Divisional application generally see infra § 208.

40. Chicago, etc., R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; Young v. Struble, 34 App. (D. C.) 218.

41. Young v. Struble, supra; Phillips v. Sensenich, 31 App. (D. C.) 159.

42. In re Manson, 45 App. (D. C.) 563.

Relation back generally see infra § 187.

43. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139 [aff 155 Fed. 731, 740, 84 CCA 157, 166]; Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Eagleton Mfg. Co. v. West Bradley, etc., Mfg. Co., 111 U. S. 490, 4 SCt 593, 28 L. ed. 493; Chicago, etc., R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; Bonnot Co. v. Lopulco Systems, 15 F. (2d) 848; Kintner v. Atlantic Communication Co., 240 Fed. 716, 153 CCA 514 [aff 230 Fed. 829]; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Frank F. Smith Metal Window Hardware Co. v. Yates, 216 Fed. 361 [aff 216 Fed. 359, 132 CCA 503]; L. H. Gilmer Co. v. Geisel, 187 Fed. 606 [aff 187 Fed. 941, 109 CCA 620]; General Electric Co. v. Sangamo Electric Co., 174 Fed. 246, 98 CCA 154; Long v. Pope Mfg. Co., 75 Fed. 835, 21 CCA 533; Michigan Cent. R. Co. v. Consolidated Car-Heating Co., 67 Fed. 121, 14 CCA 232; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; Brush Electric Co. v. Julien Electric Co., 41 Fed. 679; Consolidated Electric Light Co. v. McKeesport Light Co., 40 Fed. 21 [aff 73 Off. Gaz. 1289, and aff 159 U. S. 465, 16 SCt 75, 40 L. ed. 221]; Globe Nail Co. v. Superior Nail Co., 27 Fed. 450 [app dism 136 U. S. 636 mem, 10 SCt 1068 mem, 34 L. ed. 552 mem]; Milligan v. Lalance, etc., Mfg. Co., 21 Fed. 570; Eagleton Mfg. Co. v. West, etc., Mfg. Co., 2 Fed. 774, 18 Blatchf. 218 [aff 111 U. S. 490, 4 SCt 593, 28 L. ed. 493]; In re Scott, 117 Off. Gaz. (U. S.) 278; In re Dilg, 115 Off. Gaz. (U. S.) 1067; Miehle v. Read, 96 Off. Gaz. (U. S.) 426; Bancel v. Meier, 54 App. (D. C.) 257, 296 Fed. 1004; In re Manson, 45 App. (D. C.) 563; In re Dosselman, 37 App. (D. C.) 211; Manly v. Williams, 37 App. (D.

by the statutory oath.[44] This rule is especially applicable where the new or enlarged claims will interfere with other inventors who have acquired intervening rights.[45] The allowance of such an amendment rests within the sound discretion of the patent office;[46] and in determining whether matter introduced into an application by way of amendment is new matter, the original drawings are to be understood with such variations in form, shape, and proportions as common sense and mechanical skill in the art would suggest.[47]

New application. An applicant, however, advancing enlarged claims may present them in a new and distinct application.[48]

[§ 186] **e. Supplemental Oath.**[49] An amendment which is within the scope of the original specifications and drawings need not be verified by a new or supplemental oath,[50] although it is made after the death of applicant,[51] and although it is made by applicant's attorney.[52]

Oath required. Where, however, the amendment presents a claim or conception materially different from, or enlarged over, the invention described in the original application, it must be supported by a supplemental oath of the inventor,[53] in the same terms as are required in an original application,[54] the sufficiency of the supplemental oath being a question for the determination of the officials of the patent office.[55] Such oath is required, not because it is to be used for an amended or new claim, but because the amendment tells some fact of invention not told before;[56] and a patent issued on an application so amended without a new verification is invalid.[57] A statement by applicant in such a supplemental

C.) 194; In re Mraz, 36 App. (D. C.) 435; McFarland v. Watson, 33 App. (D. C.) 445; In re Scott, 25 App. (D. C.) 307; In re Dilg, 25 App. (D. C.) 9; Luger v. Browning, 21 App. (D. C.) 201; McBerty v. Cook, 16 App. (D. C.) 133.

[a] **"The reason for the rule** is that intervening rights may have accrued which may be greatly affected by the allowance of such amendment or addition." In re Scott, 25 App. (D. C.) 307, 311. To same effect McFarland v. Watson, 33 App. (D. C.) 445, 449.

[b] **Added claim invalid.**—A claim added to an application by amendment, to matter not disclosed in the application as originally filed, is invalid. Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72.

[c] **Where the mode of operation is the essence of the invention,** a new principle or method of operation cannot be introduced by amendment, and be sustained on the original application, to interfere with other inventors who have entered the field in the meantime, although the apparatus itself is left unchanged. American Bell Tel. Co. v. National Tel. Mfg. Co., 109 Fed. 976.

[d] **In England** the same rule applies. Re British Thomson-Houston Co., Ltd., 89 L. J. Ch. 194.

[e] **In Australia,** under Patents Act (1903) §§ 71, 78, an amendment is properly disallowed where the invention claimed in the proposed amendment, whether the discovery of a new principle or a mere working direction for the use of existing apparatus, is substantially different from that claimed by the original specification. Neilson v. Minister of Public Works, 18 Austr. C. L. R. 423.

44. See infra § 186.

45. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Chicago, etc., R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; Lopulco Systems v. Bonnot Co., 24 F. (2d) 510 [aff 15 F. (2d) 848]; Lyon Non-Skid Co. v. Edward V. Hartford, Inc., 247 Fed. 524 [aff 250 Fed. 1021 mem, 162 CCA 664 mem]; American Bell Tel. Co. v. National Tel. Mfg. Co., 109 Fed. 976; Ficklen v. Baker, 47 App. (D. C.) 587; Cosper v. Gold, 36 App. (D. C.) 302; Young v. Struble, 35 App. (D. C.) 410; Bechman v. Wood, 15 App. (D. C.) 484.

Interference generally see infra §§ 196–222.

46. In re Cowles, 54 App. (D. C.) 280, 297 Fed. 539.

47. Mine, etc., Supply Co. v. Braeckel Concentrator Co., 197 Fed. 897.

48. In re Scott, 25 App. (D. C.) 307.

Renewal applications generally see infra §§ 189–191.

49. Oath to application generally see supra § 170.

50. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139 [aff 155 Fed. 731, 740, 84 CCA 157, 166]; De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Richardson Co. v. Rubberoid Co., 30 F. (2d) 232; Tinsel Corp. v. B. Haupt & Co., 25 F. (2d) 318; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Permutit Co. v. Wadham, 13 F. (2d) 454 [rev 294 Fed. 370, and reh den 15 F. (2d) 20]; Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; Heller Bros. Co. v. Crucible Steel Co., 297 Fed. 39 [rev on other grounds 291 Fed. 175]; Kelsey Wheel Co. v. Universal Rim Co., 296 Fed. 616; H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717; Westinghouse Electric, etc., Co. v. Metropolitan Mfg. Co., 290 Fed. 661; Union Special Mach. Co. v. Metropolitan Sewing Mach. Corp., 279 Fed. 770 [aff 286 Fed. 519]; Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co., 276 Fed. 834; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 260 Fed. 197 [aff 269 Fed. 140]; Taggart Baking Co. v. Green, 257 Fed. 87, 168 CCA 299; Camp v. Portable Wagon Dump, etc., Co., 251 Fed. 603, 163 CCA 597 [certiorari den 248 U. S. 572 mem, 39 SCt 11 mem, 63 L. ed. 427 mem]; Motion Picture Patents Co. v. Calehuff Supply Co., Inc., 248 Fed. 724 [aff 251 Fed. 598, 163 CCA 592]; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418; Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 717 [aff 195 Fed. 763, 115 CCA 462 (certiorari den 225 U. S. 709 mem, 32 SCt 840 mem, 56 L. ed. 1267 mem)]; American Steel Foundries v. Wolff Truck Frame Co., 189 Fed. 601 [rev on other grounds 195 Fed. 940, 115 CCA 628]; General Electric Co. v. Morgan-Gardner Electric Co., 168 Fed. 52, 93 CCA 474 [rev 159 Fed. 951]; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co., 147 Fed. 266; John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290; Wirt v. Hicks, 45 Fed. 256; Railway Register Mfg. Co. v. North Hudson Co. R. Co., 24 Fed. 793; In re Mattullath, 38 App. (D. C.) 497; Phillips v. Sensenich, 31 App. (D. C.) 159.

[a] **An applicant may file new claims without verification** (1) where they are within the invention as disclosed in the specification and drawings, and narrower than the original claims (General Electric Co. v. Morgan-Gardner Electric Co., 168 Fed. 52, 93 CCA 474 [rev 159 Fed. 951]), (2) or where they are fairly derivable from the sworn disclosure of the original specification (H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717).

[b] **Rule applied.**—The fact that there was no claim for a method in the application when it was filed, and that one was added by amendment without a new oath, does not make the patent invalid. H. J. Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717.

51. Solva Waterproof Glue Co. v. Perkins Glue Co., 251 Fed. 64, 163 CCA 314 [mod 223 Fed. 792]; Wirt v. Hicks, 45 Fed. 256; In re Mattullath, 38 App. (D. C.) 497.

[a] **Oath of executor** to support a proper amendment after the inventor's death is not necessary. De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.

52. John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290. Compare Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 SCt 593, 28 L. ed. 493 (where the amendment, made by an attorney, included an invention not before described).

[a] **Thus,** where an application for a patent is made by the inventor in his lifetime by an attorney, the fact that changes are made by the attorney in the specifications and claims without new oaths will not invalidate the patent, since a discretion as to the allowance of such amendment is vested in the commissioner. Wirt v. Hicks, 45 Fed. 256.

53. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139 [aff 155 Fed. 731, 740, 84 CCA 157, 166]; Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 SCt 593, 28 L. ed. 493; Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27; Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; Westinghouse Electric, etc., Co. v. Metropolitan Mfg. Co., 290 Fed. 661; Kintner v. Atlantic Communication Co., 240 Fed. 716, 153 CCA 514 [aff 230 Fed. 829]; Gear v. Fairmount Electric, etc., Co., 225 Fed. 61 [rev on other grounds 231 Fed. 728, 146 CCA 12]; Ney Mfg. Co. v. G. A. Swineford Co., 211 Fed. 469; Rowntree v. Sloan, 45 App. (D. C.) 207.

[a] **Where an applicant dies** pending his application, the authority of his solicitors ceases, and when his administrator carries on the proceedings and amends the specifications by inserting new matter of which there has been no previous suggestion, another oath is essential. Phillips v. Sensenich, 31 App. (D. C.) 159.

54. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139 [aff 155 Fed. 731, 740, 84 CCA 157, 166].

Oath to application generally see supra § 170.

55. Young v. Struble, 34 App. (D. C.) 218.

56. Westinghouse Electric, etc., Co. v. Metropolitan Mfg. Co., 290 Fed. 661.

57. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139 [aff 155 Fed. 731, 740, 84 CCA 157, 166]; Dynamic Balancing Mach. Co. v. Akimoff, 279 Fed. 285 [mod on other grounds 285 Fed. 480]; George Cutter Co. v. Metropolitan Electric Mfg. Co., 275 Fed. 158. But see Heller Bros. Co. v. Crucible Steel Co., 297 Fed. 39 [rev 291 Fed. 175] (dicta apparently to the contrary).

Validity of patents generally see infra §§ 270–293.

oath, that he conceived the subject matter of the amendment prior to the filing of his original application, affords prima facie proof of its truth, which must be overcome by affidavits to the contrary by one who questions its truth.[58]

[§ 187] **f. Relation Back.** An amendment which is seasonably and properly made[59] relates back and speaks as of the date of the original application, the whole being regarded as one continuous application,[60] except that, where new matter is inserted by amendment, supported by a new affidavit, the application takes filing date only from that embodiment.[61]

[§ 188] **7. Alteration or Substitution.** A rule of the patent office provides that an application which has been altered or partly filled up after being signed or sworn to will be stricken from the files.[62] This rule precludes an alteration by the insertion of new and material matter after the application has been signed or sworn to;[63] but does not prevent an attorney from making formal or immaterial changes in an application once sworn to.[64]

Investigation. Whether authorized to do so by this rule or not, the commissioner has power, either in an interference case,[65] or in an ex parte proceeding, to inquire and determine whether an application has been fraudulently altered or substituted without authority;[66] and the acquittal of an applicant indicted with other persons for having conspired fraudulently to alter applications is not a bar to such investigation.[67]

[§ 189] **8. Renewal of Application[68]—a. After Abandonment.** Abandonment of the application does not of itself constitute abandonment of the invention,[69] and therefore a new application may thereafter be filed for the same invention.[70] Where a joint application of two parties is filed through inadvertence, it may be abandoned and a new application be filed by the real inventor.[71] The renewal application is generally treated in all respects as a wholly new and original application,[72] which does not relate back to the date of the original application and revive the old application so as to avoid the effect of an intervening public use,[73] or so as to entitle applicant to claim constructive reduction to practice as of his original filing date;[74] but where the new application is made within the statutory period, its original priority is established, notwithstanding intervening claims.[75] Where no testimony is taken on the question of abandonment, the granting of a renewal by the commissioner will rebut any presumption that there was an abandonment, and under such circumstances applicant is entitled to relate back to his original filing date.[76]

Requisites. Where a new application is filed in place of an abandoned one, a new specification, oath, drawing, and fee will be required, but the old model, if suitable, may be used upon the filing of suitable permanent photographic copies thereof.[77]

[§ 190] **b. After Rejection or Withdrawal.** Where neither the invention nor the application has been abandoned, but the application has been withdrawn or rejected, a new application may be filed to secure a patent for the same invention,[78] provided the renewed application is made within a reasonable time after withdrawal and return of the fee.[79] If the new application is filed without unreasonable delay, that is, within the statutory period after the withdrawal or rejection,[80] or if beyond the statutory period, there is a sufficient excuse for the delay,[81] the original application and the renewed application will be considered as constituting together one continuous application, dating from the filing of the original application,[82] provided the new application

58. Young v. Struble, 34 App. (D. C.) 218.

59. See supra §§ 183–186.

60. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Ficklen v. Baker, 47 App. (D. C.) 587; Manly v. Williams, 37 App. (D. C.) 194; Lotz v. Kenney, 31 App. (D. C.) 205.

61. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27.

62. Patent Office Rules Oct. 1, 1927, rule 31.

63. Lindstrom v. Ames, 37 App. (D. C.) 365.

[a] **The addition of two figures** showing modifications of the device, and a description of such modifications, is the insertion of new and material matter within this rule. Lindstrom v. Ames, 37 App. (D. C.) 365.

Amendments of new matter see supra § 185.

64. Lindstrom v. Ames, 37 App. (D. C.) 365.

65. Interference generally see infra §§ 196–222.

66. Moore v. Heany, 34 App. (D. C.) 31.

67. Moore v. Heany, supra.

68. Abandonment of application generally see infra §§ 192–195.

69. See supra § 124.

70. Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, 70 CCA 1 [certiorari den 199 U. S. 609 mem, 26 SCt 750 mem, 50 L. ed. 332 mem]; Edison v. American Mutoscope Co., 110 Fed. 660 [rev 114 Fed. 926, 52 CCA 546 (certiorari den 186 U. S. 486 mem, 22 SCt 944 mem, 46 L. ed. 1261 mem)]; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164 [reh den 59 Fed. 295, 8 CCA 129]; Dederick v. Fox, 56 Fed. 714; Lindsay v. Stein, 10 Fed. 907, 20 Blatchf. 370; Bevin v. East Hampton Bell Co., 3 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Clark v. Scott, 5 F. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245.

Prior application as affecting patentability see supra §§ 123, 124.

71. Burnett v. Utsman, 46 App. (D. C.) 407.

72. Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, 70 CCA 1 [certiorari den 199 U. S. 609 mem, 26 SCt 750 mem, 50 L. ed. 332 mem]; Lindsay v. Stein, 10 Fed. 907, 20 Blatchf. 370.

73. Lay v. Indianapolis Brush, etc., Mfg. Co., 120 Fed. 831, 57 CCA 313; Mowrey v. Barber, 17 F. Cas. No. 9,892, McA. Pat. Cas. 563.

"If, intermediate the first and second application, the patentee manifests an actual intention to abandon the first, his patent will have relation to the last one only. His actual intention severs the proceeding. The law deems the first application terminated, and as bearing no relation to the patent, which rests solely on the last one." Pelton v. Waters, 19 F. Cas. No. 10,913, 1 Bann. & A. 599, 601.

74. Murphy v. Thompson, 46 App. (D. C.) 515.

75. Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, 46 SCt 324, 70 L. ed. 651 [rev 1 F. (2d) 227 (aff 297 Fed. 846)].

76. Murphy v. Thompson, 46 App. (D. C.) 515.

77. Patent Office Rules Oct. 1, 1927, rule 173.

78. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Ex p. Simpson, 22 F. Cas. No. 12,878. And see cases infra notes 79–84.

79. Marsh v. Sayles, 16 F. Cas. No. 9,119, 3 Biss. 321, 5 Fish. Pat. Cas. 610; Ex p. Simpson, 22 F. Cas. No. 12,878.

80. Ex p. Simpson, supra. And see cases infra note 82.

[a] **Computation of reasonable time.**—A reasonable time for the renewal of a rejected application is to be computed, not from the date of the perfected invention, but from the date of the withdrawal of the application. Ex p. Simpson, 22 F. Cas. No. 12,878.

Period of limitation after action on application see infra § 192.

81. Ex p. O'Hara, 18 F. Cas. No. 10,464. And see cases infra note 82.

[a] **Excuses held not sufficient.**—(1) An affidavit by an applicant that he signed a power of attorney authorizing his attorney to withdraw his application without knowledge of its contents, and that he had no knowledge of the withdrawal, is not sufficient to allow him to renew his application after ten years from its rejection by the commissioner and its withdrawal by his attorney. Ex p. O'Hara, 18 F. Cas. No. 10,464. (2) The fact that an applicant was misled by the contradictory decision and practice of the patent office as to the time allowed for a renewal after its erroneous rejection is no ground of relief by the court from the effect of an applicant's unreasonable delay in making a renewal. Ex p. Simpson, 22 F. Cas. No. 12,878.

82. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Smith v. Goodyear Dental

is for substantially the same invention as that included in the original application,[83] and the second is merely an amplification of the first.[84] Where an original application disclosing two separate and distinct inventions is pending in the patent office, a divisional application is not regarded as a continuation of the original so as to give applicant the benefit of the filing date of the same;[85] and the issue of a patent on the original application is not action in the case, within the meaning of the statute, so as to entitle applicant to the statutory period from that time further to prosecute his application.[86]

[§ 191] **c. After Allowance and Forfeiture.** Where an application has been allowed, but has been forfeited by a failure to pay the final fee,[87] under the express provisions of an act of congress,[88] and also under the rules of the patent office,[89] any person interested, whether as inventor, discoverer, or assignee, may file a renewal application for a patent for the same invention,[90] provided it is filed within one year after the allowance of the original application.[91] Under these provisions only one renewal application may be filed,[92] and if it is not filed within the time prescribed, a patent cannot be issued thereon.[93]

By attorney of record. An attorney of record for an applicant who has filed with the original application the customary power of attorney to prosecute the application, containing full power of substitution and revocation and the right to make alterations and amendments therein, has authority to file, on behalf of applicant, a petition for renewal.[94] If he acts without such power of attorney of record, the application is invalid, although subsequently ratified by the patentee.[95]

Scope and sufficiency. Such renewal application may be based on the original application.[96] The oath, petition, specification, drawing, and model of the original application may be used,[97] and a mere petition to renew the original application is sufficient;[98] but it must bear date from the time of renewal and be subject to examination like an original application,[99] and a new fee will be required.[1] The second application, however, is not limited to what was allowed in the first patent, but may embrace the whole invention,[2] and a party filing such a renewal is not estopped from making certain claims in issue by a disclaimer of such claims on the original application, where the public or third persons have not come into possession of the invention.[3]

Hearing. Upon the hearing of such renewal application, abandonment is considered as a question

Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; General Electric Co. v. Continental Fibre Co., 256 Fed. 660, 168 CCA 54; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, 70 CCA 1 [certiorari den 199 U. S. 609 mem, 26 SCt 750 mem, 50 L. ed. 332 mem]; Stirling Co. v. St. Louis Brewing Assoc., 79 Fed. 80; International Tooth-Crown Co. v. Richmond, 30 Fed. 775; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39; Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Clark v. Scott, 5 F. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245; Colgate v. Western Union Tel. Co., 6 F. Cas. No. 2,995, 4 Bann. & A. 36, 15 Blatchf. 365; Ex p. Dedericks, 7 F. Cas. No. 3,734; Dental Vulcanite Co. v. Wetherbee, 7 F. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Goodyear Dental Vulcanite Co. v. Root, 10 F. Cas. No. 5,597, 1 Bann. & A. 384; Goodyear Dental Vulcanite Co. v. Willis, 10 F. Cas. No. 5,603, 1 Bann. & A. 568, 1 Flipp. 388; Howard v. Christy, 12 F. Cas. No. 6,754, 2 Bann. & A. 457; Howes v. McNeal, 12 F. Cas. No. 6,789, 3 Bann. & A. 376, 15 Blatchf. 103; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143; Ex p. Raymond, 20 F. Cas. No. 11,592a; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Smith v. Prior, 22 F. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461; U. S. Rifle, etc., Co. v. Whitney Arms Co., 28 F. Cas. No. 16,793, 2 Bann. & A. 493, 14 Blatchf. 94 [aff 118 U. S. 22, 6 SCt 950, 30 L. ed. 53]; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645.

[a] **Intention to renew.**—If an applicant withdraws his application, intending at the time of such withdrawal to file a new petition, and he accordingly does so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application. Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684.

83. Clark Blade, etc., Co. v. Gillette Safety Razor Co., 194 Fed. 421, 114 CCA 383 [aff 187 Fed. 149]; L. E. Waterman Co. v. Forsyth, 121 Fed. 103 [aff 127 Fed. 1020, 61 CCA 653]; Globe Nail Co. v. Superior Nail Co., 27 Fed. 450 [app dism 136 U. S. 636 mem, 10 SCt 1068 mem, 34 L. ed. 552 mem]; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447; In re Spitteler, 31 App. (D. C.) 271.

[a] **Illustrations.**—(1) An application for a patent for gears made of compressed textile material, the specific material used being cotton batting, describes the same invention as a prior pending application describing the material as compact layers of textile fibers. General Electric Co. v. Continental Fibre Co., 256 Fed. 660, 168 CCA 54. (2) Where the discoverer of a new form of a chemical product makes an application for a broad patent thereon, which is rejected, and he afterward, but more than two years after his product has been in public use, makes a new application for a more limited patent, which after various amendments is granted, the second application is a continuation of the first, the product which is the subject of both applications being the same. Union Carbide Co. v. American Carbide Co., 172 Fed. 120 [rev on other grounds 181 Fed. 104, 104 CCA 522]. (3) A second application for a patent, describing the same device as a former one, which is abandoned with the acquiescence of the patent office, may be treated as a continuation of the first, even though the patentee requested the suppression of the first. Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 103 CCA 479 [rev 173 Fed. 69, and certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem].

84. Clark Blade, etc., Co. v. Gillette Safety Razor Co., 194 Fed. 421, 114 CCA 383 [aff 187 Fed. 149].

85. In re Spitteler, 31 App. (D. C.) 271.

Divisional applications generally see infra § 208.

86. In re Spitteler, 31 App. (D. C.) 271. But see Duryea v. Rice, 28 App. (D. C.) 423 (holding that, where two years have not elapsed after final action by the patent office on an original application before the filing of a divisional application, U. S. Rev. St. § 4894, providing that application shall be regarded as abandoned upon failure of applicant to prosecute the same within two years after any action thereon, does not apply).

87. See supra § 174.

88. U. S. Code tit 35 § 38.

89. Patent Office Rules Oct. 1, 1927, rule 175.

90. Van Heusen Products, Inc. v. Earl, 300 Fed. 922; Christensen v. Noyes, 15 App. (D. C.) 94. And see cases infra notes 91–93.

[a] **Where the application has been assigned,** a renewal thereof after its allowance and lapse may be made in the name of the inventor, instead of the assignee. Van Heusen Products, Inc. v. Earl, 300 Fed. 922.

91. U. S. Rev. St. § 4897, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273 § 2); U. S. Code tit 35 § 38; Patent Office Rules Oct. 1, 1927, rule 175.

[a] **The period of limitation was two years** prior to the amendment of March 2, 1927. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 Fed. 90 [aff 136 Fed. 599, 69 CCA 329]; In re Atty.-Gen., 70 Off. Gaz. (U. S.) 493.

92. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 Fed. 90 [aff 136 Fed. 599, 69 CCA 329].

93. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., supra.

[a] **The commissioner of patents is without authority** of law to issue a patent on an application filed more than the prescribed period after the allowance of a patent for the same invention on a prior application has been forfeited for nonpayment of fees. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 136 Fed. 599, 69 CCA 329 [aff 131 Fed. 90].

94. Le Brou v. Nix, 38 App. (D. C.) 494.

95. Consolidated Fruit Jar Co. v. Bellaire Stamping Co., 27 Fed. 377.

96. Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337 (as to bar by prior use).

Bar by prior use and publication generally see supra §§ 106–119.

97. Patent Office Rules Oct. 1, 1927, rule 176.

98. Le Brou v. Nix, 38 App. (D. C.) 494.

99. Patent Office Rules Oct. 1, 1927, rule 176.

1. Patent Office Rules Oct. 1, 1927, rule 176.

Fees generally see supra § 174.

2. Bowers v. San Francisco Bridge Co., 69 Fed. 640.

3. Wells v. Honigmann, 50 App. (D. C.) 99, 267 Fed. 743.

of fact,[4] and the intention of the party in allowing his former application to be forfeited may be inquired into to determine the question of abandonment,[5] but such inquiry must be directed to the abandonment of the invention in the original application, and not to some other invention that may be described incidentally therein, and made the subject of a new application by the same party, and brought into interference.[6]

[§ 192] **9. Abandonment[7]—a. In General.** An application for a patent or invention may be abandoned before the issue of a patent.[8] By express statutory provision and rules of the patent office, an application for a patent will be regarded as abandoned upon the failure of applicant to complete and prepare it for examination within six months after the filing thereof,[9] or upon his failure to prosecute it within six months after any action thereon by the patent office, of which notice has been duly given to him,[10] unless it is shown to the satisfaction of the commissioner that such delay was unavoidable;[11] or it may be expressly abandoned by applicant's filing in the office a written declaration of abandonment signed by himself and assignee, if any, identifying his application by title of invention, serial number, and date of filing.[12] Under the Nolan Act[13] certain applicants whose applications became abandoned during the World War for want of prosecution are relieved of the burden of showing that the delay was unavoidable;[14] and such provision was within the authority of congress to enact.[15]

Application of provisions and rules. Under these provisions and rules a failure to take such further action for longer than the period of limitation, after application has been finally rejected, and notice thereof received, operates as an abandonment of the application,[16] unless the delay was unavoidable,[17] or unless there was a sufficient excuse for the delay and it was therefore not unreasonable.[18] Prosecution of an application to save it from abandonment must include such proper action as the condition of the case may require;[19] and where an applicant complies with the terms of an order of the commissioner reopening an application for inserting claims, the fact that he adds other claims not expressly authorized does not constitute a failure to prosecute within the meaning of the statute.[20] Where an applicant, on the patent office's requiring a division of claims, cancels claims covering certain matter disclosed, and later files an application, not a divisional application, disclosing the matter covered by the previously canceled claims, he does not thereby abandon such claims[21] or estop himself, after denial of the second application, from applying for a divisional patent covering the matter involved.[22]

Withdrawal. A mere withdrawal of an application does not of itself constitute an abandonment thereof,[23] and this rule has been held to apply, even though a return of the fee is accepted;[24] but as to this there are decisions to the contrary.[25]

The filing of an application in interference does not constitute an abandonment of a prior application merely because the prior application did not disclose the present issue, where it clearly appears that, at the time of filing the prior application, the inventor had a machine showing the invention.[26]

Determination of question. The commissioner has full authority to examine and adjudicate on the question of abandonment,[27] which is a question of fact,[28] and to compel the attendance of witnesses for that

4. Wells v. Honigmann, supra.

5. Saunders v. Miller, 33 App. (D. C.) 456.

6. Saunders v. Miller, supra.

7. Abandonment of invention see supra §§ 120-125.

8. Kling v. Haring, 56 App. (D. C.) 153, 11 F. (2d) 202 [certiorari den 271 U. S. 671 mem, 46 SCt 485 mem, 70 L. ed. 1143 mem].

9. U. S. Rev. St. § 4894, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273 § 1) (to take effect May 2, 1927); U. S. Code tit 35 § 37 (as amended); Patent Office Rules Oct. 1, 1927, rule 171.

[a] **Prior limitations.**—(1) One year was the period of limitation under Rev. St. § 4894, as amended by Act March 3, 1897 (29 St. at L. 693 c 391 § 4). (2) Two years were allowed by statute upon applications filed before Jan. 1, 1898.

[b] **In England** complete specification must be filed within nine months after provisional specification, and, unless accepted in twelve months, is void. Act (1883) § 8.

10. U. S. Rev. St. § 4894, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273 § 1); U. S. Code tit 35 § 37 (as amended); Patent Office Rules Oct. 1, 1927, rule 171.

11. U. S. Rev. St. § 4894, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273 § 1); U. S. Code tit 35 § 37 (as amended).

12. Patent Office Rules Oct. 1, 1927, rule 171.

13. Act March 3, 1921 (41 St. at L. 1313 c 126 §§ 1-8).

14. Seror v. Dick, 55 App. (D. C.) 151, 3 F. (2d) 92.

[a] **Citizen of France.**—Where a party whose application had been abandoned during the World War relies on the Nolan Act for relief from the burden of showing that delay in prosecution of application was unavoidable, a verified representation in his application that he was a citizen of France constituted a prima facie showing that he was a citizen of France, and therefore entitled to the benefits of such Nolan Act. Seror v. Dick, 55 App. (D. C.) 151, 3 F. (2d) 92.

15. Seror v. Dick, supra.

16. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Lay v. Indianapolis Brush, etc., Mfg. Co., 120 Fed. 831, 57 CCA 313; Fire-Extinguisher Mfg. Co. v. Graham, 16 Fed. 543; Goodyear v. Hills, 10 F. Cas. No. 5,571, 3 Fish. Pat. Cas. 134.

17. U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144; Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Ex p. Hayden, 11 F. Cas. No. 6,256; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275.

Revival or reinstatement see infra § 195.

18. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Ballard v. Pittsburgh, 12 Fed. 783; Goodyear Dental Vulcanite Co. v. Smith, 10 F. Cas. No. 5,598, 1 Bann. & A. 201, Holmes 354 [aff 93 U. S. 486, 23 L. ed. 952]; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447.

19. Patent Office Rules Oct. 1, 1927, rule 171.

[a] **A bill in equity** brought under the statute to obtain a patent is a step in the prosecution of the application and will prevent the inference of an abandonment, provided it is brought within the statutory period from the last action of the patent office. Gandy v. Marble, 122 U. S. 432, 7 SCt 1290, 30 L. ed. 1223.

20. In re Selden, 36 App. (D. C.) 428.

[a] **Thus,** where an applicant complied with the terms of an order which reopened the application "for the purpose of inserting therein" twenty-one claims "when amended in accordance herewith," he cannot be said to have failed to prosecute his application within the meaning of the statute, merely because he added other claims not expressly authorized by the commissioner. In re Selden, 36 App. (D. C.) 428.

21. Overland Motor Co. v. Packard Motor Car Co., 274 U. S. 417, 47 SCt 672, 71 L. ed. 1131.

22. Overland Motor Co. v. Packard Motor Car Co., supra.

Divisional applications generally see infra § 208.

23. Hayden v. James, 11 F. Cas. No. 6,260; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645.

Renewal after withdrawal see supra § 190.

24. Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Colgate v. Western Union Tel. Co., 6 F. Cas. No. 2,995, 4 Bann. & A. 36, 15 Blatchf. 365. But see Ex p. O'Hara, 18 F. Cas. No. 10,464 (where, on rejection by the commissioner, applicant withdraws his application and receives back his fee, the commissioner's decision becomes final).

25. Mowry v. Barber, 17 F. Cas. No. 9,892, McA. Pat. Cas. 563; Pelton v. Walters, 19 F. Cas. No. 10,913, 1 Bann. & A. 579.

26. Hopkins v. Peters, 41 App. (D. C.) 302.

27. Hunt v. Howe, 12 F. Cas. No. 6,891, McA. Pat. Cas. 366; Marcy v. Trotter, 16 F. Cas. No. 9,063; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645.

As to revival of application see infra § 195.

28. Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447; Harbridge

purpose;[29] and his ruling upon the question of abandonment of an application is final and conclusive.[30]

[§ 193] **b. Delay in Patent Office.** Where applicant takes proper action in the prosecution of his application within the time fixed by statute, a delay in the proceedings for which he is not responsible, which is caused in the patent office, does not work an abandonment of the application;[31] nor does it affect the validity of a patent issued on such application;[32] and so long as the statute law is not violated these rules apply even though applicant acquiesces in such delay.[33] Where applicant makes constant and persistent effort to meet every objection in the patent office, one who knows of the application and attempts to delay it cannot claim any equities on the ground of lack of diligence on the part of applicant in pressing the patent to issue.[34]

[§ 194] **c. Effect of Abandonment.**[35] An abandonment of an application or of claims therein by an applicant for a patent is abandonment to the public,[36] and not to another who claims to be the inventor,[37] but is not a bar to a patent to a later applicant, either as negativing novelty or as a printed publication.[38] Thus, where an inventor files an application, disclosing an invention not embraced in his claims, and allows the statutory period to elapse after the issuance of a patent to another, embracing the matter not so claimed, he in effect dedicates his invention to the public;[39] but where separate applications are made by an inventor for a method and an apparatus patent, the withdrawal or abandonment of one does not affect the validity of a patent granted for the other.[40]

[§ 195] **d. Revival or Reinstatement; Unavoidable Delay.**[41] Under the statute,[42] if the delay, beyond the prescribed period, in prosecuting the application was unavoidable, the commissioner may revive and reinstate it as a pending application,[43] the test whether the delay was unavoidable being whether applicant used such care and diligence as a prudent and careful person would have used under the circumstances.[44] The commissioner has exclusive authority in such cases to determine whether or not a delay beyond the statutory period was unavoidable,[45] and to revive an abandoned application and issue a patent thereon,[46] and the validity of a patent so issued is not affected by the failure to prosecute the application within the statutory period.[47] Such a revivor is conclusive and binding on the examiner of interferences and the board of examiners-in-chief,[48] and cannot be collaterally attacked in an interfer-

v. Perrin, 54 App. (D. C.) 106, 295 Fed. 927 [certiorari den 264 U. S. 597 mem, 44 SCt 454 mem, 68 L. ed. 868 mem].

29. Hunt v. Howe, 12 F. Cas. No. 6,891, McA. Pat. Cas. 366.

30. Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275, 3 Pittsb. (Pa.) 377.

As to revival see infra § 195.

31. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Adams v. Jones, 1 F. Cas. No. 57, 1 Fish. Pat. Cas. 527, 2 Pittsb. (Pa.) 73; Bevin v. East Hampton Bell Co., 4 F. Cas. No. 1,379, 9 Blatchf. 50, 5 Fish. Pat. Cas. 23; Colgate v. Western Union Tel. Co., 6 F. Cas. No. 2,995, 4 Bann. & A. 36, 15 Blatchf. 365; Howes v. McNeal, 12 F. Cas. No. 6,789, 3 Bann. & A. 376, 15 Blatchf. 103; Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat Cas. 471, 1 Woods 138; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; Singer v. Braunsdorf, 22 F. Cas. No. 12,897, 7 Blatchf. 521; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447; Crown Cork, etc., Co. v. Aluminum Stopper Co., 96 Off. Gaz. (U. S.) 2573; Cutler v. Leonard, 31 App. (D. C.) 297.

[a] **Involuntary delays.**—The mistakes of public officers, or the delays of courts not caused by the laches of applicant, should not work a forfeiture of his rights. Adams v. Jones, 1 F. Cas. No. 57, 1 Fish. Pat. Cas. 527, 2 Pittsb. (Pa.) 73.

32. U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144 [aff 68 Fed. 542, 15 CCA 569]; Kohler v. Cline Electric Mfg. Co., 28 F. (2d) 405 [aff 27 F. (2d) 638]; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Webster Electric Co. v. Podlesak, 255 Fed. 907; Electric Storage Battery Co. v. Buffalo Electric Carriage Co., 117 Fed. 314 [aff 120 Fed. 672, 57 CCA 183 (certiorari den 188 U. S. 741 mem, 23 SCt 849 mem, 47 L. ed. 678 mem)]; Thomson-Houston Electric Co. v. Winchester Ave. R. Co., 71 Fed. 192; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; Brush Electric Co. v. Electrical Accumulator Co., 47 Fed. 48; Adams v. Edwards, 1 F. Cas. No. 53, 1 Fish. Pat. Cas. 1; Dental Vulcanite Co. v. Wetherbee, 7 F. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Howard v. Christy, 12 F. Cas. No. 6,754, 2 Bann. & A. 457; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,414, 1 Biss. 468, 2 Fish. Pat. Cas. 523 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; Sparkman v. Higgins, 22 F. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. R. 110, 5 NYLegObs 122.

33. Electric Vehicle Co. v. Duerr, 172 Fed. 923 [rev on other grounds 184 Fed. 893, 107 CCA 215].

34. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

35. **Renewal of application** see supra § 189.

Revival of application see infra § 195.

36. Harbridge v. Perrin, 54 App. (D. C.) 106, 295 Fed. 927 [certiorari den 264 U. S. 597 mem, 44 SCt 454 mem, 68 L. ed. 868 mem].

37. Harbridge v. Perrin, supra.

38. Acme Acetylene Appliance Co. v. Commercial Acetylene Co., 192 Fed. 321, 112 CCA 573 [aff 188 Fed. 89]; Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298.

39. Chapman v. Beede, 54 App. (D. C.) 209, 296 Fed. 956.

40. Acme Acetylene Appliance Co. v. Commercial Acetylene Co., 192 Fed. 321, 112 CCA 573 [aff 188 Fed. 89].

Method and apparatus as subject of separate inventions and patents see supra § 14.

41. **Renewal of application** see supra § 189.

42. U. S. Rev. St. § 4894.

43. Lay v. Indianapolis Brush, etc., Mfg. Co., 120 Fed. 831, 57 CCA 313; In re Mattullath, 38 App. (D. C.) 497. And see cases infra notes 44–49.

[a] **Negligence of attorney.**—The negligence of an attorney which works the abandonment of an application under the statute does not constitute unavoidable delay which will avoid the effect of such abandonment as to applicant. Lay v. Indianapolis Brush, etc., Mfg. Co., 120 Fed. 831, 57 CCA 313.

[b] **Conclusiveness.**—The reinstatement of an application after several years, during which no action had been taken thereon, on a finding by the patent office that the delay was unavoidable, is conclusive on the courts that the application was not abandoned. McDuffee v. Hestonville, etc., R. Co., 181 Fed. 503 [rev on other grounds 185 Fed. 798, 109 CCA 606 (certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem)].

[c] **Rule.**—Before an application abandoned by failure to complete or prosecute can be revived as a pending application, it must be shown to the satisfaction of the commissioner that the delay in the prosecution of it was unavoidable. Patent Office Rules Oct. 1, 1927, rule 172.

44. In re Mattullath, 38 App. (D. C.) 497.

[a] **Excuse as question of fact.**—A conclusive presumption against the existence of an acceptable excuse for the delay is not necessarily created by the fact that others have, in the meantime, entered the field and obtained patents, and are reaping the rewards of their efforts. In re Mattullath, 38 App. (D. C.) 497.

[b] **Ignorance of fact.**—Ignorance by the widow of an applicant for a patent that she could obtain information concerning her husband's application by applying to the patent office, and also that there is an essential difference between a patent and an application for a patent, is ignorance of fact and not of law. In re Mattullath, 38 App. (D. C.) 497.

[c] **Revival denied.**—A petition twenty-five years after rejection, and thirteen years after denial of another similar petition, may be properly denied. Herring's Application, 57 App. (D. C.) 95, 17 F. (2d) 683.

45. Ex p. Hayden, 11 F. Cas. No. 6,256; U. S. Rifle, etc., Co. v. Whitney Arms Co., 28 F. Cas. No. 16,793, 2 Bann. & A. 493, 14 Blatchf. 94 [aff 118 U. S. 22, 6 SCt 950, 30 L. ed. 53]; McMillin v. Barclay, 4 Brewst. (Pa.) 275.

46. Schram Glass Mfg. Co. v. Homer Brooke Glass Co., 249 Fed. 228, 161 CCA 264 [certiorari den 247 U. S. 520 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem]; Terry v. Webster, 56 App. (D. C.) 198, 12 F. (2d) 139 [certiorari den 273 U. S. 709 mem, 47 SCt 100 mem, 71 L. ed. 852, mem].

47. Schram Glass Mfg. Co. v. Homer Brooke Glass Co., 249 Fed. 228, 161 CCA 264 [certiorari den 247 U. S. 520 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem].

Validity of patents generally see infra §§ 270–293.

48. Terry v. Webster, 56 App. (D. C.) 198, 12 F. (2d) 139 [certiorari den

ence proceeding.[49]

[§ 196] **10. Interference[50]—a. Definitions and Nature.** An interference is a proceeding instituted for the purpose of determining the question of priority of invention between two or more parties claiming substantially the same patentable invention.[51] The proceeding is expressly authorized by act of congress, and is governed by the statute[52] and the rules of the patent office, which relate to interferences,[53] and if there is any antagonism between the statute and the rules, the statute must prevail.[54] An interference is declared between applications rather than between applicants,[55] and is intended to disclose and determine which invention was first produced,[56] and not who has the title.[57]

Senior and junior party. The party to an interference who was first to file his application is generally regarded as the senior party,[58] although while it is pending his rival's application goes to patent.[59] Conversely, a party whose application was filed after that of the other party will be regarded as the junior party, notwithstanding a patent has been issued to him.[60] But the party whose application for a patent is last filed is the senior party to an interference proceeding where his application is for the reissue of a patent issued on an application filed prior to the other party's filing date.[61]

[§ 197] **b. When May Be Declared—(1) In General.** Under the provisions of the governing statute[62] and rules of practice in the patent office,[63] an interference may be declared when an application is made for a patent or for a reissue of a patent,[64] which, in the opinion of the commissioner, would conflict or interfere with any pending application[65] or with any unexpired patent.[66] The duty of the commissioner to declare an interference arises only when, in the exercise of his judgment upon the facts presented, he is of the opinion that a senior application will be interfered with by a junior one;[67] he is not required so to act upon the mere fact that the junior application covers the same ground,[68] or that the junior application asserts an interference or antagonism.[69]

[§ 198] **(2) Essential Elements.** It is generally essential that there be two or more claimants for the same invention,[70] and that their claims disclose substantially the same invention, either in whole or in part;[71] but a second application by the same inventor may constitute an interference with a prior ap-

273 U. S. 709 mem, 47 SCt 100 mem, 71 L. ed. 852 mem].

49. Terry v. Webster, supra.

Interference generally see infra §§ 196–222.

50. Interfering patents see infra §§ 276–281.

51. Patent Office Rules, rule 93 [quot Ewing v. U. S., 244 U. S. 1, 7, 37 SCt 494, 61 L. ed. 955].

[a] **Similar definitions.**—(1) "A [judicial] proceeding carried on in the Patent Office, for the purpose of determining the question of priority between two or more parties, each of which is seeking a patent for the same invention; or between two or more parties, at least one of which is seeking a patent for an invention already covered by a patent which has not yet expired." Walker Patents § 140 [quot Lattig v. Dean, 25 App. (D. C.) 591, 595]. To same effect Hisey v. Peters, 6 App. (D. C.) 68, 70. (2) "A proceeding instituted for the purpose of determining the priority of the inventive act between two or more parties who claim substantially the same patentable invention." 2 Robinson Patents § 587 [quot Lattig v. Dean, supra]. (3) "The act or state of claiming a right to the same invention." Webster D. [quot Milton v. Kingsley, 7 App. (D. C.) 531, 540].

52. U. S. Rev. St. § 4904, as amended by Act March 2, 1927 (44 St. at L. 1336 c 273 § 4); U. S. Code tit 35 § 52 (as amended).

[a] **The statute provides** that, whenever an application is made for a patent which, in the opinion of the commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, as the case may be, within such time, not less than twenty days, as the commissioner shall prescribe. U. S. Rev. St. § 4904, as amended by Act March 2, 1927 (44 St. at L. 1336 c 273 § 4); U. S. Code tit. 35 § 52 (as amended).

[b] **In England** (1) the grant may be opposed by one interested but not refused where there is doubt. Ex p. Sheffield, L. R. 8 Ch. 237; Ex p. Bailey, L. R. 8 Ch. 60; In re Vincent, L. R. 2 Ch. 341; Matter of Spence, 3 De G. & J. 523, 60 EngCh 406, 44 Reprint 1370; Matter of Russell, 2 De G. & J. 130, 59 EngCh 104, 44 Reprint 937; Tolson's Patent, 6 De G. M. & G. 422, 55 EngCh 329, 43 Reprint 1297; In re Lowe, 25 L. J. Ch. 454, 20 ERC 467; Ex p. Daly, Vern. & S. 499; In re Tolhausen, 14 Wkly. Rep. 551; In re Stoll, 1 Wkly. Rep. 472. (2) A person interested may oppose before the law officer, and if he orders sealing may oppose before the lord chancellor. In re Mitchell, L. R. 2 Ch. 343; In re Vincent, L. R. 2 Ch. 341; Matter of Brennard, 3 De G. F. & J. 695, 64 Eng Ch 543, 45 Reprint 1048. (3) A caveat against sealing must be with leave of the lord chancellor. Re Heathorn, 10 Jur. N. S. 810. (4) The opposition is referred to a law officer to determine if the patent should issue. Ex p. Manceaux, L. R. 5 Ch. 518; Ex p. Yates, L. R. 5 Ch. 1. (5) The law officer must decide between rival claimants and not seal both patents. Ex p. Henry, L. R. 8 Ch. 167. (6) He may order sealing on conditions. In re Daine, 26 L. J. Ch. 298, 20 ERC 470. (7) A ruling of the law office will not be overruled except for fraud or new evidence. In re Vincent, L. R. 2 Ch. 341. (8) On an application for sealing, witnesses may be examined viva voce. In re Gething, L. R. 9 Ch. 633. (9) The time for the application for sealing may be extended. In re Hersee, L. R. 1 Ch. 518; In re Somerset, 13 Ch. D. 397; In re Mackintosh, 2 Jur. N. S. 1242. (10) Where opposition is withdrawn, the opposer pays the costs. In re Cobley, 8 Jur. N. S. 106; Re Ashenhurst, 2 Wkly. Rep. 3.

[c] **In Canada,** under the Patent Act, Rev. St. (1886) c 61 § 19 subd 3, three arbitrators are appointed, and when there are more than two conflicting applications for any patent, and one of the applicants has intimated to the commissioner or deputy commissioner or person appointed to perform the duty of that officer that he will not unite with the other applicants in appointing arbitrators, the appointment may be made by that official without notice to, or consultation of, the wishes of the other applicants, and he has the absolute right to decide, without possibility of his decision being reviewed by prohibition or injunction, whether the conditions exist in which he should proceed to exercise the power of appointment. Faller v. Aylen, 8 Ont. L. 70.

53. Patent Office Rules, Oct. 1, 1927, rules 93–132, 153–163.

54. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955 [rev 45 App. (D. C.) 185].

55. Lattig v. Dean, 25 App. (D. C.) 591.

56. Lattig v. Dean, supra.

Issues involved generally see infra § 212.

57. Lattig v. Dean, 25 App. (D. C.) 591.

58. Miehle v. Read, 18 App. (D. C.) 128.

59. Miehle v. Read, supra; Esty v. Newton, 14 App. (D. C.) 50.

60. Furman v. Dean, 24 App. (D. C.) 277.

61. Hayes v. Davison, 50 App. (D. C.) 361, 273 Fed. 325.

62. U. S. Rev. St. § 4904, as amended by Act March 2, 1927 (44 St. at L. 1336 c 273 § 4); U. S. Code tit 35 § 52 (as amended).

63. Patent Office Rules Oct. 1, 1927, rule 94.

[a] **Patent office rule.**—"Interferences will be declared between applications by different parties for patent or for reissue when such applications contain claims for substantially the same invention which are allowable in the application of each party, and interferences will also be declared between applications for patent, or for reissue, and unexpired original or reissued patent, of different parties, when such applications and patents contain claims for substantially the same invention which are allowable in all of the applications involved." Patent Office Rules Oct. 1, 1927, rule 94.

64. Reissues generally see infra §§ 307–328.

65. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955 [rev 45 App. (D. C.) 185]; Fooks v. Thompson, 30 F. (2d) 875.

66. See infra § 199.

67. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955 [rev 45 App. (D. C.) 185].

68. Ewing v. U. S., supra.

69. Ewing v. U. S., supra.

70. Tyson v. Rankin, 24 F. Cas. No. 14,320, McA. Pat. Cas. 262; Lattig v. Dean, 117 Off. Gaz. (U. S.) 1798; Cushman v. Lines, 10 App. (D. C.) 156.

71. DuBois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895; Lowrey v. Cowles Electric Smelting, etc., Co., 68 Fed. 354 [rev on other grounds 79 Fed. 331, 24 CCA 616]; Lowry v. Cowles Electric Smelting, etc., Co., 56 Fed. 488; Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Pentlarge v. New York Bung, etc., Co., 20 Fed. 314; Gold, etc.,

plication by him.[72] It is also essential that there be an actual interference or conflict between the different claims;[73] and whether there is such an interference depends chiefly upon the subject matter disclosed and not merely upon the language of the respective claims,[74] or upon the admissions or denials of the parties.[75]

A prior forfeited application, to justify an award of priority, must disclose the subject matter of the claims in issue.[76]

[§ 199] **(3) Between Applicant and Patentee.**[77] Under the statute[78] and a rule of the patent office,[79] an interference may be declared between an application and a patent previously granted to another for the same thing,[80] for, although the patent office cannot cancel the patent already issued,[81] it may issue a second patent to the real inventor.[82] The fact that a patent has been issued to one party to an interference proceeding accords no advantage to him in that proceeding if the applications were copending,[83] or if the record of the patent shows that the patentee had no right to make in his application the claims which are the issue of the interference.[84]

Limitation or laches. But an applicant is not entitled to maintain an interference proceeding more than two years after the grant of a patent to the adverse party thereto unless he shows special circumstances justifying the delay.[85]

[§ 200] **(4) Successive Interferences or Applications.** The power of the commissioner is not exhausted by once deciding a question of interference;[86] but where cause is shown, he may permit the unsuccessful party to withdraw his application, and refile it and then declare anew an interference between the same parties;[87] or a second interference may be declared after the court on appeal has decided in favor of an applicant and ordered that a patent issue to him.[88] But where a party whose application is involved in a pending interference presents another application based upon the invention involved in the interference, he will be refused a patent upon the later application until the interference has terminated.[89]

As rehearing. A second interference is merely a rehearing of the same case, granted, for cause shown, to the losing party,[90] and testimony taken on the former interference is admissible therein,[91] although a new party has been introduced,[92] as the addition of another party does not change the nature of the interference so as to make it entirely a new case, where the subsequent proceedings show it to be a rehearing or new trial as to the original parties as well as to the issues to which the new applicant is to be considered a party.[93]

[§ 201] **c. Disclaimer or Waiver.** A disclaimer of the invention of the particular matter in issue, in order to avoid the continuance of the interference, as permitted by a rule of the patent office,[94] extends only to the particular claim or claims as to which interference has been declared.[95] But in an interference involving three parties, the junior applicant cannot waive the limitation put upon the senior applicant by his preliminary statement, as to his date of disclosure, although the examiner of interferences and the examiners-in-chief have found in favor of both the senior and junior applicants as against the intermediate applicant.[96]

[§ 202] **d. Estoppel To Make Claim.**[97] A party may be estopped from making claims in interference by failing to present such claims in an interference proceeding to which he is a party,[98] or by failing to amend his application,[99] or by other conduct during the interference proceeding;[1] and he may also be estopped to claim the benefit of a claim which has

Ore Separating Co. v. U. S. Disintegrating Ore Co., 10 F. Cas. No. 5,508, 6 Blatchf. 307, 3 Fish. Pat. Cas. 489; Nichols v. Harris, 18 F. Cas. No. 10,244, McA. Pat. Cas. 362; Tyson v. Rankin, 24 F. Cas. No. 14,320, McA. Pat. Cas. 262; Ex p. Platts, 15 Off. Gaz. (U. S.) 827; Brewer v. Russell, 53 App. (D. C.) 221, 289 Fed. 619; Viele v. Cummings, 30 App. (D. C.) 455; Newton v. Woodward, 16 App. (D. C.) 568; Rosell v. Allen, 16 App. (D. C.) 559; Cushman v. Lines, 10 App. (D. C.) 156.

72. Porter v. Louden, 7 App. (D. C.) 64.

73. Christie v. Seybold, 55 Fed. 69, 5 CCA 33; Bain v. Morse, 2 F. Cas. No. 754, McA. Pat. Cas. 90; Nichols v. Harris, 18 F. Cas. No. 10,244, McA. Pat. Cas. 362; Stephenson v. Hoyt, 22 F. Cas. No. 13,373, McA. Pat. Cas. 292; Rosell v. Allen, 16 App. (D. C.) 559; Porter v. Louden, 7 App. (D. C.) 64.

[a] **Cases of lack of interference.** —(1) In general. Podlesak v. McInnerney, 26 App. (D. C.) 399; O'Reilly v. Smith, 18 F. Cas. No. 10,566, McA. Pat. Cas. 218; Tyson v. Rankin, 24 F. Cas. No. 14,320, McA. Pat. Cas. 262; Lallig v. Dean, 117 Off. Gaz. (U. S.) 1796. (2) A junior party's sewing machine mechanism for covering seams, so as to eliminate ridges, does not interfere with the senior party's device designed to overcome the tendency of certain goods to draw or pucker, except as to two claims, in which the mechanism operated similarly. Seymour v. Molyneux, 49 App. (D. C.) 219, 263 Fed. 471; Seymour v. Molyneux, 49 App. (D. C.) 216, 263 Fed. 468.

74. Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Dederick v. Fox, 56 Fed. 714; Ellis v. Shaw, 54 App. (D. C.) 185, 295 Fed. 1006; New Departure Mfg. Co. v. Robinson, 39 App. (D. C.) 504; Norling v. Hayes, 37 App. (D. C.) 169; Blackford v. Wilder, 28 App. (D. C.) 535 [certiorari den 205 U. S. 541 mem, 27 SCt 788 mem, 51 L. ed. 922 mem].

[a] **In case of machines,** the modus operandi may be looked to as a test. Tyson v. Rankin, 24 F. Cas. No. 14,320, McA. Pat. Cas. 262.

75. Hutchinson v. Meyer, 12 F. Cas. No. 6,957.

76. Jeffery v. Locke, 56 App. (D. C.) 345 13 F (2d) 316; Locke v. Riddle, 56 App. (D. C.) 344, 13 F. (2d) 315.

77. Burden of proof see infra § 216.

78. U. S. Rev. St. § 4904, as amended by Act March 2, 1927 (44 St. at L. 1336 c 273 § 4); U. S. Code tit 35 § 52 (as amended).

79. Patent Office Rules Oct. 1, 1927, rule 93.

[a] **The rule provides** that the fact that one of the parties has already obtained a patent will not prevent an interference, for, although the commissioner has no power to cancel a patent, he may grant another patent for the same invention to a person who proves to be the prior inventor. Patent Office Rules Oct. 1, 1927, rule 93.

80. Western Electric Mfg. Co. v. Chicago Electric Mfg. Co., 14 Fed. 691, 11 Biss. 427; Porter v. Louden, 7 App. (D. C.) 64.

81. Annulment or cancellation of patent generally see infra § 283.

82. Bird v. Elaborated Roofing Co., 256 Fed. 366, 167 CCA 536 [certiorari dism 250 U. S. 647 mem, 39 SCt 490 mem, 63 L. ed. 1188 mem].

[a] **Thus,** under Rev. St. § 4904, which expressly provides for declaring interference with an existing patent, priority of invention may be adjudged in the adverse party, and a patent issued to him. Bird v. Buffalo Elaborated Roofing Co., 256 Fed. 366, 167 CCA 536 [certiorari dism 250 U. S. 647 mem, 39 SCt 490 mem, 63 L. ed. 1188 mem].

83. Drey v. Peller, 53 App. (D. C.) 35, 287 Fed. 1012; Lorimer v. Erickson, 44 App. (D. C.) 503.

84. McKnight v. Pohle, 30 App. (D. C.) 92.

85. Webster Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463, 44 SCt 342, 68 L. ed. 792 [aff 283 Fed. 83]; Chapman v. Wintroath, 252 U. S. 126, 40 SCt 234, 64 L. ed. 491; O'Brien v. Bonelli, 57 App. (D. C.) 148, 18 F. (2d) 190; Hambuechen v. Schorger, 56 App. (D. C.) 141, 10 F. (2d) 1006; Sundstrand v. Gubelmann, 55 App. (D. C.) 200, 4 F. (2d) 166.

86. Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143; Potter v. Dixon, 19 F. Cas. No. 11,325, 5 Blatchf. 160, 2 Fish. Pat. Cas. 381.

87. Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143; Moore v. U. S., 40 App. (D. C.) 201.

88. Potter v. Dixon, 19 F. Cas. No. 11,325, 5 Blatchf. 160, 2 Fish. Pat. Cas. 381.

89. In re Wickers, 29 App. (D. C.) 71.

90. Eames v. Richards, 8 F. Cas. No. 4,240.

91. Eames v. Richards, supra.

92. Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388; Eames v. Richards, 8 F. Cas. No. 4,240.

93. Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388

94. Patent Office Rules Oct. 1, 1927, rule 107.

95. Reed v. Cropp Concrete Mach. Co., 239 Fed. 869, 152 CCA 653 [rev 218 Fed 643].

96. Blaw v. Whitall, 43 App. (D. C.) 20.

97. On failure to move for dissolution see infra § 222.

98. See infra § 204.

99. See infra § 206.

1. Lauritzen v. Banner Mach. Co.,

been rejected with his acquiescence.[2] But an employee is not estopped from becoming a party to the interference and claiming the invention, by the fact that he had testified in the proceedings for his employer, the senior applicant, to whom he had in good faith assigned the invention;[3] and where a party to an interference has taken steps to apply for a patent, before the corporation of which he is president obtains a license to manufacture the device covered by the other party's patent, such license does not estop him from claiming the invention, but is justifiable for the protection of his interests.[4]

[§ 203] **e. Proceedings in General.**[5] Interference proceedings in the patent office are of an equitable nature,[6] but must be conducted with due regard to the requirements of the statute[7] and the rules of practice in the patent office affecting such proceedings;[8] and so long as the case is pending, it is within the supervision of the commissioner of patents,[9] who is charged with the duty of seeing that full justice is done.[10] His jurisdiction attaches when he directs the declaration of an interference and extends to the awarding of priority to the successful party after his adversary has been eliminated;[11] but the duty of determining whether an interference exists may be delegated to the primary examiner.[12] Technical objections to papers filed by an opponent should not be sustained, except upon the clearest proof.[13]

Process. A statute providing for the issuance by the clerk of a federal court of subpœnas for witnesses for the taking of testimony for use in any contested case pending in the patent office[14] does not authorize the issuance of a subpœna duces tecum;[15] nor is such a subpœna authorized in such proceedings by a statute[16] which deals only with writs necessary for the exercise by the courts of their own jurisdictions.[17]

Notice of interference. Whenever an interference is declared, notice thereof must be given to applicants, or applicant and patentee as the case may be, whereupon the examiner proceeds to determine the question of priority.[18]

A motion to reopen an interference proceeding, so that applicant might substitute an earlier application, is an admission that the subject matter of all the counts in the interference are the same.[19]

[§ 204] **f. Preliminary Statement—(1) In General.** Generally speaking, there are no pleadings in an interference case;[20] but under a rule of the patent office,[21] each party, within the time designated in the notice of interference, must make and file in the patent office a preliminary statement which corresponds to and constitutes the pleading in the case,[22] and which contains a concise statement under oath setting forth the dates of the original conception, the making of drawings and models, the first disclosure to others, the reduction to practice, and showing the extent of the use of the invention.[23] In such statement a party must present for determination all of his claims relating to the interfering subject matter,[24] and if he fails to do so, and furthermore fails to file any amendment containing additional claims, he becomes barred and is estopped from subsequently presenting such claims as a basis for another in-

287 Fed. 692.

2. Engel v. Sinclair, 34 App. (D. C.) 212.

[a] **Thus,** where an applicant presents his claim in one form, and the patent office rejects it with his acquiescence, he is estopped to claim the benefit of his rejected claim, or such a construction of his amended claim as would be equivalent to the rejected claim, whether the rejected claim be broader or narrower than the one allowed. Engel v. Sinclair, 34 App. (D. C.) 212.

3. Blaw v. Whitall, 43 App. (D. C.) 20.

4. Laughlin v. Burry, 50 App. (D. C.) 273, 270 Fed. 1013.

5. Remedy in equity for refusal of patent see infra §§ 243-252.

6. Blackford v. Wilder, 104 Off. Gaz. (U. S.) 580; Nielson v. Bradshaw, 91 Off. Gaz. (U. S.) 644; In re Henderson, 50 App. (D. C.) 191, 269 Fed. 707 [certiorari den 256 U. S. 699 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem]; Bruckman v. Miller, 50 App. (D. C.) 36, 267 Fed. 338.

7. Bruckman v. Miller, supra.

8. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955; Spear v. Abbott, 22 F. Cas. No. 13,222; Jones v. Starr, 117 Off. Gaz. (U. S.) 1495; Ross v. Loewer, 77 Off. Gaz. (U. S.) 2141; Bruckman v. Miller, 50 App. (D. C.) 36, 267 Fed. 338.

[a] **Preliminary questions.**—"Before the declaration of an interference all preliminary questions must be settled by the primary examiner, the issue clearly defined and the claims put in such condition that they will not require alteration." Patent Office Rules, rule 95 [quot Ewing v. U. S., 244 U. S. 1, 7, 37 SCt 494, 61 L. ed. 955].

[b] **Failure to prepare.**—"Whenever the claims of the co-pending applications differs in phraseology they must be brought to expression substantially in the same language and claims may be suggested to the applicants and if not followed the invention covered by them shall be considered as disclaimed. The declaration of an interference will not be delayed by the failure of a party to put his claim in condition for allowance." Ewing v. U. S., 244 U. S. 1, 7, 37 SCt 494, 61 L. ed. 955.

Governing rules see Patent Office Rules Oct. 1, 1927, rules 93-132, 153-163.

9. Bruckman v. Miller, 50 App. (D. C.) 36, 267 Fed. 338; U. S. v. Moore, 30 App. (D. C.) 464.

10. Bruckman v. Miller, 50 App. (D. C.) 36, 267 Fed. 338.

11. U. S. v. Moore, 30 App. (D. C.) 464.

[a] **In Canada** the commissioner of patents becomes functus officio on giving notice to the parties, declaring a conflict, and the exchequer court has no jurisdiction to pass upon any claims other than those which are referred by the department and which have already been passed upon by the commissioner, and where the commissioner has declared a conflict, and one of the applicants institutes proceedings to have it declared who was the first inventor, the court ought to assume that the commissioner has found that the patent applied for is meritorious and involves invention, and should restrict its finding solely to the issue of priority of invention between the parties, and the American rule of reduction to practice ought not to be applied. Permutit Co. v. Borrowman, [1924] Can. Exch. 6.

12. U. S. v. Moore, 30 App. (D. C.) 464.

13. Davis v. Garrett, 28 App. (D. C.) 9.

[a] **Thus** a motion by one of the parties to an interference to strike the application of his opponent from the files for want of proper verification is properly refused where it appears that the date of the oath on the file is February 18, that changes were alleged to have been made in the papers after that date, but at the direction of applicant, that applicant claims to have made oath as to the inventorship after the making of changes, that the application passed through the patent office, and that it had been acted upon for nearly ten years. Davis v. Garrett, 28 App. (D. C.) 9.

14. U. S. Code tit 35 § 54.

15. In re Outcault, 149 Fed. 228.

16. U. S. Rev. St. § 716; U. S. Code tit 28 § 377.

17. In re Outcault, 149 Fed. 228.

18. U. S. Rev. St. § 4904, as amended by Act March 2, 1927 (44 St. at L. 1336 c 273 § 4); U. S. Code tit 35 § 52 (as amended).

[a] **Rule of practice.**—The notices must be forwarded by the examiner of interferences to all the parties, in care of their attorneys, if they have attorneys, and, if the application or patent in interferences has been assigned, to the assignee. When one of the parties has received a patent, a notice must be sent to the patentee and to his attorney of record. Patent Office Rules Oct. 1, 1927, rule 103.

19. In re Dement, 49 App. (D. C.) 261, 263 Fed. 813 [certiorari den 254 U. S. 630 mem, 41 SCt 7 mem, 65 L. ed. 447 mem].

20. McKenzie v. Garrett, 43 App. (D. C.) 6.

21. Patent Office Rules Oct. 1, 1927, rule 110.

22. Lindmark v. De Ferranti, 34 App. (D. C.) 445; Parkes v. Lewis, 28 App. (D. C.) 1; Lowrie v. Taylor, 27 App. (D. C.) 522; Hammon v. Basch, 24 App. (D. C.) 469.

23. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955; McKenzie v. Garrett, 43 App. (D. C.) 6.

[a] **"The purpose** of requiring preliminary statements by the parties in interference is that the issues upon which priority depends shall be specifically presented." Lindmark v. De Ferranti, 34 App. (D. C.) 445, 450.

[b] **The dates of conception and reduction to practice** should be alleged in the preliminary statements. McKenzie v. Garrett, 43 App. (D. C.) 6.

24. Doble's Application, 57 App. (D. C.) 10, 16 F. (2d) 350.

terference with the other party's application.[25] A disclosure of the counts in issue by the prior inventor may be sufficient to sustain his rights, although his disclosure is less efficient than that of the subsequent inventor.[26]

[§ 205] **(2) Amendment of Preliminary Statement.** By virtue of a rule of the patent office,[27] the patent office tribunals may, in their discretion, permit a party, on motion, to amend his preliminary statement so as to correct a material error which has occurred through an honest inadvertence or mistake,[28] but the motion to correct such error must be made, if possible, before the taking of any testimony and as soon as possible after the discovery of the error.[29] The commissioner's action in allowing or refusing such an amendment will not be disturbed on appeal, unless there has been an abuse of discretion causing a palpable miscarriage of justice,[30] and error, if any, in permitting an amendment may be waived by a failure to object to evidence introduced under the amended statement.[31]

Changing date. A motion for leave to amend such statement so as to change the date of disclosure made after applicant has seen the adverse party's statement should be carefully scrutinized,[32] and should not be granted unless the interests of justice plainly require it,[33] or unless the testimony to support it is convincing and free from suspicion;[34] and where leave to make such an amendment is obtained on affidavits which are later shown to have been at least mistakenly made, the amended preliminary statement should be stricken out.[35] Where the other party is permitted to amend so as to show an earlier date, the prior party under the original statements may likewise amend.[36]

[§ 206] **g. Amendment of Application during Interference[37]—(1) In General.** Under a rule of the patent office,[38] a party to an interference may file an amendment to his application, containing any claims which in his opinion should be made the basis of an interference between himself and any of the other parties,[39] provided such amendment is filed within thirty days after the preliminary statements have been received and approved,[40] or when a motion for dissolution is made.[41] It is the duty of the examiner of interferences to transmit the claims thus proposed to the primary examiner for his determination;[42] and if the claims are allowed, the interference will be redeclared, or other interferences will be declared, to include the new claims.[43] After a successful contest in interference, the successful applicant cannot, without changing his specification, broaden his claims to include something not shown or claimed in his original application, but which is claimed in the interfering application;[44] and the losing party is not entitled to make claims that will dominate the claims given to his successful rival.[45]

Where a joint application is involved, the prior inventor, who is found to be the sole inventor, should be given an opportunity to amend his application, or to file a new application so as to protect his rights as sole inventor;[46] and where, in such a case, the sole inventor files a separate application, he is entitled to the date of the joint application for reduction to practice, as the application of the sole inventor is an amendment of the joint application and relates back to the time of the filing of the original application;[47] but in seeking to correct his own mistake in filing the application jointly with another, he must act with reasonable diligence and assume the burden of establishing his good faith.[48]

Correcting mistake. A mere mistake or inadvert-

25. Doble's Application, supra.

Amendments generally see infra §§ 206–208.

Successive interference in general see supra § 200.

26. Ransdall v. Jahns, 51 App. (D. C.) 3, 273 Fed. 365.

27. Patent Office Rules Oct. 1, 1927, rule 113.

28. Myers v. Myers, 55 App. (D. C.) 281, 4 F. (2d) 948; Chapman v. Hammett, 53 App. (D. C.) 236, 289 Fed. 634; Hernandez-Mejia v. Kelley, 51 App. (D. C.) 210, 277 Fed. 609; Blaw v. Whitall, 43 App. (D. C.) 20; Hammond v. Basch, 24 App. (D. C.) 469; Cross v. Phillips, 15 App. (D. C.) 228; Stevens v. Seher, 11 App. (D. C.) 245; Parker v. Appert, 8 App. (D. C.) 270.

[a] **"The right of a party to amend** in a patent case is not different from the similar right accorded by courts in proceedings at law and in equity. Where a party, acting timely and in good faith, shows that amendment is essential to the preservation of his rights, the privilege should be accorded, and this may be done at any step in the proceedings prior to the final determination of the case in the Patent Office." Stillwell v. Thompson, 53 App. (D. C.) 196, 198, 289 Fed. 594.

29. Stevens v. Seher, 11 App. (D. C.) 245.

30. Saunders v. Campbell, 56 App. (D. C.) 21, 6 F. (2d) 719; Hernandez-Mejia v. Kelley, 51 App. (D. C.) 210, 277 Fed. 609; Hammond v. Basch, 24 App. (D. C.) 469; Cross v. Phillips, 14 App. (D. C.) 228.

[a] **Refusal held proper.**—(1) The denial of a motion of a junior party to amend his preliminary statement, by alleging an earlier reduction to practice, is not error, where his evidence shows tests which either did not amount to reduction to practice, or, even if sufficient, were no more than the senior party did at a still earlier date by way of reduction to practice. Gammeter v. Thropp, 42 App. (D. C.) 564. (2) A refusal to permit an amendment on a showing that applicant was without experience in interference proceedings, that his counsel was not conveniently near, that he did not know he would be bound by the dates set forth in the statement, and did not then know the correct dates, will not be disturbed. Chapman v. Hammett, 53 App. (D. C.) 236, 289 Fed. 634.

31. Saunders v. Campbell, 56 App. (D. C.) 21, 6 F. (2d) 719.

32. Sawyer v. Strauss, 57 App. (D. C.) 118, 18 F. (2d) 160; Myers v. Myers, 55 App. (D. C.) 281, 4 F. (2d) 948; Parker v. Appert, 8 App. (D. C.) 270.

33. Sawyer v. Strauss, 57 App. (D. C.) 118, 18 F. (2d) 160; Earles v. Gomber, 50 App. (D. C.) 389, 273 Fed. 353; Parker v. Appert, 8 App. (D. C.) 270.

[a] **Refusal not abuse of discretion.**—Stein v. Dosch, 51 App. (D. C.) 343, 279 Fed. 799.

34. Earles v. Gomber, 50 App. (D. C.) 389, 273 Fed. 353.

35. Myers v. Myers, 55 App. (D. C.) 281, 4 F. (2d) 948.

36. Stillwell v. Thompson, 53 App. (D. C.) 196, 289 Fed. 594.

37. Amendment of application generally see supra §§ 180–187.

38. Patent Office Rules Oct. 1, 1927, rule 109.

39. In re Capen, 43 App. (D. C.) 342; Bolin v. Slingluff, 39 App. (D. C.) 134.

[a] **"The object of this rule** obviously is to require the parties to an interference to have determined in that proceeding all rights growing out of their respective applications. In other words, the rule affords either party to an interference full opportunity to put in issue matter which he may think patentable or common to the interfering applications, but which was not included in the interference as originally declared by the primary examiner." In re Capen, 43 App. (D. C.) 342, 344.

40. In re Capen, supra.

41. In re Capen, supra.

[a] **After dissolution too late.**—Doble's Application, 57 App. (D. C.) 10, 16 F. (2d) 350; In re Capen, 43 App. (D. C.) 342.

42. In re Capen, supra.

43. In re Capen, supra.

44. General Electric Co. v. Sangamo Electric Co., 174 Fed. 246, 98 CCA 154.

[a] **Rule applied.**—When application is made for a specific form of invention, and the claims are thrown into interference proceedings with generic claims in the pending application of another inventor, on the issue of priority being decided in favor of the former, he is confined to the particular mechanical construction for which he has declared. Union Typewriter Co. v. Smith, 173 Fed. 288 [aff 181 Fed. 966, 104 CCA 430].

45. In re Henderson, 50 App. (D. C.) 191, 269 Fed. 707 [certiorari den 256 U. S. 699 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem]; In re Marconi, 38 App. (D. C.) 286.

46. Briggs v. Kaisling, 53 App. (D. C.) 49, 288 Fed. 254; In re Roberts, 49 App. (D. C.) 250, 263 Fed. 646.

47. Bijur v. Kennington, 51 App. (D. C.) 230, 278 Fed. 313.

[a] **Thus,** where, by mistake and without fraudulent intention, a patent application filed by two inventors embraced an invention of which one of them was sole inventor, a new application, filed by him, should have been treated as a continuation of the original application, and hence not barred by an interfering patent issued more than two years prior to its filing. In re Roberts, 49 App. (D. C.) 250, 263 Fed. 646.

48. In re Roberts, supra.

ence in a drawing, made by the draughtsman, should, without amendment, be disregarded in proceedings for interference;[49] but if, after an applicant has obtained an award in interference, the commissioner discovers a mistake in the drawings which show that the device is inoperative, he may refuse to grant applicant a patent, unless the mistake is corrected.[50]

Laches; estoppel. A party to an interference is not estopped from amending his application before the other party has filed his application;[51] and whether, in other cases, a party is estopped to amend or make new claims depends upon whether the adverse litigant or the public will be injured thereby.[52] A motion to amend an application to carry back the alleged date of reduction to practice to a date prior to the opponent's filing date may properly be denied where it is not made until after the taking of testimony is completed.[53]

[§ 207] **(2) Copying Claims.** Where an application in interference discloses, although it does not formally claim, matter contained in a patent issued to the other party, such matter may be copied from the patent, in amendment of the application.[54] Where, however, the claims involved are substantially different and are not disclosed in the application, applicant is not entitled to copy them from the patent and make them his claims in interference;[55] nor is he entitled to make or be awarded a claim that will dominate the invention covered by the patent.[56]

Reference to prior patent. It is sufficient for applicant in a subsequent specification to incorporate, by reference to a prior patent, the detailed disclosure in that patent,[57] and the subsequent application thereby contains a sufficient disclosure to support the count in issue in interference proceedings, if the intended method of operation is indicated and the reference for detail is sufficient.[58]

Limitation as to time. Under the statute limiting the time for filing an application after a prior patent or prior public use,[59] unless, in the party's original application, which antedated the patent, there was a claim for the same subject matter,[60] the copying of claims must be made within two years after the issuance of the prior patent;[61] and one having an application for a patent pending has constructive notice of the issuance of a patent to another containing claims which he subsequently attempts to make.[62] Where the inventor proceeds within the statutory period, his right to priority in interference cannot be denied, on the theory that his failure to copy claims of the other party sooner was injurious to the latter's rights, by inducing him to use the invention.[63]

49. Moore v. U. S., 40 App. (D. C.) 201.

50. Moore v. U. S., supra.

51. Phillips v. Sensenich, 31 App. (D. C.) 159.

52. In re Henderson, 50 App. (D. C.) 191, 269 Fed. 707 [certiorari den 256 U. S. 699 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem]; In re Martin, 48 App. (D. C.) 187.

[a] **Consideration of injury.**—Where, after an interference has been decided against him, an applicant presents his application in new form but without changing the substance, the commissioner in passing on such application represents the adverse litigant in the previous interference proceeding and the public, and therefore may consider the injury to the adverse litigant and the public as establishing estoppel to make the new claims. In re Henderson, 50 App. (D. C.) 191, 269 Fed. 707 [certiorari den 256 U. S. 699 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem].

[b] **Failure to move to amend.**—Where M filed an application, placed in interference with applications of D and G, and subsequently filed another application, claiming different features of the same subject matter, which claims were readable on the specification of G, later given a patent covering such claims, and M failed to move under Patent Office Rules, rule 109 to amend his first application, so as to bring such claims into interference, and there was a decision of a patent office tribunal, from which he took no appeal, in favor of D whose specification did not disclose such features, M was not estopped by laches from making the claims, as his failure to move under rule 109 was not shown to have resulted in injury to anyone. In re Martin, 48 App. (D. C.) 187.

[c] **Delay in making new claims.**—Where a party, defeated in an interference proceeding, takes the full time allowed him for presenting new claims, as a result of which the successful party's time for applying for a reissue to cover the new claims has expired, he is estopped en pais from making the new claims. In re Henderson, 50 App. (D. C.) 191, 269 Fed. 707 [certiorari den 256 U. S. 699 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem].

53. Clark v. Birdsey, 56 App. (D. C.) 136, 10 F.(2d) 1001.

54. Steenstrup v. Morton, 30 F. (2d) 867; Craig v. Mayer, 56 App. (D. C.) 158, 11 F. (2d) 207; Bancel v. Meier, 54 App. (D. C.) 257, 296 Fed. 1004; Luger v. Browning, 21 App. (D. C.) 201 [dist Beckman v. Wood, 15 App. (D. C.) 484]; McBerty v. Cook, 16 App. (D. C.) 133.

[a] **Estoppel.**—(1) Where the junior applicant, after his original application became abandoned through oversight of his solicitor, files a new application with the same drawings and specifications and the same claims, with the exception of one, which is changed to avoid an objection which has been raised in the patent office, and subsequently, a patent having been inadvertently issued to the senior party while the junior party's second application is pending, the latter brings about an interference, and for that purpose inserts certain claims of the patent, he, the junior party, is not estopped to embody the claims of the senior party's patent. Jannson v. Larsson, 30 App. (D. C.) 203. (2) The fact that an applicant did not realize that his claims were inadequate until he saw the competing device does not preclude an amendment, so long as applicant does not depart from or unduly enlarge the invention shown by his specifications and drawings. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27.

55. Craig v. Mayer, 56 App. (D. C.) 158, 11 F. (2d) 207; Drey v. Peiler, 53 App. (D. C.) 35, 287 Fed. 1012; Ficklen v. Baker, 47 App. (D. C.) 587.

[a] **Illustration.**—Where, in an interference involving an improvement in inductive bonds employed to bridge the rails of an electric railway at each end of a block section thereof, one of the parties amends his claims so as to insert claims copied from his adversary's patent, the party so amending has no right to make certain of the claims so inserted, where he fails to disclose an induction bond with the turns of the windings interposed with each other as called for by such claims. General R. Signal Co. v. Thullen, 32 App. (D. C.) 575.

56. Craig v. Mayer, 56 App. (D. C.) 158, 11 F. (2d) 207.

57. Lynch v. Headley, 52 App. (D. C.) 269, 285 Fed. 1003.

58. Lynch v. Headley, supra.

59. U. S. Rev. St. § 4886, as amended by Act March 3, 1897 (29 St. at L. 692 c 391).

60. Bancel v. Meier, 54 App. (D. C.) 257, 296 Fed. 1004.

[a] **Rule applied.**—Where in interference proceedings involving both apparatus and method claims, the senior party is entitled to make the apparatus claims, he may also make the method claims, notwithstanding a delay of more than two years in copying such claims after another patent embodying them has been issued, where the method is an inherent part of the apparatus, and anyone using the apparatus must use the method. Leonard v. Everett, 52 App. (D. C.) 90, 281 Fed. 594.

61. Craig v. Mayer, 56 App. (D. C.) 158, 11 F. (2d) 207; Replogle v. Kirby, 50 App. (D. C.) 210, 269 Fed. 862; Kane v. Podlesak, 48 App. (D. C.) 11; Rowntree v. Sloan, 45 App. (D. C.) 207.

[a] **Thus,** in an interference proceeding, an applicant for a patent, more than three years and six months after the issuance of a patent on a copending application, is not entitled to copy the claim of such patent. Craig v. Mayer, 56 App. (D. C.) 158, 11 F. (2d) 207.

[b] **Copying within limitation.**—The prior inventor does not lose his right by delay in taking the claims in issue from the application of the other party for twenty months after that application was filed and fifteen months after the prior inventor had knowledge thereof, since such claims were taken well within the two-year period allowed by the rule, as construed by the supreme court. Ransdall v. Jahns, 51 App. (D. C.) 3, 273 Fed. 365.

[c] **After original issuance of patent.**—Where claims in a patent issued in 1909 were appropriated by H, and, on interference, awarded to him, D could not make such claims more than two years after the issuance of the patent in 1909, although within two years after the issuance of the patent to H. De Ferranti v. Harmatta, 50 App. (D. C.) 393, 273 Fed. 357.

62. De Ferranti v. Harmatta, supra.

63. Harbridge v. Perrin, 54 App. (D. C.) 106, 295 Fed. 927 [certiorari den 264 U. S. 597 mem, 44 SCt 454 mem, 68 L. ed. 868 mem]; Leonard v. Everett, 52 App. (D. C.) 90, 281 Fed. 594.

[a] **Reason for rule.**—An inventor's right to his invention "is a statutory one, and, though the inventor delay in making his application until the last moment allowed him

[§ 208] **(3) Divisional Applications.** Where a part only of an application is involved in an interference, applicant may withdraw from his application the claims adjudged not to interfere, and file a new application therefor, or he may file a divisional application for the subject matter involved, if the invention can be legitimately divided.[64] But, except where the inclusion of new matter is permitted, a divisional application is limited to the invention disclosed by the original application;[65] and no claim can be made in either application broad enough to include matter claimed in the other.[66] It has been held that a divisional application so filed while the original application is pending constitutes a continuation of the original application,[67] and therefore relates back to its filing date,[68] and thus gives applicant the benefit of his original application as a constructive reduction to practice in a subsequently declared interference.[69]

Limitation as to time. Notwithstanding the provision requiring an application to be completed and prepared for examination within six months after the filing thereof,[70] under the statutory provisions relating to the filing of an application after a prior patent or public use,[71] in the absence of special circumstances excusing delay, a divisional application may and must be filed within two years after the issuance of the patent covering the same subject matter.[72] It has been held that this rule applies, even though the claims of the intervening patent are claimed as well as disclosed in the original application, by claims which were required to be canceled;[73] and it has also been held that, where an invention is not only disclosed in the original application, but is substantially claimed, although in an unscientific way, a failure to file a divisional application until it is suggested by the patent office is not laches which invalidates the patent therefor.[74]

[§ 209] **h. Construction of Claims and Issues[75]—(1) In General.** In determining the right of either party to make the claims in issue, and the question of priority between them,[76] real, and not artificial, distinctions must be found in the involved applications,[77] and to this end the claims in issue must be reasonably construed in the light of the specifications of the party who first made the particular claims,[78] and of the rule that an inventor is entitled to all the uses of which his invention is capable, whether fully described or not.[79] If possible, the claims should be given an interpretation consistent with the specification in which they originated,[80] and with the evident meaning intended by the party first making them.[81]

After a patent has been issued, the claims in interference should be so interpreted, if possible, as to protect the patentee;[82] and therefore claims copied from a patent for the purpose of securing an interference must be interpreted in the light of the patent disclosure,[83] and every doubt should be resolved in

by the statute, his right 'may not be denied or diminished on the ground that such delay may have been prejudicial to either public or private interests.'" Harbridge v. Perrin, 54 App. (D. C.) 106, 109, 295 Fed. 927 [certiorari den 264 U. S. 597 mem, 44 SCt 454 mem, 68 L. ed. 868 mem, and quot Chapman v. Wintroath, 252 U. S. 126, 40 SCt 234, 64 L. ed. 491].

[b] **Estoppel.**—The fact that an apparatus, for which a patent application is pending, has been in public use for more than two years, does not estop applicant from copying claims from an interfering application, the patent on which has been issued less than two years before he copies the claims. Leonard v. Everett, 52 App. (D. C.) 90, 281 Fed. 594.

64. Patent Office Rules Oct. 1, 1927, rule 106. And see cases infra notes 65–69.

65. Wagenhorst v. Hydraulic Steel Co., 27 F. (2d) 27.

66. Patent Office Rules Oct. 1, 1927, rule 106. And see case infra this note.

[a] **Rule applied.**—There is no proper line of division between one application covering a specific device and implying certain adjuncts and another application by the same inventor for a combination of the device and the adjuncts; and one application should not go to patent while the other is interference. Porter v. Louden, 7 App. (D. C.) 64.

67. Dwight, etc., Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Duryea v. Rice, 28 App. (D. C.) 423.

68. Duryea v. Rice, supra.

69. Duryea v. Rice, supra.

70. U. S. Rev. St. § 4894.

71. U. S. Rev. St. § 4886, as amended by Act March 3, 1897 (29 St. at L. 692 c 391 § 1); U. S. Code tit 35 § 31; and U. S. Rev. St. § 4897.

72. Chapman v. Wintroath, 252 U. S. 126, 135, 40 SCt 234, 64 L. ed. 491 [rev 47 App. (D. C.) 428]; Splitdorf Electrical Co. v. Webster Electric Co., 283 Fed. 83 [certiorari granted 260 U. S. 715 mem, 43 SCt 92 mem, 67 L. ed. 478 mem, and aff 264 U. S. 463, 44 SCt 342, 68 L. ed. 792]; Lotz v. Kenney, 31 App. (D. C.) 205.

"A prior patent is in no sense a bar to the granting of a second patent for the same invention to an earlier inventor, provided that his application is filed not more than two years after the date of the conflicting patent. The applicant may not be able to prove that he was the first inventor but the statute gives him two years in which to claim that he was and in which to secure the institution of an interference proceeding in which the issue of priority between himself and the patentee may be determined in a prescribed manner." Chapman v. Wintroath, supra.

[a] **The rule that delay of two years or more will invalidate a reissue patent,** unless the delay is accounted for and excused by special circumstances which show it to have been not unreasonable, applies prima facie to divisional applications, where laches, equitable estoppel, or intervening rights are involved. Webster Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463, 44 SCt 342, 68 L. ed. 792 [aff 283 Fed. 83 (rev 255 Fed. 907)].

73. In re Nathan, 51 App. (D. C.) 347, 279 Fed. 925.

74. Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [rev 293 Fed. 771, and certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem].

75. Construction of letters patent see infra §§ 335–363.

76. Issues involved see infra §§ 212, 213.

77. Western Electric Co. v. Martin, 39 App. (D. C.) 147. And see cases infra notes 78–81.

[a] **No right to claim.**—Where certain of the counts of an interference, involving the invention of a motor-operated ticket-issuing machine, in which the tickets were fed from a continuous roll call for means for locking the actuating motor after a spring has been placed under tension, and it appears that in the machine of one of the parties the actuating spring is not normally under tension, he has no right to make such claims. Meier v. Sullivan, 45 App. (D. C.) 10.

78. McIntyre v. Dodge, 29 F. (2d) 861; Ruete v. Elwell, 87 Off. Gaz. (U. S.) 2119; Enz v. Rogers, 57 App. (D. C.) 345, 23 F. (2d) 766; Swain v. Booth, 54 App. (D. C.) 95, 295 Fed. 236; Standerwick v. Kane, 53 App. (D. C.) 101, 288 Fed. 455; Bungau v. Grey, 52 App. (D. C.) 63, 281 Fed. 423; White v. Cottrell, 50 App. (D. C.) 269, 270 Fed. 877; Speed v. Kirby, 50 App. (D. C.) 263, 270 Fed. 699; Cox v. Headley, 49 App. (D. C.) 341, 265 Fed. 981; Seymour v. Molyneux, 49 App. (D. C.) 216, 263 Fed. 468; Hauss v. Merrell, 48 App. (D. C.) 433; Monte v. Dunkley, 46 App. (D. C.) 70; Murphy v. Cooper, 45 App. (D. C.) 307; Rohlfing v. Murphy, 44 App. (D. C.) 252; Eastwood v. Rowell, 40 App. (D. C.) 280; Eshleman v. Shantz, 39 App. (D. C.) 434; Western Electric Co. v. Martin, 39 App. (D. C.) 147; Frost v. Chase, 37 App. (D. C.) 179; Ladoff v. Dempster, 36 App. (D. C.) 520; Weintraub v. Hewitt, 34 App. (D. C.) 487; Viele v. Cummings, 30 App. (D. C.) 455; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem]; Andrews v. Nilson, 27 App. (D. C.) 451; Podlesak v. McInnerney, 26 App. (D. C.) 399; Tracy v. Leslie, 14 App. (D. C.) 126.

[a] **The fact that the invention of the issue is an extremely narrow one** is material in determining the question whether one of the parties, in the light of his original specifications and drawings, was entitled to make the claims of the issue. Frost v. Chase, 37 App. (D. C.) 179.

79. Hendler v. Hansen, 48 App. (D. C.) 146; Shaver v. Newdick, 40 App. (D. C.) 273.

80. Macfarren v. Morgan, 24 F. (2d) 1003; Barcley v. Schuler, 41 App. (D. C.) 250. And see cases supra note 78.

81. Bungay v. Grey, 52 App. (D. C.) 63, 281 Fed. 423; Weintraub v. Hewitt, 34 App. (D. C.) 487; Viele v. Cummings, 30 App. (D. C.) 455. And see cases supra note 78.

82. In re Carr, 54 App. (D. C.) 283, 297 Fed. 542; Hendler v. Hansen, 48 App. (D. C.) 146.

[a] **Patentee entitled to all uses.**—Hendler v. Hansen, 48 App. (D. C.) 146.

83. McIntyre v. Dodge, 29 F. (2d) 861; Engel v. Sinclair, 34 App. (D. C.) 212; Funk v. Whitely, 25 App. (D. C.) 313; Tracy v. Leslie, 14 App. (D. C.) 126.

[a] **Thus,** where the claims of the patent of the senior party to an interference are bodily incorporated into the junior party's application after the issue of the patent, for the purpose of provoking the interference, the counts of the issue thus formed are to be construed in the light of the

favor of patentability, especially where priority has been established.[84]

Elimination of party. The elimination from interference proceedings of the originator of the application which stated the claims does not affect the rule that the claims must be construed in the light of the specifications,[85] so that it is error to limit interfering claims after the elimination of the originator in a manner which excludes his specifications.[86]

[§ 210] **(2) Broad Construction.** Moreover the claims must be given the broadest interpretation which the language in which they are expressed will reasonably support;[87] and if they are susceptible of a broad interpretation they must be assumed to have been selected for the purpose of covering the invention broadly.[88] The construction, however, should not be so broad as to permit a party to claim a device or invention not disclosed by his specifications.[89] The employment of the same language in describing two structures that are not the same does not necessarily prove that there is an interference in fact.[90]

[§ 211] **(3) Limitations.** Where there is no ambiguity in the claims, and they are capable of a broad construction,[91] limitations will not be read into them which are not expressed therein,[92] in order to meet the exigencies of a particular situation,[93] or so as to save a claim from destruction.[94] A limitation should not be arbitrarily read into a claim, which will deprive a prior inventor of his discovery or thereafter harass him,[95] or defeat the claim of the party with whom it originated.[96] But whenever it is necessary to preserve its validity, the construction of a claim may be narrowed;[97] and limitations or restrictions which are disclosed in a party's application or counts must be considered as being material to the invention covered thereby,[98] and must not be disregarded to such party's disadvantage.[99]

[§ 212] **i. Issues Involved.** The sole ultimate issue to be determined in an interference proceeding is the priority of invention as between the parties

specifications of the senior party's patent. Bourn v. Hill, 27 App. (D. C.) 291.

[b] **Claims directed to an article,** instead of a process, should be so construed as to read on the completed article. McIntyre v. Dodge, 29 F. (2d) 861; Shaver v. Newdick, 40 App. (D. C.) 273.

84. In re Cowles, 54 App. (D. C.) 280, 297 Fed. 539.

85. Cox v. Headley, 49 App. (D. C.) 341, 265 Fed. 981.

86. Cox v. Headley, supra.

87. Scott v. Weiss, 25 F. (2d) 924; Humiston v. Voorhees, 23 F. (2d) 765; Enz v. Rogers, 57 App. (D. C.) 345, 23 F. (2d) 766; McChesney v. Gerrard, 57 App. (D. C.) 138, 18 F. (2d) 180; Jeffery v. Locke, 56 App. (D. C.) 345, 13 F. (2d) 316; Campbell v. Gilpin, 56 App. (D. C.) 79, 10 F. (2d) 644; In re Levy, 55 App. (D. C.) 137, 2 F. (2d) 939; Chamberlin v. Kadow, 54 App. (D. C.) 294, 297 Fed. 873; In re Carr, 54 App. (D. C.) 283, 297 Fed. 542; Swain v. Booth, 54 App. (D. C.) 95, 295 Fed. 236; Swartwout v. Skinner, 53 App. (D. C.) 104, 288 Fed. 458; Briggs v. Kaisling, 53 App. (D. C.) 49, 288 Fed. 254; Brenzinger v. Thornburgh, 52 App. (D. C.) 298, 286 Fed. 637; Lynch v. Headley, 52 App. (D. C.) 269, 285 Fed. 1003; Scott v. Longtin, 52 App. (D. C.) 102, 281 Fed. 606; Chessin v. Klahn, 52 App. (D. C.) 88, 281 Fed. 592; Paris v. Burke, 52 App. (D. C.) 69, 281 Fed. 429; Bungay v. Grey, 52 App. (D. C.) 63, 281 Fed. 423; Sherman v. Hagemann, 51 App. (D. C.) 373, 279 Fed. 1011; Rogers v. Aikman, 51 App. (D. C.) 218, 277 Fed. 617; Clement v. Roberts, 51 App. (D. C.) 29, 273 Fed. 757; Smith v. Warnock, 50 App. (D. C.) 329, 271 Fed. 559; Speed v. Kirby, 50 App. (D. C.) 263, 270 Fed. 699; Dewson v. Tomlinson, 50 App. (D. C.) 227, 269 Fed. 879; Cox v. Headley, 49 App. (D. C.) 341, 265 Fed. 981; Luckett v. Staub, 47 App. (D. C.) 379; Monte v. Dunkley, 46 App. (D. C.) 70; Murphy v. Cooper, 45 App. (D. C.) 307; Kirby v. Clements, 44 App. (D. C.) 12; Rotter v. Hodgkinson, 43 App. (D. C.) 254; Freeman v. Waid, 42 App. (D. C.) 103; Hewlett v. Steinberger, 40 App. (D. C.) 287; Leonard v. Pardee, 39 App. (D. C.) 458; Eshleman v. Shantz, 39 App. (D. C.) 434; Hopkins v. Cleal, 39 App. (D. C.) 144; Sanders v. Emerson, 37 App. (D. C.) 598; Bastian v. Champ, 34 App. (D. C.) 225; Engel v. Sinclair, 34 App. (D. C.) 212; Lecroix v. Tyberg, 33 App. (D. C.) 586; Lindmark v. Hodgkinson, 31 App. (D. C.) 612; Miel v. Young, 29 App. (D. C.) 481; Andrews v. Nilson, 27 App. (D. C.) 451.

[a] **The senior applicant** is entitled to a construction of the claim in issue in interference proceedings as broad as the language will permit. Speed v. Kirby, 50 App. (D. C.) 263, 270 Fed. 699.

[b] **The first inventor is entitled to priority** over the objection that the counts contain limitations not found in his disclosure, where the disclosure is sufficient if the counts are broadly construed. Dewson v. Tomlinson, 50 App. (D. C.) 227, 269 Fed. 879.

[c] **An issue which involves priority only** will not be strictly construed as against one of the parties because his machine, upon which he relies to show reduction to practice, was in public use for more than two years before his application was filed. Johnson v. Martin, 41 App. (D. C.) 502.

88. Jeffery v. Locke, 56 App. (D. C.) 345, 13 F. (2d) 316.

89. White v. Cottrell, 50 App. (D. C.) 269, 270 Fed. 877; Speed v. Kirby, 50 App. (D. C.) 263, 270 Fed. 699; Hauss v. Merrell, 48 App. (D. C.) 433; Yemiker v. Nesbitt, 48 App. (D. C.) 250; Kane v. Podlesak, 48 App. (D. C.) 11; Weisbrod v. Sisson, 46 App. (D. C.) 311; Cooper v. Downing, 45 App. (D. C.) 345; Murphy v. Cooper, 45 App. (D. C.) 307; Rowntree v. Sloan, 45 App. (D. C.) 207; Coe v. Bayer, 44 App. (D. C.) 458; Coe v. Brown, 44 App. (D. C.) 455; Clulee v. Adt, 44 App. (D. C.) 300; Western Electric Co. v. Martin, 39 App. (D. C.) 147; Manly v. Williams, 37 App. (D. C.) 194; Breul v. Smith, 10 App. (D. C.) 180.

[a] **Thus** the construction of the terms of the issue should not be so liberal as to enable the patent office to include a structure which had previously been held to be patentably distinct therefrom. Breul v. Smith, 10 App. (D. C.) 180.

[b] **Attempts to enlarge the scope of a filed application** should be frowned on, especially when an intervening invention would be appropriated. Macfarren v. Morgan, 24 F.(2d) 1003.

Limitations generally see infra § 211.

90. Podlesak v. McInnerney, 26 App. (D. C.) 399.

[a] **General terms may be used** which apply equally to two structures which are not the same, as may be shown when those terms are read and construed in the light of the specifications behind them. Podlesak v. McInnerney, 26 App. (D. C.) 399.

91. See supra § 210.

92. In re Levy, 55 App. (D. C.) 137, 2 F. (2d) 939; Day v. Bower, 49 App. (D. C.) 259, 263 Fed. 655; Hendler v. Hansen, 48 App. (D. C.) 146; Meier v. Sullivan, 45 App. (D. C.) 10; Rotter v. Hodgkinson, 43 App. (D. C.) 254; Young v. Struble, 35 App. (D. C.) 410.

93. Jeffery v. Locke, 56 App. (D. C.) 345, 13 F. (2d) 316; Swartwout v. Skinner, 53 App. (D. C.) 104, 288 Fed. 458; Lynch v. Headley, 52 App. (D. C.) 269, 285 Fed. 1003; Scott v. Longtin, 52 App. (D. C.) 102, 281 Fed. 606; De Forest v. Richards, 49 App. (D. C.) 257, 263 Fed. 653; Seymour v. Molyneux, 49 App. (D. C.) 216, 263 Fed. 468; Milmoe v. Holly, 46 App. (D. C.) 455; Monte v. Dunkley, 46 App. (D. C.) 70; Murphy v. Cooper, 45 App. (D. C.) 307; Kirby v. Clements, 44 App. (D. C.) 12; Rotter v. Hodgkinson, 43 App. (D. C.) 254; Leonard v. Horton, 40 App. (D. C.) 22; Townsend v. Copeland, 37 App. (D. C.) 325; Geltz v. Crozier, 32 App. (D. C.) 324; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem].

[a] **The scope of a claim should not be restricted** beyond the fair and ordinary meaning of the words, save for the purpose of saving it. Miel v. Young, 29 App. (D. C.) 481.

[b] **Illustration.**—Claims of one of the parties to an interference will not be so construed, at the instance of the other party, as to read into them limitations in order to exclude a device that is within their broad meaning. Leonard v. Horton, 40 App. (D. C.) 22.

[c] **A party must stand or fall on his claim as drawn** (1) where he has deliberately elected to claim the invention broadly, from which the count in interference originated. Holslag v. Hollup, 52 App. (D. C.) 272, 285 Fed. 1006. (2) The inventor of a particular device who chooses to make claims broader than necessary to cover the same cannot ask, when thrown in interference with another inventor in the same general field, that they be limited to correspond with his own particular structure. Leonard v. Horton, 40 App. (D. C.) 22.

94. Rice v. Schutte, 38 App. (D. C.) 175.

95. Malz v. Fox, 42 App. (D. C.) 560; Arbetter v. Lewis, 34 App. (D. C.) 491.

96. Collins v. Lotz, 56 App. (D. C.) 239, 12 F.(2d) 180.

97. Rice v. Schutte, 38 App. (D. C.) 175; Miel v. Young, 29 App. (D. C.) 481.

98. Lindley v. Shepherd, 24 F. (2d) 606; Wahl v. Wright, 51 App. (D. C.) 38, 273 Fed. 766; Bijur v. Rushmore, 46 App. (D. C.) 395; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem].

99. Chamberlin v. Kadow, 54 App. (D. C.) 294, 297 Fed. 873.

to the interference;[1] and is not merely a claim which is distinct and separable from other claims, which are or may be made on the same disclosure.[2] The issue of priority is limited to the claims as drawn by the parties to the proceeding,[3] and does not include priority under other and different claims.[4]

Incidental or ancillary issues. Before the issue of priority can be determined, however, it may be, and usually is, necessary to decide one or more incidental or ancillary questions, which for the time being, at least, may become the sole issue.[5] For example, it may be necessary to determine the right of one of the parties to make the claims of the issue;[6] such as which party procured from the other the idea of the invention,[7] and whether there has been a reduction to practice.[8] It has also been held that the question of abandonment of invention by one applicant is always available as affecting his right to priority.[9]

Diligence. The question of diligence is involved where the matter in issue is reduction to practice;[10] but not where the issue presented is one of originality, and not one of independent invention.[11]

[§ 213] **j. Issues Not Involved.** It has been held that the following questions will not be determined in an interference proceeding: The respective merits of the rival devices;[12] whether either of the parties will ultimately have a right to a patent under his pending application;[13] whether the disclosure in a party's application is sufficient;[14] whether an applicant's right to a patent has been barred by prior public use for more than the statutory period;[15] whether the party entitled to priority had knowledge of the invention disclosed in a prior application, which did not claim it, so as to prevent the issuance of a patent to him;[16] or whether a party was guilty of delay in filing his application for a reissue.[17] As between a patentee and an applicant for a reissue, the former has no right to raise the question of intervening rights;[18] and as between an applicant for an original patent and an applicant for reissue, the objections that the reissue application sought to broaden the claims more than two years after the original patent was granted, and that it was for a different invention, are not available to the original applicant.[19]

Patentability. As a general rule the question of patentability[20] is not involved and cannot be determined in an interference proceeding,[21] since the

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1. McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 46 SCt 347 mem, 70 L. ed. 778 mem]; National Mach. Co. v. Wheeler, etc., Mfg. Co., 79 Fed. 432, 24 CCA 663; Ironclad Mfg. Co. v. Jacob J. Vollrath Mfg. Co., 52 Fed. 143; Perry v. Starrett, 19 F. Cas. No. 11,012, 3 Bann. & A. 485; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes 429; Bechman v. Wood, 89 Off. Gaz. (U. S.) 2462; Hulett v. Long, 89 Off. Gaz. (U. S.) 1141; Cross v. Phillips, 87 Off. Gaz. (U. S.) 1399; Cushman v. Lines, 78 Off. Gaz. (U. S.) 2051; Westinghouse v. Duncan, 66 Off. Gaz. (U. S.) 1009; Fekete v. Robertson, 57 App. (D. C.) 73, 17 F. (2d) 335; Ragsdale v. Gathmann, 55 App. (D. C.) 17, 299 Fed. 702; Hayes v. Davison, 50 App. (D. C.) 361, 273 Fed. 325; De Forest v. Miller, 50 App. (D. C.) 202, 269 Fed. 718; In re Dement, 49 App. (D. C.) 261, 263 Fed. 813 [certiorari den 254 U. S. 630 mem, 41 SCt 7 mem, 65 L. ed. 447 mem]; Wintroath v. Chapman, 47 App. (D. C.) 428 [rev on other grounds 252 U. S. 126, 40 SCt 234, 64 L. ed. 491]; Gammeter v. Thropp, 42 App. (D. C.) 564; Johnson v. Martin, 41 App. (D. C.) 502; Allen v. U. S., 26 App. (D. C.) 8 [aff 203 U. S. 476, 27 SCt 141, 51 L. ed. 281]; Swihart v. Mauldin, 19 App. (D. C.) 570; Austin v. Johnson, 18 App. (D. C.) 83; McBerty v. Cook, 16 App. (D. C.) 133; Hulett v. Long, 15 App. (D. C.) 284; Hisey v. Peters, 6 App. (D. C.) 68; U. S. v. Thacher, 9 D. C. 24.

"Priority of invention is necessarily the essential thing, and to determine it interference proceedings are provided." Ewing v. U. S., 244 U. S. 1, 8, 37 SCt 494, 61 L. ed. 955.

2. In re Dement, 49 App. (D. C.) 261, 263 Fed. 813 [certiorari den 254 U. S. 630 mem, 41 SCt 7 mem, 65 L. ed. 447 mem].

3. Kirby v. Clements, 44 App. (D. C.) 12. And see cases supra note 1.

4. Kirby v. Clements, supra.

5. Wintroath v. Chapman, 47 App. (D. C.) 428 [rev on other grounds 252 U. S. 126, 40 SCt 234, 64 L. ed. 491]. And see cases infra note 6.

6. White v. Wege, 44 App. (D. C.) 495; Rohlfing v. Murphy, 44 App. (D. C.) 252; Moore v. U. S., 40 App. (D. C.) 201; Skinner v. Carpenter, 36 App. (D. C.) 178; Lindmark v. Hodgkinson, 31 App. (D. C.) 612; U. S. v. Moore, 30 App. (D. C.) 464; MacMulkin v. Bollee, 30 App. (D. C.) 112; Wickers v. McKee, 29 App. (D. C.) 4; Podlesak v. McInnerney, 26 App. (D. C.) 399; Matthes v. Burt, 24 App. (D. C.) 265; Huebel v. Bernard, 15 App. (D. C.) 510; Milton v. Kingsley, 7 App. (D. C.) 531.

[a] **Illustrations.**—(1) One party may defeat the priority of his adversary by showing that his adversaries, claiming as joint inventors, were not in fact such, and therefore not entitled to make the application in interference. Lemp v. Randall, 33 App. (D. C.) 430. (2) Although the language of interference counts differs from that of the claims of a reissue application, where interference applications disclose the invention claimed in the reissue application, the reissue claims are involved, and may be presented and determined in the interference proceedings. In re Wasserfallen, 54 App. (D. C.) 367, 298 Fed. 826.

Motion to dissolve interference as procedure for raising question see infra § 222.

7. Milton v. Kingsley, 7 App. (D. C.) 531.

8. Janin v. Curtiss, 45 App. (D. C.) 362; Sherwood v. Drewson, 29 App. (D. C.) 161; Stevens v. Seher, 11 App. (D. C.) 245.

9. Snelling v. Whitehead, 50 App. (D. C.) 196, 269 Fed. 712. But see McBerty v. Cook, 16 App. (D. C.) 133 (whether there has been such public use as to amount to an abandonment to the public will not be determined in an interference proceeding to determine priority of invention).

10. Paul v. Johnson, 23 App. (D. C.) 187; Yates v. Huson, 8 App. (D. C.) 93.

11. Kelly v. Reed, 48 App. (D. C.) 2[illegible]4.

12. Spain v. Gamble, 22 F. Cas. No. 13,199, McA. Pat. Cas. 358; Hopkins v. Peters, 41 App. (D. C.) 302.

[a] **The operativeness or inoperativeness of a device showing the invention,** which was disclosed in a prior application and is the basis of the claim of reduction to practice, is immaterial in passing on a present application involving the same invention, where applicant, in other respects, is entitled to priority. Hopkins v. Peters, 41 App. (D. C.) 302, 315 (where the court said: "A court . . . will not deprive an inventor of the fruits of his invention upon fine-spun technicalities touching the inoperativeness of his device as disclosed in the application, when it conclusively appears that at the time of filing the application he had a machine showing the invention").

[b] **In Australia,** on an application for a patent of an invention, it is not open to an opponent under Trade-Marks Act (1903) § 56 to take the objection that the alleged invention does not involve any real exercise of the inventive faculty. McGlashan v. Rabett, 9 Austr. C. L. R. 223.

13. Gueniffet v. Wictorsohn, 30 App. (D. C.) 432.

14. Bechman v. Southgate, 28 App. (D. C.) 405; Lotterhand v. Hanson, 23 App. (D. C.) 372; Schüpphaus v. Stevens, 95 Off. Gaz. (U. S.) 1452; Ostergren v. Tripler, 95 Off. Gaz. (U. S.) 837; Dodge v. Fowler, 82 Off. Gaz. (U. S.) 595.

15. Wintroath v. Chapman, 47 App. (D. C.) 428 [rev on other grounds 252 U. S. 126, 40 SCt 234, 64 L. ed. 491]; Gammeter v. Thropp, 42 App. (D. C.) 564; Johnson v. Martin, 41 App. (D. C.) 502; Burson v. Vogel, 29 App. (D. C.) 388 [certiorari den 207 U. S. 585 mem, 28 SCt 254 mem, 52 L. ed. 352 mem]. But see Dittgen v. Racine Paper Goods Co., 181 Fed. 394 (holding that, under rule 126, which provides that interference proceedings may be suspended where an issue is made against one applicant on the ground that he is barred by the statute from the right to a patent because of prior use for more than two years, until such issue has been tried, the action of the patent office in ignoring such an issue, which when made becomes the primary and paramount issue, or in referring it for an ex parte hearing, and in issuing the patent without any finding thereon, was unauthorized by law).

[a] **Rule applied.**—An issue in interference, which involves the question of priority only, will not be strictly construed as against one of the parties because his machine, upon which he relies to show reduction to practice, was in public use for more than two years before his application was filed. Johnson v. Martin, 41 App. (D. C.) 502.

16. Wahl v. Main, 51 App. (D. C.) 398, 280 Fed. 974.

17. Frost v. Chase, 37 App. (D. C.) 179.

18. Frost v. Chase, supra; Norling v. Hayes, 37 App. (D. C.) 169.

19. Earles v. Gomber, 50 App. (D. C.) 389, 273 Fed. 353.

20. **Patentability generally** see supra §§ 9–125.

21. National Mach. Co. v. Wheeler, etc., Mfg. Co., 79 Fed. 432, 24 CCA 663; Lynch v. Headley, 52 App. (D. C.) 269, 285 Fed. 1003; Hernandez-Mejia v. Kelley, 51 App. (D. C.) 210, 277 Fed. 609; Hayes v. Davison, 50 App. (D.

interference is declared on the assumption that the claims are patentable, and that assumption is not open to attack,[22] and the question of patentability may be raised in the patent office against the successful party, after the determination of the interference proceeding.[23] But it has been held that the patent office need not declare an interference until patentability has been determined;[24] that the practice of the patent office in deciding as to the patentability of the invention before declaring an interference is proper, and should be strictly observed;[25] and that such a decision, being important to the subsequent steps to be taken by the parties, should be made with deliberation.[26]

Improvement. Where the issue is a basic claim, one of the parties cannot successfully support a contention that there is no interference in fact by showing that his device is an improvement on that of the other party;[27] for if his device is an improvement, he is entitled to claim it specifically as such, but not broadly.[28]

Priority of a third person who is not a party to the interference proceedings is not involved in such proceeding,[29] and one of the parties to such proceeding cannot defeat an award of priority to the other party by showing that some third person was in fact the first and original inventor,[30] but the junior applicant cannot object that the record shows that the senior applicant was not in fact the real inventor.[31]

[§ 214] **k. Proof and Variance—(1) In General.** A party to an interference is held strictly to his preliminary statement as to matters of proof,[32] and the evidence in such proceeding must be pertinent to the issue;[33] and where the issue is specific, testimony as to the invention must correspond in every detail with the requirements of the issue.[34] But by express rule of the patent office the preliminary statement cannot be used as evidence in behalf of the party making it.[35] The junior party has the burden of proving his case;[36] and the party who was the first to file an allowable application is not put to his proof until his adversary has introduced evidence showing his own independent conception of the invention prior to that date.[37]

[§ 215] **(2) As to Dates.**[37½] As a general rule, the parties are limited, in their proof, to the dates set out in their preliminary statements, in respect of disclosure and reduction to practice;[38] and this rule will not be ignored, even with the consent of counsel, unless expressly approved by the commissioner or his representatives,[39] especially where leave to file an amended preliminary statement has been refused.[40] Thus, as a general rule, a party will not be permitted to prove and rely on a date earlier than alleged in his preliminary statement,[41] even though the testimony shows an earlier date,[42] unless an amendment of the statement in this regard has been allowed;[43] and while cases may arise where the interest of the parties and the public will be best sub-

C.) 361, 273 Fed. 325; Snelling v. Whitehead, 50 App. (D. C.) 196, 269 Fed. 712; Blair v. Colman, 46 App. (D. C.) 43; Hathaway v. Colman, 46 App. (D. C.) 40; Slingluff v. Sweet, 45 App. (D. C.) 302; Gammeter v. Thropp, 42 App. (D. C.) 564; Radcliffe v. Fottinger, 41 App. (D. C.) 233; Leonard v. Horton, 40 App. (D. C.) 22; Putnam v. Wetmore, 39 App. (D. C.) 138; Norling v. Hayes, 37 App. (D. C.) 169; Arbetter v. Lewis, 34 App. (D. C.) 491; Gold v. Gold, 34 App. (D. C.) 229; Lecroix v. Tyberg, 33 App. (D. C.) 536; Mell v. Midgley, 31 App. (D. C.) 534; Dunbar v. Schellenger, 29 App. (D. C.) 129; Johnson v. Mueser, 29 App. (D. C.) 61; Sobey v. Holsclaw, 28 App. (D. C.) 65; Slaughter v. Halle, 21 App. (D. C.) 19; Newton v. Woodward, 17 App. (D. C.) 34; Newton v. Woodward, 16 App. (D. C.) 568; McBerty v. Cook, 16 App. (D. C.) 133; Hill v. Hodge, 12 App. (D. C.) 528; Dodge v. Fowler, 11 App. (D. C.) 592; Doyle v. McRoberts, 10 App. (D. C.) 445; Hisey v. Peters, 6 App. (D. C.) 68; Latham v. Armat, 95 Off. Gaz. (U. S.) 232; Hulett v. Long, 89 Off. Gaz. (U. S.) 1141.

22. Hernandez-Mejia v. Kelley, 51 App. (D. C.) 210, 277 Fed. 609.

23. Hill v. Hodge, 12 App. (D. C.) 528; Dodge v. Fowler, 11 App. (D. C.) 592.

24. Fekete v. Robertson, 57 App. (D. C.) 73, 17 F. (2d) 335; In re Neill, 11 App. (D. C.) 584. See Collins v. White, 6 F. Cas. No. 3,019 (where it was held that on interference the application should be dismissed where it appears that the claim has no patentable novelty, irrespective of the question of priority of invention).

25. Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493.

[a] **There must be an adjudication of patentability** final to all ordinary intents and purposes before the court can be called upon to determine the right of ownership as between rival claimants. Oliver v. Felbel, 20 App. (D. C.) 255.

26. Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493.

27. Weintraub v. Hewitt, 34 App. (D. C.) 487.

28. Weintraub v. Hewitt, supra.

29. Hayes v. Davison, 50 App. (D. C.) 361, 273 Fed. 325; Bossart v. Pohl, 31 App. (D. C.) 218; Prindle v. Brown, 24 App. (D. C.) 114.

[a] **In England** a person who has no interest in the controversy is not entitled to be heard. Reg. v. Comptroller-Gen. of Patents, etc., [1899] 1 Q. B. 909.

30. De Forest v. Miller, 50 App. (D. C.) 202, 269 Fed. 718; Erben v. Yardley, 50 App. (D. C.) 43, 267 Fed. 345; Luellen v. Claussen, 43 App. (D. C.) 444; Pope v. McKenzie, 38 App. (D. C.) 111; Lemp v. Randall, 33 App. (D. C.) 430; Bossart v. Pohl, 31 App. (D. C.) 218; Dunbar v. Schellenger, 29 App. (D. C.) 129; Prindle v. Brown, 24 App. (D. C.) 114; Brown v. Blood, 22 App. (D. C.) 216; Foster v. Antisdel, 14 App. (D. C.) 552.

31. De Forest v. Miller, 50 App. (D. C.) 202, 269 Fed. 718.

32. Browne v. Dyson, 39 App. (D. C.) 415; Lindmark v. De Ferranti, 34 App. (D. C.) 445.

Preliminary statement generally see supra § 204.

33. Weintraub v. Hewitt, 38 App. (D. C.) 82; Lotz v. Kenney, 31 App. (D. C.) 205; Gibbons v. Peller, 28 App. (D. C.) 530; McKnight v. Pohle, 22 App. (D. C.) 219; Sachs v. Hundhausen, 21 App. (D. C.) 511; Blackford v. Wilder, 21 App. (D. C.) 1; Tracy v. Leslie, 14 App. (D. C.) 126; Mergenthaler v. Scudder, 11 App. (D. C.) 264.

Evidence in interference generally see infra § 216.

34. Gibbons v. Peller, 28 App. (D. C.) 530.

35. Patent Office Rules Oct. 1, 1927, rule 117. And see Fish v. Dyson, 55 App. (D. C.) 209, 4 F. (2d) 175; Ingersoll v. Holt, 15 App. (D. C.) 519 (both cases recognizing the rule).

Preliminary statement generally see supra § 204.

36. See infra § 216.

37. Pope v. McKenzie, 38 App. (D. C.) 111.

37½. Evidence as to dates generally see infra § 216.

38. Burson v. Vogel, 29 App. (D. C.) 388 [certiorari den 207 U. S. 585 mem, 28 SCt 254 mem, 52 L. ed. 352 mem]; Parkes v. Lewis, 28 App. (D. C.) 1; Fowler v. Boyce, 27 App. (D. C.) 55; Hammond v. Basch, 24 App. (D. C.) 469; Stevens v. Seher, 11 App. (D. C.) 245.

[a] **Variance held immaterial.**—Baus v. Copony, 51 App. (D. C.) 232, 278 Fed. 315.

39. Fowler v. Boyce, 27 App. (D. C.) 55.

40. Browne v. Dyson, 39 App. (D. C.) 415; Fowler v. Boyce, 27 App. (D. C.) 55; Fowler v. Dyson, 27 App. (D. C.) 52; Fowler v. McBerty, 27 App. (D. C.) 41, 46.

41. Hammond v. Basch, 115 Off. Gaz. (U. S.) 804; Kelly v. Reed, 48 App. (D. C.) 264; Thompson v. Storrie, 46 App. (D. C.) 324; Browne v. Dyson, 39 App. (D. C.) 415; Burson v. Vogel, 29 App. (D. C.) 388 [certiorari den 207 U. S. 585 mem, 23 SCt 254 mem. 52 L. ed. 352 mem]; Parkes v. Lewis, 28 App. (D. C.) 1; Lowrie v. Taylor, 27 App. (D. C.) 522; Neth v. Ohmer, 27 App. (D. C.) 319; Fowler v. Boyce, 27 App. (D. C.) 55; Fowler v. Boyce, 27 App. (D. C.) 48; Fowler v. McBerty, 27 App. (D. C.) 41, 46; Hammond v. Basch, 24 App. (D. C.) 469; Funk v. Haines, 20 App. (D. C.) 285; Bader v. Vajen, 14 App. (D. C.) 241; Cross v. Phillips, 14 App. (D. C.) 228; Stevens v. Seher, 11 App. (D. C.) 245; Colhoun v. Hodgson, 5 App. (D. C.) 21.

[a] **Reason for rule.**—"If proofs can be submitted [in an interference case] wholly inconsistent with the dates alleged in preliminary statements, the rules might as well be abrogated which require the filing of statements before the records are opened to the inspection of the parties interested." Fowler v. Boyce, 27 App. (D. C.) 48, 52.

42. Kelly v. Reed, 48 App. (D. C.) 264; Burson v. Vogel, 29 App. (D. C.) 388 [certiorari den 207 U. S. 585 mem, 28 SCt 254 mem, 52 L. ed. 352 mem]; Lowrie v. Taylor, 27 App. (D. C.) 522.

43. Kelly v. Reed, 48 App. (D. C.) 264; Browne v. Dyson, 39 App. (D. C.) 415; Fowler v. McBerty, 27 App. (D. C.) 41; Bader v. Vajen, 14 App. (D. C.) 241.

served by permitting earlier dates to be proved, this should be done under the supervision of, and with the approval of, the patent office.[44] But a party may show that his reduction to practice was at a later date than that alleged in his preliminary statement, if no prejudice will result to the other party.[45] If neither party makes any effort to support his preliminary statement as to the date of his reduction to practice, but the proof of both parties is of a reduction several months later than is alleged therein, this fact indicates a looseness of assertion in the preliminary statements, which tends to discredit both parties.[46]

[§ 216] **1. Evidence.** The burden of proof in an interference proceeding is upon the junior applicant to show conception prior to that of his adversary, and either actual reduction to practice, or diligence in reducing to practice prior to the filing date of his adversary.[47] But where the evidence produced by the junior applicant sustains this burden prima facie, the burden of producing evidence that he made the invention at an earlier date is upon the senior applicant.[48] A party to an interference proceeding who takes no testimony is restricted to his filing date for conception and reduction to practice.[49] A party whose application was not filed until after the issuance of a patent covering the invention to the adversary party must sustain this burden by proof establishing his priority beyond a reasonable doubt.[50] But where the applications of the parties are copending in the patent office, a preponderance of the credible evidence is sufficient to sustain the burden.[51] This is so, even though a patent was issued on the earlier application.[52] The burden of proof on the party to an interference who was the last to file an application is greatly increased by concurrent decisions of the several tribunals of the patent office in favor of his opponent,[53] or by long delay in making application.[54] The established rules of evidence govern the admissibility of evidence in interference proceedings.[55] Thus the proofs must conform to the issue,[56] and must relate to the rights of the parties involved.[57] Evidence of conduct on the part of a party inconsistent with his claim to priority may,

44. Fowler v. Boyce, 27 App. (D. C.) 55.

45. Thompson v. Storrie, 46 App. (D. C.) 324; Herman v. Fullman, 23 App. (D. C.) 259.

46. Shaffer v. Dolan, 23 App. (D. C.) 79.

47. Downs v. Andrews, 26 F. (2d) 522; Smith v. Pritchard, 24 F. (2d) 274; Westinghouse Electric, etc., Co. v. De Forest Radio Tel., etc., Co., 21 F. (2d) 918 [aff 13 F. (2d) 1014, 18 F. (2d) 338, 345, and certiorari granted 276 U. S. 610 mem, 48 SCt 302 mem, 72 L. ed. 730 mem (aff 49 SCt 34 mem)]; Barber v. Forsyth, 57 App. (D. C.) 348, 23 F. (2d) 769; Hoffman v. Outman, 57 App. (D. C.) 264, 20 F. (2d) 280; Crabbs v. Wardell, 57 App. (D. C.) 241, 19 F. (2d) 715; McLean v. Williams, 57 App. (D. C.) 239, 19 F. (2d) 713; Robinson v. Davis, 57 App. (D. C.) 47, 16 F. (2d) 543; Gray v. Greene, 56 App. (D. C.) 387, 16 F. (2d) 332; Woodruff v. Rodman, 56 App. (D. C.) 246, 12 F. (2d) 187; Masury v. Bell, 56 App. (D. C.) 10, 6 F. (2d) 708; Pinkerton v. Gibson, 55 App. (D. C.) 135, 2 F. (2d) 937; Kremer v. Harsel, 53 App. (D. C.) 61, 288 Fed. 267; Lewis v. Strom, 52 App. (D. C.) 251, 285 Fed. 985; Chessin v. Klahn, 52 App. (D. C.) 88, 281 Fed. 592; Chalman v. De Voe, 51 App. (D. C.) 276, 278 Fed. 585; Huntington v. Brown, 51 App. (D. C.) 225, 277 Fed. 624; Clark v. Buffum, 51 App. (D. C.) 212, 277 Fed. 611; Grus v. Eynon, 50 App. (D. C.) 48, 267 Fed. 350; Blaine v. White, 50 App. (D. C.) 38, 267 Fed. 340; Maremont v. Olson, 49 App. (D. C.) 369, 265 Fed. 1009; Dickinson v. Swinehart, 49 App. (D. C.) 222, 263 Fed. 474; Swinglehurst v. Ballard, 49 App. (D. C.) 73, 258 Fed. 973; Derr v. Gleason, 49 App. (D. C.) 69, 258 Fed. 969; Lake v. Gunn, 48 App. (D. C.) 376; Henggi v. Dallmeyer, 48 App. (D. C.) 141; McAffee v. Gray, 47 App. (D. C.) 237; McParland v. Beall, 45 App. (D. C.) 162; Becker v. Bird, 44 App. (D. C.) 432; Jameson v. Ellsworth, 40 App. (D. C.) 164, 168; Pope v. McKenzie, 38 App. (D. C.) 111; Smith v. Phelps, 35 App. (D. C.) 358; Woodbridge v. Winship, 33 App. (D. C.) 490; McArthur v. Mygatt, 31 App. (D. C.) 514; Smith v. Smith, 31 App. (D. C.) 518; Goolman v. Hobart, 31 App. (D. C.) 286; Duff v. Latshaw, 31 App. (D. C.) 235; Weeks v. Dale, 30 App. (D. C.) 498; Braunstein v. Holmes, 30 App. (D. C.) 328; Howell v. Hess, 30 App. (D. C.) 194; Gibbons v. Peller, 28 App. (D. C.) 530; Lowrie v. Taylor, 27 App. (D. C.) 522; Cleveland v. Wilkin, 27 App. (D. C.) 311; Bourn v. Hill, 27 App. (D. C.) 291; Orcutt v. McDonald, 27 App. (D. C.) 228; Fowler v. Dyson, 27 App. (D. C.) 52; Ball v. Flora, 26 App. (D. C.) 394; Herman v. Fullman, 23 App. (D. C.) 259; Flora v. Powrie, 23 App. (D. C.) 195; McKnight v. Pohle, 22 App. (D. C.) 219; Flather v. Weber, 21 App. (D. C.) 179; Funk v. Haines, 20 App. (D. C.) 285; Tyler v. Kelch, 19 App. (D. C.) 180; Hunter v. Stikeman, 13 App. (D. C.) 214; McCormack v. Cleal, 12 App. (D. C.) 335.

[a] **In Australia,** where an application for a patent is opposed on the ground of want of novelty under Patents Act (1903) § 56, the onus is on the opponent to establish that the patent if granted would be clearly bad on that ground. McGlashan v Rabett, 9 Austr. C. L. R. 223.

48. Kling v. Haring, 56 App. (D. C.) 153, 11 F. (2d) 202 [certiorari den 271 U. S. 671 mem, 46 SCt 485 mem, 70 L. ed. 1143 mem]; Herman v. Fullman, 23 App. (D. C.) 259.

49. Burdett v. Luening, 54 App. (D. C.) 317, 297 Fed. 896; McKnight v. Pohle, 30 App. (D. C.) 92.

50. Paul v. Hess, 115 Off. Gaz. (U. S.) 251; Furman v. Dean, 114 Off. Gaz. (U. S.) 1552; Hoffman v. Outman, 57 App. (D. C.) 264, 20 F. (2d) 280; Kremer v. Harsel, 53 App. (D. C.) 61, 288 Fed. 267; Pupin v. Meissner, 52 App. (D. C.) 295, 286 Fed. 634; Rosen v. Terry, 52 App. (D. C.) 282, 285 Fed. 1016; Walser v. Scott, 52 App. (D. C.) 232, 285 Fed. 966; Hernandez-Mejia v. Kelley, 51 App. (D. C.) 210, 277 Fed. 609; Shoemaker v. Huntington, 51 App. (D. C.) 207, 277 Fed. 606; Replogle v. Kirby, 50 App. (D. C.) 210, 269 Fed. 862; Pembroke v. Sulzer, 49 App. (D. C.) 356, 265 Fed. 996; Bader v. Burroughs, 49 App. (D. C.) 136, 261 Fed. 1016; Leonard v. Young, 49 App. (D. C.) 85, 258 Fed. 985; Blackstone v. Wild, 43 App. (D. C.) 392; Brenizer v. Robinson, 41 App. (D. C.) 560; Huff v. Gulick, 38 App. (D. C.) 334; Curtis v. Lindmark, 37 App. (D. C.) 322; Schmidt v. Clark, 32 App. (D. C.) 290; Cutler v. Leonard, 31 App. (D. C.) 297; Fenner v. Blake, 30 App. (D. C.) 507; Weeks v. Dale, 30 App. (D. C.) 498; De Ferranti v. Lyndmark, 30 App. (D. C.) 417; Jansson v. Larsson, 30 App. (D. C.) 203; McKnight v. Pohle, 30 App. (D. C.) 92; Lewis v. Cronemeyer, 29 App. (D. C.) 174; Shuman v. Beall, 27 App. (D. C.) 324; Anderson v. Wells, 27 App. (D. C.) 115; Rolfe v. Hoffman, 26 App. (D. C.) 336; French v. Halcomb, 26 App. (D. C.) 307; Shaffer v. Dolan, 23 App. (D. C.) 79; Quist v. Ostrom, 23 App. (D. C.) 69; Watson v. Thomas, 23 App. (D. C.) 65; Sendelbach v. Gillette, 22 App. (D. C.) 168; Gallagher v. Hastings, 21 App. (D. C.) 88; Dashiell v. Tasker, 21 App. (D. C.) 64; Meyer v. Sarfert, 21 App. (D. C.) 26; Gedge v. Cromwell, 19 App. (D. C.) 192; Sharer v. McHenry, 19 App. (D. C.) 158, Miehle v. Read, 18 App. (D. C.) 128; Reichenbach v. Kelley, 17 App. (D. C.) 333; Fefel v. Stocker, 17 App. (D. C.) 317; Locke v. Boch, 17 App. (D. C.) 75; Kelly v. Fynn, 16 App. (D. C.) 573; Nielson v. Bradshaw, 16 App. (D. C.) 92; Hulett v. Long, 15 App. (D. C.) 284; Williams v. Ogle, 14 App. (D. C.) 145; Esty v. Newton, 14 App. (D. C.) 50; Guilbert v. Killinger, 13 App. (D. C.) 107; Hunt v. McCaslin, 10 App. (D. C.) 527; Doyle v. McRoberts, 10 App. (D. C.) 445; Hill v. Parmelee, 9 App. (D. C.) 503; La Flare v. Chase, 8 App. (D. C.) 83.

51. Lake v. Gunn, 48 App. (D. C.) 376; Luckett v. Staub, 47 App. (D. C.) 379; La Fleur v. Harris, 43 App. (D. C.) 388; Smith v. Phelps, 35 App. (D. C.) 358; Flather v. Weber, 21 App. (D. C.) 179.

52. Bolin v. Slingluff, 39 App. (D. C.) 134; Lederer v. Walker, 39 App. (D. C.) 122; Ruping v. Lowry, 37 App. (D. C.) 311; Pool v. Dunn, 34 App. (D. C.) 132; Fenner v. Blake, 30 App. (D. C.) 507; Jansson v. Larsson, 30 App. (D. C.) 203; Andrews v. Nilson, 27 App. (D. C.) 451; Laas v. Scott, 26 App. (D. C.) 354.

53. Johnson v. Mueser, 29 App. (D. C.) 61; Parkes v. Lewis, 28 App. (D. C.) 1; Turnbull v. Curtis, 27 App. (D. C.) 567; Orcutt v. McDonald, 27 App. (D. C.) 228; Bauer v. Crone, 26 App. (D. C.) 352; Macdonald v. Edison, 21 App. (D. C.) 527; Hallwood v. Lalor, 21 App. (D. C.) 61; Swihart v. Mauldin, 19 App. (D. C.) 570; Gedge v. Cromwell, 19 App. (D. C.) 192; Howard v. Hey, 18 App. (D. C.) 142.

54. Fefel v. Stocker, 17 App. (D. C.) 317; Nielson v. Bradshaw, 16 App. (D. C.) 92; Beals v. Finkenbiner, 12 App. (D. C.) 23; Hunt v. McCaslin, 10 App. (D. C.) 527.

55. Nielson v. Bradshaw, 16 App. (D. C.) 92; Patent Office Rules Oct. 1, 1927, rule 159.

[a] **An inventor who has assigned his rights** is not a competent witness, nor is his wife. Eames v. Richards, 8 F. Cas. No. 4,240.

[b] **Exhibits** offered may be examined microscopically. Flora v. Powrie, 23 App. (D. C.) 195.

[c] **Objections to testimony** must be made at proper time. Allen v. Alter, 1 F. Cas. No. 212; Brown v. Hall, 4 F. Cas. No. 2,008, 6 Blatchf. 401, 3 Fish. Pat. Cas. 531; Smith v. Flickenger, 22 F. Cas. No. 13,047, Cranch Pat. Dec. 116, McA. Pat. Cas. 46.

56. See supra § 214.

57. Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193; Brown v. Blood, 22 App. (D. C.) 216; Garrels v. Freeman, 21 App. (D. C.) 207; Foster v. Antisdel, 14 App. (D. C.) 552.

of course, be shown.[58] Thus it may be shown that a party signed his opponent's application,[59] witnessed his opponent's caveat,[60] or that he took an assignment from him.[61] The prejudicial effect of witnessing the caveat of an adversary in an interference is not avoided by the failure of the caveat to disclose the whole issue, where the part omitted is well-known to both parties at the time.[62] A patentee is a competent witness in his own behalf,[63] but his uncorroborated testimony is not sufficient to establish conception of the invention,[64] or its reduction to practice.[65] Corroboration by independent circumstances is necessary.[66] This rule, however, does not extend to facts and circumstances having no connection with the facts of conception and reduction to practice, and which are of a character readily susceptible of rebuttal or contradiction.[67] In such cases the testimony of the patentee may be considered and weighed like that of any other interested witness.[68] Corroboration of the testimony of a party may exist in established circumstances admitting of satisfactory inferences.[69] Memoranda used by one of the parties while testifying in his own behalf, for the purpose of refreshing his memory, do not have the effect of corroborating his testimony within the rule that the uncorroborated testimony of a party to an interference is insufficient to establish priority of invention.[70] Failure of a party to rebut testimony of his adversary that he had fully disclosed the invention to him furnishes convincing evidence that he is not the prior inventor.[71] This rule, however, does not apply where there is no evidence of a complete disclosure, and merely unsatisfactory evidence of a partial disclosure.[72] The failure of a party to call as a witness one to whom he claims to have disclosed the invention, or to give any reason for his failure, may be considered as tending to discredit his testimony.[73] Where each of two parties to an interference claims a disclosure to the other, the presumption is in favor of the one who has a practical knowledge of the art, and against the one who has not such knowledge.[74] Special rules have been established by the commissioner of patents for taking and transmitting testimony in interferences.[75] Evidence will not be considered on the hearing which shall not have been taken and filed in compliance with these rules.[76] Technical objections, however, must be taken before hearing.[77] Under the rules of the patent office, testimony taken in an interference proceeding may be used in any other and subsequent interference proceeding, so far as relevant and material, subject, however, to the right of any contesting party to recall witnesses whose depositions had been taken, and to take other testimony in rebuttal of the depositions.[78] This rule is applicable, even though a new party is added.[79]

[§ 217] **m. Hearing.** In determining the issues in interference, the commissioner may look to the records of his own department and the reports and decisions of courts in cases relating to actions therein, without pleading,[80] as well as hear testimony of the parties,[81] and, in a proper case, may deny leave to take testimony;[82] and the rule which requires a party to examine all his witnesses in chief before closing his opening examination[83] does not apply.[84] Where the appellate court reverses a decision of the commissioner granting a motion for an award on the record, without, however, making any award of priority, the senior party has the right to proceed upon the issues of fact by moving for leave to take testimony;[85] and this right is not lost by his having entered into a stipulation with the junior party which relates merely to the identity of the parties, and adds no material fact not admitted by the motion itself, and contains nothing to show that it was intended to be an agreed case.[86]

58. Barr Car Co. v. Chicago, etc., R. Co., 110 Fed. 972, 49 CCA 194; Jenner v. Dickinson, 117 Off. Gaz. (U. S.) 600; Harter v. Barrett, 114 Off. Gaz. (U. S.) 975; Hillard v. Brooks, 111 Off. Gaz. (U. S.) 302; Talbot v. Monell, 23 App. (D. C.) 108; Adams v. Murphy, 18 App. (D. C.) 172; Reichenbach v. Kelley, 17 App. (D. C.) 333; Warner v. Smith, 13 App. (D. C.) 111; Hill v. Parmelee, 9 App. (D. C.) 503; Wells v. Reynolds, 4 App. (D. C.) 43.

59. Pickles v. Aglar, 13 App. (D. C.) 556.

60. Blaw v. Whitall, 43 App. (D. C.) 20.

61. Winslow v. Austin, 14 App. (D. C.) 137.

62. Blaw v. Whitall, 43 App. (D. C.) 20.

63. Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193; Kitchen v. Smith, 39 App. (D. C.) 500.

64. Henggi v. Dallmeyer, 43 App. (D. C.) 141; McAfee v. Gray, 47 App. (D. C.) 237; Turner v. Ellinger, 42 App. (D. C.) 562; Kitchen v. Smith, 39 App. (D. C.) 500; Goolman v. Hobart, 31 App. (D. C.) 286; Durkee v. Winquist, 31 App. (D. C.) 248; Duff v. Latshaw, 31 App. (D. C.) 235; Taylor v. Lowrie, 27 App. (D. C.) 527; French v. Halcomb, 26 App. (D. C.) 307; Garrels v. Freeman, 21 App. (D. C.) 207; Petrie v. De Schweinitz, 19 App. (D. C.) 386; Sharer v. McHenry, 19 App. (D. C.) 158; Mergenthaler v. Scudder, 11 App. (D. C.) 264.

65. Malcom v. Richards, 47 App. (D. C.) 582; Kitchen v. Smith, 39 App. (D. C.) 500.

66. Podlesak v. McInnerney, 26 App. (D. C.) 399.

67. Kitchen v. Smith, 39 App. (D. C.) 500.

68. Kitchen v. Smith, supra.

69. Kitchen v. Smith, supra; French v. Halcomb, 26 App. (D. C.) 307.

70. McAfee v. Gray, 47 App. (D. C.) 237.

71. Ingersoll v. Holt, 15 App. (D. C.) 519; Winslow v. Austin, 14 App. (D. C.) 137.

72. Podlesak v. McInnerney, 26 App. (D. C.) 399.

73. Schmidt v. Clark, 32 App. (D. C.) 290.

74. Alexander v. Blackman, 26 App. (D. C.) 541.

75. Patent Office Rules Oct. 1, 1927, rules 154–162.

76. Patent Office Rules Oct. 1, 1927, rule 159.

[a] **Depositions not taken in accordance with the rules** will not be considered. Arnold v. Bishop, 1 F. Cas. No. 552, Cranch Pat. Dec. 109, McA. Pat. Cas. 36; Perry v. Cornell, 19 F. Cas. No. 11,001, Cranch Pat. Dec. 130, McA. Pat. Cas. 66; Jones v. Starr, 117 Off. Gaz. (U. S.) 1495.

[b] **Ex parte affidavits** filed after the close of the taking of testimony to correct alleged errors and deficiencies in the testimony will not be considered. Blackford v. Wilder, 104 Off. Gaz. (U. S.) 580; Nielson v. Bradshaw, 91 Off. Gaz. (U. S.) 644.

77. Meyer v. Rothe, 13 App. (D. C.) 97.

78. Patent Office Rules Oct. 1, 1927, rule 157.

79. Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388; Eames v. Richards, 8 F. Cas. No. 4,240.

80. Armstrong v. Levy, 29 F. (2d) 953; Jeffery v. Locke, 56 App. (D. C.) 345, 13 F. (2d) 316; McKenzie v. Barrett, 43 App. (D. C.) 6; In re Marconi, 38 App. (D. C.) 286.

Award on the record see infra § 219.

[a] **Res judicata.**—(1) A decision of court, in an ex parte proceeding, bearing on the right to make claims, is not res judicata as to a party in interference proceedings who was not, and could not have been, a party in an ex parte proceeding. Armstrong v. Levy, 29 F. (2d) 953. (2) A former adjudication against the patentability of claims, made on motion of one of the parties in interference to dissolve on that ground, does not conclude the question of patentability. Gold v. Gold, 34 App. (D. C.) 229.

81. Cosper v. Gold, 36 App. (D. C.) 302.

Evidence in interference cases generally see supra § 216.

82. Armstrong v. Levy, 29 F. (2d) 953.

[a] **Denial held not erroneous.**—Denial of a motion for leave to take testimony bearing on the right to make claims constituting the counts of an interference proceeding is not erroneous, where the only question involved is whether or not disclosure supported the claims of issue, which can be determined by the experts in the patent office aided by arguments and explanations of counsel. Armstrong v. Levy, 29 F. (2d) 953.

[b] **Refusal to consider prior art.**—Creveling v. Jepson, 47 App. (D. C.) 597.

83. See Trial [38 Cyc 1352].

84. Spear v. Abbott, 22 F. Cas. No. 13,222.

85. Lindmark v. De Ferranti, 34 App. (D. C.) 445.

86. Lindmark v. De Ferranti, supra.

Consolidation. Where the same subject matter is in three separate interferences, they may be properly consolidated, in accordance with the practice in the patent office, for hearing and determination as one.[87]

Continuance or suspension. The question of extending the time for hearing the case,[88] and for taking testimony therein,[89] is within the discretion of the commissioner. The commissioner may temporarily suspend the proceedings pending the determination of questions of patentability;[90] but not for the purpose of considering public use or intervening rights, as these questions cannot properly be considered.[91]

[§ 218] **n. Decision or Award; Discretion of Patent Office—(1) In General.** It is a matter within the sound discretion and judgment of the patent office tribunals, applying the rules of construction heretofore considered,[92] whether to declare an interference,[93] and to determine, upon the facts presented, questions arising in an interference proceeding,[94] and to decide which of the parties is entitled to make the claims in issue and be awarded priority as being the first and original inventor.[95] The party claiming actual reduction to practice is generally entitled to an award of priority, where he makes out a prima facie case which is not rebutted by the other party.[96] A senior applicant may be entitled to priority as to a process, notwithstanding a decision denying priority to him as to an apparatus for carrying out such process.[97]

Control of discretion. The commissioner's discretion in such cases cannot be controlled by mandamus;[98] and mandamus will not lie to vacate an order declaring an interference, on the ground that the discontinuance of a prior interference is res judicata as to the present interference,[99] as that defense can be raised and preserved at all stages of the interference proceeding.[1]

[§ 219] **(2) Award on Record.** The commissioner, in a proper case, may award priority on the record to the senior applicant,[2] as, where the claims involved do not distinguish in any substantial and patentable way between the structures of the two parties, the senior party may properly be allowed to make the claims.[3] But where the application of the senior party does not meet the issues of some of the counts, priority as to those counts may be awarded to the junior applicant.[4]

Failure to file statement. Under a rule of the patent office,[5] if a party, other than the senior party, fails to file a preliminary statement after due notice,[6] or his statement fails to overcome a prima facie case made by the respective dates of the applications,[7] a judgment of priority may, in the discretion of the commissioner, be awarded against him, unless he shows cause why such action should not be taken.[8]

Motion for judgment on record. A motion by the senior party for a judgment on the record, in view of the record dates of the parties and the allegations of the junior party in his preliminary statement, is in the nature of an exception to the sufficiency of such preliminary statement,[9] and is analogous to an exception to the answer for insufficiency, which is common in equity practice.[10]

[§ 220] **(3) Effect of Decision[11]—(a) Refusal To Declare Interference.** A refusal to declare an interference is not a denial of a junior party's right to challenge the senior party's right to make the claims,[12] as the junior party has a remedy in such a case by an application ex parte,[13] or by a resort to equity under the statute relating to interfering patents,[14] to determine the priority of invention.[15] So, also, a failure to declare an interference between a senior application and a patent issued to a junior applicant will not deprive the senior applicant of the opportunity of having the question of priority

87. New Departure Mfg. Co. v. Robinson, 39 App. (D. C.) 504; Cosper v. Gold, 36 App. (D. C.) 302.

88. O'Reilly v. Smith, 18 F. Cas. No. 10,566, McA. Pat. Cas. 218.

89. Hopkins v. Lewis, 12 F. Cas. No. 6,688; O'Reilly v. Smith, 18 F. Cas. No. 10,566, McA. Pat. Cas. 218; Wellman v. Blood, 29 F. Cas. No. 17,385, McA. Pat. Cas. 432.

90. U. S. v. Thacher, 9 D. C. 24.

91. Hayes v. Davison, 50 App. (D. C.) 361, 273 Fed. 325.

92. See supra §§ 209–211.

93. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955 [rev 45 App. (D. C.) 185].

[a] **The commissioner may refuse to declare** an interference where an applicant admits that the invention shown in his application was made at a date subsequent to the date on which another application for the same invention was filed. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 64 L. ed. 955 [rev 45 App. (D. C.) 185].

94. Hutchinson v. Meyer, 12 F. Cas. No. 6,957; Doble v. Scott, 54 App. (D. C.) 97, 295 Fed. 238; U. S. v. Newton, 47 App. (D. C.) 449.

[a] **Sufficiency of findings.**—National Metallurgic Co. v. Whitman, 35 App. (D. C.) 420.

95. McChesney v. Gerrard, 57 App. (D. C.) 138, 18 F. (2d) 180; Doble v. Scott, 54 App. (D. C.) 97, 295 Fed. 238; Nicoll v. Hoey, 48 App. (D. C.) 245; Schneider v. Driggs, 36 App. (D. C.) 116; Scott v. Cruse, 34 App. (D. C.) 414; Neuberth v. Lizotte, 32 App. (D. C.) 329.

[a] **Junior party held entitled to priority** (1) on the strength of a foreign patent which discloses the invention of the issue. Prescott v. Michelin, 57 App. (D. C.) 104, 17 F. (2d) 863. (2) Where the junior party, prior to the filing date of his adversary, which is relied on for disclosure and reduction to practice, files amendments to an application then pending, disclosing the invention of the issue, which amendments are rejected as constituting new matter, and he is diligent in filing his application in interference, he is entitled to an award of priority. Hauschild v. Speidel, 48 App. (D. C.) 419.

[b] **Alternative ruling** as to right to a patent is not objectionable on that ground alone. Brown v. Campbell, 41 App. (D. C.) 499.

Priority of invention generally see supra §§ 128–132.

96. Manly v. Janney, 45 App. (D. C.) 516; Carlin v. Crumpton, 45 App. (D. C.) 166; Smith v. Kihlgren, 43 App. (D. C.) 193.

97. McNeil v. Molyneux, 50 App. (D. C.) 160, 269 Fed. 676.

98. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955 [rev 45 App. (D. C.) 185]; U. S. v. Robertson, 56 App. (D. C.) 16, 6 F. (2d) 714 [certiorari den 269 U. S. 562 mem, 46 SCt 21 mem, 70 L. ed. 413 mem]; U. S. v. Newton, 47 App. (D. C.) 449.

Mandamus as to patents generally see Mandamus § 251.

99. U. S. v. Newton, 47 App. (D. C.) 449.

1. U. S. v. Newton, supra.

2. Prescott v. Swain, 57 App. (D. C.) 306, 22 F. (2d) 1004; Lee v. Vreeland, 262 Fed. 654.

3. Scott v. Longtin, 52 App. (D. C.) 102, 281 Fed. 606; Leonard v. Pardee, 39 App. (D. C.) 458.

4. Sharp v. Gamage, 50 App. (D. C.) 284, 271 Fed. 126.

5. Patent Office Rules Oct. 1, 1927, rule 114.

6. Churchill v. Goodwin, 32 App. (D. C.) 428; U. S. v. Robertson, (D. C.) 29 F. (2d) 639.

7. Wright v. Halle, 50 App. (D. C.) 391, 273 Fed. 355; Peters v. Hopkins, 34 App. (D. C.) 141; U. S. v. Robertson, (D. C.) 29 F. (2d) 639.

[a] **Thus,** where a junior party in his preliminary statements fails to allege a date of conception prior to the senior party's filing date, priority may properly be adjudged to the senior party on the record. Wright v. Halle, 50 App. (D. C.) 391, 273 Fed. 355; Hopkins v. Peters, 44 App. (D. C.) 196.

8. U. S. v. Robertson, (D. C.) 29 F. (2d) 639.

9. Lindmark v. De Ferranti, 34 App. (D. C.) 445, 450.

"There is no special rule of the Patent Office regulating the procedure on such a motion, and it is therefore governed by the general provision of rule 153, that 'in contested cases the practice on points to which the rules shall not be applicable will conform as near as possible to that of the United States courts in equity proceedings.'" Lindmark v. De Ferranti, supra.

"The hearing on such an exception is not a hearing on bill and answer." Lindmark v. De Ferranti, supra.

10. Lindmark v. De Ferranti, supra.

Exception to answer for insufficiency generally see Equity §§ 573–575.

11. **Conclusiveness and effect of decisions in patent office generally** see infra §§ 254–269.

12. U. S. v. Robertson, 56 App. (D. C.) 16, 6 F. (2d) 714 [certiorari den 269 U. S. 562 mem, 46 SCt 21 mem, 70 L. ed. 413 mem].

13. U. S. v. Robertson, supra.

14. U. S. Rev. St. § 4918.

15. Ewing v. U. S., 244 U. S. 1, 37 SCt 494, 61 L. ed. 955; U. S. v. Robertson, 56 App. (D. C.) 16, 6 F. (2d) 714 [certiorari den 269 U. S. 562 mem, 46 SCt 21 mem, 70 L. ed. 413 mem].

determined,[16] notwithstanding he failed to copy the junior applicant's claims within the statutory period from the issuance of the patent to the junior applicant.[17] A failure to declare an interference when a patentee is seeking a reissue pending an application by another is not a decision that the claims are for different inventions.[18]

[§ 221] **(b) Of Award of Priority.** Under the rules and practice of the patent office, the decision of the examiner of interferences on a declared interference determines only the question of priority of invention as between the parties to the interference,[19] and does not necessarily entitle the party in whose favor it is made to a patent.[20] The party against whom the decision is rendered may still contend that there is no interference in fact or that the successful party is not entitled to the claims made,[21] and he is not concluded upon the question of his right to a patent until the expiration of the time allowed him by statute for an appeal from the final order rejecting his application,[22] but he has no right thereafter to prosecute the claims of the issue in an ex parte proceeding.[23]

Res judicata.[24] A judgment awarding priority in interference is entitled to great weight, if not controlling in subsequent controversies between the parties on the patents involved.[25] A judgment awarding priority in interference is not res judicata in a suit in equity by the losing party, instituted under the statute,[26] to compel the issuance of the patent refused in the patent office;[27] but is final in a second interference proceeding therein as between the applications,[28] and therefore bars a further interference between the parties upon an issue which covers the common patentable subject matter;[29] and the fact that it is not final in the former interference does not affect its finality in the latter.[30]

[§ 222] **o. Dissolution of Interference.** Under the rules of the patent office,[31] questions as to the regularity or propriety of the interference must be raised, by motion to dissolve the interference,[32] within thirty days after the statements of the parties have been received and approved,[33] and a failure to make such a motion within the time allowed estops a party from raising objections which might have been made the ground for the motion,[34] unless a good reason is shown for the failure to make such motion,[35] the determination of whether such good reason exists being largely within the discretion of the patent office.[36] A person to whom a patent is issued upon his application cannot object to the dissolution of an interference, as he has obtained all to which he is entitled.[37]

On commissioner's own motion. The commissioner, in the exercise of his supervisory authority, may dissolve interference on his own motion if it clearly appears that one of the parties thereto has no right to make the claim,[38] or that the issues are barred by public use.[39]

Issues. Questions raised upon such motion upon grounds not relating to priority of invention are of

Interfering patents generally see infra §§ 276–281.

16. Chapman v. Beede, 54 App. (D. C.) 209, 296 Fed. 956 (under the equitable principle that courts view as done what ought to have been done).

17. Chapman v. Beede, supra.

18. Hicks v. Shaver, 12 F. Cas. No. 6,462.

19. Westinghouse v. Hien, 159 Fed. 936, 87 CCA 142, 24 LRANS 948 [certiorari den 212 U. S. 576 mem, 29 SCt 685 mem, 53 L. ed. 658 mem].

Issues involved generally see supra §§ 212, 213.

20. U. S. v. Ewing, 42 App. (D. C.) 176; Gueniffet v. Wictorsohn, 30 App. (D. C.) 432; Burson v. Vogel, 29 App. (D. C.) 388 [certiorari den 207 U. S. 585 mem, 28 SCt 254 mem, 52 L. ed. 352 mem]; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem].

21. Westinghouse v. Hien, 159 Fed. 936, 87 CCA 142, 24 LRANS 948 [certiorari den 212 U. S. 576 mem, 29 SCt 685 mem, 53 L. ed. 658 mem].

22. Westinghouse v. Hien, supra.

23. U. S. v. Moore, 30 App. (D. C.) 464.

24. Res judicata generally see Judgments §§ 1154–1525.

25. Dwight, etc., Sintering Co. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206 [rev 158 Fed. 415].

26. U. S. Rev. St. § 4915.

27. McKenzie v. Garrett, 43 App. (D. C.) 6.

Remedy in equity for refusal of patent generally see infra §§ 243–252.

28. McKenzie v. Garrett, 43 App. (D. C.) 6; Sutton v. Wentworth, 41 App. (D. C.) 582; New Departure Mfg. Co. v. Robinson, 39 App. (D. C.) 504; Carroll v. Hallwood, 31 App. (D. C.) 165; Blackford v. Wilder, 28 App. (D. C.) 535 [certiorari den 205 U. S. 541 mem, 27 SCt 788 mem, 51 L. ed. 922 mem].

29. In re Creveling, 46 App. (D. C.) 536; Sutton v. Wentworth, 41 App. (D. C.) 582; U. S. v. Moore, 30 App. (D. C.) 464.

30. McKenzie v. Garrett, 43 App. (D. C.) 6.

31. Patent Office Rules Oct. 1, 1927, rules 122, 130. And see cases infra this note.

[a] **Rules held reasonable.**—Under Patent Office Rules Oct. 1, 1927, rule 122, parties to an interference who would question the right of an adversary to make the claims at the issue are required, if possible, to file their motion to dissolve not later than the thirtieth day after the statements of the parties have been received and approved, and such a motion must be accompanied by a motion to transmit the question to the primary examiner for initial determination. Rule 130 permits a party to allege the nonpatentability of the claims of his opponent at final hearing before the examiner of interferences, and, upon appeals from his decision, only in the event that such party has complied with the provisions of rule 122, "or shown good reason why such a motion was not presented and prosecuted." These rules are reasonable and within the authority conferred upon the commissioner. Hopkins v. Peters, 44 App. (D. C.) 196; Broadwell v. Long, 36 App. (D. C.) 418.

32. Rocke v. Bogdonoff, 56 App. (D. C.) 140, 10 F. (2d) 1005; Ellis v. Shaw, 54 App. (D. C.) 185, 295 Fed. 1006; Dodge v. Fowler, 11 App. (D. C.) 592; Croskey v. Atterbury, 9 App. (D. C.) 207.

[a] **Grounds of motion.**—Such motion may be based on the ground that the adversary's application does not disclose the same invention. Ellis v. Shaw, 54 App. (D. C.) 185, 295 Fed. 1006.

33. Patent Office Rules Oct. 1, 1927, rule 122.

34. Harvey v. Short, 55 App. (D. C.) 199, 4 F. (2d) 165; White v. Wege, 44 App. (D. C.) 495; Hopkins v. Peters, 44 App. (D. C.) 196.

[a] **Illustrations.**—(1) A failure to move for dissolution of interference on the ground of nonpatentability of the other party's claim disentitles a party to question his adversary's right to make claim on the ground of nonpatentability thereof, under Patent Office Rules Oct. 1, 1927, rule 130. Harvey v. Short, 55 App. (D. C.) 199, 4 F. (2d) 165. (2) A failure to move to dissolve an interference on the ground that an accepted amendment to one of the applications involves new matter is an acquiescence in the allowance of the amendment. Croskey v. Atterbury, 9 App. (D. C.) 207. (3) Operativeness of structure disclosed in an application cannot be challenged in an interference proceeding, in the absence of motion challenging such operativeness. Isom v. Dubbs, 24 F. (2d) 467.

[b] **Rule not applicable.**—Where a party to an interference does not question the right of others to priority, there can be no award of priority in his favor, and his motions to dissolve do not therefore relate to priority, but to the propriety of the declaration of interference, and do not come within Patent Office Rules Oct. 1, 1927, rule 130. Elsom v. Bonner, 46 App. (D. C.) 230.

35. White v. Wege, 44 App. (D. C.) 495; Hopkins v. Peters, 44 App. (D. C.) 196.

[a] **Excuse held insufficient.**—Reliance by a party in interference proceedings on estoppel of his adversary, under a prior decision of the appellate court, which was subsequently reversed, does not excuse failure to move to dissolve the interference proceedings, because the adversary is not entitled to make the claims. Ball v. Barnhurst, 50 App. (D. C.) 257, 270 Fed. 693.

[b] **Ill health as excuse.**—Broadwell v. Long, 36 App. (D. C.) 418.

36. Isom v. Dubbs, 24 F. (2d) 467; Broadwell v. Long, 36 App. (D. C.) 418.

37. Cushman v. Lines, 10 App. (D. C.) 156.

38. Harvey v. Short, 55 App. (D. C.) 199, 4 F. (2d) 165.

39. U. S. v. Ewing, 43 App. (D. C.) 204 [certiorari den 238 U. S. 640

an interlocutory character,[40] and cannot be considered on appeal from the decision of the commissioner awarding priority to one of the parties to the interference.[41] Where the right of one party to make the claims of the issue is presented on the motion to dissolve, two questions arise, namely, the right to make the claims, and priority of invention.[42]

Effect of decision on motion. If the motion to dissolve is denied by the commissioner, the soundness of his ruling is a question ancillary to the final judgment of priority,[43] and may be considered on an appeal from the final award of priority,[44] unless the appeal is abandoned, in which case the decision is a final adjudication between the parties.[45] If a motion to dissolve the interference, on the ground of want of right to make the claim, is decided adversely to claimant, the formal award of priority goes to his opponent as a matter of course.[46] If decided in his favor, the issue of priority in fact is to be determined also before the decision becomes final;[47] and if the commissioner decides that the claims can be made, and the question of priority is determinable on the record, it can be awarded at the same time.[48] But if the motion is sustained, without an award of priority, the interference is ended and no cause of action survives or exists upon which an award of priority can be based.[49]

[§ 223] **11. Appeals in Patent Office.** By act of congress and rules of the patent office, every applicant for a patent, or for the reissue of a patent,[50] any of whose claims have been twice rejected, and every party to an interference,[51] upon paying the required fee therefor, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences to the board of appeals,[52] composed of the commissioner of patents, the first assistant commissioner, the assistant commissioners, and the examiners-in-chief.[53] The procedure on such appeals is governed by the rules of the patent office adopted to comply with the statute as amended,[54] except that cases in which appeals were pending and heard prior to such amendment are governed by the rules which were in effect at that time.[55] The terms of a statute providing for such appeals should receive a reasonable interpretation,[56] and be so construed as to avoid multiplying litigation or producing unnecessary delay and expense to the parties concerned, and to prevent, as far as possible, embarrassment and hindrance to the proceedings in the patent office.[57]

[§ 224] **12. Appeals from Decisions of Patent Office—a. In General.** The right of appeal from a decision of the patent office is purely statutory.[58] By act of congress, if an applicant for a patent or a party to an interference is dissatisfied with the decision of the board of appeals. he may appeal to the court of appeals of the District of Columbia;[59] and a statute permitting such appeals has been held

mem, 35 SCt 941 mem, 59 L. ed. 1501 mem].

40. Hulett v. Long, 15 App. (D. C.) 284.

41. Hulett v. Long, supra.

42. Cosper v. Gold, 36 App. (D. C.) 302.

43. Carlin v. Goldberg, 45 App. (D. C.) 540.

44. See infra § 229.

45. U. S. v. Moore, 30 App. (D. C.) 464.

46. Cosper v. Gold, 36 App. (D. C.) 302; Cosper v. Gold, 34 App. (D. C.) 194.

47. Cosper v. Gold, 36 App. (D. C.) 302.

48. Cosper v. Gold, supra.

49. Field v. Colman, 47 App. (D. C.) 189; Carlin v. Goldberg, 45 App. (D. C.) 540; U. S. v. Moore, 39 App. (D. C.) 36.

50. **Reissues of patents generally** see infra §§ 307–328.

51. **Interferences generally** see supra §§ 196–222.

52. U. S. Rev. St. § 4909, as amended by Act March 2, 1927; U. S. Code tit 35 § 57 (as amended); Patent Office Rules Oct. 1, 1927, rules 133, 143; Carroll v. Hallwood, 31 App. (D. C.) 165.

[a] **Prior to amendment of statute.**—(1) Under U. S. Rev. St. §§ 4909, 4910, prior to the amendment of 1927, such appeals were taken to the board of examiners-in-chief, and from such board to the commissioner of patents in person. Carroll v. Hallwood, 31 App. (D. C.) 165; In re Mygatt, 26 App. (D. C.) 366. (2) The commissioner on appeal in an interference proceeding had no power to vacate a prior order reviving an abandoned application. Terry v. Webster, 56 App. (D. C.) 198, 12 F. (2d) 139 [certiorari den 273 U. S. 709 mem, 47 SCt 100 mem, 71 L. ed. 852 mem]. (3) The assistant commissioner could be assigned the duty of hearing and deciding such appeals. U. S. v. Duell, 17 App. (D. C.) 575. (4) There was no appeal to the secretary of the interior from the commissioner's action in granting or refusing patents, and he could not in any way control such action. Butterworth v. U. S., 112 U. S. 50, 5 SCt 25, 28 L. ed. 656; U. S. v. Duell, 86 Off. Gaz. (U. S.) 995; U. S. v. Seymour, 10 App. (D. C.) 294.

53. U. S. Rev. St. § 482, as amended by Act March 14, 1927; U. S. Code tit 35 § 7.

54. Patent Office Rules Oct. 1, 1927, rules 133–146.

55. Patent Office Rules Oct. 1, 1927, rule 139. And see cases infra this note.

[a] **Matters on appeal under prior rules.**—(1) Refusal to consider ex parte affidavits. Nielson v. Bradshaw, 16 App. (D. C.) 92. (2) Motion to transmit interference to primary examiner Parkes v. Lewis, 28 App. (D. C.) 1. (3) Ruling on motion to amend preliminary statement. Jobski v. Johnson, 47 App. (D. C.) 230. (4) Rehearing. In re Blackmore, 32 App. (D. C.) 338; In re Garrett, 27 App. (D. C.) 19. (5) Remanding. In re Dement, 49 App. (D. C.) 261, 263 Fed. 813 [certiorari den 254 U. S. 630 mem, 41 SCt 7 mem, 65 L. ed. 447 mem]; In re Merrill, 41 App. (D. C.) 294; In re Garrett, supra. (6) Reversing. Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem]. (7) Effect of violation by primary examiner of a patent office rule respecting the binding effect of a recommendation of the examiner-in-chief. Humane Stanchion Works v. Mitchell Mfg. Co., 23 F. (2d) 5 [certiorari den 277 U. S. 597 mem, 48 SCt 56 mem, 72 L. ed. 1006 mem].

56. Allen v. U. S., 26 App. (D. C.) 8 [aff 203 U. S. 476, 27 SCt 141, 51 L. ed. 281].

57. Allen v. U. S., supra.

58. Carlin v. Goldberg, 45 App. (D. C.) 540.

Right of appeal:
In interference cases see infra §§ 228, 229.
On rejection of application for patent see infra §§ 225–227.

59. U. S. Rev. St. § 4911, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273); U. S. Code tit 35 § 59a.

[a] **Prior statutes.**—(1) Under an act of congress passed in 1836, appeals from decisions of the commissioner of patents were to a board of examiners composed of three disinterested persons appointed by the secretary of state. Act July 4, 1836 (5 St. at L. 119 c 357 §§ 7, 8). (2) For this tribunal the act of 1839 substituted the chief justice of the district court of the United States for the District of Columbia. Act March 3, 1839 (5 St. at L. 353 c 88 §§ 11, 12). (3) The act of 1852 provided that an appeal might also be taken to either of the assistant judges of the circuit court of the District of Columbia, and imposed and conferred upon each of them the powers and duties given by the previous act to the aforesaid chief justice. Act Aug. 30, 1852 (10 St. at L. 75 c 107 §§ 1, 2). (4) Under the act of 1861 appeal was to the circuit court judges, but only from the decisions of the commissioner of patents, and not from the decision of a primary examiner. It was necessary under this act for applicant to go from the primary examiner by appeal to the examiner-in-chief, from the latter by appeal to the commissioner, and lastly from the commissioner to the judges of the circuit court. Act March 2, 1861 (12 St. at L. 246 c 88 §§ 2, 3). And see Snowden v. Pierce, 22 F. Cas. No. 13,151, 2 Hayw. & H. 386. (5) This system continued in force until, by the act of 1870, incorporated in the United States revised statutes, the final appellate jurisdiction was vested in the supreme court of the District of Columbia sitting in banc, the intermediate appeals remaining as before. Act July 8, 1870 (16 St. at L. 198 c 230); U. S. Rev. St. §§ 409–411. (6) The act of 1893, however, relieved the supreme court of the District of Columbia of the determination of appeals from the decision of the commissioner of patents, and vested such appellate jurisdiction in the court of appeals of the District of Columbia, created by that act. Act Febr. 9, 1893 (27 St. at L. 436 c 74 § 9).

[b] **Appeal not a proceeding in equity.**—(1) An appeal to the court of appeals in an interference case is not a proceeding in equity, and the provisions of U. S. Rev. St. § 4915, providing for relief by a bill in equity where the patent has been finally refused, do not apply. It is a proceeding at law, and hence a decision of the supreme court of the United States as to the statute referred to does not apply. Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem,

constitutional, as being within the power of congress to enact.[60] The court of appeals has no original jurisdiction to direct and supervise the administration of the affairs of the patent office;[61] but merely the power to review its final decisions.[62] The statute also provides that by such appeal applicant for a patent waives his right to proceed in equity for the refusal of a patent.[63]

Supreme court. No appeal lies to the supreme court from the court of appeals in a case brought up from the patent office.[64]

[§ 225] **b. Right of Appeal—(1) On Rejection of Application—(a) In General.** Under the statute and rules providing for appeals from the board of appeals to the court of appeals of the District of Columbia,[65] as well as under prior provisions for appeals from the commissioner of patents,[66] an unsuccessful applicant for a patent, or for the reissue of a patent,[67] may appeal from an adverse final decision of the patent office.[68] One who has accepted a patent allowed him has no grounds for appeal;[69] and one who induces the amendment of a decision is estopped to question its validity.[70]

Distinctions. The rights of appeal in the case of the refusal of a patent upon the ground of nonpatentability of the claim, and refusal of a patent because of interference with a prior right of invention, are distinct rights, and the latter does not involve the former.[71]

[§ 226] **(b) Decisions Appealable or Reviewable.** A final decision within the meaning of the above rule[72] is determinable by its substance and effect, rather than its form,[73] and accordingly an applicant for a patent, or for a reissue thereof, may appeal from, and only from, any decision or action by the patent office tribunals that amounts to a final rejection of the application, as requested,[74] such as from the rejection of his application upon his refusal to take a limited patent,[75] or from the requirement that his application be divided.[76]

[§ 227] **(c) Decisions Not Appealable or Reviewable.** Mere interlocutory or preliminary rulings or orders on matters within the discretionary powers of the patent office tribunals are generally not the subject of review on appeal,[77] unless it appears that there has been a clear abuse of discretion and that substantial rights have been thereby affected or denied.[78] Thus, in the absence of a clear abuse of discretion, the appellate court will not review a decision holding an application abandoned,[79] or refusing to

51 L. ed. 332 mem]. (2) Remedy in equity for refusal of patent see infra §§ 243-252.

[c] **Appeal in forma pauperis.**— Act Congr. June 25, 1910 c 435 (36 St. at L. 866), amending Act Congr. July 20, 1892 c 209 § 1 (27 St. at L. 252), and allowing appeals and writs of error from United States courts to circuit courts of appeal to be prosecuted in forma pauperis upon certain conditions therein prescribed, did not apply to an appeal to this court from a decision of the commissioner of patents in an interference proceeding. In re Mattulath, 37 App. (D. C.) 410.

[d] **In Canada,** under the Patents Act (Rev. St. [1906] c 69 § 20), no provision is made for an appeal in case of conflicting applications for a patent; but under § 23(a) of the "Exchequer Court Act," that court may assume jurisdiction in such cases, and under § 82 of that act an appeal may be taken from its decision to the supreme court of Canada. Burnett v. Hutchins Car Roofing Co., 54 Can. S. C. 610, 36 DomLR 45.

[e] **In Australia,** under Patents Act (1890) § 29(3), appeal does not lie to the law officer from an order of the commissioner for payment by one party to an application of another party's cost. Potter v. Dickenson, 2 Austr. C. L. R. 668 [aff 26 Austr. L. T. 124].

Jurisdiction of courts of District of Columbia generally see Federal Courts §§ 366-373.

60. In re Mattulath, 37 App. (D. C.) 410; Moore v U. S., 33 App. (D. C.) 597; U. S. v. Duell, 13 App. (D. C.) 379 [aff 172 U. S. 576, 19 SCt 286, 43 L. ed. 559]; U. S. v. Seymour, 10 App. (D. C.) 294.

61. Aufiero v. Ewing, 44 App. (D. C.) 328; De Ferranti v. Lindmark, 32 App. (D. C.) 6.

62. Aufiero v. Ewing, 44 App. (D. C.) 328.

63. U. S. Rev. St. § 4911, as amended by the act of March 2, 1927 (44 St. at L. 1335 c 273).

[a] **Election to withdraw application or to appeal** under Act July 4, 1836 (5 St. at L. 119 c 357 § 7). Ex p. O'Hara, 18 F. Cas. No. 10,464.

Remedy in equity on refusal of patent see infra §§ 243-252.

64. Johnson v. Mueser, 212 U. S. 283, 29 SCt 390, 53 L. ed. 514; Frasch v. Moore, 211 U. S. 1, 29 SCt 6, 53 L. ed. 65; Rousseau v. Brown, 21 App. (D. C.) 73.

65. See supra § 224.

66. See supra note 59 [a].

67. Reissues of patents generally see infra §§ 307-328.

68. Moore v. U. S., 40 App. (D. C.) 591 [app dism 237 U. S. 197, 35 SCt 571, 59 L. ed. 913, and certiorari den 238 U. S. 630 mem, 35 SCt 941 mem, 59 L. ed. 1497 mem].

[a] **Information as to right of appeal.**—One whose claim to letters patent has been denied cannot complain that his remedy of right to appeal to the court was not pointed out to him, where the decision concludes as follows: "Appeal from this decision to the court of appeals should be taken, if at all, within the time prescribed by the rules of that court." Moore v. U. S., 40 App. (D. C.) 591, 597 [app dism 237 U. S. 197, 35 SCt 571, 59 L. ed. 913, and certiorari den 238 U. S. 630 mem, 35 SCt 941 mem, 59 L. ed. 1497 mem].

[b] **In England,** under Patents and Designs Act (1907) § 2, on an application for a patent, the examiner is entitled to report to the comptroller that the alleged invention is not an invention at all, and, if the comptroller refuses the application, the appropriate remedy is an appeal to the law officer. Rex v. Comptroller-Gen. of Patents, [1922] W. N. 176.

Decisions appealable or reviewable see infra § 226.

69. New York Belting, etc., Co. v. Sibley, 15 Fed. 386; Cushman v. Lines, 10 App. (D. C.) 156.

70. Browne v. Dyson, 39 App. (D. C.) 415.

71. Hisey v. Peters, 6 App. (D. C.) 68.

72. See supra § 225.

73. Aufiero v. Ewing, 44 App. (D. C.) 328; In re Mattullath, 38 App. (D. C.) 497.

74. U. S. v. Allen, 192 U. S. 543, 24 SCt 416, 48 L. ed. 555; Holloway v. Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335; In re Janney, 13 F. Cas. No. 7,209, Cranch Pat. Dec. 143, McA. Pat. Cas. 86; Ex p. Selden, 21 F. Cas. No. 12,638; In re Smith, 49 App. (D. C.) 189, 262 Fed. 643; In re Carvalho, 47 App. (D. C.) 584; Elsom v. Bonner, 46 App. (D. C.) 230; Carlin v. Goldberg, 45 App. (D. C.) 540; Mann v. Brown, 43 App. (D. C.) 457; Moore v. U. S., 40 App. (D. C.) 591 [app dism 237 U. S. 197, 35 SCt 571, 59 L. ed. 913, and certiorari den 238 U. S. 630 mem, 35 SCt 941 mem, 59 L. ed. 1497 mem]; In re Mygatt, 40 App. (D. C.) 32; Cosper v. Gold, 34 App. (D. C.) 194; In re Fullagar, 32 App. (D. C.) 222; In re Mygatt, 26 App. (D. C.) 366.

[a] **Decisions from which appeals have been allowed under prior statutes.**—(1) Refusal to entertain an application as being a rejection. Holloway v. Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335. (2) An order of the commissioner reversing without authority a decision of his predecessor that an invention was patentable and meritorious. Matter of Hoeveler, 21 D. C. 107. (3) A rejection or decision by the commissioner was appealable under the prior statutes even where there had been no decision in the case by the examiner or examiners-in-chief. Holloway v. Whiteley, supra; In re Chambers, 5 F. Cas. No. 2,581, McA. Pat. Cas. 641; Snowden v. Pierce, 22 F. Cas. No. 13,151, 2 Hayw. & H. 386.

[b] **Withholding a patent merely by virtue of supervisory authority,** without a decision, has been held not appealable. Hull v. Patents Comr., 9 D. C. 90.

75. New York Belting, etc., Co. v. Sibley, 15 Fed. 386.

76. Ex p. Frasch, 192 U. S. 566, 24 SCt 424, 48 L. ed. 564; U. S. v. Allen, 192 U. S 543, 24 SCt 416, 48 L. ed. 555 [overr In re Frasch, 20 App. (D. C.) 298; Blackford v. Wilder, 104 Off. Gaz. (U. S.) 582].

77. Allen v. U. S., 116 Off. Gaz. (U. S.) 2253; Hillard v. Brooks, 111 Off. Gaz. (U. S.) 302; Luger v. Browning, 104 Off. Gaz. (U. S.) 1123; Swihart v. Mauldin, 99 Off. Gaz. (U. S.) 2322; In re Bastian, 44 App. (D. C.) 425; Universal Motor Truck Co v. Universal Motor Co., 41 App. (D. C.) 261; In re Mygatt, 40 App. (D. C.) 32; In re Atkins, 29 App. (D. C.) 385; Davis v. Garrett, 28 App. (D. C.) 9; In re Frasch, 27 App. (D. C.) 25; In re Mygatt, 26 App. (D. C.) 366; In re Frasch, 20 App. (D. C.) 298; In re Marshutz, 13 App. (D. C.) 228; In re Chinnock, 21 D. C. 594.

[a] **Mere comments** in the decision are not appealable. In re Freeman, 23 App. (D. C.) 226.

[b] **In Australia** the same rule applies. Reid v. Patents Comr., 20 Austr. C. L. R. 261.

78. In re Chambers, 5 F. Cas. No. 2,581, McA. Pat. Cas. 641; Ex p. Munson, 17 F. Cas. No. 9,933; Ex p. Spence, 22 F. Cas. No. 13,228; In re Frasch, 27 App. (D. C.) 25; In re Mygatt, 26 App. (D. C.) 366; In re Marshutz, 13 App. (D. C.) 228. And see cases supra note 77.

79. In re Seiss, 48 App. (D. C.) 581.

reinstate an abandoned application for a patent,[80] or refusing a rehearing,[81] or refusing an application for leave to amend the claims of an original patent, on reissue.[82]

The reasons for a decision are not reviewable, but only the decision itself.[83]

[§ 228] **(2) In Interference Cases[84]—(a) In General.** Under acts of congress a party to an interference proceeding who is dissatisfied with the final decision therein may appeal to the court of appeals of the District of Columbia;[85] and the jurisdiction of the court of appeals in such cases depends solely upon the statute,[86] and is not defeated by the possibility that the party entitled to priority might not be entitled to a patent.[87]

Patentee. There was a conflict of authority under the prior statutes as to whether a patentee could appeal from an adverse decision in interference proceedings.[88] The present statute, however, provides that "any party to an interference" may appeal,[89] and this would include a patentee as well as an applicant.

[§ 229] **(b) Decisions Appealable or Reviewable.** Since the only ultimate issue to be decided in an interference proceeding is that of priority of invention,[90] an appeal, in such cases, lies only from a final decision of priority in favor of one of the parties.[91] Mere interlocutory or preliminary orders or rulings on matters within the discretionary powers of the patent office tribunals and which have no reference to the merits of the cause, are not subject to review by the court of appeals,[92] except possibly in the case of a palpable abuse of discretion in making the order or ruling,[93] and except where, in extreme cases, it is necessary for the maintenance of the jurisdiction of the appellate court.[94]

Where the interference is between several parties, an award of priority to one is a final judgment in his favor as against all the others, from which each of the unsuccessful parties may appeal.[95] If one of

80. In re Carvalho, 47 App. (D. C.) 584 [overr In re Mattullath, 38 App. (D. C.) 497; In re Selden, 36 App. (D. C.) 428; Moore v. Heany, 34 App. (D. C.) 31, in which cases a different doctrine was announced].

81. In re Janney, 13 F. Cas. No. 7,209, Cranch Pat. Dec. 143, McA. Pat. Cas. 86; In re Rouse, 20 F. Cas. No. 12,086, McA. Pat. Cas. 286; Jones v. Starr, 117 Off. Gaz. (U. S.) 1495; In re Smith, 49 App. (D. C.) 189, 262 Fed. 643; Greenwood v. Dover, 23 App. (D. C.) 251; In re Messinger, 12 App. (D. C.) 532; Ross v. Loewer, 9 App. (D. C.) 563.

82. In re Messinger, 12 App. (D. C.) 532.

83. In re Aiken, 1 F. Cas. No. 107, McA. Pat. Cas. 126; In re Crooker, 6 F. Cas. No. 3,414, McA. Pat. Cas. 134; Ex p. Spence, 22 F. Cas. No. 13,228.

84. Interference proceedings in general see supra §§ 196-222.

85. U. S. Rev. St. § 4911, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273).

[a] **Under prior statutes.**—(1) Under the acts of 1836 and 1839, and, in fact, until 1870, an appeal could be taken, where the proper conditions existed, from the decision of the commissioner in an interference case to the court having jurisdiction of appeals from the commissioner's decisions. Acts July 4, 1836 (5 St. at L. 120 c 357) § 8; March 3, 1839 (5 St. at L. 353 c 88) § 11; Aug. 30, 1852 (10 St. at L. 75 c 107) § 1; March 2, 1861 (12 St. at L. 246 c 88) §§ 2, 3. (2) Cases decided under and construing the above statutes, on appeals from the commissioner's decision in interference cases: Ex p. Allen, 1 F. Cas. No. 207b; Bain v. Morse, 2 F. Cas. No. 754, McA. Pat. Cas. 90; Blackinton v. Douglass, 3 F. Cas. No. 1,470, McA. Pat. Cas. 622; Bowen v. Herriet, 3 F. Cas. No. 1,722, McA. Pat. Cas. 310; Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388; Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493; Collins v. White, 6 F. Cas. No. 3,019; In re Henry, 11 F. Cas. No. 6,371, McA. Pat. Cas. 467; Hopkins v. Lewis, 12 F. Cas. No. 6,688; Jones v. Wetherill, 13 F. Cas. No. 7,508, McA. Pat. Cas. 409; Justice v. Jones, 14 F. Cas. No. 7,588, McA. Pat. Cas. 635; Ex p. Linton, 15 F. Cas. No. 8,378; Lovering v. Dutcher, 15 F. Cas. No. 8,553, 2 Hayw. & H. 367; Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143; O'Reilly v. Smith, 18 F. Cas. No. 10,566, McA. Pat. Cas. 218; Potter v. Dixon, 19 F. Cas. No. 11,325, 5 Blatchf. 160, 2 Fish. Pat. Cas. 381; In re Rouse, 20 F. Cas. No. 12,086, McA. Pat. Cas. 286; Wellman v. Blood, 29 F. Cas. No. 17,385, McA. Pat. Cas. 432; Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193. (3) By the act of 1870 no appeal was allowed in any case of interference, the remedy being by bill in equity for adjudication that the applicant who was refused a patent by the commissioner was entitled to receive one. Act July 8, 1870 (16 St. at L. 204, 205). (4) The remedy by appeal in interference cases was restored, however, by the act of 1893, and appellate jurisdiction was vested in the court of appeals of the District of Columbia, created by that act. Act Febr. 9, 1893 (27 St. at L. 436 c 74). And see Bernardin v. Northall, 77 Fed. 849; Smith v. Muller, 75 Fed. 612; Westinghouse v. Duncan, 2 App. (D. C.) 131.

86. Norling v. Hayes, 37 App. (D. C.) 169.

87. Marx v. Brown, 57 App. (D. C.) 127, 18 F.(2d) 827.

88. See cases infra this note.

[a] **Right of patentee to appeal.**—(1) Upon the question as to whether, on an interference declared between an applicant for a patent and a patentee, the patentee could appeal from a decision of the commissioner, not refusing or rejecting, but granting, the application for letters patent, and awarding priority of invention to applicant and against the patentee, the majority of cases have strongly held in the negative. Bowen v. Herriet, 3 F. Cas. No. 1,722, McA. Pat. Cas. 310; Drake v. Cunningham, 7 F. Cas. No. 4,060, McA. Pat. Cas. 378; Hopkins v. Barnum, 12 F. Cas. No. 6,685, McA. Pat. Cas. 334; Pomeroy v. Connison, 19 F. Cas. No. 11,259, Cranch Pat. Dec. 112, McA. Pat. Cas. 40; Whipple v. Renton, 29 F. Cas. No. 17,521, McA. Pat. Cas. 332. (2) But other decisions gave him a right of appeal. Babcock v. Degener, 2 F. Cas. No. 698, McA. Pat. Cas. 607; Beach v. Tucker, 2 F. Cas. No. 1,153.

89. U. S. Rev. St. § 4911, as amended by Act of March 2, 1927 (44 St. at L. 1335 c 273).

90. See supra § 212.

91. U. S. v. Robertson, (D. C.) 29 F. (2d) 639; Prichard v. Setzler, 54 App. (D. C.) 266, 296 Fed. 1013; In re Carvalho, 47 App. (D. C.) 584; Wintroath v. Chapman, 47 App. (D. C.) 428 [rev on other grounds 252 U. S. 126, 40 SCt 234, 64 L. ed. 491]; Field v. Colman, 47 App. (D. C.) 189; Elsom v. Bonner, 46 App. (D. C.) 230; Carlin v. Goldberg, 45 App. (D. C.) 540; Mann v. Brown, 43 App. (D. C.) 457; Browne v. Dyson, 38 App. (D. C.) 5; Cosper v. Gold, 34 App. (D. C.) 194, 198; In re Fullagar, 32 App. (D. C.) 222; Johnson v. Mueser, 29 App. (D. C.) 61; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem]; Allen v. U. S., 26 App. (D. C.) 8 [aff 203 U. S. 476, 27 SCt 141, 51 L. ed. 281]; Westinghouse v. Duncan, 2 App. (D. C.) 131.

[a] **Contra cases,** under prior statutes see Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388; King v. Gedney, 14 F. Cas. No. 7,795, McA. Pat. Cas. 443.

[b] **Order declaring party not prior inventor.**—The necessary effect of an order declaring that a party in interference, who has been found not to be entitled to make the claims of the issue, was not the prior inventor, being to award priority to his opponent, the order is final and appealable. Cosper v. Gold, 36 App. (D. C.) 302.

92. Clements v. Kirby, 274 Fed. 575; O'Reilly v. Smith, 15 F. Cas. No. 10,566, McA. Pat. Cas. 218; Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143; In re Rouse, 20 F. Cas. No. 12,086, McA. Pat. Cas. 286; Elsom v. Bonner, 46 App. (D. C.) 230; In re Bastian, 44 App. (D. C.) 425; Dalton v. Wilson, 44 App. (D. C.) 249; Muhlfeld v. O'Connor, 42 App. (D. C.) 546; Kinsman v. Strohm, 31 App. (D. C.) 531; McArthur v. Mygatt, 31 App. (D. C.) 514; Phillips v. Sensenich, 31 App. (D. C.) 159; Davis v. Garrett, 28 App. (D. C.) 9; Jones v. Starr, 26 App. (D. C.) 64; Ritter v. Krakau, 24 App. (D. C.) 271; Herman v. Fullman, 23 App. (D. C.) 259; In re Neill, 11 App. (D. C.) 584; Westinghouse v. Duncan, 2 App. (D. C.) 131.

[a] **Rulings not appealable or reviewable:** (1) As to extent of oral argument at hearing. Sobey v. Holsclaw, 28 App. (D. C.) 65 (certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem]. (2) As to the taking of testimony. Hopkins v. Lewis, 12 F. Cas. No. 6,688; Spear v. Abbott, 22 F. Cas. No. 13,222; Wellman v. Blood, 29 F. Cas. No. 17,385, McA. Pat. Cas. 432; Weintraub v. Hewitt, 34 App. (D. C.) 487; Jones v. Starr, 26 App. (D. C.) 64. (3) As to leave to amend preliminary statement. Blaw v. Whitall, 43 App. (D. C.) 20; Warrington v. Combs, 41 App. (D. C.) 568; Thomas v. Weintraub, 38 App. (D. C.) 281; Neth v. Ohmer, 27 App. (D. C.) 319; Cross v. Phillips, 14 App. (D. C.) 228. (4) An order reviving, upon a showing of unavoidable delay, an application for a patent and allowing an amendment thereto, cannot be collaterally attacked on appeal in an interference proceeding. Field v. Colman, 40 App. (D. C.) 598.

[b] **Right to make claim.**—A decision sustaining a party's right to make a claim, in interference, is not appealable. U. S. v. Robertson, 56 App. (D. C.) 16, 6 F. (2d) 714 [certiorari den 269 U. S. 562 mem, 46 SCt 21 mem, 70 L. ed. 413 mem].

93. Dunbar v. Schellenger, 29 App. (D. C.) 129; Neth v. Ohmer, 27 App. (D. C.) 319; Cross v. Phillips, 14 App. (D. C.) 228.

94. Ritter v. Krakau, 24 App. (D. C.) 271.

95. Browne v. Dyson, 38 App. (D. C.) 5.

[a] **Decision after reopening.**—Where, after a decision in an inter-

them fails to appeal, his claims which were involved in the interference stand finally rejected and he can have no standing in the court of appeals on an appeal by one of the other parties.[96]

Ruling on motion to dissolve. A motion to dissolve an interference in the patent office before the final hearing of the question of priority, and before the case is ready for such hearing, is not appealable to the court of appeals unless made so by statute or rule of court;[97] and therefore, as a general rule, a decision dissolving an interference is not appealable to, or reviewable by, the appellate court,[98] unless, upon the request of the petitioners, the order is extended to a formal order of priority,[99] or unless the order dissolving the interference is in effect a judgment of priority;[1] and where a dissolving decision has been made, it cannot be changed into an order awarding priority, in order to permit an appeal.[2] But it has been held that if the motion to dissolve is denied, the soundness of this ruling may be considered on an appeal from the final award of priority as ancillary to the final judgment of priority.[3]

[§ 230] **c. Proceedings Requisite To Appeal.** The procedure by which such appeals may be perfected is purely statutory, and must be strictly followed.[4] Under the controlling statutory provisions,[5] rules of the patent office,[6] and rules of the court of appeals,[7] where an appeal is taken to the court of appeals of the District of Columbia, appellant must give notice thereof to the commissioner, and must file in the patent office his reasons of appeal, specifically set forth in writing,[8] and must file in the court of appeals a certified copy of all the original papers and evidence in the case;[9] and the commissioner must furnish the court with a statement in writing of the grounds for his decision touching the points involved in the reasons of appeal.[10] The transcript of the reasons, however, should not be encumbered with unnecessary recitals.[11] The fact that a party has overlooked a rule of court relating to the perfecting of such appeals does not afford ground for excusing his delinquency;[12] but if he has done something, although imperfectly, toward perfecting his appeal, relief may possibly be granted him.[13]

The "reasons of appeal" are in the nature of the ordinary assignments of error in actions at law or in equity.[14] They must be specific, and must involve a point or points material to and affecting the decision of the patent office;[15] but they may be amended so as to make them more specific, or to remedy some inadvertence in their preparation, if the amendment is made in due time and no injury is done the opposing party.[16]

Amendment of claim before appeal. Where a claim for a patent is broader than the invention, the claim should be restricted by an amendment within proper limits before an appeal is taken from the decision of the patent office.[17]

ference case between several parties awarding priority to one party and after the time for appeal therefrom has expired, the interference is reopened and priority awarded to another party, the effect of the last decision is to set aside the first, and is therefore a final decision adjudicating the rights of all of the parties, from which each of the other parties has the right of appeal. Browne v. Dyson, 38 App. (D. C.) 5.

96. Fowler v. Boyce, 27 App. (D. C.) 48.

97. Allen v. U. S., 26 App. (D. C.) 8 [aff 203 U. S. 476, 27 SCt 141, 51 L. ed. 281]; Hulett v. Long, 15 App. (D. C.) 284.

98. Hillard v. Brooks, 111 Off. Gaz. (U. S.) 302; Parker v. Craft, 49 App. (D. C.) 88, 258 Fed. 988; Vincent v. Landsiedel, 48 App. (D. C.) 427; Field v. Colman, 47 App. (D. C.) 189; Carlin v. Goldberg, 45 App. (D. C.) 540; Griffin v. Young, 44 App. (D. C.) 210; Cosper v. Gold, 34 App. (D. C.) 194, 198; In re Fullagar, 32 App. (D. C.) 222; Herman v. Fullman, 23 App. (D. C.) 259; In re Locke, 17 App. (D. C.) 314; Cushman v. Lines, 10 App. (D. C.) 156.

[a] **Illustration.**—A patent office decision, dissolving an interference proceeding on the ground that the junior party's claims were not patentable, because barred by previous public use, and not passing upon the question of priority, is not appealable, because not a final order. Cowles v. Rody, 49 App. (D. C.) 135, 261 Fed. 1015; U. S. v. Moore, 39 App. (D. C.) 26.

99. Cosper v. Gold, 34 App. (D. C.) 194, 198.

1. Vincent v. Landsiedel, 48 App. (D. C.) 427.

[a] **Thus,** where in an interference the question of priority was before the commissioner of patents on appeal, and the junior party moved to dissolve on the ground that his adversary could not make the claims, and the commissioner sustained the motion without passing directly on the question of priority, the decision was in effect, although not in form, a judgment of priority which the court had jurisdiction to review, and a motion to dismiss the appeal was denied. Vincent v. Landsiedel, 48 App. (D. C.) 427.

2. Carlin v. Goldberg, 45 App. (D. C.) 540.

[a] **Thus,** where in an interference, before any trial, the commissioner granted a motion to dissolve the interference on the ground of the inoperativeness of the device disclosed by one of the parties, but, on the motion of that party, and in order to permit an appeal, changed his order into one awarding priority to the other party, an appeal from such order should be dismissed for want of jurisdiction in the commissioner to make it. Carlin v. Goldberg, 45 App. (D. C.) 540.

3. Vincent v. Landsiedel, 48 App. (D. C.) 427; Carlin v. Goldberg, 45 App. (D. C.) 540; Cosper v. Gold, 34 App. (D. C.) 194, 198.

4. Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493; Carlin v. Goldberg, 45 App. (D. C.) 540.

[a] **An intention to appeal** does not constitute an appeal. In re Hitchcock, 47 App. (D. C.) 251.

5. U. S. Rev. St. §§ 4912, 4913.

6. Patent Office Rules Oct. 1, 1927, rules 148–150.

7. See D. C. Ct. of App. Rules, rules XXII–XXVIII.

8. U. S. Rev. St. § 4912.

[a] **Control of court over reasons of appeal.**—Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143.

[b] **New oath not required.**—In re Crooker, 6 F. Cas. No. 3,414, McA. Pat. Cas. 134.

[c] **Refusal to hear certain evidence offered** as reason for appeal see In re Fultz, 9 F. Cas. No. 5,156, McA. Pat. Cas. 178.

9. U. S. Rev. St. § 4913, as amended by Act of March 2, 1927 (44 St. at L. 1335 c 273).

10. U. S. Rev. St. § 4913, as amended by Act of March 2, 1927 (44 St. at L. 1335 c 273).

[a] **Rule should be strictly followed.**—Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493.

[b] **The commissioner is bound to answer the reasons of appeal** in cases of single applications, as well as in cases of interference. In re Henry, 11 F. Cas. No. 6,371, McA. Pat. Cas. 467.

[c] **No reply to the grounds of the commissioner's decision** can be laid before the judge on appeal, nor be permitted to be filed in the office to be recorded with the proceedings. In re Aiken, 1 F. Cas. No. 108, McA. Pat. Cas. 130.

11. Howell v. Hess, 28 App. (D. C.) 167.

12. In re Hitchcock, 47 App. (D. C.) 251.

13. In re Hitchcock, supra.

14. Horine v. Wende, 29 App. (D. C.) 415.

[a] **The filing of the reasons of appeal is essentially the appeal itself.**—The judge can judicially know nothing of the case until the party aggrieved presents to him his petition for a revision on appeal. Greenough v. Clark, 10 F. Cas. No. 5,784, McA. Pat. Cas. 173.

15. Blackinton v. Douglass, 3 F. Cas. No. 1,470, McA. Pat. Cas. 622; Greenough v. Clark, 10 F. Cas. No. 5,784, McA. Pat. Cas. 173; In re Winslow, 30 F. Cas. No. 17,879, McA. Pat. Cas. 123.

[a] **No assignment is sufficiently specific** which does not, with that reasonable certainty which would satisfy an intelligent mind, point out the precise matter of alleged error, in order that the office in response to the assignments of error may present definite suggestions thereon for the consideration of the judge on appeal, and if need be, upon a clear error being pointed out, itself correct that error without the vexation of an appeal. Blackinton v. Douglass, 3 F. Cas. No. 1,470, McA. Pat. Cas. 622.

[b] **Assignment held insufficient.**—That the commissioner "erred in many material respects." In re Frasch, 27 App. (D. C.) 25.

16. Horine v. Wende, 29 App. (D. C.) 415.

[a] **Abuse of privilege.**—In re Tallmadge, 37 App. (D. C.) 590.

17. Arnold v. Pettee, 1 F. Cas. No. 561b.

[a] **Refusal of relief where amendment not asked.**—Where an applicant for a patent is represented by counsel acquainted with the rules and practice of the patent office, and there is enough in what the board of

[§ 231] **d. Time for Taking and Perfecting Appeal.** The notice of appeal to the court of appeals must be given to the commissioner, and the reasons of appeal filed in the patent office, within forty days from the date of the decision appealed from,[18] exclusive of Sundays and holidays, but including Saturday half holidays;[19] and appellant may avail himself of all the time allowed for taking and perfecting his appeal.[20] The time so prescribed must be computed from the date of the ruling or order, excluding the day of the date,[21] and not from the date of the notice sent to the party against whom the order is made, or his attorney.[22] But the petition for an appeal and the transcript of the record must be filed within forty days from the day upon which notice of appeal is given to the commissioner, unless such time is extended for special and sufficient cause.[23]

Extension of time. There has been a question as to whether the commissioner has power to extend the time for filing a transcript of the record beyond the time allowed by the rules of court;[24] and if the power exists at all, it cannot be exercised upon an application filed after the expiration of the prescribed time.[25]

Failure to file in time. Where the transcript of the record is not filed within the time allowed, it is the commissioner's duty to grant a motion by appellee to take further proceedings necessary to dispose of his case, "as though no notice of appeal had ever been given."[26]

[§ 232] **e. Hearing and Review—(1) In General.** The rules regulating the practice on the hearing and review of appeals generally[27] are applicable to appeals from the patent office with, of course, such modifications and variations as the patent laws provide or the nature of the particular case requires.[28] Under the statutes and rules, the court of appeals appoints the time and place for the hearing, and gives notice thereof to the commissioner, who in turn transmits such notice to all parties appearing to be interested therein;[29] and at the appointed time, the court hears and determines the appeal in a summary way,[30] and in doing so is limited to the papers and evidence produced in the patent office.[31] The court of appeals is bound by the rules lawfully established for the taking of testimony in such cases,[32] and cannot discredit witnesses whose credibility is in no way impeached and whose testimony is reasonable and free from suspicion.[33] Where the case is a very clear one, the appellate court may affirm a decision of the patent office on motion and in advance of the hearing on the printed record.[34]

Attendance of officers. An officer of the patent office may attend the hearing not as counsel or advocate for either party but to advise the court, and explain the decision appealed from.[35]

Nonappearance of appellant when the case is called for argument, and failure to file a brief in his behalf, is ground for affirming the decision of the patent office.[36]

Dismissal. Under the statute an appeal by a party to an interference must be dismissed if an adverse party files notice with the commissioner that he elects to proceed under the statute relating to a bill in equity to obtain a patent.[37]

[§ 233] **(2) Scope of Review[38]—(a) In General.**

appeals said to call his attention to the necessity for amending his specification in order that it might include only what is patentable, if no amendment of the claim or specification is asked for, the court, on appeal from the commissioner's decision, will refuse relief. Ex p. Thomas, 23 F. Cas. No. 13,885.

18. D. C. Ct. of App. Rules, rule XXII § 2; Patent Office Rules Oct. 1, 1927, rule 149.

[a] **The power to make rules limiting the time** for taking appeals to the court of appeals of the District of Columbia from the decisions of the patent office was given to that court by Act (1893) § 6, as amended by Act July 30, 1894 (28 St. at L. 160 c 172) § 6. In re Hien, 166 U. S. 432, 17 SCt. 624, 41 L. ed. 1066.

[b] **Under prior provisions** the time for filing reasons of appeal and taking appeal was fixed by the commissioner. Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388; Greenough v. Clark, 10 F. Cas. No. 5,784, McA. Pat. Cas. 173.

[c] **In England** the period of the long vacation is to be reckoned in computing the one calendar month within which, or such further time as, the court may under special circumstances allow, an appeal from a decision of the comptroller under Patents and Designs Act (1907) §§ 20, 26, 27 must, by Order LIII A rule 4, be presented. In re Beldam, [1911] 1 Ch. 60.

19. D. C. Ct. of App. Rules, rule XXVIII; Patent Office Rules Oct. 1, 1927, rule 149. But see Ocumpaugh v. Norton, 114 Off. Gaz. (U. S.) 545 (Saturday half holidays not counted).

20. Jones v. Starr, 26 App. (D. C.) 64.

[a] **Thus** an appeal from the decision of the commissioner of patents will not be dismissed because appellant has availed himself of all the time allowed by the rules for taking and perfecting his appeal, although by so doing he necessarily prevents the hearing of the appeal until after the summer recess of the court. Jones v. Starr, 26 App. (D. C.) 64.

21. Burton v. Bentley, 14 App. (D. C.) 471.

22. Burton v. Bentley, supra.

23. D. C. Ct. of App. Rules, rule XXII § 2

24. Schmidt v. Tait, 42 App. (D. C.) 227.

[a] **Under prior statutes and rules.**—(1) For good cause shown, the commissioner could suspend the limit of appeal or direct the time to be enlarged. Greenough v. Clark, 10 F. Cas. No. 5,784, McA. Pat. Cas. 173; Justice v. Jones, 14 F. Cas. No. 7,588, McA. Pat. Cas. 635. (2) But such time was not extended or suspended by the filing of a motion for a rehearing Ex p. Linton, 15 F. Cas. No. 8,378; Ross v. Loewer, 9 App. (D. C.) 563. (3) Enlargement could be presumed by the court where the appeal in an interference case was regular, but the reasons of appeal were not filed until a short time after the time limited. Blackinton v. Douglass, 3 F. Cas. No. 1,470, McA. Pat. Cas. 622.

25. Schmidt v. Tait, 42 App. (D. C.) 227.

26. Schmidt v. Tait, supra.

[a] **Appeals beyond the time fixed** were dismissed under prior statutes and rules. In re Messinger, 12 App. (D. C.) 523; Ross v. Loewer, 9 App. (D. C.) 563; Hein v. Pungs, 9 App. (D. C.) 492; In re Bryant, 9 App. (D. C.) 447

27. See Appeal and Error §§ 2465–3092.

28. See cases infra this note.

[a] **On the question of usefulness and cost of an invention,** it has been held that the testimony of machinists and manufacturers having practical knowledge of the subject matter is of greater weight than the opinion of the commissioner of patents. Ex p. Arthur, 1 F. Cas. No. 563a.

[b] **Burden of proof.**—In re Duncan, 28 App (D. C.) 457.

[c] **Harmless error.**—In re Nathan, 51 App. (D. C.) 347, 279 Fed. 925; Swinglehurst v. Ballard, 49 App. (D. C.) 73, 258 Fed. 973.

29. U. S. Rev. St. § 4913, as amended by Act of March 2, 1927 (44 St. at L. 1335 c 273).

30. U. S. Rev. St. § 4914.

31. In re Boughton, 3 F. Cas. No. 1,696, McA. Pat. Cas. 278; Ex p. Sanders, 21 F. Cas. No. 12,292.

[a] **Affidavits not authorized or used by commissioner.**—The appellate court cannot take judicial notice of affidavits sent up from the patent office with the other papers in the case, where those affidavits were not taken with the authority of the commissioner, or acted upon by him in forming his decision. In re Jackson, 13 F. Cas. No. 7,126, McA. Pat. Cas. 485.

32. Lowrie v. Taylor, 27 App. (D. C.) 522.

33. Lautenschlager v. Glass, 47 App. (D. C.) 443.

34. Jones v. Starr, 26 App. (D. C.) 64.

35. Perry v. Cornell. 19 F. Cas. No. 11,001, Cranch Pat. Dec. 130, McA. Pat. Cas. 66.

[a] **Under a prior statute,** Act March 3, 1839 § 11, the commissioner and examiners could be examined orally by the court in explanation of the principles of the invention. Richardson v. Hicks, 20 F. Cas. No. 11,783, McA. Pat. Cas. 335; In re Seely, 21 F. Cas. No. 12,632, McA. Pat. Cas. 248.

[b] **In Australia,** where an applicant for a patent applies to the high court for an indulgence on notice to the commissioner of patents, it is the duty of the commissioner to attend the hearing, and applicant, whether he is or is not successful, must pay the costs of the commissioner. In re Stanley, 5 Austr. C. L. R. 508.

36. Peckham v. Price, 26 App. (D. C.) 556.

37. U. S. Rev. St. § 4911, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273)

Remedy in equity on refusal of patent see infra §§ 243–252

38. Decisions reviewable see supra §§ 226, 227.

On such appeal the appellate court is limited in its revision to the points involved in the reasons of appeal.[39] It has no power to consider points or objections which were not properly raised and reserved in the patent office,[40] or which are not included in the notice and reasons of appeal.[41] A ruling of the patent office from which no appeal is taken cannot be disregarded on an appeal from another ruling in the case.[42]

[§ 234] **(b) In Interference Proceedings.** The jurisdiction of the court of appeals on appeal from a decision in an interference proceeding is limited to the determination of priority,[43] and it need not decide whether either party shall receive a patent.[44] In passing on the issue of priority the court will consider only objections and questions that were properly raised and reserved in the patent office and included in the reasons of appeal,[45] unless the question or objection is a jurisdictional one.[46]

Particular objections or questions. Unless the ruling thereon is clearly erroneous, the appellate court will not consider or disturb the rulings of the patent office on the question of the operativeness of the device;[47] or the question of the patentability of the invention;[48] or whether the statutory bar of public use exists.[49]

Right to make claim. A decision sustaining a party's right to make a claim, in interference, is not appealable;[50] but where an interference is declared, the right of either party to make the claims of the issue may be considered, on appeal, as an ancillary question,[51] provided he filed, in the patent office, a motion to dissolve or showed good reasons why he failed to do so.[52]

Identity of invention. The question of identity of the invention ordinarily will not be reviewed by the appellate court,[53] except in extreme cases,[54] where such question was raised in the patent office by a motion to dissolve the interference.[55]

[§ 235] **f. Determination and Disposition of Case—(1) In General.** It is the duty of the appellate court to determine the merits of an appeal from a decision of the patent office;[56] and in a proper case it may tax the costs against one of the parties.[57] It should not disturb decisions, within the discretionary powers of the patent office, on questions of fact,[58]

39. In re Aiken, 1 F. Cas. No. 107, McA. Pat. Cas. 126; Arnold v. Bishop, 1 F. Cas. No. 553, Cranch Pat. Dec. 109, McA. Pat. Cas. 36; Burlew v. O'Neil, 4 F. Cas. No. 2,167, McA. Pat. Cas. 168; In re Conklin, 8 D. C. 375.

40. Allen v. Alter, 1 F. Cas. No. 212; In re Bishop, 3 F. Cas. No. 1,439, McA. Pat. Cas. 519; Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493; In re Jewett, 13 F. Cas. No. 7,308, McA. Pat. Cas. 259; Smith v. Flickenger, 22 F. Cas. No. 13,047, Cranch Pat. Dec. 116, McA. Pat. Cas. 46; In re Winslow, 30 F. Cas. No. 17,879, McA. Pat. Cas. 123; In re Hutter, 55 App. (D. C.) 210, 4 F. (2d) 176; Harbridge v. Perrin, 54 App. (D. C.) 106, 295 Fed. 927 [certiorari den 264 U. S. 597 mem. 44 SCt 454 mem, 68 L. ed. 868 mem]; Parker's Application, 53 App. (D. C.) 209, 289 Fed. 607; Eiermann's Application, 53 App. (D. C.) 39, 287 Fed. 1016; In re Cranmer, 52 App. (D. C.) 257, 285 Fed. 991; In re Shollenberger, 51 App. (D. C.) 332, 279 Fed. 314; Field v. Coleman, 40 App. (D. C.) 598; In re Heinz, 34 App. (D. C.) 187; Moore v. Heany, 34 App. (D. C.) 31; LeCroix v. Tyberg, 33 App. (D. C.) 586; In re Garrett, 27 App. (D. C.) 19; Colhoun v. Hodgson, 5 App. (D. C.) 21.

41. In re Jewett, 13 F. Cas. No. 7,308, McA. Pat. Cas. 259; Sturtevant v. Greenough, 23 F. Cas. No. 13,579; Harbridge v. Perrin, 54 App. (D. C.) 106, 295 Fed. 927 [certiorari den 264 U. S. 597 mem, 44 SCt 454 mem, 68 L. ed. 868 mem]; Wickers v. McKee, 29 App. (D. C.) 25.

42. Brenzinger v. Thornburgh, 52 App. (D. C.) 298, 286 Fed. 637

43. Taggart v. Shilstone, 55 App. (D. C.) 154, 3 F. (2d) 95; Prichard v. Setzler, 54 App. (D. C.) 266, 296 Fed. 1013; Wintroath v. Chapman, 47 App (D. C.) 428 [rev on other grounds 252 U. S. 126, 40 SCt 234, 64 L. ed. 491]; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem].

[a] **Party entitled to award of priority.**—Kirby v. Replogle, 50 App. (D. C.) 212, 269 Fed. 864.

Decisions appealable generally see supra § 229.

44. Lovering v. Dutcher, 15 F. Cas. No. 8,533, 2 Hayw. & H. 367; Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem]. Contra Bain v. Morse, 2 F. Cas. No. 754, McA. Pat. Cas. 90.

45. Fish v. Dyson, 55 App. (D. C.) 209, 4 F. (2d) 175; Field v. Colman, 40 App. (D. C.) 598; Bower v. Gray, 40 App. (D. C.) 483; Leonard v. Horton, 40 App. (D. C.) 22; Sanders v. Emerson, 37 App. (D. C.) 598; Lindstrom v. Ames, 37 App. (D. C.) 365; Bechman v. Southgate, 28 App. (D. C.) 405; Jones v. Starr, 26 App. (D. C.) 64.

46. Sundstrand v. Gubelmann, 55 App. (D. C.) 200, 4 F. (2d) 166.

[a] **Illustration.**—The junior party, appealing from a decision awarding priority to the senior party, can rely on the senior party's failure to show that his failure to copy claims from the junior party's patent within two years from issuance thereof was due to special circumstances justifying delay, although the question was not raised below, since the showing of special circumstances justifying such delay is jurisdictional. Sundstrand v. Gubelmann, 55 App. (D. C.) 200, 4 F. (2d) 166.

47. Lee v. Vreeland, 55 App. (D. C.) 289, 4 F. (2d) 956; Wright v. Halle, 50 App. (D. C.) 391, 273 Fed. 355; Cheatham v. Collins, 43 App. (D. C.) 16; Field v. Colman, 40 App. (D. C.) 598; Duryea v. Rice, 28 App. (D. C.) 423.

48. Scott v. Weiss, 25 F. (2d) 924; Matthews v. Wade, 16 F. Cas. No. 9,292, McA. Pat. Cas. 143; Stone v. Pupin, 100 Off. Gaz. (U. S.) 1113; Melling v. Gordon, 55 App. (D. C.) 278, 4 F. (2d) 945; Taggart v. Shilstone, 55 App. (D. C.) 154, 3 F. (2d) 95; Prichard v. Setzler, 54 App. (D. C.) 266, 296 Fed. 1013; Snelling v. Whitehead, 50 App. (D. C.) 196, 269 Fed. 712; Lautenschlager v. Glass, 47 App. (D. C.) 444; Elsom v. Bonner, 46 App. (D. C.) 230; Hathaway v. Colman, 46 App. (D. C.) 40; Slingluff v. Sweet, 45 App. (D. C.) 302; Griffin v. Young, 44 App. (D. C.) 210; Gammeter v. Thropp, 42 App. (D. C.) 564; Wilson v. Ellis, 42 App. (D. C.) 555; Barber v. Spalckhaver, 41 App. (D. C.) 576; In re Merrill, 41 App. (D. C.) 294; Rice v. Schutte, 38 App. (D. C.) 175; LeCroix v. Tyberg, 33 App. (D. C.) 586; In re Luten, 32 App. (D. C.) 599; Mell v. Midgley, 31 App. (D. C.) 534; Dunbar v. Schellenger, 29 App. (D. C.) 129; Johnson v. Mueser, 29 App. (D. C.) 61; Blackford v. Wilder, 28 App. (D. C.) 535 [certiorari den 205 U. S. 541 mem, 27 SCt 788 mem, 51 L. ed. 922 mem]; Potter v. McIntosh, 28 App. (D. C.) 510; Kreag v. Geen, 28 App. (D. C.) 437; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem]; Orcutt v. McDonald, 27 App. (D. C.) 228; Hillard v. Brooks, 23 App. (D. C.) 526; Ostergren v. Tripler, 17 App. (D. C.) 557; Schupphaus v. Stevens, 17 App. (D. C.) 548; Tyler v. St. Amand, 17 App. (D. C.) 464; Latham v. Armat, 17 App. (D. C.) 345; Newton v. Woodward, 17 App. (D. C.) 34; Westinghouse v. Duncan, 2 App. (D. C.) 131. Contra Burrows v. Wetherill, 4 F. Cas. No. 2,208, McA. Pat. Cas. 315; Jones v. Wetherill, 13 F. Cas. No. 7,508, McA. Pat. Cas. 409; Yearsley v. Brookfield, 30 F. Cas. No. 18,131, McA. Pat. Cas. 193.

[a] **Decision of the law examiner** as to the patentability of the issue is controlling on appeal in an interference proceeding. Langmuir v. Arnold, 56 App. (D. C.) 6, 6 F. (2d) 704.

49. Lecroix v. Tyberg, 33 App. (D. C.) 586; Burson v. Vogel, 29 App. (D. C.) 388 [certiorari den 207 U. S. 585 mem, 28 SCt 254 mem, 52 L. ed. 352 mem].

[a] **As to reissue.**—Norling v. Hayes, 37 App. (D. C.) 169.

50. See supra § 229.

51. Cosper v. Gold, 36 App. (D. C.) 302; Skinner v. Carpenter, 36 App. (D. C.) 178; In re Fullagar, 32 App. (D. C.) 222; U. S. v. Moore, 30 App. (D. C.) 464; Podlesak v. McInnerney, 26 App. (D. C.) 399.

52. Ball v. Barnhurst, 50 App. (D. C.) 257, 270 Fed. 693; Broadwell v. Long, 36 App. (D. C.) 418.

53. Lecroix v. Tyberg, 33 App. (D. C.) 586; Bechman v. Southgate, 28 App. (D. C.) 405; Parkes v. Lewis, 28 App. (D. C.) 1; Seeberger v. Dodge, 24 App. (D. C.) 476.

54. MacMulkin v. Bollee, 30 App. (D. C.) 112; Bechman v. Southgate, 28 App. (D. C.) 405.

55. Manly v. Williams, 37 App. (D. C.) 194; Lecroix v. Tyberg, 33 App. (D. C.) 586; McFarland v. Watson, 33 App. (D. C.) 445; Cutler v. Leonard, 31 App. (D. C.) 297.

56. Bungay v. Grey, 52 App. (D. C.) 63, 281 Fed. 423.

57. Chubb v. Short, 24 F. (2d) 469.

[a] **In Australia** the costs of an appeal to the high court from the decision of the commissioner are in the discretion of the court. McDonald v. Patents Comr., 15 Austr. C. L. R. 713.

Costs on appeal or error generally see Costs §§ 594-727.

58. Steele v. Chubb, 24 F. (2d) 468; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Curtis' Application, 52 App. (D. C.) 277, 285 Fed. 1011; In re Carroll, 51 App. (D. C.) 226, 277

except where palpable error has been committed.[59] But nevertheless the court is not bound by the conclusions drawn from such facts, unless convinced that such conclusions are correct;[60] and if it is apparent that the patent office tribunals are not in harmony upon controlling questions involved, or if the court is satisfied that an incorrect conclusion has been reached, it may consider the case afresh.[61] Where the facts on a particular issue are admitted, the question becomes one of law, and is not governed by the same rule applicable to cases where it is sought to review the exercise of discretion on the part of the patent office.[62]

Erroneous opinion. If the decision of the patent office is correct, the fact that its opinion is erroneous is immaterial.[63]

One claim covering invention. Where one claim out of a number erroneously rejected by the patent office completely covers applicant's invention, the rejection of the other claims will be affirmed to avoid inviting controversy and litigation.[64]

Former decision adhered to. A decision by the court in a former proceeding, based upon a party's own conduct, will be adhered to by the court in a subsequent proceeding involving the same application and the same exhibit and reduction to practice, although the testimony is somewhat different.[65] But the contention in an interference proceeding that the decision in an earlier proceeding was res judicata came too late, when not made in the patent office but first made in the court of appeals.[66]

[§ 236] **(2) Concurrent Decisions.** Concurrent decisions of the patent office tribunals on questions of fact in interference proceedings are entitled to very great weight and respect in the appellate court,[67] and carry a very strong presumption of their correctness;[68] but, if material error is made to appear, it is the duty of the court to correct it, and enter judgment accordingly.[69] Accordingly the court of appeals will affirm and not disturb decisions, concurred in by all the tribunals of the patent office, on questions of fact,[70] such as awarding priority of invention to one of the parties,[71] unless it is clearly and affirmatively made to appear that the decision

Fed. 861; Bonine v. Bliss, 49 App. (D. C.) 93, 259 Fed. 989; Greenawalt v. Dwight, 49 App. (D. C.) 82, 258 Fed. 982; In re Eckroad, 48 App. (D. C.) 593; Gammeter v. Lister, 48 App. (D. C.) 145; In re Lindau, 46 App. (D. C.) 148; Pierman v. Chisholm, 44 App. (D. C.) 460; Cheatham v. Collins, 43 App. (D. C.) 16; Gammeter v. Thropp, 42 App. (D. C.) 564; Lorimer v. Keith, 41 App. (D. C.) 562; Barcley v. Schuler, 41 App. (D. C.) 250; Benners v. Richards, 39 App. (D. C.) 553; Re Hodkinson, 39 App. (D. C.) 155; Brewer v. Whitney, 38 App. (D. C.) 273; In re Luten, 37 App. (D. C.) 379; McIntyre v. Perry, 37 App. (D. C.) 372; In re Cottrell, 37 App. (D. C.) 370; Griffith v. Braine, 36 App. (D. C.) 538; Swartwout v. Barnes, 36 App. (D. C.) 129; In re McElroy, 36 App. (D. C.) 93; Arbetter v. Lewis, 34 App. (D. C.) 491; Durkee v. Winquist, 31 App. (D. C.) 248; MacMulkin v. Bollee, 30 App. (D. C.) 112; Dunbar v. Schellenger, 29 App. (D. C.) 129; Davis v. Garrett, 28 App. (D. C.) 9; O'Connell v. Schmidt, 27 App. (D. C.) 77; Tyler v. St. Amand. 17 App. (D. C.) 464; McBerty v. Cook, 16 App. (D. C.) 133; In re Cheneau, 5 App. (D. C.) 197.

59. Benners v. Richards, 39 App. (D. C.) 553; In re Moore, 38 App. (D. C.) 276; In re Luten, 32 App. (D. C.) 599; O'Connell v. Schmidt, 27 App. (D. C.) 77; Podlesak v. McInnerney, 26 App. (D. C.) 399; Shellaberger v. Sommer, 8 App. (D. C.) 3. And see cases supra note 58.

60. Derr v. Gleason, 49 App. (D. C.) 69, 258 Fed. 969; O'Connell v. Schmidt, 27 App. (D. C.) 77.

61. Arbetter v. Lewis, 34 App. (D. C.) 491.

62. In re Selden, 36 App. (D. C.) 428.

63. In re Aiken, 1 F. Cas. No. 107, McA. Pat. Cas. 126; In re Crooker, 6 F. Cas. No. 3,414, McA. Pat. Cas. 134; Ex p. Spence, 22 F. Cas. No. 13,228.

64. In re Prescott, 51 App. (D. C.) 281, 278 Fed. 590.

65. Bijur v. Kennington, 51 App. (D. C.) 230, 278 Fed. 313.

66. Goodrum v. Clement, 51 App. (D. C.) 184, 277 Fed. 586, 279 Fed. 304.

67. Downs v. Andrews, 26 F. (2d) 522; Olm v. Cather, 57 App. (D. C.) 91, 17 F. (2d) 679; Bungay v. Grey, 52 App. (D. C.) 63, 281 Fed. 423; Healey v. Inwood, 38 App. (D. C.) 78.

[a] **Thus,** where the question whether drawings of the senior party in interference proceedings, in connection with the statements in the specifications, disclosed the claims in issue was very close and its determination required a thorough knowledge of drawings, supplemented by the ability to apply specifications to drawings, as to which the patent office tribunals were experts, their judgment is entitled to great weight. Chalman v. De Voe, 51 App. (D. C.) 276, 278 Fed. 585.

68. Oldroyd v. Morgan, 24 F. (2d) 1004; Llewellyn v. Upson, 45 App. (D. C.) 17; Hubbard v. Berg, 40 App. (D. C.) 577; Kruh v. Thomas, 38 App. (D. C.) 337; Cosper v. Gold, 36 App. (D. C.) 302; Goldberg v. Halle, 34 App. (D. C.) 183; Gold v. Gold, 34 App. (D. C.) 152.

[a] **Presumption of performance of duty.**—If a party to an interference proceeding had moved in time before the examiner of interferences for leave to amend, by substituting an earlier application for the one in interference, it must be assumed that the examiner would have performed his duty and allowed the amendment. In re Dement, 49 App. (D. C.) 261, 263 Fed. 813 [certiorari den 254 U. S. 630 mem, 41 SCt 7 mem, 65 L. ed. 447 mem].

69. Olm v. Cather, 57 App. (D. C.) 91, 17 F. (2d) 679.

70. Jones v. Midgley, 55 App. (D. C.) 287, 4 F. (2d) 954; Harbridge v. Perrin, 54 App. (D. C.) 106, 295 Fed. 927 [certiorari den 264 U. S. 597 mem, 44 SCt 454 mem, 68 L. ed. 868 mem]; Dennis v. Karns, 54 App. (D. C.) 93, 295 Fed. 234; Mock v. Johnson, 52 App. (D. C.) 300, 286 Fed. 639; Rosen v. Terry, 52 App. (D. C.) 282, 285 Fed. 1016; Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587; Clark v. Buffum, 51 App. (D. C.) 212, 277 Fed. 611; Anglada v. Moyer, 50 App. (D. C.) 395, 273 Fed. 359; Dunham v. Dyson, 50 App. (D. C.) 338, 272 Fed. 206; Massey v. Ridge, 50 App. (D. C.) 271, 270 Fed. 879; Ball v. Barnhurst, 50 App. (D. C.) 257, 270 Fed. 693; Steubing v. Hennessy, 50 App. (D. C.) 203, 269 Fed. 719; Dutcher v. Jackson, 50 App. (D. C.) 172, 269 Fed. 688; Allen v. Hill, 50 App. (D. C.) 255, 270 Fed. 691; Blaine v. White, 50 App. (D. C.) 38, 267 Fed. 340; Kennicott v. Caps, 49 App. (D. C.) 187, 262 Fed. 641; Erickson v. Dyson, 49 App. (D. C.) 86, 258 Fed. 986; Hadley v. Ellis, 49 App. (D. C.) 84, 258 Fed. 984; Greenawalt v. Dwight, 49 App. (D. C.) 82, 258 Fed. 982; Swinglehurst v. Ballard, 49 App. (D. C.) 73, 258 Fed. 973; Field v. Rugh, 48 App. (D. C.) 589; Fieux v. Coppus, 48 App. (D. C.) 422; Knudsen v. Fitzgerald, 48 App. (D. C.) 236; Luellen v. House, 48 App. (D. C.) 218; Rees v. White, 48 App. (D. C.) 149; Creveling v. Jepson, 47 App. (D. C.) 597; Malcom v. Richards, 47 App. (D. C.) 582; Jobski v. Johnson, 47 App. (D. C.) 230; Becker v. Bird, 44 App. (D. C.) 432; Hubbard v. Berg, 40 App. (D. C.) 577; Grabowsky v. Gallaher, 39 App. (D. C.) 548; Hewitt v. Weintraub, 38 App. (D. C.) 548; Thomas v. Weintraub, 38 App. (D. C.) 281; Weintraub v. Hewitt, 38 App. (D. C.) 82; Healey v. Inwood, 38 App. (D. C.) 78; McIntyre v. Perry, 37 App. (D. C.) 372; In re Gold, 34 App. (D. C.) 239; Gold v. Gold, 34 App. (D. C.) 229; In re Blackmore, 33 App. (D. C.) 434; Lindmark v. Hodgkinson, 31 App. (D. C.) 612; Richards v. Burkholder, 29 App. (D. C.) 485; In re Wickers, 29 App. (D. C.) 71; Wickers v. McKee, 29 App. (D. C.) 4; Parkes v. Lewis, 28 App. (D. C.) 1; Bourn v. Hill, 27 App. (D. C.) 291; Orcutt v. McDonald, 27 App. (D. C.) 228; Fowler v. McBerty, 27 App. (D. C.) 41, 46; Ball v. Flora, 26 App. (D. C.) 394; Flora v. Powrie, 23 App. (D. C.) 195; Talbott v. Monell, 23 App. (D. C.) 108; Cobb v. Goebel, 23 App. (D. C.) 75; Rosell v. Allen, 16 App. (D. C.) 559; In re Beswick, 16 App. (D. C.) 345; In re Fay, 15 App. (D. C.) 515; Fowler v. Dodge, 14 App. (D. C.) 477; In re Barratt, 14 App. (D. C.) 255; In re Smith, 14 App. (D. C.) 181; Glenn v. Adams, 12 App. (D. C.) 175; In re Barratt, 11 App. (D. C.) 177.

[a] **Modification of ruling.**—Creveling v. Jepson, 47 App. (D. C.) 597.

71. Oldroyd v. Morgan, 24 F. (2d) 1004; Leonard v. Everett, 52 App. (D. C.) 90, 281 Fed. 594; Convery v. Brucker, 51 App. (D. C.) 306, 278 Fed. 1019; Clement v. McQuarrie, 51 App. (D. C.) 278, 278 Fed. 587; Chalman v. De Voe, 51 App. (D. C.) 276, 278 Fed. 585; Bijur v. Kennington, 51 App. (D. C.) 230, 278 Fed. 313; Ruth v. Groch, 51 App. (D. C.) 226, 277 Fed. 861; Valerius v. Pfouts, 50 App. (D. C.) 394, 273 Fed. 358; Thomson v. Pearsons, 50 App. (D. C.) 273, 270 Fed. 1013; Kitselman v. Reid, 49 App. (D. C.) 378, 266 Fed. 256; Maremont v. Olson, 49 App. (D. C.) 369, 265 Fed. 1009; Brown v. Tomlinson, 49 App. (D. C.) 310, 265 Fed. 460; Shenk v. Clark, 49 App. (D. C.) 249, 263 Fed. 645; Hopkins v. Riegger, 49 App. (D. C.) 188, 262 Fed. 642; Kennicott v. Caps, 49 App. (D. C.) 187, 262 Fed. 641; Bonine v. Bliss, 49 App. (D. C.) 93, 259 Fed. 989; Hughes v. Humason, 48 App. (D. C.) 223; Jobski v. Johnson, 47 App. (D. C.) 230; Porter v. Rider, 46 App. (D. C.) 294; Le Compte v. Adams, 42 App. (D. C.) 595; Bolin v. Slingluff, 39 App. (D. C.) 134; Williams v. Barnes, 39 App. (D. C.) 120; Churchill v. Goodwin, 32 App. (D. C.) 428; Bossart v. Pohl, 31 App. (D. C.) 218; Ries v. Kirkegaard, 30 App. (D. C.) 199. And see cases supra note 70.

was the result of material error,[72] the burden of making such showing being heavily upon appellant.[73] This rule is especially applicable where the case presented involves subject matter of a complicated and highly technical nature, upon which the experts of the patent office are less likely to err than the court.[74] It has been held that such a decision will not be reversed on any mere question of doubt, whether it be correct or not;[75] but that a conviction beyond a reasonable doubt that it is erroneous is necessary to justify a reversal;[76] and where the court is so convinced that error has occurred, it is its duty to reverse the decision.[77]

Rule not applicable. The rule, however, that the court will hesitate to disturb concurrent decisions of the patent office does not apply, where the different tribunals do not agree on the facts, or the conclusions to be drawn therefrom, although all award priority to the same party.[78]

[§ 237] **g. Decision and Return of Proceedings.** A decision by the court of appeals in an interference proceeding is not necessarily conclusive as to claims of the respective parties which were not put in issue,[79] but is conclusive upon every question which was or might have been presented and determined therein.[80]

Remanding case. In a proper case the appellate court may remand the case to the patent office for further proceedings in accordance with its decision,[81] but it has no power to send the case back to take further proofs.[82]

Return of proceedings. After hearing the case the court is required to return to the commissioner a certificate of its proceedings and decision, and the further proceedings in the case are governed thereby.[83]

[§ 238] **13. Caveats.**[84] The practice of filing a caveat no longer prevails in this country, the statute providing therefor having been repealed.[85] Under the statute as it existed before repeal,[86] any person, who made a new invention or discovery, in order to protect himself and prevent a patent from being issued for the same device to another person until the caveator had an opportunity to complete and establish his priority of invention, could file in the patent office a caveat describing his invention and praying protection until it could be matured.[87] Such caveat

72. Langmuir v. Arnold, 56 App. (D. C.) 6, 6 F. (2d) 704; Takamine v. Kohman, 54 App. (D. C.) 274, 296 Fed. 1021; Bungay v. Grey, 52 App. (D. C.) 63, 281 Fed. 423; Goodrum v. Clement, 51 App. (D. C.) 184, 279 Fed. 304, 277 Fed. 586; Anglada v. Moyer, 50 App. (D. C.) 395, 273 Fed. 359; Blaine v. White, 50 App. (D. C.) 38, 267 Fed. 340; Derr v. Gleason, 49 App. (D. C.) 69, 258 Fed. 969; Russell v. Robertson, 48 App. (D. C.) 579; Nicoll v. Hoey, 48 App. (D. C.) 245; Luellen v. House, 48 App. (D. C.) 218; Creveling v. Jepson, 47 App. (D. C.) 597; Malcom v. Richards, 47 App. (D. C.) 582; In re Kohler, 47 App. (D. C.) 373; Healey v. Inwood, 38 App. (D. C.) 78; Arbetter v. Lewis, 34 App. (D. C.) 491; Duff v. Latshaw, 31 App. (D. C.) 235; Richards v. Burkholder, 29 App. (D. C.) 485; Kilbourn v. Hirner, 29 App. (D. C.) 54; Sobey v. Holsclaw, 28 App. (D. C.) 65 [certiorari den 203 U. S. 594 mem, 27 SCt 783 mem, 51 L. ed. 332 mem]; Parkes v. Lewis, 28 App. (D. C.) 1; Orcutt v. McDonald, 27 App. (D. C.) 228; Fowler v. McBerty, 27 App. (D. C.) 41; Hien v. Buhoup, 11 App. (D. C.) 293. And see cases supra notes 70, 71.

[a] **Overruling.**—While, ordinarily, much weight is accorded concurrent decisions of the patent office, they will be overruled, where the court is convinced that an incorrect conclusion was reached. Derr v. Gleason, 49 App. (D. C.) 69, 258 Fed. 969.

73. Swain v. Booth, 54 App. (D. C.) 95, 295 Fed. 236; Dowell v. Doman, 51 App. (D. C.) 375, 279 Fed. 1013; Nicoll v. Hoey, 48 App. (D. C.) 245; Lautenschlager v. Glass, 47 App. (D. C.) 443; In re Kohler, 47 App. (D. C.) 373; Becker v. Bird, 44 App. (D. C.) 432; Le Compte v. Adams, 42 App. (D. C.) 595; Henderson v. Gilpin, 39 App. (D. C.) 428; In re Gold, 38 App. (D. C.) 544; Ruping v. Lowry, 37 App. (D. C.) 311; Woodbridge v. Winship, 33 App. (D. C.) 490; Daggett v. Kaufmann, 33 App. (D. C.) 450; Onderdonk v. Parkes, 31 App. (D. C.) 214; Dunbar v. Schellenger, 29 App. (D. C.) 129; Johnson v. Mueser, 29 App. (D. C.) 61; Wickers v. McKee, 29 App. (D. C.) 4; In re Clunies, 28 App. (D. C.) 18; Parkes v. Lewis, 28 App. (D. C.) 1; Bourn v. Hill, 27 App. (D. C.) 291; Ball v. Flora, 26 App. (D. C.) 394; In re Adams, 24 App. (D. C.) 275.

74. Downs v. Andrews, 26 F. (2d) 522; White v. Hartley, 56 App. (D. C.) 109, 10 F. (2d) 904; De Forest v. Hartley, 56 App. (D. C.) 106, 10 F. (2d) 901; Chalman v. De Voe, 51 App. (D. C.) 276, 278 Fed. 585; Wahl v. Wright, 51 App. (D. C.) 38, 273 Fed. 766; Creveling v. Jepson, 47 App. (D. C.) 597; Hathaway v. Colman, 46 App. (D. C.) 40; Hewitt v. Weintraub, 38 App. (D. C.) 548; Kruh v. Thomas, 38 App. (D. C.) 337; Thomas v. Weintraub, 38 App. (D. C.) 281; Weintraub v. Hewitt, 38 App. (D. C.) 82; Healey v. Inwood, 38 App. (D. C.) 78; In re Gold, 34 App. (D. C.) 239; Gold v. Gold, 34 App. (D. C.) 229; Lindmark v. Hodgkinson, 31 App. (D. C.) 612.

75. Ex p. Allen, 1 F. Cas. No. 207b; Ladoff v. Dempster, 36 App. (D. C.) 520; Munster v. Ashworth, 29 App. (D. C.) 84; Orcutt v. McDonald, 27 App. (D. C.) 228.

Doubt resolved in favor of applicant see supra § 178.

76. In re Schraubstadter, 26 App. (D. C.) 331; Glenn v. Adams, 12 App. (D. C.) 175; Arnold v. Tyler, 10 App. (D. C.) 175; Hisey v. Peters, 6 App. (D. C.) 68.

77. Seymour v. Molyneux, 49 App. (D. C.) 216, 263 Fed. 468.

78. Laughlin v. Burry, 50 App. (D. C.) 273, 270 Fed. 1013. But see Taylor v. Lowrie, 27 App. (D. C.) 527 (holding that, where the question involved was whether one of the parties reduced to practice prior to the date of conception by his adversary, and the examiners-in-chief of the patent office awarded him priority on the ground that he had done so, while the commissioner's decision in his favor was based upon the ground that he had secured a design patent two days prior to the date of conception by the other party, and the court of appeals affirmed the decision of the commissioner, basing its decision on the ground assigned by the examiners-in-chief, although agreeing with the commissioner that the issue of a design patent entitled the patentee to judgment in the interference).

79. Clements v. Kirby, 274 Fed. 575; In re Mattullath, 46 App. (D. C.) 143.

80. Blackford v. Wilder, 28 App. (D. C.) 525 [certiorari den 205 U. S. 541 mem, 27 SCt 788 mem, 51 L. ed. 922 mem].

81. Phillips v. Sensenich, 31 App. (D. C.) 159.

[a] **Although of opinion that error has been committed,** the court may refuse to hold that there is no interference in fact, and may send the case back to the patent office for further consideration. Podlesak v. McInnerney, 26 App. (D. C.) 399.

[b] **Remand of case for amendment.**—If a claim is broader than the invention, the appellate court may remand the case to the commissioner with instructions to allow the amendment of the specifications by narrowing the claim to that which, in the opinion of the office and the judgment of the appellate court, is considered as patentable. Collins v. White, 6 F. Cas. No. 3,019.

[c] **In Australia,** under Patents Act (1903–1909) § 47 which gives the high court power on an appeal from the commissioner of patents to decide "whether and subject to what conditions, if any, the application and specification shall be accepted," the court may make a verbal alteration of the specification, which is necessary to give effect to its real meaning, a condition of the grant of a patent. Broadbent v. Davies, 21 Austr. C. L. R. 253.

82. Ex p. Sanders, 21 F. Cas. No. 12,292; Blackford v. Wilder, 104 Off. Gaz. (U. S.) 580; De Ferranti v. Lindmark, 32 App. (D. C.) 6.

83. U. S. Rev. St. § 4914.

[a] **Further proceedings held proper.**—(1) Declaration of another interference. Potter v. Dixon, 19 F. Cas. No. 11,325, 5 Blatchf. 160, 2 Fish. Pat. Cas. 381. (2) Rejection of application. Arnold v. Bishop, 1 F. Cas. No. 553, Cranch Pat. Dec. 109, McA. Pat. Cas. 36. (3) Where the decision is reversed and the case is remanded for further proceeding, and without any decision on the merits of the question, but because of an error in the omission of testimony before the commissioner, the latter is not under obligation to grant appellant a patent, but may proceed to grant a rehearing, order the testimony to be taken anew, and found his decision on such rehearing. Nichols v. Harris, 18 F. Cas. No. 10,244, McA. Pat. Cas. 362.

84. **"Caveat" defined generally** see 11 C. J. p 42.

85. Act June 5, 1910 c 414 § 1 (repealing U. S. Rev. St. 4902, as amended by Act of March 3, 1903, 32 St. at L. 1227 c 1019 § 4).

[a] **In England** (1) a caveat is simply opposition at any stage to the grant of a patent to another. In re Johnson, 13 Ch. D. 398 note; In re Somerset, 13 Ch. D. 397. (2) It entitles the caveator to notice. Reg. v. Cutler, 14 Q. B. 372 note, 68 ECL 373, 117 Reprint 147, 1 Starke 354, 2 ECL 138, 171 Reprint 495; Matter of Fawcett, 2 De G. M. & G. 439, 51 Eng Ch 344, 42 Reprint 942.

86. U. S. Rev. St. § 4002, as amended by Act of March 3, 1903 (32 St. at L. 1227 c 1019) § 4.

87. Allen v. Hunter, 1 F. Cas. No.

was usually, but not necessarily, the record of an incomplete invention,[88] and entitled the one filing it to notice from the patent office if anyone filed an application for the same thing within the life of the caveat which was one year;[89] but it did not entitle him to notice of applications filed previously or subsequently,[90] and did not operate as a substitute for diligence in reducing the invention to practice.[91]

[§ 239] **14. Secrecy of Application.** A rule of the patent office that pending applications for patents are preserved in secrecy by the patent office[92] is binding in the patent office,[93] but is not applicable to the investigation of causes by the courts;[94] and it has been held that this "rule of secrecy" is unwarranted and invalid as being inconsistent with the statutory provision[95] which permits any person to apply for and obtain copies of any of the records, papers, etc., of the patent office.[96]

[§ 240] **15. Right To Inspect and Obtain Copies of Records.** Under the statutes and rules of the patent office the records, models, etc., of the patent office pertaining to patents granted may be inspected by a prospective applicant for a patent, or by his attorney;[97] and anyone making a proper application therefor and paying the fees provided by law may obtain certified copies of all public records of the patent office;[98] but he cannot obtain copies of pending applications to which he is not a party except upon a proper showing made to the commissioner of the right to, and necessity for, the copies or upon the order of a competent court.[99]

[§ 241] **16. Copies of Records as Evidence.** Certified copies of records, books, papers, or drawings belonging to the patent office are received as evidence in all cases where the originals could be evidence,[1] in proof of facts pertinent to the issues in a case,[2] and certified copies of the specifications and drawings of foreign letters patent in the United States patent office constitute prima facie evidence of the fact of the granting of such letters patent and of the date and contents thereof.[3]

Of assignments. Although, under earlier statutes which required the assignment of a patent to be recorded in the patent office, a certified copy of such record could be received in evidence in place of the original instrument,[4] under the later statute, which leaves the recording of the assignment optional to the assignee,[5] such a certified copy, if standing alone and seasonably and properly objected to, is not admissible as primary evidence of the assignment,[6] and is admissible to prove title to a patent only where the proper foundation therefor is laid by showing the existence of the original instrument and that it is lost or destroyed,[7] or that it is out of complainant's

225, 6 McLean 303; Cochrane v. Waterman, 5 F. Cas. No. 2,929, Cranch Pat. Dec. 131, McA. Pat. Cas. 52.

[a] **Cases construing former statute.**—(1) In general. Ex p. Woodruff, 30 F. Cas. No. 17,989. (2) As to sufficiency of caveat. Electric R. Co. v. Jamaica, etc., R. Co., 61 Fed. 655; Hoe v. Kahler, 12 Fed. 111, 20 Blatchf. 430; Robertson v. Secombe Mfg. Co., 20 F. Cas. No. 11,928, 10 Blatchf. 481, 6 Fish. Pat. Cas. 268. (3) As to failure to file caveat while maturing invention. Heath v. Hildreth, 11 F. Cas. No. 6,309, Cranch Pat. Dec. 96, 132, McA. Pat. Cas. 12. (4) As to protection of invention from date of caveat. Hoe v. Kahler, supra; Allen v. Hunter, 1 F. Cas. No. 225, 6 McLean 303; American Nicolson Pavement Co. v. Elizabeth, 1 F. Cas. No. 311, 6 Fish. Pat. Cas. 424; Phelps v. Brown, 17 F. Cas. No. 10,072, 4 Blatchf. 362, 1 Fish. Pat. Cas. 479; Ex p. Woodruff, 30 F. Cas. No. 17,989. (5) As to patent for same invention to another. Cochrane v. Waterman, 5 F. Cas. No. 2,929, Cranch Pat. Dec. 131, McA. Pat. Cas. 52; Phelps v. Brown, supra.

88. Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351.

[a] **Not admission invention imperfect.**—The caveat was not conclusive evidence that the invention was in part perfected; a person could choose to file a caveat while he is going on and making improvements upon an invention which he has already completed so as to be of practical utility. Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Calhoun v. Hodgson, 70 Off. Gaz. (U. S.) 276.

89. Allen v. Hunter, 1 F. Cas. No. 225, 6 McLean 303; American Nicolson Pavement Co. v. Elizabeth, 1 F. Cas. No. 311, 6 Fish. Pat. Cas. 424; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Heath v. Hildreth, 11 F. Cas. No. 6,309, Cranch Pat. Dec. 96, 132, McA. Pat. Cas. 12; Ex p. Graves, 65 Off. Gaz. (U. S.) 2059; Ex p. Ward, 46 Off. Gaz. (U. S.) 513.

[a] **Prior caveat.**—One who had filed a caveat could not be prejudiced by the omission of the commissioner to give him notice of the application for a patent by one who had filed a prior caveat. Phelps v. Brown, 19 F. Cas. No. 11,072, 4 Blatchf. 362, 1 Fish. Pat. Cas. 479.

90. Johnson v. Onion, 13 F. Cas. No. 7,401, 4 Fish. Pat. Cas. 170, 3 Hughes 290.

91. Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351.

92. Patent Office Rules Oct. 1, 1927, rule 15.

[a] **In Canada** all papers are open to inspection save caveats. Patent Act (35 Vict. c 26 § 44).

93. Diamond Match Co. v. Oshkosh Match Works, 63 Fed. 984; Edison Electric Light Co. v. U. S. Electric Lighting Co., 44 Fed. 294.

94. Diamond Match Co. v. Oshkosh Match Works, 63 Fed. 984; Edison Electric Light Co. v. U. S. Electric Lighting Co., 44 Fed. 294.

[a] **"It is inoperative to change the rules of evidence** in courts of justice, both because to that extent it would be inconsistent with law, and also because the effecting of such a change is in no sense the regulation of proceedings in the patent-office." Edison Electric Light Co. v. U. S. Electric Lighting Co., 44 Fed. 294, 299.

95. U. S. Rev. St. § 892.

96. Carson Inv. Co. v. Anaconda Copper Min. Co., 14 F. (2d) 559 [rev on other grounds 26 F. (2d) 651 (certiorari den 49 SCt 32 mem)].

Right to obtain copies generally see infra § 240.

97. U. S. Rev. St. § 484; Patent Office Rules Oct. 1, 1927, rule 14.

98. U. S. Rev. St. § 892; Patent Office Rules Oct. 1, 1927, rules 14, 16, 191, 193; U. S. v. Butterworth Patent Comr., 81 Off. Gaz. (U. S.) 505; In re Drawbaugh, 66 Off. Gaz. (U. S.) 1451.

[a] **A rude and insulting demand** is not a legal demand. Boyden v. Burke, 14 How. (U. S.) 575, 14 L. ed. 548.

[b] **Abandoned application.**—The commissioner's refusal, under the rule of secrecy, to furnish copies of an abandoned application for patent, is unwarranted. Carson Inv. Co. v. Anaconda Copper Min. Co., 14 F. (2d) 559 [rev on other grounds 26 F. (2d) 651 (certiorari den 49 SCt 32 mem)].

[c] **In England** an application to inspect a provisional specification has been refused. Tolson's Patent, 6 De G. M. & G. 422, 55 EngCh 329, 43 Reprint 1297.

99. U. S. v. Butterworth Patent Comr., 81 Off. Gaz. (U. S.) 505; U. S. v. Patent Comr., 62 Off. Gaz. (U. S.) 1968; U. S. v. Patent Comr., 54 Off. Gaz. (U. S.) 267; U. S. v. Hall, 48 Off. Gaz. (U. S.) 1263; U. S. v. Patent Comr., 19 D. C. 223.

Secrecy of application see supra § 239.

1. U. S. Rev. St. § 892.

[a] **In Canada** the law is like that of the United States. Patent Act (35 Vict. c 26 § 2).

2. Toohey v. Harding, 1 Fed. 174, 4 Hughes 253; Johnson v. Beard, 13 F. Cas. No. 7,371, 12 Bann. & A. 50.

3. U. S. Rev. St. § 893.

[a] **Rule applied** to a copy of a French patent see Schoerken v. Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

[b] **Certificate by acting commissioner is sufficient.**—Woodworth v. Hall, 30 F. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248.

[c] **In England** a copy of a foreign patent under seal of that country is proved without proof of the official character of the signer. In re Betts, 1 Moore P. C. N. S. 49, 15 Reprint 621.

4. Carpenter v. Eberhard Mfg. Co., 78 Fed. 127; Standard El. Co. v. Crane El. Co., 76 Fed. 767, 22 CCA 549; National Folding-Box, etc., Co. v. American Paper Pail, etc., Co., 55 Fed. 488; Dederick v. Whitman Agricultural Co., 26 Fed. 763; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Parker v. Haworth, 18 F. Cas. No. 10,738, 4 McLean 370, 2 Robb Pat. Cas. 725.

5. U. S. Rev. St. § 4898.

6. National Cash-Register Co. v. Navy Cash-Register Co., 99 Fed. 89; New York v. American Cable R. Co., 60 Fed. 1016, 9 CCA 336; Paine v. Trask, 56 Fed. 233, 5 CCA 497 [aff 56 Fed. 231].

[a] **Absence of objection.**—A certified copy of the patent office record of an assignment taken on notice, but in the absence of defendant's counsel, will not be excluded on final hearing where no objection was made to its admissibility when offered, and no motion was afterward made to suppress it. International Tooth-Crown Co. v. Bennett, 72 Fed. 169 [aff 77 Fed. 313, 23 CCA 179].

7. National Cash-Register Co. v. Navy Cash-Register Co., 99 Fed. 89.

Evidence of lost instruments generally see Lost Instruments §§ 21-27.

power to produce it.[8]

[§ 242] **17. Rules of Patent Office as Law.** Rules of practice established, under statutory authority by the commissioner of patents, with the approval of the secretary of the interior, for the conduct of proceedings in the patent office,[9] when not inconsistent with the statutes relating to the patent system, have the force and effect of law in all matters to which they relate,[10] and are binding upon the commissioner as well as upon applicants for patents,[11] and are not to be declared invalid upon any strained or doubtful construction.[12] Such a rule can be repealed, modified, or suspended by the commissioner only with the approval of the secretary of the interior.[13]

[§ 243] **E. Remedy in Equity for Refusal of Patent—1. In General.** By act of congress, as recently amended, whenever an application for a patent is refused by the commissioner of patents, applicant may maintain a bill in equity to obtain the patent,[14] unless an appeal has been taken from the decision of the board of appeals to the court of appeals and is pending or has been decided, in which case no action may be brought under this statute.[15] Under another provision, in case of an interference, an adverse party to such proceedings, after a decision by the board of appeals and notice of appeal to the court of appeals of the District of Columbia, may elect to have further proceedings conducted by a suit in equity, whereupon appellant must file, within thirty days, a bill in equity.[16] The purpose of such suit in equity is to establish complainant's right to a patent which has been refused by the patent office,[17] and the remedy applies only where an application for a patent is rejected on the ground that the applicant is not, on the merits, entitled to it;[18] it is not available before the commissioner has made his decision.[19] Where there is no interfering claimant, a copy of the bill must be served upon the commissioner of patents, and in such case all costs and expenses of the proceedings must be paid by complainant whether the decision is in his favor or not.[20] Where there is an opposing party, the court will not make an order for substituted service on a defendant, but will leave complainant to give such "notice to adverse parties" as he deems sufficient.[21]

Necessity of resorting to mandamus.[22] Where the commissioner has refused to act on new claims presented by an applicant defeated in interference proceedings, on the ground of want of jurisdiction, applicant is not required to resort to mandamus to compel his action as a condition precedent to the bringing of a suit in equity under the statute.[23]

[§ 244] **2. Nature of, and Rules Governing, Proceeding.** The proceeding in equity under this statute is not an appeal, but an original independent proceeding,[24] although it has been said that it is substantially an appeal in that the object of the bill is to secure a different result from that obtained in the patent office,[25] and that the proceeding is necessarily a part of the application for a patent.[26] It is a plenary suit in equity, to which all the rules of practice in such suits apply,[27] a proceeding in a court of the United States having original equity jurisdiction under the patent laws.[28]

In rem. A suit to establish right to a patent granted another is not strictly speaking one in rem.[29]

[§ 245] **3. Time of Suit.** The suit must be brought within six months after the patent is refused.[30]

[§ 246] **4. Jurisdiction and Venue.**[31] The federal district courts in the various districts have juris-

8. National Cash-Register Co. v. Navy Cash-Register Co., 99 Fed. 89.

9. U. S. Rev. St. § 483.

10. Westinghouse Tract. Brake Co. v. Christensen, 243 Fed. 901, 156 CCA 413; Fish v. Dyson, 55 App. (D. C.) 209, 4 F. (2d) 175; In re Mraz, 36 App. (D. C.) 435; Broadwell v. Long, 36 App. (D. C.) 418; Mell v. Midgley, 31 App. (D. C.) 534; U. S. v. Allen, 22 App. (D. C.) 56 [rev on other grounds 192 U. S. 543, 24 SCt 416, 48 L. ed. 555].

11. O'Hara v. Hawes, 18 F. Cas. No. 10,466.

12. U. S. v. Allen, 22 App. (D. C.) 56 [rev on other grounds 192 U. S. 543, 24 SCt 416, 48 L. ed. 555].

13. Mell v. Midgley, 31 App. (D. C.) 534.

14. U. S. Rev. St. § 4915, as amended by Act of March 2, 1927 (44 St. at L. 1335 c 273).

15. U. S. Rev. St. § 4915, as amended by Act of March 2, 1927 (44 St. at L. 1335 c 273).

[a] **Case construing statute prior to amendment** of 1927 see Prindle v. Brown, 155 Fed. 531, 84 CCA 45 [rev 136 Fed. 616).

[b] **Necessity or propriety of first exhausting appeal,** under the statutes as they read prior to the amendment of 1927 see Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; Gold v. Gold, 237 Fed. 84, 150 CCA 286; McKnight v. Metal Volatilization Co., 128 Fed. 51; Bernardin v. Northall, 77 Fed. 849; Smith v. Muller, 75 Fed. 612; Butler v. Shaw, 21 Fed. 321; Ex p. Greeley, 10 F. Cas. No. 5,745, 6 Fish. Pat. Cas. 575, Holmes 284; In re Squire, 22 F. Cas. No. 13,269, 3 Bann. & A. 133; Fekete v. Robertson, 57 App. (D. C.) 73, 17 F. (2d) 335; Jones v. Starr, 26 App. (D. C.) 64; Kirk v. Patents Comr., 16 D. C. 229.

16. U. S. Rev. St. § 4911, as amended by Act of March 2, 1927 (44 St. at L. 1355 c 273).

17. Richards v. Meissner, 162 Fed. 485.

18. Butterworth v. U. S., 112 U. S. 50, 5 SCt 25, 28 L. ed. 656.

19. Rein v. Clayton, 37 Fed. 354, 3 ALR 78; Hoeltge v. Hoeller, 12 F. Cas. No. 6,574, 2 Bond 386.

20. Clements v. Kirby, 274 Fed. 575.

[a] **Expenses are paid by complainant** only where there is no opposing party save the commissioner. Butler v. Shaw, 21 Fed. 321.

21. Central R. Signal Co. v. Jackson, 254 Fed. 103.

22. Mandamus against patent officers generally see Mandamus § 251.

23. Clements v. Kirby, 274 Fed. 575.

24. Gandy v. Marble, 122 U. S. 432, 7 SCt 1290, 30 L. ed. 1223; Butterworth v. U. S., 112 U. S. 50, 5 SCt 25, 28 L. ed. 656; Muther v. United Shoe Mach. Corp., 7 F. (2d) 954 [aff 14 F. (2d) 808]; Colman v. Hathaway, 285 Fed. 602; Central R. Signal Co. v. Jackson, 254 Fed. 103; Sutton v. Wentworth, 247 Fed. 493, 160 CCA 3; Dover v. Greenwood, 154 Fed. 854; Appert v. Brownsville Plate Glass Co., 144 Fed. 115; Minneapolis Harvester Works v. McCormick Harvesting-Mach. Co., 28 Fed. 565; Butler v. Shaw, 21 Fed. 321; New York Belting, etc., Co. v. Sibley, 15 Fed. 386; Whipple v. Miner, 15 Fed. 117; Atkinson v. Boardman, 2 F. Cas. No. 607; In re Squire, 22 F. Cas. No. 13,269, 3 Bann. & A. 133.

[a] **The original judgment is not superseded** by this proceeding, as it is by an appeal. Whipple v. Miner, 15 Fed. 117.

[b] **It is not a technical appeal** from the patent office confined to the case as made in the record of that office but is prepared and heard on all competent evidence adduced upon the whole merits. Butterworth v. U. S., 112 U. S. 50, 5 SCt 25, 28 L. ed. 656.

25. Gold v. Newton, 254 Fed. 824, 166 CCA 270 [certiorari den 249 U. S. 608 mem, 39 SCt 290 mem, 63 L. ed. 799 mem]; Rein v. Clayton, 37 Fed. 354, 3 LRA 78; Ex p. Greeley, 10 F. Cas. No. 5,745, 6 Fish. Pat. Cas. 575, Holmes 284; In re Squire, 22 F. Cas. No. 13,269, 3 Bann. & A. 133.

26. Gandy v. Marble, 112 U. S. 432, 7 SCt 1290, 30 L. ed. 1223; Becker v. General Chain Co., 273 Fed. 419; Central R. Signal Co. v. Jackson, 254 Fed. 103; Westinghouse Electric, etc., Co. v. Ohio Brass Co., 186 Fed. 518.

27. Butterworth v. U. S., 112 U. S. 50, 5 SCt 25, 28 L. ed. 656; Hammer v. Robertson, 6 F. (2d) 460 [aff 291 Fed. 656, 300 Fed. 246]; Dover v. Greenwood, 177 Fed. 946 [rev on other grounds 194 Fed. 91, 114 CCA 169].

28. Butterworth v. U. S., 112 U. S. 50, 5 SCt 25, 28 L. ed. 656.

29. Armstrong v. De Forest, 13 F. (2d) 438 [certiorari den 273 U. S. 734 mem, 47 SCt 243 mem, 71 L. ed. 865 mem].

30. U. S. Rev. St. § 4915, as amended by Act of March 2, 1927 (44 St. at L. 1335 c 273).

[a] **Prior to amendment.**—The statute, prior to the amendment of 1927, presented no period of limitation, but the statute relating to delay in prosecuting applications was held to apply to a bill in equity. Gandy v. Marble, 122 U. S. 432, 7 SCt 1290, 30 L. ed. 1223; Clements v. Kirby, 274 Fed. 575; Westinghouse Electric, etc., Co. v. Ohio Brass Co., 186 Fed. 518; Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co., 168 Fed. 73.

31. Jurisdiction of federal courts in equity generally see Equity §§ 6, 16, 17.

diction of bills in equity to obtain patents which have been refused by the commissioner.[32] The fact that, pending suit between two applicants, their interests become united does not deprive the court of jurisdiction to proceed to a decree adjudging the prior inventor's right to a patent.[33]

Venue. The suit must be brought in the district in which defendant is a resident,[34] or in which valid service can be had on him,[35] or in which he voluntarily appears;[36] and as the commissioner of patents is a resident of the District of Columbia the suit must be brought there against him where there is no interfering party,[37] unless, by accepting service, he consents to be sued in another district.[38]

[§ 247] **5. Parties.**[39] Such suit may be maintained against another applicant to whom the patent has been awarded;[40] and in such a case the commissioner of patents is not a necessary party.[41] But the commissioner is a necessary party to such a suit where there is no opposing party.[42]

Assignor and assignee.[43] Where an applicant for a patent transfers his rights, a suit in equity, under the statute, to obtain a patent may be brought by the assignee in his own name;[44] and in such a case, the assignor alone cannot sue,[45] unless the assignment agreement gives him the right to do so.[46] The assignor of a patent, however, is a proper party to a suit to determine the right of an adverse applicant to the patent;[47] and where the suit is against the assignor, the assignee is a necessary party defendant.[48]

Government officers, applying for a patent, although having no monetary interest in the patent, if granted, are real parties in interest, and as such may maintain a suit in equity in aid of their application.[49]

[§ 248] **6. Requisites of Bill.** The general rules apply as to the form and sufficiency of the bill,[50] in accordance with which it should be definite and certain and contain all the averments requisite for the maintenance of the suit,[51] and must name a defendant.[52]

[§ 249] **7. Issues and Proof.** The question for the court to consider and decide in such a suit is whether applicant was entitled to a patent as prayed for,[53] and this generally depends upon the determination of the question of priority of invention as between the parties to the suit,[54] and also upon the

32. Schiller v. Robertson, 28 F. (2d) 301; Craig Demagnetizer, etc., Corp. v. Static Control Co., 295 Fed. 72. But see Prentiss v. Elsworth, 19 F. Cas. No. 11,386 (holding exclusive jurisdiction in circuit court of District of Columbia).

[a] **Jurisdiction in circuit court before abolished.**—Bernardin v. Northall, 77 Fed. 849; Vermont Farm Mach. Co. v. Marble, 20 Fed. 117; Whipple v. Miner, 15 Fed. 117.

33. Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co., 168 Fed. 73.

34. Armstrong v. De Forest, 13 F. (2d) 438 [certiorari den 273 U. S. 734 mem, 47 SCt 243 mem, 71 L. ed. 865 mem]; Bernardin v. Northall, 77 Fed. 849; Vermont Farm Mach. Co. v. Marble, 20 Fed. 117.

35. Thoma v. Perri, 205 Fed. 632 [aff 228 Fed. 904, 143 CCA 302]; Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co., 181 Fed. 974.

36. Armstrong v. De Forest, 13 F. (2d) 438 [certiorari den 273 U. S. 734 mem, 47 SCt 243 mem, 71 L. ed. 865 mem].

37. Butterworth v. Hill, 114 U. S. 128, 5 SCt 796, 29 L. ed. 119; Hammer v. Robertson, 291 Fed. 656 [aff 6 F. (2d) 460]; Illingworth v. Atha, 42 Fed. 141.

38. Vermont Farm Mach. Co. v. Marble, 20 Fed. 117.

39. **Parties generally** see Parties 47 C. J. p 1.

40. Thoma v. Perri, 205 Fed. 632 [aff 228 Fed. 904, 143 CCA 302].

41. Graham v. Teter, 25 Fed. 555.

[a] **Multifariousness.**—A bill filed against an adverse party to obtain the issuance of a patent and which also joins the commissioner of patents as a defendant to compel the granting of a reissue, which is an ex parte matter, is multifarious. Gold v. Gold, 181 Fed. 544.

42. In re Hammer, 300 Fed. 246 [aff 6 F. (2d) 460].

[a] **The secretary of the interior** is not a necessary or proper party to a suit against the commissioner. Kirk v. Patent Comr., 16 D. C. 229.

43. **Assignor or assignee as party:** In suit by or against assignor or assignee generally see Assignments §§ 194-202, 214-216, 218, 219. Substitution of assignee as party generally see Parties § 296.

44. Becker v. General Chain Co., 273 Fed. 419; Smith v. Thompson, 177 Fed. 721; Gay v. Cornell, 10 F. Cas. No. 5,280, 1 Blatchf. 506, 1 Fish. Pat. Cas. 312; In re Pearsall, 31 App. (D. C.) 265.

[a] **Illustration.**—An assignee, under an assignment made after the rejection by the commissioner of the assignor's application for a patent and after an appeal, may file a bill in his own name against the party to whom the patent was issued when the assignor's application was rejected, in order to have the patent issue to defendant declared void and to have one granted to him as assignee. Gay v. Cornell, 10 F. Cas. No. 5,280, 1 Blatchf. 506, 1 Fish. Pat. Cas. 312.

45. Garfield v. Western Electric Co., 298 Fed. 659 [overr Wende v. Horine, 191 Fed. 620].

46. Colman v. Hathaway, 285 Fed. 602.

47. Armstrong v. Langmuir, 6 F. (2d) 369; Thoma v. Perri, 205 Fed. 632 [aff 228 Fed. 904, 143 CCA 302].

[a] **Thus,** where an assignee of an invention has filed his bill to compel the issuance of a patent to him, the court may thereafter in its discretion authorize the original inventor to be joined as a party plaintiff without affecting the right to maintain the suit, although the suit could not be maintained under those circumstances if the inventor was a necessary party to the original bill. Becker v. General Chain Co., 273 Fed. 419.

[b] **Suit against assignor.**—A suit may be maintained against another applicant to whom the patent was awarded, although he has assigned his rights under the application. Thoma v. Perri, 205 Fed. 632 [aff 228 Fed. 904, 143 CCA 302].

48. Armstrong v. De Forest, 13 F. (2d) 438 [certiorari den 273 U. S. 734 mem, 47 SCt 243 mem, 71 L. ed. 865 mem]; Graham v. Teter, 25 Fed. 555.

49. Willoughby v. Rogers, 20 F. (2d) 981.

50. See Equity §§ 392-452.

51. See cases infra this note.

[a] **Bill held sufficient in general.**—Prindle v. Brown, 155 Fed. 531, 84 CCA 45 [rev 136 Fed. 616].

[b] **As to date of invention.**—A bill which states the date of an application for a patent is not to be held to state that the invention was then first completed or reduced to practice unless nothing is alleged showing invention prior thereto, and a further allegation that the invention was made prior to such date covers the fact of reduction to practice, and is sufficient to carry the date back of the application. Prindle v. Brown, 155 Fed. 531, 84 CCA 45.

[c] **As to priority of invention.**—A bill praying for a decree declaring that a patent is void, and that plaintiff is entitled to a patent for his invention, should aver that plaintiff had so reduced his invention to practice or carried his idea into practical operation; and the bill cannot be sustained upon an averment that plaintiff had invented what had been previously patented to defendant, and had made drawings of the invention. Ellithorp v. Robertson, 8 F. Cas. No. 4,408, 4 Blatchf. 307, 2 Fish. Pat. Cas. 83.

[d] **As to perjury and fraud.**—To have the court of equity authorize the commissioner of patents to issue a patent to an unsuccessful applicant in interference proceedings and to enjoin the successful applicant from receiving or using letters patent for the invention, upon the ground that the commissioner was induced by defendant to decide priority of invention in his favor by means of false testimony and misleading statements, the bill must particularize or specify the perjury or falsity relied upon; to allege generally that there were false swearing, false representations, and misleading statements is not sufficient. Illingworth v. Atha, 42 Fed. 141.

[e] **As to excuse for abandonment.**—Where a bill in equity is brought for the grant of a patent which had been abandoned by failure to prosecute the application within the time limited, it must be alleged that the delay was unavoidable. Gandy v. Marble, 122 U. S. 432, 7 SCt 1290, 30 L. ed. 1223.

52. Hammer v. Robertson, 6 F. (2d) 460 [aff 291 Fed. 656, 300 Fed. 246].

Parties generally see Parties 47 C. J. p 1.

53. Gold v. Gold, 237 Fed. 84, 150 CCA 286; Richards v. Meissner, 163 Fed. 957 [app dism 178 Fed. 1004 mem, 101 CCA 663 mem].

[a] **Insufficiency in the specification** in the patent issued is not involved in the case and cannot be inquired into. Standard Cartridge Co. v. Peters Cartridge Co., 69 Fed. 408 [aff 77 Fed. 630, 23 CCA 367].

[b] **Abandonment of application by failure to prosecute.**—If applicant has abandoned his right by failure to prosecute his application within the time limited by law, the court will pass upon the question, and, if the delay is not shown to have been unavoidable, will not adjudge that applicant is by law entitled to receive a patent. Gandy v. Marble, 122 U. S. 432, 7 SCt 1290, 30 L. ed. 1223.

Issues in interference proceedings generally see supra §§ 212, 213.

54. Gold v. Gold, 237 Fed. 84, 150 CCA 286; Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co., 168 Fed. 73; Christie v. Seybold, 55 Fed. 69, 5 CCA 33.

question of patentability of the invention.[55] It has been held that the court may direct the issuance of a patent on claims presented to the court, which are germane to the subject matter, although not included in the application as filed.[56]

Proof. Such a suit is subject to the ordinary equity rule that the evidence must be relevant to the issues made by pleadings,[57] which in such case relate only to complainant's right to a patent;[58] and for this purpose new evidence, other than that introduced in the patent office, may be presented,[59] except that complainant is estopped to offer evidence to overcome the decision of the patent office tribunals, which was wholly within his possession and control at the time of an interference proceeding, but which he withheld in that proceeding.[60] Complainant is not entitled to introduce proof to defeat defendant's right, as well as his own, by showing that neither party was entitled to a patent.[61]

[§ 250] **8. Evidence.** The general rules apply as to the evidence[62] and witnesses.[63]

Burden of proof. The burden of proof is upon complainant to prove his right to a patent,[64] and where a patent has been issued to another, he must prove priority of invention on his part.[65] Even though defendant has defaulted, complainant is not entitled to a decree adjudging his right to a patent as a matter of course but must establish such right.[66]

Admissibility. Plaintiff may show by the patent office proceedings that a judgment of priority has been entered against him for the purpose of showing his right to maintain a bill under the statute;[67] and under the terms of the statute, in a suit in which there are adverse parties, the record in the patent office shall be admitted in whole or in part, on the motion of either party, subject to such terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court may impose; and the testimony and exhibits or parts thereof of such record, when admitted, shall have the same force and effect as if originally taken and produced in the suit.[68]

[§ 251] **9. Effect and Weight of Decision of Patent Office.**[69] A decision of the patent office refusing an application for a patent or awarding priority of invention and the issuance of a patent to the opposing party in interference[70] is not res judicata in a suit in equity by the unsuccessful party.[71] Such a decision, however, is presumptively correct and of great weight, and, in the absence of evidence showing it to be clearly erroneous, will be followed in such suit,[72] especially where, under the former practice, such decision was concurred in or granted by the court of appeals of the District of Columbia.[73]

[a] **Where the commissioner has left priority to be determined,** this question is the material one in a suit in equity brought by complainant to have his adversary's patent declared void. Sawyer v. Massey, 25 Fed. 144.

[b] **Whether a party not involved in the suit** was the first inventor is not the issue. Christie v. Seybold, 55 Fed. 69, 5 CCA 33.

Priority of invention as ultimate issue in interference proceedings see supra § 212.

55. Hill v. Wooster, 132 U. S. 693, 10 SCt 228, 33 L. ed. 502 [rev 22 Fed. 830, 23 Blatchf. 72]; Hansen v. Slick, 216 Fed. 164 [aff 230 Fed. 627, 145 CCA 37]; Leslie v. Tracy, 100 Fed. 475.

[a] **Where, in an interference, the issue is not patentable,** there can be no judgment. Hill v. Wooster, 132 U. S. 693, 10 SCt 228, 33 L. ed. 502; Leslie v. Tracy, 100 Fed. 475.

56. Schiller v. Robertson, 28 F. (2d) 301; Ingersoll v. Holt, 104 Fed. 682. But see Wheaton v. Kendall, 85 Fed. 666; Durham v. Seymour, 6 App. (D. C.) 78 [app dism 161 U. S. 235, 16 SCt 452, 40 L. ed. 682] (in both of which cases complainant was confined to claims passed on by the patent office).

57. Martin v. Curtiss Aeroplane, etc., Co., 26 F. (2d) 701; Richards v. Meissner, 163 Fed. 957 [app dism 178 Fed. 1004 mem, 101 CCA 663 mem]; Richards v. Meissner, 162 Fed. 485. See generally Equity § 676.

58. See supra text and note 53.

59. Colman v. Hathaway, 285 Fed. 602; Ingersoll v. Holt, 104 Fed. 682; Christie v. Seybold, 55 Fed. 69, 5 CCA 33; In re Squire, 22 F. Cas. No. 13,269, 3 Bann. & A. 133; Durham v. Seymour, 6 App. (D. C.) 78.

[a] **Objection not raised in patent office.**—The objection that the invention of one of the parties did not include the issue declared in the interference may be brought to the attention of the court in this independent proceeding by bill, although it was not raised in the patent office. Christie v. Seybold, 55 Fed. 69, 5 CCA 33.

60. Barrett Co. v. Koppers Co., 22 F. (2d) 395.

61. Richards v. Meissner, 163 Fed. 957, 162 Fed. 485 [app dism 178 Fed. 1004 mem, 101 CCA 663 mem, and overr 155 Fed. 135].

62. General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)].

[a] **Disclosure of information.**—Where two persons filed a joint application for a patent, any disclosure previously made by another to one of the applicants, in the absence of evidence to the contrary, must be presumed to have been made to the other. General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)].

Evidence generally see Evidence 22 C. J. p. 1.

63. Dover v. Greenwood, 177 Fed. 946 [rev on other grounds 194 Fed. 91, 114 CCA 169].

[a] **Cross-examination.**—A party cannot be deprived of the right given him by Equity Rules, rule 67 to cross-examine opposing witnesses by the introduction of the proofs taken in interference proceedings, unless a showing of necessity is made for their introduction as secondary evidence. Dover v. Greenwood, 177 Fed. 946 [rev on other grounds 194 Fed. 91, 114 CCA 169].

Witnesses generally see Witnesses [40 Cyc 2133].

64. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; Wiegand v. Dover Mfg. Co., 292 Fed. 255; James Heddon's Sons v. Rush, 271 Fed. 689; Durham v. Seymour, 6 App. (D. C.) 78.

[a] **Complainant assumes a heavy burden of proof,** and, if the facts are seriously in dispute, must adduce new and persuasive testimony not submitted to the administrative tribunal. Curtiss Aeroplane, etc., Corp. v. Janin, 278 Fed. 454 [rev 267 Fed. 198].

65. Wiegand v. Dover Mfg. Co., 292 Fed. 255.

[a] **Conception.**—The unsuccessful applicant, suing for a patent, must show that he conceived the invention described by precise language used in the interference, and constituting the claims of the successful party. Martin v. Curtiss Aeroplane, etc., Co., 26 F. (2d) 701.

66. Davis v. Garrett, 152 Fed. 723.

67. Sutton v. Wentworth, 247 Fed. 493, 160 CCA 3.

68. U. S. Rev. St. § 4915, as amended by Act March 2, 1927 (44 St. at L. 1335 c 273).

[a] **Prior to such amendment** (1) the testimony taken in the patent office and the record of proceedings therein was not competent as evidence in the equity suit, unless a foundation was laid for its introduction as secondary evidence. Sutton v. Wentworth, 247 Fed. 493, 160 CCA 3; Dover v. Greenwood, 154 Fed. 854. (2) But admissions of parties made in such proceedings could be received. Sutton v. Wentworth, supra. (3) And statements of witnesses made therein could be used for purposes of cross-examination. Sutton v. Wentworth, supra.

69. Conclusiveness and effect of patent office decisions generally see infra §§ 254-269.

70. See supra §§ 179, 218-221.

71. McKenzie v. Garrett, 43 App. (D. C.) 6. And see cases infra notes 72-74.

72. Morgan v. Daniels, 153 U. S. 120, 14 SCt 772, 38 L. ed. 657; Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; Martin v. Curtiss Aeroplane, etc., Co., 26 F. (2d) 701; Wiegand v. Dover Mfg. Co., 292 Fed. 255; Illingworth v. Atha, 42 Fed. 141; Whipple v. Miner, 15 Fed. 117; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes 429.

73. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; U. S. v. De Forest Radio Tel., etc., Co., 18 F. (2d) 338, 345 [aff 21 F. (2d) 918 (certiorari granted 276 U. S. 610 mem, 48 SCt 302 mem, 72 L. ed. 730 mem [aff 49 SCt 34 mem])]; Miehle Printing Press, etc., Co. v. Miller Saw Trimmer Co., 6 F. (2d) 417 [aff 2 F. (2d) 744]; Texas Co. v. McAfee, 299 Fed. 718; James Heddon's Sons v. Rush, 271 Fed. 689; Curtiss Aeroplane, etc., Corp. v. Janin, 267 Fed. 198 [rev on other grounds 278 Fed. 454]; Thoma v. Perri, 228 Fed. 904, 143 CCA 302; General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)]; Richards v. Meissner, 163 Fed. 957 [app dism 178 Fed. 1004 mem, 101 CCA 663 mem].

[a] **Thus,** where the patent office denied a patent to an applicant, and its decision was affirmed by the court of appeals of the District of Columbia, in a suit, under Rev. St. § 4915, the circuit court of appeals will not render judgment requiring the commissioner of patents to issue a patent

In order to overcome such decision and warrant the granting of relief to the unsuccessful applicant, there must be clear and convincing evidence that the decision was erroneous.[74]

[§ 252] **10. Adjudication; Appeal.** The court is limited to an adjudication, in such a suit, as to whether the unsuccessful applicant is or is not entitled to a patent for his invention;[75] it may construe the claims in issue,[76] but has no power to alter them.[77] An affirmative adjudication in favor of an applicant authorizes the commissioner to issue such a patent on applicant's filing, in the patent office, a copy of the adjudication and otherwise complying with the requirements of the law.[78]

Notice before decree. Where defendant, in an inter partes suit, has entered an appearance, although in default for want of pleading, he is entitled to notice before a final decree is entered.[79]

Injunction.[80] The court has no power, under this statute, at the suit of the unsuccessful applicant, to enjoin the patent office from issuing a patent in favor of the one whom it has adjudged entitled thereto,[81] unless it is clearly shown that irreparable injury will otherwise result to complainant.[82]

Appeal.[83] An appeal may be taken, in a proper case, from the decree in such a suit.[84] But the circuit court of appeals to which appeal has been taken from a dismissal, for want of jurisdiction, cannot render an advisory opinion as to whether there is any remedy under the statute for an unsuccessful applicant with no opponent but the commissioner;[85] nor is defendant, to whom a patent has been issued, entitled to urge for the first time on appeal that the patent should be a joint one.[86]

[§ 253] **F. Patent Agents or Attorneys.** By act of congress, the commissioner of patents, subject to the approval of the secretary of the interior, may prescribe rules and regulations governing the right and qualifications of a person to act as a patent agent or attorney before his office[87] and may, after notice and opportunity for a hearing, suspend or exclude from further practice an agent or attorney who has violated or refused to comply with such regulations.[88] The commissioner's hearing and determination of charges against a patent agent or attorney and the secretary's approval of the commissioner's findings are judicial functions;[89] but as congress has the right to vest the commissioner and the secretary with such judicial functions, it also has the power to authorize them to delegate such functions to an assistant,[90] and therefore the act of congress[91] which provides that the assistant secretary of the interior shall perform such duties in the department as shall be prescribed by the secretary is not limited to merely administrative duties, but authorizes the secretary to delegate to the assistant the judicial duty of approving the findings of the commissioner of patents in proceedings for the disbarment of a patent solici-

where there is a diversity of opinion between its members as to whether the patent should issue, and there is no testimony materially changing the record before the court of appeals of the District of Columbia. Gold v. Newton, 254 Fed. 824, 166 CCA 270 [certiorari den 249 U. S. 608 mem, 39 SCt 290 mem, 63 L. ed. 799 mem].

[b] **Judgment not conclusive.**—(1) The court of appeals of the District of Columbia, in respect of its action in patent cases, is one of the tribunals of the patent office, and its decision is in no sense a final decree which cannot be collaterally attacked, but is subject to review as to all matters decided in a suit in equity under Rev. St. § 4915, although it will be followed, unless the contrary is established by convincing testimony. Clements v. Kirby, 274 Fed. 575. (2) A judgment of the court of appeals of the District of Columbia in an interference proceeding is not conclusive of patentability or priority, and the doctrines of res judicata and estoppel can have no application in a subsequent suit to have the patent adjudged invalid and void, but such judgment is admissible, and has evidential value, in the subsequent suit. Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 290 Fed. 565 [aff 8 F. (2d) 41 (certiorari granted 269 U. S. 547 mem, 46 SCt 106 mem, 70 L. ed. 405 mem, and certiorari den 269 U. S. 581 mem, 46 SCt 106 mem, 70 L. ed. 423 mem)].

74. Morgan v. Daniels, 153 U. S. 120, 14 SCt 772, 38 L. ed. 657 [rev 42 Fed. 451]; Martin v. Curtiss Aeroplane, etc., Co., 26 F. (2d) 701; U. S. v. De Forest Radio Tel., etc., Co., 18 F. (2d) 338, 345 [aff 21 F. (2d) 918 (certiorari granted 276 U. S. 610 mem, 48 SCt 302 mem, 72 L. ed. 730 mem (aff 49 SCt 34 mem)]; Texas Co. v. McAfee, 299 Fed. 718; Wiegand v. Dover Mfg. Co., 292 Fed. 255; James Heddon's Sons v. Rush, 271 Fed. 689; Sutton v. Wentworth, 247 Fed. 493, 160 CCA 3; Gold v. Gold, 237 Fed. 84, 150 CCA 286; Courson v. O'Connor, 227 Fed. 890, 142 CCA 414; Greenwood v. Dover, 194 Fed. 91, 114 CCA 169 [rev 177 Fed. 946]; Western Electric Co. v. Fowler, 177 Fed. 224, 101 CCA 394; Richards v. Meissner, 163 Fed. 957 [app dism 178 Fed. 1004 mem, 101 CCA 663 mem]; Richards v. Meissner, 158 Fed. 109; Gillette v. Sendelbach, 146 Fed. 758, 77 CCA 55. But see Standard Cartridge Co. v. Peters Cartridge Co., 69 Fed. 408 [aff 77 Fed. 630, 23 CCA 367] (beyond reasonable doubt).

[a] **Thus,** where the question which of two applicants for a patent for the same invention was the true inventor depends on questions of fact, the court, in an action brought, under Rev. St. § 4915, by the unsuccessful applicant to compel an issuance of the patent to him, must be very clearly satisfied that the decision of the patent office tribunals between the two was erroneous before it will be justified in reversing the same. Gillette v. Sendelbach, 146 Fed. 758, 77 CCA 55.

[b] **Testimony given long after experiment** with a device for which a patent was claimed, and after litigation had been consummated in patent office tribunals, is entitled to little weight. Muther v. United Shoe Mach. Corp., 7 F. (2d) 954 [aff 14 F. (2d) 808].

[c] **Evidence held sufficient.**—(1) In general. James Heddon's Sons v. Rush, 271 Fed. 689. (2) Decisions of the patent office and the court of appeals of the District of Columbia, after a hearing in interference between the same parties, adjudging priority of invention to defendant, are presumptively correct only, and that presumption is destroyed by proof that they were based on false and perjured evidence. Laas v. Scott, 161 Fed. 122.

[d] **Evidence held insufficient.**—Hernandez v. Robertson, 16 F. (2d) 276 [aff 16 F. (2d) 279]; Melling v. Gordon Form Lathe Co., 14 F. (2d) 437 [app dism 22 F. (2d) 1015]; Miehle Printing Press, etc., Co. v. Miller Saw Trimmer Co., 6 F. (2d) 417 [aff 2 F. (2d) 744]; Thoma v. Perri, 228 Fed. 904, 143 CCA 302.

75. Illingworth v. Atha, 42 Fed. 141.

76. General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)].

77. General Electric Co. v. Steinberger, supra.

78. U. S. Rev. St. § 4915.

79. Davis v. Garrett, 152 Fed. 723.

80. **Injunction against federal department officers generally** see Injunctions §§ 387, 388.

81. Illingworth v. Atha, 42 Fed. 141; Whipple v. Miner, 15 Fed. 117.

82. Richards v. Meissner, 158 Fed. 109.

83. **Appeals from patent office decisions generally** see supra §§ 224-237.

84. See cases infra this note.

[a] **Appellate procedure.**—Where, under Rev. St. § 4915, the circuit court decreed that plaintiff was entitled to a patent for certain claims, the decision resting solely on the fact of his being the prior inventor, the appellate court must consider the question of patentability, and, if it finds there was no patentability in the claims as to which plaintiff was declared to be entitled to a patent, the decree will be reversed and the bill dismissed. Hill v. Wooster, 132 U. S. 693, 10 SCt 228, 33 L. ed. 502; Dilg v. Moore, 34 App. (D. C.) 106; Moore v. Heany, 34 App. (D. C.) 31.

85. Hammer v. Robertson, 6 F. (2d) 460 [aff 291 Fed. 656, 300 Fed. 246].

86. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem].

87. U. S. Rev. St. § 487, as amended by Act Febr. 18, 1922 (42 St. at L. 390 c 58) § 3; U. S. Code tit 35 § 11.

[a] **In England** (1) a person is not entitled to describe himself as a patent agent unless he is registered as a patent agent. Patents and Designs Act (1907) § 84 subs 1. (2) Cases construing and applying this and prior similar statutes as to description as patent agent by unregistered person see Hans v. Graham, [1914] 3 K. B. 400; Graham v. Tanner, [1913] 1 K. B. 17; Starey v. Graham, [1899] 1 Q. B. 406; Lockwood v. Chartered Inst. of Patent Agents, [1913] S. C. (J.) 8; Graham v. Eli, 14 T. L. R. 370.

88. U. S. Rev. St. § 487, as amended by Act Febr. 18, 1922 (42 St. at L. 390 c 58) § 3; U. S. Code tit 35 § 11.

89. Robertson v. U. S., 52 App. (D. C.) 177, 285 Fed. 911.

90. Robertson v. U. S., supra.

91. U. S. Rev. St. § 439; U. S. Code tit 5 § 483.

tor.[92]

Revocation. Under a rule of the patent office, the powers of a patent attorney may be revoked at any stage in the proceedings upon application to, and approval by, the commissioner; and when so revoked, the office will communicate directly with applicant or such other attorney as he may appoint, and the attorney whose powers are revoked will be promptly notified thereof.[93] The spirit of this rule requires that notice of such revocation should be given to the legal representatives of a deceased applicant.[94]

[§ 254] **G. Conclusiveness and Effect of Patent Office Decisions*[95]—1. Upon Proceedings in Patent Office—a. In General.** The commissioner of patents is bound by the decision of a predecessor, except in case of fraud, clerical error apparent upon the face of the proceedings, or newly discovered evidence presented within a reasonable time and such as would be sufficient cause for granting a new trial in a court of law.[96] Accordingly, the commissioner of patents is bound by the decision of his predecessor in granting,[97] refusing,[98] or in antedating[99] a patent, so long as such decision is unreversed by a competent court.[1] The decision of an assistant commissioner is of the same authority as that of the commissioner.[2] The commissioner, however, is not bound to issue a patent upon the decision of an examiner[3] or the board of examiners-in-chief.[4]

Final rejection of an application by the patent office will authorize its rejection of another application by the same party upon the same subject matter.[5]

In an interference, the grant of a patent is prima facie evidence that the patentee is the inventor[6]—the first inventor; the burden of proof is upon the contestant, and every reasonable doubt should be resolved against him.[7]

A patentee is bound by the terms of his patent.[8]

[§ 255] **b. Decision in Interference.**[9] A decision in an interference is res judicata upon a subsequent application by the defeated party or his assign,[10] or in a subsequent interference between the same parties or their assigns,[11] as to every issue which was or might have been decided. Such decision is not res judicata upon a question that was not in issue.[12] A losing party in an interference, however,

92. Robertson v. U. S., 52 App. (D. C.) 177, 285 Fed. 911.

93. Patent Office Rules Oct. 1, 1927, rule 20.

94. In re Mattullath, 38 App. (D. C.) 497.

95. **Upon appeal to court of appeals of District of Columbia** see supra §§ 233, 234.

96. Matter of Hoeveler, 21 D. C. 107.

Newly discovered evidence in general as ground for new trial see New Trial §§ 216-243.

97. Ex p. Larowe, 14 F. Cas. No. 8,093; Matter of Hoeveler, 21 D. C. 107.

98. Ex p. Simpson, 22 F. Cas. No. 12,878.

99. In re Cushman, 6 F. Cas. No. 3,514, McA. Pat. Cas. 577.

1. Ex p. Larowe, 14 F. Cas. No. 8,093; Ex p. Simpson, 22 F. Cas. No. 12,878.

2. Matter of Hoeveler, 21 D. C. 107.

3. In re Woodsome, 56 App. (D. C.) 138, 10 F. (2d) 1003; Moore v. U. S., 40 App. (D. C.) 591 [app dism 237 U. S. 197, 35 SCt 571, 59 L. ed. 913, and certiorari den 238 U. S. 630, 35 SCt 941, 59 L. ed. 1497]; Hull v. Patents Comr., 9 D. C. 90.

[a] **Division of claims.**—The action of the examiner who required a division of claims will not foreclose the commissioner from rejecting an application upon the ground that the claims involved only a single inventive idea, covered by the patent issued. In re Woodsome, 56 App. (D. C.) 138, 10 F. (2d) 1003.

4. Moore v. U. S., 40 App. (D. C.) 591 [app dism 237 U. S. 197, 35 SCt 571, 59 L. ed. 913, and certiorari den 238 U. S. 630, 35 SCt 941, 59 L. ed. 1497]; Hull v. Patents Comr., 9 D. C. 90.

[a] **Thus** the finding of the board of examiners-in-chief reversing a decision of the primary examiner, and sustaining claims for a patent, is not binding upon the commissioner of patents, so as to deprive him of the general power conferred upon him by U. S. Rev. St. § 4893 (U. S. Comp. St. [1901] p 3384) to satisfy himself before issuing a patent "that the claimant is justly entitled to a patent under the law." Moore v. U. S., 40 App. (D. C.) 591, 594 [app dism 237 U. S. 197, 35 SCt 571, 59 L. ed. 913, and certiorari den 238 U. S. 630, 35 SCt 941, 59 L. ed. 1497].

5. In re Edison, 30 App. (D. C.) 321; In re Barratt, 14 App. (D. C.) 255, 261.

"We do not desire it to be understood that the Patent Office may not, if it thinks proper so to do, entertain and adjudicate a second application for a patent after the first application has been rejected. What we decide is, that it is not incumbent upon the office as a duty to entertain such applications, and that, if it refuses to entertain them, it has a perfect legal right so to do." In re Barratt, supra.

[a] **Reason for rule.**—"In administrative action, as well as in judicial proceeding, it is both expedient and necessary that there should be an end of controversy." In re Barratt, 14 App. (D. C.) 255, 257.

[b] **Mere difference in phraseology** between the claims in the applications does not affect the conclusiveness of the former adjudication. In re Edison, 30 App. (D. C.) 321.

6. Spear v. Belson, 22 F. Cas. No. 13,223, McA. Pat. Cas. 699.

7. Burr v. Ford, 5 App. (D. C.) 26; Wells v. Reynolds, 4 App. (D. C.) 43.

Interference in general see supra §§ 196-222.

8. In re Cushman, 6 F. Cas. No. 3,514, McA. Pat. Cas. 577.

[a] **Thus** a patentee who asked for and accepted an antedated patent is bound by its terms. In re Cushman, 6 F. Cas. No. 3,514, McA. Pat. Cas. 577.

9. **Cross references:**

Effect of patent upon burden of proof in interference see supra § 216.

Interference in general see supra §§ 196-222.

Second interference see supra § 200.

Res judicata in general see Judgments §§ 1154-1525.

Upon appeal to court of appeals of District of Columbia see supra § 234.

10. In re Wasserfallen, 54 App. (D. C.) 367, 298 Fed. 826; Power's Application, 52 App. (D. C.) 72, 281 Fed. 432; In re Dement, 49 App. (D. C.) 261, 263 Fed. 813 [certiorari den 254 U. S. 630 mem, 41 SCt 7 mem, 65 L. ed. 447 mem]; In re Cutler, 48 App. (D. C.) 444; In re New Departure Mfg. Co., 44 App. (D. C.) 430; In re Wenzelmann, 38 App. (D. C.) 528; In re Marconi, 38 App. (D. C.) 286; U. S. v. Moore, 30 App. (D. C.) 464. But see In re Henderson, 50 App. (D. C.) 191, 269 Fed. 707 [certiorari den 256 U. S. 699 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem] (holding that an interference decision estops a party—who copies opponent's claims, and, therefore, could not bring into judgment matters outside of those claims—as to the exact thing in judgment, not as to what might have been adjudicated); In re Curtiss, 46 App. (D. C.) 183 (holding that the rule of estoppel by judgment should not be applied with the same severity in interference proceedings in the patent office as in cases at law and in equity, since in the latter instances the issues are made up by the parties themselves, but in interferences the issues are made up by the proper official in the patent office and the case confined to the issues so found).

[a] **Parties.**—When the decision in an interference proceeding is relied on as res judicata, to defeat claims of an application, the commissioner of patents stands in the place of the persons having a right to claim res judicata. In re Dement, 49 App. (D. C.) 261, 263 Fed. 813 [certiorari den 254 U. S. 630 mem, 41 SCt 7 mem, 65 L. ed. 447 mem].

[b] **Mere difference in phraseology** is not sufficient to warrant a new application. Power's Application, 52 App. (D. C.) 72, 281 Fed. 432; In re Henderson, 50 App. (D. C.) 191, 269 Fed. 707 [certiorari den 256 U. S. 699 mem, 41 SCt 537 mem, 65 L. ed. 1177 mem].

[c] **Patent refused successful party.**—A decision in an interference case is res judicata against the unsuccessful party, although upon its termination, and in another proceeding, the same claims of the successful party were rejected. In re Wenzelmann, 38 App. (D. C.) 528.

11. In re Meyer, 57 App. (D. C.) 174, 18 F. (2d) 824; In re Cutler, 48 App. (D. C.) 444; Thompson v. Storrie, 47 App. (D. C.) 383; McKenzie v. Garrett, 43 App. (D. C.) 6; Cross v. Rusby, 42 App. (D. C.) 341; Sutton v. Wentworth, 41 App. (D. C.) 582; New Departure Mfg. Co. v. Robinson, 39 App. (D. C.) 504; Carroll v. Hallwood, 31 App. (D. C.) 165; Horine v. Wende, 29 App. (D. C.) 415; Blackford v. Wilder, 28 App. (D. C.) 535 [certiorari den 205 U. S. 541 mem, 27 SCt 788 mem, 51 L. ed. 922 mem].

[a] **Individual application as substitute for joint application.**—A judgment in an interference proceeding involving a joint application is res judicata in a subsequent proceeding involving an individual application, intended as a substitute for the joint application. In re Meyer, 57 App. (D. C.) 174, 18 F. (2d) 824.

[b] **No waiver** of estoppel by submitting evidence upon adjudicated question. McKenzie v. Garrett, 43 App. (D. C.) 6.

12. Fish v. Dyson, 55 App. (D. C.) 209, 4 F. (2d) 175; Bijur v. Kenning-

*By CHARLES REZNIKOFF (§§ 254-269).

may proceed in equity[13] where the decision in the former proceeding is not res judicata.[14] Nor is a defeated party in an interference estopped from contesting the validity of the patent, if sued for its infringement.[15]

Conclusiveness upon patent office. Since the question decided in an interference is that of priority,[16] to which the right of a party to make a claim has been held to be ancillary,[17] the commissioner is without authority to direct a primary examiner to read-judicate, upon an ex parte application of a defeated party, the question whether or not he had a right to make his claims in the interference proceeding.[18] However, where the operativeness of a device, the claims of which were in interference, did not raise the question of the right to make the claims, but one of patentability, the dissolution of the interference upon such ground of inoperativeness, since it was not a determination of priority, will not prevent an examiner from redeclaring the interference upon applicant's ex parte prosecution of the application.[19]

As to question of priority. The effect of an order that a party in interference is not the prior inventor is to award priority to his opponent.[20] Where several interferences are consolidated and heard as one, an order that the senior party was not the prior inventor is an award of priority against him as to each of his opponents, but not a final decision of priority in favor of any of such opponents as against another.[21]

As to right to patent. An award of priority in interference does not necessarily entitle the party in whose favor it is made to a patent.[22]

Duress. A decision in an interference proceeding obtained by duress must be attacked in a direct proceeding and not collaterally.[23]

[§ 256] **2. Upon Proceedings in Court[24]—a. In General.** Except as to compliance with statutory provisions regulating procedure in the patent office,[25] decisions of the patent office in granting or refusing a patent,[26] or in the construction of claims,[27] including the decisions of the court of appeals of the District of Columbia upon an appeal from the patent office,[28] are not conclusive upon the courts. Such decisions are, however, regarded as prima facie correct.[29] If a patent has been granted, it is prima

ton, 51 App. (D. C.) 230, 278 Fed. 313; Goodrum v. Clement, 51 App. (D. C.) 184, 277 Fed. 586, 279 Fed. 304; In re Martin, 48 App. (D. C.) 187; In re Curtiss, 46 App. (D. C.) 183; Rotter v. Hodgkinson, 43 App. (D. C.) 254; Moore v. U. S., 40 App. (D. C.) 201; Nelson v. Felsing, 32 App. (D. C.) 420.

[a] **Dictum.**—The decision of the examiner of interferences in a prior interference that a party reduced his invention to practice by a certain date is not res judicata where, in that proceeding, such party had a constructive reduction to practice as of an earlier date and it was therefore unnecessary for the examiner to decide that he had actually reduced it to practice at a later date. Bijur v. Kennington, 51 App. (D. C.) 230, 278 Fed. 313.

Priority as question to be determined in interference see supra § 212 text and note 1.

13. See supra §§ 243–252.

14. Morgan v. Daniels, 153 U. S. 120, 14 SCt 772, 38 L. ed. 657; Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem]; McKenzie v. Garrett, 43 App. (D. C.) 6.

Conclusiveness on court of decision of patent office in general see supra § 251; and infra § 256 et seq.

15. Elliott-Fisher Co. v. Donning, 171 Fed. 96.

16. See supra § 212.

17. See supra § 212.

18. U. S. v. Moore, 30 App. (D. C.) 464.

Power of commissioner to declare second interference in general see supra § 200.

19. Moore v. U. S., 40 App. (D. C.) 201.

20. Cosper v. Gold, 36 App. (D. C.) 302.

21. Cosper v. Gold, supra.

22. In re Cowles, 54 App. (D. C.) 280, 297 Fed. 539; U. S. v. Ewing, 42 App. (D. C.) 176; Gueniffet v. Victorsohn, 30 App. (D. C.) 432; Burson v. Vogel, 29 App. (D. C.) 388; Sobey v. Holsclaw, 28 App. (D. C.) 65; Dodge v. Fowler, 11 App. (D. C.) 592.

[a] **Although claims were copied from issued patent** and applicant has established priority. In re Cowles, 54 App. (D. C.) 280, 297 Fed. 539.

Issues in interference see supra §§ 212, 213.

23. Nelson v. Felsing, 32 App. (D. C.) 420.

Collateral attack upon judgments in general see Judgments § 815 et seq.

24. Cross references:
As to reissues see infra §§ 323–325.
Construction of letters patent see infra §§ 335–363.
Patentee bound by limitations of claims see supra § 161.
Upon appeal in court of appeals, District of Columbia see supra § 234.

25. See infra § 257.

26. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538; Andrews v. Hovey, 124 U. S. 694, 8 SCt 676, 3 L. ed. 557; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Turner, etc., Mfg. Co. v. Dover Stamping Co., 111 U. S. 319, 4 SCt 401, 28 L. ed. 442; Clements v. Odorless Excavating Apparatus Co., 109 U. S. 641, 3 SCt 525, 27 L. ed. 1060; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Cammeyer v. Newton, 94 U. S. 225, 24 L. ed. 72; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Linville v. Milberger, 29 F. (2d) 610; Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72; General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)]; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, 70 CCA 1 [certiorari den 199 U. S. 609 mem, 26 SCt 750 mem, 50 L. ed. 332 mem]; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 982; Wheaton v. Kendall, 85 Fed. 666; Featherstone v. George R. Bidwell Cycle Co., 57 Fed. 631, 6 CCA 487; Minneapolis Harvester Works v. McCormick Harvesting-Mach. Co., 28 Fed. 565; Odell v. Stout, 22 Fed. 159; Allen v. Hunter, 1 F. Cas. No. 225, 6 McLean 303; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Cahart v. Austin, 4 F. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Congress Rubber Co. v. American Elastic Cloth Co., 6 F. Cas. No. 3,099a; Potter v. Holland, 19 F. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes 429. But see Allen v. Blunt, 1 F. Cas. No. 216, 2 Robb Pat. Cas. 288, 3 Story 742; Dorsey Harvester Revolving Rake Co. v. Marsh, 7 F. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275 (early cases holding such decision conclusive upon questions of fact).

[a] **Thus** patents are often granted to leave open for decision of the courts questions which the patent office does not consider proper to adjudicate against applicant by withholding the patent. Andrews v. Hovey, 124 U. S. 694, 8 SCt 676, 31 L. ed. 557.

[b] **Duty to inquire.**—The presumption in favor of the validity of a patent is insufficient in itself to relieve a court of equity from the duty of inquiring into the validity of the patent. Linville v. Milberger, 29 F. (2d) 610.

Conclusiveness upon patentee see infra text and notes 42–44.

Decision as to:
Abandonment see infra § 264.
Anticipation see infra § 260.
Invention see infra § 262.
Novelty see infra § 259.
Originality and priority see infra §§ 265, 266.
Patentability see infra §§ 258–264.
Utility see infra § 261.

Right of defeated party to:
Deny validity of patent in suit for infringement see infra § 285.
Remedy in equity for refusal of patent see supra §§ 243–252.

27. Ironclad Mfg. Co. v. Jacob J. Vollrath Mfg. Co., 52 Fed. 143.

28. Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 290 Fed. 565 [aff 8 F. (2d) 41 (certiorari den 269 U. S. 581 mem, 46 SCt 106 mem, 70 L. ed. 423 mem)]; United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem].

Appeal from decision of patent office see supra §§ 224–237.

29. Morgan v. Daniels, 153 U. S. 120, 14 SCt 772, 38 L. ed. 657 [rev 42 Fed. 451]; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Duff v. Sterling Pump Co., 107 U. S. 636, 2 SCt 487, 27 L. ed. 517; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Garratt v. Seibert, 98 U. S. 75, 25 L. ed. 84; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Marsh v. Seymour, 97 U. S. 348, 24 L.

facie valid.[30] The burden is upon one disputing a decision of the patent office to overcome it,[31] as the rule is variously stated, by clear and convincing proof,[32] by the clearest of evidence,[33] or by evidence beyond a reasonable doubt.[34] Every reasonable doubt is to be resolved in favor of the patent.[35] The presumption of the validity of a patent is strengthened by decisions of the patent office tribunals sustaining it.[36] A patent is entitled to the presumption of validity, although an unessential allegation in an affidavit supporting the application was false.[37]

There is no presumption in favor of the validity of a patent where the records of the patent office show conclusively that the commissioner has acted without authority,[38] or that the patent has been is-

ed. 963; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Cammeyer v. Newton, 94 U. S. 225, 24 L. ed. 72; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Blanchard v. Putnam, 8 Wall. (U. S.) 420, 19 L. ed. 433; Agawam Woollen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem]; John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290; Thomson-Houston Electric Co. v. Walker Co., 104 Fed. 816; McEwan Bros. Co. v. McEwan, 91 Fed. 787; Wheaton v. Kendall, 85 Fed. 666; Kinnear, etc., Co. v. Capital Sheet-Metal Co., 81 Fed. 491 [rev on other grounds 87 Fed. 333, 31 CCA 3]; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; National Harrow Co. v. Hanby, 54 Fed. 493; Pacific Cable R. Co. v. Butte City St. R. Co., 52 Fed. 863 [aff 60 Fed. 90, 8 CCA 484]; Kirk v. Du Bois, 33 Fed. 252 [aff 158 U. S. 58, 15 SCt 729, 39 L. ed. 895]; Osborne v. Glazier, 31 Fed. 402; Fraim v. Keen, 25 Fed. 820; Duffy v. Reynolds, 24 Fed. 855; Celluloid Mfg. Co. v. Chrolithian Collar, etc., Co., 24 Fed. 275; Patterson v. Duff, 20 Fed. 641; Smith v. Halkyard, 16 Fed. 414; Holliday v. Pickhardt, 12 Fed. 147; Wire Book Sewing Mach. Co. v. Stevenson, 11 Fed. 155; Peck, etc., Co. v. Lindsay, 2 Fed. 688, 5 Bann. & A. 390; Comstock v. Sandusky Seat Co., 6 F. Cas. No. 3,082, 3 Bann. & A. 188; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215; Konold v. Klein, 14 F. Cas. No. 7,925, 3 Bann. & A. 226; Potter v. Holland, 19 F. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382 [cit Burke v. Partridge, 58 N. H. 349]; Union Sugar Refinery v. Mathiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Busch v. Jones, 16 App. (D. C.) 23 [rev on other grounds 184 U. S. 598, 22 SCt 511, 46 L. ed. 707]; Burr v. Ford, 5 App. (D. C.) 26; Wells v. Reynolds, 4 App. (D. C.) 43; Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

[a] **Thus** the same presumption should be applied to the acts and decisions of the commissioner of patents as to those of any other administrative officer to whom congress has appointed the administration of any law. United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem].

[b] **Rejection** by the patent office of an application for a patent is prima facie proof that the device is not patentable. Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

30. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610 [rev 16 F. (2d) 419]; Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; Rachlin v. Watsky, 30 F. (2d) 225; Linville v. Milberger, 29 F. (2d) 610; Marvel Equipment Co. v. Merit Oil Equipment Co., 29 F. (2d) 308 [aff 29 F. (2d) 313]; Tropic-Aire, Inc. v. Jumper, 28 F. (2d) 631; Hookless Fastener Co. v. H. L. Rogers Co., 26 F. (2d) 264 [rev on other grounds 28 F. (2d) 814]; Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Household Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838]; Barkis v. California Almond Growers' Exch., 17 F. (2d) 327; I. P. Frink, Inc. v. Erickson, 16 F. (2d) 496; Alfred Hale Rubber Co. v. Morse, etc., Co., 10 F. (2d) 843; Johnson Auto. Lock Co. v. Noser Instant Auto Lock Co., 9 F. (2d) 265; Meufer Steel Barrel Co. v. Boyle Mfg. Co., 9 F. (2d) 92; Follen v. Lambert Tire, etc., Co., 8 F. (2d) 303; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Trimble v. Woodstock Mfg. Co., 297 Fed. 524 [aff 297 Fed. 529]; James L. Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Ward Baking Co. v. Hazleton Baking Co., 292 Fed. 202; Knapp v. Will, etc., Co., 273 Fed. 380 [rev 253 Fed. 191]; Window Glass Mach. Co. v. Smethport, Window Glass Co., 266 Fed. 85; F. N. Burt Co. v. Ritchie, 251 Fed. 909; National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72; Williamson v. Electric Service Supplies Co., 236 Fed. 353 [aff 242 Fed. 873, 155 CCA 461]; Meccano, Ltd. v. Wagner, 234 Fed. 912; Los Angeles Art Organ Co. v. Æolian Co., 143 Fed. 880, 75 CCA 88; Atwood-Morrison Co. v. Sipp Electric Co., 136 Fed. 859 [rev on other grounds 142 Fed. 149]; De Lamar v. De Lamar Min. Co., 110 Fed. 538 [aff 117 Fed. 240, 54 CCA 272]; National Co. v. Belcher, 71 Fed. 876, 18 CCA 375; Williames v. Bernard, 41 Fed. 358; American Bell Tel. Co. v. Molecular Tel. Co., 32 Fed. 214, 23 Blatchf. 253 [rev on other grounds 126 U. S. 1, 8 SCt 778, 31 L. ed. 863]; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Brady v. Atlantic Works, 3 F. Cas. No. 1,794, 2 Bann. & A. 436, 4 Cliff. 408 [rev on other grounds 107 U. S. 192, 2 SCt 225, 27 L. ed. 438]; Brown v. Whittemore, 4 F. Cas. No. 2,033, 5 Fish. Pat. Cas. 524; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; In re Heroult, 29 App. (D. C.) 42, 54.

"No absolute right of property is conferred by the grant of the patent. The patentee is merely put in position to assert his prima facie right." In re Heroult, supra.

Sufficiency to justify preliminary injunction see infra § 601.

Presumptions:
Anticipation see infra § 260.
Invention see infra § 262.
Inventorship see infra § 267.
Noninfringement of earlier patents see infra § 260.
Novelty see infra § 259.
Originality and priority see infra §§ 265, 266.
Persons entitled to patent see infra §§ 265–269.
Utility see infra § 261.

31. Linville v. Milberger, 29 F. (2d) 610; Knapp v. Will, etc., Co., 273 Fed. 380 [rev 253 Fed. 191]; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 982; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277.

32. Matteawan Mfg. Co. v. Emmons Bros. Co., 253 Fed. 372, 165 CCA 154; General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)].

[a] **Thus** the conclusions of the commissioner and of the court of appeals, in so far as upon the same facts, should not be disturbed unless plainly and unmistakably erroneous. General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)].

33. Barkis v. California Almond Growers' Exch., 17 F. (2d) 327.

34. Ward Baking Co. v. Hazleton Baking Co., 292 Fed. 202; General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)].

[a] **Suit for infringement.**—Ward Baking Co. v. Hazleton Baking Co., 292 Fed. 202.

[b] **Suit in equity to obtain patent.**—General Electric Co. v. Steinberger, 208 Fed. 699 [aff 214 Fed. 781, 131 CCA 193 (certiorari den 234 U. S. 762 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem)].

Probative force of presumptions:
In general see Evidence § 88.
As to:
First inventor see infra § 265.
Novelty see infra § 259.
Patentability in view of:
Anticipation see infra § 260.
Prior art see infra §§ 259, 260.
Prior patents see infra § 260.
Prior use see infra § 260.

35. Linville v. Milberger, 29 F. (2d) 610; Barkis v. California Almond Growers' Exch., 17 F. (2d) 327; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132 [aff 215 Fed. 114].

36. Trane Co. v. Nash Engineering Co., 25 F. (2d) 267 [aff 20 F. (2d) 439]; Pittsburgh Plate Glass Co. v. American Window Glass Co., 276 Fed. 197, 199 [aff 276 Fed. 849]; Western Electric Co. v. Fowler, 177 Fed. 224, 101 CCA 394.

"The presumption is by no means so strong where the proceeding is ex parte, with no opportunity to be heard by a party adversely interested. On the other hand, it is greatly enhanced and reinforced, where, as here, the conclusion is reached after a full hearing and a heated contest followed through all the tribunals." Pittsburgh Plate Glass Co. v. American Window Glass Co., supra.

Concurrence as strengthening presumption of:
Novelty see infra § 259.
Priority see infra § 266.

37. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610 [rev 16 F. (2d) 419 (rev 10 F. (2d) 598)].

38. Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Damrow Bros. Co. v. Stoelting Bros. Co., 295 Fed. 492; Giant Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Allen v. Blunt, 1 F. Cas. No. 216, 2 Robb Pat. Cas. 288, 3 Story 742; Whitely v. Swayne, 29 F. Cas. No. 17,568, 4 Fish.

sued inadvertently.[39]

Collateral attack. A patent cannot be attacked collaterally for defects not apparent upon its face,[40] as where the patent is alleged to have been fraudulently obtained.[41]

Estoppel of patentee. Where an applicant accepts a claim narrower than that in his original application, such claim cannot afterward be construed to cover that which was rejected by the patent office.[42] But to be so estopped a patentee must have surrendered something, which he now claims, to obtain that which he was allowed.[43] Moreover, the rejection of claims in an application for an apparatus patent, although acquiesced in by applicant, does not invalidate a patent subsequently granted to him for the method of operation of such apparatus.[44]

Foreign patents and decrees. The presumption of validity of a patent from the successive grant of similar patents in various foreign countries is strengthened by decrees of the courts of foreign countries sustaining the patents in those countries.[45] But such presumption is rebutted by a decree of the United States court of another circuit, sustained by the circuit court of appeals, holding the patent void.[46]

State courts. A patent, it has been held, is conclusively valid in a state court.[47]

[§ 257] **b. As to Application and Procedure in Obtaining Patent.** In the absence of fraud, the grant of a patent is conclusive as to compliance with statutory requirements as to the procedure in the patent office,[48] for example, as to oaths,[49] notice,[50] or fees;[51] as to unavoidable delay in preparing the application for examination;[52] as to the filing, necessity, and sufficiency of drawings, models, and specimens of ingredients;[53] as to the appointment and authority of an attorney;[54] or as to the signatures upon the patent.[55] But a patent is void where the theory of the alleged invention and the mode of employing it are introduced for the first time in an amended specification that is unsworn to.[56]

Collateral proceeding. If the patent is invalid for

Pat. Cas. 117 [aff 7 Wall. 685, 19 L. ed. 199].

[a] **Patent invalid on its face.**—The commissioner of patents is an officer of limited authority, whose jurisdiction is restricted to the particular cases mentioned in the statute; therefore, whenever it is apparent upon inspection of the patents that he has acted without authority, or has exceeded it, his judgment must necessarily be regarded as invalid. Giant Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508.

39. Safe-Cabinet Co. v. Globe-Wernicke Co., 242 Fed. 497, 155 CCA 273.

40. Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799].

Proceedings in general to attack validity of patent see infra §§ 278–281.

41. Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536. But see Goodyear v. Day, 10 F. Cas. No. 5,567 (holding that, where fraud is charged upon a party in respect of his patent, it must be made out at least prima facie).

42. Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 27 SCt 307, 51 L. ed. 645; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Thacher v. Transit Constr. Co., 228 Fed. 905 [aff 234 Fed. 640, 148 CCA 406].

Construction and operation of letters patent in general see infra §§ 335–363.

43. Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Valvona-Marchiony Co. v. Marchiony, 207 Fed. 380.

44. H. K. Porter Co. v. Baldwin Locomotive Works, 227 Fed. 246, 141 CCA 642 [rev 219 Fed. 226].

Patent for art or process in general see supra §§ 11–16.

45. Wire Wheel Corp. v. Madison Motor Car Co., 267 Fed. 220.

[a] **In Newfoundland** (1) letters patent obtained abroad are conclusive evidence that the patentee is the first and true inventor. Cabot S. Whaling Co. v. Newfoundland S. Whaling Co., 9 Newfoundl. 122. (2) First and original inventor in general see infra § 265.

46. Wire Wheel Corp. v. Madison Motor Car Co., 267 Fed. 220.

47. Forster v. Brown Hoisting Mach. Co., 266 Ill. 287, 297, 107 NE 588, AnnCas1916B 795; Peck v. Collins, 70 N. Y. 376 [aff 103 U. S. 660, 26 L. ed. 512]; Smith v. Shallow, 18 Pa. Dist. 956; Cowan v. Mitchell, 11 Heisk. (Tenn.) 87.

"The determination of that claim [that patentee is not the inventor] cannot be made without deciding upon the validity of . . . [the] patent. We can come to no other conclusion than that this is a case under the patent laws and that State courts have no jurisdiction." Forster v. Brown Hoisting Mach. Co., supra.

48. Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Calculagraph Co. v. Wilson, 132 Fed. 20 [rev on other grounds 144 Fed. 91, 75 CCA 249]; Giant Powder Co. v. Safety Nitro Powder Co., 19 Fed. 509; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275, 3 Pittsb. (Pa.) 377; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312. But see Coffield v. Spears, 169 Fed. 641 (implying that irregularities may be shown by full and satisfactory proof).

Application and proceedings thereon in general see supra §§ 146–242.

Separation of claims for divisional applications see infra § 258.

49. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Westinghouse Electric, etc., Co. v. Metropolitan Electric Mfg. Co., 290 Fed. 661; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; American Hoist, etc., Co. v. Nancy Hanks Hay Press, etc., Co., 216 Fed. 785; Empire Cream Separator Co. v. Sears, 157 Fed. 238 [mod on other grounds 160 Fed. 668, 87 CCA 556]; Holmes Burglar Alarm Tel. Co. v. Domestic Tel., etc., Co., 42 Fed. 220; Hancock Inspirator Co. v. Jenks, 21 Fed. 911; Hartshorn v. Eagle Shade Roller Co., 18 Fed. 90, Hoe v. Kahler, 12 Fed. 111, 20 Blatchf. 430; Eagleton Mfg. Co. v. West, etc., Mfg. Co., 2 Fed. 774, 18 Blatchf. 218 [aff 111 U. S. 490, 4 SCt 593, 28 L. ed. 493]; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; Child v. Adams, 5 F. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; De Florez v. Raynolds, 7 F. Cas. No. 3,742, 4 Bann. & A. 331, 16 Blatchf. 397; Whittemore v. Cutter, 29 F. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536; Jackson v. Lawton, 10 Johns. (N. Y.) 23, 6 AmD 311; Abbott v. Bahr, 3 Pinn. (Wis.) 193, 3 Chandl. 210; Canadian General Electric Co., Ltd. v. Fada Radio, Ltd., [1927] Can. Exch. 107, [1927] 1 DomLR 1184.

[a] **Blank form.**—That a blank form of oath, not executed, is found among the papers cannot overcome the direct recital of the letters patent that the oath was taken. Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

[b] **"Inartistic document."**—If, from a certified copy of the record, it appears that the oath was taken before a notary of one state, who affixed his jurat to an affidavit the venue of which was laid in another, although this might have furnished grounds for a rejection of the affidavit by the examiner or commissioner of patents, where "there is no fraud shown . . . the recital in the letters patent that the required oath was made is . . . conclusive upon this court, whatever may be thought of the Patent Office practice in accepting such an inartistic document." Empire Cream Separator Co. v. Sears, 157 Fed. 238, 240 [mod on other grounds 160 Fed. 668, 87 CCA 556].

Amended specifications see infra text and note 56.

Oath on application in general see supra § 170.

50. Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312.

51. Lamprey Boiler Furnace Mouth Protector Co. v. Economy Feed Water Heater Co., 62 Fed. 590 [aff 65 Fed. 1000, 13 CCA 271]; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312.

52. McDuffee v. Hestonville, etc., R. Co., 181 Fed. 503 [rev on other grounds 185 Fed. 798, 109 CCA 606 (certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem)]; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275. But see Matteawan Mfg. Co. v. Emmons Bros. Co., 253 Fed. 372, 165 CCA 154 (holding proof insufficient to reverse decision of commissioner on question of abandonment of application, since such proof must be clear and convincing).

Abandonment of application in general see supra §§ 192–195.

Patent office decision upon abandonment in general not conclusive see infra § 264.

53. Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312.

Drawings in general in application see supra § 171.

54. Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546.

55. Smith v. Mercer, 5 PaLJ 529.

56. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139; Westinghouse Electric, etc., Co. v. Metropolitan Electric Mfg. Co., 290 Fed. 661.

formal defects, its validity in general cannot be questioned in a collateral proceeding.[57]

[§ 258] **c. As to Patentability[58]—(1) In General.** The decision of the patent office is not conclusive upon questions of patentability,[59] such as novelty,[60] utility,[61] invention,[62] prior public use or sale,[63] and abandonment.[64] The grant of a patent, however, is prima facie evidence of patentability.[65] The rejection of a patent is prima facie evidence that a device is not patentable.[66]

The burden of proof is upon those who question the validity of the patent.[67]

Separation of claims. The decision of the patent office is not conclusive upon the separation of claims for the purpose of filing divisional applications.[68]

Design. Where a patent has been granted for a design, it has been held to raise a strong legal presumption of patentability which the courts may not lightly disregard.[69]

[§ 259] **(2) Novelty.**[70] The decision of the patent office is not conclusive upon the question of novelty.[71] The grant of a patent, however, is prima facie evidence of novelty.[72] The burden is upon those who question the patent's novelty to rebut the presumption,[73] as the rule is variously stated, with reasonable clearness,[74] by clear[75] and convincing evidence,[76] or, if oral evidence is relied upon, by clear, satisfactory proof, beyond a reasonable doubt.[77] Thus every doubt is to be resolved in favor of the novelty of the patent,[78] especially where the commercial utility of the device is beyond dispute.[79] The decision of the commissioner of patents on the question of novelty, it has been said, is entitled to the highest respect.[80] If the patent office did not take the prior art into consideration[81] or did not cite

Oath in general to amendment see supra § 186.

57. Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; American Hoist, etc., Co. v. Nancy Hanks Hay Press, etc., Co., 216 Fed. 785, 224 Fed. 524; Railway Register Mfg. Co. v. North Hudson County R. Co., 23 Fed. 593; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; Colt v. Young, 6 F. Cas. No. 3,032, 2 Blatchf. 471; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Dorsey Harvester Revolving Rake Co. v. Marsh, 7 F. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312.

Attack upon validity of patent in general see infra §§ 278-281.

58. Patentability in general see supra §§ 9-125.

Conclusiveness of patent in state court see supra § 256.

59. Slawson v. Grand St. R. Co., 107 U. S. 649, 2 SCt 663, 27 L. ed. 576; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Bird v. Elaborated Roofing Co., 256 Fed. 366, 167 CCA 536 [certiorari dism 250 U. S. 647 mem, 39 SCt 490 mem, 63 L. ed. 1188 mem]; National Mach. Co. v. Wheeler, etc., Mfg. Co., 72 Fed. 185 [rev on other grounds 79 Fed. 432, 24 CCA 603 (certiorari den 166 U. S. 722 mem, 17 SCt 997 mem, 41 L. ed. 1188 mem)]; Burrows v. Wetherill, 4 F. Cas. No. 2,208, McA. Pat. Cas. 315.

60. See infra § 259.

61. See infra § 261.

62. See infra § 262.

63. See infra § 263.

64. See infra § 264.

65. Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885; Boyle v. Rousso, 16 F. (2d) 666; Corona Chemical Co. v. Latimer Chemical Co., 248 Fed. 493, 160 CCA 503 [rev 240 Fed. 423]; Colman v. Byrd Mfg. Co., 200 Fed. 59 [aff 205 Fed. 904, 124 CCA 248].

[a] **Combination.**—Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885. Combination in general see supra §§ 86, 87.

Patent as prima facie evidence of:
Invention see infra § 262.
No abandonment see infra § 264.
Novelty see infra § 259.
Utility see infra § 261.

66. Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

67. Colman v. Byrd Mfg. Co., 200 Fed. 59 [aff 205 Fed. 904, 124 CCA 248].

Burden of proof:
As to:
Abandonment see infra § 264.
Invention see infra § 262.
Novelty see infra § 259.
Priority and invention see infra §§ 265, 266.
Utility see infra § 261.
In:
Infringement see infra § 574.
Interference see supra § 216.

68. Fassett v. Ewart Mfg. Co., 58 Fed. 360 [aff 62 Fed. 404, 10 CCA 441]. But see McKay v. Dibert, 5 Fed. 587 (holding that, where the commissioner issued a patent for a machine and later a patent for a process and did not require a surrender of the first patent and an issue of both to expire at the same time, the courts have no absolute control over the head of the patent office in the exercise of his discretion whether a given invention or improvement shall be embraced in one, two, or more letters patent).

69. Boyle v. Rousso, 16 F. (2d) 666 [aff 2 F. (2d) 299].

70. Novelty in general see supra §§ 26-57.

Presumption of nonanticipation in general see infra § 260.

71. Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Empire State Nail Co. v. American Solid Leather Button Co., 61 Fed. 650; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; De Florez v. Raynolds, 7 F. Cas. No. 3,742, 3 Bann. & A. 292, 14 Blatchf. 505; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes 429; Wells v. Reynolds, 4 App. (D. C.) 43.

72. U. S.—Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112; Boyd v. Janesville Hay-Tool Co., 158 U. S. 260, 15 SCt 837, 39 L. ed. 973; King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Electro-Bleaching Gas Co. v. Paradon Engineering Co., 8 F. (2d) 890 [aff 12 F. (2d) 511]; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]; Smalley v. Auto Specialists, Inc., 7 F. (2d) 710; Zip Mfg Co. v. Pusch, 2 F. (2d) 828; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593 [rev 267 Fed. 435]; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Toledo Metal Wheel Co. v. Foyer, 223 Fed. 350, 138 CCA 612; T. B. Wood's Sons Co. v. Valley Iron Works, 191 Fed. 196 [aff 196 Fed. 780, 116 CCA 46]; Clark v. George Lawrence Co., 160 Fed. 512; Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co., 139 Fed. 312, 71 CCA 442; Ney v. Ney Mfg. Co., 69 Fed. 405, 16 CCA 293; Frankfort Whisky Process Co. v. Mill Creek Distilling Co., 37 Fed. 533; Shaver v. Skinner Mfg. Co., 30 Fed. 68; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; Goodyear v. Day, 10 F. Cas. No. 5,566; Serrell v. Collins, 21 F. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Spaulding v. Tucker, 22 F. Cas. No. 13,220, Deady 649 [rev on other grounds 13 Wall. 453, 20 L. ed. 515]; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes 429.

Ala.—Stephenson v. Allison, 123 Ala. 439, 26 S 290.

Oh.—Clark v. Bentel, 9 Oh. Dec. (Reprint) 289, 12 CincLBul 53.

S. C.—Wright v. Wilson, 45 S. C. L. 144.

Tenn.—Green v. Stuart, 7 Baxt. 418.

73. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 8 F. (2d) 890 [aff 12 F. (2d) 511]; Smalley v. Auto Specialists, Inc., 7 F. (2d) 710; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Benthall Mach. Co. v. National Mach. Corp., Inc., 222 Fed. 918 [rev on other grounds 241 Fed. 72, 154 CCA 72]; Hassam Pav. Co. v. Consolidated Contract Co., 215 Fed. 114 [aff 227 Fed. 436, 142 CCA 132]; T. B. Wood's Sons Co. v. Valley Iron Works, 191 Fed. 196 [aff 196 Fed. 780, 116 CCA 46]; Clark v. George Lawrence Co., 160 Fed. 512.

Burden of proof in general in infringement suits see infra § 574.

74. Zip Mfg. Co. v. Pusch, 2 F. (2d) 828.

75. King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593 [rev 267 Fed. 435].

76. Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85.

77. Clark v. George Lawrence Co., 160 Fed. 512.

78. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 8 F. (2d) 890 [aff 12 F. (2d) 511]; Zip Mfg. Co. v. Pusch, 2 F. (2d) 828; Permutit Co. v. Harvey Laundry Co., 274 Fed. 937 [aff 279 Fed. 713 (certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem)]; Window Glass Mach. Co. v. Smethport Window Glass Co., 266 Fed. 85; Hassam Pav. Co. v. Consolidated Contract Co., 215 Fed. 114 [aff 227 Fed. 436, 142 CCA 132]; T. B. Wood's Sons Co. v. Valley Iron Works, 191 Fed. 196 [aff 196 Fed. 780, 116 CCA 46].

79. Permutit Co. v. Harvey Laundry Co., 274 Fed. 937 [aff 279 Fed. 713 (certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem)]; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 402, 133 CCA 310.

"We are required to view with caution and careful scrutiny evidence which is introduced to show a prior use that destroys the pecuniary value of a patent, which has met with commercial success and has been of value to the community." Diamond Patent Co. v. S. E. Carr Co., supra.

80. Boyden Power-Brake Co. v. Westinghouse Air-Brake Co., 70 Fed. 816, 17 CCA 430 [aff 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136]; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195.

81. King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615

pertinent references,[82] the presumption is weakened. But where the prior art[83] or prior research[84] was considered by the patent office, or where the application was sharply contested[85] and passed the scrutiny of the tribunals of the patent office,[86] the presumption of novelty carries weight. The original presumption of novelty arising from the grant of a patent is strengthened by its extension.[87]

Popular acclaim.[88] The grant of a patent and popular acclaim raises a presumption of novelty,[89] to be overcome only by clear proof.[90] However, where commercial success is attributable to the unique advertising of the article, the weight of this presumption may be discounted.[91]

[§ 260] **(3) Anticipation.**[92] In an action by a patentee, to which the defense is invalidity of the patent because of anticipation,[93] that the patent has been granted after other patents, supposed to show anticipation, were considered by the patent office, although not conclusive,[94] is prima facie evidence,[95] usually strong prima facie evidence,[96] of the validity of the patent, particularly as against the patents considered,[97] to be overcome only by clear proof.[98] Where the patent office failed to cite or consider pertinent references, the presumption of validity from the grant of the patent is weakened.[99] It has been held that, where controlling references have not been cited or considered, there is no presumption in favor of the patent.[1] There is a presumption, however, it has been held, that in determining the state of the prior art the officials of the patent office in granting a patent considered other patents than those cited in the file wrapper.[2] In general, doubt must be resolved in favor of the patent in suit.[3]

Infringement of prior patent. In an action against a patentee—or one using a device or combination similar to that of the patentee—because of infringement of an earlier patent,[4] the grant of the subsequent patent is not conclusive that there is no infringement of the prior patent.[5] However, it has been held, that a patent is prima facie evidence that the invention so patented is different from that of the prior patent[6] and does not infringe it.[7] Likewise, there is a presumption that a later patent does not infringe an earlier patent where the commissioner has decided that there was no interference between them;[8] and the grant of a patent by the patent office after withdrawing a reference to another patent creates a presumption of substantial difference to be considered in determining whether or not the earlier

[aff 26 F. (2d) 357]; American Soda Fountain Co. v. Sample, 130 Fed. 145, 64 CCA 497 [certiorari den 195 U. S. 634 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Cleveland Fdy. Co. v. Kaufmann, 126 Fed. 658 [rev on other grounds 135 Fed. 360, 68 CCA 658]; Earle v. Wanamaker, 87 Fed. 740.

Prior knowledge or use in general see supra §§ 33–43.

82. American Can Co. v. Goldee Mfg. Co., 290 Fed. 523; International Flatstub Check Book Co., Inc. v. Young, etc., Co., 278 Fed. 835 [aff 284 Fed. 831].

Failure to cite or consider pertinent references:
No presumption that patent unanticipated see infra text and note 1.
Presumption that patent unanticipated weakened see infra text and note 99.

83. Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 267 (reh den 27 F. (2d) 334)].

84. Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570].

85. Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112; Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883.

86. Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112; Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co., 139 Fed. 312, 320, 71 CCA 442.

"There is always a presumption of novelty arising from the patent itself, greater or less, according to circumstances. If the patent relates to something of temporary interest, and the object sought is of little importance, and offers but slight chance of profitable use, it may receive but little attention in the Patent Office, and the presumption therefore is slight; but where the problem sought to be solved by the patent is of such importance that the solution of it promises great pecuniary returns, and the testimony shows . . . that all the claims of the patent were subject to critical analysis by trained experts in that office . . . and the subject appears to have been thoroughly threshed out, the presumption in favor of novelty is greater than in those cases where the patent may have passed by inadvertence." Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co., supra.

87. Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Evarts v. Ford, 8 F. Cas. No. 4,574, 6 Fish. Pat. Cas. 587.

88. Commercial success as evidence of invention see supra § 92.

89. Acme Fdy., etc., Co. v. Oil Well Impr. Co., 2 F. (2d) 530, 531 [certiorari den 268 U. S. 704 mem, 45 SCt 639 mem, 69 L. ed. 1167 mem].

90. Acme Fdy., etc., Co. v. Oil Well Impr. Co., supra.

"Neither of these . . . [grant of patent and popular acclaim] are conclusive; but in case of doubt, and where the proof of lack of novelty is not clear and convincing, they are to be considered as making for validity in resolving the doubt." Acme Fdy., etc., Co. v. Oil Well Impr. Co., supra.

91. Butler v. Pratt, 253 Fed. 654, 165 CCA 280.

92. Effect of patent office decision as to originality and priority see infra §§ 265, 266.

Presumption of novelty in general see supra § 259.

93. Anticipation in general see supra §§ 26–57.

Infringement suits in general see infra §§ 521–656.

Prior patents in general see supra §§ 44–51.

94. Mohr v. Alliance Securities Co., 14 F. (2d) 799 [aff 14 F. (2d) 793]; Blackington v. Adels, 282 Fed. 641 [aff 282 Fed. 645].

95. Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Household Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838].

96. Trico Products Corp. v. Ace Products Corp., 30 F. (2d) 688; Elkon Works v. Welworth Automotive Corp., 25 F. (2d) 968; Einson Freeman Co. v. International Folding Paper Box Co., 21 F. (2d) 701; Simplex Piston Ring Co. v. Hamilton, 21 F. (2d) 196 [aff 25 F. (2d) 1022 mem]; Mohr v. Alliance Securities Co., 14 F. (2d) 799 [aff 14 F. (2d) 793]; Blackington v. Adels, 282 Fed. 641 [aff 282 Fed. 645]; MacClemmy v. Gilbert Corset Co., 221 Fed. 73 [rev on other grounds 224 Fed. 497, 140 CCA 205]; American Caramel Co. v. Glen Rock Stamping Co., 201 Fed. 363 [rev on other grounds 209 Fed. 619, 126 CCA 579].

97. Linville v. Milberger, 29 F. (2d) 610.

98. Mohr v. Alliance Securities Co., 14 F. (2d) 799 [aff 14 F. (2d) 793].

99. American Can Co. v. Goldee Mfg. Co., 290 Fed. 523; International Flatstub Check Book Co., Inc. v. Young, etc., Co., 278 Fed. 835 [aff 284 Fed. 831]; Westinghouse Electric, etc., Co. v. Toledo, etc., R. Co., 172 Fed. 371, 97 CCA 69.

[a] **File wrapper.**—(1) The presumption of validity arising from the grant of the patent is greatly weakened where the file wrapper contains no reference to an alleged anticipating patent. International Flatstub Check Book Co., Inc. v. Young, etc., Co., 284 Fed. 831 [aff 278 Fed. 835]. (2) Presumption that other patents than those cited in file wrapper considered see infra text and note 2.

Presumption of novelty weakened by failure to cite pertinent references see supra § 259.

1. Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175 [rev 173 Fed. 315].

2. Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118.

[a] **Reason for rule.**—A presumption that the officials of the patent office did their duty. Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118.

3. Victor Talking Mach. Co. v. Duplex Phonograph Co., 177 Fed. 248.

Burden of proof to show patent's invalidity in general see supra § 256.

4. Suit for infringement in general see infra §§ 521–656.

5. Roberti v. Jonas, 300 Fed. 181 [aff 7 F. (2d) 563].

6. Bake-Rite Mfg. Co. v. Tomlinson, 16 F. (2d) 556; Gerrity v. Dallas Fdy., 4 F. (2d) 655; Western Well Works v. Layne, etc., Corp., 276 Fed. 465 [certiorari granted 258 U. S. 615 mem, 42 SCt 315 mem, 66 L. ed. 792 mem, and certiorari dism 261 U. S. 387, 43 SCt 422, 67 L. ed. 712]; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Wonder Mfg. Co. v. Block, 249 Fed. 748, 161 CCA 658; Crowe v. Oscar Barnett Fdy. Co., 206 Fed. 164 [aff 213 Fed. 633, 130 CCA 297].

7. Abbott Coin Counter Co. v. Standard-Johnson Co., 290 Fed. 418 [aff 296 Fed. 126]; Fore Electrical Mfg. Co. v. St. Louis Electrical Works, 280 Fed. 49 [rev 267 Fed. 440, and certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem]; Mastoras v. Hildreth, 263 Fed. 571 [rev 253 Fed. 68, certiorari granted 254 U. S. 622 mem, 41 SCt 6 mem, 65 L. ed. 443 mem, and rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112]; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Simplex Electric Heating Co. v. Leonard, 180 Fed. 763 [aff 200 Fed. 581, 119 CCA 61].

8. Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8.

patent has been infringed.[9] Thus the burden is upon one maintaining that a subsequent patent is an infringement to overcome the presumption in its favor.[10] On the other hand, it has been held that the prima facie evidence of patentable difference from the grant of the later patent is no evidence of noninfringement of the earlier patent.[11] Likewise, where the prior patentee has made a primary invention which accomplishes a result never before produced, the presumption that a later patent on the same subject is for a subordinate improvement of the primary invention and subject to an infringement of the earlier patent is as strong as the general presumptions of noninfringement.[12] Any presumption of noninfringement from the grant of a patent to an alleged infringer is of no avail where the article sold materially departs from his patent.[13]

Prior art.[14] Evidence of prior use, in order to avoid a patent, must be clear and convincing; every reasonable doubt is to be resolved against the contestant.[15] Where the evidence of anticipation in an infringement suit is not substantially different from that considered by the patent office, the presumption is that the patent is valid.[16] Where the most relevant prior art was considered and disregarded by the patent office, the presumption of validity, it has been held, is strengthened.[17] However, a patent issued without due consideration of the prior art is entitled to little, if any, presumption of validity.[18] Likewise, where the patent examiner failed to find a prior disclosure, discovery of which would have rendered a grant of the patent doubtful, there is no presumption of validity.[19] But doubt as to the prior disclosure of a patent should be resolved in favor of the patentee.[20]

Patentable difference between pending applications. The grant of a patent for an invention, while another application for an invention for the same purpose is pending,[21] or the grant of patents on two applications which are pending at the same time and relate to the same subject matter,[22] is prima facie evidence that there is a patentable difference between the two, and that the later does not infringe the prior patent.[23] Where patents have been issued, after close scrutiny by the patent office in an interference between the two applications, the decision of the patent office that one is not an infringement of the other is entitled to great consideration.[24] Likewise, that an alleged anticipating patent had been pending in the patent office at the same time as the patent in suit and that no interference had been declared between them is strong prima facie evidence of patentable novelty.[25]

[§ 261] **(4) Utility.**[26] The decision of the patent office is not conclusive upon the question of utility.[27] However, the grant of a patent is prima facie evidence of utility.[28] A contestant has the burden of

9. Henderson v. Welch Dry Kiln Co., 26 F. (2d) 810.

10. Fore Electrical Mfg. Co. v. St. Louis Electrical Works, 280 Fed. 49 [certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem].

Burden of proof in general in infringement action see infra § 574.

11. Wisconsin-Minnesota Gas, etc., Household Appliance Co. v. Hirschy Co., 28 F. (2d) 838 [aff 18 F. (2d) 347]; Bake-Rite Mfg. Co. v. Tomlinson, 16 F. (2d) 556; Monroe Body Co. v. Herzog, 13 F. (2d) 705; French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem]; General Electric Co. v. Electric Controller, etc., Co., 243 Fed. 188, 1007 mem, 156 CCA 54, 664 mem; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185.

[a] **Reasons for rule.**—(1) "Patentable difference does not of itself tend to negative infringement. It may just as well be based upon infringement, plus improvement." Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 585, 112 CCA 185. (2) "The supposition that they [later patents] do raise such inference [of noninfringement] overlooks the familiar fact that in issuing patents no attention whatever is paid to the (possibly broad) scope of the claims of former patents, but only to their specific disclosures." Monroe Body Co. v. Herzog, 13 F. (2d) 705, 707.

12. Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8.

Presumptions of noninfringement see supra text and notes 7, 8.

13. Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410.

14. Prior knowledge and use in general see supra §§ 33-43.

15. Stead Lens Co. v. Kryptok Co., 214 Fed. 368, 131 CCA 144; Greenwald v. Weiss, 180 Fed. 474.

[a] **Oral testimony.**—Stead Lens Co. v. Kryptok Co., 214 Fed. 368, 131 CCA 144.

16. Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115.

17. Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948.

18. Carson Inv. Co. v. Anaconda Copper Min. Co., 17 F. (2d) 815 [rev on other grounds 26 F. (2d) 651 (certiorari den 49 SCt 32 mem)].

19. R. Hoe & Co., Inc. v. Goss Printing Press Co., 30 F. (2d) 271.

Disclosure in general see supra §§ 43, 46.

20. Sandusky v. Brooklyn Box Toe Co., 13 F. (2d) 238.

21. Supreme Mfg. Corp. v. Security Mfg. Co., 299 Fed. 65 [certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 469 mem]; Riter-Conley Mfg. Co. v. Atlanta Gaslight Co., 234 Fed. 896 [aff 246 Fed. 840, 159 CCA 142].

22. Boyd v. Janesville Hay-Tool Co., 158 U. S. 260, 15 SCt 837, 39 L. ed. 973; Union Special Mach. Co. v. Singer Mfg. Co., 215 Fed. 598 [rev on other grounds 227 Fed. 858, 142 CCA 382].

23. Boyd v. Janesville Hay-Tool Co., 158 U. S. 260, 15 SCt 837, 39 L. ed. 973; Riter-Conley Mfg. Co. v. Atlanta Gaslight Co., 234 Fed. 896 [aff 246 Fed. 840, 159 CCA 142]; Union Special Mach. Co. v. Singer Mfg. Co., 215 Fed. 598 [rev on other grounds 227 Fed. 858, 142 CCA 382].

24. Chester N. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372 [mod 1 F. (2d) 590, and certiorari den 273 U. S. 699 mem, 47 SCt 94 mem, 71 L. ed. 847 mem].

25. Denaro v. McLaren Cons. Cone Corp., 23 F. (2d) 384.

26. Utility in general see supra §§ 58-66.

27. Boyd v. Janesville Hay-Tool Co., 158 U. S. 260, 15 SCt 837, 39 L. ed. 973; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Ney v. Ney Mfg. Co., 69 Fed. 405, 16 CCA 293; Frankfort Whisky Process Co. v. Mill Creek Distilling Co., 37 Fed. 533; Shaver v. Skinner Mfg. Co., 30 Fed. 68; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; Goodyear v. Day, 10 F. Cas. No. 5,566; Serrell v. Collins, 21 F. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Spaulding v. Tucker, 22 F. Cas. No. 13,220, Deady 649 [rev on other grounds 13 Wall. 453, 20 L. ed. 515]; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes 429; Bierce v. Stocking, 11 Gray (Mass.) 174.

Patent as conclusively valid in state courts see supra § 256.

28. U. S.— Boyd v. Janesville Hay-Tool Co., 158 U. S. 260, 15 SCt 837, 39 L. ed. 973; Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Household Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838]; Electro-Bleaching Gas Co. v. Paradon Engineering Co., 8 F. (2d) 890 [aff 12 F. (2d) 511]; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Vaco Grip Co. v. Sandy MacGregor Co., 292 Fed. 249 [aff 2 F. (2d) 655]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (certiorari granted 254 U. S. 622 mem, 41 SCt 6 mem, 65 L. ed. 443 mem, and rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)]; Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 227 Fed. 115; Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787; Ney v. Ney Mfg. Co., 69 Fed. 405, 16 CCA 293; Frankfort Whisky Process Co. v. Mill Creek Distilling Co., 37 Fed. 533; Kirk v. Du Bois, 33 Fed. 252 [aff 158 U. S. 58, 15 SCt 729, 39 L. ed. 895]; Shaver v. Skinner Mfg. Co., 30 Fed. 68; Corvallis Fruit Co. v. Curran, 8 Fed. 150, 7 Sawy. 270; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; Geier v. Goetinger, 10 F. Cas. No. 5,299, 1 Bann. & A. 553; Miller, etc., Mfg. Co. v. Du Brul, 17 F. Cas. No. 9,597, 2 Bann. & A. 618; Potter v. Holland, 19 F. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; Rollhaus v. McPherson, 20 F. Cas. No. 12,026; Serrell v. Collins, 21 F. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Spaulding v. Tucker, 22 F. Cas. No. 13,220, Deady 649 [rev on other grounds 13 Wall. 453, 20 L. ed. 515]; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes 429.

Ala.—Stephenson v. Allison, 123 Ala. 439, 26 S 290.

Oh.—Clark v. Bentel, 9 Oh. Dec.

rebutting this[29] by strong and clear evidence.[30] Every reasonable doubt, it has been held, is to be resolved in favor of the utility of a patent.[31] The grant of a patent, it has been held, is entitled to weight on the question of utility.[32] The presumption of utility upon the grant of a patent is greatly strengthened by the fact that one, claiming the uselessness of the patent, for many years represented it to be useful.[33] That no machine has been constructed or put into practical operation under a patent is not sufficient to overcome the presumption of its validity.[34] Likewise, that a device is susceptible of improvement, or that like inventions are so superior that they may supersede the use of it, will not negative the presumption of utility.[35] The original presumption of utility arising from the grant of a patent is strengthened by its extension.[36]

Generic invention. The presumption of the utility and operativeness of a generic invention is stronger than that in the case of a simple or improvement patent.[37]

The decision of an examiner of interferences that a device is inoperative is of no effect in an infringement suit where the evidence before the examiner was not the same as that before the court, and where the question was not properly before him and the board of examiners-in-chief and the court of appeals of the District of Columbia so held.[38]

[§ 262] **(5) Invention.**[39] A decision of the patent office is not conclusive upon the question of invention.[40] However, the grant of a patent is prima facie evidence of invention;[41] and the burden of proof is upon one asserting that a device is without invention.[42] The presumption of invention is ordinarily given weight,[43] but may be outweighed by facts showing lack of invention,[44] such as manifest equivalency of function,[45] or that changes in old devices required only the skill of a mechanic,[46] or represent a mere mechanical advance.[47] Where the grant of a patent has been made upon consideration of the prior art, the presumption of invention carries weight,[48] and is strengthened in an infringement suit where the prior patents cited by defendant as anticipatory were considered by the patent office.[49] The result of interference proceedings, it has been held, has no weight upon the question of invention in a subsequent suit for infringement between the same parties.[50]

Combination.[51] The grant of a patent is prima facie evidence that a claim is a valid combination.[52]

Aggregation.[53] That a patent has been issued, after objection upon the ground of aggregation, although not conclusive,[54] is persuasive prima facie evidence of its validity.[55]

(Reprint) 289, 12 CincLBul 53.
Or.—Waymire v. Shipley, 52 Or. 464, 97 P 807.
S. C.—Wright v. Wilson, 45 S. C. L. 144.
Tenn.—Green v. Stuart, 7 Baxt. 418.

29. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 8 F. (2d) 890 [aff 12 F. (2d) 511].

Burden of proof in:
Infringement suit see infra § 574.
Interference see supra § 216.

30. Waymire v. Shipley, 52 Or. 464, 97 P 807.

31. Scovill Mfg. Co. v. Satler, 21 F. (2d) 630; Electro-Bleaching Gas Co. v. Paradon Engineering Co., 8 F. (2d) 890 [aff 12 F. (2d) 511].

32. Troy Laundry Mach. Co. v. Columbia Mfg. Co., 217 Fed. 787, 789.
"Nevertheless, such a finding [that a patented device is useful] should carry with it something more than a bare prima facie. The Patent Office is a co-ordinate branch of government. The courts owe an attitude of respect towards the opinions which are expressed in the grant of letters. Where the office had before it all that is before the court, such opinion is entitled to have accorded it all the force which is the accompaniment of judgments which, although not binding, are informative and persuasive." Troy Laundry Mach. Co. v. Columbia Mfg. Co., supra.

33. Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422].

34. Packard v. Lacing-Stud Co., 70 Fed. 66, 16 CCA 639.

35. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

36. Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Evarts v. Ford, 8 F. Cas. No. 4,574, 6 Fish. Pat. Cas. 587.

Extensions in general see infra §§ 304-306.

37. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 253 Fed. 187 [aff 267 Fed. 422]; Hildreth v. Mastoras, 253 Fed. 68 [aff 257 U. S. 27, 42 SCt 20, 66 L. ed. 112]; Scott v. Fisher Knitting Mach. Co., 145 Fed. 915, 76 CCA 447; Von Schmidt v. Bowers, 80 Fed. 121, 25 CCA 323 [certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem].
[a] **Reason for rule.**—"It is frequently a characteristic of generic inventions that their first embodiments work imperfectly." Scott v. Fisher Knitting Mach. Co., 145 Fed. 915, 922, 76 CCA 447.

38. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

39. Invention in general see supra §§ 67-99.
Presumption of:
Nonanticipation see supra § 260.
Novelty see supra § 259.
Originality and priority see infra §§ 265, 266.

40. Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Stimpson v. Woodman, 10 Wall. (U. S.) 117, 19 L. ed. 866; Automatic Racking Mach. Co. v. White Racker Co., 145 Fed. 643; Fraim v. Keen, 25 Fed. 820.

41. Frank v. Western Electric Co., 24 F. (2d) 642; Finley v. MacDougald Constr. Co., 23 F. (2d) 204; Hirschy Co. v. Wisconsin-Minnesota Gas, etc., Household Appliances Co., 18 F. (2d) 347 [aff 28 F. (2d) 838]; Inland Mfg. Co. v. American Wood Rim Co., 14 F. (2d) 657; Smalley v. Auto Specialists, Inc., 7 F. (2d) 710; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Trimble v. Woodstock Mfg. Co., 297 Fed. 524 [aff 297 Fed. 529]; Willamette Iron, etc., Works v. Columbia Engineering Works, 252 Fed. 594, 164 CCA 510; Brown Portable El. Co. v. Interior Warehouse Co., 234 Fed. 649; T. B. Wood's Sons Co. v. Valley Iron Works, 191 Fed. 196 [aff 196 Fed. 780, 116 CCA 46]; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626.

42. Smalley v. Auto Specialists, Inc., 7 F. (2d) 710; Ball, etc., Co. v. F. C. Sanford Mfg. Co., 291 Fed. 442, 450 [rev on other grounds 297 Fed. 163]; Pangborn Corp. v. W. W. Sly Mfg. Co., 284 Fed. 217 [aff 263 Fed. 394, 276 Fed. 971, and certiorari den 260 U. S. 749 mem, 43 SCt 249 mem, 67 L. ed. 495 mem]; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626, 638.
"Courts should lean toward the presumption that an issued patent expresses invention, and should favor the affirmative in a doubtful case of invention or no invention." Ball, etc., Co. v. F. C. Sanford Mfg. Co., supra.
"That a patented device . . . was allowed by the Patent Office . . . is persuasive of invention, when doubtful." Pangborn Corp. v. W. W. Sly Mfg. Co., supra.
"Simply raising a doubt as to whether a skilled mechanic conversant with the art involved would not have seen the means adopted does not rebut such presumption" of invention arising from the grant of the patent. National Malleable Casting Co. v. American Steel Foundries, supra.

43. Trimble v. Woodstock Mfg. Co., 297 Fed. 524 [aff 297 Fed. 529].

44. Trimble v. Woodstock Mfg. Co., supra; Willamette Iron, etc., Works v. Columbia Engineering Works, 252 Fed. 594, 164 CCA 510; Brown Portable El. Co. v. Interior Warehouse Co., 234 Fed. 649.

45. Butler v. Pratt, 253 Fed. 654, 165 CCA 280.

46. Ball, etc., Co. v. F. C. Sanford Mfg. Co., 291 Fed. 442, 450, 280 Fed. 415 [rev on other grounds 297 Fed. 163]; Cordley v. Richardson Corp., 278 Fed. 683 [aff 280 Fed. 515].
"No duty rests upon a tribunal to transpose mechanical intelligence into genius." Ball, etc., Co. v. F. C. Sanford Mfg. Co., supra.

47. American Caramel Co. v. Glen Rock Stamping Co., 201 Fed. 363 [rev on other grounds 209 Fed. 619, 126 CCA 579].

48. Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 267 (reh den 27 F. (2d) 334)].

49. American Caramel Co. v. Glen Rock Stamping Co., 201 Fed. 363 [rev on other grounds 209 Fed. 619, 126 CCA 579].

50. Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175 [rev 173 Fed. 315].
[a] **Reason for rule.**—(1) The only question in an interference proceeding is one of priority. Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175 [rev 173 Fed. 315]. (2) Issues in interference generally see supra §§ 212, 213.

51. Combinations in general see supra §§ 86, 87.

52. Galvin Electric Mfg. Co. v. Emerson Electric Mfg. Co., 19 F. (2d) 885.

53. Aggregation in general see supra § 88.

54. Blackington v. Adels, 282 Fed. 641, 644 [aff 282 Fed. 645].

55. Blackington v. Adels, supra.
"Such fact is entitled to some weight, in that the allowance of the claims, after such objection, indi-

[§ 263] **(6) Prior Public Use or Sale.**[56] The presumption is against two years' public use or sale as a bar to a patent, and the burden is upon the one rebutting the presumption to do so by the clearest of proof,[57] beyond a reasonable doubt.[58]

[§ 264] **(7) Abandonment.**[59] The decision of the patent office is not conclusive upon the question of abandonment.[60] However, the grant of a patent is prima facie evidence that there has been no abandonment.[61] Where an extension is authorized by an act of congress, the grant of the patent is conclusive upon the question of abandonment.[62]

[§ 265] **d. As to Persons Entitled to Patents**[63]**—(1) As to Originality and Priority**[64]**—(a) First and Original Inventor.**[65] A patent, although not conclusive evidence,[66] is prima facie evidence that the patentee is the original and first inventor.[67] One controverting this has the burden of establishing invention by another,[68] as the rule is variously stated, by clear and satisfactory proof,[69] by the clearest of proof,[70] or by proof beyond a reasonable doubt.[71] Every reasonable doubt, it has been held, should be

cates that this action represented the deliberate judgment of an official more or less expert." Blackington v. Adels, supra.

56. Prior public use or sale in general see supra §§ 108-119.

57. Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697.

58. Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; Wendell v. American Laundry Mach. Co., 248 Fed. 698, 160 CCA 598 [aff 239 Fed. 555]; Albright v. Longfeld, 131 Fed. 473; Timolat v. Philadelphia Pneumatic Tool Co., 131 Fed. 257; Durfee v. Bawo, 118 Fed. 853; Loew Filter Co. v. German-American Filter Co., 107 Fed. 949, 47 CCA 94; Brown v. Zaubitz, 105 Fed. 242; Flomerfelt v. Newwitter, 88 Fed. 696 [aff 95 Fed. 1006 mem, 37 CCA 356 mem]; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191 [aff 177 U. S. 485, 20 SCt 708, 44 L. ed. 856]; Kraatz v. Tieman, 79 Fed. 322 [rev on other grounds 85 Fed. 437, 29 CCA 257]; Dodge v. Post, 76 Fed. 807; Oval Wood Dish Co. v. Sandy Creek, N. Y. Wood Mfg. Co., 60 Fed. 285; Converse v. Matthews, 58 Fed. 246; Francis v. Kirkpatrick, 52 Fed. 824; Wetherell v. Keith, 27 Fed. 364; Adams, etc., Mfg. Co. v. Rathbone, 26 Fed. 262; Dreyfus v. Schneider, 25 Fed. 481; Innis v. Oil City Boiler Works, 22 Fed. 780; Everest v. Buffalo Lubricating Oil Co., 20 Fed. 848; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; American Hide, etc., Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Andrews v. Carmen, 1 F. Cas. No. 371, 2 Bann. & A. 277, 13 Blatchf. 307; Brown v. Whittemore, 4 F. Cas. No. 2,033, 5 Fish. Pat. Cas. 524; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Parker v. Remhoff, 18 F. Cas. No. 10,747, 3 Bann. & A. 550, 17 Blatchf. 206; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.

59. Abandonment of invention in general see supra §§ 120-125.

60. Woodbury Patent Planing-Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939 [aff 30 F. Cas. No. 17,970, 4 Bann. & A. 100]; Fassett v. Ewart Mfg. Co., 58 Fed. 360; Marsh v. Sayles, 16 F. Cas. No. 9,119, 3 Biss. 321; U. S. Rifle, etc., Co. v. Whitney Arms Co., 28 F. Cas. No. 16,793, 2 Bann. & A. 493, 14 Blatchf. 94 [aff 118 U. S. 22, 6 SCt 950, 30 L. ed. 53].

61. Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138.

Unavoidable delay in patent office see supra § 124.

62. Jordan v. Dobson, 13 F. Cas. No. 7,519, 4 Fish. Pat. Cas. 232.

Extensions in general see infra §§ 304-306.

63. Persons entitled to patents in general see supra §§ 126-145.

Presumption as to:
Anticipation see supra § 260.
Invention see supra § 262.
Novelty see supra § 259.

64. Originality and priority in general see supra §§ 127-132.

65. First and original inventor in general see supra § 26 et seq.

Priority see infra § 266.

66. Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516.

67. U. S.—Ashcroft v. Boston, etc., R. Co., 97 U. S. 189, 24 L. ed. 982; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Seymour v. Osborne, 11 Wall. 516, 20 L. ed. 33; Blanchard v. Putnam, 8 Wall. 420, 19 L. ed. 433; Agawam Woolen Co. v. Jordan, 7 Wall. 583, 19 L. ed. 177; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Crone v. John J. Gibson Co., 237 Fed. 637 [rev on other grounds 247 Fed. 503, 150 CCA 13]; Warren Bros. Co. v. Evans, 234 Fed. 657 [rev on other grounds 240 Fed. 696, 153 CCA 494]; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132 [aff 215 Fed. 114]; Toledo Metal Wheel Co. v. Foyer, 223 Fed. 350, 138 CCA 612; American Brake Shoe, etc., Co. v. Hoadley Brake Shoe Co., 222 Fed. 327 [aff 227 Fed. 90, 141 CCA 638]; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem]; Colman v. Byrd Mfg. Co., 200 Fed. 59 [aff 205 Fed. 904, 124 CCA 248]; San Francisco Cornice Co. v. Beyrle, 195 Fed. 516, 115 CCA 426; Merrimac Mattress Mfg. Co. v. Feldman, 133 Fed. 64; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 129 Fed. 598; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [rev on other grounds 96 Fed. 850, 37 CCA 593, and rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968]; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367 [aff 69 Fed. 408]; Front Rank Steel Furnace Co. v. Wrought Iron Range Co., 63 Fed. 995; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Pacific Cable R. Co. v. Butte City St. R. Co., 52 Fed. 863 [aff 60 Fed. 90, 8 CCA 484]; Donoughe v. Hubbard, 27 Fed. 742; Green v. French, 11 Fed. 591; Rogers v. Beecher, 3 Fed. 639; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Allbright v. Celluloid Harness Trimming Co., 1 F. Cas. No. 147, 2 Bann. & A. 629; Brodie v. Ophir Silver Min. Co., 4 F. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Carter v. Carter, 5 F. Cas. No. 2,475, McA. Pat. Cas. 388; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Crouch v. Speer, 6 F. Cas. No. 3,438, 1 Bann. & A. 145; Doherty v. Haynes, 7 F. Cas. No. 3,963, 1 Bann. & A. 289, 4 Cliff. 291; Goodyear v. Day, 10 F. Cas. No. 5,566; Goodyear Dental Vulcanite Co. v. Gardiner, 10 F. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224; Haskell v. Shoe Mach. Mfg. Co., 11 F. Cas. No. 6,194, 3 Bann. & A. 553; Hoffheins v. Brandt, 12 F. Cas. No. 6,576, 3 Fish. Pat. Cas. 218; Johnson v. Root, 13 F. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; Knight v. Baltimore, etc., R. Co., 14 F. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Konold v. Klein, 14 F. Cas. No. 7,925, 3 Bann. & A. 226; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Putnam v. Yerrington, 20 F. Cas. No. 11,486, 2 Bann. & A. 237; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Reeves v. Keystone Bridge Co., 20 F. Cas. No. 11,660, 5 Fish. Pat. Cas. 456, 9 Phila. (Pa.) 368; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535; Sloat v. Spring, 22 F. Cas. No. 12,948a; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397; Winans v. New York, etc., R. Co., 30 F. Cas. No. 17,864, 4 Fish. Pat. Cas. 1.

Ill.—Forster v. Brown Hoisting Mach. Co., 266 Ill. 287, 107 NE 588, AnnCas1916B 795; West Disinfecting Co. v. U. S. Sanitary Specialties Corp., 221 Ill. A. 372.

Mich.—Paul v. Collins, 191 Mich. 113, 157 NW 400.

N. Y.—Seed Filter, etc., Co., Inc. v. Stocking, 172 App. Div. 726, 158 NYS 687.

Oh.—Clark v. Bentel, 9 Oh. Dec. (Reprint) 289, 12 CincLBul 53.

W. Va.—Maurice v. Devol, 23 W. Va. 247.

68. Warren Bros. Co. v. Evans, 234 Fed. 657 [rev on other grounds 240 Fed. 696, 153 CCA 494]; Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132; San Francisco Cornice Co. v. Beyrle, 195 Fed. 516, 115 CCA 426; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; Roberts v. Pittsburgh Wire Co., 69 Fed. 624 [aff 71 Fed. 706, 18 CCA 302]; Roberts v. H. P. Nail Co., 53 Fed. 916; Cohansey Glass Mfg. Co. v. Wharton, 28 Fed. 189; Thayer v. Spaulding, 27 Fed. 66; Duffy v. Reynolds, 24 Fed. 855; Albany Steam Trap Co. v. Felthousen, 20 Fed. 633, 22 Blatchf. 169; Green v. French, 11 Fed. 591; Shirley v. Sanderson, 8 Fed. 905; Brodie v. Ophir Silver Min. Co., 4 F. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Crouch v. Speer, 6 F. Cas. No. 3,438, 1 Bann. & A. 145; Fisk v. Church, 9 F. Cas. No. 4,826, 5 Fish. Pat. Cas. 540; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [aff 3 Wall. 315, 18 L. ed. 76]; Hoffheins v. Brandt, 12 F. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Taylor v. Wood, 23 F. Cas. No. 13,808, 1 Bann. & A. 270, 12 Blatchf. 110; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

69. American Brake Shoe, etc., Co. v. Hoadley Brake Shoe Co., 222 Fed. 327 [aff 227 Fed. 90, 141 CCA 638]; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem].

[a] **Thus,** where the evidence is principally oral, accompanied by sketches or writings whose genuineness and dates are evidenced by oral testimony only, the proof must be at least clear, convincing, and satisfactory. Drum v. Turner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem].

70. Austin Mach. Co. v. Buckeye Tract. Ditcher Co., 13 F. (2d) 697.

71. Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; Drum v. Tur-

resolved in favor of the patentee as the first inventor.[72] But the presumption that the patentee is the first inventor may be overcome by facts within the judicial knowledge of the court.[73] Where the court of appeals of the District of Columbia has decided as to the first inventor, a contestant, it has been held, cannot succeed except upon new and convincing evidence.[74] The extension of a patent, resisted on the ground of want of novelty, strengthens the presumption that the patentee was the original inventor.[75]

Time to which presumption extends. The presumption that the patentee is the first and original inventor extends back only to the time of filing the original application.[76] In the absence of the application, the presumption extends back only to the date of the patent.[77]

[§ 266] **(b) Priority.**[78] The decisions of the patent office, including those of the court of appeals of the District of Columbia, are not conclusive upon the question of priority, even as between the parties to the prior interference proceedings.[79] However, such decision is prima facie correct,[80] is entitled to weight,[81] and places upon one contesting it the burden of proving the contrary,[82] as the rule is variously stated, by clear and convincing evidence,[83] by the clearest of proof,[84] by evidence of the most convincing and satisfactory nature,[85] or evidence which in character and amount carries thorough conviction.[86] All doubts, it has been held, must be resolved

ner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem].

[a] **Thus,** where the claim of such priority is first made many years after a patent is issued and it is supported by oral evidence only, the proof must be beyond a reasonable doubt. Drum v. Turner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem].

72. Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132 [aff 215 Fed. 114]; San Francisco Cornice Co. v. Beyrle, 195 Fed. 516, 115 CCA 426.

73. Charles Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 CCA 621.

Judicial notice in general see Evidence 23 C. J. p 58 et seq.

74. James Heddon's Sons v. Rush, 271 Fed. 689.

75. Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195.

76. Crone v. John J. Gibson Co., 237 Fed. 637 [rev on other grounds 247 Fed. 503, 150 CCA 13]; Johnson v. Root, 13 F. Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275]; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Webster Loom Co. v. Higgins, 29 F. Cas. No. 17,342, 4 Bann. & A. 88, 15 Blatchf. 446 [rev on other grounds 105 U. S. 580, 26 L. ed. 1177]; White v. Allen, 29 F. Cas. No. 17,535, 2 Cliff. 224, 2 Fish. Pat. Cas. 440; Wing v. Richardson, 30 F. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

77. Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Wing v. Richardson, 30 F. Cas. No. 17,869, 2 Cliff. 449, 2 Fish. Pat. Cas. 535.

78. **Date to which priority of invention is carried by patent** see supra § 265.

79. McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Morgan v. Daniels, 153 U. S. 120, 14 SCt 772, 38 L. ed. 657; Andrews v. Hovey, 124 U. S. 694, 8 SCt 676, 31 L. ed. 557; Rousso v. Barber, 299 Fed. 801 [aff 3 F. (2d) 740 (certiorari den 267 U. S. 596 mem, 45 SCt 352 mem, 69 L. ed. 805 mem)]; Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 290 Fed. 565 [aff 8 F. (2d) 41 (certiorari den 269 U. S. 581 mem, 46 SCt 106 mem, 70 L. ed. 423 mem)]; Webster Electric Co. v. Podlesak, 255 Fed. 907; Smart v. Wright, 227 Fed. 84, 141 CCA 632; Hillard v. Remington Typewriter Co., 186 Fed. 334, 108 CCA 534; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 CCA 206; Davis, etc., Temperature Controlling Co. v. National Steam Specialty Co., 164 Fed. 191; John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290; Wheaton v. Kendall, 85 Fed. 666; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367 [aff 69 Fed. 408]; Empire State Nail Co. v. American Solid Leather Button Co., 61 Fed. 650; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Minneapolis Harvester Works v. McCormick Harvesting-Mach. Co., 28 Fed. 565; Hubel v. Tucker, 24 Fed. 701, 23 Blatchf. 297; Celluloid Mfg. Co. v. Chrolithian Collar, etc., Co., 24 Fed. 275; Gloucester Isinglass, etc., Co. v. Brooks, 19 Fed. 426; Whipple v. Miner, 15 Fed. 117; Wire Book Sewing Mach. Co. v. Stevenson, 11 Fed. 155; Peck, etc., Co. v. Lindsay, 2 Fed. 688, 5 Bann. & A. 390; Greenwood v. Bracher, 1 Fed. 856; Goodyear v. Day, 10 F. Cas. No. 5,566; Perry v. Starrett, 19 F. Cas. No. 11,012, 3 Bann. & A. 485; Union Paper-Bag Mach. Co. v. Crane, 24 F. Cas. No. 14,388, 1 Bann. & A. 494, Holmes, 429. But see National Mach. Co. v. Wheeler, etc., Mfg. Co., 72 Fed. 185 [rev on other grounds 79 Fed. 432, 24 CCA 663 (certiorari den 166 U. S. 722 mem, 17 SCt 997 mem, 41 L. ed. 1188 mem)]; Fassett v. Ewart Mfg. Co., 58 Fed. 360 [aff 62 Fed. 404, 10 CCA 441]; Shuter v. Davis, 16 Fed. 564; Holliday v. Pickhardt, 12 Fed. 147; Peck, etc., Co. v. Lindsay, 2 Fed. 688, 5 Bann. & A. 390; Greenwood v. Bracher, 1 Fed. 856; Hanford v. Westcott, 11 F. Cas. No. 6,022 (holding such decision conclusive between the parties, even if wrong, where no steps have been taken to set it aside, or where it has been acquiesced in); Peck v. Collins, 70 N. Y. 376 [aff 103 U. S. 660, 26 L. ed. 512] (holding such decision conclusive so long as it is unreversed by proceedings authorized to be instituted in equity).

[a] **Suit to obtain patent.**—(1) Morgan v. Daniels, 153 U. S. 120, 14 SCt 772, 38 L. ed. 657. (2) Suit in equity to obtain patent in general see supra §§ 243-252.

[b] **Suit for infringement.**—(1) The failure of a party to an interference proceeding in the patent office to make any showing or take any testimony does not estop him from claiming that he was the original inventor in subsequent litigation for infringement. Smart v. Wright, 227 Fed. 84, 141 CCA 632. (2) "It must be borne in mind that the question here presented [whether or not the patent has been anticipated] is one in which . . . the whole public is interested, as against whom no estoppel can be predicated upon the decision in an interference case." Davis, etc., Temperature Controlling Co. v. National Steam Specialty Co., 164 Fed. 191, 192. (3) Infringement suit in general see infra §§ 521-656.

80. Lenk v. Hunt-Lasher Co., 14 F. (2d) 335; Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 290 Fed. 565 [aff 8 F. (2d) 41 (certiorari den 269 U. S. 581 mem, 46 SCt 106 mem, 70 L. ed. 423 mem)]; Webster Electric Co. v. Podlesak, 255 Fed. 907; American Graphophone Co. v. Gimbel, 234 Fed. 344; Hillard v. Remington Typewriter Co., 186 Fed. 334, 108 CCA 534.

[a] **Executive decision.**—Decisions by the court of appeals of the District of Columbia in interference cases, like all executive decisions, are presumptively valid on questions of fact. Webster Electric Co. v. Podlesak, 255 Fed. 907.

Decision as justifying preliminary injunction see infra § 601.

81. Reed v. Cropp Concrete Mach. Co., 239 Fed. 869, 152 CCA 653 [rev 218 Fed. 643 and certiorari den 243 U. S. 649 mem, 37 SCt 476 mem, 61 L. ed. 946 mem]; Lang v. Twitchell-Champlin Co., 207 Fed. 363.

82. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. ed. 952; Safe-Cabinet Co. v. Globe-Wernicke Co., 293 Fed. 568 [certiorari den 264 U. S. 586 mem, 44 SCt 335 mem, 68 L. ed. 862 mem]; Curtiss Aeroplane, etc., Corp. v. Janin, 267 Fed. 198 [rev on other grounds 278 Fed. 454]; Webster Electric Co. v. Podlesak, 255 Fed. 907; American Graphophone Co. v. Gimbel, 234 Fed. 344; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Gloucester Isinglass, etc., Co. v. Brooks, 19 Fed. 426; Wire Book Sewing Mach. Co. v. Stevenson, 11 Fed. 155.

Burden of proof in general in infringement suit see infra § 574.

83. Lenk v. Hunt-Lasher Co., 14 F. (2d) 335; Rousso v. Barber, 299 Fed. 801 [aff 3 F. (2d) 740 (certiorari den 267 U. S. 596 mem, 45 SCt 352 mem, 69 L. ed. 805 mem)]; Curtiss Aeroplane, etc., Corp. v. Janin, 267 Fed. 198 [rev on other grounds 278 Fed. 454]; Hillard v. Remington Typewriter Co., 186 Fed. 334, 108 CCA 534; Whipple v. Miner, 15 Fed. 117.

[a] **Thus,** while the decision of the court of appeals of the District of Columbia, determining priority of invention between a patentee and a later applicant in favor of the latter, does not preclude a relitigation of the question on the merits as between the two patents, unless there is a material difference in the evidence, it should be accepted as the law of the patents involved. Rousso v. Barber, 299 Fed. 801 [aff 3 F. (2d) 740 (certiorari den 267 U. S. 596 mem, 45 SCt 352 mem, 69 L. ed. 805 mem)].

[b] **Mere suggestion of mistake insufficient.**—The successful applicant will not be enjoined from receiving his patent upon the mere suggestion that the commissioner was mistaken. Whipple v. Miner, 15 Fed. 117.

84. Miehle Printing Press, etc., Co. v. Miller Saw-Trimmer Co., 2 F. (2d) 744 [aff 6 F. (2d) 417].

85. Reed v. Cropp Concrete Mach. Co., 239 Fed. 869, 152 CCA 653 [certiorari den 243 U. S. 649 mem, 37 SCt 476 mem, 61 L. ed. 946 mem].

86. Morgan v. Daniels, 153 U. S. 120, 14 SCt 772, 38 L. ed. 657 [rev 42 Fed. 451]; U. S. v. De Forest Radio Tel., etc., Co., 18 F. (2d) 338 [aff 21 F. (2d) 918 (certiorari granted 276 U. S. 610 mem, 48 SCt 302 mem, 72 L. ed. 730 mem, and aff 49 SCt 34 mem)]; Earles v. A. W. Drake Mfg. Co., 300 Fed. 265 [aff 289 Fed.

against the contestant of the decision.[87] If all the tribunals of the patent office have concurred in the decision, the presumption in favor of its correctness is especially strong.[88] Likewise, where the claim of an inventor has been subjected to close and careful scrutiny in the patent office and in the court of appeals of the District of Columbia, under the stimulus of a heated contest, the presumption of priority arising from the grant of the patent has greatly increased weight.[89] Where the decision of the commissioner has been affirmed by the court of appeals of the District of Columbia, it has been held that the question of priority will not be reopened, unless new evidence is adduced.[90] That an award of priority by the patent office was not based on an adjudication upon the merits, but on the failure of a party to take testimony in support of his claim of priority, tends to weaken the force of the award.[91] When the prima facie force of a patent as to priority of invention on the part of the patentee has been once destroyed by evidence of prior invention on the part of another, it cannot be restored by the patent itself, but only by specific testimony from witnesses.[92] A decision in interference proceedings as to the priority of invention is not a bar to an action to determine the ownership of the patent under a contract affecting all future inventions of the inventor.[93]

No presumption. If the decision of the patent office is based upon fraudulent evidence, there is no presumption of priority in favor of the successful party.[94] Nor is there a presumption of priority because of a decision in an interference proceeding where the patent held to be nonanticipating was itself anticipated by another patent not involved in the interference.[95]

Collateral attack. The decision of the patent office is not subject to collateral attack except for gross mistake or fraud.[96]

In a suit against one not a party nor in privity with parties to an interference proceeding, decisions of patent office officials, if admissible at all, are so only in support of independent evidence to establish prior invention.[97]

[§ 267] **(2) Identity of Inventor.** The decision of the patent office is presumptively correct as to the identity of the inventor.[98]

[§ 268] **(3) Joint Inventors.**[99] A joint patent is prima facie evidence that all patentees participated in the invention.[1]

[§ 269] **(4) Assignees.**[2] A patent is prima facie evidence that title is in the assignee named.[3]

VIII. REQUISITES AND VALIDITY OF LETTERS PATENT*

[§ 270] **A. Form and Contents—1. In General.** The statute requires that all patents be issued in the name of the United States of America, under the seal of the patent office, and shall either be signed by the commissioner of patents or have his name printed thereon and attested by an assistant commissioner of the patents or by one of the law examiners duly designated by the commissioner.[4] The statutes also provide that the patent shall contain a short title or description of the invention or discovery correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the statutory term, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof, referring to the specification for the particulars thereof.[5] The title or description provided by the statute need not be more specific than necessary to indicate generally

137 (certiorari den 266 U. S. 616 mem, 45 SCt 96 mem, 69 L. ed. 470 mem)]; Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 290 Fed. 565 [aff 8 F. (2d) 41 (certiorari den 269 U. S. 581 mem, 46 SCt 106 mem, 70 L. ed. 423 mem)]; United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem]; Perry Auto Lock Co. v. Security Lock Co., 286 Fed. 101 [certiorari den 260 U. S. 747 mem, 43 SCt 248 mem, 67 L. ed. 493 mem]; Computing Scale Co. v. Standard Computing Scale Co., 195 Fed. 508, 115 CCA 418; Roth v. Harris, 168 Fed. 279, 93 CCA 581; Richards v. Meissner, 163 Fed. 957 [app dism 178 Fed. 1004 mem, 101 CCA 663 mem]; John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290; Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630, 23 CCA 367 [aff 69 Fed. 408]; Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73.

87. Miehle Printing Press, etc., Co. v. Miller Saw-Trimmer Co., 2 F. (2d) 744 [aff 6 F. (2d) 417]; Parham v. American Buttonhole, etc., Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

88. Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374].

89. Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112 [rev 263 Fed. 571].

90. R. Thomas, etc., Co. v. Electric Porcelain, etc., Co., 111 Fed. 923.

91. Thomson Spot Welder Co. v. Ford Motor Co., 281 Fed. 680 [aff 268 Fed. 836, certiorari granted 260 U. S. 718 mem, 43 SCt 96 mem, 67 L. ed. 479 mem, and aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098].

92. Barstow v. Swan, 2 F. Cas. No. 1,065.

93. Strauss v. Borg, 172 Ill. A. 466.

94. Laas v. Scott, 161 Fed. 122.

95. American Graphophone Co. v. Gimbel, 234 Fed. 344.

96. Craig Demagnetizer, etc., Dryer Corp. v. Static Control Co., Inc., 295 Fed. 72; Webster Electric Co. v. Podlesak, 255 Fed. 907.

Collateral attack upon validity of patent in general see supra § 256 et seq.

97. Crone v. John J. Gibson Co., 237 Fed. 637 [rev on other grounds 247 Fed. 503, 150 CCA 13].

98. Wilkie v. Manhattan Rubber Mfg. Co., 8 F. (2d) 785 [aff 14 F. (2d) 811]; Procter, etc., Co. v. Berlin Mills Co., 256 Fed. 23, 167 CCA 295 [certiorari granted 249 U. S. 598 mem, 39 SCt 390 mem, 63 L. ed. 795 mem, and rev on other grounds 254 U. S. 156, 41 SCt 75, 65 L. ed. 196].

99. **Joint inventors in general** see supra §§ 133–135.

1. Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Hotchkiss v. Greenwood, 12 F. Cas. No. 6,718, 4 McLean 456, 2 Robb. Pat. Cas. 730 [aff 11 How. 248, 13 L. ed. 683]. See also Wilson v. Singer, 30 F. Cas. No. 17,835 (holding that the oath of joint patentees is prima facie proof that an invention is joint).

2. **Assignees in general** see supra § 138.

3. Beckwith Box Toe Co. v. Gowdy, 244 Fed. 805.

4. U. S. Code tit 35 § 39.

[a] **Signature** (1) is essential to the creation of the instrument as a patent. Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538. (2) Date of attaching signature may be shown. Marsh v. Nichols, supra. (3) Prior to the amendment of April 11, 1902 patents had to be signed by the secretary of the interior and countersigned by the commissioner of patents, and the failure of the secretary of the interior to sign it made it invalid. Marsh v. Nichols, supra; Marsh v. Scott, 125 Ill. 114, 16 NE 863. (4) Under Act (1836) § 5, which required that all patents be signed by the secretary of state and countersigned by the commissioner, the sanction of the secretary of state to the correction of a mistake could be by a writing afterward, without a resigning of the letters patent themselves. Woodworth v. Hall, 30 F. Cas. No. 18,017, 2 Robb Pat. Cas. 517, 1 Woodb. & M. 389.

[b] **Acting commissioner** (1) may sign patents. York, etc., Line R. Co. v. Winans, 17 How. (U. S.) 30, 15 L. ed. 27; Smith v. Mercer, 22 F. Cas. No. 13,078; Woodworth v. Hall, 30 F. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248; Woodworth v. Hall, 30 F. Cas. No. 18,017, 2 Robb Pat. Cas. 517, 1 Woodb. & M. 389. See Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141 (where letters patent signed by the acting commissioner were upheld). (2) Proof of office is not required as the court will take judicial notice of it. York, etc., Line R. Co. v. Winans, supra.

[c] **In Canada** the patent is issued under the seal of the patent office and the signature of the commissioner or deputy commissioner. Rev. St. (1906) c 69 § 22; Patent Act (Rev. St. c 61) § 21.

5. U. S. Code tit 35 § 40.

*By GILBERT G. FINLEY (§§ 270–293).

the nature and design of the invention;[6] and the patent office frequently suggests its form.[7] As to its sufficiency some confusion arose in the early cases from failure to distinguish between the requirements of our statutes and the requirements of the English law.[8] The specifications must be searched for an exact description of what is covered;[9] a copy of the specification and drawings must be annexed to the patent and form a part thereof;[10] and the title or description ought not to be repugnant to the specifications.[11] It is not necessary for the patent to contain any recitals that the prerequisites to the grant of it have been duly complied with.[12]

[§ 271] **2. Name of Patentee.**[13] While the statute provides that every patent shall contain a grant to "the patentee, his heirs or assigns,"[14] the words "the patentee, his heirs and assigns" mean "the patentee or his heirs or assigns."[15] They comprehend the legal representatives,[16] assigns in law,[17] and assigns in fact.[18] The "assignee" means the assignee in any degree and however remote,[19] and the patent may issue to the person who by the records of the office is assignee of the patent, although not technically the assignee of the inventor,[20] and although he has made an assignment to another,[21] and although he ceases to have any legal or equitable interest in the invention after executing the assignment.[22] The issuance of letters patent to the assignee of an applicant is prima facie evidence of title in the assignee named.[23]

Issuance in name of inventor after his death. The words "his heirs or assigns" raise no limitation in the sense of the strict common-law rule applied to realty,[24] and a patent issued to the inventor, "his heirs and assigns," is not void because of the death of the inventor before the patent was issued.[25]

Executor or administrator. While congress has provided that the right of applying for and obtaining a patent devolves upon the executor or administrator in trust for the inventor's heirs at law, in case he should have died intestate, or in trust for his devisees, if he shall have left a will,[26] letters patent issued to the personal representatives of a deceased inventor need not contain words creating a trust for such persons,[27] nor is it necessary that the beneficiaries should be named upon the face of the patent.[28] The patent office rules provide that in case of the death of the inventor during the time intervening between the filing of his application and the granting of a patent thereon, the letters patent will issue to the executor or administrator upon proper intervention by him.[29]

Partnership. Where a partnership has become the assignee of the inventor,[30] a patent may issue to it in its firm name,[31] although such name is wholly fanciful.[32]

Fraud. A patent fraudulently taken out in the name of another than the inventor is void.[33]

[§ 272] **B. Date of Issue.** The statute provides that every patent shall issue within three months from the date of payment of the final fee, which fee must be paid within six months from the date of allowance and notice to applicant or his agent.[34] This requirement has been held to be directory

[a] **Prior to the act of 1793** the description contained in the application was required to be recited substantially in the patent. Evans v. Chambers, 8 F. Cas. No. 4,555, 1 Robb Pat. Cas. 7, 2 Wash. C. C. 125.

[b] **In Canada** the requirements are similar to those obtaining in this country. Rev. St. (1906) c 69 § 21; Patent Act (Rev. St. c 61) § 20.

Term of patent see infra §§ 294–306.

6. Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505; Sickles v. Gloucester Mfg. Co., 22 F. Cas. No. 12,841, 4 Blatchf. 229, 1 Fish. Pat. Cas. 222.

7. Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356.

8. Hogg v. Emerson, 6 How (U. S.) 437, 12 L. ed. 505.

[a] **In England** (1) fuller description is required because the letters first issue and complete specifications are filed afterward. Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505. (2) The title must correctly indicate what is described or the patent is void. Cook v. Pearce, 8 Q. B. 1044, 115 Reprint 1167, 20 ERC 186; Rex v. Wheeler, 2 B. & Ald. 345, 106 Reprint 392; Croll v. Edge, 9 C. B. 479, 67 ECL 479, 137 Reprint 978. (3) The title may be broader than the description. Oxley v. Holden, 8 C. B. N. S. 666, 98 ECL 666, 141 Reprint 1327; Patent Bottle Envelope Co. v. Seymer, 5 C. B. N. S. 164, 94 ECL 164, 141 Reprint 65; Nickels v. Haslem, 7 M. & G. 378, 49 ECL 378, 135 Reprint 158; Neilson v. Harford, 8 M. & W. 806, 151 Reprint 1266, 20 ERC 56.

9. Sickles v. Gloucester Mfg. Co., 22 F. Cas. No. 12,841, 4 Blatchf. 229, 1 Fish. Pat. Cas. 222.

10. U. S. Code tit 35 § 40.

[a] **Under the act of 1793** (1) the patent was required to conform to the specification, affirmation, and petition of applicant. Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433. (2) The specification could be incorporated into the letters patent, even though it was not required. Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824.

[b] **In Canada** the same rule obtains. Rev. St. (1906) c 69 § 13 subs 5, 6; Patent Act (Rev. St. c 61) § 13; Reg. v. LaForce, 4 Can. Exch. 14; Smith v. Ball, 21 U. C. Q. B. (Ont.) 122.

11. Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356.

12. Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

[a] **Recitals** as to the notices issued are not necessary. Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

Compliance with prerequisites presumed see supra § 256 et seq.

13. Effect of clerical error in name of patentee see infra § 274.

Persons entitled to patent see supra §§ 126–145.

14. U. S. Code tit 35 § 40.

15. De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.

Right of assignee to patent see supra § 138.

16. De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.

17. De La Vergne Refrigerating Mach. Co. v. Featherstone, supra.

18. De La Vergne Refrigerating Mach. Co. v. Featherstone, supra.

19. Consolidated Electric Light Co. v. Edison Electric Light Co., 25 Fed. 719, 23 Blatchf. 412; Selden v. Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544.

[a] **Patent may issue** to the fourth assignee in succession. Selden v. Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544.

20. Consolidated Electric Light Co. v. Edison Electric Light Co., 25 Fed. 719, 23 Blatchf. 412.

21. Consolidated Electric Light Co. v. Edison Electric Light Co., supra.

22. Consolidated Electric Light Co. v. Edison Electric Light Co., supra.

23. Beckwith Box Toe Co. v. Gowdy, 244 Fed. 805.

[a] **Assignment** need not be produced. Beckwith Box Toe Co. v. Gowdy, 244 Fed. 805.

24. De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.

[a] **The word "heirs"** in a patent is not a definition of the extent of the patentee's own interest in the patent. De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.

25. De La Vergne Refrigerating Mach. Co. v. Featherstone, supra.

26. U. S. Code tit 35 § 46.

27. Stimpson v. Rogers, 23 F. Cas. No. 13,457, 4 Blatchf. 333.

28. Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,337, 1 Bann. & A. 177, 10 Phila. (Pa.) 227.

29. See supra § 139.

30. Right of partnership to take and hold patent see infra § 365.

31. Fresno Home-Packing Co. v. Fruit-Cleaning Co., 101 Fed. 826, 42 CCA 43.

32. Fresno Home-Packing Co. v. Fruit-Cleaning Co., supra.

33. Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576; Cheatham Electric Switching Device etc., Co. v. Kentucky Switch, etc., Co., 213 Ky. 23, 280 SW 469.

[a] **The letters patent** are only prima facie evidence that the patentee is the inventor, and the presumption may be rebutted. Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576.

34. U. S. Code tit 35 § 41.

[a] **Amended patent.**—Where a patent is refused and canceled because of error therein, and an amended patent issued, it dates from the amendment. Railway Register Mfg. Co. v. North Hudson County R. Co., 23 Fed. 593.

[b] **In England** (1) letters patent are valid when the seal is applied and before enrollment. Devonshire v. Neill, L. R. 2 Ir. 132, 146. (2) Renewed letters patent are not void because issued after the date of the expiration of the original letters patent. Russell v. Ledsam, 14 M. & W.

merely.[35] A patent cannot be antedated.[36] Where several patents are dated alike, there is a rebuttable presumption that the earlier in number is earlier in publication.[37] The date of issue and not the date of filing determines the priority of patents issued to the same inventor on the same invention.[38]

[§ 273] **C. Record.** All patents, together with the specifications, must be recorded in the patent office in books kept for that purpose.[39]

[§ 274] **D. Clerical Errors.**[40] Letters patent, regularly issued and valid on their face, will not be invalidated by a clerical error of the patent office.[41] Clerical errors in the name of the patentee will not render the patent void, provided there is sufficient evidence to identify him.[42]

[§ 275] **E. Correction or Amendment of Patents.** The officials of the government have the power to correct errors made by them in the issue of patents,[43] and errors made by applicant may be corrected by disclaimer or reissue.[44] The correction must be by the action of existing officers, not by former officers who have gone out of office.[45] The validity of an amendment shortening the term of a patent cannot be questioned, as against one who relied thereon, by a patentee who voluntarily procured it under a mistake as to the necessity thereof.[46]

[§ 276] **F. Interfering Patents[47]—1. In General.** Interfering patents are those which claim the same invention in whole or in part.[48]

[§ 277] **2. Validity.** No more than one patent can legally be granted for the same invention.[49] If the second patent is to the same patentee, it is ipso facto void,[50] but if to a different patentee, it is not,[51] and the patentee may bring suit to determine who is the first inventor.[52] The statute extending the rights of priority for the filing of applications for patent for inventions patented abroad, but providing that the rights of citizens having rights under conflicting patents or applications shall not be affected,[53] does not validate an interfering patent issued prior to the other but subsequent to an application by the other patentee for a foreign one for the same invention, as it only licenses the patentee to make, use, and sell the invention.[54]

[§ 278] **3. Proceedings To Invalidate—a. In General.** After interfering patents have been issued,

574, 153 Reprint 604 [aff 16 M. & W. 633, 153 Reprint 1343 (aff 1 H. L. Cas. 687, 9 Reprint 931)]. (3) A patent is not given the date of a foreign application unless requested within seven months. Acetylene Illum. Co. v. United Alkali Co., [1902] 1 Ch. 494. (4) Letters patent may be granted before the specification is made. Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586. (5) Where applications are made on the same day for similar patents, both letters patent will be sealed and dated as of the same day. In re Gething, L. R. 9 Ch. 633; In re Dering, 13 Ch. D. 393.

35. Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553.

[a] **Reallowance and issuance of patent more than six months after the first allowance** does not invalidate it. Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553.

36. Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538; Gramme Electrical Co. v. Arnoux, etc., Electric Co., 17 Fed. 838, 21 Blatchf. 450; Aronson v. Orlov, 228 Mass. 1, 116 NE 951.

[a] **Formerly** (1) under the law in force in 1854, a patent could be antedated to make it correspond with a prior English patent to the same patentee. Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279. (2) Under the act of 1861 it could date from the time of filing the specification, if not more than six months prior to the actual issue. De Florez v. Raynolds, 8 Fed. 434, 17 Blatchf. 436; Burdett v. Estey, 3 Fed. 566, 19 Blatchf. 1.

37. Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. 841, 69 CCA 200.

38. Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem].

[a] **It is immaterial** that the application for the later patent bears the lower serial number. Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 616 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem].

39. U. S. Code tit 35 § 39.

[a] **In England** (1) the patent must be enrolled by the patentee within the time fixed. In re Brough, 7 Beav. 104, 29 EngCh 104, 49 Reprint 1002; Ex p. Beck, 1 Bro. Ch. 578, 28 Reprint 1308; Ex p. Hoops, 6 Ves. 599, 31 Reprint 1215. (2) The enrollment is for the benefit of the public, and cannot be dispensed with, or the specification kept secret. Ex p. Hoops, supra. (3) The master of the rolls can correct only clerical errors. Re Dinsmore, 18 Beav. 538, 52 Reprint 211; In re Sharp, 3 Beav. 245, 43 EngCh 245, 49 Reprint 96; In re Redmund, 5 Russ. 44, 5 EngCh 44, 38 Reprint 943. (4) The enrollment cannot be amended until the letters patent have been amended and resealed. In re Nickel, 1 Phil. 36, 19 EngCh 36, 41 Reprint 544.

40. Correction of clerical errors see infra § 275.

41. Deere v. Arnold, 95 Fed. 169.

[a] **In Canada,** by force of statute, the rule is the same. Rev. St. (1906) c 69 § 58; Patent Act (Rev. St. c 61) § 48.

42. Bignall v. Harvey, 4 Fed. 334, 18 Blatchf. 353; Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,337, 1 Bann. & A. 177, 10 Phila. (Pa.) 227.

[a] **Transposition** of double christian name will not void a patent where it supplies upon its face an added description sufficient to identify the patentee. Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., 18 F. Cas. No. 10,337, 1 Bann. & A. 177, 10 Phila. (Pa.) 227.

43. Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538; Woodworth v. Hall, 30 F. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248; Woodworth v. Hall, 30 F. Cas. No. 18,017, 2 Robb Pat. Cas. 517, 1 Woodb. & M. 389.

[a] **In England** (1) the master of the rolls may correct clerical errors. In re Johnson, 5 Ch. D. 503. (2) Notice of the order must be given to the commissioner of patents so that the specification may be reprinted. In re Johnson, supra. (3) Specification may be corrected by way of disclaimer, correction, or explanation, but not to cover an enlarged or different invention. Kelly v. Heathman, 45 Ch. D. 256, 20 ERC 460; Marsden v. Moser, 73 L. T. Rep. N. S. 667. (4) Leave to amend, once given, is conclusive of the right to make the amendment, except in case of fraud, and the amendment is part of the specification. Marsden v. Moser, supra. (5) When the letters patent have been actually enrolled, they are corrected and resealed by application to the lord chancellor, before the enrollment is altered. In re Nickel, 1 Phil. 36, 19 EngCh 36, 41 Reprint 544.

[b] **In Australia** the recording by the registrar of patents of an amendment of a British specification has not the effect of an amendment of the specification in letters of registration of the British patent. Australian Gold Recovery Co., Ltd. v. Lake View Consols, Ltd., [1901] A. C. 142.

44. Disclaimers see infra §§ 329-334.

Reissues see infra §§ 307-328.

45. Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538.

46. Edison Electric Light Co. v. Buckeye Electric Co., 59 Fed. 691.

[a] **Thus,** where an amendment limited a patent so as to expire with a foreign patent, the patentee was estopped from claiming invalidity of the patent, or relying on a subsequent annulment of the amendment. Edison Electric Light Co. v. Buckeye Electric Co., 59 Fed. 691.

47. Interferences on application see supra §§ 196-222.

48. International Signal Co. v. Vreeland Apparatus Co., 278 Fed. 468; Simplex R. Appliance Co. v. Wands, 115 Fed. 517, 53 CCA 171; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Dederick v. Fox, 56 Fed. 714; Nathan Mfg. Co. v. Craig, 49 Fed. 370; Gold, etc., Ore Separating Co. v. U. S. Disintegrating Ore Co., 10 F. Cas. No. 5,508, 6 Blatchf. 307, 3 Fish. Pat. Cas. 489.

[a] **Interference** (1) is determined by the claims, not by the general appearance and functions of the machine, shown but not claimed. Dederick v. Fox, 56 Fed. 714. (2) It does not exist between a patent having a dominant broad claim and one having a subordinate specific claim. Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374].

[b] **Claims.**—Substantial identity between claims is required, interpreting them in the light, not only of text, but of the specifications and drawings, and of the prior art. International Signal Co. v. Vreeland Apparatus Co., 278 Fed. 468.

49. Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275].

50. Miller v. Eagle Mfg. Co. 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 SCt 40, 35 L. ed. 817; Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Keystone Trading Co. v. Zapota Mfg. Co., 210 Fed. 456.

51. Eick v. Economic Mach. Co., 297 Fed. 835.

52. Eick v. Economic Mach. Co., supra.

53. U. S. Code tit 35 §§ 80, 82.

54. Federal Yeast Corp. v. Fleish-

the court, not the patent office, is the forum to determine priority of invention.[55] By force of express statutory provision,[56] any person interested in interfering patents, or in the working of the invention claimed under either of them, may have relief against the interfering patentee and all parties interested under him by suit in equity against the owners of the interfering patent, and the court may adjudge either patent invalid.[57] A party is not limited to this remedy, however; he may join it with an infringement suit,[58] or he may bring an action at law or in equity for infringement alone.[59] The proceeding contemplated by the statute is the ordinary adversary proceeding in chancery.[60] It is independent of any interference in the patent office,[61] is governed by ordinary equity rules,[62] and must be brought in the district where defendant may be found.[63] It is not necessary for defendant to file a cross bill to obtain affirmative relief,[64] but he has the right to do so.[65]

[§ 279] **b. Issues.** In this proceeding the issue of whether the patents are interfering patents is determined,[66] and, if this is shown, ordinarily the next question is who is the first inventor.[67] While the contrary has been held,[68] it is now well settled, in accord with the earliest decisions,[69] that the statute authorizes the court to declare, not only either, but both, of the patents void either in whole or in part,[70] and any ground of invalidity of complainant's patent may be put in issue.[71]

Defenses. If the bill fails to show that defendants are the owners of the alleged interfering patent, it is bad on special demurrer.[72] A sale pendente lite by a plaintiff of his interest in the patent operates as an abatement, but it is a matter of defense of which plaintiff cannot take advantage.[73]

mann Co., 13 F. (2d) 570.

55. International Signal Co. v. Vreeland Apparatus Co., 278 Fed. 468.

56. U. S. Code tit 35 § 66.

57. See cases infra this note.

[a] **Parties.**—(1) it is required only that the persons instituting the proceedings shall be "interested" in any one of the patents. Palmer Pneumatic Tire Co. v. Lozier, 69 Fed. 346. (2) Complainant's right is not affected by the fact that he has surrendered his patent for the purpose of procuring a reissue. Palmer Pneumatic Tire Co. v. Lozier, supra.

[b] **Statute applies** to cases where there is a claimed interference between patents granted to the same inventor. Keystone Trading Co. v. Zapota Mfg. Co., 210 Fed. 456.

[c] **Patentability** of an alleged specific improvement of a prior and basic patent is not the subject matter of an interference suit. International Signal Co. v. Vreeland Apparatus Co., 278 Fed. 468.

[d] **Design of the statute** was to give a speedy and complete remedy to the owners of interfering patents. Lockwood v. Cleaveland, 6 Fed. 721.

58. Kuhlke Mach. Co. v. Miller Rubber Co., 8 F. (2d) 614; Nikola Tesla Co. v. Marconi Wireless Tel. Co., 227 Fed. 903; Western Electric Co. v. Sperry Electric Co., 59 Fed. 295, 8 CCA 129; American Roll-Paper Co. v. Knopp, 44 Fed. 609; Leach v. Chandler, 18 Fed. 262.

59. Eick v. Economic Mach. Co., 297 Fed. 835; Western Electric Co. v. Sperry Electric Co., 59 Fed. 295, 8 CCA 129.

Suit for infringement see infra §§ 521–656.

60. Liggett, etc., Tobacco Co. v. Miller, 1 Fed. 203, 1 McCrary 31.

61. Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73; Atkinson v. Boardman, 2 F. Cas. No. 607.

Interference in patent office see supra §§ 196–222.

62. Liggett, etc., Tobacco Co. v. Miller, 1 Fed. 203, 1 McCrary 31.

[a] **Service of notice** on parties outside the district cannot be made. Liggett, etc., Tobacco Co. v. Miller, 1 Fed. 203, 1 McCrary 31.

63. Liggett, etc., Tobacco Co. v. Miller, supra; Prentiss v. Elsworth, 19 F. Cas. No. 11,386.

64. Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602; American Clay-Bird Co. v. Ligowski Clay-Pigeon Co., 31 Fed. 466; Lockwood v. Cleaveland, 6 Fed. 721.

[a] **Affirmative relief** may be obtained by an answer alleging the validity of his own patent and the invalidity of plaintiff's. Electric Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

[b] **Dismissal of bill.**—Plaintiff cannot dismiss where affirmative relief is prayed. Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

65. Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 279 Fed. 758; Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602; American Clay-Bird Co. v. Ligowski Clay-Pigeon Co., 31 Fed. 466.

[a] **Counterclaim for infringement** (1) of claims not involved in interference may be filed (Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 279 Fed. 758), (2) even though plaintiff does not reside, or have a regular and established place of business, in the district (Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., supra), (3) and states in his complaint that he appears in court only for the purpose of the relief provided by U. S. Code tit 35 § 66 (Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., supra).

66. Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274; International Signal Co. v. Vreeland Apparatus Co., 278 Fed. 468; Natural Food Co. v. Williams, 163 Fed. 252, 89 CCA 630; Simplex R. Appliance Co. v. Wands, 115 Fed. 517, 53 CCA 171; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Dederick v. Fox, 56 Fed. 714; Nathan Mfg. Co. v. Craig, 49 Fed. 370; Pentlarge v. New York Bung, etc., Co., 20 Fed. 314; Morris v. Kempshall Mfg. Co., 20 Fed. 121; Gold, etc., Ore Separating Co. v. U. S. Disintegrating Ore Co., 10 F. Cas. No. 5,508, 6 Blatchf. 307, 3 Fish. Pat. Cas. 489.

[a] **First question** to be determined is whether the patents involved are interfering patents. Simplex R. Appliance Co. v. Wands, 115 Fed. 517, 53 CCA 171; Gold, etc., Ore Separating Co. v. U. S. Disintegrating Ore Co., 10 F. Cas. No. 5,508, 6 Blatchf. 307, 3 Fish. Pat. Cas. 489.

[b] **Patents held interfering.**—Gold, etc., Ore Separating Co. v. U. S. Disintegrating Ore Co., 10 F. Cas. No. 5,508, 6 Blatchf 307, 3 Fish. Pat. Cas. 489.

[c] **Patents held not interfering.**—Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274; International Signal Co. v. Vreeland Apparatus Co., 278 Fed. 468; Natural Food Co. v. Williams, 163 Fed. 252, 89 CCA 630; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Dederick v. Fox, 56 Fed. 714; Nathan Mfg. Co. v. Craig, 49 Fed. 370; Pentlarge v. New York Bung, etc., Co., 20 Fed. 314.

67. Nathan Mfg. Co. v. Craig, 49 Fed. 370.

68. Palmer Pneumatic Tire Co. v. Lozier, 69 Fed. 346; Nathan Mfg. Co. v. Craig, 47 Fed. 522; Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602; American Clay-Bird Co. v. Ligowski Clay-Pigeon Co., 31 Fed. 466; Lockwood v. Cleveland, 20 Fed. 164; Pentlarge v. Pentlarge, 19 Fed. 817.

[a] **Issue** is limited to the question of priority between the interfering patents. American Clay-Bird Co. v. Ligowski Clay-Pigeon Co., 31 Fed. 466; Lockwood v. Cleveland, 20 Fed. 164.

[b] **Questions not in issue.**—(1) Novelty. Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602; Lockwood v. Cleveland, 20 Fed. 164; Pentlarge v. Pentlarge, 19 Fed. 817. (2) Anticipation by other patents. American Clay-Bird Co. v. Ligowski Clay-Pigeon Co., 31 Fed. 466. (3) Duration of either patent by reason of the existence of a foreign patent. Electrical Accumulator Co. v. Brush Electric Co., supra.

69. Foster v. Lindsay, 9 F. Cas. No. 4,975, 1 Bann. & A. 605; Foster v. Lindsay, 9 F. Cas. No. 4,976, 2 Bann. & A. 172, 3 Dill. 126.

[a] **The court** should adjudge both void if neither has a valid patent. Foster v. Lindsay, 9 F. Cas. No. 4,976, 2 Bann. & A. 172, 3 Dill. 126.

70. Cutler-Hammer Mfg. Co. v. General Electric Co., 6 F. (2d) 376; Nikola Tesla Co. v. Marconi Wireless Tel. Co., 227 Fed. 903; Dittgen v. Racine Paper Goods Co., 181 Fed. 394; General Chemical Co. v. Blackmore, 156 Fed. 968; Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 CCA 255 [rev 84 Fed. 659].

[a] **"The court** is bound to determine whether, upon identifying the subject matter of the interfering patents, the invention therein stated is patentable." Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 734, 33 CCA 255 [rev 84 Fed. 659].

71. Nikola Tesla Co. v. Marconi Wireless Tel. Co., 227 Fed. 903; Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 CCA 255 [rev 84 Fed. 659]; Foster v. Lindsay, 9 F. Cas. No. 4,976, 2 Bann. & A. 172, 3 Dill. 126.

[a] **Defenses allowed.**—(1) Lack of invention. Nikola Tesla Co. v. Marconi Wireless Tel. Co., 227 Fed. 903; Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 CCA 255 [rev 84 Fed. 659]. (2) Want of novelty. Nikola Tesla Co. v. Marconi Wireless Tel. Co., supra; Foster v. Lindsay, 9 F. Cas. No. 4,976, 2 Bann. & A. 172, 3 Dill. 126. (3) Prior use or sale. Nikola Tesla Co. v. Marconi Wireless Tel. Co., supra. (4) No utility. Nikola Tesla Co. v. Marconi Wireless Tel. Co, supra; Dittgen v. Racine Paper Goods Co., 181 Fed. 394. (5) Fraud, inadvertence, negligence, and mistake on the part of the patent office. Dittgen v. Racine Paper Goods Co., supra.

[b] **Allegations** by defendant that in a prior suit to which he was not a party the court held complainant's patent not in anticipation of or for the same invention as defendant's are irrelevant. Nikola Tesla Co. v. Marconi Wireless Tel. Co., 227 Fed. 903.

72. Nathan Mfg. Co. v. Craig, 47 Fed. 522.

73. Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73; Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

[§ 280] **c. Evidence.** There is a prima facie presumption that patents do not interfere.[74] To make out a case, a party must show actual conflict of claims and not mere infringement.[75] In determining the question of interference the court cannot go beyond the claims and consider generally the two inventions as a whole.[76] However, the specifications and designs may be used to throw light upon any doubtful language.[77] The decision of the patent office on an interference is not final upon the question of priority of invention,[78] but it is controlling in a subsequent suit between the same parties unless the contrary is clearly established,[79] and the fact that novelty has been urged in procuring the patent may be considered as evidence thereof in the suit.[80] The fact that no interference was declared argues strongly for the validity of patents which were pending in the patent office at the same time.[81] Depositions there taken are not ordinarily admissible in evidence,[82] nor is the opinion of the commissioner of patents.[83] Evidence as to the state of the art is admissible.[84] There is a rebuttable presumption that the patentee who first filed his application is the first inventor.[85]

[§ 281] **d. Judgment and Relief Granted.** If there is no patentable invention,[86] or if there is no interference in fact,[87] the bill of complaint will be dismissed. But if there is an interference the court will, as authorized by the statute,[88] adjudge and declare either or both of the patents void, in whole or in part, or inoperative or invalid in a specific part of the United States according to the interest of the parties.[89] Relief by injunction may be granted when necessary to protect the rights of a party.[90] By express statutory provisions,[91] the judgment or decree does not affect the right of any person except the parties to the suit and those deriving title under them subsequent to its rendition.[92]

[§ 282] **G. Nonuser.**[93] In the United States the nonuse of a patented article will not render the patent void.[94] The inventor does not forfeit his patent or his right to exclude others from using his invention by his failure to make use of it himself,[95] or his refusal to license others to use it upon rea-

74. Norton v. Jensen, 90 Fed. 415, 33 CCA 141; Lowry v. Cowles Electric Smelting, etc., Co., 56 Fed. 488.

75. Donner v. American Sheet, etc., Co., 160 Fed. 971 [rev 165 Fed. 199, 91 CCA 233].

76. Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274; Donner v. American Sheet, etc., Co., 160 Fed. 971 [rev 165 Fed. 199, 91 CCA 233]; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Nathan Mfg. Co. v. Craig, 49 Fed. 370.

[a] **Issue is determined** by a reference to the claims themselves. Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274.

77. Kelly Well Co. v. Kirschke Concrete Well Co., supra; Thomson-Houston Electric Co. v. Western Electric Co., 72 Fed. 530, 19 CCA 1, 70 Fed. 69, 16 CCA 642.

[a] **Evidence** is not limited to a mere reading of the specifications and claims, but evidence of the construction and actual operation of each invention is allowed. Thomson-Houston Electric Co. v. Western Electric Co., 72 Fed. 530, 19 CCA 1, 70 Fed. 69, 16 CCA 642.

78. Kuhlke Mach. Co. v. Miller Rubber Co., 8 F. (2d) 614; Sawyer v. Massey, 25 Fed. 144.

[a] **Issue of priority of invention** is open even though it has once been decided in an interference proceeding. Kuhlke Mach. Co. v. Miller Rubber Co., 8 F. (2d) 614.

[b] **Laches** in filing the bill after an adverse decision by the commissioner may be considered as bearing on complainant's good faith. Sawyer v. Massey, 25 Fed. 144.

Conclusiveness of decisions of patent office as to priority generally see supra §§ 265, 266.

79. Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73.

[a] **Evidence held insufficient.**—Miehle Printing Press, etc., Co. v. Miller Saw-Trimmer Co., 2 F. (2d) 744 [aff 6 F. (2d) 417].

Degree of proof generally see supra § 266.

80. Cutler-Hammer Mfg. Co. v. General Electric Co., 6 F. (2d) 376.

[a] **Probative value** is equivalent to admissions or declarations solemnly and deliberately made by an adversary. Cutler-Hammer Mfg. Co. v. General Electric Co., 6 F. (2d) 376.

81. Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 236 Fed. 731, 150 CCA 63 [rev 219 Fed. 234].

82. Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73; Clow v. Baker, 36 Fed. 692.

[a] **Depositions not admissible** where it is not shown that they cannot be retaken. Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73; Clow v. Baker, 36 Fed. 692.

83. Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73.

84. Simplex R. Appliance Co. v. Wands, 115 Fed. 517, 53 CCA 171; Ecaubert v. Appleton, 67 Fed. 917, 15 CCA 73.

[a] **Parol evidence** to show the state of the art is admissible. Simplex R. Appliance Co. v. Wands, 115 Fed. 517, 53 CCA 171.

85. Sundh Electric Co. v. Interborough Rapid Transit Co., 198 Fed. 94, 117 CCA 280; American Roll-Paper Co. v. Knopp, 44 Fed. 609; Pelton v. Waters, 19 F. Cas. No. 10,913, 1 Bann. & A. 599.

[a] **Thus** a prior invention may be shown by the patentee's prior application even though his patent was issued later than the other when there is no evidence to carry the invention of either patentee back of the date of his application. Sundh Electric Co. v. Interborough Rapid Transit Co., 198 Fed. 94, 117 CCA 280.

[b] **Burden of proof.**—One applying for a patent, after invention was conceived and reduced to practice by another, must show that his conception was first and reasonable diligence in its reduction to practice. Willoughby v. Rogers, 20 F. (2d) 981; Muther v. United Shoe Mach. Corp., 7 F. (2d) 954 [aff 14 F. (2d) 808].

[c] **Evidence held sufficient:** (1) To show complainant entitled to patent. Clements v. Kirby, 274 Fed. 575; Gillette v. Sendelbach, 146 Fed. 758, 77 CCA 55. (2) To establish priority. Larson v. Crowther, 26 F. (2d) 780 [certiorari den 49 SCt 83 mem]; Earles v. A. W. Drake Mfg. Co., 300 Fed. 265 [aff 289 Fed. 137 (certiorari den 266 U. S. 616 mem, 45 SCt 96 mem, 69 L. ed. 470 mem)]; Dover v. Greenwood, 177 Fed. 946 [rev 194 Fed. 91, 114 CCA 169].

86. International Signal Co. v. Vreeland Apparatus Co., 278 Fed. 468.

87. Boston Pneumatic Power Co. v. Eureka Patents Co., 139 Fed. 29; Dederick v. Fox, 56 Fed. 714; Nathan Mfg. Co. v. Craig, 49 Fed. 370; Pentlarge v. New York Bung, etc., Co., 20 Fed. 314.

[a] **Jurisdiction of court** does not extend beyond controversies between identical claims. Boston Pneumatic Power Co. v. Eureka Patents Co., 139 Fed. 29.

[b] **Motion to dismiss** will be denied where it is not raised until final hearing. Dederick v. Fox, 56 Fed. 714.

88. U. S. Code tit 35 § 66.

89. Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 CCA 255; Putnam v. Hutchinson, 12 Fed. 131, 11 Biss. 240; Foster v. Lindsay, 9 F. Cas. No. 4,975, 1 Bann. & A. 605.

90. Keystone Trading Co. v. Zapota Mfg. Co., 210 Fed. 456; Palmer Pneumatic Tire Co. v. Lozier, 69 Fed. 346; Sawyer v. Massey, 25 Fed. 144.

[a] **Preliminary injunction** preventing defendant from disposing of his patent may be granted. Keystone Trading Co. v. Zapota Mfg. Co., 210 Fed. 456.

[b] **Litigious complainant** may be enjoined from bringing or threatening further suits against defendant. Sawyer v. Massey, 25 Fed. 144.

91. U. S. Code tit 35 § 66.

92. Mowry v. Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Knight v. Rite Shoe Co., 23 F. (2d) 903; General Chemical Co. v. Blackmore, 156 Fed. 968; Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 CCA 255; Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602; Brush v. Naugatuck R. Co., 24 Fed. 371, 23 Blatchf. 277.

[a] **Decree:** (1) Binds conclusively all who are brought in and made parties and who claim any right or interest in the invention. Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 CCA 255. (2) Affects one purchasing an interest during the pendency of the suit. Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

[b] **Suit on different claims** is not prevented. Brush v. Naugatuck R. Co., 24 Fed. 371, 23 Blatchf. 277.

93. Nonuser as ground for annulment proceedings in foreign countries see infra § 283.

94. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; McKay-Copeland Lasting Mach. Co. v. Copeland Rapid-Laster Mfg. Co., 77 Fed. 306 [aff 80 Fed. 518, 25 CCA 611]; Packard v. Lacing-Stud Co., 70 Fed. 66, 16 CCA 639; Kling v. Haring, 56 App (D. C.) 153, 11 F. (2d) 202 [certiorari den 271 U. S. 671 mem, 47 SCt 485 mem, 70 L. ed. 1143 mem].

[a] **Continued nonuse** suggests a question as to the effect of the patent when its validity is in issue. Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330].

[b] **Thus** nonconstruction or nonuse of a machine will not show that the patent is inoperative or overcome the prima facie presumption of its validity. Packard v. Lacing-Stud Co., 70 Fed. 66, 16 CCA 639.

95. Continental Paper Bag Co. v.

sonable terms.[96] The question of licensing others to use his invention is one which the patentee alone has the right to answer, and courts cannot compel him to make use of his invention, or to permit others to use it against his will.[97]

[§ 283] **H. Annulment or Repeal.** The authority to set aside a patent, or to annul it, is vested in the courts of the United States.[98] It does not reside in any officer of the government,[99] or in the patent office.[1] Impeachment of letters patent cannot occur in a collateral proceeding,[2] but must take place in a proceeding had directly for that purpose.[3] Only the United States can maintain a suit for the cancellation of a patent.[4] However, it has been held

Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Bement v. National Harrow Co., 186 U. S. 70, 22 SCt 747, 46 L. ed. 1058; Wine R. Appliance Co. v. Enterprise R. Equipment Co., 25 F. (2d) 236; Hammond v. Benzer Corp., 6 F. (2d) 760 [rev 295 Fed. 908]; Indiana Lamp Co. v. Alvo Mfg. Co., 296 Fed. 623; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330]; American Brake Shoe, etc., Co. v. Hoadley Brake Shoe Co., 222 Fed. 327 [aff 227 Fed. 90, 141 CCA 638]; Masseth v. Johnston, 59 Fed. 613; Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803.

[a] **Injunction** to prevent infringement will not be denied on the ground of nonuse. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122 [overr Hoe v. Knap, 17 Fed. 204]; Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Consolidated Roller Mill Co. v. Coombs, 39 Fed. 803.

[b] **Nonuse of patent:** (1) Cannot be material element in determining whether monopoly exists. Indiana Lamp Co. v. Alvo Mfg. Co., 296 Fed. 623. (2) Will not affect right to exclude competitors. Wine R. Appliance Co. v. Enterprise R. Equipment Co., 25 F. (2d) 236.

[c] **Exception,** unless an intention is shown to abandon the invention. American Brake Shoe, etc., Co. v. Hoadley Brake Shoe Co., 222 Fed. 327 [aff 227 Fed. 90, 141 CCA 638].

[d] **In Canada** (1) the patentee's failure to manufacture the invention within two years, or the importation of it, will invalidate the patent. 35 Vict. c 26 § 28; 38 Vict. c 14 § 2; Power v. Griffin, 33 Can. S. C. 39; Hambly v. Albright & Wilson, Ltd., 7 Can. Exch. 363; Auer Incandescent Light Mfg. Co., Ltd. v. O'Brien, 5 Can. Exch. 243; Consolidated Car Heating Co. v. Came, 18 Que. Super. 44. (2) Offering to license the invention is not sufficient. Hildreth v. McCormick Mfg. Co., Ltd., 39 Can. S. C. 499 [dism app 10 Can. Exch. 378]. (3) Importation of parts will not invalidate. Anderson Tire Co. v. American Dunlop Tire Co., 5 Can. Exch. 82. (4) Trifling and accidental importation will not invalidate. Consolidated Car Heating Co. v. Came, supra.

96. Bement v. National Harrow Co., 186 U. S. 70, 22 SCt 747, 46 L. ed. 1058; Masseth v. Reiber, 59 Fed. 614; Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803.

97. Consolidated Roller-Mill Co. v. Coombs, supra.

98. McCormick Harvesting Mach. Co. v. Aultman, 169 U. S. 606, 18 S Ct 443, 42 L. ed. 875; U. S. v. American Bell Tel. Co., 128 U. S. 315, 364, 9 SCt 90, 35 L. ed. 450; Bourne v. Goodyear, 9 Wall. (U. S.) 811, 19 L. ed. 786; Mica Insulator Co. v. Commercial Mica Co., 157 Fed. 90 [rev on other grounds 166 Fed. 440, 92 CCA 292 (certiorari den 215 U. S. 604 mem, 30 SCt 405 mem, 54 L. ed. 345 mem)]; Merserole v. Union Paper Collar Co., 17 F. Cas. No. 9,488, 6 Blatchf. 356, 3 Fish. Pat. Cas. 483.

"The only authority competent to set a patent aside, or to annul it, or to correct it, for any reason whatever, is vested in the judicial department of the government, and this can only be effected by proper proceedings taken in the courts of the United States." U. S. v. American Bell Tel. Co., supra.

[a] **State court** does not have jurisdiction of a direct suit to repeal a patent. Merserole v. Union Paper Collar Co., 17 F. Cas. No. 9,488, 6 Blatchf. 356, 3 Fish. Pat. Cas. 483.

[b] **Expired patent.**—A court has no jurisdiction to vacate extension after its expiration. Bourne v. Goodyear, 9 Wall. (U. S.) 811, 19 L. ed. 786.

[c] **In England** (1) a petition for revocation presented subsequent to an application to amend does not deprive the comptroller of jurisdiction to allow the amendment. Woolfe v. Automatic Picture Gallery, Ltd., [1903] 1 Ch. 18 [aff [1902] W. N. 137]. (2) A petition for revocation of a patent should be heard in open court, and not in chambers, even by consent. In re Clifton, [1904] 2 Ch. 357. (3) When the ground of revocation is want of novelty of part of the invention, the court may order it revoked unless leave to amend by disclaimer is obtained. Deeley v. Perkes, [1896] A. C. 496, 20 ERC 825. (4) If the patentee is not the first inventor of a material part of the invention, the court should revoke the patent and it has no power to exclude from it the part of which the patentee is not the first inventor. In re Ralston, 100 L. T. Rep. N. S. 386.

[d] **In Canada** (1) the court has power to revoke letters patent. Reg. v. General Engineering Co., 6 Can. Exch. 328. (2) The minister of agriculture or his deputy has power to revoke patents for nonmanufacture in, or importation into, Canada. Smith v. Goldie, 9 Can. S. C. 46 [allowing app 7 Ont. A. 628]; Toronto Tel. Mfg. Co. v. Bell Tel. Co., 2 Can. Exch. 524; In re Bell Tel. Co., 9 Ont. 339; In re Bell Tel. Co., 7 Ont. 605.

[e] **In Transvaal** the high court of the late republic has jurisdiction to cancel a patent in an action to which the attorney-general is not a party. African Gold Recovery Co., Ltd. v. Hay, [1904] A. C. 438.

99. McCormick Harvesting Mach. C. v. Aultman, 169 U. S. 606, 18 SCt 443, 42 L. ed. 875; U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 SCt 90, 35 L. ed. 450; Porter v. Louden, 7 App. (D. C.) 64.

[a] **No authority to repeal or revoke:** (1) In the president. McCormick Harvesting Mach. Co. v. Aultman, 169 U. S. 606, 18 SCt 443, 42 L. ed. 875; U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 SCt 90, 35 L. ed. 450. (2) In the commissioner of patents. U. S. v. American Bell Tel. Co., supra; Porter v. Louden, 7 App. (D. C.) 64.

1. McCormick Harvesting Mach. Co. v. Aultman, 169 U. S. 606, 18 SCt 443, 42 L. ed. 875; Mica Insulator Co. v. Commercial Mica Co., 157 Fed. 90 [rev on other grounds 166 Fed. 440, 92 CCA 292 (certiorari den 215 U. S. 604 mem, 30 SCt 405 mem, 54 L. ed. 345 mem)].

[a] **Claims** of the original patent cannot be canceled where no reissue is granted. McCormick Harvesting Mach. Co. v. Aultman, 169 U. S. 606, 18 SCt 443, 42 L. ed. 875.

2. Eureka Clothes Wringing Mach. Co. v. Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566 [aff 10 F. Cas. No. 5,583, 2 Cliff. 351, 2 Fish. Pat. Cas. 499]; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Railway Register Mfg. Co. v. North Hudson County R. Co., 23 Fed. 593; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; American Wood-Paper Co. v. Glen's Falls Paper Co., 1 F. Cas. No. 321, 8 Blatchf. 513, 4 Fish. Pat. Cas. 324; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Doughty v. West, 7 F. Cas. No. 4,028, 6 Blatchf. 429, 3 Fish. Pat. Cas. 580; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215; Tilghman v. Mitchell, 23 F. Cas. No. 14,042, 9 Blatchf. 18, 4 Fish. Pat. Cas. 615 [rev on other grounds 19 Wall. 287, 22 L. ed. 125].

[a] **In infringement suit** (1) a patent cannot be abrogated. Railway Register Mfg. Co. v. North Hudson County R. Co., 23 Fed. 593. (2) The court can examine and pass upon only what appears upon the face of the patent, and not questions of fact behind the patent. Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445. (3) Irregularity or fraud in granting of extension of patent, regular on its face, cannot be raised. Tilghman v. Mitchell, 23 F. Cas. No. 14,042, 9 Blatchf. 18, 4 Fish. Pat. Cas. 615 [rev on other grounds 19 Wall. 287, 22 L. ed. 125]. (4) Defense that patent was reissued unintentionally through blunder in patent office is not allowed. Doughty v. West, 7 F. Cas. No. 4,028, 6 Blatchf. 429, 3 Fish. Pat. Cas. 580. (5) Procuration of extension by fraud cannot be shown. Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536.

[b] **Fraud** in extension of patent cannot be shown in collateral proceeding for purposes of impeaching it. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; American Wood-Paper Co. v. Glen's Falls Paper Co., 1 F. Cas. No. 321, 8 Blatchf. 513, 4 Fish. Pat. Cas. 324; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

[c] **Commissioner's decision** that the formal acts to be done by the patentee before the issuing of the patent were performed cannot be reviewed collaterally. Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546.

[d] **Exceptions to rule.**—In cases of interference equity may annul the patent issued to the party in the wrong. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

3. Eureka Clothes Wringing Mach. Co. v. Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; American Wood-Paper Co. v. Glen's Falls Paper Co., 1 F. Cas. No. 321, 8 Blatchf. 513, 4 Fish. Pat. Cas. 324; Birdsall v. McDonald, 3 F. Cas. No. 1,434, 1 Bann. & A. 165; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

[a] **Thus** impeachment of reissued patent on ground of fraud is only allowed by bill in equity in direct proceeding for that purpose. Birdsall v. McDonald, 3 F. Cas. No. 1,434, 1 Bann. & A. 165.

4. Briggs v. United Shoe Mach. Co., 239 U. S. 48, 36 SCt 6, 60 L. ed. 138; U. S. v. American Bell Tel. Co., 159 U. S. 548, 16 SCt 69, 40 L. ed. 255; U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 SCt 90, 32 L. ed. 450; Mowry v. Whitney, 14 Wall. (U. S.)

that an inventor may bring a bill to obtain an accounting and a decree declaring letters patent void against one who fraudulently patented the secret after it had been confidentially disclosed to him.[5] As to whether a suit shall be instituted is determined by the attorneys for the government,[6] and, if so, when and where.[7] Suit may be maintained by the government, not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary to enable it to discharge its obligations to the public,[8] and sometimes when the purpose and effect are simply to enforce the rights of an individual.[9] Annulment proceedings may be instituted on the ground of fraud in procuring the patent;[10] but the government cannot maintain a suit to repeal on grounds that have been sustained in a suit for infringement,[11] nor ask an injunction restraining the commencement or prosecution of suits for infringement of a patent for the repeal of which they have begun an action.[12] In certain foreign countries, additional grounds for revocation, such as nonuser or importation from abroad, exist.[13] The appropriate remedy is by a bill in equity.[14] Prayers for the cancellation of two patents relating to the same subject and owned by the same parties may be joined.[15] Before a decree canceling a patent for fraud can be granted, actual fraud must be established by testimony which is clear, convincing, and satisfactory.[16] A judgment of cancellation is good against the world.[17]

[§ 284] **I. Estoppel To Dispute Validity—1. In General.** The issuance of a patent does not estop the patentee from proving that the invention claimed therein is not novel, provided he has acted in good faith in the matter.[18] A patentee is, however, estopped to deny the correctness of the description of the existing art in the specification,[19] or that improvements in a patented machine covered by a second patent to him are merely mechanical and do not involve invention.[20] So, also, a patentee who secures

434, 20 L. ed. 858; Knight v. Rite Shoe Co., 23 F. (2d) 903; Atty.-Gen. v. Rumford Chemical Works, 32 Fed. 608; U. S. v. Gunning, 18 Fed. 511, 21 Blatchf. 516.

[a] **The information** should be filed by the attorney of the United States in the name and behalf of the United States. Atty.-Gen. v. Rumford Chemical Works, 32 Fed. 608.

[b] **The general public** is left to the protection of the government and its officers. Mowry v. Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858.

[c] **Thus** (1) the attorney-general cannot maintain a suit in his own name as he is the attorney-general of the United States. Atty.-Gen. v. Rumford Chemical Works, 32 Fed. 608. (2) A bill in equity lies to set aside letters patent obtained by fraud, but only between the sovereignty making the grant and the grantee. U. S. v. Gunning, 18 Fed. 511, 21 Blatchf. 516.

[d] **Prior to 1836** a writ of scire facias could issue to repeal letters patent, which although instituted by a private individual was under the control of the official attorneys of the government. U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 SCt 90, 32 L. ed. 450; Mowry v. Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Ex p. Wood, 9 Wheat. (U. S.) 603, 6 L. ed. 171; Delano v. Scott, 7 F. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700; Thompson v. Haight, 23 F. Cas. No. 13,956.

[e] **In England** the attorney-general or a party interested may petition to revoke a patent. In re Avery, 36 Ch. D. 307; In re Edge, 63 L. T. Rep. N. S. 370; In re Morgan, 58 L. T. Rep. N. S. 713.

[f] **In Canada** a scire facias to annul must be by the authority of the attorney-general, and not by a private party. Reg. v. Pattee, 5 Ont. Pr. 292; Patent Elbow Co. v. Cunin, 10 Que. Super. 56.

Suit to annul interfering patent

5. Murjahn v. Hall, 119 Fed. 186. see supra §§ 278-281.

6. New York, etc., Polishing Co. v. New York Coffee Polishing Co., 9 Fed. 578, 20 Blatchf. 174.

[a] **No duty** to institute annulment proceedings at request of party asserting invalidity of patent. New York, etc., Polishing Co. v. New York Coffee Polishing Co., 9 Fed. 578, 20 Blatchf. 174.

7. New York, etc., Polishing Co. v. New York Coffee Polishing Co., supra.

[a] **In Canada** the proceedings are according to the practice on scire facias in England. Smith v. Goldie, 9 Can. S. C. 46; Peterson v. Crown Cork, etc., Co., 5 Can. Exch. 400; Reg. v. LaForce, 4 Can. Exch. 14; Reg. v. Hall, 27 U. C. Q. B. (Ont.) 146.

8. U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144.

9. U. S. v. American Bell Tel. Co., supra; U. S. v. Frazer, 22 Fed. 106.

[a] **Suit brought simply to help an individual** (1) is subject to rules governing like suits between private individuals. U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144. (2) Who gave bond to indemnify the government for costs and who could have set up the matters on which suit is based as a defense in a suit by the patentee will be dismissed. U. S. v. Frazer, 22 Fed. 106.

10. Briggs v. United Shoe Mach. Co., 239 U. S. 48, 36 SCt 6, 60 L. ed. 138; U. S. v. American Bell Tel. Co., 159 U. S. 548, 16 SCt 69, 40 L. ed. 255; U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 SCt 90, 32 L. ed. 450; Mowry v. Whitney, 14 Wall. (U. S.) 434, 20 L. ed. 858; Knight v. Rite Shoe Co., 23 F. (2d) 903; U. S. v. Gunning, 18 Fed. 511, 21 Blatchf. 516.

[a] **In England,** where the material parts of the invention were obtained in fraud of the rights of the true inventor, the court will make an absolute order for revocation and not allow the patentee to amend by disclaimer. In re Ralston, 100 L. T. Rep. N. S. 386.

11. U. S. v. Colgate, 32 Fed. 624 [app dism 127 U. S. 792 mem, 32 L. ed. 328 mem].

12. U. S. v. Colgate, 21 Fed. 318.

13. See cases infra this note.

[a] **In England** (1) the patentee, if he fails to manufacture under his patent within four years after its grant, may have it revoked. He may also be required to grant a license under it on terms to be fixed. Act (1907) c 29 §§ 27, 24. (2) The Patents and Designs Act of 1919 does not render a patent liable to revocation on grounds more extensive than those on which the grant might have been opposed. In re Ucar, [1922] 2 Ch. 220. (3) A patent granted before 1919 cannot be revoked on the ground of prior publication in an earlier British specification. In re Ucar, supra. (4) Prior publication is a sufficient ground for revocation. In re Stahlwerk Becker Aktiengesellschaft, 36 R. P. C. 13; In re Daimler-Motoren Gesellschaft Patent, 35 R. P. C. 253. (5) The mere fact that a patent has expired is not a sufficient reason why a petition for its revocation should not be presented. North Eastern Mar. Engineering Co. v. Leeds Forge Co., [1906] 2 Ch. 498 [aff [1906] 1 Ch. 324]. (6) An action merely to declare invalid letters patent already expired, where no legal right of the plaintiff has been infringed is not maintainable. North Eastern Mar. Engineering Co. v. Leeds Forge Co., supra.

[b] **In Canada** (1) letters patent cannot be annulled because of expiration of a foreign patent upon a proceeding by scire facias. Reg. v. General Engineering Co., 6 Can. Exch. 328. (2) Failure to manufacture in Canada within two years, or importation from abroad, are grounds for annulment proceedings. Power v. Griffin, 33 Can. S. C. 39; Hambly v. Albright & Wilson, Ltd., 7 Can. Exch. 363; Royal Electric Co. v. Edison Electric Co., 2 Can. Exch. 576; Brook v. Broadhead, 2 Can. Exch. 562; Toronto Tel. Mfg. Co. v. Bell Tel. Co., 2 Can. Exch. 524; Barter v. Smith, 2 Can. Exch. 455.

Effect of nonuser in the United States see supra § 282.

14. U. S. v. Gunning, 18 Fed. 511, 21 Blatchf. 516.

15. U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 SCt 90, 32 L. ed. 450 [rev 32 Fed. 591].

16. U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 SCt 809, 42 L. ed. 144 [aff 68 Fed. 542, 15 CCA 569]; Delano v. Scott, 7 F. Cas. No. 3,753, Gilp. 489, 1 Robb Pat. Cas. 700; Stearns v. Barrett, 22 F. Cas. No. 13,337, 1 Mason 153, 1 Robb Pat. Cas. 97.

[a] **In England** fraud may be inferred, not only from the patentee's conduct prior to, and at the time of, the application, but also from the use which he makes of the grant. In re Ralston, 100 L. T. Rep. N. S. 386.

17. Knight v. Rite Shoe Co., 23 F. (2d) 903.

18. Rice-Stix Dry Goods Co. v. J. A. Scriven Co., 165 Fed. 639, 91 CCA 475 [certiorari den 212 U. S. 582 mem, 29 SCt 692 mem, 53 L. ed. 660 mem, and app dism 223 U. S. 708 mem, 32 SCt 518 mem, 56 L. ed. 622 mem]; Greenwood v. Bracher, 1 Fed. 856.

[a] **Patentee estopped** to claim anticipation in support of his claim to a trade-mark, after he has enjoyed its protection during its full life. Rice-Stix Dry Goods Co. v. J. A. Scriven Co., 165 Fed. 639, 91 CCA 475 [certiorari den 212 U. S. 582 mem, 29 SCt 692 mem, 53 L. ed. 660 mem, and app dism 223 U. S. 708 mem, 32 SCt 518 mem, 56 L. ed. 622 mem].

19. Heaton-Peninsular Button-Fastener Co. v. Schlochtmeyer, 69 Fed. 592 [aff 72 Fed. 520, 18 CCA 642].

[a] **Recitals** which tend to limit, explain, or nullify the grant bind the patentee. Heaton-Peninsular Button-Fastener Co. v. Schlochtmeyer, 69 Fed. 592 [aff 72 Fed. 520, 18 CCA 674].

20. Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 274 Fed. 964.

a correction limiting the life of his patent is estopped, as against infringers, to deny the validity of the limitation.[21] Furthermore other persons associated with him in the ownership of rights under the patent are also estopped, in the absence of an affirmative showing that they were ignorant of his acts in procuring the limitation.[22] The owner of a patent originally sued upon, but abandoned, may show that it is inoperative after defendant has introduced it in evidence in order to show the state of the prior art.[23] An estoppel of the patentee by the file history of the patent can be considered only on the question of infringement, and not on the question of validity.[24]

An interference in the patent office will not estop the defeated applicant from assailing the validity of the patent upon grounds other than priority,[25] or from claiming the invention only an improvement on an invention covered by a prior patent of his.[26] A party who, in an interference, asserted the validity of its patent until it became the owner of the pending application when it abandoned its contention and secured the issuance of a patent, is estopped to assert the validity of the second patent.[27]

The doctrine of estoppel should not be extended to persons to whom it is not clearly applicable.[28]

[§ 285] **2. Estoppel of Infringer.** An infringer cannot deny the utility of the invention,[29] or allege that the patent was procured by fraud and collusion or by illegal procedure,[30] although he may deny its novelty;[31] nor can he deny that the patentee is the first inventor when he has acquiesced in the patentee's claim.[32] And it has been held that one making use of another's patent mark is estopped to deny the validity of the patent.[33]

Inconsistent positions. The fact that a party had filed an application for a patent for the same or a similar device will not estop him from denying the validity of the patent,[34] but one who joined in an application for reissue is estopped to assert that the patent obtained on such application is void.[35] So, where a defendant in an infringement suit by his answer asserts the validity of a patent granted to him, he is estopped to claim that a similar patent granted to plaintiff is void for lack of patentability.[36]

[§ 286] **3. Estoppel of Assignor and Licensor.** An assignor[37] of a patent is, as against his as-

21. Edison Electric Light Co. v. Buckeye Electric Co., 64 Fed. 225; Edison Electric Light Co. v. Buckeye Electric Co., 59 Fed. 691.

[a] **Estoppel applies** where infringer invested money in plant on the faith of the limitation. Edison Electric Light Co. v. Buckeye Electric Co., 59 Fed. 691.

22. Edison Electric Light Co. v. Buckeye Electric Co., 64 Fed. 225.

23. Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168 [mod on other grounds 229 Fed. 407, 143 CCA 527, and certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem].

24. Lektophone Corp. v. Sylo Lighting Fixture Co., 11 F. (2d) 421 [rev 16 F. (2d) 7].

25. Holliday v. Pickhardt, 29 Fed. 853.

[a] **Grounds available.**—Novelty. Holliday v. Pickhardt, 29 Fed. 853.

26. Temco Electric Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 48 SCt 170, 72 L. ed. 298 [rev 11 F. (2d) 109].

[a] **Statement** that invention was improvement "over" patented machine does not estop proof that it was improvement "upon" machine. Temco Electric Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 48 SCt 170, 72 L. ed. 298 [rev 11 F. (2d) 109].

27. Thomson Spot Welder Co. v. Ford Motor Co., 268 Fed. 836 [aff 281 Fed. 680 (certiorari granted 260 U. S. 718 mem, 43 SCt 96 mem, 67 L. ed. 479 mem, and aff 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098)].

28. National Cash Register Co. v. Remington Arms Co., 283 Fed. 196.

29. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222; Du Bois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895 [aff 33 Fed. 252]; Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Western Electric Co. v. La Rue, 139 U. S. 601, 11 SCt 670, 35 L. ed. 294; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939; Abrahams v. Universal Wire Co., 10 F. (2d) 838; Starr Ball Player Co. v. Baseball Display Co., 8 F. (2d) 46; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 46 SCt 347 mem, 70 L. ed. 778 mem]; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655 [aff 292 Fed. 249]; Ward Baking Co. v. Hazleton Baking Co., 292 Fed. 202; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330]; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Shakespeare, Jr., Co. v. Enterprise Mfg. Co., 211 Fed. 477 [aff 220 Fed. 304, 136 CCA 138]; F. D. Cummer, etc., Co. v. Atlas Dryer Co., 193 Fed. 993, 113 CCA 611; Animarium Co. v. Filloon, 102 Fed. 896, 98 Fed. 103; La Rue v. Western Electric Co., 31 Fed. 80, 24 Blatchf. 392 [aff 139 U. S. 601, 11 SCt 670, 35 L. ed. 294]; Coleman v. Liesor, 6 F. Cas. No. 2,984; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Vance v. Campbell, 28 F. Cas. No. 16,836; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [rev on other grounds 1 Black. 427, 17 L. ed. 168]; Whitney v. Mowry, 29 F. Cas. No. 17,594, 4 Fish Pat. Cas. 207 [rev on other grounds 14 Wall. 620, 20 L. ed. 860].

[a] **The fact of infringement** is sufficient to establish utility as against the infringer. Gandy v. Main Belting Co., 143 U. S. 587, 12 SCt 598, 36 L. ed. 272; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. ed. 939.

[b] **Utility** means sufficient practical utility to make a device useful in the sense of the patent statute. Sandy MacGregor Co. v. Vaco Grip Co., 2 F. (2d) 655 [aff 292 Fed. 249].

30. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 8 F. (2d) 890 [aff 12 F. (2d) 511]; Western Glass Co. v. Schmertz Wire-Glass Co., 185 Fed. 788, 109 CCA 1.

31. California Fruit Growers' Exch. v. Blake, 19 F. (2d) 467 [rev 14 F. (2d) 756]; Gerosa v. Columbia Metal Stamping, etc., Co., 8 F. (2d) 611; Simmond v. Morrison, 44 Fed. 757.

[a] **Purchase and use** of patented article while prices are satisfactory will not estop attack on its novelty. California Fruit Growers' Exch. v. Blake, 19 F. (2d) 467 [rev 14 F. (2d) 756].

[b] **In Newfoundland** novelty cannot be denied where a foreign patent was issued prior to the grant there. Cabot S. Whaling Co. v. Newfoundland S. Whaling Co., 9 Newfoundl. 122.

32. Beecroft & Blackman, Inc. v. Rooney, 268 Fed. 545 [rev on other grounds 280 Fed. 543].

[a] **Thus** infringers, who, when advised by the patentee of his intent to obtain a patent, they to have the shop right, without objection acquiesced, and manufactured the device, are estopped to deny that the patentee is the first inventor. Beecroft & Blackman, Inc. v. Rooney, 268 Fed. 545 [rev on other grounds 280 Fed. 543].

[b] **Rule applied.**—In a suit for infringement of letters patent, it has been held that recognition of the validity of the patent during fourteen years' litigation in other suits is sufficient to justify the court in refusing to consider the question as open to consideration. Ryder v. Beaver Silo, etc., Mfg. Co., 219 Fed. 242.

33. Washburn, etc., Mfg. Co. v. Haish, 29 F. Cas. No. 17,217, 4 Bann. & A. 571, 9 Biss. 141.

34. Haughey v. Lee, 151 U. S. 282, 14 SCt 331, 38 L. ed. 162; McCloskey v. Toledo Pressed Steel Co., 30 F. (2d) 12; Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948.

[a] **Preparation of application** for letters patent will not create estoppel. Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948.

35. Frick Co. v. Lindsay, 27 F. (2d) 59.

36. Russell, etc., Mfg. Co. v. Mallory, 21 F. Cas. No. 12,166, 10 Blatchf. 140, 5 Fish. Pat. Cas. 632. See Steel Protected Concrete Co. v. Central Impr. etc., Co., 155 Fed. 279 [aff 158 Fed. 1021, 85 CCA 7] (where there was no evidence showing fraud in defendant, plaintiff's patent was held invalid).

37. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; Frick Co. v. Lindsay, 27 F. (2d) 59; Premier Register Table Co. v. West, 21 F. (2d) 762; Pearson v. Uncle Sam Mfg. Co., 11 F. (2d) 603; Johnson Automatic Scale Co. v. Ginn, 10 F. (2d) 793; Federal Electric Co. v. Flexume Corp., 9 F. (2d) 647; National Cash Register Co. v. Remington Arms Co., 283 Fed. 196; Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435; Dynamic Balancing Mach. Co. v. Akimoff, 279 Fed. 285 [mod on other grounds 285 Fed. 480]; Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co., 256 Fed. 847, 168 CCA 193; Martin Gauge Co. v. Pollock, 251 Fed. 295 [aff 261 Fed. 201]; Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 CCA 390; United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232 [mod 220 Fed. 313]; Dalton Adding Mach. Co. v. Moon-Hopkins Billing Mach. Co., 223 Fed. 51 [rev 236 Fed. 936, 150 CCA 198]; Underwood Typewriter Co. v. Manning, 221 Fed. 652; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Fishel Nessler Co. v. Fishel, 204 Fed.

signee, or a licensor[38] of a patent is, as against his licensee, estopped to deny its validity. The estoppel extends to all persons interested in the assignment[39] and in privity with the assignor.[40] So

790, 123 CCA 142; Peelle Co. v. Raskin, 194 Fed. 440 [rev on other grounds 222 Fed. 293, 138 CCA 19]; Babcock, etc., Co. v. Toledo Boiler Works Co., 170 Fed. 81, 95 CCA 363; New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534; Mathews Gravity Carrier Co. v. Lister, 154 Fed. 490; Wold v. Thayer, 148 Fed. 227, 78 CCA 350 [aff 142 Fed. 776]; Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co., 142 Fed. 157, 73 CCA 375 [certiorari den 200 U. S. 622 mem, 26 SCt 758 mem, 50 L. ed. 624 mem]; Frank v. Bernard, 131 Fed. 269 [aff 135 Fed. 1021, 68 CCA 566]; Continental Wire Fence Co. v. Pendergast, 126 Fed. 381; Marvel Co. v. Pearl, 114 Fed. 946; Force v. Sawyer-Boss Mfg. Co., 111 Fed. 902 [aff 113 Fed. 1018, 51 CCA 592]; Piaget Novelty Co. v. Headley, 108 Fed. 870, 48 CCA 116 [aff 107 Fed. 134]; Alvin Mfg. Co. v. Scharling, 100 Fed. 87; Griffith v. Shaw, 89 Fed. 313; Daniel v. Miller, 81 Fed. 1000; National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co., 73 Fed. 491; Martin, etc., Cash-Carrier Co. v. Martin, 67 Fed. 786, 14 CCA 642; Western Tel. Constr. Co. v. Stromberg, 66 Fed. 550; Babcock v. Clarkson, 63 Fed. 607, 11 CCA 351; Electric R. Co. v. Jamaica, etc., R. Co., 61 Fed. 655; Woodward v. Boston Lasting Mach. Co., 60 Fed. 283, 8 CCA 622; Corbin Cabinet Lock Co. v. Yale, etc., Mfg. Co., 58 Fed. 563; Adee v. Thomas, 41 Fed. 346; Adee v. Thomas, 41 Fed. 342; Burdsall v. Curran, 31 Fed. 918; American Paper Barrel Co. v. Laraway, 28 Fed. 141; Parker v. McKee, 24 Fed. 808; Underwood v. Warren, 21 Fed. 573; Curran v. Burdsall, 20 Fed. 835; Rumsey v. Buck, 20 Fed. 697; Time Tel. Co. v. Himmer, 19 Fed. 322, 22 Blatchf. 34; Consolidated Middlings Purifier Co. v. Guilder, 9 Fed. 155, 3 McCrary 186; Onderdonk v. Fanning, 4 Fed. 148; Faulks v. Kamp, 3 Fed. 898, 17 Blatchf. 432; Aberthaw Constr. Co. v. Ransome, 192 Mass. 434, 78 NE 485; Bowman v. Taylor, 2 A. & E. 278, 29 ECL 142, 111 Reprint 108, 11 ERC 55; Chambers v. Crichley, 33 Beav. 374, 55 Reprint 412; Walton v. Lavates, 8 C. B. N. S. 162, 98 ECL 162, 141 Reprint 1127; Heugh v. Chamberlain, 25 Wkly. Rep. 742.

[a] **Basis for estoppel** (1) is that assignor, having received a valuable consideration, may not derogate from his grant by denying that it had any value. Babcock, etc., Co. v. Toledo Boiler Works Co., 170 Fed. 81, 95 CCA 363. (2) Basis for estoppel is that the vendor patentee has received and retained a valuable thing in consideration of the statements contained in the application for, or specification of, the patent. Therefore, when an assignment is made pending the application for a patent, it is immaterial whether or not the vendor may have made representations to the purchasers concerning the probability of obtaining a patent. Nor is it material that the purchasers knew that the thing sought to be patented was old, when they understood that the patent was sought for a new application and use of it. National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co., 73 Fed. 491.

[b] **Transfer of stock** of a corporation owning a patent by another corporation is not such an assignment of the patent as will create an estoppel. Electric R. Co. v. Jamaica, etc., R. Co., 61 Fed. 655.

[c] **Estoppel extends:** (1) To all the claims in the patent. Mathews Gravity Carrier Co. v. Lister, 154 Fed. 490. (2) To every structure within the fair meaning of the claim. Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 CCA 390; United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232 [mod 220 Fed. 313]. (3) Where application is assigned to claims within the scope of the original disclosure, although not made in the application as filed. National Cash Register Co. v. Remington Arms Co., 283 Fed. 196; Dynamic Balancing Mach. Co. v. Akimoff, 279 Fed. 285 [mod on other grounds 285 Fed. 480]; Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co., 256 Fed. 847, 168 CCA 193. (4) To reissues as well as to originals. Burdsall v. Curran, 31 Fed. 918.

[d] **Estoppel applies:** (1) Against the assignor of a part interest to a partner in favor of the assignee of the partner's interest through bankruptcy proceedings. Fishel Nessler Co. v. Fishel, 204 Fed. 790, 123 CCA 142. (2) Even though assignee, at the time of the assignment, knew facts which would render the patent invalid. Peelle Co. v. Raskin, 194 Fed. 440 [rev on other grounds 222 Fed. 293, 138 CCA 19].

[e] **Assignor cannot claim:** (1) That the patent has been anticipated by prior inventions. United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232 [mod 220 Fed. 313]; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Martin, etc., Cash-Carrier Co. v. Martin, 67 Fed. 786, 14 CCA 642. (2) That patent lacks novelty. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; United Printing Mach. Co. v. Cross Paper Feeder Co., supra; Schiebel Toy, etc., Co. v. Clark, supra; Griffith v. Shaw, 89 Fed. 313; Martin, etc., Cash-Carrier Co. v. Martin, supra; Babcock v. Clarkson, 63 Fed. 607, 11 CCA 351; Woodward v. Boston Lasting Mach. Co., 60 Fed. 283, 8 CCA 622. (3) That patent lacks utility. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232 [mod 220 Fed. 313]; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Griffith v. Shaw, 89 Fed. 313; Martin, etc., Cash-Carrier Co. v. Martin, 67 Fed. 786, 14 CCA 642; Babcock v. Clarkson, 63 Fed. 607, 11 CCA 351. (4) That patent infringes another patent owned by him. Adee v. Thomas, 41 Fed. 346; Curran v. Burdsall, 20 Fed. 835.

[f] **A patentee whose wife has sold the patent to another** is estopped to deny its validity. Onderdonk v. Fanning, 4 Fed. 148.

[g] **An employee assignor** who left plaintiff's employ after the patent was applied for, but before it was granted, is estopped. Johnson Automatic Scale Co. v. Ginn, 10 F. (2d) 793.

[h] **Waiver of estoppel** does not occur by introduction of other patents as bearing on the question of infringement where waiver is expressly disclaimed. Martin Gauge Co. v. Pollock, 251 Fed. 295 [aff 261 Fed. 201].

38. New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534; Seal v. Beach, 113 Fed. 831; Smith v. Ridgely, 103 Fed. 875, 43 CCA 365; Oscar Barnett Fdy. Co. v. Crow, 80 N. J. Eq. 112, 258, 86 A 915; Smith v. Scott, 6 C. B. N. S. 771, 95 ECL 771, 141 Reprint 654; Clark v. Adie, 21 Wkly. Rep. 456 [aff 21 Wkly. Rep. 764].

[a] **Licensor** is estopped to claim that patents expired before the term for which granted by reason of expiration of prior foreign patents. New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534.

39. Welsbach Light Co. v. Cohn, 181 Fed. 122; Johnson Furnace, etc., Co. v. Western Furnace Co., 178 Fed. 819, 102 CCA 267; Force v. Sawyer-Boss Mfg. Co., 111 Fed. 902 [aff 113 Fed. 1018, 51 CCA 592].

[a] **The estoppel** "rests upon the broad and equitable doctrine that one who receives and retains a portion of the fruits of a sale of a patent which he has assisted in making to another is estopped from claiming that such patent is invalid and worthless." Johnson Furnace, etc., Co. v. Western Furnace Co., 178 Fed. 819, 822, 102 CCA 267.

[b] **Thus** a stockholder in a corporation organized for the purpose of taking title to a patent and selling it, and who participated in the sale and received his share of the profits, is estopped. Welsbach Light Co. v. Cohn, 181 Fed. 122.

40. Frick Co. v. Lindsay, 27 F. (2d) 59; Premier Register Table Co. v. West, 21 F. (2d) 762; National Cash Register Co. v. Remington Arms Co., 283 Fed. 196; Martin Gauge Co. v. Pollock, 251 Fed. 295 [aff 261 Fed. 201]; Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168 [mod on other grounds 229 Fed. 407, 143 CCA 527, and certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem]; St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co., 161 Fed. 725, 88 CCA 585; Mellor v. Carroll, 141 Fed. 992; Continental Wire Fence Co. v. Pendergast, 126 Fed. 381; Force v. Sawyer-Boss Mfg. Co., 111 Fed. 902 [aff 113 Fed. 1018, 51 CCA 592]; Boston Lasting Mach. Co. v. Woodward, 82 Fed. 97, 27 CCA 69 [aff 75 Fed. 272]; Daniel v. Miller, 81 Fed. 1000; Time Tel. Co. v. Himmer, 19 Fed. 322, 22 Blatchf. 34.

[a] **Privity** (1) does not exist between joint wrongdoers. National Cash Register Co. v. Remington Arms Co., 283 Fed. 196 [aff 286 Fed. 367]. (2) Privity of a corporation is not established by its employment of the assignor of a patent who designed and aided in the manufacture of an infringing machine, he having no title or interest in it. National Cash Register Co. v. Remington Arms Co., 283 Fed. 196 [aff 286 Fed. 367] (where the court refused to follow Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168 [mod on other grounds 229 Fed. 407, 143 CCA 527 (certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem)]).

[b] **Employer of assignor** (1) who hired him for the purpose of designing a competing device is estopped. Robert Findley Mfg. Co. v. Hygrade Lighting Fixture Corp., 275 Fed. 362; Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168 [mod on other grounds 229 Fed. 407, 143 CCA 527, and certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem]. (2) He is not estopped by reason of the engagement of the assignor in a subordinate position. Boston Lasting Mach. Co. v. Woodward, 82 Fed. 97, 27 CCA 69 [aff 75 Fed. 272].

[c] **No estoppel** of defendants who subsequently became associated with assignor of a patent where the relations between them are not shown. St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co., 161 Fed. 725, 88 CCA 585.

[d] **Third person** who furnishes money to make and sell infringing device is also estopped. Martin Gauge Co. v. Pollock, 251 Fed. 295 [aff 261 Fed. 201].

[e] **Wife** of assignor, engaged with him in the manufacture of an infringing device, is estopped. Frick Co. v. Lindsay, 27 F. (2d) 59.

a partnership,[41] or a corporation[42] in which he is interested may be estopped. However, the assignor may testify as to its invalidity in a suit between his assignee and a third party.[43] As to the rest of the world the patent may be void, but the assignor is estopped from urging that defense against his assignee.[44] The assignor is not estopped, however, to deny infringement,[45] and for this purpose he may show the prior state of the art so as to limit the scope of the patent assigned.[46]

41. Alvin Mfg. Co. v. Scharling, 100 Fed. 87.

[a] **Thus** a partnership of which assignor is a member and manager is estopped. Alvin Mfg. Co. v. Scharling, 100 Fed. 87.

42. Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1022 mem (certiorari den 267 U. S. 597 mem, 45 SCt 352 mem, 69 L. ed. 806 mem)]; Dynamic Balancing Mach. Co. v. Akimoff, 279 Fed. 285 [mod on other grounds 285 Fed. 480]; Martin Gauge Co. v. Pollock, 251 Fed. 295 [aff 261 Fed. 201]; Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 CCA 390; Crown Cork, etc., Co. v. Carper Automatic Bottling Mach. Co., 229 Fed. 748 [aff 243 Fed. 200, 156 CCA 66]; Dalton Adding Mach. Co. v. Moon-Hopkins Billing Mach. Co., 223 Fed. 51 [rev 236 Fed. 936, 150 CCA 198]; Roessing-Ernst Co. v. Coal, etc., By-Products Co., 219 Fed. 898, 135 CCA 562 [aff 212 Fed. 434]; Trussed Concrete Steel Co. v. Corrugated Bar Co., 214 Fed. 393 [aff 222 Fed. 514, 138 CCA 114 (certiorari den 241 U. S. 681 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem)]; Roessing-Ernst Co. v. Coal, etc., By-Products Co., 208 Fed. 990, 127 CCA 394; Rollman Mfg. Co. v. Universal Hardware Works, 207 Fed. 97; Climax Lock, etc., Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126; Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co., 182 Fed. 832; Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Macey Co. v. Globe-Wernicke Co., 180 Fed. 401, 103 CCA 547; Johnson Furnace, etc., Co. v. Western Furnace Co., 178 Fed. 819, 102 CCA 267; Johns-Pratt Co. v. Sachs Co., 175 Fed. 70, 99 CCA 92; Babcock, etc., Co. v. Toledo Boiler Works Co., 170 Fed. 81, 95 CCA 363; Mathews Gravity Carrier Co. v. Lister, 154 Fed. 490; Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co., 142 Fed. 157, 73 CCA 375 [certiorari den 200 U. S. 622 mem, 26 SCt 758 mem, 50 L. ed. 624 mem]; Mellor v. Carroll, 141 Fed. 992; Marvel Co. v. Pearl, 114 Fed. 946; Force v. Sawyer-Boss Mfg. Co., 111 Fed. 902 [aff 113 Fed. 1018, 51 CCA 592]; National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co., 73 Fed. 491; Corbin Cabinet Lock Co. v. Yale, etc., Mfg. Co., 58 Fed. 563.

[a] **Bona fide stockholder for value** will not relieve the corporation from the effect of estoppel. Mellor v. Carroll, 141 Fed. 992.

[b] **Joint infringement.**—A corporation acting jointly with the assignors of a patent in infringing it are estopped to deny its validity. Climax Lock, etc., Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126.

[c] **Estoppel extends:** (1) To a corporation which assignor was instrumental in forming and in which he is a stockholder. Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1022 mem (certiorari den 267 U. S. 597 mem, 45 SCt 352 mem, 69 L. ed. 806 mem)]; Martin Gauge Co. v. Pollock, 251 Fed. 295 [aff 261 Fed. 201]; Crown Cork, etc., Co. v. Carper Automatic Bottling Mach. Co., 229 Fed. 748 [aff 243 Fed. 200, 156 CCA 66]; Rollman Mfg. Co. v. Universal Hardware Works, 207 Fed. 97; Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Macey Co. v. Globe-Wernicke Co., 180 Fed. 401, 103 CCA 547; Johns-Pratt Co. v. Sachs Co., 175 Fed. 70, 99 CCA 92; Mathews Gravity Carrier Co. v. Lister, 154 Fed. 490; Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co., 142 Fed. 157, 73 CCA 375 [certiorari den 200 U. S. 622 mem, 26 SCt 758 mem, 50 L. ed. 624 mem]; Marvel Co. v. Pearl, 114 Fed. 946; National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co., 73 Fed. 491. (2) To a corporation organized by the assignor of a patent, of which he is manager and in which his wife owns stock. Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co., 182 Fed. 832. (3) To a corporation organized by the party who aided in the sale of the patent. Johnson Furnace, etc., Co. v. Western Furnace Co., 178 Fed. 819, 102 CCA 267. (4) To a corporation which commenced business under license from the assignor of other patents, who became its general manager. Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 CCA 390. (5) To a corporation building infringing apparatus under orders from a corporation organized and controlled by the assignor of the patent. Roessing-Ernst Co. v. Coal, etc., By-Products Co., 219 Fed. 898, 135 CCA 562 [aff 212 Fed. 434].

[d] **Estoppel does not extend:** (1) Of necessity to a corporation in which the assignor subsequently becomes officer and stockholder. Macey Co. v. Globe-Wernicke Co., 180 Fed. 401, 103 CCA 547; Corbin Cabinet Lock Co. v Yale, etc., Mfg. Co., 58 Fed. 563. (2) To a corporation, who with knowledge of the ownership of a patent by an assignee, contracted with the assignor for the use of a later improvement made by him. Trussed Concrete Steel Co. v. Corrugated Bar Co., 214 Fed. 393 [aff 222 Fed. 514, 138 CCA 114 (certiorari den 241 U. S. 681 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem)]. (3) To a corporation merely because the assignor of the patent is a subordinate in its employment. Babcock, etc., Co. v. Toledo Boiler Works Co., 170 Fed. 81, 95 CCA 363.

43. Campbell v. Skinner, 236 Fed. 359; De Laval Separator Co. v. Vermont Farm Mach. Co., 135 Fed. 772, 68 CCA 474. But see Many v. Jagger, 16 F. Cas. No. 9,055, 1 Blatchf. 372, 1 Fish. Pat. Cas. 222 (where declarations impeaching the validity of the patent made by the assignor after assignment were held inadmissible).

[a] **Thus** he may testify contrary to oath made on application. Campbell v. Skinner, 236 Fed. 359; De Laval Separator Co. v. Vermont Farm Mach. Co., 135 Fed. 772, 68 CCA 474.

44. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316; Alvin Mfg. Co. v. Scharling, 100 Fed. 87; Adee v. Thomas, 41 Fed. 342.

45. Kelsey Wheel Co. v. Hayes Wheel Co., 5 F.(2d) 491; Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1022 mem (certiorari den 267 U. S. 597 mem, 45 SCt 352 mem, 69 L. ed. 806 mem)]; Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 CCA 390; Moon-Hopkins Billing Mach. Co. v. Dalton Adding Mach. Co., 236 Fed. 936, 150 CCA 198 [rev 223 Fed. 51]; Cross Paper Feeder Co. v. United Printing Mach. Co., 220 Fed. 313 [mod on other grounds 227 Fed. 600, 142 CCA 232]; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Leather Grille, etc., Co. v. Christopherson, 182 Fed. 817, 105 CCA 249; Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 CCA 426; Martin, etc., Cash-Carrier Co. v. Martin, 67 Fed. 786, 14 CCA 642; Western Tel. Constr. Co. v. Stromberg, 66 Fed. 550; Babcock v. Clarkson, 63 Fed. 607, 11 CCA 351; Essex Button Co. v. Paul, 48 Fed. 310.

[a] **No estoppel** to deny infringement by later invention of assignor. Leather Grille, etc., Co. v. Christopherson, 182 Fed. 817, 105 CCA 249.

46. Westinghouse Electric, etc., Co. v. Formica Insulator Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; Federal Electric Co. v. Flexlume Corp., 9 F. (2d) 647; Kelsey Wheel Co. v. Hayes Wheel Co., 5 F.(2d) 491; Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F.(2d) 1022 mem (certiorari den 267 U. S. 597 mem, 45 SCt 352 mem, 69 L. ed. 806 mem)]; Piano Motors Corp. v. Motor Player Corp, 282 Fed. 435; Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 CCA 390; Moon-Hopkins Billing Mach. Co. v. Dalton Adding Mach. Co., 236 Fed. 936, 150 CCA 198 [rev 223 Fed. 51]; Cross Paper Feeder Co. v. United Printing Mach. Co., 220 Fed. 313 [mod on other grounds 227 Fed. 600, 142 CCA 232]; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614; Standard Plunger El. Co. v. Stokes, 212 Fed. 941, 129 CCA 461; Rollman Mfg. Co. v. Universal Hardware Works, 207 Fed. 97; Leather Grille, etc., Co. v. Christopherson, 182 Fed. 817, 105 CCA 249; Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Hurwood Mfg. Co. v. Wood, 138 Fed. 835; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 CCA 426; Griffith v. Shaw, 89 Fed. 313; Martin, etc., Cash-Carrier Co. v. Martin, 67 Fed. 786, 14 CCA 642; Western Tel. Constr. Co. v. Stromberg, 66 Fed. 550; Aberthaw Constr. Co. v. Ransome, 192 Mass. 434, 78 NE 485.

"Although these defendants may not be heard to contend that the patent is void for lack of invention, they are entitled, as any one else would be, to whatever narrow construction the language of the claims may warrant and the condition of the prior art may require." Standard Plunger El. Co. v. Stokes, 212 Fed. 941, 943, 129 CCA 461.

[a] **State of the art:** (1) Is not admissible to destroy the patent and defeat the grant. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; Cross Paper Feeder Co. v. United Printing Mach. Co., 220 Fed. 313 [mod on other grounds 227 Fed. 600, 142 CCA 232]. (2) May be used to construe and narrow the claims of the patent, conceding their validity. Westinghouse Electric, etc., Co. v. Formica Insulation Co., supra.

[b] **Evidence not admissible:** (1) For the ostensible purpose of narrowing the scope of a patent, but which in effect attacks its validity. Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435; Alvin Mfg. Co. v. Scharling, 100 Fed. 87. (2) To narrow the patent's scope to a point which would render it valueless. Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Hurwood Mfg. Co. v. Wood, 138 Fed. 835.

[c] **Construction** (1) narrower than that used to induce the sale cannot be claimed. United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232 [mod 220 Fed. 313]. (2) Construction of the patent and its scope as limited by the prior art must be determined by the same rule which would be applied between the patentee and a stranger. Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1022 mem (certiorari den 267 U. S. 597 mem, 45 SCt 352 mem, 69 L. ed. 806 mem)].

[§ 287] **4. Estoppel of Licensee or Assignee—a. Effect of License Generally.** In general a licensee is estopped to deny the validity of the patent during the continuance of the license.[47] Thus, in an action for the recovery of royalties under a contract of license[48] if the licensee has acted under an apparently valid patent he is estopped to set up the invalidity of the patent as a defense to prevent recovery,[49] except where such invalidity amounts to a failure of consideration or occasions an eviction of the licensee from an enjoyment of benefits under the license;[50] and if the patent has been annulled or declared void by due and effective legal proceedings,[51] or if the licensee has repudiated the contract,[52] such a defense may be set up. In an infringement upon other prior patents. Rhodes v. Ashurst, supra.

[b] **Licensee is not estopped** to purchase valid patent subsequently issued to another, and to assert his patent by suit against all infringers including his licensor. Victor Talking Mach. Co. v. American Graphophone Co., 189 Fed. 359 [aff 190 Fed. 1023 mem, 111 CCA 675 mem].

[c] **Reasons for rule** are that the party has got what he bargained for; that he cannot be allowed at the same time to affirm and disaffirm the contract, and that he cannot in this way force the patentee into a defense of his right and compel him to try it in a collateral action. Marston v. Swett, 82 N. Y. 526.

[d] **Express clause not to question validity** is not necessary. Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; L. Heller & Sons, Inc. v. Lassner Co., 214 App. Div. 315, 212 NYS 175; Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem]; Imperial Supply Co. v. Grand Trunk R. Co., 13 Can. Exch. 507, 1 DomLR 243, 10 EastLR 414.

[e] **Estoppel by patent license:** (1) Is by deed and does not depend on user of the device licensed. Chicago, etc., R. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 CCA 395 [certiorari den 245 U. S. 652 mem, 38 SCt 11 mem, 62 L. ed. 532 mem]. (2) Is an estoppel implied by law. Ferry-Hallock Co. v. Progressive Paper Box Co., 76 N. J. Eq. 1, 73 A 230.

[f] **Prior art** is not admissible to show invalidity of patent. Chicago, etc., R. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 CCA 395 [certiorari den 245 U. S. 652 mem, 38 SCt 11 mem, 62 L. ed. 532 mem].

[g] **Rule applies** (1) to reissued patent. Hyatt v. Ingalls, 49 N. Y. Super. 375 [aff 124 N. Y. 93, 26 NE 289 mem]. (2) In case of implied license where patentee was director of defendant corporation which had enjoyed the use of the patent. Deane v. Hodge, 35 Minn. 146, 27 NW 917, 59 AmR 321. (3) In action to recover royalties due before notice of repudiation of license. Ely v. Topliff, 41 Oh. St. 357.

[h] **Rule does not apply** where defendant ceased to infringe upon discovery that it was mistaken in its belief that it had a license. Schulte v. Colorado Tire, etc., Co., 259 Fed. 562, 170 CCA 524.

Effect of clause in license recognizing validity of patent see infra § 460.

50. See infra § 460.

51. Universal Rim Co. v. Scott, 21 F.(2d) 346; Ross v. Fuller, etc., Co., 105 Fed. 510; Hyatt v. Dale Tile Mfg. Co., 106 N. Y. 651, 12 NE 705 [aff 125 U. S. 46, 8 SCt 756, 31 L. ed. 683]; Marston v. Swett, 82 N. Y. 526, 66 N. Y. 206, 23 AmR 43; Hawks v. Swett, 4 Hun (N. Y.) 146, 6 Thomps. & C. 530.

Adjudication of invalidity as affecting liability for royalties see infra § 461.

52. Martin v. New Trinidad Lake Asphalt Co., 255 Fed. 93; Mudgett v. Thomas, 55 Fed. 645; Brown v. Lapham, 27 Fed. 77, 23 Blatchf. 475; Universal Rim Co. v. Scott, 21 F. (2d) 346; Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 138, 55 A 401; Skinner v. Walter A. Wood Mowing, etc., Mach. Co., 140 N. Y. 217, 35 NE 491, 37 AmSR 540; Marston v. Swett, 82 N. Y. 526, 66 N. Y. 206, 23 AmR 43; L. Heller & Son, Inc. v. Lassner

47. U. S.—Federal Electric Co. v. Flexlume Corp., 9 F. (2d) 647; Chadeloid Chemical Co. v. Charles McAdam Co., 298 Fed. 713; Cassidy v. Evan L. Reed Mfg. Co., 293 Fed. 797; Kohn v. Eimer, 265 Fed. 900; Bell, etc., Co. v. Bliss, 262 Fed. 131; Churchward International Steel Co. v. Bethlehem Steel Co., 260 Fed. 962; Webster Electric Co. v. Podlesak, 255 Fed. 907; Indiana Mfg. Co. v. Nichols, etc., Co., 190 Fed. 579; Regina Music Box Co. v. Newell, 131 Fed. 606; Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 116 Fed. 629; Philadelphia Creamery Supply Co. v. Davis, etc., Bldg., etc., Co., 77 Fed. 879; Dunham v. Bent, 72 Fed. 60; Platt v. Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 CCA 357; Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co., 21 Fed. 47; Goodyear v. Day, 10 F. Cas. No. 5,566.

N. J.—American Mechanical Impr. Co. v. Des Lauriers Aircraft Corp., 94 N. J. Eq. 197, 119 A 179.

Pa.—Harwick v. Galbraith, 147 Pa. 333, 23 A 451.

Eng.—Trotman v. Wood, 16 C. B. N. S. 479, 111 ECL 479, 143 Reprint 1214.

Ont.—Whiting v. Tuttle, 17 Grant Ch. 454; Gray v. Billington, 21 U. C. C. P. 288.

[a] **Party** asserting license to operate may not question validity of patent. Churchward International Steel Co. v. Bethlehem Steel Co., 260 Fed. 962.

[b] **License granted by assignee** after reversion of patent to assignor does not estop licensee. Kohn v. Eimer, 265 Fed. 900.

[c] **Basis of the estoppel** is the rule of landlord and tenant. Indiana Mfg. Co. v. Nichols, etc., Co., 190 Fed. 579.

[d] **Mortgagee trustee** of licensee is estopped. Regina Music Box Co. v. Newell, 131 Fed. 606.

[e] **Purchaser from licensee** is not estopped to deny validity of patent. Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co., 21 Fed. 47.

48. See infra § 460.

49. U. S.—U. S. v. Harvey Steel Co., 196 U. S. 310, 25 SCt 240, 49 L. ed. 492 [aff 38 Ct. Cl. 662]; Universal Rim Co. v. Scott, 21 F.(2d) 346; Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; H. C. White Co. v. Morton E. Converse, etc., Co., 20 F. (2d) 311 [certiorari den 275 U. S. 547 mem, 48 SCt 85 mem, 72 L. ed. 419 mem]; Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 Fed. 753; Hewitt v. American Tel., etc., Co., 272 Fed. 392 [aff 272 Fed. 194]; Bell, etc., Co. v. Bliss, 262 Fed. 131; Schulte v. Colorado Tire, etc., Co., 259 Fed. 562, 170 CCA 524; Martin v. New Trinidad Lake Asphalt Co., 255 Fed. 93; Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22; Chicago, etc., R. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 CCA 395 [certiorari den 245 U. S. 652 mem, 38 SCt 11 mem, 62 L. ed. 532 mem]; Tate v. Baltimore, etc., R. Co., 229 Fed. 141, 143 CCA 417; Victor Talking Mach. Co. v. American Graphophone Co., 189 Fed. 359 [aff 190 Fed. 1023 mem, 111 CCA 675 mem]; Moore v. National Water-Tube Boiler Co., 84 Fed. 346; Mudgett v. Thomas, 55 Fed. 645; National Rubber Co. v. Boston Rubber-Shoe Co., 41 Fed. 48; Foley v. U. S., 56 Ct. Cl. 303 [aff 260 U. S. 667, 43 SCt 240, 67 L. ed. 451]; Curved Electrotype Plate Co. v. U. S., 50 Ct. Cl. 258.

Ill.—Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118; Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 NE 873; Bell, etc., Co. v. Spoor, 216 Ill. A. 221; Pharis v. Moline Plow Co., 158 Ill. A. 64; Charter Gas Engine Co. v. Charter, 47 Ill. A. 36.

Me.—Jones v. Burnham, 67 Me. 93, 24 AmR 10.

Minn.—Deane v. Hodge, 35 Minn. 146, 27 NW 917, 59 AmR 321.

N. J.—Ferry-Hallock Co. v. Progressive Paper Box Co., 76 N. J. Eq. 1, 73 A 230.

N. H.—Clark v. Amoskeag Mfg. Co., 62 N. H. 612.

N. Y.—Skinner v. Walter A. Wood Mowing, etc., Mach. Co., 140 N. Y. 217, 35 NE 491, 37 AmSR 540; Saltus v. Belford Co., 133 N. Y. 499, 31 NE 518; Hyatt v. Ingalls, 124 N. Y. 93, 26 NE 285; Hyatt v. Dale Tile Mfg. Co., 106 N. Y. 651, 12 NE 705 [aff 125 U. S. 46, 8 SCt 756, 31 L. ed. 683]; Marston v. Swett, 82 N. Y. 526, 66 N. Y. 206, 23 AmR 43; L. Heller & Son, Inc. v. Yokelson-Cooper, Inc., 214 App. Div. 321, 212 NYS 182; L. Heller & Son, Inc. v. Lassner Co., 214 App. Div. 315, 212 NYS 175; Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234 [aff 222 N. Y. 547 mem, 118 NE 1067 mem]; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 NYS 1016; Denise v. Swett, 68 Hun 188, 22 NYS 950 [rev on other grounds 142 N. Y. 602, 37 NE 627]; Marsh v. Dodge, 4 Hun 278 [rev on other grounds 66 N. Y. 533]; Hyatt v. Ingalls, 49 N. Y. Super. 375 [aff 124 N. Y. 93, 26 NE 289 mem]; Smith v. Standard Laundry Mach. Co., 11 Daly 154; Baylis v. Bullock Electric Mfg. Co., 32 Misc. 218, 66 NYS 253 [rev 59 App. Div. 576, 69 NYS 693]; Kaffeman v. Stern, 23 Misc. 599, 53 NYS 260; Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem]; Brusie v. Peck, 16 NYS 648 [rev on other grounds 135 N. Y. 622, 32 NE 76].

Oh.—Ely v. Topliff, 41 Oh. St. 357; Clark v. Bentel, 9 Oh. Dec. (Reprint) 289, 12 CincLBul 53.

Pa.—Jarecki v. Hays, 161 Pa. 613, 29 A 118; Hubbard v. Allen, 123 Pa. 198, 16 A 772; Patterson's App., 99 Pa. 521; Hardwick v. Caves, 1 Pa. Dist. 137.

Eng.—Clark v. Adie, 2 App. Cas. 423; Cutler v. Bower, 11 Q. B. 973, 63 ECL 973, 116 Reprint 736; Bowman v. Taylor, 2 A. & E. 278, 29 ECL 142, 111 Reprint 108, 11 ERC 55; Hills v. Laming, 9 Exch. 256, 156 Reprint 109; Crossley v. Dixon, 10 H. L. Cas. 293, 11 Reprint 1039, 20 ERC 756.

Can.—Imperial Supply Co. v. Grand Trunk R. Co., 14 Can. Exch. 88, 7 DomLR 504, 11 EastLR 340; Imperial Supply Co. v. Grand Trunk R. Co., 13 Can. Exch. 507, 1 DomLR 243, 10 East LR 414.

Ont.—Beam v. Merner, 14 Ont. 412; Green v. Watson, 2 Ont. 627.

"The rule is that a licensee is estopped to deny the validity of the patent as long as he is acting under it." Tate v. Baltimore, etc., R. Co., 229 Fed. 141, 143 CCA 417.

[a] **Licensee is estopped to claim:** (1) That the invention lacks novelty. Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118; Clark v. Adie, 2 App. Cas. 423; Beam v. Merner, 14 Ont. 412. (2) That the invention lacks utility. Clark v. Adie, supra. (3) That the specification is insufficient. Clark v. Adie, supra. (4) That the patent is

fringement suit there is no estoppel,[53] even though defendant sets up the alternative defense that he was acting under a license,[54] especially if the licensor either repudiates the license or considers it as having been forfeited,[55] or sues on the basis that the licensee is infringing by operating outside the scope of his license.[56] But in an action to prevent infringement by a licensee in which plaintiff is not seeking to cancel the license, the invalidity of the patent cannot be set up as a defense.[57] The licensee may show that what he has done is not within the terms of the patent,[58] and for this purpose he may show the state of the art as bearing upon the scope of the patent.[59] A licensee cannot dispute the validity of the patent for the purpose of avoiding carrying out the conditions of sale or license,[60] so a licensee, the owner of a conflicting patent, who contracted to avoid a conflict and divide the royalty, is estopped to deny the validity of the licensor's patent.[61]

Corporation or stockholders. A corporation is not estopped by a personal license to a stockholder.[62] Nor is an officer of the corporation estopped by a license to the corporation.[63]

[§ 288] **b. Option or Offer To Take a License.** A mere offer to take a license will not operate as an estoppel,[64] nor will an option to take a license.[65]

[§ 289] **c. Implied License.** An allegation of an implied license is not sufficient upon which to found an estoppel.[66]

[§ 290] **d. Expired License.** The fact that a party once operated under a license will not estop him from disputing the validity of the patent.[67] Thus, a former licensee is not estopped from questioning the validity of a patent after the termination of his license as a defense to acts done subsequent to its termination,[68] unless there was an agreement by him to that effect.[69]

[§ 291] **e. Effect of Assignment.** An assignee who has acted under an assignment is estopped to deny the validity of the patent.[70]

[§ 292] **5. Estoppel by Trade Agreements or Compromises.** A mere mercantile agreement not to deal in certain patented machines does not operate as an estoppel to deny the validity of the patent.[71] A covenant or agreement not to infringe estops the parties thereto from controverting the validity of the patent,[72] but a sales agency contract does not estop the agent after the contract has been terminated.[73] An arrangement between two patentees, by way of compromise to avoid litigation, for the mutual use of their respective patents will not estop either party or his assigns or licensees to deny the validity of the other's patent.[74]

[§ 293] **6. Estoppel of Employees.** An employee is not estopped by the allegations of or decision against his employer in a former action.[75]

Co., 214 App. Div. 315, 212 NYS 175; Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234 [aff 222 N. Y. 547 mem, 118 NE 1067 mem]; Sherman v. Champlain Transp. Co., 31 Vt. 162.

Repudiation or abandonment see infra § 462.

Termination of license see infra § 465.

53. Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 251 Fed. 897 [aff 260 Fed. 841, 171 CCA 567]; National Mfg. Co. v. Meyers, 7 Fed. 355.

[a] **Action** is one in tort and not in contract and therefore estoppel does not operate. Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 251 Fed. 897 [aff 260 Fed. 841, 171 CCA 567].

[b] **Purchaser of patented article** is not bound to accept the position of a licensee and is not estopped from attacking the validity of a patent in an action for infringement. Gillette Safety Razor Co. v. Gamage, 25 T. L. R. 808.

54. National Mfg. Co. v. Meyers, 7 Fed. 355.

55. Tate v. Baltimore, etc., R. Co., 229 Fed. 141, 143 CCA 417; Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co., 21 Fed. 47; Burr v. Duryee, 4 F. Cas. No. 2,190, 2 Fish. Pat. Cas. 275 [aff 1 Wall. 531, 17 L. ed. 650, 660, 661].

56. T. H. Symington Co. v. National Malleable Castings Co., 257 Fed. 564; Lagonda Mfg. Co. v. Elliott Co., 214 Fed. 578, 131 CCA 158 [mod 205 Fed. 152, and certiorari den 235 U. S. 697 mem, 35 SCt 199 mem, 59 L. ed. 431 mem]; Indiana Mfg. Co. v. Nichols, etc., Co., 190 Fed. 579; Dunham v. Bent, 72 Fed. 60.

[a] **Estoppel is confined** to particular device covered by the lease or license. T. H. Symington Co. v. National Malleable Castings Co., 257 Fed. 564; Dunham v. Bent, 72 Fed. 60.

[b] **Thus,** licensee is not estopped to question the validity of patents subsequently issued not referred to in the agreement and covering devices not shown to have been then conceived. Lagonda Mfg. Co. v. Elliott Co., 214 Fed. 578, 131 CCA 158 [mod 205 Fed. 152, and certiorari den 235 U. S. 697 mem, 35 SCt 199 mem, 59 L. ed. 431 mem].

57. Eskimo Pie Corp. v. Arctic Fruit Ices, 15 F. (2d) 853.

58. Clark v. Adie, 2 App. Cas. 423; Crossley v. Dixon, 10 H. L. Cas. 293, 11 Reprint 1039, 20 ERC 756; Beam v. Merner, 14 Ont. 412.

Royalty on articles outside scope see infra § 454.

59. McLaren Products Co. v. Cone Co. of America, 7 F. (2d) 120; Chadeloid Chemical Co. v. Charles McAdam Co., 298 Fed. 713; Pressed Steel Car Co. v. Union Pac. R. Co., 270 Fed. 518 [rev 254 Fed. 316].

60. General Electric Co. v. Nassau Electric R. Co., 36 App. Div. 510, 55 NYS 858 [aff 161 N. Y. 656 mem, 57 NE 1110 mem].

[a] **Illustration.**—In an action on note given a year before patent was held invalid by federal court, for license and to settle infringement suit, licensee could not set up invalidity of patent to show failure of consideration. General Electric Co. v. Nassau Electric R. Co., 36 App. Div. 510, 55 NYS 858 [aff 161 N. Y. 656 mem, 57 NE 1110 mem].

61. Hall Mfg. Co. v. American R. Supply Co., 48 Mich. 331, 12 NW 205.

62. Newark Spring-Mattress Co. v. Ryan, 102 Fed. 693, 42 CCA 594.

63. Laughlin v. Burry, 50 App. (D. C.) 273, 270 Fed. 1013.

[a] **President** of corporation which has a license from the patentee may assert his rights as inventor. Laughlin v. Burry, 50 App. (D. C.) 273, 270 Fed. 1013.

64. Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433].

65. Albrecht Mfg. Co. v. Blum, 283 Fed. 413.

66. Curved Electrotype Plate Co. v. U. S., 50 Ct. Cl. 258; Farnham v. U. S., 49 Ct. Cl. 19 [mod on other grounds 240 U. S. 537, 35 SCt 427, 60 L. ed. 786]; Harvey Steel Co. v. U. S., 38 Ct. Cl. 662 [aff 196 U. S. 310, 25 SCt 240, 49 L. ed. 492]; Lovell-McConnell Mfg. Co. v. Waite Auto Supply Co., 198 Fed. 130.

67. Dueber Watch-Case Mfg. Co. v. Robbins, 75 Fed. 17, 21 CCA 198 [rev 71 Fed. 186].

68. Eskimo Pie Corp. v. National Ice Cream Co., 26 F. (2d) 901 [aff 20 F. (2d) 1003]; Pries v. Union R. Equipment Co., 22 F. (2d) 943; Tate v. Baltimore, etc., R. Co., 229 Fed. 141, 143 CCA 417; Auto Spring Repairer Co. v. Grinberg, 196 Fed. 52; Stimson Computing Scale Co. v. W. F. Stimson Co., 104 Fed. 893, 44 CCA 241; Mudgett v. Thomas, 55 Fed. 645; H. Tibble, etc., Mfg. Co. v. Heineken, 37 Fed. 686; Wooster v. Singer Mfg. Co., 30 F. Cas. No. 18,039a; Goucher v. Clayton, 11 Jur. N. S. 107; Dangerfield v. Jones, 13 L. T. Rep. N. S. 142.

[a] **Thus** a licensee to use up parts sold to him in making patented articles is not estopped from contesting the validity of the patent when sued for subsequent infringement. Auto Spring Repairer Co. v. Grinberg, 196 Fed. 52.

69. Eskimo Pie Corp. v. National Ice Cream Co., 26 F. (2d) 901 [aff 20 F. (2d) 1003].

[a] **Agreement** must be in such express and clear words that the intent cannot be doubtful. Eskimo Pie Corp. v. National Ice Cream Co., 26 F. (2d) 901 [aff 20 F. (2d) 1003].

70. Kinsman v. Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385.

[a] **Thus,** assignee who made and sold machines under assignor's title and for his account cannot deny validity of patent and retain profits. Kinsman v. Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385.

71. Mannie v. Everett, 16 F. Cas. No. 9,039.

72. Smith v. Southington Mfg. Co., 247 Fed. 342, 159 CCA 436; American Specialty Stamping Co. v. New England Enameling Co., 176 Fed. 557, 100 CCA 193; Brooks v. Moorhouse, 4 F. Cas. No. 1,956, 3 Bann. & A. 229; Parkhurst v. Kinsman, 18 F. Cas. No. 10,757, 1 Blatchf. 488, Fish. Pat. R. 161, 8 NYLegObs 146 [aff 18 How. 289, 15 L. ed. 385]; Berliner Gramaphone Co., Ltd. v. Pollock, 35 Ont. L. 137, 9 OntWN 263, 26 DomLR 628 (unless patent is adjudged void by a court of competent jurisdiction).

[a] **Estoppel exists** where agreement was to respect the validity of the patent and refrain from infringing it. Smith v. Southington Mfg. Co., 247 Fed. 342, 159 CCA 436; American Specialty Stamping Co. v. New England Enameling Co., 176 Fed. 557, 100 CCA 193.

73. K-W Ignition Co. v. Temco Electric Motor Co., 243 Fed. 588, 156 CCA 286.

74. Van Hook v. Wood, 28 F. Cas. No. 16,855.

75. American Coat Pad Co. v. Phœnix Pad Co., 113 Fed. 629, 51 CCA

IX. TERM

[By Rudy J. Brossman]

[§ 294] **A. Beginning of Term.** The patentee has no monopoly until the patent has been issued,[76] it being the legislative intention that the term shall run from that time.[77]

Effect of amendment or correction. Where, owing to the omission of an essential element, the patent must be corrected, the date of such correction is the date of the patent,[78] although it has been said that the date of application for an amendment is the effective date of the patent, where the claims are built wholly on the amendment.[79]

[§ 295] **B. Duration of Term—1. Mechanical Patents.** All mechanical patents granted in the United States upon applications filed after December 31, 1897, have a term of seventeen years from the date of the grant.[80] The term of seventeen years was fixed by the act of 1861.[81] But between that date and the time the act of March 3, 1897, went into effect, patents were limited to expire with foreign patents upon the invention.[82] Under section 8, the act of 1897 applied only to patents granted on applications filed after December 31, 1897.[83]

[§ 296] **2. Designs.** The term of a design patent is three and one-half, seven, or fourteen years, as elected in the application for patent.[84]

[§ 297] **3. Reissues.** A reissued patent is operative only for the unexpired part of the term of the original patent.[85]

[§ 298] **4. Limitation by Foreign Patent—a. In General.** Patents granted upon applications filed before January 1, 1898, are by statute limited to expire at the same time as any foreign patent previously procured by or for the United States patentee having the shortest term to run.[86] The question of secrecy or publicity of the foreign patent does not prevent the limitation.[87] To act as a limitation, however, the foreign patent must be procured by the United States patentee or by his consent or be ratified by him.[88] It would be manifestly unjust that a patentee should lose the full fruits of his patent by the fact that some intermeddler had caused the invention to be patented abroad.[89] A provisional

339; Hayes v. Bickelhoupt, 24 Fed. 806.

[a] **Illustrations.**—(1) Employee and stockholder of corporation is not bound by its allegation of the validity of patent in former suit. American Coat Pad Co. v. Phœnix Pad Co., 113 Fed. 629, 51 CCA 339. (2) Servant or agent is not bound by former decision against principal. Hayes v. Bickelhoupt, 24 Fed. 806.

76. Kirk v. U. S., 163 U. S. 49, 55, 16 SCt 911, 41 L. ed. 66 [cit Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595]; Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538; Gayler v. Wilder, 10 How. (U. S.) 477, 493, 13 L. ed. 504; Sargent v. Seagrave, 21 F. Cas. No. 12,365, 2 Curt. 553; Aronson v. Orlov, 228 Mass. 1, 116 NE 951 [certiorari den 245 U. S. 662 mem, 38 SCt 61 mem, 62 L. ed. 536 mem].

[a] **Under the English law,** patents take effect from the time of affixing the great seal; but by virtue of the practice of antedating patents as of the date of the application, the letters first sealed may be postponed to those first applied for. Saxby v. Hennett, L. R. 8 Exch. 210.

77. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159 [aff 55 Ct. Cl. 234]; Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538.

78. Marsh v. Nichols, supra.

79. Bonnot Co. v. Lopulco Systems, Inc., 15 F. (2d) 848 [aff 24 F. (2d) 510].

80. U. S. Code tit 35 § 40; U. S. Rev. St. (1878) § 4884 (U. S. Comp. St. [1901] p 3381); Guaranty Ins. Trust, etc., Co. v. Sellers, 123 U. S. 276, 8 SCt 117, 31 L. ed. 153.

[a] **Under some of the prior statutes** the term was for fourteen years. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159.

[b] **Act March 3, 1903** (32 St. at L. 1225 c 1019) is not retroactive to revive a patent which had expired by reason of the expiration of a prior foreign patent for the same invention. Sawyer Spindle Co. v. Carpenter, 133 Fed. 238 [aff 143 Fed. 976, 75 CCA 162].

[c] **In England** the term is fourteen years from date, but fees must be paid at stated times to keep it in force. Act (1883) § 17; Acetylene Illum. Co. v. United Alkali Co., [1902] 1 Ch. 494.

[d] **In Canada** the term is eighteen years, but the fee may be paid for only six years, or twelve if so elected. 55 & 56 Vict. c 24 § 5.

81. 12 U. S. St. at L. 249 § 16.

82. See infra §§ 298-303.

83. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 155 Fed. 842, 84 CCA 76.

84. U. S. Code tit 35 § 77; U. S. Rev. St. (1878) § 4931 (U. S. Comp. St. [1901] p 3399).

85. U. S. Code tit 35 § 64; U. S. Rev. St. (1878) § 4916 (U. S. Comp. St. [1901] p 3393). And see infra § 310.

86. U. S. Rev. St. § 4887, prior to the amendment of March 3, 1897 (29 U. S. St. at L. 692). And see Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 SCt 508, 39 L. ed. 601; Commercial Mfg. Co. v. Fairbank Canning Co., 135 U. S. 176, 10 SCt 718, 34 L. ed. 88; Pohl v. Anchor Brewing Co., 134 U. S. 381, 10 SCt 577, 33 L. ed. 953; Bate Refrigerating Co. v. Hammond, 129 U. S. 151, 9 SCt 225, 32 L. ed. 645; Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Guarantee Ins. Trust, etc., Co. v. Sellers, 123 U. S. 276, 8 SCt 117, 31 L. ed. 153; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 155 Fed. 842, 84 CCA 76; United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 148 Fed. 31 [aff 155 Fed. 842, 84 CCA 76]; United Shoe Mach. Co. v. Caunt, 134 Fed. 239; Sawyer Spindle Co. v. Carpenter, 133 Fed. 238 [aff 143 Fed. 976, 75 CCA 162]; John R. Williams Co. v. Miller, etc., Mfg. Co., 115 Fed. 526; Western Electric Co. v. Citizens' Tel. Co., 106 Fed. 215; Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem]; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Mott Iron-Works v. Henry McShane Mfg. Co., 80 Fed. 516; Edison Electric Light Co. v. Waring Electric Co., 59 Fed. 358 [aff 69 Fed. 645, 15 CCA 700]; Accumulator Co. v. Julien Electric Co., 57 Fed. 605; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682; De Florez v. Raynolds, 8 Fed. 434, 17 Blatchf. 436; Nathan v. New York El. R. Co., 2 Fed. 225; Henry v. Providence Tool Co., 11 F. Cas. No. 6,384, 3 Bann. & A. 501; Weston v. White, 29 F. Cas. No. 17,458, 2 Bann. & A. 321, 13 Blatchf. 364; U. S. v. Marble, 13 D. C. 12.

[a] **Assignment of right to patent.**—The fact that an applicant for a patent assigned his right thereto to another before applying for and obtaining a foreign patent for the invention which was issued before the one in this country will not prevent the latter from being limited to the term of the foreign patent. John R. Williams Co. v. Miller, etc., Mfg. Co., 115 Fed. 526.

[b] **"Term."**—The word "term," used in reference to a foreign patent, when more than one such patent exists, indicates that the time of expiration as to be ascertained by the term of the patent, was meant as the time of duration. Paillard v. Bruno, 29 Fed. 864, 865.

[c] **The statute is not retroactive** and does not apply to American patents granted before the law took effect or to the reissues of such patents granted after the law took effect. Badische Anilin, etc., Fabrik v. Hamilton Mfg. Co., 2 F. Cas. No. 721, 3 Bann. & A. 235; Goff v. Stafford, 10 F. Cas. No. 5,504, 3 Bann. & A. 610.

[d] **Effect of treaty.**—The omission from the act of March 3, 1903, enacted to make effective the Brussels Treaty of Dec. 14, 1900, for the protection of industrial property, of any provision to carry out art 4 bis, which article was not self-executing, left in force the provisions of the statute as to the existing United States patents. Cameron Septic Tank Co. v. Knoxville, 227 U. S. 39, 33 SCt 209, 57 L. ed. 407; Commercial Acetylene Co. v. Schroeder, 203 Fed. 276, 121 CCA 474 [aff 197 Fed. 908]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Malignani v. Hill-Wright Electric Co., 177 Fed. 430 [overr dicta Hennebique Constr. Co. v. Myers, 172 Fed. 869, 97 CCA 289]; United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 155 Fed. 842, 84 CCA 76 [aff 148 Fed. 31].

87. Gramme Electrical Co. v. Arnoux, etc., Electrical Co., 17 Fed. 838, 21 Blatchf. 450.

88. Hobbs v. Beach, 180 U. S. 363, 21 SCt 409, 45 L. ed. 586 [aff 92 Fed. 146, 34 CCA 248]; United Shoe Mach., etc., Co. v. Duplessis Shoe Mach. Co., 155 Fed. 842, 84 CCA 76; Sawyer Spindle Co. v. Carpenter, 133 Fed. 238 [aff 143 Fed. 976, 75 CCA 162]; Willcox, etc., Sewing Mach. Co. v. Industrial Mfg. Co., 110 Fed. 210 [rev on other grounds 112 Fed. 535, 50 CCA 387]; Beach v. Hobbs, 82 Fed. 916 [mod on other grounds 92 Fed. 146, 34 CCA 248 (aff 180 U. S. 383, 21 SCt 409, 45 L. ed. 586)]; Edison Electric Light Co. v. U. S. Electric Lighting Co., 35 Fed. 134; Kendrick v. Emmons, 14 F. Cas. No. 7,695, 2 Bann. & A. 208.

89. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586.

patent issued in a foreign country which merely secures the applicant against the effects of publication for three years and entitles him to a definitive patent on making the required proofs of the existence of either the article itself or a model thereof within that time is not such a patent as is referred to in the statute,[90] and a foreign patent void ab initio will not limit or invalidate the United States patent.[91] The rule is otherwise, however, as to a patent issued by virtue of the recognized lawful authority vested in the king of a foreign country, although there was no patent law in the shape of a legislative enactment.[92] Failure to limit the patent on its face so as to expire at the same time with the prior foreign patent having the shortest time does not affect its validity.[93] Although the patentee procures the "correction" of a patent limiting it to expire with a foreign patent, which attempted "correction" is void for want of jurisdiction of the commissioner to make it, he is not estopped to claim that the patent was in force for the full term of its life as originally fixed.[94]

In England the patent expired with any foreign patent granted before the English patent.[95]

In Canada the patent expired with any foreign patent in existence during the life of the Canadian patent.[96]

[§ 299] **b. Identity of Invention.** It is not necessary that the patents be identical in all particulars, or that the inventions disclosed therein be identical, since it is sufficient if upon examination of the two instruments it appears that substantially the same thing is intended to be covered thereby.[97] A difference in mere detail does not avoid identity,[98] unless such difference affects the essence of the invention in a patentable sense.[99] And a foreign patent and a subsequent American patent are not for different inventions because the latter contains a more genuine claim, which covers the specific form of device described in the former, and other forms as well.[1] But a prior patent in a foreign country for a minor part of a broad or basic invention is not for the same invention as a subsequent United States patent covering both the minor parts and the broad main invention.[2] When American letters patent are issued covering the same invention described in foreign letters patent of an earlier date, the life of the American patent is not prolonged by the fact that it also covers improvements upon the invention as patented in a foreign country.[3] It is necessary that the foreign patent claim the same invention; it is not sufficient that it disclose the invention of the later United States patent, where it is not claimed therein.[4]

[§ 300] **c. Date of Foreign Patent.** To limit a United States patent the foreign patent must have been actually sealed and issued before the date of the United States patent, and the antedating of a foreign patent will not make it limit a patent here which was actually granted first.[5] Dates of actual issue and not the dates of application control.[6]

[§ 301] **d. Term of Foreign Patent.** The term of a foreign patent is the time which the patentee may, as a matter of right, keep it in force under the law of the country.[7] It includes not merely the term

90. Société Anonyme, etc., v. General Electric Co., 97 Fed. 604.

91. Hennebique Constr. Co. v. Myers, 172 Fed. 869, 97 CCA 289; Bate Refrigerating Co. v. Gillett, 20 Fed. 192.

92. Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 643, 42 CCA 554 [aff 102 Fed. 338, and certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem].

93. Bate Refrigerating Co. v. Hammond, 129 U. S. 151, 9 SCt 225, 32 L. ed. 645; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83; American Paper Barrel Co. v. Laraway, 28 Fed. 141; Canan v. Pound Mfg. Co., 23 Fed. 185, 23 Blatchf. 173. Contra Smith v. Ely, 22 F. Cas. No. 13,043, 5 McLean 76.

94. Edison Electric Light Co. v. Bloomingdale, 65 Fed. 212; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83.

95. In re Winan, L. R. 4 P. C. 93; In re Bett, 1 Moore P. C. N. S. 49, 15 Reprint 621; In re Bodmer, 8 Moore P. C. 282, 14 Reprint 108.

96. Dominion Cotton Mills Co., Ltd. v. Ontario Gen. Engineering Co., [1902] A. C. 570; Auer Incandescent Light Mfg. Co., Ltd. v. Dreschel, 6 Can. Exch. 55 [app dism 28 Can. S. C. 608]; Barter v. Howland, 26 Grant Ch. (Ont.) 135.

[a] **A British patent** is a foreign patent within the meaning of the Canadian Patent Act. Dominion Cotton Mills Co., Ltd. v. Ontario Gen. Engineering Co., [1902] A. C. 570.

97. Commercial Mfg. Co. v. Fairbank Canning Co., 135 U. S. 176, 10 SCt 718, 34 L. ed. 88; Bate Refrigerating Co. v. Hammond, 129 U. S. 151, 9 SCt 225, 32 L. ed. 645; Guarantee Ins. Trust, etc., Co. v. Sellers, 123 U. S. 276, 8 SCt 117, 31 L. ed. 153; Plummer v. Sargent, 120 U. S. 442, 7 SCt 640, 30 L. ed. 737; Commercial Acetylene Co. v. Searchlight Gas Co., 197 Fed. 908 [aff 203 Fed. 276, 121 CCA 474]; United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 148 Fed. 31 [aff 155 Fed. 842, 84 CCA 76]; Aquarama Co. v. Old Mill Co., 124 Fed. 229; Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 338 [aff 102 Fed. 643, 42 CCA 554 (certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem)]; J. L. Mott Iron Works v. Henry McShane Mfg. Co., 80 Fed. 516; Accumulator Co. v. Julien Electric Co., 57 Fed. 605; Clark v. Wilson, 28 Fed. 95; Brush Electric Co. v. Electric Accumulator Co., 56 Off. Gaz. (U. S.) 1334 [aff 61 Off. Gaz. 886].

[a] **Patent is limited,** although one is for process and the other for product. Accumulator Co. v. Julien Electric Co., 57 Fed. 605.

98. Thomson-Houston Electric Co. v. McLean, 153 Fed. 883, 82 CCA 629.

99. Acme Acetylene Appliance Co. v. Commercial Acetylene Co., 192 Fed. 321, 112 CCA 573; Commercial Acetylene Co. v. Searchlight Gas Co., 188 Fed. 85; Thomson-Houston Electric Co. v. McLean, 153 Fed. 883, 82 CCA 629.

1. Sawyer Spindle Co. v. Carpenter, 133 Fed. 238 [aff 143 Fed. 976, 75 CCA 162].

2. Victor Talking Mach. Co. v. Leeds, etc., Co., 146 Fed. 534 [aff 148 Fed. 1022 mem, 79 CCA 536 mem (aff 213 U. S. 301, 29 SCt 495, 53 L. ed. 805)].

3. Siemens v. Sellers, 123 U. S. 276, 8 SCt 117, 31 L. ed. 153.

4. Leeds v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Victor Talking Mach. Co. v. Hoschke, 188 Fed. 326, 110 CCA 304; Westinghouse Electric, etc., Co. v. Stanley Instrument Co., 138 Fed. 823, 71 CCA 189; Western Electric Co. v. Citizens' Tel. Co., 106 Fed. 215; Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co., 22 Fed. 341.

[a] **Rule applied.**—A foreign patent for a method is not for the same invention as an application for a United States patent for an apparatus for practicing that method so as to bring the case within the statute. Fireball Gas Tank, etc., Co. v. Commercial Acetylene Co., 239 U. S. 156, 36 SCt 86, 60 L. ed. 191 [aff 198 Fed. 650, 117 CCA 354]; Commercial Acetylene Co. v. Acme Acetylene Appliance Co., 188 Fed. 89 [aff 192 Fed. 321, 112 CCA 573].

[b] **Expiration of some of the claims** in a patent by reason of the expiration of a foreign patent does not affect the patent as to other claims not identical with those covered by the foreign patent. Leeds v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805.

5. Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 SCt 508, 39 L. ed. 601; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Edison Electric Light Co. v. Waring Electric Co., 59 Fed. 358 [aff 69 Fed. 645, 15 CCA 700]; American Bell Tel. Co. v. Cushman, 57 Fed. 842; Holmes Burglar Alarm Tel. Co. v. Domestic Tel., etc., Co., 42 Fed. 220; Seibert Cylinder Oil Cup Co. v. William Powell Co., 35 Fed. 591; Emerson v. Lippert, 31 Fed. 911; Gold, etc., Tel. Co. v. Commercial Tel. Co., 23 Fed. 340, 23 Blatchf. 199.

[a] **In Canada** the foreign patent must be in existence when the Canadian patent is granted. Ontario Gen. Engineering Co. v. Dominion Cotton Mills Co., 31 Can. S. C. 75; Auer Incandescent Light Mfg. Co. v. Dreschel, 6 Can. Exch. 55 [aff 28 Can. S. C. 608].

6. Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 SCt 508, 39 L. ed. 601; Accumulator Co. v. Julien Co., 57 Fed. 605; Edison Electric Light Co. v. U. S. Electric Lighting Co., 35 Fed. 134; Bate Refrigerating Co. v. Gillett, 13 Fed. 553, 31 Fed. 809.

7. Pohl v. Anchor Brewing Co., 134 U. S. 381, 10 SCt 577, 33 L. ed. 953; Bate Refrigerating Co. v. Hammond, 129 U. S. 151, 9 SCt 225, 32 L. ed. 645; Atlas Glass Co. v. Simonds Mfg. Co., 102 Fed. 338 [aff 102 Fed. 643, 42 CCA 554 (certiorari den 179 U. S. 684 mem, 21 SCt 916 mem, 45 L. ed. 386 mem)]; Bonsack Mach. Co. v. Smith, 70 Fed. 383; Diamond Match Co. v. Adirondack Match Co., 65 Fed. 803; Consolidated Roller-Mill Co. v. Walker, 43 Fed. 575 [aff 138 U. S. 124, 11 SCt 292, 34 L. ed. 920]; Edi-

mentioned in the grant, but any extension thereof which may be procured at the option of the patentee, and it is immaterial whether or not such extension is actually procured.[8] The judgment of the courts of the foreign country as to the meaning of its laws and the term of the patents is controlling.[9]

[§ 302] **e. Lapse or Expiration of Foreign Patent.** Where, at the time that the United States patent is granted, a foreign patent is in force, granted for a certain term, and that patent subsequently lapses through failure to pay fees or taxes or for similar cause, the United States patent does not lapse with the foreign patent, but extends throughout the original term of the foreign patent.[10] The life of a United States patent must be certain from the day of the grant.[11] Where the foreign patent expired or lapsed for any cause before the grant of the United States patent, the United States patent is void.[12]

[§ 303] **5. Effect of Expiration.** The rights of monopoly given by a patent expire with its term, and others are free to make and sell the thing patented,[13] subject only to the rule against unfair competition.[14] An old element, whose patent monopoly has expired, cannot, by being put into a new patented combination, have its individual monopoly revived.[15] The term of a patent of a more general nature is not limited by the expiration of a patent for a specific form previously issued.[16]

[§ 304] **C. Extensions—1. In General.** An extension of a patent is a prolongation of the term.[17] A renewal when used in this sense is the same thing,[18] but not when used to designate a new patent taken out after the surrender of an old one.[19] The state has a perfect right to extend or renew a patent,[20] or refuse to do so.[21]

[§ 305] **2. Right to Extension—a. In United States.** There is no general act of congress permitting the extension of patents, and therefore patents can now be extended only by special acts of congress.[22] Congress, however, as is shown by a very considerable number of decisions, has authority to extend the term of patents either by general law or special act.[23]

[§ 306] **b. In England and British Dominions.** In England,[24] and some of the dominions of the British Empire,[25] the term of a patent may be extended. Assignees may secure an extension,[26] but their claims are not viewed so favorably as those of the original patentee.[27] An importer also may secure an extension, but is not looked upon favorably.[28] The extension may be granted on conditions.[29] The invention must have merit and public utility and the

son Electric Light Co. v. Perkins Electric Lamp Co., 42 Fed. 327.

8. Bate Refrigerating Co. v. Hammond, 129 U. S. 151, 9 SCt 225, 32 L. ed. 645; Edison Electric Light Co. v. U. S. Electric Lighting Co., 52 Fed. 300, 3 CCA 83. Contra Gramme Electrical Co. v. Arnoux, etc., Electric Co., 17 Fed. 838, 21 Blatchf. 450; Bate Refrigerating Co. v. Gillett, 13 Fed. 553; Henry v. Providence Tool Co., 11 F. Cas. No. 6,384, 3 Bann. & A. 501; Reissner v. Sharp, 20 F. Cas. No. 11,689, 4 Bann. & A. 366, 16 Blatchf. 383.

[a] **Extension under subsequent law** will not avoid. Accumulator Co. v. Julien Electric Co., 57 Fed. 605.

9. Consolidated Roller Mill Co. v. Walker, 43 Fed. 575 [aff 138 U. S. 124, 11 SCt 292, 34 L. ed. 920].

10. Leeds v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805; Pohl v. Anchor Brewing Co., 134 U. S. 381, 10 SCt 577, 33 L. ed. 593; Victor Talking Mach. Co. v. Leeds, etc., Co., 146 Fed. 534 [aff 148 Fed. 1022 mem, 79 CCA 536 mem (aff 213 U. S. 301, 29 SCt 495, 53 L. ed. 805)]; Welsbach Light Co. v. Apollo Incandescent Gaslight Co., 96 Fed. 332, 37 CCA 508; Diamond Match Co. v. Adirondack Match Co., 65 Fed. 803; Pohl v. Heyman, 58 Fed. 568; Paillard v. Bruno, 29 Fed. 864; Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co., 21 Fed. 458.

11. Huber v. N. O. Nelson Mfg. Co., 148 U. S. 270, 13 SCt 603, 37 L. ed. 447; Bate Refrigerating Co. v. Gillett, 40 Off. Gaz. (U. S.) 1029; Paillard v. Bruno, 38 Off. Gaz. (U. S.) 900; Henry v. Providence Tool Co., 14 Off. Gaz. (U. S.) 855.

12. Huber v. N. O. Nelson Mfg. Co., 148 U. S. 270, 13 SCt 603, 37 L. ed. 447.

[a] **Where foreign patent lapsed after application in the United States,** the United States patent is valid. Welsbach Light Co. v. Apollo Incandescent Gaslight Co., 96 Fed. 332, 37 CCA 508.

13. McKesson v. Chas. H. Phillips Chemical Co., 23 F. (2d) 763; Keller, Inc. v. Chicago Pneumatic Tool Co., 298 Fed. 52 [certiorari den 265 U. S. 593 mem, 44 SCt 637 mem, 68 L. ed. 1196 mem]; Lenox, Inc. v. Jones, etc., Corp., 271 Fed. 511; De Long Hook, etc., Co. v. Hump Hairpin Mfg. Co., 297 Ill. 359, 130 NE 765 [rev 216 Ill. A. 230].

[a] **It is the legislative intention** that the term shall run from the date of issue of the patent and that at the end of that time the public might derive from the full specifications required in the application accompanying the patent knowledge sufficient to enable it freely to make and use the invention. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159 [aff 55 Ct. Cl. 234].

[b] **Right not based on contract.**—The grant of an exclusive privilege to an invention for a limited time does not imply a binding and irrevocable contract with the people that at the expiration of the period the invention shall become their property. Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433].

[c] **Construction which infringed during term.**—A construction, which was anticipated by a patent and condemned as an infringement of it, may be freely made and sold after such patent has expired. Van Kannel Revolving Door Co. v. Winton Hotel Co., 263 Fed. 988 [mod 276 Fed. 234].

14. See Trade-Marks, Trade-Names, and Unfair Competition [38 Cyc 756 et seq].

15. Radio Corp. of America v. Lord, 28 F. (2d) 257 [aff 24 F. (2d) 565, and certiorari den 49 SCt 83 mem].

16. Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930.

17. Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141.

18. Wilson v. Rousseau, supra.

19. See infra §§ 307-328.

20. Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433].

21. Evans v. Eaton, supra.

22. See cases infra this note.

[a] **The act of 1861 (12 U. S. St. at L. 249) prohibited extensions.**—Guarantee Ins. Trust, etc., Co. v. Sellers, 123 U. S. 276, 8 SCt 117, 31 L. ed. 153.

[b] **Extension by treaty.**—The term of a patent granted by the United States to a citizen thereof cannot be extended by a treaty. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 148 Fed. 31 [aff 155 Fed. 842, 84 CCA 76].

23. Woodbridge v. U. S., 263 U. S. 50, 44 SCt 45, 68 L. ed. 159; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; New American File Co. v. Nicholson File Co., 8 Fed. 816 [app dism 140 U. S. 690 mem, 11 SCt 1025 mem, 35 L. ed. 594 mem]; Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. R. 184; Bloomer v. Stolley, 3 F. Cas. No. 1,559, Fish. Pat. R. 376, 5 McLean 158; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Evans v. Robinson, 8 F. Cas. No. 4,571, Brunn. Coll. Cas. 400; Gibson v. Gifford, 10 F. Cas. No. 5,395, 1 Blatchf. 529, Fish. Pat. R. 366; Gibson v. Harris, 10 F. Cas. No. 5,396, 1 Blatchf. 167, Fish. Pat. R. 115; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232; Potter v. Braunsdorf, 19 F. Cas. No. 11,321, 7 Blatchf. 97; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Woodworth v. Hall, 30 F. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248; Woodworth v. Sherman, 30 F. Cas. No. 18,019, 2 Robb Pat. Cas. 257, 3 Story 171.

24. In re Parsons, [1898] A. C. 673; Matter of Brandon, 9 App. Cas. 589; Ledsam v. Russell, 1 H. L. Cas. 687, 9 Reprint 931; In re Bett, 1 Moore P. C. N. S. 49, 15 Reprint 621.

[a] **Extension as to part.**—(1) The patent may be extended as to a part only of the claiming clauses. In re Lodge, [1911] 2 Ch. 46. (2) An order for the extension of the term of a part of a patent does not require it to be advertised. In re Ferranti, 88 L. J. Ch. 123.

25. Robinson v. Forgan, 24 Austr. C. L. R. 382.

26. Russell v. Ledsam, 14 M. & W. 574, 153 Reprint 604 [aff 16 M. & W. 633, 153 Reprint 1343 (aff 1 H. L. Cas. 687, 9 Reprint 931)]; In re Napier, 13 Moore P. C. 543, 15 Reprint 204.

27. In re Van Gelder, [1907] A. C. 174; In re Henderson, [1901] A. C. 616; In re Hopkinson, [1897] A. C. 249; In re Normand, L. R. 3 P. C. 193; In re Goucher, 2 Moore P. C. N. S. 532, 15 Reprint 1001; In re Norton, 1 Moore P. C. N. S. 339, 15 Reprint 729.

28. In re Johnson, L. R. 4 P. C. 75; In re Newton, 14 Moore P. C. 156, 15 Reprint 265; In re Claridge, 7 Moore P. C. 394, 13 Reprint 932.

29. In re Mallet, L. R. 1 P. C. 308; In re Lodge, [1911] 2 Ch. 46; Led-

patentee must have been insufficiently remunerated.[30] The petition for extension must state everything fully and fairly and must include a complete account of profits.[31] Expenses, etc., must be deducted in estimating profits,[32] and the failure of profits must be shown not to be due to the failure to make proper efforts.[33] An extension will be refused where the patent is not sufficiently useful,[34] or where it is void;[35] the expiration of foreign patents for the same invention is a serious obstacle to the success of an applicant for prolongation.[36] The petition must be filed before the expiration of the prescribed time,[37] and the requirements for advertising must have been complied with.[38] Anyone filing a caveat may oppose the extension;[39] the petitioner ought to learn at the earliest possible stage the nature of objections made on the grounds of novelty or subject matter.[40] Costs are allowed on opposition to extension.[41]

For losses caused by war. In England, by virtue of an amendment to the statute,[42] the term of patents may be extended because of losses caused by war.[43] They may be extended by proceedings begun after their expiration,[44] but after a period of two[45] or three[46] years has elapsed, an exceptional case must be shown. The proceedings ordinarily are by originating summons,[47] but in an involved case, should be by petition.[48] A proceeding instituted

sam v. Russell, 1 H. L. Cas. 687, 9 Reprint 931; In re Baxter, 13 Jur. 593; In re Bodmer, 8 Moore P. C. 282, 14 Reprint 108; In re Fleming, 36 R. P. C. 266; In re Michell, 36 R. P. C. 223; In re Taylor, 35 R. P. C. 247.

30. In re Henderson, [1901] A. C. 616; In re Currie, [1898] A. C. 347; In re Blake, L. R. 4 P. C. 535; In re McDougal, L. R. 2 P. C. 1; In re Johnson, [1909] 1 Ch. 114; In re Pinkus, 12 Jur. 233; In re Bell, 10 Jur. 363; In re Heath, 8 Moore P. C. 217, 14 Reprint 83; In re Pettit Smith, 7 Moore P. C. 133, 13 Reprint 830; Re Russell, 2 Moore P. C. 496, 12 Reprint 1095; In re Hood, 41 R. P. C. 592; In re Smith, 39 R. P. C. 313; In re Muir, 36 R. P. C. 327; Re Ritchie, 31 R. P. C. 1; In re Fleming, 35 T. L. R. 179; In re Dewar, 34 T. L. R. 512.

[a] **In an exceptional case** a period of extension may exceed five years. In re Dickson, 42 R. P. C. 463.

31. In re Wuterich, [1903] A. C. 206; Peach's Patent, [1902] A. C. 414; In re Johnson, L. R. 5 P. C. 87; In re Wield, L. R. 4 P. C. 89; In re Pitman, L. R. 4 P. C. 84; In re Clark, L. R. 3 P. C. 421; In re Markwick, 13 Moore P. C. 310, 15 Reprint 116; In re Bett, 1 Moore P. C. N. S. 49, 15 Reprint 621.

32. In re Carr, L. R. 4 P. C. 539; In re Poole, L. R. 1 P. C. 514; Matter of Galloway, 7 Jur. 453; In re Newton, 14 Moore P. C. 156, 15 Reprint 265.

33. In re Henderson, [1901] A. C. 616; In re Thornycroft, [1899] A. C. 415; In re Johnson, [1909] 1 Ch. 114; In re Patterson, 6 Moore P. C. 469, 13 Reprint 765; In re Norton, 1 Moore P. C. N. S. 339, 15 Reprint 729; In re Hood, 41 R. P. C. 592.

34. In re Allan, L. R. 1 P. C. 507; In re Herbert, L. R. 1 P. C. 399; Matter of Simister, 4 Moore P. C. 164, 13 Reprint 264.

[a] **Burden of proof.**—It is the petitioner's duty to bring before the court at the outset matters relating to the merits of the invention, but he need only make a prima facie case. In re Johnson, [1909] 1 Ch. 114.

[b] **Evidence.**—While evidence as to the novelty and subject matter cannot altogether be excluded, the detailed scientific evidence usual in infringement actions and petitions for revocation should be excluded. In re Johnson, [1909] 1 Ch. 114.

35. In re Hill, 1 Moore P. C. N. S. 258, 15 Reprint 698; In re Worrall, 35 R. P. C. 226.

36. In re Henderson, [1901] A. C. 616; In re Bett, 1 Moore P. C. N. S. 49, 15 Reprint 621.

37. Marshall's Patent, [1891] A. C. 430; In re Jablochkoff, [1891] A. C. 293; Matter of Brandon, 9 App. Cas. 589; In re Hutchison, 14 Moore P. C. 364, 15 Reprint 343.

[a] **Statutory increase of term after petition filed.**—Where the statutory term of patents was increased after the filing of a petition for an extension, the petition will be adjourned generally as being premature. Matter of Allibon, [1920] 1 Ir. 33; In re Smith, 123 L. T. Rep. N. S. 568.

[b] **Grant of extension after expiration.**—A patent may be extended even after its expiration where the application was prosecuted within the time prescribed. Ledsam v. Russell, 1 H. L. Cas. 687, 9 Reprint 931; Re Bodmer, 2 Moore P. C. 471, 12 Reprint 1085.

[c] **Extending time for filing petition.**—By virtue of temporary rules passed in 1914, the comptroller had power to extend the time for filing a petition. In re Woodhall, 87 L. J. Ch. 67.

38. In re Frieze-Greene, [1907] A. C. 460; Robinson v. Forgan, 24 Austr. C. L. R. 382.

39. In re Schlumberger, 9 Moore P. C. 1, 14 Reprint 197; In re Lowe, 8 Moore P. C. 1, 14 Reprint 1; In re Pettit Smith, 7 Moore P. C. 133, 13 Reprint 830; Re Woodcroft, 3 Moore P. C. 171, 13 Reprint 72.

40. In re Johnson, [1908] 2 Ch. 487.

[a] **Under former rules** an objection to an extension was required to state grounds but not necessarily particulars. In re Ball, 4 App. Cas. 171.

41. In re Wield, L. R. 4 P. C. 89; In re Johnson, L. R. 4 P. C. 75; In re Jones, 9 Moore P. C. 41, 14 Reprint 213; In re Milner, 9 Moore P. C. 39, 14 Reprint 212.

42. Patents and Designs Act (1907) § 8, as amended by Patents and Designs Act (1919) § 7 subs 3.

43. In re Gilbert, 44 R. P. C. 527; In re Enfield Cycle Co., 44 R. P. C. 526; In re Panicali, 44 R. P. C. 509; In re Higginson, 44 R. P. C. 430; In re Chamber, 44 R. P. C. 332; In re Nourse, 44 R. P. C. 252; In re Haydock, 44 R. P. C. 250; In re Still, 44 R. P. C. 248; In re Dressler, 44 R. P. C. 203; In re Cossar, 44 R. P. C. 201; In re Claude, 44 R. P. C. 17; In re Mikklesen, 44 R. P. C. 12; In re Fairies, 43 R. P. C. 349; In re Evans, 43 R. P. C. 345; In re Moyes, 43 R. P. C. 183; In re Walker, 43 R. P. C. 181; In re Larssons, 43 R. P. C. 179; In re Inshaw, 43 R. P. C. 178; In re Dicker, 43 R. P. C. 167; In re Sheffield, 43 R. P. C. 165; In re Ewart, 43 R. P. C. 164; In re Schoop, 43 R. P. C. 74; In re McCollum, 42 R. P. C. 526; In re Westmoreland, 42 R. P. C. 513; In re Morison, 42 R. P. C. 511; In re Ayre, 42 R. P. C. 178; In re Stock, 41 R. P. C. 647; In re Willmott, 41 R. P. C. 646; In re Lumiere, 41 R. P. C. 645; In re Sperry, 41 R. P. C. 422; In re Recess Screws, Ltd., 41 R. P. C. 419; In re Matter, 41 R. P. C. 341; In re Levick, 41 R. P. C. 202; In re Kent, 41 R. P. C. 172; In re Parkinson, 41 R. P. C. 169; In re Haddan, 41 R. P. C. 166; In re Stiff, 40 R. P. C. 459; In re Spencer, 40 R. P. C. 458; In re Hadwin, 40 R. P. C. 457; In re Brock, 40 R. P. C. 397; In re Garratt, 40 R. P. C. 396; In re Johnson, 40 R. P. C. 394; In re Robinson, 40 R. P. C. 217; In re MacGregor, 40 R. P. C. 157; In re Ewart, 40 R. P. C. 155; In re Le Bas, 40 R. P. C. 101; In re Brown, 40 R. P. C. 95; In re Hardinge, 40 R. P. C. 92; In re Jerram, 40 R. P. C. 74; In re Townsley, 40 R. P. C. 73; In re Baines, 40 R. P. C. 61; In re Wohler, 40 R. P. C. 49; Re Bennet, 39 R. P. C. 447; In re Gresley, 39 R. P. C. 444; In re Coleman, 39 R. P. C. 389; In re Young, 39 R. P. C. 364; In re Duncan, 39 R. P. C. 311; Re Austin, 39 R. P. C. 294; In re Tomkinson, 39 R. P. C. 283; In re Crighton, 39 R. P. C. 259; In re Osborne, 39 R. P. C. 143; In re Howarth, 39 R. P. C. 140; In re Petersen, 38 R. P. C. 267.

[a] **Loss not due to hostilities** cannot be considered. In re Casmey, 40 R. P. C. 99; In re Johnson, 39 R. P. C. 419.

[b] **Losses suffered by the sole licensee** are not to be considered. In re Summers Brown, [1922] 2 Ch. 759; In re Wingquist, 40 R. P. C. 261.

[c] **Where patent assigned.**—Although the patentee has assigned his invention since the war, he and the assignee may apply for an extension. In re Summers Brown, [1922] 2 Ch. 759.

[d] **The failure to manufacture in the United Kingdom,** while a strong objection to granting an extension of the patent in the ordinary way, is not an objection to anything like the same degree to an extension of the patent which is really only by way of substitution. In re Société Chimique des Usines du Rhône, [1922] 1 Ch. 258.

[e] **Extension beyond term of foreign patent.**—A patent was extended although for a period beyond that of the term of a patent in the United States for the same invention where the evidence showed that the patented machinery could be sold in the United States at approximately two thirds of the cost of production in England. In re Haddan, 41 R. P. C. 166.

[f] **Application adjourned in part.**—In re Fullagar, 39 R. P. C. 421; In re Pierpont, etc., Monotype Corp., 38 R. P. C. 353; In re Pugh, 38 R. P. C. 150.

[g] **Loss held counterbalanced by profits.**—In re Rushton, 40 R. P. C. 30.

44. In re Brown, 89 L. J. Ch. 463; In re Kay, 42 R. P. C. 222; In re Wilderman, 42 R. P. C. 42; In re Eugster, 41 R. P. C. 175; In re Taylor, 41 R. P. C. 64; In re Boult, 40 R. P. C. 375; In re Bates, 38 R. P. C. 385; Boult's Patent, 38 R. P. C. 359; Re Bettington Boilers, Ltd., 38 R. P. C. 349; In re Hope, 38 R. P. C. 152; In re Dixon, 38 R. P. C. 23; In re Hatfield, etc., Mfg. Co., 37 R. P. C. 273; In re United Velvet Cutters' Assoc., Ltd., 37 R. P. C. 261.

45. In re Pierpont, 38 R. P. C. 355.

46. In re Brown, 37 R. P. C. 142.

47. In re Poulsen, 38 R. P. C. 105. And see cases supra note 44.

[a] **Amendment of summons.**—An error in the title of the summons as to the name of the patent may not be amended after a grant of the extension; the order for the extension may be repeated on proceedings had on a new summons. In re Houghton, 43 R. P. C. 343.

48. In re Martineau, 44 R. P. C. 205.

[a] **Showing grounds under original and amended statute.**—A petition may be regarded as an application for an extension under the original statute and as a proceeding for

when the patent has several years to run will be adjourned as premature,[49] save in an exceptional case.[50] Costs may be allowed on opposition.[51]

Second extension. There is no authority to grant a second extension,[52] even for losses caused by war.[53]

X. REISSUES

[By Rudy J. Brossman]

[§ 307] **A. In General[54]—1. Definition and Nature.** A reissued patent is in effect an amendment of the original patent made to cure some defect or insufficiency in the original;[55] a patent which merely secures the patent rights more definitely in some particular wherein the original patent was defective.[56] A patentee, being entitled to a reissue in case of a mistaken limitation of his claims,[57] cannot obtain relief by construction of his patent,[58] or by the issuance of another patent.[59]

[§ 308] **2. Power To Reissue and Grounds.** The statutes of the United States authorize a reissue of a patent where the original is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee's claiming as his own invention or discovery more than he has a right to claim as new, provided the error arose by inadvertence, accident, or mistake and without any fraudulent or deceptive intent.[60] The statute is mandatory and gives the commissioner no discretion as to cases within its provisions.[61] While it is to be construed liberally according to its spirit,[62] a reissue cannot be granted except as provided therein.[63] To warrant a reissue it is necessary that there should be a bona fide mistake or accident[64] and not merely

an extension for losses caused by war. In re Hunt, 39 R. P. C. 131.

49. In re Davidson, [1921] 1 Ch. 69.

50. In re Metropolitan Amalgamated R. Carriage, etc., Co., 37 R. P. C. 266.

51. In re Wingquist, 40 R. P. C. 261; In re Poulsen, 38 R. P. C. 105.

[a] **Costs not awarded applicant** (1) where the opposition succeeded in materially reducing the term of the extension asked for (In re Johnston, 44 R. P. C. 254), (2) or where the court received a measure of assistance from the opposition (In re Dicker, 44 R. P. C. 263).

52. In re Thompson, [1909] 2 Ch. 447 [foll In re Goucher, 2 Moore P. C. N. S. 532, 15 Reprint 1001].

53. In re Muir, [1927] 1 Ch. 188.

54. **Correction or amendment of original patent** see supra § 275.

Extension of original patent see supra §§ 304-306.

55. Dobson v. Lees, 137 U. S. 258, 11 SCt 71, 34 L. ed. 652; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Shaw v. Colwell Lead Co., 11 Fed. 711, 20 Blatchf. 417; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Lattig v. Dean, 25 App. (D. C.) 591; McBurney v. Goodyear, 11 Cush. (Mass.) 569.

[a] **Renewal** is sometimes used to designate a reissue. Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141.

56. Ingersoll v. Holt, 104 Fed. 682.

57. See infra § 308.

58. Perfection Spring Serv. Co. v. American Auto Heater Co., 236 Fed. 256; Dey Time-Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807 [aff 178 Fed. 812, 102 CCA 260].

59. Toledo Scale Co. v. Computing Scale Co., 9 F. (2d) 823; Westinghouse Tract. Brake Co. v. Christensen, 243 Fed. 901, 156 CCA 413 [dist National Brake, etc., Co. v. Christensen, 229 Fed. 564, 144 CCA 24 (certiorari den 241 U. S. 659 mem, 36 SCt 447 mem, 60 L. ed. 1225 mem)]; Union Typewriter Co. v. L. C. Smith, etc., Typewriter Co., 181 Fed. 966, 104 CCA 430 [aff 173 Fed. 288]; Re Leonard, 14 Can. Exch. 351, 14 Dom LR 364, 13 EastLR 280.

60. U. S. Code tit 35 § 64; U. S. Rev. St. § 4916; Woolwine Metal Products Co. v. Boyle, 279 Fed. 609 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Pierce v. Bell, 239 Fed. 549; Bertels v. Trethaway, 175 Fed. 971 [rev on other grounds 180 Fed. 730, 104 CCA 96]; Sewing-Mach. Co. v. Frame, 24 Fed. 596; Gold, etc., Tel. Co. v. Wiley, 17 Fed. 234; Hailes v. Albany Stove Co., 16 Fed. 240, 21 Blatchf. 271 [aff 123 U. S. 582, 8 SCt 262, 31 L. ed. 284]; Woven-Wire Mattress Co. v. Wire-Web Bed Co., 8 Fed. 87; Smith v. Merriam, 6 Fed. 713; Wilson v. Coon, 6 Fed. 611, 18 Blatchf. 532 [rev on other grounds 113 U. S. 268, 5 SCt 537, 28 L. ed. 963]; Giant Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Atlantic Giant-Powder Co. v. Goodyear, 2 F. Cas. No. 623, 3 Bann. & A. 161; Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290; Ex p. Ball, 2 F. Cas. No. 810; Dyson v. Gambrill, 8 F. Cas. No. 4,230; Knight v. Baltimore, etc., R. Co., 14 F. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Stevens v. Pritchard, 23 F. Cas. No. 13,407, 2 Bann. & A. 390, 4 Cliff. 417; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397; Wells v. Jacques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60.

[a] **Purpose of statute.**—The statute providing for the reissuance of patents in certain cases is intended to secure to the inventor a monopoly of that which he actually discovered. In re Otto, 49 App. (D. C.) 89, 259 Fed. 985.

[b] **Similarity to amendment.**—"Within specified limitations, that which may be done by amendment in the Patent Office pending the application may be done after the patent is granted, by a reissue." Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831, 841.

[c] **Prior to the passage of the reissue statute** the authority to grant a reissue existed. Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376.

[d] **In Canada** (1) the law is like that in the United States. 35 Vict. c 26 § 19. (2) A defective or inoperative patent may be amended by reissue. Auer Incandescent Light Mfg. Co. v. O'Brien, 5 Can. Exch. 243; Hunter v. Carrick, 28 Grant Ch. 489 [rev on other grounds 10 Ont. A. 449]. (3) An omission through mistake to make a claim in a patent application for one of the inventions disclosed in the specification is within the purview of the statute. Re Leonard, 14 Can. Exch. 351, 14 DomLR 364, 13 EastLR 280.

61. Thomson-Houston Electric Co. v. Black River Tract. Co., 135 Fed. 759, 68 CCA 461; Ex p. Dyson, 8 F. Cas. No. 4,228.

62. Iowa Washing Mach. Co. v. Ward, 227 Fed. 1004 [aff 234 Fed. 88, 148 CCA 104 (certiorari den 241 U. S. 680 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem)]; Autopiano Co. v. American Player Action Co., 222 Fed. 276, 138 CCA 38; Grand Rapids Show Case Co. v. Baker, 216 Fed. 341, 132 CCA 485; Ex p. Ball, 2 F. Cas. No. 810; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,398, Holmes 45.

63. Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 [rev 15 F. (2d) 215]; Heidbrink v. Charles H. Hardessen Co., 25 F. (2d) 8 [certiorari den 49 SCt 29 mem]; Wichita Visible Gasoline Pump Co. v. Clear Vision Pump Co., 19 F. (2d) 435 [rev 9 F. (2d) 996]; Stafford Co. v. Coldwell-Gildard Co., 202 Fed. 744, 121 CCA 110 [certiorari den 235 U. S. 700 mem, 35 SCt 200 mem, 59 L. ed. 432 mem]; Moneyweight Scale Co. v. Toledo Computing Scale Co., 187 Fed. 826, 109 CCA 586 [aff 178 Fed. 557, and petition to open decree den 199 Fed. 905, 118 CCA 235]; General Electric Co. v. Richmond St., etc., R. Co., 178 Fed. 84, 102 CCA 138 [certiorari den 216 U. S. 620 mem, 30 SCt 574 mem, 54 L. ed. 640 mem]; Peoria Target Co. v. Cleveland Target Co., 58 Fed. 227, 7 CCA 197; Child v. Adams, 5 F. Cas. No. 2,673, 1 Fish. Pat. Cas. 189, 3 Wall. Jr. 20; Bergeon v. De Kermor Electric Heating Co., Ltd., [1927] Can. Exch. 181, [1927] 3 DomLR 99.

64. Huber v. N. O. Nelson Mfg. Co., 148 U. S. 270, 13 SCt 603, 37 L. ed. 447 [aff 38 Fed. 830]; Yale Lock Mfg. Co. v. James, 125 U. S. 447, 8 SCt 967, 31 L. ed. 807; Matthews v. Iron-Clad Mfg. Co., 124 U. S. 347, 8 SCt 639, 31 L. ed. 477; Coon v. Wilson, 113 U. S. 268, 5 SCt 537, 28 L. ed. 963; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 28 L. ed. 665; Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; American Steel Foundries v. Laughlin, 30 F. (2d) 137 [aff 30 F. (2d) 139]; Hatmaker v. Dry Milk Co., 29 F. (2d) 918; In re Hicks, 29 F. (2d) 879; Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937; Bucher, etc., Plow Co. v. International Harvester Co., 211 Fed. 473; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 115 Fed. 810; American Soda-Fountain Co. v. Swietusch, 85 Fed. 968, 29 CCA 506; Jenkins v. Stetson, 32 Fed. 398; Arnheim v. Finster, 24 Fed. 276; American Diamond Drill Co. v. Sullivan Mach. Co., 21 Fed. 74; Newton v. Furst, etc., Mfg. Co., 14 Fed. 465, 11 Biss. 405 [aff 119 U. S. 373, 7 SCt 369, 30 L. ed. 442]; Putnam v. Hutchinson, 12 Fed. 127, 11 Biss. 233; Otis v. Ingoldsby, 35 App. (D. C.) 102; In re Conklin, 8 D. C. 375.

[a] **Mistake not of fact.**—"Mistake which will justify a reissue need not necessarily be a mistake of fact." Gross v. Norris, 18 F. (2d) 418, 422 [mod on other grounds 26 F. (2d) 898].

[b] **Patentee must not be guilty of fraud or deception** to be entitled to a reissue patent. Wichita Visible Gasoline Pump Co. v. Clear Vision Pump Co., 19 F. (2d) 435 [rev 9 F. (2d) 996]; General Electric Co. v. Richmond St., etc., R. Co., 178 Fed. 84, 102 CCA 138 [certiorari den 216 U. S. 620 mem, 30 SCt 574 mem, 54 L. ed. 640 mem]; In re Heroult, 29 App. (D. C.) 42.

an error in judgment,[65] and the patent must be inoperative and invalid.[66] A "defective or insufficient specification" which justifies a reissue includes not only the technical specifications,[67] but the claims following them;[68] hence claims that are too narrow and render the patent inoperative justify a reissue.[69] So where the patent claims too much, there may be a reissue.[70] The reissue is not invalid because the

[c] **Acts of attorneys.**—Applicants for patents usually act through solicitors or attorneys, and their inadvertence, accident, or mistake, if such in fact, is remediable by a reissue. Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod 263 Fed. 988]; Perfection Disappearing Bed Co., Inc. v. Murphy Wall Bed Co., 266 Fed. 698 [certiorari den 254 U. S. 652 mem, 41 SCt 149 mem, 65 L. ed. 458 mem]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450; Moneyweight Scale Co. v. Toledo Computing Scale Co., 187 Fed. 826, 109 CCA 586 [aff 178 Fed. 557, and petition to open decree den 199 Fed. 905, 118 CCA 235]; In re Heroult, 29 App. (D. C.) 42.

[d] **Errors of patent office** may be corrected by a reissue. Morey v. Lockwood, 8 Wall. (U. S.) 230, 19 L. ed. 339; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Dunbar v. Eastern El. Co., 75 Fed. 567 [rev on other grounds 81 Fed. 201, 26 CCA 330]; Yale Lock Mfg. Co. v. New Haven Sav. Bank, 32 Fed. 167.

[e] **Actual mistake shown.**—Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 653; Ashley v. Samuel C. Tatum Co., 240 Fed. 979; Peoria Target Co. v. Cleveland Target Co., 43 Fed. 922; National Spring Co. v. Union Car Spring Mfg. Co., 17 F. Cas. No. 10,051, 1 Bann. & A. 240, 12 Blatchf. 80.

65. Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 SCt 884, 34 L. ed. 168; Yale Lock Mfg. Co. v. James, 125 U. S. 447, 8 SCt 967, 31 L. ed. 807; American Steel Foundries v. Laughlin, 30 F. (2d) 139; Moneyweight Scale Co. v. Toledo Computing Scale Co., 187 Fed. 826, 109 CCA 586 [aff 178 Fed. 557, and petition to open decree den 199 Fed. 905, 118 CCA 235].

[a] **The deliberate acts of applicant's attorney** in protracted proceedings in the patent office leading to the issuance of the patent cannot be treated as inadvertence, accident, or mistake which will authorize a reissue. Grand Rapids Show Case Co. v. Baker, 216 Fed. 341, 132 CCA 485.

66. Eby v. King, 158 U. S. 366, 15 SCt 972, 39 L. ed. 1018; Huber v. Nelson Mfg. Co., 148 U. S. 270, 13 SCt 603, 37 L. ed. 447; Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 SCt 884, 34 L. ed. 168; Yale Lock Mfg. Co. v. James, 125 U. S. 447, 8 SCt 967, 31 L. ed. 807; Matthews v. Iron-Clad Mfg. Co., 124 U. S. 347, 8 SCt 639, 31 L. ed. 477; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; McMurray v. Mallory, 111 U. S. 97, 4 SCt 375, 28 L. ed. 365; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937; Cover v. American Thermo-Ware Co., 188 Fed. 670; Idealite Co. v. Protection Light Co., 103 Fed. 973; Peoria Target Co. v. Cleveland Target Co., 58 Fed. 227, 7 CCA 197; Brewster v. Shuler, 37 Fed. 785; Giant Powder Co. v. California Powder Works, 10 F. Cas. No. 5,379, 2 Bann. & A. 131, 3 Sawy. 448 [rev on other grounds 98 U. S. 126, 25 L. ed. 77]; Goodyear v. Day, 10 F. Cas. No. 5,566.

[a] **Clause construed.**—"The statute does not mean that the patent as such must be inoperative or invalid, but does mean that the patent is inoperative or invalid to secure the enjoyment of the invention which the patent within its four corners fairly discloses." Iowa Washing Mach. Co. v. Ward, 227 Fed. 1004, 1007 [aff 234 Fed. 88, 148 CCA 104 (certiorari den 241 U. S. 680 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem)]. See to same effect Perfection Disappearing Bed Co., Inc. v. Murphy Wall Bed Co., 266 Fed. 698 [certiorari den 254 U. S. 652 mem, 41 SCt 149 mem, 65 L. ed. 458 mem]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105]; Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831.

[b] **Suits sustaining the original patent** are not conclusive that it is not inoperative and invalid in part, and consequently not necessarily a bar to the right to reissue. Thomson v. Wooster, 114 U. S. 104, 5 SCt 788, 29 L. ed. 105.

[c] **Adjudged lack of patentability** is not a ground for reissue. Penn Electrical, etc., Co. v. Conroy, 185 Fed. 511, 107 CCA 611 [rev 181 Fed. 697].

67. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Russell v. Dodge, 93 U. S. 460, 23 L. ed. 973; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Weston Electrical Instrument Co. v. Stevens, 119 Fed. 181 [rev on other grounds 134 Fed. 574, 67 CCA 374]; Holmes Burglar Alarm Tel. Co. v. Domestic Tel., etc., Co., 42 Fed. 220; Smith v. Pearce, 22 F. Cas. No. 13,089, 2 McLean 176, 2 Robb Pat. Cas. 13.

68. Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105]; McDowell v. Ideal Concrete Mach. Co., 187 Fed. 814, 109 CCA 574; Hart, etc., Mfg. Co. v. Anchor Electric Co., 92 Fed. 657, 34 CCA 606.

[a] **Extent to which applicant may remold or expand claims** is determined on equitable principles. Haiss Mfg. Co. v. Link Belt Co., 27 F. (2d) 397.

[b] **Claim invalid because functional.**—(1) Where a claim of a patent was adjudged invalid as functional, and there was no fraud or deceptive intention, the error was one arising from inadvertence, accident, or mistake, authorizing a reissue. Motion Picture Patents Co. v. Laemmle, 214 Fed. 787. (2) Otherwise where the original patent was adjudged invalid because functional, in that the patentee deliberately and skillfully drafted claims to cover any means which anyone might ever discover to produce the same result. Heidbrink v. Charles H. Hardessen Co., 25 F. (2d) 8 [certiorari den 49 SCt 29 mem].

69. Keller v. Adams-Campbell Co., 264 U. S. 314, 44 SCt 356, 68 L. ed. 705 [dism writ of certiorari 287 Fed. 838]; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658 [expl Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783]; Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 SCt 884, 34 L. ed. 168; Flower v. Detroit, 127 U. S. 563, 8 SCt 1291, 32 L. ed. 175; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Brown v. Davis, 116 U. S. 237, 6 SCt 379, 29 L. ed. 659; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 28 L. ed. 665; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Hommel Mfg. Co. v. East Side Mfg. Co., 16 F. (2d) 1008; Standard Brick Co. v. Denison Interlocking Tile Corp., 285 Fed. 108; Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod 263 Fed. 988]; Perfection Disappearing Bed Co., Inc. v. Murphy Wall Bed Co., 266 Fed. 698 [certiorari den 254 U. S. 652 mem, 41 SCt 149 mem, 65 L. ed. 458 mem]; Robert v. Krementz, 243 Fed. 877, 156 CCA 389 [rev 232 Fed. 876]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105]; Witzel v. Berman, 212 Fed. 734, 129 CCA 344; Houghton v. Whitin Mach. Works, 153 Fed. 740, 83 CCA 84; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580; Peoria Target Co. v. Cleveland Target Co., 43 Fed. 922; Holmes Burglar Alarm Tel. Co. v. Domestic Tel., etc., Co., 42 Fed. 220; Huber v. N. O. Nelson Mfg. Co., 38 Fed. 830 [aff 148 U. S. 270, 13 SCt 603, 37 L. ed. 447]; Hutchinson v. Everett, 33 Fed. 502; Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 25 Fed. 30; Stutz v. Armstrong, 20 Fed. 843; Giant Powder Co. v. Safety Nitro Powder Co., 19 Fed. 509; Ex p. Ball, 2 F. Cas. No. 810; Dorsey Harvester Revolving Rake Co. v. Marsh, 7 F. Cas. No. 4,014, 6 Fish. Pat. Cas. 387, 9 Phila. (Pa.) 395; Morse, etc., Tel. Case, 17 F. Cas. No. 9,861; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Poppenhusen v. Falke, 19 F. Cas. No. 11,280, 5 Blatchf. 46, 2 Fish. Pat. Cas. 213; Welling v. Rubber-Coated Harness Trimming Co., 29 F. Cas. No. 17,383, 2 Bann. & A. 1; Woodward v. Dinsmore, 30 F. Cas. No. 18,003, 4 Fish. Pat. Cas. 163; Miel v. Young, 29 App. (D. C.) 481; In re Briede, 27 App. (D. C.) 298.

[a] **Reissue of design patent,** the original of which was taken out when patent office rules limited applicant to diagrammatic description, is not open to suspicion because the claims have been broadened, as permitted by change of rules allowing a verbal description. Ashley v. Samuel C. Tatum Co., 240 Fed. 979.

[b] **Claim enlarging monopoly.**—A reissue patent applied for, not for the purpose of narrowing the original patent because the patentee had claimed too much, but for the purpose of giving him a broader monopoly, and the claims of which as recast have that effect, is unauthorized and void. General Electric Co. v. Richmond St., etc., R. Co., 178 Fed. 84, 102 CCA 138 [certiorari den 216 U. S. 620 mem, 30 SCt 574 mem, 54 L. ed. 640 mem]; Otis v. Ingoldsby, 35 App. (D. C.) 102.

[c] **Inadvertent use of limiting word.**—Wirebounds Patents Co. v. Chicago Mill, etc., Co., 238 Fed. 929.

70. Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Kraft Cheese Co. v. Pabst Corp., 17 F. (2d) 787; Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod 263 Fed. 988]; Geneva Mfg. Co. v. National Furniture Co., 188 Fed. 662; Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831; Hubel v. Dick, 28 Fed. 656; Mathews v. Flower, 25 Fed. 830 [app dism 131 U. S. 441 mem, 9 SCt 800 mem, 33 L. ed. 219 mem]; Dorsey Harvester Revolving-Rake Co. v. Marsh, 7 F. Cas. No. 4,014, 6 Fish. Pat. Cas. 387; Giant Powder Co. v. California Powder Works, 10 F. Cas. No. 5,379, 2 Bann. & A. 131, 3 Sawy. 448 [rev on other grounds 98 U. S. 126, 25 L. ed. 77]; Knight v. Baltimore, etc., R. Co., 14 F. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas.

error corrected was immaterial.[71]

[§ 309] **3. Persons Entitled to Reissue.** A reissue may be granted to the inventor, his executor or administrator,[72] or, in case of assignment recorded in the patent office, may be granted to the assignee.[73] Joint owners must all join in a surrender for reissue or ratify a reissue, otherwise it is invalid.[74] In regard to reissues, citizens and aliens have the same rights.[75]

[§ 310] **4. Term.** The reissue is granted for the unexpired part of the term of the original patent.[76]

[§ 311] **B. Time for Application—1. In General.** Application for reissue should be made with promptness,[77] and while the length of delay which is permissible depends on the circumstances of the particular case,[78] as a general rule, where claims are broadened, a delay of two years will ordinarily be regarded as too long unless excuse is shown therefor;[79] this rule is not applicable where the claims are not broadened,[80] and it has been said that, where the claims are narrowed, lapse of time does no more than suggest laches,[81] and does not of itself bar the

468; Treadwell v. Bladen, 24 F. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. C. C. 703.

[a] **Reissue is rarely resorted to simply to cure excessive claims** (1) as a simpler remedy exists by disclaimer. Russell v. Dodge, 93 U. S. 460, 23 L. ed. 973. (2) Disclaimer generally see infra §§ 329-334.

71. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Thomson-Houston Electric Co. v. Black River Tract. Co., 135 Fed. 759, 68 CCA 461; Buerk v. Valentine, 4 F. Cas. No. 2,109, 9 Blatchf. 479, 5 Fish. Pat. Cas. 366.

72. U. S. Code tit 35 § 64; U. S. Rev. St. (1878) § 4916 (U. S. Comp. St. [1901] pp 3385, 3393); Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Smith v. Mercer, 22 F. Cas. No. 13,078.

73. U. S. Code tit 35 § 44; Providence Rubber Co. v. Goodyear Rubber Co., 9 Wall. (U. S.) 788, 19 L. ed. 566; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Wing v. Warren, 30 F. Cas. No. 17,871, 5 Fish. Pat. Cas. 548.

[a] **Assignee** may secure reissue in his own name and for his own benefit without consent of the inventor. Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,398, Holmes 45; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

[b] **Compelling assignor to make application.**—An assignment of an application for a patent has been held to carry with it an implied covenant, running with the grant, to make application for a reissue in case the patent disclosed grounds therefor, which may be specifically enforced. Northrop v. Draper Co., 239 Fed. 719, 152 CCA 553.

74. Dental Vulcanite Co. v. Wetherbee, 7 F. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Woodworth v. Stone, 30 F. Cas. No. 18,021, 3 Story 749.

75. Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689.

76. U. S. Rev. St. § 4916; Westinghouse Tract. Brake Co. v. Christensen, 243 Fed. 901, 156 CCA 413; Gibson v. Harris, 10 F. Cas. No. 5,396, 1 Blatchf. 167, Fish. Pat. R. 115; Morris v. Huntington, 17 F. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448; Woodworth v. Edwards, 30 F. Cas. No. 18,014, 2 Robb. Pat. Cas. 610, 3 Woodb. & M. 120.

77. Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 SCt 884, 34 L. ed. 168; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 7 SCt 421, 30 L. ed. 539; Woolensak v. Reiher, 115 U. S. 96, 5 SCt 1137, 29 L. ed. 350; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 28 L. ed. 665; Heidbrink v. Charles H. Hardessen Co., 25 F. (2d) 8 [certiorari den 49 SCt 29 mem]; Geneva Mfg. Co. v. National Furniture Co., 188 Fed. 662; Bertels v. Trethaway, 175 Fed. 971, 974 [rev on other grounds 180 Fed. 730, 104 CCA 96, and cit Cyc]; Thomson-Houston Electric Co. v. Sterling-Meaker Co., 150 Fed. 589; Milloy Electric Co. v. Thompson-Houston Electric Co., 148 Fed. 843, 78 CCA 533; Pelzer v. Meyberg, 97 Fed. 969; Shirley v. Mayer, 25 Fed. 38, 23 Blatchf. 249; Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 25 Fed. 30; Ives v. Sargent, 17 Fed. 447, 21 Blatchf. 417 [aff 119 U. S. 652, 7 SCt 436, 30 L. ed. 544]; Pope Mfg. Co. v. Marqua, 15 Fed. 400; Jones v. Barker, 11 Fed. 597; Kidder v. Smart Mfg. Co., 8 Ont. 362.

[a] **Reason for rule.**—"When a patentee takes out a patent, he, in effect, disclaims all that is not claimed. It is notice to the public that the claim to invention is for the elements or combination described, and for nothing more. That which is not claimed immediately becomes public property, and the public has the right to adopt and use it; hence the necessity of prompt action on the part of a patentee, since tardy reissues may conflict with intervening public rights." In re Otto, 49 App. (D. C.) 89, 90, 259 Fed. 985.

78. Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Krauth v. Autographic Register Co., 285 Fed. 199 [rev on other grounds 286 Fed. 470]; Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831; Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 25 Fed. 30; Odell v. Stout, 22 Fed. 159; Stutz v. Armstrong, 20 Fed. 843.

[a] **Equitable principles** govern the time within which applicant may remold or expand claims. Haiss Mfg. Co. v. Link Belt Co., 27 F. (2d) 397.

[b] **Facts showing unreasonable delay.**—(1) Eby v. King, 158 U. S. 366, 15 SCt 972, 39 L. ed. 1018; Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Leggett v. Standard Oil Co., 149 U. S. 287, 13 SCt 902, 37 L. ed. 737; Electric Gas-Lighting Co. v. Boston Electric Co., 139 U. S. 481, 11 SCt 586, 35 L. ed. 250; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 7 SCt 421, 30 L. ed. 539; White v. Dunbar, 119 U. S. 47, 7 SCt 72, 30 L. ed. 303; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Thomson v. Wooster, 114 U. S. 104, 5 SCt 788, 29 L. ed. 105; Torrent, etc., Lumber Co. v. Rodgers, 112 U. S. 659, 5 SCt 501, 28 L. ed. 842; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Johnson v. Flushing, etc., R. Co., 105 U. S. 539, 26 L. ed. 1162; Bantz v. Frantz, 105 U. S. 160, 26 L. ed. 1013; Matthews v. Boston Mach. Co., 105 U. S. 54, 26 L. ed. 1022; Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Heidbrink v. Charles H. Hardessen Co., 25 F. (2d) 8 [certiorari den 49 SCt 29 mem]; Wichita Visible Gasoline Pump Co. v. Clear Vision Pump Co., 19 F. (2d) 435 [rev 9 F. (2d) 996]; United Blue Flame Oil Stove Co. v. Glazier, 119 Fed. 157, 55 CCA 553; Troy Laundry Mach. Co. v. Adams Laundry Mach. Co., 112 Fed. 437; Pfenninger v. Heubner, 99 Fed. 440; Horn, etc., Mfg. Co. v. Pelzer, 91 Fed. 665, 34 CCA 45; Mast v. Iowa Windmill, etc., Co., 76 Fed. 816, 22 CCA 586; Philadelphia Novelty Mfg. Co. v. Rouss, 39 Fed. 273; Wollensak v. Sargent, 33 Fed. 840 [aff 151 U. S. 221, 14 SCt 291, 38 L. ed. 137]; Shickle, etc., Iron Co. v. South St. Louis Fdy. Co., 29 Fed. 866; Curran v. St. Louis Refrigerator, etc., Co., 29 Fed. 320; Hubel v. Dick, 28 Fed. 656; Shirley v. Mayer, 25 Fed. 38, 23 Blatchf. 249; Tuttle v. Loomis, 24 Fed. 789; Scrivner v. Oakland Gas Co., 22 Fed. 98, 10 Sawy. 390; Singer Mfg. Co. v. Goodrich, 15 Fed. 455; Sheriff v. Fulton, 12 Fed. 136; Combined Patents Can Co. v. Lloyd, 11 Fed. 149; In re Claude, 56 App. (D. C.) 281, 12 F. (2d) 816; In re Starkey, 21 App. (D. C.) 519; In re Messinger, 12 App. (D. C.) 532. (2) After a decision of a court of appeals declaring a patent void, the owner cannot continue litigation in other circuits and wait until the patent has again been declared void before applying for a reissue. Thomson-Houston Electric Co. v. Western Electric Co., 158 Fed. 813.

[c] **Facts showing reasonable diligence.**—Vortex Mfg. Co. v. F. N. Burt Co., 297 Fed. 513; Standard Brick Co. v. Denison Interlocking Tile Corp., 285 Fed. 108; Fetzer, etc., Leather Co. v. I. T. S. Rubber Co., 260 Fed. 939, 171 CCA 581; Ashley v. Samuel C. Tatum Co., 240 Fed. 979; Witzel v. Berman, 212 Fed. 734, 129 CCA 344; A. D. Howe Mach. Co. v. Coffield Motor Washer Co., 197 Fed. 541, 117 CCA 37 [aff 190 Fed. 42]; Bertels v. Trethaway, 175 Fed. 971 [rev on other grounds 180 Fed. 730, 104 CCA 96]; Coffield v. Spears, 169 Fed. 641; Featherstone v. George R. Bidwell Cycle Co., 53 Fed. 113 [rev on other grounds 57 Fed. 631, 6 CCA 487]; Russell v. Laughlin, 26 Fed. 699; In re Briede, 123 Off. Gaz. (U. S.) 322; In re Heroult, 29 App. (D. C.) 42; In re Briede, 27 App. (D. C.) 298.

79. Webster Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463, 44 SCt 342, 68 L. ed. 792; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Wollensak v. Reiher, 115 U. S. 96, 5 SCt 1137, 29 L. ed. 350; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 28 L. ed. 665; Schneider's Application, 262 Fed. 718; American Thermos Bottle Co. v. Semple, 222 Fed. 942; Grier Bros. Co. v. Baldwin, 219 Fed. 735, 135 CCA 433; Asmus v. Alden, 27 Fed. 684; Phillips v. Risser, 26 Fed. 308; In re Schroeder, 52 App. (D. C.) 67, 281 Fed. 427; In re Lees, 50 App. (D. C.) 163, 269 Fed. 679; In re Otto, 49 App. (D. C.) 89, 259 Fed. 985; In re Ams, 29 App. (D. C.) 91; In re Starkey, 21 App. (D. C.) 519.

[a] **Period adopted by analogy.**—"The two-year period seems to have been adopted by analogy to the statute affecting public use before application for a patent, which operates as a bar." In re Otto, 49 App. (D. C.) 89, 259 Fed. 985. See to same effect In re Ams, 29 App. (D. C.) 91.

[b] **Application to enlarge monopoly.**—Where the reissue was obtained, not for the purpose of correcting a mistake, but for the mere purpose of enlarging the monopoly of the patent, it is immaterial that the application for reissue was made within two years from the time of the original grant. Parker, etc., Co. v. Yale Clock Co., 123 U. S. 87, 8 SCt 38, 31 L. ed. 100; Coon v. Wilson, 113 U. S. 268, 5 SCt 537, 28 L. ed. 963; Union Paper-Bag Mach. Co. v. Waterbury, 39 Fed. 389; Russell v. Laughlin, 26 Fed. 699.

80. Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937; Northrop v. Draper Co., 239 Fed. 719, 152 CCA 553.

81. Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831.

right to a reissue.[82]

[§ 312] **2. Intervening Rights of Third Persons.** Where a reissue is sought merely to expand the claims of a patent, so as to embrace structures or devices brought into use since the issuance of the original, and which were not infringements of the claim of the original, there being no proof of mistake or inadvertence, the right to a reissue is lost by unreasonable delay, and the reissue, being made, is void.[83] What is not claimed in an original patent is dedicated to the public unless the patent is surrendered and reissued within a reasonable time and before adverse rights have accrued.[84] It will not do for the patentee to wait until other inventors have produced new forms of improvement and then, with the new light thus acquired, under pretense of inadvertence and mistake, apply for such an enlargement of his claim as to make it embrace these new forms.[85] Such a process of expansion carried on indefinitely, without regard to lapse of time, would operate most unjustly against the public and is totally unauthorized by the law.[86] No matter how valuable and meritorious an invention may be, a patentee has no right, by reissuing his patent, gradually to widen the scope of his claims so as to keep pace with the progress of invention.[87] But a reissued patent is not void because the things claimed in the original had been in public use in the interval between the original and the reissued patent. Such a publication is not an abandonment or dedication.[88] Neither is a reissue patent, obtained without unreasonable delay, void because the manufacture of an infringing device was begun before the grant of the patent.[89] Patents, applications for which were pending at the time of the issue of another patent, but which were issued later, do not of themselves raise an estoppel which will bar the right to a reissue.[90]

Structure within original patent. An infringer cannot claim an estoppel against a reissue patent as having acquired intervening rights where its structure contains all the elements of the original patent,[91] nor can he set up intervening rights where he simply copied from the original patent, knowing that the patentee had a right to a reissue.[92]

Rule where claims narrowed. The doctrine of intervening rights cannot be invoked to invalidate a reissue patent by an infringer of the device disclosed by the original patent and protected by the narrower claims of the reissue.[93] However, a reissue after long delay, during which adverse equities have arisen, cannot be sustained, when the original patent did

82. Shipman v. Frank, 237 Fed. 395; Specialty Mach. Co. v. Ashcroft Mfg. Co., 213 Fed. 35, 129 CCA 629 [rev 205 Fed. 760]; Sirocco Engineering Co. v. B. F. Sturtevant Co., 173 Fed. 378.

[a] **Failure of patentee to file disclaimer** of a claim of his patent adjudged invalid within such time as to save his right to sue for infringement of other claims does not necessarily affect his right subsequently to apply for and obtain a reissue. Motion Picture Patents Co. v. Laemmle, 214 Fed. 787.

83. Dunham v. Dennison Mfg. Co., 154 U. S. 103, 14 SCt 986, 38 L. ed. 924 [aff 40 Fed. 667]; Ives v. Sargent, 119 U. S. 652, 7 SCt 436, 30 L. ed. 544; Newton v. Furst, etc., Mfg. Co., 119 U. S. 373, 7 SCt 369, 30 L. ed. 442; White v. Dunbar, 119 U. S. 47, 7 SCt 72, 30 L. ed. 303 [rev 15 Fed. 747, 4 Woods 116]; Brown v. Davis, 116 U. S. 237, 6 SCt 379, 29 L. ed. 659; Coon v. Wilson, 113 U. S. 268, 5 SCt 537, 28 L. ed. 963; Torrent, etc., Lumber Co. v. Rodgers, 112 U. S. 659, 5 SCt 501, 28 L. ed. 872; Turner, etc., Mfg. Co. v. Dover Stamping Co., 111 U. S. 319, 4 SCt 401, 28 L. ed. 442; Clements v. Odorless Excavating Apparatus Co., 109 U. S. 641, 3 SCt 525, 27 L. ed. 1060; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Elliott Co. v. H. S. B. W. Cochrane Corp., 26 F. (2d) 815; Wichita Visible Gasoline Pump Co. v. Clear Vision Pump Co., 19 F. (2d) 435 [rev 9 F. (2d) 996]; Keller v. Adams-Campbell Co., 287 Fed. 838 [certiorari granted 262 U. S. 741 mem, 43 SCt 702 mem, 67 L. ed. 1209 mem, and certiorari dism 264 U. S. 314, 44 SCt 356, 68 L. ed. 705]; Diamond Drill Contracting Co. v. Mitchell, 269 Fed. 261; Grier Bros. Co. v. Baldwin, 219 Fed. 735, 135 CCA 433 [mod 215 Fed. 735]; Troy Laundry Mach. Co. v. Adams Laundry Mach. Co., 112 Fed. 437; Horn, etc., Mfg. Co. v. Pelzer, 91 Fed. 665, 34 CCA 45; American Soda-Fountain Co. v. Swietusch, 85 Fed. 968, 29 CCA 506 [aff 75 Fed. 573]; Mast v. Iowa Windmill, etc., Co., 76 Fed. 816, 22 CCA 586 [aff 68 Fed. 213]; Hubel v. Dick, 28 Fed. 132; Hudnut v. Lafayette Hominy Mills, 26 Fed. 636; Flower v. Detroit, 22 Fed. 292 [aff 127 U. S. 563, 8 SCt 1291, 32 L. ed. 175]; Wooster v. Handy, 21 Fed. 51; Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co., 21 Fed. 47; Turrell v. Bradford, 15 Fed. 808, 21 Blatchf. 284; Holt v. Keeler, 13 Fed. 464, 21 Blatchf. 68; Batten v. Taggert, 2 F. Cas. No. 1,107, 2 Wall. Jr. 101 [rev on other grounds 17 How. 74, 15 L. ed. 37]; Swain Turbine, etc., Co. v. Ladd, 23 F. Cas. No. 13,662, 2 Bann. & A. 488 [aff 102 U. S. 408, 26 L. ed. 184]; Whitely v. Swayne, 29 F. Cas. No. 17,568, 4 Fish. Pat. Cas. 117 [aff 7 Wall. 685, 19 L. ed. 199].

[a] **One having actual, as distinguished from constructive, notice** of an original patent is not thereby chargeable with notice of all the possibilities of reissue, so as to make unavailable in his behalf the doctrine of intervening rights of one making devices covered by the reissue, but not by the original patent. American Soda-Fountain Co. v. Swietusch, 85 Fed. 968, 29 CCA 506 [aff 75 Fed. 573].

[b] **Claims affected by interference proceedings.**—In re Marconi, 38 App. (D. C.) 286; In re Lacroix, 30 App. (D. C.) 299.

[c] **Limitation of rule.**—Where claims substantially identical with claims in plaintiff's application for reissue were embodied in its application for a second patent, of which defendant had knowledge before it conceived the idea, defendant could not be given the benefit of the conception covered by plaintiff's application, notwithstanding plaintiff had not then made his application for the reissue. Murphy Wall Bed Co. v. Pacific Spring Bed Co., 295 Fed. 745.

84. Clements v. Odorless Excavating Apparatus Co., 109 U. S. 641, 3 SCt 525, 27 L. ed. 1060; Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 [rev 15 F. (2d) 215]; Supreme Mfg. Corp. v. Security Mfg. Co., 299 Fed. 65 [certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 469 mem]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105]; Flower v. Detroit, 22 Fed. 292 [aff 127 U. S. 563, 8 SCt 1291, 32 L. ed. 175]; Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co., 21 Fed. 47; Brainard v. Cramme, 12 Fed. 621, 20 Blatchf. 530.

[a] **Application as withdrawal of dedication.**—The right to claim an estoppel to support a private intervening right in the nature of a license as against a generally valid reissue depends upon the dedication and its existence as a continuing offer of immunity, which the patentee withdraws by reissue application. Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744.

[b] **Effect of intervening patent.**—The right of the public to use whatever was disclosed in an application for a patent, but not claimed, is sufficient to warrant the denial of a reissue patent containing broader claims after the lapse of two years where only the rights of applicant and the public are to be considered, notwithstanding the intervening patentees have since claimed the abandoned matter, and thereby prevented the public from enjoying the fruits of the abandonment. In re Schroeder, 52 App. (D. C.) 67, 281 Fed. 427.

85. Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Pierce v. Bell, 239 Fed. 549; Perfection Spring Serv. Co. v. American Auto Heater Co., 236 Fed. 256; Cover v. American Thermo-Ware Co., 188 Fed. 670; Flower v. Detroit, 22 Fed. 292 [aff 127 U. S. 563, 8 SCt 1291, 32 L. ed. 175]; Wooster v. Handy, 21 Fed. 51; Carley, v. Matthes, 56 App. (D. C.) 20, 6 F. (2d) 718; Hauss v. Merrell, 48 App. (D. C.) 433; Manly v. Williams, 37 App. (D. C.) 194.

86. Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. ed. 783; Pierce v. Bell, 239 Fed. 549.

87. Swain Turbine, etc., Co. v. Ladd, 23 F. Cas. No. 13,662, 2 Bann. & A. 488 [aff 102 U. S. 408, 26 L. ed. 184].

88. Goodyear v. Day, 10 F. Cas. No. 5,566.

89. Frick Co. v. Lindsay, 27 F. (2d) 59; Vortex Mfg. Co. v. F. N. Burt Co., 297 Fed. 513; A. D. Howe Mach. Co. v. Coffield Motor Washer Co., 197 Fed. 541, 117 CCA 37 [aff 190 Fed. 42].

90. American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105].

91. Bucher, etc., Plow Co. v. International Harvester Co., 211 Fed. 473.

92. Albertson v. Beckley-Ralston Co., 258 Fed. 453.

93. Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937; Babcock, etc., Co. v. Springfield Boiler Co., 16 F. (2d) 964 [rev 8 F. (2d) 618]; Krauth v. Autographic Register Co., 285 Fed. 199 [rev on other grounds 286 Fed. 470]; Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831.

[a] **Claim broadened in different aspect.**—A narrowing limitation in a claim of a reissued patent cannot justify a broadening of the claim in a different respect when it serves to bring within the monopoly after many years a structure which otherwise would have been free. Fox

not indicate, or even hint at, the invention of the reissue, even if the claim is technically narrowed instead of broadened.[94]

[§ 313] **3. Excuses for Delay.** Applicant may excuse delay in applying for reissue by showing good reasons for failing to make the application sooner.[95] The question whether delay is unreasonable is a matter of law for the court.[96]

[§ 314] **C. Identity of Invention[97]—1. In General.** The reissued patent must be for the same invention as the original patent and no new matter can be introduced.[98] The invention may be definitely stated, but must remain the same.[99] The "same invention" as used in the reissue statute refers to

Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502.

94. Carpenter Straw-Sewing Mach. Co. v. Searle, 60 Fed. 82, 8 CCA 476 [aff 52 Fed. 809].

95. Whitcomb v. Spring Valley Coal Co., 47 Fed. 652; Boland v. Thompson, 26 Fed. 633, 23 Blatchf. 440; In re Heroult, 29 App. (D. C.) 42; In re Briede, 27 App. (D. C.) 298.

[a] **Discretion of commissioners.**—A determination whether the delay of more than three years after the issuance of the patent in seeking a reissue with broader claims was excusable is one largely within the discretion of the commissioner. In re Holland, 50 App. (D. C.) 268, 270 Fed. 704.

[b] **Facts constituting insufficient excuse.**—(1) Generally. Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Ives v. Sargent, 119 U. S. 652, 7 SCt 436, 30 L. ed. 544; Heidbrink v. Charles H. Hardessen Co., 25 F. (2d) 8 [certiorari den 49 SCt 29 mem]; Schneider's Application, 262 Fed. 718; Haines v. Peck, 26 Fed. 625; In re Markel, 57 App. (D. C.) 97, 17 F. (2d) 685; Parks' Application, 57 App. (D. C.) 45, 16 F. (2d) 541; In re Ams, 29 App. (D. C.) 91; In re Briede, 27 App. (D. C.) 298. (2) A showing that a delay of three and one-half years was caused by the ill health of applicant, the death of her husband, and the absence of her son in the military service, is insufficient. In re Mummert, 51 App. (D. C.) 258, 278 Fed. 399. (3) An affidavit that applicant was unskilled in patent matters and relied on his solicitor, and only recently discovered that the claims were not as broad as the invention, does not show special circumstances excusing the delay, which alone authorized a reissue of the patent with broadened claims more than two years after the original issue. In re Lees, 50 App. (D. C.) 163, 269 Fed. 679.

[c] **Circumstances excusing delay.**—(1) Generally. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Worthington Pump, etc., Corp. v. Clark Bros. Co., 17 F. (2d) 189; Western Mfg. Co. v. Hartford, 194 Fed. 875, 114 CCA 621; Maitland v. B. Goetz Mfg. Co., 86 Fed. 124, 29 CCA 607; Celluloid Mfg. Co. v. Zylonite Brush, etc., Co., 27 Fed. 291. (2) A delay of twelve years before applying for a reissue was held not to bar a patentee by laches, where the device manufactured and sold by him was in strict conformity with that shown in his patent, and his exclusive right was acquiesced in by the trade for more than ten years, and it was only when after that serious infringement commenced that he was put upon notice that his claims were probably invalid as too broad. Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831.

96. Hoskin v. Fisher, 125 U. S. 217, 8 SCt 834, 31 L. ed. 759; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 28 L. ed. 665; Wichita Visible Gasoline Pump Co. v. Clear Vision Pump Co., 19 F. (2d) 435 [rev 9 F. (2d) 996]; Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 25 Fed. 30.

97. Conclusiveness and effect of decision in patent office on issue of identity see infra § 325.

98. U. S. Code tit 35 § 64; U. S. Rev. St. § 4916; Lehigh Valley R. Co. v. Kearney, 158 U. S. 461, 15 SCt 871, 39 L. ed. 1055; Eby v. King, 158 U. S. 366, 15 SCt 972, 39 L. ed. 1018; Olin v. Timken, 155 U. S. 141, 15 SCt 49, 39 L. ed. 100; Dunham v. Dennison Mfg. Co., 154 U. S. 103, 14 SCt 986, 38 L. ed. 924; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 SCt 28, 37 L. ed. 989; Leggett v. Standard Oil Co., 149 U. S. 287, 13 SCt 902, 37 L. ed. 737; Huber v. N. O. Nelson Mfg. Co., 148 U. S. 270, 13 SCt 603, 37 L. ed. 447; Freeman v. Asmus, 145 U. S. 226, 12 SCt 939, 36 L. ed. 685; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Patent Clothing Co. v. Glover, 141 U. S. 560, 12 SCt 79, 35 L. ed. 858; Electric Gas-Lighting Co. v. Boston Electric Co., 139 U. S. 481, 11 SCt 586, 35 L. ed. 250; Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 SCt 884, 34 L. ed. 168; Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 10 SCt 570, 33 L. ed. 963; Pattee Plow Co. v. Kingman, 129 U. S. 294, 9 SCt 259, 32 L. ed. 700; Farmers' Friend Mfg. Co. v. Challenge Corn-Planter Co., 128 U. S. 506, 9 SCt 146, 32 L. ed. 529; Flower v. Detroit, 127 U. S. 563, 8 SCt 1291, 32 L. ed. 175; Eames v. Andrews, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Worden v. Searls, 121 U. S. 14, 7 SCt 814, 30 L. ed. 853; White v. Dunbar, 119 U. S. 47, 7 SCt 72, 30 L. ed. 303; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Eachus v. Broomall, 115 U. S. 429, 6 SCt 229, 29 L. ed. 419; Cochrane v. Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 SCt 455, 28 L. ed. 433; McMurray v. Mallory, 111 U. S. 97, 4 SCt 375, 28 L. ed. 365; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Moffitt v. Rogers, 106 U. S. 423, 1 SCt 70, 27 L. ed. 76; Wing v. Anthony, 106 U. S. 142, 1 SCt 93, 27 L. ed. 110; Johnson v. Flushing, etc., R. Co., 105 U. S. 539, 26 L. ed. 1162; Heald v. Rice, 104 U. S. 737, 26 L. ed. 910; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Garneau v. Dozier, 102 U. S. 230, 26 L. ed. 133; Ball v. Langles, 102 U. S. 128, 26 L. ed. 104; Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25 L. ed. 77; Marsh v. Seymour, 97 U. S. 348, 24 L. ed. 963; Russell v. Dodge, 93 U. S. 460, 23 L. ed. 973; Union Paper Collar Co. v. Van Deusen, 23 Wall. (U. S.) 530, 23 L. ed. 128; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; American Steel Foundries v. Laughlin, 30 F. (2d) 137 [aff 30 F. (2d) 139]; Nash Engineering Co. v. Cashin, 13 F. (2d) 718; Lorraine v. Townsend, 8 F. (2d) 673 [aff 2 F. (2d) 729]; I. T. S. Rubber Co. v. Essex Rubber Co., 1 F. (2d) 780 [certiorari granted 266 U. S. 600 mem, 45 SCt 226 mem, 69 L. ed. 461 mem]; U. S. Rubber Co. v. I. T. S. Rubber Co., 260 Fed. 947, 171 CCA 589; Bonnell v. Ward, 238 Fed. 171, 151 CCA 247; Stafford Co. v. Coldwell-Gildard Co., 213 Fed. 468, 130 CCA 114; Moneyweight Scale Co. v. Toledo Computing Scale Co., 187 Fed. 826, 109 CCA 586 [aff 178 Fed. 557, and petition to open decree den 199 Fed. 905, 118 CCA 235]; Morse Chain Co. v. Link Belt Co., 182 Fed. 825 [aff 189 Fed. 584, 110 CCA 564]; Troy Laundry Mach. Co. v. Adams Laundry Mach. Co., 112 Fed. 437; Idealite Co. v. Protection Light Co., 103 Fed. 973; Gaskill v. Myers, 81 Fed. 854, 26 CCA 642; Peoria Target Co. v. Cleveland Target Co., 58 Fed. 227, 7 CCA 197; American Heat Insulating Co. v. Johnston, 52 Fed. 228, 3 CCA 53; Walker v. Terre Haute, 44 Fed. 70; Philadelphia Novelty Mfg. Co. v. Rouss, 39 Fed. 273; Putnam v. Keystone Bottle Stopper Co., 38 Fed. 234; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117; Dobson v. Lees, 30 Fed. 625 [aff 137 U. S. 258, 11 SCt 71, 34 L. ed. 652]; Hubel v. Dick, 28 Fed. 132; Gage v. Kellogg, 26 Fed. 242; Reed v. Chase, 25 Fed. 94; Driven Well Cases, 16 Fed. 387, 5 McCrary 181 [aff sub nom. Andrews v. Hovey, 123 U. S. 267, 18 SCt 101, 31 L. ed. 160]; Doane, etc., Mfg. Co. v. Smith, 15 Fed. 459; Gould v. Spicer, 15 Fed. 344; Hayes v. Seton, 12 Fed. 120, 20 Blatchf. 484; Walters v. Crandal, 11 Fed. 868, 20 Blatchf. 118; Smith v. Merriam, 6 Fed. 903; Novelty Paper-Box Co. v. Stapler, 5 Fed. 919; Flower v. Rayner, 5 Fed. 793; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Putnam v. Tinkham, 4 Fed. 411; Siebert Cylinder Oil-Cup Co. v. Harper Steam Lubricator Co., 4 Fed. 328; Yale Lock Mfg. Co. v. Scovill Mfg. Co., 3 Fed. 288, 18 Blatchf. 248; Abbe v. Clark, 1 F. Cas. No. 5, 3 Bann. & A. 211; Ball v. Withington, 2 F. Cas. No. 815, 1 Bann. & A. 549; Cahart v. Austin, 4 F. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Cammeyer v. Newton, 4 F. Cas. No. 2,344, 4 Bann. & A. 159; Doughty v. West, 7 F. Cas. No. 4,028, 6 Blatchf. 429, 3 Fish. Pat. Cas. 580; Ex p. Dyson, 8 F. Cas. No. 4,228; Francis v. Mellor, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153; Hoffheins v. Brandt, 12 F. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Johnson v. Flushing, etc., R. Co., 13 F. Cas. No. 7,384, 3 Bann. & A. 428, 15 Blatchf. 192 [aff 105 U. S. 539, 26 L. ed. 1162]; Knight v. Baltimore, etc., R. Co., 14 F. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Milligan, etc., Glue Co. v. Upton, 17 F. Cas. No. 9,607, 1 Bann. & A. 497, 4 Cliff. 237 [aff 97 U. S. 3, 24 L. ed. 985]; Sickles v. Evans, 22 F. Cas. No. 12,839, 2 Cliff. 203, 2 Fish. Pat. Cas. 417; Sloat v. Spring, 22 F. Cas. No. 12,948a; Stevens v. Pritchard, 23 F. Cas. No. 13,407, 2 Bann. & A. 390, 4 Cliff. 417; Swain Turbine, etc., Co. v. Ladd, 23 F. Cas. No. 13,662, 2 Bann. & A. 488 [aff 102 U. S. 408, 26 L. ed. 184]; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397; Wells v. Gill, 29 F. Cas. No. 17,395, 6 Fish. Pat. Cas. 574; In re Hoey, 28 App. (D. C.) 416; Kerosene Lamp Heater Co. v. Littell, 1 N. J. L. J. 195; Bergeon v. De Kermor Electric Heating Co., Ltd., [1927] Can. Exch. 181, [1927] 3 DomLR 99.

[a] **Statement of advantage** does not change invention. Whitcomb v. Spring Valley Coal Co., 47 Fed. 652; Kearney v. Lehigh Valley R. Co., 32 Fed. 320 [rev on other grounds 158 U. S. 461, 15 SCt 871, 39 L. ed. 1055]; Potter v. Stewart, 7 Fed. 215, 18 Blatchf. 561; Ex p. Ball, 2 F. Cas. No. 810.

99. Driven Well Cases, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Stanley Works v. Twisted Wire, etc., Co., 256 Fed. 98, 167 CCA 340; Witzel v. Berman, 212 Fed. 734, 129 CCA 344; Bertels v. Trethaway, 175 Fed. 971, 974 [rev on other grounds 180 Fed. 730, 104 CCA 96, and cit Cyc]; Haggenmacher v. Nelson, 88 Fed. 486; Gaskill v. Myers, 81 Fed. 854, 26 CCA 642; Pratt v. Lloyd, 65 Fed. 800; Whitcomb v. Spring Valley Coal Co., 47 Fed. 652;

whatever invention was described in the original letters patent and appears to have been secured thereby;[1] the identity of the reissue with the original patent is not fixed by the claims[2] but is to be determined by the description and such other evidence as the commissioner may receive.[3] A broader claim than that in the original patent will not invalidate the reissue if it is for the same invention.[4] If not for the same invention it will.[5] Claims may be amended to include features not before claimed.[6] What may have been claimed originally may be included in the reissue.[7] Where the reissue omits several devices which were essential to the original purpose, the reissue is void.[8] The rule is otherwise, however, where the omission does not constitute an essential or material change but is only an incidental feature.[9]

[§ 315] **2. New Matter—a. In General.** The re-

Hubel v. Waldie, 35 Fed. 414 [app dism 149 U. S. 790 mem, 13 SCt 1054 mem, 37 L. ed. 965 mem]; National Pump Cylinder Co. v. Gunnison, 17 Fed. 812; Schillinger v. Greenway Brewing Co., 17 Fed. 244, 21 Blatchf. 383; Meyer v. Goodyear India-Rubber Glove Mfg. Co., 11 Fed. 891, 20 Blatchf. 91; Yale Lock Mfg. Co. v. Scovill Mfg. Co., 3 Fed. 288, 18 Blatchf. 248; Cahart v. Austin, 4 F. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Carew v. Boston Electric Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Carver v. Braintree Mfg. Co., 5 F. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Christman v. Rumsey, 5 F. Cas. No. 2,704, 4 Bann. & A. 506, 17 Blatchf. 148; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Decker v. Grote, 7 F. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143; Ex p. Dietz, 7 F. Cas. No. 3,902; Goodyear v. Providence Rubber Co., 10 F. Cas. No. 5,583, 2 Cliff. 351, 2 Fish. Pat. Cas. 499 [aff 9 Wall. 788, 19 L. ed. 566]; Hussey v. McCormick, 12 F. Cas. No. 6,948, 1 Biss. 300, 1 Fish. Pat. Cas. 509; Parham v. American Buttonhole, etc., Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Pearl v. Ocean Mills, 19 F. Cas. No. 10,876, 2 Bann. & A. 469; Pennsylvania Salt Mfg. Co. v. Thomas, 19 F. Cas. No. 10,956, 5 Fish. Pat. Cas. 148; St. Louis Stamping Co. v. Quinby, 21 F. Cas. No. 12,240, 4 Bann. & A. 192; Sarven v. Hall, 21 F. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415; Sloat v. Spring, 22 F. Cas. No. 12,948a; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312; Union Paper-Bag Co. v. Nixon, 24 F. Cas. No. 14,386, 6 Fish. Pat. Cas. 402; Union Paper-Collar Co. v. Leland, 24 F. Cas. No. 14,394, 1 Bann. & A. 491, Holmes 427; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536; Kane v. Podlesak, 48 App. (D. C.) 11; McCreary v. Pennsylvania Canal Co., 14 Phila. (Pa.) 441.

1. Walker Patents § 233; Parker, etc., Co. v. Yale Clock Co., 123 U. S. 87, 8 SCt 38, 31 L. ed. 100; In re Briede, 27 App. (D. C.) 298.

[a] **Any doubt** that may exist as to whether a reissue is for the same invention described in the original patent should be resolved in favor of applicant, especially if it is too late to file an independent application. In re Heroult, 29 App. (D. C.) 42.

2. American Automotoneer Co. v. Porter, 232 Fed. 456, 460, 146 CCA 450.

"It is true that, for purposes of determining infringement, the identity of the patented invention is fixed by the claims; but to apply the same test to identity of invention as between original and reissue loses sight of the difference between the real invention and the originally patented invention, and unless there is such a difference, there is no occasion for reissue. To recognize that difference and permit it to be corrected is the whole purpose of the reissue statute; and so it seems quite destructive of the statute to assume that the identity of the actual invention is permanently declared and fixed by the form which the original claims are inadvertently allowed to take." American Automotoneer Co. v. Porter, supra.

3. Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod on other grounds 263 Fed. 988]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105].

4. Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Morey v. Lockwood, 8 Wall. (U. S.) 230, 19 L. ed. 339; Rousso v. New Ideal Laundry Co., 9 F. (2d) 1012; Starch Bros. Co. v. Hinman, 259 Fed. 222, 170 CCA 290 [aff 247 Fed. 346]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105]; Western Mfg. Co. v. Hartford, 194 Fed. 875, 114 CCA 621; Weber v. Automobile, etc., Mfg. Co., 190 Fed. 189; Universal Caster, etc., Co. v. M. B. Schenck Co., 165 Fed. 344; Fay v. Mason, 120 Fed. 506 [rev on other grounds 127 Fed. 325]; Hammond v. Franklin, 22 Fed. 833, 23 Blatchf. 77; Odell v. Stout, 22 Fed. 159; Jones v. Barker, 11 Fed. 597; Combined Patents Can Co. v. Lloyd, 11 Fed. 149; Wilson v. Coon, 6 Fed. 611, 18 Blatchf. 532 [rev on other grounds 113 U. S. 268, 5 SCt 537, 28 L. ed. 963]; Dorsey Harvester Revolving Rake Co. v. Marsh, 7 F. Cas. No. 4,014, 6 Fish. Pat. Cas. 387; Lorillard v. McDowell, 15 F. Cas. No. 8,510, 2 Bann. & A. 531; Morse, etc., Tel. Case, 17 F. Cas. No. 9,861; Seymour v. Marsh, 21 F. Cas. No. 12,687, 6 Fish. Pat. Cas. 115 [aff 97 U. S. 348, 24 L. ed. 963]; In re Briede, 27 App. (D. C.) 298.

[a] **Claiming new function.**—An applicant for a reissue is not barred from stating in his reissue claims new functions of his invention because such functions were not set forth in his original application, where all of the elements of the invention were shown in his original drawings. Nelson v. Felsing, 32 App. (D. C.) 420.

[b] **Although patentee disclaims** in a reissue an arrangement irrespective of the purpose for which, and the manner in which, it is employed, he can lawfully claim the arrangement which he uses, when used for the purpose for which he employs it, and can lawfully claim it when used in the manner in which he employs it. Black v. Thorne, 3 F. Cas. No. 1,465, 10 Blatchf. 66, 5 Fish. Pat. Cas. 550.

5. McMurray v. Mallory, 111 U. S. 97, 4 SCt 375, 28 L. ed. 365; Hommel Mfg. Co. v. East Side Mfg. Co., 16 F. (2d) 1008; Stafford Co. v. Coldwell-Gildard Co., 202 Fed. 744, 121 CCA 110 [certiorari den 235 U. S. 700 mem, 35 SCt 200 mem, 59 L. ed. 432 mem]; American Heat Insulating Co. v. Johnston, 52 Fed. 228, 3 CCA 53 [rev 48 Fed. 446]; International Terra-Cotta Lumber Co. v. Maurer, 44 Fed. 618; Dunham v. Dennison Mfg. Co., 40 Fed. 667 [aff 154 U. S. 103, 14 SCt 986, 38 L. ed. 924]; Driven Well Cases, 16 Fed. 387 [aff 123 U. S. 267, 8 SCt 101, 31 L. ed. 160 (aff 124 U. S. 694, 8 SCt 676, 31 L. ed. 557)]; Fay v. Preble, 14 Fed. 652, 11 Biss. 422; Searls v. Bouton, 12 Fed. 874, 20 Blatchf. 528; New York Bung, etc., Co. v. Hoffman, 9 Fed. 199, 20 Blatchf. 3; Meyer v. Maxheimer, 9 Fed. 99; Flower v. Rayner, 5 Fed. 793; Giant Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Goodyear v. Providence Rubber Co., 10 F. Cas. No. 5,583 [aff 9 Wall. 788, 19 L. ed. 566].

6. Stahlbrodt Co. v. Ford Motor Co., 233 Fed. 678 [rev on other grounds 238 Fed. 365, 151 CCA 381]; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod 63 Fed. 962, 11 CCA 528]; Adee v. Peck, 42 Fed. 497; Holmes Burglar Alarm Tel. Co. v. Domestic Tel., etc., Co., 42 Fed. 220; Jenkins v. Stetson, 32 Fed. 398; Hubel v. Dick, 28 Fed. 132; Odell v. Stout, 22 Fed. 159; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419; Atwood v. Portland Co., 10 Fed. 283; Dederick v. Cassell, 9 Fed. 306; Smith v. Merriam, 6 Fed. 713; Stephenson v. Second Ave. R. Co., 1 Fed. 416; Bantz v. Elsas, 2 F. Cas. No. 967, 1 Bann. & A. 251; Boomer v. United Power Press Co., 3 F. Cas. No. 1,638, 2 Bann. & A. 106, 13 Blatchf. 107; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Carver v. Braintree Mfg. Co., 5 F. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Christian v. Rumsey, 5 F. Cas. No. 2,704, 4 Bann. & A. 506, 17 Blatchf. 148; Dorsey Harvester Revolving Rake Co. v. Marsh, 7 F. Cas. No. 4,014, 6 Fish. Pat. Cas. 387; French v. Rogers, 9 F. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Gallahue v. Butterfield, 9 F. Cas. No. 5,198, 10 Blatchf. 232, 6 Fish. Pat. Cas. 203; Gould v. Ballard, 10 F. Cas. No. 5,635, 3 Bann. & A. 324; Herring v. Nelson, 12 F. Cas. No. 6,424, 3 Bann. & A. 55, 14 Blatchf. 293 [rev on other grounds 107 U. S. 640, 2 SCt 819, 27 L. ed. 601]; Middletown Tool Co. v. Judd, 17 F. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Morris v. Royer, 17 F. Cas. No. 9,835, 2 Bond 66, 3 Fish. Pat. Cas. 176; Parham v. American Buttonhole Overseaming, etc., Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Pennsylvania Salt Mfg. Co. v. Thomas, 18 F. Cas. No. 10,956, 5 Fish. Pat. Cas. 148; Pearl v. Ocean Mills, 19 F. Cas. No. 10,876, 2 Bann. & A. 469; Richardson v. Lockwood, 20 F. Cas. No. 11,786, 4 Cliff. 128; Seymour v. Marsh, 21 F. Cas. No. 12,687, 6 Fish. Pat. Cas. 115 [aff 97 U. S. 348, 24 L. ed. 963]; Stevens v. Pritchard, 23 F. Cas. No. 13,407, 2 Bann. & A. 390, 4 Cliff. 417; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 348; Woodward v. Dinsmore, 30 F. Cas. No. 18,003, 4 Fish. Pat. Cas. 163; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

7. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Krauth v. Autographic Register Co., 285 Fed. 199 [rev on other grounds 286 Fed. 470]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 100 Fed. 849; Hendy v. Golden State, etc., Iron Works, 17 Fed. 515, 8 Sawy. 468; Calkins v. Bertrand, 4 F. Cas. No. 2,317, 2 Bann. & A. 215, 6 Biss. 494; Draper v. Wattles, 7 F. Cas. No. 4,073, 3 Bann. & A. 618; Swift v. Whisen, 22 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Wilson v. Singer, 30 F. Cas. No. 17,835; In re Heroult, 29 App. (D. C.) 42; In re Briede, 27 App. (D. C.) 298.

8. Johnson v. Flushing, etc., R. Co., 105 U. S. 539, 26 L. ed. 1162; Russell v. Dodge, 93 U. S. 460, 23 L. ed. 973; McDowell v. Ideal Concrete Mach. Co., 187 Fed. 814, 109 CCA 574; Featherstone v. George R. Bidwell Cycle Co., 57 Fed. 631, 6 CCA 487; Brewster v. Shuler, 37 Fed. 785; Blackman v. Hibbler, 3 F. Cas. No. 1,471, 4 Bann. & A. 641, 17 Blatchf. 333.

9. Adee v. Peck, 42 Fed. 497; McWilliams Mfg. Co. v. Blundell, 11

issue cannot include matter which formed a part of the patentee's real invention unless that matter was actually included in the original patent.[10] A failure to include it through inadvertence, accident, or mistake does not justify its inclusion by reissue.[11] Nor, in the case of a machine patent, may the model or drawing be amended, except by each other.[12] When there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake.[13] It is not new matter to explain in a reissue the operation of an element shown in the original drawing and specification,[14] or to state a new use of the invention shown in the original,[15] or to vary and enlarge the description of anything inadequately described in the original.[16] Where the claims of the reissue contain new patentable matter which is so interwoven with other elements specified in the original that they cannot be separated, the entire reissued claim must be taken together, and a patent issued thereon is void.[17]

[§ 316] **b. Intention To Claim.** It must furthermore appear from the face of the papers that the subject matter covered by the claims of the reissue was not merely disclosed in the original patent, but was sought and intended to be claimed therein.[18] Matter intentionally omitted[19] or abandoned or disclaimed on the original application[20] cannot ordinarily be claimed on reissue. This doctrine does not apply, however, if the disclaimer was made by accident, inadvertence, or mistake.[21]

[§ 317] **c. Apparatus, Process, and Product.** A patent for an apparatus cannot generally be reissued to claim the process, since a process and the apparatus are not necessarily one and the same invention.[22] A process patent cannot generally be

Fed. 419.

10. Hoskin v. Fisher, 125 U. S. 217, 8 SCt 834, 31 L. ed. 759; Parker v. Yale Clock Co., 123 U. S. 87, 8 SCt 38, 31 L. ed. 100; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 7 SCt 421, 30 L. ed. 539; Ives v. Sargent, 119 U. S. 652, 7 SCt 436, 30 L. ed. 544; Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Gosling v. Roberts, 106 U. S. 39, 1 SCt 26, 27 L. ed. 61; Bantz v. Frantz, 105 U. S. 160, 26 L. ed. 1013; Hopkins, etc., Mfg. Co. v. Corbin, 103 U. S. 786, 26 L. ed. 610; Ball v. Langles, 102 U. S. 128, 26 L. ed. 104; Russell v. Dodge, 93 U. S. 460, 23 L. ed. 973; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Weston Electrical Instrument Co. v. Stevens, 134 Fed. 574, 67 CCA 374; Hammond v. Franklin, 22 Fed. 833, 23 Blatchf. 77; Washburn, etc., Mfg. Co. v. Fuchs, 16 Fed. 661, 5 McCrary 236; Lorillard v. McAlpin, 14 Fed. 112; Atwater Mfg. Co. v. Beecher Mfg. Co., 8 Fed. 608 [rev on other grounds 114 U. S. 523, 5 SCt 1007, 29 L. ed. 232]; Siebert Cylinder Oil-Cup Co. v. Harper Steam Lubricator Co., 4 Fed. 328; Albright v. Celluloid Harness Trimming Co., 1 F. Cas. No. 147, 2 Bann. & A. 629; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Giant Powder Co. v. California Powder Works, 10 F. Cas. No. 5,379, 2 Bann. & A. 131, 3 Sawy. 448 [rev on other grounds 98 U. S. 126, 25 L. ed. 77]; Kelleher v. Darling, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 424; Sarven v. Hall, 21 F. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415; Thomas v. Shoe Mach. Mfg. Co., 22 F. Cas. No. 13,911, 3 Bann. & A. 557; Tarr v. Webb, 23 F. Cas. No. 13,757, 10 Blatchf. 96, 5 Fish. Pat. Cas. 593; U. S., etc., Felting Co. v. Haven, 28 F. Cas. No. 16,788, 2 Bann. & A. 164, 3 Dill. 131; Vogler v. Semple, 28 F. Cas. No. 16,987, 2 Bann. & A. 556, 7 Biss. 382; In re Lacroix, 30 App. (D. C.) 299; Schillinger v. Cranford, 15 D. C. 450; Kerosene Lamp Heater Co. v. Littell, 1 N. J. L. J. 195.

11. James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Carpenter Straw-Sewing Mach. Co. v. Searle, 60 Fed. 82, 8 CCA 476; Cahart v. Austin, 4 F. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Giant Powder Co. v. California Powder Works, 10 F. Cas. No. 5,379, 2 Bann. & A. 131, 3 Sawy. 448 [rev on other grounds 98 U. S. 126, 25 L. ed. 77].

12. U. S. Code tit 35 § 64; Flower v. Detroit, 127 U. S. 563, 8 SCt 1291, 32 L. ed. 175; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699.

13. U. S. Code tit 35 § 64; Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25 L. ed. 77.

14. Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937; Krauth v. Autograph Register Co., 285 Fed. 199 [rev 286 Fed. 470].

[a] **Impracticable mode of operation.**—It is not the object of the statute to encourage or permit the insertion of claims in a reissue application which involve an impracticable mode of operation. Otis v. Ingoldsby, 35 App. (D. C.) 102.

15. Krauth v. Autographic Register Co., 285 Fed. 199 [rev 286 Fed. 470].

16. Krauth v. Autographic Register Co., supra.

[a] **Support for description.**—If the description in the reissue application finds no real support in the original application, a case for reissue is not made. Otis v. Ingoldsby, 35 App. (D. C.) 102.

17. Cahart v. Austin, 4 F. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543.

18. Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 SCt 28, 37 L. ed. 989; Freeman v. Asmus, 145 U. S. 226, 12 SCt 939, 36 L. ed. 685 [rev 27 Fed. 684]; Flower v. Detroit, 127 U. S. 563, 8 SCt 1291, 32 L. ed. 175; Hoskin v. Fisher, 125 U. S. 217, 8 SCt 834, 31 L. ed. 759; Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Parker v. Yale Clock Co., 123 U. S. 87, 8 SCt 38, 31 L. ed. 100; Matthews v. Boston Mach. Co., 105 U. S. 54, 26 L. ed. 1022; Lorraine v. Townsend, 8 F. (2d) 673 [aff 2 F. (2d) 729]; Pierce v. Bell, 239 Fed. 549; Stafford Co. v. Coldwell-Gildard Co., 202 Fed. 744, 121 CCA 110 [certiorari den 235 U. S. 700 mem, 35 SCt 200 mem, 59 L. ed. 432 mem]; John Kitchen, Jr., Co. v. Levison, 188 Fed. 658, 110 CCA 424; McDowell v. Ideal Concrete Mach. Co., 187 Fed. 814, 109 CCA 574; Marvel Buckle Co. v. Alma Mfg. Co., 180 Fed. 1002 [aff 196 Fed. 1006 mem, 115 CCA 672 mem]; Chicago R. Equipment Co. v. Perry Side Bearing Co., 170 Fed. 968 [mod on other grounds 178 Fed. 449, 101 CCA 433]; Whip Co. v. Hassler, 134 Fed. 398; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; American Soda-Fountain Co. v. Zwietusch, 75 Fed. 573 [aff 85 Fed. 968, 29 CCA 506]; Carpenter Straw-Sewing Mach. Co. v. Searls, 52 Fed. 809 [aff 60 Fed. 82, 8 CCA 476]; Railway Register Mfg. Co. v. Broadway, etc., R. Co., 26 Fed. 522 [app dism 149 U. S. 783 mem, 13 SCt 1051 mem, 37 L. ed. 958 mem]; Turrell v. Bradford, 15 Fed. 808, 21 Blatchf. 284; Kells v. McKenzie, 9 Fed. 284; Giant Powder Co. v. California Powder Works, 10 F. Cas. No. 5,379, 2 Bann. & A. 131, 3 Sawy. 448 [rev on other grounds 98 U. S. 126, 25 L. ed. 77]; Kane v. Podlesak, 48 App. (D. C.) 11; Otis v. Ingoldsby, 35 App. (D. C.) 102; Nelson v. Felsing, 32 App. (D. C.) 420.

"If enlargement is to come, not from evidence contained in the original patent (or in the proceedings to obtain it), but from what the inventor subsequently says (truthfully or untruthfully) was in his mind prior to filing the original application, a region of danger, of temptation to fraud and deception, would be opened wide which Congress has commanded should be kept closed." McDowell v. Ideal Concrete Mach. Co., 187 Fed. 814, 821, 109 CCA 574.

[a] **Different combination,** unless explicitly pointed out as a part of the invention in the specification, and shown to have been omitted through inadvertence, accident, or mistake, cannot be claimed. McDowell v. Ideal Concrete Mach. Co., 187 Fed. 814, 109 CCA 574.

19. Grand Rapids Show Case Co. v. Baker, 216 Fed. 341, 132 CCA 485.

[a] **For instance,** where patentee, with full knowledge that unslacked lime or Portland cement could be used as binder in bricks, confined claims, specifications, and disclosures to unslacked lime, his patent rights were limited to original disclosure, and subsequent enlargement of specifications and claims in reissue to include Portland cement, on the ground of inadvertent mistake, was unwarranted. Toupet-Taylor Engineering Co. v. Red Dog Mfg., etc., Co., 16 F. (2d) 454.

20. Leggett v. Avery, 101 U. S. 256, 25 L. ed. 865; Hatmaker v. Dry Milk Co., 29 F. (2d) 918; Casein Co. v. A. M. Collins Mfg. Co., 174 Fed. 341, 98 CCA 213; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 115 Fed. 810; Putnam v. Hutchinson, 12 Fed. 127, 11 Biss. 233; Edgarton v. Furst, etc., Mfg. Co., 9 Fed. 450, 10 Biss. 402; Atwater Mfg. Co. v. Beecher Mfg. Co., 8 Fed. 608 [rev on other grounds 114 U. S. 523, 5 SCt 1007, 29 L. ed. 232].

[a] **Deliberate withdrawal of claim** to secure a patent is conclusive of the presumption that there was no inadvertence, accident, or mistake. White's Application, 57 App. (D. C.) 355, 23 F. (2d) 776.

21. American Shoe-Tip Co. v. National Shoe-Toe Protector Co., 1 F. Cas. No. 317, 2 Bann. & A. 551; Hayden v. James, 11 F. Cas. No. 6,260; Hussey v. Bradley, 12 F. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362.

22. Eachus v. Broomall, 115 U. S. 429, 6 SCt 229, 29 L. ed. 419; Heald v. Rice, 104 U. S. 737, 26 L. ed. 910; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Brainard v. Cramme, 12 Fed. 621, 20 Blatchf. 530; New v. Warren, 22 Off. Gaz. (U. S.) 587;

reissued to cover the apparatus.[23] There is no hard and fixed rule, however, and in some cases such a reissue may be allowed.[24] A process patent may, however, in some cases be reissued to cover the product produced by the process.[25]

[§ 318] **3. Reinsertion of Canceled Claim.** The patentee cannot obtain by reissue claims inserted in the original application and canceled therefrom in view of objection or rejection by the patent office.[26]

[§ 319] **D. Surrender of Original Patent.** To obtain a reissue, applicant must surrender the original patent, but the surrender does not take effect until the reissue is granted, and if the reissue is refused, the original patent is in force.[27] The so-called surrender is nothing but a preliminary offer prior to the issue of the new patent;[28] the original patent is extinguished by reissue.[29] Whether, if the reissue is void, the patentee may fall back on his original patent has not been decided by the supreme court, although the question has been raised.[30] It has been held in other courts that, if the reissue is void for want of authority to make it, the surrender is ineffective for want of authority to accept it.[31] Suit cannot be maintained on the original after application for reissue and before the grant.[32]

[§ 320] **E. Applications and Proceedings Thereon —1. In General.** The application should put forth facts entitling the patentee to a reissue.[33] It is not indispensable that the petitioner should use the exact phraseology of the statute if he employs language which actually conveys its legal meaning.[34] Applicant must affirmatively show inadvertence, accident, or mistake,[35] and where he broadens his claims he must not only show this,[36] but that the state of the art permitted the broadened claim,[37] and that no person has acquired intervening rights.[38] A rule of the patent office requiring the petition to be accompanied by a sworn statement must be complied with in so far as the matters required to be set forth are within the power of the commissioner.[39]

The application must be signed and sworn to by the inventor if he is alive and must be acquiesced

Parks' Application, 57 App. (D. C.) 45, 16 F. (2d) 541.

23. Wing v. Anthony, 106 U. S. 142, 1 SCt 93, 27 L. ed. 110; James v. Campbell, 104 U. S. 356, 26 L. ed. 786.

24. In re Heroult, 29 App. (D. C.) 42.

[a] **Reissue held proper.**—Claims of a reissue application for electrically butt welding segments of hollow articles, which differed from the method claims in the original patent, in that they covered improvements in the apparatus, were patentable. In re Murray, 29 F. (2d) 863.

25. Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25 L. ed. 77; Asbestos Shingle, etc., Co. v. Johns-Manville Co., 184 Fed. 620; Tucker v. Dana, 7 Fed. 213; Badische Anilin, etc., Fabrik v. Hamilton Mfg. Co., 2 F. Cas. No. 721, 3 Bann. & A. 235; Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290; Tucker v. Burditt, 24 F. Cas. No. 14,216, 4 Bann. & A. 569; Hunter v. Carrick, 11 Can. S. C. 300 [aff 10 Ont. A. 449 (rev 28 Grant Ch. 489)]; Auer Incandescent Light Mfg. Co. v. O'Brien, 5 Can. Exch. 243.

[a] **Process reissued for product held invalid.**—Leggett v. Standard Oil Co., 149 U. S. 287, 13 SCt 902, 37 L. ed. 737; Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25 L. ed. 77; Vacuum Oil Co. v. Buffalo Lubricating Oil Co., 20 Fed. 850; Kelleher v. Darring, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 424.

26. Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 SCt 28, 37 L. ed. 989; Dobson v. Lees, 137 U. S. 258, 11 SCt 71, 34 L. ed. 652; Crawford v. Heysinger, 123 U. S. 589, 8 SCt 399, 31 L. ed. 269; Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 523, 5 SCt 1007, 29 L. ed. 232; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 112 U. S. 624, 5 SCt 475, 28 L. ed. 828; Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; Leggett v. Avery, 101 U. S. 256, 25 L. ed. 865; Hatmaker v. Dry Milk Co., 29 F. (2d) 918; Robert v. Krementz, 232 Fed. 876 [rev on other grounds 243 Fed. 877, 156 CCA 389]; National Casket Co. v. Stolts, 197 Fed. 940 [aff 204 Fed. 983, 123 CCA 305]; Franklin v. Illinois Moulding Co., 128 Fed. 48 [aff 138 Fed. 58, 70 CCA 484]; American Soda-Fountain Co. v. Swietusch, 85 Fed. 963, 29 CCA 506; Dobson v. Lees, 30 Fed. 625 [aff 137 U. S. 258, 11 SCt 71, 34 L. ed. 652]; Boland v. Thompson, 26 Fed. 633, 23 Blatchf. 440; Arnheim v. Finster, 26 Fed. 277 [app dism 140 U. S. 668 mem, 11 SCt 1015 mem, 35 L. ed. 602 mem]; Arnheim v. Finster, 24 Fed. 276; Streit v. Lauter, 11 Fed. 309; Giant Powder Co. v. California Powder Works, 10 F. Cas. No. 5,379, 2 Bann. & A. 131, 3 Sawy. 448 [rev on other grounds 98 U. S. 126, 25 L. ed. 77]; Wicks v. Stevens, 29 F. Cas. No. 17,616, 2 Bann. & A. 318, 2 Woods 310; In re Lacroix, 30 App. (D. C.) 299; In re Denton, 12 App. (D. C.) 504; In re Hatchman, 14 D. C. 288.

[a] **The erroneous judgment of the solicitors** of an applicant in submitting to the rejection of claims is his erroneous judgment, and he is estopped from presenting any of such rejected claims in an application for a reissue. Moneyweight Scale Co. v. Toledo Computing Scale Co., 187 Fed. 826, 109 CCA 586 [aff 178 Fed. 557, and petition to open decree den 199 Fed. 905, 118 CCA 235].

[b] **Actual mistake in canceling claim** (1) may be corrected. Morey v. Lockwood, 8 Wall. (U. S.) 230, 19 L. ed. 339; Dunbar v. Eastern Elevating Co., 75 Fed. 567 [rev on other grounds 81 Fed. 201, 26 CCA 330]; Hutchinson v. Everett, 33 Fed. 502. (2) Where none of the original claims presented by an applicant for a patent was adequate to cover the invention disclosed by the specification and drawings, acquiescence in the rejection of such claims is not an abandonment of the invention as an entirety, and the failure of his solicitors to submit adequate claims is an inadvertence which may entitle applicant to a reissue. Moneyweight Scale Co. v. Toledo Computing Scale Co., 187 Fed. 826, 109 CCA 586 [aff 178 Fed. 557, and petition to open decree den 199 Fed. 905, 118 CCA 235, and foll Bucher, etc., Plow Co. v. International Harvester Co., 211 Fed. 473].

[c] **"The proper remedy** of the patentee when a claim applied for is rejected, is an appeal, and not an application for a reissue." Mahn v. Harwood, 112 U. S. 354, 359, 5 SCt 174, 28 L. ed. 665. And see supra § 224 et seq.

Rejection of claim for part of invention as affecting reissue for another part see infra § 321.

27. U. S. Rev. St. (1878) § 4916 (U. S. Comp. St. [1901] p 3393); McCormick Harvesting Mach. Co. v. Aultman-Miller Co., 169 U. S. 606, 18 SCt 443, 42 L. ed. 875; Allen v. Culp, 166 U. S. 501, 17 SCt 644, 41 L. ed. 1093; Forbes v. Barstow Stove Co., 9 F. Cas. No. 4,923, 2 Cliff. 379.

28. Forbes v. Barstow Stove Co., supra.

[a] **Under the former rule** the surrender of the patent operated to extinguish it. Peck v. Collins, 103 U. S. 660, 26 L. ed. 512.

29. Luminous Unit Co. v. Freeman-Sweet Co., 3 F. (2d) 577; Franklin v. Illinois Moulding Co., 128 Fed. 48 [aff 138 Fed. 58, 70 CCA 484]; Brown v. Hinkley, 4 F. Cas. No. 2,012, 6 Fish. Pat. Cas. 370; Reedy v. Scott, 10 Am. & Eng. Pat. Cas. 133; Detroit Fuse, etc., Co. v. Metropolitan Engineering Co., Ltd., 21 Can. Exch. 276, 63 DomLR 179.

30. Allen v. Culp, 166 U. S. 501, 17 SCt 644, 41 L. ed. 1093; Eby v. King, 158 U. S. 366, 15 SCt 972, 39 L. ed. 1018.

31. French v. Rogers, 9 F. Cas. No. 5,103, 1 Fish. Pat. Cas. 133. And see Woodworth v. Hall, 30 F. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248 (question left undecided).

32. Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Moffitt v. Garr, 1 Black (U. S.) 273, 17 L. ed. 207 [aff 17 F. Cas. No. 9,690, 1 Bond 315]; Coffield v. Fletcher Mfg. Co., 167 Fed. 321, 93 CCA 25 [certiorari den 215 U. S. 603 mem, 30 SCt 403 mem, 54 L. ed. 345 mem]; Burrell v. Hackley, 35 Fed. 833.

[a] **Reissue after original decree.**—Patentee's right to prosecute infringement suit to final decree is lost by surrender made after entry of original decree in his favor. Luminous Unit Co. v. Freeman-Sweet Co., 3 F. (2d) 577.

33. See Eby v. King, 158 U. S. 366, 15 SCt 972, 39 L. ed. 1018 (it is doubtful whether the commissioner acquired any jurisdiction where there is only a bare statement that the patentee wishes to surrender his patent and obtain a reissue).

34. Gold, etc., Tel. Co. v. Wiley, 17 Fed. 234.

35. Stafford Co. v. Coldwell-Gildard Co., 202 Fed. 744, 121 CCA 110 [certiorari den 235 U. S. 700 mem, 35 SCt 200 mem, 59 L. ed. 432 mem].

[a] **How shown.**—Mistake may be shown by evidence outside of the official record. Ex p. Dyson, 8 F. Cas. No. 4,228; Hussey v. Bradley, 12 F. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362.

36. Hatmaker v. Dry Milk Co., 29 F. (2d) 918; Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 [rev 15 F. (2d) 215]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105]; Chicago R. Equipment Co. v. Perry Side Bearing Co., 170 Fed. 968 [mod on other grounds 178 Fed. 449, 101 CCA 433]; Skinner v. Carpenter, 36 App. (D. C.) 178.

37. Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 [rev 15 F. (2d) 215]; American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105]; Stafford Co. v Coldwell-Gildard Co., 202 Fed. 744, 121 CCA 110 [certiorari den 235 U. S. 700 mem, 35 SCt 200 mem, 59 L. ed. 432 mem].

38. Skinner v. Carpenter, 36 App. (D. C.) 178.

39. Re Fullagar, 40 App. (D. C.)

in by assignees.[40]

The proceedings on the application are the same as in the case of original applications except that a filing fee of thirty dollars is charged and no final fee is required.[41] The application brings the whole invention before the patent office coram judice.[42]

The application may be withdrawn or abandoned at any time before the reissue is granted, and in such case the original will remain in full force.[43]

[§ 321] **2. Divisional Reissues.** Several reissues may be granted for parts of the thing patented upon the payment of separate fees and other due proceedings had.[44] Several issues which in the aggregate exactly equal an originally well-drawn patent are not necessarily invalid.[45]

[§ 322] **F. Reissues of Reissued Patents.** A reissue may be granted of a reissued patent as well as of the original,[46] and a second reissue may return to the language of the original patent and be identical therewith.[47]

[§ 323] **G. Conclusiveness and Effect of Patent Office Decisions—1. In General.** The grant of a reissue by the patent office raises a presumption that the patentee was entitled to it and therefore the reissue is prima facie valid.[48] Except as to matters appearing on the face of the papers, showing excess of jurisdiction by the patent, it is conclusive.[49]

[§ 324] **2. As to Grounds for Reissue.** The conclusion of the patent office officials as to inadvertence, accident, or mistake is conclusive[50] except as to matters manifest from the record.[51]

[§ 325] **3. As to Identity.** The grant of a reissue

510.

40. U. S. Code tit 35 § 44; U. S. Rev. St. (1878) § 4895 (U. S. Comp. St. [1901] p 3385); Holloway v. Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335; Selden v. Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544. And see supra § 309.

[a] **Licensee** need not join in application. Meyer v. Bailey, 17 F. Cas. No. 9,516, 2 Bann. & A. 73.

[b] **Assignee** may file where inventor is dead. Wooster v. Handy, 21 Fed. 51.

[c] **Guardian of insane person** may file application. Whitcomb v. Spring Valley Coal Co., 47 Fed. 652.

[d] **Absence of oath** has been held not fatal. Hartshorn v. Eagle Shade Roller Co., 18 Fed. 90.

[e] **Effect of oath.**—The oath of an applicant, filed with his application for a reissue, should count for something, and cannot be entirely ignored, but must be traversed by the patent office. In re Briede, 27 App. (D. C.) 298.

41. U. S. Code tit 35 §§ 64, 78; U. S. Rev. St. §§ 4916, 4934; Holloway v. Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335.

42. Haiss Mfg. Co. v. Link Belt Co., 27 F. (2d) 397; Wilson v. Singer, 30 F. Cas. No. 17,835.

43. McCormick Harvesting Mach. Co. v. Aultman, 169 U. S. 606, 18 SCt 443, 42 L. ed. 875; Forbes v. Barstow Stove Co., 9 F. Cas. No. 4,923, 2 Cliff. 379.

44. U. S. Code tit 35 § 64; U. S. Rev. St. § 4916; International Terra-Cotta Lumber Co. v. Mauer, 44 Fed. 618; Selden v. Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544; Tucker v. Dana, 7 Fed. 213; Badische Anilin, etc., Fabrik v. Hamilton Mfg. Co., 2 F. Cas. No. 721, 3 Bann. & A. 235; Pennsylvania Salt Mfg. Co. v. Thomas, 19 F. Cas. No. 10,956, 5 Fish. Pat. Cas. 148; Ex p. Selden, 21 F. Cas. No. 12,638; Tucker v. Burditt, 24 F. Cas. No. 14,216, 4 Bann. & A. 569; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1; Wheeler v. McCormick, 29 F. Cas. No. 17,499, 11 Blatchf. 334, 6 Fish. Pat. Cas. 551.

[a] **Cancellation of claims of part of invention.**—Acquiescence by patentee in rejection of claims, which are for but part of his invention, does not estop him from obtaining by reissue claims for another and different part. Robert v. Krementz, 243 Fed. 877, 156 CCA 389 [rev 232 Fed. 876].

45. Sirocco Engineering Co. v. B. F. Sturtevant Co., 173 Fed. 378.

46. Schneider v. Bassett, 13 Fed. 351; Selden v. Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544; French v. Rogers, 9 F. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Giant Powder Co. v. California Powder Works, 10 F. Cas. No. 5,379, 2 Bann. & A. 131, 3 Sawy. 448 [rev 98 U. S. 126, 25 L. ed. 77]; Morse, etc., Tel. Case, 17 F. Cas. No. 9,861; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Union Paper Collar Co. v. White, 24 F. Cas. No. 14,396, 2 Bann. & A. 60.

47. Sawyer Spindle Co. v. Eureka Spindle Co., 33 Fed. 836 [aff 145 U. S. 637, 12 SCt 980, 36 L. ed. 849]; Celluloid Mfg. Co. v. Zylonite Brush, etc., Co., 27 Fed. 291; Giant Powder Co. v. Safety Nitro Powder Co., 19 Fed. 509.

[a] **Effect.**—A claim of an original patent may be reinstated in a second reissue, although omitted from a first reissue, but in such case one who commenced the manufacture and sale of a device when the first reissue was in force cannot be held an infringer of such claims in the second reissue. Autopiano Co. v. American Player Action Co., 222 Fed. 276, 138 CCA 38 [cit Krauth v. Autographic Register Co., 285 Fed. 199 (rev 286 Fed. 470)].

48. Chicago R. Equipment Co. v. Perry Side Bearing Co., 170 Fed. 968 [mod on other grounds 178 Fed. 449, 101 CCA 433]; Coffield v. Spears, 169 Fed. 641; Hartford v. Hollander, 163 Fed. 948, 90 CCA 308; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Beach v. Hobbs, 92 Fed. 146, 34 CCA 248 [aff 180 U. S. 383, 21 SCt 409, 45 L. ed. 586]; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; American Diamond Rock Boring Co. v. Sheldon, 1 F. Cas. No. 296, 4 Bann. & A. 551, 17 Blatchf. 208; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 311, 6 Fish. Pat. Cas. 424 [mod 97 U. S. 126, 24 L. ed. 1000]; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Eickemeyer Hat Blocking Mach. Co. v. Pearce, 8 F. Cas. No. 4,312, 10 Blatchf. 403, 6 Fish. Pat. Cas. 219; Forbes v. Barstow Stove Co., 9 F. Cas. No. 4,923, 2 Cliff. 379; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232; Middletown Tool Co. v. Judd, 17 F. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181.

49. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Spaeth v. Barney, 22 Fed. 828; Giant Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Birdsall v. McDonald, 3 F. Cas. No. 1,434, 1 Bann. & A. 165; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf, 195, 3 Fish. Pat. Cas. 294; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Judson v. Bradford, 14 F. Cas. No. 7,564, 3 Bann. & A. 539; Metropolitan Washing-Mach. Co. v. Providence Tool Co., 17 F. Cas. No. 9,507, Holmes 161 [aff 20 Wall. 342, 22 L. ed. 303]; Milligan, etc., Glue Co. v. Upton, 17 F. Cas. No. 9,607, 1 Bann. & A. 497, 4 Cliff. 237 [aff 97 U. S. 3, 24 L. ed. 985]; Parham v. American Buttonhole, etc., Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Stevens v. Pritchard, 23 F. Cas. No. 13,407, 2 Bann. & A. 390, 4 Cliff. 417; Thomas v. Shoe Mach. Mfg. Co., 23 F. Cas. No. 13,911, 3 Bann. & A. 557; Wells v. Gill, 29 F. Cas. No. 17,394, 6 Fish. Pat. Cas. 89; Wells v. Jaques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60; Auer Incandescent Light Mfg. Co. v. O'Brien, 5 Can. Exch. 243; Bergeon v. De Kermor Electric Heating Co., Ltd., [1927] Can. Exch. 181, [1927] 3 DomLR 99.

[a] **Whether the application is made in reasonable time** (1) is a matter of law which the court may determine by comparing the reissued patents with the original, and, if necessary, with the records in the patent office when presented for record. Stimpson v. West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 25 Fed. 30. (2) Whether delay in seeking a reissue with broader claims was excusable is largely within the discretion of the commissioner. In re Hoiland, 50 App. (D. C.) 268, 270 Fed. 704.

50. Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Stimpson v. West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; Rousso v. New Ideal Laundry Co., 9 F. (2d) 1012; Krauth v. Autographic Register Co., 285 Fed. 199 [rev on other grounds 286 Fed. 470]; Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod 263 Fed. 988]; Ashley v. Samuel C. Tatum Co., 240 Fed. 979; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Asbestos Shingle, etc., Co. v. Johns-Manville Co., 184 Fed. 620; General Electric Co. v. Richmond St., etc., R. Co., 178 Fed. 84, 102 CCA 138 [certiorari den 216 U. S. 620 mem, 30 SCt 574 mem, 54 L. ed. 640 mem]; Justi v. Clark, 108 Fed. 659, 47 CCA 565 [aff 100 Fed. 855]; Beach v. Hobbs, 82 Fed. 916 [aff 180 U. S. 383, 21 SCt 409, 45 L. ed. 586]; Asmus v. Alden, 27 Fed. 684 [rev on other grounds 145 U. S. 226, 12 SCt 939, 36 L. ed. 685]; Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 25 Fed. 30; Selden v. Stockwell Self-Lighting Gas Burner Co., 9 Fed. 390, 19 Blatchf. 544; Smith v. Merriam, 6 Fed. 713; Christman v. Rumsey, 3 F. Cas. No. 2,704, 4 Bann. & A. 506, 17 Blatchf. 148; Day v. Goodyear, 7 F. Cas. No. 3,678; Hoffheins v. Brandt, 12 F. Cas. No. 6,575, 3 Fish. Pat. Cas. 218; Kerosene Lamp Heater Co. v. Littell, 14 F. Cas. No. 7,724, 3 Bann. & A. 312; Middletown Tool Co v. Judd, 17 F. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Miller, etc., Mfg. Co. v. Du Brul, 17 F. Cas. No. 9,597, 2 Bann. & A. 618; Sloat v. Spring, 22 F. Cas. No. 12,948a; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343; Thomas v. Shoe Mach. Mfg. Co., 23 F. Cas. No. 13,911, 3 Bann. & A. 557; Re Fullagar, 40 App. (D. C.) 510.

51. Krauth v. Autographic Register Co., 285 Fed. 199 [rev on other

raises a presumption that it covers the same invention which was sought and intended to be claimed in the original, but such presumption is not conclusive;[52] the question is generally decided from the face of the papers,[53] and in such case, following general rules,[54] it is a question of law;[55] where extrinsic evidence is introduced, the question becomes one of fact.[56]

[§ 326] **H. Validity, Construction, and Operation of Reissues[57]—1. Validity.** Aside from the questions of new matter[58] and estoppel,[59] the validity of a reissue is determined by the same considerations as the original patent,[60] and, upon the questions of anticipation and public use and sale, relates back to the date of the original application for patent.[61] Clerical error,[62] or irregularities of procedure in matters not vital,[63] will not invalidate the reissue. One claim in a reissue may be void without necessarily invalidating the other claims,[64] and in such case it is proper to disclaim the void claim,[65] and a reissue is not invalid merely because the claim of the original patent was valid.[66] The reissue of a patent adjudged void for lack of invention is also void.[67]

Fraud. While a reissue may be impeached for fraud,[68] it cannot be attacked on that ground by defendant in a suit for infringement.[69]

[§ 327] **2. Construction and Operation[70]—a. In General.** As respects the construction and operation of reissues, the same rules apply as in original pat-

grounds 286 Fed. 470]; Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod 263 Fed. 988]; Ashley v. Samuel C. Tatum Co., 240 Fed. 979; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Grand Rapids Show Case Co. v. Baker, 216 Fed. 341, 132 CCA 435; General Electric Co. v. Richmond St., etc., R. Co., 178 Fed. 84, 102 CCA 138 [certiorari den 216 U. S. 620 mem, 30 SCt 574 mem, 54 L. ed. 640 mem]; Chicago R. Equipment Co. v. Perry Side Bearing Co., 170 Fed. 968 [mod on other grounds 178 Fed. 449, 101 CCA 433]; Westinghouse Electric, etc., Mfg. Co. v. Stanley Electric Mfg. Co., 115 Fed. 810; Peoria Target Co. v. Cleveland Target Co., 58 Fed. 227, 7 CCA 197 [aff 47 Fed. 728]; Featherstone v. George R. Bidwell Cycle Co., 57 Fed. 631, 6 CCA 487.

52. O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Vortex Mfg. Co. v. F. N. Burt Co., 297 Fed. 513; Dedrick v. Cassell, 9 Fed. 306; Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 311, 6 Fish. Pat. Cas. 424 [mod 97 U. S. 126, 24 L. ed. 1000]; Andrews v. Wright, 1 F. Cas. No. 382, 3 Bann. & A. 329; Bantz v. Elsas, 2 F. Cas. No. 967, 1 Bann. & A. 351; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; French v. Rogers, 9 F. Cas. No. 5,103, 1 Fish. Pat. Cas. 133; Guidet v. Barber, 11 F. Cas. No. 5,857; House v. Young, 12 F. Cas. No. 6,738, 3 Fish. Pat. Cas. 335; Hussey v. Bradley, 12 F. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362; Hussey v. McCormick, 12 F. Cas. No. 6,948, 1 Biss. 300, 1 Fish. Pat. Cas. 509; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Reissner v. Anness, 20 F. Cas. No. 11,688, 3 Bann. & A. 176; Sloat v. Spring, 22 F. Cas. No. 12,948a; Stevens v. Pritchard, 23 F. Cas. No. 13,407, 2 Bann. & A. 390, 4 Cliff. 417; Thomas v. Shoe Mach. Mfg. Co., 24 F. Cas. No. 13,911, 3 Bann. & A. 557; U. S., etc., Felting Co. v. Haven, 28 F. Cas. No. 16,788, 2 Bann. & A. 164, 3 Dill. 131; Woodworth v. Edwards, 30 F. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120.

53. Hoskin v. Fisher, 125 U. S. 217, 8 SCt 834, 31 L. ed. 759; Russell v. Dodge, 93 U. S. 460, 23 L. ed. 973; Stimpson v. West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; Searls v. Worden, 11 Fed. 501 [rev on other grounds 121 U. S. 14, 7 SCt 814, 30 L. ed. 853]; Flower v. Rayner, 5 Fed. 793; Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 598, 2 Woodb. & M. 121; American Diamond Rock Boring Co. v. Sheldon, 1 F. Cas. No. 296, 4 Bann. & A. 603, 17 Blatchf. 303; Bridge v. Brown, 4 F. Cas. No. 1,857, Holmes 53; Cahart v. Austin, 4 F. Cas. No. 2,288, 2 Cliff. 528, 2 Fish. Pat. Cas. 543; Goodyear v. Berry, 10 F. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Graham v. Mason, 10 F. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Johnson v. Beard, 13 F. Cas. No. 7,371, 2 Bann. & A. 50; Middleton Tool Co. v. Judd, 17 F. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Reissner v. Anness, 20 F. Cas. No. 11,688, 3 Bann. & A. 176; Sickles v. Evans, 22 F. Cas. No. 12,839, 2 Cliff. 203, 2 Fish. Pat. Cas. 417; Thomas v. Shoe Mach. Mfg. Co., 23 F. Cas. No. 13,911, 3 Bann. & A. 557; Tucker v. Tucker Mfg. Co., 25 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397; Woodward v. Dinsmore, 30 F. Cas. No. 18,003, 4 Fish. Pat. Cas. 163.

[a] **Original patent must be introduced for comparison.**—Doherty v. Haynes, 7 F. Cas. No. 3,963, 1 Bann. & A. 289, 4 Cliff. 291; Johnson v. Beard, 13 F. Cas. No. 7,371, 2 Bann. & A. 50.

[b] **Drawings and model** are to be considered in connection with the specifications. Ives v. Sargent, 119 U. S. 652, 7 SCt 436, 30 L. ed. 544; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

54. See Trial [38 Cyc 1522].

55. Heald v. Rice, 104 U. S. 737, 26 L. ed. 910; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

56. Stimpson v. West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020.

57. Identity of invention see supra § 314 et seq.

58. See supra §§ 315–317.

59. See case infra this note; and supra §§ 312, 318.

[a] **One joining in application for reissue** is estopped to assert that such patent is void because issued after he began manufacturing the alleged infringing device. Frick Co. v. Lindsay, 27 F. (2d) 59.

60. U. S. Code tit 35 § 64; U. S. Rev. St. (1878) § 4916 (U. S. Comp. St. [1901] p 3393); Shaw v. Cooper, 7 Pet. (U. S.) 292, 8 L. ed. 689; American Bank Protection Co. v. Electric Protection Co., 181 Fed. 350 [mod on other grounds 184 Fed. 916, 107 CCA 238 (certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem)]; Forsyth v. Clapp, 9 F. Cas. No. 4,949, 6 Fish. Pat. Cas. 528, Holmes 278.

[a] **If possible** the reissue will be sustained. Brainard v. Cramme, 12 Fed. 621, 20 Blatchf. 530; Ely v. Monson, etc., Mfg. Co., 8 F. Cas. No. 4,431, 4 Fish. Pat. Cas. 64.

61. U. S. Stamping Co. v. King, 7 Fed. 860, 17 Blatchf. 55; Bloomer v. Stolley, 3 F. Cas. No. 1,559, Fish. Pat. R. 376, 5 McLean 158; House v. Young, 12 F. Cas. No. 6,738, 3 Fish. Pat. Cas. 335; Hussey v. Bradley, 12 F. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362; Smith v. Pearce, 22 F. Cas. No. 13,089, 2 McLean 176, 2 Robb Pat. Cas. 13; Stanley v. Whipple, 22 F. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1; Woodworth v. Hall, 30 F. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248.

62. Bignall v. Harvey, 4 Fed. 334, 18 Blatchf. 353; Kendricks v. Emmons, 14 F. Cas. No. 7,695, 2 Bann. & A. 208; Robertson v. Secombe Mfg. Co., 20 F. Cas. No. 11,928, 10 Blatchf. 481, 6 Fish. Pat. Cas. 268.

[a] **Patent issued to correct mistake** in a prior patent, but not designated as a reissue and purporting to run the full term from its date, is invalid. Westinghouse Tract. Brake Co. v. Christensen, 243 Fed. 901, 156 CCA 413 [dist National Brake, etc., Co. v. Christensen, 229 Fed. 564, 144 CCA 24 (certiorari den 241 U. S. 659 mem, 36 SCt 447 mem, 60 L. ed. 1225 mem)].

63. Dental Vulcanite Co. v. Wetherbee, 7 F. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87.

64. Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod 263 Fed. 988]; Vandenburgh v. Electric Welding Co., 263 Fed. 95 [certiorari den 253 U. S. 497 mem, 40 SCt 587 mem, 64 L. ed. 1031 mem]; Vandenburgh v. Concrete Steel Co., 258 Fed. 143, 169 CCA 138 [certiorari den 250 U. S. 664 mem, 40 SCt 11 mem, 63 L. ed. 1196 mem]; Rawson, etc., Mfg. Co. v. C. W. Hunt Co., 147 Fed. 239, 77 CCA 381; Odell v. Stout, 22 Fed. 159; Worden v. Searls, 21 Fed. 406; Havemeyer v. Randall, 21 Fed. 404; Dryfoos v. Wiese, 19 Fed. 315 [aff 124 U. S. 32, 8 SCt 354, 31 L. ed. 362]; Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445; Wood v. Packer, 17 Fed. 650; Schillinger v. Greenway Brewing Co., 17 Fed. 244, 21 Blatchf. 383; Cote v. Moffitt, 15 Fed. 345; Starrett v. Athol Mach. Co., 14 Fed. 910; Tyler v. Galloway, 12 Fed. 567, 20 Blatchf. 445; Collins Co. v. Coes, 3 Fed. 225; Bergeon v. De Kermor Electric Heating Co., Ltd., [1927] Can. Exch. 181, [1927] 3 DomLR 99.

65. See infra §§ 329–334.

66. Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66 [certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem]; Eclipse Mach. Co. v. Harley-Davidson Motor Co., 244 Fed. 463 [cit Ward Baking Co. v. Weber, 230 Fed. 142, 144 CCA 440]; Wilson v. Coon, 6 Fed. 611, 18 Blatchf. 532 [rev on other grounds 113 U. S. 268, 5 SCt 537, 28 L. ed. 963].

67. Erikson v. Frink Co., 16 F. (2d) 498; Traitel Marble Co. v. Hungerford Brass, etc., Co., 16 F. (2d) 495 [rev on other grounds 18 F. (2d) 66 (certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem)].

68. John Kitchen, Jr., Co. v. Levison, 188 Fed. 658, 10 CCA 424.

69. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33 [dist Stimpson v. West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020]. Contra Day v. Goodyear, 7 F. Cas. No. 3,678; Thomas v. Shoe Mach. Mfg. Co., 23 F. Cas. No. 13,911, 3 Bann. & A. 557; Odell v. Stout, 22 Fed. 159; Swift v. Whisen, 23 F. Cas. No. 13,700, 2 Bond 115, 3 Fish. Pat. Cas. 343.

70. Reissues of reissued patent see supra § 322.

ents.[71] A patentee who has narrowed his claims by the insertion of a restricting clause in order to obtain any claims under a reissued patent cannot, by construction or by resorting to the doctrine of equivalents, give the claims the larger scope which they might have had without the restricting clause.[72] Original claims, retained verbatim in a reissue taken for the purpose of getting broader claims, must be given the narrow scope attributed to them by the patentee and the office, as a basis for allowing the broader reissue claims.[73]

[§ 328] **b. Retroactive Operation.** An infringer of the claims of a reissue can be held only for acts committed after the reissue is granted.[74] But the fact that he was using the invention before the reissue was granted does not relieve him from liability for using it subsequent to the reissue.[75] There is an apparent tendency to recognize an exception to the rule where the claims of a reissue are broadened and the infringer's device does not constitute an infringement of the original patent, the intervening rights of the infringer in such case being protected to some extent.[76]

XI. DISCLAIMERS[77]

[By Rudy J. Brossman]

[§ 329] **A. In General.** Whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original inventor, he, his heirs or assigns, whether of the whole or any particular interest therein, may, upon payment of the fee fixed by law, make his disclaimer of such parts of the thing patented as he shall not choose to claim or hold under the patent.[78] It must indicate the interest of disclaimant,[79] and must be in writing attested by one or more witnesses and must be recorded in the patent office.[80]

The power to disclaim is a beneficial one, and ought not to be denied, except where it is resorted to for a fraudulent and deceptive purpose.[81]

71. U. S. Rev. St. § 4916; Perkins Glue Co. v. Gould Mfg. Co., 280 Fed. 728 [aff 292 Fed. 596 (certiorari den 263 U. S. 718 mem, 44 SCt 181 mem, 68 L. ed. 523 mem)]; I. T. S. Rubber Co. v. United Lace, etc., Mfg. Co., 266 Fed. 375; Grant v. Townsend, 10 F. Cas. No. 5,701; Parham v. American Buttonhole Overseaming, etc., Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

[a] **Estoppel to deny merger.**—Where the holder of two patents for the same subject matter procured a reissue of the earlier one, and defendant, who infringed the second one, in nowise changed its position, such reissue did not operate to estop the holder from denying that all rights under the second patent passed and became merged in the reissued patent. Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 149 CCA. 345.

[b] **Abandonment of claims of another patent.**—The holder of two patents, by an application for a reissue, based on one, was held not to abandon claims of the other, although his position involved belief of invalidity of the other. Traitel Marble Co. v. Hungerford Brass, etc., Co., 22 F. (2d) 259.

[c] **Reissue of infringing patent.**—Where an infringing device is constructed in accordance with a junior patent, a reissue of the junior patent, pending a suit to restrain the infringement, does not affect the suit, where no new claims are introduced by the reissue. Robbins v. Illinois Watch Co., 50 Fed. 542 [aff 52 Fed. 215, 3 CCA 42].

Construction and operation of original patents see infra §§ 335-363.

72. I. T. S. Rubber Co. v. Essex Rubber Co., 25 F. (2d) 180.

73. American Automotoneer Co. v. Porter, 232 Fed. 456, 146 CCA 450 [mod 205 Fed. 105].

74. Brown v. Hinkley, 4 F. Cas. No. 2,012, 6 Fish. Pat. Cas. 370; Perry v. Skinner, 2 M. & W. 471, 150 Reprint 843.

75. Stimpson v. West Chester R. Co., 4 How. (U. S.) 380, 11 L. ed. 1020; Coffield Motor Washer Co. v. A. D. Howe Co., 172 Fed. 668; Bliss v. Brooklyn, 3 F. Cas. No. 1,544, 8 Blatchf. 533, 4 Fish. Pat. Cas. 596; Bloomer v. Stolley, 3 F. Cas. No. 1,559, Fish. Pat. R. 376, 5 McLean 158; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Goodyear v. Day, 10 F. Cas. No. 5,566; Howe v. Williams, 12 F. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395; Hussey v. Bradley, 12 Fed. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362.

76. Autopiano Co. v. American Player Action Co., 222 Fed. 276, 138 CCA 38.

[a] **Extent of protection.**—(1) Articles which constitute an infringement on a reissue patent, but not on the original, and which were manufactured nearly two years before the reissue was granted, may be sold after reissue without liability therefor. Bull Dog Floor Clip Co. v. Munson Mfg. Co., 19 F. (2d) 43. (2) A competitor building noninfringing machines before an application for a reissue was held to have acquired the intervening right at least to continue use as if holding a license under the reissue. Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 [rev 15 F. (2d) 215].

[b] **Design patent.**—Where defendant had, before design patent was reissued, manufactured and sold a substantial number of articles which did not infringe complainant's original design patent, but did infringe a reissue patent, it has acquired intervening rights which prevent complainant from claiming infringement by defendant. Ashley v. Samuel C. Tatum Co., 240 Fed. 979.

Intervening rights as affecting validity of reissue see supra § 312.

77. Disclaimer in proceedings to obtain patent see supra § 201; and infra §§ 341, 350, 357.

78. U. S. Code tit 35 § 65; U. S. Rev. St. § 4917; Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Collins Co. v. Coes, 130 U. S. 56, 9 SCt 514, 32 L. ed. 858; Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 112 U. S. 624, 5 SCt 475, 28 L. ed. 828; Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Cambria Iron Co. v. Carnegie Steel Co., 96 Fed. 850, 37 CCA 693 [rev 89 Fed. 721, and rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968]; Schwarzwalder v. New York Filter Co., 66 Fed. 152, 13 CCA 380; Matthews v. Spangenberg, 19 Fed. 823, 20 Blatchf. 482; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Whitney v. Emmett, 2 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Brooks v. Jenkins, 4 F. Cas. No. 1,953, 1 Fish. Pat. Cas. 41, 3 McLean 432; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433; McCormick v. Seymour, 15 F. Cas. No. 8,727, 3 Blatchf. 209 [aff 19 How. 96, 15 L. ed. 557]; Schillinger v. Gunther, 21 F. Cas. No. 12,458, 4 Bann. & A. 479, 17 Blatchf. 66; Tuck v. Bramhill, 24 F. Cas. No. 14,213, 6 Blatchf 95, 3 Fish. Pat. Cas. 400; Hotchkiss v. Oliver, 5 Den. (N. Y.) 314.

[a] **Mistake may be one of law or fact.**—Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

[b] **In Canada** the law is like that in the United States. 35 Vict. c 26 § 20.

[c] **English practice.**—(1) Application to the patent office for leave to amend by disclaimer may be made at any time where suit is not pending (In re Hall, 21 Q. B. D. 137), (2) and amendment may be made pending suit by order of court (Cropper v. Smith, 28 Ch. D. 148; Yates v. Armstrong, 77 L. T. Rep. N. S. 267; Singer v. Hasson, 50 L. T. Rep. N. S. 326). (3) The master of rolls may expunge a disclaimer improperly filed. In re Berdan, L. R. 20 Eq. 346. (4) In a proper case the court will permit the amendment on conditions (Deeley v. Perkes, [1896] A. C. 496, 20 ERC 825; In re Klaber, [1908] 1 Ch. 847; Ludington Cigarette Mach. Co. v. Baron Cigarette Mach. Co., [1900] 1 Ch. 508; Gaulard v. Lindsay, 38 Ch. D. 38; Haslam Foundry, etc., Co. v. Goodfellow, 37 Ch. D. 118; Bray v. Gardner, 34 Ch. D. 668; Fusee Vesta Co. v. Bryant, 34 Ch. D. 458; In re Gaulard, 57 L. J. Ch. 209; Lang v. Whitecross Co., 62 L. T. Rep. N. S. 119 [aff 89 L. T. J. 251]), (5) but conditions will not be imposed as a matter of course (Gillette Safety Razor Co. v. Luna Safety Razor Co., [1910] 2 Ch. 373), (6) and the assignee may disclaim (Spilsbury v. Clough, 2 Q. B. 466, 42 ECL 763, 114 Reprint 184; Wallington v. Dale, 23 L. J. Exch. 49).

79. Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Silsby v. Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Brooks v. Jenkins, 4 F. Cas. No. 1,953, 3 McLean 432.

80. Hovey v. Stevens, 12 F. Cas. No. 6,746, 3 Woodb. & M. 17.

81. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Carson v. American Smelting, etc., Co., 4 F. (2d) 463, 469 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [aff 274 Fed. 937 (certio-

The reissue[82] and disclaimer statutes, broadly speaking, have different purposes and different results.[83]

[§ 330] **B. Subject Matter of Disclaimer.** The separate claims of a patent may be eliminated by disclaimer,[84] but they cannot be amended and transformed into other claims,[85] and matter cannot be added to the specifications under guise of disclaimer.[86] A disclaimer may extend to a part of the specification[87] as well as to a claim[88] or one feature of a claim.[89] The practice of filing a disclaimer to cure an ambiguity is proper.[90] A disclaimer can eliminate only matter which is clearly severable from the balance,[91] and which can be removed without changing the balance.[92] Elements of a combination claim cannot be eliminated.[93] A patentee cannot, by a disclaimer, withdraw the invention which makes the structure patentable.[94]

Part of a reissued patent may be disclaimed.[95] But where a reissue is void because too broad, the original patent cannot be revived by merely filing a disclaimer of all extensions thereof.[96]

[§ 331] **C. Who May Disclaim.** A disclaimer may be filed by the patentee, his personal representatives or assigns.[97] Several coöwners of undivided

rari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem)]; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [aff 185 U. S. 403, 22 SCt 698, 46 L. ed. 968].

"The law which . . . permits [the patentee] to disclaim is not penal but remedial. It is intended for the protection of the patentee as well as the public, and ought not, therefore, to receive a construction that would restrict its operation within narrower limits than its words fairly import." Carson v. American Smelting, etc., Co., supra.

82. See supra §§ 307–328.

83. Motion Picture Patents Co. v. Laemmle, 214 Fed. 787.

84. Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Seiberling v. John E. Thropp's Sons Co., 284 Fed. 746 [rev on other grounds 264 U. S. 320, 44 SCt 346, 68 L. ed. 708]; McCormick v. Seymour, 15 F. Cas. No. 8,727, 3 Blatchf. 209; Taylor v. Archer, 23 F. Cas. No. 13,778, 8 Blatchf. 315, 4 Fish. Pat. Cas. 449; Tuck v. Bramhill, 24 F. Cas. No. 14,213, 6 Blatchf. 95, 3 Fish. Pat. Cas. 400.

85. Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 112 U. S. 624, 5 SCt 475, 28 L. ed. 828; Van Meter v. Irving Air Chute Co., 27 F. (2d) 170; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 257 Fed. 425, 168 CCA 465 [aff 231 Fed. 197]; Westinghouse Air Brake Co. v. New York Air Brake Co., 139 Fed. 265; Torrant v. Duluth Lumber Co., 30 Fed. 330; Hailes v. Albany Stove Co., 16 Fed. 240, 21 Blatchf. 271 [aff 123 U. S. 582, 8 SCt 262, 51 L. ed. 284]; In re British Thomson-Houston Co., 89 L. J. Ch. 194. But see Campbell Metal Window Corp. v. Pomeroy, 300 Fed. 872 (disclaimer may change the meaning of a claim, and result in effect in allowing another and more limited one than that originally granted, and its more limited scope in one part may remove necessary restrictions elsewhere).

[a] **Limitation to particular use** is proper. Thompson v. N. T. Bushnell Co., 96 Fed. 238, 37 CCA 456 [rev 88 Fed. 81].

[b] **Appropriate office of a disclaimer** (1) is to narrow a claim by confining it to what is new. Permutit Co. v. Wadham, 15 F. (2d) 20 [den reh 13 F. (2d) 454]. (2) A disclaimer is valid which only abandons something claimed in the patent, but not needed, without broadening or enlarging any claim, and leaving the claims fully supported by the original specification. Marconi Wireless Tel. Co. v. De Forest Radio Tel., etc., Co., 243 Fed. 560, 156 CCA 258 [aff 236 Fed. 942].

86. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 112 U. S. 624, 5 SCt 475, 28 L. ed. 828; Hailes v. Albany Stove Co., 16 Fed. 240, 21 Blatchf. 271 [aff 123 U. S. 582, 8 SCt 262, 31 L. ed. 284]; Ralston v. Smith, 11 C. B. N. S. 471, 103 ECL 471, 142 Reprint 880 [aff 20 C. B. N. S. 28, 144 Reprint 1013, 11 H. L. Cas. 223, 11 Reprint 1318, 20 ERC 772].

[a] **Use of disclaimer for reissue.**—A patentee is not entitled by a disclaimer to obtain a reissue and thus to avoid the scrutiny of the patent office. Fisher v. Automobile Supply Mfg. Co., Inc., 201 Fed. 543 [aff 209 Fed. 225, 126 CCA 319].

87. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968 [rev 96 Fed. 850, 37 CCA 593].

88. Seiberling v. John E. Thropp's Sons Co., 284 Fed. 746 [rev on other grounds 264 U. S. 320, 44 SCt 346, 68 L. ed. 708]; Thomas v. Welch, L. R. 1 C. P. 192; Seed v. Higgins, 8 H. L. Cas. 550, 11 Reprint 544, 20 ERC 680.

[a] **With claim for "means"** generally, a disclaimer should be of specified means. Permutit Co. v. Wadham, 15 F. (2d) 20.

[b] **Form of disclaimer.**—A disclaimer of claims filed after a decision of the supreme court adjudging them invalid, which conforms to the language of the decision, is sufficient. Minerals Separation, Ltd., v. Butte, etc., Min. Co., 245 Fed. 577 [rev on other grounds 250 Fed. 241, 162 CCA 377 (mod on other grounds 250 U. S. 336, 39 SCt 496, 63 L. ed. 1019)].

[c] **Making claim specific.**—A disclaimer, making specific that which was indefinite, is valid, in the absence of fraud, provided it does not broaden the original claim and abandons what was not originally needed. American Plug Co. v. Hudson Motor Car Co., 19 F. (2d) 609.

89. Permutit Co. v. Harvey Laundry Co., 279 Fed. 713 [aff 274 Fed. 937 (certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem)].

[a] **Patentee cannot add a feature to the invention claimed.**—Albany Steam Trap Co. v. Worthington, 79 Fed. 966, 25 CCA 258; White v. E. P. Gleason Mfg. Co., 17 Fed. 159, 21 Blatchf. 364; Hailes v. Albany Stove Co., 16 Fed. 240, 21 Blatchf. 271 [aff 123 U. S. 582, 8 SCt 262, 31 L. ed. 284]; Coburn v. Schroeder, 11 Fed. 425, 20 Blatchf. 392.

90. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968; Bay State Optical Co. v. Klein, 20 F. (2d) 915; Simplex R. Appliance Co. v. Pressed Steel Car Co., 189 Fed. 70, 110 CCA 634 [certiorari den 223 U. S. 721 mem, 32 SCt 523 mem, 56 L. ed. 630 mem].

[a] **Rule applied.**—(1) Where a patent covered the use of either of two materials, in the alternative, a disclaimer as to one does not change the nature of the invention, but is merely a limitation. Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [rev 293 Fed. 771, and certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]. (2) A disclaimer of an unnecessary and inadvertent statement in the specification of a patent may be entered in a suit for its infringement where its effect is not to broaden the claim in issue, but to limit it to the actual invention, strictly within the terms of the claim, and as described and shown, and to save the claim from possible ambiguity. Simplex R. Appliance Co. v. Pressed Steel Car Co., 189 Fed. 70, 110 CCA 634 [aff 177 Fed. 426, and certiorari den 223 U. S. 721 mem, 32 SCt 523 mem, 56 L. ed. 630 mem].

91. Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Vance v. Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Grasselli Chemical Co. v. National Aniline, etc., Co., 26 F. (2d) 305; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 257 Fed. 425, 168 CCA 465 [aff 231 Fed. 197]; Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. 126, 148 CCA 620; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Otis El. Co. v. Portland Co., 127 Fed. 557, 62 CCA 339; Bracewell v. Passaic-Print Works, 107 Fed. 467; Thompson v. N. T. Bushnell Co., 96 Fed. 238, 37 CCA 456; Root v. E. N. Welch Mfg. Co., 4 Fed. 423, 5 Bann. & A. 189, 17 Blatch. 478; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433.

[a] **Reason for rule.**—The part which the patentee disclaims must be distinguishable on the face of the specifications to constitute a valid disclaimer; otherwise there would never be need for a reissue. Grasselli Chemical Co. v. National Aniline, etc., Co., 26 F. (2d) 305.

92. Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [rev 293 Fed. 771, and certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem]; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Schillinger v. Gunther, 21 F. Cas. No. 12,458, 4 Bann. & A. 479, 17 Blatchf. 66.

93. Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Vance v. Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Cerealine Mfg. Co. v. Bates, 77 Fed. 883; Batten v. Clayton, 2 F. Cas. No. 1,105; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519.

94. Otis El. Co. v. Portland Co., 127 Fed. 557, 62 CCA 339.

95. Hurlbut v. Schillinger, 130 U. S. 456, 9 SCt 584, 32 L. ed. 1011; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Rawson, etc., Mfg. Co. v. C. W. Hunt Co., 147 Fed. 239, 77 CCA 381; Tyler v. Galloway, 12 Fed. 567, 20 Blatchf. 445; Collins Co. v. Coes, 3 Fed. 225; Schillinger v. Gunther, 21 F. Cas. No. 12,458, 4 Bann. & A. 479, 17 Blatchf. 66.

96. McMurray v. Mallory, 111 U. S. 97, 4 SCt 375, 28 L. ed. 365.

[a] **When disclaimer of addition valid.**—A disclaimer purporting to strike out everything which a reissue patent added to the patent and proceeding to narrow the original, if it can ever be upheld, will be only when there is no question that there is an invention and that the claims as modified by the disclaimer accurately define its character and its scope. Rosemary Mfg. Co. v. Halifax Cotton Mills, 288 Fed. 683.

97. Silsby v. Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Brooks v. Jenkins, 4 F. Cas. No. 1,953, 1 Fish. Pat. Cas. 41, 3 McLean 432; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

[a] **A disclaimer made by an at-**

interests in a patent must all join in a disclaimer.[98] But the owner of an entire interest, although limited to a certain territory, may disclaim, in which case the effect of the disclaimer will be limited to that territory.[99] Of course, the patentee cannot disclaim after he has parted with all his interest in the patent.[1]

[§ 332] **D. Time for Disclaimer.** Disclaimer should be filed without unreasonable delay.[2] Disclaimer may, however, be made after as well as before suit,[3] and in some cases, at least, after a decision on appeal,[4] the failure to file before suit affecting costs only,[5] and not the decree.[6] Whether a delay in filing a disclaimer is unreasonable may become a question of law.[7]

[§ 333] **E. Effect of Failure To Disclaim.** Where some of the claims sued on are found invalid, complainant will not be entitled to relief unless he files a disclaimer as to the claims held invalid.[8] It is not necessary to enter disclaimer except as to substantial or material parts.[9] The failure to disclaim invalid

torney in the prosecution of an application does not necessarily estop the patentee from maintaining that his claim embraces the matter referred to. Mann v. Bayliss, 16 F. Cas. No. 9,034.

98. Myers v. Frame, 17 F. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493 [rev on other grounds 94 U. S. 187, 24 L. ed. 34]; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; Rice v. Garnhart, 34 Wis. 453, 17 AmR 448.

99. Myers v. Frame, 17 F. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493 [rev on other grounds 94 U. S. 187, 24 L. ed. 34]; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327.

1. Myers v. Frame, 17 F. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493 [rev on other grounds 94 U. S. 187, 24 L. ed. 34].

2. U. S. Code tit 35 § 71; U. S. Rev. St. § 4922; Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Roemer v. Neumann, 132 U. S. 103, 10 SCt 12, 33 L. ed. 277; Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Dunbar v. Myers, 94 U. S. 187, 24 L. ed. 34; Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Silsby v. Foote, 20 How. (U. S.) 290, 15 L. ed. 822; McCormick v. Seymour, 19 How. (U. S.) 96, 15 L. ed. 557, 15 F. Cas. No. 8,727, 3 Blatchf. 209; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Thomson-Houston Electric Co. v. Union R. Co., 84 Fed. 888; Kittle v. Hall, 30 Fed. 239; Brooks v. Jenkins, 4 F. Cas. No. 1,953, 1 Fish. Pat. Cas. 41, 3 McLean 432; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433; Parker v. Stiles, 18 F. Cas. No. 10,749, 1 Fish. Pat. Cas. 319, 5 McLean 44; Reed v. Cutter, 20 F. Cas. No. 11,645, 1 Story 590; Tuck v. Bramhill, 24 F. Cas. No. 14,213, 6 Blatchf. 95, 3 Fish. Pat. Cas. 400; Winans v. New York, etc., R. Co., 30 F. Cas. No. 17,863, 1 Fish. Pat. Cas. 213.

[a] **Delay held not unreasonable.**—Permutit Co. v. Harvey Laundry Co., 274 Fed. 937 [aff 279 Fed. 13 (certiorari den 259 U. S. 588 mem, 42 SCt 590 mem, 66 L. ed. 1078 mem)]; Thompson v. N. T. Bushnell Co., 96 Fed. 238, 37 CCA 456; Christman v. Rumsey, 5 F. Cas. No. 2,704, 4 Bann. & A. 506, 17 Blatchf. 148, 58 HowPr (N. Y.) 114.

[b] **English practice.**—(1) Amendment by disclaimer pending suit is for discretion of the judge. Deeley v. Perkes, [1896] A. C. 496, 20 ERC 825; Brooks v. Lycett's Saddle, etc., Accessory Co., [1904] 1 Ch. 512; In re Geipel, [1904] 1 Ch. 239; In re Geipel, [1903] 2 Ch. 715; Ludington's Cigarette Mach. Co. v. Baron Cigarette Mach. Co., [1900] 1 Ch. 508; In re Owen, [1899] 1 Ch. 157; In re Gaulard, 57 L. J. Ch. 209; Yates v. Armstrong, 77 L. T. Rep. N. S. 267; In re Lang, 7 R. P. C. 469. (2) Suit instituted after petition to amend is no bar. Wolfe v. Automatic Picture Gallery, [1903] 1 Ch. 18 [aff 51 Wkly. Rep. 121]. (3) Disclaimer pending suit does not include "correction and explanation," but only elimination. In re Owen, [1899] 1 Ch. 157; In re Gaulard, 57 L. J. Ch. 209; In re Lang, 7 R. P. C. 469. (4) But the court will not refuse an application upon the ground that the proposed amendment is not an amendment by way of disclaimer as distinguished from correction or explanation unless it is satisfied that this is so by a mere perusal of the specification. In re Alsop, [1906] 1 Ch. 85.

3. Smith v. Nichols, 21 Wall. (U. S.) 112, 22 L. ed. 566; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 257 Fed. 425, 168 CCA 465 [aff 231 Fed. 197]; Libbey v. Mt. Washington Glass Co., 26 Fed. 757; Myers v. Frame, 17 F. Cas. No. 9,991, 8 Blatchf. 446 [rev on other grounds 94 U. S. 187, 24 L. ed. 34]; Wyeth v. Stone, 30 F. Cas. No. 18,107, 1 Story 273.

4. Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Seymour v. McCormick, 19 How. (U. S.) 96, 15 L. ed. 557; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601.

[a] **Disclaimer after decision on appeal** (1) has been held not to be too late although the patent had then expired. Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614. (2) Entry of disclaimer of claims of a patent filed one hundred and seven days after a decision of the supreme court holding them invalid in view of the patent owners residing in a foreign country and of the existing war conditions was not unreasonably neglected or delayed. Minerals Separation, Ltd. v. Butte, etc., Min. Co., 250 U. S. 336, 39 SCt 496, 63 L. ed. 1019 [mod 250 Fed. 241, 162 CCA 377 (rev 245 Fed. 577)].

5. Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284 [aff 16 Fed. 240]; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Silsby v. Foote, 20 How. (U. S.) 378, 15 L. ed. 953; Seymour v. McCormick, 19 How. (U. S.) 96, 15 L. ed. 557; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; Houser v. Starr, 203 Fed. 264, 121 CCA 462 [mod 194 Fed. 730]; Plecker v. Poorman, 147 Fed. 528; Fairbanks v. Stickney, 123 Fed. 79, 59 CCA 209; Metallic Extraction Co. v. Brown, 110 Fed. 665, 49 CCA 147; Ballard v. McCluskey, 58 Fed. 880; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 48 Fed. 556 [rev on other grounds 53 Fed. 810, 4 CCA 21]; Smead v. Union Free School-Dist., etc., 44 Fed. 614; Campbell Printing-Press, etc., Co. v. Eames Vacuum Brake Co., 44 Fed. 64; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117 [reh den 39 Fed. 490]; Hake v. Brown, 37 Fed. 783; Kittle v. Hall, 30 Fed. 239; Hayes v. Bickelhoupt, 23 Fed. 183; Worden v. Searls, 21 Fed. 406; Matthews v. Spangenberg, 19 Fed. 823, 20 Blatchf. 482; Proctor v. Brill, 16 Fed. 791; Tyler v. Galloway, 12 Fed. 567, 20 Blatchf. 445; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Burdett v. Estey, 4 F. Cas. No. 2,145, 4 Bann. & A. 7, 15 Blatchf. 349 [rev on other grounds 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058]; Christman v. Rumsey, 5 F. Cas. No. 2,704, 17 Blatchf. 148; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194; Myers v. Frame, 17 F. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493 [rev on other grounds 94 U. S. 187, 24 L. ed. 34]; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb. Pat. Cas. 81, 1 Story 590; Schillinger v. Gunther, 21 F. Cas. No. 12,458, 4 Bann. & A. 479, 17 Blatchf. 66; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Taylor v. Archer, 23 F. Cas. No. 13,778, 8 Blatchf. 315, 4 Fish. Pat. Cas. 449; Tuck v. Bramhill, 24 F. Cas. No. 14,213, 6 Blatchf. 95, 3 Fish. Pat. Cas. 400; Hotchkiss v. Oliver, 5 Den. (N. Y.) 314.

[a] **Costs on appeal.**—Failure to file, before suit for infringement is begun, disclaimer as to invalid claims of the patent in suit has no relation to costs in the circuit court of appeals. Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614.

[b] **Disclaimer by patentee without uniting assignee.**—If the assignee has assigned his patent in part, and a joint suit is brought in equity for a perpetual injunction, a disclaimer by the patentee alone, without the assignee's uniting in it, will not entitle the parties to the benefit of the statute. Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

[c] **Costs will not be denied** (1) where claims are abandoned on grounds other than those mentioned in the statute (Mundy v. Lidgerwood Mfg. Co., 20 Fed. 191), (2) nor where the disclaimer relates to claims not in issue (Glendale Elastic Fabric Co. v. Smith, 100 U. S. 110, 25 L. ed. 547; Stetson Hospital v. Snook-Roentgen Mfg. Co., 245 Fed. 654, 158 CCA 82; Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 77 Fed. 490, 23 CCA 250; American Bell Tel. Co. v. Spencer, 8 Fed. 509).

6. Stutz v. Armstrong, 20 Fed. 843; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433.

[a] **Action may proceed** in spite of disclaimer. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179.

[b] **Disclaimer materially and substantially changing the meaning of a claim** after it has been held void cannot render defendant chargeable with infringement by reason of acts done before the claim was so changed. Sutherland Paper Co. v. Michigan Carton Co., 14 F. (2d) 700.

7. Seymour v. McCormick, 19 How. (U. S.) 96, 15 L. ed. 557. See Brooks v. Jenkins, 4 F. Cas. No. 1,963, 3 McLean 432 (question one of law and fact).

8. Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502; Liquid Carbonic Co. v. Gilchrist Co., 253 Fed. 54; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768; Houser v. Starr, 203 Fed. 264, 121 CCA 462; F. D. Cummer, etc., Co. v. Atlas Dryer Co., 193 Fed. 993, 113 CCA 611; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185. But see Ensten v. Rich-Sampliner Co., 13 F. (2d) 132; Davey Tree Expert Co. v. Van Billiard, 255 Fed. 781, 167 CCA 125; Plecker v. Poorman, 147 Fed. 528 (all three cases supporting the view that the trial court will not require that a disclaimer be entered as a condition precedent to relief and thereby cut off the right of review).

9. Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433;

claims will not prevent recovery of damages for the infringement of valid claims in the patent where the patentee was not guilty of fraud and where there was no unreasonable neglect or delay in entering disclaimer.[10] Unreasonable delay, however, will be a good defense to the suit.[11]

[§ 334] **F. Effect of Disclaimer.** In determining the meaning of a disclaimer, the same rules are to be observed as in construing any other written instrument, the purpose being to carry out the intention of the person executing it as indicated by its language when construed with reference to the proceedings of which it forms a part.[12] A disclaimer limits the patent in so far as disclaimant is concerned to the matter therein which is not disclaimed.[13] It is effective only as to the party filing it,[14] and a disclaimer in one patent does not affect another.[15] The filing of a disclaimer is not an admission of the invalidity of the patent without it where there has been no decision by a court declaring some of the claims invalid.[16]

Review of disclaimer.[17] The appellate court is not precluded from considering the issues presented by a disclaimer because it allowed an application to be made to the trial court permitting it to be filed.[18]

XII. CONSTRUCTION AND OPERATION OF LETTERS PATENT[19]

[By Rudy J. Brossman]

[§ 335] **A. In General—1. General Rules of Construction Relating to Contracts Applicable.** A patent is subject to the same general rules of construction that apply to other contracts.[20] The entire instrument, including the drawings and specifications, is to be considered in arriving at its intent and meaning.[21]

[§ 336] **2. Liberally Construed.** Patents are to

Peek v. Frame, 19 F. Cas. No. 10,904, 5 Fish. Pat. Cas. 211.

10. O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768; Suddard v. American Motor Co., 163 Fed. 852.

[a] **Disclaimer by attorney in prosecuting application** distinguished. Mann v. Bayliss, 16 F. Cas. No. 9,034.

[b] **English practice.**—A patent is void unless a disclaimer is entered. Cannington v. Nuttall, L. R. 5 H. L. 205; In re Dellwick, [1896] 2 Ch. 705.

[c] **Patentee's mere knowledge of invalidating prior art** does not put on him the duty of disclaiming, if he might in good faith regard his patent as valid. Ensten v. Rich-Sampliner Co., 13 F. (2d) 132.

11. Hailes v. Albany Stove Co., 123 U. S. 582, 8 SCt 262, 31 L. ed. 284; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Silsby v. Foote, 20 How. (U. S.) 378, 15 L. ed. 953; Ensten v. Rich-Sampliner Co., 13 F. (2d) 132; Liquid Carbonic Co. v. Gilchrist Co., 253 Fed. 54; Office Specialty Mfg. Co. v. Globe Co., 65 Fed. 599 [aff 77 Fed. 465, 23 CCA 242]; Brooks v. Jenkins, 4 F. Cas. No. 1,953, 1 Fish. Pat. Cas. 41, 3 McLean 432; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433; Hovey v. Stevens, 12 F. Cas. No. 6,745, 2 Robb Pat. Cas. 479, 1 Woodb. & M. 479; McCormick v. Seymour, 15 F. Cas. No. 8,727, 3 Blatchf. 209 [aff 19 How. 96, 15 L. ed. 557]; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 319; Reed v. Cutter, 20 F. Cas. No. 11,645, 2 Robb Pat. Cas. 81, 1 Story 590; Rice v. Garnhart, 34 Wis. 453, 17 AmR 448.

Effect on right to reissue see supra §§ 311–313.

12. Graham v. Earl, 82 Fed. 737, 92 Fed. 155, 34 CCA 267.

[a] **A construction which would render the disclaimer nugatory** must be essentially wrong and cannot be accepted. Atlantic Giant Powder Co. v. Hulings, 21 Fed. 519.

[b] **A disclaimer may change the meaning of a claim** and result in effect in allowing another and more limited one than that originally granted, and its more limited scope in one part may remove necessary restrictions elsewhere. Campbell Metal Window Corp. v. Pomeroy, 300 Fed. 872.

13. Dunbar v. Meyers, 94 U. S. 187, 24 L. ed. 34; Silsby v. Foote, 20 How. (U. S.) 378, 15 L. ed. 953; U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 202 Fed. 915, 121 CCA 273; Manhattan Gen. Constr. Co. v. Helios Upton Co., 135 Fed. 785; Graham v. Earl, 92 Fed. 155, 34 CCA 267; Schwarzwalder v. New York Filter Co., 66 Fed. 152, 13 CCA 380; Atlantic Giant Powder Co. v. Hulings, 21 Fed. 519; Tetley v. Easton, 2 C. B. N. S. 706, 89 ECL 706, 140 Reprint 593; Jandus Arc Lamp, etc., Co., Ltd. v. Arc Lamps, Ltd., 92 L. T. Rep. N. S. 447.

[a] **Rule applied.**—Disclaimer as to process claims of a wood glue patent was held not to affect product claims. Perkins Glue Co. v. Holland Furniture Co., 18 F. (2d) 387 [rev on other grounds 277 U. S. 245, 48 SCt 474, 72 L. ed. 868].

[b] **Exception to rule.**—Matter, although disclaimed, is still in record, and may be accepted as showing historically what was in inventors' minds. Barnett v. Anchor Co., 298 Fed. 23.

14. Potter v. Holland, 20 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

15. Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; Hill v. Dunklee, 12 F. Cas. No. 6,489, McA. Pat. Cas. 475.

16. Bay State Optical Co. v. Klein, 20 F. (2d) 915; Permutit Co. v. Wadham, 13 F. (2d) 454 [rev 294 Fed. 370, and reh den 15 F. (2d) 20].

17. Cross references:

Appeal from proceedings in patent office see supra §§ 223–237.

Appeals in infringement suits see infra §§ 648–652.

18. Fellows v. Borden's Condensed Milk Co., 205 Fed. 901, 124 CCA 502.

19. Decisions of federal courts in patent cases as precedents for:

Other federal courts see Courts § 311.

State courts see Courts § 318.

20. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593; Okmulgee Window Glass Co. v. Window Glass Mach. Co., 265 Fed. 626; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Motion Picture Patents Co. v. Independent Moving Pictures Co., 200 Fed. 411, 118 CCA 563; O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 CCA 304; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Elgin Co-op. Butter-Tub Co. v. Creamery Package Mfg. Co., 80 Fed. 293, 25 CCA 426; Harris v. Allen, 15 Fed. 106; Allen v. Hunter, 1 F. Cas. No. 225, 6 McLean 303; Francis v. Mellor, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 8 Phila. (Pa.) 157; Whitney v. Emmett, 29 F. Cas. No. 17,585, Baldw. 303, 1 Robb Pat. Cas. 567; Johnson v. Oxford Knitting Co., Ltd., 15 Can. Exch. 340, 25 DomLR 658; Came v. Consolidated Car Heating Co., 11 Que. K. B. 103.

Construction of contracts generally see Contracts §§ 481–520.

21. Hogg v. Emerson, 6 How. (U. S.) 437, 12 L. ed. 505, 11 How. 587, 13 L. ed. 824; Greenawalt v. American Smelting, etc., Co., 10 F. (2d) 98 [aff 3 F. (2d) 658]; International Banding Mach. Co. v. American Bander Co., 9 F. (2d) 606 [rev 4 F. (2d) 726]; Hudson Mfg. Co. v. Louden Mach. Co., 276 Fed. 527; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593; Roberts Cone Mfg. Co. v. Bruckman, 266 Fed. 986 [certiorari den 254 U. S. 649 mem, 41 SCt 63 mem, 65 L. ed. 457 mem]; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; Marconi Wireless Tel. Co. v. De Forest Radio Tel., etc., Co., 236 Fed. 942 [aff 243 Fed. 560, 156 CCA 258]; Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, 130 CCA 117; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Faultless Rubber Co. v. Star Rubber Co., 202 Fed. 927, 121 CCA 285 [rev 191 Fed. 982, and certiorari den 229 U. S. 624 mem, 33 SCt 1051 mem, 57 L. ed. 1356 mem]; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Colt's Patent Firearms Mfg. Co. v. New York Sporting Goods Co., 190 Fed. 553, 111 CCA 405 [certiorari den 223 U. S. 726 mem, 32 SCt 526 mem, 56 L. ed. 632 mem]; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310; O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 CCA 304; Holt v. Kendall, 26 Fed. 622 [app dism 127 U. S. 784 mem, 32 L. ed. 330 mem]; Aiken v. Dolan, 1 F. Cas. No. 110; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Carver v. Braintree Mfg. Co., 5 F. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Davoll v. Brown, 7 F. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Earle v. Sawyer, 8 F. Cas. No. 4,247, 4 Mason 1, 1 Robb Pat. Cas. 490; Evans v. Eaton, 8 F. Cas. No. 4,559, 1 Robb Pat. Cas. 68, Pet. C. C. 322 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Hamilton v. Ives, 11 F. Cas. No. 5,982, 6 Fish. Pat. Cas. 244 [aff 92 U. S. 426, 23 L. ed. 494]; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Ingels v. Mast, 13 F. Cas. No. 7,035, 2 Bann. & A. 24, 1 Flipp. 424; Kittle v. Merriam, 14 F. Cas. No. 7,857, 2 Curt. 475; Sloat v. Spring, 22 F. Cas. No. 12,948a; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Russell v. Cowley, 1 C. M. & R. 864, 149 Reprint 1331; Johnson v. Oxford Knit-

be liberally construed so as to secure to the inventor the real invention which he intends to secure by his patent, and technical defects or inaccuracies will not be permitted to prevent this result.[22] While, under

ting Co., Ltd., 15 Can. Exch. 340, 25 DomLR 658; Came v. Consolidated Car Heating Co., 11 Que. K. B. 103 [allowing app 18 Que. Super. 44, and app dism [1903] A. C. 509].

[a] **Title given a patent** cannot be used to distinguish the invention from another but may only be considered to clarify or give significance to the language used in describing the individual elements. Nye Tool, etc., Works v. Crown Die, etc., Co., 292 Fed. 851.

[b] **Drawing constitutes a part of the patent** when issued. Phillips v. Sensenich, 31 App. (D. C.) 159.

22. U. S.—Henry v. A. B. Dick Co., 224 U. S. 1, 32 SCt 364, 56 L. ed. 645, AnnCas1913D 880; De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; Mitchell v. Tilghman, 19 Wall. 287, 22 L. ed. 125; Philadelphia, etc., R. Co. v. Dubois, 12 Wall. 47, 20 L. ed. 265; Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566; Turrill v. Michigan Southern, etc., R. Co., 1 Wall. 491, 17 L. ed. 668; Winans v. Denmead, 15 How. 330, 14 L. ed. 717; Corning v. Burden, 15 How. 252, 14 L. ed. 683; Linville v. Milberger, 29 F. (2d) 610; Einson Freeman Co. v. International Folding Paper Box Co., 21 F. (2d) 701; Permutit Co. v. Wadham, 13 F. (2d) 454 [rev 294 Fed. 370, and reh den 15 F. (2d) 20]; General Chemical Co. v. Aluminum Co. of America, 11 F. (2d) 810 [aff 11 F. (2d) 813]; Goldschmidt Thermit Co. v. American Vanadium Co., 291 Fed. 81; Kurtz v. Belle Hat Lining Co., Inc., 280 Fed. 277; Armstrong v. De Forest Radio Tel., etc., Co., 279 Fed. 445 [aff 280 Fed. 584]; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Curtiss Aeroplane, etc., Corp. v. United Aircraft Engineering Corp., 266 Fed. 71; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 501 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Hinman v. Visible Milker Co., 239 Fed. 896, 153 CCA 24 [aff 231 Fed. 174]; Miner v. T. H. Symington Co., 238 Fed. 806 [rev on other grounds 247 Fed. 515, 160 CCA 25]; Isaacs v. Sussman, 235 Fed. 403; Safety Car Heating, etc., Co. v. Gould Coupler Co., 229 Fed. 429 [rev on other grounds 239 Fed. 861, 152 CCA 645 (certiorari den 245 U. S. 646 mem, 38 SCt 9 mem, 62 L. ed. 529 mem)]; American Brake Shoe, etc., Co. v. Hoadley Brake Shoe Co., 222 Fed. 327 [aff 227 Fed. 90, 141 CCA 638]; Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144]; Andrews Wire, etc., Works v. Wilson Mfg. Co., 199 Fed. 798; In re Kay-Tee Film Exch., 193 Fed. 140; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Bossert Electric Constr. Co. v. Pratt Chuck Co., 179 Fed. 385, 103 CCA 45; Dey Time-Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807 [aff 178 Fed. 812, 102 CCA 260]; Denning Wire, etc., Co. v. American Steel, etc., Co., 169 Fed. 793, 95 CCA 259; Electric Candy Mach. Co. v. Morris, 156 Fed. 972; Maunula v. Sunell, 155 Fed. 535; Shepherd v. Deitsch, 138 Fed. 83 [rev on other grounds 146 Fed. 756, 77 CCA 246]; Eck v. Kutz, 132 Fed. 758; Kip-Armstrong Co. v. King Philip Mills, 130 Fed. 28 [rev on other grounds 132 Fed. 975, 66 CCA 45]; Nutter v. Mossberg, 128 Fed. 55 [aff 135 Fed. 95, 68 CCA 257]; Scott v. Tecktonius, 115 Fed. 157; Severy Process Co. v. Harper, 113 Fed. 581; Daylight Prism Co. v. Marcus Prism Co., 110 Fed. 980; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Gaisman v. Gallert, 105 Fed. 955; McMichael, etc., Mfg. Co. v. Stafford, 105 Fed. 380; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 101 Fed. 716, 41 CCA 627 [certiorari den 179 U. S. 686 mem, 21 SCt 918 mem, 45 L. ed 386 mem]; Lein v. Myers, 97 Fed. 607 [rev on other grounds 105 Fed. 962, 45 CCA 148]; Rickard v. Du Bon, 97 Fed. 96 [aff 103 Fed. 868, 43 CCA 360]; McEwan Bros. Co. v. McEwan, 91 Fed. 787; Huntington Dry-Pulverizer Co. v. Whittaker Cement Co., 89 Fed. 323 [rev on other grounds 95 Fed. 471, 37 CCA 151]; Salomon v. Garvin Mach. Co., 84 Fed. 195; American Street-Car Advertising Co. v. Newton St. R. Co., 82 Fed. 732 [rev on other grounds 88 Fed. 795, 32 CCA 122]; Red Jacket Mfg. Co. v. Davis, 82 Fed. 432, 27 CCA 204; Consolidated Fastener Co. v. Columbian Fastener Co., 79 Fed. 795; Beach v. Inman, 75 Fed. 840 [aff 78 Fed. 923 mem, 24 CCA 408]; McBride v. Kingman, 72 Fed. 908 [aff 97 Fed. 217, 38 CCA 123]; American Sulphite Pulp Co. v. Howland Falls Pulp Co., 70 Fed. 986 [rev on other grounds 80 Fed. 395, 25 CCA 500]; Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co., 61 Fed. 958, 10 CCA 194; Loring v. Booth, 52 Fed. 150; Robbins v. Aurora Watch Co., 43 Fed. 521; Fitch v. Bragg, 8 Fed. 588 [rev on other grounds 121 U. S. 478, 7 SCt 978, 30 L. ed. 1008]; Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 7 Fed. 768 [rev on other grounds 113 U. S. 157, 5 SCt 513, 28 L. ed. 939]; Ames v. Howard, 1 F. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Blanchard v. Sprague, 3 F. Cas. No. 1,516, 1 Cliff. 288; Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Burden v. Corning, 4 F. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Coffin v. Ogden, 5 F. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [aff 18 Wall. 120, 21 L. ed. 821]; Davis v. Palmer, 7 F. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Davoll v. Brown, 7 F. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Francis v. Mellor, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 8 Phila. (Pa.) 157; Goodyear v. Berry, 10 F. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Imlay v. Norwich, etc., R. Co., 13 F. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Ingels v. Mast, 13 F. Cas. No. 7,033, 6 Fish. Pat. Cas. 415; Milligan, etc., Glue Co. v. Upton, 17 F. Cas. No. 9,607, 1 Bann. & A. 497, 4 Cliff. 237 [aff 97 U. S. 3, 24 L. ed. 985]; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93; Parker v. Stiles, 18 F. Cas. No. 10,749, 1 Fish. Pat. Cas. 319, 5 McLean 44; Pike v. Potter, 19 F. Cas. No. 11,162, 3 Fish. Pat. Cas. 55; Potter v. Holland, 19 F. Cas. No. 11,330, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382; Ryan v. Goodwin, 21 F. Cas. No. 12,186, 1 Robb Pat. Cas. 725, 3 Sumn. 514; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Waterbury Brass Co. v. New York, etc., Brass Co., 29 F. Cas. No. 17,256; Whipple v. Middlesex Co., 29 F. Cas. No. 17,520, 4 Fish. Pat. Cas. 41; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645; Woodman v. Stimpson, 30 F. Cas. No. 17,979, 3 Fish. Pat. Cas. 98 [rev on other grounds 10 Wall. 117, 19 L. ed. 866].

Conn.—Johnson v. Williamantic Linen Co., 33 Conn. 436.

D. C.—Ruete v. Elwell, 15 App. 21; Hill v. Hodge, 12 App. 528.

N. J.—Massie v. Asbestos Brake Co., 95 N. J. Eq. 298, 123 A 155, 126 A 669.

Tex.—American Refining Co. v. Gasoline Products Co., (Civ. A.) 294 SW 967; Coca-Cola Co. v. State, (Civ. A.) 225 SW 791.

Eng.—Neilson v. Betts, L. R. 5 H. L. 1; Bickford v. Skewes, 1 Q. B. 938, 41 ECL 848, 11 Reprint 1391.

[a] **Patentees are a meritorious class** and all the aid and protection which the law allows the court will cheerfully give them. Holloway v. Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335.

[b] **Regard should be had for things, not names.**—Daylight Prism Co. v. Marcus Prism Co., 110 Fed. 980; Palmer Pneumatic Tire Co. v. Lozier, 84 Fed. 659 [rev on other grounds 90 Fed. 732, 33 CCA 255].

[c] **Mere literalism** should not defeat a meritorious patent. Belber Trunk, etc., Co. v. Seward Trunk, etc., Co., 279 Fed. 82; Domestic Vacuum Cleaner Co. v. Bissell Carpet Sweeper Co., 242 Fed. 943 [rev on other grounds 249 Fed. 201, 161 CCA 237].

[d] **Subtle distinctions will not be made.**—Davoll v. Brown, 7 F. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Henderson v. Cleveland Co-op. Stove Co., 11 F. Cas. No. 6,351, 2 Bann. & A. 604.

[e] **Claims for a function or result** will be construed as claims for the specific device or process described, if possible, in order to sustain the patent. Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647]; Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 SCt 299, 32 L. ed. 715; Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 9 SCt 83, 32 L. ed. 390; Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Dryfoos v. Wiese, 124 U. S. 32, 8 SCt 354, 31 L. ed. 362; Grier v. Wilt, 120 U. S. 412, 7 SCt 718, 30 L. ed. 712; Electric R. Signal Co. v. Hall R. Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Fuller v. Yentzer, 94 U. S. 299, 24 L. ed. 107; Brown v. Guild, 23 Wall. (U. S.) 181, 23 L. ed. 161; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; General Electric Co. v. De Forest Radio Co., 23 F. (2d) 698; Continental Auto. Co. v. Spaulding, 177 Fed. 693 [aff 185 Fed. 518, 107 CCA 618]; General Sub-construction Co. v. Netcher, 167 Fed. 549 [aff 174 Fed. 236, 98 CCA 144]; Expanded Metal Co. v. St. Louis Bd. of Education, 103 Fed. 287 [aff 111 Fed. 395, 49 CCA 406]; Brush Electric Co. v. Electric Impr. Co., 52 Fed. 965; Hoke Engraving Plate Co. v. Schraubstadter, 47 Fed. 506; Robbins v. Aurora Watch Co., 43 Fed. 521; Brush Electric Co. v. Ft. Wayne Electric Light Co., 40 Fed. 826; Spencer v. Pennsylvania R. Co., 34 Fed. 899; Chicopee Folding-Box Co. v. Rogers, 32 Fed. 695; Royer v. Schultz Belting Co., 28 Fed. 850; Lull v. Clark, 13 Fed. 456, 21 Blatchf. 95; Coes v. Collins Co., 9 Fed. 905, 20 Blatchf. 221; Palmer v. Gatling Gun Co., 8 Fed. 513, 19 Blatchf. 392; Blanchard v. Puttman, 3 F. Cas. No. 1,514, 2 Bond 84, 3 Fish. Pat. Cas. 186 [rev on other grounds 8 Wall. 420, 19 L. ed. 433]; Coffin v. Ogden, 5 F. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [aff 18 Wall. 120, 21 L. ed. 821]; Evarts v. Ford, 8 F. Cas. No. 4,574, 6 Fish. Pat. Cas. 587; Henderson v. Cleveland Co-op. Stove Co., 11 F. Cas. No. 6,351, 2 Bann. & A. 604; Hitchcock v. Tremaine, 12 F. Cas. No. 6,538, 8 Blatchf. 440, 4 Fish. Pat. Cas. 508; Parham v. American Buttonhole, etc., Sewing-Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Renwick v. Pond, 20 F. Cas. No. 11,702, 10 Blatchf. 39, 5 Fish. Pat. Cas. 569; Rogers v. Sargent, 20 F. Cas. No. 12,020, 7 Blatchf. 507; Sickels v. Falls Co., 22 F. Cas. No. 12,834, 4 Blatchf. 508, 2 Fish. Pat. Cas. 202; Sickles v. Evans, 22 F. Cas. No.

the patent laws, a patent creates a monopoly,[23] it is not such a monopoly as requires the application of a different rule.[24] However, the interests of the public in the granting of patents being paramount to those of inventors,[25] patent claims will also be interpreted in view of their contribution to the general welfare.[26] The description of the patent must be so certain as to be understood by those acquainted with the subject matter.[27] While a patent may be of doubtful meaning,[28] or contain several meanings suitable to varying expected conditions,[29] there should not be a liberality of construction which permits the inventor to couch his specification in such ambiguous terms that its claims may be expanded or contracted to suit the exigency;[30] a patent cannot have separate meanings inconsistent with each other.[31]

[§ 337] **3. Plain Meaning Not Varied.** The plain and clear meaning of the terms employed cannot be varied by construction.[32] The construction must be in conformity with the self-imposed limitations which are contained in the claims.[33]

[§ 338] **4. Intention of Inventor.** The intention of the parties in formulating the patent is entitled to great consideration when it can be determined from the record.[34] The court will look to the manifest

12,839, 2 Cliff. 203, 2 Fish. Pat. Cas. 417; Stone v. Sprague, 23 F. Cas. No. 13,487, 2 Robb Pat. Cas. 10, 1 Story 270; Winans v. Schenectady, etc., R. Co., 30 F. Cas. No. 17,865, 2 Blatchf. 279; Minter v. Wells, 1 C. M. & R. 505, 149 Reprint 1180.

[f] **Concessions as to prior art.**—Unless it is unavoidable, a patent should not be given a construction that makes the patentee concede a broader and more explicit prior art than existed in fact. Pieper v. S. S. White Dental Mfg. Co., 228 Fed. 30, 142 CCA 486 [certiorari granted 239 U. S. 646 mem, 36 SCt 219 mem, 60 L. ed. 484 mem, and certiorari dism 241 U. S. 690 mem, 36 SCt 553 mem, 60 L. ed. 1237 mem].

[g] **Nonessential details of construction** found in the specifications and claimed in a patent should not be allowed to obscure the real invention. Société Anonyme des Anciens Etablissements Cail v. U. S., 43 Ct. Cl. 25 [aff 224 U. S. 309, 32 SCt 479, 56 L. ed. 778].

[h] **Matter necessarily implied.**—A claim of a patent which specifies as one of the elements of a combination a hollow piston rod is not invalid because it does not mention a piston, which is necessarily implied. Typographical errors may be disregarded. Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185.

[i] **There is a presumption** arising from the grant of a patent that the invention covered by it differs substantially from any other covered by a prior patent. Union Special Mach. Co. v. Singer Mfg. Co., 215 Fed. 598 [rev on other grounds 227 Fed. 858, 142 CCA 382]; Seed Filter, etc., Co. v. Stocking, 172 App. Div. 726, 158 NYS 687.

23. See supra § 6.

24. Blanchard v. Sprague, 3 F. Cas. No. 1,518, 1 Robb Pat. Cas. 734, 742, 2 Story 164, 3 Sumn. 535; Davoll v. Brown, 7 F. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Parker v. Stiles, 18 F. Cas. No. 10,749, 1 Fish. Pat. Cas. 319, 5 McLean 44; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Wickersham v. Singer, 29 F. Cas. No. 17,610, McA. Pat. Cas. 645; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 78 Off. Gaz. (U. S.) 171; Barter v. Smith, 2 Can. Exch. 455; Peck v. Hindes, 67 L. J. Q. B. 272.

25. Warner v. Smith, 13 App. (D. C.) 111.

26. Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103].

27. Steward v. American Lava Co., 215 U. S. 161, 30 SCt 46, 54 L. ed. 139 [aff 155 Fed. 740, 84 CCA 166]; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Conrader v. Judson Governor Co., 226 Fed. 207 [mod on other grounds 238 Fed. 349, 151 CCA 365]; Davoll v. Brown, 7 F. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53.

[a] **"It is difficult to lay down a rule,** and it is best to confine the test of indefiniteness to the facts of a particular case." Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 632, 148 CCA 390 [rev 226 Fed. 766].

[b] **Use of "may."**—A patentee cannot claim to occupy more room in the art than he disclosed because, instead of positive directions in the specification, the word "may" is used. Lyon v. Boh, 1 F. (2d) 48 [rev on other grounds 10 F. (2d) 30].

[c] **Means described, without any addition or subtraction,** must produce the desirable result which it is sought by the patent to protect. Shrauger v. Phillips Bernard Co., 247 Fed. 547.

[d] **Description not void for indefiniteness.**—(1) Generally. Davis-Bournonville Co. v. Alexander Milburn Co., 297 Fed. 846 [aff 1 F. (2d) 227 (certiorari granted 266 U. S. 596 mem, 45 SCt 93 mem, 69 L. ed. 459 mem, and rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651)]; Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, 148 CCA 390 [rev 226 Fed. 766]. (2) Process patent specifying the use of a "weak acid" is not void for uncertainty where the specification names vinegar as a preferable acid. Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 275.

28. Kintner v. Atlantic Communication Co., 240 Fed. 716, 153 CCA 514 [aff 230 Fed. 829, and certiorari den 244 U. S. 661 mem, 37 SCt 746 mem, 61 L. ed. 1377 mem].

29. Kintner v. Atlantic Communication Co., supra.

30. Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93.

31. Kintner v. Atlantic Communication Co., 240 Fed. 716, 153 CCA 514 [aff 230 Fed. 829, and certiorari den 244 U. S. 661 mem, 37 SCt 746 mem, 61 L. ed. 1377 mem].

32. McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Brigham v. Coffin, 149 U. S. 557, 13 SCt 939, 37 L. ed. 845 [aff 37 Fed. 688]; Burt v. Evory, 133 U. S. 349, 10 SCt 394, 33 L. ed. 647]; Day v. Fair Haven, etc., R. Co., 132 U. S. 98, 10 SCt 11, 33 L. ed. 265; Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 5 SCt 941, 29 L. ed. 210; Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Minerals Separation North American Corp. v. Magma Copper Co., 23 F. (2d) 931; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; General Chemical Co. v. Aluminum Co. of America, 11 F. (2d) 810 [aff 11 F. (2d) 813]; Lakewood Engineering Co. v. Stein, 8 F. (2d) 713 [certiorari den 270 U. S. 661 mem, 46 SCt 471 mem, 70 L. ed. 786 mem]; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [rev 260 Fed. 183, and certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Evans v. Hall Printing Press Co., 223 Fed. 539, 139 CCA 129; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; Jones v. Davis, 138 Fed. 62, 70 CCA 558 [certiorari den 200 U. S. 617 mem, 26 SCt 754 mem, 50 L. ed. 622 mem]; Westinghouse Air Brake Co. v. New York Air Brake Co., 119 Fed. 874, 56 CCA 404; Schreiber, etc., Mfg. Co. v. Adams Co., 117 Fed. 830, 54 CCA 128; Bracewell v. Passaic Print Works, 107 Fed. 467; Peifer v. Brown, 106 Fed. 938 [aff 112 Fed. 435, 50 CCA 331]; Lappin Brake-Shoe Co. v. Corning Brake-Shoe Co., 94 Fed. 162 [aff 99 Fed. 1004 mem, 40 CCA 215]; U. S. Glass Co. v. Atlas Glass Co., 88 Fed. 493 [aff 90 Fed. 724, 33 CCA 254]; Edison Electric Light Co. v. E. G. Bernard Co., 88 Fed. 267; Doig v. Sutherland, 87 Fed. 991; Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem]; Boynton Co. v. Morris Chute Co., 82 Fed. 440 [aff 87 Fed. 225, 30 CCA 617]; Chemical Rubber Co. v. Raymond Rubber Co., 68 Fed. 570 [aff 71 Fed. 179, 18 CCA 31]; Holtzer v. Consolidated Electric Mfg. Co., 60 Fed. 748 [rev on other grounds 67 Fed. 907, 15 CCA 63]; Duff Mfg. Co. v. Forgie, 57 Fed. 748 [aff 59 Fed. 772, 8 CCA 261]; Perrin v. Manhattan R. Co., 56 Fed. 503; Steiner Fire-Extinguisher Co. v. Adrian, 52 Fed. 731 [aff 59 Fed. 132, 8 CCA 44]; Francy v. Empire Fire-Clay Co., 47 Fed. 313; Haskell v. Hotchkiss, etc., Co., 44 Fed. 423; Hurd v. Snow, 35 Fed. 423; Holliday v. Pickhardt, 29 Fed. 853; Roemer v. Neumann, 26 Fed. 102 [aff 132 U. S. 103, 10 SCt 12, 33 L. ed. 277]; Yale Lock Mfg. Co. v. James, 20 Fed. 903 [aff 125 U. S. 447, 8 SCt 967, 31 L. ed. 807]; Ames v. Howard, 1 F. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482; Dyson v. Danforth, 8 F. Cas. No. 4,229, 4 Fish. Pat. Cas. 133; Estabrook v. Dunbar, 8 F. Cas. No. 4,535, 2 Bann. & A. 427; Many v. Sizer, 16 F. Cas. No. 9,057, 1 Fish. Pat. Cas. 31; Rich v. Close, 20 F. Cas. No. 11,757, 8 Blatchf. 41, 4 Fish. Pat. Cas. 279; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239; Montgomery v. U. S., 65 Ct. Cl. 526; Blaine v. White, 50 App. (D. C.) 38, 267 Fed. 340; Bergeon v. De Kermor Electric Heat Co., Ltd., [1927] Can. Exch. 181, [1927] 3 DomLR 99.

[a] **Evidence cannot change instrument.**—Clark v. Adie, 2 App. Cas. 423.

33. Kings County Raisin, etc., Co. v. U. S. Cons. Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 64 Fed. 859 [rev on other grounds 73 Fed. 469, 19 CCA 534]; Judd v. Fowler, 61 Fed. 821, 10 CCA 100; Groth v. International Postal Supply Co., 61 Fed. 284, 9 CCA 507.

[a] **The remedy for unnecessary limitations** (1) is by reissue, and not by construction. Dey Time Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807 [aff 178 Fed. 812, 102 CCA 260]. (2) Reissues generally see supra §§ 307-328.

34. Sanitary Refrigerator v. Winters, 24 F. (2d) 15 [certiorari den 49 SCt 8 mem, and certiorari granted 49 SCt 17 mem]; I. T. S. Rubber Co. v. United Lace, etc., Mfg. Co., 266 Fed. 375; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [rev 260 Fed. 183, and certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Neva-Slip Shirt Waist Grip Co. v. Marcon Mfg. Co., 215 Fed. 117; Century Elec-

design in order to remove any ambiguity arising from the terms employed;[35] but this ambiguity must not be such as would perplex any ordinary mechanic in the art to which it applies.[36] Where a patent does not disclose on its face the real invention of the patentee, it cannot be aided by parol testimony.[37]

[§ 339] **5. Contemporaneous Construction of Inventor.** The contemporaneous construction put by the patentee upon his own invention is entitled to consideration, but cannot control the plain terms of the patent.[38]

[§ 340] **6. Meaning of Words.** Words and phrases used in the patent will be given their ordinary meaning in the absence of anything to show that they are used in a different sense.[39] But their meaning may vary with the context[40] and with the circumstances.[41] Terms should be given a reasonable, and not a technically exact, meaning.[42] It is sometimes necessary to resort to the prior art to ascertain the meaning of an expression.[43]

A patentee may define his own terms, regardless of common or technical meaning, and his definition should be accepted in construing the patent.[44] However, such definition must be ascertained from the use of the words in the specification and claims,[45] and must be in harmony with the asserted advance which the invention represents over the prior art.[46]

Technical terms will be given the meaning in which they would be understood by those skilled in the art.[47]

Particular words and phrases. Many words and phrases as employed in patents have been judicially construed,[48] as for example, "attached;"[49] "auto-

tric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; Thomson-Houston Electric Co. v. Black River Tract. Co., 135 Fed. 759, 68 CCA 461; Paxton v. Brinton, 107 Fed. 137; Kursheedt Mfg. Co. v. Naday, 103 Fed. 948 [aff 107 Fed. 488, 46 CCA 422]; Electric Smelting, etc., Co. v. Carborundum Co., 102 Fed. 618, 42 CCA 537; Magic Light Co. v. Economy Gas-Lamp Co., 97 Fed. 87; Blount Mfg. Co. v. Bardsley, 75 Fed. 674, 21 CCA 495; Duff Mfg. Co. v. Forgie, 57 Fed. 748 [aff 59 Fed. 772, 8 CCA 261]; Bradley v. Dull, 19 Fed. 913; Giant Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Roberts v. Schreiber, 2 Fed. 855; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Evans v. Eaton, 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68 [rev on other grounds 3 Wheat. 454, 4 L. ed. 433]; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Pike v. Potter, 19 F. Cas. No. 11,162, 3 Fish. Pat. Cas. 55; Union Paper-Bag Co. v. Nixon, 24 F. Cas. No. 14,386, 6 Fish. Pat. Cas. 402.

[a] **Subsequent declarations of patentee** cannot vary the instrument. Union Paper-Bag Mach. Co. v. Pultz, etc., Co., 24 F. Cas. No. 14,392, 3 Bann. & A. 403, 15 Blatchf. 160.

[b] **Mistake as to theory of operation is not binding.**—U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. 103.

35. Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139]; Union Paper-Bag Mach. Co. v. Nixon, 24 F. Cas. No. 14,386, 6 Fish. Pat. Cas. 402.

36. Union Paper-Bag Mach. Co. v. Nixon, supra.

37. Wolff Truck Frame Co. v. American Steel Foundries, 195 Fed. 940, 115 CCA 628 [rev 189 Fed. 601].

38. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; Carson v. American Smelting, etc., Co., 293 Fed. 771 [rev on other grounds 4 F. (2d) 463 (certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem)]; MacColl v. Knowles Loom Works, 95 Fed. 982, 37 CCA 346; Beach v. Hobbs, 82 Fed. 916; Elgin Co-op. Butter-Tub Co. v. Creamery Package Mfg. Co., 80 Fed. 293, 25 CCA 426; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Wright v. Postel, 44 Fed. 352; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Stow v. Chicago, 23 F. Cas. No. 13,512, 3 Bann. & A. 83, 8 Biss. 47 [aff 104 U. S. 547, 26 L. ed. 816]; Trader v. Messmore, 24 F. Cas. No. 14,132, 1 Bann. & A. 639; Wells v. Jacques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60.

[a] **Construction accepted by patent office.**—Where applicant foresaw the variation from his form which defendant subsequently made, and explained to the patent office that the language was selected to cover the latter form, and thereupon the claim was allowed, it was held that the claim in the patent should receive the construction thus given by office and applicant. Rowley Co. v. Columbus Pharmacal Co., 220 Fed. 127, 136 CCA 81.

39. Lakewood Engineering Co. v. Stein, 8 F. (2d) 713 [certiorari den 270 U. S. 661 mem, 46 SCt 471 mem, 70 L. ed. 786 mem]; Lincoln v. Waterbury Button Co., Inc., 297 Fed. 619 [aff 291 Fed. 594]; Hammond v. Benzer Corp., 295 Fed. 908; Freeman Electric Co. v. Weber Electric Co., 262 Fed. 769 [aff 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162]; Kintner v. Atlantic Communication Co., 240 Fed. 716, 153 CCA 514 [aff 230 Fed. 829, and certiorari den 244 U. S. 661 mem, 37 SCt 746 mem, 61 L. ed. 1377 mem]; Gear v. Fairmount Electric, etc., Co., 231 Fed. 728, 146 CCA 12; Malleable Iron Range Co. v. Beckwith, 189 Fed. 74, 110 CCA 638 [aff 174 Fed. 1001]; Liberty v. Champion-International Co., 164 Fed. 877 [aff 175 Fed. 780, 99 CCA 352]; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310; Lanyon Zinc Co. v. Brown, 129 Fed. 912, 64 CCA 344; U. S. Repair, etc., Co. v. Assyrian Asphalt Co., 96 Fed. 235 [aff 100 Fed. 965, 41 CCA 123 (aff 183 U. S. 591, 22 SCt 87, 46 L. ed. 342)]; Computing Scale Co. v. Keystone Store-Service Co., 88 Fed. 788 [aff 101 Fed. 837, 42 CCA 48]; Bennett v. Schooley, 75 Fed. 392; Gould Coupler Co. v. Trojan Car-Coupler Co., 74 Fed. 794, 21 CCA 97; American Sulphite Pulp Co. v. Howland Falls Pulp Co., 70 Fed. 986 [rev on other grounds 80 Fed. 395, 25 CCA 500]; Holtzer v. Consolidated Electric Mfg. Co., 60 Fed. 748 [rev on other grounds 67 Fed. 907, 15 CCA 63]; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301; Henzel v. California Electrical Works, 51 Fed. 754, 2 CCA 495; California Electrical Works v. Henzel, 48 Fed. 375 [aff 51 Fed. 754, 2 CCA 495]; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 117 [reh den 39 Fed. 490]; Michaelis v. Roessler, 34 Fed. 325; Richardson v. Bresnahan, 23 Fed. 897 [app dism 131 U. S. 445 mem, 9 SCt 802 mem, 33 L. ed. 224 mem]; Tilghman v. Mitchell, 23 F. Cas. No. 14,043, 2 Fish. Pat. Cas. 518; Clark v. Adie, 2 App. Cas. 423; Crossley v. Beverley, 9 B. & C. 63, 17 ECL 38, 109 Reprint 24, 3 C. & P. 513, 14 ECL 690, 172 Reprint 526, M. & M. 283, 22 ECL 522, 1 Russ. & M. 166 note, 5 EngCh 166 note, 39 Reprint 65, 20 ERC 197; Elliott v. Turner, 2 C. B. 446, 52 ECL 446, 135 Reprint 1019, 20 ERC 300.

[a] **Resort may be had to dictionaries.**—Freeman Electric Co. v. Weber Electric Co., 262 Fed. 769 [aff 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162].

40. Lincoln v. Waterbury Button Co., Inc., 297 Fed. 619 [aff 291 Fed. 594]; Clipper Belt Lacer Co. v. E-W Co., 237 Fed. 602, 150 CCA 484; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310.

41. Clipper Belt Lacer Co. v. E-W Co., 237 Fed. 602, 150 CCA 484.

42. E. J. Manville Mach. Co. v. Excelsior Needle Co., 167 Fed. 538, 93 CCA 216 [aff 162 Fed. 486]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Mica Insulator Co. v. Commercial Mica Co., 166 Fed. 440, 92 CCA 292 [certiorari den 215 U. S. 604 mem, 30 SCt 405 mem, 54 L. ed. 345 mem, and rev 157 Fed. 90]; Kip-Armstrong Co. v. King Phillip Mills, 130 Fed. 28 [rev on other grounds 132 Fed. 975, 66 CCA 45]; U. S. Repair, etc., Co. v. Assyrian Asphalt Co., 96 Fed. 235 [aff 100 Fed. 965 (aff 183 U. S. 591, 22 SCt 87, 46 L. ed. 342)]; Union R. Co. v. Sprague Electric R., etc., Co., 88 Fed. 82, 31 CCA 391; A. B. Dick Co. v. Wichelman, 80 Fed. 519 [aff 88 Fed. 264]; American Sulphite Co. v. Howland Falls Pulp Co., 80 Fed. 395, 25 CCA 500; Johnson v. Brooklyn Heights R. Co., 75 Fed. 668; Thompson v. Jennings, 75 Fed. 572, 21 CCA 486; Grier v. Castle, 17 Fed. 523; Chandler v. Ladd, 5 F. Cas. No. 2,593, McA. Pat. Cas. 493.

[a] **Use of relative terms** in a patent claim does not necessarily destroy the claim for indefiniteness, nor require that such terms be denied reasonable elasticity. Vacuum Cleaner Co. v. Innovation Electric Co., 234 Fed. 942 [aff 239 Fed. 543, 152 CCA 421].

43. Goldschmidt Thermit Co. v. American Vanadium Co., 291 Fed. 81.

State of the art as affecting construction of patent see infra § 343.

44. Health Products Corp. v. Ex-Lax Mfg. Co., 24 F. (2d) 245 [aff 22 F. (2d) 286]; Cadwell v. Firestone Tire, etc., Co., 13 F. (2d) 483; International Cork Co. v. New Process Cork Co., 6 F. (2d) 420 [rev 295 Fed. 539]; Victory Belt Co. v. Field, 300 Fed. 67; Wheeler Salvage Co., Inc. v. Rinelli & Guardino, Inc., 295 Fed. 717; Wire Wheel Corp. v. Budd Wheel Co., 288 Fed. 308; Rajah Auto Supply Co. v. Belvidere Screw, etc., Co., 275 Fed. 761; Advance Rumley Co. v. John Lauson Mfg. Co., 275 Fed. 249; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103]; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Kennicott Co. v. Holt Ice, etc., Co., 230 Fed. 157, 144 CCA 455; Louden Mach. Co. v. Strickler, 195 Fed. 751, 115 CCA 551; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Blair v. Jeannette-McKee Glass Works, 161 Fed. 355.

45. Advance Rumley Co. v. John Lauson Mfg. Co., 275 Fed. 249.

46. Advance Rumley Co. v. John Lauson Mfg. Co., supra.

47. Melvin v. Potter, 91 Fed. 151.

48. See words and phrases passim this work.

49. National Brake, etc., Co. v. Christensen, 229 Fed. 564, 144 CCA 24 [certiorari den 241 U. S. 659 mem, 36 SCt 447 mem, 60 L. ed. 1225 mem].

matically;"[50] "automobile transmission band;"[51] "balanced draft;"[52] "bell;"[53] "circumferential;"[54] "closed;"[55] "closed casing;"[56] "coincidentally;"[57] "concealment;"[58] "continuous;"[59] "convex;"[60] "corrugations;"[61] "drier;"[62] "end of end;"[63] "essentially;"[64] "flat;"[65] "green peanuts;"[66] "hermetically;"[67] "hung permanently;"[68] "independent;"[69] and "independently of;"[70] "integral;"[71] "iron coil;"[72] "laminated elementary scales;"[73] "leaching;"[74] "means;"[75] "more or less;"[76] "narrow;"[77] "plastic;"[78] "propelled;"[79] "resilient;"[80] "short circuiting;"[81] "simultaneous;"[82] or "simultaneously;"[83] "substantially;"[84] "sufficient vacuum;"[85] "throttling-valve;"[86] "welding;"[87] and "wind shield."[88]

[§ 341] **7. Proceedings in Patent Office.**[89] The proceedings in the patent office pending an application are not as a general rule admissible as evidence tending to enlarge, diminish, or vary the language of the claim of the patent.[90] Any correspondence between the inventor and the patent office prior to the grant of the patent is inadmissible to enlarge, diminish, or vary the language of the patent afterward issued,[91] at least where its terms are not ambiguous.[92] But the file wrapper may be used to interpret the language of a patent, when susceptible of different legitimate meaning,[93] and to determine whether an estoppel has arisen.[94] Arguments made by applicant in the patent office are not to be taken as the measure of his patent, where not accompanied by any changes in claims;[95] and do not estop the patentee from claiming what is clearly granted by the patent.[96] When the patent bears on its face a particular construction, such a construction may be

50. American Roll Gold Leaf Co. v. W. H. Coe Mfg. Co., 212 Fed. 720, 129 CCA 330 [rev 199 Fed. 435].

51. Ford Motor Co. v. Parks, 21 F. (2d) 943.

52. Engineer Co. v. Hotel Astor, 226 Fed. 779 [aff 226 Fed. 949, 141 CCA 553].

53. Victor Talking Mach. Co. v. Duplex Phonograph Co., 182 Fed. 822, 105 CCA 254.

54. Todd v. J. Whitaker Mfg. Co., 226 Fed. 791 [aff 232 Fed. 714, 146 CCA 640].

55. Marconi's Wireless Tel. Co. v. Mullard Radio Valve Co., 40 R. P. C. 159.

56. Van Ness v. Layne, 213 Fed. 804, 130 CCA 462.

57. Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295.

58. Politzer Toy Mfg. Co. v. National French Fancy Novelty Co., 253 Fed. 451.

59. Whitlock Coil Pipe Co. v. Mayo Radiator Co., 266 Fed. 215 [rev 257 Fed. 752].

60. Malleable Iron Range Co. v. Beckwith, 189 Fed. 74, 110 CCA 638 [aff 174 Fed. 1001].

61. Long v. Noye Mfg. Co., 192 Fed. 566.

62. Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424.

63. Stebler v. Riverside Heights Orange Growers' Assoc., 205 Fed. 735, 124 CCA 29 [certiorari den 231 U. S. 748 mem, 34 SCt 320 mem, 58 L. ed. 465 mem].

64. Pittsburgh Iron, etc., Co. v. Seaman-Sleeth Co., 236 Fed. 756 [aff 248 Fed. 705, 160 CCA 605].

65. Imperial Mach., etc., Corp. v. American Mach. Co., 276 Fed. 436.

66. Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496.

67. Gear v. Fairmount Electric, etc., Co., 231 Fed. 728, 146 CCA 12 [rev 225 Fed. 61].

68. Brothers v. Lidgerwood Mfg. Co., 223 Fed. 359, 138 CCA 460.

69. Thacher v. Transit Constr. Co., 234 Fed. 640, 148 CCA 406 [aff 228 Fed. 905].

70. Rowley Co. v. Columbus Pharmacal Co., 220 Fed. 127, 136 CCA 81.

71. Clipper Belt Lacer Co. v. E-W Co., 237 Fed. 602, 150 CCA 484.

72. Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103].

73. Mica Insulator Co. v. Commercial Mica Co., 166 Fed. 440, 92 CCA 292 [certiorari den 215 U. S. 604 mem, 30 SCt 405 mem, 54 L. ed. 345 mem, and rev 157 Fed. 90].

74. Tonopah Min. Co. v. Vincent, 212 Fed. 163, 129 CCA 19 [rev 207 Fed. 579].

75. Henry v. Los Angeles, 230 Fed. 457.

76. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 225 Fed. 789 [aff 229 Fed. 150, 143 CCA 426].

77. Vacuum Cleaner Co. v. Innovation Electric Co., 239 Fed. 543, 152 CCA 421 [aff 234 Fed. 942].

78. Blair v. Jeannette-McKee Glass Works, 161 Fed. 355.

79. Victor Talking Mach. Co. v. Duplex Phonograph Co., 177 Fed. 248.

80. Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523.

81. Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem].

82. Westinghouse Mach. Co. v. C. & G. Cooper Co., 245 Fed. 463, 157 CCA 625; Highland Glass Co. v. Schmertz Wire Glass Co., 178 Fed. 944, 102 CCA 316 [certiorari den 219 U. S. 588 mem, 31 SCt 472 mem, 55 L. ed. 348 mem].

83. E. J. Manville Mach. Co. v. Excelsior Needle Co., 167 Fed. 538, 93 CCA 216 [aff 162 Fed. 486].

84. Engineer Co. v. Hotel Astor, 226 Fed. 779 [aff 226 Fed. 949, 141 CCA 553]; Valvona-Marchiony Co. v. Marchiony, 207 Fed. 380.

Use of term "substantially as described" see infra § 351.

85. Vacuum Cleaner Co. v. Innovation Electric Co., 234 Fed. 942 [aff 239 Fed. 542, 152 CCA 421].

86. Advance Rumley Co. v. John Lauson Mfg. Co., 275 Fed. 249.

87. American Steel Foundries v. Damascus Brake Beam Co., 267 Fed. 574.

88. Hammond v. Benzer Corp., 295 Fed. 908.

89. Procedure see supra §§ 146-269.

90. Vandenburgh v. Electric Welding Co., 263 Fed. 95 [certiorari den 253 U. S. 497 mem, 40 SCt 587 mem, 64 L. ed. 1031 mem]; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 194 Fed. 427, 114 CCA 389; Goodyear Dental Vulcanite Co. v. Gardiner, 11 F. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224.

91. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; Campbell Metal Window Corp. v. Pomeroy, 300 Fed. 872; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Goodyear Dental Vulcanite Co. v. Gardiner, 10 F. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]. But see Pike v. Potter, 19 F. Cas. No. 11,162, 3 Fish. Pat. Cas. 55 (holding that the correspondence between the patent office and the patentee is evidence, at least in a court of equity, for the purpose of showing the limitation placed by the patentee upon his claims).

[a] **Copy of an advertising publication** submitted to the examiner before the patent was issued cannot be considered as evidence of the basis for the grant of the patent. Stumpf v. A. Schreiber Brewing Co., 252 Fed. 142, 164 CCA 254 [aff 242 Fed. 72].

92. Deppe v. General Motors Corp., 15 F. (2d) 419; Sugar Apparatus Mfg. Co. v. Yaryan Mfg. Co., 43 Fed. 140.

[a] **Language of solicitor employed to obtain patent.**—Where the specifications of the application and of the letters patent are not ambiguous and are capable of a definite construction, the language of a solicitor employed to obtain the patent, used in a communication with the patent office to convey an idea of his own, will not override the language of the patent, especially where there is no evidence to show that the idea was ever adopted by the patent office. Wirt v. Brown, 32 Fed. 283.

93. Steel Wheel Corp. v. B. F. Goodrich Rubber Co., 27 F. (2d) 427; Johnson v. Browning, 277 Fed. 315; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Freeman Electric Co. v. Weber Electric Co., 262 Fed. 769 [aff 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162]; Lewis Blind-Stitch Mach. Co. v. Arbetter Felling Mach. Co., 208 Fed. 992 [aff 219 Fed. 557, 135 CCA 325]. But see Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325] (file wrapper cannot be read in aid of the patentee).

[a] **Remedying indefiniteness.**—File wrapper cannot be used to remedy the patent's indefiniteness. Steel Wheel Corp. v. B. F. Goodrich Rubber Co., 27 F. (2d) 427.

[b] **Discussion in patent office** must be read in the light of the ground which caused the discussion. Stetson Hospital v. Snook-Roentgen Mfg. Co., 245 Fed. 654, 158 CCA 82 [aff 237 Fed. 204].

94. Lyon v. Boh, 10 F. (2d) 30 [rev 1 F. (2d) 481]; Racine Confectioners' Mach. Co. v. Metro Chocolate Co., 297 Fed. 635; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; Heitler v. Brooklyn Shield, etc., Co., 295 Fed. 333; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Baltzley v. Spengler Loomis Mfg. Co., 262 Fed. 423; Spalding v. Wanamaker, 256 Fed. 530, 167 CCA 602; Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575].

95. Racine Confectioners' Mach. Co. v. Metro Chocolate Co., 297 Fed. 635; Pangborn Corp. v. W. W. Sly Mfg. Co., 284 Fed. 217 [aff 263 Fed. 394, 276 Fed. 971 (certiorari den 260 U. S. 749 mem, 43 SCt 249 mem, 67 L. ed. 495 mem)]; Crystal Percolator Co., Inc. v. Landers, 258 Fed. 28; Auto Pneumatic Action Co. v. Kindler, 247 Fed. 323, 159 CCA 417; Hess-Bright Mfg. Co. v. Fichtel, 219 Fed. 723, 135 CCA 421 [certiorari den 238 U. S. 623 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Dodge Needle Co. v. Jones, 153 Fed. 186 [aff 159 Fed. 715, 86 CCA 191]; Victor Talking Mach. Co. v. American Graphophone Co., 151 Fed. 601, 81 CCA 145.

96. Deppe v. General Motors Corp., 15 F. (2d) 419; Alliance Se-

confirmed by what the patentee said when he was making his application.[97] Mere remarks by the examiner in the course of the proceedings do not estop the patentee from claiming the construction shown by the specification and original claim.[98]

Construction contemplated by patent office. Where it is in evidence from the record of the patent office that a certain construction was there contemplated, and that the patent would not otherwise have been granted, that construction will be followed,[99] and no objection can be made to the same construction on the ground that it is narrow, and will render the patent practically useless.[1] But an interpretation by the patent authorities extending claims beyond their proper import is not binding on the public.[2]

Formal admissions imposed upon applicant as a condition precedent to the allowance of a patent are binding.[3]

[§ 342] **8. Other Patents or Applications Therefor.** Two patents cannot be read together to make up a claim.[4] Where a patent expressly refers to another patent, such other patent may be read to ascertain the true intent and construction to be placed on the patent making the reference.[5] Other patents relating to the same subject matter and designed to protect part of the same discovery may also be considered.[6] Where different applications by a patentee and interference proceedings relating to the same subject matter are pending at the same time, all may be considered in determining the construction of the patent, as granted,[7] but it is not proper to interpret an issued patent to extend its scope in the light of a copending application referred to in the patent which application has not ripened into a patent.[8]

Where an inventor divides up his invention so as to present certain elements in different patents, he is thereby limited to a more strict and narrow construction than might have been otherwise necessary.[9]

[§ 343] **9. State of the Art.** A patent is to be

curities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Parker Rust Proof Co. v. Ford Motor Co., 6 F. (2d) 649; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Racine Confectioners' Mach. Co. v. Metro Chocolate Co., 297 Fed. 635; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; Heitler v. Brooklyn Shield, etc., Co., 295 Fed. 333; Spalding v. Wanamaker, 256 Fed. 530, 167 CCA 602; Automatic Recording Safe Co. v. Bankers' Registering Safe Co., 224 Fed. 506 [rev 241 Fed. 472, 154 CCA 304]; McCormick Waterproof Portland Cement Co. v. Medusa Concrete Waterproofing Co., 222 Fed. 288, 138 CCA 14; Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139]; Armstrong v. Belding, 174 Fed. 410, 98 CCA 361 [mod 172 Fed. 234]; Consolidated Fastener Co. v. Columbian Fastener Co., 79 Fed. 795; Britton v. White Mfg. Co., 61 Fed. 93.

[a] **The use of an unsound and unsuccessful argument** by the inventor's solicitor with respect to a rejected claim will not have the effect of imposing a constructive limitation upon the claim allowed. Société Anonyme Usine J. Cléret v. Rehfuss, 75 Fed. 657.

[b] **The claims of a patent are not narrowed by statements** made on an argument by counsel before the patent office to obtain a reconsideration after the application has been rejected, where no changes are made in the claims. Boyer v. Keller Tool Co., 127 Fed. 130, 62 CCA 244 [certiorari den 193 U. S. 673 mem, 24 SCt 855 mem, 48 L. ed. 842 mem].

97. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Racine Confectioners' Mach. Co. v. Metro Chocolate Co., 297 Fed. 635; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; Heitler v. Brooklyn Shield, etc., Co., 295 Fed. 333; Lorraine v. Townsend, 290 Fed. 54 [rev 283 Fed. 806]; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840; Stumpf v. A. Schreiber Brewing Co., 252 Fed. 142, 164 CCA 254 [aff 242 Fed. 72]; Rowley Co. v. Columbus Pharmacal Co., 220 Fed. 127, 136 CCA 81; Victor Talking Mach. Co. v. American Graphophone Co., 151 Fed. 601, 81 CCA 145.

[a] **While admissions** in the file wrapper may not be adverted to as enlarging or diminishing or varying the language of the patent thereafter issued, they may have value in indicating the construction that should be put on the claims. Warren Bros. Co. v. Thompson, 293 Fed. 745 [aff 282 Fed. 326].

98. Spalding v. Wanamaker, 256 Fed. 530, 167 CCA 602; Acme Flexible Clasp Co. v. Cary Mfg. Co., 96 Fed. 344, 99 Fed. 500 [aff 101 Fed. 269, 41 CCA 338]; Consolidated Fastener Co. v. Columbian Fastener Co., 79 Fed. 795.

99. Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Lektophone Corp. v. Rola Co., 27 F. (2d) 758; Alliance Securities Co. v. De Vilbiss Co., 24 F. (2d) 530; Greenawalt v. American Smelting, etc., Co., 3 F. (2d) 658 [aff 10 F. (2d) 98]; Phœnix Knitting Works v. Rich, 194 Fed. 721 [app dism 202 Fed. 1022 mem, 120 CCA 663 mem]; Safety Car Heating, etc., Co. v. Consolidated Car Heating Co., 160 Fed. 476 [aff 174 Fed. 658, 98 CCA 412].

[a] **Application of rule.**—Where a patent was granted on the contention and argument of applicant that his device was distinguished from prior reference in a certain particular, he cannot insist that such feature is immaterial to establish infringement. Grever v. U. S. Hoffman Co., 202 Fed. 923, 121 CCA 281.

[b] **As disclaimer.**—Representations made to secure patents operate as disclaimers, and are binding on patentee. Lektophone Corp. v. Rola Co., 27 F. (2d) 758.

[c] **Settled rule of construction.**—When the patent office has a settled rule of construction under which a certain phrase in a patent grant has a fixed meaning, acquiesced in by the patentee, the courts cannot afterward rightfully say that the phrase means something more or something less. National Tube Co. v. Mark, 216 Fed. 507, 133 CCA 13.

1. Geis v. Kimber, 36 Fed. 105.

2. Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533].

3. Welsbach Light Co. v. Cremo Incandescent Light Co., 151 Fed. 1023, 81 CCA 683 [aff 145 Fed. 521]; Victor Talking Mach. Co. v. American Graphophone Co., 151 Fed. 601, 81 CCA 145.

[a] **Where the patent is not for a broad invention but merely for a change of form,** admissions contained in a file wrapper and its contents in respect of amendments made upon the citation of references involving the issue of novelty constitute an estoppel against the patentee in the interpretation of his claims. Richardson v. American Pin Co., 73 Fed. 476.

[b] **Disclaimer as admission of priority of noninterfering claims in copending application.**—Where the owner of a pending application on notice of interference with a particular claim of a copending application disclaimed as to it, and erased part of his application relating thereto, the patent office, in declaring interference, as to one claim only, in effect ruled that there was no interference between other claims of the copending application, and applicant's course of conduct in disclaiming as to the one claim only was in effect a formal admission, with concurrence and approval of the patent office, that the copending application was entitled to priority as to claims as to which no interference was declared. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372 [mod 1 F. (2d) 590 (certiorari den 273 U. S. 699 mem, 47 SCt 94 mem, 71 L. ed. 847 mem)].

4. Rose v. Hirsh, 77 Fed. 469, 23 CCA 246.

5. North American Chemical Co. v. Dexter, 252 Fed. 148.

[a] **Patent expressly for improvement** (1) on the device of a prior patent to the same inventor should be read in connection with the first, and will not be declared void because, standing alone, it does not describe an operative apparatus. Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 CCA 446. (2) The rule that a claim which is broader than the described invention is void is not applicable in its full force where the patent is for an improvement on the device of an earlier patent to the same patentee. Hinman v. Starch Bros. Co., 247 Fed. 346 [aff 259 Fed. 222, 170 CCA 290].

6. Okmulgee Window Glass Co. v. Window Glass Mach. Co., 265 Fed. 626; Freeman Electric Co. v. Weber Electric Co., 262 Fed. 769 [aff 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162].

[a] **Later patent for one form** may indicate intended scope of claims in first. D'Arcy v. Staples, etc., Co., 161 Fed. 733, 88 CCA 606; McCormick Harvesting Mach. Co. v. Aultman, 58 Fed. 773 [mod on other grounds 69 Fed. 371, 16 CCA 259 (rev on other grounds 169 U. S. 606, 18 SCt 773, 42 L. ed. 875)].

[b] **Where process and product patent** were the result of a division, the product patent may be examined to ascertain the scope of invention of the process patent. Bestwall Mfg. Co. v. U. S. Gypsum Co., 270 Fed. 542 [aff 258 Fed. 647].

Related patents as affecting state of art see infra § 343.

7. Lewis Blind-Stitch Mach. Co. v. Arbetter Felling Mach. Co., 208 Fed. 992 [aff 219 Fed. 557, 135 CCA 325].

8. New York Calculating Mach. Co., Inc. v. International Money Mach. Co., Inc., 285 Fed. 635.

9. New Departure Bell Co. v. Be-

construed in the light of the state of the art at the time it was granted,[10] and the patentee is entitled only to the benefit of such forward movement in the art as has resulted from the particular patent in suit.[11] When they can see that there has been a new discovery of great benefit to the art, courts are liberal in the interpretation of disclosures and claims,[12] but where there has been only a slight step forward, the patent, if sustained, will be given a narrow scope.[13] Where a patent was in art which was new, and some of its definitions and phraseology were in the making, courts should not be astute to find obstacles against the inventor,[14] but the courts must also be vigilant to prevent endeavors on the part of the patentee to utilize after-acquired knowledge.[15]

Evidence. Although evidence of prior patents and prior use is not competent to show the invalidity of the patent on which a suit for infringement is brought, unless the matter is set up in the answer and the required notice is given,[16] it is nevertheless admissible for the purpose of construing the patent.[17] It has been very generally held that in re-

vin Bros. Mfg. Co., 64 Fed. 859 [rev on other grounds 73 Fed. 469, 19 CCA 534]; Electrical Accumulator Co. v. Brush Electric Co., 52 Fed. 130, 2 CCA 682.

10. Minerals Separation, Ltd. v. Hyde, 242 U. S. 261, 37 SCt 82, 61 L. ed. 286 [rev 214 Fed. 100, 130 CCA 576]; Bassick Mfg. Co. v. Rogers, 26 F. (2d) 724; Wood v. Boylan, 19 F. (2d) 48; Cincinnati Cadillac Co. v. English, etc., Co., 18 F. (2d) 542; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Hommel Mfg. Co. v. East Side Mfg. Co., 16 F. (2d) 1008; Krichbaum v. McDanel, 282 Fed. 455; Selectasine Patents Co. v. Prest-O-Graph Co., 282 Fed. 223 [aff 267 Fed. 840, 276 Fed. 260]; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Universal Farm Clamp Co. v. Taxis, 267 Fed. 578 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; Freeman Electric Co. v. Weber Electric Co., 262 Fed. 769 [aff 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162]; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Crystal Percolator Co., Inc. v. Landers, 258 Fed. 28; U. S. v. Discher, 255 Fed. 719; North American Chemical Co. v. Dexter, 252 Fed. 148; Stumpf v. A. Schreiber Brewing Co., 252 Fed. 142, 164 CCA 254 [aff 242 Fed. 72]; Consolidated R. Electric Lighting, etc., Co. v. U. S. Light, etc., Corp., 246 Fed. 127 [aff 278 Fed. 80]; Moore v. Wright Wire Co., 237 Fed. 87, 150 CCA 289; Union Special Mach. Co. v. Quaker City Flour Mills Co., 236 Fed. 246; Sundh Electric Co. v. General Electric Co., 235 Fed. 708, 217 Fed. 583; Kennicott Co. v. Holt Ice, etc., Co., 230 Fed. 157, 144 CCA 455; Hall-Borchert Dress Form Co. v. Ellanam Adjustable Form Co., 213 Fed. 341, 130 CCA 193; Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150]; Louden Mach. Co. v. Strickler, 186 Fed. 522 [rev on other grounds 195 Fed. 751, 115 CCA 551]; Friestedt v. National Interlocking Steel Sheeting Co., 182 Fed. 836 [aff 195 Fed. 757, 115 CCA 557]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484 [reh den 186 Fed. 495, 108 CCA 502]; Williams Patent Crusher, etc., Co. v. Pennsylvania Crusher Co., 176 Fed. 576 [rev on other grounds 185 Fed. 805, 108 CCA 37]; Aranow v. Chein, 172 Fed. 445; Lovell v. Seybold Mach. Co., 169 Fed. 288, 94 CCA 578; Poole v. Marshall-Jackson Co., 161 Fed. 752 [aff 171 Fed. 842, 96 CCA 510]; Simplex Railway Appliance Co. v. Wands, 115 Fed. 517, 53 CCA 171; Allen v. Grimes, 89 Fed. 869; New Departure Bell Co. v. Corbin, 88 Fed. 901; Miller Co. v. Meriden Bronze Co., 80 Fed. 523; Elgin Co-operative Butter-Tub Co. v. Creamery Package Mfg. Co., 80 Fed. 293, 25 CCA 426; Rowlett v. Anderson, 76 Fed. 827 [app dism 91 Fed. 1004, 33 CCA 686]; Missouri Lamp, etc., Mfg. Co. v. Stempel, 75 Fed. 583; Koch v. Bolz, 42 Fed. 454; Parsons v. Colgate, 15 Fed. 600, 21 Blatchf. 171; Neacy v. Allis, 13 Fed. 874; Barker v. Todd, 13 Fed. 473 [app dism 15 Fed. 265]; Scott v. Evans, 11 Fed. 726; Root v. Lamb, 7 Fed. 222; Giant Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 6 Sawy. 508; Estabrook v. Dunbar, 8 F. Cas. No. 4,535, 2 Bann. & A. 427; Huggins v. Hubby, 12 F. Cas. No. 6,839; Mann v. Bayliss, 16 F. Cas. No. 9,034; Pitts v. Wemple, 19 F. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Sprague v. Adriance, 22 F. Cas. No. 13,248, 3 Bann. & A. 124. And see infra §§ 354–356.

[a] **Terms as test of invention and infringement.**—The questions of invention and of infringement are not verbal questions, and neither can be determined by the test of the words used in the patent claims. Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304, 166 CCA 44]; Page Mach. Co. v. Dow, 166 Fed. 473 [aff 168 Fed. 703, 94 CCA 209].

[b] **Recitals of the prior art** (1) in the specification of a patent can no more be taken as conclusive to negative novelty and invention than the claims of novelty and invention therein to establish the same. Mead Morrison Mfg. Co. v. Exeter Mach. Works, 196 Fed. 789. (2) In an infringement suit involving a patent for an abrasive compound, clear statements in the patent that grinding mixtures employing oil as an ingredient were known to the art, and that the improvement claimed was a change from oil to starch, were properly to be considered on question of validity. Zip Mfg. Co. v. Pusch, 2 F. (2d) 828.

[c] **Related patents issued to patentee** as well as others must be considered to ascertain the effect on the art of the patent in suit. Haynes Stellite Co. v. Chesterfield, 8 F.(2d) 765.

[d] **Prior patents showing separate elements.**—Although all of the elements of a patented combination are not found in a single structure in the prior art, so as fully to anticipate, in determining the scope of the patent and its place in the art, as affecting the question of infringement, prior patents, showing separate elements of the combination, may properly be considered. Ventilated Cushion, etc., Co. v. D'Arcy, 232 Fed. 468, 146 CCA 462.

[e] **Adaptability to phase of art.**—Where an inventor has placed his invention generally and specifically in the printing machine art, the fact that it is especially adapted to the lithographic phase of that art is not important except in so far as the problems peculiar to that application may assist in determining the question of invention. Scott v. Harris Automatic Press Co., 284 Fed. 778.

[f] **Patent issued pending application** for the one in suit, although on a prior application, is not in the prior art. American Graphophone Co. v. Emerson Phonograph Co., 255 Fed. 574.

[g] **Evidence as to meaning of terms admitted.**—Betts v. Menzies, 10 H. L. Cas. 117, 11 Reprint 970, 20 ERC 539.

11. Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1023 (certiorari den 267 U. S. 597 mem, 45 SCt 352 mem, 69 L. ed. 806 mem)]; Ward v. Rogers Bros. Co., 241 Fed. 257, 154 CCA 177.

12. Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Van Heusen Products, Inc. v. Earl, 300 Fed. 922; Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362.

13. Dunham v. Dennison Mfg. Co., 154 U. S. 103, 14 SCt 986, 38 L. ed. 924; Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 238, 12 SCt 641, 36 L. ed. 419; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 10 SCt 409, 33 L. ed. 663; Ashcroft v. Boston, etc., R. Co., 97 U. S. 189, 24 L. ed. 982; Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Dart v. Saylor Electric Co., 210 Fed. 462 [rev on other grounds 212 Fed. 407, 129 CCA 601]; Hess-Bright Mfg. Co. v. Fichtel, 209 Fed. 867 [rev on other grounds 219 Fed. 723, 135 CCA 421 (certiorari den 238 U. S. 623 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem)]; Thomson Electric Welding Co. v. North, etc., Mfg. Co., 205 Fed. 764; Atlas Portland Cement Co. v. Sandusky Portland Cement Co., 196 Fed. 385, 116 CCA 207; Railroad Supply Co. v. Hart Steel Co., 193 Fed. 418; General Electric Co. v. Allis-Chalmers Co., 193 Fed. 58; Highland Glass Co. v. Schmertz Wire Glass Co., 178 Fed. 944, 102 CCA 316 [certiorari den 219 U. S. 588 mem, 31 SCt 472 mem, 55 L. ed. 348 mem]; Brill v. Peckham Motor Truck, etc., Co., 108 Fed. 267, 47 CCA 315 [certiorari granted 183 U. S. 698 mem, 22 SCt 946 mem, 46 L. ed. 395 mem (rev on other grounds 189 U. S. 57, 23 SCt 562, 47 L. ed. 706)]; Consolidated Store-Serv. Co. v. Siegel Cooper Co., 107 Fed. 716, 46 CCA 599; Sprague Electric R., etc., Co. v. Nassau Electric R. Co., 102 Fed. 761, 42 CCA 612; Santa Clara Valley Mill, etc., Co. v. Prescott, 102 Fed. 501, 42 CCA 477; Empire Target Co. v. Cleveland Target Co., 102 Fed. 354, 42 CCA 393; Rauh v. Guinzburg, 101 Fed. 1007, 42 CCA 139; Dodge v. Ohio Valley Pulley Works, 101 Fed. 581 [mod on other grounds 107 Fed. 277]; Regina Music-Box Co. v. Hasse, 97 Fed. 617; Ball, etc., Fastener Co. v. A. Edgarton Mfg. Co., 96 Fed. 489, 37 CCA 523; Davey Pegging-Mach. Co. v. Prouty, 96 Fed. 336 [aff 107 Fed. 505, 46 CCA 439 (certiorari den 184 U. S. 698 mem, 22 SCt 937 mem, 46 L. ed. 764 mem)]; Electric Gas Lighting Co. v. Fuller, 59 Fed. 1003, 8 CCA 442; Curtis v. Atlanta St. R. Co., 56 Fed. 596; St. Paul Plow-Works v. Deere, 54 Fed. 501; Overman v. Warwick Cycle Mfg. Co., 54 Fed. 496 [aff 61 Fed. 986, 10 CCA 222]; National Harrow Co. v. Hanby, 54 Fed. 493; Briggs v. Central Ice Co., 54 Fed. 376 [aff 60 Fed. 87, 8 CCA 480]; Blair Camera Co. v. Barker, 53 Fed. 483; Baumer v. Will, 53 Fed. 373; Pettibone v. Stanford, 53 Fed. 118, 3 CCA 469; Actiebolaget Separator v. Sharpless, 50 Fed. 87; Ricks v. Craig, 48 Fed. 169; Zan v. Quong Sang Lung, 47 Fed. 901; Johnson Co. v. Pacific Rolling Mills Co., 47 Fed. 586 [aff 51 Fed. 762, 2 CCA 506]; Firman v. New Haven Clock Co., 44 Fed. 205; Root v. Sioux City Cable R. Co., 42 Fed. 500; Reed v. Smith, 40 Fed. 882; Hatch v. Towne, 35 Fed. 139; Dodds v. Stoddard, 17 Fed. 645; Putnam v. Von Hofe, 6 Fed. 897, 19 Blatchf. 63; Decker v. Griffith, 7 F. Cas. No. 3,725, 2 Bann & A. 178, 13 Blatchf. 187; Rice v. Schutte, 38 App. (D. C.) 175.

14. Kintner v. Atlantic Communication Co., 249 Fed. 73.

15. Kintner v. Atlantic Communication Co., 230 Fed. 829 [aff 240 Fed 716, 153 CCA 514 (certiorari den 244 U. S. 661, mem, 37 SCt 746 mem, 61 L. ed. 1377 mem)].

16. See infra § 564.

17. Zip Mfg. Co. v. Pusch, 2 F. (2d) 828.

spect of the state of the art the court may take judicial notice of matters of common knowledge.[18]

[§ 344] **10. Success or Nonuse of Patent.** The fact that a patent has become a great commercial success is a reason for according it a liberality of construction;[19] but the rule is not so applicable where the success of the patent is accounted for on other grounds than its utility.[20] While the validity of a patent is not affected by nonuse,[21] it is ground for giving it a strict or narrow construction.[22]

[§ 345] **11. Construction Where Patent Assigned.** As between an assignor and assignee, a patent should be liberally construed.[23] However, the assignor is not precluded from contending for as narrow a construction of the language as the claims would warrant and the conditions of the prior art might require,[24] but the courts will not unnecessarily construe it so narrowly as to make it worthless,[25] as the assignor is estopped to deny its validity.[26] The fact that complainant, before acquiring the patent which it claimed was infringed, gave it a narrow construction does not estop him from asserting a broader construction after acquisition, and claiming defendant's infringement.[27]

[§ 346] **12. Opinion of Experts.** It is only where a court requires the explanation of technical terms or the language of any particular art to enable it to understand the specification of a patent that the testimony of those expert in the art is pertinent.[28] The question whether the judge needs the assistance of experts is for him to decide.[29] The court is not bound by the opinions of experts and may reject them where they do not seem reasonable.[30]

[§ 347] **13. Patent as Notice.** Everyone is bound to take notice of a patent, since the record thereof in the patent office is legal notice to all the world.[31]

[§ 348] **14. Questions for Court and Jury.** In conformity with general rules[32] the scope and meaning of a patent is a matter of law for the court, and the application of the law to the facts of the case is for the jury.[33] It is for the court to construe the patent and instruct the jury as to its meaning.[34] Where there is parol evidence as to the meaning of terms, the question may be submitted to the jury.[35]

[§ 349] **B. Claims—1. In General.** The protection furnished by a patent is measured by what is set forth in the claims.[36] Everything not covered by

18. Richards v. Chase El. Co., 159 U. S. 477, 16 SCt 53, 40 L. ed. 225; Black Diamond Coal-Min. Co. v. Excelsior Coal Co., 156 U. S. 611, 15 SCt 482, 39 L. ed. 553; Slawson v. Grand St., etc., R. Co., 107 U. S. 649, 2 SCt 663, 27 L. ed. 576; Terhune v. Phillips, 99 U. S. 592, 25 L. ed. 293; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Butte City St. R. Co. v. Pacific Cable R. Co., 60 Fed. 410, 9 CCA 41.

[a] **Where patented device consists of an organized mechanism,** the beneficial results secured by the invention cannot be ascertained by a scrutiny of the patent specification in the light of common popular knowledge. Mead Morrison Mfg. Co. v. Exeter Mach. Works, 196 Fed. 789.

19. Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co., 251 Fed. 288, 163 CCA 444 [certiorari den 248 U. S. 579 mem, 39 SCt 20 mem, 63 L. ed. 430 mem].

[a] **Construction to sustain.**— Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co., 151 Fed. 237, 80 CCA 589 [aff 147 Fed. 739].

20. Sternau v. Borgfeldt, 254 Fed. 582.

21. Cocks v. Rip Van Winkle Wall Bed Co., 28 F. (2d) 921; Kestner Evaporator Co. v. American Evaporator Co., 182 Fed. 844; Westinghouse Electric, etc., Co. v. Toledo, etc., R. Co., 172 Fed. 371, 97 CCA 69; National Malleable Castings Co. v. Buckeye Malleable Iron, etc., Co., 171 Fed. 847, 96 CCA 515.

22. Cocks v. Rip Van Winkle Wall Bed Co., 28 F. (2d) 921; Spengler Core Drilling Co. v. Spencer, 10 F. (2d) 579; Paynter v. Lee Tire, etc., Co., 282 Fed. 624; Firestone Tire, etc., Co. v. Seiberling, 257 Fed. 74, 168 CCA 286; Henry v. Los Angeles, 255 Fed. 769, 167 CCA 113 [aff 230 Fed. 457]; Shipman v. Frank, 237 Fed. 395; Kestner Evaporator Co. v. American Evaporator Co., 182 Fed. 844; Westinghouse Electric, etc., Co. v. Toledo, etc., R. Co., 172 Fed. 371, 97 CCA 69; National Malleable Castings Co. v. Buckeye Malleable Iron, etc., Co., 171 Fed. 847, 96 CCA 515; Boston Woven Hose, etc., Co. v. Pennsylvania Rubber Co., 164 Fed. 557, 90 CCA 84 [aff 156 Fed. 787]; Montgomery v. U. S., 65 Ct. Cl. 526.

[a] **Rule applied.**—Nonuse for nine years by the owner, able to exploit the invention, renders the patent subject to strict construction. Toledo Scale Co. v. Barnes Scale Co., 18 F. (2d) 965.

[b] **Limitation of rule.**—That the owner of a patent for a folding typewriter never made any machines thereunder, but held it merely to supplement its other patents and completely to monopolize any folding, cannot prevent giving the claims of the patent the breadth to which they are reasonably entitled. Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502.

23. Universal Gypsum, etc., Co. v. Haggerty, 21 F. (2d) 544; Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435.

Rights and interests conveyed see infra § 390.

24. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316 [aff 288 Fed. 330]; Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614; Standard Plunger El. Co. v. Stokes, 212 Fed. 941, 129 CCA 461. Contra Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co., 256 Fed. 847, 168 CCA 193; Chicago, etc., R. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 CCA 395 [certiorari den 245 U. S. 652 mem, 38 SCt 11 mem, 62 L. ed. 532 mem]; Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co., 142 Fed. 157, 73 CCA 375 [certiorari den 200 U. S. 622 mem, 26 SCt 758 mem, 50 L. ed. 624 mem].

25. Frick Co. v. Lindsay, 27 F. (2d) 59; Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435; Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 CCA 390; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614.

26. See supra § 286.

27. Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 149 CCA 345.

28. Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem].

[a] **Province of expert testimony** is to remove uncertainty where the terms used are obscure, and not to create uncertainty where the language is plain. Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]. And see Kohn v. Eimer, 265 Fed. 900 (construing new equity rules 198 Fed. XIX, 115 CCA XIX).

29. I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593; Kohn v. Eimer, 265 Fed. 900.

30. Computing Scale Co. v. Keystone Store-Service Co., 88 Fed. 788 [aff 101 Fed. 837, 42 CCA 48]; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Union Paper-Bag Co. v. Nixon, 24 F. Cas. No. 14,386, 6 Fish. Pat. Cas. 402.

31. National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Eclipse Bicycle Co. v. Farrow, 16 App. (D. C.) 468.

32. See Trial [38 Cyc 1522 et seq].

33. Silsby v. Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Teese v. Phelps, 23 F. Cas. No. 13,819, McAll. 48.

34. Brothers v. Lidgerwood Mfg. Co., 223 Fed. 359, 138 CCA 460; Simplex R. Appliance Co. v. Wands, 115 Fed. 517, 53 CCA 171; Batten v. Clayton, 2 F. Cas. No. 1,105; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Conover v. Roach, 6 F. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Davis v. Palmer, 7 F. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Emerson v. Hogg, 8 F. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. R. 77; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Serrell v. Collins, 21 F. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [rev on other grounds 1 Black 427, 17 L. ed. 168].

35. Davoll v. Brown, 7 F. Cas. No. 3,662, 2 Robb Pat. Cas. 303, 1 Woodb. & M. 53; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

36. Minerals Separation, Ltd. v. Butte, etc., Min. Co., 250 U. S. 336, 39 SCt 496, 63 L. ed. 1019 [rev 250 Fed. 241, 162 CCA 377, 245 Fed. 577]; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Grant v. Walter, 148 U. S. 547, 13 SCt 699, 37 L. ed. 552; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Sutter v. Robinson, 119 U. S. 530, 7 SCt 376, 30 L. ed. 492; White v. Dunbar, 119 U. S. 47, 7 SCt 72, 30 L. ed. 303; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 SCt 846, 29 L. ed. 952; Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 5 SCt 941, 29 L. ed. 210; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; Burns v. Meyer, 100 U. S. 671, 25 L. ed. 738; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Carter Co. v. Earnshaw Knitting Co., 25 F. (2d) 981; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Lektophone

the claim is disclaimed,[37] and the patentee is bound | by limitations contained therein.[38] While terms

Corp. v. Sylo Lighting Fixture Co., 16 F. (2d) 7 [rev 11 F.(2d) 421]; Turner v. Spinner, 6 F. (2d) 172; Hubbell, Inc. v. American Brass, etc., Co., 296 Fed. 47; Autographic Register Co. v. Diesbach, 286 Fed. 470 [rev 285 Fed. 199]; Lanston Monotype Mach. Co. v. Pittsburgh Type Founders' Co., 283 Fed. 713 [mod 276 Fed. 921]; Royal Co. v. Tweedie, 276 Fed. 351 [rev 267 Fed. 224]; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Schultz v. Jackson Cushion Spring Co., 271 Fed. 665; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840; Universal Form Clamp Co. v. Taxis, 267 Fed. 578 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; U. S. Light, etc., Corp. v. Safety Car Heating, etc., Co., 261 Fed. 915; Crystal Percolator Co. Inc., v. Landers, 258 Fed. 28; Henry v. Los Angeles, 255 Fed. 769, 167 CCA 113; Tostevin-Cottie Mfg. Co. v. Ettinger Co., 254 Fed. 434, 166 CCA 66; Wilson, etc., Mfg. Co. v. Union Tool Co., 249 Fed. 729, 161 CCA 639 [rev 237 Fed. 837, and certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem; Troy Carriage Sunshade Co. v. Kinsey Mfg. Co., 247 Fed. 672, 159 CCA 574; Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291; Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 Fed. 521, 152 CCA 399; Braun v. John Griffiths, etc., Co., 234 Fed. 636, 148 CCA 402; Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848; American Roll Gold Leaf Co. v. W. H. Coe Mfg. Co., 212 Fed. 720, 129 CCA 330 [rev 199 Fed. 435]; U. S. Cons. Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; Herzog v. New York Tel. Co., 172 Fed. 425 [aff 176 Fed. 349, 99 CCA 623]; Lewis v. Mesta Mach. Co., 169 Fed. 422; Dunlap v. Willbrandt Surgical Mfg. Co., 151 Fed. 223, 80 CCA 575; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., 125 Fed. 378, 60 CCA 244; General Fire Extinguisher Co. v. Mallers, 110 Fed. 529, 49 CCA 138; Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co., 90 Fed. 201 [mod on other grounds 93 Fed. 958, 36 CCA 24]; Griffith v. Shaw, 89 Fed. 313; Kelly v. Clow, 89 Fed. 297, 32 CCA 205; New Departure Bell Co. v. Corbin, 88 Fed. 901; U. S. Glass Co. v. Atlas Glass Co., 88 Fed. 493 [aff 90 Fed. 724, 33 CCA 254]; Tiemann v. Kraatz, 85 Fed. 437, 29 CCA 257; Walder v. Ulrich, 83 Fed. 477 [app dism 84 Fed. 1023 mem, 28 CCA 689 mem]; Monroe v. McGreer, 81 Fed. 954; Olmsted v. Andrews, 77 Fed. 835, 23 CCA 488; Thomas v. Rocker Spring Co., 77 Fed. 420, 23 CCA 211 [certiorari den 168 U. S. 709 mem, 18 SCt 945 mem, 42 L. ed. 1211 mem]; Long v. Pope Mfg. Co., 75 Fed. 835, 21 CCA 533; Missouri Lamp, etc., Co. v. Stempel, 75 Fed. 583; McBride v. Kingman, 72 Fed. 908 [aff 97 Fed. 217, 38 CCA 123]; National Mach. Co. v. Wheeler, etc., Mfg. Co., 72 Fed. 185 [rev on other grounds 79 Fed. 432, 24 CCA 663 (certiorari den 166 U. S. 722 mem, 17 SCt 997 mem, 41 L. ed. 1188 mem)]; Kennedy v. Solar Refining Co., 69 Fed. 715; Wells v. Curtis, 66 Fed. 318, 13 CCA 494; Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co., 61 Fed. 958, 10 CCA 194; Stutz v. Robson, 54 Fed. 506; Brush Electric Co. v. Ft. Wayne Electric Light Co., 40 Fed. 826; Untermeyer v. Jeannot, 20 Fed. 503; Delaware Coal, etc., Co. v. Packer, 1 Fed. 851; McMillan v. Rees, 1 Fed. 722; Tinker v. Wilber Eureka Mower, etc., Mfg. Co., 1 Fed. 138; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Kidd v. Spence, 14 F. Cas. No. 7,755, 4 Fish. Pat. Cas. 37; Rich v. Close, 20 F. Cas. No. 11,757, 8 Blatchf. 41, 4 Fish. Pat. Cas. 279; Whipple v. Baldwin Mfg. Co., 29 F. Cas. No. 17,514, 4 Fish. Pat. Cas. 29; Montgomery v. U. S., 65 Ct. Cl. 526; Neckerman v. Saunders, 46 App. (D. C.) 10; In re Seabury, 23 App. (D. C.) 377.

[a] **The patentee is conclusively presumed to know** what he invented or discovered at the time he applied for a patent, although subsequent students may perceive that he disclosed methods or processes having capabilities surpassing his claims. Kintner v. Atlantic Communication Co., 240 Fed. 716, 153 CCA 514 [aff 230 Fed. 829, and certiorari den 244 U. S. 661 mem, 37 SCt 746 mem, 61 L. ed. 1377 mem].

[b] **Must be pointed out and claimed.**—The measure of a patentee's monopoly is only what he particularly points out and distinctly claims. Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Kennicott Co. v. Holt Ice, etc., Co., 230 Fed. 157, 144 CCA 455; Hall-Borchert Dress Form Co. v. Ellanam Adjustable Form Co., 213 Fed. 341, 130 CCA 193; General Electric Co. v. Allis-Chalmers Co., 199 Fed. 169; Harder v. U. S. Piling Co., 160 Fed. 463, 87 CCA 447 [aff 149 Fed. 434].

[c] **In Canada** the scope of the invention is the measure of rights acquired. Toronto Auer Light Co., Ltd. v. Colling, 31 Ont. 18.

37. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. ed. 344; Lanston Monotype Mach. Co. v. Pittsburgh Type Founders' Co., 283 Fed. 713 [mod 276 Fed. 921]; Royal Co. v. Tweedie, 276 Fed. 351 [rev 267 Fed. 224]; Knight Soda Fountain Co. v. Walrus Mfg. Co., 258 Fed. 929, 170 CCA 125; Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; Thacher v. Transit Constr. Co., 228 Fed. 905 [aff 234 Fed. 640, 148 CCA 406]; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 652, 51 CCA 362; McBride v. Kingman, 97 Fed. 217, 38 CCA 123; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223.

[a] **Where an alleged element or characteristic feature of an invention is not necessarily inherent in the invention itself,** the failure of the patentee to refer to it is persuasive evidence that it is not within the scope of his invention, and, not being disclosed to the public, it should not be read into the patent. Edison Gen. Electric Co. v. Crouse-Hinds Electric Co., 152 Fed. 437, 81 CCA 579 [rev 146 Fed. 539].

[b] **Error in reference to prior art.**—If a patentee in his specification describes in appropriate language a real invention and properly sets forth his claim to that invention, he is not to be deprived of it merely because he has inadvertently erred in his reference to the prior art. Babcock, etc., Co. v. North American Dredging Co., 151 Fed. 265.

[c] **Specification of method** in claims entitles subsequent improvers to accomplish results by different means. Lektophone Corp. v. Western Electric Co., 16 F. (2d) 10.

[d] **Rule does not affect other applications of the patentee** which were pending at the time the patent was granted. Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 296 Fed. 188.

38. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 263; Wright v. Yuengling, 155 U. S. 47, 15 SCt 1, 39 L. ed. 64; Watson v. Cincinnati, etc., R. Co., 132 U. S. 161, 10 SCt 45, 33 L. ed. 295; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 373, 6 SCt 931, 29 L. ed. 950; Fay v. Cordesman, 109 U. S. 408, 3 SCt 236, 27 L. ed. 979; Burns v. Meyer, 100 U. S. 671, 25 L. ed. 738; Wilson, etc., Mfg. Co. v. Niedringhaus, Inc., 28 F. (2d) 766; Automatic Appliance Co. v. McNiece Motor Co., 20 F. (2d) 578; Wood v. Boylan, 19 F. (2d) 48; Lektophone Corp. v. Western Electric Co., 16 F. (2d) 10; Boe v. Marvel Equipment Co., 4 F. (2d) 193; Nash Engineering Co. v. Cashin, 3 F. (2d) 686 [aff 13 F. (2d) 718]; Western Well Works v. Layne, etc., Corp., 276 Fed. 465 [certiorari dism 261 U. S. 387, 43 SCt 422, 67 L. ed. 712]; Elyria Nat. Rubber Heel Co. v. I. T. S. Rubber Co., 263 Fed. 979; Burnett v. Vaile-Kimes Co., 259 Fed. 863, 170 CCA 663; National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72 [rev 222 Fed. 918]; Pelton v. American Auto Heater Co., 239 Fed. 320, 152 CCA 308; Safety Car Heating, etc., Co. v. Gould Coupler Co., 229 Fed. 429 [rev on other grounds 239 Fed. 861, 152 CCA 645 (certiorari den 245 U. S. 646 mem, 38 SCt 9 mem, 62 L. ed. 529 mem)]; Thacher v. Transit Constr. Co., 228 Fed. 905 [aff 234 Fed. 640, 148 CCA 406]; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; Ryder v. Lacey, 200 Fed. 966; Murray v. Detroit Wire Spring Co., 195 Fed. 774 [rev on other grounds 206 Fed. 465, 124 CCA 371]; Conley v. King Bridge Co., 175 Fed. 79 [mod on other grounds 187 Fed. 137, 109 CCA 412]; Sharp v. Bellinger, 168 Fed. 295; Dey Time Register Co. v. Syracuse Time-Recorder Co., 161 Fed. 111, 88 CCA 275 [aff 152 Fed. 440]; Durfee v. Bawo, 118 Fed. 853; Peifer v. Brown, 106 Fed. 938 [aff 112 Fed. 435, 50 CCA 331]; Consolidated Store-Serv. Co. v. Seybold, 105 Fed. 978, 45 CCA 152; Dodge v. Ohio Valley Pulley Works, 101 Fed. 581; Starrett v. J. Stevens Arms, etc., Co., 100 Fed. 93, 40 CCA 289; Seabury v. Johnson, 76 Fed. 456; Muller v. Lodge, etc., Mach. Tool Co., 69 Fed. 738 [aff 77 Fed. 621, 23 CCA 357]; Pettibone v. Stanford, 53 Fed. 118, 3 CCA 469; Celluloid Mfg. Co. v. Arlington Mfg. Co., 52 Fed. 740, 3 CCA 269; Williams v. Stolzenbach, 23 Fed. 39; Le Fever v. Remington, 13 Fed. 86, 21 Blatchf. 80; Fuller v. Yentzer, 9 F. Cas. No. 5,151, 1 Bann. & A. 520, 6 Biss. 203 [aff 94 U. S. 288, 24 L. ed. 103, 94 U. S. 299, 24 L. ed. 107]; Hawes v. Gage, 11 F. Cas. No. 6,237; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1, 1 Pittsb. (Pa.) 31; Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645].

[a] **A patent cannot be given a construction broader than its terms,** in order to cover something which might have been claimed, but was not. Houser v. Starr, 203 Fed. 264, 121 CCA 462 [mod 194 Fed. 730]; Hardison v. Brinkman, 156 Fed. 962, 87 CCA 8; Universal Brush Co. v. Sonn, 154 Fed. 665, 83 CCA 422 [rev 146 Fed. 517].

[b] **Statements of function** in claims are binding. American Stainless Steel Co. v. Ludlum Steel Co., 16 F. (2d) 823; Masseth v. Larkin, 111 Fed. 409 [aff 119 Fed. 171, 56 CCA 167]; Thomson Meter Co. v. National Meter Co., 106 Fed. 519; De Forest v. Richards, 49 App. (D. C.) 257, 263 Fed. 653.

[c] **Immaterial that limitation is voluntary.**—Vanderveld v. Rollman, 28 F. (2d) 948; Trussell Mfg. Co. v. Vernon, 11 F. (2d) 289; Schultz v. Jackson Cushion Spring Co., 271 Fed. 665; McCallum v. Pittsburgh, etc., Coal Co., 268 Fed. 831; Arnold-Creager Co. v. Barkwill Brick Co., 246 Fed. 441, 158 CCA 505; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 CCA 258; Morse Chain Co. v. Link-Belt Co., 189 Fed. 584, 110 CCA 564 [aff 182 Fed. 825].

[d] **Rule applied** where limitation made to avoid interference. Ajax Forge Co. v. Morden Frog, etc., Works, 156 Fed. 594.

[e] **Patents cannot be recon-**

used must be so construed where possible to sustain the patent and protect the real invention,[39] limitations not stated in a claim will not be read into a claim for the purpose of making out a case of novelty or infringement.[40]

When broad construction given. The claims of a patent will be given a broad construction in accordance with their terms,[41] unless limitations are written therein,[42] or imposed by the prior art[43] or by the acceptance of patent office rulings.[44] Where an invention is substantial and meritorious, a claim should not be strictly interpreted and limited.[45]

When strict or narrow construction given. Claims will be given a strict construction when they are narrow[46] and the art is crowded.[47] Where possible, claims will be restricted to save the patent.[48] A

structed to meet subsequent conditions and new facts subsequently discovered, but the patentee must abide by his specifications and claims. Siemund v. Enderlin, 212 Fed. 410, 129 CCA 604 [aff 206 Fed. 283].

39. Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co., 110 U. S. 229, 4 SCt 33, 28 L. ed. 129; Van Meter v. Irving Air Chute Co., 27 F. (2d) 170; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; F. N. Burt Co. v. Ritchie, 251 Fed. 909; Lyon Non-Skid Co. v. Edward V. Hartford, Inc., 247 Fed. 524 [aff 250 Fed. 1021 mem, 162 CCA 664 mem]; Thacher v. Transit Constr. Co., 234 Fed. 640, 148 CCA 406 [aff 228 Fed. 905]; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Asbestos Shingle, etc., Co. v. Rock Fibre Mfg. Co., 217 Fed. 66; Palmer v. Jordan Mach. Co., 186 Fed. 496 [rev on other grounds 192 Fed. 42, 112 CCA 454]; Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638]; Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co., 151 Fed. 237, 80 CCA 589 [aff 147 Fed. 739]; Estabrook v. Dunbar, 8 F. Cas. No. 4,535, 2 Bann. & A. 427; Goodyear Dental Vulcanite Co. v. Davis, 10 F. Cas. No. 5,589, 3 Bann. & A. 115 [aff 102 U. S. 222, 26 L. ed. 149]; Henderson v. Cleveland Co-Op. Store Co., 11 F. Cas. No. 6,351, 2 Bann. & A. 604; Johnson v. Willimantic Linen Co., 33 Conn. 436; Miel v. Young, 29 App. (D. C.) 481; Andrews v. Nilson, 27 App. (D. C.) 451; Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645]. But see Lektophone Corp. v. Rola Co., 27 F. (2d) 758 (any ambiguity in applicant's claims requires construction against him and any broadening of claims).

[a] **A strict construction should not be resorted to,** if the result would be a limitation on the actual invention, unless it is required by the language of the claim. Wagner Typewriter Co. v. Wyckoff, 151 Fed. 585, 81 CCA 129 [mod 138 Fed. 108].

[b] **Rule applied.**—A claim in a patent of "rotatably mounted bars . . . substantially as described" as an element of a combination is not void because the specification and drawings show a rotatable and a fixed bar, there being no doubt as to the thing intended. Maunula v. Sunell, 155 Fed. 535.

[c] **"Means" or "mechanism" as element.**—A claim of a patent is not functional and invalid merely because one of its specified elements is "means" or "mechanism." Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Davis Sewing Mach. Co. v. New Departure Mfg. Co., 217 Fed. 775, 133 CCA 505; Mershon v. Bay City Box, etc., Co., 189 Fed. 741.

40. McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Western Electric Mfg. Co. v. Ansonia Brass Co., 114 U. S. 447, 5 SCt 941, 29 L. ed. 210; Cincinnati Cadillac Co. v. English, etc., Co., 18 F. (2d) 542; American Stainless Steel Co. v. Ludlum Steel Co., 16 F. (2d) 823; Great Western Mfg. Co. v. Lowe, 13 F. (2d) 880; Fredericks, Inc. v. Eugene, 3 F. (2d) 543 [rev 298 Fed. 633]; Taggart v. Bremner, 295 Fed. 506; Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co., 272 Fed. 386; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418; National Cash Register Co. v. Gratigny, 213 Fed. 463, 130 CCA 109; Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139]; Slip Scarf Co. v. Blanchard, 205 Fed. 921; Continental Auto. Co. v. Spaulding, 177 Fed. 693 [aff 185 Fed. 518, 107 CCA 618]; Simplex R. Appliance Co. v. Pressed Steel Car Co., 177 Fed. 426 [aff 189 Fed. 70, 110 CCA 634 (certiorari den 223 U. S. 721 mem, 32 SCt 523 mem, 56 L. ed. 630 mem)]; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516 [aff 170 Fed. 830]; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; Metallic Extraction Co. v. Brown, 110 Fed. 665, 49 CCA 147; Santa Clara Valley Mill, etc., Co. v. Prescott, 102 Fed. 501, 42 CCA 477; Parsons v. Seelye, 100 Fed. 455, 40 CCA 486; Lappin Brake-Shoe Co. v. Corning Brake-Shoe Co., 94 Fed. 162 [aff 99 Fed. 1004, 40 CCA 215]; Wilson v. McCormick Harvesting Mach. Co., 92 Fed. 167, 34 CCA 280; Western Electric Co. v. Citizens' Tel. Co., 89 Fed. 670 [app dism 92 Fed. 1023 mem, 34 CCA 691 mem]; Doig v. Sutherland, 87 Fed. 991; Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem]; Paul Boynton Co. v. Morris, 82 Fed. 440 [aff 87 Fed. 225, 30 CCA 617 (rev on other grounds 135 U. S. 319, 10 SCt 833, 34 L. ed. 214)]; Royer v. Schultz Belting Co., 28 Fed. 850; Roemer v. Neumann, 26 Fed. 102 [aff 132 U. S. 103, 10 SCt 12, 33 L. ed. 277]; Couse v. Johnson, 6 F. Cas. No. 3,288, 4 Bann. & A. 501.

[a] **For example** (1) where one element in the claim for an automatic tank heat regulator was a "conduit," which means a channel, including a tube or pipe, for the conveyance of fluids, it cannot be construed to mean a long-cooled conduit, to avoid invalidity in view of defendant's prior machine, and to show infringement by defendant's subsequent machine in which the conduit was lengthened. Fulton Co. v. Powers Regulator Co., 263 Fed. 578. (2) A claim calling in general terms for a "noncombustible and nonconducting material" cannot be limited by construction to a particular noncombustible, nonconducting material named in the specification, either to avoid anticipation or infringement. Empire Circuit Co. v. Channon, 168 Fed. 705, 94 CCA 211.

41. Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; Ryder v. Lacey, 200 Fed. 966; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; In re Carr, 54 App. (D. C.) 283, 297 Fed. 542; Andrews v. Nilson, 27 App. (D. C.) 451.

[a] **Ambiguity as to given element.**—In construing a claim in that respect ambiguous, a given element should be implied if its presence was necessary to distinguish from the prior art or from the other claims; otherwise, it should not operate as a limitation. Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139].

42. See cases supra note 38.

43. Smokador Mfg. Co. v. Tubular Products Co., 27 F. (2d) 948; Carter Co. v. Earnshaw Knitting Co., 25 F. (2d) 981; Wood v. Boylan, 19 F. (2d) 48; Gerrard v. Cary, 9 F. (2d) 949 [aff 9 F. (2d) 957]; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; Ryder v. Lacey, 200 Fed. 966; Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427.

[a] **Anticipation viewed from same point as infringement.**—Where the broader view of a claim is necessary to make out infringement, the proof of anticipation must be considered from the same point of view. Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139].

44. See supra § 341; and infra § 357.

45. Greenwood v. Monarch Mfg. Co., 30 F. (2d) 547 [aff 30 F. (2d) 548]; U. S. Industrial Chemical Co. v. Theroz Co., 25 F. (2d) 387 [aff 14 F. (2d) 629, and certiorari den 49 SCt 12 mem]; Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 267]; Winget Kickernick Co. v. Kenilworth Mfg. Co., 11 F. (2d) 1; Menzer v. Kenworthy, 275 Fed. 649; American Roll Gold Leaf Co. v. W. H. Coe Mfg. Co., 212 Fed. 720, 129 CCA 330; Reminder Lock Co. v. Adler, 71 Fed. 183; In re Briede, 27 App. (D. C.) 298.

46. Wilson, etc., Mfg. Co. v. Niedringhaus, Inc., 28 F. (2d) 766; Brunswick-Balke-Collender Co. v. Seamless Rubber Co., 27 F. (2d) 925; Sanitary Refrigerator Co. v. Winters, 24 F. (2d) 15 [certiorari den 49 SCt 8 mem, and certiorari granted 49 SCt 17 mem]. But see Philadelphia Rubber Works Co. v. Portage Rubber Co., 241 Fed. 108, 154 CCA 108 [mod 227 Fed. 623]; Electric Smelting, etc., Co. v. Pittsburgh Reduction Co., 125 Fed. 926, 60 CCA 636 (both stating that unnecessary and unreasonable limitations should be liberally interpreted).

[a] **"Limitations imposed by the inventor,** especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers." I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 444, 47 SCt 136, 71 L. ed. 335 [aff 1 F. (2d) 780, and cit Hubbell v. U. S., 179 U. S. 77, 21 SCt 24, 45 L. ed. 95; Shepard v. Carrigan, 116 U. S. 593, 29 L. ed. 723; Sargent v. Hall Safe, etc., Co., 114 U. S. 63, 29 L. ed. 67].

[b] **Limits of doctrine.**—(1) The terms and expressions of a narrow claim should not necessarily be limited to a hard and fast unbending definition. Sanitary Refrigerator Co. v. Winters, 24 F. (2d) 15 [certiorari den 49 SCt 8 mem, and certiorari granted 49 SCt 17 mem]. (2) Limiting words, relied on in the patent office to differentiate a patent from a prior patent, when developing ambiguity should not be read any more broadly than is reasonably necessary to serve such purpose of differentiation. Jones v. General Fireproofing Co., 254 Fed. 97, 970 [certiorari den 250 U. S. 643 mem, 39 SCt 494 mem, 63 L. ed. 1186 mem].

47. Wilson, etc., Mfg. Co. v. Niedringhaus, Inc., 28 F. (2d) 766.

48. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed.

needless multiplicity of claims calls for a limited construction of them.[49]

[§ 350] **2. Claims Construed by Specifications.** The claims of a patent must be determined in the light of the specifications[50] and drawings,[51] as the privilege of the patentee covers only what is de-

139].

[a] **When rule not applicable.**—Where claims employ broad and nebulous terms for the apparent purpose of enabling the patentee to monopolize an important industry, the claims will not be narrowed beyond the boundaries clearly warranted by the specification. Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638].

49. Carlton v. Bokee, 17 Wall. (U. S.) 463, 21 L. ed. 517.

50. Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Haines v. McLaughlin, 135 U. S. 584, 10 SCt 876, 34 L. ed. 290; Howe Mach. Co. v. National Needle Co., 134 U. S. 388, 10 SCt 570, 33 L. ed. 963; Snow v. Lake Shore, etc., R. Co., 121 U. S. 617, 7 SCt 1343, 30 L. ed. 1004; White v. Dunbar, 119 U. S. 47, 7 SCt 72, 30 L. ed. 303; Yale Lock Co. v. Greenleaf, 117 U. S. 554, 6 SCt 846, 29 L. ed. 952; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Hailes v. Van Wormer, 20 Wall. (U. S.) 353, 22 L. ed. 241; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Turrill v. Michigan Southern, etc., R. Co., 1 Wall. (U. S.) 491, 17 L. ed. 668; Economy Baler Co. v. Solar Sturges Mfg. Co., 29 F. (2d) 656; Buckeye Blower Co. v. Arensmeyer, Warnock & Zahrndt, Inc., 28 F. (2d) 209; Power Specialty Co. v. Connecticut Light, etc., Co., 27 F. (2d) 928; Franc-Strohmenger v. Arthur Siegman, Inc., 27 F. (2d) 785 [aff 25 F. (2d) 108]; Bassick Mfg. Co. v. Rogers, 26 F. (2d) 724; Nelson Mfg. Co. v. Myers, etc., Co., 25 F. (2d) 659; Health Products Corp. v. Ex-Lax Mfg. Co., 24 F. (2d) 245 [aff 22 F. (2d) 286]; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Radio Corp. of America v. Twentieth Century Radio Corp., 19 F. (2d) 290; Cincinnati Cadillac Co. v. English, etc., Co., 18 F. (2d) 542; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Nash Engineering Co. v. Cashin, 13 F. (2d) 718; Cadwell v. Firestone Tire, etc., Co., 13 F. (2d) 483; Pearson v. Uncle Sam Mfg. Co., 11 F. (2d) 603; Winget Kickernick Co. v. Kenilworth Mfg. Co., 11 F. (2d) 1; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Fredericks, Inc. v. Eugene, 3 F. (2d) 543 [rev 298 Fed. 633]; I. T. S. Rubber Co. v. Essex Rubber Co., 1 F. (2d) 780 [certiorari granted 266 U. S. 600 mem, 45 SCt 226 mem, 69 L. ed. 461 mem]; Carson v. American Smelting, etc., Co., 293 Fed. 771 [rev on other grounds 4 F. (2d) 463 (certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem)]; Wire Wheel Corp. v. Budd Wheel Co., 288 Fed. 308; Murray v. Hodo, 276 Fed. 740; Bickford Co. v. Merrill, 268 Fed. 540 [rev 260 Fed. 207]; Selestasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [rev 260 Fed. 183, and certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Hutchins Car Roofing Co. v. Standard R. Equipment Co., 259 Fed. 226, 170 CCA 294; Vandenburgh v. Concrete Steel Co., 258 Fed. 143, 169 CCA 138 [certiorari den 250 U. S. 664 mem, 40 SCt 11 mem, 63 L. ed. 1196 mem]; Crystal Percolator Co., Inc. v. Landers, 258 Fed. 28; Henry v. Los Angeles, 255 Fed. 769, 167 CCA 113 [aff 230 Fed. 457]; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Filer, etc., Co. v. Diamond Iron Works, 250 Fed. 454, 162 CCA 524 [certiorari den 246 U. S. 676 mem, 38 SCt 426 mem, 62 L. ed. 933 mem]; Burroughs Adding Mach. Co. v. Felt, etc., Mfg. Co., 243 Fed. 861, 156 CCA 373 [certiorari den 244 U. S. 659 mem, 37 SCt 745 mem, 61 L. ed. 1376 mem]; Miner v. T. H. Symington Co., 238 Fed. 806 [rev on other grounds 247 Fed. 515, 160 CCA 25]; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330]; Bump's Perfected Paper Fastener Co. v. Max Gessler, Inc., 236 Fed. 242, 149 CCA 432; Rice v. Palisades Realty, etc., Co., 231 Fed. 763 [aff 231 Fed. 997, 146 CCA 353]; Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848; Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168 [mod on other grounds 229 Fed. 407, 143 CCA 527 (certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem)]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; United Wireless Tel. Co. v. National Electric Signaling Co., 198 Fed. 385, 117 CCA 261; Parke-Davis v. Mulford, 196 Fed. 496, 116 CCA 262; American Steel Foundries v. Wolff Truck Frame Co., 189 Fed. 601 [rev on other grounds 195 Fed. 940, 115 CCA 628]; Van Auken v. Monash-Younker Co., 187 Fed. 141 [aff 199 Fed. 123, 117 CCA 605 (certiorari den 226 U. S. 610 mem, 33 SCt 217 mem, 57 L. ed. 381 mem)]; National Phonograph Co. v. American Graphophone Co., 184 Fed. 75; Simplex Electric Heating Co. v. Leonard, 180 Fed. 763 [aff 200 Fed. 581, 119 CCA 61]; Bemis v. Stevens, 177 Fed. 717; General Sub-construction Co. v. Netcher, 174 Fed. 236, 98 CCA 144; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem)]; Herzog v. New York Tel. Co., 172 Fed. 425 [aff 176 Fed. 349, 99 CCA 623]; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310; American Steel, etc., Co. v. Denning Wire, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 CCA 461 [aff 142 Fed. 221]; Stilwell-Bierce, etc., Co. v. Eufaula Cotton Oil Co., 117 Fed. 410, 54 CCA 584 [certiorari den 189 U. S. 509 mem, 23 SCt 850 mem, 47 L. ed. 923 mem]; Lyons v. Drucker, 106 Fed. 416, 45 CCA 368; Krajewski v. Pharr, 105 Fed. 514, 44 CCA 572; Electric Smelting, etc., Co. v. Carborundum Co., 102 Fed. 618, 42 CCA 537 [certiorari den 179 U. S. 684 mem, 27 SCt 916 mem, 45 L. ed. 385 mem]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 100 Fed. 849 [rev on other grounds 108 Fed. 845, 48 CCA 72]; Melvin v. Potter, 91 Fed. 151; Soehner v. Favorite Stove, etc., Co., 84 Fed. 182, 28 CCA 317; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Bennett v. Schooley, 75 Fed. 392; Gould Coupler Co. v. Trojan Car-Coupler Co., 74 Fed. 794, 21 CCA 97; American Fibre-Chamois Co. v. Port Huron Fibre-Garment Mfg. Co., 72 Fed. 516, 18 CCA 670; Chemical Rubber Co. v. Raymond Rubber Co., 68 Fed. 570 [aff 71 Fed. 179, 18 CCA 31]; Groth v. International Postal Supply Co., 61 Fed. 284, 9 CCA 507; La Rue v. Western Electric Co., 28 Fed. 85 [aff 139 U. S. 601, 11 SCt 670, 35 L. ed. 294]; Hancock Inspirator Co. v. Jenks, 21 Fed. 911; Evans v. Kelly, 13 Fed. 903, 9 Biss. 251; Matthews v. Shoneberger, 4 Fed. 635, 18 Blatchf. 357; Holly v. Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Bryan v. Stevens, 4 F. Cas. No. 2,066a; Carter v. Messinger, 5 F. Cas. No. 2,478, 11 Blatchf. 34; Coffin v. Ogden, 6 F. Cas. No. 2,950, 7 Blatchf. 61, 3 Fish. Pat. Cas. 640 [aff 18 Wall. 120, 21 L. ed. 821]; Estabrook v. Dunbar, 8 F. Cas. No. 4,525, 2 Bann. & A. 427; Francis v. Mellar, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 8 Phila. (Pa.) 157; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [aff 3 Wall. 315, 18 L. ed. 76]; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; King v. Gedney, 14 F. Cas. No. 7,795, McA. Pat. Cas. 443; Morris v. Barrett, 17 F. Cas. No. 9,827, 1 Bond 254, 1 Fish. Pat. Cas. 461; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Pitts v. Wemple, 19 F. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Roberts v. Dickey, 20 F. Cas. No. 11,899, 4 Fish. Pat. Cas. 532, 4 Brewst. (Pa.) 260; Whipple v. Baldwin Mfg. Co., 29 F. Cas. No. 17,514, 4 Fish. Pat. Cas. 29; Harbridge v. Perrin, 54 App. (D. C.) 106, 295 Fed. 927 [certiorari den 264 U. S. 597 mem, 44 SCt 454 mem, 68 L. ed. 868 mem]; Taylor's Application, 52 App. (D. C.) 249, 285 Fed. 983; Gathmann v. Clarke, 45 App. (D. C.) 512; In re Ellis, 37 App. (D. C.) 203; Andrews v. Nilson, 27 App. (D. C.) 451; Consolidated Car Heating Co. v. Came, [1903] A. C. 509. See Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274; Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 CCA 461 [aff 142 Fed. 221] (where language is doubtful or ambiguous). And see Fowler, etc., Mfg. Co. v. National Radiator Co., 172 Fed. 661, 97 CCA 187 (to ascertain the meaning of nontechnical terms).

[a] **Necessity for rule.**—No patented invention can be practically or fairly understood or explained if the language of the claims is entirely dissociated from the specification, and the claims and specification should be read together. Nineteen Hundred Washer Co. v. Cramer, 169 Fed. 629, 95 CCA 157 [aff 163 Fed. 296].

[b] **Significance attached to terms by description.**—The court is justified, when the intention is clear, in giving to modifying words and phrases a significance ascertainable only by reference to the description. Filer, etc., Co. v. Diamond Iron Works, 250 Fed. 454, 162 CCA 524 [aff 241 Fed. 498, and certiorari den 246 U. S. 676 mem, 38 SCt 426 mem, 62 L. ed. 933 mem].

[c] **Disclosure presenting trivial advance.**—Where disclosure of the specification presents only a trivial variation over the prior art, the patentee should be literally confined to the detail he presents. Ham Boiler Corp. v. Hugo, 23 F. (2d) 163.

[d] **Notwithstanding presumption that broader claims** were intended to cover equivalent forms of construction, where other and narrower claims fully covered the construction described in the specifications, the broad claims must be read with the description of the invention, in order to determine the scope and effect that should be given to them. Troy Wagon Works Co. v. Ohio Tailer Co., 272 Fed. 850.

[e] **That additional method impossible of attainment** is set out in the specification does not prevent protection for the results accomplished. French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem].

[f] **Claims lacking in the clearness and definiteness** required by statute cannot be made good by reference to the specification. North American Chemical Co. v. Keno Supply Co., 227 Fed. 63, 141 CCA 611.

[g] **Manifest clerical errors** in the claims of a patent may be corrected by reference to the specification and drawings. American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375.

[h] **Provisional specification** cannot be used to enlarge the meaning of the complete specification. Mackelcan v. Rennie, 13 C. B. N. S. 52, 106 ECL 52, 143 Reprint 21.

51. Buckeye Blower Co. v. Arens-

scribed and claimed.[52] Specific reference in the claim to the specification is not necessary in order to warrant its consideration.[53] While the claims may be explained and illustrated by the specification,[54] they cannot be enlarged thereby;[55] it has also been said that they cannot be changed thereby.[56] It is generally held, however, that the claims may be limited by the specifications,[57] at least in case of am-

meyer, Warnock & Zahrndt, Inc., 28 F. (2d) 209; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Radio Corp. of America v. Twentieth Century Radio Corp., 19 F. (2d) 290; Nash Engineering Co. v. Cashin, 13 F. (2d) 718; Pearson v. Uncle Sam Mfg. Co., 11 F. (2d) 603; Winget Kickernick Co. v. Kenilworth Mfg. Co., 11 F. (2d) 1; I. T. S. Rubber Co. v. Essex Rubber Co., 1 F. (2d) 780 [certiorari granted 266 U. S. 600 mem, 45 SCt 226 mem, 69 L. ed. 461 mem]; Davis-Bournonville Co. v. Alexander Milburn Co., 297 Fed. 846 [aff 1 F. (2d) 227 (certiorari granted 266 U. S. 596 mem, 45 SCt 93 mem, 69 L. ed. 459 mem, and rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651)]; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; Barber v. Reo Motor Car Sales Co., 245 Fed. 938; Burroughs Adding Mach. Co. v. Felt, etc., Mfg. Co., 243 Fed. 861, 156 CCA 373 [certiorari den 244 U. S. 659 mem, 37 SCt 745 mem, 61 L. ed. 1376 mem]; Outlook Envelope Co. v. General Paper Goods Mfg. Co., 239 Fed. 877, 153 CCA 5; Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 113 CCA 310; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; Steiner, etc., Hardware Co. v. Tabor Sash Co., 178 Fed. 831; Herzog v. New York Tel. Co., 172 Fed. 425 [aff 176 Fed. 349, 99 CCA 623]; In re Ellis, 37 App. (D. C.) 203; Andrews v. Nilson, 27 App. (D. C.) 451. And see Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274; Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 CCA 461 [aff 142 Fed. 221] (where language is doubtful or ambiguous).

[a] **Invention is not to be ascertained from drawings alone.**—General Electric Co. v. Dunkirk, 211 Fed. 658 [aff 211 Fed. 657, 128 CCA 575].

[b] **Cuts cannot be used to contradict** the plain language of the claims. McMillan v. Fischer Auto Bed, etc., Co., 264 Fed. 671.

[c] **Supplying feature not described.**—Drawings cannot supply the absence of any written description of a feature of the invention. Davis-Bournonville Co. v. Alexander Milburn Co., 297 Fed. 846 [aff 1 F. (2d) 227 (certiorari granted 266 U. S. 596 mem, 45 SCt 93 mem, 69 L. ed. 459 mem, and rev on other grounds 270 U. S. 390, 46 SCt 324, 70 L. ed. 651)]; Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Fulton Co. v. Powers Regulator Co., 263 Fed. 578.

[d] **Variance between drawings and specifications.**—There cannot be a substantial variance between the drawings and specifications, but the specifications usually govern. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [rev 17 F. (2d) 815, and certiorari den 49 SCt 32 mem].

[e] **Patent should not be restricted to precise form** shown in drawing. Westinghouse Electric, etc., Co. v. Royal-Eastern Electrical Supply Co., 9 F. (2d) 397.

[f] **Drawings not made to scale.**—The drawings of a patent are often diagrammatic and not drawn to a scale, and a patented device is not to be held inoperative merely because a slavish adherence to the drawings develops obstacles, which may in many cases be overcome by the exercise of common sense and ordinary mechanical skill. Manhattan Book Casing Mach. Co. v. E. C. Fuller Co., 204 Fed. 286, 122 CCA 440.

[g] **Mistake** (1) in the illustration did not limit the claim sought to be illustrated. Van Meter v. Irving Air Chute Co., 27 F. (2d) 170. (2) That a drawing of a patent, through an error of the draftsman, shows a construction evidently not contemplated nor claimed by the inventor does not give the patent effect as an anticipation of a subsequent patent in that particular. Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144].

52. Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Lakewood Engineering Co. v. Stein, 8 F. (2d) 713 [certiorari den 270 U. S. 661 mem, 46 SCt 471 mem, 70 L. ed. 786 mem]; Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; Brooke Glass Co. v. Hartford-Fairmont Co., 262 Fed. 427 [aff 255 Fed. 901]; Bird v. Elaborated Roofing Co., 256 Fed. 366, 167 CCA 536 [certiorari dism 250 U. S. 647 mem, 39 SCt 490 mem, 63 L. ed. 1188 mem]; H. Ward Leonard, Inc. v. Maxwell Motor Sales Co., 252 Fed. 584, 164 CCA 500 [rev 288 Fed. 62]; Outlook Envelope Co. v. General Paper Goods Mfg. Co., 239 Fed. 877, 153 CCA 5; Hall-Borchert Dress Form Co. v. Ellanam Adjustible Form Co., 213 Fed. 341, 130 CCA 193; Valvona-Marchiony Co. v. Perella, 212 Fed. 168, 129 CCA 24 [aff 207 Fed. 377]; Loraine Dev. Co. v. General Electric Co., 202 Fed. 215, 120 CCA 615 [aff 198 Fed. 100]; State Bank v. Hillman's, 180 Fed. 732, 104 CCA 98.

[a] **Where a change or function is neither described nor claimed,** and especially where other changes are described and insisted on as essential and specifically claimed, it is significant proof that the change which has not been disclosed by him to the public is not his invention. Electric Storage Battery Co. v. Gould Storage Battery Co., 158 Fed. 610, 85 CCA 432 [aff 148 Fed. 695].

[b] **Claim for result or means.**—(1) The general term "means," used in a patent claim, will not include all means which can perform the same function, but only those which are shown in the patent and their mechanical equivalents. Henry v. Los Angeles, 225 Fed. 769, 167 CCA 113 [aff 230 Fed. 457]; General Electric Co. v. Sundh Electric Co., 251 Fed. 283. (2) A patentee by claiming a patent on result or function of a machine may not extend his patent to devices or mechanisms not described. Holland Furniture Co. v. Perkins Glue Co., 277 U. S. 245, 48 SCt 474, 72 L. ed. 868 [rev 18 F. (2d) 387].

[c] **Feature not shown in specification or drawings** cannot be read into a claim. Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185; H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 CCA 613.

[d] **Most generous equivalent** of the elements of a patented device can never go beyond the invention revealed by the drawings and specifications, and assured by the claims. Cheatham Electric Switching Device Co. v. Brooklyn Rapid Transit Co., 238 Fed. 172, 151 CCA 248 [aff 229 Fed. 165].

53. American Specialty Stamping Co. v. New England Enameling Co., 176 Fed. 557, 100 CCA 193; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584 mem, 31 SCt 469 mem, 55 L. ed. 346 mem)]; National Meter Co. v. Neptune Meter Co., 122 Fed. 75 [aff 127 Fed. 563, 62 CCA 345]; Francis v. Mellar, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 8 Phila. (Pa.) 157.

54. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, 130 CCA 117.

55. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Carter Co. v. Earnshaw Knitting Co., 25 F. (2d) 981; General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Pearson v. Uncle Sam Mfg. Co., 11 F. (2d) 603; Lektophone Corp. v. Sylo Lighting Fixture Co., 11 F. (2d) 421 [rev on other grounds 16 F. (2d) 7]; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]; Royal Co. v. Tweedie, 276 Fed. 351 [rev 267 Fed. 224]; Yates v. Smith, 271 Fed. 27 [aff 271 Fed. 33 (certiorari den 256 U. S. 693 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem)]; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; U. S. Light, etc., Corp. v. Safety Car Heating, etc., Co., 261 Fed. 915; Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291; Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848; Diamond Patent Co. v. S. E. Carr Co., 217 Fed. 400, 133 CCA 310; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; U. S. Cons. Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; George Frost Co. v. Samstag, 173 Fed. 793 [rev on other grounds 180 Fed. 739, 105 CCA 37 (certiorari den 225 U. S. 711 mem, 32 SCt 841 mem, 56 L. ed. 1268 mem)]; Dey Time-Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807 [aff 178 Fed. 812, 102 CCA 260]; In re Ellis, 37 App. (D. C.) 203.

56. Linville v. Milberger, 29 F. (2d) 610; H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 CCA 613; National Enameling, etc., Co. v. New England Enameling Co., 151 Fed. 19, 80 CCA 485 [rev 139 Fed. 643]; Coburn Trolley-Track Mfg. Co. v. Chandler, 91 Fed. 260 [aff 97 Fed. 333, 38 CCA 201]; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Kidd v. Horry, 33 Fed. 712 [app dism 145 U. S. 643, 12 SCt 983, 36 L. ed. 857]; Railway Register Mfg. Co. v. Third Ave. R. Co., 33 Fed. 31 [aff 149 U. S. 783, 13 SCt 1051, 37 L. ed. 964]; Becker v. Hastings, 22 Fed. 827; McKesson v. Carnrick, 9 Fed. 44, 19 Blatchf. 158; Detmold v. Reeves, 7 F. Cas. No. 3,831, 1 Fish. Pat. Cas. 127.

57. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Carter Co. v. Earnshaw Knitting Co., 25 F. (2d) 981; Nash Engineering Co. v. Trane Co., 20 F. (2d) 439 [aff 25 F. (2d) 267]; General Electric Co. v. De Forest Radio Co., 17 F (2d) 90 [mod on other grounds 28 F. (2d) 641]; Haggerty v. Rawlings Mfg. Co., 14 F. (2d) 928; Royal Co. v. Tweedie, 276 Fed. 351 [rev 267 Fed. 224]; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Yates v. Smith, 271 Fed. 27 [aff 271 Fed. 33 (certiorari den 256 U. S. 693 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem)]; Dayton Engineering Laboratories Co. v. Kent, 264 Fed. 103 [aff 260 Fed. 187]; Fulton Co. v. Powers Regulator Co., 263 Fed. 578; U. S. Light,

biguity.[58]

Reading element described into claim. If a claim includes an element in general terms and refers to the specifications to identify it, such element may be read into the claim.[59] It has been asserted without qualification that an essential element described and shown in the specifications and drawings may be read into a claim, although not specified therein.[60] It has also been asserted that this cannot be done.[61] It has been held that an essential element described and shown by the specification and drawings may be read into the claim for the purpose of making the claim describe an operative method or device,[62] but not for the purpose of making out a case of novelty or infringement.[63]

Effect of disclaimer in specification.[64] A patentee cannot claim that which he has disclaimed in his specifications.[65]

[§ 351] 3. **Effect of Words "Substantially as Described" in Claim.** Such words as "substantially as described" placed at the end of a claim do not have the effect of limiting the claim to precisely what is described and shown,[66] but mean merely that the specification and drawings are to be looked to in determining the meaning and scope of the terms used.[67] The words do limit the claim if necessary to sustain it or to cover the real invention,[68] but they cannot extend the patent beyond the claim which bounds the patentee's rights.[69] They are implied in all claims whether they are actually present

etc., Corp. v. Safety Car Heating, etc., Co., 261 Fed. 915; Bisight Co. v. Onepiece Bifocal Lens Co., 259 Fed. 275, 170 CCA 343 [mod 246 Fed. 450 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291; Van Ness v. Layne, 213 Fed. 804, 130 CCA 462; U. S. Cons. Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; Weed Chain Tire Grip Co. v. Excelsior Supply Co., 179 Fed. 232 [mod on other grounds 192 Fed. 35, 113 CCA, 1 (certiorari den 223 U. S. 727 mem, 32 SCt 526 mem, 56 L. ed. 632 mem)]; Excelsior Drum Works v. Sheip, 173 Fed. 312 [aff 180 Fed. 980, 103 CCA 592]; Dey Time-Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807 [aff 178 Fed. 812, 102 CCA 260]; In re Ellis, 37 App. (D. C.) 203. Contra Fleischman Yeast Co. v. Federal Yeast Corp., 8 F. (2d) 186 [aff 13 F. (2d) 570]; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8.

[a] **If a claim is broad,** resort may be had to the specifications to validate it. Radio Corp. of America v. Twentieth Century Radio Corp., 19 F. (2d) 290.

[b] **Description does not necessarily limit claims.**—Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289.

58. Permutit Co. v. Wadham, 13 F. (2d) 454 [rev 294 Fed. 370, and reh den 15 F. (2d) 20]; Crown Cork, etc., Co. v. Sterling Cork, etc., Co., 217 Fed. 381, 133 CCA 297 [rev 210 Fed. 26].

59. I. T. S. Rubber Co. v. Panther Rubber Mfg. Co., 260 Fed. 934, 171 CCA 576; Duncan v. Cincinnati Butchers' Supply Co., 171 Fed. 656, 96 CCA 400.

[a] **Effect.**—The general language in a claim for a patent, which points to an element or device more fully described in the specifications and drawings of which it is a part, is limited to such an element as is there described. Royal Co. v. Tweedie, 276 Fed. 351 [rev 267 Fed. 224]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504.

60. Sturm v. Wm. E. Dee Co., 249 Fed. 244; Waterloo Cement Mach. Corp. v. Engel, 230 Fed. 169 [aff 240 Fed. 976, 153 CCA 662].

[a] **Mere casual reference** in the specification of a patent to a given feature will not make it a part of the invention unless it is relied upon in describing the same. Beckwith v. Malleable Iron Range Co., 174 Fed. 1001 [aff 189 Fed. 74, 110 CCA 638].

61. Filer, etc., Co. v. Diamond Iron Works, 250 Fed. 454, 162 CCA 524 [aff 241 Fed. 498, and certiorari den 246 U. S. 676 mem, 38 SCt 426 mem, 62 L. ed. 933 mem]; Duncan v. Cincinnati Butchers' Supply Co., 171 Fed. 656, 96 CCA 400.

62. McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Slocomb v. A. C. Layman Mach. Co., 227 Fed. 94 [aff 230 Fed. 1021 mem, 144 CCA 286 mem (certiorari den 242 U. S. 635 mem, 37 SCt 18 mem, 61 L. ed. 539 mem)]; Crown Cork, etc., Co. v. Sterling Cork, etc., Co., 217 Fed. 381, 133 CCA 297 [rev 210 Fed. 26]; Canda v. Michigan Malleable Iron Co., 123 Fed. 95 [aff 124 Fed. 486, 61 CCA 194].

63. McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 CCA 613; General Sub-construction Co. v. Netcher, 167 Fed. 549 [aff 174 Fed. 236, 98 CCA 144]; Canda v. Michigan Malleable Iron Co., 123 Fed. 95 [aff 124 Fed. 486, 61 CCA 194].

64. Disclaimer where patent already issued see supra §§ 329–334.

65. Manton-Gaulin Mfg. Co. v. Wright-Ziegler Co., 271 Fed. 391.

[a] **Extent of rule.**—When necessary to construe a claim limitation to determine the question of infringement, a specification disclaimer of an older patent will not control the claim limitation unless the respect in which defendant's device differs from the patent is the same respect in which the patent differs from the reference. Rowley Co. v. Columbus Pharmacal Co., 220 Fed. 127, 136 CCA 81.

66. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Carnes Artificial Limb Co. v. Dilworth Arm Co., 273 Fed. 838; Superior Hay Stacker Mfg. Co. v. Dain Mfg. Co., 208 Fed. 549, 125 CCA 551; American Can Co. v. Hickmott Asparagus Canning Co., 142 Fed. 141, 73 CCA 359; Boyer v. Keller Tool Co., 127 Fed. 130, 62 CCA 244 [certiorari den 193 U. S. 673 mem, 24 SCt 855 mem, 48 L. ed. 842 mem]; General Electric Co. v. International Specialty Co., 126 Fed. 755, 61 CCA 329; Lowrie v. H. A. Meldrum Co., 124 Fed. 761 [rev on other grounds 130 Fed. 886, 65 CCA 194]; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 289; Beach v. Hobbs, 92 Fed. 146, 34 CCA 248 [aff 180 U. S. 383, 21 SCt 409, 45 L. ed. 586]; Boynton Co. v. Morris Chute Co., 87 Fed. 225, 30 CCA 617; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod 63 Fed. 962, 11 CCA 528]; Lorillard v. McDowell, 15 F. Cas. No. 8,510, 2 Bann. & A. 531.

67. Brown v. Davis, 116 U. S. 237, 6 SCt 379, 29 L. ed. 659; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Goldschmidt Thermit Co. v. American Vanadium Co., 291 Fed. 81; Rohm v. Martin Dennis Co., 263 Fed. 106 [aff 263 Fed. 388]; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; Scott v. Fisher Knitting Mach. Co., 139 Fed. 137 [rev on other grounds 145 Fed. 915, 76 CCA 447]; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845; Campbell v. Richardson, 76 Fed. 976, 22 CCA 669 [certiorari den 165 U. S. 720 mem, 17 SCt 992 mem, 41 L. ed. 1184 mem]; Columbus Watch Co. v. Robbins, 64 Fed. 384, 12 CCA 174; Westinghouse v. Edison Electric Light Co., 63 Fed. 588, 11 CCA 342; Bortree v. Jackson, 43 Fed. 136; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Knight v. Gavit, 14 F. Cas. No. 7,884.

[a] **Save in exceptional instances,** the presence or absence of the phrase "substantially as described" in a claim is of no interpretive importance. National Brake, etc., Co. v. Christensen, 229 Fed. 564, 144 CCA 24 [certiorari den 241 U. S. 659 mem, 36 SCt 447 mem, 60 L. ed. 1225 mem]; National Tube Co. v. Mark, 216 Fed. 507, 133 CCA 13 [mod on other grounds 10 F. (2d) 430].

68. American Air Cleaning Co. v. General Compressed Air, etc., Co., 195 Fed. 744, 115 CCA 544 [rev 177 Fed. 272]; Schaum v. Riehl, 124 Fed. 320; Parsons v. Seelye, 92 Fed. 1005 [rev on other grounds 100 Fed. 455, 40 CCA 486]; Brill v. St. Louis Car Co., 90 Fed. 666, 33 CCA 213; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Davis v. Parkman, 71 Fed. 961, 18 CCA 398; Carter Mach. Co. v. Hanes, 70 Fed. 859; Boyden Power-Brake Co. v. Westinghouse Air-Brake Co., 70 Fed. 816, 17 CCA 430 [rev on other grounds 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136]; Lee v. Pillsbury, 49 Fed. 747; Rapid Service Store R. Co. v. Taylor, 43 Fed. 249]; Bruce v. Marder, 10 Fed. 750, 20 Blatchf. 355; Vance v. Campbell, 28 F. Cas. No. 16,837, 1 Fish. Pat. Cas. 483 [rev on other grounds 1 Black 427, 17 L. ed. 168]. But see One-Piece Bifocal Lens Co. v. Bisight Co., 246 Fed. 450 [mod on other grounds 259 Fed. 275, 170 CCA 343 (certiorari den 249 U. S. 606 mem, 39 SCt 288 mem, 63 L. ed. 799 mem)]; (broad claim held not saved by use of the words "substantially as described"); Houser v. Starr, 203 Fed. 264, 121 CCA 462 [mod 194 Fed. 730] (whatever parts of the device are named in a claim are of necessity intended to be named with reference to the specification and drawings, and the reference cannot be made narrower by saying "as described," nor broader by saying "substantially").

[a] **Use of words in connection with call for means.**—Where the claims of a patent specify the elements of a combination, but do not specify the means whereby those elements perform their functions but call for "means" generally, and close with the words "substantially as and for the purpose" described, or specified, or set forth, such words import into the claims the specific means described in the specification, and the claims are limited accordingly. Union Match Co. v. Diamond Match Co., 162 Fed. 148, 89 CCA 172.

69. Henderson v. Welch Dry Kiln Co., 26 F. (2d) 810; Houser v. Starr, 203 Fed. 264, 121 CCA 462 [mod 194

or not.[70]

[§ 352] **4. Reference Letters.** The use in the claims of letters of reference appearing in the drawing as representing parts of the apparatus is not to be regarded as limiting the claim to the precise form of those parts unless such limitation is necessary in order to make the claim patentable over the prior art.[71]

[§ 353] **5. Advantages, Uses, or Forms of Invention.** Unless the patentee has foregone a part of his right by limitations in his claims,[72] he is entitled to every advantage inherent in the invention,[73] all its fairly disclosed possibilities,[74] every form in which the invention may be copied[75]—unless form is essential to the invention[76]—all the uses to which it can be applied,[77] all the properties of the discov-

Fed. 730]; U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234.

70. Juengst v. Hill Pub. Co., 267 Fed. 428 [aff 267 Fed. 435]; National Meter Co. v. Neptune Meter Co., 122 Fed. 75 [rev on other grounds 127 Fed. 563, 62 CCA 345]; Beach v. Hobbs, 82 Fed. 916; Francis v. Mellor, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153; Metropolitan Wringing-Mach. Co. v. Young, 17 F. Cas. No. 9,508, 2 Bann. & A. 460, 14 Blatchf. 46; Westinghouse v. Gardner, etc., Air-Brake Co., 29 F. Cas. No. 17,450, 2 Bann. & A. 55.

71. Pangborn Corp. v. W. W. Sly Mfg. Co., 284 Fed. 217 [aff 263 Fed. 394, 276 Fed. 971 (certiorari den 260 U. S. 749 mem, 43 SCt 249 mem, 67 L. ed. 495 mem)]; Brunswick-Balke-Collender Co. v. Rosatto, 159 Fed. 729 [aff 165 Fed. 56, 91 CCA 142]; Electric Candy Mach. Co. v. Morris, 156 Fed. 972; Kelsey Heating Co. v. James Spear Stove, etc., Co., 155 Fed. 976 [rev on other grounds 158 Fed. 622, 85 CCA 444]; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Bonnette Arc Lawn Sprinkler Co. v. Koehler, 82 Fed. 428, 27 CCA 200; Muller v. Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 CCA 357; Schreiber, etc., Co. v. Grimm, 72 Fed. 671, 19 CCA 67; McCormick Harvesting Mach. Co. v. Aultman, 69 Fed. 371, 16 CCA 259; Delemater v. Heath, 58 Fed. 414, 7 CCA 279; Brown v. Stilwell, etc., Mfg. Co., 57 Fed. 731, 741, 6 CCA 528; Bethlehem Steel Co. v. U. S., 53 Ct. Cl. 348.

[a] **Rule applied.**—The use in a claim of a patent of a letter of reference to the drawings which show a part composed of two pieces does not limit the patentee to a two-piece construction where it is not of the essence of the invention claimed. Brunswick-Balke-Collender Co. v. Rosatto, 159 Fed. 729 [aff 165 Fed. 56, 91 CCA 142].

[b] **Improvements of narrow character.**—The use of letters in a claim to describe a patented invention, which is merely an improvement of a narrow character, will limit the inventor to the elements so designated, as shown in the drawings and specifications to which the letters refer, which are by such reference, in effect, incorporated in the claim. Ross-Moyer Mfg. Co. v. Randall, 104 Fed. 355, 43 CCA 578 [foll Washburne v. Consolidated Safety Pin Co., 197 Fed. 552].

[c] **Distinction between claims.**—Where reference letters form the only distinction between two claims, they indicate a narrower scope. Curry v. Union Electric Welding Co., 230 Fed. 422, 144 CCA 564 [aff 279 Fed. 465 (certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem)].

72. See supra § 349.

73. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610; New York Scaffolding Co. v. Chain Belt Co., 254 U. S. 32, 41 SCt 21, 65 L. ed. 116 [rev 245 Fed. 747, 158 CCA 149]; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 SCt 472, 37 L. ed. 307; Perey v. Perey Mfg. Co., 17 F. (2d) 774; Wallace, etc., Co. v. Le Roy, 17 F. (2d) 593; Lyon v. Boh, 10 F. (2d) 30 [rev 1 F. (2d) 48]; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Kintner v. Atlantic Communication Co., 249 Fed. 73; Gear v. Fairmount Electric, etc., Co., 231 Fed. 728, 146 CCA 12 [rev 225 Fed. 61]; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Holton v. Pepper, 216 Fed. 368; Stromberg Motor Devices Co. v. John A. Bender Co., 212 Fed. 419; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 182 Fed. 991, 105 CCA 545 [aff 168 Fed. 549].

[a] **Feature not necessarily inherent.**—Where an alleged element or characteristic feature of an invention is not necessarily inherent in the invention itself, the failure of the patentee to refer to it is persuasive evidence that it is not within the scope of his invention, and, not being disclosed to the public, it should not be read into the patent. Edison General Electric Co. v. Crouse-Hinds Electric Co., 152 Fed. 437, 81 CCA 579 [rev 146 Fed. 539].

74. Pickett v. F. B. Stearns Co., 10 F. (2d) 414; Safety Car Heating, etc., Co. v. Gould Coupler Co., 239 Fed. 861, 152 CCA 645 [certiorari den 245 U. S. 646 mem, 38 SCt 9 mem, 62 L. ed. 529 mem]; Conrader v. Judson Governor Co., 226 Fed. 207 [mod on other grounds 238 Fed. 349, 151 CCA 365].

75. New York Scaffolding Co. v. Chain Belt Co., 254 U. S. 32, 41 SCt 21, 65 L. ed. 116; T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045 [aff 230 Fed. 821, 145 CCA 131 (reh den 234 Fed. 343, 148 CCA 245)]; T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045 [rev on other grounds 229 Fed. 730, 144 CCA 140]; U. S. v. Société Anonyme des Anciens Établissements Cail, 224 U. S. 309, 32 SCt 479, 56 L. ed. 778; Western Electric Co. v. La Rue, 139 U. S. 601, 11 SCt 670, 35 L. ed. 294; Winans v. Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Einson Freeman Co. v. International Folding Paper Box Co., 21 F. (2d) 701; French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem]; Weser v. Paul, 276 Fed. 747; Merrill v. W. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; U. S. Fire Escape Counterbalance Co. v. Joseph Halsted Co., 246 Fed. 947 [mod 257 Fed. 95]; Individual Drinking Cup Co. v. U. S. Drinking Cup Co., 220 Fed. 331; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; National Enameling, etc., Co. v. New England Enameling Co., 151 Fed. 19, 80 CCA 485 [rev 139 Fed. 643]; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785; Oehrle v. William H. Horstmann Co., 131 Fed. 487 [aff 138 Fed. 561, 70 CCA 638]; Albright v. Langfeld, 131 Fed. 473; Smeeth v. Perkins, 125 Fed. 285, 60 CCA 199; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Krajewski v. Pharr, 105 Fed. 514, 44 CCA 572; Metallic Extraction Co. v. Brown, 104 Fed. 345, 43 CCA 568; U. S. Mitis Co. v. Carnegie Steel Co., 89 Fed. 343 [aff 90 Fed. 829 mem, 33 CCA 387]; American Dunlop Tire Co. v. Erie Rubber Co., 66 Fed. 558 [rev on other grounds 70 Fed. 58, 16 CCA 632]; Consolidated Bunging Apparatus Co. v. Metropolitan Brewing Co., 60 Fed. 93, 8 CCA 485; Sugar Apparatus Mfg. Co. v. Yaryan Mfg. Co., 43 Fed. 140; Roemer v. Neuman, 26 Fed. 102 [aff 132 U. S. 103, 10 SCt 12, 33 L. ed. 277].

"The patentee, having described his invention and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of these forms." Western Electric Co. v. La Rue, 139 U. S. 601, 606, 11 SCt 670, 35 L. ed. 294.

[a] **Statutory requirement** that an applicant for a patent shall explain the best mode in which he has contemplated applying the principle of his invention (U. S. Rev. St. § 4888) does not preclude him from claiming any other mode which embodies his principle. Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484 [reh den 186 Fed. 495, 108 CCA 502]; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561.

[b] **Interpreting generic expression.**—The court should never interpret a positively recited generic expression in a claim as limited to the precise instrumentality disclosed by the patent, except where necessary to distinguish the claim from the prior art. International Banding Mach. Co. v. American Bander Co., 9 F. (2d) 606 [rev 4 F. (2d) 726].

76. Individual Drinking Cup Co. v. U. S. Drinking Cup Co., 220 Fed. 331; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561.

[a] **Form is material only** so far as it is essential to the operation or indispensable, by reason of the state of the art, to the novelty of the claim. Louden Mach. Co. v. Strickler, 195 Fed. 751, 115 CCA 551 [rev 186 Fed. 522].

[b] **Pointing out that form not essential.**—It is not necessary that the inventor should point out in his patent that the specific construction shown is not essential to the invention. Ryder v. Townsend, 188 Fed. 792.

77. Stow v. Chicago, 104 U. S. 547, 26 L. ed. 816; Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; Tucker v. Spalding, 13 Wall. (U. S.) 453, 20 L. ed. 515; Kohler v. Cline Electric Mfg. Co., 28 F. (2d) 405 [aff 27 F. (2d) 638]; West v. Premier Register Table Co., 27 F. (2d) 653 [aff 21 F. (2d) 762]; Skywriting Corp. v. Rogers Aircraft, Inc., 300 Fed. 998; Armstrong v. De Forest Radio Tel., etc., Co., 279 Fed. 445 [aff 280 Fed. 584]; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; Kennicott Co. v. Holt Ice, etc., Co., 230 Fed. 157, 144 CCA 455; Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150]; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Acme Truck, etc., Co. v. Meredith, 183 Fed. 124, 105 CCA 414; Electric Storage Battery Co. v. Gould Storage Battery Co., 158 Fed. 610, 85 CCA 432; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Stearns v. Russell, 84 Off. Gaz. (U. S.) 1434; Fieux v. Coppus, 48 App. (D. C.) 422.

[a] **Rule applied.**—Where a patented pump was designed primarily for use as an air pump, the fact that it may also be used as a combined air and water pump, or as a water pump, and that such uses are claimed, does not deprive the patentee, in determining the invention, of the

ery,[78] or the benefit of every function possessed by his mechanism.[79] It is immaterial that the particular benefits to which the patentee is entitled are not mentioned or specified[80] or claimed,[81] or that the inventor was or was not aware of them.[82]

[§ 354] **6. Equivalents.** A patentee is entitled to hold as infringer not merely one who makes or uses a device having the specific elements disclosed and claimed by him, but anyone who makes or uses a device having elements which are known equivalents of those claimed.[83] The things, however, must be known equivalent of each other at the time of the patent.[84] What is regarded as an equivalent depends upon the circumstances of the particular

weight to be given to the merits which attach to the use of the pump as an air pump. Warren Steam Pump Co. v. Blake, etc., Steam Pump Works, 163 Fed. 263, 91 CCA 19 [aff 155 Fed. 285].

78. Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150].

79. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; I. T. S. Rubber Co. v. Panther Rubber Mfg. Co., 260 Fed. 934, 171 CCA 576; Jackson Fence Co. v. Peerless Wire Fence Co., 228 Fed. 691, 143 CCA 213 [aff 226 Fed. 774]; Rollman Mfg. Co. v. Universal Hardware Works, 207 Fed. 97; Dunlap v. Willbrandt Surgical Mfg. Co., 151 Fed. 223, 80 CCA 575.

[a] **Where there is a capacity of reversibility** in a patented device the courts will not restrict the claim to one attribute, to the exclusion of the reversible attribute. Marconi Wireless Tel. Co. v. De Forest Radio Tel., etc., Co., 261 Fed. 393.

80. I. T. S. Rubber Co. v. Panther Rubber Mfg. Co., 260 Fed. 934, 171 CCA 576; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Safety Car Heating, etc., Co. v. Gould Coupler Co., 239 Fed. 861, 152 CCA 645 [certiorari den 245 U. S. 646 mem, 38 SCt 9 mem, 62 L. ed. 529 mem]; Gear v. Fairmount Electric, etc., Co., 231 Fed. 728, 146 CCA 12 [rev 225 Fed. 61]; Jackson Fence Co. v. Peerless Wire Fence Co., 228 Fed. 691, 143 CCA 213 [aff 226 Fed. 774]; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Conrader v. Judson Governor Co., 226 Fed. 207 [mod on other grounds 238 Fed. 349, 151 CCA 365]; Holton v. Pepper, 216 Fed. 368; Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150]; Stromberg Motor Devices Co. v. John A. Bender Co., 212 Fed. 419; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 182 Fed. 991, 105 CCA 545 [aff 168 Fed. 549]; Warren Steam Pump Co. v. Blake, etc., Steam Pump Works, 163 Fed. 263, 91 CCA 19 [aff 155 Fed. 285].

81. Pickett v. F. B. Stearns Co., 10 F. (2d) 414; Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, 130 CCA 117; Morgan Engineering Co. v. Alliance Mach. Co., 176 Fed. 100, 100 CCA 30; E. H. Angle Regulating Appliance Co. v. Aderer, 171 Fed. 93.

82. Stow v. Chicago, 104 U. S. 547, 26 L. ed. 816; Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; Kohler v. Cline Electric Mfg. Co., 28 F. (2d) 405 [aff 27 F. (2d) 638]; Perey v. Perey Mfg. Co., 17 F. (2d) 774; Lyon v. Boh, 10 F. (2d) 30 [rev 1 F. (2d) 48]; Armstrong v. De Forest Radio Tel., etc., Co., 279 Fed. 445 [aff 280 Fed. 584]; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Kintner v. Atlantic Communication Co., 249 Fed. 73; Gear v. Fairmount Electric, etc., Co., 231 Fed. 728, 146 CCA 12 [rev 225 Fed. 61]; Kennicott Co. v. Holt Ice, etc., Co., 230 Fed. 157, 144 CCA 455; Jackson Fence Co. v. Peerless Wire Fence Co., 228 Fed. 691, 143 CCA 213 [aff 226 Fed. 774]; Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 142 CCA 445; Conrader v. Judson Governor Co., 226 Fed. 207 [mod on other grounds 238 Fed. 349, 151 CCA 365]; Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150]; Stromberg Motor Devices Co. v. John A. Bender Co., 212 Fed. 419; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Acme Truck, etc., Co. v. Meredith, 183 Fed. 124, 105 CCA 414; Dunlap v. Willbrandt Surgical Mfg. Co., 151 Fed. 223, 80 CCA 575; Fieux v. Coppus, 48 App. (D. C.) 422.

[a] **Illustration.**—That the inventor of an aërial signaling system did not foresee its potential value as a pure advertising medium through skywriting did not authorize another to infringe by using the system as an advertising medium. Skywriting Corp. v. Rogers Aircraft, Inc., 300 Fed. 998.

83. Dolbear v. American Bell Tel. Co., 126 U. S. 1, 8 SCt 778, 31 L. ed. 863; Bassick Mfg. Co. v. Standard Products Mfg. Co., 19 F. (2d) 937 [aff 19 F. (2d) 944]; International Banding Mach. Co. v. American Bander Co., 9 F. (2d) 606 [rev 4 F. (2d) 726]; Belber Trunk. etc., Co. v. Seward Trunk, etc., Co., 279 Fed. 82; Imperial Mach., etc., Corp. v. Blakeslee, 262 Fed. 419; Getty v. Layne, 262 Fed. 141; Æolian Co. v. Schubert Piano Co., 261 Fed. 178; U. S. Gypsum Co. v. Bestwall Mfg. Co., 258 Fed. 647 [aff 270 Fed. 542 (certiorari den 263 U. S. 713 mem, 44 SCt 132 mem, 68 L. ed. 520 mem)]; Munger v. Perlman Rim Corp., 244 Fed 799 [aff 275 Fed. 21 (certiorari den 257 U. S. 645 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)]; American Hoist, etc., Co. v. Nancy Hanks Hay Press, etc., Co., 216 Fed. 785 [reh den 224 Fed. 524]; United Gas Impr. Co. v. Gas Mach. Co., 211 Fed. 672 [rev on other grounds 228 Fed. 684, 143 CCA 206]; Steiger v. Waite Grass Carpet Co., 194 Fed. 878 [aff 213 Fed. 798, 130 CCA 456]; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484 [reh den 186 Fed. 495, 108 CCA 502]; Benbow-Brammer Mfg. Co. v. Richmond Cedar Works, 170 Fed. 965, 96 CCA 101; L. J. Mueller Furnace Co. v. Groeschel, 166 Fed. 917; Diamond Match Co. v. Ruby Match Co., 127 Fed. 341; Klauder-Weldon Dyeing Mach. Co. v. Steadwell Dyeing Mach. Co., 122 Fed. 640 [aff 128 Fed. 724, 63 CCA 322]; Union Steam-Pump Co. v. Battle Creek Steam-Pump Co., 104 Fed. 337, 43 CCA 560; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; Thrall v. Poole, 89 Fed. 718; Tuttle v. Claflin, 76 Fed. 227, 22 CCA 138 [certiorari den 166 U. S. 721 mem, 17 SCt 992 mem, 41 L. ed. 1187 mem]; Delemater v. Heath, 58 Fed. 414, 7 CCA 279; Rodebaugh v. Jackson, 37 Fed. 882; Burden v. Corning, 4 F. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Corliss v. Wheeler, etc., Mfg. Co., 4 F. Cas. No. 2,233, 2 Fish. Pat. Cas. 199; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [aff 3 Wall. 315, 18 L. ed. 76]; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Murphy v. Eastham, 17 F. Cas. No. 9,949, 5 Fish. Pat. Cas. 306, Holmes 113; Société Anonyme des Anciens Établissements Cail v. U. S., 43 Ct. Cl. 25 [aff 224 U. S. 399, 32 SCt 479, 56 L. ed. 778]; In re Ellis, 37 App. (D. C.) 203.

[a] **Definition.**—"Equivalents" in an art or process are such acts as, in accordance with the rules of construction relating to patents, are interchangeable with those which the inventor has himself employed. Superior Skylight Co. v. August Kuhnla, Inc., 265 Fed. 282 [aff 273 Fed. 482].

[b] **Otherwise stated.**—Although an inventor is not confined to the exact details of his disclosure, the extent of his contribution is limited to such substitutes for any disclosed element as the art needs no help to find. H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 659 [rev 288 Fed. 62].

[c] **Patentee is not confined to equivalents named** in his specification. Treibacher-Chemische Werke Gesellschaft v. Roessler, etc., Chemical Co., 219 Fed. 210, 135 CCA 108 [aff 214 Fed. 410].

[d] **Describing two forms of element.**—The fact that the specification of a patent describes two forms of one element of the combination which may be used in the alternative, while a claim describes but one of such forms, does not preclude the patentee from invoking the doctrine of equivalents as to the alternative form. Whitin Mach. Works v. Houghton, 178 Fed. 444, 101 CCA 344.

[e] **Patent for prescribed means** or mechanism to accomplish a desired end must be limited to the particular means described in the specification, or their clear mechanical equivalents, and does not cover any other mechanical structure which is substantially different in its construction or in its operation. Dudlo Mfg. Co. v. Varley Duplex Magnet Co., 253 Fed. 745, 165 CCA 339; Union Match Co. v. Diamond Match Co., 162 Fed. 148, 89 CCA 172.

[f] **Examples of equivalents.**—(1) A call for a "one-piece integral" part has been construed to include one made integral by the permanent holding together of the parts and their integral operation or function. Goldsmith Co. v. Johnstone, 294 Fed. 756. (2) U bar may be claimed as the equivalent of an angle bar, where form is immaterial to the invention. Lutton Co. v. Lord, etc., Co., 16 F. (2d) 490 [aff 19 F. (2d) 1023]. (3) A patent for a revolving door, whose wings are "automatically unlocked" by an unusual pressure, was held to cover a structure in which the wings are held together by chains which will break with an unusual pressure. Van Kannel Revolving Door Co. v. Straus, 235 Fed. 135, 148 CCA 629. (4) Although a patent for a furnace arch illustrated only a straight roofed arch, a hipped arch was within its range of protection where the construction of such arch involved only the use of a bracket having the angle of attachment modified by a mere difference in forging or by the use of shims. Laclede Christy Clay Products Co. v. St. Louis, 270 Fed. 338 [aff 280 Fed. 83].

Substitution of equivalents as infringement see infra §§ 509, 510.

84. American Sulphite Pulp Co. v. Hinckley Fibre Co., 217 Fed. 57, 235 Fed. 173; Folger v. Dow Portable Electric Co., 128 Fed. 45 [aff 133 Fed. 295, 68 CCA 551]; Severy Process Co. v. Harper, 113 Fed. 581; Magic Light Co. v. Economy Gas-Lamp Co., 97 Fed. 87, 38 CCA 56; Kelly v. Springfield R. Co., 92 Fed. 614, 34 CCA 570 [certiorari den 177 U. S. 694 mem, 20 SCt 1028 mem, 44 L. ed. 945 mem]; Gerard v. Diebold Safe, etc., Co., 61 Fed. 209, 9 CCA 451, 54 Fed. 889, 4 CCA 644 [certiorari den 159 U. S. 253 mem, 15 SCt 1039 mem, 40 L. ed. 144 mem]; Colgate v. Law Tel. Co., 6 F. Cas. No. 2,993a, 5 Bann. & A. 437; McCormick v. Manny, 15 F. Cas. No. 8,724, 6 McLean 539 [aff 20 How. 402, 15 L. ed. 930].

case,[85] the patentee being entitled to a range of equivalents commensurate with the novelty exhibited.[86] What in the prior art is differentiated from the patent to give it validity cannot be claimed as an equivalency for the purpose of establishing infringement.[87]

Effect of limitations in claims. The fact that the claims in a patent are limited in scope does not deprive them of all the benefits of the doctrine of equivalency, if those benefits are availed of in a manner commensurate with the scope of the invention, and without doing violence to the language of the claims.[88] The rules that an express limitation may not be disregarded,[89] and that a form equivalent to a specified form infringes,[90] often seem to come into conflict.[91] Thus it is broadly stated that an expressly stated limitation cannot be overcome by the doctrine of equivalents,[92] and on the other hand it is said that a patentee is not to be so strictly limited to the language of his claims as to nullify the doctrine of equivalents.[93] There is no fixed formula by which the conflict can be settled.[94] It has been variously said that the conflict must be determined by finding the true meaning of "equivalency" in the case to be decided,[95] and that the question is how far the patentee intended to restrict the range of equivalents.[96] The true distinction appears to be that, when a word of limitation in a claim represents a thought essential to that which the inventor regarded as his new step, its limiting effect cannot be neutralized through the rule of equivalents;[97] and where the limitation does not pertain to the inventive step, but is rather an adoption of the invention to its environment,[98] or pertains to an accessory of the substantial invention, the doctrine of equivalents may be applied.[99]

[§ 355] **7. Pioneer Inventions.** A pioneer invention is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before.[1] Such patents will receive a broad and liberal construction,[2] and are

85. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Yancey v. Enright, 230 Fed. 641 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]; Draper Co. v. Stafford Co., 188 Fed. 811 [aff 196 Fed. 501, 116 CCA 320]; Rich v. Baldwin, 133 Fed. 920, 66 CCA 464; Dowagiac Mfg. Co. v. Brennan, 118 Fed. 143 [rev on other grounds 127 Fed. 143, 62 CCA 257 (certiorari den 195 U. S. 630 mem, 25 SCt 788 mem, 49 L. ed. 352 mem)]; Adams Co. v. Schreiber, etc., Mfg. Co., 111 Fed. 182 [rev on other grounds 117 Fed. 830, 54 CCA 128]; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Carter Mach. Co. v. Hanes, 70 Fed. 859; Erie Rubber Co. v. American Dunlop Tire Co., 70 Fed. 58, 16 CCA 632; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 42 Fed. 900 [app dism 154 U. S. 496 mem, 14 SCt 1143 mem, 38 L. ed. 1077 mem]; Michaelis v. Roessler, 34 Fed. 325; Bridgeport Wood Finishing Co. v. Hooper, 5 Fed. 63, 18 Blatchf. 459.

Infringement see infra § 510.

86. Greenwood v. Monarch Mfg. Co., 30 F. (2d) 547 [aff 30 F. (2d) 548]; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Wood v. Boylan, 19 F. (2d) 48; Allen v. Wingerter, 17 F. (2d) 745; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co., 295 Fed. 748 [rev on other grounds 1 F. (2d) 673 (certiorari den 267 U. S. 594 mem, 45 SCt 231 mem, 69 L. ed. 804 mem)]; Edwards Mfg. Co. v. National Fireworks Distributing Co., 272 Fed. 23 [rev on other grounds 2 F. (2d) 815]; S. S. Stafford, Inc. v. Thaddeus Davids Ink Co., 264 Fed. 111; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Oshkosh Mfg. Co. v. Koehring Mach. Co., 253 Fed. 647, 165 CCA 273; Economy Fuse, etc., Co. v. Chase-Shawmut Co., 249 Fed. 872, 162 CCA 106; Westinghouse Mach. Co. v. C. & G. Cooper Co., 245 Fed. 463, 157 CCA 625; Moon-Hopkins Billing Mach. Co. v. Dalton Adding-Mach. Co., 236 Fed. 936, 150 CCA 198 [rev 223 Fed. 51]; Weber Electric Co. v. Union Electric Co., 226 Fed. 482; Thacher v. Baltimore, 219 Fed. 909 [aff 230 Fed. 1022, 144 CCA 659]; Kings County Raisin, etc., Co. v. U. S. Consolidated Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 Fed. 136, 55 CCA 86 [certiorari den 187 U. S. 644 mem, 23 SCt 843 mem, 47 L. ed. 346 mem]; In re Ellis, 37 App. (D. C.) 203.

87. Diamond Mfg. Co. v. Dallas Brass, etc., Co., 295 Fed. 250.

88. Frederick Iron, etc., Co. v. Sanford Riley Stoker Co., 287 Fed. 495 [aff 274 Fed. 864].

89. See supra § 349.

90. See cases supra note 83.

91. D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304.

92. Goldsmith Co. v. Johnstone, 294 Fed. 756; McMillan v. Fischer Auto Bed, etc., Co., 264 Fed. 671; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304.

93. McMillan v. Fischer Auto Bed, etc., Co., 264 Fed. 671.

94. D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304.

95. D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., supra.

96. Clipper Belt Lacer Co. v. E-W Co., 237 Fed. 602, 150 CCA 484.

97. D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; Arnold-Creager Co. v. Barkwill Brick Co., 246 Fed. 441, 158 CCA 505.

98. McMillan v. Fischer Auto Bed, etc., Co., 264 Fed. 671 [cit D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304].

99. Wellman-Seaver-Morgan Co. v. William Cramp & Sons Ship, etc., Co., 3 F. (2d) 531.

1. Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 SCt 291, 48 L. ed. 437; Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 561, 562, 18 SCt 707, 42 L. ed. 1136; Autopiano Co. v. Amphion Piano Player Co., 186 Fed. 159, 108 CCA 291; Electric Candy Mach. Co. v. Morris, 156 Fed. 972; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275].

[a] **Other definitions:** (1) A patent which represents a marked advance in the art. Ford v. Bancroft, 98 Fed. 309, 312, 39 CCA 91. (2) One which first discloses the means to accomplish a certain result. National Dump Car Co. v. Ralston Steel Car Co., 172 Fed. 393, 97 CCA 91. (3) One which meets an old or plainly recognized want by an entirely new method of approach. F. N. Burt Co. v. Ritchie, 251 Fed. 909.

[b] **For the purpose of testing the character of a patent** as a pioneer, it should be considered as a whole, having in mind the entire invention, its purposes, and its results. American Cone, etc., Co. v. Denaro, 297 Fed. 913 [rev 283 Fed. 1011, and certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 468 mem]; Roberts Cone Mfg. Co. v. Bruckman, 266 Fed. 986 [certiorari den 254 U. S. 649 mem, 41 SCt 63 mem, 65 L. ed. 457 mem].

[c] **"Most conspicuous examples** of such patents are: The one to Howe of the sewing machine; to Morse of the electric telegraph; and to Bell of the telephone." Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 407, 25 SCt 697, 49 L. ed. 1100.

[d] **Other examples:** (1) Machine for homogenizing milk. Manton-Gaulin Mfg. Co. v. Dairy Mach., etc., Co., 203 Fed. 516. (2) Methods and machines for drawing glass. Okmulgee Window Glass Co. v. Window Glass Mach. Co., 265 Fed. 626. (3) An inventor, who took the important, but long-delayed and therefore not obvious step from the pulling of candy by hand to the performance of the same function by machine, making candy pulling more sanitary, greatly reducing its cost, and enlarging the field of the art, was a pioneer. Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112 [rev 263 Fed. 571].

[e] **Patent may be a pioneer in a wide or narrow field.**—A. D. Howe Mach. Co. v. Coffield Motor Washer Co., 197 Fed. 541, 117 CCA 37 [aff 190 Fed. 42, and certiorari den 227 U. S. 677 mem, 33 SCt 405 mem, 57 L. ed. 700 mem].

[f] **Inventions not of pioneer character.**—(1) Generally. Pacific States Electric Co. v. Wright, 277 Fed. 756; United Shoe Mach. Co. v. L. Q. White Shoe Co., 270 Fed. 650 [aff 279 Fed. 35]; Marconi Wireless Tel. Co. v. Kilbourne, etc., Mfg. Co., 265 Fed. 644 [aff 239 Fed. 328]; Montgomery v. U. S., 65 Ct. Cl. 526. (2) An invention which does not perform a function that was never performed by an earlier invention but merely performs its function in a substantially different way is not a "pioneer invention" and the patent therefor is a secondary patent. Racine Confectioners' Mach. Co. v. Metro Chocolate Co., 297 Fed. 635.

2. Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 561, 18 SCt 707, 42 L. ed. 1136; Packard Motor Car Co. v. Overland Motor Co., 28 F. (2d) 306; American Stainless Steel Co. v. Ludlum Steel Co., 16 F. (2d) 823; Deppe v. General Motors Corp., 15 F. (2d) 419; Universal Rim

entitled to a liberal range of equivalents.[3]

[§ 356] **8. Improvements.** That a patent is not of a pioneer character does not prevent its owner from invoking the doctrine of equivalents,[4] although ordinarily such a patent cannot be construed as liberally as a pioneer invention.[5] Where the invention, although for an improvement only, is of a meritorious character, the range of equivalents is reasonably broad and fair,[6] and in some cases the patent may be liberally construed with a corresponding range of equivalents.[7] Where the invention is a narrow specific improvement upon prior inventions, the field of equivalents is restricted and the patent must be narrowly construed.[8] One who merely makes and se-

Co. v. Firestone Tire, etc., Co., 7 F. (2d) 24 [mod 289 Fed. 884]; Bird v. Sears, 299 Fed. 574; Okmulgee Window Glass Co. v. Window Glass Mach. Co., 265 Fed. 626; Consolidated Window Glass Co. v. Window Glass Mach. Co., 261 Fed. 362 [certiorari den 251 U. S. 558 mem, 40 SCt 179 mem, 64 L. ed. 413 mem]; Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [rev 260 Fed. 183, and certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem]; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; Buffalo Forge Co. v. Buffalo, 255 Fed. 83, 166 CCA 411; Auto Vacuum Freezer Co. v. William A. Sexton Co., 239 Fed. 898, 153 CCA 26; Brothers v. Lidgerwood Mfg. Co., 223 Fed. 359, 138 CCA 460; Holmes v. Burnett, 206 Fed. 66; Minerallac Electric Co. v. Cleveland Electric Illum. Co., 203 Fed. 280; Kings County Raisin, etc., Co. v. U. S. Consolidated Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; Underfeed Stoker Co. v. American Ship Windlass Co., 165 Fed. 65; Electric Candy Mach. Co. v. Morris, 156 Fed. 972; Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 Fed. 657; Troy Laundry Mach. Co. v. Sharp, 54 Fed. 712; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; May v. Fond du Lac County, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Hammerschlag v. Scamoni, 7 Fed. 584; Lecroix v. Tyberg, 33 App. (D. C.) 586; Tecktonius v. Scott, 110 Wis. 441, 86 NW 672; Clinton Wire Cloth Co. v. Dominion Fence Co., 27 CanLTOccNotes 340. See Buffalo Forge Co. v. Buffalo, 246 Fed. 135 (an invention showing a departure from a prior process is entitled to a fairly reasonable construction).

[a] **Rule is applicable** to a pioneer invention in a limited field. Lyons v. Lewald, 254 Fed. 708; Berry v. Fuel Economy Engineering Co., 248 Fed. 736 [aff 254 Fed. 988 mem, 166 CCA 668 mem].

[b] **Rule does not permit broader construction** than the claims. Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (certiorari granted 254 U. S. 622 mem, 41 SCt 6 mem, 65 L. ed. 443 mem, and rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)]; Metallic Extraction Co. v. Brown, 104 Fed. 345, 43 CCA 568, 110 Fed. 665, 49 CCA 147; Groth v. International Postal Supply Co., 61 Fed. 284, 9 CCA 507.

3. Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 SCt 299, 32 L. ed. 715; West v. Premier Register Table Co., 27 F. (2d) 653 [aff 21 F. (2d) 762]; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F.(2d) 797]; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Electro Bleaching Gas Co. v. Paradon Engineering Co., 12 F. (2d) 511 [aff 8 F. (2d) 890, and certiorari den 273 U. S. 728 mem, 47 SCt 239 mem, 71 L. ed. 862 mem]; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Bird v. Sears, 299 Fed. 574; Bruckman v. Stephens, 268 Fed 374; Elliott Mach. Co. v. P. B. Appeldoorn's Sons Co., 267 Fed. 983; Roberts Cone Mfg. Co. v. Bruckman, 266 Fed. 986 [certiorari den 254 U. S. 649 mem, 41 SCt 63 mem, 65 L. ed. 457 mem]; Whitlock Coil Pipe Co. v. Mayo Radiator Co., 266 Fed. 215 [rev 257 Fed. 752]; Davey Tree Expert Co. v. Van Billiard, 261 Fed. 996; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; General Electric Co. v. Continental Fibre Co., 256 Fed. 660, 168 CCA 54; Rowell Co. v. William Koehl Co., 240 Fed. 953, 153 CCA 639; Trussell Mfg. Co. v. Irving-Pitt Mfg. Co., 240 Fed. 730; Brothers v. Lidgerwood Mfg. Co., 223 Fed. 359, 138 CCA 460; Outlook Envelope Co. v. Samuel Cupples Envelope Co., 223 Fed. 327, 138 CCA 589 [rev on other grounds 239 Fed. 881, 153 CCA 9]; Autopiano Co. v. American Player Co., 222 Fed. 276, 138 CCA 38; Treibacher-Chemische Werke Gesellschaft v. Roessler, etc., Chemical Co., 214 Fed. 410 [aff 219 Fed. 210, 135 CCA 108]; Wright Co. v. Herring-Curtiss Co., 211 Fed. 654, 128 CCA 158; American Pneumatic Serv. Co. v. Snyder, 180 Fed. 712, 104 CCA 78 [rev 174 Fed. 152, and certiorari den 220 U. S. 618 mem, 31 SCt 721 mem, 55 L. ed. 611 mem]; Wright Co. v. Paulhan, 177 Fed. 261 [rev on other grounds 180 Fed. 112, 103 CCA 32]; Armstrong v. Belding, 172 Fed. 234 [mod on other grounds 174 Fed. 410, 98 CCA 361]; Plunger El. Co. v. Standard Plunger El. Co., 165 Fed. 906, 91 CCA 584; Heywood Bros., etc., Co. v. Syracuse Rapid Transit R. Co., 152 Fed. 453; Ford v. Bancroft, 98 Fed. 309, 39 CCA 91; King Ax Co. v. Hubbard, 97 Fed. 795, 38 CCA 423; Penfield v. Chambers Bros. Co., 92 Fed. 630, 34 CCA 579; Muller v. Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 CCA 357; Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)]; Harmon v. Struthers, 57 Fed. 637; Dederick v. Seigmund, 51 Fed. 233, 2 CCA 169; Torrant v. Duluth Lumber Co., 30 Fed. 830; Standard Measuring Mach. Co. v. Teague, 15 Fed. 390; Knapp v. Joubert, 7 Fed. 219, 19 Blatchf. 148; Cornell v. Downer, etc., Brewing Co., 6 F. Cas. No. 3,236, 2 Bann. & A. 514, 7 Biss. 346.

[a] **Doctrine of "equivalents," as applied to primary inventions,** is that those things are held to be equivalents which perform the same functions in substantially the same way. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

[b] **Limitation of rule.**—Even a pioneer patent is not entitled to a construction broad enough to cover any and all means of accomplishing the same result. Auto Hone Co. v. Hall Cylinder Hone Co., 3 F. (2d) 479.

4. Edwards Mfg. Co. v. National Fireworks Distributing Co., 272 Fed. 23 [rev on other grounds 2 F. (2d) 815]; Superior Skylight Co. v. August Kuhnla, Inc., 265 Fed. 282 [aff 273 Fed. 482]; Irving-Pitt Mfg. Co. v. Blackwell-Wielandy Book, etc., Co., 238 Fed. 177, 151 CCA 253; Seneca Camera Mfg. Co. v. Gundlach-Manhattan Optical Co., 236 Fed. 141.

5. Lewis v. Merritt, etc., Corp., 12 F. (2d) 345 [aff 3 F. (2d) 66]; Murray v. Hodo, 276 Fed. 740; Lauter, etc., Co. v. Hildreth, 219 Fed. 753, 135 CCA 451 [aff 208 Fed. 1005].

6. Æolian Co. v. Schubert Piano Co., 261 Fed. 178; Columbia Mach., etc., Corp. v. Adriance Mach., etc., Co., 226 Fed. 455, 141 CCA 198 [aff 238 Fed. 181, 151 CCA 257]; David v. Harris, 206 Fed. 902, 124 CCA 477; Elbs v. Rochester Egg-Carrier Co., 203 Fed. 705, 121 CCA 661; Juengst v. Gullberg, 179 Fed. 374, 102 CCA 148; Elliott-Fisher Co. v. Donning, 171 Fed. 96; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 167 Fed. 546, 93 CCA 224; Benbow-Brammer Mfg. Co. v. Straus, 166 Fed. 114, 92 CCA 98; Ransome Concrete Mach. Co. v. United Concrete Mach. Co., 165 Fed. 914 [rev on other grounds 177 Fed. 413, 101 CCA 217 (certiorari den 217 U. S. 607 mem, 30 SCt 697 mem, 54 L. ed. 900 mem)]; Levy v. Harris, 124 Fed. 69 [aff 130 Fed. 711, 65 CCA 113]; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 101 Fed. 716, 41 CCA 627 [certiorari den 179 U. S. 686 mem, 21 SCt 918 mem, 45 L. ed. 386 mem]; Tatum v. Gregory, 41 Fed. 142; Wollensak v. Reiher, 28 Fed. 424.

[a] **Unusual case; single patent in prior art.**—Palmer v. Jordan Mach. Co., 192 Fed. 42, 112 CCA 454.

7. Eibel Process Co. v. Minnesota, etc., Paper Co., 261 U. S. 45, 43 SCt 322, 67 L. ed. 523 [rev 274 Fed. 540 (rev 267 Fed. 847)]; Wensel v. Gold Hill Hardware Mfg. Co., 21 F. (2d) 974; Smith v. American Electric Rabbit Racing Assoc., 21 F. (2d) 366 [aff 26 F. (2d) 1016 mem (certiorari den 49 SCt 27 mem)]; Westinghouse Electric, etc., Co. v. Royal-Eastern Electrical Supply Co., 9 F. (2d) 397; Goldschmidt Thermit Co. v. American Vanadium Co., 291 Fed. 81; F. W. Rauskolb Co. v. Anthony Mfg. Co., 253 Fed. 650, 165 CCA 276; Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 530 [mod on other grounds 220 Fed. 880, 136 CCA 446].

[a] **Primary improvements.**—Courts look with favor upon patents for primary improvements which are novel and a manifest departure from the principles of prior structures, and which constitute the final step necessary to convert failure into success. Wagner Typewriter Co. v. Wyckoff, 151 Fed. 585, 81 CCA 129 [mod 138 Fed. 108].

8. Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 SCt 502, 61 L. ed. 1136; Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 SCt 291, 48 L. ed. 437; Wright v. Yuengling, 155 U. S. 47, 15 SCt 1, 39 L. ed. 64; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Chicago, etc., R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Deubener v. Brownson, 20 F. (2d) 324; Bull Dog Floor Clip Co. v. Munson Mfg. Co., 19 F. (2d) 43; Hazeltine Corp. v. Electric Service Engineering Corp., 18 F. (2d) 662; Smith-Lee Co. v. Plympton Paper Products Co., 18 F. (2d) 153 [aff 18 F. (2d) 154]; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797]; Shawmut Engineering Co. v. Crompton, etc., Loom Works, 16 F. (2d) 685; Gruendler Mfg. Co. v. Harry L. Hussmann Refrigerator, etc., Co., 16 F. (2d) 571; Johnson Automatic Scale Co. v. Ginn, 10 F. (2d) 793; Spengler Core Drilling Co. v. Spencer, 10 F. (2d) 579; Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Racine Confectioners' Mach. Co. v. Metro Chocolate Co., 297 Fed. 635; Abbott Coin Counter Co. v. Standard-Johnson Co., 290 Fed. 418 [aff 296 Fed. 126]; Sparks-Withington Co. v. Jay, 270 Fed. 449; Meurer Steel Barrel Co. v. Cleveland Steel Barrel Co., 268 Fed. 536; Juengst v. Hill Pub. Co., 267 Fed. 428 [aff 267 Fed. 435]; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015 mem]; Dunkley Co. v. Pasadena Canning Co., 261 Fed. 386 [certiorari den 253 U. S. 485 mem, 40 SCt 481 mem, 64 L. ed. 1025 mem]; Chase v.

Union, etc., Trust Co., 258 Fed. 632; Silver v. Steernau, 258 Fed. 448, 169 CCA 464; Crystal Percolator Co., Inc. v. Landers, 258 Fed. 28; Economy Fuse, etc., Co. v. Beaver Engineering Co., 255 Fed. 569, 166 CCA 637; Bindley v. Detroit River Tunnel Co., 253 Fed. 751; F. W. Rauskolb Co. v. Anthony Mfg. Co., 253 Fed. 650, 165 CCA 276; Waterbury Farrell Fdy., etc., Co. v. E. J. Manville Mach. Co., 253 Fed. 59, 165 CCA 658; Shrauger v. Phillip Bernard Co., 247 Fed. 547; Deister Concentrator Co. v. Deister Mach. Co., 241 Fed. 379, 154 CCA 259; Luminous Unit Co. v. Williamson, 241 Fed. 265; Shambow v. New Bedford Shuttle Co., 241 Fed. 115, 154 CCA 115; American Graphophone Co. v. Gimbel, 240 Fed. 971, 153 CCA 657; Weber Electric Co. v. National Gas, etc., Fixture Co., 240 Fed. 965, 153 CCA 651; Klauder-Weldon Dyeing Mach. Co. v. Giles, 238 Fed. 367, 151 CCA 383; Erie Pump, etc., Co. v. Wisconsin Steel Co., 238 Fed. 216; Akers Steering Gear Co. v. Great Lakes Engineering Works, 237 Fed. 359, 150 CCA 373; Safety Gas Lighter Co. v. Fischer, 236 Fed. 955 [aff 247 Fed. 1005, 159 CCA 652]; Standard Optical Co. v. Cook, 236 Fed. 548, 149 CCA 600; Union Special Mach. Co. v. Quaker City Flour Mills Co., 236 Fed. 246; American Graphophone Co. v. American Parlograph Corp., 235 Fed. 137, 148 CCA 631; U. S. Expansion Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868, 148 CCA 466; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; Kellogg Switchboard, etc., Co. v. Dean Electric Co., 231 Fed. 190; Graphic Arts Co. v. Photo-Chromotype Engraving Co., 231 Fed. 146, 145 CCA 334; Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 407, 143 CCA 527 [certiorari den 243 U. S. 642 mem, 37 SCt 404 mem, 61 L. ed. 943 mem]; Ventilated Cushion, etc., Co. v. D'Arcy, 229 Fed. 398, 143 CCA 518; Morton v. A. H. Andrews Co., 229 Fed. 145, 143 CCA 421; Tate v. Baltimore, etc., R. Co., 229 Fed. 141, 143 CCA 417; Metal Products Corp. v. R. E. Thornton Co., 228 Fed. 725; Union Switch, etc., Co. v. Hall Switch, etc., Co., 228 Fed. 709; Underwood Typewriter Co. v. Fox Typewriter Co., 227 Fed. 446, 142 CCA 142; Cadwell v. Motz Tire, etc., Co., 224 Fed. 967, 140 CCA 459; National Malleable Castings Co. v. T. H. Symington Co., 222 Fed. 517 [rev on other grounds 230 Fed. 821, 145 CCA 131 (certiorari granted 242 U. S. 625 mem, 37 SCt 16 mem, 61 L. ed. 534 mem, and aff 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045)]; Trussed Steel Co. v. Corrugated Bar Co., 222 Fed. 514, 138 CCA 114 [certiorari den 241 U. S. 681 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem]; U. S. Metallic Packing Co. v. Hewitt Supply Co., 220 Fed. 171 [rev on other grounds 236 Fed. 739, 150 CCA 71 (certiorari den 242 U. S. 651 mem, 37 SCt 243 mem, 61 L. ed. 545 mem)]; Patterson v. Hohlfeld, 219 Fed. 207, 135 CCA 93; Karl Kiefer Mach. Co. v. Unionwerke, 218 Fed. 847 [aff 231 Fed. 733, 146 CCA 17]; E. N. Rowell v. William Koehl Co., 216 Fed. 780 [rev on other grounds 240 Fed. 953, 153 CCA 639]; Hitchcock v. American Glass Co., 216 Fed. 766 [rev on other grounds 227 Fed. 227, 142 CCA 117]; Grand Rapids Show Case Co. v. Baker, 216 Fed. 341, 132 CCA 485; Union Special Mach. Co. v. Singer Mfg. Co., 215 Fed. 598 [rev on other grounds 227 Fed. 858, 142 CCA 382]; Trussed Concrete Steel Co. v. Corrugated Bar Co., 214 Fed. 393 [aff 222 Fed. 514, 138 CCA 114 (certiorari den 241 U. S. 681 mem, 36 SCt 728 mem, 60 L. ed. 1234 mem)]; General Electric Co. v. American Brass, etc., Co., 214 Fed. 380, 131 CCA 282; Steiger v. Waite Grass Carpet Co., 213 Fed. 798, 130 CCA 456; Meissner v. Westinghouse Mach. Co., 213 Fed. 485; Goodwin Film, etc., Co. v. Eastman Kodak Co., 213 Fed. 231, 129 CCA 75 [app dism 216 Fed. 831 (aff 222 Fed. 249, 138 CCA 71)]; Carter v. Burch Plough Works Co., 211 Fed. 481; American Bank Protection Co. v. Electric Protection Co., 209 Fed. 845, 126 CCA 569; Wollensak Optical Co. v. Ilex Optical Co., 209 Fed. 232, 126 CCA 610; Monash-Younker Co. v. National Steam Specialty Co., 208 Fed. 559, 125 CCA 561; McKenna v. Brophy, 206 Fed. 677; Dunham Co. v. Webster, 206 Fed. 168 [aff 216 Fed. 991 mem, 132 CCA 120 mem]; Stromberg Motor Devices Co. v. Parker, 204 Fed. 462 [aff 212 Fed. 413, 129 CCA 106]; Rose Mfg. Co. v. Cox Brass Mfg. Co., 201 Fed. 930; Union Special Mach. Co. v. Metropolitan Sewing Mach. Co., 201 Fed. 690; Gibson Oat Crusher Co. v. City Fuel Co., 201 Fed. 100, 119 CCA 358 [aff 195 Fed. 772]; Westinghouse Electric, etc., Co. v. Columbia Meter Co., 200 Fed. 584, 119 CCA 64; Bleser v. Baldwin, 199 Fed. 133, 117 CCA 615; Monash-Younker Co. v. Van Auken, 199 Fed. 123, 117 CCA 605 [certiorari den 226 U. S. 610 mem, 33 SCt 217 mem, 57 L. ed. 381 mem]; Elbs v. Rochester Egg Carrier Co., 197 Fed. 764 [rev on other grounds 203 Fed. 705, 121 CCA 661]; Davis v. A. H. Reid Creamery, etc., Co., 195 Fed. 80, 115 CCA 112; McCaskey Register Co. v. Divens, 194 Fed. 967, 114 CCA 603; Oshkosh Grass Matting Co. v. Waite-Grass Carpet Co., 194 Fed. 885 [aff 207 Fed. 937, 125 CCA 385]; National Mfg. Co. v. Sharon Hardware Mfg. Co., 192 Fed. 130; Colt's Patent Fire Arms Mfg. Co. v. New York Sporting Goods Co., 190 Fed. 553, 111 CCA 405 [certiorari den 223 U. S. 726 mem, 32 SCt 526 mem, 56 L. ed. 632 mem]; Johnson v. Johnson, 190 Fed. 20; Utica Drop Forge, etc., Co. v. Irvington Mfg. Co., 189 Fed. 619 [rev on other grounds 191 Fed. 169, 111 CCA 647]; Standard Mach. Co. v. Rambo, 188 Fed. 323, 110 CCA 301; Gilmer Co. v. Geisel, 187 Fed. 606 [aff 187 Fed. 941, 109 CCA 620]; Hillard v. Remington Typewriter Co., 186 Fed. 334, 108 CCA 534; Boyer v. Cleveland Pneumatic Tool Co., 185 Fed. 808, 108 CCA 40; Electric Protection Co. v. American Bank Protection Co., 184 Fed. 916, 107 CCA 238 [certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem]; International Harvester Co. v. Richardson Mfg. Co., 183 Fed. 330, 105 CCA 542; American Stoker Co. v. Underfeed Stoker Co., 182 Fed. 642 [aff 188 Fed. 314, 110 CCA 292]; Parson Mfg. Co. v. Coe, 180 Fed. 742 [aff 185 Fed. 522, 107 CCA 628]; St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co., 178 Fed. 923, 103 CCA 565 [certiorari den 219 U. S. 588 mem, 31 SCt 471 mem, 55 L. ed. 348 mem]; Lewis Constr. Co. v. Semple, 177 Fed. 407, 101 CCA 411 [certiorari den 218 U. S. 679 mem, 31 SCt 227 mem, 54 L. ed. 1207 mem]; McMillan v. Water Arch Furnace Co., 177 Fed. 401, 101 CCA 405; Wright Co. v. Herring-Curtiss Co., 177 Fed. 257 [rev on other grounds 180 Fed. 110, 103 CCA 31]; Fries-Harley Co. v. Dornan, 175 Fed. 969, 99 CCA 359; American Bar Lock Co. v. Old, 175 Fed. 113 [aff 181 Fed. 691, 104 CCA 589]; Armstrong v. Belding, 174 Fed. 410, 98 CCA 361; Wilson Trolley Catcher Co. v. Frank Ridlon Co., 173 Fed. 308 [aff 179 Fed. 708, 103 CCA 250]; Sharp v. Bellinger, 168 Fed. 295; William Mann Co. v. Kalamazoo Loose Leaf Binder Co., 168 Fed. 284; Whitehead, etc., Co. v. Bastian, 167 Fed. 565; Union Match Co. v. Diamond Match Co., 162 Fed. 148, 89 CCA 172; Lovell v. Seybold Mach. Co., 159 Fed. 736 [aff 169 Fed. 288, 94 CCA 578]; Hardison v. Brinkman, 156 Fed. 962; Kenney Mfg. Co. v. J. L. Mott Iron Works, 137 Fed. 431; Rich v. Baldwin, 133 Fed. 920, 66 CCA 464; Weisgerber v. Clowney, 131 Fed. 477; Folger v. Dow Portable Electric Co., 128 Fed. 45 [aff 133 Fed. 295, 68 CCA 551]; Sander v. Rose, 121 Fed. 835, 58 CCA 171; General Fire Extinguisher Co. v. Mallers, 110 Fed. 528 [aff 110 Fed. 529, 49 CCA 138]; Goodyear Shoe Mach. Co. v. Spaulding, 110 Fed. 393, 49 CCA 88; Thomas-Houston Electric Co. v. Lorain Steel Co., 107 Fed. 711, 46 CCA 593; Davey Pegging Mach. Co. v. Prouty, 107 Fed. 505, 46 CCA 439 [certiorari den 184 U. S. 698 mem, 22 SCt 937 mem, 46 L. ed. 764 mem]; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Winslow v. Bronson, 106 Fed. 178; Kursheedt Mfg. Co. v. Naday, 103 Fed. 948 [aff 107 Fed. 488, 46 CCA 422]; Reineke v. Dixon-Woods Co., 102 Fed. 349, 42 CCA 388; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 CCA 426; Nutter v. Brown, 98 Fed. 892, 39 CCA 332; McBride v. Kingman, 97 Fed. 217, 38 CCA 123; Westinghouse Air-Brake Co. v. New York Air-Brake Co., 96 Fed. 991, 37 CCA 649 [certiorari den 176 U. S. 685 mem, 20 SCt 1027 mem, 44 L. ed. 639 mem]; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 96 Fed. 761, 37 CCA 580; Taber Bas-Relief Photograph Co. v. Marceau, 87 Fed. 871; MacColl v. Crompton Loom Works, 87 Fed. 731 [aff 95 Fed. 987]; Hart, etc., Mfg. Co. v. Anchor Electric Co., 82 Fed. 911 [rev on other grounds 92 Fed. 657, 34 CCA 606]; Norton v. Jensen, 81 Fed. 494; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Murphy Mfg. Co. v. Excelsior Car-Roof Co., 76 Fed. 965, 22 CCA 658; Edison Electric Light Co. v. Electrical Engineering, etc., Co., 72 Fed. 274 [aff 83 Fed. 473, 27 CCA 562]; Carter Mach. Co. v. Hanes, 70 Fed. 859; Wright, etc., Wire-Cloth Co. v. Clinton Wire-Cloth Co., 67 Fed. 790, 14 CCA 646; Wells v. Curtis, 66 Fed. 318, 13 CCA 494; Stirrat v. Excelsior Mfg. Co., 61 Fed. 980, 10 CCA 216; Standard Folding-Bed Co. v. Osgood, 51 Fed. 675 [rev on other grounds 58 Fed. 583, 7 CCA 382]; Jones Co. v. Muneger Improved Cotton Mach. Mfg. Co., 49 Fed. 61, 1 CCA 158; Wright v. Postel, 44 Fed. 352; Schmid v. Scovill Mfg. Co., 37 Fed. 345; Hill v. Sawyer, 31 Fed. 282, 24 Blatchf. 430; Hoff v. Iron-Clad Mfg. Co., 31 Fed. 45 [aff 139 U. S. 326, 11 SCt 580, 35 L. ed. 179]; Johnston Ruffler Co. v. Avery Mach. Co., 28 Fed. 193; Osceola Mfg. Co. v. Pie, 28 Fed. 83; Tobey Furniture Co. v. Colby, 26 Fed. 100; Buzzell v. Andrews, 25 Fed. 822; Root v. Lamb, 7 Fed. 222; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Fuller v. Yentzer, 9 F. Cas. No. 5,151, 1 Bann. & A. 520, 6 Biss. 203 [aff 94 U. S. 288, 299, 24 L. ed. 103, 107]; Rapp v. Bard, 20 F. Cas. No. 11,577, 1 Fish. Pat. Cas. 196; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Yuengling v. Johnson, 30 F. Cas. No. 18,195, 3 Bann. & A. 99, 1 Hughes 607; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 356; Farnham v. U. S., 49 Ct. Cl. 19 [mod on other grounds 240 U. S. 537, 36 SCt 427, 60 L. ed. 786]; Dominion Bedstead Co. v. Gertler, [1924] Can. Exch. 158; Johnson v. Oxford Knitting Co., Ltd., 15 Can. Exch. 340, 25 DomLR 658; Sharples v. National Mfg. Co., 9 Can. Exch. 460, 25 CanLT OccNotes 146. And see Minerals Separation, Ltd. v. Butte, etc., Min. Co., 250 U. S. 336, 39 SCt 496, 63 L. ed. 1019 [mod 250 Fed. 241, 162 CCA 377 (rev 245 Fed. 577)] (construed "strictly, but candidly and fairly").

[a] **Improvement on patentee's own invention.**—The patentee cannot give an improvement of his own patent a greater scope than it would have had if he had improved another man's patented disclosure, merely because the first disclosure was his own. McCaskey Register Co. v. Mantz, 224 Fed. 495, 140 CCA 203.

cures a patent for a slight improvement on an old device or combination, which performed the same functions before as after the improvement, is protected against those only who use the very device or improvement he describes or claims, or mere colorable evasions of it.[9] The term "mechanical equivalent," when applied to a slight and almost immaterial improvement in the progress of an art, has a very narrow and limited meaning.[10]

[§ 357] **9. Amendment in Patent Office—a. In General.** Limitations placed in a claim by amendment in response to rejections by the patent office must be regarded as material, and therefore the claim cannot be given the meaning which it would have had without amendment.[11] The rule applies to cases in which the original claim is narrower than

[b] **If the advance is gradual,** so that no one can claim the complete machine, each inventor is entitled only to his own specific form of device. Universal Rim Co. v. Firestone Steel Products Co., 289 Fed. 884 [aff 7 F. (2d) 24]; Elliott Mach. Co. v. P. B. Appeldoorn's Sons Co., 267 Fed. 983 [cit Chicago, etc., R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053]; Jay v. Weinberg, 262 Fed. 973 [aff 250 Fed. 469, and certiorari den 252 U. S. 586 mem, 40 SCt 396 mem, 64 L. ed. 729 mem]; Jay v. Sparks-Withington Co., 258 Fed. 45 [aff 270 Fed. 449].

[c] **When improved result accomplished by a patented device** is due to a more exact or refined application of old principles, care must be taken to limit the claims to those new features which give the better result. Adams, etc., Co. v. Peter Gray & Sons, Inc., 206 Fed. 303 [aff 218 Fed. 173, 134 CCA 53].

[d] **Patent depending on single feature.**—Where a patent depends for its novelty over the prior art upon a single limited feature of construction, the claims cannot be expanded by any doctrine of equivalents to cover a device which lacks that single essential feature. Liberman v. Ruwell, 170 Fed. 590, 95 CCA 134 [aff 165 Fed. 208].

9. Bone v. Marion County, 251 U. S. 134, 40 SCt 96, 64 L. ed. 188 [aff 249 Fed. 211, 161 CCA 247]; Chicago, etc., R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; McCormick v. Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Acme Card System Co. v. Globe-Wernicke Co., 23 F. (2d) 523; Buckeye Incubator Co. v. Hillpot, 22 F. (2d) 855 [aff 24 F. (2d) 341]; Anakin Lock Works v. Dillon Lock Works, 292 Fed. 45 [aff 283 Fed. 629]; Dalton Adding Mach. Co. v. Rockford Milling Mach. Co., 267 Fed. 422 [aff 253 Fed. 187]; Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410; Sandusky Fdy., etc., Co. v. De Lavaud, 258 Fed. 640 [mod on other grounds 274 Fed. 607]; Wonder Mfg. Co. v. Block, 249 Fed. 748, 161 CCA 658; Lamson Co. v. Standard Store Serv., Inc., 238 Fed. 201; Luten v. Sharp, 234 Fed. 880, 148 CCA 478 [mod on other grounds 263 Fed. 983]; Robinson v. Tubular Fabric Co., 225 Fed. 50 [app dism 248 Fed. 526 (aff 254 Fed. 304, 166 CCA 44)]; Underwood Typewriter Co. v. Royal Typewriter Co., 224 Fed. 477, 140 CCA 163; Trussed Concrete Steel Co. v. Goldberg, 222 Fed. 506, 138 CCA 106; J. M. Shock Absorber Co. v. Blackledge, 220 Fed. 921, 136 CCA 487; Adrian Wire Fence Co. v. Milwaukee Wire Fence Co., 215 Fed. 727; Metal Stamping Co. v. Gerhab, 202 Fed. 757, 121 CCA 123; Hall v. Frank, 202 Fed. 213, 120 CCA 613; William B. Scaife, etc., Co. v. Falls City Woolen Mills, 194 Fed. 139 [rev on other grounds 209 Fed. 210, 126 CCA 304]; U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 191 Fed. 846 [aff 202 Fed. 915, 121 CCA 273]; Chamberlin Metal Weather-Strip Co. v. Peace Metal Weather-Strip Co., 186 Fed. 843; Lorain Steel Co. v. White Mfg. Co., 184 Fed. 326, 106 CCA 356; Jackson Cushion Spring Co. v. D'Arcy, 181 Fed. 340, 104 CCA 170; McCaskey Register Co. v. Divens, 181 Fed. 171 [aff 194 Fed. 967, 114 CCA 603]; Lorain Steel Co. v. Barbour-Stockwell Co., 170 Fed. 79, 95 CCA 361; New Jersey Shoe Tree, etc., Co. v. Baker Shoe Tree Mfg. Co., 166 Fed. 322 [aff 170 Fed. 76, 95 CCA 352]; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; McBride v. Kingman, 97 Fed. 217, 38 CCA 123; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Stirrat v. Excelsior Mfg. Co., 61 Fed. 980, 10 CCA 216; Benjamin v. Davis, 76 Cal. A. 26, 243 P 706, 707 [cit Cyc]; Garrard Wire Tying Mach. Co., Ltd. v. Laidlaw Bale-Tie Co., Ltd., [1926] Can. Exch. 193, [1926] 4 Dom LR 5.

10. Broadway Towel Supply Co. v. Brown-Meyer Co., 245 Fed. 659, 158 CCA 87; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41.

11. I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 47 SCt 136, 71 L. ed. 335 [aff 1 F. (2d) 780]; Weber Electric Co. v. E. H. Freeman Electric Co., 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162 [aff 262 Fed. 769]; Hubbell v. U. S., 179 U. S. 86, 21 SCt 28, 45 L. ed. 100; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Lehigh Valley R. Co. v. Kearney, 158 U. S. 461, 15 SCt 871, 39 L. ed. 1055; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Royer v. Coupe, 146 U. S. 524, 13 SCt 166, 36 L. ed. 1073; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 10 SCt 409, 33 L. ed. 663; McCormick v. Whitmer, 129 U. S. 1, 9 SCt 213, 32 L. ed. 593; Crawford v. Heysinger, 128 U. S. 589, 8 SCt 399, 31 L. ed. 269; Sutter v. Robinson, 119 U. S. 530, 7 SCt 376, 30 L. ed. 492; Shepard v. Carrigan, 116 U. S. 593, 6 SCt 493, 29 L. ed. 723; Sargent v. Hall Safe, etc., Co., 114 U. S. 63, 5 SCt 1021, 29 L. ed. 67; Knight v. Union Hardware Co., 27 F. (2d) 946; Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Grand Rapids Refrigerator Co. v. Stevens, 27 F. (2d) 243; Black, etc., Mfg. Co. v. Baltimore Truck Tire Service Corp., 26 F. (2d) 686; Lyons v. Baer, etc., Co., 26 F. (2d) 599; N. O. Nelson Mfg. Co. v. F. E. Myers, etc., Co., 25 F. (2d) 659; Knick v. Bowes "Seal Fast" Corp., 25 F. (2d) 442; I. T. S. Rubber Co. v. Essex Rubber Co., 25 F. (2d) 180; Knorpp Candy Co. v. Cypress Novelty Corp., 24 F. (2d) 826; Ham Boiler Corp. v. Hugo, 23 F. (2d) 163; Hazeltine Corp. v. Grebe, 21 F. (2d) 643; Reflectolyte Co. v. Luminous Unit Co., 20 F. (2d) 607; Deubener v. Brownson, 20 F. (2d) 324; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Barkis v. California Almond Growers' Exch., 17 F. (2d) 327; Trussell Mfg. Co. v. S. E. & M. Vernon, Inc., 11 F. (2d) 289; Hauser v. Simplex Window Co., 10 F. (2d) 457 [certiorari den 271 U. S. 678 mem, 46 SCt 630 mem, 70 L. ed. 1147 mem]; Greenawalt v. American Smelting, etc., Co., 10 F. (2d) 98 [aff 3 F. (2d) 658]; Lionne Co. v. Cushman-Hollis Co., 7 F. (2d) 83 [aff 299 Fed. 983]; Turner v. Spinner, 6 F. (2d) 172; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; International Banding Mach. Co. v. American Bander Co., Inc., 4 F. (2d) 726 [rev on other grounds 9 F. (2d) 607]; Gerrity v. Dallas Fdy., 4 F. (2d) 655; Supreme Mfg. Corp. v. Security Mfg. Co., 299 Fed. 65 [certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 469 mem]; Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; Harvey Hubbell, Inc. v. American Brass, etc., Co., 296 Fed. 47; Carson v. American Smelting, etc., Co., 293 Fed. 771 [rev on other grounds 4 F. (2d) 463 (certiorari den 269 U. S. 555 mem, 46 SCt 18 mem, 70 L. ed. 409 mem)]; Lincoln v. Waterbury Button Co., 291 Fed. 594 [aff 297 Fed. 619]; George E. Lee Co. v. Fort-Ified Mfg. Co., 284 Fed. 315; Townsend v. Lorraine, 283 Fed. 806 [rev on other grounds 290 Fed. 54]; Monitor Stove Co. v. Williamson Heater Co., 282 Fed. 910 [aff 299 Fed. 1]; Williamson Heater Co. v. Monitor Stove Co., 282 Fed. 906 [aff 299 Fed. 1]; Selectasine Patents Co. v. Prest-O-Graph Co., 282 Fed. 223, 276 Fed. 260 [aff 267 Fed. 840]; Royal Co. v. Tweedie, 276 Fed. 351 [rev 267 Fed. 224]; General Bakelite Co. v. General Insulate Co., 276 Fed. 166; Mechanical Constr. Co. v. Locomotive Stoker Co., 274 Fed. 411 [mod on other grounds 277 Fed. 636]; Superior Skylight Co. v. August Kuhnla, Inc., 273 Fed. 482 [aff 265 Fed. 282]; American Laundry Mach. Co. v. U. S. Hoffman Co., 271 Fed. 856; Schultz v. Jackson Cushion Spring Co., 271 Fed. 665; Tee Pee Rubber Co. v. I. T. S. Rubber Co., 268 Fed. 250; Elliott Mach. Co. v. P. B. Appeldoorn's Sons Co., 267 Fed. 983; Selectasine Patents Co. v. Prest-O-Graph Co., 267 Fed. 840 [aff 276 Fed. 260]; Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Can't Slip Collar Bar Co. v. C. R. Hettel Jewelry Co., 267 Fed. 195; Superior Skylight Co. v. August Kuhnla, Inc., 265 Fed. 282 [aff 273 Fed. 482]; W. F. Schultheiss Co. v. Phillips, 264 Fed. 971; Treo Co. v. Johnson, 260 Fed. 407, 171 CCA 273; Ward v. Finley Method Co., 259 Fed. 869; Schulte v. Colorado Tire, etc., Co., 259 Fed. 562, 170 CCA 524; Steele v. D. L. Ward Co., 257 Fed. 747; Spalding v. John Wanamaker, New York, 256 Fed. 530, 167 CCA 602; Cole v. Ed. G. Hookstratten Cigar Co., 250 Fed. 629, 162 CCA 645; Crystal Laundry Co. v. Brown-Meyer Co., 245 Fed. 662, 158 CCA 90; Broadway Towel Supply Co. v. Brown-Meyer Co., 245 Fed. 659, 158 CCA 87; Garland v. Quinn, 242 Fed. 267, 155 CCA 107; Moon-Hopkins Billing Mach. Co. v. Dalton Adding-Mach. Co., 236 Fed. 936, 150 CCA 198 [rev 223 Fed. 51]; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Elliott Mach. Co. v. Rothchild, 235 Fed. 896, 149 CCA 208; Oriental Tissue Co. v. De Jonge, 235 Fed. 294; Quinn v. J. H. Faw, Inc., 235 Fed. 166 [aff 239 Fed. 1021, 152 CCA 665]; Thacher v. Transit Constr. Co., 234 Fed. 640, 148 CCA 406 [aff 228 Fed. 905]; American Graphophone Co. v. Gimbel, 234 Fed. 361 [aff 240 Fed. 971, 153 CCA 657]; American Graphophone Co. v. Gimbel, 234 Fed. 344; Ventilated Cushion, etc., Co. v. D'Arcy, 232 Fed. 468, 146 CCA 462, 229 Fed. 398, 143 CCA 518; Besser v. Merillat Core Co., 226 Fed. 783 [aff 243 Fed. 611, 156 CCA 309]; Automatic Recording Safe Co. v. Bankers' Registering Safe Co., 224 Fed. 506 [rev 241 Fed. 472, 154 CCA 304]; McCormick Waterproof Portland Cement Co. v. Medusa Concrete Waterproofing Co., 222 Fed. 288, 138 CCA 14; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150]; Crown Cork, etc., Co. v. Sterling Cork, etc., Co., 210 Fed. 26 [rev on other grounds 217 Fed. 381, 133 CCA 297]; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Simplex Electric Heating Co. v. Leonard, 200 Fed. 581, 119 CCA 61; Motion Picture Patents Co. v. Independent Motion Pictures Co., 200 Fed. 411, 118 CCA 563; Condit Electrical Mfg.

the patent as well as to cases in which it is broader.[12] So it applies, although the objections to the claim were unfounded and the limitation unnecessary.[13] Mere formal amendments, however, will not limit the patent;[14] and in any event the patent will not be limited by the amendment beyond what is necessary,[15] the patentee is not estopped where he does

Co. v. Westinghouse Electric, etc., Co., 200 Fed. 144, 118 CCA 474 [rev 194 Fed. 430]; Wollensak Optical Co. v. Ilex Optical Co., 199 Fed. 923 [aff 209 Fed. 232, 126 CCA 610]; Winchester Repeating Arms Co. v. Peters Cartridge Co., 184 Fed. 333, 106 CCA 363; Boss Mfg. Co. v. Thomas, 182 Fed. 811, 105 CCA 243; Hennebique Constr. Co. v. Urban Constr. Co., 182 Fed. 496, 105 CCA 257; Langan v. Warren Axe, etc., Co., 181 Fed. 143 [aff 184 Fed. 720, 107 CCA 631]; Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Bossert Electric Constr. Co. v. Pratt Chuck Co., 179 Fed. 385, 103 CCA 45; Williams Patent Crusher, etc., Co. v. Pennsylvania Crusher Co., 176 Fed. 576 [rev on other grounds 185 Fed. 805, 108 CCA 37]; Fries-Harley Co. v. Dornan, 171 Fed. 891 [aff 175 Fed. 969, 99 CCA 359]; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559]; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561; Poole v. Marshall-Jackson Co., 161 Fed. 752 [aff 171 Fed. 842, 96 CCA 510]; Good Form Mfg. Co. v. White, 160 Fed. 661, 87 CCA 549 [rev 153 Fed. 759]; American Stove Co. v. Cleveland Fdy. Co., 158 Fed. 978, 86 CCA 182 [rev 157 Fed. 562]; St. Louis St. Flushing Mach. Co. v. American St. Flushing Mach. Co., 156 Fed. 574, 84 CCA 340; Good Form Mfg. Co. v. White, 153 Fed. 759 [rev on other grounds 160 Fed. 661, 87 CCA 549]; Welsbach Light Co. v. Cremo Incandescent Light Co., 151 Fed. 1023 mem, 81 CCA 683 mem [aff 145 Fed. 521]; Victor Talking Mach. Co. v. American Graphophone Co., 151 Fed. 601, 81 CCA 145; Greene v. Buckley, 135 Fed. 520, 68 CCA 70; Hale v. World Mfg. Co., 127 Fed. 964, 62 CCA 596; Ludington Novelty Co. v. Leonard, 119 Fed. 937 [aff 127 Fed. 155, 62 CCA 269 (certiorari den 197 U. S. 620 mem, 25 SCt 797 mem, 49 L. ed. 909 mem)]; General Fire Extinguisher Co. v. Mallers, 110 Fed. 528 [aff 110 Fed. 529, 49 CCA 138]; Millard v. Chase, 108 Fed. 399, 47 CCA 429; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Reineke v. Dixon-Woods Co., 102 Fed. 349, 42 CCA 388; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 101 Fed. 282, 41 CCA 351 [certiorari den 183 U. S. 696 mem, 22 SCt 933 mem, 46 L. ed. 394 mem]; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 99 Fed. 758 [rev on other grounds 106 Fed. 593, 45 CCA 544]; Anthony v. Gennert, 99 Fed. 95 [aff 108 Fed. 396, 47 CCA 426]; Irwin v. Hasselman, 97 Fed. 964, 38 CCA 587; Coburn Trolley-Track Mfg. Co. v. Chandler, 97 Fed. 333, 38 CCA 201; Magic Light Co. v. Economy Gas-Lamp Co., 97 Fed. 87, 38 CCA 56; Norton v. Jensen, 90 Fed. 415, 33 CCA 141; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 721 [rev on other grounds 96 Fed. 850, 37 CCA 593 (rev on other grounds 185 U. S. 403, 22 SCt 698, 46 L. ed. 968)]; Griffith v. Shaw, 89 Fed. 313; Kelly v. Clow, 89 Fed. 297, 32 CCA 205; Perkins Electric Switch Mfg. Co. v. Gibbs Electric Mfg. Co., 87 Fed. 922; Stearns v. Russell, 85 Fed. 218, 29 CCA 121 [certiorari den 171 U. S. 689 mem, 19 SCt 886 mem, 43 L. ed. 1179 mem]; Olmsted v. Andrews, 77 Fed. 835, 23 CCA 488; Wheaton v. Norton, 70 Fed. 833, 17 CCA 447 [certiorari den 165 U. S. 518, 17 SCt 407, 41 L. ed. 810]; Kennedy v. Solar Refining Co., 69 Fed. 715; Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co., 61 Fed. 958, 10 CCA 194; McCormick Harvesting Mach. Co. v. Aultman, 58 Fed. 773 [mod on other grounds 69 Fed. 371, 16 CCA 259]; Brown Folding Mach. Co. v. Stonematz Printers' Mach. Co., 58 Fed. 571, 7 CCA 374 [aff 57 Fed. 601]; Temple Pump Co. v. Goss Pump, etc., Mfg. Co., 58 Fed. 196, 7 CCA 174; Merritt v. Middleton, 55 Fed. 976 [aff 61 Fed. 680, 10 CCA 10]; Mott Iron-Works Co. v. Standard Mfg. Co., 53 Fed. 819, 4 CCA 28; Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 52 Fed. 471; Douglas v. Abraham, 50 Fed. 420; Shaw Stocking Co. v. Pearson, 48 Fed. 234; Falls Rivet Co. v. Wolfe, 40 Fed. 465 [app dism 154 U. S. 502 mem, 14 SCt 1145 mem, 38 L. ed. 1074 mem]; Brahn v. Ramapo Iron-Works, 35 Fed. 63; Romer v. Peddie, 27 Fed. 702 [aff 132 U. S. 313, 10 SCt 98, 33 L. ed. 382]; New York Belting, etc., Co. v. Sibley, 15 Fed. 386; Baltimore, etc., R. Co. v. Murphy, 38 App. (D. C.) 582.

[a] **Qualification of acquiescence.**—Applicant cannot qualify the effect of acquiescence by statements. Norton v. Jensen, 81 Fed. 494; Thomas v. Rocker Spring Co., 77 Fed. 420, 23 CCA 211 [certiorari den 168 U. S. 709 mem, 18 SCt 945 mem, 42 L. ed. 1211 mem].

[b] **The liberal construction allowed to pioneer inventions** cannot be invoked in favor of a patentee whose claim was limited to save it from anticipation by previous patents, so as to broaden the claim and practically make it cover what was rejected by the patent office. Luellen v. Baldwin Locomotive Works, 11 F. (2d) 390; Cotto-Waxo Chemical Co. v. Perolin Co., 185 Fed. 267, 107 CCA 373 [certiorari den 223 U. S. 726 mem, 32 SCt 526 mem, 56 L. ed. 632 mem].

[c] **Claiming rejected matter as equivalent.**—A patentee, although entitled to equivalents, cannot broaden the allowed claims of the patent by claiming as an equivalent anything that was rejected. Lewis v. Merritt, etc., Corp., 3 F. (2d) 66 [aff 12 F. (2d) 345].

[d] **Effect as to withdrawn suggestions in specifications.**—Where the inventor's disclosure was fully contained in his original specification, his claims thereunder having been rejected, a substituted claim should not be read as purporting to cover withdrawn suggestions of variant structures, so as to invalidate the same, it appearing that the suggestions were withdrawn where the rejection of claims that were appropriate was acquiesced in. Ruud Mfg. Co. v. Long-Landreth-Schneider Co., 250 Fed. 860, 163 CCA 174.

[e] **Rule applies** in case of an amendment to meet the commissioner's objection of double patenting. Higgin Mfg. Co. v. Watson, 263 Fed. 378.

[f] **Rejection of claims for "means" generally.**—Acquiescence in the rejection of certain claims for "means" generally, and the allowance of claims describing specific means, precludes a construction of such claims which would include other means. XXth Century Heating, etc., Co. v. Taplin, etc., Co., 181 Fed. 96, 104 CCA 156.

12. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500; Cramer Mfg. Co. v. Nims Pump Co., 9 F. (2d) 914; Monitor Stove Co. v. Williamson Heater Co., 299 Fed. 1 [aff 282 Fed. 906, 910]; Tabor Mfg. Co. v. E. H. Mumford Co., 191 Fed. 166, 111 CCA 644.

13. I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 47 SCt 136, 71 L. ed. 335 [aff 1 F. (2d) 780]; L. J. Mueller Furnace Co. v. American Fdy. Equipment Co., 293 Fed. 165; Nisbet v. Perkins Tonneau Wind Shield Co., 269 Fed. 633; Vanmanen v. Leonard, 248 Fed. 939, 161 CCA 57; Smith v. Southington Mfg. Co., 235 Fed. 160 [rev on other grounds 247 Fed. 342, 159 CCA 436]; Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. 126, 148 CCA 620; Thacher v. Transit Constr. Co., 228 Fed. 905 [aff 234 Fed. 640, 148 CCA 406]; Marshall, etc., Co. v. Murphy Mfg. Co., 199 Fed. 772, 118 CCA 362; W. W. Sly Mfg. Co. v. Russell, 189 Fed. 61, 110 CCA 625; Campbell v. American Shipbuilding Co., 179 Fed. 498, 103 CCA 122; Johnson Furnace, etc., Co. v. Western Furnace Co., 178 Fed. 819, 102 CCA 267; Safety Oiler Co. v. Scovill Mfg. Co., 110 Fed. 203; Brill v. St. Louis Car Co., 90 Fed. 666, 33 CCA 213; Truman v. Deere Implement Co., 80 Fed. 109 [aff 87 Fed. 742, 31 CCA 215]; Smith v. Macbeth, 67 Fed. 137, 14 CCA 241; Ball, etc., Fastener Co. v. Ball Glove Fastening Co., 58 Fed. 818, 7 CCA 498; Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., 54 Fed. 884 [rev on other grounds 61 Fed. 958, 10 CCA 194]; Blades v. Rand, 27 Fed. 93 [aff 136 U. S. 631, 10 SCt 1065, 34 L. ed. 553].

[a] **Illustration of rule.**—The patentee having been defeated in interference proceedings as to one form of device, priority of invention being found in favor of the other party, at his instigation, in order to defeat the right of such party to a patent, public use proceedings were instituted, in which it was shown that, for over two years prior to the time to which such party could carry back his invention, this form of the device had been manufactured and used by the company where the patentee was employed. It was held that, while this showing was fatal to the right of the other party to a patent, it did not change the status of the patentee, or restore his rights to the device as in fact the prior inventor, his own patent having been already taken out after he had canceled claims covering this form. Dodge Needle Co. v. Jones, 153 Fed. 186 [aff 159 Fed. 715, 86 CCA 191].

14. Edwards Mfg. Co. v. National Fireworks Distributing Co., 272 Fed. 23 [rev on other grounds 2 F. (2d) 815]; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; National Tube Co. v. Mark, 216 Fed. 507, 133 CCA 13 [mod on other grounds 10 F. (2d) 430]; Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150]; Western Engineering, etc., Co. v. Risdon Iron, etc., Works, 174 Fed. 224, 98 CCA 132; Welsbach Light Co. v. Cremo Incandescent Light Co., 151 Fed. 1023 mem, 81 CCA 683 mem [aff 145 Fed. 521]; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 282 [rev on other grounds 123 Fed. 882, 59 CCA 370, 129 Fed. 756, 64 CCA 284 (certiorari den 198 U. S. 584 mem, 25 SCt 802 mem, 49 L. ed. 1173 mem)]; Babcock v. Clarkson, 58 Fed. 581 [aff 63 Fed. 607, 11 CCA 351]; Bunt Bros. Fruit-Packing Co. v. Cassidy, 53 Fed. 257, 3 CCA 525; Brush Electric Co. v. Electric Impr. Co., 52 Fed. 965; Baltimore, etc., R. Co. v. Murphy, 38 App. (D. C.) 582.

[a] **Elimination of nonessential matter.**—Where the alteration required was the elimination of extrinsic nonessential matter, which obscured the description of the essential feature of the invention, the result is a narrowing of the requirements and the consequent broadening of the claims. Hess-Bright Mfg. Co. v. Fichtel, 219 Fed. 723, 135 CCA 421 [certiorari den 238 U. S. 633 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem].

15. Lyon v. Boh, 10 F. (2d) 30

not claim anything which he has abandoned,[16] and an amendment in reference to an incidental matter does not necessarily exclude a liberal interpretation when the invention is a broad one.[17] The cancellation of a claim in an application for a patent which is substantially identical with a remaining claim does not affect the validity of the latter.[18]

[§ 358] **b. Voluntary Amendment.** An amended claim, voluntarily restricted, cannot by construction or the doctrine of equivalents be given the scope which it might have had without the amendment.[19] That a patentee voluntarily introduced into his application by amendment broader claims, which were allowed, does not deprive him of the right to have them construed as broadly as their language implies,[20] or hold as an infringer one whose structure comes within them, although not within the original claims.[21] Where a claim was voluntarily amended and broadened after its allowance, the patentee is not estopped to interpret it in the narrower form originally presented.[22] The voluntary cancellation of a claim in an application for a patent does not create an estoppel, affecting the construction or scope of other claims as allowed.[23]

Claims broadened to cover competitive devices. While claims allowed after their amendment and drawn to read on what a competitor had just put out cannot be disregarded where they are supported by the original specifications,[24] they will be closely scanned and strictly construed[25] to see that the patent has not been enlarged beyond the invention disclosed by the original application.[26]

[§ 359] **10. Combination.** Every element included in a combination claim must be regarded as material, and therefore the claim covers nothing less than the entire combination.[27] While a patent for

[rev 1 F. (2d) 48]; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Standard Brick Co. v. Denison Interlocking Tile Corp., 285 Fed. 108; Jennison-Wright Co. v. Hempy, 266 Fed. 372; Johnston v. Davenport Brick, etc., Co., 237 Fed. 668; Safety Car Heating, etc., Co. v. Gould Coupler Co., 229 Fed. 429 [rev on other grounds 239 Fed. 861, 152 CCA 645 (certiorari den 245 U. S. 646 mem, 38 SCt 9 mem, 62 L. ed. 529 mem)]; Weber Electric Co. v. Union Electric Co., 226 Fed. 482; Hess-Bright Mfg. Co. v. Fichtel, 219 Fed. 723, 135 CCA 421 [rev 209 Fed. 867, and certiorari den 283 U. S. 633 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem]; Eck v. Kutz, 132 Fed. 758; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; Heap v. Greene, 91 Fed. 792, 34 CCA 86; Westinghouse v. Boyden Power-Brake Co., 66 Fed. 997 [mod on other grounds 70 Fed. 816, 17 CCA 430 (rev on other grounds 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136)]; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 25.

[a] **Mistake in failing to impose limitation.**—Where by mistake the examiner did not impose a close enough limitation to narrow a patent as he meant to do, the patent could not be made over, as against the patentee, because of the mistake of the examiner in failing to phrase it properly. Nisbet v. Perkins Tonneau Wind Shield Co., 269 Fed. 633.

[b] **Rejection of claims later allowed.**—Where two claims of plaintiff's patent, after being rejected by the examiner, were later allowed, there is no reason for a strict construction of another claim. Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (certiorari granted 254 U. S. 622 mem, 41 SCt 6 mem, 65 L. ed. 443 mem, and rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)].

[c] **Amendment of specifications leaving claim unchanged.**—Claims of a patent are not limited by the amendment of the specifications more particularly describing the device shown in the drawings to meet the objections of the patent office, where the claims themselves are left unchanged. Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785.

16. Hoe v. Goss Printing Press Co., 30 F. (2d) 271; W. S. Godwin Co. v. International Steel Tie Co., 2 F. (2d) 198; General Electric Co. v. Nitro Tungsten Lamp Co., 266 Fed. 994; Frey v. Marvel Auto Supply Co., 236 Fed. 916, 150 CCA 178; Crown Cork, etc., Co. v. Sterling Cork, etc., Co., 217 Fed. 381, 133 CCA 297 [rev 210 Fed. 26]; National Tube Co. v. Mark, 216 Fed. 507, 133 CCA 13 [mod on other grounds 10 F. (2d) 430]; Valvona-Marchiony Co. v. Marchiony, 207 Fed. 380.

[a] **Matter not stated in objection.**—(1) Where a patentee acquiesces in the rejection of his claim and accepts a patent on an amended claim, the estoppel does not extend to a matter not stated in the objection (Bird v. Sears, 299 Fed. 574; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484 [reh den 186 Fed. 495, 108 CCA 502]), (2) or disclosed by the references on which the patent is rejected (Vrooman v. Penhollow, supra. And see infra [b]).

[b] **Matters not disclosed by references.**—Where a patentee acquiesces in the rejection of its claim on references cited in the patent office and accepts a patent on an amended claim, he is not estopped from securing by his amended claim every known and useful improvement which he has invented and which is not disclosed by the references. Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [rev 209 Fed. 854, and certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem]; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 128 CCA 53; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484 [reh den 186 Fed. 495, 108 CCA 502].

[c] **Disclaimer as to particular form.**—A claimant of a generic invention does not lose his right by declining to claim some other person's subsequently devised form. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 256 Fed. 666, 168 CCA 60 [rev on other grounds 6 F. (2d) 447].

[d] **Combination involving element separately abandoned.**—The acquiescence by an applicant for a patent in rejection by the patent office of claims for one element of his machine does not estop him from relying on claims for a combination involving that element. Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem].

17. American Cone, etc., Co. v. Denaro, 297 Fed. 913 [rev 283 Fed. 1011, and certiorari den 266 U. S. 614 mem, 45 SCt 96 mem, 69 L. ed. 468 mem]; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Sharp v. Physicians', etc., Appliance Co., 174 Fed. 424; Heywood Bros., etc., Co. v. Syracuse Rapid Transit R. Co., 152 Fed. 453; Heap v. Greene, 91 Fed. 792, 34 CCA 86; Westinghouse v. Boyden Power-Brake Co., 66 Fed. 997 [mod on other grounds 70 Fed. 816, 17 CCA 430 (rev on other grounds 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136)]; Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co., 61 Fed. 958, 10 CCA 194.

[a] **Thus,** where an applicant for a patent persisted in the basic idea upon which he claimed invention, although amending his claim from time to time after rejection by the examiner as to details of construction in attempts to avoid references by the examiner, and his application was finally rejected by the examiner, but allowed on appeal, on the broad ground that such basic idea involved invention, such amendment did not limit the claim as finally allowed to the precise construction therein described. Gray Tel. Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 CCA 353.

18. Kryptok Co. v. Stead Lens Co., 207 Fed. 85 [aff 214 Fed. 368, 131 CCA 144].

[a] **Claim canceled on request for division.**—Acquiescence in a request by the patent office for a division does not estop the patentee from claiming what was in a canceled claim, if it is also within a claim allowed. Victory Belt Co. v. Field, 300 Fed. 67.

19. Higgin Mfg. Co. v. Watson, 263 Fed. 378; Michigan Engineering Valve Co. v. Monarch Mfg. Co., 233 Fed. 107, 147 CCA 177.

20. Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 CCA 105.

21. Cadillac Motor Car Co. v. Austin, supra.

22. International Banding Mach. Co. v. American Bander Co., 9 F. (2d) 606 [rev 4 F. (2d) 726].

23. Veneer Mach. Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 CCA 115.

24. American Steel Foundries v. Damascus Brake Beam Co., 267 Fed. 574; S. S. Stafford, Inc. v. Thaddeus Davids Ink Co., 264 Fed. 111.

25. S. S. Stafford, Inc. v. Thaddeus Davids Ink Co., supra; Hestonville, etc., Pass. R. Co. v. McDuffee, 185 Fed. 798, 109 CCA 606 [rev 181 Fed. 503, and certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem].

26. United Shoe Mach. Co. v. L. Q. White Shoe Co., 270 Fed. 650 [aff 279 Fed. 35]; Lyon Non-Skid Co. v. Edward V. Hartford, Inc., 247 Fed. 524 [aff 250 Fed. 1021, 162 CCA 664 (aff 251 U. S. 48, 40 SCt 66, 64 L. ed. 130)]; Hestonville, etc., Pass. R. Co. v. McDuffee, 185 Fed. 798, 109 CCA 606 [rev 181 Fed. 503, and certiorari den 223 U. S. 719 mem, 32 SCt 523 mem, 56 L. ed. 629 mem].

27. I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 47 SCt 136, 71 L. ed. 335 [aff 1 F. (2d) 780]; Wollensak v. Sargent, 151 U. S. 221, 14 SCt 291, 38 L. ed. 137; Snow v. Lake Shore, etc., R. Co., 121 U. S. 617, 7 SCt 1343, 30 L. ed. 1004; Bragg v. Fitch, 121 U. S. 478, 7 SCt 978, 30 L. ed. 1008; Electric R. Signal Co. v. Hall R. Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Rowell v. Lindsay, 113 U. S. 97, 5 SCt 507, 28 L. ed. 906; Fay v. Cordesman, 109 U. S. 408, 3 SCt 236, 27 L. ed. 979; Case v. Brown, 2 Wall. (U. S.) 320, 17 L. ed.

a combination covering old elements has been said to require a strict construction,[28] such a construction is not required where the patent is a distinct advance in the art.[29]

Location of element. Where the location of one element in a combination is fixed absolutely or relatively by reference to another element, a fair construction of such language is obtainable only from a study of the entire patent.[30] Even where the language of a claim fixes the position of an element in a combination absolutely, the court in determining infringement will look beyond the mere language.[31]

Arrangement of parts. A claim of a patent for a combination is to be interpreted to include such connections and relations of the several means of the combination which are named as implied therewith to make them operative in conformity with the specification.[32]

Claim for element or subcombination. When a combination is claimed, it is said that there is an implied concession that the elements are separately old.[33] But an element[34] or subcombination may be separately claimed,[35] although without utility, save in combination with the other parts of the device.[36] The fact that a device is entitled to a wide range of equivalents does not entitle subcombinations to a similar range.[37]

[§ 360] **11. Claims for Process.** It is only necessary, in a process patent, to point one way of carrying out the process.[38] As in other cases,[39] the patentee of a process patent will be allowed appropriate equivalents.[40] When required by the state of the art, such patent will be narrowly construed,[41] and limited to a correspondingly narrow range of equivalents.[42] Process claims must stand or fall on their merits, and are not dependent on product claims.[43]

[§ 361] **12. Claims for Product.** A patent for a new product, having definite characteristics which distinguish it, is not necessarily limited to the precise process described as the method of obtaining it,[44] unless the product is claimed as produced by

817; Hyman v. F. W. Woolworth Co., 28 F. (2d) 833; Buckeye Blower Co. v. Arensmeyer, Warnock & Zahrndt, Inc., 28 F. (2d) 209; Automatic Appliance Co. v. McNiece Motor Co., 20 F. (2d) 578; Hazeltine Corp. v. Electric Service Engineering Corp., 18 F. (2d) 662; Kelly Well Co. v. Kirschke Concrete Well Co., 14 F. (2d) 274; Luellen v. Baldwin Locomotive Works, 11 F. (2d) 390; Townsend v. Lorraine, 283 Fed. 806 [rev on other grounds 290 Fed. 54]; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; Firestone Tire, etc., Co. v. Seiberling, 257 Fed. 74, 168 CCA 286 [rev 234 Fed. 370]; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Safety Car Heating, etc., Co. v. Gould Coupler Co., 239 Fed. 861, 152 CCA 645 [rev 229 Fed. 429, and certiorari den 245 U. S. 646 mem, 38 SCt 9 mem, 62 L. ed. 529 mem]; Leonard v. Corn Products Refining Co., 239 Fed. 734, 152 CCA 568; Electric Protection Co. v. American Bank Protection Co., 184 Fed. 916, 107 CCA 238 [mod 181 Fed. 350, and certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem]; Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Dey Time Register Co. v. Syracuse Time-Recorder Co., 161 Fed. 111, 88 CCA 275; Ajax Forge Co. v. Morden Frog, etc., Works, 156 Fed. 591 [aff 164 Fed. 843, 90 CCA 605]; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., 122 Fed. 476 [aff 125 Fed. 382, 60 CCA 248]; Muller v. Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 CCA 357; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 CCA 1; Engle Sanitary, etc., Co. v. Elwood, 73 Fed. 484; Mott Iron-Works Co. v. Standard Mfg. Co., 53 Fed. 819, 4 CCA 28; Stewart v. Mahoney, 5 Fed. 302; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Parham v. American Buttonhole, etc., Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468; Prouty v. Draper, 20 F. Cas. No. 11,446, 2 Robb Pat. Cas. 75, 1 Story 568 [aff 16 Pet. 336, 10 L. ed. 985; Came v. Consolidated Car Heating Co., 11 Que. K. B. 103 [rev 18 Que Super. 44, and app dism [1903] A. C. 509].

[a] **Useless element.**—(1) A patentee who has specified an element as part of the combination is bound thereby, although the element be valueless in the combination. Deister Concentrator Co. v. Deister Mach. Co., 263 Fed. 706. (2) But the fact that the specification of a patent, in describing the invention, describes a device which is, in fact, entirely useless so far as contributing to the result is concerned, does not restrict the claims to a combination including such device as an element where it is not mentioned therein. Barnes v. Lango, 151 Fed. 59.

[b] **Requisites of combination claim.**—A claim for a patent cannot be treated as a combination claim, in the absence of the word "combination" and of a statement of a specific element of which it is composed. Brown Mfg. Co. v. Bradley Mfg. Co., 51 Fed. 226, 227 ("claims for devices cannot be changed to claims for combination by construction").

28. Henderson v. Welch Dry Kiln Co., 26 F. (2d) 810; Trane Co. v. Nash Engineering Co., 25 F. (2d) 267 [aff 20 F. (2d) 439]; Frink, Inc. v. Erickson, 16 F. (2d) 496; Pray v. Copes, 1 F. (2d) 927; Hardison v. Brinkman, 156 Fed. 962, 87 CCA 8; Farnham v. U. S., 49 Ct. Cl. 19 [mod on other grounds 240 U. S. 537, 36 SCt 427, 60 L. ed. 786].

29. Smith v. American Electric Rabbit Racing Assoc., 21 F. (2d) 366 [aff 26 F. (2d) 1016 mem (certiorari den 49 SCt 27 mem)]; Safety Automatic Toy Co. v. Edwards Mfg. Co., 7 F. (2d) 92; Frederick Iron, etc., Co. v. Sanford Riley Stoker Co., 287 Fed. 495 [aff 274 Fed. 864]; Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, 261 Fed. 85; Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386; Westinghouse Mach. Co. v. C. & G. Cooper Co., 245 Fed. 463, 157 CCA 625.

30. Deister Concentrator Co. v. Deister Mach. Co., 263 Fed. 706.

31. Deister Concentrator Co. v. Deister Mach. Co., supra.

32. Hauser Awning Arm Co. v. Anton, 233 Fed. 262, 147 CCA 268; Jones v. Evans, 215 Fed. 586, 131 CCA 654; Duncan v. Stockham, 204 Fed. 781, 123 CCA 133 [aff 226 Fed. 740].

33. Overweight Counterbalance El. Co. v. Improved Order of Red Men's Hall Assoc., 94 Fed. 155, 36 CCA 125 [certiorari den 174 U. S. 802 mem, 19 SCt 886 mem, 43 L. ed. 1188 mem]; Hay v. S. F. Heath Cycle Co., 71 Fed. 411, 18 CCA 157.

[a] **In England** the claim to a combination protects all new parts. Parkes v. Stevens, L. R. 5 Ch. 36 [aff L. R. 8 Eq. 358].

34. Wright Co. v. Herring-Curtiss Co., 204 Fed. 597 [aff 211 Fed. 654, 128 CCA 158]; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626; Kolinski v. Thompson Voting Mach. Co., 55 App. (D. C.) 378, 6 F. (2d) 681.

35. Wright Co. v. Herring-Curtiss Co., 204 Fed. 597 [aff 211 Fed. 654, 128 CCA 158]. And see F. N. Burt Co. v. Ritchie, 251 Fed. 909 (extraneous combination).

36. Wright Co. v. Herring-Curtiss Co., 204 Fed. 597 [aff 211 Fed. 654, 128 CCA 158]; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626.

[a] **Reference may be had to specification** in such case to show operativeness. Wright Co. v. Herring-Curtiss Co., 204 Fed. 597 [aff 211 Fed. 654, 128 CCA 158].

37. Diamond Match Co. v. Sun Match Corp., 16 F. (2d) 1 [aff 9 F. (2d) 695].

38. Bakelite Corp v. Brunswick-Balke-Collender Co., 18 F. (2d) 384 [mod 7 F. (2d) 697]; International Cork Co. v. New Process Cork Co., 6 F. (2d) 420 [rev 295 Fed. 539].

39. See supra § 354 et seq.

40. Bakelite Corp. v. Brunswick-Balke-Collender Co., 18 F. (2d) 384 [mod 7 F. (2d) 697]; Buckeye Incubator Co. v. Blum, 17 F. (2d) 456 [aff 27 F. (2d) 333]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Schwarzwalder v. New York Filter Co., 66 Fed. 152, 13 CCA 380.

[a] **Use of apparatus.**—(1) As the apparatus shown in a process patent is only to show that the process may be practically applied, it follows that such illustrative apparatus does not limit the process patentee to that type of machine alone. Moore Filter Co. v. Tonopah-Belmont Dev. Co., 201 Fed. 532, 119 CCA 626 [rev 195 Fed. 530]; Bridge v. Brown, 4 F. Cas. No. 1,857, Holmes 53. (2) Where a patentee of a process made no claim that a vent tank shown in the drawings was necessary, and it was not specifically made an essential step of the process defined in the claims, its use is optional. Standard Oil Co. v. Oklahoma Natural Gas Co., 284 Fed. 469.

[b] **Order of steps.**—The patentee of a process is not necessarily restricted to the order in which the steps are named in the patent. Aurora Mantle, etc., Co. v. Kaufmann, 243 Fed. 911, 156 CCA 423.

41. Stowe v. American Refractories Co., 274 Fed. 241.

42. Knick v. Bowes "Seal Fast" Corp., 25 F. (2d) 442.

43. Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 1006 [mod 17 F. (2d) 999].

[a] **In Canada** the monopoly of both the product and the process is secured to the inventor where they constitute one discovery. Toronto AuerLight Co., Ltd. v. Colling, 31 Ont. 18.

Claims for product see infra § 361.

44. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; War-

the particular process.[45]

Composition of matter. In a patent for a composition of matter, the patentee is entitled to appropriate equivalents,[46] but the specifications and claims must be broad enough to cover them.[47] Where the composition is broadly old, the patent should be strictly construed and the patentee given no more than he claimed.[48]

[§ 362] **13. Separate Claims Distinguished.** The entire patent being construed as a whole,[49] it follows that, in construing some of the claims of the patent, it should be compared with the other claims.[50] But each claim is in effect an independent invention,[51] and the several claims must be so construed where possible as to give them different meanings;[52] broad claims must, if possible, be construed to have different meanings from specific claims;[53] and a limitation found in one claim, whereby alone it substantially differs from another, cannot be read into the other.[54]

[§ 363] **14. Designs.** Design patents govern not merely the identical design disclosed, but such as so nearly resemble it in appearance as to deceive ordinary observers.[55] The ordinary principles of construction apply.[56]

ren Bros. Co. v. Thompson, 293 Fed. 745 [aff 282 Fed. 326]; Perkins Glue Co. v. Standard Furniture Co., 279 Fed. 458; General Electric Co. v. Lac-Phillips Co., 233 Fed. 96, 147 CCA 166; Hide-ite Leather Co. v. Fiber Products Co., 226 Fed. 34, 141 CCA 142.

[a] **In Canada** the monopoly of both the product and the process is secured to the inventor where they constitute one discovery. Toronto AuerLight Co., Ltd. v. Colling, 31 Ont. 18.

Claims for process see supra § 360.

45. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 [mod on other grounds 28 F. (2d) 641]; Hide-ite Leather Co. v. Fiber Products Co., 226 Fed. 34, 141 CCA 142 [cit Cochrane v. Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 SCt 455, 28 L. ed. 433].

46. Treibacher-Chemische Werke Gesellschaft v. Roessler, etc., Chemical Co., 219 Fed. 210, 135 CCA 108 [aff 214 Fed. 410]; Blount v. Société Anonyme du Filtre Chamberland Systeme Pasteur, 53 Fed. 98, 3 CCA 455; Goodyear v. Berry, 10 F. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Matthews v. Skates, 16 F. Cas. No. 9,291, 1 Fish. Pat. Cas. 602. And see Francis v. Mellor, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 8 Phila. (Pa.) 157 (patentee not confined to particular proportion of ingredients).

[a] **How equivalency determined.** —(1) In compositions of matter, substances which, at the granting of the patent, were known as capable of serving the same purpose in the composition as the ingredients actually employed become thereby their chemical equivalents. In re Ellis, 37 App. (D. C.) 203. (2) In a patent for an alloy, described as an alloy of cerium "with certain other metals, in particular iron," the equivalency of other metals with iron is to be found, not in their chemical structure, but in their functional efficiency, when combined with cerium in a metallic alloy. Treibacher-Chemische Werke Gesellschaft v. Roessler, etc., Chemical Co., 219 Fed. 210, 135 CCA 108 [aff 214 Fed. 410].

Equivalents in general see supra § 354.

47. In re Ellis, 37 App. (D. C.) 203.

48. Haynes Stellite Co. v. Chesterfield, 8 F. (2d) 765; Politzer Toy Mfg. Co. v. National French Fancy Novelty Co., 253 Fed. 451.

49. See supra § 335.

50. Davis Sewing Mach. Co. v. New Departure Mfg. Co., 217 Fed. 775, 133 CCA 505; Andrews v. Nilson, 27 App. (D. C.) 451.

[a] **Modifying clause.**—A clause at the beginning of the claims of a mechanical patent, stating the purpose of the device, is not to be ignored as not describing any element, but is a modifying clause, to be read upon every element thereafter described. Schram Glass Mfg. Co. v. Homer Brooke Glass Co., 249 Fed. 228, 161 CCA 264 [certiorari den 247 U. S. 520 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem].

51. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Veneer Mach. Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 CCA 115; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev 193 Fed. 418, and certiorari den 238 U. S. 621 mem, 35 SCt 603 mem, 59 L. ed. 1493, and rev on other grounds 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148].

52. T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045 [aff 230 Fed. 821, 145 CCA 131 (reh den 234 Fed. 343, 148 CCA 245)]; T. H. Symington Co. v. National Malleable Castings Co., 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045 [rev 229 Fed. 730, 144 CCA 140]; Nelson Mfg. Co. v. F. E. Myers, etc., Co., 25 F. (2d) 659; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Cadwell v. Firestone Tire, etc., Co., 13 F. (2d) 483; Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed. Co., 295 Fed. 748 [rev on other grounds 1 F. (2d) 673 (certiorari den 267 U. S. 594 mem, 45 SCt 231 mem, 69 L. ed. 804 mem)]; Stumpf v. A. Schreiber Brewing Co., 252 Fed. 142, 164 CCA 254 [mod 242 Fed. 72]; Mayer v. Mutschler, 248 Fed. 911, 161 CCA 29 [rev 237 Fed. 654, and certiorari den 248 U. S. 563 mem, 39 SCt 8 mem, 63 L. ed. 423 mem]; Burroughs Adding Mach. Co. v. Felt, etc., Mfg. Co., 243 Fed. 861, 156 CCA 373 [certiorari den 244 U. S. 659 mem, 37 SCt 745 mem, 61 L. ed. 1376 mem]; Miner v. T. H. Symington Co., 238 Fed. 805 [rev on other grounds 247 Fed. 515, 160 CCA 25]; Whitaker v. Todd, 232 Fed. 714, 146 CCA 640 [aff 226 Fed. 791]; Automatic Recording Safe Co. v. W. F. Burns Co., 231 Fed. 985, 146 CCA 181 [mod 224 Fed. 513 (rev on other grounds 241 Fed. 472, 154 CCA 304)]; Hamilton Beach Mfg. Co. v. P. A. Geier Co., 230 Fed. 430, 144 CCA 572; Kennicott Co. v. Holt Ice, etc., Co., 230 Fed. 157, 144 CCA 455; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [certiorari den 238 U. S. 621 mem, 35 SCt 603 mem, 59 L. ed. 1493 mem (rev on other grounds 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148)]; Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139]; Rollman Mfg. Co. v. Universal Hardware Works, 207 Fed. 97; XXth Century Heating, etc., Co. v. Taplin, etc., Co., 181 Fed. 96, 104 CCA 156; Duncan v. Cincinnati Butchers' Supply Co., 171 Fed. 656, 96 CCA 400; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516 [aff 170 Fed. 830]; Marshall v. Pettingell-Andrews Co., 164 Fed. 862, 91 CCA 8 [aff 153 Fed. 579]; Diamond Match Co. v. Ruby Match Co., 127 Fed. 341; Thomson-Houston Electric Co. v. Nassau Electric R. Co., 110 Fed. 647; Anderson Fdy., etc., Works v. Potts, 108 Fed. 379, 47 CCA 409 [certiorari den 184 U. S. 700 mem, 22 SCt 940 mem, 46 L. ed. 765 mem]; Bresnahan v. Tripp Giant Leveller Co., 102 Fed. 899, 43 CCA 48; Page Woven Wire Fence Co. v. Land, 49 Fed. 936; Tondeur v. Stewart, 28 Fed. 561; Cohansey Glass Mfg. Co. v. Wharton, 28 Fed. 189; Burden v. Corning, 4 F. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Ruete v. Elwell, 15 App. (D. C.) 21.

[a] **Copending applications covering other developments** will not limit claims. Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. 785.

[b] **Element which expressly characterizes and limits one claim** of a patent and by which alone it substantially differs from another claim will not be read into the latter when not necessary to make it operative. Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 CCA 105.

[c] **Identical description of element.**—An element of a combination, described in the same words in each of two claims of a patent, must be taken to refer to the same thing in both claims. Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem].

53. Foamite-Childs Corp. v. Pyrene Mfg. Co., 21 F. (2d) 854; French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem]; Taggart v. Bremner, 295 Fed. 506; Cropp v. Reed, 255 Fed. 91, 166 CCA 419; Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 135 CCA 551; Oregon Woodenware Mfg. Co. v. Murray, 215 Fed. 744; General Electric Co. v. E. H. Freeman Electric Co., 190 Fed. 34 [aff 191 Fed. 168, 111 CCA 646]; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561.

54. Jones v. General Fireproofing Co., 254 Fed. 970, 165 CCA 662, 254 Fed. 97, 165 CCA 507 [certiorari den 250 U. S. 643 mem, 39 SCt 494 mem, 63 L. ed. 1186 mem]; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; Peerless Wire Fence Co. v. Jackson Fence Co., 226 Fed. 774 [aff 228 Fed. 691, 143 CCA 213]; National Tube Co. v. Mark, 216 Fed. 507, 133 CCA 13 [mod on other grounds 10 F. (2d) 430]; Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139].

55. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Mygatt v. M. Schaffer-Flaum Co., 186 Fed. 343 [rev on other grounds 191 Fed. 836, 112 CCA 350]; Braddock Glass Co. v. Macbeth, 64 Fed. 118, 12 CCA 70.

[a] **Mechanical constructions** are not covered by design patents. Royal Metal Mfg. Co. v. Art Metal Works, 121 Fed. 128 [aff 130 Fed. 778, 66 CCA 88].

[b] **Changes of color** are immaterial. Whittall v. Lowell Mfg. Co., 79 Fed. 787 [aff 84 Fed. 1019 mem, 28 CCA 653 mem].

56. U. S. Rev. St. § 4933; Miller v. Smith, 5 Fed. 359; Northrup v. Adams, 18 F. Cas. No. 10,328, 2 Bann. & A. 567; In re Mygatt, 12 Off. Gaz. (U. S.) 51.

[a] **Construed so as to uphold,** and not destroy. Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem].

[b] **Construed as a whole.**—A patented design must be looked at as a whole, and both invention and infringement be decided by considering the entity, and not dissecting it, for purposes of hostile criticism. North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936.

[c] **Range of equivalents** to which

XIII. OWNERSHIP, TRANSFERS, ASSIGNMENTS, LICENSES, AND CONTRACTS*[57]

[§ 364] **A. Ownership—1. In General.** The general nature of a patent as a grant, a statutory creation, a contract, a monopoly, and as property, has already been discussed in another part of this article,[58] as has been the general nature of patentees' rights.[59] The legal title to a patent may be in one person and the equitable title in another.[60] In such a case the holder of the legal title is considered a trustee for the equitable owner.[61] But the legal title will prevail over the equitable title unless the former was acquired with notice of the latter.[62] The legal title to a patent does not necessarily vest in the person to whom it is issued.[63] Title to the patent upon its issuance vests by operation of law in a person to whom the inventor has previously assigned his invention and his inchoate right to a patent, notwithstanding the patent was issued in the name of the inventor,[64] or the inventor died before the issuance of the patent;[65] and this, whether or not the commissioner of patents has been requested to issue the patent to the assignee.[66] Where an assignment of an invention is in itself insufficient to

a design patent is entitled depends on the invention's position in the art. America Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365; Cocacola Co. v. Whistle Co., 20 F. (2d) 955; King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; North British Rubber Co. v. Racine Rubber Tire Co., 271 Fed. 936; Borgfeldt v. Weiss, 265 Fed. 268; Byers v. F. T. Pearce Co., 228 Fed. 720.

[d] **Drawings** (1) assist the specification, but do not control, even when the specifications consist largely of references to the design drawings. King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Whiting Mfg. Co. v. Alvin Silver Co., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Borgfeldt v. Weiss, 265 Fed. 268. Contra Frank v. Hess, 84 Fed. 170. (2) But a patent not describing the design in writing is limited substantially to the pattern shown in the drawing. American Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365.

[e] **Name** by which a design patent for a figure is designated forms no part of the patent. Wilson v. Hecht, 44 App. (D. C.) 33.

57. Cross references:

Nature of patent see supra § 6.

Ownership of inventions made by employees see Master and Servant §§ 167–171.

Patents as property see supra § 8.

Quieting title to patents see infra § 379.

Right of government to use invention see supra §§ 6–8; United States [39 Cyc 754].

Rights of inventor before issue of patent:

In general see supra § 1.

To assign see infra §§ 371, 372.

Rights of patentees:

As to articles made, used, or purchased by others before application for patent see infra § 490.

As to making, use, or sale of invention see supra §§ 1, 6–8.

Nature of right see supra § 6.

Territory covered see supra § 6.

Right to issue of patent between employer and employee see supra § 136.

58. See supra §§ 6–8.

59. See supra §§ 6–8.

60. U. S.—De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Hartshorn v. Day, 19 How. 211, 15 L. ed. 605; Cook v. Sterling Electric Co., 118 Fed. 45 [aff 150 Fed. 766, 80 CCA 502]; Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co., 20 Fed. 699, 22 Blatchf. 221; Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453; Whiting v. Graves, 29 F. Cas. No. 17,577, 3 Bann. & A. 222.

Ind.—Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214.

Mass.—American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133, 126 AmSR 409; Somerby v. Buntin, 118 Mass. 279, 19 AmR 459.

N. H.—Burke v. Partridge, 58 N. H. 349.

N. Y.—Spears v. Willis, 151 N. Y. 443, 45 NE 849; Burr v. De la Vergne, 102 N. Y. 415, 7 NE 366; Klauder-Weldon Dying Mach. Co. v. Weldon, 166 App. Div. 415, 151 NYS 1068 [aff 87 Misc. 95, 150 NYS 273]; Berolzheimer v. Strauss, 51 N. Y. Super. 96, 7 NYCivProc 225.

Oh.—Blakeney v. Goode, 30 Oh. St. 350.

[a] **Illustration.**—Where an inventor agrees to assign a half interest in a patent in consideration of the promisee's advancing money to apply for and obtain the patent, and subsequently the inventor dies before the issuance of the patent, and later the inventor's executrix transfers the entire interest in the invention to the assignee, the latter acquires an equitable title to the patent. De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.

Joint owners in equity see infra § 365 text and notes 83, 84.

61. Cook v. Sterling Electric Co., 118 Fed. 45 [aff 150 Fed. 766, 80 CCA 502]; Whiting v. Graves, 29 F. Cas. No. 17,577, 3 Bann. & A. 222; Blakeney v. Goode, 30 Oh. St. 350.

Patents as subject matter of trusts see Trusts [39 Cyc 36].

62. Faulkner v. Empire State Nail Co., 67 Fed. 913, 15 CCA 69; Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co., 20 Fed. 699, 22 Blatchf. 221; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453.

Assignee with notice takes subject to prior equities see infra § 390.

63. Hildreth v. Auerbach, 200 Fed. 972.

64. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (rev 270 Fed. 587)]; De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Becker v. General Chain Co., 273 Fed. 419; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311]; Individual Drinking Cup Co. v. Osmun-Cook Co., 220 Fed. 335; Hildreth v. Auerbach, 200 Fed. 972; Consolidated Rubber Tire Co. v. B. F. Goodrich Co., 195 Fed. 764 [rev on other grounds 202 Fed. 1021 mem, 120 CCA 662 mem]; Wende v. Horine, 191 Fed. 620; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; Consolidated Electric Light Co. v. McKeesport Light Co., 34 Fed. 335; Pontiac Knit Boot Co. v. Merino Shoe Co., 31 Fed. 286; Consolidated Electric Light Co. v. Edison Electric Light Co., 25 Fed. 719, 23 Blatchf. 412; Perkins v. U. S. Electric Light Co., 16 Fed. 513, 21 Blatchf. 308; U. S. Stamping Co. v. Jewett, 7 Fed. 869, 18 Blatchf. 469; In re Pearsall, 31 App. (D. C.) 265; Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214, 216 [cit Cyc]; Ficklen v. William Stocker, Inc., 166 NYS 854. See Garfield v. Western Electric Co., 298 Fed. 659 (assignment of an application for a patent divests the inventor of title to the invention as effectively as if it was a chattel).

[a] **Successive assignments.**—(1) The assignee may in turn assign the right to another, and he to a third assignee, and so on, and upon the issuance of the patent to the first or to any subsequent assignee, title vests at once in the ultimate assignee. Consolidated Electric Light Co. v. McKeesport Light Co., 34 Fed. 335; Pontiac Knit Boot Co. v. Merino Shoe Co., 31 Fed. 286; Consolidated Electric Light Co. v. Edison Electric Light Co., 25 Fed. 719, 23 Blatchf. 412; Selden v. Stockwell Self-Lighting Gas-Burner Co., 9 Fed. 390, 19 Blatchf. 544. (2) As between assignees, title to a patent issued in the name of the assignor vests in the holder of the superior assignment. In re Pearsall, 31 App. (D. C.) 265.

Assignee of invention as person entitled to patent see supra § 138.

Assignment of future patents and inventions see infra §§ 375, 376.

Persons entitled to patents generally see supra §§ 126–145.

Right of assignee to sue in equity to obtain issue of patent see supra § 247.

65. De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138.

Personal representatives of inventor as persons entitled to patent see supra §§ 139, 140.

66. Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Garfield v. Western Electric Co., 298 Fed. 659; Becker v. General Chain Co., 273 Fed. 419; Individual Drinking Cup Co. v. Osmun-Cook Co., 220 Fed. 335; Hildreth v. Auerbach, 200 Fed. 972; Consolidated Rubber Tire Co. v. B. F. Goodrich Co., 195 Fed. 764 [rev on other grounds 202 Fed. 1021 mem, 120 CCA 662 mem]; Wende v. Horine, 191 Fed. 620; Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214.

[a] **History of rule.**—(1) The earlier cases have been interpreted to decide that a request that the patent issue to the assignee is essential to vest legal title in him upon the issuance of the patent to the assignor. Harrison v. Morton, 83 Md. 456, 35 A 99 [dism 171 U. S. 38, 18 SCt 742, 43 L. ed. 63] (based upon a statement, in Gayler v. Wilder, 10 How. (U. S.) 477, 493, 13 L. ed. 504, "the assignment requests that the patent may issue to the assignee"). And see Johnson v. Wilcox, etc., Co., 27 Fed. 689, 23 Blatchf. 531; Wright v. Randel, 8 Fed. 591, 19 Blatchf. 495; U.

*By FRED. G. KRIVONOS (§§ 364–407).

convey the legal title to the patent when issued to the assignee,[67] it may nevertheless have conveyed an inchoate title in the invention,[68] and the subsequent issuance of letters patent thereon in the assignor's name vests the equitable title to the patent in the assignee by operation of law.[69]

[§ 365] **2. Joint Owners.** There is no limitation in the United States of the number of persons who may be joint owners of a patent right.[70] Where a patent is issued to two or more persons, they become coöwners,[71] or owners in common,[72] or cotenants,[73] or tenants in common,[74] of the right and property secured by the patent. The assignment of an undivided interest in a patent right constitutes the assignee a joint owner with the assignor.[75] Joint owners of a patent right have interests which are distinct and separate in their nature;[76] and where a patent is issued to two persons, each of the joint patentees is invested with an undivided half interest in the patent.[77]

Partnership. The legal title to a patent issued to two persons designated as composing a named firm is in the parties jointly, and not in the firm.[78] In the absence of an agreement creating a partnership between the parties,[79] coöwners of a patent are not partners inter se or as to third persons.[80] But by an agreement between the parties creating the relation,[81] patent rights may be held in partnership like other property, the mutual rights and liabilities of the partners being determined by the agreement of the parties and the general law of partnership.[82]

Joint ownership in equity. Where a patent is issued to one person and the legal title thereto is in him, agreements between such person and other parties may make them joint owners in equity,[83] or

S. Stamping Co. v. Jewett, 7 Fed. 869, 18 Blatchf. 469; Gay v. Cornell, 10 F. Cas. No. 5,280, 1 Blatchf. 506; Rathbone v. Oer, 20 F. Cas. No. 11,585, Fish. Pat. R. 355, 5 McLean 131 (all to same effect). (2) The later cases, however, refuse to interpret Gayler v. Wilder, supra, as requiring such a request in order that title vest in the assignee, especially in view of the later decision in Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Individual Drinking Cup Co. v. Osmun-Cook Co., 220 Fed. 335.

67. Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214; Klauder-Weldon Dyeing Mach. Co. v. Weldon, 166 App. Div. 415, 151 NYS 1068 [aff 87 Misc. 95, 150 NYS 273].

[a] **Illustration.**—An assignment of an invention, which is sent to the patent office for record after the issuance of the patent and which is refused for record for failure to identify the patent issued and for failure to transfer a title to the patent, is itself insufficient to show that legal title to the patent, issued in the assignor's name, passed to the assignee upon issuance. Indiana Mfg. Co. v. Swift, 185 Ind. 616, 622, 114 NE 214.

68. Indiana Mfg. Co. v. Swift, supra [cit Cyc].

Assignment of future patents and inventions see infra §§ 375, 376.

69. Indiana Mfg. Co. v. Swift, 185 Ind. 616, 622, 114 NE 214 [cit Cyc]; Klauder-Weldon Dyeing Mach. Co. v. Weldon, 166 App. Div. 415, 151 NYS 1068.

70. Copeland v. Eaton, 209 Mass. 139, 95 NE 291, AnnCas1912B 521; Vose v. Singer, 4 Allen (Mass.) 226, 81 AmD 696.

71. Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201.

72. Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481.

73. Drake v. Hall, 220 Fed. 905, 136 CCA 471; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201; Williams v. Knibbs, 213 Mass. 534, 100 NE 666; Boeklen v. Hardenbergh, 60 N. Y. 8; Mathers v. Green, L. R. 1 Ch. 29, 20 ERC 737.

74. Dunham v. Indianapolis, etc., R. Co., 8 F. Cas. No. 4,151, 2 Bann. & A. 327, 7 Biss. 223; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201; Fraser v. Gates, 118 Ill. 99, 1 NE 817; Vose v. Singer, 4 Allen (Mass.) 226, 81 AmD 696; De Witt v. Elmira Nobles Mfg. Co., 66 N. Y. 459, 23 AmR 73 [aff 5 Hun 301]; Marston v. Swett, 66 N. Y. 206, 23 AmR 43.

75. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Williams v. Knibbs, 213 Mass. 534, 100 NE 666.

Right of joint owner to assign see infra § 372.

76. Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481 ("It is well established that joint owners of a patent right, in the absence of express agreement or covenants relating thereto between them, have interests which are distinct and separate in their nature").

77. Central Brass, etc., Co. v. Stuber, 220 Fed. 909, 136 CCA 475; Drake v. Hall, 220 Fed. 905, 136 CCA 471.

78. Levy v. Dattlebaum, 63 Fed. 992.

[a] **Illustration.**—The legal title to a patent issued to "T & L of firm of T & L" is in the parties jointly and not in the firm. Levy v. Dattlebaum, 63 Fed. 992.

[b] **Assignment of all the property of a partnership** does not pass title to a patent owned by individual partners jointly. Levy v. Dattlebaum, 63 Fed. 992.

79. See cases infra note 82.

80. U. S.—Drake v. Hall, 220 Fed. 905, 136 CCA 471; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201.

Ill.—Fraser v. Gates, 118 Ill. 99, 1 NE 817.

Mass.—Williams v. Knibbs, 213 Mass. 534, 100 NE 666; Vose v. Singer, 4 Allen 226, 81 AmD 696.

N. J.—Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481.

N. Y.—Boeklen v. Hardenbergh, 60 N. Y. 8.

Tex.—Kuehn v. Meredith, (Civ. A.) 187 SW 386.

[a] **Illustrations.**—(1) Where, on dissolution of a partnership, all of the property was conveyed to the succeeding partner except a patent, issued to the two partners jointly and under which they had been manufacturing, which was declared to remain partnership property, and the succeeding partner was given the exclusive use and control of the patent for one year, for which he was to pay the other party a royalty on all articles made thereunder, such agreement did not constitute a partnership, but the ownership of the patent remained as before, vested in the parties as tenants in common. Drake v. Hall, 220 Fed. 905, 136 CCA 471. (2) Under a contract reciting that plaintiff had applied for letters patent and had assigned a half interest therein to defendant, who stipulated to pay all expenses for procuring patents, the parties did not become partners as between themselves, but owned together in equal shares the invention and the patent to be issued. Williams v. Knibbs, 213 Mass. 534, 100 NE 666.

[b] **In England** joint owners are partners. Lovell v. Hicks, 2 Y. & C. Exch. 472, 160 Reprint 482. See Lovell v. Hicks, 2 Y. & C. Exch. 46, 160 Reprint 306.

81. **Essentials of partnership** see Partnership §§ 37-146.

82. U. S.—Wade v. Metcalf, 129 U. S. 202, 9 SCt 271, 32 L. ed. 661 [aff 16 Fed. 130]; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Ambler v. Whipple, 20 Wall. 546, 22 L. ed. 403; Kinsman v. Parkhurst, 18 How. 289, 15 L. ed. 385; Mueller v. Mueller, 95 Fed. 155, 37 CCA 392; Carroll v. Goldschmidt, 80 Fed. 520 [rev on other grounds 83 Fed. 508, 27 CCA 566 (certiorari den 169 U. S. 735 mem, 18 SCt 940 mem, 42 L. ed. 1214 mem)]; Levy v. Dattlebaum, 63 Fed. 992; Denning v. Bray, 61 Fed. 651, 10 CCA 6; Haffcke v. Clark, 50 Fed. 531, 1 CCA 570; Locke v. Lane, etc., Co., 35 Fed. 289 [rev on other grounds 150 U. S. 193, 14 SCt 78, 37 L. ed. 1049]; Rogers v. Riessner, 30 Fed. 525; Montross v. Mabie, 30 Fed. 234; Keller v. Stolzenbach, 20 Fed. 47; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419. And see Drake v. Hall, 220 Fed. 905, 136 CCA 471 (holding that such an agreement was not established).

Cal.—Hill v. Miller, 78 Cal. 149, 20 P 304.

D. C.—Milton v. Kingsley, 7 App. 531.

Ill.—Scutt v. Robertson, 127 Ill. 135, 19 NE 851.

Iowa.—Vetter v. Lentzinger, 31 Iowa 182.

Me.—Morrill v. Spenard, 142 A 779.

Mass.—Freeman v. Freeman, 136 Mass. 260, 142 Mass. 98; Somerby v. Buntin, 118 Mass. 279, 19 AmR 459; Bartlett v. Holbrook, 1 Gray 114.

N. Y.—Spears v. Willis, 151 N. Y. 443, 45 NE 849; Burr v. De la Vergne, 102 N. Y. 415, 7 NE 366; O'Hara v. Harman, 14 App. Div. 167, 43 NYS 556; Berolzheimer v. Strauss, 51 N. Y. Super. 96, 7 NYCivProc 225.

N. C.—Gilbert v. Howard Automatic Mach. Co., 147 N. C. 308, 61 SE 176.

Pa.—Hepworth v. Henshall, 153 Pa. 592, 25 A 1103; Blood v. Ludlow Carbon Black Co., 150 Pa. 1, 24 A 348.

Vt.—Whitcomb v. Whitcomb, 85 Vt. 76, 81 A 97, AnnCas1913E 1015.

And see Kuehn v. Meredith, (Tex. Civ. A.) 187 SW 386 (holding that such an agreement was not established).

[a] **Illustration.**—Where plaintiffs entered into a partnership with defendants, agreeing to build a machine for the manufacture of an article for which the parties were endeavoring to secure a patent, and to advance a limited sum to be used for patenting the article, and it was further agreed that no one of the partners should sell his interest in the patent without first offering such interest to the other partners, and that each should have a specified interest in the patent and in all moneys derived from sales of the article, etc., a partnership was created between the parties. Gilbert v. Howard Automatic Mach. Co., 147 N. C. 308, 61 SE 176.

83. Whiting v. Graves, 29 F. Cas. No. 17,577, 3 Bann. & A. 222.

[a] **Illustration.**—By agreement, an inventor employee may become a joint owner in equity with his employer to whom he assigned the invention, and to whom letters patent were issued. Whiting v. Graves, 29

tenants in common in equity.[84] And under an agreement that a patent is to be taken out in the joint names of two or more persons, or for their joint benefit, the parties are in equity joint owners.[85] Where a joint application by two persons is rejected, a patent for the same invention subsequently obtained by one of them in his own name inures to both, and they are joint owners.[86]

Rights, powers, and liabilities of coöwners.[87] The use of a patent right is different from the use of any other property, and in determining the rights, powers, and liabilities of coöwners of patents it is not safe to follow the rules adopted in regard to coowners of ordinary chattels.[88] The nature of a patent is such that joint owners in it are at the mercy of each other.[89] In the absence of a special agreement,[90] each coöwner may manufacture, use, and sell the patented invention with or without the consent of his coöwner,[91] no matter how small his interest may be,[92] without liability to account for his individual use of the invention,[93] and without being liable to account for profits,[94] unless such profits accrue after a joint owner has procured an assignment of his coöwner's interest to himself by fraud.[95] Still, a part owner of a patent has no right to use an infringing device; if he does he is liable to his coowner for the wrong done.[96] One part owner cannot bind his coöwner by any special contract with an assignee of the patent, not connected with the enjoyment and exercise of the common privilege under the patent.[97] Nor can one part owner prejudice the rights of his coöwners, as by a release of the right to recover damages for an infringement.[98] The rights of the coöwners may, however, be limited by an express contract.[99] Where two persons unite in obtaining a joint patent, neither can set up a prior

F. Cas. No. 17,577, 3 Bann. & A. 222.

84. Blakeney v. Goode, 30 Oh. St. 350.

[a] **Illustration.**—The beneficiary of a trust agreement with the inventor as to a half interest in the patent issued in the inventor's name is in equity a tenant in common with the inventor. Blakeney v. Goode, 30 Oh. St. 350.

85. Duke v. Graham, 19 Fed. 647.

86. Vetter v. Lentzinger, 31 Iowa 182.

87. **Coöwner's right to:**
Assign see infra § 372.
License see infra § 409.
Make and use see infra text and note 91.
Retain profits from manufacture and use see infra text and note 93.
Sue for infringement see infra § 540.
Sue for royalties see infra § 473.

88. Vose v. Singer, 4 Allen (Mass.) 226, 230, 81 AmD 696. See Blackledge v. Weir, etc., Mfg. Co., 108 Fed. 71, 47 CCA 212 [quot Vose v. Singer, supra]. But see Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201 (the rights, powers, and duties of coöwners as respects each other are substantially those of joint owners of a chattel).

"It would not be safe to conclude that, because the owner in common of a horse is not liable though he retains the exclusive use of him, therefore the part owner of the patent who uses it exclusively is not liable; nor because the tenant in common of the grain or liquor who uses it exclusively and consumes it in using is liable, therefore the part owner of the patent is liable. There is a possibility that the part owner of the patent may so supply the market as to appropriate to himself the whole value of the patent; and, on the other hand, his use of it may have the effect to create a market so extensive as greatly to enhance the value of the whole patent. On the whole, then, we are compelled to reject all arguments from analogy, and look at the question upon its own apparent merits." Vose v. Singer, supra.

89. McDuffee v. Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 CCA 76; Copeland v. Eaton, 209 Mass. 139, 95 NE 291, AnnCas1912B 521. See Vose v. Singer, 4 Allen (Mass.) 226, 232, 81 AmD 696 ("none of the parties interested has any right to control the action of the other parties, or to exercise any supervision over them").

90. See infra text and note 99.

91. U. S.—Central Brass, etc., Co. v. Stuber, 220 Fed. 909, 136 CCA 475; Drake v. Hall, 220 Fed. 905, 136 CCA 471; McDuffee v. Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 CCA 76; Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77; Blackledge v. Weir, etc., Mfg. Co., 108 Fed. 71, 47 CCA 212; Pusey, etc., Co. v. Miller, 61 Fed. 401; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506; Dunham v. Indianapolis, etc., R. Co., 8 F. Cas. No. 4,151, 2 Bann. & A. 327, 7 Biss. 223; Whiting v. Graves, 29 F. Cas. No. 17,577, 3 Bann. & A. 222. Contra Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201.

Ill.—Fraser v. Gates, 118 Ill. 99, 1 NE 817; Washburn, etc., Mfg. Co. v. Chicago Galvanized Wire Fence Co., 109 Ill. 71.

Mass.—Copeland v. Eaton, 209 Mass. 139, 95 NE 291, AnnCas1912B 521; Vose v. Singer, 4 Allen 226, 81 AmD 696.

N. J.—Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481; Parkhurst v. Kinsman, 6 N. J. Eq. 600.

N. Y.—De Witt v. Elmira Nobles Mfg. Co., 66 N. Y. 459, 23 AmR 73; Marston v. Swett, 66 N. Y. 206, 23 AmD 43.

Tex.—Davis v. Wynne, (Civ. A.) 190 SW 510.

[a] **In England** either joint owner may use and must account only for royalties received. Mathers v. Green, L. R. 1 Ch. 29, 20 ERC 737; Steers v. Rogers, [1892] 2 Ch. 13 [aff [1893] A. C. 232, 20 ERC 742]; Hancock v. Bewley, Johns. 601, 70 Reprint 559; Heyl-Dia v. Edmunds, 81 L. T. Rep. N. S. 579; Lovell v. Hicks, 2 Y. & C. Exch. 472, 160 Reprint 482.

92. Davis v. Wynne, (Tex. Civ. A.) 190 SW 510.

93. McDuffee v. Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 CCA 76; Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481; De Witt v. Elmira Nobles Mfg. Co., 66 N. Y. 459, 23 AmR 73 [aff 5 Hun 301].

94. Drake v. Hall, 220 Fed. 905, 136 CCA 471; Whiting v. Graves, 29 F. Cas. No. 17,577, 3 Bann. & A. 222; Fraser v. Gates, 118 Ill. 99, 1 NE 817.

[a] **Reason for rule.**—"The use of an invention by one of co-owners or by his licensees is not the exercise of the entire monopoly conferred by the patent That can be effected only by the joint or concurrent action of all owners. The separate action of any one owner or of his licensees can be an exercise or use only of his individual right, which, though exclusive of all besides, is not exclusive of the other patentees, their assignees or licensees. On principle, therefore, there can be no accountability on the part of a part owner of an invention to other owners for profits made by the exercise of his individual right, whether it be by engaging in the manufacture and sale, or by granting to others licenses, or by assigning interests in the patent. His use of the invention in any lawful way is not an appropriation of anything which belongs to another. The separate rights of the other owners remain unaffected. They are equally free to use the invention in all legitimate ways for their individual profit. Each is entitled to the fruits of his endeavors, taking no risk and expecting no reward from enterprises in which he does not choose to join." Blackledge v. Weir, etc., Mfg. Co., 108 Fed. 71, 76, 47 CCA 212.

[b] **The earlier cases favor the rule that a coöwner is liable to account** for profits made from the use, manufacture, and sale of the invention. See Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201 (coöwner liable for infringement and damages to cotenant for the former's assignment of the patent). And see Pusey, etc., Co. v. Miller, 61 Fed. 401; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Curran v. Burdsall, 20 Fed. 835; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506; Dunham v. Indianapolis, etc., R. Co., 8 F. Cas. No. 4,151, 2 Bann. & A. 327, 7 Biss. 223; Fraser v. Gates, 118 Ill. 99, 1 NE 817; Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481; Parkhurst v. Kinsman, 6 N. J. Eq. 600 (dicta); De Witt v. Elmira Nobles Mfg. Co., 66 N. Y. 459, 23 AmR 73 [aff 5 Hun 301 on technical grounds, although a contrary opinion as to the liability to account was expressed in the lower court].

95. Haserot v. Keller, 67 Cal. A. 659, 228 P 383.

96. Herring v. Gas Consumers' Assoc., 9 Fed. 556, 3 McCrary 206.

97. McNeven v. Livingston, 17 Johns. (N. Y.) 437; Lawrence v. Dale, 3 Johns. Ch. (N. Y.) 23 [aff 17 Johns. 437].

98. Lalance, etc., Mfg. Co. v. Haberman Mfg. Co., 93 Fed. 197; In re Horsley, L. R. 8 Eq. 475.

99. U. S.—Kinsman v. Parkhurst, 18 How. 289, 15 L. ed. 385; Central Brass, etc., Co. v. Stuber, 220 Fed. 909, 136 CCA 475; Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77.

Cal.—Haserot v. Keller, 67 Cal. A. 659, 228 P 383.

Ill.—Fraser v. Gates, 118 Ill. 99, 1 NE 817

Iowa.—Hubenthal v. Kennedy, 76 Iowa, 707, 39 NW 694.

Mass.—Stearns v. Barrett, 1 Pick. 443, 11 AmD 223.

N. J.—Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481; Parkhurst v. Kinsman, 6 N. J. Eq. 600.

N. Y.—Marston v. Swett, 66 N. Y. 206, 23 AmR 43.

Pa.—Culp v. Allen, 166 Pa. 286, 31 A 93 [aff 166 U. S. 501, 17 SCt 644, 41 L. ed. 1093].

[a] **Liability to account for profits.**—(1) Under an express agreement therefor, a coöwner is liable to account for profits derived from manufacture, use, and sale of the invention. Kinsman v. Parkhurst, 18 How. (U.

patent issued to himself for the same invention.[1]

[§ 366] **B. Assignments and Other Transfers[2]—1. Introductory.** Patent property is the creature of statute law and its incidents are equally so, and they depend upon the construction to be given to the statutes creating it and them, in view of the policy of congress in their enactment.[3] It is not safe, therefore, in dealing with a transfer of rights under the patent law to follow implicitly rules governing a transfer of rights in a chose in action at common law.[4]

[§ 367] **2. Assignability.** Under the express terms of the patent law,[5] patents or any interests therein are assignable,[6] absolutely and without restriction.[7] An equitable interest in a patent is assignable.[8]

Partial assignments. The monopoly granted by the patent laws is one entire thing, and cannot be divided into parts except as authorized by law.[9] The subject matter of a patent is not partible except in respect of territorial assignment;[10] a single claim of a patent consisting of several claims is not assignable.[11]

An assignment of a patent is not a sale of an invention within the meaning of the provision of the patent law relating to sales before application for patent.[12]

Effect of license. The grant of a license does not preclude a subsequent assignment by the owner of his interest therein.[13] But a patent is not assignable where the patentee has by contract with a licensee imposed upon himself a relation of trust and con-

S.) 289, 15 L. ed. 403; Fraser v. Gates, 118 Ill. 99, 1 NE 817; Marston v. Swett, 66 N. Y. 206, 23 AmR 43. (2) The cotenant's right to an accounting under such an agreement is enforceable notwithstanding a prior adjudication of the coöwner as bankrupt. Fraser v. Gates, supra.

[b] **Right to manufacture and sell only.**—A contract between joint owners may give each the right to manufacture and sell, but no right to the exclusive use of the patent. Central Brass, etc., Co. v. Stuber, 220 Fed. 909, 136 CCA 475.

[c] **Statute of frauds.**—Where an inventor of a new principle in mechanics assigns one-half interest in the invention to another, in consideration of an agreement that each shall share equally in the cost of procuring a patent to them jointly, and in the profits and expenses and losses, and the patent is issued to both, and for some time they account to each other, the statute of frauds will not be applied to defeat the enforcement of the agreement, for the reasons that the contract has been fully executed on one side, and might have been performed within one year, although not so expected. Fraser v. Gates, 118 Ill. 99, 1 NE 817.

[d] **Effect of fraud upon contract.**—(1) A patentee waived a reassignment of a coöwner's interest in a patent under a contract providing for assignment on failure to sell a certain number of patented articles during year following execution of contract, where patent was not issued until almost four months after expiration of year and patentee requested coowner not to sell before issuance of patent, and falsely represented to coowner that by reason of certain improvements patent was valueless to coöwner. Haserot v. Keller, 67 CalA 659, 228 P 383. (2) If provision in contract for reassignment by coöwner of interest in a patent on failure to sell a certain number of patented articles did not amount to covenant for a forfeiture, coöwner was excused from performance where patentee falsely represented that patent was valueless to coöwner because of certain improvements. Haserot v. Keller, supra. (3) Patentee's statement to coöwner to induce an assignment of coöwner's interest, that undisclosed improvements perfected by him on patented device rendered it valueless to coöwner, was a positive assertion of fact as to which he possessed means of information not accessible to coöwner, and not a mere opinion, and therefore amounted to fraud upon the coöwner. Haserot v. Keller, supra. (4) Elements and effect of fraud generally see Fraud §§ 6–85.

[e] **Evidence held insufficient to show special agreement between coowners.**—Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481.

Partnership agreement see supra text and note 82.

1. Barrett v. Hall, 3 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Stearns v. Barrett, 1 Pick. (Mass.) 443, 11 AmD 223.

2. Particular transfers of patent rights:

In case of owner's bankruptcy see Bankruptcy §§ 167, 198.

Upon:

Creditors' suits see Creditors' Suits § 84.

Execution sale see Executions § 57.

Owner's insolvency see Insolvency § 90.

When receiver is appointed see Receivers [36 Cyc 44, 183–199].

3. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (rev 270 Fed. 587)].

Nature of patents see supra §§ 6–8.

4. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (rev 270 Fed. 587)].

Rules governing assignments generally see Assignments 5 C. J. p 830.

5. U. S. Code tit 35 § 47.

6. U. S.—U. S. v. General Electric Co., 272 U. S. 476, 47 SCt 192, 71 L. ed. 362; Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316; Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (rev 270 Fed. 587)]; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Hendrie v. Sayles, 98 U. S. 546, 25 L. ed. 176; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 Fed. 753; Welsbach Light Co. v. Cohn, 181 Fed. 122; Pegram v. American Alkali Co., 122 Fed. 1000 [aff 125 Fed. 577, 60 CCA 383]; Fire Extinguisher Mfg. Co. v. Graham, 16 Fed. 543. See Campbell v. James, 2 Fed. 338, 18 Blatchf. 92 [rev on other grounds 104 U. S. 356, 26 L. ed. 786] (dictum: that all interests in patents are assignable in writing).

Cal.—Pacific Bank v. Robinson, 57 Cal. 520, 40 AmR 120.

Ill.—Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

Mass.—Vose v. Singer, 4 Allen 226, 81 AmD 696.

Mo.—Sone v. Palmer, 28 Mo. 539.

N. Y.—Waterman v. Shipman, 130 N. Y. 301, 29 NE 111.

Oh.—Blakeney v. Goode, 30 Oh. St. 350; Johnson v. Upright Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26.

Tex.—Coca-Cola Co. v. State, (Civ. A.) 225 SW 791.

Wash.—Laubach Union Check Valve Co. v. Laubach, 97 Wash. 115, 165 P 1053.

[a] **Patent not article of commerce.**—A patent is property, in the sense that it has a commercial value, and may be sold as other property, but it is not an article of commerce in the sense that it may be consumed by the purchasing public. Coca-Cola Co. v. State, (Tex. Civ. A.) 225 SW 791. And see Monopolies §§ 99–101.

Regulation of dealings in patent rights and patented articles:

By states see infra §§ 486–488.

By United States see infra §§ 484, 485.

Sale of patent rights and of articles made under patents distinguished see infra § 486.

7. Laubach Union Check Valve Co. v. Laubach, 97 Wash. 115, 165 P 1053.

[a] **Reason for rule.**—"It is a fundamental proposition that, under the patent laws of the United States, a patentee enjoys absolute freedom in the use or sale of the rights granted thereunder." Laubach Union Check Valve Co. v. Laubach, 97 Wash. 115, 117, 165 P 1053. And see supra §§ 6–8.

Covenants, conditions, and restrictions in assignments see infra § 397.

8. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133, 126 AmSR 409.

9. Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 238, 12 SCt 637, 36 L. ed. 419; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311; Van Orden v. Nashville, 67 Fed. 331; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149; Suydam v. Day, 23 F. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. R. 88; Kempton v. Bray, 99 Mass. 350.

[a] **Reason for rule.**—"For it was obviously not the intention of the legislature to permit several monopolies to be made out of one, and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place." Gayler v. Wilder, 10 How. (U. S.) 477, 494, 13 L. ed. 504. To same effect Van Orden v. Nashville, 67 Fed. 331 [quot Gayler v. Wilder, supra].

[b] **In England** part of a patent may be assigned and the assignee may sue as to that part. Walton v. Lavater, 8 C. B. N. S. 162, 98 ECL 162, 141 Reprint 1127; Dunnicliff v. Mallet, 7 C. B. N. S. 209, 97 ECL 209, 141 Reprint 795.

10. Suydam v. Day, 23 F. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. R. 88.

11. Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 248, 12 SCt 641, 36 L. ed. 423.

12. U. S. Electric Lighting Co. v. Consolidated Electric Light Co., 33 Fed. 869.

Sales of articles embodying invention before application for patent see infra § 491.

13. Splitdorf Electrical Co. v. Webster Electric Co., 283 Fed. 83 [certiorari granted 260 U. S. 715 mem, 43 SCt 92 mem, 67 L. ed. 478 mem, and aff 264 U. S. 463, 44 SCt 342, 68 L. ed. 792].

Assignee takes subject to prior li-

fidence as to the licensee;[14] nor can the patentee who has granted such a license transfer by assignment his rights under the contract as separate from his unassignable personal duties thereunder;[15] nor is a patentee's right to make, use, and sell the invention, reserved to the patentee alone in a license granting an exclusive right, assignable.[16] But the owner of a patent is not precluded from assigning his interests by reason of a prior contract appointing a person his exclusive agent to manufacture and sell the patented invention in specified territory.[17]

Right to prosecute infringement. Although it has been held that the right to assign "any interest" in a patent[18] includes the right to assign the patentee's power to prosecute infringers,[19] the weight of authority is that the monopoly conferred upon the patentee by the issuance of a patent is not assignable alone,[20] since it is a mere incident of the inventor's common-law right to make, use, and sell the patented article,[21] and can be transferred by assignment only when attached to the right to make, use, and sell.[22] Thus a patentee cannot assign merely the right to exclude a particular party from making, using, or vending the patented article, with the right to recover damages for past or future infringements by such party.[23]

[§ 368] **3. What Constitutes Assignment[24]—a. In General.** Under the statute[25] a patentee or his assigns may, by instrument in writing, assign, grant, and convey, either: (1) The whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States. (2) An undivided part or share of that exclusive right. (3) The exclusive right under the patent within and throughout a specified part of the United States.[26] A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself.[27] An instrument which does not purport to convey any present interest in an existing patent, or in one for which an application is pending, is not an assignment within the statute.[28] Still, an assignment may be either absolute, in trust, or by way of mortgage, and liable to be defeated by nonperformance of a condition subsequent.[29]

An option to purchase patent rights is not an assignment see infra § 390.

14. Paper Products Mach. Co. v. Safepack Mills, 239 Mass. 114, 131 NE 288. See Miller v. Jones, 67 Hun 281, 22 NYS 86 (where owner of patent, to secure performance of agreement embodied in license, covenanted not to make any assignments without consent of licensee).

[a] **Illustration.**—Where a contract, whereby owners of patents and pending applications granted defendant a license to operate the patented machines and manufacture and sell the products thereof, required the licensors, when requested, to advise the licensee as to the use of the machines, and to coöperate with the licensee in improving and increasing the business, it created a relation of trust and confidence between the patentee and the licensee, and the patent was thereafter not assignable by the licensors. Paper Products Mach. Co. v. Safepack Mills, 239 Mass. 114, 131 NE 288.

15. Paper Products Mach. Co. v. Safepack Mills, supra.

[a] **Illustration.**—Where a contract, granting a license to operate patented machines and manufacture and sell the product thereof, created a relation of trust and confidence, and was not assignable, the right to sue the licensee for breach of its agreement to use its best efforts to promote and increase the advantageous sale of the products and increase and develop the business was not separable from the contract, and one to whom the licensors attempted to assign its rights under the contract had no right to maintain such action in its own right and name, or in that of the licensors. Paper Products Mach. Co. v. Safepack Mills, 239 Mass. 114, 131 NE 288.

16. Webster Electric Co. v. Podlesak, 255 Fed. 907.

17. Kempton v. Bray, 99 Mass. 350.

18. See supra text and note 6.

19. Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26 [cit Nye Tool, etc., Works v. Crown Die, etc., Co., 276 Fed. 376 (rev on other grounds 261 U. S. 24, 43 SCt 254, 67 L. ed. 516)].

Assignment and license of patent distinguished see infra § 369.

Licensee's right to sue infringer generally see infra §§ 542, 543.

20. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (rev 270 Fed. 587)]; Gordon v. Anthony, 10 F. Cas. No. 5,605, 4 Bann. & A. 248, 16 Blatchf. 234.

21. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (rev 270 Fed. 587)].

22. Crown Die, etc., Co. v. Nye Tool, etc., Works, supra.

23. Crown Die, etc., Co. v. Nye Tool, etc., Works, supra.

24. Sale within regulatory statutes see infra §§ 486-488; Bills and Notes § 262.

25. See U. S. Code tit 35 § 47.

26. U. S.—U. S. v. General Electric Co., 272 U. S. 476, 47 SCt 192, 71 L. ed. 362; Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 248, 12 SCt 641, 36 L. ed. 423; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Green v. Le Clair, 24 F. (2d) 74; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311]; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. 332; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242; Van Orden v. Nashville, 67 Fed. 331; Rice v. Boss, 46 Fed. 195; Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139; Parker v. Haworth, 18 F. Cas. No. 10,738, 2 Robb Pat. Cas. 725, 4 McLean 370; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

Ill.—Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

Iowa.—McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

Mass.—Kempton v. Bray, 99 Mass. 350.

Tex.—American Refining Co. v. Gasoline Products Co., (Civ. A.) 294 SW 967, 974 [cit Cyc].

Wash.—Laubach Union Check Valve Co. v. Laubach, 97 Wash. 115, 165 P 1053.

[a] **Under the early acts** there could be no assignment except of whole right. Tyler v. Tuel, 6 Cranch (U. S.) 324, 3 L. ed. 237.

27. U. S.—Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 248, 12 SCt 641, 36 L. ed. 423; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Green v. Le Clair, 24 F. (2d) 74; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311]; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. 332; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242; Van Orden v. Nashville, 67 Fed. 331; Russell v. Kern, 58 Fed. 382 [aff 69 Fed. 94, 16 CCA 154]; Pickhardt v. Packard, 22 Fed. 530, 23 Blatchf. 23; Nellis v. Pennock Mfg. Co., 13 Fed. 451; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Suydam v. Day, 23 F. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. R. 88.

Ill.—Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

Ind.—Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322.

Iowa.—McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

Pa.—Jarecki v. Hays, 161 Pa. 613, 29 A 118.

Tex.—Horne v. Chatham, 64 Tex. 36.

28. National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114, 63 CCA 616; Kempton v. Bray, 99 Mass. 350.

[a] **Appointment of exclusive agent** in a specified territory to make and sell patented invention is not assignment of patent. Kempton v. Bray, 99 Mass. 350.

29. See cases infra this note.

[a] **Transfer held mortgage to secure obligation.**—Where a patentee agrees to assign a two-thirds interest in certain patents, and the assignee agrees to furnish the patentee with certain funds and goods as long as he is satisfied with the arrangement, and the agreement also provides that in case the assignee becomes dissatisfied after a certain time he may terminate the agreement, with the right, however, to retain his interest as security for whatever the patentee may owe him, and thereafter the patentee conveys by deed to the assignee a two-thirds interest in one of the patents, the transfer is a mortgage of the patent to secure the patentee's obligation to the grantee. Barry v. Coville, 129 N. Y. 302, 29 NE 307.

[b] **Mortgage constitutes transfer of legal title.**—Waterman v. Macken-

signment.[30] On the other hand, where an owner of a patent sells it for part cash and part notes, and he deposits an assignment of the patent in escrow, conditioned upon its redelivery to him upon default in payment of the notes, the transaction is not an option but a binding contract of purchase and sale.[31]

[§ 369] **b. License Distinguished.**[32] Any transfer of rights under a patent which is short of a conveyance to the transferee of the patentee's exclusive right to make, use, and vend the invention throughout the United States, or in a specified part thereof, or of an undivided part or share of that exclusive right,[33] is a mere license[34] giving the licensee no title in the patent.[35] Further, to constitute an assignment, the exclusive right granted by the transferor must be exclusive of the patentee, as well as

zie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; Moore v. Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Conard v. Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; Ormsby v. Connors, 133 Fed. 548; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Paper Bag Cases, C. D. (1882) 197; Littlefield v. Perry, 7 Off. Gaz. (U. S.) 964.

[c] **Conveyance on condition creates trust.**—Duff v. Gilliland, 139 Fed. 16, 71 CCA 428.

[d] **An assignment in trust** carries the legal title. Campbell v. James, 4 F. Cas. No. 2,361, 4 Bann. & A. 456, 17 Blatchf. 42.

Covenants and conditions generally see infra § 397.

30. Barber Asphalt Pav. Co. v. Standard Asphalt, etc., Co., 30 F. (2d) 281; Strauss v. Brier, 57 Colo. 65, 140 P 183; Beaudry v. Hamel Shoe Mach. Co., 235 Mass. 503, 126 NE 778.

[a] **Illustrations.**—(1) An instrument providing that, in consideration of the payment of a certain sum by the party of the second part to the party of the first part, the party of the first part "hereby agrees" to deliver to the second party all of his rights to the use of a certain patent, and "does hereby grant and convey" such rights, is a mere option, the second party not agreeing to buy or pay for the patent rights. Strauss v. Brier, 57 Colo. 65, 140 P 183. (2) A transaction giving an option to purchase a patent accompanied by a deposit of letters patent with a trust company to secure such agreement is not an assignment or transfer of title to the patent. Barber Asphalt Pav. Co. v. Standard Asphalt, etc., Co., 30 F. (2d) 281. (3) Where defendant was given by plaintiff an irrevocable license to purchase certain letters patent enumerated in the agreement exercisable within five years, but did not bind itself to purchase, and plaintiff at the request of defendant subsequently assigned to it five letters patent issued after execution of the agreement between them, such letters not having issued on application for letters pending when the agreement was executed, assignment by plaintiff to defendant at its request did not constitute exercise of option to purchase the enumerated letters patent to render it liable to make bulk payment to plaintiff of forty thousand dollars. Beaudry v. Hamel Shoe Mach. Co., 235 Mass. 503, 126 NE 778.

31. McMillan v. Davis, 54 Pa. Super. 154.

32. Assignment distinguished from other transactions generally see Assignments § 6.

Licenses see infra §§ 408-482.

33. Nature of assignment proper see supra § 368 text and notes 26, 27.

34. "License" defined see infra § 408.

35. U. S.—U. S. v. General Electric Co., 272 U. S. 476, 47 SCt 192, 71 L. ed. 362; Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; Bliss Co. v. U. S., 253 U. S. 187, 40 SCt 455, 64 L. ed. 852; Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 248, 12 SCt 641, 36 L. ed. 423; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Hayward v. Andrews, 106 U. S. 672, 1 SCt 544, 27 L. ed. 271; Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Green v. Le Clair, 24 F. (2d) 74; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311]; Bowers v. Atlantic, etc., Co., 162 Fed. 895; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. 332; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242, Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 267; Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176; Rice v. Boss, 46 Fed. 195; Hatfield v. Smith, 44 Fed. 355; Pickhardt v. Packard, 22 Fed. 530, 23 Blatchf. 23; Baldwin v. Sibley, 2 F. Cas. No. 805, 1 Cliff. 150; Goodyear v. Day, 10 F. Cas. No. 5,566; Hill v. Whitcomb, 12 F. Cas. No. 6,502, 1 Bann. & A. 34, Holmes 317; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149.

Ill.—Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

Ind.—Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322.

Iowa.—McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

N. Y.—Bottlers' Seal Co. v. Rainey, 225 N. Y. 369, 122 NE 200; Tuttle v. La Dow, 54 Hun 149, 7 NYS 277.

Oh.—Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26.

Tex.—American Refining Co. v. Gasoline Products Co., (Civ. A.) 294 SW 967, 974 [cit Cyc].

"The grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license." Waterman v. Mackenzie, 138 U. S. 252, 256, 11 SCt 334, 34 L. ed. 923.

[a] **"Grantee" and "licensee" of patent compared.**—"There are three classes of persons in whom the patentee can vest an interest of some kind in the patent. They are an assignee, a grantee of an exclusive sectional right, and a licensee. An assignee is one who has had transferred to him in writing the whole interest of the original patent, or any undivided part of such whole interest, in every portion of the United States; and no one, unless he has such interest transferred to him, is an assignee. A grantee is one who has transferred to him, in writing, the exclusive right under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States. Such right must be an exclusive sectional right, excluding the patentee therefrom. A licensee is one who has had transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest." Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 211, 1 Fish. Pat. Cas. 327.

[b] **Reservation of part of the right in the territory** makes the instrument a license, and not an assignment. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Bowers v. Atlantic, etc., Co., 162 Fed. 895; Rice v Boss, 46 Fed. 195; Hatfield v. Smith, 44 Fed. 355; Goodyear v. Day, 10 F. Cas. No. 5,566; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139; Tuttle v. La Dow, 54 Hun 149, 7 NYS 277.

[c] **Transfer of right to make and sell only.**—(1) A grant limited to the exclusive right to manufacture and sell, without the right to use a patented invention, is a license, and not an assignment. Hayward v. Andrews, 106 U. S. 672, 1 SCt 544, 27 L. ed. 271; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. 332; McFadden v. Alexander, 154 Iowa 716, 135 NW 396. (2) An agreement by which the owner of a patent grants to another "the sole and exclusive right and license to manufacture and sell" the patented article throughout the United States, not expressly authorizing him to use it, is not an assignment, but a license. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923. (3) The grant of an exclusive right to make and vend an article within a certain territory, upon paying to the assignor an agreed royalty, and reserving to the assignor the right to use and manufacture the article by paying a specified royalty to the assignee, is only a license. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504.

[d] **Transfer of right to make and use only.**—(1) The transfer of a right "to use and manufacture and sell rights to use" a patented invention in specified territory is a license, and not an assignment, the right to sell being withheld. Rice v. Boss, 46 Fed. 195. (2) The transfer of a right to make and use a patented invention, but not to sell, is a license, and not an assignment. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322. (3) A transfer or grant of the right to make and use a patented appliance upon a particular machine, or a number of machines, or cars, amounts to no more than a license so to make and use it within such fixed limits. Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322.

[e] **Transfer of the right to use and vend only.**—(1) A transfer of the right to use and vend a patented invention is a license, and not an assignment. Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Baldwin v. Sibley, 2 F. Cas. No. 805, 1 Cliff. 150. (2) A grant to use and sell or dispose of patented machines confers a license, and is not an assignment. Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221. (3) Where a patentee grants the exclusive right to use and vend the patented invention within a specified territory, reserving to himself the right of manufacture, the legal title to the monopoly remains in him, and the transaction is a license. Hill v. Whitcomb, 11 F. Cas. No. 6,502, 1 Bann. & A. 34, Holmes 317; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149.

[f] **Transfer of right "to use and to have used."**—A contract whereby

strangers.[36] But the reservation or exception by the grantor of a mere personal right, amounting merely to a license back to him from the assignee, will not reduce the transfer from an assignment to a license;[37] nor will a condition subsequent in a transfer of rights under a patent reduce the grant to a mere license.[38] So, also, a grant of an exclusive right, to make, use, and sell a certain number of the patented machines within a specified territory is, in effect, if not technically, an assignment, notwithstanding the limitation of the number of machines.[39] The patentee may sell his exclusive right for a term of years less than the full term of the patent, but in such case the legal title remains in him, and the transfer constitutes a mere license.[40]

[§ 370] **c. Determination of Character of Transfer.** Whether a transfer of a particular right or interest under a patent is an assignment or a license depends upon the effect of the whole contract,[41] and upon the legal effect of its provisions, and not upon the name by which it calls itself,[42] or the motive of the parties.[43] But the fact that the instrument is

a patentee grants "the exclusive right to use and to have used the said" patented article "as embodied in the aforesaid letters patent and applications," for a specified term, is a license, and not an assignment. Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

[g] **Transfer of exclusive right "to manufacture, sell, and use** devices made according to any and all letters patent" owned by the assignor, and limited to the assignee, a corporation, wherever the "devices come within the scope of the business of said Company as stated in their articles of incorporation," is a license, and not an assignment. Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26, 27.

[h] **Grant of right to sue infringers does not change instrument** granting license to make, use, and sell patented invention into an assignment. Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26.

[i] **A transfer of a single claim** of a patent consisting of several claims is a mere license. Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 248, 12 SCt 641, 36 L. ed. 423.

36. Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Moore v. Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Rice v. Boss, 46 Fed. 195; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139.

37. Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Green v. Le Clair, 24 F. (2d) 74; Lock Joint Pipe Co. v. Melber, 234 Fed. 319; Sirocco Engineering Co. v. Monarch Ventilator Co., 184 Fed. 84; Russell v. Kern, 58 Fed. 382 [aff 69 Fed. 94, 16 CCA 154]; Pope Mfg. Co. v. Clark, 46 Fed. 789; Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 34 Fed. 893 [aff 144 U. S. 248, 12 SCt 641, 36 L. ed. 423]; Hobbie v. Smith, 27 Fed. 656; Frankfort Whisky Process Co. v. Pepper, 26 Fed. 336; Hamilton v. Kingsbury, 11 F. Cas. No. 5,984, 3 Bann. & A. Pat. Cas. 346, 15 Blatchf. 64.

[a] **Illustrations.**—(1) An instrument granting the sole and exclusive license to manufacture, sell, and use a patented article, but reserving to the grantor the exclusive right to manufacture, sell, and use certain specific apparatus only for certain purposes, although called a "license," was in legal effect an assignment, with reservation of a license to the grantor. Sirocco Engineering Co. v. Monarch Ventilator Co., 184 Fed. 84. (2) Reservation by grantor of right to manufacture in territory specified in grant, in common with grantee, does not prevent transfer. Hamilton v. Kingsbury, 11 F. Cas. No. 5,984, 3 Bann. & A. 346, 15 Blatchf. 64. (3) An instrument granting the assignor a license to sell the patented invention in specified territory does not reduce it from an assignment to a license. Green v. Le Clair, 24 F. (2d) 74.

38. Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290.

Covenants, conditions, and restrictions as affecting transfer generally see infra § 397.

39. Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Ritter v. Serrell, 20 F. Cas. No. 11,866, 2 Blatchf. 379; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122.

40. Moore Mfg., etc., Co. v. Cronk Hanger Co., 69 Fed. 998; Still v. Reading, 9 Fed. 40, 4 Woods 345; Dudley v. Suddoth, 91 Ala. 349, 8 S 873; Nichols v. Murphy, 136 Ill. 380, 26 NE 509; Bottlers' Seal Co. v. Rainey, 225 N. Y. 369, 122 NE 200.

41. Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

42. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Green v. Le Clair, 24 F. (2d) 74; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311]; Sirocco Engineering Co. v. Monarch Ventilator Co., 184 Fed. 84; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242; Newton v. Buck, 72 Fed. 777 [rev on other grounds 77 Fed. 614, 23 CCA 355]; Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176; Russell v. Kern, 58 Fed. 382 [aff 69 Fed. 94, 16 CCA 154]; Russell v. Kendall, 58 Fed. 381; Rapp v. Kelling, 41 Fed. 792; Hobbie v. Smith, 27 Fed. 656; Pickhardt v. Packard, 22 Fed. 530, 23 Blatchf. 23; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561; Ritter v. Serrell, 20 F. Cas. No. 11,866, 2 Blatchf. 379; Lowry v. Cowles Electric Co., C. D. (1893) 549; Rapp v. Killing, C. D. (1890) 483; Comptograph Co. v. Burroughs Adding Mach. Co., 179 Iowa 83, 159 NW 465; Barclay v. Charles Roome Parmele Co., 70 N. J. Eq. 218, 61 A 715 [aff 71 N. J. Eq. 769, 71 A 1133]; Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26 (dictum); Douglass v. Campbell, 24 Oh. Cir. Ct. 241.

[a] **An instrument worded as a mere license** may, on account of the actual interest conveyed, amount to an assignment. Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176 [rev 59 Fed. 20]; Ritter v. Serrell, 20 F. Cas. No. 11,866, 2 Blatchf. 379; Lowry v. Cowles Electric Co., C. D. (1893) 549; Rapp v. Killing, C. D. (1890) 483; Douglass v. Campbell, 24 Oh. Cir. Ct. 241.

[b] **Transfers held to be assignments.**—(1) The transfer of an exclusive right to make, use, and sell a patented invention is an assignment, and not a license. Rapp v. Kelling, 41 Fed. 792; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561. (2) Instrument which transfers to assignee all that United States confers on patentee by terms of letters patent is an assignment. Green v. Le Clair, 24 F. (2d) 74. (3) A contract purporting to convey for a prescribed royalty the exclusive right to make, use, and sell a patented invention in the United States is an assignment, and not a license. Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176. (4) An agreement granting the sale and exclusive right, license, and privilege to manufacture, use, and sell machines embodying patented inventions, the grant being absolute without conditional limitation, and for the life of the patent, increases in royalties which are the consideration of the grant alone being contingent on the validity of the patent and the establishment of a monopoly, is an assignment, and not a license. Comptograph Co. v. Burroughs Adding Mach. Co., 179 Iowa 83, 159 NW 465. (5) An instrument by which a patentee conveyed to a corporation, "its assigns and legal representatives, the exclusive right to manufacture, use, and sell, and to sell to others to be used and sold, said improvements as patented . . . throughout the United States and territories thereof, to the full extent of the term for which said patents are or may be granted," is not merely an exclusive license, but constitutes an assignment granting all the patentee's rights; its character is not changed by the fact that the consideration to the patentee was to be a certain sum on each machine made by the grantee embodying the patented invention, designated in the contract as a "license fee," nor by reason of a clause in the nature of a condition subsequent authorizing the termination of the contract by either party in certain contingencies, nor because it provided that, in case of infringement, suits against the infringers should at once be brought "at the request of the company," maintained under the joint direction and at the joint expense of the parties, and that the damages recovered should be equally divided. D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 287, 51 CCA 242. (6) A contract between two joint owners of a patent, intended to perfect and establish in each respectively the exclusive right to the patent in certain states, constitutes an assignment and vests title in each for the state designated. Russell v. Kern, 58 Fed. 382 [aff 69 Fed. 94, 16 CCA 154]; Russell v. Kendall, 58 Fed. 381. (7) Where complainant conveyed absolutely his interest in the discovery of formulæ for the preparation of certain proprietary medicines for a term of fifty years, and granted the exclusive use of his name as a trade-mark in connection with the preparations for the same time, the transferee was not a mere licensee, but was vested with complainant's entire estate and interest in the subject matter. Barclay v. Charles Roome Parmele Co., 71 N. J. Eq. 769, 71 A 1133 [aff 70 N. J. Eq. 218, 61 A 715].

[c] **Contract to join forces in suing infringers,** embodied in an instrument transferring rights under a patent, to the effect that the assignor and the assignee should consider suits against infringers, and if they cannot agree, either may proceed at his own expense, does not alter the effect of such instrument as an assignment. Green v. Le Clair, 24 F. (2d) 74.

[d] **An assignment of a patent right for certain territory** is not affected by a reservation by the assignor for other territory. Hobbie v. Smith, 27 Fed. 656.

[e] **Reservation of mill right** will not prevent legal transfer. Russell v. Kern, 58 Fed. 382.

Effect of covenant or condition as qualification of interest assigned see infra § 397.

Nature of an assignment see supra § 368.

43. Siebert Cylinder Oil-Cup Co. v.

called a "license" upon its face, although not controlling, is significant as showing the intent of the parties.[44] The recording of the instrument is evidence that it was intended as an assignment.[45]

[§ 371] **4. Who May Assign—a. In General.** By the express provisions of the patent law, the patentee, his assigns, or legal representatives, may transfer interests in, or rights under, the patent.[46] Under these provisions an assignee in any degree may make assignments.[47] A patent may be assigned by the administrator[48] or by the executor[49] of a deceased patentee, or by one of two administrators.[50] The proper officers of a corporation may assign a patent which it owns.[51] The capacity of a married woman to assign a patent depends upon the laws of the several states.[52] Where, under the law of the state where the parties reside and where the transaction takes place, a husband and wife are authorized to make contracts and conveyances regarding personal property to and with each other as strangers,[53] a husband may make an assignment of a patent to his wife,[54] and a wife may assign a patent which she owns[55] to her husband[56] or to third persons.[57] There is authority that a patent may be assigned by an infant,[58] and that an assignment may be made by a person under guardianship,[59] although it has also been held that an assignment by a person of unsound mind is void.[60] A patent may be assigned by an agent of the owner,[61] where he has authority to do so,[62] in writing.[63] A trustee for joint beneficiaries, under an instrument expressly precluding him from the power to make transfers, may not assign.[64] A receiver of the property of the owner of a patent cannot assign such right so as to pass the legal title, unless the owner joins in the assignment.[65] But under a state statute authorizing a court of equity to order a conveyance of a debtor's property upon a creditor's bill,[66] a master may, under an order of the court, execute a conveyance of a patent owned by the debtor.[67]

[§ 372] **b. Joint Owners.** Either of the joint owners of a patent, who are at the mercy of each other,[68] may, in the absence of a special agreement,[69] assign to others his right to use, manufacture, or sell the invention[70] without the consent of his coöwners.[71] And a coöwner cannot maintain a suit for infringement against the grantee.[72] However, the right of a joint owner to assign extends only to his own interest,[73] and he has no right to assign the interest of his coproprietor without liability there-

Beggs, 32 Fed. 790; Seibert Cylinder Oil-Cup Co. v. Phillips Lubricator Co., 10 Fed. 677.

44. Moore Mfg., etc., Co. v. Cronk Hanger Co., 69 Fed. 998; Theberath v. Celluloid Mfg. Co., 3 Fed. 143.

45. Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577.

Recording see infra § 378.

46. U. S. Code tit 35 § 47.

47. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Selden v. Stockwell Self-Lighting Gas-Burner Co., 9 Fed. 390, 19 Blatchf. 544; McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

Who may be assignee see infra § 373.

48. May v. Logan County, 30 Fed. 250; Peoria Target Co. v. Cleveland Target Co., 43 Fed. 922 [aff 58 Fed. 227, 7 CCA 197]; Donoughe v. Hubbard, 27 Fed. 742; Bradley v. Dull, 19 Fed. 913; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114.

Right of administrator to make sales and assignments see Executors and Administrators §§ 716–728.

49. De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; May v. Logan County, 30 Fed. 250; Elwood v. Christy, 17 C. B. N. S. 754, 112 ECL 754, 144 Reprint 302.

Right of executor to make sales and assignments see Executors and Administrators §§ 716–728.

50. Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

Right of one of two administrators to assign see Executors and Administrators § 2820.

51. Gottfried v. Miller, 104 U. S. 521, 26 L. ed. 851; National Folding Box, etc., Co. v. American Paper Pail, etc., Co., 55 Fed. 488; Campbell v. James, 4 F. Cas. No. 2,361, 4 Bann. & A. 456, 17 Blatchf. 42.

[a] **President of corporation:** (1) Such officer may execute an assignment of a patent for the corporation. Campbell v. James, 4 F. Cas. No. 2,361, 4 Bann. & A. 456, 17 Blatchf. 42. (2) A president duly authorized by a resolution passed by the company may execute an assignment of the patent for the corporation. Gottfried v. Miller, 104 U. S. 521, 26 L. ed. 851.

[b] **Treasurer of corporation** may execute assignment of patent for it. National Folding Box, etc., Co. v. American Paper Pail, etc., Co., 55 Fed. 488.

Who may make assignments for corporations generally see Corporations §§ 2297–2999.

52. Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

What law governs capacity of married woman to contract generally see Conflict of Laws § 51; Federal Courts § 189 text and note 44.

53. See Husband and Wife §§ 248–262.

54. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923.

Who may be assignee see supra § 373.

55. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

Capacity of married woman to transfer:

Personal property see Husband and Wife § 375.

Separate estate see Husband and Wife §§ 638–663½.

56. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923.

57. Waterman v. Mackenzie, supra; Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

58. Fetter v. Newhall, supra.

Assignments by infants see Infants § 53.

59. Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

Assignments by insane persons see Assignments § 103; Insane Persons §§ 495–543.

60. Colburn v. Van Velzer, 11 Fed. 795, 3 McCrary 650.

61. Sherman v. Champlain Transp. Co., 31 Vt. 162.

Form of assignment by agent see infra § 377.

62. Johnson R. Signal Co. v. Union Switch, etc., Co., 59 Fed. 20, 51 Fed. 20 [mod on other grounds 61 Fed. 940, 10 CCA 176]; Sone v. Palmer, 28 Mo. 539; Sherman v. Champlain Transp. Co., 31 Vt. 162.

[a] **No authority to assign.**—(1) A power of attorney which, in consideration of a prescribed royalty, appoints the donee sole agent in the United States "for the purpose of working and developing the business of said patents," with power to "negotiate the sale of the said patents upon terms to be agreed upon," does not give the agent power to grant an exclusive license, or assignment which would transfer substantially the entire interest in the patent; but it does authorize him to grant nonexclusive licenses to manufacture and sell. Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176. (2) License and assignment distinguished see supra § 369.

Powers of agent to make sales and assignment of personalty see Agency §§ 229–243; Assignments § 103.

63. Sherman v. Champlain Transp. Co., 31 Vt. 162.

Necessity for written authority to agent see Agency § 53.

64. McDuffee v. Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 CCA 76.

Assignment by one of joint beneficiaries see infra § 372 text and notes 76, 77.

65. Gordon v. Anthony, 10 F. Cas. No. 5,605, 4 Bann. & A. 243, 16 Blatchf. 234.

Sale by receiver generally see Receivers [34 Cyc 309–336].

66. See statutory provisions; and Creditors' Suits §§ 164–168.

67. Wilson v. Martin-Wilson Automatic Fire Alarm Co., 151 Mass. 515, 24 NE 784, 8 LRA 309; Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 AmD 385.

Patents subject to transfer upon creditors' suits see Creditors' Suits § 84.

68. See supra § 365.

69. See infra text and note 78.

70. McDuffee v. Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 CCA 76; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77; Levy v. Dattlebaum, 63 Fed. 992; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Curran v. Burdsall, 20 Fed. 835; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506, Dunham v. Indianapolis, etc., R. Co., 8 F. Cas. No. 4,151, 2 Bann. & A. 327, 7 Biss. 223; May v. Chaffee, 16 F. Cas. No. 9,332, 2 Dill. 385, 5 Fish. Pat. Cas. 160; Copeland v. Eaton, 209 Mass. 139, 95 NE 291, AnnCas1912B 521; Vose v. Singer, 4 Allen (Mass.) 226, 81 AmD 696; Marsh v. Newark Heating, etc., Mach. Co., 57 N. J. L. 36, 29 A 481.

Joint owner's right to use, manufacture, and sell see supra § 365.

71. Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77; Copeland v. Eaton, 209 Mass. 139, 95 NE 291, AnnCas1912B 521; Vose v. Singer, 4 Allen (Mass.) 226, 81 AmD 696.

72. Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77; Pusey, etc., Co. v. Miller, 61 Fed. 401; Copeland v. Eaton, 209 Mass. 139, 95 NE 291, AnnCas1912B 521.

Who may sue for infringement generally see infra §§ 540–543.

73. Pitts v. Hall, 19 F. Cas. No.

for.[74] And one of two complainants who are co-owners of a patent cannot, pending suit for infringement, make an assignment to defendant and thus defeat the other's right to recover damages.[75] One of several joint beneficiaries of the trust in a patent may not assign his interest,[76] for to permit such an assignment would obviate the object of a trust for joint owners, which is intended to avoid the effects of their being placed at each other's mercy.[77] Joint owners may restrict each other's right to assign by agreement.[78]

[§ 373] **5. Who May Be Assignee.**[79] A married woman,[80] an infant,[81] or a person under guardianship,[82] may be the assignee of a patent. The statutory provision for the assignment of patents does not confine assignment to the immediate assignee of the invention, but includes an assignee in any degree.[83] In the United States, any number of persons may be joint assignees.[84]

[§ 374] **6. Agreements To Assign**[85]**—a. In General.** An agreement to assign a patent, or an interest therein, is an executory contract[86] which is valid and enforceable.[87] The assignor's equitable interest in a patent may be transferred by such an agreement.[88]

Consideration. An agreement to assign a patent, like any other contract,[89] must be supported by a legal consideration.[90]

[§ 375] **b. Future Patents.**[91] The rule is well settled[92] that an inventor has an inchoate right to obtain a patent which he may sell or assign before a patent is issued and either before or after he has applied for a patent.[93] An agreement to assign inventions, patents for which have not yet been se-

11,193, 3 Blatchf. 201.

74. Pitts v. Hall, supra; Morrill v. Spenard, (Me.) 142 A 779; Harrison v. Ingersoll, 56 Mich. 36, 22 NW 268.

[a] **Where one part owner sells the entire patent:** (1) The other co-owner may sue him for infringement and recover damages. Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201. (2) The other coöwner may recover from him his proportionate share of the price. Harrison v. Ingersoll, 56 Mich. 36, 22 NW 268. (3) Where defendant assigned one-half interest in patent to plaintiff and parties thereafter formed partnership, whose business was continued by corporation, all of whose stock defendant purchased, plaintiff on defendant's assignment of patent was entitled to one-half amount received, where patent had never been transferred to the partnership or to the corporation. Morrill v. Spenard, (Me.) 142 A 779. (4) In action by owner of half interest in patent to recover proceeds of sale, in which defendant claimed that sale embraced property other than the patent, verdict was properly rendered for plaintiff for one half the proceeds of the sale, where defendant failed to offer any evidence of value of the other articles sold with the patent or the price at which they were sold. Morrill v. Spenard, supra.

75. Lalance, etc., Mfg. Co. v. Habermann Mfg. Co., 93 Fed. 197, 107 Fed. 487.

76. McDuffee v. Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 CCA 76.

[a] **Illustration.**—An assignment by a trustee of a patent for joint beneficiaries, where the trustee is one of them, and the trustee has no power of sale under the trust instrument, does not operate to transfer even the trustee's interest as a joint beneficiary. McDuffee v. Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 CCA 76.

77. McDuffee v. Hestonville, etc., Pass. R. Co., supra.

78. Central Brass, etc., Co. v. Stuber, 220 Fed. 909, 136 CCA 475; Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77.

[a] **Personal contract.**—A contract between joint owners which provides only for manufacture and sale but not for exclusive use by the parties, and which involves a relation of personal confidence between the parties is not assignable, although the contract expressly refers to the parties and "their heirs and assigns." Central Brass, etc., Co. v. Stuber, 220 Fed. 909, 136 CCA 475.

[b] **Evidence held insufficient to show agreement** between coöwners that neither should assign without the other's consent. Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77.

79. Corporation as assignee of patent see Corporations § 2367.

Partnership as assignee of patent see supra §§ 365, 373.

80. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

Capacity of married woman to take and hold property see Husband and Wife §§ 373, 374.

Wife's separate estate see Husband and Wife §§ 424–511.

81. Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

Infant's capacity to acquire property see Infants §§ 73–79.

82. Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

Insane person's capacity to acquire property see Insane Persons §§ 490–493.

83. Selden v. Stockwell Self-Lighting Gas-Burner Co., 9 Fed. 390, 17 Blatchf. 544.

Who may assign see supra §§ 371, 372.

84. Vose v. Singer, 4 Allen (Mass.) 226, 81 AmD 696.

Joint ownership see supra § 365.

85. Assignment of invention or right to patent see infra §§ 375, 376.

86. Minerals Separation v. Miami Copper Co., 275 Fed. 572.

Form and contents of assignment see infra § 381.

87. U. S.—Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576; Mississippi Glass Co. v. Franzen, 143 Fed. 501, 74 CCA 135, 6 AnnCas 707; Ball, etc., Fastener Co. v. Patent Button Co., 136 Fed. 272; Thibodeau v. Hildreth, 124 Fed. 892, 60 CCA 78, 63 LRA 480; Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201.

Conn.—Birkery Mfg. Co. v. Jones, 71 Conn. 113, 40 A 917.

Ill.—Bates Mach. Co. v. Bates, 192 Ill. 138, 61 NE 518; Greer v. Sellers, 64 Ill. A. 505; Wheeler v. Fishell, 32 Ill. A. 343.

Mass.—American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133, 126 AmSR 409.

Mich.—Detroit Lubricator Co. v. Lavigne, 151 Mich. 650, 115 NW 988.

N. J.—Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 138, 55 A 401.

N. Y.—Spears v. Willis, 151 N. Y. 443, 45 NE 849; Thourot v. Holub, 81 App. Div. 634, 80 NYS 1083.

Eng.—National Soc. for Distribution of Electricity, etc. v. Gibbs, [1900] 2 Ch. 280; Hill v. Mount, 18 C. B. 72, 86 ECL 72, 139 Reprint 1291.

Agreements between master and servant see Master and Servant §§ 168, 169.

Assignment of future patents see infra § 375.

Remedies and actions as to agreements to assign see infra § 379.

88. American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 NE 133, 126 AmSR 409.

89. See Contracts §§ 144–244.

90. Cowles v. Rochester Folding Box Co., 179 N. Y. 87, 71 NE 468; Westervelt v. Fuller Mfg. Co., 13 Daly (N. Y.) 352.

91. Use or sale of invention by persons purchasing from inventor before application for patent see infra § 491.

92. Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214.

93. U. S.—Gill v. U. S., 160 U. S. 426, 16 SCt 322, 40 L. ed. 480; Dalzell v. Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 SCt 886, 37 L. ed. 749; De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 269, 13 SCt 283, 37 L. ed. 138; Solomons v. U. S., 137 U. S. 342, 11 SCt 88, 34 L. ed. 667; Hendrie v. Sayles, 98 U. S. 546, 25 L. ed. 176; Cammeyer v. Newton, 94 U. S. 225, 24 L. ed. 72; Hammond v. Mason, etc., Organ Co., 92 U. S. 724, 23 L. ed. 767; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Ambler v. Whipple, 20 Wall. 546, 22 L. ed. 403; Philadelphia, etc., R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Hartshorn v. Day, 19 How. 211, 15 L. ed. 605; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Saunders v. Internal Revenue Comr., 29 F. (2d) 834; Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242; Hildreth v. Auerbach, 200 Fed. 972; Thompson v. Automatic Fire Protection Co., 197 Fed. 750 [aff 211 Fed. 120, 128 CCA 22]; Fairchild v. Dement, 164 Fed. 200; Reece Folding Mach. Co. v. Fenwick, 140 Fed. 287, 72 CCA 39, 2 LRANS 1094; Cook v. Sterling Electric Co., 118 Fed. 45 [aff 150 Fed. 766, 80 CCA 502]; Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130; Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Puetz v. Bransford, 31 Fed. 458; Hapgood v. Rosenstock, 23 Fed. 86, 23 Blatchf. 95; Duke v. Graham, 19 Fed. 647; Fire-Extinguisher Mfg. Co. v. Graham, 16 Fed. 543; Gay v. Cornell, 10 F. Cas. No. 5,280, 1 Blatchf. 506, Fish. Pat. R. 312; Herbert v. Adams, 12 F. Cas. No. 6,394, 4 Mason 15, 1 Robb Pat. Cas. 505; Nesmith v. Calvert, 18 F. Cas. No. 10,123, 1 Woodb. & M. 34; Rathbone v. Orr, 20 F. Cas. No. 11,585, Fish. Pat. R. 355, 5 McLean 131; Tatham v. Loring, 23 F. Cas. No. 13,763. See Ingle v. Landis Tool Co., 262 Fed. 150 [rev on other grounds 272 Fed. 464 (certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)] (assignment of invention not patented is not prevented by any provision of law).

Ark.—Blackmer v. Stone, 51 Ark. 489, 11 SW 693.

Del.—Satterthwait v. Marshall, 4 Del. Ch. 337.

Ill.—Bates Mach. Co. v. Bates, 192 Ill. 138, 61 NE 518; Marsh v. Scott, 125 Ill. 114, 16 NE 863.

Ind.—Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214; Ullman v. Thompson, 57 Ind. A. 126, 106 NE

cured, may be enforced where it is sufficiently definite as to the subject matter, and where the parties, intending to contract for future inventions, use language plainly expressing such a purpose.[94] An assignment of an invention before the issue of a patent passes legal title to the invention to the assignee;[95] legal title to the patent vests in the assignee by operation of law upon the issuance of the patent in the assignor's name.[96]

Extension or renewal. The inchoate right of an inventor to an extension or renewal of his patent[97] may be the subject of a valid and enforceable assignment;[98] such an assignment passes an equitable title to the assignee.[99]

Performance or breach. A person who has advanced money to a patentee to construct and patent an invention under an agreement to incorporate should the invention be successful has an equitable interest in the invention and patent,[1] and is entitled to a lien thereon,[2] and on the price paid to the patentee who has sold the patent in contravention of his agreement;[3] but the transferee is liable only in accordance with his contract.[4] Breach of such a contract is not excused by a suspicion that the party advancing the money intended to steal the invention.[5] Under an agreement to purchase a certain described invention when patented, the purchaser is not liable to pay where the patent is for something substantially different, nor until a patent is issued and tendered;[6] on the other hand it has been held that a contract to transfer a patent is sufficiently complied with by an offer of the patent as issued,

611; Watson v. Deeds, 3 Ind. A. 75, 29 NE 151.

Iowa.—Searle v. Hill, 73 Iowa 367, 35 NW 490, 5 AmSR 688.

Mass.—Richardson Shoe Mach. Co. v. Essex Mach. Co., 207 Mass. 219, 93 NE 650; Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029; Lamson v. Martin, 159 Mass. 557, 35 NE 78; Currier v. Hallowell, 158 Mass. 254, 33 NE 497; Adams v. Messinger, 147 Mass. 185, 17 NE 491, 9 AmSR 679; Somerby v. Buntin, 118 Mass. 279, 19 AmR 459; Binney v. Annan, 107 Mass. 94, 9 AmR 10.

N. J.—Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293, 78 A 698; Consolidated R., etc., Co. v. U. S. Light, etc., Co., 77 N. J. Eq. 285, 78 A 684.

N. Y.—Spears v. Willis, 151 N. Y. 443, 45 NE 849; Burr v. De la Vergne, 102 N. Y. 415, 7 NE 366; Klauder-Weldon Dyeing Mach. Co. v. Weldon, 166 App. Div. 415, 151 NYS 1068 [aff 87 Misc. 95, 150 NYS 273]; Nilsson v. De Haven, 47 App. Div. 537, 62 NYS 506 [aff 168 N. Y. 656 mem, 61 NE 1131 mem]; Bezer v. Hall Signal Co., 22 App. Div. 489, 48 NYS 203.

Oh.—Pumphrey v. Hoffiner, 18 Oh. Cir. Ct. N. S. 346.

Or.—Hume v. Mears, 89 Or. 519, 174 P 1156.

Pa.—Hepworth v. Henshall, 153 Pa. 592, 25 A 1103; Reese's App., 122 Pa. 392, 15 A 807.

Tenn.—McRae v. Smart, 120 Tenn. 413, 114 SW 729.

W. Va.—Maurice v. Devol, 23 W. Va. 247.

Wis.—Fuller, etc., Mfg. Co. v. Bartlett, 68 Wis. 73, 31 NW 747, 60 AmR 838.

[a] **Transfer of future foreign patents.**—In view of the international convention of March 20, 1883 (25 U. S. St. at L. 1372), as modified by a supplementary treaty concluded at Brussels Dec. 14, 1900, and ratified by the United States Aug. 25, 1902 (32 U. S. St. at L. 1936), where defendants, having acquired some rights under the United States patent laws, at least by application for patents, filed application for a patent in Great Britain, defendants' English rights, even before issuance of the patent in Great Britain, constituted a property right which was the legitimate subject of contract and sale. Hume v. Mears, 89 Or. 519, 174 P 1156.

[b] **A mortgage** of an invention and the patent to be obtained will be enforced. Hollins v. Mallard, 10 HowPr (N. Y.) 540.

Assignee of invention as person entitled to patent see supra § 138.

Right of inventor before patent see supra § 2.

94. U. S.—Gill v. U. S., 160 U. S. 426, 16 SCt 322, 40 L. ed. 480; Dalzell v. Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 SCt 886, 37 L. ed. 749; De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 219, 13 SCt 283, 37 L. ed. 138; Solomons v. U. S., 137 U. S. 342, 11 SCt 88, 34 L. ed. 667; Ambler v. Whipple, 20 Wall. 546, 22 L. ed. 403; Philadelphia, etc., R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; McClurg v. Kingsland, 1 How. 202, 11 L. ed. 102; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Shaw v. Cooper, 7 Pet. 292, 8 L. ed. 689; Popp v. Newport News Shipbuilding, etc., Co., 5 F. (2d) 962; Piggly Wiggly Corp. v. Saunders, 1 F. (2d) 572; Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242]; Wege v. Safe-Cabinet Co., 249 Fed. 696, 161 CCA 606; Thompson v. Automatic Fire Protection Co., 211 Fed. 120, 128 CCA 22 [aff 197 Fed. 750]; Davis, etc., Temperature Controlling Co. v. Tagliabue, 159 Fed. 712; Reece Folding Mach. Co. v. Fenwick, 140 Fed. 287, 72 CCA 39, 2 LRANS 1094; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 49 Fed. 68, 1 CCA 169; Emmons v. Sladdin, 8 F. Cas. No. 4,470, 2 Bann. & A. 199.

Mass.—Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029.

Mich.—Zagelmeyer v. Laughray Concrete Brick Co., 169 Mich. 589, 593, 132 NW 1045 [cit Cyc].

N. Y.—Jones v. Reynolds, 120 N. Y. 213, 24 NE 279; Tabor v. Hoffman, 118 N. Y. 30, 23 NE 12, 16 AmSR 740; Palmer v. De Witt, 47 N. Y. 532, 7 AmR 480; Klauder-Weldon Dyeing Mach. Co. v. Weldon, 166 App. Div. 415, 151 NYS 1068 [aff 87 Misc. 95, 150 NYS 273]; Nilsson v. De Haven, 47 App. Div. 537, 62 NYS 506 [aff 168 N. Y. 656 mem, 61 NE 1131 mem].

W. Va.—Boone v. Hess Dustless Min. Mach. Co., 76 W. Va. 716, 718, 86 SE 752 [cit Cyc]; Maurice v. Devol, 23 W. Va. 247.

Eng.—Maxim Nordenfelt Guns, etc., Co. v. Nordenfelt, [1893] 1 Ch. 630; Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462, 21 ERC 696; Bewley v. Hancock, 6 De G. M. & G. 391, 55 EngCh 305, 43 Reprint 1285; Knowles v. Bovill, 22 L. T. Rep. N. S. 70.

Ont.—Watson v. Harris, 31 Ont. 134.

[a] **Agreement to pay for application.**—An employer may agree to pay the expenses of the application to secure to itself the benefit of the patent. Webster Electric Co. v. Podlesak, 241 Fed. 489.

[b] **Agreement held not enforceable.**—An agreement to assign patents for existing inventions which does not plainly express a purpose to embrace future inventions is not enforceable as to the latter. Boone v. Hess Dustless Min. Mach. Co., 76 W. Va. 716, 86 SE 752.

[c] **Foreign patent included in transfer.**—Where defendant, an inventor with application for patent pending, sold and assigned to complainant "my entire right, title, and interest in and to said invention, . . . and in and to any letters patent that may be granted in pursuance of said application," the instrument was an assignment of the invention in its entirety, as well as of the pending application, and entitled complainant to an assignment of a patent subsequently procured in a foreign country. Popp v. Newport News Shipbuilding, etc., Co., 5 F. (2d) 962.

[d] **Transfer of interest creating joint adventure.**—Williams v. Walsh Mfg. Co., 169 Mich. 676, 135 NW 954 (inventor entitled to accounting).

95. Hendrie v. Sayles, 98 U. S. 546, 25 L. ed. 176; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Saunders v. Internal Revenue Comr., 29 F. (2d) 834; Garfield v. Western Electric Co., 298 Fed. 659; Individual Drinking Cup Co. v. Osmun-Cook Co., 220 Fed. 335; Dixon v. Moyer, 7 F. Cas. No. 3,931, 1 Robb Pat. Cas. 324, 4 Wash. C. C. 68; Herbert v. Adams, 12 F. Cas. No. 6,394, 4 Mason 15, 1 Robb Pat. Cas. 505; Rathbone v. Orr, 20 F. Cas. No. 11,585, Fish. Pat. R. 355, 5 McLean 131; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293, 78 A 698.

[a] **Nature of grantee's title.**—The transfer by a discoverer of his discovery or invention will pass to the purchaser the title to the discovery, either absolute or limited, against the discoverer, but, as against others than the seller, the title, not being protected by patent law, depends upon the right of the inventor or his grantee to prevent the use of the invention, which right is based on special equities or rights against such person which disentitle him to the use. Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293, 78 A 698.

96. See supra § 364.

97. Extension see supra §§ 304–306.

Renewal see supra §§ 307–328.

98. Nicolson Pav. Co. v. Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Hartshorn v. Day, 19 How. (U. S.) 211, 15 L. ed. 605; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506; Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9; Emmons v. Sladdin, 8 F. Cas. No. 4,470, 2 Bann. & A. 199; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453; Bezer v. Hall Signal Co., 22 App. Div. 489, 48 NYS 203.

99. Hartshorn v. Day, 19 How. (U. S.) 211, 15 L. ed. 605; Day v Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453.

1. Caulkins v. Lavigne, 156 Mich. 89, 120 NW 607.

2. Caulkins v. Lavigne, supra.

3. Caulkins v. Lavigne, supra.

4. Caulkins v. Lavigne, supra.

[a] **Practical construction.**—A contract to pay expenses for developing and patenting an invention is construed to include all expenses when bills for such expenses are presented and paid. Hartz v. Cleveland Block Co., 95 Fed. 681, 37 CCA 227.

5. Barthel v. Crippen, 162 Mich. 150, 127 NW 401.

6. Serviss v. Stockstill, 30 Oh. St.

although such patent was not coextensive with the invention as claimed.[7] A contract to apply for patents and to assign patents granted is not broken by the opinion of defendant's patent attorney that the invention had been anticipated where there is no other matter constituting a breach.[8]

[§ 376] **c. Future Inventions.** Although generally an agreement to assign all future inventions, in gross, is not looked upon favorably by the courts, and will be strictly construed against the assignee,[9] still, provisions in an employment contract assigning to the employer all rights in the employee's inventions, and contracts as to future inventions with employees hired to make inventions, are valid and enforceable,[10] as are agreements to assign future inventions, relating to a particular subject.[11] Thus an assignment of future inventions fairly and reasonably necessary for the protection of the assignee of existing patents is valid;[12] and a contract to assign all future improvements which may be made upon an invention is valid and enforceable.[13] An assignment of future improvements vests in the assignee an equitable title to the improvements when made.[14]

License or assignment. An agreement to pay royalties on inventions to be made implies a provision for a license or transfer of the patents.[15]

Discharge of contract. A contract to give all subsequent inventions to a corporation is discharged by the insolvency of the corporation.[16]

[§ 377] **d. Form.** An agreement to assign a patent[17] or an agreement to assign a patent before it

418; Hargraves v. A. B. Pitkin Mach. Co., 19 R. I. 426, 34 A 738.

7. Frey v. Iver Johnson Sporting Goods Co., 212 Mass. 213, 98 NE 682.

8. Porter v. Thoens, 180 NYS 733.

9. Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Bates Mach. Co. v. Bates, 192 Ill. 138, 61 NE 518 [aff 87 Ill. A. 225]; Montgomery Palace Stock Car Co. v. Street Stable Car Line, 142 Ill. 315, 31 NE 434; Zagelmeyer v. Laughray Concrete Brick Co., 169 Mich. 589, 593, 132 NW 1045 [cit Cyc]; Consolidated R., etc., Co. v. U. S. Lighting, etc., Co., 77 N. J. Eq. 285, 78 A 684; Arnold v. Talcott, 55 N. J. Eq. 519, 37 A 891; McFarland v. Stanton Mfg. Co., 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647. See Lamson v. Martin, 159 Mass. 557, 35 NE 78 (sale of firm property, including patents, limited to inventions then made).

[a] **Illustrations.**—(1) An agreement by incorporators of a company to exploit an invention to construct cars, and to patent all inventions or improvements relating to such cars in the name of the company, will not be construed to entitle the assignee of such company to improvement patents issued to one of the incorporators and a third person. Montgomery Palace Stock Car Co. v. Street Stable Car Line, 142 Ill. 315, 31 NE 434. (2) An agreement by a partner to assign all future inventions to the partnership covers only future inventions within the scope of the partnership business. Bates Mach. Co. v. Bates, 192 Ill. 138, 61 NE 518.

10. See Master and Servant §§ 167–169.

11. U. S.—A. B. Dick Co. v. Fuller, 6 F. (2d) 393; Chadeloid Chemical Co. v. H. B. Chalmers Co., 243 Fed. 606, 156 CCA 304; Davis, etc., Temperature Controlling Co. v. Tagliabue, 159 Fed. 712, 86 CCA 466; Reece Folding Mach. Co. v. Fenwick, 140 Fed. 287, 72 CCA 39, 2 LRANS 1094; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 49 Fed. 68, 1 CCA 169.

Conn.—Birkery Mfg. Co. v. Jones, 71 Conn. 113, 40 A 917.

Ill.—Bates Mach. Co. v. Bates, 192 Ill. 138, 61 NE 518 [aff 87 Ill. A. 225].

N. J.—Consolidated R., etc., Co. v. U. S. Light, etc., Co., 77 N. J. Eq. 285, 78 A 684.

N. Y.—Magnolia Anti-Friction Metal Co. v. Singley, 17 NYS 251 [aff 137 N. Y. 557 mem, 33 NE 337 mem].

Wis.—Miller Saw-Trimmer Co. v. Cheshire, 172 Wis. 278, 178 NW 855.

[a] **Illustrations.**—(1) Where competitors in the manufacture and sale of paint removers formed a corporation, an agreement by all of them to assign future improvements or inventions to the corporation is not invalid. Chadeloid Chemical Co. v. H. B. Chalmers Co., 243 Fed. 606, 156 CCA 304. (2) A contract, whereby the inventor of a paper feeding mechanism for a particular type of press assigned his patent to another and agreed to assign all future patents he acquired for any paper feeding mechanism during the term of the original patent, is not void as contrary to public policy. Miller Saw-Trimmer Co. v. Cheshire, 172 Wis. 278, 178 NW 855.

[b] **Executory character of agreement.**—An agreement which is worded to "grant and convey" all future inventions to be made in gas engines and mechanism to operate them is good as an executory agreement to sell and assign a future invention which may be enforced in equity, but it cannot operate as a sale or assignment of the invention. Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 49 Fed. 68, 1 CCA 169.

[c] **Contract not personal.**—An agreement to disclose future inventions relating to a particular subject is not personal and may be assigned. A. B. Dick Co. v. Fuller, 6 F. (2d) 393.

[d] **Right to acquire patents from third person.**—A contract providing that, if F obtained letters patent within two years on certain machines, he would assign them to a company, did not preclude the company from procuring another to secure patents on machinery designed to do the same work to be performed by F's machines. Forster v. Brown Hoisting Mach. Co., 266 Ill. 287, 107 NE 588, AnnCas1916B 795.

[e] **Performance.**—Such contracts generally contemplate the construction or production of a successful workable or usable article. Coburn v. Bardwell, 241 Mass. 478, 135 NE 552.

[f] **The Clayton Anti-Trust Law does not invalidate** the assignment of patents or applications therefor with an agreement to transfer inventions relating thereto during the life of the original patent. A. B. Dick Co. v. Fuller, 6 F. (2d) 393. See Monopolies §§ 47–182.

12. Consolidated, etc., R., etc., Co. v. U. S. Light, etc., Co., 77 N. J. Eq. 285, 78 A 684.

13. U. S.—Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; A. B. Dick Co. v. Fuller, 6 F. (2d) 393; Adamson v. Alexander Milburn Co., 275 Fed. 148; Chadeloid Chemical Co. v. H. B. Chalmers Co., 243 Fed. 606, 156 CCA 304; Lion Tractor Co. v. Bull Tractor Co., 231 Fed. 156, 145 CCA 344; Fairchild v. Dement, 164 Fed. 200; Reece Folding Mach. Co. v. Fenwick, 140 Fed. 287, 72 CCA 39, 2 LRA NS 1094; Westinghouse Air-Brake Co. v. Chicago Brake, etc., Co., 85 Fed. 786; Hulse v. Bonsack Mach. Co., 65 Fed. 864, 13 CCA 180; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem].

Conn.—New Haven Sand Blast Co. v. Dreisbach, 102 Conn. 169, 128 A 320; Birkery Mfg. Co. v. Jones, 71 Conn. 113, 40 A 917.

Del.—Foreman's Systems v. Milk Dealers' Crate Corp., 13 Del. 351, 120 A 358.

Mass.—Morse Twist Drill, etc., Co. v. Morse, 103 Mass. 73, 4 AmR 513.

Mich.—Zagelmeyer v. Laughray Concrete Brick Co., 169 Mich. 589, 132 NW 1045.

N. J.—McFarland v. Stanton Mfg. Co., 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647.

N. Y.—Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

Eng.—Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462, 21 ERC 696.

[a] **Offer and acceptance.**—(1) A resolution of a corporation accepting an offer to sell "the certain letters patent and patent applications as set forth in the letter herewith attached" is a sufficient acceptance of part of the offer agreeing to assign future improvements as well, the offer being made in the letter attached. Foreman's Systems v. Milk Dealers' Crate Corp., 13 Del. Ch. 351, 120 A 358. (2) A covenant in an assignment of a patent for future conveyances of patents for improvements is effective, although not covered by antecedent negotiations, where the assignors are officers and directors of the assignee, and the instrument is read aloud to the assignors and accepted by them. New Haven Sand Blast Co. v. Dreisbach, 102 Conn. 169, 128 A 320.

[b] **Sale or option.**—An offer to assign for a cash consideration to be payable on agreement by the assignee's attorneys as to the breadth and patentability of the claims creates a binding contract of sale, and not merely an option to purchase the patent rights. Adamson v. Alexander Milburn Co., 275 Fed. 148.

[c] **Superseding contract.**—A finding that an assignment of a patent to a corporation by the incorporators, containing no covenant to assign improvements, was not intended to supersede an earlier assignment containing such a covenant is supported by evidence showing that defendant called the attention of the buyer of stock to the covenant in the earlier assignment. New Haven Sand Blast Co. v. Dreisbach, 102 Conn. 169, 128 A 320.

[d] **Annulment or release.**—Where the organizers of a corporation agreed to assign future inventions or improvements to it, the payment of a retainer or salary to one party to conduct experiments does not annul the agreement or release another of the parties. Chadeloid Chemical Co. v. H. B. Chalmers Co., 243 Fed. 606, 156 CCA 304.

What improvements pass by transfer see infra § 391.

14. Westinghouse Air-Brake Co. v. Chicago Brake, etc., Co., 85 Fed. 786; McFarland v. Stanton Mfg. Co., 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647; Granulator Soap Co. v. Haddow, 159 App. Div. 563, 144 NYS 610.

15. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302.

16. New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

17. Agreements to assign patents see supra § 374.

is issued[18] may be oral.[19] Such agreements are not within the statute of frauds,[20] nor within the provision of the patent law[21] that patents shall be assignable by an instrument in writing.[22] A written assignment of an application for a patent, made by a corporation, need not be under seal.[23]

[§ 378] **e. Recording.** The assignment of a patent not yet issued need not be recorded,[24] and the record of such agreement, not being authorized, is not notice.[25]

[§ 379] **f. Actions.**[26] In an action for breach of a contract to assign a patent, general rules govern as to the admissibility of evidence under the issues in the case,[27] as to the sufficiency of evidence,[28] as to questions for the jury,[29] and as to findings.[30]

A cloud on the title to patent rights, resulting from a contract to assign an interest in the invention on issuance of the patent, may be removed by a court of equity,[31] and by statute such jurisdiction is given to a federal district court.[32] Likewise a court of equity may cancel the contract creating such a cloud on title,[33] but it should grant only such relief as was asked for, or relief of like nature.[34]

[§ 380] **7. Requisites and Validity of Assignments—a. In General.** A patent right being in the United States the creature of the federal statutes,[35] it may be transferred only in the manner provided by such statutes.[36] The method provided by con-

18. Future patents see supra § 375.

19. U. S.—Ingle v. Landis Tool Co., 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem, 262 Fed. 150; Dalzell v. Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 SCt 886, 37 L. ed. 749; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Obear-Nester Glass Co. v. Lax, 11 F. (2d) 240; Pressed Steel Car Co. v. Hansen, 128 Fed. 444 [aff 137 Fed. 403, 71 CCA 207, 2 LRANS 1172 (certiorari den 199 U. S. 608 mem, 26 SCt 749 mem, 50 L. ed. 331 mem)]; Cook v. Sterling Electric Co., 118 Fed. 45 [aff 150 Fed. 766, 80 CCA 502]; Nesmith v. Calvert, 18 F. Cas. No. 10,123, 1 Woodb. & M. 34.

Ill.—Whitney v. Burr, 115 Ill. 289, 3 NE 434.

Ind.—Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214.

Iowa.—Searle v. Hill, 73 Iowa 367, 35 NW 490, 5 AmSR 688; Lockwood v. Lockwood, 33 Iowa 509.

Mass.—Somerby v. Buntin, 118 Mass. 279, 19 AmR 459.

N. Y.—Spears v. Willis, 151 N. Y. 443, 43 NE 849; Jones v. Reynolds, 120 N. Y. 213, 24 NE 279; Burr v. De la Vergne, 102 N. Y. 415, 7 NE 366.

Oh.—Blakeney v. Goode, 30 Oh. St. 350.

Tenn.—McRae v. Smart, 120 Tenn. 413, 114 SW 729.

Vt.—Whitcomb v. Whitcomb, 85 Vt. 76, 81 A 97, AnnCas1913E 1015.

Ont.—Dalgleish v. Conboy, 26 U. C. C. P. 254.

20. See Frauds, Statute of § 265.

21. See infra § 381.

22. U. S.—Dalzell v. Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 SCt 886, 37 L. ed. 749; Ingle v. Landis Tool Co., 262 Fed. 150 [rev on other grounds 272 Fed. 464 (certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)]; Pressed Steel Car Co. v. Hansen, 128 Fed. 444 [aff 137 Fed. 403, 71 CCA 207, 2 LRANS 1172 (certiorari den 199 U. S. 608 mem, 26 SCt 749 mem, 50 L. ed. 331 mem)]; Cook v. Sterling Electric Co., 118 Fed. 45 [aff 150 Fed. 766, 80 CCA 502].

Ill.—Whitney v. Burr, 115 Ill. 289, 3 NE 434.

Ind.—Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214.

Iowa.—Searle v. Hill, 73 Iowa 367, 35 NW 490, 5 AmSR 688.

N. Y.—Spears v. Willis, 151 N. Y. 443, 45 NE 849; Jones v. Reynolds, 120 N. Y. 213, 24 NE 279; Burr v. De la Vergne, 102 N. Y. 415, 7 NE 366.

Oh.—Blakeney v. Goode, 30 Oh. St. 350.

Vt.—Whitcomb v. Whitcomb, 85 Vt. 76, 81 A 97, AnnCas1913E 1015.

[a] **In Canada,** under the patent law there prevailing, a contract to assign a patent need not be in writing. Dalgleish v. Conboy, 26 U. C. C. P. 254.

23. U. S. Light, etc., Co. v. J. B. M. Electric Co., 189 Fed. 382 [mod 194 Fed. 866, 114 CCA 612].

Use of seal by corporation generally and in assignments and sales see Corporations §§ 2156, 2807.

24. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 Fed. 47; National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114, 63 CCA 616; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co. 49 Fed. 68, 1 CCA 169; New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co., 32 Fed. 783; Wright v. Randel, 8 Fed. 591, 19 Blatchf. 495; Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214; Jones v. Reynolds, 120 N. Y. 213, 24 NE 279.

[a] **In England** an equitable assignment may be recorded but the statute refers only to legal transfers. In re Casey, [1892] 1 Ch. 104 [aff 65 L. T. Rep. N. S. 40].

Necessity of record to permit patent to issue in assignee's name see supra § 138.

Recording assignments see infra § 383.

25. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 Fed. 47; National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114, 63 CCA 616; New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co., 32 Fed. 783; Wright v. Randel, 8 Fed. 591, 19 Blatchf. 495.

Record of assignment as notice see infra § 383.

26. Specific performance of agreements to assign patents see Specific Performance [36 Cyc 558].

27. See case infra this note.

[a] **Evidence held admissible.**—In a suit against a patentee of an ore crushing mill by an assignee for breach of a covenant to disclose and assign improvements on the mill, the patentee's good faith in believing that a device on which he applied for a patent was not an improvement on the mill was provable, especially where his good faith was questioned by plaintiff, and both parties necessarily resorted to evidence opinionative in its nature. Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

28. See case infra this note. And see Evidence §§ 1730–1806.

[a] **Evidence held insufficient** to show that a device on which a patentee applied for a patent was an improvement on an ore crushing mill invented by him, within a covenant to disclose and assign improvements to an assignee of the patent covering the mill. Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

29. See cases infra this note. And see Trial [38 Cyc 1511–1530].

[a] **Questions held for jury.**—(1) In an action for breach of contract to pay plaintiffs a cash consideration for patent rights and rights under pending application and future improvements conceived by the inventor, on agreement by defendant's attorneys as to the breadth and patentability of the claims, the question whether the attorneys had in fact agreed as to the breadth and patentability of the claims held for the jury. Adamson v. Alexander Milburn Co., 275 Fed. 148. (2) In such an action, on agreement by defendant's attorneys as to the breadth and patentability of the claims, the question of whether a sufficient time had elapsed for the attorneys to make the necessary investigations and agree as to the breadth and patentability of the claims held for the jury. Adamson v. Alexander Milburn Co., supra. (3) In such an action, on agreement of defendant's attorneys as to the breadth and patentability of the claims, the question of whether there was such a failure in the breadth and patentability of the claims as would not protect the purchaser of the patent in the manufacture, sale, and use of it, and so justify defendant's instruction to his attorneys to drop the matter prior to an adverse report from such attorneys, held for the jury. Adamson v. Alexander Milburn Co., supra.

30. See case infra this note. And see Trial [38 Cyc 1953–1990].

[a] **Findings held not necessary.**—In a suit against a patentee by an assignee of the patent for breach of a covenant to disclose and assign improvements invented by the patentee, the patentee's good faith in believing that a device on which he applied for a patent was not an improvement on the assigned mill was not an ultimate fact in issue, on which the court was bound to make a finding. Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

31. Burpee v. Guggenheim, 226 Fed. 214; O'Donnell v. Brown, 35 R. I. 522, 87 A 311.

32. Judicial Code § 57.

33. O'Donnell v. Brown, 35 R. I. 522, 87 A 311.

[a] **Rule applied.**—A contract between complainant, an inventor, and defendant, which stipulates that neither shall grant any license relating to patents, or dispose of the same, without the consent of the other, creates a cloud on complainant's title to patents; and, where defendant abandoned the contract, complainant may sue to cancel it. O'Donnell v. Brown, 35 R. I. 522, 87 A 311.

34. O'Donnell v. Brown, supra.

[a] **Illustration.**—Where, in a suit by complainant, an inventor, to cancel a contract between himself and defendant, complainant did not ask for the appointment of a receiver, and defendant, who had abandoned the contract, did not ask for a receiver, the court could not appoint one and direct a sale of the interests of both parties to the contract. O'Donnell v. Brown, 35 R. I. 522, 87 A 311.

35. See supra §§ 1–8.

36. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Minerals Separation v. Miami Copper Co., 275 Fed. 572; Ball v. Coker, 168 Fed. 304; Jewett v. Atwood Suspender Co., 100 Fed. 647; Ashcroft v. Walworth, 2 F. Cas. No. 580, 5 Fish. Pat. Cas. 528, Holmes 152; Baldwin v. Sibley, 2 F. Cas. No. 805, 1 Cliff. 150; Gordon v. Anthony, 10 F. Cas. No. 5,605, 4 Bann. & A. 248, 16 Blatchf. 234; Peterson v. San Francisco Sheriff, 115 Cal. 211, 46 P 1060; Pacific Bank v. Robinson, 57 Cal. 520, 40 AmR 120; Strauss v. Brier, 57 Colo. 65, 140 P 183; Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26.

gress for the assignment of patents or any interests therein is the exclusive method of making such transfers,[37] and an assignment is sufficient if it conforms with the requirements of the patent law regardless of state statutes.[38] The validity of an assignment of a patent is determined by the same considerations as apply to other deeds and contracts.[39]

[§ 381] **b. Form and Contents.**[40] Under the provisions of the patent law,[41] an assignment of a patent must be by an instrument in writing executed by the patentee, or his assigns, or his legal representatives.[42] However, it has been held that, as between the parties, a verbal assignment is valid and passes an equitable right.[43] The assignment need not be under seal,[44] although executed by a corporation.[45] No particular form of written instrument is required,[46] but there must be some operative words expressing at least an intention to assign,[47] and, like any deed, the instrument must be free from ambiguity.[48] A mere certificate in writing that a certain person has a joint interest in a patent right with the subscriber will not operate as an assignment.[49] But an irrevocable power of attorney to hold and control a patent may operate as an assignment,[50] although the appointment of an agent, not vesting in the appointee a legal or equitable title to the patent, is not an assignment, although irrevocable.[51]

Description of right conveyed; designation of assignee. The instrument must describe the right conveyed so that it can be identified, but this is sufficient, no technical or particular description being required.[52] So, also, a designation of the assignee

Patent rights as subject to transfer:
In case of owner's bankruptcy see Bankruptcy §§ 167, 169.
Upon:
Creditors' suits see Creditors' Suits § 84.
Execution sale see Executions § 57.
Owner's insolvency see Insolvency § 90.
When receiver is appointed see Receivers [36 Cyc 44, 183–190].

37. Strauss v. Brier, 57 Colo. 65, 140 P 183.

38. Welsbach Light Co. v. Cohn, 181 Fed. 122.

39. Nicholson Pav. Co. v. Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Kansas City Hay-Press Co. v. Devol, 72 Fed. 717 [rev on other grounds 81 Fed. 726, 26 CCA 578]; National Folding Box, etc., Co. v. American Paper Pail, etc., Co., 55 Fed. 488; Gibson v. Cook, 10 F. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. R. 415.

Validity of:
Assignments generally see Assignments §§ 103–109.
Contracts generally see Contracts §§ 245–480.

40. Mode and sufficiency of assignments generally see Assignments §§ 61–102.

41. U. S. Code tit 35 § 47.

42. U. S.—Gates Iron Works v. Fraser, 153 U. S. 332, 14 SCt 883, 38 L. ed. 734; Moore v. Marsh, 7 Wall. 515, 19 L. ed. 37; Minerals Separation v. Miami Copper Co., 275 Fed. 572; Ball v. Coker, 168 Fed. 304; American Tobacco Co. v. Ascot Tobacco Works, 165 Fed. 207; Ormsby v. Connors, 133 Fed. 548; Jewett v. Atwood Suspender Co., 100 Fed. 647; Newton v. Buck, 72 Fed. 777 [rev on other grounds 77 Fed. 614, 23 CCA 355]; Ashcroft v. Walworth, 2 F. Cas. No. 580, 5 Fish. Pat. Cas. 528, Holmes 152; Baldwin v. Sibley, 2 F. Cas. No. 805, 1 Cliff. 150; Gibson v. Cook, 10 F. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. R. 415; Gordon v. Anthony, 10 F. Cas. No. 5,605, 4 Bann. & A. 248, 16 Blatchf. 234; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232.
Colo.—Strauss v. Brier, 57 Colo. 65, 140 P 183.
N. Y.—Davy v. Morgan, 56 Barb. 218; Berolzheimer v. Strauss, 51 N. Y. Super. 96, 7 NYCivProc 225; Clan Ranald v. Wyckoff, 41 N. Y. Super. 527, 52 HowPr 509.
Oh.—Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26.
Pa.—Wolf v. Bonta Plate Glass Co., 5 LackLegN 51.

[a] **A verbal assignment** of an interest in a patent is void as against a subsequent assignee by a written assignment without notice of the prior assignment. Gates Iron Works v. Fraser, 153 U. S. 332, 14 SCt 883, 38 L. ed. 734.

[b] **In Canada** an assignment must be in writing and executed by the patentee, his assigns, or legal representatives. Dalgleish v. Conboy, 26 U. C. C. P. (Ont.) 254.

[c] **In England** (1) the assignment of a patent must be by an instrument in writing signed by the patentee, his assigns, or legal representatives. Duvergier v. Fellows, 10 B. & C. 826, 21 ECL 346, 109 Reprint 655 [aff 1 Cl. & F. 39, 6 Reprint 831]. (2) As to the stamp duty on an agreement for the sale of foreign patents see Urban v. Inland Revenue Comrs., 29 T. L. R. 141 [aff 29 T. L. R. 476].

43. Burke v. Partridge, 58 N. H. 349. And see Westinghouse Electric, etc., Co. v. Formica Insulation Co., 288 Fed. 330 [certiorari granted 263 U. S. 692 mem, 44 SCt 6 mem, 68 L. ed. 509 mem, and aff 266 U. S. 342, 45 SCt 117, 69 L. ed. 316]; Ormsby v. Connors, 133 Fed. 548 (dicta).

Right of assignee to license and to recover royalties see infra §§ 409, 449.

44. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316; Gottfried v. Miller, 104 U. S. 521, 26 L. ed. 851; Bessick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Reed v. Van Ostrand, 1 Wend. (N. Y.) 424, 19 AmD 529.

45. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316; Gottfried v. Miller, 104 U. S. 521, 26 L. ed. 851; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331.

Use of seal by corporation see Corporations §§ 2156, 2807.

46. Minerals Separation v. Miami Copper Co., 275 Fed. 572; American Tobacco Co. v. Ascot Tobacco Works, 165 Fed. 207; Canda v. Michigan Malleable Iron Co., 123 Fed. 95 [mod 124 Fed. 486, 61 CCA 194]; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242; Piaget Novelty Co. v. Headley, 107 Fed. 134 [aff 108 Fed. 870, 48 CCA 116]; Jonathan Mills Mfg. Co. v. Whitehurst, 56 Fed. 589; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 49 Fed. 68, 1 CCA 169; Siebert Cylinder Oil-Cup Co. v. Beggs, 32 Fed. 790; Campbell v. James, 2 Fed. 338, 18 Blatchf. 92 [rev on other grounds 104 U. S. 356, 26 L. ed. 786]; Lowry v. Cowles Electric Co., C. D. (1893) 549.

Instrument transferring title as assignment see supra § 368.

"License" distinguished see supra § 369.

47. Minerals Separation v. Miami Copper Co., 275 Fed. 572; National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114, 63 CCA 616; Siebert Cylinder Oil-Cup Co. v. Beggs, 32 Fed. 790; Campbell v. James, 2 Fed. 338, 18 Blatchf. 92 [rev on other grounds 104 U. S. 356, 26 L. ed. 786]; Kempton v. Bray, 99 Mass. 350.

[a] **Instrument held not to constitute assignment.**—A mere agreement to execute an instrument "vesting in the [purchaser] . . . the premises mentioned in the Schedule [specifying the patents involved]" does not indicate an intention to assign. Minerals Separation v. Miami Copper Co., 275 Fed. 572.

What constitutes assignment see supra § 368.

48. Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Clark v. Scott, 5 F. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245; United Nickel Co. v. American Nickel-Plating Works, 24 F. Cas. No. 14,405, 4 Bann. & A. 74; Dudley v. Suddoth, 91 Ala. 349, 8 S 873; Hill v. Thuermer, 13 Ind. 351; Harmon v. Bird, 22 Wend. (N. Y.) 113.

49. Kearney v. Lehigh Valley R. Co., 27 Fed. 699; Hope Iron Works v. Holden, 58 Me. 146.

50. Hartshorn v. Day, 19 How. (U. S.) 211, 15 L. ed. 605; Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9.

51. Kempton v. Bray, 99 Mass. 350.

52. U. S.—Philadelphia, etc., R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Worthington Pump, etc., Corp. v. Traylor Engineering, etc., Co., 292 Fed. 777 [mod on other grounds 1 F. (2d) 833 (certiorari den 267 U. S. 600 mem, 45 SCt 355 mem, 69 L. ed. 807 mem)]; American Tobacco Co. v. Ascot Tobacco Works, 165 Fed. 207; Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 Fed. 64 [aff 160 Fed. 928, 88 CCA 110 (certiorari den 212 U. S. 580 mem, 29 SCt 689 mem, 53 L. ed. 659 mem)]; Levy v. Dattlebaum, 63 Fed. 992; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Schaum v. Baker, 21 F. Cas. No. 12,440.
Ala.—Dudley v. Suddoth, 91 Ala. 349, 8 S 873.
D. C.—Fisk v. Hollander, 11 D. C. 355.
Ill.—Myers v. Turner, 17 Ill. 179.
Ind.—Hill v. Thuermer, 13 Ind. 351.
N. H.—Holden v. Curtis, 2 N. H. 61; Case v. Morey, 1 N. H. 347.
N. Y.—Harmon v. Bird, 22 Wend. 113.

[a] **The instrument of assignment need not specify the name and number** of the patent, but the patent must be described without ambiguity or doubt as to its identity. Levy v. Dattlebaum, 63 Fed. 992.

[b] **Mistake in name of the invention transferred** is not vital. Holden v. Curtis, 2 N. H. 61; Case v. Morey, 1 N. H. 347.

[c] **Clerical error in giving office number of patent** does not invalidate the assignment. Worthington Pump, etc., Corp. v. Traylor Engineering, etc., Co., 292 Fed. 777 [mod on other grounds 1 F. (2d) 833 (certiorari den 267 U. S. 600 mem, 45 SCt 355 mem, 69 L. ed. 807 mem)].

[d] **Addition of patentee's middle initial in description of patent in assignment,** although the patent as issued omits such initial, is immaterial where the assignment otherwise describes the patent by number, the date of the issue, and the name. Bas-

sufficient for identification is sufficient.[53]

Assignment by agent. The assignment of a patent by an agent[54] must be made in the name of the owner;[55] such an assignment in the name of the agent is insufficient to convey the owner's title to the patent.[56]

[§ 382] **c. Consideration.**[57] An instrument, to operate as an assignment of a patent, must be supported by a valuable consideration.[58] The consideration for the assignment of a patent may consist of a promise to pay the specified sum of money and specified royalties,[59] or it may be in the form of royalties to be paid by the assignee,[60] or of a share in the profits made by him.[61]

[§ 383] **d. Recording.**[62] The patent law expressly provides that an assignment, grant, or conveyance of a patent or interest therein shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the patent office within three months from the date thereof, or prior to such subsequent purchase or mortgage.[63] Although there is authority that an assignment of a patent must be recorded to be operative as such,[64] it has been held that the provisions of the statute are merely directory for the protection of bona fide purchasers;[65] as to them the assignment is void unless recorded as prescribed.[66] Under the latter view, the statute does not require the recording of an assignment within three months as a prerequisite to its validity.[67] Hence, an unrecorded assignment is valid as between the parties,[68] or as against infringers,[69] or even as against a sub-

sick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331.

[e] **A general transfer of property** carries patents. Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 Fed. 64 [aff 160 Fed. 928, 88 CCA 110 (certiorari den 212 U. S. 580 mem, 29 SCt 689 mem, 53 L. ed. 659 mem)]; Schaum v. Baker, 21 F. Cas. No. 12,440.

53. Bliss v. Reed, 102 Fed. 903 [aff 106 Fed. 314, 45 CCA 304]; Fisk v. Hollander, 11 D. C. 355.

[a] **Designation of assignee by last name only** is sufficient where his identity is certain. Fisk v. Hollander, 11 D. C. 355.

[b] **Assignment to a person named** "et al." is valid. Bliss v. Reed, 102 Fed. 903 [aff 106 Fed. 314, 45 CCA 304].

54. Assignment by agent:
Form of authority see supra § 371.
Necessity for authority see supra § 371.
Power to assign see supra § 371.

55. Johnson R. Signal Co. v. Union Switch, etc., Co., 59 Fed. 20 [mod on other grounds 61 Fed. 940, 10 CCA 176]; Machesney v. Brown, 29 Fed. 145; Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 AmD 385; Pryor v. Coulter, 1 S. C. L. 517.

Execution of agent's authority generally see Agency §§ 315–341.

56. Johnson R. Signal Co. v. Union Switch, etc., Co., 59 Fed. 20 [mod on other grounds 61 Fed. 940, 10 CCA 176]; Machesney v. Brown, 29 Fed. 145; Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 AmD 385; Pryor v. Coulter, 1 S. C. L. 517.

57. Consideration for:
Assignments generally see Assignments §§ 90–92.
Contracts generally see Contracts §§ 144–244.

Liability of assignee or grantee see infra § 399.

Recovery back see infra § 400.

58. Barry v. Colville, 129 N. Y. 302, 29 NE 307.

[a] **Illustration.**—Where a patentee agrees to assign a two-thirds interest in certain patents, and the assignee agrees to furnish the patentee with certain funds and goods as long as they are satisfied with the arrangement, and the agreement also provides that in case the assignee becomes dissatisfied after a certain time he may terminate the agreement, with the right, however, to retain his interest as security for whatever the patentee may owe him, and thereafter the patentee conveys by deed to the assignee a two-thirds interest in one of the patents, and no consideration is given for this deed, and that expressed is nominal, it requires proof of some other agreement and of some new consideration, pending the running of the contract, to give to the patent deed a necessary operation independent of the terms of the first contract. Barry v. Colville, 129 N. Y. 302, 29 NE 307.

59. Forum Inv. Co. v. Cement Stave Silo Co., 219 Fed. 213, 135 CCA 111; Piaget Novelty Co. v. Headley, 108 Fed. 870, 48 CCA 116 [aff 107 Fed. 134].

[a] **Failure to pay sum specified** in an agreement as consideration for an assignment does not invalidate the contract for want of consideration, since the promise to pay constitutes a sufficient consideration. Forum Inv. Co. v. Cement Stave Silo Co., 219 Fed. 213, 135 CCA 111; Piaget Novelty Co. v. Headley, 108 Fed. 870, 48 CCA 116 [aff 107 Fed. 134]. And see Contracts § 170.

60. U. S.—Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Johnson R. Signal Co. v. Union Switch, etc., Co., 59 Fed. 20 [mod on other grounds 61 Fed. 940, 10 CCA 176].

Mass.—Porter v. Standard Measuring Mach. Co., 142 Mass. 191, 7 NE 925.

Mich.—Rodgers v. Torrant, 43 Mich. 113, 4 NW 507.

N. Y.—Herzog v. Heyman, 151 N. Y. 587, 45 NE 1127, 56 AmSR 646.

Pa.—Jarecki v. Hays, 161 Pa. 613, 29 A 118.

Utah.—Stuart v. Pederson, 41 Utah 308, 125 P 395.

61. Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888; Curry v. Charles Warner Co., 16 Del. 98, 42 A 425; Wilson v. Marlow, 66 Ill. 385.

62. Necessity of recording:
Agreements or transfers of future patents see supra § 378.
Licenses see infra § 414.

Records as evidence in infringement suits see infra § 571.

Regulation of transfers of patent rights by state statutes see Bills and Notes § 262; and infra §§ 486–488.

63. U. S. Code tit 35 § 47.

[a] **In Canada.**—(1) Assignment is good between parties without record, but not against subsequent purchasers. Doyon v. Canadian Fire Extinguishing Co., 14 Que. Super. 367. (2) In the absence of fraud, assignment of a patent ranks in priority in the order of registration. Colpitts v. Sherwood, (Alta) [1927] 2 DomLR 671.

[b] **In England.**—(1) Assignee cannot sue until the deed is recorded. Chollet v. Hoffman, 7 E. & B. 686, 90 ECL 686, 119 Reprint 1400. (2) Assignment is good against the assignor, although not recorded. Hassall v. Wright, L. R. 10 Eq. 509. (3) A purchaser with notice has no equity. New Ixion Tyre, etc., Co. v. Spilsbury, [1898] 2 Ch. 484 [aff [1898] 2 Ch. 137]. (4) Estoppel to allege failure to record. Hassall v. Wright, supra. (5) The high court of justice has jurisdiction over the register and may expunge or order a correction. In re Horsley, L. R. 8 Eq. 475 [app refused L. R. 4 Ch. 784]; In re Morey, 25 Beav. 581, 53 Reprint 759; In re Morgan, 24 Wkly. Rep. 245. (6) The master of rolls may expunge an entry wrongfully made. In re Horsley, L. R. 4 Ch. 784; Re Green, 24 Beav. 145, 53 Reprint 312.

64. Strauss v. Brier, 57 Colo. 65, 140 P 183; Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26.

65. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 Fed. 64 [aff 160 Fed. 928, 88 CCA 110 (certiorari den 212 U. S. 580 mem, 29 SCt 689 mem, 53 L. ed. 659 mem)]; Pitts v. Whitman, 19 F. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609; Turnbull v. Weir Plow Co., 24 F. Cas. No. 14,244, 1 Bann. & A. 544, 6 Biss. 225; Harrison v. Ingersoll, 56 Mich. 36, 22 NW 268; Winfrey v. Gallatin, 72 Mo. A. 191.

66. Burgess Battery Co. v. Solar Light Co., 266 Fed. 368; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; Faulkner v. Empire State Nail Co., 67 Fed. 913, 15 CCA 69 [aff 55 Fed. 819]; Gibson v. Cook, 11 F. Cas. No. 5,393, 2 Blatchf. 144, 1 Fish. Pat. Cas. 415; Perry v. Corning, 19 F. Cas. No. 11,004, 7 Blatchf. 195.

67. Pitts v. Whitman, 19 F. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609; Winfrey v. Gallatin, 72 Mo. A. 191.

68. U. S.—Fyrac Mfg. Co. v. Bergstrom, 24 F. (2d) 9; Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. R. 184; Boyd v. McAlpin, 3 F. Cas. No. 1,748, 3 McLean 427, 2 Robb Pat. Cas. 277; Brooks v. Ryam, 4 F. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525; Case v. Redfield, 5 F. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741; Gibson v. Cook, 10 F. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. R. 415; Hall v. Speer, 11 F. Cas. No. 5,947, 1 Pittsb. (Pa.) 513; Perry v. Corning, 19 F. Cas. No. 11,004, 7 Blatchf. 195; Pitts v. Whitman, 19 F. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609; Turnbull v. Weir Plow Co., 24 F. Cas. No. 14,244, 1 Bann. & A. 544, 6 Biss. 225; Van Hook v. Wood, 28 F. Cas. No. 16,854.

Ala.—Black v. Stone, 33 Ala. 327.

Ill.—Hildreth v. Turner, 17 Ill. 184.

Ind.—McKernan v. Hite, 6 Ind. 428; Louden v. Birt, 4 Ind. 566.

Iowa.—Moore v. Bare, 11 Iowa 198.

Kan.—Pinney v. Concordia First Nat. Bank, 68 Kan. 229, 75 P 119, 1 AnnCas 331.

Mo.—Sone v. Palmer, 28 Mo. 539; Winfrey v. Gallatin, 72 Mo. A. 191.

N. H.—Holden v. Curtis, 2 N. H. 61.

Pa.—Christ v. Firestone, 7 Pa. Cas. 376, 11 A 395.

Tex.—Horne v. Chatham, 64 Tex. 36.

[a] **Under Act of Febr. 21, 1793** (1 St. at L. 318 c 11) an assignment of a patent was required to be recorded in the office of the secretary of state in order to give validity to the title of the assignee. Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273; Mullikin v. Latchem, 7 Blackf. (Ind.) 136; Higgins v. Strong, 4 Blackf. (Ind.) 182.

69. Delaware Seamless Tube Co. v. Shelby Steel Tube Co., 160 Fed. 928, 88 CCA 110 [certiorari den 212 U. S. 580 mem, 29 SCt 689 mem, 53 L. ed. 659 mem]; Ormsby v. Connors, 133 Fed. 548; Case v. Redfield, 5 F. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741.

sequent purchaser with actual or constructive notice,[70] or not for a valuable consideration,[71] or within three months from the date of the assignment.[72] It is not necessary that an assignment of a patent by a bankruptcy court to the assignee of the owner of the patent be recorded;[73] and it is immaterial whether an assignment offered in evidence was recorded before or after the suit was brought.[74]

Record as notice. The record of an assignment is contructive notice to all the world.[75] Where an assignment has been duly recorded, the assignee will be protected as against a subsequent assignee of the assignor,[76] and a purchaser has a right to rely upon the record title.[77]

[§ 384] **e. Acknowledgment.**[78] Under the express provisions of the patent law,[79] if any assignment, grant, or conveyance of a patent has been acknowledged before a notary public or other specified officer, the certificate of the notary or other officer as to such acknowledgment is prima facie evidence of the execution of such assignment, grant, or conveyance.[80] This provision merely provides a new method of proof;[81] it applies to instruments executed and acknowledged before its passage.[82] Acknowledgment is not essential to the validity of an

70. U. S.—Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Burgess Battery Co. v. Solar Light Co., 266 Fed. 368; Thompson v. Automatic Fire Protection Co., 211 Fed. 120, 128 CCA 22; Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130; National Heeling-Mach. Co. v. Abbott, 70 Fed. 54; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 49 Fed. 68, 1 CCA 169; Pontiac Knit Boot Co. v. Merino Shoe Co., 31 Fed. 286; Kearney v. Lehigh Valley R. Co., 27 Fed. 699; Hapgood v. Rosenstock, 23 Fed. 86, 23 Blatchf. 95; Dare v. Boylston, 6 Fed. 493, 18 Blatchf. 548; Hamilton v. Kingsbury, 4 Fed. 428, 17 Blatchf. 460; Ashcroft v. Walworth, 2 F. Cas. No. 580, 5 Fish. Pat. Cas. 528, Holmes 152; Continental Windmill Co. v. Empire Windmill Co., 6 F. Cas. No. 3,142, 8 Blatchf. 295, 4 Fish. Pat. Cas. 428; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453; Valentine v. Marshal, 28 F. Cas. No. 16,812a.

Conn.—Peck v. Bacon, 18 Conn. 377.

Ill.—Whitney v. Burr, 115 Ill. 289, 3 NE 434.

N. J.—Stanton Mfg. Co. v. McFarland, 52 N. J. Eq. 85, 27 A 828 [aff 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647].

N. Y.—Auburn Button Co. v. Sylvester, 72 Hun 498, 25 NYS 237 [aff 147 N. Y. 714 mem, 42 NE 721 mem]; Coleman v. Ryan, 33 Misc. 715, 68 NYS 253.

W. Va.—Maurice v. Devol, 23 W. Va. 247.

[a] **Knowledge of facts sufficient to put a party on inquiry** will bind him as notice. Burgess Battery Co. v. Solar Light Co., 266 Fed. 368; Thompson v. Automatic Fire Protection Co., 211 Fed. 120, 128 CCA 22; Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130; National Heeling-Mach. Co. v. Abbott, 70 Fed. 54; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Kearney v. Lehigh Valley R. Co., 27 Fed. 699; Hamilton v. Kingsbury, 4 Fed. 428, 17 Blatchf. 460; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453; Stanton Mfg. Co. v. McFarland, (Ch.) 30 A 1058 [aff 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647]; Auburn Button Co. v. Sylvester, 72 Hun 498, 25 NYS 237 [aff 147 N. Y. 714 mem, 42 NE 721 mem].

[b] **Where the recorded assignment refers in terms to an unrecorded supplementary agreement,** this is sufficient to charge subsequent purchasers with notice of such agreement. Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577.

[c] **Notice held insufficient.**—Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 49 Fed. 68, 1 CCA 169.

[d] **A purchaser with notice holds in trust for the first assignee.**—Pontiac Knit Boot Co. v. Merino Shoe Co., 31 Fed. 286; Whitney v. Burr, 115 Ill. 289, 3 NE 434.

[e] **In England,** where the owner of a patent has entered into an agreement to assign it for value, and express notice of such agreement has been given to persons who subsequently obtain a license from the owner for value, and register it before the registration of the agreement, the fact of such notice will enable the assignees of the patent under the agreement to set up their prior equity against the licensees, by virtue of the proviso in Patents Act (1883) § 87 which proviso keeps open all equities in respect of registered patents, so that they may be enforced in like manner as in respect of other personal property. New Ixion Tyre, etc., Co. v. Spilsbury, [1898] 2 Ch. 484.

Rights and interests conveyed generally see infra § 390.

71. Saxton v. Aultman, 15 Oh. St. 471.

Consideration see supra § 382.

72. Gibson v. Cook, 10 F. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. R. 415.

73. Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453.

74. Pitts v. Whitman, 19 F. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609.

75. Westinghouse Air-Brake Co. v. Chicago Brake, etc., Co., 85 Fed. 786; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114; Granulator Soap Co. v. Haddow, 159 App. Div. 563, 144 NYS 610.

[a] **Transfer of future improvements.**—Record in patent office of assignment of application for patent with improvements is notice of the transfer of the improvement as well as of the original invention. Granulator Soap Co. v. Haddow, 159 App. Div. 563, 144 NYS 610.

76. Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Day v. Stokes, 97 N. J. Eq. 378, 127 A 331.

[a] **Record within three months fixes title.**—Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [aff 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem].

[b] **Assignment first recorded prevails.**—Assignee of patent, who was sister-in-law of assignor, is not bona fire assignee as against corporation in which she owned stock and of which her husband and the assignor, his brother, were officers, which was entitled to such patent under prior agreement duly recorded in patent office before record of subsequent assignment. Day v. Stokes, 97 N. J. Eq. 378, 127 A 331.

77. Gates Iron Works v. Fraser, 153 U. S. 332, 14 SCt 883, 38 L. ed. 734; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; Secombe v. Campbell, 2 Fed. 357, 18 Blatchf. 108; Campbell v. James, 2 Fed. 338, 18 Blatchf. 92 [rev on other grounds 104 U. S. 356, 26 L. ed. 786]; Boyd v. McAlpin, 3 F. Cas. No. 1,748, 3 McLean 427, 2 Robb Pat. Cas. 277; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114.

78. Acknowledgment generally see Acknowledgments 1 C. J. p 739.

79. U. S. Code tit 35 § 47.

80. Linde Air Products Co. v. Morse Dry Dock, etc., Co., 239 Fed. 909 [aff 246 Fed. 834, 159 CCA 136]; Hildreth v. Auerbach, 223 Fed. 651, 139 CCA 205 [aff 223 Fed. 545]; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; Welsbach Light Co. v. Cohn, 181 Fed. 122; Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 Fed. 47; Lanyon Zinc Co. v. Brown, 115 Fed. 150, 53 CCA 354 [aff 119 Fed. 918, 56 CCA 448 (certiorari den 187 U. S. 646 mem, 23 SCt 846 mem, 47 L. ed. 347 mem)]; De Laval Separator Co. v. Vermont Farm-Mach. Co., 109 Fed. 813.

81. National Electric Signaling Co. v. Telefunken Wireless Tel. Co., 208 Fed. 679, 125 CCA 647 [certiorari den 234 U. S. 760 mem, 34 SCt 776 mem, 58 L. ed. 1580 mem]; Murray Co. v. Continental Gin Co., 149 Fed. 989, 79 CCA 499.

[a] **Purpose of the act**—"The evident intent of the act was to substitute proof of execution by acknowledgment, instead of by the production of the subscribing witness, if there were one, or proof of the handwriting of the assignor, if there were no subscribing witness." Murray Co. v. Continental Gin Co., 149 Fed. 989, 991, 79 CCA 499.

82. Lanyon Zinc Co. v. Brown, 115 Fed. 150, 53 CCA 354 [aff 119 Fed. 918, 56 CCA 448 (certiorari den 187 U. S. 646 mem, 23 SCt 846 mem, 47 L. ed. 347 mem)]; De Laval Separator Co. v. Vermont Farm-Mach. Co., 109 Fed. 813. See Murray Co. v. Continental Gin Co., 149 Fed. 989, 79 CCA 499 (dictum).

[a] **Reasons for rule.**—(1) "By section 5 of the act of March 3, 1897, relating to patents . . . it is declared that, if an assignment of a patent is made before a notary public, his certificate of such acknowledgment, under his hand and seal, shall be taken as prima facie evidence of its execution; and while it is true that this act did not take effect until January 1, 1898, yet it will be observed that the act does not say that it shall only be applicable to acknowledgments taken after that date. It is a statute which was intended to declare the evidential effect to be given to acknowledgments before a notary, after a given date, without special reference, however, to the time when the acknowledgment was taken; and in the absence of any specific provision that it should only apply to acknowledgments taken subsequently to January 1, 1898, we perceive no sufficient reason why it should be limited in its operation to acknowledgments so taken." Lanyon Zinc Co. v. Brown, 115 Fed. 150, 154 [aff 119 Fed. 918, 56 CCA 448 (certiorari den 187 U. S. 646 mem, 23 SCt 846 mem, 47 L. ed. 347 mem)]. (2) "The defendant contends that 'shall be acknowledged' [as used in the statute] means thereafter acknowledged, and excludes acknowledgments made before; but these words seem to me to refer to the time when the acknowledgment is produced in evidence, rather than to the time when it is taken, and that if it shall then appear to be so acknowledged it will be sufficient." De Laval

assignment of a patent,[83] and the genuineness of the assignor's signature may be proved otherwise.[84] Acknowledgment under the statute dispenses with proof of the execution and genuineness of an assignment,[85] but the statute does not make a certified copy of an assignment of a patent prima facie proof of its execution or genuineness.[86] Although it has been held that an assignment of a patent by a corporation is not sufficiently executed if a state statute providing for corporate acknowledgments has not been complied with,[87] generally state statutes governing acknowledgments are not applicable to acknowledgments of transfers of patents,[88] and an acknowledgment good at common law is sufficient under the patent law.[89] An acknowledgment before a United States consular officer is sufficient under the statute.[90] The acknowledgment of an assignment of a patent relates to the date of the assignment.[91]

[§ 385] **8. Assignment after Expiration of Patent.** An assignment of a patent after the patent has expired is, of course, a nullity so far as the transfer of a monopoly is concerned, but such assignment will operate as a transfer to the assignee of the right to sue for past infringements.[92] Such an assignment need not be recorded.[93]

[§ 386] **9. Construction and Operation[94]—a. Construction in General.** Assignments and grants of patent rights are subject to the same rules of construction as other contracts.[95]

Separator Co. v. Vermont Farm-Mach. Co., 109 Fed. 813, 814.

83. Clancy v. Troy Belting, etc., Co., 152 Fed. 188 [rev on other grounds 157 Fed. 554, 85 CCA 314].

84. Clancy v. Troy Belting, etc., Co., supra.

85. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 Fed. 47.

86. Eastern Dynamite Co. v. Keystone Powder Mfg. Co., supra. See Toledo Computing Scale Co. v. Computing Scale Co., 208 Fed. 410, 125 CCA 622 (certified copies of assignments are not proof of execution).

[a] **Before congress enacted the present provision of the patent law in 1897** it was variously held: (1) That where under a state statute the assignment of a patent duly acknowledged before a notary is sufficiently proved, it was not necessary to prove the signature of the assignor. New York Pharmical Assoc. v. Tilden, 14 Fed. 740, 21 Blatchf. 190. (2) That an assignment in a foreign country purporting to have been executed before a United States consul general is sufficiently proved by the signature of such officer and the seal of the consulate. Matheson v. Campbell, 69 Fed. 597 [rev on other grounds 78 Fed. 910, 24 CCA 384]. (3) That a certified copy of the patent office record of an assignment is not prima facie evidence of the genuineness of the assignment. New York v. American Cable R. Co., 60 Fed. 1016, 9 CCA 336 [rev 56 Fed. 149]; Paine v. Trask, 56 Fed. 233, 5 CCA 497. See also International Tooth Crown Co. v. Bennett, 72 Fed. 169 [aff 77 Fed. 313, 23 CCA 179] (holding that such evidence would have been inadmissible on trial upon objection). (4) That a certified copy of the patent office record of an assignment is prima facie evidence of the execution and genuineness of the assignment. Carpenter v. Eberhard Mfg. Co., 78 Fed. 127; Standard El. Co. v. Crane El. Co., 76 Fed. 767, 22 CCA 549; American Cable R. Co. v. New York, 56 Fed. 149 [rev on other grounds 60 Fed. 1016, 9 CCA 336]; National Folding-Box, etc., Co. v. American Paper Pail, etc., Co., 55 Fed. 488; Dederick v. Whitman Agricultural Co., 26 Fed. 763; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Parker v. Haworth, 18 F. Cas. No. 10,738, 4 McLean 370, 2 Robb Pat. Cas. 725.

Acknowledgments before consular officers see Acknowledgments § 108; Ambassadors and Consuls § 49; Oaths and Affirmations § 7.

87. Toledo Computing Scale Co. v. Computing Scale Co., 208 Fed. 410, 125 CCA 622.

Certificate of acknowledgment for corporation see Acknowledgments § 192.

88. Hildreth v. Auerbach, 223 Fed. 651, 139 CCA 205 [aff 223 Fed. 545]; Welsbach Light Co. v. Cohn, 181 Fed. 122. Compare New York Pharmical Assoc. v. Tilden, 14 Fed. 740, 21 Blatchf. 190 (signature of assignor need not be proved when assignment, duly acknowledged before notary, is sufficiently proved under state statute).

[a] **Illustration.**—State statute providing form of corporate acknowledgments need not be complied with to render acknowledgment of assignment of patent sufficient under federal patent law. Welsbach Light Co. v. Cohn, 181 Fed. 122.

89. Hildreth v. Auerbach, 223 Fed. 651, 139 CCA 205 [aff 223 Fed. 545].

"In the absence of . . . a statute, I think it is a good acknowledgment if the notary knows the acknowledger and certifies that he acknowledged the execution of the paper, provided, of course, that the acknowledger has the same name as the person described in the instrument and executing it. The identity of the person so described and executing, with the person who acknowledged, must generally be known to the notary only by identity of name, together with the fact, that he asserts the identity himself." Hildreth v. Auerbach, 223 Fed. 545, 549 [aff 223 Fed. 651, 139 CCA 205].

90. Linde Air Products Co. v. Morse Dry Dock, etc., Co., 239 Fed. 909 [aff 246 Fed. 834, 159 CCA 136]. See also Matheson v. Campbell, 69 Fed. 597 [rev on other grounds 78 Fed. 910, 24 CCA 384] (to same effect, case being decided before passage of present provisions as to acknowledgment).

91. National Electric Signaling Co. v. Telefunken Wireless Tel. Co., 208 Fed. 679, 125 CCA 647 [certiorari den 234 U. S. 760 mem, 34 SCt 776 mem, 58 L. ed. 1580 mem]; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; Murray Co. v. Continental Gin Co., 149 Fed. 989, 79 CCA 499.

Effect of rule on date of transfer of title see infra § 390 text and notes 39–41.

92. Tompkins v. St. Regis Paper Co., 226 Fed. 744 [aff 236 Fed. 221, 149 CCA 411]; Ross v. Ft. Wayne, 63 Fed. 466, 11 CCA 288 [rev 58 Fed. 404]; May v. Saginaw County, 32 Fed. 629; Bell v. McCullough, 3 F. Cas. No. 1,256, 1 Bond 194, 1 Fish. Pat. Cas. 380; Gear v. Fitch, 10 F. Cas. No. 5,290, 3 Bann. & A. 573; Montgomery Palace Stock Car Co. v. Street Stable Car Line, 142 Ill. 315, 31 NE 434.

Assignee after expiration as plaintiff in infringement see infra § 541.

93. Gear v. Fitch, 10 F. Cas. No. 5,290, 3 Bann. & A. 573.

94. Construction of:
Assignments generally see Assignments §§ 116–118.
Contracts generally see Contracts §§ 481–592.

Construction as to particular matters:
Covenants, conditions, and restrictions see infra § 397.
Rights and interest conveyed see infra §§ 390–396.
Rights, duties, and liabilities of parties see infra §§ 398–400.
Warranties see infra §§ 387, 388.

95. Nicholson Pav. Co. v. Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777. And see cases infra this note.

[a] **Intention of parties** is to be carried out in construction of assignment. Nicholson Pav. Co. v. Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Piggly Wiggly Corp. v. Saunders, 1 F. (2d) 572; Lowry v. Cowles Electric Smelting, etc., Co., 56 Fed. 488; Siebert Cylinder Oil-Cup Co. v. Beggs, 32 Fed. 790; Butterfield v. Harris, 20 Cal. A. 471, 129 P 614 (agreement between patentee and creditor to transfer patent to corporation, paying debt with capital stock); Wilson v. Marlow, 66 Ill. 385; Peck v. Collins, 70 N. Y. 376 [aff 103 U. S. 660, 26 L. ed. 512]; Klauder-Weldon Dyeing Mach. Co. v. Giles, 87 Misc. 95, 150 NYS 273 [aff 166 App. Div. 415, 151 NYS 1068]; Vaughan v. Porter, 16 Vt. 266 (contract for sale of patent providing for rescission in case of defect of patent).

[b] **Intent rather than technical form controls.**—Cowles Electric Smelting, etc., Co. v. Lowrey, 79 Fed. 331, 24 CCA 616; Kearney v. Lehigh Valley R. Co., 27 Fed. 699.

[c] **Every part of instrument should be given effect** in order to ascertain its meaning. Nicholson Pav. Co. v. Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Ficklen v. William Stocker, Inc., 166 NYS 854.

[d] **Contemporaneous instruments referring to same matter construed together.**—Hammond v. Mason, etc., Organ Co., 92 U. S. 724, 23 L. ed. 767; Standard Asphalt, etc., Co. v. Barber Asphalt Pav. Co., 240 Fed. 749; Arnold Monophase Electric Co. v. Wagner Electric Mfg. Co., 148 Fed. 234; Levy v. Dattlebaum, 63 Fed. 992; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 47 Fed. 511 [rev on other grounds 49 Fed. 68, 1 CCA 169]; Mann v. Urquhart, 89 Ark. 239, 116 SW 219; Barry v. Colville, 129 N. Y. 302, 29 NE 307; Ficklen v. William Stocker, Inc., 166 NYS 854.

[e] **Practical construction by parties** is strong evidence of what they both intended contract of assignment to mean. Sparks v. Gus V. Brecht Butchers' Supply Co., (Mo. A.) 225 SW 1022.

[f] **Particular contracts construed.**—Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888 (agreement concerning division of profits from sale and use of invention); No-Leak-O Piston Ring Co. v. Chandlee, 289 Fed. 526 (waiver of provisions for benefit of assignee); Wadsworth v. Pressed Prism Plate Glass Co., 239 Fed. 507, 152 CCA 385 (as to assignee's obligation to pay expenses of obtaining patents on pending applications); Adriance v. McCormick Harvesting Mach. Co., 55 Fed. 288 [aff 56 Fed. 918, 6 CCA 168] (words as to inclusion of foreign rights in terms of transfer); Puetz v. Bransford, 31 Fed. 458 (effect of alteration in specifications referred to in assignment); Hatch v. Hall, 30 Fed. 613 (effect of language describing territory for which assignment is made); Buckley v. Sawyer Mfg. Co., 7 Fed. 358, 2 McCrary 350 (what is reasonable diligence under agreement, in promotion of enterprise in-

[§ 387] **b. Warranties[96]—(1) Express.** The assignor may bind himself by express warranties as to his title; the validity and the utility of the patent, and the rights and liabilities of the parties will, in such case, be determined by the terms of the contract.[97] The assignor may also make an express warranty against infringement.[98] An express warranty of title in an assignment of a void patent is a nullity, there being nothing for it to operate upon.[99] In an action by the assignee on an express warranty that the invention is original and novel, the fact that the patent was issued is not conclusive against plaintiff.[1]

[§ 388] **(2) Implied.** The assignment of a patent carries an implied warranty of title and a right to sell in the assignor,[2] unless the instrument purports to convey only what title the assignee had.[3] There is also an implied warranty that the patent has issued in due form.[4] But there is no implied warranty that the patent is valid,[5] or that the invention does not infringe prior patents.[6] The assignor of a patent does not impliedly agree that he will not compete with the assignee in the sale of an article similar to that covered by the patent, nor produce or sell anything that may serve as a substitute therefor.[7]

[§ 389] **c. Estoppel.**[8] The assignor of a patent is estopped from disputing the validity or utility of the patent as against his assignee,[9] and this although the patent may be void as to the rest of the world;[10] and he is estopped from demanding such a construction of the patent as to render it valueless,[11] or to deny his own construction of the patent,[12] especially where such construction was employed to induce the sale.[13] Too, the assignor is estopped from defeating the right of his assignee by purchasing or obtaining control of an older patent for the same invention.[14] Further, the assignor cannot derogate from his own grant, and thus he is estopped to deny

volved in transfer); Emigh v. Chicago, etc., R. Co., 8 F. Cas. No. 4,448, 1 Biss. 400, 2 Fish. Pat. Cas. 387 (effect of specific language describing patent conveyed); Mann v. Urquhart, 89 Ark. 239, 116 SW 219 (term "carry" as used in contract); Snyder v. Kurtz, 61 Iowa 593, 16 NW 722 (agreement to furnish specified patterns); Rowley v. Woodruff, 50 N. Y. 700 ("said process" construed to designate patented process and not one not patented, assigned by same transfer); Conklin v. Douglas, 16 NYWklyDig 10 (effect of language of agreement to exploit patent transferred); Reese's App., 122 Pa. 392, 15 A 807 (effect of language describing patents and rights transferred).

96. Parol evidence of warranty in action for price see infra § 402.

97. McClure v. Jeffrey, 8 Ind. 79; Bailey v. Miller, 45 Ind. A. 475, 91 NE 24; Scott v. Sweet, 2 Greene (Iowa) 224; Herzog v. Heyman, 151 N. Y. 587, 45 NE 1127, 56 AmSR 646; Grant v. Lawrence, 79 Hun 565, 29 NYS 901; Ball v. Murry, 10 Pa. 111.

[a] **Guaranty of peaceable possession.**—(1) A contract, reciting, "I further guarantee the said S. peaceable possession of the 'rights' to said patent and invention in said L. county and all the expenses which may be incurred for suits for infringements or for ousting or keeping out present contractors within said territory," is not void on its face because the word "guarantee" in the connection used is meaningless. Bailey v. Miller, 45 Ind. A. 475, 91 NE 24. (2) Such a contract does not stipulate for peaceable possession of the territory named, but for peaceable possession of the "rights" to such patent, hence the assignee could not recover for profits made in the county through infringements by others than the assignor. Bailey v. Miller, supra.

[b] **Validity warranted.**—An assignment containing language importing that both parties understood they were dealing with a real right secured under a valid patent, and that their mutual covenants were based on this assumption, is to be construed as warranting the validity of the patent. Herzog v. Heyman, 151 N. Y. 587, 45 NE 1127, 56 AmSR 646.

[c] **Novelty and utility warranted.**—McClure v. Jeffrey, 8 Ind. 79.

[d] **Utility warranted.**—Scott v. Sweet, 2 Greene (Iowa) 224.

[e] **Joint and several covenants.**—An agreement under seal for the sale of patents, which provided that the vendors should establish a title to the patents, and assign and transfer the same, and that such assignments should contain a covenant that the patents were valid, and also such other covenants and provisions as "may be reasonably required by the said company for giving effect to the sale hereby agreed to be made," required that such assignments should contain joint and several covenants by the vendors that the patents were valid; and the rights of the vendee against the personal representative of one of the vendors who had died before any assignment had been made must be ascertained upon that footing. National Soc. for Distribution of Electricity, etc. v. Gibbs, [1900] 2 Ch. 280, 286.

98. Green v. Watson, 10 Ont. A. 113 [aff .2 Ont. 627].

99. Bliss v. Negus, 8 Mass. 46; Dickinson v. Hall, 14 Pick. (Mass.) 217, 25 AmD 390.

1. Wright v. Wilson, 11 S. C. L. 144.

2. U. S.—Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Curran v. Burdsall, 20 Fed. 835; Faulks v. Kamp, 3 Fed. 898, 17 Blatchf. 432.

N. J.—Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 138, 55 A 401.

N. Y.—Herzog v. Heyman, 8 Misc. 27, 28 NYS 74 [aff 151 N. Y. 587, 45 NE 1127, 56 AmSR 646]; Carmen v. Trude, 25 HowPr 440.

Vt.—Sherman v. Champlain Transp. Co., 31 Vt. 162.

Can.—Electric Fireproofing Co. v. Electric Fireproofing Co., 43 Can. S. C. 182.

See Leese v. Bernard Gloekler Co., 287 Pa. 295, 298, 135 A 206 [quot Cyc].

After-acquired title see infra § 394.

Lack of title:

As basis for recovery back of consideration see infra § 399.

As defense in action for purchase price see infra § 399.

3. Davis v. Hammond, 75 Mich. 1, 42 NW 490.

[a] **Illustration.**—An instrument of assignment which contains no warranty of title, but in which the assignee agrees to pay for the patent in the event that the validity of the patent is established in a pending suit or in case the suit is settled without proceeding to final decree, binds the assignee to pay for the patent upon settlement of the suit before trial, although the assignor's title was defective. Davis v. Hammond, 75 Mich. 1, 42 NW 490.

4. Shepherd v. Jenkins, 73 Mo. 510.

5. U. S.—Milligan v. Lalance, etc., Mfg. Co., 21 Fed. 570.

Conn.—Bull v. Pratt, 1 Conn. 342.

Ind.—Detrick v. McGlone, 46 Ind. 291.

Me.—Elmer v. Pennel, 40 Me. 430.

Mass.—Ryan v. Reed, 165 NE 396; Gilmore v. Aiken, 118 Mass. 94.

Mich.—Brazel v. Smith, 141 Mich. 628, 104 NW 1097.

N. J.—Barclay v. Charles Roome Parmele Co., 70 N. J. Eq. 218, 61 A 715; Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 138, 55 A 401.

N. Y.—Nilsson v. De Haven, 47 App. Div. 537, 62 NYS 506 [aff 168 N. Y. 656 mem, 61 NE 1131 mem].

N. C.—Hiatt v. Twomey, 21 N. C. 315.

Pa.—Leese v. Bernard Gloekler Co., 287 Pa. 295, 298, 135 A 206 [quot Cyc]; Palmer's App., 96 Pa. 106.

Eng.—Otto v. Singer, 62 L. T. Rep. N. S. 220.

Can.—Electric Fireproofing Co. v. Electric Fireproofing Co., 43 Can. S. C. 182.

Ont.—Duryea v. Kaufman, 21 Ont. L. 161, 16 OntWR 57.

Express warranty of validity see supra § 387.

Invalidity of patent:

As basis for:

Assignee's action to recover consideration paid see infra § 400.

Defense of failure of consideration see infra § 399.

As defense in action for purchase price see infra § 399.

Estoppel of assignee to assert see infra § 389.

6. Horne v. Hoyle, 27 Fed. 216; Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118; Standard Button Fastening Co. v. Harney, 155 Mass. 507, 29 NE 1148; Leese v. Bernard Gloekler Co., 287 Pa. 295, 298, 135 A 206 [quot Cyc].

Express warranty against infringement see supra § 387.

7. Lamson v. Martin, 159 Mass. 557, 35 NE 78.

8. License by estoppel see infra § 411.

9. See supra § 286.

10. See supra § 286.

11. Piano Motors Corp. v. Motor Players Corp., 282 Fed. 435; Automatic Switch Co. v. Monitor Mfg. Co., 180 Fed. 983; Hurwood Mfg. Co. v. Wood, 138 Fed. 835.

[a] **Illustration.**—The assignor of a patent for value, with covenants of warranty, is estopped, when sued for infringement thereof by the assignee, to deny that the claims cover every structure within the fair meaning of the language of the claims; the words "substantially as set forth" as used in the claims do not limit the claim to the construction shown in the patent. United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232.

12. United Printing Mach. Co. v. Cross Paper Feeder Co., supra; Hurwood Mfg. Co. v. Wood, 138 Fed. 835.

13. United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232.

14. United Printing Mach. Co. v. Cross Paper Feeder Co., 227 Fed. 600, 142 CCA 232; Curran v. Burdsall, 20 Fed. 835; Faulks v. Kamp, 3 Fed.

his title,[15] or to claim title as against his assignee,[16] as is a legatee of the assignor where the assignments had been executed but not recorded.[17] However, the assignor is generally not estopped to deny infringement or to show that the patent is limited in its scope;[18] and the assignor of a patent is not estopped by the assignment from taking out a patent for an improvement upon the invention.[19]

Of assignee. An assignee of a patent who has acted under the assignment is estopped to deny the validity of the patent.[20] But he may not be estopped to assert a failure of consideration due to the worthlessness of the patented device.[21]

[§ 390] **d. Rights and Interests Conveyed[22]—(1) In General.** Generally an assignment of a patent vests in the assignee a title to so much of the patent itself,[23] and transfers to the assignee an exclusive right to do everything under the patent which the patentee himself could do.[24] But an inventor, by assigning one patent, does not give the assignee the right to inquire into applications pending in the patent office for other patents.[25] The assignee acquires by the assignment only such title and rights as his assignor had, subject to all existing equities, conditions, and limitations of which he had actual or constructive notice.[26] The assignee of a patent

898, 17 Blatchf. 432. Compare Union Switch, etc., Co. v. Day, 16 F. (2d) 4 [certiorari den 273 U. S. 756 mem, 47 SCt 459 mem, 71 L. ed. 876 mem] (inventor abandoning application after assignment cannot thereafter secure application in own name).

After-acquired title see infra § 394.

Operation of estoppel as implied license see infra § 411.

15. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 266 U. S. 342, 45 SCt 117, 69 L. ed. 316; New Departure Mfg. Co. v. Rockwell-Drake Co., 270 Fed. 219 [mod on other grounds 287 Fed. 328]; Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]; Faulks v. Kamp, 3 Fed. 898, 17 Blatchf. (U. S.) 432; Herbert v. Adams, 12 F. Cas. No. 6,394, 4 Mason 15, 1 Robb Pat. Cas. 505.

[a] **Illustration.**—Where an inventor assigned the application for a patent to one of the defendants, who assigned it to plaintiff, to whom the patent was issued, such defendant and those claiming under him could not attack plaintiff's title on the ground that the inventor was an infant at the time of his assignment, as the assignor of a patentable invention may not deny his own title to the interest transferred. New Departure Mfg. Co. v. Rockwell-Drake Corp., 270 Fed. 219 [mod on other grounds 287 Fed. 328].

16. Littlefield v. Perry, 2 Wall. (U. S.) 205, 22 L. ed. 577.

[a] **Illustration.**—If the owner of a patent right assigns it and subsequently executes a second assignment, without warranty of title, to another, and the patent is reassigned to him by the first assignee, he is estopped to claim title as against the second assignee. Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577.

17. Fyrac Mfg. Co. v. Bergstrom, 24 F. (2d) 9.

Effect of lack of record of assignment between parties see supra § 383 text and note 68.

Estoppel of persons in privity with assignor to dispute validity of patent see supra § 286.

18. See supra § 286.

Estoppel as defense in infringement suit generally see infra § 539.

19. Essex Button Co. v. Paul, 48 Fed. 310.

20. Kinsman v. Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385. Compare No-Leak-O Piston Ring Co. v. Chandlee, 289 Fed. 526 (where a party having a contract for the conveyance of a patent when it should be issued received information that the patent sought was too broad to be valid, his transmission of such information to the patent office to protect the validity of the patent did not defeat his rights under the contract).

21. Craddick v. Emery, 93 Wash. 648, 161 P 484.

[a] **Illustration.**—Where one who was not a mechanic gave his notes for a device represented by the payee to be valuable and patentable, when in fact it was neither, he is not estopped to assert failure of consideration, although advised by casual observers that the device was valueless. Craddick v. Emery, 93 Wash. 648, 161 P 484.

22. Assignee's right to royalties see infra § 449.

23. See supra § 368 text and note 27.

24. Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139; McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

[a] **In Canada** an assignee for a limited period with a right to purchase, who reassigns at the expiration of such period, cannot thereafter sell the patented invention although manufactured before such assignment. Bennett v. Wortman, 2 Ont. L. 292.

25. American Steel Foundries v. Laughlin, 30 F. (2d) 137 [aff 30 F. (2d) 139].

26. U. S.—Worley v. Loker Tobacco Co., 104 U. S. 340, 26 L. ed. 821; Kinsman v. Parkhurst, 18 How. 289, 15 L. ed. 385; McClurg v. Kingsland, 1 How. 202, 11 L. ed. 102; Wallister v. F. W. Maurer, etc., Co., 17 F. (2d) 122; Richmond Screw Anchor Co. v. Bethlehem Steel Bridge Corp., 287 Fed. 94; Ingle v. Landis Tool Co., 262 Fed. 150 [rev on other grounds 272 Fed. 464 (certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)]; Webster Electric Co. v. Podlesak, 255 Fed. 907; Mix v. National Envelope Co., 244 Fed. 822; New York Phonograph Co. v. Edison, 136 Fed. 600 [aff 144 Fed. 404, 75 CCA 382]; Bradford Belting Co. v. Kisinger-Ison Co., 113 Fed. 811, 51 CCA 483; Westinghouse Air-Brake Co. v. Chicago Brake, etc., Co., 85 Fed. 786; Carroll v. Goldschmidt, 83 Fed. 508, 27 CCA 566 [certiorari den 169 U. S. 735 mem, 18 SCt 940 mem, 42 L. ed. 1215 mem]; Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130; Walter A. Wood Mowing, etc., Mach. Co. v. Deering, 66 Fed. 547; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Grier v. Baynes, 46 Fed. 523; Sheldon Axle Co. v. Standard Axle Works, 37 Fed. 78, 3 LRA 656; Kearney v. Lehigh Valley R. Co., 27 Fed. 699; Blades v. Rand, 27 Fed. 93; Hapgood v. Rosenstock, 23 Fed. 86, 23 Blatchf. 95; Pennington v. Hunt, 20 Fed. 195; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 Fed. 638, 24 Fed. 604, 21 Blatchf. 519; Washburn, etc., Mfg. Co. v. Griesche, 16 Fed. 669, 5 McCrary 246; Gottfried v. Miller, 10 Fed. 471; Hamilton v. Kingsbury, 4 Fed. 428, 17 Blatchf. 460; Chambers v. Smith, 5 F. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453.

D. C.—Computing Scale Co. v. Automatic Scale Co., 26 App. 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645].

Iowa.—Des Moines Ins. Co. v. McIntire, 99 Iowa 50, 68 NW 565.

Mich.—Harrison v. Ingersoll, 56 Mich. 36, 22 NW 268; Eames v. Eames, 16 Mich. 348.

N. J.—Oscar Barnett Fdy. Co. v. Ironworks Co., 81 N. J. Eq. 412, 87 A 160.

N. Y.—Rogers v. Adams, 119 Misc. 77, 195 NYS 772 [aff 206 App. Div. 739 mem, 199 NYS 947 mem]; Coleman v. Ryan, 33 Misc. 715, 68 NYS 253.

Tenn.—McRae v. Smart, 120 Tenn. 413, 114 SW 729.

Wis.—Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

Eng.—Werderman v. Société Générale d'Electricité, 19 Ch. D. 246.

[a] **Limitations in patent.**—(1) Where it appears that the patentee admitted in the patent office that one of his claims as presented was old by a reference to another patent, and, to avoid the reference, inserted a non-patentable limitation, his assignee is bound by such action. Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645]. (2) Where a patentee is shown not to have been merely an improver, he is entitled to such recognition as his contribution to the art warrants, and his assignees to protection to the same extent, subject, however, to such limitations, if any, as either permitted to be imposed upon the grant, as disclosed by the file wrapper and contents of the application upon which the patent issued. Computing Scale Co. v. Automatic Scale Co., supra.

[b] **Unassignable right.**—Under a shop license granted by patentees to complainant for the term of the patents, with the sole right to maintain infringement suits and a limited right to grant licenses, reserving to patentees only the right "to themselves make, use, and sell the inventions," such reserved right was not assignable and did not pass by an assignment of the patents which merely transferred patentee's title and the right to royalties. Webster Electric Co. v. Podlesak, 255 Fed. 907.

[c] **Prior contracts including rejected claims.**—A corporation, taking an assignment of an inventor's rights under a patent knowing that such inventor has contracted with another for exclusive rights therein, cannot claim to be entitled to manufacture and sell an article based on claims in the specifications of which the patent was not granted. Oscar Barnett Fdy. Co. v. Ironworks Co., 81 N. J. Eq. 412, 87 A 160.

[d] **The assignee of several distinct patents** has no greater right than his several assignors respectively. Washburn, etc., Mfg. Co. v. Griesche, 16 Fed. 669, 5 McCrary 246.

[e] **What constitutes notice.**—(1) An assignee of a patent is chargeable with notice of every fact in relation to an outstanding interest the possible existence of which is indicated by the recitals of the assignment. Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453. (2) Information given by S to defendants prior to assigning to them a patentable invention charges them with notice of his contract with complainant to work on such inventions, and to assign to the latter any patentable invention or improvement S might make thereon. Thompson v. Automatic Fire Protection Co., 211 Fed. 120, 128 CCA 22 [aff 197 Fed. 750]. (3) A purchaser of an invention for which an application for a patent is pending, with knowledge that the inventor had

ordinarily takes subject to licenses previously granted by the assignor,[27] and there is authority that he must inform himself of prior licenses as best he can, at his own risk.[28] But the assignment does transfer to the assignee all the rights remaining in the assignor.[29] Where the owner of a patent has assigned all his interest, a subsequent assignment by him is a nullity, and the second assignee acquires no right to the patent,[30] unless the first assignee had abandoned his rights under the contract, in which case a subsequent assignment conveys a perfect title.[31] An assignment of an invention or patent, or interest therein, will pass only the specific right, title, or interest described in the conveyance.[32] An assignment of all the grantor's right, title, and interest in and to a certain patent carries only the existing interest of the grantor at the time of the assignment.[33] Still, words restricting the grant to such patents as the grantor "holds in his own right" do not exclude patents of which his tenure is not exclusive.[34]

Construction of patent between parties.[35] As between assignor and assignee a patent will not be unnecessarily construed so narrowly as to make it worthless;[36] rather the patent must be construed liberally enough to give full value thereto, and to exclude the assignor from every structure within the fair meaning of the claim.[37] Where one, who was no novice in the patent business, assigned an application for a patent, no fine line will be drawn in his favor, as against the assignee, between claims as allowed and those originally made upon the description and drawings.[38]

Time when assignment takes effect. Since the acknowledgment of an assignment of a patent[39] relates back to the date of the assignment,[40] title passes as of the date of the assignment, and not on the date of the acknowledgment.[41]

[§ 391] **(2) Rights in Improvements and New In-**

assigned a previous invention of a similar character to others by an assignment which was recorded, is put upon inquiry and cannot rely on statements of the assignor as to what was covered by the prior assignment. Electric Storage Battery Co. v. Gould Storage Battery Co., 197 Fed. 745 [aff 204 Fed. 280, 122 CCA 478]. (4) A corporation, taking an assignment of an inventor's rights under a patent at a time subsequent to a decision in a suit against such inventor for breach of a contract for exclusive rights in such patent, is chargeable under the facts with notice of all the rights accruing under the prior contract. Oscar Barnett Fdy. Co. v. Ironworks Co., 81 N. J. Eq. 412, 87 A 160. (5) Where the facts of which the assignee of a patent knew and those which it was chargeable with the duty of finding out plainly pointed to the probable existence of a right or title in conflict with that which it was about to buy, the failure to make reasonable inquiry deprived it of the status of a bona fide purchaser without notice. Rogers v. Adams, 119 Misc. 77, 195 NYS 772 [aff 206 App. Div. 739 mem, 199 NYS 947 mem]. (6) The assignee is chargeable with notice of outstanding equities suggested by the recitals of the assignment. Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130.

[f] **Extraordinary interpretation of terms of prior contract.**—Where a contract for the assignment of certain patents included inventions of a similar nature which the patentee might thereafter complete, the assignee of a subsequent invention not conceived by the party at the time such contract was executed, although with actual knowledge of such previous assignments, was not chargeable with notice that the word "complete" was intended to be given an extraordinary interpretation to include inventions then conceived. Davis, etc., Temperature Controlling Co. v. Tagliabue, 159 Fed. 712, 86 CCA 466.

27. U. S.—Koppe v. Burnstingle, 29 F. (2d) 923; Wallister v. F. W. Maurer, etc., Co., 17 F. (2d) 122; Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242; Mix v. National Envelope Co., 244 Fed. 822; Thompson v. Automatic Fire Protection Co., 197 Fed. 750 [aff 211 Fed. 120, 128 CCA 22]; Electric Storage Battery Co. v. Gould Storage Battery Co., 197 Fed. 745 [aff 204 Fed. 280, 122 CCA 478]; St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co., 178 Fed. 923, 103 CCA 565 [certiorari den 219 U. S. 588 mem, 31 SCt 471 mem, 55 L. ed. 348 mem]; Jones v. Berger, 58 Fed. 1006; Hapgood v. Rosenstock, 23 Fed. 86, 23 Blatchf. 95; Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221.

D. C.—Whitson v. Columbia Phonograph Co., 18 App. 565.

Ind.—Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322.

N. J.—Oscar Barnett Fdy. Co. v. Ironworks Co., 81 N. J. Eq. 412, 87 A 160.

N. Y.—Waterman v. Shipman, 130 N. Y. 301, 29 NE 111; Mayer v. Hardy, 127 N. Y. 125, 27 NE 837; Miller v. Jones, 67 Hun 281, 22 NYS 86.

Wis.—Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

[a] **An assignment may by its terms be made subject to a prior license,** and in such case the assignee succeeds to the rights under and is bound by the conditions of the license. Wilson v. Stolley, 30 F. Cas. No. 17,840, Fish. Pat. R. 261, 5 McLean 1.

28. Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242.

29. Mayer v. Hardy, 127 N. Y. 125, 27 NE 837; Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

[a] **Illustrations.**—(1) The assignee of a patentee who had previously granted a license is entitled to the patentee's reserved right to manufacture and sell the invention. Mayer v. Hardy, 127 N. Y. 125, 27 NE 837. (2) Where owner of patent had given exclusive license for manufacture and sale of the patented article in foreign countries, one to which it transferred all its property and rights acquired the domestic rights in such article. Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

30. Waterman v. Mackenzie, 29 Fed. 316 [aff 138 U. S. 252, 11 SCt 334, 34 L. ed. 923]; Perry v. Corning, 19 F. Cas. No. 11,004, 7 Blatchf. 195; Ritter v. Serrell, 20 F. Cas. No. 11,866, 2 Blatchf. 379; McRae v. Smart, 120 Tenn. 413, 114 SW 729; Colpitts v. Sherwood, (Alta.) [1927] 3 DomLR 7.

After-acquired title see infra § 394.

31. Buck v. Timony, 78 Fed. 487 [aff 84 Fed. 887, 28 CCA 561].

32. Ball, etc., Fastener Co. v. Patent Button Co., 152 Fed. 187; Puetz v. Bransford, 31 Fed. 458; Downton v. Allis, 9 Fed. 766; Downton v. Yaeger Milling Co., 9 Fed. 402, 3 McCrary 414; Clark v. Scott, 5 F. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245; United Nickel Co. v. American Nickel Plating Works, 24 F. Cas. No. 14,405, 4 Bann. & A. 74; Warren v. Cole, 15 Mich. 265.

[a] **Illustrations.**—(1) An assignment of an interest in a patent for a machine will not convey a patent for a process to use which the machine was invented. Downton v. Allis, 9 Fed. 766; Downton v. Yaeger Milling Co., 9 Fed. 402, 3 McCrary 414. (2) An assignment of an invention as described in the specifications filed covers all the devices claimed therein to be patentable, and not merely such as are covered by the patent as ultimately issued. Puetz v. Bransford, 31 Fed. 458.

Assignment as transferring:
After-acquired title see infra § 394.
Improvements see infra § 391.
Rights in extended term see infra § 392.
Rights in reissue see infra § 393.
Right of action for past infringement see infra § 395.

33. Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 47 Fed. 511 [rev on other grounds 49 Fed. 68, 1 CCA 169]; Turnbull v. Weir Plow Co., 14 Fed. 108, 9 Biss. 334; Hamilton v. Kingsbury, 4 Fed. 428, 17 Blatchf. 460; Ashcroft v. Walworth, 2 F. Cas. No. 580, 5 Fish. Pat. Cas. 528, Holmes 152; Goodyear v. Cary, 10 F. Cas. No. 5,562, 4 Blatchf. 271, 1 Fish. Pat. Cas. 424; Turnbull v. Weir Plow Co., 24 F. Cas. No. 14,244, 1 Bann. & A. 544, 6 Biss. 225; Waterman v. Shipman, 130 N. Y. 301, 29 NE 111; Horne v. Chatham, 64 Tex. 36; Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

[a] **Successive assignments.**—An assignment of all the assignor's right, title, and interest does not affect a prior unrecorded assignment, since the assignor purports only to convey what he has. Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 47 Fed. 511 [rev on other grounds 49 Fed. 68, 1 CCA 169]; Turnbull v. Weir Plow Co., 14 Fed. 108, 9 Biss. 334; Horne v. Chatham, 64 Tex. 36.

[b] **Representations by assignor that he owns entire patent** cannot enlarge terms of conveyance transferring what interest assignor has so as to include interest of which he had previously divested himself. Horne v. Chatham, 64 Tex. 36.

Effect of recording or failure to record see supra § 383.

34. Lowry v. Cowles Electric Smelting, etc., Co., 56 Fed. 488; Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385.

35. Construction of patent generally see supra §§ 335-363.

36. See supra § 345.

37. Frick Co. v. Lindsay, 27 F. (2d) 59.

38. Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co., 256 Fed. 847, 168 CCA 193.

39. See supra § 384.

40. See supra § 384 text and note 91.

41. National Electric Signaling Co. v. Telefunken Wireless Tel. Co., 208 Fed. 679, 125 CCA 647 [certiorari den 234 U. S. 760 mem, 34 SCt 776 mem, 58 L. ed. 1580 mem]; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; Murray Co. v.

ventions.[42] An assignment of the patent does not of itself pass the right to future improvements,[43] unless the assignor attempts to defeat the assignee's rights by securing patents for a pretended improvement.[44] Still, an assignment may be made to transfer improvements by the use of apt words.[45] In order to have this effect it must plainly appear from the language used that such was the intention of both parties.[46] However, no rule of strict construction applies to such a covenant.[47] A change increasing the economy or efficiency of the existing patent for the purpose for which it is intended constitutes an improvement thereon within the meaning of covenants of the character under consideration.[48] An assignment of a patent with future improvements includes only improvements on the particular machine secured by the patent, not unrelated inventions.[49] Whether the assignment of a patent with improvements includes nonpatentable improvements or is confined to those which are patentable depends upon a construction of the contract between the parties in the light of all the surrounding circumstances.[50] An assignment of all right, title, and interest in an improvement of an invention already patented conveys no interest in the original patent.[51]

New inventions. The assignment of a patent does not entitle the assignee to subsequent patents for new inventions by the assignor in the same field, but

Continental Gin Co., 149 Fed. 989, 79 CCA 499.

42. Validity of transfer of future patents and inventions see supra §§ 375, 376.

43. United Nickel Co. v. American Nickel Plating Works, 24 F. Cas. No. 14,405, 4 Bann. & A. 74.

44. Hollins v. Mallard, 10 HowPr (N. Y.) 540.

[a] **Illustration.**—The assignor of an invention and the patent to be obtained cannot defeat the assignee's rights by pretended improvements and a mere subdivision of the patent into two parts for which two patents are later issued. Hollins v. Mallard, 10 HowPr (N. Y.) 540.

45. U. S.—Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Philadelphia, etc., R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Ingle v. Landis Tool Co., 262 Fed. 150 [rev on other grounds 272 Fed. 464 (certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)]; Brown v. Owen, 158 Fed. 98, 85 CCA 566; Reece Folding Mach. Co. v. Fenwick, 140 Fed. 287, 72 CCA 39, 2 LRANS 1094; Geiser Mfg. Co. v. Frick Co., 92 Fed. 189 [rev on other grounds 100 Fed. 94, 40 CCA 291 (certiorari den 177 U. S. 694 mem, 20 SCt 1028 mem, 44 L. ed. 945 mem)]; Westinghouse Air-Brake Co. v. Chicago Brake, etc., Co., 85 Fed. 786; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 47 Fed. 511 [rev on other grounds 49 Fed. 68, 1 CCA 169]; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Chase v. Walker, 5 F. Cas. No. 2,630, 3 Fish. Pat. Cas. 120; Nesmith v. Calvert, 18 F. Cas. No. 10,123, 1 Woodb. & M. 34.

N. J.—Stanton Mfg. Co. v. McFarland, 30 A 1058 [aff 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647].

N. Y.—Allison Bros. Co. v. Allison, 144 N. Y. 21, 38 NE 956; Magnolia Anti-Friction Metal Co. v. Singley, 17 NYS 251 [aff 137 N. Y. 557 mem, 33 NE 337 mem].

Pa.—Reese's App., 122 Pa. 392, 15 A 807; White Dental Mfg. Co. v. Bonwill, 15 Pa. Co. 76.

Ont.—Watson v. Harris, 31 Ont. 134.

[a] **Illustration.** — Assignments, by which a concern transferred a boring machine, together with all patents, drawings, patterns, etc., relating thereto, conveys any rights the assignor had in an unpatented improvement made by one of its employees. Ingle v. Landis Tool Co., 262 Fed. 150 [rev on other grounds 272 Fed. 464 (certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)].

[b] **Patents on improvements secured "from time to time."**—Where a deed conveyed all the right, title, and interest which the grantor had in a certain invention as secured to him by letters patent, and also all rights which might be secured to him for alterations and improvements "from time to time," the phrase "from time to time" imported all patents which might be issued thereafter on alterations and improvements. Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 369, 19 L. ed. 948.

46. Allison Bros. Co. v. Allison, 144 N. Y. 21, 38 NE 956.

47. New Haven Sand Blast Co. v. Dreisbach, 102 Conn. 169, 128 A 320.

[a] **Applications.**—In a covenant for future conveyance of "all patents and patent rights which may be issued to us" for improvements, rights arising in connection with applications for such patents are included. New Haven Sand Blast Co. v. Dreisbach, 102 Conn. 169, 180, 128 A 320.

[b] **Improvements on improvements** are included in the words "all improvements thereon." Marshall Engine Co. v. New Marshall Engine Co., 199 Mass. 546, 85 NE 741

[c] **A contract for the sale of improvements** includes only those already made unless the contrary is expressed. Adams v. Turner, 73 Conn. 38, 46 A 247.

[d] **Assignor's right to acquire patents from third persons.**—A covenant to convey future improvements contained in an assignment of a patent does not prevent assignor from acquiring patents relating to such improvements issued to third persons. New Haven Sand Blast Co. v. Dreisbach, 102 Conn. 169, 128 A 320.

48. U. S.—American Can Co. v. Hedstrom, 29 F. (2d) 804.

Del.—Foreman's Systems v Milk Dealers' Crate Corp., 13 Del. 351, 120 A 358.

Mich.—Atlas Press Co. v. Eames, 206 Mich. 588, 173 NW 344.

N. Y.—Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

Pa.—White Dental Mfg. Co. v. Bonwill, 3 Pa. Dist. 332, 15 Pa. Co. 76.

Ont.—Watson v. Harris, 31 Ont. 134.

[a] **A distinct and independent device** is not an improvement. American Cone, etc., Co. v. Consolidated Wafer Co., 247 Fed. 335, 159 CCA 429; Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

[b] **A patent to manufacture the same goods** by a different process which could be used without any of the machinery included in the earlier patent and without infringing does not constitute an "improvement." Allison Bros. Co. v. Allison, 144 N. Y. 21, 38 NE 956.

[c] **In England.**—(1) Anything which makes a patented machine more effective, useful, or valuable is an "improvement" to that machine, and falls under a covenant to "communicate" and "give the exclusive benefit of" every improvement to a patented machine, although such improvement might be used without involving an infringement of the former patent. Hopkins v. Linotype, etc., Ltd., 101 L. T. Rep. N. S. 898. (2) Future improvements upon the patent transferred part to the assignee under an agreement granting the assignee the benefit of all improvements and future inventions to be made upon the patented invention. Vislok, Ltd. v. Peters, 44 R. P. C. 235.

Inventions or improvements included in employment contracts see Master and Servant § 168.

What are improvements generally see supra § 20.

49. U. S.—American Can Co. v. Hedstrom, 29 F. (2d) 804; American Cone, etc., Co. v. Consolidated Wafer Co., 247 Fed. 335, 159 CCA 429; Brown v. Owen, 158 Fed. 98, 85 CCA 566; Wright v. Vocalian Organ Co., 148 Fed. 209, 79 CCA 183; Frick Co. v. Geiser Mfg. Co., 100 Fed. 94, 40 CCA 291 [certiorari den 177 U. S. 694 mem, 20 SCt 1028 mem, 44 L. ed. 945 mem]; Independent Electric Co. v. Jeffrey, 76 Fed. 981 [rev on other grounds 83 Fed. 191, 27 CCA 512]; Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 49 Fed. 68, 1 CCA 169; Aspinwall v. Gill, 32 Fed. 697 [aff 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Bunker v. Stevens, 26 Fed. 245; Stebbins Hydraulic El. Mfg. Co. v. Stebbins, 4 Fed. 445; Nesmith v. Calvert, 18 F. Cas. No. 10,123, 2 Robb Pat. Cas. 311, 1 Woodb. & M. 34.

Conn.—New Haven Sand Blast Co. v. Dreisbach, 102 Conn. 169, 128 A 320.

Del.—Foreman's Systems v. Milk Dealers' Crate Corp., 13 Del. 351, 120 A 358.

Ill.—Bates Mach. Co. v. Bates, 192 Ill. 138, 61 NE 518.

Mass.—Marshall Engine Co. v. New Marshall Engine Co., 199 Mass. 546, 85 NE 741; Lamson v. Martin, 159 Mass. 557, 35 NE 78.

Mich.—Atlas Press Co. v. Eames, 206 Mich. 588, 173 NW 344; Zagelmeyer v. Laughray Concrete Brick Co., 169 Mich. 589, 132 NW 1045.

N. J.—McFarland v. Stanton Mfg. Co., 53 N. J. Eq. 649, 33 A 962, 51 AmSR 647 [aff (Ch.) 30 A 1058].

N. Y.—Allison v. Allison, 144 N. Y. 21, 38 NE 956; May v. Page, 60 N. Y. 628; Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

Pa.—Bessemer Steel Co. v. Reese, 122 Pa. 392, 15 A 807.

Ont.—Watson v. Harris, 31 Ont. 134.

50. Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A 847; Fraser v. Kent, 194 App. Div. 742, 185 NYS 746.

[a] **Nonpatentable improvements not included.**—(1) A covenant by a patentee on an assignment of the patent to disclose and assign improvements on the patented article did not oblige him to disclose ideas or suggestions as to changes or alterations which were not patentable, although they might be described as "improvements." Fraser v. Kent, 194 App. Div. 742, 185 NYS 746. (2) A change in the location of equalizing springs in an ore-crushing mill was not an invention, within a covenant to disclose and assign improvements invented by the patentee, so long as the functions were the same. Fraser v. Kent, supra.

[b] **Nonpatentable improvements included.**—Parties' practical construction of agreement transferring patents and "any subsequent invention or improvement" shows intent to include nonpatentable improvements. Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A 847.

What are patentable improvements generally see supra § 20.

51. Vose v. U. S. Metal Products Co., 219 Fed. 747, 135 CCA 445; Leach v. Dresser, 69 Me. 129.

not for the same machine.[52] The assignee of an agreement transferring a patent with all future inventions relating thereto succeeds to all of the assignor's rights under the contract.[53] Such an assignment includes only inventions within the terms of the contract between the parties.[54]

[§ 392] **(3) Rights in Extended Term.**[55] In the absence of a specific provision in an assignment of letters patent granting rights in the extended term, the assignment does not carry with it an interest in a subsequently extended term;[56] no right in an extension will be implied in favor of the assignee.[57] But the operation of an assignment is not limited to the term specified in the patent where the instrument contains apt words to show that the parties intended that its operation should be more comprehensive.[58] The extent to which an assignee may enjoy the benefits of an extended term of a patent depends entirely upon the stipulations of the contract.[59] Where the conveyance is of the invention, before the issue of letters patent therefor, the assignee is entitled, unless the instrument of assignment shows a different intention, to obtain a renewal at the expiration of the original term.[60] A conveyance transferring rights in the extended term to the assignee becomes operative upon the grant of the extension.[61]

[§ 393] **(4) Rights in Reissue.**[62] Where after assignment a patent is reissued, the rights of the assignee are the same under a reissued patent as under the original.[63] But the assignee must consent to or ratify such reissue.[64] An agreement by the assignor of a patent to join in the signing of any lawful and proper application for reissue at the request of the assignee does not require the assignor to sign an application which obviously would be rejected by the patent office, nor one which would necessitate a false oath.[65]

[§ 394] **(5) After-Acquired Title.**[66] Where an instrument of transfer is made when the assignor has no title, an after-acquired title inures to the benefit of the assignee.[67] But where the assignor had parted with his entire interest to another before the assignment, thus rendering the second assignment a nullity,[68] a subsequent reassignment by the first assignee to the assignor does not inure to the benefit of the second assignee.[69]

[§ 395] **(6) Rights of Action for Past Infringement.** The assignee of a patent does not acquire a right of action for past infringement unless so speci-

52. Gould Storage Battery Co. v. Electric Storage Battery Co., 192 Fed. 28, 112 CCA 416 [certiorari den 223 U. S. 730 mem, 32 SCt 527 mem, 56 L. ed. 634 mem].

[a] **Title to patent cannot be split up.**—A court cannot split up the title to a patent, and a complainant is not entitled to a decree requiring a patent to be transferred to him, where it contains claims to which he has established no right, even though he may be entitled to the broad invention by reason of a prior assignment of a patent for an invention in the same field. Gould Storage Battery Co. v. Electric Storage Battery Co., 192 Fed. 28, 112 CCA 416 [certiorari den 223 U. S. 730 mem, 32 SCt 527 mem, 56 L. ed. 634 mem].

[b] **Subsequent patent held not for same invention.**—Gould Storage Battery Co. v. Electric Storage Battery Co., 192 Fed. 28, 112 CCA 416 [certiorari den 223 U. S. 730 mem, 32 SCt 527 mem, 56 L. ed. 634 mem].

53. A. B. Dick Co. v. Fuller, 6 F. (2d) 393.

54. Davis, etc., Temperature Controlling Co. v. Tagliabue, 159 Fed. 712, 86 CCA 466; Miller Saw-Trimmer Co. v. Cheshire, 172 Wis. 278, 178 NW 855.

[a] **Transfer of inventions to be completed.**—In an assignment of all inventions which might thereafter be completed, the word "completed" was not used in the sense of "conceived;" but should be construed to mean the finishing or perfection of something already commenced. Davis, etc., Temperature Controlling Co. v. Tagliabue, 159 Fed. 712, 86 CCA 466.

[b] **Inventions not included in contract.**—A contract for the assignment of all paper-feeding mechanism during the life of a patent assigned by such contract for a similar mechanism to be attached to an existing press of specified type does not require the assignment of a paper-feeding mechanism, invented and designed as an integral part of a newly invented press of a different type. Miller Saw-Trimmer Co. v. Cheshire, 172 Wis. 278, 178 NW 855.

[c] **Estoppel.**—Where plaintiff had a contract with defendant whereby the latter was to assign future patents for paper-feeding mechanism to plaintiff, the refusal of plaintiff to assist defendant in developing a subsequent invention of a printing press did not estop plaintiff from claiming the right to the patent for the feeding mechanism on the new press, where the model exhibited to plaintiff showed no such mechanism, and plaintiff had no knowledge that defendant would embody such mechanism in his new press. Miller Saw-Trimmer Co. v. Cheshire, 172 Wis. 278, 178 NW 855.

55. Extensions of term generally see supra §§ 304–306.

Rights of licensees see infra § 429.

56. Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Johnson v. Wilcox, etc., Sewing Mach. Co., 27 Fed. 689, 23 Blatchf. 531; Bloomer v. Stolley, 3 F. Cas. No. 1,559, Fish. Pat. R. 376, 5 McLean 158; Brooks v. Bicknell, 4 F. Cas. No. 1,945, Fish. Pat. R. 65, 4 McLean 64; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215; Gibson v. Cook, 10 F. Cas. No. 5,393, 2 Blatchf. 144, Fish. Pat. R. 415; Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 3 Fish. Pat. Cas. 251, 2 Hughes 492; Jenkins v. Nicolson Pavement Co., 13 F. Cas. No. 7,273, 1 Abb. 567, 4 Fish. Pat. Cas. 201 [rev on other grounds 14 Wall. 452, 20 L. ed. 777]; Phelps v. Comstock, 19 F. Cas. No. 11,075, Fish. Pat. R. 215, 4 McLean 353; Waterman v. Wallace, 29 F. Cas. No. 17,261, 2 Bann. & A. 126, 13 Blatchf. 128; Woodworth v. Sherman, 30 F. Cas. No. 18,019, 2 Robb Pat. Cas. 257, 3 Story 171; Goodyear v. Day, 13 N. Y. Super. 154.

57. Johnson v. Wilcox, etc., Sewing Mach. Co., 27 Fed. 689, 23 Blatchf. 531; Bloomer v. Stolley, 3 F. Cas. No. 1,559, Fish. Pat. R. 376, 5 McLean 158; Mowry v. Grand St., etc., R. Co., 17 F. Cas. No. 9,893, 10 Blatchf. 89, 5 Fish. Pat. Cas. 586; Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385.

58. Nicholson Pav. Co. v. Jenkins, 14 Wall. (U. S.) 452, 20 L. ed. 777; Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Case v. Redfield, 5 F. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741; Chase v. Walker, 5 F. Cas. No. 2,630, 3 Fish. Pat. Cas. 120; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215; Gear v. Holmes, 10 F. Cas. No. 5,292, 6 Fish. Pat. Cas. 595; Goodyear v. Cary, 10 F. Cas. No. 5,562, 4 Blatchf. 271, 1 Fish. Pat. Cas. 424; Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201; Ruggles v. Eddy, 20 F. Cas. No. 12,117, 10 Blatchf. 52, 5 Fish. Pat. Cas. 581; Sayles v. Dubuque, etc., R. Co., 21 F. Cas. No. 12,417, 3 Bann. & A. 219, 5 Dill. 561; Thayer v. Wales, 23 F. Cas. No. 13,872, 5 Fish. Pat. Cas. 130; Wilson v. Turner, 30 F. Cas. No. 17,845, Fish. Pat. R. 28, Taney 278 [aff 4 How. 712, 11 L. ed. 1171].

59. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Adams v. Bridgewater Iron Co., 26 Fed. 324; Fire Extinguisher Mfg. Co. v. Graham, 16 Fed. 543; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Chase v. Walker, 5 F. Cas. No. 2,630, 3 Fish. Pat. Cas. 120; Day v. Union India-Rubber Co., 7 F. Cas. No. 3,691, 3 Blatchf. 488 [aff 20 How. 216, 15 L. ed. 883]; Van Hook v. Wood, 28 F. Cas. No. 16,855.

60. Hendrie v. Sayles, 98 U. S. 546, 25 L. ed. 176.

Transfer of future patents see supra § 375.

61. Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

62. Reissues generally see supra §§ 307–328.

63. Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Smith v. Mercer, 22 F. Cas. No. 13,078, 5 PaLJ 529; Gaylord v. Case, 5 Oh. Dec. (Reprint) 413, 5 AmLRec 494.

64. Burdell v. Denig, 4 F. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Meyer v. Bailey, 17 F. Cas. No. 9,516, 2 Bann. & A. 73.

65. American Steel Foundries v. Laughlin, 30 F. (2d) 39.

66. Vesting of title to patent upon its issuance in assignee of invention before issue of patent see supra § 364.

67. Curran v. Burdsall, 20 Fed. 835; Faulks v. Kamp, 3 Fed. 898, 17 Blatchf. 432; Sherman v. Champlain Transp. Co., 31 Vt. 162. See Union Switch, etc., Co. v. Day, 16 F. (2d) 4 [certiorari den 273 U. S. 756 mem, 47 SCt 459 mem, 71 L. ed. 876 mem] (inventor, abandoning application for patent after assignment, and later securing one for same invention in own name, acquires same for benefit of assignee).

Implied warranty of title see supra § 388.

68. See supra § 390 text and note 30.

69. Perry v. Corning, 19 F. Cas. No. 11,004, 7 Blatchf. 195.

fied in the assignment.[70] But when the assignment includes, expressly or impliedly, all claims for past infringements, the assignee may sue therefor,[71] although there is authority to the contrary.[72] Mere intention, however, not signified in the assignment, to include therein claims for infringements previously committed, will not suffice to invest the assignee with any title to those claims.[73]

Conveyances of patent rights pendente lite do not affect the litigation, the courts being careful to protect the rights of the parties.[74] In such case, however, notice of the transfer should be given to defendant in order that he may not pay the wrong party.[75]

[§ 396] **(7) Rights of Action for Future Infringement.** Damages and profits for future infringements are incident to and accompany a patent on its assignment, unless separated by an express reservation.[76]

[§ 397] **e. Conditions, Covenants, and Restrictions.**[77] Conditions precedent in an assignment of a patent must be performed before an assignment will become operative.[78] But conditions in an assignment do not prevent it from operating as an absolute assignment where they are conditions subsequent.[79] For nonperformance of conditions, a forfeiture may be enforced; but, in the case of a condition subsequent, the title which had theretofore vested remains in the assignee until the forfeiture is enforced.[80] If it is so stipulated by the parties, however, the title will revert to the assignor by operation of law, upon the event of a condition subsequent.[81] A clause providing for forfeiture in such case will be strictly construed in favor of the assignee.[82] In the absence of express agreement, there can be no forfeiture for mere nonpayment of royalties which are the consideration for an assignment.[83] Forfeitures are not favored, and any inconsistent acts or dealings will be regarded as a waiver.[84]

Covenants and restrictions.[85] The operation and effect of covenants and restrictions contained in an assignment of a patent depend upon the construction of the language of the covenant in each particular case.[86]

[§ 398] **f. Rights, Duties, and Liabilities of As-**

70. Moore v. Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Chemical Foundation, Inc. v. De Nemours, 29 F. (2d) 597; Eveland v. Detroit Mach. Tool Co., 18 F. (2d) 968; Herman v. Detroit Shipbuilding Co., 295 Fed. 423; Johnston v. Southern Well Works Co., 208 Fed. 145, 125 CCA 361; Auto Spring Repairer Co. v. Grinberg, 196 Fed. 52; Canda v. Michigan Malleable Iron Co., 152 Fed. 178, 81 CCA 420; Leadam v. Ringgold, 140 Fed. 611; Superior Drill Co. v. Ney Mfg. Co., 98 Fed. 734; Jones v. Berger, 58 Fed. 1006; Emerson v. Hubbard, 34 Fed. 327; Kaolatype Engraving Co. v. Hoke, 30 Fed. 444; May v. Juneau County, 30 Fed. 241 [aff 137 U. S. 408, 11 SCt 102, 34 L. ed. 729]; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 24 Fed. 604; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519; Dibble v. Augur, 7 F. Cas. No. 3,879, 7 Blatchf. 86; Sir W. G. Armstrong Whitworth & Co., Ltd. v. Norton, 15 App. (D. C.) 223. See Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516; U. S. v. Loughrey, 172 U. S. 206, 19 SCt 153, 43 L. ed. 420 (dicta).

[a] **In England** assignment of a patent does not carry the right to sue for infringement. Elwood v. Christy, 18 C. B. N. S. 494, 114 ECL 494, 144 Reprint 537.

Who may sue for infringement generally see infra §§ 540-543.

71. Chemical Foundation, Inc. v. De Nemours, 29 F. (2d) 597; American Bank Protection Co. v. Johnson City Nat. Bank, 181 Fed. 375; May v. Logan County, 30 Fed. 250; Adams v. Bellaire Stamping Co., 25 Fed. 270; Consolidated Oil Well Packer Co. v. Eaton, 12 Fed. 865; Spring v. Domestic Sewing Mach. Co., 13 Fed. 446; Merriam v. Smith, 11 Fed. 588; Hamilton v. Rollins, 11 F. Cas. No. 5,988, 3 Bann. & A. 157, 5 Dill. 495; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37.

Assignability of right to sue for infringements without transfer of patent see supra § 366.

Assignment after expiration of patent see supra § 385.

72. Sir W. G. Armstrong Whitworth & Co., Ltd. v. Norton, 15 App. (D. C.) 223.

73. Emerson v. Hubbard, 34 Fed. 327.

74. Ross v. Ft. Wayne, 63 Fed. 466, 11 CCA 288; Campbell v. James, 2 Fed. 338, 18 Blatchf. 92 [rev on other grounds 104 U. S. 356, 26 L. ed. 786].

75. Gear v. Fitch, 10 F. Cas. No. 5,290, 3 Bann. & A. 573.

76. Chemical Foundation, Inc. v. De Nemours, 29 F. (2d) 597. See Canda v. Michigan Malleable Iron Co., 152 Fed. 178, 81 CCA 420 (damages for infringements accruing after transfer allowed).

77. Covenants and conditions as monopolies in restraint of trade see Contracts § 424; Monopolies §§ 124, 137.

78. Burpee v. Guggenheim, 226 Fed. 214; Arnold Monophase Electric Co. v. Wagner Electric Mfg. Co., 148 Fed. 234; Grier v. Baynes, 49 Fed. 363; Hull v. Pitrat, 45 Fed. 94 [aff 145 U. S. 650 mem, 12 SCt 986 mem, 36 L. ed. 847 mem]; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Kittle v. Frost, 14 F. Cas. No. 7,856, 9 Blatchf. 214, 5 Fish. Pat. Cas. 213; Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290; Thourot v. Holub, 81 App. Div. 634, 80 NYS 1083.

79. U. S.—Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Boesch v. Graff, 133 U. S. 697, 10 SCt 378, 33 L. ed. 787; Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Green v. Le Clair, 24 F. (2d) 74; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Janney v. Pancoast International Ventilator Co., 122 Fed. 535; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242; Holmes v. McGill, 108 Fed. 238, 47 CCA 296; Platt v. Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 CCA 357; Jonathan Mills Mfg. Co. v. Whitehurst, 56 Fed. 589; Bracher v. Hat-Sweat Mfg. Co., 49 Fed. 921; Andrews v. Fielding, 20 Fed. 123; Buckley v. Sawyer Mfg. Co., 7 Fed. 358, 2 McCrary 350; Abbett v. Zusi, 1 F. Cas. No. 7, 5 Bann. & A. 38; Day v. Stellman, 7 F. Cas. No. 3,690, 1 Fish. Pat. Cas. 487.

Ill.—Angell v. Jewett, 58 Ill. A. 596.

Mich.—Church v. Anti-Kalsomine Co., 138 Mich. 211, 101 NW 230.

Mo.—Ford v. Dyer, 148 Mo. 528, 49 SW 1091.

N. J.—Scheurle v. Husbands, 65 N. J. L. 681, 48 A 1118.

Pa.—Bell Tel. Co. v. Com., 2 Pa. Cas. 299, 3 A 825.

Wis.—Tecktonius v. Scott, 110 Wis. 441, 86 NW 672.

Eng.—Cartwright v. Amatt, 2 B. & P. 43, 126 Reprint 1145.

[a] **A clause appointing the assignee attorney of the patentee,** with authority to use his name whenever he may deem proper in the management of the business, does not restrict the interest or power of the assignee. Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888.

Transfers in trust or by way of mortgage as assignments generally see supra § 368.

80. Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Stanley Rule, etc., Co. v. Bailey, 22 F. Cas. No. 13,287, 3 Bann. & A. 297, 14 Blatchf. 510; Rogers v. Garland, 19 D. C. 24; Telegraphone Corp. v. Telegraphone Co., 103 Me. 444, 69 A 767. See Andrews v. Fielding, 20 Fed. 123 (court decrees reconveyance under covenant to do so upon event of condition in agreement).

Actions for rescission or cancellation see infra § 406.

81. Standard Asphalt, etc., Co. v. Barber Asphalt Pav. Co., 240 Fed. 749; Pierpoint Boiler Co. v. Penn Iron, etc., Co., 75 Fed. 289.

82. Atkins v. Parke, 61 Fed. 953, 10 CCA 189.

83. Barclay v. Charles Roome Parmele Co., 70 N. J. Eq. 218, 61 A 715 [aff 71 N. J. Eq. 769, 71 A 1133].

84. Haserot v. Keller, 67 Cal. A. 659, 228 P 383.

85. Express warranties see supra § 387.

86. See cases infra this note.

[a] **Particular stipulations construed:** (1) Putting apparatus into practical use after test. Neenan v. Otis El. Co., 180 Fed. 997 [aff 194 Fed. 414, 114 CCA 376]. (2) Recital that invention has been made on which valid patents can be obtained. Porter v. Thoens, 180 NYS 733. (3) Agreement to refrain from directly or indirectly selling or licensing the sale of geared brakes in certain countries. National Brake Co. v. Ackley, 80 Misc. 251, 140 NYS 1091. (4) An agreement, to prosecute applications for patents, a proposed interference proceeding between the applications and a patent assigned to a third person, and an infringement suit against the third person in case patents were issued. Strauss v. Dilg, 140 App. Div. 424, 125 NYS 363. (5) Assignment of a patent to plaintiff, to be held in trust and assigned by him to a corporation, organized, or to be organized, whenever the parties might deem it advisable, for the purpose of manufacturing the article contemplated by the patent, plaintiff to furnish the capital needed for the enterprise in payment for a half interest in the patent, and to hold the title in trust during such time as the parties might deem advisable. Niles v. Graham, 181 Mass. 41, 62 NE 986. (6) Condition that the assignee shall account for his sales of the invention, with a covenant that the lapse of the patent shall give him the right to terminate the contract forthwith. Mergenthaler Linotype Co. v. Dougall, 32 Que. Super. 187, 3 EastLR 292. (7) Other covenants and restrictions. Wadsworth v. Pressed Prism Plate Glass Co., 239 Fed. 507, 152 CCA 385

signees and Grantees[87]**—(1) In General.** In the absence of express contract the assignee of a patent assumes no affirmative obligation to make good the previous contracts of his assignor,[88] but he may do so by express contract,[89] in which case the invalidity of the patent is no defense to actions against him on the contract.[90] The purchaser of a patent is chargeable with the laches of his vendor as to the assertion of claims in the patent office.[91]

[§ 399] **(2) Liability for Consideration.**[92] In the absence of fraud or warranty the assignee of a patent right cannot refuse to make the payments agreed upon merely because the patent is found to be invalid,[93] or because the patented device infringes another patent;[94] but he may refuse where there is a total failure of consideration flowing from the assignor, as where the patented device is inoperative, useless, and wholly valueless.[95] But in order to sustain the defense of want of consideration it is not enough that the practical utility of the patent be limited, or that the manufactured article cannot be manufactured and sold at a profit, if it be capable of use.[96] A breach of a warranty given on the sale of a patent right is equivalent to a failure of consideration and furnishes a good defense to an action for the price.[97] Where the assignor represents that a patent has been issued, and no patent has in fact been issued, the assignee may defend an action for the price on the ground of failure of consideration.[98] The rule that a purchaser of personalty cannot defend an action for the purchase price on the ground that the vendor had no title, as long as he remains in possession and is not evicted by a paramount title,[99] does not apply to a sale of a patent or an interest therein, as a patent is intangible and incorporeal in its nature,[1] and the vendee cannot be said to be in possession, so that the reason for the rule ceases.[2] The agreement between the parties may require performance of conditions precedent to the creation of the assignee's liability for the purchase money,[3] but the assignee cannot refuse to pay the agreed consideration where nonperformance of such

(under contract assigning patents and reserving royalties, nonuser does not entitle patentee to reassignment); Bracher v. Hat-Sweat Mfg. Co., 49 Fed. 921 (as to retention of assignor in employment of assignee); Scheurle v. Husbands, 65 N. J. L. 40, 46 A 759 [aff 65 N. J. L. 681, 48 A 1118] (as to alternative provision for payment); Bell Tel. Co. v. Com., 2 Pa. Cas. 299, 3 A 825 (as to competition by assignee); Tecktonius v. Scott, 110 Wis. 441, 86 NW 672 (as to competition).

87. **Rights and interest conveyed** see supra § 390.

88. New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534; Bradford Belting Co. v. Kisinger-Ison Co., 113 Fed. 811, 51 CCA 483; Mueller v. Mueller, 95 Fed. 155, 37 CCA 392; Bryant v. Smith, 57 Cal. A. 214, 206 P 1025; Courter v. Crescent Sewing Mach. Co., 60 N. J. Eq. 413, 45 A 609; New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

89. Edwards v. Smith, 63 Mo. 119.

90. Edwards v. Smith, supra.

91. Westinghouse Electric, etc., Co. v. Jeffrey-De Witt Insulator Co., 22 F. (2d) 277.

92. **Actions to recover consideration for transfer** see infra § 402.

93. U. S.—Eclipse Bicycle Co. v. Farrow, 199 U. S. 581, 26 SCt 150, 50 L. ed. 317; Wilson v. Simpson, 9 How. 109, 13 L. ed. 66; Milligan v. Lalance, etc., Mfg. Co., 21 Fed. 570.

Conn.—Fowler v. Mallory, 53 Conn. 420, 3 A 560; Johnson v. Willimantic Linen Co., 33 Conn. 436.

Ill.—Dillman v. Nadelhoffer, 19 Ill. A. 375 [aff 119 Ill. 567, 7 NE 88].

Ind.—Detrick v. McGlone, 46 Ind. 291.

Md.—Schwarzenbach v. Odorless Excavating Apparatus Co., 65 Md. 34, 3 A 676, 57 AmR 301.

Mass.—Ryan v. Reed, 165 NE 396; Gilmore v. Aiken, 118 Mass. 94.

Mich.—Thomson Spot Welder Co. v. Oldberg Mfg. Co., 234 Mich. 317, 319, 207 NW 828 [quot Cyc].

Minn.—Clark v. Smith, 21 Minn. 539.

Mo.—Edwards v. Smith, 63 Mo. 119.

N. Y.—McGill v. Holmes, 168 N. Y. 647, 61 NE 1131; Saxton v. Dodge, 57 Barb. 84.

N. C.—Cansler v. Eaton, 55 N. C. 499; Hiatt v. Twomey, 21 N. C. 315.

[a] **In England,** in the absence of warranty, invalidity is no defense. Smith v. Neale, 2 C. B. N. S. 67, 89 ECL 67, 140 Reprint 337; Hall v. Conder, 2 C. B. N. S. 22, 89 ECL 22, 140 Reprint 318, 20 ERC 747; Lawes v. Purser, 6 E. & B. 930, 88 ECL 930, 119 Reprint 1110; Smith v. Buckingham, 21 L. T. Rep. N. S. 819; Hayne v. Maltby, 3 T. R. 438, 100 Reprint 665; Liardet v. Hammond Electric Light, etc., Co., 31 Wkly. Rep. 710.

[b] **In Canada** (1) in the absence of warranty, invalidity is no defense. Vermilyea v. Canniff, 12 Ont. 164; Owens v. Taylor, 29 Grant. Ch. 210.

94. Horne v. Hoyle, 27 Fed. 216; Fowler v. Mallory, 53 Conn. 420, 3 A 560; Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118; Standard Button Fastening Co. v. Harney, 155 Mass. 507, 29 NE 1148.

[a] **Adjudication of infringement may be essential** under terms of contract between parties, in order to establish defense in action for price. Tinsman v. Independent Harvester Co., 205 Ill. A. 239.

95. Ind.—Mooklar v. Lewis, 40 Ind. 1.

Kan.—Sturgis First Nat. Bank v. Peck, 8 Kan. 660.

Md.—Groff v. Hansel, 33 Md. 161.

Mass.—Bliss v. Negus, 8 Mass. 46; Lester v. Palmer, 4 Allen 145; Bierce v. Stocking, 11 Gray 174; Dickinson v. Hall, 14 Pick. 217, 25 AmD 363.

Mo.—Jolliffe v. Collins, 21 Mo. 338.

N. H.—Dunbar v. Marden, 13 N. H. 311.

N. Y.—McDougall v. Fogg, 15 N. Y. Super. 387; Cross v. Huntly, 13 Wend. 385. See Herzog v. Heyman, 151 N. Y. 587, 45 NE 1127, 56 AmSR 646 (dictum, decision being based on existence of warranty of validity).

Oh.—Sunderland v. Barnes, 23 Oh. Cir. Ct. N. S. 477.

Pa.—Geiger v. Cook, 3 Watts & S. 266.

Vt.—Clough v. Patrick, 37 Vt. 421; Cragin v. Fowler, 34 Vt. 326, 80 AmD 680.

Wash.—Craddick v. Emery, 93 Wash. 648, 161 P 484.

Wis.—Rowe v. Blanchard, 18 Wis. 441, 86 AmD 783.

Transfer of patent as consideration for bill or note see Bills and Notes §§ 361, 362.

Want of consideration as defense to bill or note given for transfer of patent see Bills and Notes §§ 1017–1023.

Utility as essential to validity of patent see supra §§ 58–66.

96. Ind.—Hunter v. McLaughlin, 43 Ind. 38.

Me.—Elmer v. Pennel, 40 Me. 430.

Mass.—Howe v. Richards, 102 Mass. 64.

Minn.—Van Norman v. Barbeau, 54 Minn. 388, 55 NW 1112.

N. C.—Fair v. Shelton, 128 N. C. 105, 38 SE 290.

97. McClure v. Jeffrey, 8 Ind. 79; Hawes v. Twogood, 12 Iowa 582; Scott v. Sweet, 2 Greene (Iowa) 224; Groff v. Hansel, 33 Md. 161; Herzog v. Heyman, 151 N. Y. 587, 45 NE 1127, 56 AmSR 646.

[a] **Warranty of validity.**—Where a court of competent authority has declared a patent void, and has enjoined the manufacture and sale of the article patented, the purchaser of the patent may defend an action for the price on the ground of want of consideration, where the contract between the parties is construed to warrant the validity of the patent. Herzog v. Heyman, 151 N. Y. 587, 45 NE 1127, 56 AmSR 646.

[b] **Warranty of novelty and utility.**—Where the assignment contains a warranty that the invention is new and useful, the fact that it is neither is a good defense to an action for the price. McClure v. Jeffrey, 8 Ind. 79.

[c] **Warranty of utility.**—Breach of warranty of utility is a defense as a failure of consideration in an action for price. Scott v. Sweet, 2 Greene (Iowa) 224; Groff v. Hansel, 33 Md. 161.

Express warranties see supra § 387.

98. Brown v. Wright, 17 Ark. 9.

99. See Sales [35 Cyc 541 note 74].

1. **Nature of patent right** see supra §§ 1–8.

2. Columbia County Bank v. Emerson, 101 Ark. 331, 142 SW 852.

3. U. S.—Paine v. Parkhurst, 205 Fed. 740, 126 CCA 195; Childs v. Le Brocq, 178 Fed. 719, 102 CCA 211.

Colo.—Strauss v. Brier, 57 Colo. 65, 140 P 183.

Md.—Jones v. Boardman, 148 Md. 147, 128 A 752.

Minn.—Rentz v. Hurst, 157 Minn. 81, 195 NW 771.

Mo.—Sparks v. Gus V. Brecht Butchers' Supply Co., (A.) 225 SW 1022.

N. Y.—Manvel v. Holdredge, 45 N. Y. 151; Ficklen v. F. William Stocker, Inc., 166 NYS 854.

[a] **Rule applied.**—Contract for sale of patent required decision by buyers that invention was practical as a condition precedent to any liability on their part. Peck v. Edwards, 90 Conn. 669, 98 A 325.

[b] **Sale of securities.**—Payment of the purchase price may be conditioned on the obtaining of money from the sale of the securities of a projected corporation to be formed by the transferees. Jones v. Boardman, 148 Md. 147, 128 A 752.

[c] **Liability conditioned on existence of profits.**—(1) Where defendants contracted with plaintiff that they would at their own expense apply for a patent for an article invented by plaintiff, and, as soon as a patent was issued and a satisfactory practical demonstration had, would pay plaintiff five hundred dol-

conditions is due to the assignee's own conduct,[4] or is not due to any default of the assignor.[5] The event of conditions upon which the assignee's agreement to pay the agreed consideration is based fixes his liability therefor,[6] and he cannot then avoid payment on the ground of defects in the assignor's title in the absence of an express warranty of title.[7] Where before the issuance of letters patent an inventor assigned his right, but the assignment was refused recordation in the patent office, and the patent issued in the name of the inventor, who made no claim to it and offered to convey to the assignee, the latter cannot defeat an action for the purchase money.[8] Where a patent is issued, the fact that it was not issued when contemplated by the parties will not constitute a defense to an action for the purchase price.[9] The assignee's liability to pay a stipulated consideration periodically continues as long as the agreement remains in force.[10] An agreement to pay the assignor an "annuity" to continue during the life of the patent does not limit such payment to the life of the assignor, and the assignee is liable therefor after the assignor's death to his personal representatives as long as the patent remains in force.[11]

[§ 400] **(3) Right to Return of Consideration Paid.** Since no warranty of validity is implied in the sale of a patent right,[12] the purchaser of such a right cannot, in the absence of fraud, and without an express covenant, recover of his vendor the price paid for it, because it is found to be invalid.[13]

But under the implied warranty that a patent has been issued in due form,[14] the assignee may recover back the purchase money paid where no patent had in fact been issued at the time of the assignment.[15] And he may recover back the purchase money if the patent right was not that which he agreed to buy,[16] unless he has accepted a deed describing the patent.[17] If a patentee elects to rescind a contract of sale for nonpayment of the whole purchase price, the vendee is entitled to recover back the amount paid on the contract.[18]

Fraud.[19] The assignee of a patent has a right to recover the purchase money paid for the transfer

lars, and the profits on the patented article sold until he had received twenty-five hundred dollars, for his invention, and they made two applications for a patent, both of which were rejected, but one of defendants subsequently obtained a patent for a similar article, and not profits were made from its sale, however, and it proved commercially a failure, in an action on the contract by plaintiff, claiming that such patent embodied his invention, there can be no recovery beyond five hundred dollars, because further payment was contingent on the making of profits. Childs v. Le Brocq, 178 Fed. 719, 102 CCA 211. (2) A patentee, suing a manufacturer for the amount due under a contract to assign a future patent, giving the patentee a specified per cent of the "net amount realized," was not entitled to recover under stipulation of facts that the manufacturer "did not make or realize any profit," the words "net amount realized" meaning "net profits." Sparks v. Gus V. Brecht Butchers' Supply Co., (Mo. A.) 225 SW 1022.

[d] **Condition that seller work for buyer.**—Where it was an essential condition of a contract of sale of a patent right that the seller work for the buyers in the manufacture of the patented article, but he breached his contract, and the buyers could not get the requisite skilled service, and the project failed, the seller cannot recover the purchase money. Rentz v. Hurst, 157 Minn. 81, 195 NW 771.

[e] **Delivery of original letters patent.**—A provision in a contract for the sale of a patent, requiring the delivery of the original letters patent, is material, and their delivery or tender is a condition precedent to the creation of any liability of the purchaser for the purchase price. Paine v. Parkhurst, 205 Fed. 740, 126 CCA 195.

[f] **Tender of conveyance.**—One suing for the balance due under an agreement for the sale of patent rights must show a tender of a conveyance of the rights as agreed in order to recover. Strauss v. Brier, 57 Colo. 65, 140 P 183.

[g] **Option to pay or reassign.**—Where, in consideration of the assignment to him by plaintiff of an interest in a patent, defendant bound himself to pay plaintiff a thousand dollars before the end of the next year "or reassign the patent," the year having elapsed without payment, and defendant having, a few days thereafter, on the money being demanded, offered to reassign, no action lies against him upon his obligation to recover the thousand dollars, for, by its terms, he had the option during the whole year to pay the price, and, upon his failure to do so within that time, plaintiff's only remedy was to compel the reassignment, or, in case of refusal, to recover whatever might be its value. Manvel v. Holdredge, 45 N. Y. 151.

4. Adamson v. Alexander Milburn Co., 275 Fed. 148. See Pennsylvania Re-Treading Tire Co. v. Goldberg, 305 Ill. 54, 137 NE 81 (contract for sale of patent and payment in corporate stock).

[a] **Illustration.**—Where payment of a cash consideration for patent rights and rights under the pending application and future improvements conceived by the inventor was made conditional on an agreement by the purchaser's attorneys as to the breadth and patentability of the claims, the failure of the attorneys to reach such agreement was no defense in the seller's action for such consideration, where the purchaser's acts of intervention had prevented them from reaching such an agreement. Adamson v. Alexander Milburn Co., 275 Fed. 148.

5. Adamson v. Alexander Milburn Co., supra.

[a] **Illustrations.**—A purchaser who had agreed to pay a cash consideration for patent rights and rights under a pending application and future improvements conceived by the inventor, on the agreement of his attorneys as to the breadth and patentability of the claims, could not withhold payment on the plea that the condition precedent had not been complied with, if the attorneys had, without reason, refused to examine into the merits or had withheld their assent on fictitious or unreasonable grounds. Adamson v. Alexander Milburn Co., 275 Fed. 148. (2) A purchaser in such case could not withhold payment on the plea that the condition precedent had not been complied with, if the attorneys had without reason refused to examine into the merits or had withheld their assent on fictitious or unreasonable grounds. Adamson v. Alexander Milburn Co., supra.

6. Davis v. Hammond, 75 Mich. 1, 42 NW 690; Sparks v. Gus V. Brecht Butchers' Supply Co., (Mo. A.) 225 SW 1022; Electric Accessaries Co. v. Mittenthal, 146 App. Div. 647, 131 NYS 433; Ficklen v. F. William Stocker, Inc., 166 NYS 854; McMillan v. Davis, 54 Pa. Super. 154.

[a] **In England** (1) the assignor of a patent has a lien upon the patent for unpaid minimum royalties under an assignment providing for the payment of such royalties, and this lien may be asserted against a purchaser with notice from the original assignee. Dansk Rekylriffel Syndikat v. Snell, [1908] 2 Ch. 127. (2) In such case the assignor cannot recover damages against the original assignee and at the same time retain his lien under the agreement, but he can claim against the assignee for unpaid consideration, and upon that claim is entitled to an account of what is due him for royalties. Dansk Rekylriffel Syndikat v. Snell, supra.

7. Davis v. Hammond, 75 Mich. 1, 42 NW 690.

8. Indiana Mfg. Co. v. Swift, 185 Ind. 616, 114 NE 214.

Ownership of patents generally see supra § 364.

9. Read v. Bowman, 2 Wall. (U. S.) 591, 17 L. ed. 812.

10. Williams v. Knipps, 213 Mass. 534, 100 NE 666.

[a] **Illustration.**—A contract providing to pay plaintiff twelve dollars a week salary and stipulating to pay the expenses of procuring patents remains in force until the stipulation is complied with by defendant, or performance becomes impossible, and defendant has no right to terminate the contract. Williams v. Knipps, 213 Mass. 534, 100 NE 666.

11. Dancel v. Goodyear Shoe-Mach. Co., 109 Fed. 333.

12. See supra §. 388 text and note 5.

13. Schwarzenbach v. Odorless Excavating Apparatus Co., 65 Md. 34, 3 A 676, 57 AmR 301; Foss v. Richardson, 15 Gray (Mass.) 303; Holden v. Curtis, 2 N. H. 61; Case v. Morey, 1 N. H. 347; Cansler v. Eaton, 55 N. C. 499; Hiatt v. Twomey, 21 N. C. 315.

14. See supra § 388 text and note 4.

15. Shepherd v. Jenkins, 73 Mo. 510.

16. Foss v. Richardson, 15 Gray (Mass.) 303; Magnusson v. Tanzy, 85 Wash. 561, 148 P 883. See Burrall v. Jewett, 2 Paige (N. Y.) 134 (right to recover money paid for transfer where transaction founded on mistake of fact).

[a] **In Canada** (1) where the assignor agrees to secure a United States patent on a particular machine, but the patent varies from the description in the assignment, the assignee may counterclaim for the amount he has paid in the assignor's action for the balance of the purchase price. Bingham v. McMurray, 30 Can. S. C. 159. (2) In such case there can be no counterclaim for the Canadian patent, accepted by the assignee who operated thereunder, although the patent varies from the description in the assignment. Bingham v. McMurray, supra.

17. Foss v. Richardson, 15 Gray (Mass.) 303.

18. Bellis v. Henwood, 6 Pa. Co. 78.

19. Fraud as basis for action to rescind see infra § 405.

where he disavows the transaction upon discovering that material representations made by the assignor were false.[20]

[§ 401] **10. Transfer by Succession or Inheritance.**[21] Upon the death of the patentee the patent vests in the administrator or executor and not in the heirs.[22]

[§ 402] **11. Actions[23]—a. To Recover Consideration for Transfer.** General rules[24] govern the sufficiency of the complaint in an action to recover the consideration for the assignment of a patent.[25]

Evidence. General rules apply[26] as to the admissibility[27] and as to the weight and sufficiency[28] of evidence in actions to recover the consideration for the transfer of a patent.

Instructions.[29] An instruction which states the issues, theories, and defenses raised by the evidence is sufficient.[30]

Questions for jury.[31] In actions to recover the consideration for the assignment of a patent, questions of fact are for the jury.[32]

[§ 403] **b. For Damages.** Either party to the assignment of a patent may recover damages for a breach of a condition or covenant.[33] An action may be brought against assignors jointly, although separate notes have been given to them for their shares of the purchase price.[34] A sale of a void patent right upon false representations that it is valid is a fraud for which an action will lie.[35]

Questions for jury. In an action for damages for breach of contract for the transfer of a patent, questions of fact are for the jury.[36]

Damages. In a tort action for damages for defendant's wrongful appropriation of plaintiff's invention, based upon defendant's having secured a patent for an invention embodying plaintiff's invention which had been the subject of a prior agreement between the parties as to its transfer, the measure for the buyer, is sufficient as against defendant's contention that the court failed to charge breach of an implied warranty where there was no evidence to sustain such contention. Leese v. Bernard Gloekler Co., 287 Pa. 295, 135 A 206.

20. Spicer v. Hurley, 161 Cal. 1, 118 P 249.

[a] **Illustrations.**—(1) Approval of an application for a patent is not the equivalent of a patent granted and issued as represented by the assignor in a contract for the sale of an interest in a patent granted and issued, the term "patented" meaning the actual issuance of a patent by the government; and the assignor's representations are therefore false. Spicer v. Hurley, 161 Cal. 1, 118 P 249. (2) In such case the fact that subsequent to the rescission and the action patents have been actually granted does not affect the buyer's right. Spicer v. Hurley, supra. (3) In such case, the fact that under the bill of sale the buyer acquired an interest recognized in equity did not preclude him from recovering the price paid. Spicer v. Hurley, supra.

21. Power of executor or administrator to assign see supra § 371.

Rights of heirs and personal representatives as to issuance of patent see supra §§ 139, 140.

22. Bradley v. Dull, 19 Fed. 913; Shaw Relief Valve Co. v. New Bedford, 19 Fed. 753; Hodge v. North Missouri R. Co., 12 F. Cas. No. 6,561, 1 Dill. 104, 4 Fish. Pat. Cas. 161.

[a] **In England** the surviving partner takes patent. Smith v. London, etc., R. Co., 2 E. & B. 69, 75 ECL 69, 118 Reprint 694.

23. Specific performance of agreements and assignments see Specific Performance [36 Cyc 558].

24. Pleading generally see Pleading [31 Cyc 1].

25. See cases infra this note.

[a] **Implied promise.**—A declaration in such an action sufficiently states a cause of action where it depends on an implied promise to pay for the transfer. Beaudry v. Hamel Shoe Mach. Co., 235 Mass. 503, 126 NE 778.

[b] **Complaint held sufficient.**—(1) In an action on a contract obligating plaintiff to assign to defendant, on request, "all inventions and letters patent" obtained by plaintiff which may be useful in defendant's business, and requiring defendant to pay plaintiff one half the net profits arising from the sale of goods manufactured under the patents, a complaint which alleges that plaintiff assigned the patents, and that defendants used them, and made net profits by such use, is sufficient, without also alleging an assignment of "all inventions," since the court cannot assume that defendant requested their assignment, and that plaintiff refused. Dalzell v. Fahy's Watch Case Co., 138 N. Y. 285, 33 NE 1071. (2) An allegation that the patents were assigned to "defendant, or for its use," shows a sufficient compliance with the contract requiring the assignment to be made to defendant, where it is further alleged that the assignment was made at defendant's request. Dalzell v. Fahy's Watch Case Co., supra.

[c] **Complaint held not to state cause of action.**—Where a complaint alleged an assignment of a patent by intestate to defendant's assignor in consideration of such assignor's agreement to pay intestate in each year, while the patent should remain in force, a certain annuity, and that defendant had succeeded to all the property of its assignor, including the patent, and had assumed all its obligations, which it fulfilled during intestate's life, but had since refused, but failed to allege any contract between intestate and defendant, it did not state a cause of action. Dancel v. United Shoe Mach. Co., 120 Fed. 839.

26. See Evidence §§ 89-1806.

27. See cases infra this note.

[a] **Evidence held admissible** (1) in an action to recover consideration paid, to show that defendant was not the seller. Kaufman v. Christy, 95 Kan. 554, 148 P 617. (2) Where the assignor conveys "all his right, title, and interest" in the invention, and the interest intended to be conveyed is not specified, parol evidence is admissible to show its extent. Horne v. Chatham, 64 Tex. 36.

[b] **Evidence held inadmissible:** (1) Parol evidence of warranty. Rose v. Hurley, 39 Ind. 77; Johnson v. McCabe, 37 Ind. 535; McClure v. Jeffrey, 8 Ind. 79; Jolliffe v. Collins, 21 Mo. 338; Reed v. Van Ostrand, 1 Wend. (N. Y.) 424, 19 AmD 529. (2) Evidence of slight value. Vaughan v. Porter, 16 Vt. 266. (3) Proof that a patent is void for infringement is not admissible in a suit upon a note given for its conveyance, unless that fact has been determined by a competent court. Elmer v. Pennel, 40 Me. 430.

28. See cases infra this note.

[a] **Evidence held sufficient:** (1) To show that the seller's representations that the patents were issued to him were untrue, and known by him to be untrue. Spicer v. Hurley, 161 Cal. 1, 118 P 249. (2) To support a recovery of the sum defendant agreed to pay for the transfer upon the organization of a company to manufacture and sell the patented invention; as against the objection that the patents were worthless and the company organized to manufacture machines under different patents. Brandt v. Computing Cloth Measuring Mach. Co., 27 Ga. A. 704, 109 SE 694 [transf 151 Ga. 583, 108 SE 61].

29. Instructions generally see Trial [38 Cyc 1594-1818].

30. Leese v. Bernard Gloekler Co., 287 Pa. 295, 135 A 206.

[a] **Instructions held sufficient.**—An instruction that, if the patent had no value, the verdict should be

31. Questions for court and jury generally see Trial [38 Cyc 1511-1593].

32. See cases infra this note.

[a] **Questions held for jury:** (1) Question of utility of patent. Rowe v. Blanchard, 18 Wis. 441, 86 AmD 783. (2) Whether there was fraud or warranty in the sale, and, if either, what was the value of the right sold. Fowler v. Swift, 3 Ind. 188.

33. Ga.—Barrett v. Verdery, 93 Ga. 546, 21 SE 64; Hornsby v. Butts, 85 Ga. 694, 11 SE 846.

Ill.—Lord v. Owen, 35 Ill. A. 382.

Ind.—Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322.

Mass.—Weed v. Draper, 104 Mass. 28.

Mo.—Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 SW 1008.

N. J.—Johnson v. Johnson R. Signal Co., 57 N. J. Eq. 79, 40 A 193.

N. Y.—Warth v. Liebovitz, 179 N. Y. 200, 71 NE 734; Kirschmann v. Lediard, 61 Barb. 573; Brusie v. Peck, 16 NYS 648 [rev on other grounds 135 N. Y. 622, 32 NE 76].

Tex.—Clark v. Cyclone Woven Wire Fence Co., 22 Tex. Civ. A. 41, 54 SW 392.

Vt.—Vaughan v. Porter, 16 Vt. 266.

34. Myrick v. Purcell, 99 Minn. 457, 109 NW 995.

35. Bull v. Pratt, 1 Conn. 342.

Fraud as basis for:

Recovery of consideration paid see supra § 400.

Rescission see infra § 405.

36. See cases infra this note.

[a] **Questions held for jury.**—(1) In an action for breach of contract to pay plaintiffs a cash consideration for patent rights and rights under a pending application and future improvements conceived by the inventor, on an agreement by defendant's attorneys as to the breadth and patentability of the claims, the question whether the attorneys had in fact agreed as to the breadth and patentability of the claims is held for the jury. Adamson v. Alexander Milburn Co., 275 Fed. 148. (2) In such an action the question of whether a sufficient time had elapsed for the attorneys to make the necessary investigations and agree as to the breadth and patentability of the claims is for the jury. Adamson v. Alexander Milburn Co., supra. (3) In such an action, the question of whether there was such a failure in the breadth and patentability of the claims as would not protect the purchaser of the patent in the manufacture, sale, and use

of damages is the value of plaintiff's invention.[37] In such an action the price fixed by the parties in the agreement is not evidence of the actual value of the invention.[38]

[§ 404] **c. Equitable Relief[39]—(1) In General.** A corporation which takes an assignment of a patent and proceeds to manufacture and sell the patented invention with knowledge of a prior contract for exclusive rights under the patent with another is liable for an accounting for profits.[40] Where the allegations of a complaint are insufficient to state a cause of action at law to recover the consideration for the transfer of a patent,[41] they may nevertheless be sufficient to entitle plaintiff to a decree in equity for payment of the amount due.[42]

[§ 405] **(2) Rescission and Cancellation[43]—(a) For Fraud.** In the absence of warranty equity can give no relief to the assignee of a patent found to be void unless fraud is shown.[44] But an assignment or contract for the sale of a patent or interest therein may be rescinded or canceled for fraud.[45] To rescind a contract of sale of a patent right on the ground of false and fraudulent representations, such representations must have been of material facts, constituting an inducement to the contract, whereon the other party had a right to rely, and did rely, and was thereby misled to his injury.[46] Mere circumstantial differences between the patent right and the description of it in the conveyance are immaterial, and raise no presumption of fraud.[47] Further fraudulent representations, in order to afford a ground for relief, must be of facts then existing or preëxisting, as distinguished from an opinion,[1] a promise, or an assumed future fact. Furthermore, these facts must be of a concrete character, as distinguished from a truth or principle.[48] Mere promises or predictions,[49] or misrepresentations amounting to mere trade talk,[50] are not sufficient basis for relief. Representations by the seller of a patent that it is valid and does not interfere with any prior patent must be regarded as matters of opinion, and not as statements of fact,[51] unless it appears that there was a prior patent covering the identical invention, and that the seller was aware thereof.[52] So a statement that letters patent are new and useful, if untrue, is not cause for avoiding a sale of the letters made in reliance on such statement.[53] Nor is a mere false assertion of value, when no warranty is intended, ground of relief to a purchaser, because the assertion is matter of opinion.[54] But a gross misrepresentation of the capacity of a machine and the success in selling and operating it, of which the purchaser was ignorant, has been held sufficient to warrant the rescission of a contract induced thereby.[55]

Procedure.[56] A contract of assignment will not be rescinded without an allegation of fraud or offer to return the consideration, or other ground justifying equitable interposition.[57]

Parties. All persons interested in the suit should be made parties thereto.[58]

Evidence. General rules[59] apply as to the admissibility and as to the weight and sufficiency of evidence.[60]

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of it, and so justify defendant's instructions to his attorneys to drop the matter prior to an adverse report from such attorneys, is for the jury. Adamson v. Alexander Milburn Co., supra.

37. Childs v. Le Brocq, 178 Fed. 719, 102 CCA 211.

38. Childs v. Le Brocq, supra.

39. **Equitable relief generally** see Equity 21 C. J. p 1.

40. Oscar Barnett Fdy. Co. v. Ironworks Co., 81 N. J. Eq. 412, 515, 87 A 160.

Accounting in equity see Accounts and Accounting §§ 56–141.

41. See supra § 402 note 25 [c].

42. Dancel v. United Shoe Mach. Co., 120 Fed. 839.

43. **Recovery by assignee of consideration paid** see supra § 400.

Fraud as defense to action for bill or note given for transfer of patent see Bills and Notes §§ 1045–1051.

44. Fowler v. Mallory, 53 Conn. 420, 3 A 560; Dillman v. Nadlehoffer, 19 Ill. A. 375 [aff 119 Ill. 567, 7 NE 88]; Wade v. Ringo, 122 Mo. 322, 25 SW 901; Cansler v. Eaton, 55 N. C. 499; Hiatt v. Twomey, 21 N. C. 315.

45. Ala.—Pierce v. Wilson, 34 Ala. 596.

Ill.—Marsh v. Scott, 125 Ill. 114, 16 NE 863.

Ind.—Gatling v. Newell, 9 Ind. 572.

Iowa.—Hall v. Orvis, 35 Iowa 366.

Wis.—Leonard v. Barnum, 34 Wis. 105; Page v. Dickerson, 28 Wis. 694, 9 AmR 532.

46. U. S.—Thurston v. Reed, 229 Fed. 737 [aff 249 Fed. 158, 161 CCA 210]; American Car, etc., Co. v. Merchants' Despatch Transp. Co., 216 Fed. 904.

Oh.—Pumphrey v. Haffner, 18 Oh. Cir. Ct. N. S. 346.

Or.—Paulson v. Kenney, 110 Or. 688, 224 P 634.

Va.—Hull v. Fields, 76 Va. 594.

Ont.—Carrique v. Catts, 32 Ont. L. 548, 7 OntWN 500 [dism app 5 OntWN 785, 886].

[a] **Representations held not material.**—A representation of a party, in negotiating for an assignment of a patent having five and a half years to run, that it had only a short time to run, is not a material representation, authorizing cancellation of the assignment. Thurston v. Reed, 229 Fed. 737 [aff 249 Fed. 158, 161 CCA 210].

[b] **Mere fact that patents were issued no defense.**—It is no defense to a suit to set aside a judgment on a fraudulent contract to buy a patent on a worthless "hydraulic donkey engine" that the machine was patented in the United States and Canada. Paulson v. Kenney, 110 Or. 688, 224 P 634.

47. Holden v. Curtis, 2 N. H. 61; Case v. Morey, 1 N. H. 347.

48. Thurston v. Reed, 229 Fed. 737 [aff 249 Fed. 158, 161 CCA 210]; Wade v Ringa, 122 Mo. 322, 25 SW 901; Lederer v. Yule, 67 N. J. Eq. 65, 57 A 309 [aff 67 N. J. Eq. 728, 63 A 1118]; Pumphrey v. Haffner, 18 Oh. Cir. Ct. N. S. 346.

[a] **Opinion as to matter of law.**—Misrepresentations in negotiating for an assignment of a patent as to the patentee's right to assign do not authorize cancellation of the assignment because untrue representations were mere opinions as to matter of law. Thurston v. Reed, 229 Fed. 737 [aff 249 Fed. 158, 161 CCA 210].

49. Lederer v. Yule, 67 N. J. Eq. 65. 57 A 309 [aff 67 N. J. Eq. 728, 63 A 1118].

50. Des Moines Ins. Co. v. McIntire, 99 Iowa 50, 68 NW 565; Pumphrey v. Haffner, 18 Oh. Cir. Ct. N. S. 346.

51. Dillman v. Nadlehoffer, 119 Ill. 567, 7 NE 88 [aff 19 Ill. A. 375].

52. Reeves v. Corning, 51 Fed. 774.

53. Dillman v. Nadlehoffer, 119 Ill. 567, 7 NE 88 [aff 19 Ill. A. 375].

54. Dillman v. Nadlehoffer, supra; Rockafellow v. Baker, 41 Pa. 319, 80 AmD 624.

55. Pierce v. Wilson, 34 Ala. 596.

56. **Jurisdiction of state and federal courts** see Courts §§ 632–636; Federal Courts § 34.

57. Morgan v. National Pump Co., 74 Mo. A. 155.

58. See cases infra this note.

[a] **Necessary parties.**—(1) Where a father who purchased a patent right for his son sues to rescind the assignment for deceit, he must make the son a party to the suit or tender the son's release. Witliff v. Spreen, 51 Tex. Civ. A. 544, 112 SW 98. (2) In a suit in equity for the cancellation and surrender of an alleged fraudulent assignment of a patent and to expunge such assignment from the records of the patent office, the parties by whom and to whom the assignment was made as well as the commissioner of patents are necessary parties. Backus Portable Steam Heater Co. v. Simonds, 2 App. (D. C.) 290.

59. See Cancellation of Instruments §§ 188–196; Fraud §§ 170–207.

60. See cases infra this note.

[a] **Evidence held sufficient** to establish fraud. Goldsmith v. Koopman, 140 Fed. 616 [mod on other grounds 152 Fed. 173, 81 CCA 465]; Lederer v. Yule, 67 N. J. Eq. 65, 57 A 309 [aff 67 N. J. Eq. 728, 63 A 1118]; Paulson v. Kenney, 110 Or. 688, 224 P 634; Carrique v. Catts, 32 Ont. L. 548, 7 OntWN 500 [dism app 5 OntWN 785. 886].

[b] **Evidence held insufficient:** (1) To establish fraud. Fuller v. Reed, 249 Fed. 158, 161 CCA 210 [aff 229 Fed. 737]; American Car, etc., Co. v. Merchants' Despatch Transp. Co., 216 Fed. 904; Magnusson v. Tanzy, 85 Wash. 561, 148 P 883. (2) To show that the patentee was deceived by the assignee's agent respecting the unexpired term of the patent. Thurston v. Reed, 229 Fed. 737 [aff 249 Fed. 158, 161 CCA 210]. (3) To show that the person negotiating for assignment of the patent, which the patentee had previously agreed to assign to another, took any fraudulent advantage of the patentee's failing memory. Thurston v. Reed, supra. (4) To show that the consideration paid for the assignment was so grossly inadequate as to raise a presumption of fraud. Thurston v. Reed, supra. (5) To show that defendant's agent, in negotiating for assignment of a patent, did not represent that he was sent to the patentee by the treasurer of the corporation to which

[§ 406] **(b) For Breach of Covenant or Condition.**[61] A party to an assignment may maintain a suit in equity to rescind or cancel the transfer upon the other party's breach of a covenant or condition where there are equitable grounds for relief.[62] A patentee may, by his acquiescence, estop himself to claim the cancellation of an assignment.[63]

Pleading.[64] A bill to rescind the transfer of a patent for breach of a covenant must allege grounds for equitable relief.[65] Where plaintiff alleges readiness to perform all terms and conditions of the agreement, his failure in his complaint formally to offer to refund whatever sum may be found to be due from him in restoration of a status quo between the parties is immaterial.[66]

[§ 407] **(3) Injunction.**[67] An injunction will not issue in the absence of proof of grounds for equitable relief.[68] A preliminary injunction will not be decreed where it would cause irreparable damage to defendant,[69] but the court may, on motion for a preliminary injunction, grant whatever relief the equities of the situation demand.[70] The owner of an undivided interest in a patent[71] cannot maintain a suit to restrain another part owner from manufacturing thereunder or from authorizing others to do so.[72] An assignee who proceeds to manufacture and sell the patented invention, knowing that the inventor has contracted for the exclusive rights under the patent with another, may be enjoined at the instance of the parties to the prior contract.[73]

[§ 408] **C. Licenses*[74]—1. In General.** A license is any right to make, use, or sell the patented invention which is less than an undivided part interest in the patent itself.[75] A grant of the rights to

the patentee had agreed to assign. Thurston v. Reed, supra.

61. Covenants and conditions see supra § 397

62. Neenan v. Otis El. Co., 194 Fed. 414, 114 CCA 376; Dow v. Harkin, 67 N. H. 383, 29 A 846.

[a] **Illustrations.**—(1) Where the sole consideration of the assignment of a patent right is the assignee's promise to make enough of the article to supply the demand, and pay the assignor a royalty, and the assignee has repeatedly refused to perform, and cannot respond in damages, the assignor may have the assignment annulled by bill in equity. Dow v. Harkin, 67 N. H. 383, 29 A 846. (2) The assignor is entitled to a rescission of the contract in equity, where the assignee failed to make practical use of the apparatus for five years after the making of the contract, under an absolute covenant to do so, there being no rational rule of damages in such case. Neenan v. Otis El. Co., 194 Fed. 414, 114 CCA 376.

[b] **In England,** where the remedy at law is sufficient, a court of equity will not interfere. Osborne v. Jullion, 3 Drew. 596, 61 Reprint 1031.

Cancellation and rescission for nonperformance see Cancellation of Instruments §§ 45-47.

63. Duff v. Gilliland, 139 Fed. 16, 71 CCA 428 [rev 135 Fed. 581].

64. Pleading in suit for rescission generally see Cancellation of Instruments §§ 143-187.

65. Morgan v. National Pump Co., 74 Mo. A. 155.

[a] **Bill held insufficient.**—Mere allegations of insolvency, failure to pay royalty, and failure to perform conditions without allegation of fraud or offer to return consideration are insufficient to justify equitable interposition in rescinding an assignment of a patent. Morgan v. National Pump Co., 74 Mo. A. 155.

66. Haserot v. Keller, 67 Cal. A. 659, 228 P 383.

67. Injunctions generally see Injunctions 32 C. J. p 1.

68. Robinson v. Robinson, 33 Que. K. B. 180.

[a] **Illustrations.**—(1) An inventor, who sold his right in a patent for a connector to his brother with the understanding that this latter would form a company to exploit, protect, defend, and introduce his invention, and who complains that his brother, defendant, entered into direct competition with him in the manufacture and exploitation of a competitive connector, imperiling his rights, cannot obtain an injunction for the purpose of preventing defendant from violating the agreement entered into with him and restraining him from organizing and doing any act to promote the new invention to plaintiff's prejudice if he has not proved and established: First, the merits of his invention; second, that a patent has been issued to protect his invention; third, that defendant is not in a position to obtain a patent for his own invention and to exploit it. Robinson v. Robinson, 33 Que. K. B. 180. (2) Where plaintiffs and defendant entered into an agreement in writing for the assignment by defendant to plaintiff of all his rights in a gold separator of which he was the inventor, upon receiving a certain number of shares in a company to be organized for the purpose of obtaining a patent for the separator and for other purposes in connection therewith, and prior to the incorporation of the company a patent obtained in Canada was assigned to plaintiffs, and an action was brought for an injunction to prevent defendant from dealing, as his own, with a patent obtained in the United States, and which was included within the terms of the agreement, the obligation to transfer the invention on the one side and to allot the shares on the other are concurrent conditions, and plaintiffs have no right to ask for a transfer of the invention until they were ready to deliver the shares. Sutherland v. Westhaver, 39 N. S. 52, 1 EastLR 102. (3) In such case, in the absence of any indication of readiness or willingness on the part of plaintiffs to perform their part of the agreement, they were not in a position to come into a court of equity and ask for an injunction against defendant to restrain him from selling the American patent, or for a declaration as to their interest in it. Sutherland v. Westhaver, supra.

69. Carpenter Chemical Co. v. Lansdale Silk Hosiery Co., 2 F. (2d) 976.

[a] **Illustration.**—Where process covered by defendant's patent is shown, on motion for preliminary injunction, to be substantially the same as the invention assigned by defendant's assignor to plaintiff, and where application for the patent for the invention assigned to plaintiff was made before application for defendant's patent, and where defendant is financially responsible, the court will not, by preliminary injunction, prohibit defendant from practicing the invention. Carpenter Chemical Co. v. Lansdale Silk Hosiery Co., 2 F. (2d) 976.

70. Carpenter Chemical Co. v. Lansdale Silk Hosiery Co., supra.

[a] **Illustration.**—Upon the facts stated in note 69 [a] supra, the court will enjoin defendant from licensing or granting the right to practice the invention to others. Carpenter Chemical Co. v. Lansdale Silk Hosiery Co., 2 F. (2d) 976.

71. Joint owners see supra § 365.

72. Central Brass, etc., Co. v. Stuber, 220 Fed. 909, 136 CCA 475.

73. Oscar Barnett Fdy. Co. v. Ironworks Co., 81 N. J. Eq. 412, 515, 87 A 160.

74. Regulation of dealings in patent rights and patented articles see infra §§ 484-488.

Specific enforcement of agreements for licenses see Specific Performance.

75. U. S.—U. S. v. General Electric Co., 272 U. S. 476, 47 SCt 192, 71 L. ed. 362 [aff 15 F. (2d) 715]; E. W. Bliss Co. v. U. S., 253 U. S. 187, 40 SCt 455, 64 L. ed. 852 [aff 53 Ct. Cl. 47, 641]; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 9 F. (2d) 150 [aff 20 F. (2d) 598]; Russell v. Boston Card Index Co., 276 Fed. 4; Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242 [rev 263 Fed. 99]; Curtiss Aeroplane, etc., Corp. v. United Aircraft Engineering Corp., 266 Fed. 71; Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242; Rice v. Boss, 46 Fed. 195; Theberath v. Celluloid Mfg. Co., 3 Fed. 143; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149; Troy Iron, etc., Factory v. Corning, 24 F. Cas. No. 14,195, 1 Blatchf. 467, Fish. Pat. R. 290 [rev on other grounds 14 How. 193, 14 L. ed. 383].

Ill.—Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

Ind.—Eclipse Wind Engine Co. v. Zimmerman Mfg. Co., 16 Ind. A. 496, 44 NE 1115; Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322.

Mass.—Arnold v. North American Chemical Co., 232 Mass. 196, 122 NE 283; Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682; Jackson v. Allen, 120 Mass. 64.

Mo.—Poe v. Stockton, 39 Mo. A. 550.

N. Y.—Tuttle v. La Dow, 54 Hun 149, 7 NYS 277.

[a] **Compulsory licenses in England.**—(1) By statute an interested person may secure a compulsory license whenever the patentee fails or refuses to satisfy the reasonable requirements of the public, by failure to manufacture, or to grant licenses on reasonable terms. Patents and Designs Act of 1907 (7 Edw. VII c 29) § 24. (2) The party seeking the license must show default to the public as distinguished from an individual. In re Robin Electric Lamp Co., [1915] 1 Ch. 780. (3) Such licenses will not be granted merely to allow the importation of an infringing article. In re Schou, [1924] 1 Ch. 574.

*By JOSEPH W. ROUSE (§§ 408-483).

make, use, and sell will constitute an assignment of the patent;[76] but any or all of these rights may be granted separately,[77] and no more than a mere license will be given by a grant of the right to make,[78] use,[79] or sell;[80] or to make and use, but not to sell;[81] or to use and sell, but not make,[82] or to make and sell, but not use;[83] and a grant of all three rights will convey no more than a license when their exercise is restricted to a specified purpose,[84] or for a limited time on payment of royalty,[85] or subject to rights previously granted;[86] and the same is true of a grant of an exclusive right within a certain territory with a reservation to the grantor of the right to make[87] or sell articles of his own manufacture therein,[88] or a reservation of the right to make and sell for export to foreign countries,[89] or reservation of the right to revoke the grant.[90]

[§ 409] **2. Who May Grant.** A true license can be granted only by one who owns or has an interest in the patent.[91]

A license granted by one coöwner of a patent is valid as against the licensor and his coöwners,[92] and the licensee is liable to the licensor for the agreed price,[93] but he is not liable to the other coöwners,[94] unless otherwise stipulated.[95] Nor can the coöwners recover such sum from the licensor,[96] in the absence of an agreement to divide moneys received,[97] although early decisions intimated that such recovery might be had.[98] The licensor must account for royalties obtained by him when obtained by fraud.[99]

The assignee of a patent may, in the absence of stipulations to the contrary in the assignment, grant a valid license.[1]

[§ 410] **3. Creation and Validity in General—a. Express Licenses.** The validity of a license is determined by the principles that apply to other contracts.[2] A valid express license may be created by a parol agreement,[3] agreements for the transfer of

"Assignment" distinguished see supra § 369.

76. See supra § 368.

77. Adams v. Burks, 17 Wall. (U. S.) 453, 21 L. ed. 700; Hatfield v. Smith, 44 Fed. 355; Porter Needle Co. v. National Needle Co., 17 Fed. 536; Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co., 7 F. Cas. No. 4,015, 1 Bann. & A. 330, 12 Blatchf. 202; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Peoria Malting Co. v. Davenport Grain, etc., Co., 68 Ill. A. 104.

78. American Graphophone Co. v. Walcutt, 87 Fed. 556.

79. E. W. Bliss Co. v. U. S., 253 U. S. 187, 40 SCt 455, 64 L. ed. 852 [aff 53 Ct. Cl. 47, 641]; Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Theberath v. Celluloid Mfg. Co., 3 Fed. 143; Suydam v. Day, 23 F. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. R. 88; Bell, etc., Co. v. Spoor, 216 Ill. A. 221; Peoria Malting Co. v. Davenport Grain, etc., Co., 68 Ill. A. 104.

[a] **For example,** a contract by which owners of a patent granted to complainant "the sole right to use their said patent rights" in certain states and territories "upon the conditions hereinafter named, so far as the same may be necessary for the successful making and marketing" constituted a license, and not an assignment. Russell v. Boston Card Index Co., 276 Fed. 4.

80. Ingalls v. Tice, 14 Fed. 297.

81. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Bowers v. Atlantic, etc., Co., 162 Fed. 895; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. 332; Rice v. Boss, 46 Fed. 195; Wilson v. Chickering, 14 Fed. 917; Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Eclipse Wind Engine Co. v. Zimmerman Mfg. Co., 16 Ind. A. 496, 44 NE 1115; Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. A. 479, 44 NE 322; Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682.

82. Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Boyd v. Brown, 3 F. Cas. No. 1,747, 3 McLean 295, 2 Robb Pat. Cas. 203; Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149.

83. U. S.—Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Topliff v. Topliff, 122 U. S. 121, 7 SCt 1057, 30 L. ed. 1110; Hayward v. Andrews, 106 U. S. 672, 1 SCt 544, 27 L. ed. 271; Shepherd v. Deitch, 138 Fed. 83 [rev on other grounds 146 Fed. 756, 77 CCA 246]; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. 332; Hatfield v. Smith, 44 Fed. 355; Armstrong v. Hanlenbeck, 1 F. Cas. No. 544; Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co., 7 F. Cas. No. 4,015, 1 Bann. & A. 330, 12 Blatchf. 202.

D. C.—Mathy v. Republic Metalware Co., 35 App. 151.

Iowa.—McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

N. Y.—Hurd v. Gere, 27 App. Div. 625, 50 NYS 235.

N. C.—Wildes v. Nelson, 154 N. C. 590, 70 SE 940.

[a] **Thus,** when the patentee grants a right to make and use, he grants only a license and does not transfer such an interest as will prevent him from registering a trademark on the patented article. Mathy v. Republic Metalware Co., 35 App. (D. C.) 151.

[b] **Assignee's grant to third person** of the right to make and sell held to be a mere license. Nellis v. Pennock Mfg. Co., 13 Fed. 451.

84. Bogart v. Hinds, 25 Fed. 484; Gamewell Fire-Alarm Tel. Co. v. Brooklyn, 14 Fed. 255.

85. Armstrong v. Hanlenbeck, 1 F. Cas. No. 544; Bottlers' Seal Co. v. Rainey, 225 N. Y. 369, 122 NE 200.

86. De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 20 F. (2d) 598 [aff 9 F. (2d) 150].

87. Hamilton v. Kingsbury, 4 Fed. 428, 17 Blatchf. 460.

88. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Bowers Hydraulic Dredging Co. v. Vare, 112 Fed. 63; Brooks v. Byam, 4 F. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525; Hussey v. Whitely, 12 F. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Pitts v. Jameson, 15 Barb. (N. Y.) 310.

89. Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co., 7 F. Cas. No. 4,015, 1 Bann. & A. 330, 12 Blatchf. 202.

90. Smith v. Preston, 170 Ill. 179, 48 NE 688; Wildes v. Nelson, 154 N. C. 590, 70 SE 940.

91. Chemical Foundation v. Du Pont de Nemours, 29 F. (2d) 597.

[a] **Agent.**—A complainant is estopped to maintain a suit for infringement of patents by ratification of a license contract made by an agent. Vose v. Roebuck Weather-Strip, etc., Co., 216 Fed. 523.

92. Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 108 Fed. 77; Blackledge v. Weir, etc., Mfg. Co., 108 Fed. 71, 47 CCA 212; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506; Dunham v. Indianapolis, etc., R. Co., 8 F. Cas. No. 4,151, 2 Bann. & A. 327, 7 Biss. 223; Washburn, etc., Mfg. Co. v. Chicago Galvanized Wire Fence Co., 109 Ill. 71.

93. Dunham v. Indianapolis, etc., R. Co., 8 F. Cas. No. 4,151, 2 Bann. & A. 327, 7 Biss. 223.

94. Pusey, etc., Co. v. Miller, 61 Fed. 401.

95. Pusey, etc., Co. v. Miller, supra.

96. Blackledge v. Weir, etc., Mfg. Co., 108 Fed. 71, 47 CCA 212; Gates v. Fraser, 9 Ill. A. 624 [aff 118 Ill. 99, 1 NE 817]; Vose v. Singer, 4 Allen (Mass.) 226, 81 AmD 696; De Witt v. Elmira Nobles Mfg. Co., 5 Hun 301 [aff 66 N. Y. 459, 23 AmR 73].

97. Gates v. Fraser, 9 Ill. A. 624 [aff 118 Ill. 99, 1 NE 817]; Hansen v. Hough, 177 Iowa 93, 158 NW 501 (contract to share proceeds); Vose v. Singer, 4 Allen (Mass.) 226, 81 AmD 696.

98. Pusey, etc., Co. v. Miller, 61 Fed. 401; Dunham v. Indianapolis, etc., R. Co., 8 F. Cas. No. 4,151, 2 Bann. & A. 327, 7 Biss. 223; De Witt v. Elmira Nobles Mfg. Co., 66 N. Y. 459, 23 AmR 73.

99. Haserot v. Keller, 67 Cal. A. 659, 228 P 383.

1. Seifert v. Gildersleeve, 84 Colo. 31, 268 P 589; Burke v. Partridge, 58 N. H. 349.

[a] **Rule applied.**—(1) A corporation, the assignee of the right under contract to use, make, sell, and dispose of an invention, could grant an exclusive license. Seifert v. Gildersleeve, 84 Colo. 31, 268 P 589. (2) A provision in a contract imposing a royalty on the income of a corporation from inventions did not prohibit licensing of the right to exclusive distribution of an invention. Seifert v. Gildersleeve, supra.

Rights of assignee see supra §§ 390–396.

2. Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

[a] **Duress.**—A threat to sue for royalties and injunction for infringement will not constitute duress sufficient to vitiate a subsequent license. Heller v. Lassner Co., 214 App. Div. 315, 212 NYS 175. And see Contracts § 314.

[b] **Certainty.**—A contract whose terms are to be fixed at a later date is too indefinite. Beall v. Foster, 95 Or. 39, 186 P 554.

3. Gates Iron Works v. Fraser, 153 U. S. 332, 14 SCt 883, 38 L. ed. 734; Koppe v. Burnstingle, 29 F. (2d) 923; Sun Oil Co. v. Red River Refining Co., 29 F. (2d) 827; Cline v. Horton, 274 Fed. 728; St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co., 178 Fed. 923, 103 CCA 565 [certiorari den 219 U. S. 588 mem, 31 SCt 471 mem, 55 L. ed. 348 mem]; Cook v. Sterling Electric Co., 150 Fed. 766, 80 CCA 502 [aff 118 Fed. 45]; Sharples v. Moseley, etc., Mfg. Co., 75 Fed. 595 [mod on other grounds 81 Fed. 179, 26 CCA 327]; Jones v. Berger, 58 Fed. 1006; Baldwin v. Sibley, 2 F. Cas. No. 805, 1

patent rights not being within the statute of frauds,[4] unless the parties have intended the execution of a formal agreement,[5] and they may waive such a formal agreement, even though they may have provided therefor.[6] If the license is in writing, no particular form is necessary;[7] nor need it be recorded.[8] It must conform to the requirements of state laws,[9] and not be in restraint of trade, or against public policy.[10] A valid license may be given by a covenant not to sue for future infringements.[11] The mere fact that corporate stock of the licensor and licensee corporations is owned by the same stockholders will not invalidate an otherwise valid license.[12] A license of a void patent is validated by the issuance of a second patent for the invention.[13]

License before patent. The license may be given before issuance of the patent,[14] and, if without restrictions, and if acted on by applying the invention to machines or mechanisms constructed before the granting of the patent, will protect the licensee in its use afterward.[15]

Modification or reformation. The contract may be modified by a subsequent agreement between the parties,[16] and may be altered or reformed when it fails to embody the intentions of the parties.[17] In order to obtain reformation, mutual mistake must be shown.[18] Modification will not affect the rights of third persons when they were acquired prior thereto.[19]

Uniformity of licenses. Licenses given to distinct individuals need not contain the same restrictions.[20]

[§ 411] **b. Implied Licenses—(1) In General.** A license to make, use, or sell an invention may arise by implication from the conduct of the patentee[21]

Cliff. 150; Nichols v. Marsh, 61 Mich. 509, 28 NW 699 [app dism 140 U. S. 344, 11 SCt 798, 35 L. ed. 413]; Springfield v. Drake, 58 N. H. 19; Buss v. Putney, 38 N. H. 44.

[a] **Failure to demand written agreement** may be excused by the fact that the licensor was a responsible concern, and regarded as trustworthy by the licensee. Champlin Refining Co. v. Gasoline Products Co., 29 F. (2d) 331.

4. See Frauds, Statute of § 265.

5. Gilbert v. Smith, 30 F. (2d) 296; Hilditch v. American Bumper Corp., 15 F. (2d) 451; Ben-Wat Corp. v. David Lupton's Sons Co., 13 F. (2d) 390 [aff 9 F. (2d) 928].

6. Okmulgee Window Glass Co. v. Frink, 260 Fed. 159, 171 CCA 195 [certiorari den 251 U. S. 563 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22.

[a] **Right of licensee,** under an informal contract for a license to require the execution of a formal recordable license, cannot affect the sufficiency or validity of the contract when he has waived this right. Horvath v. McCord Radiator, etc., Co., 27 F. (2d) 148.

7. De Forest Radio Tel., etc., Co. v. U. S., 273 U. S. 236, 47 SCt 366, 71 L. ed. 625; Horvath v. McCord Radiator, etc., Co., 27 F. (2d) 148; Luten v. Bearce, 219 Fed. 237 [aff 229 Fed. 391, 143 CCA 511]; Seibert Cylinder Oil-Cup Co. v. Detroit Lubricator Co., 34 Fed. 216; Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

[a] **Writing intended as memorandum.**—Horvath v. McCord Radiator, etc., Co., 27 F. (2d) 148.

8. See infra § 414.

9. Sandage v. Studabaker Bros. Mfg. Co., 142 Ind. 148, 41 NE 380, 51 AmSR 165, 34 LRA 363; Mason v. McLeod, 57 Kan. 105, 45 P 76, 57 AmSR 327, 41 LRA 548.

10. See Contracts § 481.

11. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem]; Seibert Cylinder Oil-Cup Co. v. Detroit Lubricator Co., 34 Fed. 216; Colgate v. Western Electric Mfg. Co., 28 Fed. 146.

[a] **Rule applied.**—Licensor having granted exclusive license cannot grant immunity to infringers, an immunity contract being a license. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem].

12. In re Michigan Motor Specialties Co., 288 Fed. 377.

13. Stanley v. Whipple, 22 F. Cas. No. 13,286, 2 McLean 35, 2 Robb Pat. Cas. 1.

14. U. S.—Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242 [rev 263 Fed. 99]; St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co., 178 Fed. 923, 103 CCA 565 [certiorari den 219 U. S. 588 mem, 31 SCt 471 mem, 55 L. ed. 348 mem]; Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368.

Del.—O'Neill v. DuPont de Nemours, 12 Del. Ch. 76, 106 A 50.

Mass.—Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029.

Mich.—Hamilton v. Park, etc., Co., 112 Mich. 138, 70 NW 436.

N. Y.—Bezer v. Hall Signal Co., 22 App. Div. 489, 48 NYS 203.

W. Va.—Cook Pottery Co. v. Parker, 89 W. Va. 7, 11, 109 SE 744.

Ont.—Fowell v. Chown, 25 Ont. 71. "An inventor has an inchoate right of property in an invention pending his application for patent, with which he may deal as an article of property." Cook Pottery Co. v. Parker, supra.

[a] **Consideration for license before patent.**—A license to use an invention pending application for patent thereon is a sufficient consideration for a contract between inventor and licensee whereby the latter may manufacture and place on the market articles of commerce on a royalty basis, and protection of the licensee in the use of the invention when patented forms a part of the consideration for such contract. Cook Pottery Co. v. Parker, 89 W. Va. 7, 109 SE 744.

[b] **Sufficient existence of article.**—The concrete embodiment of an invention in a machine is a reduction to practice, equivalent to the filing of a specification, for the purposes of a license by the inventor. Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242 [rev 263 Fed. 99].

[c] **Estoppel to deny scope of patent.**—When a license is given before issuance, on the theory that pending claims, if allowed, would cover the licensee's product, when the patent issues with these claims the licensee cannot deny that it covers the product. Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22.

15. Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029; Cook Pottery Co. v. Parker, 89 W. Va. 7, 109 SE 744.

16. Gilman v. Turner Tanning Mach. Co., 232 Mass. 573, 122 NE 747; Lyndon v. Wagner Electric Mfg. Co., 285 Mo. 77, 225 SW 711; Anderson v. Weber, 162 App. Div. 725, 148 NYS 133 [app dism 220 N. Y. 763 mem, 116 NE 1033 mem] (extension of time for experiments).

[a] **Consideration.**—A modification agreement providing for a means of ascertainment of royalties was of benefit to the licensor and hence on a sufficient consideration. Goshen Rubber Works v. Single Tube Auto., etc., Tire Co., 166 Fed. 431, 92 CCA 183.

[b] **Fraud.**—(1) A supplemental agreement by the officers and receivers of a corporation holding a license to make a particular type of bearings under a patent, by which the corporation waived the provision of the original contract prohibiting licenses to others in return for the right to make any type of bearings covered by the patent and for a rebate on the royalties, was not so improvident as to indicate fraud, although a court decision as to the scope of the patent had necessitated procuring licenses by other manufacturers of bearings. Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 264 Fed. 516 [aff 275 Fed. 916]. (2) A letter by the owner of a patent to the president of a licensee corporation, refusing consent to an assignment of the license, but agreeing to give license to the president or his nominee, was held not to establish fraud by the president in making a supplemental agreement, four months before the letter was written, consenting to licenses to other corporations on terms which were not improvident, and which were known to the majority of the stockholders and directors before the contract was signed. Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., supra.

[c] **Effect.**—Where the contract has been modified by a subsequent agreement, the licensor cannot take advantage of both contracts. Mouat v. Bamlet, 123 Mich. 345, 82 NW 74.

[d] **Provision for modification.**—Where a license provides that in case any subsequent license is granted on more favorable terms the licensee may take advantage thereof, the licensee cannot take advantage of the license pending at the time his license was granted which he had knowledge of and which he knew that his licensor was morally bound to grant. Sun Oil Co. v. Red River Refining Co., 29 F. (2d) 827.

17. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628; Baldwin v. National Hedge, etc., Co., 73 Fed. 574, 19 CCA 575; Woodworth v. Cook, 30 F. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. R. 423; Cortland Howe Ventilating Stove Co. v. Howe, 92 Hun 113, 36 NYS 701.

18. Buffalo Specialty Co. v. Indiana Rubber, etc., Wire Co., 59 Ind. A. 465, 109 NE 782.

19. Newton v. McGuire, 97 Fed. 614.

20. Victor Talking Mach. Co. v. Strauss, 230 Fed. 449, 144 CCA 591 [certiorari granted 241 U. S. 662 mem, 36 SCt 449 mem, 60 L. ed. 1227 mem, and rev on other grounds 243 U. S. 490, 37 SCt 412, 61 L. ed. 866]; Universal Talking Mach. Mfg. Co. v. Southern California Music Co., 165 Cal. 757, 134 P 702.

21. De Forest Radio Tel., etc., Co. v. U. S., 273 U. S. 236, 47 SCt 366, 71 L. ed. 625 [aff 60 Ct. Cl. 1034 mem]; De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 9 F. (2d) 150 [aff 20 F. (2d) 598]; Luten v. Bearce, 219 Fed. 237 [aff 229 Fed. 391, 143 CCA 511]; Edison Electric Light Co. v. Peninsular Light, etc., Co., 101 Fed. 831, 43 CCA 479 [aff 95 Fed. 669]; Mueller v. Mueller, 95 Fed. 155,

or one acting under him.[22] Acquiescence, if founded on a valuable consideration, may amount to a license,[23] but more than mere consent to the use of the patent is necessary.[24] Whether a license will be implied depends on whether or not the circumstances of the case are such as to estop the owner from asserting infringement.[25] A license will not be implied merely from the partnership relation,[26] or where an express contract exists.[27] The attachment of patented machinery to a building so that it becomes a part of the realty[28] has been held not to imply a right of use against the patentee.[29] The question of implied license arising out of the relationship of employer and employee is treated elsewhere in this work,[30] as is the question of the right of the government to the use of inventions.[31]

[§ 412] **(2) From Sale of Patented Article.** The unrestricted sale of a patented article by anyone having the right to make such sale releases the article sold from the monopoly of the patent,[32] and the purchaser thereof ordinarily acquires the unqualified right to sell[33] or to use the article[34] so long as such use does not violate the vendor's exclusive property in another invention.[35] That the sale may be unrestricted, it must have been made by one having a right to sell.[36]

Sale of parts or elements. The sale of parts of a machine used in a patented process will not imply a license to use the process;[37] nor will the sale of an element of a patented combination imply the right to use the combination,[38] or the sale of parts of a machine as scrap give the right to reassemble and use the machine.[39] A purchaser of parts may, however, have an implied license to make as many of the patented articles as is necessary to use up the parts.[40]

[§ 413] **c. Options and Executory Agreements.** An option to take a license is supported by a sufficient consideration where the party to whom it is given is bound by it to make required tests of the

37 CCA 392; Anderson v. Eiler, 50 Fed. 775, 1 CCA 659; Dodge Mfg. Co. v. Puster, 42 Fed. 54; Montross v. Mabie, 30 Fed. 234; Blanchard v. Sprague, 3 F. Cas. No. 1,516, 1 Cliff. 288; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215; Magoun v. New England Glass Co., 16 F. Cas. No. 8,960, 3 Bann. & A. 114; Reutgen v. Kanowrs, 20 F. Cas. No. 11,710, 1 Robb Pat. Cas. 1, 1 Wash. C. C. 168; Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029; Deane v. Hodge, 35 Minn. 146, 27 NW 917, 59 AmR 321; Incandescent Gas Light Co. v. New Incandescent Gas Lighting Co., 76 L. T. Rep. N. S. 47; Kenny's Patent Button-Holeing Co. v. Somervell, 38 L. T. Rep. N. S. 878.

[a] **A sale of the entire interest** of the owners of a patent for a sum, part to be paid in cash and the remainder to be paid as royalties, involved a license to the buyer to manufacture the patented article. Hiner v. C. G. Aldrich Co., 255 Fed. 785.

[b] **License by estoppel.**—A single purchase of wrappers such as are used for a patented confection does not render the purchaser a licensee by estoppel as to the patent for the confection where the purchaser is without knowledge that the wrappers bore any patent notice. Eskimo Pie Corp. v. Levous, 24 F. (2d) 599.

22. De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 9 F. (2d) 150 [aff 20 F. (2d) 598].

23. Seibert Cylinder Oil-Cup Co. v. Detroit Lubricator Co., 34 Fed. 216; Blanchard v. Sprague, 3 F. Cas. No. 1,516, 1 Cliff. 288.

24. Farnham v. U. S., 49 Ct. Cl. 19 [mod on other grounds 240 U. S. 537, 36 SCt 427, 60 L. ed. 786].

[a] **Lack of mutuality.**—Where defendants disclaim having used the patented article, and follow this assertion with a positive claim of invention upon their part, declining to concede either use or ownership in the article used by plaintiff, the elements of mutuality are lacking, and no implied license will result. Farnham v. U. S., 49 Ct. Cl. 19 [mod on other grounds 240 U. S. 537, 36 SCt 427, 60 L. ed. 786].

25. Edison Electric Light Co. v. Peninsular Light, etc., Co., 101 Fed. 831, 43 CCA 479 [aff 95 Fed. 669]; Montross v. Mabie, 30 Fed. 234.

26. Keller v. Stolzenbach, 20 Fed. 47.

27. Hazen Mfg. Co. v. Wareham, 242 Fed. 642, 155 CCA 332; Standard Sanitary Mfg. Co. v. Arrott, 135 Fed. 750, 68 CCA 388.

28. See Fixtures §§ 8–27.

29. McCreery Engineering Co. v. Massachusetts Fan Co., 195 Fed. 498, 115 CCA 408 [rev 186 Fed. 846].

30. See Master and Servant §§ 167–171.

31. See United States [39 Cyc 754].

32. U. S. v. General Electric Co., 272 U. S. 476, 47 SCt 192, 71 L. ed. 362 [aff 15 F. (2d) 715]; Bauer v. O'Donnell, 229 U. S. 1, 33 SCt 616, 57 L. ed. 1041, 50 LRANS 1185, AnnCas 1915A 150; Keeler v. Standard Folding-Bed Co., 157 U. S. 659, 15 SCt 738, 39 L. ed. 848; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500; Wade v. Metcalf, 129 U. S. 202, 9 SCt 271, 32 L. ed. 661; Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Adams v. Burks, 17 Wall. 453, 21 L. ed. 700 [aff 1 F. Cas. No. 50, 4 Fish. Pat. Cas. 392, Holmes 40]; Ideal Wrapping Mach. Co. v. George Close Co., 23 F. (2d) 848 [aff 29 F. (2d) 533]; De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 20 F. (2d) 598 [aff 9 F. (2d) 150]; J. F. Rowley Co. v. Rowley, 18 F. (2d) 704; Russell v. Tilghman, 275 Fed. 235; Free Sewing Mach. Co. v. Bry-Block Mercantile Co., 204 Fed. 632; O'Rourke Engineering Constr. Co. v. McMullen, 150 Fed. 338; Hanifen v. Lupton, 95 Fed. 465 [rev on other grounds 101 Fed. 462, 41 CCA 462]; Edison Electric Light Co. v. Bloomingdale, 65 Fed. 212; Roosevelt v. Western Electric Co., 20 Fed. 724; American Cotton-Tie Co. v. Simmons, 1 F. Cas. No. 293, 3 Bann. & A. 320 [rev on other grounds 106 U. S. 89, 1 SCt 52, 27 L. ed. 79]; Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Goodyear v. Beverly Rubber Co., 10 F. Cas. No. 5,557, 1 Cliff. 348; McKay v. Wooster, 16 F. Cas. No. 8,847, 6 Fish. Pat. Cas. 375, 2 Sawy. 373; American, etc., Mfg. Co. v. U. S., 50 Ct. Cl. 204; Bauer v. O'Donnell, 41 App. (D. C.) 1; Coca-Cola Co. v. State, (Tex. Civ. A.) 225 SW 791.

"It is clear that by such a sale the purchaser acquires an absolute title to the manufactured product which is the subject of a patent, and may deal with it in the same manner as if dealing with any other kind of property." Adams v. Burks, 1 F. Cas. No. 50, 4 Fish. Pat. Cas. 392, Holmes 40, 41 [aff 17 Wall. 453, 21 L. ed. 700].

33. Keeler v. Standard Folding-Bed Co., 157 U. S. 659, 15 SCt 738, 39 L. ed. 848; De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 20 F. (2d) 598 [aff 9 F. (2d) 150]; J. F. Rowley Co. v. Rowley, 18 F. (2d) 704; Russell v. Tilghman, 275 Fed. 235; Alabastine Co. v. Richardson, 26 Fed. 620; Pratt v. Marean, 25 Ill. A. 516; Coca-Cola Co. v. State, (Tex. Civ. A.) 225 SW 791.

34. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500; Robbie v. Jennison, 149 U. S. 355, 13 SCt 879, 37 L. ed. 766; Adams v. Burks, 17 Wall. (U. S.) 453, 21 L. ed. 700; George Close Co. v. Ideal Wrapping Mach. Co., 29 F. (2d) 533 [aff 23 F. (2d) 848]; J. F. Rowley Co. v. Rowley, 18 F. (2d) 704; Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398, 148 CCA 660 [aff 243 U. S. 502, 37 SCt 416, 61 L. ed. 871]; U. S. v. Kellogg Toasted Corn Flake Co., 222 Fed. 725, AnnCas 1916A 78; George Frost Co. v. Kora Co., 136 Fed. 487 [aff 140 Fed. 987, 71 CCA 19]; Brown v. Puget Sound Reduction Co., 110 Fed. 383; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; Edison Electric Light Co. v. Goelet, 65 Fed. 613; Edison Electric Light Co. v. Citizens' Electric Light, etc., Co., 64 Fed. 491; Roosevelt v. Western Electric Co., 20 Fed. 724; Porter Needle Co. v. National Needle Co., 17 Fed. 536; Detweiler v. Voege, 8 Fed. 600, 19 Blatchf. 482; Black v. Hubbard, 3 F. Cas. No. 1,460, 3 Bann. & A. 39; Brooks v. Stolley, 4 F. Cas. No. 1,963, Fish. Pat. R. 137, 4 McLean 275; Goodyear v. Beverly Rubber Co., 10 F. Cas. No. 5,557, 1 Cliff. 348; McKay v. Wooster, 16 F. Cas. No. 8,847, 6 Fish. Pat. Cas. 375, 2 Sawy. 373; Pratt v. Marean, 25 Ill. A. 516; Howe v. Wooldredge, 12 Allen (Mass.) 18; Buss v. Putney, 38 N. H. 44.

[a] **Thus** a member of the public, who paid for a license to use a patented machine, could dispose of the license to another for any consideration, if he turned the machine over with the license label containing conditions for use unaltered. Victor Talking Mach. Co. v. Straus, 225 Fed. 535, 140 CCA 519 [aff 222 Fed. 524].

[b] **Use of maker's name.**—Where defendant became the owner, or legally possessed, of patented Edison phonographs and kinetoscopes, it was entitled to use such machines for public entertainment, and to advertise that the machines used were in fact Edison machines. Edison v. Mills-Edisonia, 74 N. J. Eq. 521, 70 A 191.

35. Roosevelt v. Western Electric Co., 20 Fed. 724.

36. Brooks v. Stolley, 4 F. Cas. No. 1,963, Fish. Pat. R. 137, 4 McLean 275; Union Paper-Bag Mach. Co. v. Nixon, 24 F. Cas. No. 14,391, 2 Bann. & A. 244, 1 Flipp. 491; Wilson v. Stolley, 30 F. Cas. No. 17,839, Fish. Pat. R. 146, 4 McLean 272; United Shoe Mach. Co. v. Dean, 51 Pa. Super. 88.

37. Lawther v. Hamilton, 124 U. S. 1, 8 SCt 342, 31 L. ed. 325.

38. Westinghouse Electric, etc., Co. v. Independent Wireless Tel. Co., 300 Fed. 748; General Electric Co. v. Continental Lamp Works, 280 Fed. 846; American Graphophone Co. v. Amet, 74 Fed. 789.

39. Tindel-Morris Co. v. Chester Forging, etc., Co., 163 Fed. 304 [aff 165 Fed. 899, 91 CCA 577].

40. Auto Spring Repairer Co. v. Grinberg, 175 Fed. 799.

patent,[41] and such tests, where made by the agreement conditions precedent, must be performed,[42] unless waived.[43] A mere option, not acted upon, will not create a license.[44] An agreement to give a license may be treated in equity as a license,[45] and such agreement may be specifically enforced.[46] A license is not rendered a mere executory agreement for a license by the fact that certain of its terms depend upon the sustaining of the validity of the patent.[47] Where the agreement is to purchase a license upon the construction of a satisfactory sample of work thereunder, the dissatisfaction of the promisor because of the cost of the work is a ground for his refusal to perform notwithstanding the quality of the work is satisfactory.[48]

[§ 414] **d. Recording.**[49] The law does not require that a license be recorded in the patent office even as against subsequent purchasers.[50]

[§ 415] **4. Construction and Operation—a. In General.** The rules applicable to the construction of contracts generally[51] apply to the construction of license agreements.[52] Such contracts will be construed according to the intention of the parties as expressed in the contract[53] as a whole,[54] or as shown by the conduct of the parties where the agreement does not express their true intention,[55] their practical construction being entitled to great weight.[56] The original contract may be construed by the par-

41. Schweyer Electric, etc., Co. v. Regan Safety Devices Co., 4 F. (2d) 970 [certiorari den 268 U. S. 690 mem, 45 SCt 510 mem, 69 L. ed. 1159 mem].

42. Schweyer Electric, etc., Co. v. Regan Safety Devices Co., supra.

43. Schweyer Electric, etc., Co. v. Regan Safety Devices Co., supra.

[a] **Expression of satisfaction** upon the part of the patentee as to the machinery of the test waives an objection that a provision of an option contract requiring the principles of the tenantee's invention to be embodied in the test equipment is not complied with. Schweyer Electric, etc., Co. v. Regan Safety Devices Co., 4 F. (2d) 970 [certiorari den 268 U. S. 690 mem, 45 SCt 510 mem, 69 L. ed. 1159 mem].

44. Life Preserver Suit Co. v. National Life Preserver Co., 252 Fed. 139, 164 CCA 251 [certiorari den 248 U. S. 571 mem, 39 SCt 11 mem, 63 L. ed. 426 mem].

[a] **Held not option.**—A provision in a contract for a license that the license shall take effect from and after a future day stated if the licensee shall within a certain time thereafter elect to accept and act under the license does not render the contract a mere option. Cook v. Automatic Fire Protection Co., 228 Fed. 192.

45. Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242 [rev 263 Fed. 99]; American Paper-Bag Co. v. Van Nortwick, 52 Fed. 752, 3 CCA 274; Duryea v. Kaufman, 3 OntWN 651, 21 OntWR 141, 2 DomLR 468.

[a] **Rule applied.**—An agreement to grant a license before the patent is effective against a subsequent assignee of the patent. Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242 [rev 263 Fed. 99].

46. Bijur Motor Lighting Co. v. Eclipse Mach. Co., 243 Fed. 600, 156 CCA 298 [aff 237 Fed. 89].

47. Comptograph Co. v. Burroughs Adding Mach. Co., 175 Fed. 792 [aff 183 Fed. 321, 105 CCA 533 (certiorari den 219 U. S. 586, 31 SCt 471, 55 L. ed. 347)].

48. Wetterwald v. Woodall, 83 W. Va. 647, 98 SE 890.

49. Of assignment see supra § 378.

50. Jones v. Berger, 58 Fed. 1006; Baldwin v. Sibley, 2 F. Cas. No. 805, 1 Cliff. 150; Brooks v. Byam, 4 F. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525; Chambers v. Smith, 5 F. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575; Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Hamilton v. Kingsbury, 11 F. Cas. No. 5,985, 4 Bann. & A. 615, 17 Blatchf. 264; Peoria Malting Co. v. Davenport Grain, etc., Co., 68 Ill. A. 104; Buss v. Putney, 38 N. H. 44; Stevens v. Head, 9 Vt. 174, 31 AmD 617.

[a] **English practice.**—Record is unnecessary unless royalty is fixed. In re Fletcher, 62 L. J. Ch. 938.

51. See Contracts §§ 481–592.

52. Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; Morse v. O'Reilly, 17 F. Cas. No. 9,858, 4 PaLJR 75, 6 PaLJ 501; Star Salt Caster Co. v. Crossman, 22 F. Cas. No. 13,321, 3 Bann. & A. 281, 4 Cliff. 568; Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385; Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

[a] **Particular words.**—(1) "Interest" construed to mean a limited property right less than an absolute ownership. Copeland v. Eaton, 209 Mass. 139, 95 NE 291, AnnCas1912B 521. (2) "Road" as used in license to use paving material includes railroad crossings and station platforms. Barber Asphalt Pav. Co. v. Headley Good Roads Co., 283 Fed. 236 [new trial granted 284 Fed. 177 (aff 292 Fed. 119)]. (3) "Form" of articles may mean kind and not shape. Macallen Co. v. Johns-Pratt Co., 80 Fed. 410. (4) A contract between the owners of two patents, covering similar inventions, by which joint licenses were to be issued at request of the second party, who was to recover a share of the license fees for the use of the patent of the first party, and also of the "damages" payable from infringers of such patent, does not entitle him to share in a sum recovered by a suit in equity as "profits" realized by an infringer, where no damages were allowed. Wooster v. Trowbridge, 115 Fed. 722 [aff 120 Fed. 667, 57 CCA 129 (certiorari den 190 U. S. 557 mem, 23 SCt 854 mem, 47 L. ed. 1183 mem)]. (5) Where profits are defined by a certain article, all the provisions of which are to apply to the relations between the parties springing into existence after the expiration of the contract "mutatis mutandis," these latter words mean necessary changes in details to conform to a single vital alteration, and suggest a reversal of the relative positions of the parties under the contract, which was to continue the same in other respects. Copeland v. Eaton, 209 Mass. 139, 95 NE 291, Ann Cas1912B 521. (6) Provision giving licensor benefit of any "combination" which licensee might enter included the organization of a company to control licensee's business, the licensee being entitled to representation on the board of directors. Brownsville Glass Co. v. Appert Glass Co., 136 Fed. 240.

[b] **Evasion clauses** (1) are contractual, although found in the preamble of the written agreement (Pressed Steel Car Co. v. Union Pac. R. Co., 270 Fed. 518 [rev 254 Fed. 316]), (2) and have been construed to mean that the licensee will not resort to colorable differences of construction to escape infringement (Pressed Steel Car Co. v. Union Pac. R. Co., supra).

[c] **Implied covenants.**—(1) The parties to an exclusive license impliedly agree not to prevent performance of the contract. Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363; Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 124 NW 291, 18 AnnCas 976. (2) A company having leased to another company a patent owned by it and leased its plant for the manufacture and sale thereof, it was bound not to do any act rendering the lease and patent less beneficial to the other company. National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 SW 561.

[d] **Severable covenants.**—A covenant to pay royalties for a license to use a patented process, the amount to be determined by quarterly statements, is not a severable covenant to render quarterly statements. Jobbins v. Kendall Mfg. Co., 196 Fed. 216.

53. Ruckstell Sales, etc., Co. v. Perfecto Gear Differential Co., 28 F. (2d) 407; Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; Westinghouse Electric, etc., Co. v. Cutting, etc., Radio Corp., 5 F. (2d) 1004; Buffalo Specialty Co. v. Indiana Rubber, etc., Co., 234 Fed. 334, 148 CCA 236; Jobbins v. Kendall Mfg. Co., 184 Fed. 463; New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534; Morse v. O'Reilly, 17 F. Cas. No. 9,858; Star Salt Caster Co. v. Crossman, 22 F. Cas. No. 13,321, 3 Bann. & A. 281, 4 Cliff. 568; Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385; National Fire Proofing Co. v. Imperishable Silo Co., 63 Ind. A. 183, 112 NE 403; Buffalo Specialty Co. v. Indiana Rubber, etc., Wire Co., 59 Ind. A. 465, 109 NE 782; Oscar Barnett Fdy. Co. v. Crowe, 80 N. J. Eq. 112, 86 A 915 [aff 80 N. J. Eq. 258, 86 A 915]; Fry Glass Co. v. McKee Glass Co., 239 Pa. 34, 86 A 644.

[a] **Rule applied.**—Purpose and intention of parties contracting for use of patent for manufacturing bottles held not to include vials. Owens Bottle Co. v. Libbey Glass Co., 9 F. (2d) 564 (conduct of parties inconsistent with claim that vials were included).

[b] **Papers which are not referred to** in the contract cannot be considered as a part of the agreement. Kersey v. Wright Mach. Co., 185 Ky. 261, 214 SW 919.

[c] **Reissue of patent** will not affect the liability of the licensee, although the patentee places a narrower construction on the claims. Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22.

54. Sun Oil Co. v. Red River Refining Co., 29 F. (2d) 827.

[a] **Rule applied** to a provision that licensee could at its option avail itself of more favorable terms granted to any other subsequent licensee. Sun Oil Co. v. Red River Refining Co., 29 F. (2d) 827.

55. Laver v. Dennett, 109 U. S. 90, 3 SCt 73, 27 L. ed. 867; Leonard v. Crocker Wheeler Co., 126 Fed. 375; Fox Solid Pressed Steel Co. v. Schoen, 77 Fed. 29 [aff 84 Fed. 544, 28 CCA 492].

56. Thorn Wire Hedge Co. v. Washburn, etc., Mfg. Co., 159 U. S. 423, 16 SCt 94, 40 L. ed. 205; Providence Rubber Co. v. Goodyear, 9

ties themselves by a supplementary contract,[57] and several licenses constituting one transaction may be construed together.[58] Although the language used is often of great significance in determining whether or not the transfer is a license,[59] the legal effect, and not the name, will determine whether the agreement is a license or an assignment.[60] All previous parol agreements are considered as merged in the written agreement.[61] A written license agreement which is clear and unambiguous cannot be explained by oral or extrinsic evidence,[62] but it may be so explained where it is capable of two interpretations and a doubt exists as to its true meaning.[63] Uncertainty in a contract limiting the usual obligations of the licensor to his licensee is to be resolved in favor of the licensee.[64]

[§ 416] **b. Rights and Interests Conveyed—(1) In General.** The rights and interests of the parties to a license agreement are to be ascertained from its terms,[65] including the limitations and restrictions which it contains.[66] The patentee may grant a license upon any condition, the performance of which is reasonably within the reward which the patentee by the grant of the letters patent is entitled to secure,[67] and a violation of the condition on which the license has been granted may make the licensee an infringer of the patent.[68] In general, a license conveys the right not to be sued for infringement.[69]

Wall. (U. S.) 788, 19 L. ed. 566.

57. Rickly v. Parlin, etc., Co., 215 Ill. A. 512.

58. Hammond v. Mason, etc., Organ Co., 92 U. S. 724, 23 L. ed. 767.

59. E. W. Bliss Co. v. U. S., 253 U. S. 187, 40 SCt 455, 64 L. ed. 852 [aff 53 Ct. Cl. 47, 641].

60. Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 CCA 162; E. W. Bliss Co. v. U. S., 53 Ct. Cl. 47 [aff 253 U. S. 187, 40 SCt 455, 64 L. ed. 852]; Bell, etc., Co. v. Spoor, 216 Ill. A. 221.

61. Hazen Mfg. Co. v. Wareham, 242 Fed. 642, 155 CCA 332; Evory v. Candee, 8 F. Cas. No. 4,583, 4 Bann. & A. 545, 17 Blatchf. 200.

62. Troy Iron, etc., Factory v. Corning, 24 F. Cas. No. 14,195, 1 Blatchf. 467, Fish. Pat. R. 290 [rev on other grounds 14 How. 193, 14 L. ed. 383]; National Fire Proofing Co. v. Imperishable Silo Co., 63 Ind. A. 183, 112 NE 403.

63. Western Union Tel. Co. v. American Bell Tel. Co., 105 Fed. 684 [rev on other grounds 125 Fed. 342, 60 CCA 220].

64. Ruckstell Sales, etc., Co. v. Perfecto Gear Differential Co., 28 F. (2d) 407.

65. See cases infra this note.

[a] **Particular contracts construed as to:** (1) Use of patented article or process. Libbey Glass Co. v. McKee Glass Co., 216 Fed. 172 [aff 220 Fed. 672, 136 CCA 314 (certiorari den 238 U. S. 624 mem, 35 SCt 662 mem, 59 L. ed. 1494 mem)] (glass manufacturing process not limited to lead glass); Fry Glass Co. v. McKee Glass Co., 239 Pa. 34, 86 A 644 (license limited to lead glass). (2) Provision allowing infringer to make and sell to owner and for payment of royalties on other infringing articles. National Marking Mach. Co. v. Triumph Mfg. Co., 13 F. (2d) 6. (3) Provision for purchase of licensed machine. Wickwire Spencer Steel Corp. v. Pittsburgh Steel Corp., 4 F. (2d) 776 (improvements embodied in machine during term included). (4) Indemnity for loss suffered by licensee from use of patent. Mankato Mills Co. v. Willard, 94 Minn. 160, 102 NW 202. (5) Right to sell to distributors, jobbers, and dealers. Westinghouse Electric, etc., Co. v. Cutting, etc., Radio Corp., 294 Fed. 671.

[b] **Diligence in pushing sale.**—(1) Extensive advertising and attempts to secure customers is sufficient compliance with the condition that licensee push sales. Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363 (efforts unsuccessful because of war). (2) Where the contract for the manufacture and sale of certain patented machinery provided that defendant agreed to be diligent in supplying the market with sufficient machines to supply the demand therefor, he was not bound to create a market or to try to sell the machines. Dixie Cotton Picker Co. v. Bullock, 188 Fed. 921 (failure will not cancel the contract).

[c] **Void contract** gives licensee no rights thereunder. United Shoe Mach. Co. v. Ramlose, 231 Mo. 508, 132 SW 1133.

66. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Owens Bottle Co. v. Libbey Glass Co., 9 F. (2d) 564; Elliott Co. v. Lagonda Mfg. Co., 205 Fed. 152 [mod on other grounds 214 Fed. 578, 131 CCA 158 (certiorari den 235 U. S. 697 mem, 35 SCt 199 mem, 59 L. ed. 431 mem)]; Pelzer v. Binghamton, 95 Fed. 823, 37 CCA 288; Bloomer v. Gilpin, 3 F. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Star Salt Caster Co. v. Crossman, 22 F. Cas. No. 13,321, 3 Bann. & A. 281, 4 Cliff. 568; Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385.

[a] **Reservation of right to make other classes of article** licensed gives licensor the right to make articles differing from those licensed but producing similar or like results from their use. Ruckstell Sales, etc., Co. v. Perfecto Gear Differential Co., 28 F. (2d) 407 (speed change gearing and transmission gears).

[b] **Reservation of right to dispose of patented article** gives licensee only a right to use, and he cannot object that licensor refused to furnish him with the article after termination of the license. Æolian Co. v. Victor Talking Mach. Co., 238 Fed. 164, 151 CCA 240 [certiorari den 244 U. S. 660 mem, 37 SCt 743 mem, 61 L. ed. 1376 mem].

[c] **Right to prosecute for piracy** may be reserved by the licensor. Bicknell v. Todd, 3 F. Cas. No. 1,389, Fish. Pat. R. 452, 5 McLean 236 (on assignment this right passes to the assignee).

67. U. S.—U. S. v. General Electric Co., 272 U. S. 476, 47 SCt 192, 71 L. ed. 362 [aff 15 F. (2d) 715]; Henry v. A. B. Dick Co., 224 U. S. 1, 32 SCt 364, 56 L. ed. 645, AnnCas 1913D 880; Bement v. National Harrow Co., 186 U. S. 70, 22 SCt 747, 46 L. ed. 1058; George Close Co. v. Ideal Wrapping Mach. Co., 29 F. (2d) 533 [aff 23 F. (2d) 848]; Radio Corp. of America v. Lord, 28 F. (2d) 257 [aff 24 F. (2d) 565, and certiorari den 49 SCt 83 mem]; General Electric Co. v. Continental Lamp Works, 280 Fed. 846; Schrade v. Camillus Cutlery Co., 242 Fed. 523; Æolian Co. v. Victor Talking Mach. Co., 238 Fed. 164, 151 CCA 240 [certiorari den 244 U. S. 660 mem, 37 SCt 743 mem, 61 L. ed. 1376 mem]; Waterman Co. v. Kline, 234 Fed. 891, 148 CCA 489; Sheridan-Clayton Paper Co. v. U. S. Envelope Co., 232 Fed. 153, 146 CCA 345; U. S. v. Keystone Watch Case Co., 218 Fed. 502 [app dism 257 U. S. 664 mem, 42 SCt 45 mem, 66 L. ed. 424 mem]; Rajah Auto Supply Co. v. Rex Ignition Mfg. Co., 209 Fed. 622; Waltham Watch Co. v. Keene, 191 Fed. 855; Indiana Mfg. Co. v. Nichols, etc., Co., 190 Fed. 579; Edison v. Ira M. Smith Mercantile Co., 188 Fed. 925; St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co., 178 Fed. 923, 103 CCA 565 [certiorari den 219 U. S. 588 mem, 31 SCt 471 mem, 55 L. ed. 348 mem]; The Fair v. Dover Mfg. Co., 166 Fed. 117, 92 CCA 43; National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 CCA 594; Victor Talking Mach. Co. v. The Fair, 123 Fed. 424, 61 CCA 58; Edison Phonograph Co. v. Pike, 116 Fed. 863; Cortelyou v. Lowe, 111 Fed. 1005, 49 CCA 671; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Dickerson v. Tinling, 84 Fed. 192, 28 CCA 139; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; Washburn, etc., Mfg. Co. v. Southern Wire Co., 37 Fed. 428; Brooks v. Stolley, 4 F. Cas. No. 1,962, 3 McLean 523, 2 Robb Pat. Cas. 281; Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co., 7 F. Cas. No. 4,015, 1 Bann. & A. 330, 12 Blatchf. 202; Goodyear v. Day, 10 F. Cas. No. 5,567; Wood v. Wells, 30 F. Cas. No. 17,967, 6 Fish. Pat. Cas. 382; Woodworth v. Cook, 30 F. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. R. 423.

Cal.—Braun v. McGuire, 201 Cal. 134, 255 P 808.

Mass.—Garst v. Harris, 177 Mass. 72, 58 NE 174.

N. H.—Burke v. Partridge, 58 N. H. 349.

Tex.—Coca-Cola Co. v. State, (Civ. A.) 225 SW 791.

Ont.—Copeland-Chatterson Co. v. Lyman Bros. Co., 9 OntWR 908.

[a] **Financial status of licensee.**—Contract licensing sale of patented products, which authorized assignment to corporation sufficiently financed, required financing before assignment. American Woodlite Corp. v. Woodlite Corp., (Cal. A.) 265 P 397 (corporation found to be insufficiently financed).

[b] **An agreement to use only the patented form** is not contrary to public policy. Jones v. Lees, 1 H. & N. 189, 156 Reprint 1171.

Restrictions upon resale see Contracts § 427.

68. Schrade v. Camillus Cutlery Co., 242 Fed. 523; Waterman Co. v. Kline, 234 Fed. 891, 148 CCA 489; Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493, 121 CCA 615; Winchester Repeating Arms Co. v. Buengar, 199 Fed. 786; Indiana Mfg. Co. v. Nichols, etc., Co., 190 Fed. 579; St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co., 178 Fed. 923, 103 CCA 565 [certiorari den 219 U. S. 588 mem, 31 SCt 471 mem, 55 L. ed. 348 mem]; Cortelyou v. Johnson, 138 Fed. 110 [rev 145 Fed. 933, 76 CCA 455, and later decision aff 207 U. S. 196, 28 SCt 105, 52 L. ed. 167, on the ground that there was no sufficient proof of notice of restrictions on sale]; Victor Talking Mach. Co. v. The Fair, 123 Fed. 424, 61 CCA 58; Edison Phonograph Co. v. Pike, 116 Fed. 863; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Tubular Rivet, etc., Co. v. O'Brien, 93 Fed. 200; Dickerson v. Tinling, 84 Fed. 192, 28 CCA 139; Brooks v. Stolley, 4 F. Cas. No. 1,962, 3 McLean 523, 2 Robb Pat. Cas. 281; Chambers v. Smith, 5 F. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575; Copeland-Chatterson Co. v. Lyman Bros. Co., 9 OntWR 908.

69. Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242 [rev 263 Fed. 99]; Dwight, etc., Sintering Co., Inc. v. American Ore Reclamation Co., 263 Fed. 315 [certiorari den 252 U. S. 582 mem, 40 SCt 393 mem, 64 L. ed. 727

In the absence of stipulations to the contrary the agreement assumes that patents referred to in it are valid according to their respective claims.[70] The licensor can convey no greater title or interest than he possesses,[71] although it has been held that a title subsequently acquired by him will inure to the benefit of his licensee,[72] and the license may, by the express agreement of the parties, operate to transfer subsequently acquired rights.[73] Further, the licensor, in order to be permitted to enforce the license agreement, must be able to transfer the rights which it recites him as possessing.[74] A licensee of an original patent, being the holder of a substantial interest therein, is not bound by a construction placed by the patentee upon his original claims to support his theory that a reissue is necessary.[75]

[§ 417] **(2) Exclusive Licenses.** A patentee has the right to grant an exclusive license of his patent,[76] and such a license is not illegal as in restraint of trade.[77] In the absence of a provision to the contrary in the license, the licensor may execute other licenses to other licensees,[78] and may grant them at a lower rate;[79] but an exclusive license during its existence prevents the licensor from granting a license to another person.[80] Although the patentee agrees not to issue other licenses, he may nevertheless assign the rights remaining to him.[81]

[§ 418] **(3) License to Several.** A license given to several individuals gives to each a separate and distinct interest which he may transfer or use without obligation to the others in the absence of a contract controlling the matter.[82]

[§ 419] **(4) Rights Necessary to Enjoyment or Use of License—(a) In General.** A license to use a patented article in one way will not license a use in another;[88] but generally a license carries with it whatever further license may be necessary to render the granted license effective.[84] Thus an implied right to make a patented article may accompany the grant of the right to use,[85] or use and sell, the article,[86] but not unless the right to use would be of no value without the implied right to make;[87] and a license to sell will not include the right to exchange.[88] A conveyance of the right to make and sell a patented article may include the right to use it,[89] and the right to make may imply the right to sell[90] or use and sell it;[91] and a license to make and

mem]; Webster Electric Co. v. Podlesak, 255 Fed. 907; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728 [rev 65 Fed. 619]; Bottlers' Seal Co. v. Rainey, 225 N. Y. 369, 122 NE 200.

70. Ball, etc., Fastener Co. v. Ball Glove Fastening Co., 58 Fed. 818, 7 CCA 498.

71. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242]; New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534; Keene Mach. Co. v. Barratt, 100 Fed. 590, 40 CCA 571; Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176; Dare v. Boylston, 6 Fed. 493, 18 Blatchf. 548; Abbett v. Zusi, 1 F. Cas. No. 7, 5 Bann. & A. 38.

[a] **Licensee of assignee.**—(1) The licensee is limited by the terms and subject to the conditions of the assignment. Abbett v. Zusi, 1 F. Cas. No. 7, 5 Bann. & A. 38. (2) An exclusive license to sell phonographs granted by an assignee of the patentee, with the right to improvement patents granted to him within fifteen years, covered only phonographs containing patented inventions and improvements owned by the licensor. New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534. (3) Assignee having lost the benefits of an agreement between it and the patentee, such agreement will not inure to the benefit of the assignee's licensee. New York Phonograph Co. v. National Phonograph Co., supra.

[b] **A license to one having notice** (1) of a valid subsisting prior exclusive license by his licensor covering the same right is void as to the original licensee. Dare v. Boylston, 6 Fed. 493, 18 Blatchf. 548. (2) Persons subsequently contracting with plaintiff's licensors for patent rights would be affected only by such knowledge of plaintiff's prior rights as they had when they made the contract. Wise v. Tube Bending Mach. Co., 194 N. Y. 272, 87 NE 430.

[c] **Prior executory assignment.**—An agreement to convey applications for a patent on an invention and the consequent patent is valid in equity, and takes precedence over a subsequent agreement to give an exclusive license, although it does not purport to make a present conveyance of the applications, and no applications have in fact been filed. Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242].

72. Gottfried v. Miller, 104 U. S. 521, 26 L. ed. 851.

[a] **Where the licensor had no title** the license is a nullity, and subsequent acquisition of title by the licensor will not inure to the benefit of the licensee. Keene Mach. Co. v. Barratt, 100 Fed. 590, 40 CCA 571.

73. Radio Corp. of America v. Emerson, 296 Fed. 51 [certiorari den 265 U. S. 582 mem, 44 SCt 456 mem, 68 L. ed. 1190 mem].

74. Kent v. Addicks, 126 Fed. 112, 60 CCA 660 [certiorari den 192 U. S. 607 mem, 24 SCt 851 mem, 48 L. ed. 585 mem].

75. Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22.

76. Laubach Union Check Valve Co. v. Laubach, 97 Wash. 115, 165 P 1053.

77. Good v. Daland, 121 N. Y. 1, 24 NE 15.

78. Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261; Alexander v. Mosaic Tile Co., 113 NYS 265; Fire Extinguisher Co. v. North Western Fire Extinguisher Co., 20 Grant Ch. (Ont.) 625.

[a] **Construction.**—A restriction in a license prohibiting the licensing of others in the same territory is limited in its operation to the granting of such licenses under the patents then owned by the licensor. New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534.

[b] **Effect of recital in another writing.**—Where a contract granting a license does not grant an exclusive license, the right cannot be rendered exclusive by a recital in a receipt given for the consideration. Fechter v. Zagelmeyer, 235 Mich. 490, 209 NW 574.

79. Alexander v. Trent Tile Co., 61 Misc. 193, 113 NYS 264; Alexander v. Mosaic Tile Co., 113 NYS 265.

80. Agnew v. Kelsey Wheel Co., 185 Mich. 340, 151 NW 1038.

81. Mayer v. Hardy, 127 N. Y. 125, 27 NE 837.

82. Gordon v. O'Neill, 174 Mich. 575, 140 NW 927.

83. Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Alvord v. Smith, etc., Ironworks, 216 Fed. 150.

84. Radio-Craft Co. v. Westinghouse Electric, etc., Co., 7 F. (2d) 432 [aff 291 Fed. 169]; Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 Fed. 753, 758; Buffalo Specialty Co. v. Indiana Rubber, etc., Co., 234 Fed. 334, 148 CCA 236; Steam Stonecutter Co. v. Shortsleeves, 22 F. Cas. No. 13,384, 16 Blatchf. 381, 4 Bann. & A. 364; Rickly v. Parlin, etc., Co., 215 Ill. A. 512.

"It is a maxim of the common law that one, granting a thing, impliedly grants that without which the thing expressly granted would be useless to the grantee. This maxim is as applicable to grants of patent rights as to other species of property." Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., supra.

[a] **Thus** (1) an unrestricted license to manufacture and use or sell implies authority to contract with others to supply what may be lawfully used or sold. Radio-Craft Co. v. Westinghouse Electric, etc., Co., 7 F. (2d) 432 [aff 291 Fed. 169]. (2) A grant of a "nonexclusive, nontransferable license to manufacture the apparatus, and to sell the apparatus of the licensee's manufacture," does not prevent licensee from having the apparatus manufactured for itself by some one else. Westinghouse Electric, etc., Co. v. Cutting, etc., Radio Corp., 294 Fed. 671, 672.

85. Dunkley Co. v. California Packing Corp., 277 Fed. 996 [aff 277 Fed. 989, and certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem]; Illingworth v. Spaulding, 43 Fed. 827; Steam Stonecutter Co. v. Shortsleeves, 22 F. Cas. No. 13,384, 16 Blatchf. 381, 4 Bann. & A. 364; Woodworth v. Curtis, 30 F. Cas. No. 18,013, 2 Woodb. & M. 524, 2 Robb Pat. Cas. 603; MacLaughlin v. Lake Erie, etc., R. Co., 2 Ont. L. 190 [app allowed on other grounds 3 Ont. L. 706, 3 BRC 321].

86. Hamilton v. Kingsbury, 11 F. Cas. No. 5,984, 3 Bann. & A. 346, 15 Blatchf. 64.

87. Braun v. McGuire, 201 Cal. 134, 255 P 808.

88. Pressey v. H. B. Smith Mach. Co., 45 N. J. Eq. 872, 19 A 618.

89. Turnbull v. Weir Plow Co., 14 Fed. 108, 9 Biss. 334.

90. Poirier v. Bradford, 119 Minn. 475, 138 NW 687, 43 LRANS 142.

[a] **After termination of license.**—Where a corporation had the right under contract with plaintiff to sell farm implements covered by patents held by him, the articles held by the corporation when such right ceased may be sold by the corporation or its successor in interest. Poirier v. Bradford, 119 Minn. 475, 138 NW 687, 43 LRANS 142.

91. Curtiss Aeroplane, etc., Corp. v. United Aircraft Engineering Corp., 266 Fed. 71; Thomas v. Hunt, 17 C.

use may include the right to sell.[92] A license to make and sell articles of the licensee's manufacture gives him no right to have others manufacture for him.[93]

Use of other patented article. Ordinarily a right to use one patent will not give the user an implied license to make use of some other patent belonging to the licensor;[94] but if the patented article sold to the licensee can be used only in connection or combination with another patented invention of the licensor, a license to use the latter invention may be implied.[95] Nor will the right to use a composition carry the right to use the process.[96]

[§ 420] **(b) Right To Repair or Improve Patented Article.** A license to use carries with it the right to repair the patented article,[97] or add improvements.[98]

[§ 421] **(c) License Implied from Purchase of Patented Article.**[99] Although an unrestricted sale gives the licensee the unqualified right to use the patented article,[1] the licensee cannot reconstruct,[2] or make another machine or structure like it,[3] or buy one from an infringer,[4] or use machines other than those purchased from the patentee.[5]

[§ 422] **(5) Rights of Licensee as to Competition or Infringement.**[6] In the absence of a covenant to protect the licensee against infringers, there is no obligation on the part of the licensor to do so.[7] A mere notice, attached to the article, that the patentee will prosecute infringers is not a covenant or guaranty to protect the purchaser;[8] nor is an agreement to sell exclusively to one person for a certain period.[9] A covenant that the licensor will not license or permit others to use or sell does not amount to a covenant to secure the licensee against unauthorized and unlawful acts of wrongdoers.[10] An agreement to save the licensee harmless against infringement claims does not require the licensor to protect the licensee from competition by infringers.[11] Where the contract stipulates that the patentee shall not be responsible for damages from infringement, the licensee takes the risk.[12]

Competition by licensee. Unless the license so provides, the manufacture of similar articles on other patents not constituting an infringement of the patent as to which the license is granted is not a violation of the license.[13]

[§ 423] **(6) Control of Mode of Manufacture.** In the absence of a stipulation in the contract, the licensee is required in the construction of the licensed article to use only such materials as are reasonably suitable for the purpose,[14] and the licensor has no right to dictate as to such materials.[15]

[§ 424] **(7) Right to Improvements upon Patent.** Whether improvements pass under a license depends upon the intention of the parties as evidenced by a proper construction of their agreement.[16] A license to a patent does not in itself carry with it improvements to such patent.[17]

[§ 425] **(8) Effect of Limitations upon Third Persons.** A purchaser from the licensee having notice of restrictions in the license takes subject to them,[18] unless such restrictions are invalid or il-

B. N. S. 183, 112 ECL 183, 144 Reprint 74.

92. Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 AmD 385.

93. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628; Radio-Craft Co. v. Westinghouse Electric, etc., Co., 7 F. (2d) 432; Westinghouse Electric, etc., Co. v. Cutting, etc., Radio Corp., 5 F. (2d) 1004.

94. Salvage Process Co. v. Shewan, 26 F. (2d) 258; United Nickel Co. v. California Electrical Works, 25 Fed. 475.

95. Edison Electric Light Co. v. Peninsular Light, etc., Co., 101 Fed. 831, 43 CCA 479 [aff 95 Fed. 669].

96. United Nickel Co. v. California Electrical Works, 25 Fed. 475.

97. Chaffee v. Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; George Close Co. v. Ideal Wrapping Mach. Co., 29 F. (2d) 533 [aff 23 F. (2d) 848]; Aiken v. Manchester Print Works, 1 F. Cas. No. 113, 2 Cliff. 435; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 24 F. Cas. No. 14,369, 2 Bann. & A. 593.

[a] **Extent of right** (1) depends on the character of the part out of repair and the relation of the substituted part to the parts with which it must coact. Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957. (2) That the repair of the defective part of a patented device is difficult or expensive is not ground for enlarging an implied license. Connecticut Tel., etc., Co. v. Automotive Equipment Co., supra.

98. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; MacLaughlin v. Lake Erie, etc., R. Co., 3 Ont. L. 706.

99. Duration of license implied from unrestricted purchase see infra § 430.

Infringement by purchaser see infra § 496.

1. See supra § 412.

2. American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 1 SCt 52, 27 L. ed. 79 [rev 1 F. Cas. No. 293, 3 Bann. & A. 320]; George Close Co. v. Ideal Wrapping Mach. Co., 29 F. (2d) 533 [aff 23 F. (2d) 848]; C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380.

[a] **Separately patented part** of machine sold cannot be reconstructed. C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380.

Reconstruction as infringement see infra § 495.

3. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Brown v. Puget Sound Reduction Co., 110 Fed. 383; Boston v. Allen, 91 Fed. 248, 33 CCA 485; Aiken v. Manchester Print Works, 1 F. Cas. No. 113, 2 Cliff. 435.

4. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Victor Talking Mach. Co. v. American Graphophone Co., 178 Fed. 577 [rev on other grounds 183 Fed. 580, 106 CCA 348]; Brown v. Puget Sound Reduction Co., 110 Fed. 383; Davis v. Chesapeake, etc., Tel. Co., 77 Fed. 895; Vermont Farm Mach. Co. v. Gibson, 56 Fed. 143, 5 CCA 451 [aff 50 Fed. 423].

5. Union Metallic Cartridge Co. v. U. S. Cartridge Co., 24 F. Cas. No. 14,369, 2 Bann. & A. 593.

6. Right to sue for infringement see infra §§ 540–543.

7. Martin v. New Trinidad Lake Asphalt Co., 255 Fed. 93; National Rubber Co. v. Boston Rubber-Shoe Co., 41 Fed. 48; Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682; Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234.

8. Pratt v. Auto Spring Repairer Co., 199 Fed. 431 [aff 196 Fed. 495, 116 CCA 261].

9. American Toy Mfg. Co. v. McLoughlin, 221 Mass. 576, 109 NE 836.

10. Baker v. Mason, 3 R. I. 45.

11. Venner v. Pittsburgh Plate Glass Co., 192 Wis. 606, 213 NW 307.

12. Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261; Alexander v. Mosaic Tile Co., 113 NYS 265.

13. Clancy v. Troy Belting, etc., Co., 157 Fed. 554, 85 CCA 314 [rev 152 Fed. 188].

14. Kersey v. Wright Mach. Co., 185 Ky. 261, 214 SW 919.

15. Kersey v. Wright Mach. Co., supra.

[a] **A provision that the licensor is to instruct and assist** the licensee until he becomes familiar with the construction of the article does not confer the right to dictate as to the materials. Kersey v. Wright Mach. Co., 185 Ky. 261, 214 SW 919.

16. See cases infra this note.

[a] **Construction of provisions.**— (1) Whether term "improvement," used in connection with transfer of right or interest in patent, means patentable improvement depends on subject matter and context of contract, construed in light of surrounding circumstances. Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A 847. (2) Where one who claims to be the inventor and owner of improvements in appliances grants to another the sole and absolute license to manufacture machinery containing the improvements, the license covers applications for patents filed at the time of the making of the agreement. Oscar Barnett Fdy. Co. v. Crowe, 80 N. J. Eq. 112, 86 A 915 [aff 80 N. J. Eq. 258, 86 A 915]. (3) An invention, described in the specifications for a patent as an improvement on the earlier invention, was an improvement covered by the contract, in view of the conduct of the parties in treating it as such for several years. Phœnix Mfg. Co. v. White, 149 Wis. 287, 135 NW 891.

[b] **The manufacturer was estopped to claim** that a new invention was an improvement covered by his contract, where he had consented to its manufacture by the patentee, and the patentee had expended money and labor in preparing to manufacture and sell the article on the faith of such consent. Phœnix Mfg. Co. v. White, 149 Wis. 287, 135 NW 891.

[c] **Contract requiring assignment** to licensor may be valid. American Refining Co. v. Gasoline Products Co., (Tex. Civ. A.) 294 SW 967.

17. May v. Page, 60 N. Y. 628 mem.

18. Skee Ball Co. v. Cohen, 286 Fed. 275; Edison v. Ira M. Smith Mercantile Co., 188 Fed. 925; Victor Talking Mach. Co. v. The Fair, 123 Fed. 424, 61 CCA 58; Edison Phonograph Co. v. Pike, 116 Fed. 863; Edison Phonograph Co. v. Kaufmann, 105

legal,[19] in which case he is not bound, even though he has notice.[20] A purchaser without notice of any private agreements between the patentee and his licensee is not bound thereby.[21]

[§ 426] **c. Where License May Be Exercised—(1) Express License.** The express terms of the license will control as to the territory in which it may be exercised.[22] A license to use a patented device in a particular territory,[23] or at a particular establishment,[24] is binding on the licensee. But a license to use and sell a machine within a specified territory authorizes the licensee to sell the product of the machine out of such territory.[25] And a license to use a patented device in a particular shop does not prevent its manufacture elsewhere.[26] Exclusive licensees may, by agreement between themselves, limit the territory in which they may operate.[27]

[§ 427] **(2) Implied License.** A purchaser at an unrestricted sale of a patented article has an unqualified right to use or sell the article,[28] and this, although the purchase was from a territorial assignee for use in another territory;[29] and the vendor's right to sell is not affected by his knowledge of such intended use.[30] The right to sell, as distinguished from the right to use, in the territory of another, was formerly denied;[31] but the later decisions have overruled this doctrine, holding that the sale of patented articles by the patentee or a territorial assignee confers upon the purchasers of such articles the right to carry the same into the territory of another assignee, and there sell them, in the usual course of trade, without the consent or license of the latter assignee.[32] But a purchase of an article patented in a foreign country will not imply a right to sell in another country wherein the article is patented unless the licensee of that country consents to the sale.[33]

[§ 428] **d. Duration of License—(1) In General.** In the absence of an express provision on the subject a license continues until the expiration of the original term of the patent,[34] but not be-

Fed. 960; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; International Pav. Co. v. Richardson, 75 Fed. 590; Porter Needle Co. v. National Needle Co., 17 Fed. 536; American Cotton-Tie Supply Co. v. Bullard, 1 F. Cas. No. 294, 4 Bann. & A. 520, 17 Blatchf. 160; Wilson v. Sherman, 30 F. Cas. No. 17,833, 1 Blatchf. 536, Fish. Pat. R. 361; National Phonograph Co. v. Menck, [1911] A. C. 336; British Mutoscope, etc., Co. v. Homer, [1901] 1 Ch. 671.

[a] **Notice of conditions printed and posted upon each machine** is binding upon purchasers. Cortelyou v. Johnson, 138 Fed. 110 [rev 145 Fed. 933, 76 CCA 455 (aff 207 U. S. 196, 28 SCt 105, 52 L. ed. 167)]; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728.

[b] **Insufficiency of written notice is immaterial** when the purchaser had actual notice of the condition. The Fair v. Dover Mfg. Co., 166 Fed. 117, 92 CCA 43.

19. See Contracts § 424; Monopolies § 124.

20. Ford Motor Co. v. Union Motor Sales Co., 244 Fed. 156, 156 CCA 584 [aff 225 Fed. 373].

21. Cortelyou v. Johnson, 207 U. S. 196, 28 SCt 105, 52 L. ed. 167 (knowledge of salesman does not charge corporation with notice); Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398, 148 CCA 660 [aff 243 U. S. 502, 37 SCt 416, 61 L. ed. 871]; Ford Motor Co. v. International Auto League, 209 Fed. 235; Washing Mach. Co. v. Earle, 29 F. Cas. No. 17,219, 2 Fish. Pat. Cas. 203, 3 Wall. Jr., 320; Badische Anilin und Soda Fabrik v. Isler, [1906] 2 Ch. 443 [dism app [1906] 1 Ch. 605].

[a] **Thus** the holder of patent rights for a motion picture projecting machine was not entitled to demand royalties from purchaser licensee to manufacture because the plate attached to the machine recited that the sale and purchase was made upon other terms to be fixed. Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398, 148 CCA 660 [aff 243 U. S. 502, 37 SCt 416, 61 L. ed. 871] (notice of customary royalties charged does not affect licensee).

22. See cases infra this note; and notes 23-27.

[a] **Rule applied.**—License to make in a particular factory is effective as a negative covenant not to make elsewhere. Cassidy v. Evan L. Reed Mfg. Co., 293 Fed. 797.

[b] **United States.**—A license to manufacture, use, and sell to others for sale throughout the United States a patented combination is held to extend no farther than the United States. Lagonda Mfg. Co. v. Elliott Co., 214 Fed. 578, 131 CCA 158 [mod 205 Fed. 152, and certiorari den 235 U. S. 697 mem, 35 SCt 199 mem, 59 L. ed. 431 mem].

[c] **Foreign sales** do not violate a limitation in the license when the article is not patented in the place sold. Herman v. William B Pierce Co., 105 App. Div. 16, 93 NYS 413.

23. Skee Ball Co. v. Cohen, 286 Fed. 275; Elliott Co. v. Lagonda Mfg. Co., 205 Fed. 152 [mod on other grounds 214 Fed. 578, 131 CCA 158 (certiorari den 235 U. S. 697 mem, 35 SCt 199 mem, 59 L. ed. 431 mem)]; Chambers v. Smith, 5 F. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575; Wicke v. Kleinknecht, 29 F. Cas. No. 17,608, 1 Bann. & A. 608; Woodworth v. Cook, 30 F. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. R. 423; Coleman v. Ford Motor Co., 195 Mo. A. 554, 193 SW 866; Burke v. Partridge, 58 N. H. 349; Southland Sweet Potato Curing, etc., Assoc. v. Beck, (Tex. Civ. A.) 221 SW 656.

24. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Cassidy v. Evan L. Reed Mfg. Co., 293 Fed. 797.

[a] **For example** (1) a license for use on a railroad extends only to the then existing road (Earll v. Metropolitan St. R. Co., 85 Fed. 214; Emigh v. Chicago, etc., R. Co., 8 F. Cas. No. 4,448, 1 Biss. 400, 2 Fish. Pat. Cas. 387; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410), (2) unless otherwise stipulated in the license (Matthew v. Pennsylvania R. Co., 8 Fed. 45; Lightner v. Boston, etc., R. Co., 15 F. Cas. No. 8,343, 1 Lowell 338). (3) A license to use a patented invention upon the locomotives used by a railroad company on its road or on any road or roads now owned or that may hereafter be owned or operated by such company embraces not only locomotives in use at the date of the license upon roads then owned and operated by the company, but also such other locomotives as it might thereafter use and other roads which it might thereafter operate. Matthew v. Pennsylvania R. Co., supra.

[b] **A license to use an invention to the capacity of a factory** confers the right to use the invention in a subsequent addition to the factory, where the total use does not exceed the original capacity. England v. Thompson, 8 F. Cas. No. 4,487, 3 Cliff. 271.

[c] **A lease of premises and machinery** by which a patented process is carried on is not a general license, but gives the licensee a right to use such process on the leased premises only. Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385.

25. Simpson v. Wilson, 4 How. (U. S.) 709, 11 L. ed. 1169.

26. Wood v. Wells, 29 F. Cas. No. 17,967, 6 Fish. Pat. Cas. 382.

27. Southland Sweet Potato Curing, etc., Assoc. v. Beck, (Tex. Civ. A.) 221 SW 656.

28. See supra § 412.

29. Hobbie v. Jennison, 149 U. S. 355, 13 SCt 879, 37 L. ed. 766 [aff 40 Fed. 887]; Adams v. Burke, 17 Wall. 453, 21 L. ed. 700 [aff 1 F. Cas. No. 50, 4 Fish. Pat. Cas. 392, Holmes 40]; Edison Electric Light Co. v. Goelet, 65 Fed. 612; Hobbie v. Smith, 27 Fed. 656; McKay v. Wooster, 16 F. Cas. No. 8,847, 6 Fish. Pat. Cas. 375, 2 Sawy. 373; Betts v. Willmott, L. R. 6 Ch. 239.

30. Hobbie v. Smith, 27 Fed. 656.

31. California Electrical Works v. Finck, 47 Fed. 533; Sheldon Axle Co. v. Standard Axle Works, 37 Fed. 789, 3 LRA 656; Hatch v. Adams, 22 Fed. 434 [app dism 131 U. S. 427 mem, 9 SCt 794 mem, 33 L. ed. 216 mem]; Wicke v. Kleinknecht, 29 F. Cas. No. 17,608, 1 Bann. & A. 608.

32. Keeler v. Standard Folding-Bed Co., 157 U. S. 659, 15 SCt 738, 39 L. ed. 848 [rev 37 Fed. 693, 41 Fed. 51]; Jackson v. Vaughan, 73 Fed. 837.

33. Boesch v. Graff, 133 U. S. 697, 10 SCt 378, 33 L. ed. 787; Free Sewing Mach. Co. v. Bry-Block Mercantile Co., 204 Fed. 632; Dickerson v. Tinling, 84 Fed. 192, 28 CCA 139.

[a] **In England** (1) it has been held that, where the owner of a patent manufactures and sells the patented article in a foreign country as well as in England, the sale of the article in one country implies a license to use it in the other, but if he has assigned his patent in the other country, the article cannot be sold so as to defeat the rights of the assignee. Betts v. Willmott, L. R. 6 Ch. 239. (2) Where the owner of patents in two countries grants a license to use the patent in one country, there is no implied license to sell the manufactured article in the other country in violation of the licensor's patent in the latter country. Société Anonyme, etc. v. Tilghman's Patent Sand Blast Co., 25 Ch. D. 1.

34. St. Paul Plow-Works v. Starling, 140 U. S. 184, 11 SCt 803, 35 L. ed. 404; Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Koppe v. Burnstingle, 29 F. (2d) 923; Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; Conley Camera Co. v. Multiscope, etc., Co., 216 Fed. 892, 133 CCA 96; American St. Car Advertising Co. v. Jones, 122 Fed. 803 [rev on other grounds 142 Fed. 974, 74 CCA 236]; Edison Electric Light Co. v. Peninsular

yond,[35] and it ordinarily will not embrace an extended term.[36] However, an express stipulation in the contract as to the duration of the license will of course control.[37] If a license for a limited period provides for a renewal, it may be extended by the conduct of the licensee indicating his intention to avail himself of the renewal option,[38] or, if notice is necessary, it may be given orally,[39] and failure to give such notice may be excused.[40]

[§ 429] **(2) Extended Terms.** Ordinarily a license is limited to the term of the patent,[41] and in the absence of express stipulations an extended term does not inure to the benefit of the licensee.[42] But renewals may be covered by the license by express agreement.[43] Where the ownership of the article does not carry with it the right of use, the owner may use it only during the period covered by the license.[44] A licensee who, having machines in use at the end of an original term of a patent, takes a license for another year under the extended term, waives any rights which he had to use such machines when the first term ended.[45] If, before the extension, the right to use was limited to a particular district or to a specified number of machines, it continues during the extension, subject to the same limitations.[46]

[§ 430] **(3) License Implied from Purchase of Patented Article.**[47] The right to use, acquired by an unrestricted purchase,[48] continues until the article is worn out;[49] and this, although the term of the patent has been extended.[50] But when the article is worn out or destroyed, the license to use ceases.[51]

[§ 431] **5. Assignments and Sublicenses—a. In General.** As a general rule, a license is personal to the licensee, and not transferable,[52] unless the terms

Light, etc., Co., 95 Fed. 669 [aff 101 Fed. 831, 43 CCA 479]; McKay v. Mace, 23 Fed. 76.

Forfeiture by licensee see infra § 439.

Termination by mutual consent see infra § 434.

35. Paper-Bag Mach. Co. v. Nixon, 105 U. S. 766, 26 L. ed. 959; Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Porter Needle Co. v. National Needle Co., 17 Fed. 536; Bloomer v. Stolley, 3 F. Cas. No. 1,559, Fish. Pat. R. 376, 5 McLean 158; England v. Thompson, 8 F. Cas. No. 4,487, 3 Cliff. 271; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410; Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385; Wood v. Michigan Southern, etc., R. Co., 30 F. Cas. No. 17,957, 2 Biss. 62, 3 Fish. Pat. Cas. 464; Thomson Electric Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496, 157 NW 67.

[a] **The right to use a patented process** during the original term of the patent does not authorize the use of it after the patent is extended. Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385.

[b] **Construction of particular stipulations.**—(1) A stipulation in a license that it shall continue "during the term for which said letters patent are or may be granted" (Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410), (2) or "for the whole term of the patent which may be granted" (Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385), does not authorize the use of the invention during the extended term.

36. See infra § 429.

37. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Sherborne v. Wilcox, etc., Sewing-Mach. Co., 105 Fed. 970 [aff 109 Fed. 319, 48 CCA 378 (certiorari den 183 U. S. 696 mem, 22 SCt 933 mem, 46 L. ed. 394 mem)]; Nichols v. Murphy, 136 Ill. 380, 26 NE 509; Phœnix Mfg. Co. v. White, 149 Wis. 287, 135 NW 891.

[a] **Year to year.**—License under patent to continue "from year to year" during term of patents provided for continuation for a year at a time at licensee's election. Brown Method Co. v. Ginsberg, 153 Md. 414, 138 A 402.

[b] **Where contract provides for a trial period** with an option to take a license, failure to exercise such option terminates the license at the end of the probationary period. Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242].

[c] **Provisions for termination** (1) will not invalidate a license. Meurer Steel Barrel Co. v. Martin, 1 F. (2d) 687. (2) Where the contract gave the licensee right to cancel if the device failed "to be commercially successful to the satisfaction" of the licensee, there was no necessary intent that commercial success could be decided only by actual manufacture and commercial sale, the reasonable meaning being that, if the licensee found itself not satisfied within the time limit specified that the device would be a commercial success, it might cancel. Computing Scale Co. v. Barnard Co., 259 Fed. 250, 170 CCA 318. (3) Contract to use machine for certain number of revolutions created a revocable license. Elliott Mach. Co. v. Center, 227 Fed. 124.

[d] **Sale of accumulated stock.**—A license to make and sell during term of license, royalty to be paid on all sales made before its termination, although delivery was not made until afterward, by implication denies the right to sell after license has been terminated at his election, although the articles sold were made during the term. Pelzer v. Binghamton, 95 Fed. 823, 37 CCA 288.

38. Rowland v. Biesecker, 185 Fed. 515, 107 CCA 615 [aff 181 Fed. 128].

[a] **Thus** a license contract under a patent, providing that "this agreement to extend five years from date with a privilege of ten years or terminate at any time if by mutual consent of both parties," gave the licensee the privilege of continuing for ten years which he could exercise ex parte, and it was sufficient to extend the license if he continued making the patented machines or otherwise indicated his intention. Rowland v. Biesecker, 185 Fed. 515, 107 CCA 615 [aff 181 Fed. 128].

[b] **Suit by licensee** to restrain violation of license agreement sufficiently shows election. Buhl v. Stephens, 84 Fed. 922.

39. Rowland v. Biesecker, 181 Fed. 128 [aff 185 Fed. 515, 107 CCA 615].

40. Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

[a] **Failure to give such notice is excused** where, during the period of original license, licensor prevents performance by licensee, agrees that he need no longer tender royalties as they will not be accepted, and knows that licensee intends to rely on extension. Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

41. See supra § 428.

42. New York Phonograph Co. v. Edison, 136 Fed. 600 [aff 144 Fed. 404, 75 CCA 382]; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,560, 6 Blatchf. 165.

43. McKay v. Mace, 23 Fed. 76; Union Mfg. Co. v. Lounsbury, 41 N. Y. 363 [aff 42 Barb. 125].

44. Porter Needle Co. v. National Needle Co., 17 Fed. 536.

Right acquired by unrestricted purchase see infra § 412.

45. Wooster v. Taylor, 30 F. Cas. No. 18,040, 1 Bann. & A. 594, 12 Blatchf. 384.

46. Day v. Union India-Rubber Co., 7 F. Cas. No. 3,691, 3 Blatchf. 488 [aff 20 How. 216, 15 L. ed. 833].

47. Infringement by purchaser see infra § 496.

48. See supra § 412.

49. Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Bloomer v. Millinger, 1 Wall. (U. S.) 340, 17 L. ed. 581; Chaffee v. Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240.

50. Paper-Bag Mach. Co. v. Nixon, 105 U. S. 766, 26 L. ed. 959; Mitchell v. Hawley, 16 Wall. (U. S.) 544, 21 L. ed. 322; Bloomer v. Millinger, 1 Wall. (U. S.) 340, 17 L. ed. 581; Chaffee v. Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; Bloomer v. McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532; Wilson v. Turner, 4 How. (U. S.) 712, 11 L. ed. 1171; Simpson v. Wilson, 4 How. (U. S.) 709, 11 L. ed. 1169; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Blanchard v. Whitney, 3 F. Cas. No. 1,519, 3 Blatchf. 307; Farrington v. Gregory, 8 F. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410; May v. Chaffee, 16 F. Cas. No. 9,332, 2 Dill. 385, 5 Fish. Pat. Cas. 160; Spaulding v. Page, 22 F. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Wetherill v. Passaic Zinc Co., 29 F. Cas. No. 17,465, 6 Fish. Pat. Cas. 50, 9 Phila. (Pa.) 385; Wood v. Michigan Southern, etc., R. Co., 30 F. Cas. No. 17,957, 2 Biss. 62, 3 Fish. Pat. Cas. 464; Woodworth v. Curtis, 30 F. Cas. No. 18,013, 2 Robb Pat. Cas. 603, 2 Woodb. & M. 524; Wooster v. Sidenberg, 30 F. Cas. No. 18,039, 2 Bann. & A. 91, 13 Blatchf. 88.

51. American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 1 SCt 52, 27 L. ed. 79 [rev 1 F. Cas. No. 293, 3 Bann. & A. 320]; Brown v. Puget Sound Reduction Co., 110 Fed. 383.

52. U. S.—Hapgood v. Hewitt, 119 U. S. 226, 7 SCt 193, 30 L. ed. 369; Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Troy Iron, etc., Factory v. Corning, 14 How. 193, 14 L. ed. 388; Lanahan v. Clark Car Co., 11 F. (2d) 820 [aff 11 F. (2d) 814]; Lock Joint Pipe Co. v. Melber, 234 Fed. 319, 148 CCA 221; Gray Engine Starter Co. v. Gray, 224 Fed. 723; Niagara Fire Extinguisher Co. v. Hibbard, 179 Fed. 844, 103 CCA 330; Bowers v. Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 CCA 493; Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co., 61 Fed. 256; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Thomson v. Citizens' Nat. Bank, 53 Fed. 250, 3 CCA 518; Racine Seeder Co. v. Joliet Wire-Check Rower Co., 27 Fed. 367; Eclipse Windmill Co. v. Woodmanse Windmill Co., 24 Fed. 650; Adams v. Howard, 22 Fed. 656, 23 Blatchf. 27; Curran v. Craig, 22 Fed. 101; Gibbs v. Hoefner, 19 Fed. 323; Putnam v. Hollender, 6 Fed. 882, 19 Blatchf. 48; Brooks v. Byam, 4 F. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525;

of the agreement show an intention to permit an assignment.[53] However, it has been held that a license, although not usually transferable, will pass to one who is a successor rather than an assignee of the licensee,[54] and that a mere change of business status will not effect an assignment.[55]

Apportionment. A licensee cannot apportion his rights under the license by assignment,[56] unless a manifest intent to confer such a right appears in the contract of license;[57] and such intent cannot be inferred merely from the grant to him and his "assigns."[58] But where such a license runs to the executors and administrators of the licensees as well as to their assigns, it is apportionable and divisible by assignment, and may be transferred in severalty by one of the licensees.[59]

[§ 432] **b. Assent to, or Recognition of, Assignment.** Although a license is ordinarily unassignable,[60] the licensor may affirm an assignment by recognizing and dealing with the assignee.[61] Even where a license contains a stipulation that it should be nontransferable, it may be assigned with the assent of the licensor, since such a stipulation is for his sole benefit.[62]

[§ 433] **c. Rights and Liabilities of Parties.** In the case of an assignment of a license, the assignee takes subject to the terms of the license,[63] and may take all of the rights of the assignor,[64] although no more.[65] It is the duty of the purchaser to inform himself of the nature of the licensee's ownership, and the extent of his right,[66] but he may rescind the

Wilson v. Stolley, 30 F. Cas. No. 17,840, Fish. Pat. R. 261, 5 McLean 1.

Conn.—Bull v. Pratt, 1 Conn. 342.

Ill.—Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 NE 873.

N. Y.—Tuttle v. La Dow, 54 Hun 149, 7 NYS 277.

Pa.—Houghton v. Rowley, 9 Phila. 288.

[a] **Receiver.**—A license will not vest in a receiver of the licensee's property. Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Curran v. Craig, 22 Fed. 101.

[b] **An implied license to make and use does not pass by an administrator's sale** of the licensee's place of business, including a few articles covered by the patent. Kraatz v. Tieman, 79 Fed. 322 [rev on other grounds 85 Fed. 437, 29 CCA 257].

[c] **Subsidiary corporations.**—A license to a corporation will not benefit subsidiary corporations. De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 3 F. (2d) 847.

[d] **Rule applied.**—(1) The benefit of a nonassignable license cannot be obtained by a corporation which has absorbed the licensee corporation, but has made an attempt to preserve a fictitious existence of the corporation it absorbed for the purpose of using the nonassignable license. Westinghouse Electric, etc., Co. v. Radio-Craft Co., 291 Fed. 169 [aff 7 F. (2d) 432]. (2) A license granted before issuance of the patent is not transferable. Thomson v. Citizens' Nat. Bank, 53 Fed. 250, 3 CCA 518. (3) A licensor is not estopped to claim damages for a licensee's sublicensing, not known to him. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628.

53. Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Troy Iron, etc., Factory v. Corning, 14 How. (U. S.) 193, 14 L. ed. 383; Splitdorf Electrical Co. v. Webster Electric Co., 283 Fed. 83 [certiorari granted 260 U. S. 715 mem, 43 SCt 92 mem, 67 L. ed. 478 mem, and aff 264 U. S. 463, 44 SCt 342, 68 L. ed. 792]; Dunkley Co. v. California Packing Corp., 277 Fed. 996 [certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem, and aff 277 Fed. 989]; Bowers v. Lake Superior Contracting Co., 149 Fed. 983, 79 CCA 493; Waldo v. American Soda Fountain Co., 92 Fed. 623; Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co., 61 Fed. 256; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Adams v. Howard, 22 Fed. 656, 23 Blatchf. 27; Curran v. Craig, 22 Fed. 101; Putnam v. Hollender, 6 Fed. 882, 19 Blatchf. 48; Hamilton v. Kingsbury, 11 F. Cas. No. 5,984, 3 Bann. & A. 346, 15 Blatchf. 64; Paper Stock Disinfecting Co. v. Boston Disinfecting Co., 147 Mass. 318, 17 NE 554; Tuttle v. La Dow, 54 Hun 149, 7 NYS 277; Pitts v. Jameson, 15 Barb. (N. Y.) 310.

[a] **Requisites for assignability.**—In order to give the quality of assignability to a mere license it must run to the licensee and his assigns. Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Troy Iron, etc., Factory v. Corning, 14 How. (U. S.) 193, 14 L. ed. 383. But see Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766 (the fact that the terms of a license contract to manufacture and sell a patented article contained promises of the defendant licensee, running to the licensor, and not to him and his assigns, is indecisive of the contract's assignability, and where the contract terms did not forbid assignment, the contract not being purely personal, and an assignment not absolving licensor from his obligations, under the general rule of law it was assignable).

[b] **License to license others.**—A contract whereby the patentee of an engine sold a license to manufacture and sell and to license others to make and sell was not broken when the buyers assigned to a corporation which performed all their engagements. Moors v. Gilbert, 178 Ky. 359, 198 SW 903.

[c] **License to corporation and its successors** passes to a corporation succeeding to the property and business, and assuming the obligations, of the licensee. Dunkley Co. v. California Packing Corp., 277 Fed. 996 [aff 277 Fed. 989, and certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem].

54. Lane, etc., Co. v. Locke, 150 U. S. 193, 14 SCt 78, 37 L. ed. 1049; Schmidt v. Central Fdy. Co., 218 Fed. 466 [aff 229 Fed. 157, 143 CCA 433, AnnCas1917C 258]; Lightner v. Boston, etc., R. Co., 15 F. Cas. No. 8,343, 1 Lowell 338.

55. Foster Hose Supporter Co. v. Thomas P. Taylor Co., 191 Fed. 1003, 111 CCA 667 [aff 189 Fed. 407].

56. Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Brooks v. Byam, 4 F. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525; Consolidated Fruit-Jar Co. v. Whitney, 6 F. Cas. No. 3,132, 1 Bann. & A. 356, 10 Phila. (Pa.) 268.

57. Consolidated Fruit-Jar Co. v. Whitney, supra.

58. Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Brooks v. Byam, 4 F. Cas. No. 1,948, 2 Robb Pat. Cas. 161, 2 Story 525.

59. Adams v. Howard, 22 Fed. 656, 23 Blatchf. 27.

60. See supra § 431.

61. Lane, etc., Co. v. Locke, 150 U. S. 193, 14 SCt 78, 37 L. ed. 1049; Holmes Burglar Alarm Tel. Co. v. Domestic Tel., etc., Co., 42 Fed. 220; Bloomer v. Gilpin, 3 F. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Havana Press Drill Co. v Ashurst, 148 Ill. 115, 35 NE 873; Moors v. Gilbert, 178 Ky. 359, 198 SW 903; Wilde v. Smith, 8 Daly (N. Y.) 196.

[a] **Assignee liable as a licensee** when the parties have by their conduct allowed an unassignable license to be assigned. Bowers v. Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 CCA 493.

[b] **Conduct of parties.**—An unassignable license may be given a continuing assignable quality by the conduct of the parties or other facts and circumstances during the continuance of the license. Bowers v. Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 CCA 493.

62. Scutt v. Robertson, 127 Ill. 135, 19 NE 851.

63. American Graphophone Co. v. Pickard, 201 Fed. 546; Moody v. Taber, 17 F. Cas. No. 9,747, 1 Bann. & A. 41, Holmes 325; Wilson v. Stolley, 30 F. Cas. No. 17,840, Fish. Pat. R. 261, 5 McLean 1; Feaster v. Feaster Film Feed Co., 229 Mass. 550, 118 NE 912; Paper Stock Disinfecting Co. v. Boston Disinfecting Co., 147 Mass. 318, 17 NE 554; Rahe Match Co. v. World Match Corp., 213 App. Div. 729, 211 NYS 425. But see Loose v. Bellows Falls Pulp Plaster Co., 266 Fed. 81 (assignee not liable for royalties unless the obligation is assumed).

[a] **The grantee from a licensee must pay the license fees** (1) stipulated in the license from the patentee. Goodyear v. Congress Rubber Co., 10 F. Cas. No. 5,565, 3 Blatchf. 449; Paper Stock Disinfecting Co. v. Boston Disinfecting Co., 147 Mass. 318, 17 NE 554. (2) But he will not be enjoined from acting under the license because of failure of his grantee to pay license fees accrued before the conveyance, nor is he liable therefor. Goodyear v. Congress Rubber Co., supra.

[b] **In Canada,** a purchaser from the patentee of a license under a patent who has resold the license under a contract in which the original patentee has joined, whereby cancellation of the contract between him and the patentee shall not effect cancellation of the resale contract, cannot after cancellation of the original contract for default in payment of the purchase price, claim against his subpurchaser the purchase price due on the resale contract. Hill v. Moisan, (Can.) [1927] 2 DomLR 1089.

64. Feaster v. Feaster Film Feed Co., 229 Mass. 550, 118 NE 912.

65. L. E. Waterman Co. v. Kline, 234 Fed. 891, 148 CCA 489; Hawley v. Mitchell, 11 F. Cas. No. 6,250, 4 Fish. Pat. Cas. 388, Holmes 42 [aff 16 Wall. 544, 21 L. ed. 322]; Burke v. Partridge, 58 N. H. 349; New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

66. Chambers v. Smith, 5 F. Cas. No. 2,582, 5 Fish. Pat. Cas. 12, 7 Phila. (Pa.) 575, 576; Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291

"In the absence of any statutory provision, there is no principle of equity which requires the owner of a patented invention to give notice to a voluntary purchaser of a licensee's right, to enable him to hold such purchaser to the restricted use and enjoyment of the invention stipulated in

contract when his purchase was induced by fraud.[67] The licensor, it has been held, is entitled to the licensee's profits under an unauthorized sublicensing agreement,[68] and he may claim damages for an unknown sublicensing.[69] When the assignment is assented to, the licensee cannot be held as a guarantor of his assignee's performance of the conditions of the license.[70]

[§ 434] **6. Termination[71]—a. In General.** A license containing no stipulation as to revocation cannot be terminated except by mutual consent,[72] or because of the wrong or default of the party against whom termination is sought.[73] A mere difference as to one or more of the minor terms of a parol license will not justify one of the parties in declaring it rescinded and proceeding as if nothing had been done under it.[74] Where the licensee obtains a cancellation of the license by means of fraud, such cancellation may be set aside.[75]

[§ 435] **b. Options To Terminate.** A stipulation allowing the licensee to terminate the agreement by notice will, when followed, bring an end to the agreement;[76] but the notice given must be clear and unequivocal,[77] and in accordance with the agreement,[78] unless waived.[79] The licensor does not lose his right to exercise an option to terminate by delay due to his failure to receive information to which he is entitled from the licensee.[80]

[§ 436] **c. Fraud or Misrepresentation as Ground.** Subject to the rules applicable in the case of contracts generally,[81] the licensee may rescind where he has been induced to enter into the agreement through the fraudulent misrepresentations of the licensor,[82]

the licensee." Chambers v. Smith, supra.

67. Stevens v. Privett, (Cal. A.) 264 P 549.

[a] **Motive** for rescission is not material where legally authorized. Stevens v. Privett, (Cal. A.) 264 P 549.

[b] **Damage** is sufficiently shown by evidence that because of the representations of the seller, the buyer made payments to him for which he got nothing. Stevens v. Privett, (Cal. A.) 264 P 549.

[c] **Assignor's title** may be disputed where the buyer seeks to rescind on the ground of a fraudulent representation as to right to sell. Stevens v. Privett, (Cal. A.) 264 P 549.

[d] **Financial difficulties** and the treatment of the buyer by the owner of the patent are not grounds for rescission. Stevens v. Privett, (Cal. A.) 264 P 549.

[e] **Recognition of the buyer as licensee** by the owner of the patent does not preclude rescission by the buyer because of false representations as to right to sell. Stevens v. Privett, (Cal. A.) 264 P 549.

[f] **Rule applied.**—That licensee under patent obtains only immunity from suit is immaterial in action to rescind contract purchasing license on ground of fraudulent representations. Stevens v. Privett, (Cal. A.) 264 P 549.

68. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628.

69. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., supra.

70. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

71. Duration of license see supra §§ 428-430.

72. U. S.—St. Paul Plow-Works v. Starling, 140 U. S. 184, 11 SCt 803, 35 L. ed. 404; Laver v. Dennett, 109 U. S. 90, 3 SCt 73, 27 L. ed. 867; Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; American Graphophone Co. v. Victor Talking Mach. Co., 188 Fed. 431 [aff 188 Fed. 428, 110 CCA 308]; Comptograph Co. v. Burroughs Adding Mach. Co., 175 Fed. 787 [aff 183 Fed. 321, 105 CCA 533, 37 LRANS 821 (certiorari den 219 U. S. 586, 31 SCt 471, 55 L. ed. 347)]; Wagner Typewriter Co. v. Watkins, 84 Fed. 57; Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Illingworth v. Spaulding, 43 Fed. 827; Chase v. Cox, 41 Fed. 475; Goddard v. Wilde, 17 Fed. 845; Kelly v. Porter, 17 Fed. 519, 8 Sawy. 482; Cook v. Bidwell, 8 Fed. 452; Burdell v. Denig, 4 F. Cas. No. 2,142, 2 Fish. Pat. Cas. 588.

Ill.—Scutt v. Robertson, 127 Ill. 135, 19 NE 851. See Duer v. Chicago Coach, etc., Co., 194 Ill. A. 314.

Iowa.—Simmons v. Sefrit, 125 NW 93.

Mass.—Lyons Burial Vault Co. v. Taylor, 198 Mass. 63, 84 NE 320.

N. J.—Barclay v. Charles Roome Parmele Co., 70 N. J. Eq. 218, 61 A 715 [aff 71 N. J. Eq. 769, 71 A 1133].

N. Y.—Bezer v. Hall Signal Co., 22 App. Div. 489, 48 NYS 203.

Pa.—Consolidated Oil Well Packer Co. v. Jarecki Mfg. Co., 157 Pa. 342, 27 A 543. But see Bayliss v. Hough, 41 Pa. Super. 458 (contract to sell stipulated number of articles per year terminable on reasonable notice in absence of stipulation).

Wis.—Sullivan v. Compressed Air Renovator, etc., Mfg. Co., 131 Wis. 134, 111 NW 73.

Eng.—Bower v. Hodges, 13 C. B. 765, 76 ECL 765, 138 Reprint 1402; Tielens v. Hooper, 5 Exch. 830, 155 Reprint 363; Cherry v. Heming, 2 Exch. 557, 154 Reprint 613; Guyot v. Thomson, 71 L. T. Rep. N. S. 124 [aff [1894] 3 Ch. 388, 16 ERC 64]; Ward v. Livesey, 5 R. P. C. 102; Lewin v. Brown, 14 Wkly. Rep. 640.

Ont.—MacLaughlin v. Lake Erie, etc., R. Co., 2 Ont. L. 190 [app allowed on other grounds 3 Ont. L. 706, 3 BRC 321].

73. St. Paul Plow-Works v. Starling, 140 U. S. 184, 11 SCt 803, 35 L. ed. 404.

Grounds for termination see infra §§ 436-446.

74. Hartell v. Tilghman, 99 U. S. 547, 556, 25 L. ed. 357.

"If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice." Hartell v. Tilghman, supra.

75. Hartsough v. Hirshheimer, 283 Fed. 759 [certiorari den 260 U. S. 723 mem. 43 SCt 13 mem, 67 L. ed. 482 mem].

76. U. S.—Stimpson Computing Scale Co. v. W. F. Stimpson Co., 104 Fed. 893, 44 CCA 241; Union Switch, etc., Co. v. Johnson, 72 Fed. 147, 18 CCA 490; Hunt v. Moline Plow Co., 52 Fed. 745; Woodworth v. Weed, 30 F. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. R. 108.

Ill.—Warth v. Loewenstein, 121 Ill. A. 71 [mod on other grounds 219 Ill. 222, 76 NE 379].

Mich.—Garver v. Bement, 69 Mich. 149, 37 NW 63.

Mo.—Ford v. Dyer, 148 Mo. 528, 49 SW 1091.

N. Y.—Warth v. Liebovitz, 83 App. Div. 632, 82 NYS 578 [aff 179 N. Y. 200, 71 NE 734]; Pitts v. Jameson, 15 Barb. 310; Wilde v. Smith, 8 Daly 196.

[a] **Paying basis.**—Where a license to a corporation authorizes cancellation at the option of either party if the corporation is not on a paying basis within a year, the licensor may have a cancellation where the proceeds of the year's operations are represented by notes not yet due. Nelson v. Steele, 165 Cal. 15, 130 P 886.

Termination affecting liability for royalties see infra § 465.

77. Ford v. Dyer, 148 Mo. 528, 49 SW 1091; Watson Fireproof Window Co. v. Henry Weiss Cornice Co., 181 Mo. A. 318, 168 SW 905; Skinner v. Walter A. Wood Mowing, etc., Mach. Co., 140 N. Y. 217, 35 NE 491, 37 AmSR 540; Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234; Hurd v. Gere, 27 App. Div. 625, 50 NYS 235.

[a] **Notice held sufficient.**—A lease of a patent right giving right to have it canceled only if the lessee corporation be not on a paying basis within a year, notice by the lessor that he will not continue, extend, or renew it, as the lessee has not fulfilled its part of the agreement, is sufficient, without stating that it is because it is not on a paying basis. Nelson v. Steele, 165 Cal. 15, 130 P 886.

78. Computing Scale Co. v. Barnard Co., 259 Fed. 250, 170 CCA 318.

[a] **Assignment of ground.**—A notice that the licensee considered the device so inoperative or defective as to entitle it to cancellation is a sufficient notice of cancellation under a clause entitling the licensee to cancel if the patented article fails to be commercially successful to its satisfaction. Computing Scale Co. v. Barnard Co., 259 Fed. 250, 170 CCA 318.

79. Graves v. Mound City Paint, etc., Co., (Mo. A.) 204 SW 57.

[a] **Notice that formula has proved unsuccessful** may be waived by the acts of the parties. Graves v. Mound City Paint, etc., Co., (Mo. A.) 204 SW 57.

80. Nelson v. Steele, 165 Cal. 15, 130 P 886.

81. See Contracts §§ 652, 653.

82. Bechtold v. Coney, 42 Cal. A. 563, 183 P 841; Driver v. Hunt, 2 KyL 435, 11 Ky. Op. 169; Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779; Hull v. Fields, 76 Va. 594.

[a] **Statements made in good faith** may justify decision. Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779.

[b] **Representations of value.**—Licensees induced to take a license of a worthless invention may rescind for misrepresentation of value of the article. Rushing v. Spreen, (Tex. Civ. A.) 142 SW 49.

[c] **The licensee must have been deceived** by the misrepresentations. Rushing v. Spreen, (Tex. Civ. A.) 142 SW 49.

[d] **Representations as to mere matters of opinion** (1) will not justify rescission. In re Tear-Off Bottle Seal Co., 224 Fed. 492, 140 CCA 200; Parks v. Bucy, 72 Colo. 414, 211 P 638; Ferry-Hallock Co. v. Progressive Paper Box Co., 76 N. J. Eq. 1, 73 A 230 [aff 76 N. J. Eq. 338, 75 A 1100]; Arnold v. Norfolk, etc., Hosiery Co., 148 N. Y. 392, 42 NE 980; American Nat. Co. v. Thompson Spot Welder Co., 30 Oh. A. 156, 164 NE 435; Waymire v. Shipley, 52 Or. 464, 97 P 807. (2) Representation in good faith that patent covers certain matter is not representation of fact. Ferry-Hallock Co. v. Progressive Paper

unless the licensee has been guilty of laches[83] or has ratified or affirmed the contract.[84]

Ratification by the patentee after denial of the right of a licensee to confer title upon another, and after such other has for that reason repudiated his contract with the licensee, will not affect the right of such other to rescind for false statements by the licensee as to his ownership and right to grant licenses.[85]

[§ 437] **d. Insufficiency or Failure of Consideration as Ground.** A license contract may be rescinded because of a total failure of consideration,[86] as where, by reason of the invalidity of the patent and threatened suits for infringement, the purchaser of a patented article or process has been prevented from making use of it.[87] The fact that the licensee paid more than his license was worth will not entitle him to rescind in the absence of fraud.[88] Where a contract conferring the right to manufacture and sell certain machines provides also for the granting of a license under patents to be procured, the failure to procure the patent does not constitute such a failure of consideration as to warrant a rescission of the agreement.[89]

[§ 438] **e. Breach of Covenant as Ground.** A breach of covenant does not per se work a forfeiture of a license,[90] even though the license contains an express stipulation that it shall do so.[91] It will remain in force so as to defeat a suit against the licensee for infringement until it has been rescinded by decree of a court having jurisdiction.[92] Where the licensor has an adequate remedy at law, equity will not annul the license.[93] Nor will it terminate the license when to do so would be inequitable,[94] or for acts which are not violative of the contract.[95] While breach of a covenant in a license contract may, in a proper case, authorize rescission in equity,[96] there should be clear and satisfactory proof of the grounds,[97] and performance of conditions precedent, if any are imposed by the contract, must be shown.[98]

Notice of forfeiture. An agreement that upon failure of a party to a license to perform his covenant it may be forfeited by a written notice served on him is valid, and may be enforced,[99] although it has been decided that the licensor must resort to a court of equity.[1] The licensor cannot annul the license for such default without giving the notice provided for;[2] and such notice must be a clear and unequivocal revocation.[3] If the licensee continues, after default and notice, to exercise the license, the licensor cannot sue him as an infringer, but must either bring an action at law on the contract for royalty, or sue in equity to have the license annulled.[4] The reservation by the licensor of the right to revoke the license for nonpayment of royalties confers no rights upon the licensee, nor does it take away the licensor's common-law right to enforce the

Box Co., supra. (3) Representation of validity of patent is a matter of opinion on a question of law and will not generally afford grounds for avoiding a license. American Nat. Co. v. Thompson Spot Welder Co., supra.

83. Bechtold v. Coney, 42 Cal. A. 563, 183 P 841.

[a] **Laches.**—Right to rescind not barred by laches when licensor's promises to restore license fee was cause of delay. Bechtold v. Coney, 42 Cal. A. 563, 183 P 841.

84. In re Tear-Off Bottle Seal Co., 224 Fed. 492, 140 CCA 200 [certiorari den 239 U. S. 638 mem, 36 SCt 160 mem, 60 L. ed. 481 mem]; Landon v. Tucker, 130 Mo. A. 704, 107 SW 1037.

85. McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

86. Pratt v. Paris Gaslight Co., 168 U. S. 255, 18 SCt 62, 42 L. ed. 458 [aff 155 Ill. 531, 10 NE 1032 (aff 51 Ill. A. 603)]; Schutte, etc., Co. v. Wheeler Condenser, etc., Co., 295 Fed. 158.

87. Pratt v. Paris Gaslight Co., 168 U. S. 255, 18 SCt 62, 42 L. ed. 458 [aff 155 Ill. 531, 10 NE 1032 (aff 51 Ill. A. 603)].

88. Owens v. National Hatchet Co., 147 Iowa 393, 121 NW 1076, 126 NW 333.

89. Bancroft v. Union Embossing Co., 72 N. H. 402, 57 A 97, 64 LRA 298.

90. Hartshorn v. Day, 19 How. (U. S.) 211, 15 L. ed. 605; Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628; Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172; Standard Stoker Co. v. Brewster, 277 Fed. 783; Dixie Cotton Picker Co. v. Bullock, 188 Fed. 921; Rowland v. Biesecker, 185 Fed. 515, 107 CCA 615; New York Phonograph Co. v. Edison, 136 Fed. 600 [aff 144 Fed. 404, 75 CCA 382]; Hanifen v. Lupton, 95 Fed. 465 [rev on other grounds 101 Fed. 462, 41 CCA 462]; Standard Dental Mfg. Co. v. National Tooth Co., 95 Fed. 291; Wagner Typewriter Co. v. Watkins, 84 Fed. 57; Densmore v. Tanite Co., 32 Fed. 544; Consolidated Middlings Purifier Co. v. Wolf, 28 Fed. 814; Dare v. Boylston, 6 Fed. 493, 18 Blatchf. 548; White v. Lee, 3 Fed. 222; Woodworth v. Weed, 30 F. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. R. 108; Jones, etc., Co. v. Crary, 234 Ill. 26, 84 NE 651 [aff 138 Ill. A. 225]; Maitland v. Central Gas, etc., Co., 7 Misc. 408, 27 NYS 965 [aff 7 Misc. 245, 27 NYS 421]; Sullivan v. Compressed Air Renovator, etc., Mfg. Co., 131 Wis. 134, 111 NW 73 (failure to market successfully due to lack of capital).

[a] **Rule applied to:** (1) Delay in payment of royalties. Rowland v. Biesecker, 185 Fed. 515, 107 CCA 615 [aff 181 Fed. 128]; Foster Hose Supporter Co. v. Taylor, 184 Fed. 71, 106 CCA 467 [certiorari den 220 U. S. 611 mem, 31 SCt 715 mem, 55 L. ed. 609 mem] (equity will relieve against forfeiture). (2) Failure to make reports periodically. Critcher v. Linker, 169 Fed. 653. (3) Refusal to manufacture and sell. Dixie Cotton Picker Co. v. Bullock, 188 Fed. 921 (condition precedent must have been performed by licensors). (4) Sublicensing. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628; Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172. (5) Refusal to account when nothing was due. American Woodlite Corp. v. Woodlite Corp., (Cal. A.) 265 P 397; Jones, etc., Co. v. Crary, 234 Ill. 26, 84 NE 651 [aff 138 Ill. A. 225].

91. Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172; Dixie Cotton Picker Co. v. Bullock, 188 Fed. 921; Foster Hose Supporter Co. v. Taylor, 180 Fed. 994 [aff 184 Fed. 71, 106 CCA 467 (certiorari den 220 U. S. 611 mem, 31 SCt 715 mem, 55 L. ed. 609 mem)]; Comptograph Co. v. Burroughs Adding Mach. Co., 175 Fed. 787 [aff 183 Fed. 321, 105 CCA 533, 37 LRANS 821 (certiorari den 219 U. S. 586, 31 SCt 471, 55 L. ed. 347)]; Standard Dental Mfg. Co. v. National Tooth Co., 95 Fed. 291.

92. Rowland v. Biesecker, 185 Fed. 515, 107 CCA 615; Hanifen v. Lupton, 95 Fed. 465 [rev on other grounds 101 Fed. 462, 41 CCA 462]; Standard Dental Mfg. Co. v. National Tooth Co., 95 Fed. 291; Consolidated Middlings Purifier Co. v. Wolf, 28 Fed. 814; Union Mfg. Co. v. Lounsbury, 42 Barb. 125 [aff 41 N. Y. 363].

[a] **The exceptions to this rule** are where the licensee has assumed such a hostile attitude toward the patent as to amount to a repudiation of the right conveyed by the license. Wood v. Wells, 30 F. Cas. No. 17,967, 6 Fish. Pat. Cas. 382.

93. Chase v. Cox, 41 Fed. 475; Densmore v. Tanite Co., 32 Fed. 544; Consolidated Middlings Purifier Co. v. Wolf, 28 Fed. 814.

94. Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172; Critcher v. Linker, 169 Fed. 653.

95. Dixie Cotton Picker Co. v. Bullock, 188 Fed. 921.

96. Crowe v. Oscar Barnett Fdy. Co., 213 Fed. 864 [mod 219 Fed. 450, 135 CCA 162].

97. Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172.

98. Dixie Cotton Picker Co. v. Bullock, 188 Fed. 921.

99. Hammacher v. Wilson, 26 Fed. 239; Nelson v. Steele, 165 Cal. 15, 130 P 886; American Woodlite Corp. v. Woodlite Corp., (Cal. A.) 265 P 397; Schalkenbach v. National Ventilating Co., 129 App. Div. 389, 113 NYS 352; Hegelein v. Anthony, 33 Misc. 616, 68 NYS 2 (must be followed).

1. Foster Hose Supporter Co. v. Taylor, 180 Fed. 994 [aff 184 Fed. 71, 106 CCA 467 (certiorari den 220 U. S. 611 mem, 31 SCt 715 mem, 55 L. ed. 609 mem)]; Rogers v. Riessner, 30 Fed. 525; White v. Lee, 3 Fed. 222.

2. Hurd v. Gere, 27 App. Div. 625, 50 NYS 235.

[a] **Time to perform.**—Where the licensee is given a period of time, after receipt of preliminary notice of the licensor's intention to terminate because of default, in which to perform the conditions of the agreement, the date of preliminary notice of default does not constitute the date as of which the licensee's rights are to be determined. American Woodlite Corp. v. Woodlite Corp., (Cal. A.) 265 P 397.

3. Pope Mfg. Co. v. Owsley, 27 Fed. 100.

4. Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; Adams v. Meyrose, 7 Fed. 208, 2 McCrary 360.

contract.[5] Further, an option to terminate upon notice conferred by the contract does not constitute the licensor's exclusive remedy in case of breach by the licensor.[6]

[§ 439] **f. Repudiation or Abandonment by Licensee as Ground.** The licensee may forfeit his rights under the license by an abandonment or renunciation of his contract,[7] and on his repudiation the patentee is released from further performance.[8] Nonuser may show sufficient abandonment to permit the license to be treated as forfeited,[9] and may entitle the licensor to a rescission of the license.[10] Assistance, by the licensee, to an adverse litigant to defeat the patent does not amount to repudiation or abandonment;[11] nor does nonperformance when the licensors prevent performance.[12] The failure of the licensee to respond to a notice by the licensor, that it has elected to consider the license as repudiated by the licensee and terminated, does not amount to an acquiescence in such termination.[13] The license need not be reconveyed on repudiation,[14] although it has been held that a licensee for use must tender return of the patented article as a condition precedent to asking for rescission of the license.[15]

[§ 440] **g. Assignment of License.** An unauthorized assignment of a license by the licensee is a nullity, and will not work a forfeiture,[16] unless it amounts to an abandonment.[17] A stipulation for termination in case of assignment is valid and enforceable.[18]

[§ 441] **h. Death of Licensee.** A mere personal license expires with the death of the licensee, and does not pass to his personal representatives,[19] although the contrary has been held.[20]

[§ 442] **i. Dissolution of Partnership or Corporation.** The dissolution of a partnership or corporation exercising a patent license extinguishes the license, in the absence of language importing transferability,[21] except as to a continuing partner.[22] The same result follows the absorption of the licensee corporation by another corporation.[23]

[§ 443] **j. Termination of Business Association.** A license to two or more individuals is not affected by a termination of their association in business.[24]

[§ 444] **k. Partial Rescission.** A licensee cannot repudiate the license in part and claim under it in part.[25] So where a contract provides for an exchange of license and contains mutual and interdependent covenants, a single license forming a small part of the subject matter of the contract cannot be treated by a party as rescinded or abrogated and the remainder of the contract held to be in force.[26] The surrender of a license by part of the licensees does not avoid the license as to the remainder of the licensees.[27]

[§ 445] **l. Waiver.** The right to rescind or otherwise terminate the agreement may be waived,[28] and such waiver constitutes a sufficient considera-

5. Bezer v. Hall Signal Co., 22 App. Div. 489, 48 NYS 203.

6. Bernard v. Golden Gate Mfg. Co., 187 App. Div. 542, 175 NYS 741 [aff 231 N. Y. 591 mem, 132 NE 900 mem].

7. Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172; Bell v. McCullough, 3 F. Cas. No. 1,256, 1 Bond 194, 1 Fish. Pat. Cas. 380; Steam Cutter Co. v. Sheldon, 22 F. Cas. No. 13,331, 10 Blatchf. 1, 5 Fish. Pat. Cas. 477; Wilson v. Stolley, 30 F. Cas. No. 17,840, Fish. Pat. R. 261, 5 McLean 1; Sullivan v. Wilson, (Ind. A.) 155 NE 221.

[a] **Rule applied to:** (1) Nonpayment of royalty and other facts showing intention not to practice invention. Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172. (2) Ceasing Manufacture under exclusive license. American Mechanical Impr. Co. v. Des Lauriers Aircraft Co., 94 N. J. Eq. 197, 119 A 179.

[b] **A license is not repudiated** by a letter notifying the licensor that others are using an abandoned process in violation of the licensee's rights and removing the consideration for royalties. Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234.

8. Simmons v. Sefrit, (Iowa) 125 NW 93.

9. Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172; Steam Cutter Co. v. Sheldon, 22 F. Cas. No. 13,331, 10 Blatchf. 1, 5 Fish. Pat. Cas. 477; Sullivan v. Wilson, (Ind. A.) 155 NE 221; American Mechanical Impr. Co. v. Des Lauriers Aircraft Co., 94 N. J. Eq. 197, 119 A 179; Wildes v. Nelson, 154 N. C. 590, 70 SE 940.

10. Crowe v. Oscar Barnett Fdy. Co., 213 Fed. 864 [mod on other grounds 219 Fed. 450, 135 CCA 162].

11. Comptograph Co. v. Burroughs Adding Mach. Co., 183 Fed. 321, 105 CCA 533, 37 LRANS 821 [certiorari den 219 U. S. 586, 31 SCt 471, 55 L. ed. 347].

12. Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

[a] **Thus,** where a patent licensee could not, during pendency of suit for specific performance, successfully continue his business relations with defendants because they refused to accept royalties or coöperate with him and were actively resisting his efforts, but he tendered performance and kept the tender good, and, in his complaint and on the final hearing, offered to perform, there was no abandonment of the contract by him. Gessler v. Erwin Co., 182 Wis. 315, 193 NW 363.

13. Comptograph Co. v. Burroughs Adding Mach. Co., 175 Fed. 787 [aff 183 Fed. 321, 105 CCA 533, 37 LRANS 821 (certiorari den 219 U. S. 586, 31 SCt 471, 55 L. ed. 347)].

14. Poe v. Stockton, 39 Mo. A. 550.

15. Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co., 251 Fed. 897 [aff 260 Fed. 841, 171 CCA 567].

16. Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368.

17. Automotive Products Corp. v. Wolverine Bumper, etc., Co., 15 F. (2d) 745.

18. Russell v. Boston Card Index Co., 276 Fed. 4.

19. Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 SCt 61, 27 L. ed. 862; Kraatz v. Tieman, 79 Fed. 322 [rev on other grounds 85 Fed. 437, 29 CCA 257]; Smith v. Preston, 170 Ill. 179, 48 NE 688 [aff 67 Ill. A. 613].

20. Oliver v. Morgan, 10 Heisk. (Tenn.) 322.

21. Hapgood v. Hewitt, 119 U. S. 226, 7 SCt 193, 30 L. ed. 369; In re Michigan Motor Specialties Co., 288 Fed. 377 (adjudication in bankruptcy); Keystone Type Fdy. v. Fastpress Co., 272 Fed. 242 [rev 263 Fed. 99]; Carroll v. Goldschmidt, 80 Fed. 520 [rev on other grounds 83 Fed. 508, 27 CCA 566 (certiorari den 169 U. S. 735 mem, 18 SCt 940 mem, 42 L. ed. 1215 mem)]; Elgin Wind Power, etc., Co. v. Nichols, 65 Fed. 215, 12 CCA 578; Haffcke v. Clark, 50 Fed. 531, 1 CCA 570; Curran v. Craig, 22 Fed. 101; Keller v. Stolzenbach, 20 Fed. 47; Hapgood v. Hewitt, 11 Fed. 422, 11 Biss. 184 [aff 119 U. S. 226, 7 SCt 193, 30 L. ed. 369]; Eustis Mfg. Co. v. Eustis, 51 N. J. Eq. 565, 27 A 439; Warth v. Mertens, 71 App. Div. 395, 75 NYS 1092 [aff 173 N. Y. 626 mem, 66 NE 1117 mem]; Johnson v. Uprite Co., Ltd., 27 Oh. A. 173, 161 NE 26.

22. Belding v. Turner, 3 F. Cas. No. 1,243, 8 Blatchf. 321, 4 Fish. Pat. Cas. 446.

23. Westinghouse Electric, etc., Co. v. Radio-Craft Co., 291 Fed. 169 [aff 7 F. (2d) 432].

24. Koppe v. Burnstingle, 29 F. (2d) 923.

25. Ferry-Hallock Co. v. Progressive Paper Box Co., 76 N. J. Eq. 1, 73 A 230 [aff 76 N. J. Eq. 338, 75 A 1100].

26. American Graphophone Co. v. Victor Talking Mach. Co., 188 Fed. 431 [aff 188 Fed. 428, 110 CCA 308].

27. Theberath v. Celluloid Mfg. Co., 3 Fed. 143.

28. Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172; Barnett v. Q. & C. Co., 226 Fed. 935, 141 CCA 539; Foster Hose Supporter Co. v. Taylor, 180 Fed. 994 [aff 184 Fed. 71, 106 CCA 467 (certiorari den 220 U. S. 611 mem, 31 SCt 715 mem, 55 L. ed. 609 mem)]; Washburn, etc., Mfg. Co. v. Cincinnati Barbed-Wire Fence Co., 42 Fed. 675; Rogers v. Riessner, 30 Fed. 525; Kersey v. Wright Mach. Co., 185 Ky. 261, 214 SW 919; Hyatt v. Dale Tile Mfg. Co., 106 N. Y. 651, 12 NE 705 [aff 125 U. S. 46, 8 SCt 756, 31 L. ed. 683]; Hurd v. Gere, 27 App. Div. 625, 50 NYS 235; Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem]; Jarecki v. Hays, 161 Pa. 613, 29 A 118 (recognizing rule).

[a] **Illustration.**—The doctrine that, where a party to an executory contract puts it out of his power to perform, the other party may regard the contract as terminated and demand damages sustained, is inapplicable, where the licensor for manufacture of an article under a patent inexcusably breached the contract by a sale and assignment, so that he could not protect as to infringers and infringements as provided in the license agreement, where the licensee did not exercise its right to terminate the contract while executory, but used the license to contracted termination. Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766.

[b] **Waiver by new contract.**—The right to forfeit an exclusive selling license under a patent for failure to earn a minimum royalty may be annulled or waived by a subsequent contract between the parties. Barnett v. Q. & C. Co., 226 Fed. 935, 141 CCA 539.

tion for a promise to pay the royalties due.[29] But when the license has been forfeited, it cannot be revived by a tender of royalties due.[30]

[§ 446] **m. Effect of Termination.** When a license has been properly terminated,[31] the rights and liabilities of the licensee thereunder are likewise brought to an end,[32] and his further use of the patented articles may be enjoined.[33] He no longer has a right to use the licensor's name in connection with articles subsequently manufactured by him so as to lead the public to understand that they were made under the licensor's patent;[34] and he is no longer estopped to deny the validity of the patent,[35] although an agreement not to contest the patent may be enforced where the intent is clear that it shall continue after termination of the license.[36] He is no longer liable for royalties under the license;[37] he is liable only as an infringer.[38] He may, however, be liable for royalties under an implied promise.[39] A distinct, although subsidiary, agreement is not affected by the termination.[40]

[§ 447] **7. Royalties[41]—a. In General.** The right of the owner of a patent to charge a royalty or license fee for the use of the invention being unquestioned,[42] the grant of the license is a sufficient consideration to support the promise to pay,[43] and the parties are bound by the terms of their contract[44] properly construed,[45] notwithstanding they may be harsh.[46] As in other cases[47] the terms of the license contract as to royalties may be modified by the subsequent agreement of the parties.[48] A memorandum incorporating in a license additional patents acquired by the licensor does not terminate his right to the license fees reserved in the original agreement.[49]

[§ 448] **b. Implied Agreements.** Although the terms of the contract ordinarily fix the right to royalty,[50] a promise to pay a reasonable compensation for the use of a patent may be implied,[51] but not unless one uses another's invention under circumstances that lead the owner to consent to such use in the belief that the user intended to pay therefor.[52] Mere acquiescence in the use of an improvement will not bind the licensee to pay the same royalty as he agreed to pay for the use of the patent.[53]

[§ 449] **c. Effect of Assignment of Patent or Royalties.** Royalties to accrue pass with an assignment of the patent unless separated by an express reservation,[54] and, in analogy to the right of the assignor to sue and recover for past infringements,[55] it would seem that he has like rights with respect to royalties accrued at the time of the assignment.[56] However, the right to recover accrued royalties may be assigned,[57] and where, with knowledge of the licensee, the licensor assigns a portion of the royalty to a third person for a valuable consideration, he cannot, by a secret settlement with the licensee, cut off the rights of such third person.[58] A stipulation upon the back of a note that it is to be paid by royalties earned from the use of an invention amounts to an equitable assignment of such royal-

29. Hyatt v. Dale Tile Mfg. Co., 106 N. Y. 651, 12 NE 705 [aff 125 U. S. 46, 8 SCt 756, 31 L. ed. 683].

30. Platt v. Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 CCA 357.

31. See supra §§ 434, 435.

32. See cases infra notes 34-40.

33. See infra § 469.

34. Stimpson Computing Scale Co. v. W. F. Stimpson Co., 104 Fed. 893, 44 CCA 241.

35. See supra §§ 287-291.

Invalidity as defense to action for royalties see infra §§ 460-462.

36. Eskimo Pie Corp. v. National Ice Cream Co., 26 F. (2d) 901.

37. See infra § 465.

38. Walker Bin Co. v. Schmidt Co., 230 Fed. 636, 145 CCA 46; Union Switch, etc., Co. v. Johnson, 72 Fed. 147, 18 CCA 490; Hammacher v. Wilson, 26 Fed. 239; Woodworth v. Cook, 30 F. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. R. 423; Denise v. Swett, 142 N. Y. 602, 37 NE 627.

39. See infra § 448.

40. Lyons Burial Vault Co. v. Taylor, 198 Mass. 63, 84 NE 320.

41. Cross references:
Compensation for use by United States see United States [39 Cyc 754].
Right of employee to royalty see Master and servant § 171.
"Royalty" defined see [34 Cyc 1817].

42. U. S. Fidelity, etc., Co. v. California-Arizona Constr. Co., 21 Ariz. 172, 186 P 502.

43. U. S.—Rowland v. Biesecker, 181 Fed. 128 [aff 185 Fed. 515, 107 CCA 615].
Me.—Elmer v. Pennel, 40 Me. 430.
Minn.—Wilson v. Hentges, 26 Minn. 288, 3 NW 338.
N. Y.—Bottlers' Seal Co. v. Rainey, 225 N. Y. 369, 122 NE 200; Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem].
Vt.—Sherman v. Champlain Transp. Co., 31 Vt. 162.

44. Elliott v. Barrett Co., 25 F. (2d) 125 [aff 25 F. (2d) 126]; Meurer Steel Barrel Co., Inc. v. Martin, 1 F. (2d) 687; Wadsworth v. Pressed Prism Plate Glass Co., 239 Fed. 507, 152 CCA 385; Western Union Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 60 CCA 220 [rev 105 Fed. 684]; McIntyre v. Newton, 9 OntWR 303.

[a] **Where an unauthorized contract has been ratified** by the owner of the patent by an attempt to collect royalties, he cannot thereafter proceed against the licensee for infringement of the patent or for a reasonable or proper amount of royalty other than that fixed in the license contract. Vose v. Roebuck Weather-Strip, etc., Co., 216 Fed. 523.

45. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302; Gilman v. Turner Tanning Mach. Co., 232 Mass. 573, 122 NE 747.

[a] **Practical construction.**—Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302; Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A 847; Rickly v. Parlin, etc., Co., 215 Ill. A. 512; McIntosh v. Groomes, 227 Mich. 215, 198 NW 954.

46. Meurer Steel Barrel Co., Inc. v. Martin, 1 F. (2d) 687.

47. See Contracts § 604.

48. Taylor Gas Producer Co. v. Wood, 125 Fed. 337, 60 CCA 215 [aff 119 Fed. 966]; Gilman v. Turner Tanning Mach. Co., 232 Mass. 573, 122 NE 747; Ellery v. Morley Button Mfg. Co., 225 Mass. 494, 114 NE 747.

[a] **Consideration for modification.**—Plaintiff granted to defendant an exclusive license under a patent, and defendant agreed to pay royalties after three years on not less than a stated number of the patented machines annually. The contract was subsequently modified by parol, but whether the provision requiring the payment of minimum royalties had been abrogated was in dispute. Plaintiff failed to protect defendant against infringers of the patent, and finally abandoned any attempt to do so, and, in consequence, defendant ceased to make the patented article, never paid the stipulated minimum royalty, but paid on the machines actually made, and no claim was made until eight years after the first of such payments was due. The failure of plaintiff to maintain the validity of its patent and protect defendant as its licensee was sufficient consideration for the modification of the contract claimed by defendant. Taylor Gas Producer Co. v. Wood, 125 Fed. 337, 60 CCA 215 [aff 119 Fed. 966].

[b] **Postponement of payment.**—Luten v. Bearce, 229 Fed. 391, 143 CCA 511 [aff 219 Fed. 237] (until completion of bridge on which invention is used).

49. Hanson v. Hall Mfg. Co., 185 Iowa 1091, 169 NW 471.

50. See supra § 447.

51. U. S.—U. S. v. Palmer, 128 U. S. 262, 9 SCt 104, 32 L. ed. 442; In re Michigan Motor Specialties Co., 288 Fed. 377.
Ind.—P. H. & M. F. Roots Co. v. Morgan, 84 Ind. A. 32, 147 NE 281.
Mass.—Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029.
Minn.—Deane v. Hodge, 35 Minn. 146, 27 NW 917, 59 AmR 321.
N. Y.—Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem].

[a] **After expiration of license,** a licensee who continues use is under an implied contract to pay a reasonable royalty. In re Michigan Motor Specialties Co., 288 Fed. 377.

52. May v. Western Lime Co., 65 Wash. 696, 118 P 895, 44 LRANS 333.

53. Ross v. Fuller, etc., Co., 105 Fed. 510.

54. Chemical Foundation v. Du Pont de Nemours, 29 F. (2d) 597; Federal Mfg., etc., Co. v. U. S., 42 Ct. Cl. 479; Rosenthal Paper Co. v. National Folding Box, etc., Co., 266 N. Y. 313, 123 NE 766; Mann's Boudoir Car Co. v. Shaw, 141 N. Y. 571, 36 NE 345.

[a] **The equitable owner under a verbal assignment** may recover royalties. Burke v. Partridge, 58 N. H. 349.

55. See infra § 541.

56. Chemical Foundation v. Du Pont de Nemours, 29 F. (2d) 597.

57. Chemical Foundation v. Du Pont de Nemours, supra.

58. Grier v. Baynes, 46 Fed. 523.

ties to the payee.[59]

[§ 450] **d. Effect of Assignment of License.** When a license has been assigned, the assignee is bound by its terms,[60] and by acceptance of the assignment becomes bound to pay the license fee to the licensor.[61] A licensee who has assigned his license[62] remains liable for the royalties due.[63]

[§ 451] **e. Duration of Period for Which Payment To Be Made.** The terms of the contract control as to the time during which royalty payments are to be made.[64] As a license to use a patented invention may be granted prior to the issuance of the patent,[65] the licensor may be entitled to royalties for use of the invention before issuance of the patent.[66] As a general rule the liability to pay royalties terminates at the expiration of the patent,[67] although the parties may contract to the contrary.[68]

[§ 452] **f. When Liability Accrues.** If the licensee exercises the rights granted him under the license he is liable, during the continuation of the license, for the stipulated fee or royalty for the use of the patent,[69] and this whether the article is fully protected by patent or not,[70] or although, after the agreement, a patent was refused.[71] No royalties can be required on an agreement to grant a license under a patent if the patent is never granted.[72] Where no time for payment is stipulated in the contract, royalty attendant upon sales of patented articles becomes due as each article is sold,[73] and after a reasonable time, on demand, the licensee is bound to account.[74] Although a contract for a license fee based upon sales of the patented article provides for a minimum payment, the liability is contingent and creates no debt until the time stipulated for payment arrives.[75] Where a royalty is to be paid upon manufacture and sale of articles under the patent, the debt does not accrue until there is both a manufacture and sale.[76]

[§ 453] **g. Measure and Amount of Royalty.** Where the terms of the license agreement fix the amount of the royalties to be paid,[77] or provide the

59. United Film Ad Serv., Inc. v. Roach, (Mo. A.) 297 SW 91.

60. See supra § 433.

61. Goodyear v. Congress Rubber Co., 10 F. Cas. No. 5,565, 3 Blatchf. 449; Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118; Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 NE 873; Paper Stock Disinfecting Co. v. Boston Disinfecting Co., 147 Mass. 318, 17 NE 554; Wilder v. Stearns, 48 N. Y. 656 mem; Rahe Match Co. v. World Match Corp., 213 App. Div. 729, 211 NYS 425.

[a] **Assignee of grantee is** not bound to pay royalties, unless an obligation has been assumed. Loose v. Bellows Falls Pulp Plaster Co., 266 Fed. 81.

62. See supra §§ 431–433.

63. U. S.—Steam Cutter Co. v. Sheldon, 22 F. Cas. No. 13,331, 10 Blatchf. 1, 5 Fish. Pat. Cas. 477.

Mass.—Porter v. Standard Measuring Mach. Co., 142 Mass. 191, 7 NE 925.

Mich.—Rodgers v. Torrant, 43 Mich. 113, 4 NW 507.

N. Y.—Wilson v. Mechanical Orguinette Co., 170 N. Y. 542, 63 NE 550; Marsh v. Dodge, 4 Hun 278, 6 Thomps. & C. 568 [rev on other grounds 66 N. Y. 533]; Wilde v. Smith, 8 Daly 196.

Vt.—Sherman v. Champlain Transp. Co., 31 Vt. 162.

Eng.—Cummings v. Stewart, [1911] 1 Ir. 235.

64. Lauth v. McKenna Steel Working Co., 160 Wis. 309, 151 NW 797.

[a] **Construction as a whole.**—Stipulations in a contract as to payment beginning upon a fixed time and as to payment after issuance of the patent are not necessarily inconsistent. Bezer v. Hall Signal Co., 22 App. Div. 489, 48 NYS 203.

[b] **Extended term.**—When the contract so provides, royalties must be paid during extension of the term of the patent. Union Mfg. Co. v. Lounsbury, 42 Barb. 125 [aff 41 N. Y. 363].

[c] **Particular contracts construed.**—(1) Effect of provisions for payment on award of priority and application for reissue. Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22. (2) Payment when pooling agreement shall have become inoperative. Shepard v. Kinner, 86 Fed. 638, 30 CCA 315.

65. See supra § 410.

66. Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029; Hamilton v. Park, etc., Co., 112 Mich. 138, 70 NW 436.

[a] **In absence of any contract,** the patentee is not entitled to royalties prior to the issuance of the letters patent. D. M. Steward Mfg. Co. v. Steward, 109 Tenn. 288, 70 SW 808.

[b] **Implied promise to pay royalties before issuance** may be inferred from the circumstances surrounding the use of the invention. Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029.

[c] **Terms of contract held to show right:** (1) Where the licensee agreed to pay the costs of procuring the patent, and pay royalties on devices sold. Boyer v. Metropolitan Sewing Mach. Co., 128 App. Div. 458, 112 NYS 317 [aff 199 N. Y. 593 mem, 93 NE 1116 mem]. (2) Where the licensee agreed to account for royalties on a certain day whether patents had been issued or not. Thomas v. Chicago Pump Co., 172 Ill. A. 614.

67. Pressed Steel Car Co. v. Union Pac. R. Co., 270 Fed. 518 [rev 254 Fed. 316].

68. Pressed Steel Car Co. v. Union Pac. R. Co., supra.

69. U. S.—Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 Fed. 753; Sea Gull Specialty Co. v. Humphrey, 242 Fed. 271, 155 CCA 111; Holmes v. McGill, 108 Fed. 238, 47 CCA 296; Kirkpatrick v. Pope Mfg. Co., 64 Fed. 369; Pope Mfg. Co. v. Owsley, 27 Fed. 100; Washburn, etc., Mfg. Co. v. Cincinnati Barbed-Wire Fence Co., 22 Fed. 712; McKay v. Jackman, 17 Fed. 641; Day v. Hartshorn, 7 F. Cas. No. 3,683, 3 Fish. Pat. Cas. 32; England v. Thompson, 8 F. Cas. No. 4,487, 3 Cliff. 271.

Iowa.—Ross v. Dowden Mfg. Co., 147 Iowa 180, 123 NW 182.

Me.—Spinney v. Allen, 140 A 688.

Mass.—Simonds Rolling Mach. Co. v. Pope Mfg. Co., 180 Mass. 393, 62 NE 467; Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682.

Mich.—Perfection Socket Co. v. American Forging, etc., Co., 222 Mich. 396, 192 NW 583; Kline v. M. Garland Co., 135 Mich. 313, 97 NW 768.

Mo.—Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730 (although article had no value).

N. J.—Ferry-Hallock Co. v. Zipfel, (Ch.) 74 A 299; Warwick v. Stockton, (Ch.) 37 A 458.

N. Y.—Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766; Wing v. Ansonia Clock Co., 102 N. Y. 531, 7 NE 621; Creamer v. Mitchell, 12 App. Div. 350, 42 NYS 207 (licensee, having obtained injunction to prevent rescission, must pay royalties); Hackett v. Hackett Hatch Door Mfg. Co., 52 N. Y. Super. 263 [aff 108 N. Y. 665 mem, 15 NE 445 mem]; Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 44 N. Y. Super. 454 [aff 81 N. Y. 468]; Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779; Kaffeman v. Stern, 23 Misc. 599, 53 NYS 260.

Pa.—Miller v. Belmont Packing, etc., Co., 268 Pa. 51, 110 A 802; Genese v. H. K. Mulford Co., 231 Pa. 80, 79 A 932; Kroegher v. McConway, etc., Co., 149 Pa. 444, 23 A 341; Hardwick v. Galbraith, 147 Pa. 333, 23 A 451; Boviard's App., 8 Pa. Cas. 60, 5 A 26.

See Tinsman v. Independent Harvester Co., 205 Ill. A. 239.

Total or partial failure to use as defense to liability for royalty see infra § 464.

70. U. S.—U. S. v. Harvey Steel Co., 196 U. S. 310, 25 SCt 240, 49 L. ed. 492; Headley Good Roads Co. v. Barber Asphalt Pav. Co., 292 Fed. 119 [aff 284 Fed. 177]; Corbin v. Taussig, 137 Fed. 151; Leslie v. Standard Sewing-Mach. Co., 98 Fed. 827, 39 CCA 314; Sproull v. Pratt, etc., Co., 97 Fed. 807 [aff 108 Fed. 963, 48 CCA 167].

Cal.—Keith v. Electrical Engineering Co., 136 Cal. 178, 68 P 598.

Iowa.—Hanson v. Hall Mfg. Co., 185 Iowa 1091, 169 NW 471.

Mass.—Strong v. Carver Cotton Gin Co., 197 Mass. 53, 83 NE 328, 14 LRANS 274, 14 AnnCas 1182.

Mich.—Perfection Socket Co. v. American Forging, etc., Co., 222 Mich. 396, 192 NW 583; Hall Mfg. Co. v. American R. Supply Co., 48 Mich. 331, 12 NW 205.

N. Y.—McGill v. Holmes, 48 App. Div. 628, 64 NYS 787 [aff 168 N. Y. 647 mem, 61 NE 1131 mem].

Pa.—Palmer's App., 96 Pa. 106.

Ont.—Vermilyea v. Canniff, 12 Ont. 164.

71. Ingraham v. Schaum, 157 Pa. 88, 27 A 404.

72. Hamilton v. Park, etc., Co., 125 Mich. 72, 83 NW 1018; Travis v. Hunter, 41 Minn. 176, 42 NW 1015; Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779.

73. Price v. Smith Mfg. Co., 53 Cal. A. 303, 200 P 53.

74. Miller v. Belmont Packing, etc., Co., 268 Pa. 51, 110 A 802.

75. Bottlers' Seal Co. v. Rainey, 225 N. Y. 369, 122 NE 200.

[a] **Thus,** where the right to make, use, and sell a patented article is granted for a certain term less than the full term of the patent in consideration of an agreement to pay royalties, the enjoyment of the uninterrupted use of the patent, not the mere execution of the grant, is the consideration for the royalties; and the debt is not contracted until the consideration is furnished. Bottlers' Seal Co. v. Rainey, 225 N. Y. 369, 122 NE 200.

76. Peo. v. Remington, 59 Hun 282, 12 NYS 824, 14 NYS 98 [aff 126 N. Y. 654 mem, 27 NE 853 mem].

77. Spurck v. Benner, 89 Ill. A. 79.

[a] **Diminishing scale of royalties.**—Hanson v. Hall Mfg. Co., 185 Iowa 1091, 169 NW 471; Potthoff v. Safety Armorite Conduit Co., 143

mode by which such amount is to be ascertained,[78] their proper construction is controlling as to such matters, for example, with regard to the sales which are to be included[79] or the uses which are to be paid for.[80]

Provisions for minimum sum. When the contract provides for the payment of royalty on each article sold, and binds the licensee to pay royalty on not less than a stated number of articles a year, he must pay royalty on at least such stipulated number without reference to the number of articles sold;[81] and likewise, where the contract provides for payment of a minimum specified sum for the privileges granted, the licensee is bound to at least that amount.[82] How-

App. Div. 161, 127 NYS 994.

[b] **Reduction of agreed amount.**—(1) Where a contract provides for an equal rate of royalty payable by licensees, a license to one for less royalty entitles the others to reduction (Newport News Shipbuilding, etc., Co. v. Isherwood, 5 F. (2d) 924; Guggenheim v. Kirchhofer, 66 Fed. 755, 14 CCA 72; Florence Sewing Mach. Co. v. Grover, etc., Sewing Mach. Co., 110 Mass. 70, 14 AmR 579 [aff 18 Wall. (U. S.) 553, 21 NE 914]), (2) although the contract allowing less royalties is never acted on (Guggenheim v. Kirchhofer, supra). (3) A decree pro confesso is not within the terms and conditions of a license providing for a reduction of the amount of royalties on a decision by the United States circuit court holding the patent valid. Kerosene Lamp Heater Co. v. Monitor Oil Stove Co., 41 Oh. St. 287. (4) A provision that, in case the patent should be held not infringed by a certain manufacture by "any court of competent jurisdiction," the royalty should be reduced and limited in all to a certain sum, must be construed as meaning a decision which should finally settle the question of such infringement and a decision of noninfringement by a trial court, which was reversed on appeal, did not have the effect of reducing the royalty. Critcher v. Linker, 169 Fed. 653. (5) Failure to perform conditions precedent to reduction prevents any valid agreement to reduce royalties. Bowers v. Lake Superior Contracting, etc., Co., 149 Fed. 983, 79 CCA 493.

[c] **Provision for increase.**—(1) A provision that the royalty "shall be forty-five per cent in lieu of forty per cent" in cases of sales abroad by the licensee will be construed as prospective, causing the higher rate to apply only as to transactions after the commencement of sales abroad. National Sewing-Mach. Co. v. Willcox, etc., Sewing Mach. Co., 74 Fed. 557, 20 CCA 654. (2) Final adjudication of validity is a condition precedent for increase of the amount where it is agreed that the amount shall be increased if the patent is found valid. Comptograph Co. v. Burroughs Adding Mach. Co., 179 Iowa 83, 159 NW 465. (3) Condition not waived by acceptance of benefit of nisi prius decree and consenting to reversal of that decree. Comptograph Co. v. Burroughs Adding Mach. Co., supra.

[d] **Penalty** requiring larger sum to be paid if lesser sum is not paid promptly is unenforceable, and payment of the lesser sum is all that can be required. Goodyear Shoe Mach. Co. v. Selz, etc., Co., 157 Ill. 186, 41 NE 625.

[e] **Parol agreement,** prior to the execution of a written contract fixing a specified rate of royalties, cannot be shown by the licensee to vary the terms of the written agreement. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 SW 1008.

[f] **Provision for termination** on failure to pay the royalties stipulated does not waive payment according to the contract during its continuance. Cummings v. Standard Harrow Co., 55 Misc. 601, 105 NYS 646 [aff 124 App. Div. 915 mem, 108 NYS 1128 mem (aff 195 N. Y. 513 mem, 88 NE 1117 mem)].

[g] **Agreement to pay lump sum construed** and held not to require the payment of a yearly lump sum where the contract was terminated by mutual consent before the end of a year. In re Dr. Voorhees Awning Hood Co., 187 Fed. 611 [rev on other grounds 188 Fed. 425, 110 CCA 215].

78. Bates Mach. Co. v. Cookson, 202 Ill. 248, 66 NE 1093; Rickly v. Parlin, etc., Co., 215 Ill. A. 512; Tully v. Felton, 5 Pa. Dist. 15, 17 Pa. Co. 385.

[a] **A practical construction by the parties may control as to:** (1) "Gross sales." Horvath v. McCord Radiator, etc., Co., 27 F. (2d) 148. (2) Payment of royalty on sale price of entire article, and not a part of the article. Keith v. Electrical Engineering Co., 136 Cal. 178, 68 P 598.

79. See cases infra this note.

[a] **Particular provisions construed.**—(1) Where the agreement is to pay royalties for sales made within a particular state, liability attaches in the case of sales made outside of the state for use within the state. Illinois Terra Cotta Lumber Co. v. Owen, 167 Ill. 360, 47 NE 722 [rev 64 Ill. A. 632]. (2) Where the agreement is to pay a royalty upon goods sold and delivered while the contract is in force, a royalty does not accrue upon goods sold during a period of suspension of the contract, although delivered after it had again become operative. Fries v. Merck, 167 N. Y. 445, 60 NE 777. (3) Provision for payment on machines "sold and delivered" includes machines delivered but not paid for, although taken back by licensee. Confectioners' Mach., etc., Co. v. Panoualias, 134 Fed. 393, 67 CCA 391. (4) A provision for the payment of royalties on sales after expiration of the license does not apply when the license is breached by the fault of the licensor. National Marking Mach. Co. v. Triumph Mfg. Co., 13 F. (2d) 6. (5) A contract for the manufacture of patented silos entitled plaintiff to five per cent of the proceeds of the sale of such patented silos, and not of other silos which defendant might sell. National Fire Proofing Co. v. Imperishable Silo Co., 63 Ind. A. 183, 112 NE 403. (6) A license, requiring payment of royalties for the manufacture and sale of circular tiling under a patent, was held to include sales of portions of the tiling alone. Alexander v. American Encaustic Tiling Co., 207 N. Y. 276, 100 NE 809.

[b] **Agreement by sublicensee.**—On an accounting under a license contract, which authorized the licensee to grant sublicenses, accounting to the licensors for a stated royalty on each patented article sold by the sublicensee, where a sublicensee paid an agreed sum for the license privilege, which entitled him to sell a stated number of the articles without further payment, the licensors are entitled to the royalty on such number, without regard to the number actually sold. Reizenstein v. Koopman, 178 Fed. 546, 101 CCA 462 [aff 176 Fed. 922].

[c] **Furnishing for use by United States.**—A licensee to make and use a patented invention is not excused from payment of royalties for such use merely because he furnishes the article to the United States. Newport News Shipbuilding, etc., Co. v. Isherwood, 5 F. (2d) 924 [rev on other grounds 289 Fed. 282].

80. [a] **For example** (1) under a license requiring the licensee to pay a royalty upon every car built or caused to be built by it embodying the patented devices, it must pay a royalty upon cars which it has built for it by a builder which is also a licensee under the patent. Pressed Steel Car Co. v. Union Pac. R. Co., 270 Fed. 518 [rev 254 Fed. 316]. (2) Contract for payment of certain royalty on drilling jars did not require payment of broken jars. Dick's App., 8 Pa. Cas. 70, 5 A 30.

81. U. S.—Neenan v. Otis El. Co., 180 Fed. 997 [aff 194 Fed. 414, 114 CCA 376].

Cal.—Capell v. Capell Sales Co., 165 Cal. 334, 132 P 260.

Ill.—Linington v. Strong, 111 Ill. 152.

Mass.—Lyons Burial Vault Co. v. Taylor, 198 Mass. 63, 84 NE 320.

Mich.—Hamilton v. Park, etc., Co., 112 Mich. 138, 70 NW 436.

N. Y.—Cummings v. Standard Harrow Co., 55 Misc. 601, 105 NYS 646 [aff 124 App. Div. 915 mem, 108 NYS 1128 mem (aff 195 N. Y. 513 mem, 88 NE 1117 mem)]; Meyer v. Brenzinger, 22 Misc. 712, 49 NYS 1091.

Okl.—Hyatt v. Vinita Brass Works, 89 Okl. 171, 214 P 706.

Pa.—Bayliss v. Hough, 41 Pa. Super. 454.

[a] **Rule applied.**—In a contract for the assignment of patents in which the assignee agreed to pay a royalty on each of the articles it constructed, a provision that, beginning on a specified date, the assignee "shall guarantee that the royalty upon elevators erected and constructed by it . . . shall amount to not less than three thousand dollars," did not obligate the assignee to construct articles each year, the royalty on which should amount to three thousand dollars, but was no more than an agreement to pay that amount if the royalties on the articles constructed amounted to less. Neenan v. Otis El. Co., 180 Fed. 997 [aff 194 Fed. 414, 114 CCA 376].

[b] **Binding on assignor of license.**—(1) A contract for the sale of patented gas irons and the payment of royalties to plaintiff was held to bind defendant's assignors to pay plaintiff guaranteed royalties amounting to at least one hundred and fifty dollars a month, whether irons sufficient to make royalties average that amount were sold or not. Capell v. Capell Sales Co., 165 Cal. 334, 132 P 260. (2) Where the contract, although fixing the royalty at a certain sum for each article sold, provides for the payment of a minimum sum, the minimum sum only can be claimed in the absence of evidence of the number of articles sold. Volk v. Bergman, 14 Misc. 443, 35 NYS 1025.

82. American Delinting Co. v. Pomeraning, 274 Fed. 212; Simonds Rolling Mach. Co. v. Pope Mfg. Co., 180 Mass. 393, 62 NE 467; Hackett v. Hackett Hatch Door Mfg. Co., 52 N. Y. Super. 263 [aff 108 N. Y. 665 mem, 15 NE 445 mem]; Beecher v. Stein, 139 Pa. 570, 21 A 79.

[a] **Thus** an agreement to pay a certain sum on a fixed date during the term of the patent and all renewals or extensions requires the licensee to pay that sum each year during the life of the patent, even though he does not use the article. Simonds Rolling Mach. Co. v. Pope Mfg. Co., 180 Mass. 393, 62 NE 467.

[b] **Particular agreements construed.**—(1) A contract for leasing solder-saving machines, providing for the payment as rental of one third the saving of the machines each month, a provision immediately following, "but the minimum amount of rent or

ever, the licensee is not bound in either instance to pay the minimum amount where it is fixed merely as an alternative to avoid a forfeiture or termination of the license,[83] or where the contract is illegal.[84]

Reasonable amount. Where a patent is made use of under an implied license[85] or implied agreement for the payment of royalties,[86] the owner is entitled to recover a reasonable compensation therefor,[87] which may be determined by the testimony of experts,[88] and other evidence as to the value of the invention.[89]

Deductions and offsets. The licensee may not deduct, from the amount of royalties due, the amount expended in defending a suit to cancel his license;[90] nor may he, when sued for infringement of a patent other than the one he is licensed to use, deduct from the royalties the sum expended in such litigation,[91] or the amount recovered against him.[92]

Interest. On failure to pay royalties due under the contract the licensee may be charged with interest thereon.[93]

[§ 454] **h. Use of Other Processes or Patented Articles as Imposing Liability.** Patents not possessed by plaintiff and in which he had no right do not, in the absence of express agreement, afford a ground for the recovery of royalty.[94] The licensee is not liable for royalties on articles manufactured by him which are not covered by the patent,[95] or on articles made by a process other than that of the patentee.[96] But he is liable where he uses an article equivalent to that patented, al-

royalty paid in any calendar year, after the year in which the machines are installed, shall be three hundred dollars for each machine," was unambiguous, reasonable, and valid, it being shown that, if a machine was continuously used, the royalty would much exceed such sum. Fellows v. National Can Co., 257 Fed. 970, 169 CCA 120 [certiorari den 250 U. S. 662 mem, 40 SCt 11 mem, 63 L. ed. 1195 mem] (minimum amount on returned machines due only for portion of year machine was used). (2) A provision that the royalty shall not be less than a certain sum "in any one year in which the licensee operates under the license" does not mean merely that the royalty shall not be less than such sum in any one year. Elliott v. Barrett Co., 25 F. (2d) 125, 126 [aff 25 F. (2d) 126].

[c] **Alternative provisions.**—Where a contract for the manufacture of a minimum number of oil burners and payment of royalty on such minimum number also provides that plaintiff has the option, in the event of failure to manufacture and pay for such minimum number as provided in the contract, to buy the machinery of the company together with its rights under the contract, plaintiff may elect to exercise his option or to insist on the manufacture and payment of royalty on the minimum number of burners, and, in the event of the failure to pay therefor, may maintain an action to recover the amount due, and the other party to the contract has no right to demand of him the exercise of his option and to declare a forfeiture of contract upon failure to exercise such option. Hyatt v. Vinita Brass Works, 89 Okl. 171, 214 P 706.

83. U. S.—Standard Appliance Co. v. Standard Equipment Co., 296 Fed. 456.

Ill.—Moon v. Roberts, 186 Ill. A. 15.

Ky.—Fairbanks v. Guilfoyle, 110 SW 233, 33 KyL 408.

Mo.—Graves v. Mound City Paint, etc., Co., (A.) 204 SW 57.

N. Y.—Hornbostel v. Kinney, 110 N. Y. 94, 17 NE 666; Wing v. Ansonia Clock Co., 102 N. Y. 531, 7 NE 621; Ebert v. Loewenstein, 42 App. Div. 109, 58 NYS 889 [aff 167 N. Y. 577 mem, 60 NE 1110 mem]; Hegelein v. Anthony, 33 Misc. 616, 68 NYS 2 (bound to pay royalty only on articles made).

[a] **Illustrations.**—(1) Where the licensee agreed to pay a minimum sum each year, and, if royalties did not meet this amount, to make up the deficit or forfeit the license, he did not bind himself to make up such deficit. Ebert v. Loewenstein, 42 App. Div. 109, 58 NYS 889 [aff 167 N. Y. 577 mem, 60 NE 1110 mem]. (2) A provision of an agreement that it is mutually agreed that, in order to keep this agreement in force, the licensee or its assigns shall pay a stated minimum yearly royalty, gives to the licensee an optional right to pay those minimum royalties as a condition of avoiding forfeiture by the licensor, and does not impose on the licensee the duty to pay them for the full life of the patent. Standard Appliance Co. v. Standard Equipment Co., 296 Fed. 456. (3) A licensee of an exclusive right to use a patented spring in the manufacture of automobiles, with the option to release the exclusive right and pay less, is estopped to assert oral surrender of the right, in view of letters indicating retention of the right. Austin v. Barley Motor Car Co., 233 Mich. 587, 207 NW 905.

84. Baltimore Process Co. v. Red Lodge Brewing Co., 66 Mont. 407, 213 P 798.

[a] **Rule applied.**—A contract licensing or permitting defendant to use a patented process, the patent for which was owned by plaintiff, for the dealcoholization of a malt beverage, of Dec. 18, 1917, became void in so far as it was executory after Dec. 31, 1918, its object and the benefit conferred on the promisor being contrary to the policy of the Prohibition Law. Baltimore Process Co. v. Red Lodge Brewing Co., 66 Mont. 407, 213 P 798.

85. **Implied license** see supra §§ 411, 412.

86. See supra § 448.

87. McKeever v. U. S., 18 Ct. Cl. 757; Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029; Deane v. Hodge, 35 Minn. 146, 27 NW 917, 59 AmR 321; Griffin v. White, 142 N. Y. 539, 37 NE 468; Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem]; Skinner v. Walter A. Wood Mowing, etc., Co., 14 NYSt 317 [aff 120 N. Y. 652 mem, 24 NE 1102 mem (writ of error dism 139 U. S. 293, 11 SCt 528, 35 L. ed. 193)].

88. McKeever v. U. S., 18 Ct. Cl. 757; Burton v. Burton Stock-Car Co., 171 Mass. 437, 50 NE 1029.

89. Berdan Firearms Mfg. Co. v. U. S., 26 Ct. Cl. 48 [aff 156 U. S. 552, 15 SCt 420, 39 L. ed. 530]; McKeever v. U. S., 18 Ct. Cl. 757; Harrison v. Ingersoll, 56 Mich. 36, 22 NW 268; Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem].

[a] **Value of patented process** for making rope computed by the gain in weight of materials made by the process. Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem].

90. Reed Roller Bit Co. v. Hughes Tool Co., 12 F. (2d) 207 [aff 4 F. (2d) 136].

91. Reed Roller Bit Co. v. Hughes Tool Co., supra.

92. Reed Roller Bit Co. v. Hughes Tool Co., supra.

93. Newport News Shipbuilding, etc., Co. v. Isherwood, 5 F. (2d) 924; Sea Gull Specialty Co. v. Humphrey, 242 Fed. 271, 155 CCA 111; Massie v. Asbestos Brake Co., 95 N. J. Eq. 298, 123 A 155, 126 A 669; Pressey v. H. B. Smith Mach. Co., 45 N. J. Eq. 872, 19 A 618; McCornack v. Sharples, 254 Pa. 541, 99 A 155; Jarecki v. Hays, 161 Pa. 613, 29 A 118. See Duer v. Chicago Coach, etc., Co., 194 Ill. A. 314.

94. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302.

95. U. S.—Eclipse Bicycle Co. v. Farrow, 199 U. S. 581, 26 SCt 150, 50 L. ed. 317 [rev 18 App. (D. C.) 101, 16 App. (D. C.) 468]; Dwight, etc., Sintering Co., Inc. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; Bucher, etc., Plow Co. v. International Harvester Co. 10 F. (2d) 24; Hewitt v. American Tel., etc., Co., 272 Fed. 194 [aff 272 Fed. 392]; Loose v. Bellows Falls Pulp Plaster Co., 266 Fed. 81; Moore v. National Water-Tube Boiler Co., 84 Fed. 346; Standard Sewing-Mach. Co. v. Leslie, 78 Fed. 325, 24 CCA 107; Covell v. Bostwick, 39 Fed. 421; Foley v. U. S., 56 Ct. Cl. 303 [aff 260 U. S. 667, 43 SCt 240, 67 L. ed. 451].

Ill.—Blome v. Illinois Portland Cement Pav. Co., 172 Ill. A. 171.

Mass.—Strong v. Carver Cotton Gin Co., 197 Mass. 53, 83 NE 328, 14 LRA NS 274, 14 AnnCas 1182.

Mich.—Forncrook Mfg. Co. v. Barnum Wire, etc., Works, 63 Mich. 195, 29 NW 537.

Mo.—Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

N. J.—Briggs v. United Show Mach. Corp., 92 N. J. Eq. 277, 114 A 538 [certiorari den 254 U. S. 653 mem, 41 SCt 149 mem, 65 L. ed. 459 mem].

N. Y.—Darrasse v. Ferment Co., 182 App. Div. 591, 169 NYS 963; Dutchess Tool Co. v. Kolb, 44 App. Div. 624, 60 NYS 94; Hyatt v. Mark, 55 N. Y. Super. 507, 2 NYS 727 [aff 124 N. Y. 93, 26 NE 285]; Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261.

Eng.—Goucher v. Clayton, 11 Jur. N. S. 462.

[a] **Rule applied.**—(1) The making of a machine that will perform the same functions as the machine covered by the patent is not the exercise of any right under the license, unless there is an adaptation of the principle covered by the patent. Bucher, etc., Plow Co. v. International Harvester Co., 10 F. (2d) 24. (2) The licensee of a patented device consisting of two elements is not liable for royalties on a device producing the same result by a single element. Rathbun v. Wolverine Metal Specialties Co., 240 Mich. 603, 216 NW 454. (3) Under a contract entitling plaintiff to royalty "upon all other manufactures" of defendant "embodying" any or all inventions by plaintiff, he was not entitled to royalty on a particular article which did not contain within, or as a part of, its physical structure any invention of plaintiff, although several patented machines and process invented by plaintiff were used in its "manufacture," "embody" being used in its primary and ordinary sense, and "manufactures" as so used relating to patent meaning an article or manufacture, a concrete marketable product. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302.

96. Jobbins v. Kendall Mfg. Co., 270 Fed. 671.

though in different form,[97] or uses a process, although making slight changes in the apparatus.[98] And a licensee under a patent, who has for several years manufactured, stamped, advertised, and sold an article as made under such patent, and paid royalties thereon to the licensor, is estopped thereafter in an action for further royalties to deny that such article was covered by the patent.[99]

[§ 455] **i. Duty of Licensee To Make Use of License.** A licensee is not bound to use the patent of the licensor, but only to abide by the terms of the license in case he does use it.[1]

[§ 456] **j. Defenses to Liability for Royalty—(1) In General.** A royalty contract is, so far as they may be applicable, subject to the same excuses for nonperformance as exist in the case of contracts generally.[2] The licensee cannot avoid liability on the ground that no formal execution or delivery of the license was made.[3]

[§ 457] **(2) Failure of Consideration.**[4] While it would seem that, where the licensee receives the patent which he has bargained for, there cannot be an entire failure of consideration,[5] it has been held in some jurisdictions that the entire worthlessness of the patent may constitute a defense to a claim for the purchase price of the license,[6] and that a right alleged to be exclusive may be shown by the licensee not to be in fact such.[7] It is sufficient to sustain a plea of want of consideration to show that no patent had ever issued for the article licensed to be made and sold,[8] or that it does not confer the right contemplated by the parties.[9] Where the fact that patents may be held invalid is a recognized factor leading to the making of the contract, it cannot be held that there is a complete failure of consideration upon a subsequent adjudication of their invalidity.[10]

[§ 458] **(3) Fraud or Misrepresentation.** Fraudulent representations inducing the acceptance of the license may constitute a defense to liability for royalties thereunder,[11] although the licensee cannot complain of false representations which have caused him no injury.[12] A licensee from one having no right to convey a license must offer to return what he has purchased before he can avail himself of a defense of fraud when sued for the purchase price of his license.[13]

[§ 459] **(4) Failure of Licensor To Perform Dependent Covenants.**[14] In order that the licensor may recover he must have fulfilled any conditions precedent imposed upon him by the license agreement,[15] but his failure to perform an independent covenant, while it may impose a liability upon him to respond in damages, will not prevent him from enforcing his claim for royalties.[16] Where the agreement is to pay license fees in case the pat-

97. U. S.—Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; Isherwood v. Newport News Shipbuilding, etc., Co., 289 Fed. 282 [rev on other grounds 5 F. (2d) 924 (certiorari dism 269 U. S. 592 mem, 46 SCt 13 mem, 70 L. ed. 429 mem)]; Barber Asphalt Paving Co. v. Headly Good Roads Co., 283 Fed. 236 [new trial granted 284 Fed. 177 (aff 292 Fed. 119)]; Clifford v. Capell, 165 Fed. 193, 91 CCA 227; Leslie v. Standard Sewing-Mach. Co., 98 Fed. 827, 39 CCA 314.

Mass.—Wilder v. Adams, 16 Gray 478.

Mich.—Perfection Socket Co. v. American Forging, etc., Co., 209 Mich. 497, 177 NW 194, 222 Mich. 396, 192 NW 583.

N. Y.—Russell Hardware, etc., Mfg. Co. v. Utica Drop Forge, etc., Co., 195 N. Y. 54, 87 NE 788; Denise v. Swett, 68 Hun 188, 22 NYS 950.

Eng.—Roger v. Cochrane, [1909] A. C. 285.

98. Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234.

99. Universal Rim Co. v. Scott, 21 F. (2d) 346; Sproull v. Pratt, etc., Co., 97 Fed. 807 [aff 108 Fed. 963, 48 CCA 167]; Andrews v. Landers, 72 Fed. 666; Felix v. Scharnweber, 19 Ill. A. 628 [aff 119 Ill. 445, 10 NE 16].

[a] **Slight modification** of the invention for which the license was granted will not relieve the licensee from his agreement to pay royalty for the use of the invention. Felix v. Scharnweber, 19 Ill. A. 628 [aff 119 Ill. 445, 10 NE 16].

1. Jobbins v. Kendall Mfg. Co., 196 Fed. 216; Blome v. Illinois Portland Cement Pav. Co., 172 Ill. A. 171.

[a] **Rule applied.**—(1) Where in an action for damages alleged to have been caused by the fraudulent withholding for three years from the market of a machine involving the patented device, thereby depriving the owners of the patent of the beneficial use thereof the evidence fails to establish that the patented device was of practical or commercial value and fails to establish a fraudulent purpose to withhold it from the market, plaintiff cannot recover. Virtue v. Creamery Package Mfg. Co., 114 Minn. 167, 130 NW 996. (2) Injunction should not issue to prevent a licensee under a patent, not obligated to continue in business or to make and sell any minimum number of machines, from selling its property and business other than the license, although it knows the purchaser intends to use such property in manufacturing and selling in opposition to the patent, where the sale is in good faith, and not merely colorable, to avoid the obligations of the contract. Thomson Spot Welder Co. v. National Electric Welder Co., 260 Fed. 223.

2. See cases infra §§ 457–459.

Excuses for nonperformance of contract see Contracts §§ 706–736.

3. Moore v. National Water-Tube Boiler Co., 84 Fed. 346; American Paper-Bag Co. v. Van Nortwick, 52 Fed. 752, 3 CCA 274; Warwick v. Stockton, (N. J. Ch.) 37 A 458.

4. Failure of consideration as defense to note see Bills and Notes §§ 362, 1017 et seq.

5. Nash v. Lull, 102 Mass. 60, 3 AmR 435.

[a] **The fact that the invention was not commercially successful** does not in the absence at least of an implied warrant of utility show a total failure of consideration. Bird's-Eye Veneer Co. v. Franck-Philipson, 259 Fed. 266, 170 CCA 334.

6. Smith v. Hightower, 76 Ga. 629; Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730; Jenkins v. Abbotts, 54 N. H. 447; Clough v. Patrick, 37 Vt. 421.

7. Martin v. Pinney, 163 Cal. 652, 126 P 481.

8. Brown v. Wright, 17 Ark. 9; Hamilton v. Park, etc., Co., 125 Mich. 72, 83 NW 1018; Buffalo Rubber Mfg. Co., v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779.

9. Pomeroy v. New York Hippodrome Corp., 197 App. Div. 114, 188 NYS 734.

[a] **Failure to obtain patent because of prior patent** is sufficient failure of consideration to defeat an action for royalties. Pomeroy v. New York Hippodrome Corp., 197 App. Div. 114, 188 NYS 734 (where licensor secured merely an improvement patent).

10. International Radio Tel. Co. v. Marconi Wireless Tel. Co., 89 N. J. Eq. 319, 104 A 378 [aff 90 N. J. Eq. 271, 106 A 891].

[a] **Adjudication of invalidity.**—Where the licensee entered into agreement to pay royalties for use of the patent after conflicting decisions on its validity by two federal district courts of equal jurisdiction, it cannot be said as a matter of law that there was no consideration by reason of invalidity. Brazel v. Thompson Smith's Sons, 141 Mich. 628, 104 NW 1097.

11. Hat-Sweat Mfg. Co. v. Porter, 46 Fed. 757; Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87, 106.

12. Clark v. Amoskeag Mfg. Co., 62 N. H. 612; McGill v. Holmes, 48 App. Div. 628, 64 NYS 787 [aff 168 N. Y. 647 mem, 61 NE 1131 mem].

13. Weitzel v. Nover, 8 Ky. Op. 351.

14. Protection of licensee from infringements or competition see infra § 463.

15. Capell v. Capell Sales Co., 165 Cal. 334, 132 P 260. See Bell, etc., Co. v. Spoor, 225 Ill. A. 256 (breach of covenant not to assign not bar).

[a] **Application for foreign patent.**—A mere recital of an intention to apply for a foreign patent and a prospective grant of an exclusive right under it when obtained does not impose a condition precedent to a recovery of license fees for manufacture under a United States patent. Capell v. Capell Sales Co., 165 Cal. 334, 132 P 260.

[b] **Protection from infringement.**—Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766.

16. Bowers' California Dredging Co. v. San Francisco Bridge Co., 132 Cal. 342, 64 P 475.

[a] **Rule applied.**—Where a licensee, after it had the option to cease performance and recover damages because of the licensor's sale and assignment of the patent right and assignment of license to another, kept alive the contract and secured the results by manufacturing and selling the article to the end of the contract time, it cannot maintain that it is not subject to the obligations and liabilities of the license contract, including the payment of royalty, and its remedy for breach is recovery by counterclaim or action for damages.

ented device fulfills certain guaranteed requirements, the fulfillment of such requirements, unless waived, is a condition to liability upon the part of the licensee.[17]

[§ 460] **(5) Invalidity of Patent—(a) In General.** A licensee, where the patent which is the subject matter of the license is apparently valid and in force, cannot, when sued for royalties payable under the agreement, set up the supposed invalidity of the patent and the consequent failure of consideration of the agreement,[18] especially where he has, by his contract, acknowledged its validity and agreed not to contest it;[19] and in order to permit the licensee to defend by attacking the validity of the patent something corresponding to an eviction from the enjoyment of the rights conferred by the license must be shown.[20] By some authorities, it has been held, however, that when, in addition to the invalidity of the patent by reason of a prior outstanding patent for the same invention, it is shown that the owner of the prior patent is asserting his exclusive rights thereunder by supplying the market with the patented article, forbidding all interference upon the part of others, etc., and the licensee under the invalid patent is deprived of the enjoyment of the monopoly for which he contracted and in consideration of which he agreed to pay the royalty, he may defend on the ground of the actual failure of the

Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766.

17. Columbia Chemical Co. v. Duff, 168 Fed. 57, 93 CCA 479.

18. U. S.—U. S. v. Harvey Steel Co., 196 U. S. 310, 25 SCt 240, 49 L. ed. 492; Eureka Clothes Wringing Mach. Co. v. Bailey Washing, etc., Mach. Co., 11 Wall. 488, 20 L. ed. 209; Kinsman v. Parkhurst, 18 How. 289, 15 L. ed. 385; Eskimo Pie Corp. v. National Ice Cream Co., 26 F. (2d) 901 [aff 20 F. (2d) 1003]; Universal Rim Co. v. Scott, 21 F. (2d) 346; Barber Asphalt Pav. Co. v. Headley Good Roads Co., 284 Fed. 177 [aff 292 Fed. 119]; Martin v. New Trinidad Lake Asphalt Co., 255 Fed. 93; Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22; Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 116 Fed. 629; Holmes v. McGill, 108 Fed. 238, 47 CCA 296; Leslie v. Standard Sewing-Mach. Co., 98 Fed. 827, 39 CCA 314; Moore v. National Water-Tube Boiler Co., 84 Fed. 346; National Sewing-Mach. Co. v. Willcox, etc., Sewing-Mach. Co., 74 Fed. 557, 20 CCA 654; Godell v. Wells, etc., Co., 70 Fed. 319; Platt v. Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 CCA 357; National Rubber Co. v. Boston Rubber-Shoe Co., 41 Fed. 48; McKay v. Smith, 39 Fed. 556 [app dism 161 U. S. 355, 16 SCt 490, 40 L. ed. 731]; Covell v. Bostwick, 39 Fed. 421; Rogers v. Riessner, 30 Fed. 525; Pope Mfg. Co. v. Owsley, 27 Fed. 100; Brown v. Lapham, 27 Fed. 77, 23 Blatchf. 475; McKay v. Jackman, 17 Fed. 641; White v. Lee, 14 Fed. 789; Birdsall v. Perego, 3 F. Cas. No. 1,435, 5 Blatchf. 251; Cohn v. National Rubber Co., 6 F. Cas. No. 2,968, 3 Bann. & A. 568; Federal Mfg., etc., Co. v. U. S., 42 Ct. Cl. 479 (recognizing rule); Morse Arms Mfg. Co. v. U. S., 16 Ct. Cl. 296.

Conn.—Johnson v. Willimantic Linen Co., 33 Conn. 436.

Ill.—Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118 [aff 71 Ill. A. 242]; Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 NE 873; Bell, etc., Co. v. Spoor, 216 Ill. A. 221; Pharis v. Moline Plow Co., 158 Ill. A. 64; Peoria Malting Co. v. Davenport Grain, etc., Co., 68 Ill. A. 104.

Iowa.—Hanson v. Hall Mfg. Co., 184 Iowa 1091, 169 NW 471.

Me.—Jones v. Burnham, 67 Me. 93, 24 AmR 10.

Mass.—Strong v. Carver Cotton Gin Co., 197 Mass. 53, 83 NE 328, 14 LR ANS 274, 14 AnnCas 1182; Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682; Bartlett v. Holbrook, 1 Gray 114.

Mich.—Thomson Spot Welder Co. v. Oldberg Mfg. Co., 234 Mich. 317, 207 NW 828; Hall Mfg. Co. v. American R. Supply Co., 48 Mich. 331, 12 NW 205.

Minn.—Deane v. Hodge, 35 Minn. 146, 27 NW 917, 59 AmR 321.

N. H.—Clark v. Amoskeag Mfg. Co., 62 N. H. 612. But see Jenkins v. Abbotts, 54 N. H. 447.

N. J.—Warwick v. Stockton, (Ch.) 37 A 458; American Mechanical Impr. Co. v. Des Lauriers Aircraft Corp., 94 N. J. Eq. 197, 119 A 179.

N. Y.—Mark v. Hyatt, 135 N. Y. 306, 31 NE 1099, 18 LRA 275; Hyatt v. Ingalls, 124 N. Y. 93, 26 NE 285; Hyatt v. Dale Tile Mfg. Co., 106 N. Y. 651, 12 NE 705 [aff 125 U. S. 46, 8 SCt 756, 31 L. ed. 683]; Gillett v. Bate, 86 N. Y 87, 10 AbbNCas 88; Marston v. Swett, 66 N. Y. 206, 23 AmR 43; Heller v. Yokelson-Cooper, Inc., 214 App. Div. 321, 212 NYS 182; McGill v. Holmes, 48 App. Div. 628, 64 NYS 787 [aff 168 N. Y. 647 mem, 61 NE 1131 mem]; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 NYS 1016; Hurd v. Gere, 27 App. Div. 625, 50 NYS 235; Denise v. Swett, 68 Hun 188, 22 NYS 950 [rev on other grounds 142 N. Y. 602, 37 NE 627]; Marsh v. Dodge, 4 Hun 278, 6 Thomps. & C. 568 [rev on other grounds 66 N. Y. 533]; Hyatt v. Ingalls, 49 N. Y. Super. 375 [aff 124 N. Y. 93, 26 NE 285]; Washburn, etc., Mfg. Co. v. Wilson, 48 N. Y. Super. 159; Smith v. Standard Laundry Mach. Co., 11 Daly 154; Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779; Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261; Baylis v. Bullock Electric Mfg. Co., 32 Misc. 218, 66 NYS 253 [rev on other grounds 59 App. Div. 576, 69 NYS 693]; Maitland v. Drew, 14 Misc. 60, 35 NYS 249; Montgomery v. Waterbury, 2 Misc. 145, 21 NYS 631 [aff 142 N. Y. 652 mem, 37 NE 569 mem]; Bruise v. Peck, 16 NYS 648.

Oh.—Ely v. Topliff, 41 Oh. St. 357; American Nat. Co. v. Thompson Spot Welder Co., 30 Oh. A. 156, 164 NE 435 (assignee of licensee); Clark v. Bentel, 6 Oh. Dec. (Reprint) 1205, 12 AmLRec 534; Gaylord v. Case, 5 Oh. Dec. (Reprint) 413, 5 AmLRec 494.

Pa.—Edison Gen. Electric Co. v. Thackara Mfg. Co., 167 Pa. 530, 31 A 856; Jarecki v. Hays, 161 Pa. 613, 29 A 118; Ingraham v. Schaum, 157 Pa. 88, 27 A 404; Patterson's App., 99 Pa. 521; Angier v. Eaton, etc., Co., 98 Pa. 594.

Wis.—Marsh v. Harris Mfg. Co., 63 Wis. 276, 22 NW 516. But see Rice v. Garnhart, 34 Wis. 453, 17 AmR 448 (action to recover contract price).

Eng.—Cutler v. Bower, 11 Q. B. 973, 6 ECL 973, 116 Reprint 736; Adie v. Clark, 3 Ch. D. 134; Cummings v. Stewart, [1913] 1 Ir. 95; Bowman v. Taylor, 2 A. & E. 278, 29 ECL 142, 111 Reprint 108, 11 ERC 55; Trotman v. Wood, 16 C. B. N. S. 479, 111 ECL 479, 143 Reprint 1214; Lawes v. Purser, 6 E. & B. 930, 88 ECL 930, 119 Reprint 1110; Hills v. Laming, 9 Exch. 256, 156 Reprint 109; Noton v. Brooks, 7 H. & N. 499, 158 Reprint 569.

Can.—Imperial Supply Co., Ltd. v. Grand Trunk R. Co., 13 Can. Exch. 507, 1 DomLR 243, 10 EastLR 414.

Ont.—Beam v. Merner, 14 Ont. 412; Vermilyea v. Canniff, 12 Ont. 164; Bull v. Williams Piano Co., 29 OntWN 304; Copeland-Chatterson Co. v. Lyman Bros. Co., 9 OntWR 908.

[a] **Reason for rule.**—Invalidity is no defense because the licensee may still continue to enjoy all the benefits of a valid patent. McKay v. Smith, 39 Fed. 556 [app dism 161 U. S. 355, 16 SCt 490, 40 L. ed. 731].

[b] **Implied admission of validity.**—A contract of license to manufacture under a patent, although limited to manufacture at licensee's factory in a particular place, is effective as an admission of the validity of the patent. Cassidy v. Evan L. Reed Mfg. Co., 293 Fed. 797.

[c] **Mortgage trustees** of a licensee corporation cannot deny the validity of the patent. Regina Music Box Co. v. Newell, 131 Fed. 606.

[d] **Trustee in bankruptcy,** acting under the license, cannot deny title of the licensor. In re Michigan Motor Specialties Co., 288 Fed. 377.

Estoppel to deny validity see supra §§ 287–291.

19. Pope Mfg. Co. v. Owsley, 27 Fed. 100; Washburn, etc., Mfg. Co. v. Cincinnati Barbed-Wire Fence Co., 22 Fed. 712; Evory v. Candee, 8 F. Cas. No. 4,583, 4 Bann. & A. 545, 17 Blatchf. 200; Magic Ruffle Co. v. Elm City Co., 16 F. Cas. No. 8,949, 2 Bann. & A. 152, 13 Blatchf. 151; Morse Arms Mfg. Co. v. U. S., 16 Ct. Cl. 296; Hyatt v. Ingalls, 124 N. Y. 93, 26 NE 285; Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261; Marsh v. Harris Mfg. Co., 63 Wis. 276, 22 NW 516. See Tinsman v. Independent Harvester Co., 205 Ill. A. 239.

[a] **Public policy** does not render void an agreement not to dispute the validity of a patent. Philadelphia Creamery Supply Co. v. Davis, etc., Bldg. etc., Co., 77 Fed. 879.

20. Barber Asphalt Pav. Co. v. Headley Good Roads Co., 284 Fed. 177 [aff 292 Fed. 119]; Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 Fed. 753; McKay v. Smith, 39 Fed. 556 [app dism 161 U. S. 355, 16 SCt 490, 40 L. ed. 731]; White v. Lee, 14 Fed. 789; Potterton v. Condit, 218 Mass. 216, 105 NE 443; Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682; Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234.

[a] **Notice of infringement.**—Where the licensee was notified by the owners of other patents that the construction of the machines under the patent was an infringement of the other patents, and the patentee's attorney after investigation practically conceded infringement and advised discontinuance of manufacture, there was a substantial eviction of the licensee. Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 Fed. 753.

[b] **A decree for infringement** is an eviction of the licensee under the patent declared to be infringing. Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 138, 55 A 401.

[c] **Surrender and reissue** not an eviction so as to release licensee from liability for royalties due prior to surrender and reissue. Barber Asphalt Pav. Co. v. Headley Good Roads Co., 284 Fed. 177 [aff 292 Fed. 119] (eviction has no effect on liability for royalties accruing prior thereto).

[d] **Licensee under nonexclusive license** is not evicted when the licensor gives to others the same rights, there being no stipulation in the license that he would not do so. McKay v. Smith, 39 Fed. 556 [app dism 161 U. S. 355, 16 SCt 490, 40 L. ed. 731].

consideration.[21]

[§ 461] **(b) Effect of Adjudication of Invalidity.** The licensee, if evicted from the use of the patent by a judgment of a court of competent jurisdiction declaring the patent invalid, may, after giving notice to the licensor, defend against the payment of royalties subsequently accruing,[22] although remaining liable for royalties previously earned.[23] Where the licensee has not been prevented from using the patented invention, the mere adjudication of the invalidity of the patent does not relieve him from liability for payment of royalties so long as he continues the use thereof.[24] Where, by the agreement of the parties, the payment of royalties is to cease in case the patent is declared invalid or void by a court of competent jurisdiction, the licensee remains liable for royalties until it has been so declared void.[25]

[§ 462] **(c) Effect of Renunciation of License.** Where the patent is in fact invalid, the licensee may renounce and abandon the license and, after having given notice thereof to the licensor, defend against an action to recover royalties subsequently accruing,[26] but an unequivocal notice is necessary.[27]

[§ 463] **(6) Competition by Other Licensees or Infringers.** Where the licensor, in addition to a grant of the license, has covenanted to protect the exclusive rights conferred, a failure upon his part to perform such covenant precludes a recovery of royalties,[28] but, in the absence of an agreement to protect the licensee from competition by infringers, such competition affords no defense to such an action;[29] nor does infringement by the patentee of an exclusive right granted to the licensee.[30] The fact that the licensor has granted other licenses or failed to prevent competition with the licensee does not relieve the licensee from his liability for royalties where no monopoly is given him by the license.[31] In an action for accounting for royalties the licensee may not set up a breach of contract to protect him from infringers when the breach was due to his own fault.[32]

[§ 464] **(7) Nonuser.** A use of any part of the invention renders the licensee liable for the stipulated royalty unless his liability is expressly limited.[33] Where a license grants an exclusive right to use an invention, the failure of the licensee to make use of it is no defense to an action to recover the agreed compensation.[34] A mere option to make use of a patented machine or process upon the pay-

21. Edison Gen. Electric Co. v. Thackara Mfg. Co., 167 Pa. 530, 31 A 856; Angier v. Eaton, etc., Co., 98 Pa. 594. See Wilfley v. New Standard Concentrator Co., 164 Fed. 421, 90 CCA 543 (applying principle to breach by licensor of covenant to protect the exclusive right granted).

22. Universal Rim Co. v. Scott, 21 F. (2d) 346; Ross v. Fuller, etc., Co., 105 Fed. 510; Herzog v. Heyman, 151 N. Y. 587, 45 NE 1127, 56 AmSR 646; Marston v. Swett, 82 N. Y. 526; Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779.

23. Thomson Spot Welder Co. v. Oldberg Mfg. Co., 234 Mich. 317, 207 NW 828; Marston v. Swett, 66 N. Y. 206, 23 AmR 43; Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem].

[a] **Illustration.**—Under an agreement that the licensor should commence suit to determine the validity of the patent and prosecute an appeal to the United States circuit court of appeals, the licensee remains liable for royalties until the circuit court declares the patent invalid. Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem].

24. Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682; Marston v. Swett, 66 N. Y. 206, 23 AmR 43.

[a] **No failure of consideration** when licensee under an invalid patent has enjoyed the use of the patent unmolested under the license, or obtained benefits under the license. McKay v. Smith, 39 Fed. 556 [app dism 161 U. S. 355, 16 SCt 490, 40 L. ed. 731]; Jones v. Burnham, 67 Me. 93, 24 AmR 10; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 NYS 1016; Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem].

[b] **Judicial determination of invalidity** has no effect on a license where the licensee has agreed not to contest the validity of the patent. Pope Mfg. Co. v. Owsley, 27 Fed. 100; Thomson Spot Welder Co. v. Fairbanks Co., 37 Ga. A. 774, 141 SE 923.

25. U. S.—Miami Cycle, etc., Co. v. Robinson, 245 Fed. 556, 158 CCA 22.

Mass.—Potterton v. Condit, 218 Mass. 216, 105 NE 443.

Mich.—Forncrook Mfg. Co. v. Barnum Wire, etc., Works, 63 Mich. 195, 29 NW 537.

N. Y.—Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem].

Oh.—Kerosene Lamp Heater Co. v. Monitor Oil Stove Co., 41 Oh. St. 287.

Pa.—Hardwick v. Galbraith, 147 Pa. 333, 23 A 451; Patterson's App., 99 Pa. 521.

[a] **Illustrations.**—(1) Where the validity of the patent is, according to the agreement, to be tested by suit in the United States district court and prosecution of an appeal to final determination in the United States circuit court of appeals, the licensee remains liable until such final determination, although the district court held the patent invalid. Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem]. (2) In a license of patent rights, requiring the licensee to pay royalties unless the article shall be found to infringe other patents, the word "found" means found by a court of competent jurisdiction, the word implying a finding after judicial inquiry. Potterton v. Condit, 218 Mass. 216, 105 NE 443.

[b] **Decree pro confesso** is not a decision of the invalidity of the patent within the meaning of the contract, but rather a waiver of a decision. Kerosene Lamp Heater Co. v. Monitor Oil Stove Co., 41 Oh. St. 287.

26. U. S.—Universal Rim Co. v. Scott, 21 F. (2d) 346; Schutte, etc., Co. v. Wheeler Condenser, etc., Co., 295 Fed. 158; Mudgett v. Thomas, 55 Fed. 645; McKay v. Smith, 39 Fed. 556 [app dism 161 U. S. 355, 16 SCt 490, 40 L. ed. 731]; Brown v. Lapham, 27 Fed. 77, 23 Blatchf. 475; McKay v. Jackman, 17 Fed. 641; Morse Arms Mfg. Co. v. U. S., 16 Ct. Cl. 296.

Iowa.—Ross v. Dowden Mfg. Co., 147 Iowa 180, 123 NW 182.

Mass.—Standard Button Fastening Co. v. Ellis, 159 Mass. 448, 34 NE 682; Harlow v. Putnam, 124 Mass. 553.

N. J.—Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 138, 55 A 401.

N. Y.—Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc 418, 153 NYS 779.

Pa.—Edison Gen. Electric Co. v. Thackara Mfg. Co., 167 Pa. 530, 31 A 856.

27. Martin v. New Trinidad Lake Asphalt Co., 255 Fed. 93; Watson Fireproof Window Co. v. Henry Weiss Cornice Co., 181 Mo. A. 318, 168 SW 905; Skinner v. Walter A. Wood Mowing, etc., Mach. Co., 140 N. Y. 217, 35 NE 491, 37 AmSR 540; Heller v. Lassner Co., 214 App. Div. 315, 212 NYS 175; Martin v. New Trinidad Lake Asphalt Co., 182 App. Div. 719, 170 NYS 234; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 NYS 1016; Hurd v. Gere, 27 App. Div. 625, 50 NYS 235; Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem]; Maitland v. Drew, 14 Misc. 60, 35 NYS 249; Maitland v. Central Gas, etc., Co., 7 Misc. 408, 27 NYS 965.

[a] **Necessity of notice.**—Proper notice is necessary unless patent has been adjudicated invalid or void before royalties accrued. Maitland v. Drew, 14 Misc. 60, 35 NYS 249.

[b] **Notice of suspension** of payment until adjudication of validity is not notice of termination of the license, but merely a delay of payment. Matter of Muser, 122 Misc. 164, 203 NYS 619 [aff 212 App. Div. 861 mem, 207 NYS 883 mem].

28. Wilfley v. New Standard Concentrator Co., 164 Fed. 421, 90 CCA 543; American Mach., etc., Co. v. Haas, 127 La. 811, 54 S 38; Massie v. Asbestos Brake Co., 95 N. J. Eq. 320, 126 A 669; Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766.

[a] **Excuse for breach.**—Breach of such covenant by licensor is not excused by nonpayment of royalties, or by insufficiency of royalties to meet expenditures necessary to prevent infringement. Massie v. Asbestos Brake Co., 95 N. J. Eq. 320, 126 A 669 [rev 95 N. J. Eq. 298, 123 A 155].

[b] **Covenants held dependent.**—A promise of the licensor to protect against infringers, and a promise of licensee to pay royalties are dependent. Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766.

29. Sea Gull Specialty Co. v. Humphrey, 242 Fed. 271, 155 CCA 111; Hardwick v. Galbraith, 147 Pa. 333, 23 A 451.

30. Birdsall v. Perego, 3 F. Cas. No. 1,435, 5 Blatchf. 251; Nunes v. Russell, 65 Ill. A. 171; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 NYS 1016; Jarecki v. Hays, 161 Pa. 613, 29 A 118.

31. Hardwick v. Galbraith, 147 Pa. 333, 23 A 451.

32. Massie v. Asbestos Brake Co., 95 N. J. Eq. 298, 123 A 155, 126 A 669.

33. Kroegher v. McConway, etc., Co., 149 Pa. 444, 23 A 341; Hubbard v. Allen, 123 Pa. 198, 16 A 772; Palmer's App., 96 Pa. 106.

34. Skinner v. Walter A. Wood Mowing Mach. Co., 14 NYSt 317 [aff 120 N. Y. 652 mem, 24 NE 1102 mem

ment of a specified royalty imposes no liability for royalty except as the patent is made use of under the option.[35]

[§ 465] **(8) Termination of License.** When a license has been properly terminated,[36] the licensee is no longer liable for royalties,[37] although he must pay those royalties which accrued before the license was terminated;[38] and a licensee who continues to operate under a license pending an appeal from a judgment canceling the contract is liable for royalties accruing during the pendency of the appeal.[39] When the licensee has renounced his license, the licensor may sue him for breach of contract or infringement,[40] and, if the license is terminable only by mutual consent,[41] the licensor may sue, after receiving notice of renunciation, for royalties for the continued use of his invention.[42]

[§ 466] **(9) Estoppel To Assert Defense.** One who has continued to act in the manner authorized by a license which he has entered into cannot, without notice to the licensor that he has repudiated or terminated the license, assert in defense of a claim for royalties that he was not acting thereunder;[43] nor can he assert that the patent was valueless because lacking in novelty.[44]

[§ 467] **k. Lien for Royalties.** An agreement to pay royalties is a personal contract, and creates no lien on the manufactured articles.[45]

[§ 468] **8. Enforcement of Licenses—a. In General.** The rights and liabilities of the parties arise from the license contract and are to be determined from its terms and conditions.[46]

Violation by licensor or patentee. Where the licensee has exclusive right within certain territory the patentee cannot invade that right and the licensee may maintain suit against him for infringement,[47] or breach of contract;[48] and the failure of the licensor to protect his licensee from infringers after covenanting to do so will entitle the licensee to cancellation of the contract,[49] or damages for the breach,[50] which may be recovered by separate suit or by counterclaim in an action for royalties.[51]

Violation by licensee. Where a licensee violates his express covenants or repudiates the license, the licensor may sue either for breach of the agreement,[52] for infringement,[53] for specific perform-

(writ of error dism 139 U. S. 293, 11 SCt 528, 35 L. ed. 193)].

35. Foley v. U. S., 56 Ct. Cl. 303 [aff 260 U. S. 667, 43 SCt 240, 67 L. ed. 451] (option to use at specified royalty dependent on practicability of patented article); Federal Mfg. etc., Co. v. U. S., 42 Ct. Cl. 479.

36. See supra §§ 434-466.

37. Union Switch, etc., Co. v. Johnson, 72 Fed. 147, 18 CCA 490; Warth v. Loewenstein, 121 Ill. A. 71 [mod on other grounds 219 Ill. 222, 76 NE 379]; Perfection Socket Co. v. American Forging, etc., Co., 209 Mich. 497, 177 NW 194, 222 Mich. 396, 192 NW 583; Garver v. Bement, 69 Mich. 149, 37 NW 63; Denise v. Swett, 142 N. Y. 602, 37 NE 627; Brusie v. Peck, 135 N. Y. 622, 32 NE 76.

[a] **Notice of intention to terminate.**—(1) Letter of licensee of exclusive right to use patented automobile spring, with option of surrendering such right on ninety days' notice, stating that it renewed alleged original notice, held notice of surrender to become effective ninety days thereafter. Austin v. Barley Motor Car Co., 233 Mich. 587, 207 NW 905. (2) Licensee's letter, which could not reach licensor before beginning of new year, giving notice of intention to terminate license continuing from year to year, was held ineffective. Brown Method Co. v. Ginsberg, 153 Md. 414, 138 A 402.

38. Hamilton v. Park, etc., Co., 112 Mich. 138, 70 NW 436; Quereau v. Dayton Computing Scale Co., 148 App. Div. 860, 133 NYS 501 [aff 210 N. Y. 545 mem, 103 NE 1131 mem]; Cummings v. Standard Harrow Co., 55 Misc. 601, 105 NYS 646 [aff 124 App. Div. 915 mem, 108 NYS 1128 mem (aff 195 N. Y. 513 mem, 88 NE 1117 mem)]; K-W Ignition Co. v. Unit Coil Co., 93 Oh. St. 128, 112 NE 199. See Duer v. Chicago Coach, etc., Co., 194 Ill. A. 314.

39. Bennett v. Iron Clad Mfg. Co., 110 App. Div. 443, 96 NYS 968.

40. See infra § 468.

41. See supra § 434.

42. St. Paul Plow-Works v. Starling, 140 U. S. 184, 11 SCt 803, 35 L. ed. 404 [aff 29 Fed. 790, 32 Fed. 290]; Cohn v. National Rubber Co., 6 F. Cas. No. 2,968, 3 Bann. & A. 568.

43. Sproull v. Pratt, etc., Co., 97 Fed. 807 [aff 108 Fed. 963, 48 CCA 167]; Illinois Watch Case Co. v. Ecaubert, 177 Ill. 587, 52 NE 861; Hyatt v. Ingalls, 124 N. Y. 93, 26 NE 285; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 NYS 1016; Consolidated Oil Well Packer Co. v. Jarecki Mfg. Co., 157 Pa. 342, 27 A 543, 128 Pa. 421, 18 A 348.

[a] **Defective formation of corporation** given a license is no defense when the corporation has operated under the license. Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 44 N. Y. Super. 454 [aff 81 N. Y. 468].

44. Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118.

[a] **For example,** a licensee who has agreed to manufacture an article under a particular patent, and who has stamped such article with the date of the patent and advertised and sold it as made thereunder, is estopped from setting up that the article as made was not covered by the patent. Sproull v. Pratt, etc., Co., 97 Fed. 807 [aff 108 Fed. 963, 48 CCA 167].

45. Peo. v. Remington, 59 Hun 282, 12 NYS 824, 14 NYS 98 [aff 126 N. Y. 654 mem, 27 NE 853 mem].

46. See supra §§ 416-425.

47. Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 22 SCt 681, 46 L. ed. 910; Waterman v. McKenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Mitchell v. Kemp, etc., Mfg. Co., 218 Fed. 843, 134 CCA 615; National Heeling-Mach. Co. v. Abbott, 77 Fed. 462; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Whitson v. Columbia Phonograph Co., 18 App. (D. C.) 565; Oscar Barnett Fdy. Co. v. Crowe, 80 N. J. Eq. 112, 258, 86 A 915; New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363.

[a] **Violation complete.**—Where the court in a suit by a licensee of patentable inventions, to restrain the licensor from violating the license, will not issue an injunction because the violation is complete, it will retain jurisdiction and permit complainant to file an amended bill for an accounting for the profits made by the licensor. Oscar Barnett Fdy. Co. v. Crowe, 80 N. J. Eq. 112, 258, 86 A 915.

48. Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 124 NW 291, 18 AnnCas 976.

49. Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 Fed. 753.

50. Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766; Alexander v. American Encaustic Tiling Co., 61 Misc. 190, 113 NYS 261; Alexander v. Mosaic Tile Co., 113 NYS 265.

[a] **Anticipatory breach.**—Where the owner of letters patent disabled himself from performing a concurrent and dependent promise of protection against infringers and infringements, the other party had the option to treat the contract as ended, so far as further performance was concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach, or to wait until there was to be a final performance. Rosenthal Paper Co. v. National Folding Box, etc., Co., 226 N. Y. 313, 123 NE 766.

[b] **Liability and defenses.**—Under a provision that the seller would, on notice, at its own expense, defend any suits that might be brought for alleged infringement, it is not a defense to an action by the purchaser to recover the expense incurred in defending against an infringement suit, which the seller failed to defend on notice and request, that the machines sold were adapted to other uses which did not infringe the patent sued on, where that was the use for which they were made, equipped, and sold or that the suit was based on the product of the machines and not on the machines themselves, or that the suit was dismissed on objections to jurisdiction and not on the merits, especially where a motion for preliminary injunction was also heard. Macneale v. Lalance, etc., Mfg. Co., 276 Fed. 491.

51. Watson Fireproof Window Co. v. Henry Weiss Cornice Co., 181 Mo. A. 318, 168 SW 905.

52. Henry v. A. B. Dick Co., 224 U. S. 1, 32 SCt 364, 56 L. ed. 645, AnnCas 1913D 880; Pressed Steel Car Corp. v. Union Pac. R. Co., 297 Fed. 788; Starling v. St. Paul Plow-Works, 32 Fed. 290; Magic Ruffle Co. v. Elm City Co., 16 F. Cas. No. 8,949, 2 Bann. & A. 152, 13 Blatchf. 151; Woodworth v. Weed, 30 F. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. R. 108; Booth v. Cleveland Rolling Mill Co., 74 N. Y. 15.

[a] **Licensee's failure to use diligence in introducing and selling** the patented article as required by the license gives a right of action for the breach of the covenant, such requirement not being a mere condition to the enjoyment by the licensee of his rights under the license. Booth v. Cleveland Rolling Mill Co., 74 N. Y. 15.

53. Henry v. A. B. Dick Co., 224 U. S. 1, 32 SCt 364, 56 L. ed. 645, AnnCas 1913D 880; Eskimo Pie Corp. v. Artic Fruit Ices, 15 F. (2d) 853; Schrade v. Camillus Cutlery Co., 242 Fed. 523; Indiana Mfg. Co. v. Nichols, etc., Co., 190 Fed. 579; St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co., 178 Fed. 923, 103 CCA 565 [certiorari den 219 U. S. 588, 31 SCt 471, 55 L. ed. 348]; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co., 154 Fed. 365, 83 CCA 343 [certiorari den 207 U. S. 603, 28 SCt 261, 52 L. ed. 359]; Starling v. St. Paul Plow-Works, 32 Fed. 290; Cohn v. National

ance,[54] or for forfeiture of the license.[55]

Waiver or excuse of breach. A breach of a covenant or condition in a license may be waived[56] or excused;[57] but the waiver of a past breach does not preclude the party from insisting upon future compliance with the license,[58] provided protection be given against damage resulting from reliance upon the waiver.[59]

[§ 469] **b. Enjoining Use of Invention—(1) By Licensee.** A provisional injunction will be granted against a licensee to restrain his use of a patented article in violation of restrictions contained in the license,[60] or its use after expiration of the license,[61] and the licensee may be enjoined from using the patent without paying the license fee;[62] but no injunction will be granted where there is no actual or threatened violation,[63] or were the licensor was guilty of fraud,[64] or where it appears that the licensee violated the restrictions under a misapprehension of his rights, and had discontinued the violation.[65] An assignee cannot enjoin a licensee given a valid license prior to the assignment.[66] The exercise of a license to build a certain number of patented machines will not be restrained until such number of machines has been completed.[67]

[§ 470] **(2) By Licensor.** A licensee having an exclusive license may enjoin interference with his rights by the licensor,[68] and, the licensor having been enjoined, a violation of the injunction will render him guilty of contempt.[69] No injunction will be granted where he has an adequate legal remedy,[70] or where the licensor has done nothing against his exclusive rights.[71] It has been held that an exclusive licensee cannot enjoin the use of the invention by some third person.[72] A bill by a licensee to enjoin the licensor from manufacturing the goods contrary to his agreement cannot be maintained where it appears that the licensee himself has ceased to manufacture any goods under the license.[73]

[§ 471] **c. Recovery of Royalties.**[74] Royalties are ordinarily collected by an action at law,[75] and equity will not grant relief where the licensor's rem-

Rubber Co., 6 F. Cas. No. 2,968, 6 Bann. & A. 568; England v. Thompson, 8 F. Cas. No. 4,487, 3 Cliff. 271; Magic Ruffle Co. v. Elm City Co., 16 F. Cas. No. 8,949, 2 Bann. & A. 152, 13 Blatchf. 151.

[a] **Thus,** for licensee to manufacture patented article and sell it in other wrappers than those bought from patentee, in violation of license contract, constitutes infringement. Eskimo Pie Corp. v. Artic Fruit Ices, 15 F. (2d) 853.

54. Indiana Mfg. Co. v. Nichols, etc., Co., 190 Fed. 579; Miner v. Husted, 191 Mich. 25, 157 NW 442.

55. Henry v. A. B. Dick Co., 224 U. S. 1, 32 SCt 364, 56 L. ed. 645, Ann Cas1913D 880; Cohn v. National Rubber Co., 6 F. Cas. No. 2,968, 3 Bann. & A. 568; Woodworth v. Weed, 30 F. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. R. 108.

56. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628; Bird's-Eye Veneer Co. v. Franck-Philipson, 259 Fed. 266, 170 CCA 334; Mitchell v. Kemp, etc., Mfg. Co., 218 Fed. 843, 134 CCA 615; Crary v. Jones, etc., Co., 138 Ill. A. 225 [aff 234 Ill. 26, 84 NE 651].

[a] **Sworn statements.**—A provision in a contract providing for the payment of royalties, which requires the submission of sworn statements, is waived by the long-continued acceptance of unsworn statements without objection. Crary v. Jones, etc., Co., 138 Ill. A. 225 [aff 234 Ill. 26, 84 NE 651].

[b] **Renewal of license with notice of breach.**—A licensee who takes a renewal of an exclusive license with notice that the licensor had invaded his rights under the first agreement waived his right to sue. Mitchell v. Kemp, etc., Mfg. Co., 218 Fed. 843, 134 CCA 615.

57. Schweyer Electric, etc., Co. v. Regan Safety Devices Co., 4 F. (2d) 970 [certiorari den 268 U. S. 690 mem, 45 SCt 510 mem, 69 L. ed. 1159 mem].

[a] **Rule applied.**—(1) Where patentee had repudiated optional contract with licensees, had insisted on reclaiming license, and was threatening licensees' possible customers with suits for infringement, he will not be heard to object that licensees did not use due diligence to exploit inventions. Schweyer Electric, etc., Co. v. Regan Safety Devices Co., 4 F. (2d) 970 [certiorari den 268 U. S. 690 mem, 45 SCt 510 mem, 69 L. ed. 1159 mem]. (2) Whether licensees used due diligence in exploiting inventions, as required by supplemental option agreement with patentee, is question of fact, as to which requirement of optional agreement for arbitration was binding, and for determination of which parties must proceed as therein required. Schweyer Electric, etc., Co. v. Regan Safety Devices Co., supra.

58. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., 23 F. (2d) 628.

59. Westinghouse Electric, etc., Co. v. Tri-City Radio Electric Supply Co., supra.

60. Thomson Spot Welder Co. v. National Electric Welder Co., 260 Fed. 223; American Graphophone Co. v. Pickard, 201 Fed. 546; Edison v. Ira M. Smith Mercantile Co., 188 Fed. 925; Crowell v. Parmenter, 6 F. Cas. No. 3,446, 3 Bann. & A. 480; Wilson v. Sherman, 30 F. Cas. No. 17,833, 1 Blatchf. 536, Fish. Pat. R. 361; Tipograph Patented Sweat Band Corp. v. Rappaport, 220 App. Div. 122, 220 NYS 620; Schalkenbach v. National Ventilating Co., 129 App. Div. 389, 113 NYS 352.

[a] **To justify a temporary injunction** (1) in a suit on a patent or license agreement, the case should be clear and free from reasonable doubts. Flintkote Co. v. Philip Carey Co., 13 F. (2d) 850. (2) Where there was nothing to rebut the presumption of validity of a patent, and there was a certain public acquiescence, it was no objection to the issuance of a temporary injunction to restrain defendant's sale of the patented article in violation of price restrictions that the patent had never been adjudicated. Thomas A. Edison, Inc. v. Ira M. Smith Mercantile Co., 188 Fed. 925.

61. J. F. Rowley Co. v. Rowley, 18 F. (2d) 704.

[a] **Thus** (1) a licensee of a patent for artificial legs should be enjoined after the expiration of the term of the license from having metal parts manufactured which, when assembled, constituted back checks patented by the licensor and from incorporating them in new artificial legs (J. F. Rowley Co. v. Rowley, 18 F. (2d) 704) (2) and from inducing customers to whom he had sold a leg to trade it in and using its parts in new artificial legs (J. F. Rowley Co. v. Rowley, supra).

62. Day v. Hartshorn, 7 F. Cas. No. 3,683, 3 Fish. Pat. Cas. 32.

Royalties or license fees see supra §§ 447-467.

63. Brunner v. Kaempfer, 2 App. Div. 177, 37 NYS 700.

64. Washburn, etc., Mfg. Co. v. Cincinnati Barbed-Wire Fence Co., 22 Fed. 712.

65. Wilson v. Sherman, 30 F. Cas. No. 17,833, 1 Blatchf. 536, Fish. Pat. R. 361.

66. Young Reversible Lock-Nut Co. v. Young Lock-Nut Co., 66 Fed. 563.

67. Aspinwall Mfg. Co. v. Gill, 32 Fed. 702.

68. Barnett v. Q. & C. Co., 226 Fed. 935, 141 CCA 539; New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534; Goddard v. Wilde, 17 Fed. 845; Singer Sewing-Mach. Co. v. Union Button-Hole, etc., Co., 22 F. Cas. No. 12,904, 6 Fish. Pat. Cas. 480, Holmes 253; Oscar Barnett Fdy. Co. v. Crowe, 80 N. J. Eq. 112, 258, 86 A 915.

69. New York Phonograph Co. v. National Phonograph Co., 163 Fed. 534.

70. Florence Sewing-Mach. Co. v. Singer Mfg. Co., 9 F. Cas. No. 4,884, 8 Blatchf. 113, 4 Fish. Pat. Cas. 329.

71. Robinson v. Robinson, (Que.) [1923] 2 DomLR 64.

72. Johnson v. Seaman, 108 Fed. 951, 48 CCA 158 [rev 106 Fed. 915].

73. Adams, etc., Mfg. Co. v. Westlake, 53 Fed. 588.

74. Right to royalties in general see supra §§ 447-467.

75. U. S.—Morris v. Texas Working Barrel Mfg. Co., 13 F. (2d) 977; Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172 [rev on other grounds 10 F. (2d) 148]; Guggenheim v. Kirchhofer, 66 Fed. 755, 14 CCA 72; Washburn, etc., Mfg. Co. v. Cincinnati Barbed-Wire Fence Co., 42 Fed. 675; Washburn, etc., Mfg. Co. v. Freeman Wire Co., 41 Fed. 410 [app dism 159 U. S. 269 mem, 15 SCt 1043 mem, 40 L. ed. 141 mem]; Russell v. U. S., 35 Ct. Cl. 154.

Ill.—Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291; Preston v. Smith, 156 Ill. 359, 40 NE 949; American Merchants' Mfg. Co. v. Kantrowitz, 77 Ill. A. 155.

La.—American Mach., etc., Co. v. Stewart, 115 La. 188, 38 S 960.

Md.—Meyer v. Saul, 82 Md. 459, 33 A 539.

Mo.—Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

N. J.—Stewart Mfg. Co. v. Iron Clad Mfg. Co., 67 N. J. L. 577, 52 A 391; Scheurle v. Husbands, 65 N. J. L. 40, 46 A 759 [aff 65 N. J. L. 681, 48 A 1118].

N. Y.—Hyatt v. Ingalls, 124 N. Y. 93, 26 NE 285; Henderson v. Dougherty, 95 App. Div. 346, 88 NYS 665.

Eng.—Moxon v. Bright, L. R. 4 Ch. 292; Kernot v. Potter, 3 De G. F. & J. 447, 64 EngCh 350, 45 Reprint 951.

"Where it is solely a question of unpaid compensation, courts of law have exclusive jurisdiction, and can give an adequate remedy." Hazeltine Research Corp. v. Freed-Eisemann Radio Corp., 3 F. (2d) 172, 178 [rev on other grounds 10 F. (2d) 148].

edy at law is adequate.[76] Where the remedy at law is inadequate, however, the licensor may maintain a bill in equity for an accounting,[77] unless he has been guilty of misconduct;[78] and an action for an accounting may be joined with a demand for equitable relief by forfeiture of the license,[79] or a demand for injunction to prevent further use in violation of the agreement,[80] and, having obtained jurisdiction, equity will give complete and adequate relief.[81] A licensee cannot enjoin the licensor from bringing action for the recovery of royalties when he can adequately present his defense in an action at law.[82]

Laches. The licensor may lose his right to recover royalties by delay in bringing suit,[83] but mere delay is not enough to constitute laches.[84]

Jurisdiction. State courts have jurisdiction of an action to recover royalties under an agreement where there is no question as to the validity of the patent;[85] but when the validity is in dispute the federal courts alone have jurisdiction.[86]

[§ 472] **d. Recovery of Royalties Erroneously Paid.** A licensee who has terminated his agreement because of misrepresentations by which he was induced to accept the license[87] may recover back the royalties he has paid;[88] but no recovery can be had when the parties had equal opportunities of ascertaining the true situation,[89] or where the alleged false representations are not shown to have been relied or acted upon.[90]

[§ 473] **e. Parties.** The general rules relating to parties in civil actions[91] apply to actions growing out of licenses or contracts relating to, or dealing with, patents and patent rights.[92] One of several coöwners may sue alone to recover royalties and profits due for the use of the patent,[93] and a partner of the licensor may sue in equity when he was not a party to the contract.[94] A licensor who has parted with his right to royalties, but retained the right to collect them, is the proper party to sue for the royalties due.[95] All parties whose rights will be affected must be joined;[96] but persons having no interest in the outcome of the litigation are properly omitted;[97] and so, when some of several licensees have been released by a surrender of the license they need not be made parties to a suit on the license against the remaining licensees.[98] Failure to join proper parties must be objected to in

76. Loose v. Bellows Falls Pulp Plaster Co., 266 Fed. 81; Hiner v. C. G. Aldrich Co., 255 Fed. 785; Heckscher v. Pennsylvania Steel Co., 205 Fed. 377; Allen v. Consolidated Fruit Jar Co., 145 Fed. 948; Washburn, etc., Mfg. Co. v. Cincinnati Barbed-Wire Fence Co., 42 Fed. 675; Washburn, etc., Mfg. Co. v. Freeman Wire Co., 41 Fed. 410 [app dism 159 U. S. 269 mem, 15 SCt 1043 mem, 40 L. ed. 141 mem]; Consolidated Middlings Purifier Co. v. Wolf, 28 Fed. 814; Crandall v. Plano Mfg. Co., 24 Fed. 738; Perkins v. Hendryx, 23 Fed. 418; Baker Mfg. Co. v. Washburn, etc., Mfg. Co., 18 Fed. 172, 5 McCrary 504; Forster v. Brown Hoisting Mach. Co., 266 Ill. 287, 107 NE 588, AnnCas1916B 795; Electric Regulator Mfg. Corp. v. American Mechanical Laboratories, Inc., 225 App. Div. 37, 232 NYS 220; Henderson v. Dougherty, 95 App. Div. 346, 88 NYS 665; Storr v. Central Bedding Co., 55 Misc. 398, 106 NYS 546.

[a] **Rule applied.**—An action for an accounting and for specific performance cannot be maintained by one to whom royalties are due for the manufacture and sale of a patented device, merely because plaintiff does not know the amount thereof and defendant has failed to render statements as agreed; and a complaint alleging plaintiff's ignorance of the amount due and demanding judgment for no definite sum is demurrable. Storr v. Central Bedding Co., 55 Misc. 398, 106 NYS 546.

77. Magic Ruffle Co. v. Elm City Co., 16 F. Cas. No. 8,949, 2 Bann. & A. 152, 13 Blatchf. 151; Eclipse Bicycle Co. v. Farrow, 16 App. (D. C.) 468. See also Rickly v. Parlin, etc., Co., 206 Ill. A. 599.

[a] **Rule applied.**—(1) Where complainant, who was entitled to a royalty for the use of a patent under a contract, had never owned the patent, and chose to affirm a transfer thereof from an assignee to defendant company, and to hold both for the royalty on the theory that defendants took the patent with actual notice of complainant's interest and the nature thereof, complainant was entitled to sue defendants in equity for an accounting. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291. (2) Plaintiff, suing for an accounting for royalties after defendants' breach of his employment contract, was held entitled to an accounting as of the date of the judgment to be rendered in a superior court. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302. (3) In a suit for an accounting for royalties where invalidity of patent and notice of termination of license contract is pleaded, the fact that the licensee continues to use patent marks and dates of patentee presents strong evidence of operation under license, and the patentee has remedy in equity. K-W Ignition Co. v. Unit Coil Co., 93 Oh. St. 128, 112 NE 199.

[b] **In Pennsylvania** (1) a bill in equity is the proper remedy to recover royalties. Adams' App., 113 Pa. 449, 6 A 100. (2) A person to whom letters patent were granted may invoke equity jurisdiction to procure an accounting for royalties, under the terms of an assignment of the patents, on the sale of articles, manufactured by the assignee, four different patents being involved, each containing several claims. Holden v. Bernstein Mfg. Co., 232 Pa. 366, 81 A 428.

78. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730.

79. American St. Car Adv. Co. v. Jones, 122 Fed. 803 [rev on other grounds 142 Fed. 974, 74 CCA 236]; Woodworth v. Weed, 30 F. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. R. 108; Russell Hardware, etc., Mfg. Co. v. Utica Drop Forge, etc., Co., 195 N. Y. 54, 87 NE 788; Hyatt v. Ingalls, 124 N. Y. 93, 26 NE 285 [aff 55 N. Y. Super. 507, 2 NYS 727]; Ashworth v. Roberts, 45 Ch. D. 623; Haddan v. Smith, 16 Sim. 42, 39 EngCh 42, 60 Reprint 788.

Forfeiture of license for violation see supra § 438.

80. Ball Glove Fastening Co. v. Ball, etc., Fastener Co., 36 Fed. 309 [rev on other grounds 58 Fed. 818, 7 CCA 498]; McKay v. Smith, 29 Fed. 295 [aff 164 U. S. 701 mem, 17 SCt 1001 mem, 41 L. ed. 1180 mem]; Brooks v. Stolley, 4 F. Cas. No. 1,962, 3 McLean 523, 2 Robb Pat. Cas. 281; Woodworth v. Weed, 30 F. Cas. No. 18,022, 1 Blatchf. 165, Fish. Pat. R. 108; K-W Ignition Co. v. Unit Coil Co., 93 Oh. St. 128, 112 NE 199.

Enjoining use of invention by licensee see supra § 469.

81. Russell Hardware, etc., Mfg. Co. v. Utica Drop Forge, etc., Co., 195 N. Y. 54, 87 NE 788.

Retention of equitable jurisdiction to afford complete relief in general see Equity §§ 117–129.

82. Baker Mfg. Co. v. Washburn, etc., Mfg. Co., 18 Fed. 172, 5 McCrary 504.

83. Keyes v. Eureka Cons. Min. Co., 158 U. S. 150, 15 SCt 772, 39 L. ed. 929; Lane, etc., Co. v. Locke, 150 U. S. 193, 14 SCt 78, 37 L. ed. 1043; Leggett v. Standard Oil Co., 149 U. S. 287, 13 SCt 902, 37 L. ed. 737; Ford v. Huff, 296 Fed. 652 [rev 289 Fed. 858, and certiorari den 266 U. S. 602 mem, 43 SCt 90 mem, 69 L. ed. 462 mem]; Pope Mfg. Co. v. Johnson, 40 Fed. 584; Forster v. Brown Hoisting Mach. Co., 266 Ill. 287, 107 NE 588, AnnCas1916B 795.

84. Massie v. Asbestos Brake Co., 95 N. J. Eq. 298, 123 A 155 [rev on other grounds 95 N. J. Eq. 320, 126 A 669].

85. See Courts §§ 633, 634.

86. See Federal Courts § 34.

87. See supra § 436.

88. Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779.

[a] **Thus** payment of royalties from February, when invalidity of plaintiff's application for patent was learned by defendant, to August, did not preclude defendant, under the facts, from repudiating the contract and recovering payments made. Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779.

89. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302.

Recovery of payment generally see Payment §§ 280–341.

90. Bonsack Mach. Co. v. Hess, 68 Fed. 119, 15 CCA 303.

91. See Parties 47 C. J. p 1.

92. See infra text and notes 93–99.

93. Sheehan v. Great Eastern R. Co., 16 Ch. D. 59.

94. Rogers v. Riessner, 30 Fed. 525.

95. Bell, etc., Co. v. Spoor, 225 Ill. A. 256.

96. Florence Sewing-Mach. Co. v. Singer Mfg. Co., 9 F. Cas. No. 4,884, 8 Blatchf. 113, 4 Fish. Pat. Cas. 329.

[a] **Rule applied.**—A patentee claiming a reversionary right in a patent was properly made the new defendant in an action for royalties by a purchaser at a receiver's sale of the transferee of the patent against the licensee, under Civ. Pract. Act § 287. Eastern Optical Co. v. General Optical Co., 219 App. Div. 294, 219 NYS 692.

[b] **Bill against fraudulent sale brought by one partner.**—One partner cannot maintain a bill in equity against a fraudulent sale of a patent, issued to the partnership, without joining the other partner as a party, even though the latter was concerned in such fraudulent sale. Ambler v. Chouteau, 1 F. Cas. No. 272 [aff 107 U. S. 586, 1 SCt 556, 27 L. ed. 322].

97. See Rogers v. Riessner, 30 Fed. 525.

98. Theberath v. Celluloid Mfg. Co., 3 Fed. 143.

time.[99]

[§ 474] **f. Pleading—(1) Declaration, Petition, Complaint, or Bill.** The rules relating to pleadings in civil actions generally,[1] and particularly in actions on contracts,[2] ordinarily apply in an action on a license or contract relating to a patent or patent rights.[3] The declaration, petition, or complaint must state a sufficient cause of action,[4] or, if equitable relief is sought, the bill must state an equity;[5] and it must show what relief is desired.[6] Under the rules of pleading relating to surplusage,[7] unnecessary averments may be stricken out of the pleadings;[8] but, if not stricken, those which relieve the other party from setting up the same matter affirmatively must be proved by the pleader.[9] In accordance with the general rules relating to the amendment of pleadings,[10] a declaration may be amended to state the injury more particularly,[11] or even to show the first time a new cause of action.[12]

[§ 475] **(2) Plea or Answer.** The rules relating to pleas or answers in civil actions generally[13] govern pleas or answers in actions involving rights under patent licenses or contracts.[14]

[§ 476] **(3) Variance.** The rules relating to variance between pleadings and proof in civil actions generally[15] apply in actions on licenses or contracts dealing with patents and patent rights.[16] Thus, in an action to recover royalties accruing down to the time of the commencement of the action, evidence of royalties earned between the commencement of the action and trial thereof is not within the issues.[17] Where a declaration in substance alleges modification of a written contract, evidence of a supplemental oral agreement cannot be excluded as not pleaded;[18] and proof of such an agreement, even though not mentioned in the pleadings, is not a fatal variance when the other party to the action is not injured or misled.[19] Evidence of the situation of the parties at the time of making the license agreement may be admitted, although not pleaded, in the discretion of the court.[20]

[§ 477] **g. Evidence—(1) Burden of Proof and Presumptions.** The usual rules as to the burden of proof[21] and presumptions[22] in civil actions generally are applicable in actions on licenses or contracts dealing with patents or patent rights.[23] Thus, in an action for royalties, the burden is upon the patentee to show that the articles on which he claims royalties were covered by the patent,[24] while the licensee has the burden of proving lack of title in the licensor,[25] uselessness of the patented article,[26] or fraud;[27] and in an action for infringement, the burden is on plaintiff to show that a license produced by defendant was delivered in escrow upon a condition which had not been performed.[28]

[§ 478] **(2) Admissibility.** The general rules as to the admissibility of evidence in civil actions[29] apply in actions on licenses or contracts dealing with patents and patent rights.[30]

[§ 479] **(3) Weight and Sufficiency.** The rules

99. Florence Sewing-Mach. Co. v. Singer Mfg. Co., 9 F. Cas. No. 4,884, 8 Blatchf. 113, 4 Fish. Pat. Cas. 329.

1. See Equity § 374 et seq; Pleading [31 Cyc 92 et seq].

2. See Contracts §§ 826–925.

3. See cases infra notes 4–12.

4. See cases infra this note.

[a] **Sufficient cause of action stated.**—(1) Refusal to pay royalties after operating under license. Anderson v. Eastern Coupling Co., 108 Me. 374, 81 A 167. (2) Declaration stating right of plaintiffs to grant exclusive license not demurrable for misrepresentations. Gray Engine Starter Co. v. Gray, 224 Fed. 723 (plaintiffs owning only fractional interest but having proper authority). (3) Allegation that plaintiff has complied with all the terms and provisions of license agreement. Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co., 144 App. Div. 225, 129 NYS 117.

[b] **Complaint insufficient.**—Under compromise agreement to give licensee a license as favorable as any given to others, a complaint failing to set out the terms of the most favorable license is demurrable. Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co., 144 App. Div. 225, 129 NYS 117.

5. See cases infra this note.

[a] **Bill sufficient to show cause of action.**—(1) Fraud. Murjahn v. Hall, 119 Fed. 186; Maull v. Campbell, 69 Fla. 541, 68 S 760. (2) Violation of exclusive licensee's rights. New York Phonograph Co. v. National Phonograph Co., 112 Fed. 822; New England Phonograph Co. v. Edison, 110 Fed. 26; Maull v. Campbell, supra.

[b] **Bill insufficient.**—(1) Vague and contradictory bill. Torrent v. Rodgers, 39 Mich. 85. (2) Bill failing to aver damage to complainant. Adams, etc., Mfg. Co. v. Westlake, 53 Fed. 588.

6. Ambler v. Chouteau, 1 F. Cas. No. 272 [aff 107 U. S. 586, 1 SCt 556, 27 L. ed. 322].

7. See Pleading [31 Cyc 68].

8. Ralya v. Atkins, 157 Ind. 331, 61 NE 726 (allegations referring to subsequent patent).

9. Conte v. Allen Candy Co., 230 Ill. A. 471.

10. See Pleading [31 Cyc 359 et seq].

11. Peck v. Bacon, 18 Conn. 377.

12. Hunt v. Hoover, 24 Iowa 231.

13. See Pleading [31 Cyc 126 et seq].

14. See cases infra this note.

[a] **Sufficiency of answer.**—(1) In a suit for royalties, denial of allegations in the complaint as to the amount of licensed products sold sufficiently puts in issue defendant's liability. Darrasse v. Ferment Co., 182 App. Div. 591, 169 NYS 963. (2) An answer alleging false representations as to the novelty, patentability, and satisfactoriness of an invention, and that it was in great demand, and that a designated person known to defendant was then organizing a corporation to purchase manufacturing rights, sufficiently sets up fraud and is good as an answer in an action to recover on a note given for a right in the patent. Prescott v. Brown, 30 Okl. 428, 120 P 991.

[b] **Insufficient allegations:** (1) Allegation of fraud not stating in what fraud consisted. Smith v. Standard Laundry Mach. Co., 11 Daly (N. Y.) 154. (2) Allegation of repudiation of license agreement. Heller v. Lassner Co., 214 App. Div. 315, 212 NYS 175. (3) Allegation of illegal combination held hearsay. American Refining Co. v. Gasoline Products Co., (Tex. Civ. A.) 294 SW 967.

[c] **Admissions.**—An answer alleging a return of part of several patented machines delivered to defendant is a clear concession that the others had not been returned. Wilcox, etc., Sewing Mach. Co. v. Himes, 21 NYS 760.

15. See Pleading [31 Cyc 700 et seq].

16. See cases infra notes 17–20.

17. Electrical Accessaries Co. v. Mittenthal, 146 App. Div. 647, 131 NYS 433.

18. Gilman v. Turner Tanning Mach. Co., 232 Mass. 573, 122 NE 747.

19. Marsh v. Dodge, 5 Lans. (N. Y.) 541.

20. Comptograph Co. v. Burroughs Adding Mach. Co., 179 Iowa 83, 159 NW 465.

21. See Evidence §§ 13–24.

22. See Evidence §§ 25–88.

23. See cases infra notes 24–28.

24. Hyatt v. Ingalls, 124 N. Y. 93, 26 NE 285; Bennett v. Iron Clad Mfg. Co., 121 App. Div. 133, 105 NYS 593.

[a] **Illustration.**—Where plaintiff had patents on certain metal baskets, and gave defendant the exclusive right to manufacture this kind of basket on the payment of a certain royalty, no presumption arises that the baskets manufactured by defendant were within the terms of the contract; but in an action for the royalties the burden is on plaintiff to show that the metal baskets which defendant manufactured were within the scope of his patents, and hence covered by the royalty contract. Bennett v. Iron Clad Mfg. Co., 121 App. Div. 133, 105 NYS 593.

25. Buss v. Putney, 38 N. H. 44; Stevens v. Head, 9 Vt. 174, 31 AmD 617.

26. Waymire v. Shipley, 52 Or. 464, 97 P 807.

[a] **Illustration.**—In an action to foreclose a mortgage to secure the purchase price of certain patent rights, the defense being misrepresentations as to the value of the patented article, the issuance of the patent and ownership and possession thereof by the seller were prima facie evidence of its utility, and the burden was upon the mortgagor to show its uselessness by clear and strong evidence. Waymire v. Shipley, 52 Or. 464, 97 P 807.

27. Goodyear v. Day, 10 F. Cas. No. 5,567.

28. Mellon v. Delaware, etc., R. Co., 154 U. S. 673, 14 SCt 1194, 26 L. ed. 929.

29. See Evidence §§ 89–1729.

30. See cases infra this note.

[a] **Evidence held admissible.**—(1) Conversation modifying original agreement. Gilman v. Turner Tanning Mach. Co., 232 Mass. 573, 122 NE 747. (2) Expert evidence as to anything new and useful in improvement on patented article. Haley v. Flaccus, 193 Pa. 521, 44 A 566. (3) Letters patent are material when introduced by defendant to show that articles made by him were not within

relative to the weight and sufficiency of evidence in civil actions generally[31] have been applied in actions growing out of licenses and contracts dealing with patents and patent rights.[32]

[§ 480] **h. Trial.** The rules governing the course and conduct of civil actions generally[33] apply in actions involving licenses and contracts dealing with patents and patent rights.[34]

Questions for jury. Controverted questions of fact are to be determined by the jury.[35]

Instructions. The general rules relating to instructions in civil actions[36] apply in actions on licenses or contracts in regard to patents and patent rights.[37] In an action against a licensee for infringement, an instruction is erroneous which omits the doctrine of defendant's estoppel to assert that the articles manufactured by him were not in accordance with the patent.[38] Instructions relating to questions of fact to be determined by the jury are properly refused.[39]

[§ 481] **i. Judgment or Decree.** The rules which relate to and govern judgments[40] and decrees[41] in civil actions generally apply to judgments and decrees in actions arising out of licenses or other contracts dealing with patents and patent rights.[42]

[§ 482] **j. Damages.** The general rules as to damages in civil actions[43] apply in actions growing out of licenses and contracts relating to patents and patent rights.[44] A licensor suing for royalties is not entitled to recover as damages the costs of litigation to establish the validity of his patent.[45] The measure of damages for breach of an agreement

the scope of the patent. Brusie v. Peck, 135 N. Y. 622, 32 NE 76.

[b] **Evidence held properly excluded.**—(1) Evidence of the "state of the art" to impeach the validity of a patent and thereby avoid payment of royalty. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730. (2) Evidence of a prior similar patent, to show fraud. Potterton v. Condit, 218 Mass. 216, 105 NE 443. (3) Evidence that the patented article was the invention of plaintiff's copatentee. Hubbard v. Allen, 123 Pa. 198, 16 A 772. (4) Evidence of another patent not embodied in the contract. Ralya v. Atkins, 157 Ind. 331, 61 NE 726. (5) Letters written before the execution of a written contract, being immaterial or merged in the contract, and letters written after the execution of the contract which show no breach and did not tend to establish any obligation of the pleadings. Lyndon v. Wagner Electric Mfg. Co., 285 Mo. 77, 225 SW 711. (6) Evidence of an attempted termination of the license contract by the licensee. Lyndon v. Wagner Electric Mfg. Co., 285 Mo. 77, 225 SW 711. (7) Evidence as to sale of an entire patented combination when royalties were claimed only for the sale of a part. Alexander v. American Encaustic Tiling Co., 207 N. Y. 276, 100 NE 809. (8) Evidence that no written notice of the lack of success of a patented formula was given to the licensor, where notice had been waived by him. Graves v. Mound City Paint, etc., Co., (Mo.) 204 SW 57.

31. See Evidence §§ 1730–1806.

32. See Anderson v. Benson, 187 Ill. A. 576; and cases infra this note.

[a] **Evidence held sufficient:** (1) To establish breach of contract. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302. See Matter of Hesser, 205 Ill. A. 496. (2) To show that performance of contract was waived. Agnew v. Kelsey Wheel Co., 185 Mich. 340, 151 NW 1038. (3) To show that the article manufactured and sold by defendant was the thing the parties had in mind and intended to describe in the contract. American Mechanical Impr. Co. v. Des Lauriers Aircraft Corp., 94 N. J. Eq. 197, 119 A 179. (4) To show sale of goods, entitling licensor to royalties thereon. Reizenstein v. Koopman, 178 Fed. 546, 101 CCA 462 [aff 176 Fed. 922]; Marsh v. Dodge, 5 Lans. (N. Y.) 541 (manufacture and shipment is prima facie evidence of sale under a license to make and sell). (5) To show that licensor was to receive salary and royalties. Welch v. International High Speed Steel Co., 91 N. J. Eq. 518, 111 A 154. (6) To show that patented article was worthless. Rushing v. Spreen, (Tex. Civ. A.) 142 SW 49. (7) To show patenting of improvement. Bowman v. Reed, 2 Wall. (U. S.) 591, 17 L. ed. 812. (8) To show that memorandum was not intended to operate as a license. Kerr v. Southwick, 109 Fed. 482 [rev on other grounds 120 Fed. 772, 57 CCA 136]. (9) To show that joint owner sold license and received money therefor. Hansen v. Hough, 177 Iowa 93, 158 NW 501. (10) To show that agreement had not been terminated so as to release defendant from liability for royalties. Strong v. Carver Cotton Gin Co., 202 Mass. 209, 88 NE 582. (11) To show agreement to repurchase and election to act thereunder. Mosley v. Seely, 47 Cal. A. 608, 191 P 36. (12) To show that plaintiff was entitled to possession of workshop equipment under contract. Paine v. Keszthelyi, 83 Cal. A. 449, 256 P 864. (13) To show that the sale of the right to sell the patented article in a certain state was fraudulent. Rushing v. Spreen, (Tex. Civ. A.) 142 SW 49. (14) To show that the appealing defendant was connected with the fraudulent conduct of the others so as to make him responsible therefor. Rushing v. Spreen, (Tex. Civ. A.) 142 SW 49. (15) To support a finding as to the amount of unpaid royalties. Rogers v. Riessner, 34 Fed. 270. (16) To support a finding as to damages for breach of contract. Sermuks v. Automatic Aluminum Heel Co., 256 Mass. 478, 153 NE 8.

[b] **Evidence held insufficient:** (1) To show failure to perform contract. Caddo Rock Drill Bit Co. v. Reed, 149 La. 1016, 90 S 388. See Anderson v. Benson, 187 Ill. A. 576. (2) To show breach of contract to protect against infringement. American Toy Mfg. Co. v. McLoughlin, 221 Mass. 567, 109 NE 836; Channell, Ltd. v. O'Cedar Corp., [1928] Can. S. C. 542, [1928] 3 DomLR 843 [dism app 60 Ont. L. 525, [1927] 3 DomLR 575]. (3) To show fraud by licensor. Caddo Rock Drill Bit Co. v. Reed, 149 La. 1016, 90 S 388; Consumers' Twine, etc., Co. v. Mt. Pleasant Thermo Tank Co., 196 Iowa 64, 194 NW 290. (4) To show bad faith in cancellation by the licensor. Computing Scale Co. v. Barnard Co., 259 Fed. 250, 170 CCA 318. (5) To show that the license was obtained by fraud. Rushing v. Spreen, (Tex. Civ. A.) 142 SW 49. (6) To show rescission by the licensee. American Mechanical Impr. Co. v. Des Lauriers Aircraft Corp., 94 N. J. Eq. 197, 119 A 179. (7) To show rescission by acquiescence or otherwise. Massie v. Asbestos Brake Co., 95 N. J. Eq. 298, 123 A 155 [rev on other grounds 95 N. J. Eq. 320, 126 A 669]. (8) To show renewal of a terminated contract. Gode v. Russell, (Iowa) 194 NW 85. (9) To show that the license was conditional on establishing a monopoly. Massie v. Asbestos Brake Co., supra. (10) To show infringement, so as to bar recovery of royalties. Benjamin v. Davis, 76 Cal. 26, 243 P 706. See Tinsman v. Independent Harvester Co., 205 Ill. A. 239. (11) To show agreement giving right to compensation for use. Knapp v. U. S., 46 Ct. Cl. 601. (12) To show omission from contract of promise to install machine. Haag v. Damon Mfg. Co., 153 Ky. 840, 156 SW 884. (13) To show that plaintiff was entitled to royalties on all the metal baskets manufactured by defendant during a certain period of time whether made under patent or not. Bennett v. Iron Clad Mfg. Co., 121 App. Div. 133, 105 NYS 593. (14) To show agreement to pay for patent rights from any other source than as provided by written contract. Jones v. Boardman, 148 Md. 147, 128 A 752.

33. See Trial [38 Cyc 1238].

34. See cases infra notes 35–39.

35. See cases infra this note.

[a] **Particular matters.**—(1) Acceptance by defendant of the proposition submitted by plaintiff. Franklin R. Supply Co. v. Pittsburg R. Co., 54 Pa. Super. 217. (2) Failure of consideration. Meissner v. Standard R. Equipment Co., 211 Mo. 112, 109 SW 730. (3) Modification of original contract. Taylor Gas Producer Co. v. Wood, 125 Fed. 337, 60 CCA 215. (4) Breach of contemporaneous contract. Champlin Refining Co. v. Gasoline Products Co., 29 F. (2d) 331. (5) Amount of sales of the patented article. Adams v. George H. Rives Mfg. Co., 189 App. Div. 128, 178 NYS 214. (6) Investment as condition of license. Conant v. Furnace Impr. Co., 44 R. I. 98, 115 A 644. (7) Whether contract was induced by fraudulent representations. Lyons Burial Vault Co. v. Taylor, 198 Mass. 63, 84 NE 320. (8) Whether or not a part of a device made is the same as that protected by patent. Gaylord v. Case, 5 Oh. Dec. (Reprint) 413, 5 AmL Rec 494. (9) Whether testimony is accurate or inaccurate. Beck v. Magnolia Co., 294 Fed. 896.

Generally see Trial [38 Cyc 1511].

36. See Trial [38 Cyc 1594].

37. See cases infra notes 38, 39.

38. Spinney v. Allen, (Me.) 140 A 688.

Estoppel of licensee see supra §§ 287–291.

39. Sermuks v. Automatic Aluminum Heel Co., 256 Mass. 478, 153 NE 8.

[a] **Thus** requests to find for defendant, if the patented machine was imperfect for lack of an air compressor, were properly refused where the jury could find that defendant was required by the agreement to furnish the compressor. Sermuks v. Automatic Aluminum Heel Co., 256 Mass. 478, 153 NE 8.

40. See Judgments § 20 et seq.

41. See Equity §§ 820–968.

42. See case infra this note.

[a] **Protection of all rights of parties.**—A decree requiring defendant to transfer to plaintiffs all rights in a cotton picking machine, as he contracted to do if unable to construct a successful machine embracing a patented feature, should have reserved to defendant, as the contract did, the right to all benefits from the use and application of patents or patentable ideas or devices originated by him other than the use thereof in machines for picking cotton. Coburn v. Bardwell, 241 Mass. 478, 135 NE 552.

43. See Damages 17 C. J. p 699.

44. See cases infra notes 45, 46.

45. Comptograph Co. v. Burroughs

to use only the patented article is the amount of royalties the licensor would have realized had the contract been complied with.[46]

[§ 483] **D. Agency Contracts.** A contract giving an exclusive right to sell a patented article in a specified territory is ordinarily a license,[47] but such a contract, making no mention of patents, patent licenses, royalties, or anything else to indicate that it is a license creates merely an exclusive agency.[48] Where the duration of such a contract depends on the value of sales made, the minimum which controls is the amount of sales and not the amount paid to the principal.[49] A contract of agency to sell machines is breached by refusal to supply machines for sale.[50] The mere recital that the articles are patented has been held not to establish the intent that the term of the patent should be the term of the agreement.[51]

XIV. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES

[By MANUEL PRENNER]

[§ 484] **A. By Congress—1. Marking Patented Articles.** It is the duty of a patentee or of his assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented, either by fixing thereon the word "patented," together with the day and year the patent was granted; or when, from the character of the article, the word "patented" cannot be so affixed, by fixing to it or to the package wherein one or more of them is inclosed a label containing the like notice.[52] The notice must include the date on which the patent was granted,[53] stating the day, as well as the month and year.[54] Where possible, the article itself, rather than the package, must be marked;[55] but it has been held that, where the article is small, something must be left to the judgment of the patentee as to whether to put such mark upon each article or to affix a label to the packages in which the articles are shipped and sold.[56]

Patent for process. The statute requiring marking has been held not to apply to a patent for a process.[57]

Penalty for failure to mark. The penalty prescribed for failure to comply with this rule is that in a suit for infringement no damages shall be recovered by the party failing so to mark the articles, except on proof that the infringer was duly notified of his infringement and continued, after such notice, to make, use, or vend the patented article.[58] The statute has more recently been held to apply to all patentees, including holders of patents under which the patented article has not been made or vended,[59] although earlier cases held that the statute does

Adding Mach. Co., 179 Iowa 83, 159 NW 465.

46. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 SW 1008.

47. See supra § 408.

48. Standard Sewing Mach. Co. v. Jones, 260 Fed. 170, 171 CCA 260.

49. Adams v. George H. Rives Mfg. Co., 189 App. Div. 128, 178 NYS 214.

50. Dunkley Co. v. Huntley Mfg. Co., 285 Fed. 383 [aff 292 Fed. 756].

51. Kenny v. Knight, 119 Fed. 475.

52. U. S. Code tit 35 § 49; U. S. Rev. St. § 4900.

[a] **Marking is legal notice to all.**—Hogg v. Gimbel, 94 Fed. 518 [rev on other grounds 97 Fed. 791, 38 CCA 419]. See Jones v. Van Kirk, 13 F. Cas. No. 7,500, 2 Fish. Pat. Cas. 586 (holding that the word "patented" stamped upon an article is conclusive evidence that it was made under the patent referred to).

[b] **Excuse for not marking** is immaterial. Putnam v. Sudhoff, 20 F. Cas. No. 11,483, 1 Bann. & A. 198.

[c] **Marking held sufficient notice.**—Munger v. Perlman Rim Corp., 244 Fed. 799 (marking on wheels manufactured commercially).

[d] **Marking held insufficient notice.**—Notice of a design patent for a hatband is not sufficiently given by printing words upon the lining in the inside of the hats, with nothing to indicate that such notice refers to the band. Lichtenstein v. Phipps, 168 Fed. 61, 93 CCA 483 [mod 161 Fed. 578].

[e] **Canada.**—Must mark subject to penalty of one hundred dollars. 38 Vict. c 14 § 3.

Allegation of notice in infringement suit see infra § 553.

Proof of notice in infringement suits see infra § 572.

53. Traver v. Brown, 62 Fed. 933 [rev on other grounds 70 Fed. 810, 17 CCA 424]; Hawley v. Bagley, 11 F. Cas. No. 6,248.

54. Franklin Brass Fdy. Co. v. Shapiro, 278 Fed. 435 [mod 268 Fed. 551, 272 Fed. 176].

55. Smith v. Walton, 51 Fed. 17; Sessions v. Romadka, 21 Fed. 124 [rev on other grounds 145 U. S. 29, 12 SCt 799, 36 L. ed. 609].

56. Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609.

57. Wagner v. Corn Products Refining Co., 28 F. (2d) 617; U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. 103; U. S. Mitis Co. v. Carnegie Steel Co., 89 Fed. 206 [aff 90 Fed. 829, 33 CCA 387].

[a] **Reason for rule.**—"It is clear that section 4900 . . . is limited to tangible things, viz. 'patented articles'—things that can be marked or labeled. A process, as ordinarily understood, is not an article, and cannot be made to carry the prescribed notice. Its very character defies its being marked or labeled." Wagner v. Corn Products Refining Co., 28 F. (2d) 617, 618.

[b] **Well-considered case.**—Wagner v. Corn Products Refining Co., 28 F. (2d) 617 (reviewing legislation and cases).

58. U. S. Code tit 35 § 49; U. S. Rev. St. § 4900; Dunlap v. Schofield, 152 U. S. 244, 14 SCt 576, 38 L. ed. 426; Muther v. United Shoe Mach. Co., 21 F. (2d) 773; Ford Motor Co. v. K. W. Ignition Co., 278 Fed. 373 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem]; Globe Knitting Works v. Segal, 239 Fed. 322; Gibson v. American Graphophone Co., 234 Fed. 633, 148 CCA 399; American Caramel Co. v. White, 234 Fed. 328, 148 CCA 230; Byerley v. Philip Carey Co., 225 Fed. 77; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. 103; Goodyear v. Allyn, 10 F. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374.

[a] **Marking and specific notice not both required.**—Wagner v. Corn Products Refining Co., 28 F. (2d) 617.

[b] **Clear and explicit notice required.**—Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 154 [aff 167 Fed. 546, 93 CCA 224].

[c] **Notice as specific as mark on article.**—The actual notice must be as specific as that required by the statute to be marked upon the article, and a mere statement to a defendant by a person unknown to him that his article is an infringement of a patent is not sufficient. Franklin Brass Fdy. Co. v. Shapiro, 278 Fed. 435 [mod 268 Fed. 551, 272 Fed. 176].

[d] **The record of the patent in the patent office** is not sufficient notice under the statute. Flat Slab Patents Co. v. Northwestern Glass Co., 281 Fed. 51.

[e] **Verbal notice,** together with an exhibition of a copy of the letters patent, and notification of the infringement, is sufficient. New York Pharmical Assoc. v. Tilden, 14 Fed. 740, 21 Blatchf. 190.

[f] **The term "damages" in the statute** (1) is used in its general sense (Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]), (2) is intended to include all sums which complainant is entitled to recover by way of damages for the infringement alleged and proved (Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 154 [aff 167 Fed. 546, 93 CCA 224]), (3) and includes profits (Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502; MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [aff 23 F. (2d) 459]; Son v. Pressed Steel Car Co., 21 F. (2d) 528; Flat Slab Patents Co. v. Turner, supra; Franklin Brass Fdy. Co. v. Shapiro, 278 Fed. 435 [mod 268 Fed. 551, 272 Fed. 176]; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 154 [aff 167 Fed. 546, 93 CCA 224]; Lorain Steel Co. v. New York Switch, etc., Co., 153 Fed. 205).

[g] **Rule applied where patent has expired.**—Robinson v. Jeffrey Mfg. Co., 10 F. (2d) 384.

[h] **Prior to enactment of statute** under consideration it seems that previous notice or claim of right and exclusive use of device was not essential to enable the patentee to recover damages for infringement. Ames v. Howard, 1 F. Cas. No. 326, 1 Robb Pat. Cas. 689, 1 Sumn. 482.

59. Son v. Pressed Steel Car Co., 21 F. (2d) 528; Jost v. Borden Stove Co., 285 Fed. 626; Flat Slab Patents Co. v. Northwestern Glass Co., 281 Fed. 51 [crit Campbell v. New York, 81 Fed. 182]; Churchward International Steel Co. v. Bethlehem Steel

not embrace a case where a patent since its issue has lain absolutely dormant, the patented article not being made or sold.[60-62] The notice of infringement required by the statute is necessary only in a case where the mark is not so attached, an infringer being innocent in the absence of such mark or notice.[63] But when an article contains such mark, an infringer is liable, although he is in fact ignorant of the existence of letters patent.[64] The statute requires some affirmative act of notification on the part of the patentee, the fact that defendant had actual knowledge of the patent and his infringement from some independent source being insufficient.[65] Notice of the existence of a patent is not notice of infringement as required by the statute.[66] Recovery has been limited to damages and profits arising on infringement after notice has been given,[67] and, where notice prior to the filing of the bill of complaint is not shown, damages are recoverable only for infringement after the filing which affords notice.[68] Likewise, where a court instead of granting an injunction ordered an account to be kept of the infringing articles, it was held that profits at least since the order should be given.[69] Failure to mark the patented article or to give notice has been held not to deprive the patentee of the right to an accounting for profits made by the infringer;[70] nor does such failure deprive complainant of the right to an injunction to prevent infringement.[71] Such failure has been held not to prevent recovery of nominal damages for infringement.[72]

[§ 485] **2. Marking Unpatented Articles.** Anyone who, having no patent therefor, marks an article with the name, or imitation of the name, of any person who has a patent, without the latter's consent, or who marks upon an article an imitation or counterfeit of the mark or device of a patentee, or who marks upon an unpatented article the word "patent" or any word importing that the article is patented, for the purpose of deceiving the public, is liable, for every such offense, to a penalty of not less than one hundred dollars with costs; one half to go to the party suing, the other half to the United States, to be recovered by suit in any district court of the United States within whose jurisdiction the

Co., 262 Fed. 438 [rev on other grounds 268 Fed. 361 (certiorari den 255 U. S. 572 mem, 41 SCt 376 mem, 65 L. ed. 792 mem)]. See American Caramel Co. v. Mills, 162 Fed. 147, 89 CCA 171 (holding that the statute applies to a patentee who neither licenses nor sells his machines, reserving the benefit of the patent for the advantage of his own business).

[a] **Reason for rule.**—"The reason for giving some kind of notice to the alleged infringer would seem to be the same, if not greater, when the patented device was not sold or manufactured by the patentee as where it is." Flat Slab Patents Co. v. Northwestern Glass Co., 281 Fed. 51, 53.

[b] **Rule applied** where the patentee did not manufacture or sell the patented article, but only granted licenses to others to engage in such manufacture. Flat Slab Patents Co. v. Northwestern Glass Co., 281 Fed. 51.

60-62. Ewart Mfg. Co. v. Baldwin Cycle-Chain Co., 91 Fed. 262, 265; Campbell v. New York, 81 Fed. 182.

"A patent for an invention which the patentee refuses to make available himself, and refuses to allow others to make useful, is not within the spirit of . . . the constitution . . . and. . . patents so held are entitled to scant recognition at law . . . but to none whatever in equity." Ewart Mfg. Co. v. Baldwin Cycle-Chain Co., supra.

63. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; American Caramel Co. v. Mills, 162 Fed. 147, 89 CCA 171; Westinghouse Air Brake Co. v. New York Air Brake Co., 111 Fed. 741; Schofield v. Dunlop, 42 Fed. 323 [rev on other grounds 152 U. S. 244, 14 SCt 576, 38 L. ed. 426]; Allen v. Deacon, 21 Fed. 122, 10 Sawy. 210; Goodyear v. Allyn, 10 F. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374.

64. Hogg v. Gimbel, 94 Fed. 518 [rev on other grounds 97 Fed. 791, 38 CCA 419].

65. Parker Rust Proof Co. v. Ford Motor Co, 23 F. (2d) 502; Muther v. United Shoe Mach. Co., 21 F. (2d) 773; Tuttle v. Claflin, 76 Fed. 227, 22 CCA 138 [certiorari den 166 U. S. 721 mem, 17 SCt 992 mem, 41 L. ed. 1187 mem]; Pairpoint Mfg. Co. v. Eldridge Co., 71 Fed. 307.

66. Son v. Pressed Steel Car Co., 21 F. (2d) 528; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 154 [aff 167 Fed. 546, 93 CCA 224].

67. Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502; MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [aff 23 F. (2d) 459]; Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Franklin Brass Fdy. Co. v. Shapiro, 278 Fed. 435 [mod 268 Fed. 551, 272 Fed. 176]; American Caramel Co. v. White, 234 Fed. 328, 148 CCA 230; Lorain Steel Co. v. New York Switch, etc., Co., 153 Fed. 205; Allen v. Deacon, 21 Fed. 122. See Hitchcock v. Valley Camp Coal Co., 29 F. (2d) 426 (so limiting the accounting on account of the circumstances, and not referring to the statute); Jost v. Borden Stove Co., 285 Fed. 626 (applying analogous equitable rule in case of paper patent).

[a] **Reason for rule.**—"To permit a patentee to disregard the specific duty imposed upon him by the statute of properly marking the patented articles and to continue for years in the violation of his duty and then to award him profits and damages for a period of six years preceding suit because one, who perchance may have been ignorant of his infringement, continues to infringe even in a single instance after the notice, would be, in our judgment, a complete perversion both of the letter and the spirit of the statute. It would enable a patentee, who has utterly disregarded his statutory duty, to recover the most highly punitive damages. The very purpose of the statute is to bar a patentee from recovering damages for acts done during the period when the patentee himself is violating his obligation toward the public." American Caramel Co. v. White, 234 Fed. 328, 333, 148 CCA 230.

68. Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Maimen v. Union Special Mach. Co., 165 Fed. 440, 91 CCA 384 [aff 161 Fed. 748]; Eastern Dynamite Co. v. Keystone Powder Mfg. Co., 164 Fed. 47; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 154 [aff 167 Fed. 546, 93 CCA 224]. See Westinghouse Air Brake Co. v. New York Air Brake Co., 111 Fed. 741 (question raised).

"To permit an accounting . . . after notice given by the filing of the bill, if the complainant shall establish its right thereto, does not contravene the statute, since, notwithstanding such notice, the complainant can recover no damages unless it affirmatively shows infringement after notice." Maimen v. Union Special Mach. Co., 165 Fed. 440, 442, 91 CCA 384.

69. Putnam v. Sudhoff, 20 F. Cas. No. 11,483, 1 Bann. & A. 198.

70. Churchward International Steel Co. v. Bethlehem Steel Co., 262 Fed. 438 [rev on other grounds 268 Fed. 361 (certiorari den 255 U. S. 572 mem, 41 SCt 376 mem, 65 L. ed. 792 mem)]; Rollman Mfg. Co. v. Universal Hardware Works, 207 Fed. 97. See Jennings v. Rogers Silver Plate Co., 96 Fed. 340 (holding that the failure of a patentee to send, as promised, a copy of a patent to one whom he has informed thereof and whom he has informed that he is infringing, does not prevent him from being entitled to an accounting of profits made by the infringer).

"An infringer . . . may be making profits without the patentee knowing of it, because he is not otherwise damaged. The fact that an infringer is an innocent infringer without notice is a reason for relieving him from the payment of damages when he has made no profits. It is no reason for permitting him to retain profits which belong to another. The fact that he is innocent does not give him title to the property of another. Damages may be well denied, but profits allowed." Churchward International Steel Co. v. Bethlehem Steel Co., supra.

71. Wolf v. Buckeye Incubator Co., 296 Fed. 680 [aff 291 Fed. 253]; Morton Trust Co. v. American Car, etc., Co., 161 Fed. 546 [rev on other grounds 175 Fed. 568, 99 CCA 190]; McDowell v. Kurtz, 77 Fed. 206, 23 CCA 119; Pairpoint Mfg. Co. v. Eldridge Co., 71 Fed. 307; Horn v. Bergner, 68 Fed. 428 [aff 72 Fed. 687]; Anderson v. Monroe, 55 Fed. 398 [rev on other grounds 58 Fed. 398, 7 CCA 272]; Goodyear v. Allyn, 10 F. Cas. No. 5,555, 6 Blatchf. 33, 36, 3 Fish. Pat. Cas. 374.

"The penalty imposed by the statute, for a failure to mark patented articles, is only the taking away of the right to recover damages in the suit. It does not affect the right to an injunction, either perpetual or provisional, as a remedy." Goodyear v. Allyn, supra.

[a] **In Canada,** while the only consequence to plaintiff of a breach of Patent Act § 55 (Rev. St. [1906] c 69), requiring marking, is the penalty imposed by § 69, the failure to mark does not affect the right to an injunction against infringement. Overend v. Stewart, etc., Co., 19 Ont. L. 642, 14 OntWR 961.

72. B. B. Hill Mfg. Co. v. Stewart, 116 Fed. 927; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153.

[a] **For example,** only nominal damages will be allowed where it ap-

offense was committed.[73] To create the offense of marking an unpatented article as patented, the intent to deceive the public, and consequently knowledge of the falseness of the claim, are necessary;[74] hence, the article marked must appear to be one which might lawfully be patented, in order that there may exist a possibility of deceiving the public.[75] Marking an article with intent to deceive is an offense, even though the article is not sold, while selling an article innocently marked is not.[76] The intention to secure a patent subsequently does not excuse the offense, if it was intended to deceive the public;[77] it is otherwise if the article is not offered for sale until the patent is granted.[78] After application for a patent the article may be stamped "patent applied for,"[79] and the word "patented" may be affixed when the patent has been allowed but not issued.[80] After the patent has expired, marking the word "patented," with the date of the patent, upon a previously patented article, is not an offense under the statute.[81]

Corporations have been held to be within the statute and liable for offenses committed under it.[82]

Amount of penalty. The penalty of "not less than one hundred dollars" has been held to be one of not more than one hundred dollars.[83] The penalty is not recoverable for each article marked, but the marking of a number of articles as one continuous act constitutes but one offense.[84]

Action for penalty.[85] Anyone, whether or not interested in the patent or injured by the infringement, may bring the action for the penalty.[86] Suit must be brought in the name of the informer, and not of the United States,[87] and must be brought in the district where the offense was committed.[88] The burden is upon plaintiff to show that the article marked "patented" is not protected by a patent,[89] as well as that it was so marked with the purpose of deceiving the public.[90] The jury must be reasonably satisfied that an unpatented article was marked "patented;" but proof beyond a reasonable doubt is not required.[91]

Injunction against marking. It has been held that marking articles as patented under a patent which is in fact owned by another will be enjoined by the court without examining the question of the validity of the patent involved.[92]

[§ 486] **B. By States—1. With Respect to Patented Articles.** The owner of a patent himself cannot make and sell his patented articles in violation

pears that for a time plaintiffs made and sold the patented article without marking it "patented." B. B. Hill Mfg. Co. v. Stewart, 116 Fed. 927.

73. U. S. Code tit 35 § 50; U. S. Rev. St. § 4901.

[a] **Statute strictly construed.**—Pentlarge v. Kirby, 19 Fed. 501; U. S. v. Morris, 26 F. Cas. No. 15,814, 2 Bond 23, 3 Fish. Pat. Cas. 72; Wilson v. Singer Mfg. Co., 30 F. Cas. No. 17,836, 4 Bann. & A. 637, 9 Biss. 173 [aff 12 Fed. 57, 11 Biss. 298].

[b] **The patent is not invalidated** by marking articles as patented which are not covered by the patent. Dade v. Boorum, etc., Co., 121 Fed. 135.

[c] **Statute held not to apply** (1) to the putting, on a patented article, of a stamp, not of the patentee of that article, but of some other patentee, who never patented the article so stamped, and never claimed it as his. French v. Foley, 11 Fed. 801. (2) To marking as patented, under letters patent of a certain date and number, a machine not containing the improvements set forth and claimed in the letters patent. Russell v. Newark Mach. Co., 55 Fed. 297.

[d] **In England,** the fact that the patented article is not a new manufacture is no defense for marking without patentee's consent. Myers v. Baker, 3 H. & N. 802, 157 Reprint 691.

[e] **Canada.**—Penalty two hundred dollars or imprisonment for six months or both. 35 Vict. c 26 § 50.

74. Bowman v. Read, 2 Wall. (U. S.) 591, 17 L. ed. 812; Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957; Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; Meccano, Ltd. v. Wagner, 234 Fed. 912 [reopening authorized 235 Fed. 890, 149 CCA 202]; London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 CCA 130; A. B. Dick Co. v. Fuerth, 57 Fed. 834; Hotchkiss v. Samuel Cupples Wooden-Ware Co., 53 Fed. 1018; Lawrence v. Holmes, 45 Fed. 357; Tompkins v. Butterfield, 25 Fed. 556; Nichols v. Newell, 18 F. Cas. No. 10,245, 1 Fish. Pat. Cas. 647; Stephens v. Caldwell, 22 F. Cas. No. 13,367; Walker v. Hawxhurst, 29 F. Cas. No. 17,071, 5 Blatchf. 494.

"Where the article marked is obviously very remote from the patent referred to in justification of the marking, this difference alone may be sufficient to show an intention to deceive; but where the difference is slight, and the question of the breadth of the invention or of the claims is so close as to permit of an honest difference of opinion, then it may become necessary for the plaintiff to adduce testimony additional to the fact that the article is unpatented, in order to show guilty knowledge as distinguished from erroneous opinion." London v. Everett H. Dunbar Corp., 179 Fed. 506, 510, 103 CCA 130.

[a] **Question for jury.**—The intention to deceive is a question for the jury. Folberth Auto Specialty Co. v. Mayo-Skinner Mfg. Co., 292 Fed. 883; London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 CCA 130; Walker v. Hawxhurst, 29 F. Cas. No. 17,071, 5 Blatchf. 494.

75. Winne v. Snow, 19 Fed. 507; Oliphant v. Salem Flouring Mills Co., 18 F. Cas. No. 10,486, 3 Bann. & A. 256, 5 Sawy. 128; U. S. v. Morris, 26 F. Cas. No. 15,814, 2 Bond 23, 3 Fish. Pat. Cas. 72.

76. Nichols v. Newell, 18 F. Cas. No. 10,245, 1 Fish. Pat. Cas. 647.

77. Nichols v. Newell, supra; Stephens v. Caldwell, 22 F. Cas. No. 13,367; Walker v. Hawxhurst, 29 F. Cas. No. 17,071, 5 Blatchf. 494.

78. Nichols v. Newell, 18 F. Cas. No. 10,245, 1 Fish. Pat. Cas. 647.

79. A. B. Dick Co. v. Fuerth, 57 Fed. 834; Schwebel v. Bothe, 40 Fed. 478.

80. Lauferty v. Wheeler, 11 Daly (N. Y.) 194, 11 AbbNCas 220, 63 How Pr 488.

81. Wilson v. Singer Mfg. Co., 30 F. Cas. No 17,836, 4 Bann. & A. 637, 9 Biss. 173 [aff 12 Fed. 57, 11 Biss. 298].

[a] **Reason for rule.**—"Can it be said that the public is deceived by the notice, inscribed upon or affixed to a manufactured article, that it has been patented, and that the patent has expired? The 'public' is presumed to know . . . that a patent issued on the 9th day of October, 1855, had expired on the 1st day of November, 1876." Wilson v. Singer Mfg. Co., 30 F. Cas. No. 17,836, 4 Bann. & A. 637, 639, 9 Biss. 173 [aff 12 Fed. 57, 11 Biss. 298].

82. London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 CCA 130; Tompkins v. Butterfield, 25 Fed. 556.

83. Stimpson v. Pond, 23 F. Cas. No. 13,455, 2 Curt. 502.

[a] **Reason for rule.**—"It would be difficult to reconcile such an implication [of authority to inflict a greater penalty than one hundred dollars] with the constitutional prohibition to impose excessive fines. . . . I know of no ground upon which the Court can assume to itself this power [to fix the amount of the penalty]; and there seems to be equal difficulty in maintaining that the jury are to exercise it. . . . The Act does not indicate that there are to be degrees of the offence, and it is not perceived that it admits of great aggravation." Stimpson v. Pond, 23 F. Cas. No. 13,455, 2 Curt. 502, 504. Contra Nichols v. Newell, 18 F. Cas. No. 10,245, 1 Fish. Pat. Cas. 647 (holding that the jury may assess damages, not less than one hundred dollars, and as much more as it may think proper).

84. London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 CCA 130; Hoyt v. Computing Scale Co., 96 Fed. 250; Hotchkiss v. Samuel Cupples Wooden-Ware Co., 53 Fed. 1018.

[a] **Reason for rule.**—"A fraudulent design maintained throughout the continuous marking of a number of articles cannot be divided into as many distinct fraudulent purposes as there are distinct overt acts of marking. Though the marking of each article makes a distinct instrument for the publication of a false statement, this cannot be a proper ground for multiplying penalties. The statute does not measure the penalty by the extent of publication, but affixes the penalty regardless of the fact of publication." London v. Everett H. Dunbar Corp., 179 Fed. 506, 508, 103 CCA 130.

85. **Generally** see Fines, Forfeitures, and Penalties §§ 79-154.

86. Winne v. Snow, 19 Fed. 507.

[a] **A patentee who has not marked his own articles** "patented," as required by § 4900 of the statute, cannot bring an action for the penalty under § 4901. Smith v. Walton, 56 Fed. 499; Smith v. Walton, 51 Fed. 17.

87. U. S. v. Winner, 28 F. (2d) 295; Winne v. Snow, 19 Fed. 507; Oliphant v. Salem Flouring Mills Co., 18 F. Cas. No. 10,486, 3 Bann. & A. 256, 5 Sawy. 128; U. S. v. Morris, 26 F. Cas. No. 15,814, 2 Bond 23, 3 Fish. Pat. Cas. 72.

88. Winne v. Snow, 19 Fed. 507; Pentlarge v. Kirby, 19 Fed. 501.

89. London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 CCA 130; Russell v. Newark Mach. Co., 55 Fed. 297.

90. London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 CCA 130.

91. Hawloetz v. Kass, 25 Fed. 765 [aff 136 U. S. 638 mem, 10 SCt 1068 mem, 34 L. ed. 549 mem].

92. Washburn, etc., Mfg. Co. v.

of the laws of the state prescribed for the general welfare.[93] The right conferred by statute to make, use, and vend his invention throughout the United States and the territories thereof is not granted or secured without reference to the general powers which the several states of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or police.[94] The manufacture and sale of patented articles is subject to state legislation enacted in pursuance of the police power inherent in the state,[95] and to the taxing power of the states,[96] and a license fee can be required for selling in the state patented articles,[97] if there is no discrimination in such taxation as between the patented article and the sale of other similar articles in the state.[98]

[§ 487] **2. With Respect to Patent Rights.**[99] In a number of states statutes have been enacted regulating the transfer or sale of patent rights, as by requiring registration of the patent, together with an affidavit as to its genuineness and the authority of the seller to sell, and particular forms for the instruments relating to such transfer or sale.[1] Such regulating statutes have generally been held constitutional as infringing upon no constitutional rights,[2] while in other cases, the constitutionality of such

Haish, 29 F. Cas. No. 17,217, 4 Bann. & A. 571, 9 Biss. 141.

93. Bement v. National Harrow Co., 186 U. S. 70, 22 SCt 747, 46 L. ed. 1058; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Bloomer v. McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; In re Brosnahan, 18 Fed. 62, 4 McCrary 1; Livingston v. Van Ingen, 9 Johns. (N. Y.) 507; Jordan v. Dayton, 4 Oh. 294; State v. Smith, 184 Wis. 309, 199 NW 954.

[a] **Sale of patent rights and patented articles distinguished.**—"There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. . . . The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of congress, and no state legislation can deprive him of this right; but when the fruits of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of a state, it is subject to its laws, like other property." Patterson v. Com., 11 Bush (Ky.) 311, 314, 21 AmR 220 [aff 97 U. S. 501, 24 L. ed. 1115]. See Allen v. Riley, 203 U. S. 347, 355, 27 SCt 95, 51 L. ed. 216, 8 AnnCas 137 [aff 71 Kan. 378, 80 P 952, 114 AmSR 481, 6 AnnCas 158] (where it was said: "These two cases [Patterson v. Kentucky and Webber v. Virginia, supra] do not cover the one now before us, because they refer to tangible property which has been manufactured and come into existence under a patent, and the case before us relates to provisions which are to accompany an assignment of intangible rights, growing out of a patent").

94. Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115.

95. Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; Vannini v. Paine, 1 Del. 65; In re Opinion of Justices, 193 Mass. 605, 81 NE 142; State v. Smith, 184 Wis. 309, 199 NW 954.

"Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits." Webber v. Virginia, 103 U. S. 344, 347, 26 L. ed. 565.

[a] **Thus** refusal to permit sale of railroad passenger's accident policies under a patented device contrary to the standard accident policy statute (St. [1923] § 208.05) held not derogative of rights under patent. State v. Smith, 184 Wis. 309, 199 NW 954.

96. Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Bloomer v. McQuewan, 14 How. (U. S.) 539, 14 L. ed. 532; In re Sheffield, 64 Fed. 833; Palmer v. State, 39 Oh. St. 236, 48 AmR 429; State v. Bell Tel. Co., 36 Oh. St. 296, 38 AmR 583.

97. Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Peo. v. Russell, 49 Mich. 617, 14 NW 568, 43 AmR 478. Contra State v. Butler, 3 Lea (Tenn.) 222.

98. In re Sheffield, 64 Fed. 833; Palmer v. State, 39 Oh. St. 236, 48 AmR 429.

99. Grant of patents by state see supra § 3.

1. See statutory provisions and cases infra this note and notes 2–5.

[a] **Rights within prescribed territory.**—A contract by which the owner of a patent right conveys to another the exclusive right to sell the patented article within certain prescribed territory for a term of years is a sale of such an interest in a patent right as brings the transaction within statutes relating to the registration and sale of patent rights. New v. Walker, 108 Ind. 365, 9 NE 386, 58 AmR 40; Schomoyer v. Van Hosen, 111 Kan. 759, 208 P 554; State v. Morey, 81 Kan. 149, 105 P 501; Nyhart v. Kubach, 76 Kan. 154, 90 P 796; Pinney v. Concordia First Nat. Bank, 68 Kan. 223, 75 P 119, 1 AnnCas 331.

[b] **Agency for sale of patented articles.**—A territorial lease and appointment of agency giving the party of the second part six sample machines and the agency for the sale of the same for a term of years, the company agreeing to furnish all machines ordered by the agent at a certain fixed price, is a contract for the sale of a patent right within Gen. St. (1901) §§ 4356–4358, relating to the registration and sale of patent rights. Nyhart v. Kubach, 76 Kan. 154, 90 P 796.

[c] **Patent allowed but not issued.**—(1) A contract for sale of party's rights in letters patent on an article on which application for letters patent had been made and allowed, but letters not yet issued, held to be one for a sale of patent rights, within the provisions of statutes, requiring incorporation in contract of words "given for a patent right," and filing of copies of letters patent. Hager v. Hale, 110 Kan. 507, 204 P 529. Contra Ullman v. Thompson, 57 Ind. A. 126, 106 NE 611, 614 (holding that "the right to a patent was yet inchoate, and might never become complete, since such favorable action was subject to annulment for cause shown"). (2) Assignment of future patents see supra § 375.

[d] **Patent applied for but not issued.**—A contract, undertaking to sell the exclusive right for five years to sell within a specified territory an article for which patent has been applied for but not issued, is one for the sale of the patent right within Gen. St. (1915) § 6794, relating to the registration and sale of patent rights. Schomoyer v. Van Hosen, 111 Kan. 759, 208 P 554.

[e] **The assignment of part of a certificate of deposit** in payment for a patent right is within Gen. St. (1915) § 6795, requiring any allegation in writing for which a patent right forms a consideration to have inserted the words "given for a patent right." Schomoyer v. Van Hosen, 111 Kan. 759, 208 P 554.

[f] **Consideration shown on face of contract.**—The fact that a contract shows upon its face its character and consideration does not dispense with the statutory requirement that the words "given for a patent right" be inserted. Schomoyer v. Van Hosen, 111 Kan. 759, 208 P 554.

[g] **An assignment of letters patent,** made after the sale of the patent right has been completed, does not change the character of the sale. Hager v. Hale, 110 Kan. 507, 204 P 529.

[h] **Article used in manufacture of patented article.**—Where a party having a patent contracts to sell to another party and convey the exclusive right to sell in a certain territory, for a fixed time, molds to be used in the manufacture of a patented article, he undertakes to convey to such party exclusive right to manufacture, sell, and use, the article patented within such territory, and such contract is illegal unless the steps required by Gen. St. (1901) § 4356, have been complied with. Tredick v. Walters, 81 Kan. 828, 106 P 1067.

[i] **Statute not confined to negotiable obligations.**—Schomoyer v. Van Hosen, 111 Kan. 759, 208 P 554.

Statement of consideration on notes given for patent rights see Bills and Notes § 262.

2. U. S.—Allen v. Riley, 203 U. S. 347, 27 SCt 95, 51 L. ed. 216 [aff 71 Kan. 378, 80 P 952, 114 AmSR 481]; Reeves v. Corning, 51 Fed. 774; In re Brosnahan, 18 Fed. 62, 4 McCrary 1. Contra Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336 [certiorari granted 207 U. S. 589 mem, 28 SCt 255 mem, 52 L. ed. 354 mem]; U. S. Cons. Seeded Raisin Co. v. Griffin, etc., Co., 126 Fed. 364, 61 CCA 334; Columbia Wire Co v. Freeman Wire Co., 71 Fed. 302; Ex p. Robinson, 20 F. Cas. No. 11,932, 2 Biss. 309, 4 Fish. Pat. Cas. 186.

Ark.—Tilson v. Gatling, 60 Ark. 114, 29 SW 35.

Ind.—Sandage v. Studabaker Bros. Mfg. Co., 142 Ind. 148, 41 NE 380, 51 AmSR 165, 34 LRA 363; Mayfield v. Sears, 133 Ind. 86, 32 NE 816; Tescher v. Merea, 118 Ind. 586, 21 NE 316; Pape v. Wright, 116 Ind. 502, 19 NE 459; Hankey v. Downey, 116 Ind. 118, 18 NE 271, 1 LRA 447; New v. Walker, 108 Ind. 365, 9 NE 386, 58 AmR 40; Hockett v. State, 105 Ind. 250, 5 NE 178, 55 AmR 201; Robertson v. Cooper, 1 Ind. A. 78, 27 NE 104.

Kan.—Nyhart v. Kubach, 76 Kan. 154, 90 P 796; Allen v. Riley, 71 Kan. 378, 80 P 952, 114 AmSR 481 [aff 203 U. S. 347, 27 SCt 95, 51 L. ed. 216]; Mason v. McLeod, 57 Kan. 105, 45 P 76, 57 AmSR 327, 41 LRA 548.

Oh.—Jordan v. Dayton, 4 Oh. 294.

Pa.—Graham's Estate, 14 Phila. 280.

"We think the State has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the

regulations has been denied.[3] It has been held that a license tax cannot be imposed by a state upon the right to vend patent rights;[4] nor can a tax be laid upon the capital stock of corporations invested in patent rights.[5] State legislatures may enact statutes whose effect is to pass the title to letters patent,[6] and state courts may hear and determine questions arising out of contracts whose subject matter is patent rights, but may not settle questions as to the validity of the patent rights.[7]

[§ 488] **3. Criminal Prosecution.** In some states the statutes regulating dealings in patent rights and patented articles provide for criminal prosecution for failure to comply with the terms of the statutes.[8] Under such a statute, a complaint has been held not indefinite or uncertain because of its referring to the letters patent involved as those of defendant, whereas the contract dealing with the letters referred to the patent as the property of a company of which defendant was president.[9]

XV. INFRINGEMENT

[By STANLEY A. HACKETT]

[§ 489] **A. What Constitutes—1. Infringement Generally—a. Definition, Nature, and Distinctions.** As applied to a patent,[10] infringement is the unauthorized making, using, or selling for practical use, or for profit, of an invention covered by a valid claim of a patent during the life of the patent.[11] It is a violation of the exclusive right or monopoly created by statute[12] and conferred upon a patentee,[13] and it differs from unfair competition in that no element of monopoly is necessary or involved in the latter.[14] An infringement of a patent is a tort[15] or wrong;[16] it is a trespass upon the property rights of the patentee,[17] or at least it is analogous to a trespass.[18] It is said that there is no such thing as partial infringement.[19]

"Anticipation" is distinguishable from "infringement"[20] in that the former depends upon the nature and extent of the earlier disclosure,[21] while the latter depends upon the character of the grant as fixed by the claim.[22]

[§ 490] **b. Requisites—(1) Valid and Existing Patent.**[23] A patent must be a valid one in order to support a claim of infringement thereof.[24] Use of the subject of a patent subsequent to its issuance

sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. . . . The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the States to legislate on the subject themselves in a manner neither inconsistent with nor opposed to the Federal statute." Allen v. Riley, 203 U. S. 347, 355, 357, 27 SCt 95, 51 L. ed. 216, 8 AnnCas 137 [aff 71 Kan. 378, 80 P 952, 114 AmSR 481, 6 AnnCas 158].

Constitutionality of statutes relating to notes given for patent rights see Bills and Notes § 262.

Requirement that note given for patent right state consideration see Bills and Notes § 262.

3. Peo. v. Russell, 49 Mich. 617, 14 NW 568, 43 AmR 478; State v. Butler, 3 Lea (Tenn.) 222; State v. Lockwood, 43 Wis. 403.

4. In re Sheffield, 64 Fed. 833; Com. v. Petty, 96 Ky. 452, 29 SW 291, 16 KyL 488, 29 LRA 786; Peo. v. Russell, 49 Mich. 617, 14 NW 568, 43 AmR 478.

5. Peo. v. Neff, 15 App. Div. 8, 44 NYS 46 [aff 156 N. Y. 701 mem, 51 NE 1093 mem], 19 App. Div. 599, 46 NYS 388 [aff 156 N. Y. 417, 51 NE 269, 42 LRA 290]. Com. v Davis-Colby Ore Roaster Co., 1 Dauph. Co. (Pa.) 118

[a] **Stock in hands of lessor of patent rights.**—But stock in a company, paid to a lessor by the lessee of certain rights to use patents, does not represent capital invested in patents so as to exempt such stock from state taxation. Com. v. Brush Electric Light Co., 145 Pa. 147, 22 A 844; Com. v. Philadelphia Co., 145 Pa. 142, 22 A 843, 157 Pa. 527, 27 A 378; Com. v. Edison Electric Light Co., 145 Pa. 131, 22 A 841, 845, 27 AmSR 683, 157 Pa. 529, 27 A 379, 37 AmSR 747; Com. v. Central Dist., etc., Tel. Co., 145 Pa. 121, 22 A 841, 27 AmSR 677; Com. v. United Gas Impr. Co., 7 Pa. Co. 116; Com. v. U. S. Electric Lighting Co., 7 Pa. Co. 90.

6. Barton v. White, 144 Mass. 281, 10 NE 840, 59 AmR 84.

7. Rawson v Harger, 48 Iowa 269; Mason v. McLeod, 57 Kan. 105, 45 P 76, 57 AmSR 327, 41 LRA 548; Gordon v. Deckebach, 9 Oh. Dec. (Reprint) 324, 12 CincLBul 169; Hotchkiss v. Fitzgerald Patent Prepared Plaster Co., 41 W. Va. 357, 23 SE 576.

8. See statutory provisions.

9. State v. Morey, 81 Kan. 149, 105 P 501.

10. Infringement:
Generally see Infringement 31 C. J. p 1193.
Of:
Copyright see Copyright and Literary Property § 263.
Trade-mark see Trade-Marks, Trade-Names, and Unfair Competition [38 Cyc 741].

11. 1 Rogers Patents p 137 [quot Johnston v. Davenport Brick, etc., Co., 237 Fed. 668, 671].

[a] **Other definitions.**—(1) "The unlawful making or selling or using of the patented invention." Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 148, 50 CCA 159, 55 LRA 692. (2) "The unauthorized making, using, or selling of the invention during the life of the patent." Luten v. MacAfee, 206 Fed. 175, 176.

12. Unit Constr. Co. v. Huskey Mfg. Co., 241 Fed. 129.

13. Waterman v. Shipman, 130 N. Y. 301, 29 NE 111 [rev 55 Hun 611, 8 NYS 814].

14. Unit Constr. Co. v. Huskey Mfg. Co., 241 Fed. 129.

"Unfair competition" defined see Trade-Marks, Trade-Names, and Unfair Competition [38 Cyc 756].

15. Chicago Pneumatic Tool Co. v. Keeler Pneumatic Tool Co., 293 Fed. 945; Radio Corp. of America v. Hohenstein, 289 Fed. 757; Churchward International Steel Co. v Bethlehem Steel Co., 262 Fed. 438 [rev on other grounds 268 Fed. 361 (certiorari den 255 U. S. 572 mem, 41 SCt 376 mem, 65 L. ed. 792 mem)]; Walter S. Newhall Co. v. Baltimore, etc., R. Co., 258 Fed. 650; Decker v. Smith, 225 Fed. 776 [mod on other grounds 234 Fed. 646, 148 CCA 412]; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614; Valvona-Marchiony Co. v. Perella, 207 Fed. 377 [aff 212 Fed. 168, 129 CCA 24]; Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728, 32 SCt 526, 56 L. ed. 633]; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 CCA 107.

[a] **Infringement is tortious taking** of a part of the property consisting of the exclusive right conferred by the patent. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 393; American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535.

[b] **"There is no contract relation** between a patentee and an infringer, but the latter is invading property rights acquired by the former from the government." Reed Roller Bit Co. v. Hughes Tool Co., 12 F. (2d) 207, 211.

16. Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728, 32 SCt 526, 56 L. ed. 633].

17. Churchward International Steel Co. v. Bethlehem Steel Co., 262 Fed. 438 [rev on other grounds 268 Fed. 361 (certiorari den 255 U. S. 572 mem, 41 SCt 376 mem, 65 L. ed. 792 mem)].

18. Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 CCA 107.

19. Harvey Hubbell Inc. v. General Electric Co., 267 Fed. 564.

Appropriation or use of part of invention see infra § 496.

Contributory infringement see infra §§ 516–519.

20. Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258.

Anticipation generally see supra §§ 26–57.

21. See supra § 43 et seq.

22. Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258.

Scope of claim as bearing on infringement see infra § 499.

23. Scope of claim of patent see infra § 499.

24. Kennedy v. Hazelton, 128 U. S. 667, 9 SCt 202, 32 L. ed. 576; Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538; Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797]; Johnston v. Woodbury, 109 Fed. 567, 48 CCA 550; Swain v. Holyoke Mach. Co., 109 Fed. 154, 48 CCA 265 [reh den 111 Fed. 403, 49 CCA 419, and certiorari den 184 U. S. 699 mem, 22 SCt 938 mem, 46 L. ed. 765 mem]; American Ordnance Co. v. Driggs-Seabury Gun, etc., Co., 109 Fed. 83, 48 CCA 241 [certiorari den 183 U. S. 698 mem, 22 SCt 935 mem, 46 L. ed. 396 mem]; Hoskins v. Matthes, 108 Fed. 404, 47 CCA 434; Goss Printing-Press Co. v. Scott, 108 Fed. 253, 47 CCA 302 [reh den 110 Fed. 402, 49 CCA 97, and certiorari den 183 U. S. 699 mem, 22 SCt 935 mem, 46 L. ed. 396 mem]; Thomson-Houston Electric Co. v. Nassau Electric R. Co., 107 Fed. 277, 46 CCA 263; Pelzer v. Dale Co., 106 Fed. 989, 46 CCA 83; Dodge Mfg. Co. v. Col-

and prior to its expiration may constitute infringement,[25] even though it is a continuation of a use commenced prior to the issuance of the patent;[26] but use pending application for a patent is not infringement,[27] nor is it infringement to use, subsequent to the granting of the patent, something which was old,[28] and which the public had a right to use,[29] prior to the patentee's invention, even though its character and capacities were not generally understood[30] or it was not a commercial success.[31]

After expiration of patent, the subject matter thereof may be manufactured,[32] used,[33] or sold[34] lawfully and without infringement; and a device which admittedly infringed a certain patent cannot, after the expiration of such patent, infringe a subsequent patent, unless it contains some element covered by the subsequent patent which was not included in the expired patent.[35] While articles illegally made during the life of a patent cannot be lawfully sold after the patent has expired,[36] the part manufacture of articles not constituting an infringement, with intent to complete the manufacture of the patented article immediately on the expiration of the patent, is not infringement.[37]

[§ 491] **(2) Lack of Authority from Owner of Patent.**[38] The manufacture, use, or sale of a patented invention by a person other than the owner of the patent constitutes an infringement of the patent when,[39] and only when,[40] it is not authorized by the owner of the patent.

Authority conferred prior to application for patent. Any person who purchases of the inventor, or with his knowledge and consent constructs an article embodying the invention prior to his application for a patent, has the right to use and sell the particular article after a patent is granted without liability therefor to the inventor or any other person interested in the invention.[41] The rule does not apply to an article made or bought without the inventor's consent;[42] nor does the right conferred thereby ex-

lins, 106 Fed. 935, 46 CCA 53; Solvay Process Co. v. Michigan Alkali Co., 90 Fed. 818, 33 CCA 285; Chuse v. Ide, 89 Fed. 491, 32 CCA 260; Antisdel v. Chicago Hotel Cabinet Co., 89 Fed. 308, 32 CCA 216 [reh den 90 Fed. 828 mem, 32 CCA 602 mem]; Kelly v. Clow, 89 Fed. 297, 32 CCA 205; Talbot v. Fear, 89 Fed. 197, 32 CCA 186; Clisby v. Reese, 88 Fed. 645, 32 CCA 80; Eastman Co. v. Getz, 84 Fed. 458, 28 CCA 459; Soehner v. Favorite Stove, etc., Co., 84 Fed. 182, 28 CCA 317; Dunbar v. Eastern Elevating Co., 81 Fed. 201, 26 CCA 330; Crossley v. Duggan, 79 Fed. 992, 25 CCA 681; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Pope Mfg. Co. v. Marqua, 15 Fed. 400.

[a] **Rule applied to design patent.**—Union Welting Co. v. McCarter, 108 Fed. 398, 47 CCA 428; Feder v. Stewart, etc., Co., 105 Fed. 628 [aff 118 Fed. 1015 mem, 56 CCA 138 mem]; Kampfe v. Reichard, 105 Fed. 622; Rowe v. Blodgett, etc., Co., 103 Fed. 873, [aff 112 Fed. 161, 46 CCA 214]; Matthews, etc., Mfg. Co. v. American Lamp, etc., Co., 103 Fed. 634; Koenen v. Drake, 101 Fed. 466, 41 CCA 466; Cary Mfg. Co. v. Neal, 98 Fed. 617, 39 CCA 189; Westinghouse Electric, etc., Co. v. Triumph Electric Co., 97 Fed. 99, 38 CCA 65; Sagendorph v. Hughes, 95 Fed. 478.

Invalidity of patent as defense in infringement suit see infra § 538.

25. Detroit Iron, etc., Co. v. Carey, 236 Fed. 924, 150 CCA 186 [certiorari den 242 U. S. 649 mem, 37 SCt 242 mem, 61 L. ed. 545 mem].

26. Detroit Iron, etc., Co. v. Carey, supra.

27. Brill v. St. Louis Car Co., 80 Fed. 909.

28. Pope Mfg. Co. v. Gormully, etc., Mfg. Co., 144 U. S. 238, 12 SCt 641, 36 L. ed. 419; Jones v. Morehead, 1 Wall. (U. S.) 155, 17 L. ed. 662; McCormick v. Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Wilson v. Townley Shingle Co., 125 Fed. 491, 60 CCA 327; Byram v. Friedberger, 87 Fed. 559 [aff 100 Fed. 963, 41 CCA 121]; Challenge Corn-Planter Co. v. Gearhardt, 46 Fed. 768; Lee v. Upson, etc., Co., 42 Fed. 530 [reh den 43 Fed. 670]; Webster v. Ovens, 39 Fed. 388; Simon v. Neumann, 20 Fed. 196; Consolidated Safety-Valve Co. v. Kunkle, 14 Fed. 732 [aff 119 U. S. 45, 7 SCt 50, 30 L. ed. 302]; Adams, etc., Mfg. Co. v. St. Louis Wire-Goods Co., 1 F. Cas. No. 72, 3 Bann. & A. 77; Byam v. Eddy, 4 F. Cas. No. 2,263, 2 Blatchf. 521; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Smith v. Clark, 22 F. Cas. No. 13,027, Brunn. Coll. Cas. 345; Smith v. Higgins, 22 F. Cas. No. 13,058; Cooper v. Jacobi, 7 OntWR 36. See Computing Scale Co. v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645] (to determine correctly the question of infringement must be considered in the light of the prior art).

Newness or novelty as essential to patentability see supra § 26.

29. Jones v. Morehead, 1 Wall. (U. S.) 155, 17 L. ed. 662; Universal Traffic Control Co. v. Dallas, 6 F. (2d) 282; Lee v. Upson, etc., Co., 42 Fed. 530 [reh den 43 Fed. 670]; Knapp v. Benedict, 26 Fed. 627; Consolidated Safety-Valve Co. v. Kunkle, 14 Fed. 732 [aff 119 U. S. 45, 7 SCt 50, 30 L. ed. 302]; McCormick v. Manny, 15 F. Cas. No. 8,724, 6 McLean 539 [aff 20 How. 402, 15 L. ed. 930]; Smith v. Clark, 22 F. Cas. No. 13,027, Brunn. Coll. Cas. 345; Smith v. Higgins, 22 F. Cas. No. 13,058; Hubbell v. U. S., 20 Ct. Cl. 354 [aff 171 U. S. 203, 18 SCt 828, 43 L. ed. 136].

Authority conferred by inventor prior to application for patent see infra § 491.

30. McCormick v. Manny, 15 F. Cas. No. 8,724, 6 McLean 539 [aff 20 How. 402, 15 L. ed. 930]; Smith v. Higgins, 22 F. Cas. No. 13,058.

31. Lee v. Upson, etc., Co., 42 Fed. 530 [reh den 43 Fed. 670].

32. Westcott Chuck Co. v. Oneida Nat. Chuck Co., 199 N. Y. 247, 92 NE 639, 139 AmSR 907, 20 AnnCas 858 [rev 133 App. Div. 937 mem, 118 NYS 1149 mem]; Westcott Chuck Co. v. Oneida Nat. Chuck Co., 122 App. Div. 260, 106 NYS 1016.

33. Tompkins v. St. Regis Paper Co., 226 Fed. 744 [aff 236 Fed. 221, 149 CCA 411]; Sawyer Spindle Co. v. Carpenter, 133 Fed. 238 [aff 143 Fed. 976, 75 CCA 162].

34. British Insulated Wire Co. v. Dublin United Tramways Co., [1900] 1 Ir. 287.

35. Marconi Wireless Tel. Co. v. Kilbourne, etc., Mfg. Co., 265 Fed. 644 [aff 239 Fed. 328].

36. Underwood Typewriter Co. v. Elliott-Fisher Co., 156 Fed. 588; American Diamond Rock-Boring Co. v. Rutland Marble Co., 2 Fed. 355, 18 Blatchf. 147; American Diamond Rock-Boring Co. v. Sheldon, 1 Fed. 870, 18 Blatchf. 50; Crossley v. Beverly, 9 B. & C. 63, 17 ECL 38, 109 Reprint 24, 3 C. & P. 513, 14 ECL 690, 172 Reprint 526, M. & M. 283, 22 ECL 522, 1 Russ. & M. 166 note, 5 EngCh 166 note, 39 Reprint 65, 20 ERC 197 [aff 4 L. J. Ch. 251]; Richards v. Williamson 30 L. T. Rep. N. S. 746.

[a] **Illegality attaches** to the things themselves. The person making them has no right to make them and no right to them when made. American Diamond Rock-Boring Co. v. Sheldon, 1 Fed. 870, 18 Blatchf. 50.

37. White v. Walbridge, 46 Fed. 526.

38. **Cross references:**
Laches in bringing suit see infra §§ 532–537.
Licenses generally see supra §§ 408–482.
Right or authority of purchaser to repair see infra § 495.
Violation of restrictions see infra § 497.

39. Bassick Mfg. Co. v. Auto Equipment Co., 13 F. (2d) 463; Union Special Mach. Co. v. Maimin, 161 Fed. 748 [aff 165 Fed. 440, 91 CCA 384].

[a] **Refusal of patentee** to furnish device does not authorize infringement. Masseth v. Reiber, 59 Fed. 614.

[b] **Authority not shown.**—Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957.

40. Morris v. Texas Working Barrel Mfg. Co., 13 F. (2d) 977; Richmond Screw Anchor Co. v. Bethlehem Steel Bridge Corp., 287 Fed. 94; Luten v. MacAfee, 206 Fed. 175; Foster Hose Supporter Co. v. Thomas P. Taylor Co., 189 Fed. 407 [aff 191 Fed. 1003, 111 CCA 667]; Goshen Rubber Works v. Single Tube Auto., etc., Tire Co., 166 Fed. 431, 92 CCA 183; Thomson-Houston Electric Co. v. Illinois Tel. Constr. Co., 152 Fed. 631, 81 CCA 473; Holmes v. Kirkpatrick, 133 Fed. 232, 66 CCA 286; Hanifen v. Lupton, 101 Fed. 462, 41 CCA 462; American Graphophone Co. v. Talking-Mach. Co., 98 Fed. 729, 39 CCA 245; Pelzer v. Binghamton, 95 Fed. 823, 37 CCA 288; Sprague Electric R., etc., Co. v. Nassau Electric R. Co., 95 Fed. 821, 37 CCA 286; Blakey v. National Mfg. Co., 95 Fed. 136, 37 CCA 27; Dibble v. Augur, 7 F. Cas. No. 3,879, 7 Blatchf. 86; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232.

[a] **Equitable owner** of the patent is not an unauthorized user. Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506.

41. Dable Grain Shovel Co. v. Flint, 137 U. S. 41, 11 SCt 8, 34 L. ed. 618; Wade v. Metcalfe, 129 U. S. 202, 9 SCt 271, 32 L. ed. 661 [aff 16 Fed. 130]; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. ed. 102; Peck v. Standard Parts Co., 282 Fed. 443 [certiorari granted 260 U. S. 719 mem, 43 SCt 248 mem, 67 L. ed. 480 mem]; Federal Constr. Co. v. Park Impr. Co., 166 Fed. 128; Pardy v. J. D. Hooker Co., 148 Fed. 631, 78 CCA 403; Campbell v. New York, 35 Fed. 504, 1 LRA 48; Duffy v. Reynolds, 24 Fed. 855; Fowell v. Chown, 25 Ont. 1.

[a] **Statutory statement of rule** see U. S. Rev. St. § 4899; Pat. Act, Can. Rev. St. c 61 § 61.

[b] **Articles properly obtained before patent** may be used after extension. Paper Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Simpson v. Wilson, 4 How. (U. S.) 709, 11 L. ed. 1169; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141.

42. Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165; Columbia, etc., R. Co. v. Chandler, 241 Fed. 261, 154 CCA 181; Evans v. Weiss, 8 F.

tend to further manufacture after the issuance of the patent,[43] unless such manufacture is with the knowledge and consent of the owner of the patent.[44]

[§ 492] **(3) Knowledge or Intent of Infringer.** Generally speaking, the motive or intent with which an alleged act of infringement is committed is immaterial,[45] except as bearing upon the amount of damages recoverable;[46] a person who is otherwise an infringer is no less so because he does not intend to infringe;[47] and, on the other hand, where a machine, article, or apparatus does not infringe, infringement cannot be predicated upon an intent to infringe,[48] and it is immaterial whether the lack of infringement results from accident or deliberation.[49] However, intent is an element of contributory infringement,[50] and the making or using of a patented invention merely for experimental purposes, without any intent to derive profit or practical advantage therefrom, is not infringement.[51] It is immaterial whether an infringer knows or is ignorant of the fact that the article manufactured or sold infringes a patent;[52] he is chargeable with knowledge of the infringing acts;[53] and a person may infringe a patent without having any actual knowledge of its existence.[54] It is not incumbent upon a patentee to warn infringers,[55] unless he wishes to recover damages, in which case he is required by statute to mark the article "patented" or give notice of the patent and its infringement to the infringers.[56]

[§ 493] **(4) Acts—(a) In General.** Broadly speaking, the infringement of a patent may consist of any one, two, or all three[57] of the acts of making,[58] using,[59] or selling[60] the patented invention without authority from the owner of the patent.[61] Conversely, there is no infringement unless one of these acts is committed.[62]

[§ 494] **(b) Making.**[63] Although unaccompanied by use or sale, the unauthorized making of a patented invention for sale, profit, or practical use constitutes infringement of the patent;[64] but the making of a patented invention merely as a bona fide experiment and without any intent to sell it or use it for profit is not infringement.[65] A purchaser of a patented machine has no right to use a portion thereof to complete the manufacture of another machine within the scope of the patent.[66]

Making for sale abroad is infringement.[67]

Cas. No. 4,572, 1 Robb Pat. Cas. 10, 2 Wash. C. C. 342 [aff 9 Cranch (U. S.) 199, 3 L. ed. 704]; Hovey v. Stevens, 12 F. Cas. No. 6,745, 2 Robb Pat. Cas. 479, 1 Woodb. & M. 290. Compare Victor Sporting Goods Co. v. Harold A. Wilson Co., 7 Ont. L. 570, 3 OntWR 496 [allowing app 2 OntWR 465] (where defendant purchased a sample from plaintiff, the rule applies to articles manufactured by defendant in accordance with the sample without plaintiff's consent).

[a] **Purchase from wrongdoer** does not bring the case within the rule. Pierson v. Eagle Screw Co., 19 F. Cas. No. 11,156, 2 Robb Pat. Cas. 268, 3 Story 402.

43. Smalley v. Auto Specialists, Inc., 7 F. (2d) 710; Fowell v. Chown, 25 Ont. 71.

44. Ford Motor Co. v. K. W. Ignition Co., 278 Fed. 373 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem].

45. Kawneer Mfg. Co. v. Toledo Plate, etc., Glass Co., 232 Fed. 362 [aff 237 Fed. 364, 150 CCA 378]; Timken v. Olin, 41 Fed. 169; Hawes v. Washburne, 11 F. Cas. No. 6,242; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Unwin v. Heath, 16 C. B. 713, 81 ECL 713, 139 Reprint 939; Stead v. Anderson, 4 C. B. 806, 56 ECL 806, 136 Reprint 724, 20 ERC 610; Heath v. Unwin, 15 Sim. 552, 38 EngCh 552, 60 Reprint 733.

Intent to make infringing device imperfect or defective see infra § 503.

46. See infra § 628.

47. C. F. Mueller Co. v. A. Zeregas Sons, 12 F. (2d) 517; Corrugated Fiber Co. v. Paper Working Machines Co., 259 Fed. 283; Thompson v. N. T. Bushnell Co., 96 Fed. 238, 37 CCA 456 [rev 88 Fed. 81]; MacKnight v. McNiece, 64 Fed. 115; Timken v. Olin, 41 Fed. 169; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Stead v. Anderson, 4 C. B. 806, 56 ECL 806, 136 Reprint 724, 20 ERC 610; Heath v. Unwin, 15 Sim. 552, 38 EngCh 552, 60 Reprint 733; Harvey v. Murray, 6 Newfoundl. 183.

[a] **That infringement is accidental is no excuse.**—C. F. Mueller Co. v. A. Zeregas Sons, 12 F. (2d) 517; Thompson v. N. T. Bushnell Co., 96 Fed. 238, 37 CCA 456.

48. Baltimore, etc., R. Co. v. Walter S. Newhall Co., 274 Fed. 889 [rev 258 Fed. 650]; Stead v. Anderson, 4 C. B. 806, 56 ECL 806, 136 Reprint 724, 20 ERC 610.

49. F. N. Burt Co. v. Ritchie, 251 Fed. 909.

50. See infra § 516.

51. See infra §§ 494, 496.

52. National Cash-Register Co. v. Leland, 94 Fed. 502, 37 CCA 372 [certiorari den 175 U. S. 724 mem, 20 SCt 1021 mem, 44 L. ed. 337 mem]; Wright v. Hitchcock, L. H. 5 Exch. 37.

53. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)].

54. Jost v. Borden Stove Co., 285 Fed. 626; Tubular Rivet, etc., Co. v. O'Brien, 93 Fed. 200; Pirkl v. Smith, 42 Fed. 410 [app dism 154 U. S. 517 mem, 14 SCt 1153 mem, 38 L. ed. 1082 mem]; Bate Refrigerating Co. v. Gillett, 31 Fed. 809; Jacobs v. Hamilton County, 13 F. Cas. No. 7,161, 1 Bond 500, 4 Fish. Pat. Cas. 81; Matthews v. Skates, 16 F. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Unwin v. Heath, 16 C. B. 713, 81 ECL 713, 139 Reprint 939; Walton v. Lavater, 8 C. B. N. S. 162, 98 ECL 162, 141 Reprint 1127; Curtis v. Platt, 11 L. T. Rep. N. S. 245.

[a] **An erroneous decision holding patent void** does not relieve other infringers from liability. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664.

Record of patent as notice see supra § 273.

55. Proctor v. Bennis, 36 Ch. D. 740.

56. See infra § 529.

57. Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Haarman-De Laire-Schaefer Co. v. Van Dyk, 165 Fed. 934 [aff 169 Fed. 1021, 94 CCA 666]; Tuttle v. Matthews, 28 Fed. 98; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Locomotive Engine Safety Truck Co. v. Erie R. Co., 15 F. Cas. No. 8,453, 1 Bann. & A. 470, 10 Blatchf. 292 [rev on other grounds 110 U. S. 490, 4 SCt 220, 28 L. ed. 222]; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1; Braun v. McGuire, 201 Cal. 134, 140, 255 P 808 [cit Cyc]; British Motor Syndicate, Ltd. v. Taylor, [1901] 1 Ch. 122.

[a] **Distinct acts.**—"(1) Making, (2) selling, or (3) using a device embodying a patented invention, without leave of the patentee, are entirely distinctive acts of invasion or trespass." Christensen v. National Brake, etc., Co., 18 F. (2d) 981.

Applications of rule see infra §§ 494, 496, 497.

58. See infra § 494.

59. See infra § 496.

60. See infra § 497.

61. See supra § 491.

62. George Close Co. v. Ideal Wrapping Mach. Co., 29 F. (2d) 533; Governform Corp. v. Terry, 4 F. (2d) 894.

63. **Making parts:**
As contributory infringement see infra § 518.
For repair or replacement see infra § 495.

64. Carter Crume Co. v. American Sales Book Co., 124 Fed. 903; Page Woven Wire Fence Co. v. Land, 49 Fed. 936; Ketchum Harvester Co. v. Johnson Harvester Co., 8 Fed. 586, 19 Blatchf. 367; Bloomer v. Gilpin, 3 F. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Whittemore v. Cutter, 29 F. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28.

[a] **Thus** (1) it is an infringement to make for use, although the invention is not used (General Electric Co. v. Condit Electrical Mfg. Co., 191 Fed. 511 [aff 196 Fed. 42, 115 CCA 634]; Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co., 36 Fed. 191; Bloomer v. Gilpin, 3 F. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512), (2) or is not used by the maker (Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378), (3) or is used, or intended to be used, in some way other than that suggested by the patentee (General Electric Co. v. Condit Electrical Mfg. Co., supra). (4) Also it is an infringement to make for sale, although no sale is actually effected. Bloomer v. Gilpin, supra; Carter v. Baker, supra; Oxley v. Holden, 8 C. B. N. S. 666, 98 ECL 666, 141 Reprint 1327.

65. Bonsack Mach. Co. v. Underwood, 73 Fed. 206; Standard Measuring Mach. Co. v. Teague, 15 Fed. 390; Frearson v. Loe, 9 Ch. D. 48. Compare Albright v. Celluloid Harness Trimming Co., 1 F. Cas. No. 147, 2 Bann. & A. 629 (such making is a technical infringement).

Experimental use see infra § 496.

66. National Cash Register Co. v. Grobet, 153 Fed. 905, 82 CCA 651.

67. K. W. Ignition Co. v. Temco Electric Motor Co., 283 Fed. 873 [certiorari den 260 U. S. 746 mem, 43 SCt 247 mem, 67 L. ed. 493 mem;

[§ 495] **(c) Repair or Reconstruction.**[68] The purchaser of a patented machine has a right to repair it or replace lost, broken, injured, or worn-out parts, not separately patented, so long as the identity of the machine is not destroyed.[69] He may not, however, under the guise or pretext of repairs, and without the consent of the owner of the patent, reconstruct or rebuild a worn-out machine,[70] replace parts or elements which are not worn out,[71] or replace or reconstruct a part or element which is patented separately.[72] Where none of the parts or elements are quickly perishable or consumable, no one can be replaced without infringing the patent.[73] Frequently difficulty is encountered in applying the

Ketchum Harvester Co. v. Johnson Harvester Co., 8 Fed. 586, 19 Blatchf. 367; British Motor Syndicate, Ltd. v. Taylor, [1901] 1 Ch. 122; Goucher v. Clayton, 11 Jur. N. S. 462.

68. Implied license from purchase see supra § 412.

69. Heyer v. Duplicator Mfg. Co., 263 U. S. 100, 44 SCt 31, 68 L. ed. 189 [rev 284 Fed. 242]; Chaffee v. Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; Wilson v. Simpson, 9 How. (U. S.) 109, 13 L. ed. 66; Ideal Wrapping Mach. Co. v. George Close Co., 23 F. (2d) 848 [aff 29 F. (2d) 533]; Ellett v. Klein, 22 F. (2d) 807; C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380; Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957; Connecticut Tel., etc., Co. v. Brown, 10 F. (2d) 823; Pyle Nat. Bank v. Oliver Electric Mfg. Co., 281 Fed. 632 [certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem]; Foglesong Mach. Co. v. J. D. Randall Co., 239 Fed. 893, 153 CCA 21; Slocomb v. A. C. Layman Mach. Co., 227 Fed. 94 [aff 230 Fed. 1021, 144 CCA 286 (certiorari den 242 U. S. 635 mem, 37 SCt 18 mem, 61 L. ed. 539 mem)]; J. M. Burguieres Co. v. Deming Apparatus Co., 224 Fed. 956, 140 CCA 528; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626; O'Rourke Engineering Constr. Co. v. McMullen, 150 Fed. 338 [rev on other grounds 160 Fed. 933, 88 CCA 115 (certiorari den 210 U. S. 435, 28 SCt 763, 52 L. ed. 1136)]; Morrin v. Robert White Engineering Works, 138 Fed. 68 [mod on other grounds 143 Fed. 519, 74 CCA 466]; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692; Alaska Packers' Assoc. v. Pacific Steam Whaling Co., 93 Fed. 672 [aff 100 Fed. 462, 40 CCA 494]; Shickle, etc., Iron Co. v. St. Louis Car-Coupler Co., 77 Fed. 739, 23 CCA 433 [certiorari den 166 U. S. 720 mem, 17 SCt 998 mem, 41 L. ed. 1186 mem]; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 CCA 1; Young v. Foerster, 37 Fed. 203 [app dism 159 U. S. 272 mem, 15 SCt 1044 mem, 40 L. ed. 138 mem]; Singer Mfg. Co. v. Springfield Fdy. Co., 34 Fed. 393; Gottfried v. Conrad Seipp Brewing Co., 8 Fed. 322, 10 Biss. 368; Aiken v. Manchester Print Works, 1 F. Cas. No. 113, 2 Cliff. 435; Bicknell v. Todd, 3 F. Cas. No. 1,389, Fish. Pat. R. 452; Farrington v. Detroit Water Comrs, 8 F. Cas. No. 4,687, 4 Fish. Pat. Cas. 216; Steam Cutter Co. v. Sheldon, 22 F. Cas. No. 13,331, 10 Blatchf. 1, 5 Fish. Pat. Cas. 477; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 24 F. Cas. No. 14,369, 2 Bann. & A. 593.

"Where a machine is patented as a whole, one who acquires, as by purchase, the right to use, but not the right to construct it, may, so long as the identity of the machine is not destroyed, make repairs or replace the worn-out parts, particularly the quickly-wearing parts, without which, notwithstanding the substantial character of the machine as a whole, it would be useless to the purchaser for more than a very limited time." C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380.

"When one has manufactured and sold a patented device or machine on the market, the purchaser or owner may, as necessity therefor demands, repair or cause to be repaired the broken or worn-out parts of such patented machine without trespassing upon the rights of the owner of the letters patent under which the machine was manufactured." Pyle Nat. Bank v. Oliver Electric Mfg. Co., 281 Fed. 632, 633 [certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem].

[a] **Durable or perishable elements.**—"Durable parts and elements may be mended or repaired, but not replaced, and quickly perishable or consumed elements may be replaced." Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331, 340.

Right of purchaser to use machine until worn out see infra § 496.

70. Wilson v Simpson, 9 How. (U. S.) 109, 13 L. ed. 66; George Close Co. v. Ideal Wrapping Mach. Co., 29 F. (2d) 533; Ideal Wrapping Mach. Co. v. George Close Co., 23 F. (2d) 848 [aff 29 F. (2d) 533]; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380; Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957; Morrin v. Robert White Engineering Works, 138 Fed. 68 [mod on other grounds 143 Fed. 519, 74 CCA 466]; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692; Pacific Steam Whaling Co. v. Alaska Packers' Assoc., 100 Fed. 462, 40 CCA 494 [aff 93 Fed. 672]; Shickle, etc., Iron Co. v. St. Louis Car-Coupler Co., 77 Fed. 739, 23 CCA 433 [certiorari den 166 U. S. 720 mem, 17 SCt 998 mem, 41 L. ed. 1186 mem]; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 CCA 1; Davis Electrical Works v. Edison Electric Light Co., 60 Fed. 276, 8 CCA 615 [aff 58 Fed. 878]; Bicknell v. Todd, 3 F. Cas. No. 1,389, Fish. Pat. R. 452, 5 McLean 236; Goodyear Dental Vulcanite Co. v. Preterre, 10 F. Cas. No. 5,596, 3 Bann. & A. 471, 15 Blatchf. 274; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No. 5,633, 5 Bann. & A. 4; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 24 F. Cas. No. 14,369, 2 Bann. & A. 593; Wortendyke v. White, 30 F. Cas. No. 18,050, 2 Bann. & A. 25; Baldwin v. Sibley, 2 F. Cas. No. 805, 1 Cliff. 150; Dunlop Pneumatic Tyre Co. v. Neal, [1899] 1 Ch. 807.

[a] **What constitutes reconstruction or rebuilding.**—(1) "Substantial reconstruction is sufficient to make the act one of rebuilding, instead of repair or replacement." C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380, 381. (2) "The substitution of the vital and distinctively new part of the combination, if the whole invention resides substantially in such part, is a reconstruction of the machine." C. & R. Research Corp. v. Write, Inc., supra. (3) The forbidden realm of reconstruction is invaded where repairs are so extensive as to result in a new and different machine and a loss of identity of the original machine. Ideal Wrapping Mach. Co. v. George Close Co., 23 F. (2d) 848 [aff 29 F. (2d) 533].

[b] **Acts constituting infringement.**—Changing and reconstructing patented machines and selling them under a different name is infringement. National Phonograph Co. v. Fletcher, 117 Fed. 149.

[c] **Ordinary infringement distinguished.**—"A purchaser stands in no different position from an ordinary infringer, except in the circumstance that he has bought a patented machine, and, consequently, his infringement does not consist in the construction of a wholly new machine, but in the reconstruction of such machine after it is worn out or substantially destroyed. The essence of the infringement is the same in both cases. The ordinary infringer makes the entire patented machine; the infringing purchaser begins with what remains of the patented machine, and rebuilds it. To show infringement in the case of an ordinary infringer, where the patented invention comprises several elements in combination, it is necessary to prove that the alleged infringing machine contains all the elements (or their equivalents) which make up the combination, although some of the elements may not be material, or of the essence of the invention. To show infringement by the purchaser in such a case, the same strictness of proof is not required, for the reason that it may not be necessary for him to make the immaterial or unessential elements of the patented combination, because they may not be worn out or destroyed in his machine when the work of reconstruction begins." Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 148, 50 CCA 159, 55 LRA 692.

[d] **Contributory infringement distinguished.**—(1) "Infringement by the purchaser of a patented machine consists in the substantial rebuilding of such machine. A contributory infringer necessarily only makes or sells a part of the patented invention. The purchaser of a patented machine, in order to infringe, must make or reproduce, in substance, the whole patented invention. To prove infringement, in one case, it is only necessary to show a partial infringement in aid of an unlawful complete infringement, while in the other case a substantially full and complete infringement must be established." Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 148, 50 CCA 159, 55 LRA 692. (2) Contributory infringement generally see infra §§ 516–519.

71. Connecticut Tel., etc., Co. v. Brown, 10 F. (2d) 823.

[a] **That repair is difficult,** costly, or inconvenient does not authorize the user to replace other elements not worn out where repair of the worn-out element is possible. Connecticut Tel., etc., Co. v. Brown, 10 F. (2d) 823.

72. C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626; Shickle, etc., Iron Co. v. St. Louis Car-Coupler Co., 77 Fed. 739, 23 CCA 433 [certiorari den 166 U. S. 720 mem, 17 SCt 998 mem, 41 L. ed. 1186 mem]; Singer Mfg. Co. v. Springfield Fdy. Co., 34 Fed. 393; Gottfried v. Conrad Seipp Brewing Co., 8 Fed. 322, 10 Biss. 368; Aiken v. Manchester Print Works, 1 F. Cas. No. 113, 2 Cliff. 435.

"The purchaser may not reconstruct a separately patented part or element of the machine without the consent of the owner of the patent for such part, for such reconstruction would constitute a making of the thing covered by the separate patent, notwithstanding it might properly be considered a repair, when viewed from the standpoint of the machine as a whole." C. & R. Research Corp. v. Write, Inc., 19 F. (2d) 380, 381.

73. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331.

[a] **Reason for rule** is that to allow the replacement of any part would, if carried to its logical conclusion, allow the replacement of all parts, from time to time, and thus extend the life of the machine indefinitely and far beyond its natural and normal life in service. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331.

foregoing rules[74] and in distinguishing between legitimate repairs and substantial reconstruction;[75] and it is said that no general rule can be laid down by which to determine the line of demarcation between legitimate repairs which a purchaser of a patented machine may rightfully make thereon, and a reconstruction or reproduction which will constitute infringement;[76] each case must in that regard be decided on its own facts,[77] having reference to the scope and purpose of the invention[78] and the fair and reasonable intention of the parties.[79]

By purchaser of parts. A purchaser of a patented machine or article which has been dismantled or taken to pieces has no right to reconstruct the machine or article by assembling the parts thereof or otherwise.[80]

Making or supplying parts for repairs or replacements.[81] The rights of a maker of, or dealer in, parts of a patented device, other than the owner of the patent or a person authorized by him, correspond with,[82] but cannot exceed,[83] the rights of the owner and user of the device. Such repairs or replacements as the owner of the machine or device is entitled to make[84] may, at his instance, be made for, or be furnished or supplied to, him by another person;[85] but no one, under the guise or claim of merely furnishing needed repair parts to a patented article or machine, may in fact remake the patented device or machine in competition with, or in violation of, the rights of the owner of the patent;[86] the supplying of a nonperishable element to a user is infringement;[87] and a person is an infringer where he repairs an infringing article, machine, or device.[88] An assembly unit or component part made up of smaller parts cannot be rightfully made or marketed by a third person,[89] unless all the smaller parts making the assembly are needed at one time for the purpose of immediate repair.[90]

Patented process cannot be used in repairing.[91]

[§ 496] **(d) Use.**[92] A patent is infringed by the unauthorized use of the patented invention, even though it was made by a third person,[93] or by a use for personal benefit or convenience without a sale.[94] Infringement is not avoided by imperfectly practicing or using the invention;[95] refraining from confiscating the whole value of the patented device;[96] using the patented machine or device only part of the time[97] or to accomplish only part of the results it was intended to accomplish;[98] or, except where the patent covers merely a particular combination of elements,[99] by using only part of the invention embraced within the patent.[1] The use of an invention for an analogous purpose is infringement,[2] but use for a nonanalogous purpose, where invention is necessary to procure its adaptability, is not infringe-

74. Shickle, etc., Iron Co. v. St. Louis Car-Coupler Co., 77 Fed. 739, 23 CCA 433 [certiorari den 166 U. S 720 mem, 17 SCt 998 mem, 41 L. ed. 1186 mem].

75. Electro Bleaching Gas Co. v. Miller, 264 Fed. 429 [rev on other grounds 276 Fed. 379 (certiorari den 257 U S 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)].

76. Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692.

77. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F (2d) 331; Morrin v. Robert White Engineering Works, 143 Fed. 519, 74 CCA 466 [mod 138 Fed. 68]; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692.

78. Goodyear Shoe Mach. Co. v. Jackson, supra.

79. Goodyear Shoe Mach. Co. v. Jackson, supra. But see Ideal Wrapping Mach. Co. v George Close Co., 23 F. (2d) 848, 850 [aff 29 F. (2d) 533] ("The patentee has no interest in the reason for the change, whether it be due to a wearing-out of the machine or to a desire on the purchaser's part for a different machine. The prohibition applies to the change itself, not to the state of the purchaser's mind in ordering the change").

80. American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 1 SCt 52, 27 L. ed 79; Tindel-Morris Co. v. Chester Forging, etc., Co., 163 Fed. 304 [aff 165 Fed. 899, 91 CCA 577]; Wortendyke v. White, 30 F. Cas. No. 18,050, 2 Bann. & A. 25.

Use of reconstructed machine or article see infra § 496

81. Making or selling parts as contributory infringement see infra § 518.

82. Heyer v. Duplicator Mfg. Co., 263 U. S. 100, 44 SCt 31, 68 L. ed. 189 [rev 284 Fed. 242]; Connecticut Tel., etc., Co v. Automotive Equipment Co., 14 F. (2d) 957

83. Connecticut Tel., etc., Co. v. Automotive Equipment Co., supra.

84. See supra text and note 69.

85. Pyle Nat. Bank v. Oliver Electric Mfg. Co., 281 Fed. 632 [certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem]; Morgan Gardner Electric Co. v. Buettner, etc., Mach. Co., 203 Fed. 490, 121 CCA 612; Morrin v. Robert White Engineering Works, 143 Fed. 519, 74 CCA 466 [mod 138 Fed. 68].

[a] **"Any one** has a right to furnish supplies for a legitimate repair, or for replacing any element rapidly consumed or deteriorated in the normal or expected use of the combination constituting the invention of the patent." Bassick Mfg. Co. v. Larkin Auto. Parts Co., 19 F. (2d) 939, 942 (so stating, but holding that the parts in question were not perishable or rapidly consumed in use within the meaning of the rule).

86. Pyle Nat Bank v. Oliver Electric Mfg. Co., 281 Fed. 632 [certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem].

87. Belknap v. Wallace Addressing Mach. Co., 12 F. (2d) 597 [certiorari den 271 U. S 678 mem, 46 SCt 630 mem, 70 L. ed. 1147 mem].

88. Union Special Mach. Co. v. Maimin, 161 Fed. 748 [aff 165 Fed. 440, 91 CCA 384].

89. Bassick Mfg. Co. v Larkin Auto. Parts Co., 19 F. (2d) 939, Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957.

[a] **Rule applies** notwithstanding the patentee or owner of the patent has (1) advertised such an assembly unit (Connecticut Tel., etc., Co. v. Brown, 10 F. (2d) 823), (2) or has made and sold such an assembly and subsequently withdrawn it from the market (Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957). (3) Also the rule applies where the repair of the defective part is mechanically possible, although difficult or expensive. Connecticut Tel., etc., Co. v. Automotive Equipment Co., supra.

90. Connecticut Tel., etc., Co. v. Automotive Equipment Co., supra.

91. Goodyear Dental Vulcanite Co. v. Preterre, 10 F. Cas. No. 5,596, 3 Bann. & A. 471, 15 Blatchf. 274.

92. Use:
By government see United States [39 Cyc 754].
Of steps of process see infra § 513.

93. Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Hawes v. Washburne, 11 F. Cas. No. 6,242.

94. Beedle v. Bennett, 122 U. S. 71, 7 SCt 1090, 30 L. ed. 1074; United Nickel Co. v. Central Pac. R. Co., 36 Fed. 186; Andrews v. Cross, 8 Fed. 269, 19 Blatchf. 214.

95. Gibbs v. Triumph Trap Co., 26 F. (2d) 312; Wm. B. Scaife, etc., Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 CCA 304 [rev 194 Fed. 139].

Inferiority of infringing device see infra § 503.

96. Ellett v. Klein, 22 F. (2d) 807.

97. Wright Co. v. Herring-Curtiss Co., 211 Fed. 654, 128 CCA 158 [aff 204 Fed. 597]; Wright Co. v. Paulham, 177 Fed. 261 [rev on other grounds 180 Fed. 112, 103 CCA 32].

98. Walker v. Lakewood Engineering Co., 14 F. (2d) 333; Wills v. Scranton Cold Storage Co., 147 Fed. 525 [aff 153 Fed. 181, 82 CCA 355].

99. See infra § 512.

1. Union Tool Co. v. Wilson, 249 Fed 736, 161 CCA 646 [aff 237 Fed. 847, and certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem]; Union Tank Line Co. v. American Car, etc., Co., 202 Fed. 503; Blake v. Smith, 3 F. Cas. No. 1,502; Foss v Herbert, 9 F Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Smith v. London, etc., R. Co., 2 E. & B. 69, 75 ECL 69, 118 Reprint 694.

[a] **Use to substantial, although not full, extent is infringement.**—Carson Inv. Co. v Anaconda Copper Min. Co., 26 F. (2d) 651 [certiorari den 49 SCt 32 mem].

[b] **Where patent covers several machines** working to a common end, the use of one alone is an infringement. Western Well Works v. Layne, etc., Corp., 276 Fed. 465 [certiorari granted 258 U. S. 615 mem, 42 SCt 315 mem, 66 L. ed. 792 mem (certiorari dism 261 U. S. 387, 43 SCt 422, 67 L. ed. 712)]; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 982; Emerson v. Hogg, 8 F. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. R. 77; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

Omission of element see infra § 506.

2. Sanitary Fireproofing, etc., Co. v. Sprickerhoff, 139 Fed. 801, 71 CCA 565; Westinghouse Electric, etc., Co. v. Roberts, 125 Fed. 6; Williams Patent Crusher, etc., Co. v. St. Louis Pulverizer Co., 104 Fed. 795; Red Jacket Mfg. Co. v. Davis, 82 Fed. 432, 27 CCA 204; Long v. Pope Mfg. Co., 75 Fed. 835, 21 CCA 533; Thompson

ment.[3] A mere proposal or intent to use, not followed by actual use, does not constitute infringement.[4] Also, mere possession not coupled with actual use does not constitute infringement.[5]

Place of use. Infringement may exist where some benefit is derived from patented articles while they are within the country covered by the patent,[6] even though they are only temporarily in the country and are to be transshipped to foreign parts,[7] and even though the use thereof is passive rather than active.[8] Also, a use of a patented article within the country covered by the patent without authority from the patentee constitutes infringement, even though the article was purchased in another country from a foreign patentee or person authorized by him to make the sale.[9] On the other hand, a use in another country, beyond the protection of the patent, is not infringement.[10] Use on a domestic vessel at sea is infringement;[11] but use on a foreign vessel in a domestic port is not.[12]

Experimental use of a patented invention for the sole purpose of gratifying curiosity or a philosophical taste, or for mere amusement, is not an infringement.[13] This rule, however, cannot be invoked for the protection of one who uses a patented invention commercially,[14] as in the course of business[15] or for profit.[16] Indeed, if the use is of advantage to the user, it need not necessarily be profitable in order to fall without the rule permitting experimental use.[17]

Use by purchaser or licensee. A person who has purchased a patented article or machine from the owner of the patent has a right to use it[18] until it is worn out[19] or has lived its normal life in service,[20] and where he has purchased without restrictions he is entitled to make any use thereof he deems fit;[21] but where a person has acquired a patented machine or device subject to, or with knowledge of, restrictions upon its use, a violation of such restrictions by him,[22] or by any person with actual knowledge thereof,[23] constitutes infringement; and a person who is without right to reconstruct a patented machine or article by assembling parts which he has purchased[24] has no right to use the machine or article so reconstructed by him.[25] Except in some jurisdictions,[26] where a patent covers a process merely and not the product thereof, a purchaser and user of an article or product made by infringing the process is not an infringer.[27] Also, a person who merely entered into a bona fide agreement to purchase all the articles which another might be able to make, within a limited period of time, with any machine which the latter might choose to employ, cannot be held to have used a patented machine in violation of the rights of the patentee.[28]

Use of building containing patented part. It is

v. Gl'dersleeve, 34 Fed. 43; Cincinnati Ice-Mach. Co. v. Foss Schneider Brewing Co., 31 Fed. 469; Zinn v. Weiss, 7 Fed. 914; American Wood-Paper Co. v. Fibre Disintegrating Co., 1 F. Cas. No. 320, 6 Blatchf. 27, 3 Fish Pat. Cas. 362 [aff 23 Wall. 566, 23 L. ed. 31]; Mabie v. Haskell, 15 F. Cas No. 8,653, 2 Cliff. 507; Pike v. Potter, 19 F. Cas. No. 11,162, 3 Fish. Pat. Cas. 55; Young v. Lippman, 30 F. Cas. No. 18,160, 9 Blatchf. 277, 5 Fish. Pat. Cas. 230; Cannington v. Nuttal', L. R. 5 H. L. 205.

3. Cary Mfg. Co. v. Standard Metal Strap Co., 120 Fed. 945, 57 CCA 235; Johnson v. McCurdy, 108 Fed. 671, 47 CCA 577; Thomson Meter Co. v. National Meter Co., 106 Fed. 519; Palmer v. De Yongh, 90 Fed. 281; MacColl v. Knowles Loom Works, 87 Fed. 727 [aff 95 Fed. 982, 37 CCA 346]; Heap v. Tremont, etc., Mills, 82 Fed. 449, 27 CCA 316; Boston, etc., Electric St. R. Co. v. Bemis Car Box Co., 80 Fed. 287, 25 CCA 420; Long v. Pope Mfg. Co., 75 Fed. 835, 21 CCA 533; Hoe v. Knap, 27 Fed. 204; Osmer v. J. B. Sickles Saddlery Co., 23 Fed. 724 [app dism 131 U. S. 442 mem, 9 SCt 801 mem, 33 L. ed. 216 mem]; Judd v. Babcock, 8 Fed. 605; Brown v. Rubber Step Mfg. Co., 4 F. Cas. No. 2,028, 3 Bann. & A. 232; Stuart v. Shantz 23 F. Cas. No. 13,556, 6 Fish. Pat. Cas. 35; Tathan v. Le Roy, 23 F. Cas. No. 13,762; Higgs v. Goodwin, E. B. & E. 529, 96 ECL 529, 120 Reprint 606.

4. Luten v. Lee, 206 Fed. 904.

Injunction against use see infra § 594.

5. British United Shoe Mach. Co. v. Collier, 26 T. L. R. 587.

6. Betts v. Neilson, 3 De G. J. & S. 82, 68 EngCh 63, 46 Reprint 569.

7. Betts v. Neilson, supra.

8. Betts v. Neilson, supra.

9. Daimler Mfg. Co. v. Conklin, 170 Fed. 70, 95 CCA 346, 27 LRANS 534 [certiorari den 216 U. S. 621, 30 SCt 575, 54 L. ed. 641].

Use by purchaser generally see infra text and notes 18–28.

10. Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co., 129 Fed. 105, 63 CCA 607 [certiorari den 194 U. S. 636 mem, 24 SCt 859 mem, 48 L. ed. 1160 mem].

11. Gardiner v. Howe, 9 F. Cas. No. 5,219, 2 Cliff. 462.

12. Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. ed. 595. And see Marconi Wireless Tel. Co. v. Canadian Car, etc., Co., 61 Can. S. C. 78 [dism app 19 Can. Exch. 311] (mere installation in a foreign vessel under contion in a domestic port is not struction in a infringement, as it is either not a use or, if so, it is within a statute providing that no patent shall prevent the use of an invention in a foreign ship or vessel).

13. Bonsack Mach. Co. v. Underwood, 73 Fed. 206; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181. Compare Albright v. Celluloid Harness Trimming Co., 1 F. Cas. No. 147, 2 Bann. & A. 629 (such use is technically an infringement).

[a] **Exhibition as model or illustration is not infringement.**—Standard Measuring Mach. Co. v. Teague, 15 Fed. 390.

Experimental making see supra § 494.

14. U. S. Mitis Co. v. Carnegie Steel Co., 89 Fed. 343 [aff 90 Fed. 829, 33 CCA 387].

15. U. S. Mitis Co. v. Carnegie Steel Co., supra; Cimiotti Unhairing Co. v. Derbeklow, 87 Fed. 997; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62.

16. U. S. Mitis Co. v. Carnegie Steel Co., 89 Fed. 343 [aff 90 Fed. 829, 33 CCA 387]; Bonsack Mach. Co. v. Underwood 73 Fed. 206.

17. United Tel. Co. v. Sharples, 29 Ch. D. 164.

[a] **Use by teacher for instruction** is infringement. United Tel. Co. v. Sharples, 29 Ch. D. 164.

[b] **Use by United States army** of a large quantity of patented articles for "huge experiment" is infringement. Palmer v. U. S., 20 Ct. Cl. 432 [aff 128 U. S. 262, 9 SCt 104, 32 L. ed. 442].

18. National Cash Register Co. v. Grobet, 153 Fed. 905, 82 CCA 651.

Implied license from purchase see supra § 412.

Place of use see supra text and note 9.

19. Chaffee v. Boston Belting Co., 22 How. (U. S.) 217, 16 L. ed. 240; Wilson v. Simpson, 9 How. (U. S.) 109, 13 L. ed. 66; Ideal Wrapping Mach. Co. v. George Close Co., 23 F. (2d) 848 [aff 29 F. (2d) 533]; J. M. Burguieres Co. v. Deming Apparatus Co., 224 Fed. 956, 140 CCA 528; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692; Shickle, etc., Iron Co. v. St. Louis Car-Coupler Co., 77 Fed. 739, 23 CCA 433 [certiorari den 166 U. S. 720 mem, 17 SCt 998 mem, 41 L. ed. 1186 mem]; Day v. Union India-Rubber Co., 7 F. Cas. No. 3,691, 3 Blatchf. 488 [aff 20 How. 216, 15 L. ed. 883]; May v. Chaffee, 16 F. Cas. No. 9,332, 2 Dill. 385, 5 Fish. Pat. Cas. 160; Spaulding v. Page. 22 F. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702.

20. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331, 340. "The purchaser of a patented machine, a combination of elements, from the patentee, has the right to use that machine until it has lived its normal life in service, long or short as the case may be." Bassick Mfg. Co. v. Ready Auto Supply Co., supra.

Right to repair see supra § 495.

21. Gerrard v. Carry, 9 F. (2d) 949 [aff 9 F. (2d) 957]; Sheridan-Clayton Paper Co. v. U. S. Envelope Co., 232 Fed. 153, 146 CCA 345.

22. Schrade v. Camillus Cutlery Co., 242 Fed. 523; Crown Cork, etc., Co. v. Standard Brewery, 174. Fed. 252; Crown Cork, etc., Co. v. Brooklyn Bottle Stopper Co., 172 Fed. 225 [mod on other grounds 200 Fed. 592, 119 CCA 20]; Hatton v. Copeland-Chatterson Co., 37 Can. S. C. 651.

Validity of restrictions or conditions see Monopolies § 115.

23. Commercial Acetylene Co. v. Autolux Co., 181 Fed. 387.

24. See supra § 495.

25. Tindel-Morris Co. v. Chester Forging, etc., Co., 163 Fed. 304 [aff 165 Fed. 899, 91 CCA 577].

26. Toronto Auer Light Co. v. Colling, 31 Ont. 18.

27. American Graphophone Co. v. Gimbel, 234 Fed. 361 [aff 240 Fed. 971, 974, 153 CCA 657, 660]; National Phonograph Co. v. Lambert Co., 125 Fed. 388 [aff 142 Fed. 164, 73 CCA 382]; Welsbach Light Co. v. Union Incandescent Light Co., 101 Fed. 131, 41 CCA 255; Ferris v. Batcheller, 70 Fed. 714; Durand v. Green, 60 Fed. 392 [aff 61 Fed. 819, 10 CCA 97]; Anonymous, 1 F. Cas. No. 477; Brown v. District of Columbia, 14 D. C. 502.

28. Keplinger v. De Young, 10 Wheat. (U. S.) 358, 6 L. ed. 341.

held that a tenant who merely occupies an entire building without moving, manipulating, or making any special or independent use of parts thereof containing patented features, such as slabs, floors, or columns, does not make such use of the patented invention as to constitute infringement;[29] but it is also held that the use of a building containing a patented floor by a person as owner and occupier after its construction constitutes infringement.[30]

[§ 497] **(e) Sale.** A sale constituting an infringement of a patent may consist of a single sale,[31] the giving away of infringing articles as premiums with other goods sold,[32] or a sale by a licensee which is beyond the terms of his license.[33] An unauthorized sale is an infringement, although the article was made by another person,[34] or, where the sale is in the country protected by the patent, although the article was manufactured in, and imported from, another country;[35] and infringement of the patent by sale of an infringing device or article cannot be evaded, or accountability therefor escaped, by a sale of the device or article in parts,[36] the giving of directions to the purchaser as to the use thereof,[37] or entire nonuse[38] or use by the seller or purchaser in some way other than that suggested by the patentee.[39] On the other hand, it is not infringement merely to expose to sale[40] or propose to sell;[41] nor is a sale by a sheriff on execution actionable infringement;[42] and a patent for a machine or process alone is not violated by a sale of the product of an infringing machine or process.[43] A sale in a country other than the one which granted the patent is not infringement.[44]

Time of sale. A sale is made, so as to constitute an act of infringement of a patent, when the contract of sale is made,[45] irrespective of the time of delivery.[46]

Resale. Ordinarily a buyer of a patented article, product, or machine made and sold under a valid license may resell without infringing;[47] but a resale in violation of restrictions imposed thereon constitutes infringement,[48] unless the restrictions are invalid.[49] It is an infringement to sell, in the country granting the patent, a patented article purchased or acquired in a foreign country from one not claiming under the domestic patentee;[50] but the sale, in the country granting the patent, of an article purchased abroad from the domestic patentee is not an infringement,[51] unless the purchase was coupled with a restriction forbidding use or sale in the country granting the patent;[52] and a resale abroad of an article purchased abroad does not infringe a domestic patent.[53]

[§ 498] **(5) Substantial Identity of Subject Matter—(a) In General.** A patent may be infringed where the essential or substantial features of the patented invention are taken or appropriated,[54] or the device, machine, or other subject matter alleged

29. Turner v. Quincy Market Cold Storage, etc., Co., 225 Fed. 41, 140 CCA 367.

30. First Slab Patents Co. v. Wright, etc., Co., 283 Fed. 345 (holding, without discussion, that there is no merit in the contention that such use does not constitute infringement).

31. Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 CCA 652.

32. Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co., 144 Fed. 429 [rev on other grounds 170 Fed. 965, 96 CCA 101].

33. L. E. Waterman Co. v. Kline, 234 Fed. 891, 148 CCA 489.

34. Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378.

35. Saccharin Corp. v. Anglo-Continental Chemical Works, [1901] 1 Ch. 414; Elmslie v. Boursier, L. R. 9 Eq. 217; Von Heyden v. Neustadt, 14 Ch. D. 230, 20 ERC 700.

Resale of article purchased abroad see infra text and notes 50–52.

36. Ellett v. Klein, 22 F. (2d) 807.

37. Johnston v. Davenport Brick, etc., Co., 237 Fed. 668.

38. General Electric Co. v. Condit Electrical Mfg. Co., 191 Fed. 511 [aff 196 Fed. 42, 115 CCA 634].

39. General Electric Co. v. Condit Electrical Mfg. Co., supra. And see Seager v. Stewart-Warner Speedometer Corp., 277 Fed. 824 (where the patented and infringing devices may both be applied to two different kinds of property, the fact that the infringing device has been sold for use on one kind of property and the patented device has not been applied to, or sold for use on, that kind of property does not avoid infringement).

40. Minter v. Williams, 4 A. & E. 251, 31 ECL 124, 111 Reprint 781.

Injunction against sale after advertising and offering to sell see infra § 594.

41. Van Kannell Revolving Door Co. v. Revolving Door, etc., Co., 293 Fed. 261.

42. Sawin v. Guild, 21 F. Cas. No. 12,391, 1 Gall. 485, 1 Robb Pat. Cas. 47.

43. Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; Simpson v. Wilson, 4 How. (U. S.) 709, 11 L. ed. 1169; Welsbach Light Co. v. Union Incandescent Light Co., 101 Fed. 131, 41 CCA 255; Boyd v. McAlpin, 3 F. Cas. No. 1,748, 3 McLean 427, 2 Robb Pat. Cas. 277; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356.

44. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398; Badische Anilin und Soda Fabrik v. Basle Chemical Works Bindschedler, [1898] A. C. 200, 20 ERC 703.

45. Toledo Metal Wheel Co. v. Foyer, 223 Fed. 350, 138 CCA 612.

46. Toledo Metal Wheel Co. v. Foyer, supra.

47. De Forest Radio Tel., etc., Co. v. Radio Corp. of America, 20 F. (2d) 598 [aff 9 F. (2d) 150]; Curtiss Aeroplane, etc., Corp. v. United Aircraft Engineering Corp., 266 Fed. 71.

48. Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493, 121 CCA 615; Waltham Watch Co. v. Keene, 191 Fed. 855 [certiorari den 232 U. S. 724 mem, 34 SCt 602 mem, 58 L. ed. 815 mem]; Automatic Pencil Sharpener Co. v. Goldsmith, 190 Fed. 205; New Jersey Patent Co. v. Schaeffer, 159 Fed. 171 [aff 178 Fed. 276, 101 CCA 540]. See American Graphophone Co. v. Boston Store, 225 Fed. 785 (whether a violation of an agreement by an agent or vendee of a patentee to observe a price restriction be dealt with as an infringement or breach of contract enforceable in equity is immaterial as between the patentee and his contractee, save only as it may affect the jurisdiction to be invoked).

49. Bauer v. O'Donnell, 229 U. S. 1, 33 SCt 616, 57 L. ed. 1041, 50 LR ANS 1185, AnnCas1915A 150; Free Sewing Mach. Co. v. Bry-Block Mercantile Co., 204 Fed. 632; Waltham Watch Co. v. Keene, 202 Fed. 225 [aff 209 Fed. 1007, 126 CCA 668 (certiorari den 232 U. S. 724 mem, 34 SCt 603 mem, 58 L. ed. 815 mem)].

Validity of restrictions see Monopolies §§ 124, 137.

50. Boesch v. Graff, 133 U. S. 697, 10 SCt 378, 33 L. ed. 787 [rev 33 Fed. 279, 13 Sawy. 17]; Dickerson v. Tinling, 84 Fed. 192, 28 CCA 139; Featherstone v. Ormonde Cycle Co., 53 Fed. 110; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356.

Sale of article manufactured in another country see supra text and note 35.

51. Holiday v. Mattheson, 24 Fed. 185, 23 Blatchf. 239.

52. Dickerson v. Tinling, 84 Fed. 192, 28 CCA 139; Dickerson v. Matheson, 57 Fed. 524, 6 CCA 466 [aff 50 Fed. 73].

53. Saccharin Corp. v. Reitmeyer, [1900] 2 Ch. 659.

54. Driven Well Cases, 122 U. S. 40, 7 SCt 1073, 30 L. ed. 1064; Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Winans v. Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; American Chain Co. v. Bethlehem Bumper Corp., 25 F. (2d) 759; Einson Freeman Co. v. International Folding Paper Box Co., 21 F. (2d) 701; Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682 [certiorari den 269 U. S. 571 mem, 46 SCt 26 mem, 70 L. ed. 417 mem]; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Seager v. Stewart-Warner Speedometer Corp., 277 Fed. 824; Foster v. T. L. Smith Co., 244 Fed. 946, 157 CCA 296; John Kitchen, Jr., Co. v. Levison, 188 Fed. 658, 110 CCA 424; Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 Fed. 64 [aff 160 Fed. 928, 88 CCA 110 (certiorari den 212 U. S. 580 mem, 29 SCt 689 mem, 53 L. ed. 659 mem)]; Edison Gen. Electric Co. v. Crouse-Hinds Electric Co., 146 Fed. 539 [rev on other grounds 152 Fed. 437, 81 CCA 579]; Smyth Mfg. Co. v. Sheridan, 144 Fed. 423 [rev on other grounds 149 Fed. 208, 79 CCA 166]; International Time Recording Co. v. Dey, 142 Fed. 736, 74 CCA 68; Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 CCA 304; Cazier v. Mackie-Lovejoy Mfg. Co., 138 Fed. 654, 71 CCA 104 [aff 157 Fed. 88, 84 CCA 591 (certiorari den 207 U. S. 594 mem, 28 SCt 260 mem, 52 L. ed. 356 mem)]; Solmson v. Bredin, 136 Fed. 187, 69 CCA 203 [aff 132 Fed. 161]; Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 CCA 652; Van Epps v. International Paper Co., 124 Fed. 542; Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 498, 53

to infringe is substantially identical with the patented invention,[55] even though there are some differences in form[56] or variations in detail.[57] Conversely, to constitute infringement, there must be at least substantial identity,[58] quantitative as well as qualitative;[59] the variations, if any, must be such as are consistent with substantial identity;[60] and no matter how closely infringement may be approached,[61] it is avoided if the substance of the patented invention is not taken.[62] More specifically, there must be substantial identity not only in the results obtained,[63] but also in the means[64] and principle or mode of operation[65] employed to obtain the results; and where substantial identity exists in all these matters, infringement may exist.[66]

CCA 230; Morrison v. Sonn, 111 Fed. 172; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Morgan v. Maul, 84 Fed. 336; Dunbar v. Eastern Elevating Co., 75 Fed. 567 [rev on other grounds 81 Fed. 201, 26 CCA 330]; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203; Consolidated Car Heating Co. v. Martin Anti-Fire Car Heater Co., 71 Fed. 697; Shaver v. Skinner Mfg. Co., 30 Fed. 68; Globe Nail Co. v. U. S. Horse Nail Co., 19 Fed. 819; Ward v. Grand Detour Plow Co., 14 Fed. 696; Holly v. Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; American Mfg. Co. v. Lane, 1 F. Cas. No. 304, 3 Bann. & A. 268, 14 Blatchf. 438; Blanchard v. Eldridge, 3 F. Cas. No. 1,509; Blanchard v. Reeves, 3 F. Cas. No. 1,515, 1 Fish. Pat. Cas. 103; Blandy v. Griffith, 3 F. Cas. No. 1,529, 3 Fish. Pat. Cas. 609; Burr v. Prentiss, 4 F. Cas. No. 2,194; Byam v. Eddy, 4 F. Cas. No. 2,263, 2 Blatchf. 521; Coleman v. Liesor, 6 F. Cas. No. 2,984; Collender v. Came, 6 F. Cas. No. 2,999, 2 Bann. & A. 412, 4 Cliff. 393; Conover v. Roach, 6 F. Cas. No. 3,125, 4 Fish. Pat. Cas. 12; Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536; Fuller v. Yentzer, 9 F. Cas. No. 5,151, 1 Bann. & A. 520, 6 Biss. 203 [aff 94 U. S. 299, 24 L. ed. 107]; Goodyear v. Day, 10 F. Cas. No. 5,566; Henderson v. Cleveland Co-op. Stove Co., 11 F. Cas. No. 6,351, 2 Bann. & A. 604; Howes v. McNeal, 12 F. Cas. No. 6,789, 3 Bann. & A. 376, 15 Blatchf. 103; Lorillard v. McDowell, 15 F. Cas. No. 8,510, 2 Bann. & A. 531; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. (U. S.) 480, 14 L. ed. 1024]; Odiorne v. Winkley, 18 F. Cas. No. 10,432, 2 Gall. 51, 1 Robb Pat. Cas. 52; Parker v. Haworth, 18 F. Cas. No. 10,738, 4 McLean 370, 2 Robb Pat. Cas. 725; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Pitts v. Edmonds, 19 F. Cas. No. 11,191, 1 Biss. 168, 2 Fish. Pat. Cas. 52; Root v. Ball, 20 F. Cas. No. 12,035, 2 Robb Pat. Cas. 513, 4 McLean 177; Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535; Smith v. Downing, 22 F. Cas. No. 13,036, 1 Fish. Pat. Cas. 64; Storrs v. Howe, 23 F. Cas. No. 13,495, 2 Bann. & A. 420, 4 Cliff. 388; Thorn v. Worthing Skating Rink Co., 6 Ch. D. 415 note; Marconi v. British Radio-Tel., etc., Co., 27 T. L. R. 274; Taylor v. Annand, 16 T. L. R. 84; Marconi v. Helsby Wireless Tel. Co., [1914] W. N. 347; Consolidated Car Heating Co. v. Came, 18 Que. Super. 44.

[a] **Substantial appropriation of function of patent** by using substantially the patented means is infringement. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290, and certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem].

55. Werner v. King, 96 U. S. 218, 24 L. ed. 613; Skelton v. Igoe, 29 F. (2d) 837; Tompkins-Hawley-Fuller Co. v. Holden, 273 Fed. 424; Stetson Hospital v. Snook-Roentgen Mfg. Co., 245 Fed. 654, 158 CCA 82 [aff 237 Fed. 204]; McCormick Harvesting Mach. Co. v. Aultman, 69 Fed. 371, 16 CCA 259; May v. Fond Du Lac, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Converse v. Cannon, 6 F Cas. No. 3,144, 2 Woods 7; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535; Sloat v. Spring, 22 F. Cas. No. 12,948a; Van Berkel v. Simpson, [1907] S. C. 165; Marconi v. British Radio-Tel., etc., Co., 27 T. L. R. 274.

56. See infra § 502.

57. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586 [aff 92 Fed. 146, 34 CCA 248]; Munger v. Perlman Rim Corp., 244 Fed. 799; Wagner Typewriter Co. v. Wyckoff, 151 Fed. 585, 81 CCA 129; Consolidated Car Heating Co. v. Martin Anti-Fire Car Heater Co., 71 Fed. 697; Crompton v. Knowles, 7 Fed. 204; Conover v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Davis v. Palmer, 7 F. Cas. No. 3,645, 2 Brock. 298, 1 Robb Pat. Cas. 518; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298; Marconi v. British Radio-Tel., etc., Co., 27 T. L. R. 274.

[a] **Variation not constituting new discovery.**—(1) Infringement takes place whenever a person avails himself of the invention of the patentee without such variation as will constitute a new discovery. Norton v. Jensen, 49 Fed. 859, 1 CCA 452; May v. Fond Du Lac, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Rich v. Lippincott, 20 F. Cas. No. 11,758, 2 Fish. Pat. Cas. 1. (2) Infringing device containing patentable improvement see infra § 504.

58. Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Union Special Mach. Co. v. Metropolitan Sewing Mach. Corp., 279 Fed. 770 [aff 286 Fed. 519]; Pacific States Electric Co. v. Wright, 277 Fed. 756; Silver v. Sternau, 258 Fed. 448, 169 CCA 464; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 246 Fed. 834, 159 CCA 136 [aff 239 Fed. 909]; Goodyear Shoe Mach. Co. v. Spaulding, 101 Fed. 990 [aff 110 Fed. 393, 49 CCA 88]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Sloat v. Spring, 22 F. Cas. No. 12,948a.

[a] **Patent representing only slight advance.**—"If what he [the inventor] has done works only a slight step forward, and that which he says is a discovery is on the border line between mere mechanical change and real invention, then his patent, if sustained, will be given a narrow scope, and infringement will be found only in approximate copies of the new device." Spengler Core Drilling Co. v. Spencer, 10 F. (2d) 579, 582.

[b] **Where difference is so great that comparison is difficult,** there is no infringement. Oshkosh Grass Matting Co. v. Waite Grass Carpet Co., 207 Fed. 937, 125 CCA 385.

[c] **Difference held sufficient to negative noninfringement.**—Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427.

59. Beldam v. Garlock Packing Co., 24 F. (2d) 852 [rev on other grounds 29 F. (2d) 673]; Silver v. Sternau, 258 Fed. 448, 169 CCA 464; Goodyear Shoe Mach. Co. v. Spaulding, 101 Fed. 990 [aff 110 Fed. 393, 49 CCA 88].

60. Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; May v. Fond Du Lac, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298.

61. Englander Spring Bed Co. v. Trounstine, 296 Fed. 248; Rood v. Evans, 92 Fed. 371; Blanchard v. Beers, 3 F. Cas. No. 1,506, 2 Blatchf. 411.

62. May v. Fond Du Lac, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Shaw Relief Valve Co. v. New Bedford, 26 Fed. 331 [app dism 136 U. S. 649 mem, 10 SCt 1073 mem, 34 L. ed. 551 mem]; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Blanchard v. Beers, 3 F. Cas. No. 1,506, 2 Blatchf. 411; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024].

[a] **"Construction which would not anticipate cannot infringe."**—Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 709, 153 CCA 501.

63. See infra § 500.

64. See infra § 501.

65. See infra § 501.

66. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586 [aff 92 Fed. 146, 34 CCA 248]; Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Potts v. Creager, 155 U. S. 597, 15 SCt 194, 39 L. ed. 275; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; McDonough v. Johnson-Wentworth Co., 30 F. (2d) 375; Beldam v. Garlock Packing Co., 29 F. (2d) 673; Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937; Frick Co. v. Lindsay, 27 F. (2d) 59; Goldschmidt Thermit Co. v. Alumino-Thermic Corp., 25 F. (2d) 196; Goodbody v. Firestone Steel Products Co., 23 F. (2d) 625; Denaro v. McLaren Cons. Cone Corp., 23 F. (2d) 384; Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Diamond Power Specialty Corp. v. Bayer Co., 13 F. (2d) 337; General Electric Co. v. Minneapolis Electric Lamp Co., 10 F. (2d) 851 [app dism 7 F. (2d) 1020 mem]; Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314; Casey v. Bennett, 3 F. (2d) 640; Schumacker v. Buttonlath Mfg. Co., 292 Fed. 522; Triumph Trap Co. v. Oneida Community Co., 279 Fed. 142; Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem]; Meurer Steel Barrel Co. v. Draper Mfg. Co., 260 Fed. 410; Wagner v. Mt. Carmel Iron Works, 244 Fed. 818; Ward Baking Co. v. Weber, 230 Fed. 142, 144 CCA 440; Parker v. Automatic Mach. Co., 227 Fed. 449; Veneer Mach. Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 CCA 115; Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 135 CCA 551; Sundh Electric Co. v. General Electric Co., 198 Fed. 116 [aff 204 Fed. 277, 122 CCA 475 (certiorari den 245 U. S. 661 mem, 38 SCt 61 mem, 62 L. ed. 536 mem)]; Seeger Refrigerator Co. v. American Can, etc., Co., 171 Fed. 416 [aff 178 Fed. 278, 101 CCA 542]; Glauber v. H. Mueller Mfg. Co., 169 Fed. 110, 95 CCA 108 [reh den 241 Fed. 487, 154 CCA 319, and certiorari den 214 U. S. 517 mem, 29 SCt 698 mem, 53 L. ed.

Changes after construction.[67] A machine or article is not of an infringing character merely because it is capable of being changed into one;[68] and where a machine, as originally designed and constructed, does not infringe, the fact that rightful wear and usage results in such identity as to bring it within the scope of the patent does not constitute infringement;[69] but the maker is liable, if, with intent to infringe, he makes a colorably different machine, which will inevitably become an infringement in the course of usage,[70] or can easily be so adjusted as to infringe.[71]

[§ 499] **(b) Comparison with Claims or Commercial Structure of Patentee.**[72] Infringement of a patent depends upon a violation of the claims of the patent[73] in question,[74] and in determining the question of infringement, defendant's structure or machine is to be compared with the language of the claims of the patent,[75] rather than with plaintiff's commercial structure or machine,[76] especially where plaintiff's machine is not manufactured strictly in accordance with his patent.[77] However, it is said that the question of infringement is not a verbal one,[78] and cannot be determined by the test of the words used in the claim.[79] At any rate, while nothing can be held an infringement that does not fall within the terms which the patentee has chosen to express his invention,[80] yet devices not described, but plainly within the concept in so far as it is patentable and is defined in the claims, may infringe the patent,[81] and if another than the patentee, without his consent, makes something which is substantially the patented thing, and is within a fair description thereof, infringement cannot be escaped because there may be verbal differences between the language of the claims and the words in which the infringing thing may be described.[82] Also, there may be no infringement, even though the language of the claims of a valid patent may literally be read upon, or applied to, an alleged infringing device, machine, or structure;[83] but where a claim reads literally and functionally upon defendant's device,

1064 mem]; Hillard v. Fisher Book Typewriter Co., 159 Fed. 439, 86 CCA 469 [aff 151 Fed. 34, and certiorari den 208 U. S. 617, 28 SCt 569, 52 L. ed. 647]; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845; Rood v. Evans, 92 Fed. 371; Hoe v. Scott, 65 Fed. 606 [aff 70 Fed. 781, 17 CCA 410]; Sayre v. Scott, 55 Fed. 971, 5 CCA 366; American Automaton Weighing Mach. Co. v. Blauvelt, 50 Fed. 213; Howard v. St. Paul Plow-Works, 35 Fed. 743; Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co., 34 Fed. 130; Shaver v. Skinner Mfg. Co., 30 Fed. 68; Pennsylvania Diamond-Drill Co. v. Simpson, 29 Fed. 238; May v. Fond Du Lac, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Halliday v. Covel, 27 Fed. 217; Jenkins v. Gurney, 23 Fed. 898; Collignon v. Hayes, 8 Fed. 912; American Diamond Rock Boring Co. v. Sheldon, 1 F. Cas. No. 296, 4 Bann. & A. 551, 17 Blatchf. 208; Blanchard v. Puttman, 3 F. Cas. No. 1,514, 2 Bond 84, 3 Fish. Pat. Cas. 186 [rev on other grounds 8 Wall. 420, 19 L. ed. 433]; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; New York Rubber Co. v. Chaskel, 18 F. Cas. No. 10,215; Odiorne v. Winkley, 18 F. Cas. No. 10,432, 2 Gall. 51, 1 Robb Pat. Cas. 52; Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535; Sloat v. Spring, 22 F. Cas. No. 12,948a; Tatham v. Le Roy, 23 F. Cas. No. 13,760, 2 Blatchf. 474 [rev on other grounds 14 How. 156, 14 L. ed. 367]; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519.

67. **Repair or reconstruction** see supra § 495.

68. Brinkman v. Laurette Mfg. Co., 21 F. (2d) 607; Paige v. Brown, 260 Fed. 955 [aff 272 Fed. 686].

Capability of infringing use see infra § 500.

69. Onl v. Falstrom, etc., Co., 166 Fed. 898 [aff 175 Fed. 67, 99 CCA 89]; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298.

70. Brown v. Traver, 70 Fed. 810, 17 CCA 424; American Diamond Rock Boring Co. v. Sullivan Mach. Co., 1 F. Cas. No. 298, 2 Bann. & A. 522, 14 Blatchf. 119; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298.

71. Holbrook v. Small, 12 F. Cas. No. 6,595, 2 Bann. & A. 396; Knight v. Gavit, 14 F. Cas. No. 7,884.

72. **Claims:**
Generally see supra §§ 161-169.
Construction see supra §§ 349-363.

73. Schoellkopf v. Chicago, 216 Ill. A. 52 [aff 128 NE 337].

74. General Electric Co. v. Electric Controller, etc., Co., 243 Fed. 188, 156 CCA 54 [motion to modify mandate den 243 Fed. 1007 mem, 156 CCA 664 mem].

75. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Heitler v. Brooklyn Shield, etc., Co., 295 Fed. 333; Gessner v. Philips, 63 Fed. 954.

[a] **Machine.**—"Where the invention or inventions are embodied in a machine the question of infringement is best determined by a comparison of the machine made by the respondent with the mechanism described in the complainant's patent." Seymour v. Osborne, 11 Wall. (U. S.) 516, 559, 20 L. ed. 33.

Comparison without extrinsic evidence see infra §§ 587, 588.

76. Heitler v. Brooklyn Shield, etc., Co., 295 Fed. 333; Gessner v. Philips, 63 Fed. 954. See Diamond Match Co. v. Sun Match Corp., 16 F. (2d) 1, 2 ("Infringement can seldom be safely rested or denied upon a comparison of defendant's mechanism with the commercial embodiment of plaintiff's patent. A closer scrutiny is usually necessary, but the comparison has its uses").

[a] **Advantages of commercial article.**—Infringement cannot be found merely from the use of advantages contained in the commercial article, but must be based on the appropriation of something which the claim of the patent substantially describes. Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564.

77. Abbott Coin Counter Co. v. Standard-Johnson Co., 290 Fed. 418 [aff 296 Fed. 126].

78. Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304].

79. Robinson v. Tubular Woven Fabric Co., supra.

80. McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; Geoghegan v. Ernst, 256 Fed. 670, 168 CCA 64; Tostevin-Cottie Mfg. Co. v. M. Ettinger Co., 254 Fed. 434, 166 CCA 66; Frazer v. Rohr, 180 Fed. 773; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Chemical Rubber Co. v. Raymond Rubber Co., 68 Fed. 570 [aff 71 Fed. 179, 18 CCA 31]; Groth v. International Postal Supply Co., 61 Fed. 284, 9 CCA 507.

[a] **Matters rejected or differentiated by patentee.**—(1) To seize, and prove fruitful and feasible, an idea which the patentee rejected does not infringe the patent. Autopiano Co. v. Amphion Piano Player Co., 186 Fed. 159, 108 CCA 291. (2) "A patentee cannot make an infringement of the thing from which he differentiated his invention in order to obtain his patent." Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 610, 112 CCA 194 [certiorari den 223 U. S. 728, 32 SCt 526, 56 L. ed. 633].

[b] **Claims, properly construed, held not infringed.**—Tin Decorating Co. v. Metal Package Corp., 29 F. (2d) 1006; I. T. S. Rubber Co. v. Essex Rubber Co., 25 F. (2d) 180; Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641; Miller v. Monarch Printing Co., 285 Fed. 364; Krichbaum v. McDanel, 282 Fed. 455; Fowler Car Co. v. Chicago, etc., R. Co., 237 Fed. 202, 151 CCA 8.

81. F. N. Burt Co. v. Ritchie, 251 Fed. 909.

82. Worthington Pump, etc., Corp. v. Traylor Engineering, etc., Co., 292 Fed. 777 [mod on other grounds 1 F. (2d) 833 (certiorari den 267 U. S. 600 mem, 45 SCt 355 mem, 69 L. ed. 807 mem)].

83. Henderson v. Welch Dry Kiln Co., 26 F. (2d) 810; Beldam v. Garlock Packing Co., 24 F. (2d) 852 [rev on other grounds 29 F. (2d) 673]; Gordon Form Lathe Co. v. Walcott Mach. Co., 20 F. (2d) 673; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; Cadwell v. Firestone Tire, etc., Co., 13 F. (2d) 483; Silver v. Sternau, 258 Fed. 448, 169 CCA 464; Geoghegan v. Ernst, 256 Fed. 670, 168 CCA 64; Linde Air Products Co. v. Morse Dry Dock, etc., Co., 246 Fed. 834, 159 CCA 136 [aff 239 Fed. 909]; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822, 827 [aff 247 Fed. 112, 159 CCA 330]; General Electric Co. v. Allis-Chalmers Co., 178 Fed. 273, 101 CCA 537 [aff 171 Fed. 666]; Goodyear Shoe Mach. Co. v. Spaulding, 101 Fed. 990 [aff 110 Fed. 393, 49 CCA 88]. See Lovell v. Seybold Mach. Co., 169 Fed. 288, 94 CCA 578 [aff 159 Fed. 736] (the claims of a patent should cover only what the patentee has in fact invented, and not what he imagines he has invented; and the inventor of a practical working machine will not be held to have infringed a prior patent for an unsuccessful machine, which added nothing of substantial value to the art, merely because the language of its claims is broad enough to include the successful structure).

"It is well settled that it does not

something which is not in the claim will not be read into it for the purpose of permitting defendant to escape infringement.[84] Each claim of the patent is separately considered in determining infringement,[85] and while a claim describing the invention in broad terms may be infringed by devices differing in many respects from that of the patent,[86] a claim including a distinct limitation to a particular feature is not infringed unless that feature is used.[87]

[§ 500] **(c) Purpose, Function, and Result.**[88] For a device or machine to infringe a patent, it must perform the same, or substantially the same, function,[89] or accomplish the same result,[90] or at least a substantially identical result,[91] or the same broad result,[92] or the same kind of result,[93] as the patented invention; but there is sufficient identity of function where a machine or device performs the primary function of the patented machine or device,[94] although it does not perform all of the functions thereof,[95] or where it performs the same function to an appreciable extent,[96] although there is impairment of function in degree;[97] there is sufficient identity of result where the result is the same in kind, although not in degree;[98] and the accomplishment of an additional result does not avoid infringement when the substance of the invention is taken.[99] Ordinarily, infringement cannot be predicated upon identity or similarity of function,[1] or result or effect[2] alone; substantial identity in other matters, such as means and methods or mode of op-

necessarily follow from the fact that an alleged infringing device comes literally within the terms of a patent claim that there is infringement." Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co, supra.

[a] **In practical sense,** two things are not necessarily similar, because the same words are applicable to each. Goodyear Shoe Mach. Co. v. Spaulding, 101 Fed. 990 [aff 110 Fed. 393, 49 CCA 88].

Necessity of identity in mode of operation see infra § 501.

84. Sloan Valve Co. v. John Douglas Co., 10 F. (2d) 885.

85. Oregon Woodenware Mfg. Co. v. Murray, 215 Fed. 744; Mast v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 CCA 191; Holloway v. Dow, 54 Fed. 511; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600.

86. General Electric Co. v. Brooklyn Heights R. Co., 117 Fed. 613; Tuscarawas Mfg. Co. v. Cole, 109 Fed. 161; Thomson-Houston Electric Co. v. Lorain Steel Co., 103 Fed. 641 [aff 107 Fed. 711, 46 CCA 593]; Hatch Storage Battery Co. v. Electric Storage Battery Co., 100 Fed. 975; Parsons v. Seelye, 100 Fed. 455, 40 CCA 486 [rev 92 Fed. 1005]; American Paper Barrel Co. v. Laraway, 28 Fed. 141; Fricke v. Hum, 22 Fed. 302; Gibson v. Betts, 10 F. Cas. No. 5,390, 1 Blatchf. 163, Fish. Pat. R. 91.

87. I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429, 47 SCt 136, 71 L. ed. 335; Brill v. Washington R., etc., Co., 215 U. S. 527, 30 SCt 177, 54 L. ed. 311; Hubbell v. U. S., 179 U. S. 77, 21 SCt 24, 45 L. ed. 95; Ball, etc., Fastener Co. v. Kraetzer, 150 U. S. 111, 14 SCt 48, 37 L. ed. 1019; McClain v. Ortmayer, 141 U. S. 419, 12 SCt 76, 35 L. ed. 800; Lyons v. Baer, etc., Co., 26 F. (2d) 599; Dry Hand Mop Co., Inc. v. Squeez-Ezy Mop Co., Inc., 17 F. (2d) 465; Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co., 272 Fed. 386; Ward Baking Co. v. Weber, 230 Fed. 142, 144 CCA 440; Anderson Fdy., etc., Works v. Potts, 108 Fed. 379, 47 CCA 409 [certiorari den 184 U. S. 700 mem, 22 SCt 940 mem, 46 L. ed. 765 mem]; Consolidated Store-Serv. Co. v. Siegel-Cooper Co., 107 Fed. 716, 46 CCA 599; Lepper v. Randall, 105 Fed. 975 [rev on other grounds 113 Fed. 627, 51 CCA 337]; Ross-Moyer Mfg. Co. v. Randall, 104 Fed. 355, 43 CCA 578; Union Steam-Pump Co. v. Battle Creek Steam-Pump Co., 104 Fed. 337, 43 CCA 560; Starrett v. J. Stevens Arms, etc., Co., 96 Fed. 244 [aff 100 Fed. 93, 40 CCA 289]; A. J. Phillips Co. v. Owosso Mfg. Co., 83 Fed. 176; Foos Mfg. Co. v. Springfield Engine, etc., Co., 49 Fed. 641, 1 CCA 410 [aff 44 Fed. 595]; Heine Safety Boiler Co. v. Anheuser-Busch Brewing Assoc., 43 Fed. 786 [aff 154 U. S. 504 mem, 14 SCt 1146 mem, 38 L. ed. 1083 mem]; Newark Mach. Co. v. Hargett, 28 Fed. 567; Osceola Mfg. Co. v. Pie, 28 Fed. 83; Celluloid Mfg. Co. v. Pratt, 21 Fed. 313; McKay v. Stowe, 17 Fed. 516 [app dism 127 U. S. 786 mem, 32 L. ed. 325 mem]; Cornell v. Littlejohn, 6 F. Cas. No. 3,238, 2 Bann. & A. 324; Keystone Bridge Co. v. Phœnix Iron Co., 14 F. Cas. No. 7,751, 5 Fish. Pat. Cas. 468, 9 Phila. (Pa.) 374 [aff 95 U. S. 274, 24 L. ed. 344]; Lane v. Levi, 21 App. (D. C.) 168.

88. Cross references:

Addition of part or feature to obtain additional function see infra § 506.

Consideration of function and result in determining equivalency of parts see infra § 510.

89. Beldam v. Garlock Packing Co., 29 F. (2d) 673; Muehlberg v. International Metal Hose Co., 29 F. (2d) 109; Hyman v. F. W. Woolworth Co., 28 F. (2d) 833; Hiler Audio Corp. v. General Radio Co., 26 F. (2d) 475; Diamond Match Co. v. Sun Match Corp., 9 F. (2d) 695 [aff 16 F. (2d) 1]; Chicago Pneumatic Tool Co. v. Keller Pneumatic Tool Co., 293 Fed. 945; Dayton Engineering Laboratories Co. v. Kent, 264 Fed. 103 [aff 260 Fed. 187]; Lewis Blind Stitch Mach. Co. v. Arbetter Felling Mach. Co., 219 Fed. 557, 135 CCA 325 [aff 208 Fed. 992].

90. Electric R. Signal Co. v. Hall R. Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Hiler Audio Corp. v. General Radio Co., 26 F. (2d) 475; Elevator Supplies Co. v. Boedtcher, 11 F. (2d) 609 [aff 11 F. (2d) 615]; Diamond Match Co. v. Sun Match Corp., 9 F. (2d) 695 [aff 16 F. (2d) 1]; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; National Metal Molding Co. v. Triangle Conduit Co., 292 Fed. 989; Edwards Mfg. Co. v. National Fireworks Distributing Co., 272 Fed. 23 [rev on other grounds 2 F. (2d) 815]; Dayton Engineering Laboratories Co. v. Kent, 264 Fed. 103 [aff 260 Fed. 187]; Dey Time-Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807 [aff 178 Fed. 812, 102 CCA 260]; American Can Co. v. Hickmott Asparagus Canning Co., 137 Fed. 86 [mod on other grounds 142 Fed. 141, 73 CCA 359]; Brown v. Rubber Step Mfg. Co., 4 F. Cas. No. 2,028, 3 Bann. & A. 232.

91. Beldam v. Garlock Packing Co. 29 F. (2d) 673; Hyman v. F. W. Woolworth Co., 28 F. (2d) 833; American Steel, etc., Co. v. Denning Wire, etc., Co., 176 Fed. 564.

92. Chase v. Union, etc., Trust Co., 258 Fed. 632.

93. Anakin Lock Works v. Dillon Lock Works, 292 Fed. 45 [aff 283 Fed. 629]; Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103].

94. Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586 [aff 92 Fed. 146, 34 CCA 248].

95. Hobbs v. Beach, supra.

96. Bryant Electric Co. v. Reno Sales Co., Inc., 16 F. (2d) 789 [aff 16 F. (2d) 797].

97. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290, and certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem]; Kawneer Mfg. Co. v. Toledo Plate, etc., Glass Co., 232 Fed. 362 [aff 237 Fed. 364, 150 CCA 378].

Impairment of function of part or element see infra § 505.

98. Sewall v. Jones, 91 U. S. 171, 23 L. ed. 275; Winans v. Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Lakewood Engineering Co. v. Walker, 23 F. (2d) 623 [aff 14 F. (2d) 333]; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Whipple v. Middlesex Co., 29 F. Cas. No. 17,520.

99. New York Rubber Co. v. Chaskel, 18 F. Cas. No. 10,215.

Superiority of infringing device see infra § 503.

1. Gordon Form Lathe Co. v. Walcott Mach. Co., 20 F. (2d) 673; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822, 830 [aff 247 Fed. 112, 159 CCA 330]; Johnson Furnace, etc., Co. v. Western Furnace Co., 178 Fed. 819, 102 CCA 267.

"An alleged infringing machine may perform the same function and accomplish the same result as one that is patented without infringement. To hold to the contrary would be to declare in opposition to settled principles the patentability of a mere function. If the mechanical means by which the function is performed be substantially different there is no infringement." Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., supra.

2. Hubbell v. U. S., 179 U. S. 77, 21 SCt 24, 45 L. ed. 95; Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Dryfoos v. Wiese, 124 U. S. 32, 8 SCt 354, 31 L. ed. 362; Werner v. King, 96 U. S. 218, 24 L. ed. 613; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. ed. 650, 660, 661; Elliott Co. v. H. S. B. W.-Cochrane Corp., 26 F. (2d) 815; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; Stoehrer, etc., Dodgem Corp. v Lusse, 7 F. (2d) 87 [aff 1 F. (2d) 793]; Robeson Process Co v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1022 mem]; Akimoff v. Dynamic Balancing Mach. Co., 285 Fed. 480 [mod 279 Fed. 285]; Stebler v. Porterville Citrus Assoc., 248 Fed. 927, 161 CCA 45; Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501; Marconi Wireless Tel. Co. v. Kilbourne, etc., Mfg. Co., 239 Fed. 328 [aff 265 Fed. 644]; Conrader v. Judson Governor Co., 238 Fed. 349, 151 CCA 365 [mod 226 Fed. 207]; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330]; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)]; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; American Pin Co. v. Oakville Co., 1 F. Cas. No. 313, 3 Blatchf. 190; Diamond Match Co. v. Sun Match Corp., 9 F. (2d) 695 [aff 16 F. (2d) 1]; Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Smith v. Higgins, 22 F. Cas. No. 13,058.

"The mere fact that the same result is obtained by the operation of an apparatus is not conclusive of infringe-

eration is also necessary to constitute infringement.[3] However, where a patent covers a product only, identity of product alone is sufficient identity to constitute infringement.[4]

Purpose. There is no infringement when there is a substantial difference in purpose[5] or accomplishment.[6]

Capacity to infringe by use.[7] The interchangeability in use of two devices is an important test in determining the question of infringement.[8] A machine, device, or apparatus may be of an infringing character where it is capable of infringing when used in a proper, ordinary, normal, and effective way,[9] or is capable of an infringing use and is sold with the intent that it shall be so used,[10] even if it is also capable of being so used as not to infringe,[11] and the seller goes through the form of instructing that it shall be used in a noninfringing way.[12] On the other hand, a device designed to be used in a manner which will not infringe is not of an infringing character merely because it is capable of infringing by use in another manner which is more difficult and without object or advantage;[13] and a device does not infringe where it is not capable of use in the same situation[14] or for the same purpose[15] as that for which the patented device is specifically intended.

[§ 501] **(d) Means and Operation.**[16] To infringe a patent, a device or machine must not only perform the same, or substantially the same, function or accomplish the same result as the patented invention,[17] but it must also perform the function or accomplish the result by identical, or substantially identical, means;[18] and furthermore the principle or mode of operation must be the same, or substantially the same,[19] or, in other words, the function

ment. Infringement cannot be predicated on results obtained, irrespective of the apparatus employed." Marconi Wireless Tel. Co. v. Kilbourne, etc., Mfg. Co., 239 Fed. 328, 354 [aff 265 Fed. 644].

3. See infra § 501.

4. See infra § 514.

5. Ball Bearing Co. v. Star Ball Retainer Co., 147 Fed. 721 [aff 149 Fed. 219, 79 CCA 177]; Hawes v. Gage, 11 F. Cas. No. 6,237.

6. Dayton Engineering Laboratories Co. v. Kent, 260 Fed. 187 [aff 264 Fed. 103].

7. **Use as infringement generally** see supra § 496.

8. Ball Bearing Co. v. Star Ball Retainer Co., 147 Fed. 721 [aff 149 Fed. 219, 79 CCA 177].

Equivalency of parts as dependent upon interchangeability see infra § 510.

9. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 Fed. 64 [aff 160 Fed. 928, 88 CCA 110 (certiorari den 212 U. S. 580 mem, 29 SCt 689 mem, 53 L. ed. 659 mem)].

[a] **"Test of infringement,** when alleged against the manufacturer of a machine, and based solely upon the machine itself, is whether, as made and when offered for sale, it contains the patented invention. If its structure is such that, when used in the manner contemplated by the manufacturer, it has the capacity of appropriating the invention, he can be treated as an infringer by participation with the user. But if its structure is such that it can only acquire that capacity by misuse, whether negligent or intentional, he is not responsible as an infringer." Brown v. Traver, 70 Fed. 810, 816, 17 CCA 424.

10. Westinghouse Electric, etc., Co. v. Precise Mfg. Corp., 11 F. (2d) 209 [aff 10 F. (2d) 517]; Sandusky Fdy., etc., Co. v. De Lavaud, 274 Fed. 607.

11. Westinghouse Electric, etc., Co. v. Precise Mfg. Corp., 11 F. (2d) 209 [aff 10 F. (2d) 517]; Sandusky Fdy., etc., Co. v. De Lavaud, 274 Fed. 607; Marconi Wireless Tel. Co. v. De Forest Radio Tel., etc., Co., 225 Fed. 65 [aff 225 Fed. 373, 140 CCA 637]; Parsons Non-Skid Co. v. Atlas Chain Co., 198 Fed. 399, 117 CCA 286.

12. Westinghouse Electric, etc., Co. v. Precise Mfg. Corp., 11 F. (2d) 209 [aff 10 F. (2d) 517]; Sandusky Fdy., etc., Co. v. De Lavaud, 274 Fed. 607; Parsons Non-Skid Co. v. Atlas Chain Co., 198 Fed. 399, 117 CCA 286.

13. U. S. Slicing Mach. Co. v. Wolf, 243 Fed. 412 [aff 257 Fed. 93, 168 CCA 305].

14. Ball Bearing Co. v. Star Ball Retainer Co., 147 Fed. 721 [aff 149 Fed. 219, 79 CCA 177].

15. Ball Bearing Co. v. Star Ball Retainer Co., supra.

16. **Cross references:**

Consideration of operation in determining equivalency of parts see infra § 510.

Same or different operation after transposition of parts or elements see infra § 508.

17. See supra § 500.

18. Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136 [rev 70 Fed. 816, 17 CCA 430]; Worden v. Searls, 121 U. S. 14, 7 SCt 814, 30 L. ed. 853; Fairbanks v. American Valve, etc., Co., 31 F. (2d) 103; Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Van Meter v. Irving Air Chute Co., 27 F. (2d) 170; Gordon Form Lathe Co. v. Walcott Mach. Co., 20 F. (2d) 673; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; Elevator Supplies Co. v. Boedtcher, 11 F. (2d) 609 [aff 11 F. (2d) 615]; Stoehrer, etc., Dodgem Corp. v. Lusse, 7 F. (2d) 87 [aff 1 F. (2d) 793]; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Auto Hone Co. v. Hall Cylinder Hone Co., 3 F. (2d) 479; Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1022 mem]; National Metal Molding Co. v. Triangle Conduit Co., 292 Fed. 989; Akimoff v. Dynamic Balancing Mach. Co., 285 Fed. 480 [mod 279 Fed. 285]; Juengst v. Hill Pub. Co., 267 Fed. 428 [aff 267 Fed. 435]; Chase v. Union, etc., Trust Co., 258 Fed. 632; T. L. Smith Co. v. Cement Tile Mach. Co., 257 Fed. 423, 168 CCA 463 [aff 249 Fed. 481, and certiorari den 250 U. S. 669 mem, 40 SCt 14 mem, 63 L. ed. 1198 mem]; Stebler v. Porterville Citrus Assoc., 248 Fed. 927, 161 CCA 45; Marconi Wireless Tel. Co. v. Kilbourne, etc., Mfg. Co., 239 Fed. 328 [aff 265 Fed. 644]; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330]; Murray v. C. L. Greeno Co., 234 Fed. 91, 148 CCA 107; Lewis Blind Stitch Mach. Co. v. Arbetter Felling Co., 219 Fed. 557, 135 CCA 325 [aff 208 Fed. 992]; Standard Truck Co. v. Pittsburg R. Co., 219 Fed. 222, 135 CCA 106 [aff 211 Fed. 667]; American Steel, etc., Co. v. Denning Wire, etc., Co., 176 Fed. 564; American Can Co. v. Hickmott Asparagus Canning Co., 137 Fed. 86 [mod on other grounds 142 Fed. 141, 73 CCA 359]; Masseth v. Larkin, 119 Fed. 171, 56 CCA 167 [aff 111 Fed. 409]; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580; Taber Bas-Relief Photograph Co. v. Marceau, 87 Fed. 871; Dickinson v. A. Plamondon Mfg. Co., 76 Fed. 455; Hall v. Stern, 15 Fed. 463; American Pin Co. v. Oakville Co., 1 F. Cas. No. 313, 3 Blatchf. 190; Burden v. Corning, 4 F. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Burr v. Duryee, 4 F. Cas. No. 2,190, 2 Fish. Pat. Cas. 275 [aff 1 Wall. 531, 17 L. ed. 650, 660, 661]; Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Morris v. Barrett, 17 F. Cas. No. 9,827, 1 Bond 254, 1 Fish. Pat. Cas. 461; Reckendorfer v. Faber, 20 F. Cas. No. 11,625, 1 Bann. & A. 229, 12 Blatchf. 68 [aff 92 U. S. 347, 23 L. ed. 719]; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Brothers v. U. S., 52 Ct. Cl. 462.

[a] **Rule applied.**—(1) Where the claims of the patentee are limited to a cylinder-actuating rod provided with a spiral groove, and the coacting means by which motion is imparted to the cylinder, defendant does not infringe where its structure does not have the rod provided with a spiral, and consequently the means for producing rotary movement of the cylinder are different. Computing Scale Co. of America v. Automatic Scale Co., 26 App. (D. C.) 238 [aff 204 U. S. 609, 27 SCt 307, 51 L. ed. 645]. (2) "Any device which accomplishes the same result by means of different mechanism is not an infringement" of a patent involving mere improvements. Anakin Lock Works v. Dillon Lock Works, 292 Fed. 45, 47 [aff 283 Fed. 629].

[b] **Substantially equivalent means.**—Patents cover the means employed to effect results, and to be an infringer one must reach the same result by the same or substantially equivalent means. Dey Time-Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807 [aff 178 Fed. 812, 102 CCA 260].

[c] **Other apparatus.**—One who obtains the same result through other apparatus is not an infringer. Elliott Co. v. H. S. B. W.-Cochrane Corp., 26 F. (2d) 815.

19. Weber Electric Co. v. E. H. Freeman Electric Co., 256 U. S. 668, 41 SCt 600, 65 L. ed. 1162; Hyman v. F. W. Woolworth Co., 28 F. (2d) 833; Van Meter v. Irving Air Chute Co., 27 F. (2d) 170; Gordon Form Lathe Co. v. Walcott Mach. Co., 20 F. (2d) 673; C. F. Mueller Co. v. Clermont Mach. Co., 20 F. (2d) 413 [aff 20 F. (2d) 416]; Lektophone Corp. v. Western Electric Co., 16 F. (2d) 10; Cadwell v. Firestone Tire, etc., Co., 13 F. (2d) 483; Spengler Core Drilling Co. v. Spencer, 10 F. (2d) 579; Diamond Match Co. v. Sun Match Corp., 9 F. (2d) 695 [aff 16 F. (2d) 1]; Superior Skylight Co., Inc. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Auto Hone Co. v. Hall Cylinder Hone Co., 3 F. (2d) 479; Chicago Pneumatic Tool Co. v. Keller Pneumatic Tool Co., 293 Fed. 945; Anakin Lock Works v. Dillon Lock Works, 292 Fed. 45 [aff 283 Fed. 629]; Union Special Mach. Co. v. Metropolitan Sewing Mach. Corp., 279 Fed. 770 [aff 286 Fed. 519]; United Shoe Mach. Co. v. L. I. White Shoe Co., 279 Fed. 35; Pacific States Electric Co. v. Wright, 277 Fed. 756; Paige v. Brown, 272 Fed. 686 [aff 260 Fed. 955]; Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330];

must be performed or the result must be accomplished in substantially the same way,[20] or by a substantially identical method.[21] However, where there is otherwise sufficient identity in all essential matters,[22] infringement may exist, although preferred methods described by the patentee are not adopted.[23]

[§ 502] **(e) Form.** Unless form is of the essence of the invention,[24] or is the distinguishing characteristic thereof,[25] or form and substance are inseparable,[26] mere differences in form are immaterial[27]

Lewis Blind Stitch Mach. Co. v. Arbetter Felling Mach. Co., 219 Fed. 557, 135 CCA 325 [aff 208 Fed. 992]; American Steel, etc., Co. v. Denning Wire, etc., Co., 194 Fed. 117, 114 CCA 195; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)]; American Can Co. v. Hickmott Asparagus Canning Co., 137 Fed. 86 [mod on other grounds 142 Fed. 141, 73 CCA 359]; Peerless Rubber Mfg. Co. v. White, 118 Fed. 827, 55 CCA 502 [certiorari den 187 U. S. 649 mem, 23 SCt 848 mem, 47 L. ed. 349 mem]; Goodyear Shoe Mach. Co. v. Spaulding 110 Fed. 393, 49 CCA 88; Brunswick-Balke-Collender Co. v. Brunswick, 47 Fed. 218; Hall v. Stern, 15 Fed. 463; Brett v. Quintard, 10 Fed. 741, 20 Blatchf. 320; White v. Noyes, 2 Fed. 782; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; May v. Johnson County, 16 F. Cas. No. 9,334; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

[a] **"Principle" means "mode of operation."**—Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465.

[b] **Real test** is principle on which machine works. International Curtis Mar. Turbine Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 211 Fed. 124, 127 CCA 522 [certiorari den 234 U. S. 755 mem, 34 SCt 674 mem, 58 L. ed. 1578 mem].

[c] **Difference in construction and operation.**—A device or structure does not infringe where it differs from the patented invention in both construction and operation. Turner v. Spinner, 6 F. (2d) 172; Edwards Mfg. Co. v. National Fireworks Distributing Co., 272 Fed. 23 [rev on other grounds 2 F. (2d) 815].

[d] **Different application of principle.**—A patent for an invention consisting of a new application of a well-known principle for a particular purpose is not infringed by a device that applies the same principle for the same purpose, but by quite a different method of application. P. & M. Co. v. Canada Mach. Corp., Ltd., (Can.) [1925] 4 DomLR 481 [aff [1925] Exch. 47].

[e] **Different principles for grinding lenses.**—A patent for an improvement in a machine for grinding optical lenses, operating on the ring-grinding principle, is not infringed by a machine operating on the lap-grinding principle, which is a distinct field in the art. Paige v. Brown, 272 Fed. 686 [aff 260 Fed. 955].

[f] **Continuous or intermittent operation.**—Machines or devices in which the different parts are arranged and constructed to operate continuously are different in principle from those in which the parts are arranged to operate intermittently and alternately with each other, and one is not an infringement of the other. American Steel, etc., Co. v. Denning Wire, etc., Co., 176 Fed. 564.

20. Beldam v. Garlock Packing Co., 29 F. (2d) 673; Economy Baler Co. v. Solar Sturges Mfg. Co., 29 F. (2d) 656; Elliott Co. v. H. S. B. W.-Cochrane Corp., 26 F. (2d) 815; Hiler Audio Corp. v. General Radio Co., 26 F. (2d) 475; Nelson Mfg. Co. v. F. E. Myers, etc., Co., 25 F. (2d) 659; Elevator Supplies Co. v. Boedtcher, 11 F. (2d) 609 [aff 11 F. (2d) 615]; Anakin Lock Works v. Dillon Lock Works, 292 Fed. 45 [aff 283 Fed. 629]; Autographic Register Co. v. Diesbach, 286 Fed. 470 [rev 285 Fed. 199]; Chase v. Union, etc., Trust Co., 258 Fed. 632; Johnson Furnace, etc., Co. v. Western Furnace Co., 178 Fed. 819, 102 CCA 267.

21. Robeson Process Co. v. Robeson, 293 Fed. 70 [aff 1 F. (2d) 1022 mem]; Akimoff v. Dynamic Balancing Mach. Co., 285 Fed. 480 [mod 279 Fed. 285].

22. See supra § 498.

23. Casey v. Bennett, 3 F. (2d) 640. See Kohler v. Cline Electric Mfg. Co., 28 F. (2d) 405, 406 [aff 27 F. (2d) 638 (certiorari den 49 SCt 82 mem)] ("we have a case of a mechanism which can be operated in a way pointed out by the inventor to produce a given result. Defendants discover that, by operating the mechanism in a different way, precisely the same result may be achieved. Certainly defendants may not escape the charge of infringement by operating the mechanism differently from the way pointed out by the inventor, and obtaining a result identical with that obtained through the other method of operation").

24. McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 SCt 240, 40 L. ed. 358; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; Werner v. King, 96 U. S. 218, 24 L. ed. 613; Metropolitan Washing Mach. Co. v. Providence Tool Co., 20 Wall. (U. S.) 342, 22 L. ed. 303; Winans v. Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Carver v. Hyde, 16 Pet. (U. S.) 513, 10 L. ed. 1051; Allis Chalmers Mfg. Co. v. Columbus Electric, etc, Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Lyon v. Boh, 10 F. (2d) 30 [rev 1 F. (2d) 48]; Harvey Hubbell, Inc. v. American Brass, etc., Co., 296 Fed. 47; Acme Motor Shield Corp. v. Roberts Mfg. Co., 288 Fed. 127; U. S. Metallic Packing Co. v. Hewitt Co., 236 Fed. 739, 150 CCA 71 [rev 220 Fed. 171, and certiorari den 242 U. S. 651 mem, 37 SCt 243 mem, 61 L. ed. 545 mem]; Sundh Electric Co. v. General Electric Co., 235 Fed. 708, 217 Fed. 583; Panther Rubber Mfg. Co. v. I. T. S. Rubber Co., 234 Fed. 377 [aff 250 Fed. 253, 162 CCA 389]; Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 Fed. 64 [aff 160 Fed. 928, 88 CCA 110 (certiorari den 212 U. S. 580 mem, 29 SCt 689 mem, 53 L. ed. 659 mem)]; Risdon Iron, etc., Works v. Trent, 92 Fed. 375 [mod on other grounds 102 Fed. 635, 42 CCA 529]; Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., 61 Fed. 958, 10 CCA 194; Ball, etc., Fastener Co. v. Ball Glove Fastening Co., 60 Fed. 399, 8 CCA 678; Ball, etc., Fastener Co. v. Ball Glove Fastening Co., 58 Fed. 818, 7 CCA 498; Tubman v. Wason Mfg. Co., 53 Fed. 356; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Shaw Stocking Co. v. Pearson, 48 Fed. 234; Polsdorfer v. St. Louis Wooden-Ware Works, 37 Fed. 57; Morss v. Manchester, 32 Fed. 282 [app dism 136 U. S. 644 mem, 10 SCt 1071 mem, 34 L. ed. 559 mem]; Toepfer v. Goetz, 31 Fed. mem]; Newark Mach. Co. v. Hargett, 28 Fed. 913; Scott v. Evans, 11 Fed. 567; McMurray v. Mallory, 5 Fed. 726

or of little weight,[28] and do not avoid infringement[29] where the principle or mode of operation is appropriated and the same result is obtained by the same or equivalent means.[30] The rule applies to differences in appearance,[31] name,[32] shape,[33] proportions,[34] dimensions,[35] and to mere structural differences generally.[36] The resemblance or substantial similarity of two machines or devices in physical appearance does not necessarily show infringement,[37] as they may operate upon different principles[38] or achieve different results.[39]

[§ 503] **(f) Superiority or Inferiority—aa. In General.** Ordinarily the relative superiority of complainant's and defendant's devices is irrelevant to the question of infringement of a patent;[40] and where the essential features of the patented invention are appropriated and used, infringement is not avoided by the fact that the infringing device, ar-

ric form is best for purpose, other forms producing the same result may be infringements. Eddy v. Dennis, 95 U. S. 560, 24 L. ed. 363.

23. Acme Motor Shield Corp. v. Roberts Mfg. Co., 288 Fed. 127.

29. Wisconsin-Minnesota Gas, etc., Household Appliance Co. v. Hirschy Co., 28 F. (2d) 838 [aff 18 F. (2d) 347]; Carson Inv. Co. v. Anaconda Copper Min. Co. 26 F. (2d) 651 [certiorari den 49 SCt 32 mem]; Einson Freeman Co. v. International Folding Paper Box Co., 21 F. (2d) 701; Malina v. Grismon, 20 F. (2d) 406 [aff 20 F. (2d) 409]; Allis-Chalmers Mfg. Co. v. Columbus Electric, etc., Co., 19 F. (2d) 860 [certiorari den 275 U. S. 568 mem, 48 SCt 141 mem, 72 L. ed. 430 mem]; Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314; Casey v. Bennett, 3 F. (2d) 640; James L. Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Pangborn Corp. v. W. W. Sly Mfg. Co., 284 Fed. 217 [aff 263 Fed. 394, 276 Fed. 971, and certiorari den 260 U. S. 749 mem, 43 SCt 249 mem, 67 L. ed. 495 mem]; Triumph Trap Co. v. Oneida Community Co., 279 Fed. 142; Wm. F. Goessling Box Co. v. Gumb, 241 Fed. 674, 154 CCA 432; Manton-Gaulin Mfg. Co. v. Dairy Mach., etc., Co., 238 Fed. 210 [aff 247 Fed. 317, 159 CCA 411]; Union Tool Co. v. Wilson, etc., Mfg. Co., 237 Fed. 837 [rev on other grounds 249 Fed. 729, 161 CCA 639 (certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed 421 mem)]; Veneer Mach. Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 CCA 115; Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 135 CCA 551; Detroit Copper Min. Co. v. Mine, etc., Supply Co., 215 Fed. 100, 131 CCA 408; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559]; Delaware Seamless Tube Co. v. Shelby Steel Tube Co., 160 Fed. 928, 88 CCA 110 [aff 151 Fed. 64, and certiorari den 212 U. S. 580, 29 SCt 689, 53 L. ed. 659]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Collignon v. Hayes, 8 Fed. 912; Carley Life Float Co. v. U. S., 63 Ct. Cl. (U. S.) 517.

[a] **Infringement of patent for substance** cannot be avoided by a change of form; "the substance attacked must be different, to escape infringement." Lyon v. Boh, 10 F. (2d) 30, 34.

[b] **Change of form, without change of function,** does not avoid infringement. Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Daniel O'Donnell, Inc. v. Riscal Mfg. Co., 228 Fed. 127.

30. See supra § 501.

31. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Ross v. Minneapolis, 64 Fed. 592; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Hammond Buckle Co. v. Hathaway, 48 Fed. 305; Pennsylvania Diamond-Drill Co. v. Simpson, 29 Fed. 288; Blanchard v. Puttman, 3 F. Cas. No. 1,514, 2 Bond 84, 3 Fish. Pat. Cas. 186 [rev on other grounds 8 Wall. 420, 19 L. ed. 433]; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Smith v. Higgins, 22 F. Cas. No. 13,058.

[a] **Lack of physical resemblance.** —"The device of a patent and an infringing device may not show any physical resemblance one to the other." Allen v. Wingerter, 17 F. (2d) 745, 747.

32. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; Ellett v. Klein, 22 F. (2d) 807; Sloan Valve Co. v. John Douglas Co., 10 F. (2d) 885; Hammond v. Benzer Corp., 6 F. (2d) 760 [rev 295 Fed. 908]; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845; Western Electric Co. v. Home Tel. Co., 85 Fed 649; Thomson Meter Co. v. National Meter Co., 65 Fed. 427, 12 CCA 671; Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co., 34 Fed. 130; American Diamond Rock Boring Co. v. Sheldon, 1 F. Cas. No. 296, 4 Bann & A. 551, 17 Blatchf. 208; Brooks v. Norcross, 4 F. Cas. No. 1,957, 2 Fish Pat. Cas. 661; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519.

Difference in names as affecting equivalency of parts or elements see infra § 510.

33. Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; Union Steam-Pump Co. v. Battle Creek Steam-Pump Co., 104 Fed. 337, 43 CCA 560; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed 524, 36 CCA 375; Western Electric Co. v. Home Tel. Co., 85 Fed. 649; Thomson Meter Co. v. National Meter Co., 65 Fed. 427, 12 CCA 671; Ross v. Minneapolis, 64 Fed. 592; Harmon v. Struthers, 43 Fed. 437; American Diamond Rock Boring Co. v. Sheldon, 1 F. Cas. No. 296, 4 Bann. & A. 551, 17 Blatchf. 208; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600.

34. Winans v. Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Grier v. Castle, 17 Fed. 523; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Colt v. Massachusetts Arms Co., 6 F. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Parker v. Stiles, 18 F. Cas. No 10,749, Fish. Pat. R. 319, 5 McLean 44; Smith v. Higgins, 22 F. Cas. No. 13,058; Tatham v. Le Roy, 23 F. Cas. No. 13,760, 2 Blatchf. 474 [rev on other grounds 14 How. 156, 14 L. ed. 367].

35. Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Union Steam-Pump Co. v. Battle Creek Steam-Pump Co., 104 Fed. 337, 43 CCA 560; Asmus v. Alden, 27 Fed. 684 [rev on other grounds 145 U. S. 226, 12 SCt 939, 36 L. ed. 685]; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish Pat. Cas. 397; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89.

36. Brown v. Reed Mfg. Co., 81 Fed. 48 [app dism 96 Fed. 1005 mem, 37 CCA 665 mem]; Woodward v. Boston Lasting Mach. Co., 60 Fed. 283, 8 CCA 622; Norton v. Wheaton, 57 Fed. 927 [foll Norton v. Jensen, 49 Fed. 859, 1 CCA 452]; American Bell Tel. Co. v. Cushman, 57 Fed. 842; International Postal Supply Co. v. Groth, 57 Fed. 658; Consolidated Piedmont Cable Co. v. Pacific Cable R. Co., 53 Fed. 385, 3 CCA 570; California Electrical Works v. Henzel, 48 Fed. 375 [aff 51 Fed. 754, 2 CCA 495]; Enterprise Mfg. Co. v. Deisler, 46 Fed. 854 [aff 53 Fed. 791, 3 CCA 672]; National Typographic Co. v. New York Typograph Co., 46 Fed. 114; Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co., 34 Fed. 130; Putnam v. Hutchinson, 12 Fed. 131, 11 Biss. 240; Blake v. Eagle Works Mfg. Co., 3 F. Cas. No. 1,494, 3 Biss. 77, 4 Fish. Pat. Cas. 591; Blanchard v. Beers, 3 F. Cas. No. 1,506, 2 Blatchf 411; Blanchard v. Puttman, 3 F. Cas. No. 1,514, 2 Bond 84, 3 Fish. Pat. Cas. 186 [rev on other grounds 8 Wall. 420, 19 L. ed. 433]; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024]; Sargent v. Larned, 21 F. Cas. No. 12,364, 2 Curt. 340; Busch v. Jones, 16 App. (D. C.) 223 [rev on other grounds 184 U. S. 598, 22 SCt 511, 46 L. ed. 707].

37. International Curtis Mar. Turbine Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 211 Fed. 124, 127 CCA 522 [certiorari den 234 U. S. 755 mem, 34 SCt 674 mem, 58 L. ed. 1578 mem]; Westinghouse Electric, etc., Co. v. Allis-Chalmers Co., 176 Fed. 362, 100 CCA 408 [rev 168 Fed. 91].

[a] **Patents relating to electricity.** —In dealing with patents relating to electricity, an invisible, intangible agency, and in itself of different kinds, which in its different phases may affect or be affected by metals or appliances in different ways and with wholly different results, a court must guard against being misled by the mere superficial resemblances of the appliances and machines used in connection with it; for from an electrical standpoint the real significance of such appliances lies, not in their material, external appearance, but in their working effect, under the influence of diverse electrical factors. Westinghouse Electric, etc., Co. v. Allis-Chalmers Co., 176 Fed. 362, 100 CCA 408 [rev 168 Fed. 91].

38. See supra § 501.

39. See supra § 500.

40. Lourie Impl. Co. v. Lenhart, 130 Fed. 122, 64 CCA 456; May v. Fond du Lac County, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Cox v. Griggs, 6 F. Cas. No. 3,302, 1 Biss. 362, 2 Fish. Pat. Cas. 174; Roberts v. Harnden, 20 F. Cas. No. 11,903, 2 Cliff. 500; Tilghman v. Werk, 23 F. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229; Stevens v. Pierpont, 42 Conn. 360.

ticle, or structure is superior[41] or inferior[42] to the one which is patented, even though the infringing device is intentionally made imperfect or defective.[43] However, infringement may be avoided where superiority is due to a difference in function[44] or mode of operation,[45] or some change in an essential matter;[46] and considerable superiority may indicate such substantial difference as to avoid infringement.[47]

[§ 504] **bb. Improvement.** A person who appropriates and manufactures or uses a patented invention or the substance thereof without the consent of the patentee does not escape or avoid infringement by improving upon the invention, or using an improvement made by another,[48] even though the im-

41. Hoyt v. Horne, 145 U. S. 302, 12 SCt 922, 36 L. ed 713; Morley Sewing Mach. Co. v. Lancaster, 129 U S. 263, 9 SCt 299, 32 L. ed. 715; Cantrell v. Wallick, 117 U. S 689, 6 SCt 970, 29 L. ed. 1017; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Blake v. Robertson, 94 U. S. 728, 24 L. ed. 245; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Evans v. Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314; Toledo Mach., etc., Co. v. E. W. Bliss Co., 287 Fed. 443; Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, 261 Fed. 85; Wagner v. Mt. Carmel Iron Works, 244 Fed. 818; Barber v. Otis Motor Sales Co., 231 Fed. 755 [aff 240 Fed. 723]; Diamond Match Co. v. Ruby Match Co., 127 Fed. 341; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; Brislin v. Carnegie Steel Co., 118 Fed. 579 [rev on other grounds 124 Fed. 213, 59 CCA 651 (certiorari den 191 U. S. 576 mem, 24 SCt 848 mem, 48 L. ed. 309 mem)]; Adams Co. v. Schreiber, etc., Mfg. Co., 111 Fed. 182 [rev on other grounds 117 Fed. 830, 54 CCA 128]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Bonnette Arc Lawn Sprinkler Co. v. Koehler, 82 Fed. 428, 27 CCA 200; Whitely v. Fadner, 73 Fed. 486; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Robbins v. Dueber Watch-Case Mfg. Co., 71 Fed. 186 [rev on other grounds 75 Fed. 17, 21 CCA 198]; Traver v. Brown, 62 Fed. 933 [rev on other grounds 70 Fed. 810, 17 CCA 424]; Simmons v. Standard Oil Co., 62 Fed. 928; Woodward v. Boston Lasting Mach. Co., 60 Fed. 283, 8 CCA 622; Merrow v. Shoemaker, 59 Fed. 120 [rev on other grounds 61 Fed. 945, 10 CCA 181]; Gilbert v. Reinhardt Numbering Mach. Co., 58 Fed. 975; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Pittsburg Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301; White v. Walbridge, 46 Fed. 526; National Typographic Co. v. New York Typographic Co., 46 Fed. 114; Roosevelt v. Law Tel. Co., 33 Fed. 505; Shaver v. Skinner Mfg. Co., 30 Fed. 68; Filley v. Littlefield, 25 Fed. 282; Celluloid Mfg. Co. v. Chrolithion Collar, etc., Co., 23 Fed. 397, 23 Blatchf. 205; Bostock v. Goodrich, 21 Fed. 316; Roemer v. Simon, 20 Fed. 197; Evory v. Burt, 15 Fed. 112 [rev on other grounds 133 U. S. 349, 10 SCt 394, 33 L. ed. 647]; Foye v. Nichols, 13 Fed. 125, 8 Sawy. 201; Frost v. Marcus, 13 Fed. 88; American Bell Tel. Co. v. Spencer, 8 Fed. 509; Pennington v. King, 7 Fed. 462; Adams v. Joliet Mfg. Co., 1 F. Cas. No. 56, 3 Bann. & A. 1; Alden v. Dewey, 1 F. Cas. No. 153, 2 Robb Pat. Cas. 17, 1 Story 336; American Whip Co. v. Lombard, 1 F. Cas. No. 319, 3 Bann. & A. 598, 4 Cliff. 495; Blake v. Eagle Works Mfg. Co., 3 F. Cas. No. 1,494, 3 Biss. 77, 4 Fish. Pat. Cas. 591; Blake v. Robertson, 3 F. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Carstaedt v. U. S. Corset Co., 5 F. Cas. No. 2,468, 2 Bann. & A. 119, 13 Blatchf. 119; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Coleman v. Liesor, 6 F. Cas. No. 2,984; Colt v. Massachusetts Arms Co., 6 F. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Conover v. Rapp, 6 F Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Cook v. Howard, 6 F. Cas. No. 3,160. 4 Fish. Pat Cas. 269; Crehore v. Norton, 6 F. Cas. No. 3,381; Decker v. Griffith, 7 F. Cas No. 3,724, 10 Blatchf. 343 note; De Florez v. Raynolds, 7 F. Cas. No. 3,742, 3 Bann. & A. 292, 14 Blatchf. 505; Flint v. Roberts, 9 F. Cas. No. 4,875, 4 Bann. & A. 165; Forbes v Barstow Stove Co., 9 F. Cas. No. 4,923, 2 Cliff. 379; Foss v. Herbert. 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Goodyear v Mathews, 10 F. Cas No. 5,576, 1 Paine 300. 1 Robb Pat. Cas. 50; Goodyear v Mullee, 10 F. Cas. No. 5,579, 3 Fish. Pat. Cas. 420; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Hays v. Sulsor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat Cas. 532; Howe v. Morton, 12 F. Cas. No. 6,769. 1 Fish. Pat. Cas. 586; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Inlay v. Norwich, etc., R. Co., 13 F. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Kendrick v. Emmons, 14 F. Cas. No. 7,695, 2 Bann. & A. 208; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Odiorne v. Denney, 18 F. Cas. No. 10,431, 3 Bann. & A. 287; Pitts v. Wemple, 19 F. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Reutgen v. Kanowrs, 20 F. Cas. No. 11,710, 1 Robb Pat. Cas. 1, 1 Wash. C. C. 168; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,415, 3 Biss. 52, 4 Fish. Pat. Cas. 584 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; Stainthorp v. Humiston, 22 F. Cas. No. 13.281, 4 Fish. Pat. Cas. 107; Star Salt Caster Co. v. Crossman. 22 F. Cas. No. 13.321, 3 Bann. & A. 281, 4 Cliff. 568; Turrell v. Spaeth, 24 F. Cas. No. 14,269, 3 Bann. & A. 458; Union Paper-Bag Mach. Co. v. Pultz, etc., Co., 24 F. Cas. No. 14.392, 3 Bann. & A. 403. 15 Blatchf. 160; Westinghouse v. Gardner, etc., Air Brake Co., 29 F. Cas. No. 17.450, 2 Bann. & A. 55; Whipple v. Baldwin Mfg. Co., 29 F. Cas. No. 17,514, 4 Fish. Pat. Cas. 29; Whitney v. Mowry, 29 F. Cas. No. 17,592, 2 Bond 45, 3 Fish. Pat. Cas. 157; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40; Wilbur v. Beecher, 29 F. Cas. No. 17,634, 2 Blatchf. 132, Fish. Pat. R. 401; Winans v. New York, etc., R. Co., 30 F. Cas. No. 17,864, 4 Fish. Pat. Cas. 1; Woodcock v. Parker, 30 F. Cas. No. 17,971, 1 Gall. 438, 1 Robb Pat. Cas. 37; Woodworth v. Rogers, 30 F. Cas. No. 18,018, 3 Woodb. & M. 135, 2 Robb Pat. Cas. 625; United Tel. Co. v. Harrison, 21 Ch. D. 720; American Dunlop Tire Co. v. Anderson Tire Co., 5 Can. Exch. 194.

Improvement see infra § 504.

42. Allen v. Wingerter, 17 F. (2d) 745; Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Carnes Artificial Limb Co. v. Dilworth Arm Co., 273 Fed. 838; Merrill v. W. Bickford Co., 260 Fed. 207 [rev on other grounds 268 Fed. 540]; Van Kannel Revolving Door Co. v. Straus, 235 Fed. 135, 148 CCA 629; Syracuse Chilled Plow Co. v. Leroy Plow Co., 233 Fed. 682; Hinman v. Visible Milker Co., 231 Fed. 174 [aff 239 Fed. 896, 153 CCA 24]; Telescope Cot Bed Co. v. Gold Medal Camp Furniture Mfg. Co., 229 Fed. 1002, 144 CCA 284 [certiorari den 241 U. S. 666 mem, 36 SCt 551 mem, 60 L. ed. 1228 mem]; Sundh Electric Co. v. General Electric Co., 198 Fed. 116 [aff 204 Fed. 277, 122 CCA 475]; National Binding Mach. Co. v. James D. McLaurin Co., 186 Fed. 992; Bradley v. Eccles, 165 Fed. 447; King Ax Co. v. Hubbard, 97 Fed. 795, 38 CCA 523 [aff 89 Fed. 713]; Cimiotti Unhairing Co. v. Bowsky, 95 Fed. 474 [aff 143 Fed. 508, 74 CCA 617]; Smith v. Uhrich, 94 Fed. 865; Union R. Co. v. Sprague Electric R., etc., Co., 88 Fed. 82, 31 CCA 391; National Folding-Box, etc., Co v. Elsas, 86 Fed. 917, 30 CCA 487; Heap v. Greene, 75 Fed. 405 [rev on other grounds 91 Fed 792, 34 CCA 86]; Westinghouse v New York Air-Brake Co., 59 Fed 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Edison Electric Light Co v. Waring Electric Co., 59 Fed. 358 [aff 69 Fed. 645, 15 CCA 700]; Pullman's Palace-Car Co. v. Boston, etc., R. Co., 44 Fed. 195 [app dism 51 Fed. 305, 2 CCA 172]; Robinson v. Sutter, 8 Fed. 828, 10 Biss. 100 [rev on other grounds 119 U. S. 530, 7 SCt 376, 30 L. ed. 492]; Blanchard v. Beers, 3 F. Cas. No. 1,506, 2 Blatchf. 411; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No 2.669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Forbes v. Barstow Stove Co., 9 F. Cas. No. 4.923, 2 Cliff. 379; Roberts v. Harnden, 20 F. Cas. No. 11,903, 2 Cliff. 500; Union Paper-Bag Mach. Co. v. Binney, 24 F. Cas. No. 14,387, 5 Fish. Pat. Cas. 166.

"Decreased efficiency does not avoid infringement." Detroit Motor Appliance Co v. Burke, 4 F. (2d) 118, 123.

"Infringement cannot be avoided by making a slight change in a patented structure, which, while utilizing every functional feature of the claimed invention, renders the apparatus less perfect in its operation." Carnes Artificial Limb Co. v. Dilworth Arm Co., 273 Fed. 838, 844.

"Infringement may be found, although the infringing device does not obtain the advantages of an invention to the fullest extent." Telescope Cot Bed Co. v. Gold Medal Camp Furniture Mfg. Co., 229 Fed. 1002, 1004, 144 CCA 284 [certiorari den 241 U. S. 666 mem, 36 SCt 551 mem, 60 L. ed. 1228 mem].

43. Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. 199; A. R. Milner Seating Co. v. Yesbera, 133 Fed. 916, 67 CCA 210; White v. Peerless Rubber Mfg. Co., 111 Fed. 190 [rev on other grounds 118 Fed. 827, 55 CCA 502 (certiorari den 187 U. S. 640 mem, 23 SCt 848 mem, 47 L. ed. 349 mem)]; King Ax Co. v. Hubbard, 97 Fed. 795, 38 CCA 423; Penneau v. Chambers, 92 Fed. 630, 34 CCA 579; Whiteley v. Fadner, 73 Fed. 486; Tripp Giant Leveler Co. v. Bresnahan, 70 Fed. 982 [aff 72 Fed. 920, 19 CCA 237 (aff 99 Fed. 280, 39 CCA 508)]; Sawyer Spindle Co. v. W. G. & A. R. Morrison Co., 52 Fed. 590; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395.

Intention generally see supra § 492.

44. Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, 261 Fed. 85.

45. Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, supra.

46. Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, supra.

47. Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Smith v. Woodruff, 22 F. Cas. No. 13,128a, 6 Fish. Pat. Cas. 476.

48. Temco Electric Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 48 SCt 170, 72 L. ed. 298 [rev 11 F. (2d) 109];

provement is patentable[49] or patented.[50] A prior | patentee is not entitled to use a patented improve-

Hobbs v. Beach, 180 U. S. 383, 21 SCt 409, 45 L. ed. 586; Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Hoyt v. Horne, 145 U. S. 302, 12 SCt 922, 36 L. ed. 713; Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 SCt 299, 32 L. ed. 715; Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Clough v. Barker, 106 U. S. 166, 1 SCt 188, 27 L. ed. 134; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Blake v. Robertson, 94 U. S. 728, 24 L. ed. 245; McCormick v. Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; McDonough v. Johnson-Wentworth Co., 30 F. (2d) 375; Wisconsin-Minnesota Gas, etc., Household Appliance Co. v. Hirschy Co., 28 F. (2d) 838 [aff 18 F. (2d) 347]; Directoplate Corp. v. Huebner-Bleistein Patents Co., 25 F. (2d) 96; Heim Grinder Co. v. Fafnir Bearing Co., 13 F. (2d) 408; Christensen v. National Brake, etc., Co., 10 F. (2d) 856; General Electric Co. v. Mallory, 294 Fed. 562 [aff 298 Fed. 579 (certiorari den 266 U. S. 609 mem, 45 SCt 94 mem, 69 L. ed. 466 mem)]; Seager v. Stewart-Warner Speedometer Corp., 277 Fed. 824; Reed v. Hughes Tool Co., 261 Fed. 192 [certiorari den 251 U. S. 561 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; Otto Coking Co. v. Koppers Co., 258 Fed. 122, 169 CCA 208; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459; Edmands v. Perlman, 248 Fed. 731 [rev on other grounds 255 Fed. 564, 166 CCA 632]; Union Tool Co. v. Wilson, etc., Mfg. Co., 237 Fed. 837 [rev on other grounds 249 Fed. 729, 161 CCA 639 (certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem)]; Yancey v. Enright, 230 Fed. 641, 145 CCA 51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]; National Phonograph Co. v. Fletcher, 117 Fed. 149; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290; Bowers v. Pacific Coast Dredging, etc., Co., 99 Fed. 745 [app dism 105 Fed. 1004 mem, 44 CCA 684 mem]; Welsbach Light Co. v. Sunlight Incandescent Gas Lamp Co., 87 Fed. 221 [app dism 102 Fed. 1007 mem, 41 CCA 683 mem]; Western Electric Co. v. Home Tel. Co., 85 Fed. 649; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Traver v. Brown, 62 Fed. 933 [rev on other grounds 70 Fed. 810, 17 CCA 424]; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Gilbert v. Reinhardt Numbering Mach. Co., 58 Fed. 975; American Bell Tel. Co. v. Brown Tel., etc., Co., 58 Fed. 409; Norton v. Wheaton, 57 Fed. 927; International Postal Supply Co. v. Groth, 57 Fed. 658; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 57 Fed. 601 [aff 58 Fed. 571, 7 CCA 374]; Mergenthaler Linotype Co. v. Press Pub. Co., 57 Fed. 502; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301 [reh den 64 Fed. 125]; Riker v. Crocker-Wheeler Motor Co., 54 Fed. 519; Holloway v. Dow, 54 Fed. 511; Roberts v. H. P. Nail Co., 53 Fed. 916; Brown Mfg. Co. v. Mast, 53 Fed. 578; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; National Cash-Register Co. v. American Cash-Register Co., 47 Fed. 212 [rev on other grounds 53 Fed. 367, 3 CCA 559]; National Typographic Co. v. New York Typograph Co., 46 Fed. 114; Wirt v. Hicks, 45 Fed. 256; Celluloid Mfg. Co. v. Arlington Mfg. Co., 44 Fed. 81 [aff 52 Fed. 740, 3 CCA 269]; Brush Electric Co. v. Western Electric Light, etc., Co., 43 Fed 533; Shive v. Keystone Standard Watch Co., 41 Fed. 434; Baldwin v. T. G. Conway Co., 35 Fed. 519; O'Brien Bros. Mfg. Co. v. Peoria Plow Co., 34 Fed. 786; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 328; Johnson v. Forty-Second St., etc., R. Co., 33 Fed. 499; Shaver v. Skinner Mfg. Co., 30 Fed. 68; Tate v. Thomas, 27 Fed. 306; Filley v. Littlefield, 25 Fed. 282; Hartford Woven-Wire Mattress Co. v. Peerless Wire Mattress Co., 23 Fed. 587, 23 Blatchf. 227; Roemer v. Simon, 20 Fed. 197; Zeun v. Kaldenberg, 16 Fed. 539; American Bell Tel. Co. v. Dolbear, 15 Fed. 448 [aff 126 U. S. 1, 8 SCt 778, 31 L. ed. 863]; Evory v. Burt, 15 Fed. 112 [rev on other grounds 133 U. S. 349, 10 SCt 394, 33 L. ed. 647]; Union Stone Co. v. Allen, 14 Fed. 353; Foye v. Nichols, 13 Fed. 125, 8 Sawy. 201; Frost v. Marcus, 13 Fed. 88; Star Salt Caster Co. v. Alden, 10 Fed. 555; White v. Heath, 10 Fed. 291; Singer Mfg. Co. v. Henry Stewart Mfg. Co., 8 Fed. 920; California Artificial Stone Pav. Co. v. Molitor, 8 Fed. 821, 7 Sawy. 190 [app dism 113 U. S. 609, 5 SCt 618, 28 L. ed. 1106]; Corvallis Fruit Co. v. Curran, 8 Fed. 150, 7 Sawy. 270; Hobbs v. King, 8 Fed. 91; Pennington v. King, 7 Fed. 462; Adams v. Joliet Mfg. Co., 1 F. Cas. No. 56, 3 Bann. & A. 1; American Wood-Paper Co. v. Glen's Falls Paper Co., 1 F. Cas. No. 321, 8 Blatchf. 513, 4 Fish. Pat. Cas. 324; Blake v. Robertson, 3 F. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Blanchard v. Reeves, 3 F. Cas. No. 1,515, 1 Fish. Pat. Cas. 103; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Carr v. Rice, 5 F. Cas. No. 2,440, 1 Fish. Pat. Cas. 198; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Colt v. Massachusetts Arms Co., 6 F. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Cook v. Howard, 6 F. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Crehore v. Norton, 6 F. Cas. No. 3,381; Decker v. Griffith, 7 F. Cas. No. 3,724, 10 Blatchf. 343 note; De Florez v. Raynolds, 7 F. Cas. No. 3,742, 3 Bann. & A. 292, 14 Blatchf. 505; Forbes v. Barstow Stove Co., 9 F. Cas. No. 4,923, 2 Cliff. 379; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Foster v. Moore, 9 F. Cas. No. 4,978, 1 Curt. 279; Gorham v. Mixter, 10 F. Cas. No. 5,626, Brunn. Coll. Cas. 327; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; Imlay v. Norwich, etc., R. Co., 13 F. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; Pitts v. Wemple, 19 F. Cas. No. 11,194, 1 Biss. 87, 5 Fish. Pat. Cas. 10; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Stainthorp v. Humiston, 22 F. Cas. No. 13,281, 4 Fish. Pat. Cas. 107; Star Salt Caster Co. v. Crossman, 22 F. Cas. No. 13,321, 3 Bann. & A. 281, 4 Cliff. 568; Tilghman v. Mitchell, 23 F. Cas. No. 14,043, 2 Fish. Pat. Cas. 518; Turrell v. Spaeth, 24 F. Cas. No. 14,269, 3 Bann. & A. 458; Waterbury Brass Co. v. New York, etc., Brass Co., 29 F. Cas. No. 17,256; Whipple v. Baldwin Mfg. Co., 29 F. Cas. No. 17,514, 4 Fish. Pat. Cas. 29; Woodworth v. Rogers, 30 F. Cas. No. 18,018, 2 Robb Pat. Cas. 625, 3 Woodb. & M. 135; Tecktonius v. Scott, 110 Wis. 441, 86 NW 672; United Tel. Co. v. Harrison, 21 Ch. D. 720; Unwin v. Heath, 16 C. B. 713, 91 ECL 713, 139 Reprint 939, 5 H. L. Cas. 505, 10 Reprint 997, 20 ERC 619; Electric Tel. Co. v. Brett, 10 C. B. 838, 70 ECL 838, 138 Reprint 831; Lister v. Leather, 8 E. & B. 1004, 92 ECL 1004, 120 Reprint 373.

[a] **Operativeness without improvement.**—(1) Infringement is not avoided by using a patented invention with subsequent improvements, if it is operative without them. Radio Corp. v. Edmond, Inc., 20 F. (2d) 929. (2) An improvement does not relieve from infringement where its use would be valueless without employing the invention of the patent. Malina v. Grisman, 20 F. (2d) 406 [aff 20 F. (2d) 409].

[b] **Mere slight improvement** would not of itself negative the infringement. David Belais, Inc. v. Goldstein Bros. Smelting, etc., Co., 6 F. (2d) 930 [aff 10 F. (2d) 673 (certiorari den 271 U. S. 687 mem, 46 S Ct 639 mem, 70 L. ed. 1152 mem)].

49. Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 SCt 299, 32 L. ed. 715; Clough v. Barker, 106 U. S. 166, 1 SCt 188, 27 L. ed. 134; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; McCormick v. Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Vaco Grip Co. v. Sandy MacGregor Co., 292 Fed. 249 [aff 2 F. (2d) 655]; Jay v. Ireland, etc., Mfg. Co., 280 Fed. 166; Underwood Typewriter Co. v. Typewriter Inspection Co., 177 Fed. 230 [aff 180 Fed. 726, 104 CCA 92 (mod on other grounds 184 Fed. 329, 106 CCA 359)]; Benjamin Electric Mfg. Co. v. Dale Co., 158 Fed. 617, 85 CCA 439 [rev 141 Fed. 989]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Smith v. Uhrich, 94 Fed. 865; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Tate v. Thomas, 27 Fed. 306; Wilson v. Cubley, 26 Fed. 156; Zeun v. Kaldenberg, 16 Fed. 539; White v. Heath, 10 Fed. 291; Singer Mfg. Co. v. Henry Stewart Mfg. Co., 8 Fed. 920; Hobbs v. King, 8 Fed. 91; Wilt v. Grier, 5 Fed. 450 [rev on other grounds 120 U. S. 412, 7 SCt 718, 30 L. ed. 712]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Cook v. Howard, 6 F. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Crehore v. Norton, 6 F. Cas. No. 3,381; Decker v. Griffith, 7 F. Cas. No. 3,724, 10 Blatchf. 343 note; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Piper v. Brown, 19 F. Cas. No. 11,180, 4 Fish. Pat. Cas. 175, Holmes 20 [rev on other grounds 91 U. S. 37, 23 L. ed. 200]; Pitts v. Wemple, 19 F. Cas. No. 11,195, 6 McLean 558; Singer v. Walmsley, 22 F. Cas. No. 12,900, 1 Fish. Pat. Cas. 558; Sloat v. Spring, 22 F. Cas. No. 12,948a; Tilghman v. Mitchell, 23 F. Cas. No. 14,043, 2 Fish. Pat. Cas. 518; Proctor v. Bennis, 36 Ch. D. 740; Electric Tel. Co. v. Brett, 10 C. B. 838, 70 ECL 838, 138 Reprint 831.

"It is well settled that one may have an improvement on a patented device, which improvement is of itself patentable; but that such improver is not entitled to use the patented device with the improvement added. If the improver uses the specific device of the prior patent, he is an infringer." Underwood Typewriter Co. v. Typewriter Inspection Co., 177 Fed. 230, 238 [aff 180 Fed. 726, 104 CCA 92 (mod on other grounds 184 Fed. 329, 106 CCA 359)].

50. Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Blanchard v. Putnam, 8 Wall. (U. S.) 420, 19 L. ed. 433; Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Premier Register Table Co. v. West, 21 F. (2d) 762; Jonas v. Roberti, 7 F. (2d) 563 [aff 300 Fed.

ment of his invention without the consent of the patentee thereof;[51] and a third person who is infringing both the patent for the original invention and the patent for an improvement cannot set up the existence of the first patent as an excuse for infringing the second patent.[52] However, a patent for a slight improvement is narrowly construed,[53] is accorded only a limited range of equivalents,[54] and is said to be infringed only by a use of the very improvement described and claimed[55] or a colorable evasion thereof.[56]

[§ 505] **(g) Parts or Elements[57]—aa. Increase or Impairment of Function Generally.** A machine or device is no less an infringement of a patent because one of the parts or elements thereof, which performs the same function as that of the patented machine or device, also performs an additional function or functions.[58] Also infringement is not avoided by impairment of the functions of an element of a patented device in degree, if the distinguishing feature is retained.[59]

[§ 506] **bb. Addition or Omission. Addition.**[60] A person who appropriates a patented invention or the substance thereof without the consent of the patentee does not avoid infringement by merely adding one or more parts, elements, or features to the construction claimed.[61] The rule is applicable to various additions, such as an addition which secures an additional function or functions,[62] the duplication or multiplication of one or

181]; Regal Shoe Co. v. Clarke-Emerson Mfg. Co., 294 Fed. 918; Vaco Grip Co. v. Sandy MacGregor Co., 292 Fed. 249 [aff 2 F. (2d) 655]; Reed v. Hughes Tool Co., 261 Fed. 192 [certiorari den 251 U. S. 561 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; American Caramel Co. v. White, 234 Fed. 328, 148 CCA 230; Munising Paper Co. v. American Sulphite Pulp Co., 228 Fed. 700, 143 CCA 222; Stockland v. Russell Grader Mfg. Co., 222 Fed. 906, 138 CCA 386; American Car, etc., Co. v. Seeger Refrigerator Co., 178 Fed. 278, 101 CCA 542 [aff 171 Fed. 416; Ries v. Barth Mfg. Co., 136 Fed. 850, 69 CCA 528; Bradford Belting Co. v. Kisinger-Ison Co., 113 Fed. 811, 51 CCA 483; Bowers v. Pacific Coast Dredging, etc., Co., 99 Fed. 745 [app dism 105 Fed. 1004 mem, 44 CCA 684 mem]; Smith v. Uhrich, 94 Fed. 865; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)]; Putnam v. Keystone Bottle Stopper Co., 38 Fed. 234; Tate v. Thomas, 27 Fed. 306; Wilson v. Cubley, 26 Fed. 156; Zeun v. Kaldenberg, 16 Fed. 539; Union Stone Co. v. Allen, 14 Fed. 353; Star Salt Caster Co. v. Alden, 10 Fed. 555; White v. Heath, 10 Fed. 291; Pennington v. King, 7 Fed. 462; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Cleveland v. Towle, 5 F. Cas. No. 2,888, 3 Fish. Pat. Cas. 525; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Cook v. Howard, 6 F. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Foster v. Moore, 9 F. Cas. No. 4,978, 1 Curt. 279; Jones v. Merrill, 13 F. Cas. No. 7,481; Morse Fountain-Pen Co. v. Esterbrook Steel-Pen Mfg. Co., 17 F. Cas. No. 9,862, 3 Fish. Pat. Cas. 515; Storrs v. Howe, 23 F. Cas. No. 13,495, 2 Bann. & A. 420, 4 Cliff. 388; Waterbury Brass Co. v. New York, etc., Brass Co., 29 F. Cas. No. 17,256; Wilson v. Barnum, 30 F. Cas. No. 17,787, 2 Fish. Pat. Cas. 635, 2 Robb Pat. Cas. 749, 1 Wall. Jr. 347; Jackson v. Allen, 120 Mass. 64; Lister v. Leather, 8 E. & B. 1004, 92 ECL 1004, 120 Reprint 373.

Presumption of noninfringement see infra § 581.

51. Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Blake v. Robertson, 94 U. S. 728, 24 L. ed. 245; Bowers v. Pacific Coast Dredging, etc., Co., 99 Fed. 745 [app dism 105 Fed. 1004 mem, 44 CCA 684 mem]; Crehore v. Norton, 6 F. Cas. No. 3,381; Fling v. Roberts, 9 F. Cas. No. 4,875, 4 Bann. & A. 165; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Pitts v. Wemple, 19 F. Cas. No. 11,195, 6 McLean 558; Star Salt Caster Co. v. Crossman, 22 F. Cas. No. 13,321, 3 Bann. & A. 281, 4 Cliff. 568; Whipple v. Baldwin Mfg. Co., 29 F. Cas. No. 17,514, 4 Fish. Pat. Cas. 29.

52. Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017.

53. See supra § 356.

54. See infra § 509.

55. Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; Luten v. Sharp, 234 Fed. 880, 148 CCA 478 [aff 217 Fed. 76].

56. Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; Luten v. Sharp, 234 Fed. 880, 148 CCA 478 [aff 217 Fed. 76].

[a] **Subsequent improvements** do not infringe the patent for the prior improvement unless they are colorable merely. Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 144 [aff 167 Fed. 546, 93 CCA 224].

[b] **Where defendant's machines can be differentiated,** the charge of infringement cannot be sustained. Johnson v. Johnson, 190 Fed. 20.

57. Cross references:

Ingredients of composition of matter see infra § 514.

Parts or elements of combination see infra § 512.

Steps of process see infra § 513.

58. Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682 [certiorari den 269 U. S. 571 mem, 46 SCt 26 mem, 70 L. ed. 417 mem]; Palmer v. E. Z. Waist Co., 278 Fed. 530 [aff 288 Fed. 848]; De Laski, etc., Circular Woven Tire Co. v. Thropp, etc., Co., 218 Fed. 458 [aff 226 Fed. 941, 141 CCA 545]; Colby v. Card, 63 Fed. 462 [rev on other grounds 64 Fed. 594, 12 CCA 319]; Pacific Cable R. Co. v. Butte City St. R. Co., 55 Fed. 760 [rev 60 Fed. 410, 9 CCA 41]; Masseth v. Palm, 51 Fed. 824; Brush Electric Co. v. Ft. Wayne Electric Co., 44 Fed. 284; Holmes Burglar Alarm Tel. Co. v. Domestic Tel., etc., Co., 42 Fed. 220; Shaver v. Skinner Mfg. Co., 30 Fed. 68; Yale Lock Mfg. Co. v. Norwich Nat. Bank, 6 Fed. 377, 19 Blatchf. 123; New York Rubber Co. v. Chaskel, 18 F. Cas. No. 10,215; Sloat v. Spring, 22 F. Cas. No. 12,948a.

59. Kawneer Mfg. Co. v. Detroit Showcase Co., 240 Fed. 737 [mod on other grounds 250 Fed. 234, 162 CCA 370]; Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 CCA 371 [rev 195 Fed. 774].

60. Improvement see supra § 504.

61. McDonough v. Johnson-Wentworth Co., 30 F. (2d) 375; Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem]; Oregon Woodenware Mfg. Co. v. Murray, 215 Fed. 744; Murray Co. v. Detroit Wire Spring Co., 206 Fed. 465, 124 CCA 371 [rev 195 Fed. 774]; Long v. Noye Mfg. Co., 192 Fed. 566; Underwood Typewriter Co. v. Typewriter Inspection Co., 177 Fed. 230 [aff 180 Fed. 726, 104 CCA 92 (mod on other grounds 184 Fed. 329, 106 CCA 359)]; Newton v. McGuire, 97 Fed. 614; Kisinger-Ison Co. v. Bradford Belting Co., 97 Fed. 502, 38 CCA 300; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845; Lacing Stud Co. v. Packard, 67 Fed. 115 [mod on other grounds 70 Fed. 66, 16 CCA 639]; Williames v. Barnard, 41 Fed. 358; Wirt v. Brown, 30 Fed. 188; Phillips v. Carroll, 23 Fed. 249; Tate v. Thomas, 22 Fed. 660; Bostock v. Goodrich, 21 Fed. 316; Roemer v. Simon, 20 Fed. 197; Singer Mfg. Co. v. Henry Stewart Mfg. Co., 8 Fed. 920; Hobbs v. King, 8 Fed. 91; Chicago Fruit-House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 4 Fish. Pat. Cas. 395; Coleman v. Liesor, 6 F. Cas. No. 2,984; Colt v. Massachusetts Arms Co., 6 F. Cas. No. 3,030, 1 Fish. Pat. Cas. 108; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 374; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Pitts v. Wemple, 19 F. Cas. No. 11,195, 6 McLean 558; Sloat v. Spring, 22 F. Cas. No. 12,948a; Westinghouse v. Gardner, etc., Air-Brake Co., 29 F. Cas. No. 17,450, 2 Bann. & A. 55; Williams v. Boston, etc., R. Co., 29 F. Cas. No. 17,716, 4 Bann. & A. 441, 17 Blatchf. 21; Jackson v. Allen, 120 Mass. 64; Proctor v. Bennis, 36 Ch. D. 740; Marconi v. Helsby Wireless Tel Co., 30 T. L. R. 688. See Meurer Steel Barrel Co. v. National Enameling, etc., Co., 242 Fed. 273 (the addition of an unnecessary or immaterial step, without presenting any additional element, does not enable defendant to avoid a charge of infringement).

62. Rees v. Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Stebler v. Riverside Heights Orange Growers' Assoc., 205 Fed. 735, 124 CCA 29 [certiorari den 231 U. S. 748 mem, 34 SCt 320 mem, 58 L. ed. 465 mem]; Walker Patent Pivoted Bin Co. v. Miller, 132 Fed. 823 [aff 139 Fed. 134, 71 CCA 398]; Brislin v. Carnegie Steel Co., 118 Fed. 579 [rev on other grounds 124 Fed. 213, 59 CCA 651 (certiorari den 191 U. S. 576 mem, 24 SCt 848 mem, 48 L. ed. 309 mem)]; Dowagiac Mfg. Co. v. Brennan, 118 Fed. 143 [rev on other grounds 127 Fed. 143, 62 CCA 257 (certiorari den 195 U. S. 630 mem, 25 SCt 788 mem, 49 L. ed. 352 mem)]; Powell v. Leicester Mills Co., 108 Fed. 386, 47 CCA 416 [rev 103 Fed. 476 (certiorari den 181 U. S. 622 mem, 21 SCt 925 mem, 45 L. ed. 1032 mem)]; Newton v. McGuire, 97 Fed. 614; Consolidated Fastener Co. v. Hays, 95 Fed. 168; Jones v. Holman, 58 Fed. 973 [rev on other grounds 61 Fed. 105, 680, 9 CCA 385]; Heaton-Peninsular Button-Fastener Co. v. Elliott Button-Fastener Co., 58 Fed. 220; Williames v. Barnard, 41 Fed. 358; Baldwin v. T. G. Conway Co., 35 Fed. 519; Filley v. Littlefield Stove Co., 30 Fed. 434; Wirt v. Brown, 30 Fed. 188; Blake v. Robertson, 3 F. Cas. No. 1,501 [aff 94 U. S. 728, 24 L. ed. 245]; Cleveland v. Towle, 5 F. Cas. No. 2,888, 3 Fish. Pat. Cas. 525; Earle v. Harlow, 8 F. Cas. No. 4,246, 2 Bann. & A. 264; Imlay v. Norwich, etc., R. Co., 13 F. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Johnson v. Root, 13 F. Cas. No. 7,411, 1 Fish. Pat. Cas. 351; Magic Ruffle Co. v. Elm City Co., 16 F. Cas. No. 8,949, 2 Bann. & A. 152, 13 Blatchf. 151; Pitts v. Wemple, 19 F. Cas. No. 11,195, 6 McLean 558; Robertson v. Hill, 20 F. Cas. No. 11,925, 6 Fish. Pat. Cas. 465; Waterbury Brass Co. v. New York, etc., Brass Co., 29 F. Cas. No. 17,256, 3 Fish. Pat. Cas. 43; Wil-

more parts or features[63] without change or addition of function,[64] and an addition which merely makes the patented structure more complicated and cumbersome.[65] As hereinafter shown, an addition which changes or destroys a combination, and makes a new combination, avoids infringement of a patent for a combination.[66]

Omission. A claim is not infringed when an element included therein is omitted and no equivalent is used.[67] The rule applies where the part or element omitted is essential;[68] and, except in some jurisdictions,[69] it also applies where the element omitted is not really essential.[70] However, the omission of elements or features not claimed does not avoid infringement;[71] and the impairment of the function of a part of a patented structure by omitting a portion will not avoid infringement.[72]

[§ 507] **cc. Joinder or Division.** Ordinarily infringement of a patent is not avoided by joining, combining, or consolidating two parts, elements, or

liams v. Boston, etc., R. Co., 29 F. Cas. No. 17,716, 4 Bann. & A. 441, 17 Blatchf. 21.

63. McMillan v. Fischer Auto Bed, etc., Co., 264 Fed. 671; General Compressed Air, etc., Mach. Co. v. American Air Cleaning Co., 177 Fed. 272 [rev on other grounds 195 Fed. 744, 115 CCA 544]; Underwood Typewriter Co. v. Typewriter Inspection Co., 177 Fed. 230 [aff 180 Fed. 726, 104 CCA 92 (mod on other grounds 184 Fed. 329, 106 CCA 359)]; Western Tube Co. v. Rainear, 156 Fed. 49 [aff 159 Fed. 431, 86 CCA 411]; Kelsey Heating Co. v James Spear Stove, etc., Co., 155 Fed. 976 [rev on other grounds 158 Fed. 622, 85 CCA 444]; Diamond State Iron Co. v. Goldie, 84 Fed. 972, 28 CCA 589 [aff 81 Fed. 173]; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co., 36 Fed. 191; Blake v. Eagle Works Mfg. Co., 3 F. Cas. No. 1,494, 3 Biss. 77, 4 Fish. Pat. Cas. 591; Kittle v. Frost, 14 F. Cas. No. 7,856, 9 Blatchf. 214, 5 Fish. Pat. Cas. 213; Pike v. Providence, etc., R. Co., 19 F. Cas. No. 11,163, 1 Bann. & A. 560, Holmes 445.

Division of one part into two see infra § 507.

64. Western Tube Co. v. Rainear, 156 Fed. 49 [aff 159 Fed. 431, 86 CCA 411]; Kelsey Heating Co. v. James Spear Stove, etc., Co., 155 Fed. 976 [rev on other grounds 158 Fed. 622, 85 CCA 444].

65. McMillan v. Fischer Auto Bed, etc., Co., 264 Fed. 671.

66. See infra § 512.

67. Black Diamond Coal-Min. Co. v. Excelsior Coal Co., 156 U. S. 611, 15 SCt 482, 39 L. ed. 553; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 10 SCt 409, 33 L. ed. 663; Peters v. Active Mfg. Co., 129 U. S. 530, 9 SCt 389, 32 L. ed. 738; Prouty v. Ruggles, 16 Pet. (U. S.) 336, 10 L. ed. 985; Vanderveld v. Rollman, etc., Co., 28 F. (2d) 948; Ladd v. Walker, 7 F. (2d) 72; Superior Skylight Co. v. Zerbe Constr. Co., Inc., 5 F. (2d) 982 [aff 10 F. (2d) 710]; Auto Hone Co. v. Hall Cylinder Hone Co., 3 F. (2d) 479; Russell Grader Mfg. Co. v. F. B. Zeig Mfg. Co., 259 Fed. 575, 170 CCA 33; Waterbury Farrell Fdy., etc., Co. v. E. J. Manville Mach. Co., 253 Fed. 59 [aff 253 Fed. 59, 165 CCA 658]; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418; McClaskey Register Co. v. Mantz, 224 Fed. 495, 140 CCA 203 [aff 217 Fed. 415]; Collins v. Dunlap, 180 Fed. 775; Mallon v. Gregg, 137 Fed. 68, 69 CCA 48; Westinghouse Electric, etc., Co. v. Cutter Electric, etc., Co., 136 Fed. 217 [rev on other grounds 143 Fed. 966, 75 CCA 540]; Levy v. Harris, 124 Fed. 69 [aff 130 Fed. 711, 65 CCA 113]; Mayo Knitting Mach., etc., Co. v. Jenckes Mfg. Co., 121 Fed. 110 [aff 133 Fed. 527, 66 CCA 557]; American School-Furniture Co. v. J. M. Sauder Co., 113 Fed. 576; Moore v. Eggers, 107 Fed. 491, 46 CCA 425; Parsons v. Minneapolis Threshing-Mach. Co., 106 Fed. 941; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Thomson Meter Co. v. National Meter Co., 106 Fed. 519; Keyes v. United Indurated Fibre Co., 104 Fed. 1006, 44 CCA 265; Goodyear Shoe Mach. Co. v. Spaulding, 101 Fed. 990 [aff 110 Fed. 393, 49 CCA 88]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 100 Fed. 849 [rev on other grounds 108 Fed. 845, 48 CCA 72]; Mesick v. Moore, 100 Fed. 845; Ryan v. Runyon, 93 Fed. 970, 36 CCA 36; Regina Music-Box Co. v. Paillard, 85 Fed. 644; Keyes v. United Indurated Fibre Co., 82 Fed. 32 [aff 104 Fed. 1006, 44 CCA 265]; Kansas City Hay-Press Co. v. Devol, 81 Fed. 726, 26 CCA 578; Roemer v. Peddie, 81 Fed. 380, 26 CCA 440; Excelsior Coal Co. v. Oregon Impr. Co., 79 Fed. 355, 24 CCA 640; Carter Mach. Co. v. Hanes, 78 Fed. 346, 24 CCA 128; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Murphy Mfg. Co. v. Excelsior Car-Roof Co., 76 Fed. 965, 22 CCA 658; Wheaton v. Norton, 70 Fed. 833, 17 CCA 447 [certiorari den 165 U. S. 518, 17 SCt 404, 41 L. ed. 810]; Adee v. J. L. Mott Iron-Works, 55 Fed. 876, 5 CCA 288; Baumer v. Will, 53 Fed. 373; Adee v. J. L. Mott Iron-Works, 46 Fed. 77 [aff 55 Fed. 876, 5 CCA 288]; Mack v. Levy, 43 Fed. 69 [app dism 154 U. S. 508]; Sun Vapor St. Light Co. v. Western St. Light Co., 41 Fed. 43 [aff 48 Fed. 682]; Catchpole v. Pulsifer, 35 Fed. 766; Ligowski Clay-Pigeon Co. v. Peoria Target Co., 35 Fed. 755; Kidd v. Ransom, 35 Fed. 588; Wight Fireproofing Co. v. Chicago Fireproof Co., 35 Fed. 582 [app dism 149 U. S. 790 mem, 13 SCt 1054 mem, 37 L. ed. 966 mem]; Wheeler v. Hart, 32 Fed. 78 [aff 140 U. S. 704, 11 SCt 1031, 35 L. ed. 602]; Tobey Furniture Co. v. Colby, 26 Fed. 100; Sheeder v. Shannon, 25 Fed. 824 [aff 131 U. S. 447, 9 SCt 803, 33 L. ed. 224]; Taft v. Steere, 19 Fed. 600; Snow v. Lake Shore, etc., R. Co., 18 Fed. 602 [aff 121 U. S. 617, 7 SCt 1343, 30 L. ed. 1004]; National Pump Cylinder Co. v. Simmons Hardware Co., 18 Fed. 324, 5 McCrary 592; Doane, etc., Mfg. Co. v. Smith, 15 Fed. 459; Fay v. Preble, 14 Fed. 652, 11 Biss. 422; Morgan El. R. Co. v. Pullman, 14 Fed. 648; Goss v. Cameron, 14 Fed. 576, 11 Biss. 389; Hayes v. Seton, 12 Fed. 120, 20 Blatchf. 484 [app dism 21 Fed. 568 (aff 139 U. S. 503 mem, 11 SCt 594 mem, 35 L. ed. 261 mem)]; Onderdonk v. Fanning, 9 Fed. 106, 19 Blatchf. 363; Rowell v. Lindsay, 6 Fed. 290, 10 Biss. 217 [aff 113 U. S. 97, 5 SCt 507, 28 L. ed. 906]; Baldwin v. Schultz, 2 F. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75; Bliss v. Haight, 3 F. Cas. No. 1,548, 7 Blatchf. 7, 3 Fish. Pat. Cas. 621; Brown v. Hinkley, 4 F. Cas. No. 2,012, 6 Fish. Pat. Cas. 370; Burr v. Cowperthwait, 4 F. Cas. No. 2,188, 4 Blatchf. 163 [aff 2 Wall. 320, 17 L. ed. 817]; Case v. Brown, 5 F. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268, Craig v. Smith, 6 F. Cas. No. 3,339, 1 Bann. & A. 556, 4 Dill. 349 [aff 100 U. S. 226, 25 L. ed. 577]; Dodge v. Card, 7 F. Cas. No. 3,951, 1 Bond 393, 2 Fish. Pat. Cas. 116; Evarts v. Ford, 8 F. Cas. No. 4,574, 6 Fish. Pat. Cas. 587; Florence Mfg. Co. v. Boston Diatite Co., 9 F. Cas. No. 4,882, 1 Bann. & A. 396, Holmes 415; Hailes v. Van Wormer, 11 F. Cas. No. 5,904, 7 Blatchf. 443 [aff 20 Wall. 353, 22 L. ed. 241]; Hale v. Stimpson, 11 F. Cas. No. 5,915, 2 Fish. Pat. Cas. 565; Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [aff 3 Wall. 315, 18 L. ed. 76]; Hill v. Houghton, 12 F. Cas. No. 6,493, 1 Bann. & A. 291; Roberts v. Harnden, 20 F. Cas. No. 11,903, 2 Cliff. 500; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Sanford v. Merrimack Hat Co., 21 F. Cas. No. 12,313, 2 Bann. & A. 408, 4 Cliff. 404; Smith v. Higgins, 22 F. Cas. No. 13,060, 2 Fish. Pat. Cas. 97; Sweetser v. Helms, 23 F. Cas. No. 13,689, 2 Bann. & A. 263; Seed v. Higgins, 8 H. L. Cas. 550, 11 Reprint 544, 20 ERC 680.

[a] **Pioneer character of invention.**—The rule stated in the text applies (1) not only where there is nothing of a pioneer character in a patentee's device (McCaskey Register Co. v. Mantz, 224 Fed. 495, 140 CCA 203 [aff 217 Fed. 415]), (2) but also where the patentee may, at least to some extent, be considered as a pioneer (Ritter v. Veneer Mach. Co., 251 Fed. 610, 163 CCA 604).

68. Lincoln v. Waterbury Button Co., 291 Fed. 594 [aff 297 Fed. 619]; Universal Form Clamp Co. v. Taxis, 267 Fed. 578 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; J. M. Shock Absorber Co. v. Blackledge, 220 Fed. 921, 136 CCA 487 [rev 213 Fed. 478]; Consolidated Car Heating Co. v. Came, [1903] A. C. 509; Moodie v. Canadian Westinghouse Co., Ltd., 16 Can. Exch. 133, 27 DomLR 444; Drew v. Shearer, 18 Austr. C. L. R. 209.

69. Consolidated Car Heating Co. v. Came, 18 Que. Super. 44.

70. Wright v. Yuengling, 155 U. S. 47, 15 SCt 1, 39 L. ed. 64; Loraine Dev. Co. v. General Electric Co., 198 Fed. 100 [aff 202 Fed. 215, 120 CCA 615]; Henry Huber Co. v. J. L. Mott Iron Works, 113 Fed. 599 [aff 125 Fed. 944, 60 CCA 182]; Elfelt v. Steinhart, 11 Fed. 896, 6 Sawy. 480; Dodge v. Fearey, 8 Fed. 329.

71. Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Letson v. Alaska Packers' Assoc., 130 Fed. 129, 64 CCA 463 [mod 119 Fed. 599]; Hobbs Mfg. Co. v. Gooding, 111 Fed. 403, 49 CCA 414; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Bresnahan v. Tripp Giant Leveller Co., 102 Fed. 899, 43 CCA 48; Boston v. Allen, 91 Fed. 248, 33 CCA 485; Mast v. Dempster Mills Mfg. Co., 82 Fed. 327, 27 CCA 191; National Cash-Register Co. v. American Cash-Register Co., 53 Fed. 367, 3 CCA 559; American Automaton Weighing Mach. Co. v. Blauvelt, 50 Fed. 213; National Cash-Register Co. v. Boston Cash Indicator, etc., Co., 45 Fed. 481 [rev on other grounds 156 U. S. 502, 15 SCt 434, 39 L. ed. 511 (app dism 159 U. S. 261 mem, 15 SCt 1041 mem, 40 L. ed. 142 mem)]; National Car-Brake Shoe Co. v. Lake Shore, etc., R. Co., 4 Fed. 219, 9 Biss. 503 [aff 110 U. S. 229, 4 SCt 33, 28 L. ed. 129]; Francis v. Mellor, 9 F. Cas. No. 5,039, 5 Fish. Pat. Cas. 153, 8 Phila. (Pa.) 157; Jurgensen v. Magnin, 14 F. Cas. No. 7,586, 9 Blatchf. 294, 5 Fish. Pat. Cas. 237; Macdonald v. Shepard, 16 F. Cas. No. 8,767, 4 Bann. & A. 343.

72. James L. Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Manton-Gaulin Mfg. Co. v. Dairy Mach., etc., Co., 238 Fed. 210 [aff 247 Fed. 317, 159 CCA 411].

features into one integral part[73] where the single part performs the functions,[74] accomplishes the objects or purposes,[75] or secures the results[76] of both in the same, or substantially the same, way,[77] and in practical operation it makes no difference whether one form of construction or the other is adopted;[78] but it is otherwise if the patentee has intentionally made the separability of the two parts an essential feature of his invention.[79] Likewise infringement is not avoided by the division or separation of an integral part or element into two or more parts or elements,[80] where the same work is done,[81] or, in other words, the same function is performed[82] or the same result is produced[83] in substantially the same way or manner.[84]

[§ 508] **dd. Transposition.** Where there is no change in function and no substantial change in operation, infringement is not avoided by a mere transposition, rearrangement, or change in location of parts or elements,[85] such as a mere reversal of position or operation;[86] but infringement is avoided by a rearrangement or change of position which produces a substantially different mode of operation,[87] even though the result is the same or sim-

73. Lamson Co. v. G., etc., Atlas Systems, 14 F. (2d) 22; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48 [aff 299 Fed. 822]; Outlook Co. v. Malco Products Corp., 299 Fed. 996.

74. Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937; Gibbs v. Triumph Trap Co., 26 F. (2d) 312 [certiorari den 49 SCt 21 mem]; Grupe Drier, etc., Co. v. Geiger, 215 Fed. 110, 131 CCA 418.

75. Buckeye Blower Co. v. Arensmeyer, 28 F. (2d) 209; Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Barber v. Otis Motor Sales Co., 240 Fed. 723, 153 CCA 521 [aff 231 Fed. 755].

76. Kawneer Mfg. Co. v. Detroit Showcase Co., 240 Fed. 737 [mod on other grounds 250 Fed. 234, 162 CCA 370].

77. Gibbs v. Triumph Trap Co., 26 F. (2d) 312, 314 [certiorari den 49 SCt 21 mem]; Kawneer Mfg. Co. v. Detroit Showcase Co., 240 Fed. 737 [mod on other grounds 250 Fed. 234, 162 CCA 370]; Grupe Drier, etc., Co. v. Geiger, 215 Fed. 110, 131 CCA 418.

"It is settled law, and it is good sense, that one does not escape infringement by combining into one element what a claim specifies as two, provided that the single element performs the function of both in the same way." Gibbs v. Triumph Trap Co., supra.

78. Weber v. Automobile, etc., Mfg. Co., 190 Fed. 189.

79. Grupe Drier, etc., Co. v. Geiger, 215 Fed. 110, 131 CCA 418.

[a] **Parts intended to coöperate with others.**—"When the intention of the inventor is to accomplish the purpose (of thoroughly mixing the air) by two parts which are to co-operate with other elements to attain a definite result—one that is attainable only by such double parts in co-operation with the others—then the use of one part (a single by-pass) which functions differently is not the equivalent of the two." Buckeye Blower Co. v. Arensmeyer, 28 F. (2d) 209, 212.

80. Blumenthal v. Salt's Textile Mfg. Co., 21 F. (2d) 470; H. H. Miller Industries Co. v. Emery Thompson Mach., etc., Co., 18 F. (2d) 150; Outlook Co. v. Malco Products Corp., 299 Fed. 996; Hammond Buckle Co. v. Hathaway, 48 Fed. 834; Hayes v. Bickelhoupt, 21 Fed. 567; Mabie v. Haskell, 15 F. Cas. No. 8,653, 2 Cliff. 507.

"Dividing an element into distinct parts does not avoid infringement." Blumenthal v. Salt's Textile Mfg. Co., 21 F. (2d) 470, 473.

81. Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585; Barber v. Otis Motor Sales Co., 240 Fed. 723, 153 CCA 521 [aff 231 Fed. 755]; Stockland v. Russell Grader Mfg. Co., 222 Fed. 906, 138 CCA 386. And see Troy Wagon Works Co. v. Ohio Trailer Co., 272 Fed. 850 (recognizing the rule, but holding it inapplicable).

82. Simplex Piston Ring Co. v. Hamilton, 21 F. (2d) 196 [aff 25 F. (2d) 1022 mem]; Line Material Co. v. Brady Electric Mfg. Co., 7 F. (2d) 48 [aff 299 Fed. 822]; Kelsey Heating Co. v. James Spear Stove, etc., Co., 155 Fed. 976 [rev on other grounds 158 Fed. 622, 85 CCA 444]. And see Nu Bone Corset Co. v. Spirella Co., 183 Fed. 984, 106 CCA 324 [rev 180 Fed. 470] (recognizing the rule, but holding it inapplicable).

[a] **Substantial identity of function and operation.**—Infringement is not avoided by dividing an integral element into two or more distinct parts, so long as the function and operation remain substantially the same. Hiler Audio Corp. v. General Radio Co., 26 F. (2d) 475; Kings County Raisin, etc., Co. v. U. S. Cons. Seeded Raisin Co., 182 Fed. 59, 104 CCA 499.

83. Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Strobridge v. Lindsay, 6 Fed. 510; Roots v. Hyndman, 20 F. Cas. No. 12,040, 6 Fish. Pat. Cas. 439 [aff 97 U. S. 224, 24 L. ed. 975]; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1.

84. Stockland v. Russell Grader Mfg. Co., 222 Fed. 906, 138 CCA 386; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Strobridge v. Lindsay, 6 Fed. 510; Roots v. Hyndman, 20 F. Cas. No. 12,040, 6 Fish. Pat. Cas. 439 [aff 97 U. S. 224, 24 L. ed. 975]; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1.

85. Bassick Mfg. Co. v. Larkin Automotive Parts Co., 23 F. (2d) 92; United Mfg., etc., Co. v. Evans, 22 F. (2d) 936; Smith v. American Electric Rabbit Racing Assoc., 21 F. (2d) 366 [aff 26 F. (2d) 1016 mem (certiorari den 49 SCt 27 mem)]; Perey v. Perey Mfg. Co., 17 F. (2d) 774; Allen v. Wingerter, 17 F. (2d) 745; Root v. Hobbs Mfg. Co., 294 Fed. 236; Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502; International Flatstub Check Book Co. v. Young, etc., Co., 278 Fed. 835 [aff 284 Fed. 831]; Weber Electric Co. v. Union Electric Co., 226 Fed. 482; Frank F. Smith Metal Window Hardware Co. v. Yates, 216 Fed. 361 [aff 216 Fed. 359, 132 CCA 503]; Wagner Typewriter Co. v. Wyckoff, 151 Fed. 585, 81 CCA 129 [mod 138 Fed. 108]; Pettibone v. Pennsylvania Steel Co., 133 Fed. 730 [rev on other grounds 141 Fed. 95, 72 CCA 97]; Consolidated Fastener Co. v. Hays, 100 Fed. 984, 41 CCA 142; Schroeder v Brammer, 98 Fed. 880 [aff 106 Fed. 918, 46 CCA 41]; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Societe Anonyme Usine J. Cleret v. Rehfuss, 75 Fed. 657; De la Vergne Refrigerating Mach. Co. v. Featherstone, 67 Fed. 937 [aff 80 Fed. 918, 26 CCA 246]; Ross v. Minneapolis, 64 Fed. 592; Devlin v. Paynter, 64 Fed. 398, 12 CCA 188; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164 [reh den 59 Fed. 295, 8 CCA 129]; Sawyer Spindle Co v. W. G. & A. R. Morrison Co., 54 Fed. 693; Henzel v. California Electrical Works, 51 Fed. 754, 2 CCA 495; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; California Electrical Works v. Henzel, 48 Fed. 375 [aff 51 Fed. 754, 2 CCA 495]; Walker v. Terre Haute, 44 Fed. 70; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 25; Eagle Mfg. Co. v Moline, etc., Co., 35 Fed. 299; Eagle Mfg. Co. v. Bradley, 35 Fed. 295; Babcock, etc., Co. v. Pioneer Iron-Works, 34 Fed. 338; Sawyer Spindle Co. v. Eureka Spindle Co., 33 Fed. 836 [app dism 145 U. S. 637 mem, 12 SCt 980 mem, 36 L. ed. 849 mem]; Kirk v. Du Bois, 33 Fed. 252 [aff 158 U. S. 58, 15 SCt 729, 39 L. ed. 895]; Belle Patent Button Fastener Co. v. Lucas, 28 Fed. 371; Hartford Mach. Screw Co. v. Reynolds, 26 Fed. 528; Hoyt v. Slocum, 26 Fed. 329; Shannon v. J. M. W. Jones Stationery, etc., Co., 9 Fed. 205, 10 Biss. 498; Putnam v. Hollender, 6 Fed. 882, 19 Blatchf. 48; Adams v. Joliet Mfg. Co., 1 F. Cas. No. 56, 3 Bann. & A. 1; Conover v. Dohrman, 6 F. Cas. No. 3,120, 6 Blatchf. 60, 3 Fish. Pat. Cas. 382; Decker v. Grote, 7 F. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143; Gale Mfg. Co. v. Prutzman, 9 F. Cas. No. 5,191a, 5 Bann. & A. 154; Hamilton v. Ives, 11 F. Cas. No. 5,982, 6 Fish. Pat. Cas. 244 [aff 92 U. S. 426, 23 L. ed. 494]; King v. Maudelbaum, 14 F. Cas. No. 7,799, 8 Blatchf. 468, 4 Fish. Pat. Cas. 577; Knox v. Great Western Quicksilver Min. Co., 14 F. Cas. No. 7,907, 4 Bann. & A. 25, 7 Reporter 325, 6 Sawy. 430; Smith v. Higgins, 22 F. Cas. No. 13,058; Winans v. Danforth, 30 F. Cas. No. 17,859; Busch v. Jones, 16 App. (D. C.) 23 [rev on other grounds 184 U. S. 598, 22 SCt 511, 46 L. ed. 707]; Jackson v. Allen, 120 Mass. 64.

86. Wine R. Appliance Co. v. Enterprise R. Equipment Co., 25 F. (2d) 236; Bassick Mfg. Co. v. Larkin Automotive Parts Co., 23 F. (2d) 92; Allen v. Wingerter, 17 F. (2d) 745; Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435; Anchor Cap, etc., Corp. v. Pritchard, 232 Fed. 156; Hamilton Beach Mfg. Co. v. P. A. Geier Co., 230 Fed. 430, 144 CCA 572; Heap v. Greene, 91 Fed. 792, 34 CCA 86 [rev 75 Fed. 405]; Société Anonyme Usine J. Cléret v. Rehfuss, 75 Fed. 657; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164, 59 Fed. 295, 8 CCA 129; Brown Mfg. Co. v. Mast, 53 Fed 578; Masseth v. Palm, 51 Fed. 824; Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. R. 184; Buerk v. Imhaeuser, 4 F. Cas. No. 2,106, 1 Bann. & A. 337 [aff 101 U. S. 647, 25 L. ed. 945]; Potter v. Schenck, 19 F. Cas. No. 11,337, 1 Biss. 515, 3 Fish. Pat. Cas. 82. Potter v. Whitney, 19 F. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 24 F. Cas. No. 14,369, 2 Bann. & A. 593; Wells v. Jacques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60.

[a] **Meaning of term.**—"The expression 'reversal of parts' is not regarded as meaning literally a precise opposite positioning of all the parts of a patented invention." Allen v. Wingerter, 17 F. (2d) 745, 747.

87. McCormick v. Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Pacific States Electric Co. v. Wright, 277 Fed. 756; Campbell Printing-Press, etc., Co. v Duplex Printing-Press Co., 101 Fed. 282, 41 CCA 351 [certiorari den 183 U. S. 696 mem, 22 SCt 933 mem, 49 L. ed. 394 mem]; Overweight Counterbalance El. Co. v. Im-

ilar;[88] and where a specific location is claimed as essential to the conception, a change therefrom that is not a mere subterfuge will avoid infringement.[89]

[§ 509] **ee. Substitution of Equivalents[90]—(aa) In General.** Infringement is not evaded by substituting equivalent elements for those set forth in the patented claim,[91] even though the substitution is disguised to some extent.[92] To come within the rule, the part, element, or material substituted must be an equivalent of that omitted;[93] it must be known as such;[94] and, except in some jurisdictions,[95] it must have been known, at the date of the patent, as a proper substitute;[96] but if it was so known to others, it need not have been known to the patentee.[97] A patentee cannot claim equivalency in respect of an element or feature which he has voluntarily relinquished,[98] abandoned at the request of the patent office in order to obtain the patent,[99] or from which he has differentiated his invention in order to obtain a patent.[1] In some situations equivalency is not mutual,[2] and a finding as to whether an earlier device, if later, would have infringed a later patent is not helpful in determining whether the device of the later patent infringes the earlier one.[3]

Nature and extent of invention.[4] The doctrine of equivalents is not confined to pioneer patents,[5] but may be applied to secondary or improvement pat-

proved Order Red Men's Hall Assoc., 94 Fed. 155, 36 CCA 125 [certiorari den 174 U. S. 802 mem, 19 SCt 886 mem, 43 L. ed. 1188 mem]; Edison Electric Light Co. v. Electric Engineering, etc., Co., 83 Fed. 473, 27 CCA 562; Brown v. Stilwell, etc., Mfg. Co., 57 Fed. 731, 741, 6 CCA 528 [rev 49 Fed. 738]; Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., 54 Fed. 884 [rev on other grounds 61 Fed. 958, 10 CCA 194]; Bruff v. Waterbury Buckle Co., 29 Fed 214; Otis Bros. Mfg. Co. v. Crane Bros. Mfg. Co., 27 Fed. 550 [aff 136 U. S. 646, 10 SCt 1072, 34 L. ed. 553]; National Car-Brake Shoe Co. v. Boston, etc., R. Co., 15 Fed. 462; Pattee v. Moline Plow Co., 9 Fed. 821, 10 Biss. 377; Gorham v. Mixter, 10 F. Cas. No. 5,626, Brunn. Coll. Cas. 327; Habeman v. Whitman, 11 F. Cas. No. 5,885a, 5 Bann. & A. 530.

88. McCormick v. Talcott, 20 How. (U. S.) 402, 15 L. ed. 930; Pacific States Electric Co. v. Wright, 277 Fed. 756; Westinghouse Air Brake Co. v. New York Air Brake Co., 119 Fed. 874, 56 CCA 404; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 CCA 369; Adams Electric Co v. Lindell R. Co., 77 Fed. 432, 23 CCA 223; Robbins v. Aurora Match Co, 43 Fed. 434; Taylor v. Garretson, 23 F. Cas. No. 13,792, 9 Blatchf. 156, 5 Fish. Pat. Cas. 116.

89. Deister Concentrator Co. v. Deister Mach. Co., 241 Fed. 379, 154 CCA 259.

90. Lack of invention in substitution of equivalents see supra § 85.

91. Du Bois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895; Hoyt v. Horne, 145 U. S. 302, 12 SCt 922, 36 L. ed. 713; Union Water Meter Co. v. Desper, 101 U. S. 332, 25 L. ed. 1024; Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; O'Reilly v. Morse, 15 How (U. S.) 62, 14 L. ed. 601; Van Meter v. Irving Air Chute Co., 27 F. (2d) 170; Lathrop v. Rice, etc., Corp., 21 F (2d) 124 [aff 24 F. (2d) 1021 mem (certiorari granted 278 U. S. 509 mem, 49 SCt 10 mem)]; Bassick Mfg. Co. v. Standard Products Mfg. Co., 19 F. (2d) 937; Hewes v. Gay, 11 F. (2d) 165; Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314; Root v. Hobbs Mfg. Co., 294 Fed. 236; Vaco Grip Co. v. Sandy MacGregor Co., 292 Fed. 249 [aff 2 F. (2d) 655]; Palmer v. E. Z. Waist Co., 278 Fed. 530 [aff 288 Fed. 848]; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; Beryle v. San Francisco Cornice Co., 181 Fed. 692 [aff 195 Fed. 516, 115 CCA 426]; Coffield v. Spears, 169 Fed. 641; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559]; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 154 [aff 167 Fed. 546, 93 CCA 224]; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 Fed. 614 [aff 170 Fed. 965, 96 CCA 101]; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 652, 51 CCA 369; Lepper v. Randall, 113 Fed. 627, 51 CCA 337; Fruit-Cleaning Co. v. Fresno Home-Packing Co., 94 Fed. 845; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; Thompson v Second Ave. Tract. Co., 93 Fed. 824, 35 CCA 620; Hart, etc., Mfg. Co. v. Anchor Electric Co., 92 Fed. 657, 34 CCA 606; Saloman v. Garvin Mach. Co., 84 Fed. 195; Boston, etc., Electric St. R. Co. v. Bemis Car-Box Co., 80 Fed 287, 25 CCA 420; Tripp Giant Leveler Co. v. Bresnahan, 70 Fed. 982 [aff 72 Fed. 920]; McCormick Harvesting Mach. Co v. Aultman, 69 Fed. 371, 16 CCA 259; Oval Wood Dish Co. v. Sandy Creek, New York, Wood Mfg. Co., 60 Fed. 285; Westinghouse v. New York Air-Brake Co., 59 Fed. 581 [mod on other grounds 63 Fed. 962, 11 CCA 528]; Standard Folding Bed Co. v. Osgood, 58 Fed. 583, 7 CCA 382; Roberts v. H. P. Nail Co., 53 Fed. 916; Cutcheon v. Herrick, 52 Fed. 147 [mod on other grounds 60 Fed. 80, 8 CCA 475]; American Automaton Weighing Mach Co v. Blauvelt, 50 Fed. 213; California Electrical Works v. Henzel, 48 Fed. 375 [aff 51 Fed. 754, 2 CCA 495]; Hoe v Cranston, 42 Fed. 837; Butz Thermo-Electric Regulator Co. v Jacobs Electric Co., 36 Fed. 191; Cohansey Glass Mfg. Co. v. Wharton, 28 Fed. 189; Halliday v. Covel, 27 Fed. 217; Brighton v. Wilson, 18 Fed. 378; Putnam v Hutchinson, 12 Fed. 131, 11 Biss. 240; Dederick v. Cassell, 9 Fed. 306; Singer Mfg. Co. v. Henry Stewart Mfg. Co., 8 Fed. 920; Crompton v. Knowles, 7 Fed. 204; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Blanchard v. Puttman, 3 F. Cas No. 1,514, 2 Bond 84, 3 Fish. Pat. Cas. 186 [rev on other grounds 8 Wall. 420, 19 L. ed. 433]; Cahoon v. Ring, 4 F Cas No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Conover v. Dohrman, 6 F. Cas. No. 3,120, 6 Blatchf. 60, 3 Fish. Pat. Cas. 382; Conover v. Roach, 6 F. Cas. No. 3,-125, 4 Fish. Pat. Cas. 12; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Foster v. Moore, 9 F. Cas. No. 4,978, 1 Curt. 279; May v. Johnson County, 16 F. Cas. No 9,334; Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; Sloat v. Spring, 22 F. Cas. No. 12,948a, Smith v. Higgins, 22 F. Cas. No. 13,058; Tatham v. Le Roy, 23 F. Cas. No. 13,760, 2 Blatch. 474 [rev on other grounds 14 How 156, 14 L. ed. 367]; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Waterbury Brass Co. v. New York, etc., Brass Co., 29 F. Cas No. 17,256; Consolidated Car Heating Co. v. Came, [1903] A. C. 509; Palmer v. Wagstaff, 9 Exch. 494, 20 ERC 691; Ellington v. Clark, 58 L. T. Rep. N. S. 818; Woodward v. Clement, 10 Ont. 348; Patrice v. Sylvester, 23 Grant Ch. (Ont.) 573.

[a] **Combining parts of two patented structures** which results in changing one type of machine into the other is an infringement. National Cash Register Co. v. Grobet, 153 Fed. 905, 82 CCA 651.

92. Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682 [certiorari den 269 U. S. 571 mem, 46 SCt 26 mem, 70 L. ed. 417 mem].

93. What constitutes equivalency see infra § 510.

94. Badische Anilin, etc., Fabrik v. Levinstein, 24 Ch. D. 156, 20 ERC 639 [aff 12 App. Cas. 710].

95. Marconi v. British Radio-Tel. etc., Co., Ltd., 27 T. L. R. 274.

96. Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Seymour v Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Magic Light Co. v. Economy Gas-Lamp Co., 97 Fed. 87, 38 CCA 56; Jones Co. v. Munger Impr. Cotton Mach. Mfg. Co., 49 Fed. 61, 1 CCA 158; Rowell v. Lindsay, 6 Fed. 290, 10 Biss. 217 [aff 113 U. S. 97, 5 SCt 507, 28 L. ed. 906]; King v. Louisville Cement Co., 14 F. Cas. No. 7,798, 6 Fish. Pat. Cas. 336; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Webster v. New Brunswick Carpet Co., 29 F. Cas. No. 17,-337, 1 Bann. & A. 84; Welling v. Rubber-Coated Harness Trimming Co., 29 F. Cas. No. 17,382, 1 Bann & A. 282 [rev on other grounds 94 U. S. 7, 24 L. ed. 942].

[a] **Knowledge of mechanics or chemists.**—The use of a substitute is not an infringement unless it was known to ordinarily skillful mechanics or chemists at the date of the patent as an equivalent for the thing for which it is substituted. Magic Light Co. v. Economy Gas-Lamp Co., 97 Fed. 87, 38 CCA 56.

97. Detwiler v. Bosler, 55 Fed. 660; Woodward v. Morrison, 30 F. Cas. No. 18,008, 5 Fish. Pat. Cas. 357, Holmes 124.

98. Dry Hand Mop Co., Inc. v. Squeez-Ezy Mop Co., Inc., 17 F. (2d) 465.

99. Nicholas v. E. W. Brown Co., 30 F. (2d) 291; Dry Hand Mop Co., Inc., v. Squeez-Ezy Mop Co., Inc., 17 F. (2d) 465.

1. Ellett v. Klein, 22 F. (2d) 807.

2. Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326; General Electric Co. v. Electric Controller, etc., Co., 243 Fed. 188, 1007 mem, 156 CCA 54, 664 mem; Curry v. Union Electric Welding Co., 230 Fed. 422, 144 CCA 564 [certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem].

3. Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326.

4. Patent for:
Combination see infra § 512.
Composition of matter see infra § 514
Process see infra § 513.

5. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Yancey v. Enright, 230 Fed. 641, 145 CCA

ents,[6] and any patent,[7] however narrow,[8] has some range of equivalents, unless form is made indispensable.[9] However, the range of equivalents depends upon, and varies with, the degree of invention,[10] or the nature and extent of the invention;[11] a primary, generic, or pioneer patent is entitled to a broad range of equivalents,[12] while a secondary or improvement patent is accorded a more narrow and restricted range[13] proportioned to the advance which it makes in the art.[14]

[§ 510] **(bb) Tests for Determining Equivalency.** Similarities or differences are to be determined, not by the names of things,[15] but in the light of what the elements do,[16] and substantial, rather than technical, identity is the test.[17] More specifically, it is necessary and sufficient to constitute equivalency that the same function be performed[18] in substantially the same way or manner,[19] or by the same, or substantially the same, principle or mode of operation;[20] but where these tests are satisfied, mere differences

51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem].

6. Yancey v. Enright, supra; Beryle v. San Francisco Cornice Co., 181 Fed. 692, 696 [aff 195 Fed. 516, 115 CCA 426].

"Secondary or improvement patents equally with those of a primary character are entitled to be protected against infringement from equivalents to the full extent that a fair and reasonable construction of their claims will warrant." Beryle v. San Francisco Cornice Co., supra

7. Frick Co. v. Lindsay, 27 F. (2d) 59; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Lang v. Twitchell-Champlin Co., 207 Fed. 363.

8. U. S. Slicing Mach. Co. v. Wolf, Sayer & Heller, Inc., 249 Fed. 245 [aff 261 Fed. 195].

9. Frick Co. v. Lindsay, 27 F. (2d) 59; U. S. Slicing Mach. Co. v. Wolf, Sayer & Heller, Inc., 249 Fed. 245 [aff 261 Fed. 195].

10. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122; Shevenell v. Geo. J. Kelly, Inc., 19 F. (2d) 791.

[a] **Principle of invention.**—The owner of a patent is entitled to such a range of equivalents as will protect and preserve the principle of the invention. Wisconsin-Minnesota Gas, etc., Household Appliance Co. v. Hirschy Co., 28 F. (2d) 838 [aff 18 F. (2d) 347].

11. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Irving-Pitt Mfg. Co. v. Blackwell-Wielandy Book, etc., Co., 233 Fed. 177, 151 CCA 253; Thacher v. Baltimore, 219 Fed. 909 [aff 230 Fed. 1022, 144 CCA 659]; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; Beach v. Hobbs, 92 Fed. 146, 34 CCA 248 [aff 180 U. S. 383, 21 SCt 409, 45 L. ed. 586].

12. Hildreth v. Mastoras, 257 U. S. 27, 42 SCt 20, 66 L. ed. 112 [rev 263 Fed. 571]; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 SCt 299, 32 L. ed 715; Root v. Hobbs Mfg. Co., 294 Fed. 236; Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; Lang v. Twitchell-Champlin Co., 207 Fed. 363; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; McCormick Harvesting Mach. Co. v. Aultman, 69 Fed. 371, 16 CCA 259; Rogers Typograph Co. v. Mergenthaler Linotype Co., 64 Fed. 799, 12 CCA 422; Tecktonius v. Scott, 110 Wis. 441, 86 NW 672.

13. Stilz v. Bethlehem Shipbuilding Corp., 29 F. (2d) 156 [certiorari den (U. S.) 49 SCt 254 mem]; Whitney v New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; Universal Brush Co. v. Sonn, 154 Fed. 665, 83 CCA 422 [rev 146 Fed. 517].

14. Dryfoos v. Wiese, 124 U. S. 32, 8 SCt 354, 31 L. ed. 362; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 CCA 426; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; Wilson v. McCormick Harvesting Mach. Co., 92 Fed. 167, 34 CCA 280; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 87 Fed. 906 [aff 96 Fed. 761, 37 CCA 580]; Erie Rubber Co. v. American Dunlop Tire Co., 70 Fed. 58, 16 CCA 632; Wells v. Curtis, 66 Fed. 318, 13 CCA 494; Grain-Drill Mfg. Co. v. Rude, 23 Fed. 348 [app dism 131 U. S. 437 mem, 9 SCt 799 mem, 33 L. ed. 217 mem].

15. Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; James L. Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; and cases infra note 16.

16. Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; James L. Taylor Mfg. Co. v. Steuernagel, 294 Fed. 362; Columbia Wire Co. v. Kokomo Steel, etc., Co., 139 Fed. 578 [rev on other grounds 143 Fed. 116, 74 CCA 310 (certiorari den 200 U. S. 621 mem, 26 SCt 757 mem, 50 L. ed. 624 mem)]; Stetson v. Herreshoff Mfg. Co., 113 Fed. 952; Western Electric Co. v. Home Tel. Co., 85 Fed. 649; In re Boughton, 3 F. Cas. No. 1,696, McA. Pat. Cas. 278, Converse v. Cannon, 6 F. Cas. No. 3,144, 2 Woods 7; Smith v. Downing, 22 F. Cas. No. 13,036, 1 Fish. Pat. Cas. 64.

17. Sayre v. Scott, 55 Fed. 971, 5 CCA 366; Brush Electric Co. v. Western Electric Light, etc., Co., 43 Fed. 533 [aff 76 Fed. 761, 22 CCA 543]; Delong v. Bickford, 13 Fed. 32; Whipple v. Middlesex Co., 29 F. Cas. No. 17,520, 4 Fish. Pat. Cas. 41.

[a] **Mechanical equivalency is relative term** "and does not import actual identity. A structure may thus be at one and the same time the mechanical equivalent of a broad device and of an improvement thereon, the less being included in the greater." Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234, 240.

18. Hubbell v. U. S., 179 U. S. 86, 21 SCt 28, 45 L. ed. 100; Hyman v. F. W. Woolworth Co., 28 F. (2d) 833; Allen v. Wingerter, 17 F. (2d) 745; Superior Skylight Co. v. August Kuhnla, Inc., 273 Fed. 482 [aff 265 Fed. 282]; Laclede Christy Clay Products Co. v. St. Louis, 270 Fed. 338 [aff 280 Fed. 83]; Rousso v. City Towel Supply Co., 242 Fed. 655; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; Yancey v. Enright, 230 Fed. 641, 145 CCA 51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]. Read Mach. Co. v. Jaburg, 221 Fed. 662 [aff 223 Fed. 1022, 138 CCA 659]; Coffield v. Spears, 169 Fed. 641; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559]; Dey Time Register Co. v Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Scarborough v. Neff, 75 Fed. 579; Engle Sanitary, etc., Co. v. Elwood, 73 Fed. 484, Binder v. Atlanta Cotton Seed Oil Mills, 73 Fed 480; Richardson v American Pin Co., 73 Fed 476; Jackson v Birmingham Brass Co., 72 Fed. 269 [aff 79 Fed. 801, 25 CCA 196]; New York Paper-Bag Mach., etc., Co. v Hollingsworth, etc., Co., 56 Fed. 224, 5 CCA 490 [aff 48 Fed. 562]; Williams v. Steam-Gauge, etc., Co., 47 Fed. 322; Bortree v. Jackson, 43 Fed. 136; Peninsular Novelty Co. v. American Shoe-Tip Co., 39 Fed. 791; Huntington v. Hartford Heel-Plate Co., 36 Fed. 689; Matthews v. Chambers, 6 Fed. 874; Blake v. Rawson, 3 F. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, Holmes 200; Bridge v. Brown, 4 F. Cas No. 1,858, 6 Fish. Pat. Cas. 236, Holmes 205; Brown v. Rubber Step Mfg. Co., 4 F. Cas. No. 2,028, 3 Bann. & A. 232. And see cases infra note 19.

[a] **Primary function.**—"An incidental and trifling action cannot satisfy the call for a primary and characterizing function." Hayes Wheel Co. v. Michelin, 14 F. (2d) 110, 111.

19. Rowell v. Lindsay, 113 U. S. 97, 5 SCt 507, 28 L. ed. 906 [aff 6 Fed. 290, 10 Biss. 217]; Hyman v. F. W. Woolworth Co., 28 F. (2d) 833; Allen v Wingerter, 17 F. (2d) 745; Superior Skylight Co. v. August Kuhnla, Inc., 273 Fed. 482 [aff 265 Fed. 282]; McCallum v. Pittsburgh, etc., Coal Co., 268 Fed. 831; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed 746 [aff 238 Fed. 367, 151 CCA 383]; Yancey v. Enright, 230 Fed. 641, 145 CCA 51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]; Coffield v. Spears, 169 Fed. 641; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559]; O. H. Jewel Filter Co. v. Jackson, 140 Fed. 340, 72 CCA 304; International Mfg. Co. v. H. F. Brammer Mfg. Co., 138 Fed. 396, 71 CCA 633; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 652, 51 CCA 362; Wilt v. Grier, 5 Fed. 450 [rev on other grounds 120 U. S. 412, 7 SCt 718, 30 L. ed. 712; Burden v. Corning, 4 F. Cas. No. 2,-143, 2 Fish. Pat. Cas. 477; Johnson v. Root, 13 F. Cas. No. 7,410, 2 Cliff. 637; May v. Johnson County, 16 F. Cas. No. 9,334.

20. Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136 [rev 70 Fed. 816, 17 CCA 430]; Wilson, etc., Mfg. Co. v. Union Tool Co., 249 Fed. 729, 161 CCA 639 [rev 237 Fed. 837, and certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem]; Veneer Mach. Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 CCA 115; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573 [aff 157 Fed. 559]; Westinghouse Mach. Co. v. Press Pub. Co., 127 Fed. 822 [rev on other grounds 135 Fed. 767, 68 CCA 469]; Standard Computing Scale Co. v. Computing Scale Co., 126 Fed. 639, 61 CCA 541; Anderson v. Collins, 122 Fed. 451, 58 CCA 669; Cimiotti Unhairing Co. v. Nearseal Unhairing Co., 115 Fed. 507, 53 CCA 161 [aff 113 Fed. 588]; Powell v. Leicester Mills Co., 108 Fed. 386, 47 CCA 416 [certiorari den 181 U. S. 622 mem, 21 SCt 925 mem, 45 L. ed. 1032 mem]; Rosenblatt v. Fraser Tablet Triturate Mfg. Co., 106 Fed. 733 [rev on other grounds 112 Fed. 677, 50 CCA 421]; Diamond State Iron Co. v. Goldie, 84 Fed. 972, 28 CCA 589; Bowers v. Von Schmidt, 63 Fed. 572 [aff 80 Fed. 121, 25 CCA 323 (certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem)].

[a] **Continuous and intermittent operation.**—"Counsel urges that it cannot be declared as a matter of law that a machine which operates continuously cannot be the equivalent of one that operates intermittently, and we are not disposed to question that statement. Much would depend

of form are immaterial;[21] a part is no less equivalent because it performs additional functions;[22] and parts may be equivalents whether made integral or separate.[23] The interchangeability of the parts or elements of a patented machine or device and those of a machine or device alleged to infringe is a test sometimes applied in determining infringement;[24] noninterchangeability of parts tends to negative infringement;[25] and there is no infringement where reorganization is necessary to effect the substitution.[26] Mere identity or similarity of result is not alone sufficient to constitute equivalency.[27] Equivalency cannot be determined by comparing defendant's present device with his former device which he admitted was an infringement.[28] In applying the foregoing rules and tests, equivalency has been held to exist in some cases[29] and not to exist in

upon the structure of the particular machine. If it was simple, the change from intermittent to continuous action might be produced by the mere substitution of a well-known mechanical equivalent, or a slight mechanical adjustment. But the likelihood of the result being thus produced decreases as the complexity of the machine increases; and, when mechanisms attain the complexity of those involved in the present suit, the difference in the mode of operation is very strong evidence, indeed, that there is such a difference in the machines as will avoid the charge of infringement." American Steel, etc., Co. v. Denning Wire, etc., Co., 194 Fed. 117, 119, 114 CCA 195.

21. Safety Car Heating, etc., Co., v. Gould Coupler Co., 230 Fed. 848; Yancey v. Enright, 230 Fed. 641, 145 CCA 51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]; Hillard v. Fisher Book Typewriter, 159 Fed. 439 [certiorari den 208 U. S. 617 mem, 28 SCt 569 mem, 52 L. ed. 647 mem]; Eck v. Kutz, 132 Fed. 758; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 Fed. 136, 55 CCA 86 [certiorari den 187 U S. 644 mem, 23 SCt 843 mem, 47 L. ed. 346 mem]; Adams Co. v. Schreiber, etc., Mfg. Co., 111 Fed. 182 [rev on other grounds 117 Fed. 830, 54 CCA 128]: Adams v. Keystone Mfg. Co., 41 Fed. 595 [rev on other grounds 151 U. S. 139, 14 SCt 295, 38 L. ed. 103]; Celluloid Mfg. Co. v. American Zylonite Co., 31 Fed. 904; U. S. Metallic Packing Co. v. Tripp, 31 Fed. 350; Adams v. Bridgewater Iron Co., 26 Fed. 324; Shannon v. J. M. W. Jones Stationery, etc., Co., 9 Fed. 205, 10 Biss. 498; Adams v. Joliet Mfg. Co., 1 F. Cas. No. 56, 3 Bann. & A. 1; Smith v. Higgins, 22 F. Cas. Nos. 13,057, 13,059, 1 Fish. Pat. Cas. 537.

"Identity of form is not necessary to make one element in a patent the equivalent of an element in some other structure, nor is identity of form in the whole structure necessary to make the one the equivalent of the other." Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848, 851.

22. Rockwood v. General Fire Extinguisher Co., 8 F. (2d) 682 [certiorari den 269 U. S. 571 mem, 46 SCt 26 mem, 70 L. ed. 417 mem]; Universal Brush Co. v. Sonn, 146 Fed. 517 [rev on other grounds 154 Fed. 665, 83 CCA 422]; Comptograph Co. v. Mechanical Accountant Co., 145 Fed. 331, 75 CCA 205, Atlantic Giant-Powder Co. v. Goodyear, 2 F. Cas. No. 623, 3 Bann. & A. 161; Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Sarven v. Hall, 21 F. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415; Wheeler v. Clipper Mower, etc., Co., 29 F. Cas. No. 17,493, 10 Blatchf. 181, 6 Fish. Pat. Cas. 1.

23. Standard Caster, etc., Co. v. Caster Socket Co., 113 Fed. 162, 51 CCA 109; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; Brown v. Reed Mfg. Co., 81 Fed. 48 [app dism 96 Fed. 1005 mem, 37 CCA 665 mem]; Fryer v. New York Mut. L. Ins. Co., 30 Fed. 787; Baldwin v. Bernard, 2 F. Cas. No. 797, 9 Blatchf. 509 note, 5 Fish. Pat. Cas. 442; Baldwin v. Schultz, 2 F. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75.

Joinder or division of parts generally see supra § 507.

24. Gordon Form Lathe Co. v. Walcott Mach. Co., 20 F. (2d) 673; Auto Hone Co. v. Hall Cylinder Hone Co., 3 F. (2d) 479; Miller Pasteurizing Mach. Co. v. Rich, 216 Fed. 192 [rev on other grounds 243 Fed. 613, 156 CCA 311].

25. Diamond Match Co. v. Sun Match Corp., 9 F. (2d) 695 [aff 16 F. (2d) 1]; Auto Hone Co. v. Hall Cylinder Hone Co., 3 F. (2d) 479; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580.

26. American Pneumatic Tool Co. v Philadelphia Pneumatic Tool Co., 123 Fed. 891, Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580; Crompton v. Belknap Mills, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

27. Ellet v. Klein, 22 F. (2d) 807; McCallum v. Pittsburgh, etc., Coal Co., 268 Fed. 831; Cheatham Electric Switching Device Co. v. Brooklyn Rapid Transit Co., 238 Fed. 172, 151 CCA 248 [aff 229 Fed. 165]; Cheatham Electric Switching Device Co. v. Brooklyn Rapid Transit Co., 227 Fed. 613 [reh den 229 Fed. 165 (aff 238 Fed. 172, 151 CCA 248)]; American Roll Gold Leaf Co. v. W. H. Coe Mfg. Co., 212 Fed. 720, 129 CCA 330 [rev 199 Fed. 435]; Rich v. Baldwin, 133 Fed. 920, 66 CCA 464; Diamond Drill, etc., Co. v. Kelly, 120 Fed. 289; Union Steam-Pump Co. v. Battle Creek Steam-Pump Co., 104 Fed. 337, 43 CCA 560; Powell v. Leicester Mills Co., 103 Fed. 476 [rev on other grounds 108 Fed. 386, 47 CCA 416 (certiorari den 181 U. S. 622 mem, 21 SCt 925 mem, 45 L. ed. 1032 mem)]; Wilson v. McCormick Harvesting Mach. Co., 92 Fed. 167, 34 CCA 2[illegible]; Schmidt v. Freese, 12 Fed. 563; Merriam v. Drake, 17 F. Cas. No. 9,461, 9 Blatchf. 336, 5 Fish. Pat. Cas. 259.

28. Universal Form Clamp Co. v. Taxis, 267 Fed. 578 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem].

29. Premier Register Table Co. v. West, 21 F. (2d) 762; Bake-Rite Mfg. Co. v. Tomlinson, 16 F. (2d) 556; Triangle Kapok Mach. Corp. v. Solinger Bedding Supply Co., 13 F. (2d) 494; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Van Kannel Revolving Door Co. v. Winton Hotel Co., 276 Fed. 234 [mod 263 Fed. 988]; Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem]; Sherman v. H. P. Marinelli, Ltd., 232 Fed. 730; Lidgerwood Mfg. Co. v. Lambert Hoisting Engine Co., 150 Fed. 364 [mod on other grounds 154 Fed. 372, 83 CCA 350]; Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 CCA 461 [aff 142 Fed. 221]; Bredin v. Solmson, 132 Fed. 161 [aff 136 Fed. 187, 69 CCA 203]; Lepper v. Randall, 113 Fed. 627, 51 CCA 337; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72 [rev 100 Fed 849]; Dowagiac Mfg. Co v Smith, 108 Fed. 67; Kampfe v. Reichard, 105 Fed. 624; Owatonna Mfg. Co. v. Fargo, 94 Fed. 519; Beach v. Hobbs, 92 Fed. 146, 34 CCA 248 [mod 82 Fed. 916]; Heap v. Greene, 91 Fed. 792, 34 CCA 86 [rev 75 Fed. 405]; Heap v Tremont, etc., Mills, 82 Fed. 449, 27 CCA 316; C. T. Ham Mfg Co. v R. E. Dietz Co., 69 Fed. 841, 13 CCA 687 [aff 58 Fed. 367, 13 CCA 687]; H. Tibbe, etc., Mfg. Co. v. Missouri Cob-Pipe Co., 62 Fed. 158; Ballard v. McCluskey, 58 Fed. 880; Winchester Repeating Arms Co. v. American Buckle, etc., Co., 54 Fed. 703; Riker v. Crocker-Wheeler Motor Co., 54 Fed. 519; Consolidated Piedmont Cable Co. v. Pacific Cable R. Co., 53 Fed. 385, 3 CCA 570; Pacific Cable R. Co. v. Butte City St. R. Co., 52 Fed. 863 [aff 60 Fed. 90, 8 CCA 484]; Municipal Signal Co. v. Gamewell Fire-Alarm Tel. Co., 52 Fed. 459; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Creamery Package Mfg. Co. v. Elgin Co-op. Butter Tub Co., 43 Fed. 892; Rapid Serv. Store R. Co. v. Taylor, 43 Fed. 249; Reed v. Smith, 40 Fed. 882; Simonds Counter Mach. Co. v. Knox, 39 Fed. 702; Root v. Third Ave. R. Co., 39 Fed. 281; Coleman Hardware Co. v. Kellogg, 39 Fed. 39; Pullman's Palace-Car Co. v. Wagner Palace-Car Co., 38 Fed. 416; Sawyer Spindle Co. v. Buttrick, 37 Fed. 794; Bradley, etc., Mfg. Co. v. Charles Parker Co., 35 Fed. 748; Casey v. Butterfield, 35 Fed. 77; Morss v. Ufford, 34 Fed. 37; Thaxter v. Boston Electric Co., 32 Fed. 833; Pennsylvania Diamond-Drill Co. v. Simpson, 29 Fed. 288; Hoyt v. Slocum, 26 Fed. 329; Norton Door-Check, etc., Co. v. Elliott Pneumatic Door-Check Co., 26 Fed. 320; Adams, etc., Mfg. Co. v. Excelsior Oil-Stove Mfg. Co., 26 Fed. 270; Parker v. Montpelier Carriage Co., 23 Fed. 886; Hartford Woven-Wire Mattress Co. v. Peerless Wire Mattress Co., 23 Fed. 587, 23 Blatchf. 227; Parker v. Stow, 23 Fed. 252; Maxheimer v. Meyer, 9 Fed. 460, 20 Blatchf. 17; Brainard v. Pulsifer, 7 Fed. 349; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; American Whip Co. v. Lombard, 1 F. Cas. No. 319, 3 Bann. & A. 598, 4 Cliff. 495; Blake v. Robertson, 3 F. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Buchanan v. Howland, 4 F. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Cook v. Howard, 6 F. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Crehore v. Norton, 6 F. Cas. No. 3,381; Doughty v. West, 7 F. Cas. No. 4,028, 6 Blatchf. 429, 3 Fish. Pat. Cas. 580; Gibson v. Harris, 10 F. Cas. No. 5,396, 1 Blatchf. 167, Fish. Pat. R. 115; Gibson v. Van Dresar, 10 F. Cas. No. 5,402, 1 Blatchf. 532, Fish. Pat. R. 369; Harwood v. Mill River Woolen Mfg. Co., 11 F. Cas. No. 6,187, 3 Fish. Pat. Cas. 526; Johnsen v. Fassman, 13 F. Cas. No. 7,365, 5 Fish. Pat. Cas. 471, 1 Woods 138; Knox v. Loweree, 14 F. Cas. No. 7,910, 1 Bann. & A. 589; Maynadier v. Teeney, 16 F. Cas. No. 9,350, 2 Bann. & A. 615; Megraw v. Carroll, 16 F. Cas. No. 9,393b, 5 Bann. & A. 324; Myers v. Frame, 17 F. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493 [rev on other grounds 94 U. S. 187, 24 L. ed. 34]; Parker v. Remhoff, 18 F. Cas. No. 10,747, 3 Bann. & A. 550, 17 Blatchf. 206; Tilghman v. Morse, 23 F. Cas. No. 14,044, 9 Blatchf. 421, 5 Fish. Pat. Cas. 323; Waterbury Brass Co. v. Miller, 29 F. Cas. No. 17,254, 9 Blatchf. 77, 5 Fish. Pat. Cas. 48; Waterbury Brass Co. v. New York, etc., Brass Co., 29 F. Cas. No. 17,256, 3 Fish. Pat. Cas. 43; Weston v. Nash, 29 F. Cas. No. 17,454, 2 Bann. & A. 40, Holmes 488; Woolcocks v. Many, 30 F. Cas. No. 18,024, 9 Blatchf. 139, 5 Fish. Pat. Cas. 72; Berdan Fire-Arms Mfg. Co. v. U. S., 25 Ct. Cl. 355.

other cases.[30]

[§ 511] **(h) Patents of Particular Matters—aa. Combination—(aa) In General.** There can be no infringement of a patent for a combination unless the combination is infringed;[31] and the combination is not infringed by another combination which is substantially different.[32] As in the case of patents generally,[33] substantial identity of means,[34] operation,[35] and result[36] is necessary to constitute infringement of a patent for a combination, or, in other words, not only must the same elements or their equivalents be employed,[37] but there must be also a performance of substantially the same function or functions[38] in substantially the same way.[39] Also, as in the case of patents generally,[40] mere identity or similarity of result alone is not sufficient to constitute infringement.[41] The addition to a patented combination of a new function which does not

[a] **Particular matters held to be equivalents.**—(1) Chain and rod. Chicago Towel Co. v. Rousso, 248 Fed. 693, 160 CCA 593 (where chain is positively held up while in use); Rousso v. City Towel Supply Co., 242 Fed. 655. (2) Flat or leaf spring and coil spring. Coffield v. Spears, 169 Fed. 641. (3) Single row of two-faced teeth and a double row of teeth. Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 93 CCA 573. (4) Sliding contact or guide and rolling contact or guide. Yancey v. Enright, 230 Fed. 641, 145 CCA 51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]; National Tube Co. v. Mark, 216 Fed. 507, 113 CCA 13. (5) Sprocket chain drive and belt drive. Sheffield Car Co. v. Buda Fdy., etc., Co., 177 Fed. 713 [aff 187 Fed. 847, 109 CCA 646].

30. Brothers v. U. S., 250 U. S. 88, 39 SCt 426, 63 L. ed. 859; Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 25 SCt 697, 49 L. ed. 1100 [aff 123 Fed. 869, 59 CCA 357]; Black Diamond Coal-Min. Co. v. Excelsior Coal Co., 156 U. S. 611, 15 SCt 482, 39 L. ed. 553; Gates Iron Works v. Fraser, 153 U. S. 332, 14 SCt 883, 38 L. ed. 734; Ball, etc., Fastener Co. v. Kraetzer, 150 U. S. 111, 14 SCt 48, 37 L. ed. 1019; Weatherhead v. Coupe, 147 U. S. 322, 13 SCt 312, 37 L. ed. 188; Joyce v. Chillicothe Fdy., etc., Co., 127 U. S. 557, 8 SCt 1311, 32 L. ed. 171; Forncrook v. Root, 127 U. S. 176, 8 SCt 1247, 32 L. ed. 97; Matthews v. Iron-Clad Mfg. Co., 124 U. S. 347, 8 SCt 639, 31 L. ed. 477; Electric R. Signal Co. v. Hall R. Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Blake v. San Francisco, 113 U. S. 679, 5 SCt 692, 28 L. ed. 1070; Muehlberg v. International Metal Hose Co., 29 F. (2d) 109; Troy Wagon Works Co. v. Ohio Trailer Co., 272 Fed. 850; F. Wessel Mfg. Co. v. Printing Mach. Co., 218 Fed. 178; Nu Bone Corset Co. v. Spirella Co., 183 Fed. 984, 106 CCA 324 [rev 180 Fed. 470]; Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co., 154 Fed. 372, 83 CCA 350 [mod 150 Fed. 364]; L. E. Waterman Co. v. McCutchean, 127 Fed. 1020, 61 CCA 653; Evans v. Newark Rivet Works, 121 Fed. 133 [aff 126 Fed. 492, 61 CCA 474]; L. E. Waterman Co. v. Forsyth, 121 Fed. 107 [aff 128 Fed. 926, 63 CCA 648]; Wellman v. Midland Steel Co., 106 Fed. 221; Lepper v. Randall, 105 Fed. 975 [rev on other grounds 113 Fed. 627, 51 CCA 337]; McCully v. Knyscheerer Co., 103 Fed. 648; Dodge v. Ohio Valley Pulley Works, 101 Fed. 581; Rauh v. Guinzburg, 95 Fed. 151 [aff 101 Fed. 1007 mem, 42 CCA 139]; Johnson Electric Serv. Co. v. Powers Regulator Co., 85 Fed. 863, 29 CCA 459; Norton v. Jensen, 81 Fed. 494; Engle Sanitary, etc., Co. v. Elwood, 73 Fed. 484; Wells v. Curtis, 66 Fed. 318, 13 CCA 494; Whitcomb Envelope Co. v. Logan, etc., Envelope Co., 63 Fed. 982; Ball, etc., Fastener Co. v. Ball Glove Fastening Co., 58 Fed. 818, 7 CCA 498; Detwiler v. Bosler, 58 Fed. 249, 55 Fed. 660; Morss v. Domestic Sewing-Mach. Co., 55 Fed. 79, 5 CCA 47; Holloway v. Dow, 54 Fed. 511; Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., 49 Fed. 61, 1 CCA 158; Hitchcock v. Wanzer Lamp Co., 45 Fed. 362; Sackett v. Smith, 42 Fed. 846; Brush Electric Co. v. Julien Electric Co., 41 Fed. 679; Ligowsky Clay-Pigeon Co. v. Peoria Target Co., 35 Fed. 758; Eastern Paper-Bag Co. v. Standard Paper-Bag Co., 29 Fed. 787; McFarland v. Deere, etc., Mfg Co., 22 Fed. 781; Deis v. Doll, 21 Fed. 523; Lloyd v. Miller, 19 Fed. 915; Field v. Ireland, 19 Fed. 835; Schmidt v. Freese, 12 Fed. 563; Field v. De Comean, 9 F. Cas. No. 4,765, 5 Bann. & A. 40 [aff 116 U. S 187, 6 SCt 363, 29 L. ed. 596]; Forsyth v. Clapp, 9 F. Cas. No 4,949, 6 Fish. Pat. Cas. 528, Holmes 278] Sickles v. Youngs, 22 F. Cas. No 12,838, 3 Blatchf. 293; Sickles v. Evans, 22 F. Cas. No. 12,839. 2 Cliff. 203, 2 Fish. Pat. Cas. 417; Smith v. Marshall, 22 F. Cas. No. 13,077, 2 Bann. & A. 371; Wheeler v. Simpson, 29 F. Cas. No. 17,500, 1 Bann. & A. 420.

[a] **Particular matters held not to be equivalents.**—(1) Constant volume gas engine and constant pressure engine. Columbia Motor Car Co. v. Duerr, 184 Fed. 893, 107 CCA 215 [rev 172 Fed. 923]. (2) Human agency or power or manual operation and mechanical instrument, power, or operation. Brown v. Davis, 116 U. S. 237, 6 SCt 379, 29 L. ed. 659; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co., 272 Fed. 386. Compare Crehore v. Norton, 6 F. Cas. No. 3,381 (substitution of electricity for hand power is use of equivalent). (3) Lug and spring clamp. Hayes Wheel Co. v. Michelin, 14 F. (2d) 110 [rev 300 Fed. 458].

31. Rowell v. Lindsay, 113 U. S. 97, 5 SCt 507, 28 L. ed. 906 [aff 6 Fed. 290]; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)].

[a] **Particular patents for combinations held not infringed.**—Ball, etc., Fastener Co. v. Kraetzer, 150 U. S. 111, 14 SCt 48, 37 L. ed. 1019; Gordon v. Warder, 150 U. S. 47, 14 SCt 32, 37 L. ed. 992; Roemer v. Peddie, 132 U. S. 313, 10 SCt 98, 33 L. ed. 382; Sharp v. Riessner, 119 U. S. 631, 7 SCt 417, 30 L. ed. 507; Bridge v. Excelsior Mfg. Co., 105 U. S. 618, 26 L. ed. 1191; Heimlich v. Model Brassiere Co., 28 F. (2d) 541; Kursheedt Mfg. Co. v. Adler, 107 Fed. 488, 46 CCA 422 [aff 103 Fed. 948]; Consolidated Store-Serv. Co. v. Seybold, 105 Fed. 978, 45 CCA 152; Jones Special Mach. Co. v. Pentucket Variable Stitch Sewing-Mach. Co., 104 Fed. 556, 44 CCA 33; Consolidated Store-Serv. Co. v. Siegel-Cooper Co., 103 Fed. 489 [aff 107 Fed. 716, 46 CCA 599]; Whitaker Cement Co. v. Huntington Dry Pulverizer Co., 95 Fed. 471, 37 CCA 151; Risdon Iron, etc., Works v. Trent, 92 Fed. 375 [mod 102 Fed. 635, 42 CCA 529]; Kansas City Hay-Press Co. v. Devol, 81 Fed. 726, 26 CCA 578; Babcock v. Clarkson, 58 Fed. 581 [aff 63 Fed. 607, 11 CCA 351]; Gates Iron Works v. Fraser, 55 Fed. 409, 5 CCA 154; Douglas v. Abraham, 50 Fed. 420; Stauffer v. Spangler, 50 Fed. 84; Foos Mfg. Co. v. Springfield Engine, etc., Co., 49 Fed. 641, 1 CCA 410; Challenge Corn-Planter Co. v. Gearhardt, 46 Fed. 768; Joliet Mfg. Co. v. Keystone Mfg. Co., 39 Fed. 798; Royer v. Schultz Belting Co., 28 Fed. 850; Buckingham v. Porter, 26 Fed. 759, 10 Sawy. 289; Crompton v. Knowles, 7 Fed. 199; Birdsell v. Hagerstown Agricultural Impl. Mfg. Co., 3 F. Cas. No. 1,436, 2 Bann. & A. 519, 1 Hughes 59; Merriam v. Drake, 17 F. Cas. No. 9,461, 9 Blatchf. 336, 5 Fish. Pat. Cas. 259; Wheeler v. Simpson, 29 F. Cas. No. 17,500, 1 Bann. & A. 420; Carter v. Hamilton, 23 Can. S. C. 172; Sylvester v Masson. 12 Ont. A. 335.

32. Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Rees v. Gould. 15 Wall. (U S.) 187, 21 L. ed. 39; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; William B. Scaife, etc., Co. v. Falls City Woolen Mills, 194 Fed. 139 [rev on other grounds 209 Fed. 210, 126 CCA 304]; Ball Bearing Co v. Star Ball Retainer Co., 147 Fed. 721 [aff 149 Fed. 219, 79 CCA 177]; Onderdonk v. Fanning, 9 Fed. 106, 19 Blatchf. 363; Palmer v. Gatling Gun Co., 8 Fed. 513, 19 Blatchf. 392; Dedrick v. Cassell, 14 Phila. (Pa.) 503.

33. See supra §§ 500, 501.

34. Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 23 SCt 521, 47 L. ed. 689; Apeo Mfg. Co. v. Temco Electric Motor Co., 11 F. (2d) 109 [certiorari granted 271 U. S. 653 mem, 46 SCt 483 mem, 70 L. ed. 1134 mem]; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; Electric Protection Co. v. American Bank Protection Co., 184 Fed. 916, 107 CCA 238 [mod 181 Fed. 350, and certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem].

35. Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 23 SCt 521, 47 L. ed. 689; Turner v. Spinner, 6 F. (2d) 172; Barley v. Witt, 261 Fed. 77; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; Electric Protection Co. v. American Bank Protection Co., 184 Fed. 916, 108 CCA 238 [mod 181 Fed. 350, and certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem]; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)].

36. Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 23 SCt 521, 47 L. ed. 689; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; Electric Protection Co. v. American Bank Protection Co., 184 Fed. 916, 107 CCA 238 [mod 181 Fed. 350, and certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem]; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)].

37. See infra § 512.

38. Barley v. Witt, 261 Fed. 77; Safety Car Heating, etc., Co. v. Gould Coupler Co., 245 Fed. 755; Russell v. Winchester Repeating Arms Co., 148 Fed. 388.

39. Barley v. Witt, 261 Fed. 77; Safety Car Heating, etc., Co. v. Gould Coupler Co., 245 Fed. 755; Russell v. Winchester Repeating Arms Co., 148 Fed. 388.

Coaction or coöperation of elements in substantially same way see infra § 512.

40. See supra § 500.

41. Westinghouse v. Boyden Power-Brake Co., 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136; Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Gage v. Herring, 107 U. S. 640, 2 SCt 819, 27 L. ed. 601; Wichita, etc., Pump Co. v. Clear Vision Pump Co., 19 F. (2d) 435 [rev 9 F. (2d) 996, and certiorari den 275 U. S. 530 mem, 48 SCt 28 mem, 72 L.

affect the performance of the function of the patent does not avoid infringement;[42] and the fact that defendant's machine is an improvement constituting a patentable invention does not defeat infringement if the machine employs complainant's combination operating in substantially the same way to produce the same result.[43]

[§ 512] **(bb) Parts or Elements.**[44] A claim to a combination of old elements, materials, or parts is not infringed unless every element, material, or part mentioned in the claim,[45] or its equiva-

ed. 409 mem]; Concrete Appliances Co. v. Gomery, 284 Fed. 518 [mod on other grounds 291 Fed. 486 (aff 269 U. S. 177, 46 SCt 42, 70 L. ed. 222)]; Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383]; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; Jenkins v. Mahoney, 135 Fed. 550 [rev on other grounds 138 Fed. 404, 70 CCA 662]; Norton v. Wheaton, 97 Fed. 636; Bliss v. Haight, 3 F. Cas. No. 1,548, 7 Blatchf. 7, 3 Fish. Pat. Cas. 621; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536.

42. Krauth v. Autographic Register Co., 285 Fed. 199 [rev on other grounds 286 Fed. 470]. Compare American Stoker Co. v. Underfeed Stoker Co., 182 Fed. 642 [aff 188 Fed. 314, 110 CCA 292] (a patent for a combination of old elements with a single new element is not infringed by a machine which is radically different, performing an additional function which was unknown to, or unclaimed by, the patentee, or is not clearly a mechanical equivalent).

43. Klauder-Weldon Dyeing Mach. Co. v. Giles, 231 Fed. 746 [aff 238 Fed. 367, 151 CCA 383].

[a] **Improvement not presenting new combination** does not avoid infringement. Power Specialty Co. v. Connecticut Light, etc., Co., 27 F. (2d) 928.

44. Parts or elements of patented inventions generally see supra §§ 505-510.

45. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 25 SCt 697, 49 L. ed. 1100 [aff 123 Fed. 869, 59 CCA 357]; Knapp v. Morss, 150 U. S. 221, 14 SCt 81, 37 L. ed. 1059; Garratt v. Seibert, 131 U. S. appendix cxv, 21 L. ed. 956; Electric R. Signal Co. v. Hall R. Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Rowell v. Lindsay, 113 U. S. 97, 5 SCt 507, 28 L. ed. 906 [aff 6 Fed. 290, 10 Biss. 217]; McMurray v. Mallory, 111 U. S. 97, 4 SCt 375, 28 L. ed. 365 [aff 5 Fed. 593, 4 Hughes 265]; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Rees v. Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Stimpson v. Baltimore, etc., R. Co., 10 How. (U. S.) 329, 13 L. ed. 441; Prouty v. Ruggles, 16 Pet. (U. S.) 336, 10 L. ed. 985; Nicholas v. E. W. Brown Co., 30 F. (2d) 291; Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. (2d) 263; Buckeye Blower Co. v. Arensmeyer, 28 F. (2d) 209; Directoplate Corp. v. Huebner-Bleistein Patents Co., 25 F. (2d) 96; Premier Register Table Co. v. West, 21 F. (2d) 762; Wichita, etc., Pump Co. v. Clear Vision Pump Co., 19 F. (2d) 435 [rev 9 F. (2d) 996, and certiorari den 275 U. S. 530 mem, 48 SCt 28 mem, 72 L. ed. 409 mem]; Hazeltine Corp. v. Electric Serv. Engineering Corp., 18 F. (2d) 662; Dry Hand Mop Co., Inc. v. Squeez-Ezy Mop Co., Inc., 17 F. (2d) 465; Vibroplex Co. v. Bunnell, 16 F. (2d) 975; Turner v. Spinner, 6 F. (2d) 172; Racine Confectioners' Mach. Co. v. Metro Chocolate Co., 297 Fed. 635; American Can Co. v. Goldee Mfg. Co., 290 Fed. 523; Nagy v. International Cork Co., 290 Fed. 223 [aff 298 Fed. 931]; Wire Wheel Corp v. Budd Wheel Co., 288 Fed. 308; Electro-Dynamic Co. v. U. S. Light, etc., Corp., 278 Fed. 80 [aff 246 Fed. 127]; Weber v. Ward Baking Co., 273 Fed. 818; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 68, 165 CCA 478 [mod 220 Fed. 154, and certiorari den 249 U. S. 605 mem, 39 SCt 288 mem, 63 L. ed. 798 mem]; Detroit Showcase Co. v. Kawneer Mfg. Co., 250 Fed. 234, 162 CCA 370 [mod 240 Fed. 737]; Debnam v. Benthall Mach. Co., 241 Fed. 103, 154 CCA 103 [rev 222 Fed. 918]; Dresner v. Diamond, 239 Fed. 882, 153 CCA 10; Denny Renton Clay, etc., Co. v. Portland Cement Pipe, etc., Co., 232 Fed. 890; Slocomb v. A. C. Layman Mach. Co., 227 Fed. 94 [aff 230 Fed. 1021 mem, 144 CCA 286 mem (certiorari den 242 U. S. 635 mem, 37 SCt 18 mem, 61 L. ed. 539 mem)]; Stockham v. Duncan, 226 Fed. 740, 141 CCA 496; Evans v. Hall Printing Press Co., 223 Fed. 539, 139 CCA 129; Hall Mammoth Incubator Co. v. Teabout, 215 Fed. 109, 131 CCA 417 [aff 205 Fed. 906]; Steiger v. Waite Grass Carpet Co., 213 Fed. 798, 130 CCA 456 [aff 194 Fed. 878]; National Cash Register Co. v. Gritigny, 213 Fed. 463, 130 CCA 109; Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333]; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; J. D. Randall Co. v. Foglesong Mach. Co., 203 Fed. 41, 121 CCA 377; William B. Scaife, etc., Co. v. Falls City Woolen Mills, 194 Fed. 139 [rev on other grounds 209 Fed. 210, 126 CCA 304]; Morton Trust Co. v. Standard Steel Car Co., 177 Fed. 931, 101 CCA 211 [rev 171 Fed. 672]; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023, 104 CCA 669]; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)]; Duncan v. Cincinnati Butchers' Supply Co., 171 Fed. 656, 96 CCA 400; Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., 163 Fed. 950, 90 CCA 310; Union Match Co. v. Diamond Match Co., 162 Fed. 148, 89 CCA 172; Portland Gold Min. Co. v. Hermann, 160 Fed. 91, 87 CCA 247; Consolidated Engine Stop Co. v. Landers, 160 Fed. 79; H. F. Brainmer Mfg. Co. v. Witte Hardware Co., 159 Fed. 726; Ajax Forge Co. v. Morden Frog, etc., Works, 156 Fed. 591 [aff 164 Fed. 843, 90 CCA 605]; American Chocolate Mach. Co. v. Helmstetter, 142 Fed. 978, 74 CCA 240; O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 CCA 304; American Can Co. v. Hickmott Asparagus Canning Co., 137 Fed. 86 [mod on other grounds 142 Fed. 141, 73 CCA 359]; Mallon v. Gregg, 137 Fed. 68, 69 CCA 48; Levy v. Harris, 130 Fed. 711, 65 CCA 113; Cimiotti Unhairing Co. v. Derbohlaw, 115 Fed. 510, 53 CCA 164; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580; Wellman v. Midland Steel Co., 106 Fed. 221; Starrett v. J. Stevens Arms, etc., Co., 100 Fed. 93, 40 CCA 289; Norton v. Wheaton, 97 Fed. 636; Campbell Printing-Press, etc., Co. v. Duplex Printing-Press Co., 86 Fed. 315; Kansas City Hay-Press Co. v. Devol, 81 Fed. 726, 26 CCA 578; Carter Mach. Co. v. Hanes, 78 Fed. 346, 24 CCA 128; Muller v. Lodge, etc., Mach. Tool Co., 77 Fed. 621, 23 CCA 357; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 23 CCA 223 [aff 63 Fed. 986]; P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co., 76 Fed. 965, 22 CCA 658; Engle Sanitary, etc., Co. v. Elwood, 73 Fed. 484; Brown v. Stilwell, etc., Mfg. Co., 57 Fed. 731, 741, 6 CCA 528; Ashton Valve Co. v. Coale Muffler, etc., Co., 50 Fed. 100 [aff 52 Fed. 314, 3 CCA 98]; Ross v. Montana Union R. Co., 45 Fed. 424; Innis v. Oil City Boiler Works, 41 Fed. 788; Tatum v. Gregory, 41 Fed. 142; Ott v. Barth, 32 Fed. 89; Thoens v. Israel, 31 Fed. 556; Blades v. Rand, 27 Fed. 93 [aff 136 U. S. 631, 10 SCt 1065, 34 L. ed. 553]; Saladee v. Racine Wagon, etc., Co., 20 Fed. 686; Gould v. Spicers, 20 Fed. 317; Howe v. Neemes, 18 Fed. 40; Matteson v. Caine, 17 Fed. 525, 8 Sawy. 498; Doane, etc., Mfg. Co. v. Smith, 15 Fed. 459; Fourot v. Hawes, 3 Fed. 456; Barrett v. Hall, 2 F. Cas. No. 1,047, 1 Mason 447, 1 Robb Pat. Cas. 207; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Bliss v. Haight, 3 F. Cas. No. 1,548, 7 Blatchf. 7, 3 Fish. Pat. Cas. 621; Brooks v. Bicknell, 4 F. Cas. No. 1,946, Fish. Pat. R. 72, 4 McLean 70; Burr v. Duryee, 4 F. Cas. No. 2,190, 2 Fish. Pat. Cas. 275 [aff 1 Wall. 531, 17 L. ed. 650, 660, 661]; Case v. Brown, 5 F. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268 [aff 2 Wall. 320, 17 L. ed. 817]; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536; Dodge v. Card, 7 F. Cas. No. 3,951, 1 Bond 393, 2 Fish. Pat. Cas. 116; Hailes v. Van Wormer, 11 F. Cas. No. 5,904, 7 Blatchf. 443 [aff 2 Wall. 353, 22 L. ed. 241]; Hale v. Stimpson, 11 F. Cas. No. 5,915, 2 Fish. Pat. Cas. 565; Howe v. Abbott, 12 F. Cas. No. 6,766, 2 Robb Pat. Cas. 99, 2 Story 190; Huggins v. Hubby, 12 F. Cas. No. 6,839; McCormick v. Manny, 15 F. Cas. No. 8,724, 6 McLean 539 [aff 20 How. 402, 15 L. ed. 930]; Nicholson Pav. Co. v. Hatch, 18 F. Cas. No. 10,251, 3 Fish. Pat. Cas. 432, 4 Sawy. 692; Pitts v. Wemple, 19 F. Cas. No. 11,195, 6 McLean 558; Rich v. Close, 20 F. Cas. No. 11,757, 8 Blatchf. 41, 4 Fish. Pat. Cas. 279; Roberts v. Harnden, 20 F. Cas. No. 11,903, 2 Cliff. 500; Rollhaus v. McPherson, 20 F. Cas. No. 12,026; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Sanford v. Merrimack Hat Co., 21 F. Cas. No. 12,313, 2 Bann. & A. 408, 4 Cliff. 404; Smith v. Fay, 22 F. Cas. No. 13,045, 6 Fish. Pat. Cas. 446; Smith v. Higgins, 22 F. Cas. No. 13,058; Berdan Fire-Arms Mfg. Co. v. U. S., 25 Ct. Cl. 355 [aff 156 U. S. 552, 15 SCt 420, 39 L. ed. 530]; Pacific Submarine, etc., Proof Wall Co. v. U. S., 19 Ct. Cl. 234; Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co., 12 App. (D. C.) 201; Dudgeon v. Thomson, 3 App. Cas. 34; Clark v. Adie, 2 App. Cas. 315, 20 ERC 281; Curtis v. Platt, L. R. 1 H. L. 337; Parkes v. Stevens, L. R. 8 Eq. 358 [aff L. R. 5 Ch. 36]; Saxby v. Clunes, 43 L. J. Exch. 228; White v. Fenn, 15 L. T. Rep. N. S. 505; Jones v. Galbraith, 9 B. C. 521.

"No one is an infringer of a combination claim unless he uses all the elements thereof." Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 410, 25 SCt 697, 49 L. ed. 1100.

"There can be no infringement by the use of any one or more, but not all, of the elements." Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742, 749 [rev on other grounds 219 Fed. 565, 135 CCA 333].

[a] **Making, selling, or using of one element** (1) of a combination is not infringement. Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co., 129 Fed. 105, 63 CCA 607 [certiorari den 194 U. S. 636 mem, 24 SCt 859 mem, 48 L. ed. 1160 mem]. (2) Contributory infringement see infra § 518.

[b] **Performance of function of omitted element** (1) by one of remaining elements is immaterial. Hall

lent,[46] is used, and all the elements or their equivalents are combined in the same, or substantially the

Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; Gardner v. Prescott, 35 Fed. 516. (2) "In an overcrowded art, where a broad generic invention is not possible, a defendant who omits altogether one element of a combination cannot be held as an infringer, even though he makes another element do the double work. Underwood Typewriter Co. v. Royal Typewriter Co., 224 Fed. 477, 479, 140 CCA 163 [quot Russell Grader Mfg. Co. v. F. B. Zeig Mfg. Co., 259 Fed. 575, 577, 170 CCA 33].

46. Du Bois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895; National Cash-Register Co. v. Boston Cash Indicator, etc., Co., 156 U. S. 502, 15 SCt 434, 39 L. ed. 511; Hoyt v. Horne, 145 U. S. 302, 12 SCt 922, 36 L. ed. 713; Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 113 U. S. 157, 5 SCt 513, 28 L. ed. 939; Rowell v. Lindsay, 113 U. S. 97, 5 SCt 507, 28 L. ed. 906 [aff 6 Fed. 290]; Clough v. Barker, 106 U. S. 166, 1 SCt 188, 27 L. ed. 134; Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Gill v. Wells, 22 Wall. (U. S.) 11, 22 L. ed. 699; Rees v. Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Eames v. Godfrey, 1 Wall. (U. S.) 78, 17 L. ed. 547; Nicholas v. E. W. Brown Co., 30 F. (2d) 291; Gilchrist Co. v. Kar-Lac Co., 29 F. (2d) 153 [certiorari den 49 SCt 252 mem]; Van Meter v. Irving Air Chute Co., 27 F. (2d) 170; Trane Co. v. Nash Engineering Co., 25 F. (2d) 267 [aff 20 F. (2d) 439]; Premier Register Table Co. v. West, 21 F. (2d) 762; Smith v. American Electric Rabbit Racing Assoc., 21 F. (2d) 366 [aff 26 F. (2d) 1016 mem (certiorari den 49 SCt 27 mem)]; Hazeltine Corp. v. Electric Serv. Engineering Corp., 18 F. (2d) 662; Automatic Pencil Sharpener Co. v. Boston Pencil Pointer Co., 279 Fed. 40 [certiorari den 260 U. S. 718 mem, 43 SCt 91 mem, 67 L. ed. 484 mem]; Heyl & Patterson, Inc. v. M. A. Hanna Coal, etc., Co., 257 Fed. 97 [aff 279 Fed. 862]; Disc Grader, etc., Co. v. Austin-Western Road Mach. Co., 254 Fed. 430, 166 CCA 62; Detroit Showcase Co. v. Kawneer Mfg. Co., 250 Fed. 234, 162 CCA 370 [mod 240 Fed. 737]; Debnam v. Benthall Mach. Co., 241 Fed. 103, 154 CCA 103 [rev 222 Fed. 918]; Auto Vacuum Freezer Co. v. William A. Sexton Co., 239 Fed. 898, 153 CCA 26; Dresner v. Diamond, 239 Fed. 882, 153 CCA 10; Denny Renton Clay, etc., Co. v. Portland Cement Pipe, etc., Co., 232 Fed. 890; Dundon v. Pedersen, 227 Fed. 120 [aff 220 Fed. 309, 136 CCA 143]; Slocomb v. A. C. Layman Mach. Co., 227 Fed. 94 [aff 230 Fed. 1021 mem, 144 CCA 286 mem (certiorari den 242 U. S. 635 mem, 37 SCt 18 mem, 61 L. ed. 539 mem)]; Stockham v. Duncan, 226 Fed. 740, 141 CCA 496; Hall Mammoth Incubator Co. v. Teabout, 215 Fed. 109, 131 CCA 417 [aff 205 Fed. 906]; National Cash Register Co. v. Gratigny, 213 Fed. 463, 130 CCA 109; Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333]; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417; Acme Truck, etc., Co. v. Meredith, 183 Fed. 124, 105 CCA 414; Morton Trust Co. v. Standard Steel Co., 177 Fed. 931, 101 CCA 211 [rev 171 Fed. 672]; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023, 104 CCA 669]; Corrington v. Westinghouse Air Brake Co., 173 Fed. 69 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)]; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561; Consolidated Engine Stop Co. v. Landers, 160 Fed. 79, 87 CCA 235 [aff 151 Fed. 775]; Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 CCA 461; Singer Mfg. Co. v. Cramer, 109 Fed. 652, 48 CCA 548 [certiorari granted 184 U. S. 698 mem, 22 SCt 946 mem, 46 L. ed. 764 mem, and rev on other grounds 192 U. S. 265, 24 SCt 291, 48 L. ed. 437]; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 CCA 426; Salomon v. Garvin Mach. Co., 84 Fed. 195; Jensen Can-Filling Mach. Co. v. Norton, 67 Fed. 236, 14 CCA 383; McKay, etc., Lasting Mach. Co. v. Dizer, 61 Fed. 102, 9 CCA 382; Standard Folding Bed Co. v. Osgood, 58 Fed. 583, 7 CCA 382; Brown Mfg. Co. v. Mast, 53 Fed. 578; Consolidated Piedmont Cable Co. v. Pacific Cable R. Co., 53 Fed. 385, 3 CCA 570; Municipal Signal Co. v. Gamewell Fire-Alarm Tel. Co., 52 Fed. 459; Robbins v. Columbus Watch Co., 50 Fed. 545 [aff 64 Fed. 384, 12 CCA 174]; American Roll-Paper Co. v. Weston, 45 Fed. 686, 51 Fed. 237 [aff 59 Fed. 147, 8 CCA 56]; Ross v. Montana Union R. Co., 45 Fed. 424; Hoe v. Cranston, 42 Fed. 837; Leary v. Hohenstein, 37 Fed. 680; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 328; Steam-Gauge, etc., Co. v. Rogers, 29 Fed. 453; Wollensak v. Reiher, 28 Fed. 424; May v. Fond du Lac, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Wheeler v. Morris, 26 Fed. 918; Dederick v. Whitman Agricultural Co., 26 Fed. 763; Hoyt v. Slocum, 26 Fed. 329; Piper v. Shedd, 26 Fed. 151; Mundy v. Lidgerwood Mfg. Co., 20 Fed. 114; Reay v. Raynor, 19 Fed. 308; Washburn, etc., Mfg. Co. v. Griesche, 16 Fed. 669, 5 McCrary 246; Ward v. Grand Detour Plow Co., 14 Fed. 696; Whittlesey v. Ames, 13 Fed. 893, 9 Biss. 225; Babcock v. Judd, 1 Fed. 408, 5 Bann. & A. 127; American Whip Co. v. Lombard, 1 F. Cas. No. 319, 3 Bann. & A. 598, 4 Cliff. 495; Blake v. Robertson, 3 F. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Blake v. Robertson, 3 F. Cas. No. 1,501 [aff 94 U. S. 728, 24 L. ed. 245]; Brooks v. Norcross, 4 F. Cas. No. 1,957, 2 Fish. Pat. Cas. 661; Buerk v. Imhaeuser, 4 F. Cas. No. 2,106, 1 Bann. & A. 337 [aff 101 U. S. 647, 25 L. ed. 945]; Buerk v. Valentine, 4 F. Cas. No. 2,109, 9 Blatchf. 479, 5 Fish. Pat. Cas. 366; Burdett v. Estey, 4 F. Cas. No. 2,146, 4 Bann. & A. 141, 16 Blatchf. 105 [rev on other grounds 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 30 F. Cas. No. 18,285, 3 Fish. Pat. Cas. 536; Densmore v. Schofield, 7 F. Cas. No. 3,809, 4 Fish. Pat. Cas. 148 [aff 102 U. S. 375, 26 L. ed. 214]; Gorham v. Mixter, 10 F. Cas. No. 5,626, Brunn. Coll. Cas. 327; King v. Louisville Cement Co., 14 F. Cas. No. 7,798, 6 Fish. Pat. Cas. 336; Rich v. Close, 20 F. Cas. No. 11,757, 8 Blatchf. 41, 4 Fish. Pat. Cas. 279; Robertson v. Hill, 20 F. Cas. No. 11,925, 6 Fish. Pat. Cas. 465; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Sarven v. Hall, 21 F. Cas. No. 12,369, 9 Blatchf. 524, 5 Fish. Pat. Cas. 415; Smith v. Fay, 22 F. Cas. No. 13,045, 6 Fish. Pat. Cas. 446; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Webster v. New Brunswick Carpet Co., 29 F. Cas. No. 17,337, 1 Bann. & A. 84; Welling v. Rubber-Coated Harness Trimming Co., 29 F. Cas. No. 17,382, 1 Bann. & A. 282 [rev on other grounds 97 U. S. 24 L. ed. 942]; Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co., 12 App. (D. C.) 201 [rev on other grounds 174 U. S. 492, 19 SCt 641, 43 L. ed. 1058]; Smith v. Woodruff, 8 D. C. 459; Proctor v. Bennis, 36 Ch. D. 740; Sellers v. Dickinson, 5 Exch. 312, 155 Reprint 134, 6 EngL&Eq 544, 20 ERC 665; Marconi v. British Radio-Tel., etc., Co., Ltd., 27 T. L. R. 274.

"A claim for combination is not infringed if any one of the elements is omitted without substitution of an equivalent." National Cash Register Co. v. Gratigny, 213 Fed. 463, 465, 130 CCA 109.

"A combination may be infringed when some of the elements are employed and for the others mechanical equivalents are used which were known to be such at the time when the patent was granted." Rowell v. Lindsay, 113 U. S. 97, 102, 5 SCt 507, 28 L. ed. 906.

[a] **Equivalency generally.**—(1) The rules relating to equivalency generally (see supra §§ 498–510) apply to patents of combinations (Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, 261 Fed. 85; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 CCA 504; Denning Wire, etc., Co. v. American Steel, etc., Co., 160 Fed. 108 [aff 169 Fed. 793, 95 CCA 259]; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544), (2) and patentees of combinations are undoubtedly as much entitled to the benefit of equivalents as are the patentees of all other classes of invention (Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Gill v. Wells, 22 Wall. (U. S.) 1, 22 L. ed. 699; Rees v. Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Yancey v. Enright, 230 Fed. 841, 145 CCA 51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]; Brammer v. Schroeder, 106 Fed. 918, 46 CCA 41; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 CCA 375; Boston, etc., Electric St. R. Co. v. Bemis Car-Box Co., 80 Fed. 287, 25 CCA 420; Norton v. Jensen, 49 Fed. 859, 1 CCA 452; Tatum v. Gregory, 41 Fed. 142; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 328; Dederick v. Cassell, 9 Fed. 306; American Whip Co. v. Lombard, 1 F. Cas. No. 319, 3 Bann. & A. 598, 4 Cliff. 495; Goodyear Dental Vulcanite Co. v. Preterre, 10 F. Cas. No. 5,596, 3 Bann. & A. 471, 15 Blatchf. 274; King v. Louisville Cement Co., 14 F. Cas. No. 7,798, 6 Fish. Pat. Cas. 336; Sayles v. Chicago, etc., R. Co., 21 F. Cas. No. 12,415, 3 Biss. 52, 4 Fish. Pat. Cas. 584 [rev on other grounds 97 U. S. 554, 24 L. ed. 1053]; Storrs v. Howe, 23 F. Cas. No. 13,495, 2 Bann. & A. 420, 4 Cliff. 388; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600). (3) In one case, however, it was said that "when an invention relates to the production of an old result by means of a novel combination of old parts, or to a machine utilizing an old principle or system . . . it may be no infringement to achieve the same result by the use of well known equivalents. In other words when the invention claimed is the particular arrangement of old parts previously used in combination, the doctrine of infringement by the substitution of equivalents is not applicable, and the patentee cannot complain of the use of different mechanical appliances in lieu of one or more of the parts. Mere colourable evasions would not of course afford a defence." Gerrard v. Laidlaw Bale-Tie Co., Ltd., [1926] Can. Exch. 193, 197, [1926] 4 DomLR 5.

[b] **Range of equivalents.**—(1) Ordinarily the range of equivalents accorded a patent of a combination of old elements is narrow (William B. Scaife, etc., Co. v. Falls City Woolen Mills Co., 194 Fed. 139 [rev on other grounds 209 Fed. 210, 126 CCA 304]; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed.

same, way[47] and coact or coöperate in substantially the same way[48] to produce a result of substantially the same nature.[49] There is no infringement where the combination claimed is changed or destroyed by an addition making a new combination;[50] but where the essence of the combination is not changed, infringement of a patent for a combination is not avoided by the mere addition of another element,[51] a change in the location or sequence of the elements,[52] the joinder of two parts or elements into one which performs the function or accomplishes the purpose of both in substantially the same way,[53] or the separation of one integral part into two, which together accomplish substantially what was done by

440 [aff 161 Fed. 111, 88 CCA 275]), (2) and no great liberality in applying the doctrine of mechanical equivalents can be indulged in its favor (Turner v. Spinner, 6 F. (2d) 172). (3) Also, a patentee of an improvement, consisting of a combination of old elements with a single new element, is not entitled to claim equivalents to the same extent as if it was a pioneer or original patent. American Stoker Co. v. Underfeed Stoker Co., 182 Fed. 642 [aff 188 Fed. 314, 110 CCA 292]. (4) However, a patentee of a combination which marks a distinct and substantial advance in the art is entitled to a larger range of equivalents (Maunula v. Sunell, 155 Fed. 535), (5) commensurate with the scope of his invention (Smith v. American Electric Rabbit Racing Assoc., 21 F. (2d) 366 [aff 26 F. (2d) 1016 mem (certiorari den 49 SCt 27 mem)]; Veneer Mach. Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 CCA 115), (6) and in such case the term "mechanical equivalent" should have a reasonably broad and generous interpretation (Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, 261 Fed. 85).

[c] **What constitutes equivalency.**—In order to be the equivalent of an element or ingredient of a combination another element or ingredient must: (1) Perform the same function. Rowell v. Lindsay, 113 U. S. 97, 5 SCt 507, 28 L. ed. 906; Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Nicholas v. E. W. Brown Co., 30 F. (2d) 291; American Can Co. v. McGinnis, 156 Fed. 784 [aff 162 Fed. 1006, 87 CCA 118]; Maunula v. Sunell, 155 Fed. 535; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]. And see cases infra this note (2). (2) Perform it in substantially the same way. Eames v. Godfrey, 1 Wall. (U. S.) 78, 17 L. ed. 547; Westinghouse Electric, etc., Co. v. Cutter Electric, etc., Co., 169 Fed. 634, 95 CCA 162; American Can Co. v. McGinnis, 156 Fed. 784 [aff 162 Fed. 1006, 87 CCA 118]; Maunula v. Sunell, 155 Fed. 535; Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440 [aff 161 Fed. 111, 88 CCA 275]; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 CCA 426; Norton v. Wheaton, 97 Fed. 636; Engle Sanitary, etc., Co. v. Elwood, 73 Fed. 484; Erie Rubber Co. v. American Dunlop Tire Co., 70 Fed. 58, 16 CCA 632; Wells v. Curtis, 66 Fed. 318, 13 CCA 494; National Cash-Register Co. v. American Cash-Register Co., 53 Fed. 367, 3 CCA 559 [rev 47 Fed. 212], Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., 49 Fed. 61, 1 CCA 158, 50 Fed. 785, 1 CCA 668; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Smith v. Fay, 22 F. Cas. No. 13,045, 6 Fish. Pat. Cas. 446. (3) And have been known, at the date of the patent, as a proper substitute. Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Gill v. Wells, 22 Wall. (U. S.) 11, 22 L. ed. 699; Rees v. Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Rowell v. Lindsay, 6 Fed. 290, 10 Biss. 217 [aff 113 U. S. 97, 5 SCt 507, 28 L. ed. 906]; Babcock v. Judd, 1 Fed. 408, 5 Bann. & A. 127; American Whip Co. v. Lombard, 1 F. Cas. No. 319, 3 Bann. & A. 598, 4 Cliff. 495; Webster v. New Brunswick Carpet Co., 29 F. Cas. No. 17,337, 1 Bann. & A. 84; Welling v. Rubber-Coated Harness Trimming Co., 29 F. Cas. No. 17,382, 1 Bann. & A. 282 [rev on other grounds 97 U. S. 7, 24 L. ed. 942]. (4) "But this does not mean that where one part, or one element, of a combination, not only performs the same function or functions of the corresponding element in the patent, but some added function, which does not change the mode of operation of the entire combination, equivalency is not made out. The fact that a substituted element performs the same and also an additional function does not necessarily prevent its being an equivalent in the combination, or prevent the combination containing such substituted element being the equivalent of the combination of the patent in suit and alleged to be infringed by the former combination. To hold otherwise would enable persons to successfully infringe almost any combination patent by substituting an element in the combination of the patent which, without changing the combination, or its mode of operation, or the results obtained, in essentials, still performs some added function, which may be immaterial, or which may be an improvement." Corrington v. Westinghouse Air Brake Co., 173 Fed. 69, 81 [rev on other grounds 178 Fed. 711, 103 CCA 479 (certiorari den 219 U. S. 584, 31 SCt 469, 55 L. ed. 346)]. (5) "Where a combination of a plurality of mechanisms constitutes the invention, each mechanism is to be individually considered to determine equivalency, though the result of the plural operations working conjunctively is identical in the patented and accused devices." Diamond Match Co. v. Sun Match Corp., 16 F. (2d) 1, 3 [aff 9 F. (2d) 695]. (6) A pulley revolving on a central shaft and one having trunions revolving in bearings at the ends are well known mechanical equivalents, and the substitution of one for the other, which is an element in a patented combination, does not avoid infringement. Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 CCA 461 [aff 142 Fed. 221]. (7) The substitution of nonautomatic devices, operating in a different way, for automatic devices covered by a combination patent is not infringement. Dudlo Mfg. Co. v. Varley Duplex Magnet Co., 253 Fed. 745, 165 CCA 339.

47. Electric R. Signal Co. v. Hall R. Signal Co., 114 U. S. 87, 5 SCt 1069, 29 L. ed. 96; Turner v. Spinner, 6 F. (2d) 172; William B. Scaife, etc., Co. v. Falls City Woolen Mills, 194 Fed. 139 [rev on other grounds 209 Fed. 210, 126 CCA 304]; Crompton v. Belknap Mills, 6 F. Cas. No. 3,406, 3 Fish. Pat. Cas. 536, 30 F. Cas. No. 18,285; Tatham v. Le Roy, 23 F. Cas. No. 13,760, 2 Blatchf. 474 [rev on other grounds 14 How. 156, 14 L. ed. 367].

48. Electro-Dynamic Co. v. U. S. Light, etc., Corp., 278 Fed. 80 [aff 246 Fed. 127]; Seneca Camera Mfg. Co. v. Gundlach-Manhattan Optical Co., 236 Fed. 141; Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333]; Portland Gold Min. Co. v. Hermann, 160 Fed. 91, 87 CCA 247.

[a] **Operation in precisely same way** is not necessary; operation in substantially the same way is sufficient. Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848.

[b] **Continuous or single and successive action.**—Infringement may exist although all the elements of complainant's device act all the time and at times the elements of defendant's device act singly and successively, as where such constant action in complainant's device is not essential, and in defendant's device there is no independence of action and at times the elements necessarily act together and influence the operation of each other. Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848.

49. Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333].

Identity of result generally see supra § 500.

50. Voss v. Fisher, 113 U. S. 213, 5 SCt 511, 28 L. ed. 975; Robinson v. Tubular Woven Fabric Co., 248 Fed. 526 [aff 254 Fed. 304, 166 CCA 44]; Barr Co. v. New York, etc., Automatic Sprinkler Co., 35 Fed. 513; Reckendorfer v. Faber, 20 F. Cas. No. 11,625, 1 Bann. & A. 229, 12 Blatchf. 68 [aff 92 U. S. 347, 23 L. ed. 719]; Robertson v. Hill, 20 F. Cas. No. 11,925, 6 Fish. Pat. Cas. 465.

51. Rees v. Gould, 15 Wall. (U. S.) 187, 21 L. ed. 39; Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023, 104 CCA 669]; Williames v. Barnard, 41 Fed. 358; Pitts v. Wemple, 19 F. Cas. No. 11,195, 6 McLean 558; Williams v. Boston, etc., R. Co., 29 F. Cas. No. 17,716, 4 Bann. & A. 441, 17 Blatchf. 21; Hutchison Vapor Heating Corp. v. Mouat, 48 App. (D. C.) 388.

"The addition of an extra element to a combination does not avoid infringement." Detroit Motor Appliance Co. v. Burke, 4 F. (2d) 118, 123.

[a] **Auxiliary device.**—Where a patented combination is operative in itself, infringement is not avoided by the use with it of an auxiliary device which increases its efficiency. Matchette v. Streeter, 181 Fed. 380.

52. Disc Grader, etc., Co. v. Austin-Western Road Mach. Co., 254 Fed. 430, 166 CCA 62; Adam v. Folger, 120 Fed. 260, 56 CCA 540; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 CCA 36; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 CCA 544; Thompson v. Second Ave. Tract. Co., 93 Fed. 824, 35 CCA 620; Union R. Co. v Sprague Electric R., etc., Co., 88 Fed. 82, 31 CCA 391; Steel-Clad Bath Co. v. Davison, 77 Fed. 736 [rev on other grounds 80 Fed. 904, 26 CCA 227 (reh den 81 Fed. 868, 26 CCA 657)]; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203; Loercher v. Crandal, 11 Fed. 872, 20 Blatchf. 106. And see Los Angeles Lime Co. v. Nye, 270 Fed. 155 (dictum that a change in the location or sequence of the elements of a patented combination will not avoid infringement where they are all employed to perform the same functions, unless location or sequence is essential to the result or to the novelty of the claim).

53. Smith v. American Electric Rabbit Racing Assoc., 21 F. (2d) 366 [aff 26 F. (2d) 1016 mem (certiorari den 49 SCt 27 mem)]; Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works, 261 Fed. 85; Yancey v. Enright, 230 Fed. 641, 145 CCA 51 [certiorari den 241 U. S. 678 mem, 36 SCt 727 mem, 60 L. ed. 1233 mem]; Parker v. Automatic Mach. Co., 227 Fed. 449; Brown, etc., Mfg. Co. v. L. S. Starrett Co., 225 Fed. 997; Pe-

the single element.[54]

Materiality of element. The rule that a patent of a combination is not infringed unless every part or element mentioned in the claim is used[55] applies, not only to a part or element claimed which is material or essential,[56] but also to an element claimed which is in fact immaterial or unnecessary;[57] a patentee will not be heard to deny the materiality of any element included in his claim.[58]

Combination comprising new parts. Where some of the parts of the combination are new, and those parts are taken and used in the same manner, but with different things from the rest of the combination patented, and a part of the patented invention is taken although the whole is not, it is an infringement to that extent.[59]

[§ 513] **bb. Process.**[60] A claim to an art, process, or method is not infringed except by the use of all of the steps thereof or their equivalents;[61] but only "substantial," as distinguished from "absolute," identity is necessary;[62] and where the substance of

dersen v. Dundon, 220 Fed. 309, 136 CCA 143; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417].

54. Pedersen v. Dundon, 220 Fed. 309, 136 CCA 143.

55. See supra text and note 45.

56. Bassick Mfg. Co. v. Rogers, 26 F. (2d) 724; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S 646 mem, 46 SCt 347 mem, 70 L. ed. 778 mem]; Abbott Coin Counter Co v. Standard-Johnson Co., 290 Fed. 418 [aff 296 Fed. 126]; Wilson, etc., Mfg. Co. v. Union Tool Co., 249 Fed. 729, 161 CCA 639 [rev 237 Fed. 837, and certiorari den 248 U. S. 559 mem, 39 SCt 6 mem, 63 L. ed. 421 mem], Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; Star Bucket Pump Co. v. Butler Mfg. Co., 198 Fed. 857; Acme Truck, etc., Co. v. Meredith, 183 Fed. 124, 105 CCA 414; H. F. Brammer Mfg. Co. v. Witte Hardware Co., 159 Fed. 726, 86 CCA 202; Consolidated Car Heating Co. v. Came, [1903] A. C. 509 [dism app 11 Que. K. B. 103 (rev 18 Que. Super. 44)].

"The claim of a combination is not infringed if any of the material parts of the combination are omitted." Bassick Mfg. Co. v. Rogers, 26 F. (2d) 724, 726.

"The absence of a single material mechanical element of a patented combination from the machine or combination that is alleged to infringe it is fatal to the claim of infringement." Whitney v. New York Scaffolding Co., 243 Fed. 180, 186, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem].

57. Wright v. Yuengling, 155 U. S. 47, 15 SCt 1, 39 L. ed. 64; Union Water Meter Co. v. Desper, 101 U. S. 332, 25 L. ed. 1024; Hall Mammoth Incubator Co. v. Teabout, 215 Fed. 109, 131 CCA 417 [aff 206 Fed. 906]; Levy v. Harris, 124 Fed. 69 [aff 130 Fed. 711, 65 CCA 113]; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 CCA 580; Kinzel v. Luttrell Brick Co., 67 Fed. 926, 15 CCA 82; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 25; Rowell v. Lindsay, 6 Fed. 290, 10 Biss. 217 [aff 113 U. S. 97, 5 SCt 507, 28 L. ed. 906].

58. Eames v. Godfrey, 1 Wall. (U. S.) 78, 17 L. ed. 547; Charles T. Wilt Co. v. William Bal Co., 271 Fed. 73; Hall Mammoth Incubator Co. v. Teabout, 205 Fed. 906 [aff 215 Fed. 109, 131 CCA 417]; Adam v. Folger, 120 Fed. 260, 56 CCA 540.

59. Thompson v. American Bank-Note Co., 35 Fed. 203; Adair v. Thayer, 4 Fed. 441, 17 Blatchf. 468; Sharp v. Tifft, 2 Fed. 697, 18 Blatchf. 132; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Lee v. Bandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89; Rose v. Sibley Mach. Co., 20 F. Cas. No. 12,051; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Lister v. Leather, 8 E. & B. 1004, 92 ECL 1004, 120 Reprint 373; Newton v. Grand Junction R. Co., 5 Exch. 331 note, 155 Reprint 144, 6 EngL&Eq 557; Sellers v. Dickinson, 5 Exch. 312, 155 Reprint 134, 6 EngL&Eq 544, 20 ERC 665; Harvey v. Murray, 6 Newfoundl. 183.

Equivalency see supra note 46 [b] (3).

Use of part of invention generally see supra § 496.

60. **Patent covering both process and product** see infra § 514.

61. Royer v. Coupe, 146 U. S. 524, 13 SCt 166, 36 L. ed. 1073; Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; Blumenthal v Salt's Textile Mfg. Co., 21 F. (2d) 470; Universal Oil Products Co. v. Skelly Oil Co., 12 F (2d) 271; W. Bickford Co. v Merrill. 268 Fed. 540 [rev 260 Fed. 207]; Philadelphia Rubber Works Co. v. Portage Rubber Co., 241 Fed. 108, 154 CCA 108 [mod 227 Fed. 623]; Standard Paint Co. v. Bird, 175 Fed. 346 [aff 182 Fed. 1023, 104 CCA 669]; U. S. Glass Co. v. Atlas Glass Co., 90 Fed. 724, 33 CCA 254; Kennedy v. Solar Refining Co., 69 Fed. 715; Brush Electric Co. v. Electrical Accumulator Co., 47 Fed. 48 [mod on other grounds 52 Fed. 130, 2 CCA 682]; Royer v. Coupe, 38 Fed. 113 [aff 146 U. S. 524, 13 SCt 166, 36 L. ed. 1073]; United Nickel Co. v. Central Pac. R. Co., 36 Fed. 186; Hatch v. Towne, 35 Fed. 139; Royer v. Chicago Mfg. Co., 20 Fed. 853; Arnold v. Phelps, 20 Fed. 315; Heller v. Bauer, 19 Fed. 96; Cotter v. New Haven Copper Co., 13 Fed. 234; Hammerschlag v. Garrett, 10 Fed. 479; Dittmar v. Rix, 1 Fed. 342; Howe v Abbott, 12 F. Cas. No. 6,766, 2 Robb Pat. Cas. 99, 2 Story 190; Hudson v. Draper, 12 F. Cas. No. 6,834, 4 Cliff 178, 4 Fish. Pat. Cas. 256; Poppenhusen v. Falke, 19 F. Cas. No. 11,280, 5 Blatchf. 46, 2 Fish. Pat. Cas. 213; Johnson v. Willimantic Linen Co., 33 Conn. 436; Unwin v. Heath, 16 C. B. 713, 81 ECL 713, 139 Reprint 939, 5 H. L. Cas. 505, 10 Reprint 997, 20 ERC 619; Patent Bottle Envelope Co. v. Seymer, 5 C. B. N. S. 164, 94 ECL 164, 141 Reprint 65.

[a] **Process patents held infringed.**—Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; Merrell-Soule Co. v. Northland Dairy Co., 28 F. (2d) 924; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; American Stainless Steel Co. v. Ludlum Steel Co., 16 F. (2d) 823; Therloz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Goldschmidt Thermit Co. v. Primos Chemical Co., 292 Fed. 362 [certiorari den 263 U. S 719 mem, 44 SCt 181 mem, 68 L. ed. 523 mem]; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 260 Fed. 197 [aff 269 Fed. 140]; Miami Copper Co. v. Minerals Separation, Ltd., 244 Fed. 752, 157 CCA 200 [mod 237 Fed. 609]; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 225 Fed. 789, [aff 229 Fed. 150, 143 CCA 426]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Chisholm v. Johnson, 106 Fed. 191; Alvin Mfg. Co. v. Scharling, 100 Fed. 87; German-American Filter Co. v. Erdrich, 98 Fed. 300; Streator Cathedral Glass Co. v. Wire-Glass Co., 97 Fed. 950, 38 CCA 573 [certiorari den 177 U. S. 693 mem, 20 SCt 1028 mem, 44 L. ed. 945 mem]; Westinghouse Electric, etc., Co. v. Beacon Lamp Co., 95 Fed. 462; Badische Anilin, etc., Fabrik v. Kalle, 94 Fed. 163, Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co., 90 Fed. 201 [mod on other grounds 93 Fed. 958, 36 CCA 24]; Celluloid Co. v. Arlington Mfg. Co., 85 Fed. 449; Ford Morocco Co. v. Tannage Patent Co., 84 Fed. 644, 28 CCA 503; Adams v. Tannage Patent Co., 81 Fed. 178, 26 CCA 326; Matheson v. Campbell, 77 Fed. 280; Gsell v. Yap-Jue, 12 Philippine 519

[b] **Process patents held not infringed.**—Minerals Separation, Ltd. v. Butte, etc., Min. Co., 250 U. S. 336, 39 SCt 496, 63 L. ed. 1019 [rev 250 Fed. 241, 162 CCA 377, 245 Fed. 577]; California Artificial Stone Pav. Co. v. Schalicke, 119 U. S. 401, 7 SCt 391, 30 L. ed. 471; Burns v. Meyer, 100 U. S. 671, 25 L. ed. 738; Johnson v. Duquesne Light Co., 29 F. (2d) 784; Wolf Mineral Process Corp. v. Minerals Separation North American Corp., 18 F. (2d) 483 [aff 7 F. (2d) 903, and certiorari den 275 U. S. 558 mem, 48 SCt 118 mem, 72 L. ed. 425 mem]; Tompkins v. St. Regis Paper Co., 226 Fed. 744 [aff 236 Fed. 221, 149 CCA 411]; Wolff v. De Nemours, 122 Fed. 944 [aff 134 Fed. 862, 67 CCA 488]; Bradford v. Belknap Motor Co., 105 Fed. 63 [aff 115 Fed. 711, 53 CCA 293]; U. S. Repair, etc., Co. v. Standard Pav. Co., 95 Fed. 137, 37 CCA 28; Michaelis v. Larkin, 91 Fed. 778 [app dism 97 Fed. 984 mem, 38 CCA 695 mem]; U. S. Glass Co. v. Atlas Glass Co., 90 Fed. 724, 33 CCA 254; Cary Mfg. Co. v. De Haven, 88 Fed. 698 [aff 139 Fed. 262, 71 CCA 388]; Tabor Bas-Relief Photograph Co. v. Marceau, 87 Fed. 871; Chicago Sugar-Refining Co. v. Charles Pope Glucose Co., 84 Fed. 977, 28 CCA 594; Philadelphia Creamery Supply Co. v. Davis, etc., Bldg., etc., Co., 84 Fed. 881, 28 CCA 555; Jackson v. Birmingham Brass Co., 79 Fed. 801, 25 CCA 196; Cowles Electric Smelting, etc., Co. v. Lowrey, 79 Fed. 331, 24 CCA 316; Clement Mfg. Co. v. Upson, etc., Co., 50 Fed. 538; Smith v. Pittsburgh Gas Co., 42 Fed. 145 [app dism 159 U. S. 265 mem, 15 SCt 1042 mem, 40 L. ed. 137 mem]; Wickwire v. Wire Fabric Co., 41 Fed. 36; Consolidated Bunging Apparatus Co. v. H. Clausen, etc., Brewing Co., 39 Fed. 277; Gloucester Isinglass, etc., Co. v. Le Page, 30 Fed. 370; Globe Nail Co. v. Superior Nail Co., 27 Fed. 450 [aff 136 U. S. 636 mem, 10 SCt 1068 mem, 34 L. ed. 552 mem]; Celluloid Mfg. Co. v. Comstock, 23 Fed. 38; Boneless Fish Co. v. Roberts, 12 Fed. 627; Doubleday v. Bracheo, 7 F. Cas. No. 4,018; Merrill v. Yeomans, 17 F. Cas. No. 9,472, 1 Bann. & A. 47, Holmes 331 [aff 94 U. S. 568, 24 L. ed. 235]; J. D. Insulating, etc., Co. v. Anderson, Ltd., 41 R. P. C. 1; Actiengesellschaft für Anilin Fabrikation v. Levinstein, Ltd., 38 R. P. C. 277.

62. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 SCt 698, 46 L. ed. 968 [rev 96 Fed. 850, 37 CCA 593]; Burdon Wire, etc., Co. v. Williams, 128 Fed. 927; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., 125 Fed. 926, 60 CCA 636; U. S. Mitis Co. v. Carnegie Steel Co., 89 Fed. 343 [rev on other grounds 90 Fed. 829, 33 CCA 387]; New York Filter Mfg. Co. v. Elmira Waterworks Co., 82 Fed. 459, 83 Fed. 1013 [app dism 96 Fed. 1005 mem, 37 CCA 664 mem]; New York Filter Mfg. Co. v. Niagara Falls Waterworks Co., 80 Fed. 924, 26 CCA 252 [aff 77 Fed. 900]; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 795; Celluloid Mfg. Co. v. American Zylonite

the invention is taken, and the process is not essentially varied, infringement is not avoided by additions,[63] the division of a step into two operations,[64] or by a reversal or transposition of the steps of the process,[65] unless, in the last instance, it is necessary to follow the order described to obtain the particular result or product sought.[66] Also, if the patented process is substantially taken, infringement is not avoided by a mere variance from the best manner of practicing it,[67] or by a failure to utilize the patented method in its most advantageous form;[68] and where a patented process is neither dependent upon, nor limited to, any specific apparatus or machinery for carrying it into effect, it is infringed by the use of different apparatus for practicing the same process.[69]

Comparison with claim.[70] There is no infringement where, although both complainant and defendant are employing substantially the same process, neither is employing the process described and limited in the claims of the patent.[71]

Identity of product or result is not the test of infringement of a patent for a process,[72] or, at least, identity or similarity of product or result does not alone constitute infringement,[73] but it may indicate or tend to show identity of process,[74] and, likewise, lack of identity in the products is evidence of lack of identity in the processes.[75]

[§ 514] **cc. Product or Composition of Matter.** A claim to an article, substance, or product composed of a particular ingredient or ingredients is infringed by, and only by, an article, substance, or product having the same characteristics[76] and composed of the same or equivalent ingredients.[77]

Co., 31 Fed. 904; Cary v. Wolff, 24 Fed. 139, 23 Blatchf. 92; Gottfried v. Bartholomae, 10 F. Cas. No. 5,632, 3 Bann. & A. 308, 8 Biss. 219; Gottfried v. Phillip Best Brewing Co., 10 F. Cas. No 5,633, 5 Bann. & A. 4; Jones v. Merrill, 13 F. Cas. No. 7,481; Roberts v. Roter, 20 F. Cas. No. 11,912, 5 Fish. Pat. Cas. 295; United Nickel Co. v. Keith, 24 F. Cas. No. 14,408, 1 Bann. & A. 44, Holmes 328; Whitney v. Mowry, 29 F. Cas. No. 17,592, 2 Bond 45, 3 Fish. Pat. Cas. 157. See Schmertz Wire Glass Co. v. Western Glass Co., 178 Fed. 973 [aff 195 Fed 760, 115 CCA 459 (certiorari den 239 U. S. 648 mem, 36 SCt 222 mem, 60 L. ed. 485 mem)] (when an entirely new process is invented and patented, revolutionizing the art, a different apparatus and a variant use of elements may amount to infringement; but a patent for an improved process stands on different grounds, and in order to constitute infringement it must appear that all the steps of the process are substantially used).

[a] **Rule applied.**—Infringement of a patent for an improved process of filling tree cavities with concrete, constructed in sections, cannot be avoided by using a one piece filling, if slots or recesses therein are so extensive as to cause transverse breaks dividing the filling into sections when subjected to strain. Davey Tree Expert Co. v. McCarthy, 283 Fed. 135.

63. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; General Electric Co. v. De Forest Radio Co., 28 F. (2d) 641 [mod 17 F. (2d) 90, and certiorari den 49 SCt 180 mem]; Perkins Glue Co. v. Standard Furniture Co., 279 Fed. 458; Miami Copper Co. v. Minerals Separation, Ltd., 244 Fed. 752, 157 CCA 200 [mod 237 Fed. 609]; Ford Morocco Co. v. Tannage Patent Co., 84 Fed. 644, 28 CCA 503; Clerk v. Tannage Patent Co., 84 Fed. 643, 28 CCA 501; Lalance, etc., Mfg. Co. v. Habermann Mfg. Co., 53 Fed. 375 [aff 55 Fed. 292, 5 CCA 111]; Maryland Hominy, etc., Co. v. Dorr, 46 Fed. 773.

[a] **Rule applies** even though the addition or improvement is patented or patentable. Perkins Glue Co. v. Standard Furniture Co., 279 Fed. 458.

64. Blumenthal v. Salt's Textile Mfg Co., 21 F. (2d) 470.

65. Craft-Stone, Inc. v. Zenitherm Co., Inc., 22 F. (2d) 401; Los Angeles Lime Co. v. Nye, 270 Fed. 155; Chadeloid Chemical Co. v. F. W. Thurston Co., 220 Fed. 685; Malignani v. Hill-Wright Electric Co., 177 Fed. 430; General Electric Co. v. Hill-Wright Electric Co., 174 Fed. 996, 98 CCA 566 [rev 170 Fed. 189]; Malignani v. Germania Electric Lamp Co., 169 Fed. 299; Burdon Wire, etc., Co. v. Williams, 128 Fed. 927; Hammerschlag Mfg. Co. v. Bancroft, 32 Fed. 585.

"The transposition of some of the steps in a patented process, which does not change the principle, mode of operation, or result, does not avoid infringement." Craft-Stone, Inc. v. Zenitherm Co., Inc., 22 F. (2d) 401, 403.

66. Chadeloid Chemical Co. v. F. W. Thurston Co., 220 Fed. 685.

67. Elyria Iron, etc., Co. v. Mohegan Tube Co., 7 F. (2d) 827; Delaware Metal Refinery v. Woodfall, 55 Fed. 988.

68. Del Turco v. Traitel Marble Co., 25 F. (2d) 308 (dictum).

69. Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Nestle Patent Holding Co. v. E. Fredericks, Inc., 261 Fed. 780 [aff 258 Fed. 627]; Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. 301 [reh den 64 Fed. 125]; Celluloid Mfg. Co. v. American Zylonite Co., 31 Fed. 904; American Bell Tel. Co. v. Dolbear, 15 Fed. 448 [aff 126 U. S. 1, 8 SCt 778, 31 L. ed. 863]; Bridge v. Brown, 4 F. Cas. No. 1,857, Holmes 53; Tilghman v. Mitchell, 23 F. Cas. No. 14,043, 2 Fish. Pat. Cas. 518.

[a] **Improvement upon apparatus** by defendant does not avoid infringement of the patent for process. Petroleum Rectifying Co. v. Reward Oil Co., 260 Fed. 177, 171 CCA 213 [rev 260 Fed. 183, and certiorari den 251 U. S. 554 mem, 40 SCt 119 mem, 64 L. ed. 411 mem].

[b] **Use of patented machine** to perform a process previously patented by another is infringement of the patent for the process. Expanded Metal Co. v. Bradford, 136 Fed. 870 [rev on other grounds 146 Fed. 984, 77 CCA 230 (aff 214 U. S. 366, 29 SCt 652, 53 L. ed. 1034)]; Collette v. Lasnier, 13 Can. S. C. 563; Merrill v. Cousins, 26 U. C. Q. B. (Ont.) 49.

70. Comparison with claim generally see supra § 499.

71. Ward v. Finley Method Co., 259 Fed. 869.

72. General Chemical Co. v. Aluminum Co., 11 F. (2d) 810 [aff 11 F. (2d) 813]; Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728, 32 SCt 526, 56 L. ed. 633].

73. Béné v. Jeantet, 129 U. S. 683, 9 SCt 428, 32 L. ed. 803; Plummer v. Sargent, 120 U. S. 442, 7 SCt 640, 30 L. ed. 737; Schwartz v. Housman, 88 Fed. 519; Taber Bas-Relief Photograph Co. v. Marceau, 87 Fed 871; New Process Fermentation Co. v. Maus, 20 Fed. 725 [rev on other grounds 122 U. S 413, 7 SCt 1304, 30 L. ed. 1193]; Andrews v. Long, 12 Fed. 871, 2 McCrary 577; Merrill v. Yeomans, 17 F. Cas. No. 9,472, 1 Bann. & A. 47, Holmes 331 [aff 94 U. S. 568, 24 L. ed. 235]; Palmer v. Wagstaff, 9 Exch. 494, 156 Reprint 211, 20 ERC 691.

74. Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 205 Fed. 745 [mod on other grounds 210 Fed. 164, 127 CCA 22]; Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 131 Fed. 483 [aff 138 Fed. 54, 70 CCA 480 (certiorari den 199 U. S. 608 mem, 26 SCt 750 mem, 50 L. ed. 331 mem)]; Pickhardt v. Packard, 22 Fed. 530, 23 Blatchf. 23; Collender v. Came, 6 F. Cas. No. 2,999, 2 Bann. & A. 412, 4 Cliff. 393.

75. Standard Asphalt, etc., Co. v. American Asphaltum, etc., Co., 203 Fed. 508.

76. Crozier-Straub, Inc. v. Graham, 28 F. (2d) 321 [rev 22 F. (2d) 310, and certiorari den 49 SCt 253 mem]; and cases infra note 77.

77. Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Gordon v. Turco-Halvah Co., 233 Fed. 430 [aff 247 Fed. 487, 159 CCA 541]; Dickerson v. Maurer, 108 Fed. 233 [aff 113 Fed. 870, 51 CCA 494]; Propfe v. Coddington, 108 Fed. 86, 47 CCA 218 [aff 105 Fed. 951]; Badische Anilin, etc., Fabrik v. Kalle, 104 Fed. 802, 44 CCA 201; Stelwagon Co. v. Childs, 101 Fed. 989, 42 CCA 127; King v. Anderson, 90 Fed. 500; Wickelman v. A. B. Dick Co., 88 Fed. 264, 31 CCA 530 [aff 80 Fed. 519]; American Graphophone Co. v. Leeds, 87 Fed. 873; Welsbach Light Co. v. Sunlight Incandescent Gas Lamp Co., 87 Fed. 221 [app dism 102 Fed. 1007 mem, 41 CCA 683 mem]; Holliday v. Schulze-Berge, 78 Fed. 493; Pasteur Chamberland Filter Co. v. Funk, 52 Fed. 146; Tibbe, etc., Mfg. Co. v. Lamparter, 51 Fed. 763; Otley v. Watkins, 36 Fed. 323; Vulcanite Co. v. American Co., 34 Fed. 320; Roosevelt v. Law Tel. Co., 33 Fed. 505; Hobbie v. Smith, 27 Fed. 656; Kimball v. Hess, 15 Fed. 393; Atlantic Giant-Powder Co. v. Goodyear, 2 F. Cas. No. 623, 3 Bann. & A. 161; Atlantic Giant-Powder Co. v. Parker, 2 F. Cas. No. 625, 4 Bann. & A. 292, 16 Blatchf. 281; Atlantic Giant-Powder Co. v. Rand, 2 F. Cas. No. 626, 4 Bann. & A. 263, 16 Blatchf. 250; Bryan v. Stevens, 4 F. Cas. No. 2,066a; Byam v. Eddy, 4 F. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666; Collender v. Came, 6 F. Cas. No. 2,999, 2 Bann. & A. 412, 4 Cliff. 393; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Goodyear Dental Vulcanite Co. v. Gardiner, 10 F. Cas. No. 5,591, 3 Cliff. 408, 4 Fish. Pat. Cas. 224; Goodyear Dental Vulcanite Co. v. Preterre, 10 F. Cas. No. 5,596, 3 Bann. & A. 471, 15 Blatchf. 274; Hoffman v. Aronson, 12 F. Cas. No. 6,576, 8 Blatchf. 324, 4 Fish. Pat. Cas. 456; Matthews v. Skates, 16 F. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Poppenhusen v. Falke, 19 F. Cas. No. 11,280, 5 Blatchf. 46, 2 Fish. Pat. Cas. 213; Ready Roofing Co. v. Taylor, 20 F. Cas. No. 11,613, 3 Bann. & A. 368, 15 Blatchf. 94; Roots v. Hyndman, 20 F. Cas. No. 12,040, 6 Fish. Pat. Cas. 439 [aff 97 U. S. 224, 24 L. ed. 975]; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,133, 2 Bann. & A. 351; Tarr v. Fol-

Tests and standard of comparison. To determine infringement, comparison of defendant's product must be made with the claim language of the patent in suit,[78] and not with plaintiff's commercial product.[79] In some cases chemical or laboratory tests are necessary to determine infringement of the claims of a patent for a composition of matter,[80] and infringement cannot be avoided because of the necessity of such tests.[81] Any method of test which will fairly determine the question may be employed.[82]

Addition of other ingredients to those claimed does not avoid infringement if the essential character of the compound remains the same;[83] but an addition changing the character of the compound is no infringement.[84]

Different process. An article, compound, or product which is the same, or substantially the same, as that covered by the patent infringes, even though it is made by a different process;[85] the processes are immaterial,[86] except as they show either identity or difference in the characteristics of the two products.[87] This is true where the patent covers the product only, and not the process,[88] or where the chief claim is for the product and the method of producing it is secondary;[89] but a patent for a product produced by a particular process is not infringed by a product produced by a substantially different process.[90]

[§ 515] **dd. Design.** It is essential to infringement of a design patent that there be an appropriation of the novel elements of the patented design;[91] but servile imitation is not required.[92] Aside from a case of exact copying, a design infringes a design patent when, and only when, it so nearly resembles the patented design in appearance that an ordinary observer, giving such attention to the matter as is usually or ordinarily given by a would-be purchaser of an article embodying or containing the design, would be deceived or led to mistake one for the other,[93] and induced to purchase in the belief or sup-

som, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312; Taylor v. Archer, 23 F. Cas. No. 13,778, 8 Blatchf. 315, 4 Fish. Pat. Cas. 449; United Nickel Co. v. Keith, 24 F. Cas. No. 14,408, 1 Bann. & A. 44, Holmes 328; United Nickel Co. v. Manhattan Brass Co., 24 F. Cas. No. 14,410, 4 Bann. & A. 173, 16 Blatchf. 68; Woodward v. Morrison, 30 F. Cas. No. 18,008, 5 Fish. Pat. Cas. 357, Holmes 124.

[a] **Statement in specifications as to use.**—There is no infringement if an ingredient claimed is omitted, although in the specifications the use of such ingredient is stated to be for a particular case only. Otley v. Watkins, 36 Fed. 323.

[b] **Equivalent ingredients** (1) are those known in the art as possessing the desired properties. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; United Nickel Co. v. Pendleton, 15 Fed. 739, 21 Blatchf. 226; Babcock v. Judd, 1 Fed. 408; Atlantic Giant-Powder Co. v. Mowbray, 2 F. Cas. No. 624, 2 Bann. & A. 442; Matthews v. Skates, 16 F. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Woodward v. Morrison, 30 F. Cas. No. 18,008, 5 Fish. Pat. Cas. 357, Holmes 124. (2) An ingredient may be equivalent, although subsequently discovered, if it performs no new function in the compound. Read Holliday v. Schulze-Berge, 78 Fed. 493. (3) Particular ingredients held not equivalent. Hurlbut v. Schillinger, 130 U. S. 456, 9 SCt 584, 32 L. ed. 1011; New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co., 103 Fed. 316 [aff 112 Fed. 1022 mem, 50 CCA 669 mem]; S. Rauh v. Guinzburg, 101 Fed. 1007, 42 CCA 139; New Jersey Wire-Cloth Co. v. Merritt, 101 Fed. 460, 41 CCA 460; Tower v. Eagle Pencil Co., 94 Fed. 361, 36 CCA 294; Matheson v. Campbell, 78 Fed. 910, 24 CCA 384; Johns Mfg. Co. v. Robertson, 77 Fed. 985, 23 CCA 601; Seabury v. Johnson, 76 Fed. 456; Atlantic Dynamite Co. v. Climax Powder Mfg. Co., 72 Fed. 925; Blumenthal v. Burrell, 53 Fed. 105, 3 CCA 462 [aff 43 Fed. 667]; Edison Electric Light Co. v. U. S. Electric Lighting Co., 47 Fed. 454 [aff 52 Fed. 300, 3 CCA 83]; Hood v. Boston Car Spring Co., 37 Fed. 792; Western, etc., Mfg. Co. v. Rosenstock, 30 Fed. 67; Union Tubing Co. v. Patterson, 23 Fed. 79 [app dism 131 U. S. 448 mem, 9 SCt 804 mem, 33 L. ed. 216 mem]; Tucker v. Sargent, 9 Fed. 299, 19 Blatchf. 538 [aff 120 U. S. 442, 7 SCt 640, 30 L. ed. 737]; Ashcroft v. Hollings, 2 F. Cas. No. 579; Baldwin v. Schultz, 2 F. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75; Clarke v. Johnson, 5 F. Cas. No. 2,855, 4 Bann. & A. 403, 16 Blatchf. 495; Goodyear Dental Vulcanite Co. v. Flagg, 10 F. Cas. No. 5,590; Tarr v. Folsom, 23 F. Cas. No. 13,756, 1 Bann. & A. 24, Holmes 312; Union Paper Collar Co. v. White, 24 F. Cas. No. 14,396, 2 Bann. & A. 60, 11 Phila. (Pa.) 479; West v. Silver Wire, etc., Mfg. Co., 29 F. Cas. No. 17,425, 5 Blatchf. 477, 3 Fish. Pat. Cas. 306; Wonson v. Gilman, 30 F. Cas. No. 17,933, 2 Bann. & A. 590.

78. Health Products Corp. v. Ex-Lax Mfg. Co., 24 F. (2d) 245; American Adamite Co. v. Mesta Mach. Co., 17 F. (2d) 945 [aff 18 F. (2d) 538].

79. Health Products Corp. v. Ex-Lax Mfg. Co., 24 F. (2d) 245.

Comparison with claim or commercial embodiment of invention generally see supra § 499.

80. Schoellkopf v. Chicago, 216 Ill. A. 52 [aff 294 Ill. 110, 128 NE 337].

81. Schoellkopf v. Chicago, supra.

82. Schoellkopf v. Chicago, supra.

83. Crozier-Straub v. Graham, 28 F. (2d) 321 [rev 22 F. (2d) 310, and certiorari den 49 SCt 253 mem]; Haynes Stellite Co. v. Chesterfield Co., 25 F. (2d) 719 [den reh 22 F. (2d) 635]; Theroz Co. v. U. S. Industrial Chemical Co., 14 F. (2d) 629; Eastman v. Hinckel, 8 F. Cas. No. 4,256, 5 Bann. & A. 1; Thompson v. Jewett, 23 F. Cas. No. 13,961; United Nickel Co. v. Manhattan Brass Co., 24 F. Cas. No. 14,410, 4 Bann. & A. 173, 16 Blatchf. 68; Wonson v. Peterson, 30 F. Cas. No. 17,934, 3 Bann. & A. 249.

84. Dougherty v. Doyle, 63 Fed. 475, 11 CCA 298 [aff 59 Fed. 470].

85. Maurer v. Dickerson, 113 Fed. 870, 51 CCA 494; Badische Anilin, etc., Fabrik v. Cummins, 2 F. Cas. No. 720, 4 Bann. & A. 489; Badische Anilin, etc., Fabrik v. Hamilton Mfg. Co., 2 F. Cas. No. 721, 3 Bann. & A. 235; Badische Anilin, etc., Fabrik v. Higgin, 2 F. Cas. No. 722, 3 Bann. & A. 462, 15 Blatchf. 290.

86. Proctor, etc., Co. v. Berlin Mills Co., 256 Fed. 23, 167 CCA 295 [certiorari den 249 U. S. 598 mem, 39 SCt 390 mem, 63 L. ed. 795 mem, and rev on other grounds 254 U. S. 156, 41 SCt 75, 65 L. ed. 196]; J. E. Baker Co. v. Kennedy Refractories Co., 253 Fed. 739, 165 CCA 333.

87. J. E. Baker Co. v. Kennedy Refractories Co., 253 Fed. 739, 165 CCA 333 [aff 244 Fed. 812].

88. Accumulator Co. v. Edison Electric Illum. Co., 63 Fed. 979; Badische Anilin, etc., Fabrik v. Hamilton Mfg. Co., 2 F. Cas. No. 721, 3 Bann. & A. 235.

89. Malina v. Grisman, 20 F. (2d) 406 [aff 20 F. (2d) 409].

90. Plummer v. Sargent, 120 U. S. 442, 7 SCt 640, 30 L. ed. 737; Cochrane v. Badische Anilin, etc., Fabrik, 111 U. S. 293, 4 SCt 455, 28 L. ed. 433; Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149; American Graphophone Co. v. Gimbel, 234 Fed. 361 [aff 240 Fed. 971, 974, 153 CCA 657, 660]; Downes v. Teter-Heany Dev. Co., 150 Fed. 122, 80 CCA 76 [certiorari den 205 U. S. 543, 27 SCt 790, 51 L. ed. 922]; Société Fabriques v. Lueders, 142 Fed. 753, 74 CCA 15 [aff 135 Fed. 102]; Expanded Metal Co. v. St. Louis Bd. of Education, 103 Fed. 287; Carl L. Jensen Co. v. Clay, 59 Fed. 290; Van Camp v. Maryland Pavement Co., 34 Fed. 740; Schalscha v. Sutro, 19 Fed. 319; Dittmar v. Rix, 1 Fed. 342; Merrill v. Yeomans, 17 F. Cas. No. 9,472, 1 Bann. & A. 47, Holmes 331 [aff 94 U. S. 568, 24 L. ed. 235].

Infringement of patent for process generally see supra § 513.

91. Whiting Mfg. Co. v. Alvin Silver Co., Inc., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Kruttschnitt v. Simmons, 118 Fed. 851 [aff 122 Fed. 1020, 58 CCA 111].

92. American Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365.

93. Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606; Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731; Herzog v. Lesser, 29 F. (2d) 996; Eloesser-Heynemann Co. v. Bayly-Underhill Mfg. Co., 29 F. (2d) 305; Try-Me Beverage, etc., Co. v. Metropole, 25 F. (2d) 138; American Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365; Eloesser-Heynemann Co. v. Kuh, 297 Fed. 831; Whiting Mfg. Co. v. Alvin Silver Co., Inc., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem]; Borgfeldt v. Weiss, 265 Fed. 268; Bayley & Sons, Inc. v. Krich, 264 Fed. 978; Zidell v. Dexter, 262 Fed. 145 [aff 259 Fed. 582]; Inflexible Co. v. Megibow, 251 Fed. 924; Grelle v. Eugene, 221 Fed. 68, 137 CCA 18 [certiorari den 239 U. S. 647 mem, 36 SCt 219 mem, 60 L. ed. 484 mem]; Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem]; Bush, etc., Piano Co. v. Becker, 209 Fed. 233 [rev on other grounds 222 Fed. 902, 138 CCA 382]; Macbeth-Evans Glass Co. v. Rosenbaum Co., 199 Fed. 154; Phœnix Knitting Works v. Rich, 194 Fed. 708 [app dism 202 Fed. 1022, 120 CCA 663]; Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. 210 [aff 145 Fed. 928, 76 CCA 466]; Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co., 114 Fed. 362; Pelouze Scale, etc., Co. v. American Cutlery Co., 102 Fed. 916, 43 CCA 52; Myers v. Sternheim, 97 Fed. 625, 38 CCA 345; Byram v. Friedberger, 87 Fed. 559 [aff 100 Fed. 963, 41 CCA 121]; Whittall v. Lowell Mfg. Co., 79 Fed. 787 [aff 84 Fed. 1019 mem, 28 CCA 653 mem]; Britton v. White Mfg. Co., 61 Fed. 93; Henderson v. Tompkins, 60

position that one is the other.[94] Difference in structure or appearance which will enable experts to distinguish between the patented design and a design alleged to infringe will not prevent infringement;[95] and where two designs are substantially similar, the fact that different names or trade-marks are or may be used in connection with them will not sufficiently distinguish them;[96] but confusion which is due to lack of attention by purchasers or other causes than similarity of the designs will not show infringement.[97]

[§ 516] **2. Contributory Infringement—a. In General.** Contributory infringement is the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention;[98] and a contributory infringer is a person who induces, aids, or contributes to wrongful acts of another which constitute infringement of a patent.[99] The essence of contributory infringement lies in concerting with others in an unlawful invasion of the patentee's rights;[1] an intent to aid is necessary;[2] and before one may be held for contributory infringement, it must appear that he has knowingly done some act without which the infringement would

Fed. 758; Macbeth v. Gillinder, 54 Fed. 171; Ripley v. Elson Glass Co., 49 Fed. 927; Dreyfus v. Schneider, 25 Fed. 481; Dryfoos v. Friedman, 18 Fed. 824, 21 Blatchf. 563; Jennings v. Kibbe, 10 Fed. 669, 20 Blatchf. 353; Wood v. Dolby, 7 Fed. 475, 19 Blatchf. 214; McCrea v. Holdsworth, L. R. 6 Ch. 418.

"The differences in designs, which under the patent law will avoid infringement, are differences which will attract the attention of the ordinary observer, giving such attention as the purchaser usually gives in buying articles of the kind in question and for the purposes for which they are intended." Zidell v. Dexter, 262 Fed. 145, 147.

"The test of infringement is not whether dissimilarities between two designs may or not be found. The courts hold, on the question of infringement, that if, in the eye of an ordinary observer, two designs are substantially similar, and if the resemblance is such as to deceive an observer, the first design patented may be held to be infringed by the other. And it is the duty of the court to inquire whether or not defendant's design so nearly resembles plaintiff's design as to lead ordinary purchasers to mistake one for the other." Try-Me Beverage, etc., Co. v. Metropole, 25 F. (2d) 138, 140.

"If in the eyes of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, the one first patented is infringed by the other." Whiting Mfg. Co. v. Alvin Silver Co., Inc., 283 Fed. 75, 81 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem].

[a] **Leading cases.**—(1) Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. ed. 731 is a leading case on the subject. Macbeth-Evans Glass Co. v. Rosenbaum Co., 199 Fed. 154. (2) Smith v. Whitman Saddle Co., 148 U. S. 674, 13 SCt 768, 37 L. ed. 606 is also a leading case. Zidell v. Dexter, 262 Fed. 145 [aff 259 Fed. 582].

[b] **Every, or ordinary, purchaser.**—It is not necessary to constitute infringement of a design patent that the similarity be so precise that every purchaser would be misled, but it is sufficient if the ordinary purchaser would be. Knapp v. Will, etc., Co., 253 Fed. 191 [rev on other grounds 273 Fed. 380].

[c] **Patent covering slight modification.**—"When a design invention consists in nothing more than the bringing together of elements old in the art with slight modification of shape in adapting them or adjusting them to each other . . . any subsequent use of the same basic elements with a variation of form of adaptation departing, to the discernment of an ordinary observer, from the slight change employed in the patent, is not an infringement." Phœnix Knitting Works v. Rich, 194 Fed. 708, 712 [app dism 202 Fed. 1022, 120 CCA 663].

[d] **Changes in, or additions to, exact copy.**—(1) Changes in a design after desisting from producing an exact copy of the patented design, and while the trade demand for the latter was at its height, invite close scrutiny of a claim of noninfringement. American Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365, 367. (2) The addition to an otherwise exact copy of a patented design of a small detail, which changes its appearance so little that it still not only resembles, but would be taken for, the design of the patent, does not avoid infringement. Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp., 275 Fed. 362. (3) "But if defendants' changes result in producing a substantially different effect upon the eye, so that the two patterns are reasonably distinguishable, infringement will be avoided." American Fabrics Co. v. Richmond Lace Works, supra.

[e] **Particular patents for designs held infringed.**—Rousso v. Elco Towel Cabinet Co., Inc., 23 F. (2d) 300; Wilson v. Haber, 275 Fed. 346; Dominick v. R. Wallace, etc., Mfg. Co., 209 Fed. 223, 126 CCA 317; Matthews, etc., Mfg. Co. v. American Lamp, etc., Co., 103 Fed. 634; American Electrical Novelty, etc., Co. v. Acme Electric Lamp Co., 98 Fed. 895; Whittall v. Lowell Mfg. Co., 79 Fed. 787 [aff 84 Fed. 1019 mem, 28 CCA 653 mem]; Braddock Glass Co. v. Macbeth, 64 Fed. 118, 12 CCA 70; Stewart v. Smith, 58 Fed. 580, 7 CCA 380 [aff 55 Fed. 481]; Macbeth v. Gillinder, 54 Fed. 171; Ripley v. Elson Glass Co., 49 Fed. 927; Perry v. Starrett, 19 F. Cas. No. 11,012, 3 Bann. & A. 485.

[f] **Particular patents for designs held not infringed.**—Whiting Mfg. Co. v. Alvin Silver Co., Inc., 283 Fed. 75 [certiorari den 260 U. S. 731 mem, 43 SCt 93 mem, 67 L. ed. 486 mem] (patented design including not only ornamentation, but also contour or configuration); Standard Computing Scale Co. v. Detroit Automatic Scale Co., 265 Fed. 281; Bolte, etc., Co. v. Knight Light Co., 180 Fed. 412, 103 CCA 558; Buerkle v. Standard Heater Co., 105 Fed. 779; Pelouze Scale, etc., Co. v. American Cutlery Co., 102 Fed. 916, 43 CCA 52; Byram v. Friedberger, 100 Fed. 963, 41 CCA 121 [aff 87 Fed. 559]; Magic Light Co. v. Economy Gas-Lamp Co., 97 Fed. 87, 38 CCA 56; Mesinger Bicycle Saddle Co. v. Humber, 94 Fed. 672, 674; Soehner v. Favorite Stove, etc., Co., 84 Fed. 182, 28 CCA 317; Frank v. Hess, 84 Fed. 170; Sutro Bros. Braid Co. v. Schloss, 44 Fed. 356; Dukes v. Bauerle, 41 Fed. 784; Crocker v. Cutter Tower Co., 29 Fed. 456 [aff 140 U. S. 678, 11 SCt 1019, 35 L. ed. 600]; Jennings v. Kibbe, 24 Fed. 697.

94. Gorham Mfg. Co. v. White, 14 Wall. 511, 20 L. ed. 731 [rev 10 F. Cas. No. 5,627, 7 Blatchf. 513]; King Ventilating Co. v. St. James Ventilating Co., 17 F. (2d) 615 [aff 26 F. (2d) 357]; Protex Signal Co. v. Feniger, 11 F. (2d) 43; Crane, etc., Mfg. Co. v. Elgin Silver Plate Co., 268 Fed. 543; Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Macbeth-Evans Glass Co. v. Rosenbaum Co., 199 Fed. 154; Graff v. Webster, 189 Fed. 902 [aff 195 Fed. 522, 115 CCA 432]; Byram v. Friedberger, 87 Fed. 559 [aff 100 Fed. 963, 41 CCA 121]; Monroe v. Anderson, 58 Fed. 398, 7 CCA 272; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 53 Fed. 810, 4 CCA 21 [rev 48 Fed. 556]; Tomkinson v. Willets Mfg. Co., 23 Fed. 895; Miller v. Smith, 5 Fed. 359.

95. Gorham Mfg. Co. v. White, 14 Wall. 511, 20 L. ed. 731 [rev 10 F. Cas. No. 5,627, 7 Blatchf. 513, 2 Whitm. Pat. Cas. 392]; American Fabrics Co. v. Richmond Lace Works, 24 F. (2d) 365; Borgfeldt v. Weiss, 265 Fed. 268; Bayley & Sons, Inc. v. Krich, 264 Fed. 978; Macbeth-Evans Glass Co. v. Rosenbaum, 199 Fed. 154; Hutter v. Broome, 114 Fed. 655; Redway v. Ohio Stove Co., 38 Fed. 582; Tomkinson v. Willets Mfg. Co., 23 Fed. 895; Miller v. Smith, 5 Fed. 359; Perry v. Starrett, 19 F. Cas. No. 11,012, 3 Bann. & A. 485.

96. Perry v. Starrett, supra.

97. Coca-Cola Co. v. Whistle Co., 20 F. (2d) 955; Kruttschnitt v. Simmons, 122 Fed. 1020, 58 CCA 111 [aff 118 Fed. 851]; Monroe v. Anderson, 58 Fed. 398, 7 CCA 272.

98. New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; Howson Contrib. Infringe. Pat. p 1 [quot Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 72 Fed. 1016, 1017 (mod on other grounds 75 Fed. 1005, 22 CCA 1, and quot Henry v. A. B. Dick Co., 224 U. S. 1, 33, 32 SCt 364, 56 L. ed. 645)]; Hatch v. Hall, 30 Fed. 613; American Cotton-Tie Supply Co. v. McCready, 1 F. Cas. No. 295, 4 Bann. & A. 588, 17 Blatchf. 291.

[a] **Other definitions.**—(1) "Intentionally giving aid to, or intentionally co-operating in, an infringement." Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564, 571 [quot Belknap v. Wallace Addressing Mach. Co., Inc., 10 F. (2d) 602, 604 (aff 12 F. (2d) 597 [certiorari den 271 U. S. 678 mem, 46 SCt 630 mem, 70 L. ed. 1147 mem])]. (2) "Intentional aid or cooperation in transactions which collectively constitute complete infringement." Morgan Gardner Electric Co. v. Buettner, etc., Mach. Co., 203 Fed. 490, 492, 121 CCA 612; A. B. Dick Co. v. Henry, 149 Fed. 424, 428.

99. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem].

1. Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692.

[a] **"Contributory infringement exists** where one knowingly concerts or acts with another in an unlawful invasion of a patentee's rights." General Electric Co. v. Sutter, 186 Fed. 637, 638.

2. Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; Snyder v. Bunnell, 29 Fed. 47; Saxe v. Hammond, 21 F. Cas. No. 12,411, 1 Bann. & A. 629, Holmes 456.

[a] **Intent held not shown by decoy transactions.**—Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564.

not have occurred.[3] There can be no contributory infringement without an infringement to contribute to,[4] or, in other words, without actual,[5] direct,[6] and complete[7] infringement, existing or threatened,[8] in the territory covered by the patent.[9] One distinct act of direct infringement is not contributory to another distinct act of direct infringement.[10] While the making or selling of a part of a patented invention with the intent and purpose of aiding another in the unlawful making, selling, or using of the invention[11] is the mode in which contributory infringement usually takes place,[12] yet an act constituting contributory infringement may have no relation to furnishing an infringer with any article or material;[13] it may consist in actively assisting an infringer in the sale of an infringing device,[14] purchasing articles made by an infringing process where the articles are specially made for defendant on large and regular orders therefor,[15] inducing a person to use an infringing device,[16] or, inducing a licensee to violate the conditions of a license.[17] Furnishing plans of an infringing device and sharing in the profits is infringement,[18] but the mere letting of a contract, for the doing of certain work, to a firm using infringing apparatus is not.[19]

[§ 517] **b. Manufacture or Sale—(1) In General.** Contributory infringement may consist in assisting an infringer by active participation in the sale of an infringing device.[20] Also it may consist in selling a device, the natural use of which will make the purchaser an infringer;[21] but a charge of contributory infringement cannot be sustained because defendant's device, which, as made and sold, differs materially in form from that of the patent, may, as the result of wear and ordinary use, become identical.[22]

Licensor is a contributory infringer where, after granting a license to one person, he makes an agreement with another person whereby he purports to relieve the latter from liability to suit for the future acts of the latter in making and selling articles embodying the principle of the patent.[23]

Corporation and officers.[24] A corporation which controls another corporation which furnishes infringing apparatus may be guilty of contributory infringement.[25] An officer or stockholder of a corporation cannot be held liable as a contributory infringer merely because, after the infringement was completed and suit therefor was brought, he aided in disposing of the property of the infringing company.[26]

[§ 518] **(2) Parts of Patented Invention.** A person is guilty of contributory infringement when, without authority from the patentee, he manufactures, sells, or furnishes one or more parts or elements of a patented combination with the intent and for the purpose of bringing about the use thereof in such combination after another person, such as the purchaser or user, has supplied the other parts or elements, if any, and assembled all the parts into the complete combination;[27] and this is true not only

Applications of rule see infra §§ 517-519.

Burden of showing intent see infra § 579.

3. Individual Drinking Cup Co. v. Errett, 297 Fed. 733.

4. Popular Mechanics Co. v. Brown, 245 Fed. 859, 158 CCA 199.

5. Cincinnati Galvanizing Co. v. Marquette Tool, etc., Co., 26 F. (2d) 593.

6. Popular Mechanics Co. v. Brown, 245 Fed. 859, 158 CCA 199.

7. See case infra this note.

[a] **Where there is no possibility** of complete infringement, there is no contributory infringement. Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564.

8. Popular Mechanics Co. v. Brown, 245 Fed. 859, 158 CCA 199.

9. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem].

10. Christensen v. National Brake, etc., Co., 18 F. (2d) 981.

[a] **Manufacture and sale.**—"If there be infringement by manufacture, and if the manufacturer also sells, his act of manufacture is not, in a true sense, 'contributory' to his act of selling." Christensen v. National Brake, etc., Co., 18 F. (2d) 981.

[b] **Sale and use.**—"While a manufacturer who sells, or his vendee who resells, may be guilty of a distinct act of infringement, neither thereby contributes, in a legal sense, to any future infringing acts of use. . . . A seller of an infringing device completes his act of infringement by selling; his relationship with the device is then ended. And if the mere succession which is found in relationship or in the tradition of the device from the one as manufacturer or seller to the other as user (or reseller) does not make them joint infringers, it is difficult to see upon what theory the seller, by merely devolving upon the user a portion of the device, can in any sense be regarded as a contributor to, or participator in, an infringing use." Christensen v. National Brake, etc., Co., 18 F. (2d) 981.

11. See infra § 518.

12. Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 50 CCA 159, 55 LRA 692.

13. Individual Drinking Cup Co. v. Errett, 297 Fed. 733.

14. See infra § 517.

15. General Electric Co. v. De Forest Radio Co., 28 F. (2d) 641 [mod 17 F. (2d) 90, and certiorari den 49 SCt 180 mem] (the circumstances indicate that the purchases are not casual ones made by an innocent customer).

16. Individual Drinking Cup Co. v. Errett, 297 Fed. 733.

[a] **Rule applies,** even though the acts of defendant are due in part to conscientious advice by counsel, who is of opinion that the patent is invalid and not infringed. Individual Drinking Cup Co. v. Errett, 297 Fed. 733.

17. Cortelyou v. Johnson, 138 Fed. 110 [rev on other grounds 145 Fed. 933, 76 CCA 455 (aff 207 U. S. 196, 28 SCt 105, 52 L. ed. 167)].

Sale of article with intent to induce violation of license see infra § 519.

18. Trent v. Risdon Iron, etc., Works, 102 Fed. 635, 42 CCA 529 [mod 92 Fed. 375]; Toppan v. Tiffany Refrigerator Car Co., 39 Fed. 420.

19. Salvage Process Co. v. Shewan, 26 F. (2d) 258.

20. Individual Drinking Cup Co. v. Errett, 297 Fed. 733.

21. Davis v. Perry, 120 Fed. 941, 57 CCA 231 [rev 115 Fed. 333]; Loew Filter Co. v. German-American Filter Co., 107 Fed. 949, 47 CCA 94 [aff 103 Fed. 303]; John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290; Westinghouse Electric, etc., Co. v. Dayton Fan, etc., Co., 106 Fed. 724 [aff 118 Fed. 562, 55 CCA 390]; American Graphophone Co. v. Hawthorne, 92 Fed. 516; New York Filter Mfg. Co. v. Jackson, 91 Fed. 422; Boyd v. Cherry, 50 Fed. 279; Celluloid Mfg. Co. v. American Zylonite Co., 30 Fed. 437; Snyder v. Bunnell, 29 Fed. 47; Alabastine Co. v. Payne, 27 Fed. 559; American Diamond Rock Boring Co. v. Sullivan Mach. Co., 1 F. Cas. No. 298, 2 Bann. & A. 522, 14 Blatchf. 119; Bowker v. Dows, 3 F. Cas. No. 1,734, 3 Bann. & A. 518; Knight v. Gavit, 14 F. Cas. No. 7,884.

22. Elyria Nat. Rubber Heel Co. v. I. T. S. Rubber Co., 263 Fed. 979.

Identity resulting from usage as infringement generally see supra § 498.

23. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem].

24. Liability of corporation and officers for infringement generally see infra § 546.

25. General Electric Co. v. Allis-Chalmers Co., 190 Fed. 145 [apn dism 194 Fed. 413, 114 CCA 375, and aff 194 Fed. 414, 114 CCA 376].

26. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 166 Fed. 867 [aff 177 Fed. 1006, 100 CCA 670].

27. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331; Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939; Metropolitan Device Corp. v. Williamsburg Electric Supply Co., 19 F. (2d) 442; Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Westinghouse Electric, etc., Co. v. Precise Mfg. Corp., 11 F. (2d) 209 [aff 10 F. (2d) 517]; Belknap v. Wallace Addressing Mach. Co., 10 F. (2d) 602 [aff 12 F. (2d) 597 (certiorari den 271 U. S. 678 mem, 46 SCt 630 mem, 70 L. ed. 1147 mem)]; Dental Co. of America v. S. S. White Dental Mfg. Co., 266 Fed. 524; Wilson v. Union Tool Co., 265 Fed. 669 [certiorari granted 254 U. S. 624 mem, 41 SCt 14 mem, 65 L. ed. 444 mem, and aff 259 U. S. 107, 42 SCt 427, 66 L. ed. 848]; Solva Waterproof Glue Co. v. Perkins Glue Co., 251 Fed. 64 [mod 223 Fed. 792]; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Kreplik v. Couch Patents Co., 190 Fed. 565, 111 CCA 381; National Malleable Casting Co. v. American Steel Foundries, 182 Fed. 626; Leeds, etc., Co. v. Victor Talking Mach. Co., 154 Fed. 58, 83 CCA 170, 23 LRANS 1027 [aff 150 Fed. 147, and aff 213 U. S. 325, 29 SCt 503, 53 L. ed. 816]; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co., 147 Fed. 266; Bullock Electric, etc., Co. v. Westinghouse Elec-

where he, by directions or advice, points out the way in which direct infringement may be accomplished,[28] but even where he gives formal notice that the component parts are not to be used in an infringing way.[29] The rule is undoubtedly applicable where the part furnished is adapted to no other than an infringing use,[30] it being presumed in such case that it is intended for such use;[31] but it is not necessarily applicable where the part furnished is adapted to other and lawful uses, in addition to infringing uses,[32] especially where it is a common article of commerce,[33] and in such case contributory infringement exists when, and only when, there is an intent to furnish for infringing use.[34] The rule has no application to a perishable element, article, or product;[35] and of course it does not apply where a person does not furnish any element of the patented combination.[36] It is not contributory infringement to make and sell parts to lawful owners, licensees, or users of patented machines or devices for legitimate purposes of repair,[37] or to make and ship parts abroad,[38] and there is no infringement if the parts are never put into actual use in the patented combination.[39]

Selling ingredients of patented composition with the expectation and intent that they be used in making it is contributory infringement.[40]

[§ 519] **(3) Article Used with Patented Invention.** Ordinarily the sale of an article not covered by the claims of a patent but capable of use with the patented invention is not infringement or contributory infringement,[41] at least where the seller of the article is without notice that the invention was sold under restrictions,[42] and even, it is held, where the seller has knowledge that the article is to be used with the patented invention.[43] The rule is especially applicable where the thing alleged to be contributed is one of general use, suitable to a great variety of other methods of use,[44] and there is no agreement or definite purpose that the thing sold shall be employed with other things so as to infringe a patent right.[45] A sale, however, with intent to induce a licensee under the patent to violate the valid terms of his license agreement is contributory infringement.[46] Also it is contributory infringement to sell articles which can be used only

tric, etc., Co., 129 Fed. 105, 63 CCA 607 [certiorari den 194 U. S. 636 mem, 24 SCt 859 mem, 48 L. ed. 1160 mem]; Heekin v. Baker, 127 Fed. 828 [rev on other grounds 138 Fed. 63, 70 CCA 559]; Canda v. Michigan Malleable Iron Co., 124 Fed. 486, 61 CCA 194; Bishop, etc., Co. v. Levine, 119 Fed. 363; Westinghouse Electric, etc., Co. v. Dayton Fan, etc., Co., 106 Fed. 724 [aff 118 Fed. 562, 55 CCA 390]; American Graphophone Co. v. Leeds, 87 Fed. 873; Red Jacket Mfg. Co. v. Davis, 82 Fed. 432, 27 CCA 204; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 CCA 107 [aff 78 Fed. 139]; American Graphophone Co. v. Amet, 74 Fed. 789; St. Louis Car-Coupler Co. v. Shickle, etc., Iron Co., 70 Fed. 783 [aff 77 Fed. 739, 23 CCA 433 (certiorari den 166 U. S. 720 mem, 17 SCt 998 mem, 41 L. ed. 1186 mem)]; Lee v. Northwestern Stove Repair Co., 50 Fed. 202 [rev on other grounds 58 Fed. 182, 7 CCA 160]; Stearns v. Phillips, 43 Fed. 792; Travers v. Beyer, 26 Fed. 450, 23 Blatchf. 423; Schneider v. Pountney, 21 Fed. 399; Strobridge v. Lindsay, 6 Fed. 510; Holly v. Vergennes Mach. Co., 4 Fed. 74, 18 Blatchf. 327; Barnes v. Straus, 2 F. Cas. No. 1,022, 9 Blatchf. 553, 5 Fish. Pat. Cas. 531; Bowker v. Dows, 3 F. Cas. No. 1,734, 3 Bann. & A. 518; Renwick v. Pond, 20 F. Cas. No. 11,702, 10 Blatchf. 39, 5 Fish. Pat. Cas. 569; Richardson v. Noyes, 20 F. Cas. No. 11,792, 2 Bann. & A. 398; Wallace v. Holmes, 29 F. Cas. No. 17,100, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37; Alexander v. American Encaustic Tiling Co., 207 N. Y. 276, 100 NE 809; American Arch Co. v. Canuck Supply Co., [1924] 3 DomLR 567, 30 RevLeg 449.

"The sale of a component part of a complete combination with the intention that the purchaser will combine that part with other parts to make the complete combination is in and of itself an act of contributory infringement." Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939, 942.

"One who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination is guilty of contributory infringement, and is equally liable with him who organizes the complete combination." Solva Waterproof Glue Co. v. Perkins Glue Co., 251 Fed. 64, 73.

28. Westinghouse Electric, etc., Co. v. Precise Mfg. Corp., 11 F. (2d) 209 [aff 10 F. (2d) 517].

29. Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939.

30. Egry Register Co. v. Standard Register Co., 23 F. (2d) 438; Barrett v. Sheaffer, 251 Fed. 74, 163 CCA 324; General Electric Co. v. Sutter, 186 Fed. 637; Canda v. Michigan Malleable Iron Co., 147 Fed. 486, 61 CCA 194.

31. See infra § 579.

32. Standard Computing Scale Co. v. Computing Scale Co., 126 Fed. 639, 61 CCA 541; Lane v. Park, 49 Fed. 454; Robbins v. Aurora Watch Co., 43 Fed. 521; Winne v. Bedell, 40 Fed. 463; Snyder v. Bunnell, 29 Fed. 47; Keystone Bridge Co. v. Phœnix Iron Co., 14 F. Cas. No. 7,751, 5 Fish. Pat. Cas. 468, 9 Phila. (Pa.) 374 [aff 95 U. S. 274, 24 L. ed. 344].

33. Rumford Chemical Works v. Hygienic Chemical Co., 148 Fed. 862 [aff 154 Fed. 65, 83 CCA 177 (certiorari den 207 U. S. 592, 28 SCt 257, 52 L. ed. 355), and aff 215 U. S. 156, 30 SCt 45, 54 L. ed. 137].

34. Westinghouse Electric, etc., Co. v. Simms Magneto Co., 286 Fed. 558 [rev on other grounds 286 Fed. 562]; General Electric Co. v. Sutter, 186 Fed. 637; Cary Mfg. Co. v. Standard Metal Strap Co., 113 Fed. 429 [aff 120 Fed. 945]; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 CCA 267, 35 LRA 728; Boyd v. Cherry, 50 Fed. 279; Saxe v. Hammond, 21 F. Cas. No. 12,411, 1 Bann. & A. 629, Holmes 456; Wallace v. Holmes, 29 F. Cas. No. 17,100, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37.

35. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500; American Patents Dev. Corp. v. Carbice Corp., 25 F. (2d) 730; Williams v. Barnes, 234 Fed. 339, 148 CCA 241.

36. National Malleable Castings Co. v. T. H. Symington Co., 230 Fed. 821, 145 CCA 131 [rev 222 Fed. 517, reh den 234 Fed. 343, and certiorari granted 242 U. S. 625 mem, 37 SCt 16 mem, 61 L. ed. 534 mem, and aff 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045].

37. Slocomb v. A. C. Layman Mach. Co., 227 Fed. 94 [aff 230 Fed. 1021 mem, 144 CCA 286 mem (certiorari den 242 U. S. 635 mem, 37 SCt 18 mem, 61 L. ed. 539 mem)]; Morgan Gardner Electric Co. v. Buettner, etc., Mach. Co., 203 Fed. 490, 121 CCA 612; O'Rourke Engineering Constr. Co. v. McMullen, 150 Fed. 338; Shickle, etc., Iron Co. v. St. Louis Car-Coupler Co., 77 Fed. 739, 23 CCA 433 [certiorari den 166 U. S. 720 mem, 17 SCt 998 mem, 41 L. ed. 1186 mem]; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 CCA 1 [mod 72 Fed. 1016]; Robbins v. Columbus Watch Co., 50 Fed. 545 [aff 64 Fed. 384, 12 CCA 174].

Furnishing repair parts as direct infringement see supra § 495.

38. Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co., 129 Fed. 105, 63 CCA 607 [certiorari den 194 U. S. 636 mem, 24 SCt 859 mem, 48 L. ed. 1160 mem].

39. Campbell v. Kavanaugh, 11 Fed. 83, 20 Blatchf. 256.

40. Rumford Chemical Works v. New York Baking Powder Co., 136 Fed. 873; Imperial Chemical Mfg. Co. v. Stein, 69 Fed. 616 [rev on other grounds 77 Fed. 612, 23 CCA 353]; Celluloid Mfg. Co. v. American Zylonite Co., 30 Fed. 437, 35 Fed. 417; Willis v. McCullen, 29 Fed. 641; Alabastine Co. v. Payne, 27 Fed. 559; Bowker v. Dows, 3 F. Cas. No. 1,734, 3 Bann. & A. 518; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,133, 2 Bann. & A. 351. And see American Stainless Steel Co. v. Ludlum Steel Co., 16 F. (2d) 823 (discussing the question).

41. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 SCt 627, 38 L. ed. 500; American Patents Dev. Corp. v. Carbice Corp., 25 F. (2d) 730; Harvey Hubbell, Inc. v. General Electric Co., 267 Fed. 564; Handel Co. v. Jefferson Glass Co., 265 Fed. 286 [aff 277 Fed. 1015]; Wagner Typewriter Co. v. F. S. Webster Co., 144 Fed. 405; Gerard v. Diebold Safe, etc., Co., 54 Fed. 889, 4 CCA 644 [aff 48 Fed. 380]; Bliss v. Merrill, 33 Fed. 39.

42. Cortelyou v. Johnson, 145 Fed. 933, 76 CCA 455 [rev 138 Fed. 110, and aff 207 U. S. 196, 28 SCt 105, 52 L. ed. 167].

43. Individual Drinking Cup Co. v. Errett, 297 Fed. 733 (declining to follow a holding to the contrary made in the same case, 300 Fed. 955 [mod on other grounds 250 Fed. 620, 162 CCA 636] on the rendition of an interlocutory decree); Edison Electric Light Co. v. Peninsular Light, etc., Co., 95 Fed. 669 [aff 101 Fed. 831, 43 CCA 479] (knowledge of, but no interest in or stipulation for, intended use).

44. Cortelyou v. Johnson, 145 Fed. 933, 76 CCA 455 [aff 207 U. S. 196, 28 SCt 105, 52 L. ed. 167, and rev 138 Fed. 110]; Edison Electric Light Co. v. Peninsular Light, etc., Co., 95 Fed. 669 [aff 101 Fed. 831, 43 CCA 479] (electricity).

45. Edison Electric Light Co. v. Peninsular Light, etc., Co., 95 Fed. 669 [aff 101 Fed. 831, 43 CCA 479].

46. Henry v. A. B. Dick Co., 224

with an infringing machine and are furnished with an express intent to participate in infringement;[47] and an unauthorized sale of machinery, devices, apparatus, or materials for the purpose of being used in performing or practicing a patented process is contributory infringement;[48] but a person who sells an apparatus for a proper purpose cannot be held liable as a contributory infringer merely because the purchaser, using the apparatus in other than a normal manner, infringes a process patent;[49] nor can a person be held to be a contributory infringer of a process patent where he sells only a single part of an unpatented apparatus employed in performing the process and the part is manufactured and sold by him for general use, and not especially for use by the owners or licensees of the apparatus.[50]

[§ 520] **B. Effect on Title.**[51] A patent right in an invention does not give to the patentee title to a thing made in violation of the patent.[52]

[§ 521] **C. Actions**[53]**—1. Right and Form of Action; Jurisdiction and Venue**[54]**—a. In General.** It is essential to a cause of action for infringement of a patent that an act of infringement shall have been committed prior to the institution of the suit,[55] or, where an injunction is asked, that infringement shall at least be actually threatened or reasonably apprehended.[56] A suit for infringement cannot be based upon a violation of covenants of a license which have nothing to do with a trespass upon the rights granted by the patent,[57] but are rather the consideration for the license[58] and are governed by contract law, as distinguished from patent law;[59] infringement of a patent is a tort,[60] and an action for infringement is to be distinguished from an action based upon contract, express or implied.[61] As previously stated, the elements of infringement consist of the unauthorized[62] making, selling, or using[63] of an invention covered by a valid[64] patent during the life or term thereof;[65] and where any one of these elements is lacking, a suit for infringement fails.[66] The patent is the source of the right to maintain an action for infringement,[67] and the cause of action depends upon whether a patent has in fact been granted,[68] rather than upon a right to the issuance of a patent;[69] while there can be no infringement of an invalid patent,[70] and the suit fails where invalidity appears or is shown,[71] yet invalidity is a matter of defense.[72] It is said that a patentee cannot be compelled to enforce his remedy for infringement,[73] but, as hereinafter shown, an exclusive licensee may join the patentee with him as party complainant even against the will of the patentee.[74] A suit for infringement of a patent is in personam[75] and not in rem.[76]

Where surrendered patent has been reissued, the infringement of the reissue is a new cause of action[77] for which in general no remedy can be had except by a suit or action on the reissued patent.[78]

Jurisdiction of particular courts. Jurisdiction of suits for infringement of patents is vested in the

U. S. 1, 32 SCt 364, 56 L. ed. 645, Ann Cas1913D 880 [answering cert questions 149 Fed. 424]; Bement v. National Harrow Co., 186 U. S. 70, 22 SCt 747, 46 L. ed. 1058; Rajah Auto Supply Co. v. Rex Ignition Mfg. Co., 209 Fed. 622; Commercial Acetylene Co. v. Autolux Co., 181 Fed 387; Crown Cork, etc., Co. v. Standard Brewery, 174 Fed. 252; Crown Cork, etc., Co. v. Brooklyn Bottle Stopper Co., 172 Fed. 225 [mod on other grounds 200 Fed. 592, 119 CCA 20]; A. B. Dick Co. v. Milwaukee Office Specialty Co., 168 Fed. 930; Rupp, etc., Co. v. Elliott, 131 Fed. 730, 65 CCA 544; Brodrick Copygraph Co. v. Mayhew, 131 Fed. 92 [aff 137 Fed. 596, 70 CCA 557]; Tubular Rivet Co. v. O'Brien, 93 Fed. 200; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co, 77 Fed. 288, 25 CCA 267, 35 LRA 728.

Validity of license or contract restrictions see Monopolies §§ 115, 124.

47. Union Electric Welding Co. v. Curry, 279 Fed. 465 [certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem].

48. Electro Bleaching Gas Co. v. Paradon Engineering Co., 12 F. (2d) 511 [aff 8 F. (2d) 890, and certiorari den 273 U. S. 728 mem, 47 SCt 239 mem, 71 L. ed. 862 mem]; Solva Waterproof Glue Co. v. Perkins Glue Co., 251 Fed. 64 [mod 223 Fed. 792]; Loew Filter Co. v. German-American Filter Co., 107 Fed. 949, 47 CCA 94; John R. Williams Co. v. Miller, etc., Mfg. Co., 107 Fed. 290; Westinghouse Electric, etc., Co. v. Dayton Fan, etc., Co., 106 Fed. 724 [aff 118 Fed. 562, 55 CCA 390]; German-American Filter Co. v. Loew Filter Co., 103 Fed. 303 [mod on other grounds 107 Fed. 949, 47 CCA 94]; New York Filter Mfg. Co. v. Jackson, 91 Fed. 422; Boyd v. Cherry, 50 Fed. 279; Willis v. McCullen, 29 Fed. 641; Alabastine Co. v. Payne, 27 Fed. 559; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,133, 2 Bann. & A. 351. And see American Stainless Steel Co. v. Ludlum Steel Co., 16 F. (2d) 823 (discussing the question); Morgan Gardner Electric Co. v. Buettner, etc., Mach. Co., 203 Fed. 490, 121 CCA 612 (dictum).

49. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 15 F. (2d) 854.

[a] **Rule applies** where defendant sells an apparatus which is the embodiment of a certain patent and, when normally used, is capable of practicing the process of another patent, he is licensed to use the inventions of both patents, gives proper instructions as to the use of the apparatus and intends that it shall be used in accordance with the instructions. Electro-Bleaching Gas. Co. v. Paradon Engineering Co., 15 F. (2d) 854.

50. Miller v. Electro Bleaching Gas Co., 276 Fed. 379 [rev 264 Fed. 429, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem].

51. Effect of recovery of profits and damages on title see infra § 646.

52. Belknap v. Schild, 161 U. S. 10, 16 SCt 443, 40 L. ed. 599; Haupt v. Wright, 32 App. (D. C.) 408.

53. Conformity of federal practice to state practice in actions at law see Federal Courts § 121.

54. Cross references:
Grounds for preliminary injunction see infra §§ 597–605.
Persons entitled to sue see infra §§ 540–543.
Publication charging infringement as libelous see Libel and Slander § 46.

55. Humane Bit Co. v. Barnet, 117 Fed. 316; Slessinger v. Buckingham, 17 Fed. 454, 8 Sawy. 469.

56. See infra § 594.

57. Chadeloid Chemical Co. v. Johnson, 203 Fed. 993, 122 CCA 293 (covenants by licensee to pay royalties, make reports, and submit his books to the licensor's accountant).

58. Chadeloid Chemical Co. v. Johnson, supra.

59. Chadeloid Chemical Co. v. Johnson, supra.

60. See supra § 489.

61. E. W. Bliss Co. v. U. S., 53 Ct. Cl. 47 [aff 253 U. S. 187, 40 SCt 455, 64 L. ed. 852].

[a] **Contract cannot be made primary subject** of action for infringement. Rees v. Lombard, 21 F. (2d) 276.

62. See supra § 491.

63. See supra §§ 493–497.

64. See supra § 490.

65. See supra § 490.

66. Hapgood v. Hewitt, 119 U. S. 226, 7 SCt 193, 30 L. ed. 369; Eunson v. Dodge, 18 Wall. (U. S.) 414, 21 L. ed. 766; Henius v. Lublin, 30 Fed. 838; Hammacher v. Wilson, 26 Fed. 239 [app dism 145 U. S. 662 mem, 12 SCt 991 mem, 36 L. ed. 853 mem]; Miller v. Foree, 9 Fed. 603 [aff 116 U. S. 22, 6 SCt 204, 29 L. ed. 552]; Knight v. Baltimore, etc., R. Co., 14 F. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Tilghman v. Hartell, 23 F. Cas. No. 14,039, 2 Bann. & A. 260, 11 Phila. (Pa.) 500 [rev on other grounds 99 U. S. 567, 25 L. ed. 357]; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519; Betts v. Willmott, L. R. 6 Ch. 239; Morgan v. McAdam, 15 L. T. Rep. N. S. 348.

67. Kuhlke Mach. Co. v. Miller Rubber Co., 8 F. (2d) 614.

68. Jost v. Borden Stove Co., 262 Fed. 163; Vandeweghe, Ltd. v. Hallman & Sable, Ltd., 33 OntWN 110.

Commencement of suit before or after issuance of patent see infra § 530.

69. Jost v. Borden Stove Co., 262 Fed. 163.

Pleading facts giving right to issuance of patent see infra § 560.

70. See supra § 490.

71. See supra text and note 66.

72. See infra § 538.

73. Federal Electric Co. v. Flexlume Corp., 9 F. (2d) 647.

74. See infra § 543.

75. Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66 [rev 16 F. (2d) 495, and certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem].

76. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336 [rev 142 Fed. 531, and certiorari granted 207 U. S. 589, 28 SCt 255, 52 L. ed. 354]; Consolidated Roller-Mill Co. v. George T. Smith Middlings Purifier Co., 40 Fed. 305; International Signal Co. v. Marconi Wireless Tel. Co., 89 N. J. Eq. 319, 104 A 378 [aff 90 N. J. Eq. 271, 106 A 891].

Persons bound by decision see infra §§ 644, 645.

77. See cases infra note 78.

78. Reedy v. Scott, 23 Wall. (U. S.) 352, 23 L. ed. 109; Jones v. Barker, 11 Fed. 597.

Supplemental bill in suit on original patent see infra § 566.

federal courts,[79] irrespective of the sum or value of the matter in controversy,[80] and their jurisdiction is exclusive of that of state courts.[81] The particular federal courts vested with jurisdiction are the district courts,[82] the supreme court of the District of Columbia,[83] and, in the case of claims against the United States government, the court of claims.[84] Where plaintiff alleges a valid patent, sufficient title thereto, and infringement, and defendant denies validity and infringement, federal jurisdiction is complete, as involving a federal question,[85] and is not ousted by the fact that defendant interjects a dispute about the title.[86]

[§ 522] **b. Actions at Law or in Equity—(1) In General.** Generally speaking, either an action at law for damages[87] or an action in equity[88] for an injunction,[89] and, as incidental thereto, an accounting for profits[90] and damages,[91] may be brought for infringement of a patent. However, the distinction between jurisdiction at law and jurisdiction in equity observed in suits in federal courts generally[92] is applicable to suits for infringement of patents,[93] and the jurisdiction of a court of equity arises only where there are grounds for equitable interference[94] and not where the remedy at law would be full and complete.[95] If it is not clear that the remedy at law would be adequate, equity has jurisdiction.[96] Jurisdiction in equity is usually predicated upon the right to an injunction,[97] and a court of equity will not ordinarily take cognizance of a suit for infringement unless it involves injunctive relief,[98] but in exceptional cases there may be grounds for equitable relief other than an injunction,[99] as where the title

79. See Federal Courts § 34.
80. See Federal Courts § 350.
81. See Courts § 633.
82. Judicial Code § 24 (7); Comp. St. § 991.
[a] **Formerly** (1) jurisdiction was vested in the various circuit courts, in certain district courts, and in the supreme court of the District of Columbia. U. S. Rev. St. (1878) §§ 571, 629. (2) The supreme court of the District of Columbia had circuit court jurisdiction. Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139.
Particular district in which suit must be brought see infra §§ 526-528.
83. **Coextensive jurisdiction of district court and supreme court of District of Columbia generally** see Federal Courts § 372.
84. See Federal Courts § 376 note 72 [e].
85. Walsh v. Albert Wahle Co., 25 F. (2d) 350; Automotive Products Corp. v. Wolverine Bumper, etc., Co., 15 F. (2d) 745.
86. Automotive Products Corp. v. Wolverine Bumper, etc., Co., supra.
87. Carson v. American Smelting, etc., Co., 25 F. (2d) 116; Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453; Radio Corp. of America v. Hohenstein, 289 Fed. 757; Globe Knitting Works v. Segal, 239 Fed. 322; Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 215 Fed. 594, 595, 131 CCA 662 [rev on other grounds 242 U. S. 202, 37 SCt 105, 51 L. ed. 248]; Panoulias v. National Equipment Co., 198 Fed. 493; Harper, etc., Co. v. Wilgus, 56 Fed. 587, 6 CCA 45; Wise v. Grand Ave. R. Co., 33 Fed. 277; Bragg v. Stockton, 27 Fed. 509; Livingston v. Jones, 15 F. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [rev on other grounds 1 Wall. 155, 17 L. ed. 662].
"It is elementary that for infringement of a patent, as for any trespass, damages are recoverable by action at law." Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., supra.
[a] **Proper form of action** is trespass on the case. Babcock, etc., Co. v. Pioneer Iron-Works, 34 Fed. 338; Avery v. Wilson, 20 Fed. 856; Byam v. Bullard, 4 F. Cas. No. 2,262, 1 Curt. 100; Stein v. Goddard, 22 F. Cas. No. 13,353, McAll. 82.
88. White v. Rankin, 144 U. S. 628, 12 SCt 768, 36 L. ed. 569; McCoy v. Nelson, 121 U. S. 484, 7 SCt 1000, 30 L. ed. 1017; Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453; Jonathan Mills Mfg. Co. v. Whitehurst, 56 Fed. 589; Morss v. Knapp, 35 Fed. 218; Wise v. Grand Ave. R. Co., 33 Fed. 277; Kirk v. Du Bois, 28 Fed. 460; Bragg v. Stockton, 27 Fed. 509; Colgate v. Compagnie Francaise du Telegraphe, 23 Fed. 82, 23 Blatchf. 86; Avery v. Wilson, 20 Fed. 856; Brickill v. New York, 7 Fed. 479, 18 Blatchf. 273 [rev on other grounds 112 Fed. 65, 50 CCA 1]; Doughty v. West, 7 F. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 3 Fish. Pat. Cas. 251, 2 Hughes 492; Livingston v. Jones, 15 F. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [rev on other grounds 1 Wall. 155, 17 L. ed. 662]; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275.
[a] **Ordinary rules of equity jurisprudence** (1) are applicable. Keyes v. Pueblo Smelting, etc., Co., 31 Fed. 560. (2) An equitable suit for infringement of a patent is not sui generis. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648, 671 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem]. (3) "When the government, fulfilling the intent of the founders, granted to inventors a new right of property in their inventions, no statutory command was needed to open the door of equity to receive the patentee's bill to stop future trespasses, and to make the defendant pay for past trespasses. It would have taken a statutory prohibition to keep him out; and a statute, stating that he may ask for an injunction and an accounting of profits and damages, should be construed simply as an affirmation of the pre-existing principles of equity." Computing Scale Co. v. Toledo Computing Scale Co., supra.
[b] **Practice of resorting to equity.**—"The convenience of the parties and the practical trial advantages afforded have made a resort to equity the almost universal practice." Hills v. Hamilton Watch Co., 248 Fed. 499, 505.
89. Panoulias v. National Equipment Co., 198 Fed. 493; Sherman v. Nutt, 35 Fed. 149; Wise v. Grand Ave. R. Co., 33 Fed. 277; Brooks v. Miller, 28 Fed. 615; Bragg v. Stockton, 27 Fed. 509; Avery v. Wilson, 20 Fed. 856; Burdell v. Comstock, 15 Fed. 395; Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 3 Fish. Pat. Cas. 251, 2 Hughes 492; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Motte v. Bennett, 17 F. Cas. No. 9,884, 2 Fish. Pat. Cas. 642.
Grounds for granting or refusing injunction see infra §§ 594, 596-605, 609, 610.
90. Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Panoulias v. National Equipment Co., 198 Fed. 493; Wise v. Grand Ave. R. Co., 33 Fed. 277.
Right to, and measure of, profits see infra §§ 618, 620-627.
91. Panoulias v. National Equipment Co., 198 Fed. 493; Newell v. Wilson, 2 De G. M. & G. 282, 51 EngCh 220, 42 Reprint 880; Tuck v. Silver, Johns. 218, 70 Reprint 403.
Right to, and measure of, damages see infra §§ 618, 628-634.
92. See Equity § 6.
93. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Deere, etc., Co. v. Dowagiac Mfg. Co., 153 Fed. 177, 82 CCA 351; Woodmanse, etc., Mfg. Co. v. Williams, 68 Fed. 489, 15 CCA 520; Brooks v. Miller, 28 Fed. 615.
94. See cases infra note 95.
95. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Deere, etc., Co. v, Dowagiac Mfg. Co., 153 Fed. 177, 82 CCA 351; Edison Phonograph Co. v. Hawthorne, etc., Mfg. Co., 108 Fed. 630; Overweight Counterbalance El. Co. v. Standard El., etc., Co., 96 Fed. 231; Ross v. Ft. Wayne, 58 Fed. 404 [rev on other grounds 63 Fed. 466, 11 CCA 288]; Drainage Constr. Co. v. Chelsea, 41 Fed. 47; Ulman v. Chickering, 33 Fed. 582; Smith v. Sands, 24 Fed. 470; Hayward v. Andrews, 12 Fed. 786 [aff 106 U. S. 672, 1 SCt 544, 27 L. ed. 271]; Adams v. Meyrose, 7 Fed. 208, 2 McCrary 360; Livingston v. Jones, 15 F. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [rev on other grounds 1 Wall. 155, 17 L. ed. 662]; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241; Sayles v. Richmond, etc., R. Co., 21 F. Cas. No. 12,424, 4 Bann. & A. 239, 3 Hughes 172; Vaughan v. Central Pac. R. Co., 28 F. Cas. No. 16,897, 3 Bann. & A. 27, 4 Sawy. 280; Vaughan v. East Tennessee, etc., R. Co., 28 F. Cas. No. 16,898, 2 Bann. & A. 537, 1 Flipp. 621.
96. Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 65 Fed. 619 [rev on other grounds 77 Fed. 288, 25 CCA 267, 35 LRA 728]; Bicknell v. Todd, 3 F. Cas. No. 1,389, Fish. Pat. R. 452, 5 McLean 236; McMillin v. Barclay, 16 F. Cas. No. 8,902, 5 Fish. Pat. Cas. 189, 4 Brewst. (Pa.) 275; Vaughan v. East Tennessee, etc., R. Co., 28 F. Cas. No. 16,898, 2 Bann. & A. 537, 1 Flipp. 621.
97. Keyes v. Eureka Cons. Min. Co., 158 U. S. 150, 15 SCt 772, 39 L. ed. 929; Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Hills v. Hamilton Watch Co., 248 Fed. 499; Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769; W. W. Sly Mfg. Co. v. Central Iron Works, 201 Fed. 683, 120 CCA 264; Woodmanse, etc., Mfg. Co. v. Williams, 68 Fed. 489, 15 CCA 520; Bragg Mfg. Co. v. Hartford, 56 Fed. 292; Henzel v. California Electrical Works, 51 Fed. 754, 2 CCA 495 [aff 48 Fed. 375]; American Cable R. Co. v. Citizens' R. Co., 44 Fed. 484; American Cable R. Co. v. Chicago City R. Co., 41 Fed. 522; Asbestine Tiling, etc., Co. v. Hepp, 39 Fed. 324; Sayles v. Richmond, etc., R. Co., 21 F. Cas. No. 12,424, 4 Bann. & A. 239, 3 Hughes 172.
Right to injunction see infra §§ 594, 597-605, 609, 610.
98. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Woodmanse, etc., Mfg. Co. v. Williams, 68 Fed. 489, 15 CCA 520; Hewitt v. Pennsylvania Steel Co., 24 Fed. 367; Sayles v. Richmond, etc., R. Co., 21 F. Cas. No. 12,424, 4 Bann. & A. 239, 3 Hughes 172.
99. Root v. Lake Shore, etc., R.

of complainant is equitable merely,[1] or where equitable interposition is necessary on account of impediments which prevent a resort to remedies purely legal[2] or render the remedies in a legal tribunal difficult, inadequate, and incomplete.[3] The jurisdiction of a court of equity is to be determined according to conditions which exist at the time the bill is filed,[4] and not according to conditions which come into existence after commencement of the suit,[5] even though an injunction is prevented by subsequent conditions, such as the expiration of the patent pending the suit[6] or the cessation of infringement coupled with a promise not to renew it.[7] The right of action, if any, against an individual for infringement by the use of property owned by, and under the exclusive care and custody of, the United States is at law[8] and not in equity.[9] A like rule applies to a right of action against an officer of the United States for infringing acts performed under orders of the government.[10] However, where neither the United States nor any one of the officers is a party defendant, the fact that the suit is brought against an individual or private corporation that has contracted to do certain public work does not oust the court of its equitable jurisdiction to hear and decide the suit,[11] even though there may be sufficient reasons to induce the refusal of relief by injunction.[12]

Where patent has been assigned, the assignee may, as an incident to equitable relief, sue in equity for damages sustained after he became owner,[13] but, to recover damages suffered by the assignor, he should proceed at law.[14] The action is properly brought in equity where only a part interest has been assigned; the assignor is one of the complainants and has a right to an injunction and accounting.[15]

[§ 523] **(2) Actions for Damages, Profits, or Accounting Alone—(a) In General.** An action at law cannot be maintained for the sole purpose of recovering the profits which an infringer of a patent has made;[16] if only the recovery of damages is sought in an action for an infringement, the remedy at law is adequate,[17] and a court of equity has no jurisdiction;[18] an action for an account of profits and damages alone cannot be maintained in equity where there is no equitable ground of relief,[19] and ordinarily an account cannot be had except as an incident to an injunction;[20] but an account may be had where there is ground for equitable interference,[21] as where the case falls within one of the exceptions to the general rule that jurisdiction of a court of equity in infringement suits must ordinarily be limited to cases involving injunctive relief.[22]

[§ 524] **(b) After, or Shortly Prior to, Expiration of Patent.** Where suit is brought upon a patent which has expired, equity ordinarily has no jurisdiction,[23] as no injunction can be ob-

Co., 105 U. S. 189, 26 L. ed. 975; Leslie v. William Mann Co., 157 Fed. 236.

[a] **These cases cannot be defined exactly,** and each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground of exception to the general rule. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975.

1. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Leslie v. William Mann Co., 157 Fed. 236.
2. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975.
3. Root v. Lake Shore, etc., R. Co., supra.
4. Busch v. Jones, 184 U. S. 598, 22 SCt 511, 46 L. ed. 707 [rev 16 App. (D. C.) 23]; W. W. Sly Mfg. Co. v. Central Iron Works, 201 Fed. 683, 120 CCA 264.

[a] **Where bill alleges grounds for equity jurisdiction,** admissions by defendant cannot oust jurisdiction. Lilienthal v. Washburn, 8 Fed. 707, 4 Woods 65.

5. Rice, etc., Corp. v. Lathrop, 278 U. S. 509, 49 SCt 220; Busch v. Jones, 184 U. S. 598, 22 SCt 511, 46 L. ed. 707 [rev 16 App. (D. C.) 23]; Wagner v. Mt. Carmel Iron Works, 244 Fed. 818; Winchester Repeating Arms Co. v. American Buckle, etc., Co., 54 Fed. 703.
6. See infra § 595.
7. See infra § 594.
8. Cutler v. Maryland Hotel Co., 168 Fed. 931 (mail chute installed in building owned by defendant).
9. Cutler v. Maryland Hotel Co., supra.
10. See infra § 547.
11. International Curtis Mar. Turbine Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 211 Fed. 124, 127 CCA 522 [certiorari den 234 U. S. 755 mem, 34 SCt 674 mem, 58 L. ed. 1578 mem].
12. See infra § 547.
13. Nye Tool, etc., Works v. Crown Die, etc., Co., 276 Fed. 376 [rev 270 Fed. 587, certiorari granted 257 U. S. 632 mem, 42 SCt 185 mem, 66 L. ed. 407 mem, and rev on other grounds 261 U. S. 24, 43 SCt 254, 67 L. ed. 516].
14. Nye Tool, etc., Works v. Crown Die, etc., Co., supra.
15. Holmes v. Burnett, 206 Fed. 66.
16. Brown v. Lanyon, 148 Fed. 838, 78 CCA 528 [certiorari den 204 U. S. 672, 27 SCt 787, 61 L. ed. 673].
17. Belknap v. Schild, 161 U. S. 10, 16 SCt 443, 40 L. ed. 599; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Hayward v. Andrews, 106 U. S. 672, 1 SCt 544, 27 L. ed. 271; Ross v. Ft. Wayne, 58 Fed. 404 [rev on other grounds 63 Fed. 466, 11 CCA 288]; Edison Electric Light Co. v. U. S. Electric Lighting Co., 35 Fed. 134; Ulman v. Chickering, 33 Fed. 582; Brooks v. Miller, 28 Fed. 615; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167; Vaughan v. Central Pac. R. Co., 28 F. Cas. No. 16,897, 3 Bann. & A. 27, 4 Sawy. 280.
18. Belknap v. Schild, 161 U. S. 10, 16 SCt 443, 40 L. ed. 599; Schillinger v. U. S., 155 U. S. 163, 15 SCt 85, 39 L. ed. 108; Hayward v. Andrews, 106 U. S. 672, 1 SCt 544, 27 L. ed. 271; De Forest v. Collins Wireless Tel. Co., 174 Fed. 821; Edison Phonograph Co. v. Hawthorne, etc., Mfg. Co., 108 Fed. 630; Cramer v. Fry, 68 Fed. 201; Ross v. Ft. Wayne, 58 Fed. 404 [rev on other grounds 63 Fed. 466, 11 CCA 288]; Ulman v. Chickering, 33 Fed. 582; Wise v. Grand Ave. R. Co., 33 Fed. 277; Brooks v. Miller, 28 Fed. 615; Stein v. Goddard, 22 F. Cas. No. 13,353, McAll. 82; Vaughan v. East Tennessee, etc., R. Co., 28 F. Cas. No. 16,898, 2 Bann. & A. 537, 1 Flipp. 621.
19. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Le Roy v. De Vry Corp., 16 F. (2d) 18; Taylor v. Ford Motor Co., 2 F. (2d) 473; Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769; Carnegie Steel Co. v. Colorado Fuel, etc., Co., 165 Fed. 195, 91 CCA 229; Russell v. Kern, 69 Fed. 94, 16 CCA 154 [aff 64 Fed. 581]; Woodmanse, etc., Mfg. Co. v. Williams, 68 Fed. 489, 15 CCA 520; Germain v. Wilgus, 67 Fed. 597, 14 CCA 561; American Cable R. Co. v. Citizens' R. Co., 44 Fed. 484; Edison Electric Light Co. v. U. S. Electric Lighting Co., 35 Fed. 134; Consolidated Middlings Purifier Co. v. Wolf, 28 Fed. 814; Adams v. Bridgewater Iron Co., 26 Fed. 324; Brick v. Staten Island R. Co., 25 Fed. 553; Lord v. Whitehead, etc., Mach. Co., 24 Fed. 801; Smith v. Sands, 24 Fed. 470; Burdell v. Comstock, 15 Fed. 395; Spring v. Domestic Sewing-Mach. Co., 13 Fed. 446; Hayward v. Andrews, 12 Fed. 786 [aff 106 U. S. 672, 1 SCt 544, 27 L. ed. 271]; Campbell v. Ward, 12 Fed. 150; Merriam v. Smith, 11 Fed. 588; Draper v. Hudson, 7 F. Cas. No. 4,069, 6 Fish. Pat. Cas. 327, Holmes 208; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Livingston v. Jones, 15 F. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [rev on other grounds 1 Wall. 155, 17 L. ed. 662]; Sayles v. Richmond, etc., R. Co., 21 F. Cas. No. 12,424, 4 Bann. & A. 239, 3 Hughes 172; Vaughan v. Central Pac. R. Co., 28 F. Cas. No. 16,897, 3 Bann. & A. 27, 4 Sawy. 280. Contra Atwood v. Portland Co., 10 Fed. 283; Smith v. Baker, 22 F. Cas. No. 13,010, 1 Bann. & A. 117, 10 Phila. (Pa.) 221.

"A bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained. Such relief is incidental to some other equity, the right to enforce which secures to the patentee his standing in court." Taylor v. Ford Motor Co., 2 F. (2d) 473, 474.

20. Deere, etc., Co. v. Dowagiac Mfg. Co., 153 Fed. 177, 82 CCA 351; Smith v. London, etc., R. Co., 1 Kay 408, 69 Reprint 173; Price's Patent Candle Co. v. Bauwen's Patent Candle Co., 4 Kay & J. 727, 70 Reprint 302.
21. McMillin v. St. Louis, etc., Transp. Co., 18 Fed. 260, 5 McCrary 561; Perry v. Corning, 19 F. Cas. No. 11,003, 6 Blatchf. 134; Eclipse Bicycle Co. v. Farrow, 16 App. (D. C.) 468.
22. Leslie v. William Mann Co., 157 Fed. 236.

Exceptions to rule see supra § 522.

23. Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Tompkins v. St. Regis Paper Co., 236 Fed. 221, 149 CCA 411 [aff 226 Fed. 744]; Russell v. Kern, 69 Fed. 94, 16 CCA 154; Ross v. Ft. Wayne, 58 Fed. 404 [rev on other grounds 63 Fed. 466, 11 CCA 288]; American Cable R. Co. v. Citizens' R. Co., 44 Fed. 484; Montgomery Palace Stock-Car Co. v. Street Stable-Car Line, 43 Fed. 329; Edison Electric Light Co. v. U. S. Electric Lighting Co., 35 Fed. 134; Creamer v. Bowers, 30 Fed. 185; Brooks v. Miller, 28 Fed. 615; Adams v. Bridgewater Iron Co., 26 Fed. 324; Consolidated Safety-Valve Co. v. Ashton Valve Co., 26 Fed. 319; Brick v. Staten Island R. Co., 25 Fed. 553; Lord v. Whitehead, etc., Mach. Co., 24 Fed.

tained[24] and the proper remedy is at law;[25] but it has jurisdiction where, by reason of his nonuse of the patented invention, plaintiff has not sustained any damages and a recovery in equity of the actual profits made by defendant is the only remedy,[26] and where expired and unexpired patents are joined, equity may take jurisdiction.[27] Unless a suit is begun so late that, under the rules or usual practice of the court, no injunction can be obtained before the expiration of the patent,[28] or no special ground for equitable interference is shown,[29] a court of equity may properly entertain jurisdiction of a suit for infringement of a patent which will expire in the near future,[30] and before the controversy can be finally determined;[31] and where jurisdiction is once acquired, it is not ousted by the expiration of the patent during the pendency of the suit,[32] but continues for the purpose of an accounting,[33] although such expiration is a ground for denying an injunction,[34] and the right to the injunction was the basis of equity jurisdiction.[35]

[§ 525] **c. Joinder or Severance of Causes of Action; Multifariousness.**[36] A bill joining infringement of a patent and slander is multifarious.[37] On the other hand, a bill is not multifarious where, in addition to equitable relief for infringement of a patent, it prays for a transfer of the patent,[38] the cancellation of an assignment,[39] or an injunction against the use of the name applied to the article by the patentee.[40] Also, a bill primarily for infringement is not rendered multifarious by setting out a contract between plaintiff and defendant binding defendant not to contest the validity of the patent;[41] an adjudication against an interfering patent and relief against infringement may be asked for in the same suit;[42] and causes of action for infringement of a patent and unfair competition may be joined where the same acts constitute both infringement and unfair competition,[43] and the necessary diver-

801; Hewitt v. Pennsylvania Steel Co., 24 Fed. 367; Hayward v. Andrews, 12 Fed. 786 [aff 106 U. S. 672, 1 SCt 544, 27 L. ed. 271]; Campbell v. Ward, 12 Fed. 150; Sayles v. Richmond, etc., R. Co., 21 F. Cas. No. 12,424, 4 Bann. & A. 239, 3 Hughes 172. Contra Gordon v. Anthony, 10 F. Cas. No. 5,605, 4 Bann. & A. 248, 16 Blatchf. 234; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Sayles v. Dubuque, etc., R. Co., 21 F. Cas. No. 12,417, 3 Bann. & A. 219, 5 Dill. 561; Sickles v. Gloucester Mfg. Co., 22 F. Cas. No. 12,841, 4 Blatchf. 229, 1 Fish. Pat. Cas. 222; Stevens v. Kansas Pac. R. Co., 23 F. Cas. No. 13,401, 5 Dill. 486; Vaughan v. East Tennessee, etc., R. Co., 28 F. Cas. No. 16,898, 2 Bann. & A. 537, 1 Flipp. 621.

[a] **Where no special equities** are pleaded, a suit in equity cannot be maintained for infringement of a patent which expired before the suit was brought. T. W., etc., Sheridan Co. v. Robert O. Law Co., 172 Fed. 223, 97 CCA 27.

24. See infra § 595.

25. See cases supra note 23.

26. Tompkins v. St. Regis Paper Co., 236 Fed. 221, 149 CCA 411 [aff 226 Fed. 744].

27. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 Fed. 558.

Joinder of two patents in one suit generally see infra § 525.

28. Clark v. Wooster, 119 U. S. 322, 7 SCt 217, 30 L. ed. 392; Overweight Counterbalance El. Co. v. Standard El., etc., Co., 96 Fed. 231; McDonald v. Miller, 84 Fed. 344; Russell v. Kern, 69 Fed. 94, 16 CCA 154; Ross v. Ft. Wayne, 58 Fed. 404 [rev on other grounds 63 Fed. 466, 11 CCA 288]; Bragg Mfg. Co. v. Hartford, 56 Fed. 292; American Cable R. Co. v. Citizens' R. Co., 44 Fed. 484; Racine Seeder Co. v. Joliet Wire-Check Rower Co., 27 Fed. 367; Mershon v. J. F. Pease Furnace Co., 24 Fed. 741, 23 Blatchf. 329; Hewitt v. Pennsylvania Steel Co., 24 Fed. 367; Davis v. Smith, 19 Fed. 823; Burdell v. Comstock, 15 Fed. 395. But see Tompkins v. International Paper Co., 183 Fed. 773, 106 CCA 529 (expressing the opinion that, although there was not sufficient time to give four days' notice of injunction, as required by rule of court, it was within the power of the court upon the filing of the bill to issue an order to show cause returnable in some shorter time and grant an ad interim restraining order, which would have been an injunction in substance and effect; but resting its decision that a court of equity had jurisdiction on the ground that as complainant had not made, used, nor sold his patented process, nor any part thereof, had obtained no financial advantage from his invention, and had not sustained any actual damage by the enjoyment of the invention by others, he could recover only nominal damages in an action at law and therefore the remedy at law was inadequate).

Grant or refusal of injunction where patent about to expire see infra § 595.

29. W. W. Sly Mfg. Co. v. Central Iron Works, 201 Fed. 683, 120 CCA 264; Diamond Stone-Sawing Mach. Co. v. Seus, 159 Fed. 497; Miller v. Schwarner, 130 Fed. 561; Heap v. Borchers, 108 Fed. 237; McDonald v. Miller, 84 Fed. 344; American Cable R. Co. v. Chicago City R. Co., 41 Fed. 522; Racine Seeder Co. v. Joliet Wire-Check Rower Co., 27 Fed. 367; Davis v. Smith, 19 Fed. 823.

30. Clark v. Wooster, 119 U. S. 322, 7 SCt 217, 30 L. ed. 392; Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220, 222; American Sulphite Pulp Co. v. Crown-Columbia Pulp, etc., Co., 169 Fed. 140 (patent expiring forty-eight days after institution of suit); Carnegie Steel Co. v. Colorado Fuel, etc., Co., 165 Fed. 195, 91 CCA 229; Toledo Mower, etc., Co. v. Johnston Harvester Co., 24 Fed. 739, 23 Blatchf. 332.

"If at the date of the filing of a bill charging infringement of a patent there is sufficient time, under the rules of practice of the court in which such bill has been filed, to obtain a temporary injunction thereon before the expiration of such patent, the court acquires the necessary jurisdiction to grant whatever equitable relief may be proper." Stromberg Motor Devices Co. v. Holley Bros. Co., supra.

[a] **Where two or more patents are involved,** and only part of them will expire in a short time, jurisdiction may be retained and a dismissal is not necessary. Merrill-Soule Co. v. Northland Dairy Co., 28 F. (2d) 924; W. W. Sly Mfg. Co. v. Central Iron Works, 201 Fed. 683, 120 CCA 264; Thomson-Houston Electric Co. v. Electrose Mfg. Co., 155 Fed. 543.

31. American Sulphite Pulp Co. v. Crown-Columbia Pulp, etc., Co., 169 Fed. 140.

32. Rice, etc., Corp. v. Lathrop, 278 U. S. 509, 49 SCt 220; Beedle v. Bennett, 122 U. S. 71, 7 SCt 1090, 30 L. ed. 1074; Clark v. Wooster, 119 U. S. 322, 7 SCt 217, 30 L. ed. 392; Thomson v. Wooster, 114 U. S. 104, 5 SCt 788, 29 L. ed. 105; Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 113 U. S. 157, 5 SCt 513, 28 L. ed. 939; Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co., 110 U. S. 229, 4 SCt 33, 28 L. ed. 129; American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 1 SCt 52, 27 L. ed. 79; Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631; Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co., 182 Fed. 398 [aff 195 Fed. 759, 115 CCA 559]; Carnegie Steel Co. v. Colorado Fuel, etc., Co., 165 Fed. 195, 91 CCA 229; Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 Fed. 558; U. S. Mitis Co. v. Detroit Steel, etc., Co., 122 Fed. 863, 59 CCA 589; Chinnock v. Paterson, etc., Tel. Co., 112 Fed. 531, 50 CCA 384 [rev 110 Fed. 199]; Bradner Adjustable Hanger Co. v. Waterbury Button Co., 106 Fed. 735; Reedy v. Western Electric Co., 83 Fed. 709, 28 CCA 27; Ross v. Ft. Wayne, 63 Fed. 466, 11 CCA 288; Keyes v. Eureka Cons. Mfg. Co., 45 Fed. 199 [aff 158 U. S. 150, 15 SCt 772, 39 L. ed. 929]; Singer Mfg. Co. v. Wilson Sewing Mach. Co., 38 Fed. 586; Kittle v. Rogers, 33 Fed. 49; Kittle v. Schneider, 30 Fed. 690; Kittle v. De Graaf, 30 Fed. 689; Brooks v. Miller, 28 Fed. 615; Kirk v. Du Bois, 28 Fed. 460; Adams v. Bridgewater Iron Co., 26 Fed. 324; Dick v. Struthers, 25 Fed. 103; Toledo Mower, etc., Co. v. Johnston Harvester Co., 24 Fed. 739, 23 Blatchf. 332; New York Grape Sugar Co. v. Peoria Grape Sugar Co., 21 Fed. 878; Adams v. Howard, 19 Fed. 317; Gottfried v. Moerlein, 14 Fed. 170; Jones v. Barker, 11 Fed. 597; Bloomer v. Gilpin, 3 F. Cas. No. 1,558, 4 Fish. Pat. Cas. 50; Imlay v. Norwich, etc., R. Co., 13 F. Cas. No. 7,012, 4 Blatchf. 227, 1 Fish. Pat. Cas. 340; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Busch v. Jones, 16 App. (D. C.) 23 [rev on other grounds 184 U. S. 598, 22 SCt 511, 46 L. ed. 707]; Davenport v. Rylands, L. R. 1 Eq. 302; Fox v. Dellestable, 15 Wkly. Rep. 194.

33. See cases supra note 32.

34. See infra § 595.

35. See supra § 522.

36. **Multifariousness generally** see Equity §§ 427-452.

37. Fougeres v. Murbarger, 44 Fed. 292.

38. Prest-O-Lite Co. v. Avery Portable Lighting Co., 164 Fed. 60 (bill by equitable owner against the holder of legal title).

39. Atherton Mach. Co. v. Atwood Morrison Co., 102 Fed. 949, 43 CCA 72.

40. Adam v. Folger, 120 Fed. 260, 56 CCA 540; Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co., 60 Fed. 622.

41. Dunham v. Bent, 72 Fed. 60.

42. Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 46 Fed. 72; American Roll-Paper Co. v. Knopp, 44 Fed. 609; Holliday v. Pickhardt, 29 Fed. 853; Swift v. Jenks, 29 Fed. 642; Leach v. Chandler, 18 Fed. 262 mem; Ayling v. Hull, 2 F. Cas. No. 686, 2 Cliff. 494.

43. Sayre v. McGill Ticket Punch Co., 200 Fed. 771; Climax Lock, etc.,

sity of citizenship of the parties exists,[44] although not where diversity of citizenship is lacking,[45] or the two causes of action are entirely separate and distinct,[46] as where the respective acts upon which they are based are separate and their consequences are distinct.[47]

Suit upon several patents. A bill is not necessarily obnoxious to the charge of multifariousness because the suit is brought upon more than one patent;[48] a single suit may be brought for the infringement of several patents where the inventions covered by those patents are embodied in one infringing process, machine, manufacture, or composition of matter;[49] and where conjoint use is alleged, the bill is not multifarious;[50] but in the absence of conjoint use, a single suit cannot be maintained,[51] and, unless conjoint use by defendant is alleged, the bill is multifarious.[52] In England, where suit is brought on numerous patents, plaintiff may be required to limit the number.[53] Where patents for an invention and for an improvement thereon are owned by the same person, a cause of action for infringement is entire,[54] and two separate actions for the infringement of each patent cannot be maintained.[55]

Suit on separate claims of one patent. Suit may be maintained upon some of the claims of a patent and not others,[56] and it is not defeated by the invalidity of the others.[57]

Repeated infringements of a patent may be sued for in one action.[58] Indeed, complainant is not at liberty to bring separate and successive suits against the same defendant for separate acts of infringement committed before the institution of the first suit.[59]

Suit against several defendants.[60] A bill for infringement of a patent in a suit against two or more defendants may be multifarious,[61] as where it charges defendants with infringement severally;[62] but it is not multifarious where it sufficiently alleges joint infringement,[63] and it is said that, even if a cause of action against a corporation for infringement of a patent and one against its sole stockholder for infringement before he formed the corporation are separate, they may be united in one suit in order to promote the convenient administration of jus-

Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126; Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co., 182 Fed. 832; T. B. Woods Sons Co. v. Valley Iron Works, 166 Fed. 770; Weed v. Gay, 160 Fed. 695.

44. Miller Rubber Co. v. Behrend, 242 Fed. 515, 155 CCA 291; Havens v. Burns, 188 Fed. 441.

45. See Federal Courts § 11.

46. George Frost Co. v. Kora Co., 136 Fed. 487 [aff 140 Fed. 987, 71 CCA 19]; Ball, etc., Fastener Co. v. Cohn, 90 Fed. 664.

47. Ball, etc., Fastener Co. v. Cohn, supra.

48. Lilliendahl v. Detwiller, 18 Fed. 176; Gamewell Fire-Alarm Tel. Co. v. Chillicothe, 7 Fed. 351; Horman Patent Mfg. Co. v. Brooklyn City R. Co., 12 F. Cas. No. 6,703, 4 Bann. & A. 86, 15 Blatchf. 444; Meerse v. Allen, 16 F. Cas. No. 9,393a; Nourse v. Allen, 18 F. Cas. No. 10,367, 4 Blatchf. 376, 3 Fish. Pat. Cas. 63.

[a] **Bill on expired and unexpired patents** is not multifarious. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 Fed. 558; Roemer v. Logowitz, 20 F. Cas. No. 11,996.

[b] **Original patent and void reissue.**—A bill alleging the infringement of the original patent and the infringement of a void reissue is not multifarious, but allegations relative to the void reissue are surplusage. Roemer v. Logowitz, 20 F. Cas. No. 11,996.

[c] **Bill by assignee on patents assigned for different territory.**—A bill to restrain the infringement of two patents brought by complainant as the assignee of the patentees for a particular state is not multifarious because the assignment of one of those patents embraced territory outside of the state named. Gillespie v. Cummings, 10 F. Cas. No. 5,434, 1 Bann. & A. 587, 3 Sawy. 259.

49. Smith v. Peck, etc., Co., 258 Fed. 40 [mod on other grounds 262 Fed. 415 (certiorari den 253 U. S. 497 mem, 40 SCt 588 mem, 64 L. ed. 1031 mem)]; Lagonda Mfg. Co. v. Elliott Co., 214 Fed. 578, 131 CCA 158 [mod 205 Fed. 152, and certiorari den 235 U. S. 697 mem, 35 SCt 199 mem, 59 L. ed. 431 mem]; Vrooman v. Penhollow, 179 Fed. 296, 102 CCA 484 [reh den 186 Fed. 495, 108 CCA 502]; Kansas City Hay-Press Co. v. Devol, 81 Fed. 726, 26 CCA 578, 84 Fed. 463, 28 CCA 464; Russell v. Kern, 58 Fed. 382; Huber v. Myers Sanitary Depot, 34 Fed. 752; Deering v. Winona Harvester Works, 24 Fed. 90; Nellis v. Pennock Mfg. Co., 13 Fed. 451; Case v. Redfield, 5 F. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741; Gillespie v. Cummings, 10 F. Cas. No. 5,434, 1 Bann. & A. 587, 3 Sawy. 259; Nourse v. Allen, 18 F. Cas. No. 10,367, 4 Blatchf. 376, 3 Fish. Pat. Cas. 63; Richardson v. Noyes, 20 F. Cas. No. 11,792, 2 Bann. & A. 398.

[a] **Proof of conjoint use of several inventions but not all** will sustain the suit. Chisholm v. Johnson, 106 Fed. 191; Kansas City Hay-Press Co. v. Devol, 81 Fed. 726, 26 CCA 578.

[b] **Validity of patents and damages** are determined separately for each. Consolidated Electric Light Co. v. Brush-Swan Electric Light Co., 20 Fed. 502.

50. Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 193 Fed. 69; Adrian Wire Fence Co. v. Jackson Fence Co., 190 Fed. 195; Luten v. Dower Constr. Co., 189 Fed. 405; Foundation Co. v. O'Rourke Engineering Constr. Co., 171 Fed. 425; Southern Plow Co. v. Atlanta Agricultural Works, 165 Fed. 214; Edison Phonograph Co. v. Victor Talking Mach. Co., 120 Fed. 305; Continental Gin Co. v. F. H. Lummus Sons' Co., 110 Fed. 390; Elliott, etc., Book-Typewriter Co. v. Fisher Typewriter Co., 109 Fed. 330; Gamewell Fire-Alarm Tel. Co. v. Chillicothe, 7 Fed. 351; Gillespie v. Cummings, 10 F. Cas. No. 5,434, 1 Bann. & A. 587, 3 Sawy. 259; Horman Patent Mfg. Co. v. Brooklyn City R. Co., 12 F. Cas. No. 6,703, 4 Bann. & A. 86, 15 Blatchf. 444; Meerse v. Allen, 16 F. Cas. No. 9,393a; Nourse v. Allen, 18 F. Cas. No. 10,367, 4 Blatchf. 376, 3 Fish. Pat. Cas. 63.

[a] **Allegation that inventions are used in one machine** is a sufficient allegation of conjoint use. Daimler Mfg. Co. v. Conklin, 145 Fed. 955; Horman Patent Mfg. Co. v. Brooklyn City R. Co., 12 F. Cas. No. 6,703, 4 Bann. & A. 86, 15 Blatchf. 444, 7 Reporter 295.

51. Louden Mach. Co. v. Ward, 96 Fed. 232; Diamond Match Co. v. Ohio Match Co., 80 Fed. 117; Rose v. Hirsh, 77 Fed. 469, 23 CCA 246 [aff 71 Fed. 881]; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 68 Fed. 913; Griffith v. Segar, 29 Fed. 707; Shickle v. South St. Louis Fdy. Co., 22 Fed. 105; Consolidated Electric Light Co. v. Brush-Swan Electric Light Co., 20 Fed. 502; Lilliendahl v. Detwiller, 18 Fed. 176; Barney v. Peck, 16 Fed. 413; Nellis v. Pennock Mfg. Co., 13 Fed. 451; Hayes v. Dayton, 8 Fed. 702, 18 Blatchf. 420.

52. Robinson v. Chicago Rye Co., 174 Fed. 40, 98 CCA 26; Electric Goods Mfg. Co. v. Benjamin Electric Mfg. Co., 169 Fed. 832; Western Tel. Mfg. Co. v. American Electric Tel. Co., 137 Fed. 603; Russell v. Winchester Repeating Arms Co., 97 Fed. 634; Louden Mach. Co. v. Ward, 96 Fed. 232; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 69 Fed. 833; Hayes v. Dayton, 8 Fed. 702, 18 Blatchf. 420; Hayes v. Bickelhoupt, 11 F. Cas. No. 6,261b; Nellis v. McLanahan, 17 F. Cas. No. 10,099, 6 Fish. Pat. Cas. 286.

53. Saccharin Corp., Ltd. v. Wild, [1903] 1 Ch. 410; Saccharin Corp., Ltd. v. White & Sons, Ltd., 88 L. T. Rep. N. S. 850.

54. Case v. Redfield, 5 F. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741.

55. Case v. Redfield, supra.

56. Gordon v. Warder, 150 U. S. 47, 14 SCt 32, 37 L. ed. 992; Russell v. Winchester Repeating Arms, 97 Fed. 634; Blake v. Smith, 3 F. Cas. No. 1,502; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Moody v. Fiske, 17 F. Cas. No. 9,745, 2 Mason 112, 1 Robb Pat. Cas. 312; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

[a] **Rule applicable to action at law.**—Lee v. Blandy, 15 F. Cas. No. 8,182, 1 Bond 361, 2 Fish. Pat. Cas. 89.

[b] **Rule applicable to suit in equity.**—Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195.

Pendency of one suit as bar to another suit on different claims of same patent see Abatement and Revival § 91.

57. Whitney v. Boston R. Co., 50 Fed. 72 [rev on other grounds 53 Fed. 913]; Burdett v. Estey, 4 F. Cas. No. 2,145, 4 Bann. & A. 7, 15 Blatchf. 349 [rev on other grounds 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058].

58. Wilder v. McCormick, 29 F. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. R. 128.

59. Panoulias v. National Equipment Co., 198 Fed. 493.

Recovery of part of entire demand as bar to subsequent action for remainder see Judgments § 1239 note 26 [e].

60. Joinder of parties see infra § 548.

61. Jewell v. Philadelphia, 186 Fed. 639.

[a] **Thus** a bill for infringement of a patent against three defendants, alleging past and completed acts of infringement against two, a second cause of action against one of such two for continuing infringement by use of the infringing article, and a third cause of action against all the defendants, growing out of a different and uncompleted transaction, is multifarious. Jewell v. Philadelphia, 186 Fed. 639.

62. Fichtel v. Barthel, 173 Fed. 489.

63. Thomson-Houston Electric Co. v. Electrose Mfg. Co., 155 Fed. 543.

tice.[64]

[§ 526] **d. Place To Sue[65]—(1) In General.** It is provided by a federal statute that, in suits brought for the infringement of patents, the district courts of the United States shall have jurisdiction in the district of which defendant is an inhabitant, or in any district in which defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business.[66] While the statute does not relate to,[67] or take away,[68] the general jurisdiction of district courts over infringement suits,[69] but relates merely to venue[70] or the personal privilege of immunity from suit except in a particular district or districts,[71] and this privilege may be waived or lost by a general appearance and failure to object to jurisdiction before pleading to the merits,[72] or by otherwise consenting to or accepting the jurisdiction of the court of the district in which the suit is brought,[73] nevertheless the privilege of immunity is a matter of substantive law[74] and not a mere matter of practice.[75] Jurisdiction exists where the case is within either the first[76] or second[77] alternative of the statute; but where the right to object to the venue is not waived,[78] and defendant is not an inhabitant of the district in which the suit is brought, jurisdiction does not exist unless defendant has not only committed an act of infringement in the district,[79] but also has a regular and established place of business therein[80] at the time the suit is brought.[81] The suit must be commenced by plaintiff in a proper district, regardless of convenience[82] or fear of imminent infringement;[83] and inquiry into the question of jurisdiction should be made at the outset of the litigation,[84] it being better, where it is extremely doubtful whether jurisdiction exists, to remit the parties to the district where there is no doubt as to jurisdiction, before, rather than after,

64. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290, and certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem].

65. Pendency of suit in one district as ground of abatement of suit in another district see Abatement and Revival § 120.

66. Judicial Code § 48.

[a] **Enlargement or restriction of jurisdiction.**—(1) The statute restricts jurisdiction in the sense that it does not permit suit to be brought in any district wherein defendant may be served (Bowers v. Atlantic, etc., Co., 104 Fed. 887), (2) and it enlarges jurisdiction in the sense that, in a case within its second alternative, it permits suit to be brought in a district in which neither plaintiff nor defendant resides (Cutler-Hammer Mfg. Co. v. Curtis, 296 Fed. 117).

[b] **Jurisdiction in pending cases** was not ousted by the statute. Westinghouse Air-Brake Co. v. Great Northern R. Co., 88 Fed. 258, 31 CCA 525.

[c] **Prior to passage of statute** (1) a suit for infringement could be brought in any district where valid service could be had. Bowers v. Atlantic, etc., Co., 104 Fed. 887; Westinghouse Air-Brake Co. v. Great Northern R. Co., 88 Fed. 258, 31 CCA 525. (2) The provision of the Judiciary Act of 1888 (25 St. at L. 434 c 866), that no civil suit should be brought in any circuit court against any person by original process in any district other than that whereof he is an inhabitant, did not apply to patent infringement suits. Spears v. Flynn, 102 Fed. 6; Southern Pac. Co. v. Earl, 82 Fed. 690, 27 CCA 185.

67. Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 279 Fed. 758.

68. Sandusky Fdy., etc., Co. v. De Lavaud, 251 Fed. 631 [mod on other grounds 274 Fed. 607].

69. Jurisdiction of subject matter see Federal Courts § 34.

70. Sandusky Fdy., etc., Co. v. De Lavaud, 251 Fed. 631 [mod on other grounds 274 Fed. 607]; Corrugated Paper Patents Co. v. Paper Working Mach. Co., 237 Fed. 380.

71. Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 279 Fed. 758; Sandusky Fdy., etc., Co. v. De Lavaud, 251 Fed. 631 [mod on other grounds 274 Fed. 607]; U. S. Consol. Seeded Raisin Co. v. Phœnix Raisin Seeding, etc., Co., 124 Fed. 234.

72. S. S. White Dental Mfg. Co. v. Dental Co. of America, 263 Fed. 719 [aff 266 Fed. 524]; Sandusky Fdy., etc., Co. v. De Lavaud, 251 Fed. 631 [mod on other grounds 274 Fed. 607]; Corrugated Paper Patents Co. v. Paper Working Mach. Co., 237 Fed. 380; U. S. Consolidated Seeded Raisin Co. v. Phœnix Raisin Seeding, etc., Co., 124 Fed. 234.

[a] **Objection not made until close of plaintiff's case** is waived. S. S. White Dental Mfg. Co. v. Dental Co. of America, 263 Fed. 719 [aff 266 Fed. 524].

[b] **Where privilege is so waived,** "it is open to complainant to prove infringement anywhere within the United States." Sandusky Fdy., etc., Co. v. De Lavaud, 251 Fed. 631, 633 [mod on other grounds 274 Fed. 607].

73. Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796 [mod 300 Fed. 834]; Postage Meter Co. v. Standard Mailing Mach. Co., 9 F. (2d) 19; Victor Talking Mach. Co. v. Brunswick-Balke-Collender Co., 279 Fed. 758. Compare U. S. Envelope Co. v. Transo Paper Co., 229 Fed. 576 (where, after holding that there was no waiver, the court said that a jurisdictional fact cannot be waived, and that jurisdiction cannot be conferred by consent).

74. Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F. (2d) 139.

75. Durabilt Steel Locker Co. v. Berger Mfg. Co., supra.

76. Ryder v. Townsend, 188 Fed. 792; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

[a] **Where infringement is threatened,** plaintiff may, in a proper case for an injunction, sue in the district in which defendant is an inhabitant. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

[b] **Use by resident of district.**—The law gives to the owner of a patent the right to sue the user of an infringing device in the district where both parties reside, and he may, without incurring the displeasure or reprobation of the court, exercise this right instead of going far from home and suing the manufacturer in the district where the infringing device was made. Ryder v. Townsend, 188 Fed. 792.

[c] **Regardless of place of infringement** (1) the court has jurisdiction of defendant where he is an inhabitant of the district wherein suit is brought. Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641. (2) A resident of the district may be enjoined from selling anywhere. Hatch v. Hall, 22 Fed. 438; Boyd v. McAlpin, 3 F. Cas. No. 1,748, 3 McLean 427, 2 Robb Pat. Cas. 277.

77. Davis v. Motive Parts Corp., 16 F. (2d) 148; Dental Co. of America v. S. S. White Dental Mfg. Co., 266 Fed. 524 [aff 263 Fed. 719]; Smith v. Farbenfabriken of Elberfeld Co., 203 Fed. 476, 121 CCA 598; American Stoker Co. v. Underfeed Stoker Co., 182 Fed. 642 [aff 188 Fed. 314, 110 CCA 292]; Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 541; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 121 Fed. 101; Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co., 118 Fed. 852; Thomson-Houston Electric Co. v. Bullock Electric Co., 101 Fed. 587 [mod on other grounds 107 Fed. 277, 46 CCA 263].

78. Heine Chimney Co. v. Rust Engineering Co., 12 F. (2d) 596; Stryker Deflector Co. v. Perrin Mfg. Co. 256 Fed. 656, 168 CCA 50; U. S. Envelope Co. v. Transo Paper Co., 229 Fed. 576.

[a] **Facts not constituting waiver.**—(1) A foreign corporation which did no business and committed no act of infringement in the district wherein it was sued did not waive its right to object to the venue by obtaining authority to do business in the state and naming a place of business in the state, as well as an agent upon whom service of process could there be had. Heine Chimney Co. v. Rust Engineering Co., 12 F. (2d) 596. (2) Failure to obtain an immediate review of an adverse decision on a plea to the jurisdiction does not preclude defendant from subsequently raising the question of jurisdiction. U. S. Envelope Co. v. Transo Paper Co., 229 Fed. 576.

79. Davis v. Motive Parts Corp., 16 F. (2d) 148; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593 [app dism 257 U. S. 664 mem, 42 SCt 45 mem, 66 L. ed. 424 mem]; McKinnon Chain Co. v. American Chain Co., 259 Fed. 873 [aff 268 Fed. 353]; American Electric Welding Co. v. Lalance, etc., Mfg. Co., 256 Fed. 34; International Wireless Tel. Co. v. Fessenden, 131 Fed. 491; Streat v. American Rubber Co., 115 Fed. 634; Bowers v. Atlantic, etc., Co., 104 Fed. 887; Wilson Packing Co. v. Clapp, 30 F. Cas. No. 17,850, 3 Bann. & A. 243, 8 Biss. 154.

80. Zimmers v. Dodge, 21 F. (2d) 152; Cutler-Hammer Mfg. Co. v. Curtis, 296 Fed. 117; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593 [app dism 257 U. S. 664 mem, 42 SCt 45 mem, 66 L. ed. 424 mem]; U. S. Envelope Co. v. Transo Paper Co., 229 Fed. 576; General Electric Co. v. Best Electric Co., 220 Fed. 347; Bowers v. Atlantic, etc., Co., 104 Fed. 887.

81. Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476; Feder v. Fiedler, 116 Fed. 378.

82. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160.

83. Colgate v. Procter, etc., Mfg. Co., supra.

84. Colgate v. Procter, etc., Mfg. Co., supra.

[a] **Duties of court and parties.**—(1) It is incumbent upon plaintiff to aver (see infra § 557) (2) and prove (see infra § 573) (3) the requisite jurisdictional facts; it is the duty of defendant to bring the question of jurisdiction to the court's attention (Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160); (4) and it is the duty of the court, at the outset of the litigation, and even on its own initiative, to inquire into its own

expensive and protracted litigation has been had.[85] In determining the question of jurisdiction, the court will not inquire into the merits of the suit[86] further than to determine, where jurisdiction depends upon the commission of acts of infringement within the district,[87] whether the acts committed in the district prima facie constitute,[88] or are bona fide claimed to be,[89] infringement.

. **Alien** may be sued in the district in which he has a regular and established place of business and has committed an act of infringement,[90] or in any district in which process can be served upon him.[91]

In Canada suit must be brought in the court nearest defendant's residence.[92]

[§ 527] **(2) Meaning of Statutory Terms. "Act of infringement,"** within the meaning of the statute and the foregoing rules,[93] consists in the making,[94] use,[95] or sale[96] of the patented invention. Ordinarily a completed act of infringement in the district is essential;[97] but acts committed in the district and constituting contributory infringement are acts of infringement within the meaning of the statute,[98] even though the infringement is completed by acts committed by another person in another jurisdiction.[99] Contracts to manufacture[1] or negotiations for a sale[2] are not sufficient. Also, a mere threat[3] or intention[4] to infringe is not sufficient, although in a case of a threatened infringement plaintiff is not without remedy,[5] as he may sue in the district in which defendant is an inhabitant.[6]

"Regular and established place of business," within the meaning of the statute and the foregoing rules,[7] is a place where the same business in kind, if not in degree, as that done at the home office or principal place of business of defendant, is carried on.[8] While the doing of business in the district is essential,[9] it alone is not sufficient;[10] the business must be done at a regular[11] and established[12] place.

[§ 528] **(3) Two or More Suits or Defendants; Counterclaim. Suit against two or more defendants** may be brought in a particular district where each defendant is either an inhabitant of the district or has committed an act of infringement, and has a reg-

jurisdiction (Colgate v. Procter, etc., Mfg. Co., supra).

85. Zimmers v. Dodge, 21 F. (2d) 152.

[a] **"It is obviously better** that a long and expensive litigation shall be conducted before some court whose jurisdiction is not open to the possibility of successful challenge." General Electric Co. v. Best Electric Co., 220 Fed. 347, 348.

86. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; I. T. S. Rubber Co. v. U. S. Rubber Co., 278 Fed. 975 [rev on other grounds 288 Fed. 786 (certiorari den 262 U. S. 748 mem, 43 SCt 523 mem, 67 L. ed. 1213 mem)]. Compare McKinnon Chain Co. v. American Chain Co., 259 Fed. 873, 874 [aff 268 Fed. 353] (where, after holding that defendant had a regular and established place of business in the district, the court said: "The statute, in order to confer jurisdiction, also requires that acts of infringement shall have been committed in the district where such place of business is established, and this brings us to the merits of the case").

87. See supra text and note 79.

88. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160.

89. I. T. S. Rubber Co. v. U. S. Rubber Co., 278 Fed. 975 [rev on other grounds 288 Fed. 786 (certiorari den 262 U. S. 748 mem, 43 SCt 523 mem, 67 L. ed. 1213 mem)].

90. Smith v. Farbenfabriken of Elberfeld Co., 203 Fed. 476, 121 CCA 598.

91. Sandusky Fdy., etc., Co. v. De Lavaud, 251 Fed. 631 [mod on other grounds 274 Fed. 607]; United Shoe Mach. Co. v. Duplessis Independent Shoe Mach. Co., 133 Fed. 930.

92. Short v. Federation Brand Salmon Canning Co., 6 B. C. 385, 436; Aitcheson v. Maun, 9 Ont. Pr. 253, 473; Goldsmith v. Walton, 9 Ont. Pr. 10.

93. See supra § 526.

What constitutes infringement generally see supra §§ 489–515.

94. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Rumford Chemical Works v. Egg Baking Powder Co., 145 Fed. 953; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

95. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Rumford Chemical Works v. Egg Baking Powder Co., 145 Fed. 953; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

96. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Rumford Chemical Works v. Egg Baking Powder Co., 145 Fed. 953; Westinghouse Electric etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

[a] **Place of acceptance.**—(1) There is an act of infringement in the district where an offer to buy is accepted and the contract of sale is closed in the district by an agent on behalf of defendant. Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co., 118 Fed. 852. (2) On the other hand there is no act of infringement in the district where orders are merely solicited or taken in the district and they are subject to acceptance or rejection, and the sales, if any, are consummated, in another district. W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 SCt 458, 59 L. ed. 808 [aff 212 Fed. 156, 129 CCA 12]; Cutler-Hammer Mfg. Co. v. Curtis, 296 Fed. 117; Stryker Deflector Co. v. Perrin Mfg. Co., 256 Fed. 656, 168 CCA 50; United Autographic Register Co. v. Egry Register Co., 219 Fed. 637.

[b] **Sale of product of patented process** in the district in question is not sufficient to constitute infringement and confer jurisdiction where the product was made by the process in another district and defendant is not an inhabitant of the district in which the suit was brought. Kryiak v. Owens Bottle Co., 25 F. (2d) 358.

97. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

98. S. S. White Dental Mfg. Co. v. Dental Co. of America, 263 Fed. 719 [aff 266 Fed. 524].

Contributory infringement generally see supra §§ 516–519.

99. S. S. White Dental Mfg. Co. v. Dental Co. of America, 263 Fed. 719 [aff 266 Fed. 524].

1. Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

2. Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., supra.

Soliciting or taking orders accepted or rejected elsewhere see supra note 96 [a] (2).

3. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 116 Fed. 641.

4. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160 (intention abandoned, either temporarily or permanently).

5. Colgate v. Procter, etc., Mfg. Co., supra.

6. See supra § 526.

7. See supra § 526.

8. Winterbottom v. Casey, 283 Fed. 518.

[a] **Places held within term** include: (1) Large and valuable manufacturing plant. McKinnon Chain Co. v. American Chain Co., 259 Fed. 873 [aff 268 Fed. 353]. (2) Warehouse containing defendant's sole stock of goods and from which all orders are filled, and all shipments are made, in the conduct of his business. Smith v. Farbenfabriken of Elberfeld Co., 203 Fed. 476, 121 CCA 598.

[b] **Places held not within term** include: (1) Space in an exposition occupied temporarily for the exhibition of wares. L. E. Waterman Co. v. Parker Pen Co., 100 Fed. 544, 9 Pa. Dist. 194 [app dism 107 Fed. 141, 46 CCA 203]. (2) Place of business of distributor of automobiles who purchases them from defendant and is not an agent of the latter. Rosenbluth v. Hudson Motor Car Co., 265 Fed. 680. (3) A regular and established place only for the purpose of receiving and transmitting communications to and from defendant in another state. American Electric Welding Co. v. Lalance, etc., Mfg. Co., 256 Fed. 34. (4) A field office (Winterbottom v. Casey, 278 Fed. 847) (5) established to facilitate the doing of a particular piece of work but at which no other regular business is transacted (Winterbottom v. Casey, 283 Fed. 518). (6) The office of a representative or sales agent who merely solicits orders which are accepted and billed outside the district. W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 SCt 458, 59 L. ed. 808 [aff 212 Fed. 156, 129 CCA 12]; General Electric Co. v. Best Electric Co., 220 Fed. 347 (statement in advertising literature of defendant corporation that it has offices in all the principal cities, without specifying any office in any city, does not suffice to make the office at which its sales agent chooses to make his personal headquarters its regular and established place of business).

9. Zimmers v. Dodge, 21 F. (2d) 152; American Electric Welding Co. v. Lalance, etc., Mfg. Co., 256 Fed. 34.

10. Winterbottom v. Casey, 283 Fed. 518; General Electric Co. v. Best Electric Co., 220 Fed. 347.

11. American Electric Welding Co. v. Lalance, etc., Mfg. Co., 256 Fed. 34.

[a] **"'Regular place of business'** is, obviously, a place where such business is carried on 'regularly,' and not merely temporarily, or for some special work or particular transaction." Winterbottom v. Casey, 283 Fed. 518, 521.

12. American Electric Welding Co. v. Lalance, etc., Mfg. Co., 256 Fed. 34.

[a] **Mere "place of business" distinguished.**—"Passing for the moment to consider the proper construction of the phrase 'established place of business,' the words themselves necessarily indicate that an 'established' place of business is more

ularly established place of business therein,[13] or where one defendant is an inhabitant of the district and the other defendants are inhabitants of other districts in the same state,[14] but not where one defendant is an inhabitant of another state, has committed no act of infringement, and has no regular and established place of business in the district, and does not consent to jurisdiction.[15]

Counterclaim for infringement of a patent is within the application of the statute,[16] notwithstanding a rule of court relating to counterclaims in equitable suits,[17] and jurisdiction of the person of plaintiff in respect of the counterclaim does not exist unless he is within the requirements of the statute[18] or, by waiver of objections or otherwise, consents to jurisdiction.[19]

Second suit against same defendant. A suit for a new infringement committed by the same defendant after the termination of the prior suit need not be brought in the same district as the former suit where jurisdiction can be obtained only by consent,[20] but may be brought in any district wherein the jurisdictional facts exist.[21]

Reissued patent. Subject to such restrictions as are imposed by statute,[22] the owner of a reissued patent has the legal right to decide where he will bring suit for infringement thereof,[23] without interference from a person who was defendant in a former suit for infringement of the original patent.[24]

[§ 529] **2. Conditions Precedent.** By virtue of a federal statute, and the construction placed thereon, it is essential to the recovery of damages, although not to the issuance of an injunction, in a suit for infringement of a patent, that plaintiff shall have given notice, either to the whole public by marking his article "patented," or to the particular defendants by informing them of his patent and their infringement thereof; and where direct notice to defendants is relied upon damages, profits, and an accounting, are limited to acts of infringement committed after the giving of the notice.[25]

[§ 530] **3. Time To Sue—a. In General.** An inventor cannot sue for infringement until after a patent has issued for his invention;[26] but after a patent has issued to him, he is not obliged to defer the bringing of suit until after the termination of proceedings on an interference declared between his patent and pending applications;[27] and after the owner of a patent has obtained an interlocutory decree adjudging its validity and infringement, he is not required to wait until it has become final before bringing suit for infringement by the same device in another district.[28]

[§ 531] **b. Limitations.**[29] By express provision of a federal statute no damages or profits can be recovered for acts of infringement occurring more than six years before suit is brought;[30] and the statute applies to actions at law[31] as well as to suits in equity.[32] In all cases where a federal statute of limitation exists, state statutes of limitation can have no application;[33] but prior to 1870,[34] and from 1874 to 1897,[35] no federal statutes existed limiting the time within which actions for infringement of patents must be brought, and the question frequently arose whether actions at law were subject to state statutes of limitation, it being held in some cases that they were[36] and in others that they were

than, or at the very least different from, merely a 'place of business.' Otherwise Congress used a meaningless word, an act, with a result, which surely could not have been intended and should not be inferred, unless no other construction be possible. It is, however, entirely clear that the word was selected deliberately, to signify that the particular place of business contemplated was not any place where business might be transacted, however temporarily, but must be a permanent place of business." Winterbottom v. Casey, 283 Fed. 518, 521.

13. Edison v. Allis-Chalmers Co., 191 Fed. 837.

14. Zell v. Erie Bronze Co., 273 Fed. 833. Contra Cheatham Electric Switching Device Co. v. Transit Dev. Co., 191 Fed. 727.

[a] **Application of general statute.**—Judicial Code § 52, providing generally that, where two or more defendants reside in different districts of the same state, suit may be brought in a district in which one resides, is applicable to a suit for infringement of a patent. Zell v. Erie Bronze Co., 273 Fed. 833. Contra Cheatham Electric Switching Device Co. v. Transit Dev. Co., 191 Fed. 727.

15. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem].

16. See cases infra note 17.

17. Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F. (2d) 139; Parker Pen Co. v. Rex Mfg. Co., 11 F. (2d) 533.

18. Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F. (2d) 139; Parker Pen Co. v. Rex Mfg. Co., 11 F. (2d) 533; McGill v. Sorensen, 209 Fed. 876.

[a] **"Engaging in litigation** in a district is not doing business there, within this section." Durabilt Steel Locker Co. v. Berger Mfg. So., 21 F. (2d) 139.

19. See cases infra this note.

[a] **Existence and extent of consent.**—(1) By bringing suit, plaintiff does not appear, or subject himself to jurisdiction, in respect of a counterclaim for infringement of a patent unconnected with and not arising out of the subject matter of the original suit. Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F. (2d) 139; Parker Pen Co. v. Rex Mfg. Co., 11 F. (2d) 533. Compare U. S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co., 216 Fed. 186 (plaintiff subjects himself to any counterclaim which defendant may set up in his answer under Equity Rules, rule 30). Contra Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796 [mod 300 Fed. 834]. (2) By replying to an answer setting up infringement of a particular patent, plaintiff assents to jurisdiction of his person in respect of that patent (Krentler-Arnold Hinge Last Co. v. Leman, supra; Parker Pen Co. v. Rex Mfg. Co., supra), (3) but not of another patent, infringement of which is attempted to be set up by amendment of the answer (Parker Pen Co. v. Rex Mfg. Co., supra).

20. U. S. Rubber Co. v. I. T. S. Rubber Co., 288 Fed. 786 [rev 278 Fed. 975, and certiorari den 262 U. S. 748 mem, 43 SCt 523 mem, 67 L. ed. 1213 mem].

21. I. T. S. Rubber Co. v. U. S. Rubber Co., 278 Fed. 975 [rev on other grounds 288 Fed. 786 (certiorari den 262 U. S. 748 mem, 43 SCt 523 mem, 67 L. ed. 1213 mem)].

22. See supra § 526.

23. Frink Co. v. Erikson, 20 F. (2d) 707 [vacating decree 16 F. (2d) 498].

24. Frink Co. v. Erikson, supra.

25. See supra § 484.

26. Rees v. Lombard, 21 F. (2d) 276; Kuhlke Mach. Co. v. Miller Rubber Co., 8 F. (2d) 614; Rein v. Clayton, 37 Fed. 354, 3 LRA 78; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

Absence of infringement before issuance of patent see supra § 490.

27. Knight v. Rite Shoe Co., 23 F. (2d) 903; Kuhlke Mach. Co. v. Miller Rubber Co., 8 F. (2d) 614.

Interference proceedings generally see supra §§ 196–222.

28. Bredin v. National Metal Weatherstrip Co., 147 Fed. 741 [aff 157 Fed. 1003].

29. Laches within period of limitation see infra § 532.

30. U. S. Rev. St. § 4921.

[a] **Statute applied to existing causes of action.**—American Pneumatic Tool Co. v. Pratt, etc., Co., 106 Fed. 229.

31. Peters v. Hanger, 134 Fed. 586, 67 CCA 386.

32. Peters v. Hanger, supra.

33. Hayden v. Oriental Mills, 22 Fed. 103; Sayles v. Louisville City R. Co., 9 Fed. 512; Sayles v. Dubuque, etc., R. Co., 21 F. Cas. No. 12,417, 3 Bann. & A. 219, 5 Dill. 561; Sayles v. Oregon Cent. R. Co., 21 F. Cas. No. 12,423, 4 Bann. & A. 429, 8 Reporter 424, 6 Sawy. 31; Sayles v. Richmond, etc., R. Co., 21 F. Cas. No. 12,424, 4 Bann. & A. 239, 3 Hughes 172, 7 Reporter 743; Vaughan v. East Tennessee, etc. R. Co., 28 F. Cas. No. 16,898, 2 Bann. & A. 537, 1 Flipp. 621.

34. Campbell v. New York, 81 Fed. 182; Hayden v. Oriental Mills, 22 Fed. 103; Parker v. Hallock, 18 F. Cas. No. 10,735, 2 Fish. Pat. Cas. 543 note; Wood v. Cleveland Rolling-Mill Co., 30 F. Cas. No. 17,941, 4 Fish. Pat. Cas. 550.

35. Campbell v. Haverhill, 155 U. S. 610, 15 SCt 217, 39 L. ed. 280; May v. Logan, 30 Fed. 250.

36. Campbell v. New York, 81 Fed. 182; Royer v. Coupe, 29 Fed. 358 [rev on other grounds 155 U. S. 565, 15 SCt 199, 39 L. ed. 263]; Hayden v. Oriental Mills, 15 Fed. 605; Parker v. Hawk, 18 F. Cas. No. 10,737, 2

not,[37] the question being finally set at rest by the supreme court of the United States, which held that in the absence of federal legislation the statutes of limitation of the several states were applicable.[38]

[§ 532] **c. Laches—(1) In General.** A suit for infringement of a patent,[39] or at least particular relief therein,[40] may be barred by laches, as where there has been long delay in bringing suit[41] without a valid and sufficient excuse therefor,[42] or unreasonable delay,[43] or delay accompanied by circumstances amounting to an estoppel.[44] The question of laches depends upon whether, under all the circumstances, plaintiff is chargeable with lack of due diligence,[45] and it would be inexequitable to permit the enforcement of his claim;[46] and the facts and circumstances in a particular case may not be such as to constitute laches barring the suit.[47] Also, laches is not merely a question of lapse of time;[48] and mere delay in bringing suit, unaccompanied by such deceitful acts or silence on the part of the patentee, and by such circumstances, as amount to an equitable estoppel, will not warrant the application of the doctrine of laches,[49] at least where the suit is com-

Fish. Pat. Cas. 58; Rich v. Ricketts, 20 F. Cas. No. 11,762, 7 Blatchf. 230; Sayles v. Oregon Cent. R. Co., 21 F. Cas. No. 12,423, 4 Bann. & A. 429, 6 Sawy. 31.

37. Brickill v. Baltimore, 52 Fed. 737 [aff 60 Fed. 98, 8 CCA 500]; Brickill v. Hartford, 49 Fed. 372; Brickill v. Buffalo, 49 Fed. 371; California Artificial Stone Pav. Co. v. Starr, 48 Fed. 560; McGinnis v. Erie County, 45 Fed. 91; May v. Ralls County, 31 Fed. 473; May v. Cass County, 30 Fed. 762; May v. Logan County, 30 Fed. 250; May v. Buchanan County, 29 Fed. 469; Adams v. Bellaire Stamping Co., 25 Fed. 270; Hayward v. St. Louis, 11 Fed. 427, 3 McCrary 614; Sayles v. Dubuque, etc., R. Co., 9 Fed. 516; Anthony v. Carroll, 1 F. Cas. No. 487, 2 Bann. & A. 195; Collins v. Peebles, 6 F. Cas. No. 3,017, 2 Fish. Pat. Cas. 541; Parker v. Hallock, 18 F. Cas. No. 10,735, 2 Fish. Pat. Cas. 543 note; Read v. Miller, 20 F. Cas. No. 11,610, 2 Biss. 12, 3 Fish. Pat. Cas. 310; Vaughan v. East Tennessee, etc., R. Co., 28 F. Cas. No. 16,898, 2 Bann. & A. 537, 1 Flipp. 621; Wetherill v. New Jersey Zinc Co., 29 F. Cas. No. 17,464, 1 Bann. & A. 485.

38. Campbell v. Haverhill, 155 U. S. 610, 15 SCt 217, 39 L. ed. 280.

39. Lowe v. Pacific Gas, etc., Co., 2 F. (2d) 157; Yates v. Smith, 271 Fed. 27 [aff 271 Fed. 33 (certiorari den 256 U. S. 693 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem)]; General Electric Co. v. Yost Electric Mfg. Co., 208 Fed. 719 [app dism 214 Fed. 1021, 129 CCA 665]; Brown, etc., Mfg. Co. v. Coates Clipper Mfg. Co., 195 Fed. 84 [aff 200 Fed. 149, 118 CCA 479]; Fichtel v. Barthel, 173 Fed. 489; Germer Stove Co. v. Twentieth Century Heating, etc., Co., 157 Fed. 842; Beid-Archer Co. v. North American Chemical, etc., Co., 147 Fed. 746; Wilcox, etc., Co. v. Farrand Organ Co., 139 Fed. 46; American Tube Works v. Bridgewater Iron Co., 132 Fed. 16, 65 CCA 636; Meyrowitz Mfg. Co. v. Eccleston, 98 Fed. 437; McLaughlin v. People's R. Co., 21 Fed. 574; Goodyear v. Honsinger, 10 F. Cas. No. 5,572, 2 Biss. 1, 3 Fish. Pat. Cas. 147; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

[a] **Action against mere user.**—A patentee cannot maintain an action of infringement against a mere user who, in common with the public generally, has used the patented device for a period of eleven years with the full knowledge of the patentee and without objection. Edison Electric Light Co. v. Equitable L. Assur. Soc., 55 Fed. 478.

40. See infra §§ 533-535.

41. Wolf Mineral Process Corp. v. Minerals Separation North American Corp., 18 F. (2d) 483 [aff 7 F. (2d) 903, and certiorari den 275 U. S. 558 mem, 48 SCt 118 mem, 72 L. ed. 425 mem]; Wilkie v. Manhattan Rubber Mfg. Co., 8 F. (2d) 785 [aff 14 F. (2d) 811] (thirteen years after warning); Cummings v. Wilson, etc., Mfg. Co., 4 F. (2d) 453 [certiorari den 268 U. S. 701 mem, 45 SCt 637 mem, 69 L. ed. 1165 mem] (sixteen years).

42. Dwight, etc., Sintering Co. v. Greenawalt, 20 F. (2d) 533 [aff 27 F. (2d) 823]; Universal Arch Co. v. American Arch Co., 290 Fed. 647; Hall v. Frank, 195 Fed. 946 [aff 202 Fed. 213, 120 CCA 613].

Sufficiency of excuse see infra § 536.

43. Window Glass Mach. Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645 [certiorari den 261 U. S. 623 mem, 43 SCt 518 mem, 67 L. ed. 832 mem].

44. See cases infra this note.

[a] **Where both laches and estoppel are shown,** the bill should be dismissed and all relief denied. George J. Meyer Mfg. Co. v. Miller Mfg. Co., 24 F. (2d) 505.

[b] **Estoppel to assert different construction of patent.**—(1) Where a patentee, with knowledge of a device made by defendant, makes no claim of infringement for several years, he will be held estopped thereafter to place a different construction on his patent, for the purpose of making out a case of infringement. McGill v. Whitehead, etc., Co., 137 Fed. 97; Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 129 Fed. 604 [aff 173 Fed. 361, 97 CCA 621 (rev on other grounds 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222)]. (2) A delay of ten years by a patent owner after knowledge of an alleged infringement, and correspondence with defendant, who in good faith contended for a construction of the patent avoiding infringement, is such laches as will bar all relief in equity. Starrett v. J. Stevens Arms, etc., Co., 96 Fed. 244 [aff 100 Fed. 93, 40 CCA 289]. (3) Also, where plaintiff, the owner of a patent relating to concrete arches in bridges and buildings, has for years since the issuance of the patent been in close touch with concrete construction throughout the United States, and during that time bridges and other structures coming as near infringing the patent as the structure in controversy have been erected by individuals and municipalities without the assertion of any right by plaintiff, he is estopped by laches from asserting such a construction of his patent as would bring the structure in controversy within its meaning. Thacher v. Polk County, 235 Fed. 724.

Estoppel apart from delay or laches see infra § 539.

45. Starr Piano Co. v. Auto Pneumatic Action Co., 12 F. (2d) 586.

46. Frank F. Smith Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544 [certiorari den 265 U. S. 592 mem, 44 SCt 637 mem, 68 L. ed. 1194 mem]; Peirce-Smith Converter Co. v. United Verde Copper Co., 293 Fed. 108; Window Glass Mach. Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645 [certiorari den 261 U. S. 623 mem, 43 SCt 518 mem, 67 L. ed. 832 mem].

[a] **Delay in patent office proceedings.**—A bill of complaint will not be dismissed for want of equity because of long pendency of the proceedings on the application in the patent office where the numerous delays, although caused by the applicant, were within the time allowed by statute. Overland Motor Co. v. Packard Motor Car Co., 274 U. S. 417, 47 SCt 672, 71 L. ed. 1131.

47. Salvage Process Co. v. Shewan, 26 F. (2d) 258; Allington v. Forest Box, etc., Co., 25 F. (2d) 141; Karesh v. Shell-On Sol-Ted Peanut Co., 17 F. (2d) 496; Peirce-Smith Converter Co. v. United Verde Copper Co., 293 Fed. 108; Æolian Co. v. Schubert Piano Co., 261 Fed. 178; Wright's Automatic Tobacco Packing Mach. Co. v. American Tobacco Co., 220 Fed. 163; Aiken v. Riter, etc., Mfg. Co., 205 Fed. 531; Byerley v. Sun Co., 181 Fed. 138 [aff 184 Fed. 455, 106 CCA 537]; Joseph Schneible Co. v. Ebling Brewing Co., 175 Fed. 781; New York Phonograph Co. v. Edison, 136 Fed. 600 [aff 144 Fed. 404, 75 CCA 382]; Carter v. Wollschlaeger, 53 Fed. 573.

48. Frank F. Smith Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544 [certiorari den 265 U. S. 592 mem, 44 SCt 637 mem, 68 L. ed. 1196 mem]; Peirce-Smith Converter Co. v. United Verde Copper Co., 293 Fed. 108; Marconi Wireless Tel. Co. v. National Electric Signaling Co., 213 Fed. 815.

[a] **"There are peculiar and special reasons** why the holder of a patent should not be barred from enforcing his right under the patent because of his failure to promptly sue infringers. Frequently the position of the patentee (financial and otherwise) prevents the institution of suits. The patent litigation is often prolonged and expensive. Moreover from the very nature of the thing he cannot be fully cognizant of all infringements that occur throughout the length and breadth of this country. His information may be largely hearsay. Then, also, the validity of his patent and the infringement thereof may be, as here, disputed. These defenses present mixed questions of fact and law concerning which there is necessarily some doubt and uncertainty. . . . In a doubtful case the commercial success of the patented art is at times determinative of the issue of validity. This factor cannot be shown save as time establishes it. Moreover, common experience proves that inventions which appear to be revolutionary are often not accepted by the public and never become a commercial success. A patentee is therefore justified in waiting to ascertain whether realizations equal expectations." George J. Meyer Mfg. Co. v. Miller Mfg. Co., 24 F. (2d) 505, 507.

49. U. S. Slicing Mach. Co. v. Wolf, 249 Fed. 245 [aff 261 Fed. 195]; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [rev 209 Fed. 854, and certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem]; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 52 CCA 559; Imperial Chemical Mfg. Co. v. Stein, 77 Fed. 612, 23 CCA 353 [rev 69 Fed. 616]; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203; Bragg Mfg. Co. v. Hartford, 56 Fed. 292; Price v. Joliet Steel Co., 46 Fed. 107; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519; Atlantic Giant-Powder Co. v. Rand, 2 F. Cas. No. 626, 4 Bann. & A. 263, 16 Blatchf. 250; Stevens v. Felt, 23 F. Cas. No. 13,397.

"Delay and silence within the life of a patent, unaccompanied by such acts or silence of the owner as amount to inducing deceit and thereby to an equitable estoppel . . . will not deprive such owner of his right to recover for an infringement of the exclusive rights secured to him by the patent." Drum v. Turner, 219 Fed. 188, 198, 135 CCA 74 [certiorari

mence within the statutory period of limitation,[50] it being only under very special circumstances that complainant will be held chargeable with laches where he sues within such period.[51]

Dismissal or discontinuance of prior suit against the same defendant[52] and a slight delay in commencing the subsequent suit[53] do not necessarily constitute laches barring the second suit; but a long delay in instituting the second suit constitutes laches barring it where defendant protested against the dismissal of the suit, threatened to infringe, and subsequently expended a large sum in new plants and machinery.[54] No laches or estoppel on the part of plaintiff exists where the suit dismissed was against one of defendant's customers, and defendant changed the design of the machine manufactured by him with the avowed purpose of avoiding infringement of plaintiff's patent.[55]

Affirmative relief asked by each party. The general rule that, where each of the parties seeks affirmative relief against the other in reference to the same transaction, neither may assert that the other was guilty of laches[56] does not, of course, apply in a suit for infringement of a patent where the facts do not bring the case within it.[57]

[§ 533] **(2) As Bar to Particular Relief or Recovery—(a) Injunction—aa. In General.** Courts of equity refuse to grant relief by way of injunction against infringement where complainant has long delayed to seek relief under circumstances indicating acquiescence in the infringement,[58] or where he has not shown good faith, conscience, activity, and diligence.[59] However, delay and acquiescence sufficient to prove a preliminary injunction[60] may not be sufficient to deprive complainant of all relief in a court of equity[61] or prevent the court, on final hearing, from granting such relief as may be just and equitable,[62] as, for instance, a final injunction against future infringement;[63] and, likewise, delay which, in equity, prevents a recovery of, or accounting for, profits and damages for past infringements[64] does not necessarily prevent a court of equity from enjoining future infringements.[65]

[§ 534] **bb. Preliminary Injunction.** Ordinarily, a preliminary injunction will not be granted in a suit for infringement of a patent[66] where there has been laches on the part of plaintiff,[67] as where he delayed bringing suit, or applying for an injunction, for a considerable period of time after acquiring knowledge of infringement,[68] during that period he acquiesced in, or did not object to, the infringement,[69] and he does not satisfactorily explain the acquiescence;[70] but where it seems apparent that an injunction at the final hearing is inevitable, an injunction pendente lite will be granted, notwithstanding laches of complainant in asserting his rights;[71] and the right to a preliminary injunction is not barred or affected by delay where the delay is slight and defendant has not been induced to change his posi-

den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem].

[a] **Thus** (1) mere delay in bringing suit for infringement of a patent will not prevent the owner thereof from obtaining relief in a court of equity when the infringement has been persisted in with knowledge of the patent, and there have been no acts of commission or omission on the part of the patentee to encourage its use. Wilcox, etc., Co. v. Farrand Organ Co., 139 Fed. 46. (2) Complainant's failure to sue for infringement of its patents for some years after it was begun does not amount to laches, barring recovery, where an officer of complainant notified defendant it was infringing and threatened suit, and defendant made no outlay and did not change its position on the faith of any act of complainant. U. S. Slicing Mach. Co. v. Wolf, Sayer & Heller, Inc., 249 Fed. 245 [aff 261 Fed. 195]. (3) Where defendant, or the former owner of his business, ceased for a time to manufacture the infringing machine or device (Todd Protectograph Co. v. Safe-Guard Check Writer Co., 291 Fed. 613), (4) or promised to cease manufacturing (Rajah Auto Supply Co. v. Belvidere Screw, etc., Co., 275 Fed. 761), (5) plaintiff is not barred by either laches or estoppel from maintaining the suit.

50. Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 296 Fed. 188. And see Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341 (suit commenced within statutory limitation of analogous actions at law).

Limitations see supra § 531.

51. Yates v. Smith, 271 Fed. 27 [aff 271 Fed. 33 (certiorari den 256 U. S. 693 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem)]; Benthall Mach. Co. v. National Mach. Corp., 222 Fed. 918 [rev on other grounds 241 Fed. 72].

52. Victor Talking Mach. Co. v. Cheney Talking Mach. Co., 275 Fed. 444 [mod on other grounds 278 Fed. 445]; Welsbach Light Co. v. Cohn, 181 Fed. 122.

53. Thompson v. Jewett, 23 F. Cas. No. 13,961 (one year).

54. Window Glass Mach. Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645 [certiorari den 261 U. S. 623 mem, 43 SCt 518 mem, 67 L. ed. 832 mem].

55. Creamery Package Mfg. Co. v. Miller Pasteurizing Mach. Co., 6 F. (2d) 838 [certiorari den 269 U. S. 575 mem, 46 SCt 102 mem, 70 L. ed. 420 mem].

56. See Equity § 215.

57. Cummings v. Wilson, etc., Mfg. Co., 4 F. (2d) 453 [certiorari den 268 U. S. 701 mem, 45 SCt 637 mem, 69 L. ed. 1165 mem].

58. Daniel v. Miller, 81 Fed. 1000; Concord v. Norton, 16 Fed. 477; Cooper v. Mattheys, 6 F. Cas. No. 3,200; Jones v. Merrill, 13 F. Cas. No. 7,481.

59. Cooper v. Mattheys, 6 F. Cas. No. 3,200, 5 PaLJ 38.

[a] **Both parties innocent.**— Where there is no acquiescence on the part of the patentee, nor conscious infringement on the part of defendants, there is no moral delinquency on either side, or an actual estoppel; and both parties being innocent, diligence will be required of him whose property is to be protected, and the patentee will be left to his action for damages. Merriam v. Smith, 11 Fed. 588.

60. See infra § 534.

61. Beattie Mfg. Co. v. Smith, 275 Fed. 164 [aff 266 Fed. 701].

62. Beattie Mfg. Co. v. Smith, supra; Empire Cream Separator Co. v. Sears, 157 Fed. 238 [rev on other grounds 160 Fed. 668, 87 CCA 556].

63. Sawyer Spindle Co. v. Taylor, 69 Fed. 837.

64. See infra § 535.

65. Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325], Imperial Mach., etc., Corp. v. American Mach. Co., 276 Fed. 436; Rajah Auto Supply Co. v. Belvidere Screw, etc., Co., 275 Fed. 761; Closz, etc., Mfg. Co. v. J. I. Case Threshing Mach. Co., 216 Fed. 937; Marconi Wireless Tel. Co. v. National Electric Signaling Co., 213 Fed. 815; Mosler v. Lurie, 209 Fed. 364, 126 CCA 290 [rev 200 Fed. 433]; Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. 357.

66. Other grounds for denying preliminary injunction see infra §§ 597–605.

67. Byerley v. Standard Asphalt, etc., Co., 189 Fed. 759; Ladd v. Cameron, 25 Fed. 37; Hall v. Speer, 11 F. Cas. No. 5,947.

68. L. H. Gilmer Co. v. Geisel, 168 Fed. 313 (several years); Hockholzer v. Eager, 12 F. Cas. No. 6,556, 2 Sawy. 361 (eighteen months).

69. Beattie Mfg. Co. v. Smith, 275 Fed. 164 [aff 266 Fed. 701]; Empire Cream Separator Co. v. Sears, 157 Fed. 238 [rev on other grounds 160 Fed. 668, 87 CCA 556]; Brush Electric Co. v. Electric Storage Battery Co., 64 Fed. 775; Price v. Joliet Steel Co., 46 Fed. 107; Waite v. Chichester Chair Co., 45 Fed. 258; Keyes v. Pueblo Smelting, etc., Co., 31 Fed. 560; Ladd v. Cameron, 25 Fed. 37; Mundy v. Kendall, 23 Fed. 591; United Nickel Co. v. New Home Sewing Mach. Co., 17 Fed. 528, 21 Blatchf. 415; Goodyear v. Honsinger, 10 F. Cas. No. 5,572, 2 Biss. 1, 3 Fish. Pat. Cas. 147; Green v. French, 10 F. Cas. No. 5,757, 4 Bann. & A. 169; North v. Kershaw, 18 F. Cas. No. 10,311, 4 Blatchf. 70; Sloat v. Plymton, 22 F. Cas. No. 12,948; Sperry v. Ribbans, 22 F. Cas. No. 13,238, 3 Bann. & A. 260; Spring v. Domesitc Sewing-Mach. Co., 22 F. Cas. No. 13,258, 4 Bann. & A. 427; Whitney v. Rollstone Mach. Works, 29 F. Cas. No. 17,596, 2 Bann. & A. 170; Bovill v. Crate, L. R. 1 Eq. 388; Bridson v. Benecke, 12 Beav. 1, 50 Reprint 960; Flavel v. Harrison, 10 Hare 467, 44 EngCh 452, 68 Reprint 1010; Baxter v. Combe, 1 Ir. Ch. 284.

[a] **Preliminary injunction will not issue against mere user** of a machine, when the patentee has known for several years that the makers thereof were manufacturing such machines and did not warn or proceed against them or anyone else. Ballou Shoe-Mach. Co. v. Dizer, 85 Fed. 864.

[b] **One who is known to patentee to be using his patent in apparent good faith** is entitled to definite and early information of the patentee's construction of his own rights, and of his intention to enforce them. Morris v. Lowell Mfg. Co., 17 F. Cas. No. 9,833, 3 Fish. Pat. Cas. 37.

70. See cases supra note 69.

71. Brush Electric Co. v. Electric Impr. Co., 45 Fed. 241.

tion,[72] or defendant has had notice or knowledge, during the entire period of delay, of the patent and the rights or claims thereunder.[73]

[§ 535] **(b) Damages and Profits.** Generally speaking, a recovery of, or accounting for, profits and damages for past infringements may be barred in equity by laches,[74] not only where there has been acquiescence and inexcusable laches,[75] but also where there has been mere delay in seeking relief;[76] and not only where there was actual knowledge of infringement during a long period of delay,[77] but also where, during a long period of time, the alleged infringing acts were committed openly and under such circumstances that the facts could have been ascertained by reasonable effort.[78] However, in some cases a recovery of, or accounting for, profits and damages has been allowed notwithstanding delay in the commencement of the suit,[79] as where there was a sufficient excuse for the delay[80] or defendant commenced and developed an infringing business after the validity of the patent had been adjudicated;[81] and a recovery of damages occurring after the commencement of the suit has been allowed where there was laches but no estoppel.[82]

[§ 536] **(3) Excuses for Delay.** Delay in suing an infringer may be excused on the ground that the infringing article, as at first constructed by defendant, was believed by complainant not to be commercially harmful, and the grounds for such belief were reasonable.[83] Also, laches is not to be imputed to a patent owner because of his failure to prosecute to judgment a suit against an infringer after the latter has become totally insolvent;[84] and plaintiff's poverty or lack of financial means to carry on litigation may be considered in connection with other matters as tending to excuse delay,[85] but it alone is not a sufficient excuse.[86] It is no excuse for delay that plaintiff's coöwners of the patent would not agree to prosecute infringers.[87]

Ignorance of infringement. Long acquiescence and laches on the part of a patentee may be excused by satisfactory proof that he had no knowledge or means of knowledge that his patent was being infringed,[88] or that his suspicions of infringement were allayed by the direct misrepresentations of defendant;[89] but a patentee cannot stand by with "easy indifference" when there are facts sufficient to put him on notice, and then plead ignorance as an excuse for his laches.[90]

Pendency of other infringement suits. Delay in the institution or prosecution of a suit for infringement of a patent is excused by the institution, pendency, and prosecution of another suit for infringement of the same patent;[91] and this is true regardless of whether the other suit is between the same parties and directed against the same product,[92] or is against another alleged infringer and involves the validity of the patent[93] or substantially the same

72. Union Paper-Bag Mach. Co. v. Binney, 24 F. Cas. No. 14,387, 5 Fish. Pat. Cas. 166 (three months after infringement ascertained).

73. General Electric Co. v. Nitrogon Electric Co., 292 Fed. 384.

[a] **Reasonable time.**—Mere forbearance to sue for a reasonable time, after notice given, will not, in the absence of any affirmative encouragement to defendant, affect plaintiff's right to a preliminary injunction in a plain case. Loring v. Booth, 52 Fed. 150; Collignon v. Hayes, 3 Fed. 912.

[b] **Several years.**—A delay of several years, after knowledge of defendant's infringement, will not affect the right to a preliminary injunction, where his proceedings have been the subject of dispute and negotiation during the whole period. National Heeling-Mach. Co. v. Abbott, 77 Fed. 462.

74. Alliance Securities Co. v. De Vilbiss Co., 24 F. (2d) 530; George J. Meyer Mfg. Co. v. Miller Mfg. Co., 24 F. (2d) 505; Rajah Auto Supply Co. v. Belvidere Screw, etc., Co., 275 Fed. 761; Wolf, Sayer & Heller, Inc. v. U. S. Slicing Mach. Co., 261 Fed. 195 [mod 249 Fed. 245]; Closz, etc., Mfg. Co. v. J. I. Case Threshing Mach. Co., 216 Fed. 937; Safety Car Heating, etc., Co. v. Consolidated Car Heating Co., 174 Fed. 658, 98 CCA 412.

75. Dwight, etc., Sintering Co. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533]; George J. Meyer Mfg. Co. v. Miller Mfg. Co., 24 F. (2d) 505; Vacuum Cleaner Co. v. Innovation Electric Co., 234 Fed. 942 [aff 239 Fed. 543, 152 CCA 421]; Marconi Wireless Tel. Co. v. National Electric Signaling Co., 213 Fed. 815; Keller v. Stolzenbach, 28 Fed. 81.

76. Dwight, etc., Sintering Co. v. Greenawalt, 27 F. (2d) 823 [aff 20 F. (2d) 533] (thirteen years without valid excuse); Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; Price v. Joliet Steel Co., 46 Fed. 107; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519. Contra Baltzley v. Spengler Loomis Mfg. Co., 262 Fed. 423; American St. Car Adv. Co. v. Jones, 122 Fed. 803 [rev on other grounds 142 Fed. 974, 74 CCA 236].

77. Westinghouse Air Brake Co. v. New York Air Brake Co., 111 Fed. 741 (seven years); Covert v. Travers Bros. Co., 96 Fed. 568 (fourteen years).

78. Imperial Mach., etc., Corp. v. American Mach. Co., 276 Fed. 436.

[a] **No effort to ascertain, or warn against, infringement.**—The court will not grant an accounting for damages or profits during a long period in which infringement was open and notorious and the owners of the patent made no effort to ascertain if there were any infringements or to caution or warn anybody against infringement, thus leading defendant to suppose that the owners intended to make no claim. Hitchcock v. Valley Camp Coal Co., 29 F. (2d) 426; Marconi Wireless Tel. Co. v. National Electric Signaling Co., 213 Fed. 815; Mosler v. Lurie, 209 Fed. 364, 126 CCA 290 [rev 200 Fed. 433].

79. See infra text and notes 80–82.

80. Hitchcock v. Valley Camp Coal Co., 29 F. (2d) 426 (allowing accounting not limited to nominal damages, from date plaintiff notified defendant of infringement); Frank F. Smith Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544 [certiorari den 265 U. S. 592 mem, 44 SCt 637 mem, 68 L. ed. 1196 mem].

Excuses for delay see infra § 536.

81. General Electric Co. v. Mallory, 294 Fed. 562 [aff 298 Fed. 579 (certiorari den 266 U. S. 609 mem, 45 SCt 94 mem, 69 L. ed. 466 mem)].

82. Wolf, Sayer & Heller, Inc. v. U. S. Slicing Mach. Co., 261 Fed. 195 [mod 249 Fed. 245].

83. Accumulator Co. v. Edison Electric Illum. Co., 63 Fed. 979.

84. Huntington Dry-Pulverizer Co. v. Newell Univ. Mill Co., 91 Fed. 661.

85. Frank F. Smith Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544 [certiorari den 265 U. S. 592 mem, 44 SCt 637 mem, 68 L. ed. 1196 mem].

86. Leggett v. Standard Oil Co., 149 U. S. 287, 13 SCt 902, 37 L. ed. 737; Cummings v. Wilson, etc., Mfg. Co., 4 F. (2d) 453 [certiorari den 268 U. S. 701 mem, 45 SCt 637 mem, 69 L. ed. 1165 mem]; Frank F. Smith Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544 [certiorari den 265 U. S. 592 mem, 44 SCt 637 mem, 68 L. ed. 1196 mem]; Tompkins v. St. Regis Paper Co., 236 Fed. 221, 149 CCA 411 [aff 226 Fed. 744]. Compare Kittle v. Hall, 29 Fed. 508 (while a patent is in a court of bankruptcy laches can be imputed to no one; it is not the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and his failure to do so is not negligence). Contra Munger v. Perlman Rim Corp., 244 Fed. 799 [aff 275 Fed. 21 (certiorari den 257 U. S. 645 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)]; Davis v. A. H. Reid Creamery, etc., Co., 187 Fed. 157 [aff 195 Fed. 80, 115 CCA 112]; Bradford v. Belknap Motor Co., 105 Fed. 63 [aff 115 Fed. 711, 53 CCA 293].

87. Hall v. Frank, 195 Fed. 946 [aff 202 Fed. 213, 120 CCA 613]; Richardson v. D. M. Osborne, etc., Co., 93 Fed. 828, 36 CCA 610 [aff 82 Fed. 95].

88. Tompkins v. St. Regis Paper Co., 236 Fed. 221, 149 CCA 411 [aff 226 Fed. 744]; Imperial Chemical Mfg. Co. v. Stein, 77 Fed. 612, 23 CCA 353; Kittle v. Hall, 29 Fed. 508; Van Hook v. Pendleton, 28 F. Cas. No. 16,851, 1 Blatchf. 187, Fish. Pat. R. 120; Wortendyke v. White, 30 F. Cas. No. 18,050, 2 Bann. & A. 25.

89. Wortendyke v. White, supra.

90. New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 24 Fed. 604.

91. Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 CCA 203; Edison Electric Light Co. v. Mt. Morris Electric Light Co., 57 Fed. 642 [mod on other grounds 58 Fed. 572, 7 CCA 375]; Edison Electric Light Co. v. Sawyer-Man Electric Co., 53 Fed. 592, 3 CCA 605; Carter v. Wollschlaeger, 53 Fed. 573; Brush Electric Co. v. Electric Impr. Co., 45 Fed. 241; Green v. Barney, 19 Fed. 420; Rumford Chemical Works v. Vice, 20 F. Cas. No. 12,136, 2 Bann. & A. 584, 14 Blatchf. 179; Van Hook v. Pendleton, 28 F. Cas. No. 16,851, 1 Blatchf. 187, Fish. Pat. R. 120.

92. Westinghouse Electric, etc., Co. v. Formica Insulation Co., 288 Fed. 330 [certiorari granted 263 U. S. 692 mem, 44 SCt 6 mem, 68 L. ed. 509 mem, and aff 266 U. S. 342, 45 SCt 117, 69 L. ed. 316].

93. Rousso v. Elco Towel Cabinet Co., Inc., 28 F. (2d) 300; Frank F. Smith Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544 [certiorari den 265 U. S. 592 mem, 44 SCt 637 mem, 68 L. ed. 1196 mem]; General Electric Co. v. Nitrogon Electric Co., 292 Fed. 384;

issue as that involved in the present suit.[94]

[§ 537] **(4) Laches of Prior Owner.** The acquiescence, if any, of a former owner of a patent in an alleged infringement thereof, or his laches or negligence, if any, in failing to seek relief for a considerable time after knowledge of an infringement, is chargeable against a subsequent assignee or purchaser,[95] and has the same effect in equity upon the latter's rights as his own acquiescence, laches, or negligence;[96] but, as in other cases,[97] a suit is not barred by mere delay unaccompanied by any act amounting to an estoppel.[98]

[§ 538] **4. Defenses[99]—a. In General.** Invalidity of the patent is a complete defense in a suit brought for infringement thereof.[1] Indeed, invalidity and noninfringement are the defenses usually interposed in suits for infringement of patents.[2] Defendant may show that plaintiff is not the owner of the patent;[3] but a technical defense as to legal ownership by complainant is not favored;[4] where plaintiff traces his title back to the patentee by assignments acknowledged before notaries public, and defendant is a stranger to the assignments, he cannot question plaintiff's title;[5] and where the patentee is defendant in a suit for infringement brought by the assignee and legal owner of the patent, he cannot defend on the ground that he was induced to part with the title to the patent by unfair representations.[6]

License granted by the patentee or owner of the patent is a complete and perfect defense to an action for infringement,[7] except where the conditions of the license have been violated,[8] in which case lack of uniformity in enforcing the conditions is not a defense.[9]

Coming into court with unclean hands. A patentee who uses the name of a court, in advance of adjudication, to harass or obstruct a rival comes into court with unclean hands,[10] and on that ground alone will be denied relief to which he otherwise

U. S. Fire Escape Counterbalance Co. v. Wisconsin Iron, etc., Works, 290 Fed. 171; General Electric Co. v. Mallory, 286 Fed. 175; Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395; Tompkins v. St. Regis Paper Co., 236 Fed. 221, 149 CCA 411 [aff 226 Fed. 744]; Hurd v. James Goold Co., 197 Fed. 756 [rev on other grounds 203 Fed. 998, 122 CCA 298]; Hutter v. Koscherak, 137 Fed. 92, U. S. Mitis Co. v. Detroit Steel, etc., Co., 122 Fed. 863, 59 CCA 589; Timolat v. Franklin Boiler Works Co., 122 Fed. 69, 58 CCA 405; Stearns-Roger. Mfg. Co. v. Brown, 114 Fed. 939, 52 CCA 559; New York Filter Mfg. Co. v. Jackson, 91 Fed. 422; New York Filter Mfg. Co. v. Loomis-Manning Filter Co., 91 Fed. 421; Norton v. Eagle Automatic Can Co., 57 Fed. 929; Jonathan Mills Mfg. Co. v. Whitehurst, 56 Fed. 589; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 795; Atlantic Giant-Powder Co. v. Rand, 2 F. Cas. No. 626, 4 Bann. & A. 263, 16 Blatchf. 250; Colgate v Gold, etc., Tel. Co., 6 F. Cas. No. 2,991, 4 Bann. & A. 415, 16 Blatchf. 503; Green v. French, 10 F. Cas. No. 5,757, 4 Bann. & A. 169, 2 N. J. L. J. 148. Compare Window Glass Mach. Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645 [certiorari den 261 U. S. 623 mem, 43 SCt 518 mem, 67 L. ed. 832 mem] (there is no quality in suits, which plaintiffs call test suits, which places additional liability for prior infringements upon those who are not parties, the institution of suit for infringement against one party is not alone notice to another party to abstain from a practice which he is pursuing in good faith, and defendant has a right to be proceeded against with reasonable diligence, without awaiting the determination of rights between plaintiffs and others).

[a] **Patentee is not obliged to proceed against all infringers at same time,** and acquiescence will not be inferred from his neglect to do so. McWilliams Mfg. Co. v. Blundell, 11 Fed. 419.

94. Schey v. Turi, 294 Fed. 679.

[a] **Infringement by substantially same machine.**—Delay does not constitute laches barring the suit where, during the delay, there is pending another suit against a different person for infringement by a machine which is the same, or substantially the same, as defendants. Plecker v. Poorman, 147 Fed. 528.

95. Simpson v. Newport News Shipbuilding, etc., Co., 18 F. (2d) 318 [aff 18 F. (2d) 325]; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 24 Fed. 604; Goodyear v. Honsinger, 10 F. Cas. No. 5,572, 2 Biss. 1, 3 Fish. Pat. Cas. 147; Spring v. Domestic Sewing-Mach. Co., 22 F. Cas. No. 12,258, 4 Bann. & A. 427, 2 N. J. L. J. 274. See Hills v. Hamilton Watch Co., 248 Fed. 499 (discussing the point). Compare Joseph Schneible Co. v. Ebling Brewing Co., 175 Fed. 781 (where complainant corporation commenced suit in about a month after it became owner of the patent, a member of the corporation was during the preceding four years the individual owner of the stock of the former corporate owner, but prior to that time was not in a position to institute or control a suit for infringement, the laches, if any, was in not instituting the suit during the four years).

[a] **Party who purchases patent which has for years been freely plundered** by a multitude of trespassers does not answer the charge of laches by showing that immediately after he acquired title he commenced to bring the wrongdoers to account. Kittle v. Hall, 29 Fed. 508.

96. Tompkins v. St. Regis Paper Co., 236 Fed. 221, 149 CCA 411 [aff 226 Fed. 744]. Woodmanse, etc., Mfg. Co. v. Williams, 68 Fed. 489, 15 CCA 520.

97. See supra § 532.

98. Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 149 CCA 345.

99. Cross references:
Grounds for denial of injunction see infra §§ 594–605, 609, 610.
Laches or acquiescence see supra §§ 532–537.

1. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Von Schmidt v. Bowers, 80 Fed. 121, 25 CCA 323 [certiorari den 166 U. S. 720 mem, 17 SCt 1002 mem, 41 L. ed. 1187 mem]; Henius v. Lublin, 30 Fed. 838; Shaw v. Colwell Lead Co., 11 Fed. 711, 20 Blatchf. 417; Miller v. Foree, 9 Fed. 603 [aff 116 U. S. 22, 6 SCt 204, 29 L. ed. 552]; Knight v. Baltimore, etc., R. Co., 14 F. Cas. No. 7,882, 3 Fish. Pat. Cas. 1, Taney 106; Moffit v. Gaar, 17 F. Cas. No. 9,690, 1 Bond 315, 1 Fish. Pat. Cas. 610 [aff 1 Black 273, 17 L. ed. 207]; Morris v. Huntington, 17 F. Cas. No. 9,831, 1 Paine 348, 1 Robb Pat. Cas. 448; Maw v. Massey-Harris Co., 14 Man. 252. But see Sampson v. Silverman, 275 Fed. 123, 124 ("The contention by an infringer that the device which he infringes constituted no advance in the art is not received with favor").

[a] **Defenses are not confined to those mentioned in statute** (1) relating to the matters which may be proved after giving notice in writing thereof in addition to pleading the general issue, but include any showing that the patent is void. Gardner v. Herz, 118 U. S. 180, 6 SCt 1027, 30 L. ed. 158; Thompson v. Boisselier, 114 U. S. 1, 5 SCt 1042, 29 L. ed. 76; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 28 L. ed. 665. (2) Statutory provision see infra § 576.

Validity of patent as essential to infringement see supra § 490.

2. Krichbaum v. McDanel, 282 Fed. 455; Batdorf v. Sattley Coin Handling Mach. Co., 238 Fed. 925.

3. Bunnett v. Smith, 13 M. & W. 552, 153 Reprint 231.

Persons entitled to sue see infra §§ 540–543.

4. McMichael, etc., Mfg. Co. v. Ruth, 128 Fed. 706, 63 CCA 304 [rev 123 Fed. 888]; Kansas City Hay-Press Co. v. Devo, 81 Fed. 726, 26 CCA 578, 84 Fed. 463, 28 CCA 464 [rev 72 Fed. 717]; A. B. Dick Co. v. Henry, 75 Fed. 388; Kearney v. Lehigh Valley R. Co., 27 Fed. 699; Graham v. McCormick, 11 Fed. 859, 10 Biss. 39 [rev on other grounds 129 U. S. 1, 9 SCt 213, 32 L. ed. 593]; Graham v. Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

5. Fraser v. Duffey, 196 Fed. 900.

6. Vacuum Engineering Co. v. Dunn, 209 Fed. 219, 126 CCA 313 [mod 202 Fed. 967, and mandate recalled 218 Fed. 991, 133 CCA 674].

7. De Forest Radio Tel., etc., Co. v. U. S., 273 U. S. 236, 47 SCt 366, 71 L. ed. 625; Hapgood v. Hewitt, 119 U. S. 226, 7 SCt 193, 30 L. ed. 369; Eunson v. Dodge, 18 Wall. (U. S.) 414, 21 L. ed. 766; Barber v. National Carbon Co., 129 Fed. 370, 64 CCA 40, 5 LRANS 1154; Young Reversible Lock-Nut Co. v. Young Lock-Nut Co., 66 Fed. 563; Aspinwall Mfg. Co. v. Gill, 32 Fed. 702; Brown v. Lapham, 27 Fed. 77, 23 Blatchf. 475; Hammacher v. Wilson, 26 Fed. 239 [app dism 145 U. S. 662 mem, 12 SCt 991 mem, 36 L. ed. 853 mem]; Loercher v. Crandal, 11 Fed. 872, 20 Blatchf. 106; Shaw v. Colwell Lead Co., 11 Fed. 711, 20 Blatchf. 417; Watson v. Smith, 7 Fed. 350; Bigelow v. Louisville, 3 F. Cas. No. 1,400, 3 Fish. Pat. Cas. 602; Black v. Hubbard, 3 F. Cas. No. 1,460, 3 Bann. & A. 39; Moody v. Taber, 17 F. Cas. No. 9,747, 1 Bann. & A. 41, Holmes 325; Stuart v. Shantz, 23 F. Cas. No. 13,556, 6 Fish. Pat. Cas. 35, 9 Phila. (Pa.) 376; Tilghman v. Hartell, 23 F. Cas. No. 14,039, 2 Bann. & A. 260, 11 Phila. (Pa.) 500 [rev on other grounds 99 U. S. 547, 25 L. ed. 357]; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519; Woodworth v. Cook, 30 F. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. R. 423; Wooster v. Singer Mfg. Co., 30 F. Cas. No. 18,039a; Wyeth v. Stone, 30 F. Cas. No. 18,107, 1 Story 273, 2 Robb Pat. Cas. 23.

[a] **Rule applicable, although license not formal.**—De Forest Radio Tel., etc., Co. v. U. S., 273 U. S. 236, 47 SCt 366, 71 L. ed. 625.

8. Jones v. Berger, 58 Fed. 1006; Timken v. Olin, 41 Fed. 169; Fetter v. Newhall, 17 Fed. 841, 21 Blatchf. 445.

9. Winchester Repeating Arms Co. v. Buengar, 199 Fed. 786.

10. Gerosa v. Apco Mfg. Co., 299

might be entitled.[11] However, the maxim, He who comes into equity must come with clean hands,[12] is not rendered applicable by the fact that the bill makes erroneous statements as to an immaterial matter[13] or that plaintiff makes misleading statements to procure a preliminary injunction, where the true state of facts is called to the attention of the court with sufficient promptness to prevent any inadvertent or summary action by it;[14] and the fact that plaintiff has wrongfully canceled, or committed a breach of, a contract with defendant which would have expired by its terms long before the commencement of the suit is not so directly connected with plaintiff's right which he is seeking to protect and enforce in the suit as to render the maxim applicable.[15]

Various matters held not to constitute defenses in a suit for infringement of a patent include: The fact that the patented invention has never been manufactured or put into commercial use by the owner of the patent;[16] inability of the manufacturer of a patented device to supply the demand therefor with promptness;[17] manufacture, use, or sale by defendant under, or in accordance with, another patent subsequent to the one in suit;[18] use of the invention only in connection with a gambling device;[19] the fact that defendant has been trespassing upon the rights of the owner of the patent for years with impunity;[20] ignorance of chemical reactions;[21] misnomer of an invention clearly described and claimed in the patent;[22] fraud on patent officials,[23] or fraud,[24] collusion,[25] or illegal procedure[26] in a statutory suit to compel issuance of the patent; membership of plaintiff in an illegal combination in restraint of trade;[27] a collateral agreement between the assignor and assignee of the patent that the former will not engage in the manufacture and sale of competing articles during the term of the patent;[28] the fact that a city, in soliciting bids for paving, specified a patented pavement;[29] and the circumstance that another person pays the cost of infringement.[30] A contract by defendant to manufacture the infringing device for the United States government is not a defense;[31] and whatever rights and equities the government may have as against its employee who has patented an invention are not available to, and do not constitute a defense in favor of, a third person sued for infringement.[32] In a suit for infringement of a combination patent, it is no defense that the various elements of the combination may be found in the prior art.[33] One entering the field with an infringing device at a time when the validity and scope of the patent are unquestioned and the patented article has an extensive market does not acquire any intervening rights relieving him from liability for infringing a reissue of the patent.[34]

Fed. 19 [aff 288 Fed. 871]; Panay Horizontal Show Jar Co. v. Aridor Co., 292 Fed. 858.

11. Panay Horizontal Show Jar Co. v. Aridor Co., supra.

12. See Equity § 163.

13. Connecticut Tel., etc., Co. v. Brown, 10 F. (2d) 823 (extent and character of plaintiff's business in patented article).

14. Connecticut Tel., etc., Co. v. Brown, supra.

15. General Electric Co. v. Minneapolis Electric Lamp Co., 10 F. (2d) 851 [app dism 7 F. (2d) 1020 mem].

16. Toledo Scale Co. v. Barnes Scale Co., 18 F. (2d) 965; French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673 mem, 46 SCt 486 mem, 70 L. ed. 1144 mem]; Hammond v. Benzer Corp., 295 Fed. 908; Acme Motor Shield Corp. v. Roberts Mfg. Co., 288 Fed. 127; Jost v. Borden Stove Co., 285 Fed. 626; Mastoras v. Hildreth, 263 Fed. 571 [rev 253 Fed. 68, and certiorari granted 254 U. S. 622 mem, 41 SCt 6 mem, 65 L. ed. 443 mem, and rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112]; Standard Tobacco Stemmer Co. v. Tobacco Stemming Mach. Co., 237 Fed. 822 [aff 247 Fed. 112, 159 CCA 330]; Morton Trust Co. v. American Car, etc., Co., 161 Fed. 546 [rev on other grounds 175 Fed. 568, 99 CCA 190]; Eastern Paper Bag Co. v. Continental Paper Bag Co., 150 Fed. 741 [aff 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122]; U. S. Fastener Co. v. Bradley, 149 Fed. 222, 79 CCA 180.

17. Commercial Acetylene Co. v. Autolux Co., 181 Fed. 387.

18. Beldam v. Garlock Packing Co., 29 F. (2d) 673; Radio Corp. v. Twentieth Century Radio Corp., 19 F. (2d) 290; French v. Buckeye Iron, etc., Works, 10 F. (2d) 257 [certiorari den 271 U. S. 673, mem, 46 SCt 486 mem, 70 L. ed. 1144 mem]; St. Louis Electrical Works v. Fore Electrical Mfg. Co., 267 Fed. 440 [rev on other grounds 280 Fed. 49 (certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem)]; Spirella Co. v. Nubone Corset Co., 180 Fed. 470 [rev on other grounds 183 Fed. 984, 106 CCA 224 [aff 216 Fed. 898)]; Electric Candy Mach. Co. v. Morris, 156 Fed. 972; Panyard Mach., etc., Co. v. Bowman, [1926] Can. Exch. 158.

[a] **Rule applied** where the subsequent patent was for a product, the patent sued on was for a process, and the product could not be created except by use of the process. Carborundum Co. v. Electric Smelting, etc., Co., 203 Fed. 976, 122 CCA 276 [certiorari den 231 U. S. 754 mem, 34 SCt 323 mem, 58 L. ed. 467 mem].

19. Mills v. Industry Novelty Co., 230 Fed. 463.

20. Frank F. Smith Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544 [certiorari den 265 U. S. 592 mem, 44 SCt 637 mem, 68 L. ed. 1196 mem]; Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 149 CCA 345; Drum v. Turner, 219 Fed. 188, 135 CCA 74 [rev 209 Fed. 854, and certiorari den 238 U. S. 633 mem, 35 SCt 938 mem, 59 L. ed. 1498 mem].

Laches see supra §§ 532–537.

21. General Bakelite Co. v. Nikolas, 225 Fed. 539.

[a] **Patent for product of chemical process.**—"It is no defense to a charge of infringement of a patent for a product produced by some chemical process, to assert ignorance of the reactions which take place, and thus to claim the right to combine substances which on analysis are shown to cause the reactions of the process leading to the patented product, and to obtain that product itself by methods shown to be those of the patent, even though never before understood until testified to upon the trial." General Bakelite Co. v. Nikolas, 225 Fed. 539, 555.

22. Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8.

23. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [remanding for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem].

"In litigation between private parties for infringement of a patent, the patent cannot be attacked for fraud said to have been practiced by the patentee on the patent officials in the procurement of the patent." Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651, 660 [certiorari den 278 U. S. 635 mem, 49 SCt 32 mem].

24. Western Glass Co. v. Schmertz Wire-Glass Co., 185 Fed. 788, 109 CCA 1 [mod 178 Fed. 977].

25. Western Glass Co. v. Schmertz Wire-Glass Co., supra.

26. Western Glass Co. v. Schmertz Wire-Glass Co., supra.

27. See Monopolies § 194.

28. Corrugated Paper Patents Co. v. Paper Working Mach. Co., 237 Fed. 380.

29. Consolidated Contract Co. v. Hassam Pav. Co., 227 Fed. 436, 142 CCA 132 [aff 215 Fed. 114].

30. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)].

31. Firth-Sterling Steel Co. v. Bethlehem Steel Co., 216 Fed. 755 [rev on other grounds 224 Fed. 937, 140 CCA 427].

Equitable jurisdiction of suit against public contractor see supra § 522.

Liability of public contractor see infra § 547.

32. Yablick v. Protecto Safety Appliance Corp., 21 F. (2d) 885; Hazeltine Corp. v. Electric Serv. Engineering Corp., 18 F. (2d) 662 (suit by assignee).

33. Star Ball Player Co. v. Baseball Display Co., 8 F. (2d) 46, 48; Independent Coal Tar Co. v. Cressy Contracting Co., 260 Fed. 463, 171 CCA 289.

"It certainly cannot avail defendant that it may search through the limits of the prior art, gathering here one element and there another, and, building them into a combination, deny infringement because all the elements can trace their lineage to the prior art, if the use made thereof produces virtually the same combination already obtained by an earlier patentee." Star Ball Player Co. v. Baseball Display Co., supra.

[a] **Prior patents.**—"The charge of infringement may not be averted by showing that in one patent some of the elements of the patent alleged to be infringed are used, and in another others, but it must be made to appear that all of the elements of the combination alleged to be infringed are united in one combination for which a prior patent has been issued." West v. Premier Register Table Co., 27 F. (2d) 653, 655.

34. Baldwin v. Abercrombie, etc., Co., 227 Fed. 455 [aff 228 Fed. 895, 143 CCA 293 (aff 245 U. S. 198, 38 SCt 104, 62 L. ed. 240)].

[§ 539] **b. Estoppel.**[35] The general principles of estoppel apply in suits for infringement,[36] unless the facts are not such as to render the principles applicable.[37] The language of plaintiff's advertising literature will not be given a strained construction in order to make it operate as an estoppel against plaintiff.[38] An agreement by two firms manufacturing under patents relating to the same subject matter, that neither will interfere with the other in the manufacture of the inventions set forth in their respective patents, and that each will protect the other against third parties, operates to disqualify one party from acquiring any right to prosecute the other for any alleged infringement arising from operating under the patents of the latter.[39]

[§ 540] **5. Persons Entitled To Sue and Parties Plaintiff—a. In General.** Generally speaking, a suit for infringement of a patent must be brought in the name of the owner of the patent,[40] and the legal owner is a necessary party complainant;[41] but an equitable title to a patent will support a suit for infringement against the holder of the legal title.[42] Until he has parted with his legal title to the patent, the patentee may sue.[43] Also, suit may be brought by an executor or administrator[44] or by a person who holds the legal title of the patent in trust,[45] although not by an attorney in fact,[46] a selling agent,[47] or a receiver appointed to take charge of, manage, and control the patent, but not vested with title thereto.[48]

Damages. A federal statute provides that damages for the infringement of a patent may be recovered by an action brought in the name of the party interested, either as patentee, assignee, or grantee.[49] The person "interested," within the meaning of the statute, is the person who was in-

35. Estoppel:
In connection with laches see supra § 532.
To dispute validity of patent see supra § 285.

36. Thomson v. Wooster, 114 U. S. 104, 5 SCt 788, 29 L. ed. 105; Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 119 Fed. 705; Jennings v. Rogers Silver Plate Co., 118 Fed. 339; Burrell v. Elgin Creamery Co., 96 Fed. 234; Time Tel. Co. v. Himmer, 19 F. Fed. 322.

[a] **Specific applications of rules.**—(1) Where a patentee, during the course of proceedings to obtain the patent, practically conceded priority of a specific process for making the same articles, his successor in title is estopped thereafter to assert infringement by articles made in accordance with the process. Goodwin Film, etc., Co. v. Eastman Kodak Co., 207 Fed. 351 [aff 213 Fed. 231, 129 CCA 575]. (2) One who fails to perform his agreement to assign a patent cannot sue his proposed assignee for infringement. Schmitt v. Nelson Valve Co., 125 Fed. 754, 60 CCA 522. (3) Admissions in open court are binding. Kirchberger v. American Acetylene Burner Co., 124 Fed. 764 [aff 128 Fed. 599, 64 CCA 107]. (4) An agreement of settlement between the parties will be given effect as to all matters covered thereby. Greenwald v. Weist, 193 Fed. 79.

37. See cases infra this note.

[a] **Matters held not to estop plaintiff.**—(1) Where, before issuance of a patent, a government employee applying therefor amended his application so as to eliminate a dedication to the public, there is no estoppel on the part of his assignee as against an alleged infringer who did not have any knowledge of the original application until after the amendment and the issuance of the patent. Hazeltine Corp. v. Electric Serv., etc., Corp., 18 F. (2d) 662. (2) The sale by a partner to his copartner of his interest in the firm, without warranty, does not estop him, on subsequently acquiring a patent covering articles of the kind manufactured by the firm, to maintain a suit against his former partner for infringement not committed during the partnership term. Dull v. Reynolds Electric Flasher Mfg. Co., 161 Fed. 129. (3) The holder of a reissue is not estopped to sue one who used the invention prior to reissue. Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72 [rev 100 Fed. 849]. (4) Nonuse or misuse of the invention by complainant does not operate as estoppel. Fuller v Berger, 120 Fed. 274, 56 CCA 588 [certiorari den 193 U. S. 668 mem, 24 SCt 852 mem, 48 L. ed. 839 mem]. (5) Plaintiff is not estopped from asserting infringement, on the ground that another person in whose later patent defendant had an interest was the commercial pioneer, and introduced his apparatus with success during a period in which plaintiff was inactive. Weber Electric Co. v. Cutler-Hammer Mfg. Co., 256 Fed. 31, 167 CCA 303.

[b] **Matters held not to estop defendant.**—(1) Filing an application for patent for the same thing does not estop defendant. Haughey v. Lee, 151 U. S. 282, 14 SCt 331, 38 L. ed. 162; R. Thomas, etc., Co. v. Electric Porcelain, etc., Co., 111 Fed. 923. (2) An agreement between complainant and defendant which, as between them, establishes the validity of complainant's patent and defendant's prior infringement, does not estop defendant to show that articles made by him after the date of the agreement, and differing from those made before, do not infringe the patent. Smith v. Southington Mfg. Co., 235 Fed. 160 [rev on other grounds 247 Fed. 342, 159 CCA 436]; American Specialty Stamping Co. v. New England Enameling Co., 178 Fed. 106. (3) The president of defendant corporation, who had, prior to its organization, built and sold infringing machines, which had not been paid for, and the accounts for which had been transferred to defendant, on behalf of defendant wrote a letter to the purchaser, in which he acknowledged the sale of the machines by defendant, and guaranteed in its behalf that they were not infringements. It was held that, while the letter would, as between defendant and the purchaser, estop defendant from denying the truth thereof, it did not estop defendant as against complainant from showing that it did not in fact build or sell the machines. Palmer v. Jordan Mach. Co., 186 Fed. 496 [rev on other grounds 192 Fed. 42, 112 CCA 454].

38. Connecticut Tel., etc., Co. v. Brown, 10 F. (2d) 823.

39. Pratt v. Wilcox Mfg. Co., 64 Fed. 589.

40. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)]; American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem].

[a] **Purpose of rule.**—The owner of the patent must be a party plaintiff not only to confer jurisdiction of the suit under the patent laws, but also in most cases to enable the alleged infringer to respond in one action to all claims of infringement for his act, and thus either to defeat all claims in one action or, by satisfying one adverse decree, to bar all subsequent actions. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)].

Exception where licensee sues licensor see infra § 542.

41. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Milwaukee Carving Co. v. Brunswick-Balke-Collender Co., 126 Fed. 171, 61 CCA 175; Owatonna Mfg. Co. v. Fargo, 94 Fed. 519; Gormully, etc., Mfg. Co. v. Stanley Cycle Mfg. Co., 90 Fed. 279; Carpenter v. Eberhard Mfg. Co., 78 Fed. 127; Dueber Watch-Case Mfg. Co. v. Fahys Watch-Case Co., 45 Fed. 697; Herbert v. Adams, 12 F. Cas. No. 6,394, 4 Mason 15, 1 Robb Pat. Cas. 505; North v. Kershaw, 18 F. Cas. No. 10,311, 4 Blatchf. 70; Potter v. Wilson, 19 F. Cas. No. 11,342, 2 Fish. Pat. Cas. 102.

42. Texas Co. v. Gulf Refining Co., 13 F. (2d) 873; Prest-O-Lite Co. v. Avery Portable Lighting Co., 164 Fed. 60.

43. Philadelphia, etc., R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. ed. 948; Ormsby v. Connors, 133 Fed. 548; Freese v. Swartchild, 35 Fed. 141; Still v. Reading, 9 Fed. 40, 4 Woods 345; Hussey v. Whitely, 12 F. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120; Park v. Little, 18 F. Cas. No. 10,715, 1 Robb Pat. Cas. 17, 3 Wash. C. C. 196; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149. Compare National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 SW 561 (the rule is otherwise where the patentee has conveyed all beneficial interest and holds merely the naked legal title).

[a] **Temporary pledge,** there being no intent to transfer the title, does not preclude the patentee from maintaining the suit. Westmoreland Specialty Co. v. Hogan, 167 Fed. 327, 93 CCA 31 [aff 163 Fed. 289].

44. De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 13 SCt 283, 37 L. ed. 138; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 4 SCt 5, 28 L. ed. 154; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; May v. Logan County, 30 Fed. 250; Hodge v. North Missouri R. Co., 12 F. Cas. No. 6,561, 1 Dill. 104, 4 Fish. Pat. Cas. 161.

45. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; McLaren Products Co. v. Cone Co., 7 F. (2d) 120; Bryan v. Stevens, 4 F. Cas. No. 2,066a; Dibble v. Augur, 7 F. Cas. No. 3,879, 7 Blatchf. 86; Goodyear v. Day, 10 F. Cas. No. 5,566; Knight v. Gavit, 14 F. Cas. No. 7,884.

46. Goldsmith v. American Paper Collar Co., 2 Fed. 239, 18 Blatchf. 82.

47. Adams v. North British R. Co., 29 L. T. Rep. N. S. 367.

48. Ball v. Coker, 168 Fed. 304.

49. U. S. Rev. St. § 4919.

terested in the patent, and owned the exclusive right conferred thereby, when the infringement was committed;[50] it is a rule, both at law and in equity, that damages for past infringement may be sued for only by the person who was the owner of the patent at the time of the infringement,[51] and the sole[52] exception to the rule exists where the owner has assigned the patent and the claim for past infringement to the same person.[53]

Joinder. One of two or more joint owners of a patent cannot maintain a suit in equity to enjoin infringement without uniting the other joint owners.[54] All legal owners must join in a suit for infringement,[55] and where the suit is in equity, there should be a joinder of legal and equitable owners.[56] However, heirs need not join the administrator;[57] a mortgagor may sue without joining the mortgagee,[58] although the mortgagee is properly joined;[59] and a person who, under an agreement with complainant, was to receive a share of any amount which might be recovered, but who has filed a waiver or disclaimer of all interest in any decree which may be rendered and in any sum which may be paid by defendant pursuant to the decree, is not a necessary party complainant.[60] While only those having an interest in the patent should be joined as plaintiffs,[61] the suit should not be dismissed for misjoinder,[62] but instead an amendment should be permitted[63] or a party dismissed from the suit.[64]

[§ 541] **b. After Making of Assignment.**[65] A suit for infringement of a patent may be brought by an assignee[66] in his own name alone where the suit is for infringement occurring after the assignment[67] and the assignment is of the whole interest in, and exclusive right conferred by, the patent,[68] or is of the exclusive right under the patent within and throughout a specified part of the United States;[69] and suit may and must be brought in the joint names of the assignee and the patentee or other assignor where the assignment is of an undivided part of the entire interest;[70] but where a purported assignment does not fall within any of the foregoing classes, it confers upon the so-called assignee no right to sue[71] at law,[72] and no right to sue alone in equity,[73] as it is, at most, a mere license,[74] and a licensee cannot so sue.[75] Where the assignment in question was not made until after the commencement of the action, the right of the assignee to the relief sought is clearly no better or greater than the rights of his predecessors in title.[76]

Conditions in assignment do not necessarily take away the right of the assignee to sue alone.[77]

50. Moore v. Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Herman v. Detroit Shipbuilding Co., 295 Fed. 423.

51. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (aff 270 Fed. 587)].

52. Crown Die, etc., Co. v. Nye Tool, etc., Works, supra.

53. See infra § 541.

54. Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311].

55. Tyler v. Tuel, 6 Cranch (U. S.) 324, 3 L. ed. 237; Postal Tel. Cable Co. v. Netter, 102 Fed. 691; Van Orden v. Nashville, 67 Fed. 331; Edgerton v. Breck, 8 F. Cas. No. 4,279, 5 Bann. & A. 42; Jordan v. Dobson, 13 F. Cas. No. 7,519, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Knight v. Gavis, 14 F. Cas. No. 7,884; Stein v. Goddard, 22 F. Cas. No. 13,353, McAll. 82; Valentine v. Marshal, 28 F. Cas. No. 16,812a; Whittemore v. Cutter, 29 F. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28.

56. Chisholm v. Johnson, 106 Fed. 191; Clement Mfg. Co. v. Upson, etc., Co., 40 Fed. 471; Otis Bros. Mfg. Co. v. Crane Bros. Mfg. Co., 27 Fed. 550 [aff 136 U. S. 646, 10 SCt 1072, 34 L. ed. 553]; Goodyear v. Allyn, 10 F. Cas. No. 5,555, 6 Blatchf, 33, 3 Fish. Pat. Cas. 374; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Stimpson v. Rogers, 23 F. Cas. No. 13,457, 4 Blatchf. 333.

[a] **Addition of equitable owner.**—The owner of an equitable right or interest in a patent may be added as complainant upon request. Patterson v. Stapler, 7 Fed. 210.

57. Haarmann v. Lueders, 109 Fed. 325; Hodge v. North Missouri R. Co., 12 F. Cas. No. 6,561, 1 Dill. 104, 4 Fish. Pat. Cas. 161.

58. Van Gelder v. Sowerby Bridge United Dist. Flour Soc., 44 Ch. D. 374.

59. Witherow Steel Corp. v. Donner Steel Co., 31 F. (2d) 157.

60. Graham v. Geneva Lake Crawford Mfg. Co., 11 Fed. 138.

61. Kaiser v. Bortel, 162 Fed. 902; Chisholm v. Johnson, 106 Fed. 191.

62. See cases infra notes 63, 64.

63. Tesla Electric Co. v. Scott, 97 Fed. 588.

64. Edgarton v. Breck, 8 F. Cas. No. 4,279, 5 Bann. & A. 42.

65. **Assignment of patent:** Generally see supra §§ 366–407. Amendment of pleadings to show see infra § 569.

66. Dickinson Tire, etc., Co. v. Dickinson, 29 F. (2d) 493; American Bank Protection Co. v. City Nat. Bank, 181 Fed. 375; Johnson v. Uprite Mfg. Co., Ltd., 27 Oh. A. 173, 161 NE 26; Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 124 NW 291, 18 AnnCas 976. And see National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 SW 561 (person who is assignee for all practical purposes).

[a] **Assignee of foreign administrator** may sue, although no ancillary letters of administration have been taken out. Smith v. Mercer, 22 F. Cas. No. 13,078, 5 PaLJ 529.

[b] **Assignee of heirs.**—One having an assignment from heirs after the administrator has been discharged has title and may sue. Winkler v. Studebaker Bros. Mfg. Co., 105 Fed. 190.

[c] **"Equitable assignee** under a recorded assignment may sue the assignor patentee for infringement." Dickinson Tire, etc., Co. v. Dickinson, 29 F. (2d) 493, 495.

67. **Suit for infringement prior to assignment** see infra text and notes 78–80.

68. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Moore v. Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Lincoln Ironworks v. W. H. McWhirter Co., 131 Fed. 880; Newton v. Buck, 72 Fed. 777 [rev on other grounds 77 Fed. 614, 23 CCA 355]; Rapp v. Kelling, 41 Fed. 792; Siebert Cylinder Oil-Cup Co. v. Beggs, 32 Fed. 790; Herman v. Herman, 29 Fed. 92; Nellis v. Pennock Mfg. Co., 13 Fed. 451; Seibert Cylinder Oil-Cup Co. v. Phillips Lubricator Co., 10 Fed. 677; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Suydam v. Day, 23 F. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. R. 88.

69. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; Colonial Trust Co. v. Chaplin-Fulton Mfg. Co., 266 Fed. 546; Russell v. Kendall, 58 Fed. 381; Canton Steel Roofing Co. v. Kanneberg, 51 Fed. 599; Bicknell v. Todd, 3 F. Cas. No. 1,389, Fish. Pat. R. 452, 5 McLean 236; Perry v. Corning, 19 F. Cas. No. 11,004, 7 Blatchf. 195; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; E. W. Bliss Co. v. U. S., 53 Ct. Cl. 47 [aff 253 U. S. 187, 40 SCt 455, 64 L. ed. 852]; McFadden v. Alexander, 154 Iowa 716, 135 NW 396.

70. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923 [aff 29 Fed. 316]; Moore v. Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Colonial Trust Co. v. Chaplin-Fulton Mfg. Co., 266 Fed. 546; Yates v. Great Western R. Co., 24 Grant Ch. (Ont.) 495.

71. See cases infra this note, and notes 72, 73.

[a] **Purported assignment of future cause of action** for infringement, without assignment of the patent, confers upon the alleged assignee no right to sue. Radio Corp. of America v. Hohenstein, 289 Fed. 757.

72. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923 [aff 29 Fed. 316].

73. De Forest v. Collins Wireless Tel. Co., 174 Fed. 821.

[a] **Reservation of right to sue.**—A transfer of the patent does not authorize the transferee to sue for an injunction and accounting where the assignor receives back, or perhaps in legal effect reserves, the right to decide whom he will sue as an infringer and to keep for himself all he may recover. Jockmus v. London, 265 Fed. 12.

[b] **Purported assignment of right to sue for damages** and royalties, past or future, for the infringement of a patent does not authorize a suit by injunction to restrain infringers. De Forest v. Collins Wireless Tel. Co., 174 Fed. 821.

74. **Licenses generally** see supra §§ 408–482.

75. See infra § 542.

76. George J. Meyer Mfg. Co. v. Miller Mfg. Co., 24 F. (2d) 505.

Assignee as chargeable with laches of assignor see supra § 537.

77. Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Wayman v. Louis Lipp Co., 222 Fed. 679; Union Trust Co. v. Walker Electric Co., 122 Fed. 814; Platt v. Fire-Extinguisher Mfg. Co., 59 Fed. 897, 8 CCA 357; Russell v. Kern, 58 Fed. 382; Pope Mfg. Co. v. Clark, 46 Fed. 789; Hobbie v. Smith, 27 Fed. 656; Frankfort Whisky Process Co. v. Pepper, 26 Fed. 336.

Damages for infringement proper to assignment may be recovered in an action brought in the name of the assignee alone where he is the assignee of both the patent and the claim for damages,[78] but not where he is the assignee of the patent[79] or of the claim for damages[80] alone.

Patentee or other former owner cannot sue for infringement occurring after the making of an absolute assignment of the patent,[81] or at least he cannot sue without making the assignee a party;[82] but the patentee has a sufficient interest in the patent to enable him to commence a suit for infringement where, notwithstanding an assignment to a trustee, he has a beneficial interest in the patent and its proceeds;[83] and where the patent alone is assigned, the patentee or other owner making the assignment may recover damages for prior infringement.[84]

[§ 542] **c. After Granting of License[85]—(1) In General.** Except where the patentee or other owner of the patent is the infringer,[86] or a contributory infringer,[87] or is otherwise hostile and is properly joined with the infringer as defendant,[88] a licensee of a patent cannot bring a suit in his own name alone, either at law or in equity, for its infringement.[89] A simple licensee has no such interest as to make him either a necessary[90] or a proper[91] party to the infringement suit; and a licensee whose license is not such as to amount to an assignment of the patent is not a necessary party complainant in such a suit,[92] although, if his interests are to be affected by the decree, he is a proper party,[93] and the court, in its discretion, may require him to be

78. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376, (aff 270 Fed. 587)]; Tompkins v. St. Regis Paper Co., 226 Fed. 744 [aff 236 Fed. 221, 149 CCA 411]; American Bank Protection Co. v. City Nat. Bank, 181 Fed. 375.

[a] **Where assignment is after institution of suit,** the assignee may be substituted as complainant. Denaro v. McLaren Products Co., 9 F. (2d) 328; George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496; Leadam v. Ringgold, 140 Fed. 611; Ross v. Ft. Wayne, 63 Fed. 466, 11 CCA 288. See Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co., 182 Fed. 398 [aff 195 Fed. 759, 115 CCA 559] (allowing the suit to be maintained by an assignee pendente lite after the expiration of the patent, but not stating the extent of the subject matter of the assignment).

79. Eveland v. Detroit Mach. Tool Co., 18 F. (2d) 968; Herman v. Detroit Shipbuilding Co., 295 Fed. 423, 424; Auto Spring Repairer Co. v. Grinberg, 196 Fed. 52; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 47 Fed. 504.

"A mere assignment of a patent, which does not also expressly assign the right to recover damages or profits arising from infringement of such patent occurring before such assignment, does not transfer to the assignee the right to recover such damages or profits." Herman v. Detroit Shipbuilding Co., supra.

Suit by patentee see infra text and note 84.

80. Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 43 SCt 254, 67 L. ed. 516 [rev 276 Fed. 376 (aff 270 Fed. 587)]; Radio Corp. of America v. Hohenstein, 289 Fed. 757; Webb v. Goldsmith, 127 Fed. 572.

[a] **At law or in equity.**—"If the owner of the patent when the infringements took place has assigned his patent to one, and his claims for damages for infringement to another, then the latter can not sue at law at all but must compel his assignor of the claims to sue for him. In equity both such assignor and the assignee who is the real party in interest must join as plaintiffs. Such assignor is a necessary party and a bill for accounting and damages is fatally defective otherwise." Crown Die, etc., Co. v. Nye Tool, etc., Works, 261 U. S. 24, 44, 43 SCt 254, 67 L. ed. 516.

81. Green v. Le Clair, 24 F. (2d) 74.

82. Snead v. Scheble, 175 Fed. 570, 99 CCA 578.

83. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [remanding for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem].

84. Moore v. Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796 [mod 300 Fed. 834]; Herman v. Detroit Shipbuilding Co., 295 Fed. 423.

[a] **Assignment after commencement of suit.**—"One who owns a patent and has the right to recover for infringement thereof at the time of its infringement, and who does not afterwards assign to another person such right, together with the patent to which it is incident, is entitled, and is the only person entitled, to recover the damages and profits arising from such infringement, even though, after the infringement, he assigns all of his right, title, and interest in such patent, at least where, as here, he commences suit for such recovery before such assignment." Herman v. Detroit Shipbuilding Co., 295 Fed. 423, 424.

85. Licenses to make, use, or sell patented invention generally see supra §§ 408–482.

86. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Ruckstell Sales, etc., Co. v. Starr Transmission Corp., 13 F. (2d) 478; American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem]; Bowers v. Atlantic, etc., Co., 162 Fed. 895; Smith v. Ridgely, 103 Fed. 875, 43 CCA 365; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Adriance v. McCormick Harvesting Mach. Co., 55 Fed. 288 [aff 56 Fed. 918, 6 CCA 168]; New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 NYS 363. Compare Jockmus v. London, 265 Fed. 12 (the patentee cannot be sued as an infringer by a nonexclusive licensee where the patentee has reserved the right to sue infringers).

87. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem].

88. Ruckstell Sales, etc., Co. v. Starr Transmission Corp., 13 F. (2d) 478; Radio Corp. of America v. Emerson, 296 Fed. 51 [certiorari den 265 U. S. 582 mem, 44 SCt 456 mem, 68 L. ed. 1190 mem].

Joinder of owner of patent as defendant see infra § 548.

89. E. W. Bliss Co. v. U. S., 253 U. S. 187, 40 SCt 455, 64 L. ed. 852 [aff 53 Ct. Cl. 47]; Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Paper-Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Ruckstell Sales, etc., Co. v. Starr Transmission Corp., 13 F. (2d) 478; Radio Corp. of America v. Hohenstein, 289 Fed. 757; American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem]; Colonial Trust Co. v. Chaplin-Fulton Mfg. Co., 266 Fed. 546; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917 [rev on other grounds 259 Fed. 243, 170 CCA 311]; Consolidated Rubber Tire Co. v. B. F. Goodrich Co., 237 Fed. 893; Wayman v. Louis Lipp Co., 222 Fed. 679; De Forest v. Collins Wireless Tel. Co., 174 Fed. 821; Bowers v. Atlantic, etc., Co., 162 Fed. 895; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. 332; D. M. Sechler Carriage Co. v. Deere, etc., Co., 113 Fed. 285, 51 CCA 242; Bowers Hydraulic Dredging Co. v. Vare, 112 Fed. 63; New York Continental Jewel Filtration Co. v. Sullivan, 111 Fed. 179; Chauche v. Pare, 75 Fed. 283, 21 CCA 329; Moore Mfg., etc., Co. v. Cronk Hanger Co., 69 Fed. 998; Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Rice v. Boss, 46 Fed. 195; Cottle v. Krementz, 25 Fed. 494; Bogart v. Hinds, 25 Fed. 484; Wilson v. Chickering, 14 Fed. 917; Gamewell Fire-Alarm Tel. Co. v. Brooklyn, 14 Fed. 255; Blanchard v. Eldridge, 3 F. Cas. No. 1,510, 2 Robb Pat. Cas. 737, 1 Wall. Jr. 337; Grover, etc., Sewing-Mach. Co. v. Sloat, 11 F. Cas. No. 5,846, 2 Fish. Pat. Cas. 112; Hill v. Whitcomb, 12 F. Cas. No. 6,502, 1 Bann. & A. 34, Holmes 317; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139; Potter v. Holland, 19 F. Cas. No. 11,329, 4 Blatchf. 206, 1 Fish. Pat. Cas. 327; Sanford v. Messer, 21 F. Cas. No. 12,314, 5 Fish. Pat. Cas. 411, Holmes 149; Suydam v. Day, 23 F. Cas. No. 13,654, 2 Blatchf. 20, Fish. Pat. R. 88; Bell v. Spoor, 216 Ill. A. 221; American Toy Mfg. Co. v. McLoughlin, 221 Mass. 567, 570, 109 NE 836 [cit Cyc]; Heap v. Hartley, 42 Ch. D. 461; Renard v. Levinstein, 2 Hem. & M. 628, 71 Reprint 607; British Assoc. of Glass Bottle Mfrs., Ltd. v. Forster, 86 L. J. Ch. 489.

"It is settled that a licensee cannot maintain a suit for infringement suing alone, but must join the owner of the patent in his suit." Wayman v. Louis Lipp Co., 222 Fed. 679, 681.

"It is well settled that a mere licensee can not sue for infringement of a patent." E. W. Bliss Co. v. U. S., 53 Ct. Cl. 47, 56 [aff 253 U. S. 187, 40 SCt 455, 64 L. ed. 852].

90. Blair v. Lippincott Glass Co., 52 Fed. 226.

91. Blair v. Lippincott Glass Co., supra.

92. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Bowers v. Atlantic, etc., Co., 162 Fed. 895; Shepherd v. Deitsch, 138 Fed. 83 [rev on other grounds 146 Fed. 756, 77 CCA 246]; Peters v. Union Biscuit Co., 120 Fed. 679 [rev on other grounds 125 Fed. 601, 60 CCA 337]; Union Switch, etc., Co. v. Johnson R. Signal Co., 52 Fed. 867 [rev on other grounds 55 Fed. 487, 5 CCA 204]; Nellis v. Pennock Mfg. Co., 13 Fed. 451; Aultman v. Holley, 2 F. Cas. No. 656, 11 Blatchf. 317, 6 Fish. Pat. Cas. 534; Potter v. Wilson, 19 F. Cas. No. 11,342, 2 Fish. Pat. Cas. 102.

93. Bowers v. Atlantic, etc., Co., 162 Fed. 895.

joined as a party plaintiff,[94] where objection is seasonably made by defendant.[95] Damages suffered by a nonexclusive licensee cannot be recovered in a suit brought and prosecuted by the owner of the patent for himself alone and not for the benefit of the licensee.[96] A part owner of certain patents, who has not granted any license, and a person holding a license from the other part owners, which also includes other patents in which their coöwner has no interest, have not such a unity of interest as entitles them to join in a bill for infringement of all of such patents.[97]

[§ 543] **(2) Exclusive License.** Where an exclusive license has been granted, an action at law for the benefit of the exclusive licensee may and must be brought in the name of the patentee alone.[98] Both the owner of the patent[99] and the exclusive licensee[1] are necessary parties to a suit in equity; but the licensee may sue alone where the owner of the patent is properly made a party defendant,[2] or the owner of the patent and the exclusive licensee may sue together;[3] and an exclusive licensee may join the owner of the patent with him as party complainant even against his will[4] where the owner is out of the jurisdiction[5] and refuses, upon request, to become a coplaintiff voluntarily,[6] although not where the owner of the patent may and should be made a party defendant,[7] or the circumstances are such that the court will protect him from being brought in as plaintiff against his will.[8]

[§ 544] **6. Persons Liable and Parties Defendant —a. Persons and Corporations Liable—(1) In General.** Anyone who has infringed a patent,[9] or has aided in its infringement,[10] knowingly and intentionally contributed to its infringement by another,[11] or done an act which naturally caused another to commit an infringement,[12] is liable therefor. Where an infringement of a patent is brought about by a concert of action, all persons directly and intentionally engaged therein become joint infringers;[13] all who participate in the infringement of a patent are liable in an action at law for damages which may have been sustained by the patentee by reason thereof;[14] the liability of joint infringers at law for

94. Bowers v. Atlantic, etc., Co., supra.

95. Bowers v. Atlantic, etc., Co., supra.

96. Brookfield v. Novelty Glass Mfg. Co., 170 Fed. 960, 96 CCA 127.

97. Foundation Co. v. O'Rourke Engineering Constr. Co., 171 Fed. 425.

98. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Radio Corp. of America v. Hohenstein, 289 Fed. 757; Goodyear v. Bishop, 10 F. Cas. No. 5,558, 4 Blatchf. 438, 2 Fish. Pat. Cas. 96; Goodyear v. McBurney, 10 F. Cas. No. 5,574, 3 Blatchf. 32; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139. See Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 124 NW 291, 18 AnnCas 976 (dictum that exclusive licensee may sue in patentee's name).

99. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)]; Bowers Hydraulic Dredging Co. v. Vare, 112 Fed. 63; Hammond v. Hunt, 11 F. Cas. No. 6,003, 4 Bann. & A. 111.

1. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)]; Bowers Hydraulic Dredging Co. v. Vare, 112 Fed. 63; Hammond v. Hunt, 11 F. Cas. No. 6,003, 4 Bann. & A. 111. See Bredin v. Solmson, 145 Fed. 944 (the owner of a patent suing alone cannot recover profits made by an infringer, which, but for the infringement, would have inured to the sole benefit of the exclusive licensee).

2. Radio Corp. of America v. Emerson, 296 Fed. 51 [certiorari den 265 U. S. 582 mem, 44 SCt 456 mem, 68 L. ed. 1190 mem]; Libbey Glass Co. v. McKee Glass Co., 216 Fed. 172 [aff 220 Fed. 672, 136 CCA 314, and certiorari den 238 U. S. 624 mem, 35 SCt 662 mem, 59 L. ed. 1494 mem].

Propriety of joining owner of patent as defendant see infra § 548.

3. Waterman v. Mackenzie, 138 U. S. 252, 11 SCt 334, 34 L. ed. 923; Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Paper Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Woolworth v. Wilson, 4 How. (U. S.) 712, 11 L. ed. 1171; Radio Corp. of America v. Hohenstein, 289 Fed. 757; Davey Tree Expert Co. v. Van Billiard, 248 Fed. 718 [rev on other grounds 255 Fed. 781, 167 CCA 125]; Havens v. Ostrander, 190 Fed. 199; Kaiser v. General Phonograph Supply Co., 171 Fed. 432; Daimler Mfg. Co. v. Conklin, 145 Fed. 955; New York Continental Jewell Filtration Co. v. Sullivan, 111 Fed. 179; Sharples v. Moseley, etc., Mfg. Co., 75 Fed. 595 [mod on other grounds 81 Fed. 179, 26 CCA 327]; Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co., 7 F. Cas. No. 4,015, 1 Bann. & A. 330, 12 Blatchf. 202; Goodyear v. McBurney, 10 F. Cas. No. 5,574, 3 Blatchf. 32; Nelson v. McMann, 17 F. Cas. No. 10,109, 4 Bann. & A. 203, 16 Blatchf. 139.

[a] **Person claiming ownership** may properly be joined as plaintiff with the exclusive licensee. Radio Corp. of America v. Emerson, 296 Fed. 51 [certiorari den 265 U. S. 582 mem, 44 SCt 456 mem, 68 L. ed. 1190 mem].

[b] **Joinder of licensee after institution of suit allowed.**—Ensten v. Rich-Sampliner, 19 F. (2d) 66 [rev 13 F. (2d) 132].

[c] **Sharing recovery.**—Where a lessee of a patent sued for an infringement greatly to the damage of the lessee and its business, joining the lessor, as was authorized under the lease, and the lessee carried the cost of the litigation, it would seem to be entitled to all the benefits. National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 SW 561.

4. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)] (reviewing authorities); Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272]; Ruckstell Sales, etc., Co. v. Starr Transmission Corp., 13 F. (2d) 478; Hurd v. James Goold Co., 203 Fed. 998, 122 CCA 298; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156; Excelsior Wooden-Pipe Co. v. Allen, 104 Fed. 553, 44 CCA 30; Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 3 CCA 368; Brush Electric Co. v. Electric Impr. Co., 49 Fed. 73 [aff 52 Fed. 945, 3 CCA 368]; Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co., 48 Fed. 224. And see Radio Corp. of America v. Emerson, 296 Fed. 51 [certiorari den 265 U. S. 582 mem, 44 SCt 456 mem, 68 L. ed. 1190 mem] (discussing the point).

5. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)].

6. Independent Wireless Tel. Co. v. Radio Corp. of America, supra.

7. Ruckstell Sales, etc., Co. v. Starr Transmission Corp., 13 F. (2d) 478, 479

8. Ruckstell Sales, etc., Co. v. Starr Transmission Corp., supra.

"Circumstances may be present under which a court will protect the patent owner from being brought in as a plaintiff against his will, such as where a showing is made that the litigation is ill-advised, and of a character which may possibly entail great expense upon the patentee without promising advantageous results." Ruckstell Sales, etc., Co. v. Starr Transmission Corp., supra.

9. Curran v. St. Charles Car Co., 32 Fed. 835; Smith v. Powell, 7 U. C. C. P. (Ont.) 332.

10. Walter S. Newhall Co. v. Baltimore, etc., R. Co., 258 Fed. 650.

11. Gerosa v. Columbia Metal Stamping, etc., Co., 8 F. (2d) 611.

[a] **Joint or several liability of infringer and contributory infringer.** —An infringer and one who induces or contributes to the infringement are liable jointly or in solido. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem]. Compare Consolidated Rubber Tire Co. v. B. F. Goodrich Co., 237 Fed. 893 (a person who is a contributory infringer by reason of a sale of materials used by another is not jointly liable with the purchaser, but only for his own acts of infringement).

What constitutes contributory infringement see supra §§ 516–519.

12. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)].

13. Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Co., 288 Fed. 957; New Jersey Patent Co. v. Schaeffer, 159 Fed. 171 [aff 178 Fed. 276, 101 CCA 540].

[a] **Where several persons coöperate** in acts of infringement, they are joint tort-feasors. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)].

[b] **Contractor and subcontractor.** —Where one who has contracted to erect a building lets a portion of the work to a subcontractor, and in the prosecution of their respective parts each infringes the patent rights of another, both are liable as joint infringers. Jackson v. Nagle, 47 Fed. 703.

14. Graham v. Earl, 82 Fed. 737; Cramer v. Fry, 68 Fed. 201 [rev on other grounds 192 U. S. 265, 24 SCt 291, 48 L. ed. 437]; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514. Compare United Nickel Co. v. Worthington, 13 Fed. 392 (the only persons who can be held to damages are those who own or have some interest in the business of making, using, or selling the thing

whatever damages plaintiff may be able to show is joint[15] and several;[16] and, likewise, in equity all persons participating in the infringement of a patent are jointly[17] and severally[18] liable, or at least an injunction may issue against all,[19] but the profits recoverable from each are limited to those which he himself has made.[20] Where one defendant manufactured infringing articles, some of which were bought by his codefendants, conducting an independent business, and resold at the latter's own price, neither defendant is liable for the infringement by the other.[21]

Principal. In accordance with the general rule as to the liability of a principal for the torts of his agent,[22] a principal may be liable for an infringement committed by his agent.[23] Where a contractor is employed to do certain work and in doing it infringes a patent, the contractor and not the employer is liable.[24]

Personal representative.[25] An action for the infringement of a patent may, after the death of the infringer, be brought against his personal representative.[26]

Mere purchaser of infringing articles is not liable in an action at law as an infringer;[27] but, unless it is vexatious or oppressive,[28] a suit in equity may be instituted against a customer of a manufacturer,[29] notwithstanding the prior institution of another suit against the manufacturer.[30]

Part owner of patent is not liable to another part owner for infringement,[31] or at least he is not liable in equity,[32] but it has been held that he is liable at law where he has used or sold the patented invention without the authority of the coöwner.[33]

[§ 545] **(2) Agents and Servants.**[34] Generally speaking, both agents and servants are liable for infringements committed by them.[35] More specifically, servants and agents who make use of or sell for another a patented article are liable in an action at law to the patentee for damages sustained by him;[36] and one who as agent for another person sells an article which is an infringement of a patent may be restrained by injunction,[37] even where he has no pecuniary interest in the sale;[38] but such an agent is not liable to be compelled to account to the patentee for the profits of the sale of the infringing article,[39] unless it appears that he was pecuniarily interested in the sale;[40] and the use by one as the agent of another person of a patented device does not render him liable to account for infringement of the patent,[41] although a workman who uses an infringing article which is his own property is liable to be compelled to account to the patentee.[42]

[§ 546] **(3) Private Corporations and Persons**

which is an infringement).

15. International Radio Tel. Co. v. Atlantic Communication Co., 290 Fed. 698 [certiorari den 263 U. S. 705 mem, 44 SCt 34 mem, 68 L. ed. 516 mem].

16. International Radio Tel. Co. v. Atlantic Communication Co., supra.

17. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; American Bell Tel. Co. v. Albright, 32 Fed. 287 [app dism 136 U. S. 629 mem, 10 SCt 1064 mem, 34 L. ed. 557 mem]; Jennings v. Dolan, 29 Fed. 861 [app dism 139 U. S. 385, 11 SCt 584, 35 L. ed. 217].

[a] **Where there is privity of connection between different defendants** with reference to the subject matter of the action, they are jointly liable on a bill for infringing a patent. Wells v. Jacques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60.

18. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Jennings v. Dolan, 29 Fed. 861 [app dism 139 U. S. 385, 11 SCt 584, 35 L. ed. 217].

19. Standard Paint Co. v. Bird, 65 Fed. 509 [rev on other grounds 68 Fed. 483, 15 CCA 516]; Starrett v. Athol Mach. Co., 14 Fed. 910; Woodworth v. Edwards, 30 F. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120.

20. International Radio Tel. Co. v. Atlantic Communication Co., 290 Fed. 698 [certiorari den 263 U. S. 705 mem, 44 SCt 34 mem, 68 L. ed. 516 mem]; Standard Paint Co. v. Bird, 65 Fed. 509 [rev on other grounds 68 Fed. 483, 15 CCA 516]; Starrett v. Athol Mach. Co., 14 Fed. 910.

[a] **Successive owners of business.**—There may be a separate personal liability for profits on the part of successive owners of an infringing business, covering the periods of their respective ownership, although the infringement was continuous. Young v. Herman, 232 Fed. 361, 146 CCA 409.

21. Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622 [leave to reopen case den 227 Fed. 1022 mem, 141 CCA 672 mem].

22. See Agency § 532.

23. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Chadeloid Chemical Co. v. Chicago Wood Finishing Co., 180 Fed. 770; Andrews v. Creegan, 7 Fed. 477, 19 Blatchf. 113; Stevens v. Felt, 23 F. Cas. No. 13,397; Wooster v. Marks, 30 F. Cas. No. 18,038, 5 Bann. & A. 56, 17 Blatchf. 368.

Personal liability of agent see infra § 545.

24. May v. Juneau County, 30 Fed. 241 [aff 137 U. S. 408, 11 SCt 102, 34 L. ed. 729]; Bryce v. Dorr, 4 F. Cas. No. 2,070, 3 McLean 582, 2 Robb Pat. Cas. 302; Stow v. Chicago, 23 F. Cas. No. 13,512, 3 Bann. & A. 83, 8 Biss. 47 [aff 104 U. S. 547, 26 L. ed. 816].

[a] **Release of contractor** releases employer. Bigelow v. Louisville, 25 F. Cas. No. 1,400, 3 Fish. Pat. Cas. 602.

[b] **Where employer is licensee,** contractor is released. Union Switch, etc., Co. v. Johnson R. Signal Co., 52 Fed. 867 [rev on other grounds 55 Fed. 487, 5 CCA 204].

[c] **Both liable where both have knowledge.**—Palmer v. Landphere, 118 Fed. 52.

25. Personal liability of executor or administrator for infringement by him see Executors and Administrators § 592 note 1 [a] (2).

26. Griswold v. Hilton, 87 Fed. 256; Atterbury v. Gill, 2 F. Cas. No. 638, 3 Bann. & A. 174, 2 Flipp. 239; Smith v. Baker, 10 Phila. (Pa.) 221.

Survival of cause of action see Abatement and Revival § 409.

27. Blanchard's Gun-Stock Turning Factory v. Jacobs, 3 F. Cas. No. 1,520, 2 Blatchf. 69, Fish. Pat. R. 158.

28. Injunction against suit see infra § 594.

29. See cases infra note 30.

30. Frink Co. v. Erikson, 20 F. (2d) 707 [vacating decree 16 F. (2d) 498]; Wenborne-Karpen Dryer Co. v. Dort Motor Car Co., 14 F. (2d) 378; Wagner v. Meccano, Ltd., 239 Fed. 901, 153 CCA 29 [mod on other grounds 246 Fed. 603, 158 CCA 573].

31. Bell, etc., Co. v. Bliss, 262 Fed. 131; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem].

32. Bell, etc., Co. v. Bliss, 262 Fed. 131; Central Brass Stamping Co. v. Stuber, 220 Fed. 909, 136 CCA 475; Aspinwall Mfg. Co. v. Gill, 32 Fed. 697 [app dism 140 U. S. 669 mem, 11 SCt 1015 mem, 35 L. ed. 597 mem]; Powers v. Cooper, 1 Ky. Op. 309. Contra Herring v. Gas Consumers' Assoc., 9 Fed. 556, 3 McCrary 206.

33. Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201.

34. Joinder of agent with manufacturer as defendants see infra § 548.

35. Patton v. Clegg, 274 Fed. 118; Palmer v. Landphere, 99 Fed. 568; National Cash-Register Co. v. Leland, 94 Fed. 502, 37 CCA 372 [certiorari den 175 U. S. 724 mem, 20 SCt 1021 mem, 44 L. ed. 337 mem]; Cramer v. Fry, 68 Fed. 201; Cahoone Barnet Mfg. Co. v. Rubber, etc., Harness Co., 45 Fed. 582; Estes v. Worthington, 30 Fed. 465; Steiger v. Heidelberger, 4 Fed. 455, 18 Blatchf. 426; Buck v. Cobb, 4 F. Cas. No. 2,079, Brunn. Coll. Cas. 550; Maltby v. Bobo, 16 F. Cas. No. 8,998, 2 Bann. & A. 459, 14 Blatchf. 53.

36. Cramer v. Fry, 68 Fed. 201 [rev on other grounds 192 U. S. 265, 24 SCt 291, 48 L. ed. 437]; Bryce v. Dorr, 4 F. Cas. No. 2,070, 3 McLean 582, 2 Robb Pat. Cas. 302. But see Graham v. Earl, 92 Fed. 155, 160, 34 CCA 267 (dictum that "a mere workman or servant who makes, uses, or vends for another, and under his immediate supervision, a patented article, is not liable in an action at law for damages which may have been sustained by the patentee by reason thereof").

37. Patton v. Clegg, 274 Fed. 118; Featherstone v. Ormonde Cycle Co., 53 Fed. 110; Steiger v. Heidelberger, 4 Fed. 455, 18 Blatchf. 426; Buck v. Cobb, 4 F. Cas. No. 2,079, Brunn. Coll. Cas. 550; Goodyear v. Phelps, 10 F. Cas. No. 5,581, 3 Blatchf. 91; Maltby v. Bobo, 16 F. Cas. No. 8,998, 2 Bann. & A. 459, 14 Blatchf. 53.

38. Featherstone v. Ormonde Cycle Co., 53 Fed. 110; Maltby v. Bobo, 16 F. Cas. No. 8,998, 2 Bann. & A. 459, 14 Blatchf. 53.

39. Featherstone v. Ormonde Cycle Co., 53 Fed. 110.

40. Steiger v. Heidelberger, 4 Fed. 455, 18 Blatchf. 426.

41. Emigh v. Chamberlain, 8 F. Cas. No. 4,447, 1 Biss. 367, 2 Fish. Pat. Cas. 192.

42. Wooster v. Marks, 30 F. Cas. No. 18,038, 5 Bann. & A. 56, 17 Blatchf. 368.

Connected Therewith. Where a private corporation infringes a patent, it is liable therefor,[43] and it is not relieved from liability by transferring a part of its business to its managing officer;[44] nor is the issuance of a preliminary injunction against it precluded by the fact that it has gone out of active business, where it continues in existence for the purpose of collecting assets and discharging liabilities.[45] It is liable at law for damages,[46] or in equity for profits,[47] resulting from the infringement of a patent by one of its agents while proceeding within the scope of his powers; but it is not liable for the sale of an infringing machine by an individual before the incorporation of the company,[48] even though the individual subsequently became an officer and stockholder of the company[49] and the corporation took over the account, rendered bills, and collected the pay.[50] Where a private corporation, as a principal, coöperates with another corporation in the infringement of a patent, it is directly responsible to the patentee in an action at law for the resulting damage;[51] and one corporation is liable for the infringing acts of another corporation where it absolutely controls the latter,[52] or where it has purchased the assets and assumed the liabilities of the latter;[53] but a community of officers, directors, and stockholders does not alone make one corporation liable for the infringing acts of the other,[54] and, notwithstanding a close relationship between two corporations, one may not be liable for the infringing acts of the other where the latter is not the agent[55] or alter ego[56] of the former.

Stockholder of a corporation which has infringed a patent is not personally liable for infringement,[57] unless he has committed individual acts of infringement,[58] or unless he holds practically all of the stock of the corporation and personally controls and directs its action.[59]

Officers or directors.[60] Ordinarily an officer or director of the corporation is not, by virtue of his official capacity, individually or personally liable for infringement of the patent by the corporation,[61] or at least is not liable for damages[62] or profits,[63] where he has not acted beyond the scope of his office,[64] and it does not appear that the corporation is insolvent,[65] or that there is any other obstacle in the way of obtaining full relief against the corporation;[66] and a director may not be liable merely because he signed a certain paper or contract;[67] but one who in his capacity as officer of a private corporation actively participates in an infringement of a patent by it may be restrained by injunction;[68] in

43. Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295.

44. Herring-Curtiss Co. v. Curtiss, 223 App. Div. 101, 227 NYS 489 [mod 120 Misc. 733, 200 NYS 7] (transfer of exhibition business by airplane manufacturing corporation).

45. Manton-Gaulin Mfg. Co. v. American Bottle Cap Co., 250 Fed. 865 (awarding of preliminary injunction may serve to guard interests of plaintiff, and it cannot prejudice defendant).

46. Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62.

47. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000.

48. Palmer v. Jordan Mach. Co., 186 Fed. 496 [rev on other grounds 192 Fed. 42, 112 CCA 454].

49. Palmer v. Jordan Mach. Co., supra.

50. Palmer v. Jordan Mach. Co., supra.

51. York, etc., R. Co. v. Winans, 17 How. (U. S.) 30, 15 L. ed. 27.

52. Westinghouse Electric, etc., Co. v. Allis-Chalmers Co., 176 Fed. 362, 100 CCA 408.

53. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem] (purchase of assets and assumption of debts during pendency of infringement suit).

Addition of purchaser as defendant see infra § 549.

54. Owl Fumigating Corp. v. California Cyanide Co., 24 F. (2d) 718; Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)].

55. Owl Fumigating Corp. v. California Cyanide Co., 24 F. (2d) 718.

56. Owl Fumigating Corp. v. California Cyanide Co., supra.

57. Fyrac Mfg. Co. v. Bergstrom, 24 F. (2d) 9; Perey v. Perey Mfg. Co., 17 F. (2d) 774.

58. Johns-Pratt Co. v. Sachs Co., 175 Fed. 70, 99 CCA 92 [mod 168 Fed. 311].

59. Chicago R. Equipment Co. v. Perry Side Bearing Co., 170 Fed. 968 [mod on other grounds 178 Fed. 449, 101 CCA 433].

Connection of person with corporation as stockholder and in other capacities see infra note 76 [a].

Joinder with corporation as defendants see infra § 548.

60. Joinder of corporation and officers as defendants see infra § 548.

61. Arrow Electric Co. v. Gaynor Electric Co., 30 F. (2d) 956; Fyrac Mfg. Co. v. Bergstrom, 24 F. (2d) 9; Dangler v. Imperial Mach. Co., 11 F. (2d) 945; New Departure Mfg. Co. v. Rockwell-Drake Corp., 287 Fed. 328 [mod 270 Fed. 219]; Steber Mach. Co. v. Random Knitting Co., 217 Fed. 796; Reis v. Rosenfeld, 204 Fed. 282, 122 CCA 480; British Thomson-Houston Co., Ltd. v. Sterling Accessories, Ltd., [1924] 2 Ch. 33. Compare Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220 (the mere fact that the only acts of individual defendants in manufacturing, selling, or using infringing devices were performed by them as officers or directors of defendant corporation, does not necessarily relieve them from liability as infringers).

[a] **Managing officers.**—"In the absence of some special showing, the managing officers of a corporation are not liable for the infringements of such corporation, though committed under their general direction." Dangler v. Imperial Mach. Co., 11 F. (2d) 945, 947.

62. Smalley v. Auto Specialties, Inc., 7 F. (2d) 710; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; United Nickel Co. v. Worthington, 13 Fed. 392 (in action at law). See Brennan v. Dowagiac Mfg. Co., 162 Fed. 472, 89 CCA 392 (liable for nominal damages only).

63. Fulton Co. v. Janesville Laboratories, 29 F. (2d) 913; Dangler v. Imperial Mach. Co., 11 F. (2d) 945; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512, 29 SCt 694, 53 L. ed. 1062]; Mergenthaler Linotype Co. v. Ridder, 65 Fed. 853.

64. Tinsel Corp. v. Haupt, 25 F. (2d) 318; Dangler v. Imperial Mach. Co., 11 F. (2d) 945; New Departure Mfg. Co. v. Rockwell-Drake Corp., 287 Fed. 328 [mod 270 Fed. 219]; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304 (where he has not acted otherwise than through the usual relations between officer and corporation); Cazier v. Mackie-Lovejoy Mfg. Co., 138 Fed. 654, 71 CCA 104 [aff 157 Fed. 88, 84 CCA 591 (certiorari den 207 U. S. 594 mem, 28 SCt 260 mem, 52 L. ed. 356 mem)] (not liable at law for damages).

65. Tinsel Corp. v. Haupt, 25 F. (2d) 318; Glucose Sugar Refining Co. v. St. Louis Syrup, etc., Co., 135 Fed. 540; Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 CCA 652; Greene v. Buckley, 120 Fed. 955 [rev on other grounds 135 Fed. 520, 68 CCA 70]; Loomis-Manning Filter Co. v. Manhattan Filter Co., 117 Fed. 325 [aff 128 Fed. 1023]; Bowers v. Atlantic, etc., Co., 104 Fed. 887; Mergenthaler Linotype Co. v. Ridder, 65 Fed. 853; Howard v. St. Paul Plow-Works, 35 Fed. 743.

66. Loomis-Manning Filter Co. v. Manhattan Filter Co., 117 Fed. 325 [aff 128 Fed. 1023]; Mergenthaler Linotype Co. v. Ridder, 65 Fed. 853.

67. See cases infra this note.

[a] **Thus** (1) directors are not individually liable for infringement of a patent by the corporation merely because they signed a paper agreeing to save harmless from infringement suits purchasers who had previously bought the infringing devices. American Bank Protection Co. v. Electric Protection Co., 181 Fed. 350 [mod on other grounds 184 Fed. 916, 107 CCA 238, and certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem]. (2) The chairman of the board of directors is not personally liable because he, on behalf of the corporation, signed a contract for the construction and delivery to the company of certain property containing a patented improvement, where it does not appear that he knew that the contractor did not possess, or would not obtain, right or license to use the patented invention. Lightner v. Brooks, 15 F. Cas. No. 8,344, 2 Cliff. 287.

68. Cahoone Barnet Mfg. Co. v. Rubber, etc., Harness Co., 45 Fed. 582; Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co., 30 Fed. 123; American Cotton-Tie Supply Co. v. McCready, 1 F. Cas. No. 295, 4 Bann. & A. 588, 17 Blatchf. 291, 8 Reporter 811; Goodyear v. Phelps, 10 F. Cas. No. 5,581, 3 Blatchf. 91; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181.

[a] **Officers of nonresident corporation,** made defendants and served with process in a suit for infringement of a patent while acting for the corporation, may be restrained from such infringement, although the cor-

some cases an officer may be personally liable with the corporation,[69] as where, acting otherwise than as an officer, he willfully, knowingly, and personally participates in the manufacture and sale of an infringing article,[70] or uses the corporation as an instrument to carry out his own willful and deliberate infringements[71] and for the purpose of avoiding personal liability;[72] and, according to some authorities, a director who, by vote or otherwise, specifically commands a subordinate to engage in the manufacture and sale of an infringing article, is individually liable.[73]

Fact that assignor of patent enters service of corporation which infringes a patent does not necessarily make him an infringer;[74] affirmative acts on his part are necessary.[75]

Person having various relations with corporation may so participate in infringement as to be responsible with the corporation.[76]

[§ 547] **(4) Public Bodies, Officers, and Contractors.**[77] **Officer or agent of United States,** acting under orders of the government, is personally liable for his infringement of a patent;[78] but no injunction will issue[79] to restrain the use by him, in his official capacity, of property owned or leased by the United States;[80] he is not liable for profits where none have accrued to him individually,[81] and where no ground for equitable relief, by injunction, an accounting of profits, or otherwise, is shown, the proper remedy of plaintiff is an action at law for damages.[82]

Contractor with United States. By virtue of a federal statute providing that, when a patented invention is used or manufactured by or for the United States without license or lawful right, the remedy of the owner of the patent is by suit against the United States for the recovery of reasonable and entire compensation for such use and manufacture,[83] an injunction,[84] or an accounting as to profits or damages,[85] will not be decreed in a suit against a contractor, who, in accordance with the requirements of a contract with the United States, is constructing or manufacturing an article, device, or structure embodying a patented invention; but the statute does not apply where a contractor, for his own convenience, without the knowledge of the government, and without being required to do so by the contract with the government, uses a patented invention in doing government work.[86]

Municipal corporation may be liable for infringement of a patent,[87] and it may be jointly liable with a contractor[88] and a surety company which has executed a bond indemnifying the city against damages for infringement,[89] but it is not liable for profits from the infringement where it has not realized any.[90]

County commissioners will not be enjoined from operating an infringing ventilating device installed in a courthouse.[91]

poration is not a party, and is not within the jurisdiction of the court. Edison Electric Light Co. v. Packard Electric Co., 61 Fed. 1002.

69. See infra text and notes 70–72.

70. Dangler v. Imperial Mach. Co., 11 F. (2d) 945 (dictum). See Hitchcock v. American Plate Glass Co., 259 Fed. 948, 171 CCA 24 (an officer, director, or manager is individually liable where he sustains to the corporation the relation of master or principal in the sense of being its dominating force, commands the commission of an infringement by the corporation and participates in, and contributes to, the infringement); Steber Mach. Co. v. Random Knitting Co., 217 Fed. 796 (an officer is liable where he acted with full knowledge and was the procuring cause of the infringement); National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514 (whenever officers actually participate in the infringement, they are liable in an action at law).

71. Dangler v. Imperial Mach. Co., 11 F. (2d) 945 (dictum).

72. Dangler v. Imperial Mach. Co., supra; Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Co., 288 Fed. 957.

[a] **Fraud.**—"The record in this case discloses such a manifest attempt to evade responsibility by having the acts complained of done in the name of the defendant sued, with all the parties sought to be brought in actively engaged in the business of the defendant, either as officers of said defendant or as a corporation which, except in name, was really the defendant, that to permit them to escape liability would be to invite fraud." Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Co., 288 Fed. 957, 958.

73. Eddy v. Kramer, 247 Fed. 962 [rev on other grounds 256 Fed. 227, 167 CCA 443, and foll Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Co., 288 Fed. 957]; National Cash-Register Co. v. Leland, 94 Fed. 502, 37 CCA 372 [certiorari den 175 U. S. 724 mem, 20 SCt 1021 mem, 44 L. ed. 337 mem].

74. New Departure Mfg. Co. v. Rockwell-Drake Corp., 287 Fed. 328 [mod 270 Fed. 219].

75. New Departure Mfg. Co. v. Rockwell-Drake Corp., supra.

76. See cases infra this note.

[a] **For example** (1) a person who, with a partner, began infringement and then bought out the partner and continued infringement by means of a corporation which for all purposes of direction and profit was the individual himself, he being president, treasurer, and sole share owner, is responsible with the corporation, both having been engaged in one continuous infringement. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290, and certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem]. (2) An inventor and assignor of a patent, who was one of the three incorporators, and is the vice president, a director, and the owner of one third of the stock, of a corporation which since its foundation has engaged exclusively in manufacturing and selling infringing devices, is responsible with the corporation for infringement. Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435.

77. Liability of United States government see United States [39 Cyc 754].

78. Belknap v. Schild, 161 U. S. 10, 16 SCt 443, 40 L. ed. 599; Head v. Porter, 48 Fed. 481.

79. Crozier v. Aktiengesellschaft, 224 U. S. 290, 32 SCt 488, 56 L. ed. 771 [rev 32 App. (D. C.) 1].

80. Belknap v. Schild, 161 U. S. 10, 16 SCt 443, 40 L. ed. 599; International Postal Supply Co. v. Bruce, 114 Fed. 509 [aff 132 Fed. 1006, 65 CCA 130 (aff 194 U. S. 601, 24 SCt 820, 48 L. ed. 1134)].

81. Belknap v. Schild, 161 U. S. 10, 16 SCt 443, 40 L. ed. 599; International Postal Supply Co. v. Bruce, 114 Fed. 509 [aff 132 Fed. 1006, 65 CCA 130 (aff 194 U. S. 601, 24 SCt 820, 48 L. ed. 1134)].

82. Belknap v. Schild, 161 U. S. 10, 16 SCt 443, 40 L. ed. 599.

Actions at law or in equity generally see supra §§ 522–524.

83. Act July 1, 1918 (40 St. at L. 704 c 40), amending Act June 25, 1910 (36 St. at L. 851 c 423).

[a] **Prior to enactment of statute** (1) a contractor supplying the United States with an article or structure might be liable for infringement where the article or structure embodied a patented invention (Brady v. Atlantic Works, 3 F. Cas. No. 1,794, 2 Bann. & A. 436, 4 Cliff. 408 [rev on other grounds 107 U. S. 192, 2 SCt 225, 27 L. ed. 438]), (2) and the making or furnishing of it was intrinsic or per se infringement (Marconi Wireless Tel. Co. v. Simon, 246 U. S. 46, 38 SCt 275, 62 L. ed. 568 [rev 231 Fed. 1021, 145 CCA 656 (aff 227 Fed. 906)], (3) but not where there was no infringement until the article or structure was used, changed, or adjusted by the United States (Marconi Wireless Tel. Co. v. Simon, supra; Brothers v. Lidgerwood Mfg. Co., 223 Fed. 359, 138 CCA 460), (4) and the acts of the contractor merely contributed to infringement resulting from acts of the United States (Marconi Wireless Tel. Co. v. Simon, supra).

84. Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co., 276 Fed. 834; Foundation Co. v. Underpinning, etc., Co., 256 Fed. 374.

General equity jurisdiction of infringement suit against government contractor see supra § 522.

85. Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co., 276 Fed. 834.

86. Wood v. Atlantic Gulf, etc., Co., 296 Fed. 718.

87. See Municipal Corporations § 1738.

88. Reliance Constr. Co. v. Hassam Pav. Co., 248 Fed. 701, 160 CCA 601.

89. Reliance Constr. Co. v. Hassam Pav. Co., supra.

90. Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000.

91. McCreery Engineering Co. v. Massachusetts Fan Co., 180 Fed. 115.

[a] **Reasons for rule.**—"The duty of the commissioners to build and equip courthouses is a duty or function which concerns the people of the state at large. Their duty to maintain a courthouse once erected seems to be of the same sort. Rev. Laws Mass. c 20, generally, and especially sections 5 and 24. For the most part,

[§ 548] **b. Joinder of Defendants.** Joint infringers,[92] or an infringer and a contributory infringer,[93] may be joined as defendants; but it is improper to join two or more defendants where they are charged only with several and individual infringement.[94] The owner of infringing machines and a lessee from him may be joined as defendants in a suit for infringement.[95] Also, a person who is pecuniarily interested in the manufacture of an infringing article and acts as agent for its sale may be joined with the manufacturer as a defendant in a suit for infringement.[96]

Owner, part owner, or assignor, of patent. In a suit by an exclusive licensee[97] against a third person for infringement, the owner of the patent may be made a party defendant where he is within the jurisdiction of the court[98] and is hostile to the licensee.[99] Where, in a suit against a third person for infringement of an assigned patent, plaintiff relies upon the assignment as creating an estoppel to deny validity of the patent, the assignor is an indispensable party.[1] Also, where defendant pleads a counterclaim for infringement of another patent and he is only a part owner of such patent, his coöwners are necessary parties.[2]

In suit against private corporation. A private corporation and its receiver,[3] an individual who owns all, or practically all, its stock and personally directs its affairs,[4] a person who conceived, built up, and managed the business of the corporation,[5] or individuals who organized the corporation with a small capital for the sole purpose of enabling them as individuals to make and sell an infringing article through the corporation without being subject to personal liability,[6] may be joined as defendants in a suit for infringement of a patent. Officers of a private corporation are neither necessary nor proper parties defendant in a suit in equity against the corporation for the infringement of a patent where they have performed no act of infringement,[7] and were not pecuniarily interested therein;[8] but such officers, where they have personally infringed and are joint tort-feasors, may be made codefendants with the corporation,[9] and may also, for injunctive purposes, be made codefendants, where they have, in their capacity as officers of the corporation, actively participated in an infringement.[10] Where a corporation is conducting the business complained of, it is a necessary party to a suit in equity against an individual who has left its service.[11]

[§ 549] **c. Intervention or Addition of Parties Defendant.**[12] The general rules as to intervention, in so far as they obtain and are applicable in suits in federal courts,[13] apply in a suit for infringement of a patent.[14] In an action against a corporation, another corporation which has, during the pendency of an accounting proceeding, and with knowledge thereof, purchased the assets and assumed the liabilities of defendant, may be added as a defendant;[15] but, after the master has taken an accounting, complainant will not be permitted to bring in officers or directors of defendant corporation for the purpose of charging them with individual liability.[16]

Manufacturer of an article may, in the discretion

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the use of a courthouse is not that which is limited to the inhabitants of the county. To close the commonwealth's courts is to assail its sovereignty rather than to incommode the citizens of Essex county. Even if ventilation be less necessary to the holding of a court than are light and heat, concerning which proposition no opinion is here expressed, yet to deny ventilation to a courtroom is at the least to embarrass the administration of the state's justice. For these reasons I am of opinion that no injunction should issue to restrain the defendant commissioners from operating the ventilating machinery, even if they thereby infringe the complainant's patent." McCreery Engineering Co. v. Massachusetts Fan Co., 180 Fed. 115, 117.

92. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem]; Reliance Constr. Co. v. Hassam Pav. Co., 248 Fed. 701, 160 CCA 601.

93. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem]; Reliance Constr. Co. v. Hassam Pav. Co., 248 Fed. 701, 160 CCA 601.

[a] **Party encouraging manufacture and sale** of the infringing device by the other defendants and who was closely connected with the transactions complained of is a proper party. Simplex Electric Heating Co. v. Leonard, 147 Fed. 744, 148 Fed. 1023.

[b] **Two manufacturers** are proper parties, where one makes part of the infringing article and sells it to the other defendant, and the other makes and sells the completed article. Hawie Mfg. Co. v. Hatheway Mfg. Co., 27 F. (2d) 937.

94. Swift v. Inland Nav. Co., 234 Fed. 375 (no allegation of coöperation, joint action, or community of interest).

[a] **Bill against several hundred defendants** is properly dismissed as to all except one where no attempt is made to claim joint infringement by them and "they are charged with being separate, independent tort-feasors, all trespassing on the same property, but without any consort, confederation, or joint share in the proceeds." Taggart v. Bremner, 236 Fed. 544, 547, 149 CCA 596.

95. Wells v. Jacques, 29 F. Cas. No. 17,398, 1 Bann. & A. 60.

96. Lattimore Mfg. Co. v. Jones, 133 Fed. 550 [rev on other grounds 138 Fed. 62, 70 CCA 558 (certiorari den 200 U. S. 617 mem, 26 SCt 754 mem, 50 L. ed. 622 mem)].

97. Right to sue see supra § 543.

98. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)]; Ruckstell Sales, etc., Co. v. Starr Transmission Corp., 13 F. (2d) 478.

99. Ruckstell Sales, etc., Co. v. Starr Transmission Corp., supra; Radio Corp. of America v. Emerson, 296 Fed. 51 [certiorari den 265 U. S. 582 mem; 44 SCt 456 mem, 68 L. ed. 1190 mem]. See Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 SCt 166, 70 L. ed. 357 [aff 297 Fed. 521 (rev 297 Fed. 518, and reh den 270 U. S. 84, 46 SCt 224, 70 L. ed. 481)] (where he refuses or is unable to join the exclusive licensee as coplaintiff).

1. National Cash Register Co. v. Remington Arms Co., 283 Fed. 196 [aff 286 Fed. 367].

Estoppel of assignor to deny validity of patent see supra § 286.

2. Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377 [rev on other grounds 264 Fed. 670].

3. Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 69 Fed. 833.

4. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290, and certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem]; Whiting Safety Catch Co. v. Western Wheeled Scraper Co., 148 Fed. 396.

5. Shredded Wheat Co. v. Williams Biscuit Co., 188 Fed. 213.

6. Crown Cork, etc., Co. v. Brooklyn Bottle Stopper Co., 172 Fed. 225 [mod on other grounds 200 Fed. 592, 119 CCA 20].

7. Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 CCA 652.

8. Matthews, etc., Mfg. Co. v. Trenton Lamp Co., 73 Fed. 212.

9. Whiting Safety Catch Co. v. Western Wheeled Scraper Co., 148 Fed. 396; Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co., 30 Fed. 123.

[a] **On complaint alleging that corporation and its president** have infringed plaintiff's patent, the joining of the president as codefendant with the corporation is proper, although there is no specific allegation that he directed or participated in the infringement complained of. Cleveland Forge, etc., Co. v. U. S. Rolling-Stock Co., 41 Fed. 476.

10. General Electric Co. v. Alexander, 280 Fed. 852 [aff 277 Fed. 290, and certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem]; D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., 259 Fed. 236, 170 CCA 304; Nichols v. Pearce, 18 F. Cas. No. 10,246, 7 Blatchf. 5.

11. Underwood Typewriter Co. v. Manning, 221 Fed. 652.

12. Cross references:
Addition of parties plaintiff see supra §§ 540-543.
Substitution of complainant see supra § 540.
Survival upon death of defendant see Abatement and Revival § 409.

13. See Equity §§ 337-350; Parties §§ 185-226.

14. Automotive Products Corp. v. Wolverine Bumper, etc., Co., 15 F. (2d) 745; Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796 [mod 300 Fed. 834]; Ring Refrigerator, etc., Co. v. St. Louis Ice Mfg., etc., Co., 67 Fed. 535; Standard Oil Co. v. Southern Pac. Co., 54 Fed. 521, 4 CCA 491; Thomas Huston Electric Co. v. Sperry Electric Co., 46 Fed. 75; Curran v. St. Charles Car Co., 32 Fed. 835.

15. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 276 Fed. 600 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)].

16. H. C. Cook Co. v. Little River

of the court, be permitted to intervene in an infringement suit against a dealer in, or user of, the article where such intervention appears necessary to simplify and completely administer justice under the facts of the particular case,[17] but he will not be permitted to intervene where he delays making application to intervene until after the original parties have settled the controversy[18] or another case for infringement of the same patent has been decided.[19] Where the manufacturer assumes the defense of the suit he may, on his own application, be made a formal party to the record,[20] but he will not be required, upon the application of complainant, to become a party to the record,[21] or at least he will not be so required where he has not made a general appearance,[22] is not an inhabitant of, and does not have a regular and established place of business in, the district wherein the suit was brought,[23] and hence is not within the statute relating to venue,[24] even though his defense of the suit will render him privy to, and bound by, any decree that may be rendered.[25] A contest of the case by a manufacturer, after he has intervened and the original defendant has sold his property and business to complainant, requires it to be decided on its merits.[26]

Intermediate purchaser and seller will not be permitted to intervene in a suit against a dealer where his presence as a party is entirely unnecessary,[27] as where the defense which he seeks to set up is equally open to defendant,[28] and the person seeking intervention may, if he so desires, assume the burden of conducting the defense without becoming a party.[29]

[§ 550] **7. Process.** A federal statute, providing that, if a suit for infringement of a patent is brought in a district of which defendant is not an inhabitant, but in which he has a regular and established place of business, service of process, summons, or subpœna may be made upon the agent or agents engaged in conducting the business in the district,[30] applies to a case within its terms,[31] although not where defendant does not have a regular and established place of business in the district,[32] or is not doing or conducting business therein;[33] and service upon a person as agent cannot be sustained under the statute where he is not an agent of defendant,[34] or, if an agent, is not conducting defendant's business in the district.[35] The statute does not exclude service upon an officer of a corporation defendant where he is found within the district;[36] but service upon a person who is neither defendant nor an officer, agent, servant, representative, or employee of defendant is not sufficient.[37]

[§ 551] **8. Pleading[38]—a. In General.** The pleadings in an action, whether in equity or at law, should be so plain, specific, definite, and certain that the court may know on inspection thereof whether the suit is for infringement of letters patent, or merely to recover damages for the breach of a contract relating to such patent.[39]

In Canada there is no difference between the rules governing the pleadings in an action for infringement of a patent and those governing the pleadings in any other ordinary action.[40]

[§ 552] **b. In Actions at Law—(1) In General.** Generally speaking, the pleadings in an action at law for infringement of a patent must conform to the rules of the courts of the state wherein the suit is brought;[41] but the permission granted by statute to plead the general issue and give notice of certain special matters of defense to be proved at the trial[42] furnishes an exception to this requirement.[43]

[§ 553] **(2) Petition or Declaration.** The declaration in an action at law for infringement of a patent must state a cause of action[44] by identifying the patent sued on[45] and alleging plaintiff's title thereto,[46] the giving of notice of the patent by mark-

Mfg. Co., 156 Fed. 676.

17. Continuous Extracting Press Corp. v. Eastern Cotton Oil Co., 264 Fed. 340; Foote v. Parsons Non-Skid Co., 196 Fed. 951, 118 CCA 105.

[a] **Motion to intervene granted with limitations as to counterclaim.**—Leaver v. K., etc., Box, etc., Co., 6 F. (2d) 666.

18. Foote v. Parsons Non-Skid Co., 196 Fed. 951, 116 CCA 105.

19. Wenborne-Karpen Dryer Co. v. Dort Motor Car Co., 14 F. (2d) 378 [rev 300 Fed. 404].

20. U. S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co., 216 Fed. 186.

21. Van Kannel Revolving Door Co. v. Winton Hotel Co., 263 Fed. 988 [mod on other grounds 276 Fed. 234].

22. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem].

23. Radio Corp. of America v. Edmond, Inc., 20 F. (2d) 929 [dist Dicks Press Guard Mfg. Co. v. Bowen, 229 Fed. 193 on the grounds that the motion was unopposed and apparently the decision in Parsons Non-Skid Co. v. E. J. Willis Co., 176 Fed. 176, infra, was not called to the attention of the court]; Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem]; Parsons Non-Skid Co. v. E. J. Willis Co., 176 Fed. 176 (all three cases relating to foreign corporations).

24. See supra § 526.

25. See infra § 644.

26. Irving-Pitt Mfg. Co. v. Twinlock Co., 220 Fed. 325 [aff 225 Fed. 1022, 140 CCA 663].

27. Hurd v. Seim, 189 Fed. 591.

28. Hurd v. Seim, supra.

29. Hurd v. Seim, supra.

30. Judicial Code § 48.

[a] **Purpose of statute.**—The statute was enacted to facilitate adjudication of patent claims in the general public interest by enlarging jurisdictional opportunities to bring infringers into a federal court. Industrial Research Corp. v. General Motors Corp., 29 F. (2d) 623.

31. Smith v. Farbenfabriken of Elberfield Co., 203 Fed. 476, 121 CCA 598.

32. Rosenbluth v. Hudson Motor Car Co., 265 Fed. 680.

33. Zimmers v. Dodge, 21 F. (2d) 152.

34. Rosenbluth v. Hudson Motor Car Co., 264 Fed. 353, 265 Fed. 680; Stryker Deflector Co. v. Perrin Mfg. Co., 256 Fed. 656, 168 CCA 50.

35. U. S. Gramophone Co. v. Columbia Phonograph Co., 106 Fed. 220 (person merely designated agent under state law).

36. National Electric Signaling Co. v. Telefunken Wireless Tel. Co., 194 Fed. 893 [app dism 209 Fed. 856 (aff 221 Fed. 629, 137 CCA 353)].

37. Scheuerle v. Onepiece Bifocal Lens Co., 241 Fed. 270.

38. **Pleading generally** see Pleading [31 Cyc 1].

39. Schrade v. Camillus Cutlery Co., 242 Fed. 523.

40. Duryea v. Kaufman, 21 Ont. L. 161, 16 OntWR 57.

41. Celluloid Mfg. Co. v. American Zylonite Co., 34 Fed. 744; Cottier v. Stimson, 18 Fed. 689, 9 Sawy. 435.

Application of conformity statute to action at law for infringement of patent generally see Federal Courts § 121.

42. See infra § 554.

43. Myers v. Sternheim, 97 Fed. 625, 38 CCA 345; Celluloid Mfg. Co. v. American Zylonite Co., 34 Fed. 744.

44. Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140.

45. See cases infra this note.

[a] **Profert of patent held sufficient.**—Wilder v. McCormick, 29 F. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. R. 128.

[b] **Reference to patent makes it part of complaint.**—Graham v. Earl, 82 Fed. 737.

[c] **Statement of substance** (1) of the patent is sufficient. Tryon v. White, 24 F. Cas. No. 14,208, Pet. C. C. 96, 1 Robb Pat. Cas. 64. (2) The particulars contained in the specification need not be stated. Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140 [foll Cutting v. Myers, 6 F. Cas. No. 3,520, 1 Robb Pat. Cas. 159, 4 Wash. C. C. 220].

[d] **Oyer of patent** cannot be demanded. Singer v. Wilson, 22 F. Cas. No. 12,901. Contra Cutting v. Myers, 6 F. Cas. No. 3,520, 1 Robb Pat. Cas. 94, 4 Wash. C. C. 220.

46. Cutting v. Myers, supra; Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140.

[a] **Title dependent on performance of certain acts.**—If plaintiff's title depends upon the performance of certain acts he must in his declaration aver the performance of those

ing the article or otherwise,[47] infringement by defendant,[48] and damage to plaintiff therefrom.[49] Also, the petition or declaration must allege facts showing that the suit is brought in the proper district.[50] On the other hand it is not necessary to allege the time of invention[51] or infringement within the period to which damages are limited by statute;[52] where it is alleged that the patent was lawfully issued or granted, it is not necessary to allege specifically the preliminary steps leading to the grant of the patent;[53] critical and overnice objections to matters of form will not be sustained;[54] and where an allegation is too general, the defect may be cured by a verdict for plaintiff.[55]

Demurrer. The question of the validity of a patent on its face may be raised by demurrer in an action at law for its infringement;[56] but except in that class of cases where the court can see that the patent is so void that no question of fact can arise, it is not expedient to anticipate on demurrer a result at which the court may properly arrive after a trial upon the merits and an opportunity to give testimony.[57]

Amendment. An assignee of a patent who did not, at the time he instituted the suit, have a cause of action for infringement committed prior to the assignment of the patent will not be permitted to amend his declaration so as to set up an assignment of such cause of action after the commencement of the suit.[58]

[§ 554] **(3) Plea, Answer, or Notice.**[59] By virtue of express statutory provision, defendant in an action at law for infringement of a patent[60] may plead the general issue,[61] and, having given proper[62] and timely[63] notice in writing to plaintiff or his attorney,[64] may prove at the trial any one or more of several special defenses therein enumerated.[65] As the statute is permissive merely,[66] it does not prevent special pleas under ordinary rules;[67] and it is proper to present by special plea, without notice,

acts. Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140.

[b] **Title by assignment.**—(1) If the title of plaintiff is derived from assignments of the patent the declaration should so state (Van Hook v. Wood, 28 F. Cas. No. 16,854), (2) but it is not necessary for plaintiff to set forth a perfect instrument of assignment in order to maintain his action (Van Hook v. Wood, supra). (3) A declaration averring that the inventor did, before the issuance of letters patent, assign his right, title, and interest in the invention or design to plaintiff, is not open to the objection that it does not allege that the assignment was made after the application for the patent, as an invention may be assigned as well before as after the application for a patent. Rathbone v. Orr, 20 F. Cas. No. 11,585, Fish. Pat. R. 355, 5 McLean 131. (4) The declaration need not aver that the assignment of the patent to plaintiff was recorded in the patent office (Case v. Redfield, 5 F. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741), (5) as recording is necessary only to afford notice to bona fide purchasers and not as between the parties or as against strangers (see supra § 383). (6) Assignments generally see supra §§ 366-407.

47. Streat v. Finch, 154 Fed. 378; Sprague v. Bramhall-Deane Co., 133 Fed. 738.

48. Case v. Redfield, 5 F. Cas. No. 2,494, 4 McLean 526, 2 Robb Pat. Cas. 741.

[a] **Disjunctive averment** that defendant sold or contracted to sell is bad. Noe v. Prentice, 18 F. Cas. No. 10,284a.

[b] **Lack of authority to use.**—Where plaintiff shows that a named person has the right to use his invention and to authorize other persons in the United States to use the same, in order to make a prima facie case against a third person for using the patent, it must affirmatively appear by the petition that such use is not under the authority or license of the person competent to grant it. Still v. Reading, 9 Fed. 40, 4 Woods 345.

49. See cases infra this note.

[a] **Facts** as to damage and not evidence must be alleged, so that there may be an issue. Rude v. Wescott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888; Ewart Mfg. Co. v. Baldwin Cycle-Chain Co., 91 Fed. 262.

[b] **Conclusion demanding damages in gross.**—In an action on the case, the gravamen being the tortious infringement of plaintiff's patent, a demand of damages in gross is a proper conclusion of the declaration. Wilder v. McCormick, 29 F. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. R. 128.

[c] **Petition construed** to present a case for damages at law and not to allege facts constituting a basis for the ascertainment of profits. Portland Gold Min. Co. v. Hermann, 160 Fed. 91, 87 CCA 247.

50. Shaw v. American Tobacco Co., 108 Fed. 842, 48 CCA 68.

[a] **Rule applied.**—"To give the court below jurisdiction, the petition failing to show that the defendant is an inhabitant of the district in which it is sued, it is necessary that it should aver that the act of infringement complained of was committed in the district, and that the defendant had a regular and established place of business in the district. If it be conceded that the petition sufficiently shows that the defendant has a regular and established place of business in the district in which the suit was brought, the petition contains no averment showing where the acts of infringement were committed. It is not alleged that the acts were committed at any named place. It does not appear from the petition that the acts of infringement were committed in the district in which the suit is brought. The petition, therefore, on its face, does not show that the court below had jurisdiction." Shaw v. American Tobacco Co., 108 Fed. 842, 844, 48 CCA 68.

Venue generally see supra § 526.

51. Wilder v. McCormick, 29 F. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. R. 128.

52. Peters v. Hanger, 134 Fed. 586, 67 CCA 386.

Statutory limitation see supra § 531.

53. Cutting v. Myers, 6 F. Cas. No. 3,520, 1 Robb Pat. Cas. 159, 4 Wash. C. C. 220; Van Hook v. Wood, 28 F. Cas. No. 16,854; Wilder v. McCormick, 29 F. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. R. 128.

54. May v. Mercer County, 30 Fed. 246; Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140; Parker v. Haworth, 18 F. Cas. No. 10,738, 4 McLean 370, 2 Robb Pat. Cas. 725; Van Hook v. Wood, 28 F. Cas. No. 16,854; Wilder v. McCormick, 29 F. Cas. No. 17,650, 1 Blatchf. 31, Fish. Pat. R. 128.

[a] **Declaration embodying essential matters.**—Although the declaration is not formal in its frame, yet where it embodies all that is essential to enable plaintiff to give evidence of his right and of its violation by defendant, and affords to defendant the opportunity to interpose every defense allowed him by law, the court will not encourage objections merely critical and overnice, but will seek, even on special demurrer, to sustain pleadings substantially sufficient, and thus avoid useless delays and expenses. Wilder v. McCormick, 29 F. Cas. No. 17,650, 2 Blatchf. 31, Fish. Pat. R. 128.

55. Gray v. James, 10 F. Cas. No. 5,719, Pet. C. C. 476, 1 Robb Pat. Cas. 140.

56. Thomas v. St. Louis, etc., R. Co., 149 Fed. 753, 79 CCA 89.

[a] **Patentability of subject matter.**—The question whether or not the subject matter of a patent is within one of the classes of things which are patentable under the statute is purely one of law, and may be determined on demurrer in an action for its infringement. American Disappearing Bed Co. v. Arnaelsteen, 182 Fed. 324, 105 CCA 40 [certiorari den 220 U. S. 622 mem, 31 SCt 724 mem, 55 L. ed. 613 mem].

57. Blessing v. John Trageser Steam Copper Works, 34 Fed. 753; Teese v. Phelps, 23 F. Cas. No. 13,818, McAll. 17.

58. Eveland v. Detroit Mach. Tool Co., 18 F. (2d) 968.

59. **Pleadings:**
Evidence admissible under see infra § 570 et seq.
Issues made by see infra § 570 et seq.

60. **Like provision applicable in suit in equity** see infra § 564.

61. U. S. Rev. St. § 4920.

[a] **Want of patentability** need not be specially pleaded. Richards v. Chase Elevator Co., 158 U. S. 299, 15 SCt 831, 39 L. ed. 991; May v. Juneau County, 137 U. S. 408, 11 SCt 102, 34 L. ed. 729; Hendy v. Golden State, etc., Iron Works, 127 U. S. 370, 8 SCt 1275, 32 L. ed. 207; Zane v. Soffe, 110 U. S. 200, 3 SCt 562, 28 L. ed. 119.

62. **Requisites of notice** see infra text and notes 72-75.

63. See infra text and note 73.

64. U. S. Rev. St. § 4950.

[a] **Leave or order of court** to give the notice provided for by statute is not necessary. Teese v. Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479.

[b] **Notice is not plea,** but only an awkward substitute for one. Cottier v. Stimson, 20 Fed. 906.

65. See infra § 576.

66. Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376.

67. Grant v. Raymond, supra; Phillips v. Combstock, 19 F. Cas. No. 11,099, 4 McLean 525, 2 Robb Pat. Cas. 724.

[a] **Pleas held sufficient.**—National Mfg. Co. v. Meyers, 7 Fed. 355; Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294.

[b] **Pleas held insufficient.**—Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Brickill v. Hartford, 57 Fed. 216; Kelleher v. Darling, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 424; Morse v. Davis, 17 F. Cas. No. 9,855, 5 Blatchf. 40; Root v. Ball, 20 F. Cas. No. 12,035, 4 McLean, 177, 2 Robb Pat. Cas. 513; Wheeler v. McCormick, 29 F. Cas. No. 17,498, 8 Blatchf. 267, 4 Fish. Pat. Cas. 433.

either a defense not specified in the statute[68] or a defense which, under the statute, might be the subject of notice under the general issue;[69] but if notice of special matter of defense is given, a plea covering the same matter cannot be filed.[70]

Requisites of notice. The notice of special matters of defense authorized by statute[71] must be definite and certain as to name, place, and subject matter,[72] and must be given thirty days before trial.[73] It may be given in the answer[74] and need not be under oath.[75]

In Canada the well settled practice in patent infringement cases is for the statement of defense to state merely the general outlines of the defense,[76] and these outlines are subsequently filled in and interpreted by particulars[77] on a proper demand therefor.[78]

[§ 555] **(4) Reply or Replication.** Plaintiff may put in a replication to meet a plea of new matter in avoidance,[79] such as a plea of release[80] or a decree in former litigation between the same parties;[81] but the replication should not go behind the case made by the declaration, and add another and different cause of action.[82] A notice of special matter to be proved at the trial does not require a reply.[83]

[§ 556] **c. In Suits in Equity[84]—(1) Original Bill[85]—(a) In General.** A bill in equity for infringement of a patent must state a cause of action.[86] The form[87] and requisites[88] of the bill have been settled by the practice and decisions, and have not been changed by the federal equity rules,[89] or at least they have not been changed in respect of allegations of the facts essential to entitle the patentee to a patent.[90] After alleging the requisite matters,[91] the bill should conclude with a proper prayer,[92] and, where special relief pending the suit is desired, it should be verified by the oath of plaintiff or some one having knowledge of the facts upon which the relief is asked.[93] In England there must be an oath that the patentee was the first and orig-

68. Wilder v. Gayler, 29 F. Cas. No. 17,649, 1 Blatchf. 597, Fish. Pat. R. 387.

69. Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433; Brickill v. Hartford, 57 Fed. 216; Cottier v. Stimson, 20 Fed. 906; Cottier v. Stimson, 18 Fed. 689, 9 Sawy. 435; Hubbell v. De Land, 14 Fed. 471, 11 Biss. 382; Day v. New England Car-Spring Co., 7 F. Cas. No. 3,687, 3 Blatchf. 179; Phillips v. Combstock, 19 F. Cas. No. 11,099, 4 McLean 525, 2 Robb Pat. Cas. 724; Read v. Miller, 2 Biss. 12, 20 F. Cas. No. 11,610, 3 Fish. Pat. Cas. 310; Root v. Ball, 20 F. Cas. No. 12,035, 4 McLean 177, 2 Robb Pat. Cas. 513.

70. Brickill v. Hartford, 57 Fed. 216; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465; Read v. Miller, 20 F. Cas. No. 11,610, 2 Biss. 12, 3 Fish. Pat. Cas. 310.

71. See supra text and note 64.

72. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Wise v. Allis, 9 Wall. (U. S.) 737, 19 L. ed. 784; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Teese v. Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479; Silsby v. Foote, 14 How. (U. S.) 218, 14 L. ed. 394; Tatum v. Eby, 60 Fed. 408; Orr v. Merrill, 18 F. Cas. No. 10,591, 2 Robb Pat. Cas. 331, 1 Woodb. & M. 376.

[a] **Names and residences of prior users** (1) must (Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Lock v. Pennsylvania R. Co., 15 F. Cas. No. 8,438; Many v. Jagger, 16 F. Cas. No. 9,055, 1 Blatchf. 372, Fish. Pat. R. 222; Wilton v. Railroads, 30 F. Cas. No. 17,857, 2 Robb Pat. Cas. 641, 1 Wall. Jr. 192), (2) but the names of witnesses by whom the defense is to be established need not (Wilton v. Railroads, supra), be given.

[b] **Time of prior use** need not be specified. Phillips v. Page, 24 How. (U. S.) 164, 16 L. ed. 639.

[c] **Place of prior use** (1) must be stated specifically and not merely by reference to a county or city. Schenck v. Diamond Match Co., 77 Fed. 208, 23 CCA 122 [aff 71 Fed. 521]; Hays v. Suisor, 11 F. Cas. No. 6,271, 1 Bond 279, 1 Fish. Pat. Cas. 532; Latta v. Shawk, 14 F. Cas. No. 8,116, 1 Bond 259, 1 Fish. Pat. Cas. 465. (2) However, a notice stating the town or city in which the prior use occurred may be sufficient where it also states the name and residence of the person who has knowledge of the prior use and by whom it is to be proved. Wise v. Allis, 9 Wall. (U. S.) 737, 19 L. ed. 784; Phillips v. Page, 24 How. (U. S.) 164, 16 L. ed. 639; Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433.

[d] **Each defense** must be specified in the notice. Meyers v. Busby, 32 Fed. 670, 13 Sawy. 33.

[e] **Notices held sufficient.**—Anderson v. Miller, 129 U. S. 70, 9 SCt 224, 32 L. ed. 635; Saunders v. Allen, 60 Fed. 610, 9 CCA 157; American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, 4 Fish. Pat. Cas. 284, Holmes 503; Smith v. Frazer, 22 F. Cas. No. 13,048, 5 Fish. Pat. Cas. 543, 3 Pittsb. (Pa.) 397.

73. Brunswick v. Holzalb, 4 F. Cas. No. 2,057; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519.

74. Arrott v. Standard Sanitary Mfg. Co., 113 Fed. 389; Smith v. Frazer, 22 F. Cas. No. 13,048, 5 Fish. Pat. Cas. 543, 3 Pittsb. (Pa.) 397.

[a] **Plea stricken out** is not notice. Foote v. Silsby, 9 F. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. R. 268 [aff 14 How. 218, 14 L. ed. 394].

75. Campbell v. New York, 45 Fed. 243.

76. Moffat v. Leonard, 3 OntWR 633.

77. Moffat v. Leonard, supra.

Discovery in equity generally see infra § 592.

78. Moffat v. Leonard, 3 OntWR 633.

79. See infra text and notes 80, 81.

80. Goodyear v. McBurney, 10 F. Cas. No. 5,574, 3 Blatchf. 32.

81. Robinson v. American Car, etc., Co., 150 Fed. 331, 80 CCA 127 [aff 159 Fed. 131, 86 CCA 321].

82. Burdell v. Denig, 15 Fed. 397.

83. Cottier v. Stimson, 20 Fed. 906.

84. **Equity pleadings generally** see Equity §§ 374-668.

85. **Cross references:**
Interrogatories and discovery see infra §§ 592, 593.
Multifariousness see supra § 525.

86. See cases infra this note.

[a] **Bills held to state cause of action.**—Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120]; Bayley v. Blumberg, 254 Fed. 696, 166 CCA 194.

87. American Graphophone Co. v. National Phonograph Co., 127 Fed. 349.

88. American Graphophone Co. v. National Phonograph Co., supra.

89. Aluminum Die-Casting Corp., v. Allied Die-Casting Corp., 15 F. (2d) 880; Bayley & Sons, Inc. v. Braunstein Bros. Co., 237 Fed. 671; Contra Zenith Carbureter Co. v. Stromberg Motor Devices Co., 205 Fed. 158.

Federal equity rules relating to bills in equity generally see Equity §§ 404, 406.

90. See infra § 560.

91. See infra §§ 557-562.

92. American Graphophone Co. v. National Phonograph Co., 127 Fed. 349.

[a] **Prayer for surrender and destruction** of all apparatus used or intended for use in the alleged infringement is, it seems, improper in a bill for infringement of a patent covering only a process or method. Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924.

[b] **Enforcement of decree and orders granted in another district.**—A prayer that an interlocutory decree rendered in another district shall operate as an estoppel and that defendants be denied all right to plead to the merits, but not asking that defendants be adjudged infringers, or for an injunction, except that the court enforce the injunction orders granted upon the interlocutory decree in the other district, is insufficient. Kehoe v. Bradford, 175 Fed. 800.

[c] **Damages and profits.**—(1) It is not necessary that the bill pray for damages eo nomine; where the bill asks for an account of gains and profits and such other relief as may be agreeable to equity, damages may be awarded to complainant. Emerson v. Simm, 8 F. Cas. No. 4,443, 6 Fish. Pat. Cas. 281. (2) "The allegations of the plaintiff's bill of complaint are not sufficient to warrant any recovery by the plaintiff of any damages suffered by his licensees, and further plaintiff does not pray for the recovery of any damages suffered by the licensees, but only the gains and profits of the defendant, and damages suffered by the plaintiff. This, however, does not prevent the plaintiff from recovering the gains and profits of the defendant and damages suffered by the plaintiff, because it does not appear that any one has any interest, legal or equitable, by assignment or otherwise, in the patent sued on, or that the licensees mentioned are other than licensees at sufferance." Abrahams v. Universal Wire Co., 10 F. (2d) 838, 843.

[d] **Prayers held sufficient.**—Wyckoff v. Wagner Typewriter Co., 88 Fed. 515; Campbell v. James, 2 Fed. 338, 18 Blatchf. 92 [rev on other grounds 104 U. S. 356, 26 L. ed. 786].

Interrogatories see infra § 592.

93. Scheuerle v. Onepiece Bifocal Lens Co., 241 Fed. 270. See Fichtel v. Barthel, 173 Fed. 489 (the only consequence of not verifying the bill is that it cannot be used as an affidavit on a motion for a preliminary injunction).

[a] **Bill may be verified by:** (1) Assignee. Thompson v. Jewett, 23 F. Cas. No. 13,961. (2) Equitable owner. Goodyear v. Allyn, 10 F. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374. (3) Exclusive licensee. Radio Corp. of America v. Independent Wireless Tel. Co., 297 Fed. 521 [rev 297 Fed. 518, certiorari granted 266 U. S. 596 mem, 45 SCt 91 mem, 69 L. ed.

inal inventor of the subject matter of the patent,[94] but in the United States a special oath or affidavit as to this fact is necessary when,[95] and only when,[96] the fact is not alleged in the bill. The making of a particular averment on information and belief is not fatal where the averment is unnecessary and might be wholly omitted;[97] nor does it necessarily render the bill insufficient where the averment is of material facts,[98] although it may preclude the use of the bill as an affidavit upon a motion.[99]

[§ 557] **(b) Allegations of Particular Matters—aa. Jurisdiction and Venue.** The bill must contain allegations showing that a right to an injunction, or some other ground of equitable jurisdiction, exists;[1] and it must also allege facts showing that the suit is brought in the proper district[2] within the statute relating to venue;[3] but as jurisdiction of a patent infringement suit does not depend upon the amount involved,[4] an averment of such amount is unnecessary.[5]

[§ 558] **bb. Diligence.**[6] Where delay sufficient to constitute laches, if unexcused, appears on the face of the pleading, the bill should show a sufficient excuse or reason for the delay;[7] but where the suit is brought within the statutory period, the absence of a specific allegation that plaintiff has been diligent is not fatal.[8]

[§ 559] **cc. Identity and Ownership of Claim, Patent, or Invention.** The bill may and should clearly identify the patented invention[9] either by giving an adequate description thereof[10] or by describing or referring to it generally and making profert of the patent,[11] but, although the patent contains two or more claims, it is not necessary at the outset to specify which claim or claims are relied on.[12] Ownership of the patent by plaintiff[13] at the time of filing the bill[14] should be alleged; but it is not necessary to allege the various assignments by which title was acquired;[15] nor is it necessary to allege the recording of an assignment.[16] In order to recover damages for infringements committed prior to an assignment of the patent, the assignee must allege in his bill that the claims for such damages were assigned to him.[17]

[§ 560] **dd. Issuance and Validity of Patent.** A bill for infringement of a patent should allege not

459 mem, and aff 269 U. S. 459, 46 SCt 166, 70 L. ed. 357].

94. Hill v. Thompson, Holt N. P. 636, 3 ECL 249, 171 Reprint 367, 3 Meriv. 622, 36 Reprint 239, 2 Moore C. P. 424, 8 Taunt. 375, 4 ECL 190, 129 Reprint 427.

95. Stevens v. Felt, 23 F. Cas. No. 13,397; Sullivan v. Redfield, 23 F. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Thompson v. Jewett, 23 F. Cas. No. 13,961.

96. Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 47 Fed. 894; Thompson v. Jewett, 23 F. Cas. No. 13,961; Young v. Lippman, 30 F. Cas. No. 18,160, 9 Blatchf. 277, 5 Fish. Pat. Cas. 230.

97. Fichtel v. Barthel, 174 Fed. 489.

98. Thomson-Houston Electric Co. v. Electrose Mfg. Co., 155 Fed. 543.

Averment of particular matters upon information and belief see infra §§ 557–562.

99. Thomson-Houston Electric Co. v. Electrose Mfg. Co., 155 Fed. 543.

1. Russell v. Kern, 69 Fed. 94, 16 CCA 154; Germain v. Wilgus, 67 Fed. 597, 14 CCA 561; American Cable R. Co. v. Chicago City R. Co., 41 Fed. 522; Smith v. Sands, 24 Fed. 470; Campbell v. Ward, 12 Fed. 150.

Equitable jurisdiction of patent infringement suits see supra §§ 522–524.

2. See cases infra this note.

[a] **Where defendant is not inhabitant** (1) of the district wherein suit is brought, the bill must allege that defendant not only committed an act of infringement within the district but also that he has, at the time of suit, a regular and established place of business therein. Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476. (2) An allegation that defendant had a field office within the district, and therein constructed certain tunnels by a method infringing plaintiff's patent, does not show that defendant has a regular and established place of business within the district, at least where it does not state the nature or extent of the business transacted by defendant at the office. Winterbottom v. Casey, 278 Fed. 847. (3) Allegations held sufficient. National Electric Signaling Co. v. Telefunken Wireless Tel. Co., 194 Fed. 893 [app dism 209 Fed. 856 (aff 221 Fed. 629, 137 CCA 353)]; Thomson-Houston Electric Co. v. Electrose Mfg. Co., 155 Fed. 543.

[b] **Allegation of citizenship** of defendant should be made affirmatively or, if made upon information and belief, the facts upon which the belief is founded should be stated. Aluminum Die-Casting Corp. v. Allied Die-Casting Corp., 15 F. (2d) 880.

3. See supra § 526.

4. See Federal Courts § 350.

5. Miller-Magee Co. v. Carpenter, 34 Fed. 433.

6. Laches and limitations generally see supra §§ 531–537.

7. American Thermos Bottle Co. v. Semple, 222 Fed. 942; Philadelphia Novelty Mfg. Co. v. Rouss, 39 Fed. 273; Mundy v. Kendall, 23 Fed. 591; McLaughlin v. People's R. Co., 21 Fed. 574.

8. Thomson-Houston Electric Co. v. Electrose Mfg. Co., 155 Fed. 543.

9. Wise v. Grand Ave. R. Co., 33 Fed. 277; Noe v. Prentice, 18 F. Cas. No. 10,284a; Peterson v. Wooden, 19 F. Cas. No. 11,038, 3 McLean 248, 2 Robb Pat. Cas. 116.

[a] **Identification held insufficient.**—Title of invention and date and number of patent are not sufficient identification. Welsbach Light Co. v. Rex Incandescent Light Co., 87 Fed. 477 [app dism 93 Fed. 989 mem, 34 CCA 691 mem]; Electrolibration Co. v. Jackson, 52 Fed. 773; Stirrat v. Excelsior Mfg. Co., 44 Fed. 142; Post v. T. C. Richards Hardware Co., 25 Fed. 905.

10. Electrolibration Co. v. Jackson, 52 Fed. 773; Wise v. Grand Ave. R. Co., 33 Fed. 277; Post v. T. C. Richards Hardware Co., 25 Fed. 905.

11. Hildreth v. Bee Candy Mfg. Co., 162 Fed. 40; Edison v. American Mutoscope, etc., Co., 127 Fed. 361; Fowler v. New York, 121 Fed. 747, 58 CCA 113 [aff 110 Fed. 749]; Chinnock v. Paterson, etc., Tel. Co., 110 Fed. 199 [rev on other grounds 112 Fed. 531, 50 CCA 384]; Heaton-Peninsular Button-Fastener Co. v. Schlochtermeyer, 72 Fed. 520, 18 CCA 674 [aff 69 Fed. 592]; Germain v. Wilgus, 67 Fed. 597, 14 CCA 561; Enterprise Mfg. Co. v. Snow, 67 Fed. 235; U. S. Credit System Co. v. American Credit Indemn. Co., 53 Fed. 818 [aff 59 Fed. 139, 8 CCA 49]; Dickerson v. Greene, 53 Fed. 247; International Terra-Cotta Lumber Co. v. Maurer, 44 Fed. 618; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 803; Bogart v. Hinds, 25 Fed. 484; McMillin v. St. Louis, etc., Valley Transp. Co., 18 Fed. 260, 5 McCrary 561; Pitts v. Whitman, 19 F. Cas. No. 11,196, 2 Robb Pat. Cas. 189, 2 Story 609.

[a] **Legal effect** of profert of patent is (1) to make it part of the pleading (Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120]) (2) and place it in possession of the court for inspection and construction (Coca-Cola Co. v. Whistle Co., 20 F. (2d) 261, 262). (3) "The profert of letters patent is equivalent to annexing a copy." Coca-Cola Co. v. Whistle Co., supra.

12. General Electric Co. v. American. Brass, etc., Co., 209 Fed. 237 [aff 214 Fed. 380, 131 CCA 282]; Foundation Co. v. O'Rourke Engineering Constr. Co., 171 Fed. 425; Morton Trust Co. v. American Car, etc., Co., 129 Fed. 916, 64 CCA 367; Johnson v. Columbia Phonograph Co., 106 Fed. 319. Contra Eastwood v. Cutler-Hammer Mfg. Co., 148 Fed. 718.

Cross references:
Amendment see infra § 569.
Bill of particulars see infra § 567.

13. Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120].

[a] **Allegations held sufficient.**—Sirocco Engineering Co. v. Monarch Ventilator Co., 184 Fed. 84; Æolian Co. v. Hallett, etc., Piano Co., 134 Fed. 872; General Electric Co. v. Wagner Electric Mfg. Co., 123 Fed. 101 [aff 130 Fed. 772, 66 CCA 82]; Arnold Monophase Electric Co. v. Wagner Electric Mfg. Co., 118 Fed. 653; Arrott v. Standard Sanitary Mfg. Co., 113 Fed. 1014; Goss Printing-Press Co. v. Scott, 108 Fed. 253, 47 CCA 302, 110 Fed. 402, 49 CCA 97; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 803.

[b] **Allegations held insufficient.**—Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924; Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co., 60 Fed. 622.

14. Bowers v. Bucyrus Co., 132 Fed. 39; American Graphophone Co. v. National Phonograph Co., 127 Fed. 349; Lettelier v. Mann, 79 Fed. 81; De Beaumont v. Williames, 71 Fed. 812 [aff 80 Fed. 995, 26 CCA 298]; Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co., 60 Fed. 622; Krick v. Jansen, 52 Fed. 823.

15. Edison Electric Light Co. v. Packard Electric Co., 61 Fed. 1002; Clement Mfg. Co. v. Upson, etc., Co., 40 Fed. 471; Brooks v. Jenkins, 4 F. Cas. No. 1,953, Fish. Pat. R. 41, 3 McLean 432; Meerse v. Allen, 16 F. Cas. No. 9,393a; Nourse v. Allen, 18 F. Cas. No. 10,367, 4 Blatchf. 376, 3 Fish. Pat. Cas. 63.

[a] **It is sufficient** to allege the assignment to plaintiff and make profert thereof. Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120].

16. Perry v. Corning, 19 F. Cas. No. 11,004, 7 Blatchf. 195.

17. Kaolatype Engraving Co. v. Hoke, 30 Fed. 444; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 Fed. 638, 21 Blatchf. 519, 20 Fed. 505.

[a] **Allegation held sufficient.**—Campbell v. James, 2 Fed. 338, 18 Blatchf. 92 [rev on other grounds 104 U. S. 356, 26 L. ed. 786].

only the issuance of the patent[18] in proper form,[19] but also all the facts which are statutory prerequisites to the grant of a valid patent,[20] such as the facts that the patentee invented or discovered the subject matter of the patent;[21] that the invention was not owned or used in this country prior to his invention or discovery;[22] that it was not patented or described in any printed publication in this country or any foreign country before his invention or discovery;[23] that it was not in public use or on sale in this country for more than two years prior to his application for the patent;[24] that no application for a foreign patent for the invention was filed more than twelve months prior to the filing of the application in this country;[25] and that the invention was not abandoned.[26] Averments of the facts required by statute must be made positively,[27] rather than on belief,[28] and the necessity of making them is not dispensed with by a general equity rule providing for a short and simple statement of the ultimate facts upon which plaintiff asks relief,[29] as the facts required by statute are regarded as ultimate facts within the meaning of the rule.[30] However, it is not necessary to allege the filing of an application for a patent in due form[31] or the proceedings in the patent office in an interference case;[32] nor is it necessary in a suit for infringement of a reissued patent to allege specifically the ground on which reissue was obtained.[33]

Estoppel. Where complainant relies on defendant's estoppel to contest the validity of the patent, he should plead the estoppel.[34]

Long-felt want or demand for the subject matter of the patent may properly be pleaded as indicating patentable invention.[35]

Allegation of prior adjudication sustaining validity of patent is not necessary,[36] but is proper,[37]

Necessity of assignment of claim for damages see supra § 541.

18. Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120].

19. See cases infra this note.

[a] **Bill is defective** (1) where it does not allege that the patent was issued in the name of the United States, under the seal of the patent office, and signed by the commissioner of patents (Eastwood v. Cutler-Hammer Mfg. Co., 148 Fed. 718), (2) or at least it is defective where, in addition to such omission, it fails to make profert of the patent (Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924), (3) but not where such profert is made (Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., supra; Fichtel v. Barthel, 173 Fed. 489). (4) Profert of patent generally see supra § 556.

20. Ingrassia v. A. C. W. Manufacturing Corp., 24 F. (2d) 703 [certiorari den 277 U. S. 602 mem, 48 SCt 562 mem, 72 L. ed. 1010 mem]; Aluminum Die-Casting Corp. v. Allied Die-Casting Corp., 15 F. (2d) 880; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924; Bayley & Sons, Inc. v. Braunstein Bros. Co., 237 Fed. 671; Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515; Victor Talking Mach. Co. v. Leeds, etc., Co., 165 Fed. 931; Eastwood v. Cutler-Hammer Mfg. Co., 148 Fed. 718; American Graphophone Co. v. National Phonograph Co., 127 Fed. 349; Elliott, etc., Book-Typewriter Co. v. Fisher Typewriter Co., 109 Fed. 330; Rubber Tire Wheel Co. v. Davie, 100 Fed. 85; Miller v. Smith, 5 Fed. 359. Compare Jost v. Borden Stove Co., 262 Fed. 163 (may, but need not, do so). Contra Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120]; General Bakelite Co. v. Nikolas, 207 Fed. 111; Zenith Carbureter Co. v. Stromberg Motor Devices Co., 205 Fed. 158.

[a] **"It is good pleading** for plaintiff in a patent suit to negative the exceptions of the statute in his bill." American Laundry Mach. Co. v. Prosperity Co., 295 Fed. 819, 820 [rev 294 Fed. 144].

21. Davis v. Motive Parts Corp., 16 F. (2d) 148.

[a] **That patentee was first and original inventor** or discoverer of the subject matter of the patent must be alleged. Ashcroft v. Boston, etc., R. Co., 97 U. S. 189, 24 L. ed. 982; Bayley & Sons, Inc. v. Braunstein Bros. Co., 237 Fed. 671; Miller v. Smith, 5 Fed. 359; Herring v. Nelson, 12 F. Cas. No. 6,424, 3 Bann. & A. 55, 14 Blatchf. 293 [rev on other grounds 107 U. S. 640, 2 SCt 819, 27 L. ed. 601]; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397.

[b] **Allegation held sufficient.**— Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924.

22. Ingrassia v. A. C. W. Manufacturing Corp., 24 F. (2d) 703 [certiorari den 277 U. S. 602 mem, 48 SCt 562 mem, 72 L. ed. 1010 mem].

23. Ingrassia v. A. C. W. Manufacturing Corp., supra; Rubber Tire Wheel Co. v. Davie, 100 Fed. 85; Diamond Match Co. v. Ohio Match Co., 80 Fed. 117; Hutton v. Star Slide Seat Co., 60 Fed. 747; Ross v. Ft. Wayne, 58 Fed. 404 [rev on other grounds 63 Fed. 466, 11 CCA 288]; Goebel v. American R. Supply Co., 55 Fed. 825 [rev on other grounds 64 Fed. 787, 12 CCA 416]; Hanlon v. Primrose, 56 Fed. 600; Overman Wheel Co. v. Elliott Hickory Cycle Co., 49 Fed. 859; Coop v. Dr. Savage Physical Dev. Inst., 47 Fed. 899. Contra Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120].

[a] **Allegation held sufficient.**— American Cable R. Co. v. New York, 42 Fed. 60.

24. Ingrassia v. A. C. W. Manufacturing Corp., 24 F. (2d) 703 [certiorari den 277 U. S. 602 mem, 48 SCt 562 mem, 72 L. ed. 1010 mem]; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 130 Fed. 900 [aff 137 Fed. 80, 70 CCA 1 (certiorari den 199 U. S. 609 mem, 26 SCt 750 mem, 50 L. ed. 332 mem)]; Krick v. Jansen, 52 Fed. 823; Coop v. Dr. Savage Physical Dev. Inst., 47 Fed. 899; Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 47 Fed. 894; Nathan Mfg. Co. v. Craig, 47 Fed. 522. Contra Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120]; Zenith Carbureter Co. v. Stromberg Motor Devices Co., 205 Fed. 158.

[a] **It is not sufficient** to allege that the invention was not in public use or on sale with the inventor's consent. Coop v. Dr. Savage Physical Dev. Inst., 47 Fed. 899.

25. Ingrassia v. A. C. W. Manufacturing Corp., 24 F. (2d) 703 [certiorari den 277 U. S. 602 mem, 48 SCt 562 mem, 72 L. ed. 1010 mem]; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924.

[a] **Similar rule** obtained before the statute was amended by substituting the word "twelve" for "seven" immediately preceding the word "months." Victor Talking Mach. Co. v. Leeds, etc., Co., 165 Fed. 931; Elliott, etc., Book-Typewriter Co. v. Fisher Typewriter Co., 109 Fed. 330.

26. Ingrassia v. A. C. W. Manufacturing Corp., 24 F. (2d) 703 [certiorari den 277 U. S. 602 mem, 48 SCt 562 mem, 72 L. ed. 1010 mem]. Contra Jost v. Borden Stove Co., 262 Fed. 163; Fichtel v. Barthel, 173 Fed. 489; Warren Featherbone Co. v. Warner Bros. Co., 92 Fed. 990.

27. Rubber Tire Wheel Co. v. Davie, 100 Fed. 85.

28. Rubber Tire Wheel Co. v. Davie, supra.

29. Ingrassia v. A. C. W. Manufacturing Corp., 24 F. (2d) 703 [certiorari den 277 U. S. 602 mem, 48 SCt 562 mem, 72 L. ed. 1010 mem]; Aluminum Die-Casting Corp. v. Allied Die-Casting Corp., 15 F. (2d) 880; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924; Bayley & Sons, Inc. v. Braunstein Bros. Co., 237 Fed. 671; Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515. See Jost v. Borden Stove Co., 262 Fed. 163 (holding that the bill may be restricted to a statement of the grant of the patent or it may be expanded so as to state all the facts necessary to entitle the patentee to a patent under the statute, but indicating that this conclusion is not based upon the equity rules of 1912). Contra Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120]; General Bakelite Co. v. Nikolas, 207 Fed. 111; Zenith Carbureter Co. v. Stromberg Motor Devices Co., 205 Fed. 158.

"There can be no doubt that before the present equity rules went into effect the omitted allegations were essential. . . . Rule 25 does not change the previously settled requirement of distinct allegations of compliance with sections 4886 and 4887 [Rev. St.]. Such allegations were previously held necessary because they were of facts essential to the validity of the patent sued on, and therefore to the relief sought. If essential to this extent, I must consider them statements of ultimate facts, as distinguished from statements of mere evidence, for the purposes of rule 25." Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924, 925.

Federal equity rule generally see Equity § 404.

30. Ingrassia v. A. C. W. Manufacturing Corp., 24 F. (2d) 703 [certiorari den 277 U. S. 602 mem, 48 SCt 562 mem, 72 L. ed. 1010 mem]; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924. Contra Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120].

31. Bowers v. Bucyrus Co., 132 Fed. 59.

32. Illingworth v. Atha, 42 Fed. 141.

33. Spaeth v. Barney, 22 Fed. 828.

34. Newark Spring-Mattress Co. v. Ryan, 102 Fed. 693, 42 CCA 594.

[a] **Allegation held sufficient.**— Climax Lock, etc., Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126.

35. Acme Steel Goods Co. v. American Metal Fasteners Co., 206 Fed. 478.

36. Bayley v. Blumberg, 254 Fed. 696, 166 CCA 194.

37. American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 803; Steam-

unless no preliminary injunction is sought.[38]

[§ 561] **ee. Infringement.** The bill must allege infringement by defendant.[39] In England particulars should be stated,[40] but in the United States a general allegation[41] upon information and belief[42] is sufficient.

[§ 562] **ff. Damages and Profits.**[43] The extent of complainant's damages need not be averred in the bill where the suit is brought for an injunction alone[44] or for profits in addition thereto;[45] but if an accounting is prayed for the bill must allege that defendant has made profits from the sale or use of the patented invention;[46] and in order to recover damages, the bill must aver that complainant has complied with the statute either by marking his article "patented" or by notifying defendant of the infringement.[47]

[§ 563] **(2) Plea, Answer, or Notice**[48]**—(a) In General.** While, generally speaking, such defenses as defendant wishes to assert must be set up in the answer,[49] and defenses not so set up will not be considered by the court in rendering its decision,[50] yet the defense of nonpatentability can be availed of without setting it up in the answer,[51] and, under the federal equity rules, every defense in point of law arising upon the face of the bill, which might previously have been made by plea, may be made either by motion to dismiss or in the answer.[52] The allegations of the answer must be sufficiently definite and precise to inform plaintiff what defense he has to meet.[53] More than one defense may be presented in the answer,[54] even though the defenses are inconsistent;[55] but each should be separately[56] and clearly[57] alleged without condition or qualifica-

Gauge, etc., Co. v. McRoberts, 26 Fed. 765.

38. Haarmann v. Lueders, 109 Fed. 327; Wirt v. Hicks, 46 Fed. 71.

39. Ashcroft v. Boston, etc., R. Co., 97 U. S. 189, 24 L. ed. 982; Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120]; Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515; Miller v. Smith, 5 Fed. 359; Tucker v. Tucker Mfg. Co., 24 F. Cas. No. 14,227, 2 Bann. & A. 401, 4 Cliff. 397.

[a] **In action against corporation and individual,** it is necessary, in order to hold the individual liable, to allege facts showing infringement by him. Davis v. Motive Parts Corp., 16 F. (2d) 148; Aluminum Die-Casting Corp. v. Allied Die-Casting Corp., 15 F. (2d) 880.

[b] **Lack of authority** (1) on the part of defendant to make, use, or vend the patented invention must be alleged. General Bakelite Co. v. Nikolas, 207 Fed. 111; Knox Rock-Blasting Co. v. Rairdon Stone Co., 87 Fed. 969; American Solid Leather Button Co. v. Empire State Nail Co., 50 Fed. 929; Miller v. Smith, 5 Fed. 359. (2) An allegation that defendant manufactured and offered for sale an article, product, or composition of matter, embodying the invention, is insufficient, as it is consistent with a rightful use. General Bakelite Co. v. Nikolas, supra. (3) "It is proper, in alleging infringement of a patent by a licensee (with limited rights), to allege the patent, the license, and the extent and limitations of such license, and the doing of acts constituting infringement, not warranted or authorized by such license, and that by doing such acts the patent is infringed." Schrade v. Camillus Cutlery Co., 242 Fed. 523, 524.

[c] **Infringement of two patents by one article.**—An allegation that two or more design patents are infringed by a single article is not bad as stating an impossibility. Coca-Cola Co. v. Whistle Co., 20 F. (2d) 261.

[d] **Allegations held sufficient.**—Moeller v. Scranton Glass Instrument Co., 19 F. (2d) 14 [rev 14 F. (2d) 120]; Adee v. Peck, 39 Fed. 209, 42 Fed. 497; Schneider v. Missouri Glass Co., 36 Fed. 582; Kaolatype Engraving Co. v. Hoke, 30 Fed. 444; McMillin v. St. Louis, etc., Transp. Co., 18 Fed. 260, 5 McCrary 561.

40. Ledgard v. Bull, 11 App. Cas. 648; Batley v. Kynock, L. R. 19 Eq. 229; Finnegan v. James, L. R. 19 Eq. 72; Needham v. Oxley, 1 Hem. & M. 248, 71 Reprint 108; Wenham Co. v. Champion Gas Lamp Co., 63 L. T. Rep. N. S. 827.

41. Luten v. Sharp, 200 Fed. 151; Indurated Fibre Industries Co. v. Grace, 52 Fed. 124; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 803; Fischer v. Hayes, 6 Fed. 76, 19 Blatchf. 26; American Diamond Rock-Boring Co. v. Rutland Marble Co., 2 Fed. 355, 18 Blatchf. 147; Haven v. Brown, 11 F. Cas. No. 6,228, 6 Fish. Pat. Cas. 413; Thatcher Heating Co. v. Carbon Stove Co., 23 F. Cas. No. 13,864, 4 Bann. & A. 68, 7 Reporter 199, 2 N. J. L. J. 25; Turrell v. Cammerrer, 24 F. Cas. No. 14,266, 3 Fish. Pat. Cas. 462. See New Jersey Zinc Co. v. Du Pont de Nemours, 11 F. (2d) 908 (assuming that a general allegation is sufficient, it cannot broaden the suit or extend the rights of plaintiff beyond the scope of the patent in suit).

42. Murray Co. v. Continental Gin Co., 126 Fed. 533; Wyckoff v. Wagner Typewriter Co., 88 Fed. 515.

43. Prayer for profits and damages see supra § 556.

44. American Graphophone Co. v. National Phonograph Co., 127 Fed. 349; Wirt v. Hicks, 46 Fed. 71.

45. Wirt v. Hicks, supra.

46. Wirt v. Hicks, supra.

47. Dunlap v. Schofield, 152 U. S. 244, 14 SCt 576, 38 L. ed. 426; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 154 [aff 167 Fed. 546, 93 CCA 224]; Lorain Steel Co. v. New York Switch, etc., Co., 153 Fed. 205; Sprague v. Bramhall-Deane Co., 133 Fed. 738; National Co. v. Belcher, 68 Fed. 665 [mod on other grounds 71 Fed. 876, 18 CCA 375].

Notice as condition precedent see supra § 484.

48. Sufficiency of answer to raise or tender issue see infra § 570.

49. Puetz v. Bransford, 31 Fed. 458; Butler v. Bainbridge, 29 Fed. 142; Washburn, etc., Mfg. Co. v. Haish, 4 Fed. 900, 10 Biss. 65; Brooks v. Stolley, 4 F. Cas. No. 1,963, Fish. Pat. R. 137, 4 McLean 275; Day v. New England Car Co., 7 F. Cas. No. 3,686, 3 Blatchf. 154; Guidet v. Barber, 11 F. Cas. No. 5,857; Herring v. Gage, 12 F. Cas. No. 6,422, 3 Bann. & A. 396, 15 Blatchf. 124 [rev on other grounds 107 U. S. 640, 2 SCt 819, 27 L. ed. 601]; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Morehead v. Jones, 17 F. Cas. No. 9,791, 3 Wall. Jr. 306; Thompson v. Jewett, 23 F. Cas. No. 13,961; Wonson v. Peterson, 30 F. Cas. No. 17,934, 3 Bann. & A. 249.

[a] **Federal equity rules** provide that "every defense heretofore presentable by plea in bar or in abatement shall be made in the answer." Equity Rules (1912), rule 29.

Presentation of statutory defenses in answer see infra § 564.

50. Session v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Puetz v. Bransford, 31 Fed. 458; Burden v. Corning, 4 F. Cas. No. 2,143, 2 Fish. Pat. Cas. 477; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Jennings v. Pierce, 13 F. Cas. No. 7,283, 3 Bann. & A. 361, 15 Blatchf. 42; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Pitts v. Edmonds, 19 F. Cas. No. 11,191, 1 Biss. 168, 2 Fish. Pat. Cas. 52; Williams v. Boston, etc., R. Co., 29 F. Cas. No. 17,716, 4 Bann. & A. 441, 17 Blatchf. 21; Wonson v. Peterson, 30 F. Cas. No. 17,934, 3 Bann. & A. 249; Wyeth v. Stone, 30 F. Cas. No. 18,-107, 2 Robb Pat. Cas. 23, 1 Story 273. See Hitchcock v. American Plate Glass Co., 259 Fed. 948, 171 CCA 24 (declining to hold that the defense cannot be heard, although the question is a close one, but holding that, where defendant, having an opportunity under the rules of good pleading to do so, failed to plead that another was the sole infringer, he is estopped to deny personal liability, to the extent of the profits which he actually received, for infringements in which he personally participated).

51. Hendy v. Golden State, etc., Iron Works, 127 U. S. 370, 8 SCt 1275, 32 L. ed. 207; Mahn v. Harwood, 112 U. S. 354, 5 SCt 174, 6 SCt 451, 28 L. ed. 665; Slawson v. Grand St., etc., R. Co., 107 U. S. 649, 2 SCt 663, 27 L. ed. 576; Dunbar v. Myers, 94 U. S. 187, 24 L. ed. 34; Guidet v. Barber, 11 F. Cas. No. 5,857.

52. Equity Rules (1912), rule 29. And see Equity § 542.

Motion to dismiss see infra § 641.

53. Coulston v. H. Franke Steel Range Co., 221 Fed. 669; Klein v. Seattle, 63 Fed. 702 [aff 77 Fed. 200, 23 CCA 114]; and cases infra this note.

[a] **Denial of infringement** (1) must be specific and unevasive. Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Chase v. Fillebrown, 58 Fed. 374; Miller v. Buchanan, 5 Fed. 366; Jordan v. Wallace, 13 F. Cas. No. 7,523, 5 Fish. Pat. Cas. 185, 8 Phila. (Pa.) 165. (2) An answer that the articles combined in plaintiff's patent had not been used by defendant, but that he had used other and better articles, is evasive. Goodyear v. Day, 10 F. Cas. No. 5,-566.

Application of rule to pleading of statutory defenses see infra § 564.

54. Graham v. Mason, 10 F. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Jones v. Sewall, 13 F. Cas. No. 7,-495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275].

55. Walsh v. Albert Wahle Co., 25 F. (2d) 350; Specialty Brass Co. v. Sette, 22 F. (2d) 964; Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co., 243 Fed. 405; Duryea v. Kaufman, 21 Ont. L. 161, 16 OntWR 57. Contra National Mfg. Co. v. Meyers, 7 Fed. 355.

Inconsistent defenses under federal equity rules generally see Equity § 561.

56. Graham v. Mason, 10 F. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1.

[a] **They ought not to be blended** in the same allegations where they depend upon different principles. Jones v. Sewall, 13 F. Cas. No. 7,495, 3 Cliff. 563, 6 Fish. Pat. Cas. 343 [rev on other grounds 91 U. S. 171, 23 L. ed. 275].

57. Graham v. Mason, 10 F. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1.

tion.[58] An allegation in the answer cannot, of course, change the actual facts.[59]

Pleas have been abolished by the federal equity rules.[60]

[§ 564] **(b) Notice or Pleading of Statutory Defenses.** The statute making provision, in actions at law, for the giving of written notice of any one or more of enumerated special matters of defense[61] provides for the pleading of like defenses, and the giving of like notice in the answer, in a suit in equity.[62] In order to render any of the defenses mentioned in the statute available,[63] notice thereof may[64] and must[65] be given in the answer, or, in other words, they must be pleaded.[66] An answer, or notice in the answer, purporting to set up a statutory defense must contain statements or allegations sufficient to present the defense[67] with definiteness and certainty;[68] and in cases falling within a statute providing that, in notices of previous invention, knowledge, or use of anything patented, defendant shall state the names of the patentees, the dates of their patents, and when granted, the names and residences of the persons alleged to have invented or to have had prior knowledge of the thing patented, and where and by whom it had been used,[69] there must be a compliance with the statute;[70] but notice of the names and places of residence of the witnesses by whom it is intended to prove prior knowledge and use is not required;[71] and, in giving notice, defendant is not bound to be so specific as to relieve his adversary from all inquiry or effort to investigate the facts,[72] or to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts.[73] The notice

58. Graham v. Mason, supra.

59. National Metal Molding Co. v. Triangle Conduit Co., 292 Fed. 989.

60. See Equity § 542.

[a] **Decisions under former practice.**—Decisions pertaining to pleas under the former federal equity practice in patent infringement suits, but which are now obsolete, include decisions relating to the: (1) Matters which might (Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553; Leatherbee v. Brown, 69 Fed. 590; Mergenthaler Linotype Co. v. Ridder, 65 Fed. 853; Edison Electric Light Co. v. Equitable L. Assur. Soc., 55 Fed. 478; Boston Woven Hose Co. v. Star Rubber Co., 40 Fed. 167; Edison Electric Light Co. v. U. S. Electric Lighting Co., 35 Fed. 134; Hubbell v. De Land, 14 Fed. 471, 11 Biss. 382), (2) or might not (American Sulphite Pulp Co. v. Bayless Pulp, etc., Co., 163 Fed. 843; Hubbell v. De Land, supra; Sharp v. Reissner, 9 Fed. 445, 20 Blatchf. 10), (3) be presented by plea, or which should be set up by answer rather than by plea (Jackson Skirt, etc., Co. v. Rosenbaum, 190 Fed. 197; Vacuum Cleaner Co. v. Dunn, 189 Fed. 634; Duntley Mfg. Co. v. Keller Mfg. Co., 173 Fed. 318; Glucose Sugar Refining Co. v. Douglass, etc., Co., 145 Fed. 949; Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553; Arrott v. Standard Sanitary Mfg. Co., 113 Fed. 389; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 69 Fed. 833; Leatherbee v. Brown, 69 Fed. 590; Jones v. Berger, 58 Fed. 1006; Lowry v. Cowles Electric Smelting, etc., Co., 56 Fed. 488; Korn v. Wiebusch, 33 Fed. 50; Hubbell v. De Land, 14 Fed. 471, 11 Biss. 382; Sharp v. Reissner, 9 Fed. 445, 20 Blatchf. 10; Carnrick v. McKesson, 8 Fed. 807, 19 Blatchf. 369; White v. Lee, 4 Fed. 916). (4) Requisites and sufficiency of a plea. Vacuum Cleaner Co. v. Dunn, 189 Fed. 634; Underwood Typewriter Co. v. Manning, 165 Fed. 451; American Tobacco Co. v. Ascot Tobacco Works, 165 Fed. 207; Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476; Schnauffer v. Aste, 148 Fed. 867; Western Electric Co. v. North Electric Co., 135 Fed. 79, 67 CCA 553; Leatherbee v. Brown, 69 Fed. 590; Westinghouse, etc., Co. v. Stanley, 65 Fed. 321; Jones v. Berger, 58 Fed. 1006; Edison Electric Light Co. v. U. S. Electric Lighting Co., 35 Fed. 134; Giant Powder Co. v. Safety Nitro Powder Co., 19 Fed. 509; Reissner v. Anness, 20 F. Cas. No. 11,686, 3 Bann. & A. 148. (5) Effect of setting a plea down for argument. General Electric Co. v. New England Electric Mfg. Co., 128 Fed. 738, 63 CCA 448; Edison Electric Light Co. v. Equitable L. Assur. Co., 55 Fed. 478.

61. See supra § 554.

62. U. S. Rev. St. § 4920.

63. Admissibility of evidence dependent upon pleading or notice see infra § 576.

64. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

65. Morton v. Llewellyn, 164 Fed. 693, 90 CCA 514.

66. Lemley v. Dobson-Evans Co., 243 Fed. 391, 156 CCA 171; Electric Storage Battery Co. v. Philadelphia Storage Battery Co., 211 Fed. 154; Klein v. Seattle, 63 Fed. 702 [aff 77 Fed. 200, 23 CCA 114].

[a] **Rule applied** to defenses of: (1) Abandonment. Abrahams v. Universal Wire Co., 10 F. (2d) 838. (2) Prior Patents relied on as anticipations. Jones v. Cyphers, 115 Fed. 324 [aff 126 Fed. 753, 62 CCA 21]; Odiorne v. Denney, 18 F. Cas. No. 10,431, 3 Bann. & A. 287, 1 N. J. L. J. 183.

67. See cases infra this note.

[a] **Insufficient allegations.**—(1) An allegation that a prior machine was built by a person named is not an allegation of prior use by that person. Tatum v. Eby, 60 Fed. 408. (2) An answer not setting forth that the invention was patented to any one, but that it was "fully described and publicly made known in several patents," mentioning the names and dates of the same, does not sufficiently set up the statutory defense of a prior patent of the invention, for the invention might have been described and publicly made known by a patent without being patented. Saunders v. Allen, 53 Fed. 109, 110 [aff 60 Fed. 610, 9 CCA 157].

[b] **Anticipation held sufficiently pleaded.**—Higgin Mfg. Co. v. Watson, 263 Fed. 378; Lemley v. Dobson-Evans Co., 243 Fed. 391, 156 CCA 171.

68. Corrugated Metal Co. v. Pattison, 197 Fed. 577.

[a] **If fraud or subterfuge is relied on** (1) the allegations must point out specifically the details thereof. American Sulphite Pulp Co. v. Howland Falls Pulp Co., 70 Fed. 986 [rev on other grounds 80 Fed. 395, 25 CCA 500; Clark v. Scott, 5 F. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245; Doughty v. West, 7 F. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215. (2) An answer alleging in the language of the statute that the specifications as made contain less than the whole truth relative to the invention, and more than was necessary to produce the desired effect which the law assigns to the specification, is too general to require the attention of the court where the details of fraud or subterfuge are not specifically set up. American Sulphite Pulp Co. v. Howland Falls Pulp Co., supra.

[b] **Distinction as to dates.**—In pleading defenses in a suit for infringement, the distinction should be carefully observed between the pleading of patents, and printed publications, which, as disclosures, take effect only from the date of issue, and allegations of priority of invention, in which actual dates of invention are to be the subject of testimony. Troy Laundry Mach. Co. v. International Equipment Co., 278 Fed. 891.

69. U. S. Rev. St. § 4920.

70. Anderson v. Miller, 129 U. S. 70, 9 SCt 224, 32 L. ed. 635; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Diamond Match Co. v. Schenck, 71 Fed. 521 [aff 77 Fed. 208, 23 CCA 122]; Klein v. Seattle, 63 Fed. 702 [aff 77 Fed. 200, 23 CCA 114]; Tatum v. Eby, 60 Fed. 408; Brown v. Hall, 4 F. Cas. No. 2,008, 6 Blatchf. 401, 3 Fish. Pat. Cas. 531; Earl v. Dexter, 8 F. Cas. No. 4,242, 1 Bann. & A. 400, Holmes 412; Graham v. Mason, 10 F. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Orr v. Merrill, 18 F. Cas. No. 10,591, 2 Robb Pat. Cas. 331, 1 Woodb. & M. 376; Smith v. Frazer, 22 F. Cas. No. 13,048, 5 Fish. Pat. Cas. 543.

71. Woodbury Patent Planing Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384; Allis v. Buckstaff, 13 Fed. 879. Contra Richardson v. Lockwood, 20 F. Cas. No. 11,787, 6 Fish. Pat. Cas. 454.

72. Wise v. Allis, 9 Wall. (U. S.) 737, 19 L. ed. 784; Smith v. Frazer, 22 F. Cas. No. 13,048, 5 Fish. Pat. Cas. 543, 3 Pittsb. (Pa.) 397.

[a] **Notice is sufficient** (1) where it fairly supplies plaintiff with guides to the sources of, and the means of verifying, defendant's proofs. Smith v. Frazer, 22 F. Cas. No. 13,048, 5 Fish. Pat. Cas. 543. (2) Where the answer of defendants showing they were residents of a certain place gave notice that they were prepared to prove that certain named persons who were defendants themselves had for over four years prior to the application for the patent in suit used and sold the articles described in the patent, and it was objected that the answer did not state the names and places of residence of the persons by whom and where the articles were used, it was held that the object of the statutory requirement was to apprise plaintiff of the nature of the evidence which he must be ready to meet at the trial, and that the answer substantially and fully accomplished this. Anderson v. Miller, 129 U. S. 70, 32 L. ed. 635. (3) Likewise, notice of the defense of prior invention by a named person was not insufficient, although his address was omitted, where the notice identified him as the president of one of the defendants, a corporation which bore his name. J. H. Day Co. v. Mountain City Mill Co., 264 Fed. 963 [aff 257 Fed. 561] (no one could well have failed to understand his identity).

73. Wise v. Allis, 9 Wall. (U. S.) 737, 19 L. ed. 784.

need not be under oath.[74]

[§ 565] **(3) Cross Bill or Counterclaim.** Provided jurisdiction of the person of plaintiff in respect of the counterclaim exists,[75] defendant may, under the federal equity rules,[76] assert a counterclaim for infringement of another patent,[77] where it is related,[78] or even where it is unrelated,[79] to the subject matter of the patent or transaction in suit. Also, defendant may interpose a counterclaim charging plaintiff with interference with defendant's business by circulating false statements concerning defendant's property and making false threats of suits against defendant's customers, and asking for an injunction and damages.[80] On the other hand, a counterclaim for a cause of action strictly legal cannot be interposed,[81] nor, where the case is not within the statute, can defendant pursue by counterclaim the statutory remedy accorded an applicant for a patent which has been refused.[82] The patent in suit cannot be impeached by a counterclaim.[83] Except as modified by the federal equity rules relating to set-offs and counterclaims,[84] the general rules relating to cross bills[85] apply to cross bills in patent infringement suits.[86] Thus a cross bill must be germane to the original bill,[87] and not include mere matters of defense.[88]

[§ 566] **(4) Supplemental Bill.** The general rules relating to supplemental bills[89] apply in suits for infringement of patents.[90] The allowance or refusal of leave to file such a bill is largely a matter of discretion.[91] Plaintiff may be allowed to file a supplemental bill for the purpose of setting up an adjudication of the validity of the patent in another circuit after the filing of the original bill in the present case,[92] or for the purpose of bringing in new parties[93] where the addition of such parties is proper;[94] but an assignee of the patent may not file a supplemental bill setting up a claim for past damages assigned to him since the filing of the original bill;[95] and ordinarily where a patent, during the pendency of a suit thereon, is surrendered and a reissue is granted, it is not proper to file a supplemental bill founded on the reissued patent,[96] although, where defendant does not object, the court may disregard the irregularity:[97] It is neither necessary nor proper to file a supplemental bill setting up acts of infringement committed after the commencement of the suit,[98] or to prevent infringement covered by an injunction in force.[99]

Supplementary bill in nature of bill of review may be filed where it is based upon newly discovered evidence,[1] unless the evidence might have been discovered originally;[2] but leave to file such a bill to obtain consideration of certain matters will be denied where, if they had been considered, they would not have changed the result.[3]

[§ 567] **(5) Bill of Particulars.**[4] Although the bill sufficiently states the ultimate facts,[5] nevertheless, upon defendant's motion,[6] the court, in its discretion,[7] may order plaintiff to state in a bill of particulars the precise right asserted by him[8] and the precise trespass upon that right alleged to have been committed by defendant,[9] or, in other words, the particular claims of the patent which plaintiff

74. Campbell v. New York, 45 Fed. 243.

75. See supra § 528.

76. See Equity § 617.

77. Krentler-Arnold Hinge Last Co. v. Leman, 13 F. (2d) 796 [mod 300 Fed. 834]. Contra Christensen v. Westinghouse Tract. Brake Co., 235 Fed. 898.

78. U. S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co., 216 Fed. 186; Marconi Wireless Tel. Co. v. National Electric Signaling Co., 206 Fed. 295.

79. Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377 [rev on other grounds 264 Fed. 670]. Contra Klauder-Weldon Dyeing Mach. Co. v. Giles, 212 Fed. 452; Adamson v. Shaler, 208 Fed. 566; Terry Steam Turbine Co. v. B. F. Sturtevant Co., 204 Fed. 103.

80. Vacuum Cleaner Co. v. American Rotary Valve Co., 208 Fed. 419.

81. Connecticut Tel., etc., Co. v. Automotive Equipment Co., 14 F. (2d) 957; General Electric Co. v. Minneapolis Electric Lamp Co., 10 F. (2d) 851 [app dism 7 F. (2d) 1020]. Compare Salt's Textile Mfg. Co. v. Tingue Mfg. Co., 208 Fed. 156 (allowing interposition of counterclaim for damages).

82. Colman v. American Warp Drawing Mach. Co., 235 Fed. 531 (where defendant is not the applicant for the patent, the court in question is not the one having cognizance of the matter set up in the counterclaim, and more than one year has elapsed since refusal of the application upon appeal from the commissioner).

83. Nieblo Mfg. Co. v. Standard Co., [1927] Can. Exch. 82, [1927] 2 DomLR 843.

84. See Equity § 617.

85. See Equity §§ 596–617.

86. See cases infra notes 87, 88.

87. Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 78 Fed. 639; New Departure Bell Co. v. Hardware Specialty Co., 62 Fed. 462; International Tooth-Crown Co. v. Carmichael, 44 Fed. 350; Johnson R. Signal Co. v. Union Switch, etc., Co., 43 Fed. 331; Curran v. St. Charles Car Co., 32 Fed. 835.

[a] **Infringement of defendant's patent.**—A cross bill alleging infringement by plaintiff of defendant's patent is not germane to the original bill and cannot be sustained. New Departure Bell Co. v. Hardware Specialty Co., 62 Fed. 462; Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co., 46 Fed. 351.

88. Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 78 Fed. 639; Atkins v. Parke, 61 Fed. 953, 10 CCA 189; Puetz v. Bransford, 32 Fed. 318.

89. See Equity §§ 658–668.

90. Tubman v. Wason Mfg. Co., 44 Fed. 429.

91. Brookfield v. Novelty Glass Mfg. Co., 170 Fed. 960, 96 CCA 127.

92. Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. 602.

93. Safety Car Heating, etc., Co. v. U. S. Light, etc., Co., 2 F. (2d) 384; Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Co., 288 Fed. 957.

94. See supra § 549.

95. Emerson v. Hubbard, 34 Fed. 327.

96. Reedy v. Scott, 23 Wall. (U. S.) 352, 23 L. ed. 109; Fry v. Quinlan, 9 F. Cas. No. 5,140, 13 Blatchf. 205. Contra Dental Vulcanite Co. v. Wetherbee, 7 F. Cas. No. 3,810, 2 Cliff. 555, 3 Fish. Pat. Cas. 87; Woodworth v. Stone, 30 F. Cas. No. 18,021, 2 Robb Pat. Cas. 296, 3 Story 749.

97. Reedy v. Scott, 23 Wall. (U. S.) 352, 23 L. ed. 109.

98. Minerals Separation v. Miami Copper Co., 264 Fed. 528, 268 Fed. 862 [aff 269 Fed. 265]; Westinghouse Air Brake Co. v. Christensen Engineering Co., 126 Fed. 764. Contra Chicago Grain Door Co. v. Chicago, etc., R. Co., 137 Fed. 101.

[a] **Reason for rule** is that (1) full and complete relief (Minerals Separation v. Miami Copper Co., 264 Fed. 528; Westinghouse Air Brake Co. v. Christensen Engineering Co., 126 Fed. 764), (2) not only by way of injunction (Minerals Separation v. Miami Copper Co., supra), (3) but also in the accounting (Minerals Separation v. Miami Copper Co., supra; Westinghouse Air Brake Co. v. Christensen Engineering Co., 126 Fed. 764 [writ of error dism 129 Fed. 96, 63 CCA 598 mem]), (4) may be had under the original bill. Accounting covering acts of infringement to date of master's report see infra § 637.

[b] **In cases not directly involving point,** as in cases where, on account of doubt as to the violation of an injunction, the court refused to adjudge defendant in contempt, it was suggested that plaintiff might proceed by supplemental bill. See infra § 611.

99. Baltimore, etc., R. Co. v. Walter S. Newhall Co., 274 Fed. 889 [rev 258 Fed. 650].

1. Diamond Drill, etc., Co. v. Kelley, 138 Fed. 833; Kelley v. Diamond Drill, etc., Co., 136 Fed. 855, 69 CCA 599 [certiorari den 198 U. S. 584 mem, 25 SCt 802 mem, 49 L. ed. 1173 mem]; Municipal Signal Co. v. Gamewell Fire-Alarm Tel. Co., 77 Fed. 452.

2. Westinghouse Electric, etc., Co. v. Stanley Instrument Co., 138 Fed. 823, 71 CCA 189; Bennett v. Schooley, 77 Fed. 352.

3. Denaro v. McLaren Cons. Cone Corp., 23 F. (2d) 384.

4. Cross references:

Bill of particulars:

In civil actions generally see Pleading [31 Cyc 565].

Under federal equity rules generally see Equity § 405.

Interrogatories and discovery see infra §§ 592, 593.

5. Universal Oil Products Co. v. Skelly Oil Co., 12 F. (2d) 271. Contra Bonney Supply Co. v. Heltzel, 243 Fed. 399.

6. Paraffine Cos. v. Wieland, 17 F. (2d) 992.

7. Universal Oil Products Co. v. Skelly Oil Co., 12 F. (2d) 271.

8. Wilson v. Union Tool Co., 275 Fed. 624.

9. Wilson v. Union Tool Co., supra.

[a] **Where plaintiff alleges colorable imitation** of his patented article, defendant is entitled to particulars of breaches in order that he may be informed in what particular respects plaintiff alleges that defendant's article is an infringement. Kleinert

intends to rely on as having been infringed,[10] and the particular articles manufactured or sold,[11] or the particular parts, elements, or steps used,[12] by defendant, which plaintiff will rely on to establish infringement; but plaintiff will not be required to identify infringing machines by reference to their location in the hands of purchasers from defendant;[13] nor will he be required to parallel and compare each part, element, or step set forth in a claim of the patent with alleged infringing parts, elements, or steps in defendant's structure or process.[14] Likewise, where defendant sets up matters of anticipation or the like, he may be required to state precisely the matters relied upon by way of defense,[15] as, for example, where he pleads numerous patents, publications, or instances of prior knowledge and use, he may be ordered to indicate specifically the ones he will rely on at the trial;[16] but he will not be required to specify by appropriate reference characters the part of each of the patents or printed publications upon which he will rely,[17] nor will he be required to illustrate or explain the instances of prior knowledge or use,[18] or to furnish drawings of a device alleged as an anticipation.[19] On defendant's motion for a bill of particulars, plaintiff will not be required to fix the date of the patented invention,[20] but on plaintiff's motion his disclosure to defendant of the dates of the conception and reduction to practice of the patented invention may be required as a condition of ordering defendant to state the approximate dates of prior use or knowledge.[21] Neither party will be required to state reasons, arguments, or opinions in a bill of particulars.[22]

[§ 568] **(6) Objections to Pleadings.**[23] Demurrers[24] and exceptions to the answer[25] have been

Rubber Co. v. Eisman Rubber Co., 12 OntWR 60 [foll Shroeder v. Donatt, 14 OntWR 103].

10. Paraffine Cos. v. Wieland, 17 F. (2d) 992; Bonney Supply Co. v. Heltzel, 243 Fed. 399.

11. Paraffine Cos. v. Wieland, 17 F. (2d) 992.

12. Universal Oil Products Co. v. Skelly Oil Co., 12 F. (2d) 271.

13. Paraffine Cos. v. Wieland, 17 F. (2d) 992.

14. Universal Oil Products Co. v. Skelly Oil Co., 12 F. (2d) 271; Bonney Supply Co. v. Heltzel, 243 Fed. 399.

15. Wilson v. Union Tool Co., 275 Fed. 624.

[a] **Compliance with rule of court.**—(1) Where a rule of court prescribes what shall be stated in particulars of objections for want of novelty, further particulars will be ordered where there is an insufficient compliance with the rule (Crosthwaite Fire Bar Syndicate v. Senior, [1909] 1 Ch. 801), (2) but not where there is a sufficient compliance with the rule (Minerals Separation, Ltd. v. Ore Concentration Co., Ltd., [1909] 1 Ch. 744).

16. Beacon Folding Mach. Co. v. Rotary Mach. Co., 23 F. (2d) 345; Grand Rapids Showcase Co. v. Straus, 229 Fed. 199.

[a] **Patents.**—"As a matter of practical procedure, the trial court may require, where a large number of patents are alleged, as here, the pleader to indicate specifically which of them he will rely upon as anticipations, and which will be urged as merely illustrative of the art, as well as those which will be offered in evidence for either purpose, in order that the other side may have them examined by his experts, and be prepared to demonstrate to the court whether or not they have any pertinency. This rule has grown up because of the fact that litigants often allege or 'throw in' a lot of patents, which they have no serious intention of contending have any particular relevancy to the issues in suit." Lapeer Trailer Corp. v. Freuhauf Trailer Co., 24 F. (2d) 595, 596.

17. Beacon Folding Mach. Co. v. Rotary Mach. Co., 23 F. (2d) 345.

18. Beacon Folding Mach. Co. v. Rotary Mach. Co., supra.

19. Todd v. Whitaker, 217 Fed. 319.

20. Todd v. Whitaker, supra; Kleinert Rubber Co. v. Eisman Rubber Co., 12 OntWR 60.

21. Beacon Folding Mach. Co. v. Rotary Mach. Co., 23 F. (2d) 345.

22. Beacon Folding Mach. Co. v. Rotary Mach. Co., supra; Wilson v. Union Tool Co., 275 Fed. 624.

23. Motion:
For bill of particulars see supra § 567.
To dismiss original bill see infra § 641.

24. See Equity § 504.

[a] **Decisions on, or relative to, demurrers under former practice.**—Richards v. Chase Elevator Co., 158 U. S. 299, 15 SCt 831, 39 L. ed. 991 [aff 40 Fed. 165]; Wollensak v. Reiher, 115 U. S. 96, 6 SCt 1137, 29 L. ed. 350; Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25 L. ed. 77; Hildreth v. Auerbach, 223 Fed. 545 [aff 223 Fed. 651, 139 CCA 205]; Bronk v. Charles H. Scott Co., 211 Fed. 338, 128 CCA 17; Marconi Wireless Tel. Co. v. New England Nav. Co., 191 Fed. 194; Havens v. Ostrander, 190 Fed. 199; Luten v. Dover Constr. Co., 189 Fed. 405; Matteawan Mfg. Co. v. Emmons Bros. Co., 185 Fed. 814, 108 CCA 46; Lange v. McGuin, 177 Fed. 219, 101 CCA 389; Voightman v. Seely, 176 Fed. 371; Fichtel v. Barthel, 173 Fed. 489; Kuhn v. Lock-Stub Check Co., 165 Fed. 445, 91 CCA 389 [aff 157 Fed. 235]; Southern Plow Co. v. Atlanta Agricultural Works, 165 Fed. 214; Dyer v. Cryder, 153 Fed. 767; Jackes-Evans Mfg. Co. v. Hemp, 140 Fed. 254, 71 CCA 646; Bowers v. Bucyrus Co., 132 Fed. 39; Edison v. American Mutoscope, etc., Co., 127 Fed. 361; Dade v. Boorum, etc., Co., 121 Fed. 135; Fabric Coloring Co. v. Alexander Smith, etc., Carpet Co., 109 Fed. 328; Lamson Cons. Serv. Co. v. Siegel-Cooper Co., 106 Fed. 734; Lyons v. Drucker, 106 Fed. 416, 45 CCA 368; J. Elwood Lee Co. v. F. B. Goodrich Co., 105 Fed. 627; Electric Vehicle Co. v. Winton Motor-Carriage Co., 104 Fed. 814; Fairies Mfg. Co. v. Brown, 102 Fed. 508; Beer v. Walbridge, 100 Fed. 465, 40 CCA 496; Higgin Mfg. Co. v. Scherer, 100 Fed. 459, 40 CCA 491; L. E. Waterman Co. v. Vassar College, 99 Fed. 564; Warner Bros. Co. v. Warren-Featherbone Co., 97 Fed. 604; Lyons v. Bishop, 95 Fed. 154; E. Ingraham Co. v. E. N. Welch Mfg. Co., 92 Fed. 1019, 35 CCA 163; Warren Featherbone Co. v. Warner Bros. Co., 92 Fed. 990; Chandler Adjustable Chair, etc., Co. v. Heywood Bros., etc., Co., 91 Fed. 163; Ballou v. Potter, 88 Fed. 786; E. Ingraham Co. v. E. N. Welch Mfg. Co., 87 Fed. 1000 [aff 92 Fed. 1019 mem, 35 CCA 163 mem]; Rowe v. Blodgett, etc., Co., 87 Fed. 868; Conley v. Marum, 83 Fed. 309 [aff 85 Fed. 990 mem, 29 CCA 680 mem]; Strom Mfg. Co. v. Weir Frog Co., 83 Fed. 170, 27 CCA 502 [aff 75 Fed. 279]; Diamond Match Co. v. Ohio Match Co., 80 Fed. 117; American Fibre-Chamois Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 CCA 662; Cleveland Faucet Co. v. Vulcan Brass Co., 72 Fed. 505; Covert v. Travers Bros. Co., 70 Fed. 788; Heaton Peninsular Button-Fastener Co. v. Schlochtmeyer, 69 Fed. 592 [aff 72 Fed. 520, 18 CCA 674]; Davock v. Chicago, etc., R. Co., 69 Fed. 468; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 68 Fed. 913; Drainage Constr. Co. v. Englewood Sewer Co., 67 Fed. 141; Russell v. Kern, 64 Fed. 581 [aff 69 Fed. 94, 16 CCA 154]; Hutton v. Star Slide Seat Co., 60 Fed. 747; Jaros Hygienic Underwear Co. v. Fleece Hygienic Co., 60 Fed. 622; Hanlon v. Primrose, 56 Fed. 600; Bragg Mfg. Co. v. Hartford, 56 Fed. 292; Goebel v. American R. Supply Co., 55 Fed. 825; U. S. Credit System Co. v. American Credit Indemn. Co., 53 Fed. 818 [aff 59 Fed. 139, 8 CCA 49]; Dickerson v. Greene, 53 Fed. 247; Edison Electric Light Co. v. Mather Electric Co., 53 Fed. 244; Krick v. Jansen, 52 Fed. 823; Electrolibration Co. v. Jackson, 52 Fed. 773; Blair v. Lippincott Glass Co., 52 Fed. 226; Buckingham v. Springfield Iron Co., 51 Fed. 236; American Solid Leather Button Co. v. Empire State Nail Co., 50 Fed. 929; Overman Wheel Co. v. Elliott Hickory Cycle Co., 49 Fed. 859; Coop v. Dr. Savage Physical Dev. Inst., 47 Fed. 899; Consolidated Brake-Shoe Co. v. Detroit Steel, etc., Co., 47 Fed. 894; Root v. Sontag, 47 Fed. 309; Bottle Seal Co. v. De La Vergne Bottle, etc., Co., 47 Fed. 59; International Terra-Cotta Lumber Co. v. Maurer, 44 Fed. 618; Fougeres v. Murbarger, 44 Fed. 292; Stirrat v. Excelsior Mfg. Co., 44 Fed. 142; Illingworth v. Atha, 42 Fed. 141; American Cable R. Co. v. New York, 42 Fed. 60; Studebaker Bros. Mfg. Co. v. Illinois Iron, etc., Co., 42 Fed. 52; Clement Mfg. Co. v. Upson, etc., Co., 40 Fed. 471; Blessing v. John Trageser Steam Copper Works, 34 Fed. 753; Wise v. Grand Ave. R. Co., 33 Fed. 277; West v. Rae, 33 Fed. 45; Kaolatype Engraving Co. v. Hoke, 30 Fed. 444; Griffith v. Segar, 29 Fed. 707; Post v. T. C. Richards Hardware Co., 26 Fed. 618 [app dism 131 U. S. 444, 9 SCt 802, 33 L. ed. 218]; Post v. T. C. Richards Hardware Co., 25 Fed. 905; Mershon v. J. F. Pease Furnace Co., 24 Fed. 741, 23 Blatchf. 329; Lilliendahl v. Detwiller, 18 Fed. 176; Barney v. Peck, 16 Fed. 413; Pope Mfg. Co. v. Marqua, 15 Fed. 400; Allis v. Stowell, 15 Fed. 242; Adams, etc., Mfg. Co. v. Meyrose, 12 Fed. 440; Hayes v. Dayton, 8 Fed. 702, 18 Blatchf. 420; Putnam v. Hollender, 6 Fed. 882, 19 Blatchf. 48; Fischer v. O'Shaughnessey, 6 Fed. 92; Hayes v. Bickelhoupt, 11 F. Cas. No. 6,261b; Noe v. Prentice, 18 F. Cas. No. 10,284a; Perry v. Corning, 19 F. Cas. No. 11,004, 7 Blatchf. 195; Woodworth v. Edwards, 30 F. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120; Roemer v. Logowitz, 20 F. Cas. No. 11,996.

Analogy between rules applied on demurrer and motion to dismiss see infra § 641.

25. See Equity § 583.

[a] **Decisions relative to exceptions under former practice.**—U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234; Graham v. Mason, 10 F. Cas. No.

abolished by the federal equity rules. Immaterial allegations in the bill[26] or answer[27] will be stricken out on motion; but a motion to strike out on this ground will be denied where the allegations in question have a bearing on the relief sought.[28] Objections to the bill which are highly technical and easily susceptible of correction should be insisted upon by defendant before the hearing,[29] and will not be sustained when made for the first time in the written briefs.[30]

[§ 569] **(7) Amendments.** In accordance with the principles governing the amendments of pleadings in equitable suits generally,[31] and especially the rules of court governing the amendments of pleadings in equitable suits in federal courts,[32] amendments of the bill[33] or answer[34] in a suit for infringement of a patent may be allowed; but where the answer is amended so as to set up a statutory defense, the provision of the statute requiring thirty days' notice[35] should be given effect.[36] In the discretion of the court,[37] an application for leave to amend the bill[38] or answer[39] may be denied where there has been undue delay in making the application. An amendment of the answer will not be allowed where it would be inconsistent with the answer as filed;[40] defendant concedes that he has no proof of the subject matter of the amendment;[41] or, where, if the facts shown by movant's affidavits were shown on final hearing, plaintiff's patent would not be defeated.[42] Also a motion to amend the answer so as to set up a new defense will not be regarded favorably where the new defense is dependent wholly on parol evidence.[43] Authority to grant the amendment being established, the court may properly allow it to be entered nunc pro tunc.[44]

Plaintiff may be ordered to amend his bill, on defendant's motion, so as to specify the claims of the patent alleged to have been infringed where the patent contains numerous claims and it would be unreasonable to require defendant to prepare an answer as to all of them.[45]

[§ 570] **9. Evidence and Issues, Proof, and Variance[46]—a. In General.** In a suit for infringement of a patent plaintiff has the burden of proving his case[47] and each and every essential element thereof;[48] but evidence of the grant of the patent and of infringement thereof presents a prima facie case,[49] which defendant must overcome in order to prevent a decree for plaintiff.[50] As in other civil actions,[51] the proof must correspond to the pleadings[52] and be relevant to the issues raised thereby.[53] Ex parte affidavits are not admissible.[54]

5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1.

26. Western Electric Co. v. Williams-Abbott Electric Co., 83 Fed. 842 [mod on other grounds 108 Fed. 952, 48 CCA 159].

27. P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 634.

28. National Chemical Co. v. Llewellyn, 227 Fed. 629.

29. Buckeye Incubator Co. v. Wolf, 291 Fed. 253 [aff 296 Fed. 680].

30. Buckeye Incubator Co. v. Wolf, supra.

31. See Equity §§ 618–657.

32. See Equity § 618 note 32 [a].

33. Tremaine v. Hitchcock, 23 Wall. (U. S.) 518, 23 L. ed. 97; Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [remanding for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem]; Ensten v. Rich-Sampliner Co., 19 F. (2d) 66 [rev 13 F. (2d) 132]; Davis v. Motive Parts Corp., 16 F. (2d) 148; Aluminum Die-Casting Corp. v. Allied Die-Casting Corp., 15 F. (2d) 880; Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924; John R. Williams Co. v. Miller, etc., Mfg. Co., 108 Fed. 967; Patent-Button Co. v. Pilcher, 95 Fed. 479; Westinghouse Electric, etc., Co. v. Mustard, 87 Fed. 336; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 68 Fed. 914; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 64 Fed. 859 [rev on other grounds 73 Fed. 469, 19 CCA 534]; Ross v. Ft. Wayne, 58 Fed. 404 [rev on other grounds 63 Fed. 466, 11 CCA 288]; Edison Electric Light Co. v. Mather Electric Co., 53 Fed. 244; Reay v. Berlin, etc., Envelope Co., 30 Fed. 448; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 20 Fed. 505; Reay v. Raynor, 19 Fed. 308; Holste v. Robbertson, 4 Ch. D. 9; Penn v. Bibby, L. R. 1 Eq. 548.

34. Roemer v. Simmon, 95 U. S. 214, 24 L. ed. 384; Standard El. Interlock Co. v. Ramsey, 130 Fed. 151; Campbell v. New York, 45 Fed. 243; Babcock, etc., Co. v. Pioneer Iron-Works, 34 Fed. 338.

35. U. S. Rev. St. § 4920.

36. Jorgenson v. Hawkins, 14 F. (2d) 409 (holding it error for the court not to give effect to the statute, but also holding that the error was waived by plaintiff).

37. Flowers v. Magor Car Corp., 26 F. (2d) 98; Murray v. Detroit Wire Spring Co., 251 Fed. 59.

38. Murray v. Detroit Wire Spring Co., supra.

39. Flowers v. Magor Car Corp., 26 F. (2d) 98; Walker v. Giles, 207 Fed. 825 [aff 218 Fed. 637, 134 CCA 395].

[a] **Lack of reasonable diligence.**—An amendment of the answer will not be allowed where it appears that the subject matter of the proposed amendment could, with reasonable diligence, have been sooner introduced into the answer. India Rubber Comb Co. v. Phelps, 13 F. Cas. No. 7,025, 8 Blatchf. 85, 4 Fish. Pat. Cas. 315; Ruggles v. Eddy, 20 F. Cas. No. 12,118, 1 Bann. & A. 92, 11 Blatchf. 524.

40. Pentlarge v. Beeston, 19 F. Cas. No. 10,964, 4 Bann. & A. 23, 15 Blatchf. 347.

[a] **Amendment to deny former admissions** will be refused. Pentlarge v. Beeston, 19 F. Cas. No. 10,964, 4 Bann. & A. 23, 15 Blatchf. 347; Ruggles v. Eddy, 20 F. Cas. No. 12,118, 1 Bann. & A. 92, 11 Blatchf. 524.

41. Grinnell Washing Mach. Co. v. Clarinda Lawn Mower Co., 237 Fed. 98.

42. Richardson v. Croft, 11 Fed. 800.

43. India Rubber Comb Co. v. Phelps, 13 F. Cas. No. 7,025, 8 Blatchf. 85, 4 Fish. Pat. Cas. 315.

44. Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384.

45. Russell v. Winchester Repeating Arms Co., 97 Fed. 634.

46. Cross references:
Evidence in civil actions generally see Evidence 22 C. J. p 1.
Judicial notice:
On demurrer see infra § 641.
Of:
Discoveries, inventions, and patents see Evidence § 1972.
Matters of common knowledge generally see Evidence § 1810.
Records in prior case disclosing state of art see Evidence § 1920.
Scientific facts see Evidence § 1967.
Things in common use see Evidence § 1972.
Reference to dictionaries for definitions of scientific terms see Evidence § 2001.

47. Heidbrink v. Charles H. Hardessen Co., 25 F. (2d) 8 [certiorari den 278 U. S. 629 mem, 49 SCt 29 mem]; Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453.

48. Heidbrink v. Charles H. Hardessen Co., 25 F. (2d) 8 [certiorari den 278 U. S. 629 mem, 49 SCt 29 mem].

Burden of proving particular matters see infra §§ 571–574, 578–586.

49. Jost v. Borden Stove Co., 262 Fed. 163.

50. Jost v. Borden Stove Co., supra.

[a] **Technical defenses** must be clearly proved. A. B. Dick Co. v. Fuerth, 57 Fed. 834.

51. See Equity §§ 676–678; Pleading [31 Cyc 680].

52. Lorain Steel Co. v. New York Switch, etc., Co., 184 Fed. 301, 106 CCA 443 [aff 124 Fed. 548]; New York Belting, etc., Co. v. New Jersey Car-Spring, etc., Co., 48 Fed. 556 [rev on other grounds 53 Fed. 810, 4 CCA 21]; Allis v. Buckstaff, 13 Fed. 879; Roberts v. Buck, 20 F. Cas. No. 11,897, 6 Fish. Pat. Cas. 325, Holmes 224 [aff 91 U. S. 159 note, 23 L. ed. 271].

[a] **Court cannot take notice of any proof** concerning which there is not a corresponding allegation. Serls v. Bouton, 12 Fed. 140, 20 Blatchf. 426; Marks v. Fox, 6 Fed. 727, 18 Blatchf. 502; Howe v. Williams, 12 F. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395.

[b] **Variance.**—When a declaration in an action for the infringement of a patent right professes to set forth the specification in the patent as part of the grant, the slightest variance is fatal. Tryon v. White, 24 F. Cas. No. 14,208, Pet. C. C. 96, 1 Robb Pat. Cas. 64.

53. Blanchard v. Putnam, 8 Wall. (U. S.) 420, 19 L. ed. 433; Miner v. T. H. Symington Co., 247 Fed. 515, 160 CCA 25 [rev 238 Fed. 806]; Harper, etc., Co. v. Wilgus, 56 Fed. 587, 6 CCA 45.

[a] **Admissions or declarations.**—It is competent to prove admissions or declarations against interest made by a party to the suit and bearing upon the question at issue. National Cash-Register Co. v. Leland, 94 Fed. 502, 37 CCA 372 [certiorari den 175 U. S. 724 mem, 20 SCt 1021 mem, 44 L. ed. 337 mem]; Rose v. Hirsh, 77 Fed. 469, 23 CCA 246; Wright v. Postel, 44 Fed. 352; Sugar Apparatus Mfg. Co. v. Yaryan Mfg. Co., 43 Fed. 140; Thatcher Heating Co. v. Drummond, 23 F. Cas. No. 13,865, 3 Bann. & A. 138.

54. Lilienthal v. Washburn, 8 Fed. 707, 4 Woods 65.

[§ 571] **b. As to Particular Matters—(1) Title of Plaintiff.** The title of plaintiff to the patent in suit is prima facie made out by proof of the issuance[55] or assignment[56] of the patent to him. Where defendant has filed a plea that the patent in suit is his property rather than the property of plaintiff, and plaintiff has filed a replication thereto, the burden of proof on the issue thus joined rests upon defendant.[57]

[§ 572] **(2) Notice.** When put in issue by the pleadings, the giving of notice of the patent by marking the patented article or otherwise,[58] the date of the notice,[59] and the commission of infringing acts thereafter,[60] must be proved by plaintiff to entitle him to recover damages,[61] and his evidence on this subject must conform to the allegations of the bill.[62]

[§ 573] **(3) Venue, Laches, and Limitations.** Unless alleged in the bill and not denied in the answer,[63] facts showing the jurisdiction of the particular district court in which the suit is brought must be proved by plaintiff;[64] they cannot be presumed or inferred.[65] Thus in an action against a nonresident, plaintiff has the burden of proving not only that an act of infringement was committed in the district,[66] but also that defendant has a regular and established place of business therein.[67] Ordinarily defendant has the burden of proving laches,[68] but where there has been a long delay, it is incumbent upon plaintiff to explain or excuse it.[69] Defendant may, under the general issue, show that the infringement was not committed within the statutory period of limitation for the recovery of damages.[70]

[§ 574] **(4) Existence, Validity, Scope, and Construction of Patent[71]—(a) Presumptions and Burden of Proof.** The various presumptions in favor of the validity of a patent[72] are available to plaintiff in a suit for infringement thereof.[73] These presumptions should be given more than mere formal recognition,[74] especially where an agent has appropriated the patented invention of his principal[75] or an infringer has copied the patented invention

55. See cases infra this note.

[a] **Proof supporting allegations of bill.**—Title in plaintiff is prima facie made out by proof supporting the allegations of the bill that plaintiff is the true, original, and first inventor of the device, that he applied for a patent, that a patent was issued to him, that he and his licensees are and have been manufacturing devices in accordance with the terms of the patent, and that they are supplying them to the trade. Wahl v. N. E. Norstrom Electric Mfg. Co., 19 F. (2d) 544 [aff 27 F. (2d) 635].

[b] **Presumption of continued ownership.**—Where the patent was granted to plaintiff, and no assignment by him is alleged or proved, he is presumed to be still the owner of it. Fischer v. Neil, 6 Fed. 89.

56. Hildreth v. Auerbach, 223 Fed. 545 [aff 223 Fed. 651, 139 CCA 205].

[a] **Confirmatory assignment.**—In an action by an assignee, a confirmatory assignment which is received in evidence without objection and refers to a prior assignment which has been lost or mislaid may prima facie correct any deficiency of proof consisting of a failure to show an assignment prior to the commencement of the action. American Optical Co. v. Shur-On Optical Co., 9 F. (2d) 932 [aff 16 F. (2d) 1013, and certiorari den 274 U. S. 742 mem, 47 SCt 587 mem, 71 L. ed. 1321 mem].

[b] **Assignment prior to issuance of patent.**—Where the bill alleges that the patent was issued to another applicant as assignee, it will be presumed, until the contrary is shown, that an assignment sufficient to pass title was before the patent office. Schaum & Uhlinger, Inc. v. Copley-Plaza Operating Co., 243 Fed. 924.

[c] **Delivery.**—That an assignment of a patent was recorded and is produced and put in evidence by a subsequent assignee in a suit for infringement is sufficient evidence of its delivery. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 Fed. 64 [aff 160 Fed. 928].

[d] **Evidence of title by assignment held sufficient.**—Youngstown Car Mfg. Co. v. B. K. Elliott Co., 173 Fed. 315 [rev on other grounds 181 Fed. 345, 104 CCA 175].

[e] **Evidence held insufficient** to show a mutual mistake in a contract between defendant and plaintiff and involving the assignment by the former to the latter of certain inventions, including the patented invention in suit. New Departure Mfg. Co. v. Rockwell-Drake Corp., 287 Fed. 328 [mod 270 Fed. 219].

57. Schupphaus v. E. I. Du Pont de Nemours Powder Co., 204 Fed. 624.

[a] **Burden held not sustained.**—Schupphaus v. E. I. Du Pont de Nemours Powder Co., 204 Fed. 624.

58. Dunlap v. Schofield, 152 U. S. 244, 14 SCt 576, 38 L. ed. 426 [dist. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Goodyear v. Allyn, 10 F. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374]; American Caramel Co. v. White, 234 Fed. 328, 148 CCA 230; Gibson v. American Graphophone Co., 234 Fed. 633, 148 CCA 399; Rollman Mfg. Co. v. Universal Hardware Works, 207 Fed. 97; Crier v. Innes, 170 Fed. 324, 95 CCA 508; Lorain Steel Co. v. New York Switch, etc., Co., 153 Fed. 205; Sprague v. Bramhall-Deane Co., 133 Fed. 738; Matthews, etc., Mfg. Co. v. National Brass, etc., Works, 71 Fed. 518; Pairpoint Mfg. Co. v. Eldridge Co., 71 Fed. 307; National Co. v. Belcher, 68 Fed. 665 [mod 71 Fed. 876, 18 CCA 375]. Contra U. S. Printing Co. v. American Playing-Card Co., 70 Fed. 50.

59. Lorain Steel Co. v. New York Switch, etc., Co., 153 Fed. 205.

[a] **Admission.**—(1) Where the bill alleged notice, without alleging any date, any answer, denying infringement at any time without expressly denying notice, admitted notice but not notice at any particular time, and did not relieve plaintiff from the burden of proving the date of notice. Lorain Steel Co. v. New York Switch, etc., Co., 153 Fed. 205. (2) Also, where the bill alleged notice to defendant of the infringement without alleging any date, an answer admitting that complainant sent notices to defendant's customers and prospective customers in reference to a pretended infringement, which notices, in September, 1911, were brought to defendant's attention, and denying all unlawful acts with which defendant is charged, admitted notice of the infringement as early as September, 1911, but sufficiently put in issue the giving of notice earlier than that date. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

60. Lorain Steel Co. v. New York Switch, etc., Co., 153 Fed. 205.

Burden of proving infringement generally see infra § 578.

61. Notice as condition precedent to recovery of damages see supra § 484.

62. Lorain Steel Co. v. New York Switch, etc., Co., 184 Fed. 301, 106 CCA 443 [aff 124 Fed. 548].

[a] **Shifting ground.**—The owner of a patent who alleges that he has put his patented improvement to practical use, and has always been ready to supply it to the public, and that except for the infringement complained of he would be in the receipt of the profits therefrom, and further, that defendant continued infringement after notice, cannot be allowed, on the introduction of evidence, to shift his ground of complaint by claiming that he had never made or sold the patented article, and therefore the statute relating to marking was inapplicable. Lorain Steel Co. v. New York Switch, etc., Co., 184 Fed. 301, 106 CCA 443 [aff 124 Fed. 548].

63. Streat v. American Rubber Co., 115 Fed. 634.

64. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Zimmers v. Dodge, 21 F. (2d) 152.

Place to sue see supra §§ 526-528.

65. Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160.

66. Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 541.

[a] **Evidence held insufficient.**—Gray v. Grinberg, 147 Fed. 732 [aff 159 Fed. 138].

67. Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 541.

[a] **Evidence held sufficient.**—Consolidated Rubber Tire Co. v. Diamond Rubber Co., 215 Fed. 106, 131 CCA 414 (evidence taken in connection with admissions in answer).

68. Allington v. Forest Box, etc., Co., 25 F. (2d) 141; Rajah Auto Supply Co. v. Belvidere Screw, etc., Co., 275 Fed. 761.

[a] **Evidence held insufficient** to sustain: (1) Defense of laches. Los Alamitos Sugar Co. v. Carroll, 173 Fed. 230, 97 CCA 446. (2) Defenses of laches and equitable estoppel. Seeger Refrigerator Co. v. American Car, etc., Co., 171 Fed. 416 [aff 178 Fed. 278, 101 CCA 542].

69. Ensten v. Rich-Sampliner Co., 13 F. (2d) 132; Sirocco Engineering Co. v. B. F. Sturtevant Co., 171 Fed. 440.

70. Peters v. Hanger, 134 Fed. 586, 67 CCA 386 [rev 127 Fed. 820, 62 CCA 498].

71. Evidence generally of:
Abandonment see supra § 125.
Invention see supra §§ 89-99.
Originality and priority see supra § 132.
Prior knowledge and use see supra §§ 55-57.
Utility see supra §§ 64-66.

72. See supra §§ 64, 258 et seq.

73. Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. (2d) 16 [certiorari den 275 U. S. 529 mem, 48 SCt 21 mem, 72 L. ed. 409 mem].

74. Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev 193 Fed. 418, and certiorari granted 238 U. S. 621 mem, 35 SCt 603 mem, 59 L. ed. 1493 mem, and rev on other grounds 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148].

75. Brunswick Refrigerating Co. v. Wolf, 222 Fed. 916, 138 CCA 396 [aff 221 Fed. 639].

down to its most minute details.[76] While the presumption of validity is not so strong,[77] or will be given only its minimum effect,[78] where the patent was granted without due consideration of the prior art, and a like rule obtains where the patent was issued because of fraud, misrepresentation, or mistake,[79] nevertheless the conditions necessary to render these rules applicable may not rest upon presumption.[80] Defendant has the burden of proving the invalidity of the patent,[81] unless infringement is asserted by a cross bill, in which case the burden rests on plaintiff in the original bill;[82] but where defendant shows use by others before the application, the burden of proof shifts to the patentee to show prior invention;[83] where plaintiff claims that the present commercial form of his invention is not a departure from the original disclosure, he has the burden of proving that any journeyman of the art could turn from the present form to the former with some certainty of result;[84] and where plaintiff, suing as an assignee of the patent, seeks a holding that defendant is estopped to deny the validity of the patent, he has the burden of showing such privity between defendant and the assignor as estops defendant.[85] The patentee does not have the burden of establishing the truth of an affidavit made and filed in the patent office many years previously for the purpose of showing priority of invention over other patents cited as anticipations.[86]

[§ 575] **(b) Admissibility—aa. In General.** Provided a proper basis therefor is laid in the pleadings or notice of special matter,[87] competent evidence tending to show that the patent is invalid is admissible;[88] but where the patent has previously been held valid by the circuit court of appeals, it is proper to exclude depositions bearing upon the price of a product both before and after the patented machine for making the product was put upon the market.[89] By virtue of statutory provision,[90] a certified copy of any record, book, paper, or drawing belonging to the patent office and of letters patent may be received in evidence in place of the original;[91] the printed copies of specifications and drawings of patents deposited in the capitols of the various states and territories and certified by the commissioner of patents will be received as evidence of all matters therein contained;[92] and a foreign patent may be proved by a copy under seal of the country,[93] or by a copy certified by the commissioner of patents of the United States;[94] but uncertified copies of patents are not admissible in evidence.[95] While admissions made in the prosecution of the application in the patent office may be introduced against the patentee,[96] statements made by him in prosecuting applications for patents other than the one in suit are not admissible,[97] and the court will not issue a certificate that a certain abandoned application in the patent office is probably material and competent in an infringement suit, where the certificate would be effective only as, or in support of, a request to the commissioner of patents to furnish a copy of the application.[98] The record of interference proceedings is admissible in evidence[99] where the proceedings involved the same question as is under consideration in the infringement suit,[1] but not, it is held, where the controversy was between persons with whom defendant is not in privity.[2] While it is improper to exclude evidence tending to show defendant's privity with defendant in another suit wherein the same patent was adjudged valid,[3] it is

76. Brunswick Refrigerating Co. v. Wolf, supra.

77. American Soda Fountain Co. v. Sample, 130 Fed. 145, 64 CCA 497 [certiorari den 195 U. S. 634 mem, 25 SCt 791 mem, 49 L. ed. 354 mem]; Cleveland Foundry Co. v. Kaufmann, 126 Fed. 658 [rev on other grounds 135 Fed. 360, 68 CCA 658]; Earle v. Wanamaker, 87 Fed. 740.

78. Goodbody v. Firestone Steel Products Co., 23 F. (2d) 625.

79. Goodbody v. Firestone Steel Products Co., supra.

80. Goodbody v. Firestone Steel Products Co., supra.

81. Marvel Equipment Co. v. Merit Oil Equipment Co., 29 F. (2d) 308 [aff 29 F. (2d) 313]; Eloesser-Heynemann Co. v. Bayly-Underhill Mfg. Co., 29 F. (2d) 305; Jensen-Salsbery Laboratories v. Salt Lake Stamp Co., 28 F. (2d) 99; National Paint Removing Co. v. Cochran, 287 Fed. 376; General Electric Co. v. Alexander, 277 Fed. 290 [aff 280 Fed. 852 (certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem)]; Atwood-Morrison Co. v. Sipp Electric Co., 136 Fed. 859 [rev on other grounds 142 Fed. 149]; De Lamar v. De Lamar Min. Co., 110 Fed. 538 [aff 117 Fed. 240, 54 CCA 272]; National Co. v. Belcher, 71 Fed. 876, 18 CCA 375; Williames v. Bernard, 41 Fed. 358; American Bell Tel. Co. v. Molecular Tel. Co., 32 Fed. 214, 23 Blatchf. 253 [rev on other grounds 126 U. S. 1, 8 SCt 778, 31 L. ed. 863]; Hoe v. Cottrell, 1 Fed. 597, 17 Blatchf. 546; Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Brady v. Atlantic Works, 3 F. Cas. No. 1,794, 2 Bann. & A. 436, 4 Cliff. 408 [rev on other grounds 107 U. S. 192, 2 SCt 225, 27 L. ed. 438]; Brown v. Whittemore, 4 F. Cas. No. 2,033, 5 Fish. Pat. Cas. 524; Howes v. Nute, 12 F. Cas. No. 6,790, 4 Cliff. 173, 4 Fish. Pat. Cas. 263; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232, 7 Phila. (Pa.) 533; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.

[a] **Rule applied** to defenses of: (1) Abandonment. Kohler v. Cline Electric Mfg. Co., 28 F. (2d) 405 [aff 27 F. (2d) 638]. (2) Prior use. Cantrell v. Wallick, 117 U. S. 689, 6 SCt 970, 29 L. ed. 1017; Electrical Engineers' Equipment Co. v. Champion Switch Co., 23 F. (2d) 600; Milner v. Kay, 1 OntWR 200. (3) Want of novelty. Sherman-Clay v. Searchlight Horn Co., 214 Fed. 86, 130 CCA 562; Rolland v. Fournier, (Que.) 4 Dom LR 756. (4) Where, in a suit upon a reissued patent, defendant claims that such patent is not for the same invention as that described in the original patent, it is incumbent upon him, rather than plaintiff, to introduce the surrendered patent in evidence. Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33.

[b] **Heavy burden.**—The burden of establishing the inoperativeness of the patented device rests heavily on defendant. Radio Corp. of America v. Edmond, Inc., 20 F. (2d) 929; Remington Cash Register Co. v. National Cash Register Co., 6 F. (2d) 585.

82. Keystone Type Fdy. v. Fastpress Co., 263 Fed. 99 [rev on other grounds 272 Fed. 242].

83. Clark Thread Co. v. Williamantic Linen Co., 140 U. S. 481, 11 SCt 846, 35 L. ed. 521; Michigan Cent. R. Co. v. Consolidated Car-Heating Co., 67 Fed. 121, 14 CCA 232; Caverly v. Deere, 52 Fed. 758 [aff 66 Fed. 305].

84. H. Ward Leonard, Inc. v. Maxwell Motor Sales Corp., 252 Fed. 584, 164 CCA 500.

85. National Cash Register Co. v. Remington Arms Co., 283 Fed. 196 [aff 286 Fed. 367].

86. Goodbody v. Firestone Steel Products Co., 23 F. (2d) 625.

87. See infra § 576.

88. Milner v. Kay, 1 OntWR 200.

[a] **Communications to patent agent** as such are not privileged. Moseley v. Victoria Rubber Co., 55 L. T. Rep. N. S. 482.

89. Denaro v. McLaren Cons. Cone Corp., 23 F. (2d) 384.

90. U. S. Rev. St. § 892.

91. Crawford v. Heysinger, 123 U. S. 589, 8 SCt 399, 31 L. ed. 269; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Philadelphia, etc., Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Richardson v. Campbell, 72 Fed. 525 [rev on other grounds 76 Fed. 976, 22 CCA 669 (certiorari den 165 U. S. 720 mem, 17 SCt 992 mem, 41 L. ed. 1184 mem)]; Emerson v. Hogg, 8 F. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. R. 77.

92. U. S. Rev. St. § 894.

93. Schoerken v. Swift, 7 Fed. 469, 19 Blatchf. 209; Gatling v. Newell, 9 Ind. 572.

94. U. S. Rev. St. § 893.

95. National Cash Register Co. v. Gratigny, 213 Fed. 463, 130 CCA 109.

96. Crawford v. Heysinger, 123 U. S. 589, 8 SCt 399, 31 L. ed. 269; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Philadelphia, etc., Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Richardson v. Campbell, 72 Fed. 525 [rev on other grounds 76 Fed. 976, 22 CCA 669 (certiorari den 165 U. S. 720 mem, 17 SCt 992 mem, 41 L. ed. 1184 mem)]; Emerson v. Hogg, 8 F. Cas. No. 4,440, 2 Blatchf. 1, Fish. Pat. R. 77.

97. General Electric Co. v. Mallory, 298 Fed. 579 [aff 294 Fed. 562, 567, and certiorari den 266 U. S. 609 mem, 45 SCt 94 mem, 69 L. ed. 466 mem].

98. Carson Inv. Co. v. Anaconda Copper Min. Co., 14 F. (2d) 559.

Mandamus to commissioner see Mandamus § 251.

99. United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem].

1. Bishop-Babcock-Becker Co. v. Arnholt, etc., Brewing Co., 220 Fed. 675 [dist Elliott v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 CCA 175].

2. Westinghouse Electric, etc., Co. v. Roberts, 125 Fed. 6.

3. Carson Inv. Co. v. Anaconda

proper to exclude the record and opinion in another suit between the same parties but not involving the patented invention under consideration in the present suit.[4] A prior foreign publication may be competent as evidence in regard to the state of the art,[5] and as a foundation for an inquiry whether it required invention to pass from a structure set forth in the publication to the patented structure.[6]

Expert testimony. It is for the judge trying a patent infringement suit to decide whether he needs the assistance of experts to understand specifications of patents relied on as prior art.[7] In some districts certain rules of court relating to the testimony of expert witnesses have been adopted for the purpose of confining experts to explanations which are helpful and instructive to the court in enabling it to understand the art.[8] The opinion of an expert as to the construction of the patent in suit is not admissible.[9]

Ex parte tests. In an action for an infringement of a patent for a process and a product, the court in its discretion may properly exclude evidence of the results of tests made by or on behalf of plaintiff and tending to prove the superior qualities of the product resulting from the use of the process,[10] as such evidence is at best merely self-serving,[11] and cannot be considered for the purpose of adding anything to the statements found in the claims and specifications of the patent itself.[12] However, it is not improper to consider ex parte tests of the subject matter of the patented invention or discovery where they appear to have been fairly made[13] and are not objected to on the ground of their ex parte character.[14]

[§ 576] **bb. Under Pleadings.** Ordinarily evidence bearing upon the scope[15] or validity[16] of the patent may and must correspond to the issues raised by the pleadings, but where plaintiff has introduced evidence of matters not pleaded, defendant may introduce evidence of a defense thereto without amending the answer.[17] Matters alleged by one party and admitted by the other are before the court without being offered in evidence.[18]

Under general issue defendant may show the prior state of the art,[19] that plaintiff's device is not operative,[20-21] or matters, other than statutory defenses, which affect the validity of the patent and cannot well be made the subject of a special plea;[22] and he may give in evidence the act of congress relating to patentability.[23]

Statutory defenses. Under the statute providing for proof at the trial of certain special matters of defense, all relating to the validity of the patent, where defendant has given previous written notice thereof,[24] such matters are admissible in evidence for the purpose of defeating the patent where they have been pleaded or sufficient statutory notice thereof has been given;[25] but not otherwise,[26] unless

Copper Min. Co., 26 F. (2d) 651 [remanding for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem].

4. Muther v. United Shoe Mach. Co., 21 F. (2d) 773.

5. French v. Carter, 137 U. S. 239, 11 SCt 90, 34 L. ed. 664.

Admissibility of prior publication under pleadings see infra § 576.

6. French v. Carter, 137 U. S. 239, 11 SCt 90, 34 L. ed. 664.

7. Kohn v. Eimer, 265 Fed. 900.

8. Victor Talking Mach. Co. v. Sonora Phonograph Corp., 221 Fed. 676.

9. Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683.

[a] **Expert testimony held not necessary** to enable the court to understand the particular patent or patented invention in suit. Union Sulphur Co. v. Freeport Texas Co., 251 Fed. 634 [mod on other grounds 255 Fed. 961, 167 CCA 253 (certiorari den 249 U. S. 618 mem, 39 SCt 392 mem, 63 L. ed. 804 mem)]; Hardinge Conical Mill Co. v. Abbe Engineering Co., 195 Fed. 936, 115 CCA 624.

10. Richardson Co. v. Hood Rubber Co., 22 F. (2d) 501 [aff 16 F. (2d) 785].

11. Richardson Co. v. Hood Rubber Co., supra.

12. Richardson Co. v. Hood Rubber Co., supra.

13. Hoskins Mfg. Co. v. General Electric Co., 212 Fed. 422 [aff 224 Fed. 464, 140 CCA 150].

14. Hoskins Mfg. Co. v. General Electric Co., supra.

15. See case infra this note.

[a] **Disclaimers.**—An averment in a declaration that disclaimers were duly and legally executed in writing and accepted by the commissioner is sufficient to enable plaintiff to give evidence of their execution as required by statute. Van Hook v. Wood, 28 F. Cas. No. 16,854.

16. See cases infra this note.

[a] **Reissued patent.**—Where the question whether a reissued patent is for the same invention as the original patent is put in issue by the pleadings, the original patent is admissible in evidence. Oregon Impr. Co. v. Excelsior Coal Co., 132 U. S. 215, 10 SCt 54, 32 L. ed. 344.

[b] **Fraud.**—The question of fraud can be raised only by distinct and special allegations in the plea or answer. Blake v. Stafford, 3 F. Cas. No. 1,504, 6 Blatchf. 195, 3 Fish. Pat. Cas. 294; Clark v. Scott, 5 F. Cas. No. 2,833, 9 Blatchf. 301, 5 Fish. Pat. Cas. 245; Doughty v. West, 7 F. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Gear v. Grosvenor, 10 F. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

17. Curtain Supply Co. v. National Lock Washer Co., 174 Fed. 45 [aff 178 Fed. 95, 102 CCA 99].

[a] **Illustrations.**—Where defendant manufactures under a patent of prior date, but complainant undertakes to carry the date of his invention back to a still earlier date, although no such issue is tendered by his pleadings, defendant may meet such proof by the defense of laches or abandonment, without pleading such defense in the answer either originally or by amendment. Curtain Supply Co. v. National Lock Washer Co., 174 Fed. 45 [aff 178 Fed. 95, 102 CCA 99].

18. United Shoe Mach. Corp. v. Muther, 288 Fed. 283 [certiorari den 263 U. S. 703 mem, 44 SCt 33 mem, 68 L. ed. 515 mem] (decisions of the patent office and the court of appeals of the District of Columbia finding defendant to be the prior inventor).

[a] **Abandonment.**—(1) The issue of abandonment must be tendered by clear and specific averments. Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164. (2) Where an allegation that the invention was not abandoned is not denied in the answer, it is admitted, and may well be treated as not being in issue. Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522.

19. Brown v. Piper, 91 U. S. 37, 23 L. ed. 200.

20-21. Hildreth v. Mastoras, 253 Fed. 68 [rev on other grounds 263 Fed. 571 (certiorari granted 254 U. S. 622 mem, 41 SCt 6 mem, 65 L. ed. 443 mem, and rev on other grounds 257 U. S. 27, 42 SCt 20, 66 L. ed. 112)].

22. Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9.

23. Kneass v. Schuylkill Bank, supra.

24. U. S. Rev. St. § 4920.

[a] **Matters enumerated in statute are:** "First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent-Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or, Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or, Third. That it has been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor; or, Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or, Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public." U. S. Rev. St. § 4920.

25. Bates v. Coe, 98 U. S. 31, 25 L. ed. 68.

[a] **Use by others in addition to those mentioned** in the notice may be proved. Evans v. Kremer, 8 F. Cas. No. 4,565, Pet. C. C. 215, 1 Robb Pat. Cas. 66; Treadwell v. Bladen, 24 F. Cas. No. 14,154, 1 Robb Pat. Cas. 531, 4 Wash. C. C. 703.

[b] **Use at places other than those mentioned** in the notice may be proved. Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433 [rev 8 F. Cas. No. 4,559, Pet. C. C. 322, 1 Robb Pat. Cas. 68].

Pleading or notice see supra §§ 554, 564.

26. Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384; Philadelphia, etc., R. Co. v. Dubois, 12 Wall. (U. S.) 47; Seymour v. Osborne, 11 Wall. (U. S.) 516; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. ed. 535; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; Specialty Brass Co. v. Sette, 22 F. (2d) 964; Arrott v. Standard Sanitary Mfg. Co., 113 Fed. 389;

notice thereof is waived,[27] as by failure to object to the reception of the evidence.[28] However, matters which are inadmissible under the foregoing rule for the purpose of showing the invalidity of the patent[29] may nevertheless be admissible to show the state of the art[30] and to aid in the construction of the patent.[31]

[§ 577] **(c) Weight and Sufficiency.** It is a general rule that in an action for infringement of a patent defendant has the burden of proving the invalidity of the patent[32] beyond a reasonable doubt;[33] but the rule does not apply where the patent was issued through mistake or inadvertence.[34] Where the patent has previously been adjudged valid in another case, defendant has the burden of establishing prior use by proof which, if presented in the former case, would probably have caused a different decision.[35]

Weight of particular evidence. Little weight is ac-

Klein v. Seattle, 63 Fed. 702 [aff 77 Fed. 200, 23 CCA 114]; Western Electric Co. v. Sperry Electric Co., 58 Fed. 186, 7 CCA 164; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371; Ecaubert v. Appleton, 47 Fed. 893; Lyon v. Donaldson, 34 Fed. 789; Kiesele v. Haas, 32 Fed. 794; Bragg v. Stockton, 27 Fed. 509; Marks v. Fox, 6 Fed. 727, 18 Blatchf. 502; Coleman v. Liesor, 6 F. Cas. No. 2,984; Dixon v. Moyer, 7 F. Cas. No. 3,931, 1 Robb Pat. Cas. 324, 4 Wash. C. C. 68; Geier v. Goetinger, 10 F. Cas. No. 5,299, 1 Bann. & A. 553; Graham v. Mason, 10 F. Cas. No. 5,671, 4 Cliff. 88, 5 Fish. Pat. Cas. 1; Howe v. Williams, 12 F. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395; Jordan v. Dobson, 13 F. Cas. No. 7,519, 2 Abb. 398, 4 Fish. Pat. Cas. 232; Judson v. Cope, 14 F. Cas. No. 7,565, 1 Bond 327, 1 Fish. Pat. Cas. 615; Kelleher v. Darling, 14 F. Cas. No. 7,653, 3 Bann. & A. 438, 4 Cliff. 424; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Knight v. Gavit, 14 F. Cas. No. 7,884; La Baw v. Hawkins, 14 F. Cas. No. 7,960, 1 Bann. & A. 428; Middletown Tool Co. v. Judd, 17 F. Cas. No. 9,536, 3 Fish. Pat. Cas. 141; Pitts v. Edmonds, 19 F. Cas. No. 11,191, 1 Biss. 168, 2 Fish. Pat. Cas. 52; Read v. Miller, 20 F. Cas. No. 11,610, 2 Biss. 12, 3 Fish. Pat. Cas. 310; Roberts v. Buck, 20 F. Cas. No. 11,897, 6 Fish. Pat. Cas. 325, Holmes 224 [aff 91 U. S. 159 note, 23 L. ed. 271]; Westlake v. Cartter, 29 F. Cas. No. 17,451, 6 Fish. Pat. Cas. 519; Williams v. Boston, etc., R. Co., 29 F. Cas. No. 17,716, 4 Bann. & A. 441, 17 Blatchf. 21; Wyeth v. Stone, 30 F. Cas. No. 18,107, 2 Robb Pat. Cas. 23, 1 Story 273.

[a] **Prior patents and publications** (1) are within the rule where they have not been pleaded and statutory notice thereof has not been given. Jorgenson v. Hawkins, 14 F. (2d) 409; Earl v. Dexter, 8 F. Cas. No. 4,242, 1 Bann. & A. 400, Holmes 412; Odiorne v. Denney, 18 F. Cas. No. 10,431, 3 Bann. & A. 287, 1 N. J. L. J. 183. See Troy Laundry Mach. Co. v. International Equipment Co., 278 Fed. 891 (the relevancy of a prior patent offered in evidence is limited and controlled by the pleadings and the position taken on interrogatories). (2) In such case, prior patents are not admissible to show want of novelty in the invention claimed in complainant's patent (Grier v. Wilt, 120 U. S. 412, 7 SCt 718, 30 L. ed. 712; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593 [rev 267 Fed. 435]; Morton v. Llewellyn, 164 Fed. 693, 90 CCA 514; American Saddle Co. v. Hogg, 1 F. Cas. No. 315, 5 Fish. Pat. Cas. 353; Holmes 133; Howe v. Williams, 12 F. Cas. No. 6,778, 2 Cliff. 245, 2 Fish. Pat. Cas. 395) (3) or for the purpose of showing anticipation (Sodemann Heat, etc., Co. v. Kauffman, supra; Jones v. Cyphers, 126 Fed. 753, 62 CCA 21).

[b] **Rule applied to evidence of prior use.**—Blanchard v. Putnam, 8 Wall. (U. S.) 420, 19 L. ed. 433; Hookless Fastener Co. v. H. L. Rogers Co., 26 F. (2d) 264 [rev on other grounds 28 F. (2d) 814]; Stevenson v. Magowan, 31 Fed. 824; Bragg v. Stockton, 27 Fed. 509; Collender v. Griffith, 6 F. Cas. No. 3,000, 11 Blatchf. 213; Decker v. Grote, 7 F. Cas. No. 3,726, 10 Blatchf. 331, 6 Fish. Pat. Cas. 143; La Baw v. Hawkins, 14 F. Cas. No. 7,960, 1 Bann. & A. 428.

[c] **Separate notice of each defense.**—The various defenses authorized by statute are separate and independent defenses; and each requires its appropriate notice or answer in order to let in evidence to establish the defense. Meyers v. Busby, 32 Fed. 670, 13 Sawy. 33.

27. Monroe v. Bresee, 239 Fed. 727, 152 CCA 561; Dey Time Register Co. v. W. H. Bundy Recording Co., 178 Fed. 812, 102 CCA 260 [aff 169 Fed. 807]; Crouch v. Speer, 6 F. Cas. No. 3,438, 1 Bann. & A. 145; Roemer v. Simon, 20 F. Cas. No. 11,997, 1 Bann. & A. 138 [aff 95 U. S. 214, 24 L. ed. 384].

28. Zane v. Soffe, 110 U. S. 200, 3 SCt 562, 28 L. ed. 119; Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Monroe v. Bresee, 239 Fed. 727, 152 CCA 561; Campbell v. L. B. Skinner Mfg. Co., 236 Fed. 359; Crouch v. Speer, 6 F. Cas. No. 3,438, 1 Bann. & A. 145; Roemer v. Simon, 20 F. Cas. No. 11,997, 1 Bann. & A. 138 [aff 95 U. S. 214, 24 L. ed. 384].

29. See supra text and note 26.

30. Zane v. Soffe, 110 U. S. 200, 3 SCt 562, 28 L. ed. 119; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Vance v. Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Eschenbach v. Miller Saw Trimmer Co., 23 F. (2d) 145; Simplex Window Co. v. Hauser Reversible Window Co., 248 Fed. 919, 161 CCA 37; Johnson v. Lambert, 234 Fed. 886, 148 CCA 484; Morton v. Llewellyn, 164 Fed. 693, 90 CCA 514; Parsons v. Seelye, 100 Fed. 452, 40 CCA 484; Overweight Counterbalance El. Co. v. Improved Order Red Men's Hall Assoc., 94 Fed. 155, 36 CCA 125 [certiorari den 174 U. S. 802 mem, 19 SCt 886 mem, 43 L. ed. 1188 mem]; Kennedy v. Solar Refining Co., 69 Fed. 715; Stevenson v. Magowan, 31 Fed. 824; La Baw v. Hawkins, 14 F. Cas. No. 7,960, 1 Bann. & A. 428.

[a] **Rule applied** to prior: (1) Patents and publications. Grier v. Wilt, 120 U. S. 412, 7 SCt 718, 30 L. ed. 712; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593 [rev 267 Fed. 435]; Wonder Mfg. Co. v. Block, 249 Fed. 748, 161 CCA 658; Jones v. Cyphers, 126 Fed. 753, 62 CCA 21; Parsons v. New Home Sewing Mach. Co., 125 Fed. 386 [aff 134 Fed. 394, 67 CCA 392]; Myers v. Brown, 102 Fed. 250, 42 CCA 320; Myers v. Sternheim, 97 Fed. 625, 38 CCA 345; Kennedy v. Solar Refining Co., 69 Fed. 715; American Saddle Co. v. Hogg, 1 F. Cas. No. 315, 5 Fish. Pat. Cas. 353, Holmes 133. (2) Use. Stevens v. Rodgers Boiler, etc., Co., 186 Fed. 631, 108 CCA 495; Kennedy v. Solar Refining Co., 69 Fed. 715; Dayton Loop, etc., Co. v. Ruhl, 55 Fed. 649; Stevenson v. Magowan, 31 Fed. 824; Geier v. Goetinger, 10 F. Cas. No. 5,299, 1 Bann. & A. 553; La Baw v. Hawkins, 14 F. Cas. No. 7,960, 1 Bann. & A. 428.

31. Simplex Window Co. v. Hauser Reversible Window Co., 248 Fed. 919, 161 CCA 37; Smith v. Southington Mfg. Co., 235 Fed. 160 [rev on other grounds 247 Fed. 342, 159 CCA 436]; Morton v. Llewellyn, 164 Fed. 693, 90 CCA 514.

[a] **Rule applied to prior patents.**—Grier v. Wilt, 120 U. S. 412, 7 SCt 718, 30 L. ed. 712; Eachus v. Broomall, 115 U. S. 429, 6 SCt 229, 20 L. ed. 419; Jorgenson v. Hawkins, 14 F. (2d) 409; Sodemann Heat, etc., Co. v. Kauffman, 275 Fed. 593 [rev 267 Fed. 435]; Wonder Mfg. Co. v. Block, 249 Fed. 748, 161 CCA 658; Parsons v. New Home Sewing Mach. Co., 125 Fed. 386 [aff 134 Fed. 394, 67 CCA 392].

32. See supra § 574.

33. Deering v. Winona Harvester Works, 155 U. S. 286, 15 SCt 118, 39 L. ed. 153; Washburn, etc., Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 SCt 443, 36 L. ed. 154; Eloesser-Heynemann Co. v. Bayly-Underhill Mfg. Co., 29 F. (2d) 305; San Francisco Cornice Co. v. Beyrle, 195 Fed. 516, 115 CCA 426 [aff 181 Fed. 692]; Western Electric Co. v. Home Tel. Co., 85 Fed. 649; Osgood Dredge Co. v. Metropolitan Dredging Co., 75 Fed. 670, 21 CCA 491; Frankfort Whisky Process Co. v. Mill Creek Distilling Co., 37 Fed. 533; Tompkins v. Gage, 24 F. Cas. No. 14,088, 5 Blatchf. 268, 2 Fish. Pat. Cas. 577; Wood v. Cleveland Rolling-Mill Co., 30 F. Cas. No. 17,941, 4 Fish. Pat. Cas. 550.

[a] **Rule applied** to defenses of: (1) Want of novelty. Mygatt v. Schaffer, 218 Fed. 827, 134 CCA 515 [certiorari den 238 U. S. 615 mem, 35 SCt 284 mem, 59 L. ed. 1491 mem]; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197. (2) Lack of invention. Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 CCA 23 [rev 193 Fed. 418, and certiorari granted 238 U. S. 621 mem, 35 SCt 603 mem, 59 L. ed. 1493 mem, and rev on other grounds 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148]. (3) Prior use. Inflexible Co. v. Megibow, 251 Fed. 924; Ferd Messmer Mfg. Co. v. Albert Pick & Co., 251 Fed. 894; Mygatt v. Schaffer, supra. (4) Prior invention by another, or that the patentee was not the first and original inventor. Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522; H. J. Heinz Co. v. Cohn, 207 Fed. 547, 125 CCA 197. And see Roberti v. Jonas, 300 Fed. 181 [aff 7 F. (2d) 563] (a defense that plaintiff did not in fact make the invention claimed but improperly made use of the invention of another as a basis for the patent application must be clearly established by satisfactory evidence). Compare Proctor, etc., Co. v. Berlin Mills Co., 256 Fed. 23, 167 CCA 295 [certiorari granted 249 U. S. 598 mem, 39 SCt 390 mem, 63 L. ed. 795 mem, and rev on other grounds 254 U. S. 156, 41 SCt 75, 65 L. ed. 196] (an affirmative defense that applicant for the patent was not the inventor but appropriated the invention of another must be sustained by a fair preponderance of credible evidence).

[b] **Evidence held sufficient** to: (1) Sustain verdict that patent is valid. Masonic Hall, etc., Fund v. Fountain Electrical Floor Box Corp., 218 Fed. 642, 134 CCA 663 [aff 210 Fed. 169]. (2) Establish that defendant did not commence making an article which infringed a patent owned by plaintiff as assignee until after the patentee entered plaintiff's employment, and was therefore affected by his estoppel to deny the validity of the patent. Northern Insulating Co. v. Union Fibre Co., 199 Fed. 793.

[c] **Evidence held insufficient** to: (1) Sustain defense that the invention was placed on sale or offered for sale more than two years prior to the application. Schumacher v. Buttonlath Mfg. Co., 292 Fed. 522. (2) Warrant finding that disclosure was insufficient. Schumacher v. Buttonlath Mfg. Co., supra.

34. Wilson, etc., Mfg. Co. v. Bole, 227 Fed. 607, 142 CCA 280.

35. Gamewell Fire Alarm Tel. Co.

corded evidence of experiments out of court,[36] or even experiments in court.[37] More reliance will be placed upon the testimony of experts where electric, magnetic, or chemical patents are involved than where patents for mechanical devices are under consideration;[38] and in a case involving highly technical and complicated matters, little, if any, attention will be paid to prior patents introduced in evidence without explanatory testimony;[39] but where the court is convinced from a consideration of prior patents that the patent in suit is invalid because of anticipation, its conclusion will not be changed by the fact that royalties have been paid for the use of the alleged invention.[40] Even though the contract has been terminated so that the strict rule of estoppel does not apply,[41] nevertheless the fact that defendant was formerly an exclusive agent of plaintiff for the sale of the patented article,[42] or was a licensee to manufacture it,[43] is persuasive in determining the validity of the patent.

[§ 578] **(5) Infringement—(a) In General.** Unless it is not put in issue by the pleadings,[44] as where it is properly alleged in plaintiff's pleading and is admitted, either expressly or impliedly, in defendant's pleading,[45] plaintiff has the burden of proving infringement of the patent[46] by defend-

v. Hackensack Impr. Commn., 199 Fed. 182.

36. Carson v. American Smelting, etc., Co., 4 F. (2d) 463 [rev 293 Fed. 771] (ex parte experiments); National Co. v. Belcher, 71 Fed. 876, 18 CCA 375.

37. Glauber v. H. Mueller Mfg. Co., 241 Fed. 487, 154 CCA 319 [den reh 169 Fed. 110, 95 CCA 108 (certiorari den 214 U. S. 517 mem, 29 SCt 698 mem, 53 L. ed. 1064 mem)].

38. Sundh Electric Co. v. General Electric Co., 204 Fed. 277, 122 CCA 475 [aff 198 Fed. 116].

39. General Electric Co. v. Germania Electric Lamp Co., 174 Fed. 1013; Bell v. MacKinnon, 148 Fed. 205, 79 CCA 163; Waterman v. Shipman, 55 Fed. 982, 5 CCA 371.

40. Lektophone Corp. v. Brandes Products Corp., 16 F. (2d) 934 [aff 20 F. (2d) 155].

[a] **Reason for rule.**—"The mere fact that royalties have been paid demonstrates that those paying may have been unduly timid or sagacious. The action of business men and attorneys is not a substitute for the judgment of the court after a full hearing." Lektophone Corp. v. Brandes Products Corp., 16 F. (2d) 934, 935 [aff 20 F. (2d) 155].

41. See supra § 290.

42. Hutto Engineering Co. v. Grinder Sales Co., 18 F. (2d) 985.

43. Hutto Engineering Co. v. Grinder Sales Co., supra.

44. See cases infra this note; and infra note 45.

[a] **Acts constituting infringement.**—Denying infringement, without denying acts constituting infringement, is insufficient to raise an issue as to the latter. Rees v. Lombard, 21 F. (2d) 276 (considering an answer containing a denial, not of manufacturing and selling, but of manufacturing and selling in infringement of the patent).

45. See cases infra this note.

[a] **Admissions.**—(1) Infringement is admitted where it is alleged in the bill and not denied in the answer. Chase v. Fillebrown, 58 Fed. 374; Lane v. Soverign, 43 Fed. 890; Globe Nail Co. v. Superior Nail Co., 27 Fed. 454; Goodyear v. Day, 10 F. Cas. No. 5,566; Jordan v. Wallace, 13 F. Cas. No. 7,523, 5 Fish. Pat. Cas. 185, 8 Phila. (Pa.) 165. (2) The fact thus admitted must be accepted as established (Jones v. Morehead, 1 Wall. (U. S.) 155, 17 L. ed. 662; Lane v. Soverign, 43 Fed. 890; Jordan v. Wallace, 13 F. Cas. No. 7,523, 5 Fish. Pat. Cas. 185, 8 Phila. (Pa.) 165), (3) but the admission need go no further than its terms necessarily imply (Jones v. Morehead, supra). (4) Failure to deny alleged use of the patented invention is an admission thereof. Ely v. Monson, etc., Mfg. Co., 8 F. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Parker v. Bamker, 18 F. Cas. No. 10,725, 6 McLean 631. (5) Where the answer to a bill charging infringement admitted that defendant had, during the time alleged, made and used articles conforming to the claims of the patent, no further proof is required from complainant on the issue of infringement. Fox v. Knickerbocker Engraving Co., 165 Fed. 442, 91 CCA 386 [aff 158 Fed. 422]. See Wine R. Appliance Co. v. Enterprise R. Equipment Co., 25 F. (2d) 236, 238 (defendant's answer that it had made and sold the devices before suit commenced should not be construed as reasonably referring to a time before the patent issued; but it should be taken as an admission of that conduct which is infringement if the device is of infringing character"). (6) "To treat the answer of defendants who have been brought into court to meet a single unitary bill of complaint, as answers to two bills simply because the evidence develops two separate causes of action, and to construe one and the same averment as an efficient denial of infringement in one of the cases and an irrebuttable confession of infringement in the other, we would deem an abuse of the rules of equity pleading." Perry Side Bearing Co. v. Chicago R. Equipment Co., 178 Fed. 449, 452, 101 CCA 433 [certiorari den 216 U. S. 619 mem, 30 SCt 574 mem, 54 L. ed. 640 mem].

Proper mode of pleading denial of infringement see supra § 563.

46. Price v. Kelly, 154 U. S. 669, 14 SCt 1208, 26 L. ed. 634; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Seymour v. Osborne, 11 Wall. (U. S.) 516, 20 L. ed. 33; Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Crozier-Straub v. Graham, 28 F. (2d) 321 [rev 22 F. (2d) 310, and certiorari den 49 SCt 253 mem]; Colgate v. Procter, etc., Mfg. Co., 25 F. (2d) 160; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006]; American Adamite Co. v. Mesta Mach. Co., 17 F. (2d) 945 [aff 18 F. (2d) 538]; American Sulphite Co. v. Burgess Sulphite Co., 2 F. (2d) 6; Hildreth v. Auerbach, 223 Fed. 545 [aff 223 Fed. 651, 139 CCA 205]; Valvona-Marchiony Co. v. Perella, 207 Fed. 377 [aff 212 Fed. 168, 129 CCA 24]; Fried. Krupp Atkien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem]; Niagara Fire Extinguisher Co. v. Hibbard, 179 Fed. 844, 103 CCA 330; National Casket Co. v. Stolts, 135 Fed. 534, 68 CCA 84; King v. Anderson, 90 Fed. 500; Stirling Co. v. Pierpoint Boiler Co., 72 Fed. 780, 77 Fed. 1007, 22 CCA 680; Masten v. Hunt, 51 Fed. 216 [aff 55 Fed. 78, 5 CCA 42]; Royer v. Chicago Mfg. Co., 20 Fed. 853; Miller v. Smith, 5 Fed. 359; National Car-Brake Shoe Co. v. Detroit, etc., R. Co., 4 Fed. 224; American Middlings Purifier Co. v. Atlantic Milling Co., 1 F. Cas. No. 305; Cook v. Howard, 6 F. Cas. No. 3,160, 4 Fish. Pat. Cas. 269; Dixon v. Moyer, 7 F. Cas. No. 3,931, 1 Robb Pat. Cas. 324, 4 Wash. C. C. 68; Goodyear v. Allyn, 10 F. Cas. No. 5,555, 6 Blatchf. 33, 3 Fish. Pat. Cas. 374; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,559, 6 Blatchf. 85, 3 Fish. Pat. Cas. 410; Hudson v. Draper, 12 F. Cas. No. 6,834, 4 Cliff. 178, 4 Fish. Pat. Cas. 256; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Sands v. Wardwell, 21 F. Cas. No. 12,306, 3 Cliff. 277; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No. 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600; Betts v. Willmott, L. R. 6 Ch. 239; Lanz v. McAllister, 1 OntWR 455.

[a] **Use of entire combination and not merely part** must be shown. Vance v. Campbell, 1 Black (U. S.) 427, 17 L. ed. 168; Tatum v. Gregory, 41 Fed. 142.

[b] **Identity of function.**—Where the patentee claims that the projections on defendant's tire tread perform the same functions, as vacuum cups, as are performed by plaintiff's patented tread, the burden is on the patentee to show that fact. Paynter v. Lee Tire, etc., Co., 282 Fed. 624.

[c] **Evidence of possession.**—(1) Evidence alone that defendant had an infringing device in his possession, without proof that he made, used, or sold it, does not make out a case of infringement (Sheffield Car Co. v. Buda Fdy., etc., Co., 177 Fed. 713 [aff 187 Fed. 847, 109 CCA 646]), (2) unless infringement is not explicitly denied in the answer (Gear v. Fitch, 10 F. Cas. No. 5,290, 3 Bann. & A. 573).

[d] **Evidence held sufficient to:** (1) Prove infringement. Economy Baler Co. v. Solar Sturges Mfg. Co., 29 F. (2d) 656; Hildreth v. Auerbach, 223 Fed. 545 [aff 223 Fed. 651, 139 CCA 205; White v. Hunter, 47 Fed. 819; Schneider v. Missouri Glass Co., 36 Fed. 582; Kiesele v. Haas, 32 Fed. 794; Peterson v. Simpkins, 25 Fed. 486 [app dism 131 U. S. 447 mem, 9 SCt 803 mem, 33 L. ed. 217 mem]; Goodyear v. Berry, 10 F. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Batho v. Invincible Renovator Mfg. Co., (Can.) 25 DomLR 716. (2) Sustain verdict finding infringement. Masonic Hall, etc., Fund v. Fountain Electrical Floor Box Corp., 218 Fed. 642, 134 CCA 663 [aff 210 Fed. 169]. (3) Show willful infringement. Reed Roller Bit Co. v. Hughes Tool Co., 12 F. (2d) 207 [aff sub nom. Caddo Rock Drill Bit Co. v. Reed, 4 F. (2d) 136]. (4) Show infringement after notice. Bayley v. Krich, 264 Fed. 978. (5) Make a prima facie case of infringement. Toledo Metal Wheel Co. v. Foyer, 223 Fed. 350, 138 CCA 612. See Toronto Auer Light Co., Ltd. v. Colling, 31 Ont. 18 (evidence that articles were made according to plaintiff's process held sufficient to throw on defendant the onus of showing the contrary). (6) Show that a change in the product was colorable and for purposes of evasion only. Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541. (7) The testimony of one witness is sufficient to show infringement, where plaintiff waived an answer under oath. Bassick Mfg. Co. v. Ready Auto Supply Co., 22 F. (2d) 331. (8) Where defendant, in his proposal for a government contract, which was accepted, specified a machine which as described would in-

ant.[47] Infringement is not made out by less than a preponderance of the evidence,[48] and ordinarily plaintiff is not required to prove it by more than a preponderance of the evidence,[49] but in a suit against a mere user the evidence should be convincing.[50] When the question of infringement is in doubt, the fact that the patent is a mere paper patent may turn the scale against infringement.[51] Also, where the patentee has delayed many years in bringing his contentions to trial, he is not entitled to have doubtful and difficult questions of fact as to infringement resolved in his favor.[52] Competent evidence bearing on the question of infringement is, of course, admissible.[53] The testimony of experts is admissible upon the question of infringement or identity where the question turns upon scientific principles or the meaning of technical terms,[54] but it is not necessarily to be accepted as controlling.[55]

Time and place. While the burden of proving infringement which rests on plaintiff[56] extends to the date or dates of infringement in so far as important,[57] yet the evidence receivable in this connection must be confined to that which is admissible under the pleadings.[58] Where infringement in the district wherein the suit is brought is alleged in the bill and denied in the answer, the issue of infringement is limited to infringement within the district;[59] but it is not error to receive evidence of infringement elsewhere, where, although plaintiff alleges infringement in the district, defendant denies infringement within the district or elsewhere;[60] and the case is tried in all respects as if the question were properly presented by the pleadings.[61] Evidence of a separate and wholly independent infringement in another district by one of two or more defendants jointly charged with infringement is irrelevant.[62]

Inferences and presumptions generally.[63] Identity of product raises a presumption of identity of process;[64] a sale at defendant's place of business by an employee is presumably a sale by defendant;[65] and the failure of defendant to testify may afford ground for an inference of controlling weight where infringement is otherwise in doubt and defendant is a former employee of plaintiff, familiar with the patented process in question and engaged in the same line of business.[66] The use of a device before the granting of a patent therefor raises no presumption

fringe complainant's patent, the court is justified in finding infringement, in the absence of evidence from defendant showing what he did in fact furnish. International Curtis Mar. Turbine Co. v. William Cramp, etc., Ship, etc., Bldg. Co., 211 Fed. 124, 127 CCA 522 [certiorari den 234 U. S. 755 mem, 34 SCt 674 mem, 58 L. ed. 1578 mem].

[e] **Evidence held insufficient to:** (1) Prove infringement. Edison Electric Light Co. v. Kaelber, 76 Fed. 804; Commoss v. Somers, 49 Fed. 920; Judson Mfg. Co. v. Burge-Donahoe Co., 47 Fed. 463; Parsons v. Colgate, 15 Fed. 600, 21 Blatchf. 171; Standard Measuring Mach. Co. v. Teague, 15 Fed. 390. (2) Sustain burden of proof. American Adamite Co. v. Mesta Mach. Co., 17 F. (2d) 945 [aff 18 F. (2d) 538]; American Sulphite Pulp Co. v. Burgess Sulphite Co., 2 F. (2d) 6; American Graphophone Co. v. Emerson Phonograph Co., 255 Fed. 574. (3) Establish a prima facie case of infringement. Gray v. Grinberg, 159 Fed. 138, 86 CCA 328 [aff 147 Fed. 732]. (4) Infringement cannot be found alone on a blue print of an alleged infringing machine, introduced in evidence without explanation. Morton Trust Co. v. Standard Steel Car Co., 177 Fed. 931, 101 CCA 211 [rev 171 Fed. 672]. (5) Where defendant, who admittedly made and sold an article, which infringed a patent, made an agreement with the patentee conceding the validity of the patent and agreeing to discontinue the manufacture and sale of the infringing article, the fact that he retained in his circular cuts apparently representing such article is not alone sufficient to establish subsequent infringement. American Specialty Stamping Co. v. New England Enameling Co., 176 Fed. 557, 100 CCA 193.

47. Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768; Lathrop v. Rice, etc., Corp., 21 F. (2d) 124 [aff 24 F. (2d) 1021 mem (certiorari granted 278 U. S. 585 mem, 49 SCt 10 mem].

[a] **Personal liability of corporate officer.**—(1) Evidence held sufficient to show liability of president of corporation as joint infringer. Reed v. Cropp Concrete Mach. Co., 225 Fed. 764, 141 CCA 90. (2) Evidence held not to show that officers advanced money to a corporation to enable it to infringe a patent so as to make them personally liable. Dangler v. Imperial Mach. Co., 11 F. (2d) 945.

48. Béné v. Jeantet, 129 U. S. 683, 9 SCt 428, 32 L. ed. 803; Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 999 [mod on other grounds 17 F. (2d) 1006].

49. Hildreth v. Auerbach, 223 Fed. 545 [aff 223 Fed. 651, 139 CCA 205]. But see Locomotive Stoker Co. v. Hanna Stoker Co., 18 F. (2d) 257 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 419 mem] (infringement ought not to be found unless it is reasonably clear).

50. Marcus v. Sutton, 124 Fed. 74.

51. Hills v. Hamilton Watch Co., 248 Fed. 499 [aff 252 Fed. 991 mem, 164 CCA 663 mem].

52. American Sulphite Pulp Co. v. Burgess Sulphite Co., 2 F. (2d) 6.

Laches generally see supra §§ 532–537.

53. See cases infra this note.

[a] **Evidence of purchase by plaintiff's agent from defendant** for the purpose of showing infringement is admissible. Badische Anilin, etc., Fabrik v. Klipstein, 125 Fed. 543; De Florez v. Raynolds, 7 F. Cas. No. 3,742, 3 Bann. & A. 292, 14 Blatchf. 505. Contra Byam v. Bullard, 4 F. Cas. No. 2,262, 1 Curt. 100.

[b] **Evidence of comparison.**—Parol evidence of persons who have inspected and compared plaintiff's and defendant's apparatus and methods is admissible on the question of identity. Window Glass Mach. Co. v. Brookville Glass, etc., Co., 229 Fed. 833.

54. Tucker v. Spalding, 13 Wall. (U. S.) 453, 20 L. ed. 515; Winans v. New York, etc., R. Co., 21 How. (U. S.) 88, 16 L. ed. 68; National Cash-Register Co. v. Leland, 94 Fed. 502, 37 CCA 372 [certiorari den 175 U. S. 724 mem, 20 SCt 1022 mem, 44 L. ed. 338 mem]; American Linoleum Mfg. Co. v. Nairn Linoleum Co., 44 Fed. 755; Allen v. Blunt, 1 F. Cas. No. 225, 2 Robb Pat. Cas. 288, 3 Story 742; Allen v. Hunter, 1 F. Cas. No. 225, 6 McLean 303; Birdsell v. Hagerstown Agricultural Impl. Mfg. Co., 3 F. Cas. No. 1,436, 2 Bann. & A. 519, 1 Hughes 59; Ely v. Monson, etc., Mfg. Co., 8 F. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Hudson v. Draper, 12 F. Cas. No. 6,834, 4 Cliff. 178, 4 Fish. Pat. Cas. 256; Morris v. Barrett, 17 F. Cas. No. 9,827, 1 Bond 254, 1 Fish. Pat. Cas. 461; Parham v. American Buttonhole, etc., Mach. Co., 18 F. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

55. Overweight Counterbalance El. Co. v. Improved Order Red Men's Hall Assoc., 94 Fed. 155, 36 CCA 125 [certiorari den 174 U. S. 802 mem, 19 SCt 886 mem, 43 L. ed. 1188 mem]; Hanifen v. Godshalk Co., 84 Fed. 649, 28 CCA 507; Spaulding v. Tucker, 22 F. Cas. No. 13,220, Deady 649 [rev on other grounds 13 Wall. 453, 20 L. ed. 515].

[a] **Witness without requisite qualifications.**—Infringement cannot be established by the testimony of a witness who testifies as an expert, but does not possess the qualifications of an expert. National Mach. Corp., Inc. v. Benthall Mach. Co., Inc., 241 Fed. 72, 154 CCA 72 [mod 222 Fed. 918].

[b] **Absence of actual fact proof** of infringement is not met by the presence of expert speculations, no matter how voluminous. Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 CCA 194 [certiorari den 223 U. S. 728 mem, 32 SCt 526 mem, 56 L. ed. 633 mem].

56. See supra text and note 46.

57. American Sulphite Pulp Co. v. Burgess Sulphite Co., 2 F. (2d) 6.

Proof of limitation or laches see supra § 573.

58. Geneva Mfg. Co. v. National Furniture Co., 188 Fed. 662; Eastman v. Bodfish, 8 F. Cas. No. 4,255, 2 Robb Pat. Cas. 72, 1 Story 528.

[a] **Petition of intervention,** filed for the purpose of showing a change of ownership of the patent and of the real party in interest as complainant, extends the time of the alleged infringement at least to the date of filing so as to render evidence of infringement up to such date admissible. Toledo Metal Wheel Co. v. Foyer, 223 Fed. 350, 138 CCA 612.

59. Gray v. Grinberg, 159 Fed. 138, 86 CCA 328 [aff 147 Fed. 732].

Proving venue by evidence of infringement in district see supra § 573.

60. O'Rourke Engineering Co. v. McMullen, 160 Fed. 933, 88 CCA 115 [rev 150 Fed. 338, and certiorari den 210 U. S. 435 mem, 28 SCt 763 mem, 52 L. ed. 1136 mem].

61. O'Rourke Engineering Constr. Co. v. McMullen, supra.

62. Edison v. Allis-Chalmers Co., 191 Fed. 837.

63. Presumption:
From manufacture and sale under later patent see infra § 581.
Of intent see infra § 579.

64. Matheson v. Campbell, 77 Fed. 280.

[a] **Similarity of result** may justify a conclusion of infringement, in the absence of proof that in some respects the secret process used by defendant or the resulting product differs from the patented process or product. A. B. Dick Co. v. Barnett, 277 Fed. 423.

65. Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 CCA 652.

66. Davey Tree Expert Co. v. Van Billiard, 248 Fed. 718 [rev on other

of infringement afterward;[67] and no inference of infringement by the present defendant arises from a finding of infringement by a different defendant in another case.[68] When a composition responds to the tests of identity prescribed by the patent, it is prima facie an infringement;[69] but when it fails to respond to such tests the presumption is that there is no infringement.[70]

[§ 579] **(b) Intent and Contributory Infringement.** That it was easy for defendant to have disproved an intention to infringe, and that he did not do so, is not presumptive evidence that he entertained such intention.[71] Defendant is, however, presumed to have intended all the legal consequences of his acts.[72] In an action for contributory infringement, plaintiff has the burden of showing an intention on the part of defendant to aid another person in infringing the patent;[73] and while a person who sold an article capable of use only in a patented combination is presumed to have intended it should be so used,[74] yet where the article is also capable of other uses, an intent that it should be used in an infringing way must be affirmatively shown.[75] Articles or materials sold by defendant for the purpose of use by the purchaser in an infringing manner will be assumed to have been actually so used in the absence of proof to the contrary,[76] and the burden of showing the contrary rests upon defendant.[77]

[§ 580] **(c) License or Excuse.** While defendant has the burden of proving a license[78] or of explaining or justifying acts on his part which are apparently of an infringing character,[79] and plaintiff is entitled to a decree where he has proved the sale by defendant of a large number of articles embodying the patented invention and there is no proof that defendant was a licensee,[80] yet where a large number of articles are covered by a license and the article in question has long been in use, defendant is not required to prove beyond a reasonable doubt that it is covered by the license,[81] it being sufficient in such case to show the fact to the satisfaction of the court by a fair preponderance of credible evidence.[82] Parol evidence of a prior oral agreement is not admissible materially to alter or vary a written license which appears on its face to be comprehensive and complete.[83]

[§ 581] **(d) Conformity to Another Patent.** Where defendant has been making, selling, or using the machine or device in question under, and in accordance with, a patent subsequent to that of plaintiff's, such patent is admissible in evidence[84] and gives rise to a presumption of noninfringement,[85]

grounds 255 Fed. 781, 167 CCA 125].

67. Brill v. St. Louis Car Co., 80 Fed. 909.

68. Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768.

69. Badische Anilin, etc., Fabrik v. Klipstein, etc., Co., 125 Fed. 543; Holliday v. Schulze-Berge, 78 Fed. 493.

70. Matheson v. Campbell, 78 Fed. 910.

71. Brill v. St. Louis Car Co., 80 Fed. 909.

72. Mueller v. Zeregas, 12 F. (2d) 517.

73. Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 CCA 46 [certiorari den 254 U. S. 647 mem, 41 SCt 60 mem, 65 L. ed. 456 mem]; General Electric Co. v. Sutter, 186 Fed. 637; Snyder v. Bunnell, 29 Fed. 47; Coolidge v. McCone, 6 F. Cas. No. 3,186, 1 Bann. & A. 78, 2 Sawy. 571; Saxe v. Hammond, 21 F. Cas. No. 12,411, 1 Bann. & A. 629, Holmes 456.

[a] **Evidence held clearly to show intent** of defendant to assist user in infringing. Lenk v. Hunt-Lasher Co., 14 F. (2d) 335.

[b] **Evidence of contributory infringement held insufficient.**—Governform Corp. v. Terry, 4 F. (2d) 894.

74. New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 CCA 138 [certiorari den 239 U. S. 640 mem, 36 SCt 161 mem, 60 L. ed. 482 mem]; Westinghouse Electric, etc., Co. v. Dayton Fan, etc., Co., 106 Fed. 724 [aff 118 Fed. 562, 55 CCA 390]; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 CCA 107; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 CCA 1; Travers v. Beyer, 26 Fed. 450, 23 Blatchf. 423; Schneider v. Pountney, 21 Fed. 399; Wallace v. Holmes, 29 F. Cas. No. 17,100, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37.

75. Individual Drinking Cup Co. v. Errett, 300 Fed. 955 [mod on other grounds 250 Fed. 620, 162 CCA 636]; Edison Electric Light Co. v. Peninsular Light, Power, etc., Co., 101 Fed. 831, 43 CCA 479 [aff 95 Fed. 669]; Lane v. Park, 49 Fed. 454; Robbins v. Aurora Watch Co., 43 Fed. 521; Winne v. Bedell, 40 Fed. 463; Syracuse Chilled Plow Co. v. Robinson, 35 Fed. 502 [app dism 145 U. S. 655 mem, 12 SCt 988 mem, 36 L. ed. 856 mem]; Bliss v. Merrill, 33 Fed. 39; Snyder v. Bunnell, 29 Fed. 47; Saxe v. Hammond, 21 F. Cas. No. 12,411, 1 Bann. & A. 629, Holmes 456.

76. American Stainless Steel Co. v. Ludlum Steel Co., 16 F. (2d) 823.

77. Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469].

78. Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem]; Hilditch v. American Bumper Corp., 15 F. (2d) 451; General Electric Co. v. Continental Lamp Works, 280 Fed. 846; Sherman v. Searchlight Horn Co., 225 Fed. 497, 140 CCA 539 [foll Pacific Phonograph Co. v. Searchlight Horn Co., 225 Fed. 500, 140 CCA 542]; Armat Moving Picture Co. v. Edison Mfg. Co., 121 Fed. 559 [rev on other grounds 125 Fed. 939, 60 CCA 380]; Searls v. Bouton, 12 Fed. 140, 20 Blatchf. 426; Watson v. Smith, 7 Fed. 350; Day v. New England Car-Spring Co., 7 F. Cas. No. 3,688.

[a] **Evidence held sufficient** to establish: (1) License. Wessels v. Chicago Granitine Mfg. Co., 23 F. (2d) 781; Camp v. Murray Co., 284 Fed. 272. (2) Claim of defendant that license had been extended in accordance with its terms. Rowland v. Biesecker, 181 Fed. 128 [aff 185 Fed. 515, 107 CCA 615].

[b] **Evidence held insufficient to prove license.**—Koppe v. Burnstingle, 29 F. (2d) 923; Specialty Brass Co. v. Sette, 22 F. (2d) 964.

79. Union Special Mach. Co. v. Maimin, 185 Fed. 120 [aff 187 Fed. 123, 109 CCA 41] (sales).

80. Bassick Mfg. Co. v. Auto Equipment Co., 13 F. (2d) 463.

81. O'Rourke Engineering Constr. Co. v. McMullen, 150 Fed. 338 [rev on other grounds 160 Fed. 933, 88 CCA 115 (certiorari den 210 U. S. 435 mem, 28 SCt 763 mem, 52 L. ed. 1136 mem)].

82. O'Rourke Engineering Constr. Co. v. McMullen, supra.

83. Hazen Mfg. Co. v. Wareham, 242 Fed. 642, 155 CCA 332.

84. Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Frank F. Smith Metal Window Hardware Co. v. Yates, 216 Fed. 361 [aff 216 Fed. 359, 132 CCA 503]; Reis v. Rosenfeld, 204 Fed. 282, 122 CCA 480.

85. Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Fore Electrical Mfg. Co. v. St. Louis Electrical Works, 280 Fed. 49 [rev 267 Fed. 440, and certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem]; Superior Skylight Co. v. August Kuhnla, Inc., 265 Fed. 282 [aff 273 Fed. 482]; Oregon Woodenware Mfg. Co. v. Murray, 215 Fed. 744; General Electric Co. v. Allis-Chalmers Co., 197 Fed. 558; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8; New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co., 131 Fed. 265 [aff 135 Fed. 1021, 68 CCA 672]; Anderson v. Collins, 122 Fed. 451, 58 CCA 669; Powell v. Leicester Mills Co., 103 Fed. 476 [rev on other grounds 108 Fed. 386, 47 CCA 416] (certiorari den 181 U. S. 622 mem, 21 SCt 925 mem, 45 L. ed. 1032 mem)]; Norton v. Jensen, 90 Fed. 415, 33 CCA 141; Griffith v. Shaw, 89 Fed. 313; St. Louis Car-Coupler Co. v. National Malleable Castings Co., 87 Fed. 885, 31 CCA 265; Kohler v. George Worthington Co., 77 Fed. 844; Ransome v. Hyatt, 69 Fed. 148, 16 CCA 185; National Harrow Co. v. Hanby, 54 Fed. 493; Brown v. Selby, 4 F. Cas. No. 2,030, 2 Biss. 457, 4 Fish. Pat. Cas. 363 [rev on other grounds 23 Wall. 181, 23 L. ed. 161]; Buerk v. Imhaeuser, 4 F. Cas. No. 2,108, 2 Bann. & A. 465. See Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410 (discussing the rule, but dealing with a case where defendant's commercial article so far departed from the patent owned by him as to nullify any presumption arising from the grant thereof); Frank F. Smith Metal Window Hardware Co. v. Yates, 216 Fed. 361 [aff 216 Fed. 359, 132 CCA 503] (conceding, but criticizing, the rule). But see Frick Co. v. Lindsay, 27 F. (2d) 59 (indicating the contrary, but holding that the question is of no practical importance in the present case as the presumption, if any, is clearly overcome by the evidence); Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 584, 112 CCA 185 ("the granting of the later patent and defendant's conformity thereto are not of importance in this case on the infringement issue"). Contra West v. Premier Register Table Co., 27 F. (2d) 653 [aff 21 F. (2d) 762]; Simplex Window Co. v. Hauser Reversible Window Co., 248 Fed. 919, 161 CCA 37; Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 CCA 371 [rev 195 Fed. 774]; Bowers v. Pacific Coast Dredging, etc., Co., 99 Fed. 745 [app dism 105 Fed. 1004 mem, 44 CCA 684 mem]; Hard-

or at least a presumption of a substantial[86] or patentable[87] difference between the two structures; and the burden of overcoming the presumption rests upon plaintiff;[88] but the presumption is not conclusive;[89] and where the earlier patent was for a primary invention, another presumption that a later patent on the same subject is for a subordinate improvement or modification,[90] and hence does not preclude infringement of the earlier patent,[91] is at least as strong.[92]

Patent granted on copending application. The grant of another patent creates a presumption that a machine or device manufactured and sold by defendant thereunder does not infringe plaintiff's patent where the applications for the two patents were pending in the patent office at the same time;[93] but it is sometimes stated that the failure of the patent office to declare an interference between copending applications is of little, if any, evidential force on the question whether the device of one is an infringement of the other.[94]

[§ 582] **(6) Profits and Damages—(a) In General.** Except as to a few matters hereinafter discussed,[95] questions relating to evidence bearing upon damages and profits are considered in this portion of the article, regardless of whether such questions arise on an accounting before a master, an accounting before the court, or at the trial in an action at law before a court and jury. In so far as they are applicable,[96] the ordinary rules of evidence[97] govern in ascertaining profits and damages in a patent infringement case,[98] but no arbitrary rule should be allowed to prevail over the clear equities of the case.[99] At one time it was held that opinion evidence as to the amount of damage was not admissible,[1] but it was subsequently provided by statute that opinion or expert testimony may be received in the discretion of the court where the damages or profits are not susceptible of calculation and determination with reasonable certainty from the other evidence in the case.[2]

[§ 583] **(b) Profits.** Where plaintiff seeks to recover profits realized by defendant, he has the burden of showing that defendant has realized profits from the use or sale of the infringing article, device, or machine,[3] as well as the amount of such profits;[4] but where he has met this burden, defendant then has the burden of showing that part of the profits is due to other things,[5] and after defendant has satisfied this burden plaintiff has the burden

wick v. Masland, 71 Fed. 887; Holliday v. Pickhardt, 12 Fed. 147.

86. Gillette Safety Razor Co. v. Durham Duplex Razor Co., 197 Fed. 574.

87. West v. Premier Register Table Co., 27 F. (2d) 653 [aff 21 F. (2d) 762]; Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 CCA 371 [rev 195 Fed. 774].

88. Fore Electrical Mfg. Co. v. St. Louis Electrical Works, 280 Fed. 49 [rev 267 Fed. 440, and certiorari den 260 U. S. 736 mem, 43 SCt 96 mem, 67 L. ed. 488 mem].

[a] **Presumption held overborne by facts.**—Frank F. Smith Metal Window Hardware Co. v Yates, 216 Fed. 361 [aff 216 Fed. 359, 132 CCA 503].

89. Oregon Woodenware Mfg. Co. v. Murray, 215 Fed. 744; Century Electric Co. v. Westinghouse Electric, etc., Co., 191 Fed. 350, 112 CCA 8.

90. Century Electric Co. v. Westinghouse Electric, etc., Co., supra.

91. See supra § 504.

92. Century Electric Co. v. Westinghouse Electric, etc., Co., supra.

93. Majestic Electric Appliance Co. v. Hicks, 24 F. (2d) 165.

[a] **Presumption held sustained by evidence.**—Majestic Electric Appliance Co. v. Hicks, 24 F. (2d) 165.

94. Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 CCA 465; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 CCA 185.

95. Cross references:
Bringing in of account by defendant in debtor and creditor form see infra § 638.
Rulings and findings of master based upon conflicting evidence see infra § 639.
Time and order of receiving evidence:
At trial see infra § 589.
On accounting see infra § 638.

96. Decker v. Smith, 225 Fed. 776 [mod on other grounds 234 Fed. 646, 148 CCA 412].

97. Evidence:
Generally see Evidence 22 C. J. p 1.
As to damages generally see Damages §§ 322–341.

98. Decker v. Smith, 225 Fed. 776 [mod on other grounds 234 Fed. 646, 148 CCA 412].

99. Decker v. Smith, supra.

1. Lee v. Pillsbury, 49 Fed. 747.

2. U. S. Rev. St. § 4921, amended by Act Febr. 18, 1922 (42 U. S. St. at L. 392 c 58 § 8).

Expert testimony as to particular matters see infra §§ 583–586.

3. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653 [rev 173 Fed. 361, 97 CCA 621]; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Fox Typewriter Co. v. Underwood Typewriter Co., 287 Fed. 447 [certiorari den 263 U. S. 707 mem, 44 SCt 35 mem, 68 L. ed. 517 mem]; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Page Mach. Co. v. Dow, 238 Fed. 369; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Byerly v. Sun Co., 226 Fed. 759; Decker v. Smith, 225 Fed. 776 [mod on other grounds 234 Fed. 646, 148 CCA 412].

[a] **Standard of comparison.**—(1) Plaintiff has the burden of establishing some proper standard of comparison by which to determine whether there were, in fact, any profits at all. Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1. (2) Evidence as to standards of comparison held not sufficiently clear and definite to warrant the inference sought to be drawn therefrom. Peter Schoenhofen Brewing Co. v. Alvey-Ferguson Co., 14 F. (2d) 945 (evidence introduced by defendant on an accounting for savings realized from the use of an infringing device).

[b] **Evidence held sufficient to:** (1) Entitle complainant to recover substantial profits. Schmertz Wire Glass Co. v. Western Glass Co., 203 Fed. 1006 [mod on other grounds 226 Fed. 730, 141 CCA 486]. (2) Support findings as to profits. Mackie-Lovejoy Mfg. Co. v. Cazier, 157 Fed. 88, 84 CCA 591 [aff 138 Fed. 654, 71 CCA 104, and certiorari den 207 U. S. 594, 28 SCt 260, 52 L. ed. 356].

4. Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Fox Typewriter Co. v. Underwood Typewriter Co., 287 Fed. 447 [certiorari den 263 U. S. 707 mem, 44 SCt 35 mem, 68 L. ed. 517 mem]; Byerly v. Sun Co., 226 Fed. 759; Mosher v. Joyce, 51 Fed. 441, 2 CCA 322 [aff 45 Fed. 205]; Hammacher v. Wilson, 32 Fed. 796; Black v. Munson, 3 F. Cas. No. 1,463, 2 Bann. & A. 623, 14 Blatchf. 265 [aff 111 U. S. 122, 4 SCt 326, 28 L. ed. 372]; Webster v. New Brunswick Carpet Co., 29 F. Cas. No. 17,338, 2 Bann. & A. 67.

[a] **Reasonable certainty.**—The burden on plaintiff to show the profits earned by the infringer does not require plaintiff to show such profits with precise accuracy; reasonable certainty is sufficient. Fox Typewriter Co. v. Underwood Typewriter Co., 287 Fed. 447 [certiorari den 263 U. S. 707 mem, 44 SCt 35 mem, 68 L. ed. 517 mem].

[b] **Where defendant states his profits** from proper records kept by him, plaintiff should be compelled to accept such statement as a measure of his money decree, unless he proves that the account is falsely stated, or that the profits, if truly stated, are not an adequate measure of his damages. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem].

5. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653 [rev 173 Fed. 361, 97 CCA 621]; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Vandenburgh v. Concrete Steel Co., 278 Fed. 607 [certiorari granted 257 U. S. 632 mem, 42 SCt 186 mem, 66 L. ed. 407 mem]; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 276 Fed. 600 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)]; Clark v. Johnson, 199 Fed. 116, 120 CCA 382; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem]; Canda v. Michigan Malleable Iron Co., 152 Fed. 178, 81 CCA 420; Campbell v. New York, 81 Fed. 182; Tuttle v. Claflin, 76 Fed. 227, 22 CCA 138 [certiorari den 166 U. S. 721 mem, 17 SCt 992 mem, 41 L. ed. 1187 mem]; Morss v. Union Form Co., 39 Fed. 468; Fitch v. Bragg, 16 Fed. 243, 21 Blatchf. 302 [rev on other grounds 121 U. S. 478, 7 SCt 978, 30 L. ed. 1008]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512.

[a] **Evidence held to show:** (1) That defendant's product essentially derived its marketability and value from the unlawful appropriation of the patented processes. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem]. (2) That the value of defendant's machine as a marketable commodity was not entirely attributable to the patented

of apportioning or separating the profits[6] by reliable and tangible proofs.[7] On the other hand, it is not incumbent upon plaintiff to apportion profits where it does not appear that any part of the profits was due to something other than the patented invention.[8] Defendant has the burden of showing expenses, depreciation, or like items which he claims should be deducted from receipts in ascertaining profits.[9] The fact that clear proofs are or ought to be within the control of defendant may justify inferences in favor of plaintiff which would not be justified if the proofs were controlled by him;[10] and where defendant fails or refuses to produce his books as ordered, the court is justified in acting on less definite evidence.[11]

Admissibility. Competent evidence bearing on the profits realized by defendant from the use or sale of the infringing article, machine, or device is admissible.[12] Where the infringement consisted in the use of a device or process, evidence of other means available to defendant is competent;[13] and where the infringement consisted in manufacture and sale, profits may be proved by evidence of the selling price and actual production costs[14] or by the testimony of experts.[15] The profits of other manufacturers are not relevant,[16] nor is the cost to such manufacturers,[17] except possibly for comparison in testing the claim of defendant.[18] However, the cost of manufacture to plaintiff is admissible where both he and defendant are large manufacturers of the same articles and are located in the same city.[19]

[§ 584] **(c) Damages—aa. In General.** Where plaintiff seeks to recover damages, he has the burden of proving facts which will show the amount of damages[20] or, in other words, the actual loss to

invention, but was due in a substantial degree to unpatented parts or features. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526].

6. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., supra; Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653 [rev 173 Fed. 361, 97 CCA 621]; Garretson v. Clark, 111 U. S. 120, 4 SCt 291, 28 L. ed. 371; Robertson v. Blake, 94 U. S. 728, 24 L. ed. 245; Egry Register Co. v. Standard Register Co., 23 F. (2d) 438; James L. Taylor Mfg. Co. v. Steuernagel, 19 F. (2d) 298; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622 [leave to reopen case den 227 Fed. 1022 mem, 141 CCA 672 mem]; Underwood Typewriter Co. v. Fox Typewriter Co., 220 Fed. 880, 136 CCA 446 [aff 181 Fed. 530]; Beckwith v. Malleable Iron Range Co., 195 Fed. 291; American St. Flushing Mach. Co. v. St. Louis St. Flushing Mach. Co., 192 Fed. 121, 112 CCA 582 [aff 180 Fed. 759, and certiorari den 229 U. S. 621 mem, 33 SCt 1049 mem, 57 L. ed. 1355 mem]; Canda v. Michigan Malleable Iron Co., 152 Fed. 178, 81 CCA 420; Westinghouse v. New York Air Brake Co., 140 Fed. 545, 72 CCA 61 [certiorari den 201 U. S. 648 mem, 26 SCt 762 mem, 50 L. ed. 904 mem]; Brinton v. Paxton, 134 Fed. 78, 67 CCA 204; Kansas City Hay Press Co. v. Devol, 127 Fed. 363 [app dism 137 Fed. 1019 mem, 70 CCA 679 mem]; Crane Co. v. Baker, 125 Fed. 1, 60 CCA 138 [rev on other grounds 138 Fed. 60, 70 CCA 486]; Elgin Wind Power, etc., Co. v. Nichols, 105 Fed. 780, 45 CCA 49; Robbins v. Illinois Watch Co., 81 Fed. 957, 27 CCA 21 [aff 78 Fed. 124]; Williames v. McNeely, 77 Fed. 894; Tuttle v. Claflin, 62 Fed. 453 [rev on other grounds 76 Fed. 227, 22 CCA 138 (certiorari den 166 U. S. 721 mem, 17 SCt 992 mem, 41 L. ed. 1187 mem)]; Heaton Button-Fastener Co. v. Macdonald, 57 Fed. 648; Mosher v. Joyce, 45 Fed. 205 [aff 51 Fed. 441, 2 CCA 322]; Roemer v. Simon, 31 Fed. 41, 24 Blatchf. 396; Fay v. Allen, 30 Fed. 446; Willimantic Thread Co. v. Clark Thread Co., 27 Fed. 865 [rev on other grounds 140 U. S. 481, 11 SCt 846, 35 L. ed. 521]; Bostock v. Goodrich, 25 Fed. 819; Kirby v. Armstrong, 5 Fed. 801, 10 Biss. 135; Black v. Munson, 3 F. Cas. No. 1,463, 2 Bann. & A. 623, 14 Blatchf. 265 [aff 111 U. S. 122, 4 SCt 326, 28 L. ed. 372]; Gould's Mfg. Co. v. Cowing, 10 F. Cas. No. 5,642, 1 Bann. & A. 375, 12 Blatchf. 243; Ingersoll v. Musgrove, 13 F. Cas. No. 7,040, 3 Bann. & A. 304, 14 Blatchf. 541; Star Salt Caster Co. v. Crossman, 22 F. Cas. No. 13,320, 4 Bann. & A. 566.

[a] **Apportionment impossible.**—(1) It has been held that, where defendant by his failure to keep proper books of account, destruction of records, or otherwise has made it impossible for plaintiff to segregate or apportion the profits, the burden of apportionment or segregation rests upon defendant. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 281 Fed. 453 [rev 248 Fed. 508, and certiorari den 260 U. S. 744 mem, 43 SCt 165 mem, 67 L. ed. 827 mem]; Roth v. Harris, 197 Fed. 929. (2) However, the correct rule is that, where defendant by his acts has made it impossible for plaintiff to sustain the burden of proof resting upon him, plaintiff is entitled to recover the entire profits. See infra § 622.

7. Garretson v. Clark, 111 U. S. 120, 4 SCt 291, 28 L. ed. 371; Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331, 345; Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 281 Fed. 453 [rev 248 Fed. 508, and certiorari den 260 U. S. 744 mem, 43 SCt 165 mem, 67 L. ed. 827 mem]; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Westinghouse v. New York Air Brake Co., 140 Fed. 545, 72 CCA 61 [certiorari den 201 U. S. 648 mem, 26 SCt 762 mem, 50 L. ed. 904 mem].

"The evidence on the separation of profits between the patented and unpatented features must not be merely speculative, but must have some basis of reliability." Dowagiac Mfg. Co. v. Deere, etc., Co., supra.

[a] **Evidence held sufficient** to furnish basis for apportionment. Clark v. Schieble Toy, etc., Co., 248 Fed. 276, 160 CCA 354 (testimony of parties); Seeger Refrigerator Co. v. American Car, etc., Co., 219 Fed. 565, 135 CCA 333 [rev 212 Fed. 742].

8. Vandeburgh v. Concrete Steel Co., 278 Fed. 607 [certiorari granted 257 U. S. 632 mem, 42 SCt 186 mem, 66 L. ed. 407 mem].

[a] **Evidence held not to require apportionment.**—Christensen v. National Brake, etc., Co., 10 F. (2d) 856.

9. Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541; Decker v. Smith, 225 Fed. 776 [mod on other grounds 234 Fed. 646, 148 CCA 412].

[a] **Evidence held sufficient** to form intelligent basis for computing deduction for cash discounts. Barber Asphalt Pav. Co. v. Standard Asphalt, etc., Co., 30 F. (2d) 281.

[b] **Insufficient evidence.**—The testimony of an officer of defendant corporation that some of the accounts for machines sold are not collectable is not sufficient in itself to require a deduction on account of such sales, where there is no testimony of attempts to collect or offer to assign any part of the accounts to plaintiff. Peerless Brick Mach. Co. v. Miracle Pressed Stone Co., 181 Fed. 526.

10. Byerly v. Sun Co., 226 Fed. 759.

11. Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, 92 CCA 46 [certiorari den 214 U. S. 513, 29 SCt 696, 53 L. ed. 1063].

12. Permutit Co. v. Refinite Co., 27 F. (2d) 695; Ingle v. Landis Tool Co., 24 F. (2d) 834; Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 CCA 486 [mod 203 Fed. 1006].

13. Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem].

14. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 281 Fed. 453 [rev 248 Fed. 508, and certiorari den 260 U. S. 744 mem, 43 SCt 165 mem, 67 L. ed. 827 mem].

15. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., supra. See Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526] (the testimony of experts and persons informed by observation and experience is generally helpful, and at times indispensable, in apportioning profits). Compare Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492 (the estimate of an expert as to costs and expenses to be deducted from gross profits cannot be resorted to where there is better evidence available, such as the books of defendant corporation and the testimony of its officers and employees acquainted with the facts).

16. Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 SCt 295, 38 L. ed. 103 [rev 41 Fed. 595]; Robbins v. Illinois Watch Co., 81 Fed. 957, 27 CCA 21; Child v. Boston, etc., Iron Works, 5 F. Cas. No. 2,674; Troy Iron, etc., Factory v. Corning, 24 F. Cas. No. 14,196, 6 Blatchf. 328, 3 Fish. Pat. Cas. 497.

17. See cases supra note 16.

18. Conroy v. Penn Electrical, etc., Co., 199 Fed. 427, 118 CCA 101 [certiorari den 226 U. S. 612 mem, 33 SCt 219 mem, 57 L. ed. 381 mem].

19. Mast v. Superior Drill Co., 154 Fed. 45, 83 CCA 157.

20. Robertson v. Blake, 94 U. S. 728, 24 L. ed. 245; Muther v. United Shoe Mach. Co., 21 F. (2d) 773; Lee v. Pillsbury, 49 Fed. 747; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Burdell v. Denig, 4 F. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512.

[a] **Where there is no evidence** of a certain item of damages, assessment thereof is not necessary. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den

him.[21] Generally speaking, the loss to plaintiff from the infringement may be shown by any evidence which will best establish it.[22] However, evidence of settlements with other infringers is not admissible.[23]

[§ 585] **bb. Profits Lost by Plaintiff.** Where plaintiff claims that he lost sales on account of the infringement and seeks to recover damages measured by the profits which he would have made on such sales, he has the burden of proving that he was equipped to supply the articles which defendant sold,[24] that, but for the infringement, he would have made the sales which defendant made[25] and that he would have derived a profit therefrom.[26] That plaintiff, except for the infringement, would have made the sales which defendant made, cannot, by reason of its nature, be established by evidence as persuasive as that which it is possible to produce to prove that something has happened;[27] and all inferences and presumptions are not necessarily to be excluded;[28] but nevertheless plaintiff must establish the proposition with reasonable certainty.[29] Where plaintiff had the means and facilities to supply or furnish the articles which defendant sold, and plaintiff and defendant were the only competitors, it may be presumed that plaintiff, except for the infringement, would have made the sales which defendant made,[30] but this presumption is one of fact to be raised by the proofs,[31] rather than one of law,[32] and does not arise where there were several similar and noninfringing products in competition with plaintiff's.[33] It will not be presumed that plaintiff could have supplied the same customers,[34] or sold the same number of articles,[35] as defendant, at a higher price. Evidence of a conversation in which a purchaser from defendant stated why he did not purchase from plaintiff is admissible on behalf of plaintiff,[36] and after its admission it is error to refuse to permit defendant to take the testimony of such person.[37]

Diminution of profit on sales made. Before plaintiff may recover damages measured by a diminution of profit on sales made by him, it must be shown that such diminution was due to the infringement.[38]

[§ 586] **cc. Royalties.** The evidence admissible on the question of damages from infringement includes evidence of royalties paid by other persons for the use of the patented invention,[39] or evidence tending to show what would have been a reasonable royalty where that measure of damages is applicable,[40] as where there was no established royalty and no

257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem].

[b] **Evidence held sufficient** to sustain findings as to damages. Van Kannel Revolving Door Co. v. Uhrich, 297 Fed. 363 [certiorari den 266 U. S. 604 mem, 45 SCt 91 mem, 69 L. ed. 463 mem]; Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 119 CCA 229.

[c] **Evidence held not to:** (1) Present sufficient data to justify assessment of substantial damages. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]. (2) Sustain findings as to damages. J. D. Randall Co. v. Fogelsong Mach. Co., 216 Fed. 601, 132 CCA 605.

21. Robertson v. Blake, 94 U. S. 728, 24 L. ed. 245; Philp v. Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679; Singer Mfg. Co. v. Cramer, 109 Fed. 652, 48 CCA 588 [certiorari granted 184 U. S. 698 mem, 22 SCt 946 mem, 46 L. ed. 764 mem, and rev on other grounds 192 U. S. 265, 24 SCt 291, 48 L. ed. 437]; Lee v. Pillsbury, 49 Fed. 747.

22. Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Singer Mfg. Co. v. Cramer, 109 Fed. 652, 48 CCA 588 [certiorari granted 184 U. S. 698 mem, 22 SCt 946 mem, 46 L. ed. 764 mem, and rev on other grounds 192 U. S. 265, 24 SCt 291, 48 L. ed. 437]; Hunt Bros. Fruit Packing Co. v. Cassiday, 64 Fed. 585, 12 CCA 316; Lee v. Pillsbury, 49 Fed. 747; Goodyear v. Bishop, 10 F. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Berdon Fire-Arms Mfg. Co. v. U. S., 26 Ct. Cl. 48 [aff 156 U. S. 552, 15 SCt 420, 39 L. ed. 530]; McKeever v. U. S., 14 Ct. Cl. 396.

23. Cornely v. Marckwald, 131 U. S. 159, 9 SCt 744, 33 L. ed. 117 [aff 32 Fed. 292, 23 Blatchf. 163]; International Tooth Crown Co. v. Hank's Dental Assoc., 111 Fed. 916 [rev on other grounds 130 Fed. 1022, 63 CCA 684 (cert 194 U. S. 303, 24 SCt 700, 48 L. ed. 989)]; Ewart Mfg. Co. v. Baldwin Cycle-Chain Co., 91 Fed. 262; Keyes v. Pueblo, etc., Co., 43 Fed. 478 [aff 154 U. S. 507, 513, 14 SCt 1148, 38 L. ed. 1083]; United Nickel Co. v. Central Pac. R. Co., 36 Fed. 186; Westcott v. Rude, 19 Fed. 830; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Matthews v. Spangenberg, 14 Fed. 350.

24. McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 (reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem].

25. Dobson v. Dorman, 118 U. S. 10, 6 SCt 946, 30 L. ed. 63; Woods v. McCord, 14 F. (2d) 943; Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 259 Fed. 270, 170 CCA 338; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem]; Jennings v. Rogers Silver-Plate Co., 105 Fed. 967; Tatum v. Gregory, 51 Fed. 446; Covert v. Sargent, 38 Fed. 237 [rev on other grounds 152 U. S. 516, 14 SCt 676, 38 L. ed. 536]; Bell v. U. S. Stamping Co., 32 Fed. 549; Cornely v. Marckwald, 32 Fed. 292, 23 Blatchf. 163 [aff 131 U. S. 159, 9 SCt 744, 33 L. ed. 117]; Hall v. Stern, 20 Fed. 788; Buerk v. Imhaeuser, 4 F. Cas. No. 2,107, 2 Bann. & A. 452, 14 Blatchf. 19; Ingersoll v. Musgrove, 13 F. Cas. No. 7,040, 3 Bann. & A. 304, 14 Blatchf. 541; St. Louis Stamping Co. v. Quimby, 21 F. Cas. No. 12,240a, 5 Bann. & A. 275.

26. Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 259 Fed. 270, 170 CCA 338.

[a] **Evidence held sufficient** to prove amount of profits plaintiff would have realized but for the infringement. Stockham v. Duncan, 226 Fed. 740, 141 CCA 496.

[b] **Evidence held insufficient** to show amount of costs and expenses. W. S. Godwin Co. v. International Steel Tie Co., 29 F. (2d) 476.

27. McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem].

28. Woods v. McCord, 14 F. (2d) 943.

29. Woods v. McCord, supra.

[a] **Number of sales.**—(1) While plaintiff is not required to prove that he would have made the exact number of sales made by defendant, yet where he does not do so, it is incumbent upon him to introduce evidence tending to establish that at least a certain number of sales would have been made by him. McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem]. (2) "We may readily conclude that the plaintiff lost sales through the defendant's infringement. But this alone is not sufficient reason for awarding specific damages. The pertinent question is, How many? And the answer is not to be arrived at by guessing, as, for instance, that the plaintiff would have sold all the machines marketed by the defendant, other than those to its largest customer referred to. A certain number must be proved, not necessarily with absolute accuracy, but with such data as will reasonably indicate a given number of sales that the defendant's wrongdoing actually took from the plaintiff. . . . This reasonable certainty is not afforded by the evidence in the instant case." Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993, 994.

30. Motor Player Corp. v. Piano Motors Corp., supra. And see W. S. Godwin Co. v. International Steel Tie Co., 29 F. (2d) 476 (discussing the point).

31. U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614.

[a] **Presumption held weakened** by evidence to such an extent as to be practically valueless. Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993.

32. U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614.

33. U. S. Frumentum Co. v. Lauhoff, supra.

34. Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, 92 CCA 46 [certiorari den 214 U. S. 513, 29 SCt 696, 53 L. ed. 1063].

35. Jennings v. Rogers Silver Plate Co., 118 Fed. 339.

36. J. D. Randall Co. v. Fogelsong Mach. Co., 216 Fed. 601, 132 CCA 605.

37. J. R. Randall Co. v. Fogelsong Mach. Co., supra.

38. Boesch v. Graff, 133 U. S. 697, 10 SCt 378, 33 L. ed. 787 [rev 33 Fed. 279, 13 Sawy. 17]; Cornely v. Marckwald, 131 U. S. 159, 9 SCt 744, 33 L. ed. 117.

[a] **Evidence held insufficient.**—Woods v. McCord, 14 F. (2d) 943.

39. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398; Mast v. Superior Drill Co., 154 Fed. 45, 83 CCA 157.

[a] **Evidence of royalties paid in another country** (1) is competent and admissible (Consolidated Wafer Co., Ltd. v. International Cone Co., Ltd., 59 Ont. L. 205, [1926] 4 DomLR 74), (2) unless it is hearsay (Consolidated Wafer Co., Ltd. v. International Cone Co., Ltd., supra).

40. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]; Austin-Western Road Mach. Co. v. Disc Grader, etc., Co., 291 Fed. 301 [certiorari den 263 U. S. 717 mem, 44 SCt 180 mem, 68 L. ed. 522 mem]; U. S. Frumentum

lost or diminished profits.[41] While general evidence is admissible to show a reasonable royalty,[42] nevertheless the evidence must not extend beyond that which is relevant[43] or competent.[44] An award of damages measured by either an established[45] or reasonable[46] royalty must of course be based upon sufficient evidence.

[§ 587] **10. Trial or Hearing[47]—a. In Actions at Law.** The rules governing trials in civil actions generally,[48] including such rules of the state wherein the court is held as the federal court conforms to,[49] are applicable to the trial of an action at law for infringement of a patent.[50] Unless there is no substantial dispute or conflict of evidence as to them[51] questions of fact,[52] including questions of fact as to the validity of the patent,[53] infringe-

Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614.

[a] **Such proof may be more difficult to produce,** but it is quite as admissible as that of an established royalty. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398.

41. See infra § 632.

42. Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; McCune v. Baltimore, etc., R. Co., 154 Fed. 63, 83 CCA 175 [certiorari den 207 U. S. 588, 28 SCt 255, 52 L. ed. 353].

43. Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 259 Fed. 270, 170 CCA 338.

44. See case infra this note.

[a] **Opinion of unqualified witness.**—The testimony of an accountant in plaintiff's employ, who is not a practical user of the patented device and is not shown to be familiar with the operations of any business except plaintiff's, as to what would be a reasonable royalty should not be admitted. Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem].

45. Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 259 Fed. 270, 170 CCA 338.

[a] **Evidence held sufficient** to show uniform established license fees. Fox v. Knickerbocker Engraving Co., 158 Fed. 422 [aff 165 Fed. 442, 91 CCA 386].

[b] **Evidence held insufficient** to establish a uniform license fee. Brown Bag Filling Mach. Co. v. Drohen, 175 Fed. 576, 99 CCA 192 [aff 171 Fed. 438].

46. Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 259 Fed. 270, 170 CCA 338.

[a] **Evidence held sufficient** to warrant the court in applying the doctrine of reasonable royalty. B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem].

47. Discovery and production or inspection see infra §§ 592, 593.

48. See Trial [38 Cyc 1238].

49. Conformity of federal to state trial practice generally see Federal Courts §§ 146, 148, 150.

50. See cases infra this note.

[a] **Motion to withdraw juror for surprise overruled.**—Foote v. Silsby, 9 F. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. R. 268 [aff 14 How. 218, 14 L. ed. 394].

[b] **Records and exhibits.**—(1) The court may order the production of records and exhibits. Diamond Match Co. v. Oshkosh Match Works, 63 Fed. 984; Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 191; Wisner v. Dodds, 14 Fed. 655. (2) Discovery and inspection in equitable action see infra §§ 592, 593.

[c] **Experiments.**—The court will not order defendant to conduct his experiments in the presence of plaintiff's witnesses. Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co., 83 Fed. 490.

[d] **Witness ordered to answer certain questions.**—Coop v. Dr. Savage Physical Development Inst., 48 Fed. 239, 47 Fed. 899; Delamater v. Reinhardt, 43 Fed. 76; Turrell v. Spaeth, 24 F. Cas. No. 14,267, 2 Bann. & A. 185.

[e] **Objections and exceptions.**—(1) Objections to evidence must be seasonably made (Pettibone v. Pennsylvania Steel Co., 134 Fed. 889; Brown v. Hall, 4 F. Cas. No. 2,008, 6 Blatchf. 401, 3 Fish. Pat. Cas. 531; Lock v. Pennsylvania R. Co., 15 F. Cas. No. 8,438), (2) and be definite (Barker v. Stowe, 2 F. Cas. No. 994, 3 Bann. & A. 337, 15 Blatchf. 49). (3) Exceptions must also be taken seasonably. Foote v. Silsby, 9 F. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. R. 268 [aff 14 How. 218, 14 L. ed. 394].

51. Hurin v. Electric Vacuum Cleaner Co., 298 Fed. 76; and cases infra this note.

[a] **Thus** (1) in a clear case the court may direct the jury to bring in a verdict for defendant. Keyes v. Grant, 118 U. S. 25, 6 SCt 974, 30 L. ed. 54; Connors v. Ormsby, 148 Fed. 13, 78 CCA 181. (2) Where there is no dispute or doubt as to the prior art, construction of the claims of a patent is a matter of law for the court. Burroughs Adding Mach. Co. v. Rockford Milling Mach. Co., 292 Fed. 550. (3) Also, where there is no controversy on the facts as to the meaning of the claims or the disclosures of the prior art, the question of validity is for the court. Prepayment Car Sales Co. v. Orange County Tract. Co., 221 Fed. 939, 137 CCA 509. (4) "When a patent cause is tried before a jury and the testimony is closed, the court is not bound, under all circumstances, to send it to the jury on the question whether or not the combination of the patent discloses patentable invention. Although invention is generally spoken of as a question of fact, it does not necessarily follow that it must always be sent to the jury; other questions of fact arising in actions at law are frequently disposed of by the court, when upon the whole case the judge is satisfied that a verdict different from his own conclusion, if rendered, would have to be set aside." Prepayment Car Sales Co. v. Orange County Tract. Co., 214 Fed. 576, 577, 131 CCA 156. (5) If a patent is void on its face, the court may so instruct. Roberts v. Bennett, 135 Fed. 193, 69 CCA 533; Langdon v. De Groot, 14 F. Cas. No. 8,059, 1 Paine 203, 1 Robb Pat. Cas. 433. (6) Where the validity of a patent is to be determined and its claim construed by reference to prior patents, about the dates and authenticity of which there is no controversy, the trial judge may construe these documents without invading the province of the jury (Brothers v. Lidgerwood Mfg. Co., 223 Fed. 359, 138 CCA 460); (7) and where want of novelty in the patented invention in suit clearly appears from prior patents, there is no need of extrinsic evidence to explain the terms of the art or to apply description to the subject matter, and where either no extrinsic evidence is introduced or that which is introduced is not in conflict, the court may and should instruct the jury as to want of novelty, enter a nonsuit, or direct a verdict for defendant (Market St. Cable R. Co. v. Rowley, 155 U. S. 621, 15 SCt 224, 39 L. ed. 284; Bush v. Fox, 5 H. L. Cas. 707, 10 Reprint 1080; Booth v. Kennard, 2 H. & N. 84, 157 Reprint 35; Thomas v. Foxwell, 5 Jur. N. S. 37 [aff 6 Jur. N. S. 271]). (8) Where it appears very plainly, not only from a prior patent but from the patent in suit which shows on its face that the patentee characterized his invention as an "improvement," that the patentee is not a pioneer inventor, the court should so instruct the jury, and not submit the question to them for determination. Holt Mfg. Co. v. Best Mfg. Co., 172 Fed. 409, 97 CCA 107. (9) Where infringement is conclusively established by the evidence, it is not a jury question, and the court may properly direct a verdict for plaintiff on this issue. Sears, Roebuck & Co. v. Pearce, 253 Fed. 960, 165 CCA 402. (10) In a plain case the court may determine infringement by comparing the alleged infringing article or device and the patent. Automatic Pencil Sharpener Co. v. Boston Pencil Pointer Co., 279 Fed. 40 [certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem]; Connors v. Ormsby, 148 Fed. 13, 78 CCA 181; Hardwick v. Masland, 71 Fed. 887; Jennings v. Kibbe, 10 Fed. 669, 20 Blatchf. 353. (11) The court may properly specify the amount which the jury are required to find if any liability exists, where the amount of damages is fixed and definite and there is no dispute or conflict in testimony as to it. Sears, Roebuck & Co. v. Pearce, supra. (12) The court may express an opinion upon a fact which is clear. Bollmans v. Parry, 3 F. Cas. No. 1,612.

52. Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Transit Dev. Co. v. Cheatham Electric Switching Device Co., 194 Fed. 963, 114 CCA 599; Foote v. Silsby, 9 F. Cas. No. 4,916, 1 Blatchf. 445, Fish. Pat. R. 268 [aff 14 How. 218, 14 L. ed. 394]; Goodyear v. Bishop, 10 F. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Parker v. Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181.

[a] **Verdict on conflicting evidence will not be set aside.**—Aiken v. Bemis, 1 F. Cas. No. 109, 2 Robb Pat. Cas. 644, 3 Woodb. & M. 348; Blanchard's Gun-Stock Turning Factory v. Jacobs, 3 F. Cas. No. 1,520, 2 Blatchf. 69, Fish. Pat. R. 158.

53. Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37; Graham v. Earl, 82 Fed. 737; Carver v. Braintree Mfg. Co., 5 F. Cas. No. 2,485, 2 Robb Pat. Cas. 141, 2 Story 432; Sullivan v. Redfield, 23 F. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Teese v. Phelps, 23 F. Cas. No. 13,818, McAll. 17.

[a] **Rule applied** to questions of: (1) Abandonment. Godfrey v. Eames, 1 Wall. (U. S.) 317, 17 L. ed. 684; Kendall v. Winsor, 21 How. (U. S.) 322, 16 L. ed. 165. (2) Anticipation. Keyes v. Grant, 118 U. S. 25, 6 SCt 974, 30 L. ed. 54; Bischoff v. Wethered, 9 Wall. (U. S.) 812, 19 L. ed. 829; Turrill v. Michigan, etc., R. Co., 1 Wall. (U. S.) 491, 17 L. ed. 668; Hunt Bros. Fruit Packing Co. v. Cassidy, 53 Fed. 257, 3 CCA 525; Waterman v. Thomson, 29 F. Cas. No. 17,260, 2 Fish. Pat. Cas. 461. (3) Fraud. Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Reutgen v. Kanowrs, 20 F. Cas. No. 11,710, 1 Robb Pat. Cas. 1, 1 Wash. C. C. 168. (4) Invention. Thomson Spot Welder Co. v. Ford Motor Co., 265 U. S. 445, 44 SCt 533, 68 L. ed. 1098 [aff 281 Fed. 680 (aff 268 Fed. 836)]; Masonic Hall, etc., Fund v. Fountain Electrical Floor Box Corp., 218 Fed. 642, 134 CCA 663 [aff 210 Fed. 169]; Sherman-Clay v. Searchlight Horn Co., 214 Fed. 86, 130 CCA 562; Heide v. Panoulias, 188 Fed. 914, 110 CCA 656 [certiorari den 223 U. S. 722, 32 SCt 524, 56 L. ed. 630]; Connors v. Ormsby, 148 Fed. 13, 78 CCA 181; Willis v. Miller, 121

ment,[54] or the identity of the alleged infringing device with the patented device,[55] and the amount of damages,[56] are to be determined by the jury under proper instructions by the court as to the law,[57] including a definition of the scope and meaning of the patent.[58]

[§ 588] **b. In Suits in Equity—(1) In General.** Two patent infringement cases may be consolidated where they involve the same patent and persons or corporations having the same interests,[59] even though the parties are not exactly identical.[60] A separate hearing of the defense of the nonliability of one defendant for the acts of another will not be granted.[61]

[§ 589] **(2) Taking and Reception of Evidence.** Ordinarily, under the present equity rules,[62] the testimony in a patent infringement case should be taken,[63] and the trial should be had,[64] in open court, and the taking of depositions or oral testimony out of court,[65] or a reference to a master,[66] save in matters of account,[67] should be exceptional; but the congested condition of the court calendar may render it proper to refer the case to a master to take and hear the evidence.[68] Defendant should complete his evidence before the taking of plaintiff's evidence in rebuttal.[69] Plaintiff is entitled as a matter of right to introduce evidence in rebuttal,[70] but not after the argument has commenced.[71] While the evidence on rebuttal should be limited to that which is strictly such,[72] nevertheless an irregularity in introducing in rebuttal evidence which should have been given in chief may be disregarded where the irregularity does not harm or prejudice anyone.[73] After the case has been submitted upon certain evidence, additional evidence will not be received,[74] unless the court exercises its discretion to reopen the case or grant a rehearing upon a proper showing.[75] To be available, objections to evidence should be distinctly made when the evidence is taken.[76] The court will not, on plaintiff's motion, compel defendant to file an exhibit in a form different from that already filed by him.[77]

[§ 590] **(3) Determination and Findings.**[78] In a suit in equity for infringement of a patent, the court

Fed. 985, 58 CCA 286; San Francisco Bridge Co. v. Keating, 68 Fed. 351, 15 CCA 476. (5) Sufficiency of description. Wood v. Underhill, 5 How. (U. S.) 1, 12 L. ed. 23; Reutgen v. Kanowrs, 20 F. Cas. No. 11,710, 1 Robb Pat. Cas. 1, 1 Wash. C. C. 168; Bickford v. Skewes, 1 Q. B. 938, 41 ECL 848, 113 Reprint 1391; Betts v. Menzies, 10 H. L. Cas. 117, 11 Reprint 970, 20 ECR 539.

[b] **Special findings** of jury held not inconsistent with finding of noninvention or verdict which embodies it. Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641.

54. Royer v. Schultz Belting Co., 135 U. S. 319, 10 SCt 833, 34 L. ed. 214 [rev 28 Fed. 850]; Masonic Hall, etc., Fund v. Fountain Electrical Floor Box Corp., 218 Fed. 642, 134 CCA 663 [aff 210 Fed. 169]; Heide v. Panoulias, 188 Fed. 914, 110 CCA 656 [certiorari den 223 U. S. 722, 32 SCt 524, 56 L. ed. 630]; Clark v. Adie, 2 App. Cas. 315, 20 ERC 281; Macnamara v. Hulse, C. & M. 471, 41 ECL 258; De la Rue v. Dickenson, 7 E. & B. 738, 90 ECL 738, 119 Reprint 1420; Seed v Higgins, 8 H. L. Cas. 550, 11 Reprint 544.

55. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 263, Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 SCt 310, 38 L. ed. 121; Haines v. McLaughlin, 135 U S. 584, 10 SCt 876, 34 L. ed. 290; Royer v. Schultz Belting Co., 135 U. S. 319, 10 SCt 833, 34 L. ed. 214; Heald v Rice, 104 U S. 737, 26 L. ed. 26; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. ed. 125; Tucker v. Spalding, 13 Wall. (U. S.) 453, 20 L. ed. 515, Tyler v. Boston, 7 Wall. (U. S.) 327, 19 L. ed. 93; Turrill v. Michigan Southern, etc., R. Co, 1 Wall. (U. S.) 491, 17 L. ed. 668; Battin v. Taggert, 17 How. (U. S.) 74, 15 L. ed. 37, Winans v. Denmead, 15 How. (U. S.) 330, 14 L. ed. 717; Silsby v. Foote, 14 How. (U. S.) 218, 14 L. ed. 394, Wilson v Barnum, 8 How. (U. S.) 258, 12 L. ed. 1070; Carver v. Hyde, 16 Pet. (U S.) 513, 10 L. ed. 1051; Evans v. Eaton, 7 Wheat. (U. S.) 356, 5 L. ed. 472; Graham v. Earl, 82 Fed. 737, 92 Fed. 155, 34 CCA 267; Singer Mfg. Co. v. Brill, 54 Fed. 380, 4 CCA 374; Hunt Bros. Fruit Packing Co. v. Cassidy, 53 Fed. 257, 3 CCA 525; Masten v. Hunt, 51 Fed. 216 [aff 55 Fed. 78, 5 CCA 42]; Birdsell v. Hagerstown Agricultural Impl. Mfg. Co., 3 F. Cas. No. 1,436, 2 Bann. & A. 519, 1 Hughes 59; Blanchard v. Reeves, 3 F. Cas. No. 1,515, 1 Fish. Pat. Cas. 103, Blanchard's Gun-Stock Turning Factory v Warner, 3 F. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. R. 184, Foss v. Herbert, 9 F. Cas. No. 4,957, 1 Biss. 121, 2 Fish. Pat. Cas. 31; Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Matthews v. Skates, 16 F. Cas. No. 9,291, 1 Fish. Pat. Cas. 602; Parker v. Stiles, 17 F. Cas. No. 10,749, Fish. Pat. Rep. 319, 5 McLean 44; Pennock v. Dialogue, 19 F. Cas. No. 10,941, 1 Robb Pat. Cas. 466, 4 Wash. C. C. 538 [aff 2 Pet. 1, 7 L. ed. 327]; Smith v. Higgins, 22 F. Cas. No. 13,058; Tatham v. Le Roy, 23 F. Cas. No. 13,761; Union Sugar Refinery v. Matthiesson, 24 F. Cas. No 14,399, 3 Cliff. 639, 2 Fish. Pat. Cas. 600.

56. National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Alden v. Dewey, 1 F. Cas. No. 153, 2 Robb Pat. Cas. 17, 1 Story 336; Allen v. Blunt, 1 F. Cas. No 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Goodyear v. Bishop, 10 F. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Grant v. ——, 10 F. Cas. No 5,701; Johnson v. Root, 13 F Cas. No. 7,409, 2 Cliff. 108, 2 Fish. Pat. Cas. 291; Stephens v. Felt, 22 F. Cas. No. 13,368, 2 Blatchf. 37, Fish. Pat. R. 144.

57. Coupe v. Royer, 155 U S. 565, 15 SCt 199, 39 L. ed. 263, Keyes v. Grant, 118 U. S. 25, 6 SCt 974, 30 L. ed. 54; Masonic Hall, etc., Fund v. Fountain Electrical Floor Box Corp., 218 Fed. 642, 134 CCA 663 [aff 210 Fed. 169], Graham v. Earl, 82 Fed 737; Many v. Jagger, 16 F. Cas. No. 9,055, 1 Blatchf 372, Fish. Pat. R. 222; Parker v Stiles, 18 F. Cas. No. 10,749, Fish. Pat. R. 319, 5 McLean 44; Hill v Evans, 4 De G F. & J. 288, 65 EngCh 223, 45 Reprint 1195, 20 ERC 321.

[a] **Instructions held too broad and vague.**—Philp v. Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679

[b] **Instructions held not erroneous.**—Masonic Hall, etc., Fund v. Fountain Electrical Floor Box Corp., 218 Fed. 642, 134 CCA 663 [aff 210 Fed 169]; Sherman-Clay v. Searchlight Horn Co., 214 Fed 86, 130 CCA 562; Bassett v Erickson Constr. Co, 213 Fed. 810, 130 CCA 468; Transit Dev. Co. v. Cheatham Electric Switching Device Co., 194 Fed. 963, 114 CCA 599.

[c] **Instructions held not prejudicial.**—Transit Dev. Co. v. Cheatham Electric Switching Device Co., 194 Fed. 963, 114 CCA 599.

58. Coupe v Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 263; Marsh v. Quick-Meal Stove Co., 51 Fed. 203; National Car-Brake Shoe Co. v Terre Haute Car, etc., Co., 19 Fed. 514; Clark Patent Steam, etc., Regulator Co. v. Copeland, 5 F. Cas No. 2,866, 2 Fish. Pat Cas 221, Bovil v Plimm, 11 Exch. 718, 156 Reprint 1019; Seed v. Higgins, 8 H L Cas. 550, 11 Reprint 544, 20 ERC 680.

[a] **Until evidence is in the court** may refuse to construe the patent. Young v. Fermie, 4 Giffard 577, 66 Reprint 836.

59. Union Tool Co. v. Wilson, 249 Fed. 736, 161 CCA 646 [aff 237 Fed. 847].

60. Union Tool Co. v. Wilson, supra.

61. Union Sulphur Co. v. Freeport Texas Co. 234 Fed. 191.

62. Equity Rules (1912), rules 46, 59.

63. Los Angeles Brush Mfg. Corp. v. James, 272 U. S. 701, 47 SCt 286, 71 L. ed. 481.

[a] **Decision under former practice.**—Cheatham Electric Switching Device Co. v. Transit Dev. Co., 197 Fed. 563.

64. Acme Steel Goods Co. v. American Metal Fasteners Co., 206 Fed. 478

65. Acme Steel Goods Co. v. American Metal Fasteners Co., supra.

66. Los Angeles Brush Mfg. Corp. v. James, 272 U. S. 701, 47 SCt 286, 71 L. ed. 481.

67. See infra § 636.

68. Los Angeles Brush Mfg. Corp. v. James, 272 U S. 701, 47 SCt 286, 71 L. ed. 481· Neale, Inc. v. McCormick, 19 F. (2d) 320 [certiorari den 275 U. S. 530 mem, 48 SCt 28 mem, 72 L. ed. 409 mem].

69. Smith v. Ulrich, 94 Fed. 865.

70. Blackledge v. J. M. Shock Absorber Co., 213 Fed. 478 [rev on other grounds 220 Fed. 921, 136 CCA 487]; Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397.

71. Stainthorp v. Humiston, 22 F. Cas. No. 13,281, 4 Fish. Pat. Cas. 107 [app dism 2 Wall. 106, 17 L. ed 905].

[a] **Introduction may be allowed upon terms.**—Stainthorp v. Humiston, 22 F. Cas. No. 13,281, 4 Fish. Pat. Cas. 107.

72. Cahoon v. Ring, 4 F. Cas. No. 2,292, 1 Cliff. 592, 1 Fish. Pat. Cas. 397

73. Weber v Automobile, etc., Mfg. Co., 190 Fed. 189 (as where the evidence is not disputed).

74. Peterson v. Simpkins, 25 Fed. 486 [app dism 131 U. S. 447 mem, 9 SCt 803 mem, 33 L. ed. 217 mem].

75. **Reopening or rehearing** see infra § 647.

76. Barker v. Stowe, 2 F. Cas. No. 994, 3 Bann. & A. 337, 15 Blatchf. 49.

77. Tubman v. Wason Mfg. Co., 44 Fed. 429.

[a] **For example,** the court will not, on plaintiff's motion, order defendant to file an ink drawing of an exhibit which is already on file in pencil; counsel for defendant have a right, at defendant's risk, to offer an exhibit in one form or another. Tubman v. Wason Mfg. Co., 44 Fed. 429.

78. **Decree** see infra § 591 et seq.

will not pass upon questions which are moot or the determination of which is not necessary to a decision of the actual controversy.[79] Issues of fact are to be determined on the evidence;[80] invention[81] and infringement[82] are ordinarily questions of fact; and where the question of infringement cannot be satisfactorily solved unless the court is informed of the state of the art, the court should not dispose of the case on mere inspection of an alleged infringing exhibit;[83] but in a plain case not requiring extrinsic evidence the court may determine the question of infringement merely by inspection and comparison of plaintiff's patent and defendant's device or design,[84] or, where defendant's article is manufactured under, and in accordance with, a later patent, by an inspection and comparison of the two patents,[85] and in such case the question of infringement is one of law.[86] The construction placed on the claims of a patent by the court on granting a preliminary injunction should be followed at the final hearing, where there has been no substantial change in the cause so far as it relates to the question of construction.[87] The findings made must not be inconsistent;[88] and where the suit is for the infringement of two or more patents, the validity of each must be determined separately.[89] Where the case has been referred to a master, at least a presumptive verity attaches to his findings.[90]

Submission of issues to jury.[91] In case of doubt,[92] the court may, in its discretion, award an issue to be tried by a jury;[93] but it will not grant an issue to be tried by a jury merely because requested to do so by a party;[94] and in the absence of special circumstances the issues will be tried before the court rather than before a jury.[95]

[§ 591] **11. Judgment or Decree and Recovery or Relief[96]—a. In General.** In an action at law for infringement of a patent the recovery is limited to the actual loss or damage sustained by plaintiff from the infringement,[97] and such increased damages as, under statutory authority, the court may and does award.[98] In a suit in equity the decree should not go beyond the pleadings,[99] and the issues tried, heard, and considered by the court;[1] but upon proper pleadings[2] and proof[3] the decree may grant an injunction against future infringement,[4] and award profits and damages for past infringement,[5] after a proper accounting thereof.[6] Also, where infringing

79. Electrical Engineers' Equipment Co. v. Champion Switch Co., 23 F. (2d) 600; Victor Talking Mach. Co. v. Leed, etc., Co., 180 Fed. 778; Sprague Electric R., etc., Co. v. Steel Motor Co., 105 Fed. 959; and cases infra this note. See Wisconsin Furniture Co. v. Blumberg, 212 Fed. 738, 129 CCA 348 (a claim not involved may be examined for the purpose of determining what is covered by the claim in suit).

[a] **Rule applied.**—(1) A decision in favor of defendant upon the defense of invalidity disposes of the case and renders it unnecessary and improper to make formal findings in favor of plaintiff upon other issues. Linde Air Products Co. v. Morse Dry Dock, etc., Co., 239 Fed. 909 [aff 246 Fed. 834, 159 CCA 136]. (2) The later of two patents need not be considered, where the damages are the same under the earlier patent found to be valid and infringed and no further infringement is anticipated. Goldsmith Metal Lath Co., v. Truscon Steel Co., 29 F. (2d) 658. (3) "Among several claims, the most general, which covers the alleged infringements, alone is necessary to a decision of the controversy; the rest thereafter necessarily present moot issues. If the defendant infringes the more general, a fortiori he infringes the particular." Electrical Engineers' Equipment Co. v. Champion Switch Co., 23 F. (2d) 600, 604. But see Mershon v. Bay City Box, etc., Co., 189 Fed. 741 (where certain claims are found valid and infringed, it is proper to recite in the decree a finding that another claim is invalid). (4) Where it is found that there is no infringement, the court will not pass upon the question of validity. Wahl v. N. E. Norstrom Electric Mfg. Co., 19 F. (2d) 544 [aff 27 F. (2d) 635]; Warren Bros. Co. v. Thompson, 282 Fed. 326 [aff 293 Fed. 745]; Ward v. Finley Method Co., 259 Fed. 869; Saxe v. Hammond, 21 F. Cas. No. 12,411, 1 Bann. & A. 629, Holmes 456. (5) By virtue of the principles of estoppel (see supra § 286), (6) the question of validity cannot arise in a suit by an assignee against the assignor, and where, in such suit, the prior art is not shown, the court will not attempt to determine the place therein occupied by the invention in suit, but will merely construe the claims on their face to such an extent as is sufficient to dispose of the issue of infringement (Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435). (7) An issue of unfair competition will not be passed upon where the evidence bearing thereon is meager and a decree on the issue of infringement found in plaintiff's favor will afford him ample relief (Tweedie v. Royal Co., 267 Fed. 224 [rev on other grounds 276 Fed. 351]), (8) or where the patent is held to be void and there is an absence of diversity of citizenship of the parties (Schiebel Toy, etc., Co. v. Clark, 217 Fed. 760, 133 CCA 490 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 434 mem]).

80. Trane Co. v. Nash Engineering Co., 25 F. (2d) 267 [aff 20 F. (2d) 439].

81. Gilchrist v. F. B. Mallory Co., 281 Fed. 350.

82. Line Material Co. v. Brady Electric, etc., Co., 299 Fed. 822 [aff 7 F. (2d) 48]; Wilson v. Haber, 275 Fed. 346; Laclede Christy Clay Products Co. v. St. Louis, 270 Fed. 338 [aff 280 Fed. 83].

83. Jones v. Kowaloff, 296 Fed. 121 (dealing with a claim which might be infringed if broadly construed, but not if narrowly construed).

84. Standard Computing Scale Co. v. Detroit Automatic Scale Co., 265 Fed. 281; Jennings v. Kibbe, 10 Fed. 669, 20 Blatchf. 353.

Comparison of device and claim generally see supra § 499.

85. Hardwick v. Masland, 71 Fed. 887.

86. Lincoln v. Waterbury Button Co., 291 Fed. 594 [aff 297 Fed. 619].

87. Sessions v. Gould, 60 Fed. 753 [aff 63 Fed. 1001, 11 CCA 546, 550].

88. See case infra this note.

[a] **Findings held not inconsistent.**—J. H. Day Co. v. Mountain City Mill Co., 264 Fed. 963 [aff 257 Fed. 561].

89. Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co., 245 Fed. 762 [aff 257 Fed. 314, 168 CCA 398].

90. American Chain Co., Inc. v. Chester N. Weaver Co., Inc., 1 F. (2d) 590 [mod on other grounds 9 F. (2d) 372].

Propriety of reference see supra § 589.

91. **Constitutionality of statute authorizing court to assess damages** see Juries § 51 note 4 [a].

92. Gray v. Halkyard, 28 Fed. 854; Allen v. Sprague, 1 F. Cas. No. 238, 1 Blatchf. 567, Fish. Pat. R. 388; Brooks v. Bicknell, 4 F. Cas. No. 1,944, 3 McLean 250, 2 Robb Pat. Cas. 118; Parker v. Hatfield, 18 F. Cas. No. 10,736, Fish. Pat. R. 94, 4 McLean 61; Sicles v. Pacific Mail SS. Co., 22 F. Cas. No. 12,842; Van Hook v. Pendleton, 28 F. Cas. No. 16,851, 1 Blatchf. 187, Fish. Pat. R. 120.

93. Bovill v. Hitchcock, L. R. 3 Ch. 417; Davenport v. Goldberg, 2 Hem. & M. 282, 71 Reprint 472; and cases supra note 92.

[a] **Feigned issue awarded** to try the question of the originality of plaintiff's improvement, where on a former trial at law the only question litigated was that of infringement. Foote v. Silsby, 9 F. Cas. No. 4,918, 1 Blatchf. 545, Fish. Pat. R. 357.

[b] **It is provided by statute** that the court may impanel a jury of not less than five and not more than twelve persons and submit to them such questions of fact arising in the cause as the court shall deem expedient. Act Febr. 16, 1875 (18 U. S. St. at L. 316).

94. Brooks v. Norcross, 4 F. Cas. No. 1,957, 2 Fish. Pat. Cas. 661; Goodyear v. Day, 10 F. Cas. No. 5,566.

[a] **Issue for jury refused.**—Buchanan v. Howland, 4 F. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Ely v. Monson, etc., Mfg. Co., 8 F. Cas. No. 4,431, 4 Fish. Pat. Cas. 64.

95. Patent Mar. Invention Co. v. Chadburn, L. R. 16 Eq. 447.

96. **Punishment for contempt in violating injunction** see infra § 611.

97. See infra § 628.

98. See infra § 633.

99. Aluminum Die-Casting Corp. v. Allied Die-Casting Corp., 15 F. (2d) 880.

[a] **For example,** in an action against a corporation and an individual no judgment or decree can be rendered against the individual defendant where no facts showing infringement by him are alleged. Aluminum Die-Casting Corp. v. Allied Die-Casting Corp., 15 F. (2d) 880.

1. Automotive Products Corp. v. Wolverine Bumper, etc., Co., 15 F. (2d) 745; Cheatham Electric Switching Device Co. v. Brooklyn Rapid Transit Co., 229 Fed. 165 [den reh 227 Fed. 613, and aff 238 Fed. 172, 151 CCA 248]; Sirocco Engineering Co. v. B. F. Sturtevant Co., 209 Fed. 624 [rev on other grounds 220 Fed. 137, 136 CCA 91 (certiorari den 238 U. S. 636 mem, 35 SCt 939 mem, 59 L. ed. 1500 mem)].

Matters determined see supra § 590.

2. See supra §§ 556-562.

3. See supra §§ 570-586.

4. See infra § 609.

5. See infra §§ 618-635.

6. See infra §§ 636-639.

articles, devices, or machines are in the possession or under the control of defendant, a court of equity may order him to deliver them to plaintiff to be destroyed,[7] but it is within the discretion of the court to make or not to make such an order,[8] and in the United States it will be made only under exceptional circumstances.[9] During the pendency of the suit discovery may be had,[10] a temporary injunction may be granted,[11] and articles in the possession or under the control of defendant and prima facie shown to be of an infringing character may be impounded until a final decree is rendered.[12] A pro forma decree by the trial court is not favored.[13]

Assignment of patent in suit,[14] but not another patent,[15] from one party to the other may be decreed when necessary to do full and complete equity between the parties.

Final or interlocutory decree. Where the merits of a sufficient bill for infringement of a patent have been established by proof, plaintiff is entitled to an interlocutory decree.[16-17] While a decree adjudging the patent to be valid and infringed, granting a permanent injunction, and directing an accounting of profits and damages, is interlocutory[18] in a technical sense[19] and from the standpoint of time,[20] yet it is final in its essence as to all matters of substance,[21] save the amount to be recovered,[22] and it is deemed to be final within the meaning of a statute relating to the fees of the clerk of court in connection with an appeal.[23] A decree dismissing a bill of revivor as to injunction, damages, and treble damages, but retaining it as to profits, is an interlocutory, rather than a final, decree.[24]

[§ 592] **b. Discovery[25]—(1) In General.** In a suit for infringement of a patent interrogatories are liberally allowed[26] in favor of either party,[27] and

7. Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Vavasseur v. Krupp, 9 Ch. D. 351; Western Electric Co., Ltd. v. Foot, 43 R. P. C. 106; Browne v. Cyko Mfg. Co., Ltd., 37 R. P. C. 270; British Westinghouse Electric, etc., Co. v. Electrical Co., 28 R. P. C. 530.

8. Mergenthaler Linotype Co. v. Intertype, Ltd., 42 T. L. R. 682.

9. American Caramel Co. v. Mills, 162 Fed. 147, 89 CCA 171; American Bell Tel. Co. v. Kitsell, 35 Fed. 521.

[a] **Order refused under circumstances.**—Wright's Automatic Tobacco Packing Mach. Co. v. American Tobacco Co., 220 Fed. 163.

10. See infra §§ 592, 593.

11. See infra § 596 et seq.

12. In re Steiner, 195 Fed. 299; Underwood Typewriter Co. v. Elliott-Fisher Co., 156 Fed. 588.

13. William Cramp, etc., Ship, etc., Bldg. Co. v. International Curtis Mar. Turbine Co., 228 U. S. 645, 33 SCt 722, 57 L. ed. 1003; Firestone Tire, etc., Co. v. Seiberling, 245 Fed. 937, 158 CCA 225.

14. Ingle v. Landis Tool Co., 262 Fed. 150 [rev on other grounds 272 Fed. 464 (certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem)].

15. Pollock v. Martin Gauge Co., 261 Fed. 201 [aff 251 Fed. 295].

16-17. Timolat v. Philadelphia Pneumatic Tool Co., 130 Fed. 903.

18. Vrooman v. Penhollow, 222 Fed. 894, 138 CCA 374.

Cross references:

Granting permanent injunction generally see infra § 609.

Ordering accounting generally see infra § 636.

19. Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 235 U. S. 383, 35 SCt 132, 59 L. ed. 282.

Interlocutory decree as res judicata see infra § 643.

20. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem]; Morey Linotyping Co. v. Chicago Lino-Tabler Co., 258 Fed. 888; National Brake, etc., Co. v. Christensen, 258 Fed. 880, 169 CCA 600 [certiorari granted 250 U. S. 638 mem, 39 SCt 495 mem, 63 L. ed. 1184 mem, prohibition den 40 SCt 54 mem, and rev on other grounds 254 U. S. 425, 41 SCt 154, 65 L. ed. 341].

21. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem]; Morey Linotyping Co. v. Chicago Lino-Tabler Co., 258 Fed. 888; National Brake, etc., Co. v. Christensen, 258 Fed. 880, 169 CCA 600 [certiorari granted 250 U. S. 638 mem, 39 SCt 495 mem, 63 L. ed. 1184 mem, prohibition den 40 SCt 54 mem, and rev on other grounds 254 U. S. 425, 41 SCt 154, 65 L. ed. 341].

[a] **Rights of parties are settled** "by the decree, and nothing remains but to ascertain the damages and adjudge their payment." Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 801, 19 L. ed. 566.

[b] **After interlocutory decree court will not advise parties** whether a different article infringes. Thomas, etc., Co. v. Electric Porcelain Co., 114 Fed. 407. Compare Kalamazoo Loose-Leaf Binder Co. v. Proudfit Loose-Leaf Co., 243 Fed. 895, 156 CCA 407 (court need not, but may, in a reasonably clear case, determine that a different structure does not infringe).

[c] **After entry of interlocutory decree pro confesso** neither defendant nor anyone else may appear as a party in defense. I. T. S. Rubber Co. v. Essex Rubber Co., 25 F. (2d) 180.

22. National Brake, etc., Co. v. Christensen, 258 Fed. 880, 169 CCA 600 [certiorari granted 250 U. S. 638 mem, 39 SCt 495 mem, 63 L. ed. 1184 mem, prohibition den 40 SCt 54 mem, and rev on other grounds 254 U. S. 425, 41 SCt 154, 65 L. ed. 341].

Action of court after master's report see infra § 639.

23. Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 235 U. S. 383, 35 SCt 132, 59 L. ed. 282.

Status with reference to appeal see infra § 648.

24. Duplex Printing Press Co. v. Hoe, 15 F. (2d) 362.

"This is clearly an interlocutory and not a final decree; it retains the cause; it determines only the kind of relief that will be granted, and the method of fixing the measure of recovery if plaintiffs should succeed. . . . Not until plaintiffs establish their right to some relief and the extent thereof, can there be a final decree in the cause." Duplex Printing Press Co. v. Hoe, supra.

25. Cross references:

Bill of particulars see supra § 567.

Discovery generally see Discovery 18 C. J. p 1054.

26. Paraffine Cos. v. Wieland, 17 F. (2d) 992; Byron Weston Co. v. L. L. Brown Paper Co., 13 F. (2d) 412; McLeod Tire Corp. v. B. F. Goodrich Co., 268 Fed. 205; A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300.

[a] **Questions permissible at hearing.**—The fact that the subject matter of an interrogatory may be elicited at the hearing by examination of a party or his witnesses is accorded weight by the courts in upholding the interrogatory. U. S. Gypsum Co. v. Pacific Portland Cement Co., 22 F. (2d) 180; Koehring Co. v. Foote Co., 21 F. (2d) 569.

[b] **Particular matters.**—Discovery or interrogatories may be allowed as to: (1) Pertinent dates. Paraffine Cos. v. Wieland, 17 F. (2d) 992 (dates of invention, conception and reduction to practice of the invention, and corresponding dates as to the state of the prior art, prior publication or anticipation set up by defendant by way of defense); Clairemont Sterilized Egg Co. v. Kasser Egg Process Co., 14 F. (2d) 143; Cobb Temperature Regulator Co. v. Baird, 292 Fed. 909 (dates of prior public use alleged in answer); Batdorf v. Sattley Coin Handling Mach. Co., 238 Fed. 925; Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430. (2) Whether plaintiff has ever used, or attempted to use, a particular method used by defendant and one of the alternative methods covered by the patent. Byron Weston Co. v. L. L. Brown Paper Co., 13 F. (2d) 412. (3) What act or acts of defendant are complained of by plaintiff as infringements of his patent. Paraffine Cos. v. Wieland, 17 F. (2d) 992, 994, 995; Clairemont Sterilized Egg Co. v. Kasser Egg Process Co., 14 F. (2d) 143. (4) What particular patents or publications or instances of prior use defendant will rely upon at the trial, where he has pleaded generally that there were numerous patents, publications, or instances of prior knowledge and use and plaintiff discloses to defendant the dates of the conception and reduction to practice of the patented invention in suit. Sachs v. Hartford Electric Supply Co., 26 F. (2d) 120. (5) "The mechanical features of earlier machines or devices covered by prior patents, which will be relied upon by defendant at the trial of the cause." Paraffine Cos. v. Wieland, supra. (6) Matters necessary to identify license pleaded by defendant. Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430. (7) Defendant's authorship of publication denying validity of patent. Rodman Chemical Co. v. E. F. Houghton Co., 233 Fed. 470. (8) Whether defendant has practiced the invention. Grasselli Chemical Co. v. National Aniline, etc., Co., 282 Fed. 379; Potter's Sulphide Ore Treatment, Ltd. v. Sulphide Corp., Ltd., 13 Austr. C. L. R. 101. (9) "Whether drawings or catalogue cuts submitted by plaintiff are true and correct representations of the machines made, sold, licensed, or used by defendant, which are the subjects of the litigation." Paraffine Cos. v. Wieland, supra. (10) The exact nature of machines manufactured by defendant and particulars as to his use, demonstration, license or sale thereof. Paraffine Cos. v. Wieland, supra. (11) The names of purchasers. Saccharin Corp. v. Chemicals, etc., Co., [1900] 2 Ch. 556; Murray v. Clayton, L. R. 15 Eq. 115; Tetley v. Easton, 18 C. B. 643, 86 ECL 643, 139 Reprint 1522; Crossley v. Stewart, 7 L. T. Rep. N. S. 848. (12) Places where certain described machines were sold or used. Koehring Co. v. Foote Co., 21 F. (2d) 569. (13) Defendant may properly require complainant to state, in answer to interrogatories, where the device relied on in proof of infringement is, and whether it can be inspected, and, if not, to describe and illustrate it. Batdorf v. Sattley Coin Handling Mach. Co., 238 Fed. 925.

27. Paraffine Cos. v. Wieland, 17 F.

proper interrogatories must be answered by the party to whom they are propounded,[28] even though there is a prayer for treble damages.[29] However, notwithstanding this liberal rule,[30] there are limits to the scope of interrogatories which a party may propound to his opponent,[31] and a party is not obliged to answer interrogatories calling for the names of his witnesses[32] or of the persons from whom he has obtained information;[33] a mere opinion,[34] argument,[35] comparison,[36] legal conclusion,[37] or interpretation or construction of a patent;[38] an explanation amounting to secondary evidence of the meaning of plans;[39] knowledge of attempts by other persons to use a particular patented method;[40] or facts which are within the knowledge of the party propounding the interrogatories,[41] or are not material[42] or directly pertinent to the issues.[43] Also, interrogatories by defendant will be disallowed where they cover matters comprehended in a motion for a bill of particulars which has been granted;[44] and where plaintiff has pointed out the parts of defendant's machine which he claims to be an infringement, he cannot be compelled to point out the elements in his own claim which he charges are infringed.[45] Sometimes objections to interrogatories are sustained on the ground that the information sought thereby may be procured otherwise with ease,[46] as by inspection[47] or by a motion and rule upon the opposite party.[48] While discovery or interrogatories may be allowed before the patent has been sustained,[49] at least where the validity of the patent is not in issue,[50] discovery, by interrogatories or otherwise, as to details of defendant's business bearing only upon the amount of damages or profits should not be allowed until plaintiff, by prevailing upon the issues, establishes his right to damages or profits.[51]

Trade secret or process. Where an interrogatory is otherwise proper, a refusal to answer it cannot be justified upon the ground that it involves a disclosure of a trade secret or a secret process,[52] but the courts will not allow the remedy of discovery to be used oppressively to compel disclosure of a secret process,[53] and in one jurisdiction discovery of a secret process cannot be had until the validity of the patent is established.[54]

Employing language of claim. While an interrogatory need not,[55] and ordinarily should not,[56] be framed in the language of the claims of the patent, yet where it is otherwise proper, both as to subject matter and language, the fact that it employs the language of the claims is not fatal.[57]

Sealing answer. It is stated generally that an order requiring answers to interrogatories to be sealed and deposited with the clerk of court until both parties have committed themselves as to the facts should be made only with the consent of the

(2d) 992.

[a] **Plaintiff.**—One of the methods by which plaintiff may make out his case is the filing of interrogatories touching the matters under consideration. Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453.

28. U. S. Gypsum Co. v. Pacific Portland Cement Co., 22 F. (2d) 180; General Electric Co. v. Independent Lamp, etc., Co., 244 Fed. 825; Osram Lamp Works, Ltd. v. Gabriel Lamp Co., [1914] 2 Ch. 129.

[a] **Constitutional provision against self-incrimination not applicable.**—Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453.

[b] **Answers held sufficiently definite and certain.**—D. J. Murray Mfg. Co. v. Sumner Iron Works, 286 Fed. 451, 296 Fed. 491 [aff 300 Fed. 911].

[c] **Answer as estoppel.**—Plaintiffs' answer to interrogatory that they do not charge infringement by a certain exhibit constitutes an estoppel against subsequent assertion of infringement by that exhibit. Overland Motor Co. v. Packard Motor Car Co., 30 F. (2d) 497.

29. Koehring Co. v. Foote Co., 21 F. (2d) 569; Standard Oil Co. v. Universal Oil Products Co., 21 F. (2d) 159; Beacon Folding Mach. Co. v. Rotary Mach. Co., 17 F. (2d) 934; Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453. Compare Paraffine Cos. v. Wieland, 17 F. (2d) 992; Wilson v. Union Tool Co., 275 Fed. 624 (both cases holding that defendant will not be required to answer an interrogatory where his answer will or may not result in the imposition upon him of a penalty by way of treble damages). Contra Healthometer Co. v. Jacobs Bros. Co., 12 F. (2d) 96; Blackmore v. Collins, 286 Fed. 629 [aff 290 Fed. 204]; F. Speidel Co. v. N. Barstow Co., 232 Fed. 617.

[a] **Reason for rule** (1) is that treble damages are not a penalty or forfeiture (Beacon Folding Mach. Co. v. Rotary Mach. Co., 17 F. (2d) 934; Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453); (2) within the meaning of the general rule that a party may not be compelled to make a discovery of matters which will subject him to a penalty or forfeiture (see Discovery § 4).

Treble damages generally see infra § 633.

30. See supra text and note 26.

31. Miller v. Lawrence A. Sweet Mfg. Co., 3 F. (2d) 198.

32. McLeod Tire Corp. v. B. F. Goodrich Co., 268 Fed. 205.

33. A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300.

34. Lapeer Trailer Corp. v. Freuhauf Trailer Co., 24 F. (2d) 595; Batdorf v. Sattley Coin Handling Mach. Co., 238 Fed. 925.

35. Koehring Co. v. Foote Co., 21 F. (2d) 569; D. J. Murray Mfg. Co. v. Sumner Iron Works, 286 Fed. 451, 296 Fed. 491 [aff 300 Fed. 911].

36. Koehring Co. v. Foote Co., 21 F. (2d) 569; Paraffine Cos. v. Wieland, 17 F. (2d) 992; Hartford v. Cleveland Automobile Co., 275 Fed. 590; Luten v. Camp, 221 Fed. 424.

37. Rodman Chemical Co. v. E. F. Houghton Co., 233 Fed. 470 (admission or denial of infringement as legal conclusion).

38. Koehring Co. v. Foote Co., 21 F. (2d) 569; Rodman Chemical Co. v. E. F. Houghton Co., 233 Fed. 470.

39. Paraffine Cos. v. Wieland, 17 F. (2d) 992.

40. Byron Weston Co. v. L. L. Brown Paper Co., 13 F. (2d) 412.

41. Koehring Co. v. Foote Co., 21 F. (2d) 569.

42. Koehring Co. v. Foote Co., supra.

43. Standard Oil Co. v. Universal Oil Products Co., 21 F. (2d) 159; New Jersey Zinc Co. v. Du Pont de Nemours, 11 F. (2d) 908.

[a] **Rule applied.**—"The assignment of a patent, alleged in a complaint to have been made to a plaintiff, does not authorize a defendant, under a mere denial of that assignment, to interrogate plaintiff as to whether at any other time he has made any other assignment." Miller v. Lawrence A. Sweet Mfg. Co., 3 F. (2d) 198, 200.

44. Paraffine Cos. v. Wieland, 17 F. (2d) 992.

45. Gennert v. Burke, 231 Fed. 998 [aff 243 Fed. 891, 156 CCA 403].

46. Window Glass Mach. Co. v. Brookville Glass, etc., Co., 229 Fed. 833.

47. Window Glass Mach. Co. v. Brookville Glass, etc., Co., supra.

[a] **Fact ascertainable from file wrapper** is not proper subject matter of interrogatory. Koehring Co. v. Foote Co., 21 F. (2d) 569.

48. Window Glass Mach. Co. v. Brookville Glass, etc., Co., 229 Fed. 833.

49. Foxwell v. Webster, 9 Jur. N. S. 1189; Benno Jaffe, etc., Lanolin Fabrik v. Richardson, 62 L. J. Ch. 710; Swinborne v. Nelson, 22 L. J. Ch. 331; Renard v. Levinstein, 10 L. T. Rep. N. S. 94, 11 L. T. Rep. N. S. 79; Imperial Supply Co. v. Grand Trunk R. Co., 14 Can. Exch. 88, 7 Dom LR 504, 11 EastLR 340; Batho v. Zimmer Vacuum Mach. Co., 3 OntWN 1152, 2 DomLR 902 [dism app 3 Ont WN 1009, 2 DomLR 894]; United Injector Co. v. James Morrison Brass Mfg. Co., 3 OntWN 1195, 2 DomLR 910.

50. Haarmann v. Lueders, 109 Fed. 327.

51. Munger v. Firestone Tire,, etc., Co., 261 Fed. 921 [certiorari den 252 U. S. 582 mem, 40 SCt 392 mem, 64 L. ed. 727 mem]; Lovell Mfg. Co. v. Automatic Wringer Co., 124 Fed. 971; Keller v. Strauss, 88 Fed. 517.

52. U. S. Gypsum Co. v. Pacific Portland Cement Co., 22 F. (2d) 180; John Wood Mfg. Co. v. Keiner-Williams Stamping Co., 4 F. (2d) 615; Grasselli Chemical Co. v. National Aniline, etc., Co., 282 Fed. 379 [expl Federal Mfg., etc., Co. v. International Bank Note Co., 119 Fed. 385].

[a] **Inapplicable statute.**—The provisions of Rev. St. § 4908, to the effect that a witness shall not be deemed guilty of contempt for refusing to disclose any secret invention or discovery made or owned by himself do not apply to an infringement suit in which interrogatories are filed, but refer only to contested matters pending in the patent office. U. S. Gypsum Co. v. Pacific Portland Cement Co., 22 F. (2d) 180.

53. Ashworth v. Roberts, 45 Ch. D. 623.

54. Dickerson v. Radcliffe, 17 Ont. Pr. 586.

55. Grasselli Chemical Co. v. National Aniline, etc., Co., 282 Fed. 379.

56. Grasselli Chemical Co. v. National Aniline, etc., Co., supra; A. B. Dick Co. v. Underwood Typewriter Co., 235 Fed. 300.

57. Paraffine Cos. v. Wieland, 17 F. (2d) 992.

parties.[58] However, in order to safeguard the rights of both parties,[59] answers disclosing dates should be sealed and deposited with the clerk of court,[60] and an order to this effect may be made upon an ex parte request.[61]

[§ 593] **(2) Production or Inspection of Writings or Physical Objects.** As in the case of interrogatories,[62] inspection is liberally allowed in a suit for infringement of a patent,[63] and, where otherwise proper, it will not be denied because of an objection that it will result in a disclosure of a secret process;[64] but sometimes an inspection involving a disclosure of secrets is denied under the circumstances of the particular case,[65] or conditions are attached to the allowance or making of the inspection.[66] A party may be required to produce or furnish drawings, blue prints, or models of devices referred to in the pleadings and involved in the litigation;[67] and, generally speaking, defendant may be ordered to permit inspection of his factory and machines;[68] but an inspection of an alleged infringing machine in defendant's plant or factory will not be allowed upon mere suspicion of infringement.[69] While, in a proper case, defendant may be compelled to produce certain books of account,[70] or pertinent records and documents,[71] complainant cannot compel production of all books of a big concern,[72] but must specify those wanted.[73] Defendant may have discovery of documents in plaintiff's possession in so far as they are relevant to the issues in the case.[74]

[§ 594] **c. Injunction[75]—(1) In General.** The several federal courts vested with jurisdiction of cases arising under the patent laws[76] are given power by statute to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent,[77] and this power is entirely independent of the award of any other relief in the same suit,[78] although the converse is not true, or, in other words, other relief may ordinarily be sought in a court of equity only as incidental to the right to an injunction at the time of instituting the suit.[79] Injunctions are granted to preserve property rights in patents upon the same principle that they are granted to preserve other property rights.[80] An injunction may be granted to prevent the future infringement of a patent[81] where such infringement is intended or threatened,[82] not only where defendant has,[83] but even where he has not,[84] previously infringed the patent; and an injunction may be granted, although the pat-

58. Miller v. Lawrence A. Sweet Mfg. Co., 3 F. (2d) 198.

59. Paraffine Cos. v. Wieland, 17 F. (2d) 992.

60. Paraffine Cos. v. Wieland, supra; Clairemont Sterilized Egg Co. v. Kasser Egg Process Co., 14 F. (2d) 143.

61. Batdorf v. Sattley Coin Handling Mach. Co., 238 Fed. 925.

62. See supra § 592.

63. McLeod Tire Corp. v. B. F. Goodrich Co., 268 Fed. 205.

64. McLeod Tire Corp. v. B. F. Goodrich Co., supra.

65. Stokes Bros. Mfg. Co. v. Heller, 56 Fed. 297; Dobson v. Graham, 49 Fed. 17 [app dism 154 U. S. 501 mem, 14 SCt 1145 mem, 38 L. ed. 1076 mem].

66. British Thomson-Houston Co., Ltd. v. Duram, Ltd., 37 R. P. C. 121.

[a] **For example,** where defendants offered to make admissions of facts that would, they contended, give plaintiffs all the information to which they were entitled, it was held that, if an inspection were ordered, it ought to be carried out by not more than two experts, who ought to be allowed to take samples of defendants' product in various stages of its manufacture, and to report to the court upon the facts disclosed and the experts' opinion founded upon them; that the experts ought to be put under terms not to disclose, without order of the court, any part of the secret process, but that they ought to be allowed to report to plaintiffs, without giving details, whether or not, in their opinion, defendants' process did or did not infringe the patent; that before an inspection was ordered the summons should stand over, with liberty to plaintiffs to deliver questions in writing to defendants; and that, after defendants had given their answers in writing, the summons could be restored. British Thomson-Houston Co., Ltd. v. Duram, Ltd., 37 R. P. C. 121.

67. Lapeer Trailer Corp. v. Freuhauf Trailer Co., 24 F. (2d) 595; Paraffine Cos. v. Wieland, 17 F. (2d) 992; Cobb Temperature Regulator Co. v. Baird, 292 Fed. 909; Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430.

68. Van Berkel v. Booth, [1906] 1 Ir. 383; Garrard v. Edge, 58 L. J. Ch. 397; Germ Milling Co. v. Robinson, 55 L. J. Ch. 287; Jones v. Lee, 25 L. J. Exch. 241; Singer Mfg. Co. v. Wilson, 12 L. T. Rep. N. S. 140.

69. Eibel Process Co. v. Remington-Martin Co., 197 Fed. 760 (declining to follow Rowell v. William Koehl Co., 194 Fed. 446).

70. Rollman Mfg. Co. v. Universal Hardware Works, 218 Fed. 651.

71. Carson v. American Smelting, etc., Co., 25 F. (2d) 116.

72. Fuller v. Field, 82 Fed. 813, 27 CCA 165.

73. Fuller v. Field, supra.

74. British Thomson-Houston Co., Ltd. v. Duram, Ltd., [1915] 1 Ch. 823.

[a] **Title to patent.**—Plaintiff may be compelled to produce copies of instruments through which he derives title to the patent. Paraffine Cos. v. Wieland, 17 F. (2d) 992; Clairemont Sterilized Egg Co. v. Kasser Egg Process Co., 14 F. (2d) 143.

[b] **Invalidity of patent.**—Where invalidity of the patent is pleaded, the court will not order plaintiff to disclose every document in his possession suggestive of invalidity, wholly irrespective of the question of whether or not it relates or refers to the particular ground of invalidity relied upon by defendant. Avery, Ltd. v. Ashworth, Son & Co., Ltd., 32 R. P. C. 463 [aff 32 R. P. C. 560].

75. **Whether notice condition precedent to injunction** see supra § 484.

76. See supra § 521.

77. U. S. Rev. St. § 4921.

78. American Cotton-Tie Supply Co. v. McCready, 1 F. Cas. No. 295, 4 Bann. & A. 588, 17 Blatchf. 291; Colgate v. International Ocean Tel. Co., 6 F. Cas. No. 2,993, 4 Bann. & A. 609, 17 Blatchf. 308. See Davey Tree Expert Co. v. McCarthy, 283 Fed. 135 (injunction may be granted, in a proper case therefor, although the amount of damage suffered by plaintiff is almost negligible, and profits or damages are substantially an immaterial issue).

79. See supra §§ 522–524.

80. Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 484; Keyes v. Pueblo Smelting, etc., Co., 31 Fed. 560; Brick v. Staten Island R. Co., 25 Fed. 553; Merriam v. Smith, 11 Fed. 588; American Cotton-Tie Co. v. McCready, 1 F. Cas. No. 295, 4 Bann. & A. 588, 17 Blatchf. 291, 8 Reporter 811; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Sargent v. Larned, 22 F. Cas. No. 12,364, 2 Curt. 340; McAvity v. James Morrison Brass Mfg. Co., 2 OntWR 156.

Protection of property rights by injunction generally see Injunctions § 141 et seq.

81. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

82. National Meter Co. v. Thomson Meter Co., 106 Fed. 531; Johnson R. Signal Co. v. Union Switch, etc., Co., 55 Fed. 487, 5 CCA 204; Sessions v. Gould, 49 Fed. 855 [aff 63 Fed. 1001, 11 CCA 546]; Toledo Mower, etc., Co. v. Johnston Harvester Co., 24 Fed. 739, 23 Blatchf. 332; Brammer v. Jones, 4 F. Cas. No. 1,806, 2 Bond 100, 3 Fish. Pat. Cas. 340; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,281, 4 Blatchf. 184, 2 Fish. Pat. Cas. 74; Woodworth v. Stone, 30 F. Cas. No. 18,021, 2 Robb Pat. Cas. 296, 3 Story 749.

83. See infra text and notes 96–2, 4, 5.

84. Chester Forging, etc., Co. v. Tindel-Morris Co., 165 Fed. 899, 91 CCA 577 [aff 163 Fed. 304]; Westinghouse Mach. Co. v. Press Pub. Co., 127 Fed. 822 [rev on other grounds 135 Fed. 767, 68 CCA 469]; National Meter Co. v. Thomson Meter Co., 106 Fed. 531; Brill v. St. Louis Car Co., 80 Fed. 909; Johnson R. Signal Co. v. Union Switch, etc., Co., 55 Fed. 487, 5 CCA 204; Sessions v. Gould, 49 Fed. 855 [aff 63 Fed. 1001, 11 CCA 546]; Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co., 36 Fed. 191; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,281, 4 Blatchf. 184, 2 Fish. Pat. Cas. 74; Woodworth v. Stone, 30 F. Cas. No. 18,021, 2 Robb Pat. Cas. 296, 3 Story 749; Frearson v. Loe, 9 Ch. D. 48.

[a] **Advertising and offering for sale** may authorize injunction. Thomson-Houston Electric Co. v. Ohio Brass Co., 78 Fed. 139 [aff 80 Fed. 712, 26 CCA 107]; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 75 Fed. 1005, 22 CCA 1; White v. Hunter, 47 Fed. 819; American Bell Tel. Co. v. Globe Tel. Co., 31 Fed. 729 [app dism 145 U. S. 640, 12 SCt 981, 36 L. ed. 855].

[b] **Machine ready for infringing use.**—Where a machine is capable of infringing a patent, and is complete and ready for use, in the way in which use is intended, an injunction restraining the infringement will issue, although it has not been previously used so as to cause injury. Corrugated Fiber Co. v. Paper Working Machines Co., 259 Fed. 283.

entee has never used the invention himself,[85] a license contract is alleged,[86] or defendant acted under a contract with his codefendant, to which complainant was not a party, purporting to grant immunity from the infringement.[87] On the other hand an injunction against infringement will not be granted where infringement is not actually threatened or reasonably apprehended,[88] nor will it be granted where the patent covers a gambling device,[89] or plaintiff is guilty of deception.[90] A contributory infringer may be enjoined,[91] as may also a mere user,[92] but a mere user will be enjoined only in a clear case,[93] and an injunction will not as readily be granted against him as against a maker or seller of the patented invention.[94]

Before issuance of patent, no injunction against infringement thereof can be granted.[95]

After defendant has infringed, an injunction against further infringement may be granted[96] where further infringement is threatened[97] or probable,[98] or the prior infringement was purposeful[99] and inexcusable,[1] and committed under circumstances calculated to arouse just apprehension that it would be persisted in,[2] although not where the prior infringement consisted of a few isolated acts committed in good faith.[3] Even though defendant has ceased to infringe, an injunction may be granted[4] where a renewal of infringement is actually or in effect threatened or reasonably apprehended;[5] but not otherwise.[6] Indeed the facts that defendant has ceased to infringe and promised not to infringe in the future do not necessarily prevent the issuance of an injunction;[7] but an injunction will be refused where, under all the circumstances, including such

85. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122 [aff 150 Fed. 741, 80 CCA 407]; Crown Cork, etc., Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 CCA 72; Campbell Printing-Press Mfg. Co. v. Manhattan R. Co., 49 Fed. 930; American Bell Tel. Co. v. Cushman Tel., etc., Co., 36 Fed. 488, 1 LRA 799.

[a] **That owner of patent is not manufacturer,** but grants license under which he receives royalties, is not ground for refusing an injunction against infringement, to which he is otherwise entitled. Kryptok Co. v. Haussmann, 216 Fed. 196 [foll Kryptok Co. v. Rothschild, 216 Fed. 198].

Lack of manufacture or commercial use by plaintiff as defense see supra § 538.

86. Busch v. Jones, 184 U. S. 598, 22 SCt 511, 46 L. ed. 707; Hat-Sweat Mfg. Co. v. Porter, 34 Fed. 745; Brown v. Lapham, 27 Fed. 77, 23 Blatchf. 475.

87. American Tel., etc., Co. v. Radio Audion Co., 281 Fed. 200 [aff 284 Fed. 1020 mem].

88. Duplex Printing Press Co. v. Hoe, 15 F. (2d) 362; Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 215 Fed. 594, 131 CCA 662 [rev on other grounds 242 U. S. 202, 37 SCt 105, 61 L. ed. 248]; Kennicott Water Softener Co. v. Bain, 185 Fed. 520, 107 CCA 626; Wilderman v. F. W. Berk & Co., Ltd., [1925] Ch. 116.

[a] **Mere possession** of an infringing machine, without any use or threat to use, may not, under the circumstances, warrant relief by injunction. Miller v. Whitney Glass Works, 160 Fed. 501.

89. Reliance Novelty Co. v. Dwortzek, 80 Fed. 902 [app dism 82 Fed. 1005 mem, 27 CCA 685 mem].

90. Ironclad Mfg. Co. v. Sugar Loaf Dairy Co., 140 Fed. 108.

91. Lenk v. Hunt-Lasher Co., 14 F. (2d) 335; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 CCA 107.

92. Bresnahan v. Tripp Giant Leveller Co., 102 Fed. 899 [dist Westinghouse Air-Brake Co. v. Burton Stock-Car Co., 77 Fed. 301, 23 CCA 174]; Bresnahan v. Tripp Giant Leveller Co., 72 Fed. 920, 19 CCA 237; Allington, etc., Mfg. Co. v. Booth, 72 Fed. 772 [aff 78 Fed. 878, 24 CCA 378]; Jonathan Mills Mfg. Co. v. Whitehurst, 56 Fed. 589; Thompson v. American Bank-Note Co., 35 Fed. 203; Tucker v. Burditt, 24 F. Cas. No. 14,216, 4 Bann. & A. 569; Busch v. Jones, 16 App. (D. C.) 23.

93. Jefferson Electric Light, etc., Co. v. Westinghouse Electric, etc., Co., 134 Fed. 392, 67 CCA 189; Westinghouse Air-Brake Co. v. Burton Stock-Car Co., 70 Fed. 619; Howe v. Newton, 12 F. Cas. No. 6,771, 2 Fish. Pat. Cas. 531; Morris v. Lowell Mfg. Co., 17 F. Cas. No. 9,833, 3 Fish. Pat. Cas. 67.

94. Valvona-Marchiony Co. v. Silverstein, 207 Fed. 374.

95. Marsh v. Nichols, 128 U. S. 605, 9 SCt 168, 32 L. ed. 538; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. ed. 504; Standard Scale, etc., Co. v. McDonald, 127 Fed. 709; Brill v. St. Louis Car Co., 80 Fed. 909; Rein v. Clayton, 37 Fed. 354, 3 LRA 78 [disappr Butler v. Ball, 28 Fed. 754]; Hoeltge v. Hoeller, 12 F. Cas. No. 6,574, 2 Bond 386.

96. Moffatt v. Leonard, 5 OntWR 259. See Davey Tree Expert Co. v. McCarthy, 283 Fed. 135 (plaintiff is entitled to injunctive relief where defendant has seemingly infringed or has in practice carried the matter at least to the line of danger of infringement).

97. Samuel M. Langston Co. v. Cameron Mach. Co., 281 Fed. 864.

98. Samuel M. Langston Co. v. Cameron Mach. Co., supra.

[a] **That contributory infringement is trifling** is hardly a safe reason for refusing an injunction where the infringing conduct has not been discontinued before suit brought, the willingness of defendant to infringe is apparent, and his opportunity to do so is abundant in the course of the business he continues to carry on. Lyman Mfg. Co. v. Bassick Mfg. Co., 18 F. (2d) 29 [certiorari den 275 U. S. 549 mem, 48 SCt 86 mem, 72 L. ed. 420 mem].

99. Miller Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 257 Fed. 733, 169 CCA 21.

1. Miller Rubber Co. v. De Laski, etc., Circular Woven Tire Co., supra.

[a] **Sale after notice.**—Where defendant, after notice, sold devices infringing complainant's patent, a decree for an injunction is proper. Ersted v. Willamette Iron, etc., Works, 28 F. (2d) 960; Atlas Floor Co. v. Robbins Mfg. Co., 239 Fed. 135, 152 CCA 177.

2. Miller Rubber Co. v. De Laski, etc., Circular Woven Tire Co., 257 Fed. 733, 169 CCA 21.

3. Sheridan-Clayton Paper Co. v. U. S. Envelope Co., 232 Fed. 153, 146 CCA 345.

4. Star Ball Player Co. v. Baseball Display Co., 8 F. (2d) 46; W. A. Schleit Mfg. Co. v. Syracuse Radiator Co., 278 Fed. 305 [aff 288 Fed. 52]; General Electric Co. v. Independent Lamp, etc., Co., 267 Fed. 824; Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220; Nestle Patent Holding Co., Inc. v. E. Frederics, Inc., 258 Fed. 627 [aff 261 Fed. 780]; Uhrich v. Van Kannel Revolving Door Co., 245 Fed. 991, 157 CCA 672; Johnson v. Foos Mfg. Co., 141 Fed. 73, 72 CCA 105 (cessation during pendency of litigation); General Electric Co. v. New England Electric Co., 128 Fed. 738, 63 CCA 448 [rev 123 Fed. 310]; Western Electric Co. v. Capital Tel., etc., Co., 86 Fed. 769; Matthews, etc., Mfg. Co. v. National Brass, etc., Works, 71 Fed. 518; White v. Walbridge, 46 Fed. 526; Kane v. Huggins Cracker, etc., Co., 44 Fed. 287; Facer v. Midvale Steel-Works, 38 Fed. 231; Bullock Printing-Press Co. v. Jones, 4 F. Cas. No. 2,132, 3 Bann. & A. 195.

5. Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 242 U. S. 202, 36 SCt 105, 61 L. ed. 248 [rev 215 Fed. 594, 131 CCA 662].

[a] **Rule applied.**—(1) Where defendant, a corporation, sold its plant, but retained another patent under which prior alleged infringements had been practiced and justified, it did not give up its right to proceed under that patent or deny its intention to do so; it denied complainant's right and asserted a countervailing right both in the suit in question and in another action. Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 242 U. S. 202, 37 SCt 105, 61 L. ed. 248 [rev 215 Fed. 594, 131 CCA 662] (the means of further infringement were retained and the conduct was a continuing menace). (2) An injunction will be granted, although defendant has ceased to infringe, where he contests the validity of complainant's patent (American Bank Protection Co. v. City Nat. Bank, 181 Fed. 375; Seeger Refrigerator Co. v. White Enamel Refrigerator Co., 178 Fed. 567; Morton Trust Co. v. Standard Steel Car Co., 177 Fed. 931, 101 CCA 211 [rev 171 Fed. 672]; Western Electric Co. v. Capital Tel., etc., Co., 86 Fed. 769), (3) and does not disavow an intention to further infringe (American Bank Protection Co. v. City Nat. Bank, supra).

6. Kennicott Water Softener Co. v. Bain, 185 Fed. 520, 107 CCA 626; Edison General Electric Co. v. New England Electric Mfg. Co., 121 Fed. 125. See Samuel M. Langston Co. v. Cameron Mach. Co., 281 Fed. 864 (an injunction will be denied where a different type of machine is now being used, and it is reasonably certain that no infringement has been intended for a long time, or is now contemplated).

[a] **Circumstances in addition to lack of threats.**—An injunction will be refused where it appears not only that defendnat has ceased to infringe and does not threaten to infringe, but also that: (1) He does not intend to again infringe, which fact is known to complainant. Chadeloid Chemical Co. v. Johnson, 203 Fed. 993, 122 CCA 293. (2) The only infringing machine used by him was defective and unsatisfactory and he disposed of it several months before the institution of suit. Munger Laundry Co. v. National Marking Mach. Co., 252 Fed. 144, 161 CCA 256. (3) The business of the corporate defendant, of which he is an officer, has completely terminated, and all possibility of future infringement has disappeared. Dangler v. Imperial Mach. Co., 11 F. (2d) 945.

7. Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220; Crier

cessation and promise, it is clear that no further infringement is contemplated.[8]

Exception of governmental use. In granting an injunction against an infringer of a patent the court may,[9] but need not,[10] write into the injunction an express exception of the making or use of the patented article by or for the government.

Against plaintiff.[11] In an equitable suit against a manufacturer for infringement of a patent, the court will, upon application, restrain complainant, until the determination of the present suit, from instituting or prosecuting a multiplicity of oppressive and vexatious suits against widely scattered customers of defendant.[12] The court is without authority to enjoin plaintiff from refusing to grant a license to defendant.[13]

[§ 595] **(2) After, or Shortly Prior to, Expiration of Patent.** Although jurisdiction of a bill filed shortly before the expiration of a patent may exist,[14] it does not follow that an injunction should or must issue.[15] Ordinarily a final,[16] although not a preliminary,[17] injunction will be granted where the patent is about to expire; but no injunction will be granted after the expiration of the patent,[18] nor will an injunction granted before the expiration of the patent be so construed as to continue beyond the term of the patent,[19] unless a proper case is presented for enjoining the sale or use of infringing articles made before, and in the possession of defendant at, the expiration of the patent.[20]

[§ 596] **(3) Preliminary Injunction—(a) Discretion of Court.** While the granting or refusing of a preliminary injunction in an equitable suit for infringement of a patent rests within the sound[21] dis-

v. Innes, 170 Fed. 324, 95 CCA 508 [mod 160 Fed. 103]; Deere, etc., Co. v. Dowagiac Mfg. Co., 153 Fed. 177, 82 CCA 351; General Electric Co. v. Bullock Electric Mfg. Co., 138 Fed. 412; Brookfield v. Elmer Glassworks, 132 Fed. 312; Consolidated Fastener Co. v. Toppen, 113 Fed. 697; New York Filter Mfg. Co. v. Chemical Bldg. Co., 93 Fed. 827; Braddock Glass Co. v. Macbeth, 64 Fed. 118, 12 CCA 70; New York Belting, etc., Co. v. Gutta Percha, etc., Mfg. Co., 56 Fed. 264; Sawyer Spindle Co. v. Turner, 55 Fed. 979; Celluloid Mfg. Co. v. Arlington Mfg. Co., 34 Fed. 324; Goodyear v. Berry, 10 F. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Potter v. Crowell, 19 F. Cas. No. 11,323, 1 Abb. 89, 3 Fish. Pat. Cas. 112; Rumford Chemical Works v. Vice, 20 F. Cas. No. 12,136, 2 Bann. & A. 584, 14 Blatchf. 179; Sickels v. Mitchell, 22 F. Cas. No. 12,835, 3 Blatchf. 548; Geary v. Norton, 1 De G. & Sm. 9, 63 Reprint 949. But see Richmond Screw Anchor Co. v. Bethlehem Steel Bridge Corp., 275 Fed. 585 [aff 287 Fed. 94] (motion for injunction denied with leave to plaintiff to renew it at any time). Contra General Electric Co. v. Pittsburg-Buffalo Co., 144 Fed. 439; Silver v. J. P. Eustis Mfg. Co., 130 Fed. 348; National Cash-Register Co. v. Boston Cash Indicator, etc., Co., 41 Fed. 144; Brammer v. Jones, 4 F. Cas. No. 1,806, 2 Bond 100, 3 Fish. Pat. Cas. 340.

"When after some infringement and after conduct disclosing danger of a continued or renewed infringement a patentee finds it necessary to incur the expense of bringing a bill to protect his rights, he is entitled to all the remedies which the law affords him, and among them is a final adjudication of his rights and a permanent and effective injunction against further infringement, and he should not be driven from the court to which he has rightfully resorted with a mere promise by the offender of better conduct in the future." Deere, etc., Co. v. Dowagiac Mfg. Co., 153 Fed. 177, 180, 82 CCA 351.

8. Crier v. Innes, 170 Fed. 324, 95 CCA 508 [mod 160 Fed. 103].

9. Firth-Sterling Steel Co. v. Bethlehem Steel Co., 216 Fed. 755 [rev on other grounds 224 Fed. 937, 140 CCA 427].

Refusal to grant injunction against: Contractor with government see supra § 547.
Officer of United States see supra § 547.

10. Wood v. Atlantic Gulf, etc., Co., 296 Fed. 718.

[a] **Reasons for rule.**—"First, the court cannot foresee that the infringer will ever have any occasion to make a patented article for the government, or to use it for the government, or will ever have any contract with the government which calls for either the making or using of such article. Second, if it should ever transpire in the taking of evidence as to damages, that a part of the damage claimed is by reason of the making of the article for the government, or the use of the article for the government, the court can make provision for, and grant ample protection to the infringer as to, that part of the damages, and can remit so much of the claim for damages as is for such making or use, to the Court of Claims for determination." Wood v. Atlantic Gulf, etc., Co., 296 Fed. 718, 720.

11. **Injunction against notice to public of bringing of suit** see Injunctions § 433.

12. Marconi Wireless Tel. Co. v. Kilbourne, etc., Mfg. Co., 235 Fed. 719; Stebler v. Riverside Heights Orange Growers' Assoc., 214 Fed. 550, 131 CCA 96, LRA1915F 1101 [mod 211 Fed. 985]; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 193 Fed. 658; Commercial Acetylene Co. v. Avery Portable Lighting Co., 159 Fed. 935, 87 CCA 206; National Cash-Register Co. v. Boston Cash Indicator, etc., Co., 41 Fed. 51; Ide v. Ball Engine Co., 31 Fed. 901; Allis v. Stowell, 16 Fed. 783; Barnum v. Goodrich, 2 F. Cas. No. 1,036; Motte v. Bennett, 17 F. Cas. No. 9,884, 2 Fish. Pat. Cas. 642. Compare Gamewell Fire Alarm Tel. Co. v. Star Electric Co., 199 Fed. 188 (deeming it unwise to interfere with complainant in bringing suits).

Cross references:
Separate suits against manufacturer and customers generally see supra § 544.
Suits against customer after patent held invalid see infra § 644.
Threats of suit against customers see infra § 657.

13. General Electric Co. v. Minneapolis Electric Lamp Co., 10 F. (2d) 851 [app dism 7 F. (2d) 1020].

14. See supra § 524.

15. Le Roy v. De Vry Corp., 16 F. (2d) 18.

16. American Bell Tel. Co. v. Western Tel. Constr. Co., 58 Fed. 410; American Bell Tel. Co. v. Brown Tel., etc., Co., 58 Fed. 409.

17. Keyes v. Eureka Consol. Min. Co., 158 U. S. 150, 15 SCt 772, 39 L. ed. 929; Cheatham Electric Switching Device Co. v. Transit Dev. Co., 226 Fed. 495; Keyes v. Eureka Cons. Mfg. Co., 45 Fed. 199 [aff 158 U. S. 150, 15 SCt 772, 39 L. ed. 929]; Howe v. Morton, 12 F. Cas. No. 6,769, 1 Fish. Pat. Cas. 586; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93. Compare Victor Talking Mach. Co. v. Vitaphone Co., 191 Fed. 987 (motion for a preliminary injunction will be granted where it clearly appears that an infringing device or machine is being manufactured and there is nothing in defendant's papers to show that he does not intend to sell the device or machine before the expiration of the patent in about three months). Contra J. F. Rowley Co. v. Rowley, 18 F. (2d) 704; Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 484; Rumford Chemical Works v. Vice, 20 F. Cas. No. 12,136, 2 Bann. & A. 584, 14 Blatchf. 179.

18. Jost v. Borden Stove Co., 285 Fed. 626; Excelsior Steel Furnace Co. v. Williamson Heater Co., 269 Fed. 614; W. W. Sly Mfg. Co., v. Pangborn Corp., 263 Fed. 394; Keystone Type Fdy. v. Wynkoop, 239 Fed. 355; American Sulphite Pulp Co. v. Hinckley Fibre Co., 235 Fed. 173, 217 Fed. 57; Wright's Automatic Tobacco Packing Mach. Co. v. American Tobacco Co., 220 Fed. 163; Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 121 Fed. 136; Vaughan v. Central Pac. R. Co., 28 F. Cas. No. 16,897, 3 Bann. & A. 27, 4 Sawy. 280. To same effect Merrell-Soule Co. v. Northland Dairy Co., 28 F. (2d) 924 (where the patent has expired during the pendency of the suit, there can be no decree except for an accounting).

19. De Florez v. Raynolds, 8 Fed. 434, 17 Blatchf. 436.

[a] **Injunction will be dissolved** (1) upon expiration of patent. Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 61 Fed. 208, 9 CCA 450; Westinghouse v. Carpenter, 43 Fed. 894; Bate Refrigerating Co. v. Gillett, 31 Fed. 809. (2) Dissolution generally see infra § 608.

20. Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 1006 [mod 17 F. (2d) 999]; Motion Picture Patents Co. v. Centaur Film Co., 217 Fed. 247; American Sulphite Pulp Co. v. Crown-Columbia Pulp, etc., Co., 169 Fed. 140; New York Belting, etc., Co. v. Magowan, 27 Fed. 111; American Diamond Rock-Boring Co. v. Rutland Marble Co., 2 Fed. 356, 18 Blatchf. 146; Crossley v. Derby Gas Light Co., 4 L. J. Ch. N. S. 25.

[a] **Rule applies** to article made in infringement of process patent. Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 1006 [mod 17 F. (2d) 999].

[b] **Leading case.**—Crossley v. Derby Gas Light Co., 4 L. J. Ch. N. S. 25 is a leading case. Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 1006 [mod 17 F. (2d) 999].

[c] **Facts held not to justify injunction.**—Le Roy v. De Vry Corp., 16 F. (2d) 18; Hall Signal Co. v. General R. Signal Co., 171 Fed. 436.

21. Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493, 121 CCA 615; Kings County Raisin, etc., Co. v. U. S. Consolidated Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; In re Chicago Sugar-Refining Co., 87 Fed. 750, 31 CCA 221; Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Brown v. Deere, 6 Fed. 487, 2 McCrary 425; Blanchard v. Reeves, 3 F. Cas. No. 1,515, 1 Fish. Pat. Cas. 103; Motte v. Bennett, 17 F. Cas. No. 9,884, 2 Fish. Pat. Cas. 642; Orr v. Badger, 18 F. Cas. No. 10,587, Brunn. Coll. Cas. 536; Tucker v. Carpenter, 24 F. Cas. No. 14,217, Hempst. 440.

cretion of the trial court,[22] nevertheless the discretion of the court in this respect is a judicial discretion,[23] rather than a mere personal whim,[24] and it does not extend to a refusal to apply well-settled principles to a conceded or indisputable state of facts.[25] The general principles which control the discretion of the court in granting or refusing preliminary injunctions in equity suits generally[26] apply in suits for infringement of patents.[27]

[§ 597] **(b) Grounds for Granting or Denying; Matters Considered—aa. In General.** In a suit in equity for infringement of a patent, a preliminary injunction may be granted[28] or refused[29] according to the showing made[30] and the principles governing the court in determining and disposing of the motion for the injunction.[31] To be entitled to a preliminary injunction, complainant must establish a prima facie case[32] free from reasonable doubt[33] as to every matter necessary for him to establish;[34] the right to,[35] and necessity,[36] or a satisfactory reason,[37] for the injunction must be clearly shown. On a motion for a preliminary injunction, the court will consider all pertinent facts which are clearly shown,[38] or it will interpret a written instrument or document properly

[a] **Motion for injunction is addressed to sound discretion of court.**—Gillette Safety Razor Co. v. Durham Duplex Razor Co., 197 Fed. 574; Hartford v. Western Mfg. Co., 172 Fed. 676 [aff 194 Fed. 875, 114 CCA 621].

[b] **Granting of injunction held not abuse of discretion.**—Fireball Gas Tank, etc., Co. v. Commercial Acetylene Co., 239 U. S. 156, 36 SCt 86, 60 L. ed. 191; Milwaukee Printing Co. v. Stover, 290 Fed. 387; Kansas City v. Sanitary Street Flushing Mach. Co., 224 Fed. 964, 140 CCA 456; Engineer Co. v. Blaisdell Canady Co., 220 Fed. 673, 136 CCA 315; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Wayne Mfg. Co. v. Coffield Motor Washer Co., 209 Fed. 614, 126 CCA 608.

[c] **Granting of injunction held not improvident exercise of discretion.**—Crescent Specialty Co. v. National Fireworks Distributing Co., 219 Fed. 130, 135 CCA 28; J. D. Randall Co. v. Fogelsong Mach. Co., 216 Fed. 599, 132 CCA 603.

[d] **Denial of injunction held not abuse of discretion.**—U. S. Gypsum Co. v. Bestwall Mfg. Co., 290 Fed. 800; Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 286 Fed. 358; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 254 Fed. 91, 165 CCA 501.

Reversal for abuse of discretion see infra § 651.

22. McMaster v. Daugherty Mfg. Co., 219 Fed. 219, 135 CCA 117; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; Bailey Wringing Mach. Co. v. Adams, 2 F. Cas. No. 752, 3 Bann. & A. 96; Earth Closet Co. v. Fenner, 8 F. Cas. No. 4,249, 5 Fish. Pat. Cas. 15; Forbush v. Bradford, 9 F. Cas. No. 4,930, 1 Fish. Pat. Cas. 317; Irwin v. Dane, 13 F. Cas. No. 7,081, 2 Biss. 442, 4 Fish. Pat. Cas. 359; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93; Potter v. Whitney, 19 F. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87; Union Paper-Bag Mach. Co. v. Binney, 24 F. Cas. No. 14,387, 5 Fish. Pat. Cas. 166.

[a] **Application for injunction is addressed to discretion of court.**—Imperial Mach., etc., Corp. v. Blakeslee, 262 Fed. 419.

23. Rousso v. Barber, 276 Fed. 552 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem].

[a] **Motion for injunction is addressed to judicial discretion of court.**—General Electric Co. v. Mallory, 286 Fed. 175, 294 Fed. 562, 567 [aff 298 Fed. 579 (certiorari den 266 U. S. 609 mem, 45 SCt 94 mem, 69 L. ed. 466 mem)].

24. Rousso v. Barber, 276 Fed. 552 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem].

25. Weber Electric Co. v. Connecticut Electrical Mfg. Co., 257 Fed. 429 [aff 263 Fed. 583]; Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493, 121 CCA 615.

26. See Injunctions § 11 et seq.

27. Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 116 CCA 454; Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur, 53 Fed. 98, 3 CCA 455.

28. Bassick Mfg. Co. v. Adams Grease Gun Corp., 26 F. (2d) 722; General Electric Co. v. Brite-Lite Lamp Co., 290 Fed. 967; Neff v. Coffield Motor Washer Co., 210 Fed. 166, 127 CCA 24; American Graphophone Co. v. Pickard, 201 Fed. 546; Tindel-Morris Co. v. Chester Forging, etc., Co., 163 Fed. 304 [aff 165 Fed. 899, 91 CCA 577]; Continental Wire Fence Co. v. Pendergast, 126 Fed. 381; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 52 CCA 559; National Folding-Box, etc., Co. v. Robertson, 99 Fed. 985; Welsbach Light Co. v. Rex Incandescent Light Co., 94 Fed. 1006; Welsbach Light Co. v. Rex Incandescent Light Co., 94 Fed. 1004; New York Filter Mfg. Co. v. Chemical Bldg. Co., 93 Fed. 827; Alaska Packers' Assoc. v. Pacific Steam Whaling Co., 93 Fed. 672 [aff 100 Fed. 462, 40 CCA 494]; Electric Car Co. v. Nassau Electric R. Co., 89 Fed. 204 [aff 91 Fed. 142, 33 CCA 420]; Westinghouse Air-Brake Co. v. Great Northern R. Co., 88 Fed. 258, 31 CCA 525; Pacific Contracting Co. v. Union Paving, etc., Co., 80 Fed. 737; Thomson-Houston Electric Co. v. Ohio Brass Co., 78 Fed. 139 [aff 80 Fed. 712, 26 CCA 107]; Allington, etc., Mfg. Co. v. Booth, 72 Fed. 772 [aff 78 Fed. 878, 24 CCA 378]; Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302; Corser v. Brattleboro Overall Co., 59 Fed. 781; Carter v. Wollschlaeger, 53 Fed. 573; New York Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; White v. Heath, 10 Fed. 291; Plimpton v. Winslow, 3 Fed. 333; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506; Colt v. Young, 6 F. Cas. No. 3,032, 2 Blatchf. 471; Irwin v. Dane, 13 F. Cas. No. 7,081, 2 Biss. 442, 4 Fish. Pat. Cas. 359; Miller v. Androscoggin Pulp Co., 17 F. Cas. No. 9,559, 5 Fish. Pat. Cas. 340, Holmes 142; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93; Pentlarge v. Beeston, 19 F. Cas. No. 10,963, 3 Bann. & A. 142, 14 Blatchf. 352; Potter v. Fuller, 19 F. Cas. No. 11,327, 2 Fish. Pat. Cas. 251; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241; Sickels v. Mitchell, 22 F. Cas. No. 12,835, 3 Blatchf. 548; Amiesite Asphalt, Ltd. v. Standard Pav., Ltd., (Que.) [1925] 3 DomLR 687.

[a] **Even after hearing on merits,** a temporary injunction may be granted. Cimiotti Unhairing Co. v. American Fur Refining Co., 117 Fed. 623 [aff 118 Fed. 838, 55 CCA 513].

29. Safety Car Heating, etc., Co. v. U. S. Light, etc., Corp., 233 Fed. 1007; Rudge-Whitworth v. Houk Mfg. Co., 221 Fed. 678; Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865; National Phonograph Co. v. Walker, 169 Fed. 146; American Graphophone Co. v. Leeds, etc., Co., 155 Fed. 427; National Phonograph Co. v. American Graphophone Co., 136 Fed. 231; A. B. Dick Co. v. Roper, 126 Fed. 966; Westinghouse Air-Brake Co. v. Christensen Engineering Co., 121 Fed. 558; U. S. Gramophone Co. v. National Gramophone Co., 107 Fed. 129; Westinghouse Air-Brake Co. v. Christensen Engineering Co., 103 Fed. 491 [app dism 104 Fed. 622, 44 CCA 92]; Western Electric Co. v. Anthracite Tel. Co., 100 Fed. 301; Vermilya v. Erie R. Co., 89 Fed. 96; Société Anonyme v. Allen, 84 Fed. 812 [aff 90 Fed. 815, 33 CCA 282]; Welsbach Light Co. v. Benedict, etc., Mfg. Co., 82 Fed. 747; Société Fabriques, etc. v. Franco-American Trading Co., 82 Fed. 439 [app dism 96 Fed. 1006 mem, 37 CCA 665 mem]; Carter-Crume Co. v. Watson, 69 Fed. 267; Dickerson v. Matheson, 57 Fed. 524, 6 CCA 466; Johnson v. Aldrich, 40 Fed. 675; Amazeen Mach. Co. v. Knight, 39 Fed. 612; Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 25 Fed. 30; Gold, etc., Tel. Co. v. Pearce, 19 Fed. 419; Tillinghast v. Hicks, 13 Fed. 388; Steam-Gauge, etc., Co. v. Miller, 11 Fed. 718; Toohey v. Harding, 1 Fed. 174, 4 Hughes 253; Andrews v. Spear, 1 F. Cas. No. 380, 3 Bann. & A. 82, 4 Dill. 472; Earth Closet Co. v. Fenner, 8 F. Cas. No. 4,249, 5 Fish. Pat. Cas. 15; Gear v. Holmes, 10 F. Cas. No. 5,292, 6 Fish. Pat. Cas. 595; Jones v. McMurray, 13 F. Cas. No. 7,479, 3 Bann. & A. 130, 2 Hughes 527; Jones v. Merrill, 13 F. Cas. No. 7,481; North v. Kershaw, 18 F. Cas. No. 10,311, 4 Blatchf. 70; Duryea v. Kaufman, 1 OntWN 1127, 16 OntWR 809.

30. See infra text and notes 32–38; and §§ 598–606.

31. See infra text and notes 43, 46–54; and §§ 598–605.

32. A. B. Dick Co. v. Barnett, 277 Fed. 423; George Cutter Co. v. Metropolitan Electric Mfg. Co., 275 Fed. 158; Bonella v. Espir, 43 R. P. C. 159.

33. A. B. Dick Co. v. Barnett, 277 Fed. 423; George Cutter Co. v. Metropolitan Electric Mfg. Co., 275 Fed. 158.

34. Gamewell Fire Alarm Tel. Co. v. Star Electric Co., 199 Fed. 185.

35. Packard Motor Car Co. v. Overland Motor Co., 28 F. (2d) 306; Hilditch v. Bethlehem Bumper Co., 25 F. (2d) 352; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Hartford v. Western Mfg. Co., 172 Fed. 676 [aff 194 Fed. 875, 114 CCA 621]; International Tooth-Crown Co. v. Mills, 22 Fed. 659; Cooper v. Mattheys, 6 F. Cas. No. 3,200, 5 PaLJ 38; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 PaLJ 443; Sickels v. Youngs, 22 F. Cas. No. 12,838, 3 Blatchf. 293.

[a] **Clear right to injunction may appear** otherwise than by a judgment or decree. Cary Mfg. Co. v. De Haven, 58 Fed. 786.

36. Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72.

37. Hilditch v. Bethlehem Bumper Co., 25 F. (2d) 352.

38. Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 117 Fed. 309; Irwin v. Dane, 13 F. Cas. No. 7,081, 2 Biss. 442, 4 Fish. Pat. Cas. 359; Morse Fountain-Pen Co. v. Esterbrook Steel-Pen Mfg. Co., 17 F. Cas. No. 9,862, 3 Fish. Pat. Cas. 515; Sickels v. Youngs, 22 F. Cas. No. 12,838, 3 Blatchf. 293; Union Paper-Bag Mach. Co. v. Binney, 24 F. Cas.

before it[39] where the right to an injunction depends upon such interpretation alone and not upon any controverted or doubtful facts;[40] but it will not attempt to decide doubtful questions[41] or disputed and difficult questions of law or fact;[42] and it will refuse to grant an injunction in case of doubt[43] as to the validity[44] or infringement[45] of the patent. It is ground to deny a preliminary injunction that there has been laches on the part of plaintiff;[46] that the patent is about to expire;[47] that complainant takes inconsistent positions as to a license being in force;[48] or that defendant has a later patent under which he is working;[49] and sometimes a preliminary injunction is denied on the ground, among others, that a final hearing can soon be had.[50] A preliminary injunction will be withheld where it is apparently sought for the purpose of obtaining an undue advantage,[51] creating mischief,[52] or coercing a compromise;[53] but the fact that, after the court has expressed an opinion that plaintiff is entitled to a preliminary injunction, another person or corporation attempts to license defendant to do the act which the court has held that plaintiff is entitled to have enjoined, does not furnish sufficient ground for withholding the injunction.[54] In a suit by an assignee against a stranger to the assignment, defendant is not in a position to attack the validity of the assignment on the hearing of a motion for a preliminary injunction.[55]

[§ 598] **bb. Validity of Patent—(aa) In General.** The facts that complainant owns a patent and defendant infringes it will not alone justify a preliminary injunction;[56] before an injunction will be granted, the validity of the patent must be made to appear so clearly, plainly, and convincingly that there is no doubt thereof.[57] Where the validity of

No. 14,387, 5 Fish. Pat. Cas. 166.

[a] **Admissions by defendant will be considered.**—Jones v. Merrill, 13 F. Cas. No. 7,481; Morse Fountain-Pen Co. v. Esterbrook Steel-Pen Mfg. Co., 17 F. Cas. No. 9,862, 3 Fish. Pat. Cas. 515.

39. See Drainage Constr. Co. v. Englewood Sewer Co., 67 Fed. 141 (patent not in record not considered).

40. Individual Drinking Cup Co. v. Osmun-Cook Co., 220 Fed. 335; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 75 Fed. 1004 [app dism 79 Fed. 1003 mem, 24 CCA 690 mem]; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,560, 6 Blatchf. 165.

41. Permutit Co. v. Paige, etc., Chemical Co., 22 F. (2d) 916 [mod 292 Fed. 239]; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Acme-Keystone Mfg. Co. v. Dearborn, 167 Fed. 568 [mod on other grounds 170 Fed. 963, 96 CCA 106]; Thomson-Houston Electric Co. v. Exeter Co., 110 Fed. 986; Sprague Electric R., etc., Co. v. Nassau Electric R. Co., 95 Fed. 821, 37 CCA 286; Welsbach Light Co. v. Apollo Incandescent Gaslight Co., 94 Fed. 1005 [rev on other grounds 96 Fed. 332, 37 CCA 508].

42. Seal v. Beach, 113 Fed. 831; Consolidated Fastener Co. v. Columbian Fastener Co., 73 Fed. 828; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; Bailey Wringing Mach. Co. v. Adams, 2 F. Cas. No. 752, 3 Bann. & A. 96, 5 Reporter 102; Crowell v. Harlow, 6 F. Cas. No. 3,444, 3 Bann. & A. 478; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93; Potter v. Whitney, 19 F. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87; Sickels v. Youngs, 22 F. Cas. No. 12,838, 3 Blatchf. 293. See Walsh v. Albert Wahle Co., 25 F. (2d) 350 (court will not decide important matters alleged by plaintiff and seriously disputed by defendant).

[a] **Conflicting theories of experts** are not to be passed upon in a complicated case on motion for a preliminary injunction. Thomson-Houston Electric Co. v. Exeter, etc., St. R. Co., 110 Fed. 986.

[b] **Credibility of witnesses** will not be passed upon. Sessions v. Gould, 48 Fed. 855 [aff 63 Fed. 1001, 11 CCA 546]; Cooper v. Mattheys, 6 F. Cas. No. 3,200, 5 PaLJ 38.

43. Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Hurd v. James Goold Co., 203 Fed. 998, 122 CCA 298 [rev 197 Fed. 756]; Hall Signal Co. v. General R. Signal Co., 153 Fed. 907, 82 CCA 653; Bridson v. McAlpine, 8 Beav. 229, 50 Reprint 90; Bacon v. Spottiswoode, 1 Beav. 382, 17 EngCh 382, 48 Reprint 988, 4 Myl. & C. 433, 18 EngCh 433, 41 Reprint 167; Collard v. Allsion, 4 Myl. & C. 487, 18 EngCh 487, 41 Reprint 188; Goodwin v. Fader, (N. S.) 19 CanLTOccNotes 364.

[a] **Complainant's rights** must be free from doubt to entitle him to a preliminary injunction. Parsons Non-Skid Co. v. Victor Tire Grip Co., 164 Fed. 617.

[b] **Doubt may be based,** not only upon the affidavits submitted, but also upon any other facts brought to the attention of the trial judge. Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 867.

[c] **Doubt may comprehend** a belief that there is other testimony which might be adduced by reasonable effort. Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865.

[d] **Close case.**—The court will deny a motion for a preliminary injunction where the case is rather close and the court has not had the benefit of hearing, or of a cross-examination of, the witnesses on either side, as cross-examination may, and oftentimes does, materially change the tenor of the testimony of a witness, and this is as true of experts as of other witnesses. Safety Car Heating, etc., Co. v. Gould Coupler Co., 230 Fed. 848.

44. See infra § 598.

45. See infra § 603.

46. See supra § 534.

47. See supra § 595.

48. Lovell-McConnell Mfg. Co. v. Waite Auto Supply Co., 198 Fed. 130.

49. Byerley v. Standard Asphalt, etc., Co., 189 Fed. 759; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; American Shoe-Tip Co. v. National Shoe-Toe Protector Co., 1 F. Cas. No. 317, 2 Bann. & A. 551; Congress Rubber Co. v. American Elastic Cloth Co., 6 F. Cas. No. 3,099a; Goodyear v. Dunbar, 10 F. Cas. No. 5,570, 1 Fish. Pat. Cas. 472, 3 Wall. Jr. 310; Mitchell v. Barclay, 17 F. Cas. No. 9,659; Sargent v. Carter, 21 F. Cas. No. 12,362, 1 Fish. Pat. Cas. 277; Sargent Mfg. Co. v. Woodruff, 21 F. Cas. No. 12,368, 5 Biss. 444. Compare Jones v. Merrill, 13 F. Cas. No. 7,481 (fact that defendant has obtained patent is not controlling, although entitled to some weight); Morse Fountain-Pen Co. v. Esterbrook Steel-Pen Mfg. Co., 17 F. Cas. No. 9,862, 3 Fish. Pat. Cas. 515 (injunction will be granted where infringement is clear, notwithstanding defendant's patent); Wilson v. Barnum, 30 F. Cas. No. 17,787, 2 Fish. Pat. Cas. 635, 2 Robb. Pat. Cas. 749, 1 Wall. Jr. 347 (rule is otherwise where defendant's patent was granted without prior notice to plaintiff).

[a] **Presumption** (1) arising from grant of defendant's patent that there is a substantial and patentable difference between the two inventions (see supra § 581) (2) will not be disregarded on a motion for a preliminary injunction (Rousso v. Barber, 276 Fed. 552 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem]; Byerley v. Standard Asphalt, etc., Co., 189 Fed. 759; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189).

50. U. S. Gypsum Co. v. Bestwall Mfg. Co., 290 Fed. 800; Firestone Tire, etc., Co. v. Dientenfass, 215 Fed. 747; Meyers v. Skinner, 179 Fed. 860.

[a] **Speedy determination on merits** may, in view of the situation of the parties, be of more importance than the temporary preservation of what may ultimately appear to be complainant's rights. Meyers v. Skinner, 179 Fed. 860.

51. Ney Mfg. Co. v. Superior Drill Co., 56 Fed. 152.

52. Neilson v. Thompson, Web. Pat. Cas. 275.

53. Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 Pa. LJR 443.

54. De Forest Radio Tel., etc., Co. v. Radio Corp., 4 F. (2d) 134.

55. Imperial Mach. Co. v. Streeter, 214 Fed. 985.

56. Société Anonyme, etc. v. Allen, 84 Fed. 812 [aff 90 Fed. 815, 33 CCA 282]; Palmer Pneumatic Tire Co. v. Newton Rubber Works, 73 Fed. 218; Grover, etc., Sewing-Mach. Co. v. Williams, 11 F. Cas. No. 5,847, 2 Fish. Pat. Cas. 133; Mitchell v. Barclay, 17 F. Cas. No. 9,659; Orr v. Littlefield, 18 F. Cas. No. 10,590, 2 Robb Pat. Cas. 323, 1 Woodb. & M. 13.

57. Blancard v. Simson, 22 F. (2d) 498; Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; National Cash Register Co. v. Remington Arms Co., 286 Fed. 367 [aff 283 Fed. 196]; Esta Co. v. Burke, 257 Fed. 743; Valvona-Marchiony Co. v. Silverstein, 207 Fed. 374; American Laundry Mach. Mfg. Co. v. Adams Laundry Mach. Co., 161 Fed. 556; Earll v. Rochester, etc., R. Co., 157 Fed. 241; Aquarama Co. v. Old Mill Co., 115 Fed. 806, 53 CCA 376; Welsbach Light Co. v. Cosmopolitan Incandescent Light Co., 104 Fed. 83, 43 CCA 418; Hatch Storage Battery Co. v. Electric Storage Battery Co., 100 Fed. 975; Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648 [aff 104 Fed. 83, 43 CCA 418]; Duff Mfg. Co. v. Kalamazoo Railway-Supply Co., 100 Fed. 357 [aff 113 Fed. 264, 51 CCA 221]; Overhead R., etc., Co. v. Hiller, 98 Fed. 620; Welsbach Light Co. v. Rex Incandescent Light Co., 94 Fed. 1005 [rev on other grounds 96 Fed. 332, 37 CCA 508]; Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980; New York Paper-Bag Mach., etc., Co. v. Western Paper-Bag Co., 75 Fed. 395; George Ertel Co. v. Stahl, 65 Fed. 519, 13 CCA 31; Mack v. Spencer, 44 Fed. 346; Standard Paint Co. v. Reynolds, 43 Fed. 304; Glaenzer v. Wiederer, 33 Fed. 583; Huber v. Myers Sanitary Depot, 33 Fed. 48; Baldwin v. Conway, 32 Fed. 795; Canfield Rubber

the patent has neither been adjudicated nor acquiesced in by the public, a preliminary injunction will ordinarily be refused;[58] but it may be granted where the validity of the patent is clear,[59] or is not questioned[60] or assailed by any evidence,[61] or defendant is estopped to deny it,[62] or has intentionally infringed[63] or, since the termination of a license, has been marking the articles sold by him as made under the patent.[64]

Presumption of validity of patent arising from its issuance[65] is not alone sufficient to warrant the granting of a preliminary injunction,[66] unless no prior patent or publication, and no statement as to the prior state of the art is submitted;[67] but the presumption may be so strongly buttressed on the initial showing that it would be an injustice to refuse an injunction.[68]

[§ 599] **(bb) Public Acquiescence.** A long continued public acquiescence in the claims of the patentee may justify the acceptance of the patent as valid for the purpose of a preliminary injunction[69] without an adjudication of validity;[70] but, to come within the rule, acquiescence must be clearly shown.[71] What constitutes acquiescence depends on the facts of each particular case.[72]

Co. v. Gross, 32 Fed. 226; Osborn v. Judd, 29 Fed. 96; Consolidated Safety-Valve Co. v. Ashton Valve Co., 26 Fed. 319; Bradley Mfg. Co. v. Charles Parker Co., 17 Fed. 240; Brewster v. Parry, 14 Fed. 694; Illingworth v. Spaulding, 9 Fed. 154; Consolidated Safety-Valve Co. v. Crosby Steam-Gauge, etc., Co., 7 Fed. 768 [rev on other grounds 113 U. S. 157, 5 SCt 513, 28 L. ed. 939]; White v. S. Harris, etc., Mfg. Co., 3 Fed. 161; American Shoe-Tip Co. v. National Shoe-Toe Protector Co., 1 F. Cas. No. 317, 2 Bann. & A. 551; Isaacs v. Cooper, 13 F. Cas. No. 7,096, 1 Robb Pat. Cas. 332, 4 Wash. C. C. 259; Jones v. Hodges, 13 F. Cas. No. 7,469, Holmes 37; McGuire v. Eames, 16 F. Cas. No. 8,814, 3 Bann. & A. 499, 15 Blatchf. 312; Mannie v. Everett, 16 F. Cas. No. 9,039; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Sullivan v. Redfield, 23 F. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Wilson Packing Co. v. Clapp, 30 F. Cas. No. 17,850, 3 Bann. & A. 243, 8 Biss. 154; Winans v. Eaton, 30 F. Cas. No. 17,861, 1 Fish. Pat. Cas. 181; Sugg v. Silber, 2 Q. B. D. 493; Davenport v. Rylands, L. R. 1 Eq. 302; Hill v. Evans, 4 De G. F. & J. 288, 65 EngCh 223, 45 Reprint 1195, 20 ERC 321; Foxwell v. Webster, 4 De G. J. & S. 77, 69 EngCh 60, 46 EngCh 60, 46 Reprint 844; Curtis v. Cutts, 3 Jur. 34, Davenport v. Jepson, 1 New Rep. 173.

58. Tropic-Aire, Inc. v. Jumper, 28 F. (2d) 631; Willcox, etc., Sewing Mach. Co. v. Union Special Mach. Co., 25 F. (2d) 459; Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; National Cash Register Co. v. Remington Arms Co., 283 Fed. 196 [aff 286 Fed. 367]; Hartford v. Western Mfg. Co., 172 Fed. 676 [aff 194 Fed. 875, 114 CCA 621]; St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co., 161 Fed. 725, 88 CCA 585; Earll v. Rochester, etc., R. Co., 157 Fed. 241; Sharp v. Bellinger, 155 Fed. 139; Hall Signal Co. v. General R. Signal Co., 153 Fed. 907, 82 CCA 653; Karfiol v. Rothner, 151 Fed. 777; Bristol Oil, etc., Co. v. Beacon, 143 Fed. 550; Alphons Custodis Chimney Constr. Co. v. H. R. Heinicke, 135 Fed. 552; Silver v. J. P. Eustis Mfg. Co., 130 Fed. 348; Newhall v. McCabe Hanger Mfg. Co., 125 Fed. 919, 60 CCA 629; Pennsylvania Globe Gaslight Co. v. American Lighting Co., 117 Fed. 324; Reed Mfg. Co. v. Smith, etc., Co., 107 Fed. 719, 46 CCA 601; Planters' Compress Co. v. Moore, etc., Co., 106 Fed. 500; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Smith v. Meriden Britannia Co., 97 Fed. 987, 39 CCA 32 [aff 92 Fed. 1003]; Elliott v. Harris, 92 Fed. 374 [app dism 92 Fed. 1019 mem, 34 CCA 685 mem]; Richmond Mica Co. v. De Clyne, 90 Fed. 661; Wilson v. Consolidated Store-Service Co., 88 Fed. 286, 31 CCA 533; Williams v. Breitling Metal-Ware Mfg. Co., 77 Fed. 285, 23 CCA 171; Johnson v. Aldrich, 40 Fed. 675; Raymond v. Boston Woven Hose Co., 39 Fed. 365; Dickerson v. De La Vergne Refrigerating Mach. Co., 35 Fed. 143; Edward Barr Co. v. New York, etc., Automatic Sprinkler Co., 32 Fed. 79, 24 Blatchf. 566; Johnson Ruffler Co. v. Avery Mach. Co., 28 Fed. 193; Fish v. Domestic Sewing Mach. Co., 12 Fed. 495; Kirby Bung Mfg. Co. v. White, 1 Fed. 604, 1 McCrary 155; Doughty v. West, 7 F. Cas. No. 4,029, 2 Fish. Pat. Cas. 553; Earth Closet Co. v. Fenner, 8 F. Cas. No. 4,249, 5 Fish. Pat. Cas. 15; Jones v. Field, 13 F. Cas. No. 7,461, 2 Bann. & A. 39, 12 Blatchf. 494; Noe v. Prentice, 18 F. Cas. No. 10,284; North v. Kershaw, 18 F. Cas. No. 10,311, 4 Blatchf. 70; Stevens v. Felt, 23 F. Cas. No. 13,397. And see Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 193 Fed. 658 (discussing the point); Karfiol v. Rothner, 151 Fed. 777 (recognizing and discussing the rule).

Prior adjudication generally see infra §§ 600–602.

Public acquiescence generally see infra § 599.

59. Willcox, etc., Sewing Mach. Co. v. Union Special Mach. Co., 25 F. (2d) 459; Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; Hartford v. Western Mfg. Co., 172 Fed. 676 [aff 194 Fed. 875, 114 CCA 621]; Wyckoff v. Wagner Typewriter Co., 88 Fed. 515; Foster v. Crossin, 23 Fed. 400; Gardner v. Broadbent, 2 Jur. N. S. 1041; Renard v. Levinstein, 10 L. T. Rep. N. S. 94 [aff 10 L. T. Rep. N. S. 177]. And see Tropic-Aire, Inc. v. Jumper, 28 F. (2d) 631 (where there is no substantial doubt or question as to the validity of the patent).

60. Fuller v. Gilmore, 121 Fed. 129; Foster v. Crossin, 23 Fed. 400.

[a] **Where validity of patent has been admitted** by defendant, it seems that a preliminary injunction may be granted. St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co., 161 Fed. 725, 88 CCA 585.

61. Fuller v. Gilmore, 121 Fed. 129; Wilson v. Consolidated Store-Serv. Co., 88 Fed. 286, 31 CCA 533; Hussey Mfg. Co. v. Deering, 20 Fed. 795.

62. Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; Burr v. Kimbark, 28 Fed. 574; Onderdonk v. Fanning, 4 Fed. 148.

[a] **Certainty required.**—To authorize a court to award a preliminary injunction on the ground that defendant is estopped to deny the validity of the patent, there must be more than ordinary certainty of both facts and law calling forth its action. National Cash Register Co. v. Remington Arms Co., 286 Fed. 367 [aff 283 Fed. 196].

63. Plimpton v. Winslow, 3 Fed. 333.

64. Adams v. Folger, 120 Fed. 260, 56 CCA 540.

65. See supra § 258.

66. George Cutter Co. v. Metropolitan Electric Mfg. Co., 275 Fed. 158.

67. Seidenberg v. Davidson, 112 Fed. 431.

68. Milwaukee Printing Co. v. Stover, 290 Fed. 387.

69. Perkins Oil Well Cementing Co. v. Owen, 293 Fed. 455; Westinghouse Electric, etc., Co. v. Stanley Instrument Co., 133 Fed. 167, 68 CCA 523 [certiorari den 195 U. S. 633, 25 SCt 791, 49 L. ed. 354]; Smith v. Meriden Britannia Co., 97 Fed. 987, 39 CCA 32; Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302; Kennedy v. Penn Iron, etc., Co., 67 Fed. 339; Corser v. Brattleboro Overall Co., 59 Fed. 781; Blount v. Société Anonyme, etc., 53 Fed. 98, 3 CCA 455; Sessions v. Gould, 49 Fed. 855; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419; Tyler v. Crane, 7 Fed. 775; American Shoe-Tip Co. v. National Shoe-Toe Protector Co., 1 F. Cas. No. 317, 2 Bann. & A. 551; Burleigh Rock Drill Co. v. Lobdell, 4 F. Cas. No. 2,166, 1 Bann. & A. 625, Holmes 450; Chase v. Wesson, 5 F. Cas. No. 2,631, 6 Fish. Pat. Cas. 517, Holmes 274; Orr v. Badger, 18 F. Cas. No. 10,587; Orr v. Littlefield, 18 F. Cas. No. 10,590, 2 Robb Pat. Cas. 323, 1 Woodb. & M. 13; Sargent v. Seagrave, 21 F. Cas. No. 12,365, 2 Curt. 553; Thomas v. Weeks, 23 F. Cas. No. 13,914, Fish. Pat. R. 5, 2 Paine 92; Woodworth v. Hall, 30 F. Cas. No. 18,016, 2 Robb Pat. Cas. 495, 1 Woodb. & M. 248. But see Grover, etc., Sewing-Mach. Co. v. Williams, 11 F. Cas. No. 5,847, 2 Fish. Pat. Cas. 133 (acquiescence in the original patent does not apply to a reissue).

[a] **Public acquiescence supports presumption of validity** of patent. Gustin v. Paristyle Footwear Mfg. Co., 288 Fed. 78; Wright Co. v. Herring-Curtiss Co., 177 Fed. 257 [rev on other grounds 180 Fed. 110, 103 CCA 31].

[b] **Acquiescence in claim of right before issuance of patent** may be entitled to weight in considering whether the patentee is entitled to a preliminary injunction. Sargent v. Seagrave, 21 F. Cas. No. 12,365, 2 Curt. 553.

70. See infra § 600.

71. Keasbey, etc., Co. v. Philip Carey Mfg. Co., 139 Fed. 571; American Coat Pad Co. v. Phœnix Pad Co., 113 Fed. 629, 51 CCA 339; Keasbey, etc., Co. v. Philip Carey Co., 110 Fed. 747; Mannie v. Everett, 16 F. Cas. No. 9,039.

72. Consolidated Fastener Co. v. American Fastener Co., 94 Fed. 523; Nilsson v. Jefferson, 78 Fed. 366; Mitchell v. Barclay, 17 F. Cas. No. 9,659; Potter v. Muller, 19 F. Cas. No. 11,334, 2 Fish. Pat. Cas. 465; Sargent v. Seagrave, 21 F. Cas. No. 12,365, 2 Curt. 553.

[a] **Mere failure to infringe** is not acquiescence. Welsbach Light Co. v. Benedict, etc., Mfg. Co., 82 Fed. 747; Stahl v. Williams, 52 Fed. 648; Guidet v. Palmer, 11 F. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82.

[b] **Facts held to show acquiescence.**—McDowell v. Kurtz, 77 Fed. 206, 23 CCA 119; Thomson Electric Welding Co. v. Two Rivers Mfg. Co., 63 Fed. 120; White v. Hunter, 47 Fed. 819.

[c] **Facts held not to show acquiescence.**—Palmer v. John E. Brown Mfg. Co., 84 Fed. 454 [rev on other grounds 92 Fed. 925, 35 CCA 86]; Palmer Pneumatic Tire Co. v. Newton Rubber Works Co., 73 Fed. 218; Corbin Cabinet Lock Co. v. Yale, etc., Mfg. Co., 58 Fed. 563; Upton v. Way-

[§ 600] **(cc) Prior Adjudication—aaa. Necessity.** While the court, in its discretion,[73] may properly refuse to grant a preliminary injunction against the infringement of a patent where the validity of the patent has not been previously adjudicated,[74] especially where the patent is new or of recent date,[75] nevertheless a prior adjudication sustaining the patent is not an absolute prerequisite to an injunction,[76] and, notwithstanding the lack of such a prior adjudication, a preliminary injunction may be granted where the validity of the patent is clear[77] or has been acquiesced in for a long time by the public,[78] or there has been actual, palpable, and inexcusable fraud on the part of defendant.[79]

[§ 601] **bbb. Effect[80]—(aaa) In General.** A preliminary injunction will be refused where a prior adjudication was against the patent.[81] Conversely, a preliminary injunction will ordinarily be granted where the patent has been previously sustained either at law or in equity,[82] and a sufficient showing

land, 36 Fed. 691; Guidet v. Palmer, 11 F. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82.

[d] **Time elapsed** since issuance of patent held not sufficient to allow events which would furnish satisfactory proof of acquiescence on the part of the public. Meyers v. Skinner, 179 Fed. 860.

73. Discretion generally see supra § 596.

74. Walsh v. Albert Wahle Co., 25 F. (2d) 350; Wise v. Grand Ave. R. Co., 33 Fed. 277; Booth v. Garelly, 3 F. Cas. No. 1,646, 1 Blatchf. 247, Fish. Pat. R. 154; Brooks v. Bicknell, 4 F. Cas. No. 1,946, Fish. Pat. R. 72, 4 McLean 70; Bryan v. Stevens, 4 F. Cas. No. 2,066a; Cooper v. Mattheys, 6 F. Cas. No. 3,200, 5 PaLJ 38; Muscan Hair Mfg. Co. v. American Hair Mfg. Co., 17 F. Cas. No. 9,970, 4 Blatchf. 174, 1 Fish. Pat. Cas. 320; Ogle v. Ege, 18 F. Cas. No. 10,462, 1 Robb Pat. Cas. 516, 4 Wash. C. C. 584; Miller v. McElroy, 2 PaLJ 305.

75. Long Arm System Co. v. New York Shipbuilding Co., 207 Fed. 955; New York Vitak Co. v. Lagergren, 166 Fed. 481; Hildreth v. Norton, 159 Fed. 428, 86 CCA 408 [aff 154 Fed. 82]; Sharp v. Bellinger, 155 Fed. 139, Ottawa, etc., Power, etc., Co., Ltd. v. Murphy, 15 Que. K. B. 230.

[a] **Court is slow or reluctant** to grant a preliminary injunction against infringement of a patent which is new and unadjudicated. National Cash Register Co. v. Remington Arms Co., 286 Fed. 367 [aff 283 Fed. 196]; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72.

76. Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; Universal Gypsum, etc., Co. v. Haggerty, 21 F. (2d) 544; Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Crescent Specialty Co. v. National Fireworks Distributing Co., 219 Fed. 130, 135 CCA 28; Wright Co. v. Herring-Curtiss Co., 177 Fed. 257 [rev on other grounds 180 Fed. 110, 103 CCA 31]; Lambert Snyder Vibrator Co. v. Marvel Vibrator Co., 138 Fed. 82; Wilson v. Consolidated Stove-Service Co., 88 Fed. 286, 31 CCA 533; Cary Mfg. Co. v. De Haven, 58 Fed. 786; Motte v. Bennett, 17 F. Cas. No. 9,884, 2 Fish. Pat. Cas. 642; Potter v. Muller, 19 F. Cas. No. 11,334, 2 Fish. Pat. Cas. 465; Shelly v. Brannan, 21 F. Cas. No. 12,751, 2 Biss. 315, 4 Fish. Pat. Cas. 198; Clark v. Fergusson, 1 Giffard 184, 65 Reprint 878; Young v. Fernie, 9 L. T. Rep. N. S. 590. See Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865 ("This action is upon an unadjudicated patent. Admittedly this does not by itself constitute a reason for refusing injunctive relief before final decree; yet it is interesting to note how difficult it has been to sustain preliminary injunctions on unadjudicated patents whenever the party enjoined has had courage or money enough to take the matter to the appellate court").

77. Hutto Engineering Co. v. Grinder Sales Co., 18 F. (2d) 985. See Standard Typewriter Co. v. Standard Folding Typewriter Sales Co., 181 Fed. 500, 104 CCA 248 (validity reasonably certain).

78. Gustin v. Paristyle Footwear Mfg. Co., 288 Fed. 78; Crescent Specialty Co. v. National Fireworks Distributing Co., 219 Fed. 130, 135 CCA 28; Winchester Repeating Arms Co. v. Buengar, 199 Fed. 786; National Typographic Co. v. New York Typograph Co., 46 Fed. 114; White v. Surdam, 41 Fed. 790; Buck v. Cobb, 4 F. Cas. No. 2,079, Brunn. Coll. Cas. 550; Foster v. Moore, 9 F. Cas. No. 4,978, 1 Curt. 279; Goodyear v. Central R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Grover, etc., Sewing-Mach. Co. v. Williams, 11 F. Cas. No. 5,847, 2 Fish. Pat. Cas. 133; Gutta Percha, etc., Mfg. Co. v. Goodyear Rubber Co., 11 F. Cas. No. 5,879, 2 Bann. & A. 212, 3 Sawy. 542; Hockholzer v. Eager, 12 F. Cas. No. 6,556, 2 Sawy. 361; Mitchell v. Barclay, 17 F. Cas. No. 9,659; Muscan Hair Mfg. Co. v. American Hair Mfg. Co., 17 F. Cas. No. 9,970, 4 Blatchf. 174, 1 Fish. Pat. Cas. 320; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Weston v. White, 29 F. Cas. No. 17,459, 2 Bann. & A. 364, 13 Blatchf. 447; Dudgeon v. Thomson, 3 App. Cas. 34 [aff 30 L. T. Rep. N. S. 244]; Hill v. Thompson, Holt N. P. 636, 3 ECL 249, 171 Reprint 367, 3 Meriv. 622, 36 Reprint 239, 8 Taunt. 375, 4 ECL 190, 129 Reprint 427, 20 ERC 272; Davenport v. Richard, 3 L. T. Rep. N. S. 503.

79. Chester Forging, etc., Co. v. Tindel-Morris Co., 165 Fed. 899, 91 CCA 577 [aff 163 Fed. 304].

80. Effect of:

Decision in patent infringement suit generally see infra §§ 643–646.

Prior adjudication of infringement or noninfringement see infra § 603.

81. American Graphophone Co. v. National Gramophone Co., 92 Fed. 364, 34 CCA 412; Edison Electric Light Co. v. Citizens' Electric Light, etc., Co., 64 Fed. 491; Hicks v. Beardsley, 32 Fed. 281; Keyes v. Pueblo Smelting, etc., Co., 31 Fed. 560; Concord v. Norton, 16 Fed 477; Onderdonk v. Fanning, 18 F. Cas. No. 10,510a, 5 Bann. & A. 562; Price's Patent Candle Co. v. Bauwen's Patent Candle Co., 6 Wkly. Rep. 318.

82. Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805 [aff 148 Fed. 1022, 79 CCA 536]; Hilditch v. American Bumper Corp., 15 F. (2d) 451; General Electric Co. v. Minneapolis Electric Lamp Co., 10 F. (2d) 851 [app dism 7 F. (2d) 1020]; General Electric Co. v. Brite-Lite Lamp Co., 290 Fed. 967; Rousso v. Detroit First Nat. Bank, 287 Fed. 273 [certiorari den 262 U. S. 754 mem, 43 SCt 702 mem, 67 L. ed. 1216 mem]; General Electric Co. v. Mallory, 286 Fed. 175, 294 Fed. 562, 567 [aff 298 Fed. 579 (certiorari den 266 U. S. 609 mem, 45 SCt 94 mem, 69 L. ed. 466 mem)]; General Electric Co. v. Incandescent Products, 280 Fed. 856; Victor Talking Mach. Co. v. Starr Piano Co., 263 Fed. 82 [certiorari den 260 U. S. 726 mem, 43 SCt 89 mem, 67 L. ed. 483 mem]; Weber Electric Co. v. Connecticut Electrical Mfg. Co., 257 Fed. 429 [aff 263 Fed. 583]; Æolian Co. v. Cunningham Piano Co., 244 Fed. 478, 251 Fed. 301 [aff 255 Fed. 897, 167 CCA 217]; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768; Wallerstein v. Christian Feigenspan, Inc., 215 Fed. 919, 132 CCA 157; Sherman-Clay v. Searchlight Horn Co., 214 Fed. 99, 130 CCA 575; Underfeed Stoker Co. v. Riley, 207 Fed. 963; Walker Patent Pivoted Bin Co. v. Bernard Gloekler Co., 188 Fed. 435; Motion Picture Patents Co. v. Laemmle, 178 Fed. 104; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 157 Fed. 677, 85 CCA 349 [aff 162 Fed. 892, 89 CCA 582 (aff 220 U. S. 428, 31 SCt 444, 55 L. ed. 527)]; Scott v. Laas, 150 Fed. 764, 80 CCA 500; Elite Pottery Co. v. Dececo Co., 150 Fed. 581, 80 CCA 567; Timolat v. Philadelphia Pneumatic Tool Co., 123 Fed. 899; Westinghouse Electric, etc., Co. v. Royal Weaving Co., 115 Fed. 733; Diehl Mfg. Co. v. Dayton Fan, etc., Co., 109 Fed. 566; Brill v. Peckham Motor Truck Co., 105 Fed. 626; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Consolidated Fastener Co. v. Hays, 100 Fed. 984, 41 CCA 142; Welsbach Light Co. v. Rex Incandescent Light Co., 94 Fed. 1006; Duff Mfg. Co. v. Norton, 92 Fed. 921; New York Filter Mfg. Co. v. Loomis-Manning Filter Co., 91 Fed. 421; Allington, etc., Mfg. Co. v. Globe Co., 89 Fed. 865; Westinghouse Air-Brake Co. v. Great Northern R. Co., 86 Fed. 132; Southern Pac. Co. v. Earl, 82 Fed. 690, 27 CCA 185; Adams v. Tannage Patent Co., 81 Fed. 178, 26 CCA 326; Thomson-Houston Electric Co. v. H. W. Johns Mfg. Co., 78 Fed. 364; Woodard v. Ellword Gas Stove, etc., Co., 68 Fed. 717; Norton v. Eagle Automatic Can Co., 57 Fed. 929; American Bell Tel. Co. v. Cushman, 57 Fed. 842; S. S. White Dental Mfg. Co. v. Johnson, 56 Fed. 262; Consolidated Electric Storage Co. v. Accumulator Co., 55 Fed. 485, 5 CCA 202; Carter v. Wollschlaeger, 53 Fed. 573; Putnam v. Keystone Bottle Stopper Co., 38 Fed. 234; Schneider v. Missouri Glass Co., 36 Fed. 582; American Bell Tel. Co. v. National Improved Tel. Co., 27 Fed. 663; Cary v. Domestic Spring-Bed. Co., 27 Fed. 299; Cary v. Lovell Mfg. Co., 24 Fed. 141; Mallory Mfg. Co. v. Hickok, 20 Fed. 116; Coburn v. Brainard, 16 Fed. 412, 5 McCrary 215; Coburn v. Clark, 15 Fed. 804, 5 McCrary 99; Kirby Bung Mfg. Co. v. White, 1 Fed. 604, 1 McCrary 155; Woven-Wire Mattress Co. v. Wire-Web Bed Co., 1 Fed. 222; American Middlings Purifier Co. v. Christian, 1 F. Cas. No. 307, 3 Bann. & A. 42, 4 Dill. 448; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; American Wood-Paper Co. v. Fibre Disintegrating Co., 1 F. Cas. No. 320, 6 Blatchf. 27, 3 Fish. Pat. Cas. 362 [aff 23 Wall. 566, 23 L. ed. 31]; Clum v. Brewer, 5 F. Cas. No. 2,909, 2 Curt. 506; Conover v. Mers, 6 F. Cas. No. 3,123, 3 Fish. Pat. Cas. 386; Cook v. Ernest, 6 F. Cas. No. 3,155, 5 Fish. Pat. Cas. 396, 1 Woods 195; Gibson v. Betts, 10 F. Cas. No. 5,390, 1 Blatchf. 163, Fish. Pat. R. 91; Goodyear v. Berry, 10 F. Cas. No. 5,556, 2 Bond 189, 3 Fish. Pat. Cas. 439; Goodyear v. Honsinger, 10 F. Cas. No. 5,572, 2 Biss. 1, 3 Fish. Pat. Cas. 147; Green v. French, 10 F. Cas. No. 5,757, 4 Bann. & A. 169; Hitchcock v. Shoninger Melodeon Co., 12 F. Cas. No. 6,537; Orr v. Badger, 18 F. Cas. No. 10,587, Brunn. Coll. Cas. 536; Pennsylvania Salt Mfg. Co. v. Myers, 19 F. Cas. No. 10,955, 1 WklyNC (Pa.) 377; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,281, 4 Blatchf. 184, 2 Fish. Pat. Cas. 74; Potter v. Muller, 19 F. Cas. No. 11,334, 2 Fish. Pat. Cas. 465; Robertson v. Hill, 20 F. Cas. No. 11,925, 6 Fish. Pat. Cas. 465; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,133, 2 Bann. & A. 351; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,134, 2 Bann. & A. 386;

of infringement is made,[83] or, in other words, while a prior adjudication of the validity of a patent leaves open the question of infringement,[84] yet, subject to the exceptions hereinafter mentioned,[85] where such a prior adjudication has been made, the court, in determining and disposing of a motion for a preliminary injunction, will consider only the question of infringement[86] and dispose of the matter of validity by following the prior adjudication,[87] assuming[88] or recognizing[89] the validity of the patent, or sustaining the patent, so far as the motion is concerned,[90] and leaving the question of its validity to be determined upon final hearing.[91] Notwithstanding the introduction of new evidence, a preliminary injunction may be granted upon the strength of a prior adjudication,[92] unless the new evidence is such that, if presented in the former case, it would probably have resulted in a different decision;[93] and even though the parties are different, the prior adjudication has great weight.[94] Such prior adjudication, however, unless made by the United States supreme court or the circuit court of appeals[95] of the same circuit,[96] is not controlling upon the judgment of the court[97] but is merely persua-

Sickels v. Tileston, 22 F. Cas. No. 12,837, 4 Blatchf. 109; Tilghman v. Mitchell, 23 F. Cas. No. 14,042, 9 Blatchf. 18, 4 Fish. Pat. Cas. 615 [rev on other grounds 19 Wall. 287, 22 L. ed. 125]; Van Hook v. Wood, 28 F. Cas. No. 16,855; Bovill v. Goodier, L. R. 2 Eq. 195; Newall v. Wilson, 2 De G. M. & G. 282, 51 EngCh 220, 42 Reprint 880.

83. See infra § 603.

84. Westinghouse Electric, etc., Co. v. American Transformer Co., 121 Fed. 560 [aff 130 Fed. 550]; Whippany Mfg. Co. v. United Indurated Fibre Co., 87 Fed. 215, 30 CCA 615 [rev 83 Fed. 485]; Sawyer Spindle Co. v. Turner, 55 Fed. 979; Carey v. Miller, 34 Fed. 392.

85. See infra text and notes 93, 99–2.

86. Wayman v. Louis Lipp Co., 222 Fed. 679; Tannage Patent Co. v. Adams, 77 Fed. 191 [aff 81 Fed. 178, 26 CCA 326]; Philadelphia Trust, etc., Co. v. Edison Electric Light Co., 65 Fed. 551, 13 CCA 40; Norton v. Eagle Automatic Can Co., 57 Fed. 929; Sawyer Spindle Co. v. Turner, 55 Fed. 979; Odorless Excavating Co. v. Lauman, 12 Fed. 788, 4 Woods 129; Robertson v. Hill, 20 F. Cas. No. 11,925, 6 Fish. Pat. Cas. 465.

[a] **Validity of patent is not:** (1) In issue. General Electric Co. v. Nitrogon Electric Co., 292 Fed. 384. (2) Open to question. Byerley v. Ellis Co., 190 Fed. 772.

87. Warren Bros. Co. v. Montgomery, 172 Fed. 414.

88. Smith v. Farbenfabriken of Elberfeld Co., 203 Fed. 476, 121 CCA 598; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., 192 Fed. 321, 112 CCA 573 [aff 188 Fed. 89].

89. Manton-Gaulin Co. v. American Bottle Cap Co., 250 Fed. 865.

90. Kawneer Mfg. Co. v. Ventwell Store Front Co., 210 Fed. 459; Fireball Gas Tank, etc., Co. v. Commercial Acetylene Co., 198 Fed. 650, 117 CCA 354 [aff 239 U. S. 156, 36 SCt 86, 60 L. ed. 191]; Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298.

91. See cases supra note 86.

92. Armat Moving Picture Co. v. Edison Mfg. Co., 121 Fed. 559 [rev on other grounds 125 Fed. 939, 60 CCA 380]; Consolidated Fastener Co. v. Hays, 100 Fed. 984; New York Filter Mfg. Co. v. Niagara Falls Waterworks Co., 80 Fed. 924, 26 CCA 252; Tannage Patent Co. v. Donallan, 75 Fed. 287 [app dism 79 Fed. 385, 24 CCA 647]; Sawyer Spindle Co. v. Taylor, 56 Fed. 110; Macbeth v. Braddock Glass Co., 54 Fed. 173 [aff 64 Fed. 118, 12 CCA 70]; Carter v. Wollschlaeger, 53 Fed. 573; Brush Electric Co. v. Accumulator Co., 50 Fed. 833; Seibert Cylinder Oil-Cup Co. v. Michigan Lubricator Co., 34 Fed. 33; Birdsall v. Hagerstown Agricultural Impl. Mfg. Co., 3 F. Cas. No. 1,433, 1 Bann. & A. 426.

93. General Electric Co. v. Minneapolis Electric Lamp Co., 10 F. (2d) 851 [app dism 7 F. (2d) 1020]; General Electric Co. v. Nitrogon Electric Co., 292 Fed. 384; Victor Talking Mach. Co. v. Starr Piano Co., 263 Fed. 82 [certiorari den 260 U. S. 726 mem, 43 SCt 89 mem, 67 L. ed. 483 mem]; Wayman v. Louis Lipp Co., 222 Fed. 679; Wallerstein v. Christian Feigenspan, Inc., 215 Fed. 919, 132 CCA 157; Gamewell Fire Alarm Tel. Co. v. Hackensack Impr. Commn. Co., 199 Fed. 182; General Electric Co. v. Condit Electrical Mfg. Co., 191 Fed. 511 [aff 196 Fed. 42, 115 CCA 634]; Motion Picture Patents Co. v. Laemmle, 178 Fed. 104; Panoulias v. Hawley, 178 Fed. 101; Warren Bros. Co. v. Montgomery, 172 Fed. 414; George Frost Co. v. Crandall Wedge Co., 123 Fed. 104 [aff 125 Fed. 942, 60 CCA 180]; Westinghouse Electric, etc., Co. v. Royal Weaving Co., 115 Fed. 733; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Welsbach Light Co. v. Rex Incandescent Light Co., 94 Fed. 1006; Duff Mfg. Co. v. Kalamazoo R. Velocipede, etc., Co., 94 Fed. 154; Tripp Giant Leveler Co. v. Bresnahan, 92 Fed. 391 [aff 99 Fed. 280, 39 CCA 508]; Doig v. Morgan Mach. Co., 91 Fed. 1001, 33 CCA 683; New York Filter Mfg. Co. v. Jackson, 91 Fed. 422; Doig v. Morgan Mach. Co., 89 Fed. 489 [aff 91 Fed. 1001, 33 CCA 683]; Consolidated Car Heating Co. v. Gold Car Heating Co., 87 Fed. 996; Bowers v. Pacific Coast Dredging, etc., Co., 81 Fed. 569; Bowers Dredging Co. v. New York Dredging Co., 80 Fed. 119; Tannage Patent Co. v. Adams, 77 Fed. 191 [aff 81 Fed. 178, 26 CCA 326]; Earl v. Southern Pac. Co., 75 Fed. 609; Tannage Patent Co. v. Donallan, 75 Fed. 287; Bresnahan v. Tripp Giant Leveler Co., 72 Fed. 920, 19 CCA 237; Allington, etc., Mfg. Co. v. Lynch, 71 Fed. 409; Singer Mfg. Co. v. New Home Sewing-Mach. Co., 70 Fed. 985; Philadelphia Trust, etc., Co. v. Edison Electric Light Co., 65 Fed. 551, 13 CCA 40; Electric Mfg. Co. v. Edison Electric Light Co., 61 Fed. 834, 10 CCA 106; Norton v. Eagle Automatic Can Co., 61 Fed. 293; Norton v. Eagle Automatic Can Co., 57 Fed. 929; Edison Electric Light Co. v. Electric Mfg. Co., 57 Fed. 616 [aff 61 Fed. 834, 10 CCA 106]; Accumulator Co. v. Consolidated Electric Storage Co., 53 Fed. 796 [aff 55 Fed. 485, 5 CCA 202]; National Folding-Box, etc., Co. v. American Paper Pail, etc., Co., 48 Fed. 913 [aff 51 Fed. 229, 2 CCA 165]; Ladd v. Cameron, 25 Fed. 37; Bailey Wringing Mach. Co. v. Adams, 2 F. Cas. No. 752, 3 Bann. & A. 96, 5 Reporter 102; Blaisdell v. Dows, 3 F. Cas. No. 1,489, 4 Bann. & A. 499; Jones v. Merrill, 13 F. Cas. No. 7,481; Parker v. Brant, 14 F. Cas. No. 10,727, 1 Fish. Pat. Cas. 58. See George Cutter Co. v. Metropolitan Electric Mfg. Co., 275 Fed. 158 (a prior adjudication sustaining the patent is not alone sufficient to warrant an injunction where new and material facts are alleged which raise a reasonable doubt of validity).

[a] **New evidence must be clear and convincing** to warrant what is substantially a reversal of a prior adjudication. Consolidated Fastener Co. v. Hays, 100 Fed. 984, 41 CCA 142.

[b] **Another patent not considered** (1) in a prior suit adjudging the patent in question to be valid is sufficient justification for the court, in the exercise of its discretion, to refuse a preliminary injunction. Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 286 Fed. 358; Rousso v. Barber, 276 Fed. 552 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem]. Compare Wayne Mfg. Co. v. Coffield Motor Washer Co., 209 Fed. 614, 126 CCA 608 (when a patent has been sustained on a final hearing, the right thus secured to have its validity accepted on a motion for a preliminary injunction in another suit, except in rare cases, cannot be destroyed by new citations of patents from the patent office). (2) However, while the court will not refuse to consider new references, it is fair that it "should require of them that they should throw a much larger measure of doubt upon the invention than if no suit has been tried and the art had not been already searched for relevant anticipations." Westinghouse Electric, etc., Co. v. Independent Wireless Tel. Co., 300 Fed. 748, 752.

[c] **Affidavits relating to old matters.**—The presumption in favor of the validity of a patent created by a decision of the circuit court of appeals sustaining it cannot be overcome on a motion for a preliminary injunction in a subsequent case by ex parte affidavits relating to matters occurring several years previously. American Graphophone Co. v. International Record Co., 155 Fed. 427.

94. Westinghouse Electric, etc., Co., v. Independent Wireless Tel. Co., 300 Fed. 748; A. B. Dick Co. v. Pomeroy Duplicator Co., 117 Fed. 154; American Paper Pail, etc., Co. v. National Folding Box, etc., Co., 51 Fed. 229, 2 CCA 165; Burr v. Prentiss, 4 F. Cas. No. 2,194; Potter v. Fuller, 19 F. Cas. No. 11,327, 2 Fish. Pat. Cas. 251; Potter v. Whitney, 19 F. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87.

95. Westinghouse Air Brake Co. v. Christiansen Engineering Co., 113 Fed. 594; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Bowers Dredging Co. v. New York Dredging Co., 80 Fed. 119; American Bell Tel. Co. v. McKeesport Tel. Co., 57 Fed. 661; American Middlings Purifier Co. v. Christian, 1 F. Cas. No. 307, 3 Bann. & A. 42, 4 Dill. 448; Richardson v. Lockwood, 20 F. Cas. No. 11,786, 4 Cliff. 128.

96. Westinghouse Electric, etc., Co. v. Independent Wireless Tel. Co., 300 Fed. 748; Walker Patent Pivoted Bin Co. v. Bernard Gloekler Co., 188 Fed. 435.

97. Victor Talking Mach. Co. v. Starr Piano Co., 263 Fed. 82 [certiorari den 260 U. S. 726 mem, 43 SCt 89 mem, 67 L. ed. 483 mem]; Vulcan Soot Cleaner Co. v. Amoskeag Mfg. Co., 255 Fed. 88, 166 CCA 416; Diamond Match Co. v. Union Match Co., 129 Fed. 602; Western Electric Co. v. Keystone Tel. Co., 115 Fed. 809; Brunswick-Balke-Collender Co. v. Koehler, 115 Fed. 648; Welsbach Light Co. v. Cosmopolitan Incandescent Light Co., 104 Fed. 83, 43 CCA 418; Western Electric Co. v. Anthracite Tel. Co., 100 Fed. 301; Horn, etc., Mfg. Co. v. Pelzer, 91 Fed. 665, 34 CCA 45; Ross v. Chicago, 91 Fed. 265; Stover Mfg. Co. v. Mast, 89 Fed. 333, 32 CCA 231 [aff 177 U. S. 485, 20 SCt 708, 44 L.

sive;[98] and it will not be followed where the points involved in the present case were not fairly in issue and decided in the former case,[99] there was collusion,[1] or the adjudication was made by consent or stipulation or without contest.[2] Whether judgment on the original patent shall be followed on a reissue depends on the circumstances.[3]

Conflicting adjudication. It is variously stated that, where there are conflicting prior adjudications as to the validity of a patent, a preliminary injunction will be refused,[4] the best considered decision will be followed,[5-6] or the decision in the same circuit will control.[7]

[§ 602] **(bbb) Nature and Status of Proceedings in Prior Case.** A ruling on an interlocutory motion may be followed.[8] Where an appeal or writ of error is pending, an adjudication is not binding;[9] and it is proper to refuse a preliminary injunction where defendant states a purpose to apply to the circuit court of appeals for leave to file a bill of review, in order to have a former decree of validity opened and new evidence attacking the validity of the patent heard.[10] A decision in interference proceedings in the patent office is not a controlling adjudication,[11] but it may be sufficient between the parties,[12] so far as priority of invention is concerned.[13]

[§ 603] **cc. Infringement.** Before a preliminary injunction against infringement of a patent will be granted, infringement must be shown[14] clearly[15] and convincingly;[16] in case of doubt as to infringement, an injunction will be refused.[17] Unless the

ed. 856]; Société Anonyme, etc., v. Allen, 84 Fed. 812 [aff 90 Fed. 815, 33 CCA 282]; Bowers v. San Francisco Bridge Co., 69 Fed. 640; Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. 496; Stahl v. Williams, 52 Fed. 648; Jacobson v. Alpi, 46 Fed. 767; Lockwood v. Faber, 27 Fed. 63; Cornell v. Littlejohn, 6 F. Cas. No. 3,238, 2 Bann. & A. 324; U. S., etc., Felting Co. v. Asbestos Felting Co., 28 F. Cas. No. 16,787.

98. See cases supra note 97.

99. Southern Pac. R. Co. v. Earl, 82 Fed. 690, 27 CCA 185; American Graphaphone Co. v. Leeds, 77 Fed. 193; National Hat-Pouncing Mach. Co. v. Hedden, 29 Fed. 147; Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 330, 18 Blatchf. 118; Grover v. Williams, 11 F. Cas. No. 5,847, 2 Fish. Pat. Cas. 133; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 PaLJ 443; Wells v. Gill, 29 F. Cas. No. 17,394, 6 Fish. Pat. Cas. 89.

1. Western Electric Co. v. Anthracite Tel. Co., 113 Fed. 834 [aff 133 Fed. 547, 66 CCA 523]. But see A. B. Dick Co. v. Wichelman, 74 Fed. 799 (where the merits were considered by the court, a collusive decree set aside may still have weight).

[a] **Mere failure to appeal** does not show collusion. Doig v. Morgan Mach. Co., 89 Fed. 489 [aff 91 Fed. 1001, 33 CCA 683].

2. New York Button Works v. Crescent Button Co., 185 Fed. 820; Earll v. Rochester, etc., R. Co., 157 Fed. 241; National Enameling Co. v. New England Enameling Co., 123 Fed. 436; American Coat Pad Co. v. Phœnix Pad Co., 113 Fed. 629, 51 CCA 339; American Electrical Novelty Co. v. Newgold, 99 Fed. 567; Wilson v. Consolidated Store-Service Co., 88 Fed. 286, 31 CCA 533; Société Anonyme, etc., v. Allen, 84 Fed. 812 [aff 90 Fed. 815, 33 CCA 282]; Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980; Fenton Metallic Mfg. Co. v. Chase, 73 Fed. 831; Covert v. Travers, 70 Fed. 788; De Ver Warner v. Bassett, 7 Fed. 468, 19 Blatchf. 145; Hayes v. Leton, 5 Fed. 521; Mannie v. Everett, 16 F. Cas. No. 9,039; Potter v. Fuller, 19 F. Cas. No. 11,327, 2 Fish. Pat. Cas. 251; Spring v. Domestic Sewing-Mach. Co., 22 F. Cas. No. 13,258, 4 Bann. & A. 427, 2 N. J. L. J. 274. But see Perkins Oil Well Cementing Co. v. Owen, 293 Fed. 455 (prior decrees establishing the validity of complainant's patent, although entered on stipulation, are available as evidence of acquiescence, to afford a basis for the granting of a preliminary injunction). Orr v. Littlefield, 18 F. Cas. No. 10,590, 2 Robb Pat. Cas. 323, 1 Woodb. & M. 13 (a judgment without contest has weight where there is no collusion).

3. American Middlings Purifier Co. v. Atlantic Milling Co., 1 F. Cas. No. 305, 3 Bann. & A. 168, 4 Dill. 100; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Wells v. Jacques, 29 F. Cas. No. 17,399, 5 Fish. Pat. Cas. 136.

4. Eldred v. Breitwieser, 132 Fed. 251; Wilgus v. Van Sickle, 99 Fed. 443; Allen v. Sprague, 1 F. Cas. No. 238, 1 Blatchf. 567, Fish. Pat. R. 388.

5-6. Pelzer v. Newhall, 93 Fed. 684; Philadelphia Trust, etc., Co. v. Edison Electric Light Co., 65 Fed. 551, 13 CCA 40; Van Hook v. Wood, 28 F. Cas. No. 16,855.

7. Westinghouse Electric, etc., Co. v. Independent Wireless Tel. Co., 300 Fed. 748; Pullman's Palace-Car Co. v. Wagner Palace-Car Co., 44 Fed. 764.

8. Maitland v. Graham, 96 Fed. 247; Duff Mfg. Co. v. Norton, 92 Fed. 921; Horn, etc., Mfg. Co. v. Pelzer, 91 Fed. 665, 34 CCA 45.

9. Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980; Day v. Hartshorn, 7 F. Cas. No. 3,683, 3 Fish. Pat. Cas. 32; Bridson v. McAlpine, 8 Beav. 229, 50 Reprint 90. Compare Treibacher Chemische Werke Gesellschaft mit Beschrankter Haftung v. Wolf Safety Lamp Co., 215 Fed. 126 (may be treated as an adjudication).

10. U. S. Gypsum Co. v. Bestwall Mfg. Co., 290 Fed. 800.

11. Turner Brass Works v. Appliance Mfg. Co., 164 Fed. 195; Reed Mfg. Co. v. Smith, etc., Co., 107 Fed. 719, 46 CCA 601; Wilson v. Consolidated Store-Service Co., 88 Fed. 286, 31 CCA 533 [rev 83 Fed. 201]; Empire State Nail Co. v. American Solid Leather Button Co., 61 Fed. 650; Dickerson v. De la Vergne Refrigerating Mach. Co., 35 Fed. 143; Potter v. Stevens, 19 F. Cas. No. 11,338, 2 Fish. Pat. Cas. 163.

12. Weston Electrical Instrument Co. v. American Instrument Co., 169 Fed. 659; Consolidated Bunging Apparatus Co. v. Peter Schoenhofen Brewing Co., 28 Fed. 428; Celluloid Mfg. Co. v. Chrolithian Collar, etc., Co., 24 Fed. 275; Smith v. Halkyard, 16 Fed. 414.

13. Perfection Cooler Co. v. Rose Mfg. Co., 175 Fed. 120; Scott v. Laas, 150 Fed. 764, 80 CCA 500.

14. See cases infra this note.

[a] **Evidence of infringement held sufficient to warrant injunction.**—Republic Electric Co. v. General Electric Co., 27 F. (2d) 595; Atlas Specialty Co. v. General Electric Co., 27 F. (2d) 593; Desmond Incandescent Lamp Co. v. General Electric Co., 27 F. (2d) 590; Lambert Snyder Co. v. American Vibrator Co., 154 Fed. 492.

[b] **Evidence of infringement held insufficient to warrant injunction.**—Standard Plunger El. Co. v. Stokes, 196 Fed. 47 [aff 200 Fed. 770, 119 CCA 292]; Wright Co. v. Herring-Curtiss Co., 180 Fed. 110, 103 CCA 31 [rev 177 Fed. 257]; Mathews Gravity Carrier Co. v. Lister, 154 Fed. 490.

15. Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901]; Byerley v. Standard Asphalt, etc., Co., 189 Fed. 759.

16. National Cash Register Co. v. Remington Arms Co., 286 Fed. 367 [aff 283 Fed. 196]; Byerley v. Standard Asphalt, etc., Co., 189 Fed. 759. See Desmond Incandescent Lamp Co. v. General Electric Co., 27 F. (2d) 590 (plaintiff must prove infringement sufficiently to sway the mind of the judge). Compare J. D. Randall Co. v. Fogelsong Mach. Co., 216 Fed. 599, 132 CCA 603 (it is not necessary to move the court to action that the proof of infringement should be conclusive; the court may grant a preliminary injunction where, on the situation presented, it may properly conclude that there is a reasonable probability or certainty that the case will ultimately be decided in plaintiff's favor and that it ought to interfere and preserve the status quo as between the parties during the pendency of the suit).

17. Esta Co. v. Burke, 257 Fed. 743; Denison v. Gifford, 209 Fed. 231, 126 CCA 571; Gillette Safety Razor Co. v. Durham Duplex Razor Co., 197 Fed. 574; Byerley v. Standard Asphalt, etc., Co., 189 Fed. 759; Ferry-Hallock Co. v. Herman, 178 Fed. 550, 101 CCA 230 [rev 171 Fed. 437]; Sharp v. Bellinger, 155 Fed. 139; Marconi Wireless Tel. Co. v. American De Forest Wireless Tel. Co., 154 Fed. 74; Thomson-Houston Electric Co. v. Wagner Electric Mfg. Co., 130 Fed. 902; Armat Moving Picture Co. v. Edison Mfg. Co., 125 Fed. 939, 60 CCA 380; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 52 CCA 559; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Hatch Storage Battery Co. v. Electric Storage Battery Co., 100 Fed. 975, 41 CCA 133; National Folding-Box, etc., Co. v. Munson, 99 Fed. 86; National Folding-Box, etc., Co. v. Brown, 98 Fed. 437; Blakey v. National Mfg. Co., 95 Fed. 136, 37 CCA 27; Consolidated Fastener Co. v. American Fastener Co., 94 Fed. 523; Whippany Co. v. United Indurated Fibre Co., 87 Fed. 215, 30 CCA 615; Menasha Pulley Co. v. Dodge, 85 Fed. 971, 29 CCA 508, 86 Fed. 904, 30 CCA 455 [certiorari den 169 U. S. 738 mem, 18 SCt 941 mem, 42 L. ed. 1217 mem]; Société Anonyme, etc., v. Allen, 84 Fed. 812 [aff 90 Fed. 815, 33 CCA 282]; American Pneumatic Tool Co. v. Bigelow Co., 77 Fed. 988, 23 CCA 603; Union Switch, etc., Co. v. Philadelphia, etc., R. Co., 75 Fed. 1004 [app dism 79 Fed. 1003, 24 CCA 690]; Western Tel. Constr. Co. v. Stromberg, 66 Fed. 550; George Ertel Co. v. Stahl, 65 Fed. 519, 13 CCA 31; Brush Electric Co. v. Electric Storage Battery Co., 64 Fed. 775; Hammond Buckle Co. v. Goodyear Rubber Co., 49 Fed. 274; Standard Paint Co. v. Reynolds, 43 Fed. 304; American Fire Hose Mfg. Co. v. Cornelius Callahan Co., 41 Fed. 50; Russell v. Hyde, 39 Fed. 614; Morss v. Knapp, 39 Fed. 608; Thompson v. Rand-Avery Supply Co., 38 Fed. 112; Steam-Gauge, etc., Co. v. St. Louis R. Supplies Mfg. Co., 25 Fed. 491; Gold, etc., Tel. Co. v. Commercial Tel. Co., 22 Fed. 838; Zinsser v. Colledge, 17 Fed. 538; Allis v. Stowell, 15 Fed. 242; Hardy v. Marble, 10 Fed. 752; Cross v. Livermore, 9 Fed. 607; Steam-Gauge, etc., Co. v. Miller, 8 Fed. 314; Pullman v. Baltimore, etc.,

prior action was one at law,[18] the court, on determining a motion for a preliminary injunction, will follow a prior adjudication of infringement[19] or non-infringement[20] where the machines or devices involved in the two suits are the same or substantially the same; but a preliminary injunction will not be denied merely because of defendant's pending application asking another court's advice as to whether or not a certain construction can be considered an infringement.[21]

[§ 604] **dd. Injury or Inconvenience.** A preliminary injunction against infringement of a patent is granted only to prevent irreparable injury to plaintiff,[22] and ordinarily it may be refused where the granting thereof would work great injury to defendant and its refusal would injure plaintiff in a much less degree,[23] but it will not be refused for hardship on defendant where the infringement is willful,[24] or where the validity of the patent is fully established and its infringement is clear.[25] An injunction will not be refused because of mere inconvenience to the public,[26] nor is it a ground for denying an injunction that it may be used for advertising purposes to injure defendant,[27] but where there are other grounds for denying an injunction, the possibility of advertising the injunction may be accorded weight.[28]

[§ 605] **ee. Financial Responsibility of Defendant.**[29] In connection with other matters,[30] such as a lack of prior adjudication of,[31] or of other matters

R. Co., 5 Fed. 72, 4 Hughes 236; Blake v. Boissellier, 3 F. Cas. No. 1,493a, 5 Bann. & A. 352; Dodge v. Card, 7 F. Cas. No. 3,951, 1 Bond 393, 2 Fish. Pat. Cas. 116; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Mowry v. Grand St., etc., Co., 17 F. Cas. No. 9,893, 10 Blatchf. 89, 5 Fish. Pat. Cas. 586; Winans v. Eaton, 30 F. Cas. No. 17,861, 1 Fish. Pat. Cas. 181; Woodworth v. Hall, 30 F. Cas. No. 18,016, 1 Woodb. & M. 248, 2 Robb Pat. Cas. 495. Compare Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 116 CCA 454 (although infringement is doubtful, yet the court may properly preserve the status quo by granting an injunction where irreparable injury will result to plaintiff if his motion for an injunction is denied and the final decision is in his favor, and the loss and inconvenience to defendant, if the injunction is issued, will be comparatively small and insignificant).

[a] **Infringement must be shown beyond doubt.**—Brookfield v. Elmer Glassworks, 132 Fed. 312; Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648 [aff 104 Fed. 83, 43 CCA 418]; Consolidated Fastener Co. v. American Fastener Co., 94 Fed. 523; American Nicholson Pavement Co. v. Elizabeth, 1 F. Cas. No. 312, 4 Fish. Pat. Cas. 189; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93.

[b] **Degree of doubt.**—A preliminary injunction against infringement of a patent will not be granted where there is doubt as to infringement and such doubt is: (1) Substantial. Valvona-Marchiony Co. v. Silverstein, 207 Fed. 374. (2) Considerable. Layne v. Getty, 222 Fed. 917, 138 CCA 397. (3) Grave. Western Tel. Mfg. Co. v. Swedish-American Tel. Co., 163 Fed. 308 [aff 194 Fed. 104, 114 CCA 182]. (4) Serious. Scott v. Lazell, 169 Fed. 661. (5) It is held that the court may, in its discretion, properly refuse to grant a preliminary injunction where it is reasonably in doubt as to whether defendant's device infringes plaintiff's patent. Rousso v. Detroit First Nat. Bank, 287 Fed. 273 [certiorari den 262 U. S. 754 mem, 43 SCt 702 mem, 67 L. ed. 1216 mem]. (6) But it is also held that it is not imperative that infringement be shown beyond a reasonable doubt, and that a preliminary injunction may be granted where there is a fair probability that infringement exists. Crescent Specialty Co. v. National Fireworks Distributing Co., 219 Fed. 130, 135 CCA 28.

[c] **Infringement questionable.**—It is variously stated that (1) an injunction pendente lite should not be granted in a patent suit except where the patent is infringed beyond question (Blancard v. Simson, 22 F. (2d) 498), (2) or that an injunction will not be granted where there is any fair (Standard Plunger El. Co. v. Stokes, 196 Fed. 47 [aff 200 Fed. 770, 119 CCA 292]) (3) or serious (Johns-Pratt Co. v. Sachs Co., 255 Fed. 129) question as to infringement.

18. Fountain Electrical Floor Box Corp. v. Steel City Electric Co., 223 Fed. 544, 139 CCA 134. Contra Panoulias v. Hawley, 178 Fed. 101.

19. Manton-Gaulin Mfg. Co. v. American Bottle Cap Co., 250 Fed. 865; Underfeed Stoker Co. v. Riley, 207 Fed. 963; Byerley v. Ellis Co., 190 Fed. 772; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 157 Fed. 677, 85 CCA 349 [aff 162 Fed. 892, 89 CCA 582 (aff 220 U. S. 428, 31 SCt 444, 55 L. ed. 527)] (adjudication by circuit court of appeals of same circuit).

[a] **Consent decrees.**—Where certain members of a family by consent decrees had admitted infringement of patents in suit, if the evidence established that they persisted in infringement in which three other members of the family sued for infringement were employed in capacities directly connected with the infringement, it devolved upon the members sued to show rather definitely that they were ignorant of, or not involved in, the wrongdoings of their relatives in order to avoid the granting of a preliminary injunction. Lipson v. General Electric Co., 31 F. (2d) 105.

Following prior adjudication of validity see supra § 601.

Operation and effect of decision in infringement suit generally see infra §§ 643-646.

20. Calculagraph Co. v. Automatic Time Stamp Co., 149 Fed. 436 (adjudication by a circuit court of appeals of another circuit, after full consideration and upon substantially the same record).

21. Bassick Mfg. Co. v. Larkin Automotive Parts Co., 23 F. (2d) 92.

[a] **"The court knows of no reason** why it should permit the defendant to continue to infringe merely in order that it may or may not hereafter prosecute an application in another court, asking that court to advise it whether it may in the future commit the acts actually found in this court to amount to infringement. Comity does not require such action, nor is there any reason why this court should not proceed to grant the relief to which the plaintiff is entitled. There will be an order of preliminary injunction." Bassick Mfg. Co. v. Larkin Automotive Parts Co., 23 F. (2d) 92, 94.

22. Hilditch v. American Bumper Corp., 15 F. (2d) 451; Rousso v. Barber, 276 Fed. 552 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem]; Motion Picture Patents Co. v. New York Motion Picture Co., 174 Fed. 51; Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980; Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302; Norton v. Eagle Automatic Can Co., 57 Fed. 929; New York Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; Batten v. Silliman, 2 F. Cas. No. 1,106, 3 Wall. Jr. 124; Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co., 7 F. Cas. No. 4,015, 1 Bann. & A. 330, 12 Blatchf. 202; Morris v. Lowell Mfg. Co., 17 F. Cas. No. 9,833, 3 Fish. Pat. Cas. 67; North v. Kershaw, 18 F. Cas. No. 10,311, 4 Blatchf. 70; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93, 4 PaLJ 443. See Eskimo Pie Corp. v. Arctic Fruit Ices, 15 F. (2d) 853 (where plaintiff has suffered great injury and, on the showing made, it would seem that he must ultimately prevail, further injury to him should be prevented by injunction).

23. Willcox, etc., Sewing Mach. Co. v. Union Special Mach. Co., 25 F. (2d) 459; Davey Tree Expert Co. v. McBeath, 287 Fed. 536; Rousso v. Barber, 276 Fed. 552 [certiorari den 257 U. S. 658 mem, 42 SCt 185 mem, 66 L. ed. 421 mem]; Gillette Safety Razor Co. v. Durham Duplex Razor Co., 197 Fed. 574; American Sulphite Pulp Co. v. Great Northern Paper Co., 159 Fed. 167; Johns-Pratt Co. v. Sachs Co., 155 Fed. 129; Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980; Root v. Mt. Adams, etc., R. Co., 40 Fed. 760; Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9; Hockholzer v. Eager, 12 F. Cas. No. 6,556, 2 Sawy. 361; Morris v. Lowell Mfg. Co., 17 F. Cas. No. 9,833, 3 Fish. Pat. Cas. 67; Potter v. Whitney, 19 F. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87. See J. F. Rowley Co. v. Rowley, 18 F. (2d) 704 (before granting a preliminary injunction, the court should balance with caution the benefit and injury that may flow from it).

24. Thomson-Houston Electric Co. v. Jeffrey Mfg. Co., 144 Fed. 130; Norton v. Eagle Automatic Can Co., 57 Fed. 929.

25. Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,560, 6 Blatchf. 165.

26. Lanyon Zinc Co. v. Brown, 115 Fed. 150, 53 CCA 354 [certiorari den 187 U. S. 646 mem, 23 SCt 846 mem, 47 L. ed. 347 mem]; Westinghouse Air-Brake Co. v. Great Northern R. Co., 86 Fed. 132; New York Filter Mfg. Co. v. Niagara Falls Waterworks Co., 80 Fed. 924, 26 CCA 252; Thomson-Houston Electric Co. v. Union R. Co., 78 Fed. 365; National Meter Co. v. Poughkeepsie, 75 Fed. 405 [aff 89 Fed. 1014, 32 CCA 463]; Goodyear v. New Jersey Cent. R. Co., 10 F. Cas. No. 5,563, 1 Fish. Pat. Cas. 626, 2 Wall. Jr. 356; Sickels v. Tileston, 22 F. Cas. No. 12,837, 4 Blatchf. 109.

Bond instead of injunction see infra § 616.

27. New York Belting, etc., Co. v. Gutta Percha, etc., Mfg. Co., 56 Fed. 264.

28. Motion Picture Patents Co. v. New York Motion Picture Co., 174 Fed. 51.

29. Indemnity bond instead of injunction see infra § 616.

30. See infra text and notes 31-34.

31. Walsh v. Albert Wahle Co., 25 F. (2d) 350.

showing,[32] the validity of the patent, the likelihood of great harm, injury or damage resulting to defendant from an injunction,[33] or doubt as to whether a showing sufficient to warrant an injunction has been made,[34] the fact that defendant is financially responsible and apparently able to answer to complainant for money damages in case the patent is adjudged valid and infringed may influence the court to deny a motion for a preliminary injunction; but this fact alone will not preclude the granting of a preliminary injunction where there is no substantial doubt as to infringement of a valid patent[35] and there is no proof of any definite and established royalty or license fee.[36] Likewise, in connection with other matters, an insufficient showing of defendant's responsibility to answer for the damages which plaintiff may suffer may influence the court to grant a preliminary injunction;[37] and defendant's insolvency is considered a sufficient showing of irreparable injury to complainant if infringement is not prevented by injunction.[38]

[§ 606] **(c) Application and Proceedings Thereon.** In order to obtain a preliminary injunction against infringement of a patent, the motion or other application therefor must be supported by the affidavits of complainant and others to all facts necessary to establish his right which are not shown in the bill,[39] and documents referred to should be produced.[40] Defendant may file counter affidavits,[41] and complainant may file rebutting affidavits,[42] but defendant is not entitled to file further affidavits in reply to complainant's rebutting affidavits.[43] A temporary restraining order, to be in force until the motion is decided, may be granted without previous notice in a case of exigency.[44]

[§ 607] **(d) Scope, Terms, and Conditions.**[45] In disposing of a motion for an injunction pendente lite, the court will make such order as the equities of the case demand.[46] Where defendant is a corporation, it may be restrained from paying dividends,[47] but it should not be enjoined from continuing the payment of royalties to a foreign company for the use of patents owned by that company.[48] The terms and conditions to be imposed in disposing of the motion rest in the sound discretion of the court[49] and depend upon the special circumstances of the case.[50] A bond from complainant may be required as a condition of granting a preliminary injunction.[51]

32. Eskimo Pie Corp. v. National Ice Cream Co., 20 F. (2d) 1003 [aff 26 F. (2d) 901].

33. Willcox, etc., Sewing Mach. Co. v. Union Special Mach. Co., 25 F. (2d) 459.

34. Boyce v. Stewart-Warner Speedometer Corp., 220 Fed. 118, 136 CCA 72; Thomson-Houston Electric Co. v. Wagner Electric Mfg. Co., 130 Fed. 902; Diamond Match Co. v. Union Match Co., 129 Fed. 602; Hallock v. Babcock Mfg. Co., 124 Fed. 226; Bradley v. Eccles, 120 Fed. 947; Scoville Mfg. Co. v. Patent Button Co., 99 Fed. 743; Huntington Dry-Pulverizer Co. v. Alpha Portland Cement Co., 91 Fed. 534; Overweight Counterbalance El. Co. v. Cahill, etc., El. Co., 86 Fed. 338 [aff 94 Fed. 155, 36 CCA 125]; Nilsson v. Jefferson, 78 Fed. 366; George Ertel Co. v. Stahl, 65 Fed. 519, 13 CCA 31; Rogers Typographic Co. v. Mergenthaler Linotype Co., 58 Fed. 693; Standard El. Co. v. Crane El. Co., 56 Fed. 718, 6 CCA 100; Williams v. McNeely, 56 Fed. 265; Ironclad Mfg. Co. v. Jacob J. Vollrath Mfg. Co., 52 Fed. 143; Dietz Co. v. C. T. Ham Mfg. Co., 47 Fed. 320; Southwestern Brush Electric Light, etc., Co. v. Louisiana Electric Light Co., 45 Fed. 893; Kane v. Huggins Cracker, etc., Co., 44 Fed. 287; Consolidated Roller-Mill Co. v. Richmond City Mill-Works, 40 Fed. 474; Hurlburt v. Carter, 39 Fed. 802; National Hat-Pouncing Mach. Co. v. Hedden, 29 Fed. 147; United Nickel Co. v. New Home Sewing Mach. Co., 17 Fed. 528, 21 Blatchf. 415; Hoe v. Boston Daily Advertising Corp., 14 Fed. 914; New York Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; Pullman v. Baltimore, etc., R. Co., 5 Fed. 72, 4 Hughes 236; Essex Hosiery Mfg. Co. v. Door Mfg. Co., 8 F. Cas. No. 4,533; Guidet v. Palmer, 11 F. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82; McGuire v. Eames, 16 F. Cas. No. 8,814, 3 Bann. & A. 499, 15 Blatchf. 312; Morris v. Lowell Mfg. Co., 17 F. Cas. No. 9,833, 3 Fish. Pat. Cas. 67.

35. Hilditch v. American Bumper Corp., 15 F. (2d) 451; Hilditch v. Krieger, 15 F. (2d) 393.

36. Hilditch v. American Bumper Corp., 15 F. (2d) 451; Hilditch v. Krieger, 15 F. (2d) 393.

37. Tropic-Aire, Inc. v. Jumper, 28 F. (2d) 631; Eskimo Pie Corp. v. Arctic Fruit Ices, 15 F. (2d) 853.

38. Norstrom v. Wahl, 27 F. (2d) 637.

Irreparable injury generally see supra § 604.

39. Palmer Pneumatic Tire Co. v. Newton Rubber Works, 73 Fed. 218; American Diamond Rock Boring Co. v. Sullivan Mach. Co., 1 F. Cas. No. 298, 2 Bann. & A. 552, 14 Blatchf. 119; Beane v. Orr, 2 F. Cas. No. 1,176, 2 Bann. & A. 176; Gutta Percha, etc., Mfg. Co. v. Goodyear Rubber Co., 11 F. Cas. No. 5,879, 2 Bann. & A. 212, 3 Sawy. 542; Stevens v. Felt, 23 F. Cas. No. 13,397; Sullivan v. Redfield, 23 F. Cas. No. 13,597, 1 Paine 441, 1 Robb Pat. Cas. 477; Young v. Lippman, 30 F. Cas. No. 18,160, 9 Blatchf. 277, 5 Fish. Pat. Cas. 230; Whitton v. Jennings, 1 Dr. & Sm. 110, 62 Reprint 320; Hill v. Thompson, Holt N. P. 636, 3 ECL 249, 171 Reprint 367, 3 Meriv. 622, 36 Reprint 239, 8 Taunt. 375, 4 ECL 190, 129 Reprint 427, 20 ERC 272; Mayer v. Spence, 1 Johns. & H. 87, 70 Reprint 673; Gardner v. Broadbent, 2 Jur. N. S. 1041; Sturz v. De la Rue, 5 Russ. 322, 5 EngCh 322, 38 Reprint 1048.

40. Siemens-Lungren Co. v. Hatch, 47 Fed. 64; National Typographic Co. v. New York Typograph Co., 46 Fed. 114.

[a] **Copy of plaintiff's specification** should be put in evidence. British Thomson-Houston Co. v. Mandler, 71 Sol. J. 472.

41. Brill v. Peckham Motor Truck, etc., Co., 189 U. S. 57, 23 SCt 562, 47 L. ed. 706; Robinson v. Randolph, 20 F. Cas. No. 11,962, 4 Bann. & A. 163; Wickershaff v. Jones, 29 F. Cas. No. 17,609; Young v. Lippman, 30 F. Cas. No. 18,160, 9 Blatchf. 277, 5 Fish. Pat. Cas. 230.

[a] **Answer** may, it seems, be treated as an affidavit. Goodyear v. Mullee, 10 F. Cas. No. 5,579, 3 Fish. Pat. Cas. 420; Parker v. Sears, 18 F. Cas. No. 10,748, 1 Fish. Pat. Cas. 93.

42. Brill v. Peckham Motor Truck, etc., Co., 189 U. S. 57, 23 SCt 562, 47 L. ed. 706; Norton v. Eagle Automatic Can Co., 57 Fed. 929; Goodyear v. Mullee, 10 F. Cas. No. 5,579, 3 Fish. Pat. Cas. 420; Union Paper-Bag Mach. Co. v. Binney, 24 F. Cas. No. 14,387, 5 Fish. Pat. Cas. 166; Gibbs v. Cole, Dick. 64, 21 Reprint 192, 3 P. Wms. 255, 24 Reprint 1051.

43. American Paper Barrel Co. v. Laraway, 28 Fed. 141.

44. Yuengling v. Johnson, 30 F. Cas. No. 18,195, 3 Bann. & A. 99, 1 Hughes 607.

45. Injunction against institution or prosecution of other suits by plaintiff see supra § 594.

46. Antisdel v. Chicago Hotel Cabinet Co., 89 Fed. 308, 32 CCA 216; American Middlings Purifier Co. v. Vail, 1 F. Cas. No. 308, 4 Bann. & A. 1, 15 Blatchf. 315; Atlantic Giant-Powder Co. v. Goodyear, 2 F. Cas. No. 623, 3 Bann. & A. 161; Burr v. Smith, 4 F. Cas. No. 2,196; Parkhurst v. Kinsman, 18 F. Cas. No. 10,760, 2 Blatchf. 78, Fish. Pat. R. 180; Woodworth v. Edwards, 30 F. Cas. No. 18,014, 2 Robb Pat. Cas. 603, 3 Woodb. & M. 524.

[a] **Carefully restricted injunction held properly issued.**—Æolian Co. v. Harry H. Juelg Co., 155 Fed. 119, 86 CCA 205.

47. Zenith Carburetor Co. v. Stromberg Motor Devices Co., 270 Fed. 421. Contra Manton-Gaulin Mfg. Co. v. American Bottle Cap Co., 250 Fed. 865.

48. Zenith Carburetor Co. v. Stromberg Motor Devices Co., 270 Fed. 421.

49. Westinghouse Air-Brake Co. v. Burton Stock-Car Co., 77 Fed. 301, 23 CCA 174; Palmer v. Mills, 57 Fed. 221; Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 545; Sessions v. Romadka, 21 Fed. 124 [rev on other grounds 145 U. S. 29, 12 SCt 799, 36 L. ed. 609]; Ely v. Monson, etc., Mfg. Co., 8 F. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Fisk v. West Bradley, etc., Mfg. Co., 9 F. Cas. No. 4,830a; Forbush v. Bradford, 9 F. Cas. No. 4,930, 1 Fish. Pat. Cas. 317; Hodge v. Hudson River R. Co., 12 F. Cas. No. 6,560, 6 Blatchf. 165; Rogers v. Abbot, 20 F. Cas. No. 12,004, 1 Robb Pat. Cas. 465, 4 Wash. C. C. 514; Serrell v. Collins, 21 F. Cas. No. 12,671, 4 Blatchf. 61; Smith v. Sharp's Rifle Mfg. Co., 22 F. Cas. No. 13,106, 3 Blatchf. 545; Sykes v. Manhattan El., etc., Co., 23 F. Cas. No. 13,710, 6 Blatchf. 496; Tilghman v. Mitchell, 23 F. Cas. No. 14,042, 9 Blatchf. 18, 4 Fish. Pat. Cas. 615 [rev on other grounds 19 Wall. 287, 22 L. ed. 125].

50. See cases supra note 49.

51. Toledo Plate, etc., Glass Co. v. Kawneer Mfg. Co., 262 Fed. 510; Consolidated Electric Storage Co. v. Accumulator Co., 55 Fed. 485, 5 CCA 202 [aff 53 Fed. 796]; Brush Electric Co. v. Accumulator Co., 50 Fed. 833; Tobey Furniture Co. v. Colby, 35 Fed. 592; Shelly v. Brannan, 21 F. Cas. No. 12,751, 2 Biss. 315, 4 Fish. Pat. Cas. 198.

[a] **Amount and conditions.**—(1) "If such bond is required, its conditions, since they are dependent on no statute, should be carefully fixed, so that the security which is given to defendant shall be real and not merely colorable." Vrooman v. Burdick, 222 Fed. 900, 901, 138 CCA 380. (2) "Where an injunction closes down a business which is being established and which has good prospects but no long-settled basis, a bond, conditioned in the common form to pay such damages as defendants may suffer by the

Whether such bond shall be required depends upon the circumstances.[52]

[§ 608] **(e) Suspension, Modification, or Dissolution. Suspension** of a preliminary injunction against infringement of a patent may be granted on conditions.[53]

Modification. A preliminary injunction against infringement of the patent may[54] and should[55] be modified where a proper case for modification is presented.

Dissolution. In the exercise of its sound discretion,[56] and after due consideration of the grounds urged[57] and showing made,[58] the trial court may grant[59] or deny[60] a motion to dissolve a preliminary injunction against infringement of a patent.

[§ 609] **(4) Permanent Injunction.**[61] The right to a permanent injunction ordinarily exists where judgment is in favor of complainant[62] but there may be special circumstances which will prevent its issuance,[63] as where it is not necessary and its allow-

issue of the injunction, is not a real protection. The damages in such a case are likely to be serious and genuine, but largely or wholly incapable of proof. In such case the condition should be to pay a fixed sum which can fairly be estimated as the value of the business which is destroyed." Commercial Acetylene Co. v. Acme Acetylene Appliance Co., 188 Fed. 89, 91 [aff 192 Fed. 321, 112 CCA 573].

Bond from defendant:
As condition of suspending injunction see infra § 608.
In lieu of injunction see infra § 616.

52. Pasteur Chamberland Filter Co. v. Funk, 52 Fed. 146; Van Hook v. Wood, 28 F. Cas. No. 16,855.

[a] **Special considerations.**—"The court does not require the plaintiff to give indemnity as a condition of receiving that to which the court has held he is entitled, unless some special considerations upon the balancing of equities seem to make it just to do so." Vrooman v. Burdick, 222 Fed. 900, 901, 138 CCA 380.

[b] **Where new questions are raised,** and the court on final hearing, or the court of appeals, may take a view different from that entertained on the hearing of the motion for the preliminary injunction, complainant should give security. Commercial Acetylene Co. v. Acme Acetylene Co., 188 Fed. 89 [aff 192 Fed. 321, 112 CCA 573].

53. See cases infra this note.

[a] **Giving of security by defendant.**—Kryptok Co. v. Harris, 216 Fed. 642.

[b] **Use of record in another case.**—Where defendant desires a suspension of the preliminary injunction in order to profit by any pending litigation in another circuit, the suspension may be granted on condition that plaintiff may, in the instant case, use the record in the other case in his own behalf, if he shall elect to do so. General Electric Co. v. Brite-Lite Lamp Co., 290 Fed. 967.

54. Kintner v. Marconi Wireless Tel. Co., 215 Fed. 104, 131 CCA 412 (proper exercise of discretion).

55. Westinghouse Electric, etc., Co. v. Cutting, etc., Radio Corp., 294 Fed. 671; Lovell-McConnell Mfg. Co. v. International Auto. League, 202 Fed. 219, 120 CCA 169.

[a] **Thus** it is held in particular cases that an injunction should be modified so as to: (1) Put a stop to a practice which is a mere evasion of the injunction. Lovell-McConnell Mfg. Co. v. International Auto. League, 202 Fed. 219, 120 CCA 169. (2) Strike out a clause or provision which is likely to cause confusion. Westinghouse Electric, etc., Co. v. Cutting, etc., Radio Corp., 294 Fed. 671.

56. American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 120 CCA 644; Orr v. Badger, 18 F. Cas. No. 10,587, Brunn. Coll. Cas. 536.

[a] **Refusal to dissolve injunction held not abuse of discretion.**—Owen v. Perkins Oil Well Cementing Co., 2 F. (2d) 247; American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 120 CCA 644.

57. See cases infra this note.

[a] **Where prior adjudication has been reversed,** an injunction granted on the strength thereof will be dissolved. Brill v. Peckham Mfg. Co., 135 Fed. 784, 68 CCA 486; Prieth v. Campbell Printing-Press, etc., Co., 80 Fed. 539, 25 CCA 624.

[b] **Wrongful use by complainant of preliminary injunction** by sending notices of the same to the trade and to customers of defendant, together with letters which are misleading as to its scope and effect, and calculated to injure defendant's legitimate business, affords ground for dissolution of the injunction. Meyers v. Skinner, 186 Fed. 347.

[c] **Assignment of patent** by complainant, after the preliminary injunction has been granted, is not ground for dissolution of the injunction. Thompson v. Barry, 23 F. Cas. No. 13,942.

[d] **Nonjoinder of party.**—Where it is not clear that the suit for infringement is not well brought in plaintiff's name alone, a motion to dissolve the injunction because of the nonjoinder of a party will be denied. Bassett v. Malone, 11 Fed. 801.

[e] **Objection to form or signature of papers.**—Where the objection relates not to the merits, but to the technical form or signature of papers connected with the letters patent, and the doubts arise from acts of public officers, and not any neglect or wrong of the patentee, the injunction should not be dissolved. Woodworth v. Hall, 30 F. Cas. No. 18,017, 2 Robb Pat. Cas. 517, 1 Woodb. & M. 389.

58. See cases infra this note.

[a] **Answers and proofs.**—(1) A motion to dissolve the injunction will be denied unless defendant's proofs overcome the equity of the bill and the evidence supporting it. Sparkman v. Higgins, 22 F. Cas. No. 13,208, 1 Blatchf. 205, Fish. Pat. R. 110. (2) An injunction will not be dissolved, as a matter of course, on the coming in of the answer denying the equity of the bill, if complainant has adduced auxiliary evidence of his right. Orr v. Littlefield, 18 F. Cas. No. 10,590, 2 Robb Pat. Cas. 323, 1 Woodb. & M. 13; Orr v. Merrill, 18 F. Cas. No. 10,591, 2 Robb Pat. Cas. 331, 1 Woodb. & M. 376. (3) Also, an injunction will not be dissolved on affidavits of prior use or invention where the answer does not contain averments sufficient to admit proof thereof on the final hearing. Union Paper-Bag Mach. Co. v. Newell, 24 F. Cas. No. 14,389, 1 Bann. & A. 113, 11 Blatchf. 549. (4) On the other hand, when an answer denying the validity of the patent is filed, and evidence supporting the answer, prima facie, is offered, the injunction will be dissolved, unless the other side files counter evidence sustaining it. Woodworth v. Rogers, 30 F. Cas. No. 18,018, 2 Robb Pat. Cas. 625, 3 Woodb. & M. 135. (5) In order to obtain a dissolution of the injunction, defendant must offer new and material evidence, and not merely evidence which has been heard, or should have been offered or produced before. National School Furniture Co. v. Paton, 18 F. Cas. No. 10,050, 4 Bann. & A. 432, 16 Blatchf. 563; Woodworth v. Rogers, supra.

59. Cary v. Domestic Spring-Bed Co., 26 Fed. 38; Goodyear v. Bourn, 10 F. Cas. No. 5,561, 3 Blatchf. 266; Wilson v. Barnum, 30 F. Cas. No. 17,787, 2 Fish. Pat. Cas. 635, 2 Robb Pat. Cas. 749, 1 Wall. Jr. 347; Woodworth v. Edwards, 30 F. Cas. No. 18,014, 2 Robb Pat. Cas. 610, 3 Woodb. & M. 120.

60. Crown Cork, etc., Co. v. New York Specialty Co., 206 Fed. 679; Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co., 31 Fed. 562; Richardson v. Croft, 11 Fed. 800; Perry v. Littlefield, 2 Fed. 464; Consolidated Fruit-Jar Co. v. Whitney, 6 F. Cas. No. 3,132, 1 Bann. & A. 356, 10 Phila. (Pa.) 268; Hussey v. Whitely, 12 F. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120; Potter v. Mack, 19 F. Cas. No. 11,331, 3 Fish. Pat. Cas. 428; Thompson v. Barry, 23 F. Cas. No. 13,942, 2 WklyNC (Pa.) 100; Woodworth v. Rogers, 30 F. Cas. No. 18,018, 2 Robb Pat. Cas. 625, 3 Woodb. & M. 135.

61. Injunction after expiration of patent see supra § 595.

62. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; National Marking Mach. Co. v. Triumph Mfg. Co., 13 F. (2d) 6; Tucker Bros. Mfg. Co. v. Dallas Mach., etc., Co., 286 Fed. 754; Western Electric Co. v. Capital Tel., etc., Co., 86 Fed. 769; Marden v. Campbell Printing-Press, etc., Co., 79 Fed. 653, 25 CCA 142; Matthews, etc., Mfg. Co. v. National Brass, etc., Works, 71 Fed. 513; Horton v. New York Cent., etc., R. Co., 63 Fed. 897; Roemer v. Neumann, 26 Fed. 332; Avery v. Wilson, 20 Fed. 856; Potter v. Mack, 19 F. Cas. No. 11,331, 3 Fish. Pat. Cas. 428; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,134, 2 Bann. & A. 386; Nunn v. D'Albuquerque, 34 Beav. 595, 55 Reprint 765; Canadian Steam Boiler Equipment Co. v. MacGilchrist, 16 OntWN 37; Overend v. Burrow Stewart, etc., Co., 1 OntWN 156, 14 OntWR 961; Copeland-Chatterson Co. v. Lyman Bros. Co., 9 OntWR 908; Cabot S. Whaling Co. v. Newfoundland S. Whaling Co., 9 Newfoundl. 122.

[a] **Thus** (1) an injunction has been granted (National Folding-Box, etc., Co. v. Elsas, 65 Fed. 1001; American Bell Tel. Co. v. Globe Tel. Co., 31 Fed. 729, 24 Blatchf. 522 [app dism 145 U. S. 640 mem, 12 SCt 981 mem, 36 L. ed. 855 mem]; Odell v. Stout, 22 Fed. 159; Weeks v. Buffalo Scale Co., 11 Fed. 901; Merriam v. Smith, 11 Fed. 588; Pentlarge v. Beesten, 1 Fed. 862, 18 Blatchf. 38; Potter v. Whitney, 19 F. Cas. No. 11,341, 3 Fish. Pat. Cas. 77, 1 Lowell 87), (2) without the verdict of a jury (Buchanan v. Howland, 4 F. Cas. No. 2,074, 5 Blatchf. 151, 2 Fish. Pat. Cas. 341; Goodyear v. Day, 10 F. Cas. No. 5,569, 2 Wall. Jr. 283), (3) although defendant was solvent (Bement v. National Harrow Co., 186 U. S. 70, 22 SCt 747, 46 L. ed. 1058; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; General Electric Co. v. Wise, 119 Fed. 922), (4) or the damages allowed were only nominal (Du Bois v. Kirk, 158 U. S. 58, 15 SCt 729, 39 L. ed. 895 [aff 33 Fed. 252]).

[b] **Against whom operative.**—A permanent injunction goes against all connected with the infringement. National Mechanical Directory Co. v. Polk, 121 Fed. 742, 58 CCA 24.

63. Hills v. Hamilton Watch Co., 248 Fed. 499 [aff 252 Fed. 991 mem,

ance would be injurious to the public.[64] Where the patent is recent, the specification obscure, and the proof of infringement meager and unsatisfactory, the court will not grant an injunction, even upon a final hearing.[65] While a perpetual injunction ordered by an interlocutory decree, rendered after a full hearing on the merits, may be suspended by the court until the final decree is rendered,[66] and it is proper to provide for a stay upon the giving of a bond to secure to plaintiff the damages and profits which he may finally recover,[67] the court will not ordinarily grant a stay or suspension,[68] and before doing so it should look carefully to all the facts and circumstances involved.[69] After an interlocutory decree ordering the issuance of an injunction has been entered, and before it is vacated or a final decree is rendered, it is improper to order the issuance of another injunction in substantially the same terms as the prior order.[70]

[§ 610] **(5) Supplemental Injunction.** Where, after an interlocutory decree, defendant places a new device or apparatus upon the market and there is a substantial dispute as to whether the new structure is an infringement of plaintiff's patent, it is proper practice to present the question to the court by a motion for a supplemental decree extending the injunction to the new structure;[71] but a motion to extend an injunction so as to include another device will be denied where the device was in the hands of plaintiff and disregarded by him prior to the entry of the interlocutory decree,[72] or where the asserted new infringement does not plainly render a new action and another trial an expensive futility.[73] Like the granting or refusing of preliminary injunctive relief,[74] the granting or refusing of supplemental injunctive relief is a matter of discretion,[75] but a supplemental injunction differs from a preliminary injunction in that it is not followed by a trial.[76]

[§ 611] **(6) Violation and Punishment[77]—(a) In General.** The violation of an injunction by defendant in a suit for infringement of a patent constitutes a contempt[78] for which he may be fined[79] in appro-

164 CCA 663 mem]; Marden v. Campbell Printing-Press, etc., Co., 79 Fed. 653, 25 CCA 142; Many v. Sizer, 16 F. Cas. No. 9,057, 1 Fish. Pat. Cas. 31.

64. Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Ballard v. Pittsburg, 12 Fed. 783; Bliss v. Brooklyn, 3 F. Cas. No. 1,544, 8 Blatchf. 533, 4 Fish. Pat. Cas. 596.

65. Muscan Hair Mfg. Co. v. American Hair Mfg. Co., 17 F. Cas. No. 9,970, 4 Blatchf. 174, 1 Fish. Pat. Cas. 320.

66. Barnard v. Gibson, 7 How. (U. S.) 650, 12 L. ed. 857; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803; Brown v. Deere, 6 Fed. 487, 2 McCrary 425.

67. Landis Tool Co. v. Ingle, 286 Fed. 5 [mod on condition 277 Fed. 247]; Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem].

68. Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803.

69. Brown v. Deere, 6 Fed. 487, 2 McCrary 425.

70. Metzger v. Berlin, 194 Fed. 426, 114 CCA 388. Compare Horton v. New York Cent., etc., R. Co., 63 Fed. 897 (although another injunction is unnecessary, it may be granted in a subsequent suit brought in the same court and based upon infringements committed by defendant since the rendition of the former decree).

71. Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501; Sundh Electric Co. v. General Electric Co., 217 Fed. 583, 235 Fed. 708.

73. Individual Drinking Cup Co. v. Public Serv. Cup Co., 234 Fed. 653, 237 Fed. 400 [mod on other grounds 250 Fed. 620, 162 CCA 636].

73. Charles Green Co. v. Henry P. Adams Co., 247 Fed. 485, 159 CCA 539.

74. See supra § 596.

75. Charles Green Co. v. Henry P. Adams Co., 247 Fed. 485, 159 CCA 539.

[a] **Refusal of injunction held not abuse of discretion.**—Minerals Separation, Ltd. v. Miami Copper Co., 269 Fed. 265 [aff 268 Fed. 862].

76. Charles Green Co. v. Henry P. Adams Co., 247 Fed. 485, 159 CCA 539.

[a] **Validity of patent will not be retired** on the hearing of a motion to extend the injunction. Individual Drinking Cup Co. v. Public Serv. Cup Co., 234 Fed. 653, 237 Fed. 400 [mod on other grounds 250 Fed. 620, 162 CCA 636].

77. Cross references:
Review of order made in contempt proceedings see infra § 648.
Violation of injunctions and punishment therefor generally see Injunctions §§ 833-892.

78. New Jersey Patent Co. v. Martin, 186 Fed. 513; Westinghouse Electric Mfg. Co. v. Condit Electrical Mfg. Co., 173 Fed. 82; Rushmore v. Motor Car Equipment Co., 170 Fed. 189; Gsell v. Valeriano Velosa Yap-Jue, 12 Philippine 519.

[a] **Even where decree for injunction was by consent,** defendant may be adjudged guilty of contempt. Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541. Contra Howard v. Mast, etc., Co., 33 Fed. 867; Higby v. Columbia Rubber Co., 18 Fed. 601.

[b] **Defendant should not be purged of contempt** where violation of the injunction is clear. Union Tool Co. v. Wilson, 259 U. S. 107, 42 SCt 427, 66 L. ed. 848 [aff 265 Fed. 669].

Contempt generally see Contempt 13 C. J. p 1.

79. Frank v. Bernard, 146 Fed. 137 [motion to vacate order den 171 Fed. 117 (aff 179 Fed. 516, 101 CCA 459)].

[a] **Motion to set aside order imposing fine denied.**—Frank v. Bernard, 171 Fed. 117 [den motion to vacate order 146 Fed. 137, and aff 179 Fed. 516, 101 CCA 459] (order entered three years previously).

[b] **Amount and distribution of fine.**—(1) The amount of the fine to be assessed for the violation of the injunction is within the sound discretion of the court. Morss v. Domestic Sewing-Mach. Co., 38 Fed. 482; Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co., 30 Fed. 615; Carstaedt v. U. S. Corset Co., 5 F. Cas. No. 2,468, 2 Bann. & A. 331, 13 Blatchf. 371. (2) The court may (Union Tool Co. v. U. S., 262 Fed. 431 [motion for leave to file petition for mandamus den 254 U. S. 608 mem, 41 SCt 12 mem, 65 L. ed. 436 mem]; Cheatham Electric Switching Device Co. v. Transit Dev. Co., 261 Fed. 792; Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541; U. S. Envelope Co. v. Transo Paper Co., 221 Fed. 79; New Jersey Patent Co. v. Martin, 186 Fed. 513; Robinson v. S. & B. Lederer Co., 146 Fed. 993; Christensen Engineering Co. v. Westinghouse Air-Brake Co., 135 Fed. 774, 68 CCA 476; Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. 873, 48 CCA 118 [writ of error dism 187 U. S. 427, 23 SCt 211, 47 L. ed. 244]; Macaulay v. White Sewing Mach. Co., 9 Fed. 698), (3) but need not (Cazier v. Mackie-Lovejoy Mfg. Co., 168 Fed. 701, 94 CCA 215), (4) direct payment to complainant of a part or all of the fine imposed, as a compensation for his time and outlay in prosecuting the application; and the sum directed to be paid to him may include reasonable disbursements which could not be taxed in his bill of costs (Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541). (5) Also, the court may deny a motion to punish for contempt upon condition that defendant reimburse plaintiff for the latter's time, effort, and expense. Cheatham Electric Switching Device Co. v. Transit Dev. Co., 197 Fed. 563. (6) However, the court will not compensate complainant for any profits or damages resulting from the infringement involved in the violation of the injunction. Cheatham Electric Switching Device Co. v. Transit Dev. Co., 261 Fed. 792; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 Fed. 735, 61 CCA 57 [aff 129 Fed. 1005, 64 CCA 122]; Macaulay v. White Sewing Mach. Co., 9 Fed. 698. See Worden v. Searls, 121 U. S. 14, 7 SCt 814, 30 L. ed. 853 [rev 13 Fed. 716] (where the fines are measured by the damages plaintiff has sustained and the expenses he has incurred, his right, if any, to them is founded on his right to the injunction, and where the order for the injunction was unwarranted as a matter of law, the orders imposing the fines cannot be upheld); Cazier v. Mackie-Lovejoy Mfg. Co., 168 Fed. 701, 94 CCA 215 (the court, in its discretion, may decline to take such action). But see Victor Talking Mach. Co. v. Sonora Phonograph Co., 191 Fed. 988 (denying a motion to punish for contempt because of the absence of any evidence upon which the amount of a remedial fine could be imposed, there being nothing to show what pecuniary loss or damage plaintiff sustained in consequence of the sales in question); Robinson v. S. & B. Lederer Co., 146 Fed. 993 (the penalty should be measured in part by the amount of damage which complainant has sustained through defendant's disobedience of the injunction). (7) Also, the court will not, in contempt proceedings, compensate complainant for profits and damages resulting from infringement prior to the filing of the original bill. New Jersey Patent Co. v. Martin, 186 Fed. 513. (8) "The specific objection against the imposition of the private penalty is that it was made additional to the damages and profits that might be recovered in the pending accounting, and was not to have any effect upon such accounting. We see no objection to this. A private penalty of this kind is imposed, not to compensate for assessable damages and profits, but with reference to those items of damages which are not thus assessable." Monroe Body Co. v. Herzog, 13 F. (2d) 705, 706 [mod on other grounds 18 F. (2d) 578]. (9) Matters in mitigation of fine see infra § 615.

priate proceedings[80] and upon proper pleadings[81] and evidence.[82] To authorize punishment for contempt, the evidence of a breach of the injunction must be clear,[83] and, ordinarily, where violation is doubtful, an adjudication of, or punishment for, contempt is not warranted,[84] and the court will remit the party to his right to file a supplemental bill in the original suit,[85] or to institute a new and plenary action;[86] but where the violation of an injunction is willful, the summary method of correction is imperative[87] and will not be arrested by the fact that the proofs of violation are conflicting.[88] Also, while it is within the discretion of the court in contempt proceedings to pass upon the question whether a new, changed, or modified device, process, or apparatus adopted by defendant since the granting of the injunction constitutes a violation thereof,[89] or refuse to pass upon it[90] and remit complainant to some other remedy,[91] yet the court will not ordinarily deal with the question[92] or adjudge defendant in contempt for having adopted the change,[93] unless the change is a mere colorable equivalent of the device, process, or apparatus which has been adjudged to be an infringement.[94] Questions relating to the validity of the patent will not be tried in contempt proceedings;[95] and where the injunction was granted on the strength of a prior adjudication construing the patent, such construction will be followed on the hearing of a motion for an attachment for contempt in violating the injunction.[96] In denying a motion for an attachment, the court may expressly limit the decision so that it shall be without prejudice to either party in other proceedings[97] and not conclusive on any question that may be raised on the account-

80. See cases infra this note.

[a] **Civil or criminal proceedings.**—(1) The distributions between civil and criminal contempt proceedings generally (see Contempt § 81) (2) are applicable to contempt proceedings for violation of an injunction in patent litigation (Turner v. U. S., 238 Fed. 194, 151 CCA 270). (3) While the public and private remedies may be combined in one proceeding (Electro-Bleaching Gas Co. v. Paradon Engineering Co., 15 F. (2d) 854), (4) defendant must not be left in any doubt as to whether he is called upon to face a criminal charge (Electro-Bleaching Gas Co. v. Paradon Engineering Co., supra), (5) and a civil contempt proceeding "begun and prosecuted by a litigant to preserve an individual property right, should not, in disregard of his interest, be turned by the court at the end into a criminal prosecution, merely to speed a hearing in an appellate court" (Turner v. U. S., supra). (6) Pleadings as indicating civil character of proceeding see infra note 81 [a], [b]. (7) "Under existing practice no steps will be taken to punish on the criminal side of the court, except on the interposition of the United States attorney." Gordon v. Turco-Halvah Co., Inc., 233 Fed. 430, 432 [aff 247 Fed. 487, 159 CCA 541].

81. See cases infra this note.

[a] **Prayer for issuance of attachment** (1) is such a common and appropriate prayer for process in a purely civil contempt proceeding that it will not be considered sufficient to put respondent on notice that he is in jeopardy of an order which will be in part punitive, rather than coercive or otherwise remedial. Monroe Body Co. v. Herzog, 18 F. (2d) 578 [mod 13 F. (2d) 705]. (2) Notice generally see infra § 612.

[b] **Entitling** of a motion and order to show cause in the action indicates, in the absence of a specific demand that defendant be adjudged guilty of a criminal contempt, that plaintiff is seeking to have defendant adjudged guilty of a civil contempt. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 15 F. (2d) 854.

82. See cases infra this note.

[a] **Presumptions.**—(1) Machines designated by the same name and made by the same company as the machines containing infringing devices, the manufacture and sale of which were enjoined, will be presumed to be the same, in the absence of any denial, in proceedings to punish a violation of the injunction. Stahl v. Ertel, 62 Fed. 920. (2) Defendant, four months before the service of an injunction on him, executed a bond to plaintiff, acknowledging the validity of his patent and his right to all that was granted by it. It was held that the bond was no evidence of a breach of the injunction further than the recital that defendant had infringed the patent might have a tendency to establish such breach, and that the inference or presumption arising from it might be overcome by credible and positive testimony, proving no infringement. Byam v. Eddy, 4 F. Cas. No. 2,263, 2 Blatchf. 521, 24 Vt. 666.

[b] **Burden of proof.**—The burden of establishing the violation of the injunction rests with complainant. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 15 F. (2d) 854; Accumulator Co. v. Consolidated Electric Storage Co., 53 Fed. 793.

[c] **Admissibility.**—(1) On a motion for attachment for contempt for violating an injunction issued to restrain the infringement of a patent, after a construction has been given to a patent by the court, no testimony is admissible to vary such construction. Burdett v. Estey, 4 F. Cas. No. 2,146, 4 Bann. & A. 141, 16 Blatchf. 105 [rev on other grounds 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058]. (2) Affidavits to show that the patentee was not the first and original inventor of the thing patented are immaterial and irrelevant. Whipple v. Hutchinson, 29 F. Cas. No. 17,517, 4 Blatchf. 190. (3) It is a matter of discretion whether the court will receive expert testimony on the question of infringement or violation, or will examine the alleged infringing articles for itself. Burdett v. Estey, supra.

[d] **Question of fact determined on evidence.**—On the hearing of the motion the question as to whether the machine constructed is the same as the old one enjoined is one of fact to be determined on the evidence. Birdsell v. Hagerstown Agricultural Implement Mfg. Co., 3 F. Cas. No. 1,436, 2 Bann. & A. 519, 1 Hughes 59.

83. Victor Talking Mach. Co. v. Greenberg, 181 Fed. 543; Woodruff v. North Bloomfield Gravel Min. Co., 45 Fed. 129; Smith v. Halkyard, 19 Fed. 602; Birdsell v. Hagerstown Agricultural Implement Mfg. Co., 3 F. Cas. No. 1,436, 2 Bann. & A. 519, 1 Hughes 59.

[a] **Evidence which merely establishes probability** that defendant has violated the injunction is not sufficient to warrant his punishment for contempt. Standard Typewriter Co. v. Standard Folding Typewriter Sales Co., 183 Fed. 596.

[b] **Evidence held insufficient.**—Omeliah v. American Cap Front Mfg. Co., 195 Fed. 539; Victor Talking Mach. Co. v. Greenberg, 181 Fed. 543.

84. California Artificial Stone Pav. Co. v. Molitor, 113 U. S. 609, 5 SCt 618, 28 L. ed. 1106; Electro-Bleaching Gas Co. v. Paradon Engineering Co., 15 F. (2d) 854; Rajah Auto Supply Co. v. Grossman, 207 Fed. 84, 124 CCA 659; Armstrong v. Belding, 181 Fed. 173; Electric Vehicle Co. v. De Dietrich Import Co., 159 Fed. 492.

[a] **Where question is close,** and can better be determined at final hearing, a motion to punish for contempt will be denied. Victor Talking Mach. Co. v. Hoschke, 180 Fed. 777.

85. Enterprise Mfg. Co. v. Sargent, 48 Fed. 453; Allis v. Stowell, 15 Fed. 242.

Supplemental bills generally see infra § 566.

86. U. S. Playing-Card Co. v. Spalding, 93 Fed. 822; Enterprise Mfg. Co. v. Sargent, 48 Fed. 453; Truax v. Detweiler, 46 Fed. 117; Pennsylvania Diamond-Drill Co. v. Simpson, 39 Fed. 284; Temple Pump Co. v. Goss Pump, etc., Co., 31 Fed. 292; Wirt v. Brown, 30 Fed. 187; Allis v. Stowell, 15 Fed. 242; Bate Refrigerating Co. v. Eastman, 11 Fed. 902; Putnam v. Hollender, 11 Fed. 75; Liddle v. Cory, 15 F. Cas. No. 8,338, 7 Blatchf. 1.

87. Wetherill v. New Jersey Zinc Co., 29 F. Cas. No. 17,463, 1 Bann. & A. 105.

88. Wetherill v. New Jersey Zinc Co., supra.

89. Monroe Body Co. v. Herzog, 13 F. (2d) 705 [mod on other grounds 18 F. (2d) 578]; Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541.

90. National Metal Molding Co. v. Tubular Woven Fabric Co., 239 Fed. 907, 153 CCA 35.

91. National Metal Molding Co. v. Tubular Woven Fabric Co., supra (supplemental bill or petition to be answered by defendant and heard on formal proofs).

92. Metropolitan Sewing Mach. Corp. v. American Perfect Binder Co., 272 Fed. 520; Charles Green Co. v. Henry P. Adams Co., 247 Fed. 485, 159 CCA 539; Crown Cork, etc., Co. v. American Cork Specialty Co., 211 Fed. 650, 128 CCA 154 [aff 190 Fed. 323, 201 Fed. 344, 206 Fed. 473]; Enterprise Mfg. Co. v. Sargent, 48 Fed. 453. And see Individual Drinking Cup Co. v. Public Serv. Cup Co., 234 Fed. 653, 237 Fed. 400 [mod on other grounds 250 Fed. 620, 162 CCA 636] (assuming that the new device could not, under the circumstances, have been brought into the case by contempt proceedings).

93. Electro-Bleaching Gas Co. v. Paradon Engineering Co., 15 F. (2d) 854; Minerals Separation, Ltd. v. Miami Copper Co., 268 Fed. 862 [aff 269 Fed. 265].

94. See infra § 614.

95. Metropolitan Sewing Mach. Corp. v. American Perfect Binder Co., 272 Fed. 520; Campbell v. Magnet Light Co., 175 Fed. 117; Enterprise Mfg. Co. v. Sargent, 48 Fed. 453; Roemer v. Newman, 19 Fed. 98; Whipple v. Hutchinson, 29 F. Cas. No. 17,517, 4 Blatchf. 190.

96. Accumulator Co. v. Consolidated Electric Storage Co., 53 Fed. 793.

97. Burdett v. Estey, 4 F. Cas. No. 2,146, 4 Bann. & A. 141, 16 Blatchf. 105 [rev on other grounds 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058].

ing under the interlocutory decree.[98] While some discretion is vested in the court,[99] nevertheless the order to be entered in the proceeding is not exclusively a discretionary one.[1]

Sufficiency of writ. Where the writ of injunction does not describe the things enjoined, but merely refers to the bill for this purpose, it cannot be the foundation for an attachment for contempt against any person,[2] except perhaps a defendant who has been served with the bill.[3]

Costs.[4] Where, after the granting of an injunction, defendant promptly entered upon a practice which violated it, he may, upon being adjudged guilty of contempt, be directed to pay the costs of the contempt proceedings.[5] Under some circumstances plaintiff may be required to pay the costs of a motion for attachment;[6] but where the injunction has been violated, and defendant is protected from the consequences only by a defect in the service of the writ, no costs will be allowed to him on denial of a motion for an attachment for such violation.[7]

[§ 612] **(b) Knowledge or Notice.** Actual service of an injunction upon the person sought to be restrained from infringing a patent is not requisite to lay the foundation of a proceeding against him for contempt,[8] actual notice of the order of injunction being deemed sufficient;[9] but before a party who has violated an injunction against infringing a patent can be punished for contempt, it must appear that he has been served with notice of the proceedings therefor,[10] or has appeared in the proceedings;[11] and before criminal punishment for contempt can be imposed upon a person, he must be given notice of some kind, however informal, that such punishment is sought by the complaining party or the United States or is contemplated by the court.[12]

[§ 613] **(c) Persons or Corporations Liable.** Defendant in a patent infringement suit is in contempt where he violates an injunction[13] on his own behalf[14] or as agent of another person,[15] or where the injunction is violated by his agents, servants, or employees;[16] and where he organizes a company and continues the infringement both he[17] and the corporation[18] are liable. Also an officer of defendant corporation is guilty of contempt where, after the granting of the injunction, he continues infringement individually[19] or in the name of another company;[20] and one who knowingly assists another in violating an injunction is likewise guilty of contempt;[21] but a person cannot be adjudged guilty of contempt where he is not a party to the record and is not an agent, servant, or employee of defendant or in collusion with him.[22]

[§ 614] **(d) What Constitutes Violation.** An injunction against infringement of a patent may be

98. Burdett v. Estey, supra.

99. See supra note 79 [b]; and text and notes 89-91.

1. Union Tool Co. v. Wilson, 259 U. S. 107, 42 SCt 427, 66 L. ed. 848 [aff 265 Fed. 669].

2. Whipple v. Hutchinson, 29 F. Cas. No. 17,517, 4 Blatchf. 190.

3. Whipple v. Hutchinson, supra.

4. Payment of fine to complainant as compensation for time and outlay see supra note 79 [b].

5. Blair v. Jeannette-McKee Glass Works, 161 Fed. 355.

6. Sparkman v. Higgins, 22 F. Cas. No. 13,209, 2 Blatchf. 29, Fish. Pat. R. 135.

[a] **Thus,** where plaintiff set on foot a stratagem to lead defendant to violate the injunction, and immediately made a motion for an attachment, knowing defendant to be innocent of any wrongful act, and it clearly appears that there has been no violation of the injunction, plaintiff must pay the costs of the motion. Sparkman v. Higgins, 22 F. Cas. No. 13,209, 2 Blatchf. 29, Fish. Pat. R. 135.

7. Whipple v. Hutchinson, 29 F. Cas. No. 17,517, 4 Blatchf. 190.

8. Christensen Engineering Co. v. Westinghouse Air-Brake Co., 135 Fed. 774, 68 CCA 476. Compare Whipple v. Hutchinson, 29 F. Cas. No. 17,517, 4 Blatchf. 190 (where there is no doubt about the service of the writ of injunction, a motion for an attachment will be denied).

9. Christensen Engineering Co. v. Westinghouse Air-Brake Co., 135 Fed. 774, 68 CCA 476.

[a] **Injunction ordered but not issued.**—(1) Where an injunction against the infringement of a patent has been ordered, a party who, having knowledge of that order, deliberately violates the injunction ordered, although not yet issued, is guilty of contempt of court. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 Fed. 736 [aff 129 Fed. 1005, 64 CCA 122]. See Union Tool Co. v. Wilson, 259 U. S. 107, 42 SCt 427, 66 L. ed. 848 [aff 265 Fed. 669] (dictum). (2) However, in order to convict a person of contempt under such circumstances, it must be shown clearly that he had knowledge of the order of injunction in such a way that it can be held that he understood it, and with that knowledge committed willful violation of the order. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., supra.

10. Union Tool Co. v. U. S., 262 Fed. 431; Bate Refrigerating Co. v. Gillett, 24 Fed. 696. And see Christensen Engineering Co. v. Westinghouse Air-Brake Co., 135 Fed. 774, 68 CCA 476 (recognizing the rule but holding that, where notice of the commencement of contempt proceedings was properly given to defendant's attorney, and, under order of court, notice of the application for attachment and a copy of the affidavits to be issued thereon, were sent to defendant by registered mail and returned marked "Refused," defendant not having controverted the charge of contempt, an objection that the notice of the proceeding was properly served is not well taken).

11. Union Tool Co. v. U. S., 262 Fed. 431 [motion for leave to file petition for mandamus den 254 U. S. 608 mem, 41 SCt 12 mem, 65 L. ed. 436 mem].

12. Monroe Body Co. v. Herzog, 18 F. (2d) 578 [mod reh 13 F. (2d) 705].

Pleadings as giving notice see supra § 611.

13. See supra § 611.

14. Potter v. Muller, 19 F. Cas. No. 11,333, 1 Bond 601, 2 Fish. Pat. Cas. 631.

15. Potter v. Muller, supra.

16. Motion Picture Patents Co. v. Laemmle, 186 Fed. 641; Gillette Safety Razor Co. v. Wolf, 180 Fed. 776; Westinghouse Air Brake Co. v. Christensen Engineering Co., 121 Fed. 562; Mundy v. Lidgerwood Mfg. Co., 34 Fed. 541.

[a] **Defendant is charged with duty** (1) of notifying his agents and employees of the injunction (Mundy v. Lidgerwood Mfg. Co., 34 Fed. 541), (2) and of taking such steps as will enforce obedience by his employees of instructions not to violate the injunction (Gillette Safety Razor Co. v. Wolf, 180 Fed. 776; Westinghouse Air Brake Co. v. Christensen Engineering Co., 121 Fed. 562 [mod on other grounds 135 Fed. 774, 68 CCA 476]).

17. Frank F. Smith Metal Window Hardware Co. v. Yates, 244 Fed. 793, 157 CCA 241; Diamond Drill, etc., Co. v. Kelley, 130 Fed. 893 [aff 137 Fed. 417, 69 CCA 532]; Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co., 80 Fed. 123.

18. Bernard v. Frank, 179 Fed. 516, 101 CCA 459.

19. Janney v. Pancoast International Ventilator Co., 124 Fed. 972; Stahl v. Ertel, 62 Fed. 920; Poppenhusen v. Falke, 19 F. Cas. No. 11,279, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181; Wetherill v. New Jersey Zinc Co., 29 F. Cas. No. 17,463, 1 Bann. & A. 105.

20. Donaldson v. Roksament Stone Co., 176 Fed. 368; Campbell v. Magnet Light Co., 175 Fed. 117.

21. Hamilton v. Diamond Drill, etc., Co., 137 Fed. 417, 69 CCA 532; Diamond Drill, etc., Co. v. Kelley, 132 Fed. 978, 130 Fed. 893 [aff 137 Fed. 417, 69 CCA 532]; Welsbach Light Co. v. Daylight Incandescent Gaslight Co., 97 Fed. 950; Goodyear v. Mullee, 10 F. Cas. No. 5,577, 5 Blatchf. 429, 3 Fish. Pat. Cas. 209.

[a] **Illustrations.**—(1) One who with knowledge of an injunction enjoining certain persons from infringement takes over their business and continues it in collusion with them is guilty of contempt. Hamilton v. Diamond Drill, etc., Co., 137 Fed. 417, 69 CCA 532; Diamond Drill, etc., Co. v. Kelley, 132 Fed. 978, 130 Fed. 893 [aff 137 Fed. 417, 69 CCA 532]. (2) Assisting another infringer in a suit contesting the validity of the patent is contempt. Bate Refrigerating Co. v. Gillett, 30 Fed. 683.

22. See cases infra this note.

[a] **Former employee** of defendant is not in contempt where he is acting independently. E. W. Bliss Co. v. Atlantic Handle Co., 212 Fed. 190; Donaldson v. Roksament Stone Co., 178 Fed. 103.

[b] **Agent of purchaser pendente lite.**—An agent of a corporation which purchased the property and business of defendant after the suit was instituted and before the decree of injunction was issued, and which is not a party to the record, is not in contempt. Bate Refrigerating Co. v. Gillett, 30 Fed. 685.

[c] **Part owner of patent.**—Where one part owner of a patent, together with his agents, servants, and employees, has been restrained by injunction from sending out notices of infringement of the patent to plaintiff's customers, another part owner who is not a party defendant or subject to the jurisdiction of the court, and is not an agent, servant, or employee of defendant, cannot be punished for contempt in sending out, in his own behalf, notices of infringe-

violated by a continuance of a prior practice[23] or by the adoption of a mere subterfuge or colorable change or modification;[24] but it is not violated by the adoption of a new construction which does not infringe the patent[25] or by the use of a combination after the expiration of the patent thereon;[26] and an act which may constitute a breach of a contract entered into by complainant and defendant after the granting of the injunction does not necessarily constitute contempt.[27]

Place of sale. An injunction against infringement of a patent may be violated by a sale outside the territorial jurisdiction of the court granting the injunction,[28] unless the sale is in a foreign country to which the monopoly of the patent does not extend.[29]

Contributory infringement of a patent may constitute disobedience of an injunction.[30]

Advertising for sale articles which have been adjudged infringements of complainant's patent does not in itself constitute a breach of an injunction against a sale,[31] but it is of course a violation of a clause of an injunction specifically prohibiting advertising,[32] and is also strong evidence of the violation of the injunction in other respects.[33]

[§ 615] **(e) Defenses and Mitigation.** That the injunction was granted upon a patent which has since been materially altered by disclaimer constitutes a defense in contempt proceedings.[34] Matters held not to constitute excuses for violating an injunction against infringement of a patent include a misnomer in the injunction,[35] temptation due to financial straits,[36] and the fact that the infringing article, device, or machine is made according to a junior patent.[37]

Matters mitigating punishment but not excusing violation. The fact that the injunction was erroneously granted furnishes no excuse for its violation,[38] but may be considered in mitigation of punishment.[39] Also, in civil contempt proceedings,[40] good faith or absence of intention to infringe the patent or violate the injunction is no excuse for violation,[41] but it may be considered in mitigation of the penalty,[42] and no punishment for criminal contempt can be imposed where there is a mere violation of an injunction in good faith, and without any intention to disobey or set at naught the order of the court, or any willful and contumacious disregard of the authority of the court.[43] Likewise, in civil contempt proceedings,[44] the advice of counsel is not a suffi-

ment. McCall Co. v. Bladworth, 290 Fed. 365.

23. Blair v. Jeannette-McKee Glass Works, 161 Fed. 355.

24. Field Body Corp. v. Highland Body Mfg. Co., 13 F. (2d) 626; Pyrene Mfg. Co. v. Boyce, 1 F. (2d) 185; Schey v. Giovanna, 273 Fed. 515; Eureka Tool Co. v. Wire Rope Appliance Co., 265 Fed. 673 [aff 256 Fed. 677]; Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541; Frank F. Smith Metal Window Hardware Co. v. Yates, 244 Fed. 793, 157 CCA 241; Crown Cork, etc., Co. v. Brooklyn Bottle Stopper Co., 206 Fed. 473 [app dism 211 Fed. 650, 128 CCA 154]; Queen v. Queen, 170 Fed. 611; Blair v. Jeannette-McKee Glass Works, 161 Fed. 355; Bate Refrigerating Co. v. Gillett, 30 Fed. 683; Burr v. Kimbark, 29 Fed. 428; Colgate v. Gold, etc., Tel. Co., 6 F. Cas. No. 2,992, 4 Bann. & A. 559; Craig v. Fisher, 6 F. Cas. No. 3,332, 2 Sawy. 345; Hamilton v. Simons, 11 F. Cas. No. 5,991, 5 Biss. 77; Phillips v. Detroit, 19 F. Cas. No. 11,101, 3 Bann. & A. 150, 2 Flipp. 92; Potter v. Muller, 19 F. Cas. No. 11,333, 1 Bond 601, 2 Fish. Pat. Cas. 631.

[a] **Spirit of injunction.**—Although the command of an injunction against the infringement of a patent must be explicitly obeyed, yet it is the spirit and not the letter of the injunction which must be obeyed. Bate Refrigerating Co. v. Gillett, 30 Fed. 683.

[b] **Retention of principle.**—Where the principle involved in a patent is the point in issue in a suit to restrain its infringement, defendant commits a breach of a preliminary injunction and is punishable for contempt where, for the purpose of evading the injunction, he continues to manufacture articles involving the same principle, with but slight modifications of structure. Burr v. Kimbark, 29 Fed. 428.

25. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Kelsey Heating Co. v. James Spear Stove, etc., Co., 158 Fed. 414.

26. Johnson v. Brooklyn, etc., R. Co., 37 Fed. 147, 2 LRA 489.

[a] **After patent has been surrendered** and a reissue obtained a judgment for infringement of the original patent cannot be enforced by process of contempt. Detroit Fuse, etc., Co. v. Metropolitan Engineering Co., 21 Can. Exch. 276, 63 DomLR 179.

27. American Graphophone Co. v. Victor Talking Mach. Co., 183 Fed. 580, 106 CCA 348 [rev 178 Fed. 577].

28. Macauley v. White Sewing Mach. Co., 9 Fed. 698.

29. Rushmore v. Manhattan Screw, etc., Works, 170 Fed. 188; Gould v. Sessions, 67 Fed. 163, 14 CCA 366.

30. Victor Talking Mach. Co. v. Leeds, etc., Co., 150 Fed. 147.

[a] **Sale of parts** of a machine may constitute a violation of an injunction. Wilson v. Union Tool Co., 265 Fed. 669 [certiorari granted 254 U. S. 624 mem, 41 SCt 14 mem, 65 L. ed. 444 mem, and aff 259 U. S. 107, 42 SCt 427, 66 L. ed. 848]; United Tel. Co. v. Dale, 25 Ch. D. 778.

31. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 Fed. 736 [aff 129 Fed. 1005, 64 CCA 122].

32. Stahl v. Ertel, 62 Fed. 920.

33. Stahl v. Ertel, supra.

34. Dudgeon v. Thomson, 3 App. Cas. 34.

35. Dickerson v. Armstrong, 94 Fed. 864.

36. A. B. Dick Co. v. Henry, 88 Fed. 80.

37. Monroe Body Co. v. Herzog, 13 F. (2d) 705 [mod on other grounds 18 F. (2d) 578]; Norton v. Eagle Automatic Can Co., 59 Fed. 137. See Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541 (discussing, but not deciding, the point); Charles Green Co. v. Henry P. Adams Co., 247 Fed. 485, 159 CCA 539 (dictum that while the procuring of a new patent by defendant does not absolutely prevent punishment for contempt, it is a circumstance of great weight in reaching a decision). Compare Bonsack Mach. Co. v. National Cigarette Co., 64 Fed. 858; Pennsylvania Diamond-Drill Co. v. Simpson, 39 Fed. 284; Wirt v. Brown, 30 Fed. 187 (all three cases holding that the question whether a newly-patented article, device, or machine is an infringement ought not to be determined upon a motion to attach or punish for contempt and therefore the motion should be denied).

38. Roener v. Newman, 19 Fed. 98; Craig v. Fisher, 6 F. Cas. No. 3,332, 2 Sawy. 345; Phillips v. Detroit, 19 F. Cas. No. 11,101, 3 Bann. & A. 150, 2 Flipp. 92; Valentine v. Reynolds, 28 F. Cas. No. 16,813; Whipple v. Hutchinson, 29 F. Cas. No. 17,517, 4 Blatchf. 190.

[a] **Remedy** (1) in such case is by appeal or writ of error. Craig v. Fisher, 6 F. Cas. No. 3,332, 2 Sawy. 345. (2) Appeal and error generally see infra §§ 648–652.

39. Westinghouse Air-Brake Co. v. Christensen Engineering Co., 128 Fed. 749.

40. Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418.

41. Robinson v. S. & B. Lederer Co., 146 Fed. 993; Bate Refrigerating Co. v. Gillett, 30 Fed. 683. Compare Edison Electric Light Co. v. Goelet, 65 Fed. 612 (one will not be punished for a technical violation of an injunction restraining the use of articles infringing a patent when he has made an honest effort to remove the offending articles from the premises where they were used, although, by oversight, a few articles remain).

42. Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418; Westinghouse Electric Mfg. Co. v. Condit Electrical Mfg. Co., 173 Fed. 82; In re De Forest Wireless Tel. Co., 154 Fed. 81; Robinson v. S. & B. Lederer Co., 146 Fed. 993; Norton v. Eagle Automatic Can Co., 59 Fed. 137; Morss v. Domestic Sewing-Mach. Co., 38 Fed. 482; Bate Refrigerating Co. v. Gillett, 30 Fed. 683; Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co., 30 Fed. 615; Carstaedt v. U. S. Corset Co., 5 F. Cas. No. 2,468, 2 Bann. & A. 331, 13 Blatchf. 371; Phillips v. Detroit, 19 F. Cas. No. 11,101, 3 Bann. & A. 150, 2 Flipp. 92.

[a] **Light fine** will be imposed where the violation was probably unintentional. Frank v. Bernard, 146 Fed. 137.

[b] **Only nominal penalty** will be imposed where the occurrence in question was a sporadic one, not likely to occur again, and was not planned by defendant as a cover for deliberate, or even careless, infringement. Motion Picture Patents Co. v. Laemmle, 186 Fed. 641.

43. Union Tool Co. v. U. S., 262 Fed. 431 [motion for leave to file petition for mandamus den 254 U. S. 608 mem, 41 SCt 12 mem, 65 L. ed. 436 mem]; Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 144 CCA 418.

44. Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., supra.

cient excuse for violating the injunction,[45] but where it has been honestly relied upon, a heavy penalty will not usually be imposed.[46]

[§ 616] **d. Indemnity Bond.**[47] In lieu of an injunction defendant may be required to give a bond conditioned for the payment of damages and profits awarded,[48] and, in addition to the bond, to file periodical statements showing the business done by him in respect of the alleged infringing devices;[49] but where the validity and infringement of the patent are clear, the court will often refuse to accept a bond in lieu of an injunction,[50] unless defendant would suffer great injury from an injunction.[51] Defendant will, on his motion, be relieved and discharged from further performance of an order requiring him to give bond and file monthly statements where, subsequent to the granting of the order, the court of appeals of the same circuit held the patent to be void.[52]

[§ 617] **e. Profits and Damages**[53]**—(1) Distinctions.** Defendant's profits and complainant's damages from the infringement of a patent are distinct from and independent of each other[54] and are governed by different principles.[55]

[§ 618] **(2) Right to Generally.**[56] In a suit for infringement of a patent, compensation for past infringement may be awarded.[57]

Profits generally. In equity complainant may ordinarily recover the amount of the gains and profits that defendant has made from his unauthorized use of the patented invention,[58] even though the owner

45. Queen v. Green, 170 Fed. 611; Victor Talking Mach. Co. v. Leeds, etc., Co., 150 Fed. 147 [aff 213 U. S. 325, 29 SCt 503, 53 L. ed. 816]; Calculagraph Co. v. Wilson, 136 Fed. 196; Paxton v. Brinton, 126 Fed. 542; Bowers v. Pacific Coast Dredging, etc., Co., 99 Fed. 745 [app dism 105 Fed. 1004, 44 CCA 684]; Bate Refrigerating Co. v. Gillett, 30 Fed. 683; Burr v. Kimbark, 29 Fed. 428. See Hamilton v. Simons, 11 F. Cas. No. 5,991, 5 Biss. 77 (recognizing the rule, and refusing to discharge defendant from the attachment, but declining to punish him at the time). Contra Goss Printing Press Co. v. Scott, 134 Fed. 880.

[a] **Judgment of court.**—Defendant should get the judgment of the court whether changes made avoid infringement. Bowers v. Pacific Coast Dredging, etc., Co., 99 Fed. 745 [app dism 105 Fed. 1004, 44 CCA 684]; Hamilton v. Simons, 11 F. Cas. No. 5,991, 5 Biss. 77.

46. Victor Talking Mach. Co. v. Leeds, etc., Co., 150 Fed. 147.

47. Bond from:

Defendant to obtain stay of injunction see supra §§ 608, 609.

Plaintiff to obtain preliminary injunction see supra § 607.

48. Toledo Plate, etc., Glass Co. v. Kawneer Mfg. Co., 262 Fed. 510; Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 116 CCA 454; Electric Smelting, etc., Co. v. Carborundum Co., 189 Fed. 710; Karfiol v. Rothner, 151 Fed. 777; National Enameling Co. v. New England Enameling Co., 123 Fed. 436 [aff 153 Fed. 184, 82 CCA 359]; Marvel Co. v. Pearl, 114 Fed. 946; Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 106 Fed. 175; Seiler v. Fuller, etc., Mfg. Co., 102 Fed. 344, 42 CCA 386; National Cash-Register Co. v. Navy Cash-Register Co., 99 Fed. 565; Duplex Printing-Press Co. v. Campbell Printing-Press, etc., Co., 69 Fed. 250, 16 CCA 220; Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. 496; Eastern Paper-Bag Co. v. Nixon, 35 Fed. 752; Hoe v. Knap, 27 Fed. 204; New York Belting, etc., Co. v. Magowan, 23 Fed. 596; Greenwood v. Bracher, 1 Fed. 856; Gilbert, etc., Mfg. Co. v. Bussing, 10 F. Cas. No. 5,416, 1 Bann. & A. 621, 12 Blatchf. 426; Goodyear v. Hills, 10 F. Cas. No. 5,571a, 3 Fish. Pat. Cas. 134; Howe v. Morton, 12 F. Cas. No. 6,769, Fish. Pat. R. 586; Irwin v. McRoberts, 13 F. Cas. No. 7,085, 4 Bann. & A. 411; Morris v. Shelbourne, 17 F. Cas. No. 9,836, 8 Blatchf. 266, 4 Fish. Pat. Cas. 377. Compare Manton-Gaulin Mfg. Co. v. American Bottle Cap Co., 250 Fed. 865, 867 ("This is a patent cause in which the relief prayed, aside from the recovery of profits and damages, is an injunction against acts of infringement. On the showing which has been made the plaintiff is entitled to a preliminary injunction, but not to an order against the American Bottle Cap Company in invitum for the giving of bond as moved for. After the awarding of a preliminary injunction, if the parties agree upon the giving of bond by the defendant in a given amount, to the end that it may be relieved from the possible hardship of an injunction, the court would not interpose any objection to the carrying into effect of such an arrangement. But such procedure is totally unlike that now proposed by the plaintiff").

[a] **Such course is proper** (1) where an injunction would injure the public (American Ordnance Co. v. Driggs-Seabury Co., 87 Fed. 947; Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 47 Fed. 663; Southwestern Brush Electric Light, etc., Co. v. Louisiana Electric Light Co., 45 Fed. 893; Guidet v. Palmer, 11 F. Cas. No. 5,859, 10 Blatchf. 217, 6 Fish. Pat. Cas. 82), (2) or would result in considerable loss and injury to defendant (Karfiol v. Rothner, 151 Fed. 777), (3) and the patent has only a very short time to run (Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298; Draper Co. v. American Loom Co., 161 Fed. 728, 88 CCA 588).

[b] **Computation of amount of bond.**—In fixing the amount of a bond required of defendant in a suit for infringement of patents as a condition to the refusing of a preliminary injunction, the amount of the profits made by him from the alleged infringement affords the only approximate basis for computation. Karfiol v. Rothner, 151 Fed. 779.

[c] **Bond operates prospectively** and does not cover damages for infringements prior to the order for the bond. Toledo Plate, etc., Co. v. Kawneer Mfg. Co., 262 Fed. 510.

49. U. S. Gypsum Co. v. Bestwall Mfg. Co., 290 Fed. 800; Karfiol v. Rothner, 151 Fed. 777; Marvel Co. v. Pearl, 114 Fed. 946; Macbeth v. Lippencott Glass Co., 54 Fed. 167; Eagle Mfg. Co. v. Chamberlain Plow Co., 36 Fed. 905; American Middlings Purifier Co. v. Atlantic Milling Co., 1 F. Cas. No. 305, 3 Bann. & A. 168, 4 Dill. 100; Blake v. Greenwood Cemetery, 3 F. Cas. No. 1,497, 3 Bann. & A. 112, 14 Blatchf. 342; Blake v. Robertson, 3 F. Cas. No. 1,500, 11 Blatchf. 237, 6 Fish. Pat. Cas. 509; Stainthorp v. Humiston, 22 F. Cas. No. 13,280, 2 Fish. Pat. Cas. 311.

50. Electric Storage Battery Co. v. Buffalo Electric Carriage Co., 117 Fed. 314 [aff 120 Fed. 672, 57 CCA 183 (certiorari den 188 U. S. 741, 23 SCt 849, 49 L. ed. 678)]; Campbell Printing-Press Co. v. Prieth, 77 Fed. 976; American Bell Tel. Co. v. Brown Tel., etc., Co., 58 Fed. 409; Norton v. Eagle Automatic Can Co., 57 Fed. 929; Carter v. Wollschlaeger, 53 Fed. 573; Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 545; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419; Conover v. Mers, 6 F. Cas. No. 3,123, 3 Fish. Pat. Cas. 386; Consolidated Fruit-Jar Co. v. Whitney, 6 F. Cas. No. 3,132, 1 Bann. & A. 356; Ely v. Monson, etc., Mfg. Co., 8 F. Cas. No. 4,431, 4 Fish. Pat. Cas. 64; Morse v. O'Reilly, 17 F. Cas. No. 9,859 [aff 15 How. 62, 14 L. ed. 601]; Tracy v. Torrey, 24 F. Cas. No. 14,127, 2 Blatchf. 275.

51. Westinghouse Air-Brake Co. v. Burton Stock-Car Co., 77 Fed. 301, 23 CCA 174.

52. Minerals Separation, Ltd. v. Butte, etc., Copper Co., 237 Fed. 401.

53. Accounting see infra §§ 636–639.

54. Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Beach v. Hatch, 153 Fed. 763.

[a] **Distinction stated.**—(1) "In patent nomenclature what the infringer makes is 'profits,' what the owner of the patent loses by such infringement is 'damages.'" Diamond Stone-Sawing Mach. Co. v. Brown, 166 Fed. 306, 92 CCA 224. (2) "Profits . . . [may be defined to be] the net gains of the infringer from the use of the patented invention, while damages are the losses sustained by the owner in consequence of the infringement." La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561. To same effect Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. No. 5,600, 2 Bann. & A. 252.

[b] **Decree for profits by way of damages not permissible.**—Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459].

One as measure of other see infra § 619.

"Profits from patent infringement" defined see Profit [32 Cyc 592].

55. Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Beach v. Hatch, 153 Fed. 763.

56. Profits and damages:

Liability of particular persons or corporations for see supra §§ 544–547.

Recovery of:

As affected by laches see supra § 535.

Effect of see infra § 646.

Marking of article or other notice as condition precedent to see supra § 484.

Right of particular persons or corporations to sue for see supra §§ 540–543.

57. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

58. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 565; Crosby Steam Gage, etc., Co. v. Consolidated Safety Valve Co., 141 U. S. 441, 35 L. ed. 809; Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Washington, etc., Steam Packet Co. v. Sickles, 19 Wall. (U. S.) 611, 22 L. ed. 203; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Livingston v. Woodworth, 15 How. (U. S.) 546, 14 L. ed. 809; Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; Underwood Typewriter Co. v. Stearns, 227

of the patent has made no use of the invention covered thereby;[59] but profits accruing after complainant sells his patent pending suit cannot be recovered by him.[60] While there can be no recovery of, or decree for, profits where defendant has not realized any gains, profits, or savings from the sale or use of the patented invention,[61] or it is not shown that he realized any,[62] yet where defendant has entered into an individual contract to install an apparatus for a consideration which includes a profit, he is liable for the profits made under the contract,[63] notwithstanding his attempted assignment of the contract and its profits after part performance.[64]

Damages generally. Damages for infringement of a valid patent during the life or term thereof may be recovered at law,[65] or in equity,[66] or, at least, in equity damages may be recovered in certain cases,[67] but not unless plaintiff could have recovered such damages in an action at law,[68] or there is a ground upon which a recovery of damages can be based.[69] Damages for use of the invention before the issuance of the patent cannot be recovered.[70]

Both profits and damages. In the United States it has been held that damages in addition to profits may be recovered in equity[71] when,[72] and only

Fed. 74, 141 CCA 622; Williams v. Rome, etc., R. Co., 2 Fed. 702, 5 Bann. & A. 423, 18 Blatchf. 181; Buerk v. Imhaeuser, 4 F. Cas. No. 2,107, 2 Bann. & A. 452, 14 Blatchf. 19; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Jenkins v. Greenwald, 13 F. Cas. No. 7,270, 1 Bond 126, 2 Fish. Pat. Cas. 37; Page v. Ferry, 18 F. Cas. No. 10,662, 1 Fish. Pat. Cas. 298.

[a] **"Reasons** (1) that have led to the adoption of this rule are, that it comes nearer than any other to doing complete justice between the parties; that in equity the profits made by the infringer of a patent belong to the patentee and not to the infringer; and that it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged." Tilghman v. Proctor, 125 U. S. 136, 145, 8 SCt 894, 31 L. ed. 664. (2) "The motive of the infringer of patented rights is taken away by requiring him to pay the profits of his labor to the owner of the patent." Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 77, 141 CCA 622.

[b] **Origin and affirmation of rule.** —(1) The rule stated in the text was established by a series of decisions under Patent Act July 4, 1836 c 357 (5 St. at L. 117), although that act simply conferred upon the courts of the United States general equity jurisdiction, with the power to grant injunctions, in cases arising under the patent laws. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622. (2) It was expressly affirmed by, and has been constantly upheld under, the provisions of the Patent Act July 8, 1870 c 230 par 55, embodied in Rev. St. § 4921. Tilghman v. Proctor, supra.

[c] **As trustee** (1) ex maleficio (Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653; Van Kannel Revolving Door Co. v. Uhrich, 297 Fed. 363 [certiorari den 266 U. S. 604 mem, 45 SCt 91 mem, 69 L. ed. 463 mem]; Van Kannell Revolving Door Co. v. Revolving Door, etc., Co., 293 Fed. 261; Carborundum Co. v. Electric Smelting, etc., Co., 203 Fed. 976, 122 CCA 276 [certiorari den 231 U. S. 754 mem, 34 SCt 323 mem, 58 L. ed. 467 mem]; In re Beckwith, 203 Fed. 45, 121 CCA 381), (2) or de son tort (Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; Brennan v. Dowagiac Mfg. Co., 162 Fed. 472, 89 CCA 392), defendant is bound to account for and pay over to plaintiff the profits which he has realized from the use of the latter's property.

[d] **"Wrongdoer is not allowed to keep** the profits he has made by selling an article which is an infringement of another's patent." Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331, 350.

Actual profits see infra § 620.

59. Crosby Steam Gage, etc., Co. v. Consolidated Safety Valve Co., 141 U. S. 441, 12 SCt 49, 35 L. ed. 809; Corborundum Co. v. Electric Smelting, etc., Co., 203 Fed. 976, 122 CCA 276 [certiorari den 231 U. S. 754 mem, 34 SCt 323 mem, 58 L. ed. 467 mem].

Lack of commercial use by plaintiff as defense generally see supra § 538.

60. Goss Printing Press Co. v. Scott, 134 Fed. 880.

61. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Carson v. American Smelting, etc., Co., 25 F. (2d) 116; Merrell Soule Co. v. Powdered Milk Co., 7 F. (2d) 297 [rev 2 F. (2d) 107]; American Pneumatic Serv. Co. v. Snyder, 241 Fed. 274; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622 [leave to reopen den 227 Fed. 1022 mem, 141 CCA 672 mem]; Conroy v. Penn Electrical, etc., Co., 199 Fed. 427, 118 CCA 101 [certiorari den 226 U. S. 612 mem, 33 SCt 219 mem, 57 L. ed. 381 mem].

62. Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1. See Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502 (where the advantage of plaintiff's process over other processes was not demonstrated to be so dominating as to warrant the award of profits or savings in respect thereof).

Burden of proving profits see supra § 583.

63. Hitchcock v. American Plate Glass Co., 259 Fed. 948, 171 CCA 24 (contract made between parties individually and not between them and their assigns).

64. Hitchcock v. American Plate Glass Co., supra.

65. Form of action to recover damages see supra §§ 522–524.

66. Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331.

67. Globe Knitting Works v. Segal, 239 Fed. 322.

[a] **Substantial infringement.**—Plaintiff is entitled to damages where a substantial number of infringing articles have been manufactured. Meurer Steel Barrel Co. v. Boyle Mfg. Co., 9 F. (2d) 92.

Cross references:

Cases in which damages in addition to profits recoverable see infra text and notes 71, 72.

Necessity of right to equitable relief when suit commenced see supra § 522.

68. Van Kannell Revolving Door Co. v. Revolving Door, etc., Co., 293 Fed. 261.

69. Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622.

70. Columbia, etc., R. Co. v. Chandler, 241 Fed. 261, 154 CCA 181; Lyor v. Donaldson, 34 Fed. 789; Brodie v. Ophir Silver Min. Co., 4 F. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 808.

[a] **On reissue** no damages before date of reissue are allowable. Agawam Woolen Co. v. Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177.

71. Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; Williams v. Rome, etc., R. Co., 2 Fed. 702, 18 Blatchf. 181, 5 Bann. & A. 423; Bancroft v. Acton, 2 F. Cas. No. 833, 7 Blatchf. 505; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 124 NW 291, 18 AnnCas 976.

[a] **Allowance of one does not preclude recovery of other.**—Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Beach v. Hatch, 153 Fed. 763.

[b] **Pertinent statute** (1) is U. S. Rev. St. § 4921. (2) Damages in addition to profits were first allowed by the act of July 8, 1870. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622 [leave to reopen case den 227 Fed. 1022 mem, 141 CCA 672 mem]; Willimantic Thread Co. v. Clark Thread Co., 27 Fed. 865; Williams v. Leonard, 29 F. Cas. No. 17,726, 13 Blatchf. 282, 43 Conn. 569.

[c] **Decree following language of statute** as to the recovery of profits and damages is not objectionable. Pedersen v. Dundon, 220 Fed. 309, 136 CCA 143.

72. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 263; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Marsh v. Seymour, 97 U. S. 348, 24 L. ed. 963; Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 276 Fed. 600 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)]; Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501; U. S. Mitis Co. v. Carnegie Steel Co., 89 Fed. 206 [aff 90 Fed. 829, 33 CCA 387]; Asbestine Tiling, etc., Co. v. Hepp, 39 Fed. 324; Hammacher v. Wilson, 32 Fed. 796; Simpson v. Davis, 22 Fed. 444, 22 Blatchf. 113; Andrews v. Creegan, 7 Fed. 477, 19 Blatchf. 113; Burdett v. Estey, 3 Fed. 566, 19 Blatchf. 1; Williams v. Rome, etc., R. Co., 2 Fed. 702, 18 Blatchf. 181, 5 Bann. & A. 423; Brady v. Atlantic Works, 3 F. Cas. No. 1,795, 3 Bann. & A. 577; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. No. 5,600, 2 Bann. & A. 252; Magic Ruffle Co. v. Elm City Co., 16 F. Cas. No. 8,950, 2 Bann. & A. 506, 14 Blatchf. 109; Williams v. Leonard, 29 F. Cas. No. 17,726, 9 Blatchf. 476, 5 Fish. Pat. Cas. 381; Wooster v. Taylor, 30 F. Cas. No. 18,041, 3 Bann. & A. 241, 14 Blatchf. 403.

"The rule for recovering in equity for infringement of a patent is that where the net profits earned by reason of the infringement do not sufficiently compensate the owner of the

when,[73] defendant's profits are insufficient to compensate plaintiff for the loss or injury which he has sustained from the infringement.[74] In England and Canada both damages and profits cannot be recovered[75] from the same infringer,[76] and plaintiff must elect between the two.[77]

Neither profits nor damages are recoverable where there has been no infringement.[78] A decree for damages or profits cannot be rendered against a person who is not a party to the suit;[79] and where suit is brought by two or more complainants as joint owners only, there can be no recovery of profits or damages inuring to the benefit of one complainant only as a licensee,[80] or as sole owner prior to the date of joint ownership.[81]

Damages from wrongful issuance of injunction. The dissolution of an injunction in a patent infringement suit does not necessarily entitle defendant to damages,[82] but he may be entitled to damages where complainant obtained the injunction or restraining order by giving a bond[83] or without directing the attention of the court to the fact that the patent had expired.[84]

[§ 619] **(3) Measure and Amount—(a) In General.** A sum fixed arbitrarily by the court,[85] and not based upon any evidence in the record[86] or any finding,[87] cannot be awarded as profits or damages in a suit for infringement of a patent. Profits and damages cannot be said to be the measure of each other.[88]

[§ 620] **(b) Profits—aa. In General.** The profits recoverable in equity for the infringement of a patent extend[89] and are limited[90] to the actual profits which have been made by defendant[91] directly and

patent for its infringement, there may, in a proper case, be awarded damages in addition to the ascertained net profits." Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 276 Fed. 600, 603 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)].

[a] **Where plaintiff is manufacturer,** his damages may exceed defendant's profits. Toledo Plate, etc., Glass Co. v. Kawneer Mfg. Co., 262 Fed. 510.

73. Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem]; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860; Brown Bag Filling Mach. Co. v. Drohen, 175 Fed. 576, 99 CCA 192; Hammacher v. Wilson, 32 Fed. 796; Ford v. Kurtz, 12 Fed. 789, 11 Biss. 324. See Christensen v. National Brake, etc., Co., 10 F. (2d) 856 (where profits are adequate compensation for the entire invasion of the patentee's rights, he is not entitled to have them duplicated in the form of damages, but he is entitled to make a choice between the two, and it is not the province of the court to make it for him).

[a] **Where sales were made in direct competition with complainant,** and complainant is allowed the profits which defendant made, he is not entitled also to recover as damages the profits he would have made from the same sales of his own machines. Peerless Brick Mach. Co. v. Miracle Pressed Stone Co., 181 Fed. 526.

74. **Limitation of damages to difference between defendant's profits and plaintiff's loss** see infra § 628.

75. De Vitre v. Betts, L. R. 6 H. L. 319; Neilson v. Betts, L. R. 5 H. L. 1; Holland v. Fox, 3 E. & B. 977, 77 ECL 977, 118 Reprint 1407; Needham v. Oxley, 8 L. T. Rep. N. S. 604.

76. Toronto Auer Light Co., Ltd. v. Colling, 31 Ont. 18.

[a] **Profits from manufacturer and damages from user** may be recovered. Penn v. Bibby, L. R. 3 Eq. 308; Toronto Auer Light Co., Ltd. v. Colling, 31 Ont. 18.

77. See cases supra note 75.

78. Van Kannell Revolving Door Co. v. Revolving Door, etc., Co., 293 Fed. 261.

[a] **Work performed by complainant.**—Loss of profits on contracts to obtain which the owner of the patent was compelled to lower his bids, because defendant bid to furnish an infringing article, is not "damages" arising from infringement because defendant did not infringe where he did not get the jobs. Van Kannell Revolving Door Co. v. Revolving Door, etc., Co., 293 Fed. 261.

[b] **For sales made in foreign country** (1) there can be no recovery of either profits or damages. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398. (2) Sale in foreign country as not constituting infringement see supra § 497.

[c] **Loans.**—(1) Profits or damages for a period of time a license contract was in force and fully carried out by both parties cannot be recovered. Schmertz Wire Glass Co. v. Western Glass Co., 203 Fed. 1006 [mod on other grounds 226 Fed. 730, 141 CCA 486]. (2) Lack of authority from patent owner as element of infringement see supra § 491.

79. Herman v. Youngstown Car Mfg. Co., 216 Fed. 604, 132 CCA 608 (person who, pending the suit, took over and continued defendant's business).

80. National Metal Weather Strip Co. v. Bredin, 186 Fed. 490, 108 CCA 468 [mod 182 Fed. 654].

81. Canda v. Michigan Malleable Iron Co., 152 Fed. 178, 81 CCA 420.

82. Vrooman v. Burdick, 222 Fed. 900, 138 CCA 380 (dissolution by dismissal of bill for failure to take proofs within the time prescribed by rule of court).

[a] **Gambling device.**—Where a preliminary injunction against infringement of a patent covering a gambling device was wrongfully issued, and on final hearing it was held that there was no infringement, defendant is not entitled to recover as damages the profits which plaintiff realized from the operation of the patented device while the injunction was in force. Harbaugh v. Dwyer, 289 Fed. 247.

Dissolution of injunction generally see supra § 608.

83. Tobey Furniture Co. v. Colby, 35 Fed. 592.

Bonds generally see supra § 607.

84. National Phonograph Co. v. American Graphophone Co., 136 Fed. 231.

85. Mast v. Superior Drill Co., 154 Fed. 45, 83 CCA 157.

86. Mast v. Superior Drill Co., supra.

87. Mast v. Superior Drill Co., supra.

88. Beach v. Hatch, 153 Fed. 763.

Whether damages measured by profits:
Defendant made see infra § 628.
Plaintiff would have made see infra § 630.

89. Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Burdell v. Denig, 92 U. S. 716, 23 L. ed. 764; Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Dean v. Mason, 20 How. (U. S.) 198, 15 L. ed. 876; Livingston v. Woodworth, 15 How. (U. S.) 546, 14 L. ed. 809; Conroy v. Penn Electrical, etc., Co., 199 Fed. 427, 118 CCA 101 [certiorari den 226 U. S. 612 mem, 33 SCt 219 mem, 57 L. ed. 381 mem]; Brennan v. Dowagiac Mfg. Co., 162 Fed. 472, 89 CCA 392; Campbell v. New York, 81 Fed. 182; Kirk v. Du Bois, 46 Fed. 486 [aff 158 U. S. 58, 15 SCt 729, 39 L. ed. 895]; Morss v. Union Form Co., 39 Fed. 468; Munson v. New York, 16 Fed. 560, 21 Blatchf. 342 [rev on other grounds 124 U. S. 601, 8 SCt 622, 31 L. ed. 586]; Burdett v. Estey, 3 Fed. 566, 19 Blatchf. 1 [rev on other grounds 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Coleman v. Liesor, 6 F. Cas. No. 2,984; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561; Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535; Tilghman v. Werks, 23 F. Cas. No. 14,046, 1 Bond 511, 2 Fish. Pat. Cas. 229; Vaughan v. East Tennessee, etc., R. Co., 28 F. Cas. No. 16,898, 2 Bann. & A. 537, 1 Flipp. 621; Wetherill v. New Jersey Zinc Co., 30 F. Cas. No. 18,464, 1 Bann. & A. 485.

90. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Burdell v. Denig, 92 U. S. 716, 23 L. ed. 764; Dean v. Mason, 20 How. (U. S.) 198, 15 L. ed. 876; MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459]; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 16 F. (2d) 194 [aff 296 Fed. 188, and certiorari den 268 U. S. 705 mem, 45 SCt 639 mem, 69 L. ed. 1167 mem]; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem]; Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199, 135 CCA 85 [mod 216 Fed. 828, and certiorari den 238 U. S. 623 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem]; Conroy v. Penn Electrical, etc., Co., 199 Fed. 427, 118 CCA 101 [certiorari den 226 U. S. 612 mem, 33 SCt 219 mem, 57 L. ed. 381 mem]; Westinghouse v. New York Air Brake Co., 140 Fed. 545, 72 CCA 61 [certiorari den 201 U. S. 648 mem, 26 SCt 762 mem, 50 L. ed. 904 mem]; Robbins v. Illinois Watch Co., 78 Fed. 124 [aff 81 Fed. 957, 27 CCA 21]; Munson v. New York, 16 Fed. 560, 21 Blatchf. 342 [rev on other grounds 124 U. S. 601, 8 SCt 622, 31 L. ed. 586]; Burdett v. Estey, 3 Fed. 566, 19 Blatchf. 1 [rev on other grounds 109 U. S. 633, 3 SCt 531, 27 L. ed. 1058].

[a] **Secondhand articles taken in exchange.**—(1) Where an infringer sold infringing scales at a fixed price, but sometimes accepted secondhand scales in part payment, he is required to account only for the amount received in cash and the amount received on resale of the secondhand scales, and not for the fixed price in money. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem]. (2) An infringer should not be charged with the agreed price of old machines taken in exchange, from which he realized nothing. Racine Engine, etc., Co. v. Confectioners' Mach., etc., Co., 234 Fed. 876, 148 CCA 474.

91. International Radio Tel. Co. v. Atlantic Communication Co., 290 Fed. 698 [certiorari den 263 U. S. 705 mem, 44 SCt 34 mem, 68 L. ed. 516 mem]; Kissinger-Ison Co. v. Brad-

immediately[92] from his wrongful appropriation of the patented invention, regardless of the fixed license fees or royalties paid to complainant by third persons,[93] defendant's skill and intelligence,[94] or the gains or profits which defendant might have made.[95] There can be no decree for profits as a punishment for infringement,[96] and while the damages found can,[97] the profits found cannot,[98] be increased in equity. Ordinarily the question of what constitutes profits is to be determined in a patent infringement suit by applying the principles governing the determination of what constitutes profits generally[99] or profits in noninfringing situations;[1] but in a case of willful infringement all doubts as to the amount of profits are resolved against the infringer.[2]

[§ 621] **bb. Saving from Use of Invention.** Where the infringement consisted of the use of a patented process, device, or machine,[3] as distinguished from the sale, or manufacture and sale, of a patented article, device, or machine,[4] and there is a proper standard of comparison,[5] the profits for which the infringer is liable may be measured by the saving or advantage which he has derived from the use of the patented invention over what he would have had in using other means then open to the public and adequate to obtain an equally beneficial result,[6] and he may be held liable for such saving or advantage even though, from other causes, his gen-

ford Belting Co., 123 Fed. 91, 59 CCA 221; Elwood v. Christy, 18 C. B. N. S. 494, 114 ECL 494, 144 Reprint 537; Walton v. Lavater, 8 C. B. N. S. 162, 98 ECL 162, 141 Reprint 1127.

Separate liability of two or more defendants see supra § 544.

92. Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333]; Piper v. Brown, 19 F. Cas. No. 11,181, 6 Fish. Pat. Cas. 240, Holmes 196; Wetherill v. New Jersey Zinc Co., 29 F. Cas. No. 17,464, 1 Bann. & A. 485.

93. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. ed. 1000; Wales v. Waterbury Mfg. Co., 87 Fed. 920; Fisk v. Mahler, 54 Fed. 528; Knox v. Great Western Quicksilver Min. Co., 14 F. Cas. No. 7,907, 4 Bann. & A. 25, 7 Reporter 325, 6 Sawy. 430; Wooster v. Taylor, 30 F. Cas. No. 18,041, 3 Bann. & A. 241, 14 Blatchf. 403.

Royalty or license fee as measure of damages see infra § 631.

94. Conroy v. Penn Electrical, etc., Co., 199 Fed. 427, 118 CCA 101 [certiorari den 226 U. S. 612 mem, 33 SCt 219 mem, 57 L. ed. 381 mem]; Lawther v. Hamilton, 64 Fed. 221, 224.

"An infringer cannot be heard to say that his superior skill and intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized. He is liable for all profits he has made by the illegal appropriation of another's invention. The patentee cannot recover more than actual profits because the exercise of skill would have enabled the infringer to realize better results, nor can the latter avoid paying actual profits on the ground that they would have been less, had he not been skillful." Lawther v. Hamilton, supra.

95. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Merrell Soule Co. v. Powdered Milk Co., 7 F. (2d) 297 [rev 2 F. (2d) 107]; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899, 907 [app dism 272 Fed. 1021 mem]; Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199, 135 CCA 85 [mod 216 Fed. 828, and certiorari den 238 U. S. 623 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem].

"Complainant is not entitled to recover profits which the infringer might or should have made, had it conducted its business in a different manner." Expanded Metal Co. v. General Fireproofing Co., supra.

96. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459].

97. See infra § 633.

98. Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, 92 CCA 400 [certiorari den 214 U. S. 513, 29 SCt 696, 53 L. ed. 1063]; Covert v. Sargent, 42 Fed. 298 [app dism 145 U. S. 635 mem, 12 SCt 979 mem, 36 L. ed. 855 mem (rev on other grounds 152 U. S. 516, 14 SCt 676, 38 L. ed. 536)]; Campbell v. James, 5 Fed. 806; Holbrook v. Small, 12 F. Cas. No. 6,596, 3 Bann. & A. 625.

[a] **Statute** (1) authorizing a court of equity to increase the damages found in favor of complainant in a suit for infringement of a patent (see infra § 633) (2) has no application to profits recoverable in such suit (McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem]; Covert v. Sargent, 42 Fed. 298 [app dism 145 U. S. 635 mem, 12 SCt 979 mem, 36 L. ed. 855 mem]).

99. Christensen v. National Brake, etc., Co., 10 F. (2d) 856.

1. Christensen v. National Brake, etc., Co., supra.

2. Regina Music Box Co. v. Otto, 114 Fed. 505.

3. American Pneumatic Serv. Co. v. Snyder, 241 Fed. 274; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516 [aff 170 Fed. 830].

4. Lee v. Malleable Iron Range Co., 247 Fed. 795 [mod on other grounds 263 Fed. 896 (certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem)]; American Pneumatic Serv. Co. v. Snyder, 241 Fed. 274.

[a] **Sales of similar articles by defendant.**—That defendant made and sold, or could have made and sold, similar articles at the same price, or at the same or an even larger profit, does not affect or limit the amount of profits otherwise recoverable from him for his sale of the patented article or product in question. Warren v. Keep, 155 U. S. 265, 15 SCt 83, 39 L. ed. 144; Am Ende v. Seabury, 43 Fed. 672 [aff 152 U. S. 561, 14 SCt 683, 38 L. ed. 553]; Simpson v. Davis, 22 Fed. 444, 22 Blatchf. 113; Burdett v. Estey, 3 Fed. 566, 19 Blatchf. 1.

5. See cases infra this note.

[a] **"Primarily,** the measure of profits derived from an infringing use is the infringer's gain or saving, which in turn is determined by comparing the cost of production by the infringing use with the cost of production by another machine or process when such exists." Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459, 461 [mod 21 F. (2d) 553].

[b] **Matters held to be proper standards of comparison** include: (1) That device or appliance which was open to defendant, and, next to plaintiff's invention, could have been most advantageously used in the place of that invention at the time of the infringement. Brown v. Lanyon Zinc Co., 179 Fed. 309, 102 CCA 497. (2) Another machine also used by defendant for the same purpose. Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1. (3) A structure previously used by defendant and replaced by the patented structure in question. Morgan Constr. Co. v. Forter-Miller Engineering Co., 234 Fed. 324, 148 CCA 226. (4) A separable part of the same machine where it was sometimes used alone by defendant for the same purpose, although not so satisfactorily. Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., supra. (5) A device which, although patented, was actually available to the infringer during the period of infringement. American Pneumatic Serv. Co. v. Snyder, 241 Fed. 274. (6) Another device or process which defendant might have chosen at the time of infringement, although it did not exist at the date of the patent. Minerals Separation v. Butte, etc., Min. Co., 274 Fed. 878; American Pneumatic Serv. Co. v. Snyder, supra; Columbia Wire Co. v. Kokomo Steel, etc., Co., 194 Fed. 108, 114 CCA 186. See Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem] (discussing the point). Contra Turrill v. Illinois Cent. R. Co., 20 Fed. 912. (7) The cupola or indirect method of mixing molten metal from a blast furnace so as to secure uniformity practically and substantially similar to that produced by the patented process. Cambria Iron Co. v. Carnegie Steel Co., 224 Fed. 947, 140 CCA 437 [certiorari den 239 U. S. 644 mem, 36 SCt 165 mem, 60 L. ed. 483 mem]. (8) A manual operation, where there was no prior machine which would do the work. Brown Bag Filling Mach. Co. v. Drohen, 175 Fed. 576, 99 CCA 192 (work of filling bags).

6. Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 SCt 40, 35 L. ed. 817 [aff 5 Fed. 367]; Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Black v. Thorne, 111 U. S. 122, 4 SCt 326, 28 L. ed. 372; Illinois Cent. R. Co. v. Turrill, 94 U. S. 695, 24 L. ed. 238; Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Carson v. American Smelting, etc., Co., 25 F. (2d) 116; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1; Minerals Separation, Ltd. v. Butte, etc., Min. Co., 274 Fed. 878; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021]; American Pneumatic Serv. Co. v. Snyder, 241 Fed. 274; Pressed Prism Glass Co. v. Continuous Glass Prism Co., 181 Fed. 151; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516 [aff 170 Fed. 830]; Dotem v. Boston, 138 Fed. 406, 70 CCA 308; Tuttle v. Claflin, 76 Fed. 227, 22 CCA 138 [certiorari den 166 U. S. 721 mem, 17 SCt 992 mem, 41 L. ed. 1187 mem]; Webster Loom Co. v. Higgins, 43 Fed. 673; Coupe v. Weatherhead, 37 Fed. 16 [rev on other grounds 147 U. S. 322, 13 SCt 312, 37 L. ed. 188]; Vulcanite Paving Co. v. American Artificial Stone Pavement Co., 36 Fed. 378; Tomkinson v. Willets Mfg. Co., 34 Fed. 536; Shannon v. Bruner, 33 Fed. 871; Turrill v. Il-

eral business in which the invention was employed has not been profitable;[7] but this rule, which is known as the "standard of comparison" rule,[8] is not applicable where there is no proper standard of comparison,[9] and the entire profits derived from the sale of the product made by using a patented machine or process may be recovered where there is no proper standard of comparison[10] or no profits could have been made by employing old methods.[11]

[§ 622] **cc. Entire or Apportioned Profits[12]—(aa) In General.** Complainant is entitled to recover all the profits derived by an infringer from the sale or use of an article where the patent covers the article as an entirety,[13] the article is a new and complete article of manufacture,[14] and the infringer does not show that a portion of the profits is the result of some other thing used by him.[15] Also complainant is entitled to recover all the profits realized by an infringer from the sale of an article or machine where its sale, or its entire value as a marketable commodity, is due solely to the patented feature thereof;[16] and likewise the owner of a patent

linois Cent R. Co., 20 Fed. 912; Maier v. Brown, 17 Fed. 736; Faulks v. Kamp, 10 Fed. 675; Calkins v. Bertrand, 8 Fed. 755, 10 Biss. 445; Campbell v. James, 5 Fed. 806; Williams v. Rome, etc., R. Co., 2 Fed. 702, 18 Blatchf. 181, 5 Bann. & A. 423; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Black v. Thorne, 3 F. Cas. No. 1,466, 1 Bann. & A. 155, 12 Blatchf. 20; Campbell v. Barclay, 4 F. Cas. No. 2,353, 5 Biss. 179; Knox v. Great Western Quicksilver Min. Co., 14 F. Cas. No. 7,907, 4 Bann. & A. 25, 7 Reporter 325, 6 Sawy. 430; Mulford v. Pearce, 17 F. Cas. No. 9,908, 2 Bann. & A. 542, 14 Blatchf. 141 [rev on other grounds 102 U. S. 112, 26 L. ed. 93]; Sargent v. Yale Lock Mfg. Co., 21 F. Cas. No. 12,367, 4 Bann. & A. 579, 17 Blatchf. 249 [rev on other grounds 117 U. S. 373, 29 L. ed. 950]; Serrell v. Collins, 21 F. Cas. No. 12,672, 1 Fish. Pat. Cas. 289; Tilghman v. Mitchell, 23 F. Cas. No. 14,041, 9 Blatchf. 1, 4 Fish. Pat. Cas. 599 [rev on other grounds 19 Wall. 287, 22 L. ed. 125]; Wetherill v. New Jersey Zinc Co., 29 F. Cas. No. 17,464, 1 Bann. & A. 485; New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co., 28 App. Div. 411, 50 NYS 1093 [rev on other grounds 180 N. Y. 280, 73 NE 48].

"The infringer's profits from the use of the infringing means consists of the fruits of the advantage in saving or expenses or gains in efficiency as compared with the use of other non-infringing means adequate and producing the same result and open to use during the time of infringement." Carson v. American Smelting, etc., Co., 25 F. (2d) 116, 120.

"The patentee is only entitled to recover profits, measured by gains and savings, which are attributable to the use of its invention in comparison with the use of other available means." Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1, 3.

[a] **Award of particular amount as savings upheld.**—Peter Schoenhofen Brewing Co. v. Alvey-Ferguson Co., 14 F. (2d) 945.

7. Sessions v. Romadka, 145 U. S. 29, 12 SCt 799, 36 L. ed. 609; Tilgman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Thomson v. Wooster, 114 U. S. 104, 5 SCt 788, 29 L. ed. 105; Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Illinois Cent. R. Co. v. Turrill, 94 U. S. 695, 24 L. ed. 238; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476; Andrews v. Creegan, 7 Fed. 477, 19 Blatchf. 113; Conover v. Mers, 6 F. Cas. No. 3,122, 11 Blatchf. 197, 6 Fish. Pat. Cas. 506 [aff 125 U. S. 144 note, 23 L. ed. 1008]; Knox v. Great Western Quicksilver Min. Co., 14 F. Cas. No. 7,907, 4 Bann. & A. 25, 6 Sawy. 430; Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24; Mevs v. Conover, 23 L. ed. (U. S.) 1008.

[a] **Defendant has gained** to the extent to which he has saved himself from loss and rendered his general business less unprofitable. Illinois Cent. R. Co. v. Turrill, 94 U. S. 695, 24 L. ed. 238.

8. Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459 [mod 21 F. (2d) 553]; Malleable Iron Range Co. v. Lee, 263 Fed. 896 [mod 247 Fed. 795, and certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; Page Mach. Co. v. Dow, 238 Fed. 369; Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 CCA 486, 236 Fed. 744, 150 CCA 76 [mod 203 Fed. 1006, and certiorari den 239 U. S. 648 mem, 36 SCt 222 mem, 60 L. ed. 485 mem].

9. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem].

[a] **Production not commercially attainable by old means.**—The so-called "standard of comparison" rule is not operative where, although the product is old, the production of it in the sizes required by modern trade was not commercially attainable by preëxisting means. Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 CCA 486, 236 Fed. 744, 150 CCA 76 [mod 203 Fed. 1006, and certiorari den 239 U. S. 648 mem, 36 SCt 222 mem, 60 L. ed. 485 mem].

[b] **Matters which cannot be used as standards of comparison** include: (1) A method or process covered by another patent, where the owner of the patent declines to permit its use or grant a license. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem]. (2) A machine or process not invented, discovered, improved, or developed so as to be capable of advantageous use until after the infringement took effect. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 276 Fed. 600 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)]; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem]; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 CCA 516 [aff 170 Fed. 830].

10. Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459 [mod 21 F. (2d) 553]; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem]; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem].

11. Brookfield v. Novelty Glass Mfg. Co., 170 Fed. 946, 95 CCA 516 [aff 170 Fed. 830].

"If salable articles . . . could not be made at the ruling prices, by the old methods, without a loss, while with the machine of the patent there would be a profit, the profit so made has certainly been saved or gained from the invention. The saving might be more than this, dependent on the extent of the loss with other machines. It is clear that it would not be less. But the reckoning, as it is to be observed, is not up, but down. That is to say, we start with the price at which marketable insulators could not be profitably made on the old machines, and fall to their cost by the new, and the difference represents the saving or gain between the two." Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 957, 95 CCA 516.

12. Cross references:
Apportionment of expenses see infra § 624.
Burden of making apportionment see supra § 583.

13. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653 [rev 173 Fed. 361, 97 CCA 621]; Orr, etc., Hardware Co. v. Murray, 163 Fed. 54, 89 CCA 492.

14. Orr, etc., Hardware Co. v. Murray, supra; Conroy v. Penn Electrical, etc., Co., 199 Fed. 427, 118 CCA 101 [certiorari den 226 U. S. 612 mem, 33 SCt 219 mem, 57 L. ed. 381 mem].

[a] **Machine revised so as to create new device.**—Where complainant's invention represented an entire revision of a machine and the creation of a new device in which all of the operative parts contributed to produce a new result, complainant may recover, for defendant's infringement, the profits from the entire machine without any apportionment. Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem].

[b] **Separate sale as independent article.**—Where an article covered by a patent is a new article of manufacture, sold separately as an independent, marketable article, an infringer must pay the entire profits realized from the sale thereof. Warren v. Keep, 155 U. S. 265, 15 SCt 83, 39 L. ed. 144.

Infringement of combination patent see infra text and notes 27, 28.

15. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000; Orr, etc., Hardware Co. v. Murray, 163 Fed. 54, 89 CCA 492.

16. Crosby Steam Gage, etc., Co. v. Consolidated Safety Valve Co., 141 U. S. 441, 12 SCt 49, 35 L. ed. 809 [aff 44 Fed. 66]; Hurlbut v. Schillinger, 130 U. S. 456, 9 SCt 584, 32 L. ed. 1011; Callaghan v. Myers, 128 U. S. 617, 9 SCt 177, 32 L. ed. 547; Garretson v. Clark, 111 U. S. 120, 4 SCt 291, 28 L. ed. 371; Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Armstrong v. Belding, 280 Fed. 895 [aff 297 Fed. 728 (certiorari den 265 U. S. 585 mem, 44 SCt 459 mem, 68 L. ed. 1192 mem)]; Metallic Rubber Tire Co. v. Hartford Rubber Works, 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Racine Engine, etc., Co. v. Confectioners' Mach., etc., Co., 234 Fed. 876, 148 CCA 474; Van Brunt v. La Crosse Plow Co., 208 Fed. 281 [aff 220 Fed. 626, 136 CCA 234]; Roth v. Harris, 197 Fed. 929; Peerless Brick Mach. Co. v. Miracle Pressed Stone Co., 181 Fed. 526; Maimin v. Union Special Mach. Co., 187 Fed. 123, 109 CCA 41 [aff 185 Fed. 120]; Westinghouse v. New York Air Brake Co., 140 Fed. 545, 72 CCA 61 [rev 131 Fed. 607]; Penfield v. Potts, 126 Fed. 475, 61 CCA 371; Piaget Novelty Co. v. Headley, 123 Fed. 897; Coddington v. Propfe, 112 Fed. 1016; Wales v. Waterbury Mfg. Co., 101 Fed. 126, 41 CCA 250 [certiorari den 177 U. S. 693 mem, 20 SCt 1028 mem, 44 L. ed. 945 mem]; Tuttle v. Claflin, 76 Fed. 227, 22 CCA 138 [certiorari den 166 U. S. 721 mem, 17 SCt 992 mem, 41 L. ed. 1187 mem]; Heaton Button-Fas-

for a process may recover the entire profits from the sale of a product where the salability of the product depends upon certain characteristics which can be acquired only by the practice of the patented process.[17] On the other hand, where the patented invention is only a part of an article, product, device, or machine, or is only a part of the means of producing a certain result, and it creates only a part of the profits, complainant is entitled to recover only the part of the profits attributable to his invention,[18] and not the entire profits,[19] unless a separation or apportionment of the profits is impossible[20] by reason of defendant's acts or conduct[21] in commingling infringing and noninfringing elements[22] or in confusing or commingling the profits,[23] and complainant is therefore unable to sustain the burden of

tener Co. v. Macdonald, 57 Fed. 648; Hoke Engraving Plate Co. v. Schraubstadter, 53 Fed. 817; Tatum v. Gregory, 51 Fed. 446; McDonald v. Whitney, 39 Fed. 466; Fifield v. Whittemore, 33 Fed. 835; Fay v. Allen, 30 Fed. 446; Putnam v. Lomax, 9 Fed. 448, 10 Biss. 546; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Livingston v. Jones, 15 F. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [rev on other grounds 1 Wall. 155, 17 L. ed. 662]; Ruggles v. Eddy, 20 F. Cas. No. 12,116, 2 Bann. & A. 627; Whitney v. Mowry, 29 F. Cas. No. 17,594, 4 Fish. Pat. Cas. 207 [rev on other grounds 14 Wall. 620, 20 L. ed. 860]. But see James L. Taylor Mfg. Co. v. Steuernagel, 19 F. (2d) 298, 300 ("cases are rare in which the whole marketable value of a machine or collection of devices can be attributable to a patented feature which embraces merely an improvement in one of its parts"); Bush, etc., Piano Co. v. Becker, 234 Fed. 79, 148 CCA 95 (it is not often that the giving of all the profits to the patentee of an improvement or minor invention can be justified on the ground that there would have been no profits had it not been for the appropriation of the patented idea).

"Where the infringing portion of the sales unit sells the article, the entire profit is recoverable." Flat Slab Patents Co. v. Turner, 285 Fed 257, 281 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

[a] **Rule applied.**—(1) Plaintiff is entitled to all the profits gained by defendant in its exploitation of plaintiff's patented water filter, including the profits from a water-softening mineral sold with it, where the latter, at the time in question, was no more than a scientific discovery, except for the patent in suit, and there was practically no market for it except when used in the patented apparatus. Permutit Co. v. Refinite Co., 27 F. (2d) 695. (2) Where defendant, in a suit for infringement of a patent for a silk skein holder, used the infringing holder for his product only when he could not make a sale without it, he is liable for the entire profit made on such packages. Armstrong v. Belding, 297 Fed. 728 [aff 280 Fed. 895, and certiorari den 265 U. S. 585 mem, 44 SCt 459 mem, 68 L. ed. 1192 mem]. (3) Where the owner of a patent for a tool for twisting wire ties, used for tying bags, and the maker of an infringing tool, both followed the same method of disposition, each furnishing the tool without profit to users, and making his profit from the sale to them of ties which could be used only with that tool, and without which the tool could not be used, the infringer is chargeable with the profits made on the ties. Union Electric Welding Co. v. Curry, 279 Fed. 465 [certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem]. (4) Where defendant sold an infringing washing motor, and the ordinary sales unit consisted of the tub, fixtures, and infringing motor, the profits recoverable include those derived from fixtures which were useful only in connection with this style of motor, but not those derived from fixtures which could be and were used in connection with other motors. Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626.

17. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 276 Fed. 600 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)].

18. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]; Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653 [rev 173 Fed. 361, 97 CCA 621]; Egry Register Co. v. Standard Register Co., 23 F. (2d) 438; James L. Taylor Mfg. Co. v. Steuernagel, 19 F. (2d) 298; Kintner v. Atlantic Communication Co., 294 Fed. 136; Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; A. Mecky Co. v. Garton Toy Co., 277 Fed. 507; Clark v. Schieble Toy, etc., Co., 248 Fed. 276, 160 CCA 354; Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Bush, etc., Piano Co. v. Becker, 222 Fed. 902, 138 CCA 382 [rev 209 Fed. 233]; Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333]; National Metal Weather Strip Co. v. Bredin, 186 Fed. 490, 108 CCA 468 [mod 182 Fed. 654]; Brown v. Canyon Zinc Co., 179 Fed. 309, 102 CCA 497; Force v. Sawyer-Boss Mfg. Co., 143 Fed. 894 [rev 131 Fed. 884, and certiorari den 202 U. S. 621, 26 SCt 766, 50 L. ed. 1175]; Tuttle v. Claflin, 76 Fed. 227, 22 CCA 138 [certiorari den 166 U. S. 721 mem, 17 SCt 992 mem, 41 L. ed. 1187 mem]; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24; Wetherill v. New Jersey Zinc Co., 29 F. Cas. No. 17,464, 1 Bann. & A. 485. See T. L. Smith Co. v. Cement Tile Mach. Co., 258 Fed. 636 (discussing the point).

"There are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains." Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 614, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653.

[a] **Complainant is entitled to this limited profit,** even though (1) it is only a small share of the total profits (Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653; Myles Standish Mfg. Co. v. Champion Spark Plug Co., 282 Fed. 961), (2) or defendant's business was a losing venture (Fox Typewriter Co. v. Underwood Typewriter Co., 287 Fed. 447 [certiorari den 263 U. S. 707 mem, 44 SCt 35 mem, 68 L. ed. 517 mem]).

[b] **Deduction of royalty** (1) paid for the use of a patented invention of a third person (see infra § 625) (2) does not necessarily render all the remaining profits attributable to the patented invention in suit, as the profits realized by defendant from the use of the invention of the third person may exceed the royalty (Dunn Mfg. Co. v. Standard Computing Scale Co., 204 Fed. 617, 123 CCA 111).

19. Mowry v. Whitney, 14 Wall. (U. S.) 620, 20 L. ed. 860; Egry Register Co. v. Standard Register Co., 23 F. (2d) 438; Superior Mach. Tool Co. v. Cincinnati Lathe, etc., Co., 284 Fed. 267; A. Mecky Co. v. Garton Toy Co., 277 Fed. 507; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Southern Textile Mach. Co. v. Fay Stocking Co., 259 Fed. 243, 170 CCA 311; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Bush, etc., Piano Co. v. Becker, 222 Fed. 902, 138 CCA 382 [rev 209 Fed. 233]; American St. Flushing Mach. Co. v. St. Louis St. Flushing Mach. Co., 180 Fed. 759 [aff 192 Fed. 121, 112 CCA 582 (certiorari den 229 U. S. 621 mem, 33 SCt 1049 mem, 57 L. ed. 1355 mem)]; Westinghouse v. New York Air Brake Co., 140 Fed. 545, 72 CCA 61 [certiorari den 201 U. S. 648 mem, 26 SCt 792 mem, 50 L. ed. 904 mem]; Lattimore v. Hardsocg Mfg. Co., 121 Fed. 986, 58 CCA 287; Westinghouse v. New York Air Brake Co., 115 Fed. 645; Brickill v. New York, 112 Fed. 65, 50 CCA 1; Fay v. Allen, 30 Fed. 446; Reed v. Lawrence, 29 Fed. 915; Calkins v. Bertrand, 8 Fed. 755, 10 Biss. 445; Brady v. Atlantic Works, 3 F. Cas. No. 1,795, 3 Bann. & A. 577; Garretson v. Clark, 10 F. Cas. No. 5,248, 3 Bann. & A. 352, 15 Blatchf. 70 [aff 111 U. S. 120, 4 SCt 291, 28 L. ed. 371]; Ingels v. Mast, 13 F. Cas. No. 7,034, 2 Bann. & A. 24, 1 Flipp. 424; Webster v. New Brunswick Carpet Co., 29 F. Cas. No. 17,338, 2 Bann. & A. 67.

20. A. Mecky Co. v. Garton Toy Co., 277 Fed. 507; Van Brunt v. La Crosse Plow Co., 208 Fed. 281 [aff 220 Fed. 626, 136 CCA 234].

21. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 281 Fed. 453 [rev 248 Fed. 508, and certiorari den 260 U. S. 744 mem, 43 SCt 165 mem, 67 L. ed. 827 mem]; A. Mecky Co. v. Garton Toy Co., 277 Fed. 507; Roth v. Harris, 197 Fed. 929. See Schoenhofen Brewing Co. v. Alvey-Ferguson Co., 14 F. (2d) 945 (savings in the department in which the invention was used are recoverable where defendant, by his conduct, has prevented segregation).

22. Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622.

23. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653 [rev 173 Fed. 361, 97 CCA 621]; Producers,' etc., Corp. v. Lehmann, 18 F. (2d) 492; Roth v. Harris, 197 Fed. 929; Dowagiac Mfg. Co. v. Superior Drill Co., 162 Fed. 479, 89 CCA 399; Brennan v. Dowagiac Mfg. Co., 162 Fed. 472, 89 CCA 392.

[a] **Reason for rule.**—"When a case of confusion does appear—when it is impossible to make a mathematical or approximate apportionment—then from the very necessity of the case one party or the other must secure the entire fund. It must be kept by the infringer, or it must be awarded, by law, to the patentee. On established principles of equity, and on the plainest principles of justice, the

separation or apportionment[24] which rests upon him.[25] In a case of partial commingling or confusion of profits an award to plaintiff should extend no further than the actual commingling requires or permits.[26]

Infringer of patent for combination may be,[27] but is not necessarily,[28] liable for the entire profits.

[§ 623] **(bb) Mode of Apportionment.** In apportioning profits derived in part from the infringement of a patent, the net profits are to be rationally separated[29] so that neither party may have what rightfully belongs to the other.[30] Only reasonable approximation,[31] and not mathematical exactness,[32] is required, and where the infringement was deliberate, all doubts as to apportionment of profits should be resolved against the infringer.[33] It is sometimes permissible to apportion profits on a cost ratio basis,[34] or, in other words, by awarding to plaintiff such proportion of the total profits as the cost of the infringing part bears to the cost of the whole structure,[35] but this method is not always the best one[36] or preferable to all other methods,[37] and it should not be adopted where, under the circumstances, it is apparent that there should be assigned to the infringing part a share of the profits larger than is permissible under this method.[38] The profits should not be apportioned by fixing a unit profit figure for the infringing part corresponding to the average profit derived from a few special sales of that part alone.[39]

[§ 624] **dd. Deductions from Receipts—(aa) In General.** In determining the profits which have been realized by defendant from the manufacture and sale of an infringing article, machine, or device, and for which he is liable, it is proper to deduct from the receipts all actual and legitimate expenses of manufacture[40] and sale,[41] but not a manufacturer's profit.[42] deferred selling[43] or advertising[44] expenses of a year prior to the accounting period, the cost of changes made to satisfy the purchaser a considerable time after the infringement was completed,[45] the cost of manufacturing[46] or the expense of an

guilty trustee cannot take advantage of his own wrong The fact that he may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability. He cannot appeal to a court of conscience to cast the loss upon an innocent patentee and by judicial decree repeal the provision of Rev. Stat., § 4921, which declares that in case of infringement the complainant shall be entitled to recover the 'profits to be accounted for by the defendant.'" Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 620, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653.

24. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653 [rev 173 Fed. 361, 97 CCA 621].

25. See supra § 583.

26. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447.

[a] **"In other words,** even though confusion of profits exists, whenever the court reaches a point or sum where it is demonstrable that to go beyond that point or exceed that sum is to set over to plaintiff profits to which the infringing elements make no contribution, that point or sum is the proper place to stop in enforcing the rule. . . . All profits of the defendant which can with reasonable accuracy be attributed to noninfringing parts are to be deducted, before the rule which attends confusion of profit is applied." Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447, 454.

27. Brookfield v. Novelty Glass Mfg. Co., 170 Fed. 830 [aff 170 Fed. 946, 95 CCA 516, 170 Fed. 960, 96 CCA 127]; Brennan v. Dowagiac Mfg. Co., 162 Fed. 472, 89 CCA 392.

[a] **Thus,** where a patent, although using old elements, gives the entire value to a combination, plaintiff is entitled to recover all the profits. Westinghouse Electric, etc., Co. v. Wagner Electric, etc., Co., 225 U. S. 604, 32 SCt 691, 56 L. ed. 1222, 41 LRANS 653.

28. Seeger Refrigerator Co. v. American Car, etc., Co., 212 Fed. 742 [rev on other grounds 219 Fed. 565, 135 CCA 333) (combination embodied in larger structure); Dunn Mfg. Co. v. Standard Computing Scale Co., 204 Fed. 617, 123 CCA 111.

[a] **Improvement of part of device.**—Where the real invention of a patent consists only in the improvement of a part of a device, profits made by an infringer from the sale of the entire article are prima facie apportionable, although the patent describes the entire combination. Herman v. Youngstown Car Mfg. Co., 216 Fed. 604, 132 CCA 608.

29. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526].

30. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., supra.

31. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., supra; Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447.

32. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]; Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447; Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331.

33. Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626.

34. Ellett v. Klein, 22 F. (2d) 807.

35. Bush, etc., Piano Co. v. Becker, 234 Fed. 79, 148 CCA 95.

36. Bush, etc., Piano Co. v. Becker, supra.

[a] **Objections to method.**—This method is somewhat artificial and arbitrary in that it "necessarily assumes an equal margin of profit upon each dollar invested, whether in the infringing parts or the noninfringing parts, and relegates all parts to a position of equality of importance in the assembled product." Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447, 453.

37. Bush, etc., Piano Co. v. Becker, 234 Fed. 79, 148 CCA 95.

38. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447 (as where defendant manufactured the infringing part and purchased other parts, and, on sales of the infringing part alone, realized profits equal to those realized on an entire outfit).

39. Ellett v. Klein, 22 F. (2d) 807; Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447.

40. Goulds Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. ed. 987; Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; T. L. Smith Co. v. Cement Tile Mach. Co., 258 Fed. 636.

[a] **Factory cost as carried on defendant's books.**—The factory cost of the infringing article, as carried on the books of defendant corporation, and according to which it has reckoned its profits, computed and paid its income and excess profits taxes, compiled its inventions and made up its balance sheets, is properly taken by the referee and trial judge as the basis of calculating infringing profits where it points to the factory cost of manufacture more directly than any other evidence in the case, even though it is vigorously attacked by both parties because it wholly destroys both of their theories. Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459 [mod 21 F. (2d) 553].

41. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem].

[a] **Commissions to agents are deducted.**—Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91, 59 CCA 221.

[b] **Expense of advertising** the infringing article, product, or device should be deducted from the receipts. Metallic Rubber Tire Co. v. Hartford Rubber Works, 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626; Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561.

[c] **Payment for information as to credits** is a proper part of sale expenses and is to be deducted. National Folding-Box, etc., Co. v. Dayton Paper-Novelty Co., 95 Fed. 991.

42. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Lee v. Malleable Iron Range Co., 247 Fed. 795 [mod on other grounds 263 Fed. 896 (certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem)]; National Folding-Box, etc., Co. v. Elsas, 86 Fed. 917, 30 CCA 487. Compare Barber Asphalt Pav. Co. v. Standard Asphalt, etc., Co., 30 F. (2d) 281 (where noninfringing commodities which are "marketable," that is, fit for market, are produced by the infringer and subsequently used in making infringing products, the market value, which ordinarily is the selling or transfer value rather than the cost to the infringer, is a proper basis for determining profits); Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 166 Fed. 434, 92 CCA 186 (holding otherwise as to raw material which was a marketable commodity and which defendant made instead of purchasing). Contra Hammacher v. Wilson, 32 Fed. 796.

43. Permutit Co. v. Refinite Co., 27 F. (2d) 695.

44. Permutit Co. v. Refinite Co., supra.

45. Morgan Constr. Co. v. Forter-Miller Engineering Co., 234 Fed. 324, 148 CCA 226.

46. Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459 [mod 21 F. (2d) 553, and expl Continuous Glass Press Co. v. Schmertz

unsuccessful attempt to sell[47] articles which have not been sold, or expenses which are not shown to have been connected with,[48] or made necessary by,[49] defendant's manufacture and sale of the infringing articles. It is proper to deduct the price at which materials were purchased for the purpose of infringement,[50] but not a rise in price between the time they were purchased and used.[51] No credit is to be allowed for the depletion of oil reserves where such oil is valueless unless treated by plaintiff's process.[52] Expenses which may not be deducted include defendant's expense in reorganizing a corporation,[53] obtaining patents,[54] or engaging in litigation with the owner of the patent involved in the present suit.[55] If the minimum amount of a specific and separable item of expenditure is shown by satisfactory evidence, defendant cannot be deprived of his right to an appropriate credit therefor by a mere failure to keep books.[56]

Cost of patterns necessarily made in producing infringing machines may be allowed as a credit,[57] unless they were useful after infringement ceased, and any depreciation is covered by a general depreciation allowance.[58]

Cost of guaranty of infringing articles or devices sold is a proper credit.[59]

Taxes and insurance premiums are allowable to the infringer on an accounting for profits[60] where they were paid in respect of a plant devoted solely to the infringing business,[61] or where they are properly apportioned,[62] even where defendant's plant was devoted in part to other business.[63]

Losses. Ordinarily losses may be considered in diminution of profits when,[64] and only when,[65] they occurred concurrently with the making of profits and resulted directly from the particular transactions on which the profits are allowed; but the rule may be relaxed as to losses incurred in an effort in good faith to promote and develop the use and sale of the infringing article,[66] such as losses incurred during the first year of the infringing business,[67] and it may also be relaxed where the infringer was carrying on a regular and continuous business and it is impractical to treat the infringing articles as constituting a vast number of separate infringements.[68]

Apportionment. Where defendant is carrying a business which is both infringing and noninfringing, and the proportion of each is ascertainable, the ex-

Wire Glass Co., 219 Fed. 199, 135 CCA 85 (mod 216 Fed. 828)] (articles remaining on hand at end of infringing period).

47. Decker v. Smith, 225 Fed. 776, 781 [mod on other grounds 234 Fed. 646, 148 CCA 412].

"As the complainant can recover only the profits on infringing goods sold by defendant, sales actually made, it would seem plain that defendant cannot offset, or counterclaim, or have deducted from the profits derived by him on sales actually made, the expenses incurred and paid in attempting to make sales which were not made or consummated. As there were no profits on such attempted sales, there can be nothing to deduct, and expenses incurred and paid in such attempted sale, or attempts to make sales, but which proved a failure, cannot be charged against profits or used to reduce a recovery of profits actually realized from the sales actually made." Decker v. Smith, supra.

48. Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

[a] **Cost of experiments** not shown to have been performed in connection with the infringing device or machine in question should not be allowed as a credit. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem]; Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626 (dealing with a case where the patented motor was a finished, workable article before the infringement began, and the infringing motor was manufactured for, and not by, defendant).

49. Krentler-Arnold Hinge Last Co. v. Leman, 24 F. (2d) 423 (certain overhead expenses).

50. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Barber Asphalt Pav. Co. v. Standard Asphalt, etc., Co., 30 F. (2d) 281; Byerly v. Sun Co., 226 Fed. 759.

51. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

52. Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492.

53. Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem].

54. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem].

55. Computing Scale Co. v. Toledo Computing Scale Co., supra; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem]; Piaget Novelty Co. v. Headley, 123 Fed. 897.

56. Decker v. Smith, 234 Fed. 646, 148 CCA 412 [mod 225 Fed. 776].

57. T. L. Smith Co. v. Cement Tile Mach. Co., 258 Fed. 636.

58. Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626. See Christensen v. National Brake, etc., Co., 10 F. (2d) 856 (whether patterns and drawings made and kept by the manufacturer of infringing machines should be regarded as items of expenses or valued as assets is a question of fact, and not purely a question of law).

59. Permutit Co. v. Refinite Co., 27 F. (2d) 695.

60. Christensen v. National Brake, etc., Co., 10 F. (2d) 856. Contra National Folding-Box, etc., Co. v. Dayton Paper-Novelty Co., 95 Fed. 991; Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24.

[a] **Federal excess profits tax paid may be allowed.**—Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459 [mod 21 F. (2d) 553]; W. W. Sly Mfg. Co. v. Pangborn Corp., 276 Fed. 971 [aff 284 Fed. 217 (certiorari den 260 U. S. 749 mem, 43 SCt 249 mem, 67 L. ed. 495 mem)]. Contra Ellett v. Klein, 22 F. (2d) 807.

61. Carborundum Co. v. Electric Smelting, etc., Co., 203 Fed. 976, 122 CCA 276 [certiorari den 231 U. S. 754 mem, 34 SCt 323 mem, 58 L. ed. 467 mem].

62. See infra note 69 [a].

63. Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem]. Contra Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

64. MacBeth-Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459].

[a] **Although called losses, they are really diminutions.**—MacBeth-Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459].

[b] **Amounts uncollected on profitable contracts** are proper credits. Permutit Co. v. Refinite Co., 27 F. (2d) 695.

65. Starr Piano Co. v. Auto Pneumatic Action Co., 12 F. (2d) 586; Van Kannell Revolving Door Co. v. Revolving Door, etc., Co., 293 Fed. 261; Underwood Typewriter Co. v. Fox Typewriter Co., 220 Fed. 880, 136 CCA 446 [aff 181 Fed. 530]; Canda v. Michigan Malleable Iron Co., 152 Fed. 178, 81 CCA 420; Force v. Sawyer-Boss Mfg. Co., 131 Fed. 884 [mod on other grounds 143 Fed. 894, 26 SCt 776, 50 L. ed. 1175 (certiorari den 202 U. S. 621, 26 SCt 766, 50 L. ed. 1175)]; Conover v. Mers, 6 F. Cas. No. 3,122, 6 Fish. Pat. Cas. 506, 11 Blatchf. 197 [aff 125 U. S. 144 note, 23 L. ed. 1008]; Graham v. Mason, 10 F. Cas. No. 5,672, 5 Fish. Pat. Cas. 290, Holmes 88; Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24.

[a] **Profitable and unprofitable sales.**—Losses on unprofitable sales are not to be deducted from the receipts from profitable sales. Permutit Co. v. Refinite Co., 27 F. (2d) 695; McKee Glass Co. v. H. C. Fry Glass Co., 248 Fed. 125, 160 CCA 265.

66. Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem].

67. Union Electric Welding Co. v. Curry, 279 Fed. 465 [certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem].

68. MacBeth-Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459].

[a] **Lenses.**—"While the defendant was an infringer, it was carrying on a regular and continuous business, during the period of its operations in the manufacture of the infringing lenses. In this continuous business, the infringing lenses cannot be treated separately as constituting a vast number of separate infringements. Hence, in determining the profits, if defendant is charged with the gross sales at the gross selling price, it must be credited with all those items which entered into the cost of manufacture and sale, such as lenses returned, defective lenses, the loss from bad debts and accounts in the sale of the infringing lenses, and also such discounts and allowances as were reasonably incident to the business, so that the defendant may be charged only with the prof-

penses of the business may and should be apportioned.[69] Also there should be an apportionment of the expense of salesmen where such expenses are abnormal in view of the business in hand and part has been incurred for the purpose of creating a market and good will for defendant's goods after the expiration of the patent.[70]

[§ 625] **(bb) Use of Property or Interest on Capital.** Interest on the capital invested in the infringing portion of defendant's business,[71] or, in other words, the value of the use of buildings, machinery, tools, or other facilities or property employed in manufacturing the infringing article or machine,[72] may be deducted from the receipts in arriving at the profits unless the property is employed in manufacturing both infringing and non-infringing articles and it is impossible upon the evidence presented to make a satisfactory apportionment.[73] An allowance of a separate item of this nature is not permissible where the subject matter thereof is included in another item which has been allowed.[74] Interest on dividends is not a charge which can be made in favor of the infringer.[75]

Royalties paid by defendant for the use of other patents,[76] or, in case infringement of another patent has been adjudged, a reasonable royalty charge for the use of the patent,[77] may be deducted from receipts as a part of the cost of manufacture or production.

[§ 626] **(cc) Compensation for Personal Services.**[78] Wages paid other persons for labor in manufacturing the infringing article or device may be deducted in determining the profits for which an infringing manufacturer is liable.[79]

Where defendant is a corporation, it is proper to allow a deduction of the usual salaries paid managing officers[80] in good faith[81] for services actually rendered,[82] and not as a mode of concealing or dividing profits;[83] but it is improper to allow a deduction for salaries which have never been paid,[84]

its actually made." MacBeth-Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553, 555 [mod on other grounds 23 F. (2d) 459].

69. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem]; Kinner v. Shepard, 118 Fed. 48; Hitchcock v. Tremaine, 12 F. Cas. No. 6,539, 5 Fish. Pat. Cas. 310, 9 Blatchf. 385 [aff 23 Wall. 518, 23 L. ed. 97].

[a] **Particular expenses held subject to apportionment** include: (1) Advertising. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]. (2) Compensation of branch office manager. Flat Slab Patents Co. v. Turner, supra. (3) Interest on investment. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447; Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem]; Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 CCA 486, 236 Fed. 744, 150 CCA 76 [mod 203 Fed. 1006, and certiorari den 239 U. S. 648 mem, 36 SCt 222 mem, 60 L. ed. 485 mem]. (4) Taxes and insurance. Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541.

70. Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem].

71. Permutit Co. v. Refinite Co., 27 F. (2d) 695; Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993; Producers' etc., Corp. v. Lehmann, 18 F. (2d) 492; Starr Piano Co. v. Auto Pneumatic Action Co., 12 F. (2d) 586; Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem]; Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem]; Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 CCA 486, 236 Fed. 744, 150 CCA 76 [mod 203 Fed. 1006, and certiorari den 239 U. S. 648 mem, 36 SCt 222 mem, 60 L. ed. 485 mem]. See Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 804, 19 L. ed. 566 (approving a disallowance of "interest on the captal stock," but also approving the allowance of rent and interest paid, as well as expenditures for repairs of buildings and machinery and the purchase of new machinery, tools, and fixtures); Ellett v. Klein, 22 F. (2d) 807, 815 ("interest on investment," as meaning interest on capital, is not to be allowed, but there may be other senses in which it may be allowed as an expense item); Fox Typewriter Co. v. Underwood Typewriter Co., 287 Fed. 447 [certiorari den 263 U. S. 707 mem, 44 SCt 35 mem, 68 L. ed. 517 mem] (interest on invested capital may be taken into consideration where the recovery takes in the profits of the infringer's business, but not where it is limited to so much of the profits received by defendant from the sale of a machine as was due to a part thereof covered by plaintiff's patent). Contra Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem].

"The weight of authority at the present time in infringement cases favors the allowance of interest on capital which it was necessary to invest in order to make the profits to be accounted for, where the plant in which the capital is invested is devoted wholly to the production of the infringing article, and in other cases where an apportionment can be made with reasonable certainty." Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492, 502.

[a] **Rule is just and equitable.**—Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492.

[b] **Use of old plant.**—A credit for interest on the capital invested is not to be denied defendant because the plant and facilities used by him for the manufacture of the infringing device are old, have been previously devoted to other business, and were not constructed for the purpose of manufacturing the infringing device. Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem].

[c] **Basis of computation.**—The interest with which defendant is entitled to be credited is properly computed on the appraised value of the plant and equipment, rather than on the basis of their actual cost, less depreciation for wear and tear. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447.

[d] **Rate.**—Interest on invested capital held properly charged at five per cent. Barber Asphalt Pav. Co. v. Standard Asphalt, etc., Co., 30 F. (2d) 281.

72. Goulds Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. ed. 987; Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F (2d) 447; Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 CCA 486, 236 Fed. 744, 150 CCA 76 [mod 203 Fed. 1006, and certiorari den 239 U. S. 648 mem, 36 SCt 222 mem, 60 L. ed. 485 mem]; Piaget Novelty Co. v. Headley, 123 Fed. 897 (rent of factory and office); Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24; Troy Iron, etc., Factory v. Corning, 24 F. Cas. No. 14,196, 3 Fish. Pat. Cas. 497, 6 Blatchf. 328.

[a] **Depreciation.**—Defendant is entitled to deduct the amount of depreciation in value of machinery used in manufacturing the infringing product. Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541.

73. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553 [aff 43 Fed. 672]; W. W. Sly Mfg. Co. v. Pangborn Corp., 276 Fed. 971 [aff 284 Fed. 217 (certiorari den 260 U. S. 749 mem, 43 SCt 249 mem, 67 L. ed. 495 mem)]; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

Apportionment generally see supra § 624.

74. Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459 [mod 21 F. (2d) 553]; Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626.

[a] **Rule applied.**—It is proper to refuse to make an allowance for wear, tear, and depreciation where the amounts allowed for expenditures in repairs exceeds the wear and tear which could have occurred during the time of infringement. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

75. National Folding-Box, etc., Co. v. Dayton Paper-Novelty Co., 95 Fed. 991.

76. Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Herman v. Youngstown Car Mfg. Co., 216 Fed. 604, 132 CCA 608; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561.

77. Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co., 259 Fed. 270, 170 CCA 338.

78. Commissions paid sales agents see supra § 624.

79. Piaget Novelty Co. v. Headley, 123 Fed. 897; National Folding-Box, etc., Co. v. Dayton Paper-Novelty Co., 95 Fed. 991.

80. Providence Rubber Co. v. Goodyear, 9 Wall. (U S.) 788, 19 L. ed. 566; Bush, etc., Piano Co. v. Becker, 234 Fed. 79, 148 CCA 95.

81. Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24.

82. Steam Stonecutter Co. v. Windsor Mfg. Co., supra.

83. Steam Stonecutter Co. v. Windsor Mfg. Co., supra.

84. Seabury v. Am Ende, 152 U. S. 561, 14 SCt 683, 38 L. ed. 553 [aff 43 Fed. 672].

salaries for a period of time elapsing after the termination of infringement,[85] or excessive or extraordinary salaries[86] which are really dividends disguised or concealed under another name.[87] Special payments to officers or managers over and above their regular salaries may not be deducted[88] where they are really a division of profits;[89] but bonuses paid to certain officers and employees may be credited to the infringer in determining profits where they were paid in good faith for services rendered and to avoid a general raise in salaries and wages then occurring everywhere by reason of business conditions.[90]

Where defendants are individuals, the profits recoverable from them cannot be diminished by allowing them compensation for their time and labor.[91]

[§ 627] **ee. Interest.**[92] It has been held that interest on profits should not be allowed except under special circumstances.[93] Where interest on profits is allowed, and the infringement was not willful, wanton, or deliberate,[94] it is allowed from, and only from, the date of the master's report,[95] or, in some cases, from the date of the final decree,[96] and not from any date prior to the time when the amount of profits was judicially ascertained.[97]

[§ 628] **(c) Damages**[98]**—aa. In General.** Except where damages are increased by the court under statutory authority,[99] the damages recoverable for infringement of a valid patent are the actual damages sustained by plaintiff[1] as a proximate re-

85. Elizabeth v. American Nicholson Pav. Co., 97 U. S. 126, 24 L. ed. 1000.

86. Bush, etc., Piano Co. v. Becker, 234 Fed. 79, 148 CCA 95 (salaries consisting of ninety per cent of the gross profits and paid to officers who were practically the only stockholders); National Folding-Box, etc., Co. v. Dayton Paper-Novelty Co., 95 Fed. 991.

87. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

88. Philadelphia Rubber Works Co. v. U. S Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem].

89. Lee v. Malleable Iron Range Co., 247 Fed. 795 [mod on other grounds 263 Fed. 896 (certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem)].

90. Macbeth-Evans Glass Co. v. L. E. Smith Glass Co., 23 F. (2d) 459 [mod 21 F. (2d) 553].

91. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Piper v. Brown, 19 F. Cas. No. 11,181, 6 Fish. Pat. Cas. 240, Holmes 196; Williams v. Leonard, 29 F. Cas. No. 17,726, 9 Blatchf. 476, 5 Fish. Pat. Cas. 381

[a] **Reasons for rule.**—"It would be very great injustice, if the quantum of gains and profits recoverable by a complainant depended on the question, how much of such gains and profits the defendants used for their own support, or the support of their families, or, as even more broadly claimed here by the defendants, how much they saw fit to appropriate to their own use. Infringers would rarely be required to pay over anything, if they could divide the gains and profits among themselves, under the name of salary, wages, or any other designation. Men work for gains and profits, but they are gains and profits still. Men support themselves and their families out of their gains and profits, but that does not change their nature. If it were not so, inventors might, by reason of infringements, fail to obtain anything, and the infringers obtain what they see fit to term adequate salaries, out of their piracy." Williams v. Leonard, 29 F. Cas. No. 17,726, 9 Blatchf. 476, 478, 5 Fish. Pat. Cas. 381.

[b] **Rule applied to individuals who were partners.**—Kansas City Hay Press Co. v. Devol, 127 Fed. 363 [app dism 137 Fed. 1019 mem, 70 CCA 679 mem].

92. Cross references:
Deduction of interest on invested capital see supra § 625.
Interest as element of damages see infra § 634.

93. Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 4 SCt 5, 28 L. ed. 154; Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577; Brady v. Atlantic Works, 3 F. Cas. No. 1,795, 3 Bann. & A. 577; Holbrook v. Small, 12 F. Cas. No. 6,596, 3 Bann. & A. 625. See Cambria Iron Co. v. Carnegie Steel Co., 224 Fed. 947, 955, 140 CCA 437 [certiorari den 239 U. S. 644 mem, 36 SCt 165 mem, 60 L. ed. 483 mem] ("The allowance of interest is largely a matter of discretion, to be exercised under the circumstances of the particular case").

94. Armstrong v. Belding, 297 Fed. 728 [aff 280 Fed. 895, and certiorari den 265 U. S. 585 mem, 44 SCt 459 mem, 68 L. ed. 1192 mem]; Philadelphia Rubber Works v. U. S. Rubber Reclaiming Works, 276 Fed. 600 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)]; Metallic Rubber Tire Co. v Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Oehring v Fox Typewriter Co. 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem].

95. Crosby Steam Gage, etc., Co. v. Consolidated Safety Valve Co., 141 U. S. 441, 12 SCt 49, 35 L. ed. 809 [aff 44 Fed. 66]; Tilghman v. Proctor, 125 U S. 136, 8 SCt 894, 31 L. ed. 664; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 4 SCt 5, 28 L. ed. 154; Krentler-Arnold Hinge Last Co. v. Leman, 24 F. (2d) 423, MacBeth-Evans Glass Co. v L. E Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459], Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492; Armstrong v Belding, 297 Fed. 728 [aff 280 Fed. 895, and certiorari den 265 U. S. 585 mem, 44 SCt 459 mem, 68 L. ed. 1192 mem]; Vandenburgh v Concrete Steel Co., 278 Fed. 607 [certiorari granted 257 U. S. 632 mem, 42 SCt 186 mem, 66 L. ed. 407 mem]; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem], Cambria Iron Co. v. Carnegie Steel Co., 224 Fed. 947, 140 CCA 437 [certiorari den 239 U. S. 644 mem, 36 SCt 165 mem, 60 L. ed. 483 mem]; Westinghouse v. New York Air Brake Co., 133 Fed. 936; Campbell v. New York, 105 Fed. 631; National Folding-Box, etc., Co. v. Dayton Paper-Novelty Co., 97 Fed. 331; Turrill v. Illinois Cent. R. Co., 20 Fed. 912.

96. Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem] (where proof was taken by the court after the master's death, and the findings were made by the court); American Nicholson Pav. Co. v. Elizabeth, 1 F. Cas. No. 309, 1 Bann. & A. 439 [rev on other grounds 97 U. S. 126, 24 L. ed. 1000]; Webster v. New Brunswick Carpet Co., 29 F. Cas. No. 17,338, 2 Bann. & A. 67.

[a] **Decree modified on appeal.**—Interest on the net amount finally found to be due plaintiff should be allowed from the date of the original decree where, although the decree is modified on appeal, the facts were found and the amount of profits was definitely ascertained and liquidated at the time of the original decree and the modification is due to a difference of opinion as to the law applicable to the facts rather than as to the facts themselves. Western Glass Co. v. Schmertz Wire Glass Co., 236 Fed. 744, 150 CCA 76, 226 Fed. 730, 141 CCA 486 [mod 203 Fed. 1006].

97. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 Fed. 171 [aff 276 Fed. 600, 613, and certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem] (not allowed from date of infringement); B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem]; Oehring v. Fox Typewriter Co., 251 Fed. 584 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem] (not allowed from the date when the profits were actually made); Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 CCA 486, 236 Fed. 744, 150 CCA 76 [mod 203 Fed. 1006, and certiorari den 239 U. S. 648 mem, 36 SCt 222 mem, 60 L. ed. 485 mem]; National Folding-Box etc., Co. v. Elsas, 81 Fed. 197 [aff 86 Fed. 917, 30 CCA 487] (not allowed from the filing of the bill). Compare Fairbanks v American Valve, etc., Co., 18 F. (2d) 716 [certiorari granted 274 U. S. 735 mem, 47 SCt 770 mem, 71 L. ed. 1336 mem, and rev on other grounds 276 U. S. 305, 48 SCt 317, 72 L. ed. 584]; (upholding the allowance from the close of the infringing period); Starr Piano Co. v. Auto Pneumatic Action Co., 12 F. (2d) 586 (upholding the allowance of interest from the expiration of the patent which was prior to the filing of the master's report); Steam Stonecutter Co. v. Windsor Mfg. Co, 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24, 22 F. Cas. No 13,336, 5 Bann. & A. 335, 18 Blatchf. 47 (interest allowed from the date of the interlocutory decree where defendant's books showed the amount of the profits).

98. Damages:
Evidence of see supra §§ 584-586.
From unfair competition aggravating infringement see Federal Courts § 11.
Limitation of, to damages arising after notice of patent see supra § 484.

99. See infra § 633.

1. Tilghman v. Proctor, 125 U. S.

sult of the infringement,[2] or, in other words, the measure of damages is the actual[3] pecuniary[4] loss sustained by plaintiff. While the pecuniary loss arising from infringement can be determined only through a reasonable approximation,[5] and any doubts as to the amount of damages for which defendant is liable will be resolved against him where he has deliberately and persistently infringed the patent,[6] nevertheless an estimate of the amount of a particular item of damages must be based upon some data[7] and not upon mere guess or speculation.[8]

Normal measure of damages. As the exclusive right conferred by a patent is property,[9] and an infringement is a tortious taking of a part of that property,[10] the normal measure of damages is the value of what is taken.[11]

Defendant's gains or profits.[12] Ordinarily what plaintiff has lost,[13] and not what defendant has gained,[14] is the measure of damages, and where plaintiff has suffered real loss or injury from the infringement, he may recover therefor even though defendant has suffered losses or has not realized any profits,[15] but the profits derived by the infringer may be considered in estimating damages in an exceptional case,[16] as where there was only a limited demand in a limited locality for a particular kind of article and this demand could be supplied easily and promptly by a single manufacturer,[17] or where there are no other means of estimating damages.[18] Where both damages and profits are awarded in equity, the damages should be for such amount as, added to defendant's profits, will fully compensate plaintiff for the loss or injury sustained from the infringement.[19]

Counsel fees and expenses of litigation cannot be included in the damages.[20]

Full or apportioned damages. Full damages may be recovered[21] only for full infringement according to the nature of the patent.[22] Where the patent covers only a part of a machine, the damages must be confined to those arising from the manufacture, use, or sale of that part,[23] unless the entire value

136, 8 SCt 894, 31 L. ed. 664; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; New York v. Ransom, 23 How. (U. S.) 487, 16 L. ed. 515; Seymour v. McCormick, 16 How. (U. S.) 480, 14 L. ed. 1024; Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Toledo Plate, etc., Glass Co. v. Kawneer Mfg. Co., 262 Fed. 510; T. L. Smith Co. v. Cement Tile Mach. Co., 258 Fed. 636; Lee v. Pillsbury, 49 Fed. 747; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433; Haselden v. Ogden, 11 F. Cas. No. 6,190, 3 Fish. Pat. Cas. 378; Hayden v. Suffolk Mfg. Co., 11 F. Cas. No. 6,261, 4 Fish. Pat. Cas. 86 [aff 3 Wall. 315, 18 L. ed. 76]; Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,875, 1 Robb Pat. Cas. 303, 4 Wash. C. C. 9; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Ransom v. New York, 20 F. Cas. No. 11,573, 1 Fish. Pat. Cas. 252; Russell v. Place, 21 F. Cas. No. 12,161, 9 Blatchf. 173, 5 Fish. Pat. Cas. 134 [aff 94 U. S. 606, 24 L. ed. 214]; Smith v. Higgins, 22 F. Cas. No. 13,057; Teese v. Phelps, 23 F. Cas. No. 13,819, McAll. 48; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40; Wilbur v. Beecher, 29 F. Cas. No. 17,634, 2 Blatchf. 132 Fish Pat. R. 401.

2. Boesch v. Graff, 133 U. S. 697, 10 SCt 378, 33 L. ed. 787; Roemer v. Simon, 31 Fed. 41, 24 Blatchf. 396; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Hawes v. Washburne, 11 F. Cas. No. 6,242; Smith v. Prior, 22 F. Cas. No. 13,095, 4 Fish. Pat. Cas. 469, 2 Sawy. 461; Stephens v. Felt, 22 F. Cas. No. 13,368a.

3. Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Cassidy v. Hunt, 75 Fed. 1012; Lee v. Pillsbury, 49 Fed. 747; Earle v. Sawyer, 8 F. Cas. No. 4,247, 4 Mason 1, 1 Robb Pat. Cas. 490; Goodyear v. Bishop, 10 F. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40; United Horseshoe, etc., Co. v. Stewart, 13 App. Cas. 401, 59 L. T. Rep. N. S. 561.

4. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 565; De Laski, etc., Circular Woven Tire Co. v. Empire Rubber, etc., Co., 239 Fed. 139.

5. Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1; Clark v. Schieble Toy, etc., Co., 248 Fed. 276, 160 CCA 354.

[a] **"There are many particulars** in which the courts are satisfied with reasonable estimates and approximate calculations in ascertaining damages in infringement cases." Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459, 468.

6. Consolidated Rubber Tire Co. v. Diamond Rubber Co., 232 Fed. 475, 146 CCA 469 [aff 226 Fed. 455].

7. Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459.

8. Auto Vacuum Freezer Co. v. William A. Sexton Co., supra.

[a] **Increased advertising expense** disallowed on this ground. Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459.

9. See supra § 8.

10. See supra § 489.

11. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614.

12. Recovery of defendant's profits as such see supra §§ 618, 620-627.

13. See supra text and notes 3, 4.

14. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 565; Thomson v. Wooster, 114 U. S. 104, 5 SCt 788, 29 L. ed. 105; Cassidy v. Hunt, 75 Fed. 1012; Royer v. Shultz Belting Co., 45 Fed. 51 [aff 154 U. S. 515, 14 SCt 1151, 38 L. ed 1075]; Morss v. Union Form Co., 39 Fed. 468; Cowing v. Rumsey, 6 F. Cas. No. 3,296, 8 Blatchf. 36, 4 Fish. Pat. Cas. 275; La Baw v. Hawkins, 14 F. Cas. No. 7,961, 2 Bann. & A. 561; McComb v. Brodie, 15 F. Cas. No. 8,708, 5 Fish. Pat. Cas. 384, 1 Woods 153; Tatham v. Le Roy, 23 F. Cas. No. 13,760, 2 Blatchf. 474 [rev on other grounds 14 How. 156, 14 L. ed. 367]; McKeever v. U. S., 18 Ct. Cl. 757.

15. McKee Glass Co. v. H. C. Fry Glass Co. 248 Fed. 125, 160 CCA 265; Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 CCA 622; Campbell v. Barclay, 4 F. Cas. No. 2,353, 5 Biss. 179; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. No. 5,600, 2 Bann. & A. 252; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, 1 Fish. Pat. R. 441.

16. Goulds Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. ed. 987.

[a] **Savings from use.**—In some cases, in actions at law, the measure of damages applicable has been held to be the profits or savings derived by defendant from the use of the patented machine or process over what he would have had from the use of other machines, methods, or processes which he had a right to use. McMurray v. Emerson, 36 Fed. 901; Serrell v. Collins, 21 F. Cas. No. 12,672, 1 Fish. Pat. Cas. 289.

17. Goulds Mfg. Co. v. Cowing, 105 U. S. 253, 26 L. ed. 987.

18. Burdell v. Denig, 92 U. S. 716, 23 L. ed. 764; Cassidy v. Hunt, 75 Fed. 1012; Brickill v. Baltimore, 60 Fed. 98, 8 CCA 500; Bell v. Phillips, 3 F. Cas. No. 1,262, Campbell v. Barclay, 4 F. Cas. No 2,353, 5 Biss. 179; Case v. Brown, 5 F. Cas. No. 2,488, 1 Biss. 382, 2 Fish. Pat. Cas. 268 [aff 2 Wall. 320, 17 L. ed 817]; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Grant v. ——, 10 F. Cas. No. 5,701; Page v. Ferry, 18 F. Cas. No 10,662, 1 Fish. Pat. Cas. 298, Parker v. Bamker, 18 F. Cas. No. 10,725, 6 McLean 631; Parker v. Perkins, 18 F. Cas No. 10,745; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish Pat. R. 441; Wilbur v. Beecher, 29 F. Cas. No. 17,634, 2 Blatchf. 132, Fish. Pat. R. 401; Wintermute v. Redington, 30 F. Cas. No. 17,896, 1 Fish. Pat. Cas. 239.

19. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Root v Lake Shore R. Co., 105 U. S. 189, 26 L. ed. 975; Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501.

20. Parks v Booth, 102 U. S. 96, 26 L. ed. 54; Philp v. Nock, 17 Wall. (U. S.) 460, 21 L ed. 679; Teese v. Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479; Bancroft v. Acton, 2 F. Cas. No. 833, 7 Blatchf 505; Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. No. 1,521, 1 Blatchf. 258, Fish. Pat. R. 184; Holbrook v. Small, 12 F. Cas. No. 6,596, 3 Bann. & A. 625; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Stimpson v. Railroads, 23 F. Cas. No. 13,456, 2 Robb Pat. Cas. 595, 1 Wall. Jr. 164; Whittemore v. Cutter, 29 F. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28. Compare Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502 (holding otherwise as to unusual expenses unnecessarily forced upon plaintiff by the character of the defense) Contra Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Boston Mfg. Co. v. Fiske, 3 F. Cas. No. 1,681, 2 Mason 119, 1 Robb Pat. Cas. 320; Knight v. Gavit, 14 F. Cas. No. 7,884; Pierson v. Eagle Screw Co., 19 F. Cas. No. 11,156, 2 Robb Pat. Cas. 268, 3 Story 402.

21. Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272].

22. Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824.

23. McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 SCt 40, 35 L. ed. 817; Fischer v. Hayes, 22 Fed. 529; Burdell v. Denig, 4 F. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Carter v.

of the machine is due to the patented feature.[24] Damages for infringement of separate patents sued on need not be apportioned.[25]

Mitigation. Damages may be mitigated by good faith and lack of intent to infringe upon the part of the infringer;[26] but where a part of a machine is found to infringe complainant's patent, the court will not undertake to determine, in reduction of damages, the collateral question whether or not such part also infringes another patent, the validity and scope of which are not directly put in issue.[27]

[§ 629] **bb. Nominal or Substantial Damages.** Nominal damages only may be recovered where plaintiff has not satisfactorily shown the existence and amount of actual damages or profits due to the unauthorized use of his patented invention,[28] unless, in the case of commingled profits, a separation or apportionment is impossible by reason of defendant's acts or conduct.[29] Also, nominal damages only may be recovered where the infringement was only a trifling infraction of plaintiff's rights,[30] it consisted in the mere making of a patented article without either selling or using it,[31] or it was committed innocently by an employee.[32] On the other hand, where validity and infringement of the patent, as well as title thereto, are proved, plaintiff is entitled to recover at least nominal damages,[33] and he is entitled to recover substantial damages where he has been substantially injured by the infringement of his exclusive right[34] and the evidence is sufficient to furnish a reasonable basis for the application of some rule for measuring the damages.[35] The acceptance of the "reasonable royalty" rule for measuring damages[36] has had the effect of materially lessening the cases in which nominal damages only are awarded.[37]

Commercial value of patent. Plaintiff is entitled to substantial, rather than nominal, damages where defendant has extensively converted to his own use property rights of great value conferred by the patent,[38] and, conversely, only nominal damages may be recovered where the patent is without real commercial value;[39] but the mere fact that plaintiff was not commercially successful during the infringing period does not necessarily signify that the patented invention lacks commercial value[40] or disentitle plaintiff to recover substantial damages actually sustained through the infringement.[41]

[§ 630] **cc. Profits Lost by Plaintiff.** In a case where the facts shown render the rule applicable,[42] plaintiff's damages in a patent infringement suit may be measured by the profits which, except for the infringement, he would have made[43] on the in-

Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Wayne v. Holmes, 29 F. Cas. No. 17,303, 1 Bond 27, 2 Fish. Pat. Cas. 20.

24. Hunt Bros. Fruit-Packing Co. v. Cassiday, 64 Fed. 585, 12 CCA 316; Fifield v. Whittemore, 33 Fed. 835.

25. Timken v. Olin, 41 Fed. 169.

26. Mowry v. Whitney, 14 Wall. (U. S.) 434, 620, 20 L. ed. 858; Corning v. Burden, 15 How. (U. S.) 252, 14 L. ed. 683; Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Bryce v. Dorr, 4 F. Cas. No. 2,070, 3 McLean 582, 2 Robb Pat. Cas. 302; Parker v. Corbin, 18 F. Cas. No. 10,731, 4 McLean 462, 2 Robb Pat. Cas. 736.

27. Brinton v. Paxton, 134 Fed. 78, 67 CCA 204.

28. Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 263; Boesch v. Graff, 133 U. S. 697, 10 SCt 378, 33 L. ed. 787; Cornely v. Marckwald, 131 U. S. 159, 9 SCt 744, 33 L. ed. 117 [aff 32 Fed. 292]; Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888; Dobson v. Hartford Carpet Co., 114 U. S. 439, 5 SCt 945, 29 L. ed. 177; Black v. Thorne, 111 U. S. 122, 4 SCt 326, 28 L. ed. 372; Robertson v. Blake, 94 U. S. 728, 24 L. ed. 245; Philp v. Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679; New York v. Ransom, 23 How. (U. S.) 487, 16 L. ed. 515; Seymour v. McCormick, 16 How. (U. S.) 480, 14 L. ed. 1024; Cheatham Electric Switching Device Co. v. Transit Dev. Co., 261 Fed. 792; Kansas City Hay Press Co. v. Devol, 127 Fed. 363 [app dism 137 Fed. 1019 mem, 70 CCA 679 mem]; Paxton v. Brinton, 126 Fed. 541; Hohorst v. Hamburg-American Packet Co., 91 Fed. 655, 34 CCA 39 [aff 84 Fed. 354]; Boston v. Allen, 91 Fed. 248, 33 CCA 485; Seattle v. McNamara, 81 Fed. 863, 26 CCA 652; Houston, etc., R. Co. v. Stern, 74 Fed. 636, 20 CCA 568; Hunt Bros. Fruit Packing Co. v. Cassidy, 53 Fed. 257, 3 CCA 525; Lee v. Pillsbury, 49 Fed. 747; Royer v. Schultz Belting Co., 45 Fed. 51 [aff 154 U. S. 515 mem, 14 SCt 1152 mem, 38 L. ed. 1075 mem]; Keep v. Fuller, 42 Fed. 896 [aff 155 U. S. 265, 15 SCt 83, 39 L. ed. 144]; Fischer v. Hayes, 39 Fed. 613; Bell v. U. S. Stamping Co., 32 Fed. 549; Everest v. Buffalo Lubricating Oil Co., 31 Fed. 742 [app dism 131 U. S. 449, 9 SCt 804, 33 L. ed. 215]; Roemer v. Simon, 31 Fed. 41, 24 Blatchf. 396; Tuttle v. Gaylord, 28 Fed. 97; Moffitt v. Cavanagh, 27 Fed. 511; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Blake v. Greenwood Cemetery, 16 Fed. 676, 21 Blatchf. 222; Calkins v. Bertrand, 8 Fed. 755, 10 Biss. 445; Kirby v. Armstrong, 5 Fed. 801, 10 Biss. 135; Proctor v. Brill, 4 Fed. 415; Burdell v. Denig, 4 F. Cas. No. 2,142, 2 Fish. Pat. Cas. 588; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Conover v. Rapp, 6 F. Cas. No. 3,124, 4 Fish. Pat. Cas. 57; Fisk v. West Bradley, etc., Mfg. Co., 9 F. Cas. No. 4,830a; Garretson v. Clark, 10 F. Cas. No. 5,249, 17 Blatchf. 256 [aff 111 U. S. 120, 4 SCt 291, 28 L. ed. 371]; Goodyear v. Bishop, 10 F. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Gould's Mfg. Co. v. Cowing, 10 F. Cas. No. 5,643, 3 Bann. & A. 75, 14 Blatchf. 315 [rev on other grounds 105 U. S. 253, 26 L. ed. 987]; Ingersoll v. Musgrove, 13 F. Cas. No. 7,040, 3 Bann. & A. 304, 14 Blatchf. 541; Poppenhusen v. New York Gutta Percha Comb Co., 19 F. Cas. No. 11,283, 2 Fish. Pat. Cas. 62; Rollhaus v. McPherson, 20 F. Cas. No. 12,026; Schillinger v. Gunther, 21 F. Cas. No. 12,457, 3 Bann. & A. 491, 15 Blatchf. 303; Smith v. Higgins, 22 F. Cas. No. 13,058; Spaulding v. Tucker, 22 F. Cas. No. 13,220, Deady 649 [rev on other grounds 13 Wall. 453, 20 L. ed. 515]; Whittemore v. Cutter, 29 F. Cas. No. 17,600, 1 Gall. 429, 1 Robb Pat. Cas. 28.

Burden of proof see supra §§ 583, 584.

29. Recovery of all of commingled profits see supra § 622.

30. American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535.

31. Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Carter v. Baker, 5 F. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40.

32. Bryce v. Dorr, 4 F. Cas. No. 2,070, 3 McLean 582, 2 Robb Pat. Cas. 302.

33. Reis v. Rosenfeld, 204 Fed. 282, 122 CCA 480.

[a] **"Finding of validity and infringement** is a finding that the person whose patent rights have been infringed has suffered damage." American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535.

34. Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993; British Thomson-Houston Co. v. Naamlooze Vennootschap Pope's Metaaldraadlampenfabriek, [1923] S. C. 599.

35. Evidence of damages see supra §§ 584-586.

36. See infra § 632.

37. Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993, 995.

"Before the acceptance of what has come to be known as the reasonable royalty rule as a measure of damages, nominal damages only were allowed in many cases, even where it was reasonably certain that substantial damages had been sustained. Happily, however, the employment of this additional measure of damages has ended this species of legal injustice, and merely nominal damages are now awarded only where the evidence fails to show that the injured party has sustained substantial damages." Motor Player Corp. v. Piano Motors Corp., supra.

38. American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535, 536.

"If it be made to appear that the patent infringed is a broad one of great merit and value, and that the infringement has consisted of long-continued use upon a large scale by a defendant of the invention of the patent, it is obvious, the patent being property and the infringement constituting a tortious taking or conversion of that property by a defendant to his use, that the damages are substantial and not nominal." American Tel., etc., Co. v. Radio Audion Co., supra.

39. American Tel., etc., Co. v. Radio Audion Co., supra.

40. Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993 (as where the failure of plaintiff to make a profit during the infringing period was due in part to the increased costs in the experimental and developing stages of manufacturing the new device, and in part to the competition forced upon plaintiff by defendant, which resulted in an increase of expenses, a reduction in price and a loss of some sales).

41. Motor Player Corp. v. Piano Motors Corp., supra.

42. See infra text and notes 48, 49.

43. Crosby Steam Gage, etc., Co. v. Consolidated Safety Valve Co., 141 U. S. 441, 35 L. ed. 809; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954; Philp v. Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679; Reed Roller Bit Co. v. Hughes Tool Co., 12

fringing sales made by defendant,[44] and such profits may be estimated according to the price which he would have received, except for the infringing competition,[45] less the cost of manufacture and sale,[46] or they may be estimated according to the average profit realized by plaintiff during a reasonable period of time.[47] A satisfactory showing that plaintiff would have made the sales in question except for the infringement[48] and that he was ready and equipped to supply the demand[49] is necessary and sufficient to render the rule applicable.

Diminished profits on plaintiff's sales. Where sales made by plaintiff were necessarily made at a reduced price by reason of the infringement, such reduction in price is a proper item of damages.[50]

[§ 631] **dd. Royalty or License Fee[51]—(aa) Established License Fee.** While it is not an absolute or arbitrary guide or test to be followed under all circumstances,[52] the license fee charged other persons for the use of the patented invention may be accepted as the measure of damages for infringement,[53] provided it is established and uni-

F. (2d) 207 [aff sub nom. Caddo Rock Drill Bit Co. v. Reed, 4 F. (2d) 136]; Wright's Automatic Tobacco Packing Mach. Co. v. American Tobacco Co., 220 Fed. 163; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614; Rose v. Hirsh, 94 Fed. 177; Am Ende v. Seabury, 43 Fed. 672 [aff 152 U. S. 561, 14 SCt 683, 38 L. ed. 553]; Covert v. Sargent, 38 Fed. 237 [rev on other grounds 152 U. S. 516, 14 SCt 676, 38 L. ed. 536]; Welling v. La Bau, 34 Fed. 40; Blake v. Greenwood Cemetery, 16 Fed. 676; Fitch v. Bragg, 16 Fed. 243; Zane v. Peck, 13 Fed. 475; Putnam v. Lomax, 9 Fed. 448; McCormick v. Seymour, 15 F. Cas. No. 8,727, 3 Blatchf. 209 [aff 19 How. 96, 15 L. ed. 557]; Rice v. Heald, 20 F. Cas. No. 11,752 [rev on other grounds 104 U. S. 737, 26 L. ed. 910]; American Braided Wire Co. v. Thomson, 44 Ch. D. 274; Meters, Ltd. v. Metropolitan Gas Meters, Ltd., 104 L. T. Rep. N. S. 113; Clement Talbot, Ltd. v. Wilson, 26 R. P. C. 467.

[a] **Patent covering only part of device or manufacturing processes.**—(1) Defendant is liable for the profits plaintiff would have made on a complete device where, although some of the parts were old, and the patent nominally was only for an improvement, the device as a whole was new and it was the patented invention that gave value and made it salable (Reed Roller Bit Co. v. Hughes Tool Co., 12 F. (2d) 207 [aff sub nom. Caddo Rock Drill Bit Co. v. Reed, 4 F. (2d) 136]); (2) and this is true despite the existence of another patented invention during the accounting period, where defendant did not know of the existence of the invention or that it could enter into competition with plaintiff's device (Reed Roller Bit Co. v. Hughes Tool Co., supra). (3) However, a recovery of a loss of profits on a contract for the supplying of a product, in the performance of which an infringing machine was used, cannot extend to the profits which might have been realized from the complete manufacture of the finished product from raw materials where such manufacture includes, in addition to a process which involves the patented invention, several other distinct processes which produce a finished commercial commodity and do not involve the patented invention. National Tube Co. v. Mark, 10 F. (2d) 430.

44. Filer, etc., Co. v. Diamond Iron Works, 270 Fed. 489 [certiorari den 256 U. S. 691 mem, 41 SCt 533 mem, 65 L. ed. 1174 mem]; Dallas Brass, etc., Co. v. Faries Mfg. Co., 1 F. (2d) 930; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614; Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 119 CCA 229; Pressed Prism Glass Co. v. Continuous Glass Prism Co., 181 Fed. 151; Westinghouse v. New York Air Brake Co., 131 Fed. 607 [rev on other grounds 140 Fed. 545 (certiorari den 201 U. S. 648 mem, 26 SCt 742 mem, 50 L. ed. 904 mem)]; Creamer v. Bowers, 35 Fed. 206; Welling v. La Bau, 34 Fed. 40; Blake v. Greenwood Cemetery, 16 Fed. 676, 21 Blatchf. 222; Zane v. Peck, 13 Fed. 475; British Thomson-Houston Co., Ltd. v. Goodman, Ltd., 42 R. P. C. 75.

45. Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501; Pressed Prism Glass Co. v. Continuous Glass Prism Co., 181 Fed. 151; Zane v. Peck, 13 Fed. 475.

46. Sears, Roebuck & Co. v. Pearce, 253 Fed. 960, 165 CCA 402; Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501; Zane v. Peck, 13 Fed. 475; American Saw Co. v. Emerson, 8 Fed. 806.

[a] **Overhead expense.**—(1) It is proper to deduct the increase in plaintiff's overhead expense which would have resulted from handling the additional business. Riverside Heights Orange Growers' Assoc. v. Stebler, 240 Fed. 703, 153 CCA 501. (2) However, in computing plaintiff's overhead charges, it is proper to restrict advertising expense to the normal expenditure. Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459.

[b] **Price of materials purchased.**—Although the parties have entered into a stipulation as to the cost to complainant of producing the material upon which his patented process is used, yet where it subsequently appears that complainant does not produce the material but purchases it from another person and the price at which he purchased it during the period in controversy is definitely established, the latter figure will be taken as a basis for calculating damages consisting of profits he would have made except for the infringement. Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199, 135 CCA 85 [mod 216 Fed. 828, and certiorari den 238 U. S. 623 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem].

47. Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 119 CCA 229.

[a] **Period may include** noninfringing, as well as infringing, years. Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 119 CCA 229. But see Clark v. Schieble Toy, etc., Co., 248 Fed. 276, 160 CCA 354 (where defendant, a man of considerable capability and experience in the business in question was, during a prior noninfringing period, a member of a partnership, which was engaged in the legitimate manufacture and sale of the patented device, the average profits made by the partnership during that period may not be taken as a basis for estimating the profits complainant would have made during the infringing period, but they may be taken as representing the value or earning capacity of the patent property, or a reasonable royalty for its use).

48. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]; Dallas Brass, etc., Co. v. Faries Mfg. Co., 1 F. (2d) 930; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem]; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem]; American Saw Co. v. Emerson, 8 Fed. 806.

Evidence see supra § 585.

49. Sears, Roebuck & Co. v. Pearce, 253 Fed. 960, 165 CCA 402; Bemis Car Box Co. v. J. G. Brill Co., 200 Fed. 749, 119 CCA 229; Pressed Prism Glass Co. v. Continuous Glass Prism Co., 181 Fed. 151; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem]; American Saw Co. v. Emerson, 8 Fed. 806.

50. Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 6 SCt 934, 29 L. ed. 954 [aff 21 F. Cas. No. 12,366, 4 Bann. & A. 574, 17 Blatchf. 244]; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614; Pressed Prism Glass Co. v. Continuous Glass Prism Co., 181 Fed. 151; Kinner v. Shepard, 107 Fed. 952; Am Ende v. Seabury, 43 Fed. 672 [aff 152 U. S. 561, 14 SCt 683, 38 L. ed. 553]; Hobbie v. Smith, 27 Fed. 656; Fitch v. Bragg, 16 Fed. 243, 21 Blatchf. 302; Meters, Ltd. v. Metropolitan Gas Meters, Ltd., 104 L. T. Rep. N. S. 113.

51. Interest on damages measured by royalty or license fee see infra § 634.

52. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Clark v. Wooster, 119 U. S. 322, 7 SCt 217, 30 L. ed. 392; Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Keller v. Stolzenbaugh, 43 Fed. 378; Bates v. St. Johnsbury, etc., R. Co., 32 Fed. 628; Colgate v. Western Electric Co., 28 Fed. 146; Wooster v. Thornton, 26 Fed. 274 [aff 136 U. S. 651, 10 SCt 1074, 34 L. ed. 550]; Wooster v. Handy, 23 Fed. 49, 23 Blatchf. 112; Bell v. Daniels, 3 F. Cas. No. 1,247, 1 Bond 212, 1 Fish. Pat. Cas. 372; Campbell v. Barclay, 4 F. Cas. No. 2,353, 5 Biss. 179; Parker v. Hulme, 18 F. Cas. No. 10,740, 1 Fish. Pat. Cas. 44; Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535. See Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem] (an established royalty is not necessarily the limit of the value of the patented invention which has been appropriated, as an infringer should not be allowed the profit which a licensee justly expects).

[a] **Where profits are awarded** without any deduction of a royalty as an element of cost, the award should not be augmented by allowing a recovery of a royalty as damages. McKee Glass Co. v. H. C. Fry Glass Co., 248 Fed. 125, 160 CCA 265.

53. Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888; Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Clark v. Wooster, 119 U. S. 322, 7 SCt 217, 30 L. ed. 392; Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Burdell v. Denig, 92 U. S. 716, 23 L. ed. 764; Washington, etc., Steam Packet Co. v. Sickles, 19 Wall. (U. S.) 611, 22 L. ed. 203; Philp v. Nock, 17 Wall. (U. S.) 460, 21 L. ed. 679; New York v. Ransom, 23 How. (U. S.) 487, 16 L. ed. 515; Seymour v. McCormick, 16 How. (U. S.) 480, 14 L. ed. 1024; Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. ed. 824; Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1; Munising Paper Co. v. American Sulphite Pulp Co., 228 Fed. 700, 143 CCA 222; Leeds, etc., Co. v. Victor Talking Mach. Co., 154 Fed. 58, 83 CCA 170 [aff 213 U. S. 325, 29 SCt 503, 53 L. ed. 816]; Cassidy v. Hunt, 75 Fed. 1012; Houston, etc., R. Co. v. Stern, 74 Fed. 636, 20 CCA 568; Timken v. Olin, 41 Fed. 169; McDonald v. Whitney, 39 Fed. 466; Cary v. Lovell Mfg. Co., 37 Fed. 654 [rev on other grounds 147 U. S. 623, 13 SCt 472, 37 L. ed. 307]; Asmus v. Freeman, 34 Fed. 902; May v. Fond

form,[54] relates to the right or rights infringed, as distinguished from other rights under the patent,[55] and was paid or secured before the infringement complained of[56] and under such circumstances as to indicate the value of the patented invention to defendant.[57] Where the license fee is for the use of other inventions as well as the one involved in the suit, it is not a proper measure of damages,[58] unless the fee is the same regardless of whether one

du Lac County, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; Stutz v. Armstrong, 25 Fed. 147]; Graham v. Geneva Lake Crawford Mfg. Co., 24 Fed. 642; Cottier v. Stimson, 20 Fed. 906; Wooster v. Simonson, 20 Fed. 316; Westcott v. Rude, 19 Fed. 830; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Emigh v. Baltimore, etc., R. Co., 6 Fed. 283, 4 Hughes 271; Emerson v. Simm, 8 F. Cas. No. 4,443, 6 Fish. Pat. Cas. 281; Goodyear v. Bishop, 10 F. Cas. No. 5,559, 2 Fish. Pat. Cas. 154; Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. No. 5,600, 2 Bann. & A. 252; Livingston v. Jones, 15 F. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [rev on other grounds 1 Wall. 155, 17 L. ed. 662]; McCormick v. Seymour, 15 F. Cas. No. 8,727, 3 Blatchf. 209 [aff 19 How. 96, 15 L. ed. 557]; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167; Sickels v. Borden, 22 F. Cas. No. 12,-832, 3 Blatchf. 535; Star Salt Caster Co. v. Crossman, 22 F. Cas. No. 13,320, 4 Bann. & A. 566; Penn v. Jack, L. R. 5 Eq. 81, 20 ERC 714; United Tel. Co. v. Walker, 56 L. T. Rep. N. S. 508.

54. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398; Cornely v. Marckwald, 131 U. S. 159, 9 SCt 744, 33 L. ed. 117; Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888; Black v. Thorne, 111 U. S. 122, 4 SCt 326, 28 L. ed. 372; Washington, etc., Steam Packet Co. v. Sickels, 19 Wall. (U. S.) 611, 22 L. ed. 203; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem]; Brown Bag-Filling Mach. Co. v. Drohen, 171 Fed. 438 [aff 175 Fed. 576, 99 CCA 192]; Diamond Stone Sawing Mach. Co. v. Brown, 155 Fed. 753 [aff 166 Fed. 306, 92 CCA 224]; International Tooth Crown Co. v. Hank's Dental Assoc., 111 Fed. 916 [rev on other grounds 130 Fed. 1022, 63 CCA 684]; Royer v. Shultz Belting Co., 45 Fed. 51 [aff 154 U. S. 515, 14 SCt 1151, 38 L. ed. 1075]; Keyes v. Pueblo Smelting, etc., Co., 43 Fed. 478 [app dism 154 U. S. 507 mem, 14 SCt 1148 mem, 38 L. ed. 1083 mem]; Cary v. Lovell Mfg. Co., 37 Fed. 654 [rev on other grounds 147 U. S. 623, 13 SCt 472, 37 L. ed. 307]; United Nickel Co. v. Central Pac. R. Co., 36 Fed. 186; Asmus v. Freeman, 34 Fed. 902; Hammacher v. Wilson, 32 Fed. 796; Adams v. Bellaire Stamping Co., 28 Fed. 360 [aff 141 U. S. 539, 12 SCt 66, 35 L. ed. 849]; Bates v. St. Johnsbury, etc., R. Co., 32 Fed. 628; Cornely v. Marckwald, 32 Fed. 292 [aff 131 U. S. 159, 9 SCt 744, 33 L. ed. 117]; Graham v. Geneva Lake Crawford Mfg. Co., 24 Fed. 642; Westcott v. Rude, 19 Fed. 830; National Car-Brake Shoe Co. v. Terre Haute Car, etc., Co., 19 Fed. 514; Matthews v. Spangenberg, 14 Fed. 350; Bussey v. Excelsior Mfg. Co., 1 Fed. 640, 1 McCrary 161 [rev on other grounds 110 U. S. 131, 4 SCt 38, 28 L. ed. 95]; Black v. Munson, 3 F. Cas. No. 1,463, 2 Bann. & A. 623, 14 Blatchf. 265 [aff 111 U. S. 122, 4 SCt 326, 28 L. ed. 372]; Judson v. Bradford, 14 F. Cas. No. 7,564, 3 Bann. & A. 539.

"Where there is an established regular price for a license to use a patented machine, that price may be taken as a measure of damages against infringers." Dunkley Co. v. Central California Canneries, 7 F. (2d) 972, 976 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem].

[a] **Exceptional contracts.**—(1) A fee may be regarded as fixed, although exceptions are sometimes made. Asmus v. Freeman, 34 Fed. 902. (2) However, where there is no fixed and established royalty, the fee or royalty provided for in exceptional contracts cannot be taken as the measure of damages. Greenleaf v. Yale Lock Mfg. Co., 10 F. Cas. No. 5,783, 4 Bann. & A. 583, 17 Blatchf. 253.

[b] **Granting of single license** is not sufficient to establish a fixed royalty as against an infringer. Muther v. United Shoe Mach. Co., 21 F. (2d) 773.

[c] **Royalty previously agreed upon by parties.**—As to sales made by defendant at a loss, it is not improper to allow a recovery against him of a royalty fixed at a certain percentage of the receipts from sales in a license previously agreed upon to the parties and afterward canceled. McKee Glass Co. v. H. C. Fry Glass Co., 248 Fed. 125, 160 CCA 265.

[d] **Fee established by exclusive licensee.**—Where the owners of a patent granted an exclusive license thereunder, authorizing the licensee to grant licenses to others on such terms as he saw fit, reserving as a royalty a certain per cent of the profits realized by the licensee in a joint suit by the owners and licensee for infringement which interfered with sales by the licensee and the granting of licenses, the license fee established, charged, and received by the licensee may properly be taken as a basis for the computation of damages recoverable from the infringer. Fox v. Knickerbocker Engraving Co., 158 Fed. 422 [aff 165 Fed. 442, 91 CCA 386].

Uniform and established reduction see infra note 56 [a].

55. Muther v. United Shoe Mach. Co., 21 F. (2d) 773; Colgate v. Western Electric Mfg. Co., 28 Fed. 146; La Baw v. Hawkins, 14 F. Cas. No. 7,-961, 2 Bann. & A. 561.

[a] **License fee for use** is not the proper measure of damages for infringement by manufacturing. Muther v. United Shoe Mach. Co., 21 F. (2d) 773.

56. Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Diamond Stone-Sawing Mach. Co. v. Brown, 166 Fed. 306, 92 CCA 224 [aff 155 Fed. 753]. Compare Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502, 505 ("The prevailing royalty or license rate for the infringement period is the measure of a patentee's damages, and not the rate at which the invention was licensed during an earlier period, when the patentee was willing to take almost anything to get the invention introduced").

[a] **Reduction before or after commencement of infringement.**—(1) Complainant is entitled to recover damages at the rate of the lowest license fee charged down to the time when infringement began (American Sulphite Pulp Co. v. De Grasse Paper Co., 193 Fed. 653, 113 CCA 521 [rev 190 Fed. 39, and certiorari den 225 U. S. 712 mem, 32 SCt 841 mem, 56 L. ed. 1268 mem]), (2) especially where such fee remained the prevailing rate during the period of infringement (Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem]). (3) A royalty or license fee is not to be regarded as wanting in uniformity because it was higher in the early days and later reduced to a certain basis where it was reduced to that basis before the infringement began and was not further reduced during the period of infringement. Expanded Metal Co. v. General Fireproofing Co., supra. (4) Where two different uniform license fees under a patent prevailed at different periods of time, the fee having been reduced on a certain date, an infringer whose infringement commenced during the first period and extended into the second may properly be charged with damages at the higher rate until he ceased to infringe; but where he subsequently again commenced infringement, his liability should be measured by the rate then prevailing. Fox v. Knickerbocker Engraving Co., 158 Fed. 422 [aff 165 Fed. 442, 91 CCA 386].

57. Rude v. Westcott, 130 U. S. 152, 9 SCt 463, 32 L. ed. 888.

[a] **Similar or different circumstances.**—"In cases of infringement, damages are not to be assessed solely on the basis of royalty or license unless there is evidence shewing that under similar circumstances certain definite prices have been charged and paid. It would be proper to consider what was charged and paid for royalties under other circumstances as one of the factors or elements in assessing the damages, but it is improper to treat it as the sole determining factor." Consolidated Wafer Co., Ltd. v. International Cone Co., Ltd., 59 Ont. L. 205, 209, [1926] 4 DomLR 74.

[b] **Different territory.**—The price for which the patentee has sold his rights in a certain territory is no criterion by which to determine the amount of damage sustained by an infringement in other territory. Campbell v. Barclay, 4 F. Cas. No. 2,353, 5 Biss. 179.

[c] **Fee charged after adjudication of invalidity of patent.**—The sum exacted by the patentee during the period intervening between an adjudication of the invalidity of the patent and a final adjudication of its validity cannot be regarded as a true established royalty or as an index of the actual value of the patentee's right. Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469].

[d] **Licenses granted to auxiliary companies.**—"The sum charged by the patentee as royalty to auxiliary companies, who receive exclusive licenses for a designated territory, and who invest capital and incur the expense of preparing plants, and enter into the business of supplying the patented article, would be an inadequate royalty and measure of damages for infringement. The patentee, in consideration of the benefit which it obtains from the act of co-operation of an auxiliary company, in introducing the patented improvement and exploiting it, thereby securing a far greater return for the use of its invention than could be obtained by dealing with individual users, may well afford to fix a low rate of royalty to such licensees." Reliance Constr. Co. v. Hassam Pav. Co., 248 Fed. 701, 702, 160 CCA 601.

58. Vulcanite Pav. Co. v. American Artificial Stone Pav. Co., 36 Fed. 378; Willimantic Linen Co. v. Clark Thread Co., 27 Fed. 865 [rev on other grounds 140 U. S. 481, 11 SCt 846, 35 L. ed. 521]; Porter Needle Co. v. National Needle Co., 22 Fed. 829; Wooster v. Simonson, 16 Fed. 680. And see Muther v. United Shoe Mach. Co., 21 F. (2d) 773 (recognizing the rule, but holding it inapplicable in a case involving only one device incapable

or more of the inventions are used,[59] or regardless of which one is used.[60]

[§ 632] **(bb) Reasonable Royalty.**[61] Where it is clear that plaintiff has been substantially injured by the infringement,[62] and neither damages[63] nor profits[64] can be calculated with reasonable certainty by applying any other rule, as where there is no uniform and established royalty or license fee,[65] no evidence of a loss of sales[66] or reduction of profits[67] suffered by plaintiff, and, in case defendant has realized profits,[68] there is no satisfactory evidence of the amount or portion attributable to the use of the patented invention,[69] plaintiff may recover what would have been a reasonable royalty for defendant to pay[70] or, in other words, the amount which, in view of the nature, utility, and advantages of the invention,[71] and the extent of the use involved,[72] the parties would probably have agreed on if plaintiff was willing to grant a license and defendant wished to obtain one,[73] and both parties were reasonably endeavoring to reach an agreement.[74] The rule may be applicable, even though defendant has not realized any profits.[75] However, the rule is to be applied with caution,[76] the amount recoverable is to be conservatively estimated,[77] and in some cases the rule is not applicable,[78] as where profits have been proved and allowed.[79]

Foreign or domestic sales. A reasonable royalty may be recovered on account of a sale made in the country in which the patent was obtained,[80] but not on account of a sale made in another country.[81]

[§ 633] **ee. Punitive or Increased Damages.** Exemplary damages cannot be included in the verdict in an action at law to recover damages for infringement of a patent,[82] but under statutory pro-

of being divided into separate and distinct inventions).

59. Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502.

60. Empire Rubber, etc., Co. v. Le Laski, etc., Circular Woven Tire Co., 281 Fed. 1.

61. **Evidence to show reasonable royalty** see supra § 586.

62. Egry Register Co. v. Standard Register Co., 23 F. (2d) 438; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272]; American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535.

63. W. S. Godwin Co. v. International Steel Tie Co., 29 F. (2d) 476; Fulton Bag, etc., Mills v. Werthan Bag Co., 28 F. (2d) 922; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272]; Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993; National Tube Co. v. Mark, 10 F. (2d) 430; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501; U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614 (reviewing authorities).

64. Fulton Bag, etc., Mills v. Werthan Bag Co., 28 F. (2d) 922; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272]; Gear Grinding Mach. Co. v. Studebaker Corp., 4 F. (2d) 510; Jones v. Sykes Metal Lath, etc., Co., 254 Fed. 91, 165 CCA 501.

65. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [expl Coupe v. Royer, 155 U. S. 565, 15 SCt 199, 39 L. ed. 263]; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272]; Muther v. United Shoe Mach. Co., 21 F. (2d) 773; American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535; Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331; Page Mach. Co. v. Dow, 238 Fed. 369; Hunt Bros. Fruit-Packing Co. v. Cassiday, 64 Fed. 585, 12 CCA 316; British Thomson-Houston Co., Ltd. v. Charlesworth, [1923] S. C. 599.

[a] **That complainant has granted no licenses** and fixed no royalty does not preclude resort to a reasonable royalty basis. National Tube Co. v. Mark, 10 F. (2d) 430; K. W. Ignition Co. v. Temco Electric Motor Co., 283 Fed. 873 [certiorari den 260 U. S. 746 mem, 43 SCt 247 mem, 67 L. ed. 493 mem].

66. American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535; Page Mach. Co. v. Dow, 238 Fed. 369; Hunt Bros. Fruit-Packing Co. v. Cassiday, 64 Fed. 585, 12 CCA 316.

67. American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535.

68. **Applicability of rule where defendant has not made profits** see infra text and note 75.

69. Egry Register Co. v. Standard Register Co., 23 F. (2d) 438; Fox Typewriter Co. v. Underwood Typewriter Co., 287 Fed. 453; K. W. Ignition Co. v. Temco Electric Motor Co., 283 Fed. 873 [certiorari den 260 U. S. 746 mem, 43 SCt 247 mem, 67 L. ed. 493 mem]; Malleable Iron Range Co. v. Lee, 263 Fed. 896 [mod 247 Fed. 795, and certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem].

70. See cases supra notes 62–69.

[a] **Leading case.**—U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 CCA 614 is a leading case on the subject. Krentler-Arnold Hinge Last Co. v. Leman, 24 F. (2d) 423.

[b] **Terminology.**—(1) It is said that, while the damage or compensation recoverable under this rule is conveniently named, and frequently spoken of as, a "reasonable royalty," yet, in precise terminology, it is not a royalty at all, and it may well be called "'general damage'; that is to say, damage not resting on any of the applicable, exact methods of computation but upon facts and circumstances which permit the jury or the court to estimate in a general, but in a sufficiently accurate, way the injury to plaintiff caused by each infringing sale." U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 617, 132 CCA 614. (2) However, it is also said that the name given to the value or earning capacity of the patent property, fixed by a court or jury after the event, instead of by the parties in advance, is immaterial; it is not improper to call it a "royalty." Clark v. Schieble Toy, etc., Co., 248 Fed. 276, 160 CCA 354.

[c] **Difficulty in determining reasonable royalty** does not alone bar the court from adopting that rule of measuring damages. B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem].

71. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398; Dunkley v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535.

72. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398; American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535.

[a] **Where defendant only sells,** and does not manufacture, the infringing article, it is fair to hold him liable only for one third of a reasonable royalty covering the manufacture, sale, and use of the patented article. Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331.

73. A. Mecky Co. v. Garton Toy Co., 277 Fed. 507. See Dunkley v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem] (reasonable royalty should be fixed at such sum as defendant would probably have consented to pay rather than dispense with the patented machine).

[a] **Business proposition.**—"The purpose in view in any particular case is to determine what amount a person desiring to manufacture and sell the patented article would, as a business proposition, be willing to pay as a royalty; that is, what amount could he fairly pay as a royalty and be able to make and sell in the market the patented article at a reasonable profit to himself." Austin-Western Road Mach. Co. v. Disc Grader, etc., Co., 291 Fed. 301, 304 [certiorari den 263 U. S. 717 mem, 44 SCt 180 mem, 68 L. ed. 522 mem].

[b] **Aggravation of infringement** by defendant's willfulness is not to be considered in determining what would be a reasonable royalty. A. Mecky Co. v. Garton Toy Co., 277 Fed. 507.

74. Egry Register Co. v. Standard Register Co., 23 F. (2d) 438.

75. Merrell Soule Co. v. Powdered Milk Co., 7 F. (2d) 297 [rev 2 F. (2d) 107]; Austin-Western Road Mach. Co. v. Disc Grader, etc., Co., 291 Fed. 301 [certiorari den 263 U. S. 717 mem, 44 SCt 180 mem, 68 L. ed. 522 mem]; Dunkley Co. v. Vrooman, 272 Fed. 468.

76. Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469].

77. Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469].

78. Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 275 Fed. 315 [rev 266 Fed. 543, and certiorari den 257 U. S. 650 mem, 42 SCt 57 mem, 66 L. ed. 416 mem].

79. Krentler-Arnold Hinge Last Co. v. Leman, 24 F. (2d) 423. Contra Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331.

80. Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459.

81. B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem].

82. Buck v. Hermance, 4 F. Cas. No. 2,082, 1 Blatchf. 398, Fish. Pat. R. 251; Hall v. Wiles, 11 F. Cas. No. 5,954, 2 Blatchf. 194, Fish. Pat. R. 433; McCormick v. Seymour, 15 F. Cas. No. 8,727, 3 Blatchf. 209 [aff 19 How. 96, 15 L. ed. 557]; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441; Washburn v. Gould, 29 F. Cas. No. 17,214, 2 Robb Pat. Cas. 206, 3 Story 122; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40. Contra Parker v. Corbin, 18 F. Cas. No. 10,731, 4 McLean 462, 2 Robb Pat. Cas. 736.

visions,[83] and the construction placed thereon, the court, either in an action at law[84] or in a suit in equity,[85] may, in its discretion, increase or refuse to increase the damages to any amount not exceeding three times the amount of actual damages found,[86] and damages so increased are spoken of in some cases as punitive damages,[87] although in other cases such characterization is deemed inaccurate.[88] Ordinarily the court will exercise its statutory power to increase damages where the circumstances of the infringement are aggravated,[89] or, in other words, when,[90] and only when,[91] the infringement is willful, deliberate, wanton, or in bad faith.

[§ 634] **ff. Interest.** In an action at law for infringement of a patent, interest may be allowed by way of damages[92] from the time of infringement[93] or from the time of the commencement of the suit.[94] In a suit in equity the allowance of interest is largely a matter of discretion,[95] and this discretion extends not only to the date from which interest is allowed,[96] but also, within proper limitations, to the rate.[97]

Where damages are calculated upon royalty basis,[98] interest may be allowed[99] from the date or dates when the royalty or royalties would have been due and payable if defendant had been a licensee,[1] but it is not improper to allow interest from the

83. U. S. Rev. St. §§ 4919, 4921.
84. U. S. Rev. St. § 4919.
85. U. S. Rev. St. § 4921.
[a] **Statute is not unconstitutional.**—Taylor v. Ford Motor Co., 2 F. (2d) 473.
[b] **Under act of 1836,** a court of equity could not award exemplary damages. Livingston v. Jones, 15 F. Cas. No. 8,414, 2 Fish. Pat. Cas. 207, 3 Wall. Jr. 330 [rev on other grounds 1 Wall. 155, 17 L. ed. 662]; Motte v. Bennett, 17 F. Cas. No. 9,884, 2 Fish. Pat. Cas. 642; Sanders v. Logan, 21 F. Cas. No. 12,295, 2 Fish. Pat. Cas. 167, 2 Pittsb. (Pa.) 241.
86. Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Beacon Folding Mach. Co. v. Rotary Mach. Co., 17 F. (2d) 934; Peter Schoenhofen Brewing Co. v. Alvey-Ferguson Co., 14 F. (2d) 945; Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453; Van Kannel Revolving Door Co. v. Uhrich, 297 Fed. 363 [certiorari den 266 U. S. 604 mem, 45 SCt 91 mem, 69 L. ed. 463 mem]; Malleable Iron Range Co. v. Lee, 263 Fed. 896 [mod 247 Fed. 795, and certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; Fox v. Knickerbocker Engraving Co., 165 Fed. 442, 91 CCA 386 [aff 158 Fed. 422]; National Folding-Box, etc., Co. v. Elsas, 81 Fed. 197 [aff 86 Fed. 917, 30 CCA 487]; Masseth v. Johnston, 59 Fed. 613; Covert v. Sargent, 42 Fed. 298 [app dism 145 U. S. 635, 12 SCt 979, 36 L. ed. 855]; Welling v. La Bau, 35 Fed. 302; Bell v. U. S. Stamping Co., 32 Fed. 549; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90; Gray v. James, 10 F. Cas. No. 5,718, Pet. C. C. 394, 1 Robb Pat. Cas. 120; Guyon v. Serrell, 11 F. Cas. No. 5,881, 1 Blatchf. 244, Fish. Pat. R. 151; Stimpson v. Railroads, 23 F. Cas. No. 13,456, 1 Wall. Jr. 164, 2 Robb Pat. Cas. 595; Whittemore v. Cutter, 29 F. Cas. No. 17,601, 1 Gall. 478, 1 Robb Pat. Cas. 40. See Taylor v. Ford Motor Co., 2 F. (2d) 473 ("the allowance of an increase of damages in section 4921, R. S., is a matter which rests somewhat in the discretion of the court. Plaintiff, however, has a right to its exercise when the evidence clearly requires it"); Harvey v. Murray, 6 Newfoundl. 183, 191 (considering a local act directing that defendant, if convicted, shall pay as damages three times the actual loss sustained by plaintiff, and characterizing it as "a very penal and somewhat antiquated provision").
[a] **Statute gives "plaintiff no vested rights** to have his damages increased. It rests entirely within the discretion of the court whether and to what extent the plaintiff shall recover more than actual legal damages." Beacon Folding Mach. Co. v. Rotary Mach. Co., 17 F. (2d) 934, 935.
87. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Peter Schoenhofen Brewing Co. v. Alvey-Ferguson Co., 14 F. (2d) 945; Standard Oil Co. v. Roxana Petroleum Corp., 9 F. (2d) 453; Taylor v. Ford Motor Co., 2 F. (2d) 473; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 276 Fed. 600 [aff 277 Fed. 171 (certiorari den 257 U. S. 660 mem, 42 SCt 187 mem, 66 L. ed. 422 mem)]; Malleable Iron Range Co. v. Lee, 263 Fed. 896 [mod 247 Fed. 795, and certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem].
88. Krentler-Arnold Hinge Last Co. v. Leman, 24 F. (2d) 423.
89. Fox v. Knickerbocker Engraving Co., 158 Fed. 422 [aff 165 Fed. 442, 91 CCA 386]; National Folding Box, etc., Co. v. Robertson, 125 Fed. 524; National Folding-Box, etc., Co. v. Elsas, 86 Fed. 917, 30 CCA 487 [aff 81 Fed. 197]; Morss v. Union Form Co., 39 Fed. 468; Lyon v. Donaldson, 34 Fed. 789; Stutz v. Armstrong, 25 Fed. 147; Graham v. Geneva Lake Crawford Mfg. Co., 24 Fed. 642; Allen v. Blunt, 1 F. Cas. No. 217, 2 Robb Pat. Cas. 530, 2 Woodb. & M. 121; Bell v. McCullough, 3 F. Cas. No. 1,256, 1 Bond 194, 1 Fish. Pat. Cas. 380; Brodie v. Ophir Silver Min. Co., 4 F. Cas. No. 1,919, 4 Fish. Pat. Cas. 137, 5 Sawy. 608; Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. No. 5,600, 2 Bann. & A. 252; Guyon v. Serrell, 11 F. Cas. No. 5,881, 1 Blatchf. 244, Fish. Pat. R. 151; Parker v. Corbin, 18 F. Cas. No. 10,731, 4 McLean 462, 2 Robb Pat. Cas. 736; Peek v. Frame, 19 F. Cas. No. 10,903, 9 Blatchf. 194, 5 Fish. Pat. Cas. 113; Russell v. Place, 21 F. Cas. No. 12,161, 9 Blatchf. 173, 5 Fish. Pat. Cas. 134 [aff 94 U. S. 606, 24 L. ed. 214].
90. W. S. Godwin Co. v. International Steel Tie Co., 29 F. (2d) 476; Krentler-Arnold Hinge Last Co. v. Leman, 24 F. (2d) 423; Muther v. United Shoe Mach. Co., 21 F. (2d) 773; Motor Player Corp. v. Piano Motors Corp., 19 F. (2d) 993; Van Kannel Revolving Door Co. v. Uhrich, 297 Fed. 363 [certiorari den 266 U. S. 604 mem, 45 SCt 91 mem, 69 L. ed. 463 mem]; Austin-Western Road Mach. Co. v. Disc Grader, etc., Co., 291 Fed. 301 [certiorari den 263 U. S. 717 mem, 44 SCt 180 mem, 68 L. ed. 522 mem]; Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459; Fox v. Knickerbocker Engraving Co., 158 Fed. 422 [aff 165 Fed. 442, 91 CCA 386]; Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 155 Fed. 301; National Folding-Box, etc., Co. v. Elsas, 81 Fed. 197 [aff 86 Fed. 917, 30 CCA 487]. Compare Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502 (an award of treble damages is not warranted by concealment of infringement before plaintiff gave defendant the prescribed statutory notice of the patent and infringement, or by continued infringement to a greatly increased extent after notice).
[a] **Infringement after supreme court has held patent valid** justifies increase of damages. Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469].
[b] **Damages for willful infringement increased to cover:** (1) Expense of auditors. Reed Roller Bit Co. v. Hughes Tool Co., 12 F. (2d) 207 [aff sub nom. Caddo Rock Drill Bit Co. v. Reed, 4 F. (2d) 136]. (2) Prevailing party's expenses of litigation. Krentler-Arnold Hinge Last Co. v. Leman, 24 F. (2d) 423.
91. Egry Register Co. v. Standard Register Co., 23 F. (2d) 438; Page Mach. Co. v. Dow, 238 Fed. 369; B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem]; Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem]; Brown Bag Filling Mach. Co. v. Drohen, 175 Fed. 576, 99 CCA 192 [aff 171 Fed. 438]; Welling v. La Bau, 35 Fed. 302; Carlock v. Tappan, 5 F. Cas. No. 2,412; Schwarzel v. Holenshade, 21 F. Cas. No. 12,506, 2 Bond 29, 3 Fish. Pat. Cas. 116.
[a] **Increase denied where validity of patent debatable or doubtful.**—Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469] (doubt arising from conflicting decisions); Toledo Computing Scale Co. v. Moneyweight Scale Co., 178 Fed. 557 [aff 187 Fed. 826, 109 CCA 589, and pet to open decree den 199 Fed. 905, 118 CCA 235]; Brown Bag Filling Mach. Co. v. Drohen, 175 Fed. 576, 99 CCA 192.
92. Tatham v. Le Roy, 23 F. Cas. No. 13,760, 2 Blatchf. 474 [rev on other grounds 14 How. 156, 14 L. ed. 367].
93. Tatham v. Le Roy, supra.
94. May v. Fond du Lac County, 27 Fed. 691 [rev on other grounds 137 U. S. 395, 11 SCt 98, 34 L. ed. 714]; McCormick v. Seymour, 15 F. Cas. No. 8,726, 2 Blatchf. 240 [rev on other grounds 16 How. 480, 14 L. ed. 1024]; Pitts v. Hall, 19 F. Cas. No. 11,192, 2 Blatchf. 229, Fish. Pat. R. 441.
95. Merrell Soule Co. v. Powdered Milk Co., 7 F. (2d) 297 [rev 2 F. (2d) 107]; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469].
96. Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272]; National Tube Co. v. Mark, 10 F. (2d) 430.
97. Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272].
98. See supra §§ 631, 632.
99. Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535.
1. Muther v. United Shoe Mach. Co., 21 F. (2d) 773; Merrell Soule Co. v. Powdered Milk Co., 7 F. (2d) 297 [rev 2 F. (2d) 107]; B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem]; McNeely v. Williames, 96 Fed. 978, 37 CCA 641; Locomotive Safety Truck Co. v. Pennsylvania R. Co., 2 Fed. 677 [rev on other grounds 110 U. S. 490, 4 SCt 220, 28 L. ed. 222]. See Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d)

end of the infringing period[2] or even from a date subsequent thereto where considerable time elapsed before the master filed his report and neither party was more responsible than the other for the long delay.[3]

Interest upon award of damages, including the aggregate of principal and interest awarded as damages,[4] is to be computed from the date of the master's report.[5]

[§ 635] **(d) For Infringement of Design Patent.** Under the pertinent statute,[6] and the construction placed thereon, where the infringement of a design patent was willful after notice, a minimum amount of two hundred and fifty dollars may be collected for each offense,[7] even though the infringer realized no profits,[8] or the profits realized by him are less than the statutory sum;[9] but profits are not recoverable where the design was applied only to a part of an article and it is impossible to segregate the portion of the profits due to the use of the design;[10] damages measured by a reasonable royalty cannot be recovered;[11] and the statutory amount cannot be recovered from a mere seller of an article embodying the design where he was without knowledge of the patent.[12]

[§ 636] **(4) Accounting—(a) Order or Decree for Accounting and Reference.** A decree finding infringement is a prerequisite to an accounting.[13] Also, where a patent expired before the commencement of a suit for infringement thereof, a court of equity never had jurisdiction of the suit,[14] and it is equally without power to order an accounting of profits and damages arising from alleged infringement of the patent.[15] On the other hand, where the court has jurisdiction and the patent is found to be valid and infringed, plaintiff in an equitable suit is entitled to an accounting of profits and damages,[16] unless the recovery of any substantial damages or profits is so improbable as to justify the court in declining to make an order for an accounting.[17] Where an accounting is ordered, the cause will ordinarily be referred to a master to take and state the account or ascertain the amount to be recovered;[18] but a reference may be refused where it is obvious that the amount involved is too small to warrant the expense thereof.[19]

272]; Munising Paper Co. v. American Sulphite Pulp Co., 228 Fed. 700, 143 CCA 222 (both cases to the effect that interest may be allowed from the time the license should have been purchased).

[a] **Interest with periodical rests** may be allowed where damages are calculated on the basis of royalties payable at customary intervals. Parker Rust Proof Co. v. Ford Motor Co., 23 F. (2d) 502; Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272].

2. Collins v. Hupp Motor Car Corp., supra; National Tube Co. v. Mark, 10 F. (2d) 430; K. W. Ignition Co. v. Temco Electric Motor Co., 283 Fed. 873 [certiorari den 260 U. S. 746 mem, 43 SCt 247 mem, 67 L. ed. 493 mem]; Malleable Iron Range Co. v. Lee, 263 Fed. 896 [mod 247 Fed. 795, and certiorari den 251 U. S. 562 mem, 40 SCt 342 mem, 64 L. ed. 415 mem]; Diamond Stone Sawing Mach. Co. v. Brown, 155 Fed. 753 [aff 166 Fed. 306, 92 CCA 224].

[a] **Rule applied** where: (1) The infringing period was short. Egry Register Co. v. Standard Register Co., 23 F. (2d) 438 (eighteen months). (2) It was impossible to determine upon what sum the infringer should have paid interest during any one year. B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem].

3. National Tube Co. v. Mark, 10 F. (2d) 430 (interest allowed for one half of period intervening between cessation of infringement and filing of master's report).

[a] **Delay considered in fixing royalty.**—Where the master considered the fact that payment had been long delayed as a factor in determining the reasonable royalty allowed as of the date of his report, there was no error in refusing to allow interest before the date of the report. Dunkley Co. v. Vrooman, 272 Fed. 468.

4. National Tube Co. v. Mark, 10 F. (2d) 439.

5. National Tube Co. v. Mark, supra.

[a] **Rule is applicable to:** (1) Such part of the final award as was found by the master and approved by the court. Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459. (2) A portion of the award consisting of an increase of damages by the court. K. W. Ignition Co. v. Temco Electric Motor Co., 283 Fed. 873 [certiorari den 260 U. S. 746 mem, 43 SCt 247 mem, 67 L. ed. 493 mem]. Contra Auto Vacuum Freezer Co. v. William A. Sexton Co., 250 Fed. 459.

6. Act Febr. 4, 1887 (24 U. S. St. at L. 387).

[a] **Statute is not unconstitutional.**—Untermeyer v. Freund, 58 Fed. 205, 7 CCA 183.

7. Frank v. Geiger, 121 Fed. 126; Gimbel v. Hogg, 97 Fed. 791, 38 CCA 419; Fuller v. Field, 82 Fed. 813, 27 CCA 165 [certiorari den 171 U. S. 690 mem, 19 SCt 884 mem]; Lowell Mfg. Co. v. Whittall, 71 Fed. 515; Monroe v. Anderson, 58 Fed. 398, 7 CCA 272; Untermeyer v. Freund, 50 Fed. 77 [aff 58 Fed. 205, 7 CCA 183]; Ripley v. Elson Glass Co., 49 Fed. 927.

[a] **Infringement of several claims in one patent** constitutes only one offense. Gimbel v. Hogg, 97 Fed. 791, 38 CCA 419.

[b] **Facts held to show sufficient notice.**—Anderson v. Saint, 46 Fed. 760.

[c] **Facts held not to show sufficient notice.**—Lichtenstein v. Phipps, 168 Fed. 61, 93 CCA 483 [rev 161 Fed. 578]; Gimbel v. Hogg, 97 Fed. 791, 38 CCA 419 (notice given to public by marking patented article).

8. Pirkl v. Smith, 42 Fed. 410 [aff 154 U. S. 517, 14 SCt 1153, 38 L. ed. 1082].

9. Western Gas Fixture Co. v. Jefferson Glass Co., 296 Fed. 128.

10. Young v. Grand Rapids Refrigerator Co., 268 Fed. 966.

11. Young v. Grand Rapids Refrigerator Co., supra.

[a] **Reason for rule.**—"The absence of any other measure of recovery is one of the reasons for resorting to a reasonable royalty, and the considerations supporting that measure of damages apply with much lessened force, if at all, to a design patent." Young v. Grand Rapids Refrigerator Co., 268 Fed. 966, 974.

12. Lichtenstein v. Straus, 166 Fed. 319.

13. Franklin Brass Fdy. Co. v. Shapiro, 278 Fed. 435 [mod 268 Fed. 551, 272 Fed. 176].

14. See supra § 524.

15. Creamer v. Bowers, 30 Fed. 185.

16. Alliance Securities Co. v. Mohr, 14 F. (2d) 793 [aff 14 F. (2d) 799]; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 [aff 232 Fed. 475, 146 CCA 469]; Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Whitney v. Boston, etc., R. Co., 48 Fed. 444; North American Iron-Works v. Fiske, 30 Fed. 622.

[a] **Sales after notice.**—Sales by defendant of infringing articles or devices after he has been given notice of the patent justifies an accounting. Ersted v. Willamette Iron, etc., Works, 28 F. (2d) 960; Atlas Floor Co. v. Robbins Mfg. Co., 239 Fed. 135, 152 CCA 177.

[b] **Failure to file disclaimer** does not disentitle plaintiff to an accounting. Novelty Glass Mfg. Co. v. Brookfield, 172 Fed. 221, 97 CCA 25.

[c] **Avoiding accounting by offer of certain royalty.**—Where it is plain defendants have infringed, but they have denied infringement until after the bringing of the suit, and then in their answer deny the validity of the patent and still deny infringement, they cannot avoid being subjected to the expense of an accounting by offering to pay the royalty on a certain number of the infringing articles which they admit having sold, together with the costs of the suit. Fisk v. Mahler, 54 Fed. 528.

[d] **Purpose of accounting.**—"Accountings for damages in suits for infringement are to avoid actions at law, and to close up all the rights of the parties in one suit." Van Kannell Revolving Door Co. v. Revolving Door, etc., Co., 293 Fed. 261, 262.

Scope of accounting directed by decree see infra § 637.

17. Sandusky Fdy., etc., Co. v. De Lavaud, 274 Fed. 607; Perkins Electric Switch Mfg. Co. v. Yost Electric Mfg. Co., 189 Fed. 625; Bergmann v. Macmillan, 17 Ch. D. 423. See Southern Textile Mach. Co. v. Fay Stocking Co., 259 Fed. 243, 170 CCA 311 (before any accounting is ordered for profits, as distinguished from damages, the trial court should be satisfied there is some theory of recovering profits plausible enough to justify an effort to establish it).

[a] **In earlier cases** (1) it was held that plaintiff was entitled to an accounting, even though he had introduced no evidence of profits and damages (Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Andrews v. Creegan, 7 Fed. 477, 19 Blatchf. 113; Bullock Printing Press Co. v. Jones, 4 F. Cas. No. 2,132, 3 Bann. & A. 195), (2) as, for the purpose of ordering an accounting, they would be presumed from infringement (Campbell Printing-Press, etc., Co. v. Manhattan R. Co., supra; Andrews v. Creegan, supra).

18. Campbell Printing-Press, etc., Co. v. Manhattan R. Co., 49 Fed. 930; Allen v. Blunt, 1 F. Cas. No. 215, 1 Blatchf. 480, Fish. Pat. R. 303; Carew v. Boston Elastic Fabric Co., 5 F. Cas. No. 2,397, 3 Cliff. 356, 5 Fish. Pat. Cas. 90.

Effect of bankruptcy of defendant after reference to master see Bankruptcy § 28.

19. Hewes v. Gay, 11 F. (2d) 165;

[§ 637] **(b) Scope.** On a reference for an accounting in a patent infringement case, the master is to determine profits and damages[20] arising from defendant's[21] unauthorized manufacture, sale, or use of the patented invention in question,[22] including a reasonable royalty[23] where that measure of damages is applicable,[24] but not increased damages[25] which the court, under statutory authority may award.[26] The master is bound,[27] and the scope of the accounting is limited,[28] by the terms of the interlocutory decree as properly construed.[29] Generally speaking, the only question open for determination on the accounting is the amount to be recovered,[30] and no issue can be brought into the accounting unless its object or effect is to aid in determining that question.[31] The validity[32] and scope[33] of the patent are not to be determined, and therefore evidence of the prior art is not to be introduced at the accounting.[34] However, while questions of infringement determined by the interlocutory decree are not open to reconsideration on the accounting,[35] the master is to determine the extent of the infringement;[36] the account is not limited to the date of the decree,[37] but extends to the date of the hearing before the master,[38] or, as near as may be,[39] to the date of the master's report,[40] unless infringement has ceased[41] or complainant has sold his patent[42] prior to that time; the master may determine whether a new or modified construction adopted since the date of the interlocutory decree constitutes an infringement,[43] or, more accurately speaking,[44] the master may, by comparing the new and old constructions,[45] determine whether the new is substantially like the old[46] so as to come within

Tucker Bros. Mfg. Co. v. Dallas Mach., etc., Co., 286 Fed. 754; Bradford v. Belknap Motor Co., 105 Fed. 63 [aff 115 Fed. 711, 53 CCA 293].

20. Reedy v. Western Electric Co., 83 Fed. 709, 28 CCA 27 [aff 66 Fed. 163]; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,134, 2 Bann. & A. 386; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,272, 5 Biss. 344 [rev on other grounds 94 U. S. 695, 24 L. ed. 238].

[a] **Separate findings.**—(1) Where evidence is introduced both as to damages and profits, it is proper for the master to report separate findings and conclusions as to each. Mast v. Superior Drill Co., 154 Fed. 45, 83 CCA 157. (2) The master should make findings as to damages shown, even though the profits awarded are adequate to compensate plaintiff. Christensen v. National Brake, etc., Co., 10 F. (2d) 856. (3) Plaintiff is entitled to make a choice between the two, at least according to some decisions. See supra § 618.

21. See cases infra this note.

[a] **Liability of each defendant** should be determined. Herring v. Gage, 12 F. Cas. No. 6,422, 3 Bann. & A. 396, 15 Blatchf. 124 [rev on other grounds 107 U. S. 640, 2 SCt 819, 27 L. ed. 601]; Tatham v. Lowber, 23 F. Cas. No. 13,765, 4 Blatchf. 86.

[b] **Infringement by third person or corporation.**—A decree in a suit against a corporation and individuals may be construed not to contemplate an accounting of profits derived, or arising from infringement, by another corporation in which the individual defendants are officers and stockholders. Davey Tree Expert Co. v. Frost, etc., Co., 300 Fed. 680; New York Grape Sugar Co. v. American Grape Sugar Co., 42 Fed. 455.

22. See cases infra this note.

[a] **Improvement.**—A decree directing an account of all the profits realized by defendant from the manufacture, use, or sale of a certain article is too broad where the patent is only for an improvement constituting a part of the article. Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. ed. 577.

[b] **Use of other patented machines.**—(1) The accounting will not be extended so as to cover the use by defendant of other patented machines. Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]. (2) Presumption that later patented invention does not infringe see supra § 581.

23. Fulton Co. v. Bishop, etc., Co., 17 F. (2d) 1006 [mod 17 F. (2d) 999]; Lakewood Engineering Co. v. Walker, 23 F. (2d) 623 [mod 14 F. (2d) 333]; Dunn Mfg. Co. v. Standard Computing Scale Co., 204 Fed. 617, 123 CCA 111.

24. See supra § 632.

25. Muther v. United Shoe Mach. Co., 21 F. (2d) 773.

26. See supra § 633.

27. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Hoe v. Scott, 87 Fed. 220; Skinner v. Vulcan Iron-Works, 39 Fed. 870; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,272, 5 Biss. 344 [rev on other grounds 94 U. S. 695, 24 L. ed. 238]; Whitney v. Mowry, 29 F. Cas. No. 17,594, 4 Fish. Pat. Cas. 207; Williams v. Leonard, 29 F. Cas. No. 17,726, 9 Blatchf. 476, 5 Fish. Pat. Cas. 381.

[a] **Master is to apply,** rather than alter, the decision of the court appointing him. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

28. Christensen v. National Brake, etc., Co., 18 F. (2d) 981.

29. See case infra this note.

[a] **Circumstances surrounding entry of decree** (1) must be considered in determining the scope of an accounting taken pursuant to it. Davey Tree Expert Co. v. Frost, etc., Co., 300 Fed. 680. (2) This is especially true of a consent decree. Davey Tree Expert Co. v. Frost, etc., Co., supra.

Construction as to accounting for profits of another corporation see supra note 21 [b].

30. American Tel., etc., Co. v. Radio Audion Co., 5 F. (2d) 535; Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

31. Flat Slab Patents Co. v. Turner, supra.

32. Flat Slab Patents Co. v. Turner, supra; Peerless Brick Mach. Co. v. Miracle Pressed Stone Co., 181 Fed. 526; Adie v. Clark, 3 Ch. D. 134 [aff 2 App. Cas. 423].

[a] **Utility** of patented invention was settled by the decree and the question for determination on the accounting is the amount in dollars and cents which the invention added to the article of which it was a part. Westinghouse Electric., etc., Co. v. Wagner Electric Mfg. Co., 281 Fed. 453 [rev 248 Fed. 508, and certiorari den 260 U. S. 744 mem, 43 SCt 165 mem, 67 L. ed. 827 mem].

33. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

34. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,272, 5 Biss. 344 [rev on other grounds 94 U. S. 695, 24 L. ed. 238].

Evidence as to prior art generally see supra § 576.

35. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem]; Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541; Wooster v. Thornton, 26 Fed. 274.

[a] **Master cannot go into general question of infringement.**—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 245 Fed. 860.

36. Metallic Rubber Tire Co. v. Hartford Rubber Works Co., supra; Corrugated Paper Patents Co. v. New York Paper Working Mach. Co., 237 Fed. 330; Walker Patent Pivoted Bin Co. v. Miller, 146 Fed. 249; Ruggles v. Eddy, 20 F. Cas. No. 12,116, 2 Bann. & A. 627; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,272, 5 Biss. 344 [rev on other grounds 94 U. S. 695, 24 L. ed. 238]. See L. S. Starrett Co. v. Brown, etc., Mfg. Co., 208 Fed. 887, 126 CCA 47 (the question of infringement by a particular device is an open one for the purpose of the accounting ordered, and may properly be presented to, and ruled on by, the master, where defendant has not had his day in court as to it, and the interlocutory decree for an accounting does not specify the particular devices held to infringe).

37. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Minerals Separation v. Miami Copper Co., 264 Fed. 528.

38. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566; Tatham v. Lowber, 23 F. Cas. No. 13,765, 4 Blatchf. 86 [rev on other grounds 22 How. 132, 16 L. ed. 366]. And see Knox v. Great Western Quicksilver Min. Co., 14 F. Cas. No. 7,907, 4 Bann. & A. 25, 6 Sawy. 430 (to time of accounting).

39. Minerals Separation v. Miami Copper Co., 264 Fed. 528; Hoe v. Scott, 87 Fed. 220.

40. Stebler v. Riverside Heights Orange Growers' Assoc., 211 Fed. 985 [mod on other grounds 214 Fed. 550, 131 CCA 96, LRA1915F 1101].

41. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

42. Goss Printing Press Co. v. Scott, 134 Fed. 880.

43. Brown Bag Filling Mach. Co. v. Drohen, 171 Fed. 438 [aff 175 Fed. 576, 99 CCA 192]. But see Murray v. Orr, etc., Hardware Co., 153 Fed. 369, 82 CCA 445 (deeming it better practice to require plaintiff to set up any alleged new infringements by supplemental bill, which can be disposed of and the order of reference modified as required, than to extend the accounting to devices which have not been adjudged to infringe).

44. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

45. Flat Slab Patents Co. v. Turner, supra.

46. Hoe v. Scott, 87 Fed. 220.

the decree;[47] and it is at least within the discretion of the master,[48] subject to the supervision of the trial court,[49] to include in the accounting a tool which, although not mentioned in the evidence prior to the interlocutory decree, was adopted by defendant prior to the decree and was an equivalent of the tool which was adjudged to infringe. Also, where the giving of notice of the patent in compliance with statutory provisions[50] has been properly pleaded,[51] and evidence thereof has not been previously given, such evidence may be introduced on the accounting.[52]

Presenting question of scope to court. Where the master by his rulings limits the scope of the inquiry, the matter may properly be presented to the court for decision by a motion for instructions to the master.[53]

[§ 638] **(c) Proceedings—aa. Before Master.**[54] Pertinent federal equity rules[55] and practice which has received judicial approval[56] should be followed in proceedings before a master upon a reference for an accounting of profits and damages in an equitable suit for infringement of a patent. Thus the federal equity rule, providing that all parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor,[57] applies to defendant,[58] although not to plaintiff,[59] on an accounting of profits and damages before a master in a suit for infringement of a patent, but the statement of account filed by defendant is sufficient if it conforms to what the courts deem proper practice under the rule.[60] While the statement of account filed by defendant performs only the functions of a pleading[61] and is not evidence,[62] yet where plaintiff is dissatisfied with the statement, his remedy is not to file any particular form of objections,[63] or to require any further statement from defendant,[64] but rather to examine defendant viva voce,[65] as provided by the pertinent federal equity rule.[66] A statement complying in terms with the rule should be accepted as the measure of profits[67] unless plaintiff proves that it is falsely stated,[68] in which case it seems that the court, either directly[69] or through the master,[70] may appoint a competent and disinterested accountant to cure defendant's default,[71] and the report of the accountant should stand unless it is promptly impeached for fraud[72] or gross inaccuracy;[73] and likewise it seems that an accountant may be appointed where defendant's statement is not only false in substance, but also insufficient in form.[74] Defendant should not be allowed to introduce testimony contradicting the statement.[75] The master is not called upon to suggest how profits and dam-

47. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

48. Union Electric Welding Co. v. Curry, 279 Fed. 465 [certiorari den 260 U. S. 727 mem, 43 SCt 89 mem, 67 L. ed. 484 mem].

49. Union Electric Welding Co. v. Curry, supra.

50. Notice as statutory condition precedent to recovery see supra § 484.

51. Pleading notice see supra § 562.

52. Bakelite Corp. v. Brunswick-Balke-Collender Co., 24 F. (2d) 418; Aronson v. Toy Devices, 1 F. (2d) 91; Underwood Typewriter Co. v. Elliott-Fisher Co., 171 Fed. 116.

53. Walker Patent Pivoted Bin Co. v. Miller, 146 Fed. 249.

54. Cross references:
Evidence of damages and profits generally see supra §§ 582-586.
Proceedings before masters generally see Equity §§ 765-772.

55. Equity Rules (1912), rules 60-66.

56. See cases infra this note.

[a] **Practice approved.**—"The practice which we approve is this: The master appoints a day for proceeding with the reference, and gives notice, by mail or otherwise, to the parties or their solicitors. The solicitor should be notified, whether the party is or not; although, probably, under rule 75 [present rule 60], notice to the party is a good notice. If defendant does not appear, the master proceeds ex parte and makes out the profits and damages, if he can, from the evidence produced by plaintiff. If it appears that an account of profits is necessary to a just decision of the cause, and is desired by plaintiff, he makes an order that defendant furnish an account by a certain day, and adjourns the hearing to that day. Defendant should be served personally with a notice of this adjournment, and of the order to produce his account, if it is intended to move for an attachment in case he fails to appear. The service may be made by any disinterested person, and need not be by the marshal. If defendant then fails to appear and account, he will be in contempt." Kerosene Lamp-Heater Co. v. Fisher, 1 Fed. 91, 92.

[b] **Practice not approved.**—"The mode of proceeding which we do not approve, is for the plaintiff to take out a notice, in the first instance, before any hearing has been or can lawfully be had, requiring the defendant to furnish an account by a certain day on pain of punishment for contempt. We doubt the power of the master to make such an order upon a mere inspection of the record, and we consider the practice inexpedient if it is lawful." Kerosene Lamp-Heater Co. v. Fisher, 1 Fed. 91, 92.

[c] **Instructions by court during course of proceedings.**—(1) Ordinarily the court ought not, intermediate the commencement and termination of the proceedings before the master, to give directions respecting the course of the procedure. Beckwith v. Malleable Iron Range Co., 207 Fed. 848. (2) However, it may properly do so where an important question of practice is involved. Beckwith v. Malleable Iron Range Co., supra.

57. Equity Rules (1912), rule 63 (former rule 79).

58. In re Beckwith, 203 Fed. 45, 121 CCA 381 (granting mandamus to trial court which, in Beckwith v. Malleable Iron Range Co., 195 Fed. 291, had held the rule inapplicable); Goss Printing Press Co. v. Scott, 148 Fed. 393.

[a] **Defendant in default** (1) where he does not comply with the rule. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem]. (2) Default held not cured. Computing Scale Co. v. Toledo Computing Scale Co., supra.

59. Goss Printing Press Co. v. Scott, 148 Fed. 393.

60. See cases infra this note.

[a] **Proper practice.**—"In my judgment the proper practice under the rule requires the accounting party in a patent infringing accounting at the outset merely to file such account in debtor or creditor form as, in the light of the principles and express directions of the decree, will exhibit the matters which are the subject of the accounting, namely, on the one hand the sums chargeable, the manufacture and sales, the amounts received, and the like, all in such detail as would be required in an account thereof rendered for any other purpose; and on the other hand, in detail, the items of credit or offset, such as cost of material, manufacturing cost, and the like, to the end that the statement as a whole will be an account showing gains and profits, and such as will furnish a basis for further proceeding in case the adversary is not satisfied therewith. I know of no reason why an accounting party in a patent suit should be called upon, in advance, to make detailed calculations to furnish statements whose effect is or will be evidentiary only." Beckwith v. Malleable Iron Range Co., 207 Fed. 848, 853.

[b] **Statement held sufficient.**—Carson v. American Smelting, etc., Co., 25 F. (2d) 116.

61. Carson v. American Smelting, etc., Co., supra; Beckwith v. Malleable Iron Range Co., 207 Fed. 848. See Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648, 674 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem] ("If a defendant satisfactorily states his profits from the infringing device, but contends that only a part thereof is attributable to the invention, he might well be required to allege in his account, taken as a verified pleading, the grounds on which he claims apportionment of profits").

62. Carson v. American Smelting, etc., Co., 25 F. (2d) 116.

63. Coffield Motor Washer Co. v. Wayne Mfg. Co., 255 Fed. 558, 166 CCA 626.

64. Corrugated Paper Patents Co. v. New York Paper Working Mach. Co., 237 Fed. 380.

65. Corrugated Paper Patents Co. v. New York Paper Working Mach. Co., supra.

66. Equity Rules (1912), rule 63.

67. Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 Fed. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem].

68. Computing Scale Co. v. Toledo Computing Scale Co., supra.

69. Computing Scale Co. v. Toledo Computing Scale Co., supra.

70. Computing Scale Co. v. Toledo Computing Scale Co., supra.

71. Computing Scale Co. v. Toledo Computing Scale Co., supra.

72. Computing Scale Co. v. Toledo Computing Scale Co., supra.

73. Computing Scale Co. v. Toledo Computing Scale Co., supra.

74. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447.

75. Producers' etc., Corp. v. Leh-

ages may be proved,[76] nor is he required to report oral evidence when not requested to do so at the time;[77] and he may properly refuse to reopen the accounting where sufficient grounds for such action are not shown.[78]

[§ 639] **bb. After Filing of Master's Report.** While the court may set aside the report of the master for manifest error of law or fact,[79] and refer the case back to him for further proceedings,[80] it will not take this action when it is not necessary in order to accomplish justice.[81] The findings and conclusions of the master upon matters of fact involving the weighing of conflicting testimony have every reasonable presumption in their favor[82] and will not be set aside or modified unless error or mistake clearly appears.[83] The proper mode of testing the sufficiency of the report is by exceptions pointing out error.[84] Upon the hearing of exceptions to the report, or of a motion to confirm or reject the report, questions previously decided by the court in the same case,[85] such as the validity of the patent,[86] matters of infringement,[87] and the rule of damages,[88] are not open to reconsideration; and matters agreed upon by the parties as exhibited and set forth in statements by their accountants, introduced in evidence before the master, and not controverted before the court, will be accepted by the court as correct.[89]

On subsequent accounting the evidence introduced on the first accounting may be used,[90] and further evidence may be introduced[91] and accorded its proper probative value,[92] even though it is in conflict with that introduced on the first accounting.[93]

[§ 640] **f. Dismissal[94]—(1) Voluntary Dismissal.** Plaintiff in a patent infringement suit has a right voluntarily to dismiss the bill[95] without prejudice[96] upon the payment of costs[97] or such other lawful terms as the court may deem proper to impose,[98] unless the dismissal would prejudice defendant[99] and the prejudice would consist of something

mann, 18 F. (2d) 492.

76. Garretson v. Clark, 10 F. Cas. No. 5,250, 4 Bann. & A. 536.

77. Hammacher v. Wilson, 32 Fed. 796.

78. Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem]; American Sulphite Pulp Co. v. De Grasse Paper Co., 190 Fed. 39 [rev on other grounds 193 Fed. 653, 113 CCA 521, and certiorari den 225 U. S. 712 mem, 32 SCt 841 mem, 56 L. ed. 1268 mem]; Morss v. Union Form Co., 39 Fed. 468.

79. Greenleaf v. Yale Lock Mfg. Co., 10 F. Cas. No. 5,783, 4 Bann. & A. 583, 17 Blatchf. 253; Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24.

80. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 233 Fed. 752, 147 CCA 518 [rev 218 Fed. 646, and certiorari den 242 U. S. 640 mem, 37 SCt 112 mem, 61 L. ed. 541 mem]; Fischer v. Hayes, 16 Fed. 469; Ruggles v. Eddy, 20 F. Cas. No. 12,116, 2 Bann. & A. 627; Whitney v. Mowry, 29 F. Cas. No. 17,593, 4 Fish. Pat. Cas. 141.

[a] **For example** (1) where the decree establishes fully the validity of the patent in all its parts, and the master, placing too limited a construction upon the patent, finds the infringement to extend only to a small part of an article, because he considers the monopoly to be of that part only, the case will be referred back to the master for further proofs. Ruggles v. Eddy, 20 F. Cas. No. 12,116, 2 Bann. & A. 627. (2) The court has the right to re-refer to the master the question of apportionment of expenses of a Canadian office, handling some American business, between the Canadian and American business. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]. (3) The case may be recommitted for specfic findings. Webster Loom Co. v. Higgins, 43 Fed. 673. (4) The court may order an inquiry limited to matters occurring after the making up of the master's report. Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899 [app dism 272 Fed. 1021 mem].

81. Mosher v. Joyce, 51 Fed. 441, 2 CCA 322; Timken v. Olin, 41 Fed. 169; Morss v. Union Form Co., 39 Fed. 468; Jennings v. Dolan, 29 Fed. 861 [app dism 139 U. S. 385, 11 SCt 584, 35 L. ed. 217]; Fischer v. Hayes, 16 Fed. 469; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 8 Fed. 446 [rev on other grounds 112 U. S. 624, 5 SCt 475, 28 L. ed. 828]; Garretson v. Clark, 10 F. Cas. No. 5,248, 3 Bann. & A. 352, 15 Blatchf. 70 [aff 111 U. S. 120, 4 SCt 291, 28 L. ed. 371].

[a] **Case will not be recommitted for immaterial error.**—Zane v. Peck, 13 Fed. 475.

[b] **Denial of re-reference held not abuse of discretion.**—Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492 (so deciding without discussion).

82. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295. And see A. Mecky Co. v. Garton Toy Co., 277 Fed. 507 (recognizing the rule that ordinarily the findings of the master upon matters of fact are to be given weight, but holding that the rule loses its significance when the testimony is such that the matter of credit to be accorded to an individual witness, and depending upon the fact that the master saw and heard the witness, is eliminated). But see Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 248 Fed. 508 (the court will not, regardless of the substantial equities of the cause, accord to the findings of the master the degree of weight and conclusiveness which attaches to a special verdict of a jury).

83. Tilghman v. Proctor, 125 U. S. 136, 8 SCt 894, 31 L. ed. 664; Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199, 135 CCA 85 [mod 216 Fed. 828, and certiorari den 238 U. S. 623 mem, 35 SCt 661 mem, 59 L. ed. 1494 mem]; Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 CCA 295; Welling v. La Bau, 35 Fed. 301; Welling v. La Bau, 34 Fed. 40; Hammacher v. Wilson, 32 Fed. 796; Welling v. La Bau, 32 Fed. 293, 23 Blatchf. 305; Wooster v. Thornton, 26 Fed. 274 [aff 136 U. S. 651, 10 SCt 1074, 34 L. ed. 550]; Piper v. Brown, 19 F. Cas. No. 11,181, 6 Fish. Pat. Cas. 240, Holmes 196.

84. Oehring v. Fox Typewriter Co., 251 Fed. 584, 163 CCA 578 [reh den 254 Fed. 774, 166 CCA 220, and certiorari den 249 U. S. 598 mem, 39 SCt 257 mem, 63 L. ed. 795 mem]; Turrill v. Illinois Cent. R. Co., 24 F. Cas. No. 14,272, 5 Biss. 344 [rev 94 U. S. 695, 24 L. ed. 238].

85. See infra text and notes 86–88.

86. Timken v. Olin, 41 Fed. 169; Skinner v. Vulcan Iron-Works, 39 Fed. 870 [app dism 149 U. S. 790 mem, 13 SCt 1054 mem, 37 L. ed. 961 mem]; Whitney v. Mowry, 29 F. Cas. No. 17,594, 4 Fish. Pat. Cas. 207 [rev on other grounds 14 Wall. (U. S.) 620, 20 L. ed. 860].

87. Gordon v. Turco-Halvah Co., 247 Fed. 487, 159 CCA 541 (where case has not been reopened for introduction of further evidence).

88. Webster Loom Co. v. Higgins, 39 Fed. 462.

89. MacBeth Evans Glass Co. v. L. E. Smith Glass Co., 21 F. (2d) 553 [mod on other grounds 23 F. (2d) 459].

90. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 233 Fed. 752, 147 CCA 518 [rev 218 Fed. 646, and certiorari den 242 U. S. 640 mem, 37 SCt 112 mem, 61 L. ed. 541 mem]; Campbell v. New York, 35 Fed. 504, 1 LRA 48.

91. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 233 Fed. 752, 147 CCA 518 [rev 218 Fed. 646, and certiorari den 242 U. S. 640 mem, 37 SCt 112 mem, 61 L. ed. 541 mem]; Webster Loom Co. v. Higgins, 43 Fed. 673.

92. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 233 Fed. 752, 147 CCA 518 [rev 218 Fed. 646, and certiorari den 242 U. S. 640 mem, 37 SCt 112 mem, 61 L. ed. 541 mem].

[a] **Former evidence is not to be given superior weight** simply because it was first received and has been previously considered. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 233 Fed. 752, 147 CCA 518 [rev 218 Fed. 646, and certiorari den 242 U. S. 640 mem, 37 SCt 112 mem, 61 L. ed. 541 mem].

93. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., supra.

94. Dismissal as bar to subsequent suit see infra § 644.

95. Elevator Supplies Co. v. Boedtcher, 11 F. (2d) 609 [mod on other grounds 11 F. (2d) 615]; Allington v. Shevlin-Hixon Co., 2 F. (2d) 747; E. G. Staude Mfg. Co. v. Labombarde, 229 Fed. 1004.

[a] **Dismissal as to one claim** of the patent is within the application of the rule. Barber v. Reo Motor Car Sales Co., 245 Fed. 938. Contra Mershon v. Bay City Box, etc., Co., 189 Fed. 741.

96. Elevator Supplies Co. v. Boedtcher, 11 F. (2d) 609 [mod on other grounds 11 F. (2d) 615].

97. Elevator Supplies Co. v. Boedtcher, supra; Allington v. Shevlin-Hixon Co., 2 F. (2d) 747; Christensen v. General Electric Co., 248 Fed. 284.

98. E. G. Staude Mfg. Co. v. Labombarde, 229 Fed. 1004; Robertson v. Purdey, [1906] 2 Ch. 615.

99. Individual Drinking Cup Co. v. Union News Co., 250 Fed. 625, 162 CCA 641; Fredericks, Inc. v. Eugene, 3 F. (2d) 543 [rev 298 Fed. 633]; Hills v. Federal Optical Co., 295 Fed. 213; Time-Saver Co., v. Stamford Trust Co., 165 Fed. 348.

[a] **Expense in preparing defense.** —Where defendant has afforded complainant every opportunity to examine the former's engineers, super-

other than the mere prospect of being harassed and vexed by future litigation of the same kind.[1]

[§ 641] **(2) Involuntary Dismissal[2]—(a) Before Final Hearing.** Ordinarily, a motion to dismiss a bill in equity for infringement of a patent on the ground that it fails to state a cause of action will be overruled unless it is absolutely clear that, taking all the allegations to be true, the bill must be dismissed at the hearing;[3] but it is held that, although the court is of the opinion that as a matter of law a motion to dismiss the bill on the ground that it shows on its face that plaintiff is without sufficient interest to maintain the suit should be overruled, yet the court may grant the motion in order that the question of law may be determined by the circuit court of appeals before the final hearing.[4] An objection which is at the most only an assertion that there will be a variance will not be determined on a motion to dismiss the bill before proofs have been offered.[5]

For invalidity of patent on its face. Where the patent is void on its face, the court may and should dismiss the bill either on a motion to dismiss on this ground[6] or on its own initiative,[7] regardless of whether or not the defense or objection is presented by answer or otherwise.[8] However, a motion to dismiss on this ground will not be sustained unless, on the face of the patent,[9] and by resort to matters of common and general knowledge[10] of which the court may take judicial notice,[11] the invalidity of the patent is clear and obvious[12] to such an extent that validity could not be established by any competent evidence which might be offered in support thereof.[13]

On answers to interrogatories. Where the validity of the patent is not involved, a bill sufficient on its face to charge infringement will not be dismissed on motion after plaintiff has answered interrogatories, unless from the answers to the interrogatories it so clearly appears that defendant did not infringe the patent that the court can say that under no admissible evidence which might by any possibility exist can the conclusion of noninfringement be avoided.[14]

On allegations in answer. An allegation in the answer of facts showing the triviality or limited extent of the infringement is not ground for dismissal of the bill on motion where plaintiff does not admit the facts alleged.[15]

On stipulations. Lack of jurisdiction on account of the noncommission by defendant of acts of infringement in the district wherein the suit is brought

intendents, and foremen with a view to discovering infringement, and has gone to great trouble and expense to prepare his defense, complainant will not be given leave to withdraw or discontinue the action without prejudice to a new suit at any time when he can obtain more specific and complete information of defendant's methods of manufacture. Churchward International Steel Co. v. Carnegie Steel Co., 286 Fed. 158.

[b] **Where alleged infringement has been disproved,** an application for dismissal without prejudice, as to one of the defendants, will be denied. Archer v. Arnd, 31 Fed. 475 [aff 140 U. S. 668, 11 SCt 1015, 35 L. ed. 599].

1. Allington v. Shevlin-Hixon Co., 2 F. (2d) 747.

2. **Lack of equitable jurisdiction of suit** see supra §§ 522–524.

3. Bayley v. Blumberg, 254 Fed. 696, 166 CCA 194.

4. Nye Tool, etc., Works v. Crown Die, etc., Co., 270 Fed. 587 [rev on other grounds 276 Fed. 376 (rev on other grounds 261 U. S. 24, 43 SCt 254, 67 L. ed. 516)].

5. Jost v. Borden Stove Co., 262 Fed. 163.

6. Coca-Cola Co. v. Whistle Co., 20 F. (2d) 261; Dupont v. Dennison Mfg. Co., 18 F. (2d) 317; Luten v. Allen, 254 Fed. 587 [aff 263 Fed. 986, and foll Luten v. Young, 254 Fed. 591]; American Safety Device Co. v. Liebel-Binney Constr. Co., 243 Fed. 575, 156 CCA 273. And see University Form Clamp Co. v. Taxis, 267 Fed. 578 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem] (discussing the point).

[a] **Design patents.**—In a case of a simple design patent, where the mere inspection of the patent is all that would be necessary for the determination of its validity on final hearing, a motion to dismiss the bill on the ground that the patent is void on its face for lack of invention is to be encouraged, as the practice of presenting the question of validity by motion saves time and expense and tends to prompt disposition of the litigation. Mallinson v. Ryan, 242 Fed. 951.

7. Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Wills v. Scranton Cold Storage, etc., Co., 153 Fed. 181, 82 CCA 355 [aff 147 Fed. 525].

8. Slawson v. Grand St., etc., R. Co., 107 U. S. 649, 2 SCt 663, 27 L. ed. 576; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Wills v. Scranton Cold Storage, etc., Co., 153 Fed. 181, 82 CCA 355; Conderman v. Clements, 147 Fed. 915, 78 CCA 51; Quirolo v. Ardito, 1 Fed. 610, 17 Blatchf. 400.

9. Frank v. Western Electric Co., 24 F. (2d) 642.

10. Frank v. Western Electric Co., supra; Dubilier Condenser Corp. v. New York Coil Co., 20 F. (2d) 723; Luten v. Allen, 254 Fed. 587 [aff 263 Fed. 986]; Wright v. Wisconsin Lime etc., Co., 239 Fed. 534, 152 CCA 412.

[a] **Judicial notice on demurrer** (1) under former practice. International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 CCA 569 [rev 197 Fed. 936]; Krell Auto Grand Piano Co. v. Story, etc., Co., 207 Fed. 946, 125 CCA 394; Ferro Concrete Constr. Co. v. Concrete Steel Co., 206 Fed. 666, 124 CCA 466; Charles Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 CCA 617; Lange v. McGuin, 177 Fed. 219, 101 CCA 389; Strom Mfg. Co. v. Weir Frog Co., 83 Fed. 170, 27 CCA 502; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Cleveland Faucet Co. v. Vulcan Brass Co., 72 Fed. 505; Heaton-Peninsular Button-Fastener Co. v. Schlochtmeyer, 69 Fed. 592 [aff 72 Fed. 520, 18 CCA 674]; Buckingham v. Springfield Iron Co., 51 Fed. 236; Root v. Sontag, 47 Fed. 309; Eclipse Mfg. Co. v. Adkins, 36 Fed. 554; West v. Rae, 33 Fed. 45; Kaolatype Engraving Co. v. Hoke, 30 Fed. 444. (2) Abolition of demurrers see Equity § 504.

11. See Evidence § 1810.

12. Dubilier Condenser Corp. v. New York Coil Co., 20 F. (2d) 723; Coca-Cola Co. v. Whistle Co., 20 F. (2d) 261; Crawford, etc., Co. v. Wilson, 297 Fed. 617; Luten v. Kansas City Bridge Co., 285 Fed. 840 [rev 272 Fed. 533]; Bonnie-B Co., Inc. v. Giguet, 269 Fed. 272 [aff 269 Fed. 1021 mem]; Scott v. Aristo Hosiery Co., 266 Fed. 382.

[a] **Similar rule obtained on determining demurrer.**—New York Belting, etc., Co. v. New Jersey Car Spring, etc., Co., 137 U. S. 445, 11 SCt 193, 34 L. ed. 741; Krell Auto Grand Piano Co. v. Story, etc., Co., 207 Fed. 946, 125 CCA 394; Card v. Standard Coal, etc., Co., 202 Fed. 351; Towne Steering Wheel Co. v. Lee, 199 Fed. 777, 120 CCA 463; Charles Boldt Co. v. Nivison-Weiskopf Co., 194 Fed. 871, 114 CCA 617; Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co., 193 Fed. 69; Burrowes v. Carrom-Archarena Co., 190 Fed. 204; Gilbert Mfg. Co. v. Post, etc., Co., 189 Fed. 81 [app dism 197 Fed. 57]; Sanitary Metal Tile Co. v. New York Metal Ceiling Co., 188 Fed. 441; Gaines v. Alabama Consol. Coal, etc., Co., 173 Fed. 303; Neidich v. Edwards, 169 Fed. 424; Southern Plow Co. v. Atlanta Agricultural Works, 165 Fed. 214; Hogan v. Westmoreland Specialty Co., 154 Fed. 66, 83 CCA 178; General Electric Co. v. Campbell, 137 Fed. 600; Regensberg v. American Exch. Cigar Co., 130 Fed. 549; American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 CCA 662; Cleveland Faucet Co. v. Vulcan Brass Co., 72 Fed. 505; Caldwell v. Powell, 71 Fed. 970 [rev on other grounds 73 Fed. 488, 489, 19 CCA 592]; Covert v. Travers Bros. Co., 70 Fed. 788; Heaton-Peninsular Button-Fastener Co. v. Schlochtmeyer, 69 Fed. 592 [aff 72 Fed. 520, 18 CCA 674]; Drainage Constr. Co. v. Englewood Sewer Co., 67 Fed. 141; Rodwell Mfg. Co. v. Housman, 58 Fed. 870; Hanlon v. Primrose, 56 Fed. 600; Goebel v. American R. Supply Co., 55 Fed. 825; Krick v. Jansen, 52 Fed. 823; Overman Wheel Co. v. Elliott Hickory Cycle Co., 49 Fed. 859; Lalance, etc., Mfg. Co. v. Mosheim, 48 Fed. 452; Standard Oil Co. v. Southern Pac. Co., 42 Fed. 295 [aff 54 Fed. 421, 4 CCA 491]; Philadelphia Novelty Mfg. Co. v. Rouss, 39 Fed. 273; Eclipse Mfg. Co. v. Adkins, 36 Fed. 554; Dick v. Oil Well Supply Co., 25 Fed. 105.

[b] **Unwarranted inference** should not be made the basis of the action of the court in granting a motion to dismiss. Corona Chemical Co. v. Latimer Chemical Co., 248 Fed. 493, 160 CCA 503 [rev 240 Fed. 423].

13. Frank v. Western Electric Co., 24 F. (2d) 642; Coffield v. Sunny Line Appliance, 297 Fed. 609; Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220.

[a] **Like rule obtained on determining demurrer.**—Luten v. Dover Constr. Co., 189 Fed. 405; A. R. Milner Seating Co. v. Yesbera, 111 Fed. 386, 49 CCA 397; Neidich v. Fosbenner, 108 Fed. 266; Electric Vehicle Co. v. Winton Motor-Carriage Co., 104 Fed. 814; Ballou v. Potter, 88 Fed. 786; Patent Button Co. v. Consolidated Fastener Co., 84 Fed. 189; Wall v. Leck, 61 Fed. 291 [aff 66 Fed. 552, 13 CCA 630]; Blessing v. John Trageser Steam Copper Works, 34 Fed. 753.

14. Asbestos Shingle, etc., Co. v. Asbestos Shingle Co., 239 Fed. 539, 152 CCA 417.

15. Kuhlke Mach. Co. v. Miller Rubber Co., 8 F. (2d) 614.

may not be determined on a motion to dismiss and a stipulation as to the sole acts done by defendant in the district which are claimed by plaintiff to be infringing acts, where extraneous evidence is necessary to aid the court in arriving at a conclusion.[16]

On affidavits. A motion to dismiss before the hearing will not be granted where it is based upon affidavits as to facts going to the merits of the case.[17]

On showing made for preliminary injunction. A motion to dismiss the bill on the ground that, as shown by the record made on application for an injunction pendente lite, the patent is void for anticipation or want of novelty will not be granted except in a clear case.[18] On the other hand, where motions for a temporary injunction and to dismiss the bill are considered together, the motion to dismiss should be granted where it is apparent from a comparison of plaintiff's patent and defendant's device that there is no infringement,[19] and that nothing further respecting infringement can be adduced at the final hearing.[20]

[§ 642] **(b) At Final Hearing.** The bill must be dismissed where infringement has been put in issue by the pleadings and there is no proof thereof at the hearing.[21] Also, the bill will be dismissed where, so far as appears from the bill and proofs, plaintiff has no interest in the patent upon which the suit is founded.[22] The bill may be dismissed without prejudice where a failure of proof may be attributable to a slip in practice,[23] or where the suit is upon two patents and the dismissal is as to one which the court deems it unnecessary to consider.[24] Where a court of equity declines to grant the relief sought because the right of plaintiff is not clear, it may provide that the cause stand over a reasonable time for the bringing of an action at law,[25] and that the bill be dismissed if the final judgment in the action at law is in favor of defendant[26] or such action is not brought within a reasonable time[27] and prosecuted with reasonable diligence.[28]

At close of plaintiff's proofs. The court may, in its discretion, permit defendant at the close of plaintiff's proofs to present by a motion to dismiss a jurisdictional question,[29] or a question of the legal sufficiency of the proof of title to the patent,[30] without requiring defendant to abide by the case as then made in the event that his motion shall be overruled; but a motion, made at this stage of the proceedings, to dismiss on the ground that the proofs are insufficient to establish infringement will be overruled[31] without considering the merits.[32]

[§ 643] **g. Operation and Effect[33]—(1) In General.** A decision sustaining a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field.[34] A final adjudication declaring a patent invalid relieves a licensee from all liability for royalties claimed to have been earned after he repudiated his license prior to the adjudication.[35]

[§ 644] **(2) As to Parties and Privies.** The doctrine of res judicata[36] is fully applicable to cases of patent infringement;[37] and a final decision by a court of competent jurisdiction in a suit on letters patent is conclusive upon, and as between, the parties to the suit and their privies,[38] as to all ques-

16. I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593, 281 Fed. 5 [rev 270 Fed. 593].

17. American Bank Protection Co. v. City Nat. Bank, 181 Fed. 375; Snow v. Sargent, 106 Fed. 230.

18. Blancard v. Simson, 22 F. (2d) 498.

19. Lincoln v. Waterbury Button Co., 291 Fed. 594 [aff 297 Fed. 619].

Determination of noninfringement as matter of law see supra § 590.

20. Lincoln v. Waterbury Button Co., 291 Fed. 594 [aff 297 Fed. 619].

21. Vrooman v. Burdick, 222 Fed. 900, 138 CCA 380; American Wood-Paper Co. v. Heft, 1 F. Cas. No. 322, 3 Fish. Pat. Cas. 316 [app dism 8 Wall. 333, 19 L. ed. 379]; Saxe v. Hammond, 21 F. Cas. No. 12,411, 1 Bann. & A. 629, Holmes 456.

22. Pelham v. Edelmeyer, 15 Fed. 262, 21 Blatchf. 188.

23. Pelham v. Edelmeyer, supra.

24. Goldsmith Metal Lath Co. v. Truscon Steel Co., 29 F. (2d) 658.

Nonconsideration of one of two patents see supra § 590.

25. Muscan Hair Mfg. Co. v. American Hair Mfg. Co., 17 F. Cas. No. 9,970, 4 Blatchf. 174, 1 Fish. Pat. Cas. 320.

26. Muscan Hair Mfg. Co. v. American Hair Mfg. Co., supra.

27. Muscan Hair Mfg. Co. v. American Hair Mfg. Co., supra.

28. Muscan Hair Mfg. Co. v. American Hair Mfg. Co., supra.

29. Streat v. American Rubber Co., 115 Fed. 634.

30. De Laval Separator Co. v. Vermont Farm-Mach. Co., 109 Fed. 813.

31. Hardinge Conical Mill Co. v. Abbe Engineering Co., 182 Fed. 848.

32. Hardinges Conical Mill Co. v. Abbe Engineering Co., supra.

33. **Operation and effect of decision in interference suit or proceeding** see supra §§ 220, 221, 255.

34. T. L. Smith Co. v. Cement Tile Mach. Co., 257 Fed. 423, 168 CCA 463 [aff 249 Fed. 481, and certiorari den 250 U. S. 669 mem, 40 SCt 14 mem, 63 L. ed. 1198 mem].

35. Ross v. Dowden Mfg. Co., 147 Iowa 180, 123 NW 182.

Liability for royalties generally see supra §§ 447-467.

36. **Res judicata generally** see Judgments §§ 1154-1525.

37. Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148 [rev 222 Fed. 261, 138 CCA 23]. But see Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944, 945 ("We recognize that the doctrine of res adjudicata in its strict sense may not be readily applied in patent suits, because the infringement in the second suit would not ordinarily be identical with the infringement in the first suit. It would doubtless be more accurate to use the term 'estoppel by judgment' than the term 'res adjudicata,' when applying the doctrine to patent suits. The result, however, is the same").

[a] **Presentation of claim of res judicata held proper and timely.**—Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 SCt 506, 61 L. ed. 1148 [rev 222 Fed. 261, 138 CCA 23].

38. Kessler v. Eldred, 206 U. S. 285, 27 SCt 611, 51 L. ed. 1065; Lenk v. Lasher-Peerblow Co., 27 F. (2d) 958; Norstrom v. Wahl, 27 F. (2d) 637; Zip Mfg. Co. v. Pep Mfg. Co., 27 F. (2d) 219; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [remanded for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem]; Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939 [aff 19 F. (2d) 944]; Traitel Marble Co. v. U. T. Hungerford Brass., etc., Co., 18 F. (2d) 66 [rev 16 F. (2d) 495, and certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem]; Lyon v. Boh, 10 F. (2d) 30 [rev 1 F. (2d) 48]; Tucker Mfg. Co. v. Cross, 8 F. (2d) 994; Gerrity v. Dallas Fdy., 4 F. (2d) 655; Radio Corp. of America v. Independent Wireless Tel. Co., 297 Fed. 521 [rev 297 Fed. 518, certiorari granted 266 U. S. 596 mem, 45 SCt 91 mem, 69 L. ed. 459 mem, and aff 269 U. S. 459, 46 SCt 166, 70 L. ed. 357]; Vapor Car Heating Co. v. Gold Car Heating, etc., Co., 296 Fed. 201 [aff 7 F. (2d) 284 (certiorari den 268 U. S. 705 mem, 45 SCt 639 mem, 69 L. ed. 1167 mem)]; Westinghouse Electric, etc., Co. v. Radio-Craft Co., 291 Fed. 169 [aff 7 F. (2d) 432]; U. S. Rubber Co. v. I. T. S. Rubber Co., 288 Fed. 786 [rev 278 Fed. 975, and certiorari den 262 U. S. 748 mem, 43 SCt 523 mem, 67 L. ed. 1213 mem]; Continuous Extracting Press Corp. v. Eastern Cotton Oil Co., 264 Fed. 340; Individual Drinking Cup Co. v. Public Service Cup Co., 262 Fed. 410 [mod 261 Fed. 555, and reh den 263 Fed. 98]; Sanitary Street Flushing Mach. Co. v. Studebaker Corp., 226 Fed. 797; Macey Co. v. Globe-Wernicke Co., 180 Fed. 401, 103 CCA 547; Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co., 117 Fed. 309; Simonds Counter Mach. Co. v. Knox, 39 Fed. 702; Gloucester Isinglass, etc., Co. v. Le Page, 30 Fed. 370; McCloskey v. Hamill, 15 Fed. 750; Crandall v. Dare, 11 Fed. 902; Meyer v. Goodyear India-Rubber Glove Mfg. Co., 11 Fed. 891, 20 Blatchf. 91; Shoe Mach. Co. v. Cultan, [1896] 1 Ch. 667. But see Dunkley Co. v. California Packing Corp., 277 Fed. 996 [certiorari den 257 U. S. 644 mem, 42 SCt 54 mem, 66 L. ed. 413 mem] (where defendant has been enjoined from using certain infringing machines, a person holding an unlimited license from plaintiff may properly purchase and use such machines).

[a] **Person conducting defense.**—(1) A person is bound by the decision in a patent infringement suit where, although not a party to the suit, he openly, avowedly, and with the knowledge of plaintiff, assumed, controlled, and conducted, or participated in, the defense at his own cost and for his own interest (Beyer Co.

tions, issues, or matters which were settled and disposed of thereby,[39] but not as to other matters.[40]

Interlocutory decree adjudging a patent to be valid and infringed, awarding a permanent injunction and referring the cause to a master for an accounting of profits and damages, is not res judicata as to validity and infringement of the patent,[41] but the rule is otherwise as to an interlocutory decree which has ripened into a final decree,[42] a decree of the circuit court of appeals determining questions of validity and infringement on an appeal from an interlocutory decree,[43] or a subsequent decree of the lower court entered in pursuance of the mandate of the appellate court.[44]

Dismissal of a suit without prejudice is not a bar to a second suit;[45] nor is a decree dismissing the bill for failure to prove infringement a bar to another suit for subsequent infringement.[46]

Decree pro confesso or by consent is conclusive between the parties as to all matters covered thereby,[47] but not as to other matters,[48] nor, it is held, as between defendant and an assignee of plaintiff.[49]

Protection of right by injunction. A manufacturer who was successful in a suit against him for infringement is entitled to an injunction restraining plaintiff from prosecuting a suit against a customer of defendant for infringement consisting of the use of the article involved in the former suit,[50]

v. Fleischmann Co., 15 F. (2d) 465; Murphy Wall Bed Co. v. Pacific Spring Bed Co., 295 Fed. 745; Dicks Press Guard Mfg. Co. v. Bowen, 229 Fed. 193; Gilchrist Co. v. Erie Specialty Co., 215 Fed. 741 [aff 231 Fed. 659, 145 CCA 545 (certiorari den 242 U. S. 630 mem, 37 SCt 15 mem, 61 L. ed. 537 mem)]), (2) as where he is a manufacturer and he defended a suit against an agent, dealer, customer, or user (N. O. Nelson Mfg. Co. v. F. E. Myers, etc., Co., 25 F. (2d) 659; Alliance Securities Co. v. De Vilbiss Co., 24 F. (2d) 530; Lathrop v. Rice, etc., Corp., 21 F. (2d) 124 [aff 24 F. (2d) 1021 mem (certiorari granted 278 U. S. 585 mem, 49 SCt 10 mem)]; T. L. Smith Co. v. Cement Tile Mach. Co., 257 Fed. 423, 168 CCA 463 [aff 249 Fed. 481, and certiorari den 250 U. S. 669 mem, 40 SCt 14 mem, 63 L. ed. 1198 mem]; D'Arcy v. Stables, etc., Co., 161 Fed. 733, 88 CCA 606; Sacks v. Kupferle, 127 Fed. 569; National Folding-Box, etc., Co. v. Dayton Paper-Novelty Co., 95 Fed. 991); (3) and he is likewise entitled to claim that the decision is binding upon plaintiff (Lyons v. Baer, etc., Co., 26 F. (2d) 599); (4) but the defense of prior adjudication is not available to a defendant, dismissed from a suit for infringement on his own application, on the ground that he employed counsel and defrayed the costs of the defense made by his codefendant, unless it appears by clear and definite evidence that such fact was known to plaintiff (Singer Mfg. Co. v. Cramer, 109 Fed. 652, 48 CCA 588 [rev on other grounds 192 U. S. 265, 24 SCt 291, 48 L. ed. 437]).

39. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [remanding for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem]; Cramer v. Motor Player Corp., 18 F. (2d) 450; U. S. Rubber Co. v. I. T. S. Rubber Co., 288 Fed. 786 [rev 278 Fed. 975, and certiorari den 262 U. S. 748 mem, 43 SCt 523 mem, 67 L. ed. 1213 mem]; Continuous Extracting Press Corp. v. Eastern Cotton Oil Co., 264 Fed. 340; T. L. Smith Co. v. Cement Tile Mach. Co., 257 Fed. 423, 168 CCA 463 [aff 249 Fed. 481, and certiorari den 250 U. S. 669 mem, 40 SCt 14 mem, 63 L. ed. 1198 mem]; Cheatham Electric Switching Device Co. v. Brooklyn Rapid Transit Co., 238 Fed. 172, 151 CCA 248 [aff 229 Fed. 165]; Gilchrist Co. v. Erie Specialty Co., 215 Fed. 741 [aff 231 Fed. 659, 145 CCA 545 (certiorari den 242 U. S. 630 mem, 37 SCt 15 mem, 61 L. ed. 537 mem)]; D'Arcy v. Stables, etc., Co., 161 Fed. 733, 88 CCA 606; Wooster v. Thornton, 26 Fed. 274.

[a] **Matters before court.**—The authority of a prior decision by an appellate court is not limited to the facts and defenses discussed in its opinion, but extends to all that were before it in the record. Badische Anilin, etc., Fabrik v. Klipstein, etc., Co., 125 Fed. 543.

[b] **Patent subsequently reissued.**—A decision on an original patent is res judicata in a subsequent suit between the same parties on a reissued patent, in so far as the invention or claims set forth in the two patents are identical. Del Turco v. Traitel Marble Co., 25 F. (2d) 308; Universal Adding Mach. Co. v. Comptograph Co., 161 Fed. 365; Cammeyer v. Newton, 4 F. Cas. No. 2,344, 4 Bann. & A. 159. Compare Frink Co. v. Erikson, 20 F. (2d) 707, 712 [vacating decree 16 F. (2d) 495] (a decree adjudging the original patent invalid is not a bar to a suit upon the reissue patent, as "a decision as to the validity or invalidity of the reissue patent requires a determination of other questions than the mere validity or invalidity of the original patent").

Recovery for part of cause of action as bar to suit for remainder see Judgments § 1239 note 26 [e].

40. Muther v. United Shoe Mach. Corp., 7 F. (2d) 954 [aff 14 F. (2d) 808]; Sanitary Street Flushing Mach. Co. v. Studebaker Corp., 226 Fed. 797.

[a] **Rule applied.**—(1) A matter concerning which the court made remarks but which was not raised by the pleadings or record is not res judicata. Bassick Mfg. Co. v. Larkin Automotive Parts Co., 19 F. (2d) 939 [aff 19 F. (2d) 944]. (2) The question of a limitation of patent claims is not res judicata because of an opinion expressed by the court as to such limitation in a prior suit between the parties, where the issues and the alleged infringing device were not the same as in a later suit, and where such opinion was not determinative of the suit. Imperial Mach., etc., Corp. v. American Mach. Co., 276 Fed. 436. (3) The decision in a suit for infringement of one patent does not prevent the maintenance of another suit between the same parties for infringement of another patent. Bassick Mfg. Co. v. Larkin Automotive Parts Co., 23 F. (2d) 92 (subsequent suit by plaintiff for infringement by same device); Victor Talking Mach. Co. v. American Graphophone Co., 189 Fed. 359 [aff 190 Fed. 1023, 111 CCA 675] (subsequent suit for infringement of patent granted to defendant for one of the steps included in the process patent involved in the former suit); Leonard v. Simplex Electric Heating Co., 145 Fed. 946 (subsequent suit by defendant for infringement of patent, the validity of which was not in issue in the former suit). (4) A decision as to infringement by a certain device, machine or structure is not conclusive as to infringement by a different device or structure. U. S. Rubber Co. v. I. T. S. Rubber Co., 288 Fed. 786 [rev 278 Fed. 975, and certiorari den 262 U. S. 748 mem, 43 SCt 523 mem, 67 L. ed. 1213 mem]; T. L. Smith Co. v. Cement Tile Mach. Co., 257 Fed. 423, 168 CCA 463 [aff 249 Fed. 481, and certiorari den 250 U. S. 669 mem, 40 SCt 14 mem, 63 L. ed. 1198 mem] (later modified structure); T. B. Wood's Sons Co. v. Valley Iron Works, 198 Fed. 869; D'Arcy v. Stables, etc., Co., 161 Fed. 733, 88 CCA 606. (5) "No judgment or decree, based on the use of an infringing article, can ever prevent the same defendant from using a noninfringing one." Cheatham Electric Switching Device Co. v. Brooklyn Rapid Transit Co., 238 Fed. 172, 176, 151 CCA 248. (6) A decision in a prior suit between the same parties or their privies that a certain machine had not at a particular time been so adjusted and used as to infringe is not res judicata of the question of whether or not it is capable of being so adjusted by slight changes as to infringe when in use. Sanitary Street Flushing Mach. Co. v. Amsterdam, 225 Fed. 389 [aff 229 Fed. 421, 143 CCA 541].

41. Bassick Mfg. Co. v. Larkin Automotive Parts Co., 23 F. (2d) 92; Wenborne-Karpen Dryer Co. v. Dort Motor Car Co., 14 F. (2d) 378 [rev 300 Fed. 404; American Fdy. Equipment Co. v. Wadsworth, 290 Fed. 195; Whittemore v. World Polish Mfg. Co., 159 Fed. 480; Rumford Chemical Works v. Hecker, 20 F. Cas. No. 12,-133, 2 Bann. & A. 351; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 NW 930, 1136, LRA1915B 1179, 1195.

[a] **Interlocutory decree pro confesso** (1) does not become binding as an estoppel unless, and until, a final decree is entered, but where the pro confesso decree embodies a determination of infringement, and is never revoked, defendant is bound by it, from the date of its entry, as to the question of infringement. I. T. S. Rubber Co. v. Essex Rubber Co., 25 F. (2d) 180. (2) Pro confesso decrees generally see infra text and notes 47–49.

42. Bredin v. National Metal Weather Strip Co., 147 Fed. 741 [aff 157 Fed. 1003, 85 CCA 281].

43. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [remanding for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem]; Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944 [aff 19 F. (2d) 939]; National Brake, etc., Co. v. Christensen, 258 Fed. 880, 169 CCA 600 [certiorari granted 250 U. S. 638 mem, 39 SCt 495 mem, 63 L. ed. 1184 mem, prohibition den 40 SCt 54 mem, and rev on other grounds 254 U. S. 425, 41 SCt 154, 65 L. ed. 341].

44. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2) 651 [remanding for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem].

45. Robinson v. American Car, etc., Co., 135 Fed. 693, 68 CCA 331 [certiorari den 203 U. S. 590 mem, 27 SCt 777 mem, 51 L. ed. 330 mem].

46. Steam-Gauge, etc., Co. v. Meyrose, 27 Fed. 213.

47. E. Ingraham Co. v. Germanow, 9 F. (2d) 912; E. Ingraham Co. v. Germanow, 4 F. (2d) 1002; Roberts Cone Mfg. Co. v. Bruckman, 266 Fed. 986 [certiorari den 254 U. S. 649 mem, 41 SCt 63 mem, 65 L. ed. 457 mem].

[a] **Decree pro confesso on bill** for infringement is conclusive so far at least as it is supported by the allegations of the bill. Thomson v. Wooster, 114 U. S. 104, 5 SCt 788, 29 L. ed. 105.

48. American Radium Co. v. Hipp. Didisheim Co., Inc., 279 Fed. 601 [aff 279 Fed. 1016 mem].

49. American Radium Co. v. Hipp. Didisheim Co., Inc., supra.

50. Kessler v. Eldred, 206 U. S.

but he is not entitled to an injunction restraining the prosecution of a suit against a customer who is a manufacturer and purchases only one part of the manufactured article from defendant in the former suit.[51]

[§ 645] **(3) As to Third Persons.**[52] While a judgment or decree in a suit for infringement of a patent is not res judicata or an estoppel in a subsequent suit on the same patent against a defendant who was not a party or in privity with a party in the former suit,[53] and the court in the second suit is not imperatively obligated to follow the former decision,[54] especially where the decree was rendered pro confesso or by consent,[55] or a question was decided without argument,[56] yet the former decision is persuasive[57] and entitled to weight,[58] and, on the grounds of comity[59] and stare decisis,[60] and to secure uniformity of decision,[61] as well as the orderly administration of justice,[62] it will be followed in a subsequent suit[63] unless it is clearly errone-

285, 27 SCt 611, 51 L. ed. 1065 (refraining from deciding whether the judgment in the suit against the manufacturer is a bar to, or defense in, the suit against the customer). Hudson Motor Specialties Co. v. Apco Mfg. Co., 288 Fed. 871 [aff 299 Fed. 19]; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., 164 Fed. 869. And see Wenborne-Karpen Dryer Co. v. Dort Motor Car Co., 14 F. (2d) 378 [rev 300 Fed. 404] (dictum that proper remedy of manufacturer is to apply for an injunction, but whether, under all the circumstances, the injunction ought to issue is for the judgment of the court).

Decree as estoppel in favor of customer see infra § 645 note 53 [c].

51. Rubber Tire Wheel Co. v. Goodyear Tire, etc., Co., 232 U. S. 413, 34 SCt 403, 58 L. ed. 663 [mod 183 Fed. 978, 106 CCA 318, and dist Kessler v. Eldred, 206 U. S. 285, 27 SCt 611, 51 L. ed. 1065].

52. Prior adjudication as ground for grant or refusal of preliminary injunction see supra §§ 601, 602.

53. Dunkley Co. v. Pasadena Canning Co., 261 Fed. 203 [aff 261 Fed. 386 (certiorari den 253 U. S. 485 mem, 40 SCt 481 mem, 64 L. ed. 1025 mem)]; Weber Electric Co. v. Cutler-Hammer Mfg. Co., 256 Fed. 31, 167 CCA 303.

[a] **Rule is applicable** to decisions as to (1) the validity (Rubber Tire Wheel Co. v. Goodyear Tire, etc., Co., 232 U. S. 413, 34 SCt 403, 58 L. ed. 663 [mod 183 Fed. 978, 106 CCA 318]; Carson Inv. Co. v. Calumet, etc., Min. Co., 29 F. (2d) 300; Knight v. Rite Shoe Co., 23 F. (2d) 903; Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944 [aff 19 F. (2d) 939]; Traitel Marble Co. v. U. T. Hungerford Brass, etc., Co., 18 F. (2d) 66 [rev 16 F. (2d) 495, and certiorari den 274 U. S. 753 mem, 47 SCt 765 mem, 71 L. ed. 1333 mem]; Bestwall Mfg. Co. v. U. S. Gypsum Co., 15 F. (2d) 704; Concrete Appliance Co. v. Gomeroy, 284 Fed. 518 [mod on other grounds 291 Fed. 486 (aff 269 U. S. 177, 46 SCt 42, 70 L. ed. 222)]; Flat Slabs Patents Co. v. Wright, etc., Co., 283 Fed. 345; Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 276, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem]; Bayley v. Blumberg, 254 Fed. 696, 166 CCA 194; Taigman v. Desure, 253 Fed. 364, 165 CCA 146; Clip Bar Mfg. Co. v. Steel Protected Concrete Co., 209 Fed. 874 [aff 213 Fed. 223, 129 CCA 567]; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 CCA 336 [rev 142 Fed. 531, and certiorari granted 207 U. S. 589 mem, 28 SCt 255 mem, 52 L. ed. 354 mem]; Truman v. Carvill Mfg. Co., 87 Fed. 470; Boyden Power-Brake Co. v. Westinghouse Air-Brake Co., 70 Fed. 816, 17 CCA 430 [rev on other grounds 170 U. S. 537, 18 SCt 707, 42 L. ed. 1136]; Consolidated Roller-Mill Co. v. George T. Smith Middlings Purifier Co., 40 Fed. 305; Hayes v. Bickelhoupt, 24 Fed. 806; McMillan v. Conrad, 16 Fed. 128, 5 McCrary 140; International Signal Co. v. Marconi Wireless Tel. Co., 89 N. J. Eq. 319, 104 A 378 [aff 90 N. J. L. 620, 106 A 891]), (2) scope (I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593 [rev on other grounds 281 Fed. 5]), (3) or infringement (Flat Slabs Patents Co. v. Wright, etc., Co., 283 Fed. 345) (4) of the patent, or as to the title of plaintiff to the patent (National Paint Removing Co. v. Cochran, 287 Fed. 376).

[b] **Defendant is entitled** (1) to a determination of his rights in accordance with the evidence in the present case (Carson Inv. Co. v. Calumet, etc., Min. Co., 29 F. (2d) 300; McLaren Products Co. v. Cone Co., 7 F. (2d) 120), (2) and despite prior decisions, the court must give force and effect to the evidence in the pending case (Safety Car Heating, etc., Co. v. Gould Coupler Co., 245 Fed. 755).

[c] **Decree for or against manufacturer or his vendee.**—(1) Unless he participated in the defense of the suit to such an extent as to be bound by the decision (see supra § 644 note 38 [a]), (2) a manufacturer is not bound by a decree against a dealer (I. T. S. Rubber Co. v. Essex Rubber Co., 1 F. (2d) 780 [aff 272 U. S. 429, 47 SCt 139, 71 L. ed. 335], 25 F. (2d) 180; Stromberg Motor Devices Co. v. Zenith Carburetor Co., 220 Fed. 154). (3) Likewise a decree against a manufacturer is not conclusive upon a purchaser from him (Meccano, Ltd. v. John Wanamaker, New York, 250 Fed. 250, 162 CCA 386 [certiorari granted 248 U. S. 554 mem, 39 SCt 10 mem, 63 L. ed. 419 mem]; Van Epps v. International Paper Co., 124 Fed. 542), (4) nor is it a bar to a suit against him (Kryptok Co. v. Stead Lens Co., 190 Fed. 767, 111 CCA 495, 39 LRANS 1), (5) unless full profits and damages have been recovered from, and paid by, the manufacturer (see infra § 646). (6) A decree in favor of a manufacturer in a suit against him does not operate as an estoppel in favor of his customer. Wenborne-Karpen Dryer Co. v. Dort Motor Car Co., 14 F. (2d) 378 [rev 300 Fed. 404]; Hurd v. Woodward Co., 190 Fed. 28. And see Woodward Co. v. Hurd, 232 U. S. 428, 34 SCt 408, 58 L. ed. 670 (a person who purchases from various other persons the different parts of a patented combination and sells all of them to his customers to be united into the patented structure by the latter is not immune from a suit against him as a contributory infringer by reason of a prior decree in favor of the manufacturer of one of the parts); Stoehrer v. Glen Echo Park Co., 15 F. (2d) 558 (recognizing the rule, but holding that a dismissal of the bill was proper where the manufacturer intervened and the alleged infringing device was substantially furnished by him).

54. Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Calculagraph Co. v. Automatic Time Stamp Co., 187 Fed. 276, 109 CCA 618; Rousso v. Elco Towel Cabinet Co., 28 F. (2d) 300; Eskimo Pie Corp. v. Honeymoon Pie Corp., 25 F. (2d) 154; Hewes v. Deiches, 14 F. (2d) 1020; Mine, etc., Supply Co. v. Braeckel Concentrator Co., 197 Fed. 897; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79 [rev 170 Fed. 600]; Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co., 159 Fed. 144 [aff 167 Fed. 546, 93 CCA 224].

55. Rousso v. Barber, 3 F. (2d) 740 [aff 299 Fed. 801, and certiorari den 267 U. S. 596, 45 SCt 352, 69 L. ed. 805]; I. T. S. Rubber Co. v. Essex Rubber Co., 270 Fed. 593 [rev on other grounds 281 Fed. 5].

56. Wollensak v. Sargent, 33 Fed. 840; Celluloid Mfg. Co. v. Tower, 26 Fed. 451 [app dism 136 U. S. 633 mem, 10 SCt 1066 mem, 34 L. ed. 551 mem].

57. McLaren Products Co. v. Cone Co., 7 F. (2d) 120; Irving-Pitt Mfg. Co. v. Blackwell-Wielandy Book, etc., Co., 238 Fed. 177, 151 CCA 253; Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427.

58. Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., Inc., 285 Fed. 73 [rev on other grounds 290 Fed. 625 (certiorari den 263 U. S. 708 mem, 44 SCt 36 mem, 68 L. ed. 517 mem)]; B. F. Goodrich Co. v. Consolidated Rubber Tire Co., 251 Fed. 617, 163 CCA 611 [mod 237 Fed. 893, and certiorari den 247 U. S. 519 mem, 38 SCt 582 mem, 62 L. ed. 1246 mem]; Kawneer Mfg. Co. v. Toledo Plate, etc., Glass Co., 232 Fed. 362 [aff 237 Fed. 364, 150 CCA 378].

[a] **Adjudication upon final hearing.**—Greater weight should be accorded a prior adjudication which followed a final hearing upon pleadings and proofs than one made upon a motion for a preliminary injunction. Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Brill v. Washington R., etc., Co., 30 App. (D. C.) 255 [aff 215 U. S. 527, 30 SCt 177, 54 L. ed. 311].

59. Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944 [aff 19 F. (2d) 939]; Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410; National Electric Signalling Co. v. Telefunken Wireless Tel. Co., 221 Fed. 629, 137 CCA 353 [aff 209 Fed. 856]; Warren Bros. Co. v. New York, 187 Fed. 831, 109 CCA 591.

60. See cases infra this note.

[a] **General doctrine of stare decisis is applicable** (1) in a peculiar sense to patent cases, in which the validity of a patent which has been once adjudged is brought again in question. Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., 294 Fed. 930; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768. (2) Stare decisis generally see Courts § 304 et seq.

61. Adt v. E. Kirstein Sons Co., 259 Fed. 277 [aff 259 Fed. 561, 170 CCA 523]; National Electric Signalling Co. v. Telefunken Wireless Tel. Co., 221 Fed. 629, 137 CCA 353 [aff 209 Fed. 856]; Mine, etc., Supply Co. v. Braeckel Concentrator Co., 197 Fed. 897; Calculagraph Co. v. Automatic Time Stamp Co., 187 Fed. 276, 109 CCA 618; Gormley, etc., Tire Co. v. U. S. Agency, 177 Fed. 691, 101 CCA 479 [aff 169 Fed. 831].

62. Rousso v. Elco Towel Cabinet Co., 28 F. (2d) 300; Warren Bros. Co. v. New York, 187 Fed. 831, 109 CCA 591.

63. Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410; Weber Electric Co. v. Cutler-Hammer Mfg. Co., 256 Fed. 31, 167 CCA 303; National Electric Signalling Co. v. Telefunken Wireless Tel. Co., 221 Fed. 629, 137 CCA 353 [aff 209 Fed. 856]; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631; Calculagraph Co. v. Automatic Time Stamp Co., 187 Fed. 276, 109 CCA 618; Brill v. Washington R., etc., Co., 30 App. (D. C.) 255 [aff 215 U. S. 527, 30 SCt 177, 54 L. ed. 311].

[a] **Rule applied** (1) to decisions

ous[64] or the evidence in the second suit is materially different[65] or is so different as to lead to a different conclusion.[66] The obligation to follow the decisions of other courts in patent causes increases in proportion to the number of courts which have passed upon the same question and arrived at the same conclusion.[67]

Decision in suit by defendant upon another patent is not binding upon plaintiff where he was not a party or privy to the suit.[68]

[§ 646] **(4) Recovery of Profits and Damages.** A recovery of the profits for the use of a patented article does not vest the title in defendant;[69] the recovery of damages for past infringement does not give the infringer the right to continue the infringement thereafter;[70] and a recovery from a vendor may not, under the circumstances, release the vendee from liability.[71] While the recovery of full compensation for the use of a particular machine may operate to release it from the monopoly,[72] and the recovery of profits and damages from the manufacturer of an infringing machine vests the right or title to the use in the purchaser of the article[73] and debars the owner of the patent from recovering from a user for the use thereof,[74] the latter rule cannot be properly applied unless the purchaser was using the same patented article as that involved in the suit between the owner of the patent and the

as to the validity of the patent (Rousso v. Elco Towel Cabinet Co., 28 F. (2d) 300; Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631; Voightmann v. Weis, etc., Cornice Co., 133 Fed. 298 [aff 148 Fed. 848, 78 CCA 538]; Walker Patent Pivoted Bin Co. v. Miller, 132 Fed. 823 [aff 139 Fed. 134, 71 CCA 398]; Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222 [aff 128 Fed. 730, 63 CCA 328]; Rose v. Fretz, 98 Fed. 112; Norton v. San José Fruit-Packing Co., 83 Fed. 512, 27 CCA 576; Acme Harvester Co. v. Forbes, 69 Fed. 149; Simonds Counter Mach. Co. v. Knox, 39 Fed. 702; Hussey v. Whitely, 12 F. Cas. No. 6,950, 1 Bond 407, 2 Fish. Pat. Cas. 120; Brill v. Washington R., etc., Co., 30 App. (D. C.) 255) (2) rendered by the same court (Concrete Mixing, etc., Co. v. Powers-Kennedy Contracting Corp., 27 F. (2d) 668 [certiorari granted 278 U. S. 595 mem, 49 SCt 95 mem]; Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 CCA 371 [rev 195 Fed. 774]; Crier v. Innes, 170 Fed. 324, 95 CCA 508 [mod 160 Fed. 103]), (3) or by another court of equal (see Courts § 311) (4) or higher (Minerals Separation, etc., Corp. v. Magma Copper Co., 23 F. (2d) 931; Rousso v. Detroit First Nat. Bank, 19 F. (2d) 247; Gross v. Norris, 18 F. (2d) 418 [mod on other grounds 26 F. (2d) 898]; Westinghouse Electric, etc., Co. v. Precise Mfg. Corp., 10 F. (2d) 517 [aff 11 F. (2d) 209; Johnson v. Lit Bros., Inc., 278 Fed. 279 [aff 284 Fed. 259]; Adt v. E. Kirstein Sons Co., 259 Fed. 277 [aff 259 Fed. 561, 170 CCA 523]; Grinnell Washing Mach. Co. v. Clarinda Lawn Mower Co., 237 Fed. 98; Sanitary Street Flushing Mach. Co. v. Amsterdam, 225 Fed. 389 [aff 229 Fed. 421, 143 CCA 541]; Conley v. Thomas, 204 Fed. 93 [aff 211 Fed. 655, 128 CCA 159]; Parsons Non-Skid Co. v. E. J. Willis Co., 190 Fed. 333 [aff 209 Fed. 227, 126 CCA 333]; Warren Bros. Co. v. New York, 187 Fed. 831, 109 CCA 591) (5) authority. Also the rule may be applied, in a proper case, to decisions as to infringement. Rousso v. Elco Towel Cabinet Co., 28 F. (2d) 300; Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410; National Electric Signalling Co. v. Telefunken Wireless Tel. Co., 221 Fed. 629, 137 CCA 353 [aff 209 Fed. 856]; Warren Bros. Co. v. New York, 187 Fed. 831, 109 CCA 591; Edison Electric Light Co. v. Citizens' Electric Light, etc., Co., 64 Fed. 491; American Bell Tel. Co. v. Cushman, 57 Fed. 842; Macbeth v. Gillinder, 54 Fed. 169; Thompson v. E. P. Donnell Mfg. Co., 40 Fed. 383; Stuart v. Thorman, 37 Fed. 90; Celluloid Mfg. Co. v. Tower, 26 Fed. 451 [app dism 136 U. S. 633 mem, 10 SCt 1066 mem, 34 L. ed. 351 mem].

[b] **Views entertained in early life of patent.**—"Speaking generally, the view entertained by the courts in the earlier days of the life of a patent is usually a safer guide with which to judge invention and scope of claims than new and later contentions, which, as the case may be, seek to enlarge or defeat the inventor's accomplishment." American Graphophone Co. v. Emerson Phonograph Co., 255 Fed. 574, 576.

64. Lektophone Corp. v. Rola Co., 27 F. (2d) 758; Minerals Separation, etc., Corp. v. Magma Copper Co., 23 F. (2d) 931; Rousso v. Detroit First Nat. Bank, 19 F. (2d) 247; Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 76, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem]; Meurer Steel Barrel Co., Inc. v. Draper Mfg. Co., 260 Fed. 410; Baldwin v. Abercrombie, etc., Co., 228 Fed. 895, 143 CCA 293 [aff 227 Fed. 455, and certiorari granted 239 U. S. 649 mem, 36 SCt 284 mem, 60 L. ed. 485 mem, and aff 245 U. S. 198, 38 SCt 104, 62 L. ed. 240]; Calculagraph Co. v. Automatic Time Stamp Co., 187 Fed. 276, 109 CCA 618.

[a] **Prior decision followed in case of doubt.**—Hildreth v. Auerbach, 223 Fed. 545 [aff 223 Fed. 651, 139 CCA 205]; Westinghouse Electric, etc., Co. v. Sutter, 194 Fed. 888 [aff 202 Fed. 759, 121 CCA 352]; Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 530 [aff 220 Fed. 880, 136 CCA 446]; Gormley, etc., Tire Co. v. U. S. Agency, 177 Fed. 691, 101 CCA 479 [aff 169 Fed. 831].

65. Strauss Bascule Bridge Co. v. Seattle, 5 F. (2d) 229; Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 CCA 371 [rev 195 Fed. 774].

[a] **Rule of comity does not apply** where the evidence is materially or substantially different. Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944 [aff 19 F. (2d) 939]; Torrey v. Hancock, 184 Fed. 61, 107 CCA 79 [rev 170 Fed. 600].

[b] **On same, or substantially same, evidence,** former decision will be followed. Flat Slabs Patents Co. v. Wright, etc., Co., 283 Fed. 345; Thacher v. Falmouth, 241 Fed. 869, 154 CCA 571 [aff 235 Fed. 151]; Doelger v. German-American Filter Co., 204 Fed. 274, 122 CCA 472; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 162 Fed. 892, 89 CCA 582 [aff 157 Fed. 677, 85 CCA 349 (aff 220 U. S. 428, 31 SCt 444, 55 L. ed. 527)].

66. Adt v. Kirstein Sons Co., 259 Fed. 277 [aff 259 Fed. 561, 170 CCA 523]; Cincinnati Butchers' Supply Co. v. Walker Bin Co., 230 Fed. 453, 144 CCA 595; Johns-Pratt Co. v. Economy Fuse, etc., Co., 216 Fed. 639; Conley v. Thomas, 204 Fed. 93 [aff 211 Fed. 655, 128 CCA 159].

[a] **Scope of inquiry.**—When a patent has once been sustained by an appellate court, a subordinate court, dealing subsequently with the same patent, inquires first whether the second record contains anything not before the appellate court in the prior litigation, and, if it finds something new, inquires next whether the new matter is of such a character that it may fairly be supposed that the appellate court would have reached a different conclusion, had it been advised of its existence. Carson Inv. Co. v. Calumet, etc., Min. Co., 29 F. (2d) 300; Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [certiorari den 278 U. S. 635 mem, 49 SCt 32 mem]; Flat Slabs Patents Co. v. Wright, etc., Co., 283 Fed. 345.

67. Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. (2d) 944 [aff 19 F. (2d) 939]; Cincinnati Butchers' Supply Co. v. Walker Bin Co., 230 Fed. 453, 144 CCA 595; Brill v. Washington R., etc., Co., 30 App. (D. C.) 255 [aff 215 U. S. 527, 30 SCt 177, 54 L. ed. 311].

68. Del Turco v. Traitel Marble Co., 25 F. (2d) 308.

69. Spaulding v. Page, 22 F. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702.

70. Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Root v. Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. ed. 975; Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. ed. 76; Electric Gas-Lighting Co. v. Wollensak, 70 Fed. 790; Spaulding v. Page, 22 F. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Friarson v. Loe, 9 Ch. D. 48, 27 Wkly. Rep. 183; Needham v. Oxley, 8 L. T. Rep. N. S. 604.

71. Westinghouse Electric, etc., Co. v. New York Mut. L. Ins. Co., 129 Fed. 213; Van Epps v. International Paper Co., 124 Fed. 542; Tuttle v. Matthews, 28 Fed. 98; Blake v. Greenwood Cemetery, 16 Fed. 676, 21 Blatchf. 222.

Cross references:

Circumstances necessary to release vendee see infra text and notes 75-78.

Judgment for or against manufacturer as estoppel in favor of vendee generally see supra §§ 644, 645.

72. Electric Gas-Lighting Co. v. Wollensak, 70 Fed. 790; Fisher v. Consolidated Amador Mine, 25 Fed. 201; Steam Stone-Cutter Co. v. Sheldons, 21 Fed. 875; Allis v. Stowell, 16 Fed. 783; Steam Stone-Cutter Co. v. Sheldons, 15 Fed. 608, 21 Blatchf. 260; Booth v. Seevers, 3 F. Cas. No. 1,648a; Gilbert, etc., Mfg. Co. v. Bussing, 10 F. Cas. No. 5,416, 1 Bann. & A. 621, 12 Blatchf. 426; Perrigo v. Spaulding, 19 F. Cas. No. 10,994, 2 Bann. & A. 348, 13 Blatchf. 389; Spaulding v. Page, 22 F. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Steam Stonecutter Co. v. Windsor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24.

[a] **Where license fee is adopted as measure of damages,** the article or machine is released from monopoly and defendant has a right to use it during the life or term of the patent. Stutz v. Armstrong, 25 Fed. 147; Emerson v. Simm, 8 F. Cas. No. 4,443, 6 Fish. Pat. Cas. 281; Sickels v. Borden, 22 F. Cas. No. 12,832, 3 Blatchf. 535; Spaulding v. Page, 22 F. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702.

73. Stebler v. Riverside Heights Orange Growers' Assoc., 214 Fed. 550, 131 CCA 96, LRA1915F 1101 [mod 211 Fed. 985]; and cases infra note 74.

74. Steam Stone-Cutter Co. v. Sheldons, 21 Fed. 875; Allis v. Stowell, 16 Fed. 783; Booth v. Seevers, 3 F. Cas. No. 1,648a; Perrigo v. Spaulding, 19 F. Cas. No. 10,994, 2 Bann. & A. 348, 13 Blatchf. 389; Spaulding v. Page, 22 F. Cas. No. 13,219, 4 Fish. Pat. Cas. 641, 1 Sawy. 702; Steam Stonecutter Co. v. Wind-

infringing manufacturer,[75] the user was a vendee of the manufacturer,[76] and full compensation was not only recovered from the manufacturer,[77] but was also actually paid.[78]

[§ 647] **12. Reopening or Rehearing.**[79] In an equitable suit for infringement of a patent, the court may reopen the case and grant a rehearing,[80] but it is under no compulsion to do so,[81] as the granting or refusing of an application therefor rests in the discretion of the court,[82] to be exercised according to the facts of each case[83] and the effect which the granting or refusal of the application will have on the rights of the parties respectively;[84] and, as a rule, a rehearing will not be granted unless there are exceptional circumstances.[85]

Newly discovered evidence. While, upon a proper showing, a rehearing may be granted upon the ground of newly discovered evidence,[86] it will not be granted upon this ground where, so far as appears, the evidence alleged to be newly discovered was accessible at the time of the original hearing and, by the exercise of reasonable diligence, could have been produced at such hearing,[87] there was laches or unreasonable delay in applying for a reopening or rehearing after discovering the evidence,[88] or the new evidence, if presented at the original hearing, would not have changed the result or decision.[89]

Conditions. As a condition of granting a rehearing the court may require the moving party to pay expenses of the adverse party,[90] or give an undertaking to pay the expense of additional testimony.[91]

[§ 648] **13. Review—a. In General—(1) By Circuit Court of Appeals.**[92] Under general statutory provisions an appeal may be taken to the circuit court of appeals from any final decree in a patent suit.[93] Also, under general statutory provisions, an appeal may be taken to the circuit court of appeals from an interlocutory order or decree granting, continuing, modifying, refusing, or dissolving, or refusing to modify or dissolve, an injunction;[94] and a statute expressly relating to patent infringe-

sor Mfg. Co., 22 F. Cas. No. 13,335, 4 Bann. & A. 445, 17 Blatchf. 24.

75. Allis v. Stowell, 16 Fed. 783.

76. Allis v. Stowell, supra.

77. Wilson v. Union Tool Co., 265 Fed. 669 [certiorari granted 254 U. S. 624 mem, 41 SCt 14 mem, 65 L. ed. 444 mem, and aff 259 U. S. 107, 42 SCt 427, 66 L. ed. 848]; De Laski, etc., Circular Woven Tire Co. v. Empire Rubber, etc., Co., 239 Fed. 139.

[a] **Recovery from manufacturer of profits** only, made from his manufacture and sale to a jobber, is not a bar to a suit against the jobber for damages or profits made on resales. Dowagiac Mfg. Co. v. Deere, etc., Co., 284 Fed. 331.

[b] **Recovery of damages** from a manufacturer does not preclude a suit against a user for profits. U. S. Printing Co. v. American Playing-Card Co., 70 Fed. 50.

78. Birdsell v. Shaliol, 112 U. S. 485, 5 SCt 244, 28 L. ed. 768; Stebler v. Riverside Heights Orange Growers' Assoc., 211 Fed. 985 [mod on other grounds 214 Fed. 550, 131 CCA 96, LRA1915F 1101]; Allis v. Stowell, 16 Fed. 783.

79. Rehearing:
Grant of, by:
Appellate court see infra § 650.
Lower court after decision on appeal see infra § 652.
In equitable suit generally see Equity § 871 et seq.

80. Campbell Printing-Press, etc., Co. v. Marden, 70 Fed. 339; Campbell v. New York, 36 Fed. 260; American Diamond Rock-Boring Co. v. Sheldons, 24 Fed. 374, 23 Blatchf. 286; Schneider v. Thill, 21 F. Cas. No. 12,470b, 5 Bann. & A. 595.

81. Mueller v. Zeregas, 12 F. (2d) 517.

82. Mueller v. Zeregas, supra; Pray v. Copes, 1 F. (2d) 927; American Diamond Rock-Boring Co. v. Sheldon, 1 Fed. 870, 18 Blatchf. 50.

83. Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 121 Fed. 556.

84. Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., supra; American Diamond Rock-Boring Co. v. Sheldon, 1 Fed. 870, 18 Blatchf. 50.

85. In re Gamewell Fire-Alarm Tel. Co., 73 Fed. 908, 20 CCA 111; Searls v. Worden, 11 Fed. 501 [rev on other grounds 121 U. S. 14, 7 SCt 814, 30 L. ed. 853].

86. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 166 Fed. 867 [aff 177 Fed. 1006, 100 CCA 670]; Diamond Drill, etc., Co. v. Kelley, 138 Fed. 833; Thomson-Houston Electric Co. v. Nassau Electric R. Co., 110 Fed. 646; Winchester Repeating Arms Co. v. American Buckle, etc., Co., 58 Fed. 309; Hake v. Brown, 44 Fed. 283; Webster Loom Co. v. Higgins, 43 Fed. 673; Johnson v. Beard, 13 F. Cas. No. 7,371, 2 Bann. & A. 50; Holste v. Robertson, 4 Ch. D. 9; Wilson v. Gann, 23 Wkly Rep. 546.

[a] **Evidence bearing upon important point.**—It has been held that, where it is an important point in the defense that a reissued patent is broader in its scope than the original, the case will be reopened to enable defendant to introduce testimony tending to show that fact, it being alleged that such testimony is newly discovered. Johnson v. Beard, 13 F. Cas. No. 7,371, 2 Bann. & A. 50.

87. W. W. Sly Mfg. Co. v. Pangborn Corp., 276 Fed. 971 [aff 284 Fed. 217 (certiorari den 260 U. S. 749 mem, 43 SCt 249 mem, 67 L. ed. 495 mem)]; Corrugated Paper Patents Co. v. New York Paper Working Mach. Co., 237 Fed. 380; Combustion Utilities Corp. v. Worcester Gaslight Co., 190 Fed. 155 [aff 194 Fed. 1023, 114 CCA 643]; Malignani v. Jasper Marsh Cons. Electric Lamp Co., 180 Fed. 442; Panzl v. Battle Island Paper Co., 132 Fed. 607 [rev on other grounds 138 Fed. 48, 70 CCA 474]; Brill v. North Jersey St. R. Co., 125 Fed. 526; Bliss v. Reed, 113 Fed. 946; Municipal Signal Co. v. National Electrical Mfg. Co., 97 Fed. 810; New York Filter Co. v. O. H. Jewell Filter Co., 62 Fed. 582 [aff 66 Fed. 152, 13 CCA 380]; Electrical Accumulator Co. v. Julien Electric Co., 39 Fed. 490; New York Grape Sugar Co. v. American Grape Sugar Co., 35 Fed. 212; Burdsall v. Curran, 31 Fed. 918; Albany Steam Trap Co. v. Felthousen, 26 Fed. 318; Peterson v. Simpkins, 25 Fed. 486 [app dism 131 U. S. 447 mem, 9 SCt 803 mem, 33 L. ed. 217 mem]; Hicks v. Ferdinand, 20 Fed. 111; Andrews v. Denslow, 1 F. Cas. No. 372, 2 Bann. & A. 587, 14 Blatchf. 182; De Florez v. Raynolds, 7 F. Cas. No. 3,743, 4 Bann. & A. 331, 16 Blatchf. 397; Hitchcock v. Tremaine, 12 F. Cas. No. 6,540, 9 Blatchf. 550, 5 Fish. Pat. Cas. 537; Nutter v. Rodgers, 18 F. Cas. No. 10,383.

[a] **Due diligence in obtaining evidence must be shown.**—Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co., 208 Fed. 289.

88. Peter Schoenhoefen Brewing Co. v. Alvey-Ferguson, 14 F. (2d) 945 (unexplained delay of five years); Turner v. Lauter Piano Co., 239 Fed. 560 [den reopening 236 Fed. 252, and aff 248 Fed. 930, 161 CCA 48]; Norton v. Walsh, 49 Fed. 769.

89. Universal Oil Products Co. v. Skelly Oil Co., 23 F. (2d) 111 [den rearg 20 F. (2d) 995]; American Sulphite Pulp Co. v. Hinckley Fibre Co., 241 Fed. 590; Sacks v. Brooks, 85 Fed. 970; Stuart v. St. Paul, 63 Fed. 644; Celluloid Mfg. Co. v. American Zylonite Co., 27 Fed. 750; American Bell Tel. Co. v. People's Tel. Co., 25 Fed. 725 [aff 126 U. S. 1, 8 SCt 778, 31 L. ed. 863]; Hayes v. Dayton, 20 Fed. 690; Robinson v. Sutter, 11 Fed. 798 [rev on other grounds 119 U. S. 530, 7 SCt 376, 30 L. ed. 492]; Collins Co. v. Coes, 8 Fed. 517; Adair v. Thayer, 7 Fed. 920; Brown v. Deere, 6 Fed. 487, 2 McCrary 425; Blandy v. Griffith, 3 F. Cas. No. 1,530, 6 Fish. Pat. Cas. 434; Hitchcock v. Tremaine, 12 F. Cas. No. 6,540, 9 Blatchf. 550, 5 Fish. Pat. Cas. 537; Kerosene Lamp Co. v. Littell, 14 F. Cas. No. 7,723.

[a] **Rule applied** to: (1) Cumulative evidence. Douglas-Pectin Corp. v. Armour, 21 F. (2d) 534 [den reh 14 F. (2d) 768, and mod on other grounds 27 F. (2d) 814]; Clear Vision Pump Co. v. Wichita Visible Gasoline Pump Co., 9 F. (2d) 996. (2) References which would not have affected the result. Egry Register Co. v. Standard Register Co., 267 Fed. 186 [certiorari den 254 U. S. 642 mem, 41 SCt 14 mem, 65 L. ed. 453 mem].

90. Trane Co. v. Nash Engineering Co., 25 F. (2d) 267 [aff 20 F. (2d) 439, 22 F. (2d) 868]; Hake v. Brown, 44 Fed. 283.

91. Underwood v. Gerber, 37 Fed. 796, 2 LRA 357.

92. Appellate jurisdiction of circuit court of appeals in patent cases generally see Federal Courts § 327.

93. U. S. Code tit. 28 § 225.

[a] **Final decrees within meaning of statute** include (1) a decision overruling a motion to dismiss as to one complainant (Brush Electric Co. v. Electric Impr. Co., 51 Fed. 557, 2 CCA 373), (2) but not an order vacating service of process (L. E. Waterman Co. v. Parker Pen Co., 107 Fed. 141, 46 CCA 203), (3) a decree dismissing the bill as to part of the defendants (Electric Protection Co. v. American Bank Protection Co., 184 Fed. 916, 107 CCA 238 [mod 181 Fed. 350, and certiorari den 220 U. S. 619 mem, 31 SCt 723 mem, 55 L. ed. 612 mem]), (4) or a decree which, although purporting to be final, was entered without authority during the pendency of an appeal from an interlocutory decree (Draper Corp. v. Stafford Co., 255 Fed. 554, 166 CCA 622).

Appeals to circuit court of appeals from final decrees generally see Federal Courts §§ 327, 331.

94. U. S. Code tit 28 § 227.

[a] **Decrees held to be interlocutory** within the meaning of the statute include a decree: (1) Granting an injunction and referring the cause to the master for an accounting. See

ment suits provides for the taking of an appeal to the circuit court of appeals from a decree which is final except for the ordering of an accounting.[95] The refusal of various matters, such as a rehearing,[96] permission to file a disclaimer after the decision,[97] leave to file a supplemental bill,[98] or to adjudge defendant guilty of contempt for violating an injunction,[99] is not appealable, nor will an appeal be allowed to settle costs.[1] Formerly an appeal did not lie from an interlocutory decree granting an accounting only for infringement of an expired patent,[2] but under subsequent legislation[3] the rule is otherwise.[4]

Who may appeal. A licensee who joins the patentee with him as plaintiff may appeal without the consent of the patentee.[5]

Time for appeal or writ of error. A longer time is allowed by the statute for the taking of appeals from final decrees[6] than for taking appeals from other decrees,[7] and an appeal from a particular decree may be taken within,[8] and only within,[9] the time limited by the statute applicable thereto. Questions arising on an accounting will be reviewed only after the entry of a final decree.[10] An order adjudging defendant guilty of contempt for violation of an injunction and imposing a fine on him purely as compensation to plaintiff is not appealable until after the final decree;[11] but where a fine is imposed partly as compensation to plaintiff and partly as punishment, a writ of error may be obtained immediately.[12]

Record on appeal should comply with the pertinent federal equity rules[13] and be limited to matters before the trial court at the time of the order or decree from which the appeal is taken.[14] Stipulations of the parties as to the contents of the record will not necessarily be given effect.[15]

Assignments of error on appeal in patent causes, where the error complained of consists in holding the patent valid or invalid,[16] or infringed or not infringed,[17] may be more general than in ordinary cases.[18]

Effect of appeal; supersedeas. During the pendency of an appeal from an interlocutory decree granting an injunction the trial court may enter such orders as are purely administrative in character,[19] but it is without power to enter a final decree.[20] While a supersedeas on appeal may be granted,[21] it will be granted only under special circumstances.[22] It is held that a supersedeas is effective as authority to defendant to continue his business in respect of the alleged infringing article,[23] and that plaintiff may be restrained from sending circulars to defendant's customers warning them against purchasing defendant's goods,[24] but it is also held that the supersedeas does not affect the right of plaintiff to bring suits against defendant's customers pending the appeal.[25]

Dismissal of appeal. Where the patent has expired, an appeal from an interlocutory decree granting an injunction will be dismissed.[26] Also the appeal may be dismissed for the purpose of allowing

Federal Courts § 332 note 95 [b]. (2) Dismissing a bill of revivor as to injunction. Duplex Printing Press Co. v. Hoe, 15 F. (2d) 362 (dismissal is, in legal effect, equivalent to refusal of injunction).

[b] **Appeal is given precedence in appellate court.**—U. S. Code tit 28 § 227.

Cross references:

Appeals to circuit court of appeals from interlocutory orders or decrees as to injunctions generally see Federal Courts § 332.

Cross appeal from decree dismissing bill as to part of claims see Federal Courts § 332 note 98 [b].

95. Act Febr. 28, 1927 (44 U. S. St. at L. 1261).

[a] **Statute deals** with cases where no injunctive relief can be passed upon and the question of whether or not there is an accounting is not the determining factor. Brick v. Namm, 21 F. (2d) 179.

96. Boston, etc., R. Co. v. Pullman's Palace Car Co., 51 Fed. 305, 2 CCA 172.

97. Roemer v. Neumann, 132 U. S. 103, 10 SCt 12, 33 L. ed. 277.

98. Minerals Separation, Ltd. v. Miami Copper Co., 269 Fed. 265 [aff 268 Fed. 862].

99. Minerals Separation, Ltd. v. Miami Copper Co., supra.

Time for appeal or writ of error from order imposing fine for contempt see infra text and notes 11, 12.

1. Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 77 Fed. 490, 23 CCA 250.

2. American Sulphite Pulp Co. v. Carthage Sulphite Pulp Co., 224 Fed. 501, 140 CCA 376.

3. See supra text and note 95.

4. Brick v. Namm, 21 F. (2d) 179.

5. Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 CCA 156.

6. U. S. Code tit 28 § 230 (three months).

7. Act Febr. 28, 1927 (44 U. S. St. at L. 1261); U. S. Code tit 28 § 227 (thirty days under both statutes).

8. Meurer Steel Barrel Co. v. Cleveland Steel Barrel Co., 268 Fed. 536.

9. Stromberg Motor Devices Co. v. Arnson, 239 Fed. 891, 153 CCA 19; Raymond v. Royal Baking-Powder Co., 76 Fed. 465, 22 CCA 276.

10. Brick v. Namm, 21 F. (2d) 179; Lederer v. Garage Equipment Mfg. Co., 235 Fed. 527, 149 CCA 73.

Scope of review on appeal from order for injunction see infra § 651.

11. Perfection Cooler Co. v. Rotax Co., 296 Fed. 464; Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 Fed. 774, 68 CCA 476 (dictum).

[a] **"Remedial contempt proceeding** is a part of the main case and an order made therein is interlocutory in character and reviewable only upon the appeal from the final judgment in the main case." Flat Slab Patents Co. v. Turner, 285 Fed. 257, 285 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

12. Union Tool Co. v. Wilson, 259 U. S. 107, 42 SCt 427, 66 L. ed. 848 [aff 265 Fed. 669].

[a] **Criminal feature** of order is dominant and fixes its character for purposes of review. Union Tool Co. v. Wilson, 259 U. S. 107, 42 SCt 427, 66 L. ed. 848 [aff 265 Fed. 669]. And see Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 Fed. 774, 68 CCA 476 (discussing the point).

13. Fairbanks v. American Valve, etc., Co., 18 F. (2d) 716 [certiorari granted 274 U. S. 735 mem, 47 SCt 770 mem, 71 L. ed. 1336 mem, and rev on other grounds 276 U. S. 305, 48 SCt 317, 72 L. ed. 584].

14. F. C. Austin Mfg. Co. v. American Wellworks, 121 Fed. 76, 57 CCA 330. See Wolf v. Buckeye Incubator Co., 296 Fed. 680 [aff 291 Fed. 253] (a motion on appeal to enlarge the record by the introduction of further evidence tending to show prior use will not be granted, where the newly-discovered evidence is cumulative merely, and not of such positive and irrefutable nature as would compel a different conclusion, and where it does not appear that appellant exercised due diligence to secure and present such evidence on the hearing).

15. Fairbanks v. American Valve, etc., Co., 18 F. (2d) 716 [certiorari granted 274 U. S. 735 mem, 47 SCt 770 mem, 71 L. ed. 1336 mem, and rev on other grounds 276 U. S. 305, 48 SCt 317, 72 L. ed. 584]; F. C. Austin Mfg. Co. v. American Wellworks, 121 Fed. 76, 57 CCA 330. See Baldwin v. Abercrombie, etc., Co., 228 Fed. 895, 143 CCA 293 [aff 227 Fed. 455, certiorari granted 239 U. S. 649 mem, 36 SCt 284 mem, 60 L. ed. 485 mem, and aff 245 U. S. 198, 38 SCt 104, 62 L. ed. 240] (to be effective, stipulation must be approved by the appellate court).

16. Lord Baltimore Press v. Labombarde, 197 Fed. 739, 118 CCA 481 [rev 190 Fed. 184].

17. Lord Baltimore Press v. Labombarde, supra.

18. Assignments of error generally see Appeal and Error §§ 1461–1580.

19. Byrd Mfg. Co. v. Colman, 205 Fed. 905, 124 CCA 249.

20. Brick v. Namm, 21 F. (2d) 179; Draper Corp. v. Stafford Co., 255 Fed. 554, 166 CCA 622.

[a] **Rule applies,** even though plaintiff waives the accounting. Brick v. Namm, 21 F. (2d) 179.

21. In re Haberman Mfg. Co., 147 U. S. 525, 13 SCt 527, 37 L. ed. 266; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 545, 19 CCA 25.

22. Timolat v. Philadelphia Pneumatic Tool Co., 130 Fed. 903; Edison v. American Mutoscope Co., 110 Fed. 664 [rev on other grounds 114 Fed. 926, 52 CCA 546]; Thomson-Houston Electric Co. v. Ohio Brass Co., 78 Fed. 142; National Heeling-Mach. Co. v. Abbott, 77 Fed. 462.

23. Freeman-Sweet Co. v. Luminous Unit Co., 253 Fed. 958, 165 CCA 400 [certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem]; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 545, 19 CCA 25.

24. Freeman-Sweet Co. v. Luminous Unit Co., 253 Fed. 958, 165 CCA 400 [certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem].

25. Wagner v. Meccano, Ltd., 239 Fed. 901, 153 CCA 29.

26. National Folding-Box, etc., Co. v. Robertson, 104 Fed. 552, 44 CCA 29; Lockwood v. Wickes, 75 Fed. 118, 21 CCA 257; Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 61 Fed. 208, 9 CCA 450.

the reopening of the case for the presentation of newly discovered evidence.[27] The circuit court of appeals should not dismiss an appeal from an interlocutory order granting an injunction because the order was made pro forma,[28] the proper procedure in such case being to reverse and remand for further proceedings.[29] One of several appellants cannot dismiss an appeal.[30]

In action at law. Any final judgment at law in a patent suit may be reviewed by the circuit court of appeals by writ of error.[31]

[§ 649] **(2) By Supreme Court.** The judgment or decree of the circuit court of appeals in a case arising under the patent laws is final[32] and not reviewable by the supreme court except by certification by the court of appeals[33] or by writ of certiorari by the supreme court.[34] The United States supreme court may review a decision by a state court,[35] or by a federal district court,[36] upon the question whether or not a suit arises under the patent laws of the United States so as to be within the exclusive jurisdiction of the federal courts;[37] and it may also review a decision by a particular federal district court that a suit for infringement of a patent is or is not instituted in the proper district.[38]

[§ 650] **b. Scope of Review; Determination and Disposition of Cause—(1) In General.** On appeal in a suit for infringement of a patent, the circuit court of appeals, in a sense, hears the case de novo,[39] but nevertheless it hears the case as a reviewing, rather than as a trial, court,[40] and it will not consider objections made for the first time on appeal.[41] The appellate court may consider matters which appear in the record,[42] but it will not admit[43] or strike out[44] evidence, review any question requiring a consideration of evidence which is not before it,[45] or review a portion of a decree from which no appeal has been taken.[46] A presumption in favor of the correctness of the decree of the lower court,[47] and the findings of the master[48] which have been approved by the lower court,[49] will be indulged on appeal.[50] Also a finding or determination of the trial court,[51] or a finding of the master[52] which has been approved or concurred in by the trial court,[53] as to a question of fact depending upon conflict-

27. Firestone Tire, etc., Co. v. Seiberling, 245 Fed. 937, 158 CCA 225.
Newly discovered evidence as ground for reopening or rehearing see supra § 647.
28. Ex p. Harley-Davidson Motor Co., 259 U. S. 414, 42 SCt 527, 66 L. ed. 996.
29. See infra § 651.
30. Marsh v. Nichols, 120 U. S. 598, 7 SCt 704, 30 L. ed. 796.
31. Act March 3, 1891 § 6 (26 U. S. St. at L. 828).
32. See Federal Courts § 205.
33. Act March 3, 1891 § 6 (26 U. S. St. at L. 828).
[a] **Certificate held insufficient.**—Columbus Watch Co. v. Robbins, 148 U. S. 266, 13 SCt 594, 37 L. ed. 445.
Certification by circuit court of appeals to supreme court generally see Federal Courts § 203.
34. See Federal Courts § 208.
35. See Federal Courts § 296.
36. See Federal Courts § 224.
37. **Exclusive jurisdiction** see Courts § 633.
38. See Federal Courts § 228.
District in which to sue see supra §§ 526–528.
39. Fairbanks v. American Valve, etc., Co., 18 F. (2d) 716 [certiorari granted 274 U. S. 735 mem, 47 SCt 770 mem, 71 L. ed. 1336 mem, and rev on other grounds 276 U. S. 305, 48 SCt 317, 72 L. ed. 584].
40. Fairbanks v. American Valve, etc., Co., supra.
[a] **Where disclaimer is made** intermediate the decree and the appeal, the appellate court cannot review the decision upon the original claim. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179.
41. Reliance Constr. Co. v. Hassam Pav. Co., 248 Fed. 701, 160 CCA 601; Smith, etc., Mfg. Co. v. Mellon, 58 Fed. 705, 7 CCA 439; Lane v. Levi, 21 App. (D. C.) 168.
[a] **Absence of proof of notice.**—Pettibone v. Pennsylvania Steel Co., 134 Fed. 889.
42. See cases infra this note.
[a] **Defendant's statement of account.**—Where defendant's statement of account, although belated, is in the record, it may be examined for the purpose of determining wherein and to what extent defendant, by his own showing, was prejudiced by a judgment based upon incompetent evidence. Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492.
[b] **Matters bearing upon validity or construction of patent.**—(1) In reviewing a decree holding the patent invalid, the appellate court is not limited to the particular ground upon which the lower court based its decision (U. S. Consolidated Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 115 CCA 234); (2) and although the lower court held the patent to have been anticipated by only one other patent, the court on appeal may consider the entire prior art as disclosed by the whole record (Backstay Mach., etc., Co. v. Hamilton, 262 Fed. 411 [certiorari den 253 U. S. 488 mem, 40 SCt 485 mem, 64 L. ed. 1026 mem]). (3) Even though, in an action for the infringement of two patents, the action is dismissed as to one, that patent may otherwise be sufficiently before the appellate court to permit a consideration of it on the question of anticipation of the other patented invention. R. Herschel Mfg. Co. v. Great States Corp., 26 F. (2d) 362. (4) Patents set up in the answer as a part of the prior art, printed and indexed in the record on appeal, and referred to in the briefs, and in relation to which witnesses were examined, all without objection, will not be excluded from consideration by the appellate court because they were not formally marked as exhibits by the examiner. Smyth Mfg. Co. v. Sheridan, 149 Fed. 208, 79 CCA 166. (5) However, where the appellate court is clearly of opinion that patent of plaintiff was anticipated by one of several patents alleged by defendant to be anticipations, it is unnecessary for the court to consider the other references. Comptograph Co. v. Adder Mach. Co., 41 App. (D. C.) 427.
43. Witzel v. Berman, 212 Fed. 734, 129 CCA 344.
44. Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, 130 CCA 117.
45. Fairbanks v. American Valve, etc., Co., 18 F. (2d) 716 [certiorari granted 274 U. S. 735 mem, 47 SCt 770 mem, 71 L. ed. 1336 mem, and rev on other grounds 276 U. S. 305, 48 SCt 317, 72 L. ed. 584].
46. Davey Tree Expert Co. v. Van Billiard, 255 Fed. 781, 167 CCA 125; Thacher v. Transit Constr. Co., 234 Fed. 640, 148 CCA 406 [aff 228 Fed. 905].
[a] **Validity of patent,** or of one of two patents, will not be reviewed where no appeal has been taken from the portion of the decree adjudging that patent to be valid. Davey Tree Expert Co. v. Van Billiard, 255 Fed. 781, 167 CCA 125; Thacher v. Transit Constr. Co., 234 Fed. 640, 148 CCA 406 [aff 228 Fed. 905]. But see Rip Van Winkle Wall Bed Co. v. Holmes, 15 F. (2d) 950 (where the validity of the patent was in issue and contested at the trial and an admission or concession of appellant in his brief that he does not attack the validity of the patent is coupled with an agreement which would so limit and restrict the operation of the patent as utterly to destroy its utility, the concession is not binding upon the appellate court).
47. Minneapolis, etc., R. Co. v. Barnett, etc., Co., 257 Fed. 302, 168 CCA 386.
48. Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1.
49. Weaver, Inc. v. American Chain Co., 9 F. (2d) 372 [mod 1 F. (2d) 590, and certiorari den 273 U. S. 699 mem, 47 SCt 94 mem, 71 L. ed. 847 mem].
50. **Presumptions on appeal generally** see Appeal and Error §§ 2262–2752.
51. See cases infra this note.
[a] **Rule applied** to a finding, conclusion, or determination of the trial court: (1) In favor of the validity of the patent. Central California Canneries Co. v. Dunkley Co., 247 Fed. 790, 159 CCA 648 [certiorari den 245 U. S. 668 mem, 38 SCt 134 mem, 62 L. ed. 539 mem]. (2) As to the date of invention. Union Trust Co. v. White Motor Co., 22 F. (2d) 821 [aff 22 F. (2d) 816]; Vandenburgh v. Truscon Steel Co., 277 Fed. 345 [certiorari granted 258 U. S. 615 mem, 42 SCt 314 mem, 66 L. ed. 792 mem, and aff 261 U. S. 6, 43 SCt 331, 67 L. ed. 507]. (3) That sale or public use for more than two years prior to the application was not shown. Trane Co. v. Nash Engineering Co., 25 F. (2d) 267 [aff 20 F. (2d) 439]. (4) As to infringement or noninfringement. Dobson v. Dornan, 118 U. S. 10, 6 SCt 946, 30 L. ed. 63; American Sulphite Pulp Co. v. Burgess Sulphite Co., 2 F. (2d) 6; Blettner v. Gill, 251 Fed. 81, 163 CCA 331; Diamond Patent Co. v. Webster, 249 Fed. 155, 161 CCA 207. (5) That there was an express license. Richmond Screw Anchor Co. v. Bethlehem Steel Bridge Corp., 287 Fed. 94. (6) That no notice was given defendant of the existence of the patent. Gibson v. American Graphophone Co., 234 Fed. 633, 148 CCA 399.
52. Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 281 Fed. 453 [rev 248 Fed. 508, and certiorari den 260 U. S. 744 mem, 43 SCt 165 mem, 67 L. ed. 827 mem] (finding as to the number of infringing electrical transformers sold by defendant).
53. Producers', etc., Corp. v. Lehmann, 18 F. (2d) 492; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214

ing evidence or the credibility of witnesses, will not be disturbed on appeal unless it is clearly erroneous;[54] but the rule does not apply to the determination of a question which is not purely one of fact,[55] nor does it make the determination of the lower court unassailable[56] so as, in effect, to exclude review and reversal,[57] and it need not be applied where it would result in a miscarriage of justice.[58] In the United States supreme court the rule against disturbing a finding of fact which is not clearly erroneous[59] is applicable where a finding of the district court has been approved by the circuit court of appeals,[60] but it does not apply to its full extent where a finding of the district court has been disapproved by the cir uit court of appeals[61] and is also contrary to a conclusion reached by the trial court in another case upon the same issue and evidence.[62] A refusal to increase damages is so far a matter of discretion[63] that it will not be disturbed on appeal.[64] The reviewing court will make such disposition of the cause as is appropriate in the particular case.[65] Where the circuit court of appeals adjudges certain claims valid and infringed, it should make findings that the remaining claims are either invalid or not infringed.[66]

In action at law. On a writ of error in an action at law, the circuit court of appeals will not review facts[67] or consider an objection to the validity of the patent which was not pleaded or relied on in the trial court,[68] but it may consider patents or records which, although introduced in evidence, were, by stipulation of the parties, presented to, and considered by, the lower court on a motion for a directed verdict.[69] Where the trial court sitting without a jury held certain claims not to disclose patentable novelty and other claims not to be infringed, and the latter claims disclose nothing different from the former claims, it seems that the whole cause will not be sent back for a new trial merely because the trial court made no separate specific findings as to the nonpatentability of the latter claims.[70]

[§ 651] **(2) On Appeal from Order or Decree as to Injunction.** An appeal from an interlocutory decree granting or refusing to grant an injunction does not raise any question as to damages or an accounting,[71] and on such appeal the circuit court of appeals will not consider matters which were not mentioned in the bill,[72] presented to, or argued before, the lower court,[73] or referred to in the de-

U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem].

54. Union Trust Co. v. White Motor Co., 22 F. (2d) 821 [aff 22 F. (2d) 816]; Richmond Screw Anchor Co. v. Bethlehem Steel Bridge Corp., 287 Fed. 94; Empire Rubber, etc., Co. v. De Laski, etc., Circular Woven Tire Co., 281 Fed. 1; Vandenburgh v. Truscon Steel Co., 277 Fed. 345 [certiorari granted 258 U. S. 615 mem, 42 SCt 314 mem, 66 L. ed. 792 mem, and aff 261 U. S. 6, 43 SCt 331, 67 L. ed. 507]; Diamond Patent Co. v. Webster, 249 Fed. 155, 161 CCA 207; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 CCA 26 [reh den 163 Fed. 34, 89 CCA 512, and certiorari den 214 U. S. 512 mem, 29 SCt 694 mem, 53 L. ed. 1062 mem].

[a] **Evidence insufficient in degree.**—"In patent litigation the mere fact that there is a serious conflict in the evidence as to prior public use, and that the District Court has made its findings in favor of defendants in conformity to evidence on that issue, does not present an instance where the appellate court must adopt the findings of the trial judge. An anticipation must be proven by evidence so cogent as to leave no reasonable doubt in the minds of the court, and, if the evidence in support of the issue fail to measure up to that standard, the law will not uphold a conclusion that prior use has been proven." Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651, 661 [remanded for further findings 17 F. (2d) 815, and certiorari den 278 U. S. 635 mem, 49 SCt 32 mem].

55. Autographic Register Co. v. Diesbach, 286 Fed. 470 [rev 285 Fed. 199].

56. Autographic Register Co. v. Diesbach, supra.

57. Autographic Register Co. v. Diesbach, supra.

58. Carson Inv. Co. v. Anaconda Copper Min. Co., 26 F. (2d) 651 [certiorari den 278 U. S. 635 mem, 49 SCt 32 mem].

59. See supra text and notes 51-54.

60. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 SCt 748, 52 L. ed. 1122 [aff 150 Fed. 741, 80 CCA 407].

61. Corona Cord Tire Co. v. Dovan Chemical Corp., 276 U. S. 358, 48 SCt 380, 72 L. ed. 610 [rev 16 F. (2d) 419 (rev 10 F. (2d) 598)].

62. Corona Cord Tire Co. v. Dovan Chemical Corp., supra.

63. See supra § 633.

64. Topliff v. Topliff, 145 U. S. 156, 12 SCt 825, 36 L. ed. 658; Clark v. Schieble Toy, etc., Co., 248 Fed. 276, 160 CCA 354; Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91, 59 CCA 221. See Collins v. Hupp Motor Car Corp., 22 F. (2d) 27 [aff 4 F. (2d) 272] (concurrent action of master and district court in refusing to increase damages because of failure to prove willful infringement will not be lightly set aside).

65. See cases infra this note.

[a] **Decree will not be reversed** (1) because the proof shows that the infringing machine was sold by a concern doing business under a different name and style from that of the partnership of defendants as alleged in the bill, where it also fairly shows that the defendants were the proprietors of such concern, and the fact that they made the sale was not contested in the trial court. United Shirt, etc., Co. v. Beattie, 149 Fed. 736, 79 CCA 442 [aff 149 Fed. 736, and certiorari den 205 U. S. 547, 27 SCt 795, 51 L. ed. 924]. (2) Where the decree is affirmed on the merits, it will not be reversed on the question of costs. Superior Hay Stacker Mfg. Co. v. Dain Mfg. Co., 208 Fed. 549, 125 CCA 551.

[b] **Bill not dismissed.**—(1) Where the evidence showed that the device first manufactured by defendant did not infringe, but that the form later adopted by it did infringe, the bill will not be dismissed on appeal, because the last-mentioned form was not formally put in evidence. Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502. (2) The entire cause will not be dismissed on appeal because, after appeal, the original patent was surrendered and a reissue patent granted. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem].

[c] **Without prejudice.**—The supreme court on reversing a decree of the court of appeals with directions to affirm the decree of the lower court dismissing the bill against an officer of the United States may direct that the affirmance be without prejudice to proceed in the court of claims for compensation under the act of June 25, 1910. Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 32 SCt 488, 56 L. ed. 771 [rev 32 App. (D. C.) 1, 15 AnnCas 1108].

[d] **Cause remanded** on: (1) Modification. Carlton Mach. Tool Co. v. Niles-Bement-Pond Co., 28 F. (2d) 931 (for entry of new decree in accordance with opinion). (2) Reversal. Marconi Wireless Tel. Co. v. Simon, 246 U. S. 46, 38 SCt 275, 62 L. ed. 568 [rev 231 Fed. 1021, 145 CCA 656 (aff 227 Fed. 906)] (where both the district court and the circuit court of appeals failed to make findings on material matters); Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 35 SCt 221, 59 L. ed. 398 [rev 183 Fed. 314, 105 CCA 526]; Southern Textile Mach. Co. v. Fay Stocking Co., 259 Fed. 243, 170 CCA 311; American Caramel Co. v. White, 234 Fed. 328, 148 CCA 230 (to give plaintiff an opportunity to supply evidence of infringement after notice where plaintiff, in not introducing such proof on the trial, may have rested on the belief that certain stipulations, although silent as to dates, were intended fully to supply the proof required).

Dismissal of appeal see supra § 648.

66. National Malleable Castings Co. v. T. H. Symington Co., 234 Fed. 343, 148 CCA 245 [den reh 230 Fed. 821, 145 CCA 131 (aff 250 U. S. 383, 39 SCt 542, 63 L. ed. 1045)].

67. American Sales Book Co. v. Bullivant, 117 Fed. 255, 54 CCA 287 [certiorari den 190 U. S. 560 mem, 23 SCt 855 mem, 47 L. ed. 184 mem]; Singer Mfg. Co. v. Brill, 54 Fed. 380, 4 CCA 374.

[a] **Trial without jury.**—Where the trial, although begun before a jury, was continued and concluded before the court alone, the findings and conclusions of the court take the place of the jury's verdict, and are to be accorded the same measure of conclusiveness as to all facts in controversy that a verdict would have. Prepayment Car Sales Co. v. Orange County Tract. Co., 214 Fed. 576, 131 CCA 156.

68. Heide v. Panoulias, 188 Fed. 914, 110 CCA 656 [certiorari den 223 U. S. 722, 32 SCt 524, 56 L. ed. 630].

69. Burroughs Adding Mach. Co. v. Rockford Milling Mach. Co., 292 Fed. 550.

70. Prepayment Car Sales Co. v. Orange County Tract. Co., 214 Fed. 576, 131 CCA 156 [aff 214 Fed. 402].

71. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]; Lederer v. Garage Equipment Mfg. Co., 235 Fed. 527, 149 CCA 73; Metallic Extraction Co. v. Brown, 104 Fed. 345, 43 CCA 568.

72. New Jersey Patent Co. v. Schaefer, 178 Fed. 276, 101 CCA 540 [aff 159 Fed. 171].

73. New Jersey Patent Co. v. Schaefer, supra.

cree.[74] In disposing of the cause, or such part of it as is before the appellate court, due regard may and should be given to the scope of the appeal and the status of the proceedings.[75]

Preliminary injunction. On an appeal from an interlocutory order granting or refusing to grant or dissolve a preliminary injunction against infringement of a patent, the appellate court will ordinarily review only the propriety of the action of the lower court in granting or refusing the injunction,[76] and will reverse the order only for an abuse of discretion.[77] While the reviewing court may direct the dismissal of the bill where it is so clearly devoid of equity, on account of invalidity or noninfringement of the patent, that no amendment thereof or additional evidence could effect a different result on final hearing,[78] it will not take such action upon a meager record where it might result in injustice.[79] The appellate court should examine the interlocutory decision in the light of the matters presented to the lower court,[80] in so far as they are incorporated in the record.[81] Where an injunction was granted upon the strength of a prior adjudication, and there is no controlling reason for disregarding such adjudication,[82] it will be accorded the same weight by the appellate court as it was entitled to in the lower court;[83] but where the adjudication is that of a court of another circuit, the appellate court is not bound thereby,[84] and it is at liberty to dispose of the questions of law according to its own convictions.[85] The prior adjudication is not, of course, the subject of the appeal[86] and is not to be reviewed as on a direct appeal therefrom.[87] On certiorari to a circuit court of appeals to review an affirmance of an order granting a preliminary injunction, the supreme court will not ordinarily pass upon questions of fact which were not passed upon

74. Davis-Bournonville Co. v. Alexander Milburn Co., 1 F. (2d) 227 [certiorari granted 266 U. S. 596, 45 SCt 93, 69 L. ed. 459] (denial of motion to be relieved from stipulation as to plaintiff's title).

75. See cases infra this note.

[a] **Appeal from pro forma order.**—(1) Where an interlocutory order granting an injunction was made pro forma to the end that an appeal might be prosecuted, the circuit court of appeals is not required to consider the order as one properly before it on the merits (Ex p. Harley-Davidson Motor Co., 259 U. S. 414, 42 SCt 527, 66 L. ed. 996), (2) and it may reverse and remand the cause for further proceedings in accordance with law (Ex p. Harley-Davidson Motor Co., supra), (3) but it should not dismiss the appeal (see supra § 648).

[b] **Instructions to lower court on affirmance.**—On affirmance of an interlocutory decree granting an injunction as to some of the claims of the patent, the circuit court of appeals will not instruct the lower court as to the necessity of the filing of a disclaimer by plaintiff as to other claims which have been held invalid by the lower court. Page Mach. Co. v. Dow, 168 Fed. 703, 94 CCA 209.

Directing dismissal of bill see infra text and notes 78, 79.

76. Duplex Printing Press Co. v. Hoe, 15 F. (2d) 362; Wonder Mfg. Co. v. Block, 249 Fed. 748, 161 CCA 658; Kings County Raisin, etc., Co. v. U. S. Consolidated Seeded Raisin Co., 182 Fed. 59, 104 CCA 499; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 157 Fed. 677, 85 CCA 349 [aff 162 Fed. 892, 89 CCA 582 (aff 220 U. S. 428, 31 SCt 444, 55 L. ed. 527)]; Adam v. Folger, 120 Fed. 260, 56 CCA 540; Kilmer Mfg. Co. v. Griswold, 67 Fed. 1017, 15 CCA 161 [aff 74 Fed. 561, 20 CCA 658]; Jensen v. Norton, 64 Fed. 662, 12 CCA 608; Hart v. Buckner, 54 Fed. 925, 5 CCA 1; Blount v. Société Anonyme, etc., 53 Fed. 98, 3 CCA 455; Columbus Watch Co. v. Robbins, 52 Fed. 337, 3 CCA 103 [app dism 148 U. S. 266, 13 SCt 594, 37 L. ed. 445].

[a] **Opinion upon other questions of fact,** or mixed questions of law and fact, will be reserved until after they have been decided by the trial court at a final hearing in the light of the testimony of witnesses who have been produced, heard, and cross-examined. American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 120 CCA 644; Fireball Gas Tank, etc., Co. v. Commercial Acetylene Co., 198 Fed. 650, 117 CCA 354 [aff 239 U. S. 156, 36 SCt 86, 60 L. ed. 191].

[b] **Particular matters** not considered or reviewed by the appellate court include: (1) The extent of infringement. Wonder Mfg. Co. v. Block, 249 Fed. 748, 161 CCA 658 (where infringement by defendant not disputed). (2) Propriety or impropriety of dismissal of counterclaim. Belknap v. Wallace Addressing Mach. Co., 12 F. (2d) 597 [aff 10 F. (2d) 602, and certiorari den 271 U. S. 678 mem, 46 SCt 630 mem, 70 L. ed. 1147 mem].

77. American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 120 CCA 644; Fireball Gas Tank, etc., Co. v. Commercial Acetylene Co., 198 Fed. 650, 117 CCA 354 [aff 239 U. S. 156, 36 SCt 86, 60 L. ed. 191]; Interurban R., etc., Co. v. Westinghouse Electric, etc., Co., 186 Fed. 166, 108 CCA 298; F. C. Austin Mfg. Co. v. American Wellworks, 121 Fed. 76, 57 CCA 330; American Fur Refining Co. v. Cimiotti Unhairing Co., 118 Fed. 838, 55 CCA 513; Loew Filter Co. v. German-American Filter Co., 107 Fed. 949, 47 CCA 94; Pacific Steam Whaling Co. v. Alaska Packers' Assoc., 100 Fed. 462, 40 CCA 494; Société Anonyme, etc. v. Allen, 90 Fed. 815, 33 CCA 282.

[a] **Appellate court is reluctant** (1) to disturb an order of the lower court relative to a temporary injunction in a suit for infringement of a patent (Ottawa, etc., Power, etc., Co., Ltd. v. Murphy, 15 Que. K. B. 230), (2) especially where, in case an injunction was granted, plaintiff has furnished ample security to indemnify defendant against any loss resulting from erroneous issuance of the injunction (Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 52 CCA 559), (3) or where, in case an injunction was refused, the patent is new and unadjudicated (National Cash Register Co. v. Remington Arms Co., 286 Fed. 367 [aff 283 Fed. 196]).

[b] **Presumption.**—The circuit court of appeals will presume, in the absence of evidence to the contrary, that the trial court has observed the rules pertinent to the hearing of a motion for a preliminary injunction to restrain infringement of patent. Rousso v. Detroit First Nat. Bank, 287 Fed. 273 [certiorari den 262 U. S. 754 mem, 43 SCt 702 mem, 67 L. ed. 1216 mem].

[c] **Alternative order for injunction or bond not disturbed.**—United Blue Flame Oil Stove Co. v. Silver, 128 Fed. 925, 63 CCA 110. See Rousso v. Detroit First Nat. Bank, 287 Fed. 273 [certiorari den 262 U. S. 754 mem, 43 SCt 702 mem, 67 L. ed. 1216 mem] (a requirement that defendant give bond to secure plaintiff does not indicate that the lower court regarded infringement by defendants as clear, so as to require the issuance of a preliminary injunction, where no opinion was filed and the record contains a recital from which it may be inferred that defendants voluntarily offered to give the bond).

[d] **Order reversed.**—Republic Electric Co. v. General Electric Co., 27 F. (2d) 595 (as to part of defendants); Schey v. Turi, 294 Fed. 679.

78. Mast v. Stover Mfg. Co., 177 U. S. 485, 20 SCt 708, 44 L. ed. 856; Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co., 1 F. (2d) 673 [rev 295 Fed. 748] (where the case was as fully presented on the motion for the injunction as it could be on final hearing); Victor Talking Mach. Co. v. Starr Piano Co., 263 Fed. 82 [certiorari den 260 U. S. 726 mem, 43 SCt 89 mem, 67 L. ed. 483 mem]; Co-operating Merchant's Co. v. Hallock, 128 Fed. 596, 64 CCA 104.

79. National Electric Signaling Co. v. Telefunken Wireless Tel. Co., 200 Fed. 591, 119 CCA 71 [rev 193 Fed. 424].

80. American Paper Pail, etc., Co. v. National Folding Box, etc., Co., 51 Fed. 229, 2 CCA 165.

81. See Ferry-Hallock Co. v. Herman, 178 Fed. 550, 101 CCA 230 [rev 171 Fed. 437] (where the lower court followed a prior decision sustaining the patent and "the present record contains only the bill and affidavits used on the motion for the preliminary injunction, it is manifest that the validity of the patent is not now in issue and that the question of infringement is alone presented").

82. Consolidated Fastener Co. v. Littauer, 84 Fed. 164, 28 CCA 133; American Paper Pail, etc., Co. v. National Folding Box, etc., Co., 51 Fed. 229, 2 CCA 165.

83. Consolidated Fastener Co. v. Hays, 100 Fed. 984 [aff 101 Fed. 1005 mem, 41 CCA 677 mem]; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 CCA 107; Bresnahan v. Tripp Giant Leveller Co., 72 Fed. 920, 19 CCA 237 [aff 99 Fed. 280, 39 CCA 508]; Duplex Printing-Press Co. v. Campbell Printing-Press, etc., Mfg. Co., 69 Fed. 250, 16 CCA 220 [aff 101 Fed. 282, 41 CCA 351 (certiorari den 183 U. S. 696, 22 SCt 933, 46 L. ed. 394)]; American Paper Pail, etc., Co. v. National Folding Box, etc., Co., 51 Fed. 229, 2 CCA 165. See Republic Electric Co. v. General Electric Co., 27 F. (2d) 595 (the appellate court will not attempt to determine the precise scope of the patent where it has repeatedly been held valid).

Prior adjudication of validity of patent as proper basis for preliminary injunction see supra § 601.

84. Stover Mfg. Co. v. Mast, 89 Fed. 333, 32 CCA 231; Thomson-Houston Electric Co. v. Hoosick R. Co., 82 Fed. 461, 27 CCA 419.

85. Curtis v. Overman Wheel Co., 58 Fed. 784, 7 CCA 493; American Paper Pail, etc., Co. v. National Folding Box, etc., Co., 51 Fed. 229, 2 CCA 165.

86. American Paper Pail, etc., Co. v. National Folding Box, etc., Co., supra.

87. Consolidated Fastener Co. v.

by the lower court.[88]

Permanent injunction. On appeal from an interlocutory decree which was rendered after a full hearing and which adjudged the patent valid and infringed, granted a permanent injunction and ordered an accounting of profits and damages, the circuit court of appeals may review the case on the merits,[89] at least where appellee does not object;[90] and where it is of the opinion that the bill has no equity to support it, it may render or direct a final decree dismissing the bill;[91] but it cannot render a final decree for plaintiff.[92] On appeal from an order denying a motion to suspend a permanent injunction against infringement, as applied to a new device, the appellate court may determine whether the new device infringes.[93]

Supplementary injunction. An order denying a motion for a supplementary injunction is reviewable only for an abuse of discretion,[94] and it will be affirmed where plaintiff, by his attitude, prevented the trial court from considering the merits of the motion.[95]

[§ 652] **c. Proceedings after Decision on Appeal.** Where a disclaimer is filed after affirmance of a decree dismissing the bill, the appellate court may, before issuance of the mandate, authorize the enforcement of any equities arising under the disclaimer,[96] but it will not reopen the case or grant a rehearing where, notwithstanding the disclaimer, noninfringement furnishes ample support for dismissal of the bill,[97] and, generally speaking, the appellate court will not, after affirmance of the decree of the lower court, grant a rehearing where proper grounds therefor are not shown.[98] After the cause has been decided on appeal and remanded, the subsequent action of the lower court is controlled by the mandate,[99] or at least the lower court should not violate the mandate,[1] but it may take steps not inconsistent therewith.[2] While, after remand, the lower court cannot grant a rehearing without leave or permission of the appellate court,[3] the appellate court may, in its discretion,[4] grant[5] or deny[6] leave to apply to the lower court for a rehearing, and where leave has been so granted, the lower court may, in its discretion,[7] grant[8] or deny[9] the application.

On subsequent appeal in the same case, the appellate court will consider and review only matters properly within the scope of that appeal,[10] and it will not disturb a ruling made on the prior appeal.[11]

[§ 653] **14. Costs[12]—a. In Actions at Law.** In an action at law for infringement of a patent, plaintiff is entitled to costs where a verdict has been rendered in his favor[13] for any amount,[14] even though the court does not exercise its statutory authority to increase the damages awarded by the jury.[15] In an action falling within the statute relating to disclaimers, plaintiff is not entitled to costs unless he

Hays, 100 Fed. 984, 41 CCA 142.

88. Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 301, 29 SCt 495, 53 L. ed. 805 [aff 148 Fed. 1022, 79 CCA 536].

89. Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 116 CCA 322; Smith v. Vulcan Iron Works, 165 U. S. 518, 17 SCt 407, 41 L. ed. 810; Consolidated Piedmont Cable Co. v. Pacific Cable R. Co., 58 Fed. 226, 7 CCA 195.

90. Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., 50 Fed. 785, 1 CCA 668.

91. Smith v. Vulcan Iron Works, 165 U. S. 518, 17 SCt 407, 41 L. ed. 810; Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 116 CCA 322; Richmond v. Atwood, 52 Fed. 10, 2 CCA 596, 17 LRA 615.

92. Ex p. National Enameling, etc., Co., 201 U. S. 156, 26 SCt 404, 50 L. ed. 707.

93. Wisconsin-Minnesota Gas, etc., Appliance Co. v. Hirschy Co., 28 F. (2d) 838 [aff 18 F. (2d) 347].

94. Minerals Separation, Ltd. v. Miami Copper Co., 269 Fed. 265 [aff 268 Fed. 862].

95. Willard v. Union Tool Co., 8 F. (2d) 264.

96. U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 202 Fed. 915, 121 CCA 273 [aff 191 Fed. 846].

97. U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., supra.

98. Barber v. Otis Motor Sales Co., 240 Fed. 723, 153 CCA 521 [aff 231 Fed. 755]; Dey Time Register Co. v. W. H. Bundy Recording Co., 178 Fed. 812, 102 CCA 260 [aff 169 Fed. 807].

99. Sundh Electric Co. v. Cutler-Hammer Mfg. Co., 244 Fed. 163, 156 CCA 591 [rev 235 Fed. 708, and certiorari den 245 Fed. 661 mem, 38 SCt 61 mem, 62 L. ed. 536 mem].

1. Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 21 F. (2d) 692 [den reh 285 Fed. 73].

2. See cases infra this note.

[a] **For example** (1) a general affirmance of an interlocutory decree sustaining a patent, finding infringement, and awarding an injunction, leaves so much of the decree as relates to the accounting interlocutory, and subject to modification by the district court until final decree. Racine Engine, etc., Co. v. Confectioners' Mach., etc., Co., 234 Fed. 876, 148 CCA 474. (2) Where the circuit court of appeals found the patent infringed and directed entry of an interlocutory decree, the trial judge, before whom the case thereafter came after an accounting before a master, may allow the parties to amend their pleadings in any substantial manner not affecting the fact of infringement, especially for the purpose of conforming to the proofs. Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem]. (3) The court has discretion to grant or refuse an injunction pendente lite even after a decision on appeal holding that the patent is valid and infringed, and remanding the cause "for further proceedings not inconsistent with its opinion." In re Chicago Sugar-Refining Co., 87 Fed. 750, 31 CCA 221.

3. In re Potts, 166 U. S. 263, 17 SCt 520, 41 L. ed. 994; American Soda Fountain Co. v. Sample, 136 Fed. 857, 70 CCA 415 [rev 134 Fed. 402, and certiorari den 198 U. S. 587 mem, 25 SCt 804 mem, 49 L. ed. 1175 mem].

Rehearing generally see supra § 647.

4. Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 43 SCt 458, 67 L. ed. 719 [aff 281 Fed. 488].

5. D. W. Bosley Co. v. Wirfs, 20 F. (2d) 629; Sundh Electric Co. v. Cutler-Hammer Mfg. Co., 244 Fed. 163, 156 CCA 591 [rev 235 Fed. 708, and certiorari den 245 U. S. 661 mem, 38 SCt 61 mem, 62 L. ed. 536 mem]; Cincinnati Tract. Co. v. Pope, 212 Fed. 719, 129 CCA 329 [remanding for further testimony 210 Fed. 443, 127 CCA 175].

[a] **Leave granted upon condition** that party applying therefor pay to the adverse party a fixed sum estimated as the additional expense to which the adverse party will be subjected by reason of another hearing. Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 CCA 326.

[b] **Lower court may request leave.**—Barber v. Otis Motor Sales Co., 245 Fed. 945.

6. Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 43 SCt 458, 67 L. ed. 719 [aff 281 Fed. 488]; Moneyweight Scale Co. v. Toledo Computing Scale Co., 199 Fed. 905, 118 CCA 235.

7. National Fireworks Distributing Co. v. Edwards Mfg. Co., 2 F. (2d) 815.

8. Johns Simmons Co. v. Grier Bros. Co., 258 U. S. 82, 42 SCt 196, 66 L. ed. 475 [rev 265 Fed. 481]; National Fireworks Distributing Co. v. Edwards Mfg. Co., 2 F. (2d) 815.

[a] **Leave granted upon certain condition,** and other conditions refused. Barber v. Otis Motor Sales Co., 247 Fed. 553.

9. Ingle v. Landis Tool Co., 277 Fed. 247 [mod on other grounds 286 Fed. 5].

10. See cases infra this note.

[a] **An appeal from accounting** the circuit court of appeals will not consider an alleged anticipation. Peter Schoenhofen Brewing Co. v. Alvey Ferguson Co., 14 F. (2d) 945.

[b] **Decree not appealed from** is conclusive on a second appeal. Austin-Western Road Mach. Co. v. Disc Grader, etc., Co., 291 Fed. 301 [certiorari den 263 U. S. 717 mem, 44 SCt 180 mem, 68 L. ed. 522 mem]; Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 [certiorari den 257 U. S. 657 mem, 42 SCt 184 mem, 66 L. ed. 420 mem].

11. Monroe Body Co. v. Herzog, 13 F. (2d) 705 [mod on other grounds 18 F. (2d) 578]; Austin-Western Road Mach. Co. v. Disc Grader, etc., Co., 291 Fed. 301 [certiorari den 263 U. S. 717 mem, 44 SCt 180 mem, 68 L. ed. 522 mem]; Cimiotti Unhairing Co. v. Nearseal Unhairing Co., 123 Fed. 479, 59 CCA 58.

[a] **During course of accounting** the appellate court will not construe its former decree to ascertain whether a new device is within or without its scope. Klein v. Ellett, 285 Fed. 31.

12. **Costs generally** see Costs 15 C. J. p 1.

13. Merchant v. Lewis, 17 F. Cas. No. 9,437, 1 Bond 172.

[a] **Pertinent statute** is U. S. Rev. St. § 4919.

14. Merchant v. Lewis, 17 F. Cas. No. 9,437, 1 Bond 172 [dist Kneass v. Schuylkill Bank, 14 F. Cas. No. 7,876, Fish. Pat. R. 1, 4 Wash. C. C. 106].

15. Merchant v. Lewis, 17 F. Cas. No. 9,437, 1 Bond 172.

Increased damages generally see supra § 633.

filed a disclaimer prior to the commencement of the action;[16] but the fact that he filed a disclaimer since the verdict does not necessarily disentitle him to costs,[17] as the verdict may be upon, and in affirmance of the validity of, all the claims of the patent[18] or a disclaimer may be unnecessary.[19] Where one or more statutory defenses are alleged by, and found for, defendant, he is entitled to costs.[20] The expense of obtaining copies of patents from the patent office is not taxable as costs.[21]

[§ 654] **b. In Suits in Equity[22]—(1) In General.** In a suit in equity for infringement of a patent, costs are largely in the discretion of the trial court,[23] and, in the exercise of this discretion, they may be equitably divided or apportioned between the parties,[24] but only in rare and exceptional cases will the court apportion liability for costs among several defendants in accordance with the respective participation of each in the infringement.[25] Ordinarily costs will be awarded to the successful party,[26] unless there are special circumstances which render this unjust.[27] Where an execution for costs is returned unsatisfied, a receiver will not be appointed to take possession of the patent.[28]

Security for costs need not be given by plaintiff.[29] **Treble costs** may be allowed in Canada.[30]

[§ 655] **(2) Partial or Divided Success.** Where a party, in an equitable suit for infringement of a patent, is successful only in part, the court, in its discretion,[31] may award costs to him,[32] award no costs,[33] or divide the costs.[34]

As to actions. Where two cases between the same parties are heard upon the same testimony, and plaintiff obtains a decree in one case and defendant in another, the court may allow costs in each case to the recovering party for all but the evidence[35] and disallow costs for that in both cases.[36]

As to patents. Where plaintiff, suing for the infringement of two or more patents, succeeds as to some and is defeated as to others, the costs are in the discretion of the court[37] and are to be awarded according to the circumstances of the case.[38] The court may award plaintiff full costs,[39] award costs to neither party[40] or apportion the costs[41] according to the number of patents as to which each party is successful.[42]

As to claims. Where plaintiff is successful as to some, and unsuccessful as to other, claims sued upon

16. U. S. Rev. St. §§ 973, 4922.
17. Peek v. Frame, 19 F. Cas. No. 10,904, 5 Fish. Pat. Cas. 211.
18. Peek v. Frame, supra.
19. Peek v. Frame, supra.
20. U. S. Rev. St. § 4920.
21. Woodruff v. Barney, 30 F. Cas. No. 17,986, 1 Bond 528, 2 Fish. Pat. Cas. 244.

Like rule in equity see infra § 656.

22. **Costs:**
Liability of attorney for see Attorney and Client § 111.
Of proceedings in contempt for violation of injunction see supra § 611.
Payment of, as condition of voluntary dismissal see supra § 640.

23. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179; Parker v. Stebler, 241 Fed. 589, 154 CCA 365.

[a] **Time of exercise.**—The discretion of the court may be properly exercised on the interlocutory hearing by giving to the prevailing party the incidental costs which have arisen during the progress of the cause about a matter completely disposed of by the court, and not necessary to be considered on further hearing. Avery v. Wilson, 20 Fed. 856.

[b] **Discretion held abused.**—Pomona Fruit Growers' Exch. v. Stebler, 241 Fed. 123, 154 CCA 123.

24. Dobson v. Bigelow Carpet Co., 114 U. S. 439, 5 SCt 945, 29 L. ed. 177 [rev 10 Fed. 385]; Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem]; Van Kannel Revolving Door Co. v. Uhrich, 297 Fed. 363 [certiorari den 266 U. S. 604 mem, 45 SCt 91 mem, 69 L. ed. 463 mem]; Emerson, etc., Co. v. Simpson Bros. Corp., 214 Fed. 572, 131 CCA 121 [certiorari den 235 U. S. 707 mem, 35 SCt 283 mem, 59 L. ed. 435 mem]; Crier v. Innes, 170 Fed. 324, 95 CCA 508; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 53 CCA 341; Brill v. Delaware County, etc., R. Co., 109 Fed. 901; Tesla Electric Co. v. Scott, 101 Fed. 524; Fisk v. West Bradley, etc., Mfg. Co., 9 F. Cas. No. 4,830a; Garretson v. Clark, 10 F. Cas. No. 5,250, 4 Bann. & A. 536, 10 F. Cas. No. 5,248, 3 Bann. & A. 352, 15 Blatchf. 70 [aff 111 U. S. 120, 4 SCt 291, 28 L. ed. 371]; Troy Iron, etc., Factory Co. v. Corning, 24 F. Cas. No. 14,198, 10 Blatchf. 223, 6 Fish. Pat. Cas. 85.

Division or apportionment where plaintiff successful in part see infra § 655.

25. Vrooman v. Penhollow, 186 Fed. 495, 108 CCA 502, 179 Fed. 296, 102 CCA 484.

26. Urner v. Kayton, 17 Fed. 845, 21 Blatchf. 435.

[a] **Action against crown.**—Costs may be allowed to the successful party in an action against the crown where, by agreement or waiver, it has expressed its willingness to be treated as an ordinary litigant. In re Carbonit Aktiengesellschaft, [1924] 2 Ch. 53 [dism app [1923] 2 Ch. 504].

27. Grand Rapids Showcase Co. v. Straus, 229 Fed. 199; Green v. Lynn, 81 Fed. 387 [app dism 93 Fed. 988 mem, 34 CCA 684 mem]; Lowell Mfg. Co. v. Whittall, 71 Fed. 515; Consolidated Brake-Shoe Co. v. Chicago, etc., R. Co., 69 Fed. 412; Marks Adjustable Folding Chair Co. v. Wilson, 43 Fed. 302; Hayes v. Bickelhoupt, 23 Fed. 183; Tyler v. Galloway, 13 Fed. 477, 21 Blatchf. 66; American Wood-Paper Co. v. Heft, 1 F. Cas. No. 322, 3 Fish. Pat. Cas. 316; Hussey v. Bradley, 12 F. Cas. No. 6,946, 5 Blatchf. 134, 2 Fish. Pat. Cas. 362; Prime v. Brandon Mfg. Co., 19 F. Cas. No. 11,421, 4 Bann. & A. 379, 16 Blatchf. 453; Smith v. Woodruff, 22 F. Cas. No. 13,128a, 6 Fish. Pat. Cas. 476.

[a] **For example** (1) where the penalty of two hundred and fifty dollars allowed by statute for the infringement of a design patent is the only recovery plaintiff can have, and defendant before suit makes a direct offer to pay that sum, and it is not shown that the infringement was willful, plaintiff will not be allowed costs. Lowell Mfg. Co. v. Whittall, 71 Fed. 515. (2) Defendant, although successful, may be deprived of costs or costs may be awarded against him where he did not comply reasonably or in good faith with an order for a bill of particulars stating which prior patents, of many alleged by him, he intended to rely on as anticipations. Grand Rapids Showcase Co. v. Straus, 229 Fed. 199.

28. Thayer v. Hart, 24 Fed. 558, 23 Blatchf. 303.

29. Woodworth v. Sherman, 30 F. Cas. No. 18,019, 2 Robb Pat. Cas. 257, 3 Story 171.

30. Huntingdon v. Lutz, 10 CanLJ 46; Hunter v. Carrick, 28 Grant Ch. (Ont.) 489.

31. Canadian Steam Boiler Equipment Co. v. MacGilchrist, 16 OntWN 37.

32. See case infra this note.

[a] **Rule applied.**—Where the right of plaintiff to an injunction at the time of the filing of the bill is sustained and such relief is denied only because of the expiration of the patent, pendente lite, complainant is entitled to costs regardless of whether or not he proves infringement after notice so as to entitle him to recover profits and damages, or the bill is dismissed because of his failure to offer proof of this matter. American Caramel Co. v. White, 234 Fed. 328, 148 CCA 230.

33. Canadian Steam Boiler Equipment Co. v. MacGilchrist, 16 OntWN 37.

34. Perkins Electric Switch Mfg. Co. v. Yost Electric Mfg. Co., 189 Fed. 625.

[a] **Costs of appeal.**—(1) Where, on appeal, defendant did not escape an injunction or an accounting, although the decree was modified in his favor, the costs of appeal should be divided equally between the parties. Fox Typewriter Co. v. Corona Typewriter Co., 282 Fed. 502. (2) Where, on appeal, the decree for plaintiff is affirmed as to one defendant, and reversed as to another defendant because he was improperly made a party, the latter defendant will be allowed to recover of plaintiff only such costs paid by him as were due to his joining in the appeal; and costs which would have been necessary if the first defendant had been the sole appellant will be taxed against such defendant. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 [mod 249 Fed. 876, and certiorari den 253 U. S. 486 mem, 40 SCt 482 mem, 64 L. ed. 1025 mem].

35. Corser v. Brattleboro Overall Co., 93 Fed. 809.

36. Corser v. Brattleboro Overall Co., supra.

37. Draper Co. v. American Loom Co., 169 Fed. 298.

38. Draper Co. v. American Loom Co., supra.

39. Green v. Lynn, 81 Fed. 387 (where plaintiff recovered on two of the patents sued on, but failed to prove infringement of the third).

40. Trussell Mfg. Co. v. Vernon, 11 F. (2d) 289 (suit on two patents).

41. Pennsylvania Diamond-Drill Co. v. Simpson, 29 Fed. 288.

42. Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314; Tesla Electric Co. v. Scott, 101 Fed. 524 (in both of which cases two thirds of the costs were assessed against one party and one third against the other). See Roth v. Harris, 168 Fed. 279, 93 CCA 581 [aff 162 Fed. 160] (allowing defendant costs as to the patent concerning which he was successful).

on, it is ordinarily proper to apportion the costs,[43] or even to award plaintiff full costs;[44] and where there is a recovery upon some claims, it is proper not to dismiss the bill with costs as to other claims withdrawn before the entry of the decree.[45] However, where some of the claims sued on are void, costs for plaintiff are usually refused, although the decree is in his favor upon other claims.[46] Indeed, where the statute relating to disclaimers[47] is applicable, plaintiff cannot be allowed any costs unless a proper disclaimer was filed prior to the commencement of the suit;[48] but this rule applies only to the claims in issue in the suit,[49] and costs on appeal are not affected by a failure to file a disclaimer before institution of the suit.[50] Where only a part of the claims of the patent were in issue, but the decree, drawn by the attorney of the successful party, covers all the claims, the appellate court, on modifying the decree, may deny costs of appeal to both parties[51] or it may order each to pay one half of such costs.[52]

[§ 656] **(3) Particular Items.** The ordinary rules as to what constitute taxable costs[53] apply in an equitable suit for infringement of a patent.[54]

Expenses.[55] The expense of obtaining drawings[56] and photographs,[57] but not the expense of obtaining copies of patents,[58] may be taxed as costs. Also, the expense of printing the record is taxable as a part of the costs where the printing is required by a rule of court[59] or by an established practice having all the force of a rule of court.[60]

Allowance for travel by a witness may be properly taxed as costs;[61] but the rule is otherwise as to a travel allowance for a party attending the trial to assist in the defense without testifying.[62]

Issues raised by particulars of objections. Under statutes[63] and rules of court[64] in England, and the construction placed thereon, where the action proceeds to trial, no costs are allowed in respect of issues raised in the particulars of objections unless the particulars are certified by the court to have been proved or to have been reasonable and proper;[65] but a certificate is not necessary where the action is discontinued,[66] and in such case the costs of issues raised by particulars of objections are within the discretion of the taxing master.[67]

Solicitor and client costs. An English statute providing that, where it is certified in one action that the validity of the patent came in question, defendant in a subsequent successful action for infringement shall be liable for solicitor and client costs[68] has been given effect only in so far as applicable.[69]

Motion in open court for judgment. Although defendant has consented to an order for an injunction, plaintiff is entitled to the ordinary costs of a motion in open court for judgment,[70] and is not limited to the costs of an application in chambers.[71]

Accounting. While the costs of an accounting in

43. Closz, etc., Mfg. Co. v. J. I. Case Threshing Mach. Co., 216 Fed. 937; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 CCA 561; Brill v. Delaware County, etc., R. Co., 109 Fed. 901.

44. Michigan Carton Co. v. Sutherland Paper Co., 29 F. (2d) 179 (where little additional expense was caused by including in the bill the claims as to which plaintiff was defeated); Governform Corp. v. Terry, 4 F. (2d) 894 (costs of appeal).

45. Judelson v. Hill Laundry Equipment Co., 22 F. (2d) 262 [aff 18 F. (2d) 594].

46. Suddard v. American Motor Co., 163 Fed. 852; Metallic Extraction Co. v. Brown, 110 Fed. 665, 49 CCA 147; Thomson-Houston Electric Co. v. Elmira, etc., R. Co., 71 Fed. 886; Stewart v. Mahoney, 5 Fed. 302; Yale, etc., Mfg. Co. v. North, 30 F. Cas. No. 18,123, 5 Blatchf. 455, 3 Fish. Pat. Cas. 279.

47. U. S. Rev. St. §§ 973, 4922.

Disclaimers generally see supra §§ 329-334.

48. O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. ed. 601; Liquid Carbonic Co. v. Gilchrist Co., 253 Fed. 54, 165 CCA 652; General Electric Co. v. Crouse-Hinds Electric Co., 147 Fed. 718; Fairbanks v. Stickney, 123 Fed. 79, 59 CCA 209; Worden v. Searls, 21 Fed. 406; Munday v. Lidgerwood Mfg. Co., 20 Fed. 191; Proctor v. Brill, 16 Fed. 791; Sharp v. Tift, 2 Fed. 697, 18 Blatchf. 132; Aiken v. Dolan, 1 F. Cas. No. 110, 3 Fish. Pat. Cas. 197; Christman v. Rumsey, 5 F. Cas. No. 2,704, 4 Bann. & A. 506, 17 Blatchf. 148, 58 HowPr (N. Y.) 114; Myers v. Frame, 17 F. Cas. No. 9,991, 8 Blatchf. 446, 4 Fish. Pat. Cas. 493 [rev on other grounds 94 U. S. 187, 24 L. ed. 34]; Taylor v. Archer, 23 F. Cas. No. 13,778, 8 Blatchf. 315, 4 Fish. Pat. Cas. 449.

49. National Electric Signaling Co. v. De Forest Wireless Tel. Co., 140 Fed. 449; Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 77 Fed. 490, 23 CCA 250; American Bell Tel. Co. v. Spencer, 8 Fed. 509.

50. Bankers' Utilities Co. v. Pacific Nat. Bank, 22 F. (2d) 680, 18 F. (2d) 16. Contra Novelty Glass Mfg. Co. v. Brookfield, 172 Fed. 221, 97 CCA 25; Kahn v. Starrels, 136 Fed. 597, 69 CCA 371.

51. Shute v. Morley Sewing Mach. Co., 64 Fed. 368, 12 CCA 356.

52. Hatch Storage Battery Co. v. Electric Storage Battery Co., 100 Fed. 975.

53. See Costs §§ 226-405.

54. Parks v. Booth, 102 U. S. 96, 26 L. ed. 54.

55. Expenses of:
Obtaining copies of models see Costs § 274.
Plaintiff:
Award of increased damages to cover see supra § 633.
Payment of by defendant, as condition of reopening case see supra § 647.

56. Barber-Coleman Co. v. Withnell, 28 F. (2d) 543. Contra Wooster v. Handy, 23 Fed. 49, 23 Blatchf. 112.

57. Victor Talking Mach. Co. v. Starr Piano Co., 231 Fed. 60 [certiorari den 260 U. S. 726 mem, 43 SCt 89 mem, 67 L. ed. 483 mem].

58. Ryan v. Gould, 32 Fed. 754. Contra Wooster v. Handy, 23 Fed. 49, 23 Blatchf. 112.

59. Christensen v. General Electric Co., 248 Fed. 284.

60. Detroit Heating, etc., Co. v. Kemp, 182 Fed. 847.

61. Barber-Coleman Co. v. Withnell, 28 F. (2d) 543.

62. Barber-Coleman Co. v. Withnell, supra.

63. Patents, Designs, and Trade Marks Act (46-47 Vict. c 57) § 29 subs 6.

64. Order LIII A, rule 22.

65. Haskell Golf Ball Co. v. Hutchison, [1906] 1 Ch. 518; Wilcox v. Janes, [1897] 2 Ch. 71; Longbottom v. Shaw, 43 Ch. D. 46; Honiball v. Bloomer, 10 Exch. 538, 156 Reprint 552, Gillett v. Wilby, 9 C. & P. 334, 38 ECL 201, 173 Reprint 857; Needham v. Oxley, 8 L. T. Rep. N. S. 604.

[a] **Certificate may be given by appellate court.**—Cole v. Saqui, 40 Ch. D. 132; Germ Milling Co. v. Robinson, 55 L. T. Rep. N. S. 282.

[b] **Particulars necessary, but not proved.**—Where defendant fails to prove one of his objections to plaintiff's patent, but his particulars of that objection are necessary for the purpose of the trial, it is the practice to give him a certificate that the particulars were reasonable and proper, so that he may get the costs of them, although the objection itself has failed. Castner Kellner Alkali Co. v. Commercial Dev. Corporation, [1899] 1 Ch. 803.

[c] **Certificate refused.**—Acetylene Illum. Co. v. United Alkali Co., [1902] 1 Ch. 494; Wilcox v. Janes, [1897] 2 Ch. 71; Longbottom v. Shaw, 43 Ch. D. 46; United Tel. Co. v. Harrison, 21 Ch. D. 720; Bovill v. Hadley, 17 C. B. N. S. 435, 112 ECL 435, 144 Reprint 176; Stocker v. Rodgers, 1 C. & K. 99, 47 ECL 99; Cooper Patent Anchor Rail Joint Co., Ltd. v. British Electric Equipment Co., Ltd., 95 L. T. Rep. N. S. 177; American Steel, etc., Co. v. Glover & Co., Ltd., 50 Wkly. Rep. 284.

66. Curtis v. Platt, 16 C. B. N. S. 465, 111 ECL 465, 143 Reprint 1209; Greaves v. Eastern R. Co., 1 E. & E. 961, 102 ECL 961, 120 Reprint 1171.

67. British, etc., Automatic Light Controlling Co., Ltd. v. Metropolitan Gas Meters, Ltd., [1912] 2 Ch. 32; Bibby v. Strachan, 28 R. P. C. 305.

68. Patent Act (1883) § 31.

69. Badische Anilin und Soda Fabrik v. Levinstein, 29 Ch. D. 366.

[a] **Copending actions.**—An action commenced but not determined at the time a certificate in another action is obtained is not a "subsequent action for infringement" within the meaning of Patents, Designs, and Trade Marks Act (1883) § 31, and plaintiff cannot claim solicitor-and-client costs on the production of the certificate given in the first determined action. Saccharin Corp., Ltd. v. Anglo-Continental Chemical Works, [1901] 1 Ch. 414.

[b] **Certificate refused** where: (1) Terms of settlement were agreed upon. Quasi-Arc Co. v. Anderson, 36 R. P. C. 218. (2) Patent was held invalid. Acetylene Illum. Co. v. United Alkali Co., [1902] 1 Ch. 494 [expl Haslam Co. v. Hall, 5 R. P. C. 1, 23].

70. Smith & Jones, Ltd. v. Service, [1914] 2 Ch. 576.

71. Smith & Jones, Ltd. v. Service, supra.

a suit for infringement of a patent are taxable,[72] the allowance of such costs rests in the discretion of the court[73] and each case must be disposed of upon its own merits.[74] Each party should, in the first instance, pay the costs and expenses made by him as the proceeding goes forward[75] and leave the question of allowance to subsequent determination.[76] The costs of the reference and of the proceedings thereunder should be taxed against plaintiff where the decree against defendant is reversed and a final decree is rendered in his favor.[77] Also it is a general rule of practice to tax such costs against plaintiff where, although the final decree is in his favor, he is awarded only nominal damages or nominal profits and damages;[78] but in view of the circumstances of the particular case,[79] and in the exercise of its discretion,[80] the court may impose such costs upon defendant[81] or divide them equally between the parties.[82] Where the statement of account filed by defendant was false or insufficient, defendant may be ordered to pay the fees of accountants employed by the master or by plaintiff to examine defendant's books;[83] but this rule does not apply where defendant realized no profits[84] or where there were no irreconcilable differences between the statement of account filed by him and the statement prepared by the accountants employed by plaintiff;[85] and even where applicable, the rule should be applied with caution[86] and the charges allowed should be limited to those which are reasonable[87] and do not include compensation for services of the accountants as witnesses.[88] Individuals who own all the stock of, and control, a corporation defendant may be directed to pay the master's fee.[89]

Costs unnecessarily accumulated will not be allowed.[90]

[§ 657] **D. Threats of Suit.** Suit may be maintained by a manufacturer to enjoin the owner of a patent from making baseless threats of suit for infringement against the former's customers,[91] but an injunction will not be granted where there is a reasonable doubt as to the propriety of defendant's actions,[92] and where the owner of a patent, in good faith, makes truthful statements concerning his patent and warns and notifies persons against infringement, he does not thereby render himself liable either to an injunction[93] or for damages.[94]

72. Kansas City Hay Press Co. v. Devol, 127 Fed. 363 [app dism 137 Fed. 1019 mem, 70 CCA 679 mem]; Hill v. Smith, 32 Fed. 753; American Diamond Drill Co. v. Sullivan, 32 Fed. 552, 23 Blatchf. 144 [app dism 131 U. S. 428 mem, 9 SCt 794 mem, 33 L. ed. 217 mem]; Everest v. Buffalo Lubricating Oil Co., 31 Fed. 742 [app dism 131 U. S. 449 mem, 9 SCt 804 mem, 33 L. ed. 215 mem]; Kirby v. Armstrong, 5 Fed. 801, 10 Biss. 135.

[a] **Amount of compensation of master.**—(1) For the services of the master in an accounting in an equitable suit for infringement of a patent, twenty-five dollars per day may be considered a normal allowance, subject to increase or reduction where particular cause is shown. Houghton v. Whitin Mach. Works, 163 Fed. 311. (2) Compensation allowed master held reasonable. Dunkley Co. v. Central California Canneries, 7 F. (2d) 972 [certiorari den 270 U. S. 646 mem, 40 SCt 347 mem, 70 L. ed. 778 mem] (twelve thousand dollars; where the litigation involved a large sum of money, and the master was called upon to make several trips to view the operation of the various machines involved in the controversy, and he was required to study a voluminous record, investigate a number of questions of law, and make a discriminating analysis of many exhibits, and he performed his work with fidelity and care). (3) Compensation of masters generally see Equity § 752.

73. Individual Drinking Cup Co. v. Public Serv. Cup Co., 250 Fed. 620, 162 CCA 636 [mod 237 Fed. 400, 234 Fed. 653, 226 Fed. 465].

[a] **Discretion held not abused.**—Individual Drinking Cup Co. v. Public Serv. Cup Co., 250 Fed. 620, 162 CCA 636 [mod 237 Fed. 400, 234 Fed. 653, 226 Fed. 465].

74. Individual Drinking Cup Co. v. Public Serv. Cup Co., supra.

75. Panoulias v. National Equipment Co., 227 Fed. 1008; U. S. Printing Co. v. American Playing-Card Co., 81 Fed. 506. Compare Urner v. Kayton, 17 Fed. 539, 21 Blatchf. 428 (expenses should be borne by defendant in first instance); Macdonald v. Shepard, 10 Fed. 919 (master's compensation should be borne by plaintiff in the first instance).

76. Panoulias v. National Equipment Co., 227 Fed. 1008; U. S. Printing Co. v. American Playing-Card Co., 81 Fed. 506.

77. American Diamond Drill Co. v. Sullivan Mach. Co., 32 Fed. 552, 23 Blatchf. 144 [app dism 131 U. S. 428 mem, 9 SCt 794 mem, 33 L. ed. 217 mem].

78. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 183 Fed. 314, 105 CCA 526 [rev on other grounds 235 U. S. 641, 35 SCt 221, 59 L. ed. 398]; Kansas City Hay Press Co. v. Devol, 127 Fed. 363 [app dism 137 Fed. 1019 mem, 70 CCA 679 mem]; Hill v. Smith, 32 Fed. 753; Everest v. Buffalo Lubricating Oil Co., 31 Fed. 742 [app dism 131 U. S. 449 mem, 9 SCt 804 mem, 33 L. ed. 215 mem]; Kirby v. Armstrong, 5 Fed. 801, 10 Biss. 135. See Meurer Steel Barrel Co. v. Boyle Mfg. Co., 9 F. (2d) 92 (the costs of the reference and accounting will be upon plaintiff if, upon the accounting, he establishes only an accidental manufacture of a limited number of infringing articles).

79. Kansas City Hay Press Co. v. Devol, 127 Fed. 363; Calkins v. Bertrand, 8 Fed. 755, 10 Biss. 445.

80. Kansas City Hay Press Co. v. Devol, 127 Fed. 363 [app dism 137 Fed. 1019 mem, 70 CCA 679 mem].

81. Calkins v. Bertrand, 8 Fed. 755, 10 Biss. 445.

82. Kansas City Hay Press Co. v. Devol, 127 Fed. 363 [app dism 137 Fed. 1019 mem, 70 CCA 679 mem].

83. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447; Flat Slab Patents Co. v. Turner, 285 Fed. 257 [certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem].

Power of court or master to appoint accountant see supra § 638.

84. Merrell Soule Co. v. Powdered Milk Co., 7 F. (2d) 297 [rev 2 F. (2d) 107].

85. Fairbanks v. American Valve, etc., Co., 18 F. (2d) 716 [dist Flat Slab Patents Co. v. Turner, 285 Fed. 257 (certiorari den 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem, and Computing Scale Co. v. Toledo Computing Scale Co., 279 Fed. 648 on the ground of a difference in circumstances)].

86. Merrell Soule Co. v. Powdered Milk Co., 7 F. (2d) 297 [rev 2 F. (2d) 107]; Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., 6 F. (2d) 447.

87. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., supra.

88. Standard Scale, etc., Co. v. Cropp Concrete Mach. Co., supra.

89. Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp., 288 Fed. 80.

90. Brunswick-Balke-Collender Co. v. Klump, 131 Fed. 93; Ford v. Kurtz, 12 Fed. 789, 11 Biss. 324. And see National Cash Register Co. v. Gratigny, 213 Fed. 463, 130 CCA 109 (where a party extends the cross-examination of his adversary's witness beyond legitimate limits, the court may properly take such fact into account in apportioning the costs); Phœnix Knitting Works v. Rich, 194 Fed. 721 [app dism 202 Fed. 1022, 120 CCA 663] (defendant is entitled to have unnecessary expense in taking depositions, incurred through the action of plaintiff, taxed as costs against plaintiff). But see Elyria Iron, etc., Co. v. American Welding, etc., Co., 15 F. (2d) 106 [aff 15 F. (2d) 111] (defendant's unnecessary encumbering of the record with irrelevant testimony and prior art does not warrant denial of costs to him, in view of the number of patents and claims originally in issue and the late hour at which part of them were abandoned or withdrawn by plaintiff).

91. Atlas Underwear Co. v. Cooper Underwear Co., 210 Fed. 347; Electric Renovator Mfg. Co. v. Vacuum Cleaner Co., 189 Fed. 754, 1023; Murjahn v. Hall, 119 Fed. 186; Farquhar Co. v. National Co., 102 Fed. 714, 42 CCA 600, 49 LRA 755; Computing Scale Co. v. National Computing Scale Co., 79 Fed. 962; Emack v. Kane, 34 Fed. 46; Columbia Nat. Sand Dredging Co. v. Miller, 20 App. (D. C.) 245; Schwanbeck v. Backus, 148 Mich. 508, 111 NW 1046.

Restraining suits against customers pending suit against manufacturer see supra § 594.

92. Adriance v. National Harrow Co., 121 Fed. 827, 58 CCA 163; Davison v. National Harrow Co., 103 Fed. 360; Computing Scale Co. v. National Computing Scale Co., 79 Fed. 962; New York Filter Co. v. Schwarzwalder, 58 Fed. 577; Kelley v. Ypsilanti Dress-Stay Mfg. Co., 44 Fed. 19, 10 LRA 686; Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 545; Baltimore Car Wheel Co. v. Bemis, 29 Fed. 95; Chase v. Tuttle, 27 Fed. 110; Pentlarge v. Pentlarge, 19 F. Cas. No. 10,965a; Boston Diatiti Co. v. Florence Mfg. Co., 114 Mass. 69, 19 AmR 310; Hovey v. Rubber Tip Pencil Co., 33 N. Y. Super. 522 [aff 57 N. Y. 119, 15 AmR 470].

93. Mitchell v. International Tailoring Co., 169 Fed. 145; Bonnie-B Co., Inc. v. Giguet, 269 Fed. 272 [aff 269 Fed. 1021 mem]; West Disinfecting Co. v. U. S. Sanitary Specialties Corp., 221 Ill. A. 372.

94. Virtue v. Creamery Package Mfg. Co., 179 Fed. 115, 102 CCA 413

In England a statutory action to enjoin a continuance of threats of suit for infringement, and to recover damages from past threats, may be successfully maintained when, and only when, plaintiff brings the case within the terms of the statute granting the right of action.[95]

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*PATENT TO LAND.[1]

PATER EST QUEM NUPTIÆ DEMONSTRANT.[2]

PATER, ET MATER, ET PUER SUNT UNA CARO.[3]

PATERFAMILIAS OB ALTERIUS CULPAM TENETUR SIVE SERVI SIVE LIBERI.[4]

PATERNA PATERNIS.[5] A rule of the French law, signifying that such portions of a decedent's estate as came to him from his father must descend to his heirs on the father's side.[6]

PATERNIDAD. In Spanish law, paternity.[7]

PATERNITY. Fatherhood.[8]

PATH.[9] A trodden or beaten way; a footway; more generally, any way or road.[10]

Private path.[11] A neighborhood road running from one public road to another; from a public place to another public place;[12] a neighborhood road.[13]

Towpath. A path traveled by men or animals towing boats.[14]

PATHOLOGICAL CONDITION.[15] A diseased condition of the body.[16]

PATHOLOGY.[17] That part of medicine which explains the nature of diseases and their causes and symptoms.[18]

PATIBULO. In Spanish law, the place of executing the death penalty.[19]

PATIENT.[20] A person under medical or surgical treatment;[21] one who, being in a sick or diseased

[aff 227 U. S. 8, 33 SCt 202, 57 L. ed. 393].

95. Douglass v. Pintsch's Patent Lighting Co., [1897] 1 Ch. 176; Skinner v. Shew, [1894] 2 Ch. 581; Fenner v. Wilson, [1893] 2 Ch. 656; Skinner v. Shew, [1893] 1 Ch. 413; Johnson v. Edge, [1892] 2 Ch. 1; Kensington, etc., Electric Lighting Co. v. Lane Fox Electrical Co., [1891] 2 Ch. 573; Colley v. Hart, 44 Ch. D. 179; Barrett v. Day, 43 Ch. D. 435; Combined Weighing, etc., Co. v. Automatic Weighing Mach. Co., 42 Ch. D. 665; Challender v. Royle, 36 Ch. D. 425; Fusee Vesta Co. v. Bryant & May, Ltd., 34 Ch. D. 458; Driffield, etc., Pure Linseed Cake Co. v. Waterloo Mills Cake, etc., Co., 31 Ch. D. 638; Barney v. United Tel. Co., 28 Ch. D. 394; Société Anonyme Des Glaces v. Tilghmann's Patent Sand Blast Co., 25 Ch. D. 1; Halsey v. Brotherhood, 15 Ch. D. 514 [aff 19 Ch. D. 386]; Axmann v. Lund, L. R. 18 Eq. 330; Rollins v. Hinks, L. R. 13 Eq. 355; Ellis v. Pogson, 92 L. J. Ch. 221 [aff [1923] 2 Ch. 496]; Diamond Coal Cutting Co. v. Mining Appliances Co., 85 L. J. Ch. 232; Kurtz v. Spence, 57 L. J. Ch. 238; Craig v. Dowding, 98 L. T. Rep. N. S. 231; Dunlop Pneumatic Tyre Co., Ltd. v. New Seddon Pneumatic Tyre, etc., Co., Ltd., 76 L. T. Rep. N. S. 405; Incandescent Gas Light Co. v. New Incandescent Gas Light Co., 76 L. T. Rep. N. S. 47; Goulard v. Lindsay, 56 L. T. Rep. N. S. 506; Household v. Fairburn, 51 L. T. Rep. N. S. 498; Burnett v. Tak, 45 L. T. Rep. N. S. 743; Haskell Golf Ball Co. v. Hutchinson, 20 T. L. R. 606; Weldrics, Ltd. v. Quasi-Arc Co., Ltd., 39 R. P. C. 323; Horne v. Johnston, 38 R. P. C. 366.

1. See Mines and Minerals § 324; Public Lands [32 Cyc 1029, 1243].

2. A maxim meaning "The nuptials show who is the father." Anderson L. D.

[a] **Applied in:** Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375, 377; Woodward v. Blue, 107 N. C. 407, 408, 12 SE 453, 22 AmSR 897, 10 LRA 662; Padelford's Est., 7 Pa. Dist. 331, 332; Getz's Est., 43 Pa. Co. 626, 628.

3. A maxim meaning "The father, mother, and son are of one flesh." Morgan Leg. Max. [cit Branch Max.].

4. A maxim meaning "The father is responsible for the misconduct of his child or his slave." Morgan Leg. Max. [cit Tayler p 314].

5. See Materna Maternis 39 C. J. p 1389.

6. Black L. D. See In re Lamb, 139 NYS 685, 690. See also Descent and Distribution §§ 35–40.

7. Escriche Diccionario. See Manuela Infante v. Figueras, 4 Philippine 738, 744. See also Paternity post this page.

8. Webster New Int. D. See Bastards 7 C. J. p 935; Father 25 C. J. p 675; Parent and Child 46 C. J. p 1214.

9. See Private Roads [32 Cyc 363].

"Bicycle path" defined see 7 C. J. p 1153.

Bridle path see Highways § 1 text and note 18.

10. Webster New Int. D.

[a] **"Road" synonymous.**—"Path is constantly used in our old Acts as synonymous with road. . . . And until within a very few years, it was the custom of a large portion of the population of this State, to use the term, path, to the exclusion of road." Singleton v. Road Comrs., 11 S. C. L. 526, 527.

[b] **"Paths and roads for the use of,"** etc.—Central Pac. R. Co. v. Feldman, 152 Cal. 303, 307, 92 P 849.

Footway see Highways § 1 text and note 23.

"Highway" synonymous see Highways § 1 text and note 65.

Road see Highways § 1.

"Way" defined see [40 Cyc 846].

11. See Private Roads [32 Cyc 363]. And see Easements 19 C. J. p 856; Pent Roads this volume.

12. Kirby v. Southern R. Co., 63 S. C. 494, 502, 41 SE 765.

[a] **Under a statute** (1) empowering certain commissioners to make, alter and keep in repair "public" and "private" paths, the term "private paths" is held to mean "roads free and common to all who might choose to make use of them; that is to say, public ways diverging from and running across the main or principal roads or highways, commonly called 'great roads,' and not private paths exclusively appropriated for private purposes. It would be preposterous to suppose the legislature intended to vest important powers in public commissioners, to open, improve, and keep in repair, private passages or easements for the particular and exclusive benefit of one or a few individuals." Nash v. Peden, 28 S. C. L. 17, 21; State v. Mobley, 26 S. C. L. 44, 48; Withers v. Claremont County Road Comrs., 5 S. C. L. 83, 86. (2) The term, as used in a statute authorizing the commissioners of roads to lay out, make, and keep in repair, all such high roads, private paths, bridges, etc., as have been or shall be established by law, or as they shall judge necessary in their several parishes and districts, is synonymous with "private road." Singleton v. Road Comrs., 11 S. C. L. 526, 527.

[b] **Distinguished from "private way."**—Earle v. Poat, 63 S. C. 439, 453, 41 SE 525; State v. Floyd, 39 S. C. 23, 25, 17 SE 505.

13. Earle v. Poat, 63 S. C. 439, 453, 41 SE 525; State v. Floyd, 39 S. C. 23, 25, 17 SE 505.

14. Webster D. [quot St. Louis v. St. Louis Blast Furnace Co., 235 Mo. 1, 138 SW 641, 647].

[a] **"A towpath** was an appurtenance to the navigation of the [Mississippi] river. . . . It was a public necessity in those early days before the introduction of boats propelled by steam, but the necessity ceased when steam boats came." St. Louis v. St. Louis Blast Furnace Co., 235 Mo. 1, 27, 138 SW 641.

15. See Pathology post this page.

16. Dozier v. New York Fidelity, etc., Co., 46 Fed. 446, 449, 13 LRA 114; Bacon v. U. S. Mutual Acc. Assoc., 123 N. Y. 304, 311, 25 NE 399, 20 AmSR 748, 9 LRA 617.

17. See Pathological Condition ante this page.

18. Bacon v. U. S. Mutual Acc. Assoc., 123 N. Y. 304, 311, 25 NE 399, 20 AmSR 748, 9 LRA 617; Williams v. Scudder, 102 Oh. St. 305, 131 NE 481, 483.

[a] **"One of the first terms confronting us in the art of healing** is the scientific term 'pathology,' which relates to the nature, cause, progress and symptoms of a disease." Williams v. Scudder, 102 Oh. St. 305, 310, 131 NE 481.

[b] **It deals with** the objective analysis, the survey of the human body and its ailments or diseased organs and parts, and likewise the diagnosis of the signs or symptoms, internal or external, connected with the diseased condition. Williams v. Scudder, 102 Oh. St. 305, 131 NE 481, 483.

19. Escriche Diccionario. See also Criminal Law § 3252.

20. Patient:

Communications between physician and patient see Witnesses [40 Cyc 2381–2390].

Liability to for negligence or malpractice see Physicians and Surgeons [30 Cyc 1574 et seq].

Relation of physician or surgeon to see Physicians and Surgeons [30 Cyc 1570–1574].

21. Webster New Int. D. [quot Travelers' Ins. Co. v. Bergeron, 25 F. (2d) 680, 683].

[a] **"Patient in the asylum."**—One who has been committed to the asylum and has remained there (except in case of a temporary absence as on parole) for care and treatment. Aldrich v. Barton, 153 Cal. 488, 95 P 900, 904.

[b] **"Patient in a hospital."**—(1) A girl who had been an inmate of a home for girls suffering from tubercular diseases of the spine or joints in which no medical treatment was given was not a "patient in a hospital" within the meaning of a statute. Tendring Union v. Woolwich Union, [1923] 1 K. B. 121, 124. (2) Where a mother returned to a hospital for treatment of conditions resulting from childbirth and the baby was

*By WILLIAM QUINBY DE FUNIAK (Patent to Land-Paulina inclusive except the Spanish words and phrases).

condition, applies to a physician for medical aid and advice.[22] However, voluntarily applying to a physician is not a necessary requisite to becoming a patient, since one treated by a physician against his will becomes a patient by operation of law.[23] The term may include any persons under a disability, such as infancy, lunacy, etc.[24] A deceased body cannot be a patient.[25]

PATRIA LABORIBUS ET EXPENSIS NON DEBET FATIGARI.[26]

PATRIAM DECET NOBIS CARIOREM ESSE QUAM NOSMETIPSOS.[27]

PATRIA POTESTAS. Paternal authority; paternal power.[28]

PATRIA POTESTAS IN PIETATE DEBET, NON IN ATROCITATE, CONSISTERE.[29]

PATRIARCHAL MARRIAGE.[30]

PATRICIDE. One who has killed his father.[31]

PATRIMONIALIDAD. The right to enjoy the privileges of a native.[32]

PATRIMONIO. In Spanish law, patrimony, comprehending every species of property.[33]

PATRIMONY. A right or estate inherited from one's ancestors, particularly from direct male ancestors.[34]

PATRIOTIC. Actuated by love of one's country.[35]

PATROLING.[36] Walking to and fro as a guard.[37]

PATROL LIMITS. A term used in connection with the enforcement of liquor laws, of uncertain meaning, depending upon the locality in which it is used.[38]

PATROLMAN.[39]

PATROL SYSTEM. In its statutory use with reference to highways, any system by which such highways may be kept under constant observation and be effectively and economically preserved, maintained, and repaired.[40]

PATRON.[41] One who protects, countenances, or supports some person or thing; one who habitually extends material assistance; a regular customer; a protector or benefactor.[42]

At common law, as applied to charities, such as universities, the patron was the founder, the endower.[43]

In public school statutes, one who is not only a taxpayer but also sends his children to the school.[44] The term applies only to the head of a family, on whom the law primarily places the responsibility of support and education of his minor children, generally the father, and if none, then the mother or guardian, but not both the father and the mother.[45]

Used in reference to a house of ill fame, one who goes there in the character of a purchaser, to be accommodated and entertained in the way of a bawdyhouse.[46]

PATRONAGE.[47] Special countenance or support.[48]

PATRONIZE.[49] To act as a patron[50] toward;[51] to encourage; to extend patronage; to favor; to lend countenance.[52]

PATRONUM FACIUNT DOS, ÆDIFICATIO, FUNDUS.[53]

PATTERN. An original or model proposed for imitation; something worthy to be used as a copy;[54] a mere model, which may be used to construct ma-

taken to the hospital with her for nourishment, the baby was a "patient" in the hospital. Ford Hospital v. New York Fidelity, etc., Co., 106 Nebr. 311, 183 NW 656, 658.

22. State v. Morton, 38 S. D. 504, 162 NW 155, 157, AnnCas1918E 913.

23. Meyer v. Supreme Lodge K. P., 178 N. Y. 63, 70 NE 111, 112, 64 LRA 839.

24. Corey v. Bolton, 31 Misc. 138, 140, 63 NYS 915. And see Aldrich v. Barton, 153 Cal. 488, 95 P 900, 904 (one in an insane asylum as a "patient"); Ford Hospital v. New York Fidelity, etc., Co., 106 Nebr. 311, 183 NW 656, 658 (baby in hospital as a patient).

25. Travelers' Ins. Co. v. Bergeron, 25 F. (2d) 680, 683.

26. A maxim meaning "A jury ought not to be harassed by labors and expenses." Black L. D. [cit Jenkins Cent. p 6].

27. A maxim meaning "Our country should be dearer to us than ourselves." Morgan Leg. Max. [cit Cicero].

28. Black L. D. See Modern Civil Law § 44 et seq.

29. A maxim meaning "Paternal power should consist [or be exercised] in affection, not in atrocity." Black L. D.

30. See Celestial Marriage 11 C. J. p 47.

[a] **In the Idaho constitution** the words mean a bigamous or polygamous marriage of any sort. Toncray v. Budge, 14 Ida. 621, 95 P 26, 35.

31. Black L. D. [cit Sandars Just. Inst. (5th ed) p 496]. See also Parricide 46 C. J. p 1384.

Homicide see 29 C. J. p 1045.

32. Escriche Diccionario.

33. Escriche Diccionario. See also Patrimony post this page.

34. Black L. D.

[a] **"Patrimony"** is not necessarily restricted to property derived directly from a father. Green v. Giles, 5 Ir. Ch. 25.

[b] **"Separation of patrimony."**—In Louisiana, the separation of the property of the succession from that of the heir, or the demand of the creditors of the succession against every creditor of the heir. La. Civ. Code (1900) art 1444.

35. Webster New Int. D.

[a] **"Patriotic purposes or objects,"** used in creating a trust in a will, was held to be vague and uncertain. A gift for "patriotic purposes" was distinguished from one for "charitable purposes." Atty-Gen. v. National Provincial, etc., Bank, [1924] A. C. 262, 268.

36. Picketing see Conspiracy §§ 70, 140; Injunctions § 261.

37. In re Heffron, 179 Mo. A. 639, 162 SW 652, 659.

38. State v. Schraps, 97 Minn. 62, 68, 106 NW 106 (where it was said: "It follows that at the time of the passage of this act 'patrol limits' meant one thing in Minneapolis, as generally understood by its citizens, viz., that district within which liquors were sold and which required special alertness on behalf of the police, whereas in St. Paul it meant directly the opposite and referred to that district within which no licenses were permitted, and as to Duluth it had, and could have, no application whatever").

39. See Municipal Corporations § 1315.

40. Belair v. State, 212 App. Div. 206, 209, 208 NYS 470. See Gutekunst v. State, 188 App. Div. 316, 177 NYS 192.

41. See Patronage post this page; Patronize post this page.

42. Standard D. [quot State v. Vanderbilt Univ., 129 Tenn. 279, 352, 164 SW 1151, 1170].

43. State v. Vanderbilt Univ., supra ("So, in the leading case of Philips v. Bury, 1 Ld. Raym. 5, 91 Reprint 900, 2 T. R. 346, 100 Reprint 186 Lord Holt said: 'It is now admitted on all hands that the founder is patron.' And again, in Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629, Judge Story said: 'The patron, or endower, is the perficient founder' ").

"Founder" defined see 26 C. J. p 1003.

44. Neal v. Bethea, 158 Ark. 403, 250 SW 336, 337.

[a] **A person living in a school district,** who has children of school age who will attend the school, is a patron. Willan v. Richardson, 51 Ind. A. 102, 98 NE 1094, 1096.

[b] **"Patron of a school" and "elector" distinguished.**—Hester v. Smith County, 134 Miss. 217, 98 S 529.

45. Carroll v. Leemon Special School Dist., 175 Ark. 274, 299 SW 11, 12.

46. Raymond v. Peo., 9 Ill. A. 344, 345.

Disorderly houses see 18 C. J. p 1230.

47. See Patron ante this page; Patronize post this page.

48. Webster New Int. D.

[a] **That a loose woman is under the "patronage"** of a man named means that she is supported by him, for the purpose of sexual indulgence. More v. Bennett, 48 N. Y. 472, 475.

49. See Patron ante this page; Patronage ante this page.

50. Standard D. [quot State v. Vanderbilt Univ., 129 Tenn. 279, 164 SW 1151, 1170].

51. Raymond v. Peo., 9 Ill. A. 344, 345.

52. Standard D. [quot State v. Vanderbilt Univ., 129 Tenn. 279, 164 SW 1151, 1170].

53. A maxim meaning "Endowment, building, and land make a patron." Black L. D.

[a] **Applied in:** State v. Vanderbilt Univ., 129 Tenn. 279, 164 SW 1151, 1170.

54. Standard D. [quot U. S. v. Hoe, 147 Fed. 201, 203, 77 CCA 427].

"Copy" defined see 13 C. J. p 933.

"Model" defined see 40 C. J. p 1233.

"Original" defined see 46 C. J. p 1137.

[a] **It is "usually of wood or iron,** and often in several parts to facilitate removal, about which to form a sand mold, in which a casting may be

chinery and create working implements.[55]

Iron molders' pattern. A wooden pattern used in molding the cast-iron parts of certain machinery.[56]

Model pattern. The pattern of an inventor's idea, of the same size as the blue print or drawing from which it is made, gotten up for him in order to show the working of the invention, and generally incapable of use for any other purpose.[57]

PAULIAN ACTION. In Quebec, the term applied to an action by creditors to annul a contract or payment made by their debtor in fraud of their rights.[58]

PAULINA. In Spanish ecclesiastical law, an order or bull of excommunication.[59]

made." Standard D. [quot U. S. v. Hoe, 147 Fed. 201, 203, 77 CCA 427].

[b] **"Iron molders' patterns"** are within such definition. U. S. v. Hoe, 147 Fed. 201, 203, 77 CCA 427 [aff 141 Fed. 488, 490].

55. Brewer v. Ford, 59 Hun 17, 27, 12 NYS 619. See Heath v. Rollason, [1898] A. C. 499, 502; Heywood v. Potter, 1 E. & B. 439, 72 ECL 439, 118 Reprint 501, 16 EngL&Eq 242.

56. U. S. v. Hoe, 147 Fed. 201, 203, 77 CCA 427.

[a] **"Patterns for machinery"** in a tariff act includes an iron molders' pattern. U. S. v. Hoe, 147 Fed. 201, 203, 77 CCA 427 [aff 141 Fed. 488, 490].

57. Hoe v. U. S., 141 Fed. 488, 489.

58. See Que. Civ. Code (1909) arts 1032–1040; Hyde v. Scott, 28 Que. K. B. 80; Hyde v. Thibaudeau, 20 Que. K. B. 200, 16 RevLegNS 425; Hyde v. Ross, (Que.) 17 RevLegNS 88.

[a] **Probably so-called** from the expression "robbing Peter to pay Paul."

59. Escriche Diccionario.

PAUPERS

By Albert DeForest Tyler

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 427]

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Vagrant see **Vagrancy** [39 Cyc 1108].

I. DUTY OF RELIEF IN GENERAL

[§ 1] **A. Who Are Paupers[1]—1. In General.** While, technically, it is said, the term "pauper" means only a person receiving aid and assistance from the public under a provision made by law for the support and maintenance of the poor,[2] the term is often given a wider signification.[3] It may include a poor person standing in need of immediate relief, and a poor person likely to become chargeable;[4] and, generally, the terms "pauper," "poor," "poor person," "indigent person," "person in distress," etc., in statutes providing for the relief of such persons, are used to describe that class of persons who are so destitute and helpless as to be dependent for their support upon public charity.[5] Where a per-

1. Adjudication of poverty as condition precedent to fixing liability for support see infra § 211.

2. Conn.—Weeks v. Mansfield, 84 Conn. 544, 80 A 784.

Mass.—Opinion of Justices, 124 Mass. 596; Oakham v. Sutton, 13 Metc. 192; Opinion of Justices, 11 Pick. 538.

Minn.—Cordova v. Le Sueur Center, 78 Minn. 36, 80 NW 836.

N. J.—Sayres v. Springfield, 8 N. J. L. 166.

Tex.—Kirk v. Brazos County, 73 Tex. 56, 11 SW 143.

Wyo.—Sweetwater County v. Carbon County, 6 Wyo. 254, 44 P 66.

And see infra § 5.

"In a technical sense the word 'pauper' does not apply to a poor person smitten with a contagious disease, who on account of his sickness receives aid from the county, though under a pauper act." Sweetwater County v. Carbon County, supra [cit La Salle County Comrs. v. Reynolds, 49 Ill. 186].

"The term 'pauper' has a distinct and well-defined meaning in our law. It is used to designate those persons whose support imposes a burden on the public treasury. One may be ever so destitute of estate or ability to earn a livelihood, and yet not be a pauper. He may be cared for by the voluntary action of friends or relatives. The duty to care for him may be by law cast on relatives. He becomes a member of the pauper class only when, the other means of support failing, he becomes a public charge." Weeks v. Mansfield, 84 Conn. 544, 549, 80 A 784.

[a] **A contract** to provide for all the "poor" of a certain township applies only to persons whom a justice of the peace has by a previous order declared to be paupers. Sayres v. Springfield, 8 N. J. L. 166.

3. See cases infra notes 4, 5.

4. Conn.—New Hartford v. Canaan, 52 Conn. 158; Lynne v. East Haddam, 14 Conn. 394.

Me.—Hutchinson v. Carthage, 105 Me. 134, 73 A 825; Bangor v. Hampden, 41 Me. 484; Alna v. Plummer, 4 Me. 258.

Mass.—Charlestown v. Groveland, 15 Gray 15; Monson v. Williams, 6 Gray 416; Hutchings v. Thompson, 10 Cush. 238; Shearer v. Shelburne, 10 Cush. 3; Sturbridge v. Holland, 11 Pick. 459.

Vt.—Walbridge v. Walbridge, 46 Vt. 617, 625.

Wis.—Holland v. Belgium, 66 Wis. 557, 29 NW 558.

And see cases infra note 5.

"The word 'pauper' . . . does not necessarily imply a person who has actually received support from the town, as the word in this chapter is used indiscriminately to designate poor and indigent persons standing in need of relief, and poor persons likely to become chargeable, as well as such poor persons as have actually received support from the town." Walbridge v. Walbridge, supra.

[a] **Temporary distress.**—(1) A person may be a "pauper" or "poor person" within the meaning of the poor laws although his need for relief is only temporary New Bedford v. Chace, 5 Gray (Mass.) 28. (2) A person who has become temporarily helpless by reason of a personal injury, and has no means of support except his labor, is a pauper during the period of his disability. Blodgett v. Lowell, 33 Vt. 174.

[b] **When any temporary support is given to a poor person,** it is in all cases a question of fact whether such poor person was, at the time the support was so furnished, a pauper within the meaning of the statute. Holland v. Belgium, 66 Wis. 557, 29 NW 558.

Transient poor persons see infra § 6.

5. Ark.—Lee County v. Lackie, 30 Ark. 764.

Conn.—Harrison v. Gilbert, 71 Conn. 724, 43 A 190; Beardsley v. Bridgeport, 53 Conn. 489, 3 A 557, 55 AmR 152; New Hartford v. Canaan, 52 Conn. 158; Peters v. Litchfield, 34 Conn. 264; Lyme v. East Haddam, 14 Conn. 394; East Hartford v. Pitkin, 8 Conn. 393; Stewart v. Sherman, 5 Conn. 244, 4 Conn. 553; Newtown v. Danbury, 3 Conn. 553.

Ill.—Bristol v. Fox, 159 Ill. 500, 42 NE 887; Christian County v. Rockwell, 25 Ill. A. 20.

Ind.—Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541.

Iowa.—Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303; Polk County v. Owen, 187 Iowa 220, 174 NW 99.

Kan.—State v. Osawkee Tp., 14 Kan. 418, 19 AmR 99.

Me.—Solon v. Embden, 71 Me. 418; Linneus v. Sidney, 70 Me. 114; Foxcroft v. Corinth, 61 Me. 559; New Portland v. Kingfield, 55 Me. 172; Veazie v. Chester, 53 Me. 29; Norridgewock v. Solon, 49 Me. 385; Bangor v. Hampden, 41 Me. 484; Hunnewell v. Hobart, 40 Me. 28; Clinton v. York, 26 Me. 167; Garland v. Dover, 19 Me. 441; Green v. Buckfield, 3 Me. 136.

Mass.—Crossman v. New Bedford Sav. Inst., 160 Mass. 503, 36 NE 477; Charlestown v. Groveland, 15 Gray 15; New Bedford v. Chace, 5 Gray 28; Hutchings v. Thompson, 10 Cush. 238; Taunton v. Middleborough, 12 Metc. 35; Com. v. Cambridge, 20 Pick. 267; Wilson v. Brooks, 14 Pick. 341.

Miss.—Jones v. De Soto County, 60 Miss. 409.

Nebr.—Newark Tp. v. Kearney County, 99 Nebr. 142, 155 NW 797.

N. H.—Plymouth v. Haverhill, 69 N. H. 400, 46 A 460; South Hampton v. Hampton Falls, 11 N. H. 134.

N. J.—Camden County v. Ritson, 68 N. J. L. 666, 54 A 839.

N. Y.—Bartlett v. Ackerman, 21 NYS 53; Sandlake Overseers of Poor v. Berlin Overseers of Poor, 2 Cow. 485; Schermerhorn v. Hull, 13 Johns. 270.

Oh.—Beach v. Marion Tp., 2 Oh. Dec. (Reprint) 221, 2 WestLMonth 95.

Pa.—Allegheny County v. Pittsburgh, 281 Pa. 300, 127 A 72; Com. v. Marzano, 9 Pa. Dist. & Co. 764; Beaver Tp. v. Centre Tp., 23 Pa. Dist. 123; Matter of Whiting, 3 Pittsb. 129.

Vt.—Craftsbury v. Greensboro, 66 Vt. 585, 29 A 1024; Hardwick v. Pawlet, 36 Vt. 320; Blodgett v. Lowell, 33 Vt. 174; Chelsea v. Brookfield, 27 Vt. 587; Ludlow v. Weathersfield, 18 Vt. 39; St. Johnsbury v. Waterford, 15 Vt. 692; Northfield v. Roxbury, 15 Vt. 622.

Wis.—Juneau County v. Wood County, 109 Wis. 330, 85 NW 387; Rhine v. Sheboygan, 82 Wis. 352, 52 NW 444; Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224; Sauksville v. Grafton, 68 Wis. 192, 31 NW 719; Holland v. Belgium, 66 Wis. 557, 29 NW 558.

[a] **"Pauper" defined.**—(1) A person who is so poor that he must be supported at the public expense. Bouvier L. D.; Lee County v. Lackie, 30 Ark. 764; Peo. v. Weissenbach, 60 N. Y. 385; Allegheny County v. Pittsburgh, 281 Pa. 300, 127 A 72; Rising's Pet., 25 Pa. Dist. 533, 43 Pa. Co. 399; In re Kibby, 12 Pa. Dist. 527, 17 York LegRec 75; Clement's Pet., 5 Pa. Dist. 295, 18 Pa. Co. 71; Hoffen's Est., 70 Wis. 522, 36 NW 407. (2) "A poor person; especially one so indigent as to depend on charity for maintenance; or one supported by some public provision." Webster D. [quot Saukville v. Grafton, 68 Wis. 192, 195, 31 NW 719]. (3) "One so poor as to be unable to provide for him or herself, and having no one of sufficient pecuniary ability to care for them." Matter of Whiting, 3 Pittsb. (Pa.) 129, 133. (4) One who is admittedly physically and financially unable to support himself. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303. (5) A person who is in want of immediate relief by reason of sickness or insanity, or in immediate need of food, clothes, and shelter upon the principles of common humanity. Charlestown v. Groveland, 81 Mass. 15. (6) Other definitions. City Hospital v. Milton, 232 Mass. 273, 122 NE 274; Shearer v. Shelburne, 10 Cush. (Mass.) 3; Newark Tp. v. Kearney County, 99 Nebr. 142, 155 NW 797; Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132.

[b] **The term "poor" or "poor person"** as used in the statutes (1) refers to persons so completely destitute of property as to require assistance from the public. State v. Osawkee Tp., 14 Kan. 418, 422, 19 AmR 99; Allegheny County v. Pittsburgh, 281 Pa. 300, 127 A 72. (2) A "poor" person is one who has exhausted all means of support, and is in a condition to require public aid for the supply of his necessities. Beardsley v. Bridgeport, 53 Conn. 489, 3 A 557, 55 AmR 152. (3) One who is destitute and helpless, unable to support himself, and without means of support, is a "poor person." Busser v. Snyder, 282 Pa. 440, 128 A 80, 37 ALR 1515. (4) The phrase "has a settled legal signification, and is applied to those who may rightfully claim alms from the public bounty." Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541, 542. (5) Other definitions. Noxen Tp. Poor Dist. v. Luzerne County Cent. Poor Dist., 43 Pa. Co. 114; Juneau County v. Wood County, 109 Wis. 330, 85 NW 387.

[c] **Statutory definitions.**—(1) In Iowa the statutory definition of poor persons is "those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor." Brock v. Jones County, 145 Iowa 397, 401, 124 NW 209; Hamilton County v. Hollis, 141 Iowa 477, 481, 119 NW 978; Monroe County v. Abegglen, 129 Iowa 53, 57, 105 NW 350. (2) In New York the statute defines a "poor person" as "one unable to maintain himself." Peo. v. Meyers, 161 App. Div. 315, 146 NYS 543; Delaware County v. Delaware, 105 App. Div. 129, 93 NYS 954; Tompkins County v. Ontario County, 92 Misc. 272, 156 NYS 335; St. Agnes Girls' Training School v. Erie County, 68 Misc. 648, 124 NYS 984; Onondaga

son is in need of relief within the meaning of the statute, the cause of his distress, whether through his own fault or not, is immaterial.[6]

[§ 2] **2. Ability of Self-Support.**[7] A person who is unable to provide for and maintain himself is a pauper,[8] at least prima facie,[9] and entitled to relief. And where a family is in want, the members thereof are poor and unable to support themselves, within the meaning of the various statutes, although the head of the family earns enough for their partial support.[10] It has also been held that a husband, although able to support himself, is a pauper if he has a family under his care and protection which he is unable to support,[11] and that a wife becomes a pauper where, although able to support herself, she is prevented from doing so because of her husband's illness, and the necessity of attending him as nurse.[12] But a person who has always been able to support himself is not a pauper within the purview of the various statutes making provision for the relief of that class of persons,[13] although the wages earned by him are barely sufficient for that purpose,[14] and a fortiori he is not a pauper where his earnings are more than enough for his support.[15] Nor is one a pauper, although without ability to support himself, where he has relatives or friends able and willing to care for him.[16] But the fact that a person has once received relief from public authorities does not make him a pauper or poor person after he has become self-supporting.[17] And where, at the time a person, with his family, was quarantined by the board of health, he was supporting the family and was able to continue such support after he was released from quarantine, he cannot be deemed a pauper.[18]

[§ 3] **3. Ability and Willingness of Relatives or Others To Support.** As a general rule a person is not a pauper within the meaning of the poor laws if there are relatives or other persons legally liable for his support,[19] and able and willing to support him.[20] Thus a child who has parents[21] or grandparents,[22] or a parent who has children,[23] or a wife who has a husband,[24] legally liable for his or her support and able to furnish the same, is not a pauper. On the other hand a person may be a pauper within the meaning of the poor laws, although

County v. Amsterdam, 64 Misc. 181, 117 NYS 1121.

[d] **"Poor of the county."**—Judge Breese, defining what is meant by the phrase "poor of the county," said that they are those who are "in legal contemplation . . . dependent upon public charity; in other words, they are the paupers who are maintained by taxes levied on the people, or by the income from the public property." Heuser v. Harris, 42 Ill. 425, 436.

[e] **Synonymous terms.**—(1) The term "poor person" has the same meaning as "pauper." Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541, 542; Rising's Pet., 25 Pa. Dist. 533, 43 Pa. Co. 399. (2) It is also synonymous with the term "indigent person." Warren County v. Osburn, supra.

[f] **Neglected and dependent children** are not "poor persons" for whose maintenance the poor district is liable. Allegheny County v. Pittsburgh, 281 Pa. 300, 127 A 72; In re Smith, 91 Pa. Super. 261.

[g] **Parent abandoning child.**—In Connecticut, under Gen. St. (1888) § 3298, a parent abandoning his child and failing to provide for its support is to be treated as a pauper. McCarthy v. Hinman, 35 Conn. 538.

6. New Hartford v. Canaan, 52 Conn. 158, 160; Bangor v. Hampden, 41 Me. 484; Amherst v. Hollis, 9 N. H. 107.

"Our laws for the relief of the poor, whether considered in their letter or their spirit, take no cognizance of the origin and causes of poverty, but only of its existence." New Hartford v. Canaan, supra.

[a] **For example,** it is immaterial whether a needy person is brought into that condition by quarantine, neglect of the board of health, or otherwise, inasmuch as it is the situation, not the method of producing it, that requires the action of the overseers of the poor. Hutchinson v. Carthage, 105 Me. 134, 73 A 825.

7. Ownership or possession of property see infra § 4.

8. Iowa.—Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303.

Nebr.—Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132.

N. H.—Amherst v. Hollis, 9 N. H. 107.

Pa.—West Perry Tp. v. Walker Tp., 23 Pa. Dist. 455, 41 Pa. Co. 429.

Vt.—Blodgett v. Lowell, 33 Vt. 174.

And see cases supra § 1.

[a] **Rule applied.**—A person is chargeable as a pauper, under Comp. St. (1903) § 4611, where he is unable to earn a livelihood in consequence of bodily infirmity or unavoidable cause, and has no kindred in the state liable for his support, or where his kindred are of insufficient ability or refuse to maintain him. Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132.

[b] **Weak-minded persons.**—One who owns nothing but a few shoemaker's tools and his clothing, and is so weak-minded as to be unable to perform manual labor except as assisted, may be classed as a pauper. West Perry Tp. v. Walker Tp., 23 Pa. Dist. 455, 41 Pa. Co. 429.

[c] **A prisoner** confined in jail for debt is entitled to relief as a "poor" person, if unable to maintain himself. Amherst v. Hollis, 9 N. H. 107.

9. South Brunswick Overseers of Poor v. East Windsor Overseers of Poor, 8 N. J. L. 64.

10. Old Saybrook v. Milford, 76 Conn. 152, 56 A 496; New Hartford v. Canaan, 52 Conn. 158; Lyme v. East Haddam, 14 Conn. 394; Poland v. Wilton, 15 Me. 363; Plymouth v. Haverhill, 69 N. H. 400, 46 A 460. See also St. Johnsbury v. Waterford, 15 Vt. 692 (holding that the ability of paupers to maintain themselves is a pecuniary ability, and is not affected by the manner in which they have previously disposed of their property, if the disposition has been so made as to be binding on them).

11. Green v. Buckfield, 3 Me. 136.

12. South Hampton v. Hampton Falls, 11 N. H. 134.

13. Ark.—Lee County v. Lackie, 30 Ark. 764.

Dak.—Ostland v. Porter, 4 Dak. 98, 25 NW 731.

Minn.—Brabec v. Boedigheimer, 132 Minn. 370, 157 NW 508.

Nev.—Lander County v. Humboldt County, 21 Nev. 415, 32 P 849.

Eng.—Melrose v. Gordon, [1924] S. C. 1034.

[a] **Thus** a laboring man, who had always been able to make a living until his last sickness, is not a pauper, although without money or property with which to pay the expenses of that sickness. Lee County v. Lackie, 30 Ark. 764; Lander County v. Humboldt County, 21 Nev. 415, 32 P 849.

[b] **In England** (1) the guardians of the poor have no authority to furnish relief to able-bodied men for whom work is available, but who, by reason of a strike or otherwise, refuse to accept work. Atty.-Gen. v. Poplar, 40 T. L. R. 752; Atty.-Gen. v. Bermondsey Guardians, 40 T. L. R. 512; Atty.-Gen. v. Merthyr Tydfil Union Guardians of Poor, [1900] 1 Ch. 516, 23 ERC 14; Atty.-Gen. v. Bedwellty Union, 62 J. P. 792. (2) The legislation as to unemployment insurance does not affect the principle. Atty.-Gen. v. Poplar, supra. (3) But if a man or his family is starving and might die or be seriously injured unless relief is immediately given, or any other case of sudden and urgent necessity arises, the guardians may grant relief, although the urgency of the case may have arisen from the willful refusal of the man to work. Atty.-Gen. v. Merthyr Tydfil Union Guardians of Poor, supra. (4) What constitutes refusal to work. Poplar v. Martin, [1905] 1 K. B. 728.

14. Wood v. Simmons, 51 Hun 325, 4 NYS 368.

15. Wilson v. Brooks, 14 Pick. (Mass.) 341; Jenness v. Emerson, 15 N. H. 486.

16. See infra § 3.

17. Opinion of Justices, 124 Mass. 596; Wilson v. Brooks, 14 Pick. (Mass.) 341; Tompkins County v. Ontario County, 92 Misc. 272, 156 NYS 335.

[a] **Weak-minded persons.**—Where a person who had been supported by his town as a pauper had bodily health and strength, although of small mental capacity, and was able to earn more than enough to support himself, and had found an employer, he was no longer a pauper. Wilson v. Brooks, 14 Pick. (Mass.) 341.

18. In re Kibby, 12 Pa. Dist. 527, 17 YorkLegRec 75.

19. East Hartford v. Pitkin, 8 Conn. 393.

[a] **Slave entitled to support from master.**—The term "pauper," in the sense of the statute providing that it shall be the duty of the selectmen to provide for all paupers, does not include a negro slave, who is entitled to support from the estate of her master. East Hartford v. Pitkin, 8 Conn. 393.

20. Weeks v. Mansfield, 84 Conn. 544, 80 A 784; Templeton v. Winchendon, 138 Mass. 109; Peters v. Westborough, 20 Pick. (Mass.) 506; Newark Tp. v. Kearney County, 99 Nebr. 142, 155 NW 797; Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132; Danville v. Wheelock, 47 Vt. 57.

21. Clark v. Walton, 137 Ga. 277, 73 SE 392; Litchfield v. Londonderry, 39 N. H. 247.

22. Whiting's Case, 3 Pittsb. (Pa.) 129.

23. Clark v. Walton, 137 Ga. 277, 73 SE 392.

24. Norton v. Rhodes, 18 Barb. (N. Y.) 100; Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Danville v. Sheffield, 50 Vt. 243; Chelsea v. Brookfield, 27 Vt. 587.

[a] **The wife of a man owning a valuable equity of redemption** which can be made available for her support is not chargeable to a town as a pauper. Chelsea v. Brookfield, 27 Vt. 587.

there are individuals liable by law for his support,[25] and able and willing to provide such support.[26]

Pauperism of parents. A minor child does not necessarily become a pauper by reason of the mere pauperism of his parents.[27]

Indigent pensioners. A Confederate soldier who, from poverty and age, or infirmity, is unable to provide for himself is within a statute relating to relief of "indigent pensioners," although he has a parent or child able and willing to support him, and he does not come within the statute making provision for paupers.[28]

[§ 4] **4. Ownership or Possession of Property.** The general rule is that, so long as a person is possessed of property which can be made available for his support he cannot be considered a "pauper" in the sense that the word is used in the statutes;[29] but if the property which he may own cannot be made available for his immediate wants he is within the meaning of the statutes.[30] And in many cases the rule has been laid down that it is not necessary, in order to entitle a person to relief as a pauper, that he should be altogether destitute of property, but that all that is necessary to entitle him to such relief is to show that he does not possess sufficient property for his maintenance and support.[31]

[§ 5] **5. Receiving Aid or in Need of Relief from Public Authorities.**[32] Adult persons of sound mind cannot be made paupers against their will; and to constitute pauper supplies, the supplies must be applied for, or received with a full knowledge of their nature.[33] But a person knowingly or voluntarily

25. Newton v. Danbury, 3 Conn. 553; Charlestown v. Groveland, 15 Gray (Mass.) 15, 17; New Bedford v. Chace, 5 Gray (Mass.) 28.

"Any person is held to be a pauper who is in want of immediate relief, by reason of sickness, insanity, or immediate need of food, clothes and shelter, upon the principle of simple humanity; and overseers . . . are bound by law to furnish him with support, without stopping to inquire whether the person has relatives liable for his support." Charlestown v. Groveland, supra.

[a] **A wife** is to be considered a pauper when she is in actual need of relief, and, because of the financial condition of her husband, there is no probability that her necessities will be supplied on her husband's credit. Newton v. Danbury, 3 Conn. 553.

26. Goodale v. Lawrence, 88 N. Y. 513, 42 AmR 259.

[a] **Illustration.**—An insane wife absent from her home and in pressing need of food and shelter is a poor person entitled to relief, notwithstanding she has a husband able and willing to support her. Goodale v. Lawrence, 88 N. Y. 513, 42 AmR 259.

27. Jenness v. Emerson, 15 N. H. 486.

28. Clark v. Walton, 137 Ga. 277, 73 SE 392.

29. Conn.—Cook v. Morris, 66 Conn. 137, 33 A 594; Stewart v. Sherman, 5 Conn. 244; Stewart v. Sherman, 4 Conn. 553.

Ill.—Alton v. Madison County, 21 Ill. 115; Tazewell County v. Cooney, 215 Ill. A. 617.

Iowa.—Polk County v. Owen, 187 Iowa 220, 174 NW 99.

Me.—Appleton v. Belfast, 67 Me. 579; Hampden v. Newburgh, 67 Me. 370.

Mich.—Livingston County Superintendents of Poor v. Oakland County Superintendents of Poor, 141 Mich. 667, 104 NW 978.

Mo.—Handlin v. Morgan County, 57 Mo. 114.

N. H.—Poplin v. Hawke, 8 N. H. 305.

Oh.—Beach v. Marion Tp., 2 Oh. Dec. (Reprint) 221, 2 WestLMonth 95.

Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Ludlow v. Weathersfield, 18 Vt. 39; Randolph v. Braintree, 10 Vt. 436; Londonderry v. Acton, 3 Vt. 122.

Wis.—Ettrick v. Bangor, 84 Wis. 256, 54 NW 401; Rhine v. Sheboygan, 82 Wis. 352, 52 NW 444; Holland v. Belgium, 66 Wis. 557, 29 NW 558.

[a] **Rule applied.**—(1) A man owning an undivided one-eighth interest in Iowa farm lands worth six thousand six hundred dollars, free from all encumbrances, save a life estate of a woman fifty-eight years old and in poor health, and who has practically made no effort to borrow on or sell such interest, is not destitute, helpless, and a "pauper," within the meaning of the laws for the relief of the poor. Polk County v. Owen, 187 Iowa 220, 174 NW 99. (2) Persons who, when they removed from one county to another, were well and strong, had considerable household furniture, some sixty dollars in money, and sufficient provisions to support themselves and their family a few months, were not then paupers. Livingston County Superintendents of Poor v. Oakland County Superintendents of Poor, 141 Mich. 667, 104 NW 978.

[b] **A person who has any interest in real estate,** although not sufficient to support him, and who is unable to make up the deficiency by his own labor, is not entitled to support as a pauper. Peters v. Litchfield, 34 Conn. 264.

30. Conn.—New-Milford v. Sherman, 21 Conn. 101.

Iowa.—Polk County v. Owen, 187 Iowa 220, 174 NW 99; Hamilton County v. Hollis, 141 Iowa 477, 119 NW 978; Hardin County v. Wright County, 67 Iowa 127, 24 NW 754; Jasper County v. Osborn, 59 Iowa 208, 13 NW 104.

Me.—Freedom v. McDonald, 115 Me. 525, 99 A 459; Hutchinson v. Carthage, 105 Me. 134, 73 A 825; Appleton v. Belfast, 67 Me. 579; Brewer v. East Machias, 27 Me. 489.

Mass.—Templeton v. Winchendon, 138 Mass. 109; Groveland v. Medford, 1 Allen 23; Charlestown v. Groveland, 15 Gray 15; Sturbridge v. Holland, 11 Pick. 459.

N. H.—Moultonborough v. Tuftonborough, 43 N. H. 316.

Oh.—Beach v. Marion Tp., 2 Oh. Dec. (Reprint) 221, 2 WestLMonth 95.

Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Springfield v. Chester, 68 Vt. 294, 35 A 322; Danville v. Sheffield, 50 Vt. 243.

Wis.—Coffeen v. Preble, 142 Wis. 183, 125 NW 954, 27 LRANS 1079, 20 AnnCas 753.

[a] **Reason for rule.**—"It is made the duty of the overseers of the town, where a person may be found in distress, to institute an inquiry, not as to any means he may possess, of which he cannot then avail himself; but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer, while the overseers were deliberating as to the extent of their official duty, and the nature of their remedy." Alna v. Plummer, 4 Me. 258, 262 [quot Hutchinson v. Carthage, 105 Me. 134, 138, 73 A 825].

[b] **Illustration.**—Notwithstanding a daughter was entitled to receive as her distributive share in her deceased father's estate about eighty dollars, she was entitled to aid from the town where she was in distress, and the distributive share was not yet available. Freedom v. McDonald, 115 Me. 525, 99 A 459.

[c] **The owner of a collectable note** for ninety-six dollars has been held not to be a pauper so as to render the place of his settlement liable for support furnished to him. Stewart v. Sherman, 4 Conn. 553.

Transient poor persons see infra § 6.

31. Conn.—Old Saybrook v. Milford, 76 Conn. 152, 56 A 496; Fish v. Perkins, 52 Conn. 200; Bethlehem v. Watertown, 51 Conn. 490 (possession of a few household articles and vegetables); New Milford v. Sherman, 21 Conn. 101.

Ill.—Big Grove v. Fox, 89 Ill. A. 84; Eshelman v. Clinton County, 88 Ill. A. 566; Christian County v. Rockwell, 25 Ill. A. 20.

Iowa.—Polk County v. Owen, 187 Iowa 220, 174 NW 99.

Me.—Solon v. Embden, 71 Me. 418.

Mass.—Fiske v. Lincoln, 19 Pick. 473.

Minn.—Howie v. Gangloff, 165 Minn. 346, 206 NW 441.

N. H.—Poplin v. Hawke, 8 N. H. 305.

N. Y.—Bartlett v. Ackerman, 21 NYS 53.

Vt.—Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387; Hardwick v. Pawlet, 36 Vt. 320; Blodgett v. Lowell, 33 Vt. 174.

[a] **Rule applied.**—(1) The fact that a person owned a horse and cow did not conclusively show that he was not a "poor person" in need of assistance from a town, within the pauper laws. Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas 1916C 387. (2) Under Gen. St. (1923) § 3157, imposing upon relatives the duty of supporting a poor person, a mother, unable to earn a livelihood, without means other than annual rents of two hundred dollars, and needing more for maintenance, is a "poor person." Howie v. Gangloff, 165 Minn. 346, 206 NW 441.

[b] **The ownership of a house** of little value, and reasonably necessary for the shelter of the owner's family, will not prevent him from being a pauper and entitled to relief. Fish v. Perkins, 52 Conn. 200; Norridgewock v. Solon, 49 Me. 385; Poplin v. Hawke, 8 N. H. 305. See Wallingford v. Southington, 16 Conn. 431, 435 ("We cannot think, that the law upon this subject is so rigid, that if a poor man owns a miserable hovel, used as a shelter for his family, he must sell it, provided it is of any value whatever, before he can properly call upon the selectmen of a town to assist him in procuring medicine and bread for his sick and famishing children. . . . Such a rule would be harsh and inconvenient").

[c] **In England** it has been held that an old age pensioner, who is not in receipt of poor relief, is not a person entirely outside the discharge of duties which a parish council owes to the poor. Baird v. Wallace-James, 85 L. J. P. C. 193.

32. Receipt of supplies as preventing acquisition of settlement see infra §§ 100–103.

33. Bucksport v. Cushing, 69 Me. 224; Sheboygan County v. Sheboygan

receiving support from a county, town, or municipality is technically a pauper;[34] and where the public authorities furnish necessary aid to a person, with his knowledge, for the support of another whom he is legally liable to support, he is himself a pauper.[35] But this last rule does not apply where relief is provided on the application of a person who owes no legal duty of support to the person receiving such relief.[36] Thus a man is under no legal obligation to support his stepchild[37] and the fact that such child receives aid from a town as a pauper upon the application of the stepfather will not make the latter a pauper.[38] The question whether a person is chargeable to a town as a pauper does not depend merely upon the fact that it has furnished him relief but likewise upon its legal obligation to do so.[39]

[§ 6] **6. Transient Poor Persons.** In many jurisdictions the statutes require counties, towns, and municipal corporations to furnish relief to any person temporarily residing therein who is found sick or in distress and in need of immediate assistance, without reference to the ultimate liability of any other county, town, municipality, or individual for such person's support;[40] and this duty will be enforced when, and only when, the facts show a case coming fairly within the terms of the statute.[41] The purpose of these statutes is to provide for the present necessities of any person found to be in

Falls, 130 Wis. 93, 109 NW 1030.

[a] **The phrase "supported as a pauper"** involves, not only the idea that aid shall have been given by a town, but that the aid shall have been applied to, or received by, the supposed pauper. Sheboygan County v. Sheboygan Falls, 130 Wis. 93, 109 NW 1030.

[b] **One living in the family of a pauper** aided by a town, who pays his board, whether in money or in services, which enables some member of the family to devote his time to earning money for its support, does not receive aid from the town as a pauper merely because the family use the money furnished by the town to purchase the food which he eats. Sheboygan County v. Sheboygan Falls, 130 Wis. 93, 109 NW 1030.

[c] **Families of absent soldiers,** in the service of the United States, when standing in need of assistance, do not incur the disabilities of pauperism by receiving supplies from the cities or towns where such soldiers resided at the time of their enlistment. Veazie v. China, 50 Me. 518.

34. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303; Hunnewell v. Hobert, 40 Me. 28; Crossman v. New Bedford Sav. Inst., 160 Mass. 503, 36 NE 477 (although an honorably discharged soldier); Opinion of Justices, 124 Mass. 596; Hutchings v. Thompson, 10 Cush. (Mass.) 238; Peo. v. Weissenbach, 60 N. Y. 385; Sandlake Overseers of Poor v. Berlin Overseers of Poor, 2 Cow. (N. Y.) 485.

[a] **Supplies furnished to family.**—Supplies furnished to a family by overseers of the poor will be considered as furnished to all the members living with such family, including those of full age, and not subject to the control of any other member of it. Corinth v. Lincoln, 34 Me. 310.

[b] **When one is sent to the county home by township trustees,** in exercise of wise discretion, and is admittedly physically and financially unable to support himself, he is a "poor person." Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303.

35. Tremont v. Mt. Desert, 36 Me. 390; Charlestown v. Groveland, 15 Gray (Mass.) 15; Taunton v. Middleborough, 12 Metc. (Mass.) 35; Gilmanton v. Sanbornton, 56 N. H. 336.

[a] **Determination of pauperism.**—Before overseers of the poor can make an adjudication, under St. (1793) c 59, that a parent is unable to take care of a child, it is proper, if not necessary, that they should give such parent notice, and, if he wishes it, a hearing. Reidell v. Morse, 19 Pick. (Mass.) 358.

36. Barnet v. Norton, 90 Vt. 544, 99 A 238 (relief furnished to woman on application of son-in-law with whom she was residing).

37. See Parent and Child § 186.

38. Brookfield v. Warren, 128 Mass. 287.

39. Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Ludlow v. Weathersfield, 18 Vt. 39.

40. See statutory provisions.

Liability of place of legal:
Residence see infra § 208.
Settlement see infra §§ 209, 238 et seq.

41. Conn.—Trumbull v. Moss, 28 Conn. 253.

Ill.—Kankakee v. McGrew, 178 Ill. 74, 52 NE 893; Perry County v. Du Quoin, 99 Ill. 479; La Salle County v. Reynolds, 49 Ill. 186; La Salle County v. Hatheway, 78 Ill. A. 95; Kankakee County v. Manteno, 68 Ill. A. 365.

Ind.—Jefferson County v. Rogers, 17 Ind. 341.

Iowa.—Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070; Cerro Gordo County v. Boone County, 152 Iowa 692, 133 NW 132, 39 LRANS 161, Ann Cas1913C 79.

Me.—Machias v. East Machias, 116 Me. 423, 102 A 181; Holden v. Brewer, 38 Me. 472; Brown v. Orland, 36 Me. 376.

Nev.—Lander County v. Humboldt County, 21 Nev. 415, 32 P 849.

N. H.—Strafford County v. Rockingham County, 71 N. H. 37, 51 A 677; Moultonborough v. Tuftonborough, 43 N. H. 316.

N. Y.—Goodale v. Lawrence, 88 N. Y. 513, 42 AmR 259; Wood v. Simmons, 51 Hun 325, 4 NYS 368; In re Hector, 24 NYS 475; Peo. v. Emigration Comrs., 15 HowPr 177 [rev on other grounds 27 Barb. 562].

Oh.—Cincinnati Tp. v. Ogden, 5 Oh. 23.

Pa.—Taylor v. Shenango, 114 Pa. 394, 6 A 475; Juniata County v. Delaware Tp. Overseers of Poor, 107 Pa. 68; Nippenose Tp. Overseers of Poor v. Jersey Shore Overseers of Poor, 48 Pa. 402; Milton v. Williamsport, 9 Pa. 46; Versailles v. Mifflin, 10 Watts 360; Davidson Tp. Poor Dist. v. Shrewsbury Tp. Poor Dist., 62 Pa. Super. 613; Williams County v. Mercer County, 4 Pa. Dist. 171, 15 Pa. Co. 525; Grim v. Haycock Tp., 1 Pa. Dist. 815; Austin Poor Dist. v. Potter County, 1 Pa. Dist. 637; Braintrim Tp. v. Windham Tp., 10 Pa. Co. 250; Clarion Borough v. Clarion County, 1 Pa. Co. 593; Donegal Tp. Overseers of Poor v. Sugar Creek Tp., 20 WklyNC 307; Moreland Tp. Overseers of Poor v. Benton Poor Dist. Overseers, 3 Wkly NC 20.

S. D.—Roane v. Hutchinson County, 40 S. D. 297, 167 NW 168; Hamlin County v. Clark County, 1 S. D. 131, 45 NW 329.

Utah.—Ogden City v. Weber County, 26 Utah 129, 72 P 433.

Vt.—Danville v. Hartford, 73 Vt. 300, 50 A 1082; Londonderry v. Landgrove, 66 Vt. 264, 29 A 256; Chittenden v. Stockbridge, 63 Vt. 308, 21 A 1102; Danville v. Sheffield, 50 Vt. 243.

Wis.—Davis v. Scott, 59 Wis. 604, 18 NW 530; McCaffrey v. Shields, 54 Wis. 645, 12 NW 54.

Wyo.—Sweetwater County v. Carbon County, 6 Wyo. 254, 44 P 66.

[a] **Persons entitled to relief.**—(1) A transient pauper, under the Vermont statute, is a person who is suddenly taken sick or is otherwise disabled or confined at any house in any town (New Haven v. Middlebury, 63 Vt. 399, 21 A 608) (2) or is committed to jail (New Haven v. Middlebury, supra; Bristol v. Rutland, 10 Vt. 574; Danville v. Putney, 6 Vt. 512; Manchester v. Rupert, 6 Vt. 291; Pawlet v. Rutland, Brayt. (Vt.) 175) and is in need of relief away from the town in which he resided. (3) As between the person at whose house the disabled person is confined, and the town in which he is confined, the liability of the town does not depend on such person's transiency as distinguished from the permanency of having come to reside, but, as to that, only on his being confined by disability at some house that is not his home. Goodell v. Mt. Holly, 51 Vt. 423. (4) Under Pub. St. § 3670, the town is liable, even though a transient is not left in the hands of the overseer of the poor. Wilbur v. Calais, 90 Vt. 335, 98 A 913. (5) A married man who leaves his place of residence and goes into another town to work, leaving his family at the former place, is a transient person. Bristol v. Rutland, 10 Vt. 574. (6) In Pennsylvania the act of June 25, 1885, imposing on counties liability for support of homeless persons in certain cases, is limited to persons found traveling about from place to place, idle, and apparently homeless, and without means of subsistence. Austin Poor Dist. v. Potter County, 1 Pa. Dist. 637.

[b] **That the disability should be caused by the sudden visitation of disease or accident** (1) is not necessary (Stone v. Glover, 60 Vt. 651, 15 A 334; Charleston v. Lunenburgh, 23 Vt. 525), (2) but "otherwise disabled" is enough (Stone v. Glover, supra; Charleston v. Lunenburgh, supra).

[c] **Persons held not transient paupers.**—(1) Vershire v. Hyde Park, 64 Vt. 638, 25 A 431. (2) A married woman who, with her children, comes to reside in a town, and, while seeking recovery for support from another town, comes to want, is not a "transient." Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454. (3) A pauper who comes into a town, intending and desiring to remain, and stays for months, able to walk about, is not a "transient pauper," for supporting whom an individual furnishing necessaries can recover reimbursement from the town. Macoon v. Berlin, 49 Vt. 13. (4) One who has bought a house and lot in a town, and supports his family there for a time before he becomes indigent, is not a "transient pauper" for whose support such town can recover of the town whence he came. New Haven v. Middlebury, 63 Vt. 399, 21 A 608.

[d] **State paupers; period of relief.**—Under L. (1878) c 94 § 3, providing that all persons needing relief, and having no settlement in any town in the state, shall be state paupers, and shall, when needing relief, be provided for by the comptroller "for the period of six months after they came into this state," it has been held that the period intended was the first six months after their arrival in the state. Marlborough v. Chatham, 50 Conn. 554.

[e] **Funeral expenses.**—A statute

distress and in need of immediate relief,[42] although ordinarily he may be capable of self-support.[43] The fact that such person is able but unwilling to provide for himself by his labor is immaterial as affecting the duty of the authorities to assist him.[44] So the fact that he has some property will not affect his right to relief if the property is inaccessible or otherwise unavailable, and he is without credit or friends,[45] the question of his ability to pay for his support arising only as between the town providing support and the town of his legal settlement, after such support is furnished.[46] On the other hand a person may have no property, and yet, if he is supported by relatives or friends, not be in need of immediate relief within the meaning of the statute.[47] A statute providing for the relief of indigent residents in the county does not include a transient.[48]

[§ 7] **B. Powers and Duties of Public Authorities—1. In General.** At common law the public authorities are not liable for the support of paupers. Such liability rests entirely on statute.[49] The legislature has the power to impose upon the state,[50] and upon counties, towns, and municipalities,[51] the burden of the relief and support of paupers, and may likewise impose such burden upon individuals.[52] Statutes enacted for this purpose are therefore valid,[53] unless they violate some particular provision of the constitution.[54]

Construction of constitutional provisions. Constitutional provisions authorizing aid to paupers must be given a broad construction consistently with their benevolent purpose.[55]

[§ 8] **2. Construction, Operation, and Repeal of Statutes.**[56] The general rules as to construction and operation of statutes[57] ordinarily apply to pauper laws.[58] To render a county or municipality liable, the case must come fairly within the terms of the

authorizing "reasonable" funeral expenses of a nonresident pauper means "reasonable" in fact. Pottawatomie County v. Morrall, 19 Kan. 141.

42. Trumbull v. Moss, 28 Conn. 253; Templeton v. Winchendon, 138 Mass. 109; Shearer v. Shelburne, 10 Cush. (Mass.) 3; Sweetwater County v. Carbon County, 6 Wyo. 254, 44 P 66.

43. Sweetwater County v. Carbon County, supra.

[a] **"A person may be self-sustaining in health,** yet by reason of a sudden illness or calamity, be without means to secure medical attendance, nursing, and maintenance during his illness." Sweetwater County v. Carbon County, 6 Wyo. 254, 261, 44 P 66.

44. Paris v. Hiram, 12 Mass. 262.

45. Norridgewock v. Solon, 49 Me. 385; Sturbridge v. Holland, 11 Pick. (Mass.) 459; Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387; Ripton v. Brandon, 80 Vt. 234, 67 A 541.

[a] **"A person may have property** and yet fall into distress, and be in need of immediate relief, from inability to avail himself of it." Templeton v. Winchendon, 138 Mass. 109, 110.

[b] **The fact that a pauper had fifty dollars in the bank** did not render erroneous, as a matter of law, a finding that the pauper fell into distress and was in need of immediate relief when aid was furnished him, within Pub. St. c 84 § 14, providing that the overseers of the poor of a place shall provide immediate relief to persons found there having a settlement in other places, where they fall into distress and stand in need of immediate relief. Palmer v. Hampden, 182 Mass. 511, 65 NE 817.

46. Norridgewock v. Solon, 49 Me. 385; Danville v. Sheffield, 50 Vt. 243.

Liability of place of settlement see infra §§ 209, 238 et seq.

Necessity of relief as affecting liability of town ultimately liable see infra § 239.

47. Templeton v. Winchendon, 138 Mass. 109.

48. Upshur County v. Yeury, 19 Tex. 126.

49. Ark.—Gunn v. Pulaski County, 3 Ark. 427.

Colo.—Saguache County v. Tough, 45 Colo. 395, 101 P 411.

Ill.—Peo. v. De Witt County, 161 Ill. A. 529; Kankakee County v. Manteno, 68 Ill. A. 365; Fox v. Bristol, 45 Ill. A. 330 [rev on other grounds 159 Ill. 500, 42 NE 887].

Iowa.—Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070; Cerro Gordo County v. Boone County, 152 Iowa 692, 133 NW 132, 39 LRANS 161, AnnCas1913C 79; Cooledge v. Mahaska County, 24 Iowa 211.

Me.—Davis v. Milton Plantation, 90 Me. 512, 38 A 539; Kellogg v. St. George, 28 Me. 255; Blakesburg v. Jefferson, 7 Me. 125.

Mass.—Plymouth v. Wareham, 126 Mass. 475; Berlin v. Bolton, 10 Metc. 115; Monson v. Chester, 22 Pick. 385; Robbins v. Townsend, 20 Pick. 345; East Sudbury v. Sudbury, 12 Pick. 1; Miller v. Somerset, 14 Mass. 396.

Nebr.—Gilligan v. Grattan, 63 Nebr. 242, 88 NW 477.

N. H.—Otis v. Strafford, 10 N. H. 352.

Pa.—Williams County v. Mercer County, 4 Pa. Dist. 171, 15 Pa. Co. 525.

S. D.—Roane v. Hutchinson County, 40 S. D. 297, 167 NW 168.

Vt.—Morristown v. Hardwick, 81 Vt. 31, 69 A 152; Worcester v. Ballard, 38 Vt. 60; Thetford v. Hubbard, 22 Vt. 440; Churchill v. West Fairlee, 17 Vt. 447; Houghton v. Danville, 10 Vt. 537; Baldwin v. Rupert, 8 Vt. 256; Ives v. Wallingford, 8 Vt. 224; Castleton v. Miner, 8 Vt. 209; Aldrich v. Londonderry, 5 Vt. 441; Jamaica v. Guilford, 2 D. Chipm. 103; Middlebury v. Hubbardton, 1 D. Chipm. 205.

[a] **The right to support rests on positive law** and not on contract, express or implied. Augusta v. Waterville, 106 Me. 394, 76 A 707; Davis v. Milton Plantation, 90 Me. 512, 38 A 539; Augusta v. Chelsea, 47 Me. 367; Morristown v. Hardwick, 81 Vt. 31, 69 A 152.

50. Augusta v. Waterville, 106 Me. 394, 76 A 707; State v. Thompson, 317 Mo. 903, 297 SW 62.

[a] **Pensions for blind.**—(1) In view of Const. art 4 § 47, authorizing pensions to deserving blind, the legislature has the right to define "deserving blind" to determine who and by what test one should come within the provisions of any law it might enact to pension blind persons. State v. Thompson, 317 Mo. 903, 297 SW 62; Shelley v. Missouri Commn. for Blind, 309 Mo. 612, 274 SW 688. (2) The courts are without power to make exceptions to L. (1923) p 304 § 1, providing that blind persons who are maintained in either public, private, or endowed institutions shall not be entitled to a pension under the act. State v. Thompson, supra. (3) Where a blind person entitled to a pension under the statute becomes an inmate of a county almshouse, the state auditor must, on receipt of a certificate from the state blind commission acquainting him with such fact, strike such person's name from the pension rolls, notwithstanding the latter was compelled to enter the almshouse because of the auditor's failure to transmit his pension money. State v. Thompson, supra.

51. Colo.—Saguache County v. Tough, 45 Colo. 395, 101 P 411.

Ill.—Perry County v. Du Quoin, 99 Ill. 479; Fox v. Kendall, 97 Ill. 72.

Ky.—Lexington Orphan Soc. v. Fayette County, 6 Bush 413.

La.—Webster v. Rapides Parish Police Jury, 51 La. Ann. 1204, 25 S 988.

Me.—Augusta v. Waterville, 106 Me. 394, 76 A 707.

Mo.—Shelley v. Missouri Commn. for Blind, 309 Mo. 612, 274 SW 688.

Okl.—Logan County v. State, 122 Okl. 268, 254 P 710.

Ont.—Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 12 OntWN 2, 34 DomLR 691.

[a] **Keely cure.**—Const. (1879) art 202, providing that the taxing power may be exercised by the general assembly for state purposes, and by parishes under authority granted to them by the general assembly for parish purposes, when construed with art 163, providing that the general assembly shall make it obligatory on each parish to support all infirm, sick, and disabled paupers residing within its limits, warrants the adoption of Act (1894) No. 157, requiring the parishes to pay the expense of treatment at the Keely Cure Institute of persons who are themselves unable to pay therefor. Webster v. Rapides Parish Police Jury, 51 La. Ann. 1204, 25 S 988.

[b] **Oklahoma constitution** requiring counties to provide for those inhabitants who, by reason of age, infirmity, or misfortune may have claims on the sympathy and aid of the county, is mandatory. Bd. of Comrs. of Logan County v. State, 122 Okl. 268, 254 P 710.

Local authorities liable see infra §§ 205–210.

52. See infra §§ 174–186.

53. See cases supra notes 50, 51.

54. State v. Hallock, 14 Nev. 202, 33 AmR 559; Collins v. Martin, 290 Pa. 388, 139 A 122, 59 ALR 311.

[a] **Old Age Assistance Act of 1923** (Pa. St. Suppl. [1924] §§ 16734b1–16734b37) is invalid as violating the constitution providing that no appropriations, except for pensions or military service, shall be made for charitable, etc., purposes to any person or community. Busser v. Snyder, 282 Pa. 440, 128 A 80, 37 ALR 1515.

[b] **State asylum.**—A statute "to establish and maintain a state asylum for the indigent," etc. (Acts [1879] p 142) was unconstitutional as contravening Const. art 13 § 3, requiring the respective counties to provide for paupers. State v. Hallock, 14 Nev. 202, 33 AmR 559.

Subjects and titles of acts see Statutes [36 Cyc 1017 et seq].

55. Jones v. Cooney, 81 Mont. 340, 263 P 429.

56. Statutes relating to:
Creation of poor districts see infra § 9.
Settlement and removal of paupers see infra §§ 38–40.

57. See Statutes [36 Cyc 1102 et seq].

58. See case infra this note.

[a] **Statutes construed in pari materia.**—Statutes providing for means

statute,[59] and a statute should not be extended by implication beyond what is necessary to accomplish its purpose.[60] In some jurisdictions it is held that statutes providing for the maintenance of paupers, being enacted in the interests of humanity, must be liberally construed to effectuate the benevolent policy of the legislature.[61]

Mandatory or directory provisions. The general rules for determining whether a statute is mandatory or directory[62] apply to statutes providing for the relief or support of the poor.[63] Where authority given to municipal corporations to adopt by-laws for the relief of the poor is in terms merely permissive, the adoption of such by-laws is discretionary with the municipalities.[64] But where a statute expressly makes it the duty of local authorities to provide for indigent persons, such provision is mandatory and must be strictly complied with.[65]

Retroactive operation of statutes. Such statutes, like constitutional provisions, always operate prospectively, and not retroactively, unless the words used or the objects to be accomplished indicate that a retroactive operation was intended.[66]

Repeal of statutes. The rule that repeals by implication are not favored[67] applies to pauper statutes,[68] and an intent to repeal such statutes must be clearly expressed, or necessarily implied, to effect a repeal.[69]

of support, and other statutes providing for enforcement of orders, are to be construed together. George v. George, 3 Pa. Dist. & Co. 477.

59. Ill.—Perry County v. Du Quoin, 99 Ill. 479.

Iowa.—Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070; Cooledge v. Mahaska County, 24 Iowa 211.

Me.—Bishop v. Hermon, 111 Me. 58, 88 A 86; Davis v. Milton Plantation, 90 Me. 512, 38 A 539; Augusta v. Chelsea, 47 Me. 367; Blakesburg v. Jefferson, 7 Me. 125.

Mass.—Soper v. Wheeler, 239 Mass. 327, 132 NE 46; Plymouth v. Wareham, 126 Mass. 475; Miller v. Somerset, 14 Mass. 396; Mitchell v. Cornville, 12 Mass. 333.

Miss.—Miller v. Tucker, 142 Miss. 146, 105 S 774.

Mo.—Shelley v. Missouri Commn. for Blind, 309 Mo. 612, 274 SW 688.

Nebr.—Gilligan v. Grattan, 63 Nebr. 242, 88 NW 477.

Nev.—Lander County v. Humboldt County, 21 Nev. 415, 32 P 849.

Pa.—Poor Directors v. South Bethlehem Borough, 13 Pa. Dist. 482; Williams County v. Mercer County, 4 Pa. Dist. 171, 15 Pa. Co. 525; McKenna's Case, 40 Pa. Co. 569.

S. D.—Roane v. Hutchinson County, 40 S. D. 297, 167 NW 168; Hamlin County v. Clark County, 1 S. D. 131, 45 NW 329.

Utah.—Ogden City v. Weber County, 26 Utah 129, 72 P 433.

Ont.—Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 12 OntWN 2, 34 DomLR 691.

[a] **Construction and operation of particular statutes.**—Clay County v. Plaut, 42 Ill. 324; Seagraves v. Alton, 13 Ill. 366; La Salle County v. South Ottawa, 12 Ill. 480; Newcomer v. Jefferson Tp., 181 Ind. 1, 103 NE 843, AnnCas1916D 181; Marathon Tp. v. Oregon Tp., 8 Mich. 372; Grim v. Haycock Tp., 1 Pa. Dist. 815; Armstrong v. Berwick Borough Overseers, 10 Pa. Co. 337.

[b] **Estate of decedent without relatives.**—Revision p 397 § 9 requires an administrator of one dying without relatives to pay the interest on his estate annually to the overseer of the poor for the use of the poor of the township, and, if at the expiration of seven years no relatives claim the money, to pay the principal and accumulated interest to the overseer of the poor for the "use of the township;" and it has been held that these last words must be construed to mean for the use of the poor. In re Jones, 8 N. J. L. J. 310.

[c] **Soldiers' relief.**—Crossman v. New Bedford Sav. Inst., 160 Mass. 503, 36 NE 477; Granville v. Southampton, 138 Mass. 256.

[d] **Pension for blind.**—(1) In view of § 2 denying a pension except upon "scientific vision test," the legislature, under Acts (1923) p 303, intended to give "light perception" a peculiar and appropriate meaning in law, requiring expert determination according to known methods, and a certain definite, ascertainable condition in applicant, which precludes speculation, philosophical abstractions, and judicial discretion as to whether an individual is deserving, and an applicant able to see the direction of the motion of a hand at a distance of one foot with the left eye, and able to count the fingers of one hand is not entitled to a pension. Shelley v. Missouri Commn. for Blind, 309 Mo. 612, 274 SW 688. (2) Evidence that applicant for a pension as a blind person could perceive large letters on a chart, could distinguish between ordinary daylight and darkness, could see the direction of the motion of a hand or foot, and could count the fingers at a distance of one foot from the eye, shows a vision "greater than light perception," and renders applicant ineligible, under L. (1923) p 303 § 2, for a pension as a blind person. Gwaltney v. Missouri Commn. for Blind, (Mo.) 14 SW (2d) 988. (3) The allowance to blind persons, under Code (1924) § 5379, is not a "pension," but is in the nature of relief for the poor. In re Hugus, 203 Iowa 607, 213 NW 239.

60. Morristown v. Hardwick, 81 Vt. 31, 69 A 152.

61. Beach v. Marion Tp., 2 Oh. Dec. (Reprint) 221, 2 WestLMonth 95; Ogden City v. Weber County, 26 Utah 129, 72 P 433.

62. See Statutes [36 Cyc 1157].

63. Peo. v. De Witt County, 161 Ill. A. 529; Gleason v. Sedgwick County, 92 Kan. 632, 141 P 584; Hazelip v. Edmonson County Fiscal Ct., (Ky.) 14 SW (2d) 398.

[a] **Granting of pensions,** by the board of county commissioners pursuant to L. (1911) c 146, and L. (1913) c 149, to infirm and destitute persons is discretionary, and not mandatory. Gleason v. Sedgwick County, 92 Kan. 632, 141 P 584.

[b] **Relief of the blind.**—(1) In Illinois an act in force July 1, 1908, empowering county authorities to relieve the blind, was held to make the granting of relief in a particular case discretionary with the board of supervisors. Peo. v. De Witt County, 161 Ill. A. 529. (2) In Kentucky it has been held that Act March 28, 1924 (L. [1924] c 18), providing that each county may contribute a sum not to exceed a specified maximum amount to each needy blind adult in the county, does not require the fiscal court to make provision for needy blind persons, but leaves the matter of provision for the blind to the discretion of the fiscal court, which may refuse to take any action under the statute. Hazelip v. Edmonson County Fiscal Ct., (Ky.) 14 SW (2d) 398.

64. Guérin v. St. Philomène, 16 Rev deJur (Can.) 265; Matter of McDougall, 21 U. C. Q. B. (Ont.) 80.

[a] **Right to contribute to charity** does not imply that there is any obligation to do so; and the fact that a destitute person had no relatives or others responsible for his support cannot create in his interest a right to have a municipal corporation obliged to maintain him. Guérin v. St. Philomène, 16 RevdeJur (Can.) 265.

65. Startup v. Harmon, 59 Utah 329, 203 P 637.

[a] **County's provision for indigent and dependent poor,** including dependent widowed mothers, does not comply with a statute requiring the county to provide a fund to be expended exclusively for partial support of such mothers, such statute not intending to classify them with paupers. Startup v. Harmon, 59 Utah 329, 203 P 637.

66. Conn.—Stone v. Stone, 32 Conn. 142; Wethersfield v. Montague, 3 Conn. 507.

Me.—Augusta v. Waterville, 106 Me. 394, 76 A 707.

Mass.—Worcester v. Barre, 138 Mass. 101.

Mich.—Clark's App., 186 Mich. 300, 152 NW 920.

N. S.—Overseers of the Poor v. Stevens, 44 N. S. 170.

[a] **Statute held not retroactive.**—Where the marriage of a female pauper was rendered valid by the operation of the resolve of March 19, 1821, her derivative settlement, thus gained, could not operate to oblige the town, thus newly charged with her support, to pay for supplies furnished prior to the passage of the resolve. Brunswick v. Litchfield, 2 Me. 28.

Retroactive operation of statutes generally see Statutes [36 Cyc 1201].

Validity of retroactive laws generally see Constitutional Law §§ 778–802.

67. See Statutes [36 Cyc 1071].

68. Peo. v. St. Lawrence County, 103 N. Y. 541, 9 NE 311.

69. Ill.—Smith v. Peo., 65 Ill. 375.

Ind.—Newcomer v. Jefferson Tp., 181 Ind. 1, 103 NE 843, AnnCas1916D 181.

Ky.—Silbersack v. Kraft, 194 Ky. 587, 240 SW 392.

Me.—Augusta v. Waterville, 106 Me. 394, 76 A 707.

N. J.—Atlantic County v. Bugbee, 98 N. J. L. 423, 119 A 785.

Pa.—Nissley v. Lancaster County, 27 Pa. Super. 405; Poor Directors v. Fayette County, 18 Pa. Dist. 53, 35 Pa. Co. 498; Philadelphia v. Nathans, 4 PaLJ 249.

Vt.—Barnet v. Woodbury, 40 Vt. 266.

And see cases infra this note.

[a] **Statutes held repealed.**—Silbersack v. Kraft, 194 Ky. 587, 240 SW 392; Poor Directors v. Fayette County, 18 Pa. Dist. 53, 35 Pa. Co. 498; Barnet v. Woodbury, 40 Vt. 266. See Newcomer v. Jefferson Tp., 181 Ind. 1, 103 NE 843, AnnCas1916D 181 (Burns St. Annot. [1908] § 9741 et seq, providing for the support of the poor, repeals former laws on the subject); Augusta v. Waterville, 106 Me. 394, 76 A 707 (Acts [1905] c 142 repealed the provisions of the revised statutes subjecting towns to liability for support of aliens and their families, and substituted a provision that the relief furnished such persons should be as provided in the case of persons having no legal settlement within the state); Reeves' App., 33 Pa. Super. 196, 199 (Act March 31, 1809 [5 Smith L. p 50], relating to the accounts of the managers of relief and employment of the poor for

II. POOR LAW DISTRICTS AND OFFICERS

[§ 9] **A. Creation, Alteration, Powers, and Liabilities of Districts.** Upon the enactment of a statute creating poor law districts, and having for its object the establishment of a general system for the relief of the poor in a designated county, or throughout the state, local statutes, repugnant thereto, providing for the maintenance of the poor in a county, town, or borough, are thereby repealed, and the management and control of the poor of such borough is vested exclusively in the boards and officers designated by the later act,[70] unless expressly, or by clear implication, exempted from repeal.[71]

Alteration and dissolution of districts. The power to dissolve a poor law district,[72] and the mode and effect of altering such districts, or municipal subdivisions forming a part thereof,[73] is a matter of statutory construction.

Powers of district. The powers of a poor law district are those only which are written into its charter, either in express words or by necessary implication, so that without the exercise of the power it would be impossible for the district fairly to exercise other powers expressly conferred.[74]

Liabilities of district.[75] A poor law district or

the township of Germantown, was superseded by Act June 20, 1839 [P. L. p 337], "for the better regulation and employment of the poor of the township of Germantown," as the latter act provides a complete system for the election of managers and care of the poor in that district).

[b] **Statutes held not repealed.**—(1) Tosh v. Schlottman, 2 Pa. Dist. & Co. 256. (2) Rev. St. (1903) c 27 § 11, declaring that towns shall relieve persons, when, because of poverty, they need relief, is absolute in terms and not repealed expressly or by necessary implication by c 18, authorizing the board of health to furnish medical treatment and care for persons who cannot otherwise be provided for. Hutchinson v. Carthage, 105 Me. 134, 73 A 825. (3) Act June 13, 1836 § 6, requiring an order for relief to be obtained from, and approved by, two magistrates, is not repealed by the act of May 13, 1879, which provides for relief without an order in poor districts where directors of the poor are appointed by the court of quarter sessions. Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643. (4) Payments for indigent tubercular patients in county hospitals for the care and treatment of persons suffering from tuberculosis are governed by Act March 28, 1912 (P. L. p 340), providing for the establishment of county hospitals for the care and treatment of persons suffering from tuberculosis, and such act was not repealed by L. (1918) c 147 (P. L. p 343). Atlantic County v. Bugbee, 98 N. J. L. 423, 119 A 785.

Repeal of local statutes by statutes creating poor law districts see infra § 9.

70. Ill.—Burke v. Monroe County, 77 Ill. 610.

Ind.—Bartholomew County v. Wright, 22 Ind. 187.

Minn.—Cordova v. Le Sueur Center, 74 Minn. 515, 77 NW 290, 430.

N. Y.—Peo. v. Fitch, 148 N. Y. 71, 42 NE 520.

Pa.—Com. v. Summerville, 204 Pa. 300, 54 A 27; Poor Directors v. Fayette County, 18 Pa. Dist. 53, 35 Pa. Co. 498. See also Melvin v. Summerville, 210 Pa. 41, 59 A 483 (holding that the poor district created by the act of June 4, 1879 [P. L. p 78], for which boundaries are the same as that of the county, is a separate quasi-municipal corporation).

[a] **Particular statutes construed.**—(1) By Spec. L. (1881) Extra Sess. c 221, each township in Le Sueur County was required to support its own poor, and the villages of such county remained a part of the township in which they were situated, for the purpose of supporting the poor. By Spec. L. (1885) c 71, this duty devolved "upon the several town boards, boroughs and village councils," and it was held that each village or borough thus became a separate district, liable for the support of its own poor. Cordova v. Le Sueur Center, 74 Minn. 515, 516, 77 NW 290, 430. (2) Act June 4, 1879 (P. L. p 78), being an act to create poor districts, and to authorize the erection of buildings for the relief of the poor, was intended to establish a general system for the relief of the poor without the state, and repealed local acts of March 21, 1865 (P. L. p 501), April 11, 1866 (P. L. p 608), and April 10, 1873 (P. L. p 763), giving the commissioners of Clarion County authority to act as directors of the poor of such county, and providing for the erection by them of necessary buildings for the reception and employment of the poor. Com. v. Summerville, 204 Pa. 300, 54 A 27.

71. Atlantic County v. Tilton, 39 N. J. L. 605; Peo. v. St. Lawrence County, 103 N. Y. 541, 9 NE 311.

[a] **Statutes held not repugnant.**—The enactment of L. (1882) c 28, making the town of Oswegatchie a separate and distinct poor district, did not operate as a repeal of L. (1846) c 245, by which the privilege extended to the supervisors of that county to adopt the Livingston County Act, abolishing the distinction between town and county poor, the two acts not being repugnant to each other, and repeals by implication not being favored. Peo. v. St. Lawrence County, 103 N. Y. 541, 9 NE 311.

72. Local Govt. Bd. v. South Stoneham Union, [1909] A. C. 57.

[a] **Power of local government board.**—The local government board may, by virtue of Divided Parishes Act (1876) § 11, which authorizes the board to dissolve "any Union whether formed under the Poor Law Amendment Act, 1834, or otherwise," dissolve a union formed under a local act of parliament. Local Govt. Bd. v. South Stoneham Union, [1909] A. C. 57, 59.

73. See cases infra this note.

[a] **Consent of guardians to union of parishes.**—Poor Law Amendment Act (1844) § 64 which, in the case of a parish of more than twenty thousand inhabitants, requires, for the union of such parish with any other parish, "the consent in writing of two-thirds at least" of the guardians of such parish, is confined to the case of a single parish, and does not apply to a union of parishes. Local Govt. Bd. v. South Stoneham Union, [1909] A. C. 57.

[b] **Adjustment of rights and liabilities.**—(1) Birmingham Union v. Tamworth Union, [1916] W. N. 324. (2) A portion of a township having been detached from one poor law union and included in another by an order made in pursuance of the Local Governments Acts of 1888 and 1894, the union from which the portion was taken claimed an adjustment of property and liabilities under Local Govt. Act (1894) § 68 as between their union and the union to which the transfer was made; an adjustment was rightly claimed as between the two unions, and not as between the union from which the area was taken and the transferred area, and any matter bearing upon the question whether and to what extent the union from which the area was taken had been financially damnified by the transfer would be properly taken into consideration in the adjustment. Matter of Rochdale Union, [1899] 1 Q. B. 540. (3) Where a person is separated from a union under Poor Law Amendment Act (1834) § 32, the annual sums granted by the county council to the union, under Local Govt. Act (1888) § 24 subs 1 d, § 26 subs 2, are property within the meaning of the words "other property held or enjoyed by such union" in Act (1834) § 32, and in case the parties do not agree under Dissolved Boards of Management and Guardians Act of 1870 (33 & 34 Vict. c 2) § 11, upon the manner of the valuation of these payments, it is the duty of the local government board, upon the true construction of Act (1834) § 32, to ascertain the proportionate value of these payments to every parish of the union according to their existing capital value at the time of the alteration, and upon the basis of that value to fix once for all an amount to be received or paid or secured to be paid by every parish affected by the alteration. Reg. v. Local Govt. Bd., [1901] 1 K. B. 210.

[c] **Transfer of portion of parish from one union to another.**—Where, by an order of a county council made pursuant to Local Govt. Act (1888) § 57, and confirmed by the local government board, a portion of a common-law parish wholly within one poor law union in the county is transferred to a common-law parish within another union in the same county, and the whole area of that parish as extended is included in the rural district to which the transferred portion belonged, but no order has been made altering the boundaries of the two unions, the parish to which the portion was transferred still retains its identity and, as a whole, is within the union in which it was formerly included, notwithstanding its area has been extended. The added portion consequently is within the same union. Bootle v. Whitehaven, [1903] 2 Ch. 142. To same effect West Ham Union Guardians of Poor v. London County Council, [1902] 1 K. B. 562.

Settlement of pauper as affected by annexation, consolidation, division, and incorporation of towns see infra §§ 96–99.

74. Taylor v. Middle Coal Field Poor Dist., 50 Pa. Super. 317.

[a] **Rule applied.**—The middle coal field poor district, embracing portions of the counties of Carbon and Luzerne, and incorporated by the special Act of March 25, 1862 (P. L. p 178), with powers designated by reference to Act April 26, 1855 (P. L. p 294), and its supplement of April 3, 1860 (P. L. p 619), has no power to enter into a contract, without the approval of the courts of Carbon County, to pay an architect two per cent on a very large sum of money for his services in superintending the erection of a proposed new building which was to cost the sum upon which the architect's commission was to be paid. Taylor v. Middle Coal Field Poor Dist., 50 Pa. Super. 317.

75. Liability of officers for negli-

county in furnishing relief to the poor acts in a governmental capacity,[76] and is not liable for injury caused by the negligence of its officers or employees,[77] or of inmates of a pauper institution.[78] On the same principle the county is not liable to a pauper for failure to furnish him proper relief, in the absence of a statute creating such liability.[79]

[§ 10] **B. Officers[80]—1. In General.** The nature of the office held by a poor law officer depends upon constitutional and statutory provisions.[81]

De facto officers. In accordance with the general rule[82] one who exercises the duties of an officer of the poor, with the acquiescence of the public or under color of appointment or election, is a de facto officer,[83] and his acts are valid and effectual so far as the public or the rights of third persons are concerned.[84] Accordingly, one who has been duly elected overseer of the poor and acts as such, without having taken the prescribed oath of office in the manner and time prescribed by statute, is a de facto officer whose acts as such are binding on the township.[85]

[§ 11] **2. Appointment and Election[86]—a. In General.** Matters relating to the election[87] or appointment[88] of officers of a poor law district depend for the most part upon the particular statutory provisions.[89]

[§ 12] **b. To Fill Vacancy.**[90] The power conferred upon the legislature to provide for the election or appointment of an officer of the poor necessarily embraces the power to provide for the filling of vacancies in that office.[91] Usually vacancies in such offices are required to be filled by appointment,[92] but to justify an appointment it is of course

gence or misconduct see infra § 26.

76. Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070; Wildoner v. Luzerne County Cent. Poor Dist., 267 Pa. 375, 110 A 175; Peasley v. McKean County Poor Dist., 12 Pa. Dist. 132, 26 Pa. Co. 428.

77. Peasley v. McKean County Poor Dist., supra. See Enders v. Dauphin County Poor Directors, 44 Pa. Co. 643 (holding that directors of the poor in Dauphin County constitute a corporation for the purpose of caring for the poor, and such corporation, being a public charity, is not liable for torts).

"A county, or poor district, acting as a public agency in the performance of governmental functions, is not liable for the negligence of its officers or employees. It is a part of the machinery which constitutes the public system, and it is organized almost exclusively with a view to the policy of the State at large, for the purpose of political organization, civil administration, and care of the destitute in matters of finance, of provision for the poor, and especially for the general administration of justice, and it is, therefore, invested with the immunity which attaches to the sovereign state." Wildoner v. Luzerne County Cent. Poor Dist., 267 Pa. 375, 377, 110 A 175.

[a] **Negligence of physician.**—The negligence of a poor district physician in treating an inmate of the poorhouse gives no right of action against the district. Peasley v. McKean County Poor Dist., 12 Pa. Dist. 132, 26 Pa. Co. 428.

78. Wildoner v. Luzerne County Cent. Poor Dist., 267 Pa. 375, 110 A 175.

79. Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070.

80. Poorhouse keepers or superintendents see infra § 32.

Public officers generally see Counties §§ 92–215; Municipal Corporations §§ 971–1249; Officers 46 C. J. p 911; States [36 Cyc 852]; Towns [38 Cyc 620].

81. See constitutional and statutory provisions.

[a] **Directors or commissioners of the poor.**—(1) In Kentucky, St. § 1840, giving the fiscal court jurisdiction to provide for the maintenance of the poor, gives that court authority to appoint a commissioner of the poor, which is not a constitutional or statutory office, but is created in the discretion of the fiscal court, which may provide for one or more, in accordance with its practice of caring for the poor. Silbersack v. Kraft, 194 Ky. 587, 240 SW 392. (2) In Pennsylvania directors of the poor holding their office under a special act of assembly erecting them into a corporate body are not county officers. Com. v. Sharetts, 231 Pa. 525, 80 A 1100; Nissley v. Lancaster County, 215 Pa. 562, 64 A 794; Phillips v. Kantner, 39 Pa. Super. 570. (3) But they are public municipal officers, although not so enumerated in the constitution. Com. v. Sharetts, supra.

[b] **Superintendent of poorhouse.**—(1) The superintendent of the county poor asylum is a public officer. Lake County v. Neuenfeldt, 78 Ind. A. 566, 136 NE 580. (2) In South Carolina, Civ. Code (1902) § 785 provides that the county board of commissioners shall have general supervision of the county poorhouse; and § 786 declares that the board shall be empowered to appoint a superintendent, with such assistance as may be needed to provide means for the employment of the inmates. Act of 1901 (23 St. at L. p 754) declares that the term "public officer" shall include all officers of the state previously commissioned, the trustees of the various colleges of the state, members of the various state boards, dispensary constables, and other persons whose duties are defined by law. It was held that a poorhouse superintendent appointed by a county board of commissioners was a public officer, defined as "one who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing and not occasional or intermittent." Sanders v. Belue, 78 S. C. 171, 58 SE 762.

82. See Officers §§ 366–373.

83. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303; Perth Amboy Tp. v. Smith, 19 N. J. L. 52.

84. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303; Perth Amboy Tp. v. Smith, 19 N. J. L. 52.

[a] **De facto overseer** may bind his town by any acts which would be binding if performed by a de jure officer. Smith v. Perth Amboy Tp., 19 N. J. L. 52.

85. Perth Amboy Tp. v. Smith, supra.

86. Of poorhouse keeper or superintendent see infra § 32.

Of public officers generally see Officers §§ 64–84.

87. See cases infra this note.

[a] **Power to elect.**—In view of the legislative history on the subject of elections in the town of Cumberland, the act of 1856 conferred on the town council of such town the power to elect an overseer of the poor, and such power is not taken away by the act of 1896. Barber v. Broderick, 30 R. I. 460, 76 A 116.

[b] **Time of election.**—(1) Under Const. art 8 § 3, as amended in 1909 (P. L. p 951), providing that all elections for county, city, ward, borough, and township officers for regular terms of service shall be held on the municipal election day in each odd-numbered year, directors of the poor are to be voted for on that day, and such directors elected on a general election day in the even year are without title to office. Com. v. Sharetts, 231 Pa. 525, 80 A 1100. (2) Act March 10, 1875 (P. L. p 6), providing dates on which township officers shall be elected, does not repeal or modify Act Jan. 20, 1839 (P. L. p 337), relating to the election of managers for the relief and employment of the poor in the township of Germantown. Com. v. Roop, 217 Pa. 534, 66 A 869.

[c] **Number to be elected.**—The election by a town of only one overseer of the poor is valid under a statute giving the right to choose not exceeding twelve. Lyman v. Kennebunkport, 83 Me. 219, 22 A 102.

[d] **Conduct of election.**—Where the boundaries of a parish are not coextensive with an urban district council, or with any of the wards of the urban district, or where the county council has not given directions that the polls for the election of guardians and of urban district councilors shall be taken together, the clerk to the guardians, and not the clerk to the urban district council, is entitled to act as the returning officer at an election of guardians. Rex v. Carter, 68 J. P. 466.

[e] **Election held void.**—Watts v. Hemming, 71 J. P. 504.

[f] **Statute construed.**—Com. v. Reese, 293 Pa. 398, 143 A 127.

[g] **Local act held not repealed by general statute.**—Com. v. Reese, 293 Pa. 398, 143 A 127.

88. See cases infra this note.

[a] **Authority to appoint:** (1) Overseer of the poor. Peo. v. Smith, 236 Ill. 64, 86 NE 167. (2) Commissioner of the poor. Silbersack v. Kraft, 194 Ky. 587, 240 SW 392 (appointment by fiscal court).

[b] **Resolution of parish council.**—A person may be appointed assistant overseer by a resolution of the parish council signed by the chairman of the council. Reg. v. Powell, [1899] 1 Q. B. 396.

[c] **Particular statutes construed.**—Board of Suprs. v. Peo., 49 Ill. A. 369 (poor master of town); Com. v. Dickert, 195 Pa. 234, 45 A 1058 (poor director of poor district); Chadduck v. Burke, 103 Va. 694, 49 SE 976; Jones v. Lewis, [1919] 1 K. B. 328.

89. See statutory provisions; and cases supra notes 87, 88.

90. In public office generally see Officers §§ 121–128.

Term of officer appointed to fill vacancy see infra § 14 note 11 [b].

91. Peo. v. Comstock, 78 N. Y. 356 [rev 18 Hun 311].

92. Shultise v. O'Neill, 85 N. J. L. 15, 88 A 854; Peo. v. Comstock, 78 N. Y. 356; Com. v. Dickert, 195 Pa. 234, 45 A 1058; Com. v. Greene County, 38 Pa. Co. 235.

[a] **Appointment by city council.**—New Brunswick Charter § 17, relating to the filling of vacancies, applies only to offices filled "at the annual charter election," and not to the office of overseer of the poor, a vacancy which was filled by appointment by the city council. Shultise v. O'Neill, 85 N. J. L. 15, 88 A 854.

necessary that a vacancy exist.[93] Hence, an appointment to fill a supposed vacancy caused by the expiration of the incumbent's term where, in fact, such term has not expired, is invalid.[94] Likewise, an appointment to fill a supposed vacancy, caused by an unlawful removal of an existing officer, is invalid.[95] A statute conferring the power to appoint and fill a vacancy must be strictly construed when the power is exercised, and a failure to observe a mandatory requirement of the statute renders the appointment invalid.[96]

[§ 13] **3. Eligibility and Qualification.** The question of eligibility of a person to be officer of a poor law district depends upon the same principles that apply to other public officers,[97] and is generally a matter of statutory construction.[98] A person may be disqualified, under the various statutes because he has received public relief,[99] or has made a composition with his creditors,[1] or is concerned in a contract made with the poor law officers,[2] or is holding another office.[3] The disqualification of a person for the office of superintendent of the poor by reason of his holding another office must be determined by his status at the time of the election held to fill the office of superintendent; and, hence, his subsequent resignation from such other office will not remove his disability.[4] Although the statute provides that honorably discharged Union soldiers shall be preferred for appointment, the appointment of another applicant as poor officer by a board having the selection of a fit person to fill such office, after a determination in good faith of his superior fitness as compared with a discharged soldier, is not reviewable.[5]

Bond. It is usually provided that before entering upon the discharge of his duties the overseer of a poor law district shall give an official bond.[6]

Refusal to qualify; exemptions. A person appointed or elected as officer of the poor may claim exemption, and refuse to qualify.[7] In some jurisdictions the statutes impose a penalty on one refusing to serve,[8] but such penalty is not enforceable where the claim of exemption is sustained.[9]

[§ 14] **4. Term of Office.**[10] The terms of officers of the poor law district are regulated by constitution or statute,[11] and are liable to be changed at any time by the legislature,[12] unless such charge is

93. Peo. v. Ingham County, 36 Mich. 416; Peo. v. Comstock, 78 N. Y. 356 [rev 18 Hun 311]; Close v. Burden, 163 App. Div. 83, 148 NYS 773; Com. v. Greene County, 38 Pa. Co. 235; Chadduck v. Burke, 103 Va. 694, 49 SE 976.

Existence of vacancy in public office generally see Officers §§ 117–128.

94. Peo. v. Comstock, 78 N. Y. 356 [rev 18 Hun 311]; Chadduck v. Burke, 103 Va. 694, 49 SE 976.

95. Peo. v. Ingham County, 36 Mich. 416.

96. Chadduck v. Burke, 103 Va. 694, 49 SE 976.

97. See Officers §§ 32–62.

98. Peo. v. Eichelroth, 78 Cal. 141, 20 P 364, 2 LRA 770; Rex v. Local Govt. Bd., [1918] 2 Ir. 131.

[a] **Medical officer.**—(1) The words, "suitable graduate in medicine," as used in the County Government Act requiring the board of supervisors to appoint some suitable graduate of medicine to attend the indigent sick and dependent poor of the county, mean a person legally licensed to practice medicine under the laws of the state, and are not confined to college graduates. Peo. v. Eichelroth, 78 Cal. 141, 20 P 364, 2 LRA 770. (2) In England the local government board, if satisfied that adequate medical relief for the sick poor was secured, might, in the exercise of the discretion conferred on it, by Poor Relief (Ireland) Act (1851) § 8, require that the appointment of medical officers during the war should be confined to persons over military age. Rex v. Local Govt. Bd., [1918] 2 Ir. 131. (3) The court being satisfied that in the present case the local government board had exercised its discretion with due regard to the needs of the sick poor, the action of the board could not be questioned on the ground that it also had taken into consideration the national and military exigencies arising from the war. Rex v. Local Government Bd. [1918] 2 Ir. 131 [appl Rex v. Local Govt. Bd., 5 N. Ir. J. R. 81].

99. Ex p. Brewster, 96 L. J. K. B. 741.

[a] **Officer held not disqualified.**—Ex p. Brewster, 96 L. J. K. B. 741.

1. Bradfield v. Cheltenham, [1906] 2 Ch. 371.

2. Rex v. Rowlands, [1906] 2 K. B. 292.

[a] **Illustration.**—By Local Govt. Act (1894) § 46 subs 1 "a person shall be disqualified for . . . being a member . . . of a board of guardians if he . . . is concerned in any bargain or contract entered into with the . . . board" and, by subs 7, "where a member of a . . . board of guardians becomes disqualified for holding office . . . the . . . board shall forthwith declare the office to be vacant, and signify the same by notice signed by three members and countersigned by the clerk of the . . . board, and notified in such manner as the . . . board direct, and the office shall thereupon become vacant." It was held that a member of a board of guardians who is concerned in a contract entered into with the board is disqualified for being a member, and the disqualification does not cease by reason of the termination of the contract. Rex v. Rowlands, [1906] 2 K. B. 292.

3. Peo. v. Clute, 50 N. Y. 451, 10 AmR 508.

[a] **Town supervisor** is ineligible, under L. (1853) c 80, for election or appointment to the office of supervisor of the poor. Peo. v. Clute, 50 N. Y. 451, 10 AmR 508 [rev 63 Barb. 365 (mod 12 AbbPrNS 399)]. (2) Under County L. § 220 a town supervisor is ineligible to the office of county superintendent of the poor. Close v. Burden, 163 App. Div. 83, 148 NYS 773.

[b] **Supervisor of a ward** in the city of Schenectady is ineligible for election to the office of superintendent of the poor. Peo. v. Clute, 50 N. Y. 451, 10 AmR 508 [rev 63 Barb. 356 (mod 12 AbbPrNS 399)].

[c] **In Illinois** county commissioners and members of county boards in counties not under township organization cannot hold the office of overseer of the poor under appointment by the county board. Cass v. Kloker, 239 Ill. A. 301.

4. Peo. v. Clute, 12 AbbPrNS 399 [mod on other grounds 63 Barb. 356 (rev on other grounds 50 N. Y. 451, 10 AmR 508)].

5. Peo. v. Alms-House Comrs., 65 Hun 169, 20 NYS 21.

6. See statutory provisions. See also Peo. v. Ingham County, 36 Mich. 416 (Comp. L. c 10 § 477 subd 14); South Williamsport Borough v. Miller, 20 Pa. Super. 266 (Act March 16, 1860 [P. L. p 174] § 1).

[a] **Duty to approve official bond.**—Where a poor master is appointed by a city council for a town, organized out of a part of the territory of the city, under the act of May 23, 1877, the duty of approving his official bond does not devolve upon the board of supervisors of the county. Board of Suprs. v. Peo., 49 Ill. A. 369.

7. Rex v. Justices Derbyshire, [1909] 1 K. B. 449.

[a] **Practicing solicitor** who has been appointed by an urban council as overseer of the poor, and who is unwilling to serve such office, is entitled to claim exemption by appeal to quarter sessions. If the urban council does not appear and oppose such appeal, qu rter sessions ought not to order it to pay the costs thereof. Rex v. Justices Derbyshire, [1909] 1 K. B. 449.

8. See statutory provisions. See also Perth Amboy Tp. v. Smith, 19 N. J. L. 52 (Elm Dig. p 571 § 22). Compare Smithwick v. Williams, 30 N. C. 268 (statute held not applicable to warden of the poor elected under Acts [1846] c 64).

9. Guardians of Poor v. Greene, 5 Binn. (Pa.) 554 (clergyman held exempt).

10. **Poorhouse keeper or superintendent** see infra § 32.

Public officers generally see Officers §§ 97–128.

11. See constitutional and statutory provisions.

[a] **Overseers of the poor.**—The terms of office of overseers of the poor, elected at the February election, 1910, expired, under the constitutional amendment of 1909, the first Monday of December, 1911, and were not extended by Act June 19, 1911 (P. L. p 1052), changing the term of overseers from two to four years. Com. v. Bailey, 237 Pa. 609, 85 A 876; Stauffer v. Wertz, 21 Pa. Dist. 724, 39 Pa. Co. 502.

[b] **Officer appointed to fill vacancy.**—(1) A county board of supervisors has no power to fill a vacancy existing in the office of overseer of the poor for a longer period than its own term of office. Peo. v. Smith, 143 Ill. A. 232 [aff 236 Ill. 64, 86 NE 167]. (2) Under County L. § 220, an appointee to fill a vacancy in the office of county superintendent of the poor on the death of one duly elected holds over as against one disqualified at the time of his election, although he qualifies and resigns and is subsequently appointed, notwithstanding Public Officers' L. §§ 5, 38. Close v. Burden, 163 App. Div. 83, 148 NYS 773.

[c] **Particular statutes construed and applied.**—Com. v. Bowditch, 217 Pa. 527, 66 A 867; South Williamsport Borough v. Miller, 20 Pa. Super. 266; Com. v. Greene County, 38 Pa. Co. 235.

12. Peo. v. Weldon, 14 NYS 447;

prohibited by the constitution.[13] When the law provides that a poor officer shall hold office until his successor is qualified, the period between the expiration of his regular term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory term.[14] Where the statute authorizes the county board of commissioners to appoint a poorhouse superintendent, but fails to fix his term, such term is coextensive with the term of the board.[15] The custom of a county board of commissioners to elect a superintendent of the poorhouse for a period not extending beyond its own term cannot prevent the new board of commissioners from appointing a new supervisor to displace the appointee of the old board, for a term coextensive with the term of office of the new board.[16]

[§ 15] **5. Removal[17]—a. Power To Remove.** A general authority to remove a poor officer will not be implied as a consequence of the power to appoint.[18] But where the statute provides that any officer appointed or employed by the county court shall hold office or employment at its pleasure, the court may dismiss the appointee at any time.[19] Usually the power to remove is regulated by statute,[20] and where such is the case can be exercised only within the prescribed limits.[21]

[§ 16] **b. Grounds of Removal.** Where express provision of law is made for removal, the power so to do can be exercised for no other causes than those specified.[22] It is misfeasance in office, authorizing the removal of a poor officer, to use his official power and the poor fund to coerce the recipients of his favor to vote under his direction;[23] or not to refund to the treasurer of the poor law district money which has been paid to him by persons to whom he has afforded temporary relief;[24] or to draw orders on the treasury of the poor law district in favor of persons without whose knowledge he himself draws the money, and compel the payees to take from himself at exorbitant prices such goods as he sees fit to give them.[25]

[§ 17] **c. Proceedings To Remove.** The proceeding for removal of an officer of a poor law district is of a quasi-judicial nature,[26] and statutory requirements must be observed.[27] The officer is entitled to notice of the charges against him.[28] While the rule is, in the absence of express provision of law, that the charges preferred against the officer must be sufficiently specific to apprise him of what he is to meet, yet the technical rules of pleading are not to be applied.[29]

[§ 18] **6. Compensation and Expenses.**[30] The compensation of officers of the poor,[31] including reimbursement of expenses paid or incurred,[32] is usually a matter of statutory regulation,[33] and cannot rest on custom or usage.[34] Such an officer is entitled to compensation for services performed by him in his official capacity only when such services are authorized by law.[35]

South Williamsport Borough v. Miller, 20 Pa. Super. 266.

13. Poor Directors v. Fayette County, 18 Pa. Dist. 53, 35 Pa. Co. 498.

14. Chadduck v. Burke, 103 Va. 694, 49 SE 976.

15. Sanders v. Belue, 78 S. C. 171, 58 SE 762.

16. Sanders v. Belue, supra.

17. Generally see Officers §§ 145–209.

Poorhouse keeper or superintendent see infra § 32.

18. Peo. v. Ingham County, 36 Mich. 416.

19. Barbor v. Mercer County Ct., 85 W. Va. 359, 101 SE 721.

20. See statutory provisions.

[a] **Removal by resolution of city council.**—The overseer of the poor elected, under P. L. (1902) p 284 § 2, to perform the duties prescribed by § 19 of the act, is a city officer, within the meaning of § 7, providing that any city officer may be removed from office by resolution of the council for good cause shown on complaint, notice, and hearing. Barlow v. Atlantic City, 80 N. J. L. 510, 78 A 11.

21. Peo. v. Ingham County, 36 Mich. 416.

22. Peo. v. Ingham County, supra.

23. Gager v. Chippewa County, 47 Mich. 167, 10 NW 186.

24. Gager v. Chippewa County, supra.

25. Gager v. Chippewa County, supra.

26. Burt v. Iron County, 108 Mich. 523, 66 NW 387.

27. Peo. v. Ingham County, 36 Mich. 416.

[a] **Removal held invalid.**—An attempted removal of a county superintendent of the poor by the board of supervisors was declared invalid, because the resolution of removal failed to receive the vote required by statute. Peo. v. Ingham County, 36 Mich. 416.

28. Burt v. Iron County, 108 Mich. 523, 66 NW 387; Gager v. Chippewa County, 47 Mich. 167, 10 NW 186.

29. Burt v. Iron County, 108 Mich. 523, 66 NW 387.

[a] **Sufficiency of notice.**—In a proceeding before the board of county supervisors for the removal of a superintendent of the poor for improperly allowing claims to himself a bill of particulars setting out the amount of the items improperly allowed, with the date of allowance, sufficiently notifies the officer of the charges against him. Burt v. Iron County, 108 Mich. 523, 66 NW 387.

30. Compensation of public officers generally see Officers §§ 233–286.

31. See cases infra this note.

[a] **County commissioners as poor law officers.**—Act June 7, 1917 (P. L. p 570; Pa. St. [1920] §§ 7429–7431), providing for compensation to county commissioners who are also directors of the poor within counties of a given class, has reference to officers who actually perform duties of directors of the poor and county commissioners. Tucker's App., 271 Pa. 462, 114 A 626.

[b] **Fixing salary; conditions precedent.**—The law not requiring the physician, elected by the county board of health to attend the inmates of the county poorhouse and jail, to notify the county road and revenue commissioners of his acceptance of the office before they shall fix his salary, under Code (1907) § 703 subd "G," the fact that they had not been so notified was no ground for their refusal to act. Mobile County Revenue, etc., Comrs. v. State, 163 Ala. 441, 50 S 972.

[c] **Particular statutes construed.**—(1) Act July 2, 1895 (P. L. p 424), fixing the salaries of county directors of the poor in counties containing over one hundred and fifty thousand inhabitants, does not affect "directors of the poor and of the house of employment of the county of Lancaster," created by Act Febr. 27, 1798 (3 Smith L. p 306), they not being county officers and their salaries being fixed by Act April 14, 1864 (P. L. p 422). Nissley v. Lancaster County, 215 Pa. 562, 563, 64 A 794. (2) Nor does such act affect "Directors of the Poor and of the House of Employment for the County of Schuylkill," created by Act April 4, 1831 (P. L. p 422). Phillips v. Kantner, 39 Pa. Super. 570. (3) Other statutory provisions construed. Phillips v. Kantner, supra; Reeves' Appeal, 33 Pa. Super. 196; Com. v. Warren County Treasurer, 26 Pa. Dist. 113; Tosh v. Schlottman, 2 Pa. Dist. & Co. 256; Jones v. Lewis, [1919] 1 K. B. 328; Rex v. Hertford Union, 111 L. T. Rep. N. S. 716.

32. See cases infra this note.

[a] **Statutes construed.**—(1) Under County L. § 12 subd 5, authorizing the county board of supervisors to fix the compensation of the superintendent of the poor, which shall be a county charge, the personal expenses of the superintendent of the poor are not a county charge, unless made so by the board of supervisors. Strong v. Williams, 167 App. Div. 714, 153 NYS 175. (2) Poor L. § 3 subd 10, when read with subd 14, as amended by L. (1912) c 75, does not authorize a county superintendent of poor to draw money from the county treasurer to repay himself for money disbursed by him. Strong v. Williams, supra.

[b] **Traveling expenses.**—(1) Generally. Poor Directors v. Fayette County, 18 Pa. Dist. 53, 35 Pa. Co. 498; Mercer County v. Allen, 10 Pa. Co. 342; Blatt's App., 7 Pa. Co. 149. (2) Act May 13, 1889 (P. L. p 200), allowing directors of the poor traveling expenses, with the provision that the act shall not apply to directors in counties having special laws under which each director has a compensation of one hundred and fifty dollars or more, and that the act shall not repeal any local law regulating the same, does not apply to a poor director compensated under a local law, even though his per diem compensation may in some years amount in the aggregate to one hundred and fifty dollars. Phillips v. Kantner, 39 Pa. Super. 570.

[c] **Mileage.**—Berks County Director of Poor v. Shingle, 84 Pa. 37.

33. See statutory provisions; cases supra notes 31, 32; and infra note 34.

34. Phillips v. Kantner, 39 Pa. Super. 570.

[a] **Traveling expenses.**—The right of poor directors to an allowance for traveling expenses cannot rest upon usage or custom. Phillips v. Kantner, 39 Pa. Super. 570.

35. Lake County v. Neuenfeldt, 78 Ind. A. 566, 136 NE 580.

[a] **Services held unauthorized.**—(1) Under the county law giving the superintendent of the poor general superintendence and care of poor per-

Increase of compensation. County commissioners who are also directors of the poor are "public officers" within the constitutional provisions forbidding an increase in the compensation of public officers during their term of office.[36]

Void appointment. If the appointment of a poor law officer is void, he is, of course, not entitled to compensation for his services,[37] notwithstanding the approval of his claim by the board of county commissioners;[38] and the county may recover money paid to him by the board.[39]

Pension or superannuation allowance. In England a statute provides for the payment of a pension or superannuation allowance to a poor law officer unable to discharge the duties of his office by reason of mental or physical infirmity, such allowance to be paid from a common fund to which each officer is required to contribute a percentage of his salary or emoluments.[40]

[§ 19] **7. Authority, Powers, and Duties[41]—a. In General.** The powers and duties of overseers or other officers of the poor are prescribed by statute,[42] and are limited thereby.[43] They have no authority, as such officers, to intermeddle with the

sons, and providing that all pauper insane must be transferred to a state hospital, and State Charities L. (L. [1896] pp 528, 532, 539, 545 c 546) §§ 68, 94, 109, 124, requiring the county superintendent of the poor to place epileptic paupers in the epileptic colony, and idiots in the proper asylum, etc., the superintendent of the poor of a county must provide for the conveyance of paupers to the proper institution or make provision for the conveyance, and, where a county superintendent receives an annual salary in full compensation for all his services, he can receive no other amount except by way of reimbursement for expenses incurred, and the board of supervisors is without authority to fix the compensation of the superintendent for conveying poor persons to the proper institutions. Peo. v. Westchester County, 65 Misc. 227, 119 NYS 695. (2) The board of county commissioners has no authority to instruct the county superintendent of the poor asylum to attend meetings of charitable organizations and reimburse him for his expenses so incurred, and its action in so doing is void, notwithstanding such attendance was requested by the state board of charities. Lake County v. Neuenfeldt, 78 Ind. A. 566, 136 NE 580.

36. Tucker's App., 271 Pa. 462, 114 A 626.

Nature of office generally see supra § 10.

37. Cass v. Kloker, 239 Ill. A. 301.

38. Cass v. Kloker, supra.

39. Cass v. Kloker, supra.

40. Poor Law Officers' Superannuation Act of 1896 (59 & 60 Vict. c 50).

[a] **Contract in violation of act.**—(1) The contributory scheme of superannuation allowances upon retirement instituted by the act is a compulsory statutory provision, both in the interests of the community and of the officers concerned, and binding upon guardians and their officers and servants alike, not a voluntary benefit which those officers can renounce at pleasure. It is, therefore, not competent for an officer to contract, wholly or partially, out of the scheme and scope of the act. Dewhurst v. Salford, [1925] 1 Ch. 655 [allowing app [1925] 1 Ch. 139, and aff [1926] A. C. 619]. (2) Thus poor law guardians cannot validly enter into an agreement with one of their officers or servants under which he is to receive something less than the pension or superannuation allowance provided by the statute. Dewhurst v. Salford, supra. (3) Nor can an officer or servant contract that a special war bonus shall be paid to him without deduction of the percentage prescribed by the statute, and that such bonus shall not be reckoned in calculating the pension due him on retirement. Dewhurst v. Salford, supra.

[b] **Calculation of allowance; emoluments.**—(1) Rex v. Ministry of Health, 92 L. J. K. B. 373. (2) Certain gratuities by the sanction of the minister of health were paid by a board of guardians to a registrar of births and deaths. Under Local Authorities (Expenses) Act (1887) § 3 and by virtue of the sanction of the minister these payments could not be disallowed by the district auditor. A statutory percentage was deducted from them as being part of his "emoluments" for the purpose of a superannuation allowance to which the registrar would be entitled on his retirement from office; and on his retirement he received an allowance which was based on an average of his remuneration by statutory fees of office plus the gratuities in the preceding five years. The district auditor disallowed so much of the allowance as was based on the gratuities and surcharged it on certain of the guardians and ex-guardians. It was held that the gratuities were part of the registrar's emoluments within the meaning of Poor Law Officers' Superannuation Act (1896) § 12, and as the auditor was precluded from disallowing them by reason of the minister's sanction, he could not disallow that portion of the payment of the superannuation allowance which was based on an average of his remuneration consisting of the gratuities. Rex v. Grain, [1927] 2 K. B. 205 [aff [1927] 1 K. B. 540]. (3) A public vaccinator appointed by the guardians of a union or parish in accordance with the vaccination acts is not an "officer" or "servant" of the guardians within the definition of Poor Law Officers' Superannuation Act (1896) § 10, and therefore the emoluments of a public vaccinator who is also district medical officer are not to be taken into account in calculating the amount of superannuation allowance to which he is entitled under that act. Lawson v. Marlborough Union, [1912] 2 Ch. 154.

[c] **Death of one joint appointee.**—By the proviso to § 8 of the act, where "the death . . . of one of the holders of a joint appointment" under the guardians of a union "vacates the office of the other, the officer or servant whose office or employment is vacated, shall, unless he is reappointed by the guardians . . . be entitled to receive during life, out of the common fund of the union, a superannuation allowance . . . if such officer or servant . . . has served for not less than twenty years." It was held that by virtue of § 4 of the same act such an officer was entitled to a superannuation allowance if his aggregate service under guardians of various unions amounted to twenty years, although his service under the guardians of the particular union had only extended over a shorter period. Price v. Eastbourne Union, [1920] 1 Ch. 535.

[d] **Forfeiture of allowance.**—(1) If the officer resigns or is dismissed "in consequence of any offense of a fraudulent character, or of grave misconduct" he forfeits his claim to an allowance. Under this provision the term "grave misconduct" is not limited by the words "fraudulent character," but means misconduct of a very serious character and of a higher standard than that which would justify an employer in dismissing his servant for misconduct. Poad v. Scarborough, [1914] 3 K. B. 959. (2) Plaintiff, who had been in the employment of defendants as relieving officer and collector for a number of years, had been in the habit of retaining and using for his own purpose the moneys which he collected on behalf of defendants, and only paying the sums he had collected into defendants' account every three months. He did this without any intention of defrauding his employers. He was told by defendants that this system must cease and that he must pay monthly into the account of the guardians the sums which he collected; but he reverted to his old practice, and neglected to pay into defendants' account monthly moneys which he had received during the month, and he was not in a position to repay those moneys until he received his salary in the following month. Upon being asked to resign, he sent in his resignation, and subsequently claimed a superannuation allowance alleging that he had become incapable of discharging the duties of his office by reason of permanent infirmity. It was held that the irregularities with regard to the money collected by plaintiff on behalf of defendants amounted to "grave misconduct" within the meaning of Superannuation Act § 7, and that, having in consequence thereof ceased to hold office, he had forfeited all claim to any superannuation allowance. Poad v. Scarborough, supra.

41. Cross references:

De facto officers see supra § 10.

Poorhouse keeper or superintendent see infra § 32.

Public officers generally see Officers §§ 233–364.

42. See statutory provisions.

[a] **In Kansas** the official powers of a township trustee as overseer of the poor are coextensive with his township, and are not restricted to those parts of his township lying outside the incorporated limits of any cities of the third class situated within his township. Leinbach v. Pottawatomie County, 116 Kan. 347, 226 P 993.

[b] **In Montana** county commissioners have, with respect to rules and regulations, wide latitude under statutes giving them supervisory power over paupers, although the county has an auditor whom the statute makes superintendent of the poor, with the duty to examine all claims that may be made upon the county for charity, "under such rules and regulations as may be presented by the county commissioners," under Rev. Codes (1921) §§ 4534, 4833, 4465. Jones v. Cooney, 81 Mont. 340, 263 P 429.

43. Conn.—Fielding v. Jones, 38 Conn. 191; Stratford v. Fairfield, 3 Conn. 588.

Ill.—Rayburn v. Davis, 2 Ill. A. 548.

Ind.—State v. Fountain County, 147 Ind. 235, 46 NE 525; Bartholomew County v. Wright, 22 Ind. 187; Knox County v. Jones, 7 Ind. 3; Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541.

Me.—Furbish v. Hall, 8 Me. 315; Means v. Blakesburg, 7 Me. 132.

N. H.—Glidden v. Unity, 30 N. H. 104; Peterborough v. Lancaster, 14 N. H. 382; Woodes v. Dennett, 9 N. H. 55.

N. Y.—Rochester v. Rush, 80 N. Y.

property of paupers, or to collect and discharge their debts;[44] nor have they any authority to bind the town or county which they represent by acts beyond the scope of their official duties.[45] But acts within the scope of their express or implied authority are binding,[46] and may furnish grounds for presumptions and inferences against a town which they represent in the same manner as such presumptions and inferences may arise against natural persons from their acts.[47] Where township overseers or supervisors of the poor are made subordinate to the county board of supervisors, and their action subject to review for confirmation or repudiation by such board,[48] no action of the overseers or supervisors will bind the contract unless approved by the county board.[49] So where ordinances, rules, and regulations of the directors of the board are required to be approved by the court,[50] such approval is essential to the validity of an ordinance, rule, or regulation passed by the directors.[51]

Power to employ attorney. Poor law officers have implied authority to employ counsel in matters within the scope of the duties of their office.[52]

Power to determine settlement. Poor law officers have not, under their general powers, any authority to determine,[53] or to fix by agreement[54] or by their acts, declarations, or admissions,[55] the settlement of a pauper; nor have they power to submit to arbitration the question of such settlement.[56]

Power to appoint or remove employees. Where poor law officers have power to appoint matrons, attendants, and other agents,[57] and to remove them at pleasure, they may dismiss an employee without assigning any reason therefor,[58] or giving previous notice to the employee;[59] and it is immaterial that the dismissal may have been brought about by two out of the three members of the board, conspiring together to make removals and to divide appointments between them.[60] In such case the person removed cannot recover from the county for wages after his removal,[61] although the person appointed in his place may recover for wages earned, if he was

302 [rev on other grounds 15 Hun 239]; Norwich Overseers of Poor v. Pharsalia Overseers of Poor, 15 N. Y. 341; Norwich Overseers of Poor v. New-Berlin Overseers of Poor, 18 Johns. 382.

Pa.—Nason v. Directors of Poor, 126 Pa. 445, 17 A 616; Wimer v. Worth Tp. Overseers of Poor, 104 Pa. 317; Cumberland County v. Mohler, 7 Pa. Super. 614.

Eng.—Limerick Union Guardians of Poor v. Casey, [1920] 2 Ir. 399.

[a] **Statute providing that the superintendent of county poor asylums shall be guided by suggestions of the board of state charities** is not an extension of his authority or duties, but an instruction to perform those duties imposed by law in accordance with the suggestions of the board of state charities. Lake County v. Neuenfeldt, 78 Ind. A. 566, 136 NE 580.

[b] **Cancellation of contracts.**—In England guardians of the poor cannot cancel a contract definitely and finally entered into without the consent of the local government board. Limerick Union Guardians of Poor v. Casey, [1920] 2 Ir. 399.

[c] **Assuming parental control; resolution.**—(1) In England, where guardians desire to exercise the powers of parental control over pauper children given to them by Poor Law Act (1899) § 1 subs 1 (ii), a resolution to the effect that they are of opinion that the parent of the child is unfit, by reason of the existence of some one or more of the conditions set out in subs 1 (ii) of the section, is a condition precedent to the exercise of such power; and accordingly, where the guardians assumed parental control of children, purporting to act under the section, without having passed such a resolution, the court, upon the application of the parent, granted a writ of habeas corpus directed against the guardians to release such children. In re McGlynn, [1913] 2 Ir. 337. (2) Where guardians of the poor passed a resolution that a child chargeable to the union should be placed under their control until she reached the age of eighteen, and more than two years afterward the mother of the child knowingly assisted her to leave, without the consent of the guardians, the place where she was under the control of the guardians, it was not necessary, in a prosecution for that offense, for the guardians to prove the grounds upon which the resolution was passed, or that such grounds were good grounds, within Poor Law Act § 1. Hurst v. Nowlan, [1917] 2 K. B. 863.

44. Fielding v. Jones, 38 Conn. 191; Furbish v. Hall, 8 Me. 315.

45. Means v. Blakesburg, 7 Me. 132.

[a] **Assessors of plantations** have no general authority to bind the plantation by their contract for the support of the poor beyond the amount of the money raised. Means v. Blakesburg, 7 Me. 132.

46. Me.—Unity v. Thorndike, 15 Me. 182.

Mass.—Belfast v. Leominster, 1 Pick. 123.

N. H.—Hanover v. Eaton, 3 N. H. 38.

N. Y.—Peo. v. Bennett, 37 N. Y. 117, 93 AmD 551, 4 Transcr. A. 32, 4 AbbPrNS 89, 1 Cow. Cr. 1.

Pa.—Alexander v. Zerbe Tp. Poor Dist., 63 Pa. Super. 356; Warner v. Berks County Poor Directors, 38 Pa. Super. 437.

Vt.—Burton v. Norwich, 34 Vt. 345.

[a] **Particular acts or contracts held binding.**—(1) Selectmen of a town, being ex officio overseers of the poor, may bind the town by a contract not to take advantage of any defects in a notice given by another town that a pauper has been relieved. Hanover v. Eaton, 3 N. H. 38. (2) The overseers of a poor district have authority to enter into a contract to secure the "Pasteur Treatment" for residents of the poor district who had been bitten by a mad dog. Alexander v. Zerbe Tp. Poor Dist., 63 Pa. Super. 356. (3) Where an order of removal of a pauper is made, and the pauper removed, but the time for taking an appeal has not transpired, it is competent for the overseers of the poor of the two towns to adjust the matter and place all parties in statu quo. Pawlet v. North Hero, 8 Vt. 196. (4) Act March 11, 1837 (P. L. p 45), establishing the directors of the poor of Northampton County, making them "one body politic corporate," relative to the poor of such county, and § 5, making it their duty in each year to furnish the county commissioners with an estimate of the probable expense for one year, and such commissioners' duty to assess and collect the amount of such estimate to be paid the directors by the county treasurer on warrants in their favor by such commissioners, "as the same may be found necessary," such commissioners are bound to pay orders by such directors for amounts within their estimates. Com. v. Coyle, 185 Pa. 198, 201, 39 A 814.

[b] **Office a mere agency of county.**—The office of superintendent of the poor of a county, although invested with corporate powers, is a mere agency of the county, and the relation is that of principal and agent. Peo. v. Bennett, 37 N. Y. 117, 93 AmD 551.

47. Glidden v. Unity, 33 N. H. 571.

48. See statutory provisions.

49. Ellison v. Harrison County, 74 Iowa 494, 38 NW 372; Collins v. Lucas County, 50 Iowa 448; Red Willow County v. Davis, 49 Nebr. 796, 69 NW 138; Peo. v. Ames, 19 HowPr (N. Y.) 551; Jenks Tp. Poor Dist. v. Sheffield Tp. Poor Dist., 135 Pa. 400, 19 A 1004 (holding, however, that Act June 4, 1879 (P. L. p 78), providing for making each county a single poor district, with the county commissioners as overseers, to whom the poor are to be transferred as soon as buildings and land are prepared, after which delivery the overseers of the townships shall cease to act, does not take away the authority of the township overseers where no provision has been made by the county).

50. See statutory provisions.

51. Taylor v. Middle Coal Field Poor Dist., 50 Pa. Super. 317; In re Middle Coal Field Poor Dist. Insane Asylum, 20 Pa. Dist. 673.

52. Neary v. Robinson, 98 N. Y. 81 [mod on another ground 27 Hun 145]; Burton v. Norwich, 34 Vt. 345.

53. Holden v. Brewer, 38 Me. 472.

54. Brewster v. Harwich, 4 Mass. 278; Clifford Poor Dist. v. Gibson Poor Dist., 14 Pa. Co. 327.

55. New Vineyard v. Harpswell, 33 Me. 193; Peru v. Turner, 10 Me. 185.

56. Griswold v. North Stonington, 5 Conn. 367.

57. Warner v. Berks County Poor Directors, 38 Pa. Super. 437.

[a] **Necessity of ordinance, rule, or regulation and approval by court.**—Under Act March 29, 1824 (P. L. p 200), providing that a majority of the poor directors shall constitute a quorum for the transaction of business and have full power to pass all ordinances, rules, and regulations which they think necessary for the government and support of the poor, and providing "that the same ordinances, rules and regulations shall not have any force or effect until they shall have been submitted to the court of quarter sessions . . . and shall have received the approbation of said court," the poor directors may, without an ordinance, rule, or regulation approved by the court of quarter sessions, appoint an agent by the year with a fixed salary per month to investigate applications for relief, to remove paupers and children when necessary, to collect money for the poor district, and to do such other work as may be required of him by the directors. Warner v. Berks County Poor Directors, 38 Pa. Super. 437.

58. Brennan v. Kauffman, 42 Pa. Super. 196.

59. McGuigan v. Belfast Guardians, L. R. 18 Ir. 89; Lloyd v. Bermondsey, 108 L. T. Rep. N. S. 716.

60. Brennan v. Kauffman, 42 Pa. Super. 196.

61. Brennan v. Kauffman, supra.

in no way connected with the illegal conspiracy.[62]

County commissioners as poor law officers.[63] In counties in which the county commissioners also act as overseers or directors of the poor the two offices are regarded as separate entities, with separate powers and duties fixed by statute.[64]

[§ 20] **b. As to Indebtedness and Expenditures—(1) For Relief and Support—(a) In General.** The powers of poor officers as to incurring indebtedness and making expenditures for the care and support of paupers are strictly limited by the statutes relating to the maintenance of the poor, and they cannot ordinarily step beyond the letter of those acts.[65] Being public officers, who have the care and oversight of paupers, by necessary implication they have the power to bind their town or county by any contracts made within the scope of their authority,[66] and liability thereunder cannot be defeated by failure or refusal to vote the necessary taxes to meet the obligation.[67] Officers of the poor are not restricted to the confines or instrumentalities of the poorhouse in making provision for the poor,[68] unless the statute expressly or impliedly so provides.[69]

Extending relief without previous order. Overseers of the poor have no authority to appropriate the moneys of the town or bind it for the support of a pauper without an order from a justice of the peace or superintendent of the poor, where such order is required by statute,[70] at least where the expenditure is greater than a sum fixed by statute.[71]

Determination of right to relief. It is the duty of officers of the poor, where a person is found in distress, to institute an inquiry for the purpose of

62. Brennan v. Kauffman, supra.

63. **Generally** see supra § 10.

64. Tucker's App., 271 Pa. 462, 114 A 626.

65. Ill.—Clay County v. Plaut, 42 Ill. 324.

Ind.—Knox County v. Jones, 7 Ind. 3.

Mont.—Lebcher v. Custer County, 9 Mont. 315, 23 P 713.

N. Y.—Strong v. Williams, 167 App. Div. 714, 153 NYS 175.

Pa.—Gibson v. Plumbcreek Poor Dist., 122 Pa. 557, 15 A 926; In re Middle Coal Field Poor Dist. Insane Asylum, 20 Pa. Dist. 673; Rush Tp. v. Lynn, 4 Pa. Dist. 651.

Vt.—Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387; Ives v. Wallingford, 8 Vt. 224.

Eng.—Bury and District Joint Hospital Bd. v. Chorlton Union, 70 J. P. 31.

[a] **Poor law officer derives his power from the law,** and such power cannot be abridged by the action of any other officer. Clay County v. Plaut, 42 Ill. 324.

[b] **An appropriation to poor officers to buy coffee** does not authorize the purchase of a compound which is used as a substitute for coffee. Ottoman Cahvey Co. v. Philadelphia, 1 Pa. Cas. 443, 4 A 745.

[c] **Waiver of rights.**—An overseer of the poor cannot by his conduct relieve one town from liability for the relief of the poor and charge it upon another; such liability must rest where the statute places it. Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387.

66. Conn.—Welton v. Wolcott, 45 Conn. 329; Fielding v. Jones, 38 Conn. 191.

Ill.—Kankakee v. McGrew, 178 Ill. 74, 52 NE 893; Clay County v. Plaut, 42 Ill. 324; McDonough County v. Pace, 52 Ill. A. 83.

Ind.—Morgan County v. Seaton, 122 Ind. 521, 24 NE 213; Posey County v. Harlem, 108 Ind. 164, 8 NE 918; Howard County v. Jennings, 104 Ind. 108, 3 NE 619; Morgan County v. Seaton, 90 Ind. 158; Fountain County v. Loeb, 68 Ind. 29; Perry County v. Lomax, 5 Ind. A. 567, 32 NE 800; Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541.

Iowa.—Clay County v. Palo Alto County, 82 Iowa 626, 48 NW 1053; Mussel v. Tama County, 73 Iowa 101, 34 NW 762; Hardin County v. Wright, County, 67 Iowa 127, 24 NW 754; Sloan v. Webster County, 61 Iowa 738, 17 NW 168; Bremer County v. Buchanan County, 61 Iowa 624, 16 NW 720; Mansfield v. Sac County, 60 Iowa 11, 14 NW 73; Hunter v. Jasper County, 40 Iowa 568; Armstrong v. Tama County, 34 Iowa 309.

Kan.—Stevens v. Miami County, 6 Kan. A. 438, 49 P 798.

Me.—Hutchinson v. Carthage, 105 Me. 134, 73 A 825; Palmyra v. Nichols, 91 Me. 17, 39 A 338; Linneus v. Sidney, 70 Me. 114.

Mass.—Aldrich v. Blackstone, 128 Mass. 148.

Mich.—Moden v. Van Buren County Superintendents of Poor, 183 Mich. 120, 149 NW 1064.

Mont.—Jones v. Cooney, 81 Mont. 340, 263 P 429.

Nebr.—Waltham v. Mullally, 27 Nebr. 483, 43 NW 252.

N. H.—Derry v. Rockingham County, 64 N. H. 499, 14 A 866; Burbank v. Piermont, 44 N. H. 43; Peterborough v. Lancaster, 14 N. H. 382; Mason v. Bristol, 10 N. H. 36; Woodes v. Dennett, 9 N. H. 55; Andover v. Grafton, 7 N. H. 298; Lee v. Deerfield, 3 N. H. 290.

N. J.—Perth Amboy Tp. v. Smith, 19 N. J. L. 52; Board v. Cronk, 6 N. J. L. 119; Saddle River Tp. Co. v. Colfax, 6 N. J. L. 115; Smith v. Voorheese, 2 N. J. L. 254; Gould v. Bailey, 2 N. J. L. 1.

N. Y.—Osterhoudt v. Rigney, 98 N. Y. 222 [aff 27 Hun 167]; Neary v. Robinson, 98 N. Y. 81 [mod 27 Hun 145]; Cobb v. Fellows, 59 Hun 627, 14 NYS 93; Christman v. Phillips, 58 Hun 282, 12 NYS 338; Paddock v. Symonds, 11 Barb. 117; Hayes v. Symonds, 9 Barb. 260; Grant v. Fancher, 5 Cow. 309; Palmer v. Vandenbergh, 3 Wend. 193; Olney v. Wickes, 18 Johns. 122; King v. Butler, 15 Johns. 281.

Pa.—Roxborough Tp. v. Bunn, 12 Serg. & R. 292.

Vt.—Holloway v. Barton, 53 Vt. 300; Blodgett v. Lowell, 33 Vt. 174; Walden v. Cabot, 25 Vt. 522; Washington v. Rising, Brayt. 188.

[a] **County commissioners may extend money aid** to a man and woman with five minor children, when the man and three children are sick and the family is destitute. Jones v. Cooney, 81 Mont. 340, 263 P 429.

[b] **Where an overseer makes an improvident or extravagant contract** for the support of a pauper, the board of supervisors may, no doubt, reduce the amount to be paid; but, until they act, the contract, if fair and unaffected by fraud, will bind the county. Clay County v. Plaut, 42 Ill. 324.

[c] **The town and not the overseers** are liable on their contracts made within the scope of their authority. Board v. Cronk, 6 N. J. L. 119; Saddle River Tp. v. Colfax, 6 N. J. L. 115.

[d] **Taking contract of indemnity.**—The overseers of the poor may take a contract for the town, indemnifying it against the liability of supporting a pauper, without special instructions. Palmyra v. Nichols, 91 Me. 17, 39 A 338.

Cross references:

Construction of contracts for support see infra § 252.

Powers of part of officers see infra § 24.

Requisites and validity of contracts for support see infra § 251.

67. Waltham v. Mullally, 27 Nebr. 483, 43 NW 252.

68. Henry v. Cohen, 66 Ala. 382; Herkimer County v. Sangerfield, 29 Misc. 213, 61 NYS 114.

69. Knox County v. Jones, 7 Ind. 3; Gallup v. Bell, 20 Hun (N. Y.) 172; Peo. v. Emigration Comrs., 27 Barb. (N. Y.) 562 (both under earlier statute).

[a] **Where a pauper is an inmate of the poorhouse,** an overseer of the poor cannot, at the expense of the county, furnish him with board or supplies elsewhere. Knox County v. Jones, 7 Ind. 3.

[b] **In Alabama** (1) under Code (1907) §§ 1603, 1607, county funds cannot be used for the support of a pauper outside of a poorhouse in the absence of emergency. State v. Mims, 174 Ala. 233, 57 S 466. (2) This limitation on the use of the county funds is not affected by the failure of the board of commissioners to provide a poorhouse. State v. Mims, supra.

[c] **In Montana,** under Rev. Codes (1921) §§ 4525, 4526, a county may provide for the care of the poor by the contract method or the poor farm method, but cannot, at the same time, employ both methods. Jones v. Cooney, 81 Mont. 340, 263 P 429.

70. Princeton v. Mount, 29 N. J. L. 299; Bay v. Cook, 22 N. J. L. 343; Perth Amboy Tp. v. Smith, 19 N. J. L. 52; Gourley v. Allen, 5 Cow. (N. Y.) 644; Adams v. Columbia County, 8 Johns. (N. Y.) 323; Washington County v. Wallace, 8 Watts & S. (Pa.) 94.

[a] **The borrowing of money** by overseers of the poor to pay costs and charges adjudged against their district on an appeal from an order of removal, without an order of relief, is not authorized by an imperative emergency, and does not bind the district. Gibson v. Plumbcreek Poor Dist., 122 Pa. 557, 15 A 926.

[b] **Funeral expenses.**—Directors of the poor are authorized and required to pay the funeral expenses of a destitute person upon the order of two justices, granted after the death and burial of such person. Washington County v. Wallace, 8 Watts & S. (Pa.) 94.

[c] **In Michigan** there is a difference between the powers of superintendents and directors of the poor. A superintendent has full power to provide such temporary relief as he may deem proper, and that without any of the restrictions or qualifications attached to the power of the director, who must apply to a justice of the peace and obtain his order which must not exceed twenty dollars. Hewitt v. Macomb County, 5 Mich. 166.

Order as condition precedent to recovery for relief furnished see infra § 232.

71. Gere v. Cayuga County, 7 How Pr (N. Y.) 255 (ten dollars); Ives v.

ascertaining whether relief is necessary.[72] To the extent of their authority it is a discretionary power to be exercised according to their judgment;[73] and where such officers act in good faith and with reasonable judgment, their determination is conclusive.[74] Where the duty to determine who are entitled to relief as paupers is vested in the county board[75] or township trustees,[76] such duty cannot be delegated by the board or trustees to other persons or organizations; and an allowance by the board to persons not adjudicated to be paupers in accordance with the requirements of the law is illegal.[77]

[§ 21] **(b) Of Paupers Resident in Another Town.** Where there is nothing in the statute which expressly or by implication restricts the power of the overseers to furnishing relief within the limits of their town, it is within the scope of their powers to pay expenses incurred for the support of one of their paupers by another town.[78] And the power to pay the expenses embraces that of settling an action commenced to recover them.[79] But if the method of ascertaining and collecting such expenses is expressly provided by statute, then a contract to pay them is beyond the scope of the overseers' authority, and void.[80] If a pauper has not a settlement in a town, the overseers cannot make the town chargeable therefor by their agreement with another town to pay for his support.[81]

[§ 22] **(2) For Medical Services.**[82] Although a county board of commissioners or supervisors has power to employ physicians for the poor throughout the county,[83] overseers or other officers of the poor have authority in a proper case to employ physicians to attend poor persons falling ill within their towns or districts,[84] subject to rules and regulations of the board of county commissioners;[85] and the jurisdiction of the officer of the township where such poor person resides is not taken away by the fact that the latter's illness requires removal to another township for treatment.[86] The authority of officers of the poor is unquestionable where the county board has failed to provide proper medical attention for the poor of a township,[87] or where the physicians so employed refuse or fail to render proper medical attention to such poor;[88] and the same is true where medical attendance is furnished to strangers entitled to temporary relief, but whom the physicians employed by the board of county commissioners are not bound to attend.[89] Upon the same principle, if the county physician lacks the skill and experience necessary to render reasonably efficient services in any case, the poor officers are authorized to employ special medical as-

Wallingford, 8 Vt. 224 (five dollars).

72. Hutchinson v. Carthage, 105 Me. 134, 73 A 825.

73. Henry v. Cohen, 66 Ala. 382; Peo. v. De Witt County, 161 Ill. A. 529; Clinton v. Benton, 49 Me. 550; Gere v. Cayuga County, 7 HowPr (N. Y.) 255.

74. Ill.—Rock Island County v. Rankin, 118 Ill. A. 499.

Ind.—Morgan County v. Seaton, 90 Ind. 158; Perry County v. Lomax, 5 Ind. A. 567, 32 NE 800.

Me.—Hutchinson v. Carthage, 105 Me. 134, 73 A 825.

Mich.—Belknap v. Benton Tp., 169 Mich. 58, 135 NW 101.

Vt.—Holloway v. Barton, 53 Vt. 300.

[a] **The determination by the overseer of the poor that certain persons are entitled to relief** (1) is an official act which is binding upon the county in favor of those who in good faith furnish medical attendance or supplies in reliance upon that order. Rock Island County v. Arp, 118 Ill. A. 521. (2) An overseer of the poor, in deciding whether relief shall be furnished to a pauper, acts with the authority of a principal, and not under the restrictions of an agency. His decision to aid is a final adjudication, and persons contracting with him to relieve transient paupers are not bound to inquire whether he exceeds his authority. Holloway v. Barton, 53 Vt. 300.

75. Miller v. Tucker, 142 Miss. 146, 105 S 774.

76. Sloan v. Webster County, 61 Iowa, 738, 17 NW 168.

Powers of part of officers see infra § 24.

77. Miller v. Tucker, 142 Miss. 146, 105 S 774.

Liability of sureties on bond of officers see infra § 27.

78. Harpswell v. Phipsburg, 29 Me. 313; Aldrich v. Blackstone, 128 Mass. 148; Andover v. Grafton, 7 N. H. 298.

[a] **Rule applied.**—Under Gen. St. c 70, the overseers of the poor of a town have authority to bind the town by a contract for support to be furnished in another town to a pauper whose settlement is in the former town, but who, at the time the contract for his support is made, is too ill to be removed to the town of his settlement. Aldrich v. Blackstone, 128 Mass. 148.

[b] **Selectmen of a town may give a promissory note** in the name of the town for support furnished to a pauper by the selectmen of another town where the pauper resides, although no legal notice has been served on them, if the time for giving such notice has not expired. Andover v. Grafton, 7 N. H. 298.

79. Harpswell v. Phipsburg, 29 Me. 313.

80. Norwich v. Pharsalia, 15 N. Y. 341.

81. Peterborough v. Lancaster, 14 N. H. 382; Directors v. Overseers, 4 LancLRev (Pa.) 36.

82. Liability of public authorities for medical services to paupers see infra §§ 246–250.

Requisites, validity, and construction of contracts for medical services see infra § 250.

83. Cochran v. Vermilion County, 113 Ill. A. 140; Fayette County v. Chitwood, 8 Ind. 504; Rider v. Ashland County, 87 Wis. 160, 58 NW 236.

84. Ill.—Rock Island County v. Arp, 118 Ill. A. 521; Dieffenbacher v. Mason, 117 Ill. A. 103.

Ind.—Jay County v. Brewington, 74 Ind. 7; Morgan County v. Holman, 34 Ind. 256; Bartholomew County v. Ford, 27 Ind. 17; Warren County v. Saunders, 16 Ind. 405.

Iowa.—Taylor v. Woodbury County, 106 Iowa 502, 76 NW 824; Scott v. Winneshiek County, 52 Iowa 579, 3 NW 626; Collins v. Lucas County, 50 Iowa 448; Cooledge v. Mahaska County, 24 Iowa 211.

Kan.—Leinbach v. Pottawatomie County, 116 Kan. 347, 226 P 993; Pottawatomie County v. Morrall, 19 Kan. 141.

Mich.—Barber v. Saginaw, 34 Mich. 52.

N. Y.—Christman v. Thatcher, 48 Hun 446, 1 NYS 451 [app dism 113 N. Y. 625 mem, 20 NE 877 mem]; Gere v. Cayuga County, 7 HowPr 255; Ex p. Green, 4 Hill 558.

Pa.—Alexander v. Zerbe Tp. Poor Dist., 63 Pa. Super. 356; Brown v. West Salem School Dist., 14 Pa. Dist. 492.

Vt.—Edson v. Pawlet, 22 Vt. 291.

[a] **Pasteur treatment** for person bitten by mad dog. Alexander v. Zerbe Tp. Poor Dist., 63 Pa. Super. 356.

85. Dieffenbacher v. Mason, 117 Ill. A. 103; Warren County v. Saunders, 16 Ind. 405.

86. Rock Island County v. Arp, 118 Ill. A. 521.

87. Ind.—Orange County v. Hon, 87 Ind. 356; Conner v. Franklin County, 57 Ind. 15; Huntington County v. Boyle, 9 Ind. 296; Monroe County v. Galloway, 17 Ind. A. 689, 47 NE 390; Perry County v. Lomax, 5 Ind. A. 567, 32 NE 800.

Iowa.—Collins v. Lucas County, 50 Iowa 448.

Kan.—Clay County v. Renner, 27 Kan. 225.

Nebr.—Meyers v. Furnas County, 93 Nebr. 313, 140 NW 633.

Tex.—Monghon v. Van Zandt County, 3 Tex. A. Civ. Cas. § 198.

[a] **County without poorhouse.**—(1) In Kansas a township trustee has power to bind a county having no poorhouse to pay for medical services rendered a person temporarily a pauper who is a resident of the county and township. Clay County v. Renner, 27 Kan. 225. (2) In Nebraska, in counties where no poorhouse has been established and opened for the reception of paupers, the justices of the peace of the various precincts of such county are vested with entire and exclusive superintendence of the paupers in their precincts, and such a county is not liable for services rendered by a physician to a pauper, unless it appears that such physician had been employed by some of the overseers of the poor. Red Willow County v. Davis, 49 Nebr. 796, 69 NW 138.

[b] **The county board may waive the certificate of the trustees** prescribed by statute, and pay a physician for services rendered to a pauper at the request of the trustees. Collins v. Lucas County, 50 Iowa 448.

[c] **Lack of provision for emergencies.**—Notwithstanding the provisions for medical treatment of children of indigents at the state hospital conducted by the regents of the university, the overseer of the poor in emergency should provide promptly proper medical or surgical treatment for such children where the lack of emergency relief is likely to result seriously, in view of Gen. St. (1915), §§ 6817–6822, 6878–6890, and 6851, and Const. art 7 § 4. Caton v. Osborne County, 110 Kan. 711, 205 P 341.

88. Washburn v. Shelby County, 104 Ind. 321, 3 NE 757, 54 AmR 332; Morgan County v. Seaton, 90 Ind. 158; Lawrence County v. McLahlan, 10 Ind. A. 95, 37 NE 557; Gage County v. Fulton, 16 Nebr. 5, 19 NW 781.

89. Jefferson County v. Rogers, 17 Ind. 341.

Relief to transient poor persons

sistance.[90] But where the county board has made adequate provision for medical attendance to paupers within the county, a township trustee or overseer of the poor has no authority to employ medical or surgical services for paupers within his township.[91] So where a statute expressly prohibits payment by a county board for medical services to poor persons unless done under contract with such board, a physician cannot recover for such services whether rendered voluntarily or at the request of the township board.[92] The question as to the necessities of the person relieved is a matter for the determination of the trustee, and, in the absence of fraud or collusion, his determination is conclusive.[93] So whether or not the township is otherwise provided for is a question of fact to be determined by the trustees.[94]

Relief to persons in cities. The mere fact that the person to whom relief is furnished is found ill within a third class city lying within the township will not take away the jurisdiction of the township, having jurisdiction throughout the township, to furnish such relief.[95] But it has been held that, where a city overseer of the poor is provided for by statute as well as township trustees, the city overseer has exclusive control of the city poor, and there can be no recovery for medical attendance furnished a city pauper on the order of the township trustees.[96]

Unusual or extraordinary services. Poor officers cannot bind a town or county for unusual or extraordinary medical services rendered the poor of such town or county at the request of such overseers, or subsequently ratified by them.[97] This rule is applicable to the conduct of post mortem examinations,[98] and to the treatment of a pauper to cure him of habitual drunkenness as a disease.[99]

[§ 23] **c. Power To Audit Accounts.** Compliance with statutory provisions as to the audit of accounts of overseers of the poor[1] is essential;[2] but an audit will not be rendered invalid by mere irregularities in the proceedings.[3] A statute requiring superintendents of the poor to audit and allow all accounts of overseers of the poor, justices of the peace, and all other persons, for services relating to the support, relief or transportation of county paupers,[4] does not require the audit and allowance of accounts in favor of individuals dealing with the overseers in the several towns. Such accounts may be very numerous and occasionally trifling and should be first adjusted by the overseers, and charged by them in general account.[5] Nor does their auditing power extend to their own contracts.[6] A claim of an attorney for services rendered by him in bastardy proceedings is not one relating to the "support, relief or transportation" of paupers within the meaning of the statute.[7] It is not necessary that an account for the support of a pauper in a county having a county poorhouse should be audited by the town auditors.[8]

In England, where the accounts of guardians of the poor are submitted to an auditor in the first instance, subject to confirmation by the local government board,[9] a district auditor's certificate surcharging a guardian need not be signed at the public audit, but may be signed by the auditor subsequently.[10]

[§ 24] **d. Powers of Part of Officers.** Where the statute declares that a majority of the superintendents of the poor of a county shall be competent to transact business and execute any powers of the board,[11] a majority may act irrespective of, and without consultation with, the minority,[12] and without any authorization of the board at a formal meeting.[13] The general rule is that a minority of the board of overseers or superintendents of the poor cannot bind the county or town by their acts or contracts, even concerning matters within the scope of the board's authority, but at least a majority of the board must act in order to validate

generally see supra § 6.

90. Perry County v. Lomax, 5 Ind. A. 567, 32 NE 800; Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541.

91. Ill.—De Witt County v. Wright, 91 Ill. 529.

Ind.—Morgan County v. Seaton, 122 Ind. 521, 24 NE 213; Washburn v. Shelby County, 104 Ind. 321, 3 NE 757, 54 AmR 332; Robbins v. Morgan County, 91 Ind. 537; Morgan County v. Seaton, 90 Ind. 158; Orange County v. Hon, 87 Ind. 356; Bartholomew County v. Boynton, 30 Ind. 359; Decatur County v. Wheeldon, 15 Ind. 147; Monroe County v. Galloway, 17 Ind. A. 689, 47 NE 390; Woodruff v. Noble County, 10 Ind. A. 179, 37 NE 732 (holding that the fact that the county board had once "in their discretion" paid a physician for his services contracted for by a township trustee does not estop them to refuse to do it again); Lawrence County v. McLahlan, 10 Ind. A. 95, 37 NE 557; Perry County v. Lomax, 5 Ind. A. 567, 32 NE 800; Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541; Lamar v. Pike County, 4 Ind. A. 191, 30 NE 912.

Iowa.—Johnson v. Hamilton County, 167 Iowa 485, 149 NW 639; Lacy v. Kossuth County, 106 Iowa 16, 75 NW 689; Gawley v. Jones County, 60 Iowa 159, 14 NW 236; Mansfield v. Sac County, 59 Iowa 694, 13 NW 762.

Kan.—Smith v. Shawnee County, 21 Kan. 669.

Me.—Goodrich v. Waterville, 88 Me. 39, 33 A 659.

Nebr.—Red Willow County v. Davis, 49 Nebr. 796, 69 NW 138.

[a] **When the county board has established and opened a poorhouse** (1) and spread such facts upon its records, the jurisdiction and authority of the various justices of the peace of the county over the paupers therein cease, and the superintendence, care, and maintenance of the paupers devolve upon the county board. Red Willow County v. Davis, 49 Nebr. 796, 69 NW 138. (2) The board may either employ a physician by the year to furnish such medical services as may be necessary to the paupers of the county or may employ a physician to attend each case as it arises. Red Willow County v. Davis, supra.

[b] **Where a county maintains a poorhouse,** the township trustee cannot bind the county by a contract for medical services rendered to residents of the township. Smith v. Shawnee County, 21 Kan. 669.

Powers of part of officers see infra § 24.

92. Mullen v. Decatur County, 9 Ind. 502.

Liability of county for voluntary or unauthorized medical aid generally see infra § 247.

93. See supra § 20 note 74.

94. Morgan County v. Seaton, 90 Ind. 158; Perry County v. Lomax, 5 Ind. A. 567, 32 NE 800.

95. Leinbach v. Pottawatomie County, 116 Kan. 347, 226 P 993.

96. Hoyt v. Black Hawk County, 59 Iowa 184, 13 NW 72.

97. Morgan County v. Johnson, 29 Ind. 35; Gaston v. Marion County, 3 Ind. 497; Putney Bros. Co. v. Milwaukee County, 108 Wis. 554, 84 NW 822.

98. Gaston v. Marion County, 3 Ind. 497.

99. Putney Bros. Co. v. Milwaukee County, 108 Wis. 554, 84 NW 822.

1. See statutory provisions.

2. Osterhoudt v. Rigney, 98 N. Y. 222 [aff 27 Hun 167].

[a] **In Pennsylvania** (1) Act June 27, 1895 (P. L. p 403), requiring the county comptroller to countersign all warrants drawn by the county commissioners on the county treasury, must be complied with before warrants issued by the poor directors are paid. Lee v. Davis, 22 Pa. Co. 492. (2) But such act does not apply to warrants drawn by the poor directors in counties in which such directors are incorporated by special act of the legislature. Stover Mfg., etc., Co. v. Tobias, 26 Pa. Dist. 431; Nixon v. Fayette County Treasurer, 23 Pa. Dist. 949. (3) The poor directors must, however, render their accounts to the comptroller for audit. Stover Mfg., etc., Co. v. Tobias, supra.

3. Osterhoudt v. Rigney, 98 N. Y. 222 [aff 27 Hun 167].

4. See statutory provisions.

5. Ex p. Green, 4 Hill (N. Y.) 558; Adams v. Columbia County, 8 Johns. (N. Y.) 323.

6. Neary v. Robinson, 98 N. Y. 81.

7. Neary v. Robinson, supra.

8. Peo. v. Washington County, 1 Wend. (N. Y.) 75.

9. See statutory provisions.

10. Rex v. Local Govt. Bd., 100 L. T. Rep. N. S. 434.

11. See statutory provisions.

12. Johnson v. Dodd, 56 N. Y. 76.

13. Osborne v. Macomb County, 26 Mich. 66.

such proceedings.[14] And it has been held that overseers of the poor not being a corporate body, the act of one overseer does not bind another in his official character.[15]

Exceptions to rule. A single member of the board of overseers or superintendents of the poor may bind the county or town where he has been empowered to act by the rest of the board,[16] or, as held in some cases, where the necessity for relief is urgent,[17] in which case the assent of the other officers may be presumed.[18] It has also been held that the signature of one overseer of the poor to a complaint is sufficient,[19] and that a warrant may issue on an information made by a single director.[20] Where the statute provides that every board of township trustees "and the members thereof" shall be overseers of the poor, a single trustee may act so as to bind the town.[21]

Ratification. The action of one, or less than the majority, of the overseers of the poor may thereafter be ratified by a majority of the board, so as to validate the same.[22]

[§ 25] **8. Liability of Officers and Their Sureties—a. Civil Liability—(1) Of Officers on Contracts.** An overseer or superintendent of the poor, acting within the line of his duty and by legal authority and contracting for the use of the public, is not personally responsible on the contract,[23] unless his personal liability is superadded in clear and explicit terms.[24] And where the res gestæ and the attending circumstances show the contract to be on the public account, it is not necessary, in order to screen himself from personal liability, that the officer should expressly say that he contracts in his official capacity.[25] But if the officer makes a contract without sufficient authority legally to bind the poor law district, he is personally responsible thereon,[26] notwithstanding the contract is made in the name of the district;[27] and this is true even where the officer in making the contract acts upon the subject matter within the scope of his authority, if, because of his failure to take a prerequisite step to clothe himself therewith, he has no power to bind the public.[28]

[§ 26] **(2) Of Officers for Negligence or Misconduct.**[29] A poor officer who is negligent in the performance of a duty imposed on him by law,[30] or is guilty of misconduct in office,[31] is personally liable in damages therefor. So where an overseer of the poor wholly neglects his duty in providing for a pauper, he is liable to the pauper for the injuries sustained,[32] but a third person has no right of action against him for such neglect.[33] On the other hand it has been held that, where there is no statute creating liability against a county or district for failure to furnish relief to paupers, a member of the county board who is an overseer of the poor is not personally liable to a pauper for failure to furnish such relief.[34]

[§ 27] **(3) Of Officers and Sureties on Official Bonds[35]—(a) In General.** The liability of sureties on the official bond of a poor officer generally depends upon the terms of the bond,[36] as well as upon the intention of the statute under which it is

14. Colo.—Saguache County v. Tough, 45 Colo. 395, 101 P 411.
Conn.—Haddam v. East Lyme, 54 Conn. 34, 5 A 368.
Iowa.—Sloan v. Webster County, 61 Iowa 738, 17 NW 168.
Me.—Carter v. Augusta, 84 Me. 418, 24 A 892; Boothby v. Troy, 48 Me. 560; Beetham v. Lincoln, 16 Me. 137.
Mass.—Reed v. Lancaster, 152 Mass. 500, 25 NE 974.
Minn.—Bentley v. Chisago County, 25 Minn. 259.
N. H.—Burbank v. Piermont, 44 N. H. 43; Woodes v. Dennett, 9 N. H. 55; Andover v. Grafton, 7 N. H. 298.
Pa.—Nason v. Directors of Poor, 126 Pa. 445, 17 A 616.
Vt.—Wolcott v. Wolcott, 19 Vt. 37.
Wis.—Hittner v. Outagamie County, 126 Wis. 430, 105 NW 950.

[a] **A single county commissioner,** who is ex officio superintendent of the poor, cannot bind the county by contract with a physician, other than the county physician provided for by statute, for medical attendance upon a pauper. Bentley v. Chisago County, 25 Minn. 259.

15. Gould v. Bailley, 2 N. J. L. 6.

16. Windsor v. China, 4 Me. 298; Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 AmD 223; Washington v. Rising, Brayt. (Vt.) 188.

17. Saguache County v. Tough, 45 Colo. 395, 101 P 411; Welton v. Wolcott, 45 Conn. 329.

[a] **In Michigan** Rev. St. (1846) c 38 (Comp. L. c 40) has been construed as giving one member of the board of superintendents of the poor power to determine who are subjects for temporary or permanent relief, without the necessity of calling together the whole board, which, in many cases, would make the relief come too late. Hewitt v. Macomb County Superintendents of Poor, 5 Mich. 166.

[b] **In New Brunswick** it has been held that the fact that overseers of the poor constitute a corporate body does not prevent one overseer from binding the corporation by engaging a physician to attend a person in need of immediate assistance. Irvine v. Stanley Parish, 37 N. B. 572.

18. Lee v. Deerfield, 3 N. H. 290.

19. Castleton v. Clarendon, Brayt. (Vt.) 186.

20. Sterling v. Com., 2 Grant (Pa.) 162.

21. Knox County v. Jones, 7 Ind. 3.

22. Linneus v. Sidney, 70 Me. 114; Smithfield v. Waterville, 64 Me. 412; Fayette v. Livermore, 62 Me. 229.

23. Hanover v. Eaton, 3 N. H. 38; Board v. Cronk, 6 N. J. L. 119; Brazee v. Stewart, 59 App. Div. 476, 69 NYS 231; Holmes v. Brown, 13 Barb. (N. Y.) 599; Olney v. Wickes, 18 Johns. (N. Y.) 122; Ives v. Hulet, 12 Vt. 314.

24. Olney v. Wickes, 18 Johns. (N. Y.) 122; King v. Butler, 15 Johns. (N. Y.) 281; Ives v. Hulet, 12 Vt. 314.

25. Holmes v. Brown, 13 Barb. (N. Y.) 599; Olney v. Wickes, 18 Johns. (N. Y.) 122.

26. State v. Hudson County, 32 N. J. L. 343.

[a] **Contract for relief made without previous order from justice of the peace.**—Bay v. Cook, 22 N. J. L. 343.

27. State v. Hudson County, 32 N. J. L. 343.

28. Ives v. Hulet, 12 Vt. 314.

29. Liability of superintendent or keeper of poorhouse see infra § 32.

30. Flower v. Allen, 5 Cow. (N. Y.) 654.

31. Ames v. Smith, 51 Me. 602.

[a] **In England** (1) an assistant overseer is not the servant of the overseers, but of the vestry. As there is statutory recognition of the office of assistant overseer, the overseers are not liable for his acts in the same way as a sheriff is for the acts of his subordinates. Therefore, where an assistant overseer is party to an excessive distress in the execution of a distress warrant issued for nonpayment of rates, the overseers do not incur liability unless they do some act which makes them responsible. Baker v. Wicks, [1904] 1 K. B. 743. (2) The relieving officer of a union, acting under Lunacy Act (1890) § 20, was honestly satisfied that it was necessary to remove plaintiff, as an alleged dangerous lunatic, to the workhouse, and plaintiff was accordingly removed and detained there. In an action for false imprisonment the jury found that the relieving officer did not take reasonable care to satisfy himself that plaintiff was a dangerous lunatic. It was held that as the officer was honestly satisfied he was protected by the section. Harward v. Hackney Union, 14 T. L. R. 306.

32. Flower v. Allen, 5 Cow. (N. Y.) 654.

33. Otis v. Strafford, 10 N. H. 352; Palmer v. Vandenbergh, 3 Wend. (N. Y.) 193; Minklaer v. Rockfeller, 6 Cow. (N. Y.) 276 (holding further, that if such actions would lie, the burden is on plaintiff to prove the neglect of duty affirmatively and clearly); Flower v. Allen, 5 Cow. (N. Y.) 654.

34. Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070.

[a] **A transient foreign pauper** has no right of action against an overseer of the poor for failure to furnish him adequate and timely medical aid and assistance. Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070.

Liability of county or poor district see supra § 9 note 79.

35. Liabilities on official bonds generally see Officers §§ 388-449.

36. Cosford v. Poor Law Guarantee Assoc., 103 L. T. Rep. N. S. 463.

[a] **Acts held not covered by bond.**—A was appointed assistant overseer of a parish and, by virtue of his appointment under Local Govt. Act (1894) § 17 subs 2, he became clerk to the parish council. Defendant entered into a bond guaranteeing the faithful performance of his duties as assistant overseer. A committed defalcations in respect of moneys received by him as clerk to the parish council. In an action to recover the amount of such defalcations under the guaranty given by defendants, it was held that the defalcations of A in relation to the parish council accounts were not covered by the terms of the bond guaranteeing the faithful performance of his duties in the office of assistant overseer. Cosford

drawn.[37] Allowances to persons not adjudicated to be paupers are illegal,[38] and the officers making such allowances are liable on their official bonds.[39]

Period of liability. The engagement of the sureties is for the future, and, in the absence of special stipulation to that effect, they are not liable for moneys actually received by their principal prior to the term for which they are bound.[40]

[§ 28] **(b) Actions on Bonds.**[41] An action on the bond in behalf of the county must be brought in the name of the county officer who is the payee of the bond.[42]

Limitations. A statute providing that an action against an overseer for the nonpayment of money collected on execution must be brought within three years does not apply to an action on the official bond of an overseer of the poor to recover money alleged to have come into his hands as such overseer.[43]

Pleading. An action against a collector of poor taxes upon his bond by the overseers of the poor cannot be maintained without averment in the complaint that plaintiffs are overseers at the time of the institution of the suit.[44]

Evidence. The official verified reports, filed by the overseer of the poor from time to time as required by statute, are competent against his sureties in an action against them on his official bond, as proof of the condition of his accounts both as to receipts and disbursements.[45] But evidence that certain members of the town board knew before the bond in question was executed that the overseer of the poor of the town was short in his accounts is not competent for the purpose of relieving sureties on the latter's bond from liability.[46]

[§ 29] **b. Criminal Responsibility[47] and Penalties.** Overseers, supervisors, and superintendents of the poor are public officers,[48] and as such are liable to criminal prosecution for neglect of duty or abuse of powers, either at common law[49] or by statute,[50] even after their terms have expired.[51] If, however, the duty imposed upon such officers is a discretionary one, an omission of such duty is not indictable.[52]

Indictment. The indictment must allege that the overseers willfully neglected their duty as such, or must contain other terms equivalent thereto,[53] and should name the paupers neglected or injured, or state a reason for not doing so.[54]

Evidence. Where the indictment charges merely neglect and omission of duty, evidence of acts of positive misfeasance is inadmissible.[55]

Penalties.[56] The nature and extent of liability under a statute imposing a penalty on overseers of the poor for violation of a duty imposed by law depends upon the terms of the statute.[57]

[§ 30] **9. Actions by or against Officers.**[58] It has been held that since an overseer, supervisor, or superintendent of the poor, in discharging his duty as such, is sub modo a corporation,[59] he has the capacity of suing and being sued so far as his trust is concerned,[60] and such right to sue and liability

v. Poor Law Guarantee Assoc., 103 L. T. Rep. N. S. 463.

37. See cases infra this note.

[a] **Omission of statute to provide that officer shall be liable on a bond for nonperformance of a given duty.**—(1) Where the statute requires an officer to collect the poor tax, and that he shall give a bond to the effect that he will pay over all moneys so collected, and the bond given by him so provides, the fact that the statute does not provide that the officer shall be liable on his official bond for the nonperformance of his official duty in collecting the taxes does not affect the liability of the sureties on his bond. Meagher County v. Gardner, 18 Mont. 110, 44 P 407. (2) Where a former statute, providing for the collection of a poor tax by the county assessor also provided that he should be liable on his official bond for the money so collected, was practically reënacted in a subsequent act, with the exception of the provision in respect of the liability on his bond, this omission does not release the sureties on his bond from liability for taxes collected and embezzled by him subsequent to such reënactment, where the condition of the bond was that the officer should pay over all the moneys coming into his hands as such. Meagher County v. Gardner, supra.

38. See supra § 20.

39. Miller v. Tucker, 142 Miss. 146, 105 S 774.

40. Kellem v. Clark, 97 N. Y. 390.

41. Actions by and against officers generally see infra § 30.

42. Butler County Comrs. Ct. v. McCann, 23 Ala. 599.

43. Floyd v. Dutcher, 7 Misc. 629, 27 NYS 880.

44. Horton v. Haymond, 6 Munf. (20 Va.) 399.

45. Goshen v. Smith, 61 App. Div. 461, 70 NYS 623 [aff 173 N. Y. 597, 65 NE 1123].

46. Goshen v. Smith, supra.

47. Of public officers generally see Officers §§ 344-364.

Of superintendent or keeper of poorhouse see infra § 32.

48. See cases infra note 49; and supra § 10 note 81 [a] (3), [b].

49. N. H.—State v. Hoit, 23 N. H. 355.

N. C.—State v. Hawkins, 77 N. C. 494.

Pa.—Com. v. Coyle, 160 Pa. 36, 28 A 576, 634, 40 AmSR 708, 24 LRA 552.

Tenn.—State v. West, 14 Lea 38.

Eng.—Tawney's Case, 16 Vin. Abr. 415.

[a] **Where poor commissioners neglect to supply the poor** under their charge with food and shelter, they may be indicted. State v. West, 14 Lea (Tenn.) 38; Rex v. Meredith, R. & R. 46, 168 Reprint 676.

50. See statutory provisions.

[a] **One employed to assist the selectmen in the care of paupers is an agent** of the town within a statute providing that any agent of a public community who commits certain acts shall be fined, etc. State v. Clerkin, 58 Conn. 98, 19 A 517.

[b] **Failure to provide for punishment.**—Under a statute declaring that, where a duty is enjoined on a person holding any public trust or employment, a willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall be a misdemeanor, etc., an overseer of the poor who willfully neglects to render an account to the town officers of moneys received and disbursed by him, as required by L. (1863) c 172, which provides no punishment for the neglect, is punishable as for a misdemeanor. Matter of Pickett, 55 HowPr (N. Y.) 491.

51. Com. v. Coyle, 160 Pa. 36, 28 A 576, 634, 40 AmSR 708, 24 LRA 552.

52. State v. Williams, 34 N. C. 172.

[a] **Duty to make by-laws and regulations.**—The duties imposed upon the wardens of the poor, under Rev. St. c 87 § 13, to make by-laws and regulations for the comfort of the poor, is a discretionary one, and an omission of such duty is not indictable. State v. Williams, 34 N. C. 172.

53. State v. Hoit, 23 N. H. 355 (if the indictment does not contain terms amounting to a charge of criminal intent, judgment will be arrested).

54. State v. Hawkins, 77 N. C. 494.

55. State v. Hawkins, supra.

56. Generally see Fines, Forfeitures, and Penalties §§ 72-163.

57. Sugarloaf Tp. v. Schuylkill County Director of Poor, 44 Pa. 481.

[a] **Statutes construed.**—(1) The phrase "every such overseer" in a statute requiring that each overseer of a borough divided into nine districts and having an overseer of the parish in each district shall make out and sign the parish list, and declaring that, if any such overseer of any parish shall fail to make out and sign such list, "every such overseer" shall forfeit a specified sum, was construed to authorize the collection of the penalty in a separate action from each overseer so failing to make out and sign such list. Rex v. Share, 3 Q. B. 31, 43 ECL 617, 114 Reprint 419. (2) The provision of Act June 14, 1836 § 18, imposing a penalty on poor law officers for refusal to receive a pauper under an order of removal, is not a remedy to enforce performance of the duty, but a punishment for nonperformance. Porter Tp. v. Jersey Shore, 82 Pa. 275.

58. Authority of part of overseers or board of directors to sign complaint or swear to warrant see supra § 24.

On official bonds see supra § 28.

59. See cases infra note 60.

60. Me.—Baldwin v. Whittier, 16 Me. 33.

Mass.—Powers v. Ware, 2 Pick. 451.

N. Y.—Armine v. Spencer, 4 Wend. 406; Rouse v. Moore, 18 Johns. 407; Jansen v. Ostrander, 1 Cow. 670; Todd v. Birdsall, 1 Cow. 260, 13 AmD 522.

Pa.—Baldwin Tp. v. Kline, 9 Pa. 217; Kelley v. Champion, 33 Pa. Co. 408.

Va.—Chapline v. Overseers of Poor, 7 Leigh (34 Va.) 231, 30 AmD 504.

Eng.—Islington Union v. Brentnall, 71 J. P. 407.

[a] **Selectmen who are ex officio**

to suit, being incident to his office, passes to his successor.[61] A superintendent of the poor may sue either in his corporate name alone,[62] or in his individual name with the addition of his name of office.[63] However, in some jurisdictions it has been held that overseers of the poor are not a corporate body and cannot sue in their own names for moneys of the township expended for a pauper,[64] and that they cannot be sued by a third person for services and supplies furnished to a pauper;[65] but that such actions must be brought by or against the township in its corporate name.[66]

Where an overseer acts merely as agent of the town in receiving money, the right of the town to retain the money cannot be tried in an action against the overseer.[67]

Right of action against predecessor. An overseer of the poor may sue his predecessor in office for moneys officially received by him and unaccounted for.[68]

Discontinuance of action.[69] Where suit is commenced by two overseers of the poor, it cannot be discontinued by one of them alone without the consent of the other;[70] nor can a suit begun by overseers of the poor be discontinued by them after the expiration of their term of office and after others have been elected in their places.[71]

Submission to arbitration. An overseer of the poor has power to submit a claim to arbitration.[72]

[§ 31] **C. Poorhouses and Poor Farms[73]—1. In General.** In many jurisdictions the statutes creating poor districts provide for the purchase of lands, and the erection of buildings for housing paupers, designating the officers who shall have the control and management thereof.[74] The powers conferred by such statutes include those arising by necessary implication from those expressly given.[75] Authority given to public authorities of a county to provide for the maintenance of the poor and to establish poorhouses for that purpose does not prevent such authorities from providing for the poor by

overseers of the poor, no persons having been specially chosen overseers, may sue in their capacity as selectmen. Powers v. Ware, 2 Pick. (Mass.) 451.

[b] **Action of replevin.**—It is no part of the duty, nor within the power, of the overseer of the poor to bring an action of replevin for property alleged to belong to the town. Baldwin v. Whittier, 16 Me. 33.

[c] **Limitations.**—(1) A breach by the guardians of a union of a private contract entered into by them in the performance of their public duties is not "a neglect or default" in the execution "of any public duty or authority" within the meaning of Public Authorities Protection Act (1893) § 1, and consequently the limit of six months prescribed by § 1 (a) for the commencement of proceedings does not apply to a reference to arbitration in respect of such breach. Sharpington v. Fulham, [1904] 2 Ch. 449. (2) A demand for a reference to arbitration under an arbitration clause in a building contract in respect of an alleged breach of that contract by the guardians of a union is not a commencement of proceedings within the meaning of Poor Law (Payment of Debts) Act (1859) § 4, and a claim for damages for breach of such a contract does not constitute "a debt claim or demand lawfully incurred or become due" within the meaning of § 1 of that act until the amount of the damage has been ascertained either by the award of an arbitrator or in some other manner provided by law. Sharpington v. Fulham, supra.

61. Grant v. Fancher, 5 Cow. (N. Y.) 309; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; Horton v. Haymond, 6 Munf. (20 Va.) 399.

[a] **Thus** when the overseers contract a debt, or neglect a duty which devolves upon them as overseers, by which they become liable to another, and then go out of office, they cannot be sued as late overseers, but the action should be against their successors. Grant v. Fancher, 5 Cow. (N. Y.) 309.

[b] **On the death of an overseer of the poor pending an action** brought by him as such, his duly appointed and qualified successor has the same control over such action as he would have had, without being substituted as plaintiff. Bellinger v. Birge, 54 Hun 511, 7 NYS 695, 8 NYS 174.

62. Van Keuren v. Johnston, 3 Den. (N. Y.) 183.

63. Alger v. Miller, 56 Barb. (N. Y.) 227; Paddock v. Symonds, 11 Barb. (N. Y.) 117; Hayes v. Symonds, 9 Barb. (N. Y.) 260; Van Keuren v. Johnston, 3 Den. (N. Y.) 183. Contra Pomeroy v Wells, 8 Paige (N. Y.) 406.

64. Taylor v. Green, 12 N. J. L. 124; Shotwell v. Thornall, 2 N. J. L. 127; Shotwell v. Overseers of Poor, 2 N. J. L. 72.

65. Gould v. Bailley, 2 N. J. L. 1.

66. See cases supra notes 64, 65.

67. Brown v. Marden, 61 N. H. 15.

68. Chapline v. Overseers of Poor, 7 Leigh (34 Va.) 231, 30 AmD 504.

69. Generally see Dismissal and Nonsuit §§ 5-72.

70. Perry v. Tynen, 22 Barb. (N. Y.) 137.

71. Wright v. Smith, 13 Barb. (N. Y.) 414.

72. Chapline v. Overseers of Poor, 7 Leigh (34 Va.) 231, 30 AmD 504.

73. Support of paupers in poorhouses see infra §§ 257, 258.

74. See statutory provisions.

[a] **In Pennsylvania** (1) directors of the poor of York County were unauthorized in 1915 to contract for preparation of plans and specifications of a new almshouse (under Act Febr. 6, 1804, 4 Smith L. p 113) in view of Act April 17, 1866 (P. L. p 110; St. [1920] §§ 7390, 16870), conferring upon county commissioners the duty of erecting new or additional buildings for the poor. Willis v. York County Directors of Poor, 284 Pa. 138, 130 A 401. (2) An architect's unauthorized contract with directors of poor of York County, made in 1915 under Act Febr. 6, 1804, 4 Smith L. 113, was not validated by Act March 20, 1917 (P. L. p 4), conferring authority on directors of the poor to construct new buildings. Willis v. York County Directors of Poor, supra. (3) Neither Act April 19, 1895 (P. L. p 38), relating to the erection of county buildings, nor Act April 4, 1870 (P. L. p 834), requiring county commissioners before making any contract for the erection of county buildings to advertise for bids and award the contract after approval by a judge of the common pleas, applies to the erection of a poorhouse under a contract made for the county poor district by the county commissioners under Act June 4, 1879 (P. L. p 78), after a majority of the voters have approved the project. Melvin v. Summerville, 210 Pa. 41, 59 A 483. (4) Under Act April 22, 1887 (P. L. p 76), a court may confirm a private sale of poor farm lands by the directors of the poor when it appears that such lands are unprofitable for farming purposes and that the price received was fair and the best obtainable. Poor Director's Application, 7 Del. Co. (Pa.) 478. (5) Acts April 6, 1850 (P. L. p 378) and April 17, 1866 (P. L. p 149) do not authorize directors of the poor to sell the whole of an almshouse property and with the proceeds purchase a new site and erect buildings thereon. Poor Directors' Application, 26 Pa. Dist. 313. (6) Under Acts April 26, 1855 (P. L. p 294) and March 25, 1862 (P. L. p 178) the directors of the Middle Coal Field poor district, after having made estimates, purchased land, and erected buildings thereon for the support of the poor, have exhausted their powers in this respect and have no power thereafter to purchase land and erect buildings. In re Middle Coal Field Poor Dist. Insane Asylum, 38 Pa. Co. 278. (7) Sale of city poor farm under Act May 25, 1887 (P. L. p 263) held valid. Straub v. Pittsburgh, 138 Pa. 356, 22 A 93.

[b] **In England,** where permanent casual wards for paupers were erected by the Holborn union upon land which they had acquired many years before, the union borrowing money for the purpose of erecting the wards, which was repaid by installments out of the metropolitan poor fund, as established by the Metropolitan Poor Act of 1867, and the Holborn union sought to have the value of the land so used repaid to them out of the metropolitan common poor fund in one particular half year, it was held that the whole sum could not be allowed in one half year. Rex v. Mowatt, 93 L. T. Rep. N. S. 789.

75. Hamden v. New Haven, 91 Conn. 589, 101 A 11, 3 ALR 1435; Bailey v. Miller County, 24 Ga. A. 746, 102 SE 178; Platter v. Elkhart County, 103 Ind. 360, 2 NE 544; Singleton v. Hamilton, 90 Wash. 243, 155 P 1057.

[a] **Illustrations.**—(1) Under Gen. St. (1902) §§ 2476-2492, providing for the maintenance of poorhouses, a municipality may purchase lands for a poor farm and may cultivate such farm and sell the surplus products. Hamden v. New Haven, 91 Conn. 589, 101 A 11, 3 ALR 1435. (2) The extent of the land which may be purchased is not confined to personal needs but may include reasonable provision for future requirements. Hamden v. New Haven, supra. (3) Remington & B. Code §§ 8374, 8377, 8384, vesting county commissioners with exclusive superintendence of the poor, authorizing them to contract for the maintenance of paupers, and to provide workhouses for their accommodation, authorizes the commissioners by implication to purchase a county poor farm. Singleton v. Hamilton, 90 Wash. 243, 155 P 1057. (4) A board of county commissioners under its broad powers with reference to county property and institutions may change the location of a poor farm. Platter v. Elkhart County, 103 Ind. 360, 2 NE 544. (5) Under Civ. Code (1910) § 542, giving a county power to purchase and hold land for poorhouses, it is within the legitimate powers of a county to rent a farm for the purpose of maintaining and working paupers chargeable against the county, and to furnish live stock and food products necessary to carry out such purposes. Bailey v. Miller County, 24 Ga. A. 746, 102 SE 178.

other modes,[76] and they may accordingly appropriate funds to defray the expense of buildings erected by a charitable society for the maintenance and education of poor children.[77] The repeal of local acts providing for the erection of a poorhouse will not operate retrospectively so as to give validity to proceedings brought under a general statute instead of under the local acts.[78]

[§ 32] **2. Officers and Inmates.** In some jurisdictions it has been held that county commissioners have no authority to appoint a keeper of the poorhouse for a specified term so as to deprive themselves or their successors of the power of removal.[79] So it has been held that an appointment of a keeper for a term of three years is against public policy.[80] On the other hand it has been held that, in the absence of any statutory restriction on the power of the county board, the employment of a poorhouse superintendent for a term of five years is not against public policy.[81] A constitutional provision that the terms of all officers shall be for some specified period applies to the appointment of a committee to take charge of the county poorhouse,[82] and officers claiming under a statute which fails to comply with the constitution are without warrant of office.[83] A continued course of dealing by the town with an overseer of the poor under which he appointed himself keeper of the town farm, and his wife matron, constitutes a ratification of the arrangement, which will preclude the town from recovering possession of the farm until the expiration of the keeper's current annual period of service.[84]

Control and management of inmates.[85] While the superintendent or keeper of the poorhouse or poor farm has such powers for the correction of inmates as are reasonably necessary to keep order and regulate their conduct generally,[86] he may render himself criminally[87] or civilly[88] liable if he acts in an unnecessarily severe manner. So a keeper of a county poor farm has been held civilly liable for neglect causing injury to an inmate.[89]

Removal of pauper; criminal responsibility of keeper. The keeper of a county poorhouse is criminally liable under a statute making it a misdemeanor for any persons to remove a pauper to another county without legal authority,[90] although the removal is made by him on the order of the superintendent of the poor.[91]

Criminal responsibility of inmates. In some jurisdictions the statute makes a pauper inmate of the workhouse subject to criminal prosecution for misbehavior.[92] Willful disobedience of a lawful order of a workhouse officer is not necessarily "misbehavior" within the meaning of such a statute.[93]

[§ 33] **D. Local Taxation for Relief of Poor.**[94] In many jurisdictions statutes provide for local taxation for the relief and support of paupers, and designate the courts, officers, or boards who shall have power to levy the tax, and in some instances prescribe the method of levy and the amount which may be levied.[95] Such taxes can be levied only

76. Lexington Orphan Soc. v. Fayette County, 6 Bush (Ky.) 413. See also supra § 20.

77. Lexington Orphan Soc. v. Fayette County, supra.

78. Com. v. Summerville, 26 Pa. Co. 530.

79. State v. Platner, 43 Iowa 140; Abrams v. Horton, 18 App. Div. 208, 45 NYS 887. See Peo. v. Weldon, 14 NYS 447 (appointment of county superintendent of the poor to act as keeper of the poorhouse operates as a removal of a poorhouse keeper previously appointed).

[a] **In New Jersey,** under a statute giving the board of chosen freeholders the power to appoint poorhouse officers, it may appoint to such office for such term as it sees fit, and abolish the office or change the incumbent at its pleasure. Adams v. Haines, 48 N. J. L. 25, 8 A 723.

80. Millikin v. Edgar County, 42 Ill. A. 590 [aff 142 Ill. 528, 32 NE 493, 18 LRA 447].

81. Pulaski County v. Shields, 130 Ind. 6, 29 NE 385.

82. State v. Lemon, (S. C.) 145 SE 704.

83. State v. Lemon, supra.

84. Lincoln v. Ashworth, (R. I.) 90 A 545.

85. [a] **Casual paupers; task imposed upon.**—Rex v. Baddeley, 70 J. P. 346 (order of local government board requiring casual male paupers detained over night to break stone).

86. State v. Hull, 34 Conn. 132; State v. Neff, 58 Ind. 516.

[a] **It is not assault and battery** for a superintendent of a county asylum to administer moderate corporal punishment to a pauper, when necessary to preserve order and enforce proper discipline. State v. Neff, 58 Ind. 516.

87. State v. Hull, 34 Conn. 132.

[a] **Rule applied.**—(1) The keeper of an almshouse is liable to a criminal prosecution for assault and battery where he placed an aged pauper in chains and locked him in a room, there being no impending danger from the pauper requiring such restraint. State v. Hull, 34 Conn. 132. (2) It is no defense that the selectmen of the town had directed defendant to restrain the pauper if necessary. State v. Hull, supra.

88. Sawyer v. Aldag, 45 Ill. A. 77; Forde v. Skinner, 4 C. & P. 239, 19 ECL 494, 172 Reprint 687.

[a] **Rule applied.**—The superintendent of a poor farm has no right to imprison a pauper upon his refusal to perform physical labor, in the absence of rules established by the county authorities to that effect. Sawyer v. Aldag, 45 Ill. A. 77.

89. Meier v. Paulus, 70 Wis. 165, 35 NW 301.

[a] **Illustration.**—The keeper of a county poor farm who receives a poor person into the poorhouse, and undertakes to care for him, is liable for neglect to give him proper care, even though such person was brought to the poor farm without proper authority and the keeper was not required by law to receive or take care of him there. Meier v. Paulus, 70 Wis. 165, 35 NW 301.

[b] **In England** it has been held that an action cannot be maintained by a pauper inmate of the workhouse against the guardians of the poor for negligence of the workhouse keeper causing injury to the pauper. Tozeland v. West Ham Union Guardians of Poor, [1907] 1 K. B. 920; Dunbar v. Ardee Union Guardians of Poor, [1897] 2 Ir. 76; Brennan v. Limerick Guardians, L. R. 2 Ir. 42.

90. Peo. v. Barlow, 134 Mich. 394, 96 NW 482.

91. Peo. v. Barlow, supra.

92. See statutory provisions.

[a] **Unlawful sexual intercourse** between two paupers in a workhouse constitutes "misbehaviour" within Poor Relief Act (1815) § 5. Holland v. Peacock, [1912] 1 K. B. 154.

93. Mile End v. Sims, [1905] 2 K. B. 200 (where the pauper refused to obey an order transferring him to another workhouse).

94. **Taxation:**
Generally see Taxation [37 Cyc 672].
By:
County see Counties §§ 347-352.
Municipality see Municipal Corporations §§ 4271-4549.
Town see Towns [38 Cyc 652 et seq].

95. See statutory provisions.

[a] **In Georgia,** prior to the adoption of the code, the inferior courts had authority, under Cobb Dig. p 347, to raise a special tax not exceeding one eighth of the general county tax for the support of paupers. Tucker v. Justices Lee County Inferior Ct., 34 Ga. 370.

[b] **In Illinois,** while L. (1861) p 135 require the several towns in Kankakee County to support paupers residing within their limits, as well as nonresident paupers chargeable as such therein, the county may maintain a county poorhouse and fix the rate which each town will pay for the support of its paupers therein, or transient persons not chargeable to any town may be maintained therein, so that such county, having established a county poorhouse, may levy a tax for the care of paupers. Peo. v. Chicago, etc., R. Co., 248 Ill. 118, 93 NE 761; Peo. v. Cincinnati, etc., R. Co., 247 Ill. 506, 93 NE 421.

[c] **In Iowa** Code (1873) § 1381, providing that county supervisors may levy a tax of one mill on the dollar for the support of the poor when the ordinary means are insufficient, was amended by Acts (1876) c 149, by striking out "one mill" and substituting "one and one half mills," but such amendment provided that the act should not apply to counties whose population is less than thirty-three thousand. It was held that the amendment did not affect the right to levy a tax under § 1381, in counties whose population is less than thirty-three thousand. Lucas County v. Chicago, etc., R. Co., 67 Iowa 541, 543, 25 NW 769.

[d] **In Kansas,** under Comp. L. (1879) c 79 § 35, county commissioners are authorized to levy and assess a tax for the support of the poor of their respective counties in an amount not in excess of five hundred dollars, without a previous vote of the people at a general election authorizing the levy. Pleasant Hill, etc., R. Co. v. Carpenter, 33 Kan. 216, 6 P 287; Kansas City, etc., R. Co. v. Albright,

when authorized by statute,[96] and the statutory method of levy must be followed.[97] A statute giving the county court power to levy the county levy and to provide for the maintenance of the poor does not authorize it to levy an ad valorem tax for pauper purposes;[98] nor is an ad valorem tax for pauper purposes authorized by a statute authorizing the county court to purchase land for poorhouse purposes and to levy a sufficient sum to pay for the improvements.[99] A special tax for the building or repairing of a county poorhouse must specify such purpose, and cannot be levied under the general phrase "pauper tax."[1]

Discretionary action. Where authority is given to the inhabitants of a town to raise such sum as they shall judge necessary for the support of the poor, the matter cannot be left to the discretion of the selectmen of the town.[2]

[§ 34] **E. Custody and Disposition of Proceeds of Taxation and Poor Funds.** The statutes usually make the overseers or other officers of the poor custodians of money raised for the support of the poor,[3] and the treasurer of a borough in which a poor district is located has no right to the custody of the poor district funds.[4] Where an officer of the poor pays out money for the support of a pauper, or contracts for his support, he is entitled to appropriate money in the first case, and retain it in his own hands in the other.[5] Such officers, however, are not jointly liable for money collected by them severally in their official capacity.[6] Where the directors of a poor district are authorized to appoint tax collectors, but instead of doing so make use of the collectors severally elected in the boroughs and townships comprising the district, the sureties on the general official bond of a collector so employed are not liable for moneys collected but not accounted for by him.[7]

Application and apportionment of funds. The application and apportionment of poor funds and the proceeds of tax levies must be made in compliance with provisions of the constitution[8] and statutes.[9]

33 Kan. 211, 6 P 276.

[e] **In Kentucky,** under the act of March 9, 1871, regulating taxation for the support of negro paupers, the county court is bound to levy a tax and provide means to pay for allowance made for the support of such paupers in years previous to the passage of the act. Featherston v. Thompson, 10 Bush 140.

[f] **In Maine** (1) provisions requiring towns to relieve and support the poor do not apply to plantations. Blakesburg v. Jefferson, 7 Me. 125. (2) They may raise money for the support of the poor, but are not obliged to do so. Means v. Blakesburg, 7 Me. 132.

[g] **In Michigan** it has been held that the support of the poor is an ordinary expense for which a township board is authorized to levy a tax when the electors of the township have failed to make any provision thereof. Weston Lumber Co. v. Munising Tp., 123 Mich. 138, 82 NW 267.

[h] **In Mississippi** Rev. Code p 210 art 2, authorizing the board of police of the several counties to raise revenue for the support of the poor, and Rev. Code p 416 art 16, authorizing such board to raise revenue for general county purposes, are distinct and independent statutes under which the tax contemplated by the former may be levied and collected, even though the power conferred by the latter has been exhausted. Coulson v. Harris, 43 Miss. 728.

[i] **In New York** (1) it has been held that the fact that a county poor superintendent has failed to comply with Poor L. § 11, requiring him to present to the board of supervisors at its annual meeting an estimate of the sum necessary for the support of the county poor for the ensuing year, but has reported the cost for support of both town and county poor for the preceding year, which amount was apportioned by the supervisors among the several towns under § 9 in accordance with the number of poor of each town, such amounts being levied and collected by the several towns, does not give a town any cause for complaint, the only difference in result being that, instead of each town raising an estimated amount and placing it in the hands of the county treasurer for the support of its poor, the county first paid for such support and later was reimbursed by the towns. Islip v. Suffolk County, 191 App. Div. 284, 181 NYS 203 [app dism 229 N. Y. 632 mem, 129 NE 937 mem]. (2) The fact that, under Poor L. §§ 8-11, not enough money has been raised directly by the towns, based upon the number of town poor in the almshouse, but that the county has raised and paid more than its proportionate share of the maintenance of the almshouse, and for such sum has levied upon the several towns in accordance with the assessed valuation, does not give rise to cause of action on the part of a town for the excess which the town has been thus forced to pay, the town never having had any interest in such money. Islip v. Suffolk County, supra. (3) Where the county superintendent of the poor has exercised his judgment as to the amount chargeable to the towns of the county under Poor L. §§ 8, 9, 11, and the board of supervisors has approved it, and levied and collected taxes in accordance therewith its decision should not be disturbed. Islip v. Suffolk County, supra. (4) Under L. (1845) c 334, known as the Livingstown County Act, the board of town auditors is to make an estimate of the amount which will be required for the support of the poor for the ensuing year to be laid before the board of supervisors, and the latter board is required to cause the sum so estimated to be levied and collected in the town and paid to the overseers. Osterhoudt v. Rigney, 98 N. Y. 222 [aff 27 Hun 167]. (5) The estimate must embrace, not only the sum which the board of auditors shall deem necessary for the support of the poor during the ensuing year, but also such sum as shall be required to supply any deficiency in the preceding year. Osterhoudt v. Rigney, supra.

[j] **In Virginia** (1) under a former law, the sheriff was bound to collect poor taxes if appointed by the overseers of the poor to do so, but otherwise not. Munford v. Nottoway Overseers of Poor, 2 Rand. (23 Va.) 313. (2) But a later statute made it the sheriff's official duty to collect such taxes in all cases. Munford v. Nottoway Overseers of Poor, supra.

96. Louisville, etc., R. Co. v. Pendleton County, 96 Ky. 491, 29 SW 324, 16 KyL 584; Southern R. Co. v. Hamblen County, 117 Tenn. 327, 97 SW 455. See Louisville, etc., R. Co. v. Harrison County, 29 SW 639, 16 KyL 678 (county court of Harrison County was expressly authorized by statute to levy ad valorem tax, to pay expenses of county infirmary, and interest on county infirmary bonds).

[a] **Statute construed.**—Under Shannon Code § 6045, authorizing the county court to appropriate money to support the poor, and §§ 2685, 2689, providing for the drawing of money for such purpose from the general county fund, the support of the poor is a general county purpose for which a special tax cannot be levied by the county court. Southern R. Co. v. Hamblen County, 117 Tenn. 327, 97 SW 455.

97. Dudley v. Oliver, 27 N. C. 227.

[a] **Rule applied.**—Under Rev. St. (1889) § 9, declaring that the county court must be composed of a majority of the justices of the county when a tax for the poor is laid, the sureties on a sheriff's bond are not liable for the sheriff's failure to collect a tax which was not laid by a court having a majority of the justices on the bench, since no other court had authority to lay a lawful tax. Dudley v. Oliver, 27 N. C. 227.

98. Louisville, etc., R. Co. v. Pendleton County, 96 Ky. 491, 29 SW 324, 16 KyL 584.

99. Louisville, etc., R. Co. v. Pendleton County, supra.

1. Southern R. Co. v. Hamblen County, 117 Tenn. 327, 97 SW 455.

2. Gove v. Lovering, 3 N. H. 292.

3. See statutory provisions.

4. In re Milesburg Borough Poor Dist., 39 Pa. Co. 666.

5. Robbins v. Woolcott, 66 Barb. (N. Y.) 63.

6. Huling v. Lewiston Borough, 3 Watts & S. (Pa.) 367 (holding, however, that if they are charged jointly by the auditors with a balance, and they acquiesce in the settlement, they both become liable to an action for the whole amount of the balance found in their hands).

7. Com. v. Reinhart, 15 Pa. Co. 487.

8. Bladen County Bd. of Education v. Bladen, 113 N. C. 379, 18 SE 661.

[a] **Illustration.**—The nine cents capitation tax appropriated to the payment of pensions to indigent and disabled soldiers by L. (1891) c 323 § 2 must be deducted by the county commissioners from the twenty-five per cent of the total capitation tax appropriated by them to the support of the poor; and it is error for them to deduct nine cents from each poll for pensions and then devote one fourth of the remainder to the support of the county poor, since this would leave less than three fourths of the entire capitation tax for the purposes of education, in violation of Const. art 5 § 2. Bladen County Bd. of Education v. Bladen, 113 N. C. 379, 18 SE 661.

9. See statutory provisions.

[a] **Fund for alien paupers.**—St. (1839) c 156 imposes on counties the expense of supporting all prisoners in jails and houses of correction who have no settlement in the commonwealth. St. (1837) c 238 § 3 (the Alien Passenger Act), provides that money received by towns and cities under such act shall be appropriated for the support of foreign paupers. Under these acts it has been held that vagrants sent to the house of correction are not "foreign paupers," al-

Limitation of amount of indebtedness.[10] A constitutional limitation on the amount of indebtedness which a county or municipality may incur applies to indebtedness for pauper supplies.[11]

III. SETTLEMENT AND REMOVAL[12]

[§ 35] **A. Nature of Legal Settlement—1. In General.** The word "settlement" in reference to paupers is technical and is used exclusively in relation to the dispensing of public charity.[13] When it is said that a person has a "settlement" in a particular town or county, the meaning is that such town or county is legally bound to support him in case of need.[14] There is a clear distinction between the place of legal settlement and the place of residence,[15] and also between the place of settlement and the place of domicile, as the latter term is used in general or international law.[16]

Source of law as to settlement. In the absence of statutory provisions fixing the settlement of paupers, the common and statutory law of England as it existed prior to the independence of the United States has been recognized as of force in the United States.[17]

[§ 36] **2. Estoppel To Deny.**[18] A town or county may by its acts and admissions estop itself to deny the settlement of a pauper therein,[19] unless such admissions are made under an excusable mistake of material facts.[20] But it has been held that neither the acts nor the admissions of overseers of the poor will estop a town to deny the settlement of a pauper.[21] Nor will a town be estopped to contest a settlement by the mere fact that it has furnished supplies and support for the pauper,[22] although that fact is evidence of the pauper's settlement in the town.[23]

The statutes in some jurisdictions expressly provide that, in a suit by one town against another for the support of a pauper, a recovery shall bar the town against which it is had from disputing the settlement of the pauper with the other town in any future action brought for his support.[24] The word "recovery" is construed to mean the obtaining of a final judgment,[25] and to apply to both plaintiff and defendant towns.[26] There is no "recovery" which will amount to an estoppel where defendant settles the action by paying the claim;[27] nor does the recovery estop third persons not parties to the proceedings.[28] The words "future action" have been held to mean an action to be tried after a judg-

though they have no settlement in the commonwealth, and hence money received under the act cannot be appropriated for their support. Opinion of Justices, 1 Metc. (Mass.) 572.

[b] **Application of income of poorhouse fund.**—Where the city of Rochester was by law in the condition of a town in respect of the mode of supporting its poor at the county poorhouse, the income of the poorhouse farm in that county was to be applied indiscriminately to the support of the county, town, and city poor, kept at the county poorhouse on such farm. Rochester v. Monroe County, 22 Barb. (N. Y.) 248.

10. Generally see Counties §§ 278–280; Municipal Corporations §§ 4047–4066.

11. Mayer v. Jones, 113 Okl. 119, 239 P 904.

[a] **Rule applied.**—Where, after estimate for revenues for the poor of a county had been made, a verbal agreement was made by the board of county commissioners with merchants to furnish such supplies as might be required during the year, but no supplies were required, none purchased nor furnished, nor were any claims filed against the county until after the revenue provided for poor fund had been exhausted, such purchase of supplies thereafter was incurring debts in excess of revenue provided for such fund for such year, contrary to Const. art 10 § 26. Mayer v. Jones, 113 Okl. 119, 239 P 904.

12. Ascertainment and adjudication of settlement requisite to fix liability of local authorities for support of paupers see infra § 212.

13. Augusta v. Waterville, 106 Me. 394, 76 A 707 [cit 7 Words and Phrases p 645].

14. U. S.—Delaware, etc., R. Co. v. Petrowsky, 250 Fed. 554, 162 CCA 570 [certiorari den 247 U. S. 508 mem, 38 SCt 427 mem, 62 L. ed. 1241 mem].

Conn.—Colchester v. Lyme, 13 Conn. 274.

Iowa.—Washington County v. Polk County, 137 Iowa 333, 113 NW 833.

Me.—Augusta v. Waterville, 106 Me. 394, 76 A 707; Yarmouth v. North Yarmouth, 44 Me. 352; Warren v. Thomaston, 43 Me. 406, 69 AmD 69; Belgrade v. Dearborn, 21 Me. 334; Jefferson v. Washington, 19 Me. 293.

Minn.—In re Leslie, 166 Minn. 180, 207 NW 323; Redwood County v. Minneapolis, 126 Minn. 512, 148 NW 469.

Nebr.—Clay County v. Adams County, 69 Nebr. 106, 95 NW 58.

S. D.—Moody County v. Minnehaha County, 17 S. D. 331, 96 NW 698.

Vt.—Westfield v. Coventry, 71 Vt. 175, 44 A 66.

N. B.—St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

15. Me.—Phillips v. Kingfield, 19 Me. 375, 36 AmD 760; Jefferson v. Washington, 19 Me. 293.

Mich.—Jackson County Superintendents of Poor v. Hillsdale County Superintendents of Poor, 124 Mich. 17, 83 NW 408.

Minn.—In re Leslie, 166 Minn. 180, 207 NW 323 [dist Louriston v. Swift County, 89 Minn. 91, 93 NW 1052 (where the holding that "legal settlement" and "residence" are synonymous was controlled by statutes not relating to paupers)].

Pa.—Gibson Dist. Poor Directors v. Benton Poor Dist. Poor Directors, 85 Pa. Super. 377.

N. B.—St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

Residence:
As affecting acquisition of settlement see infra §§ 83–95.
Distinguished from domicile see Domicile §§ 2, 3.
Nature generally see Residence [34 Cyc 1647].

16. Delaware, etc., R. Co. v. Petrowsky, 250 Fed. 554, 562, 162 CCA 570 [certiorari den 247 U. S. 508 mem, 38 SCt 427 mem, 62 L. ed. 1241 mem]; Jefferson v. Washington, 19 Me. 293; In re Leslie, 166 Minn. 180, 207 NW 323.

"It is plain that 'settlement' is not synonymous with 'domicile.' The statutes on the subject usually provide that a person who shall reside in any poor district for a given period of one, two, or more years and who fulfills the other requirements of the statute shall thereby acquire a legal settlement therein. A person may have to reside for years in a place to acquire a settlement therein although he may acquire a domicile at such place as soon as he arrives. The length of time a person resides in a place to which he goes with the animus manendi is immaterial as respects his acquisition of a domicile. Winans v. Winans, 205 Mass. 388, 91 NE 394, 28 LRANS 992. But it is of controlling importance as respects his right to claim a settlement." Delaware, etc., R. Co. v. Petrowsky, supra.

Nature of domicile generally see Domicile §§ 1–8.

17. Newtown v. Stratford, 3 Conn. 600; Bow v. Nottingham, 1 N. H. 260; Exeter v. Warwick, 1 R. I. 63; Londonderry v. Andover, 28 Vt. 416; Manchester v. Springfield, 15 Vt. 385; Wells v. Westhaven, 5 Vt. 322.

Statutory provisions as to settlement see infra § 38.

18. By failure to:
Answer to notice and request to remove pauper see infra § 229.
Deny that settlement is in town notified to remove see infra § 228.

19. West Bridgewater v. Wareham, 138 Mass. 305; Bath v. Haverhill, 2 N. H. 555; Ft. Ann Overseers of Poor v. Kingsbury Overseers of Poor, 14 Johns. (N. Y.) 365; East Greenwich v. Warwick, 4 R. I. 138.

20. Clinton v. Haddam, 50 Conn. 84.

21. New Vineyard v. Harpswell, 33 Me. 193; New Bedford v. Taunton, 9 Allen (Mass.) 207.

22. Me.—Norridgewock v. Madison, 70 Me. 174; Weld v. Farmington, 68 Me. 301; New Vineyard v. Harpswell, 33 Me. 193.

Mass.—Bridgewater v. Dartmouth, 4 Mass. 273; Leicester v. Rehoboth, 4 Mass. 180.

N. J.—Clinton Overseer of Poor v. Clinton Tp. Overseer of Poor, 56 N. J. L. 240; Stillwater Tp. v. Green Tp., 9 N. J. L. 59.

Vt.—Ludlow v. Weathersfield, 18 Vt. 39; Barre v. Morristown, 4 Vt. 574.

Eng.—Rex v. Coleorton, 1 B. & Ad. 25, 20 ECL 383, 109 Reprint 697; Rex v. Chadderton, 2 East 27, 102 Reprint 278.

[a] **A voluntary payment by a town** of a demand for the support of a pauper, after suit brought, does not estop the town to contest the settlement of such pauper. Edgartown v. Tisbury, 10 Cush. (Mass.) 408.

23. See infra § 133.

24. See statutory provisions.

Conclusivenesss of order for removal of pauper see infra §§ 153, 154.

25. Oxford v. Paris, 33 Me. 179.

26. Oxford v. Paris, supra.

27. Wenham v. Essex, 103 Mass. 117.

28. Shutesbury v. Hadley, 133 Mass. 242; Braintree v. Hingham, 17 Mass. 432.

ment has been recovered in one action, whether commenced before or after the other action.[29] A judgment by default operates as an estoppel within the meaning of the statute.[30]

[§ 37] **B. Constitutional and Statutory Provisions—1. Power of Legislature.** The legislature has full power to fix the settlement of paupers[31] and prescribe what shall constitute such settlement.[32] The legislature may likewise enact general laws which alter the rules of settlement, although they may operate to transfer from one town to another the duty of supporting particular persons,[33] or may give a settlement in some particular town to a person who previously had none in the state,[34] and such laws do not ordinarily impair vested rights[35] or the obligation of contracts.[36] But it has been held that, where the marriage of a female pauper was made valid by a resolve of the legislature, the derivative settlement which she thus acquired could not operate to oblige the town, thus newly charged with her maintenance, to pay for her support before the passing of the resolve, without disturbing vested rights.[37]

[§ 38] **2. Construction and Operation of Statutes—a. General Rules.** General rules[38] are applicable in construing statutes in reference to the settlement and removal of paupers.[39] Such statutes are to be given effect according to their manifest intention[40] and obvious import.[41] In determining the legislative intent, the effects and consequences of the proposed construction of a statute, as well as its reason and spirit, will be considered;[42] and if there is room for construction the court will prefer that which is most consonant with the purpose for which the act was passed.[43] The words "residents" as used in many of the statutes providing for the support of paupers is held to import a domicile only, in contradistinction to such a residence as would by the general law be necessary to confer a settlement,[44] and one in a town, whether voluntarily or involuntarily, and in need of immediate relief, is "residing" there, within the meaning of the paupers' acts.[45] But the word "belongs," when used in a statute in reference to the poor, designates the place of legal settlement of the persons referred to.[46]

[§ 39] **b. Retroactive Operation.**[47] Unless a statute relating to the settlement of paupers contains a retroactive provision, it does not take away a settlement acquired before it went into effect.[48] Unless the act is made retroactive by its terms,[49] it will not be construed to give, on the strength of residence prior to the act, a settlement to a person who had none prior thereto,[50] and such an act, although made retrospective by its terms, does not give a settlement to a person who died before its passage, and by derivation to his children;[51] nor does it apply to a person who had ceased to become a resident of the state many years before its passage, so as to give a settlement by derivation to his sons and their wives.[52] Under an act operating retrospectively, so as to give an unsettled woman a settlement upon the completion of a term of residence therein mentioned, the words "unsettled woman" means a woman unsettled at the time the statute takes effect,[53] and does not apply to a woman who has derived a settlement through her father[54] or husband[55] before the passage of the act. The derivative residence of a married woman may be based upon her situation prior to the time when the

29. Bangor v. Brunswick, 33 Me. 352.

30. Jay v. Carthage, 53 Me. 128.

31. Lewiston v. North Yarmouth, 5 Me. 66.

32. Appleton v. Belfast, 67 Me. 579.

33. Augusta v. Waterville, 106 Me. 394, 76 A 707; Portland v. Auburn, 96 Me. 501, 52 A 1011; Rangeley v. Bowdoin, 77 Me. 592, 1 A 892; Belmont v. Morrill, 69 Me. 314; Appleton v. Belfast, 67 Me. 579; Bradford v. Worcester, 184 Mass. 557, 69 NE 310; Dedham v. Milton, 136 Mass. 424; Lunenburg v. Shirley, 132 Mass. 498; Worcester v. Springfield, 127 Mass. 540; Endicott v. Hopkinton, 125 Mass. 521; Bridgewater v. Plymouth, 97 Mass. 382; Exeter v. Stratham, 2 N. H. 102; Craftsbury v. Greensboro, 66 Vt. 585, 29 A 1024; Worcester v. East Montpelier, 61 Vt. 139, 17 A 842.

Retroactive construction of laws as to settlement see infra § 39.

Validity of retroactive laws generally see Constitutional Law §§ 778–802.

34. Dedham v. Milton, 136 Mass. 424; Endicott v. Hopkinton, 125 Mass. 521.

35. Appleton v. Belfast, 67 Me. 579; Endicott v. Hopkinton, 125 Mass. 521; Exeter v. Stratham, 2 N. H. 102; Craftsbury v. Greensboro, 66 Vt. 585, 29 A 1024. See also Pembroke v. Epsom, 44 N. H. 113 (holding that, where the cause of action for supplies for a pauper has accrued, an act abolishing the settlement cannot be construed as an implied intention to impair the vested right in the cause of action).

"The legislature has no power to disturb vested rights; but rules for the settlement of paupers have always been regarded by the courts as matters of mere positive or arbitrary regulation, in establishing which the legislature is limited in its power only by its own perception of what is proper and expedient." Lewiston v. North Yarmouth, 5 Me. 66, 69.

Constitutional protection of vested rights in general see Constitutional Law §§ 485–592.

36. Rangeley v. Bowdoin, 77 Me. 592, 1 A 892; Appleton v. Belfast, 67 Me. 579.

Constitutional prohibition of statutes impairing obligation of contracts in general see Constitutional Law §§ 593–777.

37. Brunswick v. Litchfield, 2 Me. 28.

38. See Statutes [36 Cyc 1102 et seq.]

39. See cases infra note 40 et seq.

40. Plainville v. Southington, 80 Conn. 659, 69 A 1049; Bridgewater v. Plymouth, 97 Mass. 382; Lisbon v. Clark, 18 N. H. 234; Turbett Tp. Overseers of Poor v. Port Royal Borough Overseers of Poor, 33 Pa. Super. 520.

41. Charleston v. Lunenburgh, 23 Vt. 525.

42. Turbett Tp. Overseers of Poor v. Port Royal Borough Overseers of Poor, 33 Pa. Super. 520.

43. Turbett Tp. Overseers of Poor v. Port Royal Borough Overseers of Poor, supra.

44. Colchester v. East-Lyme, 18 Conn. 480; Waterbury v. Bethany, 18 Conn. 424; Leicester v. Brandon, 65 Vt. 544, 27 A 318; New Haven v. Middlebury, 63 Vt. 399, 21 A 608.

45. Bethlehem v. Watertown, 51 Conn. 490; Trumbull v. Moss, 28 Conn. 253; New Milford v. Sherman, 21 Conn. 101.

46. Reading v. Westport, 19 Conn. 561.

47. **Generally** see Statutes [36 Cyc 1201].

Validity see supra § 37.

48. Guilford v. New Haven, 56 Conn. 465, 16 A 240; Lawrence v. Methuen, 187 Mass. 592, 73 NE 860 (holding further that the provision of Rev. L. c. 80 § 6, that all persons absent from the commonwealth for ten consecutive years shall lose their settlement, is not retroactive); Woodbridge v. Amboy, 1 N. J. L. 213; Starksborough v. Hinesburgh, 13 Vt. 215.

49. Worcester v. Great Barrington, 140 Mass. 243, 5 NE 491; Dedham v. Milton, 136 Mass. 424; Fitchburg v. Ashby, 132 Mass. 495; Taunton v. Boston, 131 Mass. 18; Cambridge v. Boston, 130 Mass. 357; Worcester v. Springfield, 127 Mass. 540; Merrimack County v. Grafton County, 63 N. H. 550, 4 A 390; Exeter v. Stratham, 2 N. H. 102; Raritan Tp. v. Franklin Tp., 54 N. J. L. 536, 24 A 444, McLorinan v. Bridgewater Tp. Overseers of Poor, 49 N. J. L. 614, 10 A 187; Woodbridge v. Amboy, 1 N. J. L. 246; Worcester v. East Montpelier, 61 Vt. 139, 17 A 842; Stamford v. Whitingham, 2 Aik. (Vt.) 188; Poultney v. Fair Haven, Brayt. (Vt.) 185.

50. Com. v. Sudbury, 106 Mass. 268, Rutland v. Mendon, 1 Pick. (Mass.) 154; Andover v. Merrimack County, 46 N. H. 180; Monkton v. Panton, 12 Vt. 250; Sunderland Union Guardians of Poor v. Sussex County Clerk of Peace, 8 Q. B. D. 99; Reg. v. Ipswich Union, 2 Q. B. D. 269; Calne Union v. St. Mary, 69 L. J. Q. B. 400.

51. Taunton v. Boston, 131 Mass. 18.

52. Fitchburg v. Athol, 130 Mass. 370.

Derivative settlement:
Husband and wife see infra §§ 111–113.
Parent and child see infra §§ 114–122.

53. Worcester v. Great Barrington, 140 Mass. 243, 5 NE 491.

54. Middleborough v. Plymouth, 140 Mass. 325, 4 NE 568.

55. Worcester v. Great Barring-

act relating thereto took effect.[56]

Repealing acts. In accordance with the general rule[57] the repeal of a statute relating to the acquisition of settlements does not affect settlements already acquired thereunder, unless it is so provided.[58] But where a statute providing a mode by which a settlement may be gained is repealed before a settlement thereunder has become complete, no settlement will be gained by a subsequent continued performance of the requirements of the statute, unless there is a saving clause with regard to embryo settlements.[59]

[§ 40] **c. Repeal.**[60] The rule that, where two legislative acts are repugnant to, or in conflict with, each other, the one last passed must govern, although it contains no repealing clause,[61] applies to statutes relating to the settlement of paupers;[62] and where a later act covers the whole subject of earlier acts and it is apparent that it was the legislative intent to enact an entirely new system of laws, such earlier acts are repealed.[63] But where the later act indicates a legislative intention merely to afford a new and additional remedy to that provided by the earlier act, the earlier act is not repealed.[64]

[§ 41] **C. Settlement by Birth[65]—1. In General.** The place of a pauper's birth is prima facie the place of his settlement.[66] But this presumption may be overcome by showing a different settlement derived by the pauper from his father or mother, or one subsequently acquired by acts of his own.[67]

[§ 42] **2. Bastards.**[68] The place of birth of a bastard ordinarily fixes its settlement, both at common law,[69] and under some statutes, as construed by the courts,[70] unless some trick has been practiced

ton, 140 Mass. 243, 5 NE 491.

56. Montpelier v. Worcester, 82 Vt. 142, 72 A 321.

[a] **Illustration.**—Under a statute providing that a married woman who lives with her husband in a town where he resided for three full years, supporting himself and family, shall be deemed to have gained a residence in such town, and that such town shall be liable for her support as a pauper, the derivative residence of the wife may be based upon a three-year period completed prior to the passage of the act. Montpelier v. Worcester, 82 Vt. 142, 72 A 321.

Derivative settlement of married women generally see infra § 111.

57. See Statutes [36 Cyc 1225].

58. Guilford v. New Haven, 56 Conn. 465, 16 A 240; Starksborough v. Hinesburgh, 13 Vt. 215.

59. Windham v. Portland, 4 Mass. 384; Rutland v. Mendon, 1 Pick. (Mass.) 154; Andover v. Merrimack County, 46 N. H. 180; Gilford v. Epping, 12 N. H. 498.

[a] **Proviso construed** as not preventing the acquisition of embryo settlements by compliance with the repealed statute. Nottingham v. Barrington, 6 N. H. 302.

60. Generally see Statutes [36 Cyc 1068 et seq].

Retroactive operation of repealing acts see supra § 39.

61. See Statutes [36 Cyc 1073].

62. Lewiston v. Auburn, 32 Me. 492.

63. Lisbon v. Clark, 18 N. H. 234.

Generally see Statutes [36 Cyc 1077].

64. Westmoreland County Poor Dist. v. Kiskiminetas Tp. Poor Dist., 54 Pa. Super. 584 (Act April 6, 1905 [P. L. p 112], relating to the removal of paupers, affords a new and additional remedy to that provided by Act June 13, 1836 [P. L. p 539], and it does not repeal the earlier act).

65. Effect of division of town see infra § 97.

66. Conn.—Guilford v. Norwalk, 73 Conn. 161, 46 A 881; Harrison v. Gilbert, 71 Conn. 724, 43 A 190; Windham v. Lebanon, 51 Conn. 319; Danbury v. New Haven, 5 Conn. 584; Sterling v Plainfield, 4 Conn. 114; Newtown v. Stratford, 3 Conn. 600, Windsor v. Hartford, 2 Conn. 355.

N. J.—Madison Tp. Overseer of Poor v. Monroe Tp. Overseer of Poor, 42 N. J. L. 493; Shrewsbury Tp. v. Holmdel Tp., 42 N. J. L. 373; Paterson Tp. v. Byram Tp., 23 N. J. L. 394; Franklin Tp. v. Bridgewater Tp., 20 N. J. L. 563; Alexandria Tp. v. Kingwood Tp., 8 N. J. L. 370; Redington v. Tewksbury, 2 N. J. L. 289.

N. Y.—Bern Overseers of Poor v. Knox Overseers of Poor, 6 Cow. 433; Niskayuna Overseers of Poor v. Albany Overseers of Poor, 2 Cow. 537; Vernon v. Smithville, 17 Johns. 89; Washington Overseers of Poor v. Stanford Overseers of Poor, 3 Johns. 193; Wynkoop v. New York City Overseers of Poor, 3 Johns. 15.

Pa.—Wayne Tp. v. Jersey Shore, 81* Pa. 264; Toby Tp. Overseers of Poor v. Madison Overseers of Poor, 44 Pa. 60; Northumberland Overseers of Poor v. Milton Overseers of Poor, 6 Pa. Cas. 503, 9 A 449 [aff 1 Pa. Co. 377]; Northampton County Poor Directors v. Stroudsburg Poor Dist., 9 Pa. Dist. 614, 23 Pa. Co. 488; Union Tp. v. Monroe Tp., 8 Kulp 521; Fermanagh Tp. v. Walker Tp., 4 PaLJR 32, 6 PaLJ 285.

R. I.—Exeter v. Warwick, 1 R. I. 63.

Eng.—Amersham Union Guardians of Poor v. London Union Guardians of Poor, 20 Q. B. D. 103; Reg. v. St. Giles without Cripplegate, 17 Q. B. 636, 79 ECL 636, 117 Reprint 1425; Reg. v. All Saints, 14 Q. B. 207, 68 ECL 207, 117 Reprint 84; Reg. v. Watford, 9 Q. B. 626, 58 ECL 626, 115 Reprint 1413; Reg. v. Preston, 12 A. & E. 822, 40 ECL 408, 113 Reprint 1026; Reg. v. Newchurch, 3 B. & S. 107, 113 ECL 107, 122 Reprint 41; Rex v. Bennett, 9 L. J. M. C. O. S. 95; Cumner Parish v. Milton Parish, 3 Salk. 259, 91 Reprint 812; Rex v. Heaton Norris, 6 T. R. 653, 101 Reprint 754.

[a] **Children born out of the state** after their father had abandoned his domicile therein, and returning hither after his death, are foreigners so far as the poor laws are concerned, since the place of settlement of children of extrastate parentage is the place of their birth. Limestone Tp. Overseers of Poor v. Chillisquaque Overseers of Poor, 87 Pa. 294.

67. Madison Tp. v. Monroe Tp., 42 N. J. L. 493; Shrewsbury Tp. v. Holmdel Tp., 42 N. J. L. 373; Bern Overseers of Poor v. Knox Overseers of Poor, 6 Cow. (N. Y.) 433; Vernon v. Smithville, 17 Johns. (N. Y.) 89; Wayne Tp. v. Jersey Shore, 81* Pa. 264; Northumberland Overseers of Poor v. Milton Overseers of Poor, 6 Pa. Cas. 503, 9 A 449; Northampton County Poor Directors v. Stroudsburg Poor Dist., 9 Pa. Dist. 614, 23 Pa. Co. 488; Reg. v. St. Giles without Cripplegate, 17 Q. B. 636, 79 ECL 636, 117 Reprint 1425; Reg. v. All Saints, 14 Q. B. 207, 68 ECL 207, 117 Reprint 84; Whitechapel Parish v. Stepney Parish, Carth. 433, 90 Reprint 851; Cumner Parish v. Milton Parish, 3 Salk. 259, 91 Reprint 812.

Settlement:

Acquired by emancipated child see infra § 49.

Derived from:

Father see infra §§ 114-119.

Mother see infra §§ 120-122.

68. Rights and disabilities of bastards generally see Bastards §§ 39-56.

69. Conn.—Windham v. Lebanon, 51 Conn. 319.

Me.—Fayette v. Leeds, 10 Me. 409.

N. H.—South Hampton v. Hampton Falls, 11 N. H. 134; Bath v. Haverhill, 2 N. H. 555; Bow v. Nottingham, 1 N. H. 260.

N. Y.—Delavergne v. Noxon, 14 Johns. 333.

N. C.—Merritt v. McQuaig, 63 N. C. 550.

Pa.—Wayne Tp. v. Jersey Shore, 81* Pa. 264; Lower Augusta v. Selinsgrove, 64 Pa. 166; Philadelphia Guardian of Poor v. Bristol Tp. Overseers of Poor, 6 Serg. & R. 562.

Vt.—Burlington v. Essex, 19 Vt. 91; Manchester v. Springfield, 15 Vt. 385.

Eng.—Plymouth Guardians of Poor v. Axminster Union Guardians of Poor, [1898] A. C. 586; Northwich Union v. St. Pancras Union, 22 Q. B. D. 164; Reg. v. Marylebone, 13 Q. B. D. 15; Reg. v. Tipton, 3 Q. B. 215, 43 ECL 704, 114 Reprint 489; Reg. v. Wendron, 7 A. & E. 819, 34 ECL 427, 112 Reprint 678; Rex v. Mattersey, 4 B. & Ad. 211, 24 ECL 100, 110 Reprint 435; Rex v. Halifax, 2 B. & Ad. 211, 22 ECL 96, 109 Reprint 1122; Rex v. St. Nicholas, 2 B. & C. 889, 9 ECL 383, 107 Reprint 612, 4 D. & R. 462, 16 ECL 210; Whitechapel Parish v. Stepney Parish, Carth. 433, 90 Reprint 851; Rex v. Astley, 4 Dougl. 389, 26 ECL 542, 99 Reprint 937; Simpson v. Johnson, 1 Dougl. 7, 99 Reprint 6; Axminster Union v. Plymouth Union, 61 J. P. 228; Tenterden Poor Law Union v. St. Mary, 47 L. J. M. C. 81; Rex v. Bennett, 9 L. J. M. C. O. S. 95; Rex v. Martlesham, 8 L. J. M. C. O. S. 49; Cumner Parish v. Milton Parish, 3 Salk. 259, 91 Reprint 812; In re St. Nicholas, 2 Salk. 485, 91 Reprint 417; Reg. v. St. Giles-in-the-Fields, 2 Wkly Rep. 419.

[a] **Where the mother of a bastard child removes from another state** into a county in this state, the child being born in that county, its legal settlement is in that county. Merritt v. McQuaig, 63 N. C. 550.

[b] **In Massachusetts** the common-law rule that birth fixes the settlement of a bastard has been abrogated. Blackstone v. Seehonk, 8 Cush. 75; Petersham v. Dana, 12 Mass. 429.

70. See statutory provisions.

[a] **In Delaware,** under a statute providing that the birth place of a person shall be the place of his legal settlement, the settlement of an illegitimate child is the place of its birth, although it was begotten elsewhere. Smith v. State, Houst. Cr. 107.

[b] **In England** (1) under Divided Parishes and Poor Law Amendment Act (1876) § 35, providing that where an inquiry into the derivative settlement of father or mother would otherwise be involved, the place of a pauper's birth is the place of his settlement, and that an illegitimate child shall retain the settlement of its mother until it acquires another, where an illegitimate pauper was born in one place and his mother in

to change the place of birth,[71] as where the birth is fraudulently or collusively caused to happen there,[72] or unless the mother has been transported or conducted thither under legal authority,[73] or the child is born while an order of removal is being executed and before it can be completely fulfilled.[74] But if after the order of removal has been executed the woman returns to the place from which she was removed, and is there delivered, the place of birth is the bastard's place of settlement.[75] In some jurisdictions the place of birth of an illegitimate child is held to be its legal settlement only when it appears that the mother has not a legal settlement elsewhere.[76]

[§ 43] **D. Acquired Settlement—1. In General.** The power of acquiring a settlement is a personal privilege, and the laws regulating the settlement of paupers are not intended to fix merely the liabilities of the several towns or poor districts inter se. This follows from the fact that as a general rule paupers may be removed to their place of settlement, and therefore the power of determining for themselves where to live is among the most valuable that can be enumerated.[77] The statutes[78] prescribe the persons who may acquire[79] and the mode of acquiring[80] settlements, and compliance with all the provisions of such statutes is, of course, essential to the acquisition of a legal settlement.[81]

[§ 44] **2. Who May Acquire—a. In General.** The question who may acquire a settlement in his own right is, of course, regulated by, and dependent upon, the provisions of the statutes.[82] A person cannot have two settlements at the same time,[83] nor can two towns be bound to support the same pauper at the same time;[84] and hence one cannot gain a settlement in his own right in the same town in which he derives a settlement from his father.[85]

Indians residing within the limits of a town and being under jurisdiction of persons appointed by the government have no legal settlement in the town.[86]

[§ 45] **b. Aliens.**[87] Under the provisions of some statutes an alien can gain no settlement by commorancy,[88] but under others he may.[89] A stat-

another, neither of them having acquired a settlement of her own, and it could not be determined what settlement the child derived from her mother without inquiring into the mother's derivative settlement, the settlement of the child was the place of her birth. Plymouth Guardians of Poor v. Axminster Union Guardians of Poor, [1898] A. C. 586. To same effect Axminster Union v. Plymouth Union, 61 J. P. 228. (2) On the other hand such provision has been held not to be applicable to an illegitimate child under the age of sixteen, for whom provision is made by an earlier act. Wycome Union Guardians of Poor v. Barton-upon-Irwell Union Guardians of Poor, [1927] A. C. 217 [aff [1926] 2 K. B. 3, and overr Tendring Union v. Braintree Union, [1920] 2 K. B. 647; Lexden, etc., Union v. Windsor Union, [1921] 2 K. B. 143]. To same effect Reigate Union v. Croyden Union, 14 App. Cas. 465; West Derby Union v. Atcham Union, 24 Q. B. D. 117.

71. Rex v. St. Nicholas, 2 B. & C. 889, 9 ECL 383, 107 Reprint 612, 4 D. & R. 462, 16 ECL 210; Rex v. Astley, 4 Dougl. 389, 26 ECL 542, 99 Reprint 937; Cumner Parish v. Milton Parish, 3 Salk. 259, 91 Reprint 812.

72. Hebron v. Marlborough, 2 Conn. 18; Philadelphia v. Bristol Tp., 6 Serg. & R. (Pa.) 562; Burlington v. Essex, 19 Vt. 91; Rex v. Mattersey, 4 B. & Ad. 211, 24 ECL 100, 110 Reprint 435; Rex v. St. Nicholas, 2 B. & C. 889, 9 ECL 383, 107 Reprint 612, 4 D. & R. 462, 16 ECL 210; Tewksbury v. Twyning, 2 Bulstr. 349, 80 Reprint 1176; Masters v. Child, 3 Salk. 66, 91 Reprint 695.

[a] **If poor law officers procure a woman to go into another town** to be delivered, the child will be considered as born in the town from which she is so procured to depart. Plymouth v. Windsor, 7 Vt. 327.

73. Burlington v. Essex, 19 Vt. 91.

74. Rex v. Halifax, 2 B. & Ad. 211, 22 ECL 96, 109 Reprint 1122; Rex v. St. Nicholas, 2 B. & C. 889, 9 ECL 383, 107 Reprint 612, 4 D. & R. 462, 16 ECL 210; Rex v. Astley, 4 Dougl. 389, 26 ECL 542, 99 Reprint 937.

75. Rex v. Halifax, 2 B. & Ad. 211, 22 ECL 96, 109 Reprint 1122.

76. Bethlem v. Roxbury, 20 Conn. 298; Danbury v. New Haven, 5 Conn. 584; Hebron v. Marlborough, 2 Conn. 18; Martin v. Hardyston Overseer of Poor, 53 N. J. L. 529, 22 A 58; McCoy v. Newton, 37 N. J. L. 133. See also Wynkoop v. New York City Overseers of Poor, 3 Johns. (N. Y.) 15 (place of birth settlement of child where mother had no settlement within the state).

Settlement of bastard derived from mother see infra § 117.

77. Colchester v. Lyme, 13 Conn. 274.

78. See statutory provisions.

79. See infra §§ 44–54.

80. See infra §§ 55–95.

81. Conn.—North Stonington v. Stonington, 31 Conn. 412.

Mass.—Taunton v. Wareham, 153 Mass. 192, 26 NE 451; Monson v. Chester, 22 Pick. 385.

N. J.—Readington v. Tewksbury, 2 N. J. L. 270; Hopewell Tp. Overseers of Poor v. Kingwood Tp. Overseers of Poor, 2 N. J. L. 121; Northampton Tp. v. Stafford Tp., 2 N. J. L. 117.

Vt.—Newfane v. Dummerston, 34 Vt. 134; Middleton v. Poultney, 2 Vt. 437.

Eng.—Brighton Parish v. Strand Union, [1891] 2 Q. B. 156.

Construction of statutes as to settlement generally see supra § 38.

82. See statutory provisions.

[a] **"Every person of full age."**—Poor L. (Consol. L. [1909] c 42) § 40, providing that every person of full age who shall be a resident and inhabitant of any town or city for one year, and the members of his family who shall not have gained a separate settlement, shall be deemed settled in such town or city, and shall so remain until he shall have gained a like settlement in some other town or city, or shall remove from the state and remain therefrom one year, is intended to provide a settlement for every person, whether he be poor or not. Matter of Chamberlain, 73 Misc. 256, 258, 132 NYS 681; Matter of Porter, 68 Misc. 124, 124 NYS 162.

[b] **"Healthy" and "able-bodied" persons.**—The health ordinarily enjoyed by men of health, and the physical ability ordinarily possessed by men of sound bodies, made one "healthy" and "able-bodied," within the meaning of Act (1797) § 1, relating to legal settlement, and this notwithstanding casual and temporary illness, or bodily unsoundness producing an occasional and temporary effect upon the man's capacity to gain a livelihood by his bodily exertions. Starksboro v. Hinesburgh, 15 Vt. 200.

[c] **Ordained ministers.**—(1) Under a statute providing that every settled ordained minister of the Gospel shall be deemed to have acquired a legal settlement in the place wherein he is or may be settled as a minister. Rev. St. c 45 § 1 cl 7. (2) A minister who has once been regularly ordained in a particular town, and who is afterward settled in another town as a pastor, with the full character, rights, and duties of a pastor, although without a new ordination or ceremony of induction, and for a limited time only, gains a settlement in the latter town. Bellingham v. West Boylston, 4 Cush. (Mass.) 553. See Leicester v. Fitchburg, 7 Allen (Mass.) 90 (sufficiency of acts settling minister under rules and usage of baptist denomination).

Who may acquire settlement by employment as servant see infra § 73.

83. Salem v. Ipswich, 10 Cush. (Mass.) 517.

84. Salem v. Ipswich, supra.

85. Salem v. Ipswich, supra.

86. Andover v. Canton, 13 Mass. 547.

[a] **Reason for rule.**—"It is not an admissible idea, that a tribe of Indians, of whom the legislature had assumed the guardianship, whose land or other property is taken into public custody, and even whose labor is disposed of, without consulting the inhabitants of the town within which they may dwell, should become chargeable to the town, in case of poverty, merely because they lived within its limits. There is always supposed to be a consideration, past or present, for the obligations of towns to rest upon, in the support of paupers. They have received some benefit from their property, or that of their ancestors, by taxation or otherwise; and they may dispose of them in service. But with respect to this tribe of Indians, the town of Canton could never have received a benefit in any way, having no right to tax their property or their polls, or to diminish the expense of supporting them by placing them out at service." Andover v. Canton, 13 Mass. 547, 554.

87. **Derivative settlement** see infra § 115.

Privileges and disabilities of aliens generally see Aliens §§ 8–45.

88. See statutory provisions.

[a] **It is the duty of the state to provide for a foreign pauper,** since he has "a settlement in no town which is obliged to maintain him." Somers v. Barkhamstead, 1 Root (Conn.) 398.

[b] **Residence in town at time of incorporation.**—(1) An alien who resides in a plantation at the time of incorporation gains no settlement thereby, that method being limited to citizens of towns of the United States. Thomaston v. Vinalhaven, 13 Me. 159; Knox v. Waldoborough, 3 Me. 455; Jefferson v. Litchfield, 1 Me. 196. (2) But in Vermont it has been held that a statute in force in 1822, relating to the acquisition of settlements in towns at the time of their organization, applied to unnaturalized foreigners as well as to citizens. Derby v. Salem, 30 Vt. 722.

89. See statutory provisions.

[a] **In Maine** (1) Rev. St. c 27 § 1 par VI, essentially the same as L. (1821) c 122, declaring that any person who has reached the age of twenty-one, and who shall thereafter reside in any town within the state

pte, providing that "any person" who shall take a bona fide lease of premises, etc., shall acquire a settlement,[89] has been held to include an alien as well as a naturalized or native citizen.[91] So a statute relating to the acquisition of a settlement by a soldier enlisted in the continental army has been held to include an enlisted alien;[92] and, having acquired a settlement under such statute, the alien could gain a settlement in any other town by commorancy.[93] Where a person who was born in Great Britain came into the United States as a soldier during the Revolutionary War and was made a prisoner of war, but was not confined, voluntarily continued his residence, after the war, in the state in which he had been a prisoner, he became a citizen of that state, and capable of acquiring a settlement therein.[94]

Persons coming directly from foreign port or place. In some jurisdictions the statutes have provided for the settlement of persons coming directly from Europe, or from some foreign port or place, in the town in which they first settle and reside.[95] Such statutes do not apply to persons who have acquired a legal settlement in the United States prior to complying with the conditions of the statute.[96] The term "foreign port or place" does not include a sister state,[97] and it has been held that the term "directly" requires that the person should not have passed through some other state.[98] On the other hand it has been held that merely landing in a sister state will not prevent a person from gaining a settlement under the statute, provided he landed with the intention of continuing his journey to the place of destination, and immediately did so.[99]

A naturalized alien can thereafter acquire a settlement by compliance with statutes relating to the acquisition of settlements by citizens.[1] But in the absence of statutory authority naturalization combined with prior residence does not confer a settlement upon an alien.[2]

Children of aliens, born in the United States, are, however, citizens of the United States, and as such may acquire settlements in their own right, after reaching majority.[3]

[§ 46] **c. Citizens and Inhabitants of Same or Different States.** Statutes generally prescribe conditions under which citizens and inhabitants removing from one place to another in the state,[4] or coming from another state,[5] may obtain settlements.

[§ 47] **d. Persons Non Sui Juris Generally.**[6] Although the statutes do not expressly provide that only persons sui juris shall acquire settlements in their own right, this has been held to be an implied provision, and persons non sui juris have ordinarily been held incapable of acquiring settlements in their own right.[7] This rule has generally been adhered to even where the statute, in providing who may acquire a settlement, uses the term "any in-

for five consecutive years without having received supplies or support as a pauper during that time, shall thereby gain a settlement in such town was held to embrace aliens as well as citizens. Augusta v. Waterville, 106 Me. 394, 76 A 707; Calais v. Marshfield, 30 Me. 511; Knox v. Waldoborough, 3 Me. 455. (2) An alien who had acquired a settlement pursuant to such statute before the going into effect of Rev. St. (1905) c 142 § 9, providing that the revised statutes are not to be construed to make any town liable for relief furnished to an alien or his family since such statutes went into effect, is not deprived of any benefits which he had acquired by the settlement. Augusta v. Waterville, supra.

[b] **In Massachusetts** (1) under St. (1868) c 328 § 1, providing that "hereafter" any person having the qualifications mentioned in Gen. St. c 69, § 1 shall be deemed to have thereby gained a settlement, although not a citizen of the state or any state, the word "hereafter" applies not only to the acquiring of a settlement, but also to the qualifications, and hence an alien does not acquire a settlement unless he had gained the specified qualifications before the passage of the act. Com. v. Sudbury, 106 Mass. 268. (2) But under St. (1871) c 379, amending St. (1868) c 328 § 1, an alien having the prescribed qualifications gains a settlement whether such qualifications were acquired before or after the enactment of the statute. Shutesbury v. Hadley, 133 Mass. 242; Worcester v. Springfield, 127 Mass. 540.

[c] **In England** it has been held that a foreign pauper, although, as such, having no settlement before residence in a parish, can, under the Divided Parishes and Poor Law Amendment Act (1876) § 34, acquire a status of irremovability and consequently a settlement by such residence. Willesden v. Westminster, [1926] 2 K. B. 356.

90. See statutory provisions; and infra § 64.

91. McKean County Poor Dist. v. Rouse, 7 Pa. Super. 628.

92. Griswold v. North Stonington, 5 Conn. 367.

93. Griswold v. North Stonington, supra.

[a] **Thus,** where an alien enlisted in 1775, as a soldier in the Revolutionary army, and served as a soldier in that army during that war as one of the quota of the town of P, it was held that such soldier, by virtue of the act of Febr. 17, 1871, acquired a settlement in the town of P, and consequently a capacity to gain a settlement in any other town by commorancy. Griswold v. North Stonington, 5 Conn. 367.

94. Cummington v. Springfield, 2 Pick. (Mass.) 394.

95. See statutory provisions.

[a] **A person coming directly from Canada** into New York is not within the statute. Hempstead Overseers of Poor v. New York Alms-House Comrs., 4 CityHallRec (N. Y.) 171.

96. Brower v. Smith, 46 N. J. L. 72.

97. Chatham Overseers of Poor v. Middlefield Overseers of Poor, 19 Johns. (N. Y.) 56.

98. Chatham Overseers of Poor v. Middlefield Overseers of Poor, supra.

99. New Barbadoes Tp. v. Paterson, 27 N. J. L. 544 [dist Stillwater Tp. v. Green Tp., 9 N. J. L. 59 (where the person first landed in New York and remained there two months before coming to New Jersey)].

1. Guilford v. New Haven, 56 Conn. 465, 16 A 240; Vernon v. Ellington, 53 Conn. 330, 2 A 757.

2. Bridgeport v. Trumbull, 37 Conn. 484.

[a] **In Massachusetts** it is held that a statute permitting an alien to acquire a settlement by living on a freehold estate for three successive years inures to the benefit of an alien naturalized before the end of that time and then completing the occupation. Endicott v. Hopkinton, 125 Mass. 521.

3. New Hartford v. Canaan, 54 Conn. 39, 5 A 360.

4. See statutory provisions.

[a] **In Connecticut** (1) the term "inhabitant" in a statute providing that an "inhabitant" of any town may acquire a settlement in any other town by residence and compliance with other statutory provisions, is used in its ordinary sense to indicate one who dwells or lives in a place. New Haven v. Bridgeport, 68 Conn. 588, 37 A 397; New Hartford v. Canaan, 54 Conn. 39, 5 A 360. (2) An infant may be an "inhabitant" within the meaning of such provision, so that on removal to another town and residing there for the statutory period after reaching his majority, he acquires a legal settlement there. New Haven v. Bridgeport, supra; Canton v. Simsbury, 54 Conn. 86, 6 A 183; New Hartford v. Canaan, supra; Vernon v. Ellington, 53 Conn. 330, 2 A 757.

[b] **In Vermont,** under the act of 1817, a person who removes from one town in the state to another does not gain a settlement in the latter town by complying with the statute prescribing the mode of acquiring a settlement, unless he had previously a legal settlement in some other town in the state. Sutton v. Burke, 15 Vt. 720.

5. See statutory provisions.

[a] **In Connecticut** mere commorancy, however long continued, does not give a settlement to a person not already an inhabitant of the state. Guilford v. Norwalk, 73 Conn. 161, 46 A 881; Windham v. Lebanon, 51 Conn. 319; Danbury v. New Haven, 5 Conn. 584.

[b] **In Vermont** in the act of 1797, providing that a person "coming and residing within this state" shall be deemed to be settled in the town or place in which he shall have first resided for one year, the quoted phrase was held to apply to persons who were in the state at the time the act was passed, although they had no settlement in it. Starksborough v. Hinesburgh, 13 Vt. 215.

6. Capacity of particular persons: Infant see infra §§ 48, 49.
Insane person see infra § 50.
Married woman see infra § 52.
Slave see infra § 51.

7. Huntington v. Oxford, 4 Day (Conn.) 189; Milo v. Kilmarnock, 11 Me. 455; Hallowell v. Gardiner, 1 Me. 93; Jericho v. Morristown, 77 Vt. 367, 60 A 233.

[a] **Residence in a town at the**

habitant"[8] or "all persons,"[9] although some courts have given a contrary construction to the latter term.[10] But it has been held that a person non sui juris may acquire a settlement through the ownership and occupation of a freehold,[11] and this rule has been applied to infants[12] and persons non compos mentis.[13]

[§ 48] **e. Infants[14]—(1) In General.** Infants, not being sui juris, but under the control of their parents and deriving their settlement from them,[15] have, as a general rule, and in the absence of any statute to the contrary,[16] been held incapable of acquiring a settlement in their own right prior to emancipation,[17] and this rule applies to illegitimate as well as to legitimate children.[18] In some jurisdictions, however, it has been held that infants may acquire settlements through the ownership and occupation of a freehold,[19] in the absence of a statutory provision to the contrary;[20] and it has likewise been held that an infant comes within a statute providing for the acquisition of a settlement by military service.[21] Some authorities have also held that an infant may acquire a settlement by residence under a statute conferring such settlement on "any person or persons."[22]

[§ 49] **(2) Emancipation.**[23] It has generally been held that a minor who, while living with his parents, can have only a derivative settlement,[24] may, if emancipated, acquire a settlement in his own right under statutes providing for the acquisition of settlements by "all persons," "any resident," or "any person," etc., without any express disqualifications as regards minors.[25] Where, however, the statute expressly provides for the acquisition of settlements by "persons of age," in a particular mode, a minor, although emancipated, cannot acquire a settlement in such mode.[26] And the same is, of course, true with regard to statutes providing for the acquisition of a settlement by "any person having attained majority."[27]

time of its incorporation (1) does not confer a settlement on a person non sui juris. Milo v. Kilmarnock, 11 Me. 455; Hallowell v. Gardiner, 1 Me. 93. (2) Persons sui juris see infra § 96.

8. Huntington v. Oxford, 4 Day (Conn.) 189.

9. Milo v. Kilmarnock, 11 Me. 455; Hallowell v. Gardiner, 1 Me. 93.

[a] **The words "all persons"** must be regarded as applying only to those persons who are legally capable of gaining a settlement in their own right in any other mode. Milo v. Kilmarnock, 11 Me. 455; Hallowell v. Gardiner, 1 Me. 93.

10. See infra § 48.

11. Hopkinton v. Upton, 3 Metc. (Mass.) 165.

[a] **A person under guardianship as a spendthrift** may, in Massachusetts, gain a settlement by living on his estate for the time required by statute. Hopkinton v. Upton, 3 Metc. (Mass.) 165.

Acquisition of settlement by ownership or interest in property generally see infra §§ 56–62.

12. See infra § 48.

13. See infra § 50.

14. Privileges and disabilities of infants generally see Infants §§ 25–47.

15. Derivative settlement of infants see infra §§ 114–122.

16. See statutory provisions.

[a] **In England** (1) it has been held that under Divided Parishes and Poor Law Amendment Act (1876) §§ 34, 35, a child under sixteen years of age may acquire a settlement in its own right by residence in a parish with its deserted or widowed mother for such a period as to render it irremovable under the statutes. Reigate Union v. Croyden Union, 14 App. Cas. 465; Kingston-upon-Hull v. Hackney Union, 103 L. T. Rep. N. S. 599 [aff [1911] 1 K. B. 748]. (2) The same rule has been applied to an illegitimate child under sixteen who has resided in a parish with its mother or reputed father for the time required to render such child irremovable. Fulham Parish Guardians of Poor v. Woolwich Union Guardians of Poor, [1907] A. C. 255; West Ham Union v. Holbeach Union, [1905] A. C. 450; Maidstone Union v. Wandsworth Union, 95 L. T. Rep. N. S. 125.

17. Conn.—Harrison v. Gilbert, 71 Conn. 724, 43 A 190; Bridgeport v. Trumbull, 37 Conn. 484; Sterling v. Plainfield, 4 Conn. 114; Huntington v. Oxford, 4 Day 189; Salisbury v. Fairfield, 1 Root 131.

Me.—Frankfort v. New Vineyard, 48 Me. 565; Oldtown v. Falmouth, 40 Me. 106; Bangor v. Readfield, 32 Me. 60; Brewer v. East Machias, 27 Me. 489; Garland v. Dover, 19 Me. 441; Farmington v. Jay, 18 Me. 376; Pittston v. Wiscasset, 4 Me. 293; Sumner v. Sebec, 3 Me. 223; Hallowell v. Gardiner, 1 Me. 93.

Mass.—Jackson v. Boston, 152 NE 37; Attleborough v. Harwich, 17 Mass. 398; Taunton v. Plymouth, 15 Mass. 203; Somerset v. Dighton, 12 Mass. 383; Shirley v. Watertown, 3 Mass. 322; Danvers v. Boston, 10 Pick. 513.

N. H.—Tamworth v. New Market, 3 N. H. 472.

N. Y.—Bern Overseers of Poor v. Knox Overseers of Poor, 6 Cow. 433.

Oh.—Jefferson Tp. v. Letart Tp., 3 Oh. 99.

Pa.—Donegal Tp. Overseers of Poor v. Sugar Creek Tp., 20 WklyNC 307; Davidson Tp. Overseers of Poor v. Moreland Tp. Overseers of Poor, 7 WklyNC 12.

Vt.—Jericho v. Morristown, 77 Vt. 367, 60 A 233; South Burlington v. Cambridge, 77 Vt. 289, 59 A 1013; Danville v. Hartford, 73 Vt. 300, 50 A. 1082; Marshfield v. Tunbridge, 62 Vt. 455, 20 A 106; Poultney v. Glover, 23 Vt. 328; Hartford v. Hartland, 19 Vt. 392; Manchester v. Springfield, 15 Vt. 385; Wells v. Westhaven, 5 Vt. 322.

Eng.—Reigate Union v. Croydon Union, 14 App. Cas. 465; Holborn Union v. Chertsey Union, 15 Q. B. D. 76.

[a] **Determination of age; computation of time.**—Danvers v. Boston, 10 Pick. (Mass.) 513.

[b] **Apprentices.**—(1) Under a statute declaring that any inhabitant of a town in the state might remove to another town and gain a legal settlement in the latter town by six years' residence there, with a proviso that the act should not affect apprentices under age, etc., an infant whose settlement was with his mother could not acquire a settlement in another town to which he went for the purpose of acquiring a trade, pursuant to a parol agreement between his mother and the master, such infant being an apprentice within the meaning of the statute. Huntington v. Oxford, 4 Day (Conn.) 189. (2) Acquisition of settlement by service under indenture of apprenticeship. See infra §§ 76–78.

[c] **Residence in a town at the time of its incorporation** (1) does not give a settlement to an unemancipated infant. Milo v. Kilmarnock, 11 Me. 455; Biddeford v. Saco, 7 Me. 270; Hallowell v. Gardiner, 1 Me. 93. (2) This is especially so where the infant already has a derivative settlement from its father. Marlborough v. Hebron, 2 Conn. 20. (3) Persons sui juris see infra § 96.

Effect of emancipation see infra § 49.

18. Conn.—Marlborough v. Hebron, 2 Conn. 20; Huntington v. Oxford, 4 Day 189.

Me.—Milo v. Kilmarnock, 11 Me. 455; Fayette v. Leeds, 10 Me. 409; Biddeford v. Saco, 7 Me. 270.

Mass.—Somerset v. Dighton, 12 Mass. 383.

Vt.—Manchester v. Springfield, 15 Vt. 385.

Eng.—West Ham Union v. Holbeach Union, [1905] A. C. 450; Woolwich Union v. Fulham Union, [1905] 2 K. B. 203.

[a] **In New Hampshire** it has been held (1) that, after the age of seven, an illegitimate child can acquire a new settlement in its own right by a year's residence in a town different from that of its birth (Bow v. Nottingham, 1 N. H. 260), (2) but that it cannot acquire a settlement different from that of the place of its birth by residence in another town while under the age of seven years (South Hampton v. Hampton Falls, 11 N. H. 134).

19. Granby v. Amherst, 7 Mass. 1.

20. Granby v. Amherst, supra.

21. Fall River v. Taunton, 150 Mass. 106, 22 NE 584.

Acquisition of settlement by military service generally see infra §§ 80–82.

22. Marlboro Tp. v. Freehold, 50 N. J. L. 509, 14 A 595.

23. Generally see Parent and Child §§ 190–201.

Gaining settlement by apprenticeship see infra §§ 76–78.

24. See infra §§ 114–122.

25. Conn.—Canton v. Simsbury, 54 Conn. 86, 6 A 183.

Me.—Lowell v. Newport, 66 Me. 78; Oldtown v. Falmouth, 40 Me. 106; Brewer v. East Machias, 27 Me. 489; Milo v. Harmony, 18 Me. 415; Portland v. New Gloucester, 16 Me. 427; Leeds v. Freeport, 10 Me. 356; Wells v. Kennebunk, 8 Me. 200; Lubec v. Eastport, 3 Me. 220.

Pa.—Northampton County Poor Directors v. Stroudsburg Poor Dist., 9 Pa. Dist. 614, 23 Pa. Co. 488.

Vt.—Tunbridge v. Eden, 39 Vt. 17; Sherburne v. Hartland, 37 Vt. 528; Wells v. Westhaven, 5 Vt. 322.

Eng.—West Ham Union Guardians of Poor v. St. Matthew, [1894] A. C. 230; Reigate Union v. Croydon Union, 14 App. Cas. 465; Salford Union v. Manchester, 10 Q. B. D. 172; Wolstanton Union v. Northwich Union, 46 L. T. Rep. N. S. 528.

[a] **Incorporation of town.**—(1) Emancipated infants may acquire a settlement through the incorporation of the territory in which they reside. St. George v. Deer Isle, 3 Me. 390. (2) Acquisition of settlement generally by persons residing in town at the time it is incorporated. See infra § 96.

26. Bangor v. Veazie, 111 Me. 371, 89 A 193; Thomaston v. Greenbush, 106 Me. 242, 76 A 690; Exeter v. Stetson, 89 Me. 531, 36 A 1045; Brooksville v. Bucksport, 73 Me. 111; North Yarmouth v. Portland, 73 Me. 108; Veazie v. Machias, 49 Me. 105.

27. Clay County v. Palo Alto County, 82 Iowa 626, 48 NW 1053.

What constitutes emancipation. Emancipation under the pauper laws is not to be presumed, although it may be implied from circumstances.[28] Emancipation exists when the minor contracts a new relation inconsistent with being a part of the family,[29] as by marriage.[30] In order to constitute emancipation the parents must absolutely renounce all care and control of the infant.[31] Mere residence of a minor apart from his parents is not emancipation,[32] nor is a minor emancipated by deserting his home or becoming a vagrant,[33] unless such act is assented to by the parent.[34] So it has been held that a minor bound out by a written indenture until twenty-one years of age is not thereby emancipated so as to be capable of acquiring a settlement.[35]

[§ 50] **f. Insane Persons.**[36] An insane person or idiot cannot acquire a settlement in any place by virtue of acts requiring his own volition.[37] Such a person is, however, capable of gaining a settlement by any mode not requiring any act of volition of his own.[38] Accordingly, it has been held in some jurisdictions, under statutes providing for the acquisition of a settlement by continuous residence in a particular place for a designated time,[39] that a person non compos mentis may acquire a settlement by such residence, unless excluded by the terms of the statute.[40] In such case it has been held that the act of fixing the residence of one who is non compos mentis may be done by the individual having the care of his person.[41] But where intention and power of choice are elements of the residence necessary to gain a settlement,[42] a person non compos mentis, being incapable of intention or choice, cannot acquire a settlement by that mode;[43] and on this theory it has been held that a person non compos mentis and not emancipated, although of full age, cannot acquire an independent settlement by residence,[44] but will follow the settlement of his father.[45]

Settlement by ownership of property.[46] In some jurisdictions it has been held that a person non compos mentis may acquire a settlement through the ownership and occupation of a freehold.[47]

Where insanity occurs after legal settlement is once commenced, it does not interrupt the gaining of a settlement.[48]

Degree of incapacity. When the question of the degree of the mental capacity of a pauper has arisen, it is held that, to disqualify a person from making a choice of a settlement, the mental derangement need not amount to complete madness.[49] If the mind is diseased to such an extent as to deprive the person of volition, free will, and power of choice, or deprive him of self-control as to matters involved in a choice of settlement, this is sufficient.[50] Incipient insanity does not incapacitate one from gaining a settlement,[51] nor is a person incapacitated by mere eccentricity,[52] or weakness of intellect not amounting to idiocy.[53] And the fact that a person has once been adjudged insane will not prevent him

[a] **Thus** a statute providing that "any person having attained majority, and residing in this state one year without being warned as hereinafter provided, gains a settlement in the county of his residence," and that "legitimate minor children follow and have the settlement of their father," a minor emancipated by agreement with his father, cannot by residence acquire an independent settlement. Clay County v. Palo Alto County, 82 Iowa 626, 629, 48 NW 1053.

28. Monroe v. Jackson, 55 Me. 55; Wells v. Kennebunk, 8 Me. 200; Alexandria Tp. Overseers of Poor v. Bethlehem Tp. Overseers of Poor, 16 N. J. L. 119, 31 AmD 229.

[a] **Attaining the age of twenty-one years** is not ipso facto emancipation of a child from his parents, although at that age the child may emancipate himself so as to gain a settlement separate from that of his father. Alexandria Tp. v. Bethlehem Tp., 16 N. J. L. 119, 31 AmD 229.

29. Schuykill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41; Northampton County Poor Directors v. Stroudsburg Poor Dist., 9 Pa. Dist. 614, 23 Pa. Co. 488; Tunbridge v. Eden, 39 Vt. 17; Sherburne v. Hartland, 37 Vt. 528; Wells v. Westhaven, 5 Vt. 322.

30. Sherburne v. Hartland, 37 Vt. 528.

31. Lowell v. Newport, 66 Me. 78; Monroe v. Jackson, 55 Me. 55; Frankfort v. New Vineyard, 48 Me. 565; Oldtown v. Falmouth, 40 Me. 106; Bangor v. Readfield, 32 Me. 60; Pittston v. Wiscasset, 4 Me. 293; Tamworth v. New Market, 3 N. H. 472; South Burlington v. Cambridge, 77 Vt. 289, 59 A 1013; Tunbridge v. Eden, 39 Vt. 17.

32. Tamworth v. New Market, 3 N. H. 472; Sherburne v. Hartland, 37 Vt. 528.

33. Bangor v. Readfield, 32 Me. 60.

34. Bangor v. Readfield, supra.

35. Frankfort v. New Vineyard, 48 Me. 565; Oldtown v. Falmouth, 40 Me. 106; Milo v. Harmony, 18 Me. 415; Leeds v. Freeport, 10 Me. 356; Benson v. West Haven, Brayt. (Vt.) 187.

36. Derivative settlement see infra § 118.

Privileges and disabilities of insane persons generally see Insane Persons §§ 489-559.

37. Payne v. Dunham, 29 Ill. 125; Phillips v. Boston, 183 Mass. 314, 67 NE 250; Taunton v. Middleborough, 12 Metc. (Mass.) 35; Upton v. Northbridge, 15 Mass. 237; Valley Tp. v. Northumberland Borough, 24 Pa. Dist. 692; Dallas Tp. Poor Dist. v. Dallas Borough Poor Dist., 38 Pa. Co. 703; Clinton County v. Clearfield County Poor Dist., 38 Pa. Co. 451; Brownington v. Charleston, 32 Vt. 414 [cit Ryegate v. Wardsboro, decided in 1857 but not reported].

38. Lubec v. Eastport, 3 Me. 220. And see cases infra note 39.

Settlement by ownership and occupation of freehold see infra text and note 47.

39. See infra §§ 83-95.

40. Madison v. Guilford, 85 Conn. 55, 81 A 1046; Ridgefield v. Fairfield, 73 Conn. 47, 46 A 245; Plymouth v. Waterbury, 31 Conn. 515; Waterville v. Benton, 85 Me. 134, 26 A 1089; Corinth v. Bradley, 51 Me. 540; Auburn v. Hebron, 48 Me. 332; Gardiner v. Farmingdale, 45 Me. 537; Machias v. East Machias, 33 Me. 427; New Vineyard v. Harpswell, 33 Me. 193; Augusta v. Turner, 24 Me. 112; Sidney v. Winthrop, 5 Me. 123; Lubec v. Eastport, 3 Me. 220; Fulham Union v. Isle of Thanet Union, 6 Q. B. D. 610; Salford Union v. Manchester, 10 Q. B. D. 172.

41. Waterville v. Benton, 85 Me. 134, 26 A 1089 (by mother); Auburn v. Hebron, 48 Me. 332 (by guardian); Gardiner v. Farmingdale, 45 Me. 537 (by brother and sister); New Vineyard v. Harpswell, 33 Me. 193 (by brother); Augusta v. Turner, 24 Me. 112 (by uncle).

42. See infra §§ 86, 87, 90.

43. Phillips v. Boston, 183 Mass. 314, 67 NE 250; Taunton v. Middleborough, 12 Metc. (Mass.) 35; Upton v. Northbridge, 15 Mass. 237; Brownington v. Charleston, 32 Vt. 414 [cit Ryegate v. Wardsboro, decided in 1857 but not reported].

[a] **In Pennsylvania** a statute providing that a settlement may be gained in any poor district by a person who "bona fide comes to inhabit therein," does not apply to an insane person, who does not go into a district of his own volition, and is incapable of choosing his place of residence. Valley Tp. v. Northumberland Borough, 24 Pa. Dist. 692, 693; Dallas Tp. Poor Dist. v. Dallas Borough Poor Dist., 38 Pa. Co. 703, 704 (the statutory phrase "implies mental power, capability of selection, a definite purpose to make the place to which one comes his habitation").

44. Winterport v. Newburgh, 78 Me. 136, 3 A 48; Isleborough v. Lincolnville, 76 Me. 572; Strong v. Farmington, 74 Me. 46; Monroe v. Jackson, 55 Me. 55; Taunton v. Middleborough, 12 Metc. (Mass.) 35; Upton v. Northbridge, 15 Mass. 237; Monroe Tp. v. Union Tp., 22 Pa. Dist. 534; Topsham v. Chelsea, 60 Vt. 219, 13 A 861; Westmore v. Sheffield, 56 Vt. 239.

[a] **Residence in a town at the time of its incorporation** (1) will not confer a settlement on a person who was, at the time of the incorporation, non compos mentis. Milo v. Kilmarnock, 11 Me. 455. (2) Persons sui juris see infra § 96.

45. See infra § 118.

46. Generally see infra §§ 56-62.

47. Taunton v. Middleborough, 12 Metc. (Mass.) 35; Upton v. Northbridge, 15 Mass. 237.

Person under guardianship as spendthrift see supra § 47.

48. Washington County v. Mahaska County, 47 Iowa 57; Pittsfield v. Detroit, 53 Me. 442; Machias v. East Machias, 33 Me. 427; Chicopee v. Whately, 6 Allen (Mass.) 508; Topsham v. Williamstown, 60 Vt. 467, 12 A 112.

Interruption of residence by commitment to insane asylum see infra § 95.

49. See cases infra note 50.

50. Fayette v. Chesterville, 77 Me. 28, 52 AmR 741; Townsend v. Pepperell, 99 Mass. 40.

51. Buckland v. Charlemont, 3 Pick. (Mass.) 173.

52. Buffalo Tp. Poor Dist. v. Mifflinburg Borough Poor Dist., 168 Pa. 445, 32 A 28.

53. Monroe Tp. Poor Dist. v. Union Tp. Poor Dist., 25 Pa. Dist. 217, 43 Pa.

from gaining a settlement if he has mental capacity sufficient to choose his own residence, although he has not formally been declared restored to sanity.[54]

[§ 51] **g. Slaves.**[55] During the existence of slavery in this country, it was held that slaves could acquire no settlement in their own right,[56] and in the absence of statutory provisions;[57] but upon emancipation they became sui juris and could acquire a settlement.[58]

Wife of slave. Since a wife is not permitted to gain a settlement separate from that of her husband,[59] and a slave cannot acquire a settlement in his own right,[60] the wife of a slave does not acquire a settlement in her own right by residence on a plantation at the time of its incorporation.[61]

[§ 52] **h. Married Women.**[62] The settlement of a married woman is that of her husband if he has one within the state,[63] and she cannot as a general rule acquire a settlement in her own right,[64] even where the husband has none,[65] unless the statute so provides.[66] A statute providing that "any woman" of the age of twenty-one years who resides continuously in any place within the state for a certain length of time without receiving relief as a pauper shall thereby gain a settlement in such place[67] does not apply to married women;[68] and this is equally true of a statute providing that "any person" of full age having an estate of inheritance or freehold and living on the same for a designated period shall gain a settlement.[69] On the other hand it has been held that a married woman may acquire a settlement in her own right by the ownership of real estate, under a statute giving such right to "any person" of the age of twenty-one years having real estate.[70]

Construction of statutes giving married women right to acquire settlements. In some jurisdictions the statutes provide for the acquisition of a settlement by an unsettled married woman in her own right, through residence, provided she does not receive relief as a pauper during the period required to gain such settlement.[71] The purpose of such statutes was to change the law in regard to married women and place them on the same footing in respect of the acquisition of a settlement as widows and unmarried women.[72] A married woman who has a settlement derived from her father, although her husband has no settlement, is not "unsettled" within the meaning of such provision.[73] So it has been held that the words "married women who have not a settlement derived by marriage" refer to a marriage then existing, and not to a former marriage which has been dissolved by the death of the husband.[74]

If the marriage is void, the woman remains a feme sole so far as her right to acquire a settlement in her own right is concerned.[75]

[§ 53] **i. Deserted and Divorced Women.** It has been held that a married woman cannot acquire a settlement in her own right, even though she has been deserted by her husband,[76] in the absence of express or implied statutory authority.[77] A married woman divorced a mensa et thoro may acquire a set-

Co. 513; Westmore v. Sheffield, 56 Vt. 239; Ludlow v. Landgrove, 42 Vt. 137.

54. McHenry County v. Dorr, 39 Ill. A. 240.

55. **Generally** see Slaves [36 Cyc 465].

Support of pauper slaves see infra § 204.

56. Me.—Hallowell v. Gardiner, 1 Me. 93.

Mass.—Dighton v. Freetown, 4 Mass. 539; Springfield v. Wilbraham, 4 Mass. 493; Winchendon v. Hatfield, 4 Mass. 123; Perkins v. Emerson, 2 Dane Abr. 412.

Mo.—Vincent v. Duncan, 2 Mo. 214.

N. J.—Morris Tp. v. Warren Tp., 26 N. J. L. 312; South Brunswick v. East Windsor, 8 N. J. L. 64.

R. I.—Exeter v. Warwick, 1 R. I. 63.

[a] **Residence in a town at the time of its incorporation** (1) will not give a settlement to a slave. Hallowell v. Gardiner, 1 Me. 93. (2) Persons sui juris see infra § 96.

Derivative settlement see infra § 123.

57. Cadwallader v. Durham, 46 N. J. L. 53 (statutory provision for acquisition of legal settlement by children of slaves by seven years' service).

58. Colchester v. Lyme, 13 Conn. 274; Huntington v. Oxford, 4 Day (Conn.) 189; Exeter v. Warwick, 1 R. I. 63. See also Morris Tp. v. Warren Tp., 26 N. J. L. 312 (holding that a slave acquires no settlement, except when legally manumitted, or in case of the insolvency of his master).

59. See infra § 52.

60. See supra text and note 56.

61. Hallowell v. Gardiner, 1 Me. 93.

62. **Derivative settlement** see infra §§ 111–113.

Privileges and disabilities of coverture generally see Husband and Wife §§ 321–423.

63. See infra § 111.

64. Winslow v. Pittsfield, 95 Me. 53, 49 A 46; Holand v. Burlington, 53 Me. 54; Augusta v. Kingfield, 36 Me. 235; Thomaston v. St. George, 17 Me. 117; Richmond v. Lisbon, 15 Me. 434; Pittston v. Wiscasset, 4 Me. 293; Jefferson v. Litchfield, 1 Me. 196; Hallowell v. Gardiner, 1 Me. 93; Brookfield v. Holden, 247 Mass. 577, 142 NE 784; Somerville v. Boston, 120 Mass. 574; Shirley v. Watertown, 3 Mass. 322; Jericho v. Morristown, 77 Vt. 367, 60 A 233; Essex v. Jericho, 76 Vt. 104, 56 A 493; Brookfield v. Hartland, 10 Vt. 424; Rex v. Brington, 7 B. & C. 546, 14 ECL 246, 108 Reprint 826.

[a] **Residence in a town at the time of its incorporation** (1) does not give a settlement to a married woman in her own right. Thomaston v. Vinalhaven, 13 Me. 159; Hallowell v. Gardiner, 1 Me. 93. (2) Persons sui juris see infra § 96.

Acquiring settlement by residence after husband's death see infra § 83.

65. Winslow v. Pittsfield, 95 Me. 53, 49 A 46; Jefferson v. Litchfield, 1 Me. 196; Somerville v. Boston, 120 Mass. 574.

66. See cases infra note 67 et seq.

67. See statutory provisions.

68. Somerville v. Boston, 120 Mass. 574.

[a] **Reason for rule.**—"It is founded on the highest consideration of public policy and morality; it concerns the unity of the marriage relation, and is declared by Blackstone to prevail because the law will not permit the separation of husband and wife. 1 Bl. Com. 363. It cannot be inferred, without clear and express provision, that the Legislature intended that the rules regulating pauper settlements should under any circumstances effect the compulsory separation of man and wife and the breaking up of joint parental relations to their children. By the construction contended for by the plaintiff, the wife would gain a settlement in five years, irrespectively of the fact that at the end of that time the husband's settlement was elsewhere. She would then lose the settlement which up to the end of five years she would hold by virtue of her marriage, and acquire a new one by force of the statute. If both should fall in need of relief, that relief as furnished by law would compel the separation." Somerville v. Boston, 120 Mass. 574, 575.

69. Spencer v. Leicester, 140 Mass. 224, 5 NE 820.

70. Andover v. Merrimack County, 37 N. H. 437.

71. See statutory provisions.

[a] **Facts held to show:** (1) That a married woman was "unsettled" within the meaning of the statute. Williamsburg v. Adams, 184 Mass. 263, 68 NE 230. (2) That a married woman had gained a settlement by residence within the meaning of the act. Stoughton v. Cambridge, 165 Mass. 251, 43 NE 106.

[b] **Acquisition of settlement by wife of person absent from state.**—Burrill v. Boston, (Mass.) 118 NE 284.

Receiving pauper relief as preventing the acquisition of a settlement see infra § 100 et seq.

72. Bradford v. Worcester, 184 Mass. 557, 69 NE 310; Stoughton v. Cambridge, 165 Mass. 251, 43 NE 106; Marden v. Boston, 155 Mass. 359, 29 NE 588.

73. Middleborough v. Plympton, 140 Mass. 325, 4 NE 586.

74. Bradford v. Worcester, 184 Mass. 557, 69 NE 310 (a woman whose second husband has no settlement may acquire a settlement, under the statute, although she had formerly acquired another settlement by her first husband).

75. Johnson v. Huntington, 1 Day (Conn.) 212.

76. Howland v. Burlington, 53 Me. 54; Augusta v. Kingfield, 36 Me. 235; Van Buren v. Syracuse, 72 Misc. 463, 131 NYS 345; Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31.

77. See statutory provisions.

[a] **Effect of general statutes removing disabilities.**—(1) In Pennsylvania it is held that the statute removing the general disabilities of married women in case of desertion or nonsupport by the husband confers on a married woman, whose husband has deserted or failed to support her, the power to acquire a pauper settlement in her own right. Parker City Overseers of Poor v. Du Bois Borough Overseers of Poor, 6 Pa. Cas. 591, 9 A 457; Loyalsock Tp. v. Johnsonburg Borough, 14 Pa. Co. 323; Woodward Tp. v. Lock Haven, 13 Pa. Co. 157; Central Poor Dist. v. Jenkins Tp., 8 Kulp (Pa.) 227. See Ayres'

tlement in her own right.[78]

Remarriage of deserted wife. If a deserted wife remarries during the life of her husband, such marriage being illegal, she can acquire no settlement by residence under it.[79]

[§ 54] **j. Widows and Spinsters.** A widow may, upon complying with the requirements of the statute, acquire a settlement in her own right, just as any other person sui juris may,[80] and it is immaterial that she already had a derivative settlement from her deceased husband.[81]

Unmarried women are under no disability with regard to the acquisition of a settlement.[82]

[§ 55] **3. Mode of Acquiring[83]—a. In General.** A settlement may be acquired under the pauper laws by ownership or interest in property,[84] payment of rent,[85] payment of duly assessed taxes,[86] service under a contract of hiring[87] or indenture of apprenticeship,[88] holding public office,[89] enlisting in military service,[90] or residing in a particular town or district for a designated time under various conditions prescribed by statute.[91] Failure to comply with any one of the provisions of the statutes relating to the mode of gaining a settlement prevents the acquisition of a settlement under that provision.[92]

[§ 56] **b. Ownership or Interest in Property[93]—(1) In General.** One of the modes of gaining a settlement prescribed by many of the statutes is the ownership or interest in property of specified value within the town, and occupation thereof, if real estate, for a designated period.[94] The person's ownership must continue for the statutory period, and if he disposes of the property before the expiration of that period he will not gain a settlement, although taxes are assessed on the property and paid by him for the full time.[95] Under a statute providing that a person having real estate of a specified value or personal estate of a specified value, in the town where he dwells, and paying all taxes assessed on him and his estate for a designated number of years shall gain a settlement in the town, the person must have the required amount of real estate during the whole of the time designated, or the required amount of personal estate during such time, and if he has the real estate only a part of the time and the personal estate during the rest of the time he does not acquire a settlement.[96] Where the statute does not require that the property shall be held for any length of time, it is sufficient if the holder possesses it in fee during the shortest conceivable period of time.[97]

[§ 57] **(2) Interest or Title Necessary—(a) In General.** Where the statute provides for the acquisition of a settlement through ownership of real estate, it is necessary that a freehold estate be owned,[98] and some statutes expressly require that the person have a freehold or estate of inheritance.[99] These statutes refer to such an estate as the party has a right to occupy, and not to an estate in expectancy, where there is a preceding estate of freehold in another.[1] Nor is occupancy by tenants at

Case, 4 Pa. Co. 499 (deserted wife may gain a settlement for herself by leasing real estate of the yearly value of ten dollars, dwelling on the same for a year, and paying the rent). (2) But the deserted wife must comply with the statutes providing for the acquisition of settlements. Kittanning Borough Poor Dist. v. Armstrong County, 17 Pa. Dist. 673, 34 Pa. Co. 221.

[b] **Acts constituting desertion.**—(1) A married woman who, on account of the misconduct of her husband, has been obliged to leave him, has in law been sent away by him, and has therefore been deserted by her husband within the meaning of a statute providing for the acquisition of a settlement by a deserted wife through residence. Eastbourne v. Croydon, [1910] 2 K. B. 16. (2) A married woman who has been deserted by her husband does not cease to be "deserted," within the meaning of the statute, by the fact that she has obtained a separation order under the Summary Jurisdiction (Married Women) Act of 1895, as the desertion continues until the husband returns to cohabitation. Eastbourne v. Croydon, supra. (3) So where a husband orders his wife to leave his house because of her misconduct, and she does leave, and lives apart from him, there is a desertion by the husband within the statute allowing a deserted wife to acquire a settlement in her own right. Reg. v. Maidstone Union, 5 Q. B. D. 31 [dist Reg. v. Cookham Union, 9 Q. B. D. 522 (where the wife voluntarily left her husband and remained absent for six years, in the meantime leading a life of profligacy)]. See Southwark Union v. London Union, [1906] 2 K. B. 112 (a wife is deserted by her husband when she is, rightfully or wrongfully, sent away by him to live a separate existence).

[c] **Particular statutes construed and applied.**—Washington County v. Polk County, 137 Iowa 333, 113 NW 833; Washington County v. Mahaska County, 47 Iowa 57; Bradford v. Worcester, 184 Mass. 557, 69 NE 310; Paddington v. St. Matthew, [1913] 1 K. B. 508 [aff [1912] 2 K. B. 335]; Kingston-upon-Hull v. Hackney Union, 103 L. T. Rep. N. S. 599 [aff [1911] 1 K. B. 748].

Gaining settlement by service see infra § 73.

78. Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31; Williamsport v. Eldred Tp., 84 Pa. 429; Woodward Tp. Overseers of Poor v. Lock Haven Poor Dist., 13 Pa. Co. 157.

79. Howland v. Burlington, 53 Me. 54; Augusta v. Kingfield, 36 Me. 235; Pittston v. Wiscasset, 4 Me. 293.

80. Biddeford v. Saco, 7 Me. 270; Marden v. Boston, 155 Mass. 359, 29 NE 588; Cambridge v. Boston, 137 Mass. 152; Uxbridge v. Northbridge, 131 Mass. 454; Van Buren v. Syracuse, 72 Misc. 463, 131 NYS 345; Burrell Tp. v. Pittsburg Guardians of Poor, 62 Pa. 472, 1 AmR 441; Mifflin Tp. v. Elizabeth Tp., 18 Pa. 17.

[a] **Presumption of death from husband's absence.**—Biddeford v. Saco, 7 Me. 270; Van Buren v. Syracuse, 72 Misc. 463, 131 NYS 345.

81. Mifflin Tp. v. Elizabeth Tp., 18 Pa. 17.

82. Manchester v. Springfield, 15 Vt. 385.

83. Settlement by birth see supra §§ 41, 42.

84. See infra §§ 56–62.

85. See infra § 67.

86. See infra §§ 66–72.

87. See infra §§ 73–75.

88. See infra §§ 76–78.

89. See infra § 79.

90. See infra §§ 80–82.

91. See infra §§ 83–95.

92. Lancaster v. Coos County, 74 N. H. 439, 68 A 867.

93. Capacity to acquire settlement by ownership of property:
Infant see supra § 48.
Insane person see supra § 50.
Married woman see supra § 52.
Purchase of property see infra § 63.

94. See statutory provisions.

[a] **In Massachusetts** (1) under a statute providing for the acquisition of a settlement by three years' ownership and occupation of a freehold in the town where the person dwells, such person must, to gain a settlement, dwell in the town during the same three years he holds real estate. Boston v. Wells, 14 Mass. 384; Groton v. Boxborough, 6 Mass. 50. (2) Under St. (1789) c 14, a settlement may be acquired by occupation of a freehold, although the person is warned to depart in the meantime, the occupancy of a freehold and the acquisition of a settlement by residence being independent methods of obtaining a settlement. Salem v. Andover, 3 Mass. 436.

[b] **In New Hampshire,** under a statute providing for the acquisition of a settlement by the ownership of real estate in the town where a person dwells and the payment of taxes duly assessed thereon, a settlement may be gained by a residence and ownership of real estate, although the owner may not have been taxed for the estate. Rochester v. Chester, 3 N. H. 349.

[c] **In Pennsylvania** a certificate of settlement from the town from which he removes is necessary, under the act of March 9, 1771, in order to enable a person to acquire a settlement by the purchase of a freehold and residence therein, and such settlement cannot be obtained by an uncertified pauper who refuses to give security. Forks v. Easton, 2 Whart. 405.

[d] **In England** it has been held that the statutory time required to gain a settlement by residing on property owned in the parish need not be continuous. Reg. v. Knaresborough, 16 Q. B. 446, 71 ECL 446, 117 Reprint 950.

95. Wakefield v. Alton, 3 N. H. 378.

96. Orford v. Benton, 36 N. H. 395.

97. Barkhamsted v. Farmington, 2 Conn. 600.

98. Charlestown v. Acworth, 1 N. H. 62.

99. See statutory provisions; cases infra this section; and §§ 57–63.

1. Ipswich v. Topsfield, 5 Metc. (Mass.) 350; Orleans v. Chatham, 2 Pick. (Mass.) 29; Cascade Tp. Poor Dist. v. Plunkett's Creek Tp. Poor

will or sufferance sufficient to confer a settlement.[2] So a statute requiring property to be held by a person "in his own right" excludes all property to which the person has but a right of temporary possession, as in the case of property held by an executor, administrator, guardian, agent, bailee, trustee, or tenant.[3] The settlement does not depend upon the question whether the title is good against all persons; although it may be defeasible, it is good until defeated,[4] although a contrary rule obtains under some statutes.[5] The grantee in a deed from a married woman without her husband joining therein does not acquire settlement thereby;[6] nor can a settlement be established by a promise to give land to the pauper's wife in the township, to be a home for him, such promise never being carried out.[7]

Conditional estate. A grantee of a freehold on a condition precedent is not, prior to the performance of the condition, seized of the estate so as to enable him to acquire a settlement.[8]

Contract for purchase. It has been held that a person holding under a bond for title or contract for a conveyance upon payment of the purchase money is not possessed of a freehold so as to enable him to gain a settlement.[9] If, however, the vendee has paid the purchase money so as to be entitled to a decree for specific performance, he has such an equitable estate as will enable him to acquire a settlement.[10]

Fraudulent conveyance. The occupation of an estate of freehold by the grantor after a conveyance thereof which is fraudulent and void as against creditors is not sufficient to gain a settlement, although the grantor has a bond for reconveyance from the grantee.[11]

Effect of lease. The owner continues seized of a freehold so as to gain a settlement under a statute requiring ownership of a freehold, notwithstanding a lease thereof.[12]

Necessity of record title. In order to gain a settlement through the ownership of an estate in fee, a perfect title of record is not necessary,[13] and the want of record of the deed at the time of the occupation will not prevent the acquisition of a settlement.[14] So a title acquired by adverse possession is sufficient.[15] But where such title is relied on, the period of ownership under the pauper laws does not begin until the expiration of the time necessary to acquire title by adverse possession.[16]

The mere possession of land has been held to constitute prima facie evidence of the possessor's seizin thereof so as to enable him to acquire a settlement.[17]

[§ 58] **(b) Trust Estate.** It has been held that a person having an equitable estate of freehold, the legal title being held in trust for him, is possessed of a freehold or of real estate so as to enable him to acquire a settlement,[18] provided the estate is lawfully created.[19] It has been held, however, that a trust by mere implication, not arising by deed, nor established by any previous decree, is not sufficient to confer a settlement under a statute requiring seizin of a freehold estate.[20] Nor is a mere equitable right sufficient to confer a settlement; it must be an equitable estate actually vested.[21]

[§ 59] **(c) Interest of Mortgagor.** The interest of a mortgagor in an estate in fee is sufficient to confer a settlement on him,[22] as where a purchaser of a fee gives a mortgage back to secure a part, or

Dist., 17 Pa. Co. 450; Rex v. Willoughby-with-Sloothby, 10 B. & C. 62, 21 ECL 36, 109 Reprint 374; Rex v. Ringstead, 9 B. & C. 218, 17 ECL 105, 109 Reprint 82; Rex v. Eatington, 4 T. R. 177, 100 Reprint 959.

[a] **An estate in remainder** is insufficient to confer a settlement. Ipswich v. Topsfield, 5 Metc. (Mass.) 350.

2. Dover v. Brighton, 2 Gray (Mass.) 482; Southbridge v. Warren, 11 Cush. (Mass.) 292; Northmoreland Tp. v. Monroe Tp., 1 Pa. C. Pl. 149.

3. Newfane v. Somerset, 49 Vt. 411; Newfane v. Dummerston, 34 Vt. 184.

4. Boylston v. Clinton, 1 Gray (Mass.) 619; Brewster v. Dennis, 21 Pick. (Mass.) 233; Mt. Washington v. Clarksburgh, 19 Pick. (Mass.) 294; Conway v. Deerfield, 11 Mass. 327.

[a] **A person holding under a warranty deed** will acquire a settlement, although his grantor had no title. Boylston v. Clinton, 1 Gray (Mass.) 619.

5. See infra § 63.

6. Montoursville Borough Overseers of Poor v. Fairfield Tp. Overseers of Poor, 112 Pa. 99, 3 A 862.

7. Adams Tp. v. Forward Tp., 8 Pa. Cas. 113, 6 A 710.

8. Lewisburg v. Augusta, 2 Watts & S. (Pa.) 65.

9. Dana v. Petersham, 107 Mass. 598; West Cambridge v. Lexington, 2 Pick. (Mass.) 536; Tewksbury Tp. v. Readington Tp., 8 N. J. L. 319.

10. Respublica v. Caernarvon Tp., 2 Yeates (Pa.) 51. See Hebron v. Centre-Harbor, 11 N. H. 571 (point suggested but not decided).

11. Canton v. Dorchester, 8 Cush. (Mass.) 525.

12. Mansfield v. Pembroke, 5 Pick. (Mass.) 449.

Effect of lease under provision requiring personal occupation see infra § 62.

13. Clinton v. Westbrook, 38 Conn. 9; Brewster v. Dennis, 21 Pick. (Mass.) 233.

14. Conway v. Ashfield, 110 Mass. 113; Belchertown v. Dudley, 6 Allen (Mass.) 477.

15. Brewster v. Dennis, 21 Pick. (Mass.) 233; Rex v. Butterton, 6 T. R. 554, 101 Reprint 699. See Rex v. Okeford Fitzpaine, 1 B. & Ad. 254, 20 ECL 472, 109 Reprint 781 (holding that the adverse possession must be against the person holding title).

[a] **Thus,** where a person occupied land twenty years under a parol contract of purchase, but without any deed or writing from the owner, he was a freeholder, and three years' longer occupation gave to him a settlement under the statute. Brewster v. Dennis, 21 Pick. (Mass.) 233.

16. Wellfleet v. Truro, 5 Allen (Mass.) 137; Brewster v. Dennis, 21 Pick. (Mass.) 233.

[a] **Rule applied.**—A person who has occupied a house built by him by mistake on the land of another person does not gain a settlement unless he occupies the same for the period fixed by the pauper statutes after his adverse possession has conferred title on him. Wellfleet v. Truro, 5 Allen (Mass.) 137.

17. Dalton v. Bethlehem, 20 N. H. 505; Thornton v. Campton, 17 N. H. 338.

18. Mass.—Conway v. Ashfield, 110 Mass. 113; Randolph v. Norton, 16 Gray 395; Scituate v. Hanover, 16 Pick. 222; Orleans v. Chatham, 2 Pick. 29.

N. H.—Pembroke v. Allenstown, 21 N. H. 107; Hebron v. Centre-Harbor, 11 N. H. 571; Poplin v. Hawke, 8 N. H. 124.

N. J.—Bernards Tp. v. Warren Tp., 15 N. J. L. 447.

N. Y.—Whitestown Overseers of Poor v. Constable Overseers of Poor, 14 Johns. 469.

R. I.—Smith v. Angell, 14 R. I. 192.

Eng.—Rex v. Aslackby, 5 A. & E. 200, 31 ECL 581, 111 Reprint 1141; Rex v. Wivelingham, 2 Dougl. 767, 99 Reprint 490; Rex v. Holm East Waver Quarter, 16 East 127, 104 Reprint 1037; Rex v. Offchurch, 3 T. R. 114, 100 Reprint 484.

[a] **One entitled to a distributive share in a decedent's estate** of a sufficient amount will gain a settlement thereby, although there has been no decree of distribution, the other requirements of the law being complied with. Andover v. Merrimack County, 37 N. H. 437.

19. Canton v. Dorchester, 8 Cush. (Mass.) 525.

[a] **A trust estate unlawfully created** is not sufficient to give a settlement. Canton v. Dorchester, 8 Cush. (Mass.) 525.

20. Tewksbury Tp. v. Readington Tp., 8 N. J. L. 319.

21. Reg. v. Carlton, 14 Q. B. 110, 68 ECL 109, 117 Reprint 44; Rex v. Geddington, 2 B. & C. 129, 9 ECL 64, 107 Reprint 331; Rex v. Hagworthingham, 1 B. & C. 634, 8 ECL 268, 107 Reprint 233, 3 D. & R. 16, 16 ECL 129; Rex v. Woolpit, 4 D. & R. 456, 16 ECL 210; Rex v. Long Bennington, 6 M. & S. 403, 105 Reprint 1293.

22. Conn.—Bethlehem v. Watertown, 51 Conn. 490; Barkhamsted v. Farmington, 2 Conn. 600.

Mass.—Mt. Washington v. Clarksburgh, 19 Pick. 294; Conway v. Deerfield, 11 Mass. 327; Groton v. Boxborough, 6 Mass. 50.

N. H.—Hebron v. Centre-Harbor, 11 N. H. 571.

N. J.—Nottingham Tp. v. Amwell Tp., 21 N. J. L. 27; Newark v. Pompton, 3 N. J. L. 590.

Eng.—Rex v. Edington, 1 East 288, 102 Reprint 112.

[a] **A right in equity to redeem land** is real estate within the meaning of pauper settlement laws. Hebron v. Centre-Harbor, 11 N. H. 571; New London v. Sutton, 2 N. H. 401.

[b] **The seizin of a mortgagor in possession** is a sufficient seizin of lands to enable him to gain a settlement, although the mortgage was given for all the purchase money immediately upon the purchase. Newark v. Pompton, 3 N. J. L. 590.

even all, of the purchase money;[23] but after condition broken and possession taken by the mortgagee, the mortgagor is no longer considered as having a freehold estate, and does not acquire a settlement,[24] although he is in possession by permission of a lessee of the mortgagee,[25] or under a parol agreement which can be terminated at the mortgagee's pleasure.[26] Actual possession must, however, have been taken by the mortgagee.[27]

[§ 60] **(d) Curtesy[28] and Dower[29] Interests.** Where the statute does not require that a person shall be seized of a freehold in his own right, possession of a freehold estate as a tenant by the curtesy in the right of the possessor's wife is a sufficient interest to confer a right of settlement,[30] although possession by the husband as tenant by the curtesy initiate of land held by his wife to her sole and separate use is not sufficient.[31] Where a wife's property is dower in the lands of her first husband, she has no vested freehold estate therein at common law until dower has been assigned,[32] and hence, before assignment, her second husband cannot be seized of a freehold in her right so as to acquire a settlement.[33] So if the wife's estate is in remainder or reversion expectant upon an estate of freehold, the husband has no interest in such estate while the freehold is outstanding, which will enable him to acquire a settlement.[34] Where the statute requires the person to hold "in his own right," real estate held jure uxoris is not sufficient to confer a settlement.[35]

[§ 61] **(3) Value of Estate.** The value of the estate necessary to gain a settlement is fixed by statute.[36] In the absence of language in the statute requiring a different construction, this value will be estimated without regard to encumbrances.[37] Some statutes, however, expressly provide that the estate shall be of a particular value free of encumbrances.[38] A mortgage which has in fact been satisfied is not an encumbrance within the meaning of such a provision, although it has not been discharged of record.[39] Under a statute requiring the estate to be of a certain clear, yearly income, the words "clear, yearly income" mean income free from all charges on the estate,[40] not the sum actually received yearly by the owner of the estate, but the yearly value thereof as a rentable estate.[41] The clear yearly income is to be ascertained by deducting all expenses to which the estate might necessarily and legally be subjected.[42] The property must be valued as if it had been subjected to taxation, when the forbearance to tax it has been on account of the poverty of the occupant.[43] The assessors' valuation of the estate is not conclusive as to the value thereof.[44]

[§ 62] **(4) Occupation.** The possession of real estate required under the statutes is generally held to mean actual occupation.[45] The personal occupation of lands includes an occupation by others under the direction and control of the owner.[46] But it is otherwise if the lands are leased.[47] Nor is it sufficient for a pauper to dwell in the neighborhood or near to his estate; he must dwell upon it.[48] On the other hand it has been held that residence for the required time in a town or parish in which the person has an estate is sufficient whether he is in actual possession of the estate or not.[49]

[§ 63] **c. Purchase of Real Estate; Payment of Consideration.** In a few jurisdictions the statutes provide for the acquisition of a settlement by the "purchase" of real estate, and declare that no settlement shall be gained by any such purchase unless the consideration therefor shall amount to a designated sum, bona fide paid.[50] The word "purchase" implies that a title must be given.[51] But such title need not be a legal one; an equitable title is sufficient.[52] So a deed need not have been actually executed, if the contract is otherwise complete.[53] But

23. Barkhamsted v. Farmington, 2 Conn. 600; Mt. Washington v. Clarksburgh, 19 Pick. (Mass.) 294; Newark v. Pompton, 3 N. J. L. 1038.

24. Oakham v. Rutland, 4 Cush. (Mass.) 172.

[a] **A right of redemption,** after an entry to foreclose, the mortgagee retaining possession and taking the rents and profits, is not an estate of inheritance, on which the owner can live as on his freehold, and therefore not within the statute. Oakham v. Rutland, 4 Cush. (Mass.) 172.

25. Oakham v. Rutland, supra.

26. Newfane v. Somerset, 49 Vt. 411; Rex v. Catherington, 3 T. R. 771, 100 Reprint 850.

27. Mt. Washington v. Clarksburgh, 19 Pick. (Mass.) 294.

28. **Generally** see Curtesy 17 C. J. p 412.

29. **Generally** see Dower 19 C. J. p 448.

30. Canton v. Dorchester, 8 Cush. (Mass.) 525; Mansfield v. Pembroke, 5 Pick. (Mass.) 449; Orleans v. Chatham, 2 Pick. (Mass.) 29; Windham v. Portland, 4 Mass. 384; Whitestown Overseers of Poor v. Constable Overseers of Poor, 14 Johns. (N. Y.) 469; Rex v. Ynyscynhanarn, 7 B. & C. 233, 14 ECL 110, 108 Reprint 710; Rex v. Offchurch, 3 T. R. 114, 100 Reprint 484.

31. Leverett v. Deerfield, 6 Allen (Mass.) 431; Rouse v. McKean County Poor Dist. Poor Directors, 169 Pa. 116, 32 A 541; Montoursville Borough Overseers of Poor v. Fairfield Tp. Overseers of Poor, 112 Pa. 90, 3 A 862; Penn Tp. v. Locust Tp., 14 Pa. Co. 162.

32. See Dower § 202.

33. Windham v. Portland, 4 Mass. 384.

34. Orford v. Benton, 36 N. H. 395.

35. Baltimore v. Chester, 47 Vt. 648.

36. See statutory provisions.

[a] **Statute construed.**—Where a statute declares that the estate shall be of the clear yearly value of ten dollars and taking the rents and profits thereof three years successively, the value must be determined by the real value of the income, and this income by the rents and profits must, each and every of the three years, be of the amount of at least ten dollars. Western v. Leicester, 3 Pick. (Mass.) 198.

[b] **Facts held not to show** that estate was of required value. Hebron v. Centre-Harbor, 11 N. H. 571; Poplin v. Hawke, 8 N. H. 124.

37. Barkhamsted v. Farmington, 2 Conn. 600; Nottingham Tp. v. Amwell Tp., 21 N. J. L. 27.

38. See statutory provisions.

39. Clinton v. Westbrook, 38 Conn. 9.

40. Freeport v. Sidney, 21 Me. 305; Pelham v. Middleborough, 4 Gray (Mass.) 57.

41. Pelham v. Middleborough, supra.

42. Freeport v. Sidney, 21 Me. 305; Pelham v. Middleborough, 4 Gray (Mass.) 57; Groton v. Boxborough, 6 Mass. 50.

[a] **For example,** in case the estate is subject to a mortgage, the annual interest on the mortgage is to be deducted from the income. Conway v. Deerfield, 11 Mass. 327; Groton v. Boxborough, 6 Mass. 50.

43. Freeport v. Sidney, 21 Me. 305.

44. Derry v. Rockingham County, 62 N. H. 485.

45. Weston v. Reading, 5 Conn. 255.

46. Granby v. Amherst, 7 Mass. 1.

47. Granby v. Amherst, supra.

48. Wellfleet v. Truro, 9 Allen (Mass.) 137; Shrewsbury Tp., Poor Dist. v. Sullivan County Poor Dist., 20 Pa. Super. 270.

[a] **Thus** a person does not live on his property when his entire dwelling house is on the land of another, although some of his outbuildings are on his own land. Wellfleet v. Truro, 9 Allen (Mass.) 137.

49. Sherburne Overseers of Poor v. Norwich Overseers of Poor, 16 Johns. (N. Y.) 186; Reg. v. St. Nyotts, Burr. S. Cas. 163; Reg. v. Hasfield, Burr. S. Cas. 147; In re Ryslip, etc., Parish, 2 Salk. 524, 91 Reprint 446. See Rex v. Houghton le Spring, 1 East 247, 102 Reprint 96 (where estate was leased).

50. See statutory provisions; and cases infra note 51 et seq.

51. Augusta Overseers of Poor v. Paris Overseers of Poor, 16 Johns. (N. Y.) 279; Scaghticoke Overseers of Poor v Brunswick Overseers of Poor, 14 Johns. (N. Y.) 199; Rex v. Hagworthingham, 1 B. & C. 634, 8 ECL 268, 107 Reprint 233, 3 D. & R. 16, 16 ECL 129.

[a] **Title held not acquired.**—Rex v. Hagworthingham, 1 B. & C. 634, 8 ECL 268, 107 Reprint 233, 3 D. & R. 16, 16 ECL 129.

52. Whitestown Overseers of Poor v. Constable Overseers of Poor, 14 Johns. (N. Y.) 469.

53. Whitestown Overseers of Poor v. Constable Overseers of Poor, supra.

the contract of purchase must be enforceable,[54] and a mere contract for purchase, without payment of the consideration,[55] or a payment of only a part thereof, without any provision for payment of, or offer to pay, the balance,[56] is insufficient. A settlement is not gained by purchase if nothing passes by the conveyance, as in case of mistake in description,[57] or when the person undertaking to make the conveyance has no power to do so.[58] The conveyance need not be made directly to the purchaser, but may be made to a third person in trust for him.[59]

Payment of consideration. The statutes contemplate only a money consideration, or its equivalent.[60] Payment of an amount less than that designated in the statute,[61] even though a mortgage is given by the purchaser for the balance of the price,[62] is insufficient. But the provision of the statute that a settlement shall be gained by one who shall purchase an estate of a designated value and shall have bona fide paid therefor is satisfied where land of a greater value is purchased, and an amount at least equal to that specified in the statute is paid, provided no lien on the land is created for the balance of the purchase money.[63] Where the consideration of the purchase is a quitclaim by the pauper of other lands, such other lands must actually be of the value designated in the statute, and the fact that they were supposed to be of that value when, in fact, they had no value, is insufficient to bring the purchase within the statute.[64] In estimating the amount of the consideration, interest paid is to be included.[65] The consideration need not be paid directly by the purchaser; payment by a third person for him, or payment with money borrowed from a third person, is sufficient.[66]

Evidence as to consideration. It may be shown by parol that the consideration expressed in the deed had not in fact been paid.[67] Parol evidence is also admissible to show that the full statutory amount had been paid, although a smaller sum was stated in the deed.[68]

[§ 64] **d. Leasing Real Estate[69]—(1) In General.** In some jurisdictions the statutes provide that a person may acquire a settlement in a town by leasing or renting real estate or a tenement in such town, if the premises are of a specified yearly rental value, or the rent reserved or paid equals a designated amount, and the person occupies the premises and pays the rent for the period designated in the statute.[70] Under these statutes there must be an actual leasing or renting[71] of real estate or of a tenement,[72] so as to create the legal relation of

54. Augusta Overseers of Poor v. Paris Overseers of Poor, 16 Johns. (N. Y.) 279; Scaghticoke Overseers of Poor v. Brunswick Overseers of Poor, 14 Johns. (N. Y.) 199.

55. See cases supra note 54.

56. Rex v. Llantillio Grossenny, 5 B. & C. 461, 11 ECL 541, 108 Reprint 172; Rex v. Geddington, 2 B. & C. 129, 9 ECL 64, 107 Reprint 331; Rex v. Woolpit, 4 D. & R. 456, 16 ECL 210; Rex v. Long Bennington, 6 M. & S. 403, 105 Reprint 1293; Rex v. Standon, 2 M. & S. 461, 105 Reprint 452.

57. Blenheim Overseers of Poor v. Windham Overseers of Poor, 11 Johns. (N. Y.) 7.

58. Bridgewater Overseers of Poor v. Brookfield Overseers of Poor, 3 Cow. (N. Y.) 299; Blenheim Overseers of Poor v. Windham Overseers of Poor, 11 Johns. (N. Y.) 7.

[a] **An indefeasible interest,** either legal or equitable, must be actually acquired. Bridgewater Overseers of Poor v. Brookfield Overseers of Poor, 3 Cow. (N. Y.) 299; Augusta Overseers of Poor v. Paris Overseers of Poor, 16 Johns. (N. Y.) 279.

59. Whitestown Overseers of Poor v. Constable Overseers of Poor, 14 Johns. (N. Y.) 469.

60. Rex v. Lydlinch, 4 B. & Ad. 150, 24 ECL 75, 110 Reprint 412; Rex v. Hatfield Broad Oak, 3 B. & Ad. 566, 23 ECL 251, 110 Reprint 205; Rex v. Piddlehinton, 3 B. & Ad. 460, 23 ECL 207, 110 Reprint 166; Reg v. Belford, 3 B. & S. 662, 113 ECL 662, 122 Reprint 248; Rex v. Ufton, 3 T. R. 251, 100 Reprint 558.

[a] **Consideration held sufficient.**—Where A agreed with B to build a house, according to certain specifications, on land then belonging to B, in consideration of which undertaking, and of an annual rent charge of twenty-five shillings, a lease of the land for three lives was to be granted; and the house was built by A according to the specifications, at the cost of £85, whereupon the lease was granted—the grant of the rent charge and the erection of the house on the land conveyed being together of the pecuniary value to the grantor at the time of the conveyance of more than £30—it was held that A hereby acquired a settlement. Reg. v. Belford, 3 B. & S. 662, 666, 113 ECL 662, 122 Reprint 248 (where the court said: "The consideration was the building a house that cost 85l., and therefore, unless to satisfy the statute nothing but a pecuniary consideration in the strict sense of the word will suffice, and money value is not enough, our judgment must be for the respondents. The decision which seems most in point is Wendron Parish v. Stithians Parish, 4 E. & B. 147, 82 ECL 147, 119 Reprint 57, which was in effect that, if the value of 30l. had there been paid for the purchase of the lease, the statute would apply, if not it would not; and, the only question appears to have been had there been a payment either pecuniary, or by what was equivalent to pecuniary, or was the consideration for the lease mere love and affection. It was taken for granted there that an equivalent to money would have sufficed; and may not the building the house in this case, at the expense of 85l., be fairly taken as an equivalent to that sum?").

61. See cases infra this note.

[a] **The amount paid by the purchaser to his own attorney** in connection with the surrender of the copyhold estate purchased is no part of the required consideration. Rex v. Cottingham, 7 B. & C. 603, 14 ECL 271, 108 Reprint 848.

[b] **Subsequent improvements** are no part of the purchase price. Dunchurch v. South Kilworth, 1 W. Bl. 598, 96 Reprint 345.

[c] **Purchase held for less than statutory amount.**—Rex v. Hornchurch, 2 B. & Ald. 189, 106 Reprint 336; Wendron Parish v. Stithians Parish, 4 E. & B. 147, 82 ECL 147, 119 Reprint 57; Rex v. Mattingley, 2 T. R. 12, 100 Reprint 7.

62. Rex v. Olney, 1 M. & S. 387, 105 Reprint 145.

63. Kirby v. Waterford, 15 Vt. 753.

64. Augusta Overseers of Poor v. Paris Overseers of Poor, 16 Johns. (N. Y.) 279.

65. Whitestown Overseers of Poor v. Constable Overseers of Poor, 14 Johns. (N. Y.) 469.

66. Rex v. Tedford, Burr. S. Cas. 57; Rex v. Chailey, 6 T. R. 755, 101 Reprint 810.

67. New Berlin Overseers of Poor v. Norwich Overseers of Poor, 10 Johns. (N. Y.) 229.

68. Rex v. Scammonden, 3 T. R. 474, 100 Reprint 685.

Parol evidence to contradict recital in written instruments as to payment of consideration generally see Evidence § 1562.

69. Capacity of alien to acquire settlement by leasing see supra § 45.

70. See statutory provisions.

71. Walker v. Marion, 148 Pa. 1, 23 A 1002; Beaver Tp. Poor Dist. v. Rose Tp. Poor Dist., 98 Pa. 636; Cumberland County Directors of Poor, etc. v. Walker Tp. Overseers of Poor, 7 Pa. Super. 303; Elk Tp. v. Beaver Tp., 6 Pa. Co. 562; Rex v. Cheshunt, 1 B. & Ald. 473, 106 Reprint 174; Reg. v. Tiverton Parish, 3 E. & B. 555, 107 ECL 555, 121 Reprint 295; Rex v. South Lynn, 5 T. R. 664, 101 Reprint 370.

[a] **A mere license** to use the machinery in a mill is not a renting. Rex v. Mellor, 2 East 189, 102 Reprint 341.

[b] **Contract for board.**—One who makes a special contract with another person for board in his family, including food and lodging, is not a tenant. The fact that such person occupies a separate sleeping room does not warrant the implication that he is a tenant, there being in him no distinct and exclusive title to a particular part of the premises. Cumberland County Directors of Poor, etc. v. Walker Tp. Overseers of Poor, 7 Pa. Super. 303.

[c] **Acts held not to constitute a leasing.**—Rex v. Bowness, 4 M. & S. 210, 105 Reprint 812.

72. Rex v. Piddletrenthide, 3 T. R. 772, 100 Reprint 851.

[a] **What constitutes tenement.**—(1) A dairy farm is a tenement. Rex v. Piddletrenthide, 3 T. R. 772, 100 Reprint 851. (2) So is a rabbit warren. Rex v. Piddletrenthide, supra. (3) The tolls of a bridge constitute an interest in land within the term "tenement." Rex v. Bubwith, 1 M. & S. 514, 105 Reprint 192. (4) A stall in a market is a tenement where it is a permanent building capable of being locked and the lessee is given the key thereto. Rex v. Caversham, 4 B. & C. 683, 10 ECL 756, 107 Reprint 1214 (semble). (5) The right to take the herbage and growing produce of the soil by feeding cattle thereon is a right to the profits of the land and constitutes a tenement. Rex v. Nacton, 3 B. & Ad. 543, 23 ECL 242, 110 Reprint 197; Rex v. Benneworth, 2 B. & C. 775, 9 ECL 336, 107 Reprint 571; Rex v. Sutton St. Edmund, 1 B. & C. 536, 8 ECL 227, 107 Reprint 198. (6) The fishery of a pond, with the flags, rushes, etc., growing in and about the same, is a tenement. Rex v. All Saints, 1 B. & C. 23, 8 ECL 11, 107 Reprint 10. (7) A granary on an upper floor of a building is not a tenement within the meaning of the statute. Rex v. Henley-upon-Thames, 6 A. & E. 294, 33

landlord and tenant. But the lease need not be in writing,[73] nor for any fixed time,[74] as in the case of periodical tenancies from year to year, actually continued for the required time.[75] A tenement may consist of several separate and distinct parcels, hired at the same time,[76] or at different times,[77] and even from different landlords.[78] A settlement may be obtained by living in a house with the lessee and, by agreement with the latter, paying rent in an amount equal to that fixed by statute.[79] So the allowance of the use of a house and grounds, with other privileges, by a master to his servant, as a part of his wages, has been held to constitute a sufficient renting.[80]

Joint lease. A lease to joint lessees is sufficient, it seems, to enable them to acquire a settlement.[81]

Want of title in the lessor and his consequent inability to give a lease binding upon the true owners will not prevent the lessee from acquiring a settlement.[82]

Nature of rent reserved. To constitute a leasing under the statute it is not necessary that a money rent be reserved;[83] the rent may be made payable in labor or other services.[84]

The occupancy and cultivation of land on shares is a sufficient renting,[85] but the value of the landlord's share of the crops must, of course, equal the statutory requirement as to the yearly rental value.[86]

Evidence of tenancy. A tenancy may be implied from circumstances,[87] as by occupation and payment of rent.[88] Where a tenant holds under a written agreement, the tenancy cannot be proved by parol[89] unless, under the particular statute, the terms of the agreement are immaterial except as a test of value.[90]

[§ 65] **(2) Value of Tenement or Amount of Rent.** Under some of the English statutes the tenement taken by the lessee must be of a certain yearly value;[91] while under other English and American statutes the rent reserved or paid must be of a certain amount.[92] The rent of one year cannot be tacked to the rent of a former year so as to make the required amount.[93]

[§ 66] **(3) Occupancy of Premises.** Strict compliance with the statutory requirements as to residence and occupancy by the lessee is essential.[94]

ECL 171, 112 Reprint 112. (8) Other cases determining what constitutes a tenement within the meaning of the statute. Rex v. Great, etc., Usworth, 5 A. & E. 261, 31 ECL 606, 111 Reprint 1164; Rex v. St. Andrew the Less, 10 B. & C. 742, 21 ECL 313, 109 Reprint 626; Rex v. Tardebigg, 1 East 528, 102 Reprint 203; Reg. v. Elswick Tp., 7 Jur. N. S. 45; Rex v. Otley, 9 L. J. M. C. O. S. 11; Rex v. Thornham, 5 L. J. M. C. O. S. 70; Rex v. Rickinghall Superior, 2 L. J. M. C. 22; Rex v. Minster, 3 M. & S. 276, 105 Reprint 615.

73. Beaver Tp. Overseers of Poor v. Hartley Tp. Overseers of Poor, 11 Pa. 254; Spring Tp. Overseers of Poor v. Walker Tp. Overseers of Poor, 1 Pa. Super. 383.

74. Harmony Tp. Overseers of Poor v. Forest County, 91 Pa. 404; Beaver Tp. Overseers of Poor v. Hartley Tp. Overseers of Poor, 11 Pa. 254; Lenox Tp. v. Nicholson Tp., 3 LuzLegObs (Pa.) 310; Denison Poor Dist. v. Pittston, etc., Poor Dist., 1 Kulp (Pa.) 340; Northumberland Tp. v. Monroe Tp., 1 Pa. C. Pl. 149; Reg. v. Chawton, 1 Q. B. 247, 41 ECL 523, 113 Reprint 1123; Rex v. Helsham, 2 B. & Ad. 620, 22 ECL 260, 109 Reprint 1273; Rex v. Herstmonceaux, 7 B. & C. 551, 14 ECL 249, 108 Reprint 828; Hastings Union v. St. James, 6 B. & S. 914, 118 ECL 914, 122 Reprint 1431; Reg. v. St. Giles without Cripplegate, 4 B. & S. 509, 116 ECL 509, 122 Reprint 550; Willesden v. Paddington, 3 B. & S. 593, 113 ECL 593, 122 Reprint 223; Reg. v. Thornton Tp., 2 E. & E. 788, 105 ECL 788, 121 Reprint 295; Reg. v. Norwich, 30 L. T. Rep. N. S. 704.

75. See cases supra note 74.

76. Rex v. Gosforth, 1 A. & E. 226, 28 ECL 123, 110 Reprint 1192.

77. Rex v. Tadcaster, 4 B. & Ad. 703, 24 ECL 308, 110 Reprint 620; Rex v. North Collingham, 1 B. & C. 578, 8 ECL 244, 107 Reprint 213.

78. Rex v. Gosforth, 1 A. & E. 226, 28 ECL 123, 110 Reprint 1192; Rex v. Tadcaster, 4 B. & Ad. 703, 24 ECL 308, 110 Reprint 620; Rex v. North Collingham, 1 B. & C. 578, 8 ECL 244, 107 Reprint 213.

79. Harmony Tp. Overseers of Poor v. Forest County, 91 Pa. 404.

80. Beaver Tp. Overseers of Poor v. Hartley Tp. Overseers of Poor, 11 Pa. 254; Marion Tp. Poor Dist. v. Spring Tp. Poor Dist., 25 Pa. Dist. 475; Point Tp. Overseers of Poor v. Northumberland Overseers of Poor, 22 Pa. Co. 242; Milton Borough v. West Chillisquaque Tp., 20 Pa. Co. 547 [aff 9 Pa. Super. 204, 43 WklyNC 452].

[a] **In England** it has been held (1) that where the occupancy of a dwelling by a servant is merely ancillary to the service no settlement is gained thereby. Rex v. Iken, 2 A. & E. 147, 29 ECL 85, 111 Reprint 57; Rex v. Cheshunt, 1 B. & Ald. 473, 106 Reprint 174; Rex v. Minster, 3 M. & S. 276, 105 Reprint 615. (2) But that it is otherwise if the occupancy is wholly unconnected with the service. Rex v. Minster, supra.

81. Reg. v. St. Lawrence, 6 Q. B. 842, 51 ECL 842, 115 Reprint 317; Rex v. Wootton, 1 A. & E. 232, 28 ECL 125, 110 Reprint 1195; Rex v. Great Wakering, 5 B. & Ad. 971, 27 ECL 408, 110 Reprint 1050; Rex v. Seamer, 6 T. R. 554, 101 Reprint 699. Contra Reg. v. Caverswall, 10 A. & E. 270, 37 ECL 161, 113 Reprint 105.

82. Ft. Ann Overseers of Poor v. Kingsbury Overseers of Poor, 14 Johns. (N. Y.) 365; Rex v. Old Alresford, 1 T. R. 358, 99 Reprint 1138.

83. Ft. Ann Overseers of Poor v. Kingsbury Overseers of Poor, 14 Johns. (N. Y.) 365; Laporte Borough v. Hillsgrove Tp., 95 Pa. 269; Beaver Tp. Overseers of Poor v. Hartley Tp. Overseers of Poor, 11 Pa. 254; Rex v. Nacton, 3 B. & Ad. 543, 23 ECL 242, 110 Reprint 197; Rex v. Benneworth, 2 B. & C. 775, 9 ECL 336, 107 Reprint 571.

84. See cases supra note 83.

85. Ft. Ann Overseers of Poor v. Kingsbury Overseers of Poor, 14 Johns. (N. Y.) 365.

86. Plattekill Overseers of Poor v. New Paltz Overseers of Poor, 15 Johns. (N. Y.) 305.

Value of tenement or amount of rent generally see infra § 65.

87. Walker v. Marion, 148 Pa. 1, 23 A 1002.

[a] **Facts held insufficient** to show relation of landlord and tenant. Walker v. Marion, 148 Pa. 1, 23 A 1002; Elk Tp. v. Beaver Tp., 6 Pa. Co. 562.

Presumptions as to tenancy generally see Landlord and Tenant § 43.

88. Rex v. Rawden, 7 L. J. M. C. O. S. 35.

89. Rex v. Merthyr Tidvil, 1 B. & Ad. 29, 20 ECL 384, 109 Reprint 698.

Best and secondary evidence generally see Evidence §§ 1219-1379.

90. Rex v. Holy Trinity, 7 B. & C. 611, 14 ECL 275, 108 Reprint 851. See Rex v. Bathwick, 4 D. & R. 335, 16 ECL 205 (unstamped written agreement may be looked at to see whether it related to premises in question, in order to determine admissibility of parol evidence).

91. See statutory provisions.

[a] **Computation of value.**—(1) Generally. Reg. v. Fladbury, 10 A. & E. 706, 37 ECL 374, 113 Reprint 268; Rex v. Huntsham, 2 B. & Ad. 503, 22 ECL 213, 109 Reprint 1229; Rex v. Purley, 16 East 126, 104 Reprint 1036; Rex v. Hellingly, 10 East 41, 103 Reprint 691; Reg. v. Cuddington, 14 L. J. M. C. 182; Rex v. Ashfield-cum-Thorp, 8 L. J. M. C. O. S. 30; Rex v. Poulton-with-Fearnhead, 6 M. & S. 252, 105 Reprint 1237; Rex v. Aston, 6 M. & S. 54, 105 Reprint 1162; Rex v. Londonthorpe, 6 T. R. 377, 101 Reprint 604. (2) In case of joint tenancy. Reg. v. Aberdaron, 1 Q. B. 671, 41 ECL 722, 113 Reprint 1288.

92. See statutory provisions.

[a] **Computation of amount.**—Reg. v. St. John in Bedwardine, 8 A. & E. 192, 35 ECL 548, 112 Reprint 810; Reg. v. Hockworthy, 7 A. & E. 492, 34 ECL 266, 112 Reprint 555; Rex v. Wootton, 1 A. & E. 232, 28 ECL 125, 110 Reprint 1195; Rex v. Pickering, 2 B. & Ad. 267, 22 ECL 118, 109 Reprint 1142; Rex v. Thurmaston South End, 1 B. & Ad. 731, 20 ECL 668, 109 Reprint 959; Reg. v. West Ardsley, 4 B. & S. 95, 116 ECL 95, 122 Reprint 395.

93. Walker Overseers v. Milford Overseers, 12 Pa. Co. 321.

94. Beaver Tp. Poor Dist. v. Rose Tp. Poor Dist., 98 Pa. 636; Upper Augusta Tp. v. Rockefeller Tp., 2 Chest. Co. (Pa.) 190; Rex v. St. John's, 2 A. & E. 548, 29 ECL 258, 111 Reprint 212; Rex v. Shipdham, 3 D. & R. 384, 16 ECL 172; Rex v. Stow Bardolph, 9 L. J. M. C. O. S. 5; Rex v. Barham, 6 L. J. M. C. O. S. 78.

[a] **Computation of time.**—A person who rents a market stall to which he has a right of access for two days in the week only, and uses the stall on those days for a period of nineteen weeks, occupies the stall for thirty-eight days only, although no other person has a right to use it during the nineteen weeks, and hence a settlement is not acquired under the statute requiring an occupancy for forty days. Rex v. Caversham, 4 B. & C. 683, 10 ECL 756.

[b] **Subletting.**—(1) Under an English statute providing for the acquisition of a settlement by renting a tenement, which shall consist of a separate and distinct dwelling house or building, or of land, or of both, and that such building shall be "held," and the land "occupied," for one year, a person who rents and holds for the designated time a distinct and separate dwelling house acquires a settlement, although a part of such dwell-

The occupancy of premises under different hirings may be so connected as to make an occupancy for the statutory period.[95] But where a lessee occupies premises for less than the statutory period, and then occupies other premises without taking a lease or paying rent, his occupancy of the latter premises cannot be tacked to his occupancy of the former so as to make a continuous occupancy for the required time.[96] In computing the time of the lease and occupancy fractions of a day are to be disregarded.[97]

[§ 67] **(4) Payment of Rent.** The statutory requirement that rent shall be paid must be strictly complied with.[98] But it has been held that the entire rent reserved need not be paid, provided the amount paid equals the amount required by the statute;[99] nor need the rent be paid before the completion of the occupancy.[1] But payment of rent after the death of a pauper will not complete a settlement partially acquired in his lifetime.[2] So it has been held not to be necessary that the rent should have been paid by the lessee,[3] provided it was not paid with the fraudulent intention of fixing the pauper's settlement upon the town or parish,[4] and a payment by his surety has been sustained as sufficient.[5] But payment of rent by a trustee out of the produce of effects assigned to him by the tenant in trust for the payment of the rent is not a payment by the tenant.[6] As the rent need not be reserved in money,[7] so it need not be paid in money, but may be paid in labor or other services equivalent to money.[8] A settlement gained by compliance with the statutory provisions is not defeated by the fact that the whole rent is immediately returned to the landlord for future board which is furnished him.[9]

[§ 68] **e. Taxation—(1) In General.** In some jurisdictions the statutes provide as a mode of acquiring a settlement residence by a person in any place in the state, and payment of all duly assessed taxes on his poll or estate during the period prescribed by the statute.[10]

Nature and ownership of property. The word "estate" in such a statute does not import that the taxpayer must have a fee or freehold, but means any legal interest for which he may be taxed, whether consisting of real[11] or personal[12] property, excluding such estate as he may hold in trust, either as guardian, administrator, or otherwise.[13] Thus, if a property tax is assessed against the person whose settlement is in question, it is not necessary that the property should belong to such person,[14] or that the tax should have been paid by him on the property as his own.[15] One who has purchased and occupied land under a bond for title on payment of

ing is rented to a subtenant. Rex v. Iver, 1 A. & E. 228, 28 ECL 123, 110 Reprint 1193; Rex v. Macclesfield, 2 B. & Ad. 870, 22 ECL 365, 109 Reprint 1366; Rex v. Great Bentley, 10 B. & C. 520, 21 ECL 222, 109 Reprint 544; Rex v. Ditcheat, 9 B. & C. 176, 17 ECL 86, 109 Reprint 66; Rex v. Great Bolton, 8 B. & C. 71, 15 ECL 43, 108 Reprint 969; Rex v. Tonbridge, 6 B. & C. 88, 92, 13 ECL 52, 108 Reprint 385; Rex v. North Collingham, 1 B. & C. 578, 8 ECL 244, 107 Reprint 213; Rex v. Wainfleet All Saints, 6 L. J. M. C. O. S. 1112. (2) But the subletting of a part of a parcel of land will prevent a settlement; since in such case the original tenant does not "occupy" the land. Rex v. Great Bolton, supra; Rex v. Tonbridge, supra. (3) Under a later English statute requiring actual occupancy by the tenant, a tenant who sublets a part of the leased dwelling does not gain a settlement. Rex v. St. Nicholas, 5 B. & Ad. 219, 27 ECL 100, 110 Reprint 773. And see Rex v. Pakefield, 4 A. & E. 612 31 ECL 273, 111 Reprint 917 tenant must have exclusive possession). (4) But there is an actual occupancy, although the tenant lets a bed in a room, usually by the night, and sometimes by the week. Rex v. St. Geilsin-the-Fields, 4 A. & E. 495, 31 ECL 225, 111 Reprint 873.

[c] **Occupancy held sufficient.**—Rex v. Ormesby, 4 B. & Ad. 214, 24 ECL 102, 110 Reprint 436, Rex v. Lakenheath, 1 B. & C. 531, 8 ECL 225, 107 Reprint 196.

[d] **Occupancy held insufficient.**—Rex v. Berkswell, 6 A. & E. 282, 33 ECL 165, 112 Reprint 107; Rex v. Banbury, 1 A. & E. 136, 28 ECL 85, 110 Reprint 1159.

95. Allegheny City v. Allegheny Tp., 14 Pa. 138; Denison Poor Dist. v. Pittston, etc., Poor Dist., 1 Kulp (Pa.) 340; Rex v. Tadcaster, 4 B. & Ad. 703, 24 ECL 308, 110 Reprint 620; Rex v. Stow Parish, 4 B. & C. 87, 10 ECL 278, 107 Reprint 992.

96. Beaver Tp. Poor Dist. v. Rose Tp. Poor Dist., 98 Pa. 636. To same effect West Perry Tp. Overseers v. Monroe Tp. Overseers, 2 Walk (Pa.) 262.

97. Cascade Tp. Overseers v. Lewis Tp. Overseers, 148 Pa. 333, 23 A 1003 [aff 11 Pa. Co. 282]; Lenox Tp. v. Nicholson Tp., 3 LuzLegObs (Pa.) 310; Reg. v. St. Mary, 1 E. & B. 816, 72 ECL 816, 118 Reprint 642.

[a] **Thus** occupancy from the forenoon of April 2, 1890, to the forenoon of April 1, 1891, was held to be for a year, as the law does not regard fractions of a day. Cascade Tp. Overseers v. Lewis Tp. Overseers, 148 Pa. 333, 23 A 1003 [aff 11 Pa. Co. 282].

Fractions of day in computation of time generally see Time [38 Cyc 314].

98. Milton Borough Overseers of Poor v. West Chillisquaque Tp. Overseers of Poor, 9 Pa. Super. 204, 43 WklyNC 452; Rex v. Ashby-de-la-Hay 2 M & R. 21.

[a] **Proof of payment.**—(1) Admissibility. Reg. v. Birmingham Parish, 1 B. & S. 763, 101 ECL 763, 121 Reprint 897. (2) Facts held to show payment Ayres' Case, 4 Pa. Co. 499; Reg. v. Exeter, L. R. 4 Q. B. 341. (3) Facts held not to show payment. Laporte Borough Overseers v. Hillsgrove Tp. Overseers, 95 Pa. 269; Gregg v. Miles, 12 Pa. Dist. 215; Reg. v. Melsonby, 12 A. & E. 687, 40 ECL 342, 113 Reprint 975; Rex v. Pakefield, 4 A. & E. 612, 31 ECL 273, 111 Reprint 917.

99. Allegheny City v. Allegheny Tp., 14 Pa. 138.

[a] **In England** (1) the rule stated in the text has been affirmed under the statute as it existed prior to 6 Geo. IV c 57. Reg. v. Brighthelmstone, 1 Q. B. 674, 41 ECL 724, 113 Reprint 1289; Rex v. Dursley, 3 B. & Ad. 465, 23 ECL 209, 110 Reprint 168. (2) But after the enactment of such statute it was held that no settlement could be acquired unless the rent for the term of one year, whatever its amount, was paid. Rex v. Ashley Hay, 8 B. & C. 27, 15 ECL 23, 108 Reprint 953; Rex v. Ramsgate, 6 B. & C. 712, 13 ECL 319, 108 Reprint 613.

1. Rex v. Willoughby, 4 A. & E. 143, 31 ECL 81, 111 Reprint 742.

2. Rex v. Bexley, 5 L. J. M. C. O. S. 16; Rex v. Carshalton, 5 L. J. M. C. O. S. 14.

3. Rex v. Great Wakering, 5 B. & Ad. 971, 27 ECL 408, 110 Reprint 1050; Rex v. Ditcheat, 9 B. & C. 176, 17 ECL 86, 109 Reprint 66; Rex v. Kibworth Harcourt, 7 B. & C. 790, 14 ECL 353, 108 Reprint 918.

4. Rex v. St. Sepulchre, 1 B. & Ad. 924, 20 ECL 746, 109 Reprint 1030; Rex v. Tillingham, 1 B. & Ad. 180, 20 ECL 445, 109 Reprint 754.

5. Butler Tp. v. Sugarloaf, 6 Pa. 262.

6. Rex v. Pakefield, 4 A. & E. 612, 31 ECL 273, 111 Reprint 917.

7. See supra § 64.

8. Laporte Borough Overseers v. Hillsgrove Tp. Overseers, 95 Pa. 269; Beaver Tp. Overseers of Poor v. Hartley Tp. Overseers of Poor, 11 Pa. 254; Milton Borough Overseers of Poor v. West Chillisquaque Tp. Overseers of Poor, 9 Pa. Super. 204, 43 WklyNC 452; Spring Tp. Overseers of Poor v. Walker Tp. Overseers of Poor, 1 Pa. Super. 383; Wayne Tp. Poor Dist. v. Pine Creek Tp. Poor Dist., 26 Pa. Co. 614; Point Tp. Overseers of Poor v. Northumberland Borough Overseers of Poor, 22 Pa. Co. 242; Huntington Tp. Poor Dist. v. Salem Tp. Poor Dist., 8 Kulp (Pa.) 234; Rex v. Nacton, 3 B. & Ad. 543, 23 ECL 242, 110 Reprint 197; Rex v. Benneworth, 2 B. & C. 775, 9 ECL 336, 107 Reprint 571; Rex v. Whixley, 1 T. R. 137, 99 Reprint 1016.

9. Shrewsbury Tp. Poor Dist. v. Penn Tp. Door Dist., 33 Pa. Super. 378.

10. See statutory provisions.

[a] **Statute held prospective only.**—Manchester v. Dorset, 14 Vt. 224.

[b] **Statute held not repealed.**—Rex v. Stoke Damerel, 6 A. & E. 308, 33 ECL 178, 112 Reprint 117.

11. Sudbury v. Stow, 13 Mass. 462.

[a] **Illustration.**—Where a person paid taxes for six years on land which the owner had originally consented that the taxpayer should occupy for one year at a small rent, and which he continued to occupy during the six years without any express contract, but was too poor to pay the rent in full, such payment of taxes was sufficient to bring the taxpayer within the statute. Sudbury v. Stow, 13 Mass. 462.

12. Boston v. Dedham, 4 Metc. (Mass.) 178; Marshfield v. Middlesex, 55 Vt. 545.

[a] **"Ratable estate."**—Under an act directing listers to set dogs in the grand list at the sum of one dollar each, dogs are "ratable estate" within the pauper law. Marshfield v. Middlesex, 55 Vt. 545.

13. Sudbury v. Stow, 13 Mass. 462.

14. Randolph v. Easton, 4 Cush. (Mass.) 557; Sudbury v. Stow, 13 Mass. 462 [dist Templeton v. Sterling, 15 Mass. 253 (relating to acquiring a settlement under a different provision of the statute, under which it was held necessary to have title to the estate)]

15. Randolph v. Easton, 4 Cush.

the price holds a "ratable estate . . . in his own right," within the meaning of those words as used in some statutes relating to the acquisition of a settlement.[16]

[§ 69] **(2) Nature of Tax.** When the statute does not specify the character of the tax to be paid, the question of settlement is not affected by the quantum or the species of the tax; the payment of any tax for poll or estate is sufficient.[17] Thus it has been held that the payment of a highway tax[18] or county tax[19] is sufficient, but that the payment of a United States tax is insufficient.[20]

[§ 70] **(3) Levy and Assessment.** The statutes have usually been construed to mean that the taxes must have been actually assessed against the estate of the person claiming a settlement, and that it is not sufficient that he had an estate liable to taxation in the town, and was able to pay taxes for that period of time,[21] and it has been held that the town authorities may omit to tax a resident for the particular purpose of preventing his gaining a settlement.[22] But where the person pays taxes duly assessed upon him, the failure of the authorities to assess against him other taxes which should have been assessed will not prevent his gaining a settlement under statutes requiring the payment of all taxes duly asssessed.[23]

Invalid and irregular assessments. If the assessment of the tax was so defective as to be absolutely void, its payment will not confer a settlement.[24] But the acquisition of a settlement will not be prevented after payment by a mere irregularity in the assessment,[25] or by the nonpayment of a particular tax illegally assessed.[26] The taxes must have been assessed against the person whose settlement is claimed by reason of its payment;[27] but it is immaterial that the person was taxed by the wrong name.[28]

[§ 71] **(4) Payment.**[29] Unless the statute provides otherwise,[30] in order to confer a settlement it is not alone sufficient that the taxes have been assessed, but they must also actually have been paid,[31] and it has been held that the rule is not altered by abatement of the tax,[32] or by neglect to enforce,[33] or failure to demand,[34] payment; nor will remission of payment by special vote of the town or by action of the selectmen operate as payment.[35] The full amount assessed must be paid; payment of a part only will not suffice,[36] even though the taxpayer is discharged from payment of the residue by a vote of the town.[37]

Medium of payment. Under some statutes payment in money is necessary;[38] under others payment in labor will suffice.[39] But a promissory note payable to a town for the amount of a tax will not constitute a payment of the tax so as to give to the maker a settlement in the town, even though the authorities expressly agreed to receive such note

(Mass.) 557.

16. Weston v. Landgrove, 53 Vt. 375.

17. Andover v. Chelmsford, 16 Mass. 236; Billerica v. Chelmsford, 10 Mass. 394.

18. Andover v. Chelmsford, 16 Mass. 236; Huston Tp. Poor Dist. v. Benezette Tp. Poor Dist., 135 Pa. 393, 19 A 1060 [rev 7 Pa. Co. 383].

[a] **A township road tax** is a public tax the payment of which will secure a settlement. Huston Tp. Poor Dist. v. Benezette Tp. Poor Dist., 135 Pa. 393, 19 A 1060 [rev 7 Pa. Co. 383]; Woodward Tp. Overseers of Poor v. Lock Haven Poor Dist., 13 Pa. Co. 157.

19. Bucks County Directors of Poor v. Philadelphia Guardians of Poor, 5 Serg. & R. (Pa.) 417.

20. Bucks County House of Employment v. Brier Creek Tp. Overseers of Poor, 10 Serg. & R. (Pa.) 179.

[a] **A United States tax is not a public tax** that gives a settlement, under the act of 1771. Bucks County House of Employment v. Brier Creek Tp. Overseers of Poor, 10 Serg. & R. (Pa.) 179.

21. Berlin v. Bolton, 10 Metc. (Mass.) 115; Monson v. Chester, 22 Pick. (Mass.) 385; Southampton v. Easthampton, 8 Pick. (Mass.) 380; Reading v. Tewksbury, 2 Pick. (Mass.) 535; Pittsfield v. Barnstead, 38 N. H. 115; Springfield v. Enfield, 30 N. H. 71; Dalton v. Bethlehem, 20 N. H. 505; Henniker v. Weare, 9 N. H. 573; Burton v. Wakefield, 4 N. H. 47; Weare v. New Boston, 3 N. H. 203; Starksborough v. Hinesburgh, 13 Vt. 215; Reg. v. St. Marylebone, 15 Q. B. 399, 69 ECL 399, 117 Reprint 510; Reg. v. St. Anne, 2 E. & E. 485, 105 ECL 485, 121 Reprint 182; Rex v. St. John's, 1 Dougl. 225, 99 Reprint 147. See Beacon Falls v. Seymour, 43 Conn. 217 (holding that only when taxes have been legally imposed upon a person does a failure to pay them defeat his right to a settlement afterward).

[a] **Proof of assessment.**—Pittsfield v. Barnstead, 40 N. H. 477.

[b] **There is no presumption** that the tax was assessed. Pittsfield v. Barnstead, 38 N. H. 115.

[c] **In Connecticut,** however, the acquisition of a settlement is not prevented by failure of a person to pay taxes where none are assessed against him. Beacon Falls v. Seymour, 43 Conn. 217.

22. Berlin v. Bolton, 10 Metc. (Mass.) 115 [mod dicta to contrary Wrentham v. Attleborough, 5 Mass. 430]; Springfield v. Enfield, 30 N. H. 71; Thompson v. Newtown, 21 N. H. 595; Henniker v. Weare, 9 N. H. 573.

23. Andover v. Chelmsford, 16 Mass. 236; Billerica v. Chelmsford, 10 Mass. 394; Wrentham v. Attleborough, 5 Mass. 430.

24. Marlborough v. Sisson, 23 Conn. 401; Plymouth v. Wareham, 126 Mass. 475; Southampton v. Easthampton, 8 Pick. (Mass.) 380.

25. Conn.—Marlborough v. Sisson, 23 Conn. 401.

Mass.—Boston v. Dedham, 4 Metc. 178; Charlemont v. Conway, 8 Pick. 408; Wrentham v. Attleborough, 5 Mass. 430.

N. H.—Francestown v. Deering, 41 N. H. 438.

Pa.—Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 25 Pa. Super. 601.

Vt.—Weston v. Landgrove, 53 Vt. 375.

Eng.—Reg. v. Hulme, 4 Q. B. 538, 45 ECL 538, 114 Reprint 1001.

26. Charlemont v. Conway, 8 Pick. (Mass.) 408; Berlin v. Gorham, 34 N. H. 266; Lisbon v. Bath, 21 N. H. 319.

27. Springfield v. Enfield, 30 N. H. 71; Crossley v. Demott, 2 LegOp (Pa.) 161.

28. Canaan v. Gratton County, 64 N. H. 595, 15 A 18.

29. Burden of proof see infra § 132.

Necessity of residence in connection with payment of taxes see infra § 84.

30. See cases infra this note.

[a] **In Massachusetts** the statute provided several methods of obtaining settlement under one of which assessment was sufficient without payment. Templeton v. Sterling, 15 Mass. 253; Westbrook v Gorham, 15 Mass. 160.

31. Conn.—North Stonington v. Stonington, 31 Conn. 412.

Mass.—Taunton v. Wareham, 153 Mass. 192, 26 NE 451; Robbins v. Townsend, 20 Pick. 345; East Sudbury v. Sudbury, 12 Pick. 1; Billerica v. Chelmsford, 10 Mass. 394.

N. H.—Sunapee v. Lempster, 65 N. H. 655, 23 A 525; Hampstead v. Plaistow, 49 N. H. 84; Haverhill v. Orange, 47 N. H. 273; Hillsborough County v. Londonderry, 46 N. H. 11; Warren v. Wentworth, 45 N. H. 564; Bradford v. Newport, 42 N. H. 338; Berlin v. Gorham, 34 N. H. 266; Lisbon v. Bath, 21 N. H. 319; Dalton v. Bethlehem, 20 N. H. 505; Jaffrey v. Cornish, 10 N. H. 505.

N. Y.—Wallkill Overseers of Poor v. Mamakating Overseers of Poor, 14 Johns. 87; Amenia Overseers of Poor v. Stanford Overseers of Poor, 6 Johns. 92.

Pa.—Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 25 Pa. Super. 601.

32. Sunapee v. Lempster, 65 N. H. 655, 23 A 525.

33. Robbins v. Townsend, 20 Pick. (Mass.) 345.

34. Bradford v. Newport, 42 N. H. 338.

[a] **In Connecticut,** under Rev. St. tit 42 § 4, in order to prevent the acquisition of a settlement, the pauper must have refused to pay taxes legally imposed upon him and duly demanded by the collector, and such demand must have been made in good faith. North Stonington v. Stonington, 31 Conn. 412.

35. Haverhill v. Orange, 47 N. H. 273.

Remission of part of tax see infra text and note 37.

36. Shrewsbury v. Salem, 19 Pick. (Mass.) 389; Lisbon v. Bath, 21 N. H. 319.

[a] **Payment of three cents less** than the whole town taxes assessed upon an individual, and the receipt thereof as payment in full by the tax collector, do not constitute the payment of all taxes legally assessed. Lisbon v. Bath, 21 N. H. 319.

37. Shrewsbury v. Salem, 19 Pick. (Mass.) 389.

38. Amenia Overseers of Poor v. Stanford Overseers of Poor, 6 Johns. (N. Y.) 92.

39. Andover v. Chelmsford, 16 Mass. 236; Woodward Tp. Overseers of Poor v. Lock Haven Poor Dist., 13 Pa. Co. 157.

in payment.[40]

Time of payment. It is not necessary that the taxes be paid the year they are assessed,[41] although they must be paid before a settlement can be perfected.[42] A tender of payment at any time before the tax has been abated has been held to be equivalent to payment.[43] But after a tax has been abated it cannot be paid for the purpose of gaining a settlement.[44] A person is not prevented from gaining a settlement by paying his taxes for two years successively under the statute, although, without his knowledge or consent, and before paying the tax for the second year his name was entered on the poor books as a pauper.[45] It has also been held that a person may establish a settlement in a poor district by the payment of taxes after he has received relief from such district, if the taxes were not paid out of the money furnished him for relief.[46]

[§ 72] **(5) Persons Making Payment.** It is immaterial by whom the tax is paid, provided it is done at the instance of, or with the consent of, the person to be taxed,[47] and this has been held true when the payment was by a political candidate to qualify the person taxed as a voter.[48] On the other hand no settlement is gained unless the taxes are paid by, or in behalf of, the pauper,[49] and the unauthorized and unratified payment of such taxes by a third person will not entitle the person taxable to a settlement by reason thereof.[50]

[§ 73] **f. Service—(1) In General.** The statutes sometimes provide that a settlement may be gained in any poor district by any unmarried person, not having a child, who shall be bound or hired as a servant within such district, and shall continue in such service during one whole year,[51] or, as in England, declare that, if an unmarried person, not having a child, shall be lawfully hired into any parish or town for one year, such service shall be deemed a settlement therein.[52] The term "unmarried person" has been construed to include an emancipated minor child,[53] as in the case of a minor child who goes out to work because of the death or desertion of his parents,[54] and a married woman who has been deserted by her husband.[55] The word "child" is held to mean a legitimate child,[56] so that an unmarried woman having a bastard child may gain a settlement by hiring and service for one whole year.[57] It has also been held that if an unmarried person has no child that can be a burden on the district, town, or parish in consequence of the parent's acquiring settlement therein,[58] as where the child is emancipated,[59] the parent will be regarded as "not having a child," within the meaning of the statute.

Effect of residence elsewhere. The settlement is gained where the services are performed under a contract of hiring although the pauper may reside elsewhere.[60]

[§ 74] **(2) Contract of Hiring.** To obtain a legal settlement by service, there must be a contract of hiring, express or implied, which is binding on both parties.[61] Such contract need not be en-

[a] **Working out a highway tax** is a sufficient payment. Andover v. Chelmsford, 16 Mass. 236; Woodward Tp. Overseers of Poor v. Lock Haven Poor Dist., 13 Pa. Co. 157.

40. Jaffrey v. Cornish, 10 N. H. 505.

41. Dalton v. Bethlehem, 20 N. H. 505.

42. Dalton v. Bethlehem, supra.

43. Hillsborough County v. Londonderry, 46 N. H. 11.

44. Plymouth v. Andover, 49 N. H. 86 note.

45. Edenburg Poor Dist. v. Strattanville Poor Dist., 188 Pa. 373, 41 A 589.

46. East Franklin Tp. v. Rayburn Tp., 23 Pa. Super. 522.

Receiving supplies as preventing settlement generally see infra §§ 100–103.

47. Weare v. Deering, 58 N. H. 206; Lisbon v. Bath, 23 N. H. 1; Dallas Tp. Poor Dist. v. Eaton Tp. Poor Dist., 161 Pa. 142, 28 A 1070; Reg. v. Husthwaite, 18 Q. B. 447, 83 ECL 447, 118 Reprint 169; Rex v. Lower Heyford, 1 B. & Ad. 75, 20 ECL 403, 109 Reprint 715; Rex v. Axmouth, 8 East 383, 103 Reprint 390; Rex v. Weobley, 2 East 68, 102 Reprint 294; Rex v. Bridgewater, 3 T. R. 550, 100 Reprint 727.

[a] **Payment by guardian.**—Where a person is under guardianship as a lunatic, and has the amount of property required for a settlement, but it is taxed to the guardian, if the tax is paid by him the ward will gain a settlement at the end of four years. Andover v. Merrimack County, 37 N. H. 437.

48. Delaware Tp. v. Anthony Tp., 170 Pa. 181, 32 A 623 [rev 4 Pa. Dist. 100, 15 Pa. Co. 431] (where a candidate for office pays the taxes of a voter, pursuant to an understanding between them that he should do so in consideration of the latter's vote, it is a payment by the voter, within the meaning of the poor laws relating to settlement).

49. Coos County v. Berlin, 79 N. H. 5, 103 A 1006; Rex v. Weobley, 2 East 68, 102 Reprint 294. And see cases infra note 50.

[a] **A pauper may gain a settlement without paying his taxes in person,** "but not without being the payer of them, in some legal sense, within the reason of the law that requires from him the payment of such contributions to the town treasury." Weare v. Deering, 58 N. H. 206, 207 [quot Coos County v. Berlin, 79 N. H. 5, 103 A 1006].

50. Jaffrey v. Cornish, 10 N. H. 505; Wallkill Overseers of Poor v. Mamakating Overseers of Poor, 14 Johns. (N. Y.) 87; Dallas Tp. Poor Dist. v. Eaton Tp. Poor Dist., 161 Pa. 142, 28 A 1070; Lawrence Overseers v. Delaware Overseers, 148 Pa. 380, 23 A 1124; Beaver Tp. Poor Dist. v. Rose Tp. Poor Dist., 98 Pa. 636; Centre Tp. v. Mifflin County Poor Directors, 3 Pa. Co. 555; Reg. v. Benjeworth, 3 E. & B. 637, 77 ECL 637, 118 Reprint 1281.

[a] **Thus** it has been held that the payment of a voter's tax by a political candidate or committee to secure his vote, without any request or liability on the voter's part for repayment, is insufficient. Dallas Tp. Poor Dist. v. Eaton Tp. Poor Dist., 161 Pa. 142, 28 A 1070; Lawrence Tp. Overseers v. Delaware Tp. Overseers, 148 Pa. 380, 23 A 1124; Centre Tp. v. Mifflin County Poor Directors, 3 Pa. Co. 555.

[b] **Payment by a lessor** to whom they were assessed will be sufficient to give the lessee a settlement, where the lessor did not pay such taxes on account of or as agent of the lessee. Weare v. Deering, 58 N. H. 206; Reg. v. South Kilvington, 5 Q. B. 216, 48 ECL 216, 114 Reprint 1231.

[c] **Payment of a tax by the mortgagee,** in the absence of any contract, is not payment by the mortgagor within a statute requiring payment by the mortgagor in order to gain a settlement. Coos County v. Berlin, 79 N. H. 5, 103 A 1006.

[d] **Voluntary payment by the tax collector** is insufficient. Wallkill Overseers of Poor v. Mamakating Overseers of Poor, 14 Johns. (N. Y.) 87.

51. See statutory provisions.

52. St. 3 Wm. & M. c 11 § 7.

53. Northampton County Poor Directors v. Stroudsburg Poor Dist., 9 Pa. Dist. 614, 23 Pa. Co. 488; Bradford Tp. v. Huston Tp., 15 Pa. Co. 323; Hemlock Tp. Poor Dist. v. Shickshinny Borough Poor Dist., 6 Kulp (Pa.) 169.

Right of emancipated child to acquire settlement generally see supra § 49.

54. Schuylkill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41.

55. Loyalsock Tp. v. Johnsonburg, 14 Pa. Co. 323.

Right of deserted wife to acquire settlement generally see supra § 53.

56. See cases infra note 57.

57. Forest City Overseers of Poor v. Damascus Overseers, 176 Pa. 116, 34 A 351; Buffalo Tp. v. Lewisburg, 1 Pa. Co. 121; Overseers v. Overseers, 2 LancLRev (Pa.) 390.

58. Turbett Tp. Overseers of Poor v. Port Royal Borough Overseers of Poor, 33 Pa. Super. 520.

59. Rex v. Cowhoneyborne, 10 East 88, 103 Reprint 709.

[a] **Illustration.**—A woman who has been a widow for ten years, and whose only child, a daughter, has been married and living with her husband for ten years, acquires a settlement as an "unmarried person not having a child," by hiring and serving in a poor district for the statutory period. Turbett Tp. Overseers of Poor v. Port Royal Borough Overseers of Poor, 33 Pa. Super. 520.

[b] **Rule held not applicable.**—Where a four-year-old child was taken into the family of the grandfather and maintained by him until his death, and the grandmother continued such maintenance after the death of the grandfather, who left provision in his will therefor, there was no emancipation of the child by the father which would enable the latter to acquire a settlement as a person "not having a child." Rex v. Uckfield, 5 M. & S. 214, 105 Reprint 1029.

60. Bellefonte Borough Overseers of Poor v. Somerset County Poor Dist., 168 Pa. 286, 31 A 1086.

61. Lewistown v. Granville Tp., 5 Pa. 283; Plum Creek v. South Bend, 1 Pennyp. (Pa.) 408; Upper Milford Tp. Overseers of Poor v. Lower Macungie Tp. Overseers of Poor, 3 Whart.

tire,[62] it being sufficient if there has been a continuous service for a whole year under one or more contracts,[63] although the rule is otherwise where the time prescribed by statute refers to the contract of hiring and not to the service.[64] So where the statute requires only the service, and not the contract, to be for a year, the contract of hiring may be for an indefinite time, or at will, if the service is continued for the prescribed time.[65]

Consideration. A money consideration is not necessary to support the contract of hiring, but any other valuable consideration,[66] such as board and clothing,[67] will suffice.

[§ 75] **(3) The Service.** The service must be by virtue of a hiring; service alone, without a hiring, will not give a settlement.[68] It is not necessary that the service be menial or rendered in performance of household duties.[69]

Length and continuity of service. There must be an actual, continuous service for the required time,[70] and the criterion for determining whether absence from service breaks its continuity and prevents its being a whole year's service as contemplated by the statute is whether, during the intervals of absence, the contract of hiring is continued.[71]

[§ 76] **g. Apprenticeship[72]—(1) In General.** In several jurisdictions, statutes, varying in phraseology, provide for the acquisition of settlements by apprentices. Some of these statutes declare that the apprentice shall gain a settlement in the town or poor district in which he shall serve for a designated time under the indentures or articles of apprenticeship, while others provide that a settlement shall be obtained by one who shall be bound as an apprentice and inhabit in any district or parish for a specified time in pursuance of the apprenticeship.[73] To enable an apprentice to gain a settlement it is not necessary that the master should be settled

(Pa.) 71; Briar Creek Tp. v. Mt. Pleasant Tp., 8 Watts (Pa.) 431; Gregg Tp. v. Half-Moon Tp., 2 Watts (Pa.) 342; Tioga County Overseers v. Lawrence Tp. Overseers, 2 Watts (Pa.) 43; Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 12 Pa. Dist. 666 [aff 25 Pa. Super. 601]; Pine Tp. v. Franklin Tp., 4 Pa. Dist. 715; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70; Liberty Tp. v. Lamar Tp., 23 Pa. Co. 569; Jersey Shore Overseers of Poor v. Nippenose Tp. Overseers of Poor, 18 Pa. Co. 473; Loyalsock Tp. v. Johnsonburg Borough, 14 Pa. Co. 323; Hemlock Tp. Poor Dist. v. Shickshinny Borough Poor Dist., 6 Kulp (Pa.) 169; Rex v. Weyhill, Burr. S. Cas. 491; Tetbury v. Ilam, 1 Wils. 307, 95 Reprint 633.

[a] **Rule applied.**—A contract that one shall provide a shop, loom, etc., and the other shall perform the labor of weaving, and that each shall receive one half of the profits, is not a contract of hire, and no settlement can be gained by service thereunder. Gregg Tp. v. Half-Moon Tp., 2 Watts (Pa.) 342.

[b] **A precise and formal stipulation** is not necessary but to constitute the contract contemplated by the statute, any declarations, or acts of the parties, which evince their assent to an agreement expressed at the time, is sufficient. Tioga County Overseers v. Lawrence Tp. Overseers, 2 Watts (Pa.) 43; Fayette Tp. v. Fermanagh Tp., 11 Pa. Co. 70.

[c] **When contract will be implied.**—Where one who is not a relative and not an object of charity, but able to earn wages, is employed in the service of another for a year, the law implies a contract of hiring, so as to confer a settlement. Moreland v. Davidson Tp., 71 Pa. 371; Kelly Tp. v. Gregg Tp., 2 Walk. (Pa.) 383.

[d] **In New York** it has been held that service, without any fixed time for its continuance, and under a verbal agreement for the payment of wages, is insufficient. Wynkoop v. New York Overseers of Poor, 3 Johns. 15.

62. Moreland Tp. v. Davidson Tp., 71 Pa. 371; Lewistown Borough v. Granville Tp., 5 Pa. 283; Heidleberg v. Lynn, 5 Whart. (Pa.) 430, 34 AmD 566; Briar Creek Tp. v. Mt. Pleasant Tp., 8 Watts (Pa.) 431; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70; Byberry Tp. Overseers of Poor v. Oxford Tp., etc., Directors of Poor, etc., 2 Ashm. (Pa.) 9.

63. Moreland Tp. v. Davidson Tp., 71 Pa. 371; Lewiston Borough v. Granville Tp., 5 Pa. 283; Heidleberg v. Lynn, 5 Whart. (Pa.) 430, 34 AmD 566; Briar Creek Tp. v. Mt. Pleasant Tp., 8 Watts (Pa.) 431; Schuylkill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70.

[a] **There may be several contracts of hiring to several persons,** so long as the service is continuous. Fayette Tp. v. Fermanagh Tp., 11 Pa. Co. 70.

64. In re Dunsfold Parish, 2 Salk. 535, 91 Reprint 454.

[a] **Two separate hirings,** each for six months, will not give a settlement, although there was a continuous service one year. In re Dunsfold Parish, 2 Salk. 535, 91 Reprint 454.

65. Buffalo Tp. Poor Dist. v. Mifflinburg Borough Poor Dist., 168 Pa. 445, 32 A 28; Heidleberg v. Lynn, 5 Whart. (Pa.) 430, 34 AmD 566; Briar Creek Tp. v. Mt. Pleasant Tp., 8 Watts (Pa.) 431; Tioga County Overseers v. Lawrence Tp. Overseers, 2 Watts (Pa.) 43; Turbett Tp. Overseers of Poor v. Port Royal Borough Overseers of Poor, 33 Pa. Super. 520; Schuylkill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70; Bradford Tp. v. Huston Tp., 15 Pa. Co. 323; Byberry Tp. Overseers of Poor v. Oxford Tp., etc., Directors of Poor, etc., 2 Ashm. (Pa.) 9; Schickshinny Poor Dist. v. Montour Poor Dist., 6 Kulp (Pa.) 173.

66. Kelly Tp. v. Gregg Tp., 2 Walk. (Pa.) 383; Briar Creek Tp. v. Mt. Pleasant Tp., 8 Watts (Pa.) 431; Tioga County Overseers v. Lawrence Tp. Overseers, 2 Watts (Pa.) 43; Reading Overseers v. Cumree Overseers, 5 Binn. (Pa.) 81; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70; Huntington v. Fairmount, 2 Kulp (Pa.) 441.

67. Upper Milford Tp. Overseers of Poor v. Lower Maccungie Tp. Overseers of Poor, 3 Whart. (Pa.) 71; Northampton County Poor Directors v. Stroudsburg Poor Dist., 9 Pa. Dist. 614, 23 Pa. Co. 488; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70.

68. Moreland Tp. v. Davidson Tp., 71 Pa. 371; Lewistown Borough v. Granville Tp., 5 Pa. 283; Plum Creek v. South Bend, 1 Pennyp. (Pa.) 408; Heidleberg v. Lynn, 5 Whart. (Pa.) 430, 34 AmD 566; Tioga County Overseers v. Lawrence Tp. Overseers, 2 Watts (Pa.) 43; Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 12 Pa. Dist. 666 [aff 25 Pa. Super. 601]; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70; Liberty Tp. v. Lamar Tp., 23 Pa. Co. 569; Jersey Shore Overseers of Poor v. Nippenose Tp. Overseers of Poor, 18 Pa. Co. 473; Loyalsock Tp. v. Johnsonburg Borough, 14 Pa. Co. 323; Byberry Tp. Overseers of Poor v. Oxford Tp., etc., Directors of Poor, etc., 2 Ashm. (Pa.) 9.

69. Bradford Tp. v. Huston Tp., 15 Pa. Co. 323.

[a] **A laborer employed at a log camp to cut timber** may acquire a settlement in the township in which the camp is situated, if he works for a whole year at the camp. Bradford Tp. v. Huston Tp., 15 Pa. Co. 323.

70. Trenton Overseers v. Nottingham Overseers, 1 N. J. L. 335; Liberty Tp. v. Lamar Tp., 23 Pa. Co. 569; Bradford Tp. v. Huston Tp., 15 Pa. Co. 323. And see cases infra note 71.

[a] **A person working by the month,** who is neither hired nor at work during two months of each year, does not work under a hiring for the whole year, so as to acquire a settlement where the labor is performed, although he works there in the same business for parts of several years. Bradford Tp. v. Huston Tp., 15 Pa. Co. 323.

71. Buffalo Tp. Poor Dist. v. Mifflinburg Borough Poor Dist., 168 Pa. 445, 32 A 28; Moreland Tp. v. Davidson Tp., 71 Pa. 371; Heidleberg v. Lynn, 5 Whart. (Pa.) 430, 34 AmD 566; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70; Bradford Tp. v. Huston Tp., 15 Pa. Co. 323; Hamburg v. Fordsburg, 3 Burn Just. 448.

[a] **Mere temporary absence** (1) by the servant with the consent of the master does not break the continuity of the contract. Heidleberg v. Lynn, 5 Whart. (Pa.) 430, 34 AmD 566; Fayette Tp. v. Fermanagh Tp., 1 Pa. Dist. 795, 11 Pa. Co. 70; Bradford Tp. v. Huston Tp., 15 Pa. Co. 323; Byberry Tp. Overseers of Poor v. Oxford Tp., etc., Directors of Poor, etc., 2 Ashm. (Pa.) 9; Beccles v. Lewistoff, 3 Burn Just. 447. (2) Temporary absence of the servant, although without the master's consent, will not prevent the gaining of a settlement where the servant, after such absence, is taken back by the master under the original contract. Buffalo Tp. Poor Dist. v. Mifflinburg Borough Poor Dist., 168 Pa. 445, 32 A 28; Hamburg v. Fordsburg, 3 Burn Just. 448; Beccles v. Lewistoff, supra; St. Margaret's Westminster v. Richmond Burrows, 3 Burn Just. 445; Rex v. Islip, Str. 423, 93 Reprint 611.

72. **Apprenticeship:**
Generally see Apprentices 4 C. J. p 1412.
As emancipating child for the purpose of acquiring settlement in its own right see supra § 49.

73. See statutory provisions.

[a] **An articled clerk to an attorney** is an apprentice within the meaning of the statute. St. Pancras Parish v. Clapham Parish, 2 E. & E. 742, 105 ECL 742, 121 Reprint 278.

[b] **Prospective operation of statute.**—A statute, providing that from and after its passage no settlement shall be acquired by being apprenticed in the sea service, etc., nor by

within the parish or town in which the apprentice serves.[74] Paupers bound out as apprentices by overseers of the poor or parish officers may acquire a settlement,[75] and such settlement will not be disturbed for the fraud of the master if there was no fraud on the part of the parish officers.[76]

Residence of apprentice. Under a statute providing that, if any person shall be "bound as an apprentice and inhabit in any town or parish," such "binding and inhabiting" shall constitute a good settlement,[77] an apprentice's residence in a parish other than that of the master must be in the character of an apprentice and in furtherance of the object of apprenticeship,[78] and not merely for recreation or by way of indulgence on the part of the master.[79] On the other hand residence in a place other than that in which the master resides will confer a settlement if the apprentice resides there in his character of apprentice or performs services there which are connected with the apprenticeship,[80] as where the master affords no place for the apprentice to sleep, or appoints a place out of the parish where the services are performed.[81] Residence in a parish for the statutory period is sufficient, although not during any one year.[82]

[§ 77] **(2) Indenture.**[83] The statutes all require an indenture of apprenticeship,[84] as distinguished from a mere written contract of hire;[85] and while service under an indenture which is merely voidable will not prevent the acquisition of a settlement,[86] no settlement is gained where the indenture is void.[87]

Exemption clause. Where a pauper is bound out as an apprentice by a poor district and the indenture contains a clause whereby the master indemnifies the district against all costs for support during the term of apprenticeship, such indenture is insufficient to enable the apprentice to gain a settlement by service thereunder.[88]

[§ 78] **(3) Service.** Under statutes omitting the term "service," and declaring that the "binding and inhabiting" shall be adjudged a good settlement,[89] an apprentice duly indentured may gain a settlement without service under the indenture.[90] But where service is required, subjection to indenture without service under it is, of course, insufficient to confer a settlement.[91] The service required by the statute must be actual service under the indenture of apprenticeship.[92] An apprentice to gain a settlement must serve with his master for the period required by the statute, and if he absents himself and roves abroad he does not gain a settlement.[93]

Service under void indenture. Where the indenture is so defective as to be absolutely void, no settlement will be gained by service thereunder.[94]

any person now being such an apprentice in respect of such apprenticeship, is prospective, and a person who has resided in a parish and served an apprenticeship in the sea service for the requisite period acquires a settlement, although the statute became effective before the term of apprenticeship expired. Rex v. St. Giles in the Fields, 2 Q. B. 458, 42 ECL 759, 114 Reprint 181.

74. South Brunswick Tp. v. Independence Tp., 14 N. J. L. 549; In re St. Bride's Parish, 2 Salk. 533, 91 Reprint 453.

75. Franklin Tp. Overseers v. Bridgewater Tp. Overseers, 20 N. J. L. 563; Hamilton Overseers of Poor v. Eaton Overseers of Poor, 6 Cow. (N. Y.) 658; Rex v. Great Sheepy, 8 B. & C. 74, 15 ECL 44, 108 Reprint 970.

[a] **Notice.**—(1) In England, where an apprentice is bound from one parish into another, notice to the latter parish is necessary to the acquisition by the apprentice of a settlement therein. Rex v. Whiston, 4 A. & E. 607, 31 ECL 271, 111 Reprint 915; Rex v. Threlkeld, 4 B. & Ad. 229, 24 ECL 108, 110 Reprint 441. (2) But such notice is not necessary in the case of an assignment of the indentures. Rex v. Exminster, 6 A. & E. 598, 33 ECL 320, 112 Reprint 229.

76. Rex v. Great Sheepy, 8 B. & C. 74, 15 ECL 44, 108 Reprint 970.

77. See statutory provisions.

[a] **Facts held to show requisite residence.**—Rex v. Chelmsford, 3 B. & Ald. 411, 5 ECL 240, 106 Reprint 713; Rex v. Warden, 6 L. J. M. C. O. S. 72.

78. Rex v. Banbury, 3 B. & Ad. 706, 23 ECL 310, 110 Reprint 258; Rex v. Ilkeston, 4 B. & C. 64, 10 ECL 483, 107 Reprint 983; Reg. v. Barton upon Irwell, 3 B. & S. 604, 113 ECL 604, 122 Reprint 227; Rex v. Barmby-in-the-Marsh, 7 East 381, 103 Reprint 148.

79. Reg. v. Barton upon Irwell, 3 B. & S. 604, 113 ECL 604, 122 Reprint 227; Rex v. Ilkeston, 4 B. & C. 64, 10 ECL 483, 107 Reprint 983.

[a] **Illustration.**—An apprentice who works and lodges with his master during the week but is allowed, by way of indulgence, to return to his parents' home in another district at the end of each week does not gain a settlement in the latter district. Rex v. Ilkeston, 4 B. & C. 64, 10 ECL 483, 107 Reprint 983.

80. Reg. v. Somerby, 9 A. & E. 310, 36 ECL 177, 112 Reprint 1230; Rex v. Banbury, 3 B. & Ad. 706, 23 ECL 310, 110 Reprint 258; Rex v. Linkinhorne, 3 B. & Ad. 413, 23 ECL 187, 110 Reprint 148; Rex v. Ilkeston, 4 B. & C. 64, 67, 10 ECL 483, 107 Reprint 983; Reg. v. Barton upon Irwell, 3 B. & S. 604, 113 ECL 604, 122 Reprint 227; Reg. v. Elswick, 3 E. & E. 437, 107 ECL 437, 121 Reprint 506; Rex v. Stratford-upon-Avon, 11 East 176, 103 Reprint 971.

"There may, indeed, be cases, and some such have arisen, where an inhabitation in a parish different from that in which the master resides may be in furtherance of the service; for instance, where a master cannot take an apprentice into his own house, and appoints or allows him to choose a residence in another parish, so that he may return to his work every morning." Rex v. Ilkeston, supra.

[a] **Illustration.**—An apprentice who was sent by his master to his mother in another parish for the purpose of being cured of an illness, but who, while there, did errands for his master, acquired a settlement in such parish. Rex v. Stratford-upon-Avon, 11 East 176, 103 Reprint 971.

[b] **Sick apprentice sent to workhouse** in another district by master, who paid his expenses there. Rex v. Foulness, 6 M. & S. 351, 105 Reprint 1274.

81. Rex v. Ilkeston, 4 B. & C. 64, 10 ECL 483, 107 Reprint 983; Rex v. Castleton, Burr. S. Cas. 569.

82. Rex v. Aldstone, 2 B. & Ad. 207, 22 ECL 94, 109 Reprint 1121.

83. **Indenture of apprenticeship generally** see Apprentices §§ 38–76.

84. See statutory provisions

[a] **Contract held one of indenture.**—Rex v. Closworth, 6 A. & E. 286, 33 ECL 167, 112 Reprint 109; Rex v. Rainham, 1 East 531, 102 Reprint 205

[b] **Service under lost indenture.**—(1) The existence of an indenture which cannot be found may be presumed where services are rendered thereunder. Reg. v. Fordingbridge, E. B. & E. 678, 96 ECL 678, 120 Reprint 664. (2) Secondary evidence admissible. Reg. v. Kenilworth, 7 Q. B. 642, 53 ECL 642, 115 Reprint 631; Reg. v. Hinckley, 3 B. & S. 885, 113 ECL 885, 122 Reprint 331.

85. North Brunswick Tp. Overseers v. Franklin Tp. Overseers, 16 N. J. L. 535; Rex v. Billinghay, 5 A. & E. 676, 31 ECL 779, 111 Reprint 1321; Rex v. Great Wishford, 4 A. & E. 216, 31 ECL 111, 111 Reprint 768; Rex v. Rainham, 1 East 531, 102 Reprint 205; Rex v. Tipton, 8 L. J. M. C. O. S. 52; Rex v. Laindon, 8 T. R. 379, 101 Reprint 1444.

86. See infra § 78.

87. See infra § 78.

88. Lock Haven Poor-Dist. v. Chapman Tp. Poor Dist., 10 Pa. Cas. 136, 13 A 742.

89. See statutory provisions. See also supra § 76 notes 77–81.

90. Reg. v. Burslem, 11 A. & E. 52, 39 ECL 52, 113 Reprint 332; Rex v. Banbury, 3 B. & Ad. 706, 23 ECL 310, 110 Reprint 258; Rex v. Linkinhorne, 3 B. & Ad. 413, 23 ECL 187, 110 Reprint 148; Rex v. Charles, Burr. S. Cas. 706.

[a] **Illustration.**—Where a minor residing with his mother was apprenticed to his stepfather to learn a trade, and continued to reside with his mother and stepfather during the term, he acquired a settlement, although he never worked at the trade to which he was bound. Reg. v. Burslem, 11 A. & E. 52, 39 ECL 52, 113 Reprint 332.

91. Jefferson Tp. v. Pequanack Tp., 13 N. J. L. 187.

92. Orange Tp. v. Springfield Tp., 14 N. J. L. 321; Jefferson Tp. Overseers of Poor v. Pequanack Overseers of Poor, 13 N. J. L. 187; Niskayuna Overseers of Poor v. Albany Overseers of Poor, 2 Cow. (N. Y.) 537.

93. Jefferson Tp. v. Pequanack Tp., 13 N. J. L. 187.

94. Franklin Tp. Overseers v. Bridgewater Tp. Overseers, 20 N. J. L. 563; North Brunswick Tp. Overseers v. Franklin Tp. Overseers, 16 N. J. L. 535; Niskayuna Overseers of Poor v. Albany Overseers of Poor, 2 Cow. (N. Y.) 537; Pine Tp. v. Franklin Tp., 4 Pa. Dist. 715; Northampton County Poor Directors v. Lehigh County Poor Directors, 7 North. Co. (Pa.) 91; Reg. v. Barmston, 7 A. & E. 858, 34 ECL 446, 112 Reprint 693; Rex v. Ightman, 4 A. & E. 937, 31 ECL

Service under a parol agreement is insufficient.[95]

Service under voidable indenture. An apprentice may gain a settlement by service for the prescribed time under an indenture which is merely voidable,[96] although after such period and before the completion of the term he avoids it.[97]

Service under assigned indenture. Although a contract of apprenticeship is not assignable, in the absence of statutory authority, so as to bind the apprentice to a new service,[98] yet where an assignment has been made by the master, service with the assignee is sufficient to entitle the apprentice to a settlement.[99] The same is true where the apprentice serves the new master with the consent of his old master without any formal assignment of the indenture,[1] although the second master never knew of the apprenticeship, the service being in other respects a good service under the indenture.[2] The consent may be inferred from circumstances.[3] But in the absence of consent, whereby the new service may be attributable to apprenticeship, no settlement is conferred.[4] In other words there must be an assignment, express or implied.[5]

[§ 79] **h. Holding Public Office.** Some statutes provide that settlements may be gained by holding and serving in certain public offices for a specified time.[6] Actual service in the office and performance of the duties thereof are necessary to enable the person to gain a settlement; it is not enough that he was chosen to office.[7] When the statute requires service of one whole year in a given office to give a settlement, it means a political year, or from one election to another;[8] and hence if a person chosen to the office voluntarily removes from the town or parish, as the case may be, within the year, so as to render himself incapable of performing the duties of his office for a whole year, he gains no settlement.[9] On the same principle no settlement is

408, 111 Reprint 1036; Rex v. Great Wishford, 4 A. & E. 216, 31 ECL 111, 111 Reprint 768; Rex v. Newtown, 1 A. & E. 238, 28 ECL 127, 110 Reprint 1196; Rex v. Leeds, 4 B. & Ad. 248, 24 ECL 116, 110 Reprint 449; Rex v. Gravesend, 3 B. & Ad. 240, 23 ECL 112, 110 Reprint 90; Rex v. Crediton, 2 B. & Ad. 493, 22 ECL 209, 109 Reprint 1226; Rex v. Nether Knutsford, 1 B. & Ad. 726, 20 ECL 667, 110 Reprint 957; Rex v. Bilborough, 1 B. & Ald. 115, 106 Reprint 43; Rex v. Edingale, 10 B. & C. 739, 21 ECL 312, 109 Reprint 624; Rex v. Stoke Damerel, 7 B. & C. 563, 14 ECL 254, 108 Reprint 833; Rex v. Highnam, 4 Dougl. 238, 26 ECL 449, 99 Reprint 859; Rex v. Mountsorrell, 2 M. & S. 460, 105 Reprint 452; Rex v. Laindon, 8 T. R. 379, 101 Reprint 1444; Rex v. Margram, 5 T. R. 153, 101 Reprint 88.

[a] **Indentures held void.**—(1) An indenture which has no seal, but only a scroll or scribble in place thereof. Hopewell Tp. Overseers of Poor v. Amwell Tp. Overseers of Poor, 6 N. J. L. 169. (2) An indenture binding a parish apprentice was invalid because the assent of the justices required by the statute did not appear upon its face. Staverton Parish v. Ashburton Parish, 4 E. & B. 526, 82 ECL 526, 119 Reprint 193. (3) Under 28 Geo. III c 48 § 3, providing the indentures which bind children under eight years of age to chimney sweepers shall be void, no settlement is gained by a child so bound. Rex v. Hipswell, 8 B. & C. 466, 15 ECL 232, 108 Reprint 1116. (4) Where the evidence showed only service by the minor under a written agreement, without seals, between only the master and child, the service was not under an indenture of apprenticeship and it gave the minor no settlement. North Brunswick Tp. Overseers v. Franklin Tp. Overseers, 16 N. J. L. 535.

[b] **Indenture held valid.**—Rex v. Arundel, 5 M. & S. 257, 105 Reprint 1045.

95. Niskayuna Overseers of Poor v. Albany Overseers of Poor, 2 Cow. (N. Y.) 537.

96. Bloomfield Tp. Overseers v. Acquackanunck Tp. Overseers, 8 N. J. L. 257; Franklin Tp. v. South Brunswick Tp., 3 N. J. L. 442; Hopewell Tp. v. Amwell Tp., 3 N. J. L. 16; Hamilton Overseers of Poor v. Eaton Overseers of Poor, 6 Cow. (N. Y.) 658; Owasco Overseers of Poor v. Oswegatchie Overseers of Poor, 5 Cow. (N. Y.) 527; Hudson Overseers of Poor v. Taghkanac Overseers of Poor, 13 Johns. (N. Y.) 245; Reading Overseers v. Cumree Overseers, 5 Binn. (Pa.) 81; Rex v. Gainsborough, Burr. S. Cas. 586; Rex v. St. Nicholas, Burr. S. Cas. 91; Woodstock Union v. Shipston-on-Stour Union, 62 L. J. M. C. 43; Rex v. St. Petrox, 4 T. R. 196, 100 Reprint 970.

[a] **Misnomer.**—An apprentice may gain a settlement under an indenture wherein his name appears incorrectly. Reg. v. Wooldale, 6 Q. B. 549, 51 ECL 549, 115 Reprint 206.

[b] **Erroneous date.**—An indenture bearing an erroneous date of execution is not void, and service thereunder will give a settlement. Rex v. Harrington, 4 A. & E. 618, 31 ECL 276, 111 Reprint 919.

97. Bloomfield Tp. Overseers v. Acquackanunck Tp. Overseers, 8 N. J. L. 257.

98. See Apprentices § 119.

99. Kingwood Tp. Overseers of Poor v. Bethlehem Tp. Overseers of Poor, 13 N. J. L. 221; Guilderland Overseers of Poor v. Knox Overseers of Poor, 5 Cow. (N. Y.) 363; Reading Overseers v. Cumree Overseers, 5 Binn. (Pa.) 81; Rex v. St. Petrox, Burr. S. Cas. 248; Rex v. St. Nyott, Burr. S. Cas. 132; Rex v. Stockland, 1 Dougl. 70, 99 Reprint 49; Rex v. Barnsley, 1 M. & S. 377, 105 Reprint 142; Rex v. East-Bridgeford, Str. 1115, 93 Reprint 1068.

1. Kingwood Tp. v. Bethlehem Tp., 13 N. J. L. 221; Guilderland Overseers of Poor v. Knox Overseers of Poor, 5 Cow. (N. Y.) 363; Rex v. Sandhurst, 6 A. & E. 130, 33 ECL 90, 112 Reprint 50; Rex v. Gwinear, 1 A. & E. 152, 28 ECL 92, 110 Reprint 1165; Rex v. Banbury, 3 B. & Ad. 706, 23 ECL 310, 110 Reprint 258; Rex v. Barleston, 5 B. & Ald. 780, 7 ECL 424, 106 Reprint 1376; Rex v. St. Mary, 4 Dougl. 329, 26 ECL 506, 99 Reprint 906; Rex v. Barmby-in-the-Marsh, 7 East 381, 103 Reprint 148; Rex v. Shebbear, 1 East 73, 102 Reprint 29; Rex v. Barnsley, 1 M. & S. 377, 105 Reprint 142 [cit St. Petrox v. Stoke Fleming, Burr. S. Cas. 248]; Allhallows v. St. Olave, Str. 554, 93 Reprint 695; In re Holy Trinity Parish, Str. 10, 93 Reprint 352.

[a] **Written assignment unnecessary.**—A service may be performed by an apprentice, with the consent of his master, with another man, so as to gain a settlement, and a formal assignment of the indenture in writing is not necessary; the assent of the original master is all that the law requires. Kingwood Tp. Overseers of Poor v. Bethlehem Tp. Overseers of Poor, 13 N. J. L. 221.

[b] **An indenture merely delivered to the new master** by the old without any assignment is sufficient. Guilderland Overseers of Poor v. Knox Overseers of Poor, 5 Cow. (N. Y.) 363.

2. Rex v. Sandhurst, 6 A. & E. 130, 33 ECL 90, 112 Reprint 50.

3. Kingwood Tp. Overseers of Poor v. Bethlehem Tp. Overseers of Poor, 13 N. J. L. 221.

4. Orange Tp. Overseers of Poor v. Springfield Tp. Overseers of Poor, 14 N. J. L. 321; Trenton Overseers v. Nottingham Overseers, 1 N. J. L. 335; Guilderland Overseers of Poor v. Knox Overseers of Poor, 5 Cow. (N. Y.) 363; Rex v. Sandhurst, 6 A. & E. 130, 33 ECL 90, 112 Reprint 50; Rex v. Maidstone, 5 A. & E. 326, 31 ECL 633, 111 Reprint 1188; Rex v. St. Martin's, 2 A. & E. 655, 29 ECL 304, 111 Reprint 252; Rex v. Gwinear, 1 A. & E. 152, 28 ECL 92, 110 Reprint 1165; Rex v. St. Cuthbert, 5 B. & Ad. 939, 27 ECL 395, 110 Reprint 1038; Rex v. Banbury, 5 B. & Ad. 176, 27 ECL 82, 110 Reprint 757; Rex v. Spreyton, 3 B. & Ad. 818, 23 ECL 358, 110 Reprint 300; Rex v. Great Wigston, 3 B. & C. 484, 10 ECL 223, 107 Reprint 813; Rex v. St. Mary, 4 Dougl. 329, 26 ECL 506, 99 Reprint 906; Rex v. Whitchurch, 2 D. & R. 845; Rex v. Barmby-in-the-Marsh, 7 East 381, 103 Reprint 148; Rex v. Shebbear, 1 East 73, 102 Reprint 29; Rex v. Shipton, 6 L. J. M. C. O. S. 92; St. Olave Parish v. All Hallows on Wall Parish, 8 Mod. 168, 88 Reprint 124; Rex v. St. Paul's Bedford, 6 T. R. 452, 101 Reprint 644.

[a] **Thus,** if the master allows his apprentice to go at large and the apprentice serves a new master without any agreement therefor between the old and the new masters, the apprentice will not gain a settlement by such service. Orange Tp. Overseers of Poor v. Springfield Tp. Overseers of Poor, 14 N. J. L. 321.

[b] **Consent held sufficient.**—The consent of the master to the new service is sufficiently shown by his giving the apprentice a "character" as servant. Rex v. St. Mary, 4 Dougl. 329, 26 ECL 506, 99 Reprint 906.

5. Orange Tp. v. Springfield Tp., 14 N. J. L. 321; Trenton Overseers v. Nottingham Overseers, 1 N. J. L. 335.

6. See statutory provisions.

[a] **A collector of taxes for a school district** merely is a "collector of taxes" under Pub. St. (1882) c 83 § 1 subd 8, and acquires a settlement by one year's service in that capacity. Belgrade v. Sidney, 15 Mass. 523.

[b] **Statutory abolition of settlements** gained by officeholders. Northfield v. Merrimack County, 43 N. H. 165.

7. Barre v. Greenwich, 1 Pick. (Mass.) 129; Paris v. Hiram, 12 Mass. 262; Rumney v. Campton, 10 N. H. 567; Acworth v. Lyndeborough, 2 N. H. 295; Sherburne Overseers of Poor v. Norwich Overseers of Poor, 16 Johns. (N. Y.) 186; Burke v. Westmore, 55 Vt. 213.

8. Paris v. Hiram, 12 Mass. 262.

9. Barre v. Greenwich, 1 Pick. (Mass.) 129; Rumney v. Campton, 10 N. H. 567; Acworth v. Lyndeborough, 2 N. H. 295; Sherburne Overseers of

gained by an officer who is compulsorily removed from the town and confined in prison so that he is not able to discharge the duties of the office.[10] But temporary incapacity to discharge the duties of the office, caused by sickness or absence, does not prevent the gaining of a settlement.[11] A statute providing merely that one who holds a given office in the town for two years shall have a settlement does not necessitate a holding of such office for two years in succession;[12] but it is essential to the acquisition of a settlement under such provision that the person shall have a continuous residence in the town from the time he first holds the office until the settlement has been acquired; and if he holds the office for two years, but with an interval between, and during that period resides out of town for any time, he acquires no settlement.[13]

[§ 80] **i. Military Service—(1) Under Connecticut Statute.** An early statute in Connecticut provided that any soldier in the continental army who should be credited to any town in the state as part of its quota should be considered as settled in such town,[14] and such statute was held to include an enlisted alien.[15]

[§ 81] **(2) Under Massachusetts Statute—(a) In General.** In Massachusetts the statute provides that any person who was duly enlisted and mustered into the military or naval service of the United States during the Civil War, and duly assigned as a part of the quota of any city or town, and who served for not less than one year, shall be deemed to have acquired a settlement in such city or town.[16] Such statute has been held to include persons who were minors at the time of their enlistment,[17] and persons who were enlisted prior to the act of congress fixing the legal obligation of towns, etc., to supply their proportion of soldiers, and who under the provision of such act were eventually credited to the town.[18] The right to a settlement is not affected by the fact that the soldier was credited in excess of the proportion due from the town at the time of such credit.[19] The fact that a person was drafted into service instead of entering it as a volunteer,[20] or was enlisted and mustered under a false name,[21] will not prevent him from acquiring a settlement; and in the latter case his identity may be shown by parol.[22]

Residence of person enlisting. A settlement may be acquired under the statute, by reason of service in the navy as part of the quota of a town, although the person so serving was at the time of his enlistment a resident of another town.[23]

Length of service. Although the statute provides that the person for whom the settlement is claimed must have continued in the service for a term not less than one year,[24] yet the length of his service is immaterial if he died or was disabled by disease contracted while engaged in the service;[25] and it has been held that, when the soldier did not serve for a year, the burden was upon the parties alleging the settlement to show a discharge for such a cause.[26]

Willful deserters and persons not honorably discharged. No settlement under the act is acquired by willful deserters or persons leaving the service otherwise than by honorable discharge.[27] But absence without leave, unaccompanied by an intention not to return, is not a willful desertion.[28] And the fact that a person duly enlisted and mustered was discharged as illegally drafted, after having served the required time, will not deprive him of the benefit of the statute.[29] A certificate, in due form, from the proper officer, of an honorable discharge, is admissible,[30] and is conclusive evidence of the cause of discharge.[31] If the discharge paper does not show the cause of discharge it will be presumed to be an honorable discharge.[32]

Continuance of service after statutory period. Immediately upon service for the year a settlement is gained, although the service is continued.[33]

[§ 82] **(b) Replacing Settlement by Acquiring Another.** One who has acquired a military settlement under the statute can, like any other person, gain, in any of the modes prescribed by the ordinary law, a new settlement in another town or city, and thereby replace the military one.[34] So, too, a military settlement gained by a person in one town may be replaced by a military settlement gained by him in another town, although both settlements were acquired before the passage of the act.[35]

Poor v. Norwich Overseers of Poor, 16 Johns. (N. Y.) 186.

[a] **Thus** serving as constable for part of a year, and then removing from the town and occasionally returning merely to collect fees and settle old accounts, is not such an execution of a public annual office, during one whole year, as to give a settlement. Sherburne Overseers of Poor v. Norwich Overseers of Poor, 16 Johns. (N. Y.) 186.

10. Paris v. Hiram, 12 Mass. 262 [cit Burr. S. Cas. 239].
11. Paris v. Hiram, 12 Mass. 262.
12. Lincoln v. Warren, 19 Vt. 170.
13. Lincoln v. Warren, supra.
14. Act Febr. 1781.
15. See supra § 45.
16. St. (1865) c 230; St. (1878) c 190; St. (1882) c 83 § 1.

[a] **Facts held to show that pauper was duly assigned** as part of the quota of the town in which a settlement was claimed. Brockton v. Uxbridge, 138 Mass. 292.

17. See supra § 48.
18. Boston v. Mt. Washington, 139 Mass. 15, 29 NE 60; Bridgewater v. Plymouth, 97 Mass. 382.
19. Wayland v. Ware, 104 Mass. 46.
20. Sheffield v. Otis, 107 Mass. 282.

Discharge of soldier as illegally drafted see infra text and note 29.

21. Milford v. Uxbridge, 130 Mass. 107.
22. Milford v. Uxbridge, supra.
23. Brockton v. Uxbridge, 138 Mass. 292 (holding further that the settlement may be so acquired, notwithstanding a provision of the federal statute that naval recruits are to be credited to the quota of the town "in which they respectively reside").
24. See statutory provisions.

[a] **Computation of time.**—Where a soldier deserted, but subsequently surrendered under a proclamation of the president of the United States, and was honorably discharged, the time of his absence shall be excluded in determining whether he had served for the statutory period. Lunenburg v. Shirley, 132 Mass. 498.

25. South Scituate v. Scituate, 155 Mass. 428, 29 NE 639; Waltham v. Newburyport, 150 Mass. 569, 23 NE 379; Ashland v. Marlborough, 106 Mass. 266; Wayland v. Ware, 104 Mass. 46; Bridgewater v. Plymouth, 97 Mass. 382.

[a] **Soldier discharged for disability** does not thereby acquire a settlement under the statute, unless it appears that the disability arose from wounds received or disease contracted in the service. Ashland v. Marlborough, 106 Mass. 266.

26. Ashland v. Marlborough, supra.

Evidence of honorable discharge see infra text and notes 30–32.

27. See statutory provisions.

[a] **Desertion during second enlistment.**—Since the statute excepts from its benefits a soldier guilty of willful desertion, it does not enable a soldier who was guilty of willful desertion during his second enlistment to gain a settlement which, but for this, he might have acquired by virtue of his first enlistment. Cambridge v. Paxton, 144 Mass. 520, 12 NE 188.

[b] **Facts held insufficient** to show willful desertion. Milford v. Uxbridge, 130 Mass. 107.

28. Hanson v. South Scituate, 115 Mass. 336.
29. Sheffield v. Otis, 107 Mass. 282.
30. Hanson v. South Scituate, 115 Mass. 336.
31. South Scituate v. Scituate, 155 Mass. 428, 29 NE 639; Newburyport v. Waltham, 150 Mass. 311, 23 NE 46; Fitchburg v. Lunenburg, 102 Mass. 358.
32. Brockton v. Uxbridge, 138 Mass. 292 (where a discharge paper merely stated that the person alleged to have acquired a settlement "has this day been discharged" from the naval service of the United States).
33. Newburyport v. Worthington, 132 Mass. 510.
34. Boston v. Warwick, 132 Mass. 519.
35. Granville v. Southampton, 138 Mass. 256.

[§ 83] **j. Residence[36]—(1) In General.** The statutes generally provide for the acquisition of a settlement by a residence for a specified length of time within a town, parish, or poor district, and compliance with other statutory requirements,[37] and it is only by strict compliance with the statute that a settlement is acquired thereunder.[38] To acquire a settlement under such a provision it is not necessary that a person be a poor or dependent person at the time the settlement is acquired,[39] and the question as to where he became a poor person is immaterial.[40] Where the statute exempts from its provisions persons sent into a poor district for education, a person sent into the district under indenture to learn the art of husbandry is within the exemption.[41]

[§ 84] **(2) Necessity of, in Connection with Payment of Taxes.** Where the statute provides for the acquisition of a settlement by residence and payment of taxes, no settlement is gained by the payment of taxes during the prescribed period, without a continuous residence through the same term.[42] So it has been held that the residence must be within the actual limits of the town. If the person resides without the legal limits of the town he does not gain a settlement, although he pays taxes to the town.[43]

[§ 85] **(3) Necessity of Obtaining Approbation of Town To Acquire Settlement Thereby.** Under the earlier statutes of the New England states, no person coming to reside or dwell in a town could thereby gain a settlement without obtaining the approbation of the inhabitants of the town given at a general town meeting.[44] A person could not gain a settlement by an implied approbation by the town of his residing therein.[45]

[§ 86] **(4) Nature and Requisites—(a) In General.** The term "residence," within the meaning of the statutes relating to the acquisition of settlements by residence, means the same thing as "home," "abode," or "place of dwelling," "residing," in similar statutes, means "having a home" or "abode," etc.[46] The word "inhabitant," as used in some statutes, means the same as "resident."[47] The residence requisite to the gaining of a settlement in a poor district is a residence therein in one's own right.[48] The residence must be open and notorious,[49] and if a person conceals his presence in a town or district from the authorities, so that they cannot warn him out,[50] it is insufficient to confer a settlement.[51]

36. Cross references:
Capacity to acquire settlement by residence:
Generally see supra §§ 44–54.
Infant see supra §§ 48, 49.
Insane person see supra § 50.
Married woman see supra § 52.
Effect of receiving pauper supplies see infra §§ 100–103.
Liability of place of residence for support of pauper see infra § 208.
Necessity of:
Occupation of freehold see supra § 56.
Residence in connection with payment of taxes see infra § 84.
Retrospective operation of statutes see supra § 39.

37. See statutory provisions.

[a] **Irrespective of what season of the year the residence begins or ends,** a settlement is gained by residing continuously in a poor district for the full period required by the statute. Andover v. Merrimack County, 37 N. H. 437.

[b] **In New Jersey,** by the act of April 6, 1886 (now embodied in Gen. St. [1895] p 2519), which provided that "any person or persons who have or who shall have resided in any township of this state for the period of ten years shall be considered as legally settled in said township," the legislature expressed the design to introduce a new condition upon which a legal settlement might be acquired; and when such a condition is found to exist, an absolute settlement, and not one prima facie, is established. McLorinan v. Bridgewater Tp. Overseers of Poor, 49 N. J. L. 614, 10 A 187 [quot Marlboro Tp. v. Freehold, 50 N. J. L. 509, 511, 14 A 595].

[c] **In Vermont** a legal settlement could be acquired under the act of 1779, and prior to the act of 1787, by one year's continuous residence in a town in the state. Londonderry v. Andover, 28 Vt. 416; Corinth v. Newbury, 13 Vt. 496; Starksborough v. Hinesburg, 13 Vt. 215.

38. Conn.—Middletown v. Berlin, 18 Conn. 189.
Me.—Standish v. Gray, 18 Me. 92.
Mass.—Danvers v. Boston, 10 Pick. 513.
N. J.—East Windsor Tp. v. Montgomery Tp., 9 N. J. L. 39.
N. Y.—Cattaraugus County Superintendent of Poor v. Erie County Superintendent of Poor, 21 NYS 729 [aff 143 N. Y. 631 mem, 37 NE 826 mem].
Vt.—Newfane v. Dummerston, 34 Vt. 184.
Eng.—Hackney Union v. Kingston-Upon-Hull, [1912] A. C. 475.
And see cases infra this note.

[a] **Failure to pay taxes** as required by statute will prevent the gaining of a settlement by commorancy. Middletown v. Berlin, 18 Conn. 189. But see Litchfield v. Farmington, 7 Conn. 100 (holding that, under the statute as revised in 1821, the nonpayment of taxes did not prevent the acquisition of a settlement by a six years' residence, but the resident, for such neglect, was liable to be removed).

[b] **Statute held sufficiently complied with.**—Standish v. Gray, 18 Me. 92; Standish v. Windham, 10 Me. 97; Danvers v. Boston, 10 Pick. (Mass.) 513; East Windsor Tp. v. Montgomery Tp., 9 N. J. L. 39; Cattaraugus County Superintendent of Poor v. Erie County Superintendent of Poor, 21 NYS 729 [aff 143 N. Y. 631 mem, 37 NE 826 mem]; St. Johnsbury v. Waterford, 67 Vt. 641, 32 A 630; Hackney Union v. Kingston-Upon-Hull, [1912] A. C. 475 [aff [1911] 1 K. B. 748].

[c] **Statute held not complied with.**—West Ham Union v. St. Matthews Churchwardens, etc., [1894] A. C. 230 [overr Tadcaster Union v. Leeds Union, 4 Q. B. D. 323].

39. Redwood County v. Minneapolis, 126 Minn. 512, 148 NW 469; Matter of Chamberlain, 73 Misc. 256, 132 NYS 681.

40. Matter of Chamberlain, supra.

41. Barrington v. Gilmanton, 3 N. H. 83.

Acquisition of settlement by apprenticeship see supra §§ 76–78.

42. Me.—Westbrook v. Bowdoinham, 7 Me. 363.
Mass.—Southborough v. Marlborough, 24 Pick. 166; Billerica v. Chelmsford, 10 Mass. 394.
N. H.—Tamworth v. Freedom, 17 N. H. 279.
Pa.—Cowanshannock Tp. Overseers v. Valley Tp. Overseers, 152 Pa. 504, 25 A 801.
Vt.—Washington v. Corinth, 55 Vt. 468.

[a] **For example,** if during a part of the year for which the tax is paid the person left the town or district without any intention of returning, although in fact he did return, the continuity of his residence is broken, and no settlement is gained unless he resides in the town or district and pays his taxes for the required time after such return. Westbrook v. Bowdoinham, 7 Me. 363.

Continuity of residence generally see infra §§ 91–95.

43. Ellsworth v. Gouldsboro, 55 Me. 94.

44. See statutory provisions.

[a] **In Massachusetts,** under Poor St. (1767) (7 Geo. III) c 3 § 4 and before the enactment of St. (1789) c 14, there was no mode of acquiring a new settlement except by approbation of the town at a general meeting. Maiden v. Melrose, 125 Mass. 304; Amherst v. Shelburne, 13 Gray 341; Andover v. Canton, 13 Mass. 547; Granby v. Amherst, 7 Mass. 1; West Springfield v. Granville, 4 Mass. 486; Salem v. Andover, 3 Mass. 436.

45. Amherst v. Shelburne, 13 Gray (Mass.) 341; Orange v. Sudbury, 10 Pick. (Mass.) 22.

[a] **For example** the acceptance by a town of a list of jurymen, as revised by the selectmen, which contains the name of a person who has come into the town to reside, is not such an approbation as is required by the statute. Orange v. Sudbury, 10 Pick. (Mass.) 22.

46. New Hartford v. Canaan, 54 Conn. 39, 5 A 360; Salem v. Lyme, 29 Conn. 74; Warren v. Thomaston, 43 Me. 406, 69 AmD 69; Brewer v. Linnaeus, 36 Me. 428; Corinth v. Lincoln, 34 Me. 310; Kennebunkport v. Buxton, 26 Me. 61; Granville v. Hancock, 69 Vt. 205, 37 A 294; South Burlington v. Worcester, 67 Vt. 411, 31 A 891; Rockingham v. Springfield, 59 Vt. 521, 9 A 241; Reg v. Stepney Union, 54 L. J. M. C. 12.

Definitions of "residence" generally see Residence [34 Cyc 1647].

47. New Haven v. Bridgeport, 68 Conn. 588, 37 A 397; Canton v. Simsbury, 54 Conn. 86, 6 A 183; New Hartford v. Canaan, 54 Conn. 39, 5 A 360.

48. Fairfax v. Westford, 67 Vt. 390, 31 A 847; Marshfield v. Tunbridge, 62 Vt. 455, 20 A 106.

49. Henrietta Tp. v. Brownhelm Tp., 9 Oh. 76.

[a] **However, no special notoriety is required;** nor is it necessary that anything should be done to call the attention of the authorities to the fact of residence. It is held that all that is necessary in order to gain a settlement is a bona fide residence within the bounds of the district, in accordance with the convenience and circumstances of the party. Henrietta Tp. v. Oxford Tp., 2 Oh. St. 32.

50. Preventing settlement by warning out see infra §§ 104–109.

51. Newbury v. Harvard, 6 Pick.

Such residence must also be of a fixed and permanent character as distinguished from transient or temporary.[52]

Physical presence. Ordinarily a residence cannot be initiated unless there is a physical presence of the person in the town or district,[53] concurrent with an intention to reside there;[54] for, as has been said, intention may prolong a residence during absence, but cannot anticipate one,[55] although it has been held that intention to reside in a particular place, accompanied by removal of the person's family to such place, may be sufficient to establish his residence there without his bodily presence.[56] But physical presence need not continue for any particular time in order to establish a residence.[57]

Control over place of abode. To constitute a residence in a particular place, the person need not have any general interest in, or control over, the dwelling or house in which he lives,[58] nor need he even have any regular place of abode.[59] But a person cannot become a member of another person's family so as to give him a residence unless he is voluntarily there with the consent of the one having control.[60]

Coerced habitation. The habitation or residence necessary to confer a legal settlement under the pauper laws must not be the result of legal coercion, but there must be liberty of choice whether to live there or elsewhere,[61] and such liberty of choice does not exist in the case of a person confined as a prisoner[62] or as a lunatic.[63]

A person while supported as a pauper cannot be considered as residing at the place where he is supported, nor can such place be considered his place of residence.[64]

Residence of married woman. Where a husband has no settlement in the state, although he has acquired a residence there, and the wife is capable under the statute of acquiring a settlement in her own right,[65] her residence follows that of the husband, and she acquires a settlement by such residence for the statutory period.[66]

[§ 87] **(b) Animus Manendi.** Physical presence in a town or poor district, while generally necessary to initiate a residence,[67] is not alone sufficient,[68] but to gain a residence it is necessary that the person should take up his habitation in the place with the intention of remaining,[69] or at least without any present intention of removing.[70] But a person

(Mass.) 1; Newbury v. Topsham, 7 Vt. 407.

52. Conn.—Newtown v. Southbury, 100 Conn. 251, 123 A 278; Madison v. Guilford, 85 Conn. 55, 81 A 1046; Salem v. Lyme, 29 Conn. 74.

Iowa.—Cerro Gordo County v. Wright County, 50 Iowa 439.

Me.—Warren v. Thomaston, 43 Me. 406, 69 AmD 69; Smithfield v. Belgrade, 19 Me. 387; Jefferson v. Washington, 19 Me. 293; Hampden v. Fairfield, 3 Me. 436.

N. Y.—In re Hector, 24 NYS 475.

Pa.—West Perry Tp. v. Walker Tp., 23 Pa. Dist. 455, 41 Pa. Co. 429; Noyes Tp. Poor Dist. v. Chapman Tp. Poor Dist., 21 Pa. Dist. 667, 39 Pa. Co. 489.

N. B.—St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

Ont.—National Sanitarium Assoc. v. Toronto, 59 Ont. L. 16, [1926] 3 DomLR 279.

[a] **Foreign laborer, living in a temporary shanty** erected for railroad construction work, has been held not to be a "resident and inhabitant." In re Hector, 24 NYS 475.

Relief of transient poor persons see supra § 6.

53. Me.—Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50; Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10; Fayette v. Livermore, 62 Me. 229.

Mass.—Phillips v. Boston, 183 Mass. 314, 67 NE 250.

Minn.—Albion v. Maple Lake, 71 Minn. 503, 74 NW 282.

Vt.—Brownington v. Charleston, 32 Vt. 411.

Eng.—Farnham v. Cambridge, 45 T. L. R. 73.

54. See cases infra § 87.

55. Jamaica v. Townshend, 19 Vt. 267.

56. Hardwick v. Raynham, 14 Mass. 363.

[a] **Illustration.**—A man living in R caused his family to be removed to T where he had previously rented a house with intent to remove and dwell therein. Before the removal of the family he had left R to go abroad, without any intention of returning to R, and on his return to the state he went to his family in T where he afterward resided. It was held that such person's residence at T began, constructively, when his family removed to that place, and that such removal was an act of notoriety sufficient to put the authorities of T on their guard, so that not having warned him out, that town will be considered as having adopted him as an inhabitant. Hardwick v. Raynham, 14 Mass. 363.

57. Searsmont v. Thorndike, 77 Me. 504, 1 A 448 (per Danforth, J.).

[a] **Thus,** a pauper having established his residence in a town by the concurrence of intention and personal presence, his personal presence in the town for the full period is not essential to the acquisition of settlement. Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10.

58. Wilton v. Falmouth, 15 Me. 479; Richmond v. Vassalborough, 5 Me. 396; Parsonsfield v. Perkins, 2 Me. 411.

59. South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Searsmont v. Lincolnville, 83 Me. 75, 21 A 747.

[a] **Boarder.**—A person may have a residence in a place by living there as a boarder. Waterborough v. Newfield, 8 Me. 203.

60. Etna v. Brewer, 78 Me. 377, 5 A 884; Corinth v. Lincoln, 34 Me. 310.

61. Chaplin v. Bloomfield, 92 Conn. 395, 103 A 118; Brownington v. Charleston, 32 Vt. 411; Woodstock v. Hartland, 21 Vt. 563. And see cases infra notes 62, 63.

62. Chaplin v. Bloomfield, 92 Conn. 395, 103 A 118; Franklin County v. Henry County, 26 Ill. A. 193; Northfield v. Vershire, 33 Vt. 110; Danville v. Putney, 6 Vt. 512.

Interruption of continuity of residence by imprisonment see infra § 94.

63. Chaplin v. Bloomfield, 92 Conn. 395, 397, 103 A 118; Franklin County v. Henry County, 26 Ill. A. 193; Burke County v. Buncombe County, 101 N. C. 520, 8 SE 176; Upper Augusta Tp. v. Rockefeller Tp., 2 Chest. Co. (Pa.) 190.

"There is no substantial difference in principle between the committal for crime, or for insanity, so far as the question of residence is concerned. In neither case can the one committed exercise his will in relation to his residence. The statute intends an actual, stated residence, not one resting in presumption. One who acquires a settlement by commorancy determines the place of his settlement in the exercise of his own will, and not by the will of another." Chaplin v. Bloomfield, supra.

Capacity to acquire settlement generally see supra § 50.

Interruption of continuity of residence by commitment to insane asylum see infra § 95.

64. Lisbon v. Franklin, 1 Root (Conn.) 423; Franklin County v. Henry County, 26 Ill. A. 193; Brewer v. Eddington, 42 Me. 541; Smithfield v. Belgrade, 19 Me. 387; Sheldon Poor House Assoc. v. Sheldon, 72 Vt. 126, 47 A 542.

[a] **A pauper supported in a poorhouse** in one town by another town remains a resident of the latter town. Sheldon Poor House Assoc. v. Sheldon, 72 Vt. 126, 47 A 542.

Receiving support as preventing settlement see infra §§ 100-103.

65. See supra § 52.

66. Stoughton v. Cambridge, 165 Mass. 251, 43 NE 106.

67. See supra § 86.

68. Whately v. Hatfield, 196 Mass. 393, 82 NE 48, 13 AnnCas 690; In re Hector, 24 NYS 475; Henrietta Tp. v. Oxford Tp., 2 Oh. St. 32; Mt. Holly v. Cavendish, (Vt.) 102 A 60.

69. Conn.—Madison v. Guilford, 85 Conn. 55, 81 A 1046.

Me.—Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50; Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10; Knox v. Montville, 98 Me. 493, 57 A 792; Fayette v. Livermore, 62 Me. 229; Warren v. Thomaston, 43 Me. 406, 69 AmD 69; Brewer v. Eddington, 42 Me. 541; Corinth v. Lincoln, 34 Me. 310; Clinton v. York, 26 Me. 167; Wayne v. Greene, 21 Me. 357; Jefferson v. Washington, 19 Me. 293; Hampden v. Fairfield, 3 Me. 436; Turner v. Buckfield, 3 Me. 229.

Mass.—Whately v. Hatfield, 196 Mass. 393, 82 NE 48, 13 AnnCas 690; Phillips v. Boston, 183 Mass. 314, 67 NE 250.

Minn.—Albion v. Maple Lake, 71 Minn. 503, 74 NW 282.

N. Y.—In re Hector, 24 NYS 475.

Oh.—Henrietta Tp. v. Oxford Tp., 2 Oh. St. 32; Henrietta Tp. v. Brownhelm Tp., 9 Oh. 76.

Pa.—West Perry Tp. v. Walker Tp., 23 Pa. Dist. 455, 41 Pa. Co. 429; Noyes Tp. Poor Dist. v. Chapman Tp. Poor Dist., 21 Pa. Dist. 667, 39 Pa. Co. 489.

Vt.—Mt. Holly v. Cavendish, 102 A 60; Mt. Holly v. Peru, 72 Vt. 68, 14 A 103; Stamford v. Readsboro, 46 Vt. 606; Anderson v. Anderson, 42 Vt. 350, 1 AmR 334; Browington v. Charleston, 32 Vt. 411 [cit Ryegate v. Wardsboro, decided in 1857 but not reported]; Monkton v. Panton, 12 Vt. 250; Brookfield v. Hartland, 10 Vt. 424; Royalton v. Bethel, 10 Vt. 22.

N. B.—St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

Ont.—National Sanitarium Assoc. v. Toronto, 59 Ont. L. 16, [1926] 3 DomLR 279.

70. Warren v. Thomaston, 43 Me. 406, 99 AmD 69; Turner v. Buckfield, 3 Me. 229; St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

who moves into a town or district with the intention of making it his fixed residence, for an indefinite time, and without any certain purpose of returning to his former place of abode, and resides there for the statutory period, gains a legal settlement,[71] and such settlement is not defeated by the fact that he may have contemplated leaving the place at some future time,[72] or that his intention to remain was to a certain extent contingent.[73] The animus manendi is the controlling element in determining whether a residence has been acquired,[74] and the existence of such intention is a question of fact.[75]

[§ 88] **(c) Place of Residence.** The residence must be on the actual territory within the legal limits of the poor district sought to be charged.[76] A residence on disputed territory, claimed by two towns, and over which both exercise jurisdiction, is gained in that town within whose true boundaries the territory resided on is ultimately found to be situated.[77] In some jurisdictions it has been held that a settlement is gained in a town by a residence within the limits over which it exercises actual and exclusive jurisdiction, although those limits are not, in fact, within its true boundaries,[78] and that settlement is not defeated, or in any wise affected, by the subsequent acquisition of rightful jurisdiction by such other town.[79]

Residence on lands ceded to the federal government by a state for navy yards, forts, arsenals, etc., will not enable a person to acquire a settlement.[80]

Where a line dividing a town from a city passes diagonally through a person's dwelling house, but that part of the structure most clearly connected with the primary purposes of a dwelling is in the town, his residence is in such town.[81]

[§ 89] **(5) Determination.** As to a person having a family, his residence is usually determined by the place where his family resides;[82] but, as to a single person whose business or employment calls him away from home a great part of the time, or who is from time to time living with his friends or connections, his residence is usually determined by inquiry as to the place where he has kept his clothes or what little property he may have possessed, and to which he resorts as his home when out of employment.[83]

[§ 90] **(6) Duration and Continuity of Residence[84]—(a) Duration in General.** The length of residence necessary to acquire a settlement is regulated by statute,[85] and unless the statute is strictly complied with in this respect no settlement is acquired.[86]

Tacking periods of residence. Where a person who had resided before division in a part of the old town which, on division, was incorporated into a new town continues his residence in the new town, the two terms are to be tacked in determining whether the person has resided for a sufficient time in the new town to gain a settlement therein,[87] although there is authority to the contrary.[88] But it has been held that the period of residence required cannot be made up by tacking the time of residence in an unincorporated territory to the time of residence after its incorporation.[89] The whole period of residence must be while the person is sui juris,[90] and if the person is a minor during a part of the required time he gains no settlement.[91] So it has been held that a wife's residence in a town during her husband's life cannot be tacked to her continued residence there after his death, so as to enable her to acquire a settlement.[92] But under some statutes it has been held that the period during which a wife lives with her husband may be counted as part of the time necessary for her to acquire a

71. Conn.—Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193; Fairfield v. Easton, 73 Conn. 735, 49 A 200; Salem v. Lyme, 29 Conn. 74.

Me.—South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Warren v. Thomaston, 43 Me. 406, 69 AmD 69; Wilton v. Falmouth, 15 Me. 479; Greene v. Wynham, 13 Me. 225.

Mass.—Palmer v. Hampden, 182 Mass. 511, 65 NE 817; Wilbraham v. Ludlow, 99 Mass. 587.

Vt.—Londonderry v. Landgrove, 66 Vt. 264, 29 A 256; Stamford v. Readsboro, 46 Vt. 606; Anderson v. Anderson, 42 Vt. 350, 1 AmR 334; Middlebury v. Waltham, 6 Vt. 200.

Wis.—Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224.

72. Stamford v. Readsboro, 46 Vt. 606; Anderson v. Anderson, 42 Vt. 350, 1 AmR 334; Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224.

73. Woodstock v. Canton, 91 Me. 62, 39 A 281.

[a] **Thus,** if a person goes to a place to live and remain if he secures work and he does secure work and live there, he will acquire a residence in such place. Woodstock v. Canton, 91 Me. 62, 39 A 281.

74. St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163. And see cases supra note 69.

75. Monroe v. Hampden, 95 Me. 111, 49 A 604; Mt. Holly v. Peru, 72 Vt. 68, 47 A 103.

76. Ellsworth v. Gouldsboro, 55 Me. 94.

77. Landgrove v. Peru, 16 Vt. 422.

[a] **In Pennsylvania** it has been held that, where land on which a pauper has acquired a settlement by former ownership and residence is by judicial decision determined to be located in a township, the settlement of the pauper is also to be considered to be in such township. Plunkett's Creek v. Shrewsbury, 3 Pa. Dist. 613.

78. Northwood v. Durham, 2 N. H. 242; Plastow v. Kingstown, Smith (N. H.) 241; Reading v. Weatherfield, 30 Vt. 504; Landgrove v. Peru, 16 Vt. 422; Corinth v. Newbury, 13 Vt. 496.

79. Somerset v. Rehoboth, 6 Cush. (Mass.) 320; Northwood v. Durham, 2 N. H. 242; Corinth v. Newbury, 13 Vt. 496.

[a] **So too a residence is gained in a town by residence on a part thereof which is within the actual jurisdiction of the state,** although within the rightful jurisdiction of another state, which afterward obtains the actual jurisdiction on the establishment of the boundary line. Somerset v. Rehoboth, 6 Cush. (Mass.) 320.

80. Opinion of Justices, 1 Metc. (Mass.) 580.

81. East Montpelier v. Barre, 79 Vt. 542, 66 A 100, 10 LRANS 874.

82. Newbury v. Topsham, 7 Vt. 407; Burlington v. Calais, 1 Vt. 385, 18 AmD 691.

83. Madison v. Guilford, 85 Conn. 55, 81 A 1046; Newbury v. Topsham, 7 Vt. 407.

84. Retrospective operation of statutes see supra § 39.

85. See statutory provisions.

86. Conn.—Reading v. Westport, 19 Conn. 561; Oxford v. Woodbridge, 3 Day 224.

Me.—Kennebunkport v. Buxton, 26 Me. 61.

Mich.—In re Woodcock, 123 Mich. 369, 82 NW 71.

Minn.—Lyon County v. Murray County, 29 Minn. 240, 13 NW 43.

Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454.

Eng.—Tendring Union v. Woolwich Union, [1923] 1 K. B. 121.

[a] **Time of residence of indigent insane.**—In re Woodcock, 123 Mich. 369, 82 NW 71.

87. Simsbury v. Hartford, 14 Conn. 192; Vernon v. East Hartford, 3 Conn. 475; Franklin Tp. v. Lebanon Tp., 51 N. J. L. 93, 16 A 184.

Settlement acquired by division of towns see infra § 97.

88. Calne Union v. St. Mary Islington, 69 L. J. Q. B. 400.

[a] **Thus** an order of the local government dividing an existing parish into two separate parishes, which provides inter alia that, as between the two new parishes, every person who has acquired, or shall on or before a given date acquire, a settlement in the existing parish shall be deemed to have acquired such settlement in either of the separate parishes, does not apply to persons who are in the process of acquiring a settlement in the existing parish, and hence a pauper who had resided in the old parish for two years and ten months up to the given date, and continued his residence in one of the new parishes for eighteen months after the given date, cannot add the two periods of residence together and claim to have acquired a settlement in the new parish. Calne Union v. St. Mary Islington, 69 L. J. Q. B. 400.

89. Rutland v. Proctor, 68 Vt. 153, 34 A 427.

Settlement acquired by incorporation of unincorporated territory see infra § 96.

90. See cases infra notes 91, 92.

91. Poultney v. Glover, 23 Vt. 328; Hartford v. Hartland, 19 Vt. 392.

Capacity of minor to acquire settlement see supra §§ 48, 49.

92. Thomaston v. St. George, 17 Me. 117; Richmond v. Lisbon, 15 Me. 434; Brookfield v. Hartland, 10 Vt. 424.

Capacity of married woman to acquire settlement see supra § 52.

settlement in her own right after he has left her.[93]

[§ 91] **(b) Continuity[94]—aa. In General.** The residence for the required length of time must be continuous,[95] and many of the pauper statutes expressly so provide.[96] Separate periods of residence cannot be added together to make up the statutory time.[97] But where a residence has once been established by the concurrence of intention and personal presence, continuous personal presence thereafter is not essential to a continuous residence,[98] especially when he whose residence is in question has a family between whom and him mutual family relations are in full force.[99]

An intention to remove in the future, without an actual removal, will not break the continuity of the residence.[1]

[§ 92] **bb. Absence Animo Revertendi.**[2] The continuity of a residence within the contemplation of the pauper laws is not broken by a mere temporary absence with the intention of returning,[3] or without any definite intention of abandoning such residence,[4] in the absence of statute to the contrary.[5] Thus continuity is not broken by an absence while temporarily employed or while seeking employment,[6] or while serving a term of enlistment

93. Tewkesbury Union v. Birmingham Guardians, [1904] 2 K. B. 395 [foll Reg. v. St. George-In-The-East, L. R. 5 Q. B. 364].

94. Evidence of continuity — cases passim infra §§ 132–137.

95. Conn.—Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193; Washington v. Kent, 38 Conn. 249; Reading v. Westport, 19 Conn. 561.

Me.—Detroit v. Palmyra, 72 Me. 256; Ripley v. Hebron, 60 Me. 379; North Yarmouth v. West Gardiner, 58 Me. 207, 4 AmR 279; Kennebunkport v. Buxton, 26 Me. 61; Wayne v. Greene, 21 Me. 357.

Mass.—Athol v. Watertown, 7 Pick. 42; Billerica v. Chelmsford, 10 Mass. 394.

Oh.—Henrietta Tp. v. Brownhelm Tp., 9 Oh. 76.

Pa.—Huntington Tp. Poor Dist. v. Salem Tp. Poor Dist., 8 Kulp 234.

Vt.—Hartford v. Hartland, 19 Vt. 392; Monkton v. Panton, 12 Vt. 250; Brookfield v. Hartland, 10 Vt. 424; Royalton v. Bethel, 10 Vt. 22.

Eng.—Dorchester Union v. Weymouth Union, 16 Q. B. D. 31; Reg. v. Worcester Union, L. R. 9 Q. B. 340; Reg. v. Stapleton, 1 E. & B. 766, 72 ECL 766, 118 Reprint 623; Totnes Union v. Cardiff Union, 2 T. L. R. 370 [aff 3 T. L. R. 45].

And see cases infra note 96 et seq; and §§ 92–95.

[a] **Computation of time.**—In England, Poor Removal Act (1846) § 1 provided that no person should be removed from the parish in which he had resided for one year, provided, however, that the time during which he should serve in the navy should be excluded in the computation of time. Act (1795) § 1 provided that no person should be removed from the parish where he was inhabiting until he should have become actually chargeable to the parish. It was held that the fact that a person did not become chargeable in the parish in which he lived did not confer upon him the status of irremovability which, by reason of his being a sailor, his residence there, short of the statutory period, did not give him. Doncaster Union v. Woolwich Union, [1915] 1 K. B. 563.

96. See statutory provisions.

97. St. Olave's Union v. Canterbury Union, [1897] 1 Q. B. 438; Newark Union v. Maidstone Union, 93 L. T. Rep. N. S. 602 [foll St. Olave's Union v. Canterbury Union, [1897] 1 Q. B. 438].

98. Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; Knox v. Waldoborough, 3 Me. 455; Mt. Holly v. Plymouth, 89 Vt. 301, 95 A 572; Stamford v. Readsboro, 46 Vt. 606; Bristol v. Rutland, 10 Vt. 574.

Absence with intent to return see infra § 92.

99. Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; Knox v. Waldoborough, 3 Me. 455; Middletown v. Poultney, 2 Vt. 437.

1. Bangor v. Brewer, 47 Me. 97; Wayne v. Greene, 21 Me. 357; Greene v. Windham, 13 Me. 225; Hallowell v. Saco, 5 Me. 143; Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224.

2. Admissibility of evidence see infra § 112.

Effect of commitment to:

Insane asylum see infra § 95.

Prison see infra § 94.

3. Conn.—Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193; Salem v. Lyme, 29 Conn. 74.

Iowa.—Cerro Gordo County v. Hancock County, 58 Iowa 114, 12 NW 124.

Me.—Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50; Searsmont v. Lincolnville, 83 Me. 75, 21 A 747; Searsmont v. Thorndike, 77 Me. 504, 1 A 448; Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; East Livermore v. Farmington, 74 Me. 154; Fayette v. Livermore, 62 Me. 229; Ripley v. Hebron, 60 Me. 379; Pittsfield v. Detroit, 53 Me. 442; Corinth v. Bradley, 51 Me. 540; Bangor v. Brewer, 47 Me. 97; Warren v. Thomaston, 43 Me. 406, 69 AmD 69; Brewer v. Linnaeus, 36 Me. 428; Bangor v. Brunswick, 27 Me. 351; Clinton v. York, 26 Me. 167; Kennebunkport v. Buxton, 26 Me. 61; Wayne v. Greene, 21 Me. 357; Thomaston v. St. George, 17 Me. 117; Waterborough v. Newfield, 8 Me. 203; Parsonsfield v. Kennebunkport, 4 Me. 47; Knox v. Waldoborough, 3 Me. 455.

Mass.—Greenfield v. Buckland, 159 Mass. 491, 34 NE 952; Lee v. Lenox, 15 Gray 496; Cambridge v. Charlestown, 13 Mass. 501; Abington v. Boston, 4 Mass. 312.

N. J.—Eatontown v. Shrewsbury, 49 N. J. L. 188, 6 A 319 [aff 49 N. J. L. 482, 9 A 718].

Oh.—Henrietta Tp. v. Oxford Tp., 2 Oh. St. 32.

Pa.—Hickory Tp. Overseers of Poor v. Scott Tp. Overseers of Poor, 9 Pa. Super. 23; Northmoreland Tp. Poor Dist. v. Exeter Tp. Poor Dist., 28 Pa. Dist. 890; Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 12 Pa. Dist. 666 [aff 25 Pa. Super. 601].

Vt.—Rockingham v. Springfield, 59 Vt. 521, 9 A 241; Berlin v. Worcester, 50 Vt. 23; Barton v. Irasburgh, 33 Vt. 159; Northfield v. Vershire, 33 Vt. 110; Newbury v. Topsham, 7 Vt. 407; Burlington v. Calais, 1 Vt. 385, 18 AmD 691.

Eng.—Manchester v. Ormskirk, 16 Q. B. D. 723; Reg. v. Worcester Union, L. R. 9 Q. B. 340; Reg. v. St. Ives Union, L. R. 7 Q. B. 467; Reg. v. Abingdon Union, L. R. 5 Q. B. 406; Reg. v. Glossop Union, L. R. 1 Q. B. 227; Reg. v. St. Leonard, L. R. 1 Q. B. 21; Reg. v. Stapleton, 1 E. & B. 766, 72 ECL 766, 118 Reprint 623 (holding rule inapplicable, however); Ipswich Union v. Forehoe Union, 77 J. P. 467; Great Yarmouth v. Bethnal Green, 97 L. T. Rep. N. S. 440.

N. B.—St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

N. S.—Joggins v. Cumberland Poor Dist., 58 N. S. 76, [1925] 2 DomLR 663.

Ont.—National Sanitarium Assoc. v. Toronto, 59 Ont. L. 16, [1926] 3 DomLR 279.

[a] **Illustration.**—A railway goods guard traveling between Yarmouth and London became tenant of a house in Yarmouth, of which he remained tenant for more than three years. He resided in that house with his wife except when absent in London, where he regularly occupied as a lodger a furnished room for an agreed weekly sum. He slept in London and Yarmouth on alternative days. It was held that the pauper was settled in Yarmouth and was removable there. Great Yarmouth v. Bethnal Green, 97 L. T. Rep. N. S. 440.

[b] **Absence on whaling voyage** for fifteen months does not interrupt the continuity. Salem v. Lyme, 29 Conn. 74.

[c] **Mariner** making his home in any town for more than one year, and following his profession therefrom, has a residence in the town. Abington v. Boston, 4 Mass. 312.

[d] **"The intent need not at all times be active in the mind,** but as often as it is the subject of thought at all, the animus revertendi must be found to exist, or the home is lost." Ellsworth v. Bar Harbor, 122 Me. 356, 357, 120 A 50.

[e] **A general intent to return in the event of certain contingencies** is not sufficient animus revertendi. Tendring Union v. Ipswich Union, 67 J. P. 304.

[f] **An intention to return at an indefinite time** is not sufficient to prevent a break in the continuity of residence. Palmer v. Hampden, 182 Mass. 511, 65 NE 817.

4. Conn.—Clinton v. Westbrook, 38 Conn. 9; Salem v. Lyme, 29 Conn. 74.

Me.—Pittsfield v. Detroit, 53 Me. 442; Brewer v. Linnaeus, 36 Me. 428; Wayne v. Greene, 21 Me. 357.

Mass.—Stoughton v. Cambridge, 165 Mass. 251, 43 NE 106; Lee v. Lenox, 15 Gray 496; Worcester v. Wilbraham, 13 Gray 586.

N. D.—Burke County v. Oakland, 56 N. D. 343, 217 NW 643.

Pa.—Westmoreland County Poor Dist.'s App., 77 Pa. Super. 402.

Vt.—Mt. Holly v. Plymouth, 89 Vt. 301, 95 A 572.

[a] **Where the person so leaving does in fact return,** an absence for a longer or shorter period, without any intention of abandoning a residence once acquired, does not interrupt its continuity. New Milford v. Sherman, 21 Conn. 101; Bangor v. Frankfort, 85 Me. 126, 26 A 1088; Searsmont v. Thorndike, 77 Me. 504, 1 A 448; Lee v. Lenox, 15 Gray (Mass.) 496.

[b] **Where one has an established home at which his family resides with his consent,** an absence therefrom for a longer or shorter period does not interrupt the term of residence required by the poor law to give him a legal settlement. Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; Pittsfield v. Detroit, 53 Me. 442; Knox v. Waldoborough, 3 Me. 455.

[c] **If a person has sufficient intelligence to form and retain a purpose** of leaving for a temporary purpose and of returning, his residence required to gain a settlement is not interrupted by an absence for a temporary purpose only. Corinth v. Bradley, 51 Me. 540.

[d] **Sufficiency of intent.**—An absence "with an uncertain, indefinite, half formed purpose" to take up a residence elsewhere does not break the continuity. Worcester v. Wilbraham, 13 Gray (Mass.) 586.

5. Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37 (time a person is an inmate of a sanitorium is not to be counted in computing time necessary to gain or lose a settlement).

6. Waterborough v. Newfield, 8 Me. 203; Knox v. Waldoborough, 3

in the army,[7] unless the statute so provides.[8] So where a person, living in a town in which he had not a settlement, removed to another town, by direction of the overseers of the poor, solely to prevent his gaining a settlement in the former town, and with the intention to return at the expiration of a few weeks, it was held that the continuity of his residence was not broken.[9]

Retention of dwelling place. In some jurisdictions it has been held that an absence may be animo revertendi, although during the person's absence he does not retain in the place any house over which he has legal control, or to which he may resort as a matter of right;[10] but in others the contrary has been held.[11]

Question of fact. The question whether animus revertendi exists is one of fact to be determined by the jury.[12]

[§ 93] **cc. Absence Sine Animo Revertendi.** The necessary continuity of residence is broken where there is an absence or removal without any intention of returning,[13] or with the intention not to return.[14]

Intent formed during absence. If a person leaves his place of residence, and while absent forms the intention of not returning, the continuity of his former residence is broken as much as if he had formed such intention at the time of removal.[15]

Necessity of acquiring new residence. It is not necessary, in order that a removal without intention of returning should break the continuity of the residence, that the person should have in fact acquired another residence,[16] it being possible for a person so to wander around as to lose a home, within the legal signification of the word "home," under the pauper statutes.[17]

Effect of actual return. Removal without any intention to return,[18] or with the intention not to return,[19] will break the continuity of residence, although the person does in fact return.

[§ 94] **dd. Interruption by Imprisonment.**[20] In some jurisdictions it has been held that imprisonment in a state prison under a conviction for a crime interrupts the continuity of residence essential to the prisoner's acquisition of a legal settlement by residence in a poor district,[21] while in other jurisdictions the rule obtains that such an imprisonment does not interrupt the continuity of the residence of a prisoner in a district where he had his home and was supporting his family when imprisoned,[22] especially where the evidence shows a purpose on his part to continue such residence and to return to it as soon as he is liberated.[23] Imprisonment upon a bailable criminal offense merely, in one district, has not the effect to make a break in the continuity of the residence of a man who has at the time a home and family in another district to which he intends to return when he regains his liberty.[24]

[§ 95] **ee. Interruption by Commitment to Insane Asylum.**[25] In some jurisdictions it is provided by statute that the time any person shall be a patient in a hospital for the insane, except inhabitants of the town in which such hospital is situated, shall not be computed as part of the time required by law to gain a legal settlement.[26] Independently of

Me. 455; Albion v. Maple Lake, 71 Minn. 503, 74 NW 282.

7. Brewer v. Linnaeus, 36 Me. 428.

8. See statutory provisions.

[a] **In England,** under a statute providing that the time during which a person is serving as a soldier, sailor, etc., shall be excluded in computing the time of residence in a parish, absence on military service, although with the intention of returning, breaks the continuity of the residence. Newark Union v. Maidstone Union, 93 L. T. Rep. N. S. 602; St. Olave's Union v. Canterbury Union, [1897] 1 Q. B. 438.

9. Solon v. Embden, 71 Me. 418; Clinton v. York, 26 Me. 167.

10. South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Warren v. Thomaston, 43 Me. 406, 69 AmD 69; Waterborough v. Newfield, 8 Me. 203.

11. St. Johnsbury v. Concord, 68 Vt. 481, 35 A 429; Jericho v. Burlington, 66 Vt. 529, 29 A 801 [overr Rockingham v. Springfield, 59 Vt. 521, 9 A 241]; Jamaica v. Townshend, 19 Vt. 267; Middletown v. Poultney, 2 Vt. 437; Reg. v. Glossop Union, L. R. 1 Q. B. 227; St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

[a] **"Intention alone cannot retain a residence,** every vestige of which is gone, with no place left to which the party has a right to return." Turner v. Turner, 87 Vt. 65, 66, 88 A 3, 47 LRANS 505.

[b] **Where one sells his effects** and departs from his established place of residence, leaving no place to which he has a right to return, he will lose such residence, although he has an indefinite intention of returning at some future time. Jericho v. Burlington, 66 Vt. 529, 29 A 801.

12. Solon v. Embden, 71 Me. 418; Fitchburg v. Winchendon, 4 Cush. (Mass.) 190.

13. Conn.—Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193; Fairfield v. Easton, 73 Conn. 735, 49 A 200.

Me.—Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50; South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Etna v. Brewer, 78 Me. 377, 5 A 884; Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; Detroit v. Palmyra, 72 Me. 256; Burnham v. Pittsfield, 68 Me. 580; North Yarmouth v. West Gardiner, 58 Me. 207, 4 AmR 279; Pittsfield v. Detroit, 53 Me. 442; Corinth v. Bradley, 51 Me. 540; Bangor v. Brewer, 47 Me. 97; Exeter v. Brighton, 15 Me. 58; Westbrook v. Bowdoinham, 7 Me. 363.

Mass.—Wilbraham v. Ludlow, 99 Mass. 587; Holmes v. Greene, 7 Gray 299; Athol v. Watertown, 7 Pick. 42; Billerica v. Chelmsford, 10 Mass. 394.

Vt.—Barton v. Irasburgh, 33 Vt. 159; Hartford v. Hartland, 19 Vt. 392; Jamaica v. Townshend, 19 Vt. 267.

Eng.—Tendring Union v. Ipswich Union, 67 J. P. 304; Farnham v. Cambridge, 45 T. L. R. 73. See Ayr Parish Council v. Wigtown Parish Council, [1913] S. C. 13 (where absence from parish during the harvest season was held a break in the period of residence).

[a] **Fixed purpose not to return unnecessary.**—It is not necessary that the departure should be with a fixed purpose not to return. It is enough if the person departs without an intention to return. South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Detroit v. Palmyra, 72 Me. 256.

14. Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; Hampden v. Levant, 59 Me. 557; Wayne v. Greene, 21 Me. 357; Exeter v. Brighton, 15 Me. 58; Westbrook v. Bowdoinham, 7 Me. 363; Cambridge Union v. Edmonton Union, [1900] 2 Q. B. 111.

15. South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Ripley v. Hebron, 60 Me. 379; Hampden v. Levant, 59 Me. 557; Barton v. Irasburgh, 33 Vt. 159.

16. North Yarmouth v. West Gardiner, 58 Me. 207, 4 AmR 279; Jefferson v. Washington, 19 Me. 293; Exeter v. Brighton, 15 Me. 58.

17. South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; North Yarmouth v. West Gardiner, 58 Me. 207, 4 AmR 279; Jefferson v. Washington, 19 Me. 293.

18. Detroit v. Palmyra, 72 Me. 256; Burnham v. Pittsfield, 68 Me. 580; North Yarmouth v. West Gardiner, 58 Me. 207, 4 AmR 279; Billerica v. Chelmsford, 10 Mass. 394.

19. Westbrook v. Bowdoinham, 7 Me. 363.

20. **Coerced residence** see supra § 86.

Receiving pauper supplies as preventing settlement see infra § 102.

21. Chaplin v. Bloomfield, 92 Conn. 395, 103 A 118; Washington v. Kent, 38 Conn. 249; Reading v. Westport, 19 Conn. 561. But see Grant v. Daliber, 11 Conn. 234 (residence for purpose of serving legal process not lost by imprisonment).

22. Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; Whately v. Hatfield, 196 Mass. 393, 82 NE 48, 13 AnnCas 690; Stoughton v. Cambridge, 165 Mass. 251, 43 NE 106.

[a] **While the divorce of a pauper's wife and her subsequent marriage to another man,** during the period of her husband's confinement in the state prison of another state, establish an abandonment on her part of the residence established by the pauper, they do not per se interrupt his residence. Bangor v. Frankfort, 85 Me. 126, 26 A 1088.

23. Baltimore v. Chester, 53 Vt. 315, 38 AmR 677.

24. Northfield v. Vershire, 33 Vt. 110.

25. **Coerced residence** see supra § 86.

Receiving pauper supplies as preventing settlement see infra § 102.

26. See statutory provisions.

[a] **Construction of statute.**—Where the statute provides that the time during which an insane person shall be supported by a poor district shall not be included in the period of residence necessary to change the settlement, the mere liability of the dis-

statute, the continuity of residence is interrupted by a commitment to an asylum,[27] although there is authority to the contrary.[28]

[§ 96] **4. Incorporation, Division, and Annexation of Territory[29]—a. Incorporation.** A rule of the common law, which has been expressly recognized by statute in some jurisdictions,[30] is that, where unincorporated territory is incorporated as a town, all persons sui juris residing in such territory at the time of the incorporation gain a settlement in the town by such act of incorporation.[31] The fact that a resident within the territory incorporated was settled at any other place does not affect his acquisition of a settlement within the territory incorporated.[32] The rule with regard to the acquisition of a settlement by residence within territory incorporated does not apply, it seems, to residents of unincorporated territory which is annexed to an existing district or town;[33] and it has been held that the incorporation of a district into a town, each of such corporations being liable for the support of its settled paupers, does not itself give a settlement to unsettled persons residing therein.[34]

To constitute a residence within the rule above stated,[35] the person must actually have a home or dwell within the territory,[36] and the mere fact that before the incorporation he had the intention to make his home within the territory incorporated, and did in fact afterward make it his home, cannot be considered as giving to him a residence therein.[37]

Unincorporated territory. A settlement cannot be acquired in unincorporated territory,[38] and a statute providing that persons living in places not incorporated, and needing relief, are under the care of the overseers of the adjacent town, does not give to such persons a legal settlement in such adjacent town.[39]

Paupers supported within the territory incorporated, by the town in which they were legally settled, do not acquire a settlement through the incorporation;[40] but the mere fact that the person whose settlement is in question had some time prior to the incorporation received pauper supplies does not show that he was a pauper at the time of incorporation so as to prevent him from acquiring a settlement.[41]

[§ 97] **b. Division of Towns or Districts.**[42] In some jurisdictions the rule has been stated as a principle of the common law that, upon the division of an existing town and the incorporation of a new town from a part thereof, persons who were settled within the original town are to be considered settled within the old or the new town, according to the place from which they derived their original settlement.[43] In other jurisdictions the rule ob-

trict to pay in the first instance, with right of recovery against those ultimately chargeable, is not support by the district. Dexter v. Sangerville, 70 Me. 441 (holding further that, where the friends of such insane person, without filing the bond required by statute and in the first instance, pay all his expenses of commitment and support, and the poor district makes no payment, the time of commitment and stay at the hospital is to be included in the period of residence, in the district where the insane person had his home, necessary to change his settlement under the pauper law).

[b] **Statute held mandatory.**—Peacham v. Weeks, 48 Vt. 73.

[c] **Statute held not retrospective.**—Glenburn v. Naples, 69 Me. 68.

[d] **England.**—(1) Statutes construed. Berkshire County Council v. Reading County Council, [1921] 2 K. B. 787 (meaning of term "resides" in an approved home under the Mental Deficiency Act of 1913 [3 & 4 Geo. V c 28]); Daventry Union v. Coventry Union, [1917] 1 K. B. 289. (2) Poor Removal Act (1876) § 34 provided for the acquisition of a settlement by three years' residence in any parish under such circumstances as would render the person irremovable. Act (1846) § 1 declared that no person should be removed from a parish in which he had resided for five years provided the time during which such person resided as "patient in a hospital," should be excluded in the computation of time. It was held that a home for girls discharged from a hospital as incurable on account of tuberculosis (other than tuberculosis of the lungs) which did not provide regular medical attendance or nursing for such incurable complaints, and in which the girls might remain for any length of time until employment suitable to their condition could be found for them, was not a "hospital;" nor was a girl residing in such a home a "patient in a hospital" within the meaning of the act of 1846. Tendring Union v. Woolwich Union, [1923] 1 K. B. 121; Ormskirk Union v. Lancaster Union, [1912] W. N. 264. (3) An institution having for its object the care and treatment of persons suffering from epilepsy—providing for such persons medical attendance, in combination with healthy and suitable employment and recreation, and supported partly by endowment, partly by subscriptions and donations, and partly by payments made on behalf of the patients—is a "hospital" within the meaning of the proviso in the Poor Removal Act of 1846. Ormskirk Union v. Chorlton Union, [1903] 2 K. B. 498 [aff 51 Wkly. Rep. 190].

27. Chaplin v. Bloomfield, 92 Conn. 395, 103 A 118.

28. See cases infra this note.

[a] **In Maine,** prior to Acts (1870) c 127, under which time spent in an insane hospital cannot be included in computing the period necessary to acquire a settlement, it was held that the time so spent did not interrupt the continuity of residence. Bangor v. Wiscasset, 71 Me. 535; Pittsfield v. Detroit, 53 Me. 442, 445 ("We do not think that a person insane, sent by officers of his town to the insane hospital, as a patient, thereby loses his residence and home before established in the town. It is worthy of consideration, although perhaps it does not alter the principle, that the establishment of the opposite doctrine would offer some temptation to town officers to send doubtful cases to the hospital, to prevent the gaining of a settlement by a person likely to become a pauper").

29. As affecting liability for support see infra § 210.

Tacking time before and after incorporation to establish required length of residence see supra § 90.

30. See statutory provisions.

31. Conn.—Vernon v East Hartford, 3 Conn. 475.

Me.—Greenfield v. Camden, 74 Me. 56; Woodstock v. Bethel, 66 Me. 569; Monson v. Fairfield, 55 Me. 117; Kirkland v. Bradford, 33 Me. 580; Fayette v. Hebron, 21 Me. 266; Beetham v. Lincoln, 16 Me. 137; Thomaston v. Vinalhaven, 13 Me. 159; St. George v. Deer Isle, 3 Me. 390; Hallowell v. Gardiner, 1 Me. 93. See, however, Gorham v. Springfield, 21 Me. 58 (holding that, where a person leaves a town with the intention of going to another place and to purchase a lot of land and settle there, the latter place does not become his dwelling place or home under the mode of gaining a settlement under Acts [1821] c 122, unless that intention is carried into effect by having his dwelling and home actually established there before its incorporation into a town).

Mass.—Sutton v. Orange, 6 Metc. 484; Great Barrington v. Lancaster, 14 Mass. 253; Westport v. Dartmouth, 10 Mass. 341; Buckfield v. Gorham, 6 Mass. 445; Bath v. Bowdoin, 4 Mass. 452.

N. H.—Berlin v. Gorham, 34 N. H. 266; Salisbury v. Orange, 5 N. H. 348.

Vt.—Derby v. Salem, 30 Vt. 722.

Wis.—Hay River v. Sherman, 60 Wis. 54, 18 NW 740.

[a] **The words "actually dwells"** in Rev. St. § 15 subd 8, providing that when any territory is organized into a town, every person having a legal settlement in such territory, and who actually dwells or has his home therein, shall thereafter have a legal settlement in such new town, include a pauper who was boarded or supported at a particular house. Hay River v. Sherman, 60 Wis. 54, 18 NW 740.

Capacity to acquire settlement by incorporation of territory:

Generally see supra § 47 note 17 [a].

Alien see supra § 45 note 88 [b].

Infant:

Emancipated see supra § 49 note 25 [a].

Unemancipated see supra § 48 note 17 [c].

Insane person see supra § 50 note 44 [a].

Slaves see supra § 51 note 56 [a].

32. Monson v. Fairfield, 55 Me. 117; Buckfield v. Gorham, 6 Mass. 445.

33. Woodstock v. Bethel, 66 Me. 569.

34. Sutton v. Orange, 6 Metc. (Mass.) 484; Walpole v. Hopkinton, 4 Pick. (Mass.) 358.

35. See supra text and note 31.

36. Gorham v. Springfield, 21 Me. 58.

Effect of absence at time of incorporation see infra § 99.

37. Gorham v. Springfield, 21 Me. 58.

38. Hillsborough v. Deering, 4 N. H. 86.

39. Ellsworth v. Gouldsboro, 55 Me. 94.

40. Beetham v. Lincoln, 16 Me. 137.

41. Kirkland v. Bradford, 33 Me. 580.

Receipt of supplies as preventing settlement generally see infra §§ 100-103.

42. Division as affecting liability for support see infra § 210.

Tacking terms of residence before and after division see supra § 90.

43. Haddam v. East Lyme, 54

tains, both at common law and by virtue of statutes expressly or impliedly following such rule, that the settlement of a person upon such division depends upon the place of his residence or home at the time the division was made, that is, he becomes settled in the old town or in the new town according to whether his place of residence at the time of the division was in the former or in the latter,[44] in the absence of a special statute providing for the determination of the settlement of residents of a particular town, upon its division, according to the place from which they derived their original settlement.[45] This rule has been applied in some jurisdictions to persons who were paupers at the time of the division,[46] but in others the rule has been held to apply only to bona fide residents,[47] and not to include a residence as an existing pauper supported by the town divided;[48] in such case the pauper's last place of residence as a self-supporting person determines his place of settlement.[49] When the last place of residence of the person whose settlement is in question is unknown, his settlement remains in the old town.[50]

Special statutes. When a special act dividing an existing town and incorporating from a part thereof a new town expressly provides how the settlement of its inhabitants as regards the old and the new towns shall be determined,[51] such provisions, of course, prevail over the general law upon the question;[52] but when such special provisions include only a particular class of persons of the old town, the general law prevails with regard to the settlement of persons not included in such class.[53]

Unsettled persons. Upon the division of an existing town and the incorporation of a new town from a part thereof, unsettled persons residing in the territory incorporated into the new town do not, by the mere incorporation, as in case of the incorporation of unincorporated territory, acquire a settlement in the new town.[54] But where the act of incorporation expressly provided that persons having a "residence" in the territory incorporated in the new town should be deemed to be settled therein, the term "residence" was held to include persons residing or dwelling in such territory, although they had no settlement in the old town.[55]

What constitutes division. It has been held that a division of a town takes place only when one or more towns are divided and a new town is created from a part thereof, thus making a distinction between annexation and division.[56] When part of an existing town is taken and annexed to another

Conn. 34, 5 A 368; Waterbury v. Bethany, 18 Conn. 424; Bethany v. Oxford, 15 Conn. 550; Oxford v. Bethany, 15 Conn. 246; Simsbury v. Hartford, 14 Conn. 192; Vernon v. East Hartford, 3 Conn. 475; Mansfield v. Granby, 1 Root (Conn.) 179; Washington Overseers of Poor v. Stanford Overseers of Poor, 3 Johns. (N. Y.) 193.

[a] **Settlement by birth.**—On the division of a town by statute, the poor are to be deemed settled in the towns in which they were born, and not where they happened to reside at the time of the division. Washington Overseers of Poor v. Stanford Overseers of Poor, 3 Johns. (N. Y.) 193.

[b] **In Pennsylvania** this rule has been affirmed by statute. Lake Dist. Overseers of Poor v. South Canaan Overseers of Poor, 87 Pa. 19; Lewis v. Turbut, 15 Pa. 145; Hopewell Tp. v. Independence Tp., 12 Pa. 92, Wayne Tp. Poor Overseers v. Ellwood City Borough Poor Overseers, 29 Pa. Super. 181; Monroe Tp. v. Durrell Tp., 2 PaLJR 100, 3 PaLJ 326.

44. Me.—Holden v. Veazie, 73 Me. 312; Frankfort v. Winterport, 51 Me. 445; Clinton v. Benton, 49 Me. 550; Brewer v. Eddington, 42 Me. 541; Eddington v. Brewer, 41 Me. 462; Livermore v. Phillips, 35 Me. 184; Winthrop v. Auburn, 31 Me. 465; Freeport v. Pownal, 23 Me. 472; Smithfield v. Belgrade, 19 Me. 387; New Portland v. New Vineyard, 16 Me. 69; Bloomfield v. Skowhegan, 16 Me. 58.

Mass.—Salem v. Ipswich, 10 Cush. 517; Sutton v. Orange, 6 Metc. 484; New Braintree v. Boylston, 24 Pick. 164; Lexington v. Burlington, 19 Pick. 426; Hanson v. Pembroke, 16 Pick. 197; Sutton v. Dana, 4 Pick. 117; East Bridgewater v. Bridgewater, 2 Pick. 572; Princeton v. West Boylston, 15 Mass. 257; Westport v. Dartmouth, 10 Mass. 341; Salem v. Hamilton, 4 Mass. 676; West Springfield v. Granville, 4 Mass. 486.

Minn.—Peterson v. Emardville, 101 Minn. 24, 111 NW 652.

N. H.—Mason v. Alexandria, 3 N. H. 303; Gilford v. Gilmanton, 1 N. H. 194.

N. J.—Franklin Tp. v. Lebanon Tp., 51 N. J. L. 93, 16 A 184; Stillwater Tp. v. Green Tp., 9 N. J. L. 59.

Oh.—Ashland County v. Richland County Infirmary, 7 Oh. St. 65, 70 AmD 49; Williamsburg Tp. v. Jackson Tp., 11 Oh. 37; Center Tp. v. Wills Tp., 7 Oh. Pt. II 171 [overr Pike Tp. v. Union Tp., 5 Oh. 528].

Wis.—Hay River v. Sherman, 60 Wis. 54, 18 NW 740.

N. S.—Joggins v. Cumberland Poor Dist., 58 N. S. 76, [1925] 2 DomLR 663.

[a] **Home.**—Actual residence also determines the "home" of the pauper, upon a division of the town. Gilford v. Gilmanton, 1 N. H. 194.

[b] **Servants** are deemed to have their "home" at the place of their employment and where they actually reside. Gilford v. Gilmanton, 1 N. H. 194.

45. Lewiston v. Auburn, 32 Me. 492; Winthrop v. Auburn, 31 Me. 465; Calais v. Marshfield, 30 Me. 511; Bloomfield v. Skowhegan, 16 Me. 58; Malden v. Melrose, 125 Mass. 304; North Andover v. Groveland, 1 Allen (Mass.) 75; New Braintree v. Boylston, 24 Pick. (Mass.) 164; Hanson v. Pembroke, 16 Pick. (Mass.) 197; Bridgewater v. West Bridgewater, 9 Pick. (Mass.) 55; Sutton v. Dana, 4 Pick. (Mass.) 117; East Bridgewater v. Bridgewater, 2 Pick. (Mass.) 572; Princeton v. West Boylston, 15 Mass. 257.

[a] **A derivative settlement** is within such a statute. North Andover v. Groveland, 1 Allen (Mass.) 75.

Operation and effect of special acts generally see infra text and notes 52, 53.

46. Ashland County v. Richland County Infirmary, 7 Oh. St. 65, 70 AmD 49; Center Tp. v. Wills Tp., 7 Oh. Pt. II 171 [overr Pike Tp. v. Union Tp., 5 Oh. 528]; Hay River v. Sherman, 60 Wis. 54, 18 NW 740.

47. Brewer v. Eddington, 42 Me. 541. And see cases infra note 48.

[a] **Temporary residence.**—Under Rev. St. (1841) c 32 § 1, the question of settlement in a new town formed from one or more old towns depends upon the fact of an actual home and not a temporary residence within its limits at the time of its incorporation. Brewer v. Eddington, 42 Me. 541.

48. Me.—Yarmouth v. North Yarmouth, 44 Me. 352; Brewer v. Eddington, 42 Me. 541; Mt. Desert v. Seaville, 20 Me. 341.

Mass.—Southbridge v. Charlton, 15 Mass. 248.

Minn.—Peterson v. Emardville, 101 Minn. 24, 111 NW 652; Wellcome v. Monticello, 41 Minn. 136, 42 NW 930.

N. H.—New Chester v. Bristol, 3 N. H. 71.

N. J.—Franklin Tp. v. Lebanon Tp., 51 N. J. L. 93, 16 A 184; Bethlehem Tp. Overseers of Poor v. Alexandria Tp. Overseers of Poor, 32 N. J. L. 67.

[a] **Residence at a poorhouse** situated within the limits of a new town incorporated out of an old one does not become fixed in the new town, from the fact of thus living therein. Brewer v. Eddington, 42 Me. 541.

49. See cases supra note 48.

50. Adams v. Swansea, 116 Mass. 591; New Bedford v. Middleborough, 16 Gray (Mass.) 295; Westport v. Dartmouth, 10 Mass. 341.

51. See statutory provisions.

52. Holden v. Veazie, 73 Me. 312; Lewiston v. Auburn, 32 Me. 492; Malden v. Melrose, 125 Mass. 304; New Braintree v. Boylston, 24 Pick. (Mass.) 164; Rex v. Justices Middlesex, [1907] 2 K. B. 581; Worcester Union v. Birmingham Union, 65 J. P. 771; East Preston Union v. Lewisham Union, 91 L. T. Rep. N. S. 498.

[a] **Construction of particular special acts.**—Yarmouth v. North Yarmouth, 44 Me. 352; Lewiston v. Auburn, 32 Me. 492; Calais v. Marshfield, 30 Me. 511; Freeport v. Pownal, 23 Me. 472; Harvard v. Boxborough, 4 Metc. (Mass.) 570; Lancaster v. Sutton, 16 Mass. 112; Dillingham v. Burgis, 16 Mass. 58; Southbridge v. Charlton, 15 Mass. 248; Salem v. Hamilton, 4 Mass. 676.

53. Manchester v. West Gardiner, 53 Me. 523; Clinton v. Benton, 49 Me. 550; Salem v. Ipswich, 10 Cush. (Mass.) 517; Westborough v. Rehoboth, 4 Cush. (Mass.) 185; Hanson v. Pembroke, 16 Pick. (Mass.) 197.

54. New Portland v. Rumford, 13 Me. 299; Great Barrington v. Lancaster, 14 Mass. 253; Groton v. Shirley, 7 Mass. 156; West Springfield v. Granville, 4 Mass. 486; Bath v. Bowdoin, 4 Mass. 452; Strafford v. Strafford County, 43 N. H. 606; Gilford v. Gilmanton, 20 N. H. 456.

55. Colchester v. East Lyme, 18 Conn. 480.

56. Brewer v. Eddington, 42 Me. 541; Ripley v. Levant, 42 Me. 308; Starks v. New Sharon, 39 Me. 368; Hallowell v. Bowdoinham, 1 Me. 129; Lexington v. Burlington, 19 Pick. (Mass.) 426; Fitchburg v. Westminster, 1 Pick. (Mass.) 144.

[a] **In New Hampshire,** however, a town was held to be divided with-

town and the incorporation of the former town is annulled as to the balance, this is a division.[57]

Agreements between towns. No agreement between two towns upon the separation of one from the other can affect the legal settlement of their inhabitants as fixed by the general statutes or the special act making the separation,[58] although a contract between the two towns for the support of particular paupers may be binding.[59]

Loss of settlement.[60] In England the rule was originally laid down that, where a parish was divided into two or more parishes, all settlements acquired in the parish before its division were thereby lost,[61] unless the statute provided otherwise.[62] But these cases have been expressly overruled.[63]

[§ 98] **c. Annexation and Detachment.**[64] It is a general rule that, upon the annexation of a part of the territory of one town to another, persons residing upon the territory annexed and having their settlement in the town from which such territory is taken, acquire settlements in the town to which the annexation is made,[65] and this rule has received statutory recognition in some jurisdictions.[66] Persons who have no settlement in the town from which the territory annexed to another is taken,[67] or who do not actually dwell and have their homes upon the territory set off at the time of its separation,[68] do not acquire a settlement in the town to which such territory is annexed. But in some jurisdictions it has been held that a person having his settlement at the time of annexation upon the territory annexed, although not residing thereon, acquires a settlement in the town to which such territory is annexed.[69] The settlement of persons residing on territory set off from one town and not incorporated into another is not changed by such dismemberment.[70]

Void proceedings. Where a person has resided on land in a township for the statutory period, the attempted annexation of the land to a borough by proceedings which were void for failure to comply with the statutory requirements will not affect such settlement.[71]

[§ 99] **d. Effect on Persons Absent.** Where a person has his usual home in unincorporated territory, he is to be considered as residing therein so as to acquire a settlement through its incorporation, although at the time of its incorporation he is absent therefrom, provided it is his intention to return,[72] and this is so, even though, after the incorporation, he abandons such intention.[73] It is otherwise, however, where he removed from the territory incorporated, prior to incorporation, without any intention of returning.[74] In the absence of statutory provisions fixing the settlements of persons absent at the time of the division of a town, or the annexation of a part thereof to another town, it has been held that one who had removed from the old town prior to the division or annexation retains his settlement in the old town, irrespective of where he resided within such town;[75] but other authorities have held that the settlement of such a person is fixed by the locus of his original settlement in the old town.[76]

Statutory provisions. In many jurisdictions it is provided by statute that persons who are absent from a town at the time of its division or the annexation of a part thereof to some other town shall have a settlement in that town wherein their last dwelling place or home shall happen to fall on division or annexation,[77] and the power of the legisla-

in the meaning of the statute of Dec. 16, 1828, whenever any portion of it was separated from the rest, whether the severed portion was incorporated into a new town or annexed to an old one. Barnstead v. Alton, 32 N. H. 245.

57. Livermore v. Phillips, 35 Me. 184.

58. Naugatuck v. Middlebury, 20 Conn. 378; Oxford v. Bethany, 15 Conn. 246; Clinton v. Benton, 49 Me. 550; Veazie v. Howland, 47 Me. 127; Holden v. Brewer, 38 Me. 472; Westborough v. Rehoboth, 4 Cush. (Mass.) 185; Norton v. Mansfield, 16 Mass. 48; West Boylston v. Boylston, 15 Mass. 261; Westborough v. Franklin, 15 Mass. 254; Brewster v. Harwich, 4 Mass. 278.

[a] **Purpose of stipulation.**—Where an act is passed dividing a town, incorporating a part of it into a new town, and providing for the proportional support of the paupers then chargeable, the object of the provision is held to be to divide the expense of supporting such paupers, and not to affect their settlement. Oxford v. Bethany, 15 Conn. 246; Clinton v. Benton, 49 Me. 550; Brewster v. Harwich, 4 Mass. 278.

59. See infra § 210.

60. **Generally** see infra § 124 et seq.

61. Dorking Union v. St. Saviour's Union, [1898] 1 Q. B. 594; Stourbridge Union v. Droitwich Union, L. R. 6 Q. B. 769; Reg. v. St. Martin Parish, 9 Q. B. 241, 58 ECL 241, 115 Reprint 1266; Reg. v. Hunnington, 5 Q. B. 273, 48 ECL 273, 114 Reprint 1252; Reg. v. Tipton, 3 Q. B. 215, 43 ECL 704, 114 Reprint 489; East Preston Union v. Lewisham Union, 91 L. T. Rep. N. S. 498.

62. Rex v. Justices Middlesex, [1906] 2 K. B. 365.

63. West Ham Union v. Edmonton Union, [1908] A. C. 1, 10 AnnCas 29.

64. **Distinction between annexation and division** see supra § 97.

65. Conn.—Simsbury v. Hartford, 14 Conn. 192.

Me.—Ripley v. Levant, 42 Me. 308; Eddington v. Brewer, 41 Me. 462; Belgrade v. Dearborn, 21 Me. 334; Smithfield v. Belgrade, 19 Me. 387; New Portland v. New Vineyard, 16 Me. 69; New Portland v. Rumford, 13 Me. 299; Hallowell v. Bowdoinham, 1 Me. 129.

Mass.—Fitchburg v. Westminster, 1 Pick. 144; Great Barrington v. Lancaster, 14 Mass. 253; Groton v. Shirley, 7 Mass. 156.

N. J.—Clinton v. Clinton Tp., 56 N. J. L. 240, 27 A 916.

Pa.—Plunketts' Creek v. Shrewsbury, 3 Pa. Dist. 613; Wilkes-Barre Borough v. Dallas Tp., 3 AmLJ 59.

Vt.—Westfield v. Coventry, 71 Vt. 175, 44 A 66; Wilmington v. Somerset, 35 Vt. 232.

Eng.—Gloucester Union v. Woolwich Union, [1917] 2 K. B. 374.

N. S.—Antigonish v. Arisaig Overseers of Poor, 38 N. S. 112.

[a] **Annexation of a plantation to a town by statute, which is silent on the subject of pauper settlements,** does not change the settlement of the inhabitants of the plantation which they have in other towns. Woodstock v. Bethel, 66 Me. 569.

66. See statutory provisions; and cases passim supra note 65.

67. Starks v. New Sharon, 39 Me. 368; New Portland v. Rumford, 13 Me. 299.

68. Castine v. Winterport, 56 Me. 319; Monroe v. Frankfort, 54 Me. 252; Manchester v. West Gardiner, 53 Me. 523; Starks v. New Sharon, 39 Me. 368; New Portland v. Rumford, 13 Me. 299; Hallowell v. Bowdoinham, 1 Me. 129; Fitchburg v. Westminster, 1 Pick. (Mass.) 144; Great Barrington v. Lancaster, 14 Mass. 253; East Montpelier v. Barre, 79 Vt. 542, 66 A 100, 10 LRANS 874; Westfield v. Coventry, 71 Vt. 175, 44 A 66.

[a] **Persons supported as paupers** in the territory detached are not residents in such territory so as to acquire settlements in the town to which such territory is annexed. Monroe v. Frankfort, 54 Me. 252; Smithfield v. Belgrade, 19 Me. 387.

Effect of absence generally see infra § 99.

69. Bethany v. Oxford, 15 Conn. 550; Oxford v. Bethany, 15 Conn. 246.

70. Weld v. Carthage, 37 Me. 39.

71. Young Tp. Dist. Overseers of Poor v. Blacklick Tp. Overseers of Poor, 20 Pa. Super. 629.

72. St. George v. Deer Isle, 3 Me. 390.

73. St. George v. Deer Isle, supra.

[a] **Illustration.**—Where, at the time of incorporation of a town, a person having a legal home there lived in another town, at service, with the intention of returning, his subsequent abandonment of the purpose of returning did not affect the question of settlement. St. George v. Deer Isle, 3 Me. 390.

74. Exeter v. Brighton, 15 Me. 58.

75. Harvard v. Boxborough, 4 Metc. (Mass.) 570; Norton v. Mansfield, 16 Mass. 48; Westborough v. Franklin, 15 Mass. 254; Bath v. Bowdoin, 4 Mass. 452; Windham v. Portland, 4 Mass. 384; Brewster v. Harwich, 4 Mass. 278.

76. Naugatuck v. Middlebury, 20 Conn. 378; Mansfield v. Granby, 1 Root (Conn.) 179.

[a] **In Ohio** it has been held that, where a new township is organized, including part of an existing township, persons residing within the limits of the new township acquire a legal settlement there, although absent at the time the new township was organized. Center Tp. v. Wills Tp., 7 Oh. Pt. II 171.

77. See statutory provisions.

[a] **"Dwelling place or home" construed.**—Guilford v. Gilmanton, 1 N. H. 194.

[b] **"Being absent" construed.**—Wilmington v. Somerset, 35 Vt. 232.

ture to enact statutes of this character has been directly upheld.[78] Such a statute applies only to divisions of towns made after its passage.[79] The term "residence" or "resided" refers to the last place of dwelling or domicile, as distinguished from place of settlement.[80]

A special act as to pauper settlements will usually control a general statute fixing the settlements of persons absent from a town at the time of its division.[81]

[§ 100] **5. Preventing Settlement—a. Receiving Supplies—(1) In General.** The statutes generally provide that no person shall acquire a settlement in his own right if, during the period necessary for such acquisition, he received relief as a pauper.[82] In the absence of a statute to such effect the receipt of pauper supplies does not, it seems, prevent the acquisition of a settlement.[83] The supplies need not be furnished by the town in which the pauper resides,[84] it being sufficient if they are furnished by the town in which the person is at the time settled,[85] or by the common-

[c] **What constitutes "division" of town.**—Barnstead v. Alton, 32 N. H. 245.

[d] **Particular statutes construed and applied.**—(1) A person who by reason of nine years' absence is presumed to have died prior to the division of the town, a part of which is incorporated into a new town, cannot be considered as "absent at the time" of the division, within the meaning of Rev. St. c 23 § 1 cl 4; neither can he be considered as having his "home in the new town," within the last clause in that section. Rockland v. Morrill, 71 Me. 455. (2) The statute does not include a person who had before the division removed to and dwelt in another part of the town distinct from that part forming a part of the new town. Sutton v. Dana, 1 Metc. (Mass.) 383. (3) Other statutes construed and applied. Reading v. Westport, 19 Conn. 561; Manchester v. West Gardiner, 53 Me. 523; Ripley v. Levant, 42 Me. 308; Belgrade v. Dearborn, 21 Me. 334; Sutton v. Dana, 4 Pick. (Mass.) 117.

[e] **Statute repealed.**—Westfield v. Coventry, 71 Vt. 175, 44 A 66.

78. Wilton v. New Vineyard, 43 Me. 315.

79. Windham v. Portland, 4 Mass. 384.

80. Waterbury v. Bethany, 18 Conn. 424.

81. Malden v. Melrose, 125 Mass. 304; Lexington v. Burlington, 19 Pick. (Mass.) 426. But see Westborough v. Rehoboth, 4 Cush. (Mass.) 185 (Spec. Acts [St. (1811) c 143], relating to the support of paupers on division of the town of Rehoboth did not change the general law as to the settlement of absent persons).

82. See statutory provisions; cases infra note 83 et seq; and §§ 101-103.

"No matter how poor a man may be, so long as he is able to support himself and his family and not likely to become chargeable, he has the right to choose his own domicile or remove from one to another, and thus change his legal settlement. But as regards one who is a pauper and unable to support himself, and who calls on the State for aid and assistance to do so, the State has a right to say how he shall be supported and where, and can require him, while being thus supported at public expense, to stay in the place of his last legal settlement, and, if he attempts to go elsewhere, will remove him there." Home for Destitute v. Fayette County Almshouse, 72 Pa. Super. 491, 495.

[a] **Construction of statutes.**—(1) L. (1896) c 225 § 41, providing that no residence of any poor person "in any almshouse, while such person, or any member of his or her family is supported or relieved at the expense of any other town, city, county or state, shall operate to give such person a settlement in the town where such actual residence may be," is to be read with the disjunctive "or" after the word "almshouse," as was the case before the revision. Peo. v. Lyke, 159 N. Y. 149, 53 NE 802. (2) Such statute does not enable a poor person, who resides in a town or city for one year while supported or relieved at the expense of the county, to acquire a settlement in such town or city so that he ceases to be a county charge and becomes a charge upon such town or city. Peo. v. Lyke, supra. (3) The statute does not impliedly repeal Rev. St. tit 1 § 30, providing that no residence of a pauper in the county poorhouse or in any town, while supported at the expense of any other town or county, shall operate to give him a settlement in the town. Peo. v. Lyke, supra. Contra Matter of Connellan, 25 Misc. 592, 56 NYS 157. (4) It seems that under such statute it is not necessary that the place where a poor person is supported shall be a public building, or that it shall be but one place in order that residence there shall not operate to give such person a settlement, and where the overseer of the poor of a city administers relief to a poor person at the house where he then lives, such house is a place where the poor are supported at the public expense, and is an almshouse within the meaning of the statute. Peo. v. Lyke, supra. (5) Other statutes construed and applied. Lisbon v. Franklin, 1 Root (Conn.) 423; Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50; Freeport v. Sidney, 21 Me. 305 (Massachusetts statute); Wellcome v. Monticello, 41 Minn. 136, 42 NW 930; Peo. v. Maynard, 160 N. Y. 453, 55 NE 9; Matter of McCutcheon, 25 Misc. 650, 56 NYS 370; West Perry Tp. v. Perry Tp., 34 Pa. Co. 97; Scott v. Clayton, 51 Wis. 185, 8 NW 171.

[b] **Inmates of Soldiers' Home.**—In Maine, under Rev. St. c 24 § 5 an inmate of a soldiers' home, or one receiving rations therefrom, can acquire a settlement so long as his connection with such home continues, even though the inmate had no settlement in the state when his connection with the home commenced. Winslow v. Pittsfield, 95 Me. 53, 49 A 46.

[c] **In England** (1) the provisions of Poor Removal Act (1846) § 1 as to the exclusion for all purposes in the computation of time under the section of any period, inter alia, during which a person is in receipt of relief, prevent a pauper who has acquired a status of irremovability under the section, and who is in receipt of relief, from losing that status by a change of residence so long as he continues to be in receipt of relief. Poplar Union v. West Ham Union, 94 L. T. Rep. N. S. 769 [foll Hartfield v. Rotherfield, 17 Q. B. 746, 79 ECL 746, 117 Reprint 1467]. (2) Where a child under the age of sixteen resides with his father in a parish under such circumstances that he would acquire a status of irremovability and, after a period of three years, a settlement in the parish, the mere fact that the father has during that period received poor law relief will not, in the absence of evidence that the child has shared in such relief, disqualify the child from acquiring a settlement in the parish. Tewkesbury Union v. Upton-On-Severn Union, [1913] 3 K. B. 475.

83. East Franklin Tp. v. Rayburn Tp., 23 Pa. Super. 522.

[a] **A settlement may be acquired by payment of taxes,** although the person at the time of payment is receiving relief as a pauper, if the taxes are not paid out of funds given by the township for such relief. East Franklin Tp. v. Rayburn Tp., 23 Pa. Super. 522.

84. See cases infra notes 85, 86.

85. Iowa.—Fayette County v. Bremer County, 56 Iowa 516, 9 NW 372.

Mass.—Worcester v. Auburn, 4 Allen 574; Oakham v. Sutton, 13 Metc. 192; Taunton v. Middleborough, 12 Metc. 35; West Newbury v. Bradford, 3 Metc. 428; Brewster v. Dennis, 21 Pick. 233; East Sudbury v. Waltham, 13 Mass. 460.

N. H.—Croyden v. Sullivan County, 47 N. H. 179.

Pa.—Home for Destitute v. Fayette County Almshouse, 72 Pa. Super. 491; Brady Tp. v. Clinton Tp., 1 Pa. Co. 127; Union Tp. v. Monroe Tp., 8 Kulp 521; Lewisburg Overseers of Poor v. Milton Overseers of Poor, 18 WklyNC 141.

Vt.—Wilmington v. Somerset, 35 Vt. 232.

[a] **In other words** (1) a person who is chargeable to, and receiving aid as a pauper from, one district, cannot acquire a settlement in another district so long as that relation exists. Lawrence Overseers v. Delaware Overseers, 148 Pa. 380, 23 A 1124; Washington Tp. Overseers of Poor v. East Franklin Tp. Overseers of Poor, 3 Pennyp. (Pa.) 107; Lock Haven Poor Dist. v. Chapman Tp. Poor Dist., 10 Pa. Cas. 136, 13 A 742; Home for Destitute v. Fayette County Almshouse, 72 Pa. Super. 491, 494; Wilmington v. Somerset, 35 Vt. 232. (2) "To hold otherwise would create an intolerable condition, for by encouraging a pauper to remove into another district and surreptitiously assisting him therein for one year, a poor district could relieve itself of the burden imposed on it by law, and fasten it upon its neighbor, which would be without notice of the pauper's impoverished condition; and the effect upon the pauper would be even worse, for there would be an incentive to keep him constantly on the move." Home for Destitute v. Fayette County Almshouse, supra.

[b] **In Connecticut** (1) under Gen. St. § 2469, providing that no inhabitant of any town shall gain a settlement in any other town unless he shall have resided there four years continuously, and shall have maintained himself and family during the whole of such period "without becoming chargeable to such town," a person who removes from one town to another and resides in the latter town for the requisite time without subjecting the town to actual expense for the support of himself or family gains a settlement there, although during such time the town from which he removed had furnished him and his family with necessaries on several occasions. Plainville v. Southington, 80 Conn. 659, 69 A 1049. (2) Under earlier statutes providing for the acquisition of a settlement by an inhabitant of one town in another by residence in the latter for a prescribed period without becoming chargeable to such town or to the town liable for the support of such person or his family, a person re-

wealth,[86] and the fact that the person receiving the supplies has no other settlement in the state is immaterial.[87] But the fact that a person receives supplies after he has resided in a town for the statutory period will not affect his settlement there.[88] The statute applies to supplies furnished to a person committed to an insane asylum,[89] or confined in jail under criminal process.[90]

Notice. In order to prevent the recipient of pauper supplies from acquiring a settlement, it is not necessary, in the absence of statute, where the supplies are furnished by the town or district in which the pauper is residing, that such town or district should give notice to the town or district in which the pauper is at the time settled.[91]

[§ 101] **(2) To Whom Furnished.** Supplies ordinarily are to be deemed furnished to a person when furnished to a member of his family whom he is under obligation to support.[92] But relief furnished to members of a person's family without his knowledge, and while he is able to support them, will not prevent him from gaining a settlement.[93] It has also been held that, where a statute provides for the acquisition of a settlement by an unsettled married woman, provided she does not receive pauper relief during the period required to gain such settlement,[94] a married woman does not receive relief as a pauper within the exception of the statute by reason of the fact that during such period she applies for, and receives from the overseers of the poor, money for the board of her child.[95] Under some statutes the term "family" is deemed to embrace all the persons whom it is the right of the head of the family to control and his duty to support.[96] Under other statutes those only can be considered as his family who continue under his care and protection.[97] The wife of a minor son is not a member of the family of the father within a statute requiring a person, during the term of residence required to gain a settlement, to support himself and family;[98] and it has been held that a stepfather is not prevented from gaining a settlement by receiving supplies for the support of his stepson.[99] If, while one person is a member of another's family, pauper supplies are furnished to the family generally, they will be considered as supplies furnished to such person, even though he be of full age and not subject to the control of any of the family.[1]

Support of member of family in asylum. In some jurisdictions it is held that a person may gain a new settlement in another town or district, notwithstanding his wife or child is receiving support in an insane asylum in the district of his former settlement.[2] So where the statute expressly provides that a person's inability to support a member of his family in a lunatic hospital or similar institution shall not render him a pauper, such person's inabil-

moving from one town to another and residing in the latter place for the statutory period does not acquire a settlement if, during such time, relief was furnished to him or his family by the town where he resided or the town from which he removed. Plainville v. Southington, supra. See Ridgefield v. Fairfield, 73 Conn. 47, 46 A 245; Beacon Falls v. Seymour, 44 Conn. 210 (both holding that the words "without becoming chargeable to such town" mean "without subjecting the town to actual expense for their support").

86. Charlestown v. Groveland, 15 Gray (Mass.) 15. See Norwich v. Saybrook, 5 Conn. 384 (where expenses of town were reimbursed from state treasury).

87. Charlestown v. Groveland, 15 Gray (Mass.) 15; West Newbury v. Bradford, 3 Metc. (Mass.) 428 [disappr dicta in Mt. Washington v. Clarksburgh, 19 Pick. (Mass.) 294].

88. Rockport v. Rockland, 111 Me. 585, 89 A 72; Brampton Union v. Carlisle Union, 3 Q. B. D. 479.

89. Choate v. Rochester, 13 Gray (Mass.) 92.

90. Worcester v. Auburn, 4 Allen (Mass.) 574; East Sudbury v. Sudbury, 12 Pick. (Mass.) 1. See Whately v. Hatfield, 196 Mass. 393, 82 NE 48, 13 AnnCas 690 (rule otherwise where the obligation to support person sentenced for larceny was not on the town but was an obligation first to be borne by the county).

Interruption of continuity of residence by imprisonment see supra § 94.

91. Corinna v. Exeter, 13 Me. 321.

[a] **In Iowa** it has been held that such notice is essential under the statute. Scott County v. Polk County, 61 Iowa 616, 14 NW 206, 16 NW 736.

92. Norwich v. Saybrook, 5 Conn. 384; Winterport v. Newburgh, 78 Me. 136, 3 A 48; Green v. Buckfield, 3 Me. 136; Somerville v. Com., 225 Mass. 589, 114 NE 825; Oakham v. Warwick, 13 Allen (Mass.) 88; Gilmantown v. Sanbornton, 56 N. H. 336; Croydon v. Sullivan County, 47 N. H. 179.

[a] **Supplies furnished to wife** will prevent the husband from acquiring a settlement. Lewiston v. Harrison, 69 Me. 504; Woodward v. Worcester, 15 Gray (Mass.) 19 note; Charlestown v. Groveland, 15 Gray (Mass.) 15.

[b] **Supplies furnished to unemancipated minor children** (1) will prevent the parent from acquiring a settlement. Norwich v. Saybrook, 5 Conn. 384; Winterport v. Newburgh, 78 Me. 136, 3 A 48; Islesborough v. Lincolnville, 76 Me. 572; Eastport v. Lubec, 64 Me. 244; Tremont v. Mt. Desert, 36 Me. 390; Sanford v. Lebanon, 31 Me. 124; Clinton v. York, 26 Me. 167; Garland v. Dover, 19 Me. 441; Taunton v. Middleborough, 12 Metc. (Mass.) 35; Gilmanton v. Sanbornton, 56 N. H. 336; Croydon v. Sullivan County, 47 N. H. 179. (2) Where the parental relation continues to subsist, and there has been no emancipation or abandonment, and the circumstances are such as to make it evident that the father has knowledge of the necessities of the child, and he fails to supply those necessities, and they are supplied by the town officers, acting in good faith to relieve a case of actual want and distress, the supplies thus furnished will be deemed supplies furnished indirectly to the father, and will operate to prevent his gaining a settlement. Lewiston v. Harrison, 69 Me. 504; Eastport v. Lubec, 64 Me. 244; Sanford v. Lebanon, 31 Me. 124; Clinton v. York, 26 Me. 167; Garland v. Dover, 19 Me. 441. (3) Necessary supplies furnished by a town to a child non compos mentis, not abandoned or emancipated by the father, although of full age, will be deemed supplies furnished indirectly to the father and will operate to prevent his gaining a settlement. Islesborough v. Lincolnville, 76 Me. 572; Tremont v. Mt. Desert, 36 Me. 390.

[c] **Single woman having a minor child** who resides in her family, but is a settled inhabitant of another state, is bound to support such child, and, failing to do this, can acquire no settlement by commorancy. Norwich v. Saybrook, 5 Conn. 384.

93. Bangor v. Readfield, 32 Me. 60; Dixmont v. Biddeford, 3 Me. 205; Wareham v. Milford, 105 Mass. 293; Berkeley v. Taunton, 19 Pick. (Mass.) 480.

94. See supra § 52.

95. Gleason v. Boston, 144 Mass. 25, 10 NE 476.

96. Cheshire v. Burlington, 31 Conn. 326.

97. Raymond v. Harrison, 11 Me. 190; Hallowell v. Saco, 5 Me. 143; Dixmont v. Biddeford, 3 Me. 205; Green v. Buckfield, 3 Me. 136; Wareham v. Milford, 105 Mass. 293; Scranton Poor Dist. v. Danville, etc., Directors of Poor, 106 Pa. 446.

[a] **Where a husband has abandoned his wife** and lives separated from her and in a different town, supplies furnished to his wife, not on his application, will not prevent the acquisition of a settlement in the town in which he resides. Raymond v. Harrison, 11 Me. 190; Hallowell v. Saco, 5 Me. 143; Dixmont v. Biddeford, 3 Me. 205; Wareham v. Milford, 105 Mass. 293; Berkeley v. Taunton, 19 Pick. (Mass.) 480; Scranton Poor Dist. v. Danville, etc., Directors of Poor, 106 Pa. 446; Damascus v. Buckingham, 3 Pa. Dist. 744; Danville, etc., Poor Dist. v. Scranton Poor Dist., 2 Kulp (Pa.) 457 [aff 3 Kulp 197].

[b] **Where emancipated minor children live separately** from their father (1) supplies furnished them will not prevent his acquisition of a settlement. Thomaston v. Greenbush, 106 Me. 242, 76 A 690; Liberty v. Palermo, 79 Me. 473, 10 A 455; Bangor v. Readfield, 32 Me. 60; Garland v. Dover, 19 Me. 441; Raymond v. Harrison, 11 Me. 190; Green v. Buckfield, 3 Me. 136. (2) Furnishing supplies to a minor child who is not a member of his father's family, but is away from his care and protection, either through his own fault or his father's neglect, without the knowledge or consent of the father, by a distant town where he may happen to fall into distress, he being of sufficient ability and willing to support him at his own home, is not considered a furnishing of supplies to him as a pauper, so as to prevent his acquiring a settlement to which he would otherwise be entitled. Bangor v. Readfield, supra; Dixmont v. Biddeford, 3 Me. 205; Green v. Buckfield, supra.

98. Manchester v. Rupert, 6 Vt. 291.

99. Brookfield v. Warren, 128 Mass. 287.

1. Hampden v. Levant, 59 Me. 557; Corinth v. Lincoln, 34 Me. 310.

2. Canaan Tp. v. Covington Tp.,

ity to furnish such support will not prevent his acquisition of a settlement.[3] But a contrary rule obtains in the absence of such a statute.[4]

[§ 102] **(3) What Constitutes—(a) In General.** The actual receipt of pauper supplies is necessary to prevent the acquisition of a settlement;[5] and hence a mere application for relief does not have such effect;[6] but a pauper residing in a township will not gain a residence there where the overseers of another township to which he is legally chargeable wrongfully refuse to give him the relief to which he is entitled, so that he is forced to support himself by begging.[7] The relief must be furnished directly or indirectly by the town,[8] pursuant to its statutory obligation,[9] and the person receiving such relief must receive it as a pauper.[10] Supplies which have been furnished gratuitously or on the individual credit of the recipient thereof have no effect.[11] So supplies furnished by individuals as an act of charity,[12] or from a charitable organization supported by private subscriptions,[13] are not to be considered pauper supplies so as to affect the recipient's acquisition of a settlement. And the same is true where the supplies are furnished by an individual in such a manner as to impose no liability upon the town for reimbursement,[14] although the town does subsequently voluntarily reimburse such individual.[15]

Supplies furnished under contract duty. Where a town or poor district furnishes aid to a person in discharge of a duty assumed by it by way of contract, and not in discharge of the duty imposed upon it by statute for the support of the poor, such aid is not to be deemed pauper supplies so as to prevent the recipient from acquiring a settlement.[16]

Intent to prevent settlement. Where the person is in actual need of relief, the fact that the supplies are furnished with the intention of the officers thereby to prevent a settlement is immaterial.[17]

A promise to repay and the actual repayment do not change the nature of the relief,[18] unless the relief is furnished to the pauper on a pledge of sufficient property to secure a remuneration.[19]

Soldier relief. In some jurisdictions the statutes provide especially for the support of indigent or poor soldiers of the Civil War and their families, and further provide that the receipt of such relief shall not impose upon the recipient pauper disabilities;[20] and in such cases the receipt of aid will not prevent the acquisition of a settlement by the recipient,[21] unless the aid is given to relieve distress not occasioned by injuries sustained in the war.[22] It is otherwise, however, in the absence of express statutory provision.[23]

Character of supplies. "Pauper supplies," as the term is used with regard to disabilities arising from their receipt upon the recipient's acquisition of a settlement, are not restricted to edibles or clothing,

54 Pa. Super. 25; Homer Poor Dist. v. Austin Poor Dist., 19 Pa. Co. 546; Penn's Tp. v. Selin's Grove, 1 Pa. Co. 383.

3. Shrewsbury v. Worcester, 180 Mass. 38, 61 NE 260; Worcester v. Barre, 138 Mass. 101.

[a] **Statute held not retroactive.**—Act (1881) c 188 [Pub. St. (1882) c 83 § 3], which provides that no person actually supporting himself and his family shall be deemed a pauper because of the commitment of his wife or minor child to a lunatic hospital, etc., and his inability to maintain them therein, is prospective only in its operation. Worcester v. Barre, 138 Mass. 101.

[b] **In Maine,** under a statute providing that the time during which a person is supported in an insane hospital shall not be included in the period of residence necessary to change his settlement (now Rev. St. (1883) c 143 § 21), it is held that the support of a wife in an insane hospital by the public authorities does not affect the husband's acquisition of a settlement. Bangor v. Wiscasset, 71 Me. 535; Glenburn v. Naples, 69 Me. 68.

4. Oakham v. Warwick, 13 Allen (Mass.) 88; Woodward v. Worcester, 15 Gray (Mass.) 19 note; Charlestown v. Groveland, 15 Gray (Mass.) 15.

5. Corinna v. Hartland, 70 Me. 355; Glenburn v. Naples, 69 Me. 68; Matter of Kelly, 46 Misc. 548, 95 NYS 53; Edenburg Borough Poor Dist. v. Strattanville Borough Poor Dist., 188 Pa. 373, 41 A 589; Sheboygan County v. Sheboygan Falls, 130 Wis. 93, 109 NW 1030.

[a] **Rule applied.**—A letter given by an overseer of the poor to a wife, by means of which she obtained her husband's wages, was not relief within the meaning of the poor law. Matter of Kelly, 46 Misc. 548, 95 NYS 53.

6. Orland v. Penobscot, 97 Me. 29, 53 A 830; Glenburn v. Naples, 69 Me. 68.

7. Brady Tp. Overseers v. Clinton Tp. Overseers, 148 Pa. 311, 23 A 1136.

8. Orland v. Penobscot, 97 Me. 29, 53 A 830; Sheboygan County v. Sheboygan Falls, 130 Wis. 93, 109 NW 1030.

9. Orland v. Penobscot, 97 Me. 29, 53 A 830.

10. Oakham v. Sutton, 13 Metc. (Mass.) 192; Sheboygan County v. Sheboygan Falls, 130 Wis. 93, 109 NW 1030.

[a] **The giving of aid on a single occasion** to a family of poor persons will not prevent them from acquiring a settlement. Port Washington v. Saukville, 62 Wis. 454, 22 NW 717. See Lawrence Tp. Overseers v. Delaware Tp. Overseers, 148 Pa. 380, 23 A 1124 (giving temporary relief under order for which person relieved did not apply will not prevent acquisition of settlement).

11. Lebanon v. Hebron, 6 Conn. 45; Montpelier v. Calais, 5 Vt. 571.

[a] **A prisoner** who receives aid from the town where he is imprisoned, on a pledge of the prisoner's personal property as security, does not receive aid from the town so as to prevent him from gaining a settlement by residence in the town in which he lived at the time he was imprisoned. Montpelier v. Calais, 5 Vt. 571.

12. Conn.—Plymouth v. Waterbury, 31 Conn. 515; Colchester v. Lyme, 13 Conn. 274; Lebanon v. Hebron, 6 Conn. 45.

Me.—Orland v. Penobscot, 97 Me. 29, 53 A 830; Dexter v. Sangerville, 70 Me. 441; Corinna v. Hartland, 70 Me. 355; Hampden v. Bangor, 68 Me. 368.

Minn.—Cordova v. Le Sueur Center, 78 Minn. 36, 80 NW 836.

Vt.—Craftsbury v. Greensboro, 66 Vt. 585, 29 A 1024.

Wis.—Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224. Compare Saukville v. Grafton, 68 Wis. 192 31 NW 719 (where, during a part of the time, support was furnished by an individual).

[a] **Aid from relatives.**—(1) Generally. Wiscasset v. Waldoborough, 3 Me. 388; St. Johnsbury v. Waterford, 67 Vt. 641, 32 A 630. (2) The support of a parent by a child is not supporting a poor person as a pauper within the statute. Standish v. Windham, 10 Me. 97; Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224.

13. Fulham Union v. Isle of Thanet Union, 7 Q. B. D. 539.

14. Hampden v. Bangor, 68 Me. 368; Windham Tp. Overseers of Poor v. Portland, 23 Me. 410; Wiscasset v. Waldoborough, 3 Me. 388; Canaan v. Bloomfield, 3 Me. 172.

[a] **Illustration.**—Where the selectmen of a town drew an order in favor of a pauper on one of the inhabitants for supplies to be furnished to the pauper, which the drawee did not accept, but the supplies were voluntarily advanced by another person who took up the order, these supplies were not "received from some town," within the meaning of St. (1821) c 122 § 2, the person advancing not having any remedy against the town for reimbursement, and hence the receipt of such supplies will not prevent the gaining of a settlement under the act. Canaan v. Bloomfield, 3 Me. 172.

[b] **Where the friends of an insane person** committed to an asylum, without filing the bond required by statute, pay for the lunatic's support while in the asylum, and the town makes no payment, there is no furnishing of aid by the town so as to prevent the acquisition of a settlement. Dexter v. Sangerville, 70 Me. 441.

15. Hampden v. Bangor, 68 Me. 368; Windham Tp. Overseers of Poor v. Portland, 23 Me. 410.

16. Lebanon v. Hebron, 6 Conn. 45; Veazie v. Chester, 53 Me. 29; Wiscasset v. Waldoborough, 3 Me. 388; Cavendish v. Mt. Holly, 48 Vt. 525; Montpelier v. Calais, 5 Vt. 571.

17. Foxcroft v. Corinth, 61 Me. 559; Oakham v. Sutton, 13 Metc. (Mass.) 192.

18. Norwich v. Saybrook, 5 Conn. 384; Hartland v. St. Albans, 123 Me. 82, 121 A 552; Lewiston v. Harrison, 69 Me. 504; Veazie v. Chester, 53 Me. 29; West Newbury v. Bradford, 3 Metc., (Mass.) 428.

19. Montpelier v. Calais, 5 Vt. 571.

20. See statutory provisions.

21. Augusta v. Mercer, 80 Me. 122, 13 A 401.

22. Augusta v. Mercer, supra.

23. Juneau County v. Wood County, 109 Wis. 330, 85 NW 387.

but have been held to include a house and ground furnished to a pauper for a home.[24]

Question of law and fact. The question whether supplies constitute pauper supplies so as to prevent the recipient's acquisition of a settlement is a mixed question of law and fact.[25]

[§ 103] **(b) Necessity for Relief, and Application to, and Determination by, Officers.** To constitute pauper supplies the person receiving them must be in need of relief.[26] A town in which a person has been residing cannot, if he is not in need of relief, furnish supplies to him so as to prevent his acquiring a settlement, and the consequent loss of his settlement in another town,[27] although, on proof that supplies were furnished to the person, the burden is on the latter town to show that he was not standing in need of relief at the time.[28] But if the necessity for relief exists, it is not essential to show that the recipient applied for it, or that the party whose settlement is thereby affected should have assented to the furnishing of it by the town.[29]

Action by officers. To constitute pauper supplies, so as to break the continuity of a pauper's residence, there must be an adjudication by a majority of the board of overseers that the alleged pauper is in need of relief;[30] but it is sufficient if the act of an individual overseer in furnishing supplies is authorized or ratified by a majority of the board.[31]

[§ 104] **b. Warning Out[32]—(1) In General.** In some jurisdictions statutes have provided that, where persons come to reside in any town or poor district, the designated officers may serve upon them a warning to depart, and thereby prevent them from gaining a settlement by residence;[33] but in order that a warning out should have the effect of preventing an acquisition of a settlement, the provisions of the statute in regard to the matter must be strictly complied with.[34] The power to warn out new settlers in any town is not designed to operate as a general act of exclusion against all who may come within the bounds of any town to reside, but is placed in the hands of the selectmen to be exercised or not, in peculiar circumstances, according to their discretion;[35] and they have no right to delegate such discretion.[36]

[§ 105] **(2) Who Must Be Warned Out.** All persons who are capable of gaining a settlement in their own right must be warned out, in order to prevent them from acquiring a settlement,[37] but persons who are incapable of acquiring a settlement in their own right need not of course be warned out.[38] When a husband resides in a town together with his wife and children, it is sufficient to warn the husband to depart, since his wife and children take their settlement by derivation.[39] But after a child reaches majority he must be warned out, although prior thereto his father had been warned.[40] So a woman living with a man as his wife under a void marriage must be warned out, although warning has been given to the man and his family.[41]

[§ 106] **(3) Form and Requisites.** A warning to prevent a pauper from gaining a settlement in a town must follow strictly the statutory requirements.[42] Where the statute requires the warning to be given within a specified time after the commencement of the person's residence, the term of residence must be stated, either in the warrant[43] or in the officer's return.[44] The warning must, if the statute so requires, be signed by the designated officers,[45] and a warning signed by only one of two

24. Lee v. Winn, 75 Me. 465.

25. Lee v. Winn, supra; Fayette v. Livermore, 62 Me. 229; Foxcroft v. Corinth, 61 Me. 559; Veazie v. Chester, 53 Me. 29.

26. Wallingford v. Southington, 16 Conn. 431; Mt. Desert v. Bluehill, 118 Me. 293, 108 A 73; Winterport v. Newburgh, 78 Me. 136, 3 A 48; Foxcroft v. Corinth, 61 Me. 559; Veazie v. Chester, 53 Me. 29.

[a] **Rule for determining need of assistance.**—Wallingford v. Southington, 16 Conn. 431.

27. Foxcroft v. Corinth, 61 Me. 559; Veazie v. Chester, 53 Me. 29.

28. Oakham v. Sutton, 13 Metc. (Mass.) 192.

29. Bridgewater v. Roxbury, 54 Conn. 213, 6 A 415; Eastport v. Lubec, 64 Me. 244; Hampden v. Levant, 59 Me. 557; Clinton v. York, 26 Me. 167; Corinna v. Exeter, 13 Me. 321; Barnet v. Norton, 90 Vt. 544, 99 A 238; Weston v. Wallingford, 52 Vt. 630; Walden v. Cabot, 25 Vt. 522.

[a] **Rule applied.**—(1) If supplies, furnished bona fide by overseers to a person destitute, are in fact used for the relief of his destitution, or are received for the purpose of such relief, his unwillingness to receive them as pauper supplies, or his protest against so regarding them, or his declaration that he shall not so regard them, cannot prevent them from being so regarded, and from drawing after them all of their legal consequences. Veazie v. Chester, 53 Me. 29. (2) But if, when supplies are furnished, the overseers distinctly agree that the supplies are not, and shall not be regarded as, pauper supplies, but as a gift or loan to one in need, whether to be returned in kind or paid for or not, and they are thus received, the party so receiving will not be legally affected thereby, nor will the town acquire any rights thereby in its relation to other towns. Veazie v. Chester, supra.

[b] **Application made by son-in-law** is sufficient. Barnet v. Norton, 90 Vt. 544, 99 A 238.

30. Mt. Desert v. Bluehill, 118 Me. 293, 108 A 73.

31. Mt. Desert v. Bluehill, supra; Smithfield v. Waterville, 64 Me. 412; Fayette v. Livermore, 62 Me. 229.

[a] **Illustration.**—Supplies furnished by order of one of a board of overseers, acting under a parol agreement with the rest of the board relative to the general manner of executing their office, were supplies furnished "by some town," within the meaning of Act (1821) c 122 § 2 subd 7. Windsor v. China, 4 Me. 298.

32. Notice to remove paupers see infra § 214 et seq.

33. See statutory provisions.

[a] **Nature and object.**—The process of warning individuals to leave town, in order to prevent their gaining a settlement, is analogous to the English practice of orders of removal by justices of the sessions. The design in both cases is to impose the burden of maintenance on the town or parish where the pauper has his legal settlement. The mode of warning out is merely a milder form of effecting this object. Jaffrey v. Mt. Vernon, 8 N. H. 436.

34. Franklin v. Dedham, 18 Pick. (Mass.) 544; Sutton v. Uxbridge, 2 Pick. (Mass.) 436; Hamilton v. Ipswich, 10 Mass. 506; Gilford v. Epping, 12 N. H. 498; Olive Tp. v. Manchester Tp., 8 Oh. 113.

35. Jaffrey v. Mt. Vernon, 8 N. H. 436.

36. Jaffrey v. Mt. Vernon, supra.

37. Sherburne v. Hartland, 37 Vt. 528; Wells v. Westhaven, 5 Vt. 322; Stamford v. Whitingham, 2 Aik. (Vt.) 188; Poultney v. Fair Haven, Brayt. (Vt.) 185.

38. Somerset v. Dighton, 12 Mass. 383; Winchendon v. Hatfield, 4 Mass. 123; Sherburne v. Hartland, 37 Vt. 528; Manchester v. Springfield, 15 Vt. 385; Wells v. Westhaven, 5 Vt. 322.

[a] **Illegitimate minor children.**—A statute requiring persons to be warned out, to prevent their acquiring a settlement, does not extend to minors, although illegitimate. Somerset v. Dighton, 12 Mass. 383; Manchester v. Springfield, 15 Vt. 385.

[b] **Slaves.**—Winchendon v. Hatfield, 4 Mass. 123.

39. Shirley v. Watertown, 3 Mass. 322; Northwood v. Durham, 2 N. H. 242; Dummerston v. Jamaica, 5 Vt. 399; Barnet v. Concord, 4 Vt. 564.

Derivative settlement of:
Child see infra §§ 114–122.
Married woman see infra §§ 111, 112.

40. Berkley v. Somerset, 16 Mass. 454; Middlebury v. Hubbardton, Brayt. (Vt.) 183.

41. Manchester v. Springfield, 15 Vt. 385.

42. Hamilton v. Ipswich, 10 Mass. 506; Jaffrey v. Mt. Vernon, 8 N. H. 436; London v. Deering, 1 N. H. 13; Williamsburg Tp. v. Jackson Tp., 11 Oh. 37; Wheelock v. Lyndon, 6 Vt. 524; Dummerston v. Jamaica, 5 Vt. 399.

43. Middleborough v. Plympton, 19 Pick. (Mass.) 489; Hamilton v. Ipswich, 10 Mass. 506; Jaffrey v. Mt. Vernon, 8 N. H. 436; London v. Deering, 1 N. H. 13.

[a] **Warrant held insufficient.**—(1) A warrant which stated that the person had "lately come to reside" in the town was an insufficient specification of the length of the pauper's residence. Middleborough v. Plympton, 19 Pick. (Mass.) 489. (2) A warrant stating that the person had resided in the town "near one year" is insufficient. Meredith v. Exeter, 8 N. H. 136.

44. See infra § 107.

45. Jaffrey v. Mt. Vernon, 8 N. H. 436; Shrewsbury v. Mt. Holley, 2 Vt. 220.

[a] **Sufficiency of signature.**—A warning signed by the selectmen as selectmen simply, not adding the name of the town, was held sufficient where the name of the town suffi-

overseers is void.[46] Mere formal errors will not, however, invalidate a warning if the matter intended appear with sufficient certainty from the whole.[47] Unless expressly required by the statute, a warning need not be under the seal of the selectmen or signed by them.[48]

[§ 107] **(4) Service and Return.** The service of the warning must strictly conform to the statutory requirements,[49] and the officer's return must recite every material fact necessary to show a complete legal service.[50] Thus the return must show on what persons the process was served,[51] and recite the particular mode of service of the warning order.[52] The time of residence of a pauper in a town must be shown in the warrant,[53] or in the return.[54]

Amendment of return. The return cannot be amended after the expiration of the period required for acquisition of a settlement by the persons warned.[55]

Recording return. Failure to record the return of the officer in the clerk's office within the period designated by statute renders the warning order invalid.[56]

[§ 108] **(5) Operation and Effect.**[57] Where a person has been warned to leave a town, he cannot gain a settlement by any residence however long;[58] nor, it seems, by returning after a temporary absence too short to enable him to gain a settlement by residence elsewhere.[59] But if, after the warning, he left the town and returned after an absence sufficiently long to acquire a settlement elsewhere, a new warning is necessary to prevent a settlement,[60] unless the statute extends the effect of the warning to all subsequent, although distinct, periods of residence.[61]

[§ 109] **(6) Evidence.** The burden of proving the issuance, service, return, and recording of the warning order is upon the party claiming the benefit of such proceeding, and, if not shown by the party objecting to the settlement, it is presumed not to exist;[62] and, in the absence of all proof save that a warning order was issued, it is not to be presumed that the return was made in conformity with the provisions of the statute.[63] The best evidence of the return is a memorandum made by the clerk of the court of the time when the return was received, and where such memorandum is made it is conclusive evidence of such time;[64] but this is not the sole evidence.[65] It is not competent to show by parol evidence when the record of the return was made.[66]

[§ 110] **E. Derivative Settlement—1. In General.** It is the common-law rule that a person incapable of acquiring a settlement in his or her own right may gain a derivative settlement by reason of his or her relationship to another person having a legal settlement;[67] and this rule has been recognized as in force in the different states of the United States.[68] The doctrine is applicable to husband and wife,[69] children,[70] and slaves.[71]

[§ 111] **2. Husband and Wife**[72]**—a. General Rules—(1) Derivative Settlement of Wife.** It is a well settled rule at common law that the wife takes, by derivation, the settlement of her husband,[73]

ciently appeared in other parts of the instrument. Shrewsbury v. Mt. Holley, 2 Vt. 220.

46. Williamsburg Tp. v. Jackson Tp., 11 Oh. 37.

47. Dummerston v. Jamaica, 5 Vt. 399; Shrewsbury v. Mt. Holley, 2 Vt. 220.

48. Peterborough v. Temple, 2 N. H. 406.

49. Winhall v. Landgrove, 45 Vt. 376; Townsend v. Athens, 1 Vt. 284; Smilie v. Runnels, 1 Vt. 148.

[a] **Sufficiency of service.**—(1) The warning must be served by the delivery of a true and attested copy thereof on the person or persons to be warned, with the officers' return, or by leaving such copy at the house of his or their usual abode with some person of sufficient discretion then resident therein. Castleton v. Waybridge, 46 Vt. 474; New-Haven v. Vergennes, 3 Vt. 89. (2) If there is no such person with whom a copy can be left, it may be left at the usual abode of the person to be warned in such manner that he will most probably receive it. The right of the officer to adopt this method of service depends upon his inability to serve it in either of the first two methods named. Castleton v. Weybridge, supra. (3) If the service is not personal it should be certified to have been on "one then residing" where the pauper did. Reading v. Rockingham, 2 Aik. (Vt.) 272. (4) Where a warning issues against a man and his wife, it is sufficient to serve it on the husband alone. Dummerston v. Jamaica, 5 Vt. 399; Barnet v. Concord, 4 Vt. 564. (5) Service on one of the name and town mentioned in a warning is prima facie sufficient in default of evidence of another person of the same name in the town. Dummerston v. Jamaica, supra.

50. Castleton v. Weybridge, 46 Vt. 474; Hale v. Turner, 29 Vt. 350; Barre v. Morristown, 4 Vt. 574; Barnet v. Concord, 4 Vt. 564; Townsend v. Athens, 1 Vt. 284 (the warning out of a pauper is insufficient if the return admits of any doubt as to the strict regularity of the service); Reading v. Rockingham, 2 Aik. (Vt.) 272; Marvin v. Wilkins, 1 Aik. (Vt.) 107; Castleton v. Clarendon, Brayt. (Vt.) 181.

51. Waterford v. Brookfield, 2 Vt. 200.

52. Barre v. Morristown, 4 Vt. 574; Barnet v. Concord, 4 Vt. 564; Marshfield v. Montpelier, 4 Vt. 284 (the return of a warning out process which does not show in which of two ways it was served, one of the two being bad, is insufficient); Reading v. Weathersfield, 3 Vt. 349; New-Haven v. Vergennes, 3 Vt. 89.

[a] **Return held sufficient.**—Fairlee Tp. Overseers of Poor v. Corinth Tp. Overseers of Poor, 9 Vt. 265.

53. See supra § 106.

54. Sutton v. Uxbridge, 2 Pick. (Mass.) 436; Hamilton v. Ipswich, 10 Mass. 506; Coventry v. Boscawen, 9 N. H. 227; Jaffrey v. Mt. Vernon, 8 N. H. 436; Meredith v. Exeter, 8 N. H. 136; London v. Deering, 1 N. H. 13.

55. New-Haven v. Vergennes, 3 Vt. 89; Pittsford v. Brandon, Brayt. (Vt.) 183.

56. Northwood v. Durham, 2 N. H. 242; Bow v. Nottingham, 1 N. H. 260; Olive Tp. v. Manchester Tp., 8 Oh. 113; Salisbury v. Middlebury, 28 Vt. 282; Pawlet v. Sandgate, 17 Vt. 619; New-Haven v. Vergennes, 3 Vt. 89; Mt. Holly v. Panton, Brayt. (Vt.) 182.

57. Persons included in warning see supra § 105.

58. Chelsea v. Malden, 4 Mass. 131.

[a] **In Ohio** it has been held that a person gains a legal settlement in a township, although warned on first settlement to depart, if the warning is not repeated every year. Wayne Tp. v. Stock Tp., 3 Oh. 171.

59. Chelsea v. Malden, 4 Mass. 131.

60. Chelsea v. Malden, supra.

61. Ira v. Clarendon, Brayt. (Vt.) 180.

[a] **Thus,** where a pauper, upon warning, removed to, and gained a settlement in, another town, and then returned and resided a year without warning, the original warning operated to prevent the second residence becoming a settlement. Ira v. Clarendon, Brayt. (Vt.) 180.

62. Fayston v. Richmond, 25 Vt. 446; Pawlet v. Sandgate, 17 Vt. 619.

63. Franklin v. Dedham, 18 Pick. (Mass.) 544; Sutton v. Uxbridge, 2 Pick. (Mass.) 436.

64. Milford v. Wilton, 8 N. H. 420 (where there is anything in the memorandum of the clerk, or any such departure from the established practice of the clerk, as to render the time of the return of a warning doubtful, or other evidence to rebut the prima facie evidence of the return having been seasonably made, it is evidence to be weighed by a jury).

65. Milford v. Wilton, supra.

[a] **For example,** a warning duly issued and served, in a regular file purporting to contain papers returned within the period required by the statute, is prima facie evidence of a seasonable return. Milford v. Wilton, 8 N. H. 420.

66. Winhall v. Landgrove, 45 Vt. 376.

67. Ill.—Payne v. Dunham, 29 Ill. 125.

Me.—Lewiston v. North Yarmouth, 5 Me. 66.

Mass.—Adams v. Ipswich, 116 Mass. 570; Dedham v. Natick, 16 Mass. 135.

Minn.—Willmar v. Spicer, 129 Minn. 395, 152 NW 767.

N. H.—Chester v. Plaistow, 43 N. H. 542; Landaff v. Atkinson, 8 N. H. 532.

Vt.—Londonderry v. Andover, 28 Vt. 416; Manchester v. Springfield, 15 Vt. 385; Wells v. Westhaven, 5 Vt. 322.

68. See cases supra note 67; and infra §§ 111–123.

69. See infra §§ 111–113.

70. See infra §§ 114–122.

71. See infra § 123.

72. Power of:
Divorced woman to acquire settlement see supra § 53.
Married woman to acquire settlement see supra § 52.

73. Conn.—Harrison v. Gilbert, 71

thereby losing her maiden settlement;[74] and this rule has often been recognized by express statutory enactment.[75] The fact that the husband's settlement was by way of derivation from his parents does not prevent such settlement from becoming that of his wife.[76] So the settlement of the wife follows that of her husband acquired in his own right after the marriage,[77] and this is true, even where the wife is confined in a hospital for the insane,[78] although there is authority to the contrary.[79] And even if the settlement of the husband is acquired after he has deserted his wife, or she has deserted him, it will immediately, by derivation, become the settlement of the wife,[80] although under the provisions of some statutes a contrary rule obtains.[81]

Marriage solemnized without state. The wife takes the settlement of her husband irrespective of the place where the marriage was solemnized, whether within or without the state.[82]

Marriage of paupers. Unless the statute provides otherwise,[83] the fact that a married woman who is claimed to have acquired by marriage the settlement of her husband was a pauper at the time of the marriage does not prevent her from acquiring thereby her husband's settlement,[84] if she entered into the marriage contract without force, bribery, fraud, or undue influence on the part of the town to which she originally belonged.[85] On the other hand it has been held that, although the officers of the place in which the woman had her maiden settlement procured the marriage in order to change her settlement thereby, she will nevertheless acquire her husband's settlement,[86] unless the statute expressly provides that settlements shall not be changed by marriages so procured.[87]

[§ 112] **(2) Derivative Settlement of Husband.** A man having no settlement within the state, who marries a settled woman, does not acquire her settlement by derivation,[88] unless the statute so provides.[89]

[§ 113] **b. Effect of Void Marriage.** Where the marriage is void, the wife does not acquire any derivative settlement thereby.[90] But, although the marriage at the time of its solemnization was in-

Conn. 724, 43 A 190; Windham v. Lebanon, 51 Conn. 319; New Haven v. Huntington, 22 Conn. 25; Oxford v. Bethany, 15 Conn. 246; Danbury v. New Haven, 5 Conn. 584; Hebron v. Colchester, 5 Day 169; East Hartford v. Middletown, 1 Root 196.

Me.—Presque Isle v. Caribou, 122 Me. 269, 119 A 584; Winslow v. Troy, 97 Me. 130, 53 A 1008; Hudson v. Charleston, 97 Me. 17, 53 A 832; Portland v. Auburn, 96 Me. 501, 52 A 1011; Bangor v. Wiscasset, 71 Me. 535; Glenburn v. Naples, 69 Me. 68; Fryeburg v. Brownfield, 68 Me. 145; Burlington v. Swanville, 64 Me. 78; Bowdoinham v. Phippsburg, 63 Me. 497; Howland v. Burlington, 53 Me. 54; Harrison v. Lincoln, 48 Me. 205; Eddington v. Brewer, 41 Me. 462; Greene v. Windham, 13 Me. 225; Lewiston v. North Yarmouth, 5 Me. 66.

Mass.—Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37; Brookfield v. Holden, 247 Mass. 577, 142 NE 784; Bradford v. Worcester, 184 Mass. 557, 69 NE 310; Shutesbury v. Hadley, 133 Mass. 242; North Bridgewater v. East Bridgewater, 13 Pick. 303; Salem v. Hamilton, 4 Mass. 676; Dighton v. Freetown, 4 Mass. 539.

N. H.—Ossipee v. Carol County, 65 N. H. 12, 17 A 1058; Barnstead v. Alton, 32 N. H. 245; Merrimack v. Hillsborough County, 19 N. H. 550; Ex p. Madbury, 17 N. H. 569; Concord v. Goffstown, 2 N. H. 263.

N. J.—Bateman v. Mathes, 54 N. J. L. 536, 24 A 444; Alexandria Tp. Overseers v. Kingwood Tp. Overseers, 8 N. J. L. 370.

N. Y.—Syracuse v. Onondaga County, 25 Misc. 371, 55 NYS 634; Cattaraugus County Superintendent of Poor v. Erie County Superintendent of Poor, 21 NYS 729 [aff 143 N. Y. 631 mem, 37 NE 826 mem]; Otsego Overseers of Poor v. Smithfield Overseers of Poor, 6 Cow. 760; Sherburne Overseers of Poor v. Norwich Overseers of Poor, 16 Johns. 186.

Oh.—Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31; Crane Tp. v. Antrim Tp., 12 Oh. St. 430.

Pa.—Wayne Tp. v. Porter Tp., 138 Pa. 181, 20 A 939; Lake Dist. Overseers of Poor v. South Canaan Tp. Overseers of Poor, 87 Pa. 19; Cumberland County Directors of Poor, etc. v. Walker Tp. Overseers of Poor, 7 Pa. Super. 303; Luzerne County Cent. Poor Dist. v. Jenkins Tp., etc., Directors of Poor, 4 Pa. Super. 16; Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643; Upper Augusta Tp. v. Rockefeller Tp., 2 Chest. Co. 190; Union Tp. v. Monroe Tp., 8 Kulp 521.

R. I.—Exeter v. Richmond, 6 R. I. 149; East Greenwich v. Warwick, 4 R. I. 138; West Greenwich v. Warwick, 4 R. I. 136.

Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Montpelier v. Worcester, 82 Vt. 142, 72 A 321; Mt. Holly v. Peru, 72 Vt. 68, 47 A 103; Tunbridge v. Norwich, 17 Vt. 493; Manchester v. Springfield, 15 Vt. 385; Bethel v. Tunbridge, 13 Vt. 445; Royalton v. West Fairlee, 11 Vt. 438; Wells v. Westhaven, 5 Vt. 322. But see Jericho v. Morristown, 77 Vt. 367, 60 A 233; Danville v. Hartford, 73 Vt. 300, 50 A 1082 (both decided under statutes which did not provide for derivative settlements).

Wis.—Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224.

Eng.—Reigate Union v. Croydon Union, 14 App. Cas. 465; Lewisham Union v. Wandsworth Union, [1919] 2 K. B. 462; Doncaster Union v. Woolwich Union, [1915]. 1 K. B. 563; West Ham Union v. St. Giles-in-the-Fields, 25 Q. B. D. 272; Great Yarmouth Parish v. London, 3 Q. B. D. 232; Rex v. St. Mary, 1 B. & Ad. 201, 20 ECL 454, 109 Reprint 762; Rex v. Brington, 7 B. & C. 546, 14 ECL 246, 108 Reprint 826; Hambledon Union v. Cuckfield Union, 84 L. J. K. B. 1265; 1 Blackstone Comm. p 363.

74. See infra § 127.

75. See statutory provisions; and cases supra note 73.

76. Danbury v. New Haven, 5 Conn. 584; Bowdoinham v. Phippsburg, 63 Me. 497; Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37.

77. Danbury v. New Haven, 5 Conn. 584; Bangor v. Wiscasset, 71 Me. 535; Glenburn v. Naples, 69 Me. 68; Bowdoinham v. Phippsburg, 63 Me. 497; Cattaraugus County Superintendent of Poor v. Erie County Superintendent of Poor, 21 NYS 729 [aff 143 N. Y. 631 mem, 37 NE 826 mem].

78. Bangor v. Wiscasset, 71 Me. 535; Glenburn v. Naples, 69 Me. 68; Cattaraugus County Superintendent of Poor v. Erie County Superintendent of Poor, 21 NYS 729 [aff 143 N. Y. 631 mem, 37 NE 826 mem]; Canaan Tp. v. Covington Tp., 54 Pa. Super. 25; Homer Poor Dist. v. Austin Poor Dist., 19 Pa. Co. 546.

79. Polk County v. Clarke County, 171 Iowa 558, 151 NW 489.

[a] **Thus,** while Code § 2224 provides that the legal settlement of a wife who has not been abandoned is that of her husband, an insane wife committed to the asylum from one county and thereafter returned to that county for care does not, by reason of her husband's acquisition of a settlement in another county, acquire a settlement in the second county, so as to render it liable for her care; for, while in ordinary cases the settlement of a wife should follow that of the husband, the reason for the rule is absent where the wife is insane and the husband can acquire a settlement as a single man. Polk County v. Clarke County, 171 Iowa 558, 151 NW 489.

80. Greene v. Windham, 13 Me. 225; Luzerne County Cent. Poor Dist. v. Jenkins Tp., etc., Directors of Poor, 4 Pa. Super. 16; Mt. Holly v. Peru, 72 Vt. 68, 47 A 103; Tunbridge v. Norwich, 17 Vt. 493; Monroe County v. Jackson County, 72 Wis. 449, 40 NW 224.

81. Washington County v. Polk County, 137 Iowa 333, 113 NW 833.

[a] **Statute construed.**—Under Code § 2224, providing that the legal settlement of a married woman follows the settlement of her husband, and that a married woman abandoned by her husband may acquire settlement as if she were unmarried, a wife's legal settlement is that of her husband only when the family relation in fact exists, and her dependency on him is acquiesced in by him, and, where the relation does not exist by reason of his abandonment of the wife, her settlement does not follow his settlement. Washington County v. Polk County, 137 Iowa 333, 113 NW 833.

82. Dalton v. Bernardston, 9 Mass. 201.

83. Harrison v. Gilbert, 71 Conn. 724, 43 A 190.

84. Willmar v. Spicer, 129 Minn. 395, 152 NW 767.

85. Farmington v. Somersworth, 44 N. H. 589; Concord v. Goffstown, 2 N. H. 263.

86. Rex v. Birmingham, 8 B. & C. 29, 15 ECL 24, 108 Reprint 954.

87. See statutory provisions; and cases infra § 130.

88. Grafton v. Grafton County, 43 N. H. 382.

89. South Hampton v. Hampton Falls, 11 N. H. 134; East Greenwich v. Warwick, 4 R. I. 138 (the husband, if he have no settlement in the state, or in any of the United States, follows the settlement of his wife).

90. Conn.—Johnson v. Huntington, 1 Day 212.

Me.—Winslow v. Troy, 97 Me. 130, 53 A 1008; Howland v. Burlington, 53 Me. 54; Harrison v. Lincoln, 48 Me. 205; Augusta v. Kingfield, 36 Me. 235; Pittston v. Wiscasset, 4 Me. 293; Brunswick v. Litchfield, 2 Me. 28.

Mass.—Hyde Park v. Canton, 130 Mass. 505; West Cambridge v. Lexington, 1 Pick. 506, 11 AmD 231; Medway v. Needham, 16 Mass. 157, 8 AmD 131; Middleborough v. Rochester, 12 Mass. 363; Dalton v. Bernardston, 9 Mass. 201; Milford v.

valid by reason of the incapacity of the person performing it, the subsequent legalization of the marriage by the legislature will render it valid ab initio so far as regards derivative settlements depending thereon.[91]

Presumptions as to validity. In cases involving derivative settlements of married women, where there is proof of the performance of a marriage ceremony followed by cohabitation, a valid marriage is presumed without proof that the parties were capable of contracting a legal marriage and that all the requisite formalities with regard thereto were complied with;[92] but where it is shown that at the time of the ceremony in question the woman had been married, although her husband had deserted her, it will not be presumed, in order to sustain the second marriage, that the first husband is dead, when he is shown to have been alive within seven years prior to such ceremony.[93] Where a woman had a husband living at the time she married another man, there is no presumption of a second marriage ceremony with the latter, after the former husband had secured a divorce.[94]

[§ 114] **3. Parent and Child—a. General Rules.** The general rule is that legitimate children have the settlement of their father, if he have any such within the state, until they gain one of their own.[95] This doctrine of derivative settlement applies, unless changed by statute, although the settlement of the father was acquired by derivation and not in his own right,[96] or by birth,[97] or although it was acquired in his own right after the birth of his

Worcester, 7 Mass. 48.

N. H.—Farmington v. Somersworth, 44 N. H. 589.

Pa.—Wayne Tp. v. Porter Tp., 138 Pa. 181, 20 A 939; West Buffalo Tp. v. Benner Tp., 16 Pa. Dist. 761, 33 Pa. Co. 519.

Vt.—Reading v. Ludlow, 43 Vt. 628; Manchester v. Springfield, 15 Vt. 385; Mountholly v. Andover, 11 Vt. 226, 34 AmD 685.

Eng.—Kirkcaldy, etc., Parish v. Traquair Parish, [1915] S. C. 1124; Rex v. Northfield, 1 Dougl. 659, 99 Reprint 418; Chinham v. Preston, W. Bl. 192, 96 Reprint 104.

[a] **Bigamous marriage.**—A woman who had contracted a bigamous marriage in the bona fide belief that the first wife was dead did not acquire the settlement of the putative husband. Kirkcaldy, etc., Parish v. Traquair Parish, [1915] S. C. 1124.

[b] **Nonconsent of parties.**—A marriage celebrated by a justice of the peace, without the consent of the parties, is of no validity to change the settlement of the female. Mountholly v. Andover, 11 Vt. 226, 34 AmD 685.

[c] **Marriage of insane persons.**—(1) The marriage of a man to a lunatic does not confer the settlement of the husband on the wife, where the marriage is decreed a nullity on the ground of lunacy. Reading v. Ludlow, 43 Vt. 628. (2) But where the statutes render the marriage of persons non compos mentis valid as against collateral attack, the validity of a marriage cannot be questioned on account of the mental capacity of the parties to enter into the marriage contract, in proceedings between towns involving the settlement of a pauper, unless such marriage has been adjudged in a direct proceeding to be void. Goshen v. Richmond, 4 Allen (Mass.) 458.

Loss of derivative settlement by annulment of marriage for grounds rendering it void ab initio see infra § 128.

91. Lewiston v. North Yarmouth, 5 Me. 66.

[a] **Effect of statute.**—A wife's derivative settlement thus gained does not, however, extend so as to oblige the town thus newly charged with her support to pay for supplies furnished prior to the passage of the validating act. Brunswick v. Litchfield, 2 Me. 28.

92. Bowdoinham v. Phippsburg, 63 Me. 497; Harrison v. Lincoln, 48 Me. 205; St. Devereux v. Much Dew Church, W. Bl. 367, 96 Reprint 205.

Presumption as to validity of marriages generally see Marriage § 100.

93. Harrison v. Lincoln, 48 Me. 205; Hyde Park v. Canton, 130 Mass. 505.

94. Howland v. Burlington, 53 Me. 54.

Presumption as to continuance of illegal relation generally see Marriage § 103.

95. Conn.—Vernon v. Ellington, 53 Conn. 330; Bridgeport v. Trumbull, 37 Conn. 484; New Haven v. Huntington, 22 Conn. 25; Oxford v. Bethany, 19 Conn. 229; Sterling v. Plainfield, 4 Conn. 114; Hebron v. Colchester, 5 Day 169.

Me.—Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10; Searsmont v. Thorndike, 77 Me. 504, 1 A 448; Lowell v. Newport, 66 Me. 78; Bucksport v. Rockland, 56 Me. 22; Clinton v. Benton, 49 Me. 550; Milo v. Gardiner, 41 Me. 549; Oldtown v. Falmouth, 40 Me. 106; Augusta v. Kingfield, 36 Me. 235; Brewer v. East Machias, 27 Me. 489; Hampden v. Brewer, 24 Me. 281; Lewiston v. North Yarmouth, 5 Me. 66.

Mass.—Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37; Middleborough v. Plympton, 140 Mass. 325, 4 NE 568; Worcester v. Springfield, 127 Mass. 540; Adams v. Ipswich, 116 Mass. 570; Bellingham v. Hopkinton, 114 Mass. 553; Goshen v. Richmond, 4 Allen 458; Amherst v. Shelburne, 13 Gray 341; Salem v. Ipswich, 10 Cush. 517; Scituate v. Hanover, 7 Pick. 140; West Cambridge v. Lexington, 1 Pick. 506, 11 AmD 231; Attleborough v. Harwich, 17 Mass. 398.

N. H.—Merrimack v. Hillsborough County, 19 N. H. 550; Landaff v. Atkinson, 8 N. H. 532; Salisbury v. Orange, 5 N. H. 348; Orford v. Rumney, 3 N. H. 331.

N. J.—Madison Tp. Overseer of Poor v. Monroe Tp. Overseer of Poor, 42 N. J. L. 493; Alexandria Tp. Overseers v. Kingwood Tp. Overseers, 8 N. J. L. 370.

N. Y.—Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407; Matter of Chamberlain, 73 Misc. 256, 132 NYS 681; Bern Overseers of Poor v. Knox Overseers of Poor, 6 Cow. 433; Niskayuna Overseers of Poor v. Albany Overseers of Poor, 2 Cow. 537; Adams v. Foster, 20 Johns. 452; Vernon Overseers of Poor v. Smithville Overseers of Poor, 17 Johns. 89.

Oh.—Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31; Jefferson Tp. v. Letart Tp., 3 Oh. 99.

Pa.—Wayne Tp. v. Porter Tp., 138 Pa. 181, 20 A 939; Montoursville Tp. Overseers of Poor v. Fairfield Tp. Overseers of Poor, 112 Pa. 99, 3 A 862; Wayne Tp. v. Jersey Shore, 81 Pa. 264; Toby Tp. Overseers of Poor v. Madison Tp. Overseers of Poor, 44 Pa. 60; Lewis v. Turbut, 15 Pa. 145; Washington Tp. Overseers v. Beaver Tp. Overseers, 3 Watts & S. 548; Bucks County Directors of Poor v. Philadelphia Guardians of Poor, 1 Serg. & R. 387; Parker City Overseers of Poor v. Du Bois Borough Overseers of Poor, 6 Pa. Cas. 591, 9 A 457; Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 25 Pa. Super. 601; Northmoreland v. Monroe, 1 Pa. C. Pl. 149; Union Tp. v. Monroe Tp., 8 Kulp 521; Fermanagh Tp. v. Walker Tp., 4 PaLJR 32, 6 PaLJ 285.

R. I.—Paine v. Smithfield, 10 R. I. 446; Exeter v. Warwick, 1 R. I. 63.

Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Waterford v. Fayston, 29 Vt. 530; Sharon v. Cabot, 29 Vt. 394; Londonderry v. Andover, 28 Vt. 416; Rupert v. Sandgate, 10 Vt. 278; Bradford Tp. Overseers of Poor v. Lunenburgh Tp. Overseers of Poor, 5 Vt. 481; Wells v. Westhaven, 5 Vt. 322; Benson v. West Haven, Brayt. 187.

Eng.—Reigate Union v. Croydon Union, 14 App. Cas. 465; Doncaster Union v. Woolwich Union, [1915] 1 K. B. 563; Paddington Union v. Westminster Union, [1915] 2 K. B. 644 [disappr Mitford, etc., Union v. Wayland Union, 25 Q. B. D. 164]; Bath Union v. Berwick-upon-Tweed Union, [1892] 1 Q. B. 731; St. Pancras Parish v. Norwich Incorporation, 18 Q. B. D. 521; Reg. v. St. Mary, 15 Q. B. D. 95, 339 [overr Dorchester Union v. Poplar Union, 21 Q. B. D. 88]; Holborn Union v. Chertsey Union, 15 Q. B. D. 76; Liverpool v. Portsea, 12 Q. B. D. 303; Reg. v. Hendon, 2 Q. B. 455, 42 ECL 758, 114 Reprint 180; Westbury-on-Severn Union v. Barrow-in-Furness Overseers of Poor, 3 Exch. D. 88; Rex v. Bleasby, 3 B. & Ald. 377, 5 ECL 221, 106 Reprint 701; Rex v. Stretton, 4 Dougl. 208, 26 ECL 430, 99 Reprint 844; Rex v. Haddenham, 15 East 463, 104 Reprint 918; Reg. v. Selborne, 2 E. & E. 275, 105 ECL 275, 121 Reprint 104; Rex v. Woburn, 8 T. R. 479, 101 Reprint 1500; Hambledon Union v. Cuckfield Union, 84 L. J. K. B. 1265; Beattie v. Adamson, 5 Macph. 47; St. Giles v. Eversley Blackwater, Str. 580, 93 Reprint 712; Rex v. Stone, 6 T. R. 56, 101 Reprint 433; Rex v. Offchurch, 3 T. R. 114, 100 Reprint 484; Rex v. St. Mary, 6 T. R. 116, 101 Reprint 465.

N. B.—St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

[a] **Abandonment by father.**—On the father's abandonment of his minor children and removal from the state, their settlement continues within the state until they gain a new one for themselves. Thomaston v. Greenbush, 106 Me. 242, 76 A 690.

[b] **Settlement of a person attainted,** acquired before the attainder, is communicated to his children born afterward. Rex v. St. Mary, 6 T. R. 116, 101 Reprint 465.

Effect of fraud in procuring mother's change of settlement see infra § 130.

96. Londonderry v. Andover, 28 Vt. 416; Dorchester Union v. Poplar Union, 21 Q. B. D. 88.

[a] **Change by English statute.**—Bath Union v. Berwick-upon-Tweed Union, [1892] 1 Q. B. 731; Headington Union v. St. Olave's Union, 13 Q. B. D. 293; Woodstock Union v. St. Pancras Parish, 4 Q. B. D. 1; Westbury-on-Severn Union v. Barrow-in-Furness Overseers of Poor, 3 Exch. D. 88.

97. Shrewsbury Tp. Overseers of Poor v. Holmdel Tp. Overseers of Poor, 42 N. J. L. 373; Hereford Union v. Warwick Union, 48 L. J. M. C. 111.

child, provided before such acquisition the child had not been emancipated.[98] A child not emancipated follows the settlement of the father, although not residing in the father's family at the time he changes his place of settlement,[99] and the settlement of minor children born after the desertion of their mother by their father follows during their minority the settlement of the father.[1] It has been held that a settlement acquired by the father out of the state does not pass to the child so as to cause it to lose its settlement within the state.[2]

Posthumous children have a derivative settlement from their father in like manner as children born in his lifetime.[3]

Stepchildren do not take by derivation the settlement of their stepfather, although by antenuptial agreement the stepfather agrees to support such children and they live in his family.[4]

[§ 115] **b. Children Born in Other States or Countries.** A father's right of settlement in a state is transmitted to children born in another state so as to be available to the children on their coming to the state where the father has a settlement.[5] The same rule has been held to apply in respect of children born in a foreign country and brought during infancy to the state where the father had a settlement,[6] although in some jurisdictions it has been held that an alien born takes no right to a settlement by derivation, whether he comes to this country during or subsequent to his minority, and whether his parents return with him or not.[7] If the father, after his removal from the state, acquired a settlement in the state to which he removed, and thereby lost his settlement in the former state, his children do not, on their subsequent removal to the former state, take their father's former settlement therein.[8] So if, by the law of the place of his birth, the child acquires a settlement there by birth, it seems that he does not also acquire a derivative settlement in another state in which his parent is settled.[9]

[§ 116] **c. Adopted Children.** Under statutes providing in effect that an adopted child shall be free from all legal obligations to his natural parents, and shall be the child of the parent or parents by adoption as if born to them in lawful wedlock, etc.,[10] the settlement of such adopted child follows the settlement of his adopting parents,[11] and if the adopted child had a prior derivative settlement from his natural parent, it is lost or merged in the derivative settlement acquired from the adopting parents.[12]

[§ 117] **d. Illegitimate Children.**[13] The place of birth of an illegitimate child ordinarily fixes its legal settlement at common law.[14] But in some jurisdictions it has been held, independently of statute, that, if the mother of an illegitimate child at the time of its birth has a legal settlement elsewhere, the child takes such settlement,[15] and this rule in many jurisdictions is expressly or impliedly prescribed by statute.[16] Under statutes of this nature, as construed in some jurisdictions, the settlement of the mother at the time of the child's birth remains that of the child until he acquires one in his own right; and he does not by derivation take a settlement acquired by the mother after his

Settlement by birth generally see supra §§ 41, 42.

98. Conn.—Vernon v. Ellington, 53 Conn. 330; Torrington v. Norwich, 21 Conn. 543.

Me.—Liberty v. Palermo, 79 Me. 473, 10 A 455; Monroe v. Jackson, 55 Me. 55.

Mass.—Worcester v. Springfield, 127 Mass. 540; Buckland v. Charlemont, 3 Pick. 173.

N. H.—Salisbury v. Orange, 5 N. H. 348; Tamworth v. New Market, 3 N. H. 472; Hancock v. Hampstead, 1 N. H. 264.

N. J.—Brower v. Smith, 46 N. J. L. 72; Shrewsbury Tp. Overseers of Poor v. Holmdel Tp. Overseers of Poor, 42 N. J. L. 373; Brown v. Ramsay, 29 N. J. L. 117; Alexandria Tp. Overseers of Poor v. Bethlehem Tp. Overseers of Poor, 16 N. J. L. 119, 31 AmD 229; Alexandria Tp. Overseers v. Kingwood Tp. Overseers, 8 N. J. L. 370; South Brunswick Overseers of Poor v. East Windsor Overseers of Poor, 8 N. J. L. 64.

N. Y.—Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407; Adams v. Oaks, 20 Johns. 282.

Pa.—Damascus v. Buckingham, 3 Pa. Dist. 744; Fermanagh Tp. v. Walker Tp., 6 PaLJ 284, 4 PaLJR 32.

Eng.—St. Pancras Parish v. Norwich, 18 Q. B. D. 521; Reg. v. Scammonden, 8 Q. B. 349, 55 ECL 349, 115 Reprint 908; Rex v. Wilmington, 5 B. & Ald. 525, 7 ECL 287, 106 Reprint 1283; Rex v. Lytchet Matraverse, 7 B. & C. 226, 14 ECL 107, 108 Reprint 707; Rex v. Rotherfield Greys, 1 B. & C. 345, 8 ECL 148, 107 Reprint 128; Red v. Broadhembury, 4 Dougl. 241, 26 ECL 451, 99 Reprint 861; Rex v. Stretton, 4 Dougl. 208, 26 ECL 430, 99 Reprint 844; Reg. v. Selborne, 2 E. & E. 275, 105 ECL 275, 121 Reprint 104; Rex v. Uckfield, 5 M. & S. 214, 105 Reprint 1029; Rex v. Woburn, 8 T. R. 479, 101 Reprint 1500; Rex v. Witton-cum-Twambrookes, 3 T. R. 355, 100 Reprint 617; Rex v. Offchurch, 3 T. R. 114, 100 Reprint 484.

99. Salisbury v. Orange, 5 N. H. 348; Adams v. Oaks, 20 Johns. (N. Y.) 282; Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 25 Pa. Super. 601; Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 12 Pa. Dist. 666 [aff 25 Pa. Super. 601].

1. Damascus v. Buckingham, 3 Pa. Dist. 744.

2. Alexandria Tp. Overseers v. Kingwood Tp. Overseers, 8 N. J. L. 370.

3. Oxford v. Bethany, 19 Conn. 229; Farmington v. Jay, 18 Me. 376; 3 Burn Just. p 27.

4. Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31.

Effect of second marriage of mother generally see infra § 122.

5. Oldtown v. Bangor, 58 Me. 353; Landaff v. Atkinson, 8 N. H. 532; Westford v. Essex, 31 Vt. 459; Waterford v. Fayston, 29 Vt. 530; Londonderry v. Andover, 28 Vt. 416 (holding, however, that it is necessary for such children to move into the state during their minority).

6. Brower v. Smith, 46 N. J. L. 72.

7. Elmore v. Calais, 33 Vt. 468; Albany v. Derby, 30 Vt. 718; Lyndon v. Danville, 28 Vt. 809 (an alien born does not take the original settlement in the state of a father who before his birth removed to Canada and never returned).

8. Limestone Tp. Overseers of Poor v. Chillisquaque Tp. Overseers of Poor, 87 Pa. 294.

9. Bethlem v. Roxbury, 20 Conn. 298.

10. See statutory provisions; and Adoption of Children § 117 et seq.

11. Waldoborough v. Friendship, 87 Me. 211, 32 A 880; Washburn v. White, 140 Mass. 568, 5 NE 813.

12. Waldoborough v. Friendship, 87 Me. 211, 32 A 880.

13. Power to acquire settlement see supra § 48.

Settlement by birth see supra § 42.

14. See supra § 42.

15. Windham v. Lebanon, 51 Conn. 319; New Haven v. Huntington, 22 Conn. 25; Bethlem v. Roxbury, 20 Conn. 298; Oxford v. Bethany, 19 Conn. 229; New Haven v. Newtown, 12 Conn. 165; Guilford v. Oxford, 9 Conn. 321; Woodstock v. Hooker, 6 Conn. 35; Danbury v. New Haven, 5 Conn. 584; Sterling v. Plainfield, 4 Conn. 114; Windsor v. Hartford, 2 Conn. 355; Hebron v. Marlborough, 2 Conn. 18; Canaan v. Salisbury, 1 Root (Conn.) 155.

16. See statutory provisions; and cases infra this note and note 17 et seq.

[a] **Evidence of child's residence** held unnecessary. Lower Augusta v. Selinsgrove, 64 Pa. 166.

[b] **Settlement of mother determined.**—Howland v. Burlington, 53 Me. 54; Fayette v. Leeds, 10 Me. 409; Pine Tp. v. Franklin Tp., 4 Pa. Dist. 715; Pittsford v. Chittenden, 58 Vt. 49, 52, 3 A 323.

[c] **In Massachusetts** illegitimate children born before the enactment of the statute of 1879 had the settlement of their mother if she then had any. Blackstone v. Seekonk, 8 Cush. 75.

[d] **In New Hampshire** under the act of Jan. 1, 1796, illegitimate children took by derivation the settlement of their mother. Merrimack v. Hillsborough County, 19 N. H. 550.

[e] **In New Jersey** under Act (1846) § 4, providing that a bastard shall be settled in the place of the last legal settlement of the mother, a bastard whose mother before its birth moved out of New Jersey, and, together with her child, has ever since continued to reside in another state, is not chargeable upon any township in New Jersey. Richardson v. Burlington Tp. Overseers of Poor, 33 N. J. L. 190.

[f] **In England** under 4 & 5 Wm. IV c 76 § 71, every illegitimate child has the settlement of its mother only until the age of sixteen, and after that age is removable to the place of its birth. Reg. v. Sutton le Brailes, 5 E. & B. 814, 85 ECL 814, 119 Reprint 684; Bodenham v. Saint Andrews, 1 E. & B. 465, 72 ECL 465, 118 Reprint 510.

birth,[17] especially where the new settlement of the mother is acquired by marriage.[18] But under the construction given to other statutes[19] and under the rule laid down in some jurisdictions, independently of statute,[20] it has been held that the settlement of the children changes with the settlement of the mother acquired in her own right; and this has also been held true, although the subsequent settlement of the mother is a derivative one acquired by marriage.[21]

Legitimation of child. Where illegitimate children are by statute rendered legitimate through the subsequent marriage of their parents,[22] a child so legitimated takes the settlement of his father in like manner as other legitimate children.[23] But it is otherwise, in the absence of a statute providing that the marriage of the parents shall render antenuptial children legitimate.[24]

[§ 118] **e. Children Non Compos Mentis.** The general rule is that a child non compos mentis who, after attaining majority, continues to live with, and is under the control of, and dependent on, the father follows the settlement of the father thereafter acquired;[25] and in some cases it has been held that the incompetent child will follow the settlement acquired by the father after the child has reached majority, even though he is not living with the father.[26] On the other hand it has been held that, where such person is not residing with, or supported by, his father, he does not follow a new settlement acquired by the father after he, the child, has attained his majority.[27] And one who becomes non compos mentis after becoming of age does not follow the settlement of his father subsequently acquired.[28]

Settlement of mother.[29] A child non compos mentis who lives with, and is supported by, the mother after the father's death takes the settlement of the mother.[30]

[§ 119] **f. Adult and Emancipated Children.**[31] A child who has been emancipated does not take by derivation a settlement thereafter acquired by the father, but retains the settlement that the latter had at the time of emancipation, until he gains another in his own right;[32] and the fact that the child was unsettled at the time of his emancipation

17. Me.—Raymond v. North Berwick, 60 Me. 114; Hallowell v. Augusta, 52 Me. 216; Houlton v. Lubec, 35 Me. 411; Fayette v. Leeds, 10 Me. 409; Biddeford v. Saco, 7 Me. 270; Sidney v. Winthrop, 5 Me. 123.

Mass.—Boylston v. Princeton, 13 Mass. 381.

N. H.—South Hampton v. Hampton Falls, 11 N. H. 134; Dorchester v. Deerfield, 3 N. H. 316.

N. J.—Martin v. Hardyston Overseer of Poor, 53 N. J. L. 529, 22 A 58; McCoy v. Newton Overseer of Poor, 37 N. J. L. 133; Nottingham Tp. v. Amwell Tp., 21 N. J. L. 27.

Pa.—Nippenose Tp. Overseers of Poor v. Jersey Shore Borough Overseers of Poor, 48 Pa. 402; Limestone Tp. v. Licking Tp., 1 Pennyp. 475; Schuylkill County v. Jackson Tp., 29 Pa. Super 567; Buffalo Tp. v. Lewisburg Borough, 1 Pa. Co. 121; Crossley v. Demott, 2 LegOp 161.

Vt.—Cabot v. Washington, 41 Vt. 168; Manchester v. Springfield, 15 Vt. 385.

18. Morristown v. Fairfield, 46 Vt. 33; Newport v. Derby, 22 Vt. 553; Burlington v. Essex, 19 Vt. 91.

19. North Bridgewater v. East Bridgewater, 13 Pick. (Mass.) 303; Petersham v. Dana, 12 Mass. 429; Somerset v. Dighton, 12 Mass. 383; Canajoharie v. Johnstown, 17 Johns. (N. Y.) 41.

[a] **In England** the settlement of an illegitimate child changes with that of its mother until it reaches the age of sixteen years. Reg. v. Sutton le Brailes, 5 E. & B. 814, 85 ECL 814, 119 Reprint 684; Poplar Borough Guardians v. West Ham Union Guardians, 78 J. P. 281.

20. See cases infra this note.

[a] **In Connecticut** (1) the rule is well settled that where an illegitimate child was born in one town of a mother having a settlement there at the time, but who afterward, during the minority of the child, acquired a settlement by marriage in another town, the child took the new settlement of its mother thus acquired. Oxford v. Bethany, 19 Conn. 229; Newtown v. Fairfield, 18 Conn. 350; New Haven v. Newtown, 12 Conn. 165; Danbury v. New Haven, 5 Conn. 584. (2) A bastard child took the new settlement of its mother, acquired by marriage, although the marriage was procured by the fraud of the mother, she being pregnant at the time, and concealing that fact from her husband, who supposed her to be a chaste woman. Guilford v. Oxford, 9 Conn. 321.

21. North Bridgewater v. East Bridgewater, 13 Pick. (Mass.) 303; Newton v. Braintree, 14 Mass. 382; Canajoharie v. Johnstown, 17 Johns. (N. Y.) 41; West Ham Union v. Holbeach Union, [1903] 2 K. B. 627; Reg. v. St. Mary, 4 Q. B. 581, 45 ECL 581, 114 Reprint 1017; Poplar Borough Guardians v. West Ham Union Guardians, 78 J. P. 281.

22. See Bastards §§ 18–26.

23. Simsbury v. East Granby, 69 Conn. 302, 37 A 678; Wellington v. Corinna, 104 Me. 252, 71 A 889; Houlton v. Ludlow, 73 Me. 583; Livermore v. Peru, 55 Me. 469; Monson v. Palmer, 8 Allen (Mass.) 551; Rockingham v. Mt. Holly, 26 Vt. 653.

24. Reg. v. Wendron, 7 A. & E. 819, 34 ECL 427, 112 Reprint 678.

25. Me.—Winterport v. Newburgh, 78 Me. 136, 3 A 48; Islesborough v. Lincolnville, 76 Me. 572; Strong v. Farmington, 74 Me. 46; Monroe v. Jackson, 55 Me. 55; Gardiner v. Farmingdale, 45 Me. 537; Wiscasset v. Waldoborough, 3 Me. 388.

Mass.—Taunton v. Middleborough, 12 Metc. 35; Buckland v. Charlemont, 3 Pick. 173; Upton v. Northbridge, 15 Mass. 237.

N. H.—Orford v. Rumney, 3 N. H. 331.

N. J.—Alexandria Tp. Overseers v. Bethlehem Tp. Overseers, 16 N. J. L. 119, 31 AmD 229.

Pa.—Loyalsock Tp. Overseers v. Eldred Tp. Overseers, 154 Pa. 358, 26 A 313; Montoursville Tp. Overseers of Poor v. Fairfield Tp. Overseers of Poor, 112 Pa. 99, 3 A 862; Shippen v. Gaines, 17 Pa. 38; Monroe Tp. Poor Dist. v. Union Tp. Poor Dist., 25 Pa. Dist. 217, 43 Pa. Co. 513; Monroe Tp. v. Union Tp., 22 Pa. Dist. 534; Monroe Tp. Poor Dist. v. Union Tp. Poor Dist., 40 Pa. Co. 599.

R. I.—Glocester v. Smithfield, 2 R. I. 30.

Vt.—Topsham v. Chelsea, 60 Vt. 219, 13 A 861.

26. Rex v. Much Cowarne, 2 B. & Ad. 861, 22 ECL 362, 109 Reprint 1363.

[a] **Inmate of asylum.**—A person non compos mentis who lived continuously in his father's family until the age of forty-four years was then sent to the insane hospital. It was held that he followed the settlement of his father acquired while the pauper was an inmate of the hospital. Strong v. Farmington, 74 Me. 46.

27. Harrison v. Portland, 86 Me. 307, 29 A 1084; Corinth v. Bradley, 51 Me. 540; Gardiner v. Farmingdale, 45 Me. 537; Washington Tp. Overseers of Poor v. East Franklin Tp. Overseers of Poor, 3 Pennyp. (Pa.) 107; Gregg Tp. Overseers of Poor v. New Berlin Overseers of Poor, 6 Pa. Cas. 545, 9 A 461; Damascus v. Buckingham, 3 Pa. Dist. 744; Penn's Tp. v. Selin's Grove, 1 Pa. Co. 383.

[a] **An insane child may become so far emancipated** by being removed from his father's house with his consent, or by receiving support as a pauper, as to lose the ability or legal capacity to acquire a derivative settlement from the father. Penn's Tp. v. Selinsgrove, 9 Pa. Cas. 465, 4 A 374; Curwensville Poor Dist. v. Knox Tp. Poor Dist., 6 Pa. Cas. 536, 9 A 463.

28. Buckland v. Charlemont, 3 Pick. (Mass.) 173.

29. **Generally** see infra § 121.

30. East Hartford v. Middletown, 1 Root (Conn.) 196.

31. **Emancipation of children generally** see Parent and Child §§ 190–201.

Insane adult children see supra § 118.

32. Conn.—Torrington v. Norwich, 21 Conn. 543.

Me.—Liberty v. Levant, 122 Me. 300, 119 A 811; Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10; Carthage v. Canton, 97 Me. 473, 54 A 1104; West Gardiner v. Manchester, 72 Me. 509; Orneville v. Glenburn, 70 Me. 353; Lowell v. Newport, 66 Me. 78; Bucksport v. Rockland, 56 Me. 22; Augusta v. Kingfield, 36 Me. 235; Calais v. Marshfield, 30 Me. 511; Dennysville v. Trescott, 30 Me. 470; Lubec v. Eastport, 3 Me. 220.

Mass.—Shirley v. Lancaster, 6 Allen 31; Taunton v. Middleborough, 12 Metc. 35; Upton v. Northbridge, 15 Mass. 237; Charlestown v. Boston, 13 Mass. 469; Springfield v. Wilbraham, 4 Mass. 493.

N. H.—Fremont v. Sandown, 56 N. H. 300; Andover v. Merrimack County, 37 N. H. 437; Orford v. Rumney, 3 N. H. 331.

N. Y.—Niskayuna Overseers of Poor v. Albany Overseers of Poor, 2 Cow. 537.

Pa.—Toby Tp. v. Madison, 44 Pa. 60; Washington Tp. v. Beaver Tp., 3 Watts & S. 548; Donegal Overseers of Poor v. Sugar Creek Tp. Overseers of Poor, 8 Pa. Cas. 9, 11 A 213; Curwensville Borough Poor-Dist. v. Knox Tp. Poor-Dist., 6 Pa. Cas. 536, 9 A 463; Damascus v. Buckingham, 3 Pa. Dist. 744.

Vt.—Tunbridge v. Eden, 39 Vt. 17; Bradford Tp. Overseers of Poor v. Lunenburgh Tp. Overseers of Poor, 5 Vt. 481.

Eng.—Rex v. Lawford, 8 B. & C. 271, 15 ECL 139, 108 Reprint 1045;

does not prevent the operation of the rule.[33] As a general rule a child is emancipated on attaining his majority,[34] and does not follow the settlement of his father thereafter acquired;[35] and it has been held that the mere fact that the child is living with his father does not change the rule,[36] especially where the child is married.[37] In other cases, however, a child who, after reaching majority, continues single and remains in his father's family under the father's control has been treated as unemancipated, so as to follow a settlement thereafter acquired by the father;[38] and this is especially the rule if the child is non compos mentis.[39]

[§ 120] **g. Settlement of Mother—(1) In General.** Where legitimate minor children have a settlement derived from their father, his settlement must ordinarily be theirs in his lifetime, and they cannot acquire that of their mother.[40] But if the father has no settlement, and the mother has one, the children of the marriage take the settlement of the mother,[41] although the mother's settlement was derived from her parents,[42] and although the children were born in a different town from that in which the mother had her settlement.[43]

Divorce of parents.[44] Where the parents of minor children are divorced, and the mother is given the exclusive custody and control of the children, they take the legal settlement of the mother,[45] and if she thereafter removes to and acquires a new settlement in another county, taking the children with her, they take the new settlement so acquired.[46] On the other hand it has been held that the divorce of the parents and the appointment of the mother as guardian of their minor child does not affect the settlement of the child derived from its father.[47]

[§ 121] **(2) Acquired in Own Right after Death of Father.**[48] It is a rule of general application that the settlement of a widow, acquired in her own right after the death of her husband, is, by the common law, communicated to her minor children,[49]

Rex v. Walpole, Burr. S. Cas. 638; Eastwoodhey v. Westwoodhey, Str. 438, 93 Reprint 620; Rex v. Roach, 6 T. R. 247, 101 Reprint 536.

[a] **This is especially true** where the child has gained a settlement in his own right, although he afterward returns and lives with his father. Rex v. Bleasby, 3 B. & Ald. 377, 5 ECL 221, 106 Reprint 701.

[b] **Sufficiency of emancipation.**— Emancipation, such as will effect a settlement under the pauper law, must be an absolute and entire surrender on the part of the parent of all right to the care and custody of the child, as well as to its earnings, with a renunciation of all duties arising from such a position. It leaves the child, so far as the parent is concerned, free to act upon its own responsibility, and in accordance with its own will and pleasure, with the same independence as though it were twenty-one years of age. Lowell v. Newport, 66 Me. 78; Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 12 Pa. Dist. 666 [aff 25 Pa. Super. 601].

33. Pennysville v. Trescott, 30 Me. 470; Rex v. Stanwix, 5 T. R. 670, 101 Reprint 373.

34. See cases infra note 35. See also Parent and Child § 195.

35. Me.—Searsmont v. Thorndike, 77 Me. 504, 1 A 448.

N. H.—Fitzwilliam v. Troy, 6 N. H. 166; Wakefield v. Alton, 3 N. H. 378.

N. Y.—Niskayuna Overseers of Poor v. Albany Overseers of Poor, 2 Cow. 537.

Vt.—Hardwick v. Pawlet, 36 Vt. 320; Sharon v. Cabot, 29 Vt. 394; Poultney v. Glover, 23 Vt. 328.

Eng.—Rex v. Oulton, 5 B. & Ad. 958, 27 ECL 403, 110 Reprint 1045; Rex v. Hardwicke, 5 B. & Ald. 176, 7 ECL 104, 106 Reprint 1157; Rex v. Lawford, 8 B. & C. 271, 15 ECL 139, 108 Reprint 1044; Rex v. Everton, 1 East 526, 102 Reprint 202; Eastwoodhey v. Westwoodhey, Str. 438, 93 Reprint 620.

[a] **Rule applied.**—A child of full age, who has not acquired a settlement in his own right, and has not continued a member of his father's family and subject to his control, will not take derivatively the settlement of his father acquired by residence commenced before the child arrived at full age and completed subsequently. Poultney v. Glover, 23 Vt. 328.

36. Hampden v. Brewer, 24 Me. 281; Shirley v. Lancaster, 6 Allen (Mass.) 31; Springfield v. Wilbraham, 4 Mass. 493; Andover v. Merrimack County, 37 N. H. 437; Loyalsock Tp. v. Eldred Tp. Overseers, 154 Pa. 358, 26 A 313. But see Washington Tp. Overseers v. Beaver Tp. Overseers infra note 38.

37. Rex v. Everton, 1 East 526, 102 Reprint 202.

[a] **Adult married son** does not take the settlement subsequently acquired by his father, although he lives with his father. Rex v. Everton, 1 East 526, 102 Reprint 202.

38. Alexandria Tp. Overseers v. Bethlehem Tp. Overseers, 16 N. J. L. 119, 31 AmD 229; Washington Tp. Overseers v. Beaver Tp. Overseers, 3 Watts & S. (Pa.) 548; South Burlington v. Worcester, 67 Vt. 411, 31 A 891; Rex v. Scammonden, 8 Q. B. 349, 55 ECL 349, 115 Reprint 908; Rex v. Wilmington, 5 B. & Ald. 525, 7 ECL 287, 106 Reprint 1283; Rex v. Hardwicke, 5 B. & Ald. 176, 7 ECL 104, 106 Reprint 1157; Rex v. Uckfield, 5 M. & S. 214, 105 Reprint 1029; Rex v. Roach, 6 T. R. 247, 101 Reprint 536 [mod and explaining Rex v. Witton cum Twambrookes, 3 T. R. 355, 100 Reprint 617]; Rex v. Walpole St. Peter's, W. Bl. 669, 96 Reprint 390; Gambier Paroch. Settl. c 8.

[a] **"The rule to be extracted from the cases is this;** if the child be separated from the parents, and without marrying or obtaining any settlement for himself return to them again during the age of pupillage, he is to all intents a part of his father's family, and his settlement will vary with that of his father: but if, when that time arrives when in estimation of law the child wants no further protection from the father, the child removes from the father's family, he is not for the purpose of a derivative settlement to be deemed part of that family: this rule will reconcile all the cases, and will be found to be an intelligible one." Rex v. Roach, 6 T. R. 247, 253, 101 Reprint 536.

39. See supra § 118.

40. Gardiner v. Manchester, 88 Me. 249, 33 A 990; Fairfield v. Canaan, 7 Me. 90; Scituate v. Hanover, 7 Pick. (Mass.) 140.

41. Conn.—Goshen v. Canaan, 35 Conn. 186; Middlebury v. Bethany, 32 Conn. 71; New Haven v. Huntington, 22 Conn. 25; Oxford v. Bethany, 19 Conn. 229; Lebanon v. Hebron, 6 Conn. 45; Newtown v. Stratford, 3 Conn. 600; Hebron v. Colchester, 5 Day 169.

Me.—Albany v. Norway, 107 Me. 174, 77 A 713; Winslow v. Pittsfield, 95 Me. 53, 49 A 46; St. George v. Rockland, 89 Me. 43, 35 A 1033; Hampden v. Troy, 70 Me. 484; Eddington v. Brewer, 41 Me. 462; Augusta v. Kingfield, 36 Me. 235; Dennysville v. Trescott, 30 Me. 470; Farmington v. Jay, 18 Me. 376; Fairfield v. Canaan, 7 Me. 90; Sanford v. Hollis, 2 Me. 194.

Mass.—Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37; Stoughton v. Cambridge, 165 Mass. 251, 43 NE 106; Abington v. Duxbury, 105 Mass. 287; Amherst v. Shelburne, 13 Gray 341; North Bridgewater v. East Bridgewater, 13 Pick. 303; Wilmington v. Burlington, 4 Pick. 174; Freetown v. Taunton, 16 Mass. 52.

N. J.—Little Falls Tp. v. Bernards Tp., 44 N. J. L. 621.

N. Y.—Bern Overseers of Poor v. Knox Overseers of Poor, 6 Cow. 433; Marbletown Overseers of Poor v. Kingston Overseers of Poor, 20 Johns. 1.

Pa.—Parker City Overseers of Poor v. Du Bois Borough Overseers of Poor, 6 Pa. Cas. 591, 9 A 457.

Vt.—Newark v. Sutton, 40 Vt. 261; Rupert v. Winhall, 29 Vt. 245; Bethel v. Tunbridge, 13 Vt. 445.

Eng.—Rex v. St. Mary Leicester, 3 A. & E. 644, 30 ECL 298, 111 Reprint 557; Rex v. Harberton, 13 East 311, 104 Reprint 390. But see Norwich Union v. Henstead Union, [1927] 2 K. B. 511 (holding that under Divided Parishes and Poor Law Amendment Act [1876] § 35, a pauper where father is living, but has no settlement, cannot derive a settlement from his mother. Under such act the mother must be "widowed" in order to confer her settlement on the child).

[a] **Where the wife is a free woman and the husband a slave,** the settlement of their children was in the poor district in which the mother had her last legal settlement, without regard to the husband. New Haven v. Huntington, 22 Conn. 25; Marbletown Overseers of Poor v. Kingston Overseers of Poor, 20 Johns. (N. Y.) 1.

42. Bern Overseers of Poor v. Knox Overseers of Poor, 6 Cow. (N. Y.) 433; Rupert v. Winhall, 29 Vt. 245.

43. Newtown v. Stratford, 3 Conn. 600.

44. **Loss of wife's settlement by divorce** see infra § 128.

Second marriage after divorce see infra § 122.

45. Summit County v. Trumbull County, 116 Oh. St. 663, 158 NE 172.

46. Summit County v. Trumbull County, supra.

47. Marlborough v. Hebron, 2 Conn. 20. See Bangor v. Veazie, 111 Me. 371, 89 A 193 (a decree of divorce, with custody of children obtained by a wife from her husband, who had a pauper settlement in a town at the time he abandoned his children, does not affect the settlement of the children).

48. **Insane children** see supra § 118.

49. Conn.—Torrington v. Norwich, 21 Conn. 543; Oxford v. Bethany, 19 Conn. 229; Bozrah v. Stonington, 4 Conn. 373.

Mass.—Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37; Great Barrington v. Tyringham, 18 Pick. 264; Dedham v. Natick, 16 Mass. 135.

N. Y.—Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407.

Oh.—Bloomfield v. Chagrin, 5 Oh. 315.

Pa.—Burrell Tp. v. Pittsburg Guardians of Poor, 62 Pa. 472, 1 AmR 441.

Vt.—Bethel v. Tunbridge, 13 Vt.

even though such children had a derivative settlement from their father.[50] But under a statute providing that a child shall have and follow the settlement of his father, if he has one, until he, the child, gains another in his own right, and shall follow and have the settlement of the mother in case the father is unsettled, a derivative settlement of a child acquired from his father is not affected by the acquisition of a settlement by the mother in her own right after the father's death.[51] So if the child is emancipated, he does not take any subsequent settlement acquired by his widowed mother in her own right.[52] But the mere fact that a minor child has left the family of his mother after the father's death, and is not subject to the actual control of his parent, does not constitute an emancipation, so as to prevent him from deriving the mother's settlement.[53]

[§ 122] **(3) Acquired Derivatively by Second Marriage.** Where a child has acquired a derivative settlement from his father, such settlement does not, upon a second marriage of the mother, follow the settlement of the mother so gained;[54] and the same rule has been followed where the child had acquired no settlement from his father.[55] So a minor child having the settlement of his mother does not, at common law, lose it and acquire a new settlement gained by the mother by a second marriage,[56] and the fact that the child removed with his mother to the place of new settlement does not alter the rule.[57] Nor, at common law, is the settlement of a woman acquired by marriage communicated to her child by a former marriage, even where such child has no domicile in the state.[58] In a number of cases, however, under statutes providing that children shall have the settlement of their mother if their father was unsettled, it has been held that the children follow the settlement acquired by their mother by a second marriage when the father had no settlement in the state.[59]

Divorce of parents. Where an abandoned wife procures a divorce from her husband, with custody of her child, and afterward remarries, she can gain no new settlement for the child unless time enough has elapsed between the divorce and the second marriage to enable the wife to acquire a settlement in her own right.[60]

[§ 123] **4. Slaves.**[61] Prior to the abolition of slavery in the United States, slaves followed the settlement of their masters.[62]

Children of slaves.[63] Where the parents were slaves, they were incapable of transmitting a derivative settlement to their children, although the children were born free.[64] Nor did such children derive any settlement from the master of their parents;[65] but were deemed to be settled at their place of birth,[66] except where settlements by birth were not recognized.[67]

[§ 124] **F. Loss and Change of Settlement[68]—1.**

445; Bradford Tp. Overseers of Poor v. Lunenburgh Tp. Overseers of Poor, 5 Vt. 481; Wells v. Westhaven, 5 Vt. 322.

Eng.—West Ham Union v. St. Matthew's Churchwardens, etc., [1894] A. C. 230; Hollingbourn Union v. West Ham Union, 6 Q. B. D. 580; St. George v. St. Catharine, Burr. S. Cas. 72; Rex v. Barton Turfe, Burr. S. Cas. 49; Woodend v. Paulspury, 2 Ld. Raym. 1473, 92 Reprint 458; Paulsbury v. Woodon, Str. 746, 93 Reprint 823.

N. B.—St. John County Hospital v. Peck, 51 N. B. 324, [1924] 2 DomLR 163.

50. Bozrah v. Stonington, 4 Conn. 375; Scituate v. Hanover, 7 Pick. (Mass.) 140; Dedham v. Natick, 16 Mass. 135; Burrell Tp. v. Pittsburg Guardians of Poor, 62 Pa. 472, 1 AmR 441; Paulsbury v. Woodon, Str. 746, 93 Reprint 823.

51. Fairfield v. Canaan, 7 Me. 90; Sharon v. Cabot, 29 Vt. 394.

52. Dennysville v. Trescott, 30 Me. 470; Charlestown v. Boston, 13 Mass. 469; Andover v. Merrimack County, 37 N. H. 437; Bradford Tp. Overseers of Poor v. Lunenburgh Tp. Overseers of Poor, 5 Vt. 481.

53. Bozrah v. Stonington, 4 Conn. 373.

54. Conn.—Oxford v. Bethany, 19 Conn. 229.

Me.—Presque Isle v. Caribou, 122 Me. 269, 119 A 584; Thomaston v. Greenbush, 106 Me. 242, 76 A 690; Farmington v. Jay, 18 Me. 376; Fairfield v. Canaan, 7 Me. 90.

Mass.—Walpole v. Marblehead, 8 Cush. 528.

Pa.—Northumberland Borough Overseers of Poor v. Milton Borough Overseers of Poor, 6 Pa. Cas. 503, 9 A 449.

Vt.—Wells v. Westhaven, 5 Vt. 322.

Eng.—Llanelly Union v. Neath Union, [1893] 2 Q. B. 38; Keynsham Union v. Bedminster Union, 3 Q. B. D. 344; Rex v. Walthamstow, 6 A. & E. 301, 33 ECL 175, 112 Reprint 115; Wangford v. Brandon, 4 Burn Just. 336; Rex v. St. Giles-in-the-Fields, Burr. S. Cas. 2; In re Cumner Parish, 2 Salk. 528, 91 Reprint 449.

[a] **"The reasons** why children shall not gain a settlement where the widow gains a settlement only by remarriage, is, because it is not her family, but her husband's; and she cannot give their children any sustenance without the husband's leave." New Haven v. Newton, 12 Conn. 165, 170.

55. Clinton Tp. v. Delaware Tp., 1 Pa. Co. 375; Northumberland Overseers of Poor v. Milton Overseers of Poor, 6 Pa. Cas. 503, 9 A 449 [aff 1 Pa. Co. 377].

56. Parsonsfield v. Kennebunkport, 4 Me. 47; Freetown v. Taunton, 16 Mass. 52; Bloomfield v. Chagrin, 5 Oh. 315; Clinton Tp. v. Delaware Tp., 1 Pa. Co. 375.

57. Parsonsfield v. Kennebunkport, 4 Me. 47; Freetown v. Taunton, 16 Mass. 52.

58. Milton v. Northumberland, 1 Pa. Co. 377 [aff 6 Pa. Cas. 503, 9 A 449]; Clinton Tp. v. Delaware Tp., 1 Pa. Co. 375.

59. Albany v. Norway, 107 Me. 174, 77 A 713; St. George v. Rockland, 89 Me. 43, 35 A 1033; Hampden v. Troy, 70 Me. 484; Parsonsfield v. Kennebunkport, 4 Me. 47; Great Barrington v. Tyringham, 18 Pick. (Mass.) 264; Plymouth v. Freetown, 1 Pick. (Mass.) 197; Hopkinton v. Warner, 53 N. H. 468. See also Goshen v. Richmond, 4 Allen (Mass.) 458 (children of a woman who marries a pauper acquire his settlement).

[a] **Third marriage.**—Under Rev. St. c 27 § 1 cl 2, providing that legitimate children have the settlement of their father, if he has any in the state, and, if he has not, the settlement of their mother within it, etc., a minor's pauper settlement derived from a settlement acquired by her mother on remarriage followed that acquired by the mother in another town on a subsequent third marriage, the provision of § 3 that settlements acquired under existing laws remain until new ones are acquired not conflicting with this holding. Albany v. Norway, 107 Me. 174, 77 A 713.

60. Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31.

61. Acquired settlement see supra § 11.

62. Columbia v. Williams, 3 Conn. 467; Bolton v. Haddam, 2 Root (Conn.) 517; Edgartown v. Tisbury, 10 Cush. (Mass.) 408; Milford v. Bellingham, 16 Mass. 108; Stockbridge v. West Stockbridge, 14 Mass. 257; Salem v. Hamilton, 4 Mass. 676; Dighton v. Freetown, 4 Mass. 539; Springfield v. Wilbraham, 4 Mass. 493; Winchendon v. Hatfield, 4 Mass. 123; Shelburne v. Greenfield, 2 Dane Abr. (Mass.) 412; Claverack Overseers of Poor v. Hudson Overseers of Poor, 15 Johns. (N. Y.) 283; Ferguson Tp. v. Buffalo Tp., 6 Serg. & R. (Pa.) 103; Forks Tp. v. Catawissa Tp., 3 Binn. (Pa.) 22.

[a] **If a slave be hired as a servant, and not held in slavery,** he derives no new settlement from his new master. Stockbridge v. West Stockbridge, 12 Mass. 400.

[b] **In New Jersey** it was held, under a statute providing for the settlement of manumitted slaves and slaves of insolvent masters, without provision for the settlement of slaves of solvent masters, that a slave of a solvent master who had removed from the state could not be considered as settled at the last place of settlement of the master, but must be deemed to be unsettled. Morris Tp. Overseers v. Warren Tp. Overseers, 26 N. J. L. 312; South Brunswick Overseers of Poor v. East Windsor Overseers of Poor, 8 N. J. L. 64.

63. Children of slave father and free mother see supra § 120 note 41 [a].

64. Windsor v. Hartford, 2 Conn. 355; Edgartown v. Tisbury, 10 Cush. (Mass.) 408; Lanesborough v. Westfield, 16 Mass. 74; Andover v. Canton, 13 Mass. 547; Morris Tp. Overseers v. Warren Tp. Overseers, 26 N. J. L. 312.

65. Edgartown v. Tisbury, 10 Cush. (Mass.) 408; Lanesborough v. Westfield, 16 Mass. 74; Andover v. Canton, 13 Mass. 547.

66. Windsor v. Hartford, 2 Conn. 355; Cadwallader v. Durham, 46 N. J. L. 53.

Birth settlement generally see supra §§ 41, 42.

67. Edgartown v. Tisbury, 10 Cush. (Mass.) 408; Lanesborough v. Westfield, 16 Mass. 74.

68. Change by annexation, division, and incorporation of towns see supra §§ 96–99.

Loss of birth settlement see supra § 41.

General Rules. As a general rule a person's settlement is not lost except upon his acquisition of a new settlement.[69] But a pauper cannot have two settlements in the state at the same time,[70] and upon the acquisition of a new settlement a prior settlement is lost.[71] The settlement of a child derived from the father cannot be divested by any act of the father,[72] such as emancipating the child.[73] Nor will a woman, acquiring a settlement by marriage, lose it by becoming an inmate of a state sanitarium.[74]

Admissions, either by act or declarations of the town overseers of the poor, will not have the effect of changing the settlement of a pauper from one town to another.[75]

[§ 125] **2. Statutory Annulment or Change.** The legislature has full power to abolish or change the settlements of paupers.[76] The general rule is that, where a settlement is lost by virtue of statutory enactment, a previous settlement, lost by reason of the acquisition of the new settlement, is not thereby revived.[77] Under this rule, where a person removes from the place in which he has a legal settlement to unincorporated territory which is subsequently incorporated, so as to give him a settlement there,[78] the repeal of the act of incorporation does not revive the settlement which such person had in the place from which he removes.[79]

Annulment of derivative settlement. A wife's settlement, lost upon acquiring that of her husband,[80] is not restored by a statute which deprives her of her husband's settlement.[81]

[§ 126] **3. Gaining Settlement in Another State.** In some jurisdictions it has been held that a settlement is lost upon the acquisition of a new settlement in another state.[82] In other jurisdictions, however, it has been held that the acquisition of a settlement in another state does not affect a person's prior settlement, and upon his return to the state is to be deemed settled at the same place at which he was settled before his departure.[83] But a settlement lost by acquiring a new settlement in a district in the same state is not revived when such district becomes a separate state.[84]

Effect of disputed boundary line. A settlement may be gained in a town by residence on a part thereof which is within the actual jurisdiction of the state, although within the rightful jurisdiction of another state which afterward obtains the actual jurisdiction upon establishment of boundary lines.[85]

[§ 127] **4. Marriage.**[86] A woman, upon marrying a man who has a settlement, and thereby acquiring that settlement,[87] loses absolutely her own former settlement.[88] But mere proof of a woman's

69. Conn.—Newtown v. Southbury, 100 Conn. 251, 123 A 278; Chaplin v. Bloomfield, 92 Conn. 395, 103 A 118; Bethlem v. Roxbury, 20 Conn. 298; Norwich v. Windham, 1 Root 232.

Ill.—Payne v. Dunham, 29 Ill. 125.

Iowa.—Fayette County v. Bremer County, 56 Iowa 516, 9 NW 372.

Me.—Carthage v. Canton, 97 Me. 473, 54 A 1104; South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Woodstock v. Canton, 91 Me. 62, 39 A 281; Rangeley v. Bowdoin, 77 Me. 592, 1 A 892; Monson v. Fairfield, 55 Me. 117; Smithfield v. Belgrade, 19 Me. 387; Phillips v. Kingfield, 19 Me. 375, 36 AmD 760.

Mass.—Williamsburg v. Adams, 184 Mass. 263, 68 NE 230; Phillips v. Boston, 183 Mass. 314, 67 NE 250; Palmer v. Hampden, 182 Mass. 511, 65 NE 817; Worcester v. Springfield, 127 Mass. 540; Malden v. Melrose, 125 Mass. 304; Chicopee v. Whately, 6 Allen 508; Middleborough v. Clark, 2 Pick. 28; Princeton v. West Boylston, 15 Mass. 257; Canton v. Bentley, 11 Mass. 441; Townsend v. Billerica, 10 Mass. 411; Dalton v. Bernardston, 9 Mass. 201; Dalton v. Hinsdale, 6 Mass. 501; Chelsea v. Malden, 4 Mass. 131.

Minn.—In re Leslie, 166 Minn. 180, 182, 207 NW 323 [cit Cyc].

N. H.—Peterborough v. Lancaster, 14 N. H. 382; Landaff v. Atkinson, 8 N. H. 532; Hanover v. Weare, 2 N. H. 131.

N. J.—Bateman v. Mathes, 54 N. J. L. 536, 24 A 444.

N. Y.—New York Public Charities Comr. v. Vassie, 167 App. Div. 74, 152 NYS 496; Sitterly v. Murray, 63 How Pr 367.

Oh.—Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31; Henrietta Tp. v. Oxford Tp., 2 Oh. St. 32.

Pa.—Rouse v. Directors McKean County Poor Dist., 169 Pa. 116, 32 A 541; Parker City Overseers of Poor v. Du Bois Borough Overseers of Poor, 6 Pa. Cas. 591, 9 A 457; Cumberland County Directors of Poor, etc. v. Walker Tp. Overseers of Poor, 7 Pa. Super. 303; Braintrim Tp. v. Windham Tp., 10 Pa. Co. 250; Penn's Tp. v. Selin Grove, 1 Pa. Co. 383; Poor Dist. v. Poor Dist., 1 LancLRev 347.

Vt.—Tunbridge v. Norwich, 17 Vt. 493.

Wis.—Saukville v. Grafton, 68 Wis. 192, 31 NW 719; Scott v. Clayton, 51 Wis. 185, 8 NW 171.

Eng.—Rex v. St. Botolph, Say. 198, 96 Reprint 851.

70. See cases infra note 71.

71. Conn.—Bethlem v. Roxbury, 20 Conn. 298; Hebron v. Colchester, 5 Day 169.

Me.—Monson v. Fairfield, 55 Me. 117.

Mass.—Granville v. Southhampton, 138 Mass. 256; Boston v. Warwick, 132 Mass. 519; Mendon v. Bellingham, 1 Pick. 153; Petersham v. Dana, 12 Mass. 429; Buckfield v. Gorham, 6 Mass. 445.

N. J.—Bateman v. Mathes, 54 N. J. L. 536, 24 A 444

R. I.—West Greenwich v. Warwick, 4 R. I. 136.

Gaining new settlement in another state see infra § 126.

72. See cases infra note 73.

73. Hopkinton v. Warner, 53 N. H. 468; Adams v. Foster, 20 Johns. (N. Y.) 452.

74. Treasurer, etc., v. Boston, 255 Mass. 499, 152 NE 37.

75. Peru v. Turner, 10 Me. 185.

76. Rangeley v. Bowdoin, 77 Me. 592, 1 A 892; Abington v. Duxbury, 105 Mass. 287; Northfield v. Merrimack County, 43 N. H. 165; Barnstead v. Alton, 32 N. H. 245; Ex p. Madbury, 17 N. H. 569.

[a] **Statute held not retroactive.**—Lawrence v. Methuen, 187 Mass. 592, 73 NE 860; Abington v. Duxbury, 105 Mass. 287.

77. Monson v. Fairfield, 55 Me. 117; Barnstead v. Alton, 32 N. H. 245; Gilford v. Gilmanton, 20 N. H. 456; Ex p. Madbury, 17 N. H. 569.

78. See supra § 96.

79. Monson v. Fairfield, 55 Me. 117.

80. See infra § 127.

81. Ex p. Madbury, 17 N. H. 569.

82. Minn.—Willmar v. Kandiyohi County, 167 Minn. 178, 208 NW 648.

N. Y.—Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407; Matter of Chapman, 15 Misc. 296, 37 NYS 763.

Oh.—Crane Tp. v. Antrim Tp., 12 Oh. St. 430.

Pa.—Plumcreek Tp. v. Elderton Borough, 129 Pa. 626, 18 A 549; Taylor Tp. Overseers of Poor v. Shenango Tp. Overseers of Poor, 114 Pa. 394, 6 A 475; Juniata County v. Delaware Tp. Overseers of Poor, 107 Pa. 68; Limestone Tp. Overseers of Poor v. Chillisquaque Tp. Overseers of Poor, 87 Pa. 294; Lower Augusta Tp. Overseers of Poor v. Howard Tp. Overseers of Poor, 6 Pa. Cas. 385, 9 A 446; Braintrim Tp. v. Windham Tp., 10 Pa. Co. 250.

R. I.—Exeter v. Richmond, 6 R. I. 149.

[a] **Facts held insufficient** to prove the gaining of settlement in another state. Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407.

[b] **In Connecticut** (1) the early decisions affirmed the rule stated in the text. Marlborough v. Sisson, 23 Conn. 44; Bethlem v. Roxbury, 20 Conn. 298 (containing a dissenting opinion); Middleton v. Lyme, 5 Conn. 95; Sterling v. Plainfield, 4 Conn. 114; Windham v. Norwich, 1 Root 408. (2) A derivative settlement in another state, under this rule, must be proved as a matter of fact, and it must be shown that such derivative settlement is recognized by the laws of that other state. Sterling v. Plainfield, supra. (3) But under Gen. St. tit 50 § 26, providing that any person having a legal settlement in Connecticut and acquiring thereafter a settlement in another state and returning to Connecticut and becoming a pauper shall be supported by the town in which he had his last legal settlement, the children of a person who, having a settlement in Connecticut, obtained a settlement in another state where the children were born, had their settlement upon coming into Connecticut in the town in which the father originally was settled. Morris v. Plymouth, 34 Conn. 270.

83. Ill.—Payne v. Dunham, 29 Ill. 125.

Mass.—Wilbraham v. Sturbridge, 6 Cush. 61; Canton v. Bentley, 11 Mass. 441; Townsend v. Billerica, 10 Mass. 411; Chelsea v. Malden, 4 Mass. 131.

N. H.—Peterborough v. Lancaster, 14 N. H. 382; Landaff v. Atkinson, 8 N. H. 532; Hanover v. Weare, 2 N. H. 131.

N. J.—Alexandria Tp. Overseers v. Kingwood Tp. Overseers, 8 N. J. L. 370.

Vt.—Georgia Overseers of Poor v. Grand-Isle Tp. Overseers of Poor, 1 Vt. 464.

84. Mendon v. Bellingham, 1 Pick. (Mass.) 153.

85. Somerset v. Rehoboth, 6 Cush. (Mass.) 320.

86. Marriage procured for purpose of changing settlement see infra § 130.

Obtaining settlement by marriage see supra § 111.

87. See supra § 111.

88. Conn.—Danbury v. New Haven,

marriage, without further proof of the settlement of her husband, will not be sufficient to show that she had lost her maiden settlement,[89] although it is not necessary to fix definitely the settlement of the husband.[90]

Husband unsettled. Where at the time of marriage the husband is unsettled and the wife is settled, the wife retains her maiden settlement until her husband acquires one which can devolve upon her by derivation,[91] and her settlement is not suspended during coverture.[92] Accordingly the wife may be removed to the place of her maiden settlement notwithstanding it involves a separation from her husband.[93] On the other hand it has been held that a marriage to a man not having a settlement, although it may not suspend the settlement of the wife, suspends during cohabitation the right of removing the wife to her former settlement and thus separating her from her husband.[94]

[§ 128] **5. Divorce.** A settlement gained by marriage is not lost by divorce,[95] unless the divorce be for such cause as shows the marriage to be void ab initio.[96] And some authorities have held that a divorce, even when secured by the husband for fraud on the part of the wife whereby he was induced to enter into the marriage, does not affect the wife's settlement derived from the marriage.[97] If the husband has no settlement the wife is remitted to her maiden settlement on divorce.[98]

[§ 129] **6. Death of Husband.** Upon the death of the husband the wife's maiden settlement does not revive, but she retains the settlement of her husband,[99] until she gains another settlement in her own right.[1]

[§ 130] **7. Fraud in Procuring Change.**[2] Where the statute provides that, when it appears in a suit between towns involving the settlement of a pauper that a marriage of the pauper was procured by the agency or collusion of the town authorities, the settlement shall not be affected thereby,[3] a woman whose marriage with a man settled in another town is so procured does not lose her original settlement and take the settlement of her husband.[4] But the issue of such persons, whether born before or after the marriage, take the settlement of the father in-

5 Conn. 584; Hebron v. Colchester, 5 Day 169.

Minn.—Willmar v. Spicer, 129 Minn. 395, 152 NW 767.

N. H.—Merrimack v. Hillsborough County, 19 N. H. 550; Ex p. Madbury, 17 N. H. 569.

N. J.—Bateman v. Mathes, 54 N. J. L. 536, 24 A 444; Alexandria Tp. Overseers v. Kingwod Tp. Overseers, 8 N. J. L. 370.

Pa.—Buffaloe v. Whitedeer, 15 Pa. 182.

R. I.—Exeter v. Richmond, 6 R. I. 149; West Greenwich v. Warwick, 4 R. I. 136.

[a] **Husband settled in another state.**—It is a rule of common law, recognized by statute in some jurisdictions, that where the husband is settled in a sister state, his wife still takes such settlement and loses her maiden settlement within the state. Norwich v. Windham, 1 Root (Conn.) 232; Exeter v. Richmond, 6 R. I. 149; West Greenwich v. Warwick, 4 R. I. 136.

Statutory annulment of wife's settlement acquired by derivation from her husband see supra § 125.

89. Conn.—Windham v. Lebanon, 51 Conn. 319; Middlebury v. Bethany, 32 Conn. 71.

Me.—Hallowell v. Augusta, 52 Me. 216.

N. J.—Paterson Tp. Overseers v. Byram Tp. Overseers, 23 N. J. L. 394.

Pa.—Reading Overseers v. Cumree Overseers, 5 Binn 81.

Eng.—Rex v. Woodford, 2 Bott Poor L. 13; Rex v. Harberton, 13 East 311, 104 Reprint 390.

90. Rex v. St. Mary, 1 B. & Ad. 201, 20 ECL 454, 109 Reprint 762.

[a] **It is sufficient** to show that the husband was in fact settled in one of several places. Rex v. St. Mary, 1 B. & Ad. 201, 20 ECL 454, 109 Reprint 762.

91. Conn.—Windham v. Lebanon, 51 Conn. 319; Goshen v. Canaan, 35 Conn. 186; Middlebury v. Bethany, 32 Conn. 71; New Haven v. Huntington, 22 Conn. 25; Lebanon v. Hebron, 6 Conn. 45; Newtown v. Stratford, 3 Conn. 600; Hebron v. Colchester, 5 Day 169; Norwich v. Windham, 1 Root 232.

Me.—Winslow v. Pittsfield, 95 Me. 53, 49 A 46; Fryeburg v. Brownfield, 68 Me. 145; Bucksport v. Rockland, 56 Me. 22; Hallowell v. Augusta, 52 Me. 216; Eddington v. Brewer, 41 Me. 462; Augusta v. Kingfield, 36 Me. 235; Sandford v. Hollis, 2 Me. 194.

Mass.—Treasurer, etc. v. Boston, 229 Mass. 83, 118 NE 284.

N. J.—Paterson Tp. Overseers v. Byram Tp. Overseers, 23 N. J. L. 394.

N. Y.—Otsego Overseers of Poor v. Smithfield Overseers of Poor, 6 Cow. 760.

Oh.—Crane Tp. v. Antrim Tp., 12 Oh. St. 430.

Pa.—Buffaloe v. Whitedeer, 15 Pa. 182.

R. I.—West Greenwich v. Warwick, 4 R. I. 136.

Vt.—Rockingham v. Springfield, 59 Vt. 521, 9 A 241; Winhall v. Landgrove, 45 Vt. 376; Wilmington v. Jamaica, 42 Vt. 694; Newark v. Sutton, 40 Vt. 261; Rupert v. Winhall, 29 Vt. 245; Bethel v. Tunbridge, 13 Vt. 445; Royalton v. West Fairlee, 11 Vt. 438.

Eng.—Rex v. Hensingham, 2 Bott Poor L. 85; Rex v. Woodford, 2 Bott Poor L. 13; Rex v. Harberton, 13 East 311, 104 Reprint 390; Rex v. St. Botolph, Say. 198, 96 Reprint 851.

92. Conn.—Newtown v. Stratford, 3 Conn. 600.

Me.—Augusta v. Kingfield, 36 Me. 235.

N. Y.—Otsego Overseers of Poor v. Smithfield Overseers of Poor, 6 Cow. 760.

Vt.—Newark v. Sutton, 40 Vt. 261.

Eng.—Rex v. St. Botolph, Say. 198, 96 Reprint 851.

93. Otsego Overseers of Poor v. Smithfield Overseers of Poor, 6 Cow. (N. Y.) 760. Compare Sherburne Overseers of Poor v. Norwich Overseers of Poor, 16 Johns. (N. Y.) 186 (containing dictum of individual judge to the contrary).

94. Hebron v. Colchester, 5 Day (Conn.) 169; Newark v. Sutton, 40 Vt. 261.

Separating members of family generally see infra § 145.

95. Conn.—Guilford v. Oxford, 9 Conn. 321.

Me.—Bangor v. Veazie, 111 Me. 371, 89 A 193; Howland v. Burlington, 53 Me. 54.

Mass.—Dalton v. Bernardston, 9 Mass. 201.

N. H.—Ossipee v. Carroll County, 65 N. H. 12, 17 A 1058.

Oh.—Spencer Tp. v. Pleasant Tp., 17 Oh. St. 31.

Pa.—Lake Dist. Overseers of Poor v. South Canaan Tp. Overseers of Poor, 87 Pa. 19; Buffaloe v. Whitedeer, 15 Pa. 182; Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643; Upper Augusta Tp. v. Rockefeller Tp., 2 Chest. Co. 190.

Vt.—Montpelier v. Elmore, 71 Vt. 193, 44 A 71; Bethel v. Tunbridge, 13 Vt. 445; Royalton v. West Fairlee, 11 Vt. 438.

96. Winslow v. Troy, 97 Me. 130, 53 A 1008; Dalton v. Bernardston, 9 Mass. 201.

[a] **Annulment of marriage for mental incapacity.**—Where a marriage is annulled on the ground of mental incapacity of the husband to contract, the woman's pauper settlement is not affected by such marriage. Winslow v. Troy, 97 Me. 130, 53 A 1008.

Effect of void marriage on wife's acquisition of settlement see supra § 113.

97. Guilford v. Oxford, 9 Conn. 321.

98. Royalton v. West Fairlee, 11 Vt. 438.

99. Conn.—Danbury v. New Haven, 5 Conn. 584; East Hartford v. Middletown, 1 Root 197.

Mass.—Treasurer, etc., v. Boston, 255 Mass. 499, 152 NE 37.

Pa.—Gibson Dist. Poor Directors v. Benton Poor Dist. Poor Directors, 85 Pa. Super. 377.

Vt.—Royalton v. West Fairlee, 11 Vt. 438.

Eng.—Reigate Union v. Croydon Union, 14 App. Cas. 465.

1. Van Buren v. Syracuse, 72 Misc. 463, 131 NYS 345.

[a] **Presumption of death from absence.**—(1) Where a man abandons his family and remains absent for more than ten years, during which time his wife receives no news respecting him, and once before he had abandoned his family and was absent three years, and at the time of his last abandonment he was in good health and there was a warrant outstanding for his arrest, the evidence does not warrant a presumption of his death so as to enable the wife to obtain a new settlement and make the support of herself and her children a charge upon another town than that in which they lived at the time of the abandonment. Van Buren v. Syracuse, 72 Misc. 463, 131 NYS 345. (2) Generally see Death §§ 5-19.

2. Settlement of bastards by birth see supra § 42.

3. See statutory provisions.

4. Hudson v. Charleston, 97 Me. 17, 53 A 832; Gardiner v. Manchester, 88 Me. 249, 33 A 990; Minot v. Bowdoin, 75 Me. 205; Houlton v. Ludlow, 73 Me. 583; Burnham v. Corinth, (Me.) 10 A 454; Appleton v. Belfast, 67 Me. 579. See also supra § 111.

[a] **Evidence held sufficient** to show that marriage was procured by the agency of town officers. Hudson v. Charleston, 97 Me. 17, 53 A 832; Minot v. Bowdoin, 75 Me. 205.

stead of the mother.[5] Such a statute has been held applicable to all cases where the suit is for supplies furnished after the statute was passed,[6] although it was not passed until after the marriage and the birth of the children.[7]

[§ 131] **8. Abandonment and Absence.**[8] In some jurisdictions the statutes have provided that a settlement shall be lost by absence for a specified period of time.[9] Under such statutes it has been held that the loss of a husband's settlement by absence for the statutory period does not affect the derivative settlement which his wife has acquired by marriage;[10] and if, during the husband's absence from his place of settlement, the wife lives with him, such time cannot be counted to defeat her settlement.[11] So it has been held that a minor who has acquired a derivative settlement from the mother does not lose it by absence during minority.[12] Under some statutes a pauper and those deriving their settlement from him lose their right of settlement by living five years beyond the limits of the state without receiving pauper supplies from any source within the state;[13] and such statutes have been held to be within the legislative power.[14] A wife abandoned by her husband loses her settlement under a statute of this nature where the husband loses his by absence for the designated period.[15] But the settlement of a minor emancipated by his father after deriving a settlement through him is not affected by the statute.[16] Other statutes declare that a settlement is lost by continuous residence in another town for a year.[17]

Confinement in asylum. Absence of a pauper from his place of settlement while confined in a state insane asylum does not affect any change or loss of settlement.[18]

[§ 132] **G. Evidence of Settlement[19]—1. Presumptions[20] and Burden of Proof.**[21] In an action involving the settlement of a pauper the burden of proof, as in other civil cases,[22] is upon the party alleging that the pauper was settled in a particular town or district to prove such fact.[23] So the bur-

[b] **Evidence held insufficient** to show that the marriage was procured by the town authorities with the intention of relieving the town of the woman's support. Gardiner v. Manchester, 88 Me. 249, 33 A 990.

5. Gardiner v. Manchester, supra; Minot v. Bowdoin, 75 Me. 205; Houlton v. Ludlow, 73 Me. 583.

6. Burnham v. Corinth, (Me.) 10 A 454; Appleton v. Belfast, 67 Me. 579.

7. See cases supra note 6.

8. **Absence:**
With intention of returning see supra § 92.
Without intention of returning see supra § 93.

9. See statutory provisions.

[a] **In Massachusetts** (1) St. (1898) c 425 § 2 providing that a person shall lose his settlement by absence from the state for ten years in succession, was held not retroactive. Lawrence v. Methuen, 187 Mass. 592, 73 NE 860. (2) The word "absence," as used in St. (1911) c 669 § 4 (Gen. L. c 116 § 5), declaring that a settlement shall be lost by five years' continuous absence from the place of settlement, has its usual and natural signification of physical absence, and, if a pauper fails to acquire a settlement elsewhere, that circumstance is immaterial. Lanesborough v. Ludlow, 250 Mass. 99, 145 NE 57. (3) Under the latter statute where a pauper left the town of his settlement in 1910, and went to live with a certain person in another town, under an agreement of the overseers of the first town to pay for his support, and this agreement continued until 1921, the settlement was lost by absence, under Gen. L. c 116 § 5, and the town into which he had moved cannot recover from the first town for support furnished. Lanesborough v. Ludlow, supra. (4) The time spent in a public institution of the state is not counted in computing the time for losing a settlement under such statute. Treasurer, etc., v. Boston, 255 Mass. 499, 152 NE 37. (5) A pauper who had a legal settlement in defendant city, sued by the inhabitants of a town for his support, and left it July 13, 1911, but returned to become an inmate of a public hospital in the city before five years had elapsed, did not lose his settlement in the city, under St. (1911) c 669 § 4, excepting from the five-year period of time during which a person is an inmate of any public hospital, etc. Needham v. Fitchburg, 237 Mass. 354, 129 NE 453.

[b] **In Minnesota,** under Gen. St. (1923) § 3161, a settlement is lost by a person's voluntary and uninterrupted absence from the state for one year with intent to abandon his residence in the state. Willmar v. Kandiyohi County, 167 Minn. 178, 208 NW 648; In re Leslie, 166 Minn. 180, 207 NW 323.

10. Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37; Brookfield v. Holden, 247 Mass. 577, 142 NE 784; Treasurer, etc. v. Boston, 229 Mass. 83, 118 NE 284.

11. Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37.

[a] **"Not until the coverture is ended** can her action be taken as effective to terminate the settlement; for not until then is her action voluntary where husband and wife have been living together." Brookfield v. Holden, 247 Mass. 577, 579, 142 NE 784.

12. Treasurer, etc. v. Boston, 255 Mass. 499, 152 NE 37.

13. See statutory provisions.

14. Portland v. Auburn, 96 Me. 501, 52 A 1011.

15. Thomaston v. Greenbush, 106 Me. 242, 76 A 690; Portland v. Auburn, 96 Me. 501, 52 A 1011.

16. Bangor v. Veazie, 111 Me. 371, 89 A 193; Thomaston v. Greenbush, 106 Me. 242, 76 A 690.

[a] **The abandonment by a father** having a pauper settlement in a town of his minor children effects their emancipation, and under Rev. St. c 27 § 1 par 2, they take his settlement, which continues until they gain a new one after attaining full age notwithstanding paragraphs 4, 7, 8. Bangor v. Veazie, 111 Me. 371, 89 A 193.

17. See statutory provisions.

[a] **In New York** (1) L. (1897) c 203, providing that a person shall lose his settlement by his continued absence from the place of such settlement for one year, was held to do away with the legal fiction of a residence presumed to continue long after it has in fact ceased. Peo. v. Maynard, 160 N. Y. 453, 55 NE 9. (2) This statute was held to apply, although during such absence the person did not acquire a new settlement. Peo. v. Maynard, supra. (3) It was also held immaterial whether during that year the person was self-supporting or was aided in part by the town of his former residence. Peo. v. Maynard, supra; Matter of Hawks, 26 Misc. 359, 57 NYS 216; Onondaga v. Syracuse, 22 Misc. 265, 49 NYS 1116. (4) However continuous absence for the statutory period without proof of residence did not forfeit a settlement. Syracuse v. Onondaga County, 25 Misc. 371, 55 NYS 634; Onondaga v. Syracuse, supra. (5) Nor did the statute apply to a person residing in a county wherein each town supported its own poor, where he had been supported for many years in the town of his residence on the guaranty of the town of his settlement to repay the former town the amount expended for his support. Matter v. McCutcheon, 25 Misc. 650, 56 NYS 370. (6) But this statute was repealed by L. (1900) c 345, and was not embodied in the present Poor L. (1909) c 46. Onondaga County v. Amsterdam, 139 App. Div. 877, 124 NYS 558. (7) Under the later act a settlement in one town is not lost by absence therefrom for a time less than that required to gain a settlement in another town. Onondaga County v. Amsterdam, supra.

[b] **In Wisconsin** it has been held, that the "voluntary and uninterrupted" absence for a year by which a settlement may be lost does not include an absence during which the town in which the pauper is settled supports him in another place. Scott v. Clayton, 51 Wis. 185, 8 NW 171; Wis. St. (1898) § 1500.

18. Ashland County v. Richland County Infirmary, 7 Oh. St. 65, 70 AmD 49.

19. **Conclusiveness of order of removal as to place of settlement** see infra §§ 153, 154.
Evidence as to:
Fraud in procuring change of settlement see supra § 130.
Honorable discharge from military service see supra § 81.
Payment of:
Consideration for purchase of real estate as affecting acquisition of settlement see supra § 63.
Rent for purpose of acquiring settlement see supra § 67.
Return and record of warning order see supra § 109.
Tenancy under statutes providing for acquisition of settlement by leasing real estate see supra § 64.
Time of recording return of warning order see supra § 109.

20. **Presumptions as to:**
Tenancy under statutes providing for acquisition of settlement by leasing real estate see supra § 64.
Validity of marriage of paupers see supra § 113.

21. **Burden of showing:**
Honorable discharge from military service see supra § 81.
Service and return of warning order see supra § 109.

22. See Evidence §§ 13–24.

23. Conn.—Fairfield v. Easton, 73 Conn. 735, 49 A 200; Middlebury v. Bethany, 32 Conn. 71.
Iowa.—Washington County v. Polk County, 137 Iowa 333, 113 NW 833.
Me.—Somerville v. Smithfield, 126 Me. 511, 140 A 195; Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10; Atkinson v. Orneville, 96 Me. 311, 52 A 796; Ripley v. Hebron, 60 Me. 379; Kirkland v. Bradford, 30 Me. 452.
Mass.—Dana v. Petersham, 107 Mass. 598; New Bedford v. Middleborough, 16 Gray 295; Oakham v. Sutton, 13 Metc. 192.

den of proving the acquisition of a new settlement is upon the party alleging it,[24] since a settlement once acquired is presumed to continue until another is subsequently acquired,[25] and such party must show everything necessary to the acquisition thereof.[26] Proof of the marriage of a woman is not sufficient to create a presumption of change of settlement; it must also be shown that her husband had a settlement.[27]

Place of birth. The fact that a pauper was first known residing with his father in defendant town establishes no legal presumption that he was born there.[28]

Emancipation. In ascertaining the settlement of a pauper the presumption is that children under twenty-one years of age are unemancipated and that those above that age are emancipated, until the contrary appears.[29]

Payment of taxes. The burden of proving that the taxes were paid so as to confer a settlement[30] is upon the party alleging that a settlement was thereby gained.[31] But, in accordance with the general rule,[32] a presumption of payment arises after the lapse of twenty years,[33] although such presumption may be rebutted by showing inability to pay during that period.[34]

Furnishing supplies. Where the question of settlement arises between two towns, the burden of proving that a settlement was defeated by furnishing pauper supplies[35] is on the town claiming to have furnished such supplies.[36] The presumption is that the supplies were furnished in good faith,[37] and the burden is on the town alleging fraud and collusion to prove the same.[38]

Presumption as to residence. Where a residence is once shown, it will be presumed to have been continuous until the contrary is shown.[39]

[§ 133] **2. Admissibility[40]—a. As to Settlement Generally.** The general rules as to the admissibility of evidence[41] apply where the question of a pauper's settlement is in issue.[42] Any competent evidence is admissible which tends to prove or disprove residence or other facts necessary to establish settlement.[43] But hearsay evidence, except as far as it involves a question of pedigree, is incompetent.[44] In regard to the residence of single per-

N. H.—State v. Foster, 23 N. H. 348, 55 AmD 191.

Pa.—Williamsport v. Eldred Tp., 54 Pa. Super. 62; Howard Tp. Poor Dist. v. Howard Borough Poor Dist., 39 Pa. Co. 570.

[a] **Rule applied.**—In action to recover from defendant town for supplies furnished a pauper, the burden is on plaintiff town to show that the pauper's father's settlement was in defendant town when the pauper became of age. Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10.

24. Ellsworth v. Waltham, 125 Me. 214, 132 A 423; Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10; South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Monroe v. Hampden, 95 Me. 111, 49 A 604; Worcester v. Wilbraham, 13 Gray (Mass.) 586; Gibson Dist. Poor Directors v. Benton Poor Dist. Poor Directors, 85 Pa. Super. 377.

[a] **Rule applied.**—In an action against a town to recover for the support of a pauper, whose settlement was once in that town, the burden of proving that he afterward acquired a settlement in another town is on defendant. Bowdoinham v. Phippsburg, 63 Me. 497; Starks v. New Portland, 47 Me. 183; Worcester v. Wilbraham, 13 Gray (Mass.) 586; Oakham v. Sutton, 13 Metc. (Mass.) 192; Kilburn v. Bennett, 3 Metc. (Mass.) 199; Randolph v. Easton, 23 Pick. (Mass.) 242.

25. Conn.—Marlborough v. Sisson, 23 Conn. 44.

Me.—South Thomaston v. Friendship, 95 Me. 201, 49 A 1056; Etna v. Brewer, 78 Me. 377, 5 A 884; Bowdoinham v. Phippsburg, 63 Me. 497; Monson v. Fairfield, 55 Me. 117.

Mass.—Treasurer, etc. v. Boston, 229 Mass. 83, 118 NE 284; Williamsburg v. Adams, 184 Mass. 263, 68 NE 230; Ashland v. Marlborough, 106 Mass 266; Chicopee v. Whately, 6 Allen 508; Worcester v. Wilbraham, 13 Gray 586; Oakham v. Sutton, 13 Metc. 192.

Pa.—Gibson Dist. Poor Directors v. Benton Poor Dist. Poor Directors, 85 Pa. Super. 377.

Vt.—Newfane v. Dummerston, 34 Vt. 184.

And see supra § 124.

[a] **Derivative settlement.**—The settlement of a woman after her husband's death in the place where he was last settled is presumed to continue until lawfully changed. Gibson Dist. Poor Directors v. Benton Poor Dist. Poor Directors, 85 Pa. Super. 377.

26. Ripley v. Hebron, 60 Me. 379; Burke v. Westmore, 55 Vt. 213.

[a] **Where a pauper leaves a town where he has resided,** the law does not presume either that he intends or does not intend a temporary absence, and such intent is for the jury to determine. Ripley v. Hebron, 60 Me. 379.

27. Windham v. Lebanon, 51 Conn. 319; Hallowell v. Augusta, 52 Me. 216.

28. Union v. Plainfield, 39 Conn. 563; Rex v. Trowbridge, 7 B. & C. 252, 14 ECL 118, 108 Reprint 717.

Settlement by birth see supra §§ 41, 42.

29. Fitzwilliam v. Troy, 6 N. H. 166; Orford v. Rumney, 3 N. H. 331; Westmore v. Sheffield, 56 Vt. 239.

30. See supra § 71.

31. Dana v. Petersham, 107 Mass. 598; Attleborough v. Middleborough, 10 Pick. (Mass.) 378; Wilmington v. Burlington, 4 Pick. (Mass.) 174; Lisbon v. Lyman, 49 N. H. 553; Haverhill v. Orange, 47 N. H. 273.

32. See Payment §§ 188-213.

33. Pittsfield v. Barnstead, 40 N. H. 477; Dalton v. Bethlehem, 20 N. H. 505; Hopkinton v. Springfield, 12 N. H. 328.

34. Pittsfield v. Barnstead, 40 N. H. 477.

Rebuttal of presumption of payment generally see Payment §§ 234-247.

35. See supra §§ 100-103.

36. Belmont v. Morrill, 73 Me. 231; Corinna v. Hartland, 70 Me. 355.

37. New Portland v. Kingfield, 55 Me. 172.

38. New Portland v. Kingfield, supra.

39. Greenfield v. Camden, 74 Me. 56; Whately v. Hatfield, 196 Mass. 393, 82 NE 48, 13 AnnCas 690.

40. Admissibility of evidence as to:
Honorable discharge from military service see supra § 81.
Payment of:
Consideration for purchase of real estate see supra § 63.
Rent under statute providing for acquisition of settlement by leasing real estate see supra § 67.
Return and record of warning order see supra § 109.
Tenancy under statute providing for acquisition of settlement by leasing real estate see supra § 64.

41. See Evidence §§ 89-1739.

42. See cases infra notes 43-57; and §§ 134-136.

43. Conn.—Reading v. Weston, 8 Conn. 117, 20 AmD 97.

Me.—Ripley v. Hebron, 60 Me. 379; Wayne v. Greene, 21 Me. 357; Thomaston v. St. George, 17 Me. 117.

Mass.—Robbins v. Townsend, 20 Pick. 345; Ward v. Oxford, 8 Pick. 476.

N. H.—Thornton v. Campton, 18 N. H. 20.

N. Y.—New Berlin Overseers of Poor v. Norwich Overseers of Poor, 10 Johns. 229.

Pa.—Laporte Borough Overseers v. Hillsgrove Tp. Overseers, 95 Pa. 269.

Vt.—Jericho v. Huntington, 79 Vt. 329, 65 A 87.

[a] **To rebut the evidence of an alleged pauper's poverty** and inability to pay taxes, it is competent to show that he had money and other property sufficient to discharge them during the time within which he was claimed to have gained a settlement. Pittsfield v. Barnstead, 40 N. H. 477.

[b] **Omission to tax.**—(1) Evidence that a person possessed real estate and that the assessors omitted to tax him therefor is not admissible in proof of his having gained a settlement. Berlin v. Bolton, 10 Metc. (Mass.) 115. (2) Tax lists see infra § 135.

[c] **Evidence that deed was given as security.**—In determining whether a person had gained a settlement under a deed of land to him, parol evidence that the deed, although absolute in form, was intended as security for a debt was inadmissible. Reading v. Weston, 8 Conn. 117, 20 AmD 97.

[d] **Evidence held admissible:** (1) To prove nonpayment of taxes by a pauper. Boston v. Weymouth, 4 Cush. (Mass.) 538. (2) To show pauper's failure to pay purchase price of land. New Berlin Overseers of Poor v. Norwich Overseers of Poor, 10 Johns. (N. Y.) 229. (3) To show pauper's failure to pay rent. Laporte Borough v. Hillsgrove Tp., 95 Pa. 269. (4) In an action by one town to recover from another the expense of supporting as a pauper a married woman alleged to have her settlement with defendants, it is competent for them to prove that her husband has a settlement in the commonwealth elsewhere than with them, derived from his mother, without first proving that he derived no settlement from his father. Abington v. Duxbury, 105 Mass. 287.

[e] **Evidence held inadmissible.**—(1) To show settlement generally. Lancaster v. Coos County, 74 N. H. 439, 68 A 867. (2) To show that a pauper for whose support a town is sued had neglected and refused to pay taxes legally assessed. Hamden v. Bethany, 43 Conn. 212. (3) To prove that a person was warned to leave a town. Braintree v. Hingham, 1 Pick. (Mass.) 245.

44. Bernards Tp. v. Bedminster Tp., 74 N. J. L. 92, 64 A 960 (affidavit of person not a member of the

sons without a permanent home or abiding place, but who go out to work or reside from time to time with their relatives or friends, the ascertainment of the place in which they store or keep their effects and to which they return when out of employment or when not visiting is very material.[45] Evidence of the habitation of a man's wife and family is evidence of the residence of the husband,[46] and the testimony of old inhabitants of a town that they had never known the pauper has been held to be admissible to show that he did not have a settlement in the town.[47] A person may testify as to his intention in taking up his habitation in a place.[48] But evidence of the general reputation or as to the reputed place of residence of a person has been held to be inadmissible.[49] Defendant town is not confined, like plaintiff, to a single proposition;[50] it need not prove that the pauper had a settlement in any particular town;[51] it may set up and support by testimony any number of propositions to establish alternatively a settlement in either of several towns, or in either of several modes of acquisition.[52] So it is permissible to prove by witnesses under what agreements of hire or employment, or terms as to time or as to board, a pauper entered the town, where the question is as to the nature of his residence there, and whether temporary or not,[53] provided the evidence so offered is not hearsay.[54]

Voting. The fact that the pauper has voted in a certain town is to be considered in determining whether he had his residence in the town.[55]

Furnishing support. The act of a town or poor district in supporting a pauper or paying bills incurred by other towns for his support is admissible as tending to show that the pauper's settlement was in the former town,[56] although there is authority to the contrary.[57]

[§ 134] **b. Declarations and Admissions.**[58] Under general rules[59] verbal declarations of a person, not constituting a part of the res gestæ, are not admissible to prove his residence or other facts necessary to establish his place of settlement.[60] But his declarations showing his intention as to residence, made under such circumstances as to explain, and to constitute a part of the res gestæ of, his acts in reference to his residence, are competent,[61] and such declarations have been held to be admissible, although the pauper is alive.[62]

Of officers. Admissions or declarations of town officers, not connected with any official act, are inadmissible in evidence against the town upon the question of a pauper's settlement,[63] although admissions of poor officers in the exercise of their powers in regard to the settlement of paupers have been admitted against their towns to prove the paupers' settlement.[64] So it has been held that the admissions of overseers of the poor in performing acts under the statute as public officers, and not as agents of the town, are not admissible against the town on the question of settlement.[65] And, a fortiori, an admission by poor law officers that a person had a settlement in the town, derived from an ancestor, is not admissible in an action against the town by another town for the support of a different pauper whose settlement was derived from the same ancestor.[66]

Place of birth. Declarations of a parent as to the place of birth of his child are not admissible after

pauper's family, based on information and belief, was incompetent).

Declarations as to pedigree generally see Evidence §§ 226-248.

45. Berlin v. Worcester, 50 Vt. 23; Kirby v. Waterford, 14 Vt. 414; Newbury v. Topsham, 7 Vt. 407.

46. Topsham v. Lewiston, 74 Me. 236, 43 AmR 584; Brewer v. Linnaeus, 36 Me. 428; Greene v. Windham, 13 Me. 225; Hardwick v. Raynham, 14 Mass. 363.

Conclusiveness of evidence see infra § 137.

47. Thomas v. Ross, 8 Wend. (N. Y.) 672.

48. Rumford v. Upton, 113 Me. 543, 95 A 226; Knox v. Montville, 98 Me. 493, 57 A 792; Searsmont v. Lincolnville, 83 Me. 75, 21 A 747; Baring v. Calais, 11 Me. 463; Albion v. Maple Lake, 71 Minn. 503, 74 NW 282.

49. Albion v. Maple Lake, supra.

50. Abington v. Duxbury, 105 Mass. 287.

51. Abington v. Duxbury, supra.

52. Abington v. Duxbury, supra.

53. Ripley v. Hebron, 60 Me. 379.

54. Ripley v. Hebron, supra.

55. Newtown v. Southbury, 100 Conn. 251, 123 A 278; Monroe v. Hampden, 95 Me. 111, 49 A 604; Belmont v. Vinalhaven, 82 Me. 524, 20 A 89; East Livermore v. Farmington, 74 Me. 154.

Admissibility of voting lists see infra § 135.

Conclusiveness of evidence see infra § 137.

56. Conn.—Newtown v. Southbury, 100 Conn. 251, 123 A 278; Connecticut Hospital for Insane v. Brookfield, 69 Conn. 1, 36 A 1017.

Me.—Weld v. Farmington, 68 Me. 301; Harpswell v. Phipsburg, 29 Me. 313.

N. H.—Canaan v. Hanover, 47 N. H. 215; Pittsfield v. Barnstead, 40 N. H. 477; Thornton v. Campton, 18 N. H. 20, 17 N. H. 338.

Vt.—Barre v. Morristown, 4 Vt. 574.

Eng.—Reg. v. Wigan, 14 Q. B. 287, 68 ECL 287, 117 Reprint 113; Reg. v. St. Mary in Bungay, 12 Q. B. 38, 64 ECL 38, 116 Reprint 779; Reg. v. Crondall, 10 Q. B. 812, 59 ECL 812, 116 Reprint 308; Rex v. Edwinstowe, 8 B. & C. 671, 15 ECL 331, 108 Reprint 1192; Rex v. Trowbridge, 7 B. & C. 252, 14 ECL 118, 108 Reprint 717.

Conclusiveness of evidence see infra § 137.

57. Franklin v. Fuller, 105 Mass. 336; Dartmouth v. Lakeville, 9 Allen (Mass.) 211 note; New Bedford v. Taunton, 9 Allen (Mass.) 207 (holding that the acts of overseers of the poor, in providing support for a pauper, are not admissible in evidence against the town to prove the settlement of a person therein).

58. Admissions by:

Binding out pauper see supra § 133.

Furnishing support to pauper see supra § 133.

59. See Evidence §§ 166-509.

60. Ill.—Dorr v. Seneca, 74 Ill. 101.

Me.—Belmont v. Vinalhaven, 82 Me. 524, 20 A 89.

Mass.—Ward v. Oxford, 8 Pick. 476.

Pa.—West Buffalo Tp. v. Walker Tp., 7 Watts 171.

Vt.—Cavendish v. Troy, 41 Vt. 99.

See Rex v. Eriswell, 3 T. R. 707, 100 Reprint 815 (where the court was equally divided on the question as to whether the declarations of a pauper before magistrates authorized to remove him, in the absence of the parish to which removal was afterward ordered, were competent as against such parish on a hearing to remove the pauper's family after he had become insane, and therefore could no longer testify).

[a] **Thus it is incompetent** to prove the declarations of a pauper after his actual habitation in a place has ceased, as to where he conceives that he has had his residence or home. Dorr v. Seneca, 74 Ill. 101; Belmont v. Vinalhaven, 82 Me. 524, 20 A 89; Cavendish v. Troy, 41 Vt. 99; Derby v. Salem, 30 Vt. 722; Londonderry v. Andover, 28 Vt. 416.

Declarations of pauper to prove change of residence see infra § 136.

61. New-Milford v. Sherman, 21 Conn. 101; Knox v. Montville, 98 Me. 493, 57 A 792; Belmont v. Vinalhaven, 82 Me. 524, 20 A 89; Cornville v. Brighton, 39 Me. 333; Corinth v. Lincoln, 34 Me. 310; Wayne v. Greene, 21 Me. 357; Thomaston v. St. George, 17 Me. 117; Baring v. Calais, 11 Me. 463; Gorham v. Canton, 5 Me. 266, 17 AmD 231.

62. Baring v. Calais, 11 Me. 463.

63. Brighton v. St. Albans, 77 Me. 177.

64. Fairfield v. Oldtown, 73 Me. 573.

65. Lanesborough v. Ludlow, 250 Mass. 99, 145 NE 57; New Bedford v. Taunton, 9 Allen (Mass.) 207.

[a] **Rule applied.**—(1) In agreeing to pay the support of a poor person farmed out to a person in another town, overseers of poor did not act as agents of the town from which such person was removed, but as public officers, and their action cannot be regarded as admission as to the poor person's settlement. Lanesborough v. Ludlow, 250 Mass. 99, 145 NE 57. (2) Evidence that the overseers of defendant town had upon notice from another town removed and supported the pauper and paid the other town its expenses incurred was incompetent on the issue of settlement. South Scituate v. Stoughton, 145 Mass. 535, 14 NE 744.

[b] **Binding out.**—The admissions of overseers of the poor in binding out a pauper are inadmissible against the town to prove the settlement of such pauper therein. New Bedford v. Taunton, 9 Allen (Mass.) 207.

66. Dartmouth v. Lakeville, 9 Allen (Mass.) 211 note; Dartmouth v. Lakeville, 7 Allen (Mass.) 284.

the parent's death.[67] So declarations of a person to show his place of birth are inadmissible on the question of settlement arising after his death.[68]

[§ 135] **c. Documentary Evidence.**[69] To prove the fact of settlement, or of residence and its continuity as a basis of determining settlement, recitals in deeds,[70] wills,[71] or other instruments in writing,[72] are competent evidence. Town or parish books and records,[73] such as books, lists, and records showing the assessment and payment of taxes,[74] if such lists, etc., are valid,[75] are usually admissible. On the other hand it has been held that the assessors' records, showing the nonassessment of the person whose settlement is in question,[76] or showing that he was assessed, without showing payment of the tax assessed,[77] are not admissible.

Voting lists, unaccompanied by proof that a person whose name appears on the list actually voted, have been held inadmissible;[78] but a list on which the name of the voter is checked, indicating prima facie that he had voted, is admissible.[79] On the other hand it has been held that the register of votes in a town, showing that a person voted at an annual election held there, is not proper evidence of his settlement in such town.[80]

[§ 136] **d. As to Change of Settlement.** The question of a person's intent to change his residence is to be determined from the circumstances surrounding the person at the time of his removal, such as the character of his dwelling, his habits, early associations, disposition, etc.[81] Such person's acts,[82] or declarations accompanying his acts,[83] are admissible in evidence unless too remote.[84] But declarations not accompanying any act indicative of a design to change declarant's residence are not competent.[85] So his declarations after his return to his former place of residence are inadmissible to show his intention at the time of removal.[86] Nor is it competent to prove the pauper's declarations of his future hopes or expectations, not carried into execution.[87] The person may, of course, himself testify as to his intention,[88] including his intention

67. Union v. Plainfield, 39 Conn. 563.

68. Greenfield v. Camden, 74 Me. 56.

69. Conclusiveness of evidence see infra § 137.

70. Greenfield v. Camden, 74 Me. 56 (registry copy of a deed); Ward v. Oxford, 8 Pick. (Mass.) 476; Bridgewater v. West Bridgewater, 7 Pick. (Mass.) 191; Westmore v. Sheffield, 56 Vt. 239.

[a] **Ground of admissibility.**—This species of evidence is different from the mere verbal declarations of a pauper as to his residence which are not admissible. The designation of his residence in a solemn instrument, such as a deed or a will, is in the nature of a fact rather than a declaration, being made when there was no controversy, and when no possible interest could exist to give a false designation. Ward v. Oxford, 8 Pick. (Mass.) 476.

71. Ward v. Oxford, supra; Bridgewater v. West Bridgewater, 7 Pick. (Mass.) 191.

72. Oldtown v. Shapliegh, 33 Me. 278; West Boylston v. Sterling, 17 Pick. (Mass.) 126.

[a] **Particular instruments.**—(1) Writ not served. Oldtown v. Shapliegh, 33 Me. 278. (2) Written notification to pauper to attend district school meeting. West Boylston v. Sterling, 17 Pick. (Mass.) 126. (3) Marriage certificate. Shutesbury v. Hadley, 133 Mass. 242.

73. Me.—Greenfield v. Camden, 74 Me. 56; Weld v. Farmington, 68 Me. 301.

Mass.—West Bridgewater v. Wareham, 138 Mass. 305; Hingham v. South Scituate, 7 Gray 229; Boston v. Weymouth, 4 Cush. 538; West Boylston v. Sterling, 17 Pick. 126; Bridgewater v. West Bridgewater, 7 Pick. 191.

N. H.—Lebanon v. Plainfield, 40 N. H. 291; Thornton v. Campton, 18 N. H. 20.

R. I.—East Greenwich v. Warwick, 4 R. I. 138.

Vt.—Northfield v. Plymouth, 20 Vt. 582.

Eng.—Rex v. Birmingham, 8 L. J. M. C. O. S. 41.

[a] **Place of birth.**—A parish register is admissible in evidence upon the question as to the place of a pauper's birth. Rex v. Birmingham, 8 L. J. M. C. O. S. 41.

74. Marlborough v. Sisson, 23 Conn. 401; Pittsfield v. Barnstead, 40 N. H. 477; Lower Augusta v. Selinsgrove, 64 Pa. 166.

[a] **Collector's duplicate marked "paid."**—Directors of Danville, etc., Poor Dist. v. Directors of Scranton Poor Dist., 2 Kulp (Pa.) 457 [aff 3 Kulp 197].

[b] **Erasure of tax on collector's book as evidence of payment.**—Pittsfield v. Barnstead, 40 N. H. 477.

75. Middletown v. Berlin, 18 Conn. 189.

[a] **An invalid assessment list** is inadmissible. Middletown v. Berlin, 18 Conn. 189.

76. Rumford v. Upton, 113 Me. 543, 95 A 226; Rockland v. Union, 100 Me. 67, 60 A 705.

77. Rumford v. Upton, 113 Me. 543, 95 A 226; Rockland v. Union, 100 Me. 67, 60 A 705.

78. Rumford v. Upton, 113 Me. 543, 95 A 226.

79. Belmont v. Vinalhaven, 82 Me. 524, 20 A 89.

80. New-Milford v. Sherman, 21 Conn. 101.

81. Madison v. Guilford, 85 Conn. 55, 81 A 1046; Deer Isle v. Winterport, 87 Me. 37, 32 A 718; Ripley v. Hebron, 60 Me. 379; Wayne v. Greene, 21 Me. 357; Jefferson v. Washington, 19 Me. 293; Waterborough v. Newfield, 8 Me. 203; Jericho v. Huntington, 79 Vt. 329, 65 A 87.

[a] **Mental condition, etc.**—Where one removing from one town to another is of inferior mental capacity, the jury, in determining the question of legal settlement in the latter town, may consider such condition of mind as evidence, together with the manner in which such person lived in the town, to determine whether he resided in the town so as to obtain a settlement therein, a change of domicile being a question of act and intention. Madison v. Guilford, 85 Conn. 55, 81 A 1046.

[b] **Evidence held irrelevant.**—In a suit involving the question of the residence of a pauper, the character of his stay at a designated place was in dispute, evidence that a day or two before the pauper went to the designated place a witness called his attention to the fact that a third person wanted a man to go onto his place, there to stay for a year on specified terms, was inadmissible, it not proving the arrangement between the pauper and the third person. Jericho v. Huntington, 79 Vt. 329, 65 A 87.

82. Thomaston v. St. George, 17 Me. 117.

[a] **Evidence of his acts in breaking up housekeeping** and storing his goods previous to leaving is admissible. Deer Isle v. Winterport, 87 Me. 37, 32 A 718.

[b] **Subsequent conduct.**—Evidence of a party's conduct, afterward as well as before, may be received to ascertain his intention as to domicile on a particular day. Richmond v. Vassalborough, 5 Me. 396.

83. Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193; Madison v. Guilford, 85 Conn. 55, 81 A 1046; Atkinson v. Orneville, 96 Me. 311, 52 A 796; Deer Isle v. Winterport, 87 Me. 37, 32 A 718; Etna v. Brewer, 78 Me. 377, 5 A 884; Burnham v. Pittsfield, 68 Me. 580; North Yarmouth v. West Gardiner, 58 Me. 207, 4 AmR 279; Corinth v. Bradley, 51 Me. 540; Cornville v. Brighton, 39 Me. 333; Wayne v. Greene, 21 Me. 357; Thomaston v. St. George, 17 Me. 117; Waterborough v. Newfield, 8 Me. 203; Richmond v. Vassalborough, 5 Me. 396; Carnoe v. Freetown, 9 Gray (Mass.) 357; Mead v. Boxborough, 11 Cush. (Mass.) 362; Salem v. Lynn, 13 Metc. (Mass.) 544; Jericho v. Huntington, 79 Vt. 329, 65 A 87.

[a] **Thus** the declarations of a pauper, accompanying the act of leaving a town, expressing the object and purpose of making a home in another town, are admissible in evidence on the question of intention as part of the res gestæ. New-Milford v. Sherman, 21 Conn. 101; Deer Isle v. Winterport, 87 Me. 37, 32 A 718; Etna v. Brewer, 78 Me. 377, 5 A 884; Baring v. Calais, 11 Me. 463.

Conclusiveness of declarations see infra § 137.

84. Madison v. Guilford, 85 Conn. 55, 81 A 1046.

[a] **Illustration.**—In determining whether one has acquired a legal settlement, within the pauper laws, in a town to which he removed, a letter, written by him after his removal to a town from the town of his residence at the time of the death of his father, residing therein, to the executor of his father, stating that he did not want the executor to save any land for him, was properly excluded as bearing on the pauper's intent. Madison v. Guilford, 85 Conn. 55, 81 A 1046.

85. Rumford v. Upton, 113 Me. 543, 95 A 226; Corinth v. Lincoln, 34 Me. 310.

[a] **Rule applied.**—Evidence of a conversation with a person a few days before he removed from a town, in which he stated that he was going to live in another town, was not admissible where such statement did not accompany any act. Atkinson v. Orneville, 96 Me. 311, 52 A 796.

86. Salem v. Lynn, 13 Metc. (Mass.) 544.

87. Belmont v. Vinalhaven, 82 Me. 524, 20 A 89; Bangor v. Brewer, 47 Me. 97; Richmond v. Thomaston, 38 Me. 232.

88. Madison v. Guilford, 85 Conn. 55, 81 A 1046; Cushing v. Friendship, 89 Me. 525, 36 A 1001; Solon v. Embden, 71 Me. 418; Bangor v. Brunswick, 27 Me. 351.

as to the future.[89]

[§ 137] **3. Weight and Sufficiency.**[90] General rules as to the weight and sufficiency of evidence[91] are applicable in determining the settlement of paupers.[92] The fact of settlement may be proved by circumstantial evidence, as well as by direct evidence.[93] Proof that a person has resided for the statutory period in a town is prima facie sufficient to establish his settlement therein;[94] but if it is shown that such person is a married woman, it may be necessary to prove further that her husband resided in that town, or else that she was deserted by him.[95] And it has been held that proof that a person was residing in a certain town a few months before and a few months after its incorporation is not prima facie proof that he was residing there upon the day of its incorporation.[96] Mere residence of a married woman for the purpose of giving the court jurisdiction in divorce proceedings brought by her is not sufficient to show that she had acquired a settlement in the district where the divorce was granted.[97] Evidence of the habitation of a man's wife and family, while evidence of the residence of the husband,[98] is not conclusive.[99] Where the settlement of a pauper is derived by descent from his father, evidence of his father's marriage is essential;[1] but where the descent is shown, slight evidence is sufficient in the first instance to establish the legitimacy.[2]

The acts and declarations of a pauper in making a change of residence are not conclusive on that point.[3] So voting[4] and taxation, acquiesced in, and affirmed by, the payment of the tax,[5] are not conclusive on the question of settlement.

Support by town. Support of a person as a pauper by a town is not conclusive on the question of settlement,[6] although evidence of such support is admissible.[7] Where a town attempts to prevent the legal effect of a residence, by proving that the person whose settlement is in question has received supplies as a pauper, it is not enough merely to show that supplies have been furnished by the officers of the town;[8] it must also appear that the person supplied, or his family, was in need of the relief furnished.[9]

Documentary evidence. Recitals in deeds, wills, and other written instruments, although admissible on the question of a pauper's settlement,[10] are not conclusive.[11] Nor is a recital of residence in a marriage record conclusive of the fact of residence.[12]

Settlement by birth. As before stated, a pauper's birthplace is prima facie evidence of his settlement, but this may be overcome by showing a different settlement derived from his parents or subsequently acquired by him in his own right.[13]

[§ 138] **H. Removal of Paupers—1. Power of Removal Generally.** In many jurisdictions the statutes expressly provide for proceedings by which a pauper who becomes a public charge, or is likely to become so, in a town or district, other than that in which he is legally settled, may be removed to the place of his settlement;[14] and such a provision has been held constitutional.[15] This power of removal, being a power given by statute, cannot be exercised in any cases except those especially authorized,[16] and, in determining the intent of the legislature, the

89. Madison v. Guilford, 85 Conn. 55, 81 A 1046.

90. Weight and sufficiency of evidence as to:
Fraud in procuring change of settlement see supra § 130.
Payment of rent under statute providing for acquisition of settlement by leasing real estate see supra § 67.

91. See Evidence §§ 1730-1806.

92. Conn.—Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193.
Me.—Somerville v. Smithfield, 126 Me. 511, 140 A 195.
Mass.—Williamsburg v. Adams, 184 Mass. 263, 68 NE 230.
Minn.—Hewitt v. Hubbard County, 103 Minn. 41, 114 NW 261.
N. D.—Burke County v. Oakland, 56 N. D. 343, 217 NW 643.
Pa.—Allegheny County v. Pittsburgh, 281 Pa. 300, 127 A 72.
Vt.—Sandgate v. Rupert, 67 Vt. 258, 31 A 289.
[a] **Finding that neglected and dependent children** were found within a poor district is not sufficient to show legal settlement. Allegheny County v. Pittsburgh, 281 Pa. 300, 127 A 72.
[b] **Evidence held sufficient:** (1) To prove settlement in defendant town. Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193; Somerville v. Smithfield, 126 Me. 511, 140 A 195; Williamsburg v. Adams, 184 Mass. 263, 68 NE 230; Boylston v. Groton, 4 Gray (Mass.) 282; Fitchburg v. Winchendon, 4 Cush. (Mass.) 190; Peterson v. Emardville, 101 Minn. 24, 111 NW 652; Burke County v. Oakland, 56 N. D. 343, 217 NW 643; Mt. Holly v. Cavendish, 92 Vt. 38, 102 A 60; Glover v. Greensboro, 92 Vt. 34, 101 A 1016; Sandgate v. Rupert, 67 Vt. 258, 31 A 289; Green Lake County v. Leon, 190 Wis. 166, 208 NW 943. (2) To prove settlement in plaintiff town. Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10; Reading v. Weathersfield, 30 Vt. 504. (3) To show sufficient mental capacity to acquire settlement in own right. Monroe Tp. Poor Dist. v. Union Tp. Poor Dist., 25 Pa. Dist. 217, 43 Pa. Co. 513. (4) To prove military settlement. Waltham v. Newburyport, 150 Mass. 569, 23 NE 379; Newburyport v. Waltham, 150 Mass. 311, 23 NE 46.
[c] **Evidence held insufficient:** (1) To prove settlement in defendant town. Newtown v. Southbury, 100 Conn. 251, 123 A 278; Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50; Liberty v. Levant, 122 Me. 300, 119 A 811; Uxbridge v. Northbridge, 131 Mass. 454; Adams v. Swansea, 116 Mass. 591; Hewitt v. Hubbard County, 103 Minn. 41, 114 NW 261; Highland Grove v. Clay County, 101 Minn. 11, 111 NW 651. (2) To prove settlement in plaintiff town. Ellsworth v. Waltham, 125 Me. 214, 132 A 423; Dover v. Brighton, 2 Gray (Mass.) 482. (3) To prove derivative settlement. Eagle Lake v. Ft. Kent, 117 Me. 134, 103 A 10. (4) To show military settlement in defendant town. South Scituate v. Scituate, 155 Mass. 428, 29 NE 639.

93. Greenfield v. Camden, 74 Me. 56; Ayres' Case, 4 Pa. Co. 499. And see cases supra note 92.

94. Scott County v. Polk County, 61 Iowa 616, 14 NW 206, 16 NW 726; Belmont v. Morrill, 73 Me. 231.

95. Scott County v. Polk County, 61 Iowa 616, 14 NW 206, 16 NW 726; Harrison v. Lincoln, 48 Me. 205.
[a] **Proof of marriage followed by cohabitation** makes out a prima facie case of the settlement of a wife in the place of her husband's settlement. Harrison v. Lincoln, 48 Me. 205.

96. Kirkland v. Bradford, 30 Me. 452.

97. Gibson Dist. Poor Directors v. Benton Poor Dist. Poor Directors, 85 Pa. Super. 377.

98. See supra § 133.

99. Me.—Woodstock v. Canton, 91 Me. 62, 39 A 281; Bangor v. Frankfort, 85 Me. 126, 26 A 1088; Burlington v. Swanville, 64 Me. 78; Smithfield v. Belgrade, 19 Me. 387; Greene v. Windham, 13 Me. 225; Raymond v. Harrison, 11 Me. 190; Richmond v. Vassalborough, 5 Me. 396; Hallowell v. Saco, 5 Me. 143.
Mass.—Fitchburg v. Winchendon, 4 Cush. 190; Berkeley v. Taunton, 19 Pick. 480; Cambridge v. Charlestown, 13 Mass. 501.
N. Y.—Syracuse v. Onondaga County, 25 Misc. 371, 55 NYS 634.
Vt.—Tunbridge v. Norwich, 17 Vt. 493.
Eng.—West Ham Union v. Cardiff Union, [1895] 1 Q. B. 766.

1. Landaff v. Atkinson, 8 N. H. 532.

2. Landaff v. Atkinson, supra.

3. Wayne v. Greene, 21 Me. 357; Thomaston v. St. George, 17 Me. 117.
[a] **Acts inconsistent with declarations.**—Statements of a pauper made many years after the date to which they refer, as to his intention to remain in the place where he was working, are not decisive if inconsistent with his acts at the time. Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50.
Admissibility of declarations and admissions see supra § 134.

4. Monroe v. Hampden, 95 Me. 111, 49 A 604; Belmont v. Vinalhaven, 82 Me. 524, 20 A 89; East Livermore v. Farmington, 74 Me. 154.
Admissibility of evidence as to voting see supra §§ 133, 134.

5. Monroe v. Hampden, 95 Me. 111, 49 A 604.

6. Barre v. Morristown, 4 Vt. 574.

7. See supra § 133.

8. Veazie v. Chester, 53 Me. 29.

9. Veazie v. Chester, supra.

10. See supra § 135.

11. Ward v. Oxford, 8 Pick. (Mass.) 476.

12. Rockport v. Rockland, 109 Me. 512, 84 A 1077.

13. See supra § 41.
[a] **Evidence held sufficient to show settlement by birth.**—Reg. v. Crediton, E. B. & E. 231, 96 ECL 231. 120 Reprint 494.

14. See statutory provisions.

15. Lovell v. Seeback, 45 Minn. 465, 48 NW 23, 11 LRA 667.

16. Londonderry v. Acton, 3 Vt. 122.
[a] **In Connecticut** (1) it has been held that, in the absence of statutory

general rule that statutes are to be construed as a whole[17] applies to statutes relating to the removal of paupers.[18] The fact that the town to which the removal of the pauper is sought has provided a place for his support and requested his return will not bar a proceeding by the town in which he resides to compel his removal.[19]

[§ 139] **2. Persons Removable[20]—a. In General.** The question who are removable under the pauper acts is a matter of statutory regulation, and as every person should be permitted to take up his abode where his inclination directs, only those persons who fall within the provisions of the statute are subject to removal.[21]

Insanity of a pauper does not prevent his removal to the place of his settlement.[22]

[§ 140] **b. Persons Chargeable or Likely To Become Chargeable—(1) Persons Chargeable.** Where the statutes provide for the removal of persons who have become chargeable as paupers, to the place of their settlement,[23] it is necessary that they should be actually chargeable before their removal is authorized.[24] The fact that a town actually furnishes relief to a person has been held insufficient to prove that he is chargeable as a pauper, but there must be a legal obligation to furnish relief.[25] In some jurisdictions a previous order for relief has been held essential to an order of removal based on the ground that a person has become chargeable,[26] except in cases of emergency;[27] and the order for relief is conclusive evidence of the fact that the person had become chargeable,[28] unless such order was taken out, not at the instance of the pauper, nor in his behalf, but merely for the purpose of laying the foundation for obtaining a removal order;[29] but it is not necessary that the order for relief should have been applied for by the pauper himself, if it was applied for by some one in his behalf.[30]

Chargeability by reason of "sickness or accident." In England a statutory provision has prohibited warrants for the removal of "any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability."[31]

[§ 141] **(2) Persons Likely To Become Chargeable.** Some statutes provide for the removal of persons who are likely to become chargeable,[32] and when removal is sought on this ground no previous order for relief is necessary.[33] While the phrase "likely to become chargeable" is not restricted to persons who have actually become public charges,[34] the mere possibility that a person will become chargeable as a pauper is not sufficient to authorize his removal; there must be a prospect or strong

authority, where a pauper in need of relief resides in another town than that in which he is legally settled, neither the officers of the town in which he resides nor the officers of the town in which he is legally settled, and who are by statute liable for his support, have authority to remove him to the town of his settlement. Backus v. Dudley, 3 Conn. 568 (which was an action of trespass by a pauper against officers who had forcibly removed him against his will). (2) But in a later case, while the want of power to remove paupers in the absence of statutory authority was recognized, it was held, under statutes providing that paupers could be removed for support to places designated by the selectmen of the town in which they were settled, and for the removal of paupers who became chargeable in another town than that in which they were settled to the town of their settlement, by proceedings before justices of the peace at the instance of the former town, that where a pauper becomes a public charge in a town other than that of his settlement the selectmen of the town of his settlement may, without legal process, remove him to their town for support. Harrison v. Gilbert, 71 Conn. 724, 43 A 190.

[b] **In Illinois** is has been held, under a statute providing that the town or county in which a pauper has his legal settlement shall be liable to reimburse another town in which the pauper resides for support furnished to him, on failure of the former town to remove the pauper after notice from the latter town, but failing to provide for any proceedings for such removal, that the officers of the town of the pauper's settlement have implied power by reason of its liability for his support to remove him to its territory for support. Bristol v. Fox, 159 Ill. 500, 42 NE 88; Freeport v. Stephenson County, 41 Ill. 495.

17. See Statutes [36 Cyc 1128].

18. Cornish v. Parsonsfield, 22 Me. 433.

19. Guilford v. Abbott, 17 Me. 335.

20. **Marriage procured to change settlement** see supra § 130.

Who are paupers in general see supra §§ 1–6.

21. Edenburg Poor Dist. v. Strattanville Poor Dist., 5 Pa. Super. 516 [aff 188 Pa. 373, 41 A 589]. And see cases infra § 140 et seq.

22. Randolph v. Braintree, 10 Vt. 436; Londonderry v. Windham, 2 Vt. 149.

23. See statutory provisions.

24. Milton Overseers v. Williamsport Overseers, 9 Pa. 46; Berlin v. Morristown, 20 Vt. 574; Doncaster Union v. Woolwich Union, [1915] 1 K. B. 563; Rex v. St. Mary Westport, 3 T. R. 44, 100 Reprint 446.

[a] **A pauper become chargeable in a town other than his legal settlement who wanders to another town** may be returned to the former which is bound to maintain him until he is removed to the place of his settlement under an order. Milton v. Williamsport, 9 Pa. 46.

[b] **A minor pauper, becoming chargeable, who has a father able to support him,** may be removed to his last legal settlement, although his father resides in another town in the same state. Berlin v. Morristown, 20 Vt. 574.

[c] **Abandoned wife.**—Upon abandonment by her husband, the wife becomes head of the family, and aid furnished to her children at her request is aid furnished to her, so that she is removable to the place of her settlement. Rockingham v. Springfield, 59 Vt. 521, 9 A 241.

25. Hardwick v. Pawlet, 36 Vt. 320; Ludlow v. Weathersfield, 18 Vt. 39.

[a] **In England** (1) where a person receives relief as a pauper on application for such relief, he is deemed to be actually chargeable so as to warrant his removal. Rex v. Ampthill, 2 B. & C. 847, 9 ECL 365, 107 Reprint 596. (2) But where relief was given to a son and grandson living in a separate house from the father, it was held that the father and the other children living with him could not be removed as having become chargeable. Rex v. St. Mary Westport, 3 T. R. 44, 100 Reprint 446.

26. Elk Tp. v. Jordan Tp., 10 Pa. Co. 245.

27. Elk Tp. v. Jordan Tp., supra.

28. Cumberland Tp. v. Jefferson Tp., 25 Pa. 463.

29. Edenburg Poor Dist. v. Strattanville Poor Dist., 5 Pa. Super. 516 [aff 188 Pa. 373, 41 A 589]; Walker Tp. v. Porter Tp., 7 Pa. Dist. 601.

30. Beaver Tp. v. Centre Tp., 41 Pa. Co. 375.

31. See statutory provisions.

[a] **Statute construed and applied.**—The statute applies only in case of the sickness of the person removed, and not to removal of the wife and children who became chargeable to respondent parish after the husband, by reason of sickness, left his wife and children in such parish and went to a hospital in another parish. Reg. v. St. George, 2 B. & S. 317, 110 ECL 317, 121 Reprint 1091.

[b] **What constitutes "sickness."**—(1) Blindness is "sickness" within the meaning of the statute. Reg. v. Bucknell, 3 E. & B. 587, 77 ECL 587, 118 Reprint 1261. (2) Pregnancy is not necessarily "sickness" within the meaning of the statute. Reg. v. Huddersfield Tp., 7 E. & B. 794, 90 ECL 794, 119 Reprint 1441.

[c] **Warrant held conclusive** as to permanency of sickness or accident. Reg. v. St. Mary, etc., Parish, 3 B. & S. 432, 113 ECL 432, 122 Reprint 163.

[d] **Sufficiency of order of removal.**—Reg. v. Llandogget, 13 L. T. O. S. 115.

[e] **Facts held sufficient to show right to remove.**—Reg. v. Cuckfield Parish, 5 E. & B. 523, 85 ECL 523, 119 Reprint 575.

32. See statutory provisions; and cases infra this note.

[a] **A person falling into distress in a town is likely to become chargeable,** although a place may have been provided for his support in another town. Guilford v. Abbott, 17 Me. 335.

[b] **Facts held sufficient** to show that a person was likely to become chargeable. Philadelphia v. Bristol Tp., 6 Serg. & R. (Pa.) 562.

[c] **Facts held insufficient** to show that a person was likely to become chargeable. Cornish v. Parsonsfield, 22 Me. 433; Hartley Tp. Poor Dist. v. Adams Tp. Poor Dist., 44 Pa. Co. 649; Beaver Tp. Poor Dist. v. Adams Tp. Poor Dist., 44 Pa. Co. 208.

33. Eastside Borough v. Denison Tp., 42 Pa. Super. 523 [aff 34 Pa. Co. 533].

34. Cornish v. Parsonsfield, 22 Me. 433.

probability.[35] So a person cannot be considered as likely to become chargeable while he has the means of supporting himself, or persons liable for his support are able to furnish such support;[36] and this, it has been held, although relief has actually been furnished to him.[37] The likelihood that the pauper will become chargeable must be from one of the causes specified in the statute,[38] and must depend upon his condition at the time when the proceedings for removal are taken.[39]

[§ 142] **(3) Freeholders.** The statutes providing generally for the removal of persons chargeable, or likely to become chargeable,[40] do not authorize the removal of a person from his freehold estate, although the freeholder has not gained a settlement in the town or poor district in which his freehold is situated,[41] whether the freehold be a legal or equitable freehold;[42] and it has been held that this rule obtains, although the freeholder has actually applied for relief.[43] A tenant in dower has been held irremovable,[44] even though the dower has not been assigned.[45] On the other hand, it has been held that a tenant in dower which has not been assigned has not such an interest as will render her irremovable.[46] The status of irremovability does not attach on account of the ownership of other than a freehold estate.[47] And if the pauper does not live on his freehold it seems that he is removable.[48] It has also been held that a lunatic needing support may be removed to his place of settlement, although he has a reversionary estate in fee in the town where he resides.[49]

[§ 143] **c. Persons Wrongfully Brought into Place.** In some jurisdictions it is provided by statute that, where a poor person who has no settlement in the state and no relation chargeable with his support is brought from the county where he has resided or been supported into a county where he does not belong, he may be removed to the county from which he was brought.[50]

[§ 144] **d. Transient or Casual Paupers.**[51] In some jurisdictions an order for removal of a pauper can be made only when the pauper has come to reside in the town procuring such order, and cannot be made in the case of a transient or casual pauper.[52]

[§ 145] **e. Individual Members of Families—(1) Husband and Wife.** It has been held, on the ground of public policy, and as a principle of the common law, recognized by statutory provisions in some jurisdictions, that paupers cannot be removed where such removal would result in the separation of husband and wife,[53] and the fact that they consent to

35. Cornish v. Parsonsfield, supra; Danville v. Wheelock, 47 Vt. 57; Pomfret v. Barnard, 44 Vt. 527; Londonderry v. Acton, 3 Vt. 122; Teelby v. Willerton, 3 Burn Just. 444.

36. Chelsea v. Brookfield, 27 Vt. 587; Ludlow v. Weathersfield, 18 Vt. 39; Randolph v. Braintree, 10 Vt. 436. See Perth Amboy Tp. Overseers of Poor v. Piscataway Tp. Overseers of Poor, 19 N. J. L. 173 (slave not removable where master was able to support him).

[a] **Rule applied.**—A married woman is not subject to removal where her husband has an equity of redemption in real estate, such equity being worth two hundred and eighty-five dollars. Chelsea v. Brookfield, 27 Vt. 587.

[b] **Husband supported by his family** is not likely to become chargeable as a pauper, and cannot be removed. Danville v. Wheelock, 47 Vt. 57.

[c] **Rule held inapplicable.**—Where a husband who had abandoned his wife owned an interest, not freehold, in land which yielded but a small share of what was necessary for her support, and it did not appear that the land could have been made more productive, the wife was subject to removal as a person likely to become chargeable to the town. Winhall v. Landgrove, 45 Vt. 376.

37. Ludlow v. Weathersfield, 18 Vt. 39.

38. Walpole v. West Cambridge, 8 Mass. 276.

39. Turbett Tp. Overseers of Poor v. Tuscarora Tp. Overseers of Poor, 72 Pa. Super. 597; Plymouth v. Reading, 50 Vt. 709; Danville v. Wheelock, 47 Vt. 57; Hartland v. Windsor, 29 Vt. 354; Hartford v. Hartland, 19 Vt. 392; Londonderry v. Acton, 3 Vt. 122.

40. See supra §§ 140, 141.

41. Somerset v. Dighton, 12 Mass. 383; Granby v. Amherst, 7 Mass. 1; Salem v. Andover, 3 Mass. 436; Peacham v. Waterford, 46 Vt. 154; Dummerston v. Newfane, 37 Vt. 9; Randolph v. Braintree, 10 Vt. 436; Brookfield v. Hartland, 6 Vt. 401; Londonderry v. Acton, 3 Vt. 122; Rex v. Matlock, 1 A. & E. 124, 28 ECL 80, 110 Reprint 1155; Rex v. Brington, 7 B. & C. 546, 14 ECL 246, 108 Reprint 826; Rex v. Martley, 5 East 40, 102 Reprint 984; Rex v. Burcleer Parish, 10 Mod. 430, 88 Reprint 794; In re Ryslip Parish, 2 Salk. 524, 91 Reprint 446; Rex v. Butterton, 6 T. R. 554, 101 Reprint 699; Ashbrittle v. Wyley, 19 Vin. Abr. 372; Granborough v. Mursley, 19 Vin. Abr. 371.

[a] **Tenant in common** is within the rule. Rex v. Brington, 7 B. & C. 546, 14 ECL 246, 108 Reprint 826.

42. Walden v. Cabot, 25 Vt. 522.

[a] **Equitable estate** of freehold renders the owner irremovable. Walden v. Cabot, 25 Vt. 522.

43. Rex v. Martley, 5 East 40, 102 Reprint 984.

44. Brookfield Overseers of Poor v. Hartland Overseers of Poor, 6 Vt. 401.

45. Dummerston v. Newfane, 37 Vt. 9.

46. Rex v. Northweald Bassett, 2 B. & C. 724, 9 ECL 315, 107 Reprint 552.

47. Winhall v. Landgrove, 45 Vt. 376; Middletown v. Pawlet, 4 Vt. 202.

48. Dunchurch v. South Kilworth, W. Bl. 596, 96 Reprint 345.

49. Johnson v. Huntington, 1 Day (Conn.) 212.

50. See statutory provisions.

[a] **Petition for removal** must show that the pauper was brought into the county by some person who knew him to be indigent. Merrimack County v. Sullivan County, 45 N. H. 181.

[b] **Knowledge necessarily implies culpable intent.**—Sullivan County v. Grafton County, 55 N. H. 339.

[c] **Fraudulent intent not shown.**—Goshen v. Hillsborough County, 45 N. H. 139.

[d] **In Pennsylvania** (1) if the overseers of the poor of a township, in attempting to remove a pauper to the place of his last settlement, leave him in a township not chargeable with his support, he may be returned to them by order of removal. Kelly Tp. v. Union Tp., 5 Watts & S. 535; Nicholson Tp. Poor Dist., v. Nicholson Borough Poor Dist., 33 Pa. Super. 358. (2) A person having a settlement in the state, who becomes chargeable in a town not liable for his support and is wrongfully allowed by it to wander into another, may be returned to the first town in which he became chargeable. Milton v. Williamsport, 9 Pa. 46. (3) If the overseers of one township send a person applying for relief into another township, an order for removal to the former township will be granted. Braintrim Tp. v. Windham Tp., 10 Pa. Co. 250.

[e] **In Vermont,** where a pauper is fraudulently induced by the authorities of the town to which he becomes chargeable to remove to another town with the intent that the latter town shall be burdened with his support, the remedy of the latter town is not by obtaining an order for removal to the town from which he has fraudulently removed. Charlotte v. Colchester, 20 Vt. 91.

Damages and penalties for wrongfully bringing pauper into state, county, or town see infra §§ 166–173.

51. Duty to relieve generally see supra § 6.

Liability for support see infra § 238.

52. See statutory provisions.

[a] **Transient person.**—"A wanderer, ever on the tramp." Middlebury v. Waltham, 6 Vt. 200, 203.

[b] **Resident pauper** is one who has a legal settlement in some town in the state, and is residing in a town in which aid is needed, and liable to be removed to the town of legal settlement, or to an order of removal to such town. Topsham v. Williamstown, 60 Vt. 467, 12 A. 112.

[c] **Persons held to be transient or casual paupers.**—(1) A person who goes to a town, other than that in which his family resides, to work and does actually work under a contract for labor is a transient person, and not subject to removal. Bristol v. Rutland, 10 Vt. 574. (2) Other illustrations of transient paupers. Brownington v. Charleston, 32 Vt. 411; Ryegate v. Wardsboro, 30 Vt. 746; Sharon v. Cabot, 29 Vt. 394; Sutton v. Cabot, 19 Vt. 522; Danville v. Putney, 6 Vt. 512 (person committed to jail from another town); Rex v. St. Lawrence, 4 B. & Ald. 660, 6 ECL 643, 106 Reprint 1078; Tomlinson v. Bental, 5 B. & C. 738, 11 ECL 660, 108 Reprint 274; Rex v. St. James, 10 East 25, 103 Reprint 685.

[d] **Persons held not to be transient or casual paupers.**—Berlin v. Worcester, 50 Vt. 23; Pittsford v. Chittenden, 44 Vt. 382; Reg. v. Wakefield Union, 48 J. P. 326; Rex v. Oldland, 6 N. & M. 529, 36 ECL 650.

[e] **In New York** a poor person having a settlement in one place, who is furnished relief by the authorities of another place in which she has not resided for a period of time necessary to acquire a settlement, cannot be removed against her will to the place of her settlement. Onondaga County v. Amsterdam, 139 App. Div. 877, 124 NYS 553.

53. Cascade v. Lewis, 148 Pa. 333,

be separated has been held immaterial.[54] It follows that, where a family becomes a public charge or is likely to become so, and the husband is unsettled, the wife cannot be separated from him and removed to the place of her maiden settlement.[55] Nor can the wife be removed to the settlement of the husband without the removal of the husband also.[56] Similarly, the husband cannot be removed alone to his place of settlement and separated from his wife.[57] So if the husband has acquired a status of irremovability in a parish other than that of his legal settlement, such status also attaches to his wife and prevents her removal alone;[58] and where the wife has a status of irremovability, as by her ownership of a freehold,[59] such status attaches to the husband and he cannot be removed and separated from her.[60]

Contrary doctrine. In some jurisdictions the courts have refused to recognize any doctrine of public policy which forbids the removal of a wife to the place of her maiden settlement where the husband who is unsettled is unable to support her.[61]

Desertion by husband. Where the husband, if unsettled, has deserted his wife, she, together with her children, may be removed to the place of her maiden settlement,[62] or if the husband is settled, she may be removed to his place of settlement.[63] But there is no desertion within the above rules, where husband and wife live apart by mutual agreement,[64] or where the husband is confined in jail by legal process, the wife and family continuing their residence.[65]

Void marriage. Where the marriage is void, this principle of irremovability does not, of course, apply.[66]

[§ 146] **(2) Parent and Child.** A person of full age, although residing with his or her parents, may, of course, be removed to his or her place of settlement;[67] and this is true, although such person is non compos mentis.[68] So a minor child having a separate settlement from his parents, if he is not of such tender years or physical or mental condition as to require a parent's care, may be removed,[69] especially where he has been emancipated.[70] Where minor children reside with their parents and have their settlement in the same place, and the parents become chargeable, the children may be removed with the parents.[71]

Minors of tender age or incapacitated. Minor children whose tender age or physical or mental weakness make it necessary that they should have the care and control of their parents, making it improper that they should be separated, are irremovable from their parents.[72] A child of tender years or within the age of nurture requires a mother's care and cannot be separated from her;[73] hence, in case of the removal of the mother, such children should

23 A 1003 [aff 11 Pa. Co. 282]; Armstrong v. Berwick Borough, 10 Pa. Co. 337; Elk Tp. v. Jordan Tp., 10 Pa. Co. 245; Tunkhannock Borough v. Montrose, 3 LackJur 345 [aff 180 Pa. 582, 37 A 100]; Danville v. Wheelock, 47 Vt. 57; Peacham v. Waterford, 46 Vt. 154; Newark v. Sutton, 40 Vt. 261; Dummerston v. Newfane, 37 Vt. 9; Hartland v. Windsor, 29 Vt. 354; Rupert v. Winhall, 29 Vt. 245; Northfield v. Roxbury, 15 Vt. 622; Hartland v. Pomfret, 11 Vt. 440; Poor Law Comrs. v. Liverpool, L. R. 5 Q. B. 79; Rex v. St. Mary, 1 B. & Ad. 201, 20 ECL 454, 109 Reprint 762; Rex v. Leeds, 4 B. & Ald. 498, 6 ECL 576, 106 Reprint 1019; Rex v. Cottingham, 7 B. & C. 603, 14 ECL 271, 108 Reprint 852; Rex v. Carleton, Burr. S. Cas. 813; Rex v. Aythrop Rooding, Burr. S. Cas. 412; St. Michael Parish v. Nunny Parish, Str. 544, 93 Reprint 689.

[a] **Rule applied.**—Where a husband was confined in jail for debt, his wife having the privilege of visiting him, it was held that she could not be removed to the place of the husband's settlement and thus separated from her husband. Reg. v. Stogumber, 9 A. & E. 622, 36 ECL 330, 112 Reprint 1347.

54. Rex v. Leeds, 4 B. & Ald. 498, 6 ECL 576, 106 Reprint 1019. See Reg. v. Leeds Tp., 5 Q. B. 916, 48 ECL 916, 114 Reprint 1493 (even if the wife can be removed with her consent, such consent is not to be inferred where, on their examination at the same time, the husband consents but the wife says nothing). But see Reg. v. Preston Union Guardians of Poor, 11 Q. B. D. 113 (rule inapplicable where the wife was a lunatic and confined in the workhouse at the time removal to her husband's last place of settlement was ordered); Rex v. Eltham, 5 East 113, 102 Reprint 1012 (where an order removing the wife of a Scotchman who had not gained a settlement in England to the place of her last legal settlement was held good, where it stated that it was made with the consent of the husband and wife).

55. Armstrong v. Berwick, 10 Pa. Co. 337; Elk Tp. v. Jordan Tp., 10 Pa. Co. 245; Tunkhannock Borough v. Montrose, 3 LackJur 345 [aff 180 Pa. 582, 37 A 100]; Danville v. Wheelock, 47 Vt. 57; Peacham v. Waterford, 46 Vt. 154; Hartland v. Windsor, 29 Vt. 354; Rupert v. Winhall, 29 Vt. 245; Northfield v. Roxbury, 15 Vt. 622; Reg. v. Stogumber, 9 A. & E. 622, 36 ECL 330, 112 Reprint 1347; Rex v. St. Mary, 1 B. & Ad. 201, 20 ECL 454, 109 Reprint 762; Rex v. Leeds, 4 B. & Ald. 498, 6 ECL 576, 106 Reprint 1019; Rex v. Cottingham, 7 B. & C. 603, 14 ECL 271, 108 Reprint 852; Rex v. Carleton, Burr. S. Cas. 813; Rex v. Aythrop Rooding, Burr. S. Cas. 412; St. Michael Parish v. Nunny Parish, Str. 544, 93 Reprint 689.

56. Cascade Overseers v. Lewis Overseers, 148 Pa. 333, 23 A 1003 [aff 11 Pa. Co. 282]; Poor Law Comrs. v. Liverpool, L. R. 5 Q. B. 79; Rex v. Cottingham, 7 B. & C. 603, 14 ECL 271, 108 Reprint 852.

[a] **Order naming wife only.**—But where a husband and wife were living together at the time when an order was made for the removal of the wife to the place of the husband's settlement, and there was nothing to show that either objected to the order, or that the husband did not in point of fact accompany his wife, the order was not invalid as separating the husband from the wife in violation of the statutory provision. Cascade Overseers v. Lewis Overseers, 148 Pa. 333, 23 A 1003 [aff 11 Pa. Co. 282].

57. Danville v. Wheelock, 47 Vt. 57.

58. Ipswich Union v. West Ham Union, 20 Q. B. D. 407; Reg. v. Kingston Union, 21 L. T. Rep. N. S. 488.

59. See supra § 142.

60. Dummerston v. Newfane, 37 Vt. 9.

61. Otsego Overseers of Poor v. Smithfield Overseers of Poor, 6 Cow. (N. Y.) 760. But see Sherburne Overseers of Poor v. Norwich Overseers of Poor, 16 Johns. (N. Y.) 186, 187 ("It would be with great difficulty, and extreme reluctance, that I should ever subscribe to the doctrine, that a wife is to be removed from her husband, merely because he is unable to maintain her").

62. Reading Overseers v. Cumree Overseers, 5 Binn. (Pa.) 81; Rockingham v. Springfield, 59 Vt. 521, 9 A 241; Peacham v. Waterford, 46 Vt. 154; Winhall v. Landgrove, 45 Vt. 376; Wilmington v. Jamaica, 42 Vt. 694; Rupert v. Winhall, 29 Vt. 245; Bethel v. Tunbridge, 13 Vt. 445; Much Hoole Tp. Overseers of Poor v. Preston Tp. Overseers of Poor, 17 Q. B. 548, 79 ECL 548, 117 Reprint 1391; Reg. v. St. Marylebone, 16 Q. B. 352, 71 ECL 352, 117 Reprint 914; Rex v. Cottingham, 7 B. & C. 603, 14 ECL 271, 108 Reprint 852.

63. Peacham v. Waterford, 46 Vt. 154; Wilmington v. Jamaica, 42 Vt. 694; Reg. v. Manchester, 5 Wkly. Rep. 751. But see Poor Law Comrs. of Ireland v. Liverpool Parish, L. R. 5 Q. B. 79 (when husband and wife were Irish, and neither of them had acquired a settlement in England, and husband had deserted family, wife could not be removed to Ireland, under 8 & 9 Vict. c 117 § 2, without the husband).

64. Danville v. Wheelock, 47 Vt. 57.

65. Peacham v. Waterford, 46 Vt. 154.

66. Elk Tp. v. Jordan Tp., 10 Pa. Co. 245.

67. Rupert v. Winhall, 29 Vt. 245; Reg. v. St. Giles without Cripplegate, 17 Q. B. 636, 79 ECL 636, 117 Reprint 1425.

68. Randolph v. Braintree, 10 Vt. 436.

69. Morristown v. Fairfield, 46 Vt. 33.

70. Berlin v. Morristown, 20 Vt. 574.

[a] **Thus** a minor pauper residing apart from his father is subject to removal to the town of his legal settlement, although his father is of sufficient ability to support him. Berlin v. Morristown, 20 Vt. 574.

71. Elizabethtown v. Springfield Tp., 3 N. J. L. 67; Burlington v. Essex, 19 Vt. 91; Bethel v. Tunbridge, 13 Vt. 445.

72. Morristown v. Fairfield, 46 Vt. 33.

73. Reg. v. Birmingham, 5 Q. B. 210, 48 ECL 210, 114 Reprint 1228; Rex v. Brington, 7 B. & C. 546, 14 ECL 246, 108 Reprint 826; Skefforth v. Walford, 2 Bott Poor L. 11 (holding that a bastard under the age of seven years was not removable from its mother).

be removed with her.[74] The rule is established for the benefit of the child, and therefore cannot be dispensed with by the mother's consent.[75] If the child and parent are separated, as by the desertion or abandonment of the mother, the child, although within the age of nurture, is removable.[76]

Statutory provisions. Other cases involving the removability of children and depending upon the construction of particular English statutes are collected in the note below.[77]

[§ 147] **f. Status of Irremovability Acquired by Residence.**[78] In England it has been provided by statute[79] that by a residence in a parish for a specified length of time a pauper acquires a status of irremovability, although such residence does not confer on him a settlement in the parish.[80] Under such statutes, it is not necessary that the residence of the pauper should be in a house appropriated to human habitation.[81] Where the continuity of the residence is broken, the status of irremovability is lost,[82] and where a husband who has acquired by residence a status of irremovability breaks his residence, his wife does not remain irremovable.[83] But a mere temporary absence animo revertendi does not break the continuity of the residence.[84] The acquisition of a status of irremovability by resi-

74. Paterson Tp. Overseers v. Byram Tp. Overseers, 23 N. J. L. 394; Elizabethtown v. Springfield Tp., 3 N. J. L. 67; Bucks County Directors of Poor v. Philadelphia Guardians of Poor, 1 Serg. & R. (Pa.) 387; Bethel v. Tunbridge, 13 Vt. 445. See Landgrove v. Plymouth, 52 Vt. 503 (holding that upon an order for the removal of a pauper, and his son and daughter, it will be presumed that the son and daughter are minors and unemancipated).

[a] **Children under six years of age,** living with their mother, are not to be separated from her, but may be removed with her to her settlement, without inquiring into their settlement. Paterson Tp. Overseers v. Byram Tp. Overseers, 23 N. J. L. 394.

75. Reg. v. Birmingham, 5 Q. B. 210, 48 ECL 210, 114 Reprint 1228.

76. Tunbridge v. Eden, 39 Vt. 17; Reg. v. St. Clement Danes, 3 B. & S. 143, 113 ECL 143, 122 Reprint 55; Reg. v. Combs, 5 E. & B. 892, 85 ECL 892, 119 Reprint 713.

77. See cases infra this note.

[a] **Particular statutes construed.**—(1) Under 11 & 12 Vict. c 111, a child over sixteen years of age residing with her father, and who has no settlement other than that derived from him at the time she became sixteen, cannot be removed to her place of settlement if the father is not removable. Mitford, etc., Union v. Wayland Union, 25 Q. B. D. 164. (2) The object of the statute was to prevent the separation of parent and child. Whether a child is removable depends upon whether the parent is removable. Reg. v. St. Olave's Union, L. R. 9 Q. B. 38. (3) Where a nineteen-year-old girl, unemancipated and having no settlement other than that of her mother, became chargeable after residing more than a year in respondent union, she was removable to her mother's place of settlement. Reg. v. St. Olave's Union, supra. (4) The fact that the guardians of a poor law union by whom a child is maintained have, acting under Poor Law Act (1899) § 1, passed a resolution by which all the rights and powers of the parent of such child become vested in them, does not, even where they have not rescinded the resolution, deprive them of the right to obtain an order for the removal of the child to the place of its last legal settlement. Wantage Union v. Bristol Union, [1907] 1 K. B. 68. (5) Under the provisos of Poor Removal Act (1846 and 1848) § 1 declaring that when any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever she or he is removable, and shall not be removable when he or she is not removable, the word "children" includes both legitimate and illegitimate children. Braintree Union v. Rochford Union, 81 L. J. K. B. 251; Fulham Parish Guardians of Poor v. Woolwich Union Guardians of Poor, [1907] A. C. 255; Braintree Union v. Rochford Union, supra. (6) Other cases construing and applying statutes. West Ham Union v. St. Matthew, [1894] A. C. 230; Reg. v. St. Mary, L. R. 5 Q. B. 445; Reg. v. Stafford, 10 A. & E. 417, 37 ECL 232, 113 Reprint 159; Reg. v. Combs, 5 E. & B. 892, 85 ECL 892, 119 Reprint 713; Maidstone Union v. Wandsworth Union, 95 L. T. Rep. N. S. 125.

78. Acquisition of settlement acquired by residence see supra §§ 83-95.

79. See statutory provisions.

80. See cases infra this note.

[a] **Retrospective effect of statute.**—(1) It has been held that 24 & 25 Vict. c 55 § 1, was retrospective as regards a residence of a pauper, and that a residence for the required length of time prior to the passage of the act conferred a status of irremovability. Preston v. Blackburn, 3 B. & S. 793, 110 ECL 793, 122 Reprint 297; Reg. v. Hendon, 9 Jur. N. S. 1197. (2) 20 Vict. c 19 § 1, relating to residence in a place which was extraparochial, was not retroactive. Reg. v. Saint Sepulchre Tp., 1 E. & E. 813, 102 ECL 813, 120 Reprint 1115.

[b] **Statutes construed and applied.**—(1) Where a married woman who had resided in a parish for part of a year with her husband, a foreigner without a settlement, and, after the husband went abroad, intending to return, the wife continued to reside with her children in the parish for the remainder of the year, and afterward, during her husband's absence, became chargeable to the parish, she could not be removed therefrom under a statute providing that no person shall be removed from any parish in which such person shall have resided for one year previous to the application for removal. Tewkesbury Union v. Birmingham, [1904] 2 K. B. 395. To same effect Reg. v. St. George-in-the-East, L. R. 5 Q. B. 364. (2) A married woman, who on account of the misconduct of her husband has been obliged to leave him, has in law been sent away by him, and has therefore been deserted by her husband within the meaning of Poor Removal Act (1861) § 3 so as to be able to acquire the status of irremovability by residence apart from her husband in a parish for the period of one year required by that section as amended by Poor Law Amendment Act (1866) § 17. Eastbourne v. Croydon, [1910] 2 K. B. 16. (3) A married woman who has been deserted by her husband does not cease to be "deserted" within the meaning of Poor Removal Act (1861) § 3 by the fact that she has obtained a separation order under Summary Jurisdiction (Married Women) Act (1895) § 3; the desertion continues until the husband returns to cohabitation. Eastbourne v. Croydon, supra. (4) Residence as widow coalesces with residence as wife to make up the five years' residence which will render a pauper irremovable under 9 & 10 Vict. c 66. Reg. v. Glossop, 12 Q. B. 117, 64 ECL 117, 116 Reprint 810; Reg. v. Stowmarket, 1 Wkly. Rep. 147. (5) Under Vict. 9 & 10 c 66 § 1, as amended by 11 & 12 Vict. c 111, where a wife and her children reside for more than five years in a parish, but during that time the husband is absent serving as a soldier, the wife and children do not acquire a status of irremovability. Reg. v. Kingston Union, 21 L. T. Rep. N. S. 488. (6) Other cases in which the statute has been applied to particular facts. Southwark Union v. London Union, [1906] 2 K. B. 112; Reg. v. Cookham Union, 9 Q. B. D. 522; Reg. v. Maidstone Union, 5 Q. B. D. 31; Machynlleth Union v. Pool, L. R. 4 Q. B. 592; Reg. v. Norwood, L. R. 2 Q. B. 457; Reg. v. Forncett St. Mary, 12 Q. B. 160, 64 ECL 160, 116 Reprint 827; Rex v. Birmingham, 14 East 251, 104 Reprint 597; Reg. v. East Stonehouse, 3 E. & B. 596, 77 ECL 596, 118 Reprint 1265; Reg. v. Bennett, 3 E. & B. 341, 77 ECL 341, 118 Reprint 1169; Reg. v. Saint Ann, 2 E. & B. 440, 75 ECL 440, 118 Reprint 832; Reg. v. Cudham, 1 E. & E. 409, 102 ECL 409, 120 Reprint 963; Reg. v. Bolton-le-Sands, 12 Jur. N. S. 371; Reg. v. Great Salkeld, 33 L. J. M. C. 185.

81. Reg. v. Saint Leonard, L. R. 1 Q. B. 21.

82. St. Olave's Union Guardians of Poor v. Canterbury Union Guardians of Poor, [1897] 1 Q. B. 682; Newark Union v. Glanford Brigg Union, 2 Q. B. D. 522; Reg. v. Worcester Union Guardians of Poor, L. R. 9 Q. B. 340; Reg. v. St. Ives Union, L. R. 7 Q. B. 467; Reg. v. Caldecote, 17 Q. B. 52, 79 ECL 52, 117 Reprint 1201; Reg. v. Llanelly, 17 Q. B. 40, 79 ECL 40, 117 Reprint 1196; Reg. v. St. Marylebone, 16 Q. B. 299, 71 ECL 299, 117 Reprint 893; Reg. v. Seend, 12 Q. B. 133, 64 ECL 133, 116 Reprint 817; Wellington v. Whitchurch, 4 B. & S. 100, 116 ECL 100, 122 Reprint 397; Reg. v. Stapleton, 1 E. & B. 766, 72 ECL 766, 118 Reprint 623; Reg. v. Stourbridge Union, 11 Jur. N. S. 799.

[a] **Continuity held broken.**—Reg. v. Halifax, 12 Q. B. 111, 64 ECL 111, 116 Reprint 808.

[b] **Continuity held not broken.**—Hartfield v. Rotherfield, 17 Q. B. 746, 79 ECL 746, 117 Reprint 1467.

Continuity of residence generally see supra §§ 90-95.

83. Reg. v. Manchester Tp., 8 Q. B. D. 50; Easton v. St. Mary, L. R. 2 Q. B. 128; Reg. v. Manchester, 17 Q. B. 46, 79 ECL 46, 117 Reprint 1199; Reg. v. Llanelly, 17 Q. B. 40, 79 ECL 40, 117 Reprint 1196; Reg. v. Pott Shrigley, 12 Q. B. 143, 64 ECL 143, 116 Reprint 820.

84. Reg. v. St. Ives Union, L. R. 7 Q. B. 467; Reg. v. Abingdon Union, L. R. 5 Q. B. 406; Reg. v. St. Andrew Holborn above Bars, 17 Q. B. 746, 79 ECL 746, 117 Reprint 1467; Reg. v. Holbeck, 16 Q. B. 404, 71 ECL 404, 117 Reprint 933; Reg. v. Tacolnestone, 12 Q. B. 157, 64 ECL 157, 116 Reprint 825; Horton Tp. Overseers of Poor v. Leeds Tp., 5 E. & B. 595, 85 ECL 595, 119 Reprint 602; Reg. v. East Stonehouse Parish, 4 E. & B. 901, 82 ECL 901, 119 Reprint 335; Reg. v. Brighthelmston, 4 E. & B. 236, 82 ECL 236, 119 Reprint 91; Reg. v. Stapleton, 1 E. & B. 766, 72 ECL 766, 118 Reprint 623; Reg. v. Potterhanworth, 1 E. & E. 262, 102 ECL 262, 120 Reprint 907; Reg. v. Stourbridge Union, 11 Jur. N. S. 799; Guilford Union v. St. Olave's Union, 25 L.

dence may be prevented by furnishing relief to the pauper during the period required to gain such status.[85]

[§ 148] **3. Place to Which Removable.** The removal of a person who becomes or is likely to become chargeable as a pauper from a town or county not liable for his support must be to the place of his last legal settlement if he has one within the state.[86] If he has no legal settlement in the state, some statutes provide that he shall be removed to that town within the state in which he last resided continuously for a specified period of time,[87] while others provide that he shall be removed to the town where he first became chargeable.[88] Whether a pauper may be removed to his place of settlement in another state the authorities in the several jurisdictions differ, some holding that he may,[89] others holding that such a provision is nugatory for want of power by which the order can be enforced in the other state.[90]

Slaves. A manumitted slave who has not acquired a settlement elsewhere may be removed to the place where his former master resides.[91]

[§ 149] **4. Proceedings for Removal—a. Jurisdiction and Authority of Courts and Officers.** The jurisdiction and authority to remove paupers to the place of their legal settlement is conferred entirely by statute,[92] and is confined to the court, board, or tribunal to which the jurisdiction is given;[93] and such statutes must be strictly followed.[94] Jurisdiction of such proceedings is conferred generally upon justices of the peace.[95]

Disqualification to act.[96] In some jurisdictions it has been held that a justice of the peace is disqualified by reason of interest to act in proceedings for the removal of a pauper from the town or parish in which the justice resides and is taxable for pauper support,[97] unless power to act is expressly conferred by statute.[98] In other jurisdictions it has been held that there is no such disqualification.[99] So where the statute expressly authorizes justices to act in proceedings for the removal of paupers from towns in which they are inhabitants; such provision

T. Rep. N. S. 803; Knaresborough Union v. Pateley Bridge Union, 25 L. T. Rep. N. S. 590.

Generally see supra § 92.

85. Reg. v. St. George, 4 B. & S. 108, 116 ECL 108, 122 Reprint 400; Reg. v. St. Mary, 3 B. & S. 46, 113 ECL 46, 122 Reprint 19; Reg. v. Elvet Tp., 2 E. & E. 266, 105 ECL 266, 121 Reprint 101.

Preventing settlement by furnishing supplies generally see supra §§ 100–103.

86. N. J.—Franklin Tp. v. Bridgewater Tp., 20 N. J. L. 567; Upper Alloways Creek v. Elsingborough, 1 N. J. L. 389.

N. Y.—Vernon v. Smithville, 17 Johns. 89.

Pa.—Milton v. Northumberland, 1 Pa. Co., 377 [aff 6 Pa. Cas. 503, 9 A 449]; Jordan Tp. v. Mt. Pleasant Tp., 10 PittsbLegJ 115.

Vt.—Hartland v. Windsor, 29 Vt. 354.

Eng.—Rex v. Saighton-on-the-Hill, 2 B. & Ald. 162, 106 Reprint 326; In re Trobridge, 2 Salk. 473, 91 Reprint 407.

[a] **An apprenticed servant** cannot be removed to his master, but only to his last legal settlement. Upper Alloways Creek v. Elsingborough, 1 N. J. L. 389; Philadelphia v. Bristol Tp., 6 Serg. & R. (Pa.) 562.

87. See statutory provisions.

[a] **In New Jersey,** by Act (1852) § 2, as amended by Act (1858) § 2, providing for removal of a person having no legal settlement in the state to the township where he last resided for twelve months continuously, it was not intended that the place to which removal is made should for all purposes be considered as the place of legal settlement. The continuous residence referred to merely determines the question of relief of persons having no settlement in the state. McCoy v. Newton Tp. Overseers of Poor, 37 N. J. L. 133.

88. See statutory provisions.

Persons fraudulently brought into town see supra § 143.

89. Niskayuna Overseers of Poor v. Guilderland Overseers of Poor, 8 Johns. (N. Y.) 412; Thompson's Case, 4 CityHallRec (N. Y.) 43.

90. Juniata County v. Delaware Tp., 107 Pa. 68; Limestone Tp. v. Chillisquaque, 87 Pa. 294; Parker City Overseers of Poor v. DuBois Overseers of Poor, 6 Pa. Cas. 591, 9 A 457; Georgia v. Grand Isle, 1 Vt. 464.

91. Forks Tp. v. Catawessa Tp., 3 Binn. (Pa.) 22.

[a] **In New York,** under an early statute, a slave who has wandered from town to town, and whose master's place of settlement could not be found in the state, could be removed to the place "whence such slave shall have last come." Claverack Overseers of Poor v. Hudson Overseers of Poor, 15 Johns. 283.

92. See statutory provisions.

[a] **In Connecticut,** under Gen. St. § 3303, construed with § 3293, the selectmen of the town where a pauper has his settlement have power forcibly to remove him from the place where he becomes chargeable to an almshouse in the town of his settlement, without any warrant or process. Harrison v. Gilbert, 71 Conn. 724, 43 A 190.

93. Lucas County v. Ringgold County, 21 Iowa 83 (where jurisdiction of such proceedings is conferred upon the county supervisors, neither the county court nor the county judge has jurisdiction in the matter).

94. Bridgewater Tp. v. Bethlehem Tp., 50 N. J. L. 578, 14 A 765; Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169.

[a] **In Pennsylvania** (1) in controversies between different districts, either as to order for removal, or for expenses incurred, where such order could not be prosecuted in time, the court of quarter sessions has jurisdiction. Butler County v. Allegheny City, 158 Pa. 149, 27 A 886; Chester County v. Malany, 64 Pa. 144; Nicholson Tp. Poor Dist. v. Nicholson Borough Poor Dist., 33 Pa. Super. 358; Clifford Poor Dist. v. Gibson Poor Dist., 14 Pa. Co. 327; Moore v. Philadelphia, 13 Phila. 425. See Com. v. Darr, 11 Pa. Super. 74 (where proceedings commenced in court of common pleas were transferred to court of quarter sessions). (2) The court of common pleas has no jurisdiction of removal proceedings. See cases supra this note (1). (3) Under Act April 6, 1905 (P. L. p 112), the court of quarter sessions has power to order the removal of a poor person to the district of his last legal settlement, although there has been no previous order of release or adjudication by two justices of the peace of the fact that the poor person is a pauper and chargeable to such district. Westmoreland County Poor Dist. v. Kiskiminetas Township Poor Dist., 54 Pa. Super. 584. (4) The object of the legislature in passing Act April 6, 1905 (P. L. p 112) and Act April 6, 1905 (P. L. p 115) was to provide alternate modes of obtaining orders of removal, one by petition to the court of quarter sessions, and the other by a proceeding before a single justice in the manner theretofore authorized by Act June 13, 1836 (P. L. p 539). Windham Tp. Poor Dist. v. Colley Tp. Poor Dist., 16 Pa. Dist. 384. (5) The death of the pauper pending a proceeding for removal abates the proceeding, and leaves the court without jurisdiction. Bellefonte Borough Poor Dist. v. Howard Borough Poor Dist., 22 Pa. Dist. 901.

95. See statutory provisions.

[a] **In New Jersey** two methods of obtaining an order of removal are provided: First, before two justices of the peace; second, before a single justice. Where no application for relief has been made to the overseers of the poor by or on behalf of a pauper, the order for removal is made by two justices on the application of the overseer. But where the pauper, or some one on his behalf, applies to the overseer for relief, the proceedings for the order of removal must be before a single justice, and if the overseer proceeds before two justices, the proceedings are void. Bridgwater Tp. v. Bethlehem Tp., 50 N. J. L. 578, 14 A 765; Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169.

[b] **In New York** it has been held that two justices of the peace may order the removal of a pauper upon information obtained from any source or on suspicion. Rouse v. Moore, 18 Johns. 407; Shawangunk Overseers of Poor v. Mamakating Overseers of Poor, 1 Johns. 54.

[c] **In Nova Scotia** the statute contemplates that one justice of the peace shall take depositions as to settlement, and upon them, if a warrant or order for removal becomes necessary, it must be issued by two justices, of whom the one who took the depositions should be one. Pictou Dist. No. 7 Overseers of Poor v. Dist. No. 6 Overseers of Poor, 36 N. S. 326.

[d] **In England** 35 Geo. III c 101 § 1 repealed a former statute making it necessary that in removal proceedings one of the removing justices should be of the quorum. Reg. v. Llangian, 4 B. & S. 249, 116 ECL 249, 122 Reprint 453.

96. Disqualification of justices of the peace to act in civil proceedings generally see Justices of the Peace §§ 112–115.

97. Bradford Tp. v. Keating Tp., 27 Pa. 275; McVeytown v. Union Tp., 5 Watts & S. (Pa.) 434; Washington Tp. v. Beaver Tp., 3 Watts & S. (Pa.) 548; Upper Dublin Tp. Overseers of Poor v. Germantown Tp. Overseers of Poor, 1 Yeates (Pa.) 250; Upper Dublin v. Germantown, 2 Dall. (Pa.) 213, 1 L. ed. 353; Susquehanna Tp. v. Monroe Tp., 4 Pa. Super. 589, 40 WklyNC 450; In re Ross Poor Dist., 3 Kulp (Pa.) 198; Rex v. Great Yarmouth, 6 B. & C. 646, 13 ECL 292, 108 Reprint 589; Rex v. Great Chart, Burr. S. Cas. 194.

98. McKean County v. Rouse, 7 Pa. Super. 628.

99. Knowles' Case, 8 Me. 71; Vernon Tp. v. Wantage Tp., 2 N. J. L. 311; Hopewell Tp. v. Kingwood Tp., 2 N. J. L. 130.

controls the general statutory provision prohibiting justices from taking cognizance of a cause or doing any judicial act in which they are interested.[1] An order for removal is not invalid because one of the justices who granted it is also one of the directors of the poor asylum to which the order is directed.[2] But it has been held that a justice who is also overseer of the poor cannot, in the same case, act in the double capacity of complainant and removing justice.[3]

[§ 150] **b. Application for Removal and Proceedings Thereon.**[4] Proceedings upon application for removal of paupers are regulated entirely by statute,[5] and a strict compliance with the requirements of the statute is necessary.[6]

Complaint or application. The usual mode of proceeding is by complaint or application of the overseer of the poor, or the officer exercising his functions, to one or more justices of the peace.[7] The complaint or application should allege all the facts that are material to be proved to effect the removal,[8] but such complaint may be amended.[9] There is no fatal variance between a complaint alleging that the pauper "is chargeable," and a finding of the justices that he "is likely to become chargeable."[10]

Notice to place to which pauper is to be removed. The requirement under some statutes that no order of removal shall be made without notice to the officers of the district to be affected[11] is jurisdictional.[12]

Notice to pauper. Where notice to the pauper of the removal proceedings is required,[13] failure to give such notice invalidates the proceedings,[14] although such failure cannot be taken advantage of by the town to which the removal is made.[15] In some jurisdictions it has been held that notice is required only when the ground of removal is that the pauper is likely to become chargeable to the town from which it is sought to remove him.[16]

Examination of pauper. When the statute requires the pauper to be examined in proceedings for his removal,[17] it is not necessary that the justices expressly state in their record that they examined the pauper.[18]

[§ 151] **c. Judgment or Order and Warrant of Removal[19]—(1) Form and Requisites—(a) In General.** An order for the removal of a pauper should show on its face that the officers making it acted within their authority, and that all the facts necessary to authorize it exist and were duly proved before the officers who made it.[20] In some jurisdictions it has been held unnecessary to insert in the order that it was adjudged that the person removed was likely to become chargeable to the town from

1. Morristown v. Fairfield, 46 Vt. 33; Bristol v. Braintree, 10 Vt. 203.

2. Great Bend Tp. Poor Dist. v. Auburn, etc., Poor Asylum, 167 Pa. 254, 31 A 628.

3. Windham v. Wardsboro, 53 Vt. 675.

4. **Evidence of settlement** see supra §§ 132–137.

5. See statutory provisions.

[a] **Construction of statute relating to insane paupers.**—Peo. v. Queens County, 20 NYS 10; Donegal Tp. v. Sugarcreek Tp., 8 Pa. Cas. 9, 11 A 213.

6. Simpson v. Maybaum, 58 N. J. L. 323, 33 A 814; Bridgewater Tp. v. Bethlehem Tp., 50 N. J. L. 578, 14 A 765; McCoy v. Newton Tp. Overseers of Poor, 37 N. J. L. 133; New Barbadoes Tp. Overseers v. Paterson Overseers, 27 N. J. L. 544; Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169; Elk Tp. v. Jordan Tp., 10 Pa. Co. 245.

[a] **In Vermont** the issue as to where the pauper was last legally settled may be tried by jury. Richmond v. Milton, Brayt. 188.

7. See statutory provisions.

[a] **The acting overseer cannot make the application;** it must be the actual overseer. Simpson v. Maybaum, 58 N. J. L. 323, 33 A 814.

[b] **Signature to complaint.**—Complaint has been held sufficient although signed by one overseer only. Castleton v. Clarendon, Brayt. (Vt.) 186.

[c] **In England** (1) the complaint, under 13 & 14 Car. II c 12 § 1, may be by the churchwardens or overseers. Reg. v. Watford, 9 Q. B. 626, 58 ECL 626, 115 Reprint 1413. (2) Such complaint need not be in writing. Reg. v. Bedingham, 5 Q. B. 653, 48 ECL 653, 114 Reprint 1395.

8. Walpole v. West Cambridge, 8 Mass. 276; Merrimack County v. Sullivan County, 45 N. H. 181; Wilmington v. Jamaica, 42 Vt. 694.

[a] **Probability that pauper will become chargeable.**—A complaint is faulty when it does not state the cause of the probability of the pauper's becoming chargeable. Walpole v. West Cambridge, 8 Mass. 276.

[b] **Place of settlement.**—The complaint need not allege where the pauper's settlement is. Wilmington v. Jamaica, 42 Vt. 694.

[c] **Names of family.**—The complaint for the removal of a pauper having a family need not set forth the names of the members of the family. Windham v. Chester, 45 Vt. 459.

9. Guilford v. Abbott, 17 Me. 335.

[a] **Illustration.**—A complaint alleging that a pauper was likely to become chargeable was properly amended by the addition of the words "by reason of age and infirmity." Guilford v. Abbott, 17 Me. 335.

10. Hardwick v. Pawlet, 36 Vt. 320.

11. See statutory provisions.

12. Franklin Tp. v. Danville, 25 Pa. Super. 40; Lathrop Poor Dist. v. Nicholson Poor Dist., 10 Pa. Dist. 324, Point Tp. v. Northumberland, 22 Pa. Co. 242. See Nicholson v. Lenox Tp., 1 SusqLegChron (Pa.) 29 (where an order making the district to which removal was made a party to the proceeding was held irregular).

13. See statutory provisions.

14. Shirley v. Lunenburg, 11 Mass. 379, 382; Hartland v. Pomfret, 11 Vt. 440.

"It ought to appear distinctly, by the return of the officer to the summons, that the person removed was summoned; or upon the record, that he was present during the examination." Shirley v. Lunenburg, supra.

15. Guilford v. Abbott, 17 Me. 335; Shirley v. Lunenburg, 11 Mass. 379.

16. Gilpin Tp. v. Parks Tp., 118 Pa. 84, 11 A 791; Mifflin Tp. Poor Dist. v. Schuylkill County Poor Dist., 37 Pa. Super. 611; Walker Tp. v. Porter Tp., 7 Pa. Dist. 601.

[a] **Distinction discussed.**—"When the overseers of P. township [the plaintiffs] made their complaint against W. [the poor person], alleging his liability to become chargeable, it was the duty of the justices to direct notice to him of the complaint, and upon such notice to inquire into and adjudicate upon the truth of the complaint. If W. had been a pauper he would not have been entitled to notice of the proceedings for his removal. The contest in that case would have been between the poor districts, in order to determine which of them should be held for the support of one who was a public burden. In that contest he could have no interest. Here, however, the proceeding was against one who was not a public burden. The complaint against him was that he was likely to become chargeable. He was the party against whom the proceeding was in the first instance directed, and it was his privilege to show that the complaint was unfounded." Gilpin Tp. Overseers v. Parks Tp. Overseers, 118 Pa. 84, 88, 11 A 791.

17. See statutory provisions.

[a] **In Pennsylvania** an order of removal is not rendered invalid by the fact that the pauper was not examined in the presence of both justices who signed the order. Great Bend Tp. Poor Dist. v. Auburn, etc., Poor Asylum, 167 Pa. 254, 31 A 628.

[b] **In England** it is not essential to the validity of an order of removal that the pauper should be examined. Rex v. Tavistock, 3 D. & R. 427, 16 ECL 172.

18. Shirley v. Lunenburg, 11 Mass. 379; Hartland v. Pomfret, 11 Vt. 440.

[a] **The words "after hearing the proofs and allegations, and examining the same,"** it is considered, etc., imply that an examination has been had. Hartland v. Pomfret, 11 Vt. 440, 441; Bristol v. Braintree, 10 Vt. 203.

[b] **The statement that "due examination" was had** is not sufficiently certain. Shirley v. Lunenburg, 11 Mass. 379.

19. **As condition precedent to recover for support** see infra § 213.

20. Mass.—Walpole v. West Cambridge, 8 Mass. 276.

N. J.—Simpson v. Maybaum, 58 N. J. L. 323, 33 A 814; Bridgewater Tp. v. Bethlehem Tp., 50 N. J. L. 578, 14 A 765; New Barbadoes Tp. v. Paterson, 27 N. J. L. 544; Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169; Vernon Tp. v. Wantage Tp., 2 N. J. L. 311 (holding, however, that it need not appear that the pauper was ordered to remove, and that he refused to do so).

N. Y.—Newburgh Overseers of Poor v. Plattekill Overseers of Poor, 1 Johns. 330; Shawangunk Overseers of Poor v. Mamakating Overseers of Poor, 1 Johns. 54.

Pa.—Dromore Tp. Overseers of Poor v. West Hanover Tp. Overseers of Poor, 1 Yeates 366; Williamsport v. Eldred Tp., 54 Pa. Super. 62; Lathrop Poor Dist. v. Nicholson Poor Dist., 10 Pa. Dist. 324; Point Tp. v. Northumberland, 22 Pa. Co. 242.

Eng.—Reg. v. Crowan, 14 Q. B. 221, 68 ECL 221, 117 Reprint 88.

[a] **If it does not distinctly appear on an order of removal that the justices who made it had jurisdiction,** it is a nullity, and not merely voidable. Reg. v. Crowan, 14 Q. B. 221, 68 ECL 221, 117 Reprint 88; Reg. v.

which he is removed,[21] but usually the order must show that there was a complaint and an adjudication that the person removed was likely to become chargeable,[22] and an adjudication of the place of last legal settlement.[23] It is not necessary that an examination should appear upon the order.[24] The order of removal must be certain as to the place to which the pauper is to be removed;[25] and where the pauper is to be sent out of the state, the order should designate the route by which he is to be transported.[26]

Including several persons in order. More than one person may be included in an order of removal,[27] although it has been held that several persons having independent settlements cannot be removed by the same order.[28] The order may include the members of a family, provided they have the same settlement,[29] or even, it has been held, where they have independent settlements.[30] The names of the different persons constituting the family need not be set forth.[31]

Age of pauper. It is not ordinarily necessary to set out the age of the pauper in the order of removal.[32] Where, however, children are removed with their father or mother because of the father's or mother's settlement, the order should set forth the ages of such children, to show that they could not themselves have gained any other settlement, unless the order contains an express adjudication as to the children's place of settlement.[33]

Warrant of removal. In some jurisdictions the statutes provide for a warrant of removal in addition to the order of removal.[34]

[§ 152] **(b) Amendment.** Defects in form in an order of removal may be amended,[35] but not defects in substance.[36] A defect apparent on the record and in no way affecting the jurisdiction or the merits of the case is a defect in form and not in substance.[37] The omission to state matter necessary to give jurisdiction is matter of substance.[38]

[§ 153] **(2) Conclusiveness—(a) Order Unappealed from or Affirmed on Appeal.** A valid order of removal of a pauper, unappealed from, is conclusive evidence of the settlement of the pauper,[39] and

Newton Ferrers Parish, 9 Q. B. 32, 58 ECL 32, 115 Reprint 1187; Reg. v. Stockton, 7 Q. B. 520, 53 ECL 520, 115 Reprint 585; Rex v. Chilverscoton, 8 T. R. 178, 101 Reprint 1332; Rex v. Stotfold, 4 T. R. 596, 100 Reprint 1196.

[b] **Order held to show jurisdiction of justices of the peace.**—Reg. v. King's Lynn Recorder, 3 D. & L. 725.

21. Elizabethtown v. Springfield Tp., 3 N. J. L. 475.

22. N. J.—Princeton Tp. Overseers v. South Brunswick Tp. Overseers, 23 N. J. L. 169.

N. Y.—Shawangunk Overseers of Poor v. Mamakating Overseers of Poor, 1 Johns. 54.

Pa.—Dromore Tp. v. West Hanover Tp., 1 Yeates 366.

Vt.—Starksboro v. Huntington, 50 Vt. 599.

Eng.—Reg v. St. Giles-in-the-Fields, 7 Q. B. 529, 53 ECL 529, 115 Reprint 588; Rex v. Netherton, Burr. S. Cas. 139; Rex v. Usculm, Burr. S. Cas. 138.

[a] **Application for relief.**—It should appear upon the face of the order that application for relief had been made by or on behalf of the pauper. Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169.

23. Mass.—Shirley v. Lunenburg, 11 Mass. 379.

N. J.—Paterson Tp. v. Byram Tp., 23 N. J. L. 394.

N. Y.—Shawangunk Overseers of Poor v. Mamakating Overseers of Poor, 1 Johns. 54.

Pa.—Williamsport v. Eldred Tp., 54 Pa. Super. 62; Lathrop Poor Dist. v. Nicholson Poor Dist., 10 Pa. Dist. 324; Gleenwood Borough v. Carbondale City, 4 Pa. C. Pl. 92.

Eng.—In re St. Giles Cripplegate, 2 Salk. 478, 91 Reprint 411; In re Trobridge, 2 Salk. 473, 91 Reprint 407.

[a] **"Legal settlement,"** in an order of removal, is equivalent to "last legal settlement," and is sufficient. Franklin Tp. Overseers v. Bridgewater Tp. Overseers, 20 N. J. L. 567; Vernon v. Smithville, 17 Johns. (N. Y.) 89.

[b] **Sufficiency of order.**—(1) An adjudication that a person is "the proper poor" of a town is tantamount to an adjudication that he has his lawful settlement in such town, and is sufficient. Shirley v. Lunenburg, 11 Mass. 379. (2) An order is sufficient which states that the justices cannot discover the last legal settlement of the pauper, but that he came last from a town named. Shawangunk Overseers of Poor v. Mamakating Overseers of Poor, 1 Johns. (N. Y.) 54. (3) An order removing a married woman to her last place of maiden settlement need not state that her husband had no known legal settlement. Reading Overseers v. Cumree Overseers, 5 Binn. (Pa.) 81.

24. Fallowfield Tp. v. Marlborough Tp., 1 Dall. (Pa.) 28, 1 L. ed. 23; Rex v. South Lynn, 4 M. & S. 354, 105 Reprint 865; Cumberland Dist. No. 5 Overseers of Poor v. McDonald, 35 N. S. 394.

25. Niskayuna Overseers of Poor v. Guilderland Overseers of Poor, 8 Johns. (N. Y.) 412.

[a] **Rule applied.**—An order directing the constable to remove a pauper to the town of W from which he last came, and there deliver him to a constable of W, who was required to deliver him to the next constable, and so from constable to constable until he shall reach the place of his last legal settlement, has no force beyond the town of W, and is void for uncertainty. Niskayuna Overseers of Poor v. Guilderland Overseers of Poor, 8 Johns. (N. Y.) 412.

26. Niskayuna Overseers of Poor v. Guilderland Overseers of Poor, supra.

27. Glocester v. Smithfield, 2 R. I. 30.

28. Chewton v. Compton Martin, Str 471.

29. Derby v. Barre, 38 Vt. 276; Landgrove v. Pawlet, 20 Vt. 309.

30. Bucks County Directors of Poor v. Philadelphia Guardians of Poor, 1 Serg. & R. (Pa.) 387; Reg. v. New Castle-upon-Tyne, 1 G. & D. 133 (holding that an order may include two members of a family, although they have independent settlements).

[a] **Sufficiency of order.**—An order removing children under seven years of age to the mother's place of settlement, with the mother, for nurture, need not specify the age to which the children shall be supported, since the law fixes the age of seven as the time nurture shall cease. Bucks County Directors of Poor v. Philadelphia Guardians of Poor, 1 Serg. & R. (Pa.) 387.

31. Landgrove v. Plymouth, 52 Vt. 503; Windham v. Chester, 45 Vt. 459; Landgrove v. Pawlet, 20 Vt. 309; Burlington v. Essex, 19 Vt. 91; Bristol v. Braintree, 10 Vt. 203.

32. Franklin Tp. Overseers v. Bridgewater Tp. Overseers, 20 N. J. L. 567.

33. Elizabethtown v. Springfield Tp., 3 N. J. L. 475; Rex v. Usculm, Burr. S. Cas. 138.

34. See statutory provisions.

[a] **Date of warrant.**—It is not a valid objection to a warrant of removal that it bears date at the time when the order of removal was made, although by such order a future day is appointed before which the pauper may voluntarily remove to the place of his legal settlement. Georgia v. St. Albans, 3 Vt. 42.

[b] **In New Jersey** the warrant for removal should not issue until after an adjudication of the settlement and the making of some order or request upon the party to remove in compliance with it. Paterson Tp. Overseers v. Byram Tp. Overseers, 23 N. J. L. 394.

[c] **In New York,** where a pauper has actually become chargeable to a town, there is no necessity to order him to remove to his last legal settlement before issuing a warrant for his removal. Vernon Overseers of Poor v. Smithville Overseers of Poor, 17 Johns. 89.

35. Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169; Cumberland Tp. v. Jefferson Tp., 25 Pa. 463; Rex v. Great Bedwin, Burr. S. Cas. 163.

36. Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169; Rex v. Great Bedwin, Burr. S. Cas. 163.

37. Vernon Tp. v. Wantage Tp., 2 N. J. L. 293.

[a] **Rule applied.**—Where the order of removal was directed to the overseers of the town from which the pauper was removed, instead of to the constable, an amendment was permitted. Vernon Tp. v. Wantage Tp., 2 N. J. L. 293.

38. Princeton Tp. v. South Brunswick Tp., 23 N. J. L. 169.

39. N. J.—Elizabeth Tp. Overseers v. Westfield Tp. Overseers, 7 N. J. L. 439.

N. Y.—Southfield Overseers of Poor v. Bloomingrove Overseers of Poor, 2 Johns. 105.

Pa.—Renovo v. Half-Moon Overseers of Poor, 78 Pa. 301; Schuylkill v. Montour, 44 Pa. 484; Sugarloaf Tp. v. Schuylkill County, 44 Pa. 481; Bradford Tp. v. Keating Tp., 27 Pa. 275; Green Tp. Poor Dist. v. Highland Tp. Poor Dist., 5 Pa. Super. 199; Elk Tp. v. Jordan Tp., 10 Pa. Co. 245; Houston v. Jay, 9 Pa. Co. 412; Piney Tp. v. Sligo Borough, 2 Pa. Co. 134; Luzerne County Cent. Poor Dist. v. Pittston, etc., Poor Dist., 7 Kulp 196.

R. I.—Tiverton v. Fall River, 7 R. I. 182.

Vt.—Poultney v. Sandgate, 35 Vt. 146; Hale v. Turner, 29 Vt. 350; Chester v. Wheelock, 28 Vt. 554; Stowe v. Brookfield, 26 Vt. 524; Charleston v. Lunenburgh, 23 Vt. 525; Braintree v. Westford, 17 Vt. 141; Rupert v. Sandgate, 10 Vt. 278;

as to all derivative settlements under him;[40] and an appeal which is ineffectual because the preliminary steps necessary to perfect the same have not been taken,[41] as where the appeal is taken after the time therefor has elapsed,[42] is equivalent to no appeal within the above rule. An order affirmed on appeal is likewise conclusive.[43]

Conclusiveness dependent on actual removal or notice. To give an order of removal conclusiveness, it must be executed, that is, the pauper must be actually removed, unless prevented by sickness or death;[44] or the order must be perfected by giving legal notice of the same,[45] although the order has been held conclusive even where no notice is served, where, after removal of the pauper, the order is not appealed from.[46] This notice cannot be waived, so as to affect the settlement of the pauper, by any agreement of the overseers of the town entitled to receive it.[47]

Persons and matters concluded. Not only is an unappealed or affirmed order of removal conclusive between the towns which are parties thereto,[48] but it is also conclusive against the appealing town in favor of all other towns,[49] and no other removal can be made except to a subsequently acquired settlement.[50] Furthermore such order is conclusive not only as to the facts directly decided, but also as to all facts necessary to uphold the order.[51]

[§ 154] **(b) Order Discharged, Quashed, or Abandoned.**[52] An order of removal discharged is conclusive between the parties litigant only;[53] while an order quashed is conclusive on neither party.[54] Where the overseers of the poor of a township in whose favor an order of removal has been made expressly and voluntarily abandon it, the order cannot afterward be enforced.[55] And where a town procuring an order of removal takes the pauper back, in consequence of which an appeal by the town to which removal is ordered is not prosecuted, the order is not conclusive that the pauper's settlement is in the latter town.[56]

[§ 155] **d. Execution and Enforcement of Order or Warrant of Removal.**[57] The execution of the order or warrant of removal is governed entirely by statute providing therefor,[58] and inasmuch as the proceedings are in large degree ex parte the terms of the statute must be strictly complied with to bind the town to which removal is sought.[59] Under the various statutes[60] the warrant or order of removal is usually executed by the constable or sheriff delivering the person of the pauper[61] to the overseer of the receiving town or county,[62] and serving the latter with the order or warrant[63] by leaving with him[64] a copy of the order or warrant of re-

Dorset v. Manchester, 3 Vt. 370.

Eng.—Clifton Union v. Liverpool, 2 Q. B. D. 540; Rex v. Seend, 12 Q. B. 133, 64 ECL 133, 116 Reprint 817; Rex v. Silchester, Burr. S. Cas. 551; Rex v. Hinckworth, 1 Dougl. 46, 99 Reprint 33; Nympsfield Parish v. Woodchester Parish, Str. 1172, 93 Reprint 1107; Rex v. Rudgeley, 8 T. R. 620, 101 Reprint 1580; Rex v. Southowram, 1 T. R. 353, 99 Reprint 1135.

[a] **After a pauper has been removed** in accordance with an order of removal, and no appeal from the order is taken, the justices making it cannot supersede it. Southfield Overseers of Poor v. Bloomingrove Overseers of Poor, 2 Johns. (N. Y.) 105.

[b] **An order of removal made by justices in another state,** and unappealed from, is conclusive against the township to which the pauper was removed. Elizabeth v. Westfield Tp., 7 N. J. L. 439.

[c] **A pass warrant by a justice of the peace,** fixing the settlement of a vagrant in a certain town, is not conclusive upon such town, but only throws upon it the burden of ascertaining the place of the vagrant's settlement. Upper Freehold Tp. v. Hillsborough Tp., 13 N. J. L. 289.

[d] **A void order of removal** is not conclusive even though no appeal is taken. Elk Tp. v. Jordan Tp., 10 Pa. Co. 245; Starksboro v. Huntington, 50 Vt. 599.

40. Pittsford v. Chittenden, 58 Vt. 49, 3 A 323; Chester v. Wheelock, 28 Vt. 554; Rex v. Woodchester, Burr. S. Cas. 191; Nympsfield Parish v. Woodchester Parish, Str. 1172, 93 Reprint 1107; Rex v. St. Mary Lambeth, 6 T. R. 615, 101 Reprint 733. But see Reg. v. Wye, 7 A. & E. 761, 34 ECL 399, 112 Reprint 656 (where order was held not conclusive upon state of facts not existing at time it was made).

41. Uxbridge Union v. Winchester Union, 91 L. T. Rep. N. S. 533.

42. Westmoreland County v. Conemaugh Tp., 34 Pa. 231.

43. Little Falls Tp. v. Bernards Tp., 44 N. J. L. 621; Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; West Buffalo v. Walker Tp., 8 Pa. 177; In re Ross Poor Dist., 3 Kulp (Pa.) 198; Cabot v. Washington, 41 Vt. 168; Reg. v. Hartington Middle Quarter Tp., 4 E. & B. 780, 82 ECL 780, 119 Reprint 288.

44. Barre v. Morristown, 4 Vt. 574.

45. Barre v. Morristown, supra; Fairfield v. St. Albans, Brayt. (Vt.) 176.

[a] **A general notice and demand of the sum expended in supporting a pauper** is not sufficient notice of the order of removal to conclude the town as to the settlement of the pauper. Fairfield v. St. Albans, Brayt. (Vt.) 176.

46. Dorset v. Rutland, 16 Vt. 419.

47. Barre v. Morristown, 4 Vt. 574.

48. See supra text and notes 39–43; and infra notes 49, 50.

49. South Brunswick v. Cranbury, 53 N. J. L. 126, 20 A 1084; Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; West Buffalo v. Walker Tp., 8 Pa. 177; Barre v. Morristown, 4 Vt. 574; Dorset v. Manchester, 3 Vt. 370; Rex v. Corsham, 11 East 388, 103 Reprint 1054. But see Jenkins Tp. v. Paradise Tp., 8 Pa. Co. 164 (holding that an order of removal from one poor district to another, unappealed from, is not conclusive upon the district to which the pauper is removed as against any other than the district from which he was removed).

50. South Brunswick v. Cranbury, 53 N. J. L. 126, 20 A 1084; Little Falls Tp. v. Bernards Tp., 44 N. J. L. 621; Rex v. Kenilworth, 2 T. R. 598, 100 Reprint 321.

51. Green Tp. v. Highland Tp., 5 Pa. Super. 199; Poultney v. Sandgate, 35 Vt. 146; Reg. v. Hartington Middle Quarter Tp., 4 E. & B. 780, 82 ECL 780, 119 Reprint 288.

52. Grounds for discharging or quashing see infra § 162.

53. Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; West Buffalo v. Walker Tp., 8 Pa. 177; Barre v. Morristown, 4 Vt. 574.

54. Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; West Buffalo v. Walker Tp., 8 Pa. 177.

55. Perth Amboy Tp. v. Piscataway, 19 N. J. L. 173. To same effect Cadwallader v. Durham, 46 N. J. L. 53.

56. Peo. v. Cayuga County, 2 Cow. (N. Y.) 530; Vernon v. Smithville, 17 Johns. (N. Y.) 89; Rex v. Llanrhydd, Burr. S. Cas. 658.

57. Removal as condition precedent to recovery for support see infra § 213.

58. See statutory provisions.

59. Westminster v. Warren, 55 Vt. 522.

60. See statutory provisions.

61. See cases infra this note.

[a] **Physical transfer.**—(1) Where actual removal of the pauper is impracticable, a constructive transfer from one district to the other by delivery of the order of removal is sufficient. Donegal Tp. Overseers v. Sugar Creek Tp. Overseers, 8 Pa. Cas. 9, 11 A 213; Tunkhannock v. Montrose, 3 LackJur (Pa.) 345. (2) Nor is physical transfer requisite to the validity of an order of removal and its binding force upon the town to which the removal is ordered. Poultney v. Sandgate, 35 Vt. 146.

[b] **A constable may execute the warrant in any part of the state** in which he can find the paupers. Essex v. Milton, 3 Vt. 17.

[c] **Time of removal.**—Under a statute providing that the justices who make the order of removal shall specify the time within which the pauper shall remove himself to his place of settlement, and that, on his failure to obey the order, the justices may, by warrant directed to a constable, cause the pauper to be removed, it is no reason for quashing an order of removal that a warrant was issued by the justice and the pauper was removed with his own consent by the constable before the time for his removing himself named in the order had expired. Plymouth v. Mendon, 23 Vt. 451 [dist Barnet v. Concord, 4 Vt. 564 (where it did not appear that the removal of the pauper was with his consent)].

62. See case infra this note.

[a] **Leaving the pauper at the house of a resident** of the receiving district is sufficient, under the act of June 16, 1836, if delivery to the overseer is impracticable. Houston v. Jay, 9 Pa. Co. 412.

63. See cases infra this note.

[a] **Who may serve.**—(1) In Vermont, under Rev. L. § 2835, providing that the order "may" be served by a sheriff or constable, no other person may serve it. Granville v. Hancock, 55 Vt. 323. (2) In New York it was held in an early case that an order of removal may be served by the pauper himself delivering it to the overseers of the town to which he is removed. Guilderland Overseers of Poor v. Knox Overseers of Poor, 5 Cow. (N. Y.) 363.

64. See cases infra this note.

[a] **Service by leaving a copy at the usual abode** of the overseer with a person of sufficient discretion resident therein is good, under a Ver-

moval,[65] certified by the removing justice or justices.[66] Where the statute provides when a copy of the order shall be served on the overseer of the town to which the pauper is ordered to be removed,[67] such provisions must be complied with;[68] but, if the pauper is actually removed, failure to serve a copy of the order does not render the proceedings void, but merely voidable.[69]

Return and proof of service. The return of service of an order of removal should state every necessary fact to constitute legal service.[70] The return is prima facie evidence as between the parties as to the manner of service.[71] But the mere fact that the overseers of the receiving town found a copy of the order among the papers of their predecessors is not sufficient proof of service.[72]

Disqualification of constable. It is no objection to removal proceedings that the constable who served the removal order was also the overseer of the poor who made the complaint.[73]

Enforcement of order. It has been held that mandamus will lie to compel overseers of the poor to receive a pauper in compliance with an order of removal.[74] But other authorities have held that mandamus will not lie,[75] indictment being the proper remedy.[76]

[§ 156] **e. Review[77] of Order of Removal—(1) Right of Review and Appellate Jurisdiction.** The statutes of the various jurisdictions[78] determine the right to bring up for review orders of removal of paupers,[79] including questions as to the form of remedy[80] and the courts to which an appeal or writ of error may be taken.[81] Under statutes giving the

mont statute, although the overseer never receives the copy nor any actual notice. Poultney v. Sandgate, 35 Vt. 146.

[b] **Service on the clerk** of the overseer is sufficient in Pennsylvania if the clerk afterward delivers the copy to the overseer. Houston v. Jay, 9 Pa. Co. 412.

65. See cases infra this note.

[a] **Sufficiency of copy.**—(1) The copy must correspond with the original order in every substantial part, and an omission in the copy which would be fatal if it was in the original makes the service bad. Dorset v. Rutland, 16 Vt. 419 (holding that leaving "a true and attested copy of the original complaint" is not compliance with the statute requiring service of a copy of the order of removal); Barnet v. Concord, 4 Vt. 564. (2) Such copy should state every fact essential to give jurisdiction to the justices making the order. Landgrove v. Plymouth, 52 Vt. 503; St. Johnsbury v. Morristown, 51 Vt. 316; Starksboro v. Huntington, 50 Vt. 599; Barnet v. Concord, supra.

[b] **Statute making service unnecessary.**—(1) Act (1864) No. 18 so altered the law in Vermont as to dispense with the necessity of serving a certified copy of the order, with order of notice appended, where the pauper is removed within thirty days of the making of the order. Landgrove v. Plymouth, 52 Vt. 503; Barnet v. Woodbury, 40 Vt. 266. (2) But a certified copy of the warrant of removal, containing a recital of the record of the order, should be left with the overseer of the poor of the receiving town. Landgrove v. Plymouth, supra.

[c] **Transmission of evidence.**—In New Jersey, where an order is made for the removal of a pauper from one township to another in the same county, where no poorhouse is erected, it is not necessary to transmit and deliver with the order a copy of the evidence on which the adjudication was made. Knowlton v. Independence Tp., 9 N. J. L. 276.

[d] **Manner of service.**—In Vermont, under act of 1850 (Comp. St. p 132 § 13) the order of removal, with the notice required to be annexed thereto, should be served as an ordinary writ of summons is served. East Haven v. Derby, 38 Vt. 253.

66. See cases infra this note.

[a] **Certification of the justice is indispensable** (1) and a constituent part of the process, and without it the service is void. Sharon v. Strafford, 37 Vt. 74. (2) The defect cannot be cured by amendment. Sharon v. Strafford, supra.

67. See statutory provisions.

68. Barnet v. Woodbury, 40 Vt. 266; Dorset v. Rutland, 16 Vt. 419; Georgia v. St. Albans, 3 Vt. 42.

[a] **Leaving a copy of the complaint and warrant** with the overseer within the time specified is not a compliance with the statute requiring a copy of the order of removal to be left with such overseer within thirty days after the order is made. Dorset v. Rutland, 16 Vt. 419; Georgia v. St. Albans, 3 Vt. 42.

69. Dorset v. Rutland, 16 Vt. 419.

70. Whitingham v. Wardsboro, 47 Vt. 496.

[a] **Return held defective.**—Service of an order of removal on H, overseer of the poor of W, "by leaving a true and attested copy of this order of removal and citation at his house, in the hands of A, he being a person of suitable discretion with whom to leave the same," was defective in that it did not show that it was left at H's last and usual place of abode, or that W was "then resident therein," and in that there was no return thereon indorsed. Whitingham v. Wardsboro, 47 Vt. 496.

71. Windham v. Chester, 45 Vt. 459.

72. Guilderland Overseers of Poor v. Knox Overseers of Poor, 5 Cow. (N. Y.) 363.

73. Bristol v. Braintree, 10 Vt. 203.

74. Porter Tp. Overseers v. Jersey Shore Overseers, 82 Pa. 275, 280 ("An action on the case would not lie on behalf of the pauper to enforce the order, and a verdict for damages would be no proper substitute; and what would become of the pauper in the meantime, or who would undertake her cause? The writ of mandamus is the only remedy left, and it is clearly applicable").

75. Ex p. Downton, 8 E. & B. 856, 92 ECL 856, 120 Reprint 320.

76. Ex p. Downton, supra.

[a] **In Pennsylvania** the only penalty for disobeying an order of removal is a fine. Sugarloaf Tp. Overseers v. Schuylkill Directors of Poor, 44 Pa. 481.

77. **Review of judgment generally** see Appeal and Error 3 C. J. p 256.

78. See statutory provisions.

79. See cases infra this note; and notes 80-85.

[a] **In New Jersey** no appeal lies upon a mere vagrant pass made by a justice, although it contains some expressions resembling an order of removal. Trenton Overseers v. Maidenhead Overseers, 1 N. J. L. 88.

[b] **In England** (1) the right of appeal, under Poor Removal Act (1863) § 7, from an order for the removal of a pauper to a union in Ireland is limited to one of two grounds, either that the pauper was legally settled in some parish or township in England, or that he was not in law liable to be removed to Ireland. Ireland Local Govt. Bd. v. Blackburn, [1909] 1 K. B. 454. (2) There is no right of appeal where the pauper, although removable to some union in Ireland, is not liable to be removed to the particular union named in the order of removal. Ireland Local Govt. Bd. v. Blackburn, supra.

[c] **In Scotland** (1) under Poor Law Act (1898) § 5, whenever a parish council in Scotland has obtained a warrant for the removal of an English or Irish-born pauper, who has neither acquired a settlement by residence in Scotland nor a status of irremovability under § 4 of the act, the guardians of the parish to which it is proposed to remove such pauper have a right of appeal to the local government board, although such pauper has not resided continuously in the parish from which it is proposed to remove him for not less than one year before the date of the application for relief. Edinburgh Parish Council v. Scotland Local Govt. Bd., [1915] A. C. 717 [aff [1914] S. C. 241]. (2) The statute applies both to sane and insane paupers. Edinburgh Parish Council v. Scotland Local Govt. Bd., supra.

80. See cases infra note 81.

81. See cases infra this note.

[a] **In Pennsylvania** (1) under the act of June 13, 1836, appeals from orders of removal in pauper cases may be taken to the quarter sessions of the proper county. Bradford Tp. v. Goshen Tp., 57 Pa. 495; Mauch Chunk Tp. Overseers of Poor v. Nescopeck Tp. Overseers of Poor, 21 Pa. 46; Mifflin Tp. v. Elizabeth Tp., 18 Pa. 17; Franklin Tp. Poor Dist. v. Danville, etc., Poor Dist., 25 Pa. Super. 40; Lewisburg Overseers of Poor v. West Buffalo Overseers of Poor, 1 WklyNC 209. (2) No appeal on the merits will lie to the supreme court from the decision of the court of quarter sessions. Bradford Tp. v. Goshen Tp., supra; Mauch Chunk Tp. Overseers of Poor v. Nescopeck Tp. Overseers of Poor, supra; Mifflin Tp. v. Elizabeth Tp., supra; Lewisburg Overseers of Poor v. West Buffalo Overseers of Poor, supra. (3) The common-law jurisdiction of the supreme court to examine into the legality of the order on certiorari is not, however, taken away. Sunbury v. Dauphin, 1 AmLJ 77. (4) But under the act of March 16, 1868, either party at the hearing in the quarter sessions may except to any decision of the court upon any point of evidence or law, which exception shall then be noted and filed of record, and a writ of error may then be taken to the supreme court (Parker Tp.'s App., 1 Pa. Cas. 160, 1 A 716; Lewisburg v. West Buffalo, supra), (5) but where an order for the removal of a pauper has been made, and the district to which he has been removed does not appeal from such order, a writ of error will not lie to the subsequent order of the court of quarter sessions charging the district accepting such pauper with the costs of his previous maintenance (Perry County Directors of Poor v. Chillisquaque Tp. Overseers of Poor, 110 Pa. 153, 2 A 528; Luzerne County Poor Dist. v. Jenkins Tp. Poor Dist., 22 Pa. Super. 274; Green Tp. Poor Dist. v. Highland Tp. Poor Dist., 5 Pa. Super. 199; Lewisburg Overseers of Poor v. West Buffalo Overseers of Poor, supra).

[b] **In England** (1) on an appeal

right of appeal to a party aggrieved,[82] a town receiving a pauper under a void order of removal has no right of appeal, having acted in its own wrong.[83] Nor is a town entitled to appeal under such a statute where the pauper dies after the order of removal and no steps are taken to collect from it the expenses incurred.[84]

Waiver of right to appeal. An appeal from an order of removal will not be set aside on the ground that it was entered by consent of appellant's attorney, where it appears that such consent was given for the purpose of bringing the question of law involved to a final and conclusive adjudication by the appellate court without unnecessary expense.[85]

[§ 157] **(2) Proceedings for Transfer of Cause —(a) In General.** Where no special mode is provided for appeal from orders of removal of paupers, it is held in some jurisdictions that such appeal may be made by notice to the town or county from which the removal is made and petition to the court to allow the appeal without previous declaration of appeal to the magistrate making the order.[86] In other jurisdictions all that is necessary is that notice of an intention to appeal be given to the justices, or one of them,[87] and if, after such notice, the justice refuses to certify the appeal, mandamus will lie.[88] Provisions as to notice of appeal must be strictly complied with.[89]

[§ 158] **(b) Time for Taking Appeal.** The time for taking an appeal from an order of removal is prescribed by statute.[90]

[§ 159] **(3) Record on Appeal.** The statutes provide for the record to be sent up on appeal from an order removing a pauper.[91] Where the statutory notice of removal proceedings was in fact given, although not appearing of record, the record may be amended to accord with the fact.[92]

[§ 160] **(4) Scope and Extent of Review.** The statutes[93] regulate the scope and extent of the review.[94] Failure of the order of removal to show that the justices gave the statutory notice to the overseers of the town to which the removal was or-

against an order for the removal of a pauper, it is for the court of quarter sessions by which the appeal is actually heard to determine whether or not they are the next practicable sessions before which it could have been brought, and it is not a condition precedent to their jurisdiction to hear the appeal that it should previously have been entered and respited at a sessions by which it could have been heard. Rex v. Norfolk Justices, [1909] 1 K. B. 463. (2) An appeal lies to quarter sessions under Lunacy Act (1890) § 302 at the instance of the guardians of a union, from an order of justices adjudicating that a pauper lunatic has acquired a status of irremovability in that union. Eastbourne v. Croydon, [1910] 2 K. B. 16.

82. See statutory provisions.

83. Niskayuna Overseers of Poor v. Guilderland Overseers of Poor, 8 Johns. (N. Y.) 412.

84. Adams v. Foster, 20 Johns. (N. Y.) 452.

85. Schuylkill County v. Jackson Tp., 29 Pa. Super. 567.

[a] **This is especially true** where it appears that no motion to quash the appeal was made, that the parties agreed upon a statement of facts, and that the court finally adjudicated the question in controversy. Schuylkill County v. Jackson Tp., 29 Pa. Super. 567.

86. Northampton County v. Limestone Tp., 68 Pa. 386 (such procedure seems to accord well with the ex parte character of an order of removal).

87. Orange v. Bill, 29 Vt. 442.

88. Orange v. Bill, supra.

89. Chester v. Londonderry, 51 Vt. 535; St. Johnsbury v. Morristown, 51 Vt. 316.

90. See statutory provisions.

[a] **In Pennsylvania** (1) under Act June 13, 1836 § 19, the appeal must be to the next term of court after the order is made. Walker Tp. Overseers v. Perry County Poor Directors, 156 Pa. 426, 27 A 17; Cherry Tp. Overseers of Poor v. Marion Tp. Overseers of Poor, 96 Pa. 528; Sugar Creek v. Washington, 62 Pa. 479; Westmoreland County Directors of Poor v. Conemaugh Tp. Overseers, 34 Pa. 231; Bradford Tp. v. Keating Tp., 27 Pa. 275; Jenkins Tp. v. Paradise Tp., 8 Pa. Co. 164; Oxford Tp. Overseers of Poor v. Philadelphia Guardians of Poor, 2 Browne 253. See Lower Augusta Tp. v. Howard Tp., 6 Pa. Cas. 385, 9 A 446 [aff 1 Pa. Co. 373] (holding that, where an appeal is taken in time, the parties will not be allowed to suffer on account of a mistake of the court or the clerk). (2) This is the rule whether notice of the order was given or not. Sugar Creek v. Washington, 62 Pa. 479. (3) The statute refers to the time of entry of the appeal and not to the time of hearing it. Schuylkill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41. (4) Under Act April 6, 1905 (P. L. p 112), unless an appeal is taken within thirty days from the date of the order of removal, it will be quashed by the appellate court. Aylor's Case, 55 Pa. Super. 210.

[b] **In Rhode Island,** under Rev. St. c 346, an overseer of the town to which a pauper is removed, who shall think his town aggrieved by the order of removal, may appeal to the supreme court next to be held after twenty days from the delivery to him of the pauper, and this provision was not repealed by Rev. St. c 681, providing that a party aggrieved by a judgment of a town council, when the time within which an appeal may be claimed is not limited by law, may appeal within forty days next after the judgment is ordered. Paine v. North Providence, 9 R. I. 358.

[c] **In Vermont** (1) the appeal from an order of removal must be made to the term of the county court next to be held after a copy of such order is served as the statute requires. Braintree v. Westford, 17 Vt. 141; Dorset v. Rutland, 16 Vt. 419. (2) But if not so served, and the pauper is at any subsequent time actually removed by virtue of such order, the appeal is to be taken to the term of the county court next to be held after such removal. Westminster v. Warren, 55 Vt. 522; Dorset v. Rutland, supra. (3) If no copy of the order of removal is served on the overseers of the poor of the town to which the pauper is ordered to be removed, an appeal may be taken to the term of the county court next subsequent to the service of the warrant of removal. Landgrove v. Pawlet, 18 Vt. 325; Marshfield v. Calais, 16 Vt. 598. (4) But an appeal from a warrant of removal cannot be allowed where the order upon which the warrant was issued has been acquiesced in by neglecting to enter an appeal from it at the term required by statute, and it has thus become no longer open to litigation. Braintree v. Westford, 17 Vt. 141.

91. See statutory provisions.

[a] **In Pennsylvania** (1) a certiorari to the quarter sessions in removal proceedings brings up to the supreme court nothing but the record. Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; Bradford Tp. v. Goshen Tp., 57 Pa. 495. (2) Neither the evidence nor the opinion of the court constitutes any part of the record. Plunkett's Creek Tp. v. Fairfield Tp., supra; Bradford Tp. v. Goshen Tp., supra; Westmoreland County Directors of Poor v. Conemaugh Tp. Overseers, 34 Pa. 231; Mauch Chunk Tp. Overseers of Poor v. Nescopeck Tp. Overseers of Poor, 21 Pa. 46; Derry Overseers v. Brown, 13 Pa. 389.

[b] **In Vermont** neither the complaint nor a copy of it need be sent by the justices to the county court as a necessary paper in the proceedings of that court. Windham v. Chester, 45 Vt. 459.

92. Schuylkill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41.

93. See statutory provisions.

94. See cases infra this note.

[a] **In Pennsylvania** (1) under the act of March 16, 1868, on a writ of error the court cannot review the judgment of the court of quarter sessions on the merits, as on an appeal; only the decision on such points of law or of evidence as have been excepted to can be noticed. Cambria County v. Madison Tp., 138 Pa. 109, 20 A 944; Montoursville Borough v. Fairfield Tp., 112 Pa. 99, 3 A 862; Warsaw Tp. v. Knox Tp., 107 Pa. 301; Turbett Tp. Overseers of Poor v. Tuscarora Tp. Overseers of Poor, 72 Pa. Super. 597; Nicholson Tp. Poor Dist. v. Nicholson Borough Poor Dist., 33 Pa. Super. 358; East Franklin Tp. v. Raybum Tp., 23 Pa. Super. 522; Berks County Directors of Poor v. Schuylkill County Directors of Poor, 21 Pa. Super. 627. (2) A general exception to the decree and to the findings of fact and conclusions of law is insufficient to enable the supreme court to review the case on the merits. Huston Tp. Poor Dist. v. Benezette Tp. Poor Dist., 135 Pa. 393, 19 A 1060; Mifflin Tp. Poor Dist. v. Schuylkill County Poor Dist., 37 Pa. Super. 611; Shrewsbury Tp. Poor Dist. v. Penn Tp. Poor Dist., 33 Pa. Super. 378; East Franklin Tp. v. Raybum Tp., supra. (3) But when the omission of a point is supplied by the specific statement of the disputed question in the body of an exception, the record is then sufficient to present that question. Huston Tp. Poor Dist. v. Benezette Tp. Poor Dist., supra. (4) This act applies to the trial of the issues on the appeal. It has no reference to a motion made to the discretion of the court. Sugar Creek v. Washington, 62 Pa. 479 (holding that a writ of error will not bring up depositions taken below on the hearing of the rule to quash the appeal). (5) On certiorari to the court of quarter sessions, the revision of the supreme court is confined to the regularity of the proceedings, and does not extend to an examination of the merits. Shippen v. Gaines, 17 Pa. 38; South Huntingdon Overseers v. East Huntingdon Overseers, 7 Watts 527; Reading Overseers v. Cumree Overseers, 5 Binn. 81.

dered cannot be taken advantage of where the case is being tried on appeal upon the merits.[95]

[§ 161] **(5) Hearing and Determination—(a) In General.** While the time for hearing an appeal from an order of removal is usually provided for by statute,[96] such time is not so rigidly fixed as to deprive the parties of a reasonable time for procuring the evidence.[97]

Amendment of order of removal. A defective order of removal may be amended by the appellate court.[98]

Dismissal of appeal. Motions to dismiss the appeal reach such defects only as are apparent on the face of the record as it exists when the motion is filed.[99] Where the statute provides that, if seasonable notice of the appeal is not given, the appeal shall be continued to the next session of court, the court has no authority to dismiss the appeal for failure to give such notice.[1]

Effect of reversal. Where an order of removal is reversed, the justices of the town to which the pauper was improperly removed may make an order for his removal back to the town from which he was removed,[2] or, if it appears that the pauper has no settlement in that town, they may make a new original order for his removal to the place of his last legal settlement.[3]

[§ 162] **(b) Discharging or Quashing Order of Removal.**[4] An order of removal is discharged, or, as is sometimes said, vacated, after a successful objection to it on the merits.[5] It may be quashed for informality or irregularity of the proceedings,[6] but the fact that a pauper was removed, with his consent, before the time named in the order for his removing himself had expired, is not ground for quashing the order.[7] Where the proceedings before the justices were regular, and the appeal is taken in due season and form, the case is before the appellate court upon its merits, and an order quashing the order of removal is erroneous.[8] On the other hand, it has been held that the fact that the pauper in question is not liable to be removed may be taken advantage of on a motion to quash.[9]

Quashing in part. On appeal from an order of removal, the court may in part quash the order and in part affirm it.[10] So, where an order is made to remove several, and the order is bad as to part, either for some informality, or on the ground that they were not liable to be removed, the order as to them may be quashed and affirmed as to the residue.[11]

Time of quashing. A motion to quash an order of removal for jurisdictional defects may be made at any time.[12] It is sometimes provided that, on appeal from an order of removal, the order shall be no evidence of the facts therein stated; but respondents must begin de novo, and substantiate the order, before the appellants can be called upon to impeach it,[13] and under such a provision it is error for the appellate court to rule that the order is conclusive until impeached.[14]

[§ 163] **f. Costs upon Removal Proceedings**[15]**—(1) In General.** The right to, and items of, costs recoverable by the successful party in removal proceedings are dependent on the terms of the statutes.[16] And if at the time of trial the pauper has

95. Schuylkill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41; Point Tp. v. Northumberland, 22 Pa. Co. 242.

96. See statutory provisions.

97. Lower Augusta Tp. Overseers of Poor v. Howard Tp. Overseers of Poor, 6 Pa. Cas. 385, 9 A 446.

98. Cumberland Tp. v. Jefferson Tp., 25 Pa. 463.

[a] **Illustrations.**—(1) If an order for the removal of a pauper is defective in omitting to state that the person has become or is likely to become chargeable, it is the duty of the court of quarter sessions on appeal to amend such order and proceed to try the case upon its merits. Cumberland Tp. v. Jefferson Tp., 25 Pa. 463. (2) So an order for the removal of a pauper widow "and family" may be amended on appeal by inserting the names of her children. Chillisquaque v. Lewisburg, 2 Pennyp. (Pa.) 487.

99. Westminster v. Warren, 55 Vt. 522.

1. Chester v. Londonderry, 51 Vt. 535.

2. Rouse v. Moore, 18 Johns. (N. Y.) 407.

3. Rouse v. Moore, supra.

4. Conclusiveness of order of removal discharged or quashed see supra § 154.

5. Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; West Buffalo v. Walker Tp., 8 Pa. 177.

6. Newburgh Overseers of Poor v. Plattekill Overseers of Poor, 1 Johns. (N. Y.) 330; Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; West Buffalo v. Walker Tp., 8 Pa. 177; Lathrop Poor Dist. v. Nicholson Poor Dist., 13 Pa. Dist. 797; Beaver Tp. v. Centre Tp., 41 Pa. Co. 375; Landgrove v. Plymouth, 52 Vt. 503.

[a] **Omission of jurisdictional facts.**—Newburgh Overseers of Poor v. Plattekill Overseers of Poor, 1 Johns. (N. Y.) 330.

[b] **Failure to show adjudication as to settlement.**—Lathrop Poor Dist. v. Nicholson Poor Dist., 10 Pa. Dist. 324.

[c] **Defects reached by motion to quash.**—A motion to quash an order of removal reaches only such defects as are apparent on the face of the order. Landgrove v. Plymouth, 52 Vt. 503; Waterford Overseers of Poor v. Brookfield Overseers of Poor, 2 Vt. 200.

[d] **Failure to serve copy of order.**—An omission of the justice ordering the removal of a pauper to cause a copy of such order to be served upon the overseers of the town to which the pauper is removed, as provided by Acts (1817) c 104 § 5, within thirty days, is a defect for which the pleadings may be quashed on motion or plea in abatement. Waterbury Overseers of Poor v. Fairfax Overseers of Poor, 1 Aik. (Vt.) 295; Bradford Overseers of Poor v. Corinth Overseers of Poor, 1 Aik. (Vt.) 290.

7. Plymouth v. Mendon, 23 Vt. 451.

8. Plunkett's Creek Tp. v. Fairfield Tp., 58 Pa. 209; West Buffalo Tp. v. Walker Tp., 8 Pa. 177.

9. Brookfield v. Hartland, 6 Vt. 401; Rex v. Martley, 5 East 40, 102 Reprint 984; Rex v. Houghton le Spring, 1 East 247, 102 Reprint 96.

[a] **Chargeability of pauper.**—The inquiry whether a pauper is chargeable or likely to become so is material; but, being of an interlocutory nature, or a temporary bar, must be taken advantage of by motion to quash, or by special plea in bar, setting forth the facts. Corinth Overseers of Poor v. Bradford Overseers of Poor, 2 Aik. (Vt.) 120.

[b] **Place of residence.**—On an appeal from an order of removal, the question whether the pauper had come to reside in the town procuring the order, within the meaning of the statute, may be presented by plea as well as by motion to quash. Sutton v. Cabot, 19 Vt. 522.

10. Bucks County Directors of Poor v. Philadelphia Guardians of Poor, 1 Serg. & R. (Pa.) 387.

11. Bristol v. Braintree, 10 Vt. 203.

[a] **Removal of family.**—It is not a sufficient reason to quash an order to remove a man and "his family" that they are not named, unless it is made to appear that the pauper had a family on whom the order was to operate; and then, if such order would not be good as to the family, it would only be quashed as to them. Bristol v. Braintree, 10 Vt. 203. See Newbury v. Brunswick, 2 Vt. 151, 19 AmD 703 (where the order for the removal of A B, a pauper, and his family, was abated as to the family for generality.

12. McVeytown v. Union Tp., 5 Watts & S. (Pa.) 434.

[a] **Particular defect.**—Disqualification of justices granting order of removal. McVeytown v. Union Tp., 5 Watts & S. (Pa.) 434; Lathrop Poor Dist. v. Nicholson Poor Dist., 10 Pa. Dist. 324.

13. See statutory provisions.

14. Otsego Overseers of Poor v. Smithfield Overseers of Poor, 6 Cow. (N. Y.) 760.

15. Generally see Costs 15 C. J. p 1.

16. See statutory provisions.

[a] **The phrase "costs and expenses"** in the act of June 13, 1836, to the party successful on appeal includes nothing beyond disbursements which are immediately connected with and incidental to removal, and does not include compensation paid to physicians who examined the pauper for the purpose of qualifying themselves to testify as to her mental condition. Perry Tp. Poor Dist. v. Red Bank Tp. Poor Dist., 8 Pa. Dist. 526.

[b] **Liability of place of residence.**—The poor district where a family had an established residence is liable for the expense of their removal from another district, where they have become a charge upon the community, even though they have been absent

been removed, the action may still be prosecuted to recover costs and expenses.[17] In an action by the overseers of a town for the removal of a pauper they act as mere agents for the town, and costs, if recovered, must be taxed against the town they represent.[18]

[§ 164] **(2) Counsel Fees.** The statutes in many cases have been construed as authorizing the recovery of reasonable counsel fees by the successful party in removal proceedings.[19] But it has been held that counsel fees are allowable only where the losing party prosecuted the appeal vexatiously or frivolously;[20] and whether the appeal was taken with or without reasonable cause may, in the discretion of the court, affect the liberality of the allowance.[21] Counsel fees will not be allowed where the litigation might have been avoided by the allowance of proper credits.[22]

[§ 165] **(3) Maintenance pending Removal.**[23] A district not liable for the support of a pauper who becomes chargeable therein may recover from the town which is liable all necessary sums expended for his support pending his removal.[24] The relieving district must, however, employ due diligence in notifying the district liable for the pauper's support and in obtaining an order for his removal thereto,[25] and if it neglect to do so it cannot claim reimbursement for maintenance afforded during the delay.[26] Where there is negligence on the part of both towns in establishing legal settlement, the expenses of maintenance will be apportioned between them.[27] If the district liable refuses to accept the pauper, delay on the part of the relieving town in obtaining an order of removal will not prevent it from recov-

from their home district more than three years. Westmoreland County Poor Dist's. App., 77 Pa. Super. 402.

[c] **Necessity for appeal.**—(1) The act of June 13, 1836, relating to costs in removal proceedings, allowed costs and charges only in cases where appeals were taken from orders of removal, and no provision was made for costs when the pauper was accepted and no appeal was taken. Blair County Directors of Poor v. Clarion Borough Overseers of Poor, 91 Pa. 431; Schuylkill v. Montour, 44 Pa. 484; Sugarloaf Tp. v. Schuylkill County, 44 Pa. 481; Lawrence Tp. v. Tioga County, 2 Pa. Dist. 786, 12 Pa. Co. 305. (2) The act of April 15, 1867, remedies the defect, however, and makes the accepting district liable for costs where the pauper is accepted and the order of removal is unappealed from, in like manner as if appeal had been taken. Blair County Directors of Poor v. Clarion Borough Overseers of Poor, supra [dist Renovo Tp. Overseers of Poor v. Half-Moon Overseers of Poor, 78 Pa. 301 (where the record did not show any acceptance of the pauper)]; Lawrence Tp. v. Tioga County, supra; Bedford County v. Licking Creek Tp., 2 Chest. Co. (Pa.) 310. (3) Where there is no appeal and the pauper is not accepted there can be no recovery for costs. Renovo Tp. Overseers of Poor v. Half-Moon Overseers of Poor, supra. (4) Where, however, the overseers of the place of settlement refuse to receive the pauper, and appeal from the order of removal, the appeal being quashed because not taken in time, the relieving district may file a bill of costs and expenses in the quarter sessions. Moreland Tp. v. Union Tp., 6 Pa. Co. 566.

[d] **Necessity for order of removal.**—There must be an order of removal in order to charge the accepting town, under the act of April 15, 1867, voluntary acceptance imposing no obligation for costs or charges prior to the actual time of receipt. Directors v. Overseers, 4 LancLRev (Pa.) 36. But see Clinton Tp. v. Union Tp., 5 Pa. Co. 124 (which holds that, where relief has been furnished in obedience to an order from two justices and costs have been incurred in searching for the last legal settlement of the pauper, the accepting town is liable for costs to a reasonable amount, under the act of April 15, 1867, although there was no formal order of removal).

[e] **That the pauper was found insane and committed before removal** will not relieve the accepting district of liability for costs. Bedford County v. Licking Creek Tp., 2 Chest. Co. (Pa.) 310.

[f] **Order quashed.**—(1) Where an order of removal was quashed by the general sessions, it was held that the court might allow costs. Newburgh Overseers of Poor v. Plattekill Overseers of Poor, 1 Johns. (N. Y.) 330. (2) On affirmance by the supreme court of the order of quashal appellants are liable for the costs of the appeal. Newburgh Overseers of Poor v. Plattekill Overseers of Poor, supra. (3) But no costs are recoverable on affirmance unless payment thereof has been directed by the supreme court. Blooming Grove Overseers of Poor v. Minisink Overseers of Poor, 10 Wend. (N. Y.) 588.

[g] **Partial quashal.**—Where on appeal an order of removal is in part confirmed and in part quashed, neither party is entitled to costs. Bucks County Directors of Poor v. Philadelphia Guardians of Poor, 1 Serg. & R. (Pa.) 387.

[h] **Want of jurisdiction.**—Where an appeal from magistrates to the court of quarter sessions is quashed for want of jurisdiction in the magistrates, the appellate court has no jurisdiction to award costs to either party. St. Clair Tp. Overseers of Poor v. Moon Tp. Overseers of Poor, 6 Watts & S. (Pa.) 522.

[i] **Division of costs.**—Circumstances under which costs will be divided between two towns. Piney Tp. v. Sligo Borough, 2 Pa. Co. 134.

[j] **Services of a justice a town charge.**—In New York the services of a justice in the examination and removal of a pauper are properly a town, not a county, charge. Ex p. Bennet, 1 Cow. (N. Y.) 204.

[k] **Sickness preventing removal.**—In Vermont one town cannot recover of another the costs of removal of a pauper, except where the sickness of the pauper prevents a removal after an order is made. Londonderry v. Windham, 2 Vt. 149.

[l] **Enforcement of payment of costs.**—Where an order of removal from a township in one county is affirmed by the court of quarter sessions of that county, payment of costs may be enforced by mandamus to the overseers of the township to which the removal was ordered, on petition to the court of quarter sessions of the latter county. Eastside Borough v. Denison Tp., 42 Pa. Super. 523, 34 Pa. Co. 533.

17. Guilford v. Abbott, 17 Me. 335.

18. Buckfield v. Gorham, 6 Mass. 445.

19. See statutory provisions.

[a] **In New Jersey,** under an act allowing the recovery of "reasonable expenses" in civil cases, the court in removal cases may allow the successful party reasonable counsel fees. Hopewell Tp. v. Amwell Tp., 7 N. J. L. 4.

[b] **In Pennsylvania** (1) under Act June 13, 1836 § 20, authorizing the court on appeal in settlement cases to award such costs and charges as the court shall consider reasonable, the appellate court may award a reasonable sum for counsel fees. Westmoreland County Poor Dist.'s App., 77 Pa. Super. 402; Davison Tp. Poor Dist. Overseers of Poor v Muncy Creek Tp. Poor Dist. Overseers of Poor, 11 Pa. Super. 215; Northmoreland Tp. Poor Dist. v. Exeter Tp. Poor Dist., 29 Pa. Dist. 34; Schuylkill County Poor Directors v. Northampton County Poor Directors, 17 Pa. Dist. 41; Lathrop Poor Dist. v. Nicholson Poor Dist., 13 Pa. Dist. 797; Lawrence Tp. v. Tioga County, 2 Pa. Dist. 786, 12 Pa. Co. 305; Noxen Tp. Poor Dist. v. Luzerne County Cent. Poor Dist., 43 Pa. Co. 114; Jordan v. Jackson, 8 Pa. Co. 152 [cit Centre Dist. v. Beaver Dist., Pa. Quart. Sess. (1887); Berwick v. Salem, Pa. Quart. Sess. (1886)]; Milton v. Northumberland, 5 Pa. Co. 306; Lower Augusta v. Howard, 4 Pa. Co. 303. (2) There are other decisions, however, which hold that counsel fees are not to be allowed under such statute, and that costs must be limited to those which a party could win in any other successful litigation. Madison v. Cambria County Poor Directors, 9 Pa. Co. 435; Porter Tp. v. Jersey Shore, 6 Pa. Co. 569. (3) An allowance for attorney's fees cannot be made under Gen. Poor L. § 23. Carbondale Tp. Poor Dist. v. Scranton Poor Dist., 1 LackLegN 187. (4) Under Act April 6, 1905 (P. L. p 112), expressly limiting the recovery by a poor district, petitioning for removal of a pauper, to its expense of relief and removing, and the costs of the proceeding, it has been held that counsel fees cannot be allowed, since they are not a part of either "expense of removing" or "costs of the proceeding." Westmoreland County Poor Dist.'s App., 77 Pa. Super. 402. (5) In other cases, however, it has been held that under the act of 1905, reasonable counsel fees may be allowed as part of the expense of removal. Northmoreland Tp. Poor Dist. v. Exeter Tp. Poor Dist., 29 Pa. Dist. 34 (holding that that rule applies not only where petition for removal is granted, but also where it is denied); Noxon Tp. Poor Dist. v. Central Tp. Poor Dist., 25 Pa. Dist. 211, 43 Pa. Co. 114; Texas Tp. Poor Dist. v. Berlin Tp. Poor Dist., 23 Pa. Dist. 47, 40 Pa. Co. 652; East Side Borough v. Denison Tp., 17 Pa. Dist. 850; Monroe Tp. Poor Directors v. Union Tp. School Directors, 44 Pa. Co. 345; Adams Tp. Poor Dist. v. East Buffalo Tp. Poor Dist., 44 Pa. Co. 222 (second counsel fee not allowed).

20. Jordan v. Jackson, 8 Pa. Co. 152.

21. Lower Augusta v. Howard, 4 Pa. Co. 303.

22. Clinton Tp. v. Union Tp., 5 Pa. Co. 124.

23. Liability for maintenance where pauper is illegally brought into town or county see infra § 172.

24. See cases infra note 25 et seq.

25. Lawrence Tp. v. Tioga County, 2 Pa. Dist. 786, 12 Pa. Co. 305; Homer Poor Dist. v. Austin Poor Dist., 19 Pa. Co. 546; Jersey Shore v. Nippenose Tp., 18 Pa. Co. 473; Luzerne County Cent. Poor Dist. v. Pittston, etc., Poor Dist., 7 Kulp (Pa.) 199; In re Ross Poor Dist., 3 Kulp (Pa.) 198; Directors v. Overseers, 4 LancLRev (Pa.) 36.

26. See cases supra note 25.

27. Elk Tp. v. Jordan Tp., 10 Pa.

ering all expenses incurred up to the time of actual removal.[28] And refusal, on the part of the district liable, to receive the pauper after being served with an order of removal will render it liable for all expenses incurred up to the time of final acceptance.[29]

Where an order of removal is affirmed, the removing district is usually entitled to recover money expended for the support of the pauper from the date of the order of relief,[30] and, in necessitous cases, before that time.[31] Where a removal order is affirmed, and the pauper is too ill to be moved, the receiving district is liable for maintenance expenses subsequent to the obtaining of the order of removal.[32]

Where an order of removal is reversed or quashed, the district to which the removal is made is entitled under some statutes to recover from the removing district the necessary expenses of maintenance of the pauper incurred up to the determination of the appeal from the undue removal.[33]

Agreement as to costs. Where the parties to a pending appeal from an order of removal agreed that the suit should be discontinued, and that defendants should pay plaintiffs the "costs" which had accrued, it was held that this did not include the expense of maintaining the pauper after the order of removal was made, and while the pauper, because of illness, could not be removed.[34]

[§ 166] **5. Bringing Pauper into State, County, or Town[35]—a. Penalties[36]—(1) In General.** In many jurisdictions there are statutes, variously worded, prescribing a penalty for illegally bringing an indigent person into the state or from one town or county within the state to another town or county therein.[37] To subject a person to the penalty, even where it is imposed in general terms, he must have acted with the motive or intent of imposing the expense of the pauper's support upon the town or district to which such pauper is brought.[38] In some jurisdictions it is held that a person does not incur the penalty by taking a pauper to the place of his settlement and leaving him there,[39] or by bringing a pauper settled in another state into the state in which he has his domicile, home, and usual place of abode, and from which he had departed temporarily.[40] Under other statutes the penalty may be recovered by the town or county into which the pauper is brought, although the pauper had his settlement in such town or county.[41]

An action for the penalty does not survive against the estate of the person bringing in a pauper.[42]

[§ 167] **(2) Persons Liable.** Statutes subjecting to a penalty "whoever" brings a pauper into any town, etc.,[43] are held to apply to public officers as well as to individuals.[44] Even at common law overseers of the poor were indictable for fraudulently removing paupers into a parish in which they had no settlement.[45]

Co. 245.

28. Moreland Tp. v. Union Tp., 6 Pa. Co. 566.

29. Luzerne County Cent. Poor Dist. v. Pittston, etc., Poor Dist., 7 Kulp (Pa.) 196.

30. Brady Tp. v. Clinton Tp., 1 Pa. Co. 127

31. Brady Tp. v. Clinton Tp., supra.

32. In re Ross Poor Dist., 3 Kulp (Pa.) 198.

[a] **In Vermont** the liability of the receiving town under the circumstances stated in the text is imposed by Rev. St. c 16 § 6, and assumpsit will lie upon the statute. Pawlet v. Sandgate, 19 Vt. 621.

33. See statutory provisions.

[a] **Demand for these expenses** need not be made at the term of court when the decree of undue removal was entered. Huntington Tp. Poor Dist. v. New Columbus Borough, 109 Pa. 579, 16 WklyNC 237; Kelly Tp. v. Gregg Tp., 2 Pa. Cas. 496, 4 A 732; Williamsport v. Eldred Tp., 6 WklyNC (Pa.) 188.

[b] **Expenses recoverable.**—The receiving district may recover not only the cost of maintaining the pauper, but also the cost of maintaining her illegitimate infant child, removed with the mother, although such child was not named in the order. Lathrop Poor Dist. v. Nicholson Poor Dist., 13 Pa. Dist. 797.

[c] **In New York** it has been held that the overseers of the town to which a pauper is improperly removed cannot, after the order of removal is quashed, maintain an action against the overseers of the town from which he was removed, to recover the expenses of his maintenance, the presumption being that the order was obtained bona fide, and the statute not making it the duty of the overseers of the poor who had caused the pauper to be removed to another town to take him back at their own charge. Rouse v. Moore, 18 Johns. 407.

[d] **In Vermont** (1) towns may recover for money paid to other towns for the support of paupers, upon orders of removal afterward reversed, if the amount does not exceed the expense of keeping in the town procuring the removal. St. Johnsbury v. Waterford, 15 Vt. 692. (2) But where the court on appeal from an order of removal decided that the pauper was unduly removed because he had not gone to reside in the removing town, but was a transient there, and that such town was therefore entitled to recover, under the statute, from the receiving town for support provided such transient, it was held that the section of the statute providing that where on appeal it shall be determined that the pauper was unduly removed the receiving town could recover the amount paid out by it for the pauper's support after his removal, was repugnant to the whole spirit and intent of the pauper statutes, and would not be enforced. Ryegate v. Wardsboro, 30 Vt. 746.

34. Brookfield v. Braintree, 21 Vt. 447.

35. Cross references:

Persons wrongfully brought into town as subject to removal see supra § 143.

Procuring marriage for purpose of changing settlement as causing loss or change see supra § 130.

36. Generally see Fines, Forfeitures and Penalties §§ 72–161.

37. See statutory provisions.

38. Colo.—Pitkin County v. Law, 3 Colo. A. 328, 33 P 143.

Ill.—Williams v. Franklin County, 39 Ill. 21.

Me.—Sanford v. Emery, 2 Me. 5.

Mass.—Sturbridge v Winslow, 21 Pick. 83; Greenfield v. Cushman, 16 Mass. 393, 395.

N. Y.—Coe v. Smith, 24 Wend. 341; Thomas v. Ross, 8 Wend. 672.

Vt.—Wallingford v. Gray, 13 Vt. 228.

"As to the construction of the statute, upon which this action is brought, it must be reasonable; and it would not be so if it were held to exact a penalty for doing an act of humanity or common charity. Taking the whole statute together, we are fully satisfied that the offence intended to be punished, was that of bringing a poor person into a town, with intent to leave him there, a charge and burden upon such town." Greenfield v. Cushman, supra.

[a] **Penalty cannot be recovered** (1) against one who carried a poor person into a town with an honest purpose of helping him on his journey. Deerfield v. Delano, 1 Pick. (Mass.) 465. (2) Nor can the penalty be recovered against a person who brings a poor relative to his house, to be maintained at such person's expense, although, by the subsequent insanity of such poor relative the burden of his support is cast upon the county. Union County v. Axley, 53 Ill. A. 670.

[b] **Facts held not to show violation of statute.**—Worcester v. East Montpelier, 61 Vt. 139, 17 A 842.

[c] **In New Hampshire** (1) it was formerly held that in order to subject a person to the penalty, there must be some culpable intent shown. Sullivan County v. Grafton County, 55 N. H. 339; Merrimack County v. Sullivan County, 45 N. H. 181; Goshen v. Hillsborough County, 45 N. H. 139; Dyer v. Hunt, 5 N. H. 401. (2) But in a later case, it was held that it is no defense that the person violating the statute acted honestly and in good faith, under a mistake of fact. State v. Cornish, 66 N. H. 329, 21 A 180, 11 LRA 191.

Evidence of intent see infra § 170. **Question for jury** see infra § 171.

39. Pitkin County v. Law, 3 Colo. A. 328, 33 P 143; Franklin v. Fuller, 105 Mass. 336; Middleborough v. Clark, 2 Pick. (Mass.) 28; Canton v. Bentley, 11 Mass. 441; State v. Benton, 18 N. H. 47.

40. State v. Benton, supra.

41. Winfield v. Mapes, 4 Den. (N. Y.) 571; Weybridge v. Cushman, 64 Vt. 415, 24 A 1114; Dover v. Wheeler, 51 Vt. 160.

42. Winhall v. Sawyer, 45 Vt. 466.

43. See statutory provisions.

44. Palmer v Wakefield, 102 Mass. 214; Newaygo County v. Nelson, 75 Mich. 154, 42 NW 797; Dover v. Wheeler, 51 Vt. 160.

[a] **Keeper of a poorhouse** is not relieved from liability by the fact that he acted under orders from the superintendent of the poor. Peo. v. Barlow, 134 Mich. 394, 96 NW 482.

45. Reg. v. St. Marylebone, 16 Q. B. 299, 71 ECL 299, 117 Reprint 893; Rex v. Busby, 3 BottPoorL 335; Reg.

Common carriers transporting paupers into a state are not subject to the penalty when they act in the ordinary course of business;[46] but if they act with fraudulent intent, they are liable.[47]

Liability for act of agent. A nonresident of the state may be liable for the penalty, although he does not personally bring the pauper into the state, but sends him under the care of another.[48]

Execution of removal order. The penalty cannot be recovered against an officer acting under an order of removal regularly made,[49] but it would seem to be otherwise where the removal order is secured in bad faith and through the misrepresentations of such person;[50] and an order of a court of one state directing the removal of a pauper into another state has been held not to relieve the officer executing the order from liability for the penalty imposed by the laws of the latter state for bringing paupers into the state.[51] It has also been held that it is no defense that defendants brought the pauper into the state while acting in pursuance of a statute of a foreign state.[52]

[§ 168] **(3) Parties.** When no mode of recovering the penalty is designated and no appropriation made, it accrues to the use of the state and should be prosecuted in the name of the state.[53]

[§ 169] **(4) Pleading.** In an action for illegally bringing a pauper into plaintiff town or county, the declaration or complaint should allege all the facts that are material to be proved.[54] Thus plaintiff should state the name of the person illegally transported, in order that defendant may know the particular charge to which he must answer.[55] A plea of not guilty puts in issue only the facts alleged in the declaration.[56]

[§ 170] **(5) Evidence.**[57] In an action to recover the penalty for bringing paupers into a town, etc., the burden is of course upon plaintiff to prove all the facts necessary to subject defendant to the penalty,[58] and it has been held in some jurisdictions that, as such statutes are penal, the facts must be proved beyond a reasonable doubt.[59]

[§ 171] **(6) Questions for Jury.** In an action to recover the penalty for illegally bringing a pauper into a town, the intent of defendant is a fact to be found by the jury.[60]

[§ 172] **b. Action for Damages—(1) In General.** The removal of paupers from the town or county in which they reside and to which they are chargeable to another town or county, thereby throwing the burden of their support upon the latter, is an actionable injury,[61] for which the appropriate remedy ordinarily is an action on the case,[62] and not assumpsit.[63] But such action cannot be maintained until the person brought into a county has been adjudicated a pauper,[64] nor until expenses for his support have been incurred by plaintiff.[65] In order to maintain the action it must generally appear that the removal was made with the intent of subjecting the town or county into which the pauper is brought to the charge of supporting him,[66] although, on the other hand, it has been held that the right of action exists whether the removal was made in good faith or with fraudulent intent.[67] Such an action cannot be maintained against a town for neglect or breach of its duty whereby its paupers stroll into another town in which they have no legal settlement, and there become chargeable to the latter.[68] In some jurisdictions an action for damages is expressly given by statute against the person unlawfully bringing a pauper into a town or county.[69]

Successive actions. After the recovery of a judg-

v. Jennings, 2 D. & L. 741; Reg. v. Cooper, 13 Jur. 99.

46. Fitchburg v. Cheshire R. Co., 110 Mass. 210; Thomas v. Ross, 8 Wend. (N. Y.) 672.

47. Thomas v. Ross, supra.

48. Barkhamsted v. Parsons, 3 Conn. 1.

49. Sturbridge v. Winslow, 21 Pick. (Mass.) 83; Morgan v. Mead, 16 Vt. 644; Bradford v. Corinth, 1 Aik. (Vt.) 290.

50. Stratford v. Sanford, 9 Conn. 275.

51. Newaygo County Supts. of Poor v. Nelson, 75 Mich. 154, 42 NW 797.

52. Winfield v. Mapes, 4 Den. (N. Y.) 571.

53. Sturbridge v. Winslow, 21 Pick. (Mass.) 83.

54. See cases infra note 55.

55. St. Johnsbury v. Goodenough, 44 Vt. 662.

[a] **In Michigan** an affidavit to recover the penalty for bringing a pauper into a county with intent to make such pauper a charge on the county should state the facts positively or give the circumstances upon which the affiant had good reason to believe that they exist. Luton v. Newaygo Cir. Judge, 70 Mich. 152, 38 NW 13.

56. Marshfield v. Edwards, 40 Vt. 245 (where it was held that under the plea of not guilty, defendant could not show that the pauper had a settlement in a town other than plaintiff town).

57. **In action for damages** see infra § 173.

58. Williams v. Franklin County, 39 Ill. 21; Franklin v. Fuller, 105 Mass. 336.

[a] **Evidence held sufficient to show intent.**—Williams v. Franklin County, 39 Ill. 21.

[b] **Evidence held insufficient to show defendant's liability.**—Harding v. Peo., 34 Ill. A. 617.

59. Pitkin County v. Law, 3 Colo. A. 328, 33 P 143; Barnet v. Ray, 33 Vt. 205.

Conflicting rules as to weight and sufficiency of evidence in penal actions generally see Fines, Forfeitures and Penalties § 135.

60. Sanford v. Emery, 2 Me. 5; Deerfield v. Delano, 1 Pick. (Mass.) 465; Greenfield v. Cushman, 16 Mass. 393; Thomas v. Ross, 8 Wend. (N. Y.) 672; Wallingford v. Gray, 13 Vt. 228.

61. Stratford v. Sanford, 9 Conn. 275; Newaygo County Supts. of Poor v. Nelson, 75 Mich. 154, 42 NW 797; Pittstown Overseers of Poor v. Plattsburgh Overseers of Poor, 15 Johns. (N. Y.) 436; Sheldon v. Fairfax, 21 Vt. 102 [dist Putney v. Dummerston, 13 Vt. 370, on the ground that in holding that assumpsit would not lie to recover expenses incurred by plaintiff town for the pauper's support, the court could not be supposed to have decided that plaintiff had no remedy]. And see Charlotte v. Colchester, 20 Vt. 91 (holding that the remedy in such case is not by obtaining an order of removal of the pauper to the town from which he was thus fraudulently removed). But see Crouse v. Mabbett, 11 Johns. (N. Y.) 167 (holding that overseers of the poor who had expended money for the maintenance of a pauper could not maintain an action on the case against the person who brought the pauper into the town—that their remedy was under the statute to recover the penalty given in such case).

[a] **Who may maintain action.**—In Michigan, an action to recover for support furnished to a pauper illegally brought into a county, may be maintained by the superintendents of the poor of that county. Newaygo County Supts. of Poor v. Nelson, 75 Mich 154, 42 NW 797

62. Stratford v. Sanford, 9 Conn. 275, Somers v Barkhempstead, 1 Root (Conn.) 262; Pittstown Overseers of Poor v. Plattsburgh Overseers of Poor, 15 Johns. (N. Y.) 436; Sheldon v. Fairfax, 21 Vt. 102.

63. Brooks v. Read, 13 Johns. (N. Y.) 380; Putney v. Dummerston, 13 Vt. 370.

[a] **In Massachusetts,** however, under Gen. St. c 71 § 25, a town incurring expenses for the support of a person brought into the state who becomes a pauper within one year thereafter may recover such expenses, in an action of contract, from the person who brought him into the state. Fitchburg v. Cheshire R. Co., 110 Mass. 210.

64. Newaygo County Supts. of Poor v. Nelson, 75 Mich. 154, 42 NW 797.

65. Newaygo County Supts. of Poor v. Nelson, supra.

66. Livingston County v. Oakland County, 141 Mich. 667, 104 NW 978; Cortland County Superintendent of Poor v. Herkimer County Superintendent of Poor, 44 N. Y. 22; Foster v. Cronkhite, 35 N. Y. 139; Bartlett v. Ackerman, 21 NYS 53; Coe v. Smith, 24 Wend. (N. Y.) 341; Weybridge v. Cushman, 64 Vt. 415, 24 A 1114; Barnet v. Whitcher, 50 Vt. 170.

Evidence of intent see infra § 173.

67. Stratford v. Sanford, 9 Conn. 275.

68. Chelsea v. Washington, 48 Vt. 610

69. See statutory provisions.

[a] **In Vermont** (1) that clause of Comp. St. p 134 c 18 § 29, which gives a penalty against one who transports a poor person to a town with intent to make the town chargeable with his support, is strictly penal, although the penalty is given to the person aggrieved; while the clause giving a right of action for damages to the town to which the poor person is removed is purely remedial. Barnet v. Ray, 33 Vt 205; Calais v. Hall, 11 Vt. 494. (2) Gen. St. c 20 § 31, in addition to imposing a penalty for trans-

ment in an action for illegally bringing a pauper into a town, another action will not lie for supplies furnished to the pauper subsequent to the judgment.[70]

Measure of damages in actions for illegally bringing paupers into a town, etc., is the amount necessarily in good faith expended by the town or county in supporting the pauper from the time of his removal to the time of trial.[71]

[§ 173] **(2) Evidence.**[72] The burden is on plaintiff to prove facts sufficient to authorize recovery;[73] such as an intent to charge plaintiff town with the pauper's support.[74] General rules as to the admissibility of evidence[75] apply to actions for damages for illegally bringing a pauper into a town or county.[76] Declarations of the pauper to defendant as to his purpose in leaving the county, and as to the place where he intended to go, are admissible as part of the res gestæ on the question of defendant's intent in aiding in the pauper's removal.[77] Defendant may also testify as to his intention in removing or aiding in the removal of the pauper,[78] and as to his belief in respect of the place where the pauper intended to go.[79] The rule that, in an action to recover the penalty imposed for illegally bringing a poor person into a town, etc., plaintiff must establish his case beyond a reasonable doubt,[80] does not apply where plaintiff seeks to recover only the expenses of supporting the pauper, in which action a preponderance of evidence is sufficient to authorize a recovery.[81]

IV. SUPPORT, SERVICES, AND EXPENSES[82]

[§ 174] **A. Support by Relatives—1. Liability—a. In General.** It is generally held to be the common-law duty of a parent to support his minor children,[83] and of a husband to support his wife;[84] but beyond this a person is under no legal obligation, in the absence of statute, to support his poor relations.[85] However, for the purpose of indemnity to the public against the maintenance of paupers,[86] statutes have been passed imposing upon kindred, in certain degrees, liability for the support of their indigent or pauper relatives,[87] and such statutes have been held constitutional.[88] A statute of this kind is remedial[89] and, like other remedial statutes,[90] is to be liberally construed.[91] The provisions of the statutes in some jurisdictions have been construed as wholly prospective,[92] their operation not being delayed until the town seeking to enforce them has actually furnished necessaries, but becoming operative when the necessity of providing for a pauper by such town in default of other means arises.[93] But the state may fix the time when the liability for support shall arise,[94] and a statute imposing on relatives liability for the support of inmates of a state institution has been held broad enough to include persons who became inmates before the passage of the statute,[95] the fact that the inmate had for a time been freely maintained by the state giving no vested right to have such free maintenance continued.[96] Such a statute does not embrace an illegitimate child who has become chargeable as a pauper,[97] unless illegitimate children are expressly designated.[98]

Extraterritorial force of statute. The statutes requiring kindred to support each other have no extraterritorial force and will not be enforced by

porting a poor person into a town, gives the town into which the poor person is transported an action for damages when and only when such town is not the place of his settlement. Marshfield v. Edwards, 40 Vt. 245. (3) The fact that the pauper had a settlement in some other town, or had a father able to support him, is no defense. Marshfield v. Edwards, supra.

70. Marlborough v. Sisson, 31 Conn. 332.

71. Marlborough v. Sisson, supra; Stratford v. Sanford, 9 Conn. 275. And see cases supra passim notes 61–70.

72. **In action for penalty** see supra § 170.

73. See cases infra note 74.

74. See cases infra this note.

[a] **Burden of proof held not sustained.**—Bartlett v. Ackerman, 21 NYS 53; Weybridge v. Cushman, 64 Vt. 415, 24 A 1114; Barnet v. Whitcher, 50 Vt. 170.

75. See Evidence §§ 89–1739.

76. Foster v. Cronkhite, 35 N. Y. 139.

[a] **Evidence held irrelevant.**—In proceedings to charge a county superintendent for improper removal of a pauper, it is immaterial where defendant proposed taking the pauper, or where the pauper intended going, if the removal was not with the intent of making plaintiff county chargeable with the pauper's support. Foster v. Cronkhite, 35 N. Y. 139.

77. Foster v. Cronkhite, supra.

78. Cortland County Superintendent of Poor v. Herkimer County Superintendent of Poor, 44 N. Y. 22; Foster v. Cronkhite, 35 N. Y. 139.

79. Foster v. Cronkhite, supra.

80. See supra § 170.

81. Barnet v. Ray, 33 Vt. 205.

82. **Support of insane relatives** see Insane Persons §§ 368–372.

83. See Parent and Child § 34.

84. See Husband and Wife § 29.

85. Newtown v. Danbury, 3 Conn. 553; Wethersfield v. Montague, 3 Conn. 507; Dawson v. Dawson, 12 Iowa 512; Multnomah County v. Faling, 49 Or. 603, 91 P 21.

Common-law duty of:

Child to support parent see Parent and Child § 73.

Grandchild to support grandparent see Parent and Child § 73.

Grandparent to support grandchild see Parent and Child § 49.

Wife to support husband see Husband and Wife § 35.

86. De Brimont v. Penniman, 7 F. Cas. No. 3,715, 10 Blatchf. 436; Bradley v. Fenn, 103 Conn. 1, 130 A 126; Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634; Mercer v. Jackson, 54 Ill. 397; Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807; 2 Kent Comm. p 191.

87. See statutory provisions; and infra §§ 178–184.

[a] **The first statute** in this regard seems to be that of 43 Eliz. c 2.

88. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634.

Constitutionality of statute imposing liability on:

Brother and sister for support of each other see infra § 184.

Grandparent for support of grandchild see infra § 181.

89. Bradley v. Fenn, 103 Conn. 1, 130 A 126; Cunningham v. Cunningham, 72 Conn. 157, 44 A 41.

90. See Statutes [36 Cyc 1174].

91. Bradley v. Fenn, 103 Conn. 1, 4, 130 A 126; Cunningham v. Cunningham, 72 Conn. 157, 44 A 41.

"It is remedial, in relation to the poor person and in relation to the public bodies upon whom the support falls if not borne by the relations; a liberal construction is to be applied in the interests of such parties." Bradley v. Fenn, supra.

92. Stone v. Stone, 32 Conn. 142; Cook v. Bradley, 7 Conn. 57, 18 AmD 79; Newtown v. Danbury, 3 Conn. 553; Wethersfield v. Montague, 3 Conn. 507; Dawson v. Dawson, 12 Iowa 512; Saxville v. Bartlett, 126 Wis. 655, 105 NW 1052.

93. Walbridge v. Walbridge, 46 Vt. 617.

94. Clark's App., 186 Mich. 300, 152 NW 920.

95. Clark's App., supra.

96. Clark's App., supra.

97. Hiram v. Pierce, 45 Me. 367, 71 AmD 555; Hillsborough v. Deering, 4 N. H. 86; Directors v. Hickman, 4 Pa. Dist. 494.

Support of illegitimate children generally see Bastards §§ 31–34.

98. See cases infra this note.

[a] **Statutes construed.**—(1) Under Code Cr. Proc. § 857, providing that, if the mother of a child, chargeable or likely to become chargeable to a county, city, or town, has property, any two magistrates of the county or city where she is must examine into the matter, and make an order charging the mother with the payment of money for the support of her child, the mother of a bastard child, if she is able to support it, may be proceeded against. Peo. v. Chamberlain, 106 NYS 149. (2) In England under Bastardy Laws Amendment Act 1873 § 5, providing that when a bastard child "becomes chargeable to a parish" the guardians may apply to two justices for an order compelling support of the child by the putative father, and Poor Law Amendment Act (1834) § 57, providing that a man who marries the mother of a legitimate or illegitimate child shall be liable for its support, an illegitimate child may become "chargeable to a parish" within the meaning of the act of 1873, notwithstanding the mar-

the courts of other jurisdictions.[99]

Survival of liability. The statutory liability of one relative to support another exists only during the former's lifetime and does not deprive him of the right to dispose of his property by will without providing a maintenance for the latter,[1] and such liability does not continue as a claim upon his executor or against his estate.[2]

Interference with right of support. An indigent person has no right of action at common law against a negligent employer for injuries disabling an employee liable under the statute for plaintiff's support if of sufficient ability to furnish the same.[3]

Rights of creditors. It is provided by statute in some jurisdictions that money paid for support shall be exempt from the claims of prior creditors of the payee.[4]

[§ 175] **b. As Dependent on Ability To Support.** Persons of the requisite kinship[5] may be charged with the support of their relatives only where they are of sufficient ability.[6] In interpreting the words "sufficient ability," as used in the statutes, each case of the kind must depend upon its own special circumstances,[7] and to a large extent also upon the discretion of the court.[8] It is to be determined with reference to the existing state of things, and to the present state of defendant's property and debts, his income and probable earnings, and his present reasonable expenses;[9] and liability is not to be restricted to such persons only as have a surplus income over and above their own reasonable maintenance according to their respective stations and needs.[10] If, in the present state of his family and means, one cannot afford the assistance without reducing his property below the amount required, with his labor, to afford a comfortable support for his family, he is not to be deemed a person of sufficient ability within the meaning of the statute.[11] Yet if the required contribution would not cause present deprivation of reasonable and comfortable support of defendant and his family, or interfere with the fulfillment of his obligations to others, the fact that such contribution might impair his capital is not of itself a sufficient reason why such contribution should not be ordered.[12] In some jurisdictions it has been held that ability to support an indigent relative may depend on ability to earn money by personal labor, as well as on the possession of prop-

riage of its mother to a man who is able to support the child. Plymouth Guardians of Poor v. Gibbs, [1903] 1 K. B. 177.

99. De Brimont v. Penniman, 7 F. Cas. No. 3,715, 10 Blatchf. 436 (statute of France).

1. Rawlins v. Goldfrap, 5 Ves. Jr. 440, 31 Reprint 671 (liability of father).

2. Filon's Est., 6 Pa. Dist. 703, 20 Pa. Co. 193 (liability of child to support parent); Bevan v. McMahon, 5 Jur. N. S. 686 (liability of grandfather).

3. Allen v. Trester, 112 Nebr. 515, 199 NW 841.

4. See statutory provisions.

[a] **In Quebec** a creditor whose debt accrued before the making to his debtor of a gift by way of aliments cannot seize the property comprised in the gift; subsequent creditors only have that right. Bernier v. Leblanc, 8 Que. Pr. 316.

5. See infra §§ 178–184.

6. See statutory provisions.

[a] **Support of parent by children.**—(1) An order that the sons of an aged parent pay a certain weekly sum to the support of their mother is proper and will not be disturbed, where it appears that the sons are amply able to make the payments, and had already participated in the voluntary distribution of their mother's estate. Com. v. Hecker, 82 Pa. Super. 123. (2) In such case, the fact that the mother had conveyed a certain property to a daughter, conditioned on her providing for her care and maintenance during her lifetime, cannot be used as a defense by the other children to evade their legal responsibilities. Com. v. Hecker, supra. (3) The obligation of a man and wife with minor children to support his or her parents, pursuant to Civ. Code § 206, is limited to the extent of their ability to perform that commendable obligation, since the duty to their minor children comes first. Peo. v. Curry, 69 Cal. A. 501, 231 P 358. (4) Under a statute providing that the support of a dependent poor parent devolves upon the children if they or either of them be of sufficient ability, the question of a child's liability for the support of the parent depends not upon his age, but upon his ability. Fitzgerald v. Donoher, 48 Nebr. 852, 67 NW 880.

[b] **Children without means.**—Under Act (1910) No. 241, a mother could not compel her married daughters having no property or means, except that given them by their husbands, to contribute to her support. Mangin v. Mangin, 164 La. 326, 113 S 864.

[c] **Parents without means.**—Where the parents are poor persons without property or means and unable, on account of either physical or mental disability or other unavoidable cause, to support their infant children, and the children are without property or means and unable, on account of their tender years, to earn their livelihood, it is the duty of their relatives named in Comp. St. (1922) § 5140, who are of sufficient ability, to furnish support in the order in which they are named in Comp. St. (1922) § 5141. Howard County v. Enevoldsen, (Nebr.) 224 NW 280.

[d] **Order requiring grandparents to contribute to support of grandchildren** will be reversed where the record did not show the father's inability to maintain the children. Com. v. Wolodarsky, 90 Pa. Super. 531.

[e] **In Vermont** (1) under Gen. L. 4230, if a married man of sufficient ability to support his wife by his default suffers her to become chargeable as a pauper on a town, the town may recover the expense incurred by it for her support in an action against the husband, the recovery being limited in time covered by the expense as specified. Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454. (2) Under Rev. L. § 2822 (Gen. L. § 4232), making the father or mother or children of a poor person liable for their support if of sufficient ability, the pecuniary circumstances of the father, mother, etc., must be shown. Durfey v. South Burlington, 65 Vt. 412, 26 A 587.

7. Bradley v. Fenn, 103 Conn. 1, 130 A 126; Templeton v. Stratton, 128 Mass. 137; Dover v. McMurphy, 4 N. H. 158; Matter of Conklin, 78 Misc. 269, 272, 139 NYS 449; New York v. Wasserman, 196 NYS 325.

"What is 'sufficient ability' must depend upon the circumstances in each case and as the matter rests largely in the discretion of the court it cannot depend solely upon the amount of the property the defendant owns, for in that case a child proceeded against might have a princely income and no property subject to levy. Neither can it depend solely upon the income, as his income might be small and the amount of his property large, but, as stated before, must depend upon the circumstances of each separate case." Matter of Conklin, supra.

Evidence of ability see infra § 192.

Question for jury see infra § 193.

8. Templeton v. Stratton, 128 Mass. 137; Matter of Conklin, 78 Misc. 269, 139 NYS 449.

9. Bradley v. Fenn, 103 Conn. 1, 130 A 126; Templeton v. Stratton, 128 Mass. 137; Colebrook v. Stewartstown, 30 N. H. 9, 64 AmD 275.

"Whether or not a relative is able to contribute to the support of a poor relation is a conclusion of fact to be drawn from the facts found as to the situation in life of such person, including his accumulated means, his ability and capacity for earning money." Bradley v. Fenn, supra.

10. Templeton v. Stratton, 128 Mass. 137.

11. Sussex County Trustees of Poor v. Jacobs, 11 Del. 330; Colebrook v. Stewartstown, 30 N. H. 9, 64 AmD 275; Dover v. McMurphy, 4 N. H. 158; Newport v. Eastman [cit Hillsborough v. Deering, 4 N. H. 86, 94]; Com. v. Wolodarsky, 90 Pa. Super. 531; In re Whitesell, 18 Pa. Dist. 520; Com. v Spaar, 8 Pa. Dist. 380, 22 Pa. Co. 406; East Greenwich v. Card, 1 R. I. 409.

"We do not deem that the policy of the law requires a parent to be pauperized in order to receive some aid for the support of children." Irvin v. Union Tp., 33 Pa. Co. 458, 459.

[a] **Thus** the court will not order a parent who is old and helpless to support his child who is an insane pauper, where the effect would be to pauperize the parent by using up his entire property in a few years. Bradford County Poor Dist. v. Case, 2 Pa. Co. 644.

[b] **Annual income and not actual wealth** is the criterion of determination of a person's ability; he cannot be compelled to intrench upon his capital for such purpose, whereby he might himself be reduced to pauperism. Sussex County Trustees of Poor v. Jacobs, 11 Del. 330; Colebrook v. Stewartstown, 30 N. H. 9, 64 AmD 275.

[c] **Where the relative is not of sufficient ability to make cash allowances,** but offers to take the indigent person into his home and maintain him as a member of his family, it is sufficient. Com. v. Spaar, 8 Pa. Dist. 380, 22 Pa. Co. 406.

12. Bradley v. Fenn, 103 Conn. 1, 130 A 126; Templeton v. Stratton, 128 Mass. 137.

[a] **Rule applied.**—On a complaint by a town against a father for the support of his adult pauper daughter, the father was held to be of "sufficient ability" to contribute to her support, where the value of his property, above his debts, was between five thousand and six thousand dollars, notwithstanding he was in poor health, unable to do hard work, had a wife and child dependent upon him, and received an income less than his

erty;[13] but in other jurisdictions it has been held that liability does not arise when the power of support depends upon manual labor alone.[14]

[§ 176] **c. Condition of Person To Be Supported.**[15] In order to subject a person to liability under statutes making kindred in certain degrees liable for the support of a "poor" or "pauper" relative,[16] it is necessary that the latter be unable to provide for himself and likely to become a public charge;[17] but he need not be a pauper in the technical sense that he has actually become a public charge.[18] If a mother is receiving support from one of her children, she cannot compel support from her other children.[19] So a person owning property of a substantial value and available for his support is not a poor person for whose support his relatives are liable.[20] But the mere fact that a person owns some property does not necessarily bring him within the terms of the statute if the property is not immediately available or is insufficient for his support.[21] The fact that an adult son has supported himself since he reached his majority will not relieve the parent from liability where the son subsequently becomes an invalid and unable to work.[22]

[§ 177] **d. Manner and Extent of Support.** The place and manner of support of an indigent relative depend upon the provisions of the statute imposing the liability.[23] In some jurisdictions this is to a certain extent for the determination of the relative on whom the liability is imposed.[24] In other jurisdictions it has been held that the duty to support does not carry with it the right to determine the place where the support shall be furnished.[25] Funeral expenses,[26] and necessary expenses incurred during the sickness,[27] are within the meaning of statutes requiring persons to "support" or to "relieve and maintain" indigent relatives. Liability for physicians' fees and hospital expenses in emergency cases rests upon persons required by statute to

expenses. Templeton v. Stratton, 128 Mass. 137.

13. Bernadus v. Williamson, 1 Wheel. Cr. (N. Y.) 234; State v. Witham, 70 Wis. 473, 35 NW 934.

[a] **It is not necessary that a person be in a state of affluence** in order to be liable for the support of a pauper relative; it is sufficient that he has the ability to labor and support him. Bernadus v. Williamson, 1 Wheel. Cr. (N. Y.) 234.

14. In re Whitesell, 18 Pa. Dist. 520; Com v. Miller, 8 Pa. Co. 525.

15. Evidence see infra § 192.

16. See statutory provisions.

17. Ida.—Bannock County v. Coffin, 269 P 90.

Iowa.—Monroe County v. Abegglen, 129 Iowa 53, 105 NW 350.

La.—Hansen v. Ohio Oil Co., 2 La. A. 690.

Mich.—Clinton v. Laning, 61 Mich. 355, 28 NW 125.

Minn.—Brabec v. Boedigheimer, 132 Minn. 370, 157 NW 508.

Nebr.—Howard County v. Enevoldsen, 224 NW 280.

N. J.—Meeker v. Meeker, 61 N. J. L. 146, 38 A 749.

N. Y.—Aldridge v. Walker, 151 N. Y. 527, 45 NE 950.

Pa.—Com. v. Milne, 90 Pa. Super. 68; Luzerne County Cent. Poor Dist. v. Hirner, 5 Kulp 265.

Eng.—St. Andrew's Undershaft v. Mendez de Breta, 1 Ld. Raym. 699, 91 Reprint 1366.

[a] **The word "poor,"** as used in Code (1897) § 2219, providing for compelling parental contribution to the support of a pauper, is practically synonymous with "destitute," denoting extreme want and helplessness. Polk County v. Owen, 187 Iowa 220, 174 NW 99.

[b] **Absolute destitution** need not be shown, but it must appear "that the alleged person is without means of earning a livelihood and in want, due to neglect of those responsible for her support." New York v. Wasserman, 196 NYS 325, 328.

[c] **An adult son** who has no estate and who, while intoxicated, has his feet and a hand badly frozen, so as to render him, to a great degree, helpless, is a "poor person" liable to become a public charge, within a statute making the father liable for the son's support. Clinton v. Laning, 61 Mich. 355, 28 NW 125.

[d] **Where the parents are not in actual need,** the statute requiring the children to support them is inapplicable. Hansen v. Ohio Oil Co., 2 La. A. 690; Geiger's Est., 24 Pa. Co. 238.

[e] **Fact that woman is fifty-six years of age** will not sustain an order of support by her son, where there is no evidence that she has no property, or is decrepit or unable to work. New York v. Wasserman, 196 NYS 325.

[f] **"Not able to work."**—Under some statutes the person to be supported must be a poor person "not able to work." Meeker v. Meeker, 61 N. J. L. 146, 38 A 749; Matter of Morten, 5 Q. B. 591, 48 ECL 591, 114 Reprint 1372 (construing phrase quoted). See Huntoon v. Powell, (Cal. A.) 263 P 1030 (construing statute providing for support of poor relative "unable to maintain himself by work").

[g] **Facts held to show that daughter of defendant was a poor person** unable to earn a livelihood in consequence of an "unavoidable cause" within the meaning of such phrase as used in Comp. St. (1922) § 5140, and that defendant, being of sufficient ability, was required under the provisions of such section to furnish such support. Howard County v. Enevoldsen, (Nebr.) 224 NW 280.

Cause of poverty see infra § 186.

Who are paupers generally see supra §§ 1–6.

18. Hutchings v. Thompson, 10 Cush. (Mass.) 238; Com. v. Milne, 90 Pa. Super. 68; Philadelphia v. Hays, 56 Pa. Super. 352; Walbridge v. Walbridge, 46 Vt. 617. And see cases supra note 17.

[a] **The terms "poor person" and "pauper,"** as used in Rev. St. c 46 §§ 5, 6, in relation to the liability of certain kindred for the support of relatives, are used synonymously, and the person to be supported need not be a pauper in the technical sense that he should actually have become a public charge. Hutchings v. Thompson, 10 Cush. (Mass.) 238.

19. Duffy v. Yordi, 149 Cal. 140, 84 P 838, 117 AmSR 125, 4 LRANS 1159, 9 AnnCas 1017.

20. Polk County v. Owen, 187 Iowa 220, 174 NW 99; Brabec v. Boedigheimer, 132 Minn. 370, 157 NW 508; Meeker v. Meeker, 61 N. J. L. 146, 38 A 749.

[a] **"The test** is whether the alleged pauper owns an estate of some substantial value, which, in reason, can be appropriated, and made to contribute to his support." Polk County v. Owen, 187 Iowa 220, 224, 174 NW 99.

[b] **An infant having a vested remainder** in a large estate is not to be considered a poor person so as to subject his relatives to liability for his support. Meeker v. Meeker, 61 N. J. L. 146, 38 A 749.

Possession of property as affecting duty of public authorities generally see supra § 4.

21. Jasper County v. Osborn, 59 Iowa 208; Howie v. Gangloff, 165 Minn. 346, 206 NW 441.

[a] **Rule applied.**—(1) Under Gen. St. (1923) § 3157, imposing on relatives the duty of supporting a "poor person," a mother of advanced age, unable to earn a livelihood, without means other than annual rents of two hundred dollars, and needing more than that for her maintenance, is entitled to support. Howie v. Gangloff, 165 Minn. 346, 206 NW 441. (2) A father owning property which was wrongfully withheld from him has been held to be a "poor person" so as to render his son liable for his support. Jasper County v. Osborn, 59 Iowa 208.

22. Com. v. Ulrick, 32 Pa. Co. 283.

23. See statutory provisions.

Requisites of order of relief see infra § 194.

24. See cases infra this note.

[a] **In Massachusetts,** under Rev. L. c 81 § 13, a grandfather compelled to support his indigent minor grandchild may be allowed by the court to furnish the support in his own home. Fairhaven v. Howland, 216 Mass. 149, 103 NE 302.

[b] **In Michigan** the statute requires a parent, if able, to support his adult son who has become or is likely to become a public charge "in such manner as shall be approved by the directors of the poor." Clinton v. Laning, 61 Mich. 355, 28 NW 125.

[c] **In New York** (1) when an order is made requiring a relative of a person to support him, and fixing a sum to be paid weekly, the relative may provide for the support of the pauper at such place and in such manner as he shall deem proper, provided the place and manner are approved by the overseer, and it is not until he has neglected or refused to do this that he is liable for the sum directed to be paid. Duel v. Lamb, 1 Thomps. & C. 66. (2) The right of the relative to determine the place and manner of support is unrestricted, except that they must be such as the overseers or superintendent of the poor approve. Duel v. Lamb, supra; Weaver v. Benjamin, 18 NYS 630. (3) If the person liable for support is able and willing to furnish such support at his own home, he cannot be compelled to support the poor person elsewhere. Aldridge v. Walker, 151 N. Y. 527, 45 NE 950; Converse v. McArthur, 17 Barb. 410.

[d] **In Pennsylvania** it has been held that, where one relative, who is liable for the support of another, offers and is willing to support such other in his own home in a suitable manner, he cannot be compelled to provide for his support elsewhere. Keller v. Com., 71 Pa. 413.

25. Condon v. Pomroy-Grace, 73 Conn. 607, 48 A 756, 53 LRA 696.

26. In re Whitesell, 18 Pa. Dist. 520; Robert's Est., 2 Pa. Co. 647.

27. Robert's Est., supra.

support an indigent relative, even though the services were rendered without their knowledge.[28]

[§ 178] **e. Persons Liable[29]—(1) In General.** No liability arises where the person sought to be charged does not expressly or by necessary implication fall within one of the classes designated in the statute.[30]

A minor able to provide support may be compelled to do so if he is of sufficient ability and is within the statutory degree of relationship to the poor person.[31]

A county may waive its right to compel one relative to furnish support, and may pursue its remedy against another relative also liable under the statute.[32]

[§ 179] **(2) Liability of Parent for Support of Child.** Aside from the common-law liability on the part of parents for the support of their minor unemancipated children[33] and their adult children who are in such physical or mental condition as to be incapable of self-support,[34] the statutes in many jurisdictions have imposed on the parent, if of sufficient ability, a legal duty to support children who have become or are likely to become public charges,[35] and in some cases the statute provides that the delinquent parent shall himself be treated as a pauper.[36] The statutory liability of the parent is not affected by the fact that the child is a minor whom the parent has emancipated.[37]

Mother under coverture. Statutes imposing upon a father, mother, etc., the duty of supporting an indigent child have been held not to apply to a mother whose husband is living.[38]

[§ 180] **(3) Liability of Child for Support of Parent.** At common law a child is not bound to support his parent.[39] Under the statutes, however, it is very generally made the duty of a child, who is able to do so, to support its parents where the latter are helpless and indigent,[40] and this duty will be enforced where the facts show a case falling within the terms or intent of the statute.[41] But the liability is not extended beyond the cases mentioned in the statute,[42] and it can be enforced only in the mode and under the circumstances pointed

28. Tryon v. Dornfeld, 130 Minn. 198, 153 NW 307, LRA1915E 844.

29. Liability:
For support of illegitimate child generally see Bastards §§ 31–33.
Of:
Husband for support of wife see Husband and Wife §§ 29–34, 137, 919–965.
Relatives for support of indigent insane persons see Insane Persons § 368.
Wife for support of husband see Husband and Wife § 35.

30. Conn.—Newtown v. Danbury, 3 Conn. 553.
Iowa.—Dawson v. Dawson, 12 Iowa 512.
Me.—Hiram v. Pierce, 45 Me. 367, 71 AmD 555.
Mass.—Farr v. Flood, 11 Cush. 24.
N. H.—Chesterfield v. Hart, Smith 350.
Pa.—Com. v. Neese, 15 Pa. Dist. 87.
S. C.—Johnson v. Ballard, 45 S. C. L. 178.
Vt.—Manchester v. Rupert, 6 Vt. 291.
Eng.—Pontypool v. Buck, [1906] 2 K. B. 896; Rex v. Benoier, 2 Ld. Raym. 1454, 92 Reprint 446.
And see supra § 174.

31. Bradley v. Fenn, 103 Conn. 1, 130 A 126.
[a] **"This statute, which incorporates a rule of public policy,** does not intend to excuse minors of means and able to provide support from the duty of contributing to the support of poor relations within the statutory degree of relationship and thus impose the burden upon the public." Bradley v. Fenn, 103 Conn. 1, 3, 130 A 126.
Liability of minor:
Child for support of parent see infra § 180.
Grandchild for support of grandparent see infra § 182.

32. Jasper County v. Osborn, 59 Iowa 208.

33. See Parent and Child § 34 et seq.

34. See Parent and Child § 47.

35. See statutory provisions. See also cases passim supra §§ 174–177; and infra notes 36–38.
[a] **In Iowa** Code (1897) § 2221, providing for seizure of the property of parents who have abandoned their child, and for a jury trial, on the parents' demand, to determine the questions of abandonment and liability for support, has no application to a proceeding by the county under § 2219 to compel the parents to furnish support. In the latter proceeding, the question whether the parents of an alleged pauper have or have not abandoned their son is wholly immaterial. Polk County v. Owen, 187 Iowa 220, 174 NW 99.
Ability of parent to furnish support see supra § 175.
Condition of child see supra § 176.

36. See statutory provisions.
[a] **Abandonment of child by father.**—A statute providing that, where a minor child is abandoned by the parent, to be supported by the town, such parent shall be deemed a pauper, and be subject to the same rules and regulations as a pauper, is constitutional. McCarthy v. Hinman, 35 Conn. 538.

37. Hendrickson v. Queen, 149 Minn. 79, 182 NW 952.
Common-law liability for support of emancipated child see Parent and Child § 41.

38. Gleason v. Boston, 144 Mass. 25, 10 NE 476; Coleman v. Birmingham, 6 Q. B. D. 615.
Grandmother not under coverture see infra § 181.

39. See Parent and Child § 73.

40. See statutory provisions.

41. Cal.—Peo. v. Curry, 69 Cal. A. 501, 231 P 358.
Conn.—Condon v. Pomroy-Grace, 73 Conn. 607, 48 A 756, 53 LRA 696.
Iowa.—Jasper County v. Osborn, 59 Iowa 208, 13 NW 104; Dawson v. Dawson, 12 Iowa 512.
Nebr.—Fitzgerald v. Donoher, 48 Nebr. 852, 67 NW 880.
N. Y.—Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 NE 108; Stone v. Burgess, 47 N. Y. 521; Morris v. Metropolitan St. R. Co., 51 App. Div. 512, 64 NYS 878, 30 NY CivProc 371; Stevens v. Cheney, 36 Hun 1; Converse v. McArthur, 17 Barb. 410; Matter of Conklin, 78 Misc. 269, 139 NYS 449; New York v. Wasserman, 196 NYS 325; Bernadus v. Williamson, 1 Wheel. Cr. 234.
Pa.—In re O'Donnell, 126 Pa. 155, 19 A 42; O'Connor's App., 104 Pa. 437; Com. v. Hecker, 82 Pa. Super. 123; Henry's Est., 28 Pa. Super. 541; Directors v. Shultz, 2 LancLRev 405.
S. D.—Tobin v. Bruce, 39 S. D. 64, 162 NW 933 [certiorari den 245 U. S. 18, 38 SCt 7, 62 L. ed. 123]; McCook County v. Kammoss, 7 S. D. 558, 64 NW 1123, 58 AmSR 854, 31 LRA 461.
Vt.—Tinmouth v. Warren, 17 Vt. 606.
Eng.—Bancroft v. Mitchell, L. R. 2 Q. B. 549; Reg. v. Toke, 8 A. & E. 227, 35 ECL 565, 112 Reprint 824; Allen v. Coster, 1 Beav. 202, 17 EngCh 202, 48 Reprint 917; Rex v. Munden, Str. 190, 93 Reprint 465.
Que.—Payan v. Payan, 25 RevLeg 340; Ouimet v. Ouimet, 21 Que. Super. 479.
[a] **Construction and operation of statutes.**—(1) Gen. St. § 3318, declaring that children able to support indigent parents shall provide support for them, and, if they neglect to do so, the superior court may order them to contribute to such support such sum as may be reasonable and necessary, does not impose on a daughter an absolute legal duty to support her mother, but the duty imposed does not come into force until the court has found the necessity for aid and the ability to aid, and prescribed to what extent aid shall be furnished; and hence the obligation does not carry with it the right to determine the place where such support shall be furnished, and the court is empowered to order the daughter to contribute to her mother's support in the place of the latter's residence. Condon v. Pomroy-Grace, 73 Conn. 607, 48 A 756, 53 LRA 696. (2) The daughter's willingness to provide for her mother a comfortable bed and sufficient food, coupled with much harsh treatment, is not decisive of the question of neglect, within the statute, and the court's finding of the fact of such neglect will not be disturbed on appeal because of such willingness. Condon v. Pomroy-Grace, supra. (3) When a father is in need of support, and his son is in a condition to furnish it to him, the latter cannot refuse to do so on the ground that his father lives with persons whom the son does not consider respectable. Ouimet v. Ouimet, 21 Que. Super. 479.
[b] **Concurrent liability.**—Under Poor Relief Act (1601) § 7, justices have power to make a maintenance order against the son of a woman who is a pauper lunatic, notwithstanding a similar order has already been made against her husband under Poor Law Amendment Act (1850) § 5. Cole v. Brown, [1907] 2 K. B. 301.
Ability of child see supra § 175.
Poverty of parent see supra § 176.

42. Cal.—Parshall v. Parshall, 56 Cal. A. 553, 205 P 1083.
Kan.—In re Erickson, 104 Kan. 521, 180 P 263.
La.—Mangin v. Mangin, 164 La. 326, 113 S 864; Hansen v. Ohio Oil Co., 2 La. A. 690.
Mich.—Howe v. Hyde, 88 Mich. 91, 50 NW 102.
Pa.—Carroll's Est., 26 Pa. Dist. 1058; Geiger's Est., 24 Pa. Co. 238.
Eng.—Pontypool v. Buck, [1906] 2 K. B. 896.
[a] **Foundlings.**—The statute is not applicable to a foundling raised by plaintiff to maturity, without adoption. Parshall v. Parshall, 56 Cal. A. 553, 205 P 1083.
[b] **Liability of married woman.**—Under Poor Law Act (43 Eliz. c 2) § 7, a married woman was not liable for the maintenance of her parent, even though she had a separate estate and was of sufficient ability so to

out by the statute.[43]

A minor child is within the provisions of a statute making children liable for the support of their parents.[44]

Second marriage of the mother does not relieve her child from liability for the mother's support.[45]

[§ 181] **(4) Liability of Grandparent for Support of Grandchild.** In the absence of statute, a grandparent is under no duty to support his grandchildren.[46] But in many jurisdictions there are statutes imposing such duty,[47] and if the facts show a case coming within the terms and conditions of the statute the liability will be enforced;[48] otherwise not.[49] Such statutes are within the police power of the state,[50] and are not unconstitutional as attempts to transmute a moral obligation into a legal one.[51] The fact that the parents of a child are living does not relieve the grandparents from liability,[52] if, as held in some cases, the parents are unable to maintain the child.[53] A father's objection to his son's marriage has no effect upon his liability for the support of the children of the marriage.[54] Nor will a grandparent be relieved from liability by the fact that the probate court has appointed a guardian for his minor grandchild, with custody of the child's person.[55]

Illegitimate children. The statutes requiring a grandparent to support his grandchildren do not apply to the illegitimate offspring of his child.[56]

Effect of existing coverture. It has been held that statutes imposing in general terms liability on grandmothers for the support of their indigent grandchildren[57] should be construed as if the description were "grandmother not being under coverture," and that a grandmother whose husband is alive is under no liability for the support of her grandchild.[58]

[§ 182] **(5) Liability of Grandchild for Support of Grandparent.** A grandchild is not liable at common law for the support of his grandparents,[59] but is made liable in some jurisdictions by express provisions of the statutes,[60] and the fact that the grandchild is an infant does not affect this statutory liability.[61]

[§ 183] **(6) Liability of Kindred by Affinity.** Statutes requiring a father, mother, grandfather, grandmother, child, etc., to support each other if in need[62] do not apply to such relatives by affinity,[63]

provide. Pontypool v. Buck, [1906] 2 K. B. 896.

43. Cal.—Duffy v. Yordi, 149 Cal. 140, 84 P 838, 117 AmSR 125, 4 LRA NS 1159, 9 AnnCas 1017.

Conn.—Gilbert v. Lynes, 2 Root 168; Waterbury v. Hurlburt, 1 Root 60.

Ill.—Schwerdt v. Schwerdt, 235 Ill. 386, 85 NE 613 [aff 141 Ill. A. 386]; Mercer v. Jackson, 54 Ill. 397.

Kan.—In re Erickson, 104 Kan. 521, 180 P 263, 264 [cit Cyc].

La.—Guidry's Succ., 40 La. Ann. 671, 4 S 893.

Mich.—Pinel v. Rapid R. System, 184 Mich. 169, 150 NW 897; Schwanz v. Wujek, 163 Mich. 492, 128 NW 731.

Miss.—Wright v. Coleman, 137 Miss. 699, 102 S 774, 777 [quot Cyc].

N. H.—Gray v. Spalding, 58 N. H. 345; Lebanon v. Griffin, 45 N. H. 558.

N. Y.—Duel v. Lamb, 1 Thomps. & C. 66; Edwards v. Davis, 16 Johns. 281.

Or.—Belknap v. Whitmire, 43 Or. 75, 72 P 589.

Pa.—Com. v. Kerstetter, 3 Pa. Dist. & Co. 133; Com. v. Landis, 29 Pa. Dist. 843; Darlington v. Darlington, 5 Pa. Co. 132.

Eng.—Rex v. Munden, Str. 190, 93 Reprint 465.

"The fulfillment of that obligation does not transform the child into a creditor, capable of claiming reimbursement in any contingency. He has paid a debt imposed on him by law, and simply remains in the condition of a debtor who has discharged an obligation." Guidry's Succ., 40 La. Ann. 671, 673, 4 S 893.

[a] **Statute applies to future expenses only,** and not to reimbursement for past expenses. Stone v. Stone, 32 Conn. 142.

[b] **In Indiana** (1) Burns St. Annot. (1926) §§ 2875, 2876, making it a misdemeanor for a child, financially able, to refuse or neglect to support a parent unable to support himself, is in derogation of common law, and hence must be strictly construed. Haskamp v. Swenger, 85 Ind. A. 255, 153 NE 815. (2) Such statute does not authorize a civil action by the parent against a child to recover for support furnished by the other children. Haskamp v. Swenger, supra.

Mode of enforcing liability of relatives generally see infra § 187.

44. Tobin v. Bruce, 39 S. D. 64, 162 NW 933 [certiorari den 245 U. S. 18, 33 SCt 7, 62 L. ed. 123].

45. Arrowsmith v. Dickenson, 20 Q. B. D. 252.

46. See Parent and Child § 49.

47. See statutory provisions.

[a] **Repeal of statute.**—Act June 13, 1836 (P. L. p 541) § 28, making grandparents liable for the support of their grandchildren, is not repealed by implication by Act April 6, 1905 (P. L. p 112) § 4, making the husband and wife, parents, and children of every poor person liable for his support. Philadelphia v. Miller, 42 Pa. Super. 471.

48. Fairhaven v. Howland, 216 Mass. 149, 103 NE 302; Peo. v. Ramm, 197 NYS 234; Leiby's App., 49 Pa. 182; Duffey v. Duffey, 44 Pa. 399; Com. v. Horwitz, 78 Pa. Super. 383; Com. v. Fitzpatrick, 5 Pa. Dist. 309, 18 Pa. Co. 15; Guardians of Poor v. Smith, 4 PaLJR 60, 6 PaLJ 433; Matter of Whiting, 3 Pittsb. (Pa.) 129.

Ability of grandparent see supra § 175.

49. Huntoon v. Powell, (Cal. A.) 263 P 1030; Meeker v. Meeker, 61 N. J. L. 146, 38 A 749; Kiser v. Frankfort Tp., 3 N. J. L. 410; Com. v. Spaar, 8 Pa. Dist. 380, 22 Pa. Co. 406; Com. v. Miller, 8 Pa. Co. 525; Matter of Morten, 5 Q. B. 591, 48 ECL 591, 114 Reprint 1372.

50. Stark v. Fagan, 89 N. J. L. 29, 97 A 778, 779.

51. Stark v. Fagan, supra [cit Cyc].

52. Fairhaven v. Howland, 216 Mass. 149, 103 NE 302; Matter of Whiting, 3 Pittsb. (Pa.) 129; Rex v. Cornish, 2 B. & Ad. 498, 22 ECL 210, 109 Reprint 1227.

53. In re Hadsall, 3 Kulp (Pa.) 129. See Guardians of Poor v. Smith, 4 PaLJR 60, 6 PaLJ 433 (holding that the grandfather of poor and destitute children was liable for their support, the father being out of the state).

[a] **Where the father is able to and does provide** for his children, a grandparent is under no duty to support them. Com. v. Milne, 90 Pa. Super. 68.

[b] **In Iowa,** under Code § 2217, a grandparent is only liable for the support of his grandchildren in the absence or inability of a nearer relative, and a grandfather is not liable to support his grandchildren without proof that their father, who is accessible, is unable to support them. Monroe County v. Abegglen, 129 Iowa 53, 105 NW 350; Johnson County v. Stratton, 111 Iowa 421, 82 NW 955.

[c] **In Quebec,** in an action by a municipality against a grandfather to recover for support of his grandchildren in an industrial school, where it appears that they were sent there at the request of the mayor, and that defendant is well able to repay and is the only person who can do so from among those liable, that the father is himself confined in an institution for the insane, and the mother is in extreme poverty, defendant is liable, provided the sum charged is reasonable, although he had received no notice of the proceedings to confine the grandchildren, he having been aware of their condition and not having taken any steps to provide for them. Montreal v. Milot, 42 Que. Super. 333, 8 DomLR 817.

54. Guardians of Poor v. Smith, 4 PaLJR 60, 6 PaLJ 433.

55. Fairhaven v. Howland, 216 Mass. 149, 103 NE 302.

56. Hiram v. Pierce, 45 Me. 367, 71 AmD 555; Hillsborough v. Deering, 4 N. H. 86; Directors of Poor v. Hickman, 4 Pa. Dist. 494.

Duty to support bastards generally see Bastards §§ 31–34.

57. See statutory provisions.

58. Gleason v. Boston, 144 Mass. 25, 10 NE 476; Coleman v. Birmingham, 6 Q. B. D. 615; Custodes v. Jinkes, Style 283, 82 Reprint 713.

59. See Parent and Child § 73.

60. See statutory provisions; and cases infra this note.

[a] **Statutes construed.**—Wethersfield v. Montague, 3 Conn. 507; Smith v. Palmyra Tp., 2 Walk. (Pa.) 342; Roberts' Est., 2 Pa. Co. 647; Smith v. Overseers, 42 LegInt (Pa.) 345.

[b] **The expediency of the statute** cannot be inquired into by the court. Ex p. Hunt, 5 Cow. (N. Y.) 284 (statute extends to the case of maternal grandparents).

[c] **Individual liability.**—The liability of a grandchild, under the act of June 13, 1836, for the support of his grandparent is individual, to be measured by his individual ability. In re Hadsall, 3 Kulp (Pa.) 129.

61. Bradley v. Fenn, 103 Conn. 1, 130 A 126; Chesterfield v. Hart, Smith (N. H.) 350.

62. See statutory provisions.

63. Conn.—Newtown v. Danbury, 3 Conn. 553; Sherman v. Nichols, 1 Root 250; Mack v. Parsons, Kirby 155, 1 AmD 17.

Mass.—Farr v. Flood, 11 Cush. 24.

N. H.—Chesterfield v. Hart, Smith 350.

S. C.—Johnson v. Ballard, 45 S. C. L. 178.

and the fact that the relative by affinity upon whom it is sought to impose liability for the support of the poor person acquired property by virtue of the marriage does not alter the rule.[64]

[§ 184] **(7) Liability of Collateral Relatives.** In direct opposition to the common-law rule,[65] the statutes sometimes impose upon brothers and sisters the duty to support each other;[66] and it has been held that such statutes are not unconstitutional as depriving the relative upon whom the duty of support is imposed of his property without due process of law, as the legislature may change what is a moral duty into a legal liability, thus lessening a public burden.[67] But such statutes will be enforced only in accordance with their terms and conditions.[68] In the absence of a statute imposing liability, a nephew is not liable for the support of his uncle.[69]

[§ 185] **f. Contribution and Apportionment among Relatives.** Where kindred are jointly liable for the support of their relatives, and support is furnished by one, he may compel the others to contribute,[70] and it has been held that such contribution for past and future support is enforceable by a suit in equity.[71] The statutes sometimes provide for proceedings by one relative to apportion among other relatives jointly liable the cost of the pauper's support.[72] Where two persons jointly or severally liable for the support of a pauper are not of equal financial ability, the court may apportion the expense between them in proportion to their ability to pay;[73] and the court is not prevented from ordering one relative to support a poor person because there are other relatives out of the jurisdiction, or not cited to appear, who are also liable for such person's support.[74]

[§ 186] **g. Exemption from Liability.** Unless the statute so provides,[75] the misconduct of an indigent person will not affect the statutory liability of the relative.[76]

Bad conduct on the part of the indigent person will, in some jurisdictions, exempt relatives otherwise liable from the duty to support him.[77] A statute thus providing does not contemplate remote acts of indiscretion, or inability of such pauper to deal wisely in business affairs, but bad conduct involving some element of moral delinquency, occasioning his poverty.[78] The bad conduct must also have an immediate bearing upon, and be the material and proximate cause of, the poverty of such poor person.[79]

Vt.—Manchester v. Rupert, 6 Vt. 291.

Eng.—Rex v. Kempson, 1 Bott P. L. 373; Rex v. Benoier, 2 Ld. Raym. 1454, 92 Reprint 446.

[a] **Father-in-law** is not bound to maintain his son's wife. Manchester v. Rupert, 6 Vt. 291; Rex v. Benoier, 2 Ld. Raym. 1454, 92 Reprint 446; Rex v. Dempson, Str. 955, 93 Reprint 964.

[b] **Mother-in-law** is not bound to maintain her son-in-law. Newtown v. Danbury, 3 Conn. 553.

[c] **Son-in-law** (1) is not liable for the support of his wife's parents (Sherman v. Nichols, 1 Root (Conn.) 250; Mack v. Parsons, Kirby (Conn.) 155, 1 AmD 17; Johnson v. Ballard, 45 S. C. L. 178; Poor Comrs. v. Gansett, 18 S. C. L. 320, 23 AmD 139; Rex v. Munden, Str. 190, 93 Reprint 465) (2) or grandparents (Chesterfield v. Hart, Smith (N. H.) 350).

[d] **Stepfather** is not bound to maintain his stepchildren. Manchester v. Rupert, 6 Vt. 291; Cooper v. Martin, 4 East 76, 102 Reprint 759; Tubb v. Harrison, 4 T. R. 118, 100 Reprint 926.

[e] **Stepchild** is not bound to maintain his stepparents. Newtown v. Danbury, 3 Conn. 553; Sherman v. Nichols, 1 Root (Conn.) 250; Poor Comrs. v. Gansett, 18 S. C. L. 320, 23 AmD 139.

[f] **Husband of a grandmother** is not required to support her grandchildren. Westminster v. Gerrard, 2 Bulstr. 346, 80 Reprint 1174.

[g] **Husband of a grandchild** is not liable for the support of the latter's grandparent. Chesterfield v. Hart, Smith (N. H.) 350.

64. Chesterfield v. Hart, supra.

65. Multnomah County v. Faling, 49 Or. 603, 91 P 21; Com. v. Neese, 15 Pa. Dist. 87; Rex v. Smith, 2 C. & P. 449, 12 ECL 668, 172 Reprint 203.

66. See statutory provisions.

67. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634.

68. Mower County v. Robertson, 79 Minn. 357, 82 NW 666; Multnomah County v. Faling, 49 Or. 603, 91 P 21.

69. Dawson v. Dawson, 12 Iowa 512.

70. Rogers v. Rogers, 51 Ill. A. 683; Guidry's Succ., 40 La. Ann. 671, 4 S 893; Manthey v. Schueler, 126 Minn. 87, 147 NW 824.

71. Rogers v. Rogers, 51 Ill. A. 683.

72. See statutory provisions.

[a] **In Massachusetts,** under Rev. St. c 46 § 6, authorizing the court upon complaint made by any kindred who shall have been put to any expense for the support of a pauper to assess and apportion such expense upon the other kindred who are of sufficient ability, the words "any kindred" include only kindred by consanguinity. Farr v. Flood, 11 Cush. 24.

[b] **In Vermont,** under Gen. St. c 20 § 20, kindred who have been at any expense for the relief and support of a poor person may maintain a proceeding to have such expense assessed and apportioned upon other kindred, although the poor person has never been actually chargeable upon any town in the sense that the town has actually incurred expenses for his support, it being sufficient that he was likely to become chargeable. Walbridge v. Walbridge, 46 Vt. 617.

Persons entitled to maintain proceedings to compel support generally see infra § 188.

73. In re Whitesell, 18 Pa. Dist. 520.

[a] **In New York** (1) the order of liability between relatives was definitely stated in 1 Rev. St. c 20 § 1, and the court had authority under the statute to apportion the burden of support according to the circumstances of the individual situation presented. Peo. v. Ramm, 197 NYS 234. (2) The first clause of such section, providing that if it shall appear that any relative of designated degrees is wholly unable to maintain an indigent person, but is able to contribute toward his support, the court may, in its discretion, direct two or more relatives of different degrees to support such indigent person, and shall prescribe the proportion which each shall contribute for that purpose, was intended to provide for cases where relatives of the degree primarily liable were able to contribute something, but unable wholly to support an indigent person. Stone v. Burgess, 47 N. Y. 521 [aff 2 Lans. 439]. (3) The second clause of such section, providing that where it shall appear that the relatives liable for the support of an indigent person are not of sufficient ability wholly to maintain such person, but are able to contribute something, the court shall direct the sum, in proportion to their ability, which such relatives shall pay weekly for that purpose, provided for cases where any particular relative was unable wholly to support such person, or where one of several equally liable was unable to contribute his entire portion for such support, but was able to contribute something, and authorized the court in such cases to require such person to contribute in proportion to his ability. Stone v. Burgess, supra. (4) The fact that only two out of five children of a poor person are directed to furnish his support does not render the order invalid; nor is it invalid because the children are directed to contribute support in unequal amounts. Stone v. Burgess, supra.

74. In re Whitesell, 18 Pa. Dist. 520; In re Hadsall, 3 Kulp (Pa.) 129.

75. See statutory provisions.

76. Polk County v. Owen, 187 Iowa 220, 174 NW 99; Payan v. Payan, (Que.) 25 RevLeg 340.

[a] **Thus** (1) the fact that a son had so misconducted himself that his presence in the home of his parents was rendered well-nigh intolerable will not relieve the parents from their obligation to maintain him. Polk v. Owen, 187 Iowa 220, 174 NW 99. (2) An old man sixty-four years old, who is in need and who is incapable of obtaining the necessaries of life by his own labor, has the right to be maintained by his children who are able to do so. This is true, even though his poverty is caused by the abuse of intoxicating liquor. Payan v. Payan, (Que.) 25 RevLeg 340 (holding children jointly and severally liable).

77. See statutory provisions.

[a] **In Illinois,** under Rev. St. c 107 § 1, a person who becomes a pauper from intemperance or other bad conduct is not entitled to support from any relative except parent or child. Rogers v. Rogers, 51 Ill. A. 683.

78. Mower County v. Robertson, 79 Minn. 357, 82 NW 666.

79. Mower County v. Robertson, supra.

[a] **The fact that a woman had an illegitimate child** twenty-five years before she became a county charge, or that she willfully deserted her husband ten years before such time, while during several years subsequent she was not a pauper, was too remote to show her "bad conduct," in the sense in which these words are used in the statute. Mower County v. Robertson, 79 Minn. 357, 82 NW 666.

Exemption of husband generally from liability for support of wife see Husband and Wife §§ 32, 33.

[§ 187] **2. Proceedings To Compel Support[80]—a. Nature of Remedy, and Conditions Precedent.** The statutory liability imposed upon kindred for the support of their indigent relatives[81] can be enforced only by means of the remedy provided for by the statute.[82] In some jurisdictions the statute provides for a summary proceeding to obtain an order compelling the kindred of a person who has become, or is liable to become, a public charge, to furnish the necessary support;[83] and to fix liability against a delinquent relative, it is necessary that an order be made by the court directing him to discharge the duty imposed upon him, and that such direction has been ignored.[84]

A demand upon the relative to support the pauper is unnecessary before the institution of proceedings to enforce the statutory liability for support, unless the statute so requires.[85]

Seizure of property. In some jurisdictions the statutes provide for the issuance by magistrates, upon application of the overseers of the poor, of a warrant for the seizure of property of a husband who has abandoned his wife or children, and the application of the proceeds of the property to their maintenance.[86]

[§ 188] **b. Persons Entitled To Maintain Proceedings.** The right to prosecute a proceeding to compel defendant to support a poor relative is usually determined by the provisions of the pauper statutes,[87] and only such persons as are expressly

80. Actions to recover for supplies and expenditures see infra § 266.
Liability of pauper and pauper's estate see infra § 201.

81. See supra §§ 178-184.

82. Conn.—Newtown v. Danbury, 3 Conn. 553; Wethersfield v. Montague, 3 Conn. 507; Gilbert v. Lynes, 2 Root 168; Waterbury v. Hurlburt, 1 Root 60.
Ill.—Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634; Mercer v. Jackson, 54 Ill. 397.
Iowa.—Dawson v. Dawson, 12 Iowa 512.
Mass.—Loomis v. Newhall, 15 Pick. 159.
N. Y.—Edwards v. Davis, 16 Johns. 281.
Or.—Belknap v. Whitmire, 43 Or. 75, 72 P 589.
Vt.—Durfey v. South Burlington, 65 Vt. 412, 26 A 587.
Wis.—Saxville v. Bartlett, 126 Wis. 655, 105 NW 1052.
[a] **Rule applied.**—Under Lord L. §§ 2922, 7054, the procedure prescribed to compel the support of an adult child by a parent is exclusive, and the supreme court cannot, on appeal in proceedings to determine the mental competency of the father, compel him to provide temporary support for his daughter. In re Northcutt, 81 Or. 646, 148 P 1133, 160 P 801.

83. See statutory provisions; cases infra notes 84-86; and §§ 188-199.
[a] **In Connecticut** (1) a town which has not become a creditor of an inhabitant who had conveyed all his property must on becoming liable to support his wife as a pauper proceed under Gen. St. (1902) §§ 2480, 2499, 2500, authorizing towns to compel relatives to support poor persons. Winchester v. Moriarty, 84 Conn. 678, 81 A 965. (2) A town required to support its poor, and authorized by Gen. St. (1902) §§ 1833, 2480, 2499, 2500, to prevent a spendthrift from becoming a charge on the town, and to compel relatives to support paupers, etc., but not given a lien on the property of its inhabitants who are liable to become paupers, or any authority to prevent conveyances by such persons of their property, except as above provided, has no power to compel a reconveyance after a conveyance by an inhabitant of all his property. Winchester v. Moriarty, supra. (3) If the town has already incurred expenses for the pauper, and is therefore a creditor of the relative liable for support, and the conveyance was fraudulent, the town could attach the property the same as it could had the conveyance not been made. Winchester v. Moriarty, supra (fraudulent intent not shown).
[b] **In Illinois,** where a poor person becomes a public charge through the failure of relatives to render the necessary support, the remedy to compel such support is through the medium of the state's attorney or the overseers of the poor by summary proceedings in the county court. Rogers v. Rogers, 51 Ill. A. 683.
[c] **In Iowa,** under Code (1851) c 48, the township trustees may proceed by the method prescribed by the code to compel a child to support a parent; or the county may give the necessary relief without resorting to this process, and recover of the child, by an action in the district court, as for money paid to his use. Boone County v. Ruhl, 9 Iowa 276.
[d] **In Michigan** a proceeding under Comp. L. (1871) c 49, to compel a son to support his mother, is summary in its character and is in no sense after the course of the common law. Smith v. Lapeer County Supts. of Poor, 34 Mich. 58.
[e] **In New Jersey,** under Act April 21, 1911 (P. L. p 397) § 15, the court has no jurisdiction to make an order for the support of an indigent relative except where the overseer of the poor has made an order for support which has not been complied with, or where the relative is supported at public expense. Starck v. Jersey City Overseer of Poor, 100 A 340.
[f] **In Vermont** the statute authorizes an order for past, as well as for future, expenses, although the order cannot extend back more than six months previous to the filing of the complaint, and the death of the pauper pending the action does not relieve defendant of his liability for past expenses. Tinmouth v. Warren, 17 Vt. 606.
[g] **In England** (1) under Poor Law Amendment Act (1868) § 33, providing that where guardians of a union have granted relief to a married woman who requires relief, they may apply to the justices having jurisdiction in such union, and the justices may summon the husband to show cause why an order should not be made upon him to maintain his wife, the duty of the justices, on the hearing of such summons, is not merely ministerial, but judicial, namely, to investigate the facts and form their own opinion as to whether the wife is in "need" of relief, apart from any conclusion arrived at by the guardians. Thomas v. Alsop, L. R. 5 Q. B. 151; Richards v. Coleman, 88 L. J. K. B. 813. (2) Where a wife has obtained a maintenance order against her husband under the Summary Jurisdiction (Married Women) Act of 1895, and he has ceased to make any payments to her under the order, and the wife has subsequently required relief and become chargeable to the union, the mere fact that she had obtained a maintenance order against her husband, which the husband had ceased to obey, does not disentitle the guardians to obtain an order against the husband under Poor Law Amendment Act (1868) § 39. Birmingham Union v. Timmins, [1918] 2 K. B. 189. (3) A summons was taken out by the guardians of a union against a husband, whose wife had become chargeable, to show cause why an order should not be made upon him to maintain her. He produced an order of a stipendiary magistrate discharging, on the ground of the wife's adultery, a previous maintenance order. The wife admitted that the order had been so discharged, but denied the adultery. The justices were of opinion that they were not bound by the order of a court of concurrent jurisdiction, and disregarded it, and made an order against the husband to pay a weekly sum for the wife's maintenance. It was held that the justices were wrong and that the valid and subsisting order discharging the order of maintenance was conclusive against the wife, and the guardians could be in no better position. Selby v. Atkins, 28 Cox C. C. 202.
[h] **In Nova Scotia** (1) Rev. St. c 50 § 25, providing for the relief of paupers by relatives, does not authorize the recovery of past expenditures. Overseers of Poor v. Stevens, 44 N. S. 170, 7 EastLR 563. (2) In order to obtain the statutory relief, there must have been a direction of the muncipal council as to the manner in which the pauper was to be relieved. Overseers of Poor v. Stevens, supra.

84. Condon v. Pomroy-Grace, 73 Conn. 607, 48 A 756, 53 LRA 696. See also infra § 200.
Cross references:
Appeal from order see infra § 198.
Mode of enforcing order see infra § 196.
Requisites of order see infra § 194.

85. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634.

86. See Husband and Wife §§ 939, note 29 [a], 960.

87. See statutory provisions; and cases infra this note.
[a] **In Illinois** (1) under Rev. St. c 107, the complaint is to be filed by the state's attorney for the county, or by the overseers of the poor of the town or precinct where the poor person has his legal settlement. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634; Rogers v. Rogers, 51 Ill. A. 683. (2) Under § 1 of such statute, requiring children to support their infirm and indigent parents, a right of action does not accrue to the parent himself to enforce the act. Schwerdt v. Schwerdt, 141 Ill. A. 386 [aff 235 Ill. 386, 85 NE 613]; Mercer v. Jackson, 54 Ill. 397.
[b] **In Maine** (1) the proceedings are brought in the name of the city or town where the poor person has a legal settlement, by their proper officers. Calais v. Bradford, 51 Me. 414; Hiram v. Pierce, 45 Me. 367, 71 AmD 555; Bridgton v. Bennett, 23 Me. 420. (2) The complaint is sufficient, although made and signed by an attorney in behalf of the town. Hiram v. Pierce, supra.
[c] **In Massachusetts** (1) under St. (1793) c 59, only the overseers of the town in which the pauper is settled or some of the pauper's kindred other than defendant can bring the proceedings to compel support. Salem v. Andover, 3 Mass. 436. (2) Rev. L. c 81 § 11 authorizes the superior court to assess a pauper's kinsman for his support. Section 38 requires overseers of the poor to prosecute or defend actions founded on the "preceding sections," etc. Under St.

or by necessary implication designated in the statute can apply for the order.[88] Thus a statute empowering a poor district, that performs its duty of relieving a poor person, to enforce the liability of his kindred does not authorize a volunteer to enforce it.[89] So where the statute provides that the proceedings to compel kindred to support a poor relative shall be instituted by a person having an interest in the latter's support,[90] the court has no power to entertain a proceeding unless the petition is by a person having such interest.[91] Under such a statute the application may be made by the poor person himself.[92] Where the statute does not provide the manner in which the action of the court shall be invoked, it may properly be done by complaint or petition of the overseer of the poor of the district liable to support the pauper;[93] but if it acts upon a petition showing jurisdiction to make an order, its action will not be invalidated because the petition was presented by the pauper.[94] By statute in some jurisdictions the right is given to any kindred who has been at any expense for the relief and support of a poor person to institute proceedings to assess and apportion the expense upon other kindred liable.[95]

[§ 189] **c. Jurisdiction.** The jurisdiction of summary proceedings to compel the kindred of a poor person to contribute to his support is dependent upon statute.[96]

[§ 190] **d. Notice and Opportunity To Be Heard.** The kindred against whom the order is applied for must have notice of the application and a reasonable opportunity to be heard, even though the statute does not expressly require notice;[97] and, of course, a statutory requirement as to notice must be complied with.[98] Where the statute is silent on the subject of the manner of giving notice, it may be made by summons or rule to show cause.[99]

[§ 191] **e. Petition or Complaint.** The petition or complaint in proceedings to compel support should of course aver all the essential jurisdictional facts.[1] When the statute provides that a person presenting a petition must have an interest in the support of the poor person, a petition is fatally defective which fails to aver that the person making it has any interest in the support of the poor person named.[2] Unless the duty to make a demand on defendant is imposed by statute,[3] no demand by the pauper, or anyone in his behalf, need be alleged.[4]

Ability of defendant. A petition alleging that defendant is of sufficient ability to relieve and maintain a poor person is sufficient; it need not set forth in detail the income and property of defendant.[5]

Condition of person to be supported. The petition or complaint must allege that the person for whose support defendant is sought to be charged is a poor person, chargeable, or likely to become chargeable, to the town or poor district.[6] A complaint which charges failure to support a poor person "then and there being a pauper" sufficiently avers that such person is or will be a charge on the poor district.[7] It is a sufficient allegation that the poor district has incurred expenses, where the complaint sets forth that the poor person has been supported by complainant district since a certain day named therein.[8]

[§ 192] **f. Evidence.** General rules as to the admissibility of evidence[9] are applicable in proceedings to compel kindred to support a poor relative.[10] Likewise general rules governing the weight and

(1793) p 479 c 59 § 14, under Rev. St. (1836) c 46 § 26, and under Gen. St. (1860) c 70 § 22, successively, overseers of the poor were authorized to prosecute actions under the preceding provisions of the respective chapters, including actions to compel one to contribute to a pauper kinsman's support. The language of the provision now constituting such § 38 was changed by Pub. St. (1882) c 84 § 33, by omitting the words "of this chapter" after "preceding sections." It was held that the legislature did not, by changing the phraseology of the statute, intend to restrict the overseers' authority to actions brought under Rev. L. c 81 §§ 35–37, and that such overseers can sue in the name of their town under § 11 to compel one to contribute to his pauper kinsman's support. Great Barrington v. Gibbons, 199 Mass. 527, 85 NE 737.

[d] **In New York** (1) proceedings are properly brought by the superintendent of the poor in counties where all the poor are a charge upon the county in the first instance. Stone v. Burgess, 2 Lans. 439 [aff 47 N. Y. 521]. (2) But where the support of poor persons is a charge on the town until their removal to the county poorhouse, the application is properly made by the overseers of the poor of the town, and not the superintendent of the poor of the county. Tillotson v. Smith, 12 NYSt 331.

[e] **In Pennsylvania,** in a proceeding under Act June 1, 1915 (P. L. p 661) in the name of the commonwealth, the record must show that the proceeding was authorized by the attorney-general. Com. v. Kerstetter, 3 Pa. Dist. & Co. 133.

[f] **In Wisconsin,** where a county has adopted the county system of poor, the right to enforce liability for the support of a pauper is vested in the county superintendent of poor, so that the county court had no jurisdiction to enter a judgment, requiring such support in a suit by the supervisors of a town within the county. Berryman v. Larmer, 172 Wis. 572, 179 NW 748.

88. Ill.—Schwerdt v. Schwerdt, 141 Ill. A. 386 [aff 235 Ill. 386, 85 NE 613].

Mass.—Salem v. Andover, 3 Mass. 436.

N. H.—Gray v. Spalding, 58 N. H. 345.

Pa.—In re O'Donnell, 126 Pa. 155, 19 A 42; In re James, 116 Pa. 152, 9 A 170.

Wis.—Berryman v. Larmer, 172 Wis. 572, 179 NW 748.

89. Gray v. Spalding, 58 N. H. 345.

90. See statutory provisions.

91. In re James, 116 Pa. 152, 9 A 170.

92. In re James supra; O'Connor's App., 104 Pa. 437; Clement's Pet., 5 Pa. Dist. 295, 18 Pa. Co. 71.

93. Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807.

94. Ackerman v. Ackerman, supra.

95. See supra § 185.

96. See statutory provisions.

[a] **In New York** the domestic relations court has authority to require contribution to support. New York v. Wasserman, 196 NYS 325.

[b] **In Pennsylvania** (1) the court of quarter sessions alone has jurisdiction of proceedings to compel support. In re Harnish, 268 Pa. 128, 110 A 761; Wertz v. Blair County, 66 Pa. 13; Smith v. Palmyra Tp., 2 Walk. 342; Com. v. Kerstetter, 3 Pa. Dist. & Co. 133; Com. v. Ulrick, 32 Pa. Co. 283; Ketcham's Case, 14 Pa. Co. 9; Darlington v. Darlington, 5 Pa. Co. 132. (2) The jurisdiction of the municipal court of Philadelphia in proceedings to compel support is the same as that of the court of quarter sessions in the rest of the commonwealth. Com. v. Milne, 90 Pa. Super. 68.

97. Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807; Kiser v. Frankfort Tp., 3 N J. L. 410; Faling v. Multnomah County, 46 Or. 460, 80 P 1009.

98. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634; North v. Joslin, 59 Mich. 624, 648, 26 NW 810.

"The notice to the relatives sought to be charged . . . is the mode by which the court acquired jurisdiction to make any order in the premises. That notice never having been given, the proceedings are a nullity." North v. Joslin, supra.

99. Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807.

1. Walker Tp. v. Knisely, 17 Pa. Super. 415.

2. In re James, 116 Pa. 152, 9 A 170.

3. See statutory provisions.

4. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634.

5. Walker Tp. v. Knisely, 17 Pa. Super. 415.

6. Ida.—Bannock County v. Coffin, 269 P 90.

Ill.—Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634.

Me.—Hiram v. Pierce, 45 Me. 367, 71 AmD 555.

N. J.—Gedney v. Day, 44 N. J. L. 576.

Pa.—George v. George, 3 Pa. Dist. & Co. 477.

7. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634.

8. Hiram v. Pierce, 45 Me. 367, 71 AmD 555.

9. See Evidence §§ 89–1729.

10. See cases infra this note.

[a] **Evidence held admissible.**—In a proceeding to make parents pay their son, an alleged pauper, a sum monthly for his support, testimony that certain persons who were officers of some charitable association had said they would see to obtaining four dollars a month for the son from the trustees was admissible, the witness continuing to testify that the sum was in fact obtained. Polk County v. Owen, 187 Iowa 220, 174 NW 99.

[b] **Evidence held inadmissible.**—

sufficiency of evidence[11] are applicable in proceedings to compel support,[12] both as to the necessity for relief[13] and the ability of defendant to furnish support.[14] Where a father, in order to avoid a claim for the maintenance of his son, conveys all his property to his second wife by way of postnuptial settlement, the court can draw the inference that the father is of sufficient ability to furnish support.[15]

[§ 193] **g. Trial or Hearing.** In summary proceedings by application for a relief order to enforce a relative's statutory liability for support defendant has no constitutional right to a jury trial.[16] In accordance with general rules,[17] it is error to refuse instructions applicable to the issues and evidence.[18] The ability of defendant to furnish support is a question of fact for the court,[19] or for the jury where a trial by jury is had,[20] as is also the question whether the person to be supported is a poor person within the meaning of the statute.[21] Where the person to be supported, because of ownership of property, is not a poor person requiring support within the meaning of the statute, it has been held that, either a verdict against his relatives should be set aside,[22] or their plea in abatement should be sustained and the question of compelling them to contribute to the person's support be postponed until his property has been exhausted.[23]

[§ 194] **h. Order for Relief—(1) Form and Contents.** The order or decree for support, to be valid, must be complete in itself and self-sustaining,[24] and must declare and adjudge the existence of the statutory grounds for its existence.[25] The order must in its provisions as to relief and maintenance strictly follow the statute which is its foundation.[26] Thus an order is fatally defective for failure to direct the manner of relief and maintenance, if this is required by the statute.[27] Likewise an order is invalid if, when not so authorized by the statute, it directs payment of a given sum,[28] or embraces several poor persons in a joint provision,[29] or fixes the place or manner of support.[30] It has been held, however, that an order requiring a relative to pay a certain sum for the support of a poor person is not void because it fails to give the relative an opportunity to support such person,[31] but that this is at most an irregularity for which the order cannot be collaterally attacked.[32] Mere surplusage in the title of the order will not invalidate it.[33]

Amount of support. Unless the statute limits the power of the court as to the amount of support,[34] the court may specify in its order a fair and reasonable sum according to the financial ability of defendant.[35] Where the proceeding is brought against several persons, the order should show the amount to be paid by each.[36] In England it has been held that guardians of the poor need not fix the amount to be paid for relief in order to authorize the justices to order a husband to pay for the support of his wife,[37] but that the justices may order payment of such weekly sum as, under the circumstances, may be proper, although it may exceed the amount of relief previously given by the guardians.[38]

Relief for past support. In some jurisdictions it has been held that on an application for a relief order the court can assess only for future support, and can make no allowance for support theretofore furnished to the pauper by the town applying for such order;[39] but in other jurisdictions the court

(1) In proceedings to compel parents to contribute monthly to the support of their alleged pauper son, testimony of a witness whether, if she had known the son had a vested interest in the land, she would have expended the county's money in helping pay his rent, was properly excluded as immaterial. Polk County v. Owen, 187 Iowa 220, 174 NW 99. (2) In proceedings to compel parents to contribute a stated monthly sum to the support of their alleged pauper son, testimony of a medical man tending to show that the place in which the parents kept the son and his family was sanitary was inadmissible as immaterial. Polk County v. Owen, supra. (3) Evidence as to whether defendant parents were kind and gentle with the son was held inadmissible as immaterial. Polk County v. Owen, supra.

11. See Evidence §§ 1730–1806.

12. See cases infra notes 13–15.

13. See cases infra this note.

[a] **Evidence held sufficient** to show necessity for relief. Richards v. Coleman, 88 L. J. K. B. 813.

[b] **Evidence held insufficient** to show that the person to be supported was a pauper. Rising's Pet., 25 Pa. Dist. 533, 43 Pa. Co. 399.

14. See cases infra this note.

[a] **Evidence held sufficient** to show defendant's ability to furnish support. Bradley v. Fenn, 103 Conn. 1, 130 A 126; Polk County v. Owen, 187 Iowa 220, 174 NW 99 (compelling payment of twenty dollars a month justified by evidence); Fairhaven v. Howland, 216 Mass. 149, 103 NE 302 (support of grandchild); Com. v. Horwitz, 78 Pa. Super. 383.

15. Coulson v. Davidson, 96 L. T. Rep. N. S. 20.

16. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634.

17. See Trial [38 Cyc 1626].

18. Polk County v. Owen, 187 Iowa 220, 174 NW 99.

19. Bradley v. Fenn, 103 Conn. 1, 130 A 126; New York v. Wasserman, 196 NYS 325.

20. Polk County v. Owen, 187 Iowa 220, 174 NW 99.

21. Polk County v. Owen, supra.

22. Polk County v. Owen, supra.

23. Polk County v. Owen, supra.

24. O'Connor's App., 104 Pa. 437.

[a] **Specifying names of kindred and apportioned sums.**—(1) An order requiring members of a poor person's family to pay a certain sum per week for his support should specify the names of each such person. O'Connor's App., 104 Pa. 437; Com. v. Kerstetter, 3 Pa. Dist. & Co. 133. (2) A decree that A and B "and the other adult children" of the poor person should pay a stated sum per week was too vague and uncertain to be self-sustaining. O'Connor's App., supra.

25. Meeker v. Meeker, 61 N. J. L. 146, 38 A 749.

[a] **Thus** the order should show that the person in question either had been previously adjudged to be entitled to relief as a poor person or that the court has adjudged that he is such poor person and chargeable or likely to become chargeable as such. Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807.

26. Meeker v. Meeker, 61 N. J. L. 146, 38 A 749; Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807.

[a] **In Quebec** (1) in a proceeding for an alimentary pension by a daughter-in-law against her father-in-law, a provisional or interim allowance will not be ordered. Leclerc v. Guérin, 8 Que. Pr. 363. (2) Nor will such allowance be made in a proceeding by a grandchild against the grandmother. Hénault v. Fauteux, 8 Que. Pr. 363.

27. Meeker v. Meeker, 61 N. J. L. 146, 38 A 749; Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807.

28. Meeker v. Meeker, 61 N. J. L. 146, 38 A 749.

29. Meeker v. Meeker, supra.

30. Duel v. Lamb, 1 Thomps. & C. (N. Y.) 66; Weaver v. Benjamin, 18 NYS 630.

Manner of support generally see supra § 177.

31. Aldridge v. Walker, 73 Hun 281, 26 NYS 296.

32. Aldridge v. Walker, supra.

33. Baldwin v. McArthur, 17 Barb. (N. Y.) 414.

[a] **Illustration.**—An order of maintenance in fact granted by the "court of sessions" is not rendered invalid by purporting to be made by the "county court of sessions." Baldwin v. McArthur, 17 Barb. (N. Y.) 414.

34. See statutory provisions; and cases infra this note.

[a] **In Pennsylvania** (1) under the act of June 13, 1836, the jurisdiction of the court of quarter sessions is limited to a sum not exceeding twenty dollars a month, and it has no authority to order payment of a greater sum, even though such greater sum is reasonable and proper, considering the station in life of the parties, for the maintenance of the pauper. Wertz v. Blair County, 66 Pa. 18; Com. v. Horwitz, 78 Pa. Super. 383; In re Whitesell, 18 Pa. Dist. 520; Com. v. Ulrick, 32 Pa. 283. (2) But the effect of Act June 15, 1911 (P. L. p 973), amending the act of 1836 and providing a new method of enforcing orders of maintenance and support by attachment and by imprisonment for contempt, was to remove the former limit upon the amount for which the court can compel payment. Com. v. Horwitz, supra.

35. Peo. v. Ramm, 197 NYS 234.

[a] **Amount held excessive.**—Peo. v. Ramm, 197 NYS 234.

36. O'Connor's App., 104 Pa. 437; Com. v. Kerstetter, 3 Pa. Dist. & Co. 133.

37. Dinning v. South Shields Union, 13 Q. B. D. 25.

38. Dinning v. South Shields Union, supra.

39. Stone v. Stone, 32 Conn. 142;

has power to make and enforce orders for past, as well as future, support.[40]

[§ 195] **(2) Modification or Revocation.** An order of support may be revoked for adequate cause[41] if revocation is sought in due season,[42] or it may be modified for sufficient cause arising out of the changed conditions and circumstances of the parties.[43] But the court will not modify an order when such modification must be based upon a showing made some two years before the petition to modify was presented.[44]

Petition for modification should be filed in the court of the county in which the order was entered.[45]

Costs in proceedings to reduce the amount of support are governed by statute.[46]

[§ 196] **(3) Enforcement—(a) In General.** The manner of enforcement of the relief order is a matter of statutory regulation.[47] Unless the statute so provides,[48] the relative against whom the order is issued cannot be imprisoned for noncompliance therewith.[49] When the statute directs that the sum ordered to be paid shall be levied by the process of the court issuing the order, and prescribes no other or further remedy for its enforcement, it cannot be enforced by attachment and commitment.[50] On failure to obey the order the relative is usually subject to a penalty recoverable against him,[51] or the amount he is directed to pay is recoverable in a suit against him.[52]

Limitations. The order is in the nature of a judgment,[53] and is not barred by the statute of limitations relating to actions on simple contract debts.[54]

[§ 197] **(b) Requiring Security.**[55] Unless authority therefor is expressly given by statute,[56] the court cannot require the relative who is directed to maintain the poor person to enter into bond for the performance of the order,[57] although the town may take a bond, voluntarily given, conditioned to save the town harmless from the support of certain persons named therein.[58] A bond executed to a poor district, conditioned to indemnify it against the maintenance of a person who has a legal settlement in such district, whether he be, or be likely to become, chargeable or not, is a legal contract,[59] and not without consideration.[60]

[§ 198] **i. Review.** Unless expressly given by statute,[61] the right to appellate review does not exist in proceedings of this character.[62] A defendant present on the hearing of the application and

Cook v. Bradley, 7 Conn. 57, 18 AmD 79; Newtown v. Danbury, 3 Conn. 553; Wethersfield v. Montague, 3 Conn. 507.

40. Wertz v. Blair County, 66 Pa. 18; Directors of Poor v. Schultz, 2 Chest. Co. (Pa.) 538.

Actions at law to recover for support furnished see infra § 200.

41. Com. v. Ruff, 3 Pa. Dist. 562; Com. v. Litzenberger, 15 Phila. (Pa.) 414.

42. In re O'Donnell, 126 Pa. 155, 19 A 42.

[a] **Laches.**—One who paid no attention to an order until nine months after it was made, when attachment proceedings were commenced against him, was in no position to ask that the order be vacated because the proceedings were not instituted by the proper person or authorities. In re O'Donnell, 126 Pa. 155, 19 A 42.

43. Com. v. De Burt, 7 Pa. Super. 230; Com. v. Ruff, 3 Pa. Dist. 562; Com. v. Johns, 5 Kulp (Pa.) 238.

44. Com. v. Nicoli, 3 Pa. Dist. & Co. 262.

45. Tracy v. Rome, 64 Me. 201, 204; Com. v. De Burt, 7 Pa. Super. 230.

"The judgment or decree to be altered, and the judgment or decree altering the same, must be on the records of the same court and in the same county. There may be numerous kindred and they may each file complaints for the purpose of having alterations of their respective assessments or apportionments. If they could do this in different counties, there might be as many alterations as there are counties, while the original judgment would appear to be in full force in the county where the first complaint was filed." Tracy v. Rome, supra.

46. See statutory provisions.

[a] **In Quebec** an action to reduce an alimentary pension is classed, as regards the scale of fees, according to the amount of monthly payments of the pension in question. Lavigne v. Pouliot, 6 Que. Pr. 138.

47. See statutory provisions.

48. See statutory provisions.

[a] **In England** (1) the relative against whom the order is issued is subject to fine and imprisonment for noncompliance with the order. Bancroft v. Mitchell, L. R. 2 Q. B. 549. (2) The discharge of the relative in bankruptcy or the order of the bankrupt court for his protection does not protect him from liability to commitment, since the proceedings are in their nature criminal rather than civil. Bancroft v. Mitchell, supra. (3) But the justices have no jurisdiction to commit to prison for disobedience of an order for support in the absence of proof that the person against whom the order was made has had, since the date of the order, the means of payment and has refused or neglected to pay in accordance with the terms of the order. In re Gamble, [1899] 1 Q. B. 305. (4) Money due under such an order is recoverable before a court of summary jurisdiction as a civil debt and not as a penalty. In re Gamble, supra.

49. See cases infra note 50.

50. In re James, 116 Pa. 152, 9 A 170; Dierkes v. Philadelphia, 93 Pa. 270; Com. v. Quigg, 46 Pa. Super. 390; Com. v. Kerstetter, 3 Pa. Dist. & Co., 133; In re Whitesell, 18 Pa. Dist. 520; Com. v. Spaar, 8 Pa. Dist. 380, 22 Pa. Co. 406. Compare Jones v. Com., 2 Phila. (Pa.) 291 (holding that, where defendant has sufficient property in custody of the law on the justices' warrant, he cannot be imprisoned).

[a] **Amendment of statute.**—Under Act June 15, 1911 (P. L. p 973), amending Act June 13, 1836 (P. L. p 537), and providing a more effectual remedy for enforcing orders for support by attachment and imprisonment for contempt, the new remedy is exclusive. Com. v. Horwitz, 78 Pa. Super. 383.

51. See statutory provisions.

52. Aldridge v. Walker, 73 Hun 281, 26 NYS 296.

Actions for support furnished generally see infra § 200.

53. Henry's Est., 28 Pa. Super. 541.

54. Henry's Est., supra.

55. Security by:

Husband in abandonment proceedings for maintenance of family see Husband and Wife §§ 956–958.

Pauper to indemnify public authorities see infra § 202.

56. See statutory provisions.

[a] **Construction.**—A bond given pursuant to statute to a poor district, which contains an undertaking that a certain poor person shall not in one year become chargeable on the district and, in case of failure, to pay the district a certain sum, is a bond of indemnity only, and the district can recover thereon only such sum as it has paid out on account of the poor person. Breichelbiel v. Powles, 15 NYS 465.

57. Ackerman v. Ackerman, 55 N. J. L. 422, 27 A 807; Philadelphia v. Hays, 56 Pa. Super. 352; In re Whitesell, 18 Pa. Dist. 520; Com. v. Kerstetter, 3 Pa. Dist. & Co. 133.

[a] **A provision of statute giving to a court power to levy by its process** a given sum for failure of the kindred of a pauper to obey an order of such court requiring them to maintain him does not authorize the court, in such case, to demand security for noncompliance with its order. Dierkes v. Philadelphia, 93 Pa. 270.

58. Pawlet v. Strong, 2 Vt. 442.

59. Palmer v. Ferry, 6 Gray (Mass.) 420; Williston v. White, 11 Vt. 40; Pawlet v. Strong, 2 Vt. 442.

60. Turner v. Hadden, 62 Barb. (N. Y.) 480; Williston v. White, 11 Vt. 40.

61. Tillotson v. Smith, 12 NYSt 331.

[a] **Matters considered on appeal.**—New York v. Wasserman, 196 NYS 325.

[b] **In Maine** (1) it has been held that a statutory provision that "any party aggrieved by any opinion, direction, or judgment of the District Court in any matter of law, in a cause not otherwise appealable, may allege exceptions to the same," applies to a complaint to compel the kindred of a pauper to support him. Bridgton v. Bennett, 23 Me. 420. (2) On the other hand, it was held in an earlier case that the term "actions" in the statutes granting appeal did not apply to a proceeding to compel support. Ex p. Pierce, 5 Me. 324.

62. Nantucket v. Cotton, 14 Mass. 243; Eaton v. Williams, 51 Wis. 99, 7 NW 838; Reg. v. London Justices, [1900] 1 Q. B. 438.

[a] **Certiorari** will not lie to quash a distress warrant issued by justices for a sum alleged to be due under a maintenance order, on the ground that the issuing of the warrant was a ministerial and not a judicial act. Reg. v. Webber, 16 T. L. R. 1.

[b] **As to costs.**—Upon a complaint to compel kindred of a poor person to contribute to his support, the superior court has a discretionary power, under Gen. St. c 70 § 11, to award costs, and no appeal lies from its decision. South Reading v. Hutchinson, 10 Allen (Mass.) 68.

[c] **In Illinois** (1) it is held that a proceeding to compel relatives to support a poor person is purely statutory, and a writ of error from the appellate court to review such order will not lie. Peo. v. Seeney, 223 Ill. A. 556. (2) Nor will an appeal lie from an order made in such proceeding. Peo. v. Peters, 173 Ill. A. 564.

consenting to the making of the order will not on appeal be allowed to object that the person making the application is not the proper party.[63] The trial court's conclusion of fact as to defendant's ability to furnish support is open to attack in the appellate court as a question of law, if it is claimed to have been illegally or illogically drawn from the subordinate facts.[64]

Effect of reversal. The reversal of a judgment requiring defendant to contribute to the support of a poor relative, for lack of proof that the latter was likely to become a public charge, will not bar a new proceeding based on sufficient proof.[65]

[§ 199] **j. Costs.** The right of the successful party to costs in proceedings of this character depends entirely upon the statute, and, unless authority therefor can be found in the statute,[66] it is erroneous for the court to award costs.[67] An action of debt lies to recover the costs awarded on granting an order against the kindred of a poor person for his support.[68]

[§ 200] **3. Actions for Support Furnished—a. By Public Authorities.** A town or county may maintain an action at law to recover the amount expended in the support or relief of a pauper against such persons as the law makes liable for the pauper's support,[69] although in some jurisdictions, where the statutes provide for summary proceedings

[d] **In Michigan** it has been held that an order in proceedings to compel the kindred of a poor person to support him is not a "judgment" reviewable on writ of error. Smith v. Lapeer County Supts. of Poor, 34 Mich. 58.

[e] **In Pennsylvania** (1) no appeal on the merits lies from an order directing a relative to support a poor person. In re James, 116 Pa. 152, 9 A 170; Lampiter Tp. v. Lancaster, 2 Yeates 164; Philadelphia v. Hays, 56 Pa. Super. 352; Walker Tp. v. Knisely, 17 Pa. Super. 415. (2) An appeal in such case has the effect only of a certiorari, and the court is restricted to an examination of the record, and cannot review the evidence. In re James, supra; Com. v. Palmer, 59 Pa. Super. 307; Philadelphia v. Hays, supra; Walker Tp. v. Knisely, supra. (3) Under this restriction the court can only inquire whether the affidavit on which the proceeding was founded discloses a cause within the jurisdiction of the lower court, and, if so, whether the order was regular and within the power conferred on such court by statute. Philadelphia v. Hays, supra. (4) If the order directs respondent to pay the costs, to give security for future weekly payments, and to stand committed until the order is complied with, the portions relating to the payment of costs and the giving of a bond will be stricken off by the appellate court as unwarranted by law, and the court will not reverse the entire order and set aside the proceeding. Philadelphia v. Hays, supra. (5) Under Act July 12, 1913 (P. L. p 711), the municipal court of Philadelphia County has no jurisdiction to revise, modify, or set aside a final order made by the quarter sessions for the support of a minor for matters or reasons existing anterior to the making of the order, and which might have been brought before the court of quarter sessions at the first hearing. Com. v. Palmer, supra.

63. Baldwin v. McArthur, 17 Barb. (N. Y.) 414.

64. Bradley v. Fenn, 103 Conn. 1, 130 A 126.

65. New York v. Wasserman, 196 NYS 325.

66. Condon v. Pomroy-Grace, 73 Conn. 607, 48 A 756, 53 LRA 696; South Reading v. Hutchinson, 10 Allen (Mass.) 68.

[a] **"Civil action,"** as used in a statute giving costs to the prevailing party, is broad enough to cover a proceeding to compel kindred of a poor person to contribute to his support. Condon v. Pomroy-Grace, 73 Conn. 607, 48 A 756, 53 LRA 696.

[b] **In Illinois** (1) if the judgment is against the kindred, they may be adjudged to pay the costs, or the costs may be apportioned according to the right of the case. Peo. v. Hill, 163 Ill. 186, 46 NE 796, 36 LRA 634. (2) But if the application is dismissed, it is at the costs of the county or town on whose behalf the application was made. Peo. v. Hill, supra.

[c] **In New York.**—(1) Stone v. Burgess, 2 Lans. 439 [aff 47 N. Y. 521] (1 Rev. St. pp 614, 615). (2) Under Code Cr. Proc. §§ 915, 919, providing that costs and expenses of an application for the support of a poor person shall be paid by the relatives against whom the order is made, the word "expenses" means expenditure, outlay, or disbursements of money. Matter of McMurray, 131 Misc. 182, 227 NYS 115. (3) Money necessarily expended in such proceedings is a proper expense chargeable against relatives. Matter of McMurray, supra. (4) A reasonable fee for an attorney, employed by an overseer having no regular attorney, is a proper expense payable by relatives ordered to support a poor person on application by the overseer. Matter of McMurray, supra (seventy-five dollars held reasonable). (5) The overseer petitioning to compel support of a poor person is the proper person to whom costs and expenses are allowable. Matter of McMurray, supra.

67. Tillotson v. Smith, 12 NYSt 331; Philadelphia v. Hays, 56 Pa. Super. 352; West Perry Tp. v. Shrawder, 18 Pa. Dist. 872; In re Whitesell, 18 Pa. Dist. 520; Salem Tp. v. Cook, 6 Pa. Co. 624.

[a] **In California** an action by a daughter against her father to renew a judgment for maintenance, not being an action for maintenance, under Civ. Code § 206, attorney's fees are not allowable, in view of Code Civ. Proc. § 1021, there being no agreement of parties, especially in the absence of a showing of necessity as required by Civ. Code § 137, in a divorce action. Murphy v. Murphy, 71 Cal. A. 389, 235 P 653.

68. Stone v. Burgess, 2 Lans. 439 [aff 47 N. Y. 521].

69. Ida.—Bannock County v. Coffin, 269 P 90.

Mass.—Sturbridge v. Franklin, 160 Mass. 149, 35 NE 669; Monson v. Williams, 6 Gray 416; Brown v. Culnon, Quincy 66.

N. H.—Rumney v. Keyes, 7 N. H. 571.

N. J.—Taylor v. Green, 12 N. J. L. 124.

Oh.—Springfield Tp. v. Demott, 13 Oh. 104.

S. C.—Laurens Dist. v. Dooling, 17 S. C. L. 73.

Vt.—Woodstock v. Hartland, 21 Vt. 563; Bloomfield v. French, 17 Vt. 79.

[a] **In whose name action must be brought.**—The overseers of the poor cannot maintain an action in their name against defendant to recover moneys expended by them, as agents of the township, for the benefit of defendant, but the action should be brought in the name of the township. Taylor v. Green, 12 N. J. L. 124.

[b] **Amount of recovery.**—A town which supports a wife neglected by her husband, standing in need of relief, may recover of the husband the amount necessary to her support as a pauper, but nothing more for supplies suitable to her condition in life. Monson v. Williams, 6 Gray (Mass.) 416.

[c] **In Iowa** (1) under Code (1924) § 5309, authorizing a county to recover from the kindred liable for support the amount paid by it for the maintenance of a poor person, the county's right to recover depends on whether the person relieved was a poor person, whether the county expended money for his support, and whether defendant, his son, is made liable by statute, and not whether the county might have refused relief. Bremer County v. Schroeder, 200 Iowa 1285, 203 NW 303. (2) The fact that the money was expended for the relief of the poor at the poor farm does not preclude a recovery, although there may be difficulty in ascertaining the portion expended for the support of each person, and although inmates may be required to perform work suitable for their condition, for it will be presumed, in the absence of evidence to the contrary, that the county paid out the reasonable value of maintaining each person, and proof of the reasonable value is proof of the amount expended. Hamilton County v. Hollis, 141 Iowa 477, 119 NW 978. (3) The county's right to recover from a son for the support and burial of his father is not affected by the fact that there was no written order of the township trustees admitting the father to the poorhouse, as required by Code (1924) § 5343. Bremer County v. Schroeder, supra. (4) Nor is the right to recover for the support and burial of an inmate of the county poorhouse affected by the fact that there was no record of action of the township trustees authorizing relief, and no notice given, where the board of supervisors had notice that such person was being cared for in the poorhouse. Bremer County v. Schroeder, supra. (5) The trial court's finding that the trustees acted in good faith and in the exercise of a wise discretion has the force and effect of a verdict. Bremer County v. Schroeder, supra. (6) Recovery is limited to the expense paid within two years, in view of Code (1924) § 5309, although the claim had every attribute of a continuous, open, current account within § 11,011. Bremer County v. Schroeder, supra. (7) Petition construed and held that the action was for the amount expended, rather than for the reasonable value of the support furnished. Hamilton County v. Hollis, supra.

[d] **In Nebraska,** before a cause of action accrues in favor of a county or its county board, under Comp. St. (1922) § 5140, against a relative who fails to furnish support to an indigent relative entitled to support under the provisions of such section, it is necessary that such delinquent relative be first directed by order of the county board to furnish support and refused to do so. Howard County v. Enevoldsen, 224 NW 280 (holding that the evidence was sufficient to show that defendant refused to obey an order of relief made by the county board).

[e] **In South Dakota** it has been held that a county furnishing relief to a pauper could recover therefor against the relatives made liable by statute for the pauper's support,

to compel support,[70] it has been held that relief against a person whose liability is statutory must be obtained in such proceedings, and that an action of assumpsit will not lie.[71] But in other jurisdictions an action against a person liable may be brought without first fixing his liability in the statutory proceedings to compel support.[72] The burden is on plaintiff to show that defendant had sufficient ability to furnish support.[73] On the other hand, it has been held that, while the burden is on plaintiff to allege and prove that the person supported was without means of support,[74] it is incumbent on defendant to allege and prove that he had not sufficient ability to furnish the required support.[75] In an action by a poor district against a pauper's relative on a contract by him to pay a certain sum toward the support of the pauper, then chargeable to the district, the burden is on defendant to establish any affirmative defense interposed by him.[76]

Supplies furnished to wife. In accordance with the rule above stated,[77] where supplies are furnished by a town to a married woman who is in a destitute condition, assumpsit as upon an implied promise will lie against the husband therefor,[78] but such action will not lie unless the wife was in the condition of a pauper and the supplies were furnished as pauper supplies.[79]

Application for relief of a pauper need not be made by the pauper personally in order to enable a town poor district furnishing relief to recover from the pauper's relatives, an application by some one in his behalf being sufficient.[80]

Order of relief. An order of the officer to whom application for relief was made is not binding on a relative who was not a party to the proceedings had before the officer, as to applicant's indigent condition.[81]

Limitation of actions. An action of assumpsit, authorized by statute to be brought by a town for expenses incurred in the support of a poor person,[82] is barred by the statute barring an action of assumpsit founded upon any contract or liability, express or implied.[83]

[§ 201] **b. By Individuals.** The law will not imply a promise on the part of a relative to pay for support furnished by an individual to one whom the former is under such statutory obligation to support;[84] and it has been held that, where the statutory remedy to compel support by a relative[85] has not been resorted to, a promise by such relative to pay for support theretofore furnished is nudum pactum and unenforceable, being based solely on a moral obligation.[86] In some jurisdictions, however, it has been held that a physician rendering medical or surgical services to a poor person may maintain an action to recover therefor against the relative made liable by statute for the support of such poor person.[87]

[§ 202] **B. Liability of Pauper and Pauper's Estate[88]—1. At Common Law.** In the absence of contract[89] or of some express statutory provision,[90] where public authorities relieve a pauper, pursuant

where the statute imposing the liability provides no means for its enforcement. McCook County v. Kammoss, 7 S. D. 558, 64 NW 1123, 58 AmSR 854, 31 LRA 461.

70. See supra §§ 187–199.

71. Newtown v. Danbury, 3 Conn. 553; Waterbury v. Hurlburt, 1 Root (Conn.) 60; Saxville v. Bartlett, 126 Wis. 655, 105 NW 1052.

[a] **Statute is prospective,** and does not entitle a town to recover against a son for past contributions made to relieve his pauper father before proceedings are brought to compel the son to contribute. Saxville v. Bartlett, 126 Wis. 655, 105 NW 1052.

[b] **In Michigan** a son is under no legal obligation to support his indigent parent until an order has been obtained against him in proceedings under Comp. L. (1897) § 4487 et seq. Pinel v. Rapid R. System, 184 Mich. 169, 150 NW 897; Schwanz v. Wujek, 163 Mich. 492, 128 NW 731.

[c] **In Oregon,** under Bellinger & C. Comp. § 2654, providing that every poor person who shall be unable to earn a livelihood by reason of bodily infirmity shall be supported by the father, brothers, etc., and that every person failing to give such support, "when directed by the county court," shall forfeit such sum monthly as the court shall find sufficient, to be recovered for the use of such poor person, there is no liability under the statute until an order has been made by the county court. Multnomah County v. Faling, 49 Or. 603, 91 P 21; Faling v. Multnomah County, 46 Or. 460, 80 P 1009.

[d] **In Pennsylvania** (1) the jurisdiction to compel a repayment of money expended in support of a pauper is by proceedings in the court of quarter sessions under the acts of June 13, 1836 and April 15, 1857. Wertz v. Blair County, 66 Pa. 18. (2) But where the relative liable for support is dead, a claim for such support may properly be enforced in the orphans' court. In re Harnish, 268 Pa. 128, 110 A 761.

[e] **In England,** under 43 Eliz. c 2 § 6 a father is not liable for the maintenance of an adult son in the absence of an order of the justices. Coldingham Parish v. Smith, [1918] 2 K. B. 90.

72. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303; Hamilton County v. Hollis, 141 Iowa 477, 119 NW 978; Boone County v. Ruhl, 9 Iowa 276.

73. Nixon v. McCoy, 155 Minn. 175, 193 NW 40.

74. Brome v. Leduc, 64 Que. Super. 296, 32 RevLeg 247. See Bannock County v. Coffin, (Ida.) 269 P 90 (holding complaint insufficient to present issue as to whether person supported was in fact indigent).

75. Brome v. Leduc, 64 Que. Super. 296, 32 RevLeg 247.

76. Barnet Union v. Tilbury, 73 J. P. 466.

[a] **Illustration.**—Where, by an agreement made between plaintiff guardians and defendant, the latter agreed to pay to the guardians 3 s a week toward the relief and maintenance of his, defendant's, father, then chargeable to the common fund of the union, so long as the father should continue chargeable to that fund, and defendant after a time ceased to pay the agreed sum, and defended an action brought by the guardians under the agreement on the ground that his father, who was in receipt of outdoor relief from the guardians, was in fact able-bodied, and could therefore not be legitimately allowed outdoor relief, the onus of establishing that the father was able-bodied was on defendant. Barnet Union v. Tilbury, 73 J. P. 466 (holding that defendant had failed to prove his defense).

77. See supra text and note 69.

78. Alna v. Plummer, 4 Me. 258; Sturbridge v. Franklin, 160 Mass. 149, 35 NE 669; Hanover v. Turner, 14 Mass. 227, 7 AmD 203; Brookfield v. Allen, 6 Allen (Mass.) 585; New Bedford v. Chace, 5 Gray (Mass.) 28; Brown v. Culnon, Quincy (Mass.) 66; Goodale v. Lawrence, 88 N. Y. 513, 42 AmR 259 [rev 61 HowPr 451]; Springfield Tp. v. Demott, 13 Oh. 104; Howard v. Whetstone Tp., 10 Oh. 365. But see Norton v. Rhodes, 18 Barb. (N. Y.) 100 (holding that superintendents of the poor could not maintain an action at law against a husband for the support of his wife).

Liability of husband for support of wife generally see Husband and Wife §§ 29–34.

79. Monson v. Williams, 6 Gray (Mass.) 416; New Bedford v. Chace, 5 Gray (Mass.) 28.

80. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303; Hamilton County v. Hollis, 141 Iowa 477, 119 NW 978.

Application for relief generally see infra § 231.

81. Bannock County v. Coffin, (Ida.) 269 P 90.

Order of relief generally see infra §§ 232–236.

82. See statutory provisions.

83. Kennebunkport v. Smith, 22 Me. 445.

84. Cook v. Bradley, 7 Conn. 57, 18 AmD 79; Dawson v. Dawson, 12 Iowa 512 (obligation of child to support parent); Gray v. Spalding, 58 N. H. 345; Kelley v. Davis, 49 N. H. 187, 6 AmR 499; Mortimore v. Wright, 6 M. & W. 482, 151 Reprint 502.

85. See supra §§ 187–199.

86. Cook v. Bradley, 7 Conn. 57, 18 AmD 79; Dawson v. Dawson, 12 Iowa 512; Loomis v. Newhall, 15 Pick. (Mass.) 159; Mills v. Wyman, 3 Pick. (Mass.) 207.

87. Nixon v. McCoy, 155 Minn. 175, 193 NW 40; Brabec v. Boedigheimer, 132 Minn. 370, 157 NW 508; Tryon v. Dornfeld, 130 Minn. 198, 153 NW 307, LRA1915E 844.

[a] **Burden is on plaintiff** to prove ability of defendant. Nixon v. McCoy, 155 Minn. 175, 193 NW 40.

[b] **Evidence held sufficient** to sustain a finding that defendant's son, to whom plaintiff rendered medical and surgical services, was not a pauper or poor person so as to authorize recovery under Gen. St. (1913) § 3067. Brabec v. Boedigheimer, 132 Minn. 370, 157 NW 508.

88. Reimbursement of public authorities for support of insane pauper see Insane Persons § 374.

Services and earnings of paupers see infra §§ 253–256.

89. See infra text and notes 96–98.

90. See infra § 203.

to their statutory obligation, neither the pauper[91] nor his estate after his death[92] is under any obligation to make reimbursement; and this is the rule, even though the pauper owned property at the time the relief was furnished, in the absence of fraud[93] or deception on his part as to his ability to support himself,[94] or although he subsequently became of sufficient ability to repay.[95]

Contracts for reimbursement. It is not against public policy for a pauper voluntarily to indemnify the public authorities against expenses incurred on his account,[96] and he may bind himself by special contract to do so,[97] although it has been held that a person admitted into a county poorhouse cannot be charged for his support there, either upon express or implied contract.[98]

[§ 203] **2. Under Statutes.** By the provisions of some statutes expenses incurred in support of a pauper may be recovered from him or his estate,[99] and it has been held that a statute authorizing re-

91. Conn.—Fish v. Perkins, 52 Conn. 200.

Iowa.—Jones County v. Norton, 91 Iowa 680, 60 NW 200; Bremer County v. Curtis, 54 Iowa 72, 6 NW 135.

Mass.—Stow v. Sawyer, 3 Allen 515; Groveland v. Medford, 1 Allen 23; Medford v. Learned, 16 Mass. 215; Deer-Isle v. Eaton, 12 Mass. 328.

Minn.—Brown County v. Siebert, 220 NW 156 (dictum); In re Dufek, 164 Minn. 55, 204 NW 469 [cit Cyc].

N. H.—Chester v. Underhill, 16 N. H. 64; Charlestown v. Hubbard, 9 N. H. 195.

N. Y.—Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212.

Pa.—Stewart's Est., 38 Pa. Super. 177; Lathrop Tp. v. Stevens, 7 Pa. Co. 143.

Vt.—Bennington v. McGennes, 1 D. Chipm. 44.

Eng.—Pontypridd Union v. Drew, [1927] 1 K. B. 214 [allowing app [1926] 1 K. B. 567, and overr Birkenhead Union v. Brookes, 95 L. T. Rep. N. S. 359]; In re Benson, 87 L. J. Ch. 622. Contra St. Mary Islington Guardians of Poor v. Biggenden, [1910] 1 K. B. 105; In re Clabbon, [1904] 2 Ch. 465 (where an infant was held to be under a legal liability to repay, independently of statute, upon coming into money); West Ham Union v. Pearson, 62 L. T. Rep. N. S. 638.

[a] **Reason for rule.**—The relief afforded to a poor person is in the nature of a charitable gift, made a legal duty by statute, and no promise can be implied to make reimbursement. Bremer County v. Curtis, 54 Iowa 72, 6 NW 135; In re Dufek, 164 Minn. 55, 204 NW 469; Charlestown v. Hubbard, 9 N. H. 195 (even though relief furnished at pauper's request); Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212; Bennington v. McGennes, 1 D. Chipm. (Vt.) 44.

[b] **Statute held not to charge pauper.**—Poor Law Amendment Act (1849) § 16 does not create a charge upon a pauper's property in favor of the guardians. In re Benson, 87 L. J. Ch. 622.

92. Iowa.—Jones County v. Norton, 91 Iowa 680, 60 NW 200; Bremer County v. Curtis, 54 Iowa 72, 6 NW 135.

Minn.—In re Dufek, 164 Minn. 55, 204 NW 469 [cit Cyc].

Mo.—Montgomery County v. Gupton, 139 Mo. 303, 39 SW 447, 40 SW 1094.

N. Y.—Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212.

Vt.—Benson v. Hitchcock, 37 Vt. 567.

93. Stow v. Sawyer, 3 Allen (Mass.) 515.

94. In re Dufek, 164 Minn. 55, 204 NW 469 [cit Cyc]; Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212; Matter of Carroll, 55 Misc. 496, 106 NYS 681, 6 Mills Surr. 232 [aff 127 App. Div. 932 mem, 111 NYS 1112 mem]; Directors of Poor, etc. v. Nyce, 13 Pa. Co. 594.

[a] **Misjudgment of the officers of the poor as to necessities of the person relieved** raises no implied promise on the part of such person that he will repay moneys expended in his behalf. Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212.

95. Charlestown v. Hubbard, 9 N. H. 195; Lathrop Tp. v. Stevens, 7 Pa. Co. 143.

96. Church v. Fanning, 44 Hun 302, 7 NYSt 645.

97. Conley v. Portland, 78 Me. 217, 3 A 658; O'Donnell v. Smith, 142 Mass. 505, 8 NE 350; In re Dufek, 164 Minn. 55, 204 NW 469; Benson v. Hitchcock, 37 Vt. 567. See Amazeen v. Newcastle, 76 N. H. 250, 81 A 1079 (town may accept conveyance of pauper's property in consideration of town's agreement to support him for life).

[a] **Rule applied.**—Where a poor person in need of relief transferred to the town of his legal settlement, as an indemnity for his support, a horse and other property of small value, the transfer was on sufficient consideration, and the town could hold the property against an attaching creditor of such poor person. Lyndon v. Belden, 14 Vt. 423.

[b] **An assignment to a town to reimburse** the town for supporting the assignor as a pauper and to cover his future support is valid, even on the assumption that the assignor was not bound to pay for either. O'Donnell v. Smith, 142 Mass. 505, 8 NE 350.

98. See infra § 257.

99. See statutory provisions.

[a] **Particular statutes construed.**—(1) Under an act authorizing the directors of a county infirmary, as soon as any person is committed to such infirmary as a pauper, to take possession of any property he may own, and apply the proceeds thereof to his maintenance, the directors are not authorized to apply property acquired by a pauper after he enters the infirmary to the payment of his board for the time prior to the acquisition of such estate. Mason County Infirmary v. Smith, 111 Ky. 636, 64 SW 466, 23 KyL 860. (2) Under Rev. St. c 32 § 50, a town legally responsible for the support of a pauper person, upon paying to another town expenses incurred by the latter in relieving such person, may recover the amount from the person relieved. Cutler v. Maker, 41 Me. 594. (3) Where overseers of the poor take possession of the effects of a deceased pauper pursuant to St. (1817) c 186 § 6, and administration is not taken out within thirty days after his decease, they may sell so much of the property as is necessary to repay the expenses incurred for such pauper, although an administrator is appointed before the sale takes place. Haynes v. Wells, 6 Pick. (Mass.) 462. (4) Under L. (1903) c 42 § 1, authorizing a town to recover from the estate of a person sums paid for his assistance within six years before his death, recovery is limited to sums expended under the town's duty imposed by statute. Warren v. Weaver, 78 N. H. 108, 97 A 748. (5) The Pennsylvania statutes, giving to poor districts the right to seize the property of paupers for the repayment of money expended for their support, to the exclusion of other creditors, do not give them any preference over other creditors in the distribution of a decedent's estate. Wilson's Est., 2 Blair Co. (Pa.) 351. (6) In such a case the statute of limitations may be pleaded by the heirs of deceased, and will bar the recovery of support furnished prior to six years. Wilson's Est., supra. (7) Under the acts of June 13, 1836 and May 13, 1889, interest on sums expended for support is not recoverable. Wilson's Est., supra. (8) Poor Law Amendment Act (1849) § 16, providing that, where any pauper has money or valuable security, the guardians of the union or parish within which he is chargeable may appropriate so much of such money or the produce of such security, or recover the same as a debt, as will reimburse the guardians for the amount expended by them in the relief of the pauper during the period of twelve months prior to such appropriation or prior to such proceedings for the recovery, as the case may be, does not create a charge against the pauper's property in favor of the guardians. In re Benson, 87 L. J. Ch. 622. (9) Other statutes construed. Montgomery County v. Nyce, 161 Pa. 82, 28 A 999 [aff 13 Pa. Co. 594] (support in almshouse); Jester v. Jefferson Tp. Overseers of Poor, 11 Pa. 540; Krause's Est., 26 Pa. Dist. 104 (property in hands of pauper's guardian); In re Whitesell, 18 Pa. Dist. 520; Laver v. Botham, [1895] 1 Q. B. 59 (guardians of union held ordinary, and not preferential, creditors of deceased pauper's estate); West Ham Union Guardians of Poor v. Ovens, L. R. 8 Exch. 37; Re Cubley, 21 Wkly. Rep. 170.

[b] **Term "if able" construed.**—(1) Under a statute authorizing the municipal officers of a town to provide for a person infected with a dangerous disease, "at his charge, or that of his parent or master, if able, otherwise at that of the town to which he belongs," the sick person is not chargeable therewith unless he is able to pay all the expenses thus incurred. Orono v. Peavey, 66 Me. 60. (2) It has been held that the phrase "if able" relates to a person's pecuniary ability at the time the expenses are incurred, and that he is not chargeable with any part of the expenses incurred if he is not able to pay the full amount. Greenville v. Beauto, 99 Me. 214, 58 A 1026. (3) Where the charges were one hundred and seventy-six dollars and the infected person had six hundred dollars, he was "able" within the meaning of the statute. Hampden v. Newburgh, 67 Me. 370.

[c] **The fact that a deceased pauper was entitled to soldier's relief which he did not receive** does not bar an action by the poor officers to recover for his support as a pauper. Crossman v. New Bedford Sav. Inst., 160 Mass. 503, 36 NE 477.

[d] **Property chargeable.**—(1) In Wisconsin, St. (1921) § 49.10, providing that, if an inmate of a public institution receiving relief at public charge was, at the time of receiving the relief, the owner of property, the authorities "may sue for and collect the value of the same against such person and against his estate," charges only the property owned at the time such support was furnished and not the property subsequently received, and the property must be of such value as to make it reasonable to sue therefor. In re Decker, 181 Wis. 484, 195 NW 316. (2) In Pennsylvania, where the real

covery of such expenses from the estate of a pauper dying without heirs is valid,[1] even though retrospective in providing that it shall apply to property of paupers who have died before its enactment.[2] The statutes do not apply, however, to a purely officious payment of expenses which a town was under no legal obligation to make,[3] nor to expenses for items which properly cannot be classed as pauper supplies.[4] A statute, providing for a recovery against the pauper by towns which "have incurred expense" in his support, has been held applicable only to expenses incurred after the passage of the act.[5] So under such a statute it must appear that some expense was actually incurred for the pauper's support,[6] and this is not shown where it appears that the pauper received support in an almshouse and at the same time rendered services to an amount equal in value to the cost of such support.[7]

Coverture is no bar to an action under the statute against a married woman for pauper supplies furnished her after she had been deserted by her husband.[8]

Limitation of actions. Actions against paupers to recover the expenses of relief furnished are subject to the general statutes of limitation.[9]

[§ 204] **C. Support of Pauper Slaves.**[10] Prior to the abolition of slavery in the United States, the statutes in most jurisdictions made a master liable for the maintenance of decrepit slaves, or those manumitted, who thereafter became paupers.[11] And under some statutes the heirs, personal representatives, and assigns of a deceased master were liable.[12] But a bona fide purchaser of real estate descending to an heir of the master was not liable.[13] The town where the emancipated slave belonged, or had a settlement, was the town empowered to recover from the master, or his heirs, executors, or administrators, for expenditures incurred for the support of such slave.[14]

[§ 205] **D. Support by Local Authorities in General[15]—1. Local Authorities Liable—a. In General.** The power and duty of public authorities generally to provide for poor persons needing relief having already been discussed,[16] it remains in this connection only to consider the liability of particular governmental subdivisions inter sese,[17] which is usually dependent on a determination of the pauper's place of residence[18] or settlement.[19]

[§ 206] **b. State Paupers.** The determination as to who are "state paupers" and what public author-

estate of a pauper is sold after his death by his administrator for the payment of debts under a decree of the orphans' court, the poor district cannot maintain a claim in the orphans' court to reimburse itself out of the proceeds of the sale for maintenance of the pauper furnished to him in his lifetime. Hains' Est., 48 Pa. Super. 396; Stewart's Est., 38 Pa. Super. 177.

[e] **Repayment of relief given by way of loan** (1) becomes due on application by the guardians to the poor person so relieved for its repayment. Proceedings before justices for attachment of wages in respect of relief so given are complaints within the meaning of Summary Jurisdiction Act (1848) § 11, and time runs for the commencement of such proceedings from the date of application for repayment, and not from the date of the loan. Ashby-de-la-Zouch Guardians v. Summers, [1928] 2 K. B. 397. (2) Under Poor Law Act (1927) § 46 subs 1, a court of summary jurisdiction is not a "court for the recovery of small debts," and therefore has no jurisdiction to deal with applications under that subsection for the recovery of relief granted by way of loan. Evans v. Morgan, [1928] 2 K. B. 527.

[f] **In New York** (1) under Poor L. § 57, providing for recovery against a person or his estate by the poor law officers of any town or city which has furnished him support if it shall at any time be ascertained that the person so assisted or supported owns real or personal property, such action cannot be maintained in the absence of evidence that such person applied to the poor authorities for relief, concealed or misrepresented his property, or deceived the overseer of the poor in any way into believing that he was destitute. In re Thomas, 132 Misc. 842, 231 NYS 93; Matter of Humphries, 125 Misc. 62, 210 NYS 253. (2) Such statute did not intend to sweep away the obligation of a father of infants so supported, even though they are possessed of means for their own support, but the support to be compensated for is that provided for one for whom no one else is primarily liable for support. Coler v. Callahan, 105 Misc. 457, 174 NYS 504. (3) In an action under such provision to recover from minors money expended for their maintenance in an institution before discovering their ownership of property, the burden was on the city to show that the primary duty of their living father to support them was not discharged, and was unenforced because possible recovery against him was precluded by his lack of property. Coler v. Callahan, supra. (4) After the death of their father and mother, infants who had been supported by the city in an institution, but who had property or means for their own support, became liable, under such statute, and moneys thereafter expended for their maintenance were chargeable against their separate estates. Coler v. Callahan, supra.

Statutory liability of insane pauper or his estate see Insane Persons § 374 note 97.

1. In re Person, 7 Alaska 626.
2. In re Person, supra.

[a] **Such statute "does not impair any vested right** nor interfere with any contractual relation." In re Person, 7 Alaska 626, 629.

3. Newburyport v. Creedon, 146 Mass. 134, 15 NE 157.
4. Freedom v. McDonald, 115 Me. 525, 99 A 459.

[a] **Expenses of pauper's commitment to a charitable institution** are not recoverable. Freedom v. McDonald, 115 Me. 525, 99 A 459.

5. Medford v. Learned, 16 Mass. 215.
6. Taunton v. Talbot, 186 Mass. 341, 71 NE 785, 1 AnnCas 34.
7. Taunton v. Talbot, supra. To same effect Millis v. Frink, 213 Mass. 350, 100 NE 626 (where services rendered by pauper to poor relatives living with her in her home were held to offset her share of the pauper supplies furnished to the family).

Right to services and earnings of pauper generally see infra §§ 253–256.

8. Peru v. Poland, 78 Me. 215, 3 A 284.
9. Jones County v. Norton, 91 Iowa 680, 60 NW 200; Kennebunkport v. Smith, 22 Me. 445; Directors of Poor, etc. v. Nyce, 13 Pa. Co. 594.

Statutory limitation of actions generally see Limitations of Actions 37 C. J. p 666.

10. **Cross references:**
Acquired settlement of slave see supra § 51.
Derivative settlement of slave see supra § 123.
Regulation of slaves generally see Slaves [36 Cyc 465].

11. See statutory provisions.

[a] **"The object of the law . . .** was not to prevent the manumission of slaves, but to prevent any charge to the town in consequence of such manumission." Exeter v. Warwick, 1 R. I. 63, 69.

[b] **"A slave set at liberty,"** within the meaning of a statute making masters and their estates liable for the support of such a slave, was one placed in a permanent condition of freedom, and over whom the right of the master was extinguished. Columbia v. Williams, 3 Conn. 467.

[c] **De facto master liable.**—Overseers v. Kline, 9 Pa. 217.

[d] **Sale of slave held not rescinded** so as to exonerate vendee from liability for support. Charleston v. Cohen, 29 S. C. L. 408.

[e] **Complaint held sufficient** to show that slave was a pauper. East Hartford v. Pitkin, 8 Conn. 393.

12. See statutory provisions.

[a] **Evidence held sufficient:** (1) To show ownership of slave so as to make master's executor liable under the New Jersey statute. Chatham Tp. v. Canfield, 8 N. J. L. 52. (2) To charge town with future support of slave, and exonerate the executors of the master. Hopkins v. Fleet, 9 Johns. (N. Y.) 225.

[b] **In Delaware** (1) the liability of the owner of a slave, discharged after the age of thirty-five years, to repay the trustees of the poor the expense of maintaining such slave extended to the children and legatees of the owner. In re Hannah, 2 Del. 365. (2) The heirs of the master were liable to the extent of the real estate descended. Sussex County Trustees of Poor v. Hall, 3 Del. 322.

13. Sussex County v. Hall, supra.
14. Colchester v. Lyme, 13 Conn. 274.

15. **Cross references:**
Actions to recover for supplies, services, and expenditures see infra §§ 264–284.
Contracts for support see infra §§ 251, 252.
Duty of public authorities to furnish relief see supra §§ 7, 8.
Liability for medical services see infra § 246–250.
Maintenance pending removal see supra § 165.
Support in:
Asylum:
Generally see Insane Persons §§ 373, 374.
Particular town or district liable see infra §§ 259, 260.
Poorhouse see infra §§ 257, 258.
Reformatory and prison see infra §§ 261–263.

16. See supra §§ 7, 8.
17. See infra §§ 206–210.
18. See infra § 208.
19. See infra § 209.

ities are liable for their support is regulated by statute.[20] In some jurisdictions the statute provides that all persons needing relief, who have no settlement in the state, shall be state paupers, and be supported by the state for a period fixed by the statute, and, after the expiration of such period, all such paupers shall be sent back to the town where they resided when they first applied for relief, and thereafter be a town charge.[21] Where the state is in charge of a quarantine, the expense of the burial of paupers who die in its charge rests upon the state.[22]

[§ 207] **c. Liability of Counties.** The liability of a county for the support of the poor within its territorial limits is a matter of statutory regulation,[23] and it can be held liable in no case except as prescribed by statute.[24] In some jurisdictions the statutes provide that, where a poor person has not gained a settlement in any town or city in the county in which he has become poor, sick, or infirm, he shall be supported and relieved by the superintendent of the poor at the expense of the county.[25] Oth-

20. See statutory provisions.

[a] **In Maine** (1) Rev. St. c 24 § 33, imposing upon plantations having over a specified population certain obligations with reference to persons found within their limits did not extend to so-called state paupers. Davis v. Milton, 90 Me. 512, 38 A 539. (2) Where a person found in an unincorporated place, having no home there nor any settlement in the state, is relieved by the oldest adjoining incorporated town, in which the pauper has not lived, such town is not entitled to be reimbursed by the state, under Rev. St. c 24 § 22 and Act (1874) c 230. Opinion of Justices, 68 Me. 582.

[b] **In Massachusetts,** under St. (1866) c 234 § 1, providing that, when the operation of any provision of law in relation to poor and indigent persons might cause a separation of husband and wife by reason of the wife's having a legal settlement in some place in the commonwealth, the husband being a state pauper, both parties shall be supported by the place where the wife has a legal settlement, a town is not obliged to support a state pauper whose wife has a settlement in the town, if she herself is not a pauper. Belchertown v. Ludlow, 110 Mass. 98.

21. See statutory provisions.

[a] **In Connecticut** (1) the six months' period fixed by statute during which a pauper was entitled to relief by the state was held to be the first six months of his pauperism. Canton v. Burlington, 58 Conn. 277, 20 A 602; Marlborough v. Chatham, 50 Conn. 554. (2) A subsequent statute providing that such period should be the first six months of the pauper's residence in the state did not affect a pauper whose status as such was acquired before the statute was passed. Canton v. Burlington, supra.

22. McNorton v. Val Verde County, (Tex. Civ. A.) 25 SW 653 (a county is not liable for coffins of paupers dying in a pesthouse which is in charge of the state, under the quarantine laws).

23. See statutory provisions; cases infra this note; and note 24 et seq.

[a] **Liability as between counties.**—(1) The liability of one county to another for relief furnished by the latter to a pauper chargeable in the former is purely statutory. Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132. (2) Cobbey St. Annot. (1903) §§ 9360, 9361, 9362, providing for the care of nonresident paupers by the county wherein they are found, and reimbursement therefor by the county of such paupers' residence, apply to all counties in the state, including counties under township organization which have not established a poorhouse. Rock County v. Holt County, 78 Nebr. 616, 11 NW 366.

[b] **Liability as between county and town or township.**—(1) In Illinois, under Rev. St. c 80, the liability of counties for the support of paupers was not transferred to townships by the act of Febr. 12, 1849, providing for township and county organization; and hence a county adopting township organization remained liable for such support thereafter. La Salle County v. South Ottawa, 12 Ill. 480. (2) In Michigan, under Pub. Acts (1883) § 35 (3 Howell St. § 1789) the township in which a poor person has gained a settlement is liable for his support, and not the county, where such county has adopted the distinction between township and county poor. La Grange Tp. v. Cass County Superintendents of Poor, 115 Mich. 181, 73 NW 114. (3) In Nebraska, in counties under township organization, in which a poorhouse has not been established, the burden of supporting poor in respective townships, under Rev. St. (1913) § 1008, and § 5798, as amended by L. (1915) c 20 § 1, devolves upon such townships and not on the county "town," in legislative acts, having no fixed significance and leaving legislative intent to be gathered from the necessity of the act. Custer Tp. v. Antelope County, 103 Nebr. 128, 170 NW 600. (4) In New York, where a county board of supervisors abolished the distinction between town poor and county poor in 1909, pursuant to Poor L. § 138, and in 1912 a certain person became a poor person and began to receive relief, and in 1913 the board restored the distinction, the status of such poor person did not become fixed by having been a poor person whose support was chargeable to the county, and after the distinction between town poor and county poor was restored, the town became liable for his support, notwithstanding no provision is made by §§ 139, 140 for the disposition of moneys in the hands of the overseers of the poor, where the distinction between town poor and county poor is revived or restored, the fund in the hands of the overseers of the poor being a contingent fund, which is saved to the county like other contingent funds. Cassidy v. Little Falls, 189 App. Div. 527, 179 NYS 493. (5) Where the overseers of the poor of the town of G, in the county of G, supposing their town liable for the support of a pauper having no settlement in the state, in good faith removed him from C, in another county, to G, and supported him there, it was held that the town of G might recover of the county of G for such support. Grafton v. Grafton County, 43 N. H. 382. (6) Under the act of June 25, 1885, a town, and not the county in which it is situated, is liable for the expense of care and removal to his home of a nonresident of the state who, immediately after obtaining employment in the town, is injured so as to be rendered a public charge. Austin Poor Dist. v. Potter County, 1 Pa. Dist. 637. (7) Other statutes construed. Pushor v. Morris, 53 Minn. 325, 55 NW 143 (statute construed as making county liable); Peo. v. St. Lawrence County, 103 N. Y. 541, 9 NE 311 (town not liable to reimbursement from county).

24. Colo.—Gunnison County v. Ouray County, 53 Colo. 287, 125 P 536, 537 [cit Cyc]; Saguache County v. Tough, 45 Colo. 395, 101 P 411.

Iowa.—Wood v. Boone County, 153 Iowa 92, 133 NW 377, 39 LRANS 168, AnnCas1913D 1070; Cerro Gordo County v. Boone County, 152 Iowa 692, 133 NW 132, 39 LRANS 161, Ann Cas1913C 79; Cooledge v. Mahaska County, 24 Iowa 211.

Pa.—Com. v. Guy, 13 Pa. Dist. 213.

S. D.—Roane v. Hutchinson County, 40 S. D. 297, 167 NW 168; Hamlin County v. Clark County, 1 S. D. 131, 45 NW 329.

Utah.—Ogden City v. Weber County, 26 Utah 129, 72 P 433.

[a] **The power of quarantine** of a borough board of health implies the duty of the board to furnish necessary food and attendance, and the county directors of the poor cannot be compelled to support persons quarantined by the borough board of health. Com. v. Guy, 13 Pa. Dist. 213.

25. See statutory provisions.

[a] **Facts held to show that pauper had not gained a settlement.**—Tompkins County v. Ontario County, 92 Misc. 272, 156 NYS 335.

[b] **Incomplete settlement.**—Where paupers had no settlement in a city, except through their father, who had not wholly gained his settlement, they were county charges, in view of L. (1903) c 106, providing that no town shall be liable for the support of a person unless he or the person under whom he derives his settlement shall have wholly gained a settlement therein during ten years preceding the time when the support was furnished. Tilton v. Concord, 78 N. H. 426, 101 A 144.

[c] **Pauper not having settlement in state.**—In Minnesota, under Rev. L. (1905) § 1514 subd 2, in a county where the town system of caring for the poor is in force, a town which furnishes relief to a pauper having no settlement in the state is not entitled to reimbursement from the county. Iowa v. Todd County, 135 Minn. 183, 160 NW 669.

[d] **Particular statutes construed and applied.**—Loudon v. Merrimack County, 71 N. H. 573, 53 A 906 (county liable for supplies furnished to paupers quarantined by board of health); Peo. v. Maynard, 160 N. Y. 453, 55 NE 9; Delaware County v. Delaware, 105 App. Div. 129, 93 NYS 954; Dane County v. Sauk County, 38 Wis. 499; Westfield v. Sauk County, 18 Wis. 624.

[e] **In Illinois,** under Pauper Act § 24, where a county, after notice of the necessity therefor, fails to care for a nonresident or other person, not coming within the definition of a "pauper," who shall fall sick, without having the means to pay for his board, medical aid, etc., and a city provides such relief, the city may recover from the county the amount expended for such relief. Macomb v. McDonough, 134 Ill. A. 532; Chester v. Randolph, 112 Ill. A. 510; Winnebago County v. Rockford, 61 Ill. A. 656.

[f] **In Kansas,** under a statute providing for the removal of the poor person to the place of his settlement, "if the same can be conveniently done," but that if such person cannot be so removed he shall be relieved by the overseer of the poor, the question of removal is within the overseer's discretion, and if he determines that the person cannot properly be removed, his determination binds the county for the expenses of such person's relief. Stevens v. Miami County, 6 Kan. A. 438, 49 P 798.

[g] **In Michigan,** under 1 Howell

er statutory provisions make certain classes of counties liable for expenses incurred in relieving needy and sick and indigent persons therein who have no known legal settlement in the state.[26] Such statutes have been held constitutional,[27] and a township which has furnished relief to such a person is entitled to reimbursement from the county.[28] Where a statute provides that the county, subject to such rules and regulations as the county board shall prescribe, shall furnish relief to a nonresident or to a person not coming within the definition of a pauper, who shall fall sick therein, without having the means of paying for his board, medical treatment, etc.,[29] the county cannot relieve itself of its statutory liability by refusing or neglecting to make any rules and regulations on the subject;[30] nor can it make unreasonable rules and regulations,[31] such as limiting its duty to a particular class of persons not embraced within the statute,[32] or making its relief dependent upon the conduct of the person to be relieved.[33] The facts that proceedings have been instituted against the relatives of a pauper, and that they have been required to contribute to his support, will not relieve the county from its primary liability to provide for the support of such person.[34]

[§ 208] **d. Liability of Place of Residence.** Under the pauper statutes generally, a town or county is usually made liable in the first instance for the support of a pauper who resides therein,[35] although the town or county in which he has his legal settlement is ultimately liable therefor.[36] The liability of the poor district of a pauper's residence is not affected by the fact that, owing to confusion of boundaries, he has been supported by another district,[37] and the fact that a pauper has been temporarily removed from the town of his residence by the supervisor thereof, acting within his powers, will not change the legal residence of such pauper so as to relieve the town from liability.[38] So the fact that the relief is furnished by another town or county into which the pauper goes for a transient purpose only does not affect the liability of the place of his residence,[39] provided the person to whom the relief is furnished is strictly a transient person,[40]

St. § 1755 et seq, the burden of supporting paupers is upon the county in which they may be, except as to paupers who have gained a settlement in counties in which the distinction between county and township poor has not been abrogated, in which case a pauper is to be supported by the township of the county in which he has gained a settlement. Kalkaska County Superintendents of Poor v. Grand Traverse County Superintendents of Poor, 120 Mich. 247, 79 NW 196; La Grange Tp. v. Cass County, 115 Mich. 181, 73 NW 114.

26. See statutory provisions.

27. Pulaski Tp. Poor Dist. v. Lawrence County, 34 Pa. Super. 602; Kittanning Borough Poor Dist. v. Armstrong County, 17 Pa. Dist. 673, 34 Pa. Co. 221. Contra Renovo Borough Poor Dist. v. Clinton County, 15 Pa. Dist. 887, 32 Pa. Co. 209.

28. Union Tp. v. Lawrence County, 13 Pa. Dist. 646, 28 Pa. Co. 665.

29. See statutory provisions.

Duty to relieve transient pauper generally see supra § 6.

30. Perry County v. Du Quoin, 99 Ill. 479; Chester v. Randolph, 112 Ill. A. 510; Madison County v. Haskell, 63 Ill. A. 657.

31. Perry County v. Du Quoin, 99 Ill. 479; Spring Valley v. Bureau, 115 Ill. A. 545.

32. Spring Valley v. Bureau, supra.

33. Spring Valley v. Bureau, supra.

34. Mappes v. Iowa County, 47 Wis. 31, 1 NW 359.

35. See statutory provisions; cases infra this note; and note 36 et seq.

[a] **Persons employed in county or town, but without fixed abode.**—A person who goes into a town or county without making any arrangements for a home, and who has no fixed residence, but is employed by different persons for six months, and then becomes a pauper, is within Rev. St. (1845) c 80 § 15, providing for the support of paupers who have no fixed abode, but have been employed by some one else. Dorr v. Seneca, 74 Ill. 101; Franklin County v. Henry County, 26 Ill. A. 193.

[b] **Illegitimate children.**—(1) Under Poor L. § 62, read in connection with the amendment of Inferior Criminal Courts Act § 31 subd 3, by L. (1918) c 517, responsibility for the support of a bastard child is with the town or city of the actual bona fide residence of the mother, and is not avoided by birth out of the state, possibly on a journey or transient stay out of its territory. New York Public Charities Comr. v. Lotsky, 188 App. Div. 740, 177 NYS 130. (2) Duty of public authorities generally to support illegitimate children see Bastards § 34.

[c] **Statutes construed and applied.**—Hendrickson v. Queen, 149 Minn. 79, 182 NW 952; In re Quarantine Sustentation, 31 Pa. Co. 656 (diseased indigents); Regina v. Gull Lake, 9 Sask. L. 127, 27 DomLR 422, 34 WestLR 222, 10 WestWkly 246 (if resident at least thirty days prior to falling ill).

[d] **In New Hampshire** (1) under Gen. L. c 83 § 15, residence within a county for not less than one year renders it liable for the support of a poor person, whether relief was furnished to him within the time of such residence or not. Merrimack County v. Grafton County, 63 N. H. 550, 4 A 390. (2) Under the act of July 4, 1861, abolishing all settlements gained before January, 1820, persons whose settlements were thereby lost became county paupers, and the county in which they resided at the time pauper aid was given, although not the county of their former settlement, was liable therefor if such residence was bona fide and they had no home or domicile in any other county. Northfield v. Merrimack County, 43 N. H. 165. (3) Under Rev. St. c 85 § 9, as amended by L. (1903) c 67 § 3, the county in which the pauper had last resided for one year in the last five years, at the time relief was applied for, is chargeable with his support, although he had been aided within one year by another county in which he had not resided for three months at the time the relief was furnished. Merrimack County v. Hillsborough County, 80 N. H. 387, 118 A 813.

[e] **In Vermont** (1) the object of Act (1886) § 13, providing that the residence of a person shall be in the town in which he last resided for three full years, maintaining himself and his family, was to make the duty to support paupers dependent on their residence without any reference to their place of legal settlement. Chittenden v. Barnard, 61 Vt. 145, 17 A 844; Worcester v. East Montpelier, 61 Vt. 139, 17 A 842. (2) This means of acquiring a residence was not limited to the time subsequent to the taking effect of the statute. Chittenden v. Barnard, supra; Worcester v. East Montpelier, supra. (3) Hence where, upon the taking effect of such statute, the legal settlement of a pauper was in E, but his necessary residence in W, E thereupon ceased to be and W became chargeable with his support. Worcester v. East Montpelier, supra. (4) Under St. § 3171, providing that, if the pauper, when in need, has not resided in the town furnishing the support "for three years supporting himself and family," such town may recover the expense thereof from the town where he last resided for the space of three years supporting himself and family, it is immaterial that the pauper afterward resided outside the state. Granville v. Hancock, 69 Vt. 205, 37 A 294.

[f] **In England,** under Children Act (1908) § 74 subs 7, where there is evidence that a child in fact resides with his father in the area of one local authority, although the child has run away from home and has lived for some time in the area of another local authority, where he has been committed to an industrial school, justices may make an order for maintenance on the local authority in whose area the father resides. Yorkshire West Riding County v. Colne Corp., 117 L. T. Rep. N. S. 671 [dist Stoke-on-Trent v. Cheshire County, [1915] 3 K. B. 699 (where the facts were different)].

[g] **In Ontario** (1) a statute making a municipality in which an indigent person admitted to a hospital "is, at the time of his admission, resident," is not limited to persons capable of choosing, and who have voluntarily chosen, a residence. Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 12 OntWN 2, 34 DomLR 691. (2) The statute does not contemplate a dual residence, and the liability of the municipality in which the person resides cannot be shifted to the county. Toronto Free Hospital v. Barrie, supra. (3) Place of residence of married woman determined. Toronto Gen. Hospital v. Renfrew, 58 Ont. L. 71, 29 OntWN 151. (4) Residence held not established. Toronto Gen. Hospital v. Cobalt, 31 OntWN 439.

36. See infra § 209.

37. Carbondale Tp. Poor-Dist. v. Carbondale City Poor-Dist., 4 Pa. C. Pl. 76.

38. Randolph v. Greenwood, 122 Ill. A. 23.

39. Conn.—Bridgeport v. Trumbull, 37 Conn. 484.

Ind.—Tipton County v. Brown, 4 Ind. A. 288, 30 NE 925.

Iowa.—Hardin County v. Wright County, 67 Iowa 127, 24 NW 754.

Pa.—Jefferson County Poor Dist. v. North Mahoning Tp., 16 Pa. Dist. 612.

Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454.

Wis.—McCaffrey v. Shields, 54 Wis. 645, 12 NW 54.

40. Leicester v. Brandon, 65 Vt. 544, 27 A 318.

[a] **One town has no right of action against another town** for maintaining a pauper, unless the pauper is strictly a transient person, away from home, his abiding place, and the town where he resides. Leicester v. Brandon, 65 Vt. 544, 27 A 318; New Haven v. Middlebury, 63 Vt. 399, 21 A 608; Chittenden v. Stockbridge, 63 Vt. 308, 21 A 1102.

although in some jurisdictions the statute has been construed to make the place of a person's residence liable for relief furnished to him in another town or county only where such person was a pauper at the time of his departure from his place of residence.[41]

Where a person has no settlement in the state, it is the duty of the town where he resides to support him,[42] but where such a pauper moves to another town, the town of his prior residence is no longer liable for his support.[43] Where a poor person having no settlement in the state is injured in one township, and several years thereafter for the first time requires public aid in another township, the latter township is liable for his care.[44]

Persons sent to the county poorhouse before the passage of a statute making the town of a pauper's residence liable for his support do not thereby cease to be residents of the town from which they were sent so as to relieve such town from liability for their support.[45]

Burial expenses. Where a statute makes a county liable for the burial expenses of honorably discharged soldiers who die therein, the county is not liable for the burial expenses of a soldier who had been a resident of the county, but who died in a soldiers' home in another state.[46]

[§ 209] **e. Liability of Place of Settlement.**[47] In most jurisdictions the town or county of a pauper's legal settlement is liable for his support, and where relief has been given to such pauper by another town or county, or by the state, it is entitled to reimbursement by the place of his settlement,[48] and a statute providing for the support of paupers by the town to which they "belong" means the town in which they are settled,[49] and not the town in which they reside.[50] A town which advanced money to a person not a pauper, for his support and that of a weak-minded child whom he was not able to support, may recover from the town of the child's settlement so much of the money as actually went to the child's support.[51] But since the obligation to support the indigent is purely statutory,[52] no reimbursement from the town or county of a pauper's settlement can be had, in the absence of a provision of the

Duty to support transient poor persons found sick or in distress see supra § 6.

41. Lander County v. Humboldt County, 21 Nev. 415, 32 P 849; Wood v. Simmons, 51 Hun 325, 4 NYS 368.

[a] **Rule applied.**—Where a resident of the city and county of New York went to another county, and there met with an accident which rendered him unable to provide for the support of himself and family, as he had previously done, the county from which he came is not liable for his support, under L. (1885) c 546, making the county, city, or town from which a pauper came liable for his support. Wood v. Simmons, 51 Hun 325, 4 NYS 368.

42. Holden v. Brewer, 38 Me. 472; Harmony Tp. v. Forest County, 91 Pa. 404; Jefferson County Poor Dist. v. North Mahoning Tp., 16 Pa. Dist. 612; Grim v. Haycock Tp., 1 Pa. Dist. 815.

43. Holden v. Brewer, 38 Me. 472.

44. Davidson Tp. Poor Dist. v. Shrewsbury Tp. Poor Dist., 62 Pa. Super. 613.

45. Freeport v. Stephenson County, 41 Ill. 495.

Support in poorhouses generally see infra §§ 257, 258.

46. Wieand v. Lehigh County, 21 Pa. Dist. 217.

47. Settlement and removal of paupers generally see supra §§ 35–173.

48. See statutory provisions. See also infra § 210 et seq.

[a] **The mere fact that a person was "found" within a poor district** does not show that his settlement was there, so as to render the district liable for expenditures made by the county for such person's support. Allegheny County v. Pittsburgh, 281 Pa. 300, 127 A 72.

[b] **Statutes construed and applied.**—(1) Under St. (1793) c 59 the only remedy of a town which has relieved a pauper, to recover the expense of such relief, is against the town of the pauper's settlement. Salem v. Andover, 3 Mass. 436. (2) If a minor born out of wedlock has no relative who is liable for his support, and his legal settlement is in a town other than the one sued for nursing, such other town may be compelled to pay the expenses under Gen. St. (1913) § 3067 et seq. Hendrickson v. Queen, 149 Minn. 79, 182 NW 952. (3) Under Poor L. §§ 40, 42, 51, a town in a county or the county is chargeable for the support of a person and his family who had a legal settlement in the town, and had not lost it by their temporary removal to another county. Broome County v. Cortland County, 154 App. Div. 349, 139 NYS 365; Onondaga County v. Amsterdam, 139 App. Div. 877, 124 NYS 558 [aff 64 Misc. 181, 117 NYS 1121]; Matter of Chamberlain, 73 Misc. 256, 132 NYS 681. (4) Where poor persons had gained a settlement in a town, as provided by Poor L. § 40, and were relieved by another town within a year, and they had not gained a settlement in the latter town, and both towns were in the same county, the former town was liable for their support. Matter of Porter, 68 Misc. 124, 124 NYS 162. (5) Under Rev. St. c 34 §§ 20, 21, 24, a town which furnishes aid in an emergency to a nonresident or other person suddenly taken ill or disabled therein may recover therefor from the county in which such town is situated, or from the town of such person's legal settlement. Westfield v. Sauk County, 18 Wis. 624. (6) The liability of the place of settlement was held not affected by L. (1895) c 216, simplifying the method of aiding paupers. Portage County v. Neshkoro, 109 Wis. 520, 85 NW 414. (7) Other statutes construed and applied. Sebec v. Dover, 71 Me. 573; Redwood County v. Minneapolis, 131 Minn. 41, 154 NW 660; Redwood County v. Minneapolis, 126 Minn. 512, 148 NW 469; Rouse v. Poor Directors, 118 Pa. 1, 12 A 66; Tobey Tp. Overseers of Poor v. Madison Overseers of Poor, 44 Pa. 60.

[c] **Expenses of quarantine.**—(1) Rev. St. c 18 § 51, providing that nurses and their assistants and necessaries furnished a quarantined person shall be at his charge, or that of his parents or master if able, and otherwise, at that of the town to which he belongs, was not repealed by implication by Pub. L. (1909) c 25 § 2, providing that expenses, including supplies of food, medicines, etc., furnished a quarantined person or such part thereof as the board of health may determine, shall be deemed a legitimate expenditure for the protection of the public health, and shall be charged to the account of incidental expenses of the town, but not to any pauper account, and that no person so quarantined and assisted shall be considered a pauper, the former statute being designed to divide the expenses, so that the part designed to protect the community where the infected person is found should be borne by that town, and the part incurred for his healing and comfort should be borne by the patient or by the town of his settlement, while under the latter statute both kinds of expenditures for indigent persons are grouped together, and it is left to the board of health to determine how much shall be borne by the town of the settlement, and how much by the town where the quarantined person is found. Eden v. Southwest Harbor, 108 Me. 489, 81 A 1003. (2) Under Pub. L. (1909) c 25 § 2, providing that expenses of a quarantined person or such part thereof as the board of health may determine shall be charged to the account of incidental expenses of the town, etc., determination by the board of health of a town where nurses, necessaries, etc., were furnished persons having their pauper settlement in another town, that the expenses should be paid by the town of settlement, renders the latter town liable. Eden v. Southwest Harbor, supra.

[d] **Alien paupers.**—(1) Act March 23, 1905 (Pub. L. [1905] c 142) § 1, providing that the revised statutes shall not be construed to render a town liable for relief furnished an alien or his family since the statutes took effect, does not deprive an alien who gained a settlement before March 23, 1905, of any benefits previously acquired by such settlement. Augusta v. Waterville, 106 Me. 394, 76 A 707. (2) Under Rev. St. c 27 § 1 par 6, giving a pauper settlement to one residing in a town for five years without receiving support as a pauper, an alien who acquired a settlement before the act of March 23, 1905 was passed was entitled to support. Augusta v. Waterville, supra. (3) Act March 23, 1905 (Pub. L. [1905] c 142) § 1, providing that relief furnished to alien paupers shall be within the provisions of Rev. St. c 27 § 33, relieves towns from their support and provides for their relief the same as persons having no legal settlement, the place of their settlement being immaterial. Augusta v. Waterville, supra.

[e] **Effect of repeal of statute.**—Jenks Tp. Poor Dist. v. Sheffield Tp. Poor Dist., 135 Pa. 400, 19 A 1004.

Cross references:

Actions to recover for support see infra §§ 264–284.

Fixing liability see infra §§ 211–230.

Support in:

Asylum see infra §§ 259, 260.

Poorhouse see infra §§ 257, 258.

Reformatory or prison see infra §§ 261–263.

49. Reading v. Westport, 19 Conn. 561; Eden v. Southwest Harbor, 108 Me. 489, 81 A 1003; Hampden v. Newburgh, 67 Me. 370; Kennebunk v. Alfred, 19 Me. 221.

50. See cases supra note 49.

51. Ettrick v. Bangor, 84 Wis. 256, 54 NW 401.

52. See supra § 7.

statute authorizing such recovery,[53] unless there is an express contract for reimbursement.[54] Where a pauper, at the date of the application for relief, had no settlement in the municipality sought to be charged with his support, no recovery can be had for relief given by plaintiff town.[55]

Unsettled husband of wife having settlement. Where a wife has a settlement in the state, but her husband is unsettled, and, becoming a pauper, is relieved by the town in which he resides, no recovery of the expense of such relief can be had by such town against the town of the wife's settlement.[56] So, where a wife and her children have a settlement in the state, but her husband is unsettled, a town which furnishes supplies to the family may recover therefor from the town where the wife and children have their settlement, but not for supplies furnished to the husband.[57]

Minor children of unsettled parents. It has been held that, although a child born in the state, of parents who have acquired no settlement therein, has its settlement in the place of birth,[58] nevertheless, in order to prevent the separation of the child from its parents, it should be supported during its minority by the town where the father is chargeable and supported, although such town may require reimbursement from the town of the child's settlement.[59]

Marriage procured by collusion of town authorities. Where the statute provides that settlements shall not be changed by marriages procured by the agency or collusion of town authorities,[60] if the marriage of a female pauper to a man settled in another town is so procured, and the town of the husband's settlement supports her as a pauper, it may recover the amount expended from the town of her original settlement.[61]

[§ 210] **f. Alteration, Annexation, or Detachment of Territory.**[62] By a separation of a part of its territory and inhabitants, by annexation or a new incorporation, the liability of a town to support the paupers having a legal settlement therein remains unaltered in the absence of any statute to the contrary.[63] But as this separation must be made by the legislature, the act authorizing it may,[64] and frequently does,[65] impose conditions or limitations to relieve the town which is to be deprived of a part of its inhabitants. But if no legislative provision be made, the settlement of any person in the old town and the consequent liability of such town for his support, is not affected by the new incorporation, unless at the time of the new incorporation he shall dwell within the limits of it, and, as a party to it, acquire a new settlement in the new town.[66] Unless it is apparent that the legislature intended to prescribe a rule for all pauper cases liable to arise between two sections of a divided town and to supersede the general law by the specific provision, cases which do not fall within the specific provision will be governed by the general law.[67]

Unsettled pauper. Where a town is divided, a pauper residing therein, without any settlement in the state, must be supported by that town in which his residence may be established at the time of the division.[68] And it has been held that, where an unsettled pauper resided in a town at the time of its division, the duty to support him devolved upon the new town, if his place of residence, at the time he became chargeable, was within the limits of the new town.[69]

Agreements on alteration. Where a portion of

53. Grafton v. Grafton County, 43 N. H. 382; Delaware County v. Delaware, 105 App. Div. 129, 93 NYS 954; Palmer v. Vandenbergh, 3 Wend. (N. Y.) 193 (holding that paupers must be supported since Nov. 27, 1824, by the county in which they happened to be on that date, although previously their legal settlement was in another county); Hamlin County v. Clerk County, 1 S. D. 131, 45 NW 329.

[a] **Thus,** under Poor L. §§ 42, 51, where a person became a poor person after he has left the town or county of his settlement, he must be supported by the county in which he becomes a poor person, without right on the part of such county to reimbursement from the town or county from which he came, although his settlement still remains there. Delaware County v. Delaware, 105 App. Div. 129, 93 NYS 954.

54. Dalton v. Hinsdale, 6 Mass. 501.

55. Tilton v. Concord, 78 N. H. 426, 101 A 144.

56. Grafton v. Grafton County, 43 N. H. 382 [dist South Hampton v. Hampton Falls, 11 N. H. 134 (decided under a statute since repealed)].

57. Goshen v. Canaan, 35 Conn. 186; Sanford v. Hollis, 2 Me. 194.

58. See supra § 41.

59. Guilford v. Norwalk, 73 Conn. 161, 46 A 881.

60. See statutory provisions; and supra § 130.

61. Minot v. Bowdoin, 75 Me. 205.

62. **Effect on settlement of pauper** see supra §§ 96-99.

63. Windham v. Portland, 4 Mass. 384; Peterson v. Emardville, 101 Minn. 24, 111 NW 652; Wellcome v. Monticello, 41 Minn. 136, 42 NW 930.

64. Windham v. Portland, 4 Mass. 384.

65. See statutory provisions; and cases infra this note.

[a] **Particular statutes construed.** —(1) Under L. (1867) c 291 § 6, annexing territory formerly belonging to the town of Frankfort to the town of Winterport, and providing that the latter town shall support "all paupers whose legal settlement is upon said territory," only such persons as were then actually chargeable as paupers are required to be supported by the latter town. Castine v. Winterport, 56 Me. 319. (2) Where parts of different towns were formed into a new town, a provision that the new town should support all the poor who had their legal settlement in either of the towns from which it was formed and who had removed therefrom, and whose home was, before such removal, within the limits of the new town, did not include those poor who had removed from the limits of the new town into another part of the same old town, and from thence into another town, but included only those whose dwelling place or home, previous to such removal, was within the limits of the new town. Sutton v. Dana, 1 Metc. (Mass.) 383. (3) Where parts of different towns were formed into a district, a provision in the act of incorporation, that the inhabitants of the district should "provide for the support of all the poor who were inhabitants within the district before the passing of the act, and shall be brought back for maintenance hereafter," was limited to those individuals who before were inhabitants within the district and might be brought back, and did not include their descendants. Harvard v. Boxborough, 4 Metc. (Mass.) 570. (4) Other statutes construed. North Andover v. Groveland, 1 Allen (Mass.) 75; Dana v. Hardwick, 10 Metc. (Mass.) 208; Southbridge v. Charlton, 15 Mass. 248 (holding that the new town was not obliged to support a pauper supported by the old town on the territory forming the new one, who had a settlement by real estate in the old one); Wellcome v. Monticello, 41 Minn. 136, 42 NW 930.

66. Freeport v. Stephenson County, 41 Ill. 495; North Andover v. Groveland, 1 Allen (Mass.) 75; Harvard v. Boxborough, 4 Metc. (Mass.) 570; Windham v. Portland, 4 Mass. 384; Clinton v. Clinton Tp., 56 N. J. L. 240, 27 A 916; Ashland County v. Richland County Infirmary, 7 Oh. St. 65, 70 AmD 49.

[a] **Where the birthplace of a pauper** is severed from a township and included within the corporate limits of a town, a liability for his support passes to the town along with the birthplace. Clinton v. Clinton Tp., 56 N. J. L. 240, 27 A 916.

[b] **In Pennsylvania** where a township is divided, and two new towns created, each part remains liable, in proportion to its rates and levies, for the maintenance of the paupers who before division were a charge upon the whole township. North Whitehall Tp. v. South Whitehall Tp., 3 Serg. & R. 117; Monroe Tp. v. Durell Tp., 3 PaLJ 326.

67. Holden v. Veazie, 73 Me. 312; Yarmouth v. North Yarmouth, 44 Me. 352; Weld v. Carthage, 37 Me. 39; Fenholt v. Freeborn County, 29 Minn. 158, 12 NW 458.

[a] **Imposition of liability for the support of a single specific class of paupers** upon the new town, in an act dividing an existing municipality, does not necessarily impose upon the remaining portion the burden of supporting all other paupers not included in such class. Holden v. Veazie, 73 Me. 312.

[b] **Where territory is set off from one town but not incorporated into another,** the settlement of persons residing in such territory is not changed by such dismemberment. Weld v. Carthage, 37 Me. 39.

68. Winterport v. Frankfort, 51 Me. 447; Holden v. Brewer, 38 Me. 472.

69. Stillwater Tp. v. Green Tp., 9 N. J. L. 59.

the territory of one town is annexed to another town, or incorporated into a new town, an agreement between the towns as to the future support of paupers, not inconsistent with the act of incorporation or with the general pauper statutes, is enforceable as between the parties thereto,[70] although such agreements between towns cannot affect the settlement by their inhabitants, or the rights of third parties in relation thereto.[71] And an agreement is not conclusively presumed from the fact that the officers of the old town, for a long period of time after the alteration of the territory, continued to support the pauper.[72]

[§ 211] **2. Fixing Liability—a. Ascertainment of Poverty.** In some jurisdictions, in order to charge a town or county with relief and maintenance of a poor person, he must first have been adjudged a pauper by the tribunal designated by the statute, usually the county court, or a justice of the peace,[73] and unless the statute is complied with no liability for supplies furnished or services rendered arises.[74] There is no distinction in regard to a county's liability for funeral expenses and its liability for services rendered to the pauper in his lifetime; and in both cases a previous adjudication of poverty is necessary to fix that liability.[75]

[§ 212] **b. Ascertainment and Adjudication of Settlement.** A county, town, or municipality cannot be charged in an action for the care and maintenance of a pauper prior to an adjudication of such pauper's settlement by the proper tribunal.[76] Such adjudication may, however, be made after the expenditures have been incurred.[77] The adjudication as to settlement, although valid until impeached,[78] may be set aside for fraud or mistake.[79]

[§ 213] **c. Removal and Order Therefor.** In some jurisdictions in which the statutes provide for removal of paupers to the place of their legal settlement,[80] it has been held that there can be no recovery against the town in which a pauper has a legal settlement by a town in which he is a resident for expenses incurred in his support prior to an order of removal,[81] except in the case of extreme sickness or death,[82] or where the poor person is a transient.[83] In jurisdictions where it is provided that, if the town of a pauper's settlement shall, within a designated period after notice, remove the pauper from the town giving notice, it shall be charged only at a specified rate per week, regardless of the actual expense incurred by the town giving notice,[84] actual removal is a condition precedent which must be strictly performed within the time limit.[85] The voluntary removal of the pauper,[86] or the removal of the pauper after his decease, although before burial,[87] is not sufficient to absolve the town of settlement from payment of the actual expenses incurred. Refusal of the pauper to return or to be taken back does not discharge the town of his settlement from liability.[88]

[§ 214] **d. Notice by Local Authorities Furnishing Relief[89]—(1) Necessity.** By common law a town or district affording relief to a pauper for whose support it was not liable must, in order to recover the expenses incurred, give to the town of his settlement or to the town liable for his support reasonable notice of the facts and make demand before suit for the amount claimed.[90] The question of notice is, however, governed almost entirely by statute, and where the statute expressly requires notice to be given,[91] the giving of such notice is an indispensable prerequisite to the maintenance of an action against a town or district liable for the pauper's sup-

70. Naugatuck v. Middlebury, 20 Conn. 378; Oxford v. Bethany, 15 Conn. 246; Hebron v. Marlborough, 3 Conn. 209; Clinton v. Benton, 49 Me. 550; Veazie v. Howland, 47 Me. 127; Westborough v. Rehoboth, 4 Cush. (Mass.) 185; Norton v. Mansfield, 16 Mass. 48; West Boylston v. Boylston, 15 Mass. 261.

[a] **Construction and operation of agreement.**—Where an act incorporating the town of M provided that it should take its full proportion of the then poor of H, from which M was detached, but it was afterward agreed between the two towns that M should take A and B as its full proportion of such poor, M was not thereby made liable for the support of A's wife after his death. Hebron v. Marlborough, 3 Conn. 209.

71. See supra § 97.

72. Clinton v. Clinton Tp., 56 N. J. L. 240, 27 A 916.

73. See statutory provisions.

[a] **In Arkansas** (1) the adjudication that a person is a pauper must be made by the county court upon reports to the court from sheriffs, coroners, constables, and justices, or upon inquiry instituted by the court of its own motion. Lee County v. Lackie, 30 Ark. 764. (2) A county judge cannot declare one a pauper except in term time, or when holding a county court. Prewett v. Mississippi County, 38 Ark. 213; Lee County v. Lackie, supra.

74. Clay v. Pulaski County, 56 Ark. 468, 20 SW 251; Clark County v. Huie, 49 Ark. 145, 4 SW 452; Cantrell v. Clark County, 47 Ark. 239, 1 SW 200; Sayres v. Springfield, 8 N. J. L. 166; King County v. Collins, 1 Wash. T. 469; Collins v. King County, 1 Wash. T. 416.

75. Clay v. Pulaski County, 56 Ark. 468, 20 SW 251; Clark County v. Huie 49 Ark. 145, 4 SW 452.

76. Youngs v. Hardiston Tp., 14 N. J. L. 517; Ex p. Gates, 4 Cow. (N. Y.) 137; Ex p. Dow, 1 Cow. (N. Y.) 205; Voorhis v. Whipple, 7 Johns. (N. Y.) 89; In re Blewitt, 11 Phila. (Pa.) 652.

[a] **Order of a single justice** is sufficient. Ex p. Dow, 1 Cow. (N. Y.) 205.

77. Peo. v. Oswego, 2 Wend. (N. Y.) 291; In re Blewitt, 11 Phila. (Pa.) 652.

78. Concord v. Merrimack County, 60 N. H. 521.

[a] **In England** (1) an order adjudicating on the settlement of a pauper is conclusive as a judgment in rem as to the settlement of such pauper, and is none the less conclusive because an abortive appeal has been made against such order, which appeal failed because the notice of appeal was out of time and so was not heard on its merits. Uxbridge Union v. Winchester Union, 91 L. T. Rep. N. S. 533. (2) Evidence to show either that the adjudication was erroneous and made in ignorance of the facts, or that the pauper has since the adjudication acquired a fresh settlement, is not admissible. Where the pauper has acquired a fresh settlement since the adjudication, the remedy of the guardians is to apply for a fresh adjudication. Suffolk County Lunatic Asylum v. Nottingham Union, 69 J. P. 120.

79. Concord v. Merrimack County, 60 N. H. 521.

80. See supra §§ 138–165.

81. Ashland County v. Richmond County Infirmary, 7 Oh. St. 65, 70 AmD 49; Millcreek Tp. v. Miami Tp., 10 Oh. 375; Milford Tp. v. McCoy, 2 Penr. & W. (Pa.) 432; Pittsford v. Chittenden, 44 Vt. 382; Middlebury v. Waltham, 6 Vt. 200; Londonderry v. Windham, 2 Vt. 149.

[a] **Insanity of a pauper** does not dispense with the necessity of an order of removal. Londonderry v. Windham, 2 Vt. 149.

82. Essex v. Milton, 3 Vt. 17; Fairfield Overseers of Poor v. St. Albans Overseers of Poor, Brayt. (Vt.) 176.

83. Danville v. Putney, 6 Vt. 512; Manchester v. Rupert, 6 Vt. 291.

[a] **Debtor in prison, or on the liberties,** is a transient person, within Pauper Act § 11, and the town where the prison is situate may, if he become chargeable, recover the expense of his support from the town of his settlement, without an order of removal. Danville v. Putney, 6 Vt. 512; Manchester v. Rupert, 6 Vt. 291.

84. See statutory provisions.

85. Seekonk v. Rehoboth, 8 Cush. (Mass.) 371; Seekonk v. Attleborough, 7 Pick. (Mass.) 155; Ware v. Wilbraham, 4 Pick. (Mass.) 45.

[a] **Computation of time.**—In computing the thirty days within which a town liable for the support of a pauper is required, by Rev. St. c 46 § 15, to remove him from the town in which he has received support, in order to exempt the former from liability therefor at a greater rate than one dollar per week, the day on which notice is received that the pauper has been furnished is to be excluded. Seekonk v. Rehoboth, 8 Cush. (Mass.) 371.

86. Ware v. Wilbraham, 4 Pick. (Mass.) 45.

87. Webster v. Uxbridge, 13 Metc. (Mass.) 198.

88. Bristol v. Fox, 159 Ill. 500, 42 NE 887 [rev 45 Ill. A. 330].

89. Notice to fix liability of local authorities for support in asylum see infra § 259.

90. Newtown v. Danbury, 3 Conn. 553.

91. See statutory provisions.

port to recover for supplies furnished by plaintiff town or district.[92]

[§ 215] **(2) Form and Sufficiency—(a) In General.** No particular form of notice is necessary,[93] it being sufficient that the notice convey the necessary information to the proper person.[94] Reasonable care and diligence must be exercised in obtaining and communicating the fact;[95] and if this is done a mere inaccuracy or informality will not vitiate the notice.[96] But a notice containing misstatement of a material fact is void.[97] It has been held that notice need not be an entity, and that if all the facts necessary to constitute legal notice are severally communicated within the proper time it is sufficient.[98] So a notice has been held sufficient when accompanied by a letter which, construed with the notice proper, contains all the essential information required.[99]

Oral or written notice. Where the statute requires notice to be in writing,[1] an oral notice is of no effect.[2] And it has been held that the notice must be in writing, even though the statute does not expressly so provide.[3]

[§ 216] **(b) Name or Description of Pauper.** A pauper notice should state the names of the paupers or otherwise so describe them that the authorities of the town notified may identify them with reasonable certainty;[4] and if the identity of the pauper is sufficiently established a slight error in the name does not render the notice defective.[5] A misnomer, however, without further means of identification will render the notice defective.[6]

92. Ill.—Rock Island County v. Mercer County, 96 Ill. A. 531.
Iowa.—Poweshiek County v. Cass County, 63 Iowa 244, 18 NW 895.
Me.—Bangor v. Wiscasset, 71 Me. 535.
Mass.—Shelburne v. Buckland, 124 Mass. 117; Attleborough v. Mansfield, 15 Pick. 19.
Nev.—Washoe County v. Eureka County, 25 Nev. 356, 60 P 376.
N. H.—Gilford v. Newmarket, 7 N. H. 251.
Pa.—Cowanshannock Poor Dist. v. Armstrong County, 31 Pa. Super. 386.
Vt.—Woodstock v. Barnard, 67 Vt. 97, 30 A 806.
Wis.—Plymouth v. Sheboygan County, 101 Wis. 200, 77 NW 196; Scott v. Clayton, 51 Wis. 185, 8 NW 171.
And see cases infra §§ 215–227.

[a] **Expenses incurred in care of pauper infected with a dangerous disease** cannot be recovered unless notice thereof has been given to the town liable. Springfield v. Worcester, 2 Cush. (Mass.) 52.

[b] **Burial expenses.**—Under Act March 6, 1903 (P. L. p 18) a poor district cannot recover from a county the expenses of burying a pauper who had no settlement in the state, if it appears that such expenses were paid before any notice was given to the county commissioners. Cowanshannock Poor Dist. v. Armstrong County, 31 Pa. Super. 386.

[c] **Facts held not to dispense with need of notice.**—The fact that the county in which the pauper had his settlement sent the pauper into another county where he was for a time supported by a relative, but subsequently became a public charge in the latter county, does not dispense with the need of the statutory notice. Rock Island County v. Mercer County, 96 Ill. A. 531.

[d] **In Minnesota** the notice required by statute to be given by a town, that a pauper within its limits is a county charge, is not a condition precedent to the right of recovery by a town for expenses incurred in caring for the pauper, but is to give the county authorities an opportunity to examine into the matter. Highland Grove v. Clay County, 101 Minn. 11, 111 NW 651.

Pleading notice see infra § 274.
Waiver of notice see infra § 225.

93. Bethlehem v. Watertown, 51 Conn. 490; Rockport v. Searsmont, 103 Me. 495, 70 A 444; Kennebunkport v. Buxton, 26 Me. 61; Lynn v. Newburyport, 5 Allen (Mass.) 545; Barnet v. Norton, 90 Vt. 544, 99 A 238.

[a] **Date not essential to notice.**—Ellsworth v. Houlton, 48 Me. 416; Barnet v. Norton, 90 Vt. 544, 99 A 238.

[b] **Form held sufficient.**—Rockport v. Searsmont, 103 Me. 495, 70 A 444; Cutler v. Maker, 41 Me. 594; Kennebunkport v. Buxton, 26 Me. 61; Lynn v. Newburyport, 5 Allen (Mass.) 545.

94. Colo.—Gunnison County v. Ouray County, 53 Colo. 287, 125 P 536, 537 [cit Cyc].
Conn.—Windham v. Lebanon, 51 Conn. 319; Washington v. Kent, 38 Conn. 249.
Me.—Rockport v. Searsmont, 103 Me. 495, 70 A 444.
Mass.—Shelburne v. Buckland, 124 Mass. 117.
N. Y.—Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407.
Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454.
Wis.—La Crosse v. Melrose, 22 Wis. 459.

[a] **Notice held sufficient.**—Old Saybrook v. Milford, 76 Conn. 152, 56 A 496; Rockport v. Searsmont, 103 Me. 495, 70 A 444; Ellsworth v. Houlton, 48 Me. 416; Shelburne v. Buckland, 124 Mass. 117; Quincy v. Braintree, 5 Mass. 86; Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407; Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454.

[b] **Notice held insufficient.**—Gunnison County v. Ouray County, 53 Colo. 287, 125 P 536, 537 [cit Cyc]; Beacon Falls v. Seymour, 44 Conn. 210.

Waiver of defects see infra § 225.

95. Hamden v. Bethany, 43 Conn. 212; Scott v. Clayton, 51 Wis. 185, 8 NW 171.

96. Durham v. Lisbon, 126 Me. 429, 139 A 232; Dalton v. Bethlehem, 20 N. H. 505; Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas 1916C 387; La Crosse v. Melrose, 22 Wis. 459.

[a] **Rule applied.**—A notice by plaintiff town to defendant town that it was assisting a pauper, a resident of defendant, is not invalid because it referred to the pauper as "transiently being" within plaintiff town, the expression, if improper, being immaterial. Barnet v. Norton, 90 Vt. 544, 99 A 238.

Support in asylum see infra § 259.

97. Durham v. Lisbon, 126 Me. 429, 139 A 232; Glenburn v. Oldtown, 63 Me. 582; Dalton v. Hinsdale, 6 Mass. 501.

[a] **Misstatements as to parentage** of minor child furnished pauper supplies vitiate notice to overseers of town of alleged settlement. Durham v. Lisbon, 126 Me. 429, 139 A 232.

98. Shelburne v. Rochester, 1 Pick. (Mass.) 470.

99. Rockport v. Searsmont, 103 Me. 495, 70 A 444.

1. See statutory provisions.

2. Middletown v. Berlin, 18 Conn. 189; Ellsworth v. Houlton, 48 Me. 416; Dalton v. Hinsdale, 6 Mass. 501.

3. Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387. But see Newtown v. Danbury, 3 Conn. 553 (where it was intimated that notice need not be in writing unless the statute so requires).

[a] **"This result follows** from the purposes for which the notice is required, and its official character, and accords with the uniform though tacit construction of the statute since the the requirement of notice." Waitsfield v. Craftsbury, 87 Vt. 406, 409, 89 A 466, AnnCas1916C 387.

4. Conn.—Salem v. Montville, 33 Conn. 141.
Me.—Durham v. Lisbon, 126 Me. 429, 139 A 232; Limington v. Alfred, 122 Me. 171, 119 A 121; Auburn v. Wilton, 74 Me. 437; Kennebunkport v. Buxton, 26 Me. 61; York v. Penobscot, 2 Me. 1; Bangor v. Deer Isle, 1 Me. 329.
Mass.—Shelburne v. Buckland, 124 Mass. 117; Lanesborough v. New Ashford, 5 Pick. 190; Shelburne v. Rochester, 1 Pick. 470.
N. H.—Dalton v. Bethlehem, 20 N. H. 505; Chichester v. Pembroke, 2 N. H. 530.

[a] **The town notified must exercise reasonable fairness and diligence** in applying the notice to the proper person. Hamden v. Bethany, 43 Conn. 212.

[b] **Description held insufficient.**—"Mrs. Phelps, an inhabitant of the town of Montville." Salem v. Montville, 33 Conn. 141.

[c] **Pauper going by two names.**—Where a pauper was known by one name in the town of her residence and by another in the town of her settlement, a notice from the former to the latter stating only the name by which she was known in the former was held to be insufficient. Lanesborough v. New Ashford, 5 Pick. (Mass.) 190.

Waiver of defects see infra § 226.

5. Hamden v. Bethany, 43 Conn. 212; Shelburne v. Rochester, 1 Pick. (Mass.) 470; Dalton v. Bethlehem, 20 N. H. 505.

[a] **Technical accuracy** is not required. Windham v. Lebanon, 51 Conn. 319; Washington v. Kent, 38 Conn. 249.

[b] **Omission or substitution of an initial for the middle name** will not vitiate the notice if the identity of the pauper is otherwise sufficiently certain. Hamden v. Bethany, 43 Conn. 212 (where a notice calling the pauper "William Hall" was held sufficient, his real name being William E. Hall, his identity being further indicated by the statement that he had a broken leg; and the notice was not rendered defective by the fact that in the town named there actually lived a William Hall, whose leg, however, was not broken); Dalton v. Bethlehem, 20 N. H. 505 (where a notice omitting the middle name was held sufficient, the pauper being otherwise described as the child of clearly indicated parents).

[c] **Identity held sufficiently shown.**—(1) A notice calling the pauper "Joan" and "Joanna," her real name being Joann, she being otherwise identified as the child of parents sufficiently described. Dalton v. Bethlehem, 20 N. H. 505. (2) A notice calling the pauper "Sarah or Sally," her name being Sally. Shelburne v. Rochester, 1 Pick. (Mass.) 470.

6. Auburn v. Wilton, 74 Me. 437; Dalton v. Bethlehem, 20 N. H. 505.

[a] **Notices held defective.**—(1) Notice calling pauper "Benton L. Blackwell," his real name being Bennetto L. Blackwell. Auburn v. Wilton, 74 Me. 437. (2) Notice calling pauper "James," the real name being

"Wife," "children," and "family." A woman is sufficiently named as the wife of a man whose name is correctly given,[7] although a notice calling a woman the "wife" of a man with whom she is in fact living in adultery is fatally defective.[8] But a notice describing a parent by name, including in general terms his "children" or "family," is insufficient as to anyone except the parent;[9] and, a fortiori, a notice stating that a named person has become chargeable is insufficient to include his wife[10] or children.[11] On the other hand, a notice including parents and "children," giving the number of the children, has been held sufficient,[12] unless the number of children is misstated.[13] So the designation of the pauper as "the daughter" of a named person has been held insufficient,[14] although, on the other hand, it has been held that a notice specifying "the child" of a person named imports that there is but one child and is sufficient.[15]

Curing defect by parol. A defect in designating the pauper cannot be supplied by oral information.[16] Nor, upon trial, will evidence be admitted to prove that the designation could apply to only one person in the district.[17]

[§ 217] **(c) Settlement of Pauper.** A pauper notice must allege the settlement of the pauper to be in the town sought to be held liable.[18] But it need not contain an allegation of the means by which the settlement was obtained,[19] and, if such an allegation is made, the fact that it is erroneous will not estop the town giving notice to prove, in an action to recover expenses incurred, that the settlement was acquired in a different manner,[20] unless the statement was meant to mislead.[21] It has been held that a notice describing the pauper as having a "residence," instead of a "settlement," in the town notified does not render the notice defective if it appears plainly that it is claimed that such town is liable, and that it is requested to remove the pauper.[22]

A notice describing a pauper as an "inhabitant" of the town to which notice is given is equivalent to stating that his settlement was there.[23]

[§ 218] **(d) Condition and Chargeability of Pauper.** Where the statute requires the notice to state the condition of the pauper,[24] a notice which fails to contain such statement is ineffective.[25] The word "condition," as used in the statute, refers to pecuniary condition,[26] and a notice stating only the person's physical condition is insufficient.[27] A provision for a statement of the pauper's condition does not require the notice to state that medical services were necessary for him.[28]

Chargeability. Under the pauper statutes, either by express provisions or by implication arising from the requirement that the notice shall state all the material facts on which the liability of the town notified is based,[29] the notice must contain an allegation that the pauper is chargeable to, or is being supported by, the town or county sending the notice.[30] Notice that a pauper has become chargeable is not notice that his wife and children have

Jane. Dalton v. Bethlehem, 20 N. H. 505.

Waiver of defect see infra § 226.

7. Windham v. Lebanon, 51 Conn. 319; Washington v. Kent, 38 Conn. 249; Middletown v. Berlin, 18 Conn. 189; Sanford v. Lebanon, 31 Me. 124; Bangor v. Deer Isle, 1 Me. 329; Dalton v. Bethlehem, 20 N. H. 505.

8. Glenburn v. Oldtown, 63 Me. 582.

9. Middletown v. Berlin, 18 Conn. 189; Wellington v. Corinna, 104 Me. 252, 71 A 889; Thomaston v. Greenbush, 98 Me. 140, 56 A 621; Sanford v. Lebanon, 31 Me. 124; Dover v. Paris, 5 Me. 430; Bangor v. Deer Isle, 1 Me. 329; Shutesbury v. Oxford, 16 Mass. 102; Embden v. Augusta, 12 Mass. 307.

10. Andover v. Canton, 13 Mass. 547.

11. Limington v. Alfred, 122 Me. 171, 119 A 121; Thomaston v. Greenbush, 98 Me. 140, 56 A 621; York v. Penobscot, 2 Me. 1; Andover v. Canton, 13 Mass 547.

12. Windham v. Lebanon, 51 Conn. 319; Granville v. Southampton, 138 Mass. 256, Lynn v. Newburyport, 5 Allen (Mass.) 545; Orange v. Sudbury, 10 Pick. (Mass.) 22; Fremont v. Sandown, 56 N. H. 300.

[a] **Notices held sufficient.**—(1) "Mrs. A. B. and three children," it not being shown or suggested that either of the parents had more than three children. Lynn v. Newburyport, 5 Allen (Mass.) 545. (2) "Abel Eaton and wife and three children," there being only three children. Orange v. Sudbury, 10 Pick. (Mass.) 22. (3) "Pomeroy and family (wife and two children), whose legal settlement is in your town, but now residing in this town," although P had four children, only two of whom, however, lived with him. Granville v. Southampton, 138 Mass. 256. (4) "Austin Seymour (colored), and wife and four children, aged from ten years down to an infant." Windham v. Lebanon, 51 Conn. 319.

13. Carver v. Taunton, 152 Mass. 484, 25 NE 965; Walpole v. Hopkinton, 4 Pick. (Mass.) 357; New Boston v. Dunbarton, 12 N. H. 409.

[a] **Notice held insufficient.**—(1) "Adeline Shurtleff and three children," there being five children living with S. Carver v. Taunton, 152 Mass. 484, 25 NE 965. (2) "Nancy Towne and her four minor children," there being other minor children. New-Boston v. Dunbarton, 12 N. H. 409. (3) "Charles Reed, his wife and four children," there being more than four. Northfield v. Taunton, 4 Metc. (Mass.) 433.

14. Chichester v. Pembroke, 2 N. H. 530.

[a] **For the reason** that the person named may have had several daughters. Chichester v. Pembroke, 2 N. H. 530.

15. Ware v. Williamstown, 8 Pick. (Mass.) 388. See Washington v. Kent, 38 Conn. 249 (notice describing the pauper as "the infant child of A. P." was sufficient).

16. Middletown v. Berlin, 18 Conn. 189.

17. Salem v. Montville, 33 Conn. 141.

18. Quincy v. Braintree, 5 Mass. 86. And see cases infra notes 19–23.

19. Quincy v. Braintree, supra.

20. Northfield v. Taunton, 4 Metc. (Mass.) 433

21. Northfield v. Taunton, supra.

22. La Crosse v. Melrose, 22 Wis. 459.

23. Uxbridge v. Seekonk, 10 Pick. (Mass.) 150; Ware v. Williamstown, 8 Pick. (Mass.) 388.

[a] **Illustration.**—A notice that expenses have been incurred for the support of "O. S. widow of G. S. deceased who was an inhabitant of your town" implies, when properly punctuated, that the widow was an inhabitant of, and hence had her settlement in, such town. Uxbridge v. Seekonk, 10 Pick. (Mass.) 150.

24. See statutory provisions.

25. Barnet v. Plainfield, 82 Vt. 263, 73 A 579; Essex v. Jericho, 76 Vt. 104, 56 A 493.

[a] **Statute construed.**—To entitle one to public aid under Gen. L. § 4219, one must be a poor person, and must be in need of assistance, which is in contrast with § 4222, which only requires that one be in need of relief; and for a city to recover from a town for aid furnished under the former section, the notice required by § 4220 is a prerequisite to suit, and where such notice fails to show that the one aided was a poor person, the suit cannot be maintained. Montpelier v. East Montpelier, (Vt.) 108 A 704.

26. Barnet v. Plainfield, 82 Vt. 263, 73 A 579.

[a] **Financial condition** of the alleged pauper must be disclosed. Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387.

27. Barnet v. Plainfield, 82 Vt. 263, 73 A 579.

[a] **Thus** a notice merely stating that a boy had had an operation of some kind, and his family applied for help, was insufficient. Barnet v. Plainfield, 82 Vt. 263, 73 A 579.

28. Roxbury v. Bridgewater, 85 Conn. 196, 82 A 193.

29. See statutory provisions; and cases infra notes 30–32.

30. Gunnison County v. Ouray County, 53 Colo. 287, 125 P 536; Beacon Falls v. Seymour, 46 Conn. 281; Beacon Falls v. Seymour, 44 Conn. 210; Hamden v. Bethany, 43 Conn. 212; Quincy v. Braintree, 5 Mass. 86.

[a] **Thus** a notice to a county merely referring to an inclosed statement of money advanced for supplies furnished a pauper of the county notified, not stating that he had become a charge or would require future assistance, was not sufficient. Gunnison County v. Ouray County, 53 Colo. 287, 125 P 536.

[b] **"On expense in this town"** sufficiently alleges chargeability. Bethlehem v. Watertown, 51 Conn. 490; Hamden v. Bethany, 43 Conn. 212; Middletown v. Berlin, 18 Conn. 189. See Salem v. Montville, 33 Conn. 141 (the notice in this case being held defective on other grounds).

[c] **Chargeability held insufficiently alleged.**—Beacon Falls v. Seymour, 46 Conn. 281; Beacon Falls v. Seymour, 44 Conn. 210.

[d] **In New York,** under Rev. St. pt 1 tit 1 c 20 § 59, as amended by L. (1885) c 546, a notice is insufficient which does not state that the pauper

become chargeable.[31] On the other hand, a notice that a wife is chargeable is sufficient, although there is no allegation of chargeability of the husband.[32]

[§ 219] **(e) Statement of Expenses Incurred.** The statutes usually require the notice to contain a statement of the amount expended in the relief of the pauper.[33] But by the weight of authority the account need not be itemized to show the several amounts expended.[34] If several individuals constituting one family are supported together, the notice need not specify the sums expended for each individual,[35] and if a notice for the support of several paupers is bad as to some of them, recovery can be had for the expense of the others.[36] If the amount claimed in the notice is too great and the mistake is made in good faith, recovery may be had for what is proved to be reasonably due;[37] but if the officer giving notice knows that some of the items are much larger than the town has paid or assumed to pay, nothing can be recovered on such items.[38] And if the amount in the writ is smaller than the amount claimed in the notice, recovery must be limited to the former sum.[39]

[§ 220] **(f) Request To Remove.** Under some statutes a pauper notice must contain a request that the town notified remove the pauper to its own jurisdiction,[40] and the omission of such request renders the notice insufficient.[41] But such a provision obviously does not apply where the death and burial of the pauper intervened before notice was given.[42] A request to remove may be inferred from a statement that reimbursement for expenses is claimed "till removal."[43]

[§ 221] **(g) By Whom Signed.**[44] The pauper statutes contemplate that the notice shall be signed in the name of the overseers of the poor,[45] and a notice signed by some other person in their behalf is not sufficient,[46] even though this is done under instructions of the overseers.[47] It is sufficient, however, if the notice is signed by a majority of the board of overseers,[48] or by one overseer in behalf, or by order, of the board.[49] If there are no overseers of the poor the notice must be signed by the officers who exercise their functions.[50] Thus a notice may be signed by a majority of the selectmen or by one of them in behalf of the others,[51] or by the mayor of a city[52] or by the auditor of a county.[53] Notice signed by selectmen need not state that they are acting as overseers of the poor,[54] it being presumed that no overseers were chosen, and that the selectmen were acting in that capacity virtute officii.[55]

[§ 222] **(3) Service—(a) Upon Whom.** Statutory provisions as to the service of notice must be strictly pursued.[56] Overseers of the poor are the proper officers to receive a pauper notice, and it should therefore be directed to, and served upon, one of them.[57] If, however, there are no overseers the notice may be served upon one of the officers who exercise their functions with respect to the poor, such as selectmen[58] or supervi-

was a pauper while in the town from which he came, nor that his voluntary change of residence was improper. McKay v. Welsh, 2 Silv. Sup. 463, 6 NYS 358.

31. Andover v. Canton, 13 Mass. 547.

32. Sanford v. Lebanon, 31 Me. 124.

33. See statutory provisions.

[a] **Notice demanding contribution** in the support of a pauper from a town with which it believes itself jointly liable, but which is liable in toto, is not a sufficient notice. Dalton v. Hinsdale, 6 Mass. 501.

[b] **Notice held bad** (1) for failure to state the amount expended. Chichester v. Pembroke, 2 N. H. 530. (2) The expenses stated must be those mentioned in the declaration, and notice of other expenses previously incurred for the pauper's support is insufficient. Gilford v. Newmarket, 7 N. H. 251.

Waiver of defects see infra § 226.

34. Newtown v. Danbury, 3 Conn. 553; Barnstead v. Strafford, 8 N. H. 142; Conway v. Wakefield, 3 N. H. 277; Ettrick v. Bangor, 84 Wis. 256, 54 NW 401.

[a] **In Vermont,** however, it has been held that a town cannot recover for services rendered to a pauper by a physician the amount of whose account was not stated as a distinct item in the notice of claim given to the town liable, although it appears that the amount of that account was included in another item in the notice but without any specific designation. Pawlet v. Sandgate, 19 Vt. 621.

35. Barnstead v. Strafford, 8 N. H. 142 [dist Chichester v. Pembroke infra note 36].

36. Poland v. Wilton, 15 Me. 363; Bangor v. Deer-Isle, 1 Me. 329

[a] **It is improper to instruct the jury** that the notice would be bad as to all the paupers included in the notice if they could not distinguish between supplies to paupers as to whom the notice was bad and the others; if the jury could not ascertain what supplies had been furnished the latter, it would be a defect of proof but would not affect the validity of the notice. Sanford v. Lebanon, 31 Me. 124.

[b] **In New Hampshire** it has been held, under a statute requiring that the sums expended for the relief of several paupers, and the notice is defective as to one or more of the paupers, recovery cannot be had, unless the particular sum expended for each of the remaining paupers is stated. Chichester v. Pembroke, 2 N. H. 530.

37. Chester v. Plaistow, 43 N. H. 542; Berlin v. Gorham, 34 N. H. 266

38. Barnstead v. Strafford, 8 N. H. 142.

39. Dalton v. Bethlehem, 20 N. H. 505.

40. See statutory provisions.

41. Gunnison County v. Ouray County, 53 Colo. 287, 125 P 536; Ellsworth v. Houlton, 48 Me. 416; Kennebunkport v. Buxton, 26 Me. 61; Lynn v. Newburyport, 5 Allen (Mass.) 545; Topsham v. Harpswell, 1 Mass. 518.

42. Ellsworth v. Houlton, 48 Me. 416.

43. Kennebunkport v. Buxton, 26 Me. 61; Lynn v. Newburyport, 5 Allen (Mass.) 545.

44. **Waiver of defects** see infra § 226.

45. Cooper v. Alexander, 33 Me. 453.

[a] **In Nevada,** under Gen. St. p 540 § 8, it is essential to the validity of the notice of relief furnished to a pauper by a county not ultimately liable that such notice shall emanate from the board of county commissioners, and that it shall tend to show that it is from that body. Washoe County v. Eureka County, 25 Nev. 356, 60 P 376.

46. Cooper v. Alexander, 33 Me. 453.

47. Belfast v. Lee, 59 Me. 293.

48. Dalton v. Hinsdale, 6 Mass. 501.

49. Ellsworth v. Houlton, 48 Me. 416; Dover v. Deer Isle, 15 Me. 169; Northfield v. Taunton, 4 Metc. (Mass.) 433; Westminster v. Bernardston, 8 Mass. 104.

50. See cases infra notes 51-55.

51. Bridgewater v. Dartmouth, 4 Mass. 273; Nottingham v. Barrington, 6 N. H. 302.

[a] **Selectmen are proper officers to give notice** under Act (1837) c 244 § 1, providing for relief of persons infected with dangerous sickness. Springfield v. Worcester, 2 Cush. (Mass.) 52.

[b] **A notice signed by two persons as selectmen** will be presumed to be signed by a majority of selectmen until otherwise proved. Nottingham v. Barrington, 6 N. H. 302.

52. La Crosse v. Melrose, 22 Wis. 459 (where the mayor and council succeeded to all the rights and duties of the supervisors of towns in respect of the poor).

53. Cerro Gordo County v. Wright County, 50 Iowa 539.

54. Jay v. Carthage, 48 Me. 353; Garland v. Brewer, 3 Me. 197; Ashby v. Lunenburg, 8 Pick. (Mass.) 563; Berlin v. Gorham, 34 N. H. 266.

55. See cases supra note 54.

56. Meredith v. Canterbury, 3 N. H. 80.

[a] **Under a statute requiring notice to be directed to the town** a notice directed to the sheriff commanding him to notify the selectmen and town clerk of the town, instead of being directed to the town and ordering the sheriff to serve a copy of the notice on the selectmen and town clerk, is not notice to the town. Meredith v. Canterbury, 3 N. H. 80.

57. Gorham v. Calais, 4 Me. 475; Rogers v. Newbury, 105 Mass. 533; Walpole v. Hopkinton, 4 Pick. (Mass.) 358; Dalton v. Hinsdale, 6 Mass. 501. See Macomb v. McDonough, 134 Ill. A. 532 (notice to any member of board is sufficient where recovery is sought from a county).

[a] **Service upon overseers who have declined to accept the office** and have not been sworn in is sufficient if it appears by the records of the town notified that they are overseers of the poor for the current year. Gorham v. Calais, 4 Me. 475.

58. Salem v. Montville, 33 Conn. 141; Jay v. Carthage, 48 Me. 353;

sors[59] of a town or the auditor of a county.[60]

[§ 223] **(b) Manner of Service.** The notice must be served in accordance with the provisions of the statutes.[61] Where the statute provides that the notice shall be served by leaving it with a designated officer of the town to be notified,[62] it may be served by leaving it at his usual place of abode.[63] It has been held that service by mail is insufficient in the absence of a statute authorizing service in such manner.[64] Where service by mail is authorized,[65] and evidence is introduced to prove mailing, defendant may offer evidence to rebut such proof.[66] The presumption is that a notice mailed was received in the due course of mail.[67]

Return of service. Where the statute requires a return of the notice to be made within a specified term by the officer who served it,[68] such return is a condition precedent to a recovery against the town notified.[69] The return may be amended to conform to the facts.[70]

[§ 224] **(4) Time of Giving Notice.**[71] It is very generally prescribed by statute that a pauper notice must be given within a specified time, usually three months, after the expenses for which recovery is sought were incurred.[72] Such provisions are mandatory,[73] and failure to comply therewith will prevent recovery.[74] If the notice is received within the statutory time, the fact that it bears no date is immaterial.[75] Where the statute requires the notice to be given "immediately" upon the furnishing of the relief,[76] unreasonable delay in giving the notice will prevent recovery for such relief.[77] The notice must be given within the specified time after expenses were incurred, not within such time after they were paid.[78] A notice which by mistake includes some items arising before the statutory period, giving means of distinguishing what came before, is not invalid.[79]

Knowledge of pauper's place of settlement. Where the statute provides that town officers shall give notice within a certain time after they know to what town the pauper belongs,[80] failure to give notice within the designated time will prevent recovery for expenses incurred after such knowledge was acquired,[81] but not for expenses incurred before that time.[82]

Where no time is prescribed, reasonable notice is all that is required.[83]

Premature notice. The notice should not be given before the pauper has actually become chargeable.[84] But a notice is not premature if given after the supplies have been ordered in a case of actual necessity, although none have been actually furnished or consumed.[85] The notice may be given before the supplies furnished are paid for.[86]

[§ 225] **(5) Waiver—(a) Of Notice.** A town liable for the support of a pauper may waive statutory notice and demand from the town incurring expenses in the relief of a pauper.[87] And if the waiver prevents notice being given, the ordinary doctrine of estoppel applies.[88] A denial of liability by the poor officer of the town liable, and refusal to support the pauper, is an implied waiver of written particularized notice.[89] So the receipt of bills for support without objection is a waiver of a more formal notice.[90] A new notice is not a waiver of a

Bridgewater v. Dartmouth, 4 Mass. 273; Salisbury v. Orange, 5 N. H. 348.

[a] **Selectmen are proper officers to receive notice** under Act (1837) c 244 § 1, providing for relief of persons infected with dangerous sickness. Springfield v. Worcester, 2 Cush. (Mass.) 52.

[b] **It will be presumed that selectmen act in the capacity of overseers** when notice is directed to and served upon them, and when it does not appear that overseers have been chosen. Jay v. Carthage, 48 Me. 353.

59. La Crosse v. Melrose, 22 Wis. 459.

[a] **The name of a town having been changed** from B to M, notice actually served upon the supervisors thereof was not insufficient because addressed to the supervisors of B. La Crosse v. Melrose, 22 Wis. 459.

60. Cerro Gordo County v. Wright County, 50 Iowa 439.

61. See statutory provisions; and cases infra notes 62-70.

[a] **Service held illegal** because not made by the sheriff of the county in which the town liable was situated or by his deputy. Northwood v. Barrington, 9 N. H. 369.

62. See statutory provisions.

[a] **Service upon an overseer at a distance from his town,** while he was attending his duties as a member of the legislature, was valid. Walpole v. Hopkinton, 4 Pick. (Mass.) 358.

63. Salisbury v. Orange, 5 N. H. 348. See Whitingham v. Wardsboro, 47 Vt. 496 (where it did not appear that place at which notice was left was overseer's last and usual place of abode).

64. Groton v. Lancaster, 16 Mass. 110 (decided before the passage of the statute by which this manner of service is now expressly permitted in Massachusetts).

65. See statutory provisions; and cases infra this note.

[a] **Payment of postage.**—In Maine it is not necessary that the postage on the letter in which the notice is sent should be paid by the town sending it. Athens v. Brownfield, 21 Me. 443; Augusta v. Vienna, 21 Me. 298.

66. See infra § 277.

67. Augusta v. Vienna, 21 Me. 298; Barnet v. Norton, 90 Vt. 544, 99 A 238.

68. See statutory provisions.

69. Conway v. Wakefield, 3 N. H. 277.

70. Farmington v. Somersworth, 44 N. H. 589; Northwood v. Barrington, 9 N. H. 369.

71. Support in:
Asylum see infra § 259.
State almshouse see infra § 258.
Time to sue and limitations see infra § 272.

72. See statutory provisions.
Necessity of alleging giving of notice within statutory time see infra § 274.

73. Matter of Merville, 23 Misc. 398, 52 NYS 254.

74. Needham v. Newton, 12 Mass. 452; Townsend v. Billerica, 10 Mass. 411; Bath v. Freeport, 5 Mass. 325; Rumney v. Allenstown, 2 N. H. 470.

75. Ellsworth v. Houlton, 48 Me. 416; Barnet v. Norton, 90 Vt. 544, 549, 99 A 238.

"It is immaterial when such a notice is prepared or sent; it is the time when it is received by the overseer of the town chargeable that is important. If that time is within thirty days of the application for relief, it is all the statute requires." Barnet v Norton, supra.

[a] **Where it is proved that notice arrived at the post office in the town to be notified,** before the expiration of three months after the supplies were furnished, the want of a date on the notice is immaterial. Ellsworth v. Houlton, 48 Me. 416.

76. See statutory provisions.

77. Washoe County v. Eureka County, 25 Nev. 356, 60 P 376.

78. East Sudbury v. Sudbury, 12 Pick. (Mass.) 1. See Worcester v. Milford, 18 Pick. (Mass.) 379 (holding that expenses are not "incurred" until the town has paid them, or has undertaken or become liable to pay them).

79. Chester v. Plaistow, 43 N. H. 542.

80. See statutory provisions.

81. Fairfield v. Newtown, 75 Conn. 515, 54 A 301.

82. Fairfield v. Newtown, supra.

83. Fox v. Kendall, 97 Ill. 72; Springfield v. Worcester, 2 Cush. (Mass.) 52.

[a] **Fifty-four days held reasonable.** Fox v. Kendall, 97 Ill. 72.

[b] **In Pennsylvania,** under a statute providing that notice shall be given "as soon as conveniently may be," where a pauper suddenly falls sick, and, after an order for his relief, dies, the town of his settlement is liable for expenses incurred in his relief and burial, although it had no notice thereof until after his death. South Huntingdon Overseers v. East Huntingdon Overseers, 7 Watts 527.

84. West Gardiner v. Hartland, 62 Me. 246; Verona v. Penobscot, 56 Me. 11.

85. Fayette v. Livermore, 62 Me. 229.

86. Northwood v. Barrington, 9 N. H. 369.

87. Stratford v. Fairfield, 3 Conn. 588.

88. Lyman v. Littleton, 50 N. H. 42 [dist Hanover v. Weare, 2 N. H. 131 (where it appeared that the time for notice had elapsed when the agreement was made, and that therefore plaintiff was not induced by the agreement not to give notice, but that the agreement was a mere executory one concerning the conduct of a trial at some indefinite future date, so that the doctrine of estoppel was not involved)].

89. Stratford v. Fairfield, 3 Conn. 588; Newtown v. Danbury, 3 Conn. 553; Lyman v. Littleton, 50 N. H. 42.

90. Bradford v. Cambridge, 195

former notice nor of any rights acquired thereunder.[91]

[§ 226] **(b) Of Defects in Notice.**[92] A defect in a notice may be waived by the town upon which the notice is served.[93] The waiver may be implied.[94] And an answer denying liability upon some ground other than the defect in the notice waives a defect,[95] such as misnomer or indefinite description of the pauper,[96] calling a district a town,[97] want of particularization or itemizing of expense,[98] or the want of signature of the overseers in their official capacity;[99] but an objection that the notice is signed by a person having no authority to do so is not waived by an answer asking particulars concerning the pauper.[1] Defects in a notice are waived by the town notified acting upon the notice, paying the costs thereof, and contributing to the support of the pauper.[2]

Authority of officers to waive defects. While it has been held in some jurisdictions that the overseers of the poor have authority to bind the town by their waiver of defects in a notice,[3] and that, if a contract of waiver is made by such officers expressly in behalf of the town, they will not be answerable personally for a breach thereof,[4] in other jurisdictions it has been held that an overseer of the poor is not a general agent of the town,[5] and cannot by his acts preclude the town from asserting the insufficiency of the notice.[6]

[§ 227] **(6) New Notice.**[7] If the town notified complies with the notice either by paying for the supplies furnished,[8] by removing the pauper,[9] or by otherwise providing for his relief,[10] a new notice is necessary to enable the relieving town to recover for supplies subsequently furnished. A new notice is necessary for each new cause of action, and if the town furnishing supplies sues for them it cannot, without a new notice, recover for expenses incurred after the commencement of the first action.[11] And a new notice is necessary, even though the former action between the same parties in respect of the same pauper is still pending at the commencement of the second suit.[12] If, however, the town receiving notice does not comply therewith, no new notice for after-supplies is necessary, up to the time within which, according to the statute of limitations, action may be brought.[13] Where supplies are furnished occasionally and not continuously, a new notice is not necessary for each new lot of supplies, provided suit is commenced within the statutory period.[14]

[§ 228] **(7) Answer to Notice—(a) Necessity and Requisites.** It is generally provided by statute that a town upon which a pauper notice has been served must, in order to contest liability, serve an answer upon the notifying town within a period prescribed by the statute.[15] In computing the time for answering the notice,[16] the day on which the notice is given is excluded.[17] The answer is usually required to be in writing,[18] but this requirement may be waived by the overseers of the town giving notice.[19] The answer should be signed by one of the overseers, or selectmen, or by one of their number in behalf of a majority,[20] and an answer signed by some other person will not be sufficient.[21] Even if such defect can be waived, a reply to the answer, sent under the impression that such answer came from the proper officer, is not a waiver.[22] A denial of liability need not follow the statute, but the answer is sufficient if it contains an unequivocal denial of the liability asserted in the notice.[23] If an answer neglects to deny that the settlement of the

Mass. 42, 80 NE 610.

91. New Vineyard v. Phillips, 45 Me. 405; Kennebunkport v. Buxton, 26 Me. 61.

Necessity of new notice see infra § 227.

92. Waiver of defects in answer to notice see infra § 226.

93. Wellington v. Corinna, 104 Me. 252, 71 A 889; Unity v. Thorndike, 15 Me. 182; Hanover v. Eaton, 3 N. H. 38. And see cases infra notes 94–6.

94. Newton v. Danbury, 3 Conn. 553; Wellington v. Corinna, 104 Me. 252, 71 A 889.

[a] **Defective description of pauper.**—An insufficient compliance with the statute requiring a notice to contain a sufficiently definite description of the person whose distress has been relieved, to enable the overseers of the town sought to be charged to establish the identity of such person, is waived, where accepted without objection. Wellington v. Corinna, 104 Me. 252, 71 A 889.

95. Com. v. Dracut, 8 Gray (Mass.) 455.

96. Newtown v. Danbury, 3 Conn. 553; Auburn v. Wilton, 74 Me. 437; Holden v. Glenburn, 63 Me. 579; Com. v. Dracut, 8 Gray (Mass.) 455; Northfield v. Taunton, 4 Metc. (Mass.) 433; Orange v. Sudbury, 10 Pick. (Mass.) 22; Shutesbury v. Oxford, 16 Mass. 102; Embden v. Augusta, 12 Mass. 307; Paris v. Hiram, 12 Mass. 262.

97. Paris v. Hiram, 12 Mass. 262.

98. Newtown v. Danbury, 3 Conn. 553.

99. York v. Penobscot, 2 Me. 1; Brookfield v. West Brookfield, 186 Mass. 524, 72 NE 86.

1. Belfast v. Lee, 59 Me. 293.

2. Scott v. Clayton, 51 Wis. 185, 8 NW 171.

3. Unity v. Thorndike, 15 Me. 182; Hanover v. Eaton, 3 N. H. 38.

4. Hanover v. Eaton, supra.

5. Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387.

6. Waitsfield v. Craftsbury, supra.

7. New notice as waiver of former notice see supra § 225.

8. Bangor v. Fairfield, 46 Me. 558; Greene v. Taunton, 1 Me. 228; Wenham v. Essex, 103 Mass. 117; Palmer v. Dana, 9 Metc. (Mass.) 587; Attleborough v. Mansfield, 15 Pick. (Mass.) 19.

9. Green v. Taunton, 1 Me. 228; Palmer v. Dana, 9 Metc. (Mass.) 587; Attleborough v. Mansfield, 15 Pick. (Mass.) 19.

10. Palmer v. Dana, 9 Metc. (Mass.) 587; Sidney v. Augusta, 12 Mass. 316.

11. East Machias v. Bradley, 67 Me. 533; Attleborough v. Mansfield, 15 Pick. (Mass.) 19; Hallowell v. Harwich, 14 Mass. 186.

12. Veazie v. Howland, 53 Me. 39; Cummington v. Wareham, 9 Cush. (Mass.) 585; Walpole v. Hopkinton, 4 Pick. (Mass.) 358.

13. Jay v. Carthage, 48 Me. 353; Topsfield v. Middletown, 8 Metc. (Mass.) 564; Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Scott v. Clayton, 51 Wis. 185, 8 NW 171.

Limitation of action see infra § 272.

14. Bath v. Harpswell, 110 Me. 391, 86 A 318; Veazie v. Howland, 53 Me. 38; Topsfield v. Middleton, 8 Metc. (Mass.) 564.

[a] **Thus,** where paupers were first relieved in the fall of 1826, and notice was given on Oct. 18, 1826, and further aid was furnished in June, 1827, and suit was brought within two years after that time, it was held that both bills could be recovered. Attleborough v. Mansfield, 15 Pick. (Mass.) 19.

15. See statutory provisions; cases infra this note; and notes 16–26.

[a] **Letter** from town notified held an answer to notice, although it made no reference to such notice. Wenham v. Essex, 103 Mass. 117.

[b] **In Wisconsin** it has been held that no answer is necessary in order to entitle the town notified to defend. Ettrick v. Bangor, 84 Wis. 256, 54 NW 401; Scott v. Clayton, 51 Wis. 185, 8 NW 171.

16. See case infra this note.

[a] **In Maine** the arrival of the notice at the post office in the town to which it is directed is made, by St. (1835) c 149, equivalent to a delivery to the overseers, and the two months in which to answer it commences from such arrival. Augusta v. Vienna, 21 Me. 298.

Computation of time generally see Time [38 Cyc 306].

17. Windsor v. China, 4 Me. 298.

18. See statutory provisions.

19. Unity v. Thorndike, 15 Me. 182.

20. Bridgewater v. Dartmouth, 4 Mass. 273.

[a] **Signature held sufficient.**—An answer drawn up, as the language of all the selectmen, in the plural number, and in which, against the name of the only subscriber, is written "selectmen of Dartmouth," was a subscription in behalf of all the selectmen. Bridgewater v. Dartmouth, 4 Mass. 273.

21. Petersham v. Coleraine, 9 Allen (Mass.) 9t.

22. Petersham v. Coleraine, supra.

23. Stilwell v. Coons, 122 N. Y. 242, 25 NE 316.

[a] **Denial held sufficient.**—(1) Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407. (2) An answer, that the person so removing "has never been a pauper in this town or county, he had money to pay his way until he applied to you for help. . . . Now as [he] was not a pauper when he moved he cannot legally hold a settlement in this town," contains a sufficient denial of liability under 1 Rev. St. p 620 § 60. Stilwell v. Coons, 122 N. Y. 242, 245, 25 NE 316.

[b] **In Massachusetts,** under Gen. St. c 70 § 18, providing that the answer to the notice shall state the ob-

pauper is in the town notified, that town is estopped, in an action to recover the expenses, to deny that fact.[24] The answer need not contain a denial of the settlement of each individual named in the notice.[25]

Manner of service. Where the answer denying liability is actually received, it is a sufficient service, there being no provision in the statute as to the manner of service.[26]

[§ 229] **(b) Effect of Failure To Answer.** Where the town notified fails to remove the pauper or answer the notice within a specified time, it is, under some statutes, estopped to deny that the settlement of the pauper is in such town.[27] A notice, not objected to, is a bar to the question of settlement, although the pauper may in fact have no legal settlement within the state.[28] But it has been held that the statute does not preclude the town notified from proving that the pauper's settlement is in the town giving the notice.[29] Nor does failure to reply to the notice estop the town notified from denying that the person to whom the supplies were furnished was a pauper.[30] A notice not sufficiently certain and definite will not, although unanswered, conclude the town notified.[31] And failure to answer a notice respecting a named pauper, "his wife and their children," will not estop the town notified from denying the settlement of the alleged wife and children, where it appears that they are not the wife and children of the pauper named.[32] The estoppel is confined to the notice on which the action to recover for supplies furnished is founded;[33] and, if that action be compromised and another brought on a new notice, the omission to reply to the former notice will not preclude defendant from trying the question of settlement.[34] And where the controversy has proceeded to suit, a notice given by plaintiff town, although unanswered, will not operate as an estoppel.[35]

[§ 230] **e. Notice by Individual Furnishing Support.** Where the statute authorizes recovery against a town or county liable for a pauper's support by an individual who has furnished supplies or rendered services to the pauper, on giving notice of his condition to the town or county,[36] the giving of such notice is a condition precedent to recovery,[37] and knowledge on the part of the officers of the municipality sought to be made liable will not take the place of such notice,[38] although there is authority to the contrary.[39] In cases of emergency, however, it has been held that the person furnishing the relief may recover from the municipality without a previous notice.[40]

By and to whom notice must be given. The notice must be given by the person furnishing relief to the pauper[41] or by his agent or messenger.[42] A notice to one of the overseers of the poor intended for all of them collectively has been held to be sufficient, although the statute provides for notice to the "overseers;"[43] and where the statute provides for the appointment of a clerk or agent by the overseers, to perform generally such services as they may

jections to the removal of the pauper, an answer declaring that defendants "will not remove the pauper, because she has not any legal settlement in the town" notified, is sufficient. Wenham v. Essex, 103 Mass. 117.

24. Easton v. Wareham, 131 Mass. 10.

[a] **Statement in answer held insufficient** to constitute a denial of settlement in town notified. Easton v. Wareham, 131 Mass. 10.

Estoppel by failure to answer notice see infra § 229.

25. Palmyra v. Prospect, 30 Me. 211.

[a] **If it appears that the objection was intended to be made to all,** it meets the legal requirement. Palmyra v. Prospect, 30 Me. 211.

26. Stilwell v. Coons, 122 N. Y. 242, 25 NE 316.

[a] **Service by mail is sufficient.**—Stilwell v. Coons, 122 N. Y. 242, 25 NE 316; Stillwell v. Kennedy, 51 Hun 114, 5 NYS 407.

27. See statutory provisions; and cases infra this note.

[a] **Statute construed.**—(1) A statute, providing that the town notified shall be barred from contesting the question of settlement in an action brought for expenses incurred for the pauper's "support and removal," estops such town from contesting the settlement in an action brought for the expenses incurred for a pauper's support and "burial." Topsham v. Harpswell, 1 Mass. 518. (2) The estoppel operates only in an action to recover expenses incurred before giving notice, and does not apply to an action for after expenses. Ellsworth v. Houlton, 48 Me. 416; Leicester v. Rehoboth, 4 Mass. 180. (3) Where notice that a person has become a public charge has been given by one town to another, and, no objection being made within the time limited, the town giving the notice has actually removed the pauper to the town to which notice was given, the latter town will be estopped to contest the question of settlement. Marshpee v. Edgartown, 23 Pick. (Mass.) 156; Bridgewater v. Dartmouth, 4 Mass. 273; Leicester v. Rehoboth, supra. (4) A removal, or a reasonable excuse for not making it, is not essential to create the estoppel. Bangor v. Madawaska, 72 Me. 203.

[b] **In Iowa** the mere notice by one county to another that it is supporting a pauper, and will hold the other responsible, although not replied to in any way, will not estop the county notified from denying the settlement and consequent liability under Code (1873) § 1359, which provides that an order of removal shall be binding on the county to which it is made unless, within thirty days, notice of intended contest be given. Winneshiek County v. Allamakee County, 62 Iowa 558, 17 NW 753.

[c] **In Wisconsin** it has been held that a notice, although unanswered, does not act as an estoppel as to any material fact, the court in that state not favoring estoppels. Scott v. Clayton, 51 Wis. 185, 195, 8 NW 171, 195 ("The notice . . . only seems necessary for the purpose of giving the town in which the poor person has a settlement notice of the fact that such person is a resident of some other town in which he needs support, so that the former town may provide for such support and relieve itself from any liability to the town in which he may then reside").

Answer failing to deny settlement in town notified see supra § 228.

Estoppel to deny settlement generally see supra § 36.

28. Westminster v. Bernardston, 8 Mass. 104.

29. Wellington v. Corinna, 104 Me. 252, 71 A 889; Ellsworth v. Houlton, 48 Me. 416; Kennebunkport v. Buxton, 26 Me. 61; Turner v. Brunswick, 5 Me. 31.

30. New Bedford v. Hingham, 117 Mass. 445 [overr Freeport v. Edgecumbe, 1 Mass. 459 (decided by a single justice at nisi prius)].

31. Dover v. Paris, 5 Me. 430; Shelburne v. Buckland, 124 Mass. 117.

[a] **Notice held sufficient to require an answer.**—Shelburne v. Buckland, 124 Mass. 117.

Sufficiency of notice generally see supra §§ 215–221.

32. Holden v. Glenburn, 63 Me. 579.

33. See cases infra note 34.

34. Marshpee v. Edgartown, 23 Pick. (Mass.) 156; Needham v. Newton, 12 Mass. 452.

35. Newton v. Randolph, 16 Mass. 426.

36. See statutory provisions.

37. Conn.—Cunningham v. Frankfort, 12 A 636; Kent v. Chaplin, 6 Conn. 72.

Ill.—Dieffenbacher v. Mason, 117 Ill. A. 103.

Me.—Allen v. Lubec, 112 Me. 273, 91 A 1011; Bishop v. Hermon, 111 Me. 58, 88 A 86; Warren v. Islesborough, 20 Me. 442.

Mass.—O'Keefe v. Northampton, 145 Mass. 115, 13 NE 382; Williams v. Braintree, 6 Cush. 399; Walker v. Southbridge, 4 Cush. 199; Fiske v. Lincoln, 19 Pick. 473.

Oh.—Urbana Tp. v. Houston, 2 Oh. Cir. Ct. 14. See Beach v. Marion Tp., 2 Oh. Dec. (Reprint) 221, 2 WestLMonth 95 (notice unnecessary where immediate relief is indispensable).

Pa.—Confer v. Snow Shoe Borough Poor Dist., 23 Pa. Dist. 1070, 42 Pa. Co. 345 (burial of pauper).

N. S.—Carter v. Brookfield Overseers of Poor, 30 N. S. 225.

38. Walker v. Southbridge, 4 Cush. (Mass.) 199.

39. Beach v. Marion Tp., 2 Oh. Dec. (Reprint) 221, 2 WestLMonth 95.

40. Clinton County v. Pace, 59 Ill. A. 576.

[a] **Except in extreme cases** a municipality cannot be made responsible to an individual for relief granted to a pauper, until given an opportunity to make the necessary provision. Seagraves v. Alton, 13 Ill. 366.

Medical services see infra § 246.

41. Warren v. Islesborough, 20 Me. 442; Williams v. Braintree, 6 Cush. (Mass.) 399.

42. Wile v. Southbury, 43 Conn. 53; Williams v. Braintree, 6 Cush. (Mass.) 399.

43. Newbit v. Appleton, 63 Me. 491; Rogers v. Newbury, 105 Mass. 533;

impose on him, notice may be given to such clerk or agent.[44]

Form and sufficiency. The notice need not be in writing, unless the statute so requires,[45] but if the statute provides for written notice, oral notice is insufficient.[46] The notice must be an intelligible notice of the pauper's condition and call on the poor officers to take charge of the pauper;[47] and it has been held that information orally given through a third person is sufficient.[48] A notice is sufficient to include the pauper's infant child living with her to the knowledge of the municipal authorities, although such child's name was not specifically mentioned in the notice.[49]

New notice. Where, after notice to the officers of the poor, they furnish supplies deemed sufficient by them, or otherwise provide for the pauper's relief, a new notice is required to enable a person to recover for supplies subsequently becoming necessary.[50]

[§ 231] **3. Application for Relief.** According to some decisions, where relief is furnished to a pauper, no special request or application is necessary to the validity of the act of the poor officer in furnishing it,[51] unless required by statute;[52] and where application is required or made, it need not be made by the pauper personally.[53] Application to the individual members of the board of supervisors satisfies a statutory provision that application shall be made to the board of supervisors.[54] Where a pauper is residing in a town other than that in which he has a settlement, application for relief should be made to the poor officers of the town in which he resides,[55] since the duty of providing relief is imposed on them in the first instance.[56]

Rejection of application; review. The right of review where an application for relief is rejected is governed by statute.[57]

[§ 232] **4. Order of Relief and Order of Approval—a. Order of Relief[58]—(1) Necessity.** A town or district is not liable, under some statutes, for supplies furnished to a pauper unless an order of relief was obtained from the proper officer before the supplies were furnished,[59] although it is

Peters v. Westborough, 20 Pick. (Mass.) 506; Sillers v. Overseers of Poor Sec. 26, 46 N. S. 224, 6 DomLR 109, 9 EastLR 505.

44. Sullivan v. Lewiston, 93 Me. 71, 44 A 118.

45. Wile v. Southbury, 43 Conn. 53; Watson v. Cambridge, 15 Mass. 286.

46. Urbana Tp. v. Houston, 2 Oh. Cir. Ct. 14.

47. Allen v. Lubec, 112 Me. 273, 91 A 1011; Williams v. Braintree, 6 Cush. (Mass.) 399.

[a] **There must be a distinct request,** as explicit as the notice. Bishop v. Hermon, 111 Me. 58, 88 A 86; O'Keefe v. Northampton, 145 Mass. 115, 13 NE 382; Williams v. Braintree, 6 Cush. (Mass.) 399; Walker v. Southbridge, 4 Cush. (Mass.) 199.

[b] **Notice held sufficient.**—Allen v. Lubec, 112 Me. 273, 91 A 1011; Williams v. Braintree, 6 Cush. (Mass.) 399; Underwood v. Scituate, 7 Metc. (Mass.) 214; Fiske v. Lincoln, 19 Pick. (Mass.) 473.

Question of law or fact see infra § 279.

48. Wile v. Southbury, 43 Conn. 53.

[a] **Notice is sufficiently given** if the facts are stated to members of the selectman's family, in his absence, who communicate them to him on his return on the same day. Wile v. Southbury, 43 Conn. 53.

49. Naas v. Overseers of Poor Dist. No. 3, 35 N. S. 316.

50. Bishop v. Hermon, 111 Me. 58, 88 A 86; Warren v. Islesborough, 20 Me. 442; Eckman v. Brady Tp., 81 Mich. 70, 45 NW 502.

[a] **Contract with person furnishing relief.**—Where the town contracts with the person giving notice for the pauper's support, on termination of the contract another notice must be given. Gross v. Jay, 37 Me. 9.

51. Tilton v. Concord, 78 N. H. 426, 101 A 144; Moultonborough v. Tuftonborough, 43 N. H. 316.

[a] **Application by needy person presumed** to have been made where relief furnished. Tilton v. Concord, 78 N. H. 426, 101 A 144.

[b] **In New Jersey** the order for relief must be made on the application of the overseers of the poor, and cannot be made by the justices of their own accord. Van Nuis v. McCollister, 3 N. J. L. 371.

52. See statutory provisions.

53. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303; Hamilton County v. Hollis, 141 Iowa 477, 119 NW 978; Clay County v. Palo Alto County, 82 Iowa 626, 48 NW 1053; Barnet v. Norton, 90 Vt. 544, 99 A 238 (it is immaterial who makes application); Walden v. Cabot, 25 Vt. 522.

[a] **No application by one in jail at a distance from his home for relief for his family is necessary** to authorize the poor officer to afford it relief to the amount designated by statute. Briggs v. Whipple, 6 Vt. 95.

[b] **In Pennsylvania,** under Act May 7, 1907 (P. L. p 170), a person cannot recover from a poor district the expense of the Pasteur treatment of a person having hydrophobia unless application for medical aid has been made to the poor directors by the afflicted person or by some one in his behalf. Lupp v. Adams County House of Employment, 57 Pa. Super. 394; Kochenaur v. Cumberland County Poor Directors, 16 Pa. Dist. 581.

54. Tessier v. Lake Pleasant, 57 Minn. 145, 58 NW 871.

55. Woodes v. Dennett, 9 N. H. 55.

56. See supra § 208.

57. See statutory provisions; and cases infra this note.

[a] **Rejection of application for blind pension.**—(1) The action of the commission for the blind, in rejecting an application for a pension under Act (1923) p 302, is not a judgment, but a ministerial order and therefore § 9 of such act (p 306) is inaccurate in saying that one aggrieved by the action of the commission may "appeal." The evident intention of the legislature was to provide that the circuit court might review the acts of the commission. Shelley v. Missouri Commn. for Blind, 309 Mo. 612, 274 SW 688. (2) Under L. (1923) p 306 § 9, authorizing any person claiming the benefits of the Blind Pension Act to appeal from an adverse decision of the commission for the blind, and Rev. St. (1919) § 1469, authorizing appeal by any party to a suit aggrieved by a judgment of the circuit court, the commission for the blind is authorized to appeal from an adverse judgment of the circuit court, directing it to place on the pension roll the name of one whose application it rejected. Gwaltney v. Missouri Commn. for Blind, (Mo.) 14 SW (2d) 988. (3) Where the applicant filed a petition in the circuit court, after rejection of the application by the commission, for trial de novo, the subsequent appearance of the commissioners, after being duly notified without petitioner's objection, made them proper parties, having the right to appeal from the judgment of the circuit court, they being "aggrieved" by such judgment. Shelley v. Missouri Commn. for Blind, supra. (4) The supreme court alone has jurisdiction of an appeal from the judgment of the circuit court on review of a ruling of the commission for the blind. Shelley v. Missouri Commn. for Blind, supra. (5) Where application is made to a judge of probate, instead of to the commission for the blind, as authorized by the statute, no appeal to the circuit court lies from the decision of the probate judge refusing to grant a certificate that applicant comes within the provisions of the statute. Regan v. Commission for Blind, 219 Mo. A. 330, 271 SW 1014. (6) The fact that, when application is made to a probate judge instead of to the blind commission the commission sends instructions as to how the examination shall be made, and perhaps also sends an oculist, does not take from it the power to consider the merits of the application after the probate judge has acted. Regan v. Commission for Blind, supra.

Review of order of relief see infra § 236.

58. Order for admission to poorhouse see infra § 257.

Powers of officers to extend relief without previous order generally see supra § 20.

59. See statutory provisions; and cases infra this note. See also cases infra §§ 232–236.

[a] **In New Jersey** when an overseer of the poor provides relief without an order from a justice of the peace, he cannot recover from the town the amount expended. Princeton v. Mount, 29 N. J. L. 299; Bay v. Cook, 22 N. J. L. 343; Smith v. Perth Amboy Tp., 19 N. J. L. 52.

[b] **In New York** it has been held that, where the overseer in a number of cases, and in good faith, and in ignorance of the existing statute, expended more than ten dollars for the relief of the poor, without first having obtained an order from a justice of the peace allowing the same, and the town auditors allowed the claim for such expenditures, and at an annual town meeting it was resolved that the sum due the overseers for such expenditures be levied and assessed on the taxable property to pay the same, which was duly certified to the board of supervisors and an order for the payment thereof given, the payment of the order so drawn for such expenditures would be enforced. Cobb v. Ramsdell, 14 NYS 93.

[c] **In Pennsylvania** (1) a township or district is not liable for pauper supplies in ordinary cases in the absence of a previous order of relief. Overseers v. Baker, 2 Watts 280; Kennedy v. La Porte Tp. Poor Dist., 15 Pa. Super. 1; Confer v. Snow Shoe Borough Poor Dist., 23 Pa. Dist. 1070, 42 Pa. Co. 345; Williams v. Mercer County, 4 Pa. Dist. 171, 15 Pa. Co. 525; Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643. (2) But in emergency cases, a subsequent order of approval is

sometimes held that, in cases of emergency, an order of approval made after the relief was furnished will take the place of a previous order of relief.[60]

Discretion of court. The granting or refusal of an order of relief is a judicial act, and rests in the sound discretion of the justices.[61]

[§ 233] **(2) Form and Validity.** An order of relief, to be valid, must, as to matters of substance, conform strictly to the statute on which it is founded,[62] and where it does not so conform the regularity of the subsequent proceedings is unimportant.[63] Pure matters of form in the order of relief, however, are to be overlooked, and the order liberally treated;[64] and where no formal evidence of a given fact is required by the statute, and such evidence is to be reasonably implied from the order, it is enough.[65] The order of relief must be direct and positive in its terms, and not in the alternative.[66] A rule adopted by the county that no medical supplies shall be furnished any pauper, except on the order of the overseers of the poor, is satisfied by a verbal order merely.[67]

Delegation of power to overseers. The magistrates, in making an order of relief, cannot delegate to the overseers of the poor the power to determine whether the circumstances are such as to render relief necessary.[68]

Disqualification of justice. An order of relief made by a court, one member of which as superintendent of the poor, had applied for the order, is void.[69]

[§ 234] **(3) Nature and Extent of Relief.**[70] An act providing that the justices are to give such allowance weekly, or otherwise, as the necessities of the pauper shall require[71] gives a reasonable discretion to such justices as to the nature and extent of relief.[72]

[§ 235] **(4) Conclusiveness.**[73] Where the statute has been strictly followed, an order of relief is conclusive.[74] Where the statute has not been strictly followed, the order is not conclusive,[75] and does not bind the poor district in which the alleged pauper resides,[76] or the district to which he is subsequently removed.[77] The order is conclusive only of the fact that at the time of its use the person therein named is entitled to maintenance as a pauper,[78] but is only prima facie evidence of the continuing necessity of relief.[79] If want of jurisdiction appears on the face of the record, it can be taken advantage of at any time and in any court where the conclusiveness of the order is the subject of a judicial inquiry.[80]

[§ 236] **(5) Appeal.**[81] Unless authorized by statute,[82] no appeal[83] or certiorari[84] lies from an order of relief.

[§ 237] **b. Order of Approval.** Some statutes have been construed as making a town or district liable for relief extended to a poor person in case of emergency, without a previous order of relief, provided an order of approval is afterward obtained;[85] and this rule has been held applicable to funeral expenses.[86] But unless such subsequent order is obtained, no liability on the part of the town or district arises.[87] If the statute fixes no time within which the order of approval may be obtained, it is not for the court to prescribe the limits.[88] The right to appeal from an order of approval, or from

sufficient see infra § 237.

[d] **In Vermont** (1) the overseers cannot contract for supplies to an amount more than five dollars without an order from a justice of the peace. Ives v. Wallingford, 8 Vt. 224. (2) But transient poor falling within Act (1797) § 11 do not come within the statute requiring an order for their support, in order to bind the town beyond five dollars. Harrington v. Alburgh, 14 Vt. 132.

60. See infra § 237.

61. Palmer v. Reynolds, 5 Pa. Dist. 578.

62. Brushvalley Tp. Poor Directors v. Allegheny County Poor Directors, 25 Pa. Super. 595.

63. Brushvalley Tp. Poor Directors v. Allegheny County Poor Directors, supra.

64. Baldwin v. McArthur, 17 Barb. (N. Y.) 414; Adams v. Columbia County, 8 Johns. (N. Y.) 323; Pickett v. Erie County, 3 Pa. Co. 541; Rex v. Woodsterton, 2 Barn. 207, 94 Reprint 452.

65. Adams v. Columbia County, 8 Johns. (N. Y.) 323.

66. Pickett v. Erie County, 3 Pa. Co. 541.

67. Fayette County v. Morton, 53 Ill. A. 552.

68. Brushvalley Tp. Poor Directors v. Allegheny County Poor Directors, 25 Pa. Super. 595; Flemington Borough Poor Dist. v. Woodward Tp., 39 Pa. Co. 6; Dorworth v. Spring Tp., 35 Pa. Co. 108; Muncy Creek Tp. Poor Dist. v. Derry Tp., Poor Dist., 34 Pa. Co. 297; Pickett v. Erie County, 3 Pa. Co. 541.

69. Baldwin v. McArthur, 17 Barb. (N. Y.) 414.

70. **As affecting liability of one county or town to another** see infra § 241

71. See statutory provisions.

72. Adams v. Columbia County, 8 Johns. (N. Y.) 323 (holding further that an allowance of not only a weekly sum, but medicine and attendance, is proper).

[a] **Order held not to charge district with costs and expenses of removal.**—When the order on its face does not show, and there is no evidence in the case tending to show, that the pauper or anyone in his behalf ever applied for relief otherwise than for temporary assistance to obtain medicine, and the order in terms directs that the pauper be provided with suitable maintenance, it does not suffice to charge the poor district with the costs and expenses relating to the order of removal. Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643.

73. **Conclusiveness of determination as to right to relief generally** see supra § 20.

74. Peo. v. Cayuga County, 2 Cow. (N. Y.) 530; Brushvalley Tp. v. Allegheny County, 25 Pa. Super. 595.

75. Brushvalley Tp. v. Allegheny County, supra; Flemington Borough Poor Dist. v. Woodward Tp., 39 Pa. Co. 6.

76. Brushvalley Tp. v. Allegheny County, 25 Pa. Super. 595.

77. Brushvalley Tp. v. Allegheny County, supra.

78. Laporte Borough Overseers v. Hillsgrove Tp. Overseers, 95 Pa. 269.

79. Laporte Borough Overseers v. Hillsgrove Tp. Overseers, supra.

80. Brushvalley Tp. v. Allegheny County, 25 Pa. Super. 595; Walker Tp. v. Porter Tp., 7 Pa. Dist. 601.

81. **Review of order:**
Denying application for relief see supra § 231.
Of approval see infra § 237.

82. Brown v. Gahring, 18 Pa. Dist. 516; Walker v. Jefferson County School Dist., 16 Pa. Dist. 718, 33 Pa. Co. 302.

83. Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212; Lampiter Tp. v. Lancaster, 2 Yeates (Pa.) 164; Brushvalley Tp. v. Allegheny County, 25 Pa. Super. 595; Reg. v. London Justices, [1900] 1 Q. B. 438; Rex v. North Shields, 1 Dougl. 331, 99 Reprint 213; Rex v. Devon, 4 M. & S. 421.

[a] **Reason** for not giving the appeal is that the subject of relief might starve while the cause was in suspense. Rex v. North Shields, 1 Dougl. 331, 99 Reprint 213.

84. Brown v. Gahring, 18 Pa. Dist. 516.

85. Danville State Hospital for Insane v. Bellefonte Borough Overseers of Poor, 163 Pa. 175, 29 A 901; Blakeslee v. Chester County, 102 Pa. 274; Campbell v. Grooms, 101 Pa. 481; Chester County Directors of Poor v. Malany, 64 Pa. 144; Chester County House of Employment v. Worthington Directors of Poor, 38 Pa. 160; Westmoreland County House of Employment v. Murry, 32 Pa. 178; Washington County Directors of Poor v. Wallace, 8 Watts & S. (Pa.) 94; Roxborough Tp. Overseers of Poor v. Bunn, 12 Serg. & R. (Pa.) 292; Alexander v. Zerbe Tp. Poor Dist. 63 Pa. Super. 356; Brushvalley Tp. Poor Directors v. Allegheny County Poor Directors, 25 Pa. Super. 595; Poor Directors v. South Bethlehem Borough, 13 Pa. Dist. 482; Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643; Pickett v. Erie County Poor Directors, 3 Pa. Co. 541; Roney v. Montgomery Directors of Poor, etc., 1 Montg. Co. (Pa.) 13.

Medical services see infra § 247.

86. Washington County Directors of Poor v. Wallace, 8 Watts & S. (Pa.) 94; Neale v. Plum Creek, 3 Pa. Dist. 9, 12 Pa. Co. 649.

87. Blakeslee v. Chester County Directors of Poor, 102 Pa. 274; Brushvalley Tp. v. Allegheny County, 25 Pa. Super. 595; Kennedy v. La Porte Tp. Poor Dist., 15 Pa. Super. 1; Confer v. Snow Shoe Borough Poor Dist., 23 Pa. Dist. 1070, 42 Pa. Co. 345; Poor Directors v. South Bethlehem Borough, 13 Pa. Dist. 482; Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643; Pickett v. Erie County, 3 Pa. Co. 541.

88. Chester County House of Employment v. Worthington, 38 Pa. 160. "The time within which it may be obtained is unlimited, but the longer

a decision refusing such order, is dependent on the statute.[89]

[§ 238] **E. Furnishing Aid and Support in General—1. By Local Authorities[90]—a. Transients.** Where a poor district or town has, under its duty to do so, furnished relief to transient persons found sick or otherwise disabled and in need of relief,[91] the town or district extending such relief may recover therefor from the town or district ultimately liable.[92] But it has been held that, in the absence of a statute authorizing reimbursement,[93] a county that has furnished such relief can recover from another county on whom the obligation for support rests only on an express or implied contract to repay.[94]

[§ 239] **b. Necessity of Relief.**[95] When the act of the poor authorities of a town or county in affording relief to a pauper may affect the rights or obligations of another town or county, the law requires that a case of necessity and need should be established, before the relief is furnished, and those rights or obligations changed.[96] The liability of the town or county sought to be charged for relief furnished to a person by the authorities of another county or town is based on the fact that the person provided for has fallen into distress and stands in need of immediate relief,[97] and does not depend upon the opinion or adjudication of the authorities of the town or county extending relief that such relief was necessary,[98] although, when they act in good faith and with reasonable judgment, "their conclusions will be respected in law,"[99] and where they grant relief it will be presumed that they have made all necessary investigation, and have determined the right of the person to relief.[1] But the fact that a person is actually destitute and in need of relief authorizes and requires the proper poor authorities to provide such relief.[2]

Ownership of property. Where a town in good faith relieves a person in need of assistance, the town of his legal settlement will be liable for the expense although such person has some property of his own not available for his immediate relief,[3] or not suffi-

the time after the giving of the relief, the more difficult it ought to be to satisfy the magistrates that it was not a gratuity, or was not actually given upon the credit of the person." Blakeslee v. Chester County Directors of Poor, 102 Pa. 274, 279 [quot Roney v. Montgomery Directors of Poor, etc., 1 Montg. Co. (Pa.) 13].

89. See statutory provisions; and cases infra this note.

[a] **In Pennsylvania** (1) under the act of June 16, 1836, it has been held that an appeal lies to the court of quarter sessions from a decision of the magistrates giving an order of approval of relief previously furnished. Blakeslee v. Chester County Directors of Poor, 102 Pa. 274; Chester County House of Employment v. Worthington Directors of Poor, 38 Pa. 160; Neale v. Plum Creek, 3 Pa. Dist. 9, 12 Pa. Co. 649; Hower v. Lewisburg Poor Dist., 6 Pa. Co. 667. Contra Frank v. Penn Tp., 22 Pa. Dist. 809, 40 Pa. Co. 429; Scott Tp. Poor Dist's. App., 9 Pa. Co. 304. (2) An appeal will lie also from a decision refusing an order of approval. Pickett v. Erie County Poor Directors, 3 Pa. Co. 541.

Appeal from:
Order of relief see infra § 236.
Rejection of application for relief see supra § 231.

90. Powers of officers as to indebtedness and expenditures for relief of poor generally see supra §§ 20, 21.

91. See supra § 6.

92. Conn.—New Milford v. Sherman, 21 Conn. 101.
Iowa.—Mussel v. Tama County, 73 Iowa 101, 34 NW 762.
Me.—Norridgewock v. Solon, 49 Me. 385.
Mass.—Templeton v. Winchendon, 138 Mass. 109; Groveland v. Medford, 1 Allen 23; Marlborough v. Rutland, 11 Mass. 483.
N. H.—Strafford County v. Rockingham County, 71 N. H. 37, 51 A 677.
Vt.—Ripton v. Brandon, 80 Vt. 234, 67 A 541; Craftsbury v. Greensboro, 66 Vt. 585, 29 A 1024; Danville v. Sheffield, 50 Vt. 243; Charleston v. Lunenburgh, 23 Vt. 525.
And see cases supra § 6.

Liability of place of:
Residence see supra § 208.
Settlement see supra § 209.

Necessity of relief see infra § 239.

93. See statutory provisions.

94. Cerro Gordo County v. Boone County, 152 Iowa 692, 133 NW 132, 39 LRANS 161, AnnCas1913C 79.

[a] **Facts held not to show implied contract.**—(1) The fact that county officers gave a person who was helpless and a fit subject for relief a ticket to another town, from which he was later sent to a town in a county whose officers relieved him, cannot be construed as a request to the latter county to furnish relief, which will support an implied contract to pay for such services as were rendered. Cerro Gordo County v. Boone County, 152 Iowa 692, 133 NW 132, 39 LRANS 161, AnnCas1913C 79. (2) Where an implied contract is sufficient on which to charge a county for relief extended to a pauper, such a contract must be established by satisfactory proof, and a mere failure to extend aid in a proper case is no circumstance from which an obligation to pay another county, which voluntarily extended necessary aid, may be implied. Cerro Gordo County v. Boone County, supra.

95. Relief by individual see infra § 243.

Who are paupers see supra §§ 1-6.

96. Conn.—New Milford v. Sherman, 21 Conn. 101.
Ill.—Alton v. Madison County, 21 Ill. 115.
Me.—Vinalhaven v. Lincolnville, 78 Me. 422, 6 A 600; Veazie v. Chester, 53 Me. 29; Thomaston v. Warren, 28 Me. 289.
Mass.—Templeton v. Winchendon, 138 Mass. 109; Waltham v. Brookline, 119 Mass. 479; Freeport v. Edgecumbe, 1 Mass. 459.
Nebr.—Newark Tp. v. Kearney County, 99 Nebr. 142, 155 NW 797; Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132.
Nev.—Lander County v. Humboldt County, 21 Nev. 415, 32 P 849.
N. H.—Tilton v. Concord, 78 N. H. 426, 101 A 144; Rumney v. Ellsworth, 4 N. H. 138.
Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Ripton v. Brandon, 80 Vt. 234, 67 A 541.
Alta.—Red Deer Municipal Hospital Dist. No. 15 v. Prairie Creek Municipal Dist. No. 343, [1924] 3 West Wkly 902.

[a] **Expenditures during quarantine by board of health.**—For a city to recover, under Rev. St. c 19 § 71, for supplies and medical attendance furnished, during a quarantine ordered by its board of health, to the family of a pauper having a settlement in defendant town, the city must show that the board had determined that such supplies and medical attendance were not legitimate expenditures for the protection of public health. Ellsworth v. Bar Harbor, 122 Me. 356, 120 A 50.

Ability of self-support as affecting duty of public authorities:
Generally see supra § 2.
Transient paupers see supra § 6.

97. Thomaston v. Warren, 28 Me. 289; Springfield v. Chester, 68 Vt. 294, 35 A 322.

Duty to relieve transient paupers see supra § 6.

98. Thomaston v. Warren, 28 Me. 289; Ripton v. Brandon, 80 Vt. 234, 67 A 541.

[a] **It is always competent for defendant towns to deny the necessity** of relief furnished by other towns and with which they are sought to be charged. Thomaston v. Warren, 28 Me. 289.

99. Machias v. East Machias, 116 Me. 423, 102 A 181; Bishop v. Hermon, 111 Me. 58, 88 A 86; Hutchinson v. Carthage, 105 Me. 134, 73 A 825.

[a] **In Massachusetts** (1) the liability of a person's place of settlement for his support in a state sanitarium, under St. (1907) c 474 § 10, as amended by St. (1912) c 17, is absolute, and the trustees of the sanitarium are not required, in order to hold the place of settlement liable, to admit to the institution only those persons whose tubercular condition is beyond doubt. Treasurer, etc. v. Newton, 227 Mass. 88, 116 NE 233. (2) Even if the liability of the place of settlement is not absolute, the trustees of a sanitarium for tuberculosis patients may make reasonable regulations as to the admission of patients. Treasurer, etc. v. Newton, supra (holding that the trustees have power to admit a patient at an incipient stage of the disease, before bacilli appear in the sputum).

Generally see supra § 20.

1. Matter of Chamberlain, 73 Misc. 256, 132 NYS 681.

2. Conn.—New Milford v. Sherman, 21 Conn. 101.
Me.—Hutchinson v. Carthage, 105 Me. 134, 73 A 825; Veazie v. Chester, 53 Me. 29; Norridgewock v. Solon, 49 Me. 385.
N. H.—Tilton v. Concord, 78 N. H. 426, 101 A 144.
N. Y.—Matter of Chamberlain, 73 Misc. 256, 132 NYS 681.
Pa.—Cumberland County House of Employment v. Walker Tp., 7 Pa. Super. 303.
Vt.—Waitsfield v. Craftsbury, 87 Vt. 406, 89 A 466, AnnCas1916C 387.
Wis.—Elkey v. Seymour, 169 Wis. 223, 172 NW 138.

[a] **Enforced quarantine,** causing temporary inability of parties to support themselves, entitles them to relief. Brown v. Gahring, 18 Pa. Dist. 516.

3. Iowa.—Hardin County v. Wright County, 67 Iowa 127, 24 NW 754.
Me.—Norridgewock v. Solon, 49 Me. 385; Brewer v. East Machias, 27 Me. 489.
Mass.—Palmer v. Hampden, 182 Mass. 511, 65 NE 817; Groveland v. Medford, 1 Allen 23.
Vt.—Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454; Ripton v. Brandon, 80 Vt. 234, 67 A 541.

cient to afford necessary support.[4]

Ability of persons liable for support. If the person relieved has a relative liable for his support and able and willing to support him, the town rendering relief cannot enforce a claim therefor against the place of his legal settlement.[5] Where one town is by agreement bound to support a pauper and his wife and the settlement of the children is in another town, the latter will be liable to pay for supplies furnished the children, although the father by his industry is able to support himself and wife, provided he can do no more.[6]

[§ 240] **c. Effect of Existence of Provision for Relief.**[7] If a town or county has made adequate provision for the relief of a pauper, any relief furnished him by other towns or counties,[8] after knowledge or notice of such prior provision,[9] is deemed to be voluntary, and no action will lie therefor. So a county which maintains a poorhouse is not liable to township trustees for expenses incurred by them in the support of a pauper.[10] But an order of county commissioners for the removal of a county pauper to the poorhouse, which is not complied with because of the pauper's refusal to be removed, does not relieve the county from liability to the town where the pauper resides for support afterward furnished to him upon a new application, a new necessity having arisen.[11]

[§ 241] **d. Nature and Extent of Relief.**[12] It is only for necessaries that a town or county furnishing relief to a pauper can recover from the town or county ultimately liable.[13] The situation of a pauper admits of such infinite varieties that no arbitrary rule can be laid down as to what constitutes necessaries for him;[14] but generally plaintiff must show that the supplies furnished were, in their nature, suitable and proper under all the circumstances,[15] and that the charges therefor were reasonable in amount.[16] In other words, the nature and extent of relief depends on the facts connected with each call for aid, and must be tested by the reasonableness and propriety of the relief provided;[17] and the determination of the poor law officers, while not final,[18] will be respected.[19]

Items for which recovery may be had. There are certain items, such as medical attendance[20] and nursing,[21] in the case of a sick pauper, the expense of commitment to an asylum[22] and support there,[23] clothing destroyed by an insane pauper, without fault of asylum overseers or keeper,[24] and, in some jurisdictions,[25] but not in others,[26] burial expenses of a pauper, which in their nature are necessaries, and, when reasonable as to amount, a legal charge on the town or county ultimately liable.

Items for which recovery cannot be had. There are other items, such as the expense of the overseers of the poor in providing for the abode and support of a pauper,[27] the services of the overseers of the

Wis.—Elkey v. Seymour, 169 Wis. 223, 172 NW 138.

[a] **The fact that there was a small sum due a pauper** when the supplies were furnished is not conclusive that the verdict for plaintiff in an action to recover for such supplies was against the evidence upon the question of necessity. Solon v. Embden, 71 Me. 418.

Ownership of property as affecting duty of public authorities: Persons entitled to support generally see supra § 4. Transient paupers see supra § 6.

4. Old Saybrook v. Milford, 76 Conn. 152, 56 A 496; Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454.

5. Templeton v. Winchendon, 138 Mass. 109 (where the pauper's sister was able and willing to furnish support); Newark Tp. v. Kearney County, 99 Nebr. 142, 155 NW 797; Cabot v. St. Johnsbury, 94 Vt. 311, 111 A 454.

Persons entitled to public support see supra § 3.

6. Clinton v. Benton, 49 Me. 550.

7. Affecting right of individuals furnishing: Medical services see infra § 248. Supplies see infra § 245.

8. Licking Tp. v. Muskingum Tp., 1 Oh. Dec. (Reprint) 284, 7 WestLJ 90.

9. Backus v. Dudley, 3 Conn. 568; New Salem v. Wendell, 2 Pick. (Mass.) 341.

[a] **Where suitable accommodations are provided by the town of a pauper's settlement,** but he refuses to return and accept them, another town having notice of such facts cannot furnish relief to the pauper and recover therefor from the former. Backus v. Dudley, 3 Conn. 568; New Salem v. Wendell, 2 Pick. (Mass.) 341.

10. Licking Tp. v. Muskingum Tp., 1 Oh. Dec. (Reprint) 284, 7 WestLJ 90.

Support in poorhouses generally see infra §§ 257, 258.

11. Winchester v. Cheshire County, 64 N. H. 100, 5 A 767.

12. Relief furnished by individual see infra § 244.

13. Berlin v. Gorham, 34 N. H. 266.

14. Berlin v. Gorham, supra.

15. Hartland v. St. Albans, 123 Me. 82, 121 A 552; Machias v. East Machias, 116 Me. 423, 102 A 181; Berlin v. Gorham, 34 N. H. 266.

[a] **Supplies furnished for the support of the nurse of a sick pauper** were held to be necessaries where it appeared that the pauper's family consisted of a daughter and her child, and the daughter was willing and desirous to act as nurse, but could not board herself and child while so doing. Berlin v. Gorham, 34 N. H. 266.

[b] **Furnishing antitoxin.**—Under the express terms of Pub. L. (1909) c 55, a town furnishing antitoxin to an indigent person is entitled to reimbursement by the town of his settlement. Eden v. Southwest Harbor, 108 Me. 489, 81 A 1003.

16. See infra § 283.

17. Hartland v. St. Albans, 123 Me. 82, 121 A 552; Machias v. East Machias, 116 Me. 423, 102 A 181.

18. Hartland v. St. Albans, 123 Me. 82, 121 A 552; Machias v. East Machias, 116 Me. 423, 102 A 181.

19. Hartland v. St. Albans, 123 Me. 82, 121 A 552; Machias v. East Machias, 116 Me. 423, 102 A 181.

20. Machias v. East Machias, supra.

[a] **Care of pauper in sanitarium.**—The town in which a pauper is found may recover of a town chargeable with his support for board, services, and medical attendance at a tuberculosis sanitarium to which he was sent on advice of a physician. Machias v. East Machias, 116 Me. 423, 102 A 181.

[b] **In Nova Scotia,** where the municipality of a pauper's residence has paid his hospital expenses, it may recover therefor, under Acts (1925) c 6 § 8, from the municipality where he had his legal settlement. Sydney v. Glace Bay, 59 N. S. 448, [1928] 1 DomLR 729.

[c] **In Saskatchewan,** under Town Act Rev. St. (1909) c 85 § 171, if a person has resided in a town for thirty days prior to falling ill, and is unable to procure necessary medical aid, the town is liable therefor to the municipality furnishing such aid. Regina v. Gull Lake, 9 Sask. L. 127, 27 DomLR 422, 34 WestLR 222, 10 West Wkly 246.

Liability to individual see infra § 246 et seq.

21. Machias v. East Machias, 116 Me. 423, 102 A 181; Kennebunk v. Alfred, 19 Me. 221; Berlin v. Gorham, 34 N. H. 266; Ranson Tp. v. Jenkins Tp., 8 Kulp (Pa.) 223.

Liability to individual see infra § 249.

22. Eastport v. Belfast, 40 Me. 262; Centre County v. Howard Borough Poor Dist., 26 Pa. Co. 183; Ketchum's Case, 14 Pa. Co. 9.

23. St. Johnsburg v. Waterford, 15 Vt. 692, 699.

"If the expense had been positively increased, by sending an insane pauper to the asylum, I have no doubt, it would, under the present enlightened views, upon the most judicious and humane mode of treating such cases, be considered necessary expense of comfortable support." St. Johnsbury v. Waterford, supra.

Removal to, and support in, asylum in another state see infra text and note 33.

Support in asylums generally see infra §§ 259, 260.

24. St. Johnsburg v. Waterford, 15 Vt. 692.

25. Bath v. Harpswell, 110 Me. 391, 86 A 318; Ellsworth v. Houlton, 48 Me. 416.

Liability to individual see infra § 244.

26. Morristown v. Hardwick, 81 Vt. 31, 69 A 152.

[a] **Construction of statute.**—A statute must not be extended by implication beyond what is necessary to accomplish its purpose; and hence a statute for the relief and support of paupers, providing that every town shall relieve needy poor persons residing or found therein, and that if a person is poor and in need of relief the overseer of the poor upon application shall give relief, and if the person has not gained a residence in the town, and is not of sufficient ability to provide such assistance, the town furnishing it may recover the expense from the town of the person's residence, cannot be extended to render one town liable to another town for the expense of burying one of the other's paupers. Morristown v. Hardwick, 81 Vt. 31, 69 A 152.

27. Conway v. Deerfield, 11 Mass. 327.

poor,[28] debts of a pauper, paid at his request,[29] the expense of guarding an insane pauper to prevent injury to third persons,[30] of transporting a pauper to the county poorhouse,[31] and of redeeming a pauper's clothes,[32] which in their nature are not necessaries and therefore not a legal charge.

Removal to, and support in, asylum without the state. The town of a person's settlement is not liable to the town in which such person had fallen into distress for the expense of his removal to, and support in, an asylum in another state, even though a removal to some asylum was necessary to the comfort and relief of the pauper.[33]

[§ 242] **e. Necessity That Supplies Furnished Be Pauper Supplies.**[34] To authorize recovery against the place of settlement the supplies must have been furnished and received as pauper supplies,[35] and no recovery can be had for aid extended as a gift or loan.[36] But if the supplies are furnished and received as pauper supplies, they will be so regarded, notwithstanding a promise by the recipient to repay, followed by actual repayment.[37]

[§ 243] **2. By Individuals—a. Unauthorized and Voluntary Aid.** There is no liability on the part of a town or poor district to reimburse a third person who voluntarily affords relief to a pauper,[38] even though there is an immediate necessity for relief before the poor officers can be communicated with,[39] and no action therefor will lie by him against the town or district,[40] unless it is expressly given by statute[41] or is founded on an express or implied contract.[42]

[§ 244] **b. After Notice to Town of Pauper's Condition.**[43] It has been held that a person who relieves a pauper may recover therefor from the town or poor district legally bound to furnish such relief, where the town or district, after notice of the pauper's need, refuses or neglects to extend relief,[44] although there is authority to the contrary.[45] A right of action is sometimes expressly given by stat-

28. Barnstead v. Strafford, 8 N. H. 142.

29. Vinalhaven v. Lincolnville, 78 Me. 422, 6 A 600.

30. Casco v. Limington, 102 Me. 37, 65 A 523.

31. Young v. Lehigh County Poor Directors, 22 Pa. Dist. 562.

32. Gilman v. Portland, 51 Me. 457.

33. Deerfield v. Greenfield, 1 Gray (Mass.) 514.

Commitment to, and support in, asylum generally see infra §§ 259, 260.

34. What constitutes furnishing pauper supplies so as to prevent acquisition of settlement see supra § 102.

35. Hampden v. Bangor, 68 Me. 368; Veazie v. Chester, 53 Me. 29.

36. Hampden v. Bangor, 68 Me. 368.

37. Veazie v. Chester, 53 Me. 29.

38. Ark.—Clay v. Pulaski County, 56 Ark. 468, 20 SW 251; Clark County v. Huie, 49 Ark. 145, 4 SW 452; Lee County v. Lackie, 30 Ark. 764.

Colo.—Rio Grande County v. Phye, 27 Colo. 107, 59 P 55.

Conn.—Kent v. Chaplin, 6 Conn. 72.

Ill.—Alton v. Madison County, 21 Ill. 115; Rayburn v. Davis, 2 Ill. A. 548

Ind.—State v. Gold, 140 Ind. 699, 40 NE 55; Morgan County v. Seaton, 122 Ind. 521, 24 NE 213; Mullen v. Decatur County, 9 Ind. 502; Knox County v. Jones, 7 Ind. 3.

Iowa.—Mansfield v. Sac County, 60 Iowa 11, 14 NW 73.

Ky.—Cheatham v. Adair County Ct., 9 Ky. Op. 587.

Me.—Conley v. Woodville, 97 Me. 240, 54 A 400; Farrington v. Anson, 77 Me. 405; Warren v. Islesborough, 20 Me. 442; Beetham v. Lincoln, 16 Me. 137.

Mass.—O'Keefe v. Northampton, 145 Mass. 115, 13 NE 382; Rogers v. Newbury, 105 Mass. 533; Shearer v. Shelburne, 10 Cush. 3; Williams v. Braintree, 6 Cush. 399; Lamson v. Newburyport, 14 Allen 30; Kittredge v. Newbury, 14 Mass. 448; Miller v. Somerset, 14 Mass. 396; Mitchell v. Cornville, 12 Mass. 333; Dalton v. Hinsdale, 6 Mass. 501.

Miss.—Reynolds v. Alcorn County, 59 Miss. 132.

Mo.—Duval v. Laclede County, 21 Mo. 396.

Nebr.—Hamilton County v. Meyers, 23 Nebr. 718, 37 NW 623.

N. H.—Wilson v. Coos County, 72 N. H. 112, 54 A 1101; Buxton v. Chesterfield, 60 N. H. 357; French v. Benton, 44 N. H. 28; Otis v. Strafford, 10 N. H. 352; Woodes v. Dennett, 9 N. H. 55; Lee v. Deerfield, 3 N. H. 290; Mace v. Nottingham-West, 1 N. H. 52.

N. Y.—Smith v. Williams, 13 Misc. 761, 35 NYS 236; Palmer v. Vandenbergh, 3 Wend. 193; Minklaer v. Rockfeller, 6 Cow. 276; Flower v. Allen, 5 Cow. 654; Gourley v. Allen, 5 Cow. 644; Hull v. Oneida County Suprs., 19 Johns. 259, 10 AmD 223; Brooks v. Read, 13 Johns. 380; Everts v. Adams, 12 Johns. 352.

N. D.—St. Luke's Hospital Assoc. v. Grand Forks County, 8 N. D. 241, 77 NW 598.

Oh.—Beach v. Marion Tp., 2 Oh. Dec. (Reprint) 221, 2 WestLMonth 95.

Pa.—Salsbury v. Philadelphia, 44 Pa. 303.

R. I.—Caswell v. Hazard, 10 R. I. 490.

S. D.—Roane v. Hutchinson County, 40 S. D. 297, 167 NW 168.

Vt.—Macoon v. Berlin, 49 Vt. 13; Thetford v. Hubbard, 22 Vt. 440; Churchill v. West Fairlee, 17 Vt. 447; Putney v. Dummerston, 13 Vt. 370; Houghton v. Danville, 10 Vt. 537; Castleton v. Miner, 8 Vt. 209; Aldrich v. Londonderry, 5 Vt. 441; Jamaica v. Guilford, 2 D. Chipm. 103.

Wash.—King County v. Collins, 1 Wash. T. 469; Collins v. King County, 1 Wash. T. 416.

Wis.—Patrick v. Baldwin, 109 Wis. 342, 85 NW 274, 53 LRA 613; McCaffrey v. Shields, 54 Wis. 645, 12 NW 54.

Eng.—Atkins v. Banwell, 2 East 505, 102 Reprint 462.

[a] **One who voluntarily buries a poor person** cannot maintain an action against the county to recover the expenses thereof. Handlin v. Morgan County, 57 Mo. 114.

[b] **For aid furnished prior to an authorization** by the township trustees, no action will lie against the county. Mansfield v. Sac County, 60 Iowa 11, 14 NW 73.

Medical services see infra § 246.

Neglect or refusal of town or district to provide relief after notice see infra § 244.

39. Caswell v. Hazard, 10 R. I. 490.

40. See cases supra notes 38, 39.

41. Beetham v. Lincoln, 16 Me. 137; Houghton v. Danville, 10 Vt. 537. And see supra § 201.

[a] **A general expression in the statute,** declaring it the duty of towns to sustain their own and the transient poor, creates no legal obligation. Houghton v. Danville, 10 Vt. 537; Aldrich v. Londonderry, 5 Vt. 441.

[b] **In North Carolina,** under Revisal (1908) § 5005a, as to payment of burial expenses of Confederate veteran pensioners, where a Confederate veteran on the pension rolls of one county died while a resident of another county, one who paid for his burial could recover from the first county the statutory sum. Hannah v. Stokes County, 176 N. C. 395, 97 SE 160.

42. Me.—Beetham v. Lincoln, 16 Me. 137.

N. C.—Copple v. Davie County, 138 N. C. 127, 50 SE 574.

N. D.—St. Luke's Hospital Assoc. v. Grand Forks County, 8 N. D. 241, 77 NW 598.

Vt.—Buck v. Worcester, 48 Vt. 1; Houghton v. Danville, 10 Vt. 537; Aldrich v. Londonderry, 5 Vt. 441.

Wis.—Patrick v. Baldwin, 109 Wis. 342, 85 NW 274, 53 LRA 613.

Construction and operation of contracts see infra § 252.

Requisites and validity of contracts see infra § 251.

43. Contract for support see infra §§ 251, 252.

Right to recover for medical services see infra § 246.

44. Ill.—Seagraves v. Alton, 13 Ill. 366; Randolph v. Greenwood, 122 Ill. A. 23.

Mich.—Eckman v. Brady Tp., 81 Mich. 70, 45 NW 502.

N. J.—Shreve v. Budd, 7 N. J. L. 431.

Oh.—Cincinnati Tp. v. Ogden, 5 Oh. 23.

Eng.—Simmons v. Wilmott, 3 Esp. 91, 170 Reprint 549.

[a] **"The solution of this question must depend upon the nature of the obligation,** which rests upon a township to support its poor. If it be merely in the nature of a moral obligation, then no action can be maintained, unless there has been a previous request, or an express promise on the part of the township. But if, on the other hand, it be an absolute legal obligation, then the law implies a promise, and an action can be sustained. We are of opinion that it is of this latter description. The supreme power of the state, by legislative enactment, has imposed the obligation. It is of as much binding force as the obligation of a parent to support his child, or a husband his wife. We do not say that in every case, where an individual furnishes necessaries to a pauper, he can maintain an action against the township. Complaint must in the first instance be made to the overseers of the poor. If these neglect their duty, or if the trustees of the township refuse to make the necessary order, it is right and proper for an individual to furnish a distressed pauper with the necessary relief; and justice, sound policy, and law, require that the individual performing this benevolent act should be remunerated." Cincinnati Tp. v. Ogden, 5 Oh. 23, 27.

45. Patrick v. Baldwin, 109 Wis. 342, 85 NW 274, 53 LRA 613 [overr Davis v. Scott, 59 Wis. 604, 18 NW 530; Mappes v. Iowa County, 47 Wis. 31, 1 NW 359].

[a] **Where the law imposes upon a municipality the duty of maintaining poor persons,** and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request as to a private party to supply the needy person's wants, upon which such party can act, and hold the municipality liable as upon

ute when the town or district neglects or refuses to render aid after notice of the necessity therefor.[46] The fact that the person incurring expense is indebted to the pauper will not preclude him from recovering from the town the full amount of expense incurred.[47]

Necessity of relief.[48] An individual furnishing support must show that the person provided for was a pauper or in need of relief before he can recover, from the town or district, the expenses incurred.[49]

Persons by and to whom relief furnished. Where the right to recover of towns for supplies furnished to paupers after notice to the poor officers is restricted to inhabitants of the town wherein the relief is furnished,[50] no recovery can be had by one who is not such an inhabitant.[51] Nor can recovery be had by one who, at the time of furnishing relief, was under legal obligation to do so.[52]

Support by relatives. A person liable under the statute for the support of a needy relative[53] cannot recover for support furnished unless it appears that the person provided for was destitute and in need of immediate relief,[54] and that plaintiff was financially incapable of supporting him.[55]

Place of furnishing relief. No recovery can be had for relief furnished to a pauper outside of the town sought to be charged, the remedy being against the town where the pauper is found in distress and the relief is furnished.[56] But this rule does not apply to relief furnished to a pauper whom the town officers have removed temporarily to a place outside of its territorial limits.[57]

Nature and extent of relief.[58] The town is liable to the individual for all necessary relief furnished after notice, including the care of the pauper when ill,[59] medical expenses incurred by plaintiff,[60] although not actually paid,[61] and expenses of burial,[62] even where the pauper's relatives claim his body.[63]

[§ 245] **c. Effect of Existence of Provision for Relief.**[64] A town or poor district which has made adequate provision for the relief of a pauper is not liable for his care and support by an individual[65] having knowledge of the provision for relief.[66] So, where a town or poor district provides adequate relief for the pauper after notice from an individual, it cannot be held liable to such individual for addi-

an implied contract. Patrick v. Baldwin, 109 Wis. 342, 85 NW 274, 53 LRA 613 [overr Davis v. Scott, 59 Wis. 604, 18 NW 530; Mappes v. Iowa County, 47 Wis. 31, 1 NW 359].

Voluntary relief generally see supra § 243.

46. See statutory provisions; cases infra this note, and note 47 et seq.

"The party in whose charge, or under whose care, the poor person is, shall not be compelled to turn him forth without relief, nor to bear, himself, a burden which the town ought and is by law required to bear." Smith v. Colerain, 9 Metc. (Mass.) 492, 496.

[a] **"This is a provision designed to carry into its fullest effect the policy of the law,** itself the plain dictate of common humanity, that in a civilized community no human being shall be exposed to the danger of death, or extreme suffering from hunger, nakedness, or want of shelter. For this purpose, the overseers being always present, are made the almoners of the public charity in the first instance, that the relief may be as prompt as the exigency demands. If such town is that of the pauper's settlement, the burden ultimately rests where it first falls. If the pauper has a settlement in any other town, they have their remedy against such other town for reimbursement; if no other town is liable, the state takes upon itself the duty of such reimbursement. But as overseers might from some cause delay affording the immediate necessary relief, and to make it sure that it shall be done, the section above cited provides that any person after notice and request to the overseers, may do it, and hold such town liable." Shearer v. Shelburne, 10 Cush. (Mass.) 3, 4.

[b] **The town notified is bound to take steps to ascertain the settlement** of the pauper, and, in the event of failure to do so, will be required to recoup the person by whom the notice is given and who has furnished the pauper with necessary support. Bushby v. North Sydney, 46 N. S. 549, 9 DomLR 24, 12 EastLR 183.

[c] **Support in asylum.**—(1) Under Pub. St. § 3670, as to the care of transient persons, if a transient becomes insane and is in the care of an individual, such individual may, after notice to the town, contract for the care of the transient in an insane asylum, without losing his right to recover for a reasonable outlay for such care. Wilbur v. Calais, 90 Vt. 335, 98 A 913. (2) Liability of local authorities for support in asylum generally see infra §§ 259, 260.

[d] **Statutes construed and applied.**—Howe v. Royalton, 32 Vt. 415; Johnston v. Halifax, 46 N. S. 474, 9 DomLR 220, 12 EastLR 251; McDougall v. Sydney Mines, 45 N. S. 348.

Cross references:

Effect of provision for relief see infra § 245.

Liability to jailer for support of prisoner see infra § 262.

Necessity and sufficiency of notice by individual see supra § 230.

47. Brown v. Orlend, 36 Me. 376.

48. Medical services see infra § 246.

Relief furnished by municipality see supra § 239.

49. Allen v. Lubec, 112 Me. 273, 91 A 1011; Rogers v. Newbury, 105 Mass. 533; Shearer v. Shelburne, 10 Cush. (Mass.) 3.

[a] **No need of immediate relief shown.**—An insane woman without property was maintained by her brother and sister. The brother obtained remuneration from the town. Had the sister known the fact, she would herself have assumed the whole burden. It was held that there was no such need of immediate relief as entitled the town to recovery against the town of the insane pauper's legal settlement. Templeton v. Winchendon, 138 Mass. 109.

50. See statutory provisions.

51. Conley v. Woodville, 97 Me. 240, 54 A 400; Kennedy v. Weston, 65 Me. 596; Windham Overseers of Poor v. Portland, 23 Me. 410; Beetham v. Lincoln, 16 Me. 137.

[a] **In Massachusetts** (1) a former statute restricted the right to sue to inhabitants. Watson v. Cambridge, 15 Mass. 286; Mitchell v. Cornville, 12 Mass. 333. (2) But under Rev. St. c 46 § 18, substituting the words "any person" for the word "inhabitant," one not an inhabitant of such town is entitled to sue. Underwood v. Scituate, 7 Metc. 214.

52. Peters v. Westborough, 20 Pick. (Mass.) 506.

[a] **Person under contract to support pauper** cannot recover from town. Peters v. Westborough, 20 Pick. (Mass.) 506.

Support by relatives see infra notes 53–55.

53. See supra §§ 174–186.

54. Allen v. Lubec, 112 Me. 273, 91 A 1011.

55. Allen v. Lubec, supra.

[a] **Grandfather unable to support his grandchild** (1) stands in the same position as other inhabitants of the town in which he resides. Hall v. Clifton, 53 Me. 60. (2) If of sufficient ability to contribute partial support, he can recover only that part of the support which he cannot supply. Hall v. Clifton, supra.

56. Conley v. Woodville, 97 Me. 240, 54 A 400; Kennedy v. Weston, 65 Me. 596; Quincy City Hospital v. Milton, 232 Mass. 273, 122 NE 274; Shearer v. Shelburne, 10 Cush. (Mass.) 3; Mitchell v. Cornville, 12 Mass. 333.

[a] **Statutes construed.**—(1) The term "every town," in Rev. St. c 46 § 18 providing that "every town shall be held to pay the expense which shall be necessarily incurred for the relief of a pauper by any person who is not liable by law for his support, after notice," etc., is limited to the town in consequence of whose default the person entitled to the remedy is subjected to a duty and burden from which the officers of such town ought to have relieved him by making provision; that is, the town where the relief is required, and where it is to be afforded; the town where the person is found or is residing. Smith v. Colerain, 9 Metc. (Mass.) 492. (2) In Gen. St. c 70 § 16 and Rev. L. c 81 § 31, which substantially reënacted the provision of the earlier statute, the word "therein" was added after the words "for the relief of a pauper," and it has been held that this was a legislative adoption of the construction placed on the earlier statute in Smith v. Colerain, supra, and that the word "therein" refers to the town where the assistance is furnished. Quincy City Hospital v. Milton, 232 Mass. 273, 122 NE 274; Hawes v. Hanson, 9 Allen (Mass.) 134.

57. Randolph v. Greenwood, 122 Ill. A. 23.

58. Relief furnished by municipality see supra § 241.

59. Naas v. Overseers of Poor Dist. No. 3, 35 N. S. 316.

60. Naas v. Overseers of Poor Dist. No. 3, supra.

61. Naas v. Overseers of Poor Dist. No. 3, supra.

62. Reitz v. Jefferson County Poor Dist., 20 Pa. Dist. 165; Naas v. Overseers of Poor Dist. No. 3, 35 N. S. 316.

63. Reitz v. Jefferson County Poor Dist., 20 Pa. Dist. 165.

64. Medical services see infra § 248.

Relief furnished by municipality see supra § 240.

65. State v. Gold, 140 Ind. 699, 40 NE 55; Reynolds v. Alcorn County, 59 Miss. 132.

66. Ireland v. Newburyport, 8 Al-

tional supplies furnished by him.[67] But if the pauper is too ill to bear removal to the place provided for his relief by the poor officers after such notice, the person giving the notice may continue to relieve him and recover therefor from the town or poor district;[68] and a like rule applies where the pauper, being a minor of tender age, is not reasonably able to reach the place provided for him.[69] An offer to remove the pauper to the poorhouse, made by one overseer of the poor, without authority from the other overseers, will not relieve the town from liability.[70] Nor can a town escape liability because it had contracted to have the relief afforded by one who failed so to do.[71]

[§ 246] **F. Liability for Medical Services[72]—1. In General.** A physician who renders medical services to the poor of a county or town is entitled to recover therefor where such services were performed under employment by officers having requisite authority to contract,[73] or were subsequently ratified by them.[74] But there can be no recovery if the officers are without authority,[75] or fraudulently approve a claim for services.[76] A statute making a town liable for relief furnished to a pauper after notice to, and refusal of, the town to provide relief[77] applies to a physician who renders medical services to a sick pauper.[78] Where the statute specifically provides what persons county officers are bound to relieve, and the nature of the services for which the county shall be liable, no recovery can be had for medical services not rendered in accordance with the terms of the statute.[79]

Necessity of relief. Where a municipality is liable for medical services only where the person for whom they are rendered is incapable of providing such services, it is not sufficient that the person treated is execution proof, or insolvent within the meaning of the Bankruptcy Act.[80]

[§ 247] **2. Voluntary or Unauthorized Aid.** As in the case of pauper supplies generally,[81] a town or poor district is not liable for medical services voluntarily furnished for the relief of a pauper, without any contract with, or request from, the officers of the poor or some one in authority;[82] and this has been held to be true where the regular physician employed by the municipality to attend paupers refused his services and the poor officers refused to

len (Mass.) 73; New Salem v. Wendell, 2 Pick. (Mass.) 341.

67. Knight v. Ft. Fairfield, 70 Me. 500; Gross v. Jay, 37 Me. 9; Phelps v. Westford, 124 Mass. 286; Rawson v. Uxbridge, 113 Mass. 47; Worden v. Leyden, 10 Pick. (Mass.) 24; Shearer v. Shelburne, 10 Cush. (Mass.) 3.

[a] **Providing almshouse.**—A city or town which has provided a sufficient almshouse for the support of its poor is not liable to the owner of a tenement for the use and occupation thereof by a pauper whom he might have ejected therefrom, and who was able to bear removal to the almshouse. Rawson v. Uxbridge, 113 Mass. 47; Lamson v. Newburyport, 14 Allen (Mass.) 30.

68. Brown v. Orland, 36 Me. 376; Rankin County v. Watson, 70 Miss. 85, 11 S 632.

69. Knight v. Ft. Fairfield, 70 Me. 500.

70. Carter v. Augusta, 84 Me. 418, 24 A 892.

71. Perley v. Oldtown, 49 Me. 31; Worden v. Leyden, 10 Pick. (Mass.) 24.

[a] **If a pauper is illtreated or insufficiently provided for by an individual who has agreed with the town to support him,** another individual will not have a right to support him without notice to the town, so that it may have an opportunity to reform the abuse or make other provision for the pauper. Worden v. Leyden, 10 Pick. (Mass.) 24.

72. Furnishing aid in general see supra §§ 238–245.

Liability to municipality incurring expense for medical services see supra § 241.

73. Ill.—La Salle County v. Reynolds, 49 Ill. 186; Deason v. Williamson, 188 Ill. A. 316; Dieffenbacher v. Mason, 117 Ill. A. 103; De Witt County v. Spaulding, 111 Ill. A. 364; La Salle County v. Hatheway, 78 Ill. A. 95.

Ind.—Morgan County v. Seaton, 122 Ind. 521, 24 NE 213; Orange County v. Hon, 87 Ind. 356; Morgan County v. Holman, 34 Ind. 256.

Iowa.—Johnson v. Hamilton County, 167 Iowa 485, 149 NW 639; Brock v. Jones County, 145 Iowa 397, 124 NW 209.

Kan.—Leinbach v. Pottawatomie County, 116 Kan. 347, 226 P 993; Dykes v. Stafford County, 86 Kan. 697, 121 P 1112; Pottawatomie County v. Morrall, 19 Kan. 141.

Ky.—Marion County v. Everitt, 10 Ky. Op. 706, 1 KyL 267.

Nebr.—Red Willow County v. Davis, 49 Nebr. 796, 69 NW 138; Gage County v. Fulton, 16 Nebr. 5, 19 NW 781.

Vt.—Farmer v. Salisbury, 77 Vt. 161, 59 A 201.

Wis.—Elkey v. Seymour, 169 Wis. 223, 172 NW 138.

N. B.—Irvine v. Stanley Parish, 37 N. B. 572, 2 EastLR 5.

[a] **A county having no poorhouse** is liable for medical services rendered to a pauper, not an inhabitant, in need of immediate aid, on the order of the mayor or acting mayor of a city of the third class within such county. Dykes v. Stafford County, 86 Kan. 697, 121 P 1112.

[b] **Approval of claims after rejection.**—Where township trustees who have jurisdiction in the matter of poor relief have rejected a claim for medical services to a poor person, claimant must resort to the county board courts or apply to the county board of supervisors, and other trustees having no knowledge of the merits of the claim may not allow it, although the trustees rejecting a claim may, within a reasonable time, reconsider the matter and allow it. Case v. Davis County, 150 Iowa 552, 129 NW 804.

[c] **Fact that overseer has not made written report** to the county board of his acts in employing a physician does not affect the county's liability. Meyers v. Furnas County, 93 Nebr. 313, 140 NW 633.

Authority of:

Officers to employ physicians generally see supra § 22.

Part of officers to employ physicians see supra § 24.

74. Dieffenbacher v. Mason, 117 Ill. A. 103; La Salle County v. Hatheway, 78 Ill. A. 95; Case v. Davis County, 150 Iowa 552, 129 NW 804; Hoskins v. Woodbury County, 146 Iowa 165, 124 NW 894.

75. Orange County v. Hon, 87 Ind. 356; Mullen v. Decatur County, 9 Ind. 502; Lacy v. Kossuth County, 106 Iowa 16, 75 NW 689; Gawley v. Jones County, 60 Iowa 159, 14 NW 236; Mansfield v. Sac County, 59 Iowa 694, 13 NW 762; Hoyt v. Black Hawk County, 59 Iowa 184, 13 NW 72; Smith v. Shawnee County, 21 Kan. 669; Farmer v. Salisbury, 77 Vt. 161, 59 A 201.

76. Case v. Davis County, 150 Iowa 552, 129 NW 804.

[a] **Rule applied.**—Where township trustees, without knowledge of the merits of a claim which had been twice rejected by trustees in office at the time of the rendition of the services, allowed the claim, and certified that the person receiving the services was a pauper, and claimant and the trustees knew that the services were not performed at the direction of the trustees, and for a person who had not applied for, and was not then receiving, public aid as a poor person, the trustees and claimant were guilty of fraud on the county, and it could resist the claim. Case v. Davis County, 150 Iowa 552, 129 NW 804.

77. See supra § 244.

78. Wing v. Chesterfield, 116 Mass. 353; Barberton v. Lohmers, 18 Oh. Cir. Ct. N. S. 196.

79. Carter County v. Dowdy, (Okl.) 270 P 836.

[a] **Illustration.**—Under Comp. St. (1921) §§ 8211–8213, no recovery can be had against a county for medical services unless the person for whom such services were performed was lawfully settled in the county, or the relief was temporary for a person not settled therein, and was actually necessary pending the ascertainment of his legal settlement and removal thereto. Carter County v. Dowdy, (Okl.) 270 P 836.

80. Kerrobert Union Hospital v. Grass Lake, 19 Sask. L. 132, [1925] 1 DomLR 173, [1924] 3 WestWkly 778.

81. See supra § 243.

82. Ark.—Cantrell v. Clark County, 47 Ark. 239, 1 SW 200.

Ind.—Morgan County v. Seaton, 122 Ind. 521, 24 NE 213; Mullen v. Decatur County, 9 Ind. 502.

Iowa.—Mansfield v. Sac County, 60 Iowa 11, 14 NW 73.

Md.—Allegany County v. McClintock, 60 Md. 559.

Mass.—Kittredge v. Newbury, 14 Mass. 448; Miller v. Somerset, 14 Mass. 396.

Nebr.—Hamilton County v. Meyers, 23 Nebr. 718, 37 NW 623.

N. J.—Bay v. Cook, 22 N. J. L. 343.

N. Y.—Flower v. Allen, 5 Cow. 654; Gourley v. Allen, 5 Cow. 644; Fyerts v. Adams, 12 Johns. 352.

Vt.—Farmer v. Salisbury, 77 Vt. 161, 59 A 201.

Wash.—Guerin v. Clarke County, 90 Wash. 242, 155 P 1035.

[a] **The law presumes the services are bestowed in charity,** where they are rendered by a physician to a poor person in an emergency, and no action against the county will lie therefor. Cantrell v. Clark County, 47 Ark. 239, 1 SW 200.

[b] **Liability of county to physician for vaccinating children of poor person.**—Allegany County v. McClintock, 60 Md. 559.

Necessity of previous order of relief generally see supra § 232.

furnish other services.[83] The above rule[84] also has been held to prevent recovery for medical services voluntarily rendered even where an emergency existed,[85] if, as held in some cases, there had been no judicial ascertainment that the person treated was a pauper,[86] even though such services were requested by a member of the board of supervisors.[87]

Contrary to the rule above stated as to emergency cases,[88] it has been held by some authorities that a town or poor district upon which the duty to relieve paupers is imposed is liable for medical attendance furnished to a pauper without notice to, or request from, the officers of the poor, where immediate action is required,[89] provided, as held in some jurisdictions, an order of approval is subsequently obtained.[90]

[§ 248] **3. Effect of Existence of Provisions for Relief.**[91] A town is not liable for services rendered to a pauper by a physician with knowledge that the overseers of the poor had already employed a physician to attend the pauper.[92] And where a town or city has provided for the medical treatment of its sick paupers by the election of a town or city physician, it is not liable for services rendered by a physician under employment by the overseers of the poor.[93] So a county which has employed a physician to render aid to the poor is not liable for medical services rendered by a physician employed by township trustees.[94] It has also been held that the statutory liability of a county for medical services furnished to persons falling ill within the county and without means with which to pay for such services is not affected by the fact that there is a poorhouse in the county for the care of paupers, such persons not being paupers within the meaning of the statute.[95] On the other hand it has been held that, where a statute provides that paupers shall be maintained at the county poorhouse, or at such place as the county commissioners shall agree upon, the county cannot be held liable for the care of sick and indigent persons, unless there is a contract by the county officers, or unless the services are rendered by request and under circumstances from which a contract can be inferred.[96] But a physician employed by township trustees to render aid to a pauper may recover therefor when the regular county physician is under no obligation to attend the township poor,[97] or is incompetent,[98] or inconvenient of access.[99] It has been held that a surgeon performing an operation on an indigent person in an emergency case, at the instance of an overseer of the poor, may recover for his services from the county, although the statute provides for surgical operations and hospital treatment of poor persons afflicted with certain deformities or maladies.[1]

[§ 249] **4. Nature of Services.** The nature of medical services for which recovery may be had against a municipality depends upon the statute pursuant to which recovery is sought,[2] and the contract under which the services were rendered.[3] The rules

83. Morgan County v. Seaton, 122 Ind. 521, 24 NE 213.

84. See supra note 82.

85. Iowa.—Cerro Gordo County v. Boone County, 152 Iowa 692, 133 NW 132, 39 LRANS 161, AnnCas1913C 79; Mansfield v. Sac County, 60 Iowa 11, 14 NW 73.

Mass.—Kittredge v. Newbury, 14 Mass. 448.

N. H.—French v. Benton, 44 N. H. 28.

N. Y.—Gourley v. Allen, 5 Cow. 644.

S. D.—Roane v. Hutchinson County, 40 S. D. 297, 167 NW 168.

Wash.—Guerin v. Clarke County, 90 Wash. 242, 155 P 1035.

Sask.—Sutherland v. Canwood, [1925] 3 WestWkly 781.

86. Cantrell v. Clark County, 47 Ark. 239, 1 SW 200; Prewett v. Mississippi County, 38 Ark. 213; Lee County v. Lackie, 30 Ark. 764.

87. Tallahatchie County v. Harrison, 75 Miss. 744, 23 S 291. But see Lee County v. Gilbert, 70 Miss. 791, 12 S 593 (holding that, where no steps had been taken to have a person declared a pauper and removed to the poorhouse, a physician rendering surgical services in a case where prompt attention was imperative could recover from the county).

88. See cases supra notes 85–87.

89. Ill.—LaSalle County v. Hatheway, 78 Ill. A. 95; Madison County v. Halliburton, 64 Ill. A. 99; Madison County v. Haskell, 63 Ill. A. 657; Clinton County v. Pace, 59 Ill. A. 576; Fayette County v. Morton, 53 Ill. A. 552; Christian County v. Rockwell, 25 Ill. A. 20.

Ind.—Newcomer v. Jefferson Tp., 181 Ind. 1, 103 NE 843, AnnCas1916D 181.

Kan.—Dykes v. Stafford County, 86 Kan. 697, 121 P 1112.

Minn.—Hendrickson v. Queen, 149 Minn. 79, 182 NW 952; Robbins v. Homer, 95 Minn. 201, 205, 103 NW 1023.

Okl.—Garfield County v. Enid Springs Sanitarium, etc., 116 Okl. 249, 244 P 426.

Wyo.—Sheridan County v. Denebrink, 15 Wyo. 342, 89 P 7, 9 LRANS 1234.

"It is true that the obligations to provide for the poor are statutory. These, as we have indicated, are matters of regulation; but, where there can be no regulation from the very nature of the case, it must be that necessity will supersede the exercise of statutory authority, and immediate aid for the sick person should be furnished. A deprivation of it might inure not only to injure the poor person, but to the detriment of the public, for delay in the treatment of the injured party might entail added pecuniary burdens." Robbins v. Homer, supra.

[a] **Illustration.**—A county is liable for services furnished to a pauper by a physician, although the physician acted without the request or consent of the county board, where there was an immediate necessity for such aid, and the board was not in session at the time, so that notice could not be given to the board before the services were rendered. Garfield County v. Enid Springs Sanitarium, etc., 116 Okl. 249, 244 P 426.

[b] **Statute authorizing recovery in particular cases.**—Under Pauper Act § 24 recovery may be had for medical services to cyclone sufferers where immediate action is required, without notice to, or permission from, the supervisor. Deason v. Williamson, 188 Ill. A. 316.

[c] **In Pennsylvania** it has been held that a hospital is entitled to recover for the care of an indigent injured person from the overseers of the poor of the pauper district. In re Care of Injured Indigent Persons, 15 Pa. Dist. 627.

[d] **In Saskatchewan** under Rev. St. (1920) c 89, a physician called to a hospital by the matron thereof to attend an emergency case may recover from the rural municipality in which the indigent patient resides reasonable charges for his services. Coles v. Wawken, [1928] 3 WestWkly 532.

90. Blakeslee v. Chester County Directors of Poor, 102 Pa. 274; Campbell v. Grooms, 101 Pa. 481; Chester County Directors of Poor v. Malany, 64 Pa. 144; Chester County House of Employment v. Worthington Directors of Poor, 38 Pa. 160; Westmoreland County House of Employment v. Murry, 32 Pa. 178; Summit Tp. Poor District v. Byers, 8 Pa. Cas. 222, 11 A 242; Westmoreland v. Donnelly, 3 Pa. Cas. 483, 7 A 204; Frank v. Penn Tp., 22 Pa. Dist. 809, 40 Pa. Co. 429; Delaware Tp. v. Zerbe Tp., 3 Pa. Co. 643; Pickett v. Erie County Poor Directors, 3 Pa. Co. 541.

Order of approval generally see supra § 237.

91. Relief by town or district see supra § 239.

92. Phelps v. Westford, 124 Mass. 286.

93. Goodrich v. Waterville, 88 Me. 39, 33 A 659.

94. DeWitt County v. Wright, 91 Ill. 529; Morgan County v. Seaton, 122 Ind. 521, 24 NE 213; Washburn v. Shelby County, 104 Ind. 321, 3 NE 757, 54 AmR 332; Robbins v. Morgan County, 91 Ind. 537; Morgan County v. Seaton, 90 Ind. 158; Orange County v. Hon, 87 Ind. 356; Warren County v. Saunders, 16 Ind. 405; Decatur County v. Wheeldon, 15 Ind. 147; Woodruff v. Noble County, 10 Ind. A. 179, 37 NE 732; Johnson v. Hamilton County, 167 Iowa 485, 149 NW 639; Gawley v. Jones County, 60 Iowa 159, 14 NW 236; Mansfield v. Sac County, 59 Iowa 694, 13 NW 762.

95. La Salle County v. Reynolds, 49 Ill. 186.

96. Copple v. Davie County, 138 N. C. 127, 50 SE 574.

97. Taylor v. Woodbury County, 106 Iowa 502, 76 NW 824.

98. Lacy v. Kossuth County, 106 Iowa 16, 75 NW 689.

99. Lacy v. Kossuth County, supra.

1. Caton v. Osborne County, 110 Kan. 711, 205 P 341.

2. See statutory provisions.

[a] **Vaccination.**—Under Acts (1864) c 269 county commissioners are bound to pay the physician for every child vaccinated by him, where the guardian or parents are too poor to pay, and it is immaterial whether the child was vaccinated upon the suggestion or invitation of the physician or not. Allegany County v. McClintock, 60 Md. 559.

3. See infra § 250.

governing medical services[4] apply to the services of a person employed to nurse and watch a sick person,[5] and a nurse so employed is not required to ascertain whether the patient is in need of such services.[6] So a physician employed to perform a surgical operation may recover for services rendered by an assistant engaged by him to aid in the operation.[7]

Extraordinary services. Poor law officers have no authority to bind the town or county for extraordinary services, such as the conduct of a post mortem examination, or the treatment of a pauper for habitual drunkenness.[8]

[§ 250] **5. Form, Requisites, and Construction of Contracts for Services.**[9] To entitle a physician to recover from a town or county for medical services rendered to a poor person a valid contract of employment must be shown.[10] The contract need not be in writing,[11] and may be implied.[12] An implied contract arises where the services are rendered at the request of officers authorized to contract therefor,[13] or, in some jurisdictions, without any previous request, where the services were rendered in an emergency case.[14]

Legality. A contract made by a county board of health for services of one of its members is against public policy,[15] and no action can be maintained thereon for services rendered,[16] although it seems that the physician performing such services might recover on a quantum meruit their reasonable value.[17] It has been held that neither the failure of a physician, contracting with a county to furnish medical attendance to the county poor, to give a bond as required by statute,[18] nor the fact that the contract was not let under competitive bidding,[19] will invalidate the contract.

Indemnity against contingent liability. A contract by a county board to pay a specified sum to a physician who agrees to furnish medical services for the poor as county physician, and to satisfy all claims against the county for medicines, nurses, assistants, and surgical operations, is in the nature of insurance against such claims and is unauthorized.[20]

Rules of construction and operation applicable to other contracts for medical services,[21] and contracts generally,[22] are applicable to contracts of this kind.[23] The term "medical treatment"[24] or "duties of a physician,"[25] as used in such contracts, includes the usual cases of surgery as well as the administration of medicine.

[§ 251] **G. Contracts for Support**[26]**—1. Requisites and Validity.** Except where a statute makes provision for such support, a town or county can be held liable to third persons for the support of its paupers only by contract,[27] made by properly authorized officers[28] in the manner prescribed by law.[29] The terms of such contracts must be within the powers conferred by the pauper statutes,[30] and must not, of course, violate any provision of the constitution.[31] Contracts for support may be either

4. See supra §§ 246–248.

5. Scott v. Winneshiek County, 52 Iowa 579, 3 NW 626; Peo. v. Macomb County, 3 Mich. 475; Hendrickson v. Queen, 149 Minn. 79, 182 NW 952; Elkey v. Seymour, 169 Wis. 223, 172 NW 138.

[a] **Such services may be recovered for as "medical attendance."**—Scott v. Winneshiek County, 52 Iowa 579, 3 NW 626.

Liability to municipality incurring expense for nursing see supra § 241.

6. Elkey v. Seymour, 169 Wis. 223, 172 NW 138.

7. Jay County v. Brewington, 74 Ind. 7.

8. See supra § 22.

9. Cross references:

Authority of officers to employ physician see supra § 22.

Contract for support see infra §§ 251, 252.

Liability for medical services rendered under contract generally see supra § 246.

10. Brock v. Jones County, 145 Iowa 397, 124 NW 209.

[a] **Facts held to show contract of employment.**—Where the clerk of a township notified its trustees, and two of them appeared and with him took up the matter of caring for an injured poor person, and it was then agreed that plaintiff, a physician, should render him necessary services, and that they would sign and approve his bills, there is a sufficient meeting of the trustees and an employment by them of plaintiff. Brock v. Jones County, 145 Iowa 397, 124 NW 209.

Legality of contract see cases infra notes 15–19.

11. Warren County v. Osborn, 4 Ind. A. 590, 31 NE 541.

12. Windham Overseers of Poor v. Portland, 23 Me. 410 (holding, however, that the facts did not show an implied contract).

Implication arising from emergency see supra § 246.

13. De Witt County v. Spaulding, 111 Ill. A. 364; Wing v. Mill, 1 B. & Ald. 104, 106 Reprint 39; Watling v. Walters, 1 C. & P. 132, 12 ECL 87, 171 Reprint 1133; Paynter v. Williams, 1 Cromp. & M. 810, 149 Reprint 626; Lamb v. Bunce, 4 M. & S. 275, 105 Reprint 836.

Implied contracts for support generally see infra § 251.

14. See supra § 246.

15. Lesieur v. Rumford, 113 Me. 317, 93 A 838.

16. Lesieur v. Rumford, supra.

17. Lesieur v. Rumford, supra.

18. Johnson v. Hamilton County, 167 Iowa 485, 149 NW 639; Brock v. Jones County, 145 Iowa 397, 124 NW 209.

19. Johnson v. Hamilton County, 167 Iowa 485, 149 NW 639; Brock v. Jones County, 145 Iowa 397, 124 NW 209.

20. Hustead v. Richardson County, 104 Nebr. 27, 175 NW 648.

Indemnity against contingent liability for support see infra § 251.

21. See Physicians and Surgeons §§ 97, 166 et seq.

22. See Contracts §§ 481–592.

23. Johnson v. Santa Clara County, 28 Cal. 545; Cochran v. Vermilion, 113 Ill. A. 140; Clinton County v. Ramsey, 20 Ill. A. 577; Cooper v. Howard County, 64 Ind. 520; Wetherell v. Marion County, 28 Iowa 22.

[a] **Contract construed.**—A contract of a medical society with a county to do the "poor practice of said county" includes the treating of a poor person in the county, although having no residence in the state, it being the duty of the county, under Code §§ 2225, 2238, to take care of such a person. Brock v. Jones County, 145 Iowa 397, 124 NW 209.

24. Clinton County v. Ramsey, 20 Ill. A. 577.

25. Wetherell v. Marion County, 28 Iowa 22.

26. Contract of employment of physician see supra § 250.

27. See supra § 243.

28. Saguache County v. Tough, 45 Colo. 395, 101 P 411.

Authority of officers to bind town or county by contracts for support generally see supra §§ 20, 24.

29. Perkins v. Hart County Ct., 10 Ky. Op. 570; State v. Hindson, 44 Mont. 429, 120 P 485.

[a] **Official action necessary.**—Mere promises of members of the fiscal court are not enforceable as against the county, as the court can only speak through its records through official action. Perkins v. Hart County Ct., 10 Ky. Op. 570.

[b] **Statutes construed.**—(1) Under Rev. Codes § 2055, as amended by an Act approved Febr. 23, 1911 (L. [1911] c 45), requiring award of a contract to the lowest responsible bidder, subject to the county commissioners' right to employ a superintendent to care for the poor themselves, where the county owns a poor farm, the board must either employ the superintendent or let a contract for the care of the county's poor. State v. Hindson, 44 Mont. 429, 120 P 485. (2) Under Rev. Codes § 2054, as amended by L. (1909) c 29, requiring county commissioners to advertise "every" September for bids for the care of the poor for not less than one year nor more than two years, and under § 2055, as amended by an act approved Febr. 23, 1911 (L. [1911] c 45), requiring the board to let the contract for the "ensuing year," contracts can be awarded for one year only. State v. Hindson, supra.

30. Saguache County v. Tough, 45 Colo. 395, 101 P 411; Moden v. Van Buren County Superintendents of Poor, 183 Mich. 120, 149 NW 1064; Lebcher v. Custer County, 9 Mont. 315, 23 P 713.

[a] **Rule applied.**—A contract by the board of commissioners for the care of the "poor" at a certain price per capita, and for the care of the "sick and infirm" at another price per capita, was void where the only contract authorized by the statute was one for the care of such persons as were poor and therewith sick and infirm. Lebcher v. Custer County, 9 Mont. 315, 23 P 713.

[b] **Contract of proper officials for support of pauper outside of county of his residence** is not ultra vires as against a statute that paupers shall be supported at the place of residence. Moden v. Van Buren County Superintendents of Poor, 183 Mich. 120, 149 NW 1064.

31. Bennett v. La Grange, 153 Ga. 428, 434, 112 SE 482, 22 ALR 1312 [cit Cyc]; Colored Children's Home v. Cambria County Directors of Poor, etc., 72 Pa. Super. 106.

[a] **The power of the mayor and council of a city,** under Acts (1901) p 491 § 39, to contract with a third person for the support of the paupers of the city must be exercised so as

express or implied.[32]

Implied contracts. If relief be afforded at the request of officers authorized to contract therefor, an implied contractual obligation on the part of the town or county to pay for such relief arises.[33] So one who furnishes aid to a person, at the request of the authorities of the town in which such person temporarily falls into distress, may recover therefor from the town of the relieved person's residence.[34] But no promise can be implied to pay expenses which the poor officers are not authorized to incur.[35] In some jurisdictions it has been held that an implied contract arises to reimburse an individual for support furnished to a pauper when the town or district fails to provide relief after notice of the pauper's condition from the person furnishing support.[36]

Consideration. A contract for the support of a pauper requires a valid consideration to support it the same as any other contract.[37]

Indemnity against contingent liability. A town may indemnify itself by contract against a contingent liability of furnishing supplies to a pauper,[38] regardless of whether he is in present need[39] or whether he knows that he is receiving pauper supplies.[40]

Contract with person to be supported. Where there is a possibility that an aged woman might become a public charge, a contract made by overseers of the poor in behalf of the town, to support such person for life in consideration of a conveyance by her of her property to the town, is valid,[41] and where such contract is performed, it is binding on the grantor's heirs.[42]

[§ 252] **2. Construction, Operation, and Rescission.** Usual rules governing the construction of contracts[43] are applicable to contracts for the support of paupers.[44] Where a person contracts for the support of all the poor of a town or county for a stipulated period, he is liable for the support of all transient paupers chargeable to such town or county, and of all paupers having their legal settlement therein residing elsewhere, the burden of whose support is ultimately cast upon such town or county.[45] Under such a contract no liability exists on either side for the support of persons not paupers.[46] Nor can one who has bid off the keeping of a county poorhouse at a certain sum for each pauper recover for paupers supported by the county outside such poorhouse.[47] Where a person has performed his engagement in part, and has been prevented from fulfilling it by inevitable accident, he is entitled to compensation for the part performed, on an implied promise.[48]

Duration. Where one contracts to support a pauper for a certain period, he is under no obligation to support him for a longer period.[49] But if he continues the support of a pauper after the expiration of the period covered by his contract, without a renewal thereof, the town is not liable on the ground of failure to remove the pauper at the end of the time limited by the contract.[50] Where the overseer promises to pay for the keeping of a pauper until he removes him from plaintiff's care, the obligation

not to violate Const. art 1 § 1 par 14, relative to the use of public money in aid of sectarian institutions. Bennett v. La Grange, 153 Ga. 428, 112 SE 482.

[b] **Contract held constitutional.**—A contract by officers of the poor for the support of pauper colored children in a home incorporated for the care and maintainance of destitute or orphan colored children, and maintained by voluntary contributions by the public, does not violate a constitutional provision prohibiting the appropriation of municipal funds, or the lending of a municipality's credit to a corporation, etc. Colored Children's Home v. Cambria County Directors of Poor, etc., 72 Pa. Super. 106.

32. Perkins v. Hart County Ct., 10 Ky. Op. 570; Beetham v. Lincoln, 16 Me. 137; Davenport v. Hallowell, 10 Me. 317; Copple v. Davie County, 138 N. C. 127, 50 SE 574; Buck v. Worcester, 48 Vt. 1; Worcester v. Ballard, 38 Vt. 60; Blodgett v. Lowell, 33 Vt. 174; Howe v. Royalton, 32 Vt. 415.

Implied contracts see infra text and notes 33-36.

33. Ill.—Eshelman v. Clinton County, 88 Ill. A. 566.

Ind.—Howard County v. Jennings, 104 Ind. 108, 3 NE 619; Tipton County v. Brown, 4 Ind. A. 288, 30 NE 925.

Me.—Beetham v. Lincoln, 16 Me. 137.

N. Y.—King v. Butler, 15 Johns. 281.

N. C.—Copple v. Davie County, 138 N. C. 127, 50 SE 574.

Vt.—Worcester v. Ballard, 38 Vt. 60; Wolcott v. Wolcott, 19 Vt. 37; Aldrich v. Londonderry, 5 Vt. 441.

Wis.—Beach v. Neenah, 90 Wis. 623, 64 NW 319; McCaffrey v. Shields, 54 Wis. 645, 12 NW 54.

34. Mussel v. Tama County, 73 Iowa 101, 34 NW 762.

35. Schuylkill Directors v. Montour Overseers, 44 Pa. 484.

[a] **Rule applied.**—Where the poor directors accepted a pauper on removal, and requested the overseers of the removing town to "send bill of expenses," no such implied promise arose from the acceptance or the request as would support an action of assumpsit by the overseers to recover the expenses of maintainance. Schuylkill Directors v. Montour Overseers, 44 Pa. 484.

36. See supra § 244.

37. Freeman v. Dodge, 98 Me. 531, 57 A 884, 66 LRA 395; Rowell v. Vershire, 63 Vt. 510, 22 A 604, 62 Vt. 405, 19 A 990, 8 LRA 708.

[a] **Legal duty to support.**—It is the legal duty of a father, if able, to support his unemancipated daughter, and an agreement by the town, through its overseer, to pay him therefor, is without consideration, and is a mere nudum pactum, and void. Rowell v. Vershire, 63 Vt. 510, 22 A 604, 62 Vt. 405, 19 A 990, 8 LRA 708.

[b] **The moral obligation or contingent statutory liability** of a son to a reimburse a town for his mother's support is not a sufficient consideration for his promise to pay the same. Freeman v. Dodge, 98 Me. 531, 57 A 884, 66 LRA 395.

Consideration of contracts generally see Contracts §§ 144-244.

38. Palmyra v. Nichols, 91 Me. 17, 39 A 338.

Indemnity against contingent claims for medical services see supra § 250.

39. Palmyra v. Nichols, 91 Me. 17, 39 A 338.

40. Palmyra v. Nichols, supra.

41. Amazeen v. Newcastle, 76 N. H. 250, 81 A 1079.

42. Amazeen v. Newcastle, supra.

43. See Contracts §§ 481-592.

44. Saco v. Osgood, 5 Me. 237; Kirk v. Brazos County, 73 Tex. 56, 11 SW 143.

[a] **Bond conditioned to save town harmless from all damages, costs, and expenses,** etc., construed. Saco v. Osgood, 5 Me. 237.

[b] **Term "all other paupers" construed.**—Kirk v. Brazos County, 76 Tex. 56, 11 SW 143.

45. Macoupin County v. Edwards, 15 Ill. 197; Reniche v. Allen County, 20 Ind. 243; Wood v. Burlington, 1 Metc. (Mass.) 489.

[a] **Insane persons.**—Where plaintiff entered into a written contract with the county court of A county to receive and properly feed and clothe every pauper sent to him upon the order of any one member of such court for a specified sum, it was held that under the statute the term "pauper" included lunatics who were paupers, although the trouble and expense were increased by reason of their insanity. Macoupin County v. Edwards, 15 Ill. 197.

46. Logan County v. McFall, (Ida) 35 P 691; Hayford v. Belfast, 80 Me. 315. 14 A 287.

47. Polk v. Covington County, 77 Miss. 803, 27 S 598.

48. Willington v. West Boylston, 4 Pick. (Mass.) 101.

[a] **Death of pauper.**—Where a person entered into a contract with a town to support a pauper for one year, at the rate of one dollar a week, and the pauper died within the year, it was held that the express contract was dissolved by the death of the pauper, and that the person contracted with was entitled to recover a compensation for supporting the pauper until his death, upon an implied promise. Willington v. West Boylston, 4 Pick. (Mass.) 101.

49. Aldrich v. Londonderry, 5 Vt. 441.

50. Smith v. Colerain, 9 Metc. (Mass.) 492; Castelman v. Miner, 8 Vt. 209; Aldrich v. Londonderry, 5 Vt. 441.

[a] **Removal of pauper from town during life of contract.**—(1) Where one under contract with a town to support a pauper for a year removes the pauper during the year to another town, such removal does not terminate the contract, and the town, not having taken the pauper back, is liable for his support until the end of the year (Newton v. Waterford, 67 Vt. 372, 31 A 782; Durfey v. Worcester, 63 Vt. 418, 22 A 609); (2) but the town is not liable for support furnished the pauper after the expiration of the year, since it is plaintiff's duty to return the pauper at the

of the town to pay continues in force until such removal,[51] and the fact that the overseer came to plaintiff's home with the intention to remove the pauper, and went away without doing so, saying that he would never come again, is immaterial, when plaintiff did nothing to prevent the removal.[52]

Rescission. Where a contract is made for the support of the poor of a town or county for an indefinite period, payment for such support to be made at stipulated periods, either party to the contract may rescind it at the expiration of such stipulated period.[53]

[§ 253] **H. Services and Earnings of Pauper—1. Right Thereto—a. Of Town.** Municipalities called upon to support paupers have a right to their services and earnings to aid in their support,[54] and the inmates of poorhouses, etc., may be required to labor for the establishment to a reasonable extent.[55] But a town is not entitled to the earnings of a minor child, not a pauper,[56] although his parent is a pauper and is maintained by the town.[57]

Slaves. A person who had used the services of a negro as a reputed slave was held not to be liable to the town which subsequently supported the negro as a pauper, for the value of his services while in such person's service.[58]

[§ 254] **b. Of Persons Becoming Liable for Support by Contract with Town.** Any person who may have become liable for the support of a pauper by virtue of a contract with the town is entitled to his moderate services and the benefits thereof.[59]

[§ 255] **c. Of Pauper.** A person having a right to ordinary and moderate services from a pauper by virtue of a contract with the town may bind himself by special contract to pay him wages for particular services,[60] and it is too late for such person, after entering into a special contract with a pauper, and after the latter has performed the contract, to contend that he had a right to all the pauper's services.[61] So if the keeper of a county poorhouse employs one of the paupers therein for his individual benefit, upon a promise of compensation, he is liable in an action for work and labor performed.[62] But where the value of the services performed for the town exceeds the amount expended for his relief, the pauper cannot recover the excess in an action against the town for work and labor,[63] unless there are special circumstances warranting recovery.[64]

[§ 256] **2. Settlement and Adjustment of Rights.** An overseer of the poor having power to make a valid contract as to the pauper's services has the right to settle and adjust all disputes that may arise concerning it,[65] and, in the absence of fraud, a settlement made between the overseer and the other contracting party is conclusive.[66]

[§ 257] **I. Support in Poorhouses[67]—1. In General.** Unless the statute expressly confers on overseers of the poor the power so to do, they cannot remove and maintain a poor person, against his will, in a poorhouse outside of the poor district to which such poor person belongs.[68] Under the statutes in some jurisdictions paupers may be sent to, and kept in, the county poorhouse at the expense of the county,[69] if the provisions of the statutes as to the persons to be admitted[70] and the proceedings prelimi-

end of the year (South Burlington v. Worcester, 67 Vt. 411, 31 A 891; Newton v. Waterford, supra; Baldwin v. Worcester, 67 Vt. 285, 31 A 413).

51. Buck v. Worcester, 48 Vt. 1.

52. Buck v. Worcester, supra.

53. Palmer v. Vandenbergh, 3 Wend. (N. Y.) 193; Edwards v. Branch, 52 N. C. 90.

[a] **Rule applied.**—(1) One contracting with the overseers of the poor to support a child until it is five or six years old, or so long as it should be chargeable to the town, payment for the support to be made weekly, may put an end to his obligation at the end of the week, the contract being for no definite period. McLees v. Hale, 10 Wend. (N. Y.) 426. (2) An order, made by the wardens of the poor of a county, that a particular sum should be allowed and placed in the hands of A, payable semiannually, for the benefit of a pauper, was repealable within the time of the first half year, although A had proceeded under such order to purchase provisions for the whole year, and he was held only entitled to one-half yearly installment. Edwards v. Branch, 52 N. C. 90.

54. McCarthy v. Hinman, 35 Conn. 538; Clinton v. Benton, 49 Me. 550; Taunton v. Talbot, 186 Mass. 341, 71 NE 785, 1 AnnCas 34; Wilson v. Brooks, 14 Pick. (Mass.) 341; Wilson v. Church, 1 Pick. (Mass.) 23; Abbott v. Fremont, 34 N. H. 432.

[a] **Town is entitled to all the earnings of the state paupers** supported by the town, together with the allowance made by the state for each of them, provided they do not exceed the expenses. Com. v. Cambridge, 20 Pick. (Mass.) 267.

[b] **Town, in stating an account with the commonwealth as to the support of state paupers,** is bound to credit the value of the pauper's labor only, and not any share of the profits, if there be any, which the town derives from their labor. Com. v. Cambridge, 4 Metc. (Mass.) 35.

[c] **In an action by the commonwealth against a town to recover back money overpaid for the support of state paupers,** where the court appointed an auditor to examine the vouchers of the accounts of the town agent respecting such paupers, such auditor may require the value of the pauper's labor, which was estimated and credited in the agent's accounts, and may thereupon state an account in which the labor is estimated at a less value than in the accounts of the agent. Com. v. Cambridge, 4 Metc. (Mass.) 35.

Liability of pauper for support where sum expended does not exceed value of services see supra § 203.

55. See cases supra note 54.

56. Jenness v. Emerson, 15 N. H. 486.

57. Jenness v. Emerson, supra.

58. Overseers v. Kline, 9 Pa. 217.

59. Wilson v. Church, 1 Pick. (Mass.) 23.

[a] **Services of person no longer a pauper.**—Where a person who had been supported by his town as a pauper had bodily health and strength, although of small mental capacity, and was able to earn more than enough to support himself, and had found an employer, he was no longer a pauper, and consequently, where the town made a contract with plaintiffs that they should take care of all the paupers belonging to the town, and be entitled to their services, it was held that they were not entitled to his services. Wilson v. Brooks, 14 Pick. (Mass.) 341.

60. Wilson v. Church, 1 Pick. (Mass.) 23.

61. Wilson v. Church, supra.

62. Bergin v. Wemple, 30 N. Y. 319.

63. Abbott v. Fremont, 34 N. H. 432.

64. Abbott v. Fremont, supra.

[a] **Thus,** if the overseers of the poor retain in their town as a pauper an insane person, not needing relief, for the sake of the profit to be made for the town out of his labor, and let out his labor for a year to one who pays the town an agreed sum beyond providing for the insane pauper's support, the latter may waive his remedy against the overseers for the personal injury, and recover the money from the town in an action for money had and received. Abbott v. Fremont, 34 N. H. 432.

65. Billings v. Kneen, 57 Vt. 428.

66. Billings v. Kneen, supra.

67. Establishment and conduct of poorhouses see supra §§ 31, 32.

Power and duty to support paupers in poorhouses generally see supra §§ 20, 31.

68. Armstrong v. Berwick Borough, 10 Pa. Co. 337; McDougall v. Sydney Mines, 45 N. S. 348, 353 [cit Cyc].

69. See statutory provisions.

70. See cases infra this note.

[a] **In Indiana** (1) 1 Rev. St. p 405 § 24 makes it the duty of the overseers of the poor to grant temporary relief to persons not inhabitants of their township, lying sick therein or in distress without money or friends. Section 13 provides that, whenever any person entitled to temporary relief as a pauper shall be in any township in which he has not a legal settlement, the overseers of the poor thereof may grant such relief by placing him temporarily in the poorhouse of such county. It was held that persons entitled to relief, under § 24, may be properly placed in the county poorhouse for relief. Reiniche v. Allen County, 20 Ind. 243. (2) But such statute was not intended to require that residents, needing temporary relief, should necessarily be removed to the poorhouse before receiving relief. Bartholomew County v. Wright, 22 Ind. 187.

[b] **In Ohio** the superintendent of a county infirmary cannot be compelled to receive into such institution a pauper lunatic, an inmate of an insane asylum in the county, who had become insane before he had acquired a settlement, and was discharged from the asylum without the certificate required by statute. State v. Ritt, 6 Oh. Dec. (Reprint) 940, 8 Am LRec 750.

nary to admission[71] are complied with.

Liability of pauper and his estate.[72] It has been held that, where a person is duly admitted into the county poorhouse and supported there, pursuant to statute, the county cannot recover the value of such support either upon an express[73] or implied[74] contract, unless such recovery is authorized by statute;[75] and the fact that the pauper owned property at the time of his admission will not render his estate liable in the absence of affirmative evidence of deception on his part as to his need of relief.[76] On the other hand it has been held that a county may recover from the estate of an inmate of the county poor farm for support furnished after the time he became financially able to support himself.[77] But it has been held that a pauper inmate is under no obligation, after coming into possession of funds, to pay for support furnished prior to that time,[78] and payment by him in settlement of the county's claim is without consideration.[79] In the absence of statute, however, the pauper has no right of action against the county to recover back the sum so paid.[80]

Liability of pauper's relatives.[81] In some jurisdictions it has been held that, under a statute authorizing recovery against a pauper's relatives for money expended in his relief, a county may recover from such relatives money expended for relief at a poor farm.[82] The fact that the pauper was admitted to the poor farm without formal written order,[83] or without the making of any record in relation thereto,[84] will not relieve the relative from liability for his support therein.

[§ 258] **2. State Almshouses.** The town of a pauper's settlement is not liable for the expenses of his support at a state almshouse[85] unless the statute so provides.[86]

[§ 259] **J. Support in Asylums**[87]**—1. Local Authorities Liable.** The support of insane paupers committed to the state asylum is usually imposed by statute upon the towns or poor districts in which they had their settlement,[88] or, where an insane pauper is committed from a town or poor district other than that of his settlement, it is made directly liable for his support, with the right to recover therefor from the town or district in which the pauper has his settlement.[89] Where the insane pauper has

71. Rockaway Tp. v. Morris County, 68 N. J. L. 16, 59 A 373; Pomeroy v. Wells, 8 Paige (N. Y.) 406.

[a] **Unless an order to that effect has been made by the overseers of the poor,** or a warrant has been issued for the removal of a pauper to the county poorhouse as a lunatic, the superintendents of the poor are not authorized to receive a pauper into the county poorhouse to be supported at the expense of the town. Pomeroy v. Wells, 8 Paige (N. Y.) 406.

[b] **Refusal of steward of poorhouse to receive pauper.**—Where the provision of the statute with regard to proceedings fixing the settlement of a pauper and his commitment to the poorhouse have been substantially complied with, the refusal of the steward of the poorhouse to receive such pauper amounts to a waiver of his actual delivery to him by the overseer of the poor of the town, and the county thereby becomes charged with the expense of thereafter maintaining him. Rockaway Tp. v. Morris County, 68 N. J. L. 16, 52 A 373.

72. For support generally see supra §§ 202, 203.

73. Montgomery County v. Ristine, 124 Ind. 242, 24 NE 990, 8 LRA 461; Noble County v. Schmoke, 51 Ind. 416.

74. Montgomery County v. Ristine, 124 Ind. 242, 24 NE 990, 8 LRA 461; Switzerland County v. Hildebrand, Smith (Ind.) 361.

75. Montgomery County v. Nyce, 161 Pa. 82, 28 A 999 [aff 13 Pa. Co. 594].

[a] **Rule changed by statute.**—Under Act (1836) § 33, directors of the poor may recover for the support of an inmate of the poorhouse out of money coming to him after the support was furnished. Montgomery County v. Nyce, 161 Pa. 82, 28 A 999 [aff 13 Pa. Co. 594].

76. Matter of Carroll, 55 Misc. 496, 106 NYS 681, 6 Mills Surr. 232 [aff 127 App. Div. 932 mem, 111 NYS 1112 mem].

77. Tazewell County v. Cooney, 215 Ill. A. 617.

[a] **After a pauper's death there is no presumption** that the county intended his support in the county poor farm to be a charitable gift where it appears that for a part of the time he had been financially able to support himself. Tazewell County v. Cooney, 215 Ill. A. 617.

78. Potter-Matlack Trust Co. v. Edmonson County, 210 Ky. 705, 276 SW 491; Mason County Infirmary v. Smith, 111 Ky. 636, 64 SW 466, 23 KyL 860.

79. Potter-Matlack Trust Co. v. Edmonson County, 210 Ky. 705, 276 SW 491.

80. Potter-Matlack Trust Co. v. Edmonson County, supra.

81. Right of action against relatives for support of paupers generally see supra § 200.

82. Hamilton County v. Hollis, 141 Iowa 477, 119 NW 978.

[a] **Veteran soldiers.**—Under Code §§ 2230, 2231, a soldier and his wife may be maintained at the poor farm where they need relief in excess of two dollars each per week, and this amount expended by the county for relief may be recovered from the relatives liable under the statute. Hamilton County v. Hollis, 141 Iowa 477, 119 NW 978.

83. Bremer County v. Schroeder, 200 Iowa 1285, 206 NW 303.

84. Bremer County v. Schroeder, supra.

85. Com. v. Dracut, 8 Gray (Mass.) 455.

86. Com. v. Dracut, supra.

[a] **Statute construed.**—(1) St. (1855) c 445, making the city or town of a pauper's settlement liable to the state for his support in a state almshouse, is prospective only, and the place of settlement is liable only for the expense incurred in the support of paupers after the passing of the statute. Com. v. Dracut, 8 Gray (Mass.) 455. (2) The state can recover only the expense incurred within three months next before notice to the town that a pauper was being supported in the almshouse. Com. v. Dracut, supra.

87. Asylums generally see Asylums 5 C. J. p 1416.

Liability:

For support of criminal insane see Insane Persons § 559.

Of:

Pauper or pauper's estate see Insane Persons § 374.

Public authorities generally see Insane Persons § 373.

Relatives of lunatic see Insane Persons §§ 368-373, 374.

88. See statutory provisions.

[a] **Statute held not repealed.**—Adams v. Ipswich, 116 Mass. 570.

[b] **Statutes construed and applied.**—Gould v. Lawrence, 160 Mass. 232, 35 NE 462 (word "support" construed); Jackson County Superintendents of Poor v. Hillsdale County Superintendents of Poor, 124 Mich. 17, 83 NW 408 (term "legal settlement" defined); State v. Cole County Ct., 80 Mo. 80; Rex v. Staffordshire Justices, [1912] 1 K. B. 616; Calne Union Guardians of Poor v. Wilts County, [1911] 1 K. B. 717.

[c] **Commitment of pauper confined in house of correction.**—(1) The town where an insane pauper, confined in the house of correction and afterward sent to a state lunatic asylum by order of the probate court, has a settlement is liable for his expenses in such asylum (Bradford v. Cambridge, 195 Mass. 42, 80 NE 610; Smith v. Lee, 12 Allen (Mass.) 510), (2) even after his sentence to the house of correction has expired (Smith v. Lee, supra). (3) Rev. L. c 225 § 111, providing that the expense of supporting a prisoner removed from a jail or house of correction to the state asylum shall be paid by the county from which he is removed, does not apply to transfers to that part of the state farm known as the "State Asylum for Insane Criminals." Bradford v. Cambridge, supra.

89. See statutory provisions; and cases infra this note.

[a] **Statutes construed.**—(1) Foster v. Worcester, 16 Pick. (Mass.) 71. (2) "Although the word 'pauper' is not used in this section [Gen. St. c 73, § 25] the plain intent of the Legislature was to give to towns paying the expenses of a lunatic, committed to either state hospital, the same rights and remedies against the place of his settlement, as if the expenses had been incurred in the ordinary support of a pauper." Waltham v. Brookline, 119 Mass. 479, 480.

[b] **In Connecticut** (1) Gen. St. § 487, providing that, when any pauper in any town shall be insane, a selectman of such town may apply to the probate court of the district wherein the pauper resides for his commitment to the state hospital for the insane and that, if so committed, the expense of his support shall be paid by the town legally chargeable with his support, was held to apply to any insane pauper found in a town, regardless of his fixed residence or of the length of time he had been in the town. Connecticut Insane Hospital v. Brookfield, 69 Conn. 1, 36 A 1017. (2) The object of the statute was to put the pauper, as soon as possible, into a hospital where he could secure proper treatment, and the humane purpose of the legislature might often be defeated if only a selectman of that town, perhaps a distant one, where the pauper statedly resided, or to which he was legally chargeable as a settled inhabitant, could act. Connecticut Insane Hospital v. Brookfield, supra.

no settlement within the state, the liability for his support is in some jurisdictions imposed upon the state,[90] and in others upon the county, town, or poor district in which he resides or from which he is committed.[91]

Notice to fix liability.[92] Where the statute gives a town a right to reimbursement for expenses incurred in the support of a pauper in an asylum, upon giving notice to the town of the pauper's settlement,[93] the giving of proper and timely notice to the town of settlement is a condition precedent to the right of action to recover such expenses,[94] unless notice is waived.[95] But in the absence of any provision for notice none need be given.[96]

[§ 260] **2. Validity of Commitment.** The proceedings for the commitment of a pauper must show a substantial compliance with the statute,[97] and where such commitment is irregular, the expenses of the pauper's commitment and maintenance in the asylum cannot be recovered from the place of his settlement.[98] Under some statutes a commitment by overseers of the poor without an adjudication by any court or magistrate is irregular, so that the town cannot recover the cost of the lunatic's support from the place of his settlement.[99] In other jurisdictions such a commitment is within the meaning of the statute, and a recovery is permitted.[1]

Commitment to asylum or home for children. The rule of nonliability for the support of a pauper in an asylum, where the commitment thereto is invalid,[2] applies where one town seeks to recover from another town the expenses of supporting a child committed to a home or institution for destitute children.[3] In some jurisdictions, counties are made

[c] **In New Jersey** the county in which a lunatic in indigent circumstances, but not a pauper actually resides when he is sent to the asylum is primarily liable for his support, without reference to his settlement under the poor laws, and cannot look to any other county for reimbursement. Mercer County v. Warren County, 23 N. J. L. 415.

[d] **In Pennsylvania** (1) a hospital may recover for the support of an insane pauper either from the city or county from which the pauper was sent, or from the township to which he is chargeable. State Hospital v. Bellefonte Borough, 163 Pa. 175, 29 A 901. (2) The courts may determine where insane paupers shall be kept, and where an insane pauper is placed in the state lunatic hospital, the county is primarily liable for the expense of care, maintenance, and removal, with the right to recover from the township or poor district within which such pauper had a settlement at the time of commitment. Clearfield County v. Cameron Tp. Poor Dist., 135 Pa. 86, 19 A 952; Davidson Tp's. App., 68 Pa. 312; Lower Augusta Tp. v. Northumberland County, 37 Pa. 143; Franklin Tp. v. Pennsylvania State Lunatic Hospital, 30 Pa. 522; Centre County v. Howard Borough Poor Dist., 26 Pa. Co. 183; Ketcham's Case, 14 Pa. Co. 9; Pennsylvania State Lunatic Hospital v. Wayne County, 2 Pearson 83; In re Blewitt, 11 Phila. 652.

[e] **In Rhode Island,** prior to Revised Statutes of 1857, payments at the asylum, made by the town in which a lunatic pauper was arrested, could not be recovered of the town in which he was settled, and, if made, were voluntary and irrecoverable. Hopkinton v. Waite, 6 R. I. 374.

Cross references:
Limitation of actions see infra § 272.
Nature and extent of relief:
Generally see supra § 241 text and notes 22, 23.
Support in asylum in another state see supra § 241 text and note 33.
Notice to town or district of pauper's settlement see infra text and notes 92–96.
Validity of commitment see infra § 260.

90. See statutory provisions.

[a] **In Pennsylvania** (1) Act 1854 (P. L. p 85), imposing the burden of supporting an insane person who has been committed to the state lunatic hospital, and who has no legal settlement in the state, upon the county where he was found a lunatic, has not been repealed. Juniata County v. Delaware Tp. Overseers of Poor, 107 Pa. 68. (2) Under such statute, where a person abandons his settlement in the state and acquires a settlement in another state, and thereafter returns and resides in his old township without acquiring a new legal settlement, and becomes insane, the county where he resided when he became insane is liable for his support. Juniata County v. Delaware Tp. Overseers of Poor, supra. (3) Under Act April 22, 1863 (P. L. p 539), where an insane person has no legal settlement in the state, the county, town, or poor district where he has his residence is regarded as the place of his settlement, and is liable for his support in an asylum. Harmony Tp. Overseers of Poor v. Forest County, 91 Pa. 404.

91. See statutory provisions.

[a] **Mistake as to settlement.**—(1) Recovery of money paid by the state under a mistaken belief that a pauper had no settlement therein. Jennison v. Roksbury, 9 Gray (Mass.) 32. (2) Liability of town of settlement where the state recovers from an asylum money paid under the mistaken belief that the pauper had no settlement in the state. Andover v. East Hampton, 5 Gray (Mass.) 390.

92. Notice by:
Individual furnishing relief see supra § 230.
Local authorities furnishing relief see supra §§ 214–239.

93. See statutory provisions.

94. Eastport v. Belfast, 40 Me. 262; Taunton v. Wareham, 153 Mass. 192, 26 NE 451; Andover v. East Hampton, 5 Gray (Mass.) 390; Danville, etc., Poor Dist. v. Montour County, 75 Pa. 35; In re Blewitt, 11 Phila. (Pa.) 652.

[a] **Written notice required.**—Eastport v. East Machias, 40 Me. 280.

[b] **Notices held sufficient.**—(1) Generally. Rockport v. Searsmont, 103 Me. 495, 70 A 444; Bangor v. Orneville, 90 Me. 217, 38 A 153. (2) A notice describing an insane person as a pauper, but stating that he was supported in the insane hospital, and correct in other particulars, is not defective by reason of his being called a pauper, although the statute forbids that care in the insane hospital shall render a person a pauper, all the important facts being set forth and the demand being clearly for support in the hospital. Bangor v. Wiscasset, 71 Me. 535.

[c] **The time within which notice must be given to recover expenses incurred in the support of a pauper at a lunatic asylum** is very generally by statute prescribed to be the same as in the case of ordinary pauper expenses, that is, within three months after the expenses were incurred. West Gardiner v. Hartland, 62 Me. 246; Jay v. Carthage, 48 Me. 353; Bangor v. Fairfield, 46 Me. 558; Cooper v. Alexander, 33 Me. 453; Northampton v. Plainfield, 164 Mass. 506, 41 NE 785; Amherst v. Shelbourne, 11 Gray (Mass.) 107; Cummington v. Wareham, 9 Cush. (Mass.) 585; Worcester v. Milford, 18 Pick. (Mass.) 379.

95. Bradford v. Cambridge, 195 Mass. 42, 80 NE 610.

96. Merrimack County v. Jaffrey, 58 N. H. 426; Merrimack County v. Concord, 39 N. H. 213.

97. See cases infra note 98.

98. Naples v. Raymond, 72 Me. 213; Hopkinton v. Waite, 6 R. I. 374.

[a] **Commitment held valid.**—(1) The omission, in a justice's warrant for the commitment of an insane person, to state the town in which the lunatic was arrested, and that no recognizance was offered on behalf of the lunatic, cannot, where the insane person is a pauper, avail the town in which he is settled, in defense to a suit to recover the amount paid for his support at the hospital by the town in which he was arrested. Hopkinton v. Waite, 6 R. I. 374. (2) Other cases where commitment was held valid. Bangor v. Orneville, 90 Me. 217, 38 A 153; Etna v. Brewer, 78 Me. 377, 5 A 884; Bowdoinham v. Phippsburg, 63 Me. 497.

[b] **Commitment held invalid.**—A commitment was insufficient where there was no proof that the selectmen, in making the same, had before them the evidence and certificate of at least two respectable physicians, based upon due inquiry and a personal examination of the person to whom insanity was imputed, as required by the statute. Naples v. Raymond, 72 Me. 213.

[c] **An illegal commitment may be cured** by a legal recommitment, so that the expenses of the illegal commitment and support thereunder may be recovered from the place of the pauper's settlement. Rockport v. Searsmont, 103 Me. 495, 70 A 444.

99. See statutory provisions.

[a] **In Rhode Island,** where a pauper is committed to an insane asylum by a justice of the peace under Rev. St. c 53 §§ 1–3, the expenses of the pauper are chargeable in the first instance to the town in which he is committed, to be recovered, however, from the town of his legal settlement when that is ascertained. Section 11 of the statute authorizes an overseer of the poor of a town to place in an asylum pauper lunatics chargeable to such town, but gives the overseer no authority to remove to an asylum a lunatic settled in another town. It was held that, where a pauper lunatic was sent to an insane asylum by an overseer of the town instead of by a justice of the peace, such town is liable for the expense, and cannot have reimbursement from the town of the pauper's settlement. Tiverton v. Fall River, 7 R. I. 182.

1. Cummington v. Wareham, 9 Cush. (Mass.) 585.

2. See supra text and notes 98, 99.

3. Limington v. Alfred, 122 Me. 171, 119 A 121; Machias v. East Machias, 116 Me. 423, 102 A 181.

[a] **In New York,** by analogy to Code Cr. Proc. § 892, providing that the care of adult vagrants shall be at the expense of the town where they resided at the time of their commitment, the care of vagrant children will also be at the town's expense. St. Agnes Girls' Training School v. Erie County, 68 Misc. 648, 124 NYS 984.

liable in certain cases for the maintenance of children in an asylum for the deaf and dumb, subject to rules of the state board of charities regulating admission to such an institution,[4] but the enforcement of such rules may be waived.[5]

[§ 261] **K. Support in Reformatories and Prisons or Jails—1. Reformatories.**[6] In the absence of statute,[7] there can be no liability on the town where a person had his last legal settlement to pay the county for his maintenance in a reformatory.[8] By statutes in some jurisdictions the town where a pauper, committed to the house of correction, has his legal settlement is made liable to the master of such house of correction for the expense of his support.[9] Under such a statute the town in which the pauper has a settlement at the time the expense of his support is incurred is liable therefor, although he gains a settlement in another town before the account of such expense is audited and certified by the overseers of the house of correction.[10] Nor is the town of a pauper's settlement relieved from liability for his support by the neglect of such overseers to perform their statutory duty of establishing rules to govern the persons committed, of providing the materials for their employment, and of keeping account thereof.[11] But the town of a pauper's settlement is not liable for his support in the house of correction, unless the account thereof be audited and certified by the overseers of such house within the time prescribed by the statute.[12] Under some statutes the town from which an inmate of the reformatory was committed may recover for his support from the town of his legal settlement.[13]

[§ 262] **2. Prisons or Jails.**[14] The keeper of a prison or jail has no right of action against a town for the support of a prisoner, independently of statute or contract.[15] But some statutes give a right of action against the town where the offense was committed,[16] while others impose on the town where the jail is situated the duty in the first instance to support a prisoner, when in need thereof, and give it the right to reimbursement from the town of his legal settlement.[17] But a town which has paid for the support of a criminal in its workhouse, without being liable to do so, cannot recover therefor from the town of his settlement.[18]

Liability after notice. A person confined in jail is regarded as a pauper within the meaning of a statute requiring that every town shall be liable for any expense which shall be incurred for the relief of any pauper by any inhabitant, not liable by law for his support, after notice and request made to the overseers of such town, and until provision made for him.[19] The provision of the statute to this effect has been held in some jurisdictions applicable

[b] **In England,** under Elementary Education Act (1893) § 9, where a school authority incurs any expense under the act in respect of any blind or deaf child, the parent of the child shall be liable to contribute toward the expenses of the child such weekly sum, if any, as may be agreed on between the school authority and the parent, or, if the parties fail to agree, as may be settled by a court of summary jurisdiction. The Elementary Education Act of 1870 provides: "The term 'parent' includes guardian and every person who is liable to maintain or has the actual custody of any child." It was held that the words "liable to maintain" in the act of 1870 had no application to a board of guardians, who were liable to provide poor law relief for a deaf pauper child, and that, where such a child had been boarded out by school authority, the guardians were not included under the term "parent" in Act (1893) § 9, and were not liable to contribute as such toward the expenses of the child. Southwark Union Guardians of Poor v. London County, [1910] 2 K. B. 559.

Commitment of juvenile delinquents and dependents generally see Infants §§ 211-247.

4. See statutory provisions.

5. Matter of Lansing, 89 Misc. 312, 153 NYS 639.

[a] **Illustration.**—A rule of the state board of charities that no destitute person shall be retained in an institution for deaf mutes, as a public charge, unless accepted in writing as such, by the officer charged with the support and relief of the county poor, etc., is waived where there is attached to the bill of such an institution against the county for the support of an inmate a certificate of the state board of charities reciting that "the institution has complied with the rules of the board for the reception and retention of inmates." Matter of Lansing, 89 Misc. 312, 153 NYS 639.

6. **Compensation and reimbursement for maintenance in reformatories generally** see Reformatories [34 Cyc 1009].

7. Lawrence County v. Big Beaver, 2 Pa. Dist. 760, 12 Pa. Co. 414.

[a] **Nature of offense.**—Under the act of April 17, 1869, the liability of a township does not depend on the fact that the person sent to the reformatory was convicted of a misdemeanor or a felony, but on the fact that he was committed. Lawrence County v. Big Beaver, 2 Pa. Dist. 760, 12 Pa. Co. 414.

8. Lawrence County v. Big Beaver, supra.

9. See statutory provisions.

[a] **Support of an insane person** confined in a house of correction is imposed, by St. (1836) c 223, on the town of his settlement, if he has no parent, master, or kindred legally liable for his support. Watson v. Charlestown, 5 Metc. (Mass.) 54.

[b] **Unless he be committed by virtue of Rev. St. c 143 § 5 or § 6,** a town in which a convict, who is committed to the house of correction, has a settlement, is not, by any statute, liable to pay the expense of supporting him in such house. Boston v. Dedham, 8 Metc. (Mass.) 513.

[c] **Cost of commitment** not recoverable. Gilman v. Portland, 51 Me. 457.

[d] **Demand upon the selectmen of the town for expenses** due the master of the house of correction in Boston, for the support of a pauper, must be made by the master either in person or by letter, or by some person receiving authority from the master or the city. Boston v. Weston, 22 Pick. (Mass.) 211; Robbins v. Weston, 20 Pick. (Mass.) 112.

10. Boston v. Amesbury, 4 Metc. (Mass.) 278.

11. Wade v. Salem, 7 Pick. (Mass.) 333.

12. Boston v. Amesbury, 4 Metc. (Mass.) 278.

13. See statutory provisions.

[a] **In Maine** the town from which a truant is committed to the reform school may recover from the town of the truant's settlement money paid to the superintendent of the reform school for the support of such truant. Cushing v. Friendship, 89 Me. 525, 36 A 1001.

14. **Compensation and reimbursement for maintenance of prisoners generally** see Prisons [32 Cyc 347 et seq].

15. Mace v. Nottingham-West, 1 N. H. 52; Houghton v. Danville, 10 Vt. 537.

16. See statutory provisions.

[a] **Statute construed.**—Under Gen. L. § 4222, imposing ultimate liability for support of poor prisoners on the town where the offense was committed, the word "offense" means the act that gives rise to the cause of action for which the offender is jailed, and hence a jailer must bring an action for the support of prisoners, one of whom was confined for timber cutting, and another on a bastardy charge, pursuant to Gen. L. § 3618, against the respective towns wherein the offense was committed, and not against the town where the jail was located. Smith v. Rutland, 99 Vt. 183, 130 A 714.

17. See statutory provisions.

[a] **Unless the prison keeper is bound to furnish him supplies,** a person imprisoned in the common jail is regarded as a pauper within the meaning of the statute giving the town where the jail is situated and obligated to support him the right to recover therefor against the town of his legal settlement. Amherst v. Hollis, 9 N. H. 107.

[b] **Prisoner held destitute and in need.**—Solon v. Perry, 54 Me. 493; Norridgewock v. Solon, 49 Me. 385; Pawlet v. Rutland, Brayt. (Vt.) 175.

[c] **Statutes construed.**—Upon the conviction and sentence of a person to imprisonment for larceny, under Pub. St. c 203 § 20, his town is not liable for his support as a pauper, since he is a criminal whose support during confinement is first to be borne by the county, under the express provisions of Pub. St. c 220 §§ 53, 54, relating to the expense of supporting prisoners, the liability of a town for the support of prisoners having a settlement therein being limited to those sentenced for stealing property less than five dollars in value, under Pub. St. c 203 § 23, or for being rogues, vagabonds, etc., under c 207 § 29, and Pub. St. c 220 § 61, allowing a recovery from the town in those cases. Whately v. Hatfield, 196 Mass. 393, 82 NE 48, 13 AnnCas 690.

18. Worcester v. Auburn, 4 Allen (Mass.) 574.

19. Holmes v. St. Albans, Brayt. (Vt.) 179. And see cases infra note 20.

Liability to individual after notice

to persons detained in jail on civil process,[20] but not to persons confined on criminal process.[21]

[§ 263] **3. Validity of Commitment.** It has been held in some jurisdictions that the invalidity of the commitment of a person to a reformatory or workhouse is a defense to an action against the town to enforce its liability for his support while there,[22] but in others it has been held that actual commitment is sufficient to fix such liability, although the commitment was unlawful.[23]

[§ 264] **L. Actions against Municipalities for Supplies, Services, and Expenditures[24]—1. Right of Action—a. By Town or County.** As the liability of municipalities for the support of paupers is purely statutory,[25] one municipality furnishing relief to a pauper, the duty to support whom is imposed upon another municipality, cannot, in the absence of statutory provision, recover the cost thereof from the latter;[26] and it has been held that action for reimbursement cannot be maintained on a general statutory provision declaring it to be the duty of a town or county to support its own paupers,[27] although some authorities have held that such a statutory provision imposes on a town or county a legal obligation which, if it refuses to discharge it, gives a right of action to another town or county furnishing such support for reimbursement,[28] and the fact that plaintiff municipality had not actually paid for the supplies is immaterial, the liability to pay for them being sufficient.[29] On the other hand it has been held that, where the overseers of a town have committed to a hospital an insane person belonging to another town, a right of action to recover the expenses of maintenance therein does not accrue until the amount due to the hospital is paid.[30] A right of action for reimbursement is frequently given by express provision of statute.[31] A town is not the less entitled to recover the amount expended because it will inure to the benefit of a contractor who by agreement furnished the supplies.[32] Nor is the right of recovery affected by the residence of the pauper during the pendency of this action.[33]

Recovery of money paid under mistake. An action ordinarily will lie by one town to recover money voluntarily paid to another town to reimburse it for the support of a pauper under the mistaken belief that it was liable for such support.[34]

[§ 265] **b. By Individuals.**[35] As previously stated, an individual furnishing support or other relief to a pauper has a right of action against the town or poor district liable for the relief of the pauper when, and only when, such right of action is expressly conferred by statute or is founded on an express or implied contract.[36]

[§ 266] **2. Nature and Form of Remedy.**[37] The particular remedy provided by statute for the recovery by one town or poor district for relief extended to a pauper whose place of settlement is in another town or district is usually held to be exclusive,[38] although, on the other hand, it has been held that a statute providing a particular mode of redress in a summary way does not take away the common-law remedy.[39] But unless another remedy is expressly provided by statute, assumpsit will lie against the town or district of the pauper's settlement.[40] So if the remedy given by statute is inadequate, plaintiff may resort to the means of redress given by the common law.[41]

Where two statutory remedies are not antagonistic, both may exist at the same time.[42]

for support furnished pauper generally see supra § 230.

20. Sayward v. Alfred, 5 Mass. 244; Doggett v. Dedham, 2 Mass. 564; Cargill v. Wiscasset, 2 Mass. 547.

21. Adams v. Wiscasset, 5 Mass. 328.

22. Portland v. Bangor, 65 Me. 120, 20 AmSR 681; Lewiston v. Fairfield, 47 Me. 481.

[a] **Commitment held valid.**—Portland v. Bangor, 42 Me. 403.

23. Taunton v. Westport, 12 Mass. 355; Newfane v. Dummerston, 34 Vt. 184.

24. Against individuals liable see supra § 200.

Proceedings to compel relatives to support paupers see supra §§ 187-199.

25. See supra § 7.

26. Colo.—Gunnison County v. Ouray County, 53 Colo. 287, 125 P 536.

Me.—Machias v. Wesley, 99 Me. 17, 58 A 240; Newry v. Gilead, 60 Me. 154.

Mass.—Com. v. Dracut, 8 Gray 455; Deerfield v. Greenfield, 1 Gray 514; Marlborough v. Framingham, 13 Metc. 328; Dalton v. Hinsdale, 6 Mass. 501.

Nebr.—Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132.

N. H.—Grafton v. Grafton County, 43 N. H. 382; Peterborough v. Lancaster, 14 N. H. 382.

N. Y.—Delaware County v. Delaware, 105 App. Div. 129, 93 NYS 954; Holmes v. Brown, 13 Barb. 599.

Pa.—Danville, etc., Poor Dist. v. Montour County, 75 Pa. 35; Williams County v. Mercer County, 4 Pa. Dist. 171, 15 Pa. Co. 525.

R. I.—Hopkinton v. Waite, 6 R. I. 374.

S. D.—Hamlin County v. Clark County, 1 S. D. 131, 45 NW. 329.

Vt.—Morristown v. Hardwick, 81 Vt. 31, 69 A 152; Rutland v. Chittenden, 74 Vt. 219, 52 A 426; Chelsea v. Washington, 48 Vt. 610; Chelsea v. Vershire, 35 Vt. 446; Middlebury v. Hubbardton, 1 D. Chipm. 205.

Eng.—Atkins v. Banwell, 2 East 505, 102 Reprint 462.

27. Middlebury v. Hubbardton, 1 D. Chipm. (Vt.) 205.

Nature and form of remedy see infra § 266.

28. Ogden City v. Weber County, 26 Utah 129, 72 P 433.

29. Auburn v. Lewiston, 85 Me. 232, 27 A 159; Fayette v. Livermore, 62 Me. 229; Westfield v. Southwick, 17 Pick. (Mass.) 68; Northwood v. Barrington, 9 N. H. 369; Lee v. Deerfield, 3 N. H. 290; Pawlet v. Sandgate, 19 Vt. 621.

30. Bangor v. Fairfield, 46 Me. 558.

31. See supra § 209 et seq.

32. Calais v. Marshfield, 30 Me. 511.

33. St. Johnsbury v. Waterford, 15 Vt. 692.

34. Bristol v. New Britain, 71 Conn. 201, 41 A 548.

Conditions precedent see infra §§ 267, 268.

35. Defenses see infra § 270.

Recovery back of money paid to county by pauper for support in asylum see supra § 259.

36. Right of action for: Medical services see supra §§ 246-250. Relief generally see supra §§ 243-245, 251, 252.

37. To recover damages for wrongful removal of pauper see supra § 172.

38. Woodstock v. Hancock, 62 Vt. 348, 19 A 991; Antigonish v. Arisaig Overseers of Poor, 38 N. S. 112.

[a] **Rule applied.**—(1) Where the statute authorizes recovery by action "for money laid out and expended," assumpsit is the exclusive remedy (Woodstock v. Hancock, 62 Vt. 348, 19 A 991), (2) and general indebitatus assumpsit will not lie (Middlebury v. Hubbardton, 1 D. Chipm. (Vt.) 205). (3) Where, under the facts alleged in compliance with the statute, a promise to pay is implied, a failure to aver it will not make the proceeding an action on the case. Woodstock v. Hancock, supra.

39. Wethersfield v. Stamford, 1 Root (Conn.) 68.

[a] **In Pennsylvania,** the legislature having committed the care of paupers to the quarter sessions and clothed that court with summary powers which are equal to all exigencies, common-law remedies are not favored, even if not displaced. Campbell v. Grooms, 101 Pa. 481; Nippenose Tp. v. Jersey Shore, 48 Pa. 402.

40. Mass.—Bath v. Freeport, 5 Mass. 325.

N. H.—Hillsborough County v. Londonderry, 43 N. H. 451.

Pa.—Danville, etc., Poor Dist. v. Montour County, 75 Pa. 35.

Utah.—Ogden City v. Weber County, 26 Utah 129, 72 P 433.

Vt.—Pawlet v. Sandgate, 19 Vt. 621; Danville v. Putney, 6 Vt. 512.

[a] **"The general rule** is, that, for money accruing due under the provisions of a statute, the action of assumpsit may be supported, unless another remedy is expressly given." Pawlet v. Sandgate, 19 Vt. 621, 629.

[b] **"Assumpsit lies on an implied promise** to discharge a legal obligation created by statute." Hillsborough County v. Londonderry, 43 N. H. 451, 452.

41. Autauga County v. Davis, 32 Ala. 703.

42. Park County v. Jefferson County, 12 Colo. 585, 21 P 912; Woodstock v. Hartland, 21 Vt. 563.

[a] **Where a debtor is committed to jail,** and receives support therein from the town in which the jail is situated, although it should be conceded that such prisoner has relatives of sufficient ability, from whom the jail might recover the amount of their expenditures for his support by petition under the statute, yet this will not preclude them from also maintaining an action for money paid, which is also given by statute,

[§ 267] **3. Conditions Precedent—a. In General.** The liability of towns and counties for the support of the poor is purely statutory,[43] and unless the statutory prerequisites[44] are complied with, there can be no recovery, however equitable the claim,[45] although substantial compliance has been held sufficient.[46] But compliance with statutory prerequisites to an action to recover for support is not necessary in order to maintain an action to recover back money voluntarily paid by one town to another for the support of a pauper, under the mistaken belief that it was liable for such support.[47]

Presentation of claim. Unless the pauper laws so declare, a claim for relief furnished need not be presented to the town or city liable therefor in order to maintain an action for reimbursement,[48] and a special statute providing for the presentation of claims against defendant city must yield to the pauper statute, which is general and uniform in its application.[49]

Itemizing claims. It is not necessary that a claim presented to one town by another for expense incurred in the support of a pauper should be itemized unless the pauper statutes so provide.[50] So where a town employs a person to relieve a pauper, it is not a prerequisite to an action by such town against the town of the pauper's settlement that the claim against plaintiff town by the person so employed be itemized.[51]

Recourse against pauper's relatives. A town suing the town of a pauper's settlement or residence for his support need not first assert its claim against the pauper's relatives.[52] On the other hand, it has been held that a county is not liable to a town therein for the support of a person who has a relative in the county liable for his support, and able to furnish the same, where the town made no demand on such relative to comply with his legal obligation.[53]

Recourse against pauper's estate. Where a person has property inadequate for his needs, an individual extending relief to him need not, before presenting his demand against the county for such proportion of the demand as the county would ultimately be liable for, exhaust the pauper's estate.[54]

[§ 268] **b. Certificate of Correctness of Charges.** In some jurisdictions the statute requires as a condition precedent to the recovery of expenses incurred for pauper supplies that all such claims and bills shall be certified to be correct by the proper officers of the poor of the town or county sought to be charged.[55] This certificate partakes of a judicial character, and is binding on the county in the absence of fraud.[56]

Waiver of certificate or defects therein. The board of county supervisors may waive the certificate, if satisfied of the truth of all such a certificate would show,[57] where the relief furnished is on behalf of another county, as where it is furnished to one having a settlement in that county.[58] A defect in the certificate may likewise be waived by the board of supervisors.[59]

[§ 269] **4. Defenses[60]—a. To Action by Town or County.** In an action by one town against another to recover for pauper supplies, a deliberate and voluntary settlement, made without misrepresentation

against the town in which he has his legal settlement. Woodstock v. Hartland, 21 Vt. 563.

43. See supra § 7.

44. See statutory provisions.

45. Colo.—Saguache County v. Tough, 45 Colo. 395, 101 P 411.

Conn.—Bristol v. New Britain, 71 Conn. 201, 41 A 548; Windham v. Lebanon, 51 Conn. 319; Beacon Falls v. Seymour, 44 Conn. 210.

Iowa.—Cerro Gordo County v. Wright County, 50 Iowa 439.

Me.—Cushing v. Friendship, 89 Me. 525, 36 A 1001; Naples v. Raymond, 72 Me. 213.

Mass.—South Danvers v. Essex County, 1 Allen 25.

N. H.—Strafford County v. Rockingham County, 71 N. H. 37, 51 A 677; Peterborough v. Lancaster, 14 N. H. 382; Conway v. Wakefield, 3 N. H. 277; Meredith v. Canterbury, 3 N. H. 80.

N. Y.—Norwich Overseers of Poor v. Pharsalia Overseers of Poor, 15 N. Y. 341.

Oh.—Millcreek Tp. v. Miami Tp., 10 Oh. 375.

Pa.—Jersey Shore Overseers of Poor v. Nippenose Tp. Overseers of Poor, 18 Pa. Co. 473.

Vt.—Vershire v. Hyde Park, 64 Vt. 638, 25 A 431; Pittsford v. Chittenden, 44 Vt. 382; Ryegate v. Wardsboro, 30 Vt. 746; Thetford v. Hubbard, 22 Vt. 440; Pawlet v. Sandgate, 19 Vt. 621; Danville v. Putney, 6 Vt. 512; Middlebury v. Waltham, 6 Vt. 200; Essex v. Milton, 3 Vt. 17; Londonderry v. Windham, 2 Vt. 149.

Fixing liability generally see supra §§ 211-237.

Necessity of:

Notice see supra § 214.

Order of relief or approval see supra §§ 232-237.

46. Redwood County v. Minneapolis, 126 Minn. 512, 148 NW 469; Green Lake County v. Leon, 190 Wis. 166, 208 NW 943.

47. Bristol v. New Britain, 71 Conn. 201, 41 A. 548.

48. Onondaga County v. Amsterdam, 139 App. Div. 877, 124 NYS 558 [aff 64 Misc. 181, 117 NYS 1121].

49. Onondaga County v. Amsterdam, supra.

50. Old Saybrook v. Milford, 76 Conn. 152, 56 A 496; Ettrick v. Bangor, 84 Wis. 256, 54 NW 401.

[a] **Town furnishing support to a family** need not, in order to recover from the town of their legal settlement, show precisely what was furnished to each member of the family. Old Saybrook v. Milford, 76 Conn. 152, 56 A 496.

51. Albion v. Maple Lake, 71 Minn. 503, 74 NW 282.

52. Auburn v. Lewiston, 85 Me. 282, 27 A 159; Cordova v. Le Sueur Center, 74 Minn. 515, 77 NW 290.

[a] **"Two remedies are given;** one against the town liable and the other against the kindred. Either may be pursued. . . . Courts do not relieve destitution by creating it. It would be unreasonable, therefore, to send a town, not liable for the support of a pauper, after his kindred, for expenses incurred to relieve his destitution, when the liability for his support belongs to another town. The town may elect to call upon the kindred, but is not obliged to do so." Auburn v. Lewiston, 85 Me. 282, 283, 27 A 159.

53. Newark Tp. v. Kearney County, 99 Nebr. 142, 155 NW 797.

54. Christian County v. Rockwell, 25 Ill. A. 20.

[a] **Physician's services.**—A physician who has, in an emergency, rendered services to an eleven-year-old boy, whose mother is dead, and whose father is wholly without means, will not be compelled to exhaust the boy's estate, consisting of an interest in land worth seventy-five dollars, in order to hold the county liable for such proportion of his claim as it would ultimately be liable to pay. Christian County v. Rockwell, 25 Ill. A. 20.

55. See statutory provisions; and cases infra this note.

[a] **Certificate need not be made at a regular meeting** of the township trustees. Hunter v. Jasper County, 40 Iowa 568.

[b] **Certificate held sufficient.**—A certificate reciting that the claim was "examined and allowed" by the county commissioners is sufficient to support the account rendered by the master of a house of correction. Gilman v. Portland, 51 Me. 457.

[c] **Certificates held insufficient.**—(1) A certificate signed properly, and stating that the trustees "ordered the above services," is not sufficient without also certifying as to the correctness of the charges. Sloan v. Webster County, 61 Iowa 738, 17 NW 168. (2) A certificate of township trustees to a medical bill that they "recommend the payment of the above named bill for treatment of Mrs. Jeff. Johnson and family, as a pauper," is insufficient. Mansfield v. Sac County, 60 Iowa 11, 14 NW 73.

[d] **In New Hampshire,** in proceedings by one county against another to recover for relief furnished a pauper, the objection that plaintiff has not made the affidavit required by Pub. St. c 27 § 11, forbidding county commissioners to allow a bill for the support of a pauper unless accompanied by an affidavit, can be obviated by permitting plaintiff to supply the omission. Strafford County v. Rockingham County, 71 N. H. 37, 51 A 677.

56. Taylor v. Woodbury County, 106 Iowa 502, 76 NW 824; Mussel v. Tama County, 73 Iowa 101, 34 NW 762.

57. Brock v. Jones County, 145 Iowa 397, 124 NW 209; Bradley v. Delaware County, 57 Iowa 552, 10 NW 898; Collins v. Lucas County, 50 Iowa 448.

58. Clay County v. Palo Alto County, 82 Iowa 626, 48 NW 1053.

59. Brock v. Jones County, 145 Iowa 397, 124 NW 209.

60. Estoppel to deny settlement

or concealment, is conclusive between the parties.[61] The only effect of the failure of defendant town to answer within the statutory period a notice given by plaintiff town of supplies furnished a person is to estop the former to deny the place of the pauper's settlement; it is not estopped to deny that the person to whom the supplies were furnished was in need of immediate relief.[62] Nor will support of a pauper estop a town from contesting the question of its liability for his support.[63] And a poor district is not precluded from defending a suit brought by a county to recover for the support of a pauper on the ground that he did not reside in the district.[64] It is no defense that the application to the town for aid was not under the oath of two credible persons, as provided by law,[65] or that a town not chargeable with a pauper's support agreed with the town by which he had been maintained to pay for his support for a specific period,[66] or that plaintiff had previously given notice to another town, and claimed the same sum as that in suit,[67] or that since the commencement of the suit plaintiff town had claimed and received from the county pay for the same supplies,[68] or that a marriage, upon which the question of settlement turned, was invalid.[69] Nor can the determination of the town of the pauper's residence not to support him while in another town, uncommunicated to the latter town, be set up as a defense.[70]

Failure to remove pauper to place of settlement. When a city in which a pauper is legally settled, with knowledge that he is receiving relief from another municipality, disclaims responsibility and is unwilling to receive the pauper, the failure of the authorities of the place furnishing the relief to return him to his place of settlement is no defense in an action to recover the sums expended for such relief.[71]

[§ 270] **b. To Action by Individuals.** In an action by an individual against a town or county to recover for supplies furnished to a pauper, the fact that such person persuaded the pauper to return to defendant town in which he had a legal settlement, for the purpose of compelling such town to support him, is no defense.[72] Where an action is brought against a city on a contract for nursing and caring for a poor person, the city cannot set up the defense that its offer to pay for the services rendered was refused by plaintiff,[73] or that plaintiff agreed to look to a third person for payment, where there was no consent by such third person to the attempted substitution of debtors.[74]

[§ 271] **5. Jurisdiction and Venue.** The particular court or courts in which actions to recover for the support of paupers shall or may be brought,[75] and the venue of such actions,[76] are matters of statutory regulations.

[§ 272] **6. Time To Sue, Limitations, and Laches.** A town is not required to wait until it has stopped furnishing relief to a pauper before bringing action against the town ultimately liable.[77] Nor is a town furnishing relief to a pauper whose settlement is in defendant town compelled to wait until it is determined whether the pauper acquires a settlement in plaintiff town by reimbursing the cost of such relief within the statutory period from the time it is furnished.[78] Where the town of a pauper settlement is required to answer, within a specified time, a notice given by another town furnishing relief to a pauper,[79] an action by the relieving town against the town notified, commenced before the expiration of the time allowed for answering the notice is premature;[80] but if an answer is returned, denying liability, an action may be commenced immediately.[81] In some jurisdictions special statutes of limitations have been enacted for actions for the recovery of expenses incurred by a town in the relief of a pauper, against the town ultimately liable,[82]

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see supra §§ 36, 229.

61. Medway v. Milford, 21 Pick. (Mass.) 349.

62. See supra § 229.

63. Clinton v. Clinton Tp., 56 N. J. L. 240, 27 A 916. See Ettrick v. Bangor, 84 Wis. 256, 54 NW 401 (holding that the fact that a town in which one had a legal settlement had made agreements which recognized him as a pauper and contributed to his support does not estop it from denying that he is a pauper after notice to the town in which he lived that it would discontinue such support).

64. Harmony Tp. v. Forest County, 91 Pa. 404.

65. Cordova v. Le Sueur Center, 78 Minn. 36, 80 NW 836.

Application for relief generally see supra § 231.

66. Peterborough v. Lancaster, 14 N. H. 382.

67. Braintree v. Hingham, 17 Mass. 432.

68. Chester v. Plaistow, 43 N. H. 542.

69. Goshen v. Richmond, 4 Allen (Mass.) 458.

70. Topsham v. Waterbury, 73 Vt. 185, 50 A 860.

71. Redwood County v. Minneapolis, 131 Minn. 41, 154 NW 660.

72. Stewart v. Sherman, 4 Conn. 553.

73. Elkey v. Seymour, 169 Wis. 223, 172 NW 138.

74. Elkey v. Seymour, supra.

75. See statutory provisions.

[a] **In Iowa** (1) the circuit court is given exclusive jurisdiction where the county sought to be charged gives notice denying the pauper's settlement. Cerro Gordo County v. Wright County, 59 Iowa 485, 13 NW 645. (2) The district court has concurrent jurisdiction with the circuit court where no such notice is given. Winneshiek County v. Allamakee County, 62 Iowa 558, 17 NW 753.

[b] **In Pennsylvania** (1) the court of quarter sessions has exclusive jurisdiction in controversies between townships in pauper cases. Rouse v. McKean County Poor Dist., 169 Pa. 116, 32 A 541; Butler County v. Department of Public Charities, 158 Pa. 149, 27 A 886; Delaware Tp. v. Greenwood Tp., 66 Pa. 63; Chester County Directors of Poor v. Malany, 64 Pa. 144; Nippenose Tp. v. Jersey Shore, 48 Pa. 402; Sugar Loaf Tp. Overseers v. Schuylkill County Directors of Poor, 44 Pa. 481; Versailles Overseers v. Mifflin Overseers, 10 Watts 360; Clinton County v. Clearfield County Poor Dist., 38 Pa. Co. 451; Moore v. Philadelphia, 13 Phila. 425. See Com. v. Darr, 11 Pa. Super. 74 (where proceedings commenced in the court of common pleas were certified to the court of quarter sessions). (2) But jurisdiction is given to the court of common pleas in actions by individuals to recover expenses incurred for pauper supplies. Chester County Directors of Poor v. Malany, 64 Pa. 144; Redmond v. West New Castle Poor Dist., 5 Pa. Dist. 731, 18 Pa. Co. 276. (3) The municipal court has no jurisdiction, in a proceeding by a children's home to recover from a county the cost of support of a child committed to the home, to make an order that the town of the child's settlement reimburse the county. In re Smith, 91 Pa. Super. 261.

76. See statutory provisions.

[a] **In Ohio** (1) where township trustees furnish necessary temporary support to a pauper whose legal settlement is in a township in another county, an action to recover therefor may be brought in the court of common pleas of the county in which the support was furnished, provided the amount in controversy exceeds the jurisdiction of a justice of the peace. Jerome Tp. v. Darby Tp., 2 Oh. Dec. (Reprint) 685, 4 WestLMonth 586. (2) The directors of a county infirmary may bring an action for expenses incurred in promoting temporary relief to a pauper whose settlement is in a town situated in another county, either in the county where the relief is furnished, or in the county where the town of the pauper's settlement is situated. Muskingum County Infirmary v. Toledo, 15 Oh. St. 409. But see Perry Tp. v. Perry County Infirmary, 2 Oh. Dec. (Reprint) 382, 2 WestLMonth 573 (holding that, where the directors of a poorhouse furnish temporary support in a township in another county, suit to recover therefor must be brought in the county where the township of settlement is situated).

77. Worcester v. Northborough, 140 Mass. 397, 5 NE 270.

78. Dedham v. Milton, 136 Mass. 424.

79. See supra § 228.

80. Camden v. Lincolnville, 16 Me. 384; Belmont v. Pittston, 3 Me. 453.

81. Sanford v. Lebanon, 26 Me. 461.

82. See statutory provisions; and cases infra this note.

[a] **In Iowa,** under Code Suppl. (1907) § 2270, the special limitations of six months do not run against the county from which a patient is committed to an insane hospital in favor of another county in which the patient is claimed to have a legal settlement until the auditor of such other county makes the required in-

and ignorance on the part of the municipality furnishing relief of the place of the pauper's settlement, and the consequent ignorance of what municipality is to be charged with his support, does not prevent the running of the time within which the action must be brought.[83] If no special statute exists,[84] the general statute of limitations[85] applies.[86] And the special statute may be waived by an express promise to pay the expenses incurred,[87] in which case the general statute will apply.[88]

Laches. Unreasonable delay by the town furnishing relief, in ascertaining the pauper's place of settlement and notifying the town liable, will bar recovery.[89] A physician who renders emergency services upon the credit of a person who, several years thereafter, became a pauper cannot then recover from the directors of the poor.[90]

[§ 273] **7. Parties.** In some jurisdictions an action for supplies furnished by one town or poor district to a pauper of another must be brought in the name of the town or district furnishing the supplies,[91] while in others the action may be brought in the name of the poor officers of the furnishing district.[92] In an action by a physician against an overseer of the poor to recover for services rendered a pauper at defendant's request, plaintiff should not be compelled to make the town a party defendant.[93]

[§ 274] **8. Pleading**[94]**—a. In General.** The declaration or complaint in an action against a town or county to recover expenses incurred for pauper relief should state all the facts necessary to make the liability complete under the statute.[95] It should be alleged that the pauper's place of settlement or residence was in defendant town or county;[96] but in an action to recover for supplies furnished to a wife, the declaration need not allege that her hus-

vestigation and gives the required notice of his adverse finding. Buena Vista County v. Woodbury County, 163 Iowa 626, 145 NW 282.

[b] **In Maine** (1) under a statute providing that expenses for the relief of paupers incurred within three months before notice given to the town chargeable may be recovered by the town incurring the same in an action commenced within two years after the cause of action accrues, the cause of action is deemed to accrue, when no answer is returned by defendant town, at the expiration of two months from the time the notice was given. Veazie v. Howland, 53 Me. 39; Robbinston v. Lisbon, 40 Me. 287. (2) If an answer is returned denying liability, the cause of action is deemed to accrue at the time the answer is received by the relieving town. West Gardiner v. Hartland, 62 Me. 246; Veazie v. Howland, supra [overr Cutler v. Maker, 41 Me. 594 (holding that the statute runs from the delivery of the notice), and expl Augusta v. Vienna, 21 Me. 298 (decided on other grounds)]; Robbinston v. Lisbon, supra; Camden v. Lincolnville, 16 Me. 384. (3) If no action is brought within the two years, the right to recover is barred, not only as to such items as were incurred before the two years commenced to run, but also as to such as were incurred within the two years. Veazie v. Howland, supra. (4) An action to recover expenses incurred in supporting a pauper at a state asylum for the insane accrues at the date of payment thereof to the asylum. West Gardiner v. Hartland, 62 Me. 246; Bangor v. Fairfield, 46 Me. 358; Eastport v. East Machias, 40 Me. 280. (5) Under Rev. St. c 144 § 42, where a person unlawfully committed to an insane hospital has been lawfully recommitted, the recommitment revives the expenditures and cost of support under the unlawful commitment, and the same at once come within the application of the provisions pertaining to notice and limitation of actions in pauper cases, and a town committing has a right of action against the town liable for the support of such person for expenditures "incurred within three months before notice given to the town chargeable," whether such notice was given before the recommitment or after, provided the suit is "commenced within two years after the cause of action accrued." Rockport v. Searsmont, 103 Me. 495, 70 A 444.

[c] **In Massachusetts** (1) under a statute giving a right of action by one town against another to recover for pauper expenses incurred within three months next before notice to the town to be charged, and providing that such action shall be commenced within two years after the cause of action arises, the action must be brought within two years after notice is given and recovery cannot be had for expenses incurred more than three months before the giving of the notice. Weymouth v. Boston, 260 Mass. 388, 157 NE 591; Northampton v. Plainfield, 164 Mass. 506, 41 NE 785; Reading v. Malden, 141 Mass. 580, 7 NE 21; Cummington v. Wareham, 9 Cush. 585; Attleborough v. Mansfield, 15 Pick. 19; Townsend v. Billerica, 10 Mass. 411. See Amherst v. Shelburne, 11 Gray 107 (where recovery for support of a pauper in a state insane asylum was allowed where the action was brought within two years after payment by plaintiff to the asylum, although more than two years after notice to defendant). (2) This two years' limitation refers to the time of delivery of the notice and not to its date. Uxbridge v. Seekonk, 10 Pick. 150. (3) There being no remedy at common law, the statutory remedy must be strictly pursued. Needham v. Newton, 12 Mass. 452. (4) Expenses accruing within three months prior to the giving of notice, but incurred more than two years before the commencement of the suit, cannot be recovered. Harwich v. Hallowell, 14 Mass. 184; Readfield v. Dresden, 12 Mass. 317. (5) And this is true even though there has been a previous action in which plaintiff recovered judgment, and the expenses sued for in the present action accrued during the pendency of the former suit. Hallowell v. Harwich, 14 Mass. 186.

[d] **In New York** the action must be commenced within three months after answer, which must be returned within thirty days after notice. Stillwell v. Coons, 122 N. Y. 242, 25 NE 316 [aff 12 NYSt 745] (answer held sufficient to set the statute running).

83. Washington County v. Mahaska County, 47 Iowa 57; Adams v. Ipswich, 116 Mass. 570.

84. [a] **In Maine and Massachusetts** there is no special statute of limitations applicable to actions against towns by individuals to recover for relief furnished to paupers. Warren v. Islesborough, 20 Me. 442; Watson v. Cambridge, 15 Mass. 286.

85. See Limitation of Actions 37 C. J. p 666.

86. Washington County v. Mahaska County, 47 Iowa 57; La Crosse v. Melrose, 22 Wis. 459.

87. Belfast v. Leominster, 1 Pick. (Mass.) 123.

[a] **Waiver may be by oral promise,** and is sufficiently supported as to consideration by the obligation created by statute to support the pauper. Belfast v. Leominster, 1 Pick. (Mass.) 123.

88. Belfast v. Leominster, supra.

89. Lawrence Tp. v. Tioga County, 2 Pa. Dist. 786, 12 Pa. Co. 305; Homer Poor Dist. v. Austin Poor Dist., 19 Pa. Co. 546; Jersey Shore Overseers of Poor v. Nippenose Tp. Overseers of Poor, 18 Pa. Co. 473.

Maintenance pending removal see supra § 165.

90. Blakeslee v. Chester County Directors of Poor, 102 Pa. 274.

91. Taylor v. Green, 12 N. J. L. 124; Smith v. Voorheese, 2 N. J. L. 254; Shotwell v. Thornall, 2 N. J. L. 127; Gould v. Bailley, 2 N. J. L. 1; Pawlet v. Sandgate, 19 Vt. 621.

92. Alger v. Miller, 56 Barb. (N. Y.) 227; Norton v. Rhodes, 18 Barb. (N. Y.) 100; Paddock v. Symonds, 11 Barb. (N. Y.) 117; Hayes v. Symonds, 9 Barb. (N. Y.) 260; Van Keuren v. Johnston, 3 Den. (N. Y.) 183; Palmer v. Vandenbergh, 3 Wend. (N. Y.) 193; Grant Overseers of Poor v. Fancher Overseers of Poor, 5 Cow. (N. Y.) 309; Pomeroy v. Wells, 8 Paige (N. Y.) 406; Overseers v. Kline, 9 Pa. 217; Chapline v. Overseers of Poor, 7 Leigh (34 Va.) 231, 30 AmD 504.

93. Christman v. Thatcher, 48 Hun 446, 1 NYS 451 [app dism 113 N. Y. 625 mem, 20 NE 877 mem].

94. **Pleading generally** see Pleading [31 Cyc 1].

95. Ill.—Fox v. Bristol, 45 Ill. A. 330 [rev on other grounds 159 Ill. 500, 42 NE 887].

Ind.—Orange County v. Ritter, 90 Ind. 362.

Me.—Ripley v. Hebron, 60 Me. 379.

Mass.—Wrentham v. Attleborough, 5 Mass. 430; Bath v. Freeport, 5 Mass. 325

Nebr.—Clearwater v. Garfield, 65 Nebr. 697, 91 NW 496.

Wash.—Collins v. King County, 1 Wash. T. 416.

N. S.—Cumberland Overseers of Poor Dist. No. 5 v. McDonald, 35 N. S. 394.

[a] **Allegation that the order of relief and notice to depart were actually made at a meeting of the trustees** is sufficient to show that relief was properly and legally furnished, although it does not appear that the order and notice were recorded. Bremer County v. Buchanan County, 61 Iowa 624, 16 NW 720.

[b] **Acting in official capacity.**—In a complaint for medical services to paupers, rendered at the request of the trustee of a township, the word "as" before the phrase "trustee of the township" is not necessary to show that the trustee acted in his official capacity. Jay County v. Brewington, 74 Ind. 7.

[c] **Complaint held sufficient** to show a cause of action to recover for medical attendance furnished to a pauper. Orange County v. Ritter, 90 Ind. 362.

96. Cal.—Johnson v. Santa Clara County, 28 Cal. 545.

Iowa.—Winneshiek County v. Allamakee County, 62 Iowa 558, 17 NW 753.

Me.—Fryeburg v. Brownfield, 68 Me. 145; Ripley v. Hebron, 60 Me. 379.

Mass.—Wrentham v. Attleborough, 5 Mass. 430; Bath v. Freeport, 5

band's settlement was in defendant town, it being sufficient to allege hers to be there.[97] The service of notice upon defendant within the period required by statute is usually required to be alleged,[98] but the omission of such allegation can be taken advantage of only by demurrer.[99] Where notice is alleged, there is no need of an averment of demand before suit brought.[1] It has been held that the declaration or complaint should aver that the person to whom the relief was extended was indigent and in need of relief,[2] although the want of such allegation has been held not fatal after verdict.[3] In some jurisdictions it is necessary to allege that the pauper had no kindred legally bound to support him,[4] and a declaration which omits such allegation is bad on such demurrer,[5] although it is not ground for arrest of judgment.[6] Where the relief was furnished by an individual, he should allege that he was not liable for the pauper's support.[7] A declaration containing the common counts has been held sufficient,[8] and there need be no special count under the statute.[9] Where the statute authorizes a particular court to make and enforce an order compelling a poor district to pay for support furnished to a pauper, the fact that the prayer is for a mandamus instead of an order is immaterial.[10]

Plea, answer, or affidavit of defense.[11] The answer or affidavit of defense to a complaint for supplies furnished to a pauper must be certain and definite in its averments.[12] Legal conclusions should not be pleaded.[13] A plea in bar alleging the ability of the person relieved to maintain himself is not good on a special demurrer assigning for cause that it amounted to the general issue.[14]

Amendment.[15] An allegation of the particular day on which the person relieved fell into distress may be amended to show a different date.[16]

[§ 275] **b. Issues, Proof, and Variance.**[17] When the establishment of the whole allegation is essential to the right of recovery, such allegation should be proved in toto.[18] But facts not essential to the right of recovery need not be proved.[19] Evidence to

Mass. 325; Salem v. Andover, 3 Mass. 436.

N. C.—Burke County v. Buncombe County, 101 N. C. 520, 8 SE 176.

Wis.—Pine Valley v. Unity, 40 Wis. 682.

[a] **Pleading held sufficient.**—(1) Pine Valley v. Unity, 40 Wis. 682. (2) A complaint, in an action by one county against another for taking care of an insane pauper of defendant county, which alleges that the pauper was a lawfully committed inmate of the almshouse of defendant county, and that he escaped into plaintiff county, sufficiently avers that the pauper was "last legally settled" in defendant county. Burke County v. Buncombe County, 101 N. C. 520, 8 SE 176.

[b] **Pleading held insufficient.**—It is not sufficient for plaintiff to aver that it "is informed" that the paupers have a settlement in defendant county. Winneshiek County v. Allamakee County, 62 Iowa 558, 17 NW 753.

97. Fryeburg v. Brownfield, 68 Me. 145.

98. Iowa.—Poweshiek County v. Cass County, 63 Iowa 244, 18 NW 895.

Me.—Fryeburg v. Brownfield, 68 Me. 145.

Mass.—Rogers v. Newbury, 105 Mass. 538; Wrentham v. Attleborough, 5 Mass. 430; Bath v. Freeport, 5 Mass. 325; Salem v. Andover, 3 Mass. 436.

N. H.—Hillsborough County v. Londonderry, 43 N. H. 451.

Wis.—Pine Valley v. Unity, 40 Wis. 682.

"Assumpsit lies on a promise to discharge a legal obligation created by statute. But in the declaration all the facts must be averred, which are necessary to constitute this legal obligation. To charge the defendants in this action, it is not enough to allege, that the object of the relief was a pauper having his settlement in F. [the defendant town], and that the expenses were necessarily incurred in his relief; but also that the defendants had notice of the distressed situation of the pauper within three months from the time when the expenditures were made. For such notice is a fact necessary with others to constitute the legal obligation which will support a promise; the existence of the legal obligation being the consideration of the promise." Bath v. Freeport, supra.

[a] **Pleadings held sufficient.**—(1) Generally. Fryeburg v. Brownfield, 68 Me. 145. (2) A statement that plaintiff duly notified defendant is sufficient averment of legal notice. Pine Valley v. Unity, 40 Wis. 682.

[b] **In Vermont** the fact of giving notice required by the statute to the overseers of defendant, describing the condition of the prisoner, being a matter of evidence only, need not be averred in the complaint, in an action under Revised Laws of 1818, as amended by Acts (1886) No. 42 § 4, providing for the recovery of expenses incurred in the relief of a transient indigent prisoner. Woodstock v. Hancock, 62 Vt. 348, 19 A 991.

99. Com. v. Dracut, 8 Gray (Mass.) 455.

1. Hillsborough County v. Londonderry, 43 N. H. 451.

2. Ala.—Autauga County v. Davis, 32 Ala. 703.

Cal.—Johnson v. Santa Clara County, 28 Cal. 545.

Ky.—Thomas v. Edmonson County, 8 KyL 265.

Me.—Fryeburg v. Brownfield, 68 Me. 145; Ripley v. Hebron, 60 Me. 379.

Mass.—Rogers v. Newbury, 105 Mass. 533; Bath v. Freeport, 5 Mass. 325.

Nebr.—Custer Tp. v. Antelope County, 103 Nebr. 128, 170 NW 600.

Utah.—Ogden City v. Weber County, 26 Utah 129, 72 P 433.

Wis.—Pine Valley v. Unity, 40 Wis. 682.

[a] **Pleadings held sufficient.**—(1) An averment of circumstances showing destitution and inability to procure necessaries or to have them provided by others is a sufficient allegation of dependence upon the public. Custer Tp. v. Antelope County, 103 Nebr. 128, 170 NW 600; Meyers v. Furnas County, 93 Nebr. 313, 140 NW 633. (2) Other pleadings held sufficiently to allege need of relief. Autauga County v. Davis, 32 Ala. 703; Ogden City v. Weber County, 26 Utah 129, 72 P 433; Pine Valley v. Unity, 40 Wis. 682.

[b] **In Indiana** an averment in a complaint in an action for services rendered by a physician in attending the poor of the county, that those treated were "poor persons," is sufficient to show that they were public charges, and an averment that plaintiff was employed by the proper township trustee to treat them as poor persons shows a sufficient determination by the trustees that they were objects of charity. Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541.

[c] **In Washington** it has been held that a complaint to charge a county for the support of a pauper must show that the county board has recognized the person as a pauper. Collins v. King County, 1 Wash. T. 416.

3. Pawlet v. Rutland, Brayt. (Vt.) 175.

4. Walpole v. Marlow, 2 N. H. 385. But see Collins v. King County, 1 Wash. T. 416 (dictum to the contrary).

5. Walpole v. Marlow, 2 N. H. 385.

6. Walpole v. Marlow, supra.

7. Rogers v. Newbury, 105 Mass. 533.

8. Deason v. Williamson, 188 Ill. A. 316; Clinton County v. Pace, 59 Ill. A. 576.

9. Gilman v. Portland, 51 Me. 457.

[a] **Recovery for support in reformatory.**—In an action by the master of a house of correction to recover the expenses incurred for the support of a pauper therein, a declaration upon an account annexed to the writ is sufficient, and there need be no special count under the statute. Gilman v. Portland, 51 Me. 457.

[b] **In North Carolina** a complaint is not demurrable because not alleging any statute making defendant liable for the maintenance of its paupers, it being only necessary to allege facts, and not public laws. Burke County v. Buncombe County, 101 N. C. 520, 8 SE 176.

10. Rouse v. McKean County Poor Dist., 169 Pa. 116, 32 A 541.

11. **Generally** see Pleading [31 Cyc 126 et seq].

12. Juniata County v. Mifflintown Borough Overseers of Poor, 22 Pa. Super. 187.

13. Morristown v. Fairfield, 46 Vt. 33.

[a] **Rule applied.**—An allegation in a plea that the pauper was "unduly removed," and that "said town is not chargeable with the support of said pauper," is an averment of a legal conclusion only, and does not present the question whether the pauper, being a minor and residing with his mother, was subject to removal with her. Morristown v. Fairfield, 46 Vt. 33.

14. Freeport v. Edgecumbe, 1 Mass. 459.

15. **Generally** see Pleading [31 Cyc 359 et seq].

16. Ripley v. Hebron, 60 Me. 379.

[a] **"Time is not essential,** provided it is within the statute of limitations applicable to such a case." Ripley v. Hebron, 60 Me. 379, 389.

17. **Generally** see Pleading [31 Cyc 670 et seq].

18. Barnstead v. Alton, 32 N. H. 245.

[a] **Rule applied.**—Where, in a suit for the support of a pauper, plaintiff relied on the settlement of a wife, and alleged that her husband had no settlement in the state at their intermarriage, and did not afterward acquire any, they were bound to prove the truth of this negative allegation, as well the want of any settlement at marriage as the subsequent nonacquisition of one. Barnstead v. Alton, 32 N. H. 245.

19. Vermilion County v. Knight, 2 Ill. 97.

[a] **Proof that person relieved was a pauper.**—In Illinois, in an action by a physician against a county

rebut proof that the person relieved had a settlement in defendant town has been held admissible without pleading it.[20] The allegations and the proof must correspond, and a material variance will be fatal to the action,[21] but an immaterial variance will be disregarded;[22] and this applies also to a variance between the notice given to defendant and the declaration.[23]

[§ 276] **9. Evidence[24]—a. Presumptions and Burden of Proof.** In an action against a town or county for the recovery of expenses incurred for the support or relief of a pauper, the burden of proof, as in other civil actions,[25] is upon the party having the affirmative of the issue, as determined by the pleadings.[26] The burden is upon plaintiff to show the facts necessary to render defendant liable,[27] such as the fact that the settlement of the person relieved was in defendant town or county,[28] and that such person was a pauper at the time relief was furnished.[29] Defendant has the burden of establishing any affirmative defense,[30] such as a change of settlement from defendant town to plaintiff town.[31]

Presumption as to performance of official duty.[32] In such actions the legal presumption will, as a rule, be that the officers of the poor have done their duty.[33] But such presumption will not be indulged in, as to a vital jurisdictional fact, in favor of the officer or the principal whom he represents.[34]

Presumption of law or fact. Where supplies are shown to have been furnished on the order of one of the selectmen, a presumption that the other selectmen assented thereto is one of fact, and not of law.[35]

[§ 277] **b. Admissibility.** The rules governing admissibility of evidence in civil actions[36] are applicable in actions to recover for pauper supplies on the question of the pauper's place of settlement,[37] whether the person relieved was destitute and in need of relief,[38] and other issues on which defend-

for medical attendance on a person who was a pauper, at the request of the county commissioners, it need not be proved, to support the action, that the person was in fact a pauper, this fact not being essential to the right of recovery. Vermilion County v. Knight, 2 Ill. 97.

20. Washington County v. Polk County, 137 Iowa 333, 113 NW 833.

21. Dalton v. Bethlehem, 20 N. H. 505; Howe v. Royalton, 32 Vt. 415.

[a] **Variances held material.**—(1) A declaration for the maintenance of "Jane" cannot be supported on a notice of supplies furnished to "James." Dalton v. Bethlehem, 20 N. H. 505. (2) A declaration in assumpsit, counting upon the neglect of a town to provide for the support of a transient poor person, brought by the person supporting him against the town in which he is found, in accordance with Comp. St. p 133 c 18 § 16, is not supported by proof that the town, on being requested to provide for such person's support, promised to do so and failed to keep the promise. Howe v. Royalton, 32 Vt. 415.

22. Colebrook v. Stewartstown, 28 N. H. 75.

[a] **Illustration.**—There was no variance between a declaration alleging that the family relieved consisted of four children and proof that there were five children in the family. Colebrook v. Stewartstown, 28 N. H. 75.

23. Berlin v. Gorham, 34 N. H. 266.

[a] **Thus** a notice signed by selectmen as such is sufficient, without saying overseers of the poor, if no overseers were chosen and there will be no variance although the declaration alleges the notice to be signed by the selectmen and overseers of the poor. Berlin v. Gorham, 34 N. H. 266.

24. **Generally** see Evidence 22 C. J. p 1.

As to settlement of pauper generally see supra §§ 132–137.

25. See Evidence §§ 13–24.

26. Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541; New Bedford v. Hingham, 117 Mass. 445.

27. Ill.—Deason v. Williamson, 188 Ill. A. 316.

Ind.—Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541.

Iowa.—Winneshiek County v. Allamakee County, 62 Iowa 558, 17 NW 753.

Me.—Norridgewock v. Madison, 70 Me. 174; Corinth v. Lincoln, 34 Me. 310; Kirkland v. Bradford, 30 Me. 452.

Mass.—Waltham v. Brookline, 119 Mass. 479; New Bedford v. Hingham, 117 Mass. 445; Adams v. Swansea, 116 Mass. 591; New Bedford v. Middleborough, 16 Gray 295.

Pa.—Lupp v. Adams County House of Employment, 57 Pa. Super. 394.

[a] **Illustrations.**—(1) One who seeks to make himself the creditor of a poor district by voluntarily doing that which under prescribed conditions it is the duty of the poor district to do has the burden of showing that the prescribed conditions were complied with. Lupp v. Adams County House of Employment, 57 Pa. Super. 394. (2) In an action by a physician for medical services rendered to a pauper, the burden is on plaintiff to show a necessity for the employment of a physician other than the one provided by the county. Warren County v. Osburn, 4 Ind. A. 590, 31 NE 541.

28. Washington County v. Polk County, 137 Iowa 333, 113 NW 833; Waltham v. Brookline, 119 Mass. 479.

[a] **Rule applied.**—Where a county which supported an insane married woman sought to recover therefor from another county on the theory that her legal settlement was in the latter county, under Code § 2224, because the husband had a legal settlement therein, it must show every essential element necessary to create settlement by derivation. Washington County v. Polk County, 137 Iowa 333, 113 NW 833.

Presumptions and burden of proof as to settlement generally see supra § 132.

29. Waltham v. Brookline, 119 Mass. 479; Otoe County v. Lancaster County, 78 Nebr. 517, 111 NW 132.

30. Ellsworth v. Waltham, 125 Me. 214, 132 A 423; Monroe v. Hampden, 95 Me. 111, 49 A 604.

31. See cases supra note 30.

Burden of proving change of settlement generally see supra § 132.

32. **Generally** see Evidence § 69.

33. Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212; State Hospital v. Bellefonte Borough Overseers of Poor, 163 Pa. 175, 29 A 901.

[a] **Rule applied.**—(1) In an action by the state hospital for the insane against overseers of the poor of the borough, to recover the expenses of maintaining therein insane paupers received from defendants, plaintiff is not bound to prove that, as between defendants and the poor district, they had such paupers in charge by means of an order of relief or a subsequent order of approval, but such fact would be conclusively presumed. State Hospital v. Bellefonte Borough, 163 Pa. 175, 29 A 901. (2) The question of the propriety of charitable relief is confided to the discretion of the poor authorities, and, where they grant the relief asked, it is to be presumed they have made such investigations as they have deemed necessary and have determined the question as to the right of the party examined to such relief. Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212; Matter of Chamberlain, 73 Misc. 256, 132 NYS 681.

34. Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212.

[a] **Rule applied.**—In an action by a city for money paid in support of a pauper, a request by the poor person for such support will not be implied from the presumption that the officers of the poor performed their legal duty and investigated it and afforded aid, as the fact of such request lies at the foundation of the right of recovery, and is a substantial fact in controversy not the subject of a presumption. Albany v. McNamara, 117 N. Y. 168, 22 NE 931, 6 LRA 212.

35. Burbank v. Piermont, 44 N. H. 43.

36. See Evidence §§ 89–1729.

37. See supra §§ 133–136.

38. Hartland v. St. Albans, 123 Me. 82, 121 A 552; Topsham v. Harpswell, 1 Mass. 518; Eckman v. Brady Tp., 81 Mich. 70, 45 NW 502; Ripton v. Brandon, 80 Vt. 234, 67 A 541.

[a] **Evidence held admissible.**—(1) Testimony as to the manner of the alleged pauper's showing his distress and need of relief, and as to his physical condition, was admissible in an action by one town against another for supplies furnished. New Portland v. Kingfield, 55 Me. 172. (2) In an action by one town against another to recover expenses incurred in the support of a pauper, plaintiff was entitled to prove by the pauper's son, who was his cotenant in the ownership of certain real estate encumbered by a mortgage, that it had been agreed that the father should pay the remaining note so secured if he kept the place, and that, if he could not pay it, the witness was to have the property. Ripton v. Brandon, 80 Vt. 234, 67 A 541.

[b] **Evidence held inadmissible.**—(1) As bearing on the destitute condition of one who with his family was furnished relief by plaintiff town, for which it seeks recovery from defendant town, evidence of the earnings, not traced to the family, of the pauper's brother, who lived with the family and paid his board, is inadmissible. Hartland v. St. Albans, 123 Me. 82, 121 A 552. (2) Where a request to remove the pauper had not been objected to within two months, evidence by defendant of the pauper's ability to support himself was inadmissible in an action to recover for his expense of support and burial. Topsham v. Harpswell, 1 Mass. 518; Freeport v. Edgecombe, 1 Mass. 459. (3) Evidence as to the financial condition of a stepson of the pauper is irrelevant, the pauper not having been maintained by the stepson. Barnet v. Norton, 90 Vt. 544,

ant's liability depends.[39] Evidence of the customary method of the county commissioners in caring for the poor in emergency cases is admissible where no records are kept.[40]

Parol evidence.[41] Where the town procuring an order of removal of a sick pauper is liable for his support until he can be removed,[42] parol evidence is admissible to prove that the pauper was sick at the time the order of removal was made, and continued in that condition, so that he could not safely be removed until the time of actual removal.[43] Parol evidence is also admissible to show that certain named persons were overseers of the poor when the relief was furnished.[44]

The declarations of the pauper, explaining any acts on his part tending to establish the issue, are admissible as part of the res gestæ if made at the time such acts were performed.[45]

Special laws. Where a general law recognizes and amends special laws relating to counties having the town system of caring for the poor, such special laws are admissible to show that a certain county was operating under the town system.[46]

[§ 278] **c. Weight and Sufficiency.** General rules governing the weight and sufficiency of evidence[47] apply in actions in which it is sought to recover for supplies or other relief furnished to a pauper;[48] and, as in other civil actions,[49] a fact is sufficiently proved by a preponderance of the evidence.[50]

[§ 279] **10. Trial and Review—a. Questions of Law and Fact.** As in other civil actions,[51] questions of law in actions against towns or counties to recover for relief furnished to paupers are for the court,[52] while questions of fact are for the jury.[53] It is for the court to determine the reasonableness of rules adopted by the county board with respect to medical aid furnished to poor persons,[54] the construction of a removal notice by overseers of a town furnishing pauper supplies,[55] what constitutes the legal liability of a town to support a pauper,[56] and who is the proper officer to bind the town for support furnished by a third person,[57] and it is error to submit such questions to the jury.[58] Where there is evidence from which the jury might be justified in finding the existence of a fact in issue, the issue should be submitted to them for determination.[59] Questions which have been held for the jury under the evidence in actions of this kind are:

99 A 238.

39. Conn.—Litchfield v. Farmington, 7 Conn. 100.
Ind.—Orange County v. Ritter, 90 Ind. 362.
Me.—Lisbon v. Winthrop, 93 Me. 541, 45 A 528.
Mass.—Topsham v. Harpswell, 1 Mass. 518.
N. H.—Hampstead v. Plaistow, 49 N. H. 84.
Vt.—Barnet v. Norton, 90 Vt. 544, 99 A 238.

[a] **Evidence held admissible.**—(1) It is not error to admit in evidence a conversation between one of the claimants for medical services and the members of the county board, while in session on the presentation of such claim, where its tendency was to show that the county at the time recognized its liability to claimants for their services to paupers. Orange County v. Ritter, 90 Ind. 362. (2) Where, in an action for pauper supplies furnished a pauper and his family, an amendment is filed to the writ, adding a new count for the same supplies furnished the pauper alone, it is not error to admit evidence of the whole amount of supplies furnished the family. Lisbon v. Winthrop, 93 Me. 541, 45 A 528.

[b] **Evidence held inadmissible.**—South Burlington v. Worcester, 67 Vt. 411, 31 A 891; Tufts v. Chester, 62 Vt. 353, 19 A 988.

[c] **Notice of relief.**—(1) Notice that relief had been given a pauper resident of defendant town is admissible in evidence although bearing no date, plaintiff town, which furnished the relief, being entitled to reimbursement if notice was given within thirty days after application. Barnet v. Norton, 90 Vt. 544, 99 A 238. (2) Where one town maintains a pauper, a resident of another town, notices of expenses for relief having been given at intervals, introduction of one does not prevent introduction of subsequent notices. Barnet v. Norton, supra. (3) Communications between the overseers of the poor of the respective towns, not constituting notices, are irrelevant. Barnet v. Norton, supra.

[d] **Ratification of notice.**—The acts of a town, after service on another town of a notice of supplies furnished to a pauper, which purports to be signed by its officers, may be shown on the issue whether it ratified the notice. Hempstead v. Plaistow, 49 N. H. 84.

[e] **Relevancy of evidence to repel proof of mailing.**—Evidence by the selectmen of the town to be notified that no letter containing the notice was received by them was relevant, as was also evidence that no such letter was sent from the post office of the notifying town nor received at the post office of the town to be notified in the month when mailing was alleged. Litchfield v. Farmington, 7 Conn. 100.

40. Garfield County v. Enid Springs Sanitarium, etc., 116 Okl. 249, 244 P 426.

41. Generally see Evidence §§ 1380–1729.

42. See supra § 165.

43. Pawlet v. Sandgate, 19 Vt. 621.

44. New Portland v. Kingfield, 55 Me. 172.

45. Cornville v. Brighton, 39 Me. 333.

Competency of declarations and admissions generally see Evidence §§ 166–509.

Res gestæ generally see Evidence §§ 535–559.

46. Albion v. Maple Lake, 71 Minn. 503, 74 NW 282.

Competency of laws generally see Evidence §§ 903–905.

47. See Evidence §§ 1731–1806.

48. See cases infra this note.

49. See Evidence §§ 1743–1758.

50. Tipton v. Brown, 4 Ind. A. 288, 30 NE 925; Linneus v. Sidney, 70 Me. 114. And see cases supra note 48.

51. See Trial [38 Cyc 1511].

52. See cases infra notes 54–58.

Instructions submitting questions of law to jury see infra § 280.

53. See cases infra note 59 et seq.

54. Dieffenbacher v. Mason, 117 Ill. A. 103.

55. Durham v. Lisbon, 126 Me. 429, 139 A 232.

56. Mitchell v. Fond du Lac, 61 Ill. 174.

57. Mitchell v. Fond du Lac, supra.

58. Mitchell v. Fond du Lac, supra.

59. Conn.—Newtown v. Southbury, 100 Conn. 251, 123 A 278.
Me.—Limington v. Alfred, 122 Me. 171, 119 A 121.
Mass.—Williams v. Braintree, 6 Cush. 399.
Pa.—Ellsworth v. Bradford County Poor Dist., 52 Pa. Super. 603.
Wis.—Beach v. Neenah, 90 Wis. 623, 64 NW 319.

[a] **Questions held for jury.**—(1) Whether plaintiff voluntarily undertook the support of a child, on offer of defendant to remove it from her custody. Carter v. Augusta, 84 Me. 418, 24 A 892. (2) Whether there was an agreement to pay for medical services, there being evidence that the chairman of the supervisors knew that the physician was attending a pauper family. Beach v. Neenah, 90 Wis. 623, 64 NW 319. (3) Whether a communication from plaintiff to the overseers was intended by her as notice that she would thereafter render services to a pauper only on the credit of the town. (4) Evidence that a pauper left the poorhouse and entered the residence of an inhabitant of the same township, there becoming sick and in such condition that he could not be conveniently moved, and that notice was given to the overseer of the poor, who neglected to provide for the pauper, was sufficient to support an action for the expense of maintaining the pauper. Shreve v. Budd, 7 N. J. L. 431.

[b] **Evidence held insufficient:** (1) To warrant a recovery by plaintiff. Salsbury v. Philadelphia, 44 Pa. 303 (where no express contract to board minor pauper grandchildren was proved, nor any evidence thereof, except a book in which plaintiff had made charges against the city and credited the amounts received from the guardians of the poor, it was held that the instruction of the court on the trial that there was no evidence upon which he could recover was proper); Vershire v. Hyde Park, 64 Vt. 638, 25 A 431; Sweetwater County v. Carbon County, 6 Wyo. 254, 44 P 66. (2) To sustain a recovery for medical services rendered after the expiration of the term of office of the supervisors with whom plaintiff contracted. Jones v. Lind, 79 Wis. 64, 48 NW 247. (3) To sustain a verdict for defendant. Bangor v. Hampden, 41 Me. 484 (where, in a suit to recover for supplies furnished to persons alleged to be paupers, it was shown that the persons relieved were in need of immediate relief, and that the supplies were necessary, although rendered necessary by the misconduct of the husband and father, a verdict for defendants will be set aside and a new trial granted).

Whether the person relieved was in fact a pauper and in need of relief;[60] whether pauper supplies furnished on application were actually received by applicant;[61] whether the overseers of the poor acted in good faith in furnishing relief;[62] and whether the relief furnished was proper and reasonable.[63] The question whether supplies were furnished and received as pauper supplies is a question of fact,[64] or one of mixed law and fact.[65]

Notice to defendant. The sufficiency of the notice required to be given to defendant town or district by the town or district furnishing relief[66] is a mixed question of law and fact.[67] That is, it is for the court to determine as a matter of law whether the notice contains all the elements of information required by the statute,[68] while it is a question of fact for the jury to determine whether such elements are so clearly and expressly stated as to enable defendant's officers to understand them;[69] and where the notice is not clear, the jury may decide what its meaning is.[70] It is also a question for the jury to determine whether the notice was given within a reasonable time.[71]

[§ 280] **b. Instructions.** General rules with respect to instructions in civil actions[72] apply in actions to recover from towns or poor districts for relief furnished to paupers.[73] Instructions should correctly state the elements necessary to entitle plaintiff to recover,[74] and should not be misleading.[75]

Requests for instructions. In accordance with the general rule,[76] where a timely request is made for instructions which correctly state the law upon a material matter, and which are warranted by the pleading and evidence, they should be given.[77] Thus it is the duty of the court on request to instruct the jury what would or would not constitute the furnishing and receiving of pauper supplies so as to prevent the acquisition of a settlement.[78]

[§ 281] **c. Verdict or Findings, and Judgment.** The rules applicable to the verdict and findings in court actions generally[79] govern in an action to recover for relief furnished to a pauper.[80] Findings of fact by the court, if not irreconcilable, should be construed together.[81] As in other civil actions,[82] the judgment must conform to the pleadings.[83]

[§ 282] **d. Review.**[84] Principles governing the review of civil cases generally[85] apply in actions to recover for pauper supplies,[86] including the rule, subject to some exceptions,[87] that questions not presented in the trial court will not be considered on appeal,[88] that findings of fact by the jury on conflicting evidence will not be reviewed,[89] and that error not prejudicial to the party complaining is not ground for reversal.[90]

[§ 283] **11. Amount of Recovery.**[91] In some jurisdictions the expenses recoverable against the town of a pauper's settlement for support furnished to

Williams v. Braintree, 6 Cush. (Mass.) 399.

[b] **Settlement of pauper.**—(1) A nonsuit was improper where defendant was liable if the pauper named in the notice had a legal settlement therein, and there was evidence on that issue sufficient to have sustained a verdict if if had been rendered in favor of plaintiff. Limington v. Alfred, 122 Me. 171, 119 A 121. (2) Facts found held not to establish as a matter of law the pauper's stated and permanent residence continuously for four years in defendant town. Newtown v. Southbury, 100 Conn. 251, 123 A 278.

[c] **Contents of order of relief.**—Where there is evidence that a lost order of relief contained a condition which rendered it invalid, the question as to the contents of the order was for the jury. Frank v. Miles Tp. Poor Dist., 42 Pa. Co. 165.

60. Allen v. Lubec, 112 Me. 273, 91 A 1011; Moultonborough v. Tuftonborough, 43 N. H. 316; Ripton v. Brandon, 80 Vt. 234, 67 A 541; Coffeen v. Preble, 142 Wis. 183, 125 NW 954, 27 LRANS 1079, 20 AnnCas 753; Holland v. Belgium, 66 Wis. 557, 29 NW 558.

61. Corinth v. Lincoln, 34 Me. 310.

62. Moultonborough v. Tuftonborough, 43 N. H. 316.

63. Machias v. East Machias, 116 Me. 423, 102 A 181.

64. Sheboygan County v. Sheboygan Falls, 130 Wis. 93, 109 NW 1030.

65. Veazie v. Chester, 53 Me. 29.

66. See supra §§ 215-221.

67. Allen v. Lubec, 112 Me. 273, 91 A 1011.

68. Allen v. Lubec, supra; Sanford v. Lebanon, 31 Me. 124.

69. Newtown v. Danbury, 3 Conn. 553; Allen v. Lubec, 112 Me. 273, 91 A 1011.

70. Williams v. Braintree, 6 Cush. (Mass.) 399.

71. Fox v. Kendall, 97 Ill. 72.

72. See Trial [38 Cyc 1594 et seq].

73. See infra text and notes 74-78.

74. Madison v. Guilford, 85 Conn. 55, 81 A 1046; Deason v. Williamson, 188 Ill. A. 316; Bangor v. Hampden, 41 Me. 484; Redwood County v. Minneapolis, 126 Minn. 512, 148 NW 469.

[a] **Instructions held correct.**—(1) Bangor v. Hampden, 41 Me. 484. (2) Instruction as to pauper's legal settlement. Madison v. Guilford, 85 Conn. 55, 81 A 1046. (3) Instruction as to necessity of relief. Newtown v. Danbury, 3 Conn. 553; Madison v. Guilford, supra.

[b] **Instructions held erroneous.**—(1) An instruction on the right of a physician to recover from the county for the treatment of cyclone sufferers was erroneous, where it did not include the element that the parties treated were without means to pay for the medical aid. Deason v. Williamson, 188 Ill. A. 316. (2) An instruction that if the supervisor employed plaintiff to render medical aid to the parties mentioned in the suit plaintiff would be entitled to recover a fair and reasonable compensation for his services was erroneous. Deason v. Williamson, supra. (3) Instruction as to pauper's settlement. Redwood County v. Minneapolis, 126 Minn. 512, 148 NW 469.

75. Deason v. Williamson, 188 Ill. A. 316.

[a] **An instruction abstract in form held misleading.**—Macomb v. McDonough, 134 Ill. A. 532.

Misleading instructions in civil actions generally see Trial [38 Cyc 1602].

76. See Trial [38 Cyc 1690 et seq].

77. Veazie v. Chester, 53 Me. 29.

78. Veazie v. Chester, supra.

79. See Trial [38 Cyc 1868, 1953].

80. Moden v. Van Buren County Superintendents of Poor, 183 Mich. 120, 149 NW 1064.

[a] **Findings by jury.**—Special findings of the jury were held to determine the question of a settlement of the pauper under the statute so as to make the pauper a county charge. Moden v. Van Buren County Superintendents of Poor, 183 Mich. 120, 149 NW 1064.

81. Palmer v. Hampden, 182 Mass. 511, 65 NE 817.

Findings by court in civil actions generally see Trial [38 Cyc 1953 et seq].

82. See Judgments §§ 87-105.

83. O'd Saybrook v. Milford, 76 Conn. 152, 56 A 496 (where the objection that the judgment included items not stated in the complaint was held not sustained by the record).

84. **Of proceedings for removal** see supra §§ 156-162.

85. See Appeal and Error 3 C. J. p 256.

86. See infra text and notes 87-90.

87. Fairfield v. Newtown, 75 Conn. 515, 54 A 301 (holding that, although, in an action against a town for the support of a pauper, the claim that defendant was liable for support furnished before plaintiff's neglect to give notice to defendant of such pauper's condition was not expressly made by plaintiff, as such question was necessarily decided in sustaining defendant's claim, which was that there was no liability whatever, it would be considered on appeal).

88. Landaff v. Atkinson, 8 N. H. 532.

[a] **Illustration.**—In assumpsit for the support of paupers, in which the settlement of the pauper was claimed by descent, where the descent was admitted, and no exception was taken as to the legitimacy of the children on trial, the exception could not afterward be taken. Landaff v. Atkinson, 8 N. H. 532.

Generally see Appeal and Error §§ 580-950.

89. Bridgewater v. Roxbury, 54 Conn. 213, 6 A 415; Hayes v. Symonds, 9 Barb. (N. Y.) 260.

[a] **Illustration.**—Where, in an action against a town, the trial court found that a person needed medical aid, and was unable to pay for it, and had no property, the finding of such facts must be accepted as conclusive by an appellate court upon the question as to whether such person was a pauper. Bridgewater v. Roxbury, 54 Conn. 213, 6 A 415.

Generally see Appeal and Error §§ 2830-2877.

90. Rockport v. Rockland, 109 Me. 512, 84 A 1077; South Scituate v. Scituate, 155 Mass. 428, 29 NE 639; Eckman v. Brady Tp., 81 Mich. 70, 45 NW 502.

[a] **Error in instruction held prejudicial.**—Rockport v. Rockland, 109 Me. 512, 84 A 1077.

Generally see Appeal and Error §§ 2878-3055.

91. **Nature and extent of relief generally** see supra § 241.

him by plaintiff town are restricted to those incurred during a certain period before and after the time of giving notice to defendant.[92] The expenses for which recovery is sought must be reasonable in amount.[93] And if the notice required to be given to the town chargeable[94] is of a larger sum than that declared for, no more than the sum declared for can be recovered.[95] In an action by the directors of a county infirmary for the maintenance of an insane pauper against the county in which the township of the pauper's settlement is situated, brought after returning the pauper to such county with a request that she be cared for by it, the amount recoverable is the expense of removal to the county of settlement and of the pauper's subsequent maintenance in the infirmary, and does not include compensation from the time of admission to the infirmary.[96]

Recovery by individuals furnishing support. Where no amount has been fixed or agreed upon as compensation for services or supplies furnished by an individual to a pauper, such person is entitled to recover a reasonable compensation therefor from the town or county chargeable.[97] And where certain relatives of the pauper are chargeable with his support in proportion to their ability,[98] a relative so chargeable, if able to contribute partial support, may recover from the town only that part of the support which he cannot supply.[99]

[§ 284] **12. Costs.** The general rule that the prevailing party is entitled to costs[1] applies in actions to recover for relief furnished to a pauper.[2] In proceedings for the removal of a pauper, the recovery may include costs and counsel fees.[3]

V. OLD AGE PENSIONS

[§ 285] Old age pension acts have been enacted in some jurisdictions, providing periodical payments of money to persons who have reached a specified age, and who otherwise come within the provisions of the statute in respect of nationality, residence, pecuniary means, and other conditions on which the right to relief depends.[4] The officers authorized to administer the relief,[5] and the procedure in admin-

Support pending removal proceedings see supra § 165.

92. See statutory provisions.

[a] **In Maine and Massachusetts** (1) in an action by a town against the town of a pauper's settlement to recover for support furnished to the pauper, plaintiff is entitled to recover, not only the expenses paid or legally incurred within three months before notice was given to defendant town, but also those incurred after such notice was given, down to the commencement of the action, provided such action is not barred by the statute of limitations. Veazie v. Howland, 53 Me. 39; Weymouth v. Boston, 260 Mass. 388, 157 NE 591; Attleborough v. Mansfield, 15 Pick. (Mass.) 19; Townsend v. Billerica, 10 Mass. 411. (2) The same rule applies to expenses of a pauper's support by plaintiff town in a state insane asylum. Rockport v. Searsmont, 103 Me. 495, 70 A 444; Jay v. Carthage, 48 Me. 353; Cummington v. Wareham, 9 Cush. (Mass.) 585. But see Amherst v. Shelburne, 11 Gray (Mass.) 107 (where recovery was not allowed for expenses for support furnished after notice to defendant). (3) Limitation of actions see supra § 272 note 82 [b], [c].

93. Me.—Hartland v. St. Albans, 123 Me. 82, 121 A 552; Machias v. East Machias, 116 Me. 423, 102 A 181.

Mass.—Southbridge v. Charlton, 15 Mass. 248.

N. H.—Berlin v. Gorham, 34 N. H. 266.

Pa.—Noxen Tp. Poor Dist. v. Central Poor Dist., 25 Pa. Dist. 211, 43 Pa. Co. 114; Valley Tp. Poor Dist. v. Moreland Tp. Poor Dist., 40 Pa. Co. 76.

Eng.—Glamorgan County Asylum v. Cardiff, [1911] 1 K. B. 437 [dism app [1910] 2 K. B. 547].

[a] **Services of overseers of poor.**—On removal of a pauper cared for by one poor district to another district, in which he has his legal settlement, the latter district cannot be charged with the services of the officers of the former district in caring for the pauper, and in looking up his legal settlement, and ordering his removal, which are a part of their official duties, nor with counsel fees. Montrose v. Blakeley, 3 LackLegN (Pa.) 154.

[b] **Amount stated in notice to town ultimately liable.**—(1) If a town expends an extravagant sum in the support of a pauper, and the notice given to the town ultimately liable truly states the sum expended, the former town can recover a reasonable proportion of the sum expended. Southbridge v. Charlton, 15 Mass. 248; Barnstead v. Strafford, 8 N. H. 142. (2) But if the selectmen give notice of the sum expended, knowing that some of the items are much larger than the town has paid, or assumed to pay, nothing can be recovered on such items. Barnstead v. Strafford, supra.

[c] **Amount held excessive.**—Three hundred and eighteen dollars for one month's support held excessive, and reduced to two hundred and ten dollars and eighty-four cents. Hartland v. St. Albans, 123 Me. 82, 121 A 522.

[d] **Amount held not excessive.**—An average charge of five dollars per week for keeping a pauper in a tuberculosis sanitarium is not excessive. Machias v. East Machias, 116 Me. 423, 102 A 181.

[e] **In England** (1) on an application to justices for an order under Lunacy Act (1890) § 287 for the payment by the guardians of a poor law union of the reasonable charges of the expenses of maintenance of a pauper lunatic in an asylum, the justices have power to fix the amount of the payment to be made by the guardians, and in fixing that amount the justices are not restricted to the limit of 14s a week imposed by § 283. Glamorgan County Asylum v. Cardiff, [1911] 1 K. B. 437 [dism app [1910] 2 K. B. 547]. (2) The functions of the justices under § 287 are judicial and not merely ministerial. Glamorgan County Asylum v. Cardiff, supra, and overr Suffolk County Lunatic Asylum v. Stow Union, 76 L. T. Rep. N. S. 494; Suffolk County Lunatic Asylum v. Nottingham Union, 69 J. P. 120]. (3) The visiting committee of a lunatic asylum is not empowered under § 283 subs 3 to fix a weekly sum, not exceeding 14s, in respect of the maintenance in the asylum of out-county pauper lunatics, in addition to the weekly sum already fixed by them, under subs 1, in respect of the maintenance of each pauper lunatic in the asylum; but where they have, under subs 1, fixed a weekly sum of less than 14s in respect of each pauper lunatic, they have power to differentiate between in-county and out-county pauper lunatics by fixing the maximum weekly sum of 14s in respect of out-county pauper lunatics. Fitch v. Bermondsey, [1905] 1 K. B. 524.

94. **Necessity of notice** see supra § 214.

95. Dalton v. Bethlehem, 20 N. H. 505.

96. Ashland County v. Richland County Infirmary, 7 Oh. St. 65, 70 AmD 49.

97. Dieffenbacher v. Mason, 117 Ill. A. 103; Hunter v. Jasper County, 40 Iowa 568.

[a] **The rule of a county board** which fixes a fee of one dollar per visit for medical aid furnished to persons coming within Pauper Act (Rev. St. [1903] p 1369) § 24 is unreasonable where it is made to apply to all cases, regardless of the nature of the ailments to be treated and the character of the services to be rendered. Dieffenbacher v. Mason, 117 Ill. A. 103.

98. See supra § 175.

99. Hall v. Clifton, 53 Me. 60.

1. See Costs §§ 10–40.

2. Clinton County v. Pace, 59 Ill. A. 576.

[a] **In an action by an individual** against a county for services rendered under the Pauper Act, where the county is unsuccessful the costs are properly adjudged against it. Clinton County v. Pace, 59 Ill. A. 576.

3. See supra §§ 163, 164.

4. See statutory provisions.

[a] **Calculation of claimant's means.**—The words "yearly value of any benefit or privilege," which the statute provides shall be taken into account in calculating claimant's means, does not include casual and temporary benefits accruing to a claimant taken into a hospice for the dying. Rex v. Local Government Bd., [1920] 2 Ir. 347.

[b] **Other statutes** in England, such as the Widows', Orphans', and Old Age Contributory Pensions Act (1925) 15 & 16 Geo. V c 70, have provided for old age pensions to persons contributing to the fund from which the pensions are paid, thereby creating a form of insurance. See Wadsworth v. Minister of Health, 44 T. L. R. 159; Webster v. Minister of Health, 43 T. L. R. 36.

5. See statutory provisions.

[a] **Local pension committee; validity of appointment.**—The term of office of a local pension committee, appointed under the Old Age Pension Act of 1908 (8 Edw. VII c 40), having expired, a resolution was passed at a meeting of the county council purporting to appoint a new committee which included M as one of the members. The summons convening the meeting of the county council had not, as required by article 36 (10) vi of the Local Govt. Act, Application of Enactments Schedule of Order (1898) specified the appointment of such committee as business to be transacted at the meeting. An application having been made for an information in the nature of a quo warranto against M, it was held that the committee not having been validly appointed, there was no existing office,

istering it,[6] are also provided for.

Criminal responsibility for false statements. Under a statute making it an offense for a person to make a false statement or representation for the purpose of securing an old age pension for himself or another,[7] the false statement must be directly or indirectly relevant to the right to receive a pension.[8]

***PAVAJA.** In the law of India, a word meaning the son born of the elder wife.[1]

PAVE.[2] A word, the meaning of which, like most others, depends upon where, and the connection in which, it may be used.[3] In its generic sense, to place some substance on the street so as to form an artificial roadway or wearing surface, which shall change the natural condition of the street;[4] to cover streets with stone or brick so as to make a convenient surface for travel;[5] to cover with stone, brick, concrete, or any other substantial matter, making a smooth and level surface;[6] to floor, with brick, stone, or other material;[7] to lay streets with pavement;[8] to place some substance on the street so as to form an artificial roadway or wearing surface which will change the natural condition of the street;[9] to prepare a passage;[10] to produce, by any means, a hard, firm, smooth surface for travel.[11] As a comprehensive term it implies all things necessary to, and immediately connected with, the construction of a firm, convenient, and suitable surface, including the necessary preparation.[12] It may include the curbing[13] and guttering[14] of a street; necessary sur-

and therefore quo warranto did not lie. Rex v. McDonald, [1913] 2 Ir. 55.

6. See statutory provisions.

[a] **Conclusiveness of decision of local pension committee.**—(1) A decision of the local pension committee allowing a pension to a person under the statutory age is invalid, and, although not appealed from within the statutory time, is not final and conclusive, and may subsequently be disallowed when the question is raised by the pension officer. Murphy v. Rex, [1911] A. C. 401; Rex v. Wexford Local Pension Committee, [1910] 2 Ir. 403. (2) A decision of the local pension committee as to the means of claimant, being good on its face and within the jurisdiction of the committee, is final and conclusive under the Old Age Pension Act of 1908. Rex v. Local Government Bd., [1920] 2 Ir. 347. (3) Under the act of 1908 the determination of the local pension committee as to the rate of pension, not having been referred to the central pension authority, is final and conclusive. Rex v. Local Government Bd., [1910] 2 Ir. 440.

[b] **Appeal from local pension committee.**—(1) On an appeal to the local government board by a pension officer from a decision of a local pension committee allowing a pension, it is sufficient that claimant should have notice that an appeal has been brought; it is not necessary that notice should be given to him of the time and place of hearing. The local government board has a discretion as to whether or not it shall hear in person claimant and his witnesses. Rex v. Local Govt. Bd., [1911] 2 Ir. 440. (2) Effect of decision on former appeal as res judicata. Rex v. Local Govt. Bd., supra.

7. See statutory provisions.

8. Holder v. McCarthy, [1918] 2 K. B. 309.

[a] **False statement held relevant.**—The question whether a person has been an inmate of a workhouse or in receipt of poor relief since he first received his old age pension is relevant although not decisive, with regard to his right to continue to receive his pension, and hence if such person falsely states that he has not been in the workhouse, nor in receipt of poor relief, he commits an offense under Old Age Pensions Act (1908) § 9. Holder v. McCarthy, [1918] 2 K. B. 309.

1. Jagdish Bahadur v. Sheo Partab Singh, L. R. 28 Indian App. 100, 102.

2. See also Paved Road or Street post p 557; Pavement post p 557; Paving Tile post p 558.

Power to pave see Municipal Corporations §§ 2284, 2286.

3. Muff v. Cameron, 134 Mo. A. 607, 114 SW 1125, 1126, 117 SW 116 [quot James v. Newberg, 101 Or. 616, 201 P 212, 213].

[a] **A statutory definition** provided that the word should apply to and include the formation of the roadway or footway of any street. St. John v. Hoopel, 15 Q. B. D. 652, 658.

4. Ross v. Gates, 183 Mo. 338, 350, 81 SW 1107; Heath v. Seattle Taxicab Co., 73 Wash. 177, 182, 131 P 843 [cit Cyc].

[a] **"Paving is a generic term,** and may include, and when not otherwise limited must be held to include, paving of any kind, whether of brick, stone, asphalt, wood or planking." Heath v. Seattle Taxicab Co., 73 Wash. 177, 182, 131 P 843.

5. Warren v. Henly, 31 Iowa 31, 36; Baldwin v. Springfield, 10 OhNP NS 65, 73 [quot Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 46, 33 Oh. Cir. Ct. 202]; Harrisburg v. Segelbaum, 151 Pa. 172, 180, 24 A 1070, 20 LRA 834.

[a] **Similar definitions.**—(1) "To lay or cover with stone, brick or other material, so as to make a firm, level or convenient surface for horses, carriages or persons on foot, to travel on." Webster Int. D. [quot Morse v. West Port, 110 Mo. 502, 507, 19 SW 831]; Webster Unabr. D. [quot Coleman-Fulton Pasture Co. v. Arkansas County, (Tex. Civ. A.) 180 SW 316, 317]; Pearce v. Couvillon, 164 La. 155, 113 S 801. (2) To lay or cover with stone or brick, or other suitable material, so as to make a es, carriages or foot passengers. level or convenient surface for hors- Webster D. [quot Buell v. Ball, 20 Iowa 282, 290 (where it was said: "Could it be reasonably contended that the authority to require the owner to pave the street in front of his lot, only gave the power to require him to lay down the paving stones after the surface was prepared and made ready for them? If he may be required to prepare the surface to receive the paving stones, may he not also be required to remove an obstacle, such as a root, a stump, or a tree? And if so, may he not be required to do any excavation or filling necessary to prepare the surface? We think the word 'pave' is used in that connection as a comprehensive ultimate term, and that it includes all things necessary 'to make a level and convenient surface for horses, carriages and foot passengers,' of any convenient, common or practical material"); Harrisburg v. Segelbaum, 151 Pa. 172, 180, 24 A 1070, 20 LRA 834; Greensburg v. Laird, 8 Pa. Co. 608, 617]; Warren v. Henly, 31 Iowa 31, 36; Pearce v. Couvillon, supra; In re Phillips, 60 N. Y. 16, 22 [quot Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 46, 33 Oh. Cir. Ct. 202; Baldwin v. Springfield, 10 OhNPNS 65, 73]; Schenectady v. Union College, 66 Hun 179, 185, 21 NYS 147. (3) To lay some hard substance upon the earth, in the case of streets, avenues, and highways, so as to make a convenient surface for travel. Cedar Rapids v. Cedar Rapids, etc., R. Co., 108 Iowa 406, 409, 79 NW 125.

6. Schenectady v. Union College, 66 Hun 179, 21 NYS 147, 151.

7. Webster Int. D. [quot Morse v. West Port, 110 Mo. 502, 507, 19 SW 831; Harrisburg v. Segelbaum, 151 Pa. 172, 180, 24 A 1070, 20 LRA 834]; Pearce v. Couvillon, 164 La. 155, 113 S 801.

8. Ten Eyck v. Protestant Episcopal Church, 65 Hun 194, 195, 20 NYS 157.

9. James v. Newberg, 101 Or. 616, 201 P 212, 213.

10. Webster D. [quot Buell v. Ball, 20 Iowa 282, 290, 291];

11. Baldwin v. Springfield, 10 OhN PNS 65, 73 [quot Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 47, 33 Oh. Cir. Ct. 202].

12. Hendersonville v. Freeze, 185 N. C. 476, 117 SE 498, 499. See Hoefer v. Milwaukee, 155 Wis. 83, 143 NW 1038, 1040 [cit Buell v. Ball, 20 Iowa 282, 290].

13. Bailey v. Des Moines, 158 Iowa 747, 138 NW 853, 856; Redersheimer v. Bruning, 113 La. 343, 36 S 990, 991; Steckert v. East Saginaw, 22 Mich. 104, 113; Excelsior Springs v. Ettenson, 120 Mo. A. 215, 96 SW 701, 705; Matter of Burmeister, 76 N. Y. 174, 181, 56 HowPr 416; Baldwin v. Springfield, 10 OhNPNS 65, 72; Wistar v. Philadelphia, 80 Pa. 505, 511, 21 AmR 112; McNair v. Ostrander, 1 Wash. 110, 116, 23 P 414; Hoefer v. Milwaukee, 155 Wis. 83, 143 NW 1038, 1040. See Schenley v. Com., 36 Pa. 29, 60, 78 AmD 359 (whether it is usual to employ curbstones when streets are paved held question for the jury). And see Mobile v. Mobile Light, etc., Co., 141 Ala. 442, 38 S 127, 129; Lafayette v. Doucet, 148 La. 166, 86 S 724, 725; Williams v. Detroit, 2 Mich. 560, 577. But see McAllister v. Tacoma, 9 Wash. 272, 37 P 447, 658 (where an order of a city council to pave a roadway fifty-four feet wide was held not to include curbing).

"Curb" defined see 17 C. J. p 404.

14. Fort Smith Pav. Dist. No. 7 v. Brun, 105 Ark. 65, 150 SW 154, 156; Bailey v. Des Moines, 158 Iowa 747, 138 NW 853, 856; Warren v. Henly, 31 Iowa 31, 36; Muff v. Cameron, 134 Mo. A. 607, 114 SW 1125, 1126, 117 SW 116; Matter of Burmeister, 76 N. Y. 174, 181, 56 HowPr 416; In re Grube, 20 Hun (N. Y) 303, 304; Baldwin v. Springfield, 10 OhNPNS 65, 72; McNair v. Ostrander, 1 Wash. 110, 116, 23 P 414; Hoefer v. Milwaukee, 155 Wis. 83, 143 NW 1038, 1040. See Lafayette v. Doucet, 148 La. 166, 86 S 724, 725; Redersheimer v. Bruning, 113 La. 343, 36 S 990, 991;

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*By WILLIAM QUINBY DE FUNIAK (Pavaja-Pawn inclusive).

face grading,[15] although substantial grading may not be included;[16] the laying[17] or flagging[18] of a sidewalk; and repaving.[19] It is sometimes synonymous with "build."[20] It has been distinguished from "macadamize,"[21] although it has been said to be more comprehensive than, and to include, "macadamize."[22] "Paving" is said to be more comprehensive than, and to include, "flagging"[23] and "graveling."[24]

Phrases: "Cost of paving,"[25] "general paving fund,"[26] "paved, macadamized or other hard-surfaced road,"[27] "paving fund,"[28] and "system of street paving."[29]

PAVED ROAD OR STREET.[30] A road covered with any character of material so as to make a firm, hard, smooth surface, over which horses, carriages, automobiles, and other vehicles may pass, is classed as a "paved road."[31] The term "paved road" or "paved street" has been held to include a graveled street,[32] a planked street,[33] a road covered with sand and clay,[34] and a shell road.[35] It has been held not to include a macadam road,[36] or a street macadamized with broken stone in a strip in the middle, the remainder being dirt road,[37] although, as popularly understood, a macadamized street is a paved street, but every paved street is not necessarily a macadamized street.[38]

PAVEMENT.[39] In a broad sense, any firm, hard covering for areas subjected to the wear and tear of human feet, or of hoofs and wheels, designed to keep the feet or wheels from the ground or earth, and to present a more or less dry, durable, and

Williams v. Detroit, 2 Mich. 560, 577.

[a] **Paving the gutters** with cobblestone and the cartway with broken stone (macadamizing), is a paving within the meaning of the act of the legislature conferring upon a city the power of paving its streets, and collecting the cost from the owners of the adjoining property by filing claims for paving, as liens. Huidekoper v. Meadville, 83 Pa. 156, 158 [quot Greensburg v. Laird, 8 Pa. Co. 608, 618].

[b] **Underground drainage or sewerage included.**—"It may be, on account of the physical conditions, that it is not practicable to successfully drain a street by carrying off the water in gutters on the surface. It may be that the street is so located that this could be more successfully done by a system of underground drainage or storm sewers. Under such circumstances, a storm sewer would not be a different or separate improvement, like the construction of an ordinary sewer, but would be a part of the work necessarily incident to paving the street," etc. Fort Smith Pav. Dist. No. 7 v. Brun, 105 Ark. 65, 71, 150 SW 154.

[c] **Underground drainage or sewerage not included.**—(1) The word may also include certain kinds of drainage, but underground drainage or sewerage does not come within its meaning. Mobile v. Mobile Light, etc., Co., 141 Ala. 442, 38 S 127, 129. (2) "The terms 'grade' and 'pave' are hardly applicable to drains and sewers." Denver Bd. of Public Works v. Hayden, 13 Colo. A. 36, 49, 56 P 201. (3) Water and sewer connections are not part of "paving." Jackson v. Greaves, 134 Miss. 63, 98 S 337.

15. Little Rock v. Fitzgerald, 59 Ark. 494, 500, 28 SW 32, 28 LRA 496; Buell v. Ball, 20 Iowa 282, 290; Redersheimer v. Bruning, 113 La. 343, 36 S 990, 991; Steckert v. East Saginaw, 22 Mich. 104, 113; Williams v. Detroit, 2 Mich. 560, 577; Hendersonville v. Freeze, 185 N. C. 476, 117 SE 498, 499; McNair v. Ostrander, 1 Wash. 110, 116, 23 P 414; Hoefer v. Milwaukee, 155 Wis. 83, 143 NW 1038, 1040. See Lafayette v. Doucet, 148 La. 166, 86 S 724, 725. But see McAllister v. Tacoma, 9 Wash. 272, 37 P 447, 658 (where an order of a city council to pave a roadway fifty-four feet wide was held not to include grading).

"Grade" or "grading" as applied to a street or highway see Grade 28 C. J. p 754.

16. Little Rock v. Fitzgerald, 59 Ark. 494, 500, 28 SW 32, 28 LRA 496 (referring to removal of embankments and filling of gulches); Fort Street, etc., R. Co. v. Schneider, 15 Mich. 74, 75 (referring to excavations).

17. In re Phillips, 60 N. Y. 16, 22; Hoefer v. Milwaukee, 155 Wis. 83, 143 NW 1038, 1040.

[a] **Authority to pave** includes the laying of a plank sidewalk. Burlington, etc., R. Co. v. Spearman, 12 Iowa 112, 116.

18. Matter of Burmeister, 76 N. Y. 174, 181, 56 HowPr 416; Baldwin v. Springfield, 10 OhNPNS 65, 72.

"Flagging" defined see 26 C. J. p 737.

19. Gurnee v. Chicago, 40 Ill. 165, 170; Farrar v. St. Louis, 80 Mo. 379, 392; McCormack v. Patchin, 53 Mo. 33, 37, 14 AmR 440; Morley v. Carpenter, 22 Mo. A. 640, 643; Loewenbach v. Milwaukee, 139 Wis. 49, 119 NW 888, 889. See Wistar v. Philadelphia, 80 Pa. 505, 511, 21 AmR 112 (where the power to pave was said to include the power to repair and repave, but the city could not at pleasure change, take up, alter, or relay pavements and reset curbs at the expense of a property owner who had recently paid for a good pavement or curb). Compare Ten Eyck v. Protestant Episcopal Church, 65 Hun 194, 197, 20 NYS 157 (where it was held that "paving" in a lease providing for payment of taxes and assessments by the lessee did not include "repaving").

Repave see [34 Cyc 1340].

20. Webster Int. D. [quot Morse v. West Port, 110 Mo. 502, 507, 19 SW 831].

"Build" defined see 9 C. J. p 682.

21. Pearce v. Couvillon, 164 La. 155, 113 S 801, 803 ("the authorities are divided upon the question as to whether or not 'macadamizing' comes within the meaning of the term 'paving.' The best reasoned opinions, however, hold that it does not"); United R., etc., Co. v. Hayes, 92 Md. 490, 494, 48 A 364. See Leake v. Philadelphia, etc., Pav. Co., 10 Pa. Co. 263, 267 [aff 150 Pa. 643, 650, 24 A 351] (where it was said: "I do not regard a macadam road as paved, in the meaning of the term as it has been employed in the statutes and ordinances applicable to this city. Such a road is artificial, improved, it may be, but not paved in the technical or natural sense of the word").

[a] **In the legislative mind,** macadamizing is regarded as a species of paving. However, the latter word is more general than the former. Harrisburg v. Segelbaum, 151 Pa. 172, 180, 24 A 1070, 20 LRA 834.

[b] **"Macadamize"** is a word of fixed and definite meaning and refers, not only to the kind of material to be used in covering a street or road, but also to the manner in which it is to be laid. Partridge v. Lucas, 99 Cal. 519, 520, 33 P 1082.

"Macadamize" defined see 38 C. J. p 328.

"Macadam" and "pavement" distinguished see Pavement post this page.

"Macadam street" and "paved street" distinguished see Paved Road or Street post this page.

22. Ross v. Gates, 183 Mo. 338, 350, 81 SW 1107 ("The word is much more comprehensive than the term macadamize, but it embraces all that the term macadamize covers").

23. Matter of Burmeister, 76 N. Y. 174, 181, 56 HowPr 416; Schenectady v. Union College, 66 Hun 179, 21 NYS 147, 151.

"Flagging" defined see 26 C. J. p 737.

24. McNair v. Ostrander, 1 Wash. 110, 116, 23 P 414.

"Gravel" defined see 28 C. J. p 824.

25. Danville St. R., etc., Co. v. Mater, 116 Ill. A. 519, 523.

26. Corey v. Ft. Dodge, 133 Iowa 666, 673, 111 NW 6.

27. McDonald v. Fraleigh, 86 Fla. 577, 580, 98 S 830.

28. Corey v. Ft. Dodge, 133 Iowa 666, 670, 111 NW 6.

29. Pearce v. Couvillon, 164 La. 155, 113 S 801, 803.

30. See Pave ante p 556; Pavement post this page; Paving Tile post p 558.

Road see Highways § 1 text and notes 12–56.

Street see Municipal Corporations §§ 2277–2296, 3597–3999.

31. Gibson v. Davis, (Tex. Civ. A.) 236 SW 202, 212.

[a] **"Paved, macadamized or other hard-surfaced road."**—McDonald v. Fraleigh, 86 Fla. 577, 580, 98 S 830.

32. Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 48, 33 Oh. Cir. Ct. 202. Compare Pearce v. Couvillon, 164 La. 155, 113 S 801, 803 (which, after reviewing the authorities, comes to the conclusion that the first requisite is that the street or road must be treated in a manner so as to make an even, hard way, or floor, and that, accordingly, graveled streets do not constitute a "system of street paving").

33. Heath v. Seattle Taxicab Co., 73 Wash. 177, 182, 131 P 843.

[a] **A duty imposed to pave a street** does not include therein the obligation to cover a bridge with planking. Cedar Rapids v. Cedar Rapids, etc., R. Co., 108 Iowa 406, 409, 79 NW 125.

34. Gibson v. Davis, (Tex. Civ. A.) 236 SW 202, 212. But see McDonald v. Fraleigh, 86 Fla. 577, 98 S 830, 832 (whether a road surfaced with a combination of sand and clay is "paved" is a question of fact, depending upon the suitableness of the materials, the combination used, etc).

35. Coleman-Fulton Pasture Co. v. Aransas County, (Tex. Civ. A.) 180 SW 316, 317 [aff 108 Tex. 223, 191 SW 556, 557].

36. Leake v. Philadelphia, 10 Pa. Co. 263, 265 [aff 150 Pa. 643, 24 A 351, 353]. See also Harrisburg v. Segelbaum, 151 Pa. 172, 180, 24 A 1070, 20 LRA 834.

"Macadam" and "pavement" distinguished see Pavement post this page.

"Macadamize" and "pave" distinguished see Pave ante p 556.

37. United R., etc., Co. v. Hayes, 92 Md. 490, 48 A 364, 365.

38. Harrisburg v. Segelbaum, 151 Pa. 172, 180, 24 A 1070, 20 LRA 834 (macadamizing a street is not paving it).

39. See also Pave ante p 556; Paved Road or Street ante this page; Paving Tile post p 558.

Pavement:

Construction by city see Municipal Corporations §§ 2281–2289.

Liability for defects and obstructions

smooth surface;[40] a hard, solid surface covering for a floor, road, or factory, commonly of stone, brick, concrete, asphalt, or wood.[41] In a narrower sense, a hard covering of the surface of a road or footway commonly composed of macadam, granite blocks, brick, sheet, or block, asphalt, or wood for vehicular traffic, and flagstones, cement, or tar, concrete, and brick for sidewalks.[42] In a modern and more restricted sense, the term is sometimes confined to streets and roads,[43] excluding the sidewalks,[44] although sometimes the term is employed as including sidewalks.[45] Curbs and gutters may[46] or may not[47] be included in the term. "Pavement" is a more comprehensive word than, but includes, "flagging."[48] The first thing necessary in a pavement, of course, is a good foundation,[49] but the primary and controlling requisite is that a firm, hard, smooth surface be secured.[50] No particular material is necessary to constitute the pavement;[51] it may be made of anything which will produce a hard, firm, smooth surface for travel.[52]

Bitulithic pavement. A patented pavement having a foundation layer of stone such as is used in ordinary macadam or telford roads, upon which rests one or more layers of smaller stones coated with coal tar, coal tar pitch, asphalt, or a mixture of them, or other equivalent bituminous material.[53]

Other phrases: "Brick pavement,"[54] "kind of pavement or material,"[55] "Nicholson pavement,"[56] and "sheet asphalt pavement."[57]

PAVING TILE.[58] A piece of burned earth or clay or a piece of marble, suitable for, and intended to be used as, a covering for a floor, a pavement, or the like;[59] a tile for paving.[60]

PAWN.[61]

in see Municipal Corporations §§ 1755–1885.

40. 15 New Int. Encyc. p 464 [quot Trippeer v. Couch, 110 Or. 446, 454, 220 P 1012; James v. Newberg, 101 Or. 616, 201 P 212, 214].

[a] **This definition would include** the paved floors of cathedrals and other public buildings, often of an ornamental character, as well as the surfaces of courtyards, walks, streets, and highways, on which stones or other durable materials are placed. 15 New Int. Encyc. p 464 [quot James v. Newberg, 101 Or. 616, 201 P 212, 214].

41. Standard D. [quot Pearce v. Couvillon, 164 La. 155, 113 S 801, 802; Byers v. Sheridan, 97 Or. 154, 191 P 351, 352].

42. Nelson Encyc. [quot Trippeer v. Couch, 110 Or. 446, 454, 220 P 1012; James v. Newberg, 101 Or. 616, 201 P 212, 2131].

43. See cases infra this note.

[a] **In this sense** a pavement has been defined as: (1) A covering of stone, brick, wood, cement, or asphalt, placed on a street or road to give a hard and easier surface for travel. New Students Reference Work [quot Pearce v. Couvillon, 164 La. 155, 113 S 801, 802]. (2) "Any substance which is spread upon the street so as to form a compact, hard, or level surface or floor." Pearce v. Couvillon, supra; Lilienthal v. Yonkers, 6 App. Div. 138, 139, 39 NYS 1037. (3) "The wearing surface of that portion of improved streets lying between the curbs." 15 New Int. Encyc. p 464 [quot James v. Newberg, 101 Or. 616, 622, 201 P 212].

44. See cases infra this note.

[a] **Not synonymous with "sidewalk."**—James v. Newberg, 101 Or. 616, 201 P 212, 213.

[b] **In the United States** the term is rarely used to include sidewalks or any kind of footpaths. Nelson Encyc. [quot James v. Newberg, 101 Or. 616, 201 P 212, 213]; Uvalde Asphalt Pav. Co. v. New York, 89 Misc. 451, 453, 151 NYS 927. "Sidewalk" defined see [36 Cyc 440].

[c] **Distinguished from "banquette."**—Redersheimer v. Bruning, 113 La. 343, 346, 36 S 990. "Banquette" defined see 7 C. J. p 918.

45. Little Rock v. Fitzgerald, 59 Ark. 494, 499, 28 SW 32, 28 LRA 496.

[a] **In Great Britain** a sidewalk is also known as a pavement. Century D. [quot James v. Newberg, 101 Or. 616, 201 P 212, 213].

[b] **"In the charter,** and as it is commonly understood, [a sidewalk] is a pavement of some kind." Denver Bd. Public Works v. Hayden, 13 Colo. A. 36, 49, 56 P 201.

46. McNair v. Ostrander, 1 Wash. 110, 115, 23 P 414.

47. Redersheimer v. Bruning, 113 La. 343, 346, 36 S 990.

48. Matter of Burmeister, 76 N. Y. 174, 181, 56 HowPr 416; Schenectady v. Union College, 66 Hun 179, 185, 21 NYS 147.

[a] **Flagging** is a species of pavement. In re Phillips, 60 N. Y. 16, 21; In re Grube, 20 Hun (N. Y.) 303, 304.

[b] **The flagging of a sidewalk** is a pavement. In re Phillips, 60 N. Y. 16, 21; In re Grube, 20 Hun (N. Y.) 303, 304. And see Pave ante p 556.

"Flagging" defined see 26 C. J. p 737.

49. New Students Reference Work [quot Pearce v. Couvillon, 164 La. 155, 113 S 801, 802].

[a] **A concrete base** for railway tracks is not a part of the pavement of a street. Virginia R., etc., Co. v. Norfolk, 147 Va. 951, 133 SE 565, 567.

50. Pearce v. Couvillon, 164 La. 155, 113 S 801, 802; Baldwin v. Springfield, 10 OhNPNS 65, 72 [quot Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 47, 33 Oh. Cir. Ct. 202].

51. See cases infra note 52.

52. Little Rock v. Fitzgerald, 59 Ark. 494, 28 SW 32, 33, 28 LRA 496; Pearce v. Couvillon, 164 La. 155, 113 S 801; Belcher Sugar Refining Co. v. St. Louis Grain El. Co., 101 Mo. 192, 206 SW 822, 826, 8 LRA 801; Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 47, 33 Oh. Cir. Ct. 202; Baldwin v. Springfield, 10 OhNPNS 65, 74; Philadelphia v. Eddleman, 169 Pa. 452, 32 A. 639. See Burnham v. Chicago, 24 Ill. 496, 499 (not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but including such as are capable of being formed as well of pebbles, or gravel, or any other hard substance, which will make a compact, even, hard way or floor); In re Phillips, 60 N. Y 16, 22 (the difference in the material could not change the character or general identity of the work as embraced in the generic term, which includes any process for covering a street or walk or public place with stone or brick or concrete, so as to give a level surface, convenient for use in the manner and for the purpose for which it was intended).

"The meaning of the word cannot be limited by the particular material used on the street, nor has it reference solely to the manner in which the material is spread upon the street." Lilienthal v. Yonkers, 6 App. Div. 138, 139, 39 NYS 1037.

[a] **Gravel.**—(1) A firm, hard surface may be secured by the use of gravel. Baldwin v. Springfield, 10 OhNPNS 65, 72 [quot Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 47, 33 Oh. Cir. Ct. 202]. (2) A well laid foundation covered with gravel, sufficiently substantial for the use it will meet, is a pavement. St. John v. Hoopel, 15 Q. B. D. 652, 658. (3) Spreading loose gravel on a dirt road does not constitute a pavement. When mixed with sand and cement it may be laid so as to form a hard surface; but not otherwise. Pearce v. Couvillon, 164 La. 155, 113 S 801, 802. (4) Pavement is to be distinguished from the gravel and stone coating put on country roads. New Students Reference Work [quot Pearce v. Couvillon, supra]. "Gravel" defined see 28 C. J. p 824.

[b] **Macadam.**—(1) A macadam road is not "paved" in the technical and natural sense of the word. Leake v. Philadelphia, 10 Pa. Co. 263, 265 [aff 150 Pa. 643, 24 A 351, 353]. (2) Macadam is a species of pavement, and may well be called a pavement. Belcher Sugar Refining Co. v. St. Louis Grain El. Co., 101 Mo. 192, 206, 13 SW 822, 8 LRA 801. "Macadam" defined see 38 C. J. p 328; "Macadamize" and "pave" distinguished see Pave ante p 556; "Macadamized road" and "paved road" distinguished see Paved Road or Street ante p 557.

[c] **Planks.**—(1) A plank walk may be a pavement, within the meaning of a statute, being as permanent and practicable as one of brick or stone. Burlington, etc., R. Co. v. Spearman, 12 Iowa 112, 116. (2) Where such a meaning is given by statute, a pavement may be made of planking. Ex p. Lugrin, 16 N. B. 125, 127. "Planking" defined see post.

53. Union Pav. Co. v. Schenectady Bd. of Contract, etc., 74 Misc. 646, 134 NYS 740, 743.

"Bitulithic" defined see 8 C. J. p 1112.

54. Union Pav. Co. v. Schenectady Bd. of Contract, etc., 74 Misc. 646, 652, 134 NYS 740 ("a brick pavement may be made of soft brick or vitrified brick").

"Brick" defined see 9 C. J. p 416.

55. Union Pav. Co. v. Schenectady Bd. of Contract, etc., 74 Misc. 646, 649, 134 NYS 740.

56. Steckert v. East Saginaw, 22 Mich. 104, 112; Dean v. Borchsenius, 30 Wis. 236, 240.

57. Union Pav. Co. v. Schenectady Bd. of Contract, etc., 74 Misc. 646, 651, 134 NYS 740.

"Asphalt" defined see 5 C. J. p 607.

58. See also Pave ante p 556; Paved Road or Street ante p 557; Pavement ante p 557.

"Tile" defined see [38 Cyc 304].

59. U. S. v. Davis, 54 Fed. 147, 151, 4 CCA 251.

[a] **"Marble paving tiles."**—U. S. v. Davis, 54 Fed. 147, 151, 4 CCA 251.

60. Rossman v. Hedden, 37 Fed. 99, 102 (construing the Tariff Act of 1883). See Rossman v. Hedden, 145 U. S. 561, 568, 12 SCt 925, 36 L. ed. 817.

61. See Pawnbrokers § 2.

PAWNBROKERS

By Fred. G. Krivonos

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 560]

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CROSS REFERENCES

Bailments 6 C. J. p 1080.
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Municipal Corporations §§ 200–326, 539, 602–740.
Pledges [31 Cyc 779].
Usury [39 Cyc 876].

I. DEFINITIONS AND DISTINCTIONS

[§ 1] **A. Pawnbroker.** While in general terms a pawnbroker may be said to be one who lends money, usually in small sums, upon property delivered in pledge,[1] more accurately speaking he is a person who makes a business or occupation of lending money at interest on the security of personal property deposited in his keeping.[2]

"**Pawnbrokerage**" is commonly denominated as the business of loaning money on personal property delivered as security for loans.[3]

[§ 2] **B. Pawn.**[4] The word "pawn," usually employed synonymously with the term "pledge,"[5] is used both as a noun to designate a certain species of bailment or pledge,[6] or, in a more limited sense, to designate the thing actually deposited by the pawner with the pawnee;[7] and as a verb, as meaning to put in pawn or to pledge, by the delivery of personal property to another as security for the return on a day certain of money lent.[8]

[§ 3] **C. Pawner and Pawnee.** The parties to a pawn transaction[9] are referred to as the "pawner" and the "pawnee."[10]

The pawner is the person depositing a pawn[11] as security for the payment of his debt or the fulfillment of his liability.[12]

The pawnee is the person who lends the money and receives the security;[13] the person who takes anything in pawn;[14] a pawnbroker.[15]

1. Little Rock v. Barton, 33 Ark. 436, 446; Newman v. U. S., 41 App. (D. C.) 37, 48.

2. Levinson v. Boas, 150 Cal. 185, 187, 88 P 825, 12 LRANS 575, 11 Ann Cas 661; Chicago v. Hulbert, 118 Ill. 632, 8 NE 812, 59 AmR 400; Hunt v. Philadelphia, 35 Pa. 277, 278.

"One is a pawnbroker who carries on the business of receiving goods in pledge for loans, exacting an interest for those loans." Levinson v. Boas, supra.

[a] **"Two requisites must be established.** First, the person must receive goods in pledge for loans at a rate of interest, and, second, this must be his business, or a well-defined part of his business." Levinson v. Boas, 150 Cal. 185, 187, 88 P 825, 12 LRANS 575, 11 AnnCas 661.

Distinguished from "auctioneer" see Auctions and Auctioneers § 2.

Who are pawnbrokers subject to various regulations see infra §§ 5–19.

3. Turney v. Goldberg's Loan Office, (Okl.) 274 P 464.

4. Distinguished from:
Chattel mortgage see Chattel Mortgages §§ 3–11.
Sale:
In general see Pledges [31 Cyc 789].
Conditional sale see Pledges [31 Cyc 789].

5. See Pledges [31 Cyc 785].

[a] **As distinguished from other pledges** the term "pawn" is confined, in precise usage, to mean a deposit of personal property made to a pawnbroker to secure a loan (see cases passim this section), whereas the term "pledge" includes deposits generally of personalty, made to secure loans, debts, or engagements (see Pledges [31 Cyc 785]).

6. Ill.—Jacobs v. Grossman, 310 Ill. 247, 141 NE 714 [aff 225 Ill. A. 649].
N. C.—Barrett v. Cole, 49 N. C. 40, 41.
Oh.—Savin v. Butler, 19 Oh. A. 68 [aff 111 Oh. St. 695, 146 NE 673].
Tenn.—Pulaski Nat. Bank v. Winston, 5 Baxt. 685, 688.
Vt.—Russell v. Fillmore, 15 Vt. 130, 136.
Eng.—Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

"Bailment" defined generally see Bailments § 1.

"Pledge" defined see Pledges [31 Cyc 785].

7. Wolff v. Farrell, 5 S. C. L. 68, 70.

8. English L. D.; Webster Int. D.
[a] **As "to pawn:"** (1) A watch. Webster Int. D. (2) Plate or jewels. Anderson L. D.

9. See supra §§ 1, 2.

10. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714.

11. Rapalje & L. L. D.

12. Bouvier L. D.

13. English L. D.

14. Webster Int. D.

15. Rapalje & L. L. D.

[§ 4] **D. Pawn Ticket.** The pawn ticket is the pawnbroker's receipt for a pawn.[16]

II. REGULATION AND CONTROL

[§ 5] **A. By the State—1. In General.** The state, within the general scope of its police power,[17] may control and regulate the business or occupation of pawnbroking.[18] A single act of receiving or taking a pawn is not exercising the trade or carrying on the business of a pawnbroker under a statute regulating the trade or business of pawnbroking.[19] Under a statute defining a "pawnbroker" as any person loaning money on personal property and charging as much as the maximum rate of interest permitted by the statute, the statutory definition and regulation of the occupation is confined to pawnbrokers charging a maximum rate of interest.[20]

[§ 6] **2. Requiring License.**[21] The state[22] has power to require a license as a condition precedent to the lawful pursuit of the business of pawnbroking.[23] The license requirement may be limited to pawnbrokers doing business in cities or towns of a certain number or more of inhabitants.[24] One who has paid a license tax for the privilege of conducting the business of pawnbroking is not liable to an additional license tax as a dealer in secondhand clothing[25] or as a dealer in pistols[26] because he sells such unredeemed pawned articles,[27] or resells after he has purchased the pawn upon the pawner's default;[28] but a licensed pawnbroker, who habitually resells unredeemed pawned pistols and retains the profit, if any, resulting from the sale over and above the defaulting pawner's debt, is subject to a police regulation imposing a license tax for the retail sale of pistols.[29] A solitary instance of the sale of an unredeemed pawned pistol by a licensed pawnbroker does not render him liable to the license tax for the sale of pistols.[30]

[§ 7] **3. Amount of Loans.** Where a statute limits the amount to be loaned by a pawnbroker to any one person,[31] the limitation cannot be circumvented by the pawner's use of the names of a number of fictitious persons in order to obtain loans, no one of which exceeds the statutory limit, but all of which total more than the permitted amount.[32]

[§ 8] **4. Rate of Interest.** The state under its police power may regulate the rate of interest to be charged by pawnbrokers;[33] and the character of the business is such that it is not improper to allow a charge of interest beyond the ordinary statutory interest limit.[34] While the maximum rate is usually fixed by statute,[35] it has been held that, in the absence of a direct prohibition, by the statute governing pawnbrokers, of a rate of interest above the maximum therein mentioned, a pawnbroker may, under the express authorization of a general usury law not excepting pawnbrokers from its operation, charge any rate of interest which may be agreed upon between him and the pawner.[36] The maximum statutory rate cannot be enlarged, by treating a loan for a longer period as a monthly contract[37] or by adding storage charges for the keeping of the

16. Webster Int. D.
Necessity, nature, and effect of pawn ticket see infra §§ 10, 31, 32, 36, 41–43.

17. See Constitutional Law §§ 412–443.

18. Ind.—Shuman v. Ft. Wayne, 127 Ind. 109, 26 NE 560, 11 LRA 378.
Kan.—Blaker v. Hood, 53 Kan. 499, 36 P 1115, 24 LRA 854.
Mass.—Com. v. Danziger, 176 Mass. 290, 57 NE 461.
Mich.—Grand Rapids v. Braudy, 105 Mich. 670, 64 NW 29, 55 AmSR 472, 32 LRA 116.
N. Y.—Peo. v. Magen, 140 NYS 444.
Tex.—Juhan v. State, 86 Tex. Cr. 63, 216 SW 873, 875 [cit Cyc].
Va.—Elsner v. Hawkins, 113 Va. 47, 73 SE 479, AnnCas1913D 1278.
Wash.—Asakura v. Seattle, 122 Wash. 81, 210 P 30.

[a] **Reason for rule.**—"The business of pawnbrokers, because of the facility it furnishes for the commission of crime and for its concealment, is one which belongs to a class where the strictest police regulation may be imposed." Elsner v. Hawkins, 113 Va. 47, 49, 73 SE 479, AnnCas 1913D 1278.

[b] **Pawnbroking is a privilege,** and not a right, and is subject to regulation. Asakura v. Seattle, 122 Wash. 81, 210 P 30.

[c] **To aid in detection of crime.**—Under a city charter (L. [1901] c 466 §§ 316, 317), providing for the supervision and inspection of pawnbrokers and the right to examine their books by the police commissioner, and further providing that no property in possession of a pawnbroker shall be taken from him without due process or authority of law, proof that property pawned had been stolen and identification thereof by the owner precludes any rightful refusal by the pawnbroker to surrender such property upon demand by a searching police officer and the owner. Peo. v. Magen, 140 NYS 444, 27 N. Y. Cr. 178.

19. Reg. v. Andrews, 25 U. C. Q. B. (Ont.) 196.
[a] **Illustration.**—Where a statute requires pawnbrokers to have a sign bearing the word "pawnbroker" placed over the shop, a single pawn transaction does not render the pawnee liable for violation of this statutory requirement. Reg. v. Andrews, 25 U. C. Q. B. (Ont.) 196.

20. Provident Loan Soc. v. Denver, 64 Colo. 400, 172 P 10.

21. **License required by municipality** see infra §§ 14–17.

22. See Licenses §§ 13, 14.

23. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661; Com. v. Danziger, 176 Mass. 290, 57 NE 461.
[a] **English statute construed.**—The Pawnbrokers' Act of 1872. Reg. v. Inland Revenue Comrs., [1891] 1 Q. B. 485; Rex v. Northumberland Justices, 96 L. T. Rep. N. S. 700 (award of costs upon successful appeal from refusal by district council of required certificate).
[b] **"Successor" of pawnbroker** licensed in 1872 was held not entitled to open new shops without required certificate. Rex v. Inland Revenue Comrs., [1907] 1 K. B. 108.

Failure to procure license see infra § 19.

24. Com. v. Danziger, 176 Mass. 290, 57 NE 461. See generally Licenses §§ 51–58.

25. Shelton v. Silverfield, 104 Tenn. 67, 56 SW 1023.

Double taxation; separate licenses generally see Licenses §§ 62–64, 104.

26. Morningstar v. State, 135 Ala. 66, 33 S 485.

27. Morningstar v. State, supra; Shelton v. Silverfield, 104 Tenn. 67, 56 SW 1023.

28. Shelton v. Silverfield, supra.
[a] **Reason for rule.**—"The very nature of the pawnbroker's business carries with it the necessity for a sale of unredeemed pledges, and it could not be expected that the pawnbroker would sacrifice his security by permitting the same to be sold for a song. The law would warrant him in buying in the security, and in order to save himself from loss, sell it again; in fact this procedure is an essential part or feature of the business. To say that a pawnbroker shall pay a very large amount, perhaps $250 to $300 per annum to State and county, as a privilege tax to carry on his business, and that he cannot protect himself in the sale of unredeemed articles, would be absolutely ruinous to the business he had been licensed to do, and a denial to him of property protection." Shelton v. Silverfield, 104 Tenn. 67, 70, 56 SW 1023.

Sale of pawn generally see infra §§ 44–51.

29. State v. Winehill, 147 La. 781, 86 S 181.

30. Graham v. State, 71 Miss. 208, 13 S 883.

31. See statutory provisions.

32. Mills v. First State Pawners Soc., 192 Ill. A. 231.

Effect of violation of statute see infra § 19.

33. See Interest § 90. See also Usury [39 Cyc 876, 910].

Criminal prosecution for violation of regulation see infra §§ 57–59.

34. Griffith v. Connecticut, 218 U. S. 563, 31 SCt 132, 54 L. ed. 1151; State v. Hurlburt, 82 Conn. 232, 72 A 1079; Com. v. Young, 57 Pa. Super. 521; Reg. v. Adams, 8 Ont. Pr. 462.
[a] **Reason for rule.**—"When the Pawnbrokers' Act was proposed, the Usury Laws were in force, and that Act must therefore be regarded as an enabling Act, in the interest of the poorer classes of the community, who might be greatly benefited by the power to pledge small articles for small loans, the trouble attending the making of which would not be compensated by the legal rate of interest then permitted, and the greater rate provided by the Act furnished an inducement for the use of capital in that way." Reg. v. Adams, 8 Ont. Pr. 462, 465.

Effect of charging interest beyond statutory maximum rate see infra § 19.

35. See statutory provisions.

36. Reg. v. Adams, 8 Ont. Pr. 462.

37. Reg. v. Goodburn, 8 A. & E.

pawn.[38] The statutory rate controls where the provisions of an ordinance on the subject are in conflict therewith.[39] Actual receipt of interest in excess of the statutory maximum is essential to constitute a violation of the statute.[40]

[§ 9] **5. Dealing with Minors.** A statute forbidding the acceptance of goods in pledge from a minor[41] does not preclude a contract with an adult and delivery of the goods to the pawnbroker by the minor as messenger for the adult.[42]

[§ 10] **6. Pawn Tickets.**[43] A statute providing that certain information shall be inserted in the pawn ticket issued to the pawner has been held to be mandatory.[44]

[§ 11] **B. By Municipality—1. In General.** Under express or implied power municipal corporations may regulate the business or occupation of pawnbroking[45] within the municipal limits.[46]

[§ 12] **2. Power To Regulate Licensed Pawnbroker.** The pawnbroker's license is taken with the knowledge that the licensee is subject to reasonable regulations made by the municipality.[47]

[§ 13] **3. Absolute Prohibition of Business.** As may be seen from the rule elsewhere discussed,[48] the statutory power granted to a municipality to regulate and license pawnbrokers may[49] or may not[50] include a discretionary power to prohibit the business absolutely.

[§ 14] **4. Requiring License[51]—a. In General.** In accordance with general rules,[52] a municipal corporation, when authorized by charter or statute, may require that one desiring to pursue the business or occupation of pawnbroking shall obtain a license therefor.[53] An ordinance provision limiting eligibility for a pawnbroker's license to citizens has been held constitutional,[54] and not violative of a treaty guaranty to "carry on trade," as to Japanese nationals.[55] Since the business of a broker[56] and that of a pawnbroker[57] constitute separate and distinct classes,[58] it would be competent for a municipality to lay an entirely different license tax upon brokers and pawnbrokers.[59] A pawnbroker who has secured a license for such occupation is not doubly taxed by being required to take out the required license for the retail sale of pistols.[60] Where the ordinance leaves the suitability of applicant for a pawnbroker's license within the discretion of the mayor, he is justified in refusing a license to one whose license had previously been revoked.[61]

Amount of license fee. In the absence of clear abuse, the courts will not interfere with municipal discretion in fixing the amount of the pawnbroker's license fee.[62]

[§ 15] **b. Who Are Pawnbrokers Subject to License.**[63] A person to be subject to an ordinance requiring a license must fall within the definition given in the statute.[64] However, statutory definition of a "pawnbroker" has been held not to be exclusive so as to preclude additional specifications under a nonconflicting ordinance including persons

508, 35 ECL 705, 112 Reprint 931.

38. See State v. Goldenberg, 30 Del. 458, 108 A 137.

39. Solomon v. Denver, 12 Colo. A. 179, 55 P 199. See also Municipal Corporations §§ 218–221.

40. Hallenbeck v. Getz, 63 Conn. 385, 28 A 519.

[a] **Illustration.**—A notation upon the pawn ticket of a rate of interest in excess of the statutory maximum does not render the pawnbroker liable to the statutory penalty imposed for taking excessive interest where such excessive rate was not actually paid to, or received by, the pawnbroker. Hallenbeck v. Getz, 63 Conn. 385, 28 A 519.

41. See statutory provisions.

42. Petchenik v. Rich, 84 N. J. L. 592, 87 A 97.

[a] **Illustration.**—Where a pawn is accepted from a minor after telephonic communication with the parent in confirmation of his authorization for the transaction, the statute is not violated, the contract being regarded as made directly with the parent. Petchenik v. Rich, 84 N. J. L. 592, 87 A 97.

43. Defined see supra § 4.

44. Latham v. Nierman, 233 Ill. A. 360.

[a] **Illustration.**—The statute regulating pawnbrokers may require that the pawnee issue a receipt or pawn ticket to the pawner at the time of the transaction, which pawn ticket shall contain certain specified information, such as an accurate account, in the English language, of all the goods pawned, the value in money of the goods loaned upon, the time of the transaction, the rate of interest to be paid on the loan, and the name and residence of the pawner; and it is not satisfied by a pawn ticket which describes the property pawned, omitting, however, to state the value of the pawn, the rate of interest on the loan, and the name and residence of the pawner. Latham v. Nierman, 233 Ill. A. 360.

Failure to observe statutory requirements see infra § 19.

45. [a] **Lending money on chattel mortgages,** being a business distinct from pawnbroking (see Chattel Mortgages §§ 3–11), it is not subjected to regulation under an ordinance regulating pawnbrokers. Wood v. Krepps, 168 Cal. 382, 143 P 691, LRA1915B 851.

46. See Municipal Corporations § 539.

Conflicting ordinances and statutes see Municipal Corporations §§ 219, 220.

Violation of particular regulations see infra § 19.

47. Butte v. Paltrovich, 30 Mont. 18, 75 P 521, 104 AmSR 698.

[a] **Thus** a licensed pawnbroker is subject to ordinance regulations as to the hours within which he may conduct his business, passed after he has secured his license. Butte v. Paltrovitch, 30 Mont. 18, 75 P 521, 104 AmSR 698. See also Licenses § 101.

48. See Municipal Corporations § 250.

49. See Launder v. Chicago, 111 Ill. 291, 53 AmR 625; Kuhn v. Chicago, 30 Ill. A. 203; St. Joseph v. Levin, 128 Mo. 588, 31 SW 101, 49 AmSR 577; Asakura v. Seattle, 122 Wash. 81, 210 P 30 (dicta).

50. See Shuman v. Ft. Wayne, 127 Ind. 109, 26 NE 560, 11 LRA 378 (authority for the absolute prohibition for the business of pawnbroking is essential).

51. License required by state see supra § 6.

52. See Licenses §§ 16–29.

53. Cal.—Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661.

Colo.—Provident Loan Soc. v. Denver, 64 Colo. 400, 172 P 10.

Ill.—Chicago v. Hulbert, 118 Ill. 632, 8 NE 812, 59 AmR 400; Launder v. Chicago, 111 Ill. 291, 53 AmR 625.

Mich.—Grand Rapids v. Braudy, 105 Mich. 670, 64 NW 29, 55 AmSR 472, 32 LRA 116.

Pa.—Hunt v. Philadelphia, 35 Pa. 277.

Wash.—Asakura v. Seattle, 122 Wash. 81, 210 P 30.

Validity of contract made by unlicensed pawnbroker see Licenses § 138; and infra § 19.

54. Asakura v. Seattle, 122 Wash. 81, 210 P 30.

55. Asakura v. Seattle, supra.

56. See Brokers §§ 1–9, 13.

57. See supra § 1.

58. Schaul v. Charlotte, 118 N. C. 733, 734, 24 SE 526.

"'Pawnbrokers' is an entirely separate and distinct business and does not come under the generic title 'broker.' The word 'broker,' derived from an Anglo-Saxon word signifying 'to use,' primarily means an agent. It means in law a middle-man, or negotiator, between other persons, for a compensation called brokerage, who takes no possession of the subject matter of negotiation, and usually contracts in the name of those employing him, and not in his own name; and sometimes it means, in ordinary speech, a dealer in money, notes, bills of exchange, &c. A pawnbroker has none of the characteristics of either kind of brokers. Indeed, he is not an agent at all. He contracts in his own name, has no employer, charges no brokerage, and always takes possession of the property; neither does he deal in money, notes and bills of exchange, like the second class of brokers above named. . . . The verbal coincidence of the last two syllables of the longer word being 'broker' is purely fortuitous, for a pawnbroker is not a broker at all." Schaul v. Charlotte, supra.

59. Schaul v. Charlotte, supra.

60. Stevens v. Louisville, 135 Ky. 24, 121 SW 977. See generally Licenses §§ 62–64.

61. Harrison v. Peo., 121 Ill. A. 189. See generally Licenses §§ 92–95, 98.

62. Van Baalen v. Peo., 40 Mich. 258; Seattle v. Barto, 31 Wash. 141, 71 P 735.

Reasonableness of amount generally see Licenses §§ 41–46.

63. See Municipal Corporations §§ 219, 220.

64. See cases infra this note.

[a] **In Illinois** (1) under a statute providing "that every person or company engaged in the business of receiving property in pledge, or as security for money or other thing ad-

not pawnbrokers within the statutory definition.[65] One is no less a pawnbroker, subject to license, because at the same time and place he conducts other branches of business, not of this character,[66] or because he makes loans on pledges of no other kinds of goods than jewelry and diamonds,[67] or because he requires pawners to execute notes or chattel mortgages in connection with the transaction.[68] One may be a pawnbroker engaged in such occupation, without completion of actual contracts of pawnbroking.[69] Single or occasional loans upon the security of personal property deposited by the borrower are not sufficient to constitute the lender a pawnbroker.[70]

[§ 16] **c. Duration of License.** The year for which a pawnbroker's license runs begins when the application for the license is made and the fee paid, and runs until the corresponding day of the following year.[71]

[§ 17] **d. Revocation.**[72] A city council may provide as a condition precedent to the issuance of a pawnbroker's license that applicant shall agree that his license may be revoked at any time.[73] The revocation of the license is lawful, where it appears that the pawnbroker has been convicted of a violation of an ordinance regulating the business of pawnbrokers,[74] and this notwithstanding an appeal was taken and pending from the conviction.[75]

[§ 18] **C. In the District of Columbia.**[76] Congress has power to regulate pawnbrokers in the District of Columbia.[77] Thus congress may require a license for pawnbroking within the District of Columbia,[78] may limit eligibility for the license to residents of the District[79] and to corporations which appoint a resident agent within the District upon whom process may be served,[80] and may prescribe legal rates of interest to be charged by pawnbrokers.[81] A pawnbroker is subject to license within the District when essential elements of his business are conducted there.[82]

[§ 19] **D. Effect of Violation of Regulations on Validity of Contract.**[83] The contract between the pawner and pawnee may be rendered invalid by failure upon the part of the pawnbroker to comply with the statutory or ordinance requirements,[84] as for example, where the pawnbroker has failed to procure a license,[85] or has loaned a sum in excess of a statutory maximum.[86]

Charging interest above rate permitted by statute[87] has been held to render the contract void.[88] However, such a charge of unlawful interest has been held not to render the contract invalid as to the principal sum of the loan,[89] and to invalidate it only to the extent of the excessive interest

vanced to the pawner or pledger, shall be held and is hereby defined to be a pawn-broker. . . . Two important elements are required to constitute a pawn-broker: First, the person must be engaged in the business of receiving property in pledge for money advanced. . . . Second, the person must be engaged in receiving property in pledge, or as security for money or other thing advanced to the pawner or pledger." Chicago v. Hulbert, 118 Ill. 632, 636, 8 NE 812, 59 AmR 400. (2) Thus a person cannot be regarded a pawnbroker subject to the ordinance so long as he receives no personal property in pawn for a loan. Chicago v. Hulbert, supra. "Pawnbroker" defined see supra § 1; Property subject to pawn see infra § 20.

65. Provident Loan Soc. v. Denver, 64 Colo. 400, 172 P 10.

[a] **Illustration.**—Under a statute defining a "pawnbroker" as one who charges the maximum rate of interest permitted by the statute, an ordinance regulating pawnbrokers who charge less than the statutory rate of interest is not in conflict with the statute, and is valid. Provident Loan Soc. v. Denver, 64 Colo. 400, 172 P 10.

66. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661; Hunt v. Philadelphia, 35 Pa. 277.

67. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661.

68. Levinson v. Boas, supra; St. Paul v. Lytle, 69 Minn. 1, 71 NW 703.

69. Com. v. Schwartz, 197 Mass. 107, 83 NE 326.

[a] **Illustration.**—"Indeed it is conceivable that one may have entered upon the business (of pawnbroking) and have had many articles tendered to him for pawn and considered the bargains offered to him by the owners, and yet, by reason of the inability of the parties to agree upon terms, no actual contract of pawnbroking may have been completed." Com. v. Schwartz, 197 Mass. 107, 109, 83 NE 326.

70. Provident Loan Bank v. Parham, 137 Tenn. 483, 194 SW 570. See Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661; Chicago v. Hulbert, 118 Ill. 632, 8 NE 812, 59 AmR 400; Com. v. Schwartz, 197 Mass. 107, 83 NE 326 (dicta).

[a] **Illustration.**—A bank whose charter empowered it to receive deposits, discount notes, deal in gold, silver, bonds, and stocks, advance money on pledge or mortgage of real and personal estate, and sell the same, but specially provided that it could not carry on the business of a pawnbroker, and which only occasionally, in connection with its banking business, loaned money on the pledge of personal chattels, is not subject to the license tax imposed on pawnbrokers. Provident Loan Bank v. Parham, 137 Tenn. 483, 194 SW 570.

71. Kopelman v. Toledo, 9 Oh. Cir. Ct. N. S. 545, 29 Oh. Cir. Ct. 455. See also Licenses § 108.

72. **Revocation of license generally** see Licenses §§ 109–113.

73. Grand Rapids v. Braudy, 105 Mich. 670, 64 NW 29, 55 AmSR 472, 32 LRA 116.

74. Harrison v. Peo., 121 Ill. A. 189.

75. Harrison v. Peo., supra.

76. **Police regulations generally** see District of Columbia §§ 15–19.

77. Reagan v. District of Columbia, 41 App. (D. C.) 409; Newman v. U. S., 41 App. (D. C.) 37 [writ of error dism 238 U. S. 642 mem, 35 SCt 602 mem, 59 L. ed. 1502 mem].

78. Reagan v. District of Columbia, 41 App. (D. C.) 409; Newman v. U. S., 41 App. (D. C.) 37 [writ of error dism 238 U. S. 642 mem, 35 SCt 602 mem, 59 L. ed. 1502 mem].

79. Newman v. U. S., supra.

80. Newman v. U. S., supra.

81. Reagan v. District of Columbia, 41 App. (D. C.) 409.

82. District of Columbia v. Horning, 254 U. S. 135, 41 SCt 53, 65 L. ed. 185 [aff 48 App. (D. C.) 380].

[a] **Illustration.**—Where a pawnbroker conducts his business by means of two officers, one in Washington and one in Virginia, just across the Potomac River, and where the business as conducted by him consists of a number of elements, first, a place where applications for loans are made; second, the application for the loan; third, the disclosure of the security; fourth, the appraisement of the security; fifth, the agreement for the loan and for its repayment; sixth, the payment of the money to the borrower and the delivery of the pledge to the broker; seventh, the safe-keeping by the pledgee of the property pledged; eighth, the payment of the loan, with agreed interest; and ninth, the return of the pledge, of which five elements, namely, the first, second, third, seventh, and ninth above were performed in the Washington office, he is subject to the license required under Act Congr. (37 St. at L. 657 c 26) for conducting the business of a pawnbroker in the District of Columbia. District of Columbia v. Horning, 254 U. S. 135, 41 SCt 53, 65 L. ed. 185 [aff 48 App. (D. C.) 380].

83. **Criminal prosecution** see infra § 57.

Validity of contract in violation of statute generally see Contracts §§ 351–357.

84. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661; Latham v. Nierman, 233 Ill. A. 360; Hilgert v. Levin, 72 Mo. A. 48; Fergusson v. Norman, 5 Bing. N. Cas. 76, 35 ECL 51, 132 Reprint 1034.

85. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661. See also Licenses §§ 137–144.

[a] **Illustration.**—A pawnbroker who has failed to procure a license cannot retain possession of the pawn as against the pawner's receiver in bankruptcy. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661.

Requirement of license see supra §§ 6, 14, 15.

86. Mills v. First State Pawners Soc., 192 Ill. A. 231.

[a] **Illustration.**—Where a pawner had obtained a number of loans, each within the statutory limit but all totalling more than the statutory maximum, by the use of a fictitious name for each transaction, and the pawnbroker was cognizant of the violation of the statute, the contracts, being expressly forbidden by statute, were illegal and void, and, the parties thereto being in pari delicto, the pawner's representative could not recover the pawns or their value from the pawnee. Mills v. First State Pawners Soc., 192 Ill. A. 231.

Amount of loans see supra § 7.

87. See supra § 8.

88. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661; Hilgert v. Levin, 72 Mo. A. 48.

[a] **Illustrations.**—An exaction of unlawful interest for the loan may preclude the pawnee's right to retain the pawn: (1) As against the pawner. Hilgert v. Levin, 72 Mo. A. 48. (2) As against the pawner's receiver in bankruptcy. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRA NS 575, 11 AnnCas 661.

89. Innes v. Goldwater, 30 Cal.

charged.[90] The transaction is not rendered invalid by the pawnee's exaction of unlawful interest for an extension of time for the payment of the loan;[91] nor is it invalidated by an exaction of unlawful interest by an employee or clerk of the pawnee without the latter's knowledge.[92]

Requirements as to pawn tickets. Failure to comply with the statutory requirements as to pawn tickets[93] may render the contract invalid.[94] However, the pawnee's rights arising out of the contract of pawn are not invalidated by the insertion of false information in the pawn ticket, where such information was derived from the pawner and was inserted in good faith.[95]

Failure to keep daily record of goods pawned, as required by statute or ordinance,[96] has been held to invalidate the contract of pawn.[97] However, an agreement not to make such a required record of pawn transactions and not to make a required report of such record to designated police officials has been held not to invalidate the contract.[98]

Failure to deliver to pawner written copy of the pawnbroker's entry of the transaction on a register, as required by statute,[99] has been held to render the contract void;[1] but there is authority to the contrary.[2]

III. PROPERTY SUBJECT TO PAWN

[§ 20] Property subject to pawn is confined to "goods and chattels."[3] Under a statute regulating pawnbrokers, the term "property"[4] has been held to include only such articles of personal property as might actually be delivered over to the possession and control of the lender,[5] and not stocks, bonds, notes, or mortgages, or choses in action, or evidences of debt.[6] Under some statutory regulations,[7] certain chattels, such as pistols, dirks, bowie knives, razors, sling shots, or weapons of like kind, may not be received in pawn by a pawnbroker.[8]

IV. POSSESSION AND USE OF PAWN

[§ 21] **A. In General.** The pawnee has a special property[9] in the chattel deposited with him to secure the debt of the pawner. This special property amounts to a right to retain the pawn until the debt is paid,[10] and to a use of the pawn under certain circumstances.[11]

[§ 22] **B. Retention of Pawn[12]—1. In General.** The nature of the transaction between the pawner and the pawnee gives the latter a right to retain the thing pawned as security for the repayment of the loan made to the pawner;[13] but the pawnee cannot rightfully retain the pawn as against the pawner who tenders him the amount due even after the expiration of the statutory period for redemption,[14] where he has not at the time of the tender actually exercised his right to sell the pawn upon the pawner's default.[15]

[§ 23] **2. As against True Owner[16]—a. In General.** As against the true owner, the pawnee acquires no right to retain possession, as security for the loan, of an article pawned without the former's knowledge, consent, or authority.[17] The rule ap-

A. 101, 157 P 18.

90. Jackson v. Shawl, 29 Cal. 267. See generally Usury [39 Cyc 988–992, 995].

Amount of tender essential for redemption see infra § 38.

91. Lyon v. Simpson, 1 NYCity CtSuppl 25.

92. Lyon v. Simpson, supra.

93. See supra § 10.

94. Latham v. Nierman, 233 Ill. A. 360; Fergusson v. Norman, 5 Bing. N. Cas. 76, 35 ECL 51, 132 Reprint 1034.

[a] **Illustrations.**—(1) The pawnbroker's failure to observe mandatory statutory requirements as to the contents of the pawn ticket renders the transaction void and no property in the pawn passes to the pawnbroker, so that a sale after the time provided for redemption is wrongful and the pawner may thereafter recover the value of the pawn. Latham v. Nierman, 233 Ill. A. 360. (2) The pawnbroker's failure to insert in the pawn ticket required detailed information as to the residence of the pawner, where he might have inquired of the pawner as to such details and failed to do so, renders the contract of pawn void, and the pawnbroker cannot retain possession of the pawn as against the pawner's assignee in bankruptcy. Fergusson v. Norman, 5 Bing. N. Cas. 76, 35 ECL 51, 132 Reprint 1034.

95. Attenborough v. London, 8 Exch. 661, 155 Reprint 1517.

Pawner's liability for deficiency after sale see infra § 50.

96. See Municipal Corporations § 539.

97. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661; Fergusson v. Norman, 5 Bing. N. Cas. 76, 35 ECL 51, 132 Reprint 1034.

[a] **Illustrations.**—A pawnbroker who has failed to comply with statute or ordinance requirements for the keeping of a daily record of goods pawned cannot retain possession of the pawn: (1) As against the pawner's assignee in bankruptcy. Fergusson v. Norman, 5 Bing. N. Cas. 76, 35 ECL 51, 132 Reprint 1034. (2) As against the pawner's receiver in bankruptcy. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661.

98. Lane v. Henry, 80 Wash. 172, 141 P 365.

[a] **Reason for rule.**—"By this statute, it is made the duty of every pawnbroker and second-hand dealer to maintain in his place of business a book or other permanent record in which shall be recorded each loan, purchase, or sale, and the name and address of the persons with whom the transaction is had, together with other data. For failure to obey the mandate of the statute, a penalty is imposed. By the terms of the act, however, it does not appear that the contract should be void if the pawnbroker fail to perform the statutory duty. . . . The rule is, that where a contract violates a statutory regulation of business, it does not thereby become void unless made so by the terms of the act." Lane v. Henry, 80 Wash. 172, 173, 141 P 365.

99. See supra § 10.

1. Levinson v. Boas, 150 Cal. 185, 88 P 825, 12 LRANS 575, 11 AnnCas 661.

2. Innes v. Goldwater, 30 Cal. A. 101, 157 P 18.

3. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

"Goods and chattels" defined see Goods 28 C. J. p 723.

4. See statutory provisions.

5. Chicago v. Hulbert, 118 Ill. 632, 8 NE 812, 59 AmR 400.

6. Chicago v. Hulbert, supra.

7. See statuory provisions.

8. Elsner v. Hawkins, 113 Va. 47, 73 SE 479, AnnCas1913D 1278.

9. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

10. See infra §§ 22–25.

11. See infra § 26.

12. As against judgment creditors see Executions §§ 95, 96.

13. See supra §§ 1, 2.

14. Period for redemption see infra § 37.

15. Walter v. Smith, 5 B. & Ald. 439, 7 ECL 242, 106 Reprint 1251.

Time for sale of pawn see infra § 45.

16. Action by owner against pawnee see infra § 54.

17. Ala.—Clay v. Sullivan, 156 Ala. 392, 47 S 153 (pawnbroker acquires no title as against the true owner by receiving pawn from person in possession but without title, authority, or indicia of authority).

Cal.—E. Bastheim Co. v. Schultz, 46 Cal. A. 24, 188 P 841.

Colo.—Silberfeld v. Solomon, 70 Colo. 413, 202 P 113.

Ill.—Abel v. Poe, 199 Ill. A. 391; Schwartz v. Clark, 136 Ill. A. 150.

Ind.—Skora v. Miller, 24 Ind. A. 567, 57 NE 264.

La.—Frantz v. Winehill, 124 La. 680, 50 S 650.

Mass.—Collateral Loan Co. v. Sallinger, 195 Mass. 135, 80 NE 811.

Mo.—Schmeltz v. Morino, (A.) 183 SW 666.

N. Y.—Anderson v. McAleenan, 15 Daly 444, 8 NYS 483; Duell v. Cudlipp, 1 Hilt. 166; Heilbron v. McAleenan, 1 NYS 875, 16 NYSt 957.

Eng.—Hastings v. Pearson, [1893] 1 Q. B. 62; Packer v. Gillies, 2 Campb. 336 note, 170 Reprint 1175; Peet v. Baxter, 1 Stark. 472, 2 ECL 181, 171 Reprint 533. See Samuels v. Dominion Bank, 15 OntWN 219 (wife who pawns husband's rings, taken from his safety deposit box without authority, can give pawnbroker no greater right than she had).

[a] **Reason for rule.**—"Possession is one of the indicia of property, but no dealer can act upon it as conclusive. If he . . . contracts with

plies where the goods have been stolen[18] or embezzled[19] by the pawner, or have been loaned to the pawner,[20] or where the pawner is in possession for a specific purpose,[21] such as to sell the article on commission,[22] or to sell it to a particular person,[23] or for a particular amount,[24] or to permit another to make an inspection of it.[25] Where an executor wrongfully pawns silver plate in his possession as trustee for distribution under the terms of a will, and the pawnee has no notice that he deals with him as an executor in the execution of his duty, the pawnee cannot retain possession of the plate against the coexecutor and a new trustee appointed on the death of the pawner.[26] After the death of a tenant for life a pawnee is not, as against the remainderman, entitled to retain possession of property pawned by the tenant for life.[27] However, a pawnee may retain the pawn against the true owner as security for the loan where an article is pawned by one to whom the true owner has intrusted it with a general power to sell,[28] where the owner allows another to assume possession of the property "for the purposes of making any transfer of it,"[29] or where the pawnee is protected against the true owner by some statutory provision.[30] Where title has passed to the pawner who obtained goods from the owner by means of misrepresentations, the pawnee may retain the goods to secure the debt.[31] The owner's delivery of jewelry to the pawner for appraisal to secure a proposed loan from the pawner is sufficient to protect the pawnee who lends money to the pawner upon the security of the jewelry as against the owner who completed his transaction with the pawner thereafter.[32]

[§ 24] **b. Repayment of Loan.** The true owner is entitled to possession of the chattel pawned by an unauthorized bailee[33] without repaying the pawnee the amount advanced by him to the pawner.[34] However, where the pawner has a general power of sale,[35] or the pawnee is otherwise protected against the true owner,[36] the latter must reimburse the pawnee before he can be compelled to surrender or return the property pawned.[37]

[§ 25] **3. As against Landlord Distraining for Rent.** A pawnee with whom goods have been deposited in the way of his trade is entitled to retain possession as against his landlord attempting to distrain them for rent.[38]

[§ 26] **C. Use of Pawn.** Where the article pawned may be the worse for use, the pawnee cannot use it while in pawn,[39] but the rule is otherwise if the nature of the article is such that it will not be injured by use.[40]

V. CARE OF PAWN

[§ 27] **A. In General.** Since the transaction between the pawner and the pawnee is a mutual benefit bailment,[41] the common law imposes upon the pawnee the duty of ordinary care and diligence as to the care of the property deposited in pawn,[42] that is, the care which a prudent person would exercise as to his own property;[43] but the pawnee is not answerable for the loss of the pawn unless his failure to exercise such care and diligence is shown;[44] and the same rule applies under a statute[45] imposing liability upon the pawnee for loss of, or injury to, the goods pawned by or through his default, neglect, or willful misbehavior.[46]

[§ 28] **B. Modification of Liability by Contract.**

reference to personal property, he must, at his peril, inquire into the real ownership, or at least into the right of disposition. Any other rule would be impracticable, and make business, except on the most limited scale, impossible." Skora v. Miller, 24 Ind. A. 567, 57 NE 264, 265 [quot Reissner v. Oxley, 80 Ind. 580, 586]. To same effect E. Bastheim Co. v. Schultz, 46 Cal. A. 24, 188 P 841; Silberfeld v. Solomon, 70 Colo. 413, 202 P 113.

18. Packer v. Gillies, 2 Campb. 336 note, 170 Reprint 1175.

19. Schwartz v. Clark, 136 Ill. A. 150.

20. Skora v. Miller, 24 Ind. A. 567, 57 NE 264.

21. See cases infra notes 22–25.

22. Silberfeld v. Solomon, 70 Colo. 413, 202 P 113; Schwartz v. Clark, 136 Ill. A. 150; Frantz v. Winehill, 124 La. 680, 50 S 650; Hastings v. Pearson, [1893] 1 Q. B. 62; Peet v. Baxter, 1 Stark. 472, 2 ECL 181, 171 Reprint 533.

23. Collateral Loan Co. v. Sallinger, 195 Mass. 135, 80 NE 811; Anderson v. McAleenan, 15 Daly 444, 8 NYS 483; Heilbron v. McAleenan, 1 NYS 875, 16 NYSt 957.

24. Schmeltz v. Morino, (Mo. A.) 183 SW 666.

25. E. Bastheim Co. v. Schultz, 46 Cal. A. 24, 188 P 841.

26. Solomon v. Attenborough, [1912] 1 Ch. 451, AnnCas1912C 975 [app dism [1913] A. C. 76].

27. Hoare v. Parker, 2 T. R. 376, 100 Reprint 202.

28. Anderson v. McAleenan, 15 Daly 444, 8 NYS 483; Ludwin v. Baruch, 34 Misc. 544, 69 NYS 933.

[a] **Reason for rule.**—"There being power to pledge flowing from the general power to sell where the agent or factor has possession of the goods . . . it follows that the defendants [the pawnees] acquired a special property in the jewelry to the extent of their advances, that no action in conversion will lie against them and that they are entitled to retain the goods until their lien has been satisfied. . . . By virtue of the general power of sale and disposition resting in him [the pawner], he had the indicia of ownership, on which the defendants were justified in relying." Ludwin v. Baruch, 34 Misc. 544, 545, 69 NYS 933.

29. E. Bastheim Co. v. Schultz, 46 Cal. A. 24, 188 P 841.

30. See statutory provisions.

Effect of Factors' Act see Factors § 161.

31. Phillips v. Brooks, Ltd., [1919] 2 K. B. 243.

32. Blundell-Leigh v. Attenborough, [1921] 3 K. B. 235.

33. See supra § 23.

34. Skora v. Miller, 24 Ind. A. 567, 57 NE 264; Collateral Loan Co. v. Sallinger, 195 Mass. 135, 80 NE 811. But see infra § 54 text and notes 89, 90.

[a] **Ratification.**—The owner's acceptance of part of the money secured by a special sales agent from an unauthorized pawn of goods is not a ratification of such a pawn, so as to charge him with the duty of returning the money so credited as a condition to his right to recover the goods. Collateral Loan Co. v. Sallinger, 195 Mass 135, 80 NE 811.

35. See supra § 23.

36. See supra § 23.

37. Ludwin v. Baruch, 34 Misc. 544, 69 NYS 933; Blundell-Leigh v. Attenborough, [1921] 3 K. B. 235.

38. Swire v. Leach, 18 C. B. N. S. 479, 114 ECL 479, 144 Reprint 531. See also Landlord and Tenant § 1647.

39. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

40. Coggs v. Bernard, supra. See also Story Bailments §§ 329, 330.

41. See supra § 2.

42. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714; Abbett v. Frederick, 56 HowPr (N. Y.) 68; Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

Cross references:

Care as to mutual benefit bailment generally see Bailments §§ 61–64.

Liability of:

Pawnee to owner for delivery of pawn to holder of pawn ticket see infra § 42.

Pawner for loan after loss of pawn see infra § 52.

43. Laing v. Blumauer, 1 NYCity CtSuppl 238.

44. Jacobs v. Grossman, 310 Ill. 247, 250, 141 NE 714 [aff 225 Ill. A. 649, and cit Cyc]; Abbett v. Frederick, 56 HowPr (N. Y.) 68; Laing v. Blumauer, 1 NYCityCtSuppl 238.

[a] **Burglary.**—In the absence of proof of negligence by the pawnee, he is not accountable for loss of the pawn by burglary. Abbett v. Frederick, 56 HowPr (N. Y.) 68; Laing v. Blumauer, 1 NYCityCtSuppl 238.

45. See statutory provisions.

46. Syred v. Carruthers, E. B. & E. 469, 96 ECL 469, 120 Reprint 584; Healing v. Cathrell, 6 Jur. N. S. 96 note. See also Shackell v. West, 2 E. & E. 326, 105 ECL 326, 121 Reprint 123 (leaving premises unguarded at night may amount to negligence).

[a] **Burglary.**—Leaving the property on premises unguarded, at night, except by the ordinary locks and bolts amounts to negligence by the pawnbroker. Healing v. Cathrell, 6 Jur. N. S. 96 note.

[b] **Fire.**—The pawnbroker is not liable for loss of the pawn due to an accidental fire without his default, neglect, or willful misbehavior. Syred v. Carruthers, E. B. & E. 469, 96 ECL 469, 120 Reprint 584.

Under the general rule,[47] a pawner and a pawnee may increase or diminish the rights arising from their transaction by stipulations contained in the contract of bailment,[48] which may be embodied in the pawn ticket.[49] Thus the terms printed upon the pawn ticket may impose a personal trust upon the pawnee[50] safely to keep and protect the property pawned at his own shop[51] and under the safeguard of a specified protective company.[52] Such a contract creates a legal obligation on the part of the pawnee from which he cannot relieve himself by a transfer of the pawn without the pawner's consent,[53] and the pawnee is liable for a loss by robbery in the pawnshop of one to whom he sells his interest in all goods pawned with him, without notifying the owner, where the goods are transferred to the buyer's pawnshop and the latter is not shown to be protected as specified on the pawn ticket.[54] On the other hand the parties may make binding stipulations that the pawnee shall not be liable for losses due to fire,[55] breakage,[56] burglary,[57] or robbery,[58] or that the pawnee's liability for loss should not exceed a certain amount.[59] However, stipulations against liability for loss from certain causes do not preclude the pawnee's liability for such losses induced by his own negligence.[60]

[§ 29] **C. After Timely Tender of Money Lent.** The pawnee is liable for any loss or damage which occurs to the pawn after the amount of the debt has been tendered to him and he should have returned the pawn.[61]

[§ 30] **D. While Using Pawn.** If the thing pawned is being used by the pawnee and while so being used by him is lost and damaged, he is liable to the pawner therefor.[62]

VI. TRANSFER OF INTEREST IN PAWN

[§ 31] **A. By Pawner—1. In General.** Subject to the claim of the pawnee, the pawner has the same right over the article pawned as he had before the pawn was made,[63] and may sell and transfer his interest therein.[64]

[§ 32] **2. Rights and Liabilities of Purchasers.** The sale of the pawn by the pawner transfers to the purchaser the same interest therein which the pawner had.[65] The pawner's assignee may recover the value of the property from the pawnee where the latter, after being notified of the assignment, delivers the pawn to the original pawner.[66]

[§ 33] **B. By Pawnee—1. In General.** The pawnee may assign his interest in the pawn,[67] or he may transfer conditionally his interest by way of pawn to another,[68] independently of any agreement or assent on the part of the pawner.[69] However, where a special agreement imposes a personal trust upon the pawnee for the care and custody of the pawn,[70] he cannot sell the pawn and transfer the possession and custody thereof without the consent of the pawner.[71] Where a statute forbids sale or disposition of the pawn until a specified time after the pawner's default in payment without his written consent,[72] the pawnee cannot transfer his interest in the pawn before the expiration of the statutory period without the pawner's written consent thereto.[73]

[§ 34] **2. Effect on Rights of Pawner.** Where the contract of pawn imposes a personal obligation upon the pawnee for the care and custody of the pawn,[74] the sale of the pawn and a transfer thereof to the shop of the transferee without the pawner's consent leaves the pawnee liable to the pawner for its subsequent loss by theft.[75] The same rule applies where sale or disposition of the pawn until a specified time after the pawner's default without his written consent is forbidden by statute,[76] and the pawnee transfers his interest in the pawn within the statutory period without the pawner's written consent thereto.[77]

[§ 35] **3. Rights and Liabilities of Purchasers.**[78] The pawnee's assignee may lawfully acquire the possession of the pawn[79] which he takes under all the responsibilities of the original pawnee.[80] Upon a conditional transfer of the pawnee's interest by way of pawn to another,[81] the assignee holds the pawn until the debt of the pawner is discharged.[82] The

47. See Bailments §§ 42-44.

48. Jacobs v. Grossman, 310 Ill. 247, 250, 141 NE 714 [cit Cyc]; Oberman v. Reece, 95 Ill. A. 645; Seiden v. Stern, 95 Misc. 255, 159 NYS 88; Savin v. Butler, 111 Oh. St. 695, 146 NE 673.

[a] **Particular contract construed.**—"Whatever may have been his status, he [the pawnee] made a contract under which he was obligated to return the goods or be responsible for the value thereof, save only in case of fire or of burglary. Thus pro tanto he became an insurer." Savin v. Butler, 111 Oh. St. 695, 697, 146 NE 673.

49. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714; Oberman v. Reece, 95 Ill. A. 645; Seiden v. Stern, 95 Misc. 255, 159 NYS 88.

50. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714.

51. Jacobs v. Grossman, supra.

52. Jacobs v. Grossman, supra.

53. Jacobs v. Grossman, supra.

Effect of pawnee's transfer on rights of pawner generally see infra § 34.

54. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714.

55. Seiden v. Stern, 95 Misc. 255, 159 NYS 88; Savin v. Butler, 111 Oh. St. 695, 146 NE 673.

56. Seiden v. Stern, 95 Misc. 255, 159 NYS 88.

57. Savin v. Butler, 111 Oh. St. 695, 146 NE 673.

[a] **Extent of limitation.**—Where the property is lost by reason of a robbery, the pawnee is responsible for the loss of the pawn. Savin v. Butler, 111 Oh. St. 695, 146 NE 673.

58. Seiden v. Stern, 95 Misc. 255, 159 NYS 88.

59. Schwartz v. Chicago State Pawners Soc., 195 Ill. A. 93.

[a] **Extent of limitation.**—A provision printed on a pawn ticket limiting the pawnee's liability for loss or damage to twenty-five per cent more than the loan does not apply to a case of conversion, but to losses occurring from negligence or accident. Schwartz v. Chicago State Pawners Soc., 195 Ill. A. 93.

60. Seiden v. Stern, 95 Misc. 255, 159 NYS 88.

61. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

Duty to return see infra § 36.

Tender of money lent see infra § 38.

62. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

63. Franklin v. Neate, 13 M. & W. 481, 153 Reprint 200.

64. Franklin v. Neate, supra.

65. Franklin v. Neate, supra.

Redemption by holder of pawn ticket see infra § 36.

66. See Duell v. Cudlipp, 1 Hilt. (N. Y.) 166.

67. Pulaski Nat. Bank v. Winston, 5 Baxt. (Tenn.) 685.

68. Pulaski Nat. Bank v. Winston, supra.

69. Pulaski Nat. Bank v. Winston, supra.

70. See supra § 28.

71. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714.

72. See statutory provisions.

73. Jacobs v. Grossman, supra.

74. See supra § 28.

75. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714.

76. See statutory provisions.

77. Jacobs v. Grossman, supra.

78. **Rights of purchasers upon sale of pawn for pawner's default** see infra § 51.

79. Pulaski Nat. Bank v. Winston, 5 Baxt. (Tenn.) 685.

80. Pulaski Nat. Bank v. Winston, supra.

[a] **Illustration.**—A pawn, in the possession of the pawnee's assignee, may be attached as to the pawner's interest therein by claimants against the pawner, subject to the assignee's claim. Pulaski Nat. Bank v. Winston, 5 Baxt. (Tenn.) 685. See generally Attachment § 363.

81. See supra § 33.

82. Pulaski Nat. Bank v. Winston, 5 Baxt. (Tenn.) 685.

pawnee's transferee is liable to the true owner of an article pawned by one to whom the owner delivered it for a specific purpose.[83]

VII. REDEMPTION

[§ 36] **A. Who May Redeem.** The pawn may be redeemed by the pawner,[84] or by an assignee or purchaser of the pawn ticket upon presentation thereof,[85] where the contract of pawn[86] or a statute governing pawnbrokers[87] provides for the delivery of the pawn to the holder of the pawn ticket.[88]

[§ 37] **B. Period for.** The period for redemption may be fixed by statute,[89] express agreement,[90] or by a general custom known to the pawner at the time of the pawning.[91] However, the expiration of the statutory period for redemption does not bar the pawner's right to redeem until the pawnee has actually exercised his right of sale.[92]

After loss of pawn ticket. A pawner who has lost his pawn ticket, and has complied with the statutory requirements for the issuance of a duplicate, may redeem at any time when he would have been entitled to do so under the original contract.[93]

Pawner's death before expiration of statutory period does not toll the statute so as to permit his administratrix to redeem from the pawnee who has sold the pawn after the expiration of the statutory period, but before her appointment and offer to redeem.[94]

[§ 38] **C. Tender of Money Lent—1. Amount.** The pawner cannot redeem the pawn without paying the whole amount of the debt in principal and interest.[95] Where the pawner has agreed to pay interest in excess of the legal rate,[96] he is entitled to the possession of the pawn upon a tender of the principal and lawful interest.[97] Where the pawner has agreed to pay a given sum as a bonus for the use of the money loaned, a tender of the principal sum with the amount of the bonus, without interest, is a sufficient tender to redeem.[98]

[§ 39] **2. When Not Necessary.** The pawner is entitled to redeem without a tender of the amount of the debt where the pawnee refuses a demand for the pawn upon the ground that another claims some interest therein.[99]

[§ 40] **D. Effect of Death of Pawnee.** If the pawnee dies the pawn does not become absolute and irredeemable by the pawner merely because the goods were pawned generally, without any specified day for redemption.[1]

[§ 41] **E. Effect of Redemption—1. By Pawner.** Redemption by a pawner who is not the owner of the pawn before notice to,[2] or demand upon,[3] the pawnee by the true owner may not render the pawnee liable to the true owner for the value of the pawn.[4] But the rule does not apply where the pawn is redeemed by a third person,[5] even where he is the agent of the pawner and the person to whom the pawner has expressly authorized the pawnee to deliver the property.[6] The true owner who has made a demand on the pawnee for the pawn before redemption by the pawner may recover its value where the pawnee permits the pawner to redeem thereafter;[7] and this is the rule, even under a statute indemnifying the pawnee for delivery of the pawn to the holder of the pawn ticket.[8]

[§ 42] **2. By Third Persons—a. Upon Pawnee.**

83. Anderson v. McAleenan, 15 Daly 444, 8 NYS 483.

Retention of pawn against true owner generally see supra § 23.

84. Jackson v. Shawl, 29 Cal. 267; Hines v. Strong, 46 HowPr 97 [aff 56 N. Y. 670]; Singer Mfg. Co. v. Clark, 5 Ex. D. 37; Walter v. Smith, 5 B. & Ald. 439, 7 ECL 242, 106 Reprint 1251.

85. Schwartz v. Chicago State Pawners Soc., 195 Ill. A. 93; Burslem v. Attenborough, L. R. 8 C. P. 122; Sauvé v. Despras, 17 Que. Super. 453.

86. Schwartz v. Chicago State Pawners Soc., 195 Ill. A. 93.

87. See statutory provisions.

88. Burslem v. Attenborough, L. R. 8 C. P. 122; Sauvé v. Despras, 17 Que. Super. 453.

[a] **Nature of pawn ticket.**—The English law regulating pawnbrokers gives the pawn ticket a character analogous to that of a negotiable instrument, and the pawnbroker is required to deliver the pawn to the party presenting the ticket. Burslem v. Attenborough, L. R. 8 C. P. 122.

[b] **Right to redeem after the pawn ticket is lost,** mislaid, destroyed, or fraudulently obtained from the owner thereof is, in England, regulated by statute. Burslem v. Attenborough, L. R. 8 C. P. 122.

89. See statutory provisions.

[a] **One year.**—Burslem v. Attenborough, L. R. 8 C. P. 122; Walter v. Smith, 5 B. & Ald. 439, 7 ECL 242, 106 Reprint 1251.

[b] **Sixty days.**—McPike v. Friedman Loan, etc., Co., 206 Mo. A. 187, 227 SW 856.

90. Stern v. Simons, 77 Conn. 150, 58 A 696.

91. Stern v. Simons, supra.

92. Walter v. Smith, 5 B. & Ald. 439, 7 ECL 242, 106 Reprint 1251.

[a] **Reason for rule.**—Construing a statute which provided that, at the expiration of a year and a day from the date of the pawning, the pawn "shall be deemed forfeited, and may be sold," it was said: "The object of the sale is, to enable the pawnbroker to reimburse himself for the amount of the principal money advanced, and the interest due thereon. And if, before any sale takes place, the party pledging pays the pawnbroker his principal and interest, and expenses incurred; all the purposes of a sale are answered, and, consequently, the pawnbroker, in such a case, can have no right to sell. The words 'deemed forfeited and may be sold,' mean not that the things pledged shall become the absolute property of the pawnbroker, but only that they shall be so far forfeited as that the pawnbroker may take steps toward a sale." Walter v. Smith, 5 B. & Ald. 439, 442, 7 ECL 242, 106 Reprint 1251.

Time for sale of pawn see infra § 45.

93. Burslem v. Attenborough, L. R. 8 C. P. 122.

94. McPike v. Friedman Loan, etc., Co., 206 Mo. A. 187, 227 SW 856.

95. See Crocker v. Monrose, 18 La. 553, 36 AmD 660.

96. See supra § 8.

97. Jackson v. Shawl, 29 Cal. 267.

Effect of violation of regulations upon validity of contract generally see supra § 19.

98. Hines v. Strong, 46 HowPr 97 [aff 56 N. Y. 670].

99. Buchanan v. Provident Loan Soc., 63 Misc. 269, 116 NYS 653.

1. Anonymous, 3 Salk. 268, 91 Reprint 817.

2. Clay v. Sullivan, 156 Ala. 392, 47 S 153.

3. Schmeltz v. Morino, (Mo. A.) 183 SW 666.

4. Clay v. Sullivan, 156 Ala. 392, 47 S 153; Schmeltz v. Morino, (Mo. A.) 183 SW 666.

Retention of pawn against true owner see supra §§ 23, 24.

5. Effect of redemption by third person see infra §§ 42, 43.

6. Clay v. Sullivan, 156 Ala. 392, 47 S 153.

7. Schmeltz v. Morino, (Mo. A.) 183 SW 666; Singer Mfg. Co. v. Clark, 5 Ex. D. 37.

8. Singer Mfg. Co. v. Clark, supra.

[a] **Discussion of rule.**—"In construing the provisions of the Pawnbrokers Act, 1872, some assistance will be derived from a clear understanding of the relations between the pawner and the pawnee independently of all statutory enactment. In the case of an ordinary pledge there is no doubt an implied undertaking on the part of the pledgee to redeliver to the pledger the article pledged on payment by the latter of the sum advanced, with interest; but there is on the other hand an implied undertaking on the part of the pledger that the property pledged is his own, or that he has the authority of the owner to pledge it, and that it may be safely delivered back to him. The undertaking on the part of the pledgee to redeliver, however, is not an absolute one, but is subject to this—that the pledger has the title he warrants himself to have, and if it turns out that he is not the owner, and had no authority from him to pledge, the pledgee may restore the property pledged to the person lawfully entitled to it. . . . Further assistance to a correct understanding of the statute, and the intention of the legislature will be acquired by bearing in mind one or two matters of common knowledge relating to pledges and pawn tickets. In the first place, it is a very common occurrence for a pawner to dispose by sale or gift of his pawn ticket to another person, with the intention to confer on the vendee or donee a right to redeem the article pledged; and by the accidents of life it constantly happens that the pawner loses or accidentally destroys his ticket, or has it stolen or fraudulently obtained from him. It is also a very common practice for the owners of articles upon which they desire to obtain loans to employ other persons to pledge such articles for them, in which case the person so employed, and who actually delivers the

The pawnee is not liable to the pawner for the value of a pawn delivered to a third person who produced and surrendered the pawn ticket, where it appears that the pawner was in the habit of sending articles to pawn and receiving them therefrom by the hands of third persons.[9] However, the pawnee is liable to the owner of a pawn for a redelivery to a third person upon presentation of the pawn ticket where the article was pawned without the knowledge or consent of the owner;[10] and this is the rule, even under a statute indemnifying the pawnee for delivery of the pawn to the holder of the pawn ticket.[11]

After loss of pawn ticket. Where the pawner, after loss of the pawn ticket, procures a duplicate ticket from the pawnee upon complying with the statutory procedure therefor,[12] he is not bound to redeem immediately,[13] and the pawnee cannot, pending such period for redemption, rightfully delive. the pawn to a person presenting the original ticket.[14]

[§ 43] **b. Upon Others.** A third person, who redeems the pawn, has been held to acquire no pawnbroker's lien upon it for the money he has expended.[15] However, since the sale of a pawn ticket is a commercial transaction,[16] a purchaser in good faith of the pawn from the bearer of the ticket, who has redeemed, cannot be dispossessed by the owner of the article so purchased, without an offer by the latter to repay the amount paid by the purchaser.[17]

VIII. SALE OF PAWN ON DEFAULT OF PAWNER

[§ 44] **A. In General.** A contract of pawn implies a right in the pawnee, upon default of the pawner, to sell the pledge for the purpose of enforcing the payment of the debt secured thereby.[18]

[§ 45] **B. When Right Accrues.** The pawn may not be disposed of by the pawnee before the expiration of the time for payment fixed by the contract of pawn.[19] The parties may extend the time for payment[20] and consequently the time for sale, by agreement,[21] which, if it makes the extension of time indefinite, cannot be terminated by a notice sent to the pawner demanding an excessive amount.[22] Hence, a sale by the pawnee before the expiration of the time fixed by the agreement renders him liable to the pawner for conversion of the pawn.[23] Under some statutes[24] the sale of the pawn may be forbidden for a specified time after the pawner's default of payment of interest[25] without the pawner's written consent thereto.[26]

[§ 46] **C. Manner of—1. In General.** In the absence of a statute[27] or an agreement[28] prescribing the manner of sale, the pawnee's right to sell the pawn[29] must be exercised by a public sale[30] after due notice of the pawnee's intention to sell and the time and place of sale.[31] Failure to comply with a statute requiring the filing of a report as to specified details of the sale of a defaulted pawn does not render the sale invalid where the statute merely pro-

article to the pawnbroker, is in law the pawner, and in his name the ticket is made out, and it not rarely happens that this ticket is retained by the pawner, and not delivered over to the employing owner. It was to meet such and similar contingencies (among other things), that the Pawnbrokers Act, 1872 . . . was passed—partly for the protection of pawnbrokers, partly also for the protection of pawners and owners of property pledged." Section 25 of that act enacts that "'the holder for the time being of a pawn ticket shall be presumed to be the person entitled to redeem the pledge, and subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn ticket, and he is hereby indemnified for so doing;' and it is followed immediately by § 26, which enacts that 'a pawnbroker shall not (except as in this Act provided) be bound to deliver back a pledge unless the pawn ticket for it is delivered to him.' It is clear to our mind that in these two sections the legislature intended only to provide for the delivery back of the article pledged to the person entitled to redeem, and as between the pawner and the pawnbroker to compel the latter to recognise, in the absence of grounds for belief to the contrary, the possessor of the ticket as the person so entitled, and to presume him to be the lawful holder of it without further investigation of his title; and, should it so happen that the ticket is presented and the pledge redeemed by a person who has in fact no title to the ticket, to protect and indemnify the pawnbroker against any claim by the real pawner, or anybody to whom he may have transferred his title, or the owner who has sanctioned the pledge. This construction seems to us to give full effect to, and to be the true interpretation of the 25th section. In our judgment that section in no degree affects an owner whose property has been pledged against his will. He is in no sense a person entitled to redeem the pledge, or privy to the contract of pawn. His claim rests on a title paramount, which is unaffected by the dealing between the pawnbroker and his customer. The 25th section does not say that the holder of the ticket shall be presumed to be the owner, but that he shall be presumed to be the person entitled to redeem, or in other words, the person entitled to represent the pawner whose title is altogether inconsistent with that of an owner whose property has been unlawfully pledged against his will. To our mind it is very clear that the legislature did not in the sections relating to the redemption of pledges intend prejudicially to affect the rights of such owners as we have last referred to." Singer Mfg. Co. v. Clark, 5 Ex. D. 37, 42, 44.

[b] **The indemnity given by the statute** "is limited to and protects the pawnbroker only against the pawner, the owner who has authorized the pledge, and all those who claim title under them . . . none of the provisions of the statute were intended to affect nor do they affect the common law right of an owner of property pledged against his will who claims by title paramount to that of the pawner." Singer Mfg. Co. v. Clark, 5 Ex. D. 37, 46.

9. Johnson v. Praeger, 59 App. Div. 339, 69 NYS 836.

10. Clay v. Sullivan, 156 Ala. 392, 47 S 153.

11. Singer Mfg. Co. v. Clark, 5 Ex. D. 37.

Discussion of rule see supra note 8 [a].

12. Burslem v. Attenborough, L. R. 8 C. P. 122.

13. **Period for redemption** see supra § 37.

14. Burslem v. Attenborough, L. R. 8 C. P. 122.

15. In re Rudd, 180 Fed. 312.

[a] **Illustration.**—The pawner's assignee in bankruptcy who redeemed the pawn with his own funds and then turned over the pawn to the pawner's trustee in bankruptcy under an order of the bankruptcy court, preserving all his rights, cannot claim an interest in the proceeds of the sale of the pawn by reason of having acquired the pawnbroker's lien therein, but must recover his advance under a claim against the bankrupt's estate. In re Rudd, 180 Fed. 312.

16. Sauvé v. Despras, 17 Que Super. 453.

17. Sauvé v. Despras, supra.

18. Stern v. Simons, 77 Conn. 150, 58 A 696; Hunt v. Philadelphia, 35 Pa. 277; Pigot v. Cubley, 15 C. B. N. S. 701, 109 ECL 701, 143 Reprint 960; Franklin v. Neate, 13 M. & W. 481, 153 Reprint 200; Anonymous, 3 Salk. 268, 91 Reprint 817. See Shelton v. Silverfield, 104 Tenn. 67, 56 SW 1023 (the very nature of the pawnbroker's business carries with it the necessity for a sale of unredeemed pledges); Rawlinson v. Pearson, 5 B. & Ald. 124, 7 ECL 77, 106 Reprint 1139 (trade of pawnbroker consists of two parts, first, that of receiving pledges, and, second, that of selling those pledges).

19. Loftus v. Agrant, 18 S. D. 55, 99 NW 90.

Redemption of pawn see supra §§ 36-43.

20. See cases infra notes 21-23.

21. Stern v. Simons, 77 Conn. 150, 58 A 696; Pigot v. Cubley, 15 C. B. N. S. 701, 109 ECL 701, 143 Reprint 960

22. Pigot v. Cubley, supra.

23. Pigot v. Cubley, supra.

24. See statutory provisions.

25. See statutory provisions.

[a] **One year.**—Jacobs v. Grossman, 310 Ill. 247, 141 NE 714.

[b] **Sixty days.**—McPike v. Friedman Loan, etc., Co., 206 Mo. A. 187, 227 SW 856.

26. Jacobs v. Grossman, 310 Ill. 247, 141 NE 714.

Sale of pawnee's interest in pawn see supra § 33.

27. See statutory provisions.

28. **Special agreement controlling** see infra § 48.

29. **Sale of pawn generally** see supra § 44.

30. Stern v. Simons, 77 Conn. 150, 58 A 696.

31. Stern v. Simons, supra; Pigot v. Cubley, 15 C. B. N. S. 701, 109 ECL 701, 143 Reprint 960.

[a] **Sufficiency of notice.**—A notice sent to the pawnee that the pawn will be sold unless an excessive sum

vides penalties for its violation but fails to forbid transactions not in compliance therewith.[32]

[§ 47] **2. Pawnee as Trustee for Sale.** In executing his power of sale the pawnee becomes the trustee of the pawner.[33] The sale over which he has control as trustee must be conducted fairly and in good faith and in such a way as to subserve, not only the rights that he has, but also the highest interest of the pawner.[34] The pawnee, therefore, is not permitted to become a purchaser of the pawn without the pawner's express consent.[35] However, such a purchase is only prima facie voidable and it is valid unless repudiated within a reasonable time by the pawner.[36]

[§ 48] **3. Effect of Special Agreement.** A special agreement between the parties to a contract of pawn controlling the manner of sale, after default on the part of the pawner, is valid and binding.[37]

[§ 49] **D. Surplus.** Under some statutes[38] the pawnee must pay over the surplus arising on the sale of the pawn to the person entitled to redeem.[39] Under these statutes a particular pawn stands as security only for the amount advanced in that transaction and interest thereon, and the pawnee has no right to apply a surplus arising on the sale of the pawn in payment of any deficiency arising on the sale of an article pawned by him at a different time by the same person.[40]

[§ 50] **E. Pawner's Liability for Deficiency.** At common law the pawner is liable to the pawnee for any deficiency arising on the sale of the article pawned,[41] in the absence of a special agreement to the contrary.[42] A pawnee does not lose his right to recover from the pawner a deficiency arising from the sale of the pawn by the insertion of false information in the pawn ticket, where such information was derived from the pawner and was inserted in good faith.[43] However, where it appears under a construction of the statute governing pawnbrokers that the pawnee advanced money exclusively upon the security of the property pawned, and not upon the personal credit of the pawner, the latter is not liable for any deficiency arising upon a sale of the pawn.[44]

[§ 51] **F. Rights of Purchasers.** A pawnee who sells a forfeited pawn to a third party merely undertakes that the article sold is a pawn and irredeemable, and that he is not cognizant of any defect of title to it.[45] A statute permitting the pawnee to purchase at auction a forfeited pawn put on sale by him for nonpayment of the debt and declaring that on such purchase the pawnee shall be deemed the absolute owner of the pawn purchased applies only as between the pawner and the pawnee,[46] and gives no property in the pawn to the purchasing pawnee as against the true owner.[47]

IX. PERSONAL LIABILITY OF PAWNER FOR LOAN

[§ 52] At common law the pawner is liable to the pawnee for his debt after a loss of the pawn, if the pawnee has been duly diligent.[48] A restoration of the pawn is a condition without which a recovery cannot be had for the debt where the pawnee does not show that the loss was in nowise attributable to any want of necessary care on his part.[49] Where, under a construction of the statute governing pawnbrokers and the transaction between the parties, the loan is made solely upon the security of the property pawned and not upon the personal credit of the pawner,[50] there exists no personal liability in the pawner to the pawnee for the amount of the loan.[51]

X. ACTIONS

[§ 53] **A. By Pawner against Pawnee.** Where the pawner deliberately violates statutory or ordinance provisions regulating transactions with pawnbrokers,[52] no cause of action[53] to recover the pawn[54] or its value[55] arises against the pawnee, whether[56]

be paid immediately is not such notice as will justify a sale. Pigot v. Cubley, 15 C. B. N. S. 701, 109 ECL 701, 143 Reprint 960.

32. Uncle Sam's Loan Office v. Emery, 49 Tex. Civ. A. 236, 107 SW 1155.

33. Uncle Sam's Loan Office v. Emery, supra.

34. Uncle Sam's Loan Office v. Emery, supra.

35. Uncle Sam's Loan Office v. Emery, supra.

36. Uncle Sam's Loan Office v. Emery, supra.

Action by pawner for misconduct of sale see infra § 53.

37. Stern v Simons, 77 Conn. 150, 58 A 696; Jacobs v. Grossman, 310 Ill. 247, 250, 141 NE 714 [cit Cyc].

[a] **A custom to sell the pawn without notice** to the pawner after six months may be incorporated by the parties into the transaction and made binding. Stern v. Simons, 77 Conn. 150, 58 A 696.

38. See statutory provisions.

39. Bernstein v. Weinstein, 104 App. Div. 615, 93 NYS 1121, Stephens v. Simpson, 94 App. Div. 298, 87 NYS 1068; Walter v. Smith, 5 B. & Ald. 439, 7 ECL 242, 106 Reprint 1251; Dobree v. Norcliffe, 23 L. T. Rep. N. S. 552.

40. Bernstein v. Weinstein, 104 App. Div. 615, 93 NYS 1121; Stephens v. Simpson, 94 App. Div. 298, 87 NYS 1068; Dobree v. Norcliffe, 23 L. T. Rep. N. S. 552.

[a] **Reason for rule.**—"The statute confers a special privilege upon a pawnbroker by permitting him to charge a very high rate of interest . . . and obviously for the reason that the money he advances is upon property pledged and not upon the credit of the pledgor. The loan, therefore, being upon the property, in case of nonpayment, he must look to that." Stephens v. Simpson, 94 App. Div. 298, 299, 87 NYS 1068.

41. Mauge v. Heringhi, 26 Cal. 577; Turney v. Goldberg's Loan Office, (Okl.) 274 P 464; Jones v. Marshall, 24 Q. B. D. 269; South-Sea Co. v. Duncomb, Str. 919, 93 Reprint 942.

42. South-Sea Co. v. Duncomb, supra.

43. Attenborough v. London, 8 Exch. 661, 155 Reprint 1517.

Effect of violation of regulations generally see supra § 19.

44. Bernstein v. Weinstein, 104 App. Div. 615, 93 NYS 1121; Stephens v. Simpson, 94 App. Div. 298, 87 NYS 1068.

Personal liability of pawner for debt see infra § 52.

Surplus arising from sale see supra § 49.

45. Morley v. Attenborough, 3 Exch. 500, 154 Reprint 943.

46. Burrows v. Barnes, 82 L. T. Rep. N. S. 721.

47. Burrows v. Barnes, supra.

48. Coggs v. Bernard, 2 Ld. Raym. 909, 917, 92 Reprint 107, 112, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

"If his (the pawnee's) care of keeping it (the pawn) be exact, and the pawn is lost . . . the pawnee hath still his remedy against the pawner for the money lent." Coggs v. Bernard, supra.

[a] **"It is sufficient,** if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt." Coggs v. Bernard, 2 Ld. Raym. 909, 917, 92 Reprint 107, 3 Salk. 268, 91 Reprint 817, 5 ERC 247.

Care of pawn generally see supra §§ 27–30.

49. Crocker v. Monrose, 18 La. 553, 36 AmD 660.

50. Bernstein v. Weinstein, 104 App. Div. 615, 93 NYS 1121; Stephens v. Simpson, 94 App. Div. 298, 87 NYS 1068.

Surplus arising from sale of pawn see supra § 49.

Pawner's liability for deficiency see supra § 50.

51. Bernstein v Weinstein, 104 App. Div. 615, 93 NYS 1121; Stephens v. Simpson, 94 App. Div. 298, 87 NYS 1068.

52. Statutory provisions regulating pawnbrokers:
Generally see supra §§ 5–18.
Effect of violation generally see supra § 19.

53. Effect of illegal or immoral transaction upon cause of action generally see Actions §§ 52, 53; Contracts § 440.

54. Mills v. First State Pawners Soc., 192 Ill. A. 231. See also Replevin [34 Cyc 1342].

55. Mills v. First State Pawners Soc., supra. See also Trover and Conversion [38 Cyc 1997].

56. Mills v. First State Pawners Soc., supra.

[a] **Reason for rule.**—"If defendant was [cognizant of the violation of the statute], then the loans, being expressly prohibited by statute, were

or not[57] the pawnee participates in the violation of the statute. However, the pawner is not deprived of his right of action against the pawnee for conversion of the pawn because he has repurchased the pawn from an innocent purchaser of the pawnee.[58]

Conditions precedent. The pawner need not tender[59] the loan and interest to the pawnee in order to maintain an action for conversion[60] against him, where the latter refuses to deliver the pawn on demand on the ground that another claims an interest therein,[61] or where the transaction is void for exaction of usurious interest.[62] However, where an exaction of usurious interest does not render the whole contract void,[63] a tender of the amount of the original loan is essential to a recovery by the pawner.[64] Where, under a pawn contract providing for an unlawful rate of interest, the pawnee has paid the pawner more than the equivalent of the original sum loaned and lawful interest thereon at the time suit is commenced, he is entitled to replevin the pawn without further payment.[65]

Parties.[66] Under some code provisions[67] claimants of some interest in the pawn,[68] although not necessary parties,[69] may be brought in as parties in the pawner's action against the pawnee for conversion.[70]

Pleading.[71] The complainant in the pawner's action for conversion of the pawn must state the essential elements of the cause of action.[72] The complaint is liberally construed.[73]

Evidence.[74] In the pawner's action for the value of a pawn, in case of its loss, the burden of proof rests upon the pawnee to show due care in keeping the pawn.[75] Where the pawnee has purchased the pawn at his own sale and the pawner sues him for its conversion, the former has the burden of showing procedure according to law[76] and with the utmost good faith.[77] General rules as to the admissibility[78] and sufficiency[79] of evidence apply in such actions.

Trial.[80] General rules as to the instructions[81] and questions for the jury[82] apply in a pawner's action against a pawnee.

[§ 54] **B. By Third Person against Pawnee.** The true owner[83] of the pawn may maintain an action to recover the pawn[84] or its value[85] against the pawnee where the article pawned was stolen[86] or embezzled[87] by the pawner or was pawned without the owner's authority therefor.[88]

Conditions precedent. The true owner of the pawn must pay[89] or tender[90] the amount due to the pawnee before he can maintain an action against him to recover the property pawned. The true owner need not present the pawn ticket with his demand for the goods as a condition precedent to an action for the value of the pawn as he claims by a title paramount to that of the pawner.[91]

illegal and void . . . and the parties thereto, being in pari delicto, no cause of action could arise out of the transactions." Mills v. First State Pawners Soc., 192 Ill. A. 231, 232.

57. Mills v. First State Pawners Soc., supra.

[a] **Reason for rule.**—"The cause of action springing out of a fraud, the maxim ex dolo malo non oritur actio applies. Two things are manifest . . . (1) That on plaintiff's own theory of the facts the cause of action arises out of illegal transactions; and (2) that defendant's unlawful possession of the articles . . . [pawned] could not be proved without going into the illegal transactions and . . . [the pawner's] complicity therein." Mills v. First State Pawners Soc., 192 Ill. A. 231, 232.

58. Hilgert v. Levin, 72 Mo. A. 48.

59. **Necessity of tender for redemption** see supra §§ 38, 39.

60. See Trover and Conversion [38 Cyc 1997].

61. Buchanan v. Provident Loan Soc., 63 Misc. 269, 116 NYS 653.

62. Hilgert v. Levin, 72 Mo. A. 48. See also supra § 19.

63. See supra § 19.

64. Innes v. Goldwater, 30 Cal. A. 101, 157 P 18.

65. Turney v. Goldberg's Loan Office, (Okl.) 274 P 464.

66. See generally Parties 47 C. J. p 1.

67. See code provisions.

68. Buchanan v. Provident Loan Soc., 63 Misc. 269, 116 NYS 653.

69. Buchanan v. Provident Loan Soc., supra.

70. Buchanan v. Provident Loan Soc., supra.

71. See generally Pleading [31 Cyc 1].

72. See case infra this note.

[a] **Complaint held sufficient.**—A complaint alleging the delivery of articles of personal property to defendant in pawn, as security for a loan, to be returned on demand upon payment of the loan and interest, a demand for the return of the articles and a refusal thereof states a cause of action in conversion. Buchanan v. Provident Loan Soc., 63 Misc. 269, 116 NYS 653.

73. Buchanan v. Provident Loan Soc., supra.

74. See generally Evidence 22 C. J. p 1.

75. Savin v. Butler, 19 Oh. A. 68 [aff 111 Oh. St. 695, 146 NE 673].

76. Uncle Sam's Loan Office v. Emery, 49 Tex. Civ. A. 236, 107 SW 1155.

Sale of pawn see supra §§ 44-51.

77. Uncle Sam's Loan Office v. Emery, 49 Tex. Civ. A. 236, 107 SW 1155.

78. See Evidence §§ 13-1806.

[a] **Evidence held admissible:** (1) To show insurance carried by pawnbroker, on issue of due care. Savin v. Butler, 19 Oh. A. 68 [aff 111 Oh. St. 695, 146 NE 673]. (2) To show that robberies had recently been committed in community, on issue of due care. Savin v. Butler, supra. (3) To show a custom among pawnbrokers as to mode of sale of pawn. Stern v. Simons, 77 Conn. 150, 58 A 696.

[b] **Parol evidence held admissible:** (1) To show that actual agreement was to pay rate of interest higher than that entered upon pawnbroker's register. Innes v. Goldwater, 30 Cal. A. 101, 157 P 18. (2) To show actual payment of interest in excess of rate entered upon such register. Innes v. Goldwater, supra.

79. See Evidence §§ 1730-1806.

[a] **Evidence held sufficient:** (1) To show pawnee's negligence in keeping pawn. Savin v. Butler, 19 Oh. A. 68 [aff 111 Oh. St. 695, 146 NE 673]. (2) To show pawnee's exercise of ordinary diligence in keeping pawn. Abbett v. Frederick, 56 HowPr (N. Y.) 68. (3) To show that plaintiff had pawned article with defendant. Loftus v. Agraut, 18 S. D. 55, 99 NW 90. (4) To show pawnee's disposal of pawn before specified time to redeem. Loftus v. Agraut, supra. (5) To show that pawn had been stolen. Seiden v. Stern, 95 Misc. 255, 159 NYS 88; Abbett v. Frederick, supra.

[b] **Evidence held insufficient:** (1) To support verdict for plaintiff. McKenna v. Weaver, 133 NYS 427. (2) To show pawnee's negligence in keeping pawn. Seiden v. Stern, 95 Misc. 255, 159 NYS 88. (3) To show pawnee's good faith in sale of pawn. Uncle Sam's Loan Office v. Emery, 49 Tex. Civ. A. 236, 107 SW 1155.

80. See generally Trial [38 Cyc 1238].

81. See Trial [38 Cyc 1594].

[a] **Instructions held sufficient.**—Stern v. Simons, 77 Conn. 150, 58 A 696 (instructions as to the manner of sale by pawnbroker).

[b] **Instructions held erroneous or properly refused.**—Stern v. Simons, 77 Conn. 150, 58 A 696 (instructions as to legal effect of special agreement upon manner of sale by pawnbroker); Oberman v. Reece, 95 Ill. A. 645 (instructions ignoring provision in written contract embodied in pawn ticket as to exemption of liability in case of loss by fire or theft).

82. See Trial [38 Cyc 1511].

[a] **Question for jury.**—Whether pawnbroker exercised due care in keeping pawn. Savin v. Butler, 19 Oh. A. 68 [aff 111 Oh. St. 695, 146 NE 673].

83. **Retention of pawn against true owner** see supra § 23.

84. Schwartz v. Clark, 136 Ill. A. 150; Frantz v. Winehill, 124 La. 680, 50 S 650; Leicester v. Cherryman, [1907] 2 K. B. 101.

85. Schwartz v. Clark, 136 Ill. A. 150; Frantz v. Winehill, 124 La. 680, 50 S 650; Packer v. Gillies, 2 Campb. 336 note, 170 Reprint 1175 (trover).

86. Leicester v. Cherryman, [1907] 2 K. B. 101; Packer v. Gillies, 2 Campb. 336 note, 170 Reprint 1175.

[a] **In England** the owner is not precluded from suing at common law by the provisions of the Pawnbrokers Act of 1872 for the return of the goods upon payment of the debt by order of the court convicting the pawner of a criminal offense for the pawning, where the owner neither supported, opposed, nor complied with the order. Leicester v. Cherryman, [1907] 2 K. B. 101.

87. Schwartz v. Clark, 136 Ill. A. 150.

88. Frantz v. Winehill, 124 La. 680, 50 S 650; Leicester v. Cherryman, [1907] 2 K. B. 101.

89. Dyer v. Weinstein, 196 Ill. A. 398.

90. Dyer v. Weinstein, supra. But see supra § 24.

91. Peet v. Baxter, 1 Stark. 472, 2 ECL 181, 171 Reprint 533.

Retention of pawn against true

Evidence.[92] In an action by the true owner against the pawnee, the burden of proof rests upon the party asserting the affirmative of an issue.[93] The owner's presentation of the pawn ticket is prima facie evidence of his title to the pawn,[94] where the ticket recites that the pawn may be delivered to any person presenting the ticket.[95] General rules as to the admissibility[96] and sufficiency[97] of evidence apply.

Trial.[98] General rules as to instructions,[99] submission of issues to the jury,[1] questions for the jury,[2] and findings[3] apply in the owner's action against the pawnee.

[§ 55] **C. By Pawnee against Third Persons.** The pawnee may recover damages from a third person who induced him to deliver the pawn where the pawner obtained judgment against him for conversion by reason of such delivery.[4] Where a landlord distrains for rent goods deposited in pawn, the pawnee may maintain an action against the landlord for their value.[5]

XI. PENALTIES[6]

[§ 56] Where the statute expressly imposes a penalty to indemnify the party injured,[7] the pawnee may proceed to recover a penalty from a pawner who wrongfully pawned the goods of another which the pawnee was compelled to restore to the true owner.[8] The pawnee is not precluded from proceeding under such a statute by reason of the pawner's prior conviction of larceny for the same transaction.[9] A common informer, although not the party aggrieved, has been held a proper complainant in a proceeding to recover a statutory penalty.[10]

XII. CRIMINAL PROSECUTIONS[11]

[§ 57] **A. Offenses.** Statutes and ordinances regulating the business of pawnbrokers[12] usually provide for criminal prosecution for the violation of their provisions.[13] Such statutory and ordinance provisions are penal in their nature[14] and are construed strictly.[15] Under some statutes and ordinances,[16] to pursue the occupation of pawnbroker[17] without a license[18] or in violation of regulatory provisions[19] is punishable[20] as a misdemeanor.[21] Under statutes fixing a maximum rate of interest,[22] a pawnbroker is not punishable for merely entering upon the pawn ticket a rate in excess thereof where he does not in fact accept more than the correct amount from the pawner.[23] A charge for storage, in addition to the maximum rate, is not punishable under the statute in the absence of express provision therefor.[24] A pawnbroker, who acting honestly has lost the article pawned, is not liable to conviction under statutory provisions[25] creating an offense for neglecting or refusing to deliver a pawn to the person entitled thereto, without reasonable excuse.[26] The pawnbroker's negligence causing a loss of the pawn is not a violation of such statutory provisions,[27] since they apply only to the pawnbroker's refusal to restore the pawn on demand.[28]

[§ 58] **B. Persons Liable.** Engaging in acts essential to the transaction of his business renders a pawnbroker punishable for failure to obtain a license,[29] but a person who makes a business of purchasing goods under a contract whereby he gives to the seller a right of repurchase at an increased price does not thereby exercise the trade of a pawnbroker, and is not liable to criminal prosecution for failure to obtain a license.[30]

Pawnbroker's clerk is not punishable for failure to make a required daily report of the record of pawn transactions to a designated police official,[31] even where the clerk was present when an unre-

owner see supra § 23.

92. See generally Evidence 23 C. J. p 1.

93. See Evidence § 14.

[a] **Illustration.**—In an action against a pawnee to recover the value of property pledged by a third person, where the answer admitted that title was in plaintiff in the first instance, it was incumbent upon defendant to show a transfer of title from plaintiff to the third person or some act which, as to the third person, clothed the third person with the right to pawn the goods. Silberfeld v. Solomon, 70 Colo. 413, 202 P 113; Abel v. Poe, 199 Ill. A. 391.

94. Schwartz v. Chicago State Pawners Soc., 195 Ill. A. 93.

95. Schwartz v. Chicago State Pawners Soc., supra.

96. See Evidence §§ 13-1806.

[a] **Evidence held inadmissible.**—Silberfeld v. Solomon, 70 Colo. 413, 202 P 113; Abel v. Poe, 199 Ill. A. 391.

97. See Evidence §§ 1730-1806.

[a] **Evidence held insufficient to** show the pawnee's right to retain the pawn against the owner by reason of an agreement with third persons. Abel v. Poe, 199 Ill. A. 391

98. See generally Trial [38 Cyc 1238].

99. See Trial [38 Cyc 1594].

[a] **Instructions held erroneous.**—Silberfeld v. Solomon, 70 Colo. 413, 202 P 113; Thompson v. Goldstone, 171 App. Div. 666, 157 NYS 621.

1. See case infra this note.

[a] **Refusal to submit held erroneous.**—Schmidt v. Simpson, 204 N. Y. 434, 97 NE 966, AnnCas1913C 1288.

2. See Trial [38 Cyc 1511].

[a] **Question held for jury.**—Pawner's authority as to pawn. Marsellus v. Simpson, 143 App. Div. 383, 128 NYS 587.

3. See Trial [38 Cyc 1953].

[a] **Findings held sufficient.**—E. Bastheim Co. v. Schultz, 46 Cal. A. 24, 188 P 841.

4. Simpson v. Pilpoul, 77 Misc. 108, 136 NYS 46.

5. Swire v. Leach, 18 C. B. N. S. 479, 114 ECL 479, 144 Reprint 531.

6. Generally see Fines, Forfeitures, and Penalties §§ 72-161.

Regulation and control of business see supra §§ 5-19.

7. See statutory provisions.

8. Fancett v. Bierman, 14 T. L. R. 148.

9. Pickford v. Corsi, [1901] 2 K. B. 212.

10. Caswell v. Morgan, 1 E. & E. 809, 102 ECL 809, 120 Reprint 1114.

11. Generally see Criminal Law 16 C. J. p 1; Municipal Corporations §§ 602-740.

12. Regulation of business see supra §§ 5-19.

13. See statutory provisions.

14. State v. Goldenberg, 30 Del. 458, 108 A 137; Schane v. Atlanta, 127 Ga. 36, 56 SE 91.

15. State v. Goldenberg, 30 Del. 458, 108 A 137; Schane v. Atlanta, 127 Ga. 36, 56 SE 91.

16. See statutory and ordinance provisions.

17. "Pawnbroker" defined see supra § 1

18. Necessity for license in general see supra §§ 6, 14.

Who are pawnbrokers subject to licenses see supra § 15.

19. Regulations generally see supra §§ 5-19

20. District of Columbia v. Horning, 47 App. (D. C.) 413; Schapiro v. State, 75 Tex. Cr. 17, 169 SW 683.

21. Solomon v. Denver, 12 Colo. A. 179, 55 P 199; Philipsburg v. Weinstein, 21 Mont. 146, 53 P 272.

22. See supra § 8.

23. Levinson v. Rees, 26 Cox C. C. 384.

24. State v. Goldenberg, 30 Del. 458, 108 A 137.

25. See statutory provisions.

26. Allworthy v. Clayton, [1907] 2 K. B. 685.

27. Shackell v. West, 2 E. & E. 326, 105 ECL 326, 121 Reprint 123.

28. Shackell v. West, supra.

29. District of Columbia v. Horning, 47 App. (D. C.) 413.

[a] **Illustration.**—An unlicensed pawnbroker who conducts an office in the District of Columbia where applications for loans are received, the security disclosed, and the pawned property is kept, conducts his business there in violation of the law although he maintains a licensed office in Virginia just across the Potomac River to which he gives free automobile service to the pawner and at which all that is done is to appraise the property offered in pawn, deliver the money loaned, issue the pawn ticket, and accept repayment upon redemption entitling the pawner to redelivery of the pawn in the District of Columbia. District of Columbia v. Horning, 47 App. (D. C.) 413.

30. Reg. v. Munson, 4 CanCrCas 351.

"Pawnbroker" defined see supra § 1.

"Chattel mortgage" distinguished see Chattel Mortgages §§ 3-11.

31. Schane v. Atlanta, 127 Ga. 36, 56 SE 91.

ported pawn transaction was made, where he assisted therein, and where it was customary for him to make the required report for the pawnbroker.[32]

[§ 59] **C. Proceedings.** General rules[33] as to the sufficiency of the complaint[34] or information[35] apply in prosecutions for the violation of statutory or ordinance regulations governing pawnbrokers.

Evidence.[36] General rules as to admissibility[37] and sufficiency[38] of evidence apply in such prosecutions.

Trial.[39] General rules as to questions for the jury[40] apply in such prosecutions.

***PAY.**[1] [§ 1] **A. As a noun.**[2] In its ordinary sense, compensation.[3] To a certain extent "pay" is a technical word, used with reference to certain classes of employment, such as soldiers, sailors, and police,[4] it which sense it has been defined as a fixed and direct amount given by law in consideration of, and as compensation for, the personal services of such persons,[5] exclusive of emoluments and special allowances, whether in money or in kind.[6] "Pay," as a noun, usually implies a fixed money payment,[7] but not necessarily so.[8]

Phrases: "All back pay and emoluments,"[9] "an-

32. Schane v. Atlanta, supra.

33. See Criminal Law §§ 495–513; Indictments and Informations 31 C. J. p 548; Municipal Corporations §§ 644–662.

34. See cases infra this note.

[a] **Complaint liberally construed.**—St Joseph v. Levin, 128 Mo. 588, 31 SW 101, 49 AmSR 577.

[b] **Complaint need not negative exceptions** contained in the ordinance but not embodied in the definition of "offense." Kansas City v. Garnier, 57 Kan. 412, 46 P 707.

[c] **Complaint held sufficient.**—(1) In general. St. Joseph v. Levin, 128 Mo. 588, 31 SW 101, 49 AmSR 577. (2) Complaint in words of statute. Com. v. Danziger, 176 Mass. 290, 57 NE 461. (3) Complaint charging defendant with conducting the business of pawnbroker without a license, and without specification of detailed instances of pawn transactions. St. Paul v. Lytle, 69 Minn. 1, 71 NW 703; Schapiro v. State, 75 Tex. Cr. 17, 169 SW 683. (4) Complaint pleading ordinance allegedly violated by reference to its title, section, subdivision of section, and chapter of revised and codified ordinances of city. Philipsburg v. Weinstein, 21 Mont. 146, 53 P 272.

35. See cases infra this note.

[a] **Surplusage.**—Allegations in the information, which are the prosecutor's conclusions of the legal effect of the facts relied upon therein, neither add to, nor detract from, the information, nor in any way affect its legal interpretation. District of Columbia v. Horning, 47 App. (D. C.) 413.

[b] **Information held sufficient.**—District of Columbia v. Horning, 47 App. (D. C.) 413; Schapiro v. State, 75 Tex. Cr. 17, 169 SW 683.

36. See generally Criminal Law §§ 947–1999; Municipal Corporations §§ 671–676.

37. See Criminal Law § 1034 et seq.

[a] **Evidence held admissible:** (1) To show that defendant was a pawnbroker. Heitzelman v. State, (Tex. Cr.) 26 SW 729. (2) To show that defendant in no way complied with the statute regulating pawnbrokers, in order to show intentional breach thereof in respect of the particular article pawned with, and sold by, him. Heitzelman v. State, supra. (3) To show that defendant failed to comply with statutory requirements for the sale of unredeemed pawns. Heitzelman v. State, supra.

[b] **Evidence held inadmissible** to show the probable effect of compliance with the ordinance on the business of defendant. Launder v. Chicago, 111 Ill. 291, 53 AmR 625.

38. See Criminal Law §§ 1559–1999.

[a] **Evidence held sufficient:** (1) To show that defendant was engaged in, and conducting, the business of pawnbroking. Horning v. District of Columbia, 254 U. S. 135, 41 SCt 53, 65 L. ed. 185 [aff 48 App. (D. C.) 380]; Com. v. Schwartz, 197 Mass. 107, 83 NE 326; St. Paul v. Lytle, 69 Minn. 1, 71 NW 703; St. Joseph v. Levin, 128 Mo. 588, 31 SW 101, 49 AmSR 577; Philipsburg v. Weinstein, 21 Mont. 146, 53 P 272. (2) To show that defendant refused to submit the required records of pawn transactions to designated police officials on demand. St. Joseph v. Levin, supra.

39. See generally Criminal Law §§ 2000–2614; Municipal Corporations §§ 677–683.

40. See Criminal Law § 2272 et seq.

[a] **Question for jury.**—Whether a storage charge demanded in addition to the maximum statutory rate of interest is a subterfuge to evade such statute. State v. Goldenberg, 30 Del. 458, 108 A 137.

[b] **Evidence sufficient to submit case to jury.**—On the question of defendant's being a pawnbroker. Marshalltown v. Armstrong, (Iowa) 126 NW 195.

1. See also Payment post p 577.

2. Pay of:

Officers:

Generally see Officers §§ 233–286.

Municipal see Municipal Corporations §§ 1138, 1262, 1270, 1292, 1307, 1385, 1452, 1460, 1483, 1515, 1536, 1548, 1555, 1563, 1575, 1580, 1584, 1609, 1652.

Servant see Master and Servant §§ 192–347.

3. Smith v. Jones, 102 Conn. 471, 474, 129 A 50, 43 ALR 952; McDonald v. Fernald, 68 N. H. 171, 172, 38 A 729; Christopherson v. Reeves, 44 S. D. 634, 184 NW 1015, 1017.

[a] **As compensation for services.**—As used in a promise by a contractor that he would see that the men at work for a subcontractor should have their pay in the spring, "pay" means not only that which was subsequently earned, but all that would be due them whenever earned. McDonald v. Fernald, 68 N. H. 171, 172, 38 A 729.

[b] **As included in the term "emolument."**—McCoy v. Handlin, 35 S. D. 487, 153 NW 361, 372, LRA1915E 858, AnnCas1917A 1046.

"Compensation" defined see 12 C. J. p 229.

4. Goodwin v. Sheffield Corp., [1902] 1 K. B. 629, 634.

5. Sherburne v. U. S., 16 Ct. Cl. 491, 496; Goodwin v. Sheffield Corp., [1902] 1 K. B. 629, 636.

[a] **In the War Risk Insurance Act, or by the director** in fixing the term and conditions of the insurance contract, "pay" refers to the usual monthly pay for services actually rendered. Crawford v. U. S., 291 Fed. 801, 804.

Pay of:

Army or navy officers see Army and Navy §§ 74–107.

Enlisted men see Army and Navy §§ 108–123.

Militia see Militia § 51.

6. U. S. v. Mills, 197 U. S. 223, 25 SCt 434, 436, 49 L. ed. 732; Irwin v. U. S., 38 Ct. Cl. 87; Upperton v. Ridley, [1903] A. C. 281, 286 [aff [1900] 1 Q. B. 680, 688]; Goodwin v. Sheffield Corp., [1902] 1 K. B. 629, 634.

[a] **As used in a police act.**—(1) A word of general import, including all periodic payments made to a constable for his services as such, but not including emoluments or special allowances. Upperton v. Ridley, [1903] A. C. 281, 286 [aff [1900] 1 Q. B. 680, 688] (allowances for performance of special duties). (2) A word of somewhat technical meaning, which refers to payments in money made pursuant to the scale of pay fixed by the act, but does not include emoluments or allowances, whether in money or in kind. Goodwin v. Sheffield Corp., [1902] 1 K. B. 629, 634 (receiving free residence, fuel, gas, and water).

[b] **In the military service,** the term does not include allowances, commutations for rations, etc. U. S. v. Mills, 197 U. S. 223, 25 SCt 434, 436, 49 L. ed. 732; Irwin v. U. S., 38 Ct. Cl. 87; Bayley v. Bayley, [1922] 2 K. B. 227, 230.

[c] **"Command pay,"** in the British army, is an amount receivable by an officer in actual command in addition to his regimental pay. It is distinct in substance and fact from mere allowances, being "pay" in the true sense, since it is a definite financial remuneration for discharging the duties of a definite rank. Bayley v. Bayley, [1922] 2 K. B. 227, 230.

[d] **"Retainer pay"** is to be regarded, not as pay for services rendered, but as an "allowance" for readiness to render service if called on, which is, under the War Risk Insurance Act, expressly excluded from the term "pay." Crawford v. U. S., 291 Fed. 801, 804 (concerning member of United States Naval Reserve).

Allowances to:

Militia see Militia § 51.

Officers or enlisted men in the army or navy see Allowance 2 C. J. p 1158 text and note 46; Army and Navy §§ 74–123.

7. Goodwin v. Sheffield Corp., [1902] 1 K. B. 629, 636. See U. S. v. Mills, 197 U. S. 223, 25 SCt 434, 436, 49 L. ed. 732; Irwin v. U. S., 38 Ct. Cl. 87; Sherburne v. U. S., 16 Ct. Cl 491, 496; Smith v. Jones, 102 Conn. 471, 474, 129 A 50, 43 ALR 952; Halsted v. Allen, (Tex. Civ. A.) 73 SW 1068, 1069; Bayley v. Bayley, [1922] 2 K. B. 227, 229.

8. Halsted v. Allen, (Tex. Civ. A.) 73 SW 1068, 1069 (grant of land by Republic of Texas to soldier as pay).

[a] **Payment in labor.**—Smith v. Jones, 102 Conn. 471, 474, 129 A 50, 43 ALR 952 (where one performing services in return for similar services was held to be performing services for pay).

[b] **In land.**—Halsted v. Allen, (Tex. Civ. A.) 73 SW 1068, 1069 ("pay," as used in a resolution of the congress of the Republic of Texas providing for the pay of volunteers in the war with Mexico, included land granted to a soldier, not being limited to money).

9. McLean v. U. S., 226 U. S. 374, 381, 33 SCt 122, 57 L. ed. 260.

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*By WILLIAM QUINBY DE FUNIAK (Pay-Paymaster inclusive).

nual pay,"[10] "command pay,"[11] "current yearly pay,"[12] "day's pay,"[13] "pay or perquisites,"[14] "pay proper,"[15] "retainer pay,"[16] and "using the services of another for pay."[17]

[§ 2] **B. As a Verb.**[18] In its primary and ordinary meaning, to discharge an indebtedness by the use of money,[19] especially when used in connection with an obligation owing to the government.[20] However, it does not necessarily refer to money,[21] being a word of quite comprehensive meaning,[22] and may mean to adjust;[23] to advance;[24] to compensate;[25] to deliver;[26] to deliver the amount or value to the persons to whom it is owing;[27] to deliver a creditor the value of the debt, either in money or in goods, to his acceptance or satisfaction, by which the obligation of the debt is discharged;[28] to deliver that which is, or is regarded as, the equivalent of compensation to an employee or a creditor for services or goods;[29] to discharge a debt[30] in money, goods, or other things of value;[31] to discharge a duty created by a promise, or by custom, or by the moral law;[32] to discharge an obligation[33] by a performance according to its terms or requirements,[34] whether the obligation be for money, merchandise, or service;[35] to discharge one's obligation to another;[36] to fulfill; to perform what is promised;[37] to furnish;[38] to give;[39] to give as pay;[40] to make due return to;[41] to recompense;[42] to remunerate;[43] to render that which is due;[44] to requite;[45] to reward;[46] to satisfy;[47] to satisfy by other means than cash, as well as by cash;[48] to satisfy or content; specifically, to satisfy for service rendered, property delivered, etc.;[49] to settle;[50] to transfer;[51] to transfer or deliver money or other agreed medium from the debtor to the creditor.[52]

In an order to "pay," it means payable on demand.[53]

In wills, the word is not properly used to denote the distribution of real property,[54] but rather in

10. Goodwin v. Sheffield Corp., [1902] 1 K. B. 629, 634. See also Annual 3 C. J. p 196 text and note 52.

11. Bayley v. Bayley, [1922] 2 K. B. 227, 229. See supra note 6 [c].

12. See Current Year 17 C. J. p 411 note 57 [d].

13. See Day's Pay 17 C. J. p 1134.

14. Christopherson v. Reeves, 44 S. D. 634, 184 NW 1015, 1017.

"Perquisite" defined see post this volume.

15. U. S. v. Mills, 197 U. S. 223, 25 SCt 434, 436, 49 L. ed. 732; Irwin v. U. S., 38 Ct Cl. 87. See also Army and Navy §§ 74–83.

16. Crawford v. U. S., 291 Fed. 801, 804. See supra note 6 [d].

17. Smith v. Jones, 102 Conn. 471, 474, 129 A 50, 43 ALR 952.

18. See also Paid 46 C. J. p 1168.

Cross references:

Contract to pay legal liability see Contracts § 208.

"Forfeit" as meaning "pay" see Forfeit § 4 text and note 63.

Promise to pay debt, default, or miscarriage of another see Contracts § 156; Frauds, Statute of §§ 12–70.

19. Neblett v. Smith, 142 Va. 840, 128 SE 247, 251; Angelo v. Railroad Commn., 194 Wis. 543, 217 NW 570, 573; Krahn v. Goodrich, 164 Wis. 600, 160 NW 1072, 1075; Oneida County v. Tibbits, 125 Wis. 9, 15, 102 NW 897.

[a] **In a covenant to pay rent** the word means payment in cash. Henderson v. Arthur, [1907] 1 K. B. 10, 3 BRC 73. Covenants to pay rent generally see Landlord and Tenant §§ 1052–1062.

"Discharge" defined see 18 C. J. p 1048.

20. Angelo v. Railroad Commn., 194 Wis. 543, 217 NW 570, 573.

21. Carpenter v. Dummit, 221 Ky. 67, 297 SW 695, 700; Neblett v. Smith, 142 Va. 840, 128 SE 247, 251.

22. Krahn v. Goodrich, 164 Wis. 600, 160 NW 1072, 1075.

"The word 'pay,' while often in commercial transactions meaning satisfaction in money, has a much wider significance in its ordinary usage, and includes satisfaction, discharge, compensation." Marriner v. John L. Roper Co., 112 N. C. 164, 166, 16 SE 906.

[a] **Sale and indebtedness implied.**—In an instrument obligating the maker to pay a certain amount for certain merchandise, the word "pay" implies an indebtedness. Lent v. Hodgman, 15 Barb. (N. Y.) 274, 278. See Tucker v. Linn, (N. J. Ch.) 57 A 1017, 1019; Gutch v. Fosdick, 48 N. J. Eq. 353, 356, 22 A 590, 27 AmSR 473.

23. Lynch v. Nugent, 80 Iowa 422, 46 NW 61, 63.

"Adjust" defined see 1 C. J. p 1237.

24. Merrill v. Hussey, 101 Me. 439, 64 A 819, 821.

25. Webster D. [quot Starr v. Delaware County, 40 Ind. A. 7, 76 NE 1025, 1026, 79 NE 390].

"Compensate" defined see 12 C. J. p 224.

26. McCullough's Est., 14 Pa. Dist. 7, 31 Pa. Co. 16 (the holder of securities which are the property of another "pays" his obligation when he delivers them to the owner).

"Deliver" defined see 18 C. J. p 476.

27. Webster D. [quot Starr v. Delaware County, 40 Ind. A. 7, 76 NE 1025, 1026, 79 NE 390].

28. Webster D. [quot Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76]; Beals v. Home Ins. Co., 36 N. Y. 522, 527 [quot Cowgill v. Roberson, 75 Mo. A. 412, 418; La Montagne v. Bank of New York, 94 App. Div. 219, 88 NYS 21, 31]; Gettinger v. National Bank of Commerce, 23 Oh. Cir. Ct. 77, 82.

29. Century D. [quot Continental Hose Co. No. 1 v. Fargo, 17 N. D. 5, 114 NW 834, 836].

30. Webster D. [quot Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76]; Beals v. Home Ins. Co., 36 N. Y. 522, 527; La Montagne v. Bank of New York, 94 App. Div. 219, 88 NYS 21, 31; Gettinger v. National Bank of Commerce, 23 Oh. Cir. Ct. 77, 82.

31. Carpenter v. Dummit, 221 Ky. 67, 297 SW 695, 700.

32. Webster D. [quot Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76].

33. Hopson v. Ætna Axle, etc., Co., 50 Conn. 597, 601; Nyce v. Schmoll, 40 Ind. A. 555, 82 NE 539, 540. See Arkansas Fertilizer Co. v. U. S., 193 Fed. 667, 673.

34. Webster D. [quot Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76].

35. Gettinger v. National Bank of Commerce, 23 Oh. Cir. Ct. 77, 82.

36. Webster D. [quot Starr v. Delaware County, 40 Ind. A. 7, 76 NE 1025, 1026, 79 NE 390; Forrest v. Henry, 33 Minn. 434, 438, 23 NW 848]; Farmersville First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 44, 19 SW 334.

37. Webster D. [quot Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 76].

"Fulfill" defined see 27 C. J. p 923.

38. Merrill v. Hussey, 101 Me. 439, 64 A 819, 821.

39. Franklin v. State, 12 Md. 236, 248.

"Give" defined see 28 C. J. p 708.

"While the use of the word 'pay' might be consistent with an intention to make a gift, it is inconsistent with such intention when used with reference to the discharge of an obligation." Hart v. Ketchum, 121 Cal. 426, 430, 53 P 931.

40. Century D. [quot Continental Hose Co. No. 1 v. Fargo, 17 N. D. 5, 114 NW 834, 836].

41. Webster D. [quot Starr v. Delaware County, 40 Ind. A. 7, 76 NE 1025, 1026, 79 NE 390].

42. Century D. [quot Continental Hose Co. No. 1 v. Fargo, 17 N. D. 5, 114 NW 834, 836].

43. Century D.; Standard D. [both quot Continental Hose Co. No. 1 v. Fargo, supra]; Webster D. [quot Starr v. Delaware County, 40 Ind. A. 7, 76 NE 1025, 1026, 79 NE 390].

44. Lippincott v. Pancoast, 47 N. J. Eq. 21, 27, 20 A 360.

"Render" defined see [34 Cyc 1329].

45. Standard D. [quot Continental Hose Co. No. 1 v. Fargo, 17 N. D. 5, 114 NW 834, 836].

46. Standard D. [quot Continental Hose Co. No. 1 v. Fargo, supra].

47. Century D.; Webster Int. D. [both quot State v. Towner, 26 Mont. 339, 346, 67 P 1004]; Webster D. [quot Starr v. Delaware County, 40 Ind. A. 7, 76 NE 1025, 1026, 79 NE 390; Forrest v. Henry, 33 Minn. 434, 438, 23 NW 848].

"Satisfy" defined see [35 Cyc 795].

48. Vollmer v. Automobile F. Ins. Co., 207 App. Div. 67, 202 NYS 374, 376 [quot Smith v. Treuthart, 130 Misc. 394, 223 NYS 481, 483].

49. Webster D. [quot Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 463, 45 P 348].

50. Moore v. Hyman, 35 N. C. 272, 274. See Lynch v. Nugent, 80 Iowa 422, 46 NW 61, 63. And see Settle [35 Cyc 1442].

51. Clark's App., 70 Conn. 195, 216, 39 A 155; Neblett v. Smith, 142 Va. 840, 853, 128 SE 247 ("a direction to pay is frequently but an order to transfer or to pass that in view to the party entitled").

"Transfer" defined see [38 Cyc 940].

[a] **Not used in this sense.**—The word "pay," although generally a word of transfer, was not used in that sense in an order, by one having money in the possession of the drawee, reciting that the drawer owed the payee a less sum and directing the drawee to pay the sum due by the drawer to the payee. Clayton v. Fawcett, 2 Leigh (29 Va.) 19, 23. See Robinson v. Tipton, 31 Ala. 595, 611.

52. Oneida County v. Tibbits, 125 Wis. 9, 15, 102 NW 897.

53. Terry v. Milwaukee, 15 Wis. 490, 491.

54. Weeks v. Cornwell, 104 N. Y. 325, 338, 10 NE 431. But see Neblett v. Smith, 142 Va. 840, 852, 128 SE 247 ("we pay debts and with this definition so limited it is no more accurate to speak of the payment of a legacy than it is to speak of a payment of a devise").

[a] **"Paying £10 a year to M. C. for life,"** in a devise of a life estate to the testator's son, created a charge or condition, not a trust. Hodge v. Churchward, 16 Sim. 71, 73, 39 Eng Ch 71, 60 Reprint 799.

[b] **Sufficient to carry a fee.**—

connection with money distribution.[55]

Inserting omitted word "pay" in a bill of exchange injures no one, and, where done four months after maturity of the bill, is done within a reasonable time.[56]

Phrases: "Absolute refusal to pay,"[57] "divide and pay the remainder,"[58] "pay all costs,"[59] "pay all my just debts,"[60] "pay, assign, and transfer,"[61] "pay bills,"[62] "pay, deliver over, and transfer,"[63] "pay for lighterage,"[64] "pay into the treasury of the state,"[65] "pay or apply,"[66] "pay or convey,"[67] "pay over,"[68] "pay said principal,"[69] "pay such costs as are awarded,"[70] "pay ten per cent of the purchase money in cash,"[71] "pay the purchase money into court,"[72] "pay the within,"[73] "pay without recourse,"[74] "personally pay,"[75] "promise to pay,"[76] "unable to pay his debts in full,"[77] and "well in hand truly pay in lawful money of Great Britain;"[78] also, "false auditing and paying of claims,"[79] "passenger paying one single fare,"[80] "paying freight,"[81] "paying money into court,"[82] "paying my lawful debts,"[83] "paying out,"[84] "paying the yearly rent,"[85] "they paying to Pennoyer his balance,"[86] "upon paying,"[87] and "yielding and paying."[88]

PAYABLE.[89] Admitting or demanding payment;[90] capable of being paid;[91] due;[92] due to;[93] justly due;[94] legally enforceable;[95] matured;[96] now due;[97] suitable to be paid;[98] that may be discharged or settled by delivery of value;[99] that may, can, or should be paid;[1] to be paid;[2] to be paid

Wortendyk v. Wortendyk, 7 N. J. L. 363, 378. And see Goodright v. Stocker, 5 T. R. 13, 14, 101 Reprint 7 (where a devise of a house to A "paying yearly and every year out of the said house the sum of 15s. to B" was held sufficient to carry a fee).

55. In re Bailey, 276 Pa. 147, 119 A 907, 909. See In re Thompson, 1 NYS 213, 215 ("the terms 'to pay' and 'deliver over,' used in the clause referred to, are more appropriately applied to a disposition of personal estate, and would ordinarily have some influence in determining whether or not that is the character of the fund which the testator intended the beneficiary should receive"); Neblett v. Smith, 142 Va. 840, 853, 128 SE 247 ("and it is a common expression where bequests are ordered to be satisfied").

[a] **Implying conversion of realty into personalty.**—Matter of Tatum, 34 Misc. 25, 69 NYS 501, 503 (held insufficient to warrant implication); McDowell v. McDowell, 24 Ont. 468, 472, 14 CanLTOccNotes 123 ("it is, also, quite possible that in directing his trustee to pay to the children their shares, he was using the word in that wide and perhaps loose sense in which it is not unfrequently used when it is made to apply to other things than money").

[b] **A direction to a trustee** "to pay" to the cestui que trust is equivalent to the expression "to apply to the use of." Mason v. Jones, 2 Barb. (N. Y.) 229, 248.

56. Maclean v. McEwen, 36 Sc. L. Rep. 284, 285.

57. Great American Co-op. Fire Assoc. v. Jenkins, 11 Ga. A. 784, 76 SE 159, 160.

58. Weeks v. Cornwell, 104 N. Y. 325, 338, 10 NE 431, 434.

59. Hanson v. Ponder, (Tex. Commn. A.) 5 SW (2d) 767.

60. In re Porter, 138 Cal. 618, 72 P 173, 174 (a formal phrase of no meaning); Collamore v. Wilder, 19 Kan. 67, 82 ("such formal and general language in a will is meaningless, and has no authoritative force").

61. Stokes v. Salomons, 9 Hare 75, 79, 41 EngCh 75, 68 Reprint 421, 4 EngL&Eq 133.

62. Claflin v. Continental Jersey Works, 85 Ga. 27, 43, 11 SE 721.

63. In re Thompson, 1 NYS 213, 215.

64. Thompson v. Winslow, 128 Fed. 73, 77.

65. Daily v. State, 171 Ind. 646, 87 NE 4, 6.

66. McDowell v. McDowell, 24 Ont. 468, 471, 14 CanLTOccNotes 123.

67. Becker v. Chester, 115 Wis. 90, 122, 91 NW 87, 650.

68. Burnham v. White, 117 App. Div. 515, 517, 102 NYS 717; Mason v. Jones, 2 Barb. (N. Y.) 229, 248; Bascom v. Weed, 53 Misc. 496, 105 NYS 459; Lippincott v. Pancoast, 47 N. J. Eq. 21, 27, 20 A 360; Clarke v. Clarke, 46 S. C. 230, 245, 24 SE 202, 57 AmSR 675; Re Hay, 3 OntWN 735, 21 OntWR 546, 2 DomLR 152, 154.

[a] **"Pay over and deliver."**—Goad v. Montgomery, 119 Cal. 552, 556, 51 P 681, 63 AmSR 145.

69. Roosa v. Harrington, 171 N. Y. 341, 349, 64 NE 1.

70. See cases infra this note.

[a] **Omission from recognizance** (1) may (Schick v. Corballis, (Sask.) 55 DomLR 583, 586, 35 CanCrCas 135, [1921] 1 WestWkly 225) (2) or may not render the recognizance void (Bietel v. Ouseley, (Sask.) 58 DomLR 239, 241, 34 CanCrCas 176, [1921] 1 WestWkly 441).

71. Bailey v. Dalrymple, 47 N. J. Eq. 81, 19 A 840, 841 (does not mean a deposit, but an actual payment, on account, of part of the purchase money).

72. State Bank v. Wilchinsky, 128 App. Div. 485, 112 NYS 1002, 1005 (synonymous with "complete his purchase").

73. Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73, 75.

74. Charnley v. Dulles, 8 Watts & S. (Pa.) 353, 361.

75. Tilton v. Herman, 109 Va. 503, 64 SE 351, 352.

76. California College v. Stephens, 11 Cal. A. 523, 105 P 614, 615; Christensen v. Beebe, 32 Utah 406, 91 P 129, 133.

[a] **"Promise in writing to pay money."**—Ball v. Peper Cotton Press Co., 141 Mo. A. 26, 121 SW 798, 802.

77. Empire Sash, etc., Co. v. Maranda, 21 Man. 605, 19 WestLR 78, 81; Bertrand v. Canadian Rubber Co., 12 Man. 27, 29; Clarkson v. Sterling, 14 Ont. 460, 463. See Dominion Bank v. Cowen, 14 Ont. 465, 466 (declaring such expression to have the same meaning as "in insolvent circumstances").

78. Henderson v. Arthur, [1907] 1 K. B. 10, 13, 3 BRC 73.

79. Peo. v. Gresser, 124 NYS 581, 582.

80. McLaughlin v. New York City R. Co., 106 App. Div. 1, 94 NYS 653, 658; Carpenter v. New York City R. Co., 93 NYS 600, 602.

81. Domett v. Beckford, 5 B. & Ad. 521, 522, 27 ECL 223, 110 Reprint 883.

82. Warren v. Matthews, 96 Ala. 183, 185, 11 S 285.

83. Doe v. Weston, W. Bl. 1215, 1216, 96 Reprint 715.

84. Matter of Ingraham, 60 Misc. 44, 112 NYS 763, 767; In re Naylor, 164 NYS 462, 464.

85. Dawson v. Dyer, 5 B. & Ad. 584, 27 ECL 248, 110 Reprint 906.

86. Lloyd v. Holly, 8 Conn. 491, 495 (holding that word clearly imports a condition).

87. Ruble v. Turner, 2 Hen. & M. (12 Va.) 38, 42.

88. Fanning v. Stimson, 13 Iowa 42, 49; Young v. Hargraves, 7 Oh. Pt. II 63, 69; Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 232, 40 AmD 554; Royer v. Ake, 3 Penr. & W. (Pa.) 461, 464.

[a] **"Yielding and paying rent."**—Kimpton v. Walker, 9 Vt. 191, 200.

89. See Pay ante p 572; Payment post p 577.

[a] **Distinguished from "paid."**—Hill v. Stetler, 4 Pa. C. Pl. 119, 122.

Paid see 46 C. J. p 1168.

90. Webster D. [quot Farmersville First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 44, 19 SW 334]; In re Advisory Op. to Governor, 74 Fla. 250, 77 S 102, 103; Gulf Production Co. v. Cruse, (Tex. Civ. A.) 258 SW 211, 212.

91. Webster D. [quot Farmersville First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 44, 19 SW 334]; In re Advisory Op. to Governor, 74 Fla. 250, 77 S 102, 103; Gulf Production Co. v. Cruse, (Tex. Civ. A.) 258 SW 211, 212.

92. Hawes v. Smith, 12 Me. 429, 432; Ball v. Northwestern Mut. Acc. Assoc., 56 Minn. 414, 419, 57 NW 1063; Turk v. Stahl, 53 Mo. 437, 438; Read v. Worthington, 22 N. Y. Super. 617, 627.

It "has the same meaning as the broader sense of the word 'due' and when combined with the latter . . . the only function it can have is to point to the restricted and differential meaning of its companion word as the one intended to be expressed. To hold otherwise would be to use the two words synonymously and tautologically." Swanson v. Spencer, 177 Mo. A. 124, 129, 163 SW 285.

[a] **In pleading** "ordinarily, the words 'due,' 'owing,' and 'payable' are said to be conclusions of law, a denial of which would raise no issue." Irwin v. Insurance Co. of North America, 16 Cal. A. 143, 145, 116 P 294.

"Due" defined see 19 C. J. p 818.

93. Eckel v. Jones, 8 Pa. 501, 502.

94. Webster D. [quot Farmersville First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 44, 19 SW 334]; In re Advisory Op. to Governor, 74 Fla. 25, 77 S 102, 103.

95. Webster D. [quot Farmersville First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 44, 19 SW 334]; In re Advisory Op. to Governor, 74 Fla. 250, 77 S 102, 103.

[a] **Legally its meaning** is that a specified amount becomes due, and its payment can be enforced. Hill v. Stetler, 4 Pa. C. Pl. 119, 122.

"Enforceable" defined see 20 C. J. p 1256.

96. Webster D. [quot Farmers' Bank v. Johnson, 134 Ga. 486, 494, 68 SE 85, 137 AmSR 242, 30 LRANS 697].

"Mature" defined see 39 C. J. p 1391.

97. Webster D. [quot Farmers' Bank v. Johnson, 134 Ga. 486, 494, 68 SE 85, 13 AmSR 242, 30 LRANS 697].

98. Webster D. [quot Farmers' Bank v. Johnson, supra; Farmersville First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 44, 19 SW 334]; In re Advisory Op. to Governor, 74 Fla. 250, 77 S 102, 103.

99. Webster D. [quot Farmers' Bank v. Johnson, 134 Ga. 486, 494, 68 SE 85, 137 AmSR 242, 30 LRANS 697].

1. Webster D. [quot Farmers' Bank v. Johnson, supra].

2. Century D. [quot Johnson v. Dooley, 65 Ark. 71, 74, 44 SW 1032, 40 LRA 74]; Swanson v. Spencer, 177 Mo. A. 124, 129, 163 SW 285; Poppleton v. Jones, 42 Or. 24, 33, 69 P 919; Dungan v. Henderlite, 21 Gratt.

to.[3]

As meaning "vested." In many cases where a bequest, gift, or settlement is to be given to a person on his coming of age or marrying, but is conditioned to go elsewhere if such person die before it shall be payable, "payable" is construed to mean "vested."[4]

Phrases: "Amount otherwise payable,"[5] "[bond] payable to the county judge,"[6] "due and payable,"[7] "made and payable in this state,"[8] "not be payable,"[9] "payable after sight,"[10] "payable as convenient,"[11] "payable as it accrues,"[12] "payable at a determinable future time,"[13] "payable 'at bank,'"[14] "payable at the rate of $50 per month,"[15] "payable in cash,"[16] "payable in equal annual installments,"[17] "payable in money only,"[18] "payable in one and two years,"[19] "payable in one year,"[20] "payable [in pledged stock at par],"[21] "payable in the currency of Virginia and North Carolina money,"[22] "payable in trade,"[23] "payable 'in United States bonds,'"[24] "payable monthly,"[25] "payable on demand,"[26] "payable on or before one year,"[27] "payable on presentation of invoice,"[28] "payable quarterly,"[29] "payable through the Citizens Bank of Valdosta, Valdosta, Ga., at current rate,"[30] "payable to bearer,"[31] "[payable to] cash or order,"[32] "payable to my estate,"[33] "payable to order,"[34] "payable when in funds,"[35] "subject to taxes and special assessments levied and payable after the year A. D. 1911,"[36] and "when the same become payable."[37]

PAY CHECK. A term which is said to mean practically the same thing as "money order."[38]

PAY DIRT.[39] A stratum of gold-bearing earth and gravel which can be removed at a profit over and above the necessary expense of extracting it.[40]

PAYEE.[41] A person to whom payment is made;[42] any person to whom a debt should be paid.[43] It is clearly opposed to the word "payor"[44] as "vendee" is to "vendor," "mortgagee" to "mortgagor," and "indorsee" to "indorsor."[45] In its statutory use it may have a technical and definite meaning, and apply only to bills and notes.[46]

(62 Va.) 149, 156. See Williams v. Sims, 22 Ala. 512, 516 (terms "to be paid" and "payable" are convertible). See also Bower v. Hodges, 13 C. B. 765, 76 ECL 765, 138 Reprint 1402.

[a] **Does not mean** "may be paid." Johnson v. Dooley, 65 Ark. 71, 74, 44 SW 1032, 40 LRA 74; Swanson v. Spencer, 177 Mo. A. 124, 129, 163 SW 285; Poppleton v. Jones, 42 Or. 24, 33, 69 P 919; Dungan v. Henderlite, 21 Gratt. (62 Va.) 149, 156.

3. Eckel v. Jones, 8 Pa. 501, 502.

4. Haydon v. Rose, L. R. 10 Eq. 224; West v. Miller, L. R. 6 Eq. 59, 64; Martineau v. Rogers, 8 De G. M. & G. 328, 57 EngCh 328, 44 Reprint 416; Mocatta v. Lindo, 9 Sim. 56, 59 Reprint 278; Emperor v. Rolfe, 1 Ves. 208, 27 Reprint 986. And see Jones v. Jones, 13 Sim. 561, 568, 60 Reprint 217 (where a gift of money was to be made to certain persons when they attained the age of twenty-one, but if they should die before their shares became payable, the money to go elsewhere, "payable" was said to mean "attaining twenty-one"). Compare In re Wilmott, L. R. 7 Eq. 532, 537 (where, in discussing Mocatta v. Lindo, supra, it was said: "I am bound to say I do not think I should have held, upon that instrument, that the word 'payable' meant 'vested' ").

"Vested" defined see [40 Cyc 197].

5. Van Slooten v. Fidelity, etc., Co., 78 App. Div. 527, 79 NYS 608, 609.

6. Hicks v. Oliver, 71 Tex. 776, 10 SW 97, 99 [quot Munzesheimer v. Wickham, 74 Tex. 638, 639, 12 SW 751] ("the word 'payable' indicates that a sum should be named to be paid," etc).

7. See Due 19 C. J. p 820 text and note 71.

8. Orcutt v. Hough, 54 N. H. 472, 473.

9. In re De Borbon, 211 Pa. 623, 61 A 244, 245 (as meaning "shall not be demandable").

10. Waggoner Banking Co. v. Gray County State Bank, (Tex. Civ. A.) 165 SW 922, 925.

11. Black v. Bachelder, 120 Mass. 171, 173.

12. O'Shields v. Poff, (Tex. Civ. A.) 144 SW 1044, 1045.

13. Union Stock Yards Nat. Bank v. Bolan, 14 Ida. 87, 93 P 508, 510, 125 AmSR 146. See Hibernia Bank, etc., Co. v. Dresser, 132 La. 532, 61 S 561, 571.

14. Hazard v. Spencer, 17 R. I. 561, 23 A 729, 731.

[a] **"Payable at the Bank of Montreal, Toronto, at par."**—Rose-Belford Printing Co. v. Montreal Bank, 12 Ont. 544, 545.

15. San Francisco Credit Clearing-House v. MacDonald, 18 Cal. A. 212, 122 P 964, 966.

16. Elon Banking, etc., Co. v. Burke, 189 N. C. 69, 126 SE 163, 164.

17. Denver v. Hallett, 34 Colo. 393, 396, 83 P 1066.

18. Eastman v. Sunset Park Land Co., 35 Cal. A. 628, 170 P 642, 643.

19. Allentown School-Dist v. Derr, 115 Pa. 439, 446, 9 A 55 (meaning at the expiration of one and two years, respectively).

20. Deakin v. Underwood, 37 Minn. 98, 102, 33 NW 318, 5 AmSR 827.

21. Higgins v. Lansingh, 154 Ill. 301, 40 NE 362, 372.

22. Dungan v. Henderlite, 21 Gratt. (62 Va.) 149, 154.

23. Dudley v. Vose, 114 Mass. 34, 36. See Woods v. Dial, 12 Ill. 72, 73.

24. Easton v. Hyde, 13 Minn. 90.

25. Webster v. Cook, 38 Cal. 423, 425; Savannah Ice Delivery Co. v. American Refrigerator Transit Co., 110 Ga. 142, 145, 35 SE 280; Silver v. Standard Gold Mines, Ltd., (Que.) 3 DomLR 103, 106; Mosseau v. Tone, 7 Terr. L. 369, 370, 6 WestLR 117.

26. Cate v. Patterson, 25 Mich. 191, 193; Gilbert v. Adams, 146 App. Div. 864, 131 NYS 787, 788; Cook v. Carpenter, 212 Pa. 165, 61 A 799, 803, 108 AmSR 854, 1 LRANS 900, 4 AnnCas 723; Waggoner Banking Co. v. Gray County State Bank, (Tex. Civ. A.) 165 SW 922, 925; Terry v. Milwaukee, 15 Wis. 490, 491. And see Bills and Notes §§ 599–603.

27. Deakin v. Underwood, 37 Minn. 98, 102, 33 NW 318, 5 AmSR 827; Norwood v. Resolute F. Ins. Co., 36 N. Y. Super. 552, 554.

28. Riverside Coal Co. v. American Coal Co., (Conn.) 139 A 276, 279.

29. In re Advisory Op. to Governor, 74 Fla. 250, 77 S 102 (meaning payable in four equal amounts quarter-annually).

30. Farmers' Bank v. Johnson, 134 Ga. 486, 490, 68 SE 85, 137 AmSR 242, 30 LRANS 697.

31. People's Nat. Bank v. Taylor, 17 Ariz. 215, 149 P 763, 767; Cook v. Moody, 17 Ga. A. 465, 87 SE 713.

32. Cook v. Moody, 17 Ga. A. 465, 87 SE 713 (as in effect being "payable to bearer").

33. Leavitt v. Spaidal, 45 Ont. L. 611, 16 OntWN 271, 49 DomLR 245, 249.

34. See cases infra this note.

[a] **"Payable to my order."**—McCarthy v. Vine, 22 U. C. C. P. 458, 464.

[b] **"Payable only to their order upon the return of this certificate."**—Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 232, 40 AmD 554.

[c] **"Payable to the order of himself."**—Chandler v. Smith, 147 Ga. 637, 95 SE 223.

35. Mason v. Graff, 35 Pa. 448, 449.

36. Thornton v. Helmick, 201 Ill. A. 592, 593.

37. Union Trust Co. v. Grant, 148 Mich. 501, 111 NW 1039, 1040.

38. Barnes v. State, 46 Fla. 96, 100, 35 S 227.

Money order see Money § 18 text and note 91; Post-Office [31 Cyc 987].

39. See Dirt Mined 18 C. J. p 1046; Mines and Minerals §§ 6, 51, 66.

As used in a lease see Mines and Minerals § 624 note 40 [c].

40. Belsea v. Tindall, 190 Fed. 440, 449, 111 CCA 244.

41. **Payee:**

As a holder in due course of a negotiable instrument see Bills and Notes § 686.

As a "holder" of a negotiable instrument see Bills and Notes § 30.

As an original party to a negotiable instrument see Bills and Notes § 80.

As party to an action on a negotiable instrument see Bills and Notes § 1088.

Defenses against in action on negotiable instrument see Bills and Notes § 1004.

Delivery of negotiable instrument to see Bills and Notes §§ 333–341.

Designation of in negotiable instrument see Bills and Notes §§ 286–307, 310.

Filling blank in negotiable instrument with name of see Bills and Notes § 317.

Liability of anomalous or irregular indorser of negotiable instrument to see Bills and Notes § 129.

Necessity of naming in action on negotiable instrument see Bills and Notes §§ 1181, 1182.

Option as to time of payment of negotiable instrument see Bills and Notes § 239.

Payment of negotiable instrument to see Bills and Notes §§ 828, 831.

Payment or discharge of negotiable instrument by see Bills and Notes § 823.

Signing or indorsing a note as affecting liability see Bills and Notes §§ 100, 101.

Transfer of negotiable instrument of see Bills and Notes §§ 507–586.

42. Ex p. Butcher, L. R. 9 Ch. 595, 601.

[a] **Trustee of an express trust.**—Eagle Min., etc., Co. v. Lund, 14 N. M. 417, 94 P 949, 950.

43. Thomson v. Findlater Hardware Co., (Tex. Civ. A.) 156 SW 301, 303; Seastrunk v. Pioneer Sav., etc., Co., (Tex. Civ. A.) 34 SW 466, 467.

[a] **Assignee.**—Marrigan v. Page, 4 Humphr. (Tenn.) 247, 248; Seastrunk v. Pioneer Sav., etc., Co., (Tex. Civ. A.) 34 SW 466, 467. See Assignments § 4.

44. See Payer or Payor post p 576.

45. Ex p. Butcher, L. R. 9 Ch. 595, 601. See Indorsee 31 C. J. p 887; Indorser 31 C. J. p 888; Mortgagee 41 C. J. p 217; Mortgagor 42 C. J. p 454; Vendee [39 Cyc 1127]; Vendor [39 Cyc 1128].

46. Hall v. Byrne, 2 Ill. 140, 142. See Bills and Notes § 80.

[a] **"Obligee or payee."**—Hall v. Byrne, 2 Ill. 140, 142.

PAYER or PAYOR.[47] A person who makes a payment.[48]

PAYING. This word[49] is sometimes used as an adjective,[50] as in the phrases "dividend-paying stocks,"[51] and "oil or gas . . . in paying quantities."[52]

PAYMASTER. An officer of the army or navy whose duty it is to keep the pay accounts and pay the wages of the officers and men;[53] any official charged with the disbursement of public money.[54]

47. See Payee ante p 575.

48. Ex p. Butcher, L. R. 9 Ch. 595, 601.

Drawee see Bills and Notes §§ 90–92.

49. See Pay ante p 572.

50. See cases infra notes 51, 52.

51. Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 960, 30 KyL 935 (meaning stock actually paying dividends).

"Dividend" defined see 18 C. J. p 1406. See also Corporations § 1207.

"Stock" see Corporations § 498.

52. U. S. v. Brown, 15 F. (2d) 565, 567; Union Gas, etc., Co. v. Adkins, 278 Fed. 854, 857; Barnsdall v. Boley, 119 Fed. 191, 192; Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 NE 1084, 1086; Reynolds v. White Plains Oil, etc., Co., 199 Ky. 243, 245, 250 SW 975; Bay State Petroleum Co. v. Penn Lubricating Co., 121 Ky. 637, 638, 87 SW 1102, 27 KyL 1133; Weisant v. Follett, 17 Oh. A. 371, 374; Zeller v. Book, 7 Oh. Cir. Ct. N. S. 429, 28 Oh. Cir. Ct. 119, 120; Herrington v. Wood, 6 Oh. Cir. Ct. 326, 330, 3 Oh. Cir. Dec. 475; Gypsy Oil Co. v. Marsh, 121 Okl. 135, 248 P 329, 333, 48 ALR 876; Pine v. Webster, 118 Okl. 12, 246 P 429, 430; Keechi Oil, etc., Co. v. Smith, 81 Okl. 266, 267, 198 P 588; Pelham Petroleum Co. v. North, 78 Okl. 39, 40, 188 P 1069; Ardizonne v. Archer, 72 Okl. 70, 72, 178 P 263; Summerville v. Apollo Gas Co., 207 Pa. 334, 56 A 876, 877; Young v. Forest Oil Co., 194 Pa. 243, 250, 45 A 121; Cassell v. Crothers, 193 Pa. 359, 363, 44 A 446; Smith v. Hickman, 14 Pa. Super. 46, 51; Masterson v. Amarillo Oil Co., (Tex. Civ. A.) 253 SW 908, 914; Texas Pac. Coal. etc., Co. v. Bratton, (Tex. Civ. A.) 239 SW 688, 689; Texas Pac. Coal, etc., Co. v. Bruce, (Tex. Civ. A.) 233 SW 535, 539; Aycock v. Paraffine Oil Co., (Tex. Civ. A.) 210 SW 851, 852; Barbour v. Tompkins, 81 W. Va. 116, 117, 93 SE 1038, LRA 1918B 365; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 506, 44 SE 433, 97 AmSR 1027. And see Mines and Minerals §§ 670, 671.

53. Black L. D.

[a] **Paymaster's clerk** is naval officer. U. S. v. Hendee, 124 U. S. 309, 313, 8 SCt 507, 31 L. ed. 465; Ex p. Reed, 100 U. S. 13, 21, 25 L. ed. 538; In re Bogart, 3 F. Cas. No. 1,596, 2 Sawy. 396, 408.

54. Black L. D.

PAYMENT

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Tender see **Tender** [38 Cyc 127].

I. DEFINITION AND NATURE

[By EUSTACE W. TOMLINSON]

[§ 1] **A. In General.** The term "payment," in its more restricted legal sense, may be defined as the discharge in money of a sum due,[1] or the performance of a pecuniary obligation.[2] In its more general acceptation, however, the term may mean the fulfillment of a promise,[3] the performance of an agreement,[4] the satisfaction of a claim,[5] the discharge of a liability,[6] or the accomplishment of an obligation,[7] whether by giving or by doing.[8] In some jurisdictions it has been defined by statute.[9]

As used in its ordinary legal sense, payment involves an actual or constructive delivery,[10] by a

1. Ill.—Scott v. Gilkey, 49 Ill. A. 116 [aff 153 Ill. 168, 39 NE 265, and quot Bouvier L. D.].

Ind.—Morris v. Reyman, 55 Ind. A. 112, 103 NE 423.

Mich.—Blair v. Carpenter, 75 Mich. 167, 42 NW 790.

Mo.—Clay v. Lakenan, 101 Mo. A. 563, 74 SW 391.

N. Y.—Bouton v. Hill, 4 App. Div. 251, 38 NYS 498; Coughtry v. Levine, 4 Daly 335; Root v. Kelley, 39 Misc. 530, 80 NYS 482.

Okl.—Continental Gin Co. v. Arnold, 52 Okl. 569, 153 P 160.

Or.—Smith v. Mills, 112 Or. 496, 230 P 350; Moumal v. Parkhurst, 89 Or. 248, 173 P 669; Cranston v. West Coast L. Ins. Co., 63 Or. 427, 128 P 427.

[a] **Similar definitions.**—(1) The term "payment," in legal import, means the satisfaction of a debt by money, not by exchange, novation, compromise, or accord and satisfaction. Roach v. McDonald, 187 Ala. 64, 65 S 823; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721; City Sav. Bank v. Stevens, 59 N. Y. Super. 549, 15 NYS 139; Manice v. Hudson River R. Co., 10 N. Y. Super. 426; McPike Drug Co. v. Williams, 104 Okl. 244, 230 P 904; Continental Gin Co. v. Arnold, 52 Okl. 569, 153 P 160. (2) "It may be defined as the discharge of indebtedness by delivery of money or its equivalent to the creditor." Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 245, 187 P 538.

Money as medium of payment in general see infra § 15.

2. Blair v. Carpenter, 75 Mich. 167, 42 NW 790.

[a] **Other definitions.**—(1) "A mode of extinguishing a debt." Alabama Western R. Co. v. Foshee, 183 Ala. 182, 189, 62 S 500; Bradford v. Richard, 46 La. Ann. 1530, 1534, 16 S 487. (2) "A mode of extinguishing obligations." Jenkins v. Mapes, 53 Oh. St. 110, 115, 41 NE 137; Cranston v. West Coast L. Ins. Co., 63 Or. 427, 437, 128 P 427; Bardsley v. Sternberg, 18 Wash. 612, 617, 52 P 251, 524. (3) "The act of paying." State v. Haun, 7 Kan. A. 509, 54 P 130, 132; Moumal v. Parkhurst, 89 Or. 248, 252, 173 P 669. (4) "The discharge of a debt." Binford v. Adams, 104 Ind. 41, 3 NE 753. (5) "The discharge of an obligation by the delivery and acceptance of money or of something equivalent to money which is regarded as such at the time by the party to whom the payment is due." Cranston v. West Coast L. Ins. Co., supra. To same effect Brady v. Wasson, 6 Heisk. (Tenn.) 131. (6) "A transfer of money from one person who is the payer to another who is the payee in satisfaction of a debt." Moumal v. Parkhurst, supra. (7) "The delivery of money by one person from whom it is due to another person to whom it is due." Hathaway v. Davis, 33 Cal. 161, 166. (8) "The delivery of money as payment in the course of business." State v. Haun, 7 Kan. A. 509, 54 P 130, 132. (9) "A transfer of property from one person to another." Moulton v. Robinson, 27 N. H. 550.

[b] **The existence of a debt is implied** in the term "payment," and its satisfaction when the payment is complete. In re Tennessee Bond Cases, 114 U. S. 663, 5 SCt 974, 1098, 29 L. ed. 281; Tuttle v. Armstead, 53 Conn. 175, 22 A 677.

[c] **"Payment" is not a technical term,** and has been imported into law proceedings from the exchange, and not from law treatises. Ablett Co. v. Sencer, 130 Misc. 416, 224 NYS 251; Root v. Kelley, 39 Misc. 530, 80 NYS 482; Maillard v. Argyle, 6 M. & G. 40, 46 ECL 40, 134 Reprint 801 (per Maule, J.). To same effect Jennings v. Willis, 22 Ont. 439.

[d] **Double meaning.**—(1) "Payment" is used in two senses: meaning both performance of a contract to pay money according to its stipulations, and extinguishment of a cause of action arising from breach of the contract. "Payment" as generally used in the books has the latter meaning, and "the defence of payment" is usually of the same import, denoting a new affirmative and independent fact set up by defendant in confession and avoidance and not a denial of the breach. Kendall v. Brownson, 47 N. H. 186. (2) Payment as a defense see infra §§ 132–153.

[e] **Exclusion of idea of refunding.**—The term "payment," when used voluntarily and with full knowledge of the facts, excludes the idea of an implied promise to refund. Morton v. Chandler, 6 Me. 142, 144.

"Settlement" as payment see Compromise and Settlement § 1 note 3; Settlement [35 Cyc 1443 text and notes 14–17, 19–22].

3. Mo.—Clay v. Lakenan, 101 Mo. A. 563, 74 SW 391.

N. Y.—Stokes v. Stokes, 34 App. Div. 423, 54 NYS 319; Root v. Kelley, 39 Misc. 530, 80 NYS 482.

N. C.—Moore v. Highway Engineering, etc., Co., 196 N. C. 142, 144 SE 692.

Or.—Moumal v. Parkhurst, 89 Or. 248, 173 P 669; Cranston v. West Coast L. Ins. Co., 63 Or. 427, 128 P 427.

W. Va.—Bantz v. Basnett, 12 W. Va. 772 [quot Bouvier L. D.]; Virginia Exch. Bank v. Cookman, 1 W. Va. 69, 77 [quot Bouvier L. D.].

4. La.—Gernon v. McCan, 23 La. Ann. 84.

Mo.—Clay v. Lakenan, 101 Mo. A. 563, 74 SW 391.

N. Y.—Stokes v. Stokes, 34 App. Div. 423, 54 NYS 319; Root v. Kelley, 39 Misc. 530, 80 NYS 482.

N. C.—Moore v. Highway Engineering, etc., Co., 196 N. C. 142, 144 SE 692.

Okl.—Eastern Oil Co. v. Smith, 80 Okl. 207, 211, 195 P 773 ("Payment may be defined as being the performance of the consideration clause of the contract, and the discharge of the contract by the performance of its terms").

Or.—Moumal v. Parkhurst, 89 Or. 248, 173 P 669.

5. U. S.—Zeig v. Massachusetts Bonding, etc., Co., 23 F. (2d) 665.

Del.—Ridings v. McMenamin, 17 Del. 15, 39 A 463.

N. Y.—Stokes v. Stokes, 34 App. Div. 423, 54 NYS 319.

Or.—Moumal v. Parkhurst, 89 Or. 248, 173 P 669.

R. I.—Cohen v. P. E. Harding Constr. Co., 41 R. I. 242, 248, 103 A 702 [cit Cyc].

Vt.—Robinson v. St. Johnsbury, etc., R. Co., 80 Vt. 129, 139, 66 A 814, 9 LRANS 1249, 12 AnnCas 1060 ("payment is full satisfaction").

6. Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538.

Ida.—Miller v. Del Rio Min., etc., Co., 25 Ida. 83, 136 P 448.

Ind.—Morris v. Reyman, 55 Ind. A. 112, 103 NE 423.

Mont.—Square Butte State Bank v. Ballard, 64 Mont. 554, 210 P 889.

N. H.—Kendall v. Brownson, 47 N. H. 186.

N. Y.—La Montagne v. New York Bank, 94 App. Div. 219, 88 NYS 21. See also Stokes v. Stokes, 34 App. Div. 423, 54 NYS 319 (where it was said that the word "payment" itself imports a discharge or satisfaction of a debt or obligation).

N. C.—Moore v. Highway Engineering, etc., Co., 196 N. C. 142, 144 SE 692.

7. Ala.—J. F. Morgan Pav. Co. v. Carroll, 211 Ala. 121, 99 S 640.

Colo.—Manitou v. Colorado Springs First Nat. Bank, 37 Colo. 344, 86 P 75.

La.—Bloodworth v. Jacobs, 2 La. Ann. 24.

Mo.—Thompson v. Kellogg, 23 Mo. 281.

N. Y.—Root v. Kelley, 39 Misc. 530, 80 NYS 482.

Oh.—Jenkins v. Mapes, 53 Oh. St. 110, 41 NE 137.

Wash.—Commercial Bank v. Tiklas, 21 Wash. 36, 56 P 927.

8. Thompson v. Kellogg, 23 Mo. 281; White v. Black, 115 Mo. A. 28, 90 SW 1153; Clay v. Lakenan, 101 Mo. A. 563, 74 SW 391; Root v. Kelley, 39 Misc. 530, 80 NYS 482; Jenkins v. Mapes, 53 Oh. St. 110, 41 NE 137.

9. See statutory provisions.

[a] **In California** "payment" is defined by Civ. Code § 1478 to be "performance of an obligation for the delivery of money only." Borland v. Nevada Bank, 99 Cal. 89, 94, 33 P 737, 37 AmSR 32.

[b] **In Louisiana,** under Civ. Code art 2131, by "payment" is meant, not only the delivery of a sum of money, when such is the obligation of the contract, but the performance of that which the parties respectively undertook, either expressly or impliedly or by law, to give or to do. Morgan's Louisiana, etc., R. etc., Co. v. Stewart, 119 La. 392, 44 S 138.

[c] **In Montana** it is provided by Rev. Codes (1921) § 7429 that "performance of an obligation for the delivery of money only is called payment." Brennan v. Northern Electric Co., 72 Mont. 35, 40, 231 P 388.

[d] **In South Dakota,** by Comp. L. § 3456, a "payment" is defined as "the performance of an obligation for the delivery of money." Green v. Hughitt School Tp., 5 S. D. 452, 460, 59 NW 224.

10. U. S.—Bronson v. Rodes, 7 Wall. 229, 19 L. ed. 141; Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc].

Ala.—Smith v. Pitts, 167 Ala. 461, 52 S 402.

Ark.—Parker v. Carter, 91 Ark. 162, 120 SW 836, 134 AmSR 60.

Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538.

Iowa.—Holtz v. Peterson, 98 Iowa 741, 62 NW 19.

Mass.—Dehon v. Stetson, 9 Metc. 341.

Mich.—Blair v. Carpenter, 75 Mich. 167, 42 NW 790.

Mo.—Thompson v. Kellogg, 23 Mo. 281; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 306, 126 SW 996 [cit Cyc].

N. Y.—Kingston Bank v. Gay, 19 Barb. 459; Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Moore v. Highway Engineering, etc., Co., 196 N. C. 142, 144 SE 692; Kilpatrick v. Kilpatrick, 187 N.

debtor[11] or some one for him,[12] to his creditor,[13] or some other person authorized to receive it,[14] of money or something accepted by the creditor as the equivalent thereof,[15] with the intention or purpose on the part of the payor or transferor to extinguish a debt or obligation in whole or in part,[16] and its acceptance by the creditor for the same purpose.[17]

Intention. Whether or not a transaction consti-

C. 520, 122 SE 377, 378 [cit Cyc]; Millhiser v. Marr, 128 N. C. 318, 38 SE 887.

[a] **Placing creditor in physical control is not required** where there is an appropriation of money to satisfy the debt and an acceptance thereof. Millhiser v. Marr, 128 N. C. 318, 38 SE 887.

[b] **A mere proposal to pay** by turning over certain property does not of itself constitute a payment. Dehon v. Stetson, 9 Metc. (Mass.) 341.

Debtor paying in medium other than money must effectuate transfer see infra § 39.

11. U. S.—Bronson v. Rodes, 7 Wall. 229, 19 L. ed. 141; Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc].

Ala.—Smith v. Pitts, 167 Ala. 461, 52 S 402.

Ark.—Parker v. Carter, 91 Ark. 162, 120 SW 836, 134 AmSR 60.

Mo.—Thompson v. Kellogg, 23 Mo. 281; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 306, 126 SW 996 [cit Cyc].

N. Y.—Kingston Bank v. Gay, 19 Barb. 459; Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377, 378 [cit Cyc].

Who may pay in general see infra § 3.

12. U. S.—Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc].

Ala.—Smith v. Pitts, 167 Ala. 461, 52 S 402.

Mo.—Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 306, 126 SW 996 [cit Cyc].

N. Y.—Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377, 378 [cit Cyc].

Payment by third person see infra § 3.

13. U. S.—Bronson v. Rodes, 7 Wall. 229, 19 L. ed. 141; Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc].

Ala.—Smith v. Pitts, 167 Ala. 461, 52 S 402.

Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538.

Mo.—Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996.

N. Y.—Kingston Bank v. Gay, 19 Barb. 459; Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377, 378 [cit Cyc].

W. Va.—Virginia Exch. Bank v. Cookman, 1 W. Va. 69.

14. U. S.—Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc].

Ala.—Smith v. Pitts, 167 Ala. 461, 52 S 402.

Mo.—Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996.

N. Y.—Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377, 378 [cit Cyc].

W. Va.—Virginia Exch. Bank v. Cookman, 1 W. Va. 69.

To whom payment may be made see infra §§ 4–6.

15. U. S.—Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc].

Ala.—Smith v. Pitts, 167 Ala. 461, 52 S 402.

Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538.

Ind.—Weir v. Hudnut, 115 Ind. 525, 18 NE 24.

Mich.—Blair v. Carpenter, 75 Mich. 167, 42 NW 790.

Mo.—Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996; White v. Black, 115 Mo. A. 28, 90 SW 1153; Clay v. Lakenan, 101 Mo. A. 563, 74 SW 391.

N. M.—Hanna v. McCrory, 19 N. M. 183, 141 P 996.

N. Y.—Persons v. Gardner, 122 App. Div. 167, 106 NYS 616; Kingston Bank v. Gay, 19 Barb. 459; Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377, 378 [cit Cyc].

Oh.—Jenkins v. Mapes, 53 Oh. St. 110, 41 NE 137.

Okl.—Continental Gin Co. v. Arnold, 52 Okl. 569, 153 P 160.

Or.—Cranston v. West Coast L. Ins. Co., 63 Or. 427, 128 P 427; Steel v. Island Milling Co., 47 Or. 293, 83 P 783.

Tenn.—Brady v. Wasson, 6 Heisk. 131.

Wash.—Commercial Bank v. Toklas, 21 Wash. 36, 56 P. 927.

[a] **"'Payment' implies the delivery of value** and that it is the value called for by the engagement." Continental Gin Co. v. Arnold, 52 Okl. 569, 574, 153 P 160.

Medium of payment generally see infra §§ 15–66.

16. U. S.—Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868; Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc].

Ala.—Dixie Industrial Co. v. Wetumpka Bank, 207 Ala. 293, 92 S 786, 788 [cit Cyc]; Smith v. Pitts, 167 Ala. 461, 52 S 402.

Ark.—Pettus v. Rawls, 131 Ark. 125, 198 SW 874.

Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538; Manitou v. Colorado Springs First Nat. Bank, 37 Colo. 344, 86 P 75.

Ga.—Blakely First Nat. Bank v. Davis, 135 Ga. 687, 70 SE 246, 36 LRANS 134.

Ill.—Meyer v. Johnson, 122 Ill. A. 87.

Iowa.—In re Schanke, 201 Iowa 678, 207 NW 756; Fremont County v. Fremont County Bank, 145 Iowa 8, 123 NW 782, AnnCas1912A 1220.

Ky.—Galbraith v. Starks, 117 Ky. 915, 79 SW 1191.

La.—Gernon v. McCan, 23 La. Ann. 84; Bloodworth v. Jacobs, 2 La. Ann. 24.

Me.—Cushing v. Wyman, 44 Me. 121.

Mass.—Johnson, etc., Co. v. Longley Luncheon Co., 207 Mass. 52, 92 NE 1035.

Mich.—Blair v. Carpenter, 75 Mich. 167, 42 NW 790.

Mo.—Thompson v. Kellogg, 23 Mo. 281; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996.

N. H.—Breck v. Blanchard, 22 N. H. 303.

N. M.—Hanna v. McCrory, 19 N. M. 183, 141 P 996.

N. Y.—Persons v. Gardner, 122 App. Div. 167, 106 NYS 616; Kingston Bank v. Gay, 19 Barb. 459; Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Moore v. Highway Engineering, etc., Co., 196 N. C. 142, 144 SE 692; Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377, 378 [cit Cyc].

Or.—Moumal v. Parkhurst, 89 Or. 248, 173 P 669.

Pa.—Williams v. Moore, 9 Kulp 310.

Tenn.—McGill v. Ott, 10 Lea 147.

Vt.—Strong v. McConnell, 10 Vt. 231.

Va.—Hall Bldg. Corp. v. Edwards, 142 Va. 209, 128 SE 521.

Wash.—Fisher v. Seattle, 55 Wash. 396, 104 P 655; Bardsley v. Sternberg, 18 Wash. 612, 52 P 251, 524.

Ont.—Miron v. McCabe, 4 Ont. Pr. 171.

See also Hall v. Wilson, 6 Wis. 433 (apparently applying the rule).

[a] **"There must be an intent** upon the part of the obligor or debtor to discharge the obligation or extinguish the debt." Manitou v. Colorado Springs First Nat. Bank, 37 Colo. 344, 352, 86 P 75.

[b] **Payment as act of will.**—Payment is an act calling for the exercise of the will, of consent, without which it has not the characteristics of that mode of extinguishing obligations. Gernon v. McCan, 23 La. Ann. 84; Bloodworth v. Jacobs, 2 La. Ann. 24.

[c] **Intention as determining whether payment is made.**—The intention of the obligor is important in determining the question whether obligations have or have not been extinguished by payment. Fisher v. Seattle, 55 Wash. 396, 104 P 655; Bardsley v. Sternberg, 18 Wash. 612, 52 P 251, 524.

[d] **Where a creditor wrongfully obtains money from his debtor,** he cannot treat it as a payment and apply it to his claim without the consent of the debtor. Meyer v. Johnson, 122 Ill. A. 87. To same effect Johnson, etc., Co. v. Longley Luncheon Co., 207 Mass. 52, 92 NE 1035.

[e] **Credit refused by debtor.**—Where a creditor voluntarily allows his debtor a credit on the debt, which the debtor refuses to accept, the creditor is not bound thereby and the debt is not reduced. Hall v. Wilson, 6 Wis. 433.

[f] **Payment of note given as part of same transaction** as a contract constitutes a payment on the contract. Newark First Nat. Bank v. Hauss, 214 App. Div. 689, 213 NYS 198.

17. U. S.—Central Trust Co. v. Cassidy, 300 Fed. 386, 389 [cit Cyc]; Hendricks v. Schmidt, 68 Fed. 425, 15 CCA 504.

Ala.—J. F. Morgan Pav. Co. v. Carroll, 211 Ala. 121, 99 S 640; Smith v. Pitts, 167 Ala. 461, 52 S 402.

Ark.—Pettus v. Rawls, 131 Ark. 125, 198 SW 874; Parker v. Carter, 91 Ark. 162, 168, 120 SW 836, 134 AmSR 60 [cit Cyc].

Cal.—Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32.

Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538.

Ga.—Blakely First Nat. Bank v. Davis, 135 Ga. 687, 70 SE 246, 36 LRANS 134.

Ida.—Buhl Highway Dist. v. Allred, 41 Ida. 54, 238 P 298.

Iowa.—In re Schanke, 201 Iowa 678, 207 NW 756, 759 [cit Cyc]; Fremont County v. Fremont County Bank, 145 Iowa 8, 123 NW 782, AnnCas1912A 1220.

Me.—Cushing v. Wyman, 44 Me. 121.

Mass.—Sullivan v. Sheehan, 173 Mass. 361, 53 NE 902.

Mich.—Blair v. Carpenter, 75 Mich. 167, 42 NW 790.

Mo.—Thompson v. Kellogg, 23 Mo. 281; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 306, 126 SW 996 [cit Cyc].

N. H.—Jameson v. Carpenter, 68

tutes payment depends largely upon the intention of the parties;[18] and acts which might otherwise constitute payment will not do so when the parties do not so intend.[19] Where a debtor delivers money or property for the purpose of paying one debt, and the creditor receiving it understands that it is in payment of another, neither debt is discharged;[20] and where it is delivered and accepted as payment of a debt which does not exist, it does not discharge another debt between the same parties.[21]

Delivery to a creditor of his own money or property cannot be regarded as a payment,[22] although accepted as such by him, in ignorance of the facts.[23]

Payment is not a contract, but the discharge of an obligation or debt.[24]

Phrases in which the term is used have received judicial interpretation, such as "part payment,"[25] "immediate payment,"[26] "payment down,"[27] "pay-

N. H. 62, 36 A 554; Breck v. Blanchard, 22 N. H. 303.

N. J.—Oliver v. Phelps, 20 N. J. L. 180.

N. M.—Hanna v. McCrory, 19 N. M. 183, 141 P 996.

N. Y.—Des Arts v. Leggett, 16 N. Y. 582; Persons v. Gardner, 122 App. Div. 167, 106 NYS 616; Kingston Bank v. Gay, 19 Barb. 459; Sokoloff v. National City Bank, 130 Misc. 66, 224 NYS 102 [aff 223 App. Div. 754 mem, 227 NYS 907 mem].

N. C.—Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377, 378 [cit Cyc].

Oh.—Jenkins v. Mapes, 53 Oh. St. 110, 41 NE 137.

Or.—Moumal v. Parkhurst, 89 Or. 248, 173 P 669.

Pa.—Williams v. Moore, 9 Kulp 310.

Vt.—Strong v. McConnell, 10 Vt. 231.

Va.—Hall Bldg. Corp. v. Edwards, 142 Va. 209, 128 SE 521; Moore v. Tate, 22 Gratt. (63 Va.) 351.

Wash.—Commercial Bank v. Toklas, 21 Wash. 36, 56 P 927; Bardsley v. Sternberg, 18 Wash. 612, 52 P 251, 524.

Eng.—Pritchard v. Hitchcock, 6 M. & G. 151, 46 ECL 151, 134 Reprint 844.

Ont.—Miron v. McCabe, 4 Ont. Pr. 171; In re Brockville Election, 32 U. C. Q. B. 132.

And see cases infra this note.

"In a payment, we ordinarily look only to the act of the party making it; but yet its legal import is an act in which the debtor tenders and the creditor accepts that which is offered." Thompson v. Kellogg, 23 Mo. 281, 285.

[a] **Payment, like a sale, can result only from the mutual agreement of the parties** that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment. Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32. To same effect Blakely First Nat. Bank v. Davis, 135 Ga. 687, 70 SE 246, 36 LRANS 134.

[b] **The mere intimation by the creditor of a willingness to receive** it, without actual reception of it, is not a payment. Thompson v. Kellogg, 23 Mo. 281.

[c] **Mere possession of debtor's funds by creditor not payment.**—(1) Although money belonging to the debtor is in the hands of the creditor or his representative for the purpose of being applied to the debt, there is no payment unless the money is appropriated by the creditor or his representative as a payment. Hatch v. Hutchinson, 64 Ark. 119, 40 SW 578; Bronson v. Rugg, 39 Vt. 241. Compare O'Conner v. Bernard, 6 Mart. N. S. (La.) 572; Grandy v. Abbott, 92 N. C. 33 (both holding that, if the debtor places claims due him in the hands of his creditor, agreeing that collections shall go to the discharge of the debt, money collected is deemed applied eo instanti). (2) Thus the failure of a creditor's agent, who had been employed by the debtor to make collections to discharge the debt, before a distinct act of appropriation, casts the loss upon the debtor. Phillips v. Mayer, 7 Cal. 81. (3) And the deposit in a creditor bank by the debtor of proceeds of sale to be applied to notes held by the creditor, where the creditor is not directed to make application of the deposit on the notes, is not a payment. Randall v. Pettes, 12 Fla. 517. (4) Where the agent of the creditor, with power to collect the interest and principal of a mortgage debt against the debtor, procured a loan at the instance of the debtor to be used in paying the mortgage, but himself embezzled the money, its receipt by the agent was not a payment, especially where the debtor did not know when the agent received the money and never expressly directed him to apply it to the mortgage. Boardman v. Blizzard, 36 Fed. 26. (5) A direction by the debtor to one who is the agent both of the debtor and of the creditor, to apply money in the agent's hands to the payment of the debt, does not of itself constitute an application of the money. Moore v. Norman, 52 Minn. 83, 53 NW 809, 38 AmSR 526, 18 LRA 359.

18. Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 SCt 53, 63 L. ed. 170 [mod 235 Fed. 388, 148 CCA 650]; Central Trust Co. v. Cassidy, 300 Fed. 386; Davis v. Snyder, 248 Mass. 387, 143 NE 319.

Intention to pay and receive as payment essential see supra text and notes 16, 17.

19. International Trust Co. v. Paige Motor Car Co., 224 Mass. 95, 112 NE 484; McGill v. Ott, 10 Lea (Tenn.) 147; Bardsley v. Sternberg, 18 Wash. 612, 52 P 251, 524; and cases infra this note.

[a] **Money delivered for another purpose.**—(1) A creditor cannot lawfully pay himself with the debtor's money, without the debtor's consent, express or implied, and when the debtor delivers him money for a purpose which negatives the idea of payment, and he applies it on his debt, there is no payment: Detroit, etc., R. Co. v. Smith, 50 Mich. 112, 15 NW 39. (2) Where an attorney obtained from his client the possession of money paid to him in compromise of a claim, for the purpose of counting the money, and thereupon said he would keep it and apply it on account, but on resistance and remonstrance on the part of the client handed it back to him, no payment to the attorney was effectuated. Pennsylvania Co. v. Thatcher, 78 Oh. St. 175, 85 NE 55. (3) Where the guarantor of a note executed by a corporation deposited the amount with the bank which owned the note, under an express agreement that the deposit was to be security, and not payment, the bank undertaking to prosecute suits against the stockholders of the corporation, no payment was effectuated. Guerney v. Moore, 131 Mo. 650, 32 SW 1132.

[b] **Delivery of counterfeit money** to be passed off generally for the benefit of the parties is not a payment so as to violate a statute prohibiting the passing of such money in payment. U. S. v. Venable, 28 F. Cas. No. 16,615, 1 Cranch C. C. 416.

[c] **Cashing check held as security.**—Where one liable as indorser on unpaid checks delivered to the bank his check as security to guarantee the bank against loss in enforcing payment of such checks, the fact that the bank cashed the check and held its proceeds instead of retaining the paper itself does not warrant the conclusion that a payment was effectuated. International Trust Co. v. Paige Motor Car Co., 224 Mass. 95, 112 NE 484.

20. In re Brockville Election, 32 U. C. Q. B. (Ont.) 132.

[a] **Thus,** where a carter carried a voter to the polling place, saying that he would do so without charge, and later the person at whose request the voter was so carried gave the carter two dollars, intending it as compensation for such carriage, but the carter thought it was in payment for work which he had done for the payor in his ordinary business of carter, there was no payment for any purpose, the money being given for one purpose and received for another. In re Brockville Election, 32 U. C. Q. B. (Ont.) 132.

21. Bestwick v. Ormsby Coal Co., 129 Pa. 592, 18 A 538.

[a] **Debt due in representative instead of individual capacity.**—Where royalties for coal mined were paid and accepted in the belief that the land from which it was mined belonged to the payee individually, when in fact it belonged to him as trustee for third persons, the debt due the trust estate was not discharged. Bestwick v. Ormsby Coal Co., 129 Pa. 592, 18 A 538.

22. State Bank v. Welles, 3 Pick. (Mass.) 394; Moulton v. Robinson, 27 N. H. 550.

[a] **Money which the debtor has stolen from the creditor,** although accepted by the creditor in discharge of the debt, without knowledge of the theft, does not effectuate payment. State Bank v. Welles, 3 Pick. (Mass.) 394.

23. State Bank v. Welles, supra.

24. Moran v. Abbey, 63 Cal. 56; Porter v. Title Guaranty, etc., Co., 17 Ida. 364, 106 P 299, 27 LRANS 111; Binford v. Adams, 104 Ind. 41, 3 NE 753.

25. Wenger v. Grummel, 136 Md. 80, 110 A 206 (holding that, as used in the statute of frauds, the terms "earnest" and "part payment" have the same meaning); Young v. Perkins, 29 Minn. 173, 174, 12 NW 515 (holding that the term is equivalent to "payment of a part"; "payment of a part of a larger subsisting debt, as a part thereof"); Waters v. Tompkins, 2 C. M. & R. 723, 150 Reprint 306; Stark v. Somerville, 41 Ont. L. 591, 41 DomLR 496 (both holding that part payment is the payment of a smaller, on account of a greater, sum, due from the person making the payment to him to whom it is made).

Part payment:
Generally see infra § 10.
Affecting amount in controversy see Appeal and Error § 239; Courts §§ 72, 73; Justices of the Peace § 93.
Application see infra §§ 84–127.
Effect see infra §§ 67, 68.
Of particular classes of debts and obligations see cross references ante p 584.
Taking contract out of statute of frauds see Frauds, Statute of §§ 296–303.
Tolling statute of limitations see Limitations of Actions §§ 625–699.

26. Bruner v. Wheaton, 46 Mo. 363 (holding that an "immediate payment," as one of the terms of an offer to sell real estate, means a cash payment to be made when the deed should be delivered).

27. Bruner v. Wheaton, supra (holding that a "payment down," as one of the terms of an offer to sell real estate, means a cash payment to be made when the deed should be delivered).

ment in cash,"[28] "payment in notes,"[29] "payment stopped,"[30] "suspending payment,"[31] "payment, allowance, or benefit,"[32] "payment in due course,"[33] "payment to,"[34] "payment into the treasury of the State,"[35] "payment into court,"[36] "payment to or for the benefit of an enemy,"[37] "payments of compensation,"[38] and "payments made in consideration of the lease."[39]

[§ 2] **B. Other Transactions Distinguished.**[40] Payment is ordinarily to be distinguished from other transactions whereby a liability or obligation is terminated by the intention of the parties.[41]

A cross demand is not payment,[42] and can be made such only by the agreement of the parties.[43]

A set-off, although clearly established, is not payment,[44] and is distinguishable therefrom in that it is an independent demand, calling for its own action, whereas a payment is by consent or agreement of the parties, express or implied, appropriated to the discharge of the debt or obligation;[45] and accordingly a set-off can only become payment by agreement of the parties so to treat it and liquidate it.[46]

"Collection" is not a word of similar import to "payment."[47]

"Satisfaction" is a broader term than "payment," for while payment works satisfaction of an obligation, satisfaction may be accomplished without payment.[48]

Prescription and payment are entirely distinct methods of discharging obligations,[49] since payment completely discharges the natural, as well as the civil, obligation, but prescription does not.[50]

Purchase of debt. The essential difference between purchasing a debt and paying it consists not in what is done nor in the manner of doing it, but in the intention with which the consideration is paid and accepted, whether to extinguish the debt or to keep it alive.[51]

A promise to pay is not payment, as the agree-

28. Foley v. Mason, 6 Md. 37 (holding that a cash payment is not necessarily payment in money, but in ordinary parlance is understood in contradistinction to a credit payment, and there is no more reason for supposing that the one is to be made in money than the other); Breck v. Barney, 183 Mass. 133, 136, 66 NE 643 (holding that the payment to a trust by transferring or cancelling credits due from the trust to the payor is a payment in cash; and that a check afterward paid by the drawee is a payment in cash. "What is in law a payment is a payment in cash"); Hart v. Wyndmere, 21 N. D. 383, 131 NW 271, AnnCas1913D 169 (holding that delivery by a municipality of its warrants is a payment in cash, within a contract calling for cash payment, the municipality having power to make payments only by warrants); Turner v. Cowan, 9 B. C. 301 (holding that the transfer by a partner of his interest in the partnership business to a corporation organized to take it over, in return for shares of stock in the corporation, is a payment in cash for the stock). And see Corporations §§ 594–601.

29. Adler v. Burton Lumber Co., 46 La. Ann. 379, 15 S 156 (holding that a receipt of payment in notes implies, not a payment absolutely, but the giving of notes to represent the payment).

30. McKinley v. American Exch. Bank, 30 N. Y. Super. 663 (holding that writing the words "payment stopped" upon a note payable at a bank simply announces the maker's intention that his funds in that bank shall not be applied to the payment of the note, and does not necessarily discredit the note nor import that he will not provide for it at some other place). And see Banks and Banking § 429.

31. McCornick v. Gem State Oil, etc., Co., 38 Ida. 470, 222 P 286, 34 ALR 867 (holding that the term means failure to pay from an inability to do so).

32. Wood v. Wentworth Silkstone Colliery Co., 133 L. T. Rep. N. S. 656 (holding that a provision in a workmen's compensation act, that in fixing the amount of the award regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, refers to something which is capable of being estimated in terms of money, and not to a matter of moral benefit only).

33. See Bills and Notes § 789.

34. Brookshire v. Wambaugh, (Tex. Civ. A.) 9 SW (2d) 269 (holding that the expenditure of trust funds for one's benefit is not a payment to him).

35. Daily v. State, 171 Ind. 646, 87 NE 4 (holding that payment into the treasury of the state is not accomplished by payment to the creditor of the state).

36. American Surety Co. v. Spain, (Okl.) 270 P 844 (holding that the phrase means payment to the clerk of the court, the only official authorized by law to receive a payment). And see Tender [38 Cyc 175].

37. Rex v. Kupfer, [1915] 2 K. B. 321 (holding that a payment to a neutral to whom an enemy is indebted is within the prohibition of payment to or for the benefit of the enemy); Continental Tyre, etc., Co., Ltd. v. Daimler Co., Ltd., [1915] 1 K. B. 893 (holding that payment to an English corporation of which all but one of the shares were held by Germans is not payment to or for the benefit of an enemy, where war existed between England and Germany).

38. Jackson v. Industrial Commn., 302 Ill. 281, 134 NE 749 (holding that payments to a hospital for surgical, medical, and hospital services rendered to an injured employee are payments of compensation within a provision of a workmen's compensation act barring the filing of a claim more than a specified time after the last payment); Baade v. Omaha Flour Mills Co., (Nebr.) 225 NW 117 (to same effect); Paolis v. Tower Hill Connellsville Coke Co., 265 Pa. 291, 108 A 638; Petraska v. National Acme Co., 95 Vt. 76, 113 A 536 (both reaching the contrary conclusion).

39. Inland Revenue Comrs. v. Camden, [1915] A. C. 241 (holding that sums expended by a lessee under the terms of his lease in improving the demised property are "payments made in consideration of the lease," within a statute providing that the value of land is to be ascertained on the basis of the rent received and payments made in consideration of the lease); Inland Revenue Comrs. v. St. John's College, [1915] 2 K. B. 621 (holding that the surrender of an unexpired term and the acceptance of a new lease for a longer term is not a payment made in consideration of the lease).

40. "Payment" distinguished from:
Accord and satisfaction see Accord and Satisfaction § 1 note 1.
Discharge see § 1 note 6.
Novation see Novation § 4.
Tender see Tender [38 Cyc note 4].

41. See cases infra notes 42–52.
Intention as element of payment see supra § 1.

42. McCurdy v. Middleton, 82 Ala. 131, 2 S 721; Matthewson v. Thompson, 19 Sask. L. 420, [1925] 2 DomLR 1211, [1925] 2 WestWkly 161.
"Cross demand" defined see 17 C. J. p 385.

43. McCurdy v. Middleton, 82 Ala. 131, 2 S 721.

44. McCurdy v. Middleton, supra; Wharton v. King, 69 Ala. 365; Pratt v. Corns, 214 Mich. 390, 183 NW 71; Beekman Lumber Co. v. Glendale Lumber Co., 158 Mo. A. 309, 138 SW 90.
"Set-off" defined see Set-Off and Counterclaim [34 Cyc 625].

45. St. Louis, etc., Packet Co. v. McPeters, 124 Ala. 451, 27 S 518; McDowell v. Tate, 12 N. C. 249; Kennedy v. Davisson, 46 W. Va. 433, 33 SE 291; Osterhout v. Fox, 14 Ont. L. 599, 604, 10 OntWR 157, 241; Miron v. McCabe, 4 Ont. Pr. 171, 174.
"A payment is a sum expressly applicable in reduction of the particular demand on which it is made; that demand is therefore reduced by the extent of the payment . . . and for such payment no action is maintainable; while a set-off is a separate and independent demand which one party has against the other, and in respect of which he is as much a creditor of the other, as that other is of him, and for which he can as well maintain a separate action as his creditor can for his demand." Miron v. McCabe, supra [quot Osterhout v. Fox, supra].

46. McCurdy v. Middleton, 82 Ala. 131, 2 S 721; Hill v. Austin, 19 Ark. 230.
Payment by application of mutual indebtedness see infra § 61.

47. Square Butte State Bank v. Ballard, 64 Mont. 554, 210 P 889.
"Collection" defined see 11 C. J. p 968.

48. Oneida County v. Tibbits, 125 Wis. 9, 102 NW 897.
Satisfaction generally see Accord and Satisfaction 1 C. J. p 520; Satisfaction [35 Cyc 793].

49. Fellman v. Interstate Land Co., Ltd., 163 La. 529, 112 S 405.
Prescription generally see Limitations of Actions § 3; Prescription [31 Cyc 1165].

50. Fellman v. Interstate Land Co., Ltd., 163 La. 529, 112 S 405.
Effect of payment generally see infra §§ 67–70.

51. Porter v. Title Guaranty, etc., Co., 17 Ida. 364, 106 P 299, 27 LRANS 111; Binford v. Adams, 104 Ind. 41, 3 NE 753; Lithcap v. Wilt, 4 Phila. (Pa.) 64. See also United Waterworks Co. v. Farmers' L. & T. Co., 82 Fed. 144, 27 CCA 92; Farmers' L. & T. Co. v. Iowa Water Co., 78 Fed. 881; Farmers' L. & T. Co. v. Oregon, etc., R. Co., 67 Fed. 404; United Waterworks Co. v. Farmers' L. & T. Co., 11 Colo. A. 225, 53 P 511 (all holding that interest coupons on bonds of a corporation were paid, and not purchased, by one who took them up). Compare Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 5 SCt

ment is executory, whereas payment is executed, a | thing done.[52]

II. MANNER, TIME, AND PLACE

[By Eustace W. Tomlinson]

[§ 3] **A. Who May Make Payment.**[53] Payment may be made by the primary debtor,[54] and may be made by persons secondarily liable under circumstances considered elsewhere in this work.[55] Any one of two or more joint debtors may pay a debt for which they are jointly liable.[56]

Stranger or volunteer. The mere delivery of money or property by a stranger to an obligation does not discharge the debt or inure to the benefit of the debtor,[57] except when it is so provided by statute;[58] but if such delivery is received or accepted by the creditor as a payment on account of the debt the debtor is discharged pro tanto,[59] at least upon ratification of the transaction by him.[60] If, however, he refuses to ratify it no payment is effectuated and the debt stands unpaid as to him.[61]

[§ 4] **B. To Whom Payment May Be Made**[62]**—1. In General.** Broadly speaking, payment of a debt may be made only to the creditor,[63] or to his assignee,[64] or to some one else to whom he di-

213, 28 L. ed. 733 (holding that payment of the amount of a debt by one who had contracted with the debtor to pay it, together with an assignment of the debt by the creditor to the payor, was in substance and effect a payment).

52. Rhodes v. Chesson, 44 N. C. 336.

53. **Of particular classes of obligations and liabilities** see cross references ante p 584.

54. See cases passim this title.

Maker or acceptor of bill or note see Bills and Notes §§ 815–818.

55. See Bills and Notes §§ 423–425, 819–825; Guaranty § 167; Principal and Surety [32 Cyc 168].

56. Beaumont v. Greathead, 2 C. B. 494, 52 ECL 494, 135 Reprint 1039.

Effect of payment by one or more codebtors see infra § 69.

Payment of partnership debt by individual partner see Partnership § 333.

57. U. S.—Bradley v. Lehigh Valley R. Co., 153 Fed. 350, 82 CCA 426 [aff 145 Fed. 569].

Ark.—Benson v. Arkansas Abstract Co., 185 SW 1089.

Ill.—Pittsburgh, etc., R. Co. v. Thompson, 56 Ill. 138.

N. Y.—Thomas Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528, 100 NE 457, 461.

Oh.—Berg v. Sofge, 23 OhNPNS 206.

Compare Lithcap v. Wilt, 4 Phila. (Pa.) 64 (holding that a payment by a stranger is prima facie a purchase of the debt rather than a discharge of it, in the absence of evidence that the payor's intention was to put an end to the debt, and not to acquire dominion over it as an assignee and purchaser).

Payment of bill or note by third person see Bills and Notes § 826.

58. See statutory provisions.

[a] **In Louisiana** (1) under Civ. Code (old) art 2130, a debt may be discharged by a third person in no way concerned in it, provided he act in the name, and for the discharge, of the debt, or if he act in his own name and be not subrogated to the right of the creditor. State v. Pilsbury, 29 La. Ann. 787. To same effect Smith v. Vinson, 7 La. A. 309. (2) "It is true that the payment of a debt which is to be acquitted in money, is permitted to be made by a third person, even one not interested. The right thus to pay is absolute; it may be exercised not only against the will of the creditor, but without the knowledge and even against the opposition of the debtor; because on the one hand the creditor has no interest and consequently no right to refuse a regular and satisfactory payment, and it is a matter of indifference whence the money comes, and because, on the other hand, it is permitted to every one, by a kind of 'fraternal mandate,' to ameliorate the condition of another, even without his knowledge and against his will. . . . This rule of the Roman law . . . has been continued in . . . article 2130 of the Code of Louisiana." Germon v. McCan, 23 La. Ann. 84, 87.

[b] **In Quebec** anyone may pay the debt of another, under Civ. Code art 1141, providing that payment may be made by any person, although he is a stranger to the obligation, and the creditor may be put in default by the offer of a stranger to perform the obligation on the part of the debtor without the knowledge of the latter; but it must be for the advantage of the debtor and not merely to change the creditor that the performance of the obligation is so offered. Coderre v. Cabana, 16 Que. Pr. 272, 21 DomLR 436.

59. Ala.—Harrison v. Hicks, 1 Port. 423, 27 AmD 638.

Cal.—Dodds v. Spring, 174 Cal. 412, 163 P 351; Martin v. Quinn, 37 Cal. 55.

Del.—Horsey v. Stockley, 4 Del. Ch. 536.

Ida.—Wooton v. Dahlquist, 42 Ida. 121, 244 P 407, 408 [quot Cyc]; Donaldson v. Thousand Springs Power Co., 29 Ida. 735, 162 P 334, 339 [cit Cyc].

Iowa.—Braun v. Cox, 202 Iowa 1244, 211 NW 891.

La.—Owen v. Hanlon, 136 La. 455, 67 S 329.

Minn.—Clark v. Abbott, 53 Minn. 88, 55 NW 542, 39 AmSR 577.

Miss.—Crow v. Burgin, 38 S 625.

Mont.—Penwell v. Flickinger, 46 Mont. 526, 129 P 323 [cit Cyc].

Oh.—People's, etc., Bank v. Craig, 63 Oh. St. 374, 59 NE 102, 81 AmSR 639, 52 LRA 872; Leavitt v. Morrow, 6 Oh. St. 71, 67 AmD 334.

Okl.—Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032; Wallingford v. Alcorn, 75 Okl. 295, 183 P 726, 727.

S. C.—McRae v. Bowser, 115 S. C. 262, 105 SE 411. See also Hodge v. DeLaine, 137 S. C. 337, 135 SE 357, 359 [cit Cyc] (where it was said that a payment to the creditor could not justly be retained without being credited on the debt, although the payment is made by volunteers or strangers to the obligation).

Tenn.—Cain v. Bryant, 12 Heisk. 45.

Tex.—Holland v. De Walt, (Civ. A.) 225 SW 216, 220 [cit Cyc]. See also National Union F. Ins. Co. v. Martin, (Civ. A.) 267 SW 296 (applying the rule).

W. Va.—Crumlish v. Central Impr. Co., 38 W. Va. 390, 18 SE 456, 45 Am SR 872, 23 LRA 120 [expl Neely v. Jones, 16 W. Va. 625, 37 AmR 794].

Wis.—Smader v. Columbia Wisconsin Co., 188 Wis. 530, 205 NW 816; Gray v. Herman, 75 Wis. 453, 44 NW 248, 6 LRA 691.

See also Hickman v. Cornwell, 145 Ga. 368, 89 SE 330 (apparently applying the rule).

"The law undoubtedly is that it is not essential that payment should be made by the debtor himself, and even though it is made by one who is not a party to a contract and not even in privity with the debtor, if accepted in satisfaction of the obligation of the contract, it will operate as a discharge of such obligation." Wallingford v. Alcorn, 75 Okl. 295, 296, 183 P 726.

[a] **In New York,** however (1) a payment by a third person is effectual only when made by him as agent for, or on account of, the debtor, and with the prior authority or subsequent ratification of the latter. Danziger v. Hoyt, 120 N. Y. 190, 24 NE 294; Atlantic Dock Co. v. New York, 53 N. Y. 64; Wilmot Engineering Co. v. Blanchard, 208 App. Div. 218, 203 NYS 700. Compare Warner v. Powers, 199 App. Div. 475, 480, 192 NYS 141 (where it was said: "It is true that payment by a stranger would not be deemed payment so as to prevent a recovery. But payment by the principal for whose benefit this stock was bought is clearly payment of the liability of the agent . . . and satisfied the liability"). (2) It was formerly the unqualified rule that the satisfaction of a debt by a person not the debtor did not extinguish the debt. Wilmot Engineering Co. v. Blanchard, supra (so stating); Bleakley v. White, 4 Paige 654.

Payment by third person as:

Accord and satisfaction see Accord and Satisfaction §§ 27, 28.

Giving rights of subrogation see Subrogation [37 Cyc 370].

60. Crumlish v. Central Impr. Co., 38 W. Va. 390, 18 SE 456, 45 AmSR 872, 23 LRA 120; Smader v. Columbia Wisconsin Co., 188 Wis. 530, 205 NW 816.

[a] **Interposing defense of payment as ratification.**—Where a third person paid a debt and the payment was accepted as such by the creditor, interposing such payment as a defense to an action on the debt operated as a ratification thereof by the debtor, rendering him liable to the third person for the amount of the payment. Smader v. Columbia Wisconsin Co., 188 Wis. 530, 205 NW 816.

61. Crumlish v. Central Impr. Co., 38 W. Va. 390, 18 SE 456, 45 AmSR 872, 23 LRA 120.

62. **Particular classes of obligations or liabilities** see cross references ante p 584.

Payment to particular person or person in particular representative capacity see cross references ante p.

63. Smith v. Brooklyn Sav. Bank, 101 N. Y. 58, 4 NE 123, 54 AmR 653; Maryland Casualty Co. v. Okmulgee County, 128 Okl. 58, 260 P 1112; cases infra notes 64–77; and §§ 5, 6.

[a] **In the Philippine Islands** it is provided by Civ. Code art 1162 that payment must be made to the person in whose favor the obligation is constituted, or to another expressly authorized to receive the payment in his name. Keeler Electric Co. v. Rodriguez, 44 Philippine 19; Tin-Congco v. Trillana, 13 Philippine 194.

64. Dade v. Herbert, 6 F. Cas. No. 3,532, 1 Cranch C. C. 85; Vanarsdall v. State, 65 Ind. 176; Kelley v. Cowing, 4 Hill (N. Y.) 266.

[a] **Creditor's assignee for benefit of creditors.**—(1) Payment to the general assignee of the creditor, to whom his assets have been assigned for the benefit of his creditors, is a good defense, although the payor knows that the assignee was enjoined not to pay or receive money. Kelley v. Cowing, 4 Hill (N. Y.) 266. (2) Effect of assignment for benefit of creditors on debt due, and payment

rects,[65] or consents,[66] or has theretofore agreed,[67] that it be paid, or whom he expressly or by implication authorizes to receive it,[68] or who holds a lien or right paramount to that of the creditor;[69] and payment to any other person is ineffectual to extinguish the debt or discharge the debtor,[70] unless otherwise provided by statute.[71]

Joint creditors. Where two or more persons are joint creditors, payment may ordinarily be made to any of them,[72] even though some are minors,[73] unless it is otherwise agreed by all the parties.[74] To entitle the debtor to make payment to a third person, however, it has been held that both or all the joint creditors must agree or consent thereto.[75]

Obligation for benefit of third person. Payment to the person with whom or in whose name was made the contract under which the obligation arises, although it is for the benefit of another, is ordinarily sufficient;[76] but it would seem that a payment to the real beneficiary will also discharge the debt.[77]

by debtor see Assignments for Benefit of Creditors § 252.

Right of debtor to pay assignee generally see Assignments § 172.

65. Ga.—Hurst v. Whitly, 47 Ga. 366; Maloof v. George, 22 Ga. A. 82, 95 SE 310.

Mo.—Berrel v. Davis, 44 Mo. 407; Hilfiker v. Wurghler, 157 Mo. A. 397, 138 SW 935, 937 [cit Cyc].

N. Y.—Hubbard v. J. P. Lewis Co., 123 App. Div. 416, 112 NYS 1050.

S. D.—Bedford v. Kissick, 8 S. D. 586, 67 NW 609.

Tenn.—Gibson v. Parkey, 142 Tenn. 99, 217 SW 647, 649 [cit Cyc].

W. Va.—Shuman v. Shuman, 79 W. Va. 445, 91 SE 264 [cit Cyc].

Que.—Lepage v. Alexander, 12 Que. Super. 279.

66. Churchman v. Robinson, 99 Ga. 786, 27 SE 164; Maloof v. George, 22 Ga. A. 82, 95 SE 310; Baughan v. Brown, 122 Ind. 115, 23 NE 695; Hilfiker v. Wurghler, 157 Mo. A. 397, 138 SW 935, 937 [cit Cyc]; Krehm Bros. Fur Co. v. Bastedo, 24 OntWR 820.

[a] **Revocation of consent.**—The bringing of an action upon an open account by the owner thereof against the person liable thereon revokes an oral consent previously given by the former that the latter might pay the amount due upon such account to another where payment has not yet been made under such consent nor the debtor become legally bound to make it to the third person. Churchman v. Robinson, 99 Ga. 786, 27 SE 164.

67. Hilfiker v. Wurghler, 157 Mo. A. 397, 138 SW 935, 937 [cit Cyc]; Sailer v. Barnousky, 60 Wis. 169, 18 NW 763; Leblanc v. Lutz, 44 N. B. 398, 34 DomLR 454.

[a] **Rule applied.**—Where a debtor, whose debt was not yet due, in order to accommodate the creditor indorsed a note executed and thereafter negotiated by him for the purpose of raising money, and upon maturity of the note the debtor as indorser paid it to the holder thereof, the debtor was entitled to credit upon his debt for the amount so paid on such note. Leblanc v. Lutz, 44 N. B. 398, 34 DomLR 454.

68. Payment to:

Agent see Agency §§ 279, 564, 565.

Attorney see Attorney and Client §§ 164, 179, 180.

Payment by deposit in bank or with third person see infra § 6.

69. Crowell v. Simpson, 52 N. C. 285; Maryland Casualty Co. v. Okmulgee County, 128 Okl. 58, 260 P 1112.

[a] **Payment to lienor presumed made with creditor's assent.**—Where the purchaser of property, which at the time of purchase was subject to a lien in favor of third persons which the seller ought to have discharged, pays the encumbrance in order to protect himself, he is considered to have been authorized by the seller to make such payment, and is entitled to credit for the amount thereof upon the purchase price. Crowell v. Simpson, 52 N. C. 285.

70. U. S.—Mutual Ben. L. Ins. Co. v. Miles, 81 Fed. 32.

Ark.—Buchanan v. Hicks, 98 Ark. 370, 376, 136 SW 177, 34 LRANS 1200 [cit Cyc].

Conn.—Ryle v. Reedy, 99 Conn. 174, 121 A 460.

Ill.—Peo. v. Deams, 92 Ill. 192; Peo. v. Smith, 43 Ill. 219, 92 AmD 109; Humphreys v. Orrey, 220 Ill. A. 523; Prideaux v. Miller, 215 Ill. A. 429.

Ind. T.—Good v. Central Coal, etc., Co., 7 Ind. T. 268, 104 SW 613.

Ky.—Garth v. Runner, 121 SW 681.

La.—Landreau v. Rochelle, 1 Mart. N. S. 497. But see Ryan v. Kohn, 28 La. Ann. 100 (holding that payment of sums due to a minor was sufficiently made by paying them to the minor's mother, although she had not qualified as executrix, where it does not appear that any injury to the minor has resulted).

Minn.—McMahon v. German-American Nat. Bank, 111 Minn. 313, 127 NW 7, 29 LRANS 67.

Nebr.—Hammond v. Edwards, 56 Nebr. 631, 77 NW 75.

Nev.—Frey v. Thompson, 20 Nev. 253, 20 P 305.

N. Y.—Schrauth v. Dry Dock Sav. Bank, 86 N. Y. 390; Hayne v. Van Epps, 114 App. Div. 278, 99 NYS 772; Machauer v. Fogel, 20 Misc. 666, 46 NYS 686; Ravid v. Karo, 121 NYS 272; Bonck v. Wolston, 22 NYS 439; Armstrong v. Munday, 5 Den. 166.

N. C.—Strayhorn v. Webb, 47 N. C. 199, 64 AmD 580.

Oh.—Erie R. Co. v. Gugliotta, 17 Oh. Cir. Ct. N. S. 516; Dunphy v. Gilliam Mfg. Co., 21 Oh. Cir. Ct. 696, 11 Cir. Dec. 822.

Pa.—Crane v. Fourth St. Nat. Bank, 4 Pa. Dist. 131; Banks Tp. v. Frey, 10 Pa. Co. 580.

Tex.—Linville v. Jones, (Civ. A.) 137 SW 415.

Eng.—Lawrence v. Blake, 8 Cl. & F. 504, 8 Reprint 198.

Man.—Stewart v. Richardson, 30 Man. 481, 53 DomLR 625, [1920] 3 WestWkly 134.

N. B.—Ross v. New Brunswick Constr. Co., 43 N. B. 291, 24 DomLR 234.

Ont.—Hunter v. Wallace, 14 U. C. Q. B. 205.

Compare Black v. Hiebert, 38 Can. S. C. 557 (holding that the lender of money borrowed for the purpose of paying for the building of a house ought not to have recognized an order signed in the borrower's name in favor of the contractor for the total amount of the loan, when he knew that the contractor had not completed his contract and was not entitled to the money, and the order was signed by the borrower's mark and showed that she was unable to sign her name, and contained no name of the witness to the signature, and no such payment of the amount borrowed as to release the lender or establish the borrower's liability for repayment was effectuated by such payment to the contractor).

[a] **Payment to wrong person by mistake.**—It is no defense to an action to recover upon a debt that it had already been paid by the debtor to some other person by mistake. Humphreys v. Orrey, 220 Ill. A. 523; Erie R. Co. v. Gugliotta, 17 Oh. Cir. Ct. N. S. 516; Ross v. New Brunswick Constr. Co., 43 N. B. 291, 24 Dom LR 234.

[b] **Payment to a third person other than one to whom the creditor directs it to be made** does not discharge the debtor or extinguish the debt. Ryle v. Reedy, 99 Conn. 174, 121 A 460.

[c] **Delivery to third person for payment to creditor.**—If a debtor hands money to a third person, to be handed to the creditor, the right to the money does not vest in the creditor so as to make it his property until he is notified of the transaction and agrees to adopt the act of the third person in receiving the money as his own act, whereby the debt is extinguished. Strayhorn v. Webb, 47 N. C. 199, 64 AmD 580.

Payment to person to whom creditor is indebted see infra § 5.

71. See statutory provisions.

[a] **In the Philippine Islands,** under Civ. Code art 1163 § 2, providing that a payment made to a third person shall be valid in so far as it may have been beneficial to the creditor, a payment to one other than the creditor is of no effect when there is nothing to show that it was for the creditor's benefit, it never being presumed that the creditor was benefited by a payment to a third person, and the debtor having the burden of proving such fact. Panganiban v. Cuevas, 7 Philippine 477.

72. Ala.—Guntersville Bank v. U. S. Fidelity, etc., Co., 201 Ala. 19, 75 S 168, 170 [cit Cyc]; Peck v. Lampkin, 200 Ala. 132, 75 S 580, 581 [cit Cyc].

Ill.—Lyman v. Gedney, 114 Ill. 388, 29 NE 282, 55 AmR 1871; Harding v. Parshall, 56 Ill. 219.

Ky.—Jenkins v. Williams, 191 Ky. 165, 229 SW 94, 96 [cit Cyc]; Morrow v. Stark, 4 J. J. Marsh. 367.

Mass.—Dewey v. Metropolitan L. Ins. Co., 256 Mass. 281, 152 NE 82.

Minn.—Moore v. Bevier, 60 Minn. 240, 62 NW 281.

Mo.—Henry v. Mt. Pleasant Tp., 70 Mo. 500.

Okl.—Jens-Marie Oil Co. v. Rixse, 72 Okl. 93, 178 P 658 [cit Cyc].

Pa.—Bowes v. Seeger, 8 Watts & S. 222.

W. Va.—Hatfield v. Cabell County Ct., 75 W. Va. 595, 84 SE 335; Allen v. South Penn Oil Co., 72 W. Va. 155, 161, 77 SE 905 [cit Cyc].

See also Ely v. Bush, 89 N. C. 358; Mimoso v. Registrar, 27 Porto Rico 888 (both applying the rule).

Compare Powell v. Brodhurst, [1901] 2 Ch. 160 (holding that the rule is applicable at law but not in equity); Matson v. Dennis, 4 De G. J. & S. 345, 69 EngCh 267, 46 Reprint 952 (to same effect).

[a] **Payment to one of two trustees** discharges a debt due to them as trustees. Bowes v. Seeger, 8 Watts & S. (Pa.) 222.

Joint mortgagee see Mortgages § 900.

Joint payee of bill or note see Bills and Notes § 831.

73. Guntersville Bank v. U. S. Fidelity, etc., Co., 201 Ala. 19, 75 S 168.

74. Green v. Bounds, 112 Miss. 252, 72 S 1001.

75. More v. Bevier, 60 Minn. 240, 62 NW 281.

76. Rowland v. Doolin, 10 KyL 684; Carlisle v. Niagara Dock Co., 5 U. C. Q. B. O. S. (Ont.) 660.

77. See case infra this note.

[a] **Payment of a subscription directly to the person beneficially interested** is a good defense to an action to recover the subscription brought by the agent or collector named in it to receive payment. Er-

[§ 5] **2. Person to Whom Creditor is Indebted.**[78] Except where thereunto authorized by statute,[79] a debtor cannot discharge himself or extinguish his debt by making payment thereof to one to whom his creditor is indebted,[80] unless the creditor consents thereto,[81] or has theretofore directed or agreed that payment be made to such person,[82] or subsequently ratifies the payment.[83]

[§ 6] **3. Deposit in Bank or with Third Person.**[84] Depositing money in a bank or with a third person for the creditor's account does not constitute a payment,[85] in the absence of a statute so providing,[86] unless the creditor expressly or by implication agrees or consents that payment may be so made.[87] Where the debtor has authority to make payment by depositing the money, he is ordinarily bound to give notice of the deposit to the creditor,[88] and a mere deposit cannot effectuate payment where the creditor has no knowledge or notice of it,[89] even though, in ignorance of the state of his account, he uses or withdraws a portion of the money so deposited.[90] A deposit over which the debtor retains control does not constitute a payment.[91]

win v. Lapham, 27 Mich. 311.

78. Payment to third person generally see supra § 4.

Payment under garnishment proceedings as satisfaction of debt see Garnishment §§ 632-641.

79. See statutory provisions.

[a] **In South Carolina,** under Code § 119, providing that, after the issuing of execution against the property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid, a debtor may discharge his debt pro tanto by paying to the sheriff the amount due upon a judgment theretofore recovered against the creditor by a third person, without the request or assent of the creditor that such payment be made, and although execution issued on such judgment has lost its active force by lapse of time. Isbell v. Dunlap, 17 S. C. 581.

Payment of execution by third person see Executions § 909.

80. Ark.—Hill v. Austin, 19 Ark. 230.

Cal.—Martin v. Sharp, etc., Contracting Co., 34 Cal. A. 584, 168 P 373.

Ind.—Bedford Belt R. Co. v. Burke, 13 Ind. A. 35, 41 NE 70.

Mass.—Harrison v. Moran, 163 Mass. 495, 40 NE 850.

N. Y.—Bayer v. Doscher, 139 App. Div. 324, 123 NYS 1096.

Compare Black v. Hiebert, 38 Can. S. C. 557 (holding that a debt was not discharged by payment to a third person where the debtor knew that the third person's demand against the creditor had not matured and where the written orders requesting payment to the third person showed on its face that the creditor could not sign his own name, the order having in fact been procured by fraud).

81. Wolf v. Ætna Indemn. Co., 163 Cal. 597, 126 P 470; Anderson v. Hillies, 12 C. B. 499, 74 ECL 499, 138 Reprint 1002.

82. Ala.—Merchants', etc., Bank v. Coleman, 81 Ala. 170, 1 S 123.

Colo.—Pouppirt v. Greenwood, 48 Colo. 405, 110 P 195.

N. Y.—Leavitt v. Beers, Lalor 221.

Wis.—Story v. Menzies, 3 Pinn. 329, 4 Chandl. 61.

Eng.—Anderson v. Hillies, 12 C. B. 499, 74 ECL 499, 138 Reprint 1002.

N. B.—Leblanc v. Lutz, 44 N. B. 398, 34 DomLR 454.

See also Davis v. Smith, 5 Ga. 274, 48 AmD 279; Butler v. Bohn, 31 Minn. 325, 17 NW 862 (both apparently applying the rule).

And see cases infra this note.

[a] **Debtor's acceptance of order drawn by creditor in favor of third persons** (1) is a payment when so agreed by the parties. (Gibson v. Lenane, 94 N. Y. 183; King v. Kelley, 51 Pa. 36). (2) provided such order is actually paid (McCormack v. Phillips, 4 Dak. 506, 34 NW 39). (3) But a conditional acceptance by the debtor of an order on him in favor of a third person does not operate as a payment, especially where it is afterward given up to the debtor by such third person unpaid. Bassett v. Sanborn, 9 Cush. (Mass.) 58.

83. Dodge v. Swazey, 35 Me. 535.

84. Payment to agent see Agency §§ 279, 564, 565.

85. Ga.—Hill v. Arnold, 116 Ga. 45, 42 SE 475. See also Vason v. Beall, 58 Ga. 500 (apparently applying the rule).

Ida.—Jones v. Bussell, 44 Ida. 27, 255 P 303.

Ill.—Berry v. Berry, 238 Ill. A. 507.

Ind.—Bedford Belt R. Co. v. Burke, 13 Ind. A. 35, 41 NE 70.

Iowa.—Hillstrom v. Farmers' Inc. Soc., 197 Iowa 13, 196 NW 595.

Kan.—Chikowsky v. Central Coal, etc., Co., 124 Kan. 471, 260 P 620, 621 [quot Cyc].

La.—Aguilar v. Bourgeois, 12 La. Ann. 122.

Nebr.—O'Brien v. Coon, 103 Nebr. 836, 174 NW 513.

N. J.—King v. Paterson, etc., R. Co., 29 N. J. L. 504; Freeholders v. Thomas, 20 N. J. Eq. 39.

N. Y.—Clemons v. Livingston County Mut. F. Ins. Co., 12 NYS 433.

Okl.—Shawnee Bd. of Education v. American Nat. Co., 275 P 285.

Pa.—Cavanaugh v. Buehler, 120 Pa. 441, 14 A 391.

Va.—Moore v. Tate, 22 Gratt. (63 Va.) 351. See also Crockett v. Sexton, 29 Gratt. (70 Va.) 46 (apparently applying the rule).

Eng.—Commercial Bank v. Wilson, [1893] A. C. 181.

Man.—Brantford Cordage Co. v. Milne, [1925] 1 DomLR 92, 97, [1925] 1 WestWkly 442 [app dism 35 Man. 17, [1925] 1 DomLR 862, [1925] 1 WestWkly 911, and cit Cyc].

But see Best v. Jenkins, 14 Sask. L. 153, [1921] 1 WestWkly 527 (holding that, where the agreed place of payment of a debt was not that of the residence of the creditor and he had no agent there to receive the money at the time it was payable, the debtor was within his legal rights in paying the money into a bank to the credit of the creditor, giving notice to him of such deposit, and such act constituted a payment to the creditor).

"Money deposited by a debtor with a third person, or in a bank, for the benefit of his creditor, without the authority of the creditor, is not payment of a debt, nor can the neglect of the creditor in not calling or drawing for it in a reasonable time, make it payment." Freeholders v. Thomas, 20 N. J. Eq. 39, 41.

[a] **The depositary is merely the debtor's agent** to make payment to the creditor. Jones v. Bussell, 44 Ida. 27, 255 P 303; Shawnee Bd. of Education v. American Nat. Co., (Okl.) 275 P 285.

86. See statutory provisions.

[a] **In California** (1) under Civ. Code § 1500, an obligation for the payment of money is extinguished by a due offer of payment if the amount is immediately deposited in a bank in the creditor's name and notice given to him. Trinity County Bank v. Haas, 151 Cal. 553, 91 P 385. (2) But a mere deposit without a prior offer of payment does not extinguish the debt. Owen v. Herzihoff, 2 Cal. A. 622, 84 P 274.

87. Ind.—Indiana Natural Gas, etc., Co. v. Lee, 34 Ind. A. 119, 72 NE 492.

Mass.—Davis v. Snyder, 248 Mass. 387, 143 NE 319.

Mo.—Casey v. Swift, (A.) 14 SW (2d) 681.

N. Y.—In re Rochester, etc., R. Co., 110 N. Y. 119, 17 NE 678.

W. Va.—Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 SE 707, AnnCas 1912B 360.

Wyo.—Deadwood First Nat. Bank v. Crook County School Dist. No. 1, 6 Wyo. 485, 46 P 1090.

Alta.—Miner v. Excelsior L. Assur. Co., 3 Alta. L. 249, 16 WestLR 698.

See Beranek v. Beranek, 95 Nebr. 311, 145 NW 712 (holding that, where the creditor, notified of the deposit, objects to it on the ground that the amount is insufficient, the debtor is entitled to be credited on his debt with the amount deposited).

Compare Shrewsbury v. Shrewsbury, 23 T. L. R. 277 (holding that, where a creditor directed payment to be made by depositing the amount thereof in a bank, the debtor was bound to make payment by so depositing it, and a tender otherwise made was properly refused by the creditor's agent).

[a] **Whether or not the creditor has an account at the bank,** and whether or not he has given instructions at the bank regarding the money, is immaterial so far as the debtor is concerned when the creditor has directed or consented that payment shall be made by depositing the money in the bank. Davis v. Snyder, 248 Mass. 387, 143 NE 319.

[b] **Payment is effectuated at the time of the deposit,** where the creditor consents or agrees that it may be so made, and not merely at the time the creditor draws upon the depositary or receives the money from him. Miner v. Excelsior L. Assur. Co., 3 Alta. L. 249, 16 WestLR 698.

[c] **Requirement by depositary that creditor sign receipt** before receiving money deposited by a debtor under an agreement providing for payment in such manner does not defeat the efficacy of the deposit as a payment, the requirement of a receipt being the depositary's method of doing business, for which the debtor is not responsible. Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 SE 707, AnnCas1912B 360.

[d] **Mere error in the name of the creditor for whom money is deposited** (1) under an agreement that payment should be made by such deposit does not defeat the payment, where the variance was merely one of orthography and the names were idem sonans. Davis v. Snyder, 248 Mass. 387, 143 NE 319. (2) Names idem sonans see Names §§ 19-22.

88. Holland v. Tyus, 56 Ga. 56.

[a] **In California,** under Civ. Code § 1500, authorizing payment by depositing money in a bank in certain cases, the debtor must give notice of such deposit to the creditor. Owen v. Herzihoff, 2 Cal. A. 622, 84 P 274.

89. Owen v. Herzihoff, supra; Holland v. Tyus, 56 Ga. 56; Bedford Belt R. Co. v. Burke, 13 Ind. A. 35, 41 NE 70.

90. Bedford Belt. R. Co. v. Burke, supra.

91. Clark v. Minge, 187 Ala. 97, 65 S 832; Heyward v. Walker, 6 S. C. 449; Brown v. Grady, 16 Wyo. 151, 92 P 622; Calley v. Short, Coop. 149, 35 Reprint 511 [aff Jac. 631, 4 EngCh 631, 37 Reprint 989]. Compare Gordon v. Gordon, 98 Ind. 67 (holding that no payment was effectuated where the depositary was also the debtor's agent and as such had au-

[§ 7] **C. Time.**[92] As a strict rule of law, a payment agreed to be made at a particular time must be made at such time,[93] and, on the one hand, a debtor who fails then to pay is in default,[94] and, on the other, a creditor is not bound to receive payment before such time.[95] The right to receive payment at the time it is due may, however, be waived by the creditor,[96] and a payment may be accepted before it is due,[97] or the time of payment may be extended or a default waived,[98] as by agreement,[99] or by taking a postdated check or promissory note for the amount of the debt,[1] or by demanding payment at a later date;[2] and, in general, the time of payment is not ordinarily treated as of the essence of the contract,[3] although it may be such.[4]

Debt payable on demand. Where a debt is payable upon demand, the debtor is entitled to a reasonable time after demand in which to make payment, unless it is otherwise agreed.[5]

Payment within specified term. Where a debt is payable within a specified term, payment is not due until the last day of the term.[6]

Time of day. Where a debt is payable upon a particular day, the debtor has the entire day in which to make payment,[7] or, as it has been held, the time of payment is the last convenient hour of the day for transacting the business.[8]

Where no time is fixed for the payment of a debt, it is payable immediately on demand[9] or within a reasonable time.[10]

Deposit in bank. Where a debtor is authorized to make payment by depositing money in a bank or with a third person,[11] a deposit before the debt is due and payable is sufficient.[12]

Rejection of medium tendered. If a debtor has been led by his creditor to suppose that a particular medium would be received as payment, and a tender of such medium is rejected, the debtor is entitled to a reasonable time to convert it into money or the medium for which the contract calls.[13]

[§ 8] **D. Place**[14]**—1. In General.** As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides,[15] or at his place of business,

thority to apply the money to other debts, and did so).

[a] **Conditional deposit.**—A payment of money into a banking house to be placed to the credit of another, upon a condition the money in the meantime to stand in the bankers' books in the name of the party paying it in, is at his risk, and the loss is his, if the bankers fail before the condition is complied with, although the creditor had written to desire it to be paid in generally. Calley v. Short, Coop. 149, 35 Reprint 511 [aff Jac. 631, 4 EngCh 631, 37 Reprint 989].

92. Cross references:
Construction of contract as to time for performance in general see Contracts §§ 583, 584.
Effect of alteration of instrument as to time of payment see Alteration of Instruments § 46.
Sunday or holiday as time for payment or performance of contract see Sunday [37 Cyc 568]; Time [38 Cyc 329 et seq.].
Time for:
Payment of particular classes of obligations or liabilities see cross references ante p 584.
Performance of contracts generally see Contracts §§ 775–785.

93. See cases infra notes 94, 95.

94. Columbia Bank v. Hagner, 1 Pet. (U. S.) 455, 7 L. ed. 219; De la Rama v. Inventor, 12 Philippine 44. See also Redington v. Hartford, 85 N. J. L. 704, 90 A 284 (holding that, under an agreement fixing the time of payment and providing that the debtor should be entitled to an extension of time if he requested it, he was not entitled to such extension where he made no request therefor).

95. Beck v. Tucker, 147 Miss. 401, 113 S 209; Peryer v. Pennock, 95 Vt. 313, 15 A 105, 17 ALR 863; Graeme v. Adams, 23 Gratt. (64 Va.) 225, 14 AmR 130.

Part payment see infra § 10.

Premature tender of performance of contracts generally see Contracts § 750.

96. See cases infra notes 97–2.

97. Alexander v. Herndon, 84 S. C. 181, 65 SE 1048.

Part payment see infra § 10.

98. See cases infra notes 99–2.

Extension of time of payment:
Authority to extend of:
Agent see Agency § 272.
Attorney see Attorney and Client § 174.
Bank or banker see Banks and Banking § 270.
Consideration for extension see Contracts §§ 607, 608.
Releasing:
Guarantor see Guaranty §§ 160–163.
Surety see Principal and Surety [32 Cyc 191 et seq].
Waiving:
Forfeiture of lease see Landlord and Tenant § 254.
Lien see Liens § 54.
Right to forfeit insurance see Insurance § 625.

99. Ward v. Scarborough, (Tex. Commn. A.) 236 SW 434.

1. Secular v. Bookstaber, 136 App. Div. 868, 122 NYS 39; Bonner Oil Co. v. Gaines, (Tex. Civ. A.) 179 SW 686.

Bill, note, or check:
Of debtor as payment see infra §§ 40–53.
Of third person as payment see infra § 58.
Suspending right of action on debt see Actions § 319.

2. Buck v. Burk, 18 N. Y. 337.

3. Whittington v. Roberts, 4 T. B. Mon. (Ky.) 173; Thomas v. Elkins, 4 Mart. (La.) 376; Selden v. Camp, 95 Va. 527, 28 SE 877; Booten v. Scheffer, 21 Gratt. (62 Va.) 474.

Time as of essence of contracts generally see Contracts § 783.

4. Booten v. Scheffer, 21 Gratt. (62 Va.) 474 (holding that, where payments on a contract are to be made in a rapidly depreciating currency, such fact makes time of the essence of the contract; and delay in making or tendering such payment, where injustice results, will bar a specific performance).

5. Dunbar v. Stickler, 45 Iowa 384.

6. Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; National Park Bank v. Concordia Land, etc., Co., 159 La. 86, 105 S 234.

7. Anglo-American Provision Co. v. Prentiss, 157 Ill. 506, 42 NE 157. See also National Park Bank v. Concordia Land, etc., Co., 159 La. 86, 105 S 234, 242 (holding that a debtor is not in default until the day for payment "has expired").

8. Savary v. Goe, 21 F. Cas. No. 12,388, 3 Wash. C. C. 140; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321.

9. U. S.—Columbia Bank v. Hagner, 1 Pet. 455, 7 L. ed. 219.
Cal.—Newhall v. Sherman, 124 Cal. 509, 57 P 387.
Ky.—Darnell v. Alexander, 178 Ky. 404, 199 SW 17.
N. Y.—Bradford, etc., R. Co. v. New York, etc., R. Co., 123 N. Y. 316, 25 NE 499, 11 LRA 116.
Pa.—Demarest v. McKee, 2 Grant 248.
Tex.—Hughes v. Prewit, 5 Tex. 264.
Eng.—Lockwood v. Tunbridge Wells Local Bd., Cab. & E. 287.
See also Nicorelli v. López, 26 Porto Rico 49 (dictum).
Compare Kinston Supply Co. v. Kelly, 204 Ala. 611, 86 S 533, 534 (where it was said that, when no time is stipulated for the payment of an obligation, "it is payable presently"). To same effect Bast v. Sproll, 176 Wis. 371, 187 NW 223.

[a] **In the Philippine Islands,** under the old laws in force prior to the enactment of the civil code, when an obligation is pure, simple, and unconditional, and no particular day has been fixed for its fulfillment, payment for the same may be demanded ten days after its enactment; while under Civ. Code art 1113, such an obligation is immediately demandable. Floriano v. Delgado, 11 Philippine 154.

"Immediately" as meaning reasonable time see Contracts § 583; Immediately § 4.

Requisites and sufficiency of demand see Actions §§ 76–79; Contracts § 745.

10. Wilmot First Nat. Bank v. Eichmeier, 153 Iowa 154, 133 NW 454; Stone v. Hearn, 3 Ky. Op. 578; Owen v. Evans, 134 N. Y. 514, 31 NE 999; Nicorelli v. López, 26 Porto Rico 49.

[a] **Debt payable when convenient or as soon as practicable.**—When one undertakes to pay money when convenient, or as soon as practicable, or as soon as he can, or upon other vague and undefined conditions, or at an indefinite period, he is bound to pay within a reasonable period after the promise, and without regard to the happening of any contingency or event whatever, where none is expressly or by implication specified in the contract. Stone v. Hearn, 3 Ky. Op. 578. To same effect Owen v. Evans, 134 N. Y. 514, 31 NE 999.

What is reasonable time generally see Contracts § 782.

11. Generally see supra § 6.

12. Virginia Exch. Bank v. Cookman, 1 W. Va. 69.

13. Moore v. Morris, 20 Ill. 255.

Medium of payment generally see infra §§ 15–66.

14. Cross references:
Designation of place as creating agency to receive payment see Agency § 258.
Effect of altering instrument as to place of payment see Alteration of Instruments §§ 48–50.
Place of payment of particular classes of obligations and liabilities see cross references ante p 584.
Place of tender see Tender [38 Cyc 150].

15. Colo.—Enyart v. Orr, 78 Colo. 6, 238 P 29; Peo. v. Denver Second Judicial Dist. Ct., 70 Colo. 540, 203 P 268, 269 [quot Cyc].
Ill.—Walker v. Lovitt, 250 Ill. 543, 95 NE 631; Esmay v. Gorton, 18 Ill. 483.
Kan.—Chikowsky v. Central Coal, etc., Co., 124 Kan. 471, 260 P 620, 621

if he has one,[16] or wherever else he may be found;[17] and it is ordinarily the duty of the debtor to seek the creditor for the purpose of making payment,[18] provided the creditor is within the state of his residence when the payment is due,[19] unless otherwise provided by statute.[20] It has been held, however, that, where a debt is payable in specific goods or chattels, the residence of the debtor is the place for payment when not otherwise agreed.[21]

When the place of payment is fixed by agreement, express or implied, payment must be made at the place agreed upon unless both parties consent that it be made elsewhere,[22] and the creditor should be

[quot Cyc].

Ky.—German Nat. Bank v. Zimmer, 141 Ky. 401, 402, 132 SW 1023 [cit Cyc].

Mo.—Motherstadt v. Harry Newman, Inc., Motor Cars, 204 Mo. A. 619, 217 SW 591 [cit Cyc].

Mont.—Silver v. Morin, 74 Mont. 398, 240 P 825; State v. Fergus County Tenth Judicial Dist. Ct., 55 Mont. 330, 176 P 613.

Nebr.—House v. Lewis, 108 Nebr. 257, 187 NW 784, 785, 787, 23 ALR 877 [cit Cyc].

N. J.—King v. Ruckman, 20 N. J. Eq. 316 [rev on other grounds 21 N. J. Eq. 599].

N. Y.—Weyand v. Randall, 131 App. Div. 167, 115 NYS 279; Pomeroy v. Ainsworth, 22 Barb. 118; Stoker v. Cogswell, 25 HowPr 267; Stewart v. Ellice, 2 Paige 604.

Oh.—Thomas v. Watt, 20 Oh. Cir. Ct. N. S. 500.

Okl.—Clem Oil Co. v. Oliver, 106 Okl. 22, 232 P 942, 944 [quot Cyc].

Pa.—General Finance Co. v. Wasilowski, 5 Pa. Dist. & Co. 274, 275 [quot Cyc]; Baltimore Bldg., etc., Assoc., v. Titlow, 19 Pa. Co., 518.

W. Va.—Whitaker-Glessner Co. v. Clark, 98 W. Va. 19, 126 SE 340; Jones v. Main Island Creek Coal Co., 84 W. Va. 245, 99 SE 462.

Wis.—State v. Grimm, 186 Wis. 154, 202 NW 162; State v. Kenosha Home Tel. Co., 158 Wis. 371, 374, 148 NW 877, AnnCas1916E 365 [cit Cyc].

Alta.—Kruse v. Fallows, 16 Alta. L. 384, 59 DomLR 169, [1921] 2 West Wkly 210.

Man.—Empire Sash, etc., Co. v. McGreevy, 22 Man. 676, 8 DomLR 27, 22 WestLR 372, 3 WestWkly 129.

[a] **Although the creditor's residence is in another state,** payment must ordinarily be made there if no other place has been agreed upon, where his residence was in such other state when the debt arose, and has not been changed. Weyand v. Randall, 131 App. Div. 167, 115 NYS 279.

16. Cal.—Yolo Bank v. Sperry Flour Co., 141 Cal. 314, 74 P 855, 65 LRA 90.

Ill.—Walker v. Lovitt, 250 Ill. 543, 95 NE 631; Esmay v. Gorton, 18 Ill. 483.

Miss.—Magruder v. Cumberland Tel., etc., Co., 92 Miss. 716, 46 S 404, 16 LRANS 560.

Mont.—State v. Fergus County Tenth Judicial Dist. Ct., 55 Mont. 330, 176 P 613.

Nebr.—House v. Lewis, 108 Nebr. 257, 187 NW 784, 785, 787, 23 ALR 877 [cit Cyc].

N. J.—King v. Ruckman, 20 N. J. Eq. 316 [rev on other grounds 21 N. J. Eq. 599].

W. Va.—Danser v. Dorr, 72 W. Va. 430, 78 SE 367.

Wis.—State v. Kenosha Home Tel. Co., 158 Wis. 371, 374, 148 NW 877, AnnCas1916E 365 [cit Cyc].

Alta.—Kruse v. Fallows, 16 Alta. L. 384, 59 DomLR 169, [1921] 2 West Wkly 210.

17. U. S.—Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 19 SCt 797, 43 L. ed. 1144.

Kan.—Chikowsky v. Central Coal, etc., Co., 124 Kan. 471, 260 P 620, 621 [quot Cyc].

Mo.—Motherstadt v. Harry Newman, Inc., Motor Cars, 204 Mo. A. 619, 217 SW 591 [cit Cyc].

Mont.—Silver v. Morin, 74 Mont. 398, 240 P 825; State v. Fergus County Tenth Judicial Dist. Ct., 55 Mont. 330, 176 P 613.

Nebr.—House v. Lewis, 108 Nebr. 257, 187 NW 784, 785, 787, 23 ALR 877 [cit Cyc].

N. Y.—Pomeroy v. Ainsworth, 22 Barb. 118.

Pa.—Wiener v. American Ins. Co., 224 Pa. 292, 73 A 443, 23 LRANS 593; General Finance Co. v. Wasilowski, 5 Pa. Dist. & Co. 274, 275 [quot Cyc].

"All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere." Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 716, 19 SCt 797, 43 L. ed. 1144.

18. Colo.—Enyart v. Orr, 78 Colo. 6, 238 P 29.

Ill.—Walker v. Lovitt, 250 Ill. 543, 95 NE 631; Esmay v. Gorton, 18 Ill. 483.

Kan.—Chikowsky v. Central Coal, etc., Co., 124 Kan. 471, 260 P 620, 621 [quot Cyc].

Ky.—Bain v. Wilson, 1 J. J. Marsh. 202; Sanders v. Norton, 4 T. B. Mon. 464.

Miss.—Magruder v. Cumberland Tel., etc., Co., 92 Miss. 716, 46 S 404, 16 LRANS 560.

Mo.—Motherstadt v. Harry Newman, Inc., Motor Cars, 204 Mo. A. 619, 217 SW 591 [cit Cyc].

Mont.—Silver v. Morin, 74 Mont. 398, 240 P 825; State v. Fergus County Tenth Judicial Dist. Ct., 55 Mont. 330, 176 P 613; State v. Broadwater Ninth Judicial Dist. Ct., 41 Mont. 84, 86, 108 P 144 [quot Cyc].

Nebr.—House v. Lewis, 108 Nebr. 257, 187 NW 784, 785, 787, 23 ALR 877 [cit Cyc].

N. Y.—Weyand v. Park Terrace Co., 202 N. Y. 231, 95 NE 723, 36 LRANS 308, AnnCas1912D 1010; Hale v. Patton, 60 N. Y. 233, 19 AmR 168; Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465; Weyand v. Randall, 131 App. Div. 167, 115 NYS 279; Judd v. Ensign, 6 Barb. 258; Grussy v. Schneider, 50 HowPr 134 [aff 55 How Pr 188]; Stoker v. Cogswell, 25 How Pr 267.

Okl.—Clem Oil Co. v. Oliver, 106 Okl. 22, 232 P 942.

Pa.—General Finance Co. v. Wasilowski, 5 Pa. Dist. & Co. 274, 275 [quot Cyc].

S. C.—Empire Trust Co. v. Panola Cotton Mills, 146 SE 612.

Va.—Dandridge v. Harris, 1 Wash. (1 Va.) 326, 1 AmD 465.

W. Va.—Jones v. Main Island Creek Coal Co., 84 W. Va. 245, 99 SE 462; Danser v. Dorr, 72 W. Va. 430, 78 SE 367, 368 [cit Cyc]; Galloway v. Standard F. Ins. Co., 45 W. Va. 237, 31 SE 969.

Alta.—Kruse v. Fallows, 16 Alta. L. 384, 59 DomLR 169, [1921] 2 West Wkly 210.

Ont.—Leonard v. Cushing Bros. Co., Ltd., 30 Ont. L. 646, 19 DomLR 569, 5 OntWN 453, 25 OntWR 471 [app dism 5 OntWN 952, 25 OntWR 940].

19. Kan.—Chikowsky v. Central Coal, etc., Co., 124 Kan. 471, 260 P 620, 621 [quot Cyc].

Miss.—Magruder v. Cumberland Tel., etc., Co., 92 Miss. 716, 46 S 404, 16 LRANS 560.

Mont.—Silver v. Morin, 74 Mont. 398, 240 P 825; State v. Broadwater Ninth Judicial Dist. Ct., 41 Mont. 84, 86, 108 P 144 [quot Cyc].

N. Y.—Weyand v. Park Terrace Co., 202 N. Y. 231, 95 NE 723, 36 LRANS 308, AnnCas1912D 1010; Hale v. Patton, 60 N. Y. 233, 19 AmR 168; Weyand v. Randall, 131 App. Div. 167, 115 NYS 279.

Pa.—Hopkins Mfg. Co. v. Ketterer, 237 Pa. 285, 293, 85 A 421, AnnCas 1914B 558 [cit Cyc]; General Finance Co. v. Wasilowski, 5 Pa. Dist. & Co. 274, 275 [quot Cyc].

W. Va.—Galloway v. Standard F. Ins. Co., 45 W. Va. 237, 31 SE 969.

Wis.—State v. Kenosha Home Tel. Co., 158 Wis. 371, 374, 148 NW 877, AnnCas1916E 365 [cit Cyc].

Alta.—Kruse v. Fallows, 16 Alta. L. 384, 59 DomLR 169, [1921] 2 West Wkly 210.

See also Empire Trust Co. v. Panola Cotton Mills, (S. C.) 146 SE 612 (holding that, where a contract is made in a particular state with a nonresident of that state, it is the promisee's duty to provide a place in the state where payments can be made, and it is not necessary for the debtor to go beyond the bounds of the state to make payments).

[a] **If the creditor is outside the state** (1) the debtor is not required to seek him. Weyand v. Park Terrace Co., 202 N. Y. 231, 238, 95 NE 723, 36 LRANS 308, AnnCas1912D 1010 [cit Cyc]; Hale v. Patton, 60 N. Y. 233, 19 AmR 168; Weyand v. Randall, 131 App. Div. 167, 115 NYS 279. (2) "Lord Coke wrote that a debtor need not seek his creditor out of the realm, and such is the law of the present day, and applies to the states of this country." Hopkins Mfg. Co. v. Ketterer, 237 Pa. 285, 293, 85 A 421, Ann Cas1914B 558. (3) But where the creditor resides in a different state from the debtor at the time the obligation arose and still resides there, the debtor is bound to seek him. Weyand v. Randall, supra.

20. See statutory provisions.

[a] **In Texas,** under Rev. St. art 1830, where a contract does not specifically otherwise provide, the place of payment is the county of the domicile of the payor. Texas Farm Bureau Cotton Assoc. v. Stovall, 113 Tex. 273, 253 SW 1101 [rev (Civ. A.) 248 SW 1109]; Zihlman v. Fleetwood, (Civ. A.) 2 SW (2d) 881.

[b] **In Quebec** (1) under Civ. Code art 1152, providing that, when the place of payment is not otherwise designated, payment must be made at the domicile of the debtor, the place of payment is the debtor's actual domicile at the time of payment, and not his domicile at the date of the contract. Coutu v. Auclair, 18 Revde Jur 435. (2) Although payment must ordinarily be made at the domicile of the debtor, a deposit of the amount due with a notary, notice of such deposit being given to the creditor, was held sufficient where the creditor was not prejudiced thereby. Charlebois v. Charlebois, 54 Que. Super. 465, 24 RevdeJur 575.

21. Galloway v. Smith, Litt. Sel. Cas. (Ky.) 132; Wilmouth v. Patton, 2 Bibb (Ky.) 280; Grant v. Groshon, Hard. (Ky.) 85, 3 AmD 725; Buck v. Burk, 18 N. Y. 337; Hughes v. Prewitt, 5 Tex. 264.

Payment in goods or chattels see infra § 62.

22. Kan.—Chikowsky v. Central Coal, etc., Co., 124 Kan. 471, 260 P 620, 621 [quot Cyc].

N. J.—King v. Ruckman, 20 N. J. Eq. 316 [rev on other grounds 21 N. J. Eq. 599].

N. Y.—Weyand v. Park Terrace Co., 202 N. Y. 231, 95 NE 723, 36 LRANS 308, AnnCas1912D 1010.

Oh.—Thomas v. Watt, 20 Oh. Cir. Ct. N. S. 500.

Tex.—McCray Refrigerator Co. v. Simms, (Civ. A.) 268 SW 275; Brownwood v. Noel, (Civ. A.) 43 SW 890.

Eng.—Thorn v. City Rice Mills, 40 Ch. D. 357.

present in person or by agent to receive it.[23] Where a debt is payable at either of two or more places, payment must be made wholly in one place or another and not in part at each place.[24] The right to demand payment at a particular place is waived, however, by objecting to a tender made elsewhere for other reasons than that it is made at an improper place.[25]

[§ 9] **2. Remittance by Mail or Other Carrier.** Payment is not effectuated by sending the amount due to the creditor by mail[26] or other public carrier[27] until the remittance gets into the hands of the creditor, unless he expressly or by implication directs or consents that payment be so made,[28] or such mode of payment is according to the usual course of dealings between the parties, from which the creditor's assent can be inferred.[29] When the debtor is so authorized, the remittance must be made in the manner and with the precautions, if any, prescribed by the creditor, in order to absolve the debtor from the risk of loss in transmission;[30] and if it is impossible for the debtor to comply with the directions of the creditor he cannot make the remittance at the creditor's risk.[31] If no special or unusual formalities are required by the creditor a deposit in the mail or with the carrier in the ordinary manner is sufficient.[32] A mere general direction by a creditor to his debtor to remit money to him does not ordinarily constitute a direction or consent that remittance be made by mail at the creditor's risk,[33] although under some circumstances it has been held so to do;[34] and a direction that a particular remittance be made by mail does not of itself authorize the debtor to make other remittances in such manner,[35] nor does the fact that in a previous instance remittance has been made by mail without objection on the part of the creditor.[36]

[§ 10] **E. Part Payment.**[37] In the absence of any agreement so providing a creditor is not required to accept payment of a part or less than the whole of his debt;[38] but he may at his option accept payment of an amount less than that due,[39] and if he does so the debt is discharged pro tanto.[40] An agreement under which the debtor is entitled to pay all or any part of the debt during a prescribed period before it becomes due does not restrict the privilege of payment to a single occasion,[41] and part payments may be made at any time within such period.[42]

[§ 11] **F. Conditional Payment.** The term "con-

Ont.—Crawford v. Beard, 14 U. C. C. P. 87.
Que.—Picard v. Rugola, 56 Que. Super. 472.
[a] **Mistake of debtor as to place of payment agreed upon** does not excuse a failure to tender payment at the proper place. Thomas v. Watt, 20 Oh. Cir. Ct. N. S. 500.
[b] **Demand of payment is not made unnecessary,** when otherwise required, by a provision for payment at a stipulated place. Bourgelas v. Morin, 46 Que. Super. 334.

23. Taylor v. Munger, 169 N. C. 727, 86 SE 626 [cit Cyc]. See also Almodóver v. Santa Isabel Sugar Co., 28 Porto Rico 550 (holding that one who made every effort to pay at the agreed place, but could find no one to receive it, was not in default).

24. Parson v. Brodley, 1 Oh. Dec. (Reprint) 128, 2 WestLJ 401.

25. Union Mut. L. Ins. Co. v. Union Mills Plaster Co., 37 Fed. 286, 3 LRA 90.
Tender generally see Tender [38 Cyc 127].

26. Ark.—Burr v. Sickles, 17 Ark. 428, 65 AmD 437.
Ga.—Morton v. Morris, 31 Ga. 378.
Iowa.—Gaar v. Taylor, 128 Iowa 636, 105 NW 125.
Mass.—Gurney v. Howe, 9 Gray 404, 69 AmD 299.
N. C.—Model Mill Co. v. Webb, 164 N. C. 87, 80 SE 232.
Tex.—Roth v. Travelers' Protective Assoc., 102 Tex. 241, 115 SW 31, 132 AmSR 871, 20 AnnCas 97.
Wash.—Masterson v. Union Bank, etc., Co., 86 Wash. 560, 563, 150 P 1126, LRA1918A 531.
Eng.—Baker v. Lipton, Ltd., 15 T. L. R. 435; Pennington v. Crossley, 13 T. L. R. 513.
Ont.—Leonard v. Cushing Bros. Co., Ltd., 30 Ont. L. 646, 19 DomLR 569, 5 OntWN 453, 25 OntWR 471 [app dism 5 OntWN 952, 25 OntWR 940].
"A creditor has a right to payment in person, or through his duly authorized agent, and the debtor cannot select an agency for him, even though the agency selected be the United States mails or other public carrier." Masterson v. Union Bank, etc., Co., supra.

27. Dexter Horton Nat. Bank v. Hawkins, 193 Fed. 363, 113 CCA 287 (express company).

28. U. S.—Selman v. Dun, 21 F. Cas. No. 12,648.
Ark.—Burr v. Sickles, 17 Ark. 428, 65 AmD 437.
Ga.—Morton v. Morris, 31 Ga. 378.
Ind.—Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85.
Mass.—Buell v. Chapin, 99 Mass. 594, 97 AmD 58; Morgan v. Richardson, 13 Allen 410; Gurney v. Howe, 9 Gray 404, 69 AmD 299.
Nebr.—Farmer v. Pitts, 108 Nebr. 9, 187 NW 95, 96, 24 ALR 719 [quot Cyc].
N. Y.—Palmer v. Phœnix Mut. L. Ins. Co., 84 N. Y. 63 [aff 10 NY WklyDig 179]; Bixby v. Drexel, 56 HowPr 478.
S. C.—Townsend v. Henry, 43 S. C. L. 318.
Wis.—Jung v. Second Ward Sav. Bank, 55 Wis. 364, 13 NW 235, 42 AmR 719.
Eng.—Hawkins v. Rutt, Peake 248, 170 Reprint 145; Warwicke v. Noakes, Peake 98, 170 Reprint 93, 21 ERC 14; Norman v. Ricketts, 3 T. L. R. 182.
[a] **A credit and acceptance by telegram** constitutes a payment when made under an agreement of the parties providing therefor. Bixby v. Drexel, 56 HowPr (N. Y.) 478.

29. Ark.—Burr v. Sickles, 17 Ark. 428, 65 AmD 437.
Ga.—Morton v. Morris, 31 Ga. 378.
Mass.—Morgan v. Richardson, 13 Allen 410; Gurney v. Howe, 9 Gray 404, 69 AmD 299.
Nebr.—Farmer v. Pitts, 108 Nebr. 9, 187 NW 95, 96, 24 ALR 719 [quot Cyc].
Que.—Lepage v. Alexander, 12 Que. Super. 279.
But see Pennington v. Crossley, 77 L. T. Rep. N. S. 43 (holding that the fact that the debtor had for many years sent checks by post in payment of goods purchased was insufficient to show a request by the creditor to the debtor for payment by means of a check sent through the post so as to make the loss of a check during transmission by post fall upon him).

30. Williams v. Carpenter, 36 Ala. 9, 76 AmD 316.
[a] **Authority to remit by registered mail.**—Where a creditor authorizes his debtor to transmit money by mail at the creditor's risk, registering the letter and taking the postmaster's receipt, a remittance sent by mail unregistered is at the debtor's risk. Williams v. Carpenter, 36 Ala. 9, 76 AmD 316.

31. Williams v. Carpenter, supra.

32. Palmer v. Phœnix Mut. L. Ins. Co., 84 N. Y. 63; Townsend v. Henry, 43 S. C. L. 318. Compare Mitchell-Henry v. Norwich Union L. Ins. Soc., Ltd., [1918] 2 K. B. 67 (holding that such ordinary method must be used as is appropriate to the amount being remitted).

33. Burr v. Sickles, 17 Ark. 428, 65 AmD 437; Morton v. Morris, 31 Ga. 378; Gross v. Criss, 3 Gratt. (44 Va.) 262.

34. Buell v. Chapin, 99 Mass. 594, 97 AmD 58 (holding that an order by mail to an agent to forward "a sum of money when collected" warrants him in believing that he is authorized to transmit it in the same manner); Townsend v. Henry, 43 S. C. L. 318.

35. Dodge v. Smith, 34 Vt. 178.

36. Burr v. Sickles, 17 Ark. 428, 65 AmD 437.

37. **Cross references:**
Affecting amount in controversy see Appeal and Error § 239; Courts §§ 72, 73; Justices of the Peace § 93.
Application see infra §§ 84–127.
As accord and satisfaction see Accord and Satisfaction §§ 40–92.
As compromise and settlement see Compromise and Settlement § 11.
As rebutting presumption of payment from lapse of time see infra § 241.
Defined see supra § 1.
Effect see infra §§ 67, 68.
Of particular classes of obligations and liabilities see cross references ante p 584.
Taking contract out of statute of frauds see Frauds, Statute of §§ 296–303.
Tolling statute of limitations see Limitations of Actions §§ 625–699.

38. Wilkinson v. Sterne, 9 Mod. 299, 88 Reprint 465.
Payment before time at which debt is due see supra § 7.

39. Voss v. Mutual Ben. L. Ins. Co., 81 Fed. 24.
[a] **Acceptance may be implied** from the creditor's failure to repudiate the part payment within a reasonable time. Voss v. Mutual Ben. L. Ins. Co., 81 Fed. 24.

40. **Effect of part payment generally** see infra §§ 67, 68.
Payment of amount less than sum due as:
Accord and satisfaction see Accord and Satisfaction §§ 40–92.
Compromise and settlement see Compromise and Settlement § 11.

41. Stalworth v. Blum, 41 Ala. 319.

42. Stalworth v. Blum, supra.

ditional payment" may be used in either of two senses.[43] It may designate a payment offered upon a condition,[44] which does not effectuate payment until the condition is fulfilled or accepted by the creditor,[45] and which must be accepted, if at all, cum onere;[46] or, more properly, it may mean the acceptance by the creditor of a particular sum or medium upon a condition,[47] in which case, also, no payment is effectuated until the condition has been fulfilled[48] or waived,[49] although it may then relate back to the time of acceptance.[50] If money is advanced to the debtor by a third person to pay the debt, on the debtor's note on which the creditor is a surety, the payment is a conditional one, so that if the creditor is compelled to pay the note the debt is not discharged.[51]

[§ 12] **G. Payment Wrongfully Made or Obtained.**[52] In general, a creditor who has been paid cannot compel a second payment on the ground that the debtor paid him with money wrongfully obtained;[53] and a creditor who has procured payment by an unlawful act cannot invoke the illegality to enforce a second payment.[54]

[§ 13] **H. Fund from Which Payment Is To Be Made.**[55] It is competent for the debtor and creditor to contract for the payment of an obligation out of a particular fund,[56] and when a fund from which payment is so agreed to be made is or becomes exhausted no recovery can be had by the creditor;[57] but the mere fact that the parties expected that payment would be made from a particular fund does not relieve the debtor from liability upon the exhaustion of the fund.[58] Where several funds are held by a debtor in different capacities, the intention of the parties governs in determining from which fund a payment is to be made.[59]

[§ 14] **I. Effective Date of Payment.** Payment is effectuated as of the time the money or property delivered to the creditor is accepted as payment or treated by him as such;[60] and so, where a creditor, refusing to receive a partial payment, but consenting to hold a sum tendered until the balance shall be paid, applies the money to his own use, the debtor is entitled to have his debt credited pro tanto as of the time the money was so used by the creditor.[61] Where a particular sum or medium is received as conditional payment, and the condition is thereafter performed or fulfilled, payment ordinarily relates back to the time of such receipt.[62]

III. FORM AND MEDIUM*[63]

[§ 15] **A. In General.** In the absence of an agreement otherwise providing, or the consent of the creditor to receive some other medium,[64] payment may be made only in money;[65] and a statute author-

43. See infra text and notes 44–51.

44. See cases infra notes 45, 46.

Conditional tender see Tender [38 Cyc 152].

45. Coburn v. Hough, 32 Ill. 344; Lange v. Midwest Motor Securities Co., (Mo. A.) 231 SW 272; Persons v. Gardner, 122 App. Div. 167, 106 NYS 616; Thomas v. Cross, 7 Exch. 728, 155 Reprint 1142.

46. Jenkins v. National Mut. Bldg., etc., Assoc., 111 Ga. 732, 36 SE 945; Semms v. Barnett, (Mo. A.) 190 SW 394; Dunn v. Whalen, 120 App. Div. 729, 105 NYS 588; Grinnan v. Platt, 31 Barb. (N. Y.) 328; Kartinganer v. Cohn, 129 Misc. 910, 223 NYS 465; Thomas v. Cross, 7 Exch. 728, 155 Reprint 1142.

[a] **Acceptance of the condition may be implied** (1) from the conduct of the creditor (Jenkins v. National Mut. Bldg., etc., Assoc., 111 Ga. 732, 36 SE 945; Kartinganer v. Cohn, 129 Misc. 910, 223 NYS 465), (2) as where he retains a check marked "in full" for an unreasonable time (Kartinganer v. Cohn, supra), (3) or where he delays beyond a reasonable time to repudiate a payment made upon condition (Jenkins v. National Mut. Bldg., etc., Assoc., supra).

Payment offered upon condition as accord and satisfaction see Accord and Satisfaction §§ 83–89.

47. See cases infra note 48.

Bill or note as conditional payment see infra § 40.

Check as conditional payment see infra § 50.

48. Waite v. Vose, 62 Me. 184; Geiser v. Kershner, 4 Gill & J. (Md.) 305, 23 AmD 566; Torry v. Hadley, 27 Barb. (N. Y.) 192; Carrera v. Marrero, 27 Porto Rico 507. See also Perkins v. Hodge, 38 Iowa 284 (applying the principle).

[a] **If the condition is impossible of performance,** the debt cannot be discharged by such payment. Carrera v. Marrero, 27 Porto Rico 507.

Conditional acceptance as accord and satisfaction see Accord and Satisfaction § 90.

49. **Waiver generally** see Waiver [40 Cyc 252].

50. **Effective date of payment** see infra § 14.

51. Johnson v. Amarillo Impr. Co., 88 Tex. 505, 31 SW 503.

52. **Fraudulently procuring acceptance of worthless bill or note as payment** see infra § 43.

Recovery of payment wrongfully made or obtained see infra §§ 280–341.

53. Frank v. Thompson, 105 Ala. 211, 16 S 634.

[a] **Payment by administrator of personal debt from funds of estate.**— A creditor who has received property of the estate of a decedent from the administrator of the estate in payment of the administrator's personal debt cannot be heard to say his debt has not been paid; and an agreement entered into between him and the administrator for payment out of such property is binding upon both the administrator and the creditor. Frank v. Thompson, 105 Ala. 211, 16 S 634.

54. Rogers v. Gibbs, 25 La. Ann. 563.

[a] **Intercourse with enemy.**— Where a creditor's agent, who was resident within the Federal military lines during the Civil War, passed through the lines to a point within the Confederate lines, and there received payment, the creditor cannot invoke the illegality of its agent's acts in violating the nonintercourse laws, and thereby compel a second payment. Rogers v. Gibbs, 25 La. Ann. 563.

55. **Application of payments** see infra §§ 84–127.

56. Keller v. Cohen, 224 Pa. 434, 73 A 918.

57. William F. Mosser Co. v. Cherry River Boom, etc., Co., 290 Pa. 67, 138 A 85; Keller v. Cohen, 224 Pa. 434, 73 A 918.

58. William F. Mosser Co. v. Cherry River Boom, etc., Co., 290 Pa. 67, 138 A 85.

59. Voak v. National Inv. Co., 51 Minn. 450, 53 NW 708.

60. See case infra note 61.

Intention as element of payment see supra § 1.

61. Toll v. Hiller, 11 Paige (N. Y.) 228.

62. See infra § 41 text and note 62; and § 50 text and note 27.

Conditional payment generally see supra § 11.

63. **Of payment of particular classes of obligations and liabilities** see cross references ante p 584.

Of tender see Tender [38 Cyc 146].

What law governs form and medium of payment see infra § 16.

64. **Agreement or consent to pay other than in money** see infra § 39.

Waiver of right to demand payment in one medium by acceptance of another see infra § 66.

65. Ala.—J. F. Morgan Pav. Co. v. Carroll, 211 Ala. 121, 99 S 640; Williams v. Costello, 95 Ala. 592, 11 S 9.

Ga.—Blakely First Nat. Bank v. Davis, 135 Ga. 687, 70 SE 246, 36 LRA NS 134; Cole v. Bowersville Bank, 31 Ga. A. 435, 120 SE 790; Kerr v. Holder, 13 Ga. A. 9, 78 SE 682.

Ill.—Mead v. Chicago, etc., R. Co., 189 Ill. A. 323; Scott v. Gilkey, 49 Ill. A. 116 [aff 153 Ill. 168, 39 NE 265].

Ind.—Farmers L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 250, 26 NE 784, 11 LRA 740; Vansickle v. Furgeson, 122 Ind. 450, 23 NE 858; Johnson v. Roberts, 49 Ind. A. 697, 96 NE 1043; Johnson v. Spencer, 49 Ind. A. 166, 96 NE 1041.

Iowa.—Jasper County Sav. Bank v. Saheroff, 205 Iowa 774, 218 NW 486, 487 [cit Cyc]; National Sewer Pipe Co. v. Smith-Jaycox Lumber Co., 183 Iowa 17, 166 NW 708; State v. Chambers, 179 Iowa 436, 161 NW 470; Graydon v. Patterson, 13 Iowa 256, 81 AmD 432.

Ky.—Simons v. Douglas, 189 Ky. 644, 225 SW 721.

Mich.—State Bank v. Byrne, 97 Mich. 178, 56 NW 355, 37 AmSR 332, 21 LRA 753.

Mo.—Sutton v. Libby, (A.) 201 SW 615; McCormick v. Obanion, 168 Mo. A. 606, 153 SW 267. Compare Howe v. Mittelberg, 96 Mo. A. 490, 70 SW 396 (holding that the expression "payment of money or property" is inexact, because the word "payment" conveys the idea of a money transaction).

Mont.—Lappin v. Martin, 71 Mont. 233, 228 P 763.

N. D.—Busch v. Manahan, 56 N. D. 491, 217 NW 658; Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008.

Oh.—Bullock v. Horn, 44 Oh. St. 420, 7 NE 737.

Or.—Smith v. Mills, 112 Or. 496, 230 P 350; Anderson v. Wallowa Nat. Bank, 100 Or. 679, 198 P 560, 567 [quot Cyc].

Pa.—In re Maniatakis, 258 Pa. 11,

*By EUSTACE W. TOMLINSON (§§ 15–16).

izing payment to be made in another medium than money at the debtor's option has been held unconstitutional as an effort to make a debt dischargeable by something else than legal tender.[66]

[§ 16] **B. What Law Governs.**[67] In accordance with the general rules relating to the performance of contracts,[68] the form and medium of payment is governed by the law of the jurisdiction in which payment is to be made,[69] unless otherwise agreed, expressly or by implication.[70] Thus a contract or obligation for the payment of money, performable in a country other than that in which it is made, is payable in the lawful money of the foreign country,[71] except when a different money is specified by agreement.[72] Whether or not the acceptance of a

18, 101 A 920, LRA1918A 900 [cit Cyc].

S. C.—Brown v. Huskamp, 141 S. C. 121, 139 SE 181; Commercial Bank v. Bobo, 43 S. C. L. 31.

Tex.—Odle v. Barnes, (Civ. A.) 2 SW (2d) 577 [cert questions answered (Commn. A.) 299 SW 635].

Wash.—Van de Vanter v. Redelsheimer, 58 Wash. 38, 107 P 847.

[a] **"The rule** is that payment must be made in money unless a different medium of value or exchange is expressed." Van de Vater v. Redelsheimer, 58 Wash. 38, 40, 107 P 847.

[b] **An obligation for a specified amount in dollars and cents** is payable in money, and not by the delivery of property, in the absence of an expressed or implied agreement therefor. Simons v. Douglas, 189 Ky. 644, 225 SW 721. To same effect Kerr v. Holder, 13 Ga. A. 9, 78 SE 682.

[c] **Payment in money when medium contracted for is prohibited by statute.**—Where a railroad contracted for advertising, to be paid for in passenger transportation, and thereafter by statute the issuance of passenger tickets for advertising was prohibited, the contract price became payable in money. Mead v. Chicago, etc., R. Co., 189 Ill. A. 323.

Duty to collect in money of: Agent see Agency § 266. Attorney see Attorney and Client § 180.

Money generally see 40 C. J. p 1489.

Particular kinds of money see infra §§ 17–38.

66. Capital Grain, etc., Co. v. Federal Reserve Bank, 3 F. (2d) 614 [writ of error dism 269 U. S. 589 mem, 46 SCt 12 mem, 70 L. ed. 427 mem].

Legal tender see infra §§ 20–28.

67. As to usury see Usury [39 Cyc 891].

Payment of particular classes of obligations and liabilities see cross references ante p 584.

68. See Conflict of Laws § 31; Contracts § 19.

Payment as performance of contract or obligation see supra § 1.

69. The Quintero, 20 F. Cas. No. 11,517, 1 Lowell 38; York v. Wistar, 30 F. Cas. No. 18,141; Hall v. Clement, 41 N. H. 166; Taylor v. Booth, 1 C. & P. 286, 12 ECL 172, 171 Reprint 1198; Niagara Falls International Bridge Co. v. Great Western R. Co., 22 U. C. Q. B. (Ont.) 592; Crawford v. Beard, 14 U. C. C. P. (Ont.) 87; and cases infra note 70.

Form and medium of payment generally see supra § 15; and infra §§ 17–66.

Place of payment see supra §§ 8, 9.

What law governs payment of bills and notes see Bills and Notes § 183.

70. Quimby v. The Euphemia, 20 F. Cas. No. 11,512; Allen v. St. Leger, 19 OntWN 443; Morrell v. Ward, 10 Grant Ch. (Ont.) 231; Steine v. Courey, 61 Que. Super. 63.

[a] **Canadian mortgage payable in American money.**—Where a mortgage of land situate in Canada secures the payment of a specified sum in money of the United States, the holder seeking to foreclose the mortgage is entitled only to claim the agreed amount in the current money of the United States, or its equivalent. Morrell v. Ward, 10 Grant Ch. (Ont.) 231.

[b] **Usual custom of commerce.**—Where it is the usual custom of commerce that payment for goods purchased should be made in the currency of the country from which the goods are ordered, the purchase price of goods sold in Canada by the representative of a Swiss firm and shipped from Switzerland must be made in Swiss currency, or in the equivalent thereof in Canadian money. Steine v. Courey, 61 Que. Super. 63.

71. U. S.—Washburn-Crosby Co. v. Northern Pac. R. Co., 16 F. (2d) 76, 50 ALR 1268; Mountain Lumber Co. v. Davis, 9 F. (2d) 478 [aff 11 F. (2d) 219 (certiorari den 271 U. S. 674 mem, 46 SCt 488 mem, 70 L. ed. 1145 mem)]; New York, etc., Co. v. Davis, 8 F. (2d) 662. Compare Wormser v. Marroquin, 249 Fed. 428, 161 CCA 402 (holding that, where corn was purchased in Mexico, a partial payment of five hundred dollars must be deemed to have been made in Mexican dollars and not in American dollars, and therefore the buyer could be credited only with the value of such sum in Mexican money and not the value of that number of American dollars).

Mich.—Comstock v. Smith, 20 Mich. 338.

N. Y.—Stoker v. Cogswell, 25 How Pr 267.

Pa.—Pennsylvania R. Co. v. Cameron, 280 Pa. 458, 124 A 638, 33 ALR 1281.

N. S.—Schon v. New York L. Ins. Co., 55 N. S. 137, 63 DomLR 475.

Ont.—Crawford v. Beard, 14 U. C. C. P. 87.

Que.—Les Commissaires d'Ecole v. La Société des Artisans, 33 Que. K. B. 448.

[a] **Payment of freight charges on through shipment.**—(1) Where freight shipped from a point in Canada is carried by a Canadian carrier and thence by an American carrier to its destination in the United States at a through rate, and payment is to be made at the destination, the charges are payable in money of the United States. "Such payments, in my opinion, are controlled by the law of the place where the contract is to be performed, and any question with relation to the character of the money in which payment is made, if not specified, must be in the currency of the country where the payment is to be made or contract fulfilled, and that it was entered into in a foreign country does not alter the rule." New York, etc., Co. v. Davis, 8 F. (2d) 662, 663. To same effect Mountain Lumber Co. v. Davis, 9 F. (2d) 478 [aff 11 F. (2d) 219 (certiorari den 271 U. S. 674 mem, 46 SCt 488 mem, 70 L. ed. 1145 mem)]; Pennsylvania R. Co. v. Cameron, 280 Pa. 458, 124 A 638, 33 ALR 1281. (2) Freight charges generally see Carriers §§ 693–720.

[b] **Insurance policy.**—Under a statute providing that, where assured was a person domiciled in Nova Scotia and the policy has been delivered to him there, it shall be deemed to evidence a contract made in Nova Scotia, and all moneys payable under it shall be paid in lawful money of Canada, a policy of insurance on the life of a resident of Nova Scotia, made and, by its terms, payable in New York, must be paid in legal tender of Canada to an amount equivalent to the amount of the policy calculated in New York legal tender on the date of its maturity; and the effect of the statute is not to make the policy payable in the number of Canadian dollars specified by its terms instead of the equivalent in Canadian dollars of the number of American dollars so specified. Schon v. New York L. Ins. Co., 55 N. S. 137, 63 DomLR 475.

[c] **Creditor's option as to place of payment as affecting medium.**—(1) Railroads handling freight shipments between points in Canada and the United States, having the right to demand payment of charges either in advance or at the destination of the shipment, at a time when the rate of exchange of Canadian and American currency was fluctuating, could refuse prepayment of the charges upon a shipment from Canada to the United States and demand payment in the latter country, in which case it must be made in American money. Washburn-Crosby Co. v. Northern Pac. R. Co., 16 F. (2d) 76, 50 ALR 1268. (2) Where a bond for the payment of a sum specified in dollars, made at a time when Canadian and American dollars were of equal value, was payable either in Montreal or in New York at the holder's option, the holder demanding payment in New York had the right to receive American dollars to the number called for by the bond, although at the time of such payment American dollars were worth more than Canadian dollars. Les Commissaires d'Ecole v. La Société des Artisans, 33 Que. K. B. 448.

[d] **Mere fact that amount is specified in domestic money,** in a contract payable in a foreign country, does not give rise to an agreement that payment should be made in the domestic currency, and the debtor must pay in money of such foreign country and not at his option in domestic money. Pennsylvania R. Co. v. Cameron, 280 Pa. 458, 124 A 638, 33 ALR 1281.

72. Levy v. Cleveland, etc., R. Co., 210 App. Div. 422, 206 NYS 261. See also Les Commissaires d'Ecole v. La Société des Artisans, 33 Que. K. B. 448 (dictum).

[a] **Bond payable in francs at Paris or in Belgium or Switzerland.**—Where an American railway bond, the amount of which was specified in francs, was by its terms payable at Paris, or at the option of the holder in Belgium or Switzerland, the option of the holder to receive payment other than at Paris relates wholly to the place of payment, and does not affect the currency in which the bond is payable, the word "francs" being understood to refer to French money. Levy v. Cleveland, etc., R. Co., 210 App. Div. 422, 206 NYS 261.

[b] **Construction of agreement as to medium of payment.**—(1) In accordance with the rule that where the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended it at the time the promisee received it, a bond in the French language calling for the payment of a specified amount in francs at Paris or at the option of the holder in Belgium or Switzerland must be construed to be payable in French currency and not in the franc of Belgium or Switzerland. Levy v. Cleveland, etc., R. Co., 210 App. Div. 422, 206 NYS 261. (2) When an obligation to pay a sum of money is contracted in one country, but is to be executed in another, and those countries have money of the same denomination but of different value, it will be presumed that the parties intended money of the country where the obligation is payable; and ac-

particular medium operates as a payment, however, is determined by the law of the place where the transaction occurs.[73]

[§ 17] **C. Particular Kinds of Money*[74]—1. In General.** In the absence of any provision in the contract, or of any circumstances excluding it, contracts for the payment of money refer to the ordinary and usual currency in which business is transacted.[75] In such a case payment may be made in any legal tender.[76] A contract for the payment of a specified number of dollars will ordinarily be construed as payable only in lawful money of the United States,[77] unless otherwise provided by statute;[78] but where Confederate notes were current and constituted the principal currency at the time and place where the contract was made, it has been held that such currency should be deemed to have been referred to when dollars were mentioned, unless coin was specified.[79]

[§ 18] **2. Under Agreement—a. In General.** If a particular kind of currency is contracted for, payment can be made only in that currency,[80] except where the creditor consents to payment in a different medium.[81] If the obligation is to pay in such funds as the banks receive and pay out at the maturity of the debt, it is payable in such medium, although the loan was of another kind of currency.[82] If the obligation is payable in a certain kind of coin, the fact that such coin afterward ceases to be a legal tender is immaterial,[83] unless the intention of the parties is that the debt be payable in legal tender, in which case the intention controls.[84]

Interest is payable in the same kind of money as the principal.[85]

[§ 19] **b. Gold and Silver.** It is now well settled, since a decision of the federal supreme court,[86]

cordingly a bond payable in dollars either at Montreal or at New York at the holder's option must be deemed payable in American dollars if the holder demands payment in New York. Les Commissaires d'Ecole v. La Société des Artisans, 33 Que. K. B. 448 (per Tellier, J.).

73. Me.—Descadillas v. Harris, 8 Me. 298.

Mass.—American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526.

Minn.—Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 NW 1137, 38 AmSR 536.

N. H.—Gilman v. Stevens, 63 N. H. 342, 1 A 202; Pecker v. Kennison, 46 N. H. 488.

Vt.—Street v. Hall, 29 Vt. 165.

And see cases infra this note.

[a] **When the question arises in a federal court,** it is determined by the law of the state in which the transaction occurred. In re Wegman Piano Co., 221 Fed. 128; Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420; The Betsy and Rhoda, 3 F. Cas. No. 1,366, 2 Ware 117, 3 NYLegObs 215; The Chusan, 5 F. Cas. No. 2,717, 2 Story 455; Kimball v. Anna Kimball, 14 F. Cas. No. 7,772, 2 Cliff. 4 [aff 3 Wall. 37, 18 L. ed. 50]; Palmer v. Elliot, 18 F. Cas. No. 10,690, 1 Cliff. 63. See also Hudson v. Bradley, 12 F. Cas. No. 6,833, 2 Cliff. 130 (apparently applying the principle).

74. Definitions:
Currency 17 C. J. p 405.
Current Funds 17 C. J. p 409.
Current Money 17 C. J. p 409.
Dollar or Dollars 19 C. J. p 384.
Money 40 C. J. p 1489.
Specie [36 Cyc 525].

Judicial notice of facts in relation to circulating medium see Evidence § 1931.

75. U. S.—Howe v. Wade, 12 F. Cas. No. 6,777, 4 McLean 319.

Conn.—Burritt v. Lunny, 90 Conn. 491, 97 A 756.

Iowa.—Graydon v. Patterson, 13 Iowa 256, 81 AmD 432.

N. Y.—Fabbri v. Kalbfleisch, 52 N. Y. 28.

Tex.—Scruggs v. Woodley Lumber Co., (Civ. A.) 179 SW 897.

[a] **Form of currency not money.**—Payment should ordinarily be made in money or coin, and the creditor is not bound to accept anything but such money at its true value; and hence he is not obliged to accept a form of currency which is not money. Graydon v. Patterson, 13 Iowa 256, 81 AmD 432.

76. McInhill v. Odell, 62 Ill. 169; Wright v. Jacobs, 61 Mo. 19; O'Neil v. McKewn, 1 S. C. 147.

Judgment in action on contract containing no stipulation for payment in coin see Judgments § 140.

What constitutes legal tender see infra § 20.

77. U. S.—Cook v. Lillo, 103 U. S. 792, 26 L. ed. 460; Atlantic, etc., R. Co. v. Carolina Nat. Bank, 19 Wall. 548, 22 L. ed. 196; Thorington v. Smith, 8 Wall. 1, 19 L. ed. 361; Bank of New York v. Supervisors, 7 Wall. 26.

Ala.—Hightower v. Maull, 50 Ala. 495; Wilcoxen v. Reynolds, 46 Ala. 529; Hill v. Erwin, 44 Ala. 661 [overr Riddle v. Hill, 51 Ala. 224].

Ark.—Bone v. Torry, 16 Ark. 83.

Ky.—Hart v. Flynn, 8 Dana 190.

Md.—Taylor v. Turley, 33 Md. 500.

S. C.—Chalmers v. Jones, 23 S. C. 463.

Tex.—Taylor v. Bland, 60 Tex. 29; Miller v. Lacy, 33 Tex. 351.

Va.—Vick v. Howard, 136 Va. 101, 116 SE 465, 31 ALR 240; Hansbrough v. Utz, 75 Va. 959; Omohundro v. Crump, 18 Gratt. (59 Va.) 703.

W. Va.—Bierne v. Brown, 10 W. Va. 748.

[a] **Rule applied.**—(1) An obligation for so many dollars in gold and silver is an obligation for the direct payment of money and is not payable in bullion, spoons, rings, etc. Hart v. Flynn, 8 Dana (Ky.) 190. (2) A judgment for dollars was held in 1855 payable only in gold or silver, the constitutional coin. Bone v. Torry, 16 Ark. 83. (3) A bond given before 1862 payable in "dollars" generally could be paid in legal tender notes after 1862. Williamson v. Richardson, 30 F. Cas. No. 17,754. (4) An obligation payable in "dollars" generally could, after the passage of the legal tender acts, be discharged by treasury notes. Belloc v. Davis, 38 Cal. 242.

Presumptions as to medium of payment generally see infra § 225.

78. Walker v. Pierce, 21 Gratt. (62 Va.) 722.

79. Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275; Lester v. Union Mfg. Co., 1 Hun (N. Y.) 288, 3 Thomps. & C. 657.

80. U. S.—Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740; Bronson v. Rodes, 7 Wall. 229, 19 L. ed. 141; Deering v. Parker, 4 Dall. appendix xxiii, 1 L. ed. 925.

Cal.—Burnett v. Stearns, 33 Cal. 468; Meyer v. Kohn, 29 Cal. 278; Lane v. Gluckauf, 28 Cal. 288, 87 AmD 121.

Colo.—Hittson v. Davenport, 4 Colo. 169.

Ga.—Echols v. Grattan, 42 Ga. 547; Kaufman v. Myers, 38 Ga. 133.

Ill.—Belford v. Woodward, 158 Ill. 122, 41 NE 1097, 29 LRA 593; Rae v. Homestead Loan, etc., Co., 76 Ill. A. 548 [aff 178 Ill. 369, 53 NE 220]. Contra Reinback v. Crabtree, 77 Ill. 182 [disappr Belford v. Woodward, 158 Ill. 122, 41 NE 1097, 29 LRA 593].

Md.—Chesapeake Bank v. Swain, 29 Md. 483.

N. C.—Walkup v. Houston, 65 N. C. 501.

Oh.—Bohm v. Broadhagen, 2 Cinc. Super. 2.

Pa.—Frank v. Colhoun, 59 Pa. 381; Wharton v. Morris, 1 Dall. 125, 1 L. ed. 65; Milligan v. Marshall, 38 Pa. Super. 60; Morris v. Bancroft, 9 Phila. 277.

Tenn.—Wills v. Allison, 4 Heisk. 385.

Wash.—Dennis v. Moses, 18 Wash. 537, 52 P 333, 40 LRA 302.

Eng.—Macrae v. Goodman, 5 Moore P. C. 316, 13 Reprint 512.

Newfoundl.—Adams v. Harvey, 9 Newfoundl. 6 [aff 8 Newfoundl. 314]; Brooking v. Thomas, 4 Newfoundl. 1; Dunscomb v. Beck, 1 Newfoundl. 468; Bladeston v. Thomas, 1 Newfoundl. 334; Hany v. Gaden, 1 Newfoundl. 298.

See also Caldwell v. Craig, 22 Gratt. (63 Va.) 340 (construing a contract to pay in currency at specie value at maturity); and cases infra § 19.

[a] **Intent of parties.**—(1) The intent of the parties to a contract as to the medium of payment, where clearly expressed, should govern. Butler v. Horwitz, 7 Wall. (U. S.) 258, 19 L. ed. 149; Hood v. Olin, 68 Mich. 165, 36 NW 177. (2) The question whether a written contract, made at Ceylon, to pay "in cash" for goods deliverable at New York, means a payment in specie—gold or silver—is one of intention; but the intention is to be reached by the court from the terms of the contract, either as the words themselves import, or as they are explained by local custom or usage. Gladstone v. Chamberlain, 10 F. Cas. No. 5,469.

[b] **Illustrations of rule.**—An obligation payable in lawful current money of a particular state is payable in money issued under the authority of congress. Wharton v. Morris, 1 Dall. (Pa.) 125, 1 L. ed. 65.

[c] **Rule applied.**—A contract to pay in "sterling money of Great Britain" is not satisfied by payment in local sterling. Adams v. Harvey, 9 Newfoundl. 6 [aff 8 Newfoundl. 314].

[d] **In Porto Rico,** where by the terms of the contract a debt was payable in Spanish money, if it is not possible to pay in that medium, payment should be of its equivalent in the present currency of Porto Rico. Jones v. Caneja, 27 Porto Rico 237; Carmelite Nuns Convent v. Silva, 13 Porto Rico 144.

Negotiability of note payable in coin or particular kind of coin see Bills and Notes § 231.

81. See infra § 66.

82. Hilb v. Peyton, 21 Gratt. (62 Va.) 386.

83. Johnson v. Ash, 142 Pa. 45, 21 A 754, 12 LRA 219; Milligan v. Marshall, 38 Pa. Super. 60; Perot v. Eichholz, 19 Phila. (Pa.) 345.

84. Cook v. Lovett, 17 Pa. Dist. 347.

85. McCalla v. Ely, 64 Pa. 254.

86. Bronson v. Rodes, 7 Wall. (U. S.) 229, 19 L. ed. 141 [rev 34 N. Y. 649].

*By Felix C. Graber (§§ 17-38).

that a provision in a contract for payment in coin or a particular kind of coin is valid and enforceable,[87] and, although there is authority to the contrary,[88] this rule obtains, even though the contract was made after the passage of the legal tender acts of 1862.[89] The earlier decisions, however, generally held that payment could be made in any medium that was legal tender,[90] but this rule was not strictly applied in every case.[91]

Coin "or its equivalent." Where the agreement is to pay in coin or any particular coin "or its equivalent," it has been held that the payment must be made either in the particular coin or in other legal tender equal in value to such coin.[92] In other cases, however, the view has been taken that the contract is to pay a given number of dollars in any legal tender.[93]

[§ 20] **3. Legal Tender[94]—a. In General.** What coins and notes constitute legal tender, and in what amounts, is determined by federal statute.[95] The

87. U. S.—Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740; Trebilcock v. Wilson, 12 Wall. 687, 20 L. ed. 460; Dewing v. Sears, 11 Wall. 379, 20 L. ed. 189; Bronson v. Kimpton, 8 Wall. 444, 19 L. ed. 433; Butler v. Horwitz, 7 Wall. 258, 19 L. ed. 149; Gladstone v. Chamberlain, 10 F. Cas. No. 5,470, 7 Blatchf. 207, 10 F. Cas. No. 5,471.

Cal.—Winans v. Hassey, 48 Cal. 634. See also Perine Contracting, etc., Co. v. Quackenbush, 104 Cal. 684, 38 P 533 (holding that such a provision is not binding on one not a party to the contract).

Colo.—Hittson v. Davenport, 4 Colo. 169.

Fla.—Bowen v. Darby, 14 Fla. 202.

Ga.—Kaufman v. Myers, 38 Ga. 133.

Ida.—Emery v. Langley, 1 Ida 694.

Ill.—Dorr v. Hunter, 183 Ill. 432, 56 NE 159 [aff 83 Ill. A. 334]; Belford v. Woodward, 158 Ill. 122, 41 NE 1097, 29 LRA 593 [disappr Reinback v. Crabtree, 77 Ill. 182]; McGoon v. Shirk, 54 Ill. 408, 5 AmR 122; Rae v. Homestead Loan, etc., Co., 76 Ill. A. 548 [aff 178 Ill. 369, 53 NE 220].

Ind.—Churchman v. Martin, 54 Ind. 380.

Ky.—Hiatt v. Taylor, 7 Ky. Op. 672; Smith v. Smith, 4 Ky. Op. 543.

La.—Lafitte v. Rivera, 23 La. Ann. 32.

Mass.—Stark v. Coffin, 105 Mass. 328.

Mo.—State v. Hays, 50 Mo. 34, 11 AmR 402; Foster v. Atlantic, etc., R. Co., 1 Mo. A. 390.

Mont.—Knox v. Gerhauser, 8 Mont. 267.

Nev.—Jones v. Childs, 8 Nev. 121.

N. Y.—Chrysler v. Renois, 43 N. Y. 209; Gunther v. Colin, 3 Daly 125.

Oh.—Phillips v. Dugan, 21 Oh. St. 466, 8 AmR 66; Bohm v. Broadhagen, 2 Cinc. Super. 2.

Pa.—McCalla v. Ely, 64 Pa. 254; Rankin v. Demott, 61 Pa. 263; Frank v. Colhoun, 59 Pa. 381. But see Morris v. Bancroft, 9 Phila. 277 (holding that an obligation payable in "lawful silver money" of a given weight per dollar can be paid in gold coin).

S. C.—Bobo v. Goss, 1 S. C. 262.

Tenn.—Wills v. Allison, 4 Heisk. 385.

Tex.—Smith v. Wood, 37 Tex. 616.

Wash.—Dennis v. Moses, 18 Wash. 537, 52 P 333, 40 LRA 302.

[a] **In Alabama** (1) the rule of the text was followed in a few cases soon after it was pronounced by the United States supreme court. Russell v. McCormick, 45 Ala. 587, 6 AmR 707; Holt v. Given, 43 Ala. 612; Chisholm v. Arrington, 43 Ala. 610. (2) But later cases have reverted to the old rule. Brassell v. McLemore, 50 Ala. 476; Munter v. Rogers, 50 Ala. 283.

[b] **Rule applied** to an award of the attorney-general against the United States. Tyers v. U. S., 5 Ct. Cl. 509.

[c] **Mortgage** stipulating for payment of the debt secured thereby in gold coin of the United States of the existing standard of weight and fineness is valid, and may be enforced in the courts without violating any principle of law or public policy, although legal tender notes and silver may be in circulation. Dorr v. Hunter, 183 Ill. 432, 56 NE 159; Rae v. Homestead Loan, etc., Co., 178 Ill. 369, 53 NE 220; Belford v. Woodward, 158 Ill. 122, 41 NE 1097, 29 LRA 593.

[d] **Implied agreements.**—Since the legal tender acts, an undertaking to pay in gold may be implied under special circumstances and be as obligatory as if made in express words, but the implication must be found in the language of the contract, and cannot be gathered from the mere expectations of the parties. Maryland v. Baltimore, etc., R. Co., 22 Wall. (U. S.) 105, 22 L. ed. 713 [foll Woodruff v. Mississippi, 162 U. S. 291, 16 SCt 820, 40 L. ed. 973]. See also Gladstone v. Chamberlain, 10 F. Cas. No. 5,470, 7 Blatchf. 207 (agreement implied from the circumstances which led to the contract and under which it was made, and from the terms of the contract).

[e] **Specie as equivalent to gold and silver.**—A note expressed to be payable in specie is equivalent to a note expressed to be payable in gold or silver dollars, within the rule that such contract may be enforced by payment in coin. Trebilcock v. Wilson, 12 Wall. (U. S.) 687, 20 L. ed. 460.

[f] **Payment of dividends in gold.**—Although an insurance company agrees to pay any loss in gold, it is not bound, in the absence of any provision to that effect, to pay dividends declared upon such policies in gold. Luling v. Atlantic Mut. Ins. Co., 51 N. Y. 207 [aff 50 Barb. 520 (rev 45 Barb. 510)].

[g] **What constitutes agreement to pay in gold.**—An obligation to pay "for value received in American gold" is not specifically payable in "American gold." Hull v. Kohlsaat, 36 Ill. 130.

Judgment in action on contract to pay in coin see Judgments §§ 141, 142.

Power of town council to provide that municipal bonds shall be payable in gold see Municipal Corporations § 4201.

88. Van Alstyne v. Sorley, 32 Tex. 518.

89. The Edith, 8 F. Cas. No. 4,281, 5 Ben. 144; The Emily B. Souder, 8 F. Cas. No. 4,456, 8 Blatchf. 337 [aff 17 Wall. 666, 21 L. ed. 683].

90. U. S.—Baker v. Ward, 2 F. Cas. No. 785, 3 Ben. 499.

Ala.—Spear v. Alexander, 42 Ala. 572.

Ind.—Brown v. Welch, 26 Ind. 116.

Iowa.—Warnibold v. Schlicting, 16 Iowa 243.

Ky.—Riley v. Sharp, 1 Bush 348.

La.—Jump v. Peltier, 18 La. Ann. 193.

Mich.—Buchegger v. Shultz, 13 Mich. 420.

Mo.—Appel v. Woltmann, 38 Mo. 194; Henderson v. McPike, 35 Mo. 255.

Nev.—Hastings v. Johnson, 2 Nev. 190.

N. Y.—Rodes v. Bronson, 34 N. Y. 649 [rev 7 Wall. (U. S.) 229, 19 L. ed. 141]; Murray v. Gale, 52 Barb. 427, 5 AbbPrNS 236; Kimpton v. Bronson, 45 Barb. 618 [aff 34 HowPr 630 (rev 8 Wall. (U. S.) 444, 19 L. ed. 433)]; Wilson v. Morgan, 27 N. Y. Super. 58, 1 AbbPrNS 174, 30 HowPr 386.

Pa.—Laughlin v. Harvey, 52 Pa. 30; Graham v. Marshall, 52 Pa. 28; Sandford v. Hays, 52 Pa. 26; Mervine v. Sailor, 52 Pa. 18 [aff 5 Phila. 422]; Shollenberger v. Brinton, 52 Pa. 9; In re Jefferson Medical College's Pet., 6 Phila. 313.

S. C.—Gist v. Alexander, 49 S. C. L. 50.

Tex.—Flournoy v. Healy, 31 Tex. 590; Shaw v. Trunsler, 30 Tex. 390.

Wis.—Warner v. Sauk County Bank, 20 Wis. 492.

91. Otis v. Haseltine, 27 Cal. 80; Galland v. Lewis, 26 Cal. 46; Myers v. Kaufman, 37 Ga. 600, 95 AmD 367; Prince Edward's Island Bank v. Trumbull, 53 Barb. (N. Y.) 459, 4 AbbPrNS 82, 35 HowPr 8; Kinike v. Matthews, 6 Phila. (Pa.) 107. And see cases infra this note.

[a] **For example:** (1) In cases based on the theory that the particular contract was one for the delivery of a commodity in payment. Sears v. Dewing, 14 Allen (Mass.) 413 [rev 11 Wall. (U. S.) 379, 20 L. ed. 189]; Murray v. Harrison, 47 Barb. (N. Y.) 484, 33 HowPr 90 [aff 52 Barb. 427, 5 AbbPrNS 236]; Christ Church Hospital v. Fuechsel, 54 Pa. 71; Dutton v. Pallaret, 52 Pa. 109, 91 AmD 135; Hill v. Trustee, 7 Phila. (Pa.) 28. (2) In cases decided on the ground that the provision in the contract was for a return of the particular coin loaned, as distinguished from a debt. Commonwealth Bank v. Van Vleck, 49 Barb. (N. Y.) 508.

[b] **Specific performance** of contracts payable in coin was enforced in equity. Carpentier v. Atherton, 25 Cal. 564; Hall v. Hiles, 2 Bush (Ky.) 532; Hord v. Miller, 2 Duv. (Ky.) 103 (enforcement in equity); Woodson v. Mitchell, 1 Ky. Op. 568.

[c] **Special deposit of coin.**—Where coins were specially deposited to be redelivered on demand, refusal to redeliver the coins was treated as a conversion and evidence of their value was admissible. State Bank v. Burton, 27 Ind. 426.

92. Ala.—Holt v. Given, 43 Ala. 612; Chisholm v. Arrington, 43 Ala. 610.

Nev.—Wells v. Van Sickle, 6 Nev. 45.

N. C.—Mitchell v. Henderson, 63 N. C. 643.

Pa.—Baker's App., 59 Pa. 313.

Tenn.—Bond v. Greenwald, 4 Heisk. 453.

Tex.—Bridges v. Reynolds, 40 Tex. 204.

See also Trigg v. Drew, 10 How. (U. S.) 224, 13 L. ed. 397; Paup v. Drew, 10 How. (U. S.) 218, 13 L. ed. 394 (both holding that the fact that bonds were payable "in specie or its equivalent" shows that it was the understanding of both parties that currency less valuable than specie should not be received in payment).

Judgment in action on contract to pay in coin or equivalent currency see Judgments § 143.

93. Reese v. Stearns, 29 Cal. 273; Jones v. Smith, 48 Barb. (N. Y.) 552. See Killough v. Alford, 32 Tex. 457, 5 AmR 249 (where contract provides for payment in gold coin "or its equivalent in legal tender notes," the debt may be discharged by the payment of the number of dollars stated in legal tender notes).

94. Tender generally see Tender [38 Cyc 127].

Bank paper as legal tender see infra § 29.

Treasury and legal tender notes as legal tender see infra § 25.

95. Vick v. Howard, 136 Va. 101, 116 SE 465, 31 ALR 240. See U. S. Code tit 31 §§ 451–461.

term "legal tender" is not synonymous with "good and lawful money of the United States,"[96] and the fact that the treasury department would redeem a mutilated coin[97] or note[98] is not conclusive that it is legal tender.

[§ 21] **b. Particular Kinds of Tender—(1) Domestic Money—(a) Gold Coins.** Gold coins of the United States are legal tender in this country in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece,[99] and when reduced in weight below such standard and tolerance are legal tender at a valuation proportionate to their actual weight.[1]

[§ 22] **(b) Silver Coins—aa. In General.** A silver dollar is legal tender for its nominal value on debts of any amount.[2] Fractional silver currency was formerly, under a federal statute,[3] legal tender to any amount,[4] but now it is a valid tender only for a limited sum.[5]

[§ 23] **bb. Old, Worn, or Mutilated Coins.** A genuine silver coin of the United States, even though it is old, somewhat rare, and differing in appearance from other coins of this government of like denomination, is legal tender.[6] Silver coins worn smooth by use but not appreciably diminished in weight, and still distinguishable, do not lose their character as legal tender.[7]

[§ 24] **(c) Gold and Silver Certificates.** Gold certificates of the United States are legal tender in this country,[8] but silver certificates are not.[9]

[§ 25] **(d) Treasury and Legal Tender Notes.** At an early day payment in paper money was sufficient, in the absence of any agreement as to the medium of payment,[10] and by the federal statutes of 1814 treasury notes were made legal tender to a very limited extent.[11] Subsequently, however, and before the passage of the legal tender acts of 1862, only gold or silver coin was legal tender in payment of private debts,[12] but since that time treasury notes, commonly called "greenbacks," are legal tender in payment of all debts,[13] even as to contracts entered into, or debts due, before the passage of such statute,[14] provided there was no stipulation in the con-

96. Raine v. State, 143 Tenn. 168, 226 SW 189.

97. Cincinnati Northern Tract. Co. v. Rosnagle, 84 Oh. St. 310, 95 NE 884, 35 LRANS 1030, AnnCas1912C 639.

98. North Hudson County R. Co. v. Anderson, 61 N. J. L. 248, 39 A 905, 68 AmSR 703, 40 LRA 410.

[a] **Rule applied.**—A one dollar note from the corner of which a piece one inch and a quarter by one inch and a half had been torn is not legal tender. North Hudson County R. Co. v. Anderson, 61 N. J. L. 248, 39 A 905, 68 AmSR 703, 40 LRA 410.

99. Jersey City, etc., R. Co. v. Morgan, 160 U. S. 288, 16 SCt 276, 40 L. ed. 430 [quot Rev. St. § 3585].

1. Jersey City, etc., R. Co. v. Morgan, supra; U. S. v. Lissner, 12 Fed. 840 [cit Rev. St. § 3585].

2. State Bank v. Lockwood, 16 Ind. 306. And see U. S. Code tit 31 § 458.

3. Act Congr. Jan. 18, 1837; Dunlop L. U. S. § 9 p 916.

4. Peo. v. Dubois, 18 Ill. 333; State Bank v. Lockwood, 16 Ind. 306; Parrish v. Kohler, 11 Phila. (Pa.) 346.

5. State Bank v. Lockwood, 16 Ind. 306. And see U. S. Code tit 31 § 459.

6. Atlanta Cons. St. R. Co. v. Keeny, 99 Ga. 266, 25 SE 629, 33 LRA 824.

7. Mobile St. R. Co. v. Watters, 135 Ala. 227, 33 S 42; Jersey City, etc., R. Co. v. Morgan, 52 N. J. L. 60, 18 A 904 [aff 52 N. J. L. 558, 21 A 783]; Cincinnati Northern Tract. Co. v. Rosnagle, 84 Oh. St. 310, 95 NE 884, 35 LRANS 1030, AnnCas1912C 639.

[a] **Bruised or cracked coin.**—A coin issued by authority of law to circulate as money is not deprived of its legal tender quality merely by being worn in the process of circulation, or when bruised or cracked, so long as it is not appreciably diminished in weight, and retains the evidence of its being genuine. Cincinnati Northern Tract. Co. v. Rosnagle, 84 Oh. St. 310, 95 NE 884, 35 LRANS 1030, AnnCas1912C 639.

8. Vick v. Howard, 136 Va. 101, 116 SE 465, 31 ALR 240.

9. Vick v. Howard, supra.

10. Pryor v. Adams, 1 Call (5 Va.) 382, 1 AmD 533; Wilson v. Keeling, 1 Wash. (1 Va.) 194.

11. Thorndike v. U. S., 23 F. Cas. No. 13,987, 2 Mason 1.

12. U. S.—Gwin v. Breedlove, 2 How. 29, 11 L. ed. 167.

Ark.—Randolph v. Ringgold, 10 Ark. 279, 52 AmD 235.

Conn.—Foquet v. Hoadley, 3 Conn. 534.

Me.—Lord v. Burbank, 18 Me. 178.

Miss.—Gasquet v. Warren, 10 Miss. 214.

Mo.—Smith v. Reserve Loan L. Ins. Co., 267 Mo. 342, 350, 184 SW 464 [cit Cyc].

13. U. S.—Juilliard v. Greenman, 110 U. S. 421, 4 SCt 122, 28 L. ed. 204; Savage v. U. S., 8 Ct. Cl. 545.

Cal.—Langenberger v. Kroeger, 48 Cal. 147, 17 AmR 418; Tarbell v. Central Pac. R. Co., 34 Cal. 616; Higgins v. Bear River, etc., Water, etc., Co., 27 Cal. 153; Peo. v. Mayhew, 26 Cal. 655; Curiac v. Abadie, 25 Cal. 502.

Ill.—Whetstone v. Colley, 36 Ill. 328.

Ind.—Bowen v. Clark, 46 Ind. 405; Martin v. Bott, 17 Ind. A. 444, 46 NE 151.

Md.—Baltimore, etc., R. Co. v. State, 36 Md. 519.

Mass.—Cary v. Courtenay, 103 Mass. 316, 4 AmR 559.

Mich.—Buchegger v. Shultz, 13 Mich. 420.

Miss.—Carter v. Cox, 44 Miss. 148.

Mo.—Verges v. Giboney, 38 Mo. 458.

N. Y.—Lewis v. New York Cent. R. Co., 49 Barb. 330.

Oh.—Longworth v. Mitchell, 26 Oh. St. 334.

Pa.—Kroener v. Colhoun, 52 Pa. 24; Davis v. Burton, 52 Pa. 22.

Tex.—Central R. Co. v. George, 32 Tex. 568.

Va.—Sanders v. Branson, 22 Gratt. (63 Va.) 364.

[a] **Bank deposit.**—The legal tender acts apply to ordinary bank deposits, so that a bank may pay in treasury notes, although the deposit was made in gold and before the passage of the legal tender statutes. Thompson v. Riggs, 6 D. C. 99.

[b] **Reissuance of legal tender notes.**—Under the federal statutes of 1878 providing that legal tender notes issued during the War of the Rebellion and since the close of the war redeemed and paid in gold coin at the treasury shall be reissued and kept in circulation, such notes, when so reissued, are legal tender. Juilliard v. Greenman, 110 U. S. 421, 4 SCt 122, 28 L. ed. 204.

[c] **What constitutes debt within legal tender acts.**—(1) "We think the term 'debt' employed in the [Legal Tender] Act of Congress is not limited to a demand, for which a personal liability exists against the party offering or making the payment, but that it comprehends, also, all liens, claims and charges upon property for the payment of money." Peo. v Mayhew, 26 Cal. 655, 661. (2) The obligation to pay the condition of a mortgage bond is a debt. Dutton v. Pallaret, 52 Pa. 109, 91 AmD 135. (3) The liability to pay the principal sum under a covenant to pay ground rent or such principal sum is a debt. Shollenberger v. Brinton, 52 Pa. 9. (4) The fare of a passenger on a railroad train is a debt within the act. Lewis v. New York Cent. R. Co., 49 Barb. (N. Y.) 330. (5) The obligation to pay freight is a debt. Wilson v. Morgan, 27 N. Y. Super. 58, 1 AbbPrNS 174, 30 HowPr 386. (6) A judgment for taxes which is both a personal judgment against the taxpayer and a judgment in rem against his real estate is a debt within the act. Rhodes v. O'Farrell, 2 Nev. 60. (7) But taxes are not debts within the legal tender acts. Perry v. Washburn, 20 Cal. 318. See also Rhodes v. O'Farrell, supra (dictum to same effect per Brosnan, J.; contrary dictum per Beatty, J.). (8) A claim for damages is not a debt within the federal legal tender acts so as to invalidate a state statute making a judgment a claim for damages payable in gold coin. Clark v. Nevada Land, etc., Co., 6 Nev. 203. (9) What constitutes debt generally see Debt 17 C. J. p 1371.

Constitutional and statutory provisions see infra § 28.

14. U. S.—Norwich, etc., R. Co. v. Johnson, 15 Wall. 195, 21 L. ed. 178; Bigler v. Waller, 14 Wall. 297, 20 L. ed. 891; Dooley v. Smith, 13 Wall. 604, 20 L. ed. 547; Knox v. Lee, 12 Wall. 457, 20 L. ed. 287 [overr Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513]; Williamson v. Richardson, 30 F. Cas. No. 17,754.

Ala.—McElderry v. Jones, 67 Ala. 203.

Cal.—Peo. v. Cook, 44 Cal. 638; Belloc v. Davis, 38 Cal. 242; Poett v. Stearns, 31 Cal. 78; Lane v. Gluckauf, 28 Cal. 288, 87 AmD 121; Higgins v. Bear River, etc., Water, etc., Co., 27 Cal. 153.

Md.—Baltimore etc., R. Co. v. State, 36 Md. 519.

Miss.—Barringer v. Fisher, 45 Miss. 200.

Mo.—Verges v. Giboney, 38 Mo. 458.

N. J.—Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56 [overr Martin v. Martin, 20 N. J. Eq. 421].

Oh.—Longworth v. Mitchell, 26 Oh. St. 334.

Pa.—Aurentz v. Porter, 56 Pa. 115; Hepburn v. Watts, 28 LegInt 333; Mills v. Cook, 19 PittsbLegJ 61.

S. C.—ONeil v. McKewn, 1 S. C. 147.

[a] **Early contrary decisions.**—(1) The first case on this point in the federal supreme court after the passage of the legal tender acts held that contracts for the payment of money made before the acts could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513. (2) Shortly thereafter this decision was overruled by another in the same court. Knox v. Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287. (3) In the mean-

tract to the contrary.[15] Such notes are also a legal standard of the value of property, or for the estimation of damages for breach of contracts.[16]

[§ 26] **(2) Foreign Money.** Foreign gold or silver coins are no longer legal tender for the payment of debts in the United States,[17] although formerly, under an act of congress,[18] they were.[19]

[§ 27] **(3) Gold Dust.** Gold dust is not legal tender;[20] nor is it cash within the meaning of a contract specifying that payment shall be made in cash.[21]

[§ 28] **c. Constitutional and Statutory Provisions.** The constitutionality of the federal statutes of 1862 and the subsequent enactments making treasury notes legal tender, in addition to gold and silver, is well settled,[22] whether applied to debts contracted before or after the passage of the statute.[23]

State statutes cannot interfere with the federal constitution and statutes by authorizing as legal tender currency other than that provided for by the federal constitution and statutes,[24] but such an act requiring bank bills to be received in payment of judgments rendered in favor of banks,[25] or directing what shall be received as payment of a debt due a public corporation created for public purposes,[26] is not unconstitutional. A state statute providing that contracts for specific kinds of money may be enforced is constitutional,[27] while a state statute providing that such a provision is of no effect is unconstitutional.[28]

[§ 29] **4. Bank Paper[29]—a. In General.** In the absence of a statute providing therefor, bank notes, while often considered as money in ordinary business transactions,[30] are not legal tender,[31] although one who accepts bank notes without objecting to them on that ground cannot thereafter raise the objection;[32] but payment in bank paper may be authorized by the terms of the contract,[33] or by statute or executive order.[34] Where the agreement is

time, however, cases decided in state courts followed the doctrine of the Hepburn case. Chamblin v. Blair, 58 Ill. 385; Morrow v. Rainey, 58 Ill. 357; Walker v. Hesle, 1 Ky. Op. 331; McCallister v. Beattie, 1 Ky. Op. 7; Martin v. Martin, 20 N. J. Eq. 421; Ransford v. Marvin, 8, AbbPrNS (N. Y.) 432; Harrell v. Barnes, 34 Tex. 413. (4) But such decisions, it has been said, were rendered nugatory when the Hepburn case on which they were based was overruled. Belford v. Woodward, 158 Ill. 122, 41 NE 1097, 29 LRA 593.

15. See supra § 19.

16. Carter v. Cox, 44 Miss. 148.

17. Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482.

18. Act April 10, 1806 (2 U. S. St. at L. 374, c 22) repealed by Act Febr. 21, 1857 (11 U. S. St. at L. 163, c 56).

19. Stringer v. Coombs, 62 Me. 160, 16 AmR 414.

20. McCune v. Erfort, 43 Mo. 134.

21. Gunter v. Sanchez, 1 Cal. 45.

22. U. S.—Juilliard v. Greenman, 110 U. S. 421, 4 SCt 122, 28 L. ed. 204; Norwich, etc., R. Co. v. Johnson, 15 Wall. 195, 21 L. ed. 178; Bigler v. Waller, 14 Wall. 297, 20 L. ed. 891; Knox v. Lee, 12 Wall. 457, 20 L. ed. 287 [overr Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513 (aff 2 Duv. (Ky.) 20)]; Williamson v. Richardson, 30 F. Cas. No. 17,754.

Cal.—Belloc v. Davis, 38 Cal. 242; Kierski v. Mathews. 25 Cal. 591; Curiac v. Abadie. 25 Cal. 502; Lick v. Faulkner. 25 Cal. 404.

Ind.—Brown v. Welch, 26 Ind. 116.

Iowa.—Hintrager v. Bates, 18 Iowa 174.

Minn.—Breen v. Dewey, 16 Minn. 136.

Mo.—Verges v. Giboney, 38 Mo. 458.

Nev.—Milliken. v. Sloat, 1 Nev. 573; Maynard v. Newman, 1 Nev. 271.

N. Y.—Metropolitan Bank v. Van Dyck, 27 N. Y. 400; Rice v. Ontario Steamboat Co., 56 Barb. 384; Prince Edward's Island Bank v. Trumbull, 53 Barb. 459, 4 AbbPrNS 82, 35 HowPr 8; Murray v. Gale, 52 Barb. 427, 5 AbbPrNS 236; Lewis v. New York Cent. R. Co., 49 Barb. 330; Kimpton v. Bronson, 45 Barb. 618 [aff 34 How Pr 630 (rev on other grounds 8 Wall. (U. S.) 444, 19 L. ed. 433)]; Hague v. Powers, 39 Barb. 427, 25 HowPr 17; Wilson v. Morgan, 27 N. Y. Super. 58. 1 AbbPrNS 174, 30 HowPr 386. But see Ransford v. Marvin, 8 AbbPrNS 432 (holding acts unconstitutional so far as they relate to payment of debts contracted before their passage).

Pa.—Shollenberger v. Brinton, 52 Pa. 9; Borie v. Trott, 5 Phila. 366; Crocker v. Wolford, 5 Phila. 340, 2 Pittsb. 453.

S. C.—O'Neil v. McKewn, 1 S. C. 147.

Tenn.—Johnson v. Ivey, 4 Coldw. 608, 94 AmD 206.

Vt.—Carpenter v. Northfield Bank, 39 Vt. 46.

Wis.—Breitenbach v. Turner, 18 Wis. 140.

23. Black v. Lusk, 69 Ill. 70; O'Neil v. McKewn, 1 S. C. 147.

24. Capital Grain, etc., Co. v. Federal Reserve Bank, 3 F. (2d) 614 [writ of error dism 269 U. S. 589 mem, 46 SCt 12 mem, 70 L. ed. 427 mem]; Peay v. Ramsey, 21 Ark. 91; Lowry v. McGhee, 8 Yerg. (Tenn.) 242. See also Fall River v. Public Serv. Comrs., 232 Mass. 329, 122 NE 406 (holding that an order of the public service commission, fixing street railway fares in the city, which does not attempt to make anything else than money of the United States legal tender, but merely requires issuance of not less than five tickets for thirty-five cents as the sole means whereby the public can avail itself of seven-cent fare, ten cents being required otherwise, involves no federal question).

[a] **Statute held unconstitutional.**—Act Sept. 30, 1920 (Ala. Acts [1920] p 36), providing that, when a check is presented or forwarded to the payee bank for payment through another bank or agency, it may at its option pay or remit the same in money or in exchange drawn on its reserve agent, is unconstitutional and void as an attempt by the state to make a class of debts payable at the option of the debtor in something other than gold or silver coin. Capital Grain, etc., Co. v. Federal Reserve Bank, 3 F. (2d) 614 [writ of error dism 269 U. S. 589 mem, 46 SCt 12 mem, 70 L. ed. 427 mem].

25. Charlotte Bank v. Hart, 67 N. C. 264.

26. Fagan v. Stillwell, 19 Ark. 282; Keyes v. Jasper, 5 Ill. 305; Bush v. Shipman, 5 Ill. 186.

[a] **Rule applied** to payment of a debt due: (1) The school fund of a township. Keyes v. Jasper, 5 Ill. 305; Bush v. Shipman, 5 Ill. 186. (2) The bank of the state of Arkansas. Fagan v. Stillwell, 19 Ark. 282.

27. Burnett v. Stearns, 33 Cal. 468; Carpentier v. Atherton, 25 Cal. 564; Linn v. Minor, 4 Nev. 462 [overr Mitchell v. Bromberger, 1 Nev. 604; Milliken v. Sloat, 1 Nev. 573].

28. Dennis v. Moses, 18 Wash. 537, 52 P 333, 40 LRA 302.

29. Definitions:
Bank bill see Bank Note 6 C. J. p 1183.
Bank money see 6 C. J. p 1183.
Bank note see 6 C. J. p 1183.
Bank paper see 6 C. J. p 1188.
Negotiability of note payable in bank notes see Bills and Notes § 230.

30. See Bank Note 6 C. J. p 1185; Bank Paper 6 C. J. p 1188.

31. Conn.—Foquet v. Hoadley, 3 Conn. 534.

Del.—Corbit v. Smyrna Bank, 2 Del. 235, 30 AmD 635.

Ind.—Prather v. State Bank, 3 Ind. 356; Chicago, etc., R. Co. v. Patterson, 26 Ind. A. 295, 59 NE 688; Martin v. Bott, 17 Ind. A. 444, 46 NE 151.

Ky.—Sibert v. Kelly, 6 T. B. Mon. 669.

La.—MacLeod v. Hoover, 159 La. 244, 105 S 305.

Miss.—Bull v. Harrell, 8 Miss. 9.

N. H.—Moody v. Mahurin, 4 N. H. 296.

N. J.—Coxe v. State Bank, 8 N. J. L. 172, 14 AmD 417.

N. C.—Gaylord v. McCoy, 161 N. C. 685, 77 SE 959; Donaldson v. Benton, 20 N. C. 572.

Oh.—Howe v. Hartness, 11 Oh. St. 449, 78 AmD 312; Swetland v. Creigh, 15 Oh. 118.

R. I.—Lawrence v. Staigg, 10 R. I. 581.

Tenn.—Lowry v. McGhee, 8 Yerg. 242.

Va.—Vick v. Howard, 136 Va. 101, 116 SE 465, 31 ALR 240.

Eng.—Grigby v. Oakes, 2 B. & P. 526, 126 Reprint 1420; Wright v. Reed, 3 T. R. 554, 100 Reprint 729.

32. See Tender [38 Cyc 146].

33. U. S.—Robinson v. Noble, 8 Pet. 181, 8 L. ed. 910.

Ala.—Wilson v. Jones, 8 Ala. 536.

Ark.—Dillard v. Evans, 4 Ark. 175.

Ky.—Hay v. McKinney, 7 J. J. Marsh. 441; Speak v. Warner, 5 J. J. Marsh. 68; Chambers v. George, 5 Litt. 335.

N. C.—Gardner v. Hall, 61 N. C. 21.

[a] **Effect of mistake in contract.**—Where an agreement is by mistake written for the payment of money, instead of commonwealth bank notes, the creditor cannot insist on the paper, but the specie value of the paper when due, with interest, is the amount of his demand. Davis v. Phelps, 7 T. B. Mon. (Ky.) 632.

[b] **Measure of damages for failure to pay.**—Where a shipping contract provided that the carrier's compensation should be paid in notes of a certain banking company, payment to be made at a certain time and place, the measure of damages for the shipper's breach of the contract was the specie value of the notes at the place of payment at the time they should have been paid. Robinson v. Noble, 8 Pet. (U. S.) 181, 8 L. ed. 910.

[c] **"Alabama bank or branch notes."**—A promise to pay a sum of money in Alabama bank or branch notes is a promise to pay in the bank notes of the Bank of the state of Alabama or its branches. Wilson v. Jones, 8 Ala. 536.

34. Woodruff v. Trapnall, 10 How.

to pay in current bank notes, it means such as are current without discount in ordinary business at the time the debt becomes due.[35] If the creditor consents to receive certain bank paper as payment the debt is satisfied,[36] but consent will not be implied from mere delay in returning rejected bank notes where the creditor immediately notified the debtor of his refusal to accept them.[37] Payment made in bank bills and accepted is a good payment at their nominal par value.[38]

[§ 30] **b. Validity of Paper and Failure of Bank.** A debtor paying in bank notes impliedly warrants that they are current and will pass readily in mercantile and business transactions as money.[39] Accordingly, it has been held in some jurisdictions that payment in the bills of a bank which has failed is insufficient,[40] although neither the debtor nor the creditor knew of the failure.[41] Other courts, however, hold such a payment sufficient,[42] and in these jurisdictions it cannot be avoided by presentment of the note to the issuing bank and demand for payment with notice to the payor of the bank's refusal to pay.[43] Where such payment is held insufficient, the bills received must be returned within a reasonable time after the creditor discovers that they are valueless, to enable him to recover upon the original debt.[44] If, however, the payor, upon being seasonably notified of the failure of the bank, refuses to accept the bills, a delay in returning them is excusable.[45]

Antecedent and contemporaneous debts. As in the case of commercial paper,[46] a distinction has been made by some courts between bank notes given in payment of antecedent debts and those given in payment of contemporaneous debts.[47] In the latter circumstances, it has been said, the notes operate as payment, and the risk of the solvency of the maker of the note is on the receiver,[48] whereas in the former case they are not payment, and the risk is upon the person paying.[49] The applicability of this rule to bank paper has, however, been denied.[50]

[§ 31] **5. Counterfeit Money.** There is an implied warranty that money paid is genuine,[51] and an attempted payment in counterfeit money is a nullity,[52] even though the person paying was ignorant of the fact that it was counterfeit.[53] Unless he has

(U. S.) 190, 13 L. ed. 383; Danley v. Pike, 15 Ark. 141; Hamilton v. Cook County, 5 Ill. 519; Keyes v. Jasper, 5 Ill. 305; Bush v. Shipman, 5 Ill. 186; Townsend v. Burgher, 7 T. B. Mon. (Ky.) 224.

Constitutionality of state statute see supra § 28.

35. Pierson v. Wallace, 7 Ark. 282; Ayres v. Hayes, 13 Mo. 252. But see Bizzell v. Brewer, 9 Ark. 58, 60 (holding that a bond for one hundred and fifty dollars "to be paid in any current notes of the Bank of the State of Arkansas" is payable in the notes of such bank at their nominal value, regardless of their depreciation).

36. Dakin v. Anderson, 18 Ind. 52; Crockett v. Alexander, 5 Heisk. (Tenn.) 106; Rogers v. Leftwich, 2 Heisk. (Tenn.) 480; Wood v. Cooper, 2 Heisk. (Tenn.) 441.

37. Prather v. State Bank, 3 Ind. 356.

[a] **For example,** where the debtor's agent sent to his creditor certain bank notes to be accepted at par in payment, but gave no direction as to what was to be done in case of refusal to accept, and the creditor refused to accept them at par, immediately notifying the agent thereof and requesting directions, a delay of two months before returning the notes does not constitute an implied acceptance of such notes in payment of the debt. Prather v. State Bank, 3 Ind. 356.

38. Phillips v. Blake, 1 Metc. (Mass.) 156.

39. Kottwitz v. Bagby, 16 Tex. 656.

40. Magee v. Carmack, 13 Ill. 289; Townsends v. Racine Bank, 7 Wis. 185; and cases infra note 44.

41. Me.—Frontier Bank v. Morse, 22 Me. 88, 38 AmD 284.

N. H.—Fogg v. Sawyer, 9 N. H. 365.

N. Y.—Thomas v. Todd, 6 Hill 340; Ontario Bank v. Lightbody, 13 Wend. 101, 27 AmD 179.

Oh.—Westfall v. Braley, 10 Oh. St. 188, 75 AmD 509. Contra Imbush v. Mechanics', etc., Bank, 1 Oh. Dec. (Reprint) 8, 1 WestLJ 49.

S. C.—Harley v. Thornton, 20 S. C. L. 509 note.

Vt.—Wainwright v. Webster, 11 Vt. 576, 34 AmD 707; Gilman v. Peck, 11 Vt. 516, 34 AmD 702.

Eng.—Camidge v. Allenby, 6 B. & C. 373, 13 ECL 175, 108 Reprint 489, 21 ERC 48; Rogers v. Langford, 1 Cromp. & M. 637, 149 Reprint 555.

42. Lowrey v. Murrell, 2 Port. (Ala.) 280, 27 AmD 651; Bayard v. Shunk, 1 Watts & S. (Pa.) 92, 37 AmD 441; Ware v. Street, 2 Head (Tenn.) 609, 75 AmD 755; Scruggs v. Gass, 8 Yerg. (Tenn.) 175, 29 AmD 114; Edmunds v. Digges, 1 Gratt. (42 Va.) 359, 42 AmD 561.

43. Ware v. Street, 2 Head (Tenn.) 609, 75 AmD 755.

44. Magee v. Carmack, 13 Ill. 289; Fogg v. Sawyer, 9 N. H. 365; Camidge v. Allenby, 6 B. & C. 373, 13 ECL 175, 108 Reprint 489, 21 ERC 48; Rogers v. Langford, 1 Cromp. & M. 637, 149 Reprint 555.

Rescission of payment and return of medium generally see infra § 71.

45. Frontier Bank v. Morse, 22 Me. 88, 38 AmD 284.

46. Bills or notes as payment generally see infra § 40.

Presumption of acceptance of bill or note as payment of contemporaneous debt see infra §§ 216, 217.

47. See cases infra notes 48, 49.

48. Corbit v. Smyrna Bank, 2 Del. 235, 30 AmD 635.

[a] **Rule applied.**—When a bank note is given bona fide and received without objection on general deposit by a bank, and there is no agreement or understanding between the parties as to which of them shall stand the risk of the then or future insolvency of the bank issuing such note, the party receiving the note assumes all risk of its solvency, and is without remedy against the person from whom he received it, although it may afterward appear that the bank issuing such note had, at the time of the transaction, failed. Corbit v. Smyrna Bank, 2 Del. 235, 30 AmD 635.

49. Corbit v. Smyrna Bank, supra; Ontario Bank v. Lightbody, 13 Wend. (N. Y.) 101, 27 AmD 179; Harley v. Thorton, 20 S. C. L. 509 note; Wainwright v. Webster, 11 Vt. 576, 34 AmD 707.

50. Lowrey v. Murrell, 2 Port. (Ala.) 280, 27 AmD 651; Bayard v. Shunk, 1 Watts & S. (Pa.) 92, 37 AmD 441.

51. Watson v. Cresap, 1 B. Mon. (Ky.) 195, 36 AmD 572; Rasst v. Morris, 135 Md. 243, 108 A 787; Burrill v. Watertown Bank, etc., Co., 51 Barb. (N. Y.) 105; Reeves v. Avina, (Tex. Civ. A.) 201 SW 729.

[a] **Rule applied.**—(1) A purchaser of property who engaged to pay therefor with "Constitutionalists' money" at twenty cents on the dollar impliedly warranted that the money paid by him was valid currency of a particular sort, and in the seller's action to recover title and possession it is immaterial whether there were any representations as to the genuineness of the money. Reeves v. Avina, (Tex. Civ. A.) 201 SW 729. (2) Under a contract to pay two hundred and ninety-nine thousand pesos Mexican currency for land, although the agreement provided that the purchaser was not under obligation "to guarantee the value in U. S. currency of the said Mexican money," the purchaser necessarily guaranteed the money to be genuine, for, if not genuine, it was not Mexican currency. Rasst v. Morris, 135 Md. 243, 253, 108 A 787.

52. U. S.—U. S. v. Morgan, 11 How. 154, 13 L. ed. 643; Cassedy v. Williams, 5 F. Cas. No. 2,501, 1 Hayw. & H. 151.

Ark.—Phelan v. Dalson, 14 Ark. 79.

Ind.—Richards v. Stogsdell, 21 Ind. 74.

Md.—Keene v. Thompson, 4 Gill & J. 463.

Tex.—Reeves v. Avina, (Civ. A.) 201 SW 729.

And see cases infra note 53.

[a] **Rule applied** where the debtor knew that the money was counterfeit. Cassedy v. Williams, 5 F. Cas. No. 2,501, 1 Hayw. & H. 151; Phelan v. Dalson, 14 Ark. 79.

53. U. S.—U. S. Bank v. Georgia Bank, 10 Wheat. 333, 6 L. ed. 334.

Ill.—Simms v. Clark, 11 Ill. 137.

Ind.—Wingate v. Neidlinger, 50 Ind. 520.

Ky.—Watson v. Cresap, 1 B. Mon. 195, 36 AmD 572.

Md.—Keene v. Thompson, 4 Gill & J. 463; Mudd v. Reeves, 2 Harr. & J. 368.

Mass.—Young v. Adams, 6 Mass. 182.

Mo.—Boyd v. Mexico Southern Bank, 67 Mo. 537, 29 AmR 515.

N. Y.—Burrill v. Watertown Bank, etc., Co., 51 Barb. 105; Kenny v. Albany First Nat. Bank, 50 Barb. 112; Murray v. Bull's Head Bank, 3 Daly 364; Baker v. Bonesteel, 2 Hilt. 397; Thomas v. Todd, 6 Hill 340; Markle v. Hatfield, 2 Johns. 455, 3 AmD 446.

N. C.—Lowe v. Weatherley, 20 N. C. 212; Anderson v. Hawkins, 10 N. C. 568; Hargrave v. Dusenberry, 9 N. C. 326.

Oh.—Pumphrey v. Eyre, Tapp. 334; Haire v. Beattus, 3 Oh. Dec. (Reprint) 5, 2 WklyLGaz 3.

Pa.—Ramsdale v. Horton, 3 Pa. 330.

Tenn.—McDonald v. Allen, 8 Baxt. 446.

Tex.—Chalmers v. Harris, 22 Tex. 265.

Va.—Pindall v. Northwestern Bank, 7 Leigh (34 Va.) 617.

But see Wade's Case, 5 Coke 114a, 77 Reprint 232 (containing a dictum to the contrary).

[a] **Counterfeit foreign money.**—If a contract is payable "in foreign bills," a delivery of a counterfeit foreign bill is no payment, and although the contract is then surrendered to the debtor, the creditor may still re-

a sufficient excuse, however,[54] it is generally held that a creditor who does not, within a reasonable time after he discovers the money is counterfeit, return[55] or offer to return[56] it will be concluded by the payment, where the parties acted in good faith,[57] what shall be considered a reasonable time depending upon the facts and circumstances of each case.[58] There is authority, however, to the effect that it is not necessary to return such money.[59]

Negligence. If a bank receives counterfeits of its own notes in payment, it must bear the loss where the debtor acted innocently in making the payment.[60]

Agreement to take specific money. Where goods are delivered under an agreement to take a specific parcel of coin in payment, a delivery of such coin will be a good bar to an action for the value of the goods, although in fact it was counterfeit money.[61]

[§ 32] **6. Confederate Money[62]—a. In General.** Confederate money was not legal currency[63] and could not be made so by military orders.[64] Accordingly, a creditor could not be compelled to accept payment in Confederate notes,[65] unless the contract expressly[66] or impliedly[67] provided therefor. However, if Confederate money was accepted in good faith, at a time and place where it was current, it was generally held that the debt was thereby discharged,[68] although in a few cases it was said that

cover the amount due. Young v. Adams, 6 Mass. 182.

54. Simms v. Clark, 11 Ill. 137.

[a] **For example,** where a debtor who had given his creditor a counterfeit bill in payment refused to take it back, unless compelled by law to do so, the creditor was excused from offering to return it. Simms v. Clark, 11 Ill. 137.

55. Ill.—Union Nat. Bank v. Baldenwick, 45 Ill. 375; Simms v. Clark, 11 Ill. 137.

Ind.—Lawrenceburgh Nat. Bank v. Stevenson, 51 Ind. 594; Samuels v. King, 50 Ind. 527; Wingate v. Neidlinger, 50 Ind. 520.

Mich.—Atwood v. Cornwall, 28 Mich. 336, 15 AmR 219.

N. Y.—Kenny v. Albany First Nat. Bank, 50 Barb. 112; Thomas v. Todd, 6 Hill 340.

Pa.—Curcier v. Pennock, 14 Serg. & R. 51; Raymond v. Baar, 13 Serg. & R. 318, 15 AmD 603.

Va.—Pindall v. Northwestern Bank, 7 Leigh (34 Va.) 617.

[a] **"The reason of the rule** is, to enable him to trace out and fall back upon the person from whom he received it." Simms v. Clark, 11 Ill. 137, 141.

Rescission of payment and return of medium see infra §§ 71-74.

56. McDonald v. Allen, 8 Baxt. (Tenn.) 446.

57. Wingate v. Neidlinger, 50 Ind. 520.

[a] **Discussion of rule.—**"The doctrine . . . will have no application where the person passing the money knew or had reason to know that it was counterfeit; for in such case such person would be liable both criminally and civilly, without regard to the question of diligence on the part of the person receiving the same." Wingate v. Neidlinger, 50 Ind. A. 520, 526.

58. Union Nat. Bank v. Baldenwick, 45 Ill. 375; Simms v. Clark, 11 Ill. 137; Boyd v. Mexico Southern Bank, 67 Mo. 537, 29 AmR 515. And see cases infra this note.

[a] **Discussion of rule.—**"No certain time can be fixed, when notice of dishonor must be given to the debtor. It can hardly be pretended that it is sufficient to make the duty absolute, because the bill has been thrown out by a single bank; and especially when, as in the case at bar, it was merely doubted and declined. The duty of returning the bill must begin, if at all, from the time that the holder has what the jury shall deem satisfactory evidence that it is spurious. If the rule is to be admitted at all, it cannot with propriety be extended to doubtful cases, where there is no evidence of bad faith on the part of the plaintiff." Burrill v. Watertown Bank, etc., Co., 51 Barb. (N. Y.) 105, 113.

[b] **Delay held unreasonable.—**(1) Fifteen days. Gloucester Bank v. Salem Bank, 17 Mass. 33. (2) Nearly two months. Thomas v. Todd, 6 Hill (N. Y.) 340. (3) Two months. Pindall v. Northwestern Bank, 7 Leigh (34 Va.) 617. (4) Six months. Raymond v. Baar, 13 Serg. & R. (Pa.) 318, 15 AmD 603. (5) Three years. Curcier v. Pennock, 14 Serg. & R. (Pa.) 51; McDonald v. Allen, 8 Baxt. (Tenn.) 446.

[c] **Delay held not unreasonable** where the note was returned as a counterfeit to the party receiving it from defendant "about the 10th of October" and defendant was notified some time "certainly before November 4th . . . perhaps the very next day, as was most likely the case." Simms v. Clark, 11 Ill. 137, 141.

[d] **Burden of showing use of reasonable means to discover counterfeit.—**In an action to recover the value of two hundred and ninety-nine thousand "Carrancistas Constitutional Mexican Currency," which was alleged to have been guaranteed by defendant to be genuine, but which was alleged to be spurious, false, and counterfeit, it was incumbent on plaintiff to show that he had used reasonable means to ascertain whether or not the money was genuine. Rasst v. Morris, 135 Md. 243, 108 A 787.

59. Kent v. Bornstein, 12 Allen (Mass.) 342. See Watson v. Cresap, 1 B. Mon. (Ky.) 195, 36 AmD 572 (dictum). Contra Gloucester Bank v. Salem Bank, 17 Mass. 33.

[a] **Reason for rule.—**"The return of the counterfeit note to the defendant is not essential to the maintenance of this action. It is entirely worthless, and an offer to return it would be an idle ceremony, which the law never requires." Kent v. Bornstein, 12 Allen (Mass.) 342, 344.

60. U. S. Bank v. Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. ed. 334.

[a] **Reason for rule.—**"The maker must be presumed, and is bound to know his own notes. He cannot be heard to aver his ignorance; and when he receives notes, purporting to be his own, without objection, it is an adoption of them as his own." U. S. Bank v. Georgia Bank, 10 Wheat. (U. S.) 333, 353, 6 L. ed. 334.

61. Curcier v. Pennock, 14 Serg. & R. (Pa.) 51; Alexander v. Owen, 1 T. R. 225, 99 Reprint 1064.

62. Medium of payment of contract payable in "dollars" see supra § 17.

Power of executors or administrators to receive Confederate money in payment of indebtedness to estate see Executors and Administrators § 447.

63. Lawson v. Miller, 44 Ala. 616, 4 AmR 147; Parker v. Broas, 20 La. Ann. 167. And see cases infra note 65.

64. Parker v. Broas, supra.

[a] **For example,** the orders of General Butler of the 1st and 18th of May, 1862, permitting for a limited period the circulation of Confederate notes, did not make Confederate money legal currency. Parker v. Broas, 20 La. Ann. 167.

65. U. S.—Stoughton v. Hill, 23 F. Cas. No. 13,501, 3 Woods 404.

Ala.—Thompson v. Perryman, 45 Ala. 619.

Ga.—Pettis v. Campbell, 47 Ga. 596.

N. C.—Love v. Johnston, 72 N. C. 415.

S. C.—Lynch v. Hancock, 14 S. C. 66.

Tenn.—Scruggs v. Luster, 1 Heisk. 150.

Tex.—Miller v. Lacy, 33 Tex. 351.

Va.—Fultz v. Brightwell, 77 Va. 742; Stark v. Lipscomb, 29 Gratt. (70 Va.) 322; Alley v. Rogers, 19 Gratt. (60 Va.) 366; Omohundro v. Crump, 18 Gratt. (59 Va.) 703.

66. Rives v. Duke, 105 U. S. 132, 26 L. ed. 1031; Planters Bank v. Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473; Wintz v. Weakes, 10 Heisk. (Tenn.) 593; Williams v. Elkins, 1 Heisk. (Tenn.) 88; Dearing v. Rucker, 18 Gratt. (59 Va.) 426.

67. King v. King, 90 Va. 177, 17 SE 894.

68. U. S.—Glasgow v. Lipse, 117 U. S. 327, 6 SCt 757, 29 L. ed. 901.

Ala.—Howard College v. Turner, 71 Ala. 429, 46 AmR 326; Van Hoose v. Bush, 54 Ala. 342; Hester v. Watkins, 54 Ala. 44; Ponder v. Scott, 44 Ala. 241.

Ark.—Berry v. Bellows, 30 Ark. 198; Hendry v. Cline, 29 Ark. 414.

Ga.—Green v. Jones, 38 Ga. 347; Caruthers v. Corbin, 38 Ga. 75; King v. King, 37 Ga. 205; Freeman v. Bass, 34 Ga. 355, 89 AmD 255.

Ky.—Ewing v. Litsey, 7 Bush 496; Hazelrigg v. Prater, 5 Ky. Op. 482.

La.—Vance v. Cooper, 22 La. Ann. 508; Luzenberg v. Cleveland, 19 La. Ann. 473.

Miss.—Baughn v. Shackleford, 48 Miss. 255; Davis v. Mississippi Cent. R. Co., 46 Miss. 552.

N. Y.—Sands v. New York L. Ins. Co., 50 N. Y. 626, 10 AmR 535 [aff 59 Barb. 556]; Robinson v. International L. Assur. Soc., 42 N. Y. 54, 1 AmR 400.

N. C.—Mercer v. Wiggins, 74 N. C. 48.

S. C.—Hyatt v. McBurney, 18 S. C. 199 [rev on other grounds 118 U. S. 279, 30 L. ed. 168]; Black v. Rose, 14 S. C. 274; Johnstone v. Crooks, 3 S. C. 200; Fluitt v. Nelson, 49 S. C. L. 9; Wiseman v. Hunter, 35 S. C. Eq. 167; McPherson v. Lynah, 35 S. C. Eq. 121; Austin v. Kinsman, 34 S. C. Eq. 259.

Tenn.—Rockhold v. Blevins, 6 Baxt. 115 [app dism 92 U. S. 129, 23 L. ed. 507]; Maloney v. Stephens, 11 Heisk. 738; Pryor v. State Bank, 6 Heisk. 442; Kelley v. Story, 6 Heisk. 202; Cross v. Sells, 1 Heisk. 83.

Tex.—Rodgers v. Bass, 46 Tex. 505; Piegzar v. Twohig, 37 Tex. 225; Ritchie v. Sweet, 32 Tex. 333, 5 AmR 245; Garner v. Butcher, 1 Tex. Unrep. Cas. 430; Dohoney v. Womack, 1 Tex. Civ. A. 354, 19 SW 883, 20 SW 950.

Va.—Boyd v. Townes, 79 Va. 118.

W. Va.—Simmons v. Trumbo, 9 W. Va. 358; Washington v. Burnett, 4 W. Va. 84.

And see cases infra this note.

[a] **Conditional acceptance.—**Where a Confederate bond was transferred in payment of a debt and the debtor promised that if the manner of the transfer was not correct and valid he would make it so, or would pay the money, and the transfer was in fact invalid, the duty of ascertain-

such payment was not valid.[69]

Duress. Where the acceptance of payment in Confederate money was under duress exercised by the debtor, or through compulsion used by the military authorities, the payment was invalid,[70] but nothing short of duress in its legal sense invalidated such payment.[71] Before a creditor who had accepted such payment under duress could recover the debt in authorized currency, he was required to tender back the identical money received by him.[72]

Payment after close of war. A payment in Confederate money after the surrender of the Confederate army has been held invalid,[73] at least where the debtor knew of the surrender and induced an acceptance of payment by false statements;[74] but such a payment was held good where both parties were ignorant of the surrender.[75]

Recovery after Civil War on contracts made during war. In actions after the war upon contracts made within the Confederate states during the war, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, where it was shown by the nature of the transaction and the attendant circumstances or by the language of the contract itself to have contemplated payment in Confederate currency, it was held that no more could be recovered than the value of that currency in lawful money of the United States,[76] and statutes fixing the amount of recovery at the value of the property sold instead of the value of the Confederate notes in lawful money, were held to be unconstitutional as impairing the obligation of contracts in that they deprived the buyer or seller of

ing the defect and remedying it was upon the debtor, so that if he failed so to do he became absolutely liable to pay the amount in money without any notice of the defect from the other party. Bryan v. Heck, 67 N. C. 322.

[b] **Mere unwillingness to receive** Confederate currency in payment of a debt will not, if the currency was actually received in payment, be enough to invalidate the acceptance of the currency. The unwillingness necessary to invalidate the payment must be of the degree and character authorizing the courts to treat the acceptance and payment as void or voidable, upon the principles applicable to payments not tainted with Confederate currency. Jones v. Thomas, 5 Coldw. (Tenn.) 465.

[c] **Who may object.**—A vendor, seeking to enforce his lien on the land against a subpurchaser, who claims as a purchaser for valuable consideration without notice, cannot question the validity of the payment by such subpurchaser because made in Confederate currency. Kinsey v. Howard, 47 Ala. 236.

[d] **Payment to an administrator,** in Confederate treasury notes, of a debt due the estate relieves the debtor of liability. Hendry v. Cline, 29 Ark. 414; Hyatt v. McBurney, 18 S. C. 199 [rev on other grounds 118 U. S. 279, 30 L. ed. 168].

[e] **Payment to agents** held valid payment. Sands v. New York L. Ins. Co., 50 N. Y. 626, 10 AmR 535; Robinson v. London International L. Assur. Soc., 42 N. Y. 54, 1 AmR 400; Maloney v. Stephens, 11 Heisk. (Tenn.) 738.

[f] **Payment to guardian** discharges the debt. Baughn v. Shackleford, 48 Miss. 255.

[g] **Payment to officer.**—(1) It has been said that, while no inflexible rule could be laid down, a collecting officer without instructions to the contrary might have received Confederate treasury notes up to 1863, and ought not to have received them after 1863, and that 1863 is debatable ground. Emerson v. Mallett, 62 N. C. 234. (2) So it was held in some cases that an officer had power to accept payment of a judgment or a bid at a judicial sale in Confederate money where it was the chief circulating medium. Black v. Rose, 14 S. C. 274; Binford v. Memphis Bulletin Co., 10 Heisk. (Tenn.) 355; Douglas v. Neil, 7 Heisk. (Tenn.) 437; Coleman v. Wingfield, 4 Heisk. (Tenn.) 133; Henly v. Franklin, 3 Coldw. (Tenn.) 472, 91 AmD 296. (3) But the contrary was held in other cases. See cases infra note 69. (4) Such payment is invalid where the beneficiary had expressly refused to accept Confederate money. Blackwell v. Tucker, 7 S. C. 387. (5) If the repayment of a loan of a deposit in court, in Confederate money, was pursuant to an order of the court permitting such payment, it was valid. Taylor v. Lancaster, 33 Gratt. (74 Va.) 1.

[h] **Payment to trustee** in Confederate money, if made and accepted in good faith, discharges the debtor. Howard College v. Turner, 71 Ala. 429, 46 AmR 326; King v. King, 37 Ga. 205; Mayer v. Mordecai, 1 S. C. 383, 7 AmR 26.

69. Ark.—Cooksey v. McCrery, 27 Ark. 303; Lapham v. Clark, 25 Ark. 574.

La.—Porter v. Brown, 21 La. Ann. 532; Draughan v. White, 21 La. Ann. 175.

Miss.—New Orleans, etc., R. Co. v. State, 52 Miss. 877.

Tenn.—Wright v. Overall, 2 Coldw. 336.

Tex.—Cundiff v. Herron, 33 Tex. 622; Kleberg v. Bonds, 31 Tex. 611; Ransom v. Alexander, 31 Tex. 443.

And see cases infra this note.

[a] **Payment to an administrator** in Confederate money of a debt due the estate does not relieve the debtor of liability. Draughan v. White, 21 La. Ann. 175.

[b] **Payment to minor** in Confederate money was held not binding on the ground of incapacity to give consent. Porter v. Brown, 21 La. Ann. 532.

[c] **Payment to agent** held not a valid payment. Fretz v. Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769.

[d] **Payment to officer.**—A collecting officer had no power to accept payment in Confederate money. Ellis v. Smith, 42 Ala. 349; Aicardi v. Robbins, 41 Ala. 541, 94 AmD 614; Hendry v. Benlisa, 37 Fla. 609, 20 S 800, 34 LRA 283; Emerson v. Mallett, 62 N. C. 234; Garlington v. Copelett, 62 N. C. 234; Garlington v. Copeland, 32 S. C. 57, 10 SE 616. See also Omohundro v. Omohundro, 27 Gratt. (68 Va.) 824 (commissioner appointed to sell lands held guilty of breach of trust in selling them for Confederate currency).

70. Ga.—Jones v. Rogers, 36 Ga. 157.

La.—Emerson v. Lee, 18 La. Ann. 134, 89 AmD 648.

N. C.—Harshaw v. Dobson, 67 N. C. 203.

Tenn.—McCartney v. Wade, 2 Heisk. 369.

Tex.—Anderson v. Lewis, 31 Tex. 675.

W. Va.—Mann v. McVey, 3 W. Va. 232; Mann v. Lewis, 3 W. Va. 215, 100 AmD 747.

Payment under duress generally see infra § 70.

71. Fogg v. Union Bank, 4 Baxt. (Tenn.) 530; Rollings v. Cate, 1 Heisk. (Tenn.) 97; and cases infra this note.

[a] **Conduct not constituting duress.**—(1) Mere statements that the creditor dared not refuse to accept payment in Confederate money, that he would be liable therefor, and considered disloyal and put in prison until the end of the war, where the debtor had no power to imprison the creditor and did not threaten to do so, do not constitute duress. Simmons v. Trumbo, 9 W. Va. 358 [overr Mann v. Lewis, 3 W. Va. 215, 100 AmD 747; Mann v. McVey, 3 W. Va. 232]. (2) A mere statement of the debtor to an unwilling creditor that he "must" take Confederate money, unaccompanied by any force, threat of force, or reference to compulsion was held not to be duress, even though part of the Confederate army was in the town in which payment was made and military order required acceptance of such money in payment of debts and arrest of persons for refusal to accept it, and even though some persons had been arrested therefor. Davis v. Mississippi Cent. R. Co., 46 Miss. 552. (3) Persistence of the debtor unaccompanied by threats is not duress although the community was in intense state of excitement over a rumored military order requiring acceptance of payment in Confederate money, which order was being enforced by a vigilance committee. Fogg v. Union Bank, 4 Baxt. (Tenn.) 530. (4) Vague and undefined fears of violence from nobody in particular, but from everybody in general, at some uncertain period, without some contemporaneous demonstration of violence, is not the duress contemplated by law. Van der Hoven v. Nette, 32 Tex. 183.

[b] **Acceptance not under duress.**—(1) Taking Confederate money under some general or indefinite apprehension that failure to recognize the currency would give offense to the government or any of its officers is not acting under duress. Rollings v. Cate, 1 Heisk. (Tenn.) 97. (2) Taking Confederate money in the absence of threats or protests, even though martial law prevailed and a military order rendered the receipt of such money compulsory, is not accepting it under duress. Glenn v. Case, 25 Ark. 616, 620.

[c] **Acceptance under duress.**—(1) Where, in payment of a note due before the War of the Rebellion, a person received Confederate notes at par under the influence of an association employing unlawful and coercive means to force men by fear of personal punishment to comply with its will, it was held that he received them under duress. Jones v. Rogers, 36 Ga. 157. (2) Where defendant threatened to report plaintiff to a newspaper for refusing to receive Confederate money in payment of a debt, and plaintiff was arrested by military authorities for refusal in another case and confined while sick in jail until he consented to receive such money, his consent to do so was extorted, and it was immaterial whether or not defendant knew of the duress. Emerson v. Lee, 18 La. Ann. 134, 89 AmD 648.

72. Emerson v. Lee, supra.

Rescission of payment and return of medium generally see infra § 71.

73. Sirrine v. Griffin, 40 Ga. 169.

74. Blalock v. Phillips, 38 Ga. 216.

75. Ellis v. Hammond, 57 Ga. 179.

76. U. S.—Effinger v. Kenney, 115 U. S. 566, 6 SCt 179, 29 L. ed. 495; Rives v. Duke, 105 U. S. 132, 26 L. ed.

the value of his contract.[77]

Scaling acts. Statutes commonly known as "scaling acts," passed in many of the southern states, expressly providing a scale of recovery upon contracts entered into during the war for payment upon the basis of Confederate money, governed the amount of recovery upon such contracts.[78] These statutes were not unconstitutional as impairing the obligation of contracts.[79] They did not apply to specie debts,[80] to contracts made before the war,[81] or to notes given during the war in renewal of,[82] or in substitution for,[83] others made before the war. It has been held that a note given after the war in renewal of one made during the war was a new contract and not subject to the scale,[84] but this was denied where there was no scaling of the old note at the time of renewal.[85]

[§ 33] **b. Validity of Contracts.**[86] Although in a number of early cases, contracts performable in, or based upon, Confederate money were held to be illegal as against public policy,[87] this doctrine was

1031; Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275; Wilmington, etc., R. Co. v. King, 91 U. S. 3, 23 L. ed. 186; Atlantic, etc., R. Co. v. Carolina Nat. Bank, 19 Wall. 548, 22 L. ed. 196; Thorington v. Smith, 8 Wall. 1, 19 L. ed. 361.

Ala.—Hill v. Erwin, 60 Ala. 341; Wharton v. Cunningham, 46 Ala. 590; Powe v. Powe, 42 Ala. 113.

Fla.—Fife v. Turner, 11 Fla. 289.

Miss.—Rogers v. Tullos, 51 Miss. 685; Clayton v. McWilliams, 49 Miss. 311; Gray v. Harris, 43 Miss. 421.

N. C.—Palmer v. Love, 75 N. C. 163; Rowland v. Thompson, 73 N. C. 504; Dowd v. North Carolina R. Co., 70 N. C. 468.

S. C.—Parker v. Wilson, 5 S. C. 485.

Tenn.—Luster v. Maloney, 6 Baxt. 374; Alderson v. Clear, 7 Heisk. 667; Bowers v. Thomas, 6 Heisk. 553.

Tex.—Taylor v. Bland, 60 Tex. 29.

Va.—Stearns v. Mason, 24 Gratt. (65 Va.) 484; Calbreath v. Virginia Porcelain, etc., Co., 22 Gratt. (63 Va.) 697; Lohman v. Crouch, 19 Gratt. (60 Va.) 331.

W. Va.—Bailey v. Stroud, 26 W. Va. 614; Bierne v. Brown, 10 W. Va. 748.

77. Effinger v. Kenney, 115 U. S. 566, 6 SCt 179, 29 L. ed. 495; Wilmington, etc., R. Co. v. King, 91 U. S. 3, 23 L. ed. 186.

78. U. S.—Atlantic, etc., R. Co. v. Carolina Nat. Bank, 19 Wall. 548, 22 L. ed. 196.

Ala.—Wilson v. Isbell, 45 Ala. 142.

Fla.—Fife v. Turner, 11 Fla. 289.

Ga.—Conyers v. Bartow County, 116 Ga. 101, 42 SE 419; McIntyre v. Meldrim, 63 Ga. 58; Phillips v. Ocmulgee Mills, 55 Ga. 633; Rawson v. Cherry, 54 Ga. 276; Mitchell v. Butt, 51 Ga. 274; Cohen v. Ward, 42 Ga. 337; Blow v. White, 41 Ga. 293; Clark v. McCroskey, 41 Ga. 137; Lamar v. Thornton, 41 Ga. 48; White v. Lee, 40 Ga. 266; Thomas v. Knowles, 40 Ga. 263; Brown v. Sims, 39 Ga. 668; Gibson v. Williams, 39 Ga. 660; Phillips v. Williams, 39 Ga. 597; Butler v. Weathers, 39 Ga. 524.

Ky.—Brashear v. Kendall, 6 T. B. Mon. 545.

Miss.—Mezeix v. McGraw, 44 Miss. 100; Cowan v. McCutchen, 43 Miss. 207.

N. C.—Depriest v. Patterson, 94 N. C. 519; Brickell v. Bell, 84 N. C. 82; Duke v. Williams, 84 N. C. 74; In re Macay, 84 N. C. 63; Palmer v. Love, 82 N. C. 478; Cobb v. Gray, 78 N. C. 94; Johnson v. Miller, 76 N. C. 439; Boykin v. Barnes, 76 N. C. 318; Wooten v. Sherrard, 71 N. C. 374; Farmer v. Willard, 71 N. C. 284; Stocks v. Smith, 69 N. C. 352; Bryan v. Harrison, 69 N. C. 151; McRae v. McNair, 69 N. C. 12; Williams v. Monroe, 67 N. C. 133; Brown v. Foust, 64 N. C. 672; Alexander v. Rintels, 64 N. C. 634; Parker v. Carson, 64 N. C. 563; Summers v. McKay, 64 N. C. 555; Green v. Brown, 64 N. C. 553; Chapman v. Wacaser, 64 N. C. 532; Robeson v. Brown, 63 N. C. 554; Carter v. McGehee, 61 N. C. 431.

S. C.—Black v. Rose, 14 S. C. 274; Earle v. Stokes, 4 S. C. 309; O'Neall v. Hunt, 4 S. C. 244; Halfacre v. Whaley, 4 S. C. 173; McKeegan v. McSwiney, 2 S. C. 191; Neely v. McFadden, 2 S. C. 169; Bobo v. Goss, 1 S. C. 262; Fluitt v. Nelson, 49 S. C. L. 9.

Va.—Adams v. Logan, 27 Gratt. (68 Va.) 201; Fultz v. Davis, 26 Gratt. (67 Va.) 903; Tardy v. Boyd, 26 Gratt. (67 Va.) 631; Merewether v. Dowdy, 25 Gratt. (66 Va.) 232; Tams v. Brannaman, 23 Gratt. (64 Va.) 809; Shiflett v. Long, 23 Gratt. (64 Va.) 718; Barnett v. Miller, 23 Gratt. (64 Va.) 551; Sanders v. Branson, 22 Gratt. (63 Va.) 364; Moses v. Trice, 21 Gratt. (62 Va.) 556, 8 AmR 609; Michie v. Jeffries, 21 Gratt. (62 Va.) 334; Barnett v. Cecil, 21 Gratt. (62 Va.) 93; Bell v. Alexander, 21 Gratt. (62 Va.) 1; Magill v. Manson, 20 Gratt. (61 Va.) 527; Dearing v. Rucker, 18 Gratt. (59 Va.) 426.

W. Va.—Gilkeson v. Smith, 15 W. Va. 44; Jarrett v. Nickell, 9 W. Va. 345; Brightwell v. Hoover, 7 W. Va. 342.

[a] **A judgment rendered in 1864 upon a note** for Confederate money lent in 1862 was subject to the same scale that the note was. Alexander v. Rintels, 64 N. C. 634.

[b] **Legacies or distributive shares** (1) are subject to scale. Wilson v. Powell, 86 N. C. 230. (2) But a note given to a distributee for an amount due in good money has been held not subject to the legislative scale. McCombs v. Griffith, 67 N. C. 83. (3) Payments voluntarily received in Confederate money by a legatee from the executor in the absence of undue influence were held valid and not scalable. Boyd v. Townes, 79 Va. 118.

[c] **Date as of which scale is to be applied:** (1) As of the time when the contract was made. Rives v. Duke, 105 U. S. 132, 26 L. ed. 1031; Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275; Whitfield v. Riddle, 52 Ala. 467; Wyatt v. Evins, 52 Ala. 285; Barclay v. Russ, 14 Fla. 372; Forcheimer v. Holly, 14 Fla. 239; Randall v. Pettes, 12 Fla. 517; Blow v. White, 41 Ga. 293; Cherry v. Walker, 36 Ga. 327; Rivers v. Moss, 6 Bush (Ky.) 600; Darcey v. Shotwell, 49 Miss. 631; Mezeix v. McGraw, 44 Miss. 100; Gray v. Harris, 43 Miss. 421; Cowan v. McCutchen, 43 Miss. 207; Smith v. Smith, 101 N. C. 461, 8 SE 128, 131, 133; Palmer v. Love, 75 N. C. 163; Davis v. Glenn, 72 N. C. 519; Stokes v. Cowles, 70 N. C. 124; Charlotte Bank v. Davidson, 70 N. C. 118; Cable v. Hardin, 67 N. C. 472; Summers v. McKay, 64 N. C. 555; Taylor v. Bland, 60 Tex. 29; Johnson v. Blount, 48 Tex. 38; Short v. Abernathy, 42 Tex. 94; Mathews v. Rucker, 41 Tex. 636; Shearon v. Henderson, 38 Tex. 245; Ashby v. Porter, 26 Gratt. (67 Va.) 455; Walsh v. Hale, 25 Gratt. (66 Va.) 314; Earp v. Boothe, 24 Gratt. (65 Va.) 368; Myers v. Whitfield, 22 Gratt. (63 Va.) 780; Kendrick v. Forney, 22 Gratt. (63 Va.) 748; Bowman v. McChesney, 22 Gratt. (63 Va.) 609; Hilb v. Peyton, 22 Gratt. (63 Va.) 550; McClung v. Ervin, 22 Gratt. (63 Va.) 519; James v. Johnston, 22 Gratt. (63 Va.) 461; Moses v. Trice, 21 Gratt. (62 Va.) 556, 8 AmR 609; Stover v. Hamilton, 21 Gratt. (62 Va.) 273. (2) As of the time when the debt was payable. Dearing v. Rucker, 18 Gratt. (59 Va.) 426; Gilkeson v. Smith, 15 W. Va. 44. (3) As fixed by jury. Moses v. Trice, supra.

[d] **Under the Georgia Ordinance of 1865** the jury had a large discretion in the adjustment of the equities between the parties under the contract. Cherry v. Rawson, 49 Ga. 228; Cutcher v. Jones, 41 Ga. 675; Thomas v. Knowles, 40 Ga. 263; Cherry v. Walker, 36 Ga. 327.

79. Holt v. Patterson, 74 N. C. 650; Robeson v. Brown, 63 N. C. 554; Harmon v. Wallace, 2 S. C. 208; Neely v. McFadden, 2 S. C. 169; Rutland v. Copes, 49 S. C. L. 84. But see Leach v. Smith, 25 Ark. 246, 250 (holding that a statute providing that the creditor "shall recover in gold and silver or United States legal tender notes only the value of such Confederate money, or other paper currency, as estimated in the community at the time and place of making said contract, and interest thereon," is unconstitutional).

80. Barnett v. Cecil, 21 Gratt. (62 Va.) 93.

81. Bone v. Graves, 43 Ga. 312; Love v. Johnston, 72 N. C. 415; Fluitt v. Nelson, 49 S. C. L. 9.

82. Jackson v. Jackson, 47 Ga. 99; Cobb v. Gray, 78 N. C. 94.

83. Boykin v. Barnes, 76 N. C. 318.

84. Smith v. Belk, 40 Ga. 656.

85. Jarrett v. Nickell, 9 W. Va. 345.

86. Confederate money as consideration for contracts see Contracts § 152.

87. U. S.—Bailey v. Milner, 2 F. Cas. No. 740, 1 Abb. 261; Scudder v. Thomas, 21 F. Cas. No. 12,567.

Ala.—Tarleton v. Southern Bank, 49 Ala. 229; Askew v. Torbert, 49 Ala. 101; Wilson v. Bozeman, 48 Ala. 71; Lawson v. Miller, 44 Ala. 616, 4 AmR 147.

Ark.—Carllee v. Carlton, 27 Ark. 379; Waymack v. Heilman, 26 Ark. 449; George v. Terry, 26 Ark. 160; King v. Carnall, 26 Ark. 36; Jordan v. Walker, 26 Ark. 1; Latham v. Clark, 25 Ark. 574.

La.—Denney v. Johnson, 26 La. Ann. 55; Irvine v. Short, 23 La. Ann. 721; Bloom v. Dixon, 23 La. Ann. 265; Voinche v. Villemarette, 23 La. Ann. 227; Wynn v. Patrick, 23 La. Ann. 204; Winter v. Jones, 22 La. Ann. 485; Durbin v. McMichael, 22 La. Ann. 132; Cousin v. Abat, 21 La. Ann. 705; Fournet v. Beer, 21 La. Ann. 658; Tanneret v. Marshall, 21 La. Ann. 619; Boissat v. Sullivan, 21 La. Ann. 565; Seuzeneau v. Saloy, 21 La. Ann. 305; Juillard v. Rogay, 21 La. Ann. 259; West Tennessee Bank v. Citizens' Bank, 21 La. Ann. 18; Howard v. Yale, 20 La. Ann. 451; Pickens v. Preston, 20 La. Ann. 138; Windham v. Cerf, 19 La. Ann. 498; Norton v. Dawson, 19 La. Ann. 464, 92 AmD 548; Howard v. Kirwin, 19 La. Ann. 432; McCracken v. Poole, 19 La. Ann. 359; King v. Huston, 19 La. Ann. 288; Washburn v. Offut, 19 La. Ann. 269; Huck v. Haller, 19 La. Ann. 257; Reeve v. Doughty, 19 La. Ann. 164; Hunley v. Scott, 19 La. Ann. 161.

Mo.—Peltz v. Long, 40 Mo. 532.

Tenn.—Robertson v. Shores, 7 Coldw. 164 [disappr Thorington v. Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361]; Fain v. Headerick, 4 Coldw. 327; Hale v. Sharp, 4 Coldw. 275; Potts v. Gray, 3 Coldw. 468, 91 AmD 294; Gill v. Creed, 3 Coldw. 295; Thornburg v. Harris, 3 Coldw. 157.

afterward repudiated,[88] and contracts made on such a basis of payment were sustained, when made in the usual course of business and not for the purpose of giving currency to such notes or otherwise aiding the rebellion.[89]

[§ 34] **7. Foreign Money[90]—a. In General.** Payment of an obligation in the national currency in which it is expressed is a satisfaction thereof,[91] but payment in the currency of another nation is not, unless accepted as such.[92]

[§ 35] **b. Rate of Exchange.** The value in domestic money of a payment made in foreign money is fixed with reference to the rate of exchange at the time of such payment.[93] In an action to enforce payment of an obligation payable in foreign money the amount payable must be reckoned in domestic currency according to the value of the foreign money.[94] Where the parties have fixed the value of such money, their intention controls,[95] but in the absence of such agreement there is a wide divergence of opinion as to how the value of the foreign money is to be reckoned in domestic legal tender.[96] Although there are some early cases to the contrary,[97] according to the weight of modern authority the

Tex.—Kyle v House, 38 Tex. 155; Grant v. Ryan, 37 Tex. 37; McGar v. Nixon, 36 Tex. 289; Shepard v. Taylor, 35 Tex. 774; Kirby v. Day, 35 Tex. 652; Smith v. Nelson, 34 Tex. 516; Fox v. Woods, 34 Tex. 220; Brown v. Read, 33 Tex. 629; Cundiff v. Herron, 33 Tex. 622; Bell v. Joyce, 33 Tex. 479; Lobdell v. Fowler, 33 Tex. 346; Geiselman v. Brown, 33 Tex. 323; Casey v. Turner, 32 Tex. 64; Donley v. Tindall, 32 Tex. 43, 5 AmR 234; Hailey v. Pollard, 31 Tex. 604; Goodman v. McGehee, 31 Tex. 252; Prigeon v. Smith, 31 Tex. 171; McCartney v. Greenway, 30 Tex. 754 note; Reavis v. Blackshear, 30 Tex. 753.

W. Va.—Weeden v. Bright, 3 W Va. 548; Calfee v Burgess, 3 W. Va. 274; Brown v. Wylie, 2 W. Va. 502, 98 AmD 781.

88. See cases infra note 89.

89. U. S.—Effinger v. Kenney, 115 U. S. 566, 6 SCt 179, 29 L. ed. 495; Cook v. Lillo, 103 U. S. 792, 26 L. ed. 460; Wilmington, etc., R. Co. v. King, 91 U. S. 3, 23 L. ed 186; Atlantic, etc., R. Co. v. Carolina Nat. Bank, 19 Wall. 548, 22 L. ed. 196; Planters Bank v. Union Bank, 16 Wall. 483, 21 L. ed. 473; Delmas v. Merchants Mut. Ins. Co., 14 Wall. 661, 20 L. ed. 757; Thorington v. Smith, 8 Wall. 1, 19 L. ed. 361.

Ala.—Simpson v. Lauderdale County, 56 Ala. 64; Micou v. Ashurst, 55 Ala. 607; Whitfield v. Riddle, 52 Ala. 467; Jordan v. Cobb, 47 Ala. 132; Whitley v. Moseley, 46 Ala. 480; Leslie v. Langham, 40 Ala. 524.

Ark.—Young v. Mitchell, 33 Ark. 222; Gist v. Gans, 30 Ark. 285.

Fla.—Forcheimer v. Holly, 14 Fla. 239.

Ga.—Miller v. Gould, 38 Ga. 465.

Ky.—Hyatt v. James, 2 Bush 463, 92 AmD 505.

Md.—Taylor v. Turley, 33 Md. 500.

Miss.—Green v. Sizer, 40 Miss. 530.

N. C.—Haughton v. Merony, 65 N. C. 124; Kingsbury v. Lyon, 64 N. C. 128; Turley v. Nowell, 62 N. C. 301; Phillips v. Hooker, 62 N. C. 193.

S. C.—Pope v. Chafee, 35 S. C. Eq. 69.

Tenn.—Morgan v Snell, 3 Baxt. 382; Bond v. Perkins, 4 Heisk. 364; Scruggs v. Luster, 1 Heisk. 150; Sherfy v. Argenbright, 1 Heisk. 128, 2 AmR 690; Naff v. Crawford, 1 Heisk. 111.

Tex.—McManus v. Scott, 48 Tex. 601; Rodgers v. Bass, 46 Tex. 505; Roller v. Wooldridge, 46 Tex. 485; San Patricio County v. McClane, 44 Tex. 392; Short v. Abernathy, 42 Tex. 94; Mathews v. Rucker, 41 Tex. 636; Simpson v. Mullen, 1 Tex. Unrep. Cas. 388.

Va.—Ambrouse v. Keller, 22 Gratt. (63 Va.) 769; Walker v. Page, 21 Gratt. (62 Va.) 636; Hale v. Wilkinson, 21 Gratt. (62 Va.) 75.

90. Cross references:
Confederate currency see supra § 32.
Foreign money as legal tender see supra § 26.
Judgment upon demand due in foreign currency see Judgments § 139.
Negotiability of note payable in foreign currency see Bills and Notes § 232.
What law governs see supra § 16.

91. In re James, 248 N. Y. 1, 161 NE 201; Société des Hôtels le Touquet Paris-Plage v. Cummings, [1922] 1 K. B. 451; In re Chesterman, [1923] 2 Ch. 466; British Bank v. Russian Commercial, etc., Bank, 38 T. L. R. 65. And see Zimmermann v. Sutherland, 274 U. S. 253, 47 SCt 626, 71 L. ed. 1034 [aff 7 F. (2d) 443 (rev 2 F. (2d) 629)] (an obligation governed by foreign law is discharged by a deposit made in compliance therewith).

[a] **Rule applied.**—Where a judgment obtained in New York was unsatisfied and action was brought thereon in France, payment in francs in obedience to the French decree operated as complete execution of the New York judgment, although the sum ordered paid in France was less than the original judgment in dollars. In re James, 248 N. Y. 1, 161 NE 201.

92. Jackson v. U. S., 60 Ct Cl. 599.

[a] **For example,** the obligation of a contract providing for payment in dollars is not met by payment in francs. Jackson v. U. S., 60 Ct. Cl. 599.

93. Wormser v. Marroquin, 249 Fed. 428, 161 CCA 402; Hawes v. Woolcock, 26 Wis. 629. See The Cabot, 4 F. Cas. No. 2,277, 1 Abb. Adm. 150 (where payment of wages is made to American sailors at a foreign port in foreign coin, such coin is to be valued at its rate in the home port).

[a] **Evidence of value.**—Decrees of the Carranza government in Mexico (1913–1916), requiring money of such government to be accepted at certain prices within the territory then controlled by such government, are not evidence of the value of such foreign money in the United States. Rasst v. Morris, 135 Md. 243, 108 A 787.

94. U. S.—Forbes v. Murray, 9 F. Cas. No. 4,928, 3 Ben. 497; Grant v. Healey, 10 F. Cas. No. 5,696, 3 Sumn. 523.

Cal.—Grunwald v. Freese, 4 Cal. Unrep. Cas. 182, 34 P 73.

La.—Albert v. Citizens' Bank, 5 La. Ann. 720.

Me.—Stringer v. Coombs, 62 Me. 160, 16 AmR 414.

Mich.—Comstock v. Smith, 20 Mich. 338.

N. Y.—Stewart v. Chambers, 2 Sandf. Ch. 382.

Oh.—National City Bank v. McClosky, 26 OhNPNS 176.

Pa.—In re Willing, 292 Pa. 51, 140 A 558; Benners v. Clemens, 58 Pa. 24.

Eng.—Delegal v. Naylor, 7 Bing. 460, 20 ECL 208, 131 Reprint 178.

Can.—Barthelmes v. Bickell, 62 Can. S. C. 599, 63 DomLR 203, [1922] 1 WestWkly 503.

N. S.—Schön v. New York L. Ins. Co., 55 N. S. 137, 63 DomLR 475.

Newfoundl.—Adams v. Harvey, 9 Newfoundl. 6 [aff 8 Newfoundl. 314].

See Mattei v. Salazer, 4 Porto Rico Fed. 9 (discussing comparative value of Mexican, Porto Rican, and American money).

And see cases infra notes 95–14.

[a] **Debts payable in sister state.**—The rule stated in the text applies to debts payable in a sister state where the currency of one state is below par in another state. Howe v. Wade, 12 F. Cas. No. 6,777, 4 McLean 319.

[b] **Testamentary annuity in francs** given by a resident of Pennsylvania temporarily living in France, whose estate was located and to be distributed in Pennsylvania, is payable in American dollars at the rate of gold exchange prevailing when the bequest was made. In re Willing, 292 Pa. 51, 140 A 558.

95. Marine Ins. Co., Ltd. v. McLanahan, 290 Fed. 685 [aff 283 Fed. 240]; Turnbull v. Watkins, 2 Mo. A. 235; Murphy v. Kastner, 50 N. J. Eq. 214, 24 A 564; Pennsylvania R. Co. v. Cameron, 280 Pa. 458, 124 A 638, 33 ALR 1281. See Howard v. Union Mar. Ins. Co., 38 T. L. R. 515 (construing clause in marine insurance policy, "Claims, if any, to pay at the rate of $4.15 to £1 sterling," as not applying to claim for total loss, in view of other provisions of the contract).

[a] **Illustrations.**—(1) Where a bill of lading on a foreign shipment of wool to a western port, and from there by rail east, specified freight charges in pounds, shillings, and pence, and provided "freight if payable at destination to be at the rate of $4.866 exchange," rather than at sterling current rates, such provision controlled and precluded payment at a lower current rate of exchange. Pennsylvania R. Co. v. Cameron, 280 Pa. 458, 461, 124 A 638, 33 ALR 1281. (2) Insurance policies written by British companies on an American vessel covering loss while the vessel was in American waters, and stating the valuation of the vessel in dollars, in which had been inserted a clause stating that the rate of exchange was to be four dollars and seventy-five cents to the pound, require insurers to pay the loss in American dollars, and do not entitle them to pay in pounds at a time when the value of the pound in American money was less than the rate of exchange stated. Marine Ins. Co., Ltd. v. McLanahan, 290 Fed. 685 [aff 283 Fed. 240].

[b] **Porto Rican contract.**—United States currency at the rate of exchange prescribed by congress in Act April 12, 1900 (31 U. S. St. at L. 77, 80 c 191) § 11, and not at the rate of one dollar for each peso of indebtedness, must be accepted in discharge of the obligation on account of a purchase in 1894 of a plantation in Porto Rico, which was to be satisfied with money current in the province at the rate of one hundred centavos for each peso, since this provision evidently contemplated only such change in coins as might occur while Porto Rico remained under the same political power. Serralies v. Esbri, 200 U. S. 103, 26 SCt 176, 50 L. ed. 391.

96. Page v. Levenson, 281 Fed. 555, 557. And see cases infra notes 97–13.

"The point has been discussed for centuries, apparently without there ever having been a time when all the doctors of the law were of one mind as to it." Page v. Levenson, supra.

97. Reiser v. Parker, 20 F. Cas. No. 11,685, 1 Lowell 262; Burgess v. Alliance Ins. Co., 10 Allen (Mass.) 221; Com. v. Haupt, 10 Allen (Mass.) 38; Hussey v. Farlow, 9 Allen (Mass.) 263; Lodge v. Spooner, 8 Gray (Mass.) 166; Alcock v Hopkins, 6 Cush. (Mass.) 484; Adams v. Cordis, 8 Pick. (Mass.) 260; Rice v. Ontario Steamboat Co., 56 Barb (N. Y.) 384; Swanson v. Cooke, 45 Barb. (N. Y.) 574, 30

amount of recovery depends upon the current rate of exchange, and not the par value of the particular moneys involved.[98]

Distinction as to place of payment. A distinction is made, in some cases, between an obligation to pay foreign money in this country and an obligation to pay foreign money in a foreign country.[99] It is the rule of these cases that, if an obligation is payable in foreign money in a foreign country, and suit is brought thereon in this country, the value of the foreign money is reckoned as of the date of trial or judgment;[1] while if the obligation is payable in this country, the value of such money is reckoned as of the date it became payable.[2] Other cases apparently ignore this distinction and, without inquiring as to the place of payment, hold simply that, where foreign money is the object of the suit, the value is fixed according to the rate of exchange at the time of judgment.[3] Similarly, in determining the value of a debt expressed in foreign money, not being damages for breach of contract and not payable at a fixed time or place, the judgment-day rule has been applied.[4]

Distinction as to form of action. Although the validity of such distinction has been denied,[5] actions on a contract to recover a sum of money admitted to be due and actions for damages for breach of contract have been distinguished by some courts.[6]

HowPr 385; Ladd v. Arkell, 40 N. Y. Super. 150; Scofield v. Day, 20 Johns. (N. Y.) 102; Martin v. Franklin, 4 Johns. (N. Y.) 124; Cockrell v. Barber, 16 Ves. Jr. 460, 33 Reprint 1059.

98. Grant v. Healey, 10 F. Cas. No. 5,696, 3 Sumn. 523; Hargrave v. Creighton, 11 F. Cas. No. 6,064, 1 Woods 489; Robinson v. Hall, 28 How Pr (N. Y.) 342 [disappr Scofield v. Day, 20 Johns. (N. Y.) 102; Martin v. Franklin, 4 Johns. (N. Y.) 125]. And see cases infra notes 1–13.

99. See cases infra notes 1, 2.

1. Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U. S. 517, 47 SCt 166, 71 L. ed. 383 [rev 7 F. (2d) 330]; The Muskegon, 10 F. (2d) 817; The Hurona, 268 Fed. 910; National City Bank v. McClosky, 26 OhNPNS 176. And see Liberty Nat. Bank v. Burr, 270 Fed. 251; Marburg v. Marburg, 26 Md. 8, 90 AmD 84; Metcalf v. Mayer, 213 App. Div. 607, 211 NYS 53; Sirie v. Godfrey, 196 App. Div. 529, 188 NYS 52; Matter of King, 129 Misc. 244, 221 NYS 730; Revillon v. Demme, 114 Misc. 1, 185 NYS 443 (in all of which cases the facts and holdings conform to the rule of the text, but do not specifically recognize a distinction between debts payable in this country and those payable elsewhere).

[a] **Reasons for, and discussion of, rule.**—(1) "In this case, unlike Hicks v. Guinness, 269 U. S. 71, 46 SCt 46, 70 L. ed. 168, at the date of the demand the German Bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. It has incurred no additional or other one since. . . . It was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things." Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U. S. 517, 518, 47 SCt 166, 71 L. ed. 383. (2) "The distinction between the Deutsche Bank case [47 SCt 166] and Hicks v. Guinness, 269 U. S. 71, 46 SCt 46, 70 L. ed. 168, is not, as argued, that the plaintiff in Hicks v. Guinness was in the United States, but that, as the Court understood the facts, the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars." Zimmermann v. Sutherland, 274 U. S. 253, 255, 47 SCt 625, 71 L. ed. 1034.

[b] **For example** (1) the debt of a German bank to an American citizen, arising from refusal to pay deposit on demand, will be determined as of the value of the mark at the time of suit and not according to the rate of exchange existing when the demand was made. Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U. S. 517, 47 SCt 166, 71 L. ed. 383 [rev 7 F. (2d) 330]. (2) Where libelant made advances in France in francs to the master of respondent's vessel, and brought suit to recover for such advances in the United States, the amount being payable in France, in French money, libelant was entitled to a decree for such sum in dollars as would purchase the requisite number of francs at the rate of exchange prevailing at the date of the decree. The Hurona, 268 Fed. 910. (3) A shipper is entitled to recover the stated amount of Italian lire, for duplicate freight paid, at the exchange rate existing when the decree was entered. The Muskegon, 10 F. (2d) 817.

[c] **Rule applied** in an action brought in Ohio on a debt payable in Brazil in Brazilian money. National City Bank v. McClosky, 26 OhNPNS 176.

[d] **Date of commencement of action applied.**—Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U. S. 517, 47 SCt 166, 71 L. ed. 383; Revillon v. Demme, 114 Misc. 1, 185 NYS 443.

2. Hicks v. Guinness, 269 U. S. 71, 46 SCt 46, 70 L. ed. 168 [rev on other grounds 299 Fed. 538 (aff 291 Fed. 769)]; Det Forenede Dampskibs Selskab v. Insurance Co. of North America, 31 F. (2d) 658; In re Verdi, 268 Fed. 908; Forbes v. Murray, 9 F. Cas. No. 4,928, 3 Ben. 497; Butler v. Merchant, (Tex. Civ. A.) 27 SW 193. See also Sutherland v. Mayer, 271 U. S. 272, 46 SCt 538, 70 L. ed. 943 [expl Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U. S. 517, 47 SCt 166, 71 L. ed. 383, as holding, in a case involving settlement of accounts of a German partnership having one member in America, that the partnership contract might be regarded as subjecting the German partners to American law and warranting a settlement as of the date when it first became legal after the war, taking the mark at its value at that time].

[a] **Reasons for, and discussion of, rule.**—(1) "The debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors 'You are too late to perform what you have promised, and we want the dollars to which we have a right by the law here in force.'" Hicks v. Guinness, 269 U. S. 71, 80, 46 SCt 46, 70 L. ed. 168. (2) "The libelant . . . was entitled to the payment in New York on January 1, 1916, of the number of dollars represented by £8,269. We are not seeking the equivalent of £8,269 in dollars, in order to replace that number of pounds in England, but are ascertaining what was the damage on January 1, 1916, in dollars represented by £8,269. That can only be calculated at $4.74 for each pound sterling, the then rate of exchange." In re Verdi, 268 Fed. 908, 909.

[b] **Illustrations.**—(1) An indebtedness by a German subject to an American citizen on an account stated before declaration of war between Germany and the United States, payable in marks, on recovery in a court of the United States, is measured by the value of the marks in American money at the time the account was stated, and the right to indemnity for its nonpayment accrued, rather than at the time of recovery. Hicks v. Guinness, 269 U. S. 71, 46 SCt 46, 70 L. ed. 168 [rev on other grounds 299 Fed. 538 (aff 291 Fed. 769)]. (2) Where a collision between two British vessels occurred in New York Harbor, and suit therefor was brought in that district, but repairs were made in England and paid for in English pounds, and demurrage was also computed by agreement in that money, in reducing such sums to American money for the purposes of the decree, the rate of exchange applicable was held to be the current rate at the time the damages became payable, as fixed by the decree. In re Verdi, 268 Fed. 908. (3) Where a contract was made in this country to pay in Mexican dollars, it was held that the value of the Mexican money may be allowed at its value in our money at the time the debt was due instead of its value at the time of the trial. Butler v. Merchant, (Tex. Civ. A.) 27 SW 193.

3. The Saigon Maru, 267 Fed. 881 [aff 272 Fed. 799 (rev on other grounds 260 U. S. 490, 43 SCt 172, 67 L. ed. 364)]; Cropper v. Nelson, 6 F. Cas. No. 3,417, 3 Wash. C. C. 125; Lee v. Wilcocks, 5 Serg. & R. (Pa.) 48; Taan v. Le Gaux, 1 Yeates (Pa.) 204; Scott v. Hornsby, 1 Call (5 Va.) 41; Hawes v. Woolcock, 26 Wis. 629. See Smith v. Shaw, 22 F. Cas. No. 13,107, 2 Wash. C. C. 167 (where the question was whether a sterling debt should be turned into currency at the par of exchange or at the present rate, the court stated that it ought to be at the present rate).

4. Quartier v. Farah, 49 Ont. L. 186, 64 DomLR 37.

5. Kantor v. Aristo Hosiery Co., 222 App. Div. 502, 226 NYS 582 [aff 248 N. Y. 630 mem, 162 NE 553 mem]; Peyrae v. Wilkinson, [1924] 2 K. B. 166.

[a] **Discussion of rule.**—"We think that in the interest of uniformity, the breach-day rule should be followed in the absence of clear proof of exceptional conditions. We do not regard as exceptional the fact that the claim here asserted is for a debt due under a contract and not for damages for a breach thereof. . . . To differentiate between a debt and a claim for damages is to lose sight of the economic fact that foreign currency is a commodity. In the contemplation of the parties the promisee who is entitled to receive pounds sterling is entitled to the purchasing power of the pound sterling on that date. The breach-day rule gives him compensation measured by the purchasing power of the foreign currency on the day he was entitled to receive it." Kantor v. Aristo Hosiery Co., 222 App. Div. 502, 503, 226 NYS 582 [aff 248 N. Y. 630 mem, 162 NE 553 mem].

6. Matter of King, 129 Misc. 244,

In the former class of actions, it has been held that the debt must be paid in domestic money at the rate of exchange prevailing at the time of the decision,[7] whereas in actions for the recovery of damages for breach of contract or a tort the measure of damages is fixed by the value of the money at the time and place the action accrued.[8] In England the breach-day rule is applied to actions on a debt,[9] as well as to actions for damages for breach of contract[10] or a tort,[11] and this rule has been approved in some American cases.[12] In an action to administer trust funds the rate of exchange has been applied as of the date on which the amount due was finally ascertained.[13]

If there is no current exchange damages must be given according to the rate of exchange at par[14]

[§ 36] **8. Depreciated Currency.** Although there is some authority to the contrary,[15] as a general rule payment cannot be made in depreciated currency or

221 NYS 730; Cohn v. Boulken, 36 T. L. R. 767; and cases infra notes 7, 8.

7. Metcalf Co. v. Mayer, 213 App. Div. 607, 211 NYS 53; Sirie v. Godfrey, 196 App. Div. 529, 188 NYS 52; Matter of King, 129 Misc. 244, 221 NYS 730. Contra Kantor v. Aristo Hosiery Co., 222 App. Div. 502, 226 NYS 582 [aff 248 N. Y. 630 mem, 162 NE 553 mem].

[a] **Reasons for, and discussion of, rule.**—(1) "This was a French contract for the sale in France of French goods for which the purchaser agreed to pay in French francs at Paris, France. At any time before suit was brought the defendant could have tendered the plaintiff at Paris, France, the 10,450 francs in full payment of her claim, and plaintiff would have been compelled to accept the same. . . . By merely bringing action in this jurisdiction, the plaintiff, I apprehend, acquired no right to a more favorable judgment than she could have obtained had action been brought in France." Sirie v. Godfrey, 196 App. Div. 529, 536, 188 NYS 52. (2) "If the plaintiff had sued in France, it clearly would only be entitled to a judgment for an amount of francs, and the plaintiff by suing in another country cannot obtain the advantage of adopting a rate of exchange at a time other than the date of the rendition of the judgment. The plaintiff is entitled to a judgment for francs in accordance with its bills rendered and its demand for payment. The only reason for translating the amount of francs into dollars is because the judgment must be rendered in the money of the forum; hence the date of the application of the rate of exchange should be the time of the rendition of the judgment." Metcalf Co. v. Mayer, 213 App. Div. 607, 613, 211 NYS 53.

[b] **Illustrations.**—(1) Loans repayable in France in francs are payable in dollars at the exchange rate at the date of the decision, with interest from the due date. Matter of King, 129 Misc. 244, 221 NYS 730. (2) In an action on a contract made and to be performed in France, plaintiff was entitled to recover judgment in American currency on the basis of the rate prevailing at the date of judgment, and not at the rate when payment was due, where the bulk of payments were made in, or translated into, francs, and the bills were rendered in francs. Metcalf Co. v. Mayer, 213 App. Div. 607, 211 NYS 53; Sirie v. Godfrey, 196 App. Div. 529, 188 NYS 52.

8. U. S.—The Muskegon, 10 F. (2d) 817; Wichita Mill, etc., Co. v. Naamlooze, etc., Industrie, 3 F. (2d) 931; Page v. Levenson, 281 Fed. 555.

Cal.—Grunwald v. Freese, 4 Cal. Unrep. Cas. 182, 34 P 73.

Ill.—Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 116 NE 636; Warnock v Fleming, 200 Ill. A. 22, 24 [cit Cyc].

Md.—Rasst v. Morris, 135 Md. 243, 108 A 787.

N. J.—Katcher v. American Express Co., 94 N. J. L. 165, 109 A 741.

N. Y.—Hoppe v. Russo-Asiatic Bank, 235 N. Y. 37, 138 NE 497; Winter v. American Aniline Products, Inc., 204 App. Div. 792, 198 NYS 717 [rev on other grounds 236 N. Y. 199, 140 NE 561]; Orlik v. Wiener Bank Verein, 204 App. Div. 432, 198 NYS 413; Gross v. Mendel, 171 App. Div. 237, 157 NYS 357 [aff 225 N. Y. 633 mem, 121 NE 871 mem]; Gerli v. Compagnie Generale Transatlantique, 132 Misc. 752, 230 NYS 282; Comptoir Commercial D'Importation v. Zabriskie, 127 Misc. 461, 216 NYS 473 [aff 222 App. Div. 736 mem, 225 NYS 808 mem]; Petkus v. Lietuvos Ukio Bankas, 123 Misc. 193, 204 NYS 726.

"In an action properly brought in the courts of this state by a citizen or an alien to recover damages, liquidated or unliquidated, for breach of contract or for a tort, where primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency the rate of exchange prevailing at the date of the breach of contract or at the date of the commission of the tort is under ordinary circumstances to be applied." Hoppe v. Russo-Asiatic Bank, 235 N. Y. 37, 39, 138 NE 497.

[a] **Reasons for, and discussion of, rule.**—(1) "If a man contracts to deliver wheat on a given day, and fails to do so, the measure of damages is the market price of the article on that day and in principle it is difficult to see why the rule should not hold good when he agrees to deliver Mexican dollars, or other foreign money, which, in the absence of some positive law of our own, is but a commodity." Grunwald v. Freese, 4 Cal. Unrep. Cas. 182, 187, 34 P 73. (2) "To take any other date than that of the breach as that at which the conversion is to be made will lead to intentional obstruction of speedy trials or make the rights of the parties dependent upon all sorts of accidental occurrences." Page v. Levenson, 281 Fed. 555, 558.

[b] **Rule applied** in an action for breach of contract against a buyer of goods to be delivered in France and paid for in francs. Page v. Levenson, 281 Fed. 555.

[c] **Counterfeit foreign money.**—Where land was to be conveyed in consideration of a certain amount of money issued by a foreign government, in an action to recover the value of such money, the money having turned out to be counterfeit, the amount of recovery in American money is to be determined from the value of the foreign money at the time plaintiff had fully performed his part of the contract, and had put defendant in default, and not at a prior time when the money was paid. Rasst v. Morris, 135 Md. 243, 108 A 787.

9. Peyrae v. Wilkinson, [1924] 2 K. B. 166; Scott v. Bevan, 2 B. & Ad. 78, 22 ECL 42, 109 Reprint 1073; Anderson v. Equitable L. Assur. Soc., 134 L. T. Rep. N. S. 557; Uellendahl v. Pankhurst, [1923] W. N. 224. Contra Cohn v. Boulken, 36 T. L. R. 767.

[a] **In Canada** the English rule prevails. Montreal Tramways Co. v. Savignac, 34 Que. K. B. 245; Toronto Gen. Trusts Corp. v. Regina, 15 Sask. L. 491, 69 DomLR 542, [1922] 2 WestWkly 986.

[b] **Rule applied** to action: (1) On a judgment recovered in a foreign country. Scott v. Bevan, 2 B. & Ad. 78, 22 ECL 42, 109 Reprint 1073. (2) On a life insurance policy. Anderson v. Equitable L. Assur. Soc., 134 L. T. Rep. N. S. 557.

10. Di Ferdinando v. Simon, [1920] 3 K. B. 409, 11 ALR 358 [aff [1920] 2 K. B. 704]; Lebeaupin v. Crispin, [1920] 2 K. B. 714; Barry v. Van den Hurk, [1920] 2 K. B. 709; In re British American Continental Bank, Ltd., [1923] 1 Ch. 276; In re British American Continental Bank, Ltd., [1922] 2 Ch. 589; In re British American Continental Bank, Ltd., [1922] 2 Ch. 575; Bertram v. Duhamel, 2 Moore P. C. 211, 12 Reprint 984. See also Di Ferdinando v. Simon, [1920] 2 K. B. 704, 708 (where Roche, J., who also decided the Kirsch case, said: "He has also pressed on me my own decision in Kirsch v. Allen, Harding & Co., Ltd., [1919] W. N. 301, but I think that Mr. Shiller has succeeded in convincing me that there is no inconsistency between the decision which I am now pronouncing and that decision. If he was wrong in so persuading me all I can say is that I prefer my present decision"). But see Kirsch v. Allen, Harding & Co., Ltd., [1919] W. N. 301 [rev on other grounds 36 T. L. R. 245] (holding damages for breach of contract suffered in dollars should be converted into pounds sterling at the rate of exchange prevailing at the date of judgment, where the money was apparently payable in New York).

[a] **In Ontario** the English rule prevails. Stephens v. Berry, 15 U. C. C. P. 548; White v. Baker, 15 U. C. C. P. 292; Crawford v. Beard, 14 U. C. C. P. 87; Massachusetts Hospital v. Provincial Ins. Co., 25 U. C. Q. B. 613. And see Morrell v. Ward, 10 Grant Ch. 231 (holding that the mortgagee has an option after default to take his money according to the value either at the time of default or at any time subsequently).

11. SS. Celia v. SS. Volturno, [1921] 2 A. C. 544, 20 ALR 884.

12. Dante v. Miniggio, 298 Fed. 845, 54 App. (D. C.) 386, 33 ALR 1278; Kantor v. Aristo Hosiery Co., 222 App. Div. 502, 226 NYS 582 [aff 248 N. Y. 630 mem, 162 NE 553 mem].

13. In re Chesterman, [1923] 2 Ch. 466.

[a] **Illustration.**—Where a loan payable in foreign money is secured by a mortgage on a trust fund which others besides the mortgagor were entitled to share, in an action brought to administer such funds and apportion the security for proper proportion between the mortgagor and mortgagee, the foreign money is converted into domestic currency at the rate of exchange existing upon the date on which the amount due was finally ascertained. In re Chesterman, [1923] 2 Ch. 466.

14. Taan v. Le Gaux, 1 Yeates (Pa.) 204.

15. Société des Hôtels le Touquet Paris-Plage v. Cummings, [1922] 1 K. B. 451; British Bank v. Russian Commercial, etc., Bank, 38 T. L. R. 65.

[a] **Illustrations.**—(1) A hotel bill of eighteen thousand and thirty-five francs contracted in France in 1914 was canceled by payment of that sum in France in greatly depreciated currency. Société des Hôtels le Touquet Paris-Plage v. Cummings, [1922] 1 K. B. 451. (2) A loan of seven hundred and fifty thousand Russian roubles in 1914 is repayable in greatly depreciated paper roubles issued by the Russian Bolshevist government. British Bank v. Rus-

securities,[16] unless the creditor consents thereto.[17] If, however, the debtor is ignorant of the depreciation in value,[18] or if both parties know or have the same means of knowing the value of the depreciated paper,[19] a payment made in good faith in depreciated paper is good. Payment made in currency under a contract to pay a certain sum in specie discharges the contract to the amount of the specie value at the date thereof.[20]

[§ 37] **9. Appreciated Currency.** Where a debt is payable in current funds, the creditor cannot claim the right to be paid in an appreciated medium of payment, such as gold.[21] Under a contract to pay at a future date in the currency then in circulation an amount equivalent to the amount of the debt as it was valued at the date of the contract, the debtor has the benefit of the appreciation of gold up to the expiration of the credit but not of that which occurs after default in payment.[22] Where, after the debt is created, but before it becomes due, the value of a dollar in currency becomes appreciated, the creditor is entitled to receive payment in current money at its value when the debt falls due.[23]

[§ 38] **10. Uncurrent or Unlawful Money.** By the agreement or consent of the parties payment may be made in uncurrent money or notes,[24] or even in unlawful money;[25] but in the absence of agreement or consent a creditor cannot be compelled to accept payment in such money.[26]

[§ 39] **D. Payment Other than in Money*[27]—1. In General.** While payment is ordinarily required to be made in money,[28] it may, when so agreed, either expressly or by implication, or when the creditor so consents, be made by furnishing, transferring, or delivering anything of value;[29] and even in the absence of such agreement or consent, if payment

sian Commercial, etc., Bank, 38 T. L. R. 65.

16. U. S.—Opie v. Castleman, 32 Fed. 511 [rev on other grounds 145 U. S. 214, 12 SCt 822, 36 L. ed. 680].
Ill.—Chicago F. & M. Ins. Co. v. Keiron, 27 Ill. 501.
Ky.—Huston v. Noble, 4 J. J. Marsh. 130; Brayden v. Goulman, 1 T. B. Mon. 115. But see Sandford v. Farmers' Bank, 1 Bush 335 (a purchaser at an execution sale of mortgaged property, who pays for it in depreciated currency, on the redemption of the property is only entitled to receive his purchase money in currency of the same kind, or its equivalent in value at the time of payment, with interest).
Miss.—Sample v. Pickens, Sm. & M. Ch. 501.
N. Y.—Hulbert v. Carver, 40 Barb. 245; Hulbert v. Carver, 37 Barb. 62.
N. C.—Blackwell v. Willard, 65 N. C. 555, 6 AmR 749; Barham v. Gregory, 62 N. C. 243; McNair v. Ragland, 16 N. C. 516.
Va.—Wrightsman v. Bowyer, 24, Gratt. (65 Va.) 433; Morgan v. Otey, 21 Gratt. (62 Va.) 619.
[a] **Rule applied.**—Where one agreed to do certain work for a specified sum payable in notes of a particular bank or their equivalent, which was a fair compensation for the work, and the bills of the bank had depreciated in value at the time the money became due, the creditor was held entitled to recover a fair price for his work in current money. Sample v. Pickens, Sm. & M. Ch. (Miss.) 501.
[b] **Demand payable in currency.**—A certificate of deposit, payable in "Illinois currency," cannot be satisfied by depreciated paper. It must be met by bills passing the locality in the place of coin. Chicago F. & M. Ins. Co. v. Keiron, 27 Ill. 501; Hulbert v. Carver, 37 Barb. (N. Y.) 62.

17. Washington v. Opie, 145 U. S. 214, 12 SCt 822, 36 L. ed. 680; Deering v. Parker, 4 Dall. (U. S.) appendix xxiii, 1 L. ed. 925; State v. Beard, Smith (Ind.) 276; Dick v. Truly, Sm. & M. Ch. (Miss.) 557; Hall v. Craige, 65 N. C. 51. See Dickinson v. Helms, 29 Gratt. (70 Va.) 462; Taliaferro v. Minor, 1 Call (5 Va.) 524 (consent of trustees).
[a] **Acceptance at real value.**—Where a creditor is entitled to the payment of his debt in coin, and on an offer by the debtor to pay in depreciated paper money declares he will receive the latter only at its value, or on account, and retain his claim for the difference, and the debtor without objection allows him to do so, the latter impliedly assents to the creditor's proposal. Tyers v. U. S., 5 Ct. Cl. 509. See also Kidwell v. Baltimore, etc., R. Co., 11 Gratt. (52 Va.) 676 (applying rule to payment in city stock).
[b] **Payment in scrip.**—Where the law provided for payment of labor performed for the state in scrip, there was no recourse upon the state for the difference between the actual and par value of the scrip. State v. Beard, Smith (Ind.) 276.

18. Ridenour v. McClurkin, 6 Blackf. (Ind.) 411.

19. Ridenour v. McClurkin, supra.

20. Hittson v. Davenport, 4 Colo. 169; Walkup v. Houston, 65 N. C. 501. See also Tyers v. U. S., 5 Ct. Cl. 509 (holding same where claim against United States payable in gold was attempted to be discharged in depreciated currency).
[a] **For example,** where credits in currency are indorsed on an obligation payable in specie, such credits are payments only to the amount of the value in specie of such credits at the respective dates of payment. Walkup v. Houston, 65 N. C. 501.
[b] **Payments made in public securities,** upon a note given for public securities, apply according to their value when made. Thatcher v. Prentice, 2 Root (Conn.) 20.

21. Lamar Ins. Co. v. McGlashen, 54 Ill. 513, 5 AmR 162.

22. Whitaker v. Dye, 56 Ga. 380.

23. Shackleford v. Helm, 1 Dana (Ky.) 338; Reynolds v. Lyne, 3 Bibb (Ky.) 340.
[a] **Rule applied.**—Where a creditor agrees to take notes of the bank of the commonwealth for a specie debt, and the debtor neither pays nor tenders until the paper has risen in value, he is not entitled in equity to any allowance for the advance. Shackleford v. Helm, 1 Dana (Ky.) 338.

24. Imbush v. Mechanics', etc., Bank, 1 Oh. Dec. (Reprint) 8, 1 WestLJ 49.

25. Hoagland v. Post, 1 N. J. L. 37; Rogers v. Leftwich, 2 Heisk. (Tenn.) 480.

26. Hulbert v. Carver, 40 Barb. (N. Y.) 245.

27. Cross references:
Acceptance of property or services as accord and satisfaction see Accord and Satisfaction §§ 95-97.
Authority of agent to receive payment other than in money see Agency §§ 266-271.
Dation en paiement see 17 C. J. p 1131.
Exchange of property see Exchange of Property 23 C. J. p 182.
Presumption that property other than money is collateral security and not payment see infra § 220.

28. See supra § 15.

29. Ala.—J. F. Morgan Pav. Co. v. Carroll, 211 Ala. 121, 99 S 640; Roach v. McDonald, 187 Ala. 64, 65 S 823; Williams v. Costello, 95 Ala. 592, 11 S 9; Stovall v. Hamilton, 14 Ala. A. 484, 71 S 63, 66 [cit Cyc].
Ark.—Toulmin v. Underwood, 172 Ark. 813, 290 SW 377; Williams v. Uzzell, 108 Ark. 241, 156 SW 843.
Cal.—Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32.
Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 246, 187 P 538 [cit Cyc].
Fla.—Watkins v. Sims, 81 Fla. 730, 88 S 764.
Ga.—Blakely First Nat. Bank v. Davis, 135 Ga. 687, 70 SE 246, 36 LRANS 134.
Ill.—Crowley v. Methodist Book Concern, 323 Ill. 215, 153 NE 652; Ralston v. Wood, 15 Ill. 159, 58 AmD 604; Scott v. Gilkey, 49 Ill. A. 116 [aff 153 Ill. 168, 39 NE 265].
Ind.—Weir v. Hudnut, 115 Ind. 525, 18 NE 24; Weston v. Wiley, 78 Ind. 54; Louden v. Birt, 4 Ind. 566; Baum v. Nord, (A.) 164 NE 294; Roberts v. Vonnegut, 58 Ind. A. 142, 104 NE 321.
Iowa.—State v. Chambers, 179 Iowa 436, 161 NW 470, 476 [cit Cyc].
Ky.—Barret v. Clarke, 226 Ky. 109, 9 SW (2d) 1091; Simons v. Douglas, 189 Ky. 644, 225 SW 721.
Md.—Foley v. Mason, 6 Md. 37.
Mich.—Cleveland v. Rothschild, 132 Mich. 625, 94 NW 184; Blair v. Carpenter, 75 Mich. 167, 42 NW 790.
Mo.—McCormick v. Obanion, 168 Mo. A. 606, 153 SW 267; Clay v. Lakenan, 101 Mo. A. 563, 74 SW 391.
N. Y.—Peo. v. Cromwell, 102 N. Y. 477, 7 NE 413; Wise v. Chase, 44 N. Y. 337 [aff 26 N. Y. Super. 35]; La Montagne v. New York Bank, 94 App. Div. 219, 88 NYS 21; Bouton v. Hill, 4 App. Div. 251, 38 NYS 498; Myers v. Grey, 122 NYS 1079; Matter of Thompson, 5 Dem. Surr. 393, 7 NYSt 762, 8 NYSt 751.
Oh.—Bullock v. Horn, 44 Oh. St. 420, 7 NE 737; Wettstein v. Bankers Nat. Bank, 20 Oh. Cir. Ct. N. S. 201.
Or.—Smith v. Mills, 112 Or. 496, 230 P 350; Bush v. Abrahams, 25 Or. 336, 35 P 1066.
Tex.—Odle v. Barnes, (Civ. A.) 2 SW (2d) 577 [cert questions answered (Commn. A.) 299 SW 635].
Va.—Huffmans v. Walker, 26 Gratt. (67 Va.) 314.
Wash.—Petridge v. Osborn, 120 Wash. 21, 206 P 839; Commercial Bank v. Toklas, 21 Wash. 36, 56 P 927.
W. Va.—Legg v. Junior Mercantile Co., 142 SE 259; Bantz v. Basnett, 12 W. Va. 772.
"If the parties at the time, the debt is created, agree that its payment may be made in some way, other than by the delivery of money, it may be paid in the manner agreed upon, or if after the creation of a debt, the obligee agrees to accept something, other than money as payment, and the obligor delivers the property or other thing agreed upon in payment, it will constitute a valid payment." Simons v. Douglas, 189 Ky. 644, 647, 225 SW 721.

*By EUSTACE W. TOMLINSON (§§ 39-64).

in money actually results from the medium transferred or delivered to the creditor, the debt is extinguished to the extent of such payment.[30] Ordinarily, an agreement for payment other than in money is presumed to be made in favor of the debtor,[31] and he has the option of paying the debt either in the medium specified or in money of equal value;[32] but after the time for payment has passed the debt is payable only in money, in the absence of the creditor's consent to receive something else.[33]

Debtor must effectuate transfer or assignment. Where it is agreed that payment may be made by the assignment or transfer of property other than money, the debtor must do what is necessary to transfer such interest in the property as to enable the creditor to obtain the beneficial ownership thereof,[34] and if he fails to do so he remains liable on the debt.[35]

Where a worthless thing is received without knowledge of its worthlessness or invalidity, no payment is effectuated,[36] although the creditor may be estopped by delay in notifying the debtor of the de-

[a] **"Anything is payment** which the one obligated offers as payment, and the one to whom payment is due accepts as payment." Roberts v. Vonnegut, 58 Ind. A. 142, 104 NE 321, 326.

[b] **The acceptance of any valuable thing** in discharge of the debt amounts to payment, but it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment. Without this the transaction is regarded either as furnishing matter of set-off or as security collateral to the original debt, according as the subject received is in possession or in action. Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32; Covely v. Fox, 11 Pa. 171.

[c] **When the parties agree** to treat something other than money as constituting a payment, the law will so treat it. State v. Chambers, 179 Iowa 436, 161 NW 470.

[d] **No public policy forbids** a contract to pay in something other than money, and in the absence of any statutory restriction such contract will be enforced by the court. Petridge v. Osborn, 120 Wash. 21, 206 P 839.

Payment in particular forms or media see infra §§ 40–64.

30. Commercial Bank v. Bobo, 43 S. C. L. 31, 36; and cases infra §§ 40, 50.

"To constitute anything else than money a payment, it must be accepted as such, or payment in fact must result from it." Commercial Bank v. Bobo, supra.

31. Ga.—Mobley v. Tufts, 36 Ga. A. 764, 138 SE 272.

Md.—Skirvan v. Willis, 4 Harr. & M. 483.

N. Y.—Battle v. Rochester City Bank, 3 N. Y. 88 [aff 5 Barb. 414].

Oh.—Fosdick v. Greene, 27 Oh. St. 484, 22 AmR 328.

Tenn.—Stroud v. Rankin, 2 Baxt. 74.

[a] **Payment in money cannot be compelled.**—(1) A debtor whose obligation is to pay in land cannot be compelled against his will to pay in money. Battle v. Rochester City Bank, 3 N. Y. 88 [aff 5 Barb. 414]. (2) And where an obligation is dischargeable, by its terms, by the delivery of certain shares of stock, payment is effectuated by the delivery of such shares at the time the obligation matures, although the corporation had failed and the shares were then of no value. Fosdick v. Greene, 27 Oh. St. 484, 22 AmR 328. (3) One liable for debt in tobacco cannot be compelled to pay in money. Skirvan v. Willis, 4 Harr. & M. (Md.) 483.

[b] **Note payable in Confederate money.**—(1) Where a note payable in Confederate money is given for the agreed price of property, a recovery can be had only in the medium specified, and the seller cannot abandon the agreement and sue for the value of the property in other money. Stroud v. Rankin, 2 Baxt. (Tenn.) 74. (2) Payment in Confederate money or other depreciated currency see supra §§ 32, 33, 36.

32. Mobley v. Tufts, 36 Ga. A. 764, 138 SE 272; Williams v. Dunn, 120 Me. 506, 115 A 276; Wheeler v. Ocker, etc., Mfg. Co., 162 Mich. 204, 127 NW 332.

Election as to medium of payment see infra § 65.

33. U. S.—Marlor v. Texas, etc., R. Co., 21 Fed. 383.

Ind.—Sherwood v. Elslow, 5 Ind. 218; Walker v. Bement, 50 Ind. A. 645, 94 NE 339.

Mich.—Wheeler v. Ocker, etc., Mfg. Co., 162 Mich. 204, 127 NW 332.

Oh.—Morris v. Edwards, 1 Oh. 189; Smith v. Goddard, 1 Oh. 178.

Pa.—Goodwin v. Heckler, 252 Pa. 332, 97 A 475; Chambers v. Harger, 18 Pa. 15.

Va.—Campbell v. Ransom, 21 Gratt. (62 Va.) 405.

[a] **Stock returnable on demand.**—A mortgagee securing to the mortgagee the return of corporate stock loaned to the mortgagor, who had pledged it to a third person, or securing the payment to the mortgagor of the par value of the stock and indemnifying her against loss on account of the loan and the pledge, which fixes no time for the return of the stock, makes the stock returnable on demand, and on demand and refusal the rights of the parties are fixed, and the mortgagor, on failing to return the stock on demand or within a reasonable time, loses his right to discharge the mortgage by a return of the stock and is liable in money. Walker v. Bement, 50 Ind. A. 645, 94 NE 339.

Loss of right to elect medium of payment see infra § 66.

Time of payment see supra § 7.

34. Ind.—Sherwood v. Elslow, 5 Ind. 218.

Mass.—Di Ausilio v. Stavropulos, 252 Mass. 69, 147 NE 346.

See also Gerrish Dredging Co. v. Bethlehem Shipbuilding Corp., 247 Mass. 162, 141 NE 867 (holding that delivery of a check to a third person to be delivered to the creditor is not payment until indorsement and delivery to the creditor).

Mo.—Hughes v. Israel, 73 Mo. 538; Coy v. De Witt, 19 Mo. 322.

Mont.—Spear v. Ryan, 64 Mont. 145, 208 P 1069.

N. Y.—Tompkins v. Tompkins, 34 NYS 1032 [aff 158 N. Y. 679, 52 NE 1126].

N. C.—Watkins v. James, 48 N. C. 195.

Pa.—Heath v. Page, 48 Pa. 130.

Ont.—Fisher v. Ferris, 6 U. C. Q. B. 534.

[a] **Check on which payment is stopped.**—Where the maker of a check, representing the amount of an account, stopped payment of it, the creditor was entitled to treat it as a nullity and maintain an action to recover on the account. Di Ausilio v. Stavropulos, 252 Mass. 69, 147 NE 346.

[b] **Note destroyed in debtor's possession.**—A debtor cannot claim that his debt was discharged by the giving of his note to the creditor, where the note was later redelivered to him for safe-keeping and was destroyed while in his possession. Tompkins v. Tompkins, 34 NYS 1032 [aff 158 N. Y. 679 mem, 52 NE 1126 mem].

[c] **Property retaken on execution against debtor.**—Where goods agreed to be received as payment of a debt are, after delivery to the creditor, seized on execution against the debtor, and it is decided that the property is subject to execution against him, and thereafter the debtor pays off the execution and obtains the goods, but does not redeliver them to the creditor, no payment is effectuated. Sherwood v. Elslow, 5 Ind. 218.

[d] **Undelivered promissory note.**—(1) Where a vendee's note for the purchase price of land was made payable to a third person, by direction of the grantor, but was not delivered to the payee, and was retained by the grantor, it did not operate as a payment of the purchase price. Hughes v. Isreal, 73 Mo. 538. (2) Promissory note as payment see infra §§ 40–49.

[e] **Vendee's equity forfeited to the vendor.**—Where one who had contracted to purchase property transferred his equity therein to his creditor in satisfaction of a debt, the creditor assuming no obligation under the contract and the debtor agreeing to complete the payments thereon, and thereafter the debtor defaulted in payment of the purchase price and the contract was canceled by the vendor, whereby the interests of the debtor and the creditor therein were forfeited, no payment was effectuated. Spear v. Ryan, 64 Mont. 145, 208 P 1069.

[f] **Creditor not bound to obtain draft from third person.**—Where a creditor agreed to accept, in payment of the debt due him, a draft of a third person, and such third person failed to give the draft, the effect of such failure must fall upon the debtor, who was bound to procure the draft, and not on the creditor, who was only bound to receive it, and consequently no payment is effectuated. Watkins v. James, 48 N. C. 195.

Delivery as element of payment in general see supra § 1.

35. Weeks v. Elliott, 33 Me. 488; and cases supra note 34.

36. See cases infra this note.

[a] **Bonds of which consideration fails.**—Bonds of third persons, assigned to the creditor to be applied to the discharge of the debt, cannot be considered as payment, although they are not returned to the assignor, where the consideration of the bonds has failed, and they are of no value. Wilson v. Hurst, 30 F. Cas. No. 17,809, Pet C. C. 441.

[b] **Certificate of deposit in insolvent bank.**—(1) Where the officers of a trust company issued a certificate of deposit, in payment of a debt, at a time when the trust company was hopelessly insolvent, the certificate did not constitute payment, whether or not the trust company's officers knew of the insolvency. Reserve Loan L. Ins. Co. v. Dulin, 69 Ind. A. 363, 122 NE 3. (2) Certificates of deposit or indebtedness as payment see infra § 54.

[c] **Certificates of discharge from army valueless when assigned.**—Where payment was agreed to be made partly in cash and partly in certificates of honorable discharge from the army, and under the laws of the United States such certificates were valueless in the hands of an assignee, the vendor of the land was entitled to recover the balance of the price in money. Taft v. Wildman, 15 Oh. 123.

[d] **Mortgage which has been paid.**—(1) Where a creditor received as payment an assignment of a mort-

fect.[37]

[§ 40] **2. Bills of Exchange and Promissory Notes[38]—a. In General.** The rule obtaining in most jurisdictions is that, in the absence of agreement or consent to receive it as such,[39] a draft or bill of exchange,[40] although accepted by the

gage which has theretofore been paid and satisfied by the mortgagor, such assignment, although accompanied by no guaranty, is no payment and furnishes no defense to an action on the original debt. Hamilton v. Neel, 7 Watts (Pa.) 517. (2) Payment by assignment of claim against third person see infra § 57.

[e] **Order upon nonexistent drawee or friend.**—(1) Where a manufacturer, after securing promises that citizens of the community would contribute a specified sum toward the construction of a factory, contracts for its erection and agrees to pay part of the cost by an order upon the "citizens committee" for the amount promised to be contributed therefor, such order did not effectuate a payment of the contract price when no such committee was in fact organized or existing and no funds were raised or contributed in fulfillment of such promises. J. Weller Co. v. Gordon, 24 Oh. Cir. Ct. 407. See also Hussey v. Sibley, 66 Me. 192, 22 AmR 557 (holding that an order delivered and received in ignorance of its worthlessness was not payment, but not stating the reason for its want of value). (2) Order upon third person as payment see infra § 56.

[f] **Town warrant in excess of debt limit.**—(1) Where plaintiffs, who furnished materials to a school contractor, agreed to accept a valid town warrant, and accepted a warrant which was illegal because in excess of the debt limit, without knowledge of such illegality, there was no payment. Everly v. Ball, 60 Ind. A. 7, 108 NE 543. (2) Payment by delivery of municipal warrants see infra § 55.

[g] **Void certificate of indebtedness.**—(1) Where certificates of indebtedness of county commissioners were received, by agreement, in payment of a contract price for drainage work, both parties believing the certificates to be valid, but they were not paid and the assessment for the cost of such construction was uncollectable because of a defect in prior proceedings, the certificates did not constitute a payment and the creditor was entitled to recover the contract price. Catlin v. Munn, 37 Hun (N. Y.) 23. (2) Certificates of indebtedness as payment see infra § 54.

[h] **Worthless or invalid check.**—(1) A debtor is not discharged by giving to his creditor a check upon a bank where he has neither funds nor credit, or by indorsing a check drawn by a third party, who has no funds subject to its payment, even though such check is given and received under the agreement that it shall be payment. Citizens Bank v. Kretschmar, 91 Miss. 608, 44 S 930; Fleig v. Sleet, 43 Oh. St. 53, 1 NE 24, 54 AmR 800; Kegley v. Skillman, 68 Wash. 637, 123 P 1081. (2) So a check does not constitute payment where drawn in the absence of funds and with no reasonable expectation of funds in the hands of the drawees to meet it, and no reasonable expectation that it would be honored. Holmes v. Fall River First Nat. Bank, 126 Mass. 353; Taylor v. Wilson, 11 Metc. (Mass.) 44, 45 AmD 180; Fleig v. Sleet, 43 Oh. St. 53, 1 NE 24, 54 AmR 800. (3) A check drawn upon a bank which is insolvent and whose affairs are in liquidation is not payment. Bieringer-Hanauer Co. v. Cosmopolitan Trust Co., 247 Mass. 73, 141 NE 566; Cosmopolitan Trust Co. v. Lyons, 244 Mass. 115, 138 NE 325. (4) The delivery of a check, on which the place where it is drawn is not stated, as required by statute, and which is not stamped, does not amount to a payment. Bond v. Warden, 1 Coll. 583, 28 EngCh 583, 63 Reprint 553. (5) Payment by check see infra §§ 50–53

Worthless or invalid bill or note of:
Debtor see infra § 43.
Third person see infra § 58

37. State v. Abramson, 57 Ark. 142, 20 SW 1084.

[a] **Forged warrant.**—Where county warrants given and received in payment of an obligation to the state were afterward discovered to be forgeries, but the state did not notify the debtor thereof for nearly three years, its right to recover on the original obligation is lost, inasmuch as it should have given notice within a reasonable time to afford the debtor an opportunity to enforce his right of redress, if any, against the person who passed the forged paper to him. State v. Abramson, 57 Ark. 142, 20 SW 1084.

Retention of commercial paper and failure to give notice of dishonor see infra § 53.

38. Cross references:
Bills and notes generally see Bills and Notes 8 C. J. p 1.
Agent's authority to take bill or note in payment see Agency § 627.
Assignment of claim against third person see infra § 57
Attorney's authority to receive bill or note in payment see Attorney and Client § 180.
Bill or note as:
Accord and satisfaction see Accord and Satisfaction §§ 60–65, 85.
Assent to account stated see Accounts and Accounting § 275.
Legal tender see Tender [38 Cyc 146].
Money see § 4.
Novation see Novation § 30.
Payment of particular classes of obligations or liabilities see cross references ante p 584.
Suspending right of action on debt see Actions § 391.
Tolling statute of limitations see Limitations of Actions § 633.
Bill or note of third person see infra § 58.
Certificate of deposit or of indebtedness see infra § 54.
Checks see infra §§ 50–53.
Choses in action see infra § 62.
Creditor as holder in due course see Bills and Notes § 704.
Debts; property or services as consideration for bill or note see Bills and Notes §§ 350–365.
Municipal warrants or orders see infra § 55.
New obligation see infra § 59.
Novation see Novation § 30.
Order on third person for money or goods see infra § 56.
Payment to agent by bill or note see Agency § 627.
Presumption that bill or note is payment or security see infra §§ 216, 217.
Promise of third person, and acceptance of him as debtor see infra § 58.
Rules applied see infra §§ 44–49.

39. Agreement or consent to receive as payment see infra § 41.

40. U. S.—People's Nat. Bank v. Moore, 25 F. (2d) 599; Dow v. Cowan, 23 F. (2d) 646; Watts v. Unione Austriaca Di Navigazione, 224 Fed. 188 [aff 229 Fed. 136, 143 CCA 412 (rev on other grounds 248 U. S. 9, 39 SCt 1, 63 L. ed. 100)]; Anderson v. Brown, 1 F. Cas. No. 355; Gallagher v. Roberts, 9 F. Cas. No. 5,195, 2 Wash. C. C. 191; Wallace v. Agry, 29 F. Cas. No. 17,096, 4 Mason 336.

Ala.—McCrary v. Carrington, 35 Ala. 698; Farmers' Exch. Bank v. Greil Bros. Co., 17 Ala. A. 287, 84 S 427.

Ark.—Summers v. Wood, 131 Ark. 345, 198 SW 692; Churchill v. Yeatman-Gray Grocer Co., 111 Ark. 529, 164 SW 283; American Ins. Co. v. McGehee Liquor Co., 93 Ark. 62, 124 SW 252, 20 AnnCas 855; De Yampert v. Brown, 28 Ark. 166.

Colo.—Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717; Edwards v. Harvey, 2 Colo A. 109, 29 P 1024.

Conn.—Davidson v. Bridgeport Borough, 8 Conn. 472.

Ga.—Kinard v. Sylvester First Nat. Bank, 125 Ga. 228, 53 SE 1018, 114 AmSR 201; Flannery v. Harley, 117 Ga. 483, 43 SE 765; Kirkland v. Dryfus, 103 Ga. 127, 29 SE 612; Kyle v. Chattahoochee Nat. Bank, 96 Ga. 693, 24 SE 149; Weaver v. Nixon, 69 Ga. 699; Johnson v. Mechanics', etc., Bank, 25 Ga. 643; Wylly v. Collins, 9 Ga. 223.

Ill.—Thayer v. Peck, 93 Ill. 357; Hodgen v. Latham, 33 Ill. 344; Rawson v. Church, 123 Ill. A. 239; Chicago Sanitary Dist. v. Phœnix Powder Mfg. Co., 79 Ill. A. 36.

Kan.—Webb v. National Bank of Republic, 67 Kan. 62, 72 P 520.

La.—Napoleonville Bank v. Knobloch, 144 La. 100, 80 S 214.

Minn.—Commercial Inv. Trust v. Lundgren-Wittensten Co., 173 Minn. 83, 216 NW 531, 56 ALR 492; Isackson v. Lovell, 115 Minn. 481, 132 NW 918.

Nebr.—Chicago, etc., R. Co. v. Burns, 61 Nebr. 793, 86 NW 483; National L. Ins. Co. v. Goble, 51 Nebr. 5, 70 NW 503.

N. Y.—Thomas v. Westchester County, 115 N. Y. 47, 21 NE 674, 4 LRA 477; Holdsworth v. De Belaunzaran, 106 N. Y. 119, 12 NE 615; Fairport Union Free School Bd. of Education v. Fonda, 77 N. Y. 350; Smith v. Miller, 29 N. Y. Super. 413, 59 Abb PrNS 234 [aff 43 N. Y. 171, 3 AmR 690]; Hammond v. Christie, 28 N. Y. Super. 160; Hilton Bridge Constr. Co. v. Foster, 26 Misc. 338, 57 NYS 140 [aff 42 App. Div. 630, 59 NYS 1106]; American Luxfer Prism Co. v. Bartolicius Star Iron Works, Inc., 152 NYS 1014; Murray v. Gouverneur, 2 Johns. Cas. 438, 1 AmD 177.

N. C.—Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 SE 949; Bank v. Hollingsworth, 135 N. C. 556, 47 SE 618.

N. D.—Busch v. Manahan, 56 N. D. 491, 217 NW 658, 659 [cit Cyc].

Porto Rico.—Meunier v. Amill, 25 Porto Rico 738.

R. I.—Sweet v. James, 2 R. I. 270.

S. C.—Commercial Bank v. Bobo, 43 S. C. 31.

S. D.—Eggleston v. Plowman, 49 S. D. 609, 207 NW 981, 44 ALR 1231.

Tenn.—Southworth v. Thompson, 10 Heisk. 10.

Tex.—Kennedy v. Groves, 50 Tex. Civ. A. 266, 110 SW 136; Terry v. Dale, 27 Tex. Civ. A. 1, 65 SW 51, 396.

Eng.—Henderson v. Arthur, [1907] 1 K. B. 10, 3 BRC 73; Hadley v. Hadley, [1898] 2 Ch. 680; Burden v. Halton, 4 Bing. 454, 13 ECL 585, 130 Reprint 842, 3 C. & P. 174, 14 ECL 511, 172 Reprint 374; Bottomley v. Nuttall, 5 C. B. N. S. 122, 94 ECL 122, 141 Reprint 48; Pedder v. Watt, 2 Chit. 619, 18 ECL 815; Leake v. Young, 5 E. & B. 955, 85 ECL 955, 119 Reprint 736; Allen v. Royal Bank of Canada, 95 L. J. P. C. 17; Tempest v. Ord, 1 Madd. 89, 56 Reprint 35; Tapley v. Martens, 8 T. R. 451, 101 Reprint 1483; Grant v. Mills, 2 Ves. & B. 306, 35 Reprint 335; Ex p. Blackburne, 10 Ves. Jr. 206, 32 Reprint 823.

Ont.—Cameron v. Knapp, 7 U. C. C. P. 502.

Newfoundl.—Sparrow v. Boutin, 4 Newfoundl. 172; Meagher v. Hunt, 1 Newfoundl. 139, 142; Keefe v. Shannan, 1 Newfoundl. 52. See also Lahy v. Tree, 1 Newfoundl. 129 (applying the rule).

And see cases infra note 41.

[a] **Under the civil law** it seems that a bill of exchange does not extinguish a prior debt unless the parties so stipulate. Wallace v. Agry, 29 F. Cas. No. 17,096, 4 Mason 336.

Applications of rule see infra §§ 44–49.

drawee,[41] or a promissory note[42] of the debtor, or | his acceptance of a draft or bill of exchange drawn

Draft of third person see infra § 58.

41. U. S.—Olyphant v. St. Louis Ore, etc., Co., 28 Fed. 729.

Conn.—Dougal v. Cowles, 5 Day 511.

Ga.—Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511, 17 SE 748.

Md.—Harness v. Chesapeake, etc., Canal Co., 1 Md. Ch. 248.

Mich.—Marinette Iron Works Co. v. Cody, 108 Mich. 381, 66 NW 334; Midland State Bank v. Byrne, 97 Mich. 178, 56 NW 355, 37 AmSR 332, 21 LRA 753.

Mo.—Grube v. Stille, 61 Mo. 473.

N. Y.—Ainis v. Ayres, 62 Hun 376, 16 NYS 905.

Eng.—In re London, etc., Banking Co., 34 Beav. 332, 55 Reprint 663; Simon v. Lloyd, 2 C. M. & R. 187, 150 Reprint 80; Maxwell v. Deare, 8 Moore P. C. 363, 14 Reprint 138.

[a] **Acceptance by debtor's agent,** upon whom a bill is drawn, does not constitute payment in the absence of an agreement or consent that it shall do so, whether it is treated as made in the acceptor's capacity as agent, in which case it is in legal effect the acceptance of the debtor, or as made by a third person. Ainis v. Ayres, 62 Hun 376, 16 NYS 905.

Promise or undertaking of third person as payment see infra § 58.

42. U. S.—Lyman v. U. S. Bank, 12 How. 225, 13 L. ed. 965; Black v. Zacharie, 3 How. 483, 11 L. ed. 690; U. S. Bank v. Daniel, 12 Pet. 32, 9 L. ed. 989; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522; People's Nat. Bank v. Moore, 25 F. (2d) 599; Union Electric Steel Co. v. Imperial Bank of Canada, 286 Fed. 857; Freeman v. W. B. Moses & Sons, Inc., 285 Fed. 898; Union Trust, etc., Bank v. Southern Tract. Co., 283 Fed. 50 [certiorari den 260 U. S. 744 mem, 43 SCt 166 mem, 67 L. ed. 492 mem]; The No. 17, 275 Fed. 930; In re McAusland, 235 Fed. 173; Watts v. Unione Austriaca Di Navigazione, 224 Fed. 188 [aff 229 Fed. 136, 143 CCA 412 (rev on other grounds 248 U. S. 9, 39 SCt 1, 63 L. ed. 100)]; In re Wegman Piano Co., 221 Fed. 128, 131 [cit Cyc]; U. S. Fidelity, etc., Co. v. Eichel, 219 Fed. 803, 135 CCA 473 [app dism 239 U. S. 629 mem, 36 SCt 165 mem, 60 L. ed. 475 mem]; In re Raflo, 217 Fed. 313; Stewart v. Laberee, 185 Fed. 471, 109 CCA 351; Beall v. Hudson County Water Co., 185 Fed. 179; Bankers' Trust Co. v. T. A. Gillespie Co., 181 Fed. 448, 104 CCA 196; A. Leschen, etc., Rope Co. v. Mayflower Gold Min., etc., Co., 173 Fed. 855, 97 CCA 465, 35 LRANS 1; Atlas SS. Co. v. Colombian Land Co., 102 Fed. 358, 42 CCA 398; Lawrence v. U. S., 71 Fed. 228; Lawrence v. Morrisania Steam-Boat Co., 12 Fed. 850; Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420; Maze v. Miller, 16 F. Cas. No. 9,362, 1 Wash. C. C. 328; Moore v. Newbury, 17 F. Cas. No. 9,772, 6 McLean 472, Newb. Adm. 49; In re Ouimette, 18 F. Cas. No. 10,622, 1 Sawy. 47; Risher v. The Frolic, 20 F. Cas. No. 11,856, 1 Woods 92; Wallace v. Agry, 29 F. Cas. No. 17,096, 4 Mason 336; Weed v. Snow, 29 F. Cas. No. 17,347, 3 McLean 265.

Ala.—Manser v. Sims, 157 Ala. 167, 47 S 270; Lane, etc., Co. v. Jones, 79 Ala. 156; Keel v. Larkin, 72 Ala. 493; Lewis v. Dillard, 66 Ala. 1; Marshall v. Marshall, 42 Ala. 149; Myatts v. Bell, 41 Ala. 222; Fickling v. Brewer, 38 Ala. 685; Mooring v. Mobile Mar. Dock, etc., Ins. Co., 27 Ala. 254. See also Allen v. Pierce, 149 Ala. 677, 42 S 858; Allen v. Caldwell, 149 Ala. 293, 42 S 855 (both holding that the mere fact that the debtor was fraudulently induced by the creditor to give his note for a valid preëxisting debt does not prevent the creditor from recovering on the debt).

Ariz.—Reid v. Topper, 259 P 397, 399 [cit Cyc].

Ark.—Toulmin v. Underwood, 172 Ark. 813, 290 SW 377; Estes v. Lamp, 149 Ark. 369, 233 SW 99; Churchill v. Yeatman-Gray Grocer Co., 111 Ark. 529, 164 SW 283; Daniel v. Gordy, 84 Ark. 218, 105 SW 256; Pendergrass v. Hellman, 50 Ark. 261, 7 SW 132; Brugman v. McGuire, 32 Ark. 733.

Cal.—Western Fuel Co. v. Sanford G. Lewald Co., 190 Cal. 25, 210 P 419; Ellison v. Henion, 183 Cal. 171, 190 P 793, 1 ALR 444; Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 137 P 25; National Lumber Co. v. Whalley, 162 Cal. 224, 121 P 729; Brown v. Cronise, 21 Cal. 386; Smith v. Owens, 21 Cal. 11; Higgins v. Wortell, 18 Cal. 330; Grangers' Bank v. Shuey, 6 Cal. Unrep. Cas. 190, 55 P 682; Duke v. Levy, (A.) 274 P 1031; Mayer v. West, (A.) 273 P 849; Palmer v. Emanuel, 77 Cal. A. 766, 247 P 609; Hollenbeck v. Lunderville, 67 Cal. A. 432, 227 P 679; Clark v. Berlin Realty Co., 33 Cal. A. 50, 164 P 333; Menzel v. Primm, 6 Cal. A. 204, 91 P 754.

Colo.—Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717; Lomax v. Colorado Nat. Bank, 46 Colo. 229, 104 P 85.

Conn.—Ferrigino v. Keasbey, 93 Conn. 445, 106 A 445; Burritt Co. v. Negry, 81 Conn. 502, 71 A 570; Clark v. Savage, 20 Conn. 258; Bill v. Porter, 9 Conn. 23.

Del.—National Cash Register Co. v. Riley, 23 Del. 355, 74 A 362.

Fla.—Peacock v. Our Home L. Ins. Co., 73 Fla. 1207, 75 S 799; Our Home L. Ins. Co. v. Peacock, 71 Fla. 35, 70 S 775; King v. McConnell, 57 Fla. 77, 49 S 539; May v. Gamble, 14 Fla. 467.

Ga.—Standard Cooperage Co. v. O'Neill, 146 Ga. 235, 91 SE 82; Brantley Co. v. Lee, 109 Ga. 478, 34 SE 574; Dawkins v. Willbanks, 108 Ga. 804, 34 SE 165; Hall's Self-Feeding Cotton Gin Co. v. Black, 71 Ga. 450; Rawlings v. Robson, 70 Ga. 595; Wylly v. Collins, 9 Ga. 223; Schneider Marble Co. v. Knight, 37 Ga. A. 646, 141 SE 420; Stokes v. Walker, 21 Ga. A. 630, 94 SE 841; Lang v. Shaw, 6 Ga. A. 747, 65 SE 789; Butt v. Story, 5 Ga. A. 540, 63 SE 658.

Hawaii.—Hardy v. Collector, 1 Hawaii 488.

Ida.—Campbell v. Cove Ranch Land, etc., Co., 28 Ida. 445, 155 P 662.

Ill.—Illinois-Indiana Fair Assoc. v. Phillips, 328 Ill. 368, 159 NE 815 [aff 241 Ill. A. 454]; Baker v. Salzenstein, 314 Ill. 226, 145 NE 355; Petefish v. Watkins, 124 Ill. 384, 16 NE 248; Hoodless v. Reid, 112 Ill. 105, 1 NE 118; Archibald v. Argall, 53 Ill. 307; Gross v. Thornson, 208 Ill. A. 600; Peter Schoenhofen Brewing Co. v. Dailey, 193 Ill. A. 86, 90 [cit Cyc]; Rayfield v. Tincher, 180 Ill. A. 454; Stone v. Evangelical Lutheran St. Paul's Church, 92 Ill. A. 77; Schumacher v. Edward P. Allis Co., 70 Ill. A. 556; Davis, etc., Bldg., etc., Co. v. Montrose Butter, etc., Co., 59 Ill. A. 573; Medley v. Specker, 58 Ill. A. 157; Cox v. Keiser, 15 Ill. A. 432 [app dism 116 Ill. 26, 4 NE 384].

Iowa.—Vogel v. Wadsworth, 48 Iowa 28; McLaren v. Hall, 26 Iowa 297.

Kan.—Badger Lumber, etc., Co. v. Brown, 124 Kan. 255, 259 P 786; Coleman v. Costello, 115 Kan. 463, 223 P 289; Topeka Capital Co. v. Merriam, 60 Kan. 397, 56 P 757; McCoy v. Hazlett, 14 Kan. 430; Bradbury v. Van Pelt, 4 Kan. A. 571, 45 P 1105.

Ky.—Proctor v. Mather, 3 B. Mon. 353; Calk v. Orear, 2 B. Mon. 420; Crenshaw v. Duff, 103 SW 287, 31 KyL 773.

La.—Pattison v. His Creditors, 9 La. Ann. 228; Schulman v. Miller, 10 La. A. (Orleans) 137.

Md.—Hall v. Richardson, 16 Md. 396, 77 AmD 303; Morgan v. Bitzenberger, 3 Gill 350; Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452; Patapsco Ins. Co. v. Smith, 6 Harr. & J. 166, 14 AmD 268.

Mich.—McMullen Mach. Co. v. Grand Rapids Trust Co., 239 Mich. 295, 214 NW 110, 55 ALR 1157; Plas v. Aldrich, 238 Mich. 343, 213 NW 80; Peo. v. Davis, 237 Mich. 165, 211 NW 36; Gardner v. Gorham, 1 Dougl. 507.

Minn.—Odessa First State Bank v. Correll First State Bank, 172 Minn. 223, 214 NW 781; Miller v. Farmers' State Bank, 165 Minn. 339, 206 NW 930; Hansen v. Wilmers, 162 Minn. 139, 202 NW 708; Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 NW 109, 111 [cit Cyc]; Way v. Mooers, 135 Minn. 339, 160 NW 1014, LRA 1918B 559; Combination Steel, etc., Co. v. St. Paul City R. Co., 47 Minn. 207, 49 NW 744.

Miss.—Starling v. Wyatt, 27 S 526; Buckingham v. Walker, 48 Miss. 609.

Mo.—Wiles v. Robinson, 80 Mo. 47; Riggs v. Goodrich, 74 Mo. 108; Schneider v. Meyer, 56 Mo. 475; Block v. Dorman, 51 Mo. 31; Holmes v. Lykins, 50 Mo. 399; Howard v. Jones, 33 Mo. 583; Citizens' Bank v. Carson, 32 Mo. 191; McMurray v. Taylor, 30 Mo. 263, 77 AmD 611; The Charlotte v. Hammond, 9 Mo. 59, 43 AmD 536; Mutual Life of Illinois v. McKinnis, (A.) 15 SW (2d) 935; Missouri State Highway Bd. v. Southern Surety Co., (A.) 9 SW (2d) 92; Winters v. Reserve Loan L. Ins. Co., (A.) 290 SW 109; Morton Electric Co. v. Schramm, (A.) 277 SW 368; McKenzie v. Hall, 210 Mo. A. 1, 239 SW 154; Big Four Impl. Co. v. Chesney, 204 Mo. A. 285, 223 SW 944; People's State Sav. Bank v. Missouri, etc., R. Co., 192 Mo. A. 614, 178 SW 292; Commercial Bank v. Varnum, 176 Mo. A. 78, 162 SW 1080; West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868; American Law Book Co. v. Corbett, 162 Mo. A. 72, 141 SW 718; Golden City Banking Co. v. Greisel, 161 Mo. A. 477, 144 SW 166; Peoples' Bank v. Stewart, 152 Mo. A. 314, 133 SW 70; McCormick Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49; Chorn v. Zollinger, 143 Mo. A. 191, 128 SW 213; Berkshire v. Hoover, 92 Mo. A. 349; Howard v. Shirley, 75 Mo. A. 150; Bertiaux v. Dillon, 20 Mo. A. 603.

Mont.—Edwards v. Muri, 73 Mont. 339, 237 P 209.

Nebr.—Spear v. Olson, 104 Nebr. 139, 175 NW 1012; Edwards, etc., Lumber Co. v. Lamb, 95 Nebr. 263, 145 NW 703; Young v. Hibbs, 5 Nebr. 433.

N. H.—Clark v. Wheeler, 81 N. H. 34, 121 A 588; Woodward v. Holmes, 67 N. H. 494, 41 A 72; Hall v. Clement, 41 N. H. 166; Coburn v. Odell, 30 N. H. 540; Smith v. Smith, 27 N. H. 244; Jaffrey v. Cornish, 10 N. H. 505.

N. J.—Taylor v. Wahl, 72 N. J. L. 10, 60 A 63; Joslin v. Glese, 59 N. J. L. 130, 36 A 680; Fry v. Patterson, 49 N. J. L. 612, 10 A 390; Sayre v. Sayre, 3 N. J. L. 587; Coxe v. Hankinson, 1 N. J. L. 99; Central Union Trust Co. v. Willat Film Corp., 99 N. J. Eq. 748, 133 A 780; Swain v. Frazier, 35 N. J. Eq. 326; Freeholders v. Thomas, 20 N. J. Eq. 39; Corrigan v. Trenton Delaware Falls Co., 7 N. J. Eq. 489.

N. Y.—Phœnix Ins. Co. v. Church, 81 N. Y. 218, 37 AmR 494, 59 HowPr 293 [rev 56 HowPr 493, 56 HowPr 29]; Feldman v. Beier, 78 N. Y. 293; Jagger Iron Co. v. Walker, 76 N. Y. 521; Meyer v. Lathrop, 73 N. Y. 315 [aff 10 Hun 66]; Happy v. Mosher, 48 N. Y. 313; Winsted Bank v. Webb, 39 N. Y. 325, 100 AmD 435; Hill v. Beebe, 13 N. Y. 556; Rukeyser v. Fountain & Choate, Inc., 185 App. Div. 263, 173 NYS 21; Hoar v. Union Mut. L. Ins. Co., 118 App. Div. 416, 103 NYS 1059; St. Albans Beef Co. v. Aldridge, 112 App. Div. 803, 99 NYS 398; Hayward v. Empire State Sugar Co., 105 App. Div. 21, 93 NYS 449 [aff 191 N. Y. 536 mem, 84 NE 1114 mem]; Hubbard v. Looschen, 9 App. Div. 632, 41 NYS 580; Parrott v. Colby, 6 Hun

upon him,[43] does not in itself constitute payment or amount to a discharge of the debt, although it may postpone the right of action thereon until the maturity of the paper;[44] but if such paper delivered to a creditor is thereafter honored or paid, the debt is discharged pro tanto,[45] as of the date of such collection or payment,[46] and accordingly a bill or note is often designated prima facie or conditional payment.[47]

Minority rule. In Indiana,[48] Maine,[49] Massachu-

55 [aff 71 N. Y. 597 mem]; Smith v. Treuthart, 130 Misc. 394, 223 NYS 481; Blum v. Jurick, 83 Misc. 116, 144 NYS 822; Shattuck v. Buek, 77 Misc. 95, 136 NYS 103, 105 [cit Cyc]; Atterbury v. Edwa, 61 Misc. 234, 113 NYS 614; Hilderbrandt v. Fallot, 46 Misc. 615, 92 NYS 804; Woollard v. Albany, 190 NYS 741; Tompkins v. Tompkins, 34 NYS 1032 [aff 158 N. Y. 679 mem, 52 NE 1126 mem]; Mott v. Cook, 10 NYSt 590; Darnall v. Morehouse, 36 HowPr 511 [rev on other grounds 45 N. Y. 64]; Lewis v. Lozee, 3 Wend. 79; Reed v. Van Ostrand, 1 Wend. 424, 19 AmD 529; Porter v. Talcott, 1 Cow. 359; Muldon v. Whitlock, 1 Cow. 290, 13 AmD 533; Putnam v. Lewis, 8 Johns. 389; Holbrook v. Champlin, Hoffm. 148.

N. C.—Sexton v. Greensboro L. Ins. Co., 157 N. C. 142, 72 SE 863; Corbet Buggy Co. v. Dukes, 140 N. C. 393, 52 SE 931; State Nat. Bank v. Hollingsworth, 135 N. C. 556, 47 SE 618; Walke v. Moody, 65 N. C. 599.

N. D.—C. A. Finch Lumber Co. v. Weishaar, 55 N. D. 695, 215 NW 155; Embden State Bank v. Boyle, 50 N. D. 573, 196 NW 820, 822 [cit Cyc]; State v. Royal Indemn. Co., 44 N. D. 550, 175 NW 625, 628 [cit Cyc]; Anderson v. Kain, 40 N. D. 632, 169 NW 501; German Mercantile Co. v. Wanner, 25 N. D. 479, 142 NW 463, 52 LRANS 453; Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008.

Oh.—Merrick v. Boury, 4 Oh. St. 60; Victoria Bldg. Assoc. No. 2 v. Kelsey, 8 Oh. Dec. (Reprint) 123, 11 CincLBul 38; Koch v. St. Charles Hotel Co., 32 Oh. Cir. Ct. 581; Price v. Coblitz, 21 Oh. Cir. Ct. 732, 12 Oh. Cir. Dec. 34; Nunn v. Hubacher, 25 Oh. A. 265, 158 NE 9.

Okl.—William M. Graham Oil, etc., Co. v. Oil Well Supply Co., 128 Okl. 201, 264 P 591; Ohio Cultivator Co. v. Dunkin, 67 Okl. 58, 168 P 1002.

Or.—Pennick v. American Nat. Bank, 268 P 1012; Riner v. Southwestern Surety Ins. Co., 85 Or. 293, 165 P 684, 688, 166 P 952 [cit Cyc]; Johnson v. Paulson, 83 Or. 238, 154 P 685, 163 P 435; Clarke-Woodward Drug Co. v. Hot Lake Sanitorium Co., 75 Or. 234, 146 P 135; Seaman v. Muir, 72 Or. 583, 144 P 121; Cranston v. West Coast L. Ins. Co., 63 Or. 427, 128 P 427; Stringham v. Mutual Ins. Co., 44 Or. 447, 75 P 822; Johnston v. Barrills, 27 Or. 251, 41 P 656, 50 Am SR 717.

Pa.—Newhall v. Arnett, 279 Pa. 317, 123 A 819; Philadelphia v. Neill, etc., Sav., etc., Co., 211 Pa. 353, 60 A 1033; Powel v. Kahler, 86 Pa. Super. 419; North Penn Iron Co. v. New Jersey Bridge Co., 35 Pa. Super. 84; Adair v. Decker, 34 Pa. Super. 153; American Engraving, etc., Co. v. Deichler, 23 Pa. Dist. 608; Alexander v. Righter, 21 Pa. Dist. 842; Ellis v. Anderson, 20 Pa. Dist. 485, 38 Pa. Co. 657; Wisconsin Chair Co. v. Heilbronner, 30 Pa. Co. 299; Lesser v. Lehman, 2 LackLegN 100. See also Leighty v. Susquehanna, etc., Turnp. Co., 14 Serg. & R. 434 (holding that giving a promissory note is not payment within a statute requiring payment in money).

Philippine.—Compañia General de Tabacos v. Molina, 5 Philippine 142.

R. I.—Hessen v. Backer, 46 R. I. 245, 246, 126 A 561 [quot Cyc]; Nightingale v. Chafee, 11 R. I. 609, 23 AmR 531; Sweet v. James, 2 R. I. 270.

S. C.—Watson v. Owens, 30 S. C. L. 111; Fiske v. Judge, 29 S. C. L. 436, 42 AmD 382; Costelo v. Cave, 20 S. C. L. 528, 27 AmD 404; Chastain v. Johnson, 18 S. C. L. 574; Bryce v. Bowers, 32 S. C. Eq. 41.

Tenn.—Sparta First Nat. Bank v. Yowell, 155 Tenn. 430, 294 SW 1101. 1103 [quot Cyc]; Columbia Grocery Co. v. Marshall, 131 Tenn. 270, 174 SW 1108; Kennel v. Muncey, Peck 273.

Tex.—McGuire v. Bidwell, 64 Tex. 43; Duncan v. United Mut. F. Ins. Co., (Commn. A.) 254 SW 1101; Fulwiler v. Daniel, (Civ. A.) 280 SW 348; Marion Mach. Fdy., etc., Co. v. Peck, (Civ. A.) 265 SW 195; Hill v. Texas Trust Co., (Civ. A.) 236 SW 767, 768 [cit Cyc]; Jackson v. Home Nat. Bank, (Civ. A.) 185 SW 893; Small v. Rush, 63 Tex. Civ. A. 126, 132 SW 874; Bluthenthal v. Green, (Civ. A.) 109 SW 1133.

Utah.—Murray City v. Banks, 62 Utah 296, 219 P 246, 247 [cit Cyc]; Gottsegan Cigar Co. v. Levy, 42 Utah 366, 372, 130 P 780, 783, AnnCas1916A 1189 [quot Cyc].

Va.—Wright v. Smith, 81 Va. 777; Morriss v. Harveys, 75 Va. 726.

Wash.—Sainsbury v. Wapato Fruit, etc., Co., 132 Wash. 455, 232 P 331; Blenz v. Fogle, 127 Wash. 224, 220 P 790; Exchange Nat. Bank v. Hunt, 75 Wash. 513, 135 P 224; Otto v. Griffin, 54 Wash. 506, 103 P 789.

W. Va.—Bailey v. Riffe, 79 W. Va. 194, 90 SE 791; Sullivan v. Saunders, 66 W. Va. 350, 352, 66 SE 497, 42 LRANS 1010, 19 AnnCas 480 [cit Cyc]; Acme Food Co. v. Older, 64 W. Va. 255, 61 SE 235, 17 LRANS 807; Hornbrooks v. Lucas, 25 W. Va. 493, 49 AmR 277; Sayre v. King, 17 W. Va. 562; Cushwa v. Improvement, etc., Assoc., 32 SE 259; Dunlap v. Shanklin, 10 W. Va. 662; Poole v. Rice, 9 W. Va. 73.

Wis.—Wagener v. Old Colony L. Ins. Co., 170 Wis. 1, 172 NW 729; McDonald v. Provident Sav. L. Assur. Soc., 108 Wis. 213, 84 NW 154, 81 AmSR 885; Nash v. Meggett, 89 Wis. 486, 61 NW 283; Matteson v. Ellsworth, 33 Wis. 488, 14 AmR 766; Eastman v. Porter, 14 Wis. 39; Blunt v. Walker, 11 Wis. 334, 78 AmD 709.

Eng.—Sayer v. Wagstaff, 5 Beav. 415, 49 Reprint 639 [aff 14 L. J. Ch. 116]; Price v. Price, 16 M. & W. 232, 153 Reprint 1174; Owenson v. Morse, 7 T. R. 64, 101 Reprint 856.

Can.—Mitchell v. Holland, 16 Can. S. C. 687.

Alta.—Denny v. Nozick, 15 Alta. L. 288, 291, 48 DomLR 310, [1919] 3 WestWkly 366 [app allowed on other grounds 60 Can. S. C. 646, 56 DomLR 694, [1921] 2 WestWkly 157, and cit Cyc]; Royal Bank v. Allen, 15 Alta. L. 171, 49 DomLR 572, [1919] 3 West Wkly 1063.

Ont.—Nordheimer v. Robinson, 2 Ont. A. 305; Mitchell v. McGaffey, 6 Grant Ch. 361.

Sask.—Midgeley v. Bacon, 4 Sask. L. 152.

See also Vancleef v. Therasson, 3 Pick. (Mass.) 12; Street v. Hall, 29 Vt. 165 (both applying the law of New York).

Applications of rule see infra §§ 44–49.

Note of third person see infra § 58.

43. Lacey v. Hall, 6 La. Ann. 1; Widders v. Gorton, 1 C. B. N. S. 576, 87 ECL 576, 140 Reprint 236; Cameron v. Knapp, 7 U. C. C. P. (Ont.) 502.

44. See Actions § 391.

45. Mo.—Harmon v. Dickerson, (A.) 184 SW 139.

Nebr.—Pleasant Dale First State Bank v. Borchers, 83 Nebr. 530, 120 NW 142.

N. D.—Busch v. Manahan, 56 N. D. 491, 217 NW 658.

S. D.—Eggleston v. Plowman, 49 S. D. 609, 207 NW 981, 44 ALR 1231.

Tex.—Dorrance v. International, etc., R. Co., 103 Tex. 200, 125 SW 561; Terry v. Dale, 27 Tex. Civ. A. 1, 65 SW 51, 396.

Eng.—Wilkins v. Casey, 7 T. R. 710, 101 Reprint 1213.

Ont.—Krehm Bros. Fur Co. v. Bastedo, 24 OntWR 820.

46. Terry v. Dale, 27 Tex. Civ. A. 1, 65 SW 51, 396.

47. Hoodless v. Reid, 112 Ill. 105, 1 NE 118; Smalley v. Edey, 19 Ill. 207; Smith v. Treuthart, 130 Misc. 394, 223 NYS 481; Mehlberg v. Tisher, 24 Wis. 607; and cases supra notes 40–46. But see Webb v. National Bank of Republic, 67 Kan. 62, 64, 72 P 520 (where the court said: "It is the settled law of this state, contrary to that of a few other states, that . . . the acceptance of a . . . draft for an existing liability is not even prima facie payment thereof").

Conditional payment generally see supra § 11.

48. State v. Adams, 187 Ind. 165, 118 NE 680; Bradway v. Groenendyke, 153 Ind. 508, 55 NE 434; Nixon v. Beard, 111 Ind. 137, 12 NE 131; Jouchert v. Johnson, 108 Ind. 436, 9 NE 413; Krutsinger v. Brown, 72 Ind. 466; Smith v. Bettger, 68 Ind. 254, 34 AmR 256; Hill v. Sloan, 59 Ind. 181; Gates v. Fauvre, (Ind. A.) 119 NE 155; Roberts v. Vonnegut, 58 Ind. A. 142, 104 NE 321; Knight v. Kerfoot, (Ind. A.) 102 NE 983; Stevenson v. Stunkard, 44 Ind. A. 716, 90 NE 106; Scott v. Edgar, (Ind. A.) 60 NE 468; Davis, etc., Bldg., etc., Co. v. Vice, 15 Ind. A. 117, 43 NE 889; Mason v. Douglas, 6 Ind. A. 558, 33 NE 1009. See also In re Wegman Piano Co., 221 Fed. 128 (stating the law of Indiana). Compare U. S. Health, etc., Ins. Co. v. Clark, 41 Ind. A. 345, 83 NE 760 (holding that a bill of exchange is not legal tender). Contra Chicago, etc., R. Co. v. West, 37 Ind. 211.

49. Bryant v. Grady, 98 Me. 389, 57 A 92; Snow v. Foster, 79 Me. 558, 11 A 602; Bunker v. Barron, 79 Me. 62, 8 A 253, 1 AmSR 282; Strang v. Hirst, 61 Me. 9; Ward v. Bourne, 56 Me. 161; Milliken v. Whitehouse, 49 Me. 527; Parkhurst v. Jackson, 36 Me. 404; Shumway v. Reed, 34 Me. 560, 56 AmD 679; Bangor v. Warren, 34 Me. 324, 56 AmD 657; Jepson v. Hall, 24 Me. 422; Newall v. Hussey, 18 Me. 249, 36 AmD 717; Springer v. Shirley, 11 Me. 204; Varner v. Nobleborough, 2 Me. 121, 11 AmD 48. See also In re Wegman Piano Co., 221 Fed. 128; The Betsy and Rhoda, 3 F. Cas. No. 1,366, 2 Ware 117 (both stating the law of Maine).

[a] **"The reason assigned for this departure from the principles of the common law** is, that the debtor might otherwise be put to inconvenience, and possibly be compelled to pay the debt twice, as he could not successfully defend himself against an action on the note in the hands of an innocent indorsee, by showing that the debt, for which it was given, had been otherwise satisfied. The law, therefore, raises a presumption against the creditor, who has taken such security, that he has renounced his right of action on the original contract. This, however, is only a presumption, which may be overcome by proof to the contrary; but the burden of proving this is thrown on the creditor." The Betsy and Rhoda, 3 F. Cas. No. 1,366, 2 Ware 117, 120.

setts,[50] and Vermont,[51] the rule has frequently been stated that the execution and delivery by a debtor to his creditor of a negotiable bill of exchange or promissory note constitutes payment of a preëxisting debt, except where it appears, either by express agreement or from the circumstances of the transaction, that it was not the intention of the parties that it should be received as such,[52] or where the transaction was fraudulent or made under a misapprehension of the facts;[53] but it would seem that such supposed rule is only another way of stating the rebuttable presumption, existing in those jurisdictions, that such a bill or note is intended by the parties to be delivered and received as payment,[54] as it has been expressly held that if the paper proves unproductive the creditor may sue upon the original demand.[55] A bill or note not governed by the law merchant, however, is not a payment in the absence of agreement or consent to receive it as such,[56] no such presumption applying to it.[57]

[§ 41] **b. Agreement or Consent of Creditor.**[58] A bill of exchange[59] or promissory note[60] executed

50. Quimby v. Durgin, 148 Mass. 104, 19 NE 14, 1 LRA 514; Amos v. Bennett, 125 Mass. 120; Ely v. James, 123 Mass. 36; Getchell v. Foster, 106 Mass. 42; Ilsley v. Jewett, 2 Metc. (Mass.) 168; Butts v. Dean, 2 Metc. (Mass.) 76, 35 AmD 389; French v. Price, 24 Pick. (Mass.) 13; Scott v. Ray, 18 Pick. (Mass.) 360; Wood v. Bodwell, 12 Pick. (Mass.) 268; Jones v. Kennedy, 11 Pick. (Mass.) 125; Reed v. Upton, 10 Pick. (Mass.) 522, 20 AmD 545; Johnson v. Johnson, 11 Mass. 359; Wiseman v. Lyman, 7 Mass. 286; Thacher v. Dinsmore, 5 Mass. 299, 4 AmD 61; Apthorp v. Shepard, Quincy (Mass.) 298, 1 AmD 6. See also In re Wegman Piano Co., 221 Fed. 128; Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420; Hudson v. Bradley, 12 F. Cas. No. 6,833, 2 Cliff. 130; Palmer v. Elliot, 18 F. Cas. No. 10,690, 1 Cliff. 63; Hall v. Clement, 41 N. H. 166 (all stating the law of Massachusetts).

51. Rutland R. Light, etc., Co. v. Williams, 90 Vt. 276, 98 A 85; Hadley v. Bordo, 62 Vt. 285, 19 A 476; Wemet v. Missisquoi Lime Co., 46 Vt. 458; Collamer v. Langdon, 29 Vt. 32; Dickinson v. King, 28 Vt. 378; Stephens v. Thompson, 28 Vt. 77; Torrey v. Baxter, 13 Vt. 452; Hutchins v. Olcutt, 4 Vt. 549, 24 AmD 634. See also In re Wegman Piano Co., 221 Fed. 128 (stating the law of Vermont). Contra Curtis v. Ingham, 2 Vt. 287, 290 ("The note of the debtor is not, of course, payment of an antecedent debt. It is only so when the parties stipulate that it shall be so").

52. Bradway v. Groenendyke, 153 Ind. 508, 55 NE 434; Jouchert v. Johnson, 108 Ind. 436, 9 NE 413 [overr in effect Teal v. Spangler, 72 Ind. 380; Smith v. Bettger, 68 Ind. 254, 34 AmR 256]; Little v. Hobbs, 34 Me. 357; Comstock v. Smith, 23 Me. 202; Gilmore v. Bussey, 12 Me. 418; Davidson v. Stewart, 200 Mass. 393, 86 NE 779; Watkins v. Hill, 8 Pick. (Mass.) 522; Appleton v. Parker, 15 Gray (Mass.) 173; Butts v. Dean, 2 Metc. (Mass.) 76, 35 AmD 389; Morrill v. New England F. Ins. Co., 71 Vt. 281, 44 A 358; Follett v. Steele, 16 Vt. 30. Compare Surdam v. Lyman, 36 Vt. 733 (where a creditor agreed to accept as payment an order for goods, and instead the debtor sent him a promissory note, which he refused to receive when he was unable to obtain goods thereon, and returned it to the debtor, it was held that no payment was effectuated by the note).

[a] **Crediting a note upon the creditor's books** does not of itself constitute it a payment where such note was neither given nor received in payment, but to raise money. Follett v. Steele, 16 Vt. 30.

[b] **What constitutes nonacceptance.**—Where the debtor sent the creditor several drafts in payment, and the latter collected one and returned the others for a certain indorsement, which the debtor refused to make, there is no acceptance by the creditor enabling him to recover on the drafts instead of the original indebtedness. Morrill v. New England F. Ins. Co., 71 Vt. 281, 44 A 358.

Presumption as to bill or note as payment, and rebuttal thereof see infra § 216.

53. Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420.

Worthless bill or note see infra § 43.

54. See infra § 216.

55. Zerrano v. Wilson, 8 Cush. (Mass.) 424; Torrey v. Baxter, 13 Vt. 452.

56. Bradway v. Groenendyke, 153 Ind. 508, 55 NE 434; Travellers' Ins. Co. v. Chappelow, 83 Ind. 429; Lindeman v. Rosenfield, 67 Ind. 246, 33 AmR 79; Northwestern Mut. L. Ins. Co. v. Little, 56 Ind. 504; Alford v. Baker, 53 Ind. 279; Gates v. Fauvre, (Ind. A.) 119 NE 155; Lesh v. Bailey, 49 Ind. A. 254, 95 NE 341; Stevenson v. Stunkard, 44 Ind. A. 716, 90 NE 106; Rhodes v. Webb-Jameson Co., 19 Ind. A. 195, 49 NE 283; Orner v. Sattley Mfg. Co., 18 Ind. A. 122, 47 NE 644; Price v. Barnes, (Ind. A.) 31 NE 808; Wade v. Curtis, 96 Me. 309, 52 A 762; Bartlett v. Mayo, 33 Me. 518; Dutton Ministerial, etc., Fund v. Kendrick, 12 Me. 381; Parker v. Osgood, 4 Gray (Mass.) 456; Greenwood v. Curtis, 4 Mass. 93, 6 Mass. 358, 4 AmD 145.

Order on third person for money or goods see infra § 56.

57. See infra § 216.

58. **As novation** see Novation § 30.

Operation and conclusiveness of receipt of payment by bill or note see infra § 82.

To receive bill or note of third person see infra § 58.

59. U. S.—Brown v. Jackson, 4 F. Cas. No. 2,016, 2 Wash. C. C. 24.

Ala.—Day v. Thompson, 65 Ala. 269.

Ark.—Summers v. Wood, 131 Ark. 345, 198 SW 962; Loth v. Mothner, 53 Ark. 116, 13 SW 594.

Cal.—Brown v. Olmstead, 50 Cal. 162.

Conn.—Elm City Lumber Co. v. Mackenzie, 77 Conn. 1, 58 A 10.

Fla.—Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.

Iowa.—Beach v. Wakefield, 107 Iowa 567, 76 NW 688, 78 NW 197.

N. Y.—Peo. v. Cromwell, 102 N. Y. 477, 7 NE 413; Francia v. Del Banco, 9 N. Y. Super. 133; Southwick v. Sax, 9 Wend. 122.

N. C.—Delafield v. Lewis Mercer Constr. Co., 118 N. C. 105, 24 SE 10; Smitherman v. Kidd, 36 N. C. 86.

Pa.—Kimmell v. Bittner, 62 Pa. 203.

Va.—Campbell v. Mosby, 4 Munf. (18 Va.) 487.

W. Va.—Garrett v. Patton, 81 W. Va. 771, 95 SE 437.

Eng.—Emblin v. Dartnell, 1 D. & L. 591; Mercer v. Cheese, 4 M. & G. 804, 43 ECL 415, 134 Reprint 331; Woodford v. Whiteley, M. & M. 517, 22 ECL 576.

Newfoundl.—Custeen v. Danson, 1 Newfoundl. 206; Meany v. Pynn, 1 Newfoundl. 48.

Applications of rule see infra §§ 44-49.

60. U. S.—Sheehy v. Mandeville, 6 Cranch 253, 3 L. ed. 215; Risher v. The Frolic, 20 F. Cas. No. 11,856, 1 Woods 92.

Ala.—Hamilton Furniture Co. v. Brenard Mfg. Co., 215 Ala. 187, 110 S 153, 154 [cit Cyc]; Brewer v. Montgomery Branch Bank, 24 Ala. 439; Abercrombie v. Moseley, 9 Port. 145.

Ark.—Toulmin v. Underwood, 172 Ark. 813, 290 SW 377; Costar v. Davies, 8 Ark. 213, 46 AmD 311; Pope v. Tunstall, 2 Ark. 209.

Cal.—Hebojoff v. Globe Indemn. Co., 35 Cal. A. 390, 169 P 1048.

Colo.—Lomax v. Colorado Nat. Bank, 46 Colo. 229, 104 P 85.

Del.—National Cash Register Co. v. Riley, 23 Del. 355, 74 A 362.

Fla.—Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.

Ga.—Mims v. McDowell, 4 Ga. 182; Lang v. Shaw, 6 Ga. A. 747, 65 SE 789.

Ida.—Fidelity State Bank v. Miller, 29 Ida. 777, 162 P 244.

Ill.—Baker v. Salzenstein, 314 Ill. 226, 145 NE 355; Ralston v. Wood, 15 Ill. 159, 58 AmD 604; U. S. v. Leach, 191 Ill. A. 346; Sill v. Burgess, 134 Ill. A. 373. See W. D. Chemical Co. v. Teel, 200 Ill. A. 118; Bartholomae, etc., Brewing, etc., Co. v. South Side Trust, etc., Bank, 194 Ill. A. 654.

Ind.—Warring v. Hill, 89 Ind. 497.

Iowa.—Hardin v. Branner, 25 Iowa 364.

Kan.—Owl Hardware Co. v. Schoonmaker, 114 Kan. 767, 220 P 1052.

Ky.—Harlan v. Wingate, 2 J. J. Marsh. 138.

La.—Mitchell v. Curell, 11 La. 252.

Me.—Comstock v. Smith, 23 Me. 202.

Md.—Western Bank v. Kyle, 6 Gill 343.

Mich.—Peo. v. Davis, 237 Mich. 165, 211 NW 36; Northern Oil Co. v. Advanced Petroleum Corp., 232 Mich. 11, 204 NW 692; Hotchin v. Secor, 8 Mich. 494.

Minn.—Goenen v. Schroeder, 18 Minn. 66; Keough v. McNitt, 6 Minn. 513.

Miss.—Slocumb v. Holmes, 2 Miss. 139.

Mo.—Bushong v. Taylor, 82 Mo. 660; Cave v. Hall, 5 Mo. 59.

Nebr.—Pasewalk v. Bollman, 29 Nebr. 519, 45 NW 780, 26 AmSR 399.

N. H.—Goodall v. Richardson, 14 N. H. 567; Moody v. Leavitt, 2 N. H. 171; Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

N. Y.—Meyer v. Lathrop, 73 N. Y. 315; Richard v. Connecticut Electric Mfg. Co., 200 App. Div. 681, 194 NYS 497 [aff 235 N. Y. 530 mem, 139 NE 722 mem]; McLean v. Griot, 118 App. Div. 100, 103 NYS 129; Boyd v. Daily, 85 App. Div. 581, 83 NYS 539 [aff 176 N. Y. 613 mem, 68 NE 1114 mem]; Howe v. Buffalo, etc., R. Co., 38 Barb. 124 [aff 37 N. Y. 297]; Carter v. Howard, 17 Misc. 381, 39 NYS 1060; Strauss v. Trotter, 6 Misc. 77, 26 NYS 20; Rosenbaum v. Paletz, 114 NYS 802; New York State Bank v. Fletcher, 5 Wend. 85; Witherby v. Mann, 11 Johns. 518.

Oh.—Hall v. Union Paving Co., 3 OhS&CP 218, 2 OhNP 71.

Okl.—Ohio Cultivator Co. v. Dunkin, 67 Okl. 58, 168 P 1002.

Pa.—McCord v. Durant, 134 Pa. 184, 18 A 489; Seltzer v. Coleman, 32 Pa. 493; Colonna v. Morrissey, 72 Pa. Super. 200.

R. I.—Quidnick Co. v. Chafee, 13 R. I. 438; Wilbur v. Jernegan, 11 R. I. 113.

S. C.—Witte v. Weinberg, 37 S. C. 579, 17 SE 681; Watson v. Owens, 30 S. C. L. 111; Dogan v. Ashley, 30 S. C. L. 36; McLure v. Askew, 26 S. C. Eq. 162.

S. D.—Grissel v. Woonsocket Bank, 12 S. D. 93, 80 NW 161.

Vt.—Belknap v. Billings, 78 Vt. 214, 62 A 56.

Eng.—Sayer v. Wagstaff, 5 Beav. 415, 49 Reprint 639 [aff 14 L. J. Ch. 116.

and delivered by a debtor to his creditor constitutes a payment, and discharges the debt when it is so agreed or when the creditor consents to receive it as such, whether or not such bill or note is afterward paid,[61] except when the agreement is conditional and the condition fails.[62] While it has frequently been said obiter that an express agreement is necessary,[63] the rule established by the decisions is that an implied agreement is sufficient;[64] but the implication must be clear,[65] in view of the presumption obtaining in most jurisdictions that a bill or note is accepted only as additional security.[66]

A mere attempt to collect or enforce a bill or note from which no payment results is not such an appropriation of it as to discharge the debt.[67]

[§ 42] **c. Transfer by Creditor.** While the mere transfer by a creditor to a third person of a bill or note not received as payment does not extinguish the debt,[68] so long as such bill or note is outstanding in the hands of a third person it will be treated as having been accepted in discharge of the debt so as to bar action thereon.[69]

[a] **Not merely prima facie evidence of payment.**—(1) While a note is presumed in Vermont to be received as payment, and so prima facie is payment, if an agreement to receive it as payment is shown, the note is payment, and so it is error in such case to instruct only that it is prima facie payment. Belknap v. Billings, 78 Vt. 214, 62 A 56. (2) Presumption of acceptance as payment see infra § 216. (3) Vermont rule as to bill or note as payment see supra § 40 text and note 51.

Applications of rule see infra §§ 44–49.

61. Loth v. Mothner, 53 Ark. 116, 13 SW 594; and cases supra notes 59, 60.

62. Hayward v. Billings, 48 Vt. 355.

63. U. S.—Union Electric Steel Co. v. Imperial Bank of Canada, 286 Fed. 857.

Cal.—Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 P 28; Brown v. Olmsted, 50 Cal. 162; Griffith v. Grogan, 12 Cal. 317.

Kan.—Topeka Capital Co. v. Merriam, 60 Kan. 397, 56 P 757.

Mo.—Mutual Life of Illinois v. McKinnis, (A.) 15 SW (2d) 935; Morton Electric Co. v. Schramm, (A.) 277 SW 368; American Law Book Co. v. Corbett, 162 Mo. A. 72, 141 SW 718.

N. H.—Jaffrey v. Cornish, 10 N. H. 505.

N. Y.—Crane v. McDonald, 45 Barb. 354; Johnson v. Weed, 9 Johns. 310, 6 AmD 279.

Pa.—Philadelphia v. Neill, etc., Sav., etc., Co., 211 Pa. 353, 60 A 1033.

Wash.—White v. Panama Lumber, etc., Co., 136 Wash. 554, 240 P 913; Sainsbury v. Wapato Fruit, etc., Co., 132 Wash. 455, 232 P 331.

Wis.—Willow River Lumber Co. v. Luger Furniture Co., 102 Wis. 636, 78 NW 762.

See also Garrett v. Patton, 81 W. Va. 771, 95 SE 437 (where the rule is discussed).

64. U. S.—A. Leschen, etc., Rope Co. v. Mayflower Gold Min., etc., Co., 173 Fed. 855, 97 CCA 465, 35 LRANS 1. Compare People's Nat. Bank v. Moore, 25 F. (2d) 599, 601 (where it was said: "The acceptance from a debtor of a bill of exchange, promissory note, or other promise to pay is not a payment of the debt, unless there is an express agreement that it is received as payment, or unless there is clear and satisfactory proof of the intention that it is so received").

Ala.—Manser v. Sims, 157 Ala. 167, 47 S 270.

Conn.—Elm City Lumber Co. v. Mackenzie, 77 Conn. 1, 58 A 10. See also Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935 (applying the rule).

Ga.—Mosley v. Floyd, 31 Ga. 564.

Ida.—Fidelity State Bank v. Miller, 29 Idaho 777, 162 P 244.

Ill.—Wilhelm v. Schmidt, 84 Ill. 183; White v. Jones, 38 Ill. 159; Short v. Weisenborn, 193 Ill. A. 183. See also Davis, etc., Bldg., etc., Co. v. Montrose Butter, etc., Co., 59 Ill. A. 573 (dictum).

Iowa.—Dille v. White, 132 Iowa 327, 109 NW 909.

Md.—Haines v. Pearce, 41 Md. 221.

Mich.—Hotchin v. Secor, 8 Mich. 494.

Mo.—Harmon v. Dickerson, (A.) 184 SW 139.

N. H.—Randlet v. Herren, 20 N. H. 102; Johnson v. Cleaves, 15 N. H. 332.

N. Y.—Southwick v. Sax, 9 Wend. 122.

Oh.—Athens First Nat. Bank v. Green, 40 Oh. St. 431.

Or.—Riner v. Southwestern Surety Ins. Co., 85 Or. 293, 300, 165 P 684, 166 P 952.

R. I.—Macomber v. Macomber, 31 A 753.

Tex.—Ralston v. Aultman, (Civ. A.) 26 SW 746.

Eng.—Sayer v. Wagstaff, 5 Beav. 415, 49 Reprint 639 [aff 14 L. J. Ch. 116].

But see White v. Panama Lumber, etc., Co., 136 Wash. 554, 559, 240 P 913 (where the court said: "Another error is claimed in that the court instructed the jury, '. . . that it is not necessary that an express agreement to accept a note in payment of an obligation be proved but it is sufficient if it be shown that there was an understanding to that effect.' This instruction misstates the law, for the reason that, where a promissory note is given for a debt then in existence, the debt is not thereby extinguished, unless it was expressly agreed that an extinction should take place. This instruction is exactly contrary to the rule thus stated, and therefore was error").

"While the books, including at least two of our own precedents, frequently speak of the rule as requiring the parties to 'expressly' agree, nevertheless as stated in 30 Cyc. 1201, whenever the question has been specifically considered the decision has been that the parties 'agreed,' if it is shown that they agreed in terms or that they understood that the acceptance of a note extinguished an antecedent debt. The agreement need not be expressed in terms; but it is sufficient if it appears from all the facts and circumstances that the parties intended and understood that the note should be received in absolute payment of the antecedent debt." Riner v. Southwestern Surety Ins. Co., supra.

[a] **Attending circumstances and subsequent acts.**—The implication that a bill or note is accepted as payment may arise from the attending circumstances, and the subsequent conduct of the creditor may be looked to in arriving at a conclusion in respect of it. Manser v. Sims, 157 Ala. 167, 47 S 270. To same effect Fidelity State Bank v. Miller, 29 Ida. 777, 162 P 244; Riverside Iron-Works v. Hall, 64 Mich. 165, 31 NW 152.

[b] **Acceptance of note from drawee of draft.**—(1) Where a creditor received from his debtor a draft or bill of exchange, and upon presentment to the drawee accepted the note of the latter for the amount thereof, the creditor must be deemed to have accepted the draft in payment, and the debtor is discharged. Elm City Lumber Co. v. Mackenzie, 77 Conn. 1, 58 A 10; Southwick v. Sax, 9 Wend. (N. Y.) 122. (2) Acceptance of third person as debtor see infra §§ 56–58.

[c] **Alteration of draft by creditor.**—Where the creditor makes a draft his own by altering it so as to vitiate it, it constitutes a payment. Alderson v. Langdale, 3 B. & Ad. 660, 23 ECL 291, 110 Reprint 241.

[d] **Foreclosure of accompanying mortgage.**—(1) Where the seller of a motion picture theater, who took notes for the purchase price, secured by a chattel mortgage on the equipment, foreclosed the mortgage, he cannot be heard to say that he did not accept the notes in full payment of the purchase price. Harmon v. Dickerson, (Mo. A.) 184 SW 139. (2) Application of collateral security as payment see infra § 60.

[e] **Giving of receipt and acquiescence.**—(1) A note may properly be regarded as received in payment of a debt when a receipt is given which treats it in the same way as money received at the same time, and no attempt is made to treat it otherwise for several years. Mosley v. Floyd, 31 Ga. 564. (2) Operation and conclusiveness of receipt for payment by bill or note see infra § 82.

[f] **Laches** by not presenting a draft for payment when due may make it the creditor's own and operate as a satisfaction of the original indebtedness. Alderson v. Langdale, 3 B. & Ad. 660, 23 ECL 291, 110 Reprint 241.

Weight and sufficiency of evidence to show acceptance of bill or note as payment see infra § 266.

65. A. Leschen, etc., Rope Co. v. Mayflower Gold Min., etc., Co., 173 Fed. 855, 97 CCA 465, 35 LRANS 1.

66. See infra § 216.

67. Olyphant v. St. Louis Ore, etc., Co., 28 Fed. 729.

Debt discharged by collection of bill or note see supra § 40 text and notes 45, 46.

68. U. S.—Lyman v. U. S. Bank, 12 How. 225, 13 L. ed. 965.

Ala.—Jones v. Moore, 212 Ala. 248, 102 S 200, 206 [cit Cyc].

Conn.—Davidson v. Bridgeport Borough, 8 Conn. 472.

Fla.—Salomon v. Pioneer Co-operative Co., 21 Fla. 374, 58 AmR 667.

Ga.—Norton v. Paragon Oil Can Co., 98 Ga. 468, 25 SE 501.

Kan.—Moody v. Stubbs, 94 Kan. 250, 146 P 346, AnnCas1917B 62.

La.—Simpson v. New Orleans, 109 La. 897, 33 S 912; Lanata v. Bayhi, 31 La. Ann. 229.

Me.—Goodnow v. Howe, 20 Me. 164, 37 AmD 46.

Mass.—Alcock v. Hopkins, 6 Cush. 484.

N. Y.—Burdick v. Green, 15 Johns. 247.

Pa.—Kean v. Dufresne, 3 Serg. & R. 233.

Eng.—Hadwen v. Mendisabal, 2 C. & P. 20, 12 ECL 427, 172 Reprint 10, 10 Moore C. P. 477, 17 ECL 581.

[a] **Thus,** where a creditor accepted a draft from his debtor under instructions to collect it and apply the proceeds to the debtor's credit, and the creditor negotiated the draft and credited the debtor with the amount received therefor, but afterward was obliged to pay the draft as indorser and resumed possession of it, no payment was effectuated. Goodnow v. Howe, 20 Me. 164, 37 AmD 46.

69. U. S.—Lawrence v. U. S., 71 Fed. 228; Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569, 12 CCA 306.

Ark.—Beebe Stave Co. v. Austin, 92 Ark. 248, 122 SW 482, 485, 135 AmSR

[§ 43] **d. Effect of Invalidity or Fraud.**[70] No payment is effectuated by the delivery by a debtor to his creditor of a bill or note which is invalid or unenforceable,[71] as where it is defective in form[72] or usurious;[73] nor is the debt discharged where the creditor's consent to receive the bill or note is procured by fraud or misrepresentation,[74] unless such fraud is waived.[75]

[§ 44] **e. Application of Rules[76]—(1) Bill or Note of One or More Codebtors.** In accordance with the rules above stated,[77] a bill or note executed by one or more but less than the whole number of joint debtors is not a payment of a preëxisting indebtedness so as to discharge the other debtors,[78] even in those jurisdictions where a negotiable bill or note of a debtor is ordinarily regarded as payment,[79] except where the creditor agrees or consents to receive it in satisfaction of the debt.[80] And separate notes of each of two or more persons jointly indebted, for their respective shares of the debt, do not discharge the joint obligation, in the absence of the creditor's agreement or consent thereto,[81] although, by extending the time of payment of the share of one,[82] the note may operate to extinguish the liability of the others, considered as sureties, for such share.[83]

[§ 45] **(2) Bill or Note of Agent for Principal's Debt.**[84] In accordance with the general rules above stated,[85] it is held in most jurisdictions that a draft[86] or promissory note[87] of an agent executed for the debt of his principal does not discharge the

172 [cit Cyc].

Cal.—Locke v. Duchesnay, 84 Cal. A. 448, 258 P 418.

Fla.—Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.

Ill.—McConnell v. Stettinius, 7 Ill. 707. See Distributors Coal Co. v. Race, 211 Ill. A. 501; W. D. Chemical Co. v. Teel, 200 Ill. A. 118; Eckert v. Marhoefer, 192 Ill. A. 154.

La.—Woolfolk v. Degelos, 24 La. Ann. 199.

Miss.—Buckingham v. Walker, 48 Miss. 609.

Mo.—Hunter v. Henry, (A.) 181 SW 597.

N. H.—Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

N. Y.—McLean v. Griot, 118 App. Div. 100, 103 NYS 129.

Pa.—Plankinhorn v. Cave, 2 Yeates 370; McDuffee v. Rea, 13 Pa. Co. 261.

S. C.—Ex p. Williams, 17 S. C. 396; Adger v. Pringle, 11 S. C. 527; Townsends v. Stevenson, 33 S. C. L. 59.

Va.—Campbell v. Mosby, 4 Munf. (18 Va.) 487; Thornton v. Spotswood, 1 Wash. (1 Va.) 142.

Eng.—Davis v. Reilly, [1898] 1 Q. B. 1 (holding that the fact that the creditor has subsequently obtained possession of the bill or note is immaterial).

See also Ohio Cultivator Co. v. Dunkin, 67 Okl. 58, 168 P 1002 (dictum); Rawles v. Perkey, 50 Tex. 311 (holding that a promissory note made by a purchaser of land to his grantor, and by the latter transferred to another, was a sufficient payment to relieve the land in the hands of the maker from a vendor's lien claimed by a prior grantor, where the note was given without notice of such lien).

Compare Lamkin v. Phillips, 9 Port. (Ala.) 98 (holding that, where a partnership was dissolved and the firm assets and accounts were sold by one partner to the other, and the latter took a note from a debtor in liquidation of an account owed to the firm, the debt was "extinguished" to the extent that creditors of the former partner could not compel payment of the account to them by garnishment proceedings against the debtor).

"Although the receiving of a note is not payment, unless received as such, yet if the creditor place the note beyond his power and control, so that it cannot be delivered up to be canceled, the note is payment and the original cause of action is extinguished." Adger v. Pringle, 11 S. C. 527, 535.

Return of, or accounting for, bill or note as condition precedent to action on original indebtedness see infra §§ 72, 73.

70. Upon bill or note of third person see infra § 58.

Worthless medium as payment generally see supra § 39.

71. Ala.—Lee v. Fontaine, 10 Ala. 755, 44 AmD 505.

Md.—Owen v. Hall, 70 Md. 97, 16 A 376.

Mass.—Walker v. Mayo, 143 Mass. 42, 8 NE 873.

N. H.—Hartshorn v. Hartshorn, 67 N. H. 163, 29 A 406; Pecker v. Kennison, 46 N. H. 488.

Tenn.—Alder v. Buckley, 1 Swan 69.

Wis.—Antigo First Nat. Bank v. Larsen, 146 Wis. 653, 132 NW 610.

Eng.—Tyte v. Jones, 1 East 58 note, 102 Reprint 23; Swears v. Wells, 1 Esp. 317, 170 Reprint 370; Wilson v. Kennedy, 1 Esp. 245, 170 Reprint 345; Ruff v. Webb, 1 Esp. 129, 170 Reprint 301; Wislon v. Vysar, 4 Taunt. 288, 128 Reprint 339; Brown v. Watts, 1 Taunt. 353, 127 Reprint 870.

And see cases infra notes 72-75.

[a] **Invalidity as to some of makers.**—(1) Where a note is invalid as to some of the parties who appear to have joined in making it because the debtor who made it was not authorized to bind them, it is not a payment. Lee v. Fontaine, 10 Ala. 755, 44 AmD 505. (2) And where a joint note is executed for a debt and at its maturity a new note is given for the unpaid balance, which is invalid as to one of the makers on account of a material alteration, a recovery can be had against the maker as to whom it is invalid upon the original cause of action if the old note is produced at the trial. Owen v. Hall, 70 Md. 97, 16 A 376.

72. Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68; Torrey v. Baxter, 13 Vt. 452.

Formal requisites of bill or note see Bills and Notes §§ 187-205.

73. Lee v. Fontaine, 10 Ala. 755, 44 AmD 505; Ramsdell v. Soule, 12 Pick. (Mass.) 126; Watkins v. Hill, 8 Pick. (Mass.) 522; Stebbins v. Smith, 4 Pick. (Mass.) 97; Thurston v. Percival, 1 Pick. (Mass.) 415; Johnson v. Johnson, 11 Mass. 359; Lee v. Peckham, 17 Wis. 383; Meshke v. Van Doren, 16 Wis. 319.

Usury generally see Usury [39 Cyc 876].

74. Letcher v. Commonwealth Bank, 1 Dana (Ky.) 82; American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526; Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68; French v. White, 12 N. Y. Super. 254.

75. Ricker v. Adams, 59 Vt. 154, 8 A 278.

[a] **Retention of note and action upon it.**—Where a creditor, induced thereto by fraud or misrepresentations, accepts a note, and upon discovering the fraud, instead of rescinding the agreement of acceptance and surrendering the note within a reasonable time, pursues the note to judgment, so that he cannot place the debtor in statu quo, a purpose to affirm the agreement is shown, and he cannot then maintain an action upon the original indebtedness. Ricker v. Adams, 59 Vt. 154, 8 A 278.

76. Bill or note of partner for debt of firm see infra § 47.

77. See supra §§ 40-43.

78. Ga.—Schneider Marble Co. v. Knight, 37 Ga. A. 646, 141 SE 420.

Iowa.—Craswell v. Pure Bred Cattle Commn. Co., 148 Iowa 9, 126 NW 908.

N. Y.—Claflin v. Ostrom, 54 N. Y. 581; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480; Higgins v. Packard, 2 N. Y. Super. 586; Rindskopf v. Zimmer, 88 Misc. 28, 150 NYS 73; Muldon v. Whitlock, 1 Cow. 290, 13 AmD 533; Schemerhorn v. Loines, 7 Johns. 311.

Pa.—Schollenberger v. Seldonridge, 49 Pa. 83; Bowers v. Still, 49 Pa. 65; Jones v. Johnson, 3 Watts & S. 276, 38 AmD 760.

Tex.—Watson v. Dallas First State Bank, (Commn. A.) 237 SW 1106, 1107 [aff (Civ. A.) 223 SW 233, and cit Cyc].

See Snitzler Adv. Co. v. Orr, 198 Ill. A. 98.

See also Rosseau v. Cull, 14 Vt. 83 (applying the law of New York).

And see cases infra note 79.

79. Bristol Milling, etc., Co. v. Probasco, 64 Ind. 406; Lingenfelser v. Simon, 49 Ind. 82; Tyner v. Stoops, 11 Ind. 22, 71 AmD 341; Baldwin v. Porter, 217 Mass. 15, 104 NE 492. Contra Washburn v. Pond, 2 Allen (Mass.) 474; French v. Price, 24 Pick. (Mass.) 13.

Minority rule that bill or note is payment see supra § 40.

80. Ill.—Askins v. Hott, 188 Ill. A. 235.

Md.—Patapsco Ins. Co. v. Smith, 6 Harr. & J. 166, 14 AmD 268.

N. H.—Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

Okl.—Cox v. Fincher, 112 Okl. 77, 239 P 617.

W. Va.—Plumley v. Hinton First Nat. Bank, 76 W. Va. 635, 87 SE 94.

Wis.—Grubbe v. Pierce, 156 Wis. 29, 145 NW 207, 51 LRANS 358, AnnCas 1915C 1148.

As novation see Novation § 38.

81. Drake v. Hill, 53 Iowa 37, 3 NW 811, 5 NW 745; Yates v. Donaldson, 5 Md. 389, 61 AmD 283.

Acceptance of notes of each partner individually as satisfaction of firm debt see infra § 47.

82. Bill or note as suspending right of action on original debt see Actions § 39.

83. Drake v. Hill, 53 Iowa 37, 3 NW 811, 5 NW 745.

Discharge of sureties by extension of time of payment see Principal and Surety [32 Cyc 191].

84. Agency generally see Agency 2 C. J. p 404.

Credit given exclusively to agent see Agency § 518.

85. See supra §§ 40-43.

86. U. S.—Slocomb v. Lurty, 22 F. Cas. No. 12,949, Hempst. 431; The Washington Irving, 29 F. Cas. No. 17,244, 2 Ben. 318.

Ga.—Hogg v. Cole, 34 Ga. A. 120, 128 SE 222.

Miss.—Taylor v. Connor, 41 Miss. 722, 97 AmD 419.

Oh.—Millville Ins. Co. v. Flesher, 7 Oh. Dec. (Reprint) 510, 3 CincLBul 574.

Eng.—Taylor v. Briggs, M. & M. 28, 22 ECL 463.

[a] **Agent's draft on principal,** which the principal refuses to pay, is not such a payment as to preclude action against the principal on the original indebtedness where the draft was not received under any agreement or consent that it should constitute payment. Hogg v. Cole, 34 Ga. A. 120, 128 SE 222.

87. Keller v. Singleton, 69 Ga. 703;

debt, except when the creditor agrees or consents to receive it as payment thereof,[88] although, on principles of estoppel,[89] if the creditor, by giving a receipt as for money, or otherwise, induces the principal debtor to deal differently with his agent than he otherwise would do, the debt is discharged.[90] Where the minority rule as to bills and notes obtains,[91] however, the bill or note of an agent, received with knowledge of his agency, is regarded as payment of the principal debt.[92]

[§ 46] **(3) Bill or Note of Partnership for Private Debt of Partner.**[93] In accordance with the general rules above stated,[94] a note executed by a partnership for the private debt of one of the partners is a payment thereof when accepted as such.[95]

[§ 47] **(4) Bill or Note of Partner for Debt of Firm.**[96] In accordance with the general rules above stated,[97] the execution and delivery by a partner of his individual draft[98] or promissory note,[99] or his acceptance of a draft upon him individually,[1] for a debt of the partnership does not extinguish the firm indebtedness, although done after the dissolution of the partnership,[2] except where the creditor agrees or consents to receive it in payment,[3] and except where such act prejudicially affects the rights of other partners who may be considered as sureties.[4] If, however, the creditor accepts the individual note of each partner for his share of the firm indebtedness, such indebtedness is discharged.[5]

[§ 48] **(5) Bill or Note in Partnership Name after Dissolution.**[6] In accordance with the general rules above stated,[7] a bill or note executed for the indebtedness of a partnership by the continuing partner or partners, in the firm name, after the dissolution of the partnership or the withdrawal of other partners, is ordinarily not a satisfaction of such indebtedness so as to discharge the retiring partners,[8] except where the creditor agrees or consents to accept it as payment,[9] and not even then

Wylly v. Collins, 9 Ga. 223; Johnson v. Cleaves, 15 N. H. 332; Davis v. Allen, 3 N. Y. 168; Builders' Lumber, etc., Co. v. Cheek, 139 S. C. 299, 137 SE 734.

88. Perkins v. Cady, 111 Mass. 318; Porter v. Talcott, 1 Cow. (N. Y.) 359.

89. Estoppel generally see Estoppel 21 C. J. p 1052.

90. Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

[a] **Thus,** where a creditor accepted the agent's note for the amount due him from the principal and credited the amount therewith, whereby the principal creditor was induced in making his settlement with the agent to leave in the latter's hand sufficient to pay the note, the creditor is not entitled to recover from the debtor when the note became uncollectible by reason of the agent's insolvency. Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

Operation and conclusiveness of receipt for payment by bill or note see infra § 82.

91. See supra § 40 text and notes 48–57.

92. French v. Price, 24 Pick. (Mass.) 13.

93. Bill or note in firm name for individual use see Partnership § 346.

Payment of individual debt with firm assets or credit see Partnership §§ 337, 338.

94. See supra §§ 40–43.

95. Benneson v. Thayer, 23 Ill. 374.

96. Cross references:

Bill or note in individual name for firm use see Partnership § 345.

Bill or note of one or more codebtors generally see supra § 44.

Bond or other specialty of partner for firm debt see infra § 59.

Payment of firm debts by individual partner see Partnership § 333.

97. See supra §§ 40–43.

98. Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Spear v. Atkinson, 23 N. C. 262; Bottomley v. Nuttall, 5 C. B. N. S. 122, 94 ECL 122, 141 Reprint 48.

99. Cal.—Dellapiazza v. Foley, 112 Cal. 380, 44 P 727.

Ga.—Norton v. Paragon Oil Can Co., 98 Ga. 468, 25 SE 501.

Ill.—Rayburn v. Day, 27 Ill. 46.

Md.—Folk v. Wilson, 21 Md. 538, 83 AmD 599.

N. H.—Thompson v. Briggs, 28 N. H. 40.

N. Y.—Claflin v. Ostrom, 54 N. Y. 581; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480; Van Eps v. Dillaye, 6 Barb. 244; Williams v. Colby, 3 Silv. Sup. 337, 6 NYS 459.

Pa.—In re Davis, 5 Whart. 530, 34 AmD 574.

Tenn.—Nichols v. Cheairs, 4 Sneed 229.

Vt.—Spaulding v. Ludlow Woolen Mill, 36 Vt. 150 (especially where the agreement is that the note shall not be a payment and satisfaction of the debt but that the firm shall still remain liable).

Wash.—Vancouver Nat. Bank v. Katz, 142 Wash. 306, 252 P 934.

W. Va.—Burdett v. Greer, 63 W. Va. 515, 60 SE 497, 15 LRANS 1019, 129 AmSR 1014, 15 AnnCas 935.

Ont.—Carruthers v. Ardagh, 20 Grant Ch. 579.

1. Colo.—Tootle v. Cook, 4 Colo. A. 111, 35 P 193.

Ind.—Sigler v. Coder, Wils. 354.

Me.—Paine v. Dwinel, 53 Me. 52, 87 AmD 533.

N. Y.—Murray v. Gouverneur, 2 Johns. Cas. 438, 1 AmD 177.

Eng.—Bottomley v. Nuttall, 5 C. B. N. S. 122, 94 ECL 122, 141 Reprint 48; Lynn v. Chaters, 2 Keen 521, 15 EngCh 521, 48 Reprint 728.

2. Conn.—Parker v. Canfield, 37 Conn. 250, 9 AmR 317.

Mo.—Yarnell v. Anderson, 14 Mo. 619.

N. H.—Thompson v. Briggs, 28 N. H. 40. Contra Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68 (dictum).

N. J.—Titus v. Todd, 25 N. J. Eq. 458.

N. Y.—Vernam v. Harris, 1 Hun 451, 3 Thomps. & C. 483; Smith v. Rogers, 17 Johns. 340; Herring v. Sanger, 3 Johns. Cas. 71.

N. C.—Mebane v. Spencer, 28 N. C. 423; Wilson v. Jennings, 15 N. C. 90.

Oh.—Keating v. Sherlock, 1 Cinc. Super. 257.

Pa.—Collier v. Leech, 29 Pa. 404; Mason v. Wickersham, 4 Watts & S. 100.

Tex.—Seward v. L'Estrange, 36 Tex. 295.

Bill or note in name of firm after dissolution see infra § 48.

3. U. S.—In re Parker, 11 Fed. 397, 6 Sawy. 248.

Ark.—Golden v. Strickland, 261 SW 633.

Conn.—Bonnell v. Chamberlain, 26 Conn. 487.

Ga.—Adams v. Reid, 56 Ga. 214.

Ky.—Smith v. Turner, 9 Bush 417.

Md.—Bernard v. Torrance, 5 Gill & J. 383.

N. Y.—Waydell v. Luer, 3 Den. 410 [rev 5 Hill 448]; Arnold v. Camp, 12 Johns. 409, 7 AmD 328.

Oh.—Athens First Nat. Bank v. Green, 40 Oh. St. 431.

Pa.—White v. Rech, 171 Pa. 82, 32 A 1130.

Vt.—Stephens v. Thompson, 28 Vt. 77.

W. Va.—Bowyer v. Knapp, 15 W. Va. 277.

Wis.—Grubbe v. Pierce, 156 Wis. 29, 145 NW 207, 51 LRANS 358, AnnCas1915C 1148.

Eng.—Thompson v. Percival, 2 B. & Ad. 968, 22 ECL 405, 109 Reprint 1402.

4. Espy v. Comer, 80 Ala. 333; Stone v. Chamberlin, 20 Ga. 259; and cases infra this note.

[a] **Discharge by extension of time of payment.**—(1) The receipt of a note executed by a partner extends the time of payment by suspending the right of action on the original debt until the maturity of the note, and so the debt is discharged as against retiring partners who bear the relation of sureties for the firm indebtedness. Drake v. Hill, 53 Iowa 37, 3 NW 811, 5 NW 745; Millerd v. Thorn, 56 N. Y. 402; Dodd v. Dreyfus, 17 Hun (N. Y.) 600, 57 HowPr 319; Maier v. Canavan, 8 Daly (N. Y.) 272, 57 HowPr 504; Paul v. Ellison, 1 Oh. Dec. (Reprint) 67, 1 WestLJ 452; Townsends v. Stevenson, 38 S. C. L. 59. (2) Bill or note as suspending right of action on original debt until maturity see Actions § 391. (3) Discharge of sureties by extension of time of payment see Principal and Surety [32 Cyc 191].

5. Ind.—Maxwell v. Day, 45 Ind. 509.

Iowa.—Drake v. Hill, 53 Iowa 37, 3 NW 811, 5 NW 745.

Me.—Crooker v. Crooker, 52 Me. 267, 83 AmD 509.

N. H.—Page v. Carpenter, 10 N. H. 77.

W. Va.—Bowyer v. Knapp, 15 W. Va. 277.

Separate notes of codebtors generally see supra § 44.

6. Bill or note of new partnership for debt of old see infra § 49.

Payment of firm debts after dissolution see Partnership § 800.

Right to use firm name after dissolution see Partnership § 797.

7. See supra §§ 40–43.

8. U. S.—In re Clap, 5 F. Cas. No. 2,784, 2 Lowell 226.

Iowa.—Edwards v. Trulock, 37 Iowa 244.

Ky.—Turnbow v. Broach, 12 Bush 455.

Me.—Perrin v. Keene, 19 Me. 355, 36 AmD 759.

Mich.—Adler v. Foster, 39 Mich. 87.

Oh.—Gardner v. Conn, 34 Oh. St. 187.

Va.—Parker v. Cousins, 2 Gratt. (43 Va.) 372, 44 AmD 388.

Wash.—Moon Bros. Carriage Co. v. Devenish, 42 Wash. 415, 85 P 17, 7 AnnCas 649.

See also Monroe Bank v. E. C. Drew Inv. Co., 126 La. 1028, 53 S 129, 32 LRANS 255 (dismissing an action on such a note against retiring partners not bound thereby, but without prejudice to the creditor's right of action against such partners on the original debt).

9. Fowler v. Richardson, 3 Sneed (Tenn.) 508 (holding that, where the creditor accepted as payment a note

when it is received under a mistake of fact,[10] as where the creditor is ignorant of the dissolution of the firm.[11] But where the note prejudices the rights of the nonassenting partners, considered as sureties, their liability is extinguished.[12]

[§ 49] **(6) Bill or Note of New Partnership for Debt of Old.**[13] While a bill or note executed by a partnership, after reorganization or the admission or withdrawal of partners, for an indebtedness of the old firm, may operate to discharge retiring partners, considered as sureties, by reason of the extension of time of payment,[14] such a bill or note, in accordance with the general rules above stated,[15] will not ordinarily constitute a payment of such indebtedness,[16] especially where the creditor is ignorant of the change in the firm;[17] but it will constitute a payment if it is accepted as such by the creditor.[18]

[§ 50] **3. Checks**[19]**—a. In General.** The delivery to, or acceptance by, the creditor of his debtor's check, although for convenience often treated as the passage of money,[20] is not payment,[21] even though

signed in the firm name by the continuing partner, the retiring partner is thereby discharged from the original indebtedness, although he is not liable on the note and although both the maker and the creditor believed that the note would bind him).

10. See cases infra note 11.

11. Chittenango First Nat. Bank v. Morgan, 73 N. Y. 593; Moon Bros. Carriage Co. v. Devenish, 42 Wash. 415, 85 P 17, 7 AnnCas 649.

12. See cases infra this note.

[a] **Extension of time of payment.**—(1) Where the creditor, after dissolution, accepts a time note in the firm name from the partner continuing the business with knowledge that such partner has assumed the debts of the firm, the retiring partners occupy the position of sureties and are released by the time given. Silas v. Adams, 92 Ga. 350, 17 SE 280; Chamberlain v. Stone, 24 Ga. 310; Smith v. Shelden, 35 Mich. 42, 24 AmR 529. (2) But if the other partners afterward agree to pay the note, their liability is revived and they are not discharged. Silas v. Adams, supra; Chamberlain v. Stone, supra. (3) Bill or note as suspending right of action on original debt until maturity see Actions § 391. (4) Discharge of sureties by extension of time of payment see Principal and Surety [32 Cyc 191].

Retiring partners as sureties see Partnership § 585.

13. Assumption by new firm of obligations of old see Partnership §§ 588–597.

Bill or note in partnership name after dissolution see supra § 48.

14. Thurber v. Corbin, 51 Barb. (N. Y.) 215, 36 HowPr 66.

Bill or note as suspending rights of action on debt see Actions § 391.

Discharge of sureties by change in obligation or extension of time see Principal and Surety [32 Cyc 177–214].

Retiring partner as surety for firm debts see Partnership § 585.

15. See supra §§ 40–43.

16. Colo.—Pueblo First Nat. Bank v. Newton, 10 Colo. 161, 14 P 428.

Okl.—Ellet-Kendall Shoe Co. v. Miller, 95 Okl. 270, 215 P 417, 418 [quot Cyc].

Pa.—Kimberly's App., 3 Pa. Cas. 528, 7 A 75.

R. I.—Nightingale v. Chafee, 11 R. I. 609, 23 AmR 531.

Tex.—White v. Boone, 71 Tex. 712, 12 SW 51.

And see cases infra note 17.

17. Hill v. Marcy, 49 N. H. 265; Heroy v. Van Pelt, 17 N. Y. Super. 60.

18. Thurber v. Corbin, 51 Barb. (N. Y.) 215, 36 HowPr 66; Crowley v. Chamberlain, 6 Oh. Dec. (Reprint) 982, 9 AmLRec 377.

19. Cross references:

Checks generally see Banks and Banking §§ 383–392; Bills and Notes §§ 12–18; Checks 11 C. J. p 748.

Bills of exchange as payment generally see supra §§ 40–49.

Certification of check see Banks and Banking §§ 433–444.

Check as:

Accord and satisfaction see Accord and Satisfaction §§ 65–88.

Assent to account stated see Accounts and Accounting § 275.

Novation see Novation § 30.

Check as:—Continued

Payment of particular classes of obligations or liabilities see cross references ante p 584.

Tender see Tender [38 Cyc 146].

Tolling statute of limitations see Limitations of Actions § 633.

Check of third person see infra § 58.

Order on third person for money or goods see infra § 56.

Payment to agent by check see Agency § 267.

Presumption that check is absolute or conditional payment see infra § 218.

Worthless or invalid check see supra § 39.

20. Commercial Inv. Trust v. Lundgren-Wittensten Co., 173 Minn. 83, 216 NW 531, 56 ALR 492; Aleles v. Gullick, (N. J. Ch.) 137 A 853; Lim Chai Seng v. Trinidad, 41 Philippine 544; Gordon v. Union Bank, 26 Ont. A. 155 [dist Davidson v. Fraser, 23 Ont. A. 439].

21. U. S.—Dow v. Cowan, 23 F. (2d) 646; Cleve v. Craven Chemical Co., 18 F. (2d) 711, 52 ALR 980; In re Perpall, 256 Fed. 758, 168 CCA 104; Royal Indemn. Co. v. Beiseker, 245 Fed. 346, 157 CCA 538; Pflueger v. Lewis Fdy., etc., Co., 134 Fed. 28, 67 CCA 102.

Ala.—People's Bank, etc., Co. v. Walthall, 200 Ala. 122, 75 S 570; Lowenstein v. Bresler, 109 Ala. 326, 19 S 860; Bibb v. Snodgrass, 97 Ala. 459, 11 S 880.

Ariz.—Empire-Arizona Copper Co. v. Shaw, 20 Ariz. 471, 181 P 464, 4 ALR 1229.

Ark.—Summers v. Wood, 131 Ark. 345, 198 SW 692; Rose v. Lilly, 170 SW 483; Churchill v. Yeatman-Gray Grocer Co., 111 Ark. 529, 164 SW 283; Sharp v. Fleming, 75 Ark. 556, 88 SW 305; Henry v. Conley, 48 Ark. 267, 3 SW 181.

Cal.—Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 P 28; New Zealand Nat. Bank v. Finn, 81 Cal. A. 317, 253 P 757; Peo. v. Pearson, 69 Cal. A. 524, 231 P 612; Title Ins., etc., Co. v. Amalgamated Oil Co., 63 Cal. A. 29, 218 P 71; Bledsoe v. Stuckey, 47 Cal. A. 95, 190 P 217; Goodman v. Williamson, 45 Cal. A. 664, 188 P 291.

Colo.—Anderson v. Schroeder, 24 Colo. A. 183, 132 P 707; Leeper v. Schroeder, 24 Colo. A. 164, 132 P 701.

D. C.—Barbagollo v. Fishbien, 52 App. 318, 286 Fed. 780.

Ga.—Berry v. State, 153 Ga. 169, 111 SE 669, 35 ALR 370; Standard Cooperage Co. v. O'Neill, 146 Ga. 235, 91 SE 32; Sims v. Bolton, 138 Ga. 73, 74 SE 770; Kinard v. Sylvester First Nat. Bank, 125 Ga. 228, 53 SE 1018, 114 AmSR 201; Hatcher v. Comer, 75 Ga. 728; Phillips v. Bullard, 58 Ga. 256; Williams-Thompson Co. v. Louisville, etc., R. Co., 35 Ga. A. 556, 133 SE 633; Fairburn Supply Co. v. Crumley-Sharp Hardware Co., 32 Ga. A. 520, 124 SE 67; Ketcham v. Hines, 29 Ga. A. 627, 116 SE 225; Owens v. Jones-Kennedy Furniture Co., 28 Ga. A. 317, 111 SE 86; Moore v. Walker, 27 Ga. A. 428, 108 SE 809; Tway Co. v. Hedenberg, 24 Ga. A. 520, 101 SE 199; Kirby Planing Mill Co. v. Titus, 14 Ga. A. 1, 80 SE 18; Holland v. Mutual Fertilizer Co., 8 Ga. A. 714, 70 SE 151; Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. A. 244, 58 SE 212.

Ida.—Campbell v. Shark, 267 P 458, 460 [cit Cyc].

Ill.—Stephens Engineering Co. v. Industrial Commn., 290 Ill. 88, 124 NE 869; Angus v. Chicago Trust, etc., Bank, 170 Ill. 298, 48 NE 946; Woodburn v. Woodburn, 115 Ill. 427, 5 NE 82; Peoria, etc., R. Co. v. Buckley, 114 Ill. 337, 2 NE 179; Canadian Bank of Commerce v. McCrea, 106 Ill. 281; Strong v. King, 35 Ill. 9, 85 AmD 336; Stevenson v. Earling, 213 Ill. A. 395 [aff 290 Ill. 565, 125 NE 322]; Marshall v. Freeman, 52 Ill. A. 42.

Ind.—Federal Casualty Co. v. Chatman, 69 Ind. A. 67, 121 NE 296.

Iowa.—Carpenter v. Kruidenier, 193 Iowa 390, 187 NW 1; Sanitary Can Co. v. National Pickle, etc., Co., 191 Iowa 1259, 184 NW 354, 18 ALR 532; Carr Hardware Co. v. Chicago Bonding, etc., Co., 190 Iowa 1320, 181 NW 680; Buffalo Center Land, etc., Co. v. Swigart, 176 Iowa 422, 156 NW 701; Dille v. White, 132 Iowa 327, 109 NW 909; Harbach v. Colvin, 73 Iowa 638, 35 NW 663.

Kan.—Baker-Evans Grain Co. v. Ricord, 126 Kan. 107, 267 P 14; First Church of Christ Scientist v. Ætna Bldg., etc., Assoc., 122 Kan. 672, 253 P 574; Chappee v. Kansas Vitrified Brick Co., 70 Kan. 723, 79 P 666; Mullins v. Brown, 32 Kan. 312, 4 P 305; Kermeyer v. Newby, 14 Kan. 164.

Ky.—Ratliff v. St. Paul F. & M. Ins. Co., 207 Ky. 492, 269 SW 546, 547 [quot Cyc]; Carter v. Richardson, 60 SW 397, 22 KyL 1204.

La.—Allison v. Brown, 148 La. 530, 87 S 262; Langridge v. Dauenhauer, 120 La. 450, 45 S 387; Ocean Tow Boat Co. v. The Ophelia, 11 La. Ann. 28.

Me.—Gordon v. Keene, 118 Me. 269, 107 A 849; Marrett v. Brackett, 60 Me. 524.

Md.—First Mortg. Bond Homestead Assoc. v. Nelson, 151 Md. 181, 135 A 139; Anderson v. Gill, 79 Md. 312, 29 A 527, 47 AmSR 402, 25 LRA 200.

Mass.—Dutton v. Bennett, 159 NE 524; Wasilauskas v. Brookline Sav. Bank, 259 Mass. 215, 156 NE 34, 52 ALR 758; Goodfellow v. Webber Lumber, etc., Co., 257 Mass. 503, 154 NE 187; Ansin v. New York Mut. L. Ins. Co., 241 Mass. 107, 134 NE 350; Feinberg v. Levine, 237 Mass. 185, 129 NE 393; Bergman v. Granstein, 235 Mass. 378, 126 NE 657; Illustrated Card, etc., Co. v. Dolan, 208 Mass. 53, 94 NE 299; Taylor v. Wilson, 11 Metc. 44, 45 AmD 180; Dennie v. Hart, 2 Pick. 204.

Mich.—Baumgardner v. Henry, 131 Mich. 240, 91 NW 169.

Minn.—Commercial Inv. Trust v. Lundgren-Wittensten Co., 173 Minn. 83, 216 NW 531, 56 ALR 492; Beacon Lamp Co. v. Lombard, 165 Minn. 480, 205 NW 889; Isackson v. Lovell, 115 Minn. 481, 132 NW 918; McFadden v. Follrath, 114 Minn. 85, 130 NW 542, 37 LRANS 201; Belle Plaine First Nat. Bank v. McConnell, 103 Minn. 340, 114 NW 1129, 123 AmSR 336, 14 LRANS 616, 14 AnnCas 396; National Bank of Commerce v. Chicago, etc., R. Co., 44 Minn. 224, 46 NW 342, 20 AmSR 566, 9 LRA 263; Sardeson v. Menage, 41 Minn. 314, 43 NW 66; Good v. Singleton, 39 Minn. 340, 40 NW 359.

Miss.—Wileman v. King, 120 Miss. 392, 82 S 265, 5 ALR 584; Mayes v. Coleman, 110 Miss. 874, 71 S 14; Citizens' Bank v. Kretschmar, 91 Miss. 608, 44 S 930.

Mo.—Armstrong v. Bolivar First Nat. Bank, (A.) 195 SW 562; Com-

the check is certified before delivery,[22] in the absence of any agreement or consent to receive it as payment,[23] or any laches or want of diligence on the part of the creditor,[24] or the negotiation of the check by him.[25]

Effect of payment by drawee. Where a check delivered to a creditor, although without any agreement or consent on his part to receive it as absolute payment, is in fact paid in due course, the debt is discharged pro tanto,[26] as of the time at which the

mercial Bank v. Varnum, 176 Mo. A. 78, 162 SW 1080; Edmonson v. Lovan Carriage, etc., Co., 149 Mo. A. 128, 130 SW 64; Groomer v. McMillan, 143 Mo. A. 612, 128 SW 285; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996; Barton v. Hunter, 59 Mo. A. 610; Carroll Exch. Bank v. Carrollton First Nat. Bank, 58 Mo. A. 17; Selby v. McCullough, 206 Mo. A. 66. See also Young v. Kellar, 94 Mo. 581, 7 SW 293, 4 AmSR 405 (where a check was given without intention that it should constitute payment).

Mont.—Kalman v. Treasure County, 275 P 743; Blackwelder v. Fergus Motor Co., 80 Mont. 374, 260 P 734; Jensen v. Laurel Meat Co., 71 Mont. 582, 230 P 1081; U. S. National Bank v. Shupak, 54 Mont. 542, 172 P 324.

Nebr.—Townsend v. Swallow, 91 Nebr. 564, 136 NW 730.

Nev.—Jensen v. Wilslef, 36 Nev. 37, 132 P 16, AnnCas1914D 1220; Roberts, etc., Shoe Co. v. McKim, 34 Nev. 191, 117 P 13.

N. H.—Nason v. Fowler, 70 N. H. 291, 47 A 263; Barnet v. Smith, 30 N. H. 256, 64 AmD 290.

N. J.—Freeholders v. Thomas, 20 N. J. Eq. 39.

N. Y.—Thomas v. Westchester County, 115 N. Y. 47, 21 NE 674, 4 LRA 477; Burkhalter v. Erie Second Nat. Bank, 42 N. Y. 538; Bradford v. Fox, 38 N. Y. 289, 7 Transcr. A. 254; Turner v. Fox Lake Bank, 4 Abb. Dec. 434, 3 Keyes 425, 2 Transcr. A. 344 [aff 23 HowPr 399]; Szwento Juozupo Let Draugystes v. Manhattan Sav. Inst., 178 App. Div. 57, 164 NYS 498; Burstein v. Sullivan, 134 App. Div. 623, 119 NYS 317 [reh den 136 App. Div. 920 mem, 120 NYS 1116 mem]; Syracuse, etc., R. Co. v. Collins, 3 Lans. 29 [aff 57 N. Y. 641, 1 AbbNCas 47]; Sweet v. Titus, 67 Barb. 327; Kelty v. Erie Second Nat. Bank, 52 Barb. 328; Genin v. Tompkins, 12 Barb. 265 [app dism CodeRep NS 415]; Houston v. Shindler, 11 Barb. 36; Franklin v. Vanderpool, 1 N. Y. Super. 78; Cromwell v. Lovett, 1 N. Y. Super. 56 [aff 6 Wend. 369]; Stark v. Public Nat. Bank, 123 Misc. 647, 206 NYS 8; Cantasano v. Courtney, 98 Misc. 623, 163 NYS 156; Stegel v. Kovinsky, 93 Misc. 541, 157 NYS 340 [aff 174 App. Div. 857 mem, 159 NYS 1142 mem]; Lembeck, etc., Brewing Co. v. Crudo, 79 Misc. 234, 139 NYS 927; Kramer v. Grant, 60 Misc. 109, 111 NYS 709; Block v. Garfiel, 30 Misc. 821, 61 NYS 918; Bombas v. Fisher, 180 NYS 449; Rhodes v. S. Weisglass & Co., Inc., 178 NYS 378; Hessberg v. Welsh, 147 NYS 44; Lockwood Trade Journal v. New York Silicate Book Slate Co., 88 NYS 152; Millbury v. Heitzberg, 55 NYS 743, 28 NYCivProc 179; Flynn v. Woolsey, 10 NYS 875; Olcott v. Erwin, 9 NYS 71; Collins v. Colmey, 14 NYSt 444; Porter v. Talcott, 1 Cow. 359; Peo. v. Howell, 4 Johns. 296; Peo. v. Baker, 20 Wend. 602; Olcott v. Rathbone, 5 Wend. 490; Kobbi v. Underhill, 3 Sandf. Ch. 277.

N. C.—Moore v. Highway Engineering, etc., Co., 196 N. C. 142, 144 SE 692; Dewey v. Margolis, 195 N. C. 307, 142 SE 22; Hayworth v. Philadelphia L. Ins. Co., 190 N. C. 757, 130 SE 612; Commercial Casualty Ins. Co. v. Durham County, 190 N. C. 58, 128 SE 469.

Oh.—Hodgson v. Barrett, 33 Oh. St. 63, 31 AmR 527; Imbush v. Mechanics', etc., Bank, 1 Oh. Dec. (Reprint) 8, 1 WestLJ 49; Merchants Nat. Bank v. Procter, 1 Cinc. Super. 1.

Okl.—Shapleigh Hardware Co. v. Crews, 124 Okl. 247, 255 P 696; Dungan v. Jesko, 118 Okl. 217, 246 P 1094; Wheeler, etc., Mercantile Co. v. Kitchen, 67 Okl. 131, 169 P 877, 878, LRA 1918C 160 [cit Cyc]; Bowles v. Biffles, 50 Okl. 587, 151 P 193; Mutual L. Ins. Co. v. Chattanooga Sav. Bank, 47 Okl. 748, 150 P 190, LRA1916A 669.

Or.—Johnson v. Iankovetz, 57 Or. 24, 102 P 799, 110 P 398, 29 LRANS 709.

Pa.—Loux v. Fox, 171 Pa. 68, 33 A 190; Lowrey v. Robinson, 141 Pa. 189, 21 A 513; Levan v. Wilten, 135 Pa. 61, 19 A 945; Briggs v. Holmes, 118 Pa. 283, 12 A 355, 4 AmSR 597; Brown v. Scott, 51 Pa. 357; McIntyre v. Kennedy, 29 Pa. 448; McGiun v. Holmes, 2 Watts 121; Patton v. Ash, 7 Serg. & R. 116; Wedmore v. McInnes, 69 Pa. Super. 220.

S. C.—Bewley-Darst Coal Co. v. Laurens Gin, etc., Co., 126 S. C. 219, 119 SE 589.

S. D.—Farmers Oil, etc., Co. v. Betts, 50 S. D. 78, 208 NW 402; Eggleston v. Plowman, 49 S. D. 609, 207 NW 981, 44 ALR 1231; Dougherty v. Van Overhelde, 45 S. D. 437, 188 NW 48.

Tex.—Waggoner Bank, etc., Co. v. Gamer Co., 113 Tex. 5, 213 SW 927, 6 ALR 613; Pierce v. Pois, (Civ. A.) 15 SW (2d) 1072; Friends in Need Soc. v. Peterson, (Civ. A.) 9 SW (2d) 1110; El Paso v. Two Republics L. Ins. Co., (Civ. A.) 278 SW 231; Johnson v. Hulett, 56 Tex. Civ. A. 11, 120 SW 257.

Va.—Federal Reserve Bank v. Peters, 139 Va. 45, 123 SE 379, 53 ALR 742; Main St. Bank v. Planters' Nat. Bank, 116 Va. 137, 81 SE 24; Blair v. Wilson, 28 Gratt. (69 Va.) 165.

Wash.—Anderson v. Peterson, 147 Wash. 698, 265 P 1118; Anderson v. Tacoma Nat. Bank, 146 Wash. 520, 264 P 8; Lincoln County v. Gibson, 143 Wash. 372, 255 P 119.

Wis.—Emigh v. Earling, 134 Wis. 565, 115 NW 128, 27 LRANS 243 [aff 218 U. S. 27, 30 SCt 672, 54 L. ed. 915]; Hall v. Storrs, 7 Wis. 253.

Eng.—Cohen v. Hale, 3 Q. B. D. 371; Blumberg v. Life Interests, etc., Corp., [1897] 1 Ch. 171; Hough v. May, 4 A. & E. 954, 31 ECL 415, 111 Reprint 1042; Brown v. Kewley, 2 B. & P. 518, 126 Reprint 1415.

Ont.—Campbell v. Raynor, 59 Ont. L. 466, [1926] 4 DomLR 686; Delory v. Guyett, 47 Ont. L. 137, 52 DomLR 506; Hughes v. Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. 221.

Que.—Mailloux v. Beaudry, 48 Que. Super. 9.

"When a customer of a bank issues a check thereon, and delivers it to his creditor, rather than withdrawing the amount and paying the creditor, the check is not given as payment of the amount due, but with the implied promise that he will pay the amount if the bank does not do so." Blackwelder v. Fergus Motor Co., 80 Mont. 374, 389, 260 P 734.

22. Holland v. Mutual Fertilizer Co., 8 Ga. A. 714, 70 SE 151; First Mortg. Bond Homestead Assoc. v. Nelson, 151 Md. 181, 135 A 139, 142 [cit Cyc]; Campbell v. Raynor, 59 Ont. L. 466, [1926] 4 DomLR 686. But see Winlock v. Munday, 156 Ky. 806, 162 SW 76 (holding that the delivery of a certified check by the purchaser of land to a third person, to be held for the seller and turned over to him upon delivery of the deed, constituted a payment of the purchase money, such as to bring the purchaser within the rule of a purchaser without notice).

Effect of certification generally see Banks and Banking §§ 435–443.

23. Agreement or consent of creditor see infra § 51.

24. Diligence and laches see infra § 53.

25. Effect of transfer or negotiation see infra § 52.

26. U. S.—Stout Lumber Co. v. Hayes, 25 F. (2d) 841 [certiorari den 49 SCt 19]; Cleve v. Craven Chemical Co., 18 F. (2d) 711, 52 ALR 980; Bennett v. Bank of Commerce, etc., Co., 220 Fed. 950.

Ala.—Kansas City, etc., R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705, 12 S 395.

Cal.—Hooker v. Burr, 137 Cal. 663, 70 P 778, 99 AmSR 17 [aff 194 U. S. 415, 24 SCt 706, 48 L. ed. 1046]; Peo. v. Pearson, 69 Cal. A. 524, 231 P 612; Albert v. Pearson, 68 Cal. A. 657, 229 P 998.

Ga.—O. A. Smith Roofing, etc., Co. v. Mitchell, 117 Ga. 772, 45 SE 47.

Iowa.—Andrew v. Hartley State Bank, 219 NW 929; Carr Hardware Co. v. Chicago Bonding, etc., Co., 190 Iowa 1320, 181 NW 680; Harbach v. Colvin, 73 Iowa 638, 35 NW 663.

Kan.—Davison v. Maryland Casualty Co., 126 Kan. 365, 366, 267 P 1001 [quot Cyc].

La.—Langridge v. Dauenhauer, 120 La. 450, 45 S 387.

Mass.—Wasilauskas v. Brookline Sav. Bank, 259 Mass. 215, 156 NE 34, 52 ALR 758.

Mich.—Kallander v. Neidhold, 98 Mich. 517, 57 NW 571.

Minn.—Tobiason v. Ashby First State Bank, 173 Minn. 533, 217 NW 934; McFadden v. Follrath, 114 Minn. 85, 130 NW 542, 37 LRANS 201; Sardeson v. Menage, 41 Minn. 314, 43 NW 66.

Miss.—Tonnar v. Wade, 121 S 156.

Mont.—Jensen v. Laurel Meat Co., 71 Mont. 582, 230 P 1081.

N. Y.—Hunter v. Wetsell, 84 N. Y. 549, 38 AmR 544; Potter v. Sager, 184 App. Div. 327, 171 NYS 438 [aff 228 N. Y. 526 mem, 126 NE 920 mem]; Morrison v. Chapman, 155 App. Div. 509, 140 NYS 700; Burstein v. Sullivan, 134 App. Div. 623, 119 NYS 317; Sage v. Burton, 84 Hun 267, 32 NYS 1122; Solomon, Inc. v. Deutsch, 123 Misc. 247, 205 NYS 33.

N. C.—Quarles v. Taylor, 195 N. C. 313, 142 SE 25; Dewey v. Margolis, 195 N. C. 307, 142 SE 22.

Okl.—Bierce v. State Nat. Bank, 33 Okl. 776, 127 P 856, 858 [cit Cyc].

Pa.—Strong v. Ten Cent Tutor Bldg., etc., Assoc., 189 Pa. 406, 42 A 46.

Tex.—El Paso v. Two Republics L. Ins. Co., (Civ. A.) 278 SW 231.

Wyo.—Conway v. Smith Mercantile Co., 6 Wyo. 468, 46 P 1084.

Eng.—Hadley v. Hadley, [1892] 2 Ch. 680.

B. C.—Peck v. Parsons-Haddock Co., Ltd., 7 WestWkly 669.

See also Smith v. Smith, 52 N. S. 196, 40 DomLR 509 (applying the rule).

And see cases infra this note.

[a] **Check on insolvent bank in which payee is overdrawn.**—Where a debtor gave his creditor a check upon a bank which was insolvent, but at the time thereof the creditor had an account in such bank which was overdrawn in a larger amount than the amount of the check, the deposit of the check in the bank and its credit upon the overdrawn account made it perfectly good for the discharge of the debt, it being immaterial whether a bank is insolvent or not if the check is paid. Conway v. Smith Mercantile Co., 6 Wyo. 468, 46 P 1084.

[b] **Although the drawee bank fails before remitting** the amount of a check to the creditor or his agent, the debt is paid where the check is charged to the debtor's account and credited to the account of the collecting agent. Quarles v. Taylor, 195 N. C. 313, 142 SE 25.

check was received;[27] but a payment other than in due course does not extinguish the debt.[28] A check is accordingly often referred to as conditional payment,[29] the condition being its collectability from the bank upon which it is drawn;[30] but it is not such a conditional payment as to release security.[31]

[§ 51] **b. Agreement or Consent of Creditor.**[32] Where a creditor agrees or consents to receive a check of his debtor as payment, the original indebtedness is thereby extinguished pro tanto,[33] whether or not the check is actually paid by the drawee upon presentment,[34] and even though payment thereof is stopped by the maker.[35] The agreement need not be express[36] or in writing,[37] and it is sufficient if the circumstances and conduct of the parties show an understanding that the check is taken in satisfaction of the debt.[38] Thus retention of a check under circumstances implying that it is accepted as payment

[c] **A check given to an agent of the creditor** and paid by the drawee is payment of the debt regardless of the agent's authority to receive the check or obtain payment of it. Kansas City, etc., R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705, 12 S 395; Davison v. Maryland Casualty Co., 126 Kan. 365, 366, 267 P 1001 [quot Cyc]; First Church of Christ Scientist v. Ætna Bldg., etc., Assoc., 122 Kan. 672, 253 P 574; Sage v. Burton, 84 Hun 267, 32 NYS 1122; Bridges v. Garrett, L. R. 5 C. P. 451; Walker v. Barker, 16 T. L. R. 393.

27. Cal.—Hooker v. Burr, 137 Cal. 663, 70 P 778, 99 AmSR 17 [aff 194 U. S. 415, 24 SCt 706, 48 L. ed. 1046].

La.—Langridge v. Dauenhauer, 120 La. 450, 45 S 387.

Minn.—McFadden v. Follrath, 114 Minn. 85, 130 NW 542, 37 LRANS 201; Sardeson v. Menage, 41 Minn. 314, 43 NW 66.

Miss.—Tonnar v. Wade, 121 S 156.

N. Y.—Hunter v. Wetsell, 17 Hun 135 [aff 84 N. Y. 549, 38 AmR 544]. But see Potter v. Sager, 184 App. Div. 327, 171 NYS 438 [aff 228 N. Y. 526 mem, 126 NE 920 mem]; Solomon, Inc. v. Deutsch, 123 Misc. 247, 205 NYS 33 (in both of which it was said that a check constitutes payment from the time that it is cashed in due course).

Eng.—Hadley v. Hadley, [1898] 2 Ch. 680; Elwell v. Jackson, Cab. & E. 362.

Compare Peck v. Parsons-Haddock Co., Ltd., (B. C.) 7 WestWkly 669 (holding that payment by check dates from the delivery of the check if it is duly honored, but if it is dishonored upon presentment and later is paid by the drawee upon a subsequent presentment, the payment does not relate back but takes effect only from the date upon which it is actually made).

And see cases supra note 26.

[a] **Rule applied.**—The sale of a business including all debts due to the seller in connection therewith will not pass debts for which the seller had received checks prior to the sale, although the checks were not cashed until a time subsequent thereto. Hadley v. Hadley, [1898] 2 Ch. 680.

28. Bernheimer v. Herrman, 44 Hun 110, 7 NYSt 490; and cases infra this note.

[a] **Check lost or fraudulently obtained from creditor.**—When a debtor delivers his check payable to the order of his creditor, and the check is lost by, or fraudulently obtained from, the creditor, and is paid to the finder or fraudulent holder on a forged indorsement of the payee, the debtor is not discharged, and may again be called upon to pay his debt, at least unless the check was taken in absolute payment and extinguishment thereof. Thomson v. British North America Bank, 82 N. Y. 1; Bernheimer v. Herrman, 44 Hun 110, 7 NYS 490; Main St. Bank v. Planters' Nat. Bank, 116 Va. 137, 81 SE 24; Kelly v. Canadian Pac. R. Co., 22 B. C. 231, 25 DomLR 79, 32 West LR 891, 9 WestWkly 531.

29. Ill.—Swope v. McClure, 239 Ill. 578.

Minn.—Sardeson v. Menage, 41 Minn. 314, 43 NW 66.

Mont.—Kalman v. Treasure County, 275 P 743.

N. Y.—Bernstein v. Fuerth, 132 Misc. 343, 229 NYS 791.

Pa.—Wedmore v. McInnes, 69 Pa. Super. 220.

Wash.—Lincoln County v. Gibson, 143 Wash. 372, 255 P 119.

Eng.—Hadley v. Hadley, [1898] 2 Ch. 680.

Alta.—Kruse v. Fallows, 16 Alta. L. 384, 59 DomLR 169, [1921] 2 West Wkly 210.

B. C.—Peck v. Parsons-Haddock Co., Ltd., 7 WestWkly 669.

See Hughes v. Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. (Ont.) 221, 229 (where it was said: "The mere receipt of a cheque is not per se payment of the amount represented by the cheque. . . . But it operates as payment until it has been presented and payment refused").

And see cases supra note 21.

Conditional payment generally see supra § 11.

30. Sardeson v. Menage, 41 Minn. 314, 43 NW 66; Hadley v. Hadley, [1898] 2 Ch. 680; Kruse v. Fallows, 16 Alta. L. 384, 390, 59 DomLR 169, [1921] 2 WestWkly 210; Mailloux v. Beaudry, 48 Que. Super. 9. Compare Wedmore v. McInnes, 69 Pa. Super. 220, 222 ("A check is not an absolute but a conditional payment defeasible on the nonpayment of the check").

"It is quite well recognized that prima-facie payment by cheque is a conditional payment; but what is the condition? It seems to me that the condition is that upon presentment in due course there are funds to meet it and . . . the banker is ready to pay it." Kruse v. Fallows, supra.

31. In re J. Defries & Sons, Ltd., [1909] 2 Ch. 423.

Release of debt as discharging security see Release [34 Cyc 1094].

32. Cross references:

As novation see Novation § 30.

Negotiation or transfer by creditor as acceptance see infra § 52.

Procurement by creditor of certification as effectuating payment see Banks and Banking § 436 text and notes 87, 88.

Taking check of third person as payment see infra § 58.

33. Ala.—Cox Hat Co. v. Adams, 14 Ala. A. 426, 70 S 203.

Ark.—Golden v. Strickland, 261 SW 633; Summers v. Wood, 131 Ark. 345, 198 SW 692.

Cal.—Bakersfield Bank v. Conner, 29 Cal. A. 153, 154 P 869; American Exch. Nat. Bank v. Los Angeles County Super. Ct., 29 Cal. A. 8, 154 P 279.

Ill.—Bailey v. Pardridge, 134 Ill. 188, 27 NE 89 [aff 35 Ill. A. 121]; Strong v. King, 35 Ill. 9, 85 AmD 336; Scruggs v. Wood, 215 Ill. A. 267.

Ind.—Sutton v. Baldwin, 146 Ind. 361, 45 NE 518; Cook v. Hagedorn, (A.) 131 NE 788 [superseding (A.) 129 NE 240]; Baughman v. Lowe, 41 Ind. A. 1, 83 NE 255.

Iowa.—Rohrbach v. Hammill, 162 Iowa 131, 143 NW 872; Lyon v. Northrup, 17 Iowa 314.

Kan.—Mullins v. Brown, 32 Kan. 312, 4 P 305.

Ky.—Harbison v. Frazier, 64 SW 738, 23 KyL 1115.

Md.—Anderson v. Gill, 79 Md. 312, 29 A 527, 47 AmSR 402, 25 LRA 200; Woodville v. Reed, 26 Md. 179.

Mass.—Wasilauskas v. Brookline Sav. Bank, 259 Mass. 215, 156 NE 34, 52 ALR 758.

Mich.—Zacharias v. Donaldson, 188 Mich. 443, 154 NW 139.

N. J.—Middlesex v. Thomas, 20 N. J. Eq. 39; Abeles v. Guelick, (Ch.) 137 A 853.

N. Y.—Davenport v. Palmer, 211 N. Y. 596, 105 NE 800; Mayer v. Heidelbach, 123 N. Y. 332, 25 NE 416, 9 LRA 850; Turner v. Fox Lake Bank, 4 Abb. Dec. 434, 3 Keyes 425, 2 Transcr. A. 344; New York Utility Co. v. Williamsburg Steam Laundry Co., 187 App. Div. 110, 175 NYS 60; Lembeck, etc., Brewing Co. v. Crudo, 79 Misc. 234, 139 NYS 927; Fleischman v. Bishop, 174 NYS 142.

N. C.—Davis Sulphur Ore Co. v. Powers, 130 N. C. 152, 41 SE 6; Tiddy v. Harris, 101 N. C. 589, 8 SE 227; Sellars v. Johnson, 65 N. C. 104.

Oh.—Henry Gildehaus Co. v. John Hancock Mut. L. Ins. Co., 25 Oh. N. P. N. S. 531.

Okl.—Wheeler, etc., Mercantile Co. v. Kitchen, 67 Okl. 131, 169 P 877, LRA1918C 160.

Pa.—Sayers v. Kent, 201 Pa. 38, 50 A 296; Kilpatrick v. Home Bldg., etc., Assoc., 119 Pa. 30, 12 A 754; Cochran v. Slomkowski, 29 Pa. Super. 385.

Philippine.—Lim Chai Seng v. Trinidad, 41 Philippine 544.

R. I.—National Park Bank v. Levy, 17 R. I. 746, 24 A 777, 19 LRA 475.

Tex.—State L. Ins. Co. v. Little, (Civ. A.) 264 SW 319 (where the debtor's check signed in his trade name was held to be his own check and not that of a third person).

Va.—Blair v. Wilson, 28 Gratt. (69 Va.) 165.

Wis.—LaFayette County Monument Corp. v. Magoon, 73 Wis. 627, 42 NW 17, 3 LRA 761.

Eng.—Pollard v. Bank of England, L. R. 6 Q. B. 623; Pearce v. Davis, 1 M. & Rob. 365.

Ont.—McLeish v. Howard, 3 Ont. A. 503; Livingston v. Wood, 27 Grant Ch. 515; Hughes v. Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. 221; Geohegan v. Lawson, 13 U. C. Q. B. 495.

"A check when received and treated as money is the same as money so far as legal consequences are concerned." Lim Chai Seng v. Trinidad, 41 Philippine 544, 547.

[a] **Right of action on check only.**—When a check is given and received as payment of the debt the right of action, in case of nonpayment of the check, is upon the check only and not upon the indebtedness for which it was given. Cook, etc., Co. v. Hagedorn, (Ind. A.) 131 NE 788.

Acceptance of worthless or invalid check see supra § 39.

34. Fleischman v. Bishop, 174 NYS 142; and cases supra note 33.

35. Cook v. Hagedorn, (Ind. A.) 131 NE 788 [superseding (Ind. A.) 129 NE 240]; Zacharias v. Donaldson, 188 Mich. 443, 154 NW 139.

Stoppage of payment in general see Banks and Banking § 429.

36. Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825; Rohrbach v. Hammill, 162 Iowa 131, 143 NW 872; Blair v. Wilson, 28 Gratt. (69 Va.) 165.

37. Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825; Rohrbach v. Hammill, 162 Iowa 131, 143 NW 872; Blair v. Wilson, 28 Gratt. (69 Va.) 165.

38. Cal.—Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825.

Ill.—Strong v. King, 35 Ill. 9, 85 AmD 336.

Iowa.—Rohrbach v. Hammill, 162 Iowa 131, 143 NW 872.

Tenn.—Kirkpatrick v. Puryear, 93 Tenn. 409, 24 SW 1130, 22 LRA 785.

Va.—Blair v. Wilson, 28 Gratt. (69 Va.) 165.

Compare Kruse v. Fallows, 16 Alta. L. 384, 59 DomLR 169, [1921] 2

discharges the debt;[39] but mere retention alone, in the absence of any other facts and circumstances indicating its acceptance, does not effectuate a payment.[40]

Effect of fraud or misrepresentation. If the acceptance of a check is induced by fraud or misrepresentation it does not constitute payment.[41]

[§ 52] **c. Negotiation or Deposit.** The negotiation of the check of a debtor by his creditor to whom it has been delivered,[42] or the deposit of it in a bank as money,[43] renders it an absolute payment and discharges the original indebtedness; but merely depositing it for collection does not constitute its acceptance as payment.[44]

[§ 53] **d. Diligence and Laches.** Inasmuch as the acceptance by a creditor from his debtor of a check otherwise than as absolute payment implies an undertaking to use due diligence in presenting it for payment,[45] and giving notice of dishonor,[46] if the creditor is guilty of laches or want of diligence whereby the debtor is prejudiced, the check operates as payment of the indebtedness for which it was given,[47] at least to the extent of the debtor's loss,[48] unless such want of diligence is excused.[49] The debt is not discharged, however, where before the expiration of a reasonable time within which to present the check the bank upon which it is drawn fails[50] or is enjoined from making payments.[51]

[§ 54] **4. Certificates of Deposit or of Indebtedness.**[52] A debtor is not entitled to make payment by transferring certificates of deposit or of indebtedness to his creditor,[53] except under an agreement so providing,[54] or where the creditor consents to receive them as such;[55] and the mere receipt of such certificates, without agreement or intention that they shall be accepted as payment, does not extinguish the debt.[56] But if a certificate delivered to the creditor is honored or paid, the debt is reduced pro tanto;[57] and if the creditor converts it to his own use the debt is extinguished to the extent of the face value of the certificate.[58]

[§ 55] **5. Municipal Warrants or Orders.**[59]

WestWkly 210 (holding that, where the creditor causes a check to be presented, and the bank was ready to pay it but through fault of the creditor's agent payment was not obtained, the creditor must be deemed to have accepted the check as payment).

Procurement by creditor of certification as satisfaction of debt see Banks and Banking § 436 text and notes 87, 88.

39. Cal.—Western Pac. Land Co. v. Wilson, 19 Cal. A. 338, 125 P 1076; Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825.

Del.—Donovan v. Maloney, 26 Del. 453, 84 A 1032.

Ill.—Bloomquist v. Johnson, 107 Ill. A. 154.

Iowa.—Rohrbach v. Hammill, 162 Iowa 131, 143 NW 872.

N. Y.—Kartinganer v. Cohn, 129 Misc. 910, 223 NYS 465.

Va.—Blair v. Wilson, 28 Gratt. (69 Va.) 165.

Que.—Lavimodiere v. Gariepy, 51 Que. Super. 471.

Failure to present check for payment within due time see infra § 53.

40. Herider v. Phœnix Loan Assoc., 82 Mo. A. 427; Wheeler, etc., Mercantile Co. v. Kitchen, 67 Okl. 131, 169 P 877, LRA1918C 160. See also Washington Real Est. Co. v. Wachenheimer Bros., (R. I.) 71 A 592 (apparently applying the rule).

[a] **Retention of a worthless check** (1) after presentment and refusal of payment, does not indicate an intention on the part of the creditor to appropriate it as payment of the debt. Herider v. Phœnix Loan Assoc., 82 Mo. A. 427. (2) Worthless checks see supra § 39.

41. Martin v. Pennock, 2 Pa. 376; Loughnan v. Barry, Ir. R. 6 C. L. 457.

[a] **Knowledge of want of funds as misrepresentation.**—Where a purchaser gives his check in payment with knowledge that he has no funds in the bank to meet it, there is such a false representation of a material fact as to entitle the seller to rescind the contract, even though the purchaser at the time believed, and had reasonable ground for believing, that the check would be paid. Loughnan v. Barry, Ir. R. 6 C. L. 457.

42. Yarbrough v. Marks, (La.) 121 S 301; Kramer v. Grant, 60 Misc. 109, 111 NYS 709; Skolsky v. Harvitt, 121 NYS 592.

[a] **Whether or not the creditor receives anything** for the check, if he indorses it and so renders it possible for some one else to receive payment of it, the debt is accordingly discharged by the negotiation of the check. Yarbrough v. Marks, (La.) 121 S 301.

43. Strong v. King, 35 Ill. 9, 85 AmD 336.

44. Charleston, etc., R. Co. v. Pope, 122 Ga. 577, 50 SE 374; Strong v. King, 35 Ill. 9, 85 AmD 336; Stevenson v. Earling, 213 Ill. A. 395 [aff 290 Ill. 565, 125 NE 322].

45. See cases infra note 47.

Generally see Bills and Notes §§ 745, 752–758.

Effect of failure to present see Bills and Notes § 738.

46. See cases infra note 47.

Generally see Bills and Notes §§ 890–957.

47. Ala.—Lowenstein v. Bresler, 109 Ala. 326, 19 S 860.

Ark.—Sharp v. Fleming, 75 Ark. 556, 88 SW 305.

Cal.—R. H. Herron Co. v. Mawby, 5 Cal. A. 39, 89 P 872.

Ill.—Brown v. Schintz, 202 Ill. 509, 67 NE 172. See Forler v. Butts, 203 Ill. A. 257.

Iowa.—Braun v. Cox, 202 Iowa 1244, 211 NW 891, 893 [cit Cyc].

Me.—Marrett v. Brackett, 60 Me. 524.

Md.—Anderson v. Gill, 79 Md. 312, 29 A 527, 47 AmSR 402, 25 LRA 200.

Mass.—Taylor v. Wilson, 11 Metc. 44, 45 AmD 180.

Minn.—McFadden v. Follrath, 114 Minn. 85, 87, 130 NW 542, 37 LRANS 201 [cit Cyc].

N. Y.—Kramer v. Grant, 60 Misc. 109, 111 NYS 709.

Oh.—Fleig v. Sleet, 43 Oh. St. 53, 1 NE 24, 54 AmR 800.

Pa.—Kilpatrick v. Home Bldg., etc., Assoc., 119 Pa. 30, 12 A 754.

S. D.—Manitoba Mortg., etc., Co. v. Weiss, 18 S. D. 459, 101 NW 37, 112 AmSR 799.

Eng.—Hopkins v. Ware, L. R. 4 Exch. 268.

Ont.—Sawyer v. Thomas, 18 Ont. A. 129; Hughes v. Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. 221; Redpath v. Kolfage, 16 U. C. Q. B. 433.

And see cases infra note 48.

48. Williams v. Braun, 14 Cal. A. 396, 112 P 465; Campbell v. Shark, (Ida.) 267 P 458, 460 [cit Cyc]; Republic Metalware Co. v. Smith, 218 Ill. A. 130; Marshall v. Freeman, 52 Ill. A. 42; Mankey v. Hoyt, 27 S. D. 561, 132 NW 230.

Partial want of injury from laches of creditor see Bills and Notes § 973.

49. Williams v. Braun, 14 Cal. A. 396, 112 P 465; Smith v. Buchan, 27 U. C. Q. B. (Ont.) 106.

Excuses for delay in or omission of demand or notice see Bills and Notes §§ 958–975.

50. Cal.—Williams v. Braun, 14 Cal. A. 396, 112 P 465.

N. Y.—Syracuse, etc., R. Co. v. Collins, 3 Lans. 29 [aff 57 N. Y. 641, 1 AbbNCas 47]; Cromwell v. Lovett, 1 N. Y. Super. 64 [aff 6 Wend. 369]; Peo. v. Howell, 4 Johns. 296.

Va.—Larue v. Cloud, 22 Gratt. (63 Va.) 513.

Wash.—Mosher v. Philips, 124 Wash. 118, 213 P 484.

Eng.—Everett v. Collins, 2 Campb. 515, 170 Reprint 1236.

51. Cromwell v. Lovett, 1 N. Y. Super. 56 [aff 6 Wend. 369].

52. Cross references:

Application of deposits or funds of debtor in creditor's hands see infra § 61.

As payment of bill or note see Bills and Notes § 792.

Bills of exchange see supra §§ 40–49.

Municipal certificates of indebtedness as payment see Municipal Corporations § 4124.

Orders on third person for money or goods see infra § 56.

Payment by deposit in bank or with third person see supra § 6.

53. U. S.—Downey v. Hicks, 14 How. 240, 14 L. ed. 404.

Ill.—Leake v. Brown, 43 Ill. 372.

Iowa.—Huse v. McDaniel, 33 Iowa 406; Dougherty v. Hughes, 3 Greene 92.

Mich.—Burrows v. Bangs, 34 Mich. 304.

Tex.—Kansas City L. Ins. Co. v. Elmore, (Civ. A.) 226 SW 709.

Wis.—Gallagher v. Ruffing, 118 Wis. 284, 95 NW 117.

54. Mann v. Curtis, 29 N. Y. Super. 128.

55. Gibbons v. U. S., 2 Ct. Cl. 421; Schreiner v. Maring, 160 Ill. A. 297.

56. Park v. Best, 176 Iowa 7, 157 NW 233; Burrows v. Bangs, 34 Mich. 304; Jensen v. Wilslef, 36 Nev. 37, 132 P 16, AnnCas1914D 1220; and cases supra note 53.

57. Harrison v. Legore, 109 Iowa 618, 80 NW 670; U. S. v. Thompson, 33 Md. 575.

58. Looney v. District of Columbia, 113 U. S. 258, 5 SCt 463, 28 L. ed. 974.

[a] **Sale of certificate to third person.**—Where a creditor to whom his debtor had delivered a certificate of deposit for the amount of the debt sold the certificate to a third person, and appropriated the proceeds, the debt is extinguished, although the creditor received less than the face value of the certificate. Looney v. District of Columbia, 113 U. S. 258, 5 SCt 463, 28 L. ed. 974.

59. Cross references:

As payment of taxes see Taxation [37 Cyc 1162].

Invalid warrants or orders see supra § 39.

Orders on third persons see infra § 56.

Payments in its own warrants by:

When it is so provided by statute[60] or agreement,[61] or when the creditor so consents,[62] payment may be made by the delivery of municipal warrants, orders, or like securities; but in the absence of such provision or consent they do not constitute a valid payment or tender,[63] and even where, by statute, such warrants are made receivable in payment, the creditor may refuse to receive them in satisfaction of an obligation expressly payable in some other medium,[64] or when they are tendered upon unjustifiable conditions.[65]

[§ 56] **6. Liability of Third Person[66]—a. Order on Third Person for Money or Goods.** An order drawn by a debtor upon a third person for the payment or delivery to his creditor of money or goods constitutes a payment when, by agreement, the debt is so payable,[67] or when the creditor consents to accept the order as payment.[68] In the absence of agreement, the creditor is not bound to accept such an order;[69] and the mere receipt of it, without intention to accept it as payment or to discharge the debtor, does not effectuate a payment.[70] But when such an order received by the creditor is subsequently paid, in whole or in part, the debt is thereby discharged or reduced to the extent of the payment.[71]

Diligence in collection. Notwithstanding an order delivered to the creditor was not received under the agreement or with the consent that it should constitute payment, it may be treated as such if he fails to employ due diligence to enforce it or collect payment upon it and as a result thereof the debtor is prejudiced.[72]

Payments in its own warrants by:—Continued
County see Counties §§ 307, 373.
Municipal corporation see Municipal Corporations § 4124.
School district see Schools and School Districts [35 Cyc 983].
Town or township see Towns [38 Cyc 646].

60. See statutory provisions.

[a] **Debts due to a state bank** may be discharged in bonds of the state or in the interest due thereon as evidenced by the coupons, under a statute providing for the discharge of debts due the state in such bonds, the bank being exclusively a state institution and debts due to it being in effect due to the state. Fagan v. Stillwell, 19 Ark. 282.

61. Wise v. Chase, 44 N. Y. 337. See Thompson v. St. Charles County, 227 Mo. 220, 126 SW 1044 (holding that a statutory provision that all claims against a county should be paid in county warrants was to be read into a contract made by the county for the construction of buildings, and that the contractor could not refuse to accept such warrants or demand payment in money).

62. Holleman v. Dewey, 12 F. Cas. No. 6,607, 2 Hughes 341; Wilton v. Weston, 48 Conn. 325; Pasewalk v. Bollman, 29 Nebr. 519, 45 NW 780, 26 AmSR 399.

63. Bemis v. State, 3 Fla. 12; Perry v. Colquitt, 63 Ga. 311; Dubuque v. Miller, 11 Iowa 583; Rogers v. Shelburne, 42 Vt. 550.

Medium of tender see Tender [38 Cyc 146].

64. Helena v. Turner, 36 Ark. 577.

[a] **Thus** an act providing that city warrants shall be receivable for all debts due the corporation does not apply where the obligation expresses that it is to be paid in United States currency. Helena v. Turner, 36 Ark. 577.

65. Ollemar v. Irvington Bd. of Education, (N. J. Sup.) 135 A 696.

[a] **Thus** one whose property has been condemned for school purposes is not bound to receive a warrant in payment for the property taken, although the statute requires all disbursement of school moneys to be made on such warrants only, where the warrant tendered specified that it was given for a larger interest than that which could properly be acquired by condemnation. Olleman v. Irvington Bd. of Education, (N. J. Sup.) 133 A 696.

66. Cross references:
Acceptance of third person as debtor see infra §§ 56-58.
As accord and satisfaction see Accord and Satisfaction § 60.
As preferential transfer by bankrupt see Bankruptcy § 255.
Assignment of claim against third person see infra § 57.
Bills of exchange see supra §§ 40-49.
Checks see supra §§ 50-53.
Municipal orders and warrants see supra § 55.
Novation see Novation 46 C. J. p 572.
Promise or undertaking of third person see infra § 58.

67. Summers v. Wood, 131 Ark. 345, 198 SW 692, 693 [quot Cyc]; Besley v. Dumas, 6 Ill. A. 291; J. Willer Co. v. Gordon, 24 Oh. Cir. Ct. 407. But see Lupton v. Freeman, 82 Mich. 638, 46 NW 1042 (holding that, where by agreement a debt was payable by an order on a third person, with whom the debtor had contracted to deliver logs, the giving and receipt of such order did not effectuate a payment where as a result of the debtor's failure to perform his contract with such third person the latter had no funds belonging to him and refused to pay the order).

Delivery of worthless order see supra § 39.

68. Ala.—Moore v. Briggs, 15 Ala. 24; Harrison v. Hicks, 1 Port. 423, 27 AmD 638.

Ark.—Summers v. Wood, 131 Ark. 345, 198 SW 692, 693 [quot Cyc].

Conn.—Wilton v. Weston, 48 Conn. 325.

Iowa.—Beach v. Wakefield, 107 Iowa 567, 76 NW 688, 78 NW 197; Farwell v. Salpaugh, 32 Iowa 582; Porter v. Walker, 1 Iowa 456.

Ky.—Palmateer v. Gatewood, 4 J. J. Marsh. 503.

Mass.—Govern v. Littlefield, 13 Allen 127 note; Spooner v. Rowland, 4 Allen 485.

Mo.—Rice v. Dudley, 34 Mo. A. 383.

Tenn.—Anderson v. Hunter, 11 Heisk. 491.

Vt.—Holmes v. Laraway, 64 Vt. 175, 23 A 762.

W. Va.—Garrett v. Patton, 81 W. Va. 771, 95 SE 437.

As novation see Novation § 38.

69. Hall v. Appel, 67 Conn. 585, 35 A 524.

70. U. S.—Virginia v. Turner, 28 F. Cas. No. 16,970, 1 Cranch C. C. 261.

Ala.—Williams v. Costello, 95 Ala. 592, 11 S 9.

Alaska.—Chena Lumber, etc., Co. v. Laymon, 4 Alaska 221.

Ark.—Summers v. Wood, 131 Ark. 345, 198 SW 692, 693 [quot Cyc].

Cal.—Smith v. Harper, 5 Cal. 329.

Ill.—Frank Prox Co. v. Bryan, 185 Ill. A. 322; Bradford v. Neill, etc., Constr. Co., 76 Ill. A. 488.

Iowa.—Humphreys v. Humphreys, Morr. 359.

Ky.—Proctor v. Mather, 3 B. Mon. 353; Trimble v. Lewis, 65 SW 117, 23 KyL 1244.

Md.—Haines v. Pearce, 41 Md. 221; Morgan v. Bitzenberger, 3 Gill 350.

Miss.—Wadlington v. Covert, 51 Miss. 631.

Nebr.—Colby v. Maw, 1 Nebr. (Unoff.) 478, 95 NW 677.

N. Y.—Roscoe Co. v. Lindner, 166 App. Div. 889, 150 NYS 1023 [aff 221 N. Y. 553 mem, 116 NE 1072 mem]; Freidenrich v. Condict, 124 App. Div. 807, 109 NYS 526; Hoar v. Clute, 15 Johns. 224; Efron v. Scarpelli, 162 NYS 640; American Luxfer Prism Co. v. Bartolicius Star Iron Works, Inc., 152 NYS 1014.

N. C.—Wait v. Williams, 77 N. C. 270; Nissen v. Tucker, 46 N. C. 176.

Oh.—J. Weller Co. v. Gordon, 24 Oh. Cir. Ct. 407.

Okl.—Bowles v. Biffles, 50 Okl. 587, 151 P 193.

S. C.—Commercial Bank v. Bobo, 43 S. C. L. 31; Printems v. Helfried, 9 S. C. L. 187.

S. D.—Estey v. Birnbaum, 9 S. D. 174, 68 NW 290.

Tex.—McNeil v. McCamley, 6 Tex. 163; J. L. Case Threshing Mach. Co. v. Decatur First Nat. Bank, (Civ. A.) 160 SW 662.

Vt.—Tracy v. Pearl, 20 Vt. 162; Goodrich v. Barney, 2 Vt. 422.

W. Va.—Garrett v. Patton, 81 W. Va. 771, 95 SE 437.

Wis.—Cliver v. Heil, 95 Wis. 364, 70 NW 346.

Eng.—Wharton v. Walker, 4 B. & C. 163, 10 ECL 527, 107 Reprint 1020.

Ont.—Williams v. Marshall, 20 U. C. Q. B. 230.

See also Sullivan v. American Fruit Growers, Inc., 45 Ida. 153, 260 P 1029 (applying the rule stated in the text).

Compare Jose v. Baker, 37 Me. 465 (where it was said that an order on a third person is not a satisfaction of a precedent debt unless it be expressly shown that such at the time was the agreement of the parties, but that when such order is given for the purchase price for goods sold at the time of sale it will be presumed that such payment was meant to be absolute and that the purchaser was to be wholly discharged).

[a] **Order accepted subject to payment.**—When a creditor accepts from his debtor an order on a third person under the agreement that the debt shall be discharged when the order is paid, the order is not a payment, and if then it is not paid action lies on the original demand. Goodrich v. Barney, 2 Vt. 422. See also Proctor v. Mather, 3 B. Mon. (Ky.) 353 (to the same effect, where a note was accepted as satisfaction when it should be paid, and afterward by agreement the note was canceled and an order on a third person substituted).

Presumption against intention to accept in payment see infra § 216.

71. Summers v. Wood, 131 Ark. 345, 198 SW 692, 693 [quot Cyc]; Chapman v. Coffin, 14 Gray (Mass.) 454; Tuckerman v. Sleeper, 9 Cush. (Mass.) 177, 180; J. Weller Co. v. Gordon, 24 Oh. Cir. Ct. 407; Smith v. Farrand, 7 B. & C. 19, 14 ECL 19, 108 Reprint 632.

"If a creditor applies to his debtor for payment, and he, by a written or verbal order, requests another to pay it, whether bound to do so or not, and he does pay it, it is a payment of the debt, and discharges the claim of the creditor." Tuckerman v. Sleeper, supra.

72. Summers v. Wood, 131 Ark. 345, 198 SW 692, 693 [quot Cyc]; Gilpin v. Lewis County, 13 KyL 733; Turner v. Rabb, 4 Mart. (La.) 330; Briggs v. Parsons, 39 Mich. 400. See also Proctor v. Mather, 3 B. Mon. (Ky.) 353 (dictum); J. Weller Co. v. Gordon, 24 Oh. Cir. Ct. 407, 411 (where it is said that a creditor to whom an order is given "is bound to present it for payment and use ordinary diligence to collect it"). Compare Henry v. Donnaghy, Add. (Pa.) 39 (holding that the retention of an order with-

[§ 57] **b. Assignment of Claim against Third Person.**[73] Where it is so agreed or the creditor consents thereto, payment may be made by the assignment by the debtor of a claim against a third person;[74] but the mere acceptance by the creditor of such an assignment does not constitute a payment in the absence of any agreement or intention to receive it as such.[75]

[§ 58] **c. Promise or Undertaking of Third Person.**[76] A debtor cannot, without the consent of his creditor, substitute another in his stead as debtor,[77] and the mere promise or undertaking of a third person to pay the debt does not relieve the debtor of liability therefor;[78] and, similarly, the receipt by the creditor of a bill or note[79] or a

out effort to collect it for ten years amounted to payment, although both the original debtor and the person upon whom the order was drawn were and remained solvent).

73. Bill, check, note, or other promise of third person see infra § 58.
Choses in action see infra § 62.
Order on third person see supra § 56.

74. Brunswick v. Birkenbeuel, 83 Ill. 413; McDaniel v. Continental Casualty Co., 240 Ill. A. 535; Melick v. Knox, 44 N. Y. 676; Willard v. Germer, 3 N. Y. Super. 50; Goldblatt v. Sherman, 123 Misc. 223, 204 NYS 204; Bosca v. Bosco, 168 NYS 656; Crawford v. Woody, 63 N. C. 100; Hayden v. Johnson, 26 Vt. 768. See Lanksford v. Cruse, 206 Ill. A. 346.

[a] **Insurance policy.**—Where a debtor's buildings had been destroyed by fire, the assignment to his creditor of policies of insurance on the buildings, upon which prima facie a cause of action had arisen in favor of the debtor, when such assignment was received as payment of the debt, is binding upon the creditor, whether or not a complete cause of action existed in favor of the debtor against the insurance companies and whether any defense could be made by the companies, when it is not shown that the policies were invalid or uncollectible. Brunswick v. Birkenbeuel, 83 Ill. 413.

[b] **Claim in litigation.**—Where the debtor transfers to the creditor as payment the right to moneys for which a suit has been brought, a payment to the extent of the amount collected in pursuance of the judgment is thereby effectuated. Crawford v. Woody, 63 N. C. 100.

[c] **Where claims are accepted at an agreed valuation,** the actual value is immaterial; and so if bad accounts are included or if the assignee accepts the return of goods sold instead of demanding payment of the account the payment effectuated by the assignment is not affected or diminished. Bosca v. Bosco, 168 NYS 656.

As novation see Novation § 32.
Valueless claim see supra § 39.

75. Rogers v. Tiedeman, 9 Ga. A. 811, 72 SE 285; Efron v. Scarpelli, 162 NYS 640; Stone v. Miller, 16 Pa. 450.

Presumption that property is security and not payment see infra § 220.

76. Cross references:
Acceptance by drawee of debtor's bill or draft see supra § 40 text and note 41.
Assignment of claim against third person see supra § 57.
Order on third nerson see supra § 56.
Payment by third person generally see supra § 3.

77. Strain v. Gourdin, 23 F. Cas. No. 13,521, 2 Woods 380.

78. Steinfeld v. Wing Wong, 14 Ariz. 336, 128 P 354; Wright v. Storrs, 32 N. Y. 691; Snowden v. Estelle, (Tex.) 13 SW 970; and cases infra notes 79, 80.

79. U. S.—Union Electric Steel Co. v. Imperial Bank of Canada, 286 Fed. 857; Maxwell v. Holmesville Mill, etc., Co., 231 Fed. 684, 145 CCA 570; Allen v. King, 1 F. Cas. No. 226, 4 McLean 128; Slocomb v. Lurty, 22 F. Cas. No. 12,949, Hempst. 431; Wallace v. Agry, 29 F. Cas. No. 17,096, 4 Mason 336. See also Hamilton v. Cunningham, 11 F. Cas. No. 5,978, 2 Brock. 350 (applying the rule).

Ala.—Tuscaloosa Lumber Co. v. Tropical Paint, etc., Co., 211 Ala. 258, 100 S 236; White Star Line Steam-Boat Co. v. Moragne, 91 Ala. 610, 8 S 867.

Ark.—Hatfield Bank v. Bruce, 164 Ark. 576, 262 SW 665; Akin v. Peters, 45 Ark. 313.

Cal.—Ellison v. Henion, 183 Cal. 171, 190 P 793, 11 ALR 444; Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 137 P 25; Durfee v. Seale, 139 Cal. 603, 73 P 435; Griffith v. Grogan, 12 Cal. 317; Pacific Acceptance Corp. v. Goodman, 72 Cal. A. 143, 236 P 964; Clark v. Berlin Realty Co., 33 Cal. A. 50, 164 P 333; Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825.

Colo.—Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717; Lomax v. Colorado Nat. Bank, 46 Colo. 229, 104 P 85.

Conn.—Stebbins v. Kellogg, 5 Conn. 265.

Ga.—Rawlings v. Robson, 70 Ga. 595; Butts v. Cuthbertson, 6 Ga. 159.

Ill.—Short v. Weisenborn, 193 Ill. A. 183; McHenry v. Croft, 163 Ill. A. 426; Chicago Times Co. v. Benedict, 37 Ill. A. 250; Cheltenham Stone, etc., Co. v. Gates Iron Works, 23 Ill. A. 635 [aff 124 Ill. 623, 16 NE 923]. See Brand v. Rueter, 200 Ill. A. 42.

Ind.—State v. Taylor, 77 Ind. A. 419, 132 NE 608; Mount v. Dehaven, 29 Ind. A. 127, 63 NE 330; Price v. Barnes, 7 Ind. A. 1, 31 NE 809, 34 NE 408.

Iowa.—Brown v. Sheldon State Bank, 139 Iowa 83, 117 NW 289; Monroe Bank v. Gifford, 79 Iowa 300, 44 NW 558.

Ky.—McDonald v. Green, 4 KyL 890, 12 Ky. Op. 62; Kuhn v. Adams, 1 KyL 338, 10 Ky. Op. 750. See also Grimes v. Grimes, 89 SW 548, 28 KyL 549 (apparently applying the rule).

Md.—Sebastian May Co. v. Codd, 77 Md. 293, 26 A 316; Crawford v. Berry, 6 Gill & J. 63; Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452; Patapsco Ins. Co. v. Smith, 6 Harr. & J. 166, 14 AmD 268.

Mich.—Swan v. Gregory, 195 Mich. 457, 161 NW 933; Gardner v. Gorham, 1 Dougl. 507.

Minn.—Hansen v. Wilmers, 162 Minn. 139, 202 NW 708; Empire Cream Separator Co. v. Marshall, 158 Minn. 236, 197 NW 216; Devlin v. Chamblin, 6 Minn. 468.

Miss.—Guion v. Doherty, 43 Miss. 538; Davis v. McPherson, 1 S 100.

Mo.—Montgomery County v. Auchley, 103 Mo. 492, 15 SW 626; Appleton v. Kennon, 19 Mo. 637; Wooldridge v. Hopkins, 220 Mo. A. 1034, 278 SW 1081; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996, 998 [cit Cyc]; O'Bryan v. Jones, 38 Mo. A. 90; Commiskey v. McPike, 20 Mo. A. 82.

Nebr.—Edwards, etc., Lumber Co. v. Lamb, 95 Nebr. 263, 145 NW 703.

N. H.—Roberts v. Rowe, 75 N. H. 36, 70 A 1074; Johnson v. Cleaves, 15 N. H. 332.

N. J.—American Brick, etc., Co. v. Drinkhouse, 59 N. J. L. 462, 36 A 1034; Caldwell v. Fifield, 24 N. J. L. 150; Freeholders v. Thomas, 20 N. J. Eq. 39.

N. Y.—Claflin v. Ostrom, 54 N. Y. 581; Noel v. Murray, 13 N. Y. 167 [aff 8 N. Y. Super. 385]; Vail v. Foster, 4 N. Y. 312; Friberg v. Block, 65 App. Div. 541, 73 NYS 104; Van Steenburgh v. Hoffman, 15 Barb. 28; Higby v. New York, etc., R. Co., 16 N. Y. Super. 497, 7 AbbPr 259; Hutkoff v. Glazer, 78 Misc. 362, 138 NYS 328; Atterbury v. Edwa, 61 Misc. 234, 113 NYS 614; Darnall v. Morehouse, 36 HowPr 511 [rev on other grounds 45 N. Y. 64]; Wehrlin v. Schmutz, 1 NY CityCt 101; Hays v. Stone, 7 Hill 128 [aff 3 Den. 575]; Muldon v. Whitlock, 1 Cow. 290, 13 AmD 533; Johnson v. Weed, 9 Johns. 310, 6 AmD 279; Tobey v. Barber, 5 Johns. 68, 4 AmD 326. Contra Rew v. Barber, 3 Cow. 272.

N. C.—Dobson v. Chambers, 79 N. C. 142; Gordon v. Price, 32 N. C. 385.

N. D.—Lokken v. Miller, 9 N. D. 512, 84 NW 368.

Okl.—Mutual L. Ins. Co. v. Chattanooga Sav. Bank, 47 Okl. 748, 150 P 190, LRA1916A 669.

Pa.—Newhall v. Arnett, 279 Pa. 317, 123 A 819; Shepherd v. Busch, 154 Pa. 149, 26 A 363, 35 AmSR 815; Murphy v. Eckel, 1 Walk. 144; McGinn v. Holmes, 2 Watts 121; D. B. Martin Co. v. Strickler, 57 Pa. Super. 296; North Penn Iron Co. v. New Jersey Bridge Co., 35 Pa. Super. 84; Hummelstown Brownstone Co. v. Knerr, 25 Pa. Super. 465; Raken v. Henry, 16 Pa. Dist. 207; Edminster v. Harris, 30 LegInt 110; Cake v. Olmstead, 1 Am LJ 169.

Philippine.—Compania General de Tabacos v. Molina, 5 Philippine 142.

R. I.—Sanderson Fertilizer, etc., Co. v. Tatlas, 103 A 780.

S. C.—State v. Rosborough, 31 S. C. L. 241; Barelli v. Brown, 12 S. C. L. 449, 10 AmD 683; Prescott v. Hubbell, 12 S. C. L. 94.

Tenn.—Perry v. Williamson, 56 SW 826.

Tex.—Johnston v. Mills, 25 Tex. 704; Fulwiler v. Daniel, (Civ. A.) 280 SW 348.

Wash.—Canadian Bank of Commerce v. John J. Sesnon Co., 68 Wash. 434, 123 P 602.

W. Va.—Bailey v. Riffe, 79 W. Va. 194, 90 SE 791; Hess v. Dille, 23 W. Va. 90.

Eng.—Belshaw v. Bush, 11 C. B. 191, 73 ECL 191, 138 Reprint 444; Gordon v. Strange, 1 Exch. 477, 154 Reprint 203; Allen v. Royal Bank of Canada, 95 L. J. P. C. 17.

N. B.—Hatfield v. Worden, 41 N. B. 552, 13 DomLR 193.

Yukon T.—Northern Commercial Co. v. Northern Light, etc., Co., 30 DomLR 567.

See also Nunn v. Hubacher, 25 Oh. A. 265, 158 NE 9 (applying the rule); Street v. Hall, 29 Vt. 165 (stating the law of New York).

[a] **In Massachusetts and Vermont** (1) however, the contrary rule obtains, that the delivery of the note of a third person by a debtor to his creditor is payment unless otherwise agreed or intended. Brown v. Bishop, 225 Mass. 276, 114 NE 316; Quimby v. Durgin, 148 Mass. 104, 19 NE 14, 1 LRA 514; Ely v. James, 123 Mass. 36; French v. Price, 24 Pick. (Mass.) 13; Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85; Torrey v. Baxter, 13 Vt. 452. (2) But it has been held that if the bill or note proves unproductive, recovery may be had on the original demand. Torrey v. Baxter, supra. (3) Minority rule as to payment by bill or note of debtor see supra § 40.

[b] **A bank draft** is not payment unless the creditor agrees or consents to receive it as such. Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825; Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717; Mutual L. Ins. Co. v. Chattanooga Sav. Bank,

check[80] of a third person is not a payment in the absence of agreement or consent to accept it as such, although if payment is thereafter made by such third person or his undertaking is collected, the original debt is discharged pro tanto;[81] but if the creditor is guilty of laches whereby the debtor is prejudiced the debt is satisfied to the extent of the face value of the undertaking,[82] inasmuch as the creditor is bound to use ordinary means and diligence to collect the amount thereof.[83] The creditor's acceptance of a third person as debtor,[84] however, or his acceptance of the bill, note, or check of such person under an agreement, express or implied, to receive it as payment,[85] discharges the original debtor and extin-

47 Okl. 748, 150 P 190, LRA1916A 669.

[c] **A post-office order** is not payment in the absence of consent or agreement to receive it as such. Gordon v. Strange, 1 Exch. 477, 154 Reprint 203.

Cross references:

As accord and satisfaction see Accord and Satisfaction § 59.

As payment of:

Judgment see Judgments § 1059.

Purchase price of:

Goods see Sales [35 Cyc 269].

Lands see Vendor and Purchaser [39 Cyc 1599].

Bill or note of debtor as payment see supra §§ 40–49.

Creditor as holder in due course see Bills and Notes § 704.

Debt of another as consideration for bill or note see Bills and Notes §§ 354–358.

80. U. S.—Cleve v. Craven Chemical Co., 18 F. (2d) 711, 52 ALR 980.

Ga.—Weaver v. Nixon, 69 Ga. 699; Holland v. Mutual Fertilizer Co., 8 Ga. A. 714, 70 SE 151.

Ill.—Kraetsch v. Chicago, 198 Ill. A. 395; Smith v. Bankers Engineering Co., 186 Ill. A. 115.

Ind.—Cox v. Hayes, 18 Ind. A. 220, 47 NE 844.

Iowa.—People's Sav. Bank v. Gifford, 108 Iowa 277, 79 NW 63.

Kan.—Mordis v. Kennedy, 23 Kan. 408, 33 AmR 169.

Ky.—Caudill v. Finley, 223 Ky. 544, 4 SW (2d) 368.

Mass.—Weddigen v. Boston Elastic Fabric Co., 100 Mass. 422; Small v. Franklin Min. Co., 99 Mass. 277.

Mich.—Goldsmith v. Lichtenberg, 139 Mich. 163, 102 NW 627.

Minn.—National Bank of Commerce v. Chicago, etc., R. Co., 44 Minn. 224, 46 NW 342, 560, 20 AmSR 566, 9 LRA 263.

N. J.—Freeholders v. Thomas, 20 N. J. Eq. 39.

N. Y.—Cherey v. McLaughlin, 245 N. Y. 616, 157 NE 881; Carroll v. Sweet, 128 N. Y. 19, 27 NE 763, 13 LRA 43; Greenwich Ins. Co. v. Oregon Impr. Co., 76 Hun 194, 27 NYS 794 [aff 148 N. Y. 758 mem, 43 NE 987 mem]; Jobbitt v. Goundry, 29 Barb. 509; Rines v. New York, etc., Brewing Co., 45 Misc. 415, 90 NYS 362; Schultze v. Cohen, 156 NYS 610; Olcott v. Rathbone, 5 Wend. 490.

Oh.—Fleig v. Sleet, 43 Oh. St. 53, 1 NE 24, 54 AmR 800.

Okl.—Wheeler, etc., Mercantile Co. v. Kitchen, 67 Okl. 131, 169 P 877, 878, LRA1918C 160 [cit Cyc]; Reeves Realty Co. v. Brown, 45 Okl. 737, 147 P 318.

Or.—Smith v. Mills, 112 Or. 496, 230 P 350.

Pa.—McIntyre v. Kennedy, 29 Pa. 448.

Tenn.—Kirkpatrick v. Puryear, 93 Tenn. 409, 24 SW 1130, 22 LRA 785.

Tex.—Texas, etc., R. Co. v. Hoffecker, (Civ. A.) 123 SW 617; Johnson v. Hulett, 56 Tex. Civ. A. 11, 120 SW 257.

Eng.—Mocatta v. Bell, 4 Jur. N. S. 77.

Ont.—Davidson v. Fraser, 23 Ont. A. 439 [dist Armstrong v. Hemstreet, 22 Ont. 336].

Check of debtor as payment see supra §§ 50–53.

81. Griffin v. Erskine, 131 Iowa 444, 109 NW 13, 9 AnnCas 1193; Exeter Bank v. Gordon, 8 N. H. 66; Pratt v. Foote, 9 N. Y. 463; Conkling v. King, 10 Barb. 372 [aff 10 N. Y. 440, Seld. 86]; Terry v. Dale, 27 Tex. Civ. A. 1, 65 SW 51, 396; Craik v. MacFarlane, 21 Que. K. B. 10, 18 Revde Jur 88.

82. U. S.—Roberts v. Gallagher, 20 F. Cas. No. 11,902, 1 Wash. C. C. 156.

Ala.—Thomason v. Cooper, 57 Ala. 560.

Ill.—Kraetsch v. Chicago, 198 Ill. A. 395.

La.—Marburg v. Canneld, 4 Mart. N. S. 539. See also Rogers v. Vanlandingham, 10 La. 143 (applying the rule).

Mich.—Brown v. Spiegel, 156 Mich. 138, 120 NW 579.

Minn.—Commercial Inv. Trust v. Lundgren-Wittensten Co., 173 Minn. 83, 216 NW 531, 56 ALR 492.

Miss.—Lear v. Friedlander, 45 Miss. 559.

Nebr.—Pleasant Dale First State Bank v. Borchers, 83 Nebr. 530, 120 NW 142.

N. H.—Exeter Bank v. Gordon, 8 N. H. 66; Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

N. J.—Orange Screen Co. v. Holmes, 103 N. J. L. 560, 138 A 105; Freeholders v. Thomas, 20 N. J. Eq. 39; Shipman v. Cook, 16 N. J. Eq. 251.

N. Y.—Smith v. Miller, 43 N. Y. 171, 3 AmR 690.

Wis.—Mehlberg v. Tisner, 24 Wis. 607.

Eng.—Smith v. Wilson, Andr. 187, 95 Reprint 356; Camidge v. Allenby, 6 B. & C. 373, 13 ECL 175, 108 Reprint 489, 21 ERC 48; Peacock v. Pursell, 14 C. B. N. S. 728, 108 ECL 728, 143 Reprint 630, 4 ERC 526.

And see cases infra this note; and note 83.

[a] **Notice of dishonor** (1) of a bill or note by the person primarily liable thereon must ordinarily be given to the debtor by the creditor and upon failure thereof the debt is discharged. Hamilton v. Cunningham, 11 F. Cas. No. 5,978, 2 Brock. 350; Minehart v. Handlin, 37 Ark. 276; Blanchard v. Tittabawassee Boom Co., 40 Mich. 566; Murphy v. Phelps, 12 Mont. 531, 31 P 64; Dayton v. Trull, 23 Wend. (N. Y.) 345; Mauney v. Coit, 80 N. C. 300, 30 AmR 80; Smith v. Mercer, L. R. 3 Exch. 51; Peacock v. Pursell, 14 C. B. N. S. 728, 108 ECL 728, 143 Reprint 630, 4 ERC 526; Chamberlyn v. Delarive, 2 Wils. 353, 95 Reprint 854; Redpath v. Kolfage, 16 U. C. Q. B. (Ont.) 433. (2) Necessity of notice to hold indorser or assignee generally see Bills and Notes §§ 892–899.

[b] **Duty to sue.**—Where a note is taken by a seller of goods, with an agreement that he will endeavor to collect it or return it within two or three months, it does not imply that he is bound to proceed to a suit; nor is he liable for negligence, even though it be shown that a recovery might have been had. Martin v. Pennock, 2 Pa. 376.

[c] **Insolvency of maker as excuse for laches.**—Where the maker of the note was insolvent and the debtor held security for its payment, the failure of the creditor to sue thereon or give notice of its dishonor does not preclude him from recovering upon the original indebtedness. Kephart v. Butcher, 17 Iowa 240.

[d] **Laches not prejudicial.**—Where the laches of the creditor causes no loss or damage to the debtor, the failure of the creditor to use due diligence does not discharge the debtor. Anderson v. Timberlake, 114 Ala. 377, 22 S 431, 62 AmSR 105; American Nat. Bank v. National Fertilizer Co., 125 Tenn. 328, 143 SW 597.

[e] **Rule inapplicable to public officials.**—Where a taxpayer attempted to pay his taxes by delivering to the county treasurer a bank draft, which was held by the treasurer more than three weeks without presentation to the drawee bank, and in the interim the issuing bank failed, the rule that want of diligence in presenting a draft operates to extinguish the debtor's obligation, although applicable between private individuals, cannot govern as between an individual, whose duty it is under the law to pay his taxes and to pay them in money, and a public officer whose duty it is to collect the taxes and collect them in money. Eggleston v. Plowman, 49 S. D. 609, 207 NW 981, 44 ALR 1231.

Presentment and demand generally see Bills and Notes §§ 457–506, 736–786.

83. U. S.—In re Ouimette, 18 F. Cas. No. 10,622, 1 Sawy. 47.

Ala.—Lake v. Gilchrist, 7 Ala. 955.

Ark.—Minehart v. Handlin, 37 Ark. 276; Gracie v. Sandford, 9 Ark. 233.

Ill.—Kraetsch v. Chicago, 198 Ill. A. 395.

Md.—Dorsey v. Campbell, 1 Bland 356.

Mich.—Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 AmD 756.

N. H.—Cochran v. Wheeler, 7 N. H. 202, 26 AmD 732.

N. J.—Freeholders v. Thomas, 20 N. J. Eq. 39.

N. Y.—Copper v. Powell, Anth. N. P. 68; Woodcock v. Bennet, 1 Cow. 711, 13 AmD 568; Dayton v. Trull, 23 Wend. 345; Jones v. Savage, 6 Wend. 658.

N. C.—Gordon v. Price, 32 N. C. 385.

Tex.—Houston v. Evans, 17 SW 925.

Eng.—Camidge v. Allenby, 6 B. & C. 373, 13 ECL 175, 108 Reprint 489, 21 ERC 48; Darrach v. Savage, 1 Show. 155, 89 Reprint 509; Syderbottom v. Smith, Str. 649, 93 Reprint 759; Chamberlyn v. Delarive, 2 Wils. 353, 95 Reprint 854.

And see cases supra note 82.

Burden of proving diligence see infra § 183.

84. Shryer v. Morgan, 77 Ind. 479; Timberlake v. Baylor, 2 A. K. Marsh. (Ky.) 618; Yndo v. Rivas, 107 Tex. 408, 180 SW 96 [aff (Civ. A.) 142 SW 920]; Keyes v. Carpenter, 3 Vt. 209. See also Sampson v. Fox, 109 Ala. 662, 19 S 896, 55 AmSR 950 (where it was said that if the third person is accepted as debtor the debt is not paid, but there is a change of debtors). But see Weeks v. Elliott, 33 Me. 488 (where the oral promise of the third person, being void under the statute of frauds as a promise to pay the debt of another, was held not to discharge the original debtor, although agreed to by the creditor).

As novation see Novation § 38.

85. U. S.—Burlee Dry Dock Co. v. Besse, 130 Fed. 444, 64 CCA 646.

Ala.—Carriere v. Ticknor, 26 Ala. 571.

Ark.—Viser v. Bertrand, 14 Ark. 267.

Cal.—Stanley v. McElrath, 86 Cal. 449, 25 P 16, 26 P 800, 10 LRA 545; Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825.

Colo.—McAloon v. Ericson, 271 P 192; Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538.

Ill.—Ryan v. Dunlap, 17 Ill. 40, 63 AmD 334; Chicago R. Equipment Co. v. Nat., etc., Beam Co., 123 Ill. A. 533 [rev on other grounds 226 Ill. 28, 80 NE 556]; Gannon v. Cooke, 122 Ill. A. 615. See Binder v. Roberts, 187 Ill. A. 181. See also Scheerer v. Scheerer, 109 Ill. 11 (applying the rule).

Ind.—Jewett v. Pleak, 43 Ind. 368.

Iowa.—Burlington Gaslight Co. v. Greene, 22 Iowa 508.

Ky.—Caudill v. Finley, 223 Ky. 544, 4 SW (2d) 368.

La.—Underwriters' Wrecking Co. v. Board of Underwriters, 35 La. Ann. 803.

guishes the liability, whether or not payment is thereafter made by the third person,[86] except when such acceptance is conditional and the condition fails,[87] or where the creditor acts under a mistake of fact;[88] but the acceptance of some bills or notes tendered by the debtor as payment does not constitute an acceptance of others or obligate the creditor to accept them.[89]

Effect of invalidity, fraud, or insolvency.[90] A bill or note of a third person received by the creditor in payment will not discharge the debt if it is invalid or unenforceable,[91] as where it is made by an infant,[92] or given for a gambling debt,[93] or where it is forged,[94] or if its acceptance by the creditor is induced by fraud,[95] such as misrepresentation or concealment of the financial responsibility of the third person.[96] In the absence of fraud, it has been held that the insolvency of the drawer or maker does not prevent the bill or note from operating as payment;[97] but in other cases, when neither the debtor nor creditor knew of the insolvency at the time the paper was given or transferred to the creditor, it has been held not to discharge the debt, on account of the mutual mistake of fact.[98]

[§ 59] **7. New Obligation.**[99] Where one obligation or security is accepted by the creditor in payment or satisfaction of another, the debt evidenced by the latter is discharged.[1] In the absence of a

Md.—Hoopes v. Strasburger, 37 Md. 390, 11 AmR 538.

Mass.—Whitney v. Esson, 99 Mass. 308, 96 AmD 762.

Mich.—Northern Oil Co. v. Advanced Petroleum Corp., 232 Mich. 11, 204 NW 692; Brown v. Spiegel, 156 Mich. 138, 120 NW 579.

Minn.—Tobiason v. Ashby First State Bank, 173 Minn. 533, 217 NW 934.

Mo.—O'Bryan v. Jones, 38 Mo. A. 90.

N. H.—Willie v. Green, 2 N. H. 333; Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

N. Y.—Wachtel v. Rosen, 249 N. Y. 386, 164 NE 326; Peo. v. Cromwell, 102 N. Y. 477, 7 NE 413; Wise v. Chase, 44 N. Y. 337 [aff 26 N. Y. Super. 35]; Candee v. Fordham Stone Renovating Co., 126 App. Div. 15, 110 NYS 355 [aff 195 N. Y. 602 mem, 89 NE 1097 mem]; Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 NYS 1101; Conkling v. King, 10 Barb. 372 [aff 10 N. Y. 440, Seld. 86]; White v. Howard, 3 N. Y. Super. 81; St. John v. Purdy, 3 N. Y. Super. 9; Soffe v. Gallagher, 3 E. D. Smith 507; Ferdon v. Jones, 2 E. D. Smith 106; Fleischman v. Bishop, 174 NYS 142. See also Des Arts v. Leggett, 16 N. Y. 582 (applying the rule).

N. C.—Chard v. Warren, 122 N. C. 75, 29 SE 373.

Pa.—Harrar v. Croney, 13 Pa. Co. 193.

Tex.—Yndo v. Rivas, 107 Tex. 408, 180 SW 96.

Vt.—Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85; Cleveland v. Pearl, 63 Vt. 127, 21 A 261, 25 AmSR 748; Farr v. Stevens, 26 Vt. 299.

Wash.—Scott v. Seaboard Securities Co., 143 Wash. 514, 255 P 660.

W. Va.—Dryden v. Stephens, 19 W. Va. 1.

Wis.—Grubbe v. Pierce, 156 Wis. 29, 145 NW 207, 51 LRANS 358, AnnCas 1915C 1148; Challoner v. Boyington, 91 Wis. 27, 64 NW 422.

Eng.—Smith v. Ferrand, 7 B. & C. 19, 14 ECL 19, 108 Reprint 632.

N. B.—Cheesman v. Corey, 42 N. B. 409, 15 DomLR 445, 13 EastLR 469.

[a] **Request of creditor.**—Where, by request of a creditor, a bank draft is purchased and remitted by the debtor, and the bank drawing the bill fails before it can be presented, the draft constitutes a payment. Underwriters' Wrecking Co. v. Board of Underwriters, 35 La. Ann. 803.

[b] **Retention under circumstances implying that it is accepted as payment** shows an understanding or agreement to take the check or draft of a third person in satisfaction of the debt. Conde v. Dreisam Gold Min. Co., 3 Cal. A. 583, 86 P 825.

[c] **Thus** (1) where the purchaser of goods directs the seller to send a bill to a third person, and the seller accepts the check of the third person and notifies the purchaser that the goods have been paid for, and on the same day the third person fails, leaving the check unpaid, the check constitutes a payment of the purchase price and the purchaser's debt is paid. White v. Howard, 3 N. Y. Super. 81. (2) Where goods are bought to be delivered to a special agent of the buyer, with whom he agrees to leave cash for payment, which he does, and the seller, on delivery, accepts part cash, and the agent's check for the balance, which he holds until after the buyer settles his accounts with the agent, and the latter becomes insolvent, the buyer is released from liability. Cleveland v. Pearl, 63 Vt. 127, 21 A 261, 25 Am SR 748.

86. Shryer v. Morgan, 77 Ind. 479; Wise v. Chase, 44 N. Y. 337 [aff 26 N. Y. Super. 35]; and cases supra note 85.

87. Matney v. Abshire, (Ky.) 120 SW 274; Roscoe Co. v. Lindenr, 166 App. Div. 889, 150 NYS 1023 [aff 221 N. Y. 553 mem, 116 NE 1072 mem].

Conditional payment see supra § 11.

88. Hedge v. McQuaid, 11 Cush. (Mass.) 352; Rice v. Isham, 4 Abb. Dec. (N. Y.) 37, 1 Keyes 44; Hatch v. Barnum, 23 Vt. 133, 56 AmD 59; Carlson Bros. Co. v. Weidauer, etc., Shingle Co., 69 Wash. 161, 124 P 397.

[a] **Thus,** where a creditor accepted in payment of a debt due him from a corporation a note signed by another corporation of almost the same name, believing it to be the note of his debtor, no payment was effectuated. Carlson Bros. Co. v. Weidauer, etc., Shingle Co., 69 Wash. 161, 124 P 397.

89. Tiffany v. Glasgow, 82 Mich. 266, 46 NW 231.

90. Upon bill or note of debtor see supra § 43.

Worthless medium as payment generally see supra § 39.

91. Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68; Torrey v. Baxter, 13 Vt. 452; and cases infra notes 92-96.

92. Wentworth v. Wentworth, 5 N. H. 410.

Bill or note of infant see Infants § 188.

93. Beard v. Brandon, 11 S. C. L. 102.

Bill or note for gambling debt see Bills and Notes § 1035.

94. Ala.—Pope v. Nance, 1 Stew. 354, 18 AmD 60.

Conn.—Eagle Bank v. Smith, 5 Conn. 71, 13 AmD 37.

Mass.—Bass v. Wellesley, 192 Mass. 526, 78 NE 543. Compare Ellis v. Wild, 6 Mass. 321 (where plaintiff delivered rum to defendant, and defendant delivered to plaintiff two promissory notes, signed by a third person, on which the indorsement of the payee was afterward discovered to be forged; and in an action to recover the amount thereof, the court held that if the intention of the parties was for defendant to sell the notes and plaintiff to buy them and make payment in rum, plaintiff could not maintain his action, defendant having fulfilled his contract; but if plaintiff intended to sell rum for money, and defendant intended to buy it, and the payment by notes was an accommodation to defendant, then he has not paid for the rum and the action was maintainable).

N. H.—Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68. See also Grafton Bank v. Hunt, 4 N. H. 488 (recognizing the rule but holding it inapplicable to the facts of the particular case).

Eng.—Bell v. Buckley, 11 Exch. 631, 156 Reprint 983.

Effect of forgery generally see Bills and Notes §§ 1028-1030.

95. Me.—Atkinson v. Minot, 75 Me. 189.

Mass.—American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526.

N. H.—Wright v. First Crockery Ware Co., 1 N. H. 281, 8 AmD 68.

N. Y.—Hart v. Messenger, 46 N. Y. 253; Willson v. Foree, 6 Johns. 110, 5 AmD 195.

Vt.—Loomis v. Wainwright, 21 Vt. 520; Torrey v. Baxter, 13 Vt. 452. And see cases infra note 96.

96. U. S.—Crosby v. Lane, 6 F. Cas. No. 3,423.

Ala.—Lake v. Gilchrist, 7 Ala. 955.

Me.—Vallier v. Ditson, 74 Me. 553.

Mass.—Bridge v. Batchelder, 9 Allen 394.

N. Y.—Thomas v. Westchester County, 115 N. Y. 47, 21 NE 674, 4 LRA 477; Wilmot Engineering Co. v. Blanchard, 208 App. Div. 218, 203 NYS 700; Galoupeau v. Ketchum, 3 E. D. Smith 175; Pierce v. Drake, 15 Johns. 475.

Or.—Smith v. Mills, 112 Or. 496, 230 P 350.

[a] **Fraudulent concealment of insolvency.**—No payment was effected by the delivery by the treasurer of a corporation, in payment of his own debt, of the note of the corporation, which was accepted as payment by the creditor, where such treasurer knew that the corporation was in fact insolvent, so that the note was valueless or of less value than its face. Wilmot Engineering Co. v. Blanchard, 208 App. Div. 218, 203 NYS 700.

97. Day v. Thompson, 65 Ala. 269; Carriere v. Ticknor, 26 Ala. 571; Snyder v. Findley, 1 N. J. L. 57; Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Chase v. Byrne, 2 Edw. (N. Y.) 492; Heidenheimer v. Lyon, 3 E. D. Smith (N. Y.) 54; Long v. Spruill, 52 N. C. 96.

98. Dille v. White, 132 Iowa 327, 109 NW 909; Thomas v. Westchester County, 115 N. Y. 47, 21 NE 674, 4 LRA 477; Roberts v. Fisher, 43 N. Y. 159, 3 AmR 680; Walrath v. Abbott, 75 Hun 445, 27 NYS 529. See also Wilmot Engineering Co. v. Blanchard, 208 App. Div. 218, 203 NYS 700 (dictum).

99. Bill, note, or check as payment see supra §§ 40-53.

New bill or note as payment of older one see Bills and Notes §§ 793-797.

1. U. S.—Muir v. Geiger, 17 F. Cas. No. 9,902, 1 Cranch C. C. 323.

Ala.—Smith v. Pitts, 167 Ala. 461, 468, 52 S 402 [quot Cyc].

Md.—Northern Cent. R. Co. v. Hering, 93 Md. 164, 48 A 461.

clear intention or consent to receive it as payment, however, a debt is not extinguished by the mere acceptance of an obligation of a dignity equal to, or lower than, that by which it was theretofore evidenced;[2] but the execution by the debtor of a higher security,[3] such as a bond or other specialty,[4] and its delivery to the creditor otherwise than as collateral security,[5] constitute a payment of a preëxisting debt evidenced by an obligation of a lower dignity, except when the intention of the parties is otherwise.[6] If the new obligation, although higher, is that of a third person, however, there is no presumption that the original debt is merged therein or extinguished.[7]

[§ 60] **8. Application of Collateral Security.** The mere taking of collateral security for a preexisting debt does not discharge the debt,[8] nor do proceedings or attempts to secure payment by re-

N. Y.—Myers v. Grey, 122 NYS 1079 [aff 146 App. Div. 923 mem, 131 NYS 1130 mem].

N. C.—Smitherman v. Kidd, 36 N. C. 86.

Va.—Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1, 9 SE 759, 19 AmSR 858.

W. Va.—Sayre v. King, 17 W. Va. 562.

Alta.—Royal Bank v. Allen, 15 Alta. L. 171, 49 DomLR 572, [1919] 3 West Wkly 1063.

Acceptance of bill or note as payment see supra § 41.

Novation see Novation 46 C. J. p 572.

2. U. S.—The Betsy and Rhoda, 3 F. Cas. No. 1,366, 2 Ware 117.

Ala.—Smith v. Pitts, 167 Ala. 461, 52 S 402; Lee v. Fontaine, 10 Ala. 755, 44 AmD 505.

Md.—Owen v. Hall, 70 Md. 97, 16 A 376; Morrison v. Welty, 18 Md. 169; Yates v. Donaldson, 5 Md. 389, 61 AmD 283; Clopper v. Union Bank, 7 Harr. & J. 92, 16 AmD 294; Bowers v. State, 7 Harr. & J. 32; Patapsco Ins. Co. v. Smith, 6 Harr. & J. 166, 14 AmD 268; Williamson v. Andrew, 4 Harr. & M. 482.

N. Y.—Flower v. Lance, 59 N. Y. 603; Phelps v. Johnson, 8 Johns. 54.

Pa.—Hart v. Boller, 15 Serg. & R. 162, 16 AmD 536.

Tenn.—Sparta First Nat. Bank v. Yowell, 155 Tenn. 430, 294 SW 1101, 1103, 52 ALR 1411 [quot Cyc].

Va.—Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1, 9 SE 759, 19 AmSR 858.

W. Va.—Dudley v. Barrett, 66 W. Va. 363, 66 SE 507; Sullivan v. Saunders, 66 W. Va. 350, 66 SE 497, 42 LRANS 1010, 19 AnnCas 480.

See Stelk v. Hoff, 210 Ill. A. 229.

"By the common law, a debt due on simple contract is not discharged by the creditor's accepting another obligation of the same nature for the same consideration. . . . The new title is not considered as an extinguishment of the old debt, but is treated as a merely collateral and additional security. The same principle prevailed in the civil law. A creditor, by taking a new obligation for a debt, did not extinguish the old title. The original obligation remained in force, and the second was held to be merely an accessory, which of course became extinct when the principal was satisfied. The new title was never held to supersede the original cause of action, unless such was clearly proved to have been the intention of the parties." The Betsy & Rhoda, 3 F. Cas. No. 1,366, 2 Ware 117, 118.

[a] **No mere change in the form of the evidence of a debt** will operate to discharge the debt, unless so intended by the parties. Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1, 9 SE 759, 19 AmSR 858. See also Stelk v. Hoff, 210 Ill. A. 229.

Bill or note as payment see supra §§ 40-49.

3. Lee v. Green, 83 Ala. 491, 3 S 785; Waldrop v. Automobile Sales Co., 17 Ala. A. 4, 81 S 180; Keyes v. Keyes, 217 Mo. 48, 116 SW 537; Iseler v. Baker, 6 Humphr. (Tenn.) 85; Rush v. Amarillo First Nat. Bank, (Tex. Civ. A.) 160 SW 319 [reh den (Civ. A.) 160 SW 609]; and cases infra note 4.

[a] **Giving a note, with a waiver of exemptions, for the amount of an open account** raises the presumption of payment, inasmuch as the waiver of exemptions is an agreement independent of, and in addition to, the original promise and is a higher security, or better assurance of payment, and more beneficial to the creditor than a book account or debt of like nature. Lee v. Green, 83 Ala. 491, 3 S 785.

[b] **Note and mortgage as payment of book account.**—The giving and acceptance of a note and mortgage by a debtor for the amount of a book account evinces an intention to pay the original debt. Keyes v. Keyes, 217 Mo. 48, 116 SW 537.

Note as payment generally see supra §§ 40-49.

4. Ala.—Lee v. Green, 83 Ala. 491, 3 S 785; Lee v. Fontaine, 10 Ala. 755, 44 AmD 505.

Ill.—Cox v. Reed, 27 Ill. 434.

Md.—Davidson v. Kelly, 1 Md. 492; Williams v. Hodgson, 2 Harr. & J. 474, 3 AmD 563.

Minn.—Clark v. Lindeke, 44 Minn. 112, 46 NW 326.

Miss.—Myers v. Oglesby, 7 Miss. 46.

Mo.—State Bank v. Tesson, 1 Mo. 617.

N. Y.—Baxter v. Bell, 19 Hun 367 [rev on other grounds 86 N. Y. 195]; Averill v. Loucks, 6 Barb. 19; Tom v. Goodrich, 2 Johns. 213; Clement v. Brush, 3 Johns. Cas. 180. See also Cumming v. Hackley, 8 Johns. 202 (dictum).

N. C.—Costner v. Fisher, 104 N. C. 392, 10 SE 526.

Pa.—Jones v. Johnson, 3 Watts & S. 276, 38 AmD 760.

S. C.—Chalmers v. Turnipseed, 21 S. C. 126; Mills v. Starr, 18 S. C. L. 359.

W. Va.—Dudley v. Barrett, 66 W. Va. 363, 66 SE 507.

But see Covington v. Clark, 5 J. J. Marsh. (Ky.) 59 (where a bond given by a judgment debtor was held not a satisfaction of the judgment).

And see cases infra this note.

[a] **"A simple contract debt is merged, extinguished, or satisfied,** by giving a bond for it. Both securities for the same debt cannot exist, and the higher is to be preferred by the law." Myers v. Oglesby, 7 Miss. 46, 50.

[b] **A specialty executed by one or more partners, but by all** (1) for the payment of a partnership debt, is an extinguishment of such debt. Williams v. Hodgson, 2 Harr. & J. (Md.) 474, 3 AmD 563; Clark v. Lindeke, 44 Minn. 112, 46 NW 326; Tom v. Goodrich, 2 Johns. (N. Y.) 213; Clement v. Brush, 3 Johns. Cas. (N. Y.) 180; Chalmers v. Turnipseed, 21 S. C. 126; Isler v. Baker, 6 Humphr. (Tenn.) 85. See also Niday v. Harvey, 9 Gratt. (50 Va.) 454, 464 (holding that under "the attendant circumstances and the subsequent conduct and declarations of" the creditor the bond should be regarded as extinguishing the partnership debt). Compare Hoskinson v. Eliot, 62 Pa. 393; Fleming v. Lawhorn, 23 S. C. L. 360 (both holding that a sealed note in the name of the firm, made by one partner, is not a satisfaction of the firm debt, unless accepted as the individual note of the partner). But see Nicholson v. Leavitt, 6 N. Y. Super. 252 [rev on other grounds 6 N. Y. 510, 57 AmD 199] (holding that a simple contract partnership debt is not extinguished by the creditor's taking a higher security for it from an individual partner unless there is positive proof that it was accepted by the creditor in full satisfaction of the existing debt); Chamberlain v. Madden, 41 S. C. L. 395 (holding that a sealed individual note does not extinguish the original cause of action as against the maker's dormant partner, whose connection as partner was unknown to the creditor at the time the note was executed). (2) Where a partner executes a note under seal for a debt of the firm without authority from the other partners, the partnership debt is extinguished and it becomes the individual debt of the partner. Brozee v. Poyntz, 3 B. Mon. (Ky.) 178; Calk v. Orear, 2 B. Mon. (Ky.) 420; Horton v. Child, 15 N. C. 460; Waugh v. Carriger, 1 Yerg. (Tenn.) 31; Nunnely v. Doherty, 1 Yerg. (Tenn.) 26. (3) Bill or note of partner for firm debt see supra § 47.

[c] **Bond and mortgage of partner.**—The creditor of a firm who takes a bond and mortgage from one of the partners thereby extinguishes his demand against the firm. Baxter v. Bell, 19 Hun 367 [rev on other grounds 86 N. Y. 195]; Averill v. Loucks, 6 Barb. (N. Y.) 19. Contra Pierce v. Cameron, 41 S. C. L. 114; Dickinson v. Legare, 1 S. C. Eq. 537; Jordan v. Miller, 75 Va. 442.

5. See cases supra notes 3, 4.

Collateral security as payment see infra § 60.

6. Nelson v. Musgrave, 10 Mo. 648; Abrams v. Musgrove, 12 Pa. 292; Pelzer v. Steadman, 22 S. C. 279; Adger v. Pringle, 11 S. C. 527; Graves v. Allen, 66 Tex. 589, 2 SW 192. Compare Waldrop v. Automobile Sales Co., 17 Ala. A. 4, 5, 81 S 180 (where it was said that a higher security taken from the debtor himself extinguishes the original debt "where the contrary does not appear on the face of the security itself"). But see Costner v. Fisher, 104 N. C. 392, 10 SE 526; Jones v. Johnson, 3 Watts & S. (Pa.) 276, 38 AmD 760 (both holding that an agreement, however explicit, will not prevent a promissory note from merging in a bond given for the same debt by the same debtor).

7. Dudley v. Barrett, 66 W. Va. 363, 66 SE 507.

Cross references:

Acceptance of third person as debtor see supra §§ 56-58.

Assignment of claim against third person see infra § 57.

Presumptions as to payment or nonpayment see infra §§ 188-247.

Taking obligation as pledge not merger of debt see Pledges [31 Cyc 869 text and note 76].

8. Ark.—Hanks v. Harris, 29 Ark. 323.

Ill.—Mead v. Stevens, 22 Ill. A. 298.

Ind.—Grant v. Monticello School Town, 71 Ind. 58; Dugan v. Sprague, 2 Ind. 600.

Me.—Woodman v. Woodman, 3 Me. 350.

Md.—Pearce v. Wallace, 1 Harr. & J. 48.

Miss.—Markwell v. Swan, 69 Miss. 907, 13 S 809.

N. H.—Whitcher v. Dexter, 61 N. H. 91; Kenniston v. Avery, 16 N. H. 117.

N. J.—Coulter v. Kaighn, 30 N. J. L. 98; Alexander v. Bacot, 41 N. J. Eq. 511, 7 A 506.

N. Y.—Danaher v. Hodgkins, 25 App. Div. 6, 49 NYS 58; Day v. Leal, 14 Johns. 404.

Pa.—Kemmerer's App., 102 Pa. 558.

sort to the security where no payment results,[9] nor mere forebearance to enforce or collect the security, although payment thereby might have been obtained;[10] but if the creditor collects or otherwise realizes upon the collateral or sells it and appropriates the proceeds, the debt is extinguished or reduced pro tanto.[11] Where the creditor transfers the collateral to another and it is not shown that he received therefor an amount less than the amount of the debt,[12] or where he converts it to his own use,[13] he will be deemed to have substituted the collateral for the debt and the debtor is discharged to the extent of the full or nominal value of the security.[14]

[§ 61] **9. Debits and Credits, Deposits, Funds, or Mutual Indebtedness.** When so agreed or consented to, payment may be made by the transfer of debits or credits or the application of deposits or funds of the debtor in the hands of the creditor,[15] or by the application of mutual indebtedness of the parties;[16] and there is some authority to the effect that it may be so made even without agreement or consent,[17] except when otherwise expressly agreed.[18] The general rule, however, is that in the absence of

S. C.—Prescott v. Hubbell, 12 S. C. L. 94.

W. Va.—Hoge v. Vintroux, 21 W. Va. 1; Blair v. Core, 20 W. Va. 265; Sayre v. King, 17 W. Va. 562.

B. C.—Johnson v. McRae, 16 B. C. 473, 17 WestLR 132.

Taking pledge as defense to action on debt see Pledges [31 Cyc 869].

9. See cases infra this note.

[a] **Unsatisfied judgment.**—No payment is effectuated by obtaining judgment on a note given as collateral security where the judgment remains unsatisfied. Luter v. Roberts, (Tex. Civ. A.) 39 SW 1002; Dickinson v. King, 28 Vt. 378.

[b] **Appropriation of proceeds by debtor to other debts.**—Where a creditor sold collateral deposited with him as security and permitted the debtor to use the proceeds for the purpose of paying other outstanding indebtedness, no payment of the creditor's claim was effectuated by the sale. Burns v. National Min., etc., Co., 23 Colo. A. 545, 130 P 1037.

10. Stebbins v. Kellogg, 5 Conn. 265; Fullerton v. Mobley, (Pa.) 15 A 856.

11. U. S.—In re Alburtis Silk Ribbon Mills, 243 Fed. 777; Continental Gin Co. v. Stocker, 235 Fed. 1005, 1006 [quot Cyc].

Ill.—Post v. Union Nat. Bank, 159 Ill. 421, 42 NE 976; Levy v. Chicago Nat. Bank, 158 Ill. 88, 42 NE 129, 30 LRA 380.

Ind.—Farnsley v. Anderson Fdy., etc., Works, 90 Ind. 120; Reeves v. Plough, 41 Ind. 204.

La.—Tiner v. Maillot, 6 La. Ann. 534; Favrot v. Allain, 6 La. Ann. 428.

Mass.—Hancock v. Franklin Ins. Co., 114 Mass. 155; Hunt v. Nevers, 15 Pick. 500, 26 AmD 616.

Mich.—Carpenter v. Osborn, 107 Mich. 304, 65 NW 222.

N. H.—King v. Hutchins, 28 N. H. 561.

N. Y.—Ayrault v. Elmer, 8 N. Y. 422, Seld. 118; Duden v. Waitzfelder, 16 Hun 337; Prouty v. Eaton, 41 Barb. 409; Bell v. Weir, 5 Silv. Sup. 230, 8 NYS 661.

N. C.—Dismukes v. Wright, 20 N. C. 74.

Or.—Sellwood v. Gray, 11 Or. 534, 5 P 196.

Pa.—Sitgreaves v. Farmers', etc., Bank, 49 Pa. 359.

Vt.—Strong v. Wooster, 6 Vt. 536.

W. Va.—Blair v. Core, 20 W. Va. 265; Wiley v. Mahood, 10 W. Va. 206.

[a] **Creditor selling to self must redit amounts subsequently collected.**—Where a bank holding a bond and mortgage as collateral security for the payment of a note sold a bond and mortgage to itself for an amount less than that due upon the note and credited such amount thereon, and subsequently instituted foreclosure proceedings upon the bond and mortgage and thereby collected the full amount of the note, the note was satisfied and the liability of the maker extinguished. In re Alburtis Silk Ribbon Mills, 243 Fed. 777.

Application of deposits or funds of debtor in hands of creditor see infra § 61.

Effect of enforcement of pledge see Pledges [31 Cyc 868].

12. Cocke v. Chaney, 14 Ala. 65; Hawks v. Hinchcliff, 17 Barb. (N. Y.) 492.

13. Alden v. Camden Anchor-Rockland Mach. Co., 107 Me. 508, 78 A 977; Milburn-Davis Grocer Co. v. Howard, 220 Mo. A. 1273, 290 SW 82; Ashton's App., 73 Pa. 153.

14. See cases supra notes 12, 13.

15. Ala.—Wilkinson v. Bradley, 54 Ala. 677; Moore v. Meyer, 57 Ala. 20; Shaw v. Decatur Branch Bank, 16 Ala. 708.

Cal.—White v. Costigan, 138 Cal. 564, 72 P 178.

Ind.—Shryer v. Morgan, 77 Ind. 479.

Iowa.—Royce v. Barrager, 116 Iowa 671, 88 NW 940.

Kan.—Craig v. Ellsaesser, 113 Kan. 416, 215 P 454.

La.—Keane v. Branden, 12 La. Ann. 20.

Me.—Waite v. Vose, 62 Me. 184; Stackpole v. Keay, 45 Me. 297.

Mass.—Hill v. Fuller, 188 Mass. 195, 74 NE 361; Breck v. Barney, 183 Mass. 133, 66 NE 643.

Minn.—Randall v. Eichhorn, 80 Minn. 344, 83 NW 154; Hare v. Bailey, 73 Minn. 409, 76 NW 213; Congregational Ministers Gen. Convention v. Torkelson, 73 Minn. 401, 76 NW 215.

Nebr.—Hughes v. Kellogg, 3 Nebr. 186.

N. Y.—Weedsport Bank v. Park Bank, 15 N. Y. Super. 418 [aff 4 Abb. Dec. 545, 2 Keyes 561].

Tex.—Hudgins Produce Co. v. Beggs, (Civ. A.) 185 SW 339.

Vt.—Bond v. Clark, 47 Vt. 565.

Wash.—Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157.

Wis.—National Cash Register Co. v. Bonneville, 119 Wis. 222, 96 NW 558; Zinns Mfg. Co. v. Mendelson, 89 Wis. 133, 61 NW 302.

Eng.—Gillard v. Wise, 5 B. & C. 134, 11 ECL 399, 108 Reprint 49; Eyles v. Ellis, 4 Bing. 112, 13 ECL 425, 130 Reprint 710; Bolton v. Reichard, 1 Esp. 106, 170 Reprint 295, 6 T. R. 139, 101 Reprint 477; Proctor v. Brain, 2 M. & P. 284, 17 ECL 628.

[a] **The assignment of a claim by the creditor to the debtor** is in legal effect a settlement and payment of the claim. Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157.

[b] **Until the funds are actually applied** in payment, the debt remains unpaid and the debtor is still liable therefor. Moore v. Meyer, 57 Ala. 20.

[c] **The application is made at once,** when the parties agree that certain items of account shall go in liquidation of certain other items, and provide for no further act to be done in respect thereof. Bond v. Clark, 47 Vt. 565.

Application of collateral security see supra § 60.

16. Ark.—Grubbs v. Nixon, 93 Ark. 79, 123 SW 785, 137 AmSR 78; Thurston v. Peay, 21 Ark. 85.

Mass.—Ryan v. Whitney, 257 Mass. 218, 153 NE 449; Automatic Time Table Adv. Co. v. Automatic Time Table Co., 208 Mass. 252, 94 NE 462; Breck v. Barney, 183 Mass. 133, 66 NE 643.

Nebr.—Brockman v. Ostdiek, 79 Nebr. 843, 113 NW 529.

N. J.—Clark v. Mershon, 2 N. J. L. 70.

N. Y.—Holcomb v. Campbell, 118 N. Y. 46, 22 NE 1107; Davis v. Spencer, 24 N. Y. 386; Taylor v. Bernard, 71 Hun 207, 24 NYS 525 [aff 144 N. Y. 654 mem, 39 NE 494 mem].

Vt.—Churchill v. Bowman, 39 Vt. 518.

Va.—Braxton v. Gregory, Wythe 73.

Wis.—Buttrick v. Roy, 72 Wis. 164, 39 NW 345.

Eng.—Smith v. Winter, 12 C. B. 487, 74 ECL 487, 138 Reprint 997; Pattison v. Belford Union, 1 H. & N. 523, 156 Reprint 1309.

Ont.—Truax v. Dixon, 17 Ont. 366; Young v. Taylor, 25 U. C. Q. B. 583.

[a] **Rule applied.**—The legislature may provide that interest coupons on state bonds, issued to a state bank to enable it to draw money, on which the bank was accordingly principally liable, shall be receivable in payment of debts due the bank. Thurston v. Peay, 21 Ark. 85.

Accounting and setting off mutual accounts as part payment see Accounts and Accounting § 329 text and note 95.

Payment to agent by applying his debt see Agency § 271.

17. Sanford v. Clark, 29 Conn. 457; Merle v. Beifeld, 194 Ill. A. 364; Hand v. Gas Engine, etc., Co., 167 N. Y. 142, 60 NE 425; Pinder v. Cronkhite, 34 N. B. 498.

[a] **In California,** under Civ. Code Proc. § 440, providing that, when cross demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, an amount due may be paid by the debtor by crediting it upon a demand due him from his creditor. Automobile Truck, etc., Co. v. Salladay, 55 Cal. A. 219, 203 P 163. See also Portola Realty Co. v. Carlston, 32 Cal. A. 282, 162 P 899 (where such transfer is held a payment, but no reference to the statute is made).

[b] **Reason for rule.**—"Where there is an open account between two parties, all advancements made by one of them to the other, may, (in the absence of any express or implied agreement to the contrary,) be entered in such account, become constituent parts of the account, and be applied upon, or in payment of, the oldest item in the account on the other side; so that in an action of book debt he only is entitled to recover in whose favor the final balance upon the whole account is found; because, in the case supposed, the party making the advancement impliedly recognizes the existence of an unadjusted account, and assents to the application of his advancement thereon, as one of the elements from which the final balance is to be ascertained." Sanford v. Clark, 29 Conn. 457, 461.

18. Sanford v. Clark, supra.

[a] **Rule applied.**—Where labor is performed under an agreement to pay for it in cash, the employer cannot make payment by crediting the amount due upon a debt he holds against the employee. Sanford v. Clark, 29 Conn. 457.

agreement or consent there is no right to pay by the transfer of debits or credits or the application of the debt upon a demand due from the other party.[19] In any event, a mere entry of debits or credits is no payment unless payment is actually made thereby;[20] but, on the other hand, omission to credit a payment received does not prevent it from being effectual.[21]

[§ 62] **10. Goods, Chattels, or Choses in Action.**[22] Under an agreement so providing,[23] or when accepted as such,[24] payment may be made in goods, chattels, or choses in action; but in the absence of such agreement it cannot be so made without the consent of the creditor.[25] In order that such personalty may constitute a payment, it must be delivered and received as such,[26] or, by subsequent agreement, be applied as payment;[27] and it must be of the kind or quality contemplated by the agreement,[28] unless something else is ac-

19. Ill.—Meyer v. Johnson, 122 Ill. A. 87; Stanwood v. Smith, 3 Ill. A. 647.
Me.—Hamilton v. Wilcox, 126 Me. 529, 140 A 201.
Mass.—Greenough v. Walker, 5 Mass. 214.
N. C.—Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377.
Pa.—Post v. Carmalt, 2 Watts & S. 70, 37 AmD 484; Seitzinger v. Alspach, 2 Pa. Cas. 359, 4 A 203.
Vt.—Blair v. White, 61 Vt. 110, 17 A 49.
Va.—Hill v. Southerland, 1 Wash. (1 Va.) 128.
Ont.—Notman v. Crooks, 10 U. C. Q. B. 105.
See also Cook v. Davis, 22 Cal. 157 (apparently applying the principle stated in the text).
Compare Canfield v. Notrobe, 7 Mart. (La.) 317 (holding that payment for goods purchased cannot be made without the creditor's consent by transferring to him his own note, payable in merchandise, and indorsed by the payee to the debtor).
[a] **Mutual debts do not per se extinguish one another,** and in order to constitute a payment in whole or in part there must be an agreement between the creditor and the debtor that the one debt shall be applied in satisfaction of the other in whole or pro tanto according to the respective amounts. Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 SE 377. To same effect Hamilton v. Wilcox, 126 Me. 529, 140 A 201.

20. See cases infra this note.
[a] **Thus** (1) where defendant company was indebted to plaintiff on a call loan, which it failed to pay on demand, a manipulation of accounts, unauthorized by plaintiff, whereby defendant purported to cancel its debt to her by giving its general manager, her son-in-law, a credit on its books for a like amount, was no defense. Barker Cotton Mills Co. v. Sage, 195 Ala. 249, 70 S 684. (2) The fact that a bank to which a check had been sent for collection charged the drawer with the amount of the check and credited such amount to the account of its correspondent bank does not constitute a payment precluding the collecting bank from later changing the entry upon the drawer's failure to pay the check. Southern Stove Works v. Converse Sav. Bank, 112 S. C. 230, 100 SE 75. (3) A mere entry of a credit upon a note secured by a mortgage on a crop of tobacco, under the erroneous belief that the tobacco when sold would net the amount of such credit, does not commit the creditor to such credit. Patterson v. Field, 5 Ky. Op. 393. (4) Where a debtor, owing a debt to a corporation which in turn owed a similar sum to a third person, gave to the latter his note for the amount thereof and was credited on the books of the corporation with such amount, his debt to the corporation was not paid where he did not pay his note. Gaston v. J. I. Campbell Co., (Civ. A.) 130 SW 222 [rev on other grounds 104 Tex. 576, 140 SW 770, 141 SW 515].
[b] **Charging off account as "bad debt."**—Charging an account off the creditor's books, as being a bad debt, does not discharge the debtor or relieve him of liability to pay the debt. Wolf v. Camden First Nat. Bank, 66 Pa. Super. 72.

21. Wiedenbeck-Dobelin Co. v. Mahoney, 160 Wis. 641, 152 NW 479.

22. Particular choses in action:
Bills of exchange see supra §§ 40–49.
Certificates of deposit or of indebtedness see supra § 54.
Checks see supra §§ 50–53.
Claim against third person see supra § 57.
Municipal warrants or orders see supra § 55.
Order on third person see supra § 56.
Promissory notes see supra §§ 40–49.

23. Ala.—Peck v. Lampkin, 200 Ala. 132, 75 S 580; Waldrop v. Automobile Sales Co., 17 Ala. A. 4, 81 S 180.
Cal.—Copriviza v. Rilovich, 4 Cal. A. 26, 87 P 398.
Del.—Hart v. Hudson, 16 Del. 283, 43 A 172.
Fla.—Edgerton v. West, 43 Fla. 133, 30 S 797.
Mich.—Bulen v. Burroughs, 53 Mich. 464, 19 NW 147; Bassett v. Shepardson, 52 Mich. 3, 17 NW 217.
Mo.—Buxton v. Debrecht, 95 Mo. A. 599, 69 SW 616.
N. Y.—John H. Mahnken Co. v. Pelletreau, 93 App. Div. 420, 87 NYS 737; Quattrocchi v. Frankel, 178 NYS 396; Colton v. Dunham, 2 Paige 267.
Oh.—Fosdick v. Greene, 27 Oh. St. 484, 22 AmR 328.
Pa.—Columbia Bank v. Rogers, 10 Pa. Co. 61.
Philippine.—Manuel Ormachea Tin-Congco v. Santiago Trillana, 13 Philippine 194.
Wash.—Petridge v. Osborn, 120 Wash. 21, 206 P 839.
W. Va.—Legg v. Junior Mercantile Co., 142 SE 259.
See Conrad v. Hess, 202 Ill. A. 199.
[a] **Where a token or scrip is payable only in merchandise,** the courts will deny a money recovery thereon. Legg v. Junior Mercantile Co., (W. Va.) 142 SE 259.
[b] **Joint creditors must all assent.**—Where a debt is owing to two or more persons jointly, an agreement of one of the creditors to accept goods in payment will not enable the debtor to discharge the obligation by delivery of such goods, unless the other joint creditors have authorized such agreement. Peck v. Lampkin, 200 Ala. 132, 75 S 580.

24. Ark.—Black v. Roberson, 112 SW 402.
Cal.—Oliver v. Staples, 67 Cal. A. 570, 227 P 927.
Me.—Kneeland v. Fuller, 51 Me. 518.
Mass.—Hill v. Fuller, 188 Mass. 195, 74 NE 361.
N. Y.—Palmer v. Palmer, 3 Thomps. & C. 440.
Tex.—Tinsley v. Ryon, 9 Tex. 405; Morrison v. Hammer, 12 SW 848.

25. Iowa.—National Sewer Pipe Co. v. Smith-Jaycox Lumber Co., 183 Iowa 17, 166 NW 708.
Ky.—Leet v. Robertson, 8 Ky. Op. 638.
La.—Agricultural Credit Assoc., Inc. v. Iaccuzzo, 167 La. 230, 119 S 31.
Mass.—Centennial Electric Co. v. Morse, 227 Mass. 486, 116 NE 901; Hayes v. Allen, 150 Mass. 286, 35 NE 852, 39 AmSR 474.
Mont.—Lappin v. Martin, 71 Mont. 233, 228 P 763.
Pa.—Wolf v. Altoona, etc., Electric R. Co., 92 Pa. Super. 259.
Porto Rico.—Mendez v. Registrar of Property, 7 Porto Rico 464
Tex.—Scruggs v. E. L. Woodley Lumber Co., (Civ. A.) 179 SW 897.
N. B.—Little v. Caie, 16 N. B. 386.
Newfoundl.—Rogerson v. Quinlan, 1 Newfoundl. 228.
[a] **A tort-feasor cannot make compensation** for injuries to an automobile by providing repairs, without the consent of the owner to receive such repairs as payment of the damages. Wolf v. Altoona, etc., Electric R. Co., 92 Pa. Super. 259.

26. Ill.—Crown Coal, etc., Co. v. Thomas, 177 Ill. 534, 52 NE 1042.
Miss.—Blake v. Morrisson, 33 Miss. 123.
N. C.—Locke v. Andres, 29 N. C. 159.
N. D.—Yegen v. Northern Pac. R. Co., 19 N. D. 70, 121 NW 205.
Oh.—Jenkins v. Mapes, 53 Oh. St. 110, 41 NE 137.
Okl.—Wallingford v. Alcorn, 75 Okl. 295, 183 P 726.
Pa.—Oliver's Case, 1 Ashm. 112. Compare Zinn v. Rowley, 4 Pa. 169 (holding that, where a debtor, under an agreement to pay in grain, set aside the requisite quantity in his will, which was the place appointed for delivery, payment was effectuated and the title to such grain passed to the creditor).
Vt.—Downer v. Sinclair, 15 Vt. 495; Strong v. McConnell, 10 Vt. 231.
Wash.—Rape v. Lenz, 145 Wash. 697, 261 P 396.
[a] **A voluntary gift** of goods or chattels by a debtor to his creditor does not reduce or extinguish the debt. Rape v. Lenz, 145 Wash. 697, 261 P 396.
[b] **Sale of goods by debtor to another.**—Where a debtor pro forma set aside goods in payment of a debt, but immediately retook possession and used them, and afterward sold them to another, he cannot be permitted to say that they were the creditor's property and that the debt has been paid. Blake v. Morrisson, 33 Miss. 123.
[c] **Mere conversion of property by a creditor** to whom its possession was delivered by his debtor does not constitute payment, in the absence of any agreement that such property shall be taken as payment of the debt. Wallingford v. Alcorn, 75 Okl. 295, 183 P 726.
[d] **Goods not received as payment.**—Where a liquor dealer agreed to pay a debt either in money or liquor, and when it became due delivered to a carrier five barrels of whisky addressed to the creditor, but did not send him the bill of lading therefor, and no price or valuation thereof was specified, and the creditor did not know that the whisky had been shipped until it arrived, the transaction did not constitute payment so as to vest title to the whisky in the creditor and entitle him to obtain the same by replevin from the carrier, as against the trustee in bankruptcy of the liquor dealer intervening and claiming ownership. Yegen v Northern Pac. R. Co., 19 N. D. 70, 121 NW 205.
Intention as element of payment generally see supra § 1.

27. Locke v. Andres, 29 N. C. 159.

28. Dennett v. Short, 7 Me. 150, 20 AmD 356; Buck v. Burk, 18 N. Y. 337; Maute v. Gross, 56 Pa. 250, 94 AmD 62.
[a] **Implied agreement in given kind and quality.**—A promise to pay in the wares of a particular trade

cepted.[29]

The value of goods, chattels, or choses in action delivered as payment is ordinarily, unless otherwise agreed, their market value[30] at the time[31] and place[32] of delivery; but if they are delivered and received at an agreed valuation the actual value is immaterial.[33]

Delivery for sale. A delivery of personalty by a debtor to his creditor to sell it and apply the proceeds upon the debt is not in itself a payment,[34] but payment is effectuated as soon as value is realized from the property[35] to the extent of the amount thereof.[36] Where as a result of undue delay a lower price is received than might reasonably have been realized, the debt is reduced by the amount which could have been received if sale had been seasonably made.[37]

[§ 63] **11. Real Estate.** Where it is agreed, either expressly[38] or by implication,[39] that payment may be made by a transfer of real estate, or where such a transfer is accepted by the creditor as payment,[40] it extinguishes the debt pro tanto; but in the absence of such agreement or consent the debtor has no right to make payment in such manner,[41] and a transfer does not amount to payment.[42] Where real estate is conveyed at an agreed valuation as partial payment, the debtor is not entitled to be credited with the rents and profits received therefrom by the creditor,[43] nor with the proceeds of a sale thereof.[44]

Failure of title to the property conveyed in payment does not avoid the payment,[45] the remedy of the grantee being upon the covenants in the deed;[46] but if payment is made conditional upon transfer of good title and the condition fails, no payment is effectuated.[47]

Fraud. No payment results from the pretended conveyance of real estate which does not belong to the debtor[48] or which has no existence.[49]

[§ 64] **12. Services.** By agreement or consent of

must be understood to mean such articles as are entire, and of the kind and fashion in ordinary use; and not such as are antiquated and unsalable. Dennett v. Short, 7 Me. 150, 20 AmD 356.

[b] **Payment in merchandise from stock.**—Where payment is agreed to be made in merchandise out of the debtor's store, he is at liberty to continue selling his goods without replenishing his stock until the time for delivery comes, so long as he retains sufficient goods for the purpose; and the creditor cannot complain that he is left to a selection from a stock inferior to, or less marketable than, the stock at the date of the contract. Buck v. Burk, 18 N. Y. 337.

29. Winchester, etc., Mfg. Co. v. Funge, 109 U. S. 651, 3 SCt 436, 27 L. ed. 1064.

[a] **Acceptance of goods in bad condition.**—Where goods were agreed to be received in payment if delivered in merchantable order, to be sold by the creditor, and the surplus refunded to the debtor, acceptance by the creditor of the goods, although not in good merchantable condition, operated as a discharge of the debt pro tanto. Winchester, etc., Mfg. Co. v. Funge, 109 U. S. 651, 3 SCt 436, 27 L. ed. 1064.

30. Mobley v. Tufts, 36 Ga. A. 764, 138 SE 272; Hindman v. Edgar, 24 Or. 581, 17 P 862; and cases infra notes 31, 32.

31. Mobley v. Tufts, 36 Ga. A. 764, 138 SE 272; Gilbreath v. Dilday, 152 Ill. 207, 38 NE 572; Hall v. Williams, 2 S. C. L. 433.

32. Mobley v. Tufts, 36 Ga. A. 764, 138 SE 272; Gilbreath v. Dilday, 152 Ill. 207, 38 NE 572.

33. Clark v. Minor, 73 Ga. 590; Buck v. Burk, 18 N. Y. 337; John H. Mahnken Co. v. Pelletreau, 93 App. Div. 420, 87 NYS 737. See also Fosdick v. Greene, 27 Oh. St. 484, 22 AmR 328 (holding that, where an obligation is payable in certain specified shares of stock, it is immaterial that at the time of payment such shares had become valueless).

[a] **Twenty-five per cent above cost price.**—Where an obligation was payable in merchandise, to be delivered at not more than twenty-five per cent above the cost price to the debtor, payment is made by delivering goods at a valuation equal to twenty-five per cent above the price paid for them, although such valuation was more than twenty-five per cent above the market price at the time of delivery. Buck v. Burk, 18 N. Y. 337.

[b] **Obligation payable in specified quantity of goods.**—Where, after a note payable in cotton became due, the maker delivered some of the cotton, the credit to be given should be based on the quantity, without regard to the fact that the price of cotton had risen since the time when it should have been delivered under the contract. Clark v. Minor, 73 Ga. 590.

34. Black v. Roberson, (Ark.) 112 SW 402; Allen v. Buisson, 35 La. Ann. 108; Harpers v. Patton, 1 Leigh (28 Va.) 306.

[a] **Rule applied.**—Where the parties agreed that the creditor should send flour belonging to the debtor to be sold, and the proceeds should be applied on the debt, and the person who sold the flour failed before remitting the proceeds to the creditor, there was no payment and the loss fell on the debtor. Harpers v. Patton, 1 Leigh (28 Va.) 306.

35. Strong v. Kennedy, 40 Mich. 327; Williams v. Whiting, 92 N. C. 683.

36. Black v. Roberson, (Ark.) 112 SW 402; Buckland v. Wilson, 28 Wis. 581.

[a] **Where the creditor sells such goods with others,** or receives advances thereon, the debtor should be allowed such proportion of the whole amount of the proceeds or advances as the goods delivered by him bear to the whole amount of the goods so sold or on which the advances were made. Buckland v. Wilson, 28 Wis. 581.

[b] **Dispute as to amount does not affect fact of payment.**—Where a horse was delivered under an agreement that it should be sold and the proceeds of sale applied upon the debt, and the creditor exchanged the horse for other property and the parties disagreed as to the amount with which the debt should be credited, payment was made to the extent of the value of the horse as soon as the creditor received such value in the exchange, and a dispute as to its amount cannot change its character as to payment. Strong v. Kennedy, 40 Mich. 327.

37. Williamson v. Roberts, 70 Or. 126, 138 P 840, 140 P 633; Petridge v. Osborn, 120 Wash. 21, 206 P 839.

38. Hepburn v. Auld, 5 Cranch (U. S.) 262, 3 L. ed. 96; Graves v. Arizona Cent. Bank, (Cal.) 272 P 1063; Harvey v. Van Paten, 87 Iowa 159, 54 NW 77; Angoncillo v. Javier, 38 Philippine 424.

[a] **Agreement may be oral.**—Where a conveyance of land, absolute in form, is delivered under an oral agreement that it be considered absolute in lieu of the debt, it is an extinguishment thereof. Graves v. Arizona Cent. Bank, (Cal.) 272 P 1063.

[b] **Value determined by creditor.**—Where a contract for the sale of land was made by debtors with their creditors, which recited that the creditors were within a reasonable time to ascertain the value of the land, by personal inspection or otherwise, and, after the actual cash value had been so ascertained, to apply the land at such value as payment of the debt, in the absence of fraud the debtors were bound by the value as fixed by the creditors, and inquiry need not be made as to what the actual cash value of the land was. Harvey v. Van Paten, 87 Iowa 159, 54 NW 77.

39. Boyd v. Greer, 70 Ind. A. 77, 123 NE 122; Hebard v. Reeves, 112 Mich. 175, 70 NW 418.

40. Fogarty v. McArdle, (Ala.) 11 S 19; Merchants', etc., Bank v. Coleman, 81 Ala. 170, 1 S 123; Fales v. Reynolds, 14 Me. 89; Gulfport Land, etc., Co. v. Ansley, 87 Miss. 648, 40 S 66. See also Mimoso v. Registrar of Caguas, 27 Porto Rico 888 (applying the rule).

41. Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32; MacCorkell v. Whelan, 48 Pa. Super. 283.

[a] **Transfer as security not payment.**—A transfer to a trustee for the creditor, upon trust to convey to him absolutely if the obligation were not paid, and to reconvey to the debtor upon payment, may be treated by the creditor as merely security for the payment, and the debtor cannot insist that the property be taken in payment. MacCorkell v. Whelan, 48 Pa. Super. 283.

42. Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32; Barris v. Emmons, 173 Mich. 590, 139 NW 872; MacCorkell v. Whelan, 48 Pa. Super. 283; Oliver's Case, 1 Ashm. (Pa.) 112.

[a] **A voluntary transfer** of real estate to one to whom the grantor is indebted does not constitute a payment of the debt when received as a gift and not as payment. Barris v. Emmons, 173 Mich. 590, 139 NW 872.

43. Waller v. Dawson, 162 La. 804, 111 S 170.

44. Waller v. Dawson, supra.

45. Miller v. Young, 17 F. Cas. No. 9,596, 2 Cranch C. C. 53; Van Riswick v. Wallach, 10 D. C. 388; Hays v. Smith, 4 Ill. 427.

46. See cases supra note 45.

Actions for breach of covenant in deed see Covenants §§ 169-259.

47. Carrera v. Marrero, 27 Porto Rico 507.

48. Arnold v. Crane, 8 Johns. (N. Y.) 79.

[a] **Where the property had already been conveyed to another** by the debtor, who executed a deed thereof to his creditor in pretended payment of the debt and received from him the evidence of indebtedness, the transaction was fraudulent and there was no payment or extinguishment of the debt. Arnold v. Crane, 8 Johns. (N. Y.) 79.

49. Anderson v. Armstead, 69 Ill.

a creditor, services rendered by the debtor may constitute a payment;[50] but in the absence of such agreement or consent the services cannot be considered as payment,[51] and services voluntarily rendered do not extinguish or reduce the debt.[52]

[§ 65] **E. Election as to Medium of Payment.***[53] Where the contract provides for payment in either of two or more mediums, a debtor may elect to make either mode of payment at the time fixed therefor.[54] But the right of election does not exist after the day when the payment becomes due,[55] and if the promise is to pay in property or money,[56] or in services or money,[57] the creditor is thereafter entitled to payment in money.[58] Where the promise is to pay in specie or other currency, if the debtor fails to make his election the creditor is entitled to payment in specie.[59] If the promise is to pay in certain currency or its equivalent, upon failure of the debtor to elect, the demand becomes absolute for the value of such currency.[60] If the payee has the right of election and fails to exercise it, the promisor is bound to perform his contract by delivering one of the articles stipulated for.[61] A debtor[62] or creditor[63] with the right to choose the medium of payment, having once made his election, is bound thereby. Such election may be revoked, however, where the other party to the contract fails to consummate the transaction.[64]

[§ 66] **F. Waiver of Right To Pay or Demand Certain Medium.**[65] A debtor may waive his right to make payment in a certain medium.[66] The right of a creditor to demand or receive payment in a particular medium may also be waived, as by the failure to object specifically to a tender on the ground of the medium[67] or by the acceptance of another medium.[68] The fact that the creditor protests while

452.

50. Ala.—Patrick v. Petty, 83 Ala. 420, 3 S 779; White v. Toles, 7 Ala. 569.

Iowa.—Ross v. Crane, 74 Iowa 375, 37 NW 959.

Oh.—Moore v. Stadden, Wright 88.

Tex.—Seley v. Colbert, (Civ. A.) 272 SW 818 [cit Cyc].

Vt.—Stanley v. Turner, 68 Vt. 315, 35 A 321; McIntyre v. Corss, 18 Vt. 451.

Wash.—Allen v. Wall, 7 Wash. 316, 35 P 65.

[a] **If full performance is prevented** by the death of the creditor, it amounts to a payment pro tanto. Patrick v. Petty, 83 Ala. 420, 3 S 779.

51. Parker v. Carter, 91 Ark. 162, 168, 120 SW 836, 134 AmSR 60 [cit Cyc]; Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 210; Miles v. Ogden, 54 Wis. 573, 12 NW 81.

52. Rape v. Lenz, 145 Wash. 697, 261 P 396.

53. Agreement for payment in medium other than money as giving debtor election to pay money see supra § 39.

Waiver of right to pay or demand certain medium see infra § 66.

54. Ala.—Berry v. Nall, 54 Ala. 446.

Conn.—See Sessions v. Ainsworth, 1 Root 181.

Ind.—Nipp v. Diskey, 81 Ind. 214, 42 AmR 124.

Me.—Strout v. Joy, 108 Me. 267, 80 A 830.

N. Y.—Stephens v. Howe, 34 N. Y. Super. 133.

Tex.—Chevallier v. Buford, 1 Tex. 503.

[a] **Rule applied.**—(1) Where the debt is payable either in money or property at the election of the debtor, he may compel the creditor to accept property instead of money. Nipp v. Diskey, 81 Ind. 214, 42 AmR 124. (2) Where a contract of sale provides for payment in a paper currency which is greatly depreciated as compared with gold coin, the right to pay in such depreciated currency is a privilege of the buyer, and he performs his entire duty if he pays dollar for dollar in gold coin. Berry v. Nall, 54 Ala. 446.

[b] **What constitutes election.**—A party entitled to elect to receive either a certain rate gold or a certain other rate currency for his labor discloses his election to receive one of the rates by presenting bills to the other party for such rate, where the bills are accepted. Stephens v. Howe, 34 N. Y. Super. 133.

55. Stephens v. Howe, supra. And see cases infra notes 56–60.

Contracts to deliver goods or other commodities or money generally see Contracts § 592.

56. U. S.—Barrett v. Twin City Power Co., 118 Fed. 861 [aff 126 Fed. 362, 61 CCA 288]; Marlor v. Texas, etc., R. Co., 21 Fed. 383, 22 Blatchf. 464 [aff 123 U. S. 687, 8 SCt 311, 31 L. ed. 303].

Ala.—Nesbitt v. Pearson, 33 Ala. 668; Plowman v. Riddle, 7 Ala. 775; Henry v. Gamble, Minor 15.

Cal.—Marshall v. Ferguson, 23 Cal. 65; Delafield v. San Francisco, etc., R. Co., 5 Cal. Unrep. Cas. 71, 40 P 958.

Conn.—Brooks v. Hubbard, 3 Conn. 58, 8 AmD 154.

Ill.—Barstow v. McLachlan, 99 Ill. 641; Bilderback v. Burlingame, 27 Ill. 338; Borah v. Curry, 12 Ill. 66; Vanhooser v. Logan, 4 Ill. 389, 38 AmD 90.

Ind.—Johnson v. Seymour, 19 Ind. 24; Mettler v. Moore, 1 Blackf. 342.

Iowa.—Hall v. Hunter, 4 Greene 539; Wiley v. Shoemak, 2 Greene 205.

Kan.—Schnier v. Fay, 12 Kan. 184.

Ky.—McKee v. Beall, 3 Litt. 190.

Me.—Wyman v. Winslow, 11 Me. 398, 26 AmD 542.

Mich.—Wheeler v. Ocker, etc., Mfg. Co., 162 Mich. 204, 127 NW 332; Crowl v. Goodenberger, 112 Mich. 683, 71 NW 485.

Mo.—Harris v. Sheffel, 117 Mo. A. 514, 94 SW 738.

N. J.—Grieve v. Annin, 6 N. J. L. 461.

N. Y.—New York News Pub. Co. v. National SS. Co., 148 N. Y. 39, 42 NE 514 [aff 72 Hun 158, 25 NYS 401]; Pinney v. Gleason, 5 Wend. 393, 21 AmD 223; McNitt v. Clark, 7 Johns. 465.

Oh.—Trowbridge v. Holcomb, 4 Oh. St. 38; Sperry v. Johnson, 11 Oh. 452; Dunkle v. Jones, Wright 315.

Pa.—Goodwin v. Heckler, 252 Pa. 332, 97 A 475; Moore v. Kiff, 78 Pa. 96; Mather v. Kinike, 51 Pa. 425; Chambers v. Harger, 18 Pa. 15; Stewart v. Morrow, 1 Grant 204; Fleming v. Potter, 7 Watts 380; Church v. Feterow, 2 Penr. & W. 301; Roberts v. Beatty, 2 Penr. & W. 63, 21 AmD 410.

S. C.—Choice v. Moseley, 17 S. C. L. 136, 19 AmD 661.

Tenn.—Miller v. McClain, 10 Yerg. 245; Plummer v. Keaton, 9 Yerg. 27; Stewart v. Donelly, 4 Yerg. 177.

Tex.—Short v. Abernathy, 42 Tex. 94; Grant v. Burleson, 38 Tex. 214; Dumas v. Hardwick, 19 Tex. 238; Baker v. Todd, 6 Tex. 273, 55 AmD 775.

Vt.—Smith v. Coolidge, 68 Vt. 516, 35 A 432, 54 AmSR 902; Read v. Sturtevant 40 Vt. 521; Perry v. Smith, 22 Vt. 301; Wilkins v. Stevens, 8 Vt. 214; Way v. Wakefield, 7 Vt. 223.

Va.—Butcher v. Carlile, 12 Gratt. (53 Va.) 520; Crawford v. Daigh, 2 Va. Cas. (4 Va.) 521.

Ont.—Fisher v. Ferris, 6 U. C. Q. B. 534.

57. Morey v. Enke, 5 Minn. 392; Edwards v. McKee, 1 Mo. 123, 13 AmD 474; Gilbert v. Danforth, 6 N. Y. 585; Deel v. Berry, 21 Tex. 463, 73 AmD 236.

58. Accrual of liability to pay in money generally see Contracts § 592.

59. Hoys v. Tuttle, 8 Ark. 124, 46 AmD 309; Bridges v. Reynolds, 40 Tex. 204.

Contracts payable in coin or its equivalent generally see supra § 19.

60. Chevallier v. Buford, 1 Tex. 503.

[a] **For example,** where a note is payable in Tennessee or Alabama money or its equivalent, and the time of payment elapses without any tender or offer to pay in such money having been made, the demand becomes absolute for the value thereof, that is, its equivalent. Chevallier v. Buford, 1 Tex. 503.

61. Townsend v. Wells, 3 Day (Conn.) 327; Johnson v. Seymour, 19 Ind. 24; Fleming v. Potter, 7 Watts (Pa.) 380.

62. See Bowen v. Gordon, 5 Montr. Leg. N. (Que.) 300 (holding that, where a person has by contract an option to pay in cash or bonds, and pays a part in cash, the option is made, and the balance can be demanded in cash).

63. Stephens v. Howe, 34 N. Y. Super. 133; Ferguson v. Wilson, 14 L. T. Rep. N. S. 12.

64. Mosher v. Rogers, 117 Ill. 446, 5 NE 583.

[a] **For example,** where a promissory note is given with an option to the payee to take a conveyance of land in lieu of the money promised, and he elects to take the land, and the maker does not then consummate the bargain by conveying the land, the payee may revoke his election, and hold the maker for the money on the note. Mosher v. Rogers, 117 Ill. 446, 5 NE 583.

65. Loss of right to:

Elect medium of payment see supra § 65.

Pay in medium other than money see supra § 39.

Waiver of objection to medium of tender by failure to object see Tender [38 Cyc 146].

66. Sessions v. Peay, 21 Ark. 100; Chambers v. Harger, 18 Pa. 15.

67. See Tender [38 Cyc 146].

68. U. S.—Savage v. U. S., 92 U. S. 382, 23 L. ed. 660.

Colo.—Hittson v. Davenport, 4 Colo. 169.

Conn.—Deming v. Marsh, Kirby 424.

Ill.—Stevens v. Bradley, 22 Ill. 244.

Ind.—Rivenour v. McClurkin, 6 Blackf. 411.

Md.—Lefferman v. Renshaw, 45 Md. 119.

Nev.—Gilman v. Douglas County, 6 Nev. 27, 3 AmR 237.

Eng.—Shipton v. Casson, 5 B. & C. 378, 11 ECL 505, 108 Reprint 141.

[a] **Rule applied** to acceptance of:

*By FELIX C. GRABER (§§ 65–66).

accepting such other medium does not prevent application of the rule.[69] If, however, the creditor, in receiving payment in a medium other than that specified, declares that he will receive it only at its value as compared with the specified medium and the debtor acquiesces, the right to payment of the full value of the specified medium is not waived.[70]

Statutory provisions. Contracts assuming to waive a party's right to receive payment in lawful money are prohibited by statute in some jurisdictions,[71] and the validity of such a statute has been sustained.[72]

IV. EFFECT

[By Felix C. Graber]

[§ 67] **A. In General.**[73] Payment discharges pro tanto the debt upon which it is made,[74] even though it is returned after acceptance.[75] An obligation which has been extinguished by payment cannot be subsequently revived[76] or transferred.[77]

Before or pending suit.[78] Payment of the debt and costs extinguishes the claim upon which a suit is predicated, although made while the action is pending,[79] and payments made before or pending the suit should be deducted before judgment.[80]

(1) Bills and bank notes instead of legal tender. Shipton v. Casson, 5 B. & C. 378, 11 ECL 505, 108 Reprint 141. (2) Continental currency instead of coin. Deming v. Marsh, Kirby (Conn.) 424. (3) Currency instead of gold. Lefferman v. Renshaw, 45 Md. 119. (4) Legal tender notes instead of gold. Savage v. U. S., 92 U. S. 382, 23 L. ed. 660. (5) Scrip (treasury notes of state of Indiana) instead of legal tender. Ridenour v. McClurkin, 6 Blackf. (Ind.) 411. (6) Treasury notes instead of gold coin. Gilman v. Douglas County, 6 Nev. 27, 3 AmR 237. (7) Unindorsed notes instead of indorsed notes. Stevens v. Bradley, 22 Ill. 244.

Acceptance of payment of money debt in medium other than money see supra §§ 39–64.

Acceptance of property as accord and satisfaction of a money demand see Accord and Satisfaction §§ 95, 96.

69. Savage v. U. S., 92 U. S. 382, 23 L. ed. 660; Gilman v. Douglas County, 6 Nev. 27, 3 AmR 237.

[a] **Reason for rule.**—"They protested with the tongue, but assented by their acts." Gilman v. Douglas County, 6 Nev. 27, 30, 3 AmR 237.

70. Tyers' Case, 5 Ct. Cl. 509; Brown-Crummer Inv. Co. v. Arkansas City, 125 Kan. 768, 266 P 60. See also Riley v. Sharp, 1 Bush (Ky.) 348 (where creditor received depreciated currency without prejudice to his rights upon restoration thereof, he is entitled to judgment for his debt).

[a] **Rule applied.**—Acceptance of cash for price of sewer under express agreement that it should not prejudice right to sue for damages for failure to deliver bonds leaves matter of damages open for judicial determination. Brown-Crummer Inv. Co. v. Arkansas City, 125 Kan. 768, 266 P 60.

Payment in depreciated currency generally see supra § 36.

71. See statutory provisions.

72. Hancock v. Yaden, 121 Ind. 366, 23 NE 253, 16 AmSR 396, 6 LRA 576.

Statutes regulating medium of payment of wages see Master and Servant §§ 340–343.

73. Effect of payment of negotiable instrument see Bills and Notes §§ 814, 827.

Payment by third person:

As discharge of debtor's liability to creditor see supra § 3.

Payor's right of recovery against debtor see Money Paid §§ 2–16.

"Payment" distinguished from "purchase of debt" see supra § 2.

74. U. S.—Page v. Dickens, 77 Fed. 61.

Ala.—Hemphill v. Moody, 64 Ala. 468; Bradley v. Graves, 46 Ala. 277.

Ark.—Golden v. Strickland, 261 SW 633.

Cal.—Wright v. Mix, 76 Cal. 465, 18 P 645; McMillan v. Richards, 9 Cal. 365, 70 AmD 655.

Ga.—Butts v. Whitney, 96 Ga. 445, 23 SE 397; Coleman v. Jenkins, 78 Ga. 605, 3 SE 444.

Ida.—Porter v. Title Guaranty, etc., Co., 17 Ida. 364, 106 P 299, 27 LRANS 111.

Ill.—Murphy v. Chicago League Ball Club, 221 Ill. A. 120.

Ind.—Cook, etc., Co. v. Hagedorn, (A.) 131 NE 788.

Kan.—Citizens' Nat. Bank v. Lehrling, 113 Kan. 545, 215 P 828.

Ky.—Fennell v. Fechter, 181 Ky. 101, 203 SW 879.

La.—Fellman v. Interstate Land Co., 163 La. 529, 112 S 405; Smith v. Vinson, 7 La. A. 309.

Me.—Kennedy v. Jones, 67 Me. 538; Cushing v. Wyman, 44 Me. 121.

Mass.—Richardson v. Woodbury, 12 Cush. 279; Hammatt v. Wyman, 9 Mass. 138.

Mich.—Thayer v. Denton, 4 Mich. 192.

Mo.—State v. Hamilton, 303 Mo. 302, 260 SW 466; McCrary v. Ashbaugh, 44 Mo. 410; Walker v. Dunham, 135 Mo. A. 396, 115 SW 1086.

N. H.—Davis v. Stevens, 10 N. H. 186.

N. Y.—Champney v. Coope, 32 N. Y. 543; Newark First Nat. Bank v. Hauss, 214 App. Div. 689, 213 NYS 198; Cochran v. Sherman, 12 N. Y. Super. 13.

N. C.—Liverman v. Cahoon, 156 N. C. 187, 72 SE 327; Towe v. Felton, 52 N. C. 216.

N. D.—Styles v. Dickey, 22 N. D. 515, 134 NW 702, 706 [cit Cyc].

Oh.—Lord v. Graveson, 26 Oh. Cir. Ct. 371.

Pa.—Spiese v. Mutual Trust Co., 258 Pa. 414, 102 A 119.

Porto Rico.—Longpre v. Wolff, 23 Porto Rico 13.

S. D.—Bedford v. Kissick, 8 S. D. 586, 67 NW 609.

Tex.—Goree First Nat. Bank v. Tally, 115 Tex. 591, 285 SW 612.

Vt.—Jewett v. Winship, 42 Vt. 204; Root v. Ross, 29 Vt. 488.

Va.—Smith v. Waugh, 84 Va. 806, 6 SE 132; Citizens' Bank v. Lay, 80 Va. 436.

W. Va.—Virginia Exch. Bank v. Cookman, 1 W. Va. 69.

Wis.—Wiedenbeck-Dobelin Co. v. Mahoney, 160 Wis. 641, 152 NW 479.

Eng.—Ex p. Andrews, 1 Madd. 573, 56 Reprint 210.

And see cases passim this treatise. "Payment completely discharges the natural, as well as the civil, obligation." Fellman v. Interstate Land Co., 163 La. 529, 535, 112 S 405.

[a] **Failure to surrender evidence of debt.**—Discharge of the debt is not prevented by a failure to surrender the evidence of the indebtedness. Bradley v. Graves, 46 Ala. 277.

[b] **Ignorance of derivation of money.**—Where the creditor is paid the amount of his debt, although in ignorance of the derivation of the money, the debt is discharged where he is not injured by his want of knowledge. Butts v. Whitney, 96 Ga. 445, 23 SE 397; Coleman v. Jenkins, 78 Ga. 605, 3 SE 444.

[c] **Goods wrongfully sold.**—Neither the owner of cattle wrongfully sold by another nor his assignee can recover the value thereof, where the owner directly or indirectly received from the purchaser the value of the cattle sold. Citizens' Nat. Bank v. Lehrling, 113 Kan. 545, 215 P 828.

[d] **Payment to proper person by mistake.**—(1) When money is paid to a person to whom it properly belongs, although under a mistake as to the right in which it accrues to him, the debt is extinguished, and he cannot again enforce payment of his claim in his lawful right. Hemphill v. Moody, 64 Ala. 468. (2) Recovery of money paid by mistake see infra §§ 312–329.

[e] **Payment under protest.**—Discharge of the debt is not prevented by the fact that the payment is made under protest. McMillan v. Richards, 9 Cal. 365, 70 AmD 655.

[f] **Deposit in bank.**—(1) Where a debt was to be paid by deposit in a particular bank, the deposit constituted a discharge of the indebtedness, although no notice thereof was given the creditor. Virginia Exch. Bank v. Cookman, 1 W. Va. 69. (2) The fact that by mistake the money was deposited in the name of the agent of the creditor does not vitiate the payment. McCrary v. Ashbaugh, 44 Mo. 410.

Application of payment see infra §§ 84–127.

75. Rhodes v. Hinckley, 6 Cal. 283; Judd v. Burton, 51 Mich. 74, 16 NW 237.

[a] **For example** (1) where a debtor paid part of his debt to the creditor's clerk who was authorized to receive it, it operated as a payment, and the debtor is not liable on the original indebtedness, even though he consented thereafter to lend the amount paid to the clerk who had received it. Rhodes v. Hinckley, 6 Cal. 283. (2) Where a payment is made but is returned for the use of the payer, to be repaid at a future time, the payment must still be considered as having been made, and the return thereof as a loan. Judd v. Burton, 51 Mich. 74, 16 NW 237.

Rescission of payment see infra §§ 71–74.

76. Rhodes v. Hinckley, 6 Cal. 283; McClure v. Andrews, 68 Ind. 97; Smith v. Vinson, 7 La. A. 309; Barry v. Curley, 202 Mass. 42, 88 NE 437.

Right to reissue negotiable paper after payment thereof see Bills and Notes § 827.

77. Wright v. Mix, 76 Cal. 465, 18 P 645; Moran v. Abbey, 58 Cal. 163; Gordon v. Wansey, 21 Cal. 77; Kennedy v. Jones, 67 Me. 538; Young v. Jones, 64 Me. 563, 18 AmR 279.

78. As admission of balance due see infra § 68.

79. Root v. Ross, 29 Vt. 488.

80. Conn.—Hathaway v. Hemingway, 20 Conn. 191.

Ky.—Eversole v. Wilson, 123 SW 1196.

La.—McClellan Dry-Dock Co. v. Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 S 630.

Pa.—George P. Steel Iron Co. v. Jacobs, 9 Pa. Super. 122.

Vt.—Joy v. Hull, 4 Vt. 455, 24 AmD 625.

Title of payee. Payment vests the payee with title to the thing given in payment,[81] and the party paying cannot subsequently divest the payee of his title.[82]

Existence of debt or contract. Payment of an obligation does not conclusively establish that the party paying was indebted to the payee at the time of the payment,[83] but payment on a contract implies the existence of the contract at the time of payment.[84]

Rights of debtor. It has been held that acceptance of money due tendered without condition carries with it no obligation beyond that of giving proper credit,[85] but upon payment in full the debtor may demand surrender of his written obligation.[86]

[§ 68] **B. Part Payment.**[87] Part payment of a debt does not bar a claim for the balance,[88] but, it has been held, raises in law an implied promise to pay the balance.[89] Part payment of a claim for which the payer is not liable does not, however, raise such an implied promise,[90] and part payment will not change what is originally a mere moral obligation into a legal debt.[91] On the other hand the payment of a part of a sum which is due does not create an equity in favor of the payer to entitle him to an indefinite delay for the payment of the balance.[92]

Payment pending suit as admission. A part payment pending suit of the claim sued on is not equivalent, as an admission of the cause of action, to a payment of money into court.[93]

[§ 69] **C. Payment by One or More Codebtors.**[94] A payment made by one or more of two or more joint debtors extinguishes the debt pro tanto.[95] A payment of one debtor's share of a joint debt, however, does not release him from liability for the balance.[96]

[§ 70] **D. Payment under Duress.**[97] A compulsory payment of a debt to a person other than the creditor without his consent does not discharge the debtor.[98] It has been held, however, that money extorted by a creditor from his debtor by an unlawful execution should be considered a payment of the debt.[99]

Va.—Gray v. Hines, 4 Munf. (18 Va.) 437.

See also Wolford v. Bowen, 57 Minn. 267, 59 NW 195 (where it was held sufficient to credit the amount on the execution).

81. Morrison v. Hammer, (Tex.) 12 SW 848.

82. Morrison v. Hammer, supra.

83. Drew v. Willingham Sash, etc., Co., 113 Ga. 605, 38 SE 967.

84. France v. Ramsey, 214 Ala. 327, 107 S 816.

Part payment as implying promise to pay balance see infra § 68.

85. Williams v. Apothecaries Hall Co., 80 Conn. 503, 69 A 12.

86. Rampy v. Nance, (Tex. Civ. A.) 286 SW 294.

Right to, and necessity for, surrender of instrument upon payment see Bills and Notes §§ 812, 813.

87. **Part payment:**
Generally see supra § 10.
As accord and satisfaction of:
Liquidated debt see Accord and Satisfaction §§ 40–70.
Unliquidated or disputed claim see Accord and Satisfaction §§ 71–92.
As discharging debt pro tanto see supra § 67.

Effect of part payment on statute of limitations see Limitations of Actions §§ 651–657.

88. Gates v. Green, 151 Cal. 65, 90 P 189; Huntsman v. Monarch Oil, etc., Co., 197 Ky. 607, 247 SW 754; State v. Hamilton, 303 Mo. 302, 317, 260 SW 466; Spiese v. Mutual Trust Co., 258 Pa. 414, 102 A 119.

"The partial payment of a legal obligation is not payment in full and does not discharge the debt." State v. Hamilton, supra.

[a] **Deductions by payor from sum due.**—(1) An acceptance of a payment duly credited from which certain deductions have been made by the debtor does not constitute a waiver of the right to object to such deductions. Huntsman v. Monarch Oil, etc., Co., 197 Ky. 607, 247 SW 754. (2) So where the assignor of an interest in an oil and gas lease, whose assignment relieved him from any obligation to pay a portion of the operating costs of the well, accepted payment for the sale of some of the oil from the premises after his proportionate part of the expenses operating the well had been deducted, giving as his reason that he feared for the solvency of the assignee and believed it advisable to take what he could get, his acceptance was not a waiver of his right to be relieved from payment of the operating expenses. Huntsman v. Monarch Oil, etc., Co., supra.

[b] **Part payment pending suit.**—In the absence of some agreement to that effect, the acceptance of partial payments after the commencement o an action does not constitute a waiver of plaintiff's right of action for the balance still due. Gates v. Green, 151 Cal. 65, 90 P 189.

89. Morris v. U. S. Equitable L. Assur. Soc., 109 Neb. 348, 350, 191 NW 190 [cit Cyc]; Mostyn v. Mostyn, L. R. 5 Ch. 457.

90. Bannon v. Jackson, 121 Tenn. 381, 117 SW 504, 130 AmSR 788, 17 AnnCas 77.

91. Christensen v. Duborg, 38 Nev. 404, 150 P 306, 308 [quot Cyc]; Mostyn v. Mostyn, L. R. 5 Ch. 457; Lynch v. William Richards Co., Ltd., 38 N. B. 160.

92. Speer v. Cobb, 22 Ill. 528.

93. Galloway v. Holmes, 1 Dougl. (Mich.) 330.

Payment into court as admission see Tender [38 Cyc 176].

94. **Payment of:**
Firm debt by partner see Partnership § 333.
Judgment by joint debtor see Judgments §§ 1062–1064.

Right of one or more codebtors to make payment see supra § 3.

95. Ark.—Golden v. Strickland, 261 SW 633.

Cal.—Enscoe v. Fletcher, 1 Cal. A. 659, 82 P 1075.

Ill.—Vandalia R. Co. v. Nordhaus, 161 Ill. A. 110.

Ky.—Fennell v. Fechter, 181 Ky. 101, 203 SW 879.

La.—Adams v. State Bank, 3 La. Ann. 351.

Mass.—Holmes v. Day, 108 Mass. 563; Hammatt v. Wyman, 9 Mass. 138.

Mich.—Thayer v. Denton, 4 Mich. 192.

N. H.—Holland v. Morley Button Co., 145 A 142.

N. Y.—American Guild of Richmond v. Damon, 186 N. Y. 360, 78 NE 1081; National Surety Co. v. Seaich, 171 App. Div. 414, 157 NYS 422; Baker v. Stackpoole, 9 Cow. 420, 18 AmD 508.

N. C.—Liverman v. Cahoon, 156 N. C. 187, 72 SE 327; Towe v. Felton, 52 N. C. 216; Sherwood v. Collier, 14 N. C. 380, 24 AmD 264.

Pa.—Boggs v. Lancaster Bank, 7 Watts & S. 331; Bryant v. Bryant, 10 Pa. Dist. & Co. 723; Goldbeck v. Kensington Nat. Bank, 48 LegInt 76 [aff 147 Pa. 267, 23 A 565].

[a] **Payment in full.**—Where two or more persons are jointly liable on an obligation and one of them makes payment of the whole, the obligation is thereby extinguished. Enscoe v. Fletcher, 1 Cal. A. 659, 82 P 1075; Hammatt v. Wyman, 9 Mass. 138; Davis v. Stevens, 10 N. H. 186; Liverman v. Cahoon, 156 N. C. 187, 72 SE 327.

[b] **Payment by joint tort-feasor** extinguishes the claim against all pro tanto. Vandalia R. Co. v. Nordhaus, 161 Ill. A. 110; Fennell v. Fechter, 181 Ky. 101, 203 SW 879.

96. Griffith v. Grogan, 12 Cal. 317.

97. **Acceptance of Confederate money under duress** see supra § 32.

Recovery of payments made under duress see infra §§ 293–310.

98. Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Planters' Bank v. Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473; Shortridge v. Macon, 22 F. Cas. No. 12,812, 1 Abb. 58, Chase 136; Nelligan v. Citizens' Bank, 21 La. Ann. 332, 99 AmD 134; Levison v. Krohne, 30 Tex. 714; Culbreath v. Hunter, 30 Tex. 713; Levison v. Norris, 30 Tex. 713; Canfield v. Hunter, 30 Tex. 712; Luter v. Hunter, 30 Tex. 688, 98 AmD 494; Rhea v. Preston, 75 Va. 757. Contra Mandeville v. State Bank, 19 La. Ann. 392, 92 AmD 541.

[a] **Payments into treasury of state during Civil War.**—The fact that, during the Civil War a citizen of one of the Confederate states, being indebted to a citizen of a loyal state, was compelled to pay, and did pay, the amount of the demand into the treasury of the Confederate state, under a statute of that state for the sequestration of estates of alien enemies, constitutes no defense to an action brought by the creditor in a court of the United States, after the war was terminated, to recover the demand. Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Shortridge v. Macon, 22 F. Cas. No. 12,812, 1 Abb. 58, Chase 136; Levison v. Krohne, 30 Tex. 714; Levison v. Norris, 30 Tex. 713; Luter v. Hunter, 30 Tex. 688, 98 AmD 494; Rhea v. Preston, 75 Va. 757.

[b] **Payment under military orders to an officer** of the United States army of a debt owing a third person during the Civil War was held not to release the debtor from liability. Planters Bank v. Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473; Nelligan v. Citizens' Bank, 21 La. Ann. 332, 99 AmD 734. Contra Mandeville v. State Bank, 19 La. Ann. 392, 92 AmD 541.

Payment to third person generally see supra §§ 4–6.

99. Lord v. Waterhouse, 1 Root (Conn.) 430.

V. RESCISSION[1]

[By FELIX C. GRABER]

[§ 71] **A. Conditional Payment—1. In General.** A creditor who has accepted paper, such as a check,[2] bill, or note,[3] in conditional payment[4] of a debt may ordinarily, if such paper has not been paid, rescind the conditional payment and sue upon the original indebtedness.[5]

[§ 72] **2. Return of Medium Received—a. General Rule.** A creditor rescinding a conditional payment cannot recover upon the original debt if he fails to account for the paper received,[6] and the necessity for so accounting is not removed by a release from liability on such paper.[7] The obligation to account is satisfied by production of the paper in court to be canceled, delivered to defendant, or otherwise disposed of as the court may direct,[8] and is also satisfied by a showing that such paper has

1. Cross references:
Impeachment of settlement and return of consideration see Compromise and Settlement §§ 57, 58.
Recovery upon debt evidenced by usurious instrument see Usury [39 Cyc 991].
Rescission of contract and return of consideration see Contracts §§ 679-681.

2. Check as conditional payment see supra § 50.

3. Bill or note as conditional payment see supra § 40.

4. Conditional payment generally see supra § 11.

5. U. S.—Dow v. Cowan, 23 F. (2d) 646.
Ala.—Lee v. Fontaine, 10 Ala. 755, 44 AmD 505.
Cal.—Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 137 P 25; Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 P 28; Crawford v. Roberts, 50 Cal. 235; Brown v. Olmsted, 50 Cal. 162; Welch v. Allington, 23 Cal. 322; Smith v. Owens, 21 Cal. 11; Higgins v. Wortell, 18 Cal. 330.
Colo.—Jacobs v. Monahan, 76 Colo. 70, 230 P 596.
Conn.—Fitch v. Bogue, 19 Conn. 285.
Ga.—Belmont Farm v. Dobbs Hardware Co., 124 Ga. 827, 53 SE 312.
Ill.—Leake v. Brown, 43 Ill. 372.
Iowa.—Snyder v. Reno, 38 Iowa 329.
Md.—Myers v. Smith, 27 Md. 43.
Mass.—Illustrated Card, etc., Co. v. Dolan, 208 Mass. 53, 94 NE 299.
Mich.—Stringfield v. Vivian, 63 Mich. 681, 30 NW 346; Dodge v. Stanton, 12 Mich. 408.
Mo.—McMurray v. Taylor, 30 Mo. 263, 77 AmD 611.
Nebr.—Young v. Hibbs, 5 Nebr. 433.
N. H.—Wiswall v. Harriman, 62 N. H. 671.
N. J.—Fry v. Patterson, 49 N. J. L. 612, 10 A 390.
N. Y.—Roberts v. Fisher, 43 N. Y. 159, 3 AmR 680 [rev 53 Barb. 69]; Roberts v. Fisher, 65 Barb. 303; Porter v. Talcott, 1 Cow. 359.
N. C.—Maryland Nat. Bank v. Hollingsworth, 135 N. C. 556, 47 SE 618.
Or.—Hawkins v. Fuller, 116 Or. 433, 240 P 549.
Pa.—Buck v. Wilson, 113 Pa. 423, 6 A 97; North Penn Iron Co. v. New Jersey Bridge Co., 35 Pa. Super. 84; Alexander v. Righter, 21 Pa. Dist. 842.
S. C.—Stalnaker v. Tolbert, 121 S. C. 437, 114 SE 412; Costelo v. Cave, 20 S. C. L. 528, 27 AmD 404.
S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.
Tenn.—Stewart v. Lathrop Mfg. Co., 95 Tenn. 497, 32 SW 464; Cook v. Beech, 10 Humphr. 412.
Vt.—Edgell v. Stanford, 6 Vt. 551.
Wis.—Gallagher v. Ruffing, 118 Wis. 284, 95 NW 117.
Wyo.—Lander State Bank v. Nottingham, 37 Wyo. 50, 259 P 181.
Eng.—Hadwen v. Mendisabal, 2 C. & P. 20, 12 ECL 427, 172 Reprint 10; Puckford v. Maxwell, 6 T. R. 52, 101 Reprint 431.
N. B.—Hatfield v. Worden, 41 N. B. 552, 13 DomLR 193.
And see infra §§ 72, 73.

[a] **Recovery of part of debt represented by notes.**—(1) A creditor who has received several notes in conditional payment of a debt may, upon discovering that one of them is worthless, rescind his acceptance thereof and, retaining the other notes, recover the amount of the original debt represented by such worthless note. Wiswall v. Harriman, 62 N. H. 671; Buck v. Wilson, 113 Pa. 423, 6 A 97. (2) But, having done so, he cannot thereafter rescind his acceptance of the other notes and sue for the balance of the original debt. Buck v. Wilson, supra.

[b] **Duty to sue on note.**—Where the note of a third person is taken merely as a conditional payment, the creditor is not obliged to sue upon the note before bringing an action upon the original indebtedness. Dodge v. Stanton, 12 Mich. 408.

[c] **Actions to collect debt and to collect note** (1) given in conditional payment therefor can be maintained at the same time. Alexander v. Righter, 21 Pa. Dist. 842. (2) Actions on original consideration for bill or note generally see Bills and Notes § 1069.

6. U. S.—Harris v. Johnston, 3 Cranch 311, 2 L. ed. 450.
Ala.—Myatts v. Bell, 41 Ala. 222; Barnes v. Bailey, 2 Ala. 749.
Ark.—Southwestern Surety Ins. Co. v. Clay, 112 Ark. 220, 165 SW 644; American Ins. Co. v. McGehee Liquor Co., 93 Ark. 62, 124 SW 252, 20 Ann Cas 855; Costar v. Davies, 8 Ark. 213, 46 AmD 311.
Cal.—Brown v. Cronise, 21 Cal. 386.
Conn.—Brabazon v. Seymour, 42 Conn. 551.
Fla.—Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.
Ga.—Standard Cooperage Co. v. O'Neill, 146 Ga. 235, 91 SE 82; Jackson v. Brown, 102 Ga. 87, 29 SE 149, 66 AmSR 156.
Ill.—Hodgen v. Latham, 30 Ill. 188; Miller v. Lumsden, 16 Ill. 161; Davis, etc., Bldg., etc., Co. v. Montrose Butter, etc., Co., 59 Ill. A. 573.
La.—New Orleans v. Smith, 24 La. Ann. 405; Dixon v. Ford, 1 Rob. 253.
Md.—Owen v. Hall, 70 Md. 97, 16 A 376; Matthews v. Dare, 20 Md. 248; Morrison v. Welty, 18 Md. 169; Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452; Coursey v. Baker, 7 Harr. & J. 28.
Mass.—Brown v. Bishop, 225 Mass. 276, 114 NE 316; Estabrook v. Swett, 116 Mass. 303; Coolidge v. Brigham, 1 Metc. 547.
Mo.—The Charlotte v. Lumm, 9 Mo. 64; Missouri State Highway Bd. v. Southern Surety Co., (A.) 9 SW (2d) 92; Seeman v. Noble, (A.) 294 SW 438; Morton Electric Co. v. Schramm, (A.) 277 SW 368; Barry v. Close, 215 Mo. A. 540, 257 SW 518; West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868; Dawdy v. Dawdy, 118 Mo. A. 336, 94 SW 767; O'Bryan v. Jones, 38 Mo. A. 90; Schepflin v. Dessar, 20 Mo. A. 569.
N. Y.—Breslow v. Manchester, Robertson, Allison, Ltd., 199 App. Div. 457, 191 NYS 885; Reehl v. Martens, 40 App. Div. 231, 57 NYS 1059 [aff 54 App. Div. 626 mem, 627 mem, 66 NYS 1142 mem (aff 169 N. Y. 613 mem, 62 NE 1099 mem)]; Fitch v. McDowell, 80 Hun 207, 30 NYS 31 [aff 145 N. Y. 498, 40 NE 205]; Woodard v. Madsen, 127 Misc. 19, 215 NYS 279; Cohen v. B. N. C. Waist Co., Inc., 192 NYS 849; Dayton v. Trull, 23 Wend. 345; Smith v. Lockwood, 10 Johns. 366; Angel v. Felton, 8 Johns. 149; Holmes v. De Camp, 1 Johns. 34, 3 AmD 293. But see Spiro v. Maiman, 94 NYS 358 (holding that, where creditor took unindorsed note believing it to be indorsed, upon discovery of the fact he may recover on the original debt without returning such note, no demand for its return having been made).
N. C.—Spear v. Atkinson, 23 N. C. 262.
Oh.—Dreher v. McKenzie, 16 Oh. Cir. Ct. N. S. 55.
Pa.—Hays v. McClurg, 4 Watts 452; National Bank of Commerce v. Silver, 86 Pa. Super. 492.
S. C.—Adger v. Pringle, 11 S. C. 527; Townsends v. Stevenson, 38 S. C. L. 59.
Wis.—Williams v. Ketchum, 21 Wis. 432.
Wyo.—Lander State Bank v. Nottingham, 37 Wyo. 50, 259 P 181.
Eng.—Dangerfield v. Wilby, 4 Esp. 159, 170 Reprint 675; Kearslake v. Morgan, 5 T. R. 513, 101 Reprint 289. See also Davis v. Reilly, [1898] 1 Q. B. 1 (holding that, where a note is outstanding in the hands of a third person at the time the action is commenced upon the original indebtedness, no recovery is allowable, although the creditor has subsequently obtained possession of it).
B. C.—Kelly v. Canadian Pac. R. Co., 22 B. C. 231, 25 DomLR 79, 32 WestLR 891, 9 WestWkly 531.
Ont.—Crooks v. Gleun, 8 Grant Ch. 239.
Newfoundl.—Fowler v. Malada, 6 Newfoundl. 263.

[a] **"The reason** is that, if the creditor might sue on the original cause of action, the debtor would be exposed to two suits, one brought by the creditor and one by the holder of the note, which would be a hardship." American Ins. Co. v. McGehee Liquor Co., 93 Ark. 62, 66, 124 SW 252 [quot Brown v. Scott, 51 Pa. 357, 364].

[b] **Merely filing paper with clerk of court** and introducing it in evidence is not sufficient; there must be an offer to surrender or cancel it or surrender it into court for its disposal. Barry v. Close, 215 Mo. A. 540, 257 SW 518.

[c] **Stay of judgment pending production.**—Where plaintiffs failed to produce a note indorsed to them by defendants as conditional payment for the account sued upon, it was held not error to refuse a ruling that plaintiffs could not recover, where judgment was stayed until the note was produced. Brown v. Bishop, 225 Mass. 276, 114 NE 316.

Return of:
Bank bills see supra § 30.
Confederate money accepted as payment under duress see supra § 32.
Counterfeit money see supra § 31.

7. Fitch v. Bogue, 19 Conn. 285.

8. U. S.—Lawrence v. U. S., 71 Fed. 228; Crosby v. Lane, 6 F. Cas. No. 3,423; Palmer v. Elliot, 18 F. Cas. No. 10,690, 1 Cliff. 63.
Ala.—McCrary v. Carrington, 35 Ala. 698; Mooring v. Mobile Mar. Dock, etc., Ins. Co., 27 Ala. 254.
Cal.—Crary v. Bowers, 20 Cal. 85; Griffith v. Grogan, 12 Cal. 317.
Ga.—Belmont Farm v. Dobbs Hardware Co., 124 Ga. 827, 53 SE 312; Colfax Gin Co. v. Buckeye Cotton Oil Co., 24 Ga. A. 610, 101 SE 697.
Ill.—Leake v. Brown, 43 Ill. 372;

been surrendered[9] or tendered back[10] to the debtor, or that it has been canceled,[11] destroyed,[12] or lost without having been indorsed or negotiated,[13] or that for some other reason it is not enforceable against him.[14] If negotiable paper is lost after it is indorsed, however, the creditor cannot recover on the original indebtedness, even though a bond of indemnity is tendered to the debtor.[15]

Fraudulent alteration of a note given for the payment of a sum of money takes away the right of the payee to recover on the original demand upon surrender of the note.[16]

Unsatisfied judgment on note. Where a judgment recovered on a note by a third person to whom it had been transferred is in full force, plaintiff cannot recover on the original debt merely by producing the original note for cancellation;[17] but upon tendering an assignment of the judgment he may recover.[18]

[§ 73] **b. Exceptions to Rule.** A creditor is not required, as a condition precedent to bringing an action upon a debt, to return a worthless check[19] or note[20] which he has accepted in conditional payment thereof. Nor it is necessary to produce a note which was accepted by an agent without authority, the creditor not having subsequently ratified the transaction.[21] If the instrument is not negotiable it is unnecessary to produce it.[22] The general rule has no application to a proceeding in rem founded upon statutory enactment.[23]

[§ 74] **B. Absolute Payment.** If commercial paper such as a check,[24] bill, or note[25] is received as absolute payment, its nonpayment gives no right of action upon the original indebtedness,[26] except when

McConnell v. Stettinius, 7 Ill. 707; Peter Schoenhofen Brewing Co. v. Dailey, 193 Ill. A. 86.

Md.—Myers v. Smith, 27 Md. 43; Giles v. Ebsworth, 10 Md. 333.

Mass.—Illustrated Card, etc., Co. v. Dolan, 208 Mass. 53, 94 NE 299; Moore v. Jacobs, 190 Mass. 424, 76 NE 1041; Derickson v. Whitney, 6 Gray 248.

Mo.—McMurray v. Taylor, 30 Mo. 263, 77 AmD 611; Morton Electric Co. v. Schramm, (A.) 277 SW 368; Big Four Impl. Co. v. Chesney, 204 Mo. A. 285, 223 SW 944; American Law Book Co. v. Corbett, 162 Mo. A. 72, 141 SW 718; Bertiaux v. Dillon, 20 Mo. A. 603.

Nebr.—Young v. Hibbs, 5 Nebr. 433.

N. H.—Wiswall v. Harriman, 62 N. H. 671.

N. Y.—Bradford v. Fox, 38 N. Y. 289, 7 Transcr. A. 254 [rev 39 Barb. 203, 16 AbbPr 51]; Nichols v. Michael, 23 N. Y. 264, 80 AmD 259; Armstrong v. Tuffts, 6 Barb. 432; Johnson v. Jones, 4 Barb. 369; Hilderbrant v. Fallot, 46 Misc. 615, 92 NYS 804; Hughes v. Wheeler, 8 Cow. 77; Smith v. Rogers, 17 Johns. 340; Burdick v. Green, 15 Johns. 247.

N. C.—Maryland Nat. Bank v. Hollingsworth, 135 N. C. 556, 47 SE 618; Mauney v. Coit, 86 N. C. 463; Wilson v. Jennings, 15 N. C. 90.

S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

Que.—Miller v. Daudelin, 24 LCJur 208.

9. U. S.—Crosby v. Lane, 6 F. Cas. No. 3,423; Palmer v. Elliot, 18 F. Cas. No. 10,690, 1 Cliff. 63.

Cal.—Brewster v. Bours, 8 Cal. 501.

Ga.—Hodges v. Smith, 118 Ga. 789, 45 SE 617; Schneider Marble Co. v. Knight, 37 Ga. A. 646, 141 SE 420.

Ill.—Morrison v. Smith, 81 Ill. 221.

Md.—Morgan v. Bitzenberger, 3 Gill 350.

N. C.—Corbet Buggy Co. v. Dukes, 140 N. C. 393, 52 SE 931.

Or.—Hawkins v. Fuller, 116 Or. 433, 240 P 549.

Vt.—Street v. Hall, 29 Vt. 165.

Wyo.—Lander State Bank v. Nottingham, 37 Wyo. 50, 259 P 181, 184 [cit Cyc].

[a] **What constitutes surrender.**—Offer made, after opening argument on demurrer, to surrender check fails to meet legal requirements as to a surrender. Seeman v. Noble, (Mo. A.) 294 SW 438.

10. Walker v. Tatum, Ga. Dec. 161; Mounier v. Meyrey, 1 S. C. L. 24; Gallagher v. Ruffing, 118 Wis. 284, 95 NW 117.

11. McCormack Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49.

12. Fitch v. Bogue, 19 Conn. 285; Councilman v. Towson Nat. Bank, 103 Md. 469, 64 A 358; Young v. Hibbs, 5 Nebr. 433; Maryland Nat. Bank v. Hollingsworth, 135 N. C. 556, 47 SE 618; Mauney v. Coit, 86 N. C. 463; Wilson v. Jennings, 15 N. C. 90.

13. Fitch v. Bogue, 19 Conn. 285; Garavaglio v. Verona Min. Co., 210 Mich. 675, 178 NW 32; Young v. Hibbs, 5 Nebr. 433; Pintard v. Tackington, 10 Johns. (N. Y.) 104.

14. Schneider Marble Co. v. Knight, 37 Ga. A. 646, 141 SE 420; Burden v. Halton, 4 Bing. 454, 13 ECL 585, 130 Reprint 842. And see cases infra this note.

[a] **Overdue note in hands of trustee.**—Where the note with the consent of both parties was given to a third person as trustee for the creditor, plaintiff can recover on the original debt if the note, being due and unpaid, is still in the hands of such trustee. National Sav. Bank Assoc. v. Tranah, L. R. 2 C. P. 556.

[b] **Overdue bills in plaintiff's control.**—Where bills given in payment of a debt have not gone beyond plaintiff's control and are overdue at the time of the trial, he may sue upon the original consideration without returning them until the payment of the money. Burden v. Halton, 4 Bing. 454, 13 ECL 585, 130 Reprint 842; Hadwen v. Mendisabal, 2 C. & P. 20, 12 ECL 427, 172 Reprint 10.

15. Pierson v. Hutchinson, 2 Campb. 211, 170 Reprint 1132.

16. Meyer v. Huneke, 55 N. Y. 412 [rev 65 Barb. 304].

Effect of alteration generally see Alteration of Instruments §§ 2-89.

17. Teaz v. Chrystie, 2 E. D. Smith (N. Y.) 621, 2 AbbPr 109.

[a] **Reason for rule.**—Such production and offer furnishes no immunity to the debtor from prosecution on the note, as possession of the note ceased to be material to the third person for the purpose of enforcing his claim against the maker the moment he recovered judgment thereon. Teaz v. Chrystie, 2 E. D. Smith (N. Y.) 621, 2 AbbPr 109.

18. Lord v. Bigelow, 124 Mass. 185.

[a] **Illustration.**—Where the creditor prosecuted a note to judgment, but received nothing thereon, he was entitled to sue upon the original cause of action on tendering an assignment of the judgment. Lord v. Bigelow, 124 Mass. 185.

19. Di Ausilio v. Stavropulos, 252 Mass. 69, 147 NE 346; Herider v. Phœnix Loan Assoc., 82 Mo. A. 427.

[a] **Insolvency of drawee.**—Where the drawee is insolvent and the check worthless, it is not necessary to return it to the drawer; and its retention indicates no intention of appropriation as payment of the debt. Herider v. Phœnix Loan Assoc., 82 Mo. A. 427.

[b] **Payment stopped.**—Where check was given for work performed and materials furnished in repairing an automobile, but payment was stopped and the check therefor became worthless, the plaintiff was not required to return it before suing on the original account, and could treat it as a nullity. Di Ausilio v. Stavropulos, 252 Mass. 69, 147 NE 346.

20. Ala.—Nance v. Pope, 1 Stew. 220.

Cal.—Mitchell v. Hockett, 25 Cal. 538, 85 AmD 151.

Iowa.—Snyder v. Reno, 38 Iowa 329; Campbell v. Ayres, 9 Iowa 108.

Mass.—Estabrook v. Swett, 116 Mass. 303; Coolidge v. Brigham, 1 Metc. 547.

Mich.—Gillett v. Knowles, 108 Mich. 602, 66 NW 497.

Mo.—Howard v. Shirley, 75 Mo. A. 150.

[a] **Note fraudulently obtained from payers,** and therefore void, need not be returned. Mitchell v. Hockett, 25 Cal. 538, 85 AmD 151.

[b] **Payment of note prior to transfer.**—Where the note of a third person had been paid prior to its transfer, the creditor need not show an offer to return the note to the payee debtor. Campbell v. Ayres, 9 Iowa 108.

[c] **Failure of security.**—Note based on a mortgage, the security of which had been cut off by the foreclosure of a prior mortgage, need not be returned as a condition precedent to maintenance of an action on the original debt. Gillett v. Knowles, 108 Mich. 602, 66 NW 497.

[d] **Forged notes.**—(1) An offer to return notes, valueless because forgeries as to the supposed makers, is not a condition precedent to the right to recover from the transferor. Nance v. Pope, 1 Stew. (Ala.) 220; Snyder v. Reno, 38 Iowa 329; Howard v. Shirley, 75 Mo. A. 150. (2) But where the note is valid against the maker it is not worthless, even though indorsements upon it are forged, and suit cannot be brought upon the original indebtedness without restoring or offering to restore such note. Coolidge v. Brigham, 1 Metc. (Mass.) 547.

[e] **Where failure to return not prejudicial.**—Where a note of third persons is received in payment of a debt on the faith principally of one signature, which proves to be forged, assumpsit can be maintained on the original consideration without previously returning the note, where it is shown that the other makers are insolvent and that no injury can be sustained by defendant because of a failure to return the note. Nance v. Pope, 1 Stew. (Ala.) 220.

21. West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868.

22. Fitch v. Bogue, 19 Conn. 285.

23. Blake v. Pitcher, 46 Md. 453.

[a] **For example,** mechanics' lien proceedings. Blake v. Pitcher, 46 Md. 453.

24. **Check as absolute payment** see supra §§ 50-53.

25. **Bill or note as absolute payment** see supra §§ 40-49.

26. U. S.—Underwriters' Wrecking Co. v. The Katie, 24 F. Cas. No. 14,342, 3 Woods 182.

Ala.—Whitley v. Dumham Lumber Co., 89 Ala. 493, 7 S 810; Day v. Thompson, 65 Ala. 269; Myatts v. Bell, 41 Ala. 222.

Ark.—Adams v. Boyd, 33 Ark. 33.

Cal.—Jenne v. Burger, 120 Cal. 444, 52 P 706.

Fla.—Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.

the agreement to receive the payment as absolute payment was induced by fraud.[27] In such case, as in that of rescission of a conditional payment,[28] the creditor does all that is required of him if he produces the paper at the trial and offers to deliver it to defendant.[29]

VI. RECEIPTS[30]

[By Felix C. Graber]

[§ 75] **A. Definition.** A receipt is a written admission of the fact of payment and receipt of money or thing of value.[31]

[§ 76] **B. Nature and Contents.** Ordinarily a receipt does not amount to a contract,[32] but it may be so drawn as to be a contract.[33] No particular form of words is necessary to constitute a valid receipt,[34] although ordinarily it must show the amount paid.[35] It may consist of a separate writing,[36] a recital in an instrument,[37] or an indorsement of payment thereon.[38] A cashed check may be a receipt.[39]

[§ 77] **C. Construction.** In construing a receipt the paper must be viewed in its entirety,[40] and with due regard to the conditions surrounding its execution.[41] Thus the meaning of a clause in a receipt is ascertained by reference to the context of all the

Ill.—Kappes v. Geo. E. White Hard Wood Lumber Co., 1 Ill. A. 280.

Mich.—Riverside Iron-Works v. Hall, 64 Mich. 165, 31 NW 152.

Miss.—Slocumb v. Holmes, 1 How. 139.

N. Y.—Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397; Ferdon v. Jones, 2 E. D. Smith 106.

N. C.—Ligon v. Dunn, 28 N. C. 133.

Pa.—Tryon v. Sapovits, 15 Pa. Dist. 114.

Tenn.—Stroud v. Rankin, 2 Baxt. 74; Woodfolk v. Pratt, 1 Baxt. 348.

Eng.—Lewis v. Lyster, 2 C. M. & R. 704, 150 Reprint 298; Belshaw v. Bush, 11 C. B. 191, 73 ECL 191, 138 Reprint 444.

Ont.—Watts v. Robinson, 32 U. C. Q. B. 362.

27. Hoopes v. Strasburger, 37 Md. 390, 11 AmR 538; American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526.

Fraud inducing acceptance of bill or note in general see supra § 43.

28. See supra § 72.

29. Hoopes v. Strasburger, 37 Md. 390, 11 AmR 538.

30. Erasing indorsements of payments see Alteration of Instruments § 72.

Receipt for:

Legacy or distributive share see Executors and Administrators §§ 1290-1294.

Rent see Landlord and Tenant §§ 1282, 1283.

Right to demand receipt see Tender [38 Cyc 154].

31. Krutz v. Craig, 53 Ind. 561; Thompson v. Layman, 41 Minn. 295, 42 NW 1061.

[a] **Other definitions.**—(1) "An acknowledgment of payment or delivery." Steamboat Missouri v. Webb, 9 Mo. 193, 195. (2) An acknowledgment of the fact of payment or other settlement between debtor and creditor. Crider v. City Supply Co., 16 Ga. A. 377, 85 SE 350; Dobbin v. Perry, 30 S. C. L. 32. (3) "A written admission made by the party signing it, of the fact which it recites." Pendexter v. Carleton, 16 N. H. 482, 489.

"Receipt" defined generally see [33 Cyc 1572].

"Receipt" distinguished from "release" see Release [34 Cyc 1045]..

32. Ala.—Cowan v. Sapp, 74 Ala. 44.

Ga.—Hamlin v. Lupo, 24 Ga. A. 408, 101 SE 5; Crider v. City Supply Co., 16 Ga. A. 377, 85 SE 350.

Ind.—Krutz v. Craig, 53 Ind. 561; Bettman v. Shadle, 22 Ind. A. 542, 53 NE 662.

Iowa.—Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791; Farmers' Sav. Bank v. Aldrich, 153 Iowa 144, 133 NW 383.

Minn.—Thompson v. Layman, 41 Minn. 295, 42 NW 1061.

Mo.—Steamboat Missouri v. Webb, 9 Mo. 193; Strawn v. Missouri, etc., R. Co., 120 Mo. A. 135, 96 SW 488.

N. H.—Pendexter v. Carleton, 16 N. H. 482.

N. Y.—Ross v. McCaldin, 195 N. Y. 210, 88 NE 50, 133 AmSR 787; Komp v. Raymond, 175 N. Y. 102, 67 NE 113; Ryan v. Ward, 48 N. Y. 204, 8 AmR 539; Ramopo Fdy., etc., Works v. Carey, 113 NYS 10.

Vt.—Drown v. Chesley, 92 Vt. 19, 102 A 102, LRA1918A 1056; Randall v. Kelsey, 46 Vt. 158; Hitt v. Slocum, 37 Vt. 524.

W. Va.—Columbus Onyx, etc., Co. v. Miller, 74 W. Va. 686, 82 SE 1078.

Payment not a contract see supra § 2.

33. Bettman v. Shadle, 22 Ind. A. 542, 53 NE 662; Macdonald v. Dana, 154 Mass. 152, 27 NE 993; Ramsdell v. Clark, 20 Mont. 103, 49 P 591; Conant v. Kimball, 95 Wis. 550, 70 NW 74.

34. Crider v. City Supply Co., 16 Ga. A. 377, 85 SE 350; State v. Dalton, 8 N. C. 3.

[a] **Stating money was received.**—A receipt in full need not expressly state that money was received in order to make it a receipt for money. State v. Dalton, 8 N. C. 3.

35. Cook v. Norton, 43 Ill. 391.

36. Crider v. City Supply Co., 16 Ga. A. 377, 85 SE 350; Julius Seidel Lumber Co. v. Weaver, (Mo. A.) 184 SW 484.

[a] **Letter of cashier** of lumber company to contractor, acknowledging receipt of a check, and stating its application on three open accounts, is a "receipt." Julius Seidel Lumber Co. v. Weaver, (Mo. A.) 184 SW 484.

[b] **Affidavit acknowledging payment** is admissible in evidence as a receipt. Crider v. City Supply Co., 16 Ga. A. 377, 85 SE 350.

37. Wright v. Thompson, 14 Tex. 558.

[a] **Agreement to refund money.**—A stipulation in a bond for title to refund the money in case the obligor should be unable to make title is equivalent to an acknowledgment of the receipt of the purchase money. Wright v. Thompson, 14 Tex. 558.

38. Cal.—San Diego Constr. Co. v. Mannix, 175 Cal. 548, 166 P 325.

Iowa.—Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791.

Minn.—Steffens v. Nelson, 94 Minn. 365, 102 NW 871.

Pa.—Carr v. Beck, 51 Pa. 269.

R. I.—Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680.

Vt.—McDaniels v. Lapham, 21 Vt. 222.

[a] **An itemized bill marked paid** is a receipt for the items contained in the bill. Steffens v. Nelson, 94 Minn. 365, 102 NW 871; Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680.

[b] **Indorsements of payments made upon notes** whether of interest or principal stand upon the same ground as receipts executed by the holder to the maker of the note for the sums received. McDaniels v. Lapham, 21 Vt. 222.

[c] **Indorsement on secured note.**—Credit for payment by indorsement on secured note is in point of law a credit upon principal of indebtedness, without formal entry. San Diego Constr. Co. v. Mannix, 175 Cal. 548, 166 P 325.

Presumption of payment from indorsements on notes see Bills and Notes § 1321.

39. Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791; Crigler v. Lockard, 3 Ky. Op. 669; Christiana Hardware, etc., Co. v. Sigle, 22 Pa. Dist. 647; Rapp v. Giddings, 4 S. D. 492, 57 NW 237.

40. Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791; and case infra this note.

[a] **General and particular words.**—When a receipt acknowledges a certain sum in full of certain described promissory notes, and in full of all demands, the general words, although they do not enlarge the particular words as to what transpired at the time, yet do import and may be used to prove that the party giving the receipt had, at the time, no other demands against him to whom the receipt was given. Allen v. Woodson, 50 Ga. 53.

41. Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791. See Henry v. Britt, 197 Ill. A. 167; and cases infra this note.

[a] **Denomination of instrument as receipt** is not conclusive of its character. Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791.

[b] **Omission of word "dollars."**—A written instrument in form of a receipt, having in the margin the figures "$1,100," which acknowledges the receipt on a certain day of "eleven hundred on . . . asylum contract of fifty-five thousand dollars," is a receipt for eleven hundred dollars. Butler v. Bohn, 31 Minn. 325, 17 NW 862.

[c] **Partial payment or payment in full.**—(1) The language of a receipt which recites that the sum acknowledged was received "on the within note," together with the fact that a credit for the amount was indorsed on the note referred to, shows conclusively that it was intended as a partial payment. Hill v. Erwin, 60 Ala. 341. (2) Where a receipt covered several payments of interest on different debts and at the close of the receipt were the words "in full," such words applied to each payment. Bogart v. Van Velsor, 4 Edw. (N. Y.) 718.

[d] **Refusal to sign receipt in full.**—Where a writing read, "Received of . . . in all to date," followed by various sums, and a witness testified that it was not a receipt in full, and it was shown that the party who received it wrote a receipt in full, which the one who gave it refused to sign, it was held that the writing did not amount to a receipt in full, but was a mere statement of payments. Dewees v. Boswick Lumber, etc., Co., 96 Miss. 253, 254, 50 S 865.

[e] **Provision on face of check that it was payment in full** (1) constitutes a receipt in full as against the payee upon the cashing of the check. Christiana Hardware, etc., Co. v. Sigle, 22 Pa. Dist. 647 ("in full up to date"). (2) But this is so only when it is shown that the payee had knowledge of the presence of such

other parts of the instrument which contains it.[42] Ambiguous language is to be construed most strongly against the party who wrote the instrument.[43]

A receipt in full for a particular demand is not conclusive evidence of a general settlement of accounts between the parties.[44] For instance, a receipt for so much money specified to be for certain goods or property purchased will not be construed or presumed to be a satisfaction in full.[45]

A receipt in full of all demands against one is no evidence of the payment of a joint demand against him and others,[46] nor of the payment of obligations held by the receiptor in a different capacity from that in which he executes the receipt;[47] and such a receipt given to a corporation is not evidence of the payment of individual demands against officers of the corporation.[48] A receipt in full of all claims does not ordinarily cover claims which might arise after its execution;[49] and, on the other hand, a receipt in full of all claims from its date up to a certain future date does not cover claims existing prior to the date of the receipt.[50]

[§ 78] **D. Operation and Conclusiveness[51]—1. Receipt as Evidence—a. Admissibility—(1) In General.** The rules governing the admissibility of evidence in civil actions generally[52] are applicable in determining the admissibility of receipts as evidence of payment.[53] Receipts given by a party to the action are ordinarily admissible against him as evidence of the payment recited therein,[54] but it has

words, or facts are shown which in law would charge him with such knowledge. Muldowney v. Tualin, 38 Pa. Co. 49; Rapp v. Giddings, 4 S. D. 492, 57 NW 237.

[f] **Prior installments and interest.**—A receipt for a certain installment of principal "with interest to date" sufficiently shows that all previous installments and interest on the agreement had been duly paid. Gillespie v. Wells, 22 Man. 355, 2 DomLR 519, 21 WestLR 231, 2 WestWkly 272.

[g] **Time of payment.**—A receipt dated Dec. 9, 1867, for the amount due "for the instalment ending 1st November, 1867, of a bond," was not evidence of payment on Nov. 1. Lowe v. Morice, 19 U. C. C. P. (Ont.) 123, 132.

[h] **Conditional acknowledgment.**—Where plaintiffs in a letter to defendant acknowledged a deduction from an account and added, "on the other hand, we must collect interest on the balance of your current account," the acknowledgment of the deduction was not conditional upon payment of the interest. Baer v. Mendoza, 18 Philippine 240.

[i] **Obligations included.**—(1) A receipt between defendant and plaintiff's decedent, reciting that it was "in full payment for all claims then due," is broad enough to include a note past-due at that time. Ex p. Baggett, 211 Ala. 610, 101 S 104. (2) The fact that at the time of a settlement of accounts between parties a note made by one to another was not given up does not show that a receipt given by the payee, expressed to be in full of all demands, did not include such note. Cunningham v. Batchelder, 32 Me. 316. (3) The fact that the maker of a note, when called on by counsel for the holder, did not disclose fully his defense to the note, does not show that a receipt held by the maker and stipulating to be in full of all demands did not include the note. Cunningham v. Batchelder, supra.

[j] **Particular indorsements construed.**—(1) An indorsement of payment of interest "to" a certain date does not include interest for the day specified. Stearns v. Sweet, 78 Ill. 446. (2) An indorsement, "Received on the within 50," has been held too indefinite to entitle the debtor to a credit. Gilpatrick v. Foster, 12 Ill. 355. (3) An indorsement on a note, "Received a deed for three hundred and eleven and thirty-three one-hundredths acres of land," does not show a payment of the note. Pool v. Davis, 135 Ind. 323, 329, 34 NE 1130.

42. Importers, etc., Nat. Bank v. B. Abraham, etc., Stores, Inc., 9 La. A. (Orleans) 278.

43. Elting v. Sturtevant, 41 Conn. 176; Benson v. Reinshagen, 75 N. J. Eq. 358, 72 A 954.

[a] **Rule applied** to receipt written by: (1) Creditor and signed by him. Elting v. Sturtevant, 41 Conn. 176. (2) Debtor and signed by creditor. Benson v. Reinshager, 75 N. J. Eq. 358, 72 A 954.

44. Union Pac., etc., R. Co. v. McCarty, 3 Colo. A. 530, 34 P 767; Hannum v. Curtis, 13 Ind. 206; Fowler v. Bushby, 69 Misc. 341, 125 NYS 890; O'Hehir v. Middleton-Goshen Tract. Co., 36 NYS 140.

[a] **Construction of particular receipts.**—(1) A receipt for money, recited to be "in full settlement of account as follows: 40 cubic yards stone @ $4.50 per yard," is not a receipt in full for anything further than the stone specified. Union Pac., etc., R. Co. v. McCarty, 3 Colo. A. 530, 34 P 767. (2) A check given in settlement of work done under a building contract, indorsed by the owner as "in full settlement of contract of Dec. 3, 1909," only covered work included in the contract, and was not in settlement of extra work not included therein. Fowler v. Bushby, 69 Misc. 341, 125 NYS 890.

45. Reed v. Phillips, 5 Ill. 39; Bercier v. McInnis, 57 Miss. 279.

46. Walker v. Leighton, 11 Mass. 140; Robert v. Garnie, 3 Cai. (N. Y.) 14.

[a] **A receipt given to one in his own name** shows payment on his own account rather than on a joint account, especially where the amount is just sufficient to cover a separate balance and nothing is said about its application. Robert v. Garnie, 3 Cai. (N. Y.) 14.

47. Bartholomew v. Bartholomew, 24 Ill. 199.

[a] **Other notes held as trustee.**—A receipt for a certain sum stated to be in full of all accounts and notes does not evidence payment of notes for a very much larger sum held by the receiptor as trustee for third persons. Bartholomew v. Bartholomew, 24 Ill. 199.

48. In re Kruger, 264 Pa. 51, 107 A 379.

[a] **Demands arising from same transaction.**—Where the president of a corporation made an oral contract to have its fire lines metered at the cost of construction, plus ten per cent, and a further sum of fifteen per cent, on the resulting savings, the contractor's receipt of the corporation's check "in full payment" for services rendered did not bar his recovery of the savings percentage under the president's subsequent personal written contract, which, after reciting his oral contract, agreed to pay a fixed savings percentage, in consideration of services rendered to the corporation and to himself. In re Kruger, 264 Pa. 51, 107 A. 379.

49. Ellerson Floral Co. v. Chesapeake, etc., R. Co., 149 Va. 809, 141 SE 834.

[a] **Rule applied** to receipt executed "in full settlement, satisfaction, release and discharge of all claims or causes of action whatsoever, and particularly of all claims or causes of action arising out of the above account." Ellerson Floral Co. v. Chesapeake, etc., R. Co. 149 Va. 809, 814, 141 SE 834.

50. Bettman v. Shadle, 22 Ind. A. 542, 53 NE 662.

51. Admissibility of:

Evidence:

As to payment of particular classes of obligations and liabilities see cross references ante p 584.

In actions where payment is in issue generally see infra §§ 248-260.

Receipt as evidence of accord and satisfaction see Accord and Satisfaction §146.

Tax receipt as evidence of payment of taxes see Taxation [37 Cyc 1167].

52. See Evidence §§ 89-1729.

53. See cases infra this note; and notes 54-65.

[a] **Demand not embraced in suit.**—Receipts showing on their face payments made on demands not embracing that in suit are inadmissible. Adamson v. Wood, 5 Blackf. (Ind.) 448.

[b] **Postal money order receipts** are competent to show that plaintiff had purchased money orders, which she testified she mailed to vendor. Gosling v. Jones, (Utah) 257 P 1058.

[c] **Receipt for money paid by third person** without other explanation is not evidence of payment by defendant. Murphy v. Richardson, 33 Pa. 235.

[d] **Receipt not identified with transaction** is inadmissible. Lloyd's Est., 5 Pa. Dist. & Co. 719.

[e] **Receipt not tending to show payment.**—In an action to have a judgment declared satisfied receipts tending to prove that the creditor had purchased the land mortgaged as collateral security at a sheriff's sale are not competent evidence to prove that the judgment had been paid. Wasson v. Hodshire, 108 Ind. 26, 8 NE 621.

[f] **Receipt of nominal party.**—Under the rule that the declarations of a nominal plaintiff are not admissible to defeat the action, a receipt executed by him is inadmissible as an admission in favor of defendant. Copeland v. Clark, 2 Ala. 388.

[g] **Payment by third person.**—(1) Notes of the debtor and receipts, in the possession of a third person who closed up the business of the debtor, have been held admissible in an action by him against the debtor, to show payment by such third person out of his own moneys. Scott v. Scott, 36 Ga. 484. (2) So the receipt of B to C showing that C paid money for the benefit of A is admissible in a controversy between A's creditors in mortgage foreclosure proceedings to prove payment of such money by C for A. Locke v. Porter Gold, etc., Min. Co., 41 Cal. 305.

Admissibility of evidence to show release or payment of bills and notes see Bills and Notes § 1355.

Receipt as best evidence see Evidence §§ 1272, 1273.

54. Ala.—Ex p. Baggett, 211 Ala. 610, 101 S 104; Farrow v. Nashville, etc., R. Co., 109 Ala. 448, 20 S 303.

Ark.—Burton v. Merrick, 21 Ark. 357.

Cal.—Northrop v. Knott, 114 Cal. 612, 46 P 599.

Colo.—Gill v. Schneider, 48 Colo. 382, 110 P 62.

Conn.—Mervin v. Potter, 1 Root 201.

Ga.—Georgia R., etc., Co. v. Macon,

been held error to admit a receipt where its execution was not proved,[55] and a receipt is not admissible where a requirement that payment be pleaded was not complied with.[56] To be evidence of payment, the receipt must be one executed by the creditor or his agent authorized to give a receipt,[57] and have come into the possession of the person who is contended to have made the payment.[58] If the creditor alleges that the receipt has been altered and increased, the debtor may show that the receipt was in its present condition soon after it was signed and before the action was brought.[59]

As against strangers. A receipt is ordinarily not evidence of the payment thereby acknowledged as against strangers thereto,[60] but there are exceptions to this rule.[61] Thus the receipt of a person who is pointed out in the contract of the party against whom it is offered is admissible;[62] and the receipt of an unauthorized third person is competent evidence of payment when accompanied by evidence of the acceptance of the money by the person entitled thereto,[63] but an admission in the receipt that it was in full to date is not admissible against the latter.[64]

Indorsements of credits by the creditor on the instrument sued on are competent evidence against him as admissions of payment.[65]

[§ 79] **(2) Bills, Notes, or Checks.**[66] A note is admissible in connection with other evidence to show that it was a payment of the debt sued on,[67] but in the absence of such other evidence a note is not admissible.[68] A note is also admissible to explain a receipt and rebut any presumption that absolute payment was made.[69] While possession of a bill or note by the maker may be evidence that it has been paid,[70] bills, notes, and the like, signed by the debtor, payable to the creditor and in the possession of the debtor, without proof that they have been in the possession of the creditor, are not admissible to show that the amount thereof has been paid by the debtor to the creditor.[71] Notes and checks relating to long prior closed transactions and not to any involved in the case are inadmissible in the absence of any showing that they constituted all the transactions between the parties.[72]

Bank checks of the debtor payable to the order of the creditor and indorsed by him are admissible in evidence to show payment of the debt for which they were given.[73] If, however, the check was not indorsed by the creditor, as where it was drawn

86 Ga. 585, 13 SE 21; Allen v. Woodson, 50 Ga. 53; Scott v. Scott, 36 Ga. 484; Crider v. City Supply Co., 16 Ga. A. 377, 85 SE 350.

Iowa.—Royce v. Barrager, 116 Iowa 671, 88 NW 940.

Me.—Garnsey v. Allen, 27 Me. 366.

Mass.—Shearman v. Akins, 4 Pick. 283.

Minn.—Cain v. Mead, 66 Minn. 195, 68 NW 840.

Miss.—Wells v. Patterson, 7 How. 32.

N. Y.—Sherman v. Crosby, 11 Johns. 70.

Pa.—Carr v. Beck, 51 Pa. 269; Jones v. Shawham, 4 Watts & S. 257; Cassell v. Cooke, 8 Serg. & R. 268, 11 AmD 610; Cluggage v. Swan, 4 Binn. 150, 5 AmD 400; Smith v. Summerhill, 31 Pa. Super. 235; Elliott v. Curry, 1 Phila. 281. Compare McConnell v. Ferguson, 17 LancLRev 67, 13 York LegRec 132.

Tex.—Rogers v. Councill, (Civ. A.) 266 SW 207.

Wash.—Sherman v. Sweeny, 29 Wash. 321, 69 P 1117.

Eng.—Carmarthen, etc., R. Co. v. Manchester, etc., R. Co., L. R. 8 C. P. 685.

See McLaughlin v. National Protective Legion, 184 Ill. A. 597.

[a] **Receipt of note "in full of the above"** is evidence to rebut presumption that a larger security is not exchanged for a smaller one, and ought to have been left to the jury. Jones v. Shawham, 4 Watts & S. (Pa.) 257.

[b] **Recital in deed.**—Where a deed has been introduced in evidence without objection, a receipt showing the payment of the purchase money recited in the deed is also admissible. Farrow v. Nashville, etc., R. Co., 109 Ala. 448, 20 S 303.

[c] **Rejection in former action.**—A receipt, which has been disallowed by a jury as evidence of payment on a note, may be given in evidence in an action of assumpsit for the money. Mervin v. Potter, 1 Root (Conn.) 201.

[d] **Receipts of persons without the state.**—The receipts of persons without the commonwealth are admissible, on proof of their handwriting, as evidence of charges in a guardianship account of payments to such persons. Shearman v. Akins, 4 Pick. (Mass.) 283.

[e] **Affidavit.**—That an acknowledgment of payment is in the form of an affidavit does not render it inadmissible, when offered in evidence as a receipt. Crider v. City Supply Co., 16 Ga. A. 377, 85 SE 350.

[f] **Time of payment.**—A receipt, although too indefinite and uncertain to be evidence of the amount paid, is properly admissible to show payment on the obligation in question on the date stated therein. Smith v. Summerhill, 31 Pa. Super. 235.

[g] **Receipt for interest,** bearing a certain date, was admissible to raise the presumption that all interest had been paid to that date. Elliott v. Curry, 1 Phila. (Pa.) 281.

55. Hander v. Baade, 16 Tex. Civ. A. 119, 40 SW 422.

[a] **A debtor who produces a receipt** for the amount of the debt has the burden of proving that the receipt was executed by the creditor. Fox v. Fox, 107 S. C. 250, 92 SE 477.

56. Hander v. Baade, 16 Tex. Civ. A. 119, 40 SW 422.

Evidence admissible under pleadings generally see infra §§ 162–174.

57. Goldman v. Brandt, 5 NYS 420; Perkins v. Hawkins, 9 Gratt. (50 Va.) 649.

58. Nelson v. Boland, 37 Mo. 432; Sexton v. Greensboro L. Ins. Co., 157 N. C. 142, 72 SE 863.

[a] **Reason for rule.**—"A receipt in the possession of the opposite party certainly proves nothing more than his willingness to receive the money and give a receipt therefor." Nelson v. Boland, 37 Mo. 432, 433.

59. Burnham v. Parkhurst, 108 Mass. 341.

60. Ark.—Gould v. Tatum, 21 Ark. 329.

Ida.—Campbell v. Shark, 267 P 458.

Minn.—Ferris v. Boxell, 34 Minn. 262, 25 NW 592.

Nebr.—Ellison v. Albright, 41 Nebr. 93, 59 NW 703, 29 LRA 737.

N. J.—Roll v. Maxwell, 5 N. J. L. 493.

[a] **Indorsement by attorney of creditor without authority** is not competent evidence against the creditor. Gould v. Tatum, 21 Ark. 329.

61. Wisconsin Steel Co. v. Maryland Steel Co., 203 Fed. 403, 121 CCA 507; and cases infra notes 62, 63.

62. Wisconsin Steel Co. v. Maryland Steel Co., supra.

[a] **Illustration.**—Where a contract required defendant to deliver certain castings to plaintiff f. o. b. at a station named, receipts from the railroad company to plaintiff for freight paid on such castings were admissible against defendant in support of charges therefor. Wisconsin Steel Co. v. Maryland Steel Co., 203 Fed. 403, 121 CCA 507.

63. Sewanee Min. Co. v. Best, 3 Head (Tenn.) 701.

64. Sewanee Min. Co. v. Best, supra.

65. Sowles v. Butler, 71 Vt. 271, 44 A 355.

[a] **Rule applied** to indorsement on lease. Sowles v. Butler, 71 Vt. 271, 44 A 355.

Indorsements of credits on bills and notes see Bills and Notes § 1355.

66. Admissibility of bill or note to show its own payment see Bills and Notes § 1355.

67. Fletcher v. Young, 10 Ga. A. 183, 73 SE 38; Ruch v. Fricke, 28 Pa. 241; Snyder v. Wertz, 5 Whart. (Pa.) 163; Heffner v. Wenrich, 15 LegInt (Pa.) 102.

68. Cohu v. Husson, 119 N. Y. 609, 23 NE 573.

[a] **Illustration.**—Where defendant sets up a note as a counterclaim, another note made by defendant in favor of plaintiff shortly before the note counterclaimed became due is not admissible to show that on that date defendant received the amount named in such note to apply in payment of the counterclaim. Cohu v. Husson, 119 N. Y. 609, 23 NE 573.

69. Grovenstein v. Brewer, 76 Ga. 763.

70. See Bills and Notes § 1355.

71. Hart v. Kendall, 82 Ala. 144, 3 S 41; Lamb v. Ward, 114 N. C. 255, 19 SE 230.

72. Bailey v. Robison, 149 Ill. A. 457 [rev on other grounds 244 Ill. 16, 91 NE 98, 42 LRANS 305].

73. Cal.—Light v. Stevens, 8 Cal. A. 74, 103 P 361.

Ga.—Armour Fertilizer Works v. Abel, 15 Ga. A. 275, 82 SE 907.

Iowa.—Miller v. Brown, 82 Iowa 79, 47 NW 895.

La.—Joublanc v. Delacroix, 5 Mart. 477.

Mo.—Ferneau v. Whitford, 39 Mo. A. 311; Jesse v. Davis, 34 Mo. A. 351.

Nebr.—Peavey v. Hovey, 16 Nebr. 416, 20 NW 272.

N. Y.—Boyd v. Daily, 85 App. Div. 581, 83 NYS 539 [aff 176 N. Y. 613 mem, 68 NE 1114 mem].

Or.—Boothe v. Scriber, 48 Or. 561, 87 P 887, 90 P 1002.

Pa.—Masser v. Bowen, 29 Pa. 128, 72 AmD 619.

Porto Rico.—Garcie v. Santos, 29 Porto Rico 820.

W. Va.—Davidson v. Browning, 73 W. Va. 276, 80 SE 363, LRA1915C 976.

Eng.—Boswell v. Smith, 6 C. & P. 60, 25 ECL 321, 172 Reprint 1146; Thompson v. Pitman, 1 F. & F. 339; Mountford v. Harper, 16 M. & W. 825,

payable to bearer, it ordinarily affords no evidence of payment to the creditor;[74] but where it appears that the bank had paid other checks drawn by the payor to the payees without requiring indorsement, such unindorsed check is admissible,[75] and a draft drawn to the order of the drawee himself, and given to the creditor, is admissible on the question of payment, without being indorsed by the payee.[76] A paid check drawn by defendant's wife has been held admissible in the absence of proof of any other transaction to which it could be applied,[77] but a partner's individual check is inadmissible where he testifies that a debt had been paid with firm money.[78] A bank draft marked "paid" is not admissible to show who paid the draft.[79]

[§ 80] **b. Weight and Sufficiency**[80]**—(1) In General.** Ordinarily a receipt is prima facie evidence of payment as recited therein;[81] but it is evidence

153 Reprint 1425.

See Minor v. Lynch, 185 Ill. A. 86; Read v. Dickerson, 9 KyL 534.

[a] **Mutilated check.**—The admission, as evidence of a payment to a particular person, of a check so mutilated that only part of the name of the payee appears on the face of it is not error, where the evidence in respect of the check does not make a case for the application, against the party offering it, of the presumption arising from such mutilation. Ferneau v. Whitford, 39 Mo. A. 311.

[b] **Appropriation to debt in controversy.**—A check drawn by defendant to plaintiff's order, and paid to the latter, is evidence that the amount of it was paid to plaintiff on account of a debt shown to have existed, and cannot be excluded because the court may think it belonged to a different transaction. Masser v. Bowen, 29 Pa. 128, 72 AmD 619.

74. U. S.—Burch v. Spaulding, 4 F. Cas. No. 2,140, 2 Cranch C. C. 422; Lowe v. McClery, 15 F. Cas. No. 8,566, 3 Cranch C. C. 254.

Md.—Crain v. Barnes, 1 Md. Ch. 151.

Mich.—Bennett's Est., 52 Mich. 415, 18 NW 195.

Pa.—Patton v. Ash, 7 Serg. & R. 116.

Tenn.—Pickle v. Muse, 88 Tenn. 380, 12 SW 919, 17 AmSR 900, 7 LRA 93.

75. Baumgardner v. Henry, 131 Mich. 240, 91 NW 169.

76. Connelly v. McKean, 64 Pa. 113.

77. Murphy v. Brick, 33 Pa. 235.

78. Arbuckles v. Chadwick, 146 Pa. 393, 23 A 346.

79. Boothe v. Scriber, 48 Or. 561, 87 P 887, 90 P 1002.

[a] **Reason for rule.**—"In the nature of things the draft must have passed through the bank, and its records are the proper evidence of its payment and by whom." Boothe v. Scriber, 48 Or. 561, 565, 87 P 887, 90 P 1002.

[b] **Rule applied.**—A draft drawn by plaintiff and marked "paid" is not admissible on behalf of defendant, cashier of drawee bank, as evidence that he paid the draft. Boothe v. Scriber, 48 Or. 561, 87 P 887, 90 P 1002.

80. Sufficiency of receipt as evidence of accord and satisfaction see Accord and Satisfaction § 149.

Weight and sufficiency of:

Evidence:

In civil actions generally see Evidence §§ 1730-1806.

Of payment of particular classes of obligations and liabilities see cross references ante p 584.

Receipt as evidence of gift see Gifts § 67.

Tax receipt as evidence of payment of taxes see Taxation [37 Cyc 1167].

81. U. S.—New York, etc., Mail SS. Co. v. Texas Co., 282 Fed. 221; Corbus v. Leonhardt, 114 Fed. 10, 51 CCA 636; Thompson v. Faussat, 23 F. Cas. No. 13,954, Pet. C. C. 182.

Ala.—Ex p. Baggett, 211 Ala. 610, 101 S 104; Lampkin v. Rose, 198 Ala. 533, 73 S 896; Eufaula Nat. Bank v. Passmore, 102 Ala. 370, 14 S 683; Agnew v. McGill, 96 Ala. 496, 11 S 537; Scruggs v. Bibb, 33 Ala. 481; Harrison v. Harrison, 9 Ala. 73.

Ark.—Security Ben. Assoc. v. Punch, 173 Ark. 572, 292 SW 994; National Trust, etc., Co. v. Polk, 123 Ark. 24, 183 SW 195; Continental Gin Co. v. Benton, 104 Ark. 367, 149 SW 528; Cache Valley Lumber Co. v. Culver Co., 93 Ark. 383, 125 SW 430; Fidelity Mut. L. Ins. Co. v. Click, 93 Ark. 162, 124 SW 764; Kahn v. Metz, 88 Ark. 363, 114 SW 911; Greer v. Laws, 56 Ark. 37, 18 SW 1038; Burton v. Merrick, 21 Ark. 357.

Cal.—Northrop v. Knott, 114 Cal. 612, 46 P 599; Locke v. Porter Gold, etc., Min. Co., 41 Cal. 305.

Colo.—Salazar v. Taylor, 18 Colo. 538, 33 P 369.

Conn.—Johnson v. Shuford, 91 Conn. 1, 98 A 333.

Del.—Star Loan Assoc. v. Moore, 20 Del. 308, 55 A 946.

Fla.—Broward v. Doggett, 2 Fla. 49.

Ga.—Mallard v. Moody, 105 Ga. 400, 31 SE 45; Wooten v. Nall, 18 Ga. 609; Hamlin v. Lupo, 24 Ga. A. 408, 101 SE 5.

Ill.—Peo. v. Evanston R. Co., 323 Ill. 109, 153 NE 603; Peo. v. Davis, 269 Ill. 256, 110 NE 9; Ennis v. Pullman Palace-Car Co., 165 Ill. 161, 46 NE 439; Greenough v. Taylor, 17 Ill. 602; Ballance v. Frisby, 3 Ill. 63; Marston v. Wilcox, 2 Ill. 270; Weakley v. Mizell, 193 Ill. A. 494; Connelly v. Sullivan, 119 Ill. A. 469; Fitzgerald v. Coleman, 114 Ill. A. 25; Nielsen v. U. S. Rolling Stock Co., 37 Ill. A. 283; Lyons v. Williams, 15 Ill. A. 27.

Iowa.—Coe v. Moline Power Farming Corp., 202 NW 265; McGuire v. Interurban R. Co., 199 Iowa 203, 200 NW 55; Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791; Shropshire v. Ryan, 111 Iowa 677, 82 NW 1035; Higley v. Burlington, etc., R. Co., 99 Iowa 503, 68 NW 829, 61 AmSR 250; Thompson v. Maxwell, 74 Iowa 415, 38 NW 125; Levi v. Karrick, 13 Iowa 344.

Kan.—Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752; Scandinavian Coal, etc., Co. v. Whittaker, 40 Kan. 123, 19 P 330.

Ky.—Garriott v. Brandenburg Constr. Co., 199 Ky. 673, 251 SW 935; King v. Dorsey, 145 Ky. 176, 140 SW 183; Dugan v. Harris, 6 KyL 597, 599, 13 Ky. Op. 297; Crigler v. Lockard, 3 Ky. Op. 669.

La.—Borden v. Hope, 21 La. Ann. 581; Gray v. Lonsdale, 10 La. Ann. 749.

Md.—Virdin v. Stockbridge, 74 Md. 481, 22 A 70.

Mich.—Stone v. Steil, 230 Mich. 249, 202 NW 982; Golden v. Bartlett Illum. Co., 114 Mich. 625, 72 NW 622; Goodson v. Detroit Bd. of Health, 114 Mich. 345, 72 NW 185.

Minn.—Wherley v. Rowe, 106 Minn. 494, 119 NW 222; Cappis v. Wiedemann, 86 Minn. 156, 90 NW 368; Wilkinson v. Crookston, 75 Minn. 184, 77 NW 797; Cable v. Foley, 45 Minn. 421, 47 NW 1135.

Mo.—Anderson v. Cole, 234 Mo. 1, 136 SW 395; Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; Gregg v. Roaring Springs Land, etc., Co., 97 Mo. A. 44, 70 SW 920.

Mont.—Ramsdell v. Clark, 20 Mont. 103, 49 P 591.

N. H.—Gleason v. Sawyer, 22 N. H. 85.

N. J.—Hoffman v. Rauchmiller, 95 N. J. Eq. 500, 122 A 344.

N. Y.—Danziger v. Hoyt, 120 N. Y. 190, 24 NE 294 [aff 46 Hun 270]; Riley v. New York, 96 N. Y. 331; Bradford v. Fox, 38 N. Y. 289, 7 Transcr. A. 254; Walsh v. Gray, 214 App. Div. 296, 212 NYS 230; Matter of Waite, 43 App. Div. 296, 60 NYS 488; Burns v. Walsh, 10 Misc. 699, 31 NYS 788; National Cash Register Co. v. Kaufman, 123 NYS 983.

N. C.—Rogerson v. Leggett, 145 N. C. 7, 58 SE 596.

Oh.—Preferred Masonic Mut. Acc. Assoc. v. Harrington, 30 Oh. Cir. Ct. 612.

Okl.—Columbian Nat. L. Ins. Co. v. Wirthle, 73 Okl. 302, 176 P 406.

Or.—U. S. Fidelity, etc., Co. v. Martin, 77 Or. 369, 149 P 1023.

Pa.—Flaccus v. Wood, 260 Pa. 161, 103 A 549; Gregory v. Huslander, 227 Pa. 607, 76 A 422; MacDonald v. Piper, 193 Pa. 312, 44 A 455; In re Rhoads, 189 Pa. 460, 42 A 116; Crawford v. Forest Oil Co., 189 Pa. 415, 42 A 39; Krauser v. McCurdy, 174 Pa. 174, 34 A 518; Harris v. Hay, 111 Pa. 562, 4 A 715; Stroh v. Holmes, 83 Pa. Super. 129; Paige v. Paige, 53 Pa. Super. 311; Guhl v. Frank, 22 Pa. Super. 531; Christiana Hardware, etc., Co. v. Sigle, 22 Pa. Dist. 647; Ludwig v. State Normal School, 22 Pa. Dist. 594; Keim v. Kaufman, 4 Pa. Dist. 234, 15 Pa. Co. 539; Muldowney v. Tualin, 38 Pa. Co. 49; Price v. Worden, 1 LackLegN 391; Burkholder v. Ream, 14 LancBar 17.

R. I.—Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 229, 94 A 680 [cit Cyc].

S. C.—Terry v. Husbands, 53 S. C. 69, 30 SE 826; Trimmier v. Thomson, 10 S. C. 164; Dobbin v. Perry, 30 S. C. L. 32.

Tenn.—McKissick v. Martin, 12 Heisk. 311; Bayliss v. Williams, 6 Coldw. 440.

Tex.—Russell v. Beckert, (Civ. A.) 195 SW 607; Southwestern Tel., etc., Co. v. Luckett, (Civ. A.) 127 SW 856; Dennis v. Sanger, 15 Tex. Civ. A. 411, 39 SW 997.

Vt.—Drown v. Chesley, 92 Vt. 19, 102 A 102, LRA1918A 1056; Ashley v. Hendee, 56 Vt. 209; Guyette v. Bolton, 46 Vt. 228; Paige v. Perno, 10 Vt. 491; Sparhawk v. Buell, 9 Vt. 41.

Va.—Norfolk Hosiery, etc., Mills Co. v. Westheimer, 121 Va. 130, 92 SE 922; Kirkbride v. Keys Planing Mill Co., 116 Va. 680, 82 SE 750; Lurty v. Lurty, 107 Va. 466, 59 SE 405. But see Keister v. Philips, 124 Va. 585, 98 SE 674 (a receipt is not prima facie evidence of payment of note where the genuineness of the receipt is denied by affidavit).

W. Va.—Holcombe v. Laurel Creek Coal Co., 96 W. Va. 473, 123 SE 248; Columbus Onyx, etc., Co. v. Miller, 74 W. Va. 686, 82 SE 1078; Cushwa v. Improvement Loan, etc., Assoc., 45 W. Va. 490, 32 SE 259.

Wis.—Davenport v. Schram, 9 Wis. 119.

Eng.—Huckle v. London County, 27 T. L. R. 112.

[a] **Payment in full.**—(1) Where the creditor presents a bill for services which is paid and receipted, he cannot, in the absence of special circumstances, claim anything more for services prior to that time. Goodson v. Detroit Bd. of Health, 114 Mich. 345, 72 NW 185; Wilkinson v. Crookston, 75 Minn. 184, 77 NW 797. (2) The rule applies also where a receipt in full was given for an unliquidated account. Danziger v. Hoyt, 120 N. Y. 190, 24 NE 294 [aff 46 Hun 270].

[b] **Receipt given to one of two joint debtors.**—A receipt given by a creditor to one of two joint debtors who paid the whole of the debt is prima facie evidence of the payment. Ballance v. Frisby, 3 Ill. 63.

[c] **A receipt importing a settle-**

only of what appears on its face,[82] and has been held not to be even prima facie evidence of payment without proof of its execution.[83] A receipt is not evidence that payment was made to an authorized person.[84]

Payment by bill or note.[85] Although it has been held that a receipt of payment by bill or note is not sufficient in the absence of other evidence to show an extinguishment of the original claim,[86] such a receipt has in other cases been held to be prima facie evidence that the bill or note was accepted as absolute payment.[87] The taking of a bill or note and giving of a receipt as for so much cash does not, in most jurisdictions, amount to evidence of an express agreement to take the paper in payment;[88] but where a bill or note is regarded as absolute payment unless the contrary appears,[89] such a receipt is considered strong proof of an extinguishment of the original debt.[90] A receipt given for a bill or note to be payment when paid shows that the paper was not taken as absolute payment.[91]

Indefiniteness and uncertainty in receipts may be

ment is prima facie evidence that the parties then adjusted all matters touching the business or adventure to which it relates. Levi v. Karrick, 13 Iowa 344.

[d] **Recital in deed** that the purchase money has been received is prima facie evidence of payment. Rogerson v. Leggett, 145 N. C. 7, 58 SE 596; Bayliss v. Williams, 6 Coldw. (Tenn.) 440; Russell v. Beckert, (Tex. Civ. A.) 195 SW 607.

[e] **Recital in check.**—(1) Where one accepts and collects a check, bearing upon its face a statement that it is "in full" of all demands, it will be presumed that the check was received in discharge of all preëxisting liabilities of the maker. Greer v. Laws, 56 Ark. 37, 18 SW 1038; Garriott v. Brandenburg Constr. Co., 199 Ky. 673, 251 SW 935; Walsh v. Gray, 214 App. Div. 296, 212 NYS 230; Krauser v. McCurdy, 174 Pa. 174, 34 A 518; Price v. Worden, 1 LackLegN (Pa.) 391; Norfolk Hosiery, etc., Mills Co. v. Westheimer, 121 Va. 130, 92 SE 922; Lurty v. Lurty, 107 Va. 466, 59 SE 405. (2) Where a check recited on its face that it was in payment of royalties in full to date and was received, indorsed, and cashed without objection, the check was then prima facie evidence of the payment and of all the facts therein recited. Gregg v. Roaring Springs Land, etc., Co., 97 Mo. A. 44, 70 SW 920. (3) In an employee's action for payment for overtime, where it appeared that pay checks purporting to be in full for services were regularly given and accepted by plaintiff, such acceptance constituted presumptive evidence that the several payments were in full for all services, as recited by the indorsements thereon. Yardley v. Iowa Electric Co., 195 Iowa 380, 382, 191 NW 791 (checks on their face recited that they were "in full payment for services rendered to and including —"). (4) Where a servant accepts and indorses checks for salary, each of which contains the words "for all services rendered up to and including above date," there arises a presumption of payment in full, which is, however, rebuttable, as the checks containing the statements quoted were merely receipts. McGuire v. Interurban R. Co., 199 Iowa 203, 215, 200 NW 55.

Receipt as evidence of high order see infra § 83.

82. Corbus v. Leonhardt, 114 Fed. 10, 51 CCA 636.

[a] **For example,** a receipt of payment in full for professional services for "attending Mrs. Duncan and the baby" is not prima facie evidence of payment for treating Mr. Duncan. Corbus v. Leonhardt, 114 Fed. 10, 51 CCA 636.

Construction of receipt see supra § 77.

83. Wright v. Wright, 64 Ala. 88; Cope v. Deaton, 43 SW 190, 19 KyL 1197; Epler v. Metzger, 17 Pa. Super. 56; Dennis v. Sanger, 15 Tex. Civ. A. 411, 39 SW 997.

84. Heiskell v. Curtis, 49 App. (D. C.) 91, 259 Fed. 987.

85. Generally see supra §§ 40–49.

86. Colo.—Pueblo First Nat. Bank v. Newton, 10 Colo. 161, 14 P 428; Zook v. Odle, 3 Colo. A. 87, 32 P 82.

Ill.—Belleville Sav. Bank v. Bornman, 10 NE 552.

Md.—Berry v. Griffin, 10 Md. 27, 69 AmD 123; Maryland, etc., Coal, etc., Co. v. Wingert, 8 Gill 170; Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452. See also Phelan v. Crosby, 2 Gill 462 (holding such a receipt to be evidence of payment).

Minn.—Combination Steel, etc., Co. v. St. Paul City R. Co., 47 Minn. 207, 49 NW 744.

Mo.—Doebling v. Loos, 45 Mo. 150; Howard v. Jones, 33 Mo. 583; McMurray v. Taylor, 30 Mo. 263, 77 AmD 611; Commercial Bank v. Varnum, 176 Mo. A. 78, 162 SW 1080.

Nebr.—Colby v. Maw, 1 Nebr. (Unoff.) 478, 95 NW 677.

N. H.—Thompson v. Briggs, 28 N. H. 40; Johnson v. Cleaves, 15 N. H. 332.

N. Y.—Feldman v. Beier, 78 N. Y. 293; Muldon v. Whitlock, 1 Cow. 290, 13 AmD 533; Schemerhorn v. Loines, 7 Johns. 311.

R. I.—Wheeler v. Schroeder, 4 R. I. 383.

W. Va.—Feamster v. Withrow, 12 W. Va. 611; Dunlap v. Shanklin, 10 W. Va. 662.

Eng.—In re Romer, [1893] 2 Q. B. 286; Teed v. Carruthers, 2 Y. & C. 31, 21 EngCh 30, 63 Reprint 14.

See also D. B. Martin Co. v. Strickler, 57 Pa. Super. 296 (holding that the receipt of notes of a third person "for payment of" an obligation raises the presumption that such notes were accepted only as further security for the debt due).

"Where an account is due and the creditor receives from his debtor a promissory note 'in payment of the account,' giving a receipt in those terms, the note is not a satisfaction or extinguishment of the original claim, unless there be evidence, in addition to the receipt, for the purpose of proving an agreement that the creditor was to receive the note as payment and to run the risk of its being paid." Berry v. Griffin, 10 Md. 27, 31, 69 AmD 123.

[a] **Rule applied.**—(1) Giving a receipt expressing that the bill was taken "in settlement" does not raise a presumption that the bill was taken as absolute payment. In re Romer, [1893] 2 Q. B. 286. (2) The receipt of a note "for," or "on account of," or "in payment of," an existing debt, in the absence of an express agreement or understanding that it is taken in absolute satisfaction or discharge of the debt, will be deemed to be a conditional payment only. Combination Steel, etc., Co. v. St. Paul City R. Co., 47 Minn. 207, 49 NW 744. (3) Marking the word "paid" on a note, for the purpose of satisfying which a check was given, raises no presumption that the check was received as absolute payment. Commercial Bank v. Varnum, 176 Mo. A. 78, 162 SW 1080. (4) A receipt for bonds in payment for land, which bonds proved to be worthless, does not even prima facie show payment. Dunlap v. Shanklin, 10 W. Va. 662.

87. U. S.—Drew v. Hull of a New Ship, 7 F. Cas. No. 4,078; Moore v. Newbury, 17 F. Cas. No. 9,772, 6 McLean, 472, Newb. Adm. 49; Palmer v. Priest, 18 F. Cas. No. 10,694, 1 Sprague 512; Sutton v. The Albatross, 23 F. Cas. No. 13,645, 2 Wall. Jr. 327, 1 Phila. (Pa.) 423.

Ala.—New England Mortg. Security Co. v. Hirsch, 96 Ala. 232, 11 S 63.

Ark.—Real Est. Bank v. Rawdon, 5 Ark. 558.

Conn.—Bonnell v. Chamberlin, 26 Conn. 487. But see Bartsch v. Atwater, 1 Conn. 409 (contra; decided according to law of New York, that being the lex loci).

N. J.—Swain v. Frazier, 35 N. J. Eq. 326.

S. C.—Ex p. Williams, 17 S. C. 396; Dogan v. Ashbey, 30 S. C. L. 36.

Vt.—Stephens v. Thompson, 28 Vt. 77; Hutchins v. Olcutt, 4 Vt. 549, 24 AmD 634.

Wis.—Davenport v. Schram, 9 Wis. 119.

[a] **Rule applied.**—An account receipted as paid in full by the note of a third party, and the indorsement of such note "without recourse," show prima facie a receipt of the note as payment, and it is error to refuse an instruction to such effect. Davenport v. Schram, 9 Wis. 119.

[b] **In Louisiana** (1) if the creditor gives a receipt for a note in payment of his account, this creates a novation of the debt. White v. McDowell, 4 La. Ann. 543; Walton v. Bemiss, 16 La. 140; Hunt v. Boyd, 2 La. 109; Abat v. Nolte, 6 Mart. N. S. 636; Barron v. How, 2 Mart. N. S. 144. (2) It makes no difference whether the note received was that of the debtor or of a third person. Walton v. Bemiss, supra.

88. U. S.—Cleve v. Craven Chemical Co., 18 F. (2d) 711, 52 ALR 980.

Ga.—Weaver v. Nixon, 69 Ga. 699. But see Mosley v. Floyd, 31 Ga. 564, 581 (holding that a receipt for twelve hundred dollars, given at the time seven hundred dollars in cash and a five hundred dollar note were accepted by creditor, "is a pretty clear indication that the note was given and received as a payment").

Mont.—Kalman v. Treasure County, 275 P 743.

N. Y.—Bradford v. Fox, 38 N. Y. 289; Muldon v. Whitlock, 1 Cow. 290, 13 AmD 533.

Pa.—Shepherd v. Busch, 154 Pa. 149, 26 A 363, 35 AmSR 815.

[a] **Receipted account.**—An account marked "pd. April 8th, 1881," signed by the creditor and forwarded to the debtor, is not evidence of an express agreement to accept a bill in payment of a debt sued on. Weaver v. Nixon, 69 Ga. 699.

[b] **Paper of third person.**—"When the receipt is intended to be proof of an agreement to receive the paper of third persons as absolute payment of that much in money it ought to say so. This receipt says nothing upon that subject and therefore is very feeble proof in support of such a contention." Shepherd v. Busch, 154 Pa. 149, 151, 26 A 363, 35 AmSR 815.

89. See supra § 40 text and notes 48–57.

90. Fowler v. Ludwig, 34 Me. 455.

91. Homans v. Newton, 4 Fed. 880; Smith v. Wood, 1 N. J. Eq. 74.

[a] **Rule applied.**—A conditional receipt containing the words "which, when paid, will be in full for the above," does not show that the acceptances were taken in payment of an account. Homans v. Newton, 4 Fed. 880.

such as to render them of no value and require them to be disregarded.[92]

[§ 81] **(2) As Shifting Burden of Proof or of Evidence.** The fact that defendant, relying upon payment as a defense, is able to produce a receipt from plaintiff or his authorized representative for the amount claimed to be due does not shift the burden of proof of payment from defendant;[93] but as a receipt is prima facie evidence of payment[94] the production thereof imposes upon plaintiff the burden of going forward with evidence to impeach the receipt.[95] If the receipt is impeached, the party claiming payment has the burden of going forward with further proof of payment.[96] Where the receipt of money to be credited on a note does not describe the note, it is incumbent upon defendant to show the note sued on was intended.[97] A debtor alleging payment in full by a check marked "in full of all demands" has the burden of showing that the check contained those words when it was accepted by the creditor.[98] Where the debtor produces a receipt for a sum less than the debt in full therefor, the burden has been held to be on one contesting its sufficiency to show that the debt had not been reduced to the sum stated in the receipt;[99] but where a receipt is expressly stated to be on account, there is no burden on the creditor to show that it was not in full satisfaction of the claim.[1]

[§ 82] **(3) Conclusiveness.**[2] While an unexplained and uncontradicted receipt is a complete bar to an action for the amount of the debt represented thereby,[3] neither an ordinary receipt ac-

92. Smith v. Summerhill, 31 Pa. Super. 235.

[a] **Illustration.**—As a matter of law a receipt in words and figures as follows, "Newton No. 8.18 March 8, 1900 Jugment rescive Intres Eighteen Dollars $300 Elias A. Smith" by reason of its indefiniteness and uncertainty of meaning as to the amount of payment was of no value upon that question and should be disregarded. Smith v. Summerhill, 31 Pa. Super. 235, 238.

93. Kan.—Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752.

Mo.—Steltemaier v. Barrett, 145 Mo. A. 534, 122 SW 1095.

Pa.—Shrader v. U. S. Glass Co., 179 Pa. 623, 36 A 330; Mitchell v. Mitchell, 4 Pa. Cas. 43, 49, 6 A 682.

R. I.—Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680.

Tex.—Baker v. Pierce, (Civ. A.) 248 SW 439; Pierce v. Baker, (Civ. A.) 238 SW 699.

Vt.—Terryberry v. Woods, 69 Vt. 94, 37 A 246.

[a] **Denial of validity of release.**—In an action on a note, where defendant pleaded a release deed, acknowledging payment, to which plaintiffs replied that such deed, through mutual mistake, described the wrong note, the burden of proving payment remained on defendant, plaintiffs' reply being merely a denial of defendant's affirmative defense. Pierce v. Baker, (Tex. Civ. A.) 238 SW 699.

Burden of proof of payment see infra §§ 176–187.

94. See supra § 80.

95. U. S.—New York, etc., SS. Co. v. Texas Co., 282 Fed. 221.

Ala.—Ex p. Baggett, 211 Ala. 610, 101 S 104; Hare v. Hare, 195 Ala. 41, 70 S 630; Eufaula Nat. Bank v. Passmore, 102 Ala. 370, 14 S 683; Scruggs v. Bibb, 33 Ala. 481.

Ark.—Security Ben. Assoc. v. Punch, 173 Ark. 572, 292 SW 994; Continental Gin Co. v. Benton, 104 Ark. 367, 149 SW 528; Decker v. Laws, 74 Ark. 286, 85 SW 425.

Del.—Nicholson v. Frazier, 4 Del. 206.

D. C.—Heiskell v. Curtis, 49 App. 91, 259 Fed. 987.

Ill.—Winchester v. Grosvenor, 44 Ill. 425; Greenough v. Taylor, 17 Ill. 602; Weakley v. Mizell, 193 Ill. A. 494; Long v. Long, 132 Ill. A. 409; Fitzgerald v. Coleman, 114 Ill. A. 25; Nielsen v. U. S. Rolling Stock Co., 37 Ill. A. 283.

Ind.—Moore v. Korty, 11 Ind. 341.

Iowa.—Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791; Meginnes v. McChesney, 179 Iowa 563, 160 NW 50, LRA1917E 1060; Jones v. General Constr. Co., 150 Iowa 194, 129 NW 830; Levi v. Karrick, 13 Iowa 344; Carson v. Duncan, 1 Greene 466.

Kan.—Scandinavian Coal, etc., Co. v. Whittaker, 40 Kan. 123, 19 P 330.

La.—Gray v. Lonsdale, 10 La. Ann. 749; Mims v. Morrison, 5 La. Ann. 650; Skilliman v. Jones, 3 Mart. N. S. 686.

Me.—Partridge v. Northern Maine Seaport R. Co., 111 Me. 589, 90 A 618.

Mich.—Gregory v. McNitt, 242 Mich. 506, 219 NW 710.

Mo.—Anderson v. Cole, 234 Mo. 1, 136 SW 395.

Mont.—Ramsdell v. Clark, 20 Mont. 103, 49 P 591.

N. Y.—Matter of Waite, 43 App. Div. 296, 60 NYS 488; Harry Aronson, Inc. v. Reiss, 170 NYS 958.

Pa.—MacDonald v. Piper, 193 Pa. 312, 44 A 455; In re Rhoads, 189 Pa. 460, 42 A 116; Paige v. Paige, 53 Pa. Super. 311.

R. I.—Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680.

S. C.—Fox v. Fox, 107 S. C. 250, 92 SE 477.

Tex.—Baker v. Pierce, (Commn. A.) 259 SW 921 [rev (Civ. A.) 248 SW 439].

Vt.—Guyette v. Bolton, 46 Vt. 228.

Va.—Norfolk Hosiery, etc., Mills Co. v. Westheimer, 121 Va. 130, 92 SE 922; Kirkbride v. Keys Planing Mill Co., 116 Va. 680, 82 SE 750.

[a] **Rule applied.**—(1) Where a creditor disputes a receipt proved to have been executed by him, he has the burden of proving that it was obtained by fraud and misrepresentation. Fox v. Fox, 107 S. C. 250, 92 SE 477. (2) Where a deed recites payment of the consideration, the burden is on the party claiming that the consideration was not paid to produce evidence in support of his contention. Anderson v. Cole, 234 Mo. 1, 136 SW 395. (3) Where one who had furnished logs under a written contract signed receipts which showed on their faces that all the logs received had been paid for, such receipts, if open to attack, at least impose upon plaintiff the burden of proving that there was a shortage in the count represented thereby. Partridge v. Northern Maine Seaport R. Co., 111 Me. 589, 90 A 618.

[b] **Receipt in full.**—(1) A person giving a receipt reciting on its face that the sum mentioned is "in full" payment of the account has the burden of showing that it was not intended as full payment. Decker v. Laws, 74 Ark. 286, 85 SW 425. (2) One who has received, indorsed, and used a check to his order, reciting that it is "in full" to a certain date, has the burden of proving that there was an indebtedness to him in excess of the amount of the check. Norfolk Hosiery, etc., Mills Co. v. Westheimer, 121 Va. 130, 92 SE 922. (3) Where receipts signed by an employee for wages indicated on their face that all wages have been paid in full, but the employee claims an additional sum, the burden is upon him to show that he rendered services pursuant to an understanding that he was to be paid an additional sum therefor. Meginnes v. McChesney, 179 Iowa 563, 160 NW 50, LRA 1917E 1060. (4) A receipt, "Received . . . in various payments, at this date," prima facie refers to payments on that day, and the burden is on plaintiff to show that it meant "up to" that day. Moore v. Korty, 11 Ind. 341. (5) A receipt reciting that it is "in full payment for all claims due . . . to date" includes a note which is past due at the time, and places upon the creditor the burden of proving that such note was not in fact included in the receipt. Ex p. Baggett, 211 Ala. 610, 611, 101 S 104.

[c] **Credits indorsed on a note and erased** should be fully explained by the creditor to deprive the debtor of the benefit thereof. Carson v. Duncan, 1 Greene (Iowa) 466.

Burden of going forward with evidence generally see Evidence §§ 21–24.

Grounds of attack upon receipt see infra § 82.

96. Gregory v. McNitt, 242 Mich. 506, 219 NW 710; Keister v. Philips, 124 Va. 585, 98 SE 674.

[a] **Denial by affidavit.**—Where the genuineness of a receipt is denied by an affidavit filed by plaintiff with the pleading, the burden shifts to defendant to prove the fact of payment. Keister v. Philips, 124 Va. 585, 98 SE 674.

97. Bowsher v. Porter, 52 Ill. A. 59.

98. Decker v. Laws, 74 Ark. 286, 85 SW 425; Muldowney v. Tualin, 38 Pa. Co. 49, 50 [quot Cyc].

99. Matter of Waite, 43 App. Div. 296, 60 NYS 488.

1. Case v. St. Louis, etc., R. Co., 60 Mo. A. 185.

2. Receipt as estoppel see Estoppel § 152.

3. U. S.—De Arnaud v. U. S., 151 U. S. 483, 14 SCt 374, 38 L. ed. 244; New York, etc., Mail SS. Co. v. Texas Co., 282 Fed. 221; Newman v. U. S., 81 Fed. 122; Battle v. McArthur, 49 Fed. 715.

Ala.—Lampkin v. Rose, 198 Ala. 533, 73 S 896; Eufaula Nat. Bank v. Passmore, 102 Ala. 370, 14 S 683; Agnew v. McGill, 96 Ala. 496, 11 S 537.

Ark.—Cache Valley Lumber Co. v. Culver Co., 93 Ark. 383, 125 SW 430; Kahn v. Metz, 88 Ark. 363, 114 SW 911; Burton v. Merrick, 21 Ark. 357.

Cal.—McKenzie v. Ray, 168 Cal. 618, 143 P 1018, 1020 [cit Cyc].

Colo.—Chicago, etc., R. Co. v. Mills, 18 Colo. A. 8, 69 P 317.

Conn.—Huntington's App., 73 Conn. 582, 48 A 766; Bonnell v. Chamberlin, 26 Conn. 487; Hurd v. Blackman, 19 Conn. 177; Fuller v. Crittenden, 9 Conn. 401, 23 AmD 364.

Ga.—Conyers v. Graham, 81 Ga. 615, 8 SE 521; Allen v. Woodson, 50 Ga. 63; Freeman v. Tucker, 20 Ga. 6, 522; Hamlin v. Lupo, 24 Ga. A. 408, 101 SE 5.

Ill.—Peo. v. Evanston R. Co., 323 Ill. 109, 153 NE 603; Nielsen v. U. S. Rolling Stock Co., 37 Ill. A. 283.

Iowa.—Cummings v. Lynn, 121 Iowa 344, 96 NW 857; Levi v. Karrick, 13 Iowa 344.

Kan.—Scandinavian Coal, etc., Co. v. Whittaker, 40 Kan. 123, 19 P 330.

Ky.—Fitzpatrick v. Dundon, 179 Ky. 784, 201 SW 339; Allen v. Shepherd, 162 Ky. 756, 173 SW 135; Witt v. Thomas, 42 SW 338, 19 KyL 847; Black v. McCoy, 7 Ky. Op. 609. See Read v. Dickerson, 9 KyL 534.

knowledging a payment[4] nor a receipt in full[5] is conclusive evidence of payment in the sense that it cannot be contradicted.[6] Thus a receipt may be at-

Me.—Robbins Cordage Co. v. Brewer, 48 Me. 481; Cunningham v. Batchelder, 32 Me. 316.

Md.—Virdin v. Stockbridge, 74 Md. 481, 22 A 70.

Mich.—Pratt v. Castle, 91 Mich. 484, 487, 52 NW 52.

Minn.—Wherley v. Rowe, 106 Minn. 494, 119 NW 222.

Mo.—Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051.

N. J.—New Jersey Flax Cotton Wool Co. v. Mills, 26 N. J. L. 60.

N. Y.—Riley v. New York, 96 N. Y. 331; Swift v. State, 89 N. Y. 52; Burns v. Walsh, 10 Misc. 699, 31 NYS 788; Lambert v. Seely, 17 HowPr 432, 2 Hilt. 429; Alvord v. Baker, 9 Wend. 323.

Pa.—In re Rhoads, 189 Pa. 460, 42 A 116; McGahren v. Royal Union Mut. L. Ins. Co., 28 Pa. Super. 47; Guhl v. Frank, 22 Pa. Super. 531.

S. C.—McDowall v. Lemaitre, 13 S. C. L. 320.

Tex.—Allen v. Baker, 39 Tex. 220.

[a] **Rule applied** where an attorney, with full knowledge of all the facts and circumstances connected therewith and in the absence of mistake or fraud, executed a receipt in full for the payment of money due for professional services. Black v. McCoy, 7 Ky. Op. 609.

[b] **Entries by creditor** in the books of the debtor, his employer, showing payments up to certain dates, where unexplained, are sufficient to establish such payments. Cummings v. Lynn, 121 Iowa 344, 96 NW 857.

[c] **Check indorsed by payee.**—A check in the handwriting of, and indorsed by, the payee attorney, "in full of account to date," is conclusive as to all legal services to date thereof, in the absence of other evidence, the check being in effect a receipt. Fitzpatrick v. Dundon, 179 Ky. 784, 201 SW 339.

[d] **A recital of payment in a conveyance** is, in the absence of proof to the contrary, sufficient evidence of payment. Agnew v. McGill, 96 Ala. 496, 11 S 537.

4. U. S.—Vint v. King, 28 F. Cas. No. 16,950.

Ala.—Strange v. Watson, 11 Ala. 324.

Cal.—Bonestell v. Bowie, 128 Cal. 511, 61 P 78; Clark v. Berlin Realty Co., 33 Cal. A. 50, 164 P 333.

Conn.—Kane v. Morehouse, 46 Conn. 300.

Del.—Nicholson v. Frazier, 4 Del. 206.

Fla.—Schmitt v. Bethea, 78 Fla. 304, 82 S 817; McLeod v. Citizens Bank, 61 Fla. 343, 56 S 190.

Ill.—Frink v. Bolton, 15 Ill. 343; Firpach v. Novak, 185 Ill. A. 105; Rork v. Minor, 109 Ill. A. 12.

Ind.—Chandler v. Schoonover, 14 Ind. 324.

Iowa.—Coe v. Moline Power Farming Corp., 202 NW 265.

Kan.—Missouri Pac. R. Co. v. Lovelace, 57 Kan. 195, 45 P 590; Solomon R. Co. v. Jones, 34 Kan. 443, 8 P 730.

Ky.—Whittemore v. Stout, 3 Dana 427.

La.—Platt v. Maples, 19 La. Ann. 459.

Me.—Rollins v. Dyer, 16 Me. 475.

Md.—Hellwig v. Benzinger, 22 A 265; Brooke v. Quynn, 13 Md. 379.

Mass.—Eastern Adv. Co. v. Standard Nut Co., Inc., 162 NE 339; Hudson v. Baker, 185 Mass. 122, 70 NE 419.

Miss.—Butler v. State, 81 Miss. 734, 33 S 847; Albert Mackie Grocer Co. v. Byrd, 25 S 156.

Mo.—Massey v. Smith, 64 Mo. 347; Schwiete v. Guerre, 175 Mo. A. 687, 158 SW 402.

N. J.—Elwell v. Lesley, 7 N. J. L. 349; Hoffman v. Rauchmiller, 95 N. J. Eq. 500, 122 A 344; Freeholders v. Thomas, 20 N. J. Eq. 39.

N. Y.—Boardman v. Gaillard, 60 N. Y. 614 mem; Swanson v. White, 55 App. Div. 631, 66 NYS 787; Siegel v. Kovinsky, 93 Misc. 541, 157 NYS 340 [aff 174 App. Div. 857 mem, 159 NYS 1142 mem]; Joseph v. Normandie Shirt Co., Inc., 174 NYS 189; Reikes v. Sullivan, 99 NYS 318; Cornell v. Emigrant Industrial Sav. Bank, 9 NYSt 72; Matter of Rutherford, 5 Dem. Surr. 499 [aff sub. nom In re Jones, 1 NYS 127].

N. C.—Elliott v. Logan, 62 N. C. 163; Warlick v. Barnett, 46 N. C. 539.

Okl.—Columbian Nat. L. Ins. Co. v. Wirthle, 73 Okl. 302, 176 P 406; Kuykendall v. Lambert, 68 Okl. 258, 173 P 657.

Pa.—Guhl v. Frank, 22 Pa. Super. 531.

Wash.—Sherman v. Sweeny, 29 Wash. 321, 69 P 1117.

W. Va.—Davis v. Tidewater Coal, etc., Co., 86 W. Va. 350, 103 SE 450.

Sask.—Saskatchewan, etc., El. Co. v. Hamilton Bank, 7 Sask. L. 134, 18 DomLR 411, 20 WestLR 262, 7 WestWkly 100.

And see cases infra notes 7–12.

[a] **Failure to read receipt before signing.**—(1) Ordinarily the mere negligence of a person signing a receipt without reading it will not conclude him nor prevent explanation or denial of what it contains. Missouri Pac. R. Co. v. Lovelace, 57 Kan. 195, 45 P 590; Boardman v. Gaillard, 60 N. Y. 614 [aff 1 Hun 217, 3 Thomps. & C. 695]; Swanson v. White, 55 App. Div. 631, 66 NYS 787; Cornell v. Emigrant Industrial Sav. Bank, 9 NYSt 72; Elliot v. Logan, 62 N. C. 163. (2) This is especially true where the creditor was induced to sign the paper by the misrepresentation or fraud of the other party. Missouri Pac. R. Co. v. Lovelace, supra. (3) But where the party signing the receipt had an opportunity to read it and was chargeable with knowledge of its contents, his agent having read it, it is unconscionable that he should later be heard to say that he did not intend to do what the paper signed by him says he did. Sherman v. Sweeny, 29 Wash. 321, 69 P 1117.

Admissibility of parol evidence to vary or contradict receipt generally see Evidence § 1520.

5. U. S.—The Mary Paulina, 16 F. Cas. No. 9,224, 1 Sprague 45; Piehl v. Balchen, 19 F. Cas. No. 11,137, Olcott 24; Hughes v. U. S., 25 Ct. Cl. 472; Davis v. U. S., 17 Ct. Cl. 201; Dale v. U. S., 14 Ct. Cl. 514.

Ala.—Hare v. Hare, 195 Ala. 41, 70 S 630.

Ark.—National Union F. Ins. Co. v. Washington County School Dist. No. 60, 131 Ark. 547, 199 SW 924; National Trust, etc., Co. v. Polk, 123 Ark. 24, 183 SW 195; Greer v. Laws, 56 Ark. 37, 18 SW 1038.

Cal.—Breslauer v. McCormick-Saeltzer Co., 31 Cal. A. 284, 160 P 251.

Colo.—Moore v. Vickers, 3 Colo. A. 443, 34 P 257.

Conn.—Johnson v. Shuford, 91 Conn. 1, 98 A 333.

Del.—Derrickson v. Morris, 2 Del. 392; State v. Robinson, 2 Del. 5.

Fla.—Schmitt v. Bethea, 78 Fla. 304, 82 S 817.

Ga.—Dodd v. Mayson, 39 Ga. 605; Smith v. Cherokee Fertilizer Co., 24 Ga. A. 277, 100 SE 719.

Ill.—Rose v. Stoddard, 181 Ill. A. 405. See Dean v. Mavor Co., 209 Ill. A. 498.

Ind.—Kepler v. Jessup, 11 Ind. A. 241, 37 NE 655.

Iowa.—McGuire v. Interurban R. Co., 199 Iowa 203, 200 NW 55; Yardley v. Iowa Electric Co., 195 Iowa 380, 191 NW 791; Thompson v. Maxwell, 74 Iowa 415, 38 NW 125; Ford v. St. Louis, etc., R. Co., 54 Iowa 723, 7 NW 126.

Kan.—Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752; St. Louis, etc., R. Co. v. Davis, 35 Kan. 464, 11 P 421.

Ky.—Illinois Cent. R. Co. v. Manion, 113 Ky. 7, 67 SW 40, 23 KyL 2267, 101 AmSR 345; Newton v. Field, 98 Ky. 186, 32 SW 623, 17 KyL 769; Johnson v. Carneal, Litt. Sel. Cas. 172; Hitt v. Holliday, 2 Litt. 332; Dugan v. Harris, 6 KyL 597, 599, 13 Ky. Op. 297; Laird v. Laird, 6 KyL 584, 13 Ky. Op. 256.

La.—Ocean Tow-Boat Co. v. The Ophelia, 11 La. Ann. 28.

Me.—Duncan v. Grant, 87 Me. 429, 32 A 1000; Gilman v. Patten, 70 Me. 183; Patch v. King, 29 Me. 448.

Mass.—Grinnell v. Spink, 128 Mass. 25; Weddigen v. Boston Elastic Fabric Co., 100 Mass. 422; Taylor v. Wilson, 11 Metc. 44, 45 AmD 180; Tucker v. Maxwell, 11 Mass. 143.

Mich.—Gregory v. McNitt, 242 Mich. 506, 219 NW 710; Stone v. Steil, 230 Mich. 249, 202 NW 982; Dudgeon v. Haggart, 17 Mich. 273.

Minn.—Cappis v. Wiedemann, 86 Minn. 156, 90 NW 368.

Miss.—Dewees v. Bostwick Lumber, etc., Co., 96 Miss. 253, 50 S 865.

Nebr.—H. F. Cady Lumber Co. v. Greater America Exposition, 4 Nebr. (Unoff.) 268, 93 NW 961.

N. Y.—Syracuse, etc., R. Co. v. Collins, 57 N. Y. 641, 1 AbbNCas 47 [aff 3 Lans. 29]; Ryan v. Ward, 48 N. Y. 204, 8 AmR 539; Bradford v. Fox, 38 N. Y. 289, 7 Transcr. A. 254; Davis v. Allen, 3 N. Y. 168; Greenwich Ins. Co. v. Oregon Impr. Co., 76 Hun 194, 27 NYS 794 [aff 148 N. Y. 758 mem, 43 NE 987 mem]; Jobbitt v. Goundry, 29 Barb. 509; Carroll v. Sweet, 57 N. Y. Super. 100, 5 NYS 572 [rev on other grounds 128 N. Y. 19, 27 NE 763, 13 LRA 43]; Churchill v. Bradley, 43 N. Y. Super. 170; Rourke v. Story, 4 E. D. Smith 54; Hannon v. Gallagher, 19 Misc. 347, 43 NYS 492 [aff 44 NYS 1119 mem].

N. C.—Grant v. Hughes, 96 N. C. 177, 2 SE 339; Reid v. Reid, 13 N. C. 247, 18 AmD 570.

Or.—U. S. Fidelity, etc., Co. v. Martin, 77 Or. 369, 149 P 1023.

Pa.—In re McPherran, 212 Pa. 425, 61 A 954; Walker v. Tupper, 152 Pa. 1, 25 A 172; Megargel v. Megargel, 105 Pa. 475; Keim v. Kaufman, 15 Pa. Co. 539.

Philippine.—Manila v. Batlle, 25 Philippine 566.

S. C.—Dobbin v. Perry, 30 S. C. L. 32; Hogg v. Brown, 4 S. C. L. 223.

Vt.—Drown v. Chesley, 92 Vt. 19, 102 A 102, LRA1918A 1056; Bennett v. Flanagan, 54 Vt. 549.

W. Va.—Holcombe v. Laurel Creek Coal Co., 96 W. Va. 473, 123 SE 248; Whitten v. McDermitt, 83 W. Va. 62, 97 SE 585; Anderson v. Davis, 55 W. Va. 429, 47 SE 157.

Wis.—Catlin v. Wheeler, 49 Wis. 507, 5 NW 935.

And see cases infra notes 7–12.

[a] **An acknowledgment of the purchase money in the body of a deed** and the receipt indorsed thereon are only prima facie evidence of payment and may be rebutted by evidence. In re McPherran, 212 Pa. 425, 61 A 954.

[b] **As releasing obligation of contract.**—Where the buyer of a mercantile business agreed as part of the price to pay certain debts of the seller's, a subsequent receipt, signed by the seller, reciting that the amount named therein was in full payment of the price of the business, did not release the buyer from his obligation. National Trust, etc., Co. v. Polk, 123 Ark. 24, 183 SW 195.

Admissibility of parol evidence to vary or contradict receipt in full see Evidence § 1525.

6. Admission of parol evidence to vary or contradict receipt see Evidence §§ 1520–1525.

tacked on the ground of fraud,[7] ignorance,[8] mistake of fact,[9] duress,[10] or want of consideration,[11] or because it was executed by one who had no authority to do so;[12] but not on the ground of a mere mistake in the legal effect of the writing.[13] Where the debtor signs a receipt in full, believing it is only a receipt for a part payment, he need not return the money received in order to enable him to recover the balance due.[14]

Receipt under seal. Under the rules of common law, in the absence of a direct attack upon its validity, a receipt under seal is conclusive of the fact of payment.[15]

Payment by bill or note. Like other receipts,[16] a receipt of payment by bill or note is not conclusive upon the creditor.[17]

[§ 83] **2. Evidence To Overcome Receipt.**[18] It has been said that a receipt is evidence of a high order as to the truth of its recitals,[19] and so, although it is ordinarily for the jury to determine the weight to be given to statements contained in the receipt,[20] which may be overcome by any evidence calculated to satisfy the minds of the jury,[21] it is usually held that one attacking a receipt must establish the facts by a clear and unmistakable preponderance of the evidence.[22] Thus it has been said that a receipt can only be overcome by convincing,[23] clear and convincing,[24] clear and satisfactory,[25] or clear and direct[26] evidence, or by unequivocal testimony,[27] and that a receipt should only be set aside for weighty reasons.[28]

Genuineness of receipt. Where the genuineness of the receipt is disputed, however, the rule that a receipt's effect can be done away with only by clear

Evidence to overcome receipt see infra § 83.

7. Kan.—Missouri Pac. R. Co. v. Lovelace, 57 Kan. 195, 45 P 590.
Md.—Trisler v. Williamson, 4 Harr. & M. 219, 1 AmD 396.
N. H.—King v. Hutchins, 28 N. H. 561.
N. D.—Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008.
Pa.—Harris v. Hay, 111 Pa. 562, 4 A 715.
S. C.—Clarke v. Deveaux, 1 S. C. 172.

[a] **Receipt given for improper purpose.**—Where a party has for a fraudulent purpose given a receipt in common form, it may be shown by him that it does not state what is true, and that it was given for an improper purpose in an action between himself and a party at whose instigation such receipt was made. King v. Hutchins, 28 N. H. 561; Oliwill v. Verdenhalven, 15 NYS 94; Berryhill's App., 35 Pa. 245.

8. Anderson v. Armstead, 69 Ill. 452.

9. U. S.—Fire Ins. Assoc., Ltd. v. Wickham, 141 U. S. 564, 12 SCt 84, 35 L. ed. 860.
Ala.—Terst v. O'Neal, 108 Ala. 250, 19 S 307; Penney v. Grant, 16 Ala. A. 510, 79 S 271.
Ark.—National Union F. Ins. Co. v. Washington County School Dist. No. 60, 131 Ark. 547, 199 SW 924.
Del.—Nicholson v. Frazier, 4 Del. 206.
Nebr.—Shapleigh v. Dutcher, 15 Nebr. 563, 20 NW 32.
N. J.—Murphy v. Kastner, 50 N. J. Eq. 214, 24 A 564.
N. Y.—Boardman v. Gaillard, 60 N. Y. 614 mem [aff 1 Hun 217, 3 Thomps. & C. 695]; Swanson v. White, 55 App. Div. 631, 66 NYS 787; Cornell v. Emigrant Industrial Sav. Bank, 9 NYSt 72.
N. C.—Elliott v. Logan, 62 N. C. 163.
Pa.—Harris v. Hay, 111 Pa. 562, 4 A 715; Christiana Hardware, etc., Co. v. Sigle, 22 Pa. Dist. 647.
S. C.—Clarke v. Deveaux, 1 S. C. 172.
Wis.—Schultz v. Chicago, etc., R. Co., 44 Wis. 638; Smith v. Schulenberg, 34 Wis. 41; Butler v. Regents of Univ., 32 Wis. 124.
Eng.—Huckle v. London County, 20 T. L. R. 112.

[a] **Errors in overstating amount received** are not binding upon the person giving the receipt. Terst v. O'Neal, 108 Ala. 250, 19 S 307; Shapleigh v. Dutcher, 15 Nebr. 563, 20 NW 32.

10. The Galloway C. Morris, 9 F. Cas. No. 5,204, 2 Abb. 164; Worth v. Mumford, 1 Hilt. (N. Y.) 1.

[a] **What constitutes duress.**—Refusal to pay money admitted to be due except upon receiving a certain kind of receipt does not constitute such duress as to render the receipt void. Earle v. Berry, 27 R. I. 221, 61 A 671, 1 LRANS 867.

11. Kenny v. Kane, 50 N. J. L. 562, 14 A 597; Van Nest v. Talmage, 17 AbbPr (N. Y.) 99; Sparhawk v. Buell, 9 Vt. 41.

12. Heiskell v. Curtis, 49 App. (D. C.) 91, 259 Fed. 987; Levy v. Rust, (N. J. Ch.) 49 A 1017; Flemming v. Lawless, (N. J. Ch.) 36 A 502; Bristow v. Eastman, 1 Esp. 172, 170 Reprint 317.

13. Conant v. Kimball, 95 Wis. 550, 70 NW 74.

14. Fist v. Fist, 3 Colo. A. 273, 32 P 719.

15. State v. Messick, 6 Del. 347; Outten v. Knowles, 4 Del. 533; State v. Gott, 44 Md. 341.

Receipt of consideration or purchase money in deed see Deeds § 222.

16. See supra text and notes 4, 5.

17. U. S.—Harris v. Lindsay, 11 F. Cas. No. 6,124, 4 Wash. C. C. 271; In re Hurst, 12 F. Cas. No. 6,925, 1 Flipp. 462; Sutton v. The Albatross, 23 F. Cas. No. 13,645, 2 Wall. Jr. 327, 1 Phila. (Pa.) 423.
Ala.—New England Mortg. Security Co. v. Hirsch, 96 Ala. 232, 11 S 63.
Cal.—Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 P 28.
Miss.—Starling v. Wyatt, 27 S 526.
Mo.—Steamboat Charlotte v. Hammond, 9 Mo. 59, 43 AmD 536.
Nebr.—National L. Ins. Co. v. Goble, 51 Nebr. 5, 70 NW 503; H. F. Cady Lumber Co. v. Greater America Exposition, 4 Nebr. (Unoff.) 268, 93 NW 961.
N. J.—Joslin v. Giese, 59 N. J. L. 130, 36 A 680.
N. Y.—Wise v. Chase, 26 N. Y. Super. 35 [aff 44 N. Y. 337]; Siegel v. Kovinsky, 93 Misc. 541, 157 NYS 340 [aff 174 App. Div. 857 mem, 159 NYS 1142 mem]; Johnson v. Weed, 9 Johns. 310, 6 AmD 279; Putnam v. Lewis, 8 Johns. 389; Tobey v. Barber, 5 Johns. 68, 4 AmD 326.
Pa.—Collins v. Busch, 191 Pa. 549, 43 A 378; Patterson v. Wyomissing Woolen Mfg. Co., 2 Woodw. 215.
Vt.—Street v. Hall, 29 Vt. 165.
Ont.—Port Darlington Harbour Co. v. Squair, 18 U. C. Q. B. 533.

Payment by bill or note see supra §§ 40-49.

18. Admissibility of parol evidence to vary, explain, or contradict see Evidence §§ 1520-1525.

19. Heiskell v. Curtis, 49 App. (D. C.) 91, 259 Fed. 987; Winchester v. Grosvenor, 44 Ill. 425; Greenough v. Taylor, 17 Ill. 602; Connelly v. Sullivan, 119 Ill. A. 469; Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680; Whitten v. McDermitt, 83 W. Va. 62, 97 SE 585.

[a] **As highest and most satisfactory character.**—(1) "A written receipt is evidence of the highest and most satisfactory character." Winchester v. Grosvenor, 44 Ill. 425, 427. To same effect Connelly v. Sullivan, 119 Ill. A. 469. (2) "While a receipt is evidence of great weight and importance it seems to us, however, that the declaration that it is 'of the highest and most satisfactory character' is not justified in view of the fact that it is not conclusive, but may be disputed and contradicted by parol evidence." Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 230, 94 A 680.

[b] **As raising strong presumption.**—Indorsement of credit on a note in pencil raises a strong presumption of payment. Greenough v. Taylor, 17 Ill. 602.

Receipt as prima facie evidence see supra § 80.

20. Gardner v. Ben Steele Weigher Mfg. Co., 142 Ill. A. 348; Herkimer v. Nigh, 10 Ill. A. 372.

Questions for court and jury when payment is in issue in general see infra §§ 269-274.

21. Gleason v. Sawyer, 22 N. H. 85.

22. New York, etc., Mail SS. Co. v. Texas Co., 282 Fed. 221; Ennis v. Pullman Palace-Car Co., 165 Ill. 161, 46 NE 439; Fitzgerald v. Coleman, 114 Ill. A. 25; Guhl v. Frank, 22 Pa. Super. 531; cases infra this note; and notes 23-28.

[a] **Evidence equally balanced.**—Where the evidence on one side is entitled to as much weight as the evidence on the other, the receipt will stand. Borden v. Hope, 21 La. Ann. 581; Crawford v. Forest Oil Co., 189 Pa. 415, 42 A 39; McKissick v. Martin, 12 Heisk. (Tenn.) 311; Breeder v. Parchman, (Tenn. Ch.) 54 SW 677.

[b] **Evidence held sufficient:** (1) to rebut receipt. Johnson v. Shuford, 91 Conn. 1, 98 A 333; Eshelman's Est., 143 Pa. 24, 21 A 905. (2) To show that indorsement and receipt held by debtor for the same amount were both executed for the same payment. Doty v. Janes, 28 Wis. 319. (3) To show forgery of receipt. Tucker v. Dominquez, 6 La. A. 599; Levy v. Rust, (N. J. Ch.) 49 A 1017; Flemming v. Lawless, (N. J. Ch.) 36 A 502; Hoffman v. Rauchmiller, 95 N. J. Eq. 500, 122 A 344.

[c] **Evidence held insufficient** to defeat presumptions arising from receipt. Partridge v. Northern Maine Seaport R. Co., 111 Me. 589, 90 A 618; Wherley v. Rowe, 106 Minn. 494, 119 NW 222; Mildorf v. Matthews, 171 NYS 215; National Cash Register Co. v. Kaufman, 123 NYS 983; In re Rhoads, 189 Pa. 460, 42 A 116; Stroh v. Holmes, 83 Pa. Super. 129; Paige v. Paige, 53 Pa. Super. 311; Kirkbride v. Keys Planing Mill Co., 116 Va. 680, 82 SE 750.

23. Winchester v. Grosvenor, 44 Ill. 425.

24. Weakley v. Mizell, 193 Ill. A. 494.

25. Jenne v. Burger, 120 Cal. 444, 52 P 706; Flaccus v. Wood, 260 Pa. 161, 103 A 549; Conant v. Kimball, 95 Wis. 550, 70 NW 74.

26. Stroh v. Holmes, 83 Pa. Super. 129.

27. Dugan v. Harris, 6 KyL 597, 599, 13 Ky. Op. 297.

28. MacDonald v. Piper, 193 Pa. 312, 44 A 455; In re Rhoads, 189 Pa.

and unmistakable evidence does not apply,[29] and the question is to be determined by a preponderance of the evidence.[30]

VII. APPLICATION OF[31]

[By S. Boyd Darling]

[§ 84] **A. Definition and Origin.** "Application of payments," also referred to as "appropriation of payments,"[32] and in the civil law as "imputation of payment,"[33] is the application of money or other form of payment to the discharge of one or more of several debts owing to the creditor by the debtor.[34] The rules governing the application of payments have their origin in the civil law, but in this country, in so far as the common law prevails, the rules of the civil law have been greatly modified and in many respects entirely repudiated.[35]

[§ 85] **B. General Statement and Scope of Rule.** Payment will be applied as the debtor directs. If he does not apply at the time he makes his payment, the creditor has the same right if he exercises it within certain limitations of time. If the creditor does not, then the court makes an application[36] according to rules of law hereinafter stated.[37] While it has been said that the rule applies only where there are two debts,[38] and not to particular items of an entirety under an entire contract,[39] it is extended to a current account made up of different items constituting in the aggregate a single indebtedness[40] and to appropriations between principal and interest.[41] The rule is not confined to payments made in money but is extended to payments made in commodities or services,[42] provided the debtor's prior right to direct application,[43] or the rule in other respects, is not impaired.[44]

[§ 86] **C. Applicability to Involuntary Payments.**[45] The rule giving a debtor or creditor a right to direct application of voluntary payments has no application to involuntary payments,[46] such as result from an execution[47] or judicial sales.[48] In such cases neither the debtor[49] nor, as it is generally held, the creditor[50] has a right to make an application, although there is some authority to the effect that the creditor has the right to direct the application of involuntary as well as voluntary payments,[51] especially where necessary to secure to himself the benefit of all the security to which under contract he is entitled.[52] In cases where neither

460, 42 A 116; Paige v. Paige, 53 Pa. Super. 311.

29. Snodgrass v. Nelson, 48 Ill. A. 121.

30. Snodgrass v. Nelson, supra.

[a] **Evidence held sufficient** to show that defendant's signature to the receipt was genuine. Guice v. Mason, 156 La. 201, 100 S 397.

31. Application of:
Deposits by bank see Banks and Banking §§ 351–363.
Payments:
By particular persons see Agency § 228; Partnership §§ 335, 594.
Of rent see Landlord and Tenant §§ 1284, 1285.
Of Usury see Usury [39 Cyc 1026].
On mortgage debt see generally Mortgages § 911.
To building and loan associations see Building and Loan Associations §§ 114–118.
To particular persons see Agency § 273; Executors and Administrators § 450; Partnership § 335; Taxation [37 Cyc 1169].

32. Gwin v. McLean, 62 Miss. 121.

33. See La. Civ. Code §§ 2163–2166.

34. Gwin v. McLean, 62 Miss. 121; Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 AmD 691. See Wrightsville Bank v. Merchants', etc., Bank, 119 Ga. 288, 46 SE 94 (holding that an instruction making use of the term "application of payment" with reference to dealings between debtor and creditor did not prejudice the rights of defendant who was guarantor of payment of the debt and to whom the rule of application of payments was in no way applicable).

35. Murdock v. Clarke, 88 Cal. 384, 26 P 601; Jackson v. Moore, 39 Okl. 234, 134 P 1114.

36. Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 AmD 691.

37. See infra §§ 106–122.

38. Lamprell v. Billericay Union, 3 Exch. 283, 154 Reprint 850.

39. Scannell v. Hub Brewing Co., 178 Mass. 288, 292, 59 NE 628.
"Under an entire contract of course there is no such thing as an appropriation of payments to particular items of the entirety." Scannell v. Hub Brewing Co., supra.

[a] **Construction contract.**—A payment under a construction contract cannot be applied to the labor account in the absence of express appropriation by the parties themselves. Scannell v. Hub Brewing Co., 178 Mass. 288, 59 NE 628.

[b] **When notes are merged in a judgment,** the debtor has not the right to pay them in severalty or to appropriate payments otherwise than as credits upon the judgment as a whole. Cowgill v. Robberson, 75 Mo. A. 412.

40. See infra § 111.

41. See infra §§ 119–122.

42. See cases infra this note.

[a] **Medium of payment.**—(1) Corn. Born v. Union El. Co., 67 Ind. A. 97, 118 NE 973, 119 NE 216. (2) Credits. Union Trust, etc., Bank v. Southern Tract. Co., 283 Fed. 50 [certiorari den 260 U. S. 744 mem, 43 SCt 166 mem, 67 L. ed. 492 mem]. (3) Monthly credits to which an employee is entitled. Carson v. Cook County Liquor Co., 37 Okl. 12, 130 P 303, AnnCas1915B 695. (4) Crops. Thatcher v. Tillory, 30 Tex. Civ. A. 327, 70 SW 782. (5) Draft. Moorehead v. West Branch Bank, 3 Watts & S. (Pa.) 550. (6) Services. Young v. Harris, 36 Ark. 162.

43. Union Trust, etc., Bank v. Southern Tract. Co., 283 Fed. 50 [certiorari den 260 U. S. 744 mem, 43 SCt 166 mem, 67 L. ed. 492 mem]; Young v. Harris, 36 Ark. 162; Cass v. McDonald, 39 Vt. 65.

[a] **Crediting services on note.**—A debtor works for his creditor five days and charges for the services in his book with the intention that the credit would be allowed in adjusting their mutual accounts. The creditor has no right without the knowledge or consent of the debtor to credit the services on a note which he holds against the debtor. Cass v. McDonald, 39 Vt. 65.

[b] **Crediting services on purchase price of land.**—A purchaser of land at a fixed price, payable in services for a definite term, is entitled to credit, in a suit for specific performance, for so much of the term as he served, and the vendor cannot apply the credit to another account. Young v. Harris, 36 Ark. 162.

44. Thatcher v. Tillory, 30 Tex. Civ. A. 327, 70 SW 782.

45. Application by court to involuntary payments see infra § 108.

46. Cal.—Ohio Electric Car Co. v. Le Sage, 198 Cal. 705, 247 P 190.
Ga.—Citizens', etc., Bank v. Armstrong, 22 Ga. A. 138, 95 SE 729.
Ill.—In re Cunningham, 311 Ill. 311, 142 NE 740.
Ind.—Bond v. Armstrong, 88 Ind. 65.
N. Y.—Silverman v. Rubenstein, 162 NYS 733.
Pa.—Herr v. Lancaster Trust Co., 237 Pa. 344, 85 A 443; Bergdoll v. Sopp, 227 Pa. 363, 76 A 64; Pennsylvania L. Ins., etc., Co. v. H. Clausen, etc., Brewing Co., 3 Pa. Cas. 408, 7 A 70; Union Trust Co. v. Mowrer, 64 Pa. Super. 257, 261 [cit Cyc].
Tex.—Miller v. White, (Civ. A.) 264 SW 176.
Vt.—Wetmore, etc., Granite Co. v. Ryle, 93 Vt. 245, 107 A 109.
Ont.—Corham v. Kingston, 17 Ont. 432.

47. Nichols v. Knowles, 17 Fed. 494, 3 McCrary 477.
Distribution of proceeds of execution sale see Executions § 694.

48. See Judicial Sales § 99; Mortgages § 2004 et seq.

49. Iowa.—Van Buren County Sav. Bank v. Rockwell, 154 Iowa 26, 134 NW 424, 425 [cit Cyc].
Mass.—Blackstone Bank v. Bill, 10 Pick. 129.
Pa.—Pennsylvania L. Ins., etc., Co. v. H. Clausen, etc., Brewing Co., 3 Pa. Cas. 408, 7 A 70.
Tex.—Blair v. Teel, (Civ. A.) 152 SW 878, 882 [cit Cyc].
Vt.—Wetmore, etc., Granite Co. v. Ryle, 93 Vt. 245, 107 A 109.

50. Ga.—Citizens', etc., Bank v. Armstrong, 22 Ga. A. 138, 95 SE 729.
Ind.—Bond v. Armstrong, 88 Ind. 65.
Mass.—Blackstone Bank v. Hill, 10 Pick. 129.
N. H.—Merrimack County Bank v. Brown, 12 N. H. 320.
N. Y.—Orleans County Nat. Bank v. Moore, 112 N. Y. 543, 20 NE 357, 8 AmSR 775, 3 LRA 302; Silverman v. Rubenstein, 162 NYS 733.
Pa.—Herr v. Lancaster Trust Co., 237 Pa. 344, 85 A 443; Bergdoll v. Sopp, 227 Pa. 363, 76 A 64; Pennsylvania L. Ins., etc., Co. v. H. Clausen, etc., Brewing Co., 3 Pa. Cas. 408, 7 A 70; Union Trust Co. v. Mowrer, 64 Pa. Super. 257, 261 [cit Cyc].
Tex.—Miller v. White, (Civ. A.) 264 SW 176, 179 [cit Cyc].
Vt.—Wetmore, etc., Granite Co. v. Ryle, 93 Vt. 245, 107 A 109.
Ont.—Corham v. Kingston, 17 Ont. 432.

51. Dime Sav., etc., Co. v. O'Rourke, 21 Oh. Cir. Ct. N. S. 370.

52. Small v. Older, 57 Iowa 326, 10

the debtor nor creditor has such right, the application is determined on equitable principles,[53] pro rata in some cases,[54] to the unsecured in preference to the secured claims in other cases,[55] and under other circumstances to the secured claims in preference to the unsecured.[56]

[§ 87] **D. By Debtor—1. Rights of Debtor.** A debtor paying money to his creditor has the primary and paramount right to direct the application of his money to such items or demands as he chooses,[57]

NW 734; Sturgeon Sav. Bank v. Riggs, 72 Mo. A. 239.

53. Ohio Electric Car Co. v. Le Sage, 198 Cal. 705, 247 P 190; Gunn v. Carter, 69 Ga. 646; Citizens', etc., Bank v. Armstrong, 22 Ga. A. 138, 95 SE 729; Silverman v. Rubenstein, 162 NYS 733; Wetmore, etc., Granite Co. v. Ryle, 93 Vt. 245, 107 A 109.

54. Ga.—Citizens', etc., Bank v. Armstrong, 22 Ga. A. 138, 95 SE 729.

Ind.—Bond v. Armstrong, 88 Ind. 65; Indiana Trust Co. v. International Bldg., etc., Assoc., 35 Ind. A. 685, 74 NE 633.

La.—Interstate Trust, etc., Co. v. Young, 135 La. 465, 65 S 611.

Mass.—Browning v. Carson, 163 Mass. 255, 39 NE 1037.

Mich.—Shelden v. Bennett, 44 Mich. 634, 7 NW 223.

N. H.—Merrimack County Bank v. Brown, 12 N. H. 320.

N. Y.—Orleans County Nat. Bank v. Moore, 112 N. Y. 543, 20 NE 357, 8 AmSR 775, 3 LRA 302; Jones v. Benedict, 83 N. Y. 79; Silverman v. Rubenstein, 162 NYS 733.

Pa.—Union Trust Co. v. Mowrer, 64 Pa. Super. 257, 261 [cit Cyc].

Tex.—Miller v. White, (Civ. A.) 264 SW 176; Blair v. Teel, (Civ. A.) 152 SW 878, 882 [cit Cyc].

Vt.—Wetmore, etc., Granite Co. v. Ryle, 93 Vt. 245, 107 A 109.

Alta.—J. I. Case Threshing Mach. Co. v. Bolton, 2 Alta. L. 174.

Ont.—Hood. v. Coleman Planing Mill, etc., Co., 27 Ont. A. 203.

55. Ohio.—Electric Car Co. v. Le Sage, 198 Cal. 705, 247 P 190, 192 [quot Cyc]; Smith v. Moore, 112 Iowa 60, 83 NW 813; Hanson v. Manley, 72 Iowa 48, 33 NW 357; Linscott State Bank v. Maryland Fidelity, etc., Co., 94 Kan. 30, 36, 145 P 868 [quot Cyc]; Pope v. Transparent Ice Co., 91 Va. 79, 20 SE 940.

56. Smith v. Ettenberg, 75 Misc. 458, 133 NYS 463.

57. U. S.—U. S. v. Kirpatrick, 9 Wheat. 720, 6 L. ed. 199; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. ed. 384; In re Interborough Cons. Corp., 288 Fed. 334, 32 ALR 932 [aff 277 Fed. 249 (certiorari den Porges v. Sheffield, 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem, and Rothschild v. Sheffield, 262 U. S. 752 mem, 43 SCt 700 mem, 67 L. ed. 1215 mem)]; Nichols v. Knowles, 17 Fed. 494, 3 McCrary 477; Cremer v. Higginson, 6 F. Cas. No. 3,383, 1 Mason 323; Gordon v. Hobart, 10 F. Cas. No. 5,608, 2 Story 243; Leef v. Goodwin, 15 F. Cas. No. 8,207, Taney 460; Postmaster-Gen. v. Norvell, 18 F. Cas. No. 11,310, Gilp. 106; U. S. v. Bradbury, 24 F. Cas. No. 14,635, 2 Ware 150; U. S. v. Wardwell, 28 F. Cas. No. 16,640, 5 Mason 82.

Ala.—Whitt v. Leath, 213 Ala. 309, 311, 104 S 796 [cit Cyc]; Bell v. Bell, 174 Ala. 446, 56 S 926, 37 LRANS 1203; Lynn v. Bean, 141 Ala. 236, 37 S 515; McCurdy v. Middleton, 82 Ala. 131, 2 S 721; Callahan v. Boazman, 21 Ala. 246; McDonnell v. Montgomery Branch Bank, 20 Ala. 313.

Ark.—Augusta Cooperage Co. v. Parham, 213 SW 737.

Cal.—Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Wendt v. Ross, 33 Cal. 650.

Colo.—Kingsbury v. Riverton-Wyoming Refining Co., 68 Colo. 581, 192 P 503; Boyd v. Watertown Agricultural Ins. Co., 20 Colo. A. 28, 76 P 986.

Conn.—Windsor Trust Co. v. Champigny, 105 Conn. 615, 136 A 556; Cavanaugh v. Marble, 80 Conn. 389, 68 A 853, 15 LRANS 127; Sherwood v. Haight, 26 Conn. 432; Selleck v. Sugar Hollow Turnpike Co., 13 Conn. 453.

Del.—Pickering v. Day, 2 Del. Ch. 333.

Fla.—Consolidated Naval Stores Co. v. Wilson, 82 Fla. 396, 90 S 461, 21 ALR 681; Petroutsa v. H. C. Schrader Co., 76 Fla. 574, 80 S 486; Randall v. Parramore, 1 Fla. 409.

Ga.—Jones v. Jones, 141 Ga. 727, 82 SE 451; Massengale v. Pounds, 108 Ga. 762, 33 SE 72; Coleman v. Slade, 75 Ga. 61; Whitaker v. Groover, 54 Ga. 174; Semmes v. Boykin, 27 Ga. 47; Hargroves v. Cooke, 15 Ga. 321; Rackley v. Pearce, 1 Ga. 241; Milford v. Shackelford, 17 Ga. A. 436, 87 SE 603; Benton-Shingler Co. v. Mills, 13 Ga. A. 632, 79 SE 755.

Ida.—Shull v. Lawrence, 32 Ida. 527, 186 P 246, 248 [cit Cyc].

Ill.—Murphy v. Schnell, 248 Ill. 182, 93 NE 738; Jackson v. Bailey, 12 Ill. 159; Bayley v. Wynkoop, 10 Ill. 449; McFarland v. Lewis, 3 Ill. 344; Hahn v. Geiger, 96 Ill. A. 104; Brinckerhoff v. Greenan, 85 Ill. A. 253.

Ind.—King v. Andrews, 30 Ind. 429; Forelander v. Hicks, 6 Ind. 448; Howland v. Rench, 7 Blackf. 236; Wipperman v. Hardy, 17 Ind. A. 142, 46 NE 537.

Iowa.—Pospishil v. Jensen, 205 Iowa 1360, 219 NW 507; Reichenbach v. City Trust, etc., Bank, 205 Iowa 1009, 218 NW 903; Goodman v. First Nat. Bank, 187 NW 441.

Kan.—Atwood-Carinder Hardware, etc., Co. v. Courtney, 115 Kan. 609, 223 P 1112; Crane Co. v. Wichita Union, etc., R. Co., 98 Kan. 336, 158 P 59.

Ky.—McDaniel v. Barnes, 5 Bush 183; Nutall v. Brannin, 5 Bush 11; Howard v. London Mfg. Co., 72 SW 771, 24 KyL 1934.

La.—Grand Lodge B. K. A. v. Murphy Constr. Co., 152 La. 123, 92 S 757; Robson v. McKoin, 18 La. Ann. 544; Slaughter v. Milling, 15 La. Ann. 526; Bloodworth v. Jacobs, 2 La. Ann. 24.

Me.—Treadwell v. Moore, 34 Me. 112; Starrett v. Barber, 20 Me. 457.

Md.—Calvert v. Carter, 18 Md. 73; Mitchell v. Dall, 4 Gill & J. 361; Gwinn v. Whitaker, 1 Harr. & J. 754; McTavish v. Carroll, 1 Md. Ch. 160.

Mass.—Richardson v. Woodbury, 12 Cush. 279.

Mich.—Harper v. Concrete Pub. Co., 166 Mich. 429, 131 NW 1112; Thayer v. Denton, 4 Mich. 192.

Minn.—Solomon v. Dreschler, 4 Minn. 278.

Miss.—Champenois v. Fort, 45 Miss. 355; Crisler v. McCoy, 33 Miss. 445; Baine v. Williams, 18 Miss. 113.

Mo.—Middleton v. Frame, 21 Mo. 412; Rolla Produce Co. v. American R. Express Co., 205 Mo. A. 646, 226 SW 582; Burchard v. Western Commercial Travelers Assoc., 139 Mo. A. 606, 123 SW 973; Missouri Cent. Lumber Co. v. Stewart, 78 Mo. A. 456.

Mont.—Monidah Trust v. Hruze, 62 Mont. 444, 205 P 232, 233 [cit Cyc].

Nebr.—Lincoln v. Lincoln St. R. Co., 67 Nebr. 469, 93 NW 766; Murray v. Schneider, 64 Nebr. 484, 90 NW 206.

N. H.—Bean v. Brown, 54 N. H. 395; Parks v. Ingram, 22 N. H. 283, 55 AmD 153; Caldwell v. Wentworth, 14 N. H. 431.

N. J.—Oliver v. Phelps, 20 N. J. L. 180; White v. Trumbull, 15 N. J. L. 314, 29 AmD 687; Woodruff v. McIntyre, (Ch.) 14 A 572; Leeds v. Gifford, 41 N. J. Eq. 464, 5 A 795 [aff 45 N. J. Eq. 245, 19 A 621].

N. Y.—Seymour v. Marvin, 11 Barb. 80; Pattison v. Hull, 9 Cow. 747.

N. C.—Thomas v. Beaufort Bank, 183 N. C. 508, 112 SE 27.

N. D.—Herold v. Hill, 41 N. D. 30, 169 NW 592; Hagen v. Dwyer, 36 N. D. 346, 162 NW 699; Langdon First Nat. Bank v. Prior, 10 N. D. 146, 86 NW 362.

Oh.—Eureka Ins. Co. v. Duble, 3 Oh. Dec. (Reprint) 316.

Okl.—Ardmore First Nat. Bank v. Gillam, 273 P 261; Horn v. Alexander, 90 Okl. 184, 216 P 926; Southwestern Surety Ins. Co. v. Neal, 81 Okl. 194, 197 P 439; D'Yarmett v. Cobe, 51 Okl. 113, 151 P 589; Cleveland Nat. Bank v. Amos, 37 Okl. 674, 133 P 204; Carson v. Cook County Liquor Co., 37 Okl. 12, 130 P 303, AnnCas 1915B 695.

Or.—Kruse v. Blair, 272 P 265.

Pa.—Kann v. Kann, 259 Pa. 583, 587, 103 A 369 [quot Cyc]; Patterson v. Van Loon, 186 Pa. 367, 40 A 495; Philadelphia v. Kelly, 166 Pa. 207, 31 A 47; Watt v. Hoch, 25 Pa. 411; Harker v. Conrad, 12 Serg. & R. 301, 14 AmD 691; Davis v. Wood. 1 Del. Co. 382.

Philippine.—Bachrach Garage, etc., Co., Inc. v. Golingco, 39 Philippine 912.

S. C.—Rhodus v. Goins, 129 S. C. 40, 123 SE 645; Reid v. Wells, 56 S. C. 435, 34 SE 401, 939; Carson v. Hill, 26 S. C. L. 76; McDonald v. Pickett, 18 S. C. L. 617; Black v. Shooler, 13 S. C. L. 293; Jones v. Kilgore, 19 S. C. Eq. 63; Sager v. Warley, 14 S. C. Eq. 26.

S. D.—Paxton, etc., Co. v. Starkweather, 26 S. D. 99, 128 NW 479.

Tex.—Proctor v. Marshall, 18 Tex. 63; Calhoun v. The Maccabees, (Commn. A.) 241 SW 101 [rev (Civ. A.) 225 SW 95 (reh den 242 SW 721)]; Murchison v. Davis, (Civ. A.) 4 SW (2d) 1016; Rampy v. Nance, (Civ. A.) 286 SW 294; Johnson v. Cox, (Civ. A.) 270 SW 892; Peck v. Powell, (Civ. A.) 259 SW 640 [rev on other grounds (Commn. A.) 271 SW 891]; Blocksom v. Guaranty State Bank, etc., Co., (Civ. A.) 241 SW 315; Faulkner v. Otto, (Civ. A.) 230 SW 447; Jenkins v. Morgan, (Civ. A.) 187 SW 1091, 1093 [cit Cyc]; Citizens' Lumber Co. v. Marr, (Civ. A.) 153 SW 660; Watson v. Dodson, (Civ. A.) 143 SW 329; Bonner Memorial Home v. Colin County Nat. Bank, 57 Tex. Civ. A. 313, 122 SW 430; Crawford v. Pancoast, (Civ. A.) 62 SW 559; Lowery v. Dickson, 1 Tex. A. Civ. Cas. § 497.

Vt.—Roakes v. Bailey, 55 Vt. 542; Rosseau v. Call, 14 Vt. 83; Robinson v. Doolittle, 12 Vt. 246; Briggs v. Williams, 2 Vt. 283.

Va.—Chapman v. Com., 25 Gratt. (66 Va.) 721.

W. Va.—Henderson v. Kessel, 93 W. Va. 60, 116 SE 68.

Wis.—Johnson v. New Richmond Bank, 188 Wis. 620, 206 NW 871; Hassard v. Tomkins, 108 Wis. 186, 84 NW 174; Jones v. Williams, 39 Wis. 300.

Eng.—In re Lysaght, [1903] 1 Ir. 235; Buchanan v. Findlay, 9 B. & C. 738, 17 ECL 329, 109 Reprint 274; Ex p. Hankey, 4 Deac. 1; Waugh v. Wren, 9 Jur. N. S. 365; Re Wheal Ludcot, etc., Cons. Mines Co., 21 L. T. Rep. N. S. 67; Manning v. Westerne, 2 Vern. Ch. 606, 23 Reprint 996.

N. B.—Albert v. Storey, 52 N. B. 495, [1925] 4 DomLR 374.

Ont.—Wilson v. Rykert, 14 Ont. 188.

Sask.—Matthewson v. Thompson, 19 Sask. L. 420, [1925] 2 DomLR 1211, [1925] 2 WestWkly 161.

[a] **"The reason for the rule** which confers upon the debtor the right primarily to direct the application of a payment voluntarily made by him is apparent. Until the money is actually paid over, it belongs to him, and he may do with it as he sees fit. If he makes a specific direction, the creditor must observe it or refuse to accept the payment. If he

provided the payment is a voluntary one,[58] and the debt to which application is directed is one owing from the debtor to the creditor to whom payment is made.[59] For example, the debtor may apply the payment to an illegal demand,[60] or to principal to the exclusion of interest,[61] or to a secured to the exclusion of an unsecured debt,[62] or may direct that the payment be applied equally on several obligations.[63] It is immaterial that the creditor is acting in a fiduciary capacity,[64] or that the debtor did not fully perform his contract.[65] The debtor's right to direct the application of a payment made by him may be limited by a condition to the acceptance of such payment imposed by the creditor,[66] or by his agreement with the creditor.[67] On the other hand, the debtor's application to a particular debt may be supported by contract between the parties providing for application to that debt.[68] And where dealings tantamount to an unqualified acceptance of payment by the creditor are shown, the debtor's application becomes effective through agreement of the parties,[69] even though the application is a departure from a previously existing contract between the parties.[70]

[§ 88] **2. Time for Appropriation.**[71] The weight of authority holds that the debtor must direct the application of his payment at or before the time of payment,[72] or at least before the creditor, acting on the debtor's omission, has done so.[73] But even where the creditor has failed to act, the debtor cannot direct application long after payment has been made,[74] or after controversy or litigation has been instituted.[75] Nor can the representative of the debtor direct application after his death of pay-

accepts and retains the money, the law will treat the payment as having been applied as directed." Monidah Trust Co. v. Hruze, 62 Mont. 444, 449, 205 P 232, 233 [cit Cyc].

[b] **Statutory provisions** to this effect merely enunciate the common-law rule. Frutig v. Trafton, 2 Cal. A. 47, 83 P 70.

58. See supra § 86.

59. Culpeper Nat. Bank v. Walter, 114 Va. 522, 77 SE 484.

[a] **Rule applied.**—Where several obligations have been assigned as collateral, the principal debtor cannot direct a payment by the obligor of one of such obligations to be applied to another of them. Pacific Acceptance Corp. v. Bank of Italy, 59 Cal. A. 76, 209 P 1024.

60. Me.—Phillips v. Moses, 65 Me. 70; Treadwell v. Moore, 34 Me. 112.

Mass.—Rohan v. Hanson, 11 Cush. 44.

Mo.—Shannon Commn. Co. v. Redman, 189 Mo. A. 477, 176 SW 1074.

N. H.—Lauten v. Rowan, 59 N. H. 215, 217.

N. J.—Williamson v. New Jersey Southern R. Co., 28 N. J. Eq. 277 [rev on other grounds 29 N. J. Eq. 311].

"The question is not whether, in law, he can be compelled to pay the illegal debt, but whether, in fact he did pay it. His application of money to the payment of a particular debt is nothing more than his payment of that debt. His payment of the illegal claim was legal. State v. Rand, 51 N. H. 361. And if it were not, the law would not change it into a payment of some other claim. His lawful purpose of paying that item was irrevocably executed by his delivery of the money, as the plaintiff's purpose of violating the law was irrevocably executed by his delivery of the liquor. He paid the item which he intended to pay." Lauten v. Rowan, supra.

"The claim may be one which the law will not enforce, it may be in violation of its provisions, and the party paying may have the right to recover it back, still the money must be applied by the party receiving it, as the debtor when making the payment shall direct. When however the creditor has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made, the law will afterwards apply it in discharge of the demand which it acknowledges, and not that which it prohibits." Treadwell v. Moore, 34 Me. 112, 114.

Application by:
Court see infra § 114.
Creditor see infra § 98.

61. Kann v. Kann, 259 Pa. 583, 103 A 369; Pindall v. Marietta Bank, 10 Leigh (37 Va.) 481; Deacon v. Webb, 2 OntWR 110. Contra Johnson v. Robbins, 20 La. Ann. 569.

Application by:
Court see infra §§ 119–122.
Creditor see infra § 95.

62. Bonner Memorial Home v. Colin County Nat. Bank, 57 Tex. Civ. A. 313, 122 SW 430.

Application by:
Court see infra §§ 112, 113.
Creditor see infra § 94.

63. Consolidated Naval Stores Co. v. Wilson, 82 Fla. 396, 90 S 461, 21 ALR 681; McGaffey v. Mathie, 68 Vt. 403, 35 A 334.

Application by court see infra § 117.

64. Miller v. Trevilian, 2 Rob. (41 Va.) 1.

65. Gopcevic v. California Packing Corp., 64 Cal. A. 132, 220 P 1078.

66. Sproul v. Help Yourself Store Co., 16 F. (2d) 554; Kent v. Brosseau, 30 Que. Super. 443.

67. McCord v. Bridges, 209 Ala. 529, 96 S 432; Patrick v. Deschamp, 145 Wis. 224, 129 NW 1096.

[a] **Mortgage obligations.**—Where, by contract, a mortgage of a portable sawmill and other machinery was made a part of another contract for the cutting of timber on land to which plaintiff had a timber deed, and by express agreement the mortgage was to operate as security for advances, past and future, defendant could not direct the application of payments to the mortgage by splitting the general account. McCord v. Bridges, 209 Ala. 529, 96 S 432.

[b] **Contracts held not to prevent application.**—(1) An agreement to pay for goods out of the proceeds of sale of such goods and of other goods owned by the purchaser does not deprive the debtor of his right to apply payments to debts other than that incurred by purchase of these particular goods. Stewart v. Hopkins, 30 Oh. St. 502 [aff 104 U. S. 303, 26 L. ed. 769]. (2) A debtor's right to apply payments is not curtailed in any way by an agreement between his creditor and a third person contingent upon the debtor's payment of money to such third person. Peck v. Powell, (Tex. Civ. A.) 259 SW 640 [rev on other grounds (Commn. A.) 271 SW 891].

68. Gopcevic v. California Packing Corp., 63 Cal. A. 132, 220 P 1078.

69. Ala.—Bell v. McKay, 196 Ala. 408, 72 S 83.

Ill.—Royal Colliery Co. v. Alwart Bros. Coal Co., 276 Ill. 193, 114 NE 499.

Mass.—Spinney v. Freeman, 230 Mass. 356, 119 NE 798.

Mo.—Rolla Produce Co. v. American R. Express Co., 205 Mo. A. 646, 226 SW 582.

Mont.—Monidah Trust v. Hruze, 62 Mont. 444, 205 P 232, 233 [cit Cyc].

[a] **Acceptance constituting waiver.**—Where delay in making payments under a contract has given to the lessor a right to exercise his option to rescind, and a payment to the lessor's recently discharged agent is forwarded to the lessor with a statement that it was paid for a new period of extended service under the contract, the lessor's retention thereof is a waiver of prior defaults. Bell v. McKay, 196 Ala. 408, 72 S 83.

70. Riverside Milling, etc., Co. v. Cartersville Bank, 141 Ga. 578, 81 SE 892.

71. Appropriation by creditor see infra § 104.

72. Ala.—Pearce v. Walker, 103 Ala. 250, 15 S 568; McCurdy v. Middleton, 82 Ala. 131, 2 S 721.

Ark.—Lazarus v. Freidheim, 51 Ark. 371, 11 SW 518; Bell v. Radcliff, 32 Ark. 645

Cal.—Ray v. Borgfeldt, 169 Cal. 253, 146 P 679.

Ind.—Huffman v. Cauble, 86 Ind. 591; Taylor v. Jones, 1 Ind. 17; Taytor v. Jones, Smith 5.

La.—Bloodworth v. Jacobs, 2 La. Ann. 24.

N. Y.—California Bank v. Webb, 94 N. Y. 467; Pattison v. Hull, 9 Cow. 747.

N. C.—Thomas v. Beaufort Bank, 183 N. C. 508, 112 SE 27; Stone Co. v. Rich, 160 N. C. 161, 75 SE 1077, AnnCas1914C 244; Long v. Miller, 93 N. C. 233; Moss v. Adams, 39 N. C. 42.

N. D.—Fargo First Nat. Bank v. Roberts, 2 N. D. 195, 49 NW 722.

Okl.—Red Bank Oil Co. v. Cook, 115 Okl. 163, 242 P 198; Carson v. Cook County Liquor Co., 37 Okl. 12, 130 P 303, AnnCas1915B 695.

S. C.—Baum v. Trantham, 42 S. C. 104, 19 SC 973, 46 AmSR 697.

Tenn.—Reynolds v. McFarlane, 1 Overt. 488.

Tex.—Lowery v. Dickson, 1 Tex. A. Civ. Cas. § 497.

Wash.—Frazer v. Miller, 7 Wash. 521, 35 P 427.

Can.—St. John v. Rykert, 10 Can. S. C. 278.

73. Petty v. Dill, 53 Ala. 641; Dent v. State Bank, 12 Ala. 275.

[a] **After the credits have been entered by the creditor,** the debtor has lost his right. Burnett v. Sledge, 129 N. C. 114, 39 SE 775.

74. Dean v. Womack, 2 Tenn. Ch. A. 72.

[a] **Several notes.**—On the ground that he will not be allowed to make application of payments long after the payments were made, the maker of a series of three promissory notes who held back credits which he was entitled to apply on such notes, and instead got in the first two of such notes by conveying to the purchaser at judicial sale of such notes and very much less in value than such notes, on suit being afterward brought by the holder of the third note in such series, will be compelled to apply such credits so held back to the note first maturing and will not be allowed to apply them on the third note. Dean v. Womack, 2 Tenn. Ch. A. 72.

75. In re American Paper Co., 255

ments made by the debtor during his lifetime.[76] The debtor may direct application after payment if the creditor agrees to it,[77] and such agreement will be implied if subsequent payments are made on condition that prior payments shall be applied as directed and the creditor accepts the subsequent payments on that condition.[78] The debtor may designate the application after suit, if such payment was made upon an agreement which the creditor had repudiated.[79] So if the creditor procures possession of the money of his debtor, without his consent, unless it is by a legal proceeding binding upon the debtor, the latter does not thereby lose his right to make application of the funds so obtained to any one of several demands held by the creditor against him.[80]

[§ 89] **3. What Constitutes, and Sufficiency.**[81] A direction by the debtor as to the application of payments may be shown by an express agreement between the debtor and creditor,[82] or by the express declaration of the debtor,[83] a specific direction for application prevailing over a general direction, where they are in conflict.[84] Or direction of application may be implied from circumstances showing the debtor's intention.[85] For instance, as between a disputed demand and an admitted debt, the intention of the debtor is presumably to apply the payment to the admitted debt;[86] and as between a claim that he knew nothing about, and a debt of which he had knowledge, an intention to pay the known debt is presumed.[87] Where payment of one of two debts is demanded and payment is made in response to that demand,[88] or where inquiry by the debtor is made as to the amount of one of two debts and payment is then made in the stated amount,[89] an intention to apply the payment to the debt on which demand or inquiry is made is reasonably to be inferred. Payment of the exact sum due on one of two claims has been called "irrefragable evidence" to show that the sum was intended in payment of the claim it would exactly pay;[90] but by other authorities it is regarded as a circumstance which, in the absence of express direction, the jury might well consider in determining whether or not that was the intent of the debtor.[91] If the direction is given in words, these words must be communicated to the creditor,[92] and if circumstances are relied on as indicating the appropriation, knowledge of these circumstances must be traced to the creditor, since the mere intent of the debtor, not communicated to the creditor, nor attended by any act or declaration manifesting it to him, is insufficient.[93] But where,

Fed. 121; Lehigh Coal, etc., Co. v. McLeod, 114 Me. 427, 96 A 736; Richards v. Columbia, 55 N. H. 96.

76. Grigg v. Cocks, 4 Sim. 438, 6 EngCh 438, 58 Reprint 163.

77. Royal Colliery Co. v. Alwart Bros. Coal Co., 276 Ill. 193, 114 NE 499.

78. Royal Colliery Co. v. Alwart Bros. Coal Co., supra.

79. Littleton v. Harris, 69 Mo. A. 596.

80. Dennis v. Jones, 31 Miss. 606; Ardmore First Nat. Bank v. Gillam, (Okl.) 273 P 261.

81. **Application by creditor** see infra §§ 102, 103.

82. U. S.—Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999.

Ark.—Augusta Cooperage Co. v. Parham, 213 SW 737.

Cal.—Ray v. Borgfeldt, 169 Cal. 253, 146 P 679.

Ill.—Hansen v. Rounsavell, 74 Ill. 238; Hahn v. Geiger, 96 Ill. A. 104.

Ind.—Hughes v. McDougle, 17 Ind. 399.

Mass.—Rohan v. Hanson, 11 Cush. 44.

N. C.—Long v. U. S. Fidelity, etc., Co., 178 N. C. 503, 101 SE 11.

Pa.—Kann v. Kann, 259 Pa. 583, 103 A 369.

Vt.—Ballantine v. Fenn, 88 Vt. 166, 92 A 3.

Wash.—Ross-Higgins Co. v. Rook, 65 Wash. 546, 550, 118 P 744 [cit Cyc].

83. Milford v. Shackelford, 17 Ga. A. 436, 87 SE 603; Atwood-Carinder Hardware, etc., Co. v. Courtney, 115 Kan. 609, 223 P 1112; Terhune v. Colton, 12 N. J. Eq. 232 [aff 12 N. J. Eq. 312]; Wharton v. Lavender, 14 Lea (Tenn.) 178.

84. Standard Salt, etc., Co. v. Commercial Casualty Ins. Co., 171 Minn. 39, 213 NW 543.

85. U. S.—Tayloe v. Sandiford, 7 Wheat. 13, 5 L. ed. 384; Union Trust, etc., Bank v. Southern Tract. Co., 283 Fed. 50 [certiorari den 260 U. S. 744 mem, 43 SCt 166 mem, 67 L. ed. 492 mem]; Manning v. The Peerless, 80 Fed. 942.

Ala.—Pearce v. Walker, 103 Ala. 250, 15 S 568.

Cal.—Hanson v. Cordano, 96 Cal. 441, 31 P 457.

Colo.—Perot v. Cooper, 17 Colo. 80, 28 P 391, 31 AmSR 258.

Conn.—Cavanaugh v. Marble, 80 Conn. 389, 68 A 853, 15 LRANS 127.

Ill.—Dorris Lumber Co. v. Cummins, 157 Ill. A. 10.

Ind.—Ohio, etc., R. Co. v. Smith, 5 Ind. A. 36, 31 NE 371.

Ky.—Day v. Ewen, 140 Ky. 498, 131 SW 283; Forbes v. Morehead, 58 SW 982, 22 KyL 853.

Md.—Mitchell v. Dall, 2 Harr. & G. 159.

Miss.—Poindexter v. La Roche, 15 Miss. 699.

Mo.—Western Sash, etc., Co. v. Young, 48 Mo. A. 505.

N. J.—Terhune v. Colton, 12 N. J. Eq. 232 [aff 12 N. J. Eq. 312].

S. C.—Mulherin v. Stansell, 70 S. C. 568, 50 SE 497.

Vt.—Roakes v. Bailey, 55 Vt. 542.

Wyo.—Becker v. Hopper, 22 Wyo. 237, 138 P 179, AnnCas1916D 1041.

Eng.—Shaw v. Picton, 4 B. & C. 715, 10 ECL 771, 107 Reprint 1226, 28 Rev. Rep. 455; Peters v. Anderson, 5 Taunt. 596, 1 ECL 305, 128 Reprint 823; Parker v. Guinness, 27 T. L. R. 129.

Can.—St. John v. Rykert, 10 Can. S. C. 278.

Ont.—Charles v. Stewart, 11 OntWR 121.

"A person owing money under distinct contracts has, undoubtedly, a right to apply his payments to whichever debt he may choose; and although prudence might suggest an express direction of the application of his payments, at the time of their being made; yet there may be cases in which this power would be completely exercised, without any express direction given at the time. A direction may be evidenced by circumstances, as well as by words. A payment may be attended by circumstances which demonstrate its application, as completely as words could demonstrate it. A positive refusal to pay one debt, and an acknowledgment of . . . another, with a delivery of the sum due upon it would, we think, be such a circumstance." Per Marshall, C. J., in Tayloe v. Sandiford, 7 Wheat. (U. S.) 13, 20, 5 L. ed. 384.

[a] **Direction of application implied.**—(1) A direction in a lease. Plain v. Roth, 107 Ill. 588; Smith v. Wood, 1 N. J. Eq. 74. (2) An expression of a wish. Hansen v. Rounsavell, 74 Ill. 238. (3) Checks bearing the words "credit on note." Jennings v. Roberts, 130 Mo. A. 493, 109 SW 84. (4) Checks signed by new firm. Grant v. Matsubayashi, 31 B. C. 375, 70 Dom LR 553, [1922] 3 WestWkly 679. (5) Conversation between parties and expressed wishes of debtor. West Branch Bank v. Moorehead, 5 Watts & S. (Pa.) 542. (6) Dealings of parties. Phillips v. Moses, 65 Me. 70; French v. Richardson, 167 N. C. 41, 44, 83 SE 31 [cit Cyc]. (7) Debtor's knowledge of one debt only. Moose v. Marks, 116 N. C. 785, 21 SE 561. (8) Directing check for one thousand nine hundred and six dollars to be credited "on my note," correctly applied to note for two thousand dollars, rather than on other notes of five hundred dollars each. Harrison v. Huntsville First Nat. Bank, 117 Ark. 260, 174 SW 553. (9) Direction to factor not to sell but to hold for future sale as against debtor's note. Kempner v. Patrick, 43 Tex. Civ. A. 216, 95 SW 51. (10) Recital in a check. Scott v. Gilkey, 49 Ill. A. 116 [aff 153 Ill. 168, 39 NE 265]. (11) Retention of benefits. Driver v. Johnson, 211 Ala. 184, 100 S 116. (12) Statement by debtor that he was reserving money for payment of one account. Tayloe v. Sandiford, 7 Wheat. (U. S.) 13, 5 L. ed. 384.

[b] **Direction not implied.**—(1) Directions to "dispose" of goods as seems proper to the creditor. Sproule v. Samuel, 5 Ill. 135. (2) Remittances "for credit" or "to apply on account." Frutig v. Trafton, 2 Cal. A. 47, 83 P 70.

86. Culkin v. Matz, 27 Colo. A. 198, 149 P 270; Travis v. Mosley, 148 Miss. 368, 114 S 628; Parker v. Guinness, 27 T. L. R. 129. See Henderson v. Maysville Guano Co., 15 Ga. A. 69, 82 SE 588 (where the payment was made to a dual agent representing two claimants against the debtor, one of which claims was admitted, the other disputed).

87. Burchard v. Western Commercial Travelers Assoc., 139 Mo. A. 606, 123 SW 973.

88. Koehler v. Bierbaum, (Ky.) 122 SW 524, 526 [cit Cyc]; Smith v. Mould, 87 Misc. 199, 149 NYS 552 [mod on other grounds 170 App. Div. 930, 154 NYS 783]; Paxton, etc., Co. v. Starkweather, 26 S. D. 99, 128 NW 479.

89. New York, etc., Brewing Co. v. Angelo, 144 App. Div. 655, 129 NYS 713 [rearg den 145 App. Div. 940 mem, 130 NYS 1122 mem].

90. Marryatts v. White, 2 Stark. 101, 3 ECL 334, 171 Reprint 586.

91. Boyd v. Watertown Agricultural Ins. Co., 20 Colo. A. 28, 76 P 986; Adams Express Co. v. Black, 62 Ind. 128.

92. Pearce v. Walker, 103 Ala. 250, 15 S 568.

93. U. S.—Delaware Dredging Co. v. Tucker Stevedoring Co., 25 F. (2d) 44.

Ala.—Pearce v. Walker, 103 Ala.

through the creditor's fault, the debtor is ignorant of circumstances affecting the application of his payment, his intent prevails over any contrary application by the creditor.[94]

[§ 90] **4. Effect of Debtor's Application[95]—a. In General.** Where a debtor directs the manner in which his payment is to be applied, the creditor, if he accepts the payment,[96] must apply it accordingly,[97] the rule applying to payments by draft as well as to cash payments,[98] and to directions to pay a part of the value received to another creditor.[99] This rule also applies to payments which were made under agreement between the debtor and creditor as to their application.[1]

[§ 91] **b. On Creditor's Right To Divert Application.** The application of the payment cannot be diverted without the consent of the debtor,[2] even though the payment is made in property on which the creditor has a lien.[3] Nor can the creditor's diversion be justified by the circumstance that he could not lawfully accept the payment for application as directed, and that he would have had a right to accept it and apply it as he did in the absence of specific direction by the debtor.[4] Nor where there are several debts arising out of several contracts can the creditor justify an application of payment under one contract to the debt under another by claiming that there had been a breach of the contract under which payment was made.[5] But where the creditor qualifies his acceptance by attaching conditions or reservations thereto,[6] or where he applies the payment differently from the direction of the debtor,[7] the latter will be bound thereby if by acquiescence or other acts he indicates his acceptance of the con-

250, 15 S 568.

Ill.—Reiss v. Scherner, 87 Ill. A. 84.

N. J.—Turner v. Hill, 56 N. J. Eq. 293, 39 A 137; Terhune v. Colton, 12 N. J. Eq. 232.

S. C.—Brice v. Hamilton, 12 S. C. 32.

[a] **Direction of application proved.**—(1) Delivery of pay envelopes to employees with marks indicating for what week payment was made. In re Shantz, etc., Co., 205 Fed. 425. (2) Entry in book shown to the creditor. Frazer v. Bunn, 8 C. & P. 704, 34 ECL 973, 173 Reprint 682.

[b] **Direction not proved.**—A private, uncommunicated entry made by a debtor in his own books of account. Terhune v. Colton, 12 N. J. Eq. 232 [aff 12 N. J. Eq. 312]; Stone Co. v. Rich, 160 N. C. 161, 75 SE 1077, Ann Cas1914C 244; Manning v. Westerne, 2 Vern. Ch. 606, 23 Reprint 996.

94. Roakes v. Bailey, 55 Vt. 542.

95. Effect of creditor's application see infra § 105.

96. Wetherell v. Joy, 40 Me. 325; Christman v. Martin, 7 Pa. Super. 568.

[a] **A refusal to return drafts** after explicit direction as to their application will be regarded as an election to accept them for the purpose for which they are offered. Christman v. Martin, 7 Pa. Super. 568, 42 WklyNC 573.

[b] **Demand not due.**—If payment is offered on an account not due, the creditor need not receive it, but if he does receive it, he is bound to apply it in accordance with the directions of the debtor. Wetherell v. Joy, 40 Me. 325.

97. U. S.—In re Interborough Cons. Corp., 288 Fed. 334, 32 ALR 932; The Memnon, 62 Fed. 482, 10 CCA 502; Alexandria Bank v. Saunders, 2 F. Cas. No. 852, 2 Cranch C. C. 183.

Ala.—Perdue v. Brooks, 85 Ala. 459, 5 S 126.

Ark.—Atkinson v. Cox, 54 Ark. 444, 16 SW 124.

Cal.—Hanson v. Cordano, 96 Cal. 441, 31 P 457; Hardenbergh v. Bacon, 33 Cal. 356.

Conn.—City Coal, etc., Co. v. New Britain Inst., 59 A 33.

Ga.—Johnson v. Johnson, 30 Ga. 857.

Ind.—Carter v. Martin, 22 Ind. A. 445, 53 NE 1066; Wipperman v. Hardy, 17 Ind. A. 142, 46 NE 537.

Iowa.—Pospishil v. Jensen, 205 Iowa 1360, 219 NW 507.

Kan.—Crane Co. v. Wichita Union, etc., R. Co., 98 Kan. 336, 158 P 59.

Ky.—G. I. Frazier Co. v. Owensboro Stave, etc., Co., 162 Ky. 301, 172 SW 652; Bosley v. Porter, 4 J. J. Marsh. 621.

La.—Morse v. Brandt, 2 Mart. N. S. 515.

Md.—Lee v. Early, 44 Md. 80; Mitchell v. Dall, 4 Gill & J. 361, 2 Harr. & G. 159.

Mass.—Reed v. Boardman, 20 Pick. 441; Bonaffe v. Woodberry, 12 Pick. 456; Hussey v. Manufacturers', etc., Bank, 10 Pick. 415.

Miss.—Rosenbaum v. Meridian Nat. Bank, 73 Miss. 267, 18 S 549; Jones v. Perkins, 29 Miss. 139, 64 AmD 136.

Mo.—Western Sash, etc., Co. v. Young, 48 Mo. A. 505.

Nebr.—Durrell v. Todd, 31 Nebr. 256, 47 NW 862.

N. Y.—Goodman v. Snow, 81 Hun 225, 30 NYS 672; Allgoever v. Edmunds, 66 Barb. 579; Godfrey v. Warner, Lalor 32.

N. C.—Runyon v. Latham, 27 N. C. 551.

Oh.—Stewart v. Hopkins, 30 Oh. St. 502.

Pa.—Smuller v. Union Canal Co., 37 Pa. 68; Pearl v. Clark, 2 Pa. 350; Martin v. Draher, 5 Watts 544; Jamison v. Collins, 11 Phila. 258.

S. C.—Reid v. Wells, 56 S. C. 435, 34 SE 401, 939; Ellis v. Mason, 32 S. C. 277, 10 SE 1069.

Tex.—Bray v. Crain, 59 Tex. 649; Rugeley v. Smalley, 12 Tex. 238; Johnson v. Cox, (Civ. A.) 270 SW 892; Texarkana First Nat. Bank v. Munzesheimer, (Civ. A.) 26 SW 428; Kinnear v. Dilley, 3 Tex. A. Civ. Cas. § 406.

Ont.—Lowden v. Martin, 12 Ont. Pr. 496; Canada Powder Co. v. Burly, 9 U. C. C. P. 290.

[a] **Application directed to:** (1) Chattel mortgage. Hagen v. Dwyer, 36 N. D. 346, 162 NW 699. (2) Illegal claims then due. Caldwell v. Wentworth, 14 N. H. 431. (3) Items of well drilling account. Henderson v. Kessell, 93 W. Va. 60, 116 SE 68. (4) Land notes. Johnson v. Cox, (Tex. Civ. A.) 270 SW 892, 893 [cit Cyc]. (5) Mortgage. Marsh v. Vanness, 75 N. J. Eq. 607, 74 A 47. (6) Particular bridge construction account. Sparks v. Jasper County, 213 Mo. 218, 112 SW 265. (7) Particular construction account. Standard Salt, etc., Co. v. Commercial Casualty Ins. Co., 171 Minn. 39, 213 NW 543. (8) Particular debt on account space leased and services. Milwaukee Boston Store v. Katz, 153 Wis. 492, 140 NW 1038. (9) Particular items. Rolla Produce Co. v. American R. Express Co., 205 Mo. A. 646, 226 SW 582. (10) Particular note. Ross-Higgins Co. v. Rook, 65 Wash. 546, 118 P 744. (11) Principal. Monidah Trust v. Hruze, 62 Mont. 444, 205 P 232; Smith v. Mould, 87 Misc. 199, 149 NYS 552 [mod on other grounds 170 App. Div. 930, 154 NYS 783]; Kann v. Kann, 259 Pa. 583, 103 A 369; Tooke v. Bonds, 29 Tex. 419; Pindall v. Marietta Bank, 10 Leigh (37 Va.) 481. (12) Rent. Carberry v. Howell, 144 Miss. 549, 75 S 383. (13) Secured debt. Rhodus v. Goins, 129 S. C. 40, 123 SE 645. (14) Secured note. Harrison v. Huntsville First Nat. Bank, 117 Ark. 260, 174 SW 553, 555 [quot Cyc]; Goodman v. Logan First Nat. Bank, (Iowa) 187 NW 441.

98. Moorehead v. West Branch Bank, 3 Watts & S. (Pa.) 550.

99. Hall v. Marsten, 17 Mass. 575.

1. In re Cunningham, 311 Ill. 311, 142 NE 740 [mod 227 Ill. A. 124]; Putnam v. Live Oak Mercantile Co., 122 La. 507, 47 S 846; Mahomed Jan v. Ganga Bishun Singh, L. R. 38 Indian App. 80.

2. Ala.—Levystein v. Whitman, 59 Ala. 345.

Ga.—Jones v. Jones, 141 Ga. 727, 82 SE 451.

Ill.—Jackson v. Bailey, 12 Ill. 159.

Me.—Treadwell v. Moore, 34 Me. 112; Rundlett v. Small, 25 Me. 29.

Miss.—Carberry v. Howell, 114 Miss. 549, 75 S 383.

N. J.—Benson v. Reinshagen, 75 N. J. Eq. 358, 72 A 954.

N. D.—Hagen v. Dwyer, 36 N. D. 346, 162 NW 699.

Okl.—D'Yarmett v. Cobe, 51 Okl. 113, 151 P 589.

Tex.—Johnson v. Cox, (Civ. A.) 270 SW 892, 893 [cit Cyc]; Peck v. Powell, (Civ. A.) 259 SW 640 [rev on other grounds (Commn. A.) 271 SW 891].

3. Milford v. Shackelford, 17 Ga. A. 436, 87 SE 603.

4. Johnson, etc., Co. v. Longley Luncheon Co., 207 Mass. 52, 92 NE 1035.

5. Burton v. U. S., 51 Ct. Cl. 362.

6. Sproul v. Help Yourself Store Co., 16 F. (2d) 554.

7. U. S.—The Quickstep, 227 Fed. 355.

Ala.—Steiner v. Jeffries, 118 Ala. 573, 24 S 37.

Cal.—Cardinell v. O'Dowd, 43 Cal. 586.

Ga.—Bird v. Benton, 127 Ga. 371, 56 SE 450.

Ind. T.—Citizens' Bank v. Carey, 2 Ind. T. 84, 48 SW 1012.

Md.—Dorsey v. Wayman, 6 Gill 59.

Minn.—Flarsheim v. Brestrup, 43 Minn. 298, 45 NW 438.

N. Y.—Spencer Optical Mfg. Co. v. Jump, 10 NYSt 130.

N. C.—Bonner v. Styron, 113 N. C. 30, 18 SE 83.

Okl.—Cleveland Nat. Bank v. Amos, 37 Okl. 674, 133 P 204.

Or.—Sloan v. Sloan, 46 Or. 36, 78 P 893.

Vt.—Sawyer v. Howard, 86 Vt. 63, 83 A 535.

[a] **Renewal of note.**—Where a person, indebted on two separate notes, directs that a payment be applied upon a note designated, and the creditor applies it on the other note, the debtor's subsequent acceptance of the canceled note and renewal of the note on which he directed payment to be made is a ratification of the application. Cleveland Nat. Bank v. Amos, 37 Okl. 674, 133 P 204.

[b] **Accepting paid note and collateral.**—Where defendant, who was indebted to plaintiff on a number of notes, sent him a check after suit on the notes, requesting it to be applied on the suit, and plaintiff applied it to the earliest note, which was barred by limitations, but which was secured by a collateral note, defendant, who did not object when that note together with the collateral was returned to him, waived all right to demand that the payment be applied to those notes on which recovery

dition or reservation, or his ratification of the creditor's application. A failure to object after knowledge of the creditor's diversion to other accounts is not in itself alone acquiescence by the debtor within the meaning of this rule.[8] A fortiori, there is no acquiescence by the debtor where it is shown that he was ignorant of the creditor's diversion to other debts.[9] Nor does the fact that a debtor accepts receipts for payments as having been made "on account" estop him from showing that he directed the credits to be placed on another debt or account.[10]

[§ 92] **c. On Debtor's Right To Alter Application.** At the time of payment the debtor may change a direction previously made.[11] On the other hand, the debtor has no right, after the payment has been made, to change the application without the consent of the creditor.[12] For instance, the direction of the debtor, or his consent, to apply payments to an illegal or invalid debt cannot be changed without the consent of the creditor.[13] Nor can a debtor who pledges collateral on one account direct that it stand as security for another account without the creditor's consent.[14] But where a creditor consents to a change in the application made after payment, he will be bound,[15] and he is held to have given such consent where he retains a subsequent payment conditioned by the debtor on a change in the application of the earlier payment.[16]

[§ 93] **5. Liability of Creditor for Misappropriation.** A creditor who retains the payment but fails to apply it as directed is liable for breach of contract,[17] but to the debtor only.[18] He is not liable, however, in an action for money had and received where, notwithstanding the misapplication, the debtor has benefited thereby to the same extent as he would have if the payment had been applied as directed and where to allow a recovery would work an injustice to the creditor.[19]

[§ 94] **E. By Creditor[20]—1. Right To Apply—a. General Rule.** The general rule is that if the debtor makes no specific appropriation, the creditor may apply the payment to any one of the two or more debts owed him by such debtor,[21] although the civil-law rule allows the creditor to appropriate as he

might have been had. Sawyer v. Howard, 86 Vt. 63, 83 A 535.

8. Ballantine v. Fenn, 88 Vt. 166, 92 A 3.

9. Fargo First Nat. Bank v. Roberts, 2 N. D. 195, 49 NW 722.

[a] **Knowledge not proved.**—Where a debtor, before paying a number of notes, has directed part of the money to be applied on a certain note, the delivery to him by the creditor of a roll of notes tied together, which does not contain such note, with the remark that they are the notes taken up, does not constitute constructive notice of the creditor's application of the payment to others than the note in question, so as to create an estoppel against the debtor. Fargo First Nat. Bank v. Roberts, 2 N. D. 195, 49 NW 722.

10. Massengale v. Pounds, 108 Ga. 762, 33 SE 72; Eylar v. Read, 60 Tex. 387.

11. Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Talt v. Hackett, 2 Pa. Cas. 534, 4 A 383.

12. Ark.—Harrison v. Huntsville First Nat. Bank, 117 Ark. 260, 174 SW 553.

Cal.—Hammond Lumber Co. v. Henry, (A.) 261 P 1027; Flynn v. Seale, 2 Cal. A. 665, 84 P 263.

Mo.—Wear v. Schmelzer, 92 Mo. A. 314.

N. Y.—Hodge v. Hoppock, 75 N. Y. 491.

Tex.—Palm v. Johnson, (Civ. A.) 255 SW 1007.

W. Va.—Wait v. Homestead Bldg. Assoc., 81 W. Va. 702, 95 SE 203, 21 ALR 696.

Eng.—Hutchinson v. Heyworth, 9 A. & E. 375, 36 ECL 209, 112 Reprint 1254; Fisher v. Miller, 1 Bing. 150, 8 ECL 447, 130 Reprint 61; Yates v. Hoppe, 9 C. B. 541, 67 ECL 541, 137 Reprint 1003; Hamilton v. Spottiswoode, 4 Exch. 200, 154 Reprint 1182; Dickinson v. Marrow, 14 M. & W. 713, 153 Reprint 662; Walker v. Rostron, 9 M. & W. 411, 152 Reprint 174.

[a] **Mistake of debtor.**—The application by a receiver of a payment in accordance with the direction of the debtor will not be disturbed, after the receiver's death, on the ground of mistake of the debtor in the direction, in the absence of clear and convincing proof of such mistake. May v. Burns, 44 SW 83, 19 KyL 1595.

13. Conn.—Tomlinson Carriage Co. v. Kinsella, 31 Conn. 268.

La.—Boagni v. Pickett, 28 La. Ann. 606.

Me.—Camden Sav. Bank v. Cilley, 83 Me. 72, 21 A 746; Brown v. Burns, 67 Me. 535; Phillips v. Moses, 65 Me. 70.

Md.—Dorsey v. Wayman, 6 Gill 59.

Mass.—Hubbell v. Flint, 15 Gray 550; Richardson v. Woodbury, 12 Cush. 279.

Mich.—Thayer v. Denton, 4 Mich. 192.

N. H.—Caldwell v. Wentworth, 14 N. H. 431.

N. Y.—Johnston v. Dahlgren, 48 App. Div. 537, 62 NYS 1115 [aff 166 N. Y. 354, 59 NE 987].

[a] **Joint indebtedness.**—When a payment has been made on a debt which is due by one of two joint debtors, it cannot afterward be applied, even by the agreement of the creditor and paying debtor, to any other indebtedness. Thayer v. Denton, 4 Mich. 192.

14. Tipton v. Jonesboro Grocer Co., 166 Ark. 407, 266 SW 270.

15. Thompson v. Reeves, 170 Ark. 409, 279 SW 1011; Royal Colliery Co. v. Alwart Bros. Coal Co., 276 Ill. 193, 114 NE 499.

16. Royal Colliery Co. v. Alwart Bros. Coal Co., supra.

17. Sims v. Lester, 55 Ga. 620.

18. Sims v. Lester, supra.

19. Bruer v. Dunham, (Mo. A.) 209 SW 573.

20. Revival of debt barred by limitations see Limitations of Actions § 634.

21. U. S.—U. S. v. Kirpatrick, 9 Wheat. 720, 6 L. ed. 199; Virginia Securities Corp. v. Patrick Orchards, 20 F. (2d) 78; Farrell v. Philadelphia First Nat. Bank, 263 Fed. 778 [mod on other grounds 272 Fed. 371, 16 ALR 651 (certiorari den 257 U. S. 634 mem, 635 mem, 42 SCt 48 mem, 49 mem, 66 L. ed. 408 mem)]; In re Lindau, 183 Fed. 608; Holloway v. White-Dunham Shoe Co., 151 Fed. 216, 80 CCA 568, 10 LRANS 704; Sanborn v. Stark, 31 Fed. 18; Cremer v. Higginson, 6 F. Cas. No. 3,383, 1 Mason 323; Gordon v. Hobart, 10 F. Cas. No. 5,608, 2 Story 243; Leef v. Goodwin, 14 F. Cas. No. 8,207, Taney 460; Postmaster-Gen. v. Norvell, 19 F. Cas. No. 11,310, Gilp. 106; U. S. v. Bradbury, 24 F. Cas. No. 14,635, 2 Ware 150; U. S. v. Wardwell, 28 F. Cas. No. 16,640, 5 Mason 82; Whetmore v. Murdock, 29 F. Cas. No. 17,510, 3 Woodb. & M. 390.

Ala.—Monroe Stock, etc., Co. v. Thames, 211 Ala. 320, 100 S 348; Hall v. Nix, 156 Ala. 423, 47 S 335; McCurdy v. Middleton, 82 Ala. 131, 2 S 721; Johnson v. Thomas, 77 Ala. 367; Bobe v. Stickney, 36 Ala. 482; Callahan v. Boazman, 21 Ala. 246; McDonnell v. Montgomery Branch Bank, 20 Ala. 313.

Ark.—Toland v. Forbes, 12 SW (2d) 402; Lyon v. Bass, 76 Ark. 534, 89 SW 849; Gates v. Burkett, 44 Ark. 90; Bell v. Radcliff, 32 Ark. 645; Armistead v. Brooke, 18 Ark. 521.

Cal.—Byrnes v. Claffey, 69 Cal. 120, 10 P 321; Wendt v. Ross, 33 Cal. 650.

Colo.—Perot v. Cooper, 17 Colo. 80, 28 P 391, 31 AmSR 258.

Conn.—Sagal v. Mann, 89 Conn. 576, 95 A 6; Nichols v. Culver, 51 Conn. 177; Selleck v. Sugar Hollow Trunpike Co., 13 Conn. 453.

Del.—Pickering v. Day, 2 Del. Ch. 333.

Fla.—Petroutsa v. Schrader Co., 76 Fla. 574, 80 S 486; Randall v. Parramore, 1 Fla. 409.

Ga.—Lowenstein v. Meyer, 114 Ga. 709, 40 SE 726; Coleman v. Slade, 75 Ga. 61; Greer v. Burnam, 71 Ga. 31; Perry v. Bozeman, 67 Ga. 643; Whitaker v. Groover, 54 Ga. 174; Horne v. Planters' Bank, 32 Ga. 1; Hargroves v. Cooke, 15 Ga. 321; Rackley v. Pearce, 1 Ga. 241; Neal v. Harber, 35 Ga. A. 628, 134 SE 347; Payne v. Seagars, 13 Ga. A. 101, 78 SE 829; Baumgartner v. McKinnon, 10 Ga. A. 219, 73 SE 519.

Ida.—Smith v. Thomas, 42 Ida. 375, 245 P 399, 400 [cit Cyc].

Ill.—Liese v. Hentze, 326 Ill. 633, 158 NE 428; Wellman v. Miner, 179 Ill. 326, 53 NE 609; Stone v. Billings, 167 Ill. 170, 47 NE 372; Davis Sewing Mach. Co. v. Buckles, 89 Ill. 237; Bayley v. Wynkoop, 10 Ill. 449; McFarland v. Lewis, 3 Ill. 344; Graff v. Fox, 204 Ill. A. 598; North Shore Hardware Co. v. D'Arcy, 177 Ill. A. 329; Harding v. Harding, 120 Ill. A. 389; Miller v. Hawes, 58 Ill. A. 667.

Ind.—King v. Andrews, 30 Ind. 429; Howland v. Rench, 7 Blackf. 236; Shea v. People's Coal, etc., Co., (A.) 161 NE 849.

Iowa.—Baker v. Gladbrook First Nat. Bank, 219 NW 511; Hatch v. Kula, 195 Iowa 619, 190 NW 969; Bankers' Loan, etc., Co. v. Mapleton First Nat. Bank, 191 Iowa 119, 181 NW 791; Arthaud v. Farmers', etc., State Bank, 178 NW 342; Farmers' Sav. Bank v. Newton, 154 Iowa 49, 134 NW 436; Keairnes v. Durst, 110 Iowa 114, 81 NW 238; Heaton v. Ainley, 108 Iowa 112, 78 NW 798; Fargo v. Buell, 21 Iowa 292.

Kan.—Hutchinson First Presb. Church v. Santy, 52 Kan. 462, 34 P 974.

Ky.—Ratliff v. Anderson, 195 Ky. 320, 242 SW 35; Thacker v. Bullock Lumber Co., 140 Ky. 463, 131 SW 271; McDaniel v. Barnes, 5 Bush 183; Nutall v. Brannin, 5 Bush 11; Hillyer v. Vaughan, 1 J. J. Marsh. 583.

La.—Flower v. O'Bannon, 43 La. Ann. 1042, 10 S 376; Bloodworth v. Jacobs, 2 La. Ann. 24.

Me.—Starrett v. Barber, 20 Me. 457.

Md.—Calvert v. Carter, 18 Md. 73; Mitchell v. Dall, 4 Gill & J. 361; Mitchell v. Dall, 2 Harr. & G. 159; Gwinn v. Whitaker, 1 Harr. & J. 754; McTavish v. Carroll, 1 Md. Ch. 160.

Mass.—Henry Bill Pub. Co. v. Utley, 155 Mass. 366, 29 NE 635.

Mich.—Peo. v. Rosewarne, 224 NW

pleases only when the appropriation is a matter of indifference to the debtor;[22] and it has also been said that, under special circumstances raising reasonable inferences as to the intention of the party paying, the law takes the option out of the hands of the creditor and makes the appropriation in accordance with the presumed intention of the debtor.[23] Following the common-law rule,[24] it has been held that the creditor may apply a payment either on a note or on an account,[25] or on one of several notes or bills,[26] or apportion the payment among several notes, bills, or bonds,[27] even though the debtor when he made the payment had forgotten that some of the notes existed,[28] or distribute it between other debts.[29] The rule applies also to payments on a judgment rendered on two or more debts,[30] provided only that application is made in reduction of the judgment;[31] to payments on a mortgage securing

373; Vosburgh v. Middleditch, 214 Mich. 489, 183 NW 208; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 157 NW 96; Van Sceiver v. King, 176 Mich. 605, 142 NW 1069; Harper v. Concrete Pub. Co., 166 Mich. 429, 131 NW 1112; People v. Grant, 139 Mich. 26, 102 NW 226.

Minn.—Hawver v. Ingalls, 93 Minn. 371, 101 NW 604; Newell v. Houlton, 22 Minn. 19; Solomon v. Dreschler, 4 Minn. 278.

Miss.—Champenois v. Fort, 45 Miss. 355; Crisler v. McCoy, 33 Miss. 445; Baine v. Williams, 13 Miss. 113.

Mo.—State v. Blakemore, 275 Mo. 695, 205 SW 626; Cox v. Sloan, 158 Mo. 430, 57 SW 1052; Thorn, etc., Lime, etc., Co. v. Citizens' Bank, 158 Mo. 272, 59 SW 109; Middleton v. Frame, 21 Mo. 412; Brady v. Hill, 1 Mo. 315, 13 AmD 503; Julius Seidel Lumber Co. v. Weaver, (A.) 184 SW 484; J. I. Case Threshing Mach. Co. v. Matthews, 188 Mo. A. 429, 436, 174 SW 198, 200; Miller v. Miller, 169 Mo. A. 432, 155 SW 76; Wilson-Reheis-Rolfes Lumber Co. v. Ware, 158 Mo. A. 179, 138 SW 690.

Mont.—Conrad Mercantile Co. v. Siler, 75 Mont. 36, 241 P 617.

Nebr.—Lenzen v. Miller, 53 Nebr. 137, 73 NW 460.

Nev.—Capron v. Strout, 11 Nev. 304.

N. H.—Bean v. Brown, 54 N. H. 395; Parks v. Ingram, 22 N. H. 283, 55 AmD 153; Caldwell v. Wentworth, 14 N. H. 431; Sawyer v. Tappan, 14 N. H. 352.

N. J.—Oliver v. Phelps, 20 N. J. L. 180; White v. Trumbull, 15 N. J. L. 314, 29 AmD 687; Grover v. Franklin Tp. Bd. of Education, (Ch.) 141 A 81; Benson v. Reinshagen, 75 N. J. Eq. 358, 72 A 954; Leeds v. Gifford, 41 N. J. Eq. 464, 5 A 795 [aff 45 N. J. Eq. 245, 19 A 621]; Bird v. Davis, 14 N. J. Eq. 467; Terhune v. Colton, 12 N. J. Eq. 232 [aff 12 N. J. Eq. 312]; Smith v. Wood, 1 N. J. Eq. 74.

N. Y.—Mack v. Colleran, 136 N. Y. 617, 32 NE 604; California Bank v. Webb, 94 N. Y. 467; Newburgh Nat. Bank v. Bigler, 83 N. Y. 51 [aff 18 Hun 400]; Shipsey v. Bowery Nat. Bank, 59 N. Y. 485 [rev 36 N. Y. Super. 501]; North American Fisheries, etc. v. Green, 195 App. Div. 250, 186 NYS 313; Orr v. Nagle, 87 Hun 12, 33 NYS 879; Farren v. McDonnell, 74 Hun 176, 26 NYS 619 [aff 148 N. Y. 741, 42 NE 1093]; Seymour v. Marvin, 11 Barb. 80; California Bank v. Webb, 48 N. Y. Super. 175 [aff 94 N. Y. 467]; Berrian v. New York, 27 N. Y. Super. 538; Smith v. Applegate, 1 Daly 91; Merrill v. Equitable Surety Co., 131 Misc. 541, 227 NYS 266; Philippine Nat. Bank v. Bowring, 123 Misc. 89, 204 NYS 327 [aff 213 App. Div. 809 mem, 208 NYS 922 mem (aff 240 N. Y. 658 mem, 148 NE 747 mem)]; Barth v. Schmitz, 103 Misc. 267, 170 NYS 51; Wehle v. Schmidt, 13 NYSt 411.

N. C.—Long v. Miller, 93 N. C. 233; Sprinkle v. Martin, 72 N. C. 92; Moss v. Adams, 39 N. C. 42; Hamilton v. Benbury, 3 N. C. 385.

Oh.—Hopkins v. Cleveland, etc., Coal Co., 18 Oh. Cir. Ct. N. S. 524; Eureka Ins. Co. v. Duble, 3 Oh. Dec. (Reprint) 316.

Okl.—Red Bank Oil Co. v. Cook, 115 Okl. 163, 242 P 198 [cit Cyc]; Oklahoma City First Nat. Bank v. Farmers' Nat. Bank, 115 Okl. 136, 241 P 783; Jackson v. Moore, 39 Okl. 234, 134 P 1114.

Or.—Meier, etc., Co. v. Mitlehner, 75 Or. 331, 146 P 796; Trullinger v. Kofoed, 7 Or. 228, 33 AmR 708.

Pa.—Chestnut St. Trust, etc., Co. v. Hart, 217 Pa. 506, 66 A 870; Risher v. Risher, 194 Pa. 164, 45 A 71; Philadelphia v. Kelly, 166 Pa. 207, 31 A 47; Watt v. Hoch, 25 Pa. 411; Harker v. Conrad, 12 Serg. & R. 301, 14 AmD 691; Silver v. Tomach, 73 Pa. Super. 517; Harmony Creamery Co. v. Bickerton, 57 Pa. Super. 651; Underhill v. Wynkoop, 15 Pa. Super. 230; Maddox v. Cambridge Springs Co., 11 Pa. Dist. 358, 26 Pa. Co. 356; Keller v. Com., 1 AmLJNS 156; Davis v. Wood, 1 Del. Co. 382.

R. I.—Burt v. Butterworth, 19 R. I. 127, 32 A 167.

S. C.—Carson v. Hill, 26 S. C. L. 76; Jones v. Kilgore, 19 S. C. Eq. 63; Sager v. Warley, 14 S. C. Eq. 26; Heilbron v. Bissell, 8 S. C. Eq. 430.

Tenn.—Butler v. Heidel, 3 Tenn. Civ. A. 542.

Tex.—Proctor v. Marshall, 18 Tex. 63; Snyder-Bell Grocery Co. v. Hamilton, (Civ. A.) 276 SW 752; Palm v. Johnson, (Civ. A.) 255 SW 1007; Compton v. Ahrens, etc., Mfg. Co., (Civ. A.) 151 SW 884; Watson v. Dodson, (Civ. A.) 143 SW 329; Daniel v. Brewton, (Civ. A.) 136 SW 815; Stone v. Pettus, 47 Tex. Civ. A. 14, 103 SW 413; Thatcher v. Tillory, 30 Tex. Civ. A. 327, 70 SW 782; Rotan Grocery Co. v. Martin, (Civ. A.) 57 SW 706; Wright v. Meyer, (Civ. A.) 25 SW 1122; Lowery v. Dickson, 1 Tex. A. Civ. Cas. § 497.

Vt.—Sanborn v. Cole, 63 Vt. 590, 22 A 716, 14 LRA 208; Hicks v. Blanchard, 60 Vt. 673, 15 A 401; Corliss v. Grow, 58 Vt. 702, 2 A 388; Ayer v. Hawkins, 19 Vt. 26; Rosseau v. Cull, 14 Vt. 83; Robinson v. Doolittle, 12 Vt. 246; Briggs v. Williams, 2 Vt. 283.

Va.—Bourne v. Repass, 34 SE 623.

Wash.—Sainsbury v. Wapato Fruit, etc., Co., 132 Wash. 455, 232 P 331; Washington Grocery Co. v. Citizens' Bank, 132 Wash. 244, 231 P 780; Bishop v. T. Ryan Constr. Co., 106 Wash. 254, 180 P 126; Sturtevant Co. v. Fidelity, etc., Co., 92 Wash. 52, 158 P 740, 742, LRA1917C 630 [quot Cyc]; Crane Co. v. U. S. Fidelity, etc., Co., 74 Wash. 91, 132 P 872; Frazer v. Miller, 7 Wash. 521, 35 P 427.

W. Va.—New River Grocery Co. v. Neely, 144 SE 874; Hanly v. Potts, 52 W. Va. 263, 43 SE 218.

Wis.—Decker v. Milwaukee Cold Storage Co., 173 Wis. 87, 180 NW 256, 14 ALR 416; Nelson v. Davison, 152 Wis. 567, 140 NW 334; Pipkorn Co. v. Milwaukee Evangelical Lutheran St. Jacobi Soc., 144 Wis. 501, 129 NW 516; Coxe v. Milbrath, 110 Wis. 499, 86 NW 174; Johnston v. Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 NW 641; Jones v. Williams, 39 Wis. 300; Stone v. Talbot, 4 Wis. 442.

Eng.—Morgan v. Jones, 1 Bro. P. C. 32, 1 Reprint 397; Chitty v. Naish, 2 Dowl. P. C. 511; Brazier v. Bryant, 2 Dowl. P. C. 477; Hall v. Wood, 14 East 243 note, 104 Reprint 594; Campbell v. Hodgson, Gow 74, 5 ECL 876, 171 Reprint 843; D'Arcy v. Burke, 2 Ir. Eq. 1; Williams v. Griffith, 5 M. & W. 300, 151 Reprint 127; Clayton's Case, 1 Meriv. 572, 35 Reprint 781, 3 ERC 329; Wilkinson v. Sterne, 9 Mod. 427, 88 Reprint 551; Campbell v. Dent, 2 Moore P. C. 292, 12 Reprint 1016; Bosanquet v. Wray, 6 Taunt. 597, 1 ECL 771, 128 Reprint 1167; Weston v. Kenworthy, 6 Wkly. Rep. 543.

Can.—Armour v. Carruthers, 4 CanLJ 210.

Alta.—Canadian Bank of Commerce v. Smith, 3 Alta. L. 299, 17 WestLR 135; Revillon Wholesale, Ltd. v. Nemirsky, [1926] 2 DomLR 374, [1926] 2 WestWkly 166.

N. B.—Mayberry v. Hunt, 34 N. B. 628.

Ont.—Wilson v. Rykert, 14 Ont. 188; Re H. J. Logan Co., [1926] 2 DomLR 946; Fraser v. Locie, 10 Grant Ch. 207; Hagerman v. Smith, Taylor 123; Miller v. Miller, 1 U. C. C. P. 240; McDonald v. Peck, 17 U. C. Q. B. 270.

Que.—Chapût v. Bonhomme, 38 Que. K. B. 47.

22. Gass v. Stinson, 10 F. Cas. No. 5,262, 3 Sumn. 98 (where Mr. Justice Story followed the rule of the civil law); Everett v. Graye, 3 La. A. 136. See Logan v. Mason, 6 Watts & S. (Pa.) 9 (where Gibson, C. J., criticizes the civil-law rule and explains Mr. Justice Story's adherence to it on the ground of his "partiality for his favourite code").

[a] **Civil law stated.**—Murdock v. Clarke, 88 Cal. 384, 26 P 601; Logan v. Mason, 6 Watts & S. (Pa.) 9; Pierce v. Knight, 31 Vt. 701.

23. Cummings v. Glassup, 1 U. C. Q. B. (Ont.) 364.

24. See cases supra note 21.

25. Ark.—Hamilton v. Rhodes, 72 Ark. 625, 83 SW 351.

Ga.—Giles v. Vandiver, 91 Ga. 192, 17 SE 115.

Ind.—Brownlee v. Goldthait, 73 Ind. 481.

N. C.—Wittkowski v. Reid, 84 N. C. 21.

Pa.—Little v. Jeffers, 42 Pa. Super. 519.

S. D.—Fargo v. Jennings, 8 S. D. 99, 65 NW 433.

Tex.—Shonaker v. Citizens' Loan, etc., Co., (Civ. A.) 8 SW (2d) 566.

26. Ga.—Holmes v. Pratt, 34 Ga. 558.

Ill.—Chicago Title, etc., Co. v. Central Trust Co., 312 Ill. 396, 144 NE 165.

Ind.—Taylor v. Jones, Smith 5.

Mass.—Allen v. Kimball, 23 Pick. 473; Washington Bank v. Prescott, 20 Pick. 339.

Vt.—Sanborn v. Cole, 63 Vt. 590, 22 A 716, 14 LRA 208.

Wis.—Nelson v. Davison, 152 Wis. 567, 140 NW 334.

27. Blackman v. Leonard, 15 La. Ann. 59 (holding that the creditor is not bound to make the imputation pro rata); Young v. Alford, 118 N. C. 215, 23 SE 973; Screven v. Smith, 12 S. C. L. 368; Sanborn v. Cole, 63 Vt. 590, 22 A 716, 14 LRA 208.

28. Sanborn v. Cole, supra.

29. Beck v. Haas, 111 Mo. 264, 20 SW 19, 33 AmSR 516; Boyajian v. Reinheimer, (A.) 229 SW 441 [aff (Mo.) 250 SW 364]; Julius Seidel Lumber Co. v. Weaver, (Mo. A.) 184 SW 484.

30. Dime Sav., etc., Co. v. O'Rourke, 21 Oh. Cir. Ct. N. S. 370.

31. Dime Sav., etc., Co. v. O'Rourke, supra.

two or more debts, provided the application is made in reduction of the mortgage;[32] to the proceeds of collateral sold by the creditor in liquidation of his claims;[33] to dividends from collateral held by the creditor as security for all his claims;[34] and to payments made to the government.[35] The creditor may apply the payment to an unsecured rather than a secured claim,[36] even though the money was procured from persons who intended that the payment should be applied to the secured debt, provided the creditor knew nothing of it,[37] or to any one of two or more secured claims,[38] or to the most precarious of his secured claims,[39] or he may apportion the payments among the secured notes in his own interest and for his own protection.[40]

[§ 95] **b. Principal and Interest.**[41] The creditor may apply a payment to the satisfaction of interest rather than the principal,[42] but the creditor cannot apply payments to interest not due,[43] or not collectable under the terms of the contract.[44] Some authorities hold that, in the absence of agreement, the creditor may insist on such application;[45] other authorities hold that this is the only way in which he can apply it;[46] but unless application to interest is compulsory,[47] the creditor may apply a payment to the principal of the debt,[48] even where the interest is in arrears and because of such fact the debtor is not entitled to the benefit of a moratorium act.[49] In jurisdictions holding that application must be made to interest where interest is due,[50] an application to principal cannot be made so long as there is interest due and unpaid.[51] Where interest is due on two obligations, the payment may be applied to the interest on either.[52]

[§ 96] **c. Items of Current Account.**[53] While there is authority to the effect that the creditor cannot apply a payment to any item he pleases in a running account,[54] unless done with the consent of the debtor,[55] it is more commonly held that, where there is a running account, the creditor may apply a payment thereon as he desires.[56] So the creditor may appropriate the payment to the oldest items of the account,[57] even though such items are barred

32. Larry v. Brown, 153 Ala. 452, 44 S 841.

33. Newburgh Nat. Bank v. Bigler, 83 N. Y. 51.

34. Turner v. Woodard, 259 Fed. 737, 170 CCA 537.

35. Hendricks v. Schmidt, 68 Fed. 425, 15 CCA 504; U. S. v. Linn, 26 F. Cas. No. 15,606, 2 McLean 501 [rev on other grounds 1 How. 104, 11 L. ed. 64]. Contra U. S. v. Wardwell, 28 F. Cas. No. 16,640, 5 Mason 82.

36. U. S.—Turner v. Woodard, 259 Fed. 737, 170 CCA 537; In re Stucky Trucking, etc., Co., 240 Fed. 427; Grafton Hotel Co. v. Walsh, 228 Fed. 5, 142 CCA 461; Bankers' Surety Co. v. Maxwell, 222 Fed. 797, 138 CCA 345; Bankers' Trust Co. v. T. A. Gillespie Co., 181 Fed. 448, 104 CCA 196; Phillips v. Bossard, 35 Fed. 99.

Ala.—Brown v. Scheuer, 210 Ala. 47, 97 S 50; Jefferson Plumbers, etc., Supply Co. v. Peebles, 195 Ala. 608, 71 S 413; Smith v. Vaughan, 78 Ala. 201; Driver v. Fortner, 5 Port. 9.

Cal.—Riddle v. Etling, 84 Cal. A. 460, 258 P 162.

Conn.—Sagal v. Mann, 89 Conn. 576, 95 A 6, 7 [cit Cyc]; Lewis v. Hartford Silk Mfg. Co., 56 Conn. 25, 12 A 637.

Ga.—Coxwell v. De Vaughn, 55 Ga. 643; Payne v. Seagars, 13 Ga. A. 101, 78 SE 829; Bufford v. Wilkinson, 7 Ga. A. 443, 67 SE 114.

Ill.—Koch v. Roth, 150 Ill. 212, 37 NE 317; Plain v. Roth, 107 Ill. 588; Scheik v. School Trustees, 24 Ill. A. 369.

Ind.—White v. Beem, 80 Ind. 239.

Iowa.—Goodman v. First Nat. Bank, 187 NW 441; Mahaska County State Bank v. Brown, 159 Iowa 577, 141 NW 459; Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216.

Ky.—Allison v. Starks, 200 Ky. 708, 255 SW 517; Wilkes v. Kitchen, 187 Ky. 211, 218 SW 718; Burks v. Albert, 4 J. J. Marsh. 97, 20 AmD 209.

Mass.—Upham v. Lefavour, 11 Metc. 174; Capen v. Alden, 5 Metc. 268; Dedham Bank v. Chickering, 4 Pick. 314.

Mich.—Gardner v. LeFevre, 180 Mich. 219, 146 NW 653, AnnCas1916A 618.

Mo.—State v. Globe Indemn. Co., (A.) 2 SW (2d) 815; Fagan v. Brock Motor Car Co., (A.) 282 SW 135; Henry v. Safford, 211 Mo. A. 308, 241 SW 951.

N. J.—Grover v. Franklin Tp. Bd. of Education, (Ch.) 141 A 81, 82 [cit Cyc]; Van Sickle v. Ayres, 6 N. J. Eq. 29.

N. Y.—Harding v. Tifft, 75 N. Y. 461; White Sewing-Mach. Co. v. Fargo, 3 NYS 494.

N. C.—Lee v. Manley, 154 N. C. 244, 70 SE 385; Vick v. Smith, 83 N. C. 80; Jenkins v. Beal, 70 N. C. 440.

Oh.—Gill v. Konvisser, 32 Oh. Cir. Ct. N. S. 542; Union Nat. Bank v. Cleveland, 10 Oh. Cir. Ct. 222, 6 Oh. Cir. Dec. 536.

Okl.—Southwestern Surety Ins. Co. v. Neal, 81 Okl. 194, 197 P 439.

Pa.—Wagner's Appeal, 103 Pa. 185; McQuaide v. Stewart, 48 Pa. 198; Blaney's Est., 37 Pa. Super. 76.

S. C.—Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 SE 658, 114 AmSR 1004; Whilden v. Pearce, 27 S. C. 44, 2 SE 709; Pelzer v. Steadman, 22 S. C. 279; Bell v. Bell, 20 S. C. 34.

Tex.—Brown v. Rice, (Civ. A.) 290 SW 784 [aff (Commn. A.) 296 SW 495]; Thatcher v. Tillory, 30 Tex. Civ. A. 327, 70 SW 782; Larkin v. Watt, (Civ. A.) 32 SW 552; Lary v. Young, (Civ. A.) 27 SW 908; Lowery v. Dickson, 1 Tex. A. Civ. Cas. § 497.

Vt.—Jeffers v. Pease, 74 Vt. 215, 52 A 422.

Wash.—Puget Sound, etc., Bank v. Gallucci, 82 Wash. 445, 144 P 698, AnnCas1916A 767; Crane Co. v. U. S. Fidelity, etc., Co., 74 Wash. 91, 132 P 872; Post-Intelligencer Pub. Co. v. Harris, 11 Wash. 500, 39 P 965.

Can.—Stephens v. Boisseau, 26 Can. S. C. 437.

Alta.—Canadian Bank of Commerce v. Smith, 3 Alta. L. 299, 17 WestLR 135.

Ont.—Thomson v. Stikeman, 29 Ont. L. 146, 4 OntWN 1546, 14 DomLR 97 [app dism 30 Ont. L. 123, 5 OntWN 555, 17 DomLR 205].

[a] **Bond.**—When the defalcations of a cashier exceed the amount of his bond, the bank need not credit on the bond sums collected from other sources, but may apply them in reduction of the unsecured balance owing the bank by the cashier. Phillips v. Bossard, 35 Fed. 99.

Application by:
Court see infra §§ 112, 113.
Debtor see supra § 87.

Payment from particular fund see infra § 101.

37. Harding v. Tifft, 75 N. Y. 461.

38. Malone v. Wade, 148 Ark. 548, 230 SW 579; American Sav. Bank, etc., Co. v. Munson, 93 Wash. 78, 159 P 1195.

39. In re Lysaght, [1903] 1 Ir. 235.

40. National Deposit Bank v. Mawson, 46 Pa. Super. 85.

41. Application by:
Court see infra §§ 119–122.
Debtor see supra § 87.

Payments of usurious interest see Usury [39 Cyc 1026].

42. U. S.—Ohio Sav. Bank, etc., Co. v. Willys Corp., 8 F. (2d) 463, 44 ALR 1162; Bidwell v. George B. Douglas Trading Co., 183 Fed. 93, 105 CCA 385.

Ill.—Brand v. Rueter, 200 Ill. A. 42.

Ky.—Steele v. Taylor, 4 Dana 445.

N. Y.—Feldman v. Beier, 78 N. Y. 293; Hart v. Dewey, 2 Paige 207.

Va.—Baker v. Lynchburg Nat. Bank, 120 Va. 208, 91 SE 157.

W. Va.—Dollar Sav., etc., Co. v. Crawford, 69 W. Va. 109, 70 SE 1089, 33 LRANS 587.

[a] **The creditor is not estopped** from claiming an application to interest by his employee's unauthorized memorandum directing an application to the principal. Dollar Sav., etc., Co. v. Crawford, 69 W. Va. 109, 70 SE 1089, 33 LRANS 587.

43. Davis v. Fargo, Clarke (N. Y.) 470; Baer v. Mendoza, 18 Philippine 240; Corham v. Kingston, 17 Ont. 432.

44. Mendel v. Paepke, 69 Wis. 527, 34 NW 912.

45. McGregor v. Gaulin, 4 U. C. Q. B. (Ont.) 378.

46. Riddle v. Bridgewater Milling Co., 150 N. C. 689, 64 SE 782; Bower v. Marris, Cr. & Ph. 351, 18 EngCh 351, 41 Reprint 525.

47. See case infra note 48.

48. Phillips v. United Investors, Ltd., 27 Man. 410, 34 DomLR 283, [1917] 1 WestWkly 1348.

49. Phillips v. United Investors, Ltd., supra.

50. See cases supra note 42.

51. Riddle v. Bridgewater Milling Co., 150 N. C. 689, 64 SE 782.

52. Blair v. Carpenter, 75 Mich. 167, 42 NW 790.

53. Items barred by limitations see Limitations of Actions § 634.

54. White v. Bean, 16 Ala. A. 330, 77 S 924; Dunnington v. Kirk, 57 Ark. 595, 22 SW 430; Hughes v. Johnson, 38 Ark. 285.

[a] **Reason for rule.**—"A running account, although composed of items partly secured and partly not, is in so far one debt, that the creditor has no election as to which items he will credit and which not, in the absence of any appropriation by the debtor." Hughes v. Johnson, 38 Ark. 285, 295.

55. Hughes v. Johnson, supra.

56. U. S.—L'Hommedieu v. The H. L. Dayton, 38 Fed. 926.

Cal.—Mercantile Trust Co. v. Doe, 26 Cal. A. 246, 146 P 692.

Conn.—Ford Bros., Inc. v. Frederick M. Ward Co., 107 Conn. 425, 140 A 754.

Mo.—Julius Seidel Lumber Co. v. Weaver, (A.) 184 SW 484.

N. Y.—Sheppard v. Steele, 43 N. Y. 52, 3 AmR 660 [aff 3 Lans. 417].

N. D.—Lake Grocery Co. v. Chiostri, 34 N. D. 386, 158 NW 998.

Ont.—Read v. Whitney, 45 Ont. L. 377, 16 OntWN 127, 48 DomLR 305.

57. U. S.—Jones v. U. S., 7 How. 681, 12 L. ed. 870; Delaware Dredging Co. v. Tucker Stevedoring Co., 25 F. (2d) 44.

by the statute of limitations;[58] and where he applies a payment generally on an open running account without declaring an intention to apply it to any specific item, the presumption is that he intended an application to the oldest items of the account.[59] It is only a presumption, however, and may be rebutted by evidence that the creditor had no such intention.[60]

[§ 97] **2. Limitations of Right—a. In General.** The rule does not apply to involuntary payments,[61] nor to other payments where the debtor has had no opportunity to direct the application,[62] nor does it authorize the appropriation of a payment to a debt for which the debtor is not responsible,[63] nor to a debt the validity of which the debtor denies,[64] nor to a fictitious claim,[65] nor on a debt the payor owes a third person.[66] So if one of the debtor's liabilities is contingent, as where the creditor is his indorser or surety and has not paid the money, the latter cannot apply payments to such account.[67] Of course the creditor cannot apply a payment on a paid obligation,[68] nor on a debt other than the debt designated by the debtor, where such designation has been made with the knowledge of the creditor[69] or under circumstances charging the creditor with knowledge of it.[70] Nor can the creditor apply a payment contrary to the terms of an agreement as to application previously entered into between himself and the debtor.[71]

Where a particular debt is to be paid in a particular way, as by the rendition of services, the creditor cannot apply the value of such services to another claim.[72]

Unjust or inapplicable application. The creditor cannot apply a payment so as to be inequitable and unjust to the debtor,[73] the equities considered being those only which exist between the debtor and creditor and not those which arise out of transactions between the debtor and third persons and of which the creditor himself has no notice.[74] But, under the common-law rule, the creditor is not bound to apply a payment in the way most beneficial to the debtor,[75] although at this point the common-law rule varies from that of the civil law.[76]

[§ 98] **b. Illegal and Unenforceable Claims.**[77] While the creditor may apply a payment on a claim which he cannot enforce,[78] such as an oral one with-

Ark.—Interstate Jobbing Co. v. Velvin, 165 Ark. 263, 263 SW 966; Snow v. Wood, 163 Ark. 280, 259 SW 733; Briggs v. Steele, 91 Ark. 458, 121 SW 754; Ritchie v. Bluff City Lumber Co., 86 Ark. 175, 110 SW 591.

Ga.—Hobbs v. Crawford, 4 Ga. A. 585, 62 SE 157.

Ill.—McCasland v. O'Brien, 57 Ill. A. 636.

Ind.—Guthrie v. State, 67 Ind. A. 630, 119 NE 518.

La.—Forrey v. Strange, 158 La. 941, 105 S 21.

Mich.—Hill v. Robbins, 22 Mich. 475.

N. H.—Livermore v. Rand, 26 N. H. 85.

R. I.—Harris v. Gilbert, 46 R. I. 350, 128 A 11.

Tex.—Palm v. Johnson, (Civ. A.) 255 SW 1007; Jamison v. Alvarado Compress, etc., Co., 45 Tex. Civ. A. 263, 99 SW 1053.

Eng.—Deeley v. Lloyds Bank, Ltd., [1912] A. C. 756; Re Chute, [1914] 1 Ir. 180.

58. Hobbs v. Crawford, 4 Ga. A. 585, 62 SE 157; Brown v. Osborne, 136 Ky. 456, 124 SW 405.

59. American Woolen Co. v. Maaget, 86 Conn. 234, 243, 85 A 583, Ann Cas1913E 889 [cit Cyc]; Field v. Carr, 5 Bing. 13, 15 ECL 447, 130 Reprint 964; Union Bank v. Makepeace, 12 OntWN 397.

60. In re Hodgson, [1919] 2 Ch. 189; Deeley v. Lloyds Bank, [1910] 1 Ch. 648; Galula v. Pintus, 104 L. T. Rep. N. S. 574.

61. See supra § 86.

62. Ill.—Meyer v. Johnson, 122 Ill. A. 87.

Miss.—Dennis v. Jones, 31 Miss. 606.

Okl.—Ardmore First Nat. Bank v. Gillam, 273 P 261.

Eng.—Waller v. Lacy, 1 M. & G. 54, 39 ECL 641, 133 Reprint 245.

Ont.—Corham v. Kingston, 17 Ont. 432.

[a] **Payment in excess of designated item.**—Where a creditor wrongfully obtained a sum of money from his debtor in excess of the items of indebtedness which the debtor intended to discharge thereby, he cannot, without the consent of such debtor, apply the excess in liquidation of prior claims he may have against him. Meyer v. Johnson, 122 Ill. A. 87.

[b] **Insurance money.**—Money paid to a mortgagee by an insurance company to cover loss by fire cannot be applied by the mortgagee in the absence of consent or agreement by the mortgagor, such payment not coming from the mortgagor and he having no opportunity of first directing its application. Corham v. Kingston, 17 Ont. 432.

63. Melson v. Travis, 133 Ga. 710, 66 SE 936; Scheffer v. Tozier, 25 Minn. 478; Elizabeth City First Nat. Bank v. Scott, 123 N. C. 538, 31 SE 819; Burland v. Nash, 2 F. & F. 687.

[a] **Sale of collateral.**—Where notes of third parties are deposited by the debtor with the creditor to secure payment of his debt, the creditor on selling the collateral cannot apply proceeds to payment of claims he holds against the makers of the notes. Melson v. Travis, 133 Ga. 710, 66 SE 936.

64. Cal.—Hinckley v. Krug, 34 P 118.

Ga.—McLendon v. Frost, 57 Ga. 448.

La.—Imwolde v. Stern, 2 La. A. (Orleans) 343.

Tex.—Snyder-Bell Grocery Co. v. Hamilton, (Civ. A.) 276 SW 752.

Wis.—Stone v. Talbot, 4 Wis. 442.

65. Lamprell v. Billericay Union, 3 Exch. 283, 154 Reprint 850.

66. Turner v. Hill, 56 N. J. Eq. 293, 39 A 137.

67. Niagara Bank v. Rosevelt, 9 Cow. (N. Y.) 409.

Application by court see infra § 118.

68. Lyon v. Witters, 65 Vt. 396, 26 A 588.

69. Matthewson v. Thompson, 19 Sask. L. 420, [1925] 2 DomLR 1211, [1925] 2 WestWkly 161.

70. Jordan v. Morrilton Bank, 168 Ark. 117, 269 SW 53.

[a] **Mortgages.**—Where check given to first mortgagee by mortgagor who had received money from second mortgagee, a bank, with understanding that it be applied on first mortgage debt, was marked "in full," and first mortgagee by inquiry of bank could have ascertained that check was given as payment in full of first mortgage debt, first mortgagee could not apply it to payment of an unsecured debt owing him by mortgagor. Jordan v. Morrilton Bank, 168 Ark. 117, 269 SW 53.

71. Collerd v. Tully, 77 N. J. Eq. 439, 77 A 1079 [aff 78 N. J. Eq. 557, 80 A 491, AnnCas1912C 78]; Eagle Drug Co. v. White, (Tex. Civ. A.) 182 SW 378, 383 [cit Cyc].

72. Young v. Harris, 36 Ark. 162.

73. Ala.—Brown v. Scheuer, 210 Ala. 47, 97 S 50.

Ill.—Arnold v. Johnson, 2 Ill. 196; Dorris Lumber Co. v. Cummins, 157 Ill. A. 10.

Ky.—Scott v. Fisher, 4 T. B. Mon. 387; Bacon v. Brown, 1 Bibb 334, 4 AmD 640.

Mo.—Miller v. Miller, 169 Mo. A. 432, 155 SW 76.

Tex.—Taylor v. Coleman, 20 Tex. 772.

Vt.—Ayer v. Hawkins, 19 Vt. 26.

[a] **Interest-bearing debt.**—It has been held that, where the creditor holds an interest-bearing obligation and one not bearing interest, he must apply the payment to the former. Scott v. Fisher, 4 T. B. Mon. (Ky.) 387.

74. Harding v. Tifft, 75 N. Y. 461.

75. Miller v. Miller, 169 Mo. A. 432, 155 SW 76; Shortridge v. Pardee, 2 Mo. A. 363; Hildreth v. Davis, 6 Kulp (Pa.) 336; Snyder-Bell Grocery Co. v. Hamilton, (Tex. Civ. A.) 276 SW 752.

[a] **Application to least secure items.**—A creditor has the right, in the absence of any directions from the debtor, to apply credits to the least secure items of his claim. Hildreth v. Davis, 6 Kulp (Pa.) 336.

[b] **Family grocery bill.**—Where groceries were charged to both husband and wife, and partial payments on bill therefor were made without request as to how they should be applied, creditor, having right to apply them on any part of bill due, could apply them on part of bill chargable to husband as contradistinguished from part of bill for groceries furnished wife and her minor children as necessaries. Snyder-Bell Grocery Co. v. Hamilton, (Tex. Civ. A.) 276 SW 752.

[c] **Notes barred by statute.**—Where defendant's intestate, who owed plaintiff several notes, completely barred by limitations, made a general payment, plaintiff may apply it to the largest note or to whichever note will best subserve his interest. Miller v. Miller, 169 Mo. A. 432, 155 SW 76.

76. Logan v. Mason, 6 Watts & S. (Pa.) 9.

Civil-law requirement see supra § 94.

77. Application by:
Court see infra § 114.
Debtor see supra § 87.
Debt barred by statute of limitations see Limitations of Actions § 634.

78. Compton v. Tennings Lumber Co., (Tex. Civ. A.) 295 SW 308, 311 [cit Cyc]; Arnold v. Poole, 4 M. & G. 860, 43 ECL 444, 134 Reprint 354; Biggs v. Dwight, 1 M. & R. 308, 17

in the statute of frauds,[78] he cannot apply a payment to an illegal claim,[80] such as a claim for usurious interest,[81] a distinction being drawn between claims which are merely unenforceable and those which are malum in se or malum prohibitum.[82] The creditor may appropriate a payment, however, to an illegal claim with the debtor's consent either express or implied,[83] and consent will be implied from the course of dealing between the creditor and debtor,[84] and by the fact that the amount of the payments exceeds the amount of the legal items.[85] But where the creditor receives the payment from a receiver whose duty it is to protect the interests of the debtor, he cannot then apply the payment to a debt which the receiver in the execution of his trust could not have legally paid.[86]

[§ 99] **c. Joint Debts and Debts of Other Persons.**[87] A creditor may apply a general payment either to a joint or several indebtedness of the debtor.[88] Where a creditor holds a debt payable to himself and another payable to himself and a third person jointly, he must apply the payment ratably on the two debts.[89] So if a debt is owed to two persons jointly, the one to whom part payment is made cannot appropriate it exclusively to his portion of the debt.[90] Where payment is made by one liable individually and also as a trustee,[91] executor,[92] surety,[93] or survivor of a community estate,[94] the creditor can apply the payment only to the individual debt. A creditor cannot apply a payment by his debtor to a debt owed to the creditor by somebody else.[95]

[§ 100] **d. Debts Not Due; Order of Accrual or Maturity.**[96] A creditor cannot apply the payment on a debt not due to the exclusion of one due or overdue.[97] Accordingly an application by the creditor of an undirected payment to debts in the order of accrual or maturity will be upheld.[98] The rule applies as between guaranteed accounts and accounts not guaranteed,[99] an application to an unguaranteed open account already due rather than to a guaranteed note not yet due being upheld,[1] and an application to an unguaranteed account not due in preference to a guaranteed account already due being set aside.[2] Nor can the order of maturity of the notes be disregarded in order to apply payments on later unsecured notes leaving earlier secured notes unpaid.[3] The rule does not apply to advancements made generally by the debtor on two or more accounts not yet due, and applied by the creditor to the different accounts at the time the advancements were made so as to give the debtor a right when one account became due to alter the applications already made from the account not yet due to the past-due account.[4] Nor does the rule apply to notes maturing at different times but representing an indebtedness incurred at the same time. In such case, the creditor may apply an undirected payment to a subsequently maturing note which is due, leaving an earlier maturing note unpaid.[5]

[§ 101] **e. Payment from Particular Fund.**[6] When the money with which the payment is made is known to the creditor to have been derived from a particular source or fund, he cannot, without the

ECL 670; Mayberry v. Hunt, 34 N. B. 628; Fraser v. Locie, (Ont.) 10 Grant Ch. 207.

79. Haynes v. Nice, 100 Mass. 327, 1 AmR 109.

80. Ala.—Armour Packing Co. v. Vinegar Bend Lumber Co., 149 Ala. 205, 42 S 866, 13 AnnCas 951.

Ind.—Sawers Grain Co. v. Teagarden, 84 Ind. A. 522, 148 NE 205.

Mass.—Rohan v. Hanson, 11 Cush. 44.

Or.—Anderson v. Griffith, 51 Or. 116, 93 P 934.

Pa.—Greene v. Tyler, 39 Pa. 361.

81. Anderson v. Griffith, 51 Or. 116, 93 P 934.

82. See cases infra this note; and supra notes 78–80.

[a] **Sale of liquor with other goods.**—The distinction is made in cases where a creditor has sold his debtor spirituous liquors with other goods not the subject of regulatory legislation. (1) Where the statute forbids the sale, the creditor is not allowed to apply general payments by the debtor to those items. Bondy v. Hardina, 216 Mass. 44, 102 NE 935; Gammon v. Plaisted, 51 N. H. 444; Kidder v. Norris, 18 N. H. 532; Caldwell v. Wentworth, 14 N. H. 431; Bancroft v. Dumas, 21 Vt. 456. (2) Where the statute in certain restricted cases of such sales takes away from the creditor the right to enforce payment therefor, he is allowed to apply the payment to such items when made. Philpott v. Jones, 2 A. & E. 41, 29 ECL 41, 111 Reprint 16; Cruickshanks v. Rose, 1 M. & Rob. 100.

83. Phillips v. Moses, 65 Me. 70; Treadwell v. Moore, 34 Me. 112; Richardson v. Woodbury, 12 Cush. (Mass.) 279.

84. Phillips v. Moses, 65 Me. 70; Treadwell v. Moore, 34 Me. 112.

85. Phillips v. Moses, 65 Me. 70.

86. Hibernian Bank v. Yourell, [1919] 1 Ir. 310.

87. Appropriation to debts of partner and partnership see Partnership § 335.

88. U. S.—Santa Marina Co. v. Canadian Bank of Commerce, 242 Fed. 142 [aff 254 Fed. 391, 165 CCA 611 (certiorari den 250 U. S. 643 mem, 39 SCt 493 mem, 63 L. ed. 1186 mem)].

Colo.—McBride v. Noble, 40 Colo. 372, 90 P 1037, 13 AnnCas 1202.

Ga.—Dye v. Peacock, 5 Ga. A. 417, 63 SE 520.

Iowa.—Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216.

Me.—Livermore v. Claridge, 33 Me. 428.

N. Y.—Van Rensselaer v. Roberts, 5 Den. 470.

Pa.—Chestnut St. Trust, etc., Co. v. Hart, 217 Pa. 506, 66 A 870.

Tex.—Snyder-Bell Grocery Co. v. Hamilton, (Civ. A.) 276 SW 752.

Eng.—Frazer v. Birch, 3 Knapp 380, 12 Reprint 697.

89. Colby v. Copp, 35 N. H. 434; Coste v. McLaws, (Alta.) [1925] 2 DomLR 1078, 1087, [1925] 2 West Wkly 131 [quot Cyc].

90. Cole v. Trull, 9 Pick. (Mass.) 325; Coste v. McLaws, (Alta.) [1925] 2 DomLR 1078, 1087, [1925] 2 West Wkly 131 [quot Cyc].

91. Sawyer v. Tappan, 14 N. H. 352.

92. Ramey-Milburn Co. v. Ford, 146 Ark. 563, 226 SW 132.

93. Orwell Banking Co. v. Pelton, 34 Oh. Cir. Ct. 172 [aff 88 Oh. St. 607 mem, 106 NE 1071 mem].

94. McCarthy v. Paris, (Ida.) 267 P 232, 233 [cit Cyc].

95. Melson v. Travis, 133 Ga. 710, 66 SE 936; McCarthy v. Paris, (Ida.) 267 P 232; Young v. Swan, 100 Iowa 323, 69 NW 566; Codville Co. v. Goddard, 22 Alta. L. 41, [1926] 1 West Wkly 602.

96. Application by court see infra § 110.

Mortgage debt see Mortgages § 911; Chattel Mortgages § 449.

97. Ala.—McWhorter v. Blumenthal, 136 Ala. 568, 33 S 552, 96 AmR 43; Heard v. Pulaski, 80 Ala. 502, 2 S 343; Bobe v. Stickney, 36 Ala. 482.

Ark.—Ford Hardwood Lumber Co. v. Bryant, 13 SW (2d) 1; Gates v. Burkett, 44 Ark. 90.

Conn.—Schwartz v. Dashiff, 92 Conn. 135, 101 A 580; Blinn v. Chester, 5 Day 166.

Fla.—Petroutsa v. H. C. Schrader Co., 76 Fla. 574, 80 S 486.

Iowa.—Pospishil v. Jensen, 205 Iowa 1360, 219 NW 507; Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216.

Ky.—Bacon v. Brown, 1 Bibb 334, 4 AmD 640.

La.—Grand Lodge B. K. A. v. Murphy Constr. Co., 152 La. 123, 92 S 757.

Mich.—Richardson v. Coddington, 49 Mich. 1, 12 NW 886.

N. H.—Parks v. Ingram, 22 N. H. 283, 55 AmD 153.

N. Y.—Farwell v. Importers' etc., Nat. Bank, 90 N. Y. 483 [aff 47 N. Y. Super. 409].

Oh.—Harvey v. Shurtleff, 17 Oh. Cir. Ct. N. S. 8.

Okl.—D'Yarmett v. Cobe, 51 Okl. 113, 151 P 589, 590 [cit Cyc].

S. D.—Hesnard v. Larive, 45 S. D. 19, 184 NW 972.

Tex.—Amarillo First Nat. Bank v. Rush, (Civ. A.) 227 SW 378, 382 [mod on other grounds (Commn. A.) 246 SW 349, and cit Cyc]; Lowery v. Dickson, 1 Tex. A. Civ. Cas. § 497.

Va.—Law v. Sutherland, 5 Gratt. (46 Va.) 357.

Eng.—Allen v. London County, etc., Bank, Ltd., 84 L. J. K. B. 1286.

98. U. S.—Holloway v. White-Dunham Shoe Co., 151 Fed. 216, 80 CCA 568, 10 LRANS 704.

Colo.—Hartford Acc., etc., Co. v. Manby, 76 Colo. 464, 232 P 927.

Ga.—Hobbs v. Crawford, 4 Ga. A. 585, 62 SE 157.

Ind.—Guthrie v. State, 67 Ind. A. 630, 119 NE 518.

La.—Consolidated Companies v. Boudreaux, 6 La. A. 596.

Mo.—Wilson-Reheis-Rolfes Lumber Co. v. Ware, 158 Mo. A. 179, 138 SW 690.

99. See cases infra notes 1, 2.

1. Heintz v. Cahn, 29 Ill. 308.

2. Halsted v. Griefen, 173 Ill. A. 551.

3. International Harvester Co. v. Holmes, 165 Wis. 506, 162 NW 925, 927 [cit Cyc].

4. Red Bank Oil Co. v. Cook, 115 Okl. 163, 242 P 198.

5. Nelson v. Davison, 152 Wis. 567, 140 NW 334.

6. Application to unsecured and secured debts generally see supra §

consent of the debtor, apply it otherwise than to the exoneration of that source or fund.[7] A fortiori, such application must be made when the parties have made a prior agreement that it shall be so made.[8] The creditor, however, is not liable if he applies the payment to another debt in ignorance of the source from which the payment came.[9] An example of a payment from a source known to the creditor exists in the case of proceeds from the sale by the mortgagee of property mortgaged or pledged to secure a certain indebtedness, the rule requiring the creditor to apply the proceeds in payment of such indebtedness,[10] unless the debtor consents to its application to another debt.[11] If the secured indebtedness is in the form of several distinct debts, an application to them all is proper,[12] or if the mortgage in terms secures certain notes and "any other notes or evidences of indebtedness which the mortgagee may hereafter have or hold" against the mortgagor. the mortgagee's power to apply is extended to any or all claims he may have against the mortgagor.[13] Where separate mortgages are given, each to secure a distinct portion of the debt, the proceeds from each must be applied to the portion of the debt which it secures.[14] The rule limiting the creditor's right to apply payments as he wishes has no application where the payment is voluntarily made by the mortgagor,[15] or where the payment is made from money obtained by a sale of the equity by the mortgagor.[16] And the rule does not apply where the creditor of a bankrupt is allowed dividends on the entire amount of his claims both secured and unsecured,[17] or where it clearly appears that the secured creditor receiving the money paid it in the debtor's behalf to third persons holding claims against the latter, and that he had no interest in such payments and had acted in good faith only as the agent of the debtor in the transaction.[18]

[§ 102] **3. What Constitutes, and Sufficiency[19]—a. In General.** The performance of some act showing an intention specifically to appropriate the payment to a particular debt is sufficient to constitute an appropriation,[20] and it may be evidenced by circumstances as well as by express declarations.[21] A mere intention to appropriate, not evidenced by ex-

94 note 36.

7. U. S.—Oliver v. Garlick, 2 F. (2d) 132; Commercial City Bank v. Hall, 203 Fed. 366.

Ala.—Pearce v. Walker, 103 Ala. 250, 15 S 568; Darden v. Gerson, 91 Ala. 323, 9 S 278; Strickland v. Hardie, 82 Ala. 412, 3 S 40; Johnson v. Thomas, 77 Ala. 367; Mahan v. Smitherman, 71 Ala. 563; Levystein v. Whitman, 59 Ala. 345.

Ark.—Jordon v. Morrilton Bank, 168 Ark. 117, 269 SW 53.

Ill.—American Express Co. v. Lesem, 39 Ill. 312.

Mass.—Hicks v. Bingham, 11 Mass. 300.

Miss.—Ogden v. Harrison, 56 Miss. 743.

Nebr.—Lee v. Storz Brewing Co., 75 Nebr. 212, 106 NW 220.

N. Y.—Bennett v. Austin, 81 N. Y. 308 [rev 10 Hun 451]; Waring v. Loder, 53 N. Y. 581.

Oh.—Orwell Banking Co. v. Pelton, 34 Oh. Cir. Ct. 172 [aff 88 Oh. St. 607 mem, 106 NE 1071 mem].

S. C.—Thatcher v. Massey, 20 S. C. 542.

Tex.—Amarillo First Nat. Bank v. Rush, (Civ. A.) 227 SW 378 [mod on other grounds (Commn. A.) 246 SW 349]. See Gerlach v. North Texas, etc., R. Co., (Civ. A.) 244 SW 662, 667 [cit Cyc] (holding that, where one financing a railway subcontractor, and taking an assignment in the name of his brother of all moneys coming due the contractor, applied money so received on merchandise accounts due mercantile companies in which he and his brother were interested, in preference to his claim for moneys advanced to pay the claims of laborers, he was in no position to ask equity to aid him by declaring him subrogated to the laborers' liens).

Wash.—Cummings v. Erickson, 116 Wash. 347, 199 P 736, 737 [cit Cyc].

Eng.—In re Browne, [1903] 1 Ir. 245.

B. C.—Grant v. Matsubayashi, 31 B. C. 375, 70 DomLR 553, [1922] 3 WestWkly 679.

[a] **Goods sent C. O. D.**—Where an express company collected from a consignee only part payment for goods sent C. O. D., and remitted the portion so paid to the consignor, the consignor has no right, as between himself and the express company, to apply such payment to other indebtedness of the consignee, but must credit it to the account of the goods so sent. American Exp. Co. v. Lesem, 39 Ill. 312.

[b] **Money from third person.**—The creditor has no right to apply a payment where the money was received by the debtor from a third person whose property would be liable for the debt in case the money was not applied in exoneration of the third person's liability. Lee v. Storz Brewing Co., 75 Nebr. 212, 106 NW 220; Crane Bros. Mfg. Co. v. Keck, 35 Nebr. 683, 53 NW 606.

[c] **Payments by new firm** in the form of checks signed in the name of the new firm must be applied to the indebtedness of the new firm and not to the old firm debts. Grant v. Matsubayashi, 31 B. C. 375, 70 DomLR 553, [1922] 3 WestWkly 679.

[d] **Money furnished by wife.**—Where the wife furnishes the husband with money to make a payment on his indebtedness to a creditor to whom he owes two debts, both being due, on one of which his wife is surety, equity will require the creditor to apply the payment to the debt on which the wife is surety, if he knew that the payment was made with money of the wife, even if the husband at the time of the payment neglected to direct the application. Orwell Banking Co. v. Pelton, 34 Oh. Cir. Ct. 172 [aff 88 Oh. St. 607 mem, 106 NE 1071 mem].

8. See cases supra § 98 note 71.

9. Thacker v. Bullock Lumber Co., 140 Ky. 463, 464, 131 SW 271 [quot Cyc]; Madison Lumber Co. v. Bachemin, (La.) 120 S 508; Sturtevant Co. v. Fidelity, etc., Co., 92 Wash. 52, 158 P 740, 742, LRA1917C 630 [quot Cyc].

10. Nolen v. Farrow, 154 Ala. 269, 45 S 183; Fridley v. Bowen, 103 Ill. 633; Lee v. Manley, 154 N. C. 244, 70 SE 385; Sallisaw First Nat. Bank v. Ballard, 41 Okl. 553, 139 P 293.

11. Hawkins v. Bouic, 121 Md. 147, 88 A 126.

12. Thompson v. Jones, 200 Ala. 84, 75 S 460.

13. Moats v. Thompson, 283 Pa. 313, 319, 129 A 105.

14. Miller v. White, (Tex. Civ. A.) 264 SW 176.

15. See supra § 94 note 36.

16. Cain v. Vogt, 138 Iowa 631, 636, 116 NW 786, 128 AmSR 216; Sainsbury v. Wapato Fruit, etc., Co., 132 Wash. 455, 232 P 331.

"Rules which bind the mortgagee who sells upon foreclosure, or takes possession of and sells and converts the security, have little application to a case where the payment is made from money obtained by a voluntary sale by the mortgagor. In the latter case the lien of the mortgage does not follow or attach to the money, and the mortgagee has no recourse upon any other person to whom such moneys may be paid. In the hands of the mortgagor they have no different character than moneys derived from a wholly different source; and when paid over to the mortgagee in the absence of agreement or direction as to their application, the latter has the right to credit them upon the unsecured debt without regard to the source from which they were obtained by the debtor." Cain v. Vogt, supra.

17. Mahaska County State Bank v. Brown, 159 Iowa 577, 141 NW 459.

18. Farmers', etc., Bank v. Reeves, 20 Ga. A. 219, 92 SE 971.

19. **Application by debtor** see supra § 89.

20. U. S.—U. S. v. Bradbury, 24 F. Cas. No. 14,635, 2 Ware 150.

Cal.—Langerman v. Puritan Dining Room Co., 21 Cal. A. 627, 132 P 617.

La.—Bloodworth v. Jacobs, 2 La. Ann. 24.

N. J.—Smith v. Wood, 1 N. J. Eq. 74.

N. Y.—Reynolds v. Patten, 10 Misc. 155, 30 NYS 1050.

Pa.—Harker v. Conrad, 12 Serg. & R. 301, 14 AmD 691.

Eng.—Cory v. Turkish SS. Mecca, [1897] A. C. 286.

Can.—Reg. v. Ogilvie, 29 Can. S. C. 299.

[a] **A receipt** given by the creditor to the debtor is evidence of the creditor's application of the payment. U. S. v. Bradbury, 24 F. Cas. No. 14,635, 2 Ware 150; Bloodworth v. Jacobs, 2 La. Ann. 24; Smith v. Wood, 1 N. J. Eq. 74; Fraser v. Birch, 3 Knapp 380, 12 Reprint 697.

[b] **A statement** given the debtor by the creditor is evidence of the creditor's application of the payment. Reynolds v. Patten, 10 Misc. 155, 30 NYS 1050.

[c] **Drawing a bill on a consignee** is not an appropriation as to a balance due on a previous consignment not covered by the bill. Fabars v. Welsh, 1 PaLJR 367, 2 PaLJ 363 mem.

[d] **Crediting a payment in a particular way in a pleading** in an action after the payment is made is not an application within the meaning of the rule. Scannell v. Hub Brewing Co., 178 Mass. 288, 59 NE 628.

21. Bayley v. Wynkoop, 10 Ill. 449; Howland v. Rench, 7 Blackf. (Ind.) 236; Felin v. First Mortg. Guarantee, etc., Co., 248 Pa. 195, 93 A 956; Compton v. Ahrens, etc., Mfg. Co., (Tex. Civ. A.) 151 SW 884, 885 [cit Cyc].

[a] **Admission by letter.**—(1) Where a creditor to whom a partial payment of an account had been made wrote the guarantor of the debt demanding payment of the balance, nam-

press declarations or acts of the parties, is not sufficient.[22] An alleged appropriation by an agent of one of the parties is not established in the absence of evidence that the agent was authorized to make the appropriation.[23]

[§ 103] **b. Particular Acts.** The entry of a credit on a particular account is evidence of an appropriation by the creditor to that account,[24] an entry of a credit on a general account being evidence of an appropriation by the creditor to the earlier items in that account,[25] unless it clearly appears from the other circumstances in the case that the intention of the creditor was not to apply the payments to the earlier items.[26] It is not necessary to notify the debtor of the appropriation in order to give that effect to an entry by the creditor,[27] but in the absence of notice to the debtor the entry is not conclusive evidence of an appropriation irrevocably made.[28] When such credit is made and an account rendered to the debtor showing such application, the evidence of an irrevocable appropriation is then complete.[29] An indorsement of a payment on a note is sufficient evidence of its application to that note,[30] but under the circumstances of the case it may not show an intention to apply it first to the interest and then to the principal of the note.[31] In the absence of notice to the debtor, indorsement of payment on a note is not, however, conclusive evidence of an irrevocable appropriation.[32] In jurisdictions where the creditor may make application at any time prior to judgment or verdict,[33] the institution of the suit evidences the creditor's application of payments to items of the account other than those sued on.[34] In jurisdictions holding that the creditor loses his right to make application if he does not exercise it before controversy arises,[35] the commencement of the suit is not evidence of an intention to apply.[36] And of course the commencement of suit has no significance whatever as to application of a payment subsequently made,[37] although it has been held that in such case, if the payment is made before judgment, the taking of judgment constitutes an election to apply the payment on a debt other than the one in action.[38]

[§ 104] **4. Time for Appropriation.**[39] By the rule of the civil law the creditor was bound to make his appropriation at the time of the payment,[40] but at common law the creditor is not compelled to exercise his right of application at the time the payment is made.[41] There is much conflict among the authorities, however, as to how long the right exists. Some decisions lay down the broad rule that the creditor's right of application is not limited in time,[42] but may be exercised "up to the very last moment,"[43] except that it cannot be applied after judgment.[44] By other decisions the application must be before a controversy has arisen,[45] while another line of cases holds that it may be before suit

ing it at a figure based on the assumption that the payment already made had been applied to the unsecured portion of the debt, receives a letter from the guarantor promising that the sum named would be paid on a certain date, the application of payment to the unsecured part of the debt is established. Compton v. Ahrens, etc., Mfg. Co., (Tex. Civ. A.) 151 SW 884, 885 [cit Cyc]. (2) Where a creditor writes to his debtor that a particular appropriation of a payment will be made subject to his approval and the debtor signifies his acquiescence by not answering the letter, the appropriation is sufficiently established. Felin v. First Mortg. Guarantee, etc., Co., 248 Pa. 195, 93 A 956.

22. Schoonover v. Osborne, 117 Iowa 427, 90 NW 844.

23. Egolf Bldg., etc., Assoc. v. Cleaver, 228 Pa. 60, 77 A 245.

24. Jones v. U. S., 7 How. (U. S.) 681, 12 L. ed. 870; Missouri Cent. Lumber Co. v. Stewart, 78 Mo. A. 456; Van Rensselaer v. Roberts, 5 Den. (N. Y.) 470; Lake v. Crosbie, 9 Newfoundl. 490.

25. Grasser, etc., Brewing Co. v. Rogers, 112 Mich. 112, 70 NW 445, 67 AmSR 389.

26. See cases infra this note.

[a] **Allowance of claim in recoupment.**—Where a building contractor sues the owner of the house on a large number of notes maturing at different times but all of which have fallen due upon default in payment of the first note, an allowance by him of the owner's claim for damages due to delay are not evidence of an application of such payment to the first note where to do so would defeat his entire action. McClellan v. Rawling, 16 Ga. A. 146, 84 SE 616.

[b] **Credit at foot of account.**—Where the sum paid is credited at the foot of the whole account which is made up and sent in to the debtor for the purpose of showing the balance due, the credit is not evidence of appropriation to the earlier items. Cory v. Turkish SS. Mecca, [1897] A. C. 286.

[c] **Bank deposit by receiver.**—The deposit of money in a bank by a receiver to the credit of his account as such does not operate as an appropriation to any particular item. Wait v. Homestead Bldg. Assoc., 81 W. Va. 702, 95 SE 203, 21 ALR 696.

27. Johnson v. Thomas, 77 Ala. 367; Callahan v. Boazman, 21 Ala. 246.

28. Allen v. Culver, 3 Den. (N. Y.) 284; Simson v. Ingham, 2 B. & C. 65, 9 ECL 37, 107 Reprint 307; Scott v. Elliott, 37 B. C. 143, [1926] 2 DomLR 504, [1926] 2 WestWkly 154.

29. Peo. v. Grant, 139 Mich. 26, 102 NW 226.

30. Sanborn v. Cole, 63 Vt. 590, 22 A 716, 14 LRA 208.

[a] **Indorsement on all notes.**—Where several notes were written on one sheet an indorsement on one note of the words, "Received on the within notes," etc., is an application of the payment to all the notes. Sanborn v. Cole, 63 Vt. 590, 22 A 716, 14 LRA 208.

31. Fellows v. Christensen, 28 S. D. 353, 133 NW 814.

32. Lau v. Blomberg, 3 Nebr. (Unoff.) 124, 91 NW 206.

33. See infra § 104.

34. Haynes v. Waite, 14 Cal. 446; Starrett v. Barber, 20 Me. 457; State v. Blakemore, 275 Mo. 695, 205 SW 626; Palm v. Johnson, (Tex. Civ. A.) 255 SW 1007.

[a] **An amended petition,** in a suit for rentals past due, applying various payments to specific months, constitutes an election by the landlord to extinguish the items of rent antecedently due, in the order of time in which they stood in the account. Palm v. Johnson, (Tex. Civ. A.) 255 SW 1007.

35. See infra § 104.

36. American Woolen Co. v. Maaget, 86 Conn. 234, 85 A 583, AnnCas 1913E 889.

37. Harmony Creamery Co. v. Bickerton, 57 Pa. Super. 651.

38. Bobe v. Stickney, 36 Ala. 482.

39. **Appropriation by debtor** see supra § 88.

40. Gass v. Stinson, 10 F. Cas. No. 5,262, 3 Sumn. 98; Cory v. Turkish SS. Mecca, [1897] A. C. 286.

41. U. S.—Alexandria v. Patten, 8 Cranch 317, 2 L. ed. 633.

Cal.—Haynes v. Waite, 14 Cal. 446.

Mo.—Shortridge v. Pardee, 2 Mo. A. 363.

N. C.—Moss v. Adams, 39 N. C. 42.

Tex.—Snyder-Bell Grocery Co. v. Hamilton, (Civ. A.) 276 SW 752, 756 [quot Cyc].

N. S.—McKenzie v. Gordon, 1 N. S. Dec. 153.

42. Pearce v. Walker, 103 Ala. 250, 15 S 568; California Bank v. Webb, 94 N. Y. 467; Sheppard v. Steele, 43 N. Y. 52, 3 AmR 660. See Johnson v. Thomas, 77 Ala. 367, 369 (holding that the right must be exercised ante litem motam or before any controversy has arisen); Sanford v. Van Arsdall, 53 Hun 70, 6 NYS 494 (holding that the right is lost after suit is commenced). But see Shipsey v. Bowery Nat. Bank, 59 N. Y. 485; Allen v. Culver, 3 Den. (N. Y.) 284 (holding that creditor has reasonable time to apply).

43. Cory v. Turkish SS. Mecca, [1897] A. C. 286; Seymour v. Pickett, [1905] 1 K. B. 715; In re Lysaght, [1903] 1 Ir. 235; Mayberry v. Hunt, 34 N. B. 628. See also cases infra note 47.

[a] **At the trial** the creditor may exercise his right to appropriate in the witness box after action brought, provided that there has been no proceeding in the action amounting to a previous exercise or determination of his right. Seymour v. Pickett, [1905] 1 K. B. 715.

44. Smith v. Betty, [1903] 2 K. B. 317.

45. U. S.—New York Nat. Bank v. Mechanics Nat. Bank, 94 U. S. 437, 439, 24 L. ed. 176; U. S. v. Kirpatrick, 9 Wheat. 720, 738, 6 L. ed. 199; Bacon v. Dollar SS. Lines, 290 Fed. 964; In re American Paper Co., 255 Fed. 121; The Sophia Johnson, 237 Fed. 406.

Ark.—Lazarus v. Freidheim, 51 Ark. 371, 11 SW 518.

Conn.—Ford Bros., Inc. v. Frederick M. Ward Co., 107 Conn. 425, 140 A 754; American Woolen Co. v. Maaget, 86 Conn. 234, 85 A 583, AnnCas 1913E 889.

Fla.—Battle v. Jennings Naval Stores Co., 74 Fla. 12, 75 S 949.

Ga.—Austin v. Southern Home Bldg., etc., Assoc., 122 Ga. 439, 50 SE 382.

Ind.—Applegate v. Koons, 74 Ind. 247; Russell v. Metzgar, 2 Ind. 345.

Me.—Lehigh Coal, etc., Co. v. McLeod, 114 Me. 427, 96 A 736; Plummer v. Erskine, 58 Me. 59, 62; Milliken v. Tufts, 31 Me. 497; Starrett v. Barber, 20 Me. 457.

N. J.—Benson v. Reinshagen, 75 N. J. Eq. 358, 362, 72 A 954, 955; Terhune v. Colton, 12 N. J. Eq. 312, 320.

Va.—Chapman v. Com., 25 Gratt. (66 Va.) 721.

W. Va.—Norris v. Beaty, 6 W. Va. 477

See also cases supra note 42.

brought,[46] and still others that it may be applied before verdict or judgment.[47] It has also been held that the appropriation must be made within a reasonable time,[48] but application of a payment to a note not due at the time the payment was made cannot be postponed to a time when the note has matured, when to do so would result in prejudice to third parties.[49]

[§ 105] **5. Effect of Application.**[50] After the creditor has made an application of a payment, it cannot be altered except by mutual consent.[51] But a creditor may show an actual application of a payment differently from that indicated in the unauthorized memorandum of his agent,[52] and he may also correct an application inadvertently made to a particular debt when he was under legal obligation to make it to another,[53] and after making one application the parties may agree that the credit be changed and otherwise applied.[54] The debtor is estopped from questioning the application made by the creditor where he receives an account or receipt applying payments in a certain way and fails to object,[55] even though the application was made by the creditor in violation of an alleged agreement between the parties,[56] or where he pays the balance due on the account after deducting the payment as applied,[57] or where he deals with the creditor for a long period after the latter's application of the payments with knowledge of such application and without objecting thereto.[58]

[§ 106] **F. By Court—1. Right and Duty To Make.** If neither party makes an application of a payment the court will do so,[59] or the jury will make the application acting on the evidence and under the instruction of the court.[60] The court will not make an application where there is evidence of

[a] **"Before controversy or at least within reasonable time."**—Brown v. Rice, (Tex. Civ. A.) 290 SW 784 [aff (Commn. A.) 296 SW 495]. To same effect Stone v. Pettus, 47 Tex. Civ. A. 14, 103 SW 413.

46. Cal.—Haynes v. Waite, 14 Cal. 446; Joy v. Rousseau, 72 Cal. A. 179, 236 P 972.
Del.—McCartney v. Buck, 13 Del. 34, 12 A 717.
Iowa.—Boynton v. Salinger, 147 Iowa 537, 547, 126 NW 369.
Mich.—Peo. v. Grant, 139 Mich. 26, 102 NW 226.
Mo.—Shortridge v. Pardee, 2 Mo. A. 363.
N. C.—Moss v. Adams, 39 N. C. 42.
Vt.—Pierce v. Knight, 31 Vt. 701.
Wash.—Frazer v. Miller, 7 Wash. 521, 527, 35 P 427.
Ont.—Fraser v. Locie, 10 Grant Ch. 207.
See cases supra note 42.

47. Brice v. Hamilton, 12 S. C. 32.

48. Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 AmD 691; Taylor v. Coleman, 20 Tex. 772; Compton v. Ahrens, etc., Mfg. Co., (Tex. Civ. A.) 151 SW 884, 885 [cit Cyc]; Thatcher v. Tillory, 30 Tex. Civ. A. 327, 70 SW 782; McKenzie v. Gordon, 1 N. S. Dec. 153. See cases supra notes 42, 45.

49. The William B. Murray, 240 Fed. 147.

50. **Effect of debtor's application** see supra §§ 90–92.

51. U. S.—The Sophia Johnson, 237 Fed. 406; U. S. v. Massachusetts Bonding, etc., Co., 198 Fed. 923; The Asiatic Prince, 108 Fed. 287, 47 CCA 325 [certiorari den 183 U. S. 697 mem, 22 SCt 933 mem, 46 L. ed. 395 mem].
Ala.—Redd v. Todd, 209 Ala. 56, 95 S 276; Nelson v. Holcomb, 187 Ala. 119, 121, 65 S 773 [cit Cyc]; Pearce v. Walker, 103 Ala. 250, 15 S 568; Lane v. Jones, 79 Ala. 156.
Cal.—White v. Costigan, 138 Cal. 564, 72 P 178; Hardenbergh v. Bacon, 33 Cal. 356.
Ill.—Halsted v. Griefen, 173 Ill. A. 551; U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [rev in part on other grounds 221 Ill. 581, 77 NE 1108].
Ind.—Kendallville Lumber Co. v. Burger, (A.) 162 NE 713.
Iowa.—Mitchell v. Wheeler, 122 Iowa 368, 98 NW 152; Chicago Lumber Co. v. Woods, 53 Iowa 552, 5 NW 715.
La.—Metoyer v. Trezzini, 6 Rob. 124.
Me.—Phillips v. Moses, 65 Me. 70; Plummer v. Erskine, 58 Me. 59; Codman v. Armstrong, 28 Me. 91.
Mass.—Hanford v. Codman, 164 NE 813; Spinney v. Freeman, 230 Mass. 356, 119 NE 798, 799 [cit Cyc].
Mich.—McMullen Mach. Co. v. Grand Rapids Trust Co., 239 Mich. 295, 214 NW 110, 55 ALR 1157.
Minn.—Pond v. O'Connor, 70 Minn. 266, 73 NW 159, 248.
N. J.—Smith v. Wood, 1 N. J. Eq. 74.
N. Y.—Keller v. Keller, 154 App. Div. 919, 139 NYS 87 [mod on other grounds 209 N. Y. 552 mem, 103 NE 1125 mem]; Louis v. Bauer, 33 App. Div. 287, 53 NYS 985; Allen v. Culver, 3 Den. 284.
Oh.—Brown v. Brabham, 3 Oh. 275; Rice v. McIntyre-Skinner Trunk Co., 22 Oh. Cir. Ct. N. S. 307.
Tex.—Cave v. Talley Co., (Civ. A.) 298 SW 912; Palm v. Johnson, (Civ. A.) 255 SW 1007; Ft. Worth, etc., R. Co. v. Read, (Civ. A.) 154 SW 1027.
Va.—Chapman v. Com., 25 Gratt. (66 Va.) 721; Hill v. Southerland, 1 Wash. (1 Va.) 128.
W. Va.—Wait v. Homestead Bldg. Assoc., 81 W. Va. 702, 95 SE 203, 21 ALR 696.
Eng.—Pollard v. Bank of England, L. R. 6 Q. B. 623.
N. S.—Moore v. A. R. Williams Mach. Co., [1925] 2 DomLR 1009.
Ont.—Beatty v. Maxwell, 1 Ont. Pr. 85.
Newfoundl.—Lake v. Crosbie, 9 Newfoundl. 490.

[a] **Running account.**—Where a creditor has treated an account as a general and continuous one, and made a general application of payments thereon, he cannot afterward separate the items into two separate accounts, and apply the payments to the later items. Pond v. O'Connor, 70 Minn. 266, 73 NW 159, 248.

52. Dollar Sav., etc., Co. v. Crawford, 69 W. Va. 109, 70 SE 1039, 33 LRANS 587.

53. Sallisaw First Nat. Bank v. Ballard, 41 Okl. 553, 139 P 293.

54. Thompson v. Reeves, 170 Ark. 409, 279 SW 1011.

55. La.—Baker v. Smith, 44 La. Ann. 925, 11 S 585; Flower v. O'Bannon, 43 La. Ann. 1042, 10 S 376; McLear v. Hunsicker, 30 La. Ann. 1225.
Md.—Hawkins v. Bouic, 121 Md. 147, 88 A 126.
Miss.—Turner v. Osborn, 106 Miss. 737, 64 S 721.
N. Y.—Seymour v. Marvin, 11 Barb. 80.
Pa.—Felin v. First Mortg. Guarantee, etc., Co., 248 Pa. 195, 93 A 956.
Vt.—Sawyer v. Howard, 86 Vt. 63, 83 A 535.

56. Sweeney v. Pratt, 70 Conn. 274, 39 A 182, 66 AmSR 101; De Busk v. Perkins, 207 Ky. 556, 269 SW 716.

57. Gleason v. Hobart, 16 Vt. 472.

58. Krebs v. Blatz, 134 Ky. 505, 121 SW 436.

59. U. S.—Delaware Dredging Co. v. Tucker Stevedoring Co., 25 F. (2d) 44; McCall v. U. S. Shipping Bd. Emergency Fleet Corp., 294 Fed. 989; In re American Paper Co., 255 Fed. 121; Columbia Digger Co. v. Rector, 215 Fed. 618; U. S. v. Bradbury, 24 F. Cas. No. 14,635, 2 Ware 150; Whetmore v. Murdock, 29 F. Cas. No. 17,510, 3 Woodb. & M. 390.
Ala.—White v. Bean, 16 Ala. A. 330, 77 S 924.
Ark.—Snow v. Wood, 163 Ark. 280, 259 SW 733.
Cal.—Joy v. Rousseau, 72 Cal. A. 179, 236 P 972; Los Angeles Trust, etc., Bank v. Forve, 45 Cal. A. 298, 187 P 438.
Conn.—Ford Bros., Inc. v. Frederick M. Ward Co., 107 Conn. 425, 140 A 754.
Del.—Pickering v. Day, 2 Del. Ch. 333.
Fla.—Alford v. Leonard, 88 Fla. 532, 102 S 885.
Ga.—Citizens', etc., Bank v. Armstrong, 22 Ga. A. 138, 95 SE 729; Henderson v. Maysville Guano Co., 15 Ga. A. 69, 82 SE 588.
Hawaii.—Lewers v. Wong Wong, 24 Hawaii 39, 46 [cit Cyc].
Ill.—Garrard v. Ashbrook Co., 222 Ill. A. 387.
Ind.—Barrett v. Sipp, 50 Ind. A. 304, 98 NE 310.
Ky.—Woolfolk v. Thomas, 164 Ky. 43, 174 SW 739; McDaniel v. Barnes, 5 Bush 183; Nutall v. Brannin, 5 Bush 11.
La.—Bloodworth v. Jacobs, 2 La. Ann. 24.
Mich.—Van Sceiver v. King, 176 Mich. 605, 142 NW 1069.
Miss.—McElrath v. Kimmons, 146 Miss. 775, 112 S 164, 680; Williams v. Butts, 124 Miss. 661, 87 S 145, 147 [cit Cyc].
Mo.—Estes v. Fry, 166 Mo. 70, 65 SW 741.
N. H.—Young v. Woodward, 44 N. H. 250.
N. J.—Leeds v. Gifford, 41 N. J. Eq. 464, 5 A 795 [aff 45 N. J. Eq. 245, 19 A 621].
N. Y.—Lichtenstein v. Grossman Constr. Corp., 248 N. Y. 390, 162 NE 292; Matter of Milligan, 112 App. Div. 373, 98 NYS 480.
N. C.—Raymond v. Newman, 122 N. C. 52, 29 SE 353.
Okl.—Waples-Platter Grocer Co. v. Hardin, 85 Okl. 49, 204 P 433.
Or.—Trullinger v. Kofoed, 7 Or. 228, 33 AmR 708.
Pa.—Moore v. Kiff, 78 Pa. 96; Keller v. Conn., 1 AmLJ 156.
Tex.—Rice v. Brown, (Commn. A.) 296 SW 495 [aff (Civ. A.) 290 SW 784]; Katy State Bank v. Katy Bank, (Civ. A.) 283 SW 1114; Whitehead v. Wicker, (Civ. A.) 280 SW 604; Miller v. White, (Civ. A.) 264 SW 176, 179 [cit Cyc]; Lockett v. Farmers' State Bank, (Civ. A.) 205 SW 526; Rodgers-Wade Furniture Co. v. Wynn, (Civ. A.) 156 SW 340; Daniel v. Brewton, (Civ. A.) 136 SW 815.
Va.—Pope v. Transparent Ice Co., 91 Va. 79, 20 SE 940.
Wash.—Bishop v. T. Ryan Constr. Co., 106 Wash. 254, 180 P 126; Frazer v. Miller, 7 Wash. 521, 35 P 427.
W. Va.—Wait v. Homestead Bldg. Assoc., 81 W. Va. 702, 95 SE 203, 21 ALR 696.
Ont.—Wilson v. Rykert, 14 Ont. 188.

60. Conn.—Selleck v. Sugar Hollow Turnp. Co., 13 Conn. 453.

an appropriation by either the debtor or creditor.[61]

[§ 107] **2. Intent of Parties.** Payments by the debtor will be applied according to the intention of the parties where that can be determined with reasonable certainty,[62] as it may be from the previous dealings between the parties,[63] or by receipts or other evidences of payment made by one and received by the other,[64] or by a contract between them.[65] Where an arrangement has been made that money paid shall be appropriated to the discharge of specified debts, the court may enforce the agreement.[66]

[§ 108] **3. Preference to Debtor or Creditor.** Under the rules of the civil law, the application must be made to that debt which the debtor at the time has the most interest to discharge, irrespective of its effects on the creditor,[67] and this rule has been adopted in a few of the jurisdictions in this country.[68] On the other hand, while there are some authorities holding that, under common-law rules, the creditor should be preferred,[69] the more generally accepted rule is that the application will be made in such a manner, in view of all of the circumstances of the case, as is most in accord with justice and equity and will best protect and maintain the rights of both debtor and creditor,[70] even though in order to make a just settlement a departure is made from

Ga.—Baumgartner v. McKinnon, 10 Ga. A. 219, 73 SE 519.
Ill.—McFarland v. Lewis, 3 Ill. 344.
N. J.—Oliver v. Phelps, 20 N. J. L. 180; White v. Trumbull, 15 N. J. L. 314, 29 AmD 687.
Vt.—Robinson v. Doolittle, 12 Vt. 246.

61. D. C.—Metropolitan Loan, etc., Co. v. Schafer, 44 App. 356.
Ga.—Mercer v. Tift, 79 Ga. 174, 4 SE 114; Killorin v. Bacon, 57 Ga. 497.
Kan.—Watkins Medical Co. v. Hamm, 89 Kan. 138, 143, 130 P 650 [quot Cyc].
La.—Brice v. Rutledge, 2 La. A. 771.
Me.—Treadwell v. Moore, 34 Me. 112.
Md.—Albert v. Lindau, 46 Md. 334.
Mass.—Shaw v. Pratt, 22 Pick. 305.
Mich.—Wood v. Genett, 120 Mich. 222, 79 NW 199.
Mo.—McMillian v. Grayston, 83 Mo. A. 425.
N. J.—Benson v. Reinshagen, 75 N. J. Eq. 358, 72 A 954; Feldman v. Gamble, 26 N. J. Eq. 494; Terhune v. Colton, 12 N. J. Eq. 312.
N. Y.—Read v. Mutual Safety Ins. Co., 5 N. Y. Super. 54.
Oh.—Muskingum Bank v. Carpenter, 7 Oh. 21, 28 AmD 616.
Pa.—Watt v. Hoch, 25 Pa. 411; Selfridge v. Northampton Bank, 8 Watts & S. 320.
Tex.—City Nat. Bank v. Eastland County, (Civ. A.) 12 SW (2d) 662; Reed v. Corry, (Civ. A.) 61 SW 157.
Va.—Pitzer v. Logan, 85 Va. 374, 7 SE 385.

62. U. S.—The Mary K. Campbell, 40 Fed. 906; The Martha, 29 Fed. 708.
Ark.—Briggs v. Steele, 91 Ark. 458, 121 SW 754.
Conn.—Chester v. Wheelwright, 15 Conn. 562.
Ga.—Holley v. Hardeman, 76 Ga. 328; Henderson v. Maysville Guano Co., 15 Ga. A. 69, 82 SE 588.
Hawaii.—Lewers v. Wong Wong, 24 Hawaii 39, 46 [cit Cyc].
Ind.—Huntington County Loan, etc., Assoc. v. Cast, 67 NE 921; Weidenhammer v. McAdams, 52 Ind. A. 98, 98 NE 883; Barrett v. Sipp, 50 Ind. A. 304, 98 NE 310; Conduitt v. Ryan, 3 Ind. A. 1, 29 NE 160.
Me.—Bangor Boom Corp. v. Whiting, 29 Me. 123; Portland Bank v. Brown, 22 Me. 295.
Mass.—Bonaffe v. Woodberry, 12 Pick. 456.
Miss.—Williams v. Butts, 124 Miss. 661, 87 S 145, 147 [cit Cyc]; Gwin v. McLean, 62 Miss. 121.
N. Y.—Gillett v. Depuy, 48 App. Div. 388, 63 NYS 49.
N. C.—Long v. U. S. Fidelity, etc., Co., 178 N. C. 503, 101 SE 11, 14 [quot Cyc].
Pa.—Stewart v. Keith, 12 Pa. 238.
Tex.—El Paso Bldg., etc., Assoc. v. Lane, 81 Tex. 369, 17 SW 77; Rice v. Brown, (Commn. A.) 296 SW 495 [aff (Civ. A.) 290 SW 784]; Miller v. White, (Civ. A.) 264 SW 176.
Vt.—Cass v. McDonald, 39 Vt. 65; Farmers' Bank v. Burchard, 33 Vt. 346; McIntyre v. Corss, 18 Vt. 451; Emery v. Tichout, 13 Vt. 15; Robinson v. Doolittle, 12 Vt. 246.
Va.—Hill v. Gregory, Wythe 73.
Wyo.—Becker v. Hopper, 22 Wyo. 237, 138 P 179, AnnCas1916D 1041.
Eng.—Cory v. Turkish SS. Mecca, [1897] A. C. 286; Kirkpatrick v. South Australian Ins. Co., Ltd., 11 App. Cas. 177; Henniker v. Wigg, 4 Q. B. 792, 45 ECL 792, 114 Reprint 1095; Chitty v. Naish, 2 Dowl. P. C. 511; Brazier v. Bryant, 2 Dowl. P. C. 477; Browning v. Baldwin, 40 L. T. Rep. N. S. 248; Brett v. Marsh, 1 Vern. Ch. 468, 23 Reprint 594.
N. S.—Holmes v. Davison, 15 N. S. 61.
Ont.—Griffith v. Crocker, 18 Ont. A. 370; Russell v. Davey, 7 Grant Ch. 13.

[a] **Amount of payment.**—Where a lien was filed for tin work, and the lienor had also furnished hardware in the amount of three hundred and seventy-five dollars, for which no lien was filed, a payment of nine hundred dollars on account, made at a time when less than seventy dollars worth of the hardware had been furnished, should be applied on the lien account. Becker v. Hopper, 22 Wyo. 237, 138 P 179, AnnCas1916D 1041.

63. Gwin v. McLean, 62 Miss. 121; Bower v. Walker, 220 Pa. 294, 69 A 984.

64. Tucker v. Brackett, 25 Tex. Suppl. 199.

[a] **A receipt** for money in the ordinary form "on account" will not be applied to an outstanding note, in a proceeding to enjoin a judgment thereon, unless the intention of the parties to have the payment so applied is unequivocally proved. Tucker v. Brackett, 25 Tex. Suppl. 199.

65. Joy v. Rousseau, 72 Cal. A. 179, 236 P 972.

66. Lansdale v. Mitchell, 14 B. Mon. (Ky.) 348; Eagle Drug Co. v. White, (Tex. Civ. A.) 182 SW 378.

67. Murdock v. Clarke, 88 Cal. 384, 26 P 601; Everett v. Graye, 3 La. A. 136. And see cases infra note 68.

[a] **In Quebec** this is the statutory rule. Reg. v. Ogilvie, 29 Can. S. C. 299.

68. In re Copping Sheet Plate, etc., Works, 13 F. (2d) 895; Gass v. Stinson, 10 F. Cas. No. 5,262, 3 Sumn. 98; U. S. v. Bradbury, 24 F. Cas. No. 14,635, 2 Ware 150; Miller v. The S. F. J. Trabue, 16 La. Ann. 375; Spiller v. His Creditors, 16 La. Ann. 292; Slaughter v. Milling, 15 La. Ann. 526; Dunlop v. Tarkington, 5 La. Ann. 569; Follain v. Orillion, 9 Rob. (La.) 506; Denis v. Ramouin, 1 Rob. (La.) 318; Pargoud v. Griffing, 10 La. 356; Abadie v. Poydras, 6 Mart. N. S. (La.) 26; Wickner v. Croghan, 4 Mart. N. S. (La.) 79; Johnson v. Sterling, 3 Mart. N. S. (La.) 483; Clark v. Boarman, 89 Md. 428, 43 A 926; Frazier v. Lanahan, 71 Md. 131, 17 A 940, 17 AmSR 516; Calvert v. Carter, 18 Md. 73; Gwinn v. Whitaker, 1 Harr. & J. (Md.) 754; McTavish v. Carroll, 1 Md. Ch. 160; Sanz v. Lavin, 6 Philippine 299.

[a] **An obligation as surety** is not necessarily less onerous than one as principal, and a payment is not necessarily to be imputed to the latter rather than the former. Whether a debt be more or less onerous depends on the debtor's interest in discharging it. Denis v. Ramouin, 1 Rob. (La.) 318.

[b] **In Mississippi** (1) while the civil-law rule has been recognized (Sunflower County v. Drew Bank, 136 Miss. 191, 101 S 192; Neal v. Allison, 50 Miss. 175; Hamer v. Kirkwood, 25 Miss. 95; Baine v. Williams, 18 Miss. 113), (2) it has been applied only where the controversy is between principal debts of unequal dignity as bond or simple contract, or where they are unequally onerous as mortgage and simple contract or where one bears interest or a higher rate of interest and the other bears none or a less rate of interest (Miller v. Leflore, 32 Miss. 634). (3) The rule has not been applied as between claims for principal and interest. Miller v. Leflore, supra. (4) Nor has the rule any application where there is an express agreement between the parties, or a course of business from which an agreement would be implied that another rule shall control. Gwin v. McLean, 62 Miss. 121. (5) Nor will the rule be allowed unjustly to enrich the debtor at the creditor's expense. Clark v. Clark, 58 Miss. 68. (6) Where a married woman borrowed money to pay for land, on which she gave a mortgage to secure the lender and the money so lent was charged on general account, and unappropriated payments were made sufficient to repay the money expended for the land, a court of equity will apply the payments to other items of the account, so as to preserve the lien, a married woman because of her coverture not being liable for the loan to her, and the creditor's remedy therefore being confined to his lien on the land. Clark v. Clark, supra.

69. Brown v. Scheuer, 210 Ala. 47, 97 S 50; Porter v. Watkins, 196 Ala. 333, 71 S 687; McCurdy v. Middleton, 82 Ala. 131, 2 S 721; Zuelly v. Casper, 46 Ind. A. 430, 92 NE 785; Portland Bank v. Brown, 22 Me. 295; Smith v. Brooke, 49 Pa. 147; Pierce v. Sweet, 33 Pa. 151; Bell v. Clark, 38 Pa. Super. 365. But see Callahan v. Boazman, 21 Ala. 246 (such application will be made as seems just and proper under all the circumstances of the case); Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 AmD 691 (where the interest of the debtor would be promoted by a particular appropriation, the law presumes that he intended to pay in that way); Davis v. Wood, 1 Del. Co. (Pa.) 382.

[a] **Notes.**—Other considerations being equal, a payment will be appropriated in the first instance to the payment of a note due absolutely to the creditor, rather than of one transferred to him as collateral security only. Portland Bank v. Brown, 22 Me. 295.

70. U. S.—Korbly v. Springfield Sav. Inst., 245 U. S. 330, 38 SCt 88, 62 L. ed. 326 [aff 218 Fed. 814, 134 CCA 502]; U. S. v. Kirpatrick, 9 Wheat. 720, 6 L. ed. 199; Delaware Dredging Co. v. Tucker Stevedoring Co., 25 F. (2d) 44; Cremer v. Higginson, 6 F. Cas. No. 3,383, 1 Mason 323; Leef v. Goodwin, 15 F. Cas. No. 8,207, Taney 460; Postmaster-Gen. v. Norvell, 19 F. Cas. No. 11,310, Gilp. 106; U. S. v. Linn, 26 F. Cas. No. 15,606, 2 McLean 501 [rev on other grounds 1 How. 104, 11 L. ed. 64].
Cal.—Ohio Electric Car Co. v. Le Sage, 198 Cal. 705, 247 P 190; Murdock v. Clarke, 88 Cal. 384, 26 P 601; Joy v. Rousseau, 72 Cal. A. 179, 236

the mode of appropriation usually followed by the court.[71] This rule applies to involuntary, as well as to voluntary, payments.[72]

[§ 109] **4. Debts to Which Application Will Be Made—a. In General.** Where only one debt is shown to exist, of course the law will apply the payment to that debt.[73] A payment will not be applied to a debt owing by the debtor to a third person,[74] nor to debts contracted after the payment,[75] nor to an indebtedness to be incurred in the future,[76] nor to unenforceable demands.[77] It is generally held that the court will apply a payment to interest instead of to principal;[78] to an interest-bearing debt in preference to one bearing no interest;[79] to the debt bearing the highest rate of interest;[80] to the debt bearing compound interest;[81] to the payment of legal interest instead of that which is usurious;[82] to a debt that has matured rather than one not yet due;[83] to the payment of legal items in an account rather than those which are illegal;[84] to an unsecured debt in preference to one for which the creditor is secured;[85] to a debt for which the security is most precarious where the creditor holds more than one security;[86] and, for the purpose of protecting the rights of the creditor, to the earlier items of an account in preference to later ones.[87]

[§ 110] **b. Order of Priority in Time or Maturity[88]—(1) In General.** Subject to certain limitations,[89] the general rule for application by the court, statutory in some jurisdictions,[90] requires an appropriation to the oldest debt,[91] that is, the

P 972; Irvine, etc., Lumber Co. v. Holmes, 26 Cal. A. 453, 147 P 229.

Conn.—Ford Bros., Inc. v. Frederick M. Ward Co., 107 Conn. 425, 140 A 754, 756 [cit Cyc]; Chester v. Wheelwright, 15 Conn. 562; Stamford Bank v. Benedict, 15 Conn. 437.

Del.—Mutual Loan Assoc. v. Tyre, 26 Del. 88, 81 A 48.

Fla.—Alford v. Leonard, 88 Fla. 532, 102 S 885; Battle v. Jennings Naval Stores Co., 74 Fla. 12, 75 S 949; Randall v. Parramore, 1 Fla. 409.

Ga.—Citizens', etc., Bank v. Armstrong, 22 Ga. A. 138, 95 SE 729.

Ill.—Wilhelm v. Schmidt, 84 Ill. 183; Bayley v. Wynkoop, 10 Ill. 449; Liese v. Hentze, 240 Ill. A. 273 [rev on other grounds 326 Ill. 633, 158 NE 428]; Mutual Constr. Co. v. Baker, 237 Ill. A. 596; Garrard v. Ashbrook Co., 222 Ill. A. 387; Saffer v. Lambert, 111 Ill. A. 410; Dehner v. Helmbacher Forge, etc., Mills, 7 Ill. A. 47.

Iowa.—Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216; Stewart First Nat. Bank v. Hollinsworth, 78 Iowa 575, 43 NW 536, 6 LRA 92 [foll Shaffer v. Chernyk, 130 Iowa 686, 107 NW 801].

Ky.—Woolfolk v. Thomas, 164 Ky. 43, 174 SW 739.

Mich.—Van Sceiver v. King, 176 Mich. 605, 142 NW 1069; Youmans v. Heartt, 34 Mich. 397.

Minn.—Thorne v. Allen, 72 Minn. 461, 75 NW 706.

Mo.—Estes v. Fry, 166 Mo. 70, 65 SW 741; Benny v. Rhodes, 18 Mo. 147, 59 AmD 293.

N. H.—Clark v. Wheeler, 81 N. H. 34, 121 A 588; Young v. Woodward, 44 N. H. 250; Thompson v. Phelan, 22 N. H. 339; Merrimack County Bank v. Brown, 12 N. H. 320.

N. Y.—Lichtenstein v. Grossman Constr. Corp., 248 N. Y. 390, 162 NE 292; Jones v. Benedict, 83 N. Y. 79 [aff 17 Hun 128]; Campbell v. Vedder, 1 Abb. Dec. 295, 3 Keyes 174.

Okl.—Waples-Platter Grocer Co. v. Hardin, 85 Okl. 49, 204 P 433.

Tex.—Proctor v. Marshall, 18 Tex. 63; Lockett v. Farmers' State Bank, (Civ. A.) 205 SW 526; Rodgers-Wade Furniture Co. v. Wynn, (Civ. A.) 156 SW 340; Daniel v. Brewton, (Civ. A.) 136 SW 815; Lowery v. Dickson, 1 Tex. A. Civ. Cas. § 497. See Phillips v. Herndon, 78 Tex. 378, 14 SW 857, 22 AmSR 59 (application must not be inequitable or unjust to debtor). But see Stanley v. Westrop, 16 Tex. 200 (presumed intention of debtor will be followed); Paschall v. Pioneer Sav., etc., Co., 19 Tex. Civ. A. 102, 47 SW 98 (debtor favored in equity).

Vt.—Pierce v. Knight, 31 Vt. 701; Robinson v. Doolittle, 12 Vt. 246. But see Briggs v. Williams, 2 Vt. 283 (rule of application for interest of creditor followed).

Va.—Chapman v. Com., 25 Gratt. (66 Va.) 721; Smith v. Loyd, 11 Leigh (38 Va.) 512, 37 AmD 621.

W. Va.—Wait v. Homestead Bldg. Assoc., 81 W. Va. 702, 95 SE 203, 21 ALR 696; State v. McDermitt, 72 W. Va. 291, 296, 78 SE 56 [cit Cyc]; Buster v. Holland, 27 W. Va. 510; Norris v. Beaty, 6 W. Va. 477.

Wis.—Hannan v. Engelmann, 49 Wis. 278, 5 NW 791.

"The rule which favors the debtor may be applied in proper instances where it will work equity, and the rule which favors the creditor may be applied in proper instances where it will work equity, but neither of these rules should be carried to an extreme or unreasonable length." Thorne v. Allen, 72 Minn. 461, 464, 75 NW 706.

71. Alexander Lumber Co. v. Ætna Acc., etc., Co., 296 Ill. 500, 129 NE 871 [rev 215 Ill. A. 555]; Campbell v. Vedder, 1 Abb. Dec. (N. Y.) 295, 3 Keyes 174.

72. Ohio Electric Car Co. v. Le Sage, 198 Cal. 705, 247 P 190; Citizens', etc., Bank v. Armstrong, 22 Ga. A. 138, 95 SE 729; Linscott State Bank v. Maryland Fidelity, etc., Co., 94 Kan. 30, 37, 145 P 868 [quot Cyc]; Campbell v. Vedder, 1 Abb. Dec. (N. Y.) 295, 3 Keyes 174.

Applicability by debtor or creditor to involuntary payments see supra § 86.

73. Ala.—McDonnell v. Montgomery Branch Bank, 20 Ala. 313.

La.—Eyle v. Roman Catholic Church, etc., 36 La. Ann. 310.

Me.—Cary v. Herrin, 62 Me. 16.

Mass.—Hill v. McLaughlin, 158 Mass. 307, 33 NE 514.

Mo.—Missouri Cent. Lumber Co. v. Stewart, 78 Mo. A. 456.

Vt.—Miller v. Bingham, 29 Vt. 82.

[a] **Matured notes** growing out of the same transaction, in the hands of the same creditor, against the same debtor, constitute but one debt; and payments made after maturity are imputable to the entire debt. Eyle v. Roman Catholic Church, etc., 36 La. Ann. 310.

74. Missouri Cent. Lumber Co. v. Stewart, 78 Mo. A. 456.

75. London, etc., Bank v. Parrott, 125 Cal. 472, 58 P 164, 73 AmSR 64.

76. Harrison v. Johnston, 27 Ala. 445 (holding that, in the absence of evidence showing most unmistakably the intention of the parties, a general payment to a commission merchant, with whom a debtor has a running account, will be referred to his existing indebtedness, and not to future advances).

77. See infra § 114.

78. See infra §§ 119–122.

79. Ky.—Blanton v. Rice, 5 T. B. Mon. 253.

La.—Pargoud v. Griffing, 10 La. 356.

Md.—McTavish v. Carroll, 1 Md. Ch. 160.

Tenn.—Bussey v. Gant, 10 Humphr. 238.

Eng.—Chase v. Box, 2 Freem. 261, 22 Reprint 1197; Heyward v. Lomax, 1 Vern. Ch. 24, 23 Reprint 279.

But see Compton v. Collins, 197 Ala. 642, 73 S 334 (to interest-bearing and noninterest-bearing debts pro rata).

80. Magarity v. Shipman, 82 Va. 784, 1 SE 109.

81. Murdock v. Clarke, 88 Cal. 384, 26 P 601.

82. See Usury [39 Cyc 1026].

83. U. S.—U. S. v. Morgan, 111 Fed. 474.

Ala.—Porter v. Watkins, 196 Ala. 333, 71 S 687; Bobe v. Stickney, 36 Ala. 482.

Conn.—Stamford Bank v. Benedict, 15 Conn. 437.

Ky.—Sharp v. Nathan, 2 Ky. Op. 300.

La.—New Orleans v. Pignioló, 29 La. Ann. 835; Miller v. The S. F. J. Trabue, 16 La. Ann. 375; Spiller v. His Creditors, 16 La. Ann. 292; Slaughter v. Milling, 15 La. Ann. 526; Follain v. Orillion, 9 Rob. 506; Lebleu v. Rutherford, 9 Rob. 95; Forstall v. Blanchard, 12 La. 1; Wartelle v. Le Blanc, 10 La. 556; Cox v. Rees, 10 La. 232.

Mo.—Cloney v. Richardson, 34 Mo. 370.

N. Y.—Thomas v. Kelsey, 30 Barb. 268; Niagara Bank v. Rosevelt, 9 Cow. 409.

Pa.—Seymour v. Sexton, 10 Watts 255.

S. C.—Williams v. Vance, 9 S. C. 344, 30 AmR 26.

[a] **Where several notes,** payable in merchandise on the first days of three successive years, were given, the merchandise delivered in the course of each year should be applied in satisfaction of the note falling due the first day of the succeeding year. Anderson v. Mason, 6 Dana (Ky.) 217.

[b] **Where notes have not matured** but are the only indebtedness, payment may be applied to them. Briggs v. Steele, 91 Ark. 458, 121 SW 754.

Application by creditor see supra § 100.

84. See infra § 114.

85. See infra §§ 112, 113.

86. See infra § 112.

87. See infra § 111.

88. Rights of surety see Principal and Surety [32 Cyc 172].

89. See cases infra notes 95–99.

90. See Moss v. Odell, 141 Cal. 335, 74 P 999; Coalter v. Hurst, 97 Cal. 290, 32 P 248.

91. U. S.—Grant v. Fletcher, 283 Fed. 243, 271 [cit Cyc]; U. S. Fidelity, etc., Co. v. Eichel, 219 Fed. 803, 135 CCA 473 [app dism 239 U. S. 629 mem, 36 SCt 165 mem, 60 L. ed. 475 mem]; In re Hawks, 204 Fed. 309 [aff sub nom. Crowder v. Allen-West Commn. Co., 213 Fed. 177, 129 CCA 521]; In re The Barges 2 & 4, 58 Fed. 425; The Louie Dole, 14 Fed. 862, 11 Biss. 479; Boody v. U. S., 3 F. Cas. No. 1,636, 1 Woodb. & M. 150; McDowell v. Blackstone Canal Co., 16 F. Cas. No. 8,777, 5 Mason 11; Whetmore v. Murdock, 29 F. Cas. No. 17,510, 3 Woodb. & M. 390.

Ala.—Mayer v. Gewin, 200 Ala. 391, 76 S 307; Compton v. Collins, 197 Ala. 642, 73 S 334; Watson v. Appleton, 183 Ala. 514, 62 S 765.

debt first becoming due.[92] Where one debt is due and another is not due, application is made to the past-due indebtedness, in the absence of agreement of the parties to the contrary.[93] But an excess in the payment over the amount of the debt that is due will be applied to the debt not due, leaving the balance of the latter debt still unpaid.[94] The rule does not apply where the parties have agreed to a different application,[95] or where such an agreement is implied from the facts,[96] or where a different application is required on equitable grounds,[97] as where the debts are unequally secured,[98] or the rights of third persons are involved.[99] The fact, however, that a debt subsequently accruing cannot be enforced against exempt property does not prevent the application of a payment to an earlier debt not subject to the exemption statute.[1] If only a portion of the payment is exhausted by application to debts entitled to a preference on equitable grounds, the balance of the money available is applied to the oldest debt in accordance with the general rule.[2]

[§ 111] **(2) Items of Current Account.**[3] Subject to some limitations[4] the general rule is that, in the case of a running account, where there are various items of debt on one side and various items of credit on the other occurring at different times, and no special appropriation of payments has been made by either party, the successive payments are to be applied in discharge of the items of debit antecedently due, in the order of time in which they stand in the account. In other words, each item of payment is applied in extinguishment of the earliest items of debt until the payment is exhausted.[5] But

Ark.—Snow v. Wood, 163 Ark. 280, 259 SW 733.

Cal.—McColgan v. Sockolov, 192 Cal. 171, 219 P 61; Ducan v. Thomas, 81 Cal. 56, 22 P 297; Wendt v. Ross, 33 Cal. 650.

Fla.—Battle v. Jennings Naval Stores Co., 74 Fla. 12, 75 S 949.

Ga.—Killorin v. Bacon, 57 Ga. 497; Horne v. Planters' Bank, 32 Ga. 1; Price v. Cutts, 29 Ga. 142, 74 AmD 52.

Ind.—Shea v. People's Coal, etc., Co., (A.) 161 NE 849; Born v. Union El. Co., 67 Ind. A. 97, 118 NE 973, 119 NE 973.

Iowa.—Boynton v. Salinger, 147 Iowa 537, 126 NW 369; Fremont County v. Fremont County Bank, 138 Iowa 167, 115 NW 925; Ida County Sav. Bank v. Seidensticker, 128 Iowa 54, 102 NW 821, 111 AmSR 189, 5 Ann Cas 945; Blair Town Lot, etc., Co. v. Hillis, 76 Iowa 246, 41 NW 6.

Ky.—Trimble v. McCormick, 15 SW 358, 12 KyL 857.

La.—Dewar v. Beirne, McG. 75; Solomon v. Richard, 6 La. A. (Orleans) 129.

Me.—Lehigh Coal, etc., Co. v. McLeod, 114 Me. 427, 96 A 736; Milliken v. Tufts, 31 Me. 497.

Md.—Allstan v. Contee, 4 Harr. & J. 351.

Mass.—Snell v. Rousseau, 257 Mass. 559, 154 NE 70.

Mich.—Farago v. Krzyske, 240 Mich. 15, 214 NW 942.

Miss.—Scott v. Cleveland, 33 Miss. 447; Miller v. Lefiore, 32 Miss. 634.

Mo.—Michigan Commercial Ins. Co. v. Rodger, (A.) 191 SW 1066; Campbell Glass, etc., Co. v. Davis-Page Planing Mill Co., 130 Mo. A. 474, 110 SW 24; Hammer v. Crawford, (A.) 93 SW 348; Lewis v. Gambs, 6 Mo. A. 138.

N. H.—Smith v. Lewiston Steam Mill, 66 N. H. 613, 34 A 153; Young v. Woodward, 44 N. H. 250; Thompson v. Phelan, 22 N. H. 339; Parks v. Ingram, 22 N. H. 283, 55 AmD 153; Caldwell v. Wentworth, 14 N. H. 431.

N. Y.—National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 NE 632, 11 AmSR 612; Stanwix v. Leonard, 125 App. Div. 299, 109 NYS 804; Berrian v. New York, 27 N. Y. Super. 538; Bledderberg v. National Surety Co., 91 Misc. 340, 154 NYS 742; Kloepfer v. Maher, 84 NYS 138; Douglass v. Murray, 7 NYS 837; Wheeler v. Cropsey, 5 HowPr 288.

Pa.—Hollister v. Davis, 54 Pa. 508; Berghaus v. Alter, 9 Watts 386; Lawrence's Est., 3 Pa. Dist. 356, 14 Pa. Co. 662 [rev on other grounds 169 Pa. 185, 32 A 406].

S. C.—Huger v. Bocquet, 1 S. C. L. 497.

Tex.—Welch v. Logan, (Civ. A.) 286 SW 906; Marshall v. Stowers Furniture Co., (Civ. A.) 167 SW 230; Watson v. Dodson, (Civ. A.) 143 SW 329; Daniel v. Brewton, (Civ. A.) 136 SW 815; Fisher v. Brown Hardware Co., 47 Tex. Civ. A. 58, 103 SW 655.

Vt.—Gifford v. Thomas, 62 Vt. 34, 19 A 1088; Langdon v. Bowen, 46 Vt. 512; St. Albans v. Failey, 46 Vt. 448.

Va.—Pope v. Transparent Ice Co., 91 Va. 79, 20 SE 940; Chapman v. Com., 25 Gratt. (66 Va.) 721; Smith v. Loyd, 11 Leigh (38 Va.) 512, 37 AmD 621.

Wash.—Kelso v. Russell, 33 Wash. 474, 74 P 561.

W. Va.—Rowan v. Chenoweth, 55 W. Va. 325, 47 SE 80; Genin v. Ingersoil, 11 W. Va. 549.

Wyo.—King v. Beaumier, 26 Wyo. 35, 174 P 612.

Eng.—Toulmin v. Copland, 2 Cl. & F. 681, 6 Reprint 1310, West 164, 9 Reprint 459; Goddard v. Hodges, 1 Cromp. & M. 33, 149 Reprint 303; Wentworth v. Manning, 2 Eq. Cas. Abr. 261, 22 Reprint 221.

[a] **Reason for rule.**—"This application is made by the law because it is most just and equitable between the parties; and, being in accordance with the ordinary and usual course of business dealing, is presumed to be the intentions of the parties." Snell v. Rousseau, 257 Mass. 559, 562, 154 NE 70.

[b] **Prevention of forfeiture.**—The priority-of-debts rule is especially applicable where the proceedings are in equity, and an application to the oldest debt will prevent a forfeiture. Farago v. Krzyske, 240 Mich. 15, 214 NW 942.

92. U. S.—In re Stevens, 107 Fed. 243.

Cal.—Star Mill, etc., Co. v. Porter, 4 Cal. A. 470, 88 P 497.

La.—Bloom v. Kern, 30 La. Ann. 1263; Byrne v. Grayson, 15 La. Ann. 457; Lanusse v. Lanna, 6 Mart. N. S. 103.

Md.—Frazier v. Lanahan, 71 Md. 131, 17 A 940, 17 AmSR 516.

Mo.—McMillan v. Grayston, 83 Mo. A. 425.

Wis.—Turner v. Pierce, 31 Wis. 342.

[a] **Maturing at same time.**—Under a statute providing for application of a payment, in the absence of direction, on the obligation "earliest in date of maturity," payments should be applied pro rata on obligations maturing at the same time, although not contracted at the same time. Star Mill, etc., Co. v. Porter, 4 Cal. A. 470, 88 P 497.

93. Jones v. Dowell, 176 Ark. 986, 4 SW (2d) 949; Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216; Effinger v. Henderson, 33 Miss. 449; Amarillo First Nat. Bank v. Rush, (Tex. Civ. A.) 227 SW 378 [mod on other grounds (Commn. A.) 246 SW 349].

94. Fisher v. Brown Hardware Co., (Tex. Civ. A.) 103 SW 655.

95. Hilton v. Sims, 45 Ga. 565; J. I. Case Threshing Mach. Co. v. Matthews, 188 Mo. A. 429, 174 SW 198.

96. Goldsmith v. Lewine, 70 Ark. 516, 69 SW 308; Langerman v. Puritan Dining Room Co., 21 Cal. A. 637, 132 P 617; Taylor v. Kymer, 3 B. & Ad. 320, 23 ECL 145, 110 Reprint 120.

[a] **Bookkeeping methods.**—A change in the method of bookkeeping is not such an interruption of the running of an account current as will prevent the application of the rule that the law will appropriate payments to the earliest items of the account where no appropriation was made by the parties. Goldsmith v. Lewine, 70 Ark. 516, 69 SW 308.

97. Conn.—American Woolen Co. v. Maaget, 86 Conn. 234, 248, 85 A 583, AnnCas1913E 889 [cit Cyc].

Ga.—Killorin v. Bacon, 57 Ga. 497.

Ill.—Clow v. Goldstein, 147 Ill. A. 571.

Iowa.—Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216.

Minn.—Mueller Furnace Co. v. Colvin, 146 Minn. 252, 178 NW 496.

Mo.—J. I. Case Threshing Mach. Co. v. Matthews, 188 Mo. A. 429, 174 SW 198.

N. H.—Smith v. Lewiston Steam Mill, 66 N. H. 613, 34 A 153.

N. Y.—Campbell v. Vedder, 1 Abb. Dec. 295; Righter v. Stall, 3 Sandf. Ch. 608.

Wash.—Hughes v. Flint, 61 Wash. 460, 112 P 633.

N. S.—Merchants' Bank v. Stirling, 13 N. S. 439.

See also infra § 111.

98. In re American Paper Co., 255 Fed. 121.

Secured and unsecured debts see infra §§ 112, 113.

99. See infra §§ 123–127.

1. Wheeler v. Cropsey, 5 HowPr (N. Y.) 288.

2. In re American Paper Co., 255 Fed. 121.

3. Moneys paid in and withdrawals from a mixed fiduciary account see Trusts [39 Cyc 540 note 38].

4. See cases infra notes 9–14.

5. U. S.—U. S. v. Kirpatrick, 9 Wheat. 720, 6 L. ed. 199; West Kentucky Coal Co. v. Dillman, 15 F. (2d) 25; Bacon v. Dollar SS. Lines, 290 Fed. 964; McDonald v. The Tom Lysle, 48 Fed. 690; The Mary K. Campbell, 40 Fed. 906; Mack v. Adler, 22 Fed. 570; Kenton Furnace R., etc., Co. v. McAlpin, 5 Fed. 737; The A. R. Dunlap, 1 F. Cas. No. 513, 1 Lowell 350; Gass v. Stinson, 10 F. Cas. No. 5,262, 2 Sumn. 98; Leef v. Goodwin, 15 F. Cas. No. 8,207, Taney 460; Postmaster-Gen. v. Furber, 19 F. Cas. No. 11,308, 4 Mason 333; U. S. v. Bradbury, 24 F. Cas. No. 14,635, 2 Ware 150; U. S. v. Wardwell, 28 F. Cas. No. 16,640, 5 Mason 82; Whetmore v. Murdock, 29 F. Cas. No. 17,510, 3 Woodb. & M. 390.

Ala.—Redd v. Todd, 209 Ala. 56, 95 S 276; Compton v. Collins, 197 Ala. 642, 73 S 334; Winston v. Farrow, 40 S 53; Connor v. Armstrong, 91 Ala. 265, 9 S 816; Golden v. Conner, 89 Ala. 598, 8 S 148; Harrison v. Johnston, 27 Ala. 445.

Ark.—Snow v. Wood, 163 Ark. 280, 259 SW 733; Briggs v. Steele, 91 Ark. 458, 121 SW 754; Ritchie v. Bluff

application will not be made to items, the validity of which is in dispute.[6] The rule applying a payment to the oldest items may be confirmed in a particular case by evidence of the intention of the parties,[7] but the rule holds, even though the parties are ignorant of it.[8] If the intention of the parties appears otherwise, however, as where there is an express understanding between the parties to that effect,[9] or where there is a course of dealings between the parties indicating what their intention was,[10] the court will apply the payment in accordance with that intention. Nor does the rule apply where a different application of the payment has been made by the creditor, acting within his rights,[11] or where a different application is required on equitable grounds,[12] or where the debts and the payments were made, to the charges in the order they accrued; the earliest credits to pay the earliest charges. This is done because it is most just and equitable between the parties, and also because when no different intention has been expressed, such is presumed to be the intention of both parties, as being in accordance with the ordinary and usual course of dealing." Pierce v. Knight, 31 Vt. 701, 707.

[a] **Leading case.**—Devaynes v. Noble, 1 Meriv. 529, 572, 35 Reprint 767, 781, 3 ECR 329, familiarly known as "Clayton's case."

City Lumber Co., 86 Ark. 175, 110 SW 591; Lazarus v. Friedheim, 51 Ark. 371, 11 SW 518; Kline v. Regland, 47 Ark. 111, 14 SW 474; Price v. Dowdy, 34 Ark. 285.

Cal.—Molaskey v. Peery, 76 Cal. 84, 18 P 120.

Colo.—Ady, etc., Mercantile Co. v. Howard, 65 Colo. 272, 176 P 328; Mackey v. Fullerton, 7 Colo. 556, 4 P 1198.

Conn.—American Woolen Co. v. Maaget, 86 Conn. 234, 85 A 583, AnnCas1913E 889; Fairchild v. Holly, 10 Conn. 175.

Del.—Lodge v. Ainscow, 17 Del. 327, 41 A 187; Pickering v. Day, 2 Del. Ch. 333.

Ga.—Shafer v. Carson, 33 Ga. A. 418, 126 SE 735.

Ill.—Sprague v. Hazenwinkle, 53 Ill. 419; Carey-Lombard Lumber Co. v. Hunt, 54 Ill. A. 314; A. Fuerman Brewing Co. v. Pisa, 44 Ill. A. 207.

Ind.—Born v. Union El. Co., 67 Ind. A. 97, 118 NE 973, 119 NE 973; Conduitt v. Ryan, 3 Ind. A. 1, 29 NE 160.

Iowa.—Johnson v. Foster, 101 NW 741; Allen v. Brown, 39 Iowa 330.

Ky.—Brown v. Osborne, 136 Ky. 456, 124 SW 405; Sternberger v. Gowdy, 93 Ky. 146, 19 SW 186, 14 KyL 88.

La.—Forrey v. Strange, 158 La. 941, 105 S 21; Harman v. Legrande, 151 La. 253, 91 S 726; Houeye v. Henkel, 115 La. 1066, 40 S 460; Sleet v. Sleet, 109 La. 302, 33 S 322; Dinkgrave's Succ., 31 La. Ann. 703.

Me.—Lehigh Coal, etc., Co. v. McLeod, 114 Me. 427, 96 A 736; Miller v. Miller, 23 Me. 22, 39 AmD 597; McKenzie v. Nevius, 22 Me. 138, 38 AmD 291.

Mass.—Egremont v. Benjamin, 125 Mass. 15.

Mich.—McMullen Mach. Co. v. Grand Rapids Trust Co., 239 Mich. 295, 214 NW 110, 55 ALR 1157; Mauro v. Davie, 236 Mich. 309, 210 NW 308; Polk Printing Co. v. Smedley, 155 Mich. 249, 118 NW 984; People v. Sheehan, 118 Mich. 539, 77 NW 88; Grasser, etc., Brewing Co. v. Rogers, 112 Mich. 112, 70 NW 445, 67 AmSR 389.

Minn.—Banner Grain Co. v. Farmers' El., etc., Co., 162 Minn. 334, 202 NW 740; Ganley v. Pipestone, 154 Minn. 193, 191 NW 738; Mueller Furnace Co. v. Burkhart, 149 Minn. 68, 182 NW 909; Redwood County v. Citizens' Bank, 67 Minn. 236, 69 NW 912; Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 NW 36; Jefferson v. St. Matthew's Church, 41 Minn. 392, 43 NW 74; Hersey v. Bennett, 28 Minn. 86, 9 NW 590, 41 AmR 271.

Miss.—J. R. Watkins Co. v. Buchanan, 149 Miss. 483, 115 S 773; Travis v. Mosley, 148 Miss. 368, 114 S 628; Duffey v. Kilroe, 116 Miss. 7, 76 S 681; Fletcher v. Gillan, 62 Miss. 8.

Mo.—Campbell Glass, etc., Co. v. Davis-Page Planing Mill Co., 130 Mo. A. 474, 110 SW 24; Kaufman-Wilkinson Lumber Co. v. Christophel, 59 Mo. A. 80; Goetz v. Piel, 26 Mo. A. 634.

Nebr.—State v. Security State Bank, 116 Nebr. 526, 218 NW 407.

N. H.—Doherty v. Cotter, 68 N. H. 37, 38 A 499; Smith v. Lewiston Steam Mill, 66 N. H. 613, 34 A 153.

N. J.—Dey v. Anderson, 39 N. J. L. 199; Forst v. Kirkpatrick, 64 N. J. Eq. 578, 54 A 554.

N. Y.—Nostrand v. Ditmis, 127 N. Y. 355, 27 NE 27; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 NE 632, 11 AmSR 612; Thompson v. St. Nicholas Nat. Bank, 113 N. Y. 325, 21 NE 57 [aff 47 Hun 621, 15 NYSt 110, and aff 146 U. S. 240, 36 L. ed. 956]; Anderson v. Daley, 38 App. Div. 505, 56 NYS 511 [app dism 159 N. Y. 146, 53 NE 753, 29 NYCivProc 257]; Daws v. Morewood, 10 Barb. 183; Allen v. Culver, 3 Den. 284.

N. C.—Miller v. Womble, 122 N. C. 135, 29 SE 102; Jenkins v. Smith, 72 N. C. 296.

Oh.—Union Nat. Bank v. Cleveland, 10 Oh. Cir. Ct. 222, 6 Oh. Cir. Dec. 536.

Okl.—Waples-Platter Grocer Co. v. Hardin, 85 Okl. 49, 204 P 433.

Or.—Patterson v. British Columbia Bank, 26 Or. 509, 38 P 817; State v. Chadwick, 10 Or. 423.

Pa.—In re Lorch, 284 Pa. 500, 131 A 381, 42 ALR 922; Pittsburg v. Rhodes, 230 Pa. 397, 79 A 634; Souder v. Schechterly, 91 Pa. 83; Pierce v. Sweet, 33 Pa. 151; McKee v. Com., 2 Grant 23; Philadelphia v. Tradesmen's Trust Co., 38 Pa. Super. 286.

R. I.—Harris v. Gilbert, 46 R. I. 350, 128 A 11; Briggs v. Titus, 7 R. I. 441.

S. D.—March v. Butler, 220 NW 461.

Tenn.—Lippman v. Boals, 16 Lea 283.

Tex.—Maryland Casualty Co. v. Willig, (Civ. A.) 10 SW (2d) 415; International Shoe Co. v. Kaufman, (Civ. A.) 270 SW 1109; McLendon Hardware Co. v. Black, (Civ. A.) 264 SW 1011; Palm v. Johnson, (Civ. A.) 255 SW 1007; Jamison v. Alvarado Compress, etc., Co., 45 Tex. Civ. A. 263, 99 SW 1053; Phipps v. Willis, 11 Tex. Civ. A. 186, 32 SW 801; Shuford v. Chinski, (Civ. A.) 26 SW 141.

Vt.—Pierce v. Knight, 31 Vt. 701; Morgan v. Tarbell, 28 Vt. 498; Shedd v. Wilson, 27 Vt. 478.

W. Va.—Peale v. Grossman, 70 W. Va. 1, 73 SE 46, AnnCas1913C 1373.

Wis.—Sleeper v. Goodwin, 67 Wis. 577, 31 NW 335; Hannan v. Engelmann, 49 Wis. 278, 5 NW 791.

Eng.—Deeley v. Lloyds Bank, Ltd., [1912] A. C. 756; Henniker v. Wigg, 4 Q. B. 792, 45 ECL 792, 114 Reprint 1095; Kinnaird v. Webster, 10 Ch. D. 139; Bodenham v. Purchas, 2 B. & Ald. 39, 106 Reprint 281; Re Devenport, etc., Steam Flour Mill Co., 42 L. J. Ch. 577; Solarte v. Maes Hilbers, 1 L. J. K. B. 196; Egg v. Craig, 89 L. T. Rep. N. S. 41; Devaynes v. Noble, 1 Meriv. 529, 35 Reprint 767, 3 ERC 329.

N. S.—Netting v. Hubley, 26 N. S. 497.

Ont.—Paris Bd. of Education v. Citizens' Ins., etc., Co., 30 U. C. C. P. 132; McGillivray v. Keefer, 4 U. C. Q. B. 342.

"Among the cases where courts have been called upon to make the application, is that of open current accounts, consisting of different items of debt and credit blended in one account. Where the dealings of parties are kept in this way, the different items are not considered as distinct and several debts, but as all constituting but one entire account, the balance of which is the debt between the parties. The rule of application in such cases has, perhaps, been more uniform and invariable than in almost any other case, and that is (where there is nothing to show a different intention by the parties) that the payments shall be applied in the order of time they

[a] **Unsecured debt.**—Where a mortgage given by a principal, to his factors, to secure an existing debt, provides that it may be extended to future advances, and should remain as a continuing security up to a stipulated sum, and a course of dealing followed, wherein advancements were made by the factors to an amount exceeding the stipulated sum secured by the mortgage, and consignments of goods were sent to them, the proceeds of which were credited to the principal in a general account, in the absence of appropriation by the parties, the credits are to be applied first to the part of the debt not secured

6. Banner Grain Co. v. Burr Farmers' El., etc., Co., 162 Minn. 334, 202 NW 740; Pitner Lighting Co. v. Geddis, [1912] 2 Ir. 163.

7. Mauro v. Davie, 236 Mich. 309, 210 NW 308; In re Hamilton, 25 Wkly. Rep. 760.

8. Merriman v. Ward, 1 Johns. & H. 371, 70 Reprint 790.

9. Ark.—Terry v. Klein, 133 Ark. 366, 201 SW 801.

Conn.—Ford Bros., Inc. v. Frederick M. Ward Co., 107 Conn. 425, 140 A 754.

N. C.—Miller v. Womble, 122 N. C. 135, 29 SE 102.

Tex.—Willis v. McIntyre, 70 Tex. 34, 7 SW 594, 8 AmSR 574.

Vt.—Langdon v. Bowen, 46 Vt. 512.

Eng.—City Discount Co. v. McLean, L. R. 9 C. P. 692; Wilson v. Hirst, 1 N. & M. 746.

10. Thomson v. Stikeman, 30 Ont. L. 123, 5 OntWN 555, 17 DomLR 205 [dism app 29 Ont. L. 146, 4 OntWN 1546, 14 DomLR 97]; Griffith v. Crocker, 18 Ont. A. 370.

11. Cory v. Turkish SS. Mecca, [1897] A. C. 286; Mutton v. Peat, [1899] 2 Ch. 556.

12. U. S.—Nashville First Nat. Bank v. National Surety Co., 130 Fed. 401, 64 CCA 601, 66 LRA 777.

Ala.—Stickney v. Moore, 108 Ala. 590, 19 S 76.

Ark.—Ford Hardwood Lumber Co. v. Bryant, 13 SW (2d) 1.

Ga.—Andrews v. Macon Exch. Bank, 108 Ga. 802, 34 SE 183.

Kan.—State v. U. S. Fidelity, etc., Co., 81 Kan. 660, 106 P 1040, 26 LRA NS 865.

Mass.—Upham v. Lefavour, 11 Metc. 174.

Minn.—Ganley v. Pipestone, 154 Minn. 193, 191 NW 738.

Pa.—Johnson's App., 37 Pa. 268. See Chester Tube, etc., Co. v. Whittington, 94 Pa. 139 (holding that general payments by a debtor on a general account will not preclude the debtor from making claims for bad workmanship and defective materials with respect to the earlier items on the account).

Eng.—Thompson v. Brown, 1 M. & M. 40, 41, 22 ECL 466.

Can.—Agricultural Ins. Co. v. Sargeant, 26 Can. S. C. 29.

grow out of a contract[13] or result from separate transactions[14] having no reference whatever to an account current. It is immaterial that the debtor's property is exempt as against all the other items except the first,[15] or that one of the items consists of a note outlawed by the statute of limitations provided the note is given in the course of the mutual dealings and constitutes a part of the account.[16] If, however, the payment is derived from a particular source or fund and a part of the account is properly payable out of such particular fund and a part is not payable out of such fund, the payment will be applied to items payable out of the particular fund whether such items are the oldest in the account or not.[17] Where part of the items are illegal, a payment will be applied to the earliest legal items.[18] Where a debtor is indebted on two accounts and a payment is made in excess of the amount of the account to which it is applied, the balance will be applied on the other account.[19]

[§ 112] c. Secured and Unsecured Debts[20]—(1) In General. In those states where the civil-law rule has been adopted,[21] the court will apply a payment to a secured rather than an unsecured debt,[22] and to the oldest of the secured debts when there are several.[23] But the civil-law rule, even in these states, will not be applied to the prejudice of certain classes of creditors whose interests other statutory provisions are designed to protect.[24] In other jurisdictions, following the common-law, rather than the civil-law, rule, the payment will be appropriated to the unsecured indebtedness.[25] So where neither the debtor nor the creditor directs the application, the law will apply a payment on the debt which is least secured or for which the security is most precarious.[26] The rule is not applicable, however,

by the mortgage, and to the mortgage debt thereafter. Johnson's App., 37 Pa. 268.

13. Suter v. Ives, 47 Md. 520; Hill v. McLaughlin, 158 Mass. 307, 33 NE 514.

[a] **Indivisible contract.**—Where a number of articles are all bought at one time under a single contract and the promise to pay for them is one and indivisible, the court cannot appropriate payments made on the contract to any particular article bought. Hill v. McLaughlin, 158 Mass. 307, 33 NE 514.

14. Cory v. Turkish SS. Mecca, [1897] A. C. 286.

15. Sternberger v. Gowdy, 93 Ky. 146, 19 SW 186, 14 KyL 88.

16. Rogers v. Yarnell, 51 Ark. 198, 10 SW 622.

17. McElrath v. Kimmons, 146 Miss. 775, 112 S 164, 680.

Payment from particular source or fund generally see infra § 116.

18. Quigley v. Duffey, 52 Iowa 610, 3 NW 659.

Illegal demands generally see infra § 114.

19. Buxton v. Debrecht, 95 Mo. A. 599, 69 SW 616; Howlett v. Doran, (Alta.) 11 DomLR 372, 24 WestLR 401, 4 WestWkly 674.

20. Application by:

Creditor see supra § 94.

Debtor see supra § 87.

21. See supra § 94.

22. U. S.—In re Copping Sheet Plate, etc., Works, 13 F. (2d) 895 (Louisiana statute); The Antartic, 1 F. Cas. No. 479, 1 Sprague 206.

La.—Thiac v. Jumonville, 32 La. Ann. 142; New Orleans Ins. Co. v. Tio, 15 La. Ann. 174; Forstall v. Blanchard, 12 La. 1.

Md.—Buchanan v. Lloyd, 88 Md. 642, 41 A 1075; Laeber v. Langhor, 45 Md. 477; Dorsey v. Gassaway, 2 Harr. & J. 402, 3 AmD 557; McTavish v. Carroll, 1 Md. Ch. 160. But see Kansas City Slate, etc., Co. v. Poe, 138 Md. 513, 114 A 710; Frazier v. Lanahan, 71 Md. 134, 17 A 940, 17 AmSR 516 (in both of which, under the circumstances of the case, a contrary rule was followed).

Miss.—Sunflower County v. Drew Bank, 136 Miss. 191, 101 S 192, 193 [cit Cyc]; Windsor v. Kennedy, 52 Miss. 164; Neal v. Allison, 50 Miss. 175; Poindexter v. La Roche, 15 Miss. 699. Contra Planters' Bank v. Stockman, Freem. 502.

Tex.—Paschall v. Pioneer Sav. etc., Co., 19 Tex. Civ. A. 102, 47 SW 98. See Scott v. Cox, 30 Tex. Civ. A. 190, 70 SW 802 (error not assigned to failure of the trial court to apply the payment in satisfaction of the secured debt); Sproulle v. McFarland, (Civ. A.) 56 SW 693 (payment applied pro rata to secured and unsecured debts).

23. Frazier v. Lanahan, 71 Md. 131, 17 A 940, 17 AmSR 516.

24. Southern Constr. Co. v. Halliburton, 149 Tenn. 319, 337, 258 SW 409.

"While the civil-law rule referred to has been approved in this State in the cases mentioned and in other cases, in all of them there were other circumstances which were likewise considered by the court in applying payments to secured debts. The doctrine grew up in the days when all sureties were personal sureties, when the surety was a pronounced favorite of a court of equity. We think the act of 1917 inclined the favor of the law in a different direction. The laborer and the materialman are objects of special protection in matters such as the one before us. Such a policy of our law is plain in the statute. We think it would be extending the old doctrine to an extent never contemplated by any chancellor, if we applied it as invoked here. Neither the general contractor nor its surety, paid to assume the obligations and responsibilities of their contract, are entitled to make such demand." Southern Constr. Co. v. Halliburton, supra.

25. U. S.—Delaware Dredging Co. v. Tucker Stevedoring Co., 25 F. (2d) 44; The Katie O'Neil, 65 Fed. 111; The D. B. Steelman, 48 Fed. 580; Sanborn v. Stark, 31 Fed. 18; Caldwell v. Winder, 30 F. Cas. No. 18,245, 2 Hayw. & H. 24 [rev on other grounds 14 How. 434, 14 L. ed. 487].

Ill.—Barbee v. Morris, 221 Ill. 382, 77 NE 589; Coles County v. Haynes, 134 Ill. A. 320 [aff 234 Ill. 137, 84 NE 747]; Monson v. Meyer, 93 Ill. A. 94; Chicago Title, etc., Co. v. McGlew, 90 Ill. A. 58.

Ind.—M. A. Sweeney Co. v. Fry, 151 Ind. 178, 51 NE 234; Boyd v. Greer, 70 Ind. A. 77, 123 NE 122.

Iowa.—Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216.

Kan.—Barber County v. Lake State Bank, 121 Kan. 223, 246 P 524; State v. U. S. Fidelity, etc., Co., 81 Kan. 660, 674, 106 P 1040, 26 LRANS 865 [cit Cyc].

Ky.—Ratliff v. Anderson, 195 Ky. 320, 242 SW 35; Andrews v. Kentucky Citizens Bldg., etc., Assoc., 70 SW 409, 24 KyL 966; Offutt v. Divine, 53 SW 816, 55 SW 428, 21 KyL 1500; Bell, etc., Co. v. Kentucky Glass-Works Co., 106 Ky. 7, 50 SW 2, 20 KyL 1684, 50 SW 1092, 21 KyL 133, 51 SW 180, 21 KyL 156; McDaniel v. Barnes, 5 Bush 183; Burks v. Albert, 4 J. J. Marsh. 97, 20 AmD 209.

Mich.—Gardner v. Le Fevre, 180 Mich. 219, 146 NW 653, AnnCas1916A 618.

Minn.—Gardner v. Leck, 52 Minn. 522, 54 NW 746; Lash v. Edgerton, 13 Minn. 210.

Mo.—Michigan Commercial Ins. Co. v. Rodger, (A.) 191 SW 1066; McMillan v. Grayston, 83 Mo. A. 425. See State v. Globe Indemn. Co., (A.) 2 SW (2d) 815, 819 [cit Cyc] (holding that damages recoverable from a notary for negligence in taking an acknowledgment to a deed of trust, on the strength of which plaintiff loaned money, are not limited to nominal damages, although the borrower, who had borrowed other money without security, made payments exceeding the claim against the notary, since payments without direction for application are properly applied to an unsecured loan).

N. H.—Smith v. Lewiston Steam Mill, 66 N. H. 613, 34 A 153.

N. C.—Vick v. Smith, 83 N. C. 80.

Okl.—St. Louis, etc., R. Co. v. Ravia Granite Ballast Co., 70 Okl. 273, 174 P 252.

Or.—Union Credit Assoc. v. Corson, 77 Or. 361, 149 P 318; Trullinger v. Kofoed, 7 Or. 228, 33 AmR 708.

Pa.—Ege v. Watts, 55 Pa. 321; Smith v. Brooke, 49 Pa. 147; Johnson's App., 37 Pa. 268; Hoover v. Summerville, 67 Pa. Super. 544; Cresson's Estate, 3 Pa. Co. 419; Lyon v. Kurtz, 13 Pittsb LegJNS 478.

Vt.—Jeffers v. Pease, 74 Vt. 215, 52 A 422; Briggs v. Williams, 2 Vt. 283.

Wash.—Washington Grocery Co. v. Citizens' Bank, 132 Wash. 244, 231 P 780.

W. Va.—Wait v. Homestead Bldg. Assoc., 81 W. Va. 702, 95 SE 203, 21 ALR 696.

26. U. S.—Field v. Holland, 6 Cranch 8, 3 L. ed. 136; Bacon v. Dollar SS. Lines, 290 Fed. 964; In re Craig Lumber Co., 269 Fed. 755; In re American Paper Co., 255 Fed. 121; Coons v. Tome, 9 Fed. 532; Gordon v. Hobart, 10 F. Cas. No. 5,608, 2 Story 243.

Ala.—Bell v. Bell, 174 Ala. 446, 56 S 926, 37 LRANS 1203; McCurdy v. Middleton, 82 Ala. 131, 2 S 721.

Cal.—Ohio Electric Car Co. v. Le Sage, 198 Cal. 705, 247 P 190.

Conn.—Chester v. Wheelwright, 15 Conn. 562.

Ill.—Mutual Constr. Co. v. Baker, 237 Ill. A. 596; Garrard v. Ashbrook Co., 222 Ill. A. 387; Schmeling v. Rockford Amusement Co., 154 Ill. A. 308; Ellis v. Conrad Seipp Brewing Co., 107 Ill. A. 139.

Ind.—McCauley v. Holtz, 62 Ind. 205; King v. Andrews, 30 Ind. 429; Shea v. People's Coal, etc., Co., (A.) 161 NE 849; Zuelly v. Casper, 46 Ind. A. 430, 92 NE 785.

Ky.—McDaniel v. Barnes, 5 Bush 183; Blanton v. Rice, 5 T. B. Mon. 253.

Mo.—J. I. Case Threshing Mach. Co. v. Matthews, 188 Mo. A. 429, 174 SW 198; Poulson v. Collier, 18 Mo. A. 583.

N. J.—Turner v. Hill, 56 N. J. Eq. 293, 39 A 137; Leeds v. Gifford, 41 N. J. Eq. 464, 5 A 795 [aff 45 N. J. Eq. 245, 19 A 621]; Terhune v. Colton, 12 N. J. Eq. 232 [aff 12 N. J. Eq. 312].

N. Y.—Camp v. Smith, 48 Hun 621 mem, 1 NYS 375. Contra Dows v. Morewood, 10 Barb. 183.

N. C.—Sprinkle v. Martin, 72 N. C. 92; Moss v. Adams, 39 N. C. 42; Ransom v. Thomas, 33 N. C. 251.

Oh.—Fancher v. Kaneen, 5 OhNPNS 614.

Pa.—Pierce v. Sweet, 33 Pa. 151;

where a contrary intention of the parties is proved;[27] or where there is an agreement between the parties, implied from their dealings with each other, that payments should be applied on particular items;[28] or where the payments made are not general payments;[29] or where a note has been taken by the creditor for an indebtedness, part of which was secured and part unsecured, and payments subsequently made were indorsed on the notes;[30] or where both the debts have been cast into one stated account and a payment is made toward the satisfaction of the whole debt;[31] or where a portion of the indebtedness is secured by a lien on the debtor's homestead;[32] or where the payment is derived from the proceeds of a particular security.[33]

[§ 113] **(2) Items of Account.** Whether a payment on a running account will be appropriated to the earliest items where part are secured and part unsecured is not well settled; a majority of the cases hold that it will be applied to the earliest items,[34] but in following this rule, if part of the payment is applied to a note given for secured and unsecured indebtedness, the part so applied shall be apportioned pro rata on such secured and unsecured indebtedness.[35] Repayment of defalcations is held not to be a running account and not subject to the rule applying payments to the oldest items. In such case application is made to the most precarious debt.[36] Some authorities hold that the application will be to the unsecured, rather than to the oldest, items.[37] The court, however, will apply the payment as the parties intended, if there is clear evidence of the intention in the case.[38]

[§ 114] **d. Illegal or Unenforceable Demands.**[39] Where there are several demands or items, some of which are legal and others illegal, a payment will be applied by the court to the legal charges rather than to unlawful claims.[40] And where payments have been made and applied to unenforceable demands under a mistake of fact, such payments may be reapplied to other enforceable demands in an action brought to recover the balance due.[41] Where the payment is made, however, under circumstances indicating the intention of the debtor to apply the payment to an illegal or unenforceable demand, an effective application to such demand is held to have been made.[42] As between admitted and disputed debts, a payment by the debtor will be presumed to

Bell v. Clark, 38 Pa. Super. 365; Creasy v. Emanuel Reformed Church, 1 Pa. Super. 372; McConnell v. Ferguson, 17 LancLRev 67, 13 YorkLegRec 132.

S. C.—Jones v. Kilgore, 19 S. C. Eq. 63; Sager v. Warley, 14 S. C. Eq. 26.

Va.—Pope v. Transparent Ice Co., 91 Va. 79, 20 SE 940.

W. Va.—Hempfield R. Co. v. Thornburg, 1 W. Va. 261.

27. Compound. Lumber Co. v. Murphy, 169 Ill. 343, 48 NE 472 [aff 68 Ill. A. 579].

28. Mayer v. Gewin, 200 Ala. 391, 76 S 307; Emery v. Tichout, 13 Vt. 15 (dictum).

29. Haas Electric, etc., Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248, 127 AmSR 297, 23 LRANS 620.

[a] **Credit for returned goods.**—A credit given by the creditor for returned goods must be applied to cancellation of that item. Haas Electric, etc., Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248, 127 AmSR 297, 23 LRANS 620.

30. Shelden v. Bennett, 44 Mich. 634, 7 NW 223.

31. Perris v. Roberts, 1 Vern. Ch. 34, 23 Reprint 289.

32. Stewart First Nat. Bank v. Hollinsworth, 78 Iowa 575, 43 NW 536, 6 LRA 92; Rice v. Brown, (Tex. Commn. A.) 296 SW 495 [aff (Civ. A.) 290 SW 784].

33. See infra § 116.

34. U. S.—Delaware Dredging Co. v. Tucker Stevedoring Co., 25 F. (2d) 44 (where the oldest items were also unsecured).

Ala.—Moses v. Noble, 86 Ala. 407, 5 S 181; Harrison v. Johnston, 27 Ala. 445.

Ind.—Tapper v. New Home Sewing-Mach. Co., 22 Ind. A. 313, 53 NE 202; Conduitt v. Ryan, 3 Ind. A. 1, 29 NE 160.

Me.—Cushing v. Wyman, 44 Me. 121.

Mass.—Worthley v. Emerson, 116 Mass. 374.

Mich.—McMullen Mach. Co. v. Grand Rapids Trust Co., 239 Mich. 295, 214 NW 110, 55 ALR 1157; Mauro v. Davie, 236 Mich. 309, 210 NW 308. See McMaster v. Merrick, 41 Mich. 505, 2 NW 895 (holding that an unconditional application of payments to a general account with other circumstances negatived the existence of a lien to secure any part of the debt).

Minn.—Pond, etc., Co. v. O'Connor, 70 Minn. 266, 73 NW 159, 248.

N. Y.—Truscott v. King, 6 N. Y. 147 [rev 6 Barb. 346]; Allen v. Culver, 3 Den. 284.

Tenn.—Southern Constr. Co. v. Halliburton, 149 Tenn. 319, 258 SW 409.

Tex.—Friedman-Shelby Shoe Co. v. Davidson, (Civ. A.) 189 SW 1029; Phipps v. Willis, 11 Tex. Civ. A. 186, 32 SW 801.

Ont.—Buchanan v. Kerby, 5 Grant Ch. 332; Re Brown, 2 Grant Ch. 111.

[a] **Rule applied.**—(1) It is immaterial that after a contract had been executed and work done thereunder a bond to secure the performance of the contract had been given and that the items in the account representing the work done after the giving of the bond were in the nature, therefore, of secured items (Radichel v. Federal Surety Co., 170 Minn. 92, 212 NW 171), (2) or that, in such case, the creditor knew that the payment made was from funds paid to him with respect to such secured items (Radichel v. Federal Surety Co., supra).

35. McMullen Mach. Co. v. Grand Rapids Trust Co., 239 Mich. 295, 214 NW 110, 55 ALR 1157.

36. Fancher v. Kaneen, 5 OhNPNS 614.

37. U. S.—Schuelenburg v. Martin, 2 Fed. 747, 1 McCrary 348.

Ark.—Shurn v. Wilkinson, 131 Ark. 167, 198 SW 279.

Ill.—Schmeling v. Rockford Amusement Co., 154 Ill. A. 308.

Kan.—Barber County v. Lake State Bank, 121 Kan. 223, 246 P 524; State v. U. S. Fidelity, etc., Co., 81 Kan. 660, 106 P 1040, 26 LRANS 865.

Ky.—New Roads Bank v. Kentucky Refining Co., 85 SW 1103, 27 KyL 645.

Mo.—Price v. Merritt, 55 Mo. A. 640; Goetz v. Piel, 26 Mo. A. 634.

Pa.—Pierce v. Sweet, 33 Pa. 151.

Vt.—Langdon v. Bowen, 46 Vt. 512.

Ont.—Griffith v. Crocker, 18 Ont. A. 370.

38. Becker v. Hopper, 22 Wyo. 237, 138 P 179, AnnCas1916D 1041, 23 Wyo. 209, 147 P 1085, AnnCas1918B 35; Griffith v. Crocker, 18 Ont. A. 370.

39. Application by:
Creditor see supra § 98.
Debtor see supra § 87.
Application to barred debts see Limitations of Actions § 634.

40. Ala.—Armour Packing Co. v. Vinegar Bend Lumber Co., 149 Ala. 205, 42 S 866, 13 AnnCas 951.

Cal.—Walker v. Rockwood, 26 Cal. A. 624, 147 P 992.

Ill.—Drake v. Lux, 125 Ill. A. 469.

La.—Gillard v. Huval, 22 La. Ann. 426; Keane v. Branden, 12 La. Ann. 20.

Me.—Phillips v. Moses, 65 Me. 70; Treadwell v. Moore, 34 Me. 112.

Minn.—Solomon v. Dreschler, 4 Minn. 278.

Miss.—Parker v. Dantzler Fdy., etc., Works, 118 Miss. 126, 79 S 82.

Nev.—McCausland v. Ralston, 12 Nev. 195, 28 AmR 781.

N. H.—Dunbar v. Garrity, 58 N. H. 575; Hall v. Clement, 41 N. H. 166; Hilton v. Burley, 2 N. H. 193.

N. Y.—Rochester Commercial Bank v. MacDougall, etc., Co., 8 App. Div. 1, 40 NYS 189; Huffstater v. Hayes, 64 Barb. 573.

S. C.—Kuker v. McIntyre, 43 S. C. 117, 20 SE 976.

Tex.—Wingate v. Peoples Bldg., etc., Sav. Assoc., 15 Tex. Civ. A. 416, 39 SW 999.

Vt.—Backman v. Wright, 27 Vt. 187, 65 AmD 187.

Eng.—Wright v. Laing, 3 B. & C. 165, 10 ECL 83, 107 Reprint 695; Ex p. Randleson, 2 Deac. & C. 534.

[a] **An action to recover a balance due** cannot be sustained where payments in excess of the legal items of the account have been made. Richards v. Columbia, 55 N. H. 96.

[b] **Mortgage of married woman.**—Where the amount of a married woman's mortgage includes a debt of her husband, as to which the mortgage is void, a general partial payment by the wife must be applied to her portion of the debt secured thereby. Kuker v. McIntyre, 43 S. C. 117, 20 SE 976.

Items of running account see supra § 111.

41. Burr v. Crompton, 116 Mass. 493.

42. Hall v. Clement, 41 N. H. 166; Emery v. Tichout, 13 Vt. 15.

[a] **Legal debt not due.**—Where two charges of unequal amounts exist, the one legal and the other illegal, but the former not being then due and payable, and a payment is made generally on account, if such payment be of no greater amount than the illegal claim it will be taken to have been paid on the illegal claim, although not specially so directed. Caldwell v. Wentworth, 14 N. H. 431.

[b] **Payment in excess of legal debt.**—If, at any time of payment, the amount paid exceed the amount due for legal sales, the balance will be applied to pay for the goods illegally sold. Hall v. Clement, 41 N. H. 166.

have been made upon the admitted debt.[43]

[§ 115] **e. Joint Debts and Debts Due Different Persons.**[44] Where a debtor is solely liable on one debt and jointly liable on another, a payment by him should be applied to the former,[45] and especially so where such application is intended and agreed to by the parties.[46] So where, after the death of the debtor, his representative continues the business, and becomes further indebted on account, payments thereon will be applied to the earliest items for which the debtor's estate only is chargeable.[47]

[§ 116] **f. Payment from Particular Source or Fund.**[48] When the money is derived from a particular source or fund, the court will apply it to the relief thereof, in the absence of a contrary agreement between the parties.[49] For instance, a payment made from the proceeds of mortgaged property must be applied in payment of the mortgage debt,[50] except where to do so would be inequitable.[51] And so it is held that, where a mortgagor without knowledge of prior foreclosure makes a payment, the court will apply it for the purpose of redemption.[52] The rule does not apply where the intention of the parties in making and accepting payment is to apply it to a debt unconnected with the particular source or fund,[53] or where the mortgage by its terms provides that the mortgagee shall be entitled to apply the proceeds of sales of mortgaged property to other unsecured debts,[54] or where payment is made with proceeds from the voluntary sale of the mortgaged property by the mortgagor as distinguished from the proceeds of a foreclosure sale,[55] or where payment is made with proceeds from the voluntary sale of mortgaged chattels by one who afterward became the assignee of the chattel mortgage.[56]

[§ 117] **g. Distribution between All of Debts.**[57] In the absence of circumstances requiring a different application, the court will oftentimes appropriate a payment ratably toward the payment of all the debts of the debtor owing to the creditor,[58] as where the evidence discloses such to have been the intention of the parties,[59] or where the entire indebtedness was treated by both parties as one lump sum,[60] or where the fund available for payment had been obtained through a judgment in an action brought on all the debts.[61]

[§ 118] **h. Contingent Liabilities.**[62] As between certain debts and contingent liabilities the law applies payments to the former rather than to the latter.[63] For instance, where one indebted on his own account and also as surety for another makes a payment without specifying to which debt it shall be applied, the law will apply it to his own debt.[64] So a payment will be applied to the contract originally entered into by the debtor rather than to one with a third person which he had assumed.[65]

43. Culkin v. Matz, 27 Colo. A. 198, 149 P 270.

44. Payments by or to partnership see Partnership § 335.

45. Adams v. Tucker, 6 Colo. A. 393, 40 P 783; Livermore v. Claridge, 33 Me. 428; Bell v. Clark, 38 Pa. Super. 365; Hutches v. J. I. Case Threshing Mach. Co., (Tex. Civ. A.) 35 SW 60.

46. Eagle Drug Co. v. White, (Tex. Civ. A.) 182 SW 378, 383 [cit Cyc].

47. Sterndale v. Hankinson, 1 Sim. 393, 2 EngCh 393, 57 Reprint 625.

48. Items of running account see supra § 111.

49. U. S.—The J. F. Spencer, 13 F. Cas. No. 7,316, 5 Ben. 151.

Ala.—Compton v. Collins, 197 Ala. 642, 73 S 334; Larry v. Brown, 153 Ala. 452, 44 S 841; Winston v. Farrow, 40 S 53; Levystein v. Whitman, 59 Ala. 345.

Ark.—Cross v. Johnson, 30 Ark. 396.

Ill.—Saffer v. Lambert, 111 Ill. A. 410; Brinckerhoff v. Greenan, 85 Ill. A. 253.

La.—Newell v. Shaffett, 28 La. Ann. 235.

Md.—Gwinn v. Whitaker, 1 Harr. & J. 754.

Miss.—McElrath v. Kimmons, 146 Miss. 775, 112 S 164, 680.

N. C.—Lee v. Manley, 154 N. C. 244, 70 SE 385.

S. C.—Turner v. Washington Realty Co., 125 S. C. 109, 118 SE 30; Heyward Williams Co. v. Zeigler, 106 S. C. 425, 91 SE 298; McSween v. Windham, 104 S. C. 508, 89 SE 500.

Tex.—Miller v. White, (Civ. A.) 264 SW 176, 179 [cit Cyc]; Amarilla First Nat. Bank v. Rush, (Civ. A.) 227 SW 378, 382 [mod on other grounds (Commn. A.) 246 SW 349, and cit Cyc].

Va.—Ross v. McLauchlan, 7 Gratt. (48 Va.) 86.

Wash.—Cummings v. Erickson, 116 Wash. 347, 199 P 736.

Eng.—Young v. English, 7 Beav. 10, 29 EngCh 10, 49 Reprint 965.

[a] **Judgment lien.**—Where a creditor held two judgments and a bond, a payment from the proceeds of the land on which the judgment is a lien should be applied on the judgment debt. Ross v. McLauchlan, 7 Gratt. (48 Va.) 86.

[b] **Crop lien.**—Crops raised by a tenant, and delivered by him to his landlord, must be applied to the debt for which the landlord had a lien on the crops, although the landlord has other claims against the tenant. Powell v. State, 84 Ala. 444, 4 S 719; Strictland v. Hardie, 82 Ala. 412, 3 S 40.

50. Ala.—Compton v. Collins, 197 Ala. 642, 73 S 334.

Ark.—Lyon v. Bass, 76 Ark. 534, 89 SW 849.

Ga.—Pritchard v. Comer, 71 Ga. 18.

Ill.—Snider v. Stone, 78 Ill. A. 17.

Iowa.—Heaton v. Ainley, 108 Iowa 112, 78 NW 798.

Minn.—Thorne v. Allen, 72 Minn. 461, 75 NW 706.

N. Y.—Griswold v. Onondaga County Sav. Bank, 93 N. Y. 301 [aff 24 Hun 487].

Okl.—St. Louis, etc., R. Co. v. Ravia Granite Ballast Co., 70 Okl. 273, 174 P 252.

S. C.—Swansea Bank v. Williams, 144 S. C. 130, 142 SE 234; McSween v. Windham, 104 S. C. 508, 89 SE 500; Ellis v. Mason, 32 S. C. 277, 10 SE 1069.

Tex.—Miller v. White, (Civ. A.) 264 SW 176, 179 [cit Cyc]; Amarillo First Nat. Bank v. Rush, (Civ. A.) 227 SW 378, 382 [mod on other grounds (Commn. A.) 246 SW 349, and cit Cyc].

Vt.—Brighton v. Doyle, 64 Vt. 616, 25 A 694.

51. Thorne v. Allen, 72 Minn. 461, 75 NW 706 (holding that, where plaintiff held a mortgage on grain and also had possession under a lien given to secure other advances, and, after a part payment from a sale of part of the grain, waived his lien by surrendering possession of the balance of the grain, the payment would be applied to the advances secured by the lien).

52. Farago v. Krzyske, 240 Mich. 15, 214 NW 942.

53. Johnson, etc., Co. v. Longley Luncheon Co., 207 Mass. 52, 92 NE 1035; Eagle Drug Co. v. White, (Tex. Civ. A.) 182 SW 378.

[a] **Corporate funds.**—Where payment by a corporation check is made to a creditor of both the corporation and the officer individually who gave it, and the understanding was that the payment was to be applied on the individual debt of the officer, the court will so apply the payment. Johnson, etc., Co. v. Longley Luncheon Co., 207 Mass. 52, 92 NE 1035.

54. Moats v. Thompson, 283 Pa. 313, 129 A 105.

55. Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216; Frazier v. Lanahan, 71 Md. 131, 17 A 940, 17 AmSR 516.

56. Meers v. Sitz, 209 Ala. 264, 96 S 137.

57. Application by debtor see supra § 87.

58. Ill.—Reiss v. Scherner, 87 Ill. A. 84.

Ky.—Craycroft v. Johnson, 1 Ky. Op. 86.

La.—Miller v. The S. F. J. Trabue, 16 La. Ann. 375; Spiller v. His Creditors, 16 La. Ann. 292; Slaughter v. Milling, 15 La. Ann. 526; Follain v. Orillion, 9 Rob. 506.

Mass.—Taylor v. Foster, 132 Mass. 30.

Nebr.—Davis v. Sloman, 27 Nebr. 877, 44 NW 41.

N. J.—Turner v. Hill, 56 N. J. Eq. 293, 39 A 137.

N. Y.—Orleans County Nat. Bank v. Moore, 112 N. Y. 543, 20 NE 357, 8 AmSR 775, 3 LRA 302; Gillett v. Depuy, 48 App. Div. 388, 63 NYS 49.

S. C.—Jones v. Kilgore, 19 S. C. Eq. 63.

Tenn.—White v. Blakemore, 8 Lea 49.

Tex.—Bitter v. Bexar County, (Commn. A.) 11 SW (2d) 163.

Ont.—Hood v. Coleman Planing Mill, etc., Co., 27 Ont. A. 203.

59. Holmes v. Cabot, (Mass.) 159 NE 615; Taylor v. Foster, 132 Mass. 30.

60. Craycroft v. Johnson, 1 Ky. Op. 86; Gillett v. Depuy, 48 App. Div. 388, 63 NYS 49.

61. Cowperthwaite v. Sheffield, 3 N. Y. 243 [aff 3 N. Y. Super. 416].

62. Application by creditor see supra § 97.

63. Snyder v. Robinson, 35 Ind. 311, 9 AmR 738; Newman v. Meek, Sm. & M. Ch. (Miss.) 331; Missouri Cent. Lumber Co. v. Stewart, 78 Mo. A. 456.

64. Newman v. Meek, Sm. & M. Ch. (Miss.) 331; Missouri Cent. Lumber Co. v. Stewart, 78 Mo. A. 456; Lazarus v. Henrietta Nat. Bank, 72 Tex. 354, 10 SW 252.

65. Blair Town Lot, etc., Co. v. Hillis, 76 Iowa 246, 41 NW 6.

[§ 119] **i. Principal and Interest[66]—(1) In General.** The general rule under both the civil and common law[67] is that, in the absence of evidence of the parties' intention to make a different application,[68] a payment made on an indebtedness consisting of principal and interest, not applied by either the debtor or creditor, will be applied first to the interest due and then to the principal.[69] Application will be made, however, to the principal rather than to interest where the parties have so agreed,[70] and where such intention is established by clear and conclusive evidence,[71] such an agreement not operating, per se, as a waiver of the right to demand payment of the interest later.[72] The rule requiring application of payments to interest first applies where the payment is made by note as well as by money,[73] where a debt is one on which interest is given as damages as well as where it expressly draws interest,[74] and to transactions where an agreement for an usurious rate of interest has been repudiated, the application being restricted, however, to the amount of interest due computed at the legal rate.[75] The rule is not applicable in the case of interest on an overdrawn account which, according to the practise of bankers, has been converted from time to time into principal.[76]

[§ 120] **(2) Surplus after Payment of Interest Due.** If the payment is in excess of the interest due at the time, the balance is imputed to the principal,[77] whether it is a general payment[78] or a payment for interest only.[79] But where a payment of interest at an agreed rate in excess of the legal rate has been voluntarily made, the excess payment cannot be applied to the principal,[80] and where there was no proof of a usurious agreement, nor anything to show that usurious interest was given or accepted in consideration of an extension of the time of payment of the loan, interest in excess of the legal rate, voluntarily paid by the borrower, could not be credited on the principal.[81]

[§ 121] **(3) Advance Payments.** If neither principal nor interest is due, some cases hold that the payment must be applied to the principal,[82] but the weight of authority holds that it should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished,[83] while still other authorities hold that the advance payment must be applied first to the extinguishment of interest up to the time when payment is made and then to the principal pro tanto.[84] Where a contract provides for advance payments and their application to principal and inter-

66. Application by: Creditor see supra § 95. Debtor see supra § 87. **Application of payments as affecting computation of interest due** see Interest §§ 168-170. **Payments of usury** see Usury [39 Cyc 1026].

67. Ruffer v. Patxot, 1 Porto Rico Fed. 357.

68. See cases infra note 69.

69. U. S.—In re Copping Sheet Plate, etc., Works, 13 F. (2d) 895 (Louisiana statute); Harlan v. Houston, 258 Fed. 611, 170 CCA 65.

Ala.—Coleman v. Smith, 55 Ala. 368.

Ark.—Jones v. Dowell, 176 Ark. 986, 4 SW(2d) 949; Rose v. Hall, 171 Ark. 529, 284 SW 776.

Cal.—Joy v. Rousseau, 72 Cal. A. 179, 236 P 972, 975 [quot Cyc].

Ga.—Becker v. Shaw, 120 Ga. 1003, 48 SE 408; Worrill v. Hightower Mule Co., 32 Ga. A. 396, 124 SE 58.

Ill.—In re Cunningham, 311 Ill. 311, 142 NE 740 [mod 227 Ill. A. 124]; Brand v. Rueter, 200 Ill. A. 42.

Ind.—McCormick v. Mitchell, 57 Ind. 248.

Ky.—Rake v. Hill, 5 Ky. Op. 570.

La.—Johnson v. Robbins, 20 La. Ann. 569; Smith v. Nettles, 9 La. Ann. 455; Union Bank v. Kindrick, 10 Rob. 51; Martinstein v. His Creditors, 8 Rob. 6; Shaw v. Oakey, 3 Rob. 361; Hynson v. Maddens, 1 Mart. N. S. 571; Cable Co. v. Flynn, 8 La. A. (Orleans) 396.

Md.—Gwinn v. Whitaker, 1 Harr. & J. 754; Frazier v. Hyland, 1 Harr. & J. 98.

Mass.—Fay v. Bradley, 1 Pick. 194; Dean v. Williams, 17 Mass. 417.

Minn.—Kelgher v. St. Paul, 69 Minn. 78, 72 NW 54; Weide v. St. Paul, 62 Minn. 67, 64 NW 65; Lash v. Edgerton, 13 Minn. 210.

Miss.—Tonkel v. Shields, 125 Miss. 461, 87 S 646; Hamer v. Kirkwood, 25 Miss. 95; Bond v. Jones, 16 Miss. 368.

Mont.—Anderson v. Perkins, 10 Mont. 154, 25 P 92.

N. M.—Armijo v. Henry, 14 N. M. 181, 89 P 305, 25 LRANS 275; Jones-Downes Co. v. Chandler, 13 N. M. 501, 85 P 392, 13 AnnCas 710.

N. Y.—Shepard v. New York, 216 N. Y. 251, 110 NE 435, AnnCas1917C 1062; Merchants' Bank v. Freeman, 15 Hun 359; Peck v. Granite State Provident Assoc., 21 Misc. 84, 46 NYS 1042.

N. C.—Riddle v. Bridgewater Milling Co., 150 N. C. 689, 64 SE 782; Johnson v. Johnson, 58 N. C. 167; Peebles v. Gee, 12 N. C. 341; Anonymous, 3 N. C. 17.

N. D.—Langton v. Kops, 41 N. D. 442, 171 NW 334.

Oh.—Hammer v. Nevill, Wright 169; Smith v. Smith, 10 OhS&CP 439.

Pa.—Kann v. Kann, 259 Pa. 583, 587, 103 A 369 [quot Cyc]; Bower v. Walker, 220 Pa. 294, 69 A 984; Moore v. Kiff, 78 Pa. 96; Spires v. Hamot, 8 Watts & S. 17; Bell's Appeal, 4 Pa. Cas. 423, 8 A 927; Buck v. Mutual Bldg., etc., Assoc., 49 Pa. Super. 128.

Porto Rico.—Ruffer v. Patxot, 1 Porto Rico Fed. 357.

S. C.—Smith v. Macon, 10 S. C. Eq. 339.

S. D.—Hinrichs v. Brady, 23 S. D. 250, 121 NW 777.

Tex.—Hampton v. Dean, 4 Tex. 455; Wilson v. Ware, (Civ. A.) 166 SW 705; Smith v. Woods, 1 Tex. A. Civ. Cas. § 680.

Vt.—Bradford Academy v. Grover, 55 Vt. 462; Allen v. Lyman, 27 Vt. 20.

Wash.—Equitable Sav., etc., Assoc. v. Bowes, 70 Wash. 169, 126 P 436.

W. Va.—Genin v. Ingersoll, 11 W. Va. 549.

Eng.—Venkatadri Appa Row v. Parthasarathi Appa Row, L. R. 48, Indian App. 150; Bower v. Marris, Cr. & Ph. 351, 18 EngCh 351, 41 Reprint 525; Chase v. Box, 2 Freem. 261, 22 Reprint 1197.

Ont.—Wilson v. Ryke, 14 Ont. 188; Jones v. Spencer, 18 OntWN 130; Ross v. Perrault, 13 Grant Ch. 206.

[a] **Declaratory statute.**—Bradley v. Murray, 66 Ala. 269; Adams v. Illinois L. Ins. Co., 104 SW 718, 31 KyL 1041; Com. v. Louisville, etc., R. Co., 104 SW 267, 31 KyL 819; Interstate Trust, etc., Co. v. Young, 135 La. 465, 65 S 611.

70. Donaldson v. Cothran, 60 Ga. 603; Kann v. Kann, 259 Pa. 583, 103 A 369.

[a] **Rule applied.**—A jury cannot be instructed to apply a payment to interest where there is evidence for them to consider whether or not an agreement for a different application existed. Fellows v. Christensen, 28 S. D. 353, 133 NW 814.

71. Carter v. Sanderson, 41 SW 306, 19 KyL 620; Benson v. Reinshagen, 75 N. J. Eq. 358, 72 A 954.

[a] **Receipts** written by the mortgagor and signed by the mortgagee, acknowledging payments on the mortgage debt, must be taken most strongly against the mortgagor in determining whether they were for payments on the principal or interest. Benson v. Reinshagen, 75 N. J. Eq. 358, 72 A 954.

72. Shepard v. New York, 216 N. Y. 251, 110 NE 435, AnnCas1917C 1062.

73. North v. Mallett, 3 N. C. 151.

74. Shepard v. New York, 216 N. Y. 251, 110 NE 435, AnnCas1917C 1062.

75. Stanley v. Franco-American Ferment Co., 97 Misc. 401, 161 NYS 365.

76. Parr's Banking Co., Ltd. v. Yates, [1898] 2 Q. B. 460.

77. See cases infra notes 78, 79.

78. Ark.—Rose v. Hall, 171 Ark. 529, 284 SW 776.

La.—Johnson v. Robbins, 20 La. Ann. 569.

Mich.—Bateman v. Blake, 81 Mich. 227, 45 NW 831.

Miss.—Tonkel v. Shields, 125 Miss. 461, 87 S 646.

Utah.—Cain v. Stewart, 47 Utah 160, 152 P 465.

Wash.—Equitable Sav., etc., Assoc. v. Bowes, 70 Wash. 169, 126 P 436.

[a] **Monthly payments by a debtor,** in excess of the interest payable on the debt, will be applied to the principal of the debt, and will not be treated as compensation for extensions of time, although they were so denominated by the parties when made. Bateman v. Blake, 81 Mich. 227, 45 NW 831.

79. Deshler v. Holmes, 44 N. J. Eq. 581, 18 A 75; Moore v. Holland, 16 S. C. 15.

80. Camden Sav. Bank v. Cilley, 83 Me. 72, 21 A 746; Stewart v. Ferguson, 31 Ont. 112.

81. Bosworth v. Kinghorn, 94 App. Div. 187, 87 NYS 983 [aff 179 N. Y. 590, 72 NE 1139].

82. Starr v. Richmond, 30 Ill. 276, 83 AmD 189; Ross v. Rees, 43 SW 215, 19 KyL 1215; McElrath v. Depuy, 2 La. Ann. 520.

83. Ind.—Jacobs v. Ballenger, 130 Ind. 231, 29 NE 782, 15 LRA 169.

Iowa.—Hites v. Oldenburger, 165 NW 327.

N. Y.—Williams v. Houghtaling, 3 Cow. 86; Jencks v. Alexander, 11 Paige 619.

Oh.—Miami Exporting Co. v. U. S. Bank, 5 Oh. 260; Brown v. Ginn, 21 Oh. Cir. Ct. N. S. 85.

S. C.—Singleton v. Allen, 21 S. C. Eq. 166.

84. Monroe v. Fohl, 72 Cal. 568, 14

est in a particular way, the court will carry out the intention of the parties.[85] Payments of interest by mistake, when no interest was due, are applied as payments on the principal debt at the date of maturity of the obligation.[86]

[§ 122] **(4) Several Debts or Notes.** Where two or more debts are kept separate and distinct from each other, the law will apply partial payments to the satisfaction first of the interest, then of the principal of the debt first falling due, and, following that, first the interest, then the principal of each succeeding debt in order.[87] But where there is in reality but one debt represented by different notes maturing at different times, the payment should first be applied to the interest due on the whole debt.[88]

[§ 123] **G. Rights of Third Persons[89]—1. In General.** The exercise of the right of appropriation of payments belongs exclusively to the debtor and creditor and no third person can control or be heard for the purpose of compelling a different appropriation from that agreed upon by them.[90] The rule permitting appropriation by debtor or creditor free from the control of third persons goes on the assumption that payment is being made out of the debtor's property, and will not therefore support an appropriation by debtor or creditor where made with property or the proceeds of property belonging to a third person and without the latter's knowledge or consent.[91] But where the funds for payment are secured from the third person with his knowledge or consent, fraudulently obtained, the creditor's right to appropriate will not be affected thereby, if he himself had no knowledge of the fraud.[92]

[§ 124] **2. Enforceable Rights and Equities—a. In General.** If no specific appropriation of payments is made by either party until enforceable rights of third persons holding under the debtor have been created, the creditor cannot so appropriate payments made by the debtor as to affect such rights, if, by a different appropriation, they can be protected.[93] So where the court is called upon to appropriate payments and the equities of third persons intervene, it will apply the payment as may seem reasonable and just.[94] Of course the parties cannot apply a

P 514; Spires v. Hamot, 8 Watts & S. (Pa.) 17; De Bruhl v. Neuffer, 32 S. C. L. 426.

85. Mize v. Huggins, 115 Kan. 634, 223 P 1097.

[a] **Monthly payments.**—A contract providing for payment of the sum with interest at seven per cent per annum computed semiannually, payments to be made of twenty dollars monthly, requires that each six-months payment made shall be applied first to interest and balance in reduction of principal. Mize v. Huggins, 115 Kan. 634, 223 P 1097.

86. Carr v. Robinson, 8 Bush (Ky.) 269; Underwood v. Jefferson Standard L. Ins. Co., 177 N. C. 327, 98 SE 832, 835 [quot Cyc].

87. Loveridge v. Larned, 7 Fed. 294; Miller v. Lefiore, 32 Miss. 634.

88. Boggess v. Goff, 47 W. Va. 139, 34 SE 741; Genin v. Ingersoll, 11 W. Va. 549; Wilson v. Rykert, 14 Ont. 188.

89. Cross references:
Guarantors see Guaranty § 166.
Indorsers see Bills and Notes § 804.
Sureties see Sureties [32 Cyc 170].

90. U. S.—Philadelphia First Nat. Bank v. Farrell, 272 Fed. 371, 16 ALR 651 [mod 263 Fed. 778, and certiorari den 257 U. S. 634 mem, 635 mem, 42 SCt 48 mem, 49 mem, 66 L. ed. 408 mem]; Santa Marina Co. v. Canadian Bank of Commerce, 242 Fed. 142 [aff 254 Fed. 391, 165 CCA 611 (certiorari den 250 U. S. 643 mem, 39 SCt 493 mem, 63 L. ed. 1186 mem)]; Mack v. Adler, 22 Fed. 570.

Ala.—Steiner v. Jeffries, 118 Ala. 573, 24 S 37.

Fla.—Consolidated Naval Stores Co. v. Wilson, 82 Fla. 396, 90 S 461, 21 ALR 681.

Ga.—Riverside Milling, etc., Co. v. Cartersville Bank, 141 Ga. 578, 81 SE 892.

Ill.—Ætna Acc., etc., Co. v. Alexander Lumber Co., 215 Ill. A. 555, 570 [rev on other grounds 296 Ill. 500, 129 NE 871].

Iowa.—Bankers' Loan, etc., Co. v. Mapleton First Nat. Bank, 191 Iowa 119, 181 NW 791.

Kan.—Wyandotte Coal, etc., Co. v. Wyandotte Pav., etc., Co., 97 Kan. 203, 154 P 1012, AnnCas1917C 580.

Ky.—Thacker v. Bullock Lumber Co., 140 Ky. 463, 131 SW 271.

La.—Hughes v. Mattes, 104 La. 231, 28 S 1009.

Mass.—Thacher v. Pray, 113 Mass. 291, 18 AmR 480.

Minn.—Jefferson v. St. Matthew's Church, 41 Minn. 392, 43 NW 74.

Miss.—Hiller v. Levy, 66 Miss. 30, 5 S 226.

Mo.—Coney v. Laird, 153 Mo. 408, 55 SW 96.

Nev.—Wheeler & Stoddard, Inc. v. Portland Cattle Loan Co., 268 P 46.

N. Y.—Grant v. Keator, 117 N. Y. 369, 22 NE 1055; Louis v. Bauer, 33 App. Div. 287, 53 NYS 985.

Or.—Bohn v. Wilson, 53 Or. 490, 101 P 202.

Pa.—Harmony Creamery Co. v. Bickerton, 57 Pa. Super. 651.

S. C.—Clark v. Smith, 13 S. C. 585.

Tenn.—Dean v. Womack, 2 Tenn. Ch. A. 72.

Tex.—Peck v. Powell, (Civ. A.) 259 SW 640 [rev on other grounds (Commn. A.) 271 SW 891].

Vt.—Sherwin v. Colburn, 25 Vt. 613.

Va.—Wells v. Hughes, 89 Va. 543, 16 SE 689; Coles v. Withers, 33 Gratt. (74 Va.) 186.

Wash.—Carey v. Herrick, 146 Wash. 283, 263 P 190, 195 [quot Cyc]; Kelso v. Russell, 33 Wash. 474, 74 P 561.

Wis.—National Cash Register Co. v. Bonneville, 119 Wis. 222, 96 NW 558.

"There is no privity between an attaching creditor and one who owes his debtor that allows him to direct or have control over the payment of money by that person. The one who makes payment has the right to designate on which debt it shall be applied. If he fail, then the creditor may make application. If both fail, then the law makes application under well known rules. But we know of no authority preventing the creditor and debtor from agreeing among themselves as to the application of payments. The most favorable position the attaching creditor could hold would be one equal to his debtor. If his debtor could not apply the payments as he wished unless the payor failed to designate, how can he have a greater power?" Carey v. Herrick, supra.

[a] **An assignee of a mortgagor** cannot insist that money of the mortgagor, in the mortgagee's hands, should be used to pay off the mortgage, unless this was clearly contemplated by the parties, and the assignee made his purchase with the understanding that it should be so. Gordon v. Hobart, 10 F. Cas. No. 5,608, 2 Story 243.

[b] **Mortgagors and mortgagee** could by agreement apply payments on indebtedness other than the mortgaged debt notwithstanding attachment by another creditor of the mortgagors. Carey v. Herrick, 146 Wash. 283, 263 P 190.

91. Pacific Acceptance Corp. v. Bank of Italy, 59 Cal. A. 76, 209 P 1024; Johnson, etc., Co. v. Longley Luncheon Co., 207 Mass. 52, 92 NE 1035.

[a] **Equity of third person.**—Where the owner of a house being built borrowed money from his mortgagee and gave some of it to his contractor to pay for a furnace and the contractor paid it over to the furnaceman, giving to the latter, not at the time of payment, but a few moments later, directions to apply it on the furnace for the owner's house, the court will so apply it, notwithstanding an alleged earlier application by the furnaceman to earlier items in the contractor's account. Mueller Furnace Co. v. Colvin, 146 Minn. 252, 178 NW 496.

92. Tanner v. Lee, 121 Ga. 524, 49 SE 592; Ganley v. Pipestone, 154 Minn. 193, 191 NW 738.

93. Nebr.—Belcher v. J. I. Case Threshing Mach. Co., 78 Nebr. 798, 111 NW 848; Crane Bros. Mfg. Co. v. Keck, 35 Nebr. 683, 53 NW 606.

N. J.—Terhune v. Colton, 12 N. J. Eq. 232 [aff 12 N. J. Eq. 312].

Oh.—Clark County v. Springfield, 36 Oh. St. 643.

Okl.—Oklahoma City First Nat. Bank v. Farmers' Nat. Bank, 115 Okl. 136, 241 P 783.

Pa.—Harker v. Conrad, 12 Serg. & R. 301, 304, 14 AmD 691.

S. C.—Wiesenfeld v. Byrd, 17 S. C. 106.

Tex.—Willis v. McIntyre, 70 Tex. 34, 7 SW 594, 8 AmSR 574.

Eng.—Thompson v. Brown, M. & M. 40, 22 ECL 466.

[a] **Agent's commission certificates.**—Where an agent receives compensation for services in behalf of his principal in commissions on sales, such commissions to be payable in installments as notes given for wares are paid by purchasers, the law will, as between the principal and agent, apply payments by the debtor to the satisfaction of the notes in the order of their maturity, and not permit the principal to indorse funds received as partial payments on a series of notes, where the effect is to deprive the agent of his commission. Belcher v. J. I. Case Threshing Mach. Co., 78 Nebr. 798, 111 NW 848.

94. U. S.—Nashville First Nat. Bank v. National Surety Co., 130 Fed. 401, 64 CCA 601, 66 LRA 777.

Ala.—Hudson v. Wilson, 202 Ala. 40, 79 S 378, 379 [cit Cyc].

Cal.—Joy v. Rousseau, 72 Cal. A. 179, 236 P 972, 975 [quot Cyc].

Hawaii.—Lewers v. Wong Wong, 24 Hawaii 39, 46 [cit Cyc].

Ill.—Liese v. Hentze, 240 Ill. A. 273 [rev on other grounds 326 Ill. 633, 158 NE 428]; Dorris Lumber Co. v. Cummins, 157 Ill. A. 10; Clow v. Goldstein, 147 Ill. A. 571.

N. J.—State v. Sooy, 39 N. J. L. 539.

Pa.—Harker v. Conrad, 12 Serg. & R. 301, 304, 14 AmD 691.

Ont.—Moore v. Riddell, 11 Grant Ch. 69.

[a] **Secured debts.**—A partnership creditor holding a mortgage of one of

payment to an invalid debt to the prejudice of a subsequent creditor.[95]

[§ 125] **b. Subsequent Mortgagees or Lienors.** Where the payment is made from funds or property subject to a mortgage or other lien, such payment cannot be applied to other debts of the debtor against the objection of mortgagee or lienor.[96] The rule does not apply in the absence of an objection by the mortgagee or lienor to the appropriation as made;[97] nor where it clearly appears that the secured creditor receiving the money paid it in the debtor's behalf to third persons holding claims against the latter, and had no interest in them, and in good faith acted only as the agent of the debtor in the transaction;[98] nor where the person who later becomes the assignee of the mortgage is a stranger thereto at the time the appropriation of the payment is made.[99]

[§ 126] **c. Promise to Third Person.** The right of the debtor or creditor to appropriate to any debt will not be affected by a promise to a third person made without consideration to appropriate to a particular debt.[1] But where the promise to the third person to appropriate to a particular debt is based on a legal consideration, the rights of debtor or creditor to appropriate are subject to the terms of such agreement.[2]

[§ 127] **3. Effect of Appropriation Once Made.** An appropriation by either party cannot afterward be changed so as injuriously to affect the rights of third persons.[3] Nor, in the absence of fraud, can an appropriation once made in accordance with a preëxisting agreement by the creditor and the debtor be afterward changed upon the demand of the third person.[4]

VIII. PLEADING, EVIDENCE, TRIAL, AND REVIEW*

[§ 128] **A. In General.** Payment is ordinarily a matter of affirmative defense,[5] and as such is ordinarily required to be specifically pleaded.[6]

The defense is a meritorious one,[7] and so long as the merits of a case remain untried, the court will relieve the party who, under misapprehension or want of proper knowledge of his case, has in good faith filed pleadings or made agreements which operate to defeat a full presentation of his rights.[8]

Payment by third person. Satisfaction by one of

the partner's separate property as security for half of the debt and a note indorsed by a third party as security for the other part, and payments having been made which are not applied by either debtor or creditor, the court will appropriate them ratably upon both debts. Moore v. Riddell, 11 Grant Ch. (Ont.) 69.

95. Greene v. Tyler, 39 Pa. 361.

96. Herweigh v. Hall, 172 Ark. 1148, 292 SW 97.

97. Conrad Mercantile Co. v. Siler, 75 Mont. 36, 42, 241 P 617.

"The law affords ample protection to mortgagees situated as the bank was in this case, but it does not make them special wards of the courts or impose upon the courts the duty to enforce rights which they do not claim for themselves, upon the mere suggestion of one of the parties that they have rights which they may possibly desire to assert." Conrad Mercantile Co. v. Siler, supra.

98. Farmers', etc., Bank v. Reeves, 20 Ga. A. 219, 92 SE 971.

99. Meers v. Sitz, 209 Ala. 264, 96 S 137.

1. Peck v. Powell, (Tex. Civ. A.) 259 SW 640 [rev on other grounds (Commn. A.) 271 SW 891].

2. Brown v. Scheuer, 210 Ala. 47, 97 S 50; Eagle Drug Co. v. White, (Tex. Civ. A.) 182 SW 378.

3. U. S.—The Sophia Johnson, 237 Fed. 406; U. S. v. Brent, 236 Fed. 771; Bank of North America v. Meredith, 2 F. Cas. No. 893, 2 Wash. C. C. 47.

Kan.—Pinney v. French, 67 Kan. 473, 73 P 94.

La.—Boagni v. Wartelle, 50 La. Ann. 128, 23 S 206.

N. J.—Paterson Sav. Inst. v. Brush, 29 N. J. Eq. 119; Smith v. Wood, 1 N. J. Eq. 74.

Pa.—Morton's Estate, 2 Del. Co. 194.

4. Merchants', etc., Bank v. Hervey Plow Co., 45 La. Ann. 1214, 14 S 139.

5. Ala.—Atwood v. Benson, 215 Ala. 72, 109 S 361; Slaughter v. Martin, 9 Ala. A. 285, 63 S 689.

Ariz.—Rountree v. Clanton, 17 Ariz. 107, 149 P 58.

Cal.—Pastene v. Pardini, 135 Cal. 431, 67 P 681; Peterson v. Hubbard, 2 Cal. Unrep. Cas. 607, 9 P 106 (a valid defense).

Colo.—Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538 (even when negatived in complaint and answer contains general denial); Nitro Powder Co. v. Kearns, 50 Colo. 1, 114 P 396; Harvey v. Denver, etc., R. Co., 44 Colo. 258, 99 P 31, 130 AmSR 120; Florence Oil, etc., Co. v. Canon City First Nat. Bank, 38 Colo. 119, 88 P 182; Perot v. Cooper, 17 Colo. 80, 28 P 391, 31 AmSR 258; Esbensen v. Hover, 3 Colo. A. 467, 33 P 1008.

Conn.—Morehouse v. Throckmorton, 72 Conn. 449, 44 A 747.

Ga.—Christian v. Bryant, 102 Ga. 561, 27 SE 666; Lanier v. Huguley, 91 Ga. 791, 18 SE 39; Hobbs v. Citizens' Bank, 32 Ga. A. 522, 124 SE 72; Douglass v. Stephens, 27 Ga. A. 485, 108 SE 833.

Ill.—Hughes v. New England Casualty Co., 207 Ill. A. 630; Hughes v. Chicago Bonding, etc., Co., 207 Ill. A. 628; Beggs v. Chicago Bonding, etc., Co., 207 Ill. A. 621; Scown v. Cook County, 199 Ill. A. 351.

Iowa.—Crouch v. National Livestock Remedy Co., 205 Iowa 51, 217 NW 557; Columbia College v. Hart, 204 Iowa 265, 213 NW 761.

Minn.—Solway State Bank v. Beltrami County School Dist. No. 26, 170 Minn. 83, 212 NW 25; Marshall, etc., Bank v. Child, 76 Minn. 173, 78 NW 1048.

Miss.—Sivley v. Williamson, 112 Miss. 276, 72 S 1008.

Mo.—Ferguson v. Dalton, 158 Mo. 323, 59 SW 88; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99; Henderson v. Davis, 74 Mo. A. 1.

Nebr.—Farmers' Co-op. Mercantile Co. v. Shultz, 113 Nebr. 801, 205 NW 288; Magenau v. Bell, 14 Nebr. 7, 14 NW 664.

N. Y.—Dibble v. Dimick, 143 N. Y. 549, 38 NE 724; Lent v. New York, etc., R. Co., 130 N. Y. 504, 29 NE 988; Lerche v. Brasher, 104 N. Y. 157, 10 NE 58, 11 NYCivProc 423; Commercial Exch. Bank v. Woodward, 198 App. Div. 769, 191 NYS 51; Skelly v. Mortimer, 154 App. Div. 921, 138 NYS 1100; Schackter v. Kukowsky, 117 App. Div. 750, 102 NYS 1028; Rosenstock v. Dessar, 85 App. Div. 501, 83 NYS 334; Harder v. Continental Printing, etc., Co., 64 Misc. 89, 117 NYS 1001; Rogers v. T. H. Simonson, etc., Co., 45 Misc. 323, 90 NYS 298; Forbes v. Wheeler, 39 Misc. 538, 80 NYS 373; Price Printing House v. Jewelers' Review Pub. Co., 10 Misc. 743, 31 NYS 800; American Slicing Mach. Co. v. Kuchuklan, 147 NYS 352; Ariston Realty Co. v. Bernstein, 111 NYS 538.

Okl.—Upham Shoe Co. v. Pollard, 111 Okl. 228, 239 P 244; Lawless v. Tuthill, 97 Okl. 210, 223 P 613; Standard Fashion Co. v. Joels, 60 Okl. 195, 159 P 846.

Or.—L. B. Menefee Lumber Co. v. MacDonald, 122 Or. 579, 260 P 444.

S. C.—Morris v. Carlisle, 128 S. C. 417, 122 SE 511.

Tenn.—Vaughn v. Williams, 4 Tenn. Civ. A. 357.

Tex.—Garrett v. Grisham, (Civ. A.) 156 SW 505.

Wash.—Pickle v. Anderson, 62 Wash. 552, 114 P 177.

Wis.—Meating v. Tigerton Lumber Co., 113 Wis. 379, 89 NW 152; Knapp v. Runals, 37 Wis. 135.

Ont.—Ontario Asphalt Block Co. v. Cook, 3 OntWN 1289, 22 OntWR 203, 4 DomLR 22.

"The defense of payment is new matter and a special affirmative defense." Rountree v. Clanton, 17 Ariz. 107, 109, 149 P 58.

"The rule that payment is an affirmative defense had its origin under the common-law practice in the plea of non assumpsit, and the reason for it was that in assumpsit the allegation in the declaration and the traverse in the plea were in the past tense, and under the rule which excluded all proof not strictly within the issue, no evidence was admissible, except such as had a tendency to show that the defendant never had made the promise. It was never applied in the action of debt, the allegation in that form of action being in the present tense, and under the plea of nil debet any fact tending to show that there was no indebtedness on the part of the defendant was admissible." Lent v. New York, etc., R. Co., 130 N. Y. 504, 510, 29 NE 988.

[a] **In Louisiana** payment is a special defense. Madison Lumber Co. v. Bachemin, 120 S 508; J. T. Mann & Co., Inc. v. Barrett, 120 S 501.

Nature of plea see infra § 136.

6. See infra §§ 132-134.

7. Beals v. Hill, 58 N. H. 61.

8. Beals v. Hill, supra (holding, however, that a defendant is not estopped to set up an assignment of property as a defense of payment by reason of his having obtained a continuance of the action at a former term, upon his affidavit that he was advised by counsel, and believed that his claim for the assignment probably could not be allowed as a set-off, and that, for reasons stated, judgment should not be rendered against him before he had opportunity, in a pending suit on his claim, to obtain a judgment which might be set off against plaintiff's judgment).

*By GILBERT G. FINLEY (§§ 128-175).

two joint tort-feasors[9] or payment by a joint obligor[10] may be pleaded in bar to an action against the other. But payment by a stranger between whom and defendant there is no privity cannot be pleaded by the latter in bar of a suit for his own debt.[11]

Propriety in tort action. It has been said that, since payment is a mode of extinguishing a debt,[12] a plea of payment is not an appropriate answer to an unliquidated demand in tort.[13]

[§ 129] **B. Pleading[14]—1. Allegation of Nonpayment—a. Necessity[15]—(1) In General.** Nonpayment need not be alleged in the petition, declaration, or complaint,[16] except where failure to pay must be stated as an essential element of the cause of action,[17] as for example, in an action on a contract, the breach of which consists of nonpayment,[18] although such an allegation is not improper.[19]

[§ 130] **(2) Where Presumption of Payment Exists.** Where there is a presumption of payment from lapse of time, it has been held that facts rebutting such presumption must be alleged.[20]

[§ 131] **b. Requisites and Sufficiency.** An allegation that defendant "has not paid the said sum of . . . nor any part thereof, but the same sum is . . . still due and wholly unpaid," is sufficient,[21] but an allegation of indebtedness at a time prior

9. Knapp v. Roche, 94 N. Y. 329.

10. Mitchell v. Gibbes, 2 S. C. L. 475; Beaumont v. Greathead, 2 C. B. 494, 52 ECL 494, 135 Reprint 1039.

11. Atlantic Dock Co. v. New York, 53 N. Y. 64; Bleakley v. White, 4 Paige (N. Y.) 654; Meyer v. Stadtler, 23 Tex. Civ. A. 432, 56 SW 108.

12. See supra § 1.

13. Alabama Western R. Co. v. Foshee, 183 Ala. 182, 62 S 500.

14. **In general** see Pleading [31 Cyc 1].

15. **In action:**
For rent see Landlord and Tenant § 1335.
Of:
Assumpsit see Assumpsit, Action of § 49.
Debt see Debt, Action of § 23.
On:
Bond see Bonds § 183.
Commercial instrument see Bills and Notes § 1156.
Contract see Contracts §§ 869, 870.
Insurance policy see Insurance; and cross references thereunder.
To:
Enforce mechanic's lien see Mechanics' Liens § 589.
Foreclose mortgage see Mortgages § 1606.

16. Ala.—Atwood v. Benson, 215 Ala. 72, 109 S 361.
Cal.—Kirk v. Roberts, 3 Cal. Unrep. Cas. 671, 31 P 620.
Colo.—Esbensen v. Hover, 3 Colo. A. 467, 33 P 1008.
Conn.—Morehouse v. Throckmorton, 72 Conn. 449, 44 A 747.
Iowa.—Crouch v. National Livestock Remedy Co., 205 Iowa 51, 217 NW 557; Howerton v. Augustine, 130 Iowa 389, 106 NW 941.
Mo.—State v. Peterson, 142 Mo. 526, 39 SW 453, 40 SW 1094.
N. Y.—Hitchings v. Kayser, 65 App. Div. 302, 72 NYS 749 [aff 171 N. Y. 636 mem, 63 NE 1118 mem]; Van Demark v. Van Demark, 13 HowPr 372.
Pa.—De Cou Bros. Co. v. Englander, 39 Pa. Super. 243.
Wis.—Meating v. Tigerton Lumber Co., 113 Wis. 379, 89 NW 152; Rossiter v. Schultz, 62 Wis. 655, 22 NW 839.

[a] **Nonpayment need not be alleged in action:** (1) To recover an interest transferred to plaintiff in the accounts, bills, and debts of another. Kirk v. Roberts, 3 Cal. Unrep. Cas. 671, 31 P 620. (2) By payee against maker of unpaid check. Atwood v. Benson, 215 Ala. 72, 109 S 361. (3) To recover damages. Crouch v. National Livestock Remedy Co., 205 Iowa 51, 217 NW 557; Howerton v. Augustine, 130 Iowa 389, 106 NW 941. (4) For breach of contract by wrongful discharge. Harrod v. Wineman, 146 Iowa 718, 129 NW 812.

17. Grant v. Sheerin, 84 Cal. 197, 23 P 1094; Mills v. Lantrip, 170 Ky. 81, 185 SW 514; Conkling v. Weatherwax, 181 N. Y. 258, 73 NE 1028, 2 AnnCas 740; Lent v. New York, etc., R. Co., 130 N. Y. 504, 29 NE 988; Tracy v. Tracy, 59 Hun 1, 12 NYS 665; Miller v. Baer, 189 NYS 149; L. B. Menefee Lumber Co. v. MacDonald, 122 Or. 579, 260 P 444.

[a] **Nonpayment must be alleged in action.**—(1) In counterclaim seeking recovery of debt. Mills v. Lantrip, 170 Ky. 81, 185 SW 514. (2) For the enforcement of a lien where nonpayment of the amount secured is part of the cause of action. Conkling v. Weatherwax, 181 N. Y. 258, 73 NE 1028, 2 AnnCas 740. (3) Where breach consists of failure to pay money. L. B. Menefee Lumber Co. v. MacDonald, 122 Or. 579, 260 P 444.

18. Cal.—Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127; Grant v. Sheerin, 84 Cal. 197, 23 P 1094; Richards v. Travelers' Ins. Co., 80 Cal. 505, 22 P 939; Scroufe v. Clay, 71 Cal. 123, 11 P 882; Morgan v. Menzies, 60 Cal. 341; Davanay v. Eggenhoff, 43 Cal. 395; Frisch v. Caler, 21 Cal. 71; Cornwell v. Mulcahy, 62 Cal. A. 658, 217 P 568; Arocena v. Sawyer, 60 Cal. A. 581, 213 P 523.
Ga.—Armour v. Bluthenthal, 9 Ga. A. 707, 72 SE 168.
Ind.—Jaqua v. Shewalter, 10 Ind. A. 234, 36 NE 173, 37 NE 1072.
Iowa.—Brenton v. Hill, 197 Iowa 125, 196 NW 947; Harrod v. Wineman, 146 Iowa 718, 129 NW 812.
Mo.—State v. Peterson, 142 Mo. 526, 39 SW 453, 40 SW 1094.
Mont.—Lappin v. Martin, 71 Mont. 233, 228 P 763.
Nebr.—Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.
N. Y.—Lent v. New York, etc., R. Co., 130 N. Y. 504, 29 NE 988; Krower v. Reynolds, 99 N. Y. 245, 1 NE 775; Van Giesen v. Van Giesen, 10 N. Y. 316; Cochran v. Reich, 91 Hun 440, 36 NYS 233, 25 NYCivProc 147, 2 NYAnnCas 313; Tracy v. Tracy, 59 Hun 1, 12 NYS 665; Miller v. Baer, 189 NYS 149; Newton v. Browne, 26 NYS 83.
Va.—Strange v. Floyd, 9 Gratt. (50 Va.) 474; Nicholson v. Dixon, 5 Munf. (19 Va.) 198; Hill v. Harvey, 2 Munf. (16 Va.) 525; Green v. Dulany, 2 Munf. (16 Va.) 518; Buckner v. Blair, 2 Munf. (16 Va.) 336; Braxton v. Lipscomb, 2 Munf. (16 Va.) 282.
W. Va.—Douglass v. Central Land Co., 12 W. Va. 502.

[a] **Rule applied to particular actions.**—(1) On promissory note. Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127; Scroufe v. Clay, 71 Cal. 123, 11 P 882; Davanay v. Eggenhoff, 43 Cal. 395; Frisch v. Caler, 21 Cal. 71; Van Giesen v. Van Giesen, 10 N. Y. 316; Tracy v. Tracy, 59 Hun 1, 12 NYS 665. (2) On life insurance policy. Richards v. Travelers' Ins. Co., 80 Cal. 505, 22 P 939. (3) For money alleged to be due upon either an express or implied contract. Jaqua v. Shewalter, 10 Ind. A. 234, 36 NE 173, 37 NE 1072; Lappin v. Martin, 71 Mont. 233, 228 P 763. (4) To recover an alleged debt. Newton v. Browne, 26 NYS 83; Douglass v. Central Land Co., 12 W. Va. 502. (5) Against guarantors, whether guaranty contract be absolute or conditional. Armour v. Bluthenthal, 9 Ga. A. 707, 72 SE 168. (6) Against sureties in an undertaking. Morgan v. Menzies, 60 Cal. 341. (7) On covenant in deed to assume and pay mortgage on granted premises. Krower v. Reynolds, 99 N. Y. 245, 1 NE 775. (8) For breach of covenant to pay rent reserved in lease. Cochran v. Reich, 91 Hun 440, 36 NYS 233, 25 NYCivProc 147, 2 NYAnnCas 313. (9) Of replevin to obtain possession of goods under chattel mortgage. Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304. (10) On bond of constable for failure to pay over fees collected. State v. Peterson, 142 Mo. 526, 39 SW 453, 40 SW 1094. (11) Of debt on bond to more than one obligee. Strange v. Floyd, 9 Gratt. (50 Va.) 474. (12) Of debt on a bond in behalf of the survivor of two joint assignees. Nicholson v. Dixon, 5 Munf. (19 Va.) 198. (13) Of debt on a bond executed by two obligors. Hill v. Harvey, 2 Munf. (16 Va.) 525. (14) By surviving executor for debt due the testator. Buckner v. Blair, 2 Munf. (16 Va.) 336. (15) Of debt upon an assigned bond. Green v. Dulany, 2 Munf. (16 Va.) 518; Braxton v. Lipscomb, 2 Munf. (16 Va.) 282.

[b] **In Wisconsin** (1) nonpayment need not be alleged in action to recover wages for services performed. Meating v. Tigerton Lumber Co., 113 Wis. 379, 89 NW 152. (2) Nonpayment need not be alleged in action to recover agreed price for property sold and delivered. Rossiter v. Schultz, 62 Wis. 655, 22 NW 839.

19. Bracket v. Wilkinson, 13 HowPr (N. Y.) 102.

20. Hunt v. Forman, 2 Dana (Ky.) 471. But see Payne v. Hathaway, 3 Vt. 212 (holding that presumption of payment from lapse of time cannot be claimed by a defendant on demurrer to a bill).

21. Rawlinson v. Christian Press Assoc. Pub. Co., 139 Cal. 620, 73 P 468.

[a] **Other allegations of nonpayment held sufficient.**—(1) That defendant has neglected and refused to pay. Rankin v. Sisters of Mercy, 82 Cal. 88, 22 P 1134. (2) That defendant refused to pay said sum, and that the same is now due and unpaid. Ferguson v. McBean, 4 Cal. Unrep. Cas. 429, 35 P 559. (3) That said services were reasonably worth the sum of seven hundred and fifty dollars and defendants have paid the sum of two hundred dollars on account, and in part payment thereof, leaving the sum of five hundred and fifty dollars unpaid thereof. Burns v. Cushing, 96 Cal. 669, 31 P 1124. (4) Particular allegation in one paragraph that plaintiff has not paid sum with general allegation in another paragraph that no part of the sum has been paid. Arocena v. Sawyer, 60 Cal. A. 581, 213 P 523. (5) That defendant is indebted to plaintiff. Jaqua v. Cordesman, etc., Co., 106 Ind. 141, 5 NE 907; Johnson v. Kilgore, 39 Ind. 147. (6) Where there are several defendants, jointly, or jointly and severally, liable on a penal bond, an averment that the "said defendants have not paid" is sufficient. Hibbard v. McKindley, 28 Ill. 240.

[b] **In Virginia and West Virginia** the declaration must allege nonpayment of the debt generally so as to include not only when it fell due, but also subsequently. Strange v. Floyd, 9 Gratt. (50 Va.) 474; Nicholson v. Dixon, 5 Munf. (19 Va.) 198; Hill v. Harvey, 2 Munf. (16 Va.) 525; Green v. Dulany, 2 Munf. (16 Va.) 518; Buckner v. Blair, 2 Munf. (16 Va.) 336; Braxton v. Lipscomb, 2 Munf. (16 Va.) 282; Douglass v. Cen-

to the filing of the complaint is insufficient.[22]

[§ 132] **2. Payment as a Defense[23]—a. Necessity of Pleading—(1) In General.** Subject to certain qualifications hereinafter considered in connection with the discussion of the admissibility of evidence of payment under the general issue[24] or general denial,[25] the general rule is that payment is a defense which must be specially pleaded if it is to be relied upon.[26] Payment need not be pleaded when its effect is to show that a cause of action

tral Land Co., 12 W. Va. 502.

22. Fairchild v. King, 102 Cal. 320, 36 P 649.

[a] **Other averments held insufficient.**—(1) That defendant has refused and still refuses to pay the principal or interest of the note, or any part thereof, and that there is now due the sum, etc. Scroufe v. Clay, 71 Cal. 123, 11 P 882. (2) Allegation that defendant owes a debt not equivalent to an allegation that it is due. Musselman v. Wise, 84 Ind. 248; Jaqua v. Shewalter, 10 Ind. A. 234, 36 NE 173, 37 NE 1072.

23. In an action of assumpsit see Assumpsit, Action of § 67 note 42.

24. See infra § 172.

25. See infra § 173.

26. U. S.—Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240.

Ala.—Atwood v. Benson, 215 Ala. 72, 109 S 361; Pollak v. Winter, 166 Ala. 255, 51 S 998, 52 S 829, 53 S 339, 139 AmSR 33; Scott v. Rawls, 159 Ala. 399, 48 S 710; Alabama Jail, etc., Co. v. Marion County, 145 Ala. 684, 40 S 100; Gulfport Fertilizer Co. v. Jones, 15 Ala. A. 280, 73 S 145; Slaughter v. Martin, 9 Ala. A. 285, 63 S 689.

Ariz.—Eads v. Commercial Nat. Bank, 266 P 14; Rountree v. Clanton, 17 Ariz. 107, 149 P 58.

Ark.—Interstate Jobbing Co. v. Velvin, 172 Ark. 212, 287 SW 1015; Hays v. Dickey, 67 Ark. 169, 53 SW 887; Robinson v. Woodson, 33 Ark. 307 (defendant pleaded he had always been willing to pay).

Colo.—Nitro Powder Co. v. Kearns, 50 Colo. 1, 114 P 396; Welles v. Colorado Nat. L. Assur. Co., 49 Colo. 508, 113 P 524; Harvey v. Denver, etc., R. Co., 44 Colo. 258, 99 P 31, 130 AmSR 120; Gumaer v. Canon City First Nat. Bank, 38 Colo. 123, 88 P 183; Florence Oil, etc., Co. v. Canon City First Nat. Bank, 38 Colo. 119, 88 P 182; Esbensen v. Hover, 3 Colo. A. 467, 33 P 1008.

Conn.—O'Loughlin v. Poli, 82 Conn. 427, 74 A 763; Stalker v. Hayes, 81 Conn. 711, 71 A 1099.

Del.—Klair v. Philadelphia, etc., R. Co., 25 Del. 274, 78 A 1085.

Ga.—Hobbs v. Citizen's Bank, 32 Ga. A. 522, 124 SE 72; Douglas v. Stephens, 27 Ga. A. 485, 108 SE 833; Harris v. Dover, 18 Ga. A. 320, 89 SE 351.

Hawaii.—Kapela v. Gilliland, 22 Hawaii 655, 659 [quot Cyc].

Ind.—Baker v. Kistler, 13 Ind. 63; Hubler v. Pullen, 9 Ind. 273, 68 AmD 620; Coe v. Givan, 1 Blackf. 367.

Iowa.—Brenton v. Hill, 197 Iowa 125, 196 NW 947; Howerton v. Augustine, 130 Iowa 389, 106 NW 941; Junge v. Bowman, 72 Iowa 648, 34 NW 612.

La.—Dickson v. Dickson, 32 La. Ann. 272; Ruhlman v. Smith, 15 La. Ann. 670; D'Arensbourg v. Chauvin, 6 La. Ann. 778; Bludworth v. Hunter, 9 Rob. 256; McKown v. Mathes, 19 La. 542; Davis v. Davis, 17 La. 259; Gleises v. Faurie, 6 La. 455; House v. Croft, 8 Mart. N. S. 704; Baker Gasoline Co., Inc. v. Sutherland, 8 La. A. 815; Arkadelphia Milling Co. v. Walker-Howe Grocer Co., Inc., 5 La. A. 233; George C. Vaughan & Sons, Inc. v. L. V. Burnaman, 2 La. A. 333.

Mich.—Manglares v. Passiales, 244 Mich. 188, 221 NW 149.

Minn.—Marshall, etc., Bank v. Child, 76 Minn. 173, 78 NW 1048; Farnham v. Murch, 36 Minn. 328, 31 NW 453.

Miss.—Sivley v. Williamson, 112 Miss. 276, 72 S 1008; Hinton v. Lumberton First Nat. Bank, 98 Miss. 120, 53 S 344; Prim v. Kittridge, 1 Miss. 390.

Mo.—Ferguson v. Dalton, 158 Mo. 323, 59 SW 88; State v. Peterson, 142 Mo. 526, 39 SW 453, 40 SW 1094; Edwards v. Giboney, 51 Mo. 129; Dickensheets v. Patrick, 217 Mo. A. 171, 274 SW 891; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99.

Nebr.—Omaha Alfalfa Milling Co. v. Hallen, 105 Nebr. 193, 179 NW 1010 (settlement and ratification); Barker v. Wheeler, 62 Nebr. 150, 87 NW 20; Wyman v. Williams, 52 Nebr. 833, 73 NW 285 (note for unpaid subscription to capital stock); Culbertson Irr., etc., Co. v. Cox, 52 Nebr. 684, 73 NW 9; Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304; Ashland Land, etc., Co. v. May, 51 Nebr. 474, 71 NW 67; Cady v. South Omaha Nat. Bank, 46 Nebr. 756, 65 NW 906; Mullen v. Morris, 43 Nebr. 596, 62 NW 74; Lamb v. Thompson, 31 Nebr. 448, 48 NW 58; Clark v. Mullen, 16 Nebr. 481, 20 NW 642.

N. H.—Russell v. Fabyan, 28 N. H. 543, 61 AmD 629.

N. J.—Ball v. Consolidated Franklinite Co., 32 N. J. L. 102.

N. Y.—Quin v. Lloyd, 41 N. Y. 349; Bernhan Chemical, etc., Corp. v. Shipa-Hoy, 200 App. Div. 399, 193 NYS 372 [mod on other grounds 234 N. Y. 563 mem, 138 NE 447 mem]; Commercial Exch. Bank v. Woodward, 198 App. Div. 769, 191 NYS 51; Patterson v. J. Walter Gage Realty Co., 164 App. Div. 787, 150 NYS 215; Acharan v. Samuel, 144 App. Div. 182, 128 NYS 943; Schackter v. Kukowsky, 117 App. Div. 750, 102 NYS 1028; Rosenstock v. Dessar, 85 App. Div. 501, 83 NYS 334; Texier v. Gouin, 12 N. Y. Super. 389; Cogswell v. Cogswell, 130 Misc. 541, 224 NYS 59; Stumpf v. Cohen, 78 Misc. 158, 137 NYS 905; Harris v. Striker, 77 Misc. 219, 135 NYS 762; Ives v. Male, 75 Misc. 387, 135 NYS 526; Harder v. Continental Printing, etc., Co., 64 Misc. 89, 117 NYS 1001; Rogers v. T. H. Simonson, etc., Co., 45 Misc. 323, 90 NYS 298; Ft. Wayne First Nat. Bank v. Jennings, 44 Misc. 374, 89 NYS 995; Forbes v. Wheeler, 39 Misc. 538, 80 NYS 373; Glickman v. Loew, 20 Misc. 401, 45 NYS 1040; American Slicing Mach. Co. v. Kuchukian, 147 NYS 352.

Oh.—Margeson v. Kellar, 31 Oh. Cir. Ct. 626; Lord v. Graveson, 26 Oh. Cir. Ct. 371.

Okl.—Barlas v. Catechis, 129 Okl. 142, 263 P 647; Upham Shoe Co. v. Pollard, 111 Okl. 228, 239 P 244; Lawless v. Tuthill, 97 Okl. 210, 223 P 613; Ince Nursery Co. v. Sams, 73 Okl. 138, 177 P 370; Standard Fashion Co. v. Joels, 60 Okl. 195, 159 P 846; Higgins v. Street, 19 Okl. 42, 92 P 155; Winton v. Myers, 8 Okl. 421, 58 P 634.

Or.—Lentz v. Oregon Growers' Co-Op. Assoc., 116 Or. 683, 242 P 826; Triphonoff v. Sweeney, 65 Or. 299, 130 P 979; Farmers', etc., Nat. Bank v. Hunter, 35 Or. 188, 57 P 424.

Pa.—Stonecipher v. Keane, 268 Pa. 540, 112 A 233.

S. C.—Bacot v. South Carolina Loan, etc., Co., 132 S. C. 340, 127 SE 562.

Tex.—Marley v. McAnelly, 17 Tex. 658; Byrens v. McArthur, (Civ. A.) 262 SW 571; Biggs v. Doak, (Civ. A.) 260 SW 882, 259 SW 665; Berry v. Dawson First Nat. Bank, (Civ. A.) 253 SW 537; Garrett v. Grisham, (Civ. A.) 156 SW 505; Key v. Hickman, (Civ. A.) 149 SW 275; Thompson v. Baird, (Civ. A.) 146 SW 354; Rutherford v. Gaines, (Civ. A.) 118 SW 866 [mod 103 Tex. 263, 126 SW 261]; State v. Quillen, (Civ. A.) 115 SW 660; Kilt-Kenney Shoe Co. v. Haggarty, 43 Tex. Civ. A. 335, 114 SW 386; Haggard v. Bothwell, (Civ. A.) 113 SW 965; Richey Grocery Co. v. Warnell, (Civ. A.) 103 SW 419; Hander v. Baade, 16 Tex. Civ. A. 119, 40 SW 422.

Wash.—Palmer v. Parker, 91 Wash. 683, 158 P 1017; Pickle v. Anderson, 62 Wash. 552, 114 P 177; Richards v. Jefferson, 20 Wash. 166, 54 P 1123; Columbia Nat. Bank v. Western Iron, etc., Co., 14 Wash. 162, 44 P 145.

W. Va.—Guthrie v. Huntington Chair Co., 69 W. Va. 152, 71 SE 14; Kennedy v. Davisson, 46 W. Va. 433, 33 SE 291; Arnold v. Cole, 42 W. Va. 663, 26 SE 312.

Wis.—Heber v. Heber, 139 Wis. 472, 121 NW 328; Gardner v. Avery Mfg. Co., 117 Wis. 487, 94 NW 292.

Eng.—Cousins v. Paddon, 2 C. M. & R. 547, 150 Reprint 234.

Man.—Wark v. Curtis, 10 Man. 201.

Ont.—Gooderham v. Chalmers, 1 U. C. Q. B. 172.

"Payment is a fact ordinarily not required to be negatived in the petition, and in such case is new matter, and, to be made available as a defense, must be pleaded." State v. Peterson, 142 Mo. 526, 532, 39 SW 453, 40 SW 1094.

[a] **Defense of payment must be specially pleaded in action.**—(1) For goods sold and delivered. Esbensen v. Hover, 3 Colo. A. 467, 33 P 1008; Clark v. Mullen, 16 Nebr. 481, 20 NW 642; American Slicing Mach. Co. v. Kuchukian, 147 NYS 352 (balance due). (2) Upon an account. Harris v. Dover, 18 Ga. A. 320, 89 SE 351 (open account); Baker Gasoline Co., Inc. v. Sutherland, 8 La. A. 815 (balance due upon open account); Arkadelphia Milling Co. v. Walker-Howe Grocer Co., Inc., 5 La. A. 233 (balance due on open account); George C. Vaughan & Sons, Inc. v. L. V. Burnaman, 2 La. A. 333 (open account); Forbes v. Wheeler, 39 Misc. 538, 80 NYS 373 (account stated); Lord v. Graveson, 26 Oh. Cir. Ct. 371. (3) On promissory note. Scott v. Rawls, 159 Ala. 399, 48 S 710; Gulfport Fertilizer Co. v. Jones, 15 Ala. A. 280, 73 S 145; Marshall, etc., Bank v. Child, 76 Minn. 173, 78 NW 1048; Harris v. Striker, 77 Misc. 219, 135 NYS 762; Ft. Wayne First Nat. Bank v. Jennings, 44 Misc. 374, 89 NYS 995; Berry v. Dawson First Nat. Bank, (Tex. Civ. A.) 253 SW 537; Rutherford v. Gaines, (Civ. A.) 118 SW 866 [mod 103 Tex. 263, 126 SW 261]; Richey Grocery Co. v. Warneli, (Tex. Civ. A.) 103 SW 419; Hander v. Baade, 16 Tex. Civ. A. 119, 40 SW 422; Richards v. Jefferson, 20 Wash. 166, 54 P 1123; Columbia Nat. Bank v. Western Iron, etc., Co., 14 Wash. 162, 44 P 145. (4) On a bill of exchange. Hubler v. Pullen, 9 Ind. 273, 68 AmD 620. (5) On check. Triphonoff v. Sweeney, 65 Or. 299, 130 P 979. (6) On acceptances. Haggard v. Bothwell, (Tex. Civ. A.) 113 SW 965. (7) On a debt. Kennedy v. Davisson, 46 W. Va. 433, 33 SE 291. (8) Of debt on a judgment regularly obtained. Hinton v. Lumberton First Nat. Bank, 98 Miss. 120, 53 S 344. (9) In covenant for condition broken for rent. Arnold v. Cole, 42 W. Va. 663, 26 SE 312. (10) For work and labor. Baker v. Kistler, 13 Ind. 63. (11) On implied contract for services rendered. Douglas v. Stephens, 27 Ga. A. 485, 108 SE 833. (12) For money due on a contract. Culbertson Irr., etc., Co. v. Cox, 52 Nebr. 684, 75 NW 9. (13) On a contract for salary or wages. Manglares v. Passiales, 244 Mich. 188, 221 NW 149; Dickensheets v. Patrick, 217 Mo. A. 171, 274 SW 891; Byrens v. McArthur, (Tex. Civ. A.) 262 SW 571. (14) On an obligation at one time complete and capable of being enforced. Klair v. Philadelphia, etc., R.

never existed.[27] Nor is it necessary to plead a payment admitted in the petition,[28] or where the matter pleaded is a set-off.[29] Payment must be set up by plea or answer and not by demurrer.[30]

[§ 133] **(2) Appropriation of Payments.** A particular appropriation of payments by a party, where relied upon, must be pleaded,[31] as must objections to appropriation of payments.[32]

[§ 134] **(3) Where Presumption of Payment Exists.** Where lapse of time is relied on as evidence of payment, there are cases holding that it need not be pleaded,[33] but the general rule is that in such a case payment must be averred as in other cases.[34]

[§ 135] **b. Propriety of Pleading Specially.** Payment may be pleaded specially, even where it may be shown under the general issue.[35]

[§ 136] **c. Nature of Plea.**[36] A plea of payment is a plea in bar[37] in the nature of a plea in confession and avoidance,[38] although it is not to be considered a plea in confession and avoidance where it constitutes a denial of the averments of the declaration.[39] Where payment is made after the commencement of the action, and before issue joined, it may be pleaded in bar of the further maintenance of the action,[40] unless it was of the whole debt and costs, in which case it may be pleaded in bar of the action generally.[41] A plea of payment is distinguishable from a plea of set-off[42] or counterclaim.[43]

[§ 137] **d. Time To Plead.** Payment may be pleaded any time before judgment,[44] but it is too late to plead payment after judgment and an affirmance on appeal.[45] Where payment is made before

Co., 25 Del. 274, 78 A 1085; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99. (15) By building contractor for the unpaid price, O'Loughlin v. Poli, 82 Conn. 427, 74 A 763. (16) For injury from malpractice. Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240.

[b] **Partial payments** must be pleaded. McKyring v. Bull, 16 N. Y. 297, 69 AmD 696; Guthrie v. Huntington Chair Co., 69 W. Va. 152, 71 SE 14.

[c] **Payment after breach** must be specially pleaded. Pollak v. Winter, 166 Ala. 255, 51 S 998, 52 S 829, 53 S 339, 139 AMSR 33.

[d] **Payment of interest** when relied on as a defense must be specially pleaded. Junge v. Bowman, 72 Iowa 648, 34 NW 612.

[e] **Allegation of nonpayment by plaintiff** (1) does not remove requirement that defendant plead payment (Esbensen v. Hover, 3 Colo. A. 467, 33 P 1008; Bernham Chemical, etc., Corp. v. Ship-a-Hoy, 200 App. Div. 399, 193 NYS 372 [mod on other grounds 234 N. Y. 563 mem, 138 NE 447 mem]; Lord v. Graveson, 26 Oh. Cir. Ct. 371); (2) but specific denial of allegation in complaint of nonpayment of note is not required in addition to affirmative plea (Harris v. Striker, 77 Misc. 219, 135 NYS 762).

[f] **Action before justice of peace.**—(1) Payment need not be pleaded. Hill v. Sleeper, 58 Ind. 221. (2) Same rule applies on appeal to circuit court. Hill v. Sleeper, supra; Mahon v. Gardner, 6 Blackf. (Ind.) 319.

27. Colo.—Craddock v. Godding, 10 Colo. A. 115, 50 P 369.

Mo.—Albers v. Commercial Bank, 85 Mo. 173, 55 AmR 355.

Mont.—Penwell v. Flickinger, 46 Mont. 526, 129 P 323.

Nebr.—Barker v. Wheeler, 62 Nebr. 150, 87 NW 20.

Oh.—Flowers v. Slater, 2 Oh. Dec. (Reprint) 336, 2 WestLMonth 445.

[a] **Thus** (1) it is not required in an action for goods sold and delivered when payment was made at the time of sale. Flowers v. Slater, 2 Oh. Dec. (Reprint) 336, 2 WestL Month 445. (2) Where plaintiff alleges assignment of note to defendant, who agreed to pay the amount thereof, when collected, to plaintiff, and that it was collected, defendant may prove that he took the note to apply on a debt due him from plaintiff, without a special plea of payment. Craddock v. Godding, 10 Colo. A. 115, 50 P 369. (3) In a suit on an assigned claim, payment before assignment may be shown. Penwell v. Flickinger, 46 Mont. 526, 129 P 323. (4) In an action by a drawer against a bank for conversion of a check, proper payment to the holder may be shown. Albers v. Commercial Bank, 85 Mo. 173, 55 AmR 355.

28. Rutherford v. Gaines, 103 Tex. 263, 126 SW 261; Rowland v. Blaksley, 1 Q. B. 403, 41 ECL 599, 113 Reprint 1187.

29. Ruzeoski v. Wilrodt, (Tex. Civ. A.) 94 SW 142.

30. Dean v. Boyd, 86 Miss. 204, 38 S 297; Austin v. Tompkins, 7 N. Y. Super. 22.

31. Columbia Digger Co. v. Rector, 215 Fed. 618; Rives v. Habermacher, 1 Tex. A. Civ. Cas. § 747.

32. Rundlett v. Weeber, 3 Gray (Mass.) 263.

33. Hepburn's Case, 3 Bland (Md.) 95; Wingett's App., 122 Pa. 486, 15 A 863.

34. Ky.—Tibbs v. Clark, 5 T. B. Mon. 526.

N. J.—Gulick v. Loder, 13 N. J. L. 68, 23 AmD 711.

N. Y.—Miner v. Beekman, 50 N. Y. 337, 14 AbbPrNS 1; Austin v. Tompkins, 5 N. Y. Super. 22; Henderson v. Henderson, 3 Den. 314; Jackson v. Sackett, 7 Wend. 94.

Tenn.—Stanley v. McKinzer, 7 Lea 454.

W. Va.—Calwell v. Prindle, 19 W. Va. 604; Sadler v. Kennedy, 11 W. Va. 187.

See Shotwell v. McCardell, 19 Tex. Civ. A. 174, 47 SW 39 (presumption of payment from lapse of time cannot be taken advantage of by exceptions to a petition).

[a] **Plea** (1) should set forth not the mere lapse of time, but the allegation of payment. Gulick v. Loder, 13 N. J. L. 68, 23 AmD 711. (2) Plea of statute of limitations is not necessary. Calwell v. Prindle, 19 W. Va. 604; Sadler v. Kennedy, 11 W. Va. 187.

[b] **Rule applies** both in law and at equity. Tibbs v. Clark, 5 T. B. Mon. (Ky.) 526; Stanley v. McKinzer, 7 Lea (Tenn.) 454.

[c] **In ejectment** upon a mortgage accompanying a specialty, since the form of action will not permit the plea to be interposed, lapse of time may be used as evidence of payment. Jackson v. Sackett, 7 Wend. (N. Y.) 94.

35. U. S.—Dibble v. Duncan, 7 F. Cas. No. 3,880, 2 McLean 553.

Ill.—Surface v. Chicago, etc., R. Co., 191 Ill. A. 261.

Ind.—Page v. Prentice, 7 Blackf. 322.

Oh.—Saunders v. Stotts, 6 Oh. 080, 27 AmD 263.

Va.—Baltimore, etc., R. Co. v. Polly, 14 Gratt. (55 Va.) 447.

Eng.—Vanhatton v. Morse, 2 Ld. Raym. 787, 92 Reprint 25; Brown v. Cornish, 1 Ld. Raym. 217, 91 Reprint 1041.

36. Pleading as affirmative defense see supra § 128.

37. Columbia Digger Co. v. Rector, 215 Fed. 618; Farmers' Bank v. Orr, (Ind. A.) 55 NE 35; Young v. Park, 6 J. J. Marsh. (Ky.) 540; Day v. Clarke, 1 A. K. Marsh. (Ky.) 521.

38. Wheatly v. Phelps, 3 Dana (Ky.) 302; Tootle v. Maben, 21 Nebr. 617, 33 NW 264; Hamilton v. Moore, 4 Watts & S. (Pa.) 570; Hellings v. Amey, 1 Whart. (Pa.) 63; Goodchild v. Pledgé, 1 M. & W. 363, 150 Reprint 471.

[a] **Its office** is to confess and avoid. Hellings v. Amey, 1 Whart. (Pa.) 63.

Plea as dispensing with proof of cause of action see infra § 160.

39. Powesheik County v. Mickel, 10 Iowa 76; Stacy v. Stichton, 9 Iowa 399; McCart v. Regester, 68 Md. 429, 13 A 361.

40. Herod v. Snyder, 61 Ind. 453; Farmers' Bank v. Orr, 25 Ind. A. 71, 55 NE 35; Toppan v. Jenness, 21 N. H. 232; Pemigewasset Bank v. Brackett, 4 N. H. 557; Tillotson v. Preston, 3 Johns. (N. Y.) 229; Corbett v. Swinburne, 8 A. & E. 673, 35 ECL 787, 112 Reprint 993.

[a] **Reason for rule.**—So the court can adjust the costs, and if defendant prevails, plaintiff gets costs only up to time plea was made. Pemigewasset Bank v. Brackett, 4 N. H. 557.

[b] **Payment** after suit brought operates not in bar of the action, but only in mitigation of damages, unless it appears that costs accrued to the time of payment have been included in the payment. Farmers' Bank v. Orr, 25 Ind. A. 71, 55 NE 35.

Form of plea after issue joined see infra § 137.

41. Goings v. Mills, 1 Ark. 11; Pemigewasset Bank v. Brackett, 4 N. H. 557; Stevens v. Briggs, 14 Vt. 44, 39 AmD 209.

[a] **General release,** if given, allows a plea in bar, for it is presumed that costs of the suit have been adjusted. Pemigewasset Bank v. Brackett, 4 N. H. 557.

42. Slaughter v. Martin, 9 Ala. A. 285, 63 S 689; Northington v. Granade, 118 Ga. 584, 45 SE 447; San Antonio, etc., Constr. Co. v. Davis, (Tex. Civ. A.) 48 SW 754.

[a] **Thus** (1) a plea which alleged payment by a sale of merchandise, and also that at the date of the filing of the suit by plaintiff against defendant the items were still due, was a plea of set-off and not of payment. Northington v. Granade, 118 Ga. 584, 45 SE 447. (2) A plea which sought to set off the claim of a third person against plaintiff's claim is a plea of set-off and not of payment. San Antonio, etc., Constr. Co. v. Davis, (Tex. Civ. A.) 48 SW 754.

[b] **The fact of payment** is purely defensive matter waived unless pleaded. Slaughter v. Martin, 9 Ala. A. 285, 63 S 689.

43. Burke v. Thorne, 44 Barb. (N. Y.) 363.

[a] **A cause of action** is not presented by an answer merely alleging payment. Champlin v. Betz, 5 Ky. Op. 231.

[b] **Reconvention.**—Payment must be pleaded as such and not in reconvention. House v. Croft, 8 Mart. N. S. (La.) 704.

Distinguished from "counterclaim," etc. see supra § 2.

44. Reiners v. St. Ceran, 19 La. Ann. 207.

45. Anderson v. Barry, 2 J. J. Marsh. (Ky.) 265.

expiration of the time allowed to answer, the plea relates to the time it was interposed, and not to the time the action was commenced.[46] If payment was made after issue joined, it must be pleaded puis darrein continuance.[47]

[§ 138] **e. Joinder of Defenses.** Subject to the general rules as to joinder of defenses[48] and more particularly of inconsistent defenses,[49] a plea of payment may be joined with other pleas;[50] a defendant pleading part payment may confess as to the residue,[51] or with the plea of part payment he may interpose some other plea as to the remainder.[52] But in such case defendant should specify to what particular part the plea of payment is intended to apply.[53]

[§ 139] **f. Part Payment.**[54] The general rule is that a plea of part payment of the debt demanded is proper, and, if established, is a good defense pro tanto.[55] Under this rule there are cases, and an action on a judgment has been held to be one of them, where defendant cannot plead in bar payment of part of the amount claimed.[56] The rule is not universal, it being held in some jurisdictions that a partial payment made on or before the day the debt is due may be pleaded,[57] but a partial payment made after the debt is due cannot be pleaded,[58] and in others a plea of part payment is held to be bad,[59] the rule being that the plea must answer the whole of a count, and not a part.[60]

[§ 140] **g. Requisites and Sufficiency of Pleadings**[61]**—(1) Pleas or Answers—(a) In General.** The general allegation of payment is ordinarily held sufficient as a plea of payment.[62] However, in a

46. Bronner Brick Co. v. M. M. Canda Co., 18 Misc. 681, 42 NYS 14.

47. Pemigewasset Bank v. Brackett, 4 N. H. 557; Bank of Commerce v. Broyles, 16 N. M. 414, 120 P 670 [rev on other grounds 234 U. S. 64, 34 SCt 730, 58 L. ed. 1214] (plea in the nature of a plea puis darrein continuance). See Lindsay v. Barnett, 130 Ala. 417, 30 S 395 (payment pending suit and before issue joined should not be pleaded puis darrein continuance).

[a] **In New York,** in a plea puis darrein continuance that defendant did pay to plaintiff several sums, it is not necessary to aver that the sum was accepted in satisfaction. Chew v. Woolley, 7 Johns. 399.

Plea puis darrein continuance see Pleading [31 Cyc 493].

48. See Pleading [31 Cyc 143].

49. U. S.—Hummel v. Moore, 25 Fed. 380.

Cal.—Light v. Stevens, 8 Cal. A. 74, 103 P 361.

La.—Linton v. Stanton, 4 La. Ann. 402; Jones v. Bishop, 12 La. 397.

Mo.—Nelson v. Brodhack, 44 Mo. 596, 100 AmD 328; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99.

S. D.—Stebbins v. Lardner, 2 S. D. 127, 48 NW 847 (payment and accord and satisfaction).

[a] **Pleas:** (1) Of general issue and payment are contradictory. Jones v. Bishop, 12 La. 397. (2) Of non est factum and payment are not inconsistent. Nelson v. Brodhack, 44 Mo. 596, 100 AmD 328; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99. (3) Of discharge in bankruptcy and payment are not inconsistent. Linton v. Stanton, 4 La. Ann. 402.

[b] **The consistency required is one of fact,** defenses being inconsistent only when one fact contradicts another. Nelson v. Brodhack, 44 Mo. 596, 100 AmD 328; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99; Garr v. Black, 120 Mo. A. 181, 96 SW 683.

50. Ind.—Bates v. Halliday, 3 Ind. 159.

Ky.—Taylor v. Weister, 1 Litt. 355.

La.—Adle v. Metoyer, 1 La. Ann. 254.

Mo.—Garr v. Black, 120 Mo. A. 181, 96 SW 683.

N. Y.—Dovan v. Dinsmore, 33 Barb. 86, 20 HowPr 503.

S. C.—Kershaw v. Robinson, 3 S. C. L. 380; Crawford v. Ellison, 3 S. C. L. 378.

W. Va.—Kinsley v. Monongalia County Ct., 31 W. Va. 464, 7 SE 445; Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555.

[a] **Defendant may plead payment** (1) with nul tiel record to debt on judgment (Crawford v. Ellison, 3 S. C. L. 378) (2) and accord and satisfaction (Kershaw v. Robinson, 3 S. C. L. 380) (3) with non assumpsit (Kinsley v. Monongolia County Ct., 31 W. Va. 464, 7 SE 445; Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555), (4) and any act of plaintiff by which the debt may have been extinguished (Adle v. Metoyer, 1 La. Ann. 254) (5) with a general denial (Garr v. Black, 120 Mo. A. 181, 96 SW 683).

51. Gearhart v. Olmstead, 7 Dana (Ky.) 441; Rohr v. Anderson, 51 Md. 205.

Pleas of part payment generally see infra § 139.

52. Taylor v. Weister, 1 Litt. (Ky.) 355; Rohr v. Anderson, 51 Md. 205; Cousins v. Paddon, 2 C. M. & R. 547, 150 Reprint 234.

[a] **Thus** defendant may plead payment as to part and set-off as to the remainder. Taylor v. Weister, 1 Litt. (Ky.) 355.

53. Rohr v. Anderson, 51 Md. 205; Dunn v. Di Nuovo, 3 M. & G. 105, 42 ECL 63, 133 Reprint 1075.

54. Evidence admissible under general averment see infra § 171.

Requisites and sufficiency of plea see infra § 147.

55. Fla.—Solary v. Stultz, 22 Fla. 263.

Ill.—Sherman v. Gassett, 9 Ill. 521.

Md.—Rohr v. Anderson, 51 Md. 205.

Minn.—Colter v. Greenhagen, 3 Minn. 126.

N. J.—Somerville v. Stewart, 48 N. J. L. 116, 3 A 77.

56. Rohr v. Anderson, 51 Md. 205.

57. Gearhart v. Olmstead, 7 Dana (Ky.) 441.

58. Gearhart v. Olmstead, supra.

59. Beebe v. Sutton, 7 Ark. 405; Etheridge v. Osborn, 12 Wend. (N. Y.) 399.

60. Beebe v. Sutton, 7 Ark. 405; Etheridge v. Osborn, 12 Wend. (N. Y.) 399.

61. Cross references:

Averment of legal conclusions see Pleading [31 Cyc 49-64].

In actions on bonds see Bonds § 194.

In actions on commercial paper see Bills and Notes § 1230.

In suit to enforce mechanic's lien see Mechanics' Liens §§ 608, 609.

62. U. S.—Loveridge v. Larned, 7 Fed. 294.

Ala.—Tarver v. Union Springs Cotton Mills, 119 S 665; Cooledge v. McArdle, 211 Ala. 205, 100 S 145.

Ill.—Merrill v. Randall, 22 Ill. 227; Road Dist. No. 11 v. Coultas, 212 Ill. A. 18 (on general demurrer); Shimeall v. Lehmann, 198 Ill. A. 29.

Ind.—Johnson v. Breedlove, 104 Ind. 521, 6 NE 906; Cranor v. Winters, 75 Ind. 301 [overr Nill v. Comparet, 15 Ind. 243]; Wolcott v. Ensign, 53 Ind. 70; Louden v. Birt, 4 Ind. 566 (good upon general demurrer).

Ky.—Turner v. Ward, 201 Ky. 295, 256 SW 389; Lowry v. Drake, 1 Dana 46; Stacy v. Coleman, 10 KyL 78.

Mass.—Goss v. Calkins, 164 Mass. 546, 42 NE 96; Sweet v. Southworth, 125 Mass. 417.

Minn.—Powers v. Bunnell, 121 Minn. 152, 140 NW 748.

Mont.—Lappin v. Martin, 71 Mont. 233, 228 P 763.

Nebr.—Crilly v. Ruyle, 87 Nebr. 367, 370, 127 NW 251 [cit Cyc] (if not attacked by motion before trial); Keys v. Fink, 81 Nebr. 571, 116 NW 162.

N. H.—Breck v. Blanchard, 20 N. H. 323, 51 AmD 222.

N. Y.—Farmers', etc., Bank v. Sherman, 33 N. Y. 69 [aff 19 N. Y. Super. 181]; Van Giesen v. Van Giesen, 10 N. Y. 316 [aff 12 Barb. 520].

Eng.—Beesley v. Dolley, 6 Bing. N. Cas. 37, 37 ECL 496, 133 Reprint 15.

[a] **Receipt and acceptance by creditor** is not usually alleged. Breck v. Blanchard, 20 N. H. 323, 51 AmD 222.

[b] **Demurrer.**—Is good as against a demurrer. Powers v. Bunnell, 121 Minn. 152, 140 NW 748.

[c] **Denial** of the alleged nonpayment, and an averment of payment of the sums sued for, are in effect the same defense differently stated. Turner v. Ward, 201 Ky. 295, 256 SW 389.

[d] **Answers held sufficient to put payment in issue.**—(1) Merrill v. Randall, 22 Ill. 227. (2) Denial that such sum has never been paid by defendant to plaintiff, or that it is due or payable, together with allegations showing part payment. Sprigg v. Barber, 122 Cal. 573, 55 P 419. (3) Allegation that intestate, before maturity and for value, transferred and delivered such note to defendant is in effect a plea of payment. Hays v. Dickey, 67 Ark. 169, 53 SW 887. (4) The claim set up in plaintiff's complaint has been fully paid before the commencement of this suit. Cranor v. Winters, 75 Ind. 301. (5) That defendant has paid the debt or demand upon which this suit is brought, and that it was paid before the commencement of the action. Cooledge v. McArdle, 211 Ala. 205, 100 S 145 (plea practically in code form). (6) Such work, labor, and services were more than fully paid for, settled, and satisfied prior to the commencement of this action. Lappin v. Martin, 71 Mont. 233, 228 P 763. (7) He has paid the same in full. Goss v. Calkins, 164 Mass. 546, 42 NE 96. (8) The same has been fully paid. Swett v. Southworth, 125 Mass. 417.

[e] **Pleas held insufficient.**—(1) Plea, averring payment of contract price, but not for extra work or work outside of contract, was insufficient to set up plea of payment to the claim for extra work. Alabama Jail, etc., Co. v. Marion County, 145 Ala. 684, 40 S 100. (2) Allegation that defendant has advanced a stated sum to plaintiff does not amount to a plea of payment. Dickson v. Dickson, 32 La. Ann. 272. (3) That the sum due has been substantially, if not wholly, paid. Hardin County v. Weels, 108 Iowa 174, 78 NW 908 (action on subscription). (4) Denial that any sum is due on notes is not allegation of payment. Rodger v. Bliss, 130 Misc. 168, 223

few states more specific allegations are required.[63] In some, payments must be pleaded with sufficient certainty and particularity as to give plaintiff notice of their nature;[64] in others a bill of particulars must be filed with the plea;[65] and in others the particulars thereof must be furnished if properly demanded;[66] but, if the plea is not properly objected to, it is sufficient,[67] and in determining its sufficiency the whole pleading must be read together.[68] Where the averment of facts substantially sets up a plea of payment, it may be so considered.[69]

[§ 141] **(b) Denial of Nonpayment or Indebtedness.** Where plaintiff, in the statement of his cause of action, alleges nonpayment, a denial of such allegation is proper,[70] although the contrary has also been held;[71] but it is not necessary where payment is affirmatively alleged.[72] Such a denial alone, however, has been held insufficient to put payment in issue,[73] unless nonpayment is a necessary allegation of the complaint.[74] Nor can the negative averment of nonpayment ordinarily be put in issue by a mere general denial.[75] A denial of indebtedness has been held not to be an allegation of payment,[76] but only a denial of a legal conclusion.[77]

[§ 142] **(c) Allegations of Matters of Evidence.** It is not sufficient merely to plead evidence going to show payment;[78] in fact, circumstances which are mere evidence of the fact of payment should not ordinarily be alleged,[79] although the inclusion of such allegations, where coupled with an averment of payment, does not make the plea demurrable.[80] But where the plea sets forth evidence from which it may be inferred that the payments were less than the amount due, it is deficient.[81]

[§ 143] **(d) Certainty and Particularity[82]—aa. In General.** The plea of payment must aver payment of the demand in suit,[83] and subject to the rules applicable to pleadings generally[84] it has been held that it must answer the entire declaration or count to which it is pleaded.[85] Although in a few states the contrary is held,[86] as a general rule the

NYS 401. (5) Plea that plaintiffs received defendant's notes on account of such debt and cashed them, thus reimbursing themselves and having the alleged indebtedness paid in full, does not sufficiently allege payment. Blum v. Jurick, 83 Misc. 116, 144 NYS 822.

63. Rountree v. Clanton, 17 Ariz. 107, 149 P 58; Thomas v. Clarkson, 125 Ga. 72, 54 SE 77, 6 LRANS 658.

[a] **Plea held insufficient.**—That he (defendant) is informed and believes that some credit or credits should be placed upon the notes, and asks that plaintiff be made to make a full accounting for same not under oath. Thomas v. Clarkson, 125 Ga. 72, 54 SE 77, 6 LRANS 658.

[b] **In England,** on a count for money had and received, a plea that plaintiff requested him to send the sum of money by post and he did so was held bad on special demurrer. Kington v. Kington, 11 M. & W. 233, 152 Reprint 789.

64. Ward v. Acklen, 9 La. Ann. 443.

[a] **Thus** a plea specifying the amounts and names of parties to whom payments have been made is sufficiently explicit. Ward v. Acklen, 9 La. Ann. 443.

[b] **In Arizona** the statute provides that any payment shall be plainly and particularly described in the answer, so as to give plaintiff full notice thereof. Rev. St. (1913) § 483; Rountree v. Clanton, 17 Ariz. 107, 149 P 58.

[c] **In Texas** (1) it is only required that payment be so plainly and particularly described in the plea as to give plaintiff full notice of the character thereof. Brown v. Rash, 45 Tex. Civ. A. 603, 101 SW 1041 (general plea sufficient on second trial of that issue); Wooley v. Bell, (Civ. A.) 68 SW 71. (2) Plea of payment must be definite and certain. Nugent v. Martin, 1 Tex. A. Civ. Cas. § 1173. (3) Reply alleging payment to counterclaim must state facts with as much certainty as if made in plea. Wooley v. Bell, supra.

65. See infra § 144.

66. Tyre v. Mulvena, 16 Del. 295, 43 A 172; Crilly v. Ruyle, 87 Nebr. 367, 127 NW 251; Ireland v. Thompson, 4 Bing. N. C. 716, 33 ECL 940, 132 Reprint 965.

67. Crilly v. Ruyle, 87 Nebr. 367, 127 NW 251 (motion to make more specific); Reed v. Corry, (Tex. Civ. A.) 61 SW 157 (demurrer).

68. Jaffray v. Hunter, 15 App. Div. 615, 44 NYS 639.

69. U. S.—Bausman v. Denny, 73 Fed. 69 [rev on other grounds 79 Fed. 172, 24 CCA 473 (app dism 172 U. S. 644 mem, 19 SCt 878 mem, 43 L. ed. 1182 mem)].

Ark.—Hays v. Dickey, 67 Ark. 169, 53 SW 887.

Ida.—Hailey First Nat. Bank v. Bews, 3 Ida. (Hasb.) 486, 31 P 816.

Ill.—Allen v. Breusing, 32 Ill. 505; Lazell v. Francis, 5 Ill. 421 (on general demurrer).

Mo.—Joy v. Cooley, 19 Mo. 645.

N. Y.—Milford Spinning, etc., Corp. v. Manowitz, 203 App. Div. 415, 196 NYS 611 (plea held payment, not accord and satisfaction); Barber v. Ellingwood, 137 App. Div. 704, 122 NYS 369; Jaffray v. Hunter, 15 App. Div. 615, 44 NYS 639.

Eng.—Page v. Meek, 3 B. & S. 259, 113 ECL 259, 122 Reprint 98.

[a] **Rules of equity pleading** do not require defense of payment to be set forth according to any particular form; all that is required is for the pleader to set forth the facts in a concise and intelligent manner. Bausman v. Denny, 73 Fed. 69 [rev on other grounds 79 Fed. 172, 24 CCA 473 (app dism 172 U. S. 644 mem, 19 SCt 878 mem, 43 L. ed. 1182 mem)].

[b] **Thus** (1) a plea that defendant paid plaintiff two sums of money, stating dates and amounts, which extinguished the note, is sufficient. Joy v. Cooley, 19 Mo. 645. (2) That defendant paid plaintiff a portion of the demand and deposited the balance with the trustee until controversy between the parties should be adjusted is sufficient. Page v. Meek, 3 B. & S. 259, 113 ECL 259, 122 Reprint 98. (3) An allegation that plaintiff's intestate for value and before maturity transferred the note to defendant is a substantial plea of payment. Hays v. Dickey, 67 Ark. 169, 53 SW 887.

70. Turner v. Ward, 201 Ky. 295, 256 SW 389; Flournoy v. Osgood, 99 App. Div. 270, 90 NYS 972.

71. Hummel v. Moore, 25 Fed. 380.

72. Harris v. Striker, 77 Misc. 219, 135 NYS 762.

73. Hummel v. Moore, 25 Fed. 380; Greene v. Osceola Mines Gold Min. Co., 3 Cal. A. 427, 86 P 733; Welles v. Colorado Nat. L. Assur. Co., 49 Colo. 508, 113 P 524; Harris v. Striker, 77 Misc. 219, 135 NYS 762; Edson v. Dillaye, 8 HowPr (N. Y.) 273.

[a] **Denial of nonpayment** for want of information and belief is insufficient. Greene v. Osceola Mines Gold Min. Co., 3 Cal. A. 427, 86 P 733.

74. Henry McShane Co. v. Padian, 1 Misc. 332, 20 NYS 679 [rev on other grounds 142 N. Y. 207, 36 NE 880].

75. See infra § 173.

76. Stewart v. Budd, 7 Mont. 573, 19 P 221.

77. Stewart v. Budd, supra.

78. Shawler v. Johnson, 52 Iowa 473, 3 NW 604.

79. Farmers', etc., Bank v. Sherman, 33 N. Y. 69 [aff 19 N. Y. Super. 181].

[a] **Bad pleading.**—"If payment be relied on as a defence, it would be bad pleading, to allege the evidence of the fact, instead of the fact itself." Farmers', etc., Bank v. Sherman, 33 N. Y. 69, 79 [aff 19 N. Y. Super. 181].

80. Johnson v. Breedlove, 104 Ind. 521, 6 NE 906.

[a] **Indorsements of payments** appearing on a note may be made a part of the plea, oyer having been given of the note and indorsements. Russell v. Drummond, 6 Ind. 216.

81. Louisiana Lumber Co. v. J. W. Farrior Lumber Co., 9 Ala. A. 383, 63 S 788.

82. **Particulars required in affidavit of defense** see infra § 153.

83. Toledo Agricultural Works v. Work, 70 Ind. 253; Esch v. Hardy, 22 Minn. 65; Blum v. Jurick, 83 Misc. 116, 144 NYS 822.

[a] **Thus** (1) payment before commencement of the action of the sum then demanded is insufficient. Toledo Agricultural Works v. Work, 70 Ind. 253. (2) Allegation of payment, without showing that it was made on account of the claim sued upon, is insufficient. Esch v. Hardy, 22 Minn. 65.

84. See Pleading [31 Cyc 140].

85. Hanington v. Bostwick, 31 N. B. 621.

[a] **Thus** a plea that defendants had paid plaintiff the full amount due under several agreements set out in several counts does not answer the common counts and is bad. Hanington v. Bostwick, 31 N. B. 621.

86. See cases infra this note.

[a] **In Georgia** (1) the plea should allege when, how, and to whom the payment was made. Rentz Drug Co. v. Bishop-Babcock Co., 30 Ga. A. 391, 118 SE 414; Thompson v. Carrollton Bank, 29 Ga. A. 520, 116 SE 39; Armour Fertilizer Works v. Dwight, 22 Ga. A. 144, 95 SE 746; Lott v. Banks, 21 Ga. A. 246, 94 SE 322; Epstein v. Thomas, 15 Ga. A. 741, 84 SE 201; Ginn v. Carithers, 14 Ga. A. 298, 80 SE 698; Linam v. Anderson, 12 Ga. A. 735, 78 SE 424; Prince v. Cochran, 10 Ga. A. 495, 73 SE 693; Groves v. Sexton, 5 Ga. A. 160, 62 SE 731; Thomas v. Siesel, 2 Ga. A. 663, 58 SE 1131. (2) A plea without such allegations, although subject to special demurrer, is good as against an oral motion to strike or general demurrer. Thompson v. Carrollton Bank, 29 Ga. A. 520, 116 SE 39; Epstein v. Thomas, 15 Ga. A. 741, 84 SE 201; Netherland v. Louisville First Nat. Bank, 11 Ga. A. 110, 74 SE 849; Prince v. Cochran, 10 Ga. A. 495, 73 SE 693. See Wortham v. Sinclair, 98 Ga. 173, 25 SE 414 (motion to strike deficient in that it failed to point out defects). (3) A plea is sufficient where satisfactory excuse is made for failure specifically to allege time, place, amounts, and to whom payments were made. Palmer v. Bradshaw, (A.) 146 SE 642

plea need not allege the amount paid,[87] the place of payment,[88] or the exact date of payment;[89] nor state by whom[90] or to whom[91] the payment was made. However, a plea of payment should state whether payment was made before or after commencement of the action.[92]

[§ 144] **bb. Account or Bill of Particulars.**[93] As a general rule a plea of payment need not include an account or a bill of items or particulars.[94] Under proper circumstances, however, a bill of particulars may be required.[95] If plaintiff, under the circumstances of the case, has better knowledge of the matter than defendant so pleading payment generally, the latter will not be required to file a bill of particulars.[96] In some jurisdictions, it must be furnished if demanded,[97] and in others it is required under a general plea of payment,[98] or a plea setting up the general issue.[99]

[§ 145] **(e) Consistency.** The plea should not be inconsistent in itself,[1] as by denying indebtedness.[2]

[§ 146] **(f) Conclusion of Plea.**[3] The general rule at common law is that, where the plea of payment introduces new matter, it should conclude with a verification and not "to the country,"[4] but where it does not introduce new matter, but is pleaded by

(where no books were kept); Dania Cash Stores v. Zaring, 38 Ga. A. 427, 144 SE 132 (where canceled checks and stubs evidencing payments were lost in storm). (4) A plea of partial payment which sets forth neither the time, place, nor amount of payment is insufficient. Thomas v. Clarkson, 125 Ga. 72, 54 SE 77, 6 LRANS 658. (5) A plea which fails to state any time as to the payments is demurrable. O'Neal v. Phillips, 83 Ga. 556, 10 SE 352. (6) The plea should allege the time and place of payment. Scott v. Anderson, 29 Ga. A. 438, 115 SE 917.

[b] **In Alabama,** in view of the code, in a suit brought by one person for the use of another, a plea of payment which does not allege a payment to the beneficial plaintiff or a payment to the person holding the legal title, before the person holding the beneficial interest acquired his right, is bad. Mobile, etc., R. Co. v. Jurey, 111 U. S. 584, 4 SCt 566, 28 L. ed. 527.

[c] **In Canada** the plea must allege payment before breach. Matthewson v. Henderson, 13 U. C. C. P. (Ont.) 96.

87. Ind.—Johnson v. Breedlove, 104 Ind. 521, 6 NE 906; Cranor v. Winters, 75 Ind. 301 [overr Nill v. Comparet, 15 Ind. 243]; Demuth v. Daggy, 26 Ind. 341; Moore v. Ennis, 21 Ind. 315 (ownership of note obtained by third party).

Kan.—Bobb v. Bancroft, 13 Kan. 123.

Ky.—Turner v. Ward, 201 Ky. 295, 256 SW 389.

La.—Holmes v. Deplaigne, 23 La. Ann. 238.

Ont.—Brown v. Ross, 3 U. C. Q. B. 158.

[a] **Allegation** that the whole of the indebtedness alleged in the petition has been fully paid is sufficient. Turner v. Ward, 201 Ky. 295, 256 SW 389.

[b] **Plea to different counts** of payment of a certain sum without alleging how much on each count is sufficient. Brown v. Ross, 3 U. C. Q. B. (Ont.) 158.

[c] **In Iowa** the amount paid may be required in an action by an administrator to recover on a note which he claims was canceled when deceased was insane. Feller v. Winchester, 3 Greene 244.

88. Brown v. Gooden, 16 Ind. 444 (is a matter of form and not of substance); Holmes v. Deplaigne, 23 La. Ann. 238; Fall v. Johnson, 8 S. D. 163, 65 NW 909.

89. Ind.—Johnson v. Breedlove, 104 Ind. 521, 6 NE 906; Epperson v. Hostetter, 95 Ind. 583; Cranor v. Winters, 75 Ind. 301 [overr Nill v. Comparet, 15 Ind. 243]; Demuth v. Daggy, 26 Ind. 341.

Ky.—Young v. Park, 6 J. J. Marsh. 540.

La.—Holmes v. Deplaigne, 23 La. Ann. 238; Ward v. Acklen, 9 La. Ann. 443.

Minn.—Colter v. Greenhagen, 3 Minn. 126.

Nebr.—Keys v. Fink, 81 Nebr. 571, 116 NW 162.

S. D.—Fall v. Johnson, 8 S. D. 163, 65 NW 909.

See Schroeter v. Bowdon, 58 Tex. Civ. A. 135, 115 SW 331 (entire plea held not subject to exception where it showed some items charged to plaintiff prior to execution of contract and some after).

[a] **Maturity.**—Plea need not state that payment was made on or before the debt became due. Young v. Park, 6 J. J. Marsh. (Ky.) 540.

[b] **At common law** the plea of payment must allege that the payment was made either on the day the money was stipulated to be paid or on some day between that day and the date of the writing upon which the action is founded. McWaters v. Draper, 5 T. B. Mon. (Ky.) 494.

[c] **In Delaware** the time is often left blank, but plaintiff is entitled to have it set forth in the plea if he so demands. Tyre v. Mulvena, 16 Del. 295, 43 A 172.

Allegation as to payment after suit see supra § 137.

Payment of bond on or before due date see Bonds § 194.

90. Johnson v. Breedlove, 104 Ind. 521, 6 NE 906.

[a] **Thus** it is not necessary to allege that payment was made by the administrator of a decedent's estate, if the answer avers that plaintiff's claim was paid with moneys received from the estate, with the administrator's consent. Johnson v. Breedlove, 104 Ind. 521, 6 NE 906.

91. Johnson v. Breedlove, supra; State v. Early, 81 Ind. 540; Cranor v. Winters, 75 Ind. 301 [overr Nill v. Comparet, 15 Ind. 243]; Demuth v. Daggy, 26 Ind. 341; Keys v. Fink, 81 Nebr. 571, 116 NW 162; McGrath v. Pitkin, 26 Misc. 862, 56 NYS 398 (good on demurrer).

In assignment of chose in action see Assignments § 242.

Payment to third person see Bills and Notes § 1230 note 92 et seq.

92. Jones v. Bell, 201 Ala. 336, 77 S 998 (without averment plea is demurrable); Schillinger v. Leary, 201 Ala. 256, 77 S 846; Frank v. Thompson, 105 Ala. 211, 220, 16 S 634.

"It is only necessary to aver, that the defendant had paid the debt, for which the suit was brought, before the action was commenced." Frank v. Thompson, supra.

[a] **Reason for rule** is that payment before avoids all liability while payment after avoids liability except for costs accruing prior to the payment. Schillinger v. Leary, 201 Ala. 256, 77 S 846.

93. Bill of particulars and copy of accounts generally see Pleading [31 Cyc 565].

94. Wilby v. Harris, 13 Mass. 496; Prim v. Kittridge, 1 Miss. 390; Yangtsze Ins. Assoc. v. Stark, 195 App. Div. 401, 186 NYS 410; Ebin v. U. S. Equitable L. Assur. Soc., 177 App. Div. 458, 164 NYS 284; Barone v. O'Leary, 44 App. Div. 418, 60 NYS 1131; Watt v. Watt, 25 N. Y. Super. 685; Swan v. Swan, 44 Misc. 163, 89 NYS 794; Seely v. Breakwater Co., 144 NYS 771.

[a] **Partial payments** of money, if pleaded, do not give plaintiff any right to a bill of particulars. Watt v. Watt, 25 N. Y. Super. 685.

[b] **In Virgina or West Virginia** (1) a general payment may be proved without a bill of particulars. Rice v. Annatt, 8 Gratt. (49 Va.) 557; Lawson v. Zinn, 48 W. Va. 312, 37 SE 612 (general payment); Simmons v. Trumbo, 9 W. Va. 358; Shanklin v. Crisamore, 4 W. Va. 134. (2) Where a specific payment is relied upon, an account or bill of particulars must be filed with the plea. Richmond City, etc., R. Co. v. Johnson, 90 Va. 775, 20 SE 148; Rice v. Annatt, supra; Hunter v. Snyder, 11 W. Va. 198; Shanklin v. Crisamore, supra.

95. Mills v. Finley-Robertson-Porter Co., 203 App. Div. 84, 196 NYS 412; Sittig v. Cohen, 130 App. Div. 689, 115 NYS 332; Coolidge v. Stoddard, 120 App. Div. 641, 105 NYS 544; Baremore v. Taylor, 52 N. Y. Super. 448, 9 NYCivProc 76; Seely v. Breakwater Co., 144 NYS 771; Klock v. Brennan, 13 NYS 171.

[a] **Illustrations.**—(1) Bill of particulars showing to what officer of corporation payment was made may be ordered. Sittig v. Cohen, 130 App. Div. 689, 115 NYS 332. (2) If payments were made to plaintiff's assignor of which plaintiff has no knowledge, a bill of particulars may be required. Mills v. Finley-Robertson-Porter Co., 203 App. Div. 84, 196 NYS 412; Baremore v. Taylor, 52 N. Y. Super. 448, 9 NYCivProc 76.

96. Powell v. Schenck, 88 Hun 185, 34 NYS 768.

97. See cases infra this note.

[a] **In Arizona** (1) an early statute was construed as requiring a bill of particulars only where defendant proposed to prove items of payment, and not where a single payment in full settlement was relied upon. Cheda v. Skinner, 6 Ariz. 196, 57 P 64. (2) Under Arizona Rev. St. (1913) § 421, a bill of particulars need not be furnished unless demanded.

[b] **In Mississippi** (1) an early statute requiring every plea to be accompanied by an account was held not to apply to a payment in money. Price v. Sinclair, 13 Miss. 254; Miller v. Brooks, 12 Miss. 175; Webster v. Tiernan, 5 Miss. 352. (2) Hemingway Code Annot. (1917) § 546 provides that, in any case where a party satisfies the court that it is necessary for his adversary to be more specific, a bill of particulars may be ordered.

98. See cases infra this note.

[a] **In Texas** (1) where payment made in installments is relied upon, a bill of particulars must be filed. Hahn v. Broussard, 3 Tex. Civ. A. 481, 23 SW 88. (2) Where defendant does not seek to prove payment in items, a bill of particulars need not be filed. Able v. Lee, 6 Tex. 427; Holliman v. Rogers, 6 Tex. 91.

99. See infra § 172.

1. Witter v. McNiel, 4 Ill. 433.

2. Witter v. McNiel, supra.

3. Verification of pleadings generally see Pleading [31 Cyc 526].

4. Kennedy v. Pickering, Minor (Ala.) 137; Douglass v. Central Land Co., 12 W. Va. 502; Ensall v. Smith,

way of traverse, so as to form an issue, it should conclude "to the country."[5] However, in some jurisdictions the conclusion has been held to be a matter merely of form which, although improper, will not be allowed to affect the merits of the case.[6]

[§ 147] **(g) Pleas of Part Payment.**[7] Part payment should not be pleaded as a complete defense, for, if it commences as an answer to the whole action but is to part only, it will be held bad on demurrer;[8] but where the total of different partial payments is sufficient to discharge plaintiff's demand, they should be pleaded in bar.[9]

Smaller sum in discharge of greater. A plea of payment of a smaller sum in discharge of a greater one is bad,[10] unless a sufficient consideration for giving up the residue is alleged.[11]

[§ 148] **(h) Pleas of Payment Other than by Money.**[12] Where the plea is payment in property[13] or by a commercial instrument,[14] acceptance thereof by the creditor as payment in satisfaction and discharge of the debt sued on should be alleged; or, in the latter case, that the instrument has been paid,[15] or is an outstanding obligation in the hands of a third person.[16] It is not necessary to allege that the instrument was negotiable,[17] and a plea of payment by the transfer of notes and accounts need not set them out.[18] A plea which shows that a portion of the items claimed to have been accepted in payment were received prior to the execution of the contract sued on is not subject to exception in its entirety,[19] although it has been held that a plea averring that payment has been actually made in any manner is sufficient.[20] But in considering this proposition, the authorities which hold broadly that evidence of a delivery of property is admissible under a general plea of payment in an action on a contract to pay money must be considered.[21]

Payment in suspension. A plea of the delivery and receipt of a bill of exchange for, and on account of, and in payment and discharge of, a debt, and the causes of action in respect thereof, has been held a plea of suspension only, and not one in absolute payment and extinction of the debt.[22]

[§ 149] **(i) Pleading Payment by Third Person.**[23] It is proper to allege payment on information and belief where payment was made by an agent[24] or other person.[25]

[§ 150] **(j) Pleading Payment to Assignor or Third Person.**[26] A plea of payment to another than the creditor must allege that the third party was authorized to receive the payment.[27] In an action by the assignee of a debt, if payment to the assignor is pleaded, it must be averred that payment was made before notice of the assignment.[28]

[§ 151] **(k) Pleading Payment by or as Garnishee.**[29] A plea of payment by a garnishee is a good plea of payment.[30] A plea of payment as garnishee should show that defendant answered on oath, admitted his indebtedness, and that the debt then

1 C. M. & R. 522, 149 Reprint 1187; Goodchild v. Pledge, 1 M. & W. 363, 150 Reprint 474.

5. McCart v. Regester, 68 Md. 429, 13 A 361; Henderson v. Southall, 4 Call (8 Va.) 371; Kinsley v. Monongalia County Ct., 31 W. Va. 464, 7 SE 445; Douglass v. Central Land Co., 12 W. Va. 502, 510. But see Nadenbousch v. McRea, Gilm. (21 Va.) 228 (holding contra).

"The proper conclusion of a plea of payment must logically depend upon what allegations of non-payment, if any, were necessary in the declaration. If a general allegation of non-payment covering not only non-payment when the debt became due, but also non-payment since the debt became due must be alleged in the declaration, a general plea of payment which expressly denies this general allegation of non-payment must necessarily conclude to the country." Douglass v. Central Land Co., supra.

[a] **Plea of payment,** whether in assumpsit, debt, or covenant, should conclude to the country. Kinsley v. Monongalia County Ct., 31 W. Va. 464, 7 SE 445; Douglass v. Central Land Co., 12 W. Va. 502.

6. Clarkson v. White, 3 B. Mon. (Ky.) 376; Hamilton v. Coons, 5 Dana (Ky.) 317; McCart v. Regester, 68 Md. 429, 13 A 361.

7. Joinder of plea of part payment with other pleas see supra § 138.

8. Allen v. Breusing, 32 Ill. 505 (plea construed as applying only to one count); Johnson v. Breedlove, 72 Ind. 368; Toledo Agricultural Works v. Work, 70 Ind. 253; Somerville v. Stewart, 48 N. J. L. 116, 3 A 77.

[a] **Plea** capable of being interpreted as setting up part payment is insufficient. Toledo Agricultural Works v. Work, 70 Ind. 253.

9. Day v. Clarke, 1 A. K. Marsh. (Ky.) 521.

10. Rohr v. Anderson, 51 Md. 205; Blanchard v. Noyes, 3 N. H. 518; Mechanics' Bank v. Hazard, 13 Johns. (N. Y.) 353; Dederick v. Leman, 9 Johns. (N. Y.) 333; Down v. Hatcher, 10 A. & E. 121, 37 ECL 86, 113 Reprint 47.

[a] **Verdict** will not cure it. Down v. Hatcher, 10 A. & E. 121, 37 ECL 86, 113 Reprint 47.

11. Rohr v. Anderson, 51 Md. 205; Blanchard v. Noyes, 3 N. H. 518.

[a] **Release under seal** shows sufficient consideration. Rohr v. Anderson, 51 Md. 205.

12. Evidence of payment in property admissible under general plea of payment see infra § 164.

Necessity of pleading agreement under which payment is made see infra § 164.

Plea of payment of commercial instrument see Bills and Notes §§ 1230, 1231.

13. Homas v. McConnell, 12 F. Cas. No. 6,656, 3 McLean 381; Milgram v. Brown Shoe Co., 80 Ind. A. 385, 139 NE 377 (shoes); Corbett v. Hughes, 75 Iowa 281, 39 NW 500.

14. U. S.—Homas v. McConnell, 12 F. Cas. No. 6,656, 3 McLean 381.

Ark.—McConnon v. Brown, 169 Ark. 954, 277 SW 539; Taylor v. Purcell, 60 Ark. 606, 31 SW 567; Blunt v. Williams, 27 Ark. 374.

Fla.—Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.

Pa.—Loux v. Fox, 171 Pa. 68, 33 A 190.

Tex.—First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130; Brandt v. Thurber, 1 Tex. A. Civ. Cas. § 640.

Eng.—Emblin v. Dartnell, 1 D. & L. 591; Drake v. Mitchell, 3 East 251, 102 Reprint 594.

See State v. Adams, 187 Ind. 165, 118 NE 680 (averment that note was accepted in satisfaction and payment of debt is sufficient); Upton v. Paxton, (Iowa) 29 NW 809 (a particular averment held not equivalent to one that the creditor received the notes in payment of the indebtedness).

[a] **Sufficiency of answer.**—(1) Answer that note was executed and delivered by guarantor as payment in full, and that it constituted new indebtedness in full settlement of claim, held good as against demurrer. McConnon v. Brown, 169 Ark. 954, 277 SW 539. (2) Answer that plaintiff accepted and received bill of exchange in discharge of the debt, and then indorsed it to another who is the holder thereof, is sufficient. Emblin v. Dartnell, 1 D. & L. 591. (3) Averment that check was accepted and receipt in regular form given therefor is not sufficient. Loux v. Fox, 171 Pa. 68, 33 A 190. (4) Answer of payment by delivery of negotiable promissory note of third party which was accepted and retained in full settlement sets up a complete defense. Candee v. Fordham Stone Renovating Co., 126 App. Div. 15, 110 NYS 355 [aff 195 N. Y. 602 mem, 89 NE 1097 mem].

15. Read v. Dickerson, 9 KyL 534. See Carroll v. Weaver, 65 Conn. 76, 31 A 489 (answer held to allege that order was accepted and subsequently paid).

16. Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667; Strong v. Stevens, 11 N. Y. Super. 668; Price v. Price, 16 M. & W. 232, 153 Reprint 1174.

[a] **Answer:** (1) Must, in addition to alleging that a check was given, allege other facts showing affirmatively that it is out of the possession and control of plaintiffs. Strong v. Stevens, 11 N. Y. Super. 668. (2) Must allege that the note is still running or has been indorsed over by plaintiff. Price v. Price, 16 M. & W. 232, 153 Reprint 1174.

17. Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.

18. Wardlaw v. McConnell, 46 Ga. 273.

19. Schroeter v. Bowdon, 53 Tex. Civ. A. 135, 115 SW 331.

20. Louden v. Birt, 4 Ind. 566.

21. See infra § 164.

22. McDowall v. Boyd, 2 Saund. & C. 298; Maillard v. Argyll, 1 D. & L. 536.

23. Evidence admissible under general averment see infra § 167.

Right to plead see supra § 128.

24. Fargo First Nat. Bank v. Roberts, 2 N. D. 195, 49 NW 722.

25. Tom's Creek Coal Co. v. Skeene, 90 SW 993, 28 KyL 962.

26. Payment of note to third person see Bills and Notes § 1230 notes 92–2.

27. Cooper v. Stinson, 5 Minn. 201; Offley v. Clay, 2 M. & G. 172, 40 ECL 547, 133 Reprint 709.

28. Indianapolis, etc., R. Co. v. Hyde, 122 Ind. 188, 23 NE 706.

29. Operation and effect of judgment and payment in garnishment generally see Garnishment §§ 621–641.

30. Parks v. State Nat. Bank, (Tex.

acknowledged was the debt in controversy.[31] It is sufficient if it alleges that the court rendering the judgment had jurisdiction of the garnishment proceedings.[32]

[§ 152] **(1) Pleading Presumption of Payment.**[33] Where a party intends to rely on the presumption of payment arising from lapse of time, he must plead payment;[34] it is not necessary specially to plead the defense of presumption of payment.[35] A mere statement of the facts from which the presumption is claimed to arise[36] or a plea of limitations is not sufficient.[37]

[§ 153] **(2) Affidavits of Defense.**[38] In those states where an affidavit of defense is interposed,[39] it seems that more particularity is required than in ordinary pleas, it being held that all the circumstances of the alleged payment must be set forth with certainty and particularity and not generally and inferentially.[40] It is not sufficient to allege that the debt has been paid and that nothing is owing.[41] The affidavit must distinctly allege the fact of payment,[42] and state the time,[43] amount,[44] manner of payment,[45] and the persons to whom,[46] by whom,[47] and on whose account,[48] it was made. It is not enough to aver that the debtor has a receipt for money without alleging that he made payment, or that it was made for him.[49] If payment other than in money, as by note, bill, check, or other property, is alleged, it must be further stated either that it was accepted by the creditor as payment,[50]

Civ. A.) 34 SW 1044.

31. Reed v. Cage, 5 Miss. 253.

32. Minor v. Rogers Coal Co., 25 Mo. A. 78.

[a] **Institution of suit** prior to garnishment proceedings is immaterial. Minor v. Rogers Coal Co., 25 Mo. A. 78.

33. **Presumption from lapse of time** see infra §§ 198–213.

34. Tibbs v. Clark, 5 T. B. Mon. (Ky.) 526; Little v. McVey, (N. J.) 47 A 61; Parisen v. New York, etc., R. Co., 65 N. J. L. 413, 47 A 477; Gulick v. Loder, 13 N. J. L. 68, 23 AmD 711; Morey v. Farmers' L. & T. Co., 14 N. Y. 302; Pattison v. Taylor, 8 Barb. (N. Y.) 250, CodeRepNS 174; Fellers v. Lee, 2 Barb. (N. Y.) 488; Henderson v. Henderson, 3 Den. (N. Y.) 314; Stanley v. McKinzer, 7 Lea (Tenn.) 454; Carter v. Wolfe, 1 Heisk. (Tenn.) 694.

[a] **Rule applies** whether proceeding is at law or in equity. Tibbs v. Clark, 5 T. B. Mon. (Ky.) 526; Fellers v. Lee, 2 Barb. (N. Y.) 488; Stanley v. McKinzer, 7 Lea (Tenn.) 454.

[b] **In North Carolina** a plea "that the plaintiffs have not brought their action within the time prescribed by law, and the same is barred by the statutes of limitations" is sufficient to set up a defense of payment presumed from a lapse of time. Pemberton v. Simmons, 100 N. C. 316, 321, 6 SE 122.

35. Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124.

36. House v. Carr, 125 App. Div. 89, 109 NYS 245; Pattison v. Taylor, 8 Barb. (N. Y.) 250, 252, CodeRepNS 174.

"It is payment, and not the presumptive evidence of payment, that is a bar, and should be pleaded." Pattison v. Taylor, supra.

37. Parisen v. New York, etc., R. Co., 65 N. J. L. 413, 47 A 477; Morey v. Farmers' L. & T. Co., 14 N. Y. 302.

38. **In action on account** see Accounts and Accounting § 180.

39. **General rules governing sufficiency** see Pleading [31 Cyc 231].

40. Langfeld v. Lyon, 132 Pa. 441, 19 A 343; National Deposit Bank v. Mawson, 46 Pa. Super. 85; McCann v. Keane, 1 Pa. Co. 143; Weidman v. Frank, 19 LancLRev (Pa.) 30; Bube v. Hauck, 16 LancLRev (Pa.) 412; Jones v. Bely, 2 WklyNC (Pa.) 139; Belcher v. Zane, 1 WklyNC (Pa.) 42.

[a] **Affidavit of defense:** (1) Averring payment "by check, notes, and in cash and merchandise returned and accepted by said plaintiff," is not sufficiently particular. McCann v. Keane, 1 Pa. Co. 143. (2) Setting forth that defendant held a duebill of plaintiff, promising to pay in trade in the articles for which plaintiff sued, a certain sum, which sum had been offered by defendant to plaintiff as part payment and refused, is sufficient. Jones v. Bely, 2 WklyNC (Pa.) 139. (3) Held sufficient. Shimeall v. Lehmann, 198 Ill. A. 29.

41. McCracken v. Pittsburgh First Reformed Presb. Cong., 111 Pa. 106, 2 A 94; Snyder v. Powers, 3 Walk. (Pa.) 277; Wayne Tank, etc., Co. v. Thomas Petroleum Products Co., 83 Pa. Super. 158; Leas v. Hafer, 39 Pa. Super. 160; Stockley v. Riebenack, 12 Pa. Super. 169; Hagstrom v. Excelsior Drum Works, 24 Pa. Dist. 293; Erlicher v. Lawson, 5 WklyNC (Pa.) 473; Bank v. Muller, 2 WklyNC (Pa.) 50; Betz v. Gilmore 1 WklyNC (Pa.) 145; Fluck v. Hope, 1 WklyNC (Pa.) 42. But see Smith v. Potter, 1 Wkly NC (Pa.) 51 (on book account defendant paid full price agreed upon).

"An averment of payment merely is not sufficiently precise to prevent judgment." Leas v. Hafer, 39 Pa. Super. 160, 162.

[a] **Affidavit insufficient** which alleges that no more than specified amount is due, as will appear from receipts in deponent's possession. Betz v. Gilmore, 1 WklyNC (Pa.) 145.

[b] **In Delaware** an allegation of payment has been held sufficient. Ridings v. McMenamin, 17 Del. 15, 39 A 463.

42. McDonald Constr. Co. v. Gill, 285 Pa. 305, 132 A 368; Coulston v. Bertolet, 7 Pa. Cas. 592, 12 A 255; Christiana Hardware, etc., Co. v. Sigle, 22 Pa. Dist. 647; Hare v. Moore, 19 Pa. Dist. 222; Brandon v. Brandon, 2 Pa. Co. 46.

[a] **Thus** an averment of payment of a bill for balance according to yardage excavated is insufficient in a suit for bonus. McDonald Constr. Co. v. Gill, 285 Pa. 305, 132 A 368.

[b] **Omission of items** must be denied or their payment alleged when receipt in full is relied on. Christiana Hardware, etc., Co. v. Sigle, 22 Pa. Dist. 647.

43. Hiestand v. Williamson, 128 Pa. 122, 18 A 427; Coulston v. Bertolet, 7 Pa. Cas. 592, 12 A 255; Wayne Tank, etc., Co. v. Thomas Petroleum Products Co., 83 Pa. Super. 158; Liveright v. Thornton, 56 Pa. Super. 611; National Deposit Bank v. Mawson, 46 Pa. Super. 85; Leas v. Hafer, 39 Pa. Super. 160; Eisenhauer v. Meiser, 29 Pa. Dist. 125; Pequea Tp. School Dist. v. Klugh, 24 Pa. Dist. 968; Hagstrom v. Excelsior Drum Works, 24 Pa. Dist. 293; Hare v. Moore, 19 Pa. Dist. 222; Solly v. Moore, 11 Pa. Co. 333; McGuire v. Conway, 10 Pa. Co. 298; Brandon v. Brandon, 2 Pa. Co. 46; Eaby v. Stambaugh, 21 LancLRev (Pa.) 365; Weidman v. Frank, 19 LancL Rev (Pa.) 30.

[a] **Payment of board** at the end of each month is probably sufficient. McGuire v. Conway, 10 Pa. Co. 298.

[b] **Excuses.**—An affidavit of defense which states that defendant, owing to his absence from home and want of access to his books, is unable to give dates of payments is sufficient. Langfeld v. Lyon, 132 Pa. 441, 19 A 343.

44. Watson v. Southwick, 16 Del. 254, 43 A 93; Bakes v. Reese, 150 Pa. 44, 24 A 634 (must specify items of credit alleged to be omitted); McCracken v. Pittsburgh First Reformed Presb. Cong., 111 Pa. 106, 2 A 94; National Deposit Bank v. Mawson, 46 Pa. Super. 85; Leas v. Hafer, 39 Pa. Super. 160; Eisenhauer v. Meiser, 29 Pa. Dist. 125; Pequea Tp. School Dist. v. Klugh, 24 Pa. Dist. 968; Solly v. Moore, 11 Pa. Co. 333; McGuire v. Conway, 10 Pa. Co. 298; Brandon v. Brandon, 2 Pa. Co. 46; Eaby v. Stambaugh, 21 LancLRev (Pa.) 365; Weidman v. Frank, 19 LancLRev (Pa.) 30.

[a] **Allegation** of payment to cashier of larger sum than amount due on note under agreement that it be applied on note in suit is sufficient. Olyphant First Nat. Bank v. O'Malley Mfg. Co., 71 Pa. Super. 342.

45. Hiestand v. Williamson, 128 Pa. 122, 18 A 427; McCracken v. Pittsburgh First Reformed Presb. Cong., 111 Pa. 106, 2 A 94; Coulston v. Bertolet, 7 Pa. Cas. 592, 12 A 255; Wayne Tank, etc., Co. v. Thomas Petroleum Products Co., 83 Pa. Super. 158; Liveright v. Thornton, 56 Pa. Super. 611; National Deposit Bank v. Mawson, 46 Pa. Super. 85; Leas v. Hafer, 39 Pa. Super. 160; Eisenhauer v. Meiser, 29 Pa. Dist. 125; Pequea Tp. School Dist. v. Klugh, 24 Pa. Dist. 968; Hagstrom v. Excelsior Drum Works, 24 Pa. Dist. 293; Hare v. Moore, 19 Pa. Dist. 222; Solly v. Moore, 11 Pa. Co. 333; McGuire v. Conway, 10 Pa. Co. 298; Brandon v. Brandon, 2 Pa. Co. 46; Eaby v. Stambaugh, 21 LancLRev (Pa.) 365; Weidman v. Frank, 19 LancLRev (Pa.) 30.

46. McCracken v. Pittsburgh First Reformed Presb. Cong., 111 Pa. 106, 2 A 94; Wayne Tank, etc., Co. v. Thomas Petroleum Products Co., 83 Pa. Super. 158; National Deposit Bank v. Mawson, 46 Pa. Super. 85; Eisenhauer v. Meiser, 29 Pa. Dist. 125; Pequea Tp. School Dist. v. Klugh, 24 Pa. Dist. 968; Solly v. Moore, 11 Pa. Co. 333; Brandon v. Brandon, 2 Pa. Co. 46; Batt v. Gaslight Co., 13 WklyNC (Pa.) 417; Baird v. Adams, 1 Wkly NC (Pa.) 144; Weidman v. Frank, 19 LancLRev (Pa.) 30.

[a] **Payment to corporation.**—(1) Agent to whom money was paid must be set forth. Solly v. Moore, 11 Pa. Co. 333. (2) Corporate authority to receive payment of person to whom payment was made should be set forth. Wayne Tank, etc., Co. v. Thomas Petroleum Products Co., 83 Pa. Super. 158.

47. McCracken v. Pittsburgh First Reformed Presb. Cong., 111 Pa. 106, 2 A 94; National Deposit Bank v. Mawson, 46 Pa. Super. 85; Eisenhauer v. Meiser, 29 Pa. Dist. 125; Solly v. Moore, 11 Pa. Co. 333; Brandon v. Brandon, 2 Pa. Co. 46; Weidman v. Frank, 19 LancLRev (Pa.) 30.

48. National Deposit Bank v. Mawson, 46 Pa. Super. 85; Weidman v. Frank, 19 LancLRev (Pa.) 30.

49. Building Assoc. v. Philips, 1 LegRec (Pa.) 104.

50. Berlin Iron Bridge Co. v. Bonta, 180 Pa. 448, 36 A 867; Leas v. Hafer, 39 Pa. Super. 160; Philadelphia v. Stewart, 9 Pa. Dist. 228, 23 Pa. Co. 552; Wisconsin Chair Co. v. Heilbronner, 30 Pa. Co. 299, 7 Dauph. Co. 262; Biddle v. Bogert, 10 Kulp (Pa.) 434; Ulman v. Mealy, 19 Wkly NC (Pa.) 87. See Stansbury v. Oppenheimer, 19 WklyNC (Pa.) 182 (acceptance of draft, not negotiated); Gillingham v. Koppella, 13 WklyNC

or, if a commercial instrument, that it has been paid,[51] or is an outstanding obligation in the hands of another.[52] It has been held sufficient where certain notes sued on were given as part of a running account to allege payment of plaintiff's account in a general way.[53]

[§ 154] **3. Replication or Reply[54]—a. In General.** The general rule seems to be that, if nonpayment was a necessary allegation in the complaint, a reply traversing the allegation of payment need not be made,[55] and the parties may proceed to trial without the formal addition of a similiter.[56] But if the plea of payment sets up new matter in answer to the complaint, plaintiff must file a replication thereto,[57] except in those states where a replication is dispensed with by statute;[58] and under this rule must be considered the states which require a reply, even though nonpayment is a necessary allegation in the complaint,[59] the theory being that a plea of payment always sets up new matter.[60] As a general rule, plaintiff by unnecessarily pleading nonpayment in his complaint does not relieve himself from the necessity of making a reply,[61] although in a few states the rule seems to be that, where the complaint alleges nonpayment and the answer avers payment, no reply is necessary, even though the allegation of nonpayment was not required.[62]

Time to file replication. It has been held proper to permit a nunc pro tunc entry of a reply even after trial.[63]

Non est factum. Plaintiff need not plead non est factum in order to attack a receipt set up in support of a plea of payment.[64]

[§ 155] **b. To Part Payment.** Where payment is pleaded to part of the demand and nothing as to the remainder, it has been said that plaintiff must take judgment by nil dicit for the balance ignored,[65] and as to the part answered he may enter a nolle prosequi if he is satisfied that it is correct,[66] or he may reply and put that in issue.[67] It has been held, however, that a plaintiff may reply to a plea of part payment without taking judgment for the part of the demand unanswered.[68]

[§ 156] **c. Sufficiency.**[69] In accordance with the general rules governing the sufficiency of replications in civil actions in general,[70] a reply to a plea of payment should deny the material averments therein.[71] Thus a reply which sets up the invalidity of the medium of payment without denying an averment that plaintiff received par value for the medium is insufficient.[72] It should be confined to matters set forth in the plea;[73] so a reply is bad which joins issue on matter stated only in the bill of particulars.[74] If one of several replications to a plea of payment is good, it is sufficient to sustain the action as against such defense.[75]

(Pa.) 281 (plaintiff received and accepted promissory note in settlement of claim).

[a] **Plaintiff's attorney** must be named where acceptance of duebill by him is alleged. Biddle v. Bogert, 10 Kulp (Pa.) 434.

[b] **Affidavit held sufficient.**—Payment by delivery of carriage which plaintiffs had agreed to receive and tender of balance to plaintiff's attorney, Derr v. Coar, 1 WklyNC (Pa.) 432.

51. Meltzner v. Schwarz, 19 Pa. Dist. 44 (check); Wisconsin Chair Co. v. Heilbronner, 30 Pa. Co. 299, 7 Dauph. Co. 262.

52. National Bank of Commerce v. Silver, 86 Pa. Super. 492 (negotiability of check sufficient).

53. Hubbard v. French, 1 Pa. Super. 218.

54. Replication or reply generally see Pleading [31 Cyc 241].

In action of debt see Debt, Action of § 41.

In action on bill or note see Bills and Notes § 1240 notes 82-86.

55. Iowa.—Northern Lumber Co. v. Clausen, 201 Iowa 701, 208 NW 72; Powesheik County v. Mickel, 10 Iowa 76.

Ky.—Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 SW 675, 20 KyL 773; Tom's Creek Coal Co. v. Skeene, 90 SW 993, 28 KyL 962; Ermert v. Dietz, 44 SW 138, 19 KyL 1639.

Md.—McCart v. Regester, 68 Md. 429, 13 A 361.

Minn.—McArdle v. McArdle, 12 Minn. 98.

Mo.—Holtzbauer v. Heine, 37 Mo. 443 (mechanic's lien).

Nev.—Isola v. Soranti, 47 Nev. 365, 222 P 796.

N. Y.—Van Giesen v. Van Giesen, 10 N. Y. 316.

W. Va.—Kinsley v. Monongalia County Ct., 31 W. Va. 464, 7 SE 445; Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555; Douglass v. Central Land Co., 12 W. Va. 502.

[a] **Reasons for rule.**—(1) The affirmative averment of payment is in effect a denial of the averment of nonpayment in the complaint. Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 SW 675, 20 KyL 773; Ermert v. Dietz, 44 SW 138, 19 KyL 1639; Douglass v. Central Land Co., 12 W. Va. 502. (2) The answer is not new matter requiring a reply, but merely a proper mode of controverting an allegation of the complaint. McArdle v. McArdle, 12 Minn. 98. (3) Plea of payment is in effect a general denial. Isola v. Soranti, 47 Nev. 365, 222 P 796.

[b] **In California** (1) early cases held a reply to a plea of payment unnecessary where nonpayment was a necessary allegation of the complaint. Frisch v. Caler, 21 Cal. 71. (2) Under the code no reply is allowed and all new matter in the answer is considered controverted. Code Civ. Proc. § 462.

56. Kinsley v. Monongalia County Ct., 31 W. Va. 464, 7 SE 445; Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555; Douglass v. Central Land Co., 12 W. Va. 502.

57. Culbertson Irr., etc., Co. v. Cox, 52 Nebr. 684, 73 NW 9; Knauber v. Wunder, 5 Oh. Dec. (Reprint) 516, 6 AmLRec 366; Upham Shoe Co. v. Pollard, 111 Okl. 228, 239 P 244.

[a] **In Missouri** (1) early cases required a replication to a plea of payment in an action of debt. Hutchison v. Patrick, 3 Mo. 65; Manifee v. D'Lashmutt, 1 Mo. 258. (2) Now, under the statute, if the plea sets up new matter it must be replied to. Cordner v. Roberts, 58 Mo. A. 440.

58. Kirk v. Woodbury County, 55 Iowa 190, 7 NW 498; Burton v. Hill, 4 Greene (Iowa) 379; Mercantile Nat. Bank v. Corn Exch. Bank, 73 Hun 78, 25 NYS 1068; Burke v. Thorne, 44 Barb. (N. Y.) 363; Bracket v. Wilkinson, 13 HowPr (N. Y.) 102; Reilay v. Thomas, 11 HowPr (N. Y.) 266.

[a] **Under code** (1) plaintiff cannot reply to answer setting up payment. Bracket v. Wilkinson, 13 How Pr (N. Y.) 102. (2) Court in its discretion may require a reply. Mercantile Nat. Bank v. Corn Exch. Bank, 73 Hun 78, 25 NYS 1068.

59. Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538; Hubler v. Pullen, 9 Ind. 273, 68 AmD 620; Adams v. Tuley, 1 Ind. A. 490, 27 NE 991; Rushing v. Key, 12 Miss. 191; Webster v. Tiernan, 5 Miss. 352; Minard v. McBee, 29 Or. 225, 44 P 491; Benicia Agricultural Works v. Creighton, 21 Or. 495, 28 P 775, 30 P 676. See Somerville v. Stewart, 48 N. J. L. 116, 3 A 77 (in action on promissory note, if defendant expressly pleads payment, plaintiff may enter nolle prosequi or reply).

[a] **Failure to reply** admits plea of payment. Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538.

[b] **In Pennsylvania,** the replication to the plea of payment with leave, etc., is merely formal, and the cause is substantially at issue, within a rule of court which declares that the cause shall be considered at issue without a formal joinder, where a substantial issue is raised by the pleadings. Beale v. Buchanan, 9 Pa. 123.

60. Minard v. McBee, 29 Or. 225, 44 P 491; Benicia Agricultural Works v. Creighton, 21 Or. 495, 28 P 775, 30 P 676.

61. Benicia Agricultural Works v. Creighton, supra.

62. Upham Shoe Co. v. Pollard, 111 Okl. 228, 239 P 244; Henderson v. Southall, 4 Call (8 Va.) 371 (plea of payment creates general issue); Hickman v. Painter, 11 W. Va. 386.

63. Lockwood v. Flanagan, 2 N. Y. Super. 584; Neely v. Cummins, 8 Oh. Dec. (Reprint) 478, 8 CincLBul 191.

64. Richards v. Osborne, (Tex. Civ. A.) 164 SW 392.

65. Hawkins v. Rapier, Minor (Ala.) 113; Somerville v. Stewart, 48 N. J. L. 116, 3 A 77.

66. Somerville v. Stewart, supra.

67. Somerville v. Stewart, supra.

68. Beebe v. Hershy, 7 Ark. 428.

69. In action on bill or note see Bills and Notes § 1241 notes 81-86.

70. See Pleading [31 Cyc 241].

71. Nadenbousch v. McRea, Gilm. (21 Va.) 228.

[a] **General replication** to a plea of payment does not of itself constitute an issue, unless so treated by the parties. Nadenbousch v. McRea, Gilm. (21 Va.) 228.

[b] **Form of reply.**—The words, "and the plaintiff doth the like," cannot be taken as a traverse of a plea of payment. Betts v. Francis, 1 Ill. 165.

72. Alexander v. Byers, 19 Ind. 301 (bank notes).

73. Vanzant v. Shelton, 40 Miss. 332.

74. Vanzant v. Shelton, supra.

75. Hurd v. Earl, 6 Blackf. (Ind.) 39.

Reference to answer. A reply to a paragraph of the answer pleading payment cannot refer for facts to another paragraph of the answer.[76]

Verification. A replication to a plea of payment setting up a receipt from plaintiff, which alleges fraud or mistake in the receipt is good without being supported by affidavit.[77] But a replication to a plea of payment on the written order of plaintiff which denies payment but does not question the execution of the order, and is not supported by oath or affirmation, is not sufficient.[78]

Fraud. A reply to a plea of payment, which relies on a note executed by plaintiff to a third person and assigned to defendant, may allege that the assignment was obtained by fraud,[79] and a reply alleging that a receipt was given for a specified purpose different than that for which the plea alleged is sufficient;[80] but a reply that an exchange has been made through fraud is not sufficient.[81]

[§ 157] **4. Motions and Demurrers.**[82] As a general rule defects in a plea of payment cannot be attacked by a general demurrer,[83] so a plea of payment will be held good on general demurrer, even though it is pleaded with other matter which is improper.[84] It is variously required in the different jurisdictions that defects in the plea must be attacked by special demurrer,[85] by motion to make more specific,[86] or by special exceptions;[87] so a plea of part payment with a prayer for judgment has been held subject to a special, but not a general, demurrer.[88] It has been held error to strike a plea substantially setting up the defense of payment because the attorney called it a "plea in compensation."[89]

Denials in an affirmative defense of full payment obscure and weaken the plea, and are properly excised.[90]

Complaint. If nonpayment is a necessary allegation of the complaint,[91] the failure to allege it may be reached by a general demurrer;[92] but if it is improperly or defectively stated, the defect can be reached only by a special demurrer.[93]

[§ 158] **5. Amendments.** A plea of payment which does not contain the requisite clearness and precision, but is not altogether insufficient, may be amended,[94] but where the plea is wholly insufficient, it may not be.[95]

[§ 159] **6. Construction and Operation of Pleadings—a. In General.** The rules relating to the construction and operation of pleadings in civil actions in general[96] control the construction and operation of particular allegations in the complaint,[97] answer,[98] or reply.[99] Specific statements of fact in regard to payment will control a general allegation.[1] In conformity with the rule that a pleading in matters of substance is to be construed most strongly against the pleader,[2] if an answer to which there is no replication may be construed to contain either of two defenses, one a defense which requires a reply, and the other payment which does not, it will be construed as setting up the defense of payment.[3] It has been held that, if nonpayment is a necessary allegation of the complaint,[4] the affirmative allegation of payment serves only as notice that the issue

76. Atchinson v. Lee, 75 Ind. 132.
77. Swann v. Muschke, 42 Tex. 342.
78. Early v. Patterson, 4 Blackf. (Ind.) 449.
79. Hurd v. Earl, 6 Blackf. (Ind.) 39.
80. Tucker v. Baldwin, 13 Conn. 136, 33 AmD 384.
81. Atchinson v. Lee, 75 Ind. 132.
82. Demurrer generally see Pleading [31 Cyc 269].
Motions generally see Pleading [31 Cyc 604].
83. Baer v. Christian, 83 Ga. 322, 9 SE 790; Epstein v. Thomas, 15 Ga. A. 741, 84 SE 201; Buist v. Fitzsimons, 44 S. C. 130, 21 SE 610.
[a] **If any portion is good** the plea will be sustained. Epstein v. Thomas, 15 Ga. A. 741, 84 SE 201.
84. Johnson v. Breedlove, 104 Ind. 521, 6 NE 906; Bates v. Halliday, 3 Ind. 159.
85. Baer v. Christian, 83 Ga. 322, 9 SE 790; Armour Fertilizer Works v. Dwight, 95 Ga. A. 144, 95 SE 746; Dania Cash Stores v. Zaring, 38 Ga. A. 427, 144 SE 132; Rentz Drug Co. v. Bishop-Babcock Co., 30 Ga. A. 391, 118 SE 414; Thompson v. Carrollton Bank, 29 Ga. A. 520, 116 SE 39; Scott v. Anderson, 29 Ga. A. 438, 115 SE 917; Epstein v. Thomas, 15 Ga. A. 741, 84 SE 201; Groves v. Sexton, 5 Ga. A. 160, 62 SE 731; Crawford v. Ellison, 3 S. C. L. 378.
[a] **Plea failing to allege** (1) to whom made, time, place, or manner of payment should be stricken on special demurrer (Baer v. Christian, 83 Ga. 322, 9 SE 790; Armour Fertilizer Works v. Dwight, 95 Ga. A. 144, 95 SE 746; Scott v. Anderson, 29 Ga. A. 438, 115 SE 917; Epstein v. Thomas, 15 Ga. A. 741, 84 SE 201; Groves v. Sexton, 5 Ga. A. 160, 62 SE 731), (2) unless a sufficient excuse for failure to do so is set out (Dania Cash Stores v. Zaring, 38 Ga. A. 427, 144 SE 132).
[b] **Oral motion to strike is not allowed.**—Thompson v. Carrollton Bank, 29 Ga. A. 520, 116 SE 39.
86. Epperson v. Hostetter, 95 Ind. 583; Hart v. Crawford, 41 Ind. 197; Farmers', etc., Bank v. Sherman, 19 N. Y. Super. 181 [aff 33 N. Y. 69]; McGrath v. Pitkin, 26 Misc. 862, 56 NYS 398.
[a] **Plea** is not subject to demurrer for want of certainty. Hart v. Crawford, 41 Ind. 197.
87. May v. Taylor, 22 Tex. 348; Marley v. McAnelly, 17 Tex. 658; Holliman v. Rogers, 6 Tex. 91; Wells v. Fairbank, 5 Tex. 582; Martin v. Farmers' Nat. Bank, (Tex. Civ. A.) 294 SW 240.
[a] **Advantage of defects** must be taken by exceptions pointing out the particular defects, and not by motion. Holliman v. Rogers, 6 Tex. 91.
[b] **Motion to strike** is not appropriate unless the plea is a nullity. May v. Taylor, 22 Tex. 348.
88. Sherman v. Gassett, 9 Ill. 521.
89. Collins v. Pellerin, 6 La. Ann. 36.
90. Hitching v. Robinson, 196 App. Div. 366, 187 NYS 750.
91. See supra § 129.
92. Grant v. Sheerin, 84 Cal. 197, 23 P 1094; Richards v. Travelers' Ins. Co., 80 Cal. 505, 22 P 939; Scroufe v. Clay, 71 Cal. 123, 11 P 882.
93. Grant v. Sheerin, 84 Cal. 197, 23 P 1094.
94. Phillips v. Jarvis, 19 Wis. 204.
95. Texier v. Gouin, 12 N. Y. Super. 389.
96. See Pleading [31 Cyc 78 et seq].
97. See cases infra this note.
[a] **Rule applied.**—(1) An allegation that the account amounted to five hundred and forty-one dollars and ninety cents and the balance due after deducting payments was one hundred and seventy-five dollars and seventy-five cents amounted to an admission of payment of three hundred and sixty-six dollars and fifteen cents. White v. Smith, 46 N. Y. 418 [rev 1 Lans. 469]. (2) Date of payment is credited as of maturity where none stated. Farmer v. Milan, 1 Ky. Op. 344. (3) Petition held to foreclose controversy regarding application of payments. Edward Thompson Co. v. Foster, 101 Kan. 14, 165 P 841.
98. See cases infra this note.
[a] **Rule applied.**—(1) Averment of full payment held not to admit that plaintiff has been paid no more than the amount alleged. Cowan v. Abbott, 92 Cal. 100, 28 P 213. (2) Effect of memorandum plea of payment. Jones v. Wells, 7 Del. 223. (3) Plea held enlargement of general issue plea and not plea of payment. Wimpy v. Gaskill, 76 Ga. 41. (4) Plea held to allege payment on whole debt rather than in discharge of installment. Bishop v. Lawrence, 85 Ky. 25, 2 SW 499, 8 KyL 643. (5) Averment as equivalent that debt was to be paid in Confederate money. Karnes v. Lee, 4 W. Va. 337. (6) A plea of payment with leave to a statement of debt does not admit any fact not mentioned in the statement. Schlatter v. Etter, 13 Serg. & R. (Pa.) 36. (7) Plea construed as one of recoupment, not payment. Krauss Engineering Co. v. McKinnon, 66 Misc. 181, 121 NYS 396. (8) Allegation that check was accepted in payment construed in ordinary sense and with reference to rest of pleadings. Lincoln County v. Gibson, 143 Wash. 372, 255 P 119.
[b] **Subsequent pleas.**—A plea of payment will not preclude defendant from subsequently pleading any act of plaintiff by which the debt may have been extinguished. Adle v. Metoyer, 1 La. Ann. 254.
[c] **Time of payment.**—Answer setting out contract to sell real estate and payment of amount mentioned held not to fix the date of payments. Albany First Sav. Bank v. Linn-Haven Orchard Co., 89 Or. 354, 174 P 614.
99. See case infra this note.
[a] **Rule applied.**—No admission of payment alleged in plea. Packard v. Denver Sav. Bank, 8 Colo. A. 204, 45 P 511.
1. Hewitt v. Powers, 84 Ind. 295.
2. See Pleading [31 Cyc 78].
3. Burke v. Thorne, 44 Barb. (N. Y.) 363; Bates v. Rosekrans, 23 How Pr 98 [aff 37 N. Y. 409, 4 Transcr. A. 332, 4 AbbPrNS 276].
4. See supra § 129.

of nonpayment is actually to be raised.[5]

[§ 160] **b. Plea as Dispensing with Proof of Cause of Action.** The plea of payment does not put in issue the debtor's original legal liability.[6] It admits the cause of action and that the debt once existed,[7] so as to put the burden of proof on the party pleading payment.[8]

[§ 161] **7. Issues, Proof, and Variance[9]—a. In General.** Payment is a material issue,[10] and material matters relating to the payment, alleged by a party, must be proved by him.[11] If an issue of payment is not raised by the pleadings it should not be submitted to the jury.[12] The validity of a claim which defendant has against plaintiff is immaterial under the issue of whether it was agreed to apply it in payment of plaintiff's claim.[13]

[§ 162] **b. Evidence Admissible under Pleadings[14]—(1) In General.** The general rule is that, where there is no plea of payment, evidence thereof is not admissible.[15] However, this rule is subject to various exceptions and modifications.[16]

A receipt in full may be introduced in evidence under a plea denying the agreement to pay, to show the improbability that such an agreement existed prior to the date of such receipt.[17]

[§ 163] **(2) Under Plea of Payment[18]—(a) In General.** Under a general plea of payment evidence of a discharge of the obligation in money may be shown.[19] The rule, which it has been asserted formerly existed,[20] that, under a simple plea of payment, payment in money or its equivalent only can be shown, still prevails in some jurisdictions.[21] However, the general rule now seems to be that, under a general plea of payment, while the pleader cannot give evidence tending to disprove the cause of action as to which payment is alleged,[22] subject to the general rules as to competency, materiality, and relevancy,[23] any matter may be given in evidence which tends to show payment.[24] Evidence of the amount paid and the time and circumstances of its

5. Smith v. State Bank, 61 Misc. 647, 114 NYS 56.

Burden of proof see infra §§ 177, 178.

6. Greenlees v. Chezik, 68 Colo. 521 190 P 667; Loose v. Loose, 36 Pa. 538.

7. U. S.—Murphy v. Byrd, 17 F. Cas. No. 9,947b, Hempst. 221; Archer v. Morehouse, 30 F. Cas. No. 18,225, Hempst. 184.

Ark.—Day v. Lafferty, 4 Ark. 450.

Cal.—Caulfield v. Sanders, 17 Cal. 569.

Colo.—McMahon v. Williams, 80 Colo. 249, 250 P 560; Greenlees v. Chezik, 68 Colo. 521, 190 P 667; Mohr v. Barnes, 4 Colo. 350.

Fla.—Raney v. Baron, 1 Fla. 327.

Ill.—McGovern v. Chicago, 202 Ill. A. 139 [aff 281 Ill. 264, 118 NE 3].

La.—Robinson v. Landrum, 10 La. Ann. 539; Jones v. Bishop, 12 La. 397; Louisiana Tire Co., Inc. v. Todd, 8 La. A. 676; Brown v. King, 7 La. A. 546; Hitt v. Herndon, 7 La. A. 87; Smith v. Turner, 3 La. A. 91; Valdoz v. O'Keefe, 2 La. A. 362.

N. D.—Lokken v. Miller, 9 N. D. 512, 84 NW 368.

Okl.—Barlas v. Catechis, 129 Okl. 142, 263 P 647.

Pa.—Long v. Rhoads, 126 Pa. 378, 17 A 622; Gilinger v. Kulp, 5 Watts & S. 264; Hamilton v. Moore, 4 Watts & S. 570.

Tenn.—Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694; Bass v. Shurer, 2 Heisk. 216; Rogers v. Kincannon, 3 Humphr. 252.

Tex.—Matossy v. Frosh, 9 Tex. 610.

Can.—Mulholland v. Morley, 7 Can LJ 323.

See Harris v. Merz Architectural Iron Works, 82 Ky. 200 (payment held to be only issue).

[a] **Doctrine** only confirms general principle that litigants should be consistent and truthful in their pleadings. Robinson v. Landrum, 10 La. Ann. 539.

[b] **Capacity of plaintiff to sue as administrator** is admitted. Raney v. Baron, 1 Fla. 327.

[c] **Instrument** on which action is founded is admitted. Murphy v. Byrd, 17 F. Cas. No. 9,947b, Hempst. 221; Day v. Lafferty, 4 Ark. 450.

[d] **Averment** held not to operate as recognition of the whole debt, Robinson v. Landrum, 10 La. Ann. 539.

[e] **Entire amount claimed** is not necessarily admitted. McMahon v. Williams, 80 Colo. 249, 250 P 560; Mulholland v. Morley, 7 CanLJ 323.

8. See infra §§ 176-187.

9. General rules see Pleading [31 Cyc 670].

10. Johnson v. McLain, 13 F. Cas. No. 7,395a, Hempst. 59; Hill v. Roberts, 86 Ala. 523, 6 S 39; Smith v. Miller, 29 N. Y. Super. 157 [rev on other grounds 43 N. Y. 171, 3 AmR 690].

[a] **Issue on plea** of solvit ad diem is not immaterial. Johnson v. McLain, 13 F. Cas. No. 7,395a, Hempst. 59.

[b] **Reason for nonpayment of check** by which debt was paid is immaterial where no negligence is shown on part of plaintiff. Smith v. Miller, 29 N. Y. Super. 157 [rev on other grounds 43 N. Y. 171, 3 AmR 690].

11. See infra §§ 176-187.

12. Quarles v. Jenkins, 98 N. C. 258, 3 SE 395.

13. Lewis v. South Shore Co-op. Assoc., 211 App. Div. 831, 209 NYS 428.

14. In action on account see Accounts and Accounting § 183.

15. U. S.—Choate v. Hoogstraat, 105 Fed. 713, 46 CCA 174.

Ky.—Vallandingham v. Igo, 8 Ky. Op. 427.

La.—Davis v. Davis, 17 La. 259; George C. Vaughan & Sons, Inc. v. L. V. Burnaman, 2 La. A. 333.

Mo.—Edwards v. Giboney, 51 Mo. 129.

Nebr.—Clark v. Mullen, 16 Nebr. 481, 20 NW 642.

N. Y.—Dibble v. Dimick, 143 N. Y. 549, 38 NE 724; Schackter v. Kukowsky, 117 App. Div. 750, 102 NYS 1028 (checks dated prior to sale of goods inadmissible).

Or.—Farmers,' etc., Nat. Bank v. Hunter, 35 Or. 188, 57 P 424.

Pa.—Stonecipher v. Keane, 268 Pa. 540, 112 A 233 (in action of ejectment).

Tex.—Richey v. Grocery Co. v. Warnell, (Civ. A.) 103 SW 419 (under Rev. St. [1895] art 1266).

Wash.—Richards v. Jefferson, 20 Wash. 166, 54 P 1123.

And see cases supra § 132 note 26.

16. See infra §§ 172, 173.

17. Willis v. Abraham, 31 Or. 562, 51 P 79.

18. In action of debt see Debt, Action of § 45.

In action on bill or note see Bills and Notes § 1262.

19. Williams v. Uzzell, 108 Ark. 241, 156 SW 843; Mitchell v. Conrad, 15 Del. 417, 41 A 77; White v. Black, 115 Mo. A. 28, 90 SW 1153.

20. Uvalde Asphalt Pav. Co. v. National Trading Co., 135 App. Div. 391, 120 NYS 11.

21. Ulsch v. Muller, 143 Mass. 379, 9 NE 736; Peoples Bank v. Stewart, 152 Mo. A. 314, 133 SW 70 (under guarantor's plea, demand note of principal to creditor not admissible); Moore v. Renick, 95 Mo. A. 202, 68 SW 936.

[a] **Proof of payment** in wood is not admissible. Ulsch v. Muller, 143 Mass. 379, 9 NE 736.

[b] **In Texas** (1) a general plea of payment authorizes proof only of payment in money. Able v Lee, 6 Tex. 427; Norris v. Bogata Nat. Bank, (Civ. A.) 246 SW 105; Hudgins Produce Co. v. Beggs, (Civ. A.) 185 SW 339. (2) Payment in land is not admissible. Able v. Lee, supra. (3) Evidence of a balancing of mutual accounts may be shown if no objection is made. Hudgins Produce Co. v. Beggs, supra. (4) Under plea of payment with account showing items of goods, evidence that such goods were received in payment is admissible. Tinsley v. Ryon, 9 Tex. 405. (5) Under the plea that they had paid the consideration agreed upon, evidence of payment by a credit upon a debt owed them is admissible. Hamburg v. Wood, 66 Tex. 168, 18 SW 623. (6) Evidence that time checks of a railroad were received in satisfaction of a note is admissible. Swearingen v. Buckley, 1 Tex. Unrep. Cas. 421.

Jurisdictions allowing proof of payment other than in money see infra § 164.

Pleading payment other than in money see supra § 148.

22. Barlas v. Catechis, 129 Okl. 142, 263 P 647; Hamilton v. Moore, 4 Watts & S. (Pa.) 570; Speck v. Phillips, 5 M. & W. 279, 151 Reprint 119.

[a] **Mitigation of damages** by showing discharge for misconduct is not allowed. Speck v. Phillips, 5 M. & W. 279, 151 Reprint 119.

Plea of payment as dispensing with proof of cause of action see supra § 160.

23. See infra §§ 248-260.

24. U. S.—Columbia Digger Co. v. Rector, 215 Fed. 618.

Ind.—Hollander v. Fletcher, 62 Ind. A. 149, 112 NE 847.

Md.—Hannon v. State, 9 Gill 440 (evidence of deed to reduce amount of estate so as to show full payment of legacy admissible).

Minn.—Shakopee First Nat. Bank v. Strait, 71 Minn. 69, 73 NW 645.

N. Y.—Newcomb v. La Roe, 160 App. Div. 819, 146 NYS 133 [aff 218 N. Y. 682 mem, 113 NE 1061 mem].

Oh.—Brown v. Gimm, 10 Oh. Cir. Dec. 538.

[a] **All the facts and circumstances** may be shown to prove payment. Hollander v. Fletcher, 62 Ind. A. 149, 112 NE 847.

[b] **In Pennsylvania** (1) evidence of an equitable payment or defense as distinguished from direct payment is admissible only where the plea of payment is with leave to introduce an equitable defense, or there is notice of particulars. Lovegrove v. Christman, 164 Pa. 390, 30 A 385; Smaltz v. Ryan, 112 Pa. 423, 3 A 772; Steiner v. Erie Dime Sav., etc., Co., 98 Pa. 591; Covely v. Fox, 11 Pa. 171; Erwin v. Leibert, 5 Watts & S. 103. (2) For instance, the acceptance of a collateral security which is lost through the laches of the creditor is not admissible under the naked plea of payment. Covely v. Fox, supra. (3) Under the plea of payment with

payment is admissible under the general allegation of payment,[25] as is evidence to show that payment is presumed from lapse of time.[26] Where the plea of payment is special rather than general, evidence is inadmissible which does not conform strictly to the pleadings.[27] In an action on account the plea of payment permits plaintiff to introduce evidence of the amount owed.[28]

A receipt in support of a plea of payment may be attacked without a plea of non est factum.[29]

A plea by an intervener setting up that defendant had fully discharged the note is sufficient to admit evidence of satisfaction,[30] but defendant cannot be aided beyond the effect of his own plea.[31]

[§ 164] **(b) Payment Other than in Money.**[32] In the majority of states under the general plea of payment, evidence of payment in other things than money is admissible,[33] as by chattels,[34] realty,[35] choses in action,[36] accounts,[37] or any arrangement which, according to the agreement of the parties, operated to discharge the debt.[38] Likewise evidence that plaintiff has received the amount of collaterals placed in his hands,[39] or has become chargeable therewith, is admissible,[40] although in the latter case there is authority to the contrary.[41] But if an agreement to accept a commodity other than money is alleged, evidence of its delivery is not admissible in the absence of an averment of its acceptance or of consideration for the agreement.[42] Where the plea is payment by the giving of a note, the debtor may show the custom of the creditor in receiving notes to support his contention that the note was

proper notice, any equity which tends to defeat the plaintiff's action may be given in evidence. Smaltz v. Ryan, supra; Loose v. Loose, 36 Pa. 538. (4) Payment with leave and with notice of special matter admits anything which proves fraud, mistake, want or failure of consideration, and shows that ex æquo et bono, a part or whole of the amount claimed should not be recovered. Latapee v. Pecholier, 14 F. Cas. No. 8,101, 2 Wash. C. C. 180; Uhler v. Sanderson, 38 Pa. 128. (5) So defendant may set up deductions for foreman's wages to show that he has paid all plaintiff is entitled to under contract (Emrey v. Regar, 54 Pa. Super. 67), (6) or show an assignment to plaintiff as collateral security of the note of a third party which has been paid (Bailey v. Bailey, 14 Serg. & R. 195). (7) But evidence of the pendency of an attachment against the payee of the note, and served on defendants as garnishees, cannot be given. Adams v. Avery, 2 Pittsb. 77.

Specific matters admissible in evidence see infra § 164.

25. Williams v. Godsay, 8 Ky. Op. 210; Holmes v. Deplaigne, 23 La. Ann. 238; Wortman v. Young, (Tex. Civ. A.) 221 SW 660; Lawson v. Zinn, 48 W. Va. 312, 37 SE 612.

[a] **Manner of payment** is admissible under allegation of payment. Wortman v. Young, (Tex. Civ. A.) 221 SW 660.

[b] **Under plea of payment in Confederate money,** evidence that the military power of the Confederate states predominated at the time and place of payment, or that the money was voluntarily accepted in full satisfaction is admissible. Williams v. Godsay, 8 Ky. Op. 210.

Propriety of pleading payment generally see supra § 140.

26. Manning v. Meredith, 69 Iowa 430, 29 NW 336; Little v. McVey, (N. J.) 47 A 61; Parisen v. New York, etc., R. Co., 65 N. J. L. 413, 47 A 477; Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124; Van Ness v. Ransom, 83 Misc. 178, 144 NYS 420 [aff 164 App. Div. 483, 150 NYS 251 (aff 220 N. Y. 605 mem, 115 NE 1046 mem)].

[a] **Rule applies** whether plea is specific or general. Manning v. Meredith, 69 Iowa 430, 29 NW 336.

27. Iowa.—Hoddy v. Osborn, 9 Iowa 517.

Kan.—Lapham v. Kansas, etc., Oil, etc., Co., 87 Kan. 65, 123 P 863, AnnCas1913D 813.

Mass.—Canfield v. Miller, 13 Gray 274; Wheaton v. Nelson, 11 Gray 15.

Minn.—Shakopee First Nat. Bank v. Strait, 71 Minn. 69, 73 NW 645.

Oh.—Brown v. Gimm, 10 Oh. Cir. Dec. 538.

S. C.—Hopper v. Hopper, 61 S. C. 124, 39 SE 366.

S. D.—Peter Mintener Lumber Co. v. Harvey, 27 S. D. 624, 132 NW 252.

[a] **Thus** (1) under a plea alleging payment of a note by deposit of money in a bank, evidence of payment by note is inadmissible. Shakopee First Nat. Bank v. Strait, 71 Minn. 69, 73 NW 645. (2) Where the answer avers payment by another note, evidence of payment in money or by check is inadmissible. Canfield v. Miller, 13 Gray (Mass.) 274. (3) Evidence of payments other than those set forth are inadmissible. Lapham v. Kansas, etc., Oil, etc., Co., 87 Kan. 65, 123 P 863, AnnCas1913D 813; Wheaton v. Nelsen, 11 Gray (Mass.) 15 (goods not mentioned in answer); Hopper v. Hopper, 61 S. C. 124, 39 SE 366; Peter Mintener Lumber Co. v. Harvey, 27 S. D. 624, 132 NW 252. (4) Under plea of payment as shown by account attached, evidence of payments other than those itemized is not admissible. Hoddy v. Osborn, 9 Iowa 517.

28. Louisiana Tire Co., Inc. v. Todd, 8 La. A. 676.

29. Richards v. Osborne, (Tex. Civ. A.) 164 SW 392; Hendricks v. Leopold, (Tex. A.) 18 SW 638 (check).

30. Brown v. Mitchell, 1 Tex. Unrep. Cas. 373.

31. Brown v. Mitchell, supra.

32. Pleas of payment other than in money see supra § 148.

33. Ark.—Williams v. Uzzell, 108 Ark. 241, 156 SW 843; Bush v. Sproat, 43 Ark. 416.

Conn.—Morehouse v. Northrop, 33 Conn. 380, 89 AmD 211 note.

Del.—Mitchell v. Conrad, 15 Del. 417, 41 A 77.

Ind.—Johnston v. Niemeyer, 10 Ind. 350 (goods); Louden v. Birt, 4 Ind. 566.

Iowa.—Hicks v. Williams, 112 Iowa 691, 84 NW 935.

Ky.—Whittington v. Roberts, 4 T. B. Mon. 173.

N. M.—Phillips v. Gooch, 28 N. M. 448, 214 P 582.

N. Y.—Farmers', etc., Bank v. Sherman, 33 N. Y. 69.

Pa.—Steiner v. Erie Dime Sav., etc., Co., 98 Pa. 591; Hamilton v. Moore, 4 Watts & S. 570.

S. D.—Fall v. Johnson, 8 S. D. 163, 65 NW 909.

Wyo.—Finley v. Pew, 28 Wyo. 342, 205 P 310, 206 P 148 (in absence of motion to make more specific).

34. U. S.—Buddicum v. Kirk, 3 Cranch 293, 2 L. ed. 444 (wheat).

Ark.—Bush v. Sproat, 43 Ark. 416.

Ill.—Ruggles v. Gatton, 50 Ill. 412 (goods).

Mass.—Howe v. Mackay, 5 Pick. 44.

N. M.—Phillips v. Gooch, 28 N. M. 448, 214 P 582 (merchandise).

N. Y.—Farmers', etc., Bank v. Sherman, 33 N. Y. 69 (lumber); Stirna v. Beebe, 11 App. Div. 206, 42 NYS 614 (pork, potatoes, etc.).

Pa.—Beals v. See, 10 Pa. 56, 49 AmD 573; Richabaugh v. Dugan, 7 Pa. 394; Grosholtz v. Stifel, 4 Phila. 16 (under plea of payment in money).

Wyo.—Finley v. Pew, 28 Wyo. 342, 205 P 310, 206 P 148 (bricks).

[a] **Reason for lack of accord in cases** is resemblance to accord and satisfaction of payment in property by agreement between the parties. Phillips v. Gooch, 28 N. M. 448, 214 P 582.

35. Howe v. Mackay, 5 Pick. (Mass.) 44 (deed of land).

36. Cal.—Jones v. Snow, 64 Cal. 456, 2 P 28 (orders drawn on defendant which he paid); Light v. Stevens, 8 Cal. A. 74, 103 P 361 (paid bank check payable to order of creditor and indorsed by him).

Conn.—Morehouse v. Northrop, 33 Conn. 380, 89 AmD 211 (notes).

Del.—Mitchell v. Conrad, 15 Del. 417, 41 A 77 (check).

Iowa.—State Bank v. Kelly, 109 Iowa 544, 80 NW 520 (notes).

La.—Baker Gasoline Co., Inc. v. Sutherland, 8 La. A. 815 (check indorsed by plaintiff).

Nebr.—Hapgood Plow Co. v. Martin, 16 Nebr. 27, 19 NW 512 (notes).

N. Y.—Albany City F. Ins. Co. v. Devendorf, 43 Barb. 444 (check).

Pa.—Hobson v. Croft, 9 Pa. 363 (notes).

Wash.—Edmunds v. Black, 13 Wash. 490, 43 P 330 (bond).

See Heath v. White, 3 Utah 474, 24 P 762 (negotiable note, if notice given).

[a] **Ratification** by principal of agent's acceptance of note in payment may be shown. State Bank v. Kelly, 109 Iowa 544, 80 NW 520.

37. Sullivan v. Sullivan, 20 S. C. 509.

38. Rio Grande Southern R. Co. v. Colorado Fuel, etc., Co., 41 Colo. 3, 91 P 1114; Hollander v. Fletcher, 62 Ind. A. 149, 112 NE 847; McLaughlin v. Webster, 141 N. Y. 76, 35 NE 1081; Newcomb v. La Roe, 160 App. Div. 819, 146 NYS 133 [aff 218 N. Y. 682 mem, 113 NE 1061 mem]; Uvalde Asphalt Pav. Co. v. National Trading Co., 135 App. Div. 391, 120 NYS 11.

[a] **Provision by will** which has been accepted may be shown. McLaughlin v. Webster, 141 N. Y. 76, 35 NE 1081; Newcomb v. La Roe, 160 App. Div. 819, 146 NYS 133 [aff 218 N. Y. 682 mem, 113 NE 1061 mem].

[b] **Release of plaintiff's daughter from engagement** with defendant as payment of note. Hollander v. Fletcher, 62 Ind. A. 149, 112 NE 847.

[c] **Executed compromise and settlement agreement** is admissible. Rio Grande Southern R. Co. v. Colorado Fuel, etc., 41 Colo. 3, 91 P 1114.

39. Wolcott v. Ensign, 53 Ind. 70; Reeves v. Plough, 46 Ind. 350; Simes v. Zane, 1 Phila. (Pa.) 501 (cigars).

40. Wolcott v. Ensign, 53 Ind. 70; Reeves v. Plough, 46 Ind. 350; Crume v. Brightwell, 69 Ind. A. 404, 122 NE 230.

41. Mercantile Bank v. Anderson, 27 App. Div. 94, 50 NYS 176 (negligence of bank to recover upon securities held as collateral not admissible); Plant's Mfg. Co. v. Falvey, 20 Wis. 200.

42. Milgram v. Brown Shoe Co., 80 Ind. A. 385, 139 NE 377.

accepted as payment.[43] But a duebill payable in chattels at a specified place is not admissible to show payment on a cash sale at a different place;[44] nor is evidence admissible that plaintiff by laches in presentment and note of a check given for a debt has made it his own and discharged defendants.[45] In a few jurisdictions evidence of payment other than in money is not admissible unless the substantive facts of the agreement under which the commodity was accepted in payment are pleaded.[46]

[§ 165] **(c) Application of Particular Funds.** Under plea of payment evidence of application of particular funds to the discharge of the debt is admissible,[47] and objections to appropriations of payments may be made;[48] so evidence of erroneous application of payments is admissible,[49] as is evidence to show that the payment was on a debt other than the one sued on.[50] Likewise evidence explaining a letter which is seemingly an admission against interest may be introduced.[51]

[§ 166] **(d) Payment to Person Other than Creditor.**[52] Payment to an agent of plaintiff,[53] or to the assignor,[54] or to a deputy sheriff on a capias ad satisfaciendum,[55] or to a third person pursuant to an agreement with the creditor,[56] is admissible under a general plea of payment. Plaintiff may show that a receipt offered was not given by his agent.[57]

[§ 167] **(e) Payment by Another Person.** Where payment is alleged to have been made by one person, evidence that it was made by another is inadmissible,[58] and it has been held that evidence of payment by a party other than defendant is not admissible unless such fact is averred in the answer.[59] It has been held, however, that under a plea of payment generally payment by an agent may be proved.[60]

[§ 168] **(f) Payment after Suit Brought.** Evidence of payment made after issue joined is not admissible[61] in the absence of a supplemental pleading setting up such payment.[62]

[§ 169] **(g) Payment after Breach.** Where payment on the day the debt became due is pleaded, evidence of payment after the date is not admissible.[63]

[§ 170] **(h) Other Affirmative Defenses.** Under a general plea of payment evidence is not ordinarily admissible of an accord and satisfaction,[64] or of any special arrangement growing out of independent contracts,[65] or of a set-off,[66] or a counterclaim,[67] or equitable recoupment,[68] or a gift,[69] or novation,[70] or a discharge of another jointly liable,[71] or a discharge by parol of a sealed instrument;[72] nor is evidence admissible of the discontinuance of the suit,[73] or of a foreign attachment in an action of debt against the garnishee,[74] or evidence to excuse nonpayment.[75] It has been held, however, that in chancery pleading an allegation of payment may be sustained by proof of satisfaction of the demand in any way, as by set-off, accord and satisfaction,

43. Snyder v. Wertz, 5 Whart. (Pa.) 163.

44. Williams v. Jackson, 31 Mich. 485 (lumber at yard).

45. Smith v. Buchan, 27 U. C. Q. B. (Ont.) 106.

46. People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99; Moore v. Renick, 95 Mo. A. 202, 68 SW 936; Rider v. Culp, 68 Mo. A. 527; Harrington v. Kempton, (S. D.) 222 NW 498.

[a] **Substantial facts of the agreement must be alleged.**—People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99; Moore v. Renick, 95 Mo. A. 202, 68 SW 936.

[b] **Rule does not apply** in action commenced before justice of the peace. Rider v. Culp, 68 Mo. A. 527.

[c] **In Massachusetts** (1) an early case held evidence of payment by a chattel or deed of land admissible under a general plea of payment. Howe v. Mackay, 5 Pick. 44. (2) A later case held evidence of payment by a chattel inadmissible unless the substantive facts of the agreement under which it was made were pleaded. Ulsch v. Muller, 143 Mass. 379, 9 NE 736.

47. Columbia Digger Co. v. Rector, 215 Fed. 618; Whittington v. Roberts, 4 T. B. Mon. (Ky.) 173.

48. Columbia Digger Co. v. Rector, 215 Fed. 618.

49. Columbia Digger Co. v. Rector, supra.

50. Cal.—Yolland Ice, etc., Co. v. Mulcahy, 72 Cal. A. 722, 238 P 119.

Iowa.—Northern Lumber Co. v. Clausen, 201 Iowa 701, 208 NW 72.

La.—Solomon v. Richard, 6 La. A. (Orleans) 129.

N. Y.—Druss v. Rosen, 84 NYS 174.

Tex.—Hendricks v. Leopold, (A.) 18 SW 638.

51. Tolerton, etc., Co. v. Sult, 33 N. D. 283, 156 NW 939.

[a] **Mistake** need not be pleaded to show intention in making a payment. Tolerton, etc., Co. v. Sult, 33 N. D. 283, 156 NW 939.

52. **Pleas of payment to persons other than creditors** see supra §§ 150, 151.

53. State Bank v. Kelly, 109 Iowa 544, 80 NW 520; Spann v. Glass, 35 Tex. 761.

54. Shriner v. Lamborn, 12 Md. 170.

55. Boyce v. Young, 3 Harr. & M. (Md.) 84.

56. Talbotton R. Co. v. Gibson, 106 Ga. 229, 32 SE 151; Griswold v. Ward, 7 N. J. L. 95; Bryson v. Ker, 4 Serg. & R. (Pa.) 308 (money advanced to pay expense of lawsuit to be credited as payment on bond); Fall v. Johnson, 8 S. D. 163, 65 NW 909.

[a] **Evidence admissible:** (1) That plaintiff ordered defendant's secretary to collect the debt and credit it on an account due him from plaintiff, and that he did so. Talbotton R. Co. v. Gibson, 106 Ga. 229, 32 SE 151. (2) Of payments made to heirs of intestate at request of administrator. Griswold v. Ward, 7 N. J. L. 95.

57. Spann v. Glass, 35 Tex. 761.

58. Coffee v. Tevis, 17 Cal. 239.

59. Kansas Nat. Bank v. Quinton, 57 Kan. 750, 48 P 20.

60. Wolcott v. Smith, 15 Gray (Mass.) 537.

61. Withers v. Sandlin, 36 Fla. 619, 18 S 856 (after commencement of action); Hall v. Olney, 65 Barb. (N. Y.) 27.

62. Hall v. Olney, supra.

Pleading payment after suit brought see supra § 137.

63. Denham v. Crowell, 1 N. J. L. 534.

64. See Accord and Satisfaction § 112.

65. Lockwood v. Sturdevant, 6 Conn. 373; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99; Jennings v. Osborne, 2 NYCityCt 195; Morley v. Culverwell, 7 M. & W. 174, 151 Reprint 727.

66. Ala.—Acha Hermanos y Cia v. Rosengrant, 16 Ala. A. 267, 84 S 399 [certiorari den 204 Ala. 85, 85 S 265].

Mass.—Vrusho v. Vrusho, 258 Mass. 185, 154 NE 843; Talcott v. Smith, 142 Mass. 542, 8 NE 413.

Mo.—Oldham v. Henderson, 4 Mo. 295.

N. Y.—Birdsall v. Read, 188 App. Div. 46, 176 NYS 369 (Code Civ. Proc. § 501); Green v. Storm, 3 Sandf. Ch. 305.

Tex.—Hamburg v. Wood, 66 Tex. 168, 18 SW 623; Hudgins Produce Co. v. Beggs, (Civ. A.) 185 SW 339.

[a] **In Louisiana** (1) evidence of compensation is admissible under a plea of payment. Buard v. Buard, 5 Mart. N. S. 132. (2) Evidence of an adverse claim not equally liquidated with plaintiff's demand is not admissible. Maxwell v. Collier, 6 Rob. 86.

[b] **In New Jersey** evidence of set-off could be given only by plea of payment before the statute of 1809. Alexander v. McCleanon, 2 N. J. L. 364; Hews v. Mungan, 2 N. J. L. 256; Walton v. Lippencutt, 2 N. J. L. 161; Phillips v. McCullough, 2 N. J. L. 69.

[c] **In Pennsylvania** (1) evidence of a set-off is not admissible under the general plea of payment. Glamorgan Iron Co. v. Rhule, 53 Pa. 93. (2) Under plea of payment with leave, etc., evidence of set-off is admissible. Glamorgan Iron Co. v. Rhule, supra. (3) Early cases under the Defalcation Act of 1705 allowed evidence of set-off under the plea of payment. Balsbaugh v. Frazer, 19 Pa. 95; Hubler v. Tamney, 5 Watts 51 (where cause of action arises from same transaction as that on which suit is brought). (4) In action on bond for land evidence of payment of taxes due by prior owner is admissible under plea of payment. Fulweiler v. Baugher, 15 Serg. & R. 45.

Necessity of specially pleading see Pleading [31 Cyc 697].

67. Ark.—Hester v. Murphy, 1 Ark. 338.

Ill.—Meyer v. Johnson, 122 Ill. A. 87.

Mass.—Wenz v. Wenz, 222 Mass. 314, 110 NE 969.

S. C.—Wagener v. Mars, 20 S. C. 533.

Wash.—Commercial Bank v. Toklas, 21 Wash. 36, 56 P 927.

[a] **Evidence not admissible** of unliquidated claim. Hester v. Murphy, 1 Ark. 338; Wenz v. Wenz, 222 Mass. 314, 110 NE 969.

Necessity of specially pleading see Pleading [31 Cyc 697].

68. Wallingford v. Alcorn, 75 Okl. 295, 183 P 726.

69. White v. Black, 115 Mo. A. 28, 90 SW 1153 [dist McLaughlin v. Webster, 141 N. Y. 76, 35 NE 1081].

70. McPike Drug Co. v. Williams, 104 Okl. 244, 230 P 904.

71. U. S. v. Beattie, 24 F. Cas. No. 14,554, Gilp. 92.

72. Green v. Lockwood, 1 Del. 331.

73. Latapee v. Pecholier, 14 F. Cas. No. 8,101, 2 Wash. C. C. 180.

74. Updegraff v. Spring, 11 Serg. & R. (Pa.) 188.

75. Voak v. National Inv. Co., 51

etc.[76]

[§ 171] **(i) Partial Payment.** Although it was said in a number of early cases that evidence of part payment could not be admitted under a plea of full payment,[77] the rule now seems well settled that evidence of partial payment is admissible as a defense pro tanto.[78]

[§ 172] **(3) Under General Issue or General Denial—(a) At Common Law.** As has been elsewhere stated, payment may, at common law, be shown under the general issue in assumpsit[79] and debt.[80] In some jurisdictions the rule has been modified so as to allow evidence of payment under a plea of the general issue with notice of payment,[81] or with a brief statement of facts.[82] Where evidence of payment is admissible, plaintiff may introduce evidence to show that the payments were made on demands other than those sued on.[83]

Part payments. In some jurisdictions evidence of partial payment is admissible under the general issue,[84] and in others it is not,[85] unless it is specially pleaded or described in an account filed with the plea.[86]

Payment after suit brought cannot be shown unless pleaded,[87] but if a general payment is relied upon evidence of payment may be introduced without a bill of particulars being filed.[88]

[§ 173] **(b) Under the Codes.** In the code states, as a general rule, evidence of payment is not admissible under a general denial,[89] but in cases in which nonpayment is a necessary allegation of the complaint,[90] evidence of payment is admissible under a general denial,[91] although not admissible under a general denial where the allegation of nonpayment

Minn. 450, 53 NW 708; Omaha First Nat. Bank v. Chilson, 45 Nebr. 257, 63 NW 362.

[a] **Under plea of payment of principal debt,** evidence of release of pledged note and taking of other security is inadmissible. Omaha First Nat. Bank v. Chilson, 45 Nebr. 257, 63 NW 362.

76. Lee v. Beatty, 8 Dana (Ky.) 204; King v. King, 9 N. J. Eq. 44.

77. Hamilton v. Coons, 5 Dana (Ky.) 317.

78. Ala.—McCurdy v. Middleton, 90 Ala. 99, 7 S 655.

Ark.—Owens v. Chandler, 16 Ark. 651.

Conn.—Elm City Lumber Co. v. Mackenzie, 77 Conn. 1, 58 A 10.

Del.—State v. Lobb, 3 Del. 421.

Ill.—Hays v. Smith, 4 Ill. 427; Keyes v. Fuller, 9 Ill. A. 528.

Md.—Rohr v. Anderson, 51 Md. 205.

Eng.—Cousins v. Paddon, 2 C. M. & R. 547, 150 Reprint 234.

Ont.—Gooderham v. Chalmers, 1 U. C. Q. B. 172.

79. See Assumpsit, Action of § 75 note 77.

80. See Debt, Action of § 45 note 47 [a] (2).

81. Conn.—Buell v. Flower, 39 Conn. 462, 12 AmR 414.

Hawaii.—Kapela v. Gilliland, 22 Hawaii 655, 659 [quot Cyc].

Mich.—Smaltz v. Newhof, 178 Mich. 500, 144 NW 853.

Miss.—Sivley v. Williamson, 112 Miss. 276, 72 S 1008.

Vt.—McDonald v. Place, 88 Vt. 80, 90 A 948 (action of general assumpsit).

Va.—Whitley v. Booker Brick Co., 113 Va. 434, 74 SE 160 (in proceeding by motion for judgment); Richmond City, etc., R. Co. v. Johnson, 90 Va. 775, 20 SE 148 (see statutory provisions); Allen v. Hart, 18 Gratt. (59 Va.) 722.

82. Russell v. Fabyan, 28 N. H. 543, 61 AmD 629; Arnold v. Cole, 42 W. Va. 663, 26 SE 312.

83. Smaltz v. Newhof, 178 Mich. 500, 144 NW 853.

84. Munn v. Pope, 2 Stew. (Ala.) 498; Metzger v. Metzger, 35 App. (D. C.) 389.

Generally see Assumpsit, Action of § 75.

85. Shuman v. Shuman, 79 W. Va. 445, 91 SE 264; Shore v. Powell, 71 W. Va. 61, 76 SE 126; Shanklin v. Chrisamore, 4 W. Va. 134.

86. Shore v. Powell, 71 W. Va. 61, 76 SE 126; Shanklin v. Crisamore, 4 W. Va. 134. See Guthrie v. Huntington Chair Co., 69 W. Va. 152, 71 SE 14 (evidence not admissible because no specification held).

87. Shanklin v. Crisamore, 4 W. Va. 134.

[a] **In Arkansas** such evidence was admissible only to mitigate the damages. Costar v. Davies, 8 Ark. 213, 46 AmD 311.

88. Shanklin v. Crisamore, 4 W. Va. 134.

89. Colo.—Esbensen v. Hover, 3 Colo. A. 467, 33 P 1008.

Ga.—Dickson v. Wainwright, 137 Ga. 299, 73 SE 515.

Ind.—Baker v. Kistler, 13 Ind. 63; Hubler v. Pullen, 9 Ind. 273, 68 AmD 620. But see Indiana, etc., R. Co. v. Adams, 112 Ind. 302, 14 NE 80 (where in an action to which payment was pleaded the court said defendant could, under the general issue, prove partial or complete satisfaction since the suit was commenced).

Iowa.—Siegel Market v. Billings, 203 Iowa 190, 210 NW 749.

Ky.—American Oil Pump, etc., Co. v. Sizemore, 210 Ky. 690, 276 SW 558.

La.—Bludworth v. Hunter, 9 Rob. 256 (denial of existence of mortgage too general to authorize evidence of payment); Davis v. Davis, 17 La. 259; Doubrere v. Papin, 4 Mart. 184 (agreement to receive money at different place cannot be shown); Arkadelphia Milling Co. v. Walker-Howe Grocer Co., Inc., 5 La. A. 233.

Minn.—Farnham v. Murch, 36 Minn. 328, 31 NW 453.

Mo.—Citizens' Trust Co. v. Going, 288 Mo. 505, 232 SW 996 [aff (A.) 224 SW 1019]; State v. Peterson, 142 Mo. 526, 39 SW 453, 40 SW 1094; Wilkerson v. Farnham, 82 Mo. 672; People's Bank v. Stewart, 136 Mo. A. 24, 117 SW 99; Henderson v. Davis, 74 Mo. A. 1; Hyde v. Hazel, 43 Mo. A. 668; George T. Smith Middlings Purifier Co. v. Rembaugh, 21 Mo. A. 390.

Nebr.—Omaha Alfalfa Milling Co. v. Hallen, 105 Nebr. 193, 179 NW 1010; Barker v. Wheeler, 62 Nebr. 150, 87 NW 20; Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304; Cady v. South Omaha Nat. Bank, 46 Nebr. 756, 65 NW 906.

N. Y.—McKyring v. Bull, 16 N. Y. 297, 69 AmD 696; Potter v. Gates, 2 Silv. Sup. 389, 9 NYS 87; Stumpf v. Cohen, 78 Misc. 158, 137 NYS 905; Rogers v. T. H. Simonson, etc., Co., 45 Misc. 323, 90 NYS 298; Ft. Wayne First Nat. Bank v. Jennings, 44 Misc. 374, 89 NYS 995; Price Printing House v. Jewelers' Review Pub. Co., 10 Misc. 743, 31 NYS 800; Ariston Realty Co. v. Bernstein, 111 NYS 538.

Okl.—Upham Shoe Co. v. Pollard, 111 Okl. 228, 239 P 244; Lawless v. Tuthill, 97 Okl. 210, 223 P 613; Standard Fashion Co. v. Joels, 60 Okl. 195, 159 P 846.

Or.—L. B. Menefee Lumber Co. v. MacDonald, 122 Or. 579, 260 P 444; Clark v. Wick, 25 Or. 446, 36 P 165.

S. C.—McElwee v. Hutchinson, 10 S. C. 436.

S. D.—Kimball State Bank v. Harker, 35 S. D. 276, 152 NW 100.

Tex.—Mayblum v. Austin, 1 Tex. A. Civ. Cas. § 616.

Wis.—Gardner v. Avery Mfg. Co., 117 Wis. 487, 94 NW 292; Martin v. Pugh, 23 Wis. 184.

[a] **Rule applies:** (1) In action to recover money claimed to be due upon ordinary contracts. Barker v. Wheeler, 62 Nebr. 150, 87 NW 20. (2) In ordinary money demands. Wilkerson v. Farnham, 82 Mo. 672. (3) In action on promissory note. George T. Smith Middlings Purifier Co. v. Rembaugh, 21 Mo. A. 390.

90. See supra §§ 129, 130.

91. Cal.—Ball v. Putnam, 123 Cal. 134, 55 P 773; Shasta Bank v. Boyd, 99 Cal. 604, 34 P 337; Mickle v. Heinlen, 92 Cal. 596, 28 P 784; Wetmore v. San Francisco, 44 Cal. 294; Davanay v. Eggenhoff, 43 Cal. 395; Brooks v. Chilton, 6 Cal. 640; Snodgrass v. Snodgrass, 81 Cal. A. 360, 253 P 755 (action for services rendered on account stated); Brooks v. Ardizzone, 9 Cal. A. 215, 98 P 393 (action for services rendered). But see Pastene v. Pardini, 135 Cal. 431, 67 P 681 (where, in an action on a promissory note, it was said that payment is an affirmative defense which must be pleaded).

Ida.—Marysville Dev. Co. v. Hargis, 41 Ida. 257, 239 P 522.

Iowa.—Brenton v. Hill, 197 Iowa 125, 196 NW 947.

Mo.—State v. Peterson, 142 Mo. 526, 39 SW 453, 40 SW 1094; Wheeler, etc., Mfg. Co. v. Tinsley, 75 Mo. 458; St. Louis Perfection Tire Co. v. McKinney, 212 Mo. A. 355, 245 SW 1100.

Mont.—Mutual Oil Co. v. Hamilton, 73 Mont. 385, 236 P 545.

Nebr.—Barker v. Wheeler, 62 Nebr. 150, 87 NW 20.

N. M.—Cunningham v. Springer, 13 N. M. 259, 82 P 232 [aff 204 U. S. 647, 27 SCt 301, 51 L. ed. 662, 9 Ann Cas 897].

N. D.—Tolerton, etc., Co. v. Sult, 33 N. D. 283, 156 NW 939.

[a] **In action to recover money due,** defendant may prove payment under general denial. Ball v. Putnam, 123 Cal. 134, 55 P 773; Mickle v. Heinlen, 92 Cal. 596, 28 P 784; Wetmore v. San Francisco, 44 Cal. 294; Marysville Dev. Co. v. Hargis, 41 Ida. 257, 239 P 522; Cunningham v. Springer, 13 N. M. 259, 82 P 232 [aff 204 U. S. 647, 27 SCt 301, 51 L. ed. 662, 9 AnnCas 897].

[b] **Rule is limited** to payments made before, and not after, suit is brought. Bank of Commerce v. Broyles, 16 N. M. 414, 120 P 670 [rev on other grounds 234 U. S. 64, 34 SCt 730, 58 L. ed. 1214].

[c] **In New York** (1) the rule as above stated seems to be the law (Knapp v. Roche, 94 N. Y. 329; Patterson v. J. Walter Gage Realty Co., 164 App. Div. 787, 150 NYS 215 [contract for sale of real estate, one half cash, balance mortgage]; Altman v. Bungay, 161 App. Div. 583, 146 NYS 949; Schwarzler v. McClenahan, 38 App. Div. 525, 56 NYS 611; Cochran v. Reich, 91 Hun 440, 36 NYS 233, 25 NYCivProc 147, 2 NYAnnCas 313 [dist Lent v. New York, etc., R. Co., 130 N. Y. 504, 28 AbbNCas 478, 29 NE 988]; Mills v. Gold, 79 Misc. 209, 139 NYS 846; Harder v. Continental Printing, etc., Co., 64 Misc. 89, 117 NYS 1001), (2) although there are cases to the effect that evidence of payment is never admissible under a general denial (Lent v. New York, etc., R. Co., 130 N. Y. 504, 29 NE 988;

was unnecessary.[92] This rule is not universal, however, it being held in certain states that under a general denial of a negative averment of nonpayment, evidence of payment is not admissible, whether such allegation was necessary or not,[93] and in at least one jurisdiction, evidence of payment is admissible under a general denial where the complaint merely alleges the indebtedness in general terms,[94] but not where particulars of the claim are stated.[95] It has been held that, where suit is brought to recover a balance alleged to be due after deducting certain stated payments, defendant may prove other payments under a general denial,[96] and that, where plaintiff declares generally upon a balance due, both sides of the account are open upon the general issue;[97] and other cases have held that in a suit for a balance due above all payments made, no payment being specified, evidence of payments is admissible under a general denial,[98] but where plaintiff alleges a specific amount as originally due and admits partial payments thereon, payments other than those admitted must be specially pleaded if they are to be relied upon.[99] Also, under a general denial, evidence is admissible to show that no indebtedness to plaintiff ever existed on the cause alleged.[1]

Evidence of payment by a third person is not admissible under a general denial.[2]

After suit brought. In jurisdictions where evidence of payment is admissible under a general denial, evidence of payment after the commencement of the action is not admissible.[3]

[§ 174] **(4) Under Replication and Subsequent Pleadings.** The rule in code states,[4] that evidence of payment is not admissible under a general denial, applies where the general denial is contained in a reply.[5] So evidence that payment was accepted under duress is inadmissible under a general denial of payment in a reply.[6]

[§ 175] **c. Variance.**[7] The evidence must correspond with the allegations in the pleadings,[8] and payment must be proved as alleged in the pleadings.[9] So the proof as to payments must be within, and correspond with, the bill of particulars.[10] An immaterial variance, however, may be disregarded.[11] An averment of payment is not supported by proof

Crawford v. Tyng, 10 Misc. 143, 30 NYS 907; Dry Dock, etc., R. Co. v. North, etc., R. Co., 3 Misc. 61, 22 NYS 556).

92. Hyde v. Hazel, 43 Mo. A. 668; Werfelman v. Quick, 187 App. Div. 732, 176 NYS 58; Cochran v. Reich, 91 Hun 440, 36 NYS 233, 25 NYCivProc 147, 2 NYAnnCas 313; Harris v. Striker, 77 Misc. 219, 135 NYS 762; George A. Fuller Co. v. Manhattan Constr. Co., 44 Misc. 219, 88 NYS 1049.

[a] **Denial on information and belief** of allegation of nonpayment is insufficient under code provisions requiring matter of defense to be set up as defense. Werfelman v. Quick, 187 App. Div. 732, 176 NYS 58.

93. Ind.—Pierce v. Hower, 142 Ind. 626, 42 NE 223; Hubler v. Pullen, 9 Ind. 278, 64 AmD 620.

Nebr.—Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

N. C.—Ellison v. Rix, 85 N. C. 77.

Or.—L. B. Menefee Lumber Co. v. MacDonald, 122 Or. 579, 260 P 444.

Wash.—Columbia Nat. Bank v. Western Iron, etc., Co., 14 Wash. 162, 44 P 145.

94. Parker v. Hays, 7 Kan. 412; Stevens v. Thompson, 5 Kan. 305; Marley v. Smith, 4 Kan. 183.

95. St. Louis, etc., R. Co. v. Grove, 39 Kan. 731, 18 P 958; Clark v. Spencer, 14 Kan. 398, 19 AmR 96; Stevens v. Thompson, 5 Kan. 305.

96. Cal.—Ball v. Putnam, 123 Cal. 134, 55 P 773.

Dak.—Brown v. Forbes, 6 Dak. 273, 43 NW 93.

La.—Fram v. Allen, 3 Mart. 381.

Mont.—Harri v. Farmers' Co-op. Co., 69 Mont. 149, 223 P 109.

Okl.—Jones v. El Reno Mill, etc., Co., 26 Okl. 796, 110 P 1071, AnnCas 1912B 486.

S. C.—Parker v. Mayes, 85 S. C. 419, 67 SE 559, 137 AmSR 912; McElwee v. Hutchinson, 10 S. C. 436.

S. D.—Kimball State Bank v. Harker, 35 S. D. 276, 152 NW 100.

"Where the action is merely for an alleged existing balance due at the time of the institution of the suit, without reference to the extent or amount or original liability, evidence of payment is admissible under the general denial." Jones v. El Reno Mill, etc., Co., supra.

[a] **Theory** is that such averments amount to an allegation that nothing has been paid except as stated in the complaint which is put in issue by a general denial and disproved by showing other payments. McElwee v. Hutchinson, 10 S. C. 436.

[b] **In Texas,** in an action to foreclose vendor's lien note, where plaintiff's testimony is not conclusive as to payment, defendant may show payment, although not pleaded. Key v. Jones, (Civ. A.) 191 SW 736.

97. Quin v. Lloyd, 41 N. Y. 349 [dist McKyring v. Bull, 16 N. Y. 297, 69 AmD 696]; Acharan v. Samuel, 144 App. Div. 182, 128 NYS 943.

98. Conkling v. Weatherwax, 181 N. Y. 258, 73 NE 1028, 2 AnnCas 740; Quin v. Lloyd, 41 N. Y. 349.

99. McKyring v. Bull, 16 N. Y. 297, 69 AmD 696; Acharan v. Samuel, 144 App. Div. 182, 128 NYS 943.

1. Gruntz v. Hubert, 7 La. A. 648 (was payment of antecedent debt, and not a loan); Marvin v. Mandell, 125 Mass. 562 (on account of money received and applied by defendant); Penwell v. Flickinger, 46 Mont. 526, 129 P 323 (evidence of payment before assignment); Flowers v. Slater, 2 Oh. Dec. (Reprint) 336, 2 WestLMonth 445 (payment at time of sale).

2. Kansas Nat. Bank v. Quinton, 57 Kan. 750, 48 P 20.

3. Bank of Commerce v. Broyles, 16 N. M. 414, 120 P 670 [rev on other grounds 234 U. S. 64, 34 SCt 730, 58 L. ed. 1214].

4. See supra § 173.

5. Judy v. Duncan, 21 Mo. A. 548; Wilcox v. Joslin, 10 NYS 342; Kimball State Bank v. Harker, 35 S. D. 276, 152 NW 100.

6. Smith v. Cottrel, 8 Baxt. (Tenn.) 62.

7. See also Bills and Notes §§ 1280-1282, 1286.

8. Ala.—Wharton v. Cunningham, 46 Ala. 590.

Ark.—Turner v. Huggins, 14 Ark. 21.

Minn.—Stebbins v. Hall, 53 Minn. 169, 54 NW 1110.

N. Y.—Mayer v. Haaren, 57 N. Y. Super. 574, 5 NYS 436 (proof that payment was made for a different purpose competent where it tends to establish theory of defense).

Ont.—Williams v. Marshall, 20 U. C. Q. B. 230.

[a] **An allegation** in a declaration that the consideration paid for a horse sold by plaintiff to defendant was one hundred dollars in money is supported by evidence that plaintiff took the horse from defendant at one hundred dollars, as a payment to that extent of a cash debt which defendant owed plaintiff. Turner v. Huggins, 14 Ark. 21.

9. Ala.—Tuskaloosa Cotton-Seed Oil Co. v. Perry, 85 Ala. 158, 4 S 635; Gilmer v. Wallace, 75 Ala. 220.

La.—Gaude v. Gaude, 28 La. Ann. 181.

Md.—Staley v. Thomas, 68 Md. 439, 13 A 53.

Mass.—Canfield v. Miller, 13 Gray 274.

Minn.—Shakopee First Nat. Bank v. Strait, 71 Minn. 69, 73 NW 645.

N. Y.—Mann v. Morewood, 7 N. Y. Super. 557.

Okl.—Barlas v. Catechis, 129 Okl. 142, 263 P 647 (evidence of contract other than sued on cannot be shown).

S. D.—Peter Mintener Lumber Co. v. Harvey, 27 S. D. 624, 132 NW 252.

Eng.—Palmer v. Costerton, 4 Q. B. 525, 45 ECL 525, 114 Reprint 996; Cook v. Hopewell, 11 Exch. 555, 156 Reprint 951 (plea of payment of claim and all damages after action brought not proved on failure to show payment of costs).

See Williams v. Uzzell, 108 Ark. 241, 156 SW 843 (plaintiff entitled to continuance where proof of agreement between payee of note and defendant's husband allowing claim of husband to be credited on note was offered under general plea of payment).

[a] **Overpayment.**—A complaint alleging overpayment will be understood to mean an overpayment in money, and proof of overpayment in stock will not sustain it. Mann v. Morewood, 7 N. Y. Super. 557.

10. Judd v. Burton, 51 Mich. 74, 16 NW 237.

[a] **In New York,** under claim for money paid, evidence of payment in land is sufficient to sustain the action. Bonney v. Seely, 2 Wend. 481.

11. See cases infra this note.

[a] **Immaterial variance.**—(1) In an action by A against B for money paid to C for B's use, proof that the payment was made by giving B a receipt for a debt owed by him to A was not a material variance from the bill of particulars which alleged the payment of cash. McNerney v. Barnes, 77 Conn. 155, 58 A 714. (2) Where, under an allegation that a party paid a stated amount to his adversary's attorney, the proof showed that payment was actually made to the sheriff, who immediately and in the party's presence handed the money to the attorney. Powers v. Smith, 38 SW 1045, 18 KyL 983.

[b] **Fatal variance exists** where conditional receipt is offered to prove plea of absolute payment and discharge. Yeuren v. Smalley, 3 Vt. 251.

[c] **No variance exists** (1) where plaintiff alleged the sale of a horse to him for money, and the proof showed that he gave his promissory note in payment. Hadley v. Bordo, 62 Vt. 285, 19 A 476. (2) Between a bill in equity alleging payment by complainant to defendant by delivering a check and proof that complainant mailed to a third person a check, and that the third person gave his

of tender,[12] nor that the obligation sued on has become outlawed,[13] nor of an accord and satisfaction,[14] nor by proof of a mutual indebtedness in the absence of an agreement to offset one debt against the other,[15] nor of a counterclaim,[16] nor of a discharge in law.[17] Where payment in full is pleaded and only part payment is proved, the debtor is entitled to credit for that part which he proves to be paid.[18] It has been held that an averment of the place of payment will not preclude the party from showing payment at a different place.[19]

[§ 176] **C. Burden of Proof*[20]—1. General Rule.** The general rule is that the burden of proving payment is upon the party who alleges it.[21] The most

personal check to defendant, who obtained the money thereon. Smith v. Pullum, 184 Ala. 380, 63 S 965. (3) Where, under a plea that a note given by a client to his attorney was paid, proof that the attorney retained the amount due on the note out of money collected in payment of a judgment which he had recovered for the client was made. Braden v. Lemmon, 127 Ind. 9, 26 NE 476.

12. Clark v. Mullenix, 11 Ind. 532. See generally Tender [38 Cyc 127].

13. Austin v. Wilson, 46 Iowa 362.

14. Hardey v. Coe, 5 Gill (Md.) 189. See also Accord and Satisfaction § 112.

15. Vrusho v. Vrusho, 258 Mass. 185, 154 NE 843.

16. Wagener v. Mars, 20 S. C. 533.

17. State v. Reading, 1 Del. 23.

18. Owens v. Chandler, 16 Ark. 651; Smith v. Turner, 3 La. A. 91; Cage v. Iler, 13 Miss. 410, 43 AmD 521.

19. Brown v. Gooden, 16 Ind. 444.

20. **Burden of proof generally** see Evidence §§ 13-24.

21. U. S.—Camden v. Stuart, 144 U. S. 104, 12 SCt 585, 36 L. ed. 363; Knox College v. Gray, 299 Fed. 179; The J. D. Peters, 78 Fed. 368; Winter v. Simonton, 30 F. Cas. No. 17,894, 3 Cranch C. C. 104 [rev on other grounds 5 Pet. 141, 8 L. ed. 75]; Archer v. Morehouse, 30 F. Cas. No. 18,225, Hempst. 184.

Ala.—Montgomery First Nat. Bank v. Montgomery Cotton Mfg. Co., 211 Ala. 551, 101 S 186; Tuscaloosa Lumber Co. v. Tropical Paint, etc., Co., 211 Ala. 258, 100 S 236; Wilkerson v. Sorsby, 208 Ala. 345, 94 S 481; Robinson v. Smith, 207 Ala. 378, 92 S 546; Dixie Industrial Co. v. Wetumpka Bank, 207 Ala. 293, 92 S 786; Robinson v. Smith, 207 Ala. 378, 92 S 546; Monk v. Stuart, 204 Ala. 562, 86 S 529; Cross v. Ensley Bank, 203 Ala. 561, 84 S 267; Hunter v. Taylor, 189 Ala. 104, 66 S 671; Abercrombie v. Goode, 187 Ala. 310, 65 S 816; Seed v. Brown, 180 Ala. 8, 60 S 98; Kirkland v. Arnold, 178 Ala. 227, 59 S 162; Pollak v. Winter, 173 Ala. 550, 55 S 828; Turrentine v. Grigsby, 118 Ala. 380, 23 S 666; Sampson v. Fox, 109 Ala. 662, 19 S 896, 55 AmSR 950; Pearce v. Walker, 103 Ala. 250, 15 S 568; McCalley v. Otey, 99 Ala. 584, 12 S 406, 42 AmSR 87; Smith v. Collins, 94 Ala. 394, 10 S 334; Snodgrass v. Caldwell, 90 Ala. 319, 7 S 834; McCurdy v. Middleton, 82 Ala. 131, 2 S 721; McWilliams v. Phillips, 71 Ala. 80; Lehman v. McQueen, 65 Ala. 570; Alabama Gold L. Ins. Co. v. Sledge, 62 Ala. 566; Wolffe v. Nall, 62 Ala. 24; Harwood v. Pearson, 60 Ala. 410; Levystein v. Whitman, 59 Ala. 345; Shulman v. Brantley, 50 Ala. 81; McLendon v. Hamblin, 34 Ala. 86; Johnson v. Collins, 20 Ala. 435; Collins v. Boyd, 14 Ala. 505; Edmonds v. Edmonds, 1 Ala. 401; Sullivan v. Hobbs, 19 Ala. A. 465, 98 S 307 [certiorari den 210 Ala. 372, 98 S 309]; Lampkin v. Thomas, 16 Ala. A. 482, 79 S 156 [aff 202 Ala. 316, 80 S 398].

Ark.—Thomas v. Tygart, 6 SW (2d) 827; Leach v. Maxwell, 286 SW 1029; Hume v. Indiana Nat. L. Ins. Co., 155 Ark. 466, 245 SW 19; St. Louis, etc., R. Co. v. Bertig Store Co., 142 SW 830; Randleman v. Taylor, 94 Ark. 511, 127 SW 723, 140 AmSR 141; Black v. Roberson, 112 SW 402; Hamby v. Brooks, 86 Ark. 448, 111 SW 277; Hays v. Dickey, 67 Ark. 169, 53 SW 887; Blass v. Lawhorn, 64 Ark. 466, 42 SW 1068; Robinson v. Woodson, 33 Ark. 307; Wheat v. Moss, 16 Ark. 243; Whiting v. Beebe, 12 Ark. 421; Pelham v. Moreland, 11 Ark. 442.

Cal.—Light v. Stevens, 159 Cal. 288, 113 P 659; Stuart v. Lord, 138 Cal. 672, 72 P 142; Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127; Fisk v. Casey, 119 Cal. 643, 51 P 1077; Caulfield v. Sanders, 17 Cal. 569; Madera Sugar Pine Co. v. Adams, 68 Cal. A. 111, 228 P 544; Cornwell v. Mulcahy, 62 Cal. A. 658, 217 P 568; Lewis v. McNeal, 58 Cal. A. 70, 207 P 1021; Dyer v. Minturn, 47 Cal. A. 1, 189 P 1046; White v. Thompson, 40 Cal. A. 447, 180 P 953; Barrett-Hicks Co. v. Glas, 14 Cal. A. 289, 111 P 760; Sanguinetti v. Pelligrini, 2 Cal. A. 294, 83 P 293.

Colo.—Johnson v. Engstrom, 61 Colo. 30, 155 P 1095, 1098 [cit Cyc]; Thomas v. Carey, 26 Colo. 485, 58 P 1093; Perot v. Cooper, 17 Colo. 80, 28 P 391, 31 AmSR 258; Lovelock v. Gregg, 14 Colo. 53, 23 P 86; Mohr v. Barnes, 4 Colo. 350; Wallace v. Axtell, 5 Colo. A. 432, 39 P 594; Denver, etc., R. Co. v. Wilson, 4 Colo. A. 355, 36 P 67.

Conn.—Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 87 Conn. 691, 89 A 909; O'Loughlin v. Poli, 82 Conn. 427, 74 A 763.

Dak.—Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 NW 107.

Del.—Janvier v. Culbreth, 21 Del. 505, 63 A 309.

Fla.—Loomis v. Dubois, 82 Fla. 293, 89 S 804; International Harvester Co. v. Smith, 51 Fla. 220, 40 S 840; Lakeside Press, etc., Engraving Co. v. Campbell, 39 Fla. 523, 22 S 878.

Ga.—Warthen v. Withers, 161 Ga. 864, 132 SE 65; Gilliard v. Johnston, 161 Ga. 17, 129 SE 434; Copelin v. Williams, 152 Ga. 692, 111 SE 186; Patterson v. Campbell, 136 Ga. 664, 71 SE 1117; Christian v. Bryant, 102 Ga. 561, 27 SE 666; Lanier v. Hugueley, 91 Ga. 791, 18 SE 39; Tippin v. Brockwell, 89 Ga. 467, 15 SE 539; Powell v. Brunner, 86 Ga. 531, 12 SE 744; Murphy v. Justices Wilkinson County Inferior Ct., 11 Ga. 331; Merchants' Bank v. Rawls, 7 Ga. 191, 50 AmD 394; Hobbs v. Citizens' Bank, 32 Ga. A. 522, 124 SE 72.

Hawaii.—Bannister v. Lucas, 21 Hawaii 222, AnnCas1916A 1136.

Ida.—Sheffield v. Cleland, 19 Ida. 612, 115 P 20.

Ill.—Toffenetti v. Mellor, 323 Ill. 143, 153 NE 744 [aff 238 Ill. A. 330]; U. S. Wringer Co. v. Cooney, 214 Ill. 520, 73 NE 803; Rhodes v. Ashurst, 176 Ill. 351, 52 NE 118 [aff 71 Ill. A. 242]; Bell v. Neiderer, 169 Ill. 54, 48 NE 194; Waughop v. Bartlett, 165 Ill. 124, 46 NE 197; Jacksonville Nat. Bank v. Beesley, 159 Ill. 120, 42 NE 164; Grimes v. Hilliary, 150 Ill. 141, 36 NE 977; Atkinson v. Linden Steel Co., 138 Ill. 187, 27 NE 919; Ritter v. Schenk, 101 Ill. 387; Kent v. Mason, 79 Ill. 540; American v. Rimpert, 75 Ill. 228; Bagley v. McClure, 46 Ill. 381; Douglas v. Pfeiffer, 46 Ill. 102; Whitaker Paper Co. v. Galesburg Mail Co., 238 Ill. A. 600; Greeman Bros. Mfg. Co. v. M. L. Nelson Furniture Co., 191 Ill. A. 494; Mosely v. Waite, 180 Ill. A. 408; Turner v. Turner, 164 Ill. A. 1; Evans v. Ross Constr. Co., 142 Ill. A. 375; Laswell v. Gahan, 122 Ill. A. 513; Robison v. Bailey, 113 Ill. A. 123; Ross v. Skinner, 107 Ill. A. 579; Boon v. Bliss, 98 Ill. A. 341, Harlev v. Harlev, 67 Ill. A. 138; Lawther v. Everts, 63 Ill. A. 432 [aff 165 Ill. 487, 46 NE 233]; Price v. German Exch. Bank, 60 Ill. A. 418; Schanzenbach v. Brough, 58 Ill. A. 526; Schwarze v. Greenbaum, 58 Ill. A. 221; Hanke v. Cobiskey, 57 Ill. A. 267; Witner v. Zeman, 30 Ill. A. 195; Johnson v. Breaton, 1 Ill. A. 293.

Ind.—Godfrey v. Crisler, 121 Ind. 203, 22 NE 999; Clifford v. Smith, 4 Ind. 377; Gas Belt Torpedo Co. v. Ward, 43 Ind. A. 537, 87 NE 1110; Moore v. McPheeters, 16 Ind. A. 696, 43 NE 972.

Ind. T.—Barton v. Ferguson, 1 Ind. T. 263, 37 SW 49.

Iowa.—Herbold v. Sheley, 220 NW 88; Riggs v. Gish, 201 Iowa 148, 205 NW 833; Youtsey v. Lemley, 169 Iowa 401, 151 NW 491; Tadrow v. Johnson, 167 Iowa 513, 149 NW 645; Fitzgerald v. Flanagan, 155 Iowa 217, 135 NW 738, AnnCas1914C 1104; Jamison v. Auxier, 145 Iowa 654, 124 NW 606; Delana v. Voss, 114 NW 1076; Walker v. Russell, 73 Iowa 340, 35 NW 443.

Kan.—Pioneer Mortg. Co. v. Randall, 113 Kan. 62, 213 P 668; Cobleskill First Nat. Bank v. Hellyer, 53 Kan. 695, 37 P 130, 42 AmSR 316; Powell v. Wallace, 44 Kan. 656, 25 P 42; Guttermann v. Schroeder, 40 Kan. 507, 20 P 230; Lathrop v. Davenport, 20 Kan. 285; Anthony v. Mott, 10 Kan. A. 105, 61 P 509.

Ky.—Fornash v. Antrobus, 178 Ky. 621, 199 SW 781; Whitteker v. Holcomb, 177 Ky. 790, 198 SW 533; Chester v. Day, 127 SW 794; Harris v. Merz Architectural Iron Works, 82 Ky. 200; Clarkson v. White, 3 B. Mon. 376; Powell v. Swan, 5 Dana 1; Tom's Creek Coal Co. v. Skeene, 90 SW 993, 28 KyL 962; Ermert v. Dietz, 58 SW 442, 22 KyL 540; Gernert Bros. Lumber Co. v. Rapier, 37 SW 261, 18 KyL 536; Arthur v. Dayton, 4 KyL 831; Todd v. Todd, 11 Ky. Op. 349; Allen v. Randle, 5 Ky. Op. 215; Scott v. Pinson, 3 Ky. Op. 573.

La.—Madison Lumber Co. v. Bachemin, 120 S 508; J. T. Mann & Co., Inc. v. Barrett, 120 S 501; Irwin v. Gernon, 18 La. Ann. 228; Moreira's Succ., 16 La. Ann. 368; Kennedy v. Beaseley, 8 La. Ann. 88; Diggs v. Parish, 18 La. 6; Skinner v. Hext, 8 La. A. 481; Allen v. Gentry, 8 La. A. 293; Brown v. King, 7 La. A. 546; Hitt v. Herndon, 7 La. A. 87; Smith v. Turner, 3 La. A. 91; Prechter v. Jannarrelli, 10 La. A. (Orleans) 179; Importers, etc., Nat. Bank v. Abraham, 9 La. A. (Orleans) 278; Barriguand v. Cistac, 7 La. A. (Orleans) 300; Solomon v. Richard, 6 La. A. (Orleans) 129.

Me.—Church v. Church, 122 Me. 459, 120 A 428; Fairbanks v. Barker, 115 Me. 11, 97 A 3; Essex Fertilizer Co. v. Danforth, 111 Me. 212, 88 A 651; Witherell v. Swan, 32 Me. 347.

Md.—Brown v. White, 27 A 315.

Mass.—Gerrish Dredging Co. v. Bethlehem Shipbuilding Corp., 247 Mass. 162, 141 NE 867; Cary Brick Co. v. Wheeler, 210 Mass. 338, 96 NE 800; Swift v. Boyd, 202 Mass. 26, 88 NE 439; Jewett v. Draper, 6 Allen 434; Burnham v. Allen, 1 Gray 496; Attleborough v. Middleborough, 10 Pick. 378; McGregory v. Prescott, 5 Cush. 67.

Mich.—Oesterle v. Kinne, 243 Mich. 615, 220 NW 660; Van Sceiver v. King, 176 Mich. 605, 142 NW 1069; Liesemer v. Burg, 106 Mich. 124, 63 NW 999; Hood v. Olin, 80 Mich. 296, 45 NW 341; Coon v. Bouchard, 74

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Mich. 486, 42 NW 72; Doolittle v. Gavagan, 74 Mich. 11, 41 NW 846; McCabe v. Shaver, 69 Mich. 25, 36 NW 800; Baldwin v. Clock, 68 Mich. 201, 35 NW 904; Bennett's Est., 52 Mich. 415, 18 NW 195; Hulbert v. Hammond, 41 Mich. 343, 1 NW 1040; Atwood v. Cornwall, 25 Mich. 142; Adams v. Field, 25 Mich. 16.

Minn.—Solway State Bank v. Beltrami County School Dist. No. 26, 170 Minn. 83, 212 NW 25; Merrill v. Zimmerman, 152 Minn. 333, 188 NW 1019; Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 NW 109.

Miss.—Greenburg v. Saul, 91 Miss. 410, 45 S 569.

Mo.—Schneider v. Maney, 242 Mo. 36, 145 SW 823; Ferguson v. Dalton, 158 Mo. 323, 59 SW 88; Oil Well Supply Co. v. Wolfe, 127 Mo. 616, 30 SW 145; Oil-Well Supply Co. v. Wolf, 28 SW 167; Yarnell v. Anderson, 14 Mo. 619; Dorroh v. Wall, (A.) 297 SW 705; Kines v. Jamison, (A.) 277 SW 969; Harrison v. Doyle, 163 Mo. A. 602, 147 SW 504; West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996; Steltemeier v. Barrett, 145 Mo. A. 534, 122 SW 1095; Barrett v. Kern, 141 Mo. A. 5, 121 SW 774; Griffith v. Creighton, 61 Mo. A. 1; Diel v. Stegner, 56 Mo. A. 535; Carder v. Primm, 47 Mo. A. 301; John Hutchinson Mfg. Co. v. Henry, 44 Mo. A. 263; State v. Richardson, 29 Mo. A. 595.

Mont.—Bell v. Grimstad, 82 Mont. 185, 266 P 394, 397 [quot Cyc].

Nebr.—Farmers' Co-op. Mercantile Co. v. Shultz, 113 Nebr. 801, 205 NW 288; Gravert v. Goothard, 81 Nebr. 99, 115 NW 559; Wessel v. Bishop, 76 Nebr. 74, 107 NW 220; Davis v. Hall, 70 Nebr. 678, 97 NW 1023; Mullally v. Dingman, 62 Nebr. 702, 87 NW 543; Ashland Land, etc., Co. v. May, 51 Nebr. 474, 71 NW 67; Curtis v. Perry, 33 Nebr. 519, 50 NW 426; Lamb v. Thompson, 31 Nebr. 448, 48 NW 58; German v. Boslough, 28 Nebr. 33, 44 NW 72; Tootle v. Maben, 21 Nebr. 617, 33 NW 264; Van Buskirk v. Chandler, 18 Nebr. 584, 26 NW 356; Magenau v. Bell, 14 Nebr. 7, 14 NW 664.

Nev.—Isola v. Sorani, 47 Nev. 365, 222 P 796.

N. H.—Smith v. Lewiston Steam Mill, 66 N. H. 613, 34 A 153; Kendall v. Brownson, 47 N. H. 186; Buzzell v. Snell, 25 N. H. 474; Exeter Bank v. Rogers, 6 N. H. 142.

N. J.—Adamski v. Naurot, 138 A 305; Fein v. Meier, 74 N. J. L. 597, 65 A 1117 [aff 71 N. J. L. 12, 58 A 114]; Van Horn v. Van Horn, (Ch.) 20 A 826; Hoffman v. Rauchmiller, 95 N. J. Eq. 500, 122 A 344 [aff 98 N. J. Eq. 692, 130 A 918]; Tonn v. Pier, 82 N. J. Eq. 422, 89 A 510; Morgan v. Morgan, 48 N. J. Eq. 399 [rev on other grounds 50 N. J. Eq. 473, 26 A 331]; McKinney v. Slack, 19 N. J. Eq. 164; Smith v. Burnet, 17 N. J. Eq. 10.

N. M.—Tryone Knitting Mills v. Rubin, 27 N. M. 324, 201 P 867.

N. Y.—Dowling v. Hastings, 211 N. Y. 199, 105 NE 194 [foll Conkling v. Weatherwax, 181 N. Y. 258, 73 NE 1028, 2 AnnCas 740]; Conkling v. Weatherwax, 181 N. Y. 258, 73 NE 1028, 2 AnnCas 740; Dibble v. Richardson, 171 N. Y. 131, 63 NE 829; Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Lerche v. Brasher, 104 N. Y. 157, 10 NE 58, 11 NYCiv Proc 423; California Bank v. Webb, 94 N. Y. 467 [aff 48 N. Y. Super. 175]; Bradford v. Fox, 38 N. Y. 289, 7 Transcr. A. 254 [rev 39 Barb. 203, 16 AbbPr 51, and foll Williams v. Brown, 53 App. Div. 486, 65 NYS 1049]; Lawrence v. Ball, 14 N. Y. 477; Walsh v. Gray, 214 App. Div. 296, 212 NYS 230; Lewis v. South Shore Co-op. Assoc., 211 App. Div. 831, 209 NYS 428; Ehrich v. Andrews, 207 App. Div. 373, 202 NYS 65; Bame v. Groat, 171 App. Div. 708, 157 NYS 750; Skelly v. Mortimer, 154 App. Div. 921, 138 NYS 1100; Redmond v. Hughes, 151 App. Div. 99, 135 NYS 843; Posner v. Rosenberg, 149 App. Div. 272, 133 NYS 704; Bremer v. Ring, 146 App. Div. 724, 131 NYS 487; Acharan v. Samuel, 144 App. Div. 182, 128 NYS 943; Little v. McClain, 134 App. Div. 197, 118 NYS 916; Lynch v. Lyons, 131 App. Div. 120, 115 NYS 227 [aff 197 N. Y. 595 mem, 91 NE 1116 mem]; Hitchings v. Kayser, 65 App. Div. 302, 72 NYS 749 [aff 171 N. Y. 636 mem, 63 NE 1118 mem]; Matter of Rowell, 45 App. Div. 323, 61 NYS 382; Luxemburger Tuchfabriken v. Meyer, 31 App. Div. 52, 52 NYS 955; Hicks-Alixanian v. Walton, 14 App. Div. 199, 43 NYS 541; Frindel v. Schaikewitz, 1 App. Div. 214, 37 NYS 172; Everett v. Lockwood, 8 Hun 356; Hussey v. Culver, 3 Silv. Sup. 126, 6 NYS 466 [aff 130 N. Y. 681 mem, 29 NE 1035 mem]; Gamble v. Lewis, 88 Misc. 139, 151 NYS 778; Salomon v. Fiske, 78 Misc. 406, 138 NYS 422; Ives v. Male, 75 Misc. 387, 135 NYS 526; Guzick v. Ressler, 67 Misc. 447, 123 NYS 78; Dose v. Hirsch Bros., 65 Misc. 515, 120 NYS 91 [refusing to follow Cochran v. Reich, 91 Hun 440, 36 NYS 233, 25 NYCivProc 147, 2 NYAnnCas 313]; Barnes v. Courtright, 37 Misc. 60, 74 NYS 203; Matter of Neil, 35 Misc. 254, 2 Mills Surr. 259, 71 NYS 840; Claflin v. New York Standard Watch Co., 7 Misc. 668, 28 NYS 42; Peters v. Stewart, 1 Misc. 8, 20 NYS 661 [rev on other grounds 2 Misc. 357, 21 NYS 993]; Kessler v. Eastern Zinc Refining Co., Inc., 167 NYS 582; Efron v. Scarpelli, 162 NYS 640; American Slicing Mach. Co. v. Kuchukian, 147 NYS 352; Saks v. Ife, 135 NYS 561; Crow v. Gleason, 20 NYS 590 [rev on other grounds 141 N. Y. 489, 36 NE 497]; Riche v. Martin, 17 NYS 723 [aff 1 Misc. 285, 20 NYS 693]; Matter of Macomber, 11 NYS 198, 2 Conn. Surr. 279; Wager v. Parmenter, 8 NYWklyDig 146; Dean v. Pitts, 10 Johns. 35.

N. C.—Dewey v. Margolis, 195 N. C. 307, 142 SE 22; Carolina Bagging Co. v. Byrd, 185 N. C. 136, 116 SE 90; Metropolitan Discount Co. v. Baker, 176 N. C. 546, 97 SE 495; Geitner v. Jones, 176 N. C. 542, 97 SE 494; Goodman v. White, 174 N. C. 399, 93 SE 906; Thrash v. Ould, 172 N. C. 728, 90 SE 915; McIver v. Smith, 118 N. C. 73, 23 SE 971; Zachary v. Phillips, 101 N. C. 571, 8 SE 359; Harmon v. Taylor, 98 N. C. 341, 4 SE 510; Vaughan v. Lewellyn, 94 N. C. 472; McLean v. Shuman, 38 N. C. 457.

N. D.—Satterlund v. Beal, 12 N. D. 122, 95 NW 518.

Oh.—Carrington v. Davis, Wright 735.

Okl.—Upham Shoe Co. v. Pollard, 111 Okl. 228, 239 P 244; People's Nat. Bank v. Rickords, 85 Okl. 9, 204 P 130; Sinclair v. Stringer, 80 Okl. 218, 195 P 771; Boorigie v. Quinn-Barry Tea, etc., Co., 73 Okl. 296, 176 P 391; State v. Emery, 73 Okl. 36, 174 P 770, 6 ALR 234; Standard Fashion Co. v. Joels, 60 Okl. 195, 159 P 846.

Or.—Smith v. Mills, 112 Or. 496, 230 P 350; Hurst v. Hurst, 95 Or. 563, 188 P 182; Willis v. Holmes, 28 Or. 265, 42 P 989.

Pa.—Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Clymer v. Groff, 220 Pa. 580, 69 A 1119, 14 AnnCas 256; Shrader v. U. S. Glass Co., 179 Pa. 623, 36 A 330; Pool v. White, 175 Pa. 459, 34 A 801; Morrison v. Collins, 127 Pa. 28, 17 A 753, 14 AmSR 827; North Pennsylvania R. Co. v. Adams, 54 Pa. 94, 93 AmD 677; Gebhart v. Francis, 32 Pa. 78; Mitchell v. Mitchell, 4 Pa. Cas. 43, 49, 6 A 682; Evans' Est., 60 Pa. Super. 83; Gallitzin First Nat. Bank v. McNeelie, 37 Pa. Super. 84; Miller's Est., 33 Pa. Super. 20; Salus v. Curson, 28 Pa. Dist. 462; Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367; Wisconsin Chair Co. v. Heilbronner, 30 Pa. Co. 299.

Philippine.—Harry E. Keeler Electric Co., Inc. v. Rodriguez, 44 Philippine 19; Lichauco v. Berenguer, 39 Philippine 643; Toribio v. Foz, 34 Philippine 913; Pinon v. De Osorio, 30 Philippine 365; Ortiz v. Melliza, 22 Philippine 132; Franco v. O'Brien, 13 Philippine 359; Chienco v. Vargas, 11 Philippine 219; Behn v. Rosatzin, 5 Philippine 660.

Porto Rico.—Cochon v. Correa, 32 Porto Rico 674; Falco v. Suau, 18 Porto Rico 713; Olivieri v. Tornabells, 7 Porto Rico 92.

R. I.—Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680; Williams v. Smith, 29 R. I. 562, 72 A 1093.

S. C.—Bacot v. South Carolina Loan, etc., Co., 132 S. C. 340, 127 SE 562; Morris v. Carlisle, 128 S. C. 417, 122 SE 511; Gowdy v. Gowdy, 83 S. C. 349, 65 SE 385; Smith v. Allmon, 74 S. C. 502, 54 SE 1014; Harrell v. Parrott, 50 S. C. 16, 27 SE 521; Thatcher v. Massey, 26 S. C. 155, 1 SE 465; Adger v. Pringle, 11 S. C. 527; Walker v. Berry, 42 S. C. L. 33.

S. D.—Baker v. Baker, 2 S. D. 261, 49 NW 1064, 39 AmSR 776.

Tenn.—Mason v. Spurlock, 4 Baxt. 554; Bass v. Shurer, 2 Heisk. 216; Ford v. Lawrence, (Ch. A.) 51 SW 1023; Vaughn v. Williams, 4 Tenn. Civ. A. 357; Prince v. Fox, 2 Tenn. Civ. A. 319.

Tex.—Wright v. Hardie, 88 Tex. 653, 32 SW 885; Wilson v. Simpson, 80 Tex. 279, 16 SW 40; Henderson v. Landa, 79 Tex. 39, 14 SW 891; Hutchins v. Hamilton, 34 Tex. 290; Matossy v. Frosh, 9 Tex. 610; Martin v. Farmers' Nat. Bank, (Civ. A.) 294 SW 240; Biggs v. Doak, (Civ. A.) 260 SW 882, (Civ. A.) 259 SW 665; Pierce v. Baker, (Civ. A.) 238 SW 699; Leake v. Dallas, (Civ. A.) 197 SW 472; Milwee v. Phelps, 53 Tex. Civ. A. 195, 115 SW 891; Tinsley v. McIlhenny, 30 Tex. Civ. A. 352, 70 SW 793; Grant v. Roberts, (Civ. A.) 38 SW 650; Bannister v. Wallace, 14 Tex. Civ. A. 452, 37 SW 250; Lott v. Achilles, (Civ. A.) 27 SW 587; Cherry v. Butler, 4 Tex. A. Civ. Cas. § 271, 17 SW 1090.

Utah.—Filice v. Biscardi, 67 Utah 171, 246 P 535; Scott v. Austin, 47 Utah 248, 152 P 1178.

Vt.—Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85; Terryberry v. Woods, 69 Vt. 94, 37 A 246; Smith v. Woodworth, 43 Vt. 39.

Va.—Burton v. Manson, 142 Va. 500, 129 SE 356; Hall Bldg. Corp. v. Edwards, 142 Va. 209, 128 SE 521; Moore v. Tate, 22 Gratt. (63 Va.) 351.

Wash.—Zioncheck v. Hepden, 144 Wash. 272, 257 P 835; South Bend First International Bank v. Rockey, 117 Wash. 663, 202 P 268, 269 [cit Cyc].

W. Va.—Woodyard v. Sayre, 90 W. Va. 547, 111 SE 313; Linn v. Collins, 77 W. Va. 592, 87 SE 934, AnnCas 1918C 86; Spence v. Smith, 34 W. Va. 697, 12 SE 828.

Wis.—In re Happel-Bossi, 133 Wis. 119, 113 NW 433; Meyer v. Hafemeister, 119 Wis. 539, 97 NW 165, 100 AmSR 900; Blewett v. Gaynor, 77 Wis. 378, 46 NW 547.

Wyo.—Chapman v. Carrothers, 21 Wyo. 152, 129 P 434.

Alta.—Denny v. Nozick, 15 Alta. L. 288, 48 DomLR 310, [1919] 3 West. Wkly 366 [app allowed on other grounds 60 Can. S. C. 646, 56 DomLR 694, [1921] 2 WestWkly 157].

N. B.—Massey-Harris Co., Ltd. v. Merrithew, 39 N. B. 544.

Ont.—Ontario Asphalt Block Co. v. Cook, 3 OntWN 1289, 22 OntWR 203, 4 DomLR 22; Thompson v. Coulter, 1 OntWR 205; Manning v. Thompson, 17 U. C. C. P. 606.

Yukon T.—Putnam v. Kiffen, 11 WestLR 559.

[a] **Reason for rule.**—"It is an affirmative fact, which must be proved by the party alleging it." Montgomery First Nat. Bank v. Montgomery Cotton Mfg. Co., 211 Ala. 551, 555, 101 S 186.

[b] **Defense amounting to claim of payment.**—Where defendant in replevin alleged that live stock loaned to him was subsequently given to him for certain services, the defense was practically that of payment, and the burden of proving it was on defendant. Stewart v. Graham, 93 Miss. 251, 46 S 245.

frequent applications of this rule are found in actions on obligations for the payment of money, in which it is held that the fact of payment is an affirmative defense,[22] and that proof of nonpayment is not necessary to establish a cause of action,[23] even though a formal allegation of nonpayment is included in the bill, petition, or complaint.[24] This rule has been applied in a great variety of actions including actions in assumpsit;[25] actions in trover;[26] actions of replevin;[27] actions for accounting;[28] actions on accounts,[29] bills or notes,[30] bonds,[31] money judgments,[32] and claims against estates of decedents;[33] actions for money lent,[34] money had and received,[35] services rendered,[36] work done under contract,[37] board,[38] rent,[39] and goods sold and delivered;[40] actions by executors or administrators on debts alleged to be due to decedent;[41] actions to enforce vendors' liens,[42] me-

[c] **A defendant's admission** of allegations of the complaint showing that an indebtedness to plaintiff has existed casts upon him the burden of proving payment. Janeway v. Long Beach Paper, etc., Co., 190 Cal. 150, 211 P 6.

[d] **Payment by entry of debits or credits.**—One claiming that payment had been effected by the satisfaction of cross demands has the burden of proving such fact. Hill v. Roberts, 86 Ala. 523, 6 S 39.

[e] **Where a credit is indorsed on the instrument sued on,** the burden of proving it as a payment is nevertheless on the debtor unless the indorsement is in the handwriting of the creditor. Erhart v. Dietrich, 118 Mo. 418, 24 SW 188.

[f] **Reply setting out mistake in receipt.**—"Where a plaintiff pleads an indebtedness and the defendant alleges payment of it and sets out a receipt in full given by plaintiff and a letter acknowledging full payment of the indebtedness, and the plaintiff in turn replies that the receipt was given and the letter written through a mistake, and that payment had not in fact been made, the burden of proof rests upon the defendant and this burden is not shifted or affected by the affirmative allegations of plaintiff that a mistake had been made in giving the receipt and in writing the letter acknowledging payment." Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752. Contradiction of receipt generally see supra §§ 78–83.

22. Cal.—Levey v. Henderson, 177 Cal. 21, 169 P 673.

Iowa.—Tedrow v. Johnson, 167 Iowa 513, 149 NW 645.

Mo.—Schneider v. Maney, 242 Mo. 36, 145 SW 823; Steltemeier v. Barrett, 145 Mo. A. 534, 122 SW 1095.

N. Y.—Walsh v. Gray, 214 App. Div. 296, 212 NYS 230; Altman v. Bungay, 161 App. Div. 583, 146 NYS 949; Skelly v. Mortimer, 154 App. Div. 921, 138 NYS 1100; Redmond v. Hughes, 151 App. Div. 99, 135 NYS 843; Salomon v. Fiske, 78 Misc. 406, 138 NYS 422.

Okl.—Edwards v. Johnston-Larimer Dry Goods Co., 59 Okl. 101, 158 P 446.

S. C.—Bacot v. South Carolina Loan, etc., Co., 132 S. C. 340, 127 SE 562.

Utah.—Scott v. Austin, 47 Utah 248, 152 P 1178.

[a] **Where a plaintiff assumes the burden** of proving nonpayment, he cannot invoke a rule of court as to affirmative defenses. Parker v. Baldwin, 216 Mich. 472, 185 NW 746.

[b] **Plea not amounting to plea of payment.**—Where an attorney brought suit, alleging that the defendants were indebted to him for professional services rendered, and the defendants pleaded the general issue, and further, that plaintiff was employed by their father to render the services, this was not a plea of payment, but was an amplification of the plea of the general issue, and there was no error in instructing the jury that the burden was on the plaintiff to make out his case by a preponderance of evidence. Wimpy v. Gaskill, 76 Ga. 41.

23. Ala.—Lampkin v. Thomas, 16 Ala. A. 482, 79 S 156 [aff 202 Ala. 316, 80 S 398].

Cal.—Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127; Cornwell v. Mulcahy, 62 Cal. A. 658, 217 P 568; Dyer v. Minturn, 47 Cal. A. 1, 189 P 1046.

Kan.—Powell v. Wallace, 44 Kan. 656, 25 P 42.

La.—Johnson v. Jones, 5 La. A. 220.

Mich.—Baldwin v. Clock, 68 Mich. 201, 35 NW 904.

Mont.—Bell v. Grimstad, 82 Mont. 185, 266 P 394, 397 [quot Cyc].

N. J.—Conlon v. Hornstra, 82 N. J. L. 355, 83 A 183.

N. Y.—Hitchings v. Kayser, 65 App. Div. 302, 72 NYS 749 [aff 171 N. Y. 636 mem, 63 NE 1118 mem]; Ives v. Male, 75 Misc. 387, 135 NYS 526; Rice v. Kebak, 72 Misc. 16, 128 NYS 1092; American Slicing Mach. Co. v. Kuchukian, 147 NYS 352.

Pa.—Bell v. Young, 1 Grant 175; Salus v. Curson, 28 Pa. Dist. 462.

Porto Rico.—Cochon v. Correa, 32 Porto Rico 674.

Tex.—Bannister v. Wallace, 14 Tex. Civ. A. 452, 37 SW 250.

[a] **Misleading instruction.**—Where the sole issue is whether the note in suit has been paid, a charge that plaintiff must establish his case by a preponderance of evidence is erroneous, as putting on plaintiff the burden of proving nonpayment. Grant v. Roberts, (Tex. Civ. A.) 38 SW 650.

[b] **In case of a conditional sale** of property, title to remain in the seller until the price is paid, in replevin by the seller to recover the possession of the property, he is not required to show nonpayment. Powell v. Wallace, 44 Kan. 656, 25 P 42.

[c] **Where a debt is payable in installments,** proof of the payment of the first two installments does not cast on the creditor the burden of proving nonpayment of the third installment. McCurdy v. Middleton, 82 Ala. 131, 2 S 721.

[d] **Assumption of burden by plaintiff.**—In an action against a bank for the amount of a draft deposited by a customer, where plaintiff, when proving his side of the case, testifies that he never received the money for the draft, he takes upon himself the burden of showing prima facie that the draft had not been paid. Goff v. Stoughton State Bank, 78 Wis. 106, 47 NW 190, 9 LRA 859.

24. Wolffe v. Nall, 62 Ala. 24; Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127; Cochran v. Reich, 91 Hun 440, 36 NYS 233, 25 NYCivProc 147, 2 NYAnnCas 313.

"The rule in this state is now well established that in cases of this character [action for labor and material furnished] the plaintiff is not called upon to prove his negative averment of nonpayment, although, of course, he must allege it in his complaint." Cornwell v. Mulcahy, 62 Cal. A. 658, 662, 217 P 568.

Necessity of pleading nonpayment in anticipation of defense see supra § 129.

25. Tuscaloosa Lumber Co. v. Tropical Paint, etc., Co., 211 Ala. 258, 100 S 236; Shepherd v. Butcher Tool, etc., Co., 198 Ala. 275, 73 S 498; Laswell v. Gahan, 122 Ill. A. 513.

26. Warrant Warehouse Co. v. Cook, 209 Ala. 60, 95 S 282.

[a] **Illustration.**—In an action for conversion, brought by a conditional buyer of an automobile against a public warehouseman with whom the conditional seller had stored the property, the burden was upon plaintiff to prove payment in full of the amount due on the conditional sale contract, thus vesting title in him. Warrant Warehouse Co. v. Cook, 209 Ala. 60, 95 S 282.

27. Randleman v. Taylor, 94 Ark. 511, 127 SW 723, 140 AmSR 141; Gravert v. Goothard, 81 Nebr. 99, 115 NW 559.

[a] **Illustrations.**—(1) In replevin for timber alleged to have been wrongfully cut and removed from plaintiff's land, defendant has the burden of proving payment by him for the timber cut. Randleman v. Taylor, 94 Ark. 511, 127 SW 723, 140 AmSR 141. (2) In replevin to recover property alleged to have been turned over to plaintiff in payment of a debt, defendant, claiming that the debt had been paid, had the burden of proving payment. Gravert v. Goothard, 81 Nebr. 99, 115 NW 559.

28. Smith v. Taylor, 144 Ark. 569, 222 SW 1062 (answer denying any indebtedness).

29. See Accounts and Accounting § 184.

30. See Bills and Notes § 1317.

31. See Bonds § 223.

32. See Judgments § 1071.

33. See Executors and Administrators § 2175.

34. Macchia v. Marsigliano, 126 Misc. 342, 215 NYS 170.

35. Church v. Church, 122 Me. 459, 120 A 428; Rice v. Kabak, 72 Misc. 16, 128 NYS 1092; Williams v. Smith, 29 R. I. 562, 72 A 1093; Massey-Harris Co., Ltd. v. Merrithew, 39 N. B. 544.

36. Cal.—Lewis v. McNeal, 58 Cal. A. 70, 207 P 1021.

Ga.—Douglas v. Stephens, 27 Ga. A. 485, 108 SE 833.

Okl.—Sinclair v. Stringer, 80 Okl. 218, 195 P 771.

Wash.—Palmer v. Parker, 91 Wash. 683, 158 P 1017, 1018 [cit Cyc].

Wis.—In re Happel-Bossi, 133 Wis. 119, 113 NW 433.

[a] **An action for the reasonable value of services** is within the rule. Douglas v. Stephens, 27 Ga. A. 485, 108 SE 833.

[b] **In an action against an administrator** for personal services rendered to his decedent, the administrator has the burden of proving payment, if pleaded by him as a defense. Sinclair v. Stringer, 80 Okl. 218, 195 P 771.

37. O'Loughlin v. Poli, 82 Conn. 427, 74 A 763 (balance claimed to be due on building contract); McGovern v. Chicago, 202 Ill. A. 139 [aff 281 Ill. 264, 118 NE 3] (repairing pavements).

38. Kines v. Jamison, (Mo. A.) 277 SW 969.

39. Sullivan v. Hobbs, 19 Ala. A. 465, 98 S 307 [certiorari den 210 Ala. 372, 98 S 309]; Allen v. Gentry, 8 La. A. 293; Swift v. Boyd, 202 Mass. 26, 88 NE 439.

40. St. Louis, etc., R. Co. v. Bertig Store Co., (Ark.) 142 SW 830; White v. Thompson, 40 Cal. A. 447, 180 P 953; Tryone Knitting Mills v. Rubin, 27 N. M. 324, 201 P 867; Skelly v. Mortimer, 154 App. Div. 921, 138 NYS 1100; Efron v. Scarpelli, 162 NYS 640; Dowdall v. Borgfeldt, 113 NYS 1069 [aff 134 App. Div. 954, 118 NYS 1103].

41. See Executors and Administrators § 2175.

42. Tonn v. Pier, 82 N. J. Eq. 422, 89 A 510.

[a] **Payment recited in deed not made.**—Where, in a suit to enforce a vendor's lien, it is admitted that payment of the purchase money, although recited in the deed, was not made at the time of the delivery of the deed, the burden of proving payment subsequent thereto is on the defendant. Tonn v. Pier, 82 N. J. Eq.

chanics' liens,[43] and contracts of sale;[44] actions to foreclose mortgages or deeds of trust;[45] actions to recover money fraudulently obtained;[46] actions upon lost instruments;[47] an action upon a promise made to a third person for plaintiff's benefit;[48] an action for breach of an agreement to pay an indebtedness of plaintiff to a third person;[49] and an action against the personal representatives of a decedent on an alleged promise of decedent to make payment after his death.[50] The rule applies also to impose upon a plaintiff, who has pleaded payment as a ground for the relief which he seeks, the burden of proving such payment.[51]

Where the debtor has introduced some evidence of payment, the burden of going forward with the evidence, as distinct from the general burden of proof, shifts to the creditor who is then under the duty of producing some evidence to show nonpayment.[52]

Where a transaction, on its face, constitutes a payment, the burden of proving the contrary is on the creditor.[53]

As against a person other than the debtor, the burden of proving nonpayment of a debt is on the creditor.[54]

A distinction has been drawn between the question of payment when a debt was contracted or at its maturity and payment after a breach, to the effect that plaintiff suing for a debt has the burden of proving that the debt was not paid when contracted or at maturity,[55] but that payment after a breach is new matter to be specially pleaded as to which the burden of proof rests on defendant.[56]

[§ 177] **2. Nonpayment as Element of Cause of Action.** Where plaintiff's cause of action involves more than a simple obligation for the payment of money as to which payment is an affirmative defense,[57] so that the fact of nonpayment is an essential element of the cause of action, the burden of proving nonpayment, if plaintiff's allegation thereof is denied, rests on plaintiff.[58]

[§ 178] **3. Nonpayment as Element of Defense.** Where nonpayment is set up as an affirmative defense to an action, defendant has the burden of proving it.[59]

[§ 179] **4. Matter in Avoidance of Plea of Payment.** Where payment is alleged as a defense and a creditor sets up new matter in avoidance of such defense, the burden of proof as to such new matter rests on him.[60]

422, 89 A 510.

43. See Mechanics' Liens § 654.

44. Henry v. Britt, 197 Ill. A. 167 (action to compel conveyance of land pursuant to contract therefor); Hill v. Cheatham, 129 Mo. 71, 31 SW 261.

45. See Mortgages § 914.

46. Supreme Lodge K. P. v. Hinsey, 241 Ill. 384, 89 NE 728 [aff 138 Ill. A. 248] (defendant has burden of proving repayment).

47. Linn v. Collins, 77 W. Va. 592, 87 SE 934, AnnCas1918C 86 (instrument evidencing obligation to pay money).

48. Zioncheck v. Hepden, 144 Wash. 272, 257 P 835.

49. Chapman v. Carrothers, 21 Wyo. 152, 129 P 434 (plaintiff's indebtedness to the third person being admitted).

50. Donovan v. Walsh, 238 Mass. 356, 130 NE 841.

[a] **Illustration.**—In an action by a housekeeper employed by decedent, under an agreement to give her his house and lot if she would make a home for himself and brother and take care of them, the burden of proving payment, averred in the answer, was on defendant administratrix. Donovan v. Walsh, 238 Mass. 356, 130 NE 841.

51. Ala.—Wilkerson v. Sorsby, 208 Ala. 345, 94 S 481; Seed v. Brown, 180 Ala. 8, 60 S 98.

Ga.—Copelin v. Williams, 152 Ga. 692, 11 SE 186.

Iowa.—Fitzgerald v. Flanagan, 155 Iowa 217, 135 NW 738, AnnCas1914C 1104.

N. Y.—In re Willett, 70 N. Y. 490.

Or.—Hurst v. Hurst, 95 Or. 563, 188 P 182.

S. C.—Bacot v. South Carolina Loan, etc., Co., 132 S. C. 340, 127 SE 562.

Va.—Hall Bldg. Corp. v. Edwards, 142 Va. 209, 128 SE 521.

W. Va.—Woodyard v. Sayre, 90 W. Va. 547, 111 SE 313.

[a] **Plaintiff must prove payment where he sues:** (1) To recover amounts alleged to have been overpaid on a note. Gibbs v. Farmers', etc., State Bank, 123 Iowa 736, 99 NW 703. (2) To have a deed of trust released on the ground of payment. Hall Bldg. Corp. v. Edwards, 142 Va. 209, 128 SE 521. (3) To enforce satisfaction of a mortgage alleged to have been paid and to recover a statutory penalty for failure to satisfy the same. Bacot v. South Carolina Loan, etc., Co., 132 S. C. 340, 127 SE 562. (4) To restrain foreclosure of a mortgage. Seed v. Brown, 180 Ala. 8, 60 S 98. (5) To quiet title by removing a cloud consisting of a mortgage alleged to have been paid. Wilkerson v. Sorsby, 208 Ala. 345, 94 S 481; Fitzgerald v. Flanagan, 155 Iowa 217, 135 NW 738, AnnCas1914C 1104; Woodyard v. Sayre, 90 W. Va. 547, 111 SE 313. (6) To have it decreed that a deed constitutes a mortgage and has been paid, and that plaintiff is the owner and entitled to the possession of the property. Hurst v. Hurst, 95 Or. 563, 188 P 182. (7) To recover land conveyed as security for a debt of the grantor. Copelin v. Williams, 152 Ga. 692, 11 SE 186 (suit by heirs of grantor against transferees of grantee).

52. McCord v. Bridges, 209 Ala. 529, 96 S 432; Cook v. Malone, 128 Ala. 662, 29 S 653.

Distinction between burden of proof and burden of going forward with evidence see Evidence §§ 14–21.

53. Rice v. Georgia Nat. Bank, 64 Ga. 173; Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752, 754 [dis. op. per Johnston, C. J., quot Cyc]; Noel v. Murray, 13 N. Y. 167 [aff 8 N. Y. Super. 385, and foll Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802 (rev 40 Hun 578); Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397; Manning v. Lyon, 70 Hun 345, 24 NYS 265; Williams v. Aylesworth, 4 Silv. Sup. 44, 7 NYS 111, 8 NYS 113; Vacheron v. Hildebrant, 39 Misc. 61, 78 NYS 771].

54. Peterson v. Wilbanks, 163 Ga. 742, 137 SE 69.

[a] **Claim by third person in mortgage foreclosure.**—Where, in a proceeding to foreclose a mortgage, a claim is interposed by one claiming to be a purchaser for value, with a claim that the mortgage was paid, the burden of proof is on plaintiff to show nonpayment. Peterson v. Wilbanks, 163 Ga. 742, 137 SE 69.

55. Pollak v. Winter, 166 Ala. 255, 51 S 998, 52 S 829, 53 S 339, 139 AmSR 33.

"This does not put upon plaintiff the burden of proving a negative, but only requires that he shall prove an express promise to pay in the future, or that the nature of the transaction was such that out of it there arose an implied promise to pay. An indebtedness once thus shown, the burden of proving a discharge by payment devolves upon the defendant." Pollak v. Winter, 173 Ala. 550, 556, 55 S 828.

[a] **In an action for services** plaintiff, in order to establish a prima facie case, must prove that the services were not paid for when rendered or when payment was due. Winter v. Pollak, 188 Ala. 153, 66 S 11; Pollak v. Winter, 173 Ala. 550, 55 S 828.

56. Pollak v. Winter, 166 Ala. 255, 51 S 998, 52 S 829, 53 S 339, 139 AmSR 33.

57. See supra § 132.

58. Ala.—Sullivan v. Hobbs, 19 Ala. A. 465, 98 S 307 [certiorari den 210 Ala. 372, 98 S 309].

Iowa.—Brenton v. Hill, 197 Iowa 125, 196 NW 947.

Kan.—Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752, 754 [dis. op. per Johnston, C. J., quot Cyc].

Ky.—White v. Bolton, 9 Ky. Op. 453.

N. J.—Potoker v. Klein, 143 A 375.

N. Y.—Cochran v. Reich, 91 Hun 440, 36 NYS 233, 25 NYCivProc 147, 2 NYAnnCas 313.

"Where the non-payment of a sum of money is a fact upon which plaintiff bases a cause of action for the recovery of a separate and distinct sum of money, the burden of pleading and proving non-payment of the first-mentioned sum rests on the plaintiff, and the fact of non-payment is put in issue by a denial." Altman v. Bungay, 161 App. Div. 583, 585, 146 NYS 949.

[a] **"When the action is not upon contract for the payment of money,** but is upon an obligation created by operation of law, or is for the enforcement of a lien where non-payment of the amount secured is part of the cause of action, it is necessary both to allege and prove the fact of non-payment." Conkling v. Weatherwax, 181 N. Y. 258, 268, 73 NE 1028, 2 AnnCas 740.

[b] **Pay or return sale.**—Where property was sold under an agreement requiring the buyer to pay for it or return it on or before a certain date, and after such date the seller brought replevin to recover the article, the burden was upon him to prove nonpayment, since under such circumstances nonpayment was an essential element of his right to recover and not an affirmative defense. Miller v. Baer, 189 NYS 149.

[c] **Contract to pay on demand.**—In an action for breach of a contract to pay on demand, nonpayment is a constituent of the right of recovery and consequently plaintiff has the burden of proving nonpayment. Smith v. State Bank, 61 Misc. 647, 114 NYS 56.

59. Atlantic City R. Co. v. Wood, 78 N. J. Eq. 298, 81 A 1132 [aff 65 N. J. Eq. 530, 56 A 337].

60. Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752, 754 [dis. op. per Johnston, C. J., quot

[§ 180] **5. Time of Payment.** Where the time when a payment was made is material, the burden of proving such time rests on the payor.[61]

[§ 181] **6. Place of Payment.** Where a contract is silent as to the place of payment, the burden of proof to show that a place other than the place of business or residence of the party to be paid was agreed on is on the party by whom the money is to be paid.[62]

[§ 182] **7. Medium of Payment.** Where a contract calls for a payment of a certain amount, the burden is on the debtor, if he so claims, to prove that payment was to be made in a currency other than the lawful currency of the country.[63] Where a creditor claims that money which was received by him in payment is counterfeit, the burden is on him to prove this fact.[64]

[§ 183] **8. Payment Otherwise than in Money.** Where a debtor claims that payment was effected by the transfer to the creditor of something other than money, the burden rests on him to show that the creditor accepted the same as payment,[65] or in the case of transfer of an obligation for the payment of money, that the obligation has actually been paid,[66] or, if negotiable, that it has been transferred by the creditor to, and is still outstanding in the hands of, a holder in due course.[67] This rule has been applied where the creditor has received a draft,[68] acceptance,[69] order for payment of money,[70] certificate of deposit,[71] assignment of a chose in action,[72] check,[73] or note,[74] and where it was claimed that payment was effected by furnishing board and lodging.[75] Where, however, the acceptance by the creditor of a note or bill of a third person at the time when a debt is created raises a presumption that it was accepted in payment,[76] the burden is on the

Cyc]; Silver v. Hedges, 3 Dana (Ky.) 439; Wagner v. Spaeth, 36 Wyo. 279, 254 P 123 [reh den 37 Wyo. 1, 257 P 5].

61. Byers v. Fowler, 14 Ark. 86 (partial payment made during a year will be deemed to have been made on the last day of the year unless the payor shows that it was made earlier).

Presumption as to time of payment see infra § 222.

62. King v. Ruckman, 20 N. J. Eq. 316 [rev on other grounds 21 N. J. Eq. 599].

Presumption as to place of payment see infra § 223.

63. Halfacre v. Whaley, 4 S. C. 173; Neely v. McFadden, 2 S. C. 169.

Presumption as to medium of payment see infra § 225.

64. Atwood v. Cornwall, 25 Mich. 142.

65. U. S.—Brown v. Hiatt, 4 F. Cas. No. 2,011, 1 Dill. 372 [rev on other grounds 15 Wall. 177, 21 L. ed. 128].

Ala.—Waldrop v. Automobile Sales Co., 17 Ala. A. 4, 81 S 180.

Ark.—Barnes v. Bradley, 56 Ark. 105, 19 SW 319.

Ind.—Milgram v. Brown Shoe Co., 80 Ind. A. 385, 139 NE 377, 378 [cit Cyc].

Mont.—Bell v. Grimstad, 82 Mont. 185, 266 P 394, 397 [quot Cyc].

Nev.—Roberts, etc., Shoe Co. v. McKim, 34 Nev. 191, 196, 117 P 13.

N. Y.—Dibble v. Richardson, 171 N. Y. 131, 63 NE 829; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480.

S. D.—Union School Furniture Co. v. Mason, 3 S. D. 147, 52 NW 671.

"Where defendant sought to establish a settlement of the account other than by a payment in cash or legal tender, the burden of showing that fact was on him." Roberts, etc., Shoe Co. v. McKim, supra.

[a] **Application of collateral.**—(1) The burden of proving payment out of collateral security is upon the debtor. Barnes v. Bradley, 56 Ark. 105, 19 SW 319. (2) Where securities were originally given to a creditor as collateral, the burden is upon the debtor to show their subsequent acceptance in satisfaction of the debt. Brown v. Hiatt, 4 F. Cas. No. 2,011, 1 Dill. 372 [rev on other grounds 15 Wall. 177, 21 L. ed. 128].

Presumptions as to absolute or conditional payment see infra §§ 216-220.

66. See Kenniston v. Avery, 16 N. H. 117 (where, to a suit on the antecedent debt, defendant sets up that negotiable paper has been given to secure it, the burden is upon him to show, either that such paper has been paid, or that the debtor has been injured through the laches of the creditor).

67. Lyman v. U. S. Bank, 12 How. (U. S.) 225, 13 L. ed. 965.

68. Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717; Bell v. Grimstad, 82 Mont. 185, 266 P 394, 397 [quot Cyc]; Smith v. Applegate, 1 Daly (N. Y.) 91.

69. Devlin v. Chamblin, 6 Minn. 468.

70. Haines v. Pearce, 41 Md. 221, 231 ("bill or order on a third person"); Efron v. Scarpelli, 162 NYS 640; American Luxfer Prism Co. v. Bartolicius Star Iron Works, Inc., 152 NYS 1014; J. Weller Co. v. Gordon, 24 Oh. Cir. Ct. 407; Estey v. Birnbaum, 9 S. D. 174, 68 NW 290.

71. Reserve Loan L. Ins. Co. v. Dulin, 69 Ind. A. 363, 122 NE 3.

72. Wallace v. Axtell, 5 Colo. A. 432, 39 P 594.

73. Colo.—Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717.

Ind.—Baughman v. Lowe, 41 Ind. A. 1, 83 NE 255; Cox v. Hayes, 18 Ind. A. 220, 47 NE 844.

Mont.—Bell v. Grimstad, 82 Mont. 185, 266 P 394, 397 [quot Cyc].

N. Y.—Dehoust v. Lewis, 128 App. Div. 131, 112 NYS 559.

Oh.—J. Weller Co. v. Gordon, 24 Oh. Cir. Ct. 407.

Or.—Smith v. Mills, 112 Or. 496, 230 P 350.

Pa.—Holmes v. Briggs, 131 Pa. 233, 18 A 928, 17 AmSR 804; Cochran v. Slomkowski, 29 Pa. Super. 385.

[a] **A check of a third person** is within the rule. Smith v. Mills, 112 Or. 496, 230 P 350.

[b] **A cashier's check** is within the rule. Smith v. Mills, 112 Or. 496, 230 P 350.

74. U. S.—Freeman v. W. B. Moses & Sons, Inc., 285 Fed. 898; Beall v. Hudson County Water Co., 185 Fed. 179.

Ala.—Manser v. Sims, 157 Ala. 167, 47 S 270.

Ark.—Hatfield Bank v. Bruce, 164 Ark. 576, 262 SW 665.

Cal.—Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32; Palmer v. Emanuel, 77 Cal. A. 766, 247 P 609.

Colo.—Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717.

Ind.—Godfrey v. Crisler, 121 Ind. 203, 22 NE 999; Rhodes v. Webb-Jameson Co., 19 Ind. A. 195, 49 NE 283.

Kan.—Gonder v. Dodge, 97 Kan. 562, 155 P 937; Webb v. Republic Nat. Bank, 67 Kan. 62, 72 P 520; Bradley v. Harwi, 43 Kan. 314, 23 P 566.

Md.—Sebastian May Co. v. Codd, 77 Md. 293, 26 A 316.

Minn.—Farmers, etc., State Bank v. Nummedahl, 166 Minn. 144, 207 NW 313; Hansen v. Wilmers, 162 Minn. 139, 202 NW 708; Empire Cream Separator Co. v. Marshall, 158 Minn. 236, 197 NW 216; Merrill v. Zimmerman, 152 Minn. 333, 188 NW 1019; Way v. Mooers, 135 Minn. 339, 160 NW 1014, LRA1918B 559.

Mo.—West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868; American Law Book Co. v. Corbett, 162 Mo. A. 72, 141 SW 718; McCormack Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49.

Mont.—Bell v. Grimstad, 82 Mont. 185, 266 P 394, 397 [quot Cyc]; Edwards v. Muri, 73 Mont. 339, 237 P 209.

N. H.—Randlet v. Herren, 20 N. H. 102, 538.

N. Y.—Friberg v. Block, 65 App. Div. 541, 73 NYS 104; Smith v. Sergent, 67 Barb. 243; Crane v. McDonald, 45 Barb. 354; Smith v. Applegate, 1 Daly 91.

Oh.—Hall v. Union Pav. Co., 3 OhS &CP 218, 2 OhNP 71.

Pa.—Philadelphia v. Neill, etc., Sav., etc., Co., 211 Pa. 353, 60 A 1033; Collins v. Busch, 191 Pa. 549, 43 A 378; League v. Waring, 85 Pa. 244; In re Davis, 5 Whart. 530, 34 AmD 574; Mechanics Nat. Bank v. Kielkopf, 22 Pa. Super. 128; Wisconsin Chair Co. v. Heilbronner, 30 Pa. Co. 299.

R. I.—Nightingale v. Chafee, 11 R. I. 609, 23 AmR 531.

S. D.—Grissel v. Woonsocket Bank, 12 S. D. 93, 80 NW 161; Baker v. Baker, 2 S. D. 261, 49 NW 1064, 39 Am SR 776.

Tex.—Rushing v. Citizens' Nat. Bank, (Civ. A.) 162 SW 460.

Va.—Waynesboro Nat. Bank v. Smith, 145 SE 302.

Wash.—Blenz v. Fogle, 127 Wash. 224, 220 P 790.

W. Va.—Feamster v. Withrow, 12 W. Va. 611.

Wis.—Willow River Lumber Co. v. Luger Furniture Co., 102 Wis. 636, 78 NW 762.

Alta.—Denny v. Nozick, 15 Alta. L. 288, 48 DomLR 310, [1919] 3 WestWkly 366 [app allowed on other grounds 60 Can. S. C. 646, 56 DomLR 694, [1921] 2 WestWkly 157].

[a] **Rule applies to note of third person.**—Hatfield Bank v. Bruce, 164 Ark. 576, 262 SW 665; Webb v. Republic Nat. Bank, 67 Kan. 62, 72 P 520; Pinchot v. Roskam, 123 Misc. 253, 204 NYS 782; Willow River Lumber Co. v. Luger Furniture Co., 102 Wis. 636, 78 NW 762. See American Woolen Co. v. Friedman, 97 Misc. 593, 163 NYS 162 (note indorsed by third person).

[b] **An express agreement** to accept a note in payment of an antecedent indebtedness must be shown. McCormack Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49.

[c] **Where a nonnegotiable note is given for an antecedent debt,** the burden rests upon the maker to prove that it was given as payment. Smith v. Bettger, 68 Ind. 254, 34 AmR 256; State v. Hullihan, (Ind. A.) 157 NE 282.

75. Burton v. Manson, 142 Va. 500, 129 SE 356.

76. See infra § 217.

creditor to show that it was not so accepted.[77] If the creditor claims that he returned what he received, the burden is on him to prove such fact.[78] Where a draft on a third person is accepted in full satisfaction of the debt when paid, the burden is on the creditor to show due diligence in presenting the draft for payment and giving notice of its dishonor.[79]

[§ 184] **9. Authority To Receive Payment.** Where payment is made to a person other than the creditor, the debtor has the burden of showing that the person to whom payment was made was authorized to receive payment,[80] or that the creditor has so acted as to be estopped to deny the existence of such authority.[81]

[§ 185] **10. Effect of Presumptions as to Payment.**[82] Where circumstances such as to raise a presumption of payment[83] are shown to exist, the legal effect of the presumption is the same as though direct evidence of payment had been introduced,[84] and while the burden of proof as to the fact of payment is not thereby shifted,[85] the burden then rests on the party claiming nonpayment to introduce evidence to show that his demand has not in fact been paid.[86] The rule in this respect is the same whether the presumption arises from lapse of time,[87] from the alleged debtor's possession of the obligation evidencing the indebtedness,[88] from the acceptance of the negotiable note of the debtor for the amount of an antecedent debt,[89] from the acceptance at the time of the creation of a debt of a draft[90] or other obligation[91] of a third person for the amount of the debt, from the character of the services for which payment is claimed,[92] or from other circumstances.

[§ 186] **11. Application of Payments.** The burden of proving a particular application of a payment by either the debtor or creditor is on the party claiming that such application was made.[93]

Propriety of application. With respect to what

77. Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397 [rev 53 Barb. 191]; Noel v. Murray, 13 N. Y. 167 [aff 8 N. Y. Super. 385]; Challoner v. Boyington, 83 Wis. 399, 53 NW 694.

78. Woodruff v. Thurlby, 39 Iowa 344. See Goodall v. Norton, 88 Minn. 1, 92 NW 445 (where a creditor receives a check and agrees to credit a debtor with the amount thereof, the burden is on him to show that the check was returned or was not paid on due presentment).

79. Dayton v. Trull, 23 Wend. (N. Y.) 345.

80. U. S.—Holmes v. Dodge, 12 F. Cas. No. 6,637, Abb. Adm. 60.

D. C.—Heiskell v. Curtis, 49 App. 91, 259 Fed. 987.

Ida.—Whalen v. Vallier, 266 P 1089, 1092 [cit Cyc].

Mich.—Forgan v. Mackie, 232 Mich. 476, 205 NW 600.

Nebr.—Ketelman v. Chicago Brush Co., 65 Nebr. 429, 91 NW 282.

N. Y.—Wangner v. Grimm, 169 N. Y. 421, 62 NE 569; Seymour v. Smith, 114 N. Y. 481, 21 NE 1042, 11 AmSR 683.

Or.—Rhodes v. Belchee, 36 Or. 141, 59 P 117, 1119.

Philippine.—Harry E. Keeler Electric Co., Inc. v. Rodriguez, 44 Philippine 19.

S. C.—Bacot v. South Carolina Loan, etc., Co., 132 S. C. 340, 127 SE 562.

Utah.—McCornick v. Sadler, 11 Utah 444, 40 P 711, 10 Utah 210, 37 P 332.

[a] **Application of rule.**—Where, in an action by the assignee of the claim of a building contractor for the balance of the contract price after an accounting, defendant admits that such sum was due, but claims that it has been paid to a person having a mechanic's lien for lumber furnished, the burden is on defendant to show the amount of lumber actually furnished, and that he was warranted in making the payment, as plaintiff sues as the assignee of an account stated. McCornick v. Sadler, 11 Utah 444, 40 P 711, 10 Utah 210, 37 P 332.

81. Whalen v. Vallier, (Ida.) 266 P 1089, 1092 [cit Cyc].

82. Effect of presumptions generally see Evidence § 22.

83. Presumptions as to payment see infra §§ 188–213.

84. Martin v. Stoddard, 127 N. Y. 61, 27 NE 285; Richards v. Walp, 221 Pa. 412, 70 A 815. And see infra § 200.

85. Rule that burden of proof never shifts see Evidence § 14.

86. U. S.—Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889].

Md.—Lawson v. Burgee, 131 Md. 436, 103 A 516.

N. Y.—Dibble v. Richardson, 171 N. Y. 131, 63 NE 829; Martin v. Stoddard, 127 N. Y. 61, 27 NE 285; Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397 [rev 53 Barb. 191]; Ouvrier v. Mahon, 117 App. Div. 749, 102 NYS 981; Mutual L. Ins. Co. v. U. S. Hotel Co., 82 Misc. 632, 144 NYS 476.

Oh.—Wright v. Hull, 83 Oh. St. 385, 94 NE 813.

Pa.—In re Cummiskey, 224 Pa. 509, 73 A 916, 132 AmSR 787.

Va.—Lurty v. Lurty, 107 Va. 466, 59 SE 405.

See also cases infra notes 87–91.

Shifting of burden of evidence generally see Evidence § 21.

87. U. S.—Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889].

Kan.—Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752, 754 [dis. op. per Johnston, C. J., quot Cyc].

N. Y.—Wohanka v. Nelson, 127 Misc. 636, 217 NYS 207.

Pa.—Brankin v. Philadelphia, etc., R. Co., 286 Pa. 331, 133 A 563; In re Bartram, 282 Pa. 536, 128 A 511; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; McDowell v. North Side Bridge Co., 247 Pa. 190, 93 A 280; Wingett's Est., 122 Pa. 486, 15 A 863; Peter's App., 106 Pa. 340; Bentley's App., 99 Pa. 500; McLean v. Findley, 2 Penr. & W. 97; Titusville Second Nat. Bank v. Thompson, 20 Pa. Dist. 39 [aff 44 Pa. Super. 200]; Parker's Est., 2 Pa. Dist. 101, 12 Pa. Co. 436.

Tenn.—Yarnell v. Moore, 3 Coldw. 173.

Tex.—Duncan v. Rawls, 16 Tex. 478; Leake v. Dallas, (Civ. A.) 197 SW 472; Milwee v. Phelps, 53 Tex. Civ. A. 195, 115 SW 891.

Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

[a] **Time of entering credits.**—Where suit is brought on a bond more than twenty years after maturity and there are indorsed thereon credits purporting to have been made by the obligee during the twenty-year period, the burden rests on plaintiff to show that such credits were made before the presumption of payment had ripened and while it was against the interests of the obligee to make them. Lash v. Von Neida, 109 Pa. 207.

Presumption from lapse of time see infra §§ 198–213.

88. Ark.—Continental Gin Co. v. Benton, 104 Ark. 367, 149 SW 528.

Ill.—Tedens v. Schumers, 112 Ill. 263.

Kan.—Illinois Steel Bridge Co. v. Wayland, 107 Kan. 532, 192 P 752, 754 [dis. op. per Johnston, C. J., quot Cyc].

La.—Lindsey Mercantile Co. v. Lindsey, 5 La. A. 195.

Md.—Lawson v. Burgee, 131 Md. 436, 103 A 516.

Presumption from debtor's possession of obligation see infra § 189.

89. Smith v. Bettger, 68 Ind. 254, 34 AmR 256.

Acceptance of note as payment see infra § 216.

90. Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397 [rev 53 Barb. 191].

91. Dibble v. Richardson, 171 N. Y. 131, 63 NE 829; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480.

Acceptance of draft or other obligation of third person as payment see infra § 217.

92. Winfield v. Beaver Trust Co., 229 Pa. 530, 79 A 138; In re Cummiskey, 224 Pa. 509, 73 A 916, 132 AmSR 787; Caskey v. Kineavy, 60 Pa. Super. 87.

93. U. S.—Rickerson Roller-Mill Co. v. Farrell Fdy., etc., Co., 75 Fed. 554, 23 CCA 302.

Ark.—Arkansas Nat. Bank v. Martin, 110 Ark. 578, 163 SW 795.

Cal.—Light v. Stevens, 159 Cal. 288, 113 P 659; Madera Sugar Pine Co. v. Adams, 68 Cal. A. 111, 228 P 544, 545 [quot Cyc]; Gunther v. McCormick, 60 Cal. A. 350, 212 P 715.

Ga.—Henderson v. Maysville Guano Co., 15 Ga. A. 69, 82 SE 588.

Iowa.—Herbold v. Sheley, 220 NW 88.

Ky.—Ditto v. Hopkins, 164 Ky. 412, 175 SW 658; Tharp v. Feltz, 6 B. Mon. 6; Hill v. Pettit, 66 SW 188, 23 KyL 2001; Roberts v. Ketchen, 5 Ky. Op. 254.

La.—Barriguand v. Cistac, 7 La. A. (Orleans) 300; Mann v. Major, 6 Rob. 475.

Me.—Church v. Church, 122 Me. 459, 120 A 428.

Mich.—Gerasimos v. Wartell, 237 Mich. 1, 211 NW 29; Van Sceiver v. King, 176 Mich. 605, 142 NW 1069.

Nebr.—Davis v. Hall, 70 Nebr. 678, 97 NW 1023.

N. J.—Turner v. Hill, 56 N. J. Eq. 293, 39 A 137.

N. Y.—Goldsmid v. Lewis County Bank, 7 Barb. 427; Singer v. Strompf, 88 Misc. 103, 150 NYS 660.

S. C.—Marshall v. Nagel, 17 S. C. L. 266.

Wash.—Palmer v. Parker, 91 Wash. 683, 158 P 1017, 1018 [cit Cyc].

Wis.—Somervail v. Gillies, 31 Wis. 152.

Eng.—Lowther v. Heaver, 41 Ch. D. 248.

[a] **Illustration.**—Where a creditor claims that payments on an open account have been applied other than to the oldest item, the burden of proving such fact is upon him. Rickerson Roller-Mill Co. v. Farrell Fdy., etc., Co., 75 Fed. 554, 23 CCA 302.

is or is not the proper application of a payment, the debtor has the burden of proof where he claims that he directed a particular application;[94] and it has also been held incumbent upon him to show that a particular payment was intended to be applied on a particular indebtedness[95] or that there was no other indebtedness to which such payment could properly be applied.[96] It has also been held, however, that the creditor has the burden of proving that his application of a payment to a particular debt was proper.[97] Where payments are applied by the parties, and a surety of the debtor claims that such application is inequitable as to him, he has the burden of proof as to such contention.[98]

[§ 187] **12. Knowledge and Control as Affecting Duty To Produce Evidence.** In accordance with the general rule that, where the evidence to prove a fact is chiefly, or entirely, within the control of one party, it is incumbent upon him to produce it, even though he has not the general burden of proof on the issue,[99] it is held that, where payment is asserted as a defense, but the proof of payment is in the exclusive knowledge and control of plaintiff, the burden is on him to produce the evidence.[1]

[§ 188] **D. Presumptions[2]—1. Fact of Payment[3]—a. In General.** Ordinarily there is no presumption of payment of a debt[4] or other obligation,[5] but in the absence of any evidence on the subject

[b] **Payment to common agent of two creditors.**—Where defendant, being indebted to plaintiff and another, paid to an agent of plaintiff and such other a sum sufficient to discharge the obligation to plaintiff, and, in an action on the debt to plaintiff, defendant pleads payment and shows the above facts, and no direction of defendant as to the application of the payment at the time of making the same is shown, but plaintiff claims that the payment was applied by the agent to the debt of the other person, the burden rests upon plaintiff to show the existence and validity of such obligation, that it was due when the payment was made, and that it was of such amount as to exhaust the payment made by defendant. Henderson v. Maysville Guano Co., 15 Ga. A. 69, 82 SE 588.

[c] **Burden on person not party to payment.**—A bank which paid the proceeds of a check fraudulently procured from plaintiff and delivered to it for collection, after receiving notice of plaintiff's rights, was not entitled to reduce the recovery by a sum paid plaintiff by one of the parties to the fraud, without showing that it was paid on that particular debt, there being other debts upon which it might have been applied. Arkansas Nat. Bank v. Martin, 110 Ark. 578, 163 SW 795.

94. Pearce v. Walker, 103 Ala. 250, 15 S 568; Levystein v. Whitman, 59 Ala. 345; Wessel v. Bishop, (Nebr.) 107 NW 220; Stone Co. v. Rich, 160 N. C. 161, 75 SE 1077, AnnCas1914C 244.

95. Ark.—Terry v. Klein, 133 Ark. 366, 201 SW 801.

Iowa.—Goodman v. Logan First Nat. Bank, 187 NW 441; Barendregt v. Ven den Brink, 186 NW 449.

Ky.—Galbraith v. Starks, 117 Ky. 915, 79 SW 1191, 25 KyL 2090; White v. White, 44 SW 83, 19 KyL 1590.

La.—Harrison v. Dayries, 23 La. Ann. 216.

Md.—Hawkins v. Bouic, 121 Md. 147, 88 A 126.

Mich.—Smith's App., 52 Mich. 415, 18 NW 195.

Mo.—Trumbo v. Flournoy, 77 Mo. A. 324.

[a] **Payment by checks.**—In a suit on notes and an account secured by mortgages, where defendants pleaded payment by checks, the burden was on them to maintain the plea, and unless the checks showed for what purpose they were given, or there was some positive evidence as to the transaction to which they were referable, the burden continued on defendants to show they were given in payment of a particular account. Hill v. Green, 127 Ark. 406, 192 SW 209.

[b] **Circumstances not increasing burden of proof.**—Where a debtor claims that a payment made by him to his creditor holding his unsecured note and also a secured note should have been applied to the secured note, the fact that the creditor, after applying the payment to the unsecured note, transferred the secured note back to the person from whom it was received did not impose upon the debtor any greater burden of proof with respect to the application of the payment than would have rested upon him if the creditor had still been the holder of both notes. Goodman v. Logan First Nat. Bank, (Iowa) 187 NW 441.

96. Light v. Stevens, 159 Cal. 288, 113 P 659; Galbraith v. Starks, 117 Ky. 915, 79 SW 1191, 25 KyL 2090; White v. White, 44 SW 83, 19 KyL 1590; Smith's App., 52 Mich. 415, 18 NW 195.

97. Boyd v. Jones, 96 Ala. 305, 11 S 405, 38 AmSR 100; Greer v. Turner, 47 Ark. 17, 14 SW 383; Madera Sugar Pine Co. v. Adams, 68 Cal. A. 111, 115, 228 P 544; Ellerbeck v. Shank Auto Co., 43 Ida. 780, 783, 254 P 1055 [cit Cyc]; Davis v. Hall, 70 Nebr. 678, 97 NW 1023; Simpson v. Combes, 107 Wash. 575, 182 P 566.

"Where a lien claimant has received payment during the existence of the obligation for which his claim of lien is thereafter filed, without applying it to any particular obligation, in a suit to foreclose his lien, in which he claims that such payment was properly applicable to some other obligation, it is logical to place upon him the burden of proving facts warranting such application, especially so where, as here, the evidence of such facts, plaintiff's book account . . . is in the possession and under the control of the plaintiff and not accessible to the defendant." Madera Sugar Pine Co. v. Adams, supra.

[a] **Illustration.**—Where the seller of merchandise to one concern applied checks of such concern, signed by its manager, on debts of another concern having the same manager, the seller had the burden of proving that the payments were properly applied. Ellerbeck v. Shank Auto Co., 43 Ida. 780, 783, 254 P 1055 [cit Cyc].

[b] **Application of proceeds of mortgaged property.**—The creditor has the burden of proving: (1) That there was an agreement by which the proceeds of mortgaged property were to be applied on a debt other than the mortgage debt. Greer v. Turner, 47 Ark. 17, 14 SW 383. (2) That the application of the proceeds of mortgaged chattels to the payment of an unsecured debt was consented to or ratified by the mortgagor. Boyd v. Jones, 96 Ala. 305, 11 S 405, 38 AmSR 100.

[c] **Oral agreement differing from written agreement.**—Where a written obligation provides that payments shall be applied toward discharge of a particular indebtedness, the obligees have the burden of proving an oral agreement that they should be applied in another way. Simpson v. Combes, 107 Wash. 575, 182 P 566.

98. Merchants' Ins. Co. v. Herber, 68 Minn. 420, 71 NW 624.

99. See Evidence § 24.

1. Schneider v. Maney, 242 Mo. 36, 145 SW 823, 824 [quot Cyc].

2. Presumptions generally see Evidence §§ 25-88.

3. Presumption:
Arising from receipt see supra § 81.
As to payment by agent to principal see Agency § 656.
As to payment of:
Bond see Bonds § 233.
Commercial paper see Bills and Notes §§ 1317-1323.
Judgment see Judgments § 1068.

4. Me.—Neal v. Brainerd, 24 Me. 115.

Mass.—Clark v. Wells, 5 Gray 69.

N. Y.—Ehrich v. Andrews, 207 App. Div. 378, 202 NYS 65.

Okl.—Upham Shoe Co. v. Pollard, 111 Okl. 228, 239 P 244; People's Nat. Bank v. Rickords, 85 Okl. 9, 204 P 130; Standard Fashion Co. v. Joels, 60 Okl. 195, 159 P 846.

Tenn.—Vaughn v. Williams, 4 Tenn. Civ. A. 357.

Vt.—Bennett v. Delphia, 98 Vt. 492, 129 A 234.

Wis.—Marx v. Marx, 132 Wis. 113, 111 NW 1103.

"In the ordinary suit at law there is no presumption of payment." Ehrich v. Andrews, 207 App. Div. 378, 381, 202 NYS 65.

[a] **Services.**—In a proceeding to recover for services rendered, if plaintiff was entitled to pay for the services, the presumption was that compensation therefor was due and unpaid. Marx v. Marx, 132 Wis. 113, 111 NW 1103.

[b] **Mortgage note.**—There is no presumption that a mortgage note was paid at maturity. Bennett v. Delphia, 98 Vt. 492, 129 A 234; Sowles v. Minot, 82 Vt. 344, 73 A 1025, 137 Am SR 1010.

[c] **Disappearance or loss of a bond and mortgage** does not give rise to a presumption of payment. Lowe v. Leary, 184 App. Div. 421, 171 NYS 637 [aff 227 N. Y. 629 mem, 125 NE 920 mem].

[d] **Receipted account.**—Where land was sold to be paid for on installments, a receipted account between the parties, to an amount larger than a particular installment, will not raise a presumption that such account was paid by applying the amount thereof to the payment of the installment, but "the presumption from the account being receipted generally would seem to be quite the contrary." Clark v. Wells, 5 Gray (Mass.) 69, 71.

5. Canaday v. Krum, 83 N. Y. 67, 11 NYWklyDig 316 [aff 8 NYWkly Dig 193]; Miller's Est., 33 Pa. Super. 20.

[a] **Where a husband receives money owing to his wife,** and receipts for it as her agent, and it appears that the wife was not present when the payment was made, there is no presumption, after the husband's death, that he had, in his lifetime, paid over the money to his wife. Miller's Est., 33 Pa. Super. 20.

[b] **Moral obligation.**—No presumption of payment arises from the fact that there was a moral obligation on the part of a person to make reparation for his wrong by payment of the resulting loss. Canaday v. Krum, 83 N. Y. 67, 73, 11 NYWklyDig

there is a rebuttable[6] presumption against payment.[7] On the other hand, however, it has been said that the law presumes that every person is solvent and pays his just debts and obligations;[8] and the peculiar circumstances of a particular case may raise a presumption of payment.[9]

[§ 189] **b. Possession of Obligation—(1) By Obligee.**[10] Where a written obligation providing for the payment of money is in the possession of the obligee and uncanceled,[11] this fact raises a rebuttable[12] presumption that the debt evidenced thereby has not been paid,[13] except in so far as the obligation bears indorsements by the obligee showing payments to have been made thereon.[14] This rule has been applied to bills and notes,[15] bonds,[16] mortgages,[17] and receipts for money deposited.[18]

Conversely, the obligee's failure to produce the obligation which he seeks to enforce, coupled with lapse of time and other circumstances, may afford conclusive evidence of payment.[19]

[§ 190] **(2) By Obligor.**[20] Where a written obligation providing for the payment of money is in the possession of the obligor, or is found among his papers and effects after his death,[21] this fact raises a rebuttable[22] presumption that the indebtedness evidenced thereby has been paid,[23] and this rule is

316 [aff 8 NYWklyDig 193].

[c] **Money paid out for another.**—Plaintiff's intestate had been engaged in purchasing bonds and mortgages and defendant had acted as agent for him and had procured and sold to him several bonds and mortgages, which were in intestate's possession at the time of his death. Defendant had received from the intestate a sum of money, less than he had expended for the bonds and mortgages, and had given plaintiff a receipt for this amount. It was held that the fact of the intestate's possession of the bonds and mortgages at the time of his death did not create a presumption that he had paid for them otherwise than by the money represented by the receipt. Storz v. Kinzler, 73 App. Div. 372, 77 NYS 64.

6. Rebuttal of presumptions see infra §§ 234–247.

7. Colo.—Denver, etc., R. Co. v. Wilson, 4 Colo. A. 355, 36 P 67.

Ill.—Scown v. Cook County, 199 Ill. A. 351; Stevens v. Plummer, 195 Ill. A. 278.

Mo.—Diel v. Stegner, 56 Mo. A. 535.

N. Y.—Ehrich v. Andrews, 207 App. Div. 378, 381, 202 NYS 65.

Pa.—Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367.

Philippine.—Lichauco v. Berenguer, 39 Philippine 643.

Wis.—Marx v. Marx, 132 Wis. 113, 111 NW 1103.

"In an action at law the presumption is against payment." Ehrich v. Andrews, supra.

[a] **Before maturity.**—No presumption of payment of a note payable on or before the death of the maker and another will arise until after the death of both. Dwight v. Eastman, 62 Vt. 398, 20 A 594.

8. Hoadley v. Dumois, 11 Misc. 52, 31 NYS 853 [aff 155 N. Y. 630 mem, 49 NE 1098 mem].

9. Hem v. Allen, 179 Ill. A. 223; Theobald v. Stinson, 38 Me. 149; Benson v. Benson, 24 Miss. 625; Murphy v. Carpenter, 22 Hun (N. Y.) 15.

[a] **Board furnished as payment on note.**—A husband gave his wife a promissory note, and thereafter a sick and feeble niece of the wife was taken into the family under an agreement that the wife would pay half of her board. It was held that, after the death of both husband and wife, it was to be inferred that the board of the niece was by mutual consent applied upon the note and should have been treated as a payment thereon. Murphy v. Carpenter, 22 Hun (N. Y.) 15.

[b] **Payment for services.**—Where the person performing the services for another kept no books and made no charges, the presumption would be that he received payments when the services were performed. Theobald v. Stinson, 38 Me. 149.

[c] **Levy on property.**—Evidence that an attachment was levied on a debtor's property for a certain debt, no disposition of the levy being shown, raises a presumption that the debt is paid. Benson v. Benson, 24 Miss. 625.

Payment of wages see Master and Servant §§ 261, 262.

10. Comparative weight of presumption arising from lapse of time see infra § 200.

11. Elliott v. Capital City State Bank, 149 Iowa 309, 128 NW 369.

Effect of cancellation of obligation see infra § 192.

12. Rebuttal of presumptions see infra § 234.

13. Ark.—Davis v. Gaines, 28 Ark. 440.

Cal.—Levey v. Henderson, 177 Cal. 21, 169 P 673; McKenzie v. Ray, 168 Cal. 618, 143 P 1018; Light v. Stevens, 159 Cal. 288, 113 P 659; Rice v. Union Trust Co., 50 Cal. A. 643, 195 P 720, 721 [cit Cyc].

Colo.—Murto v. Lemon, 19 Colo. A. 314, 75 P 160.

Ga.—Haywood v. Lewis, 65 Ga. 221.

Ida.—Sheffield v. Cleland, 19 Ida. 612, 115 P 20, 22 [cit Cyc].

Ill.—Douglas v. Pfeiffer, 46 Ill. 102; Finn v. Wetmore, 212 Ill. A. 550; Melink v. Coman, 111 Ill. A. 583; Witner v. Zeman, 30 Ill. A. 195; Humpeler v. Hickman, 13 Ill. A. 537.

Iowa.—Elliott v. Capital City State Bank, 149 Iowa 309, 128 NW 369; Mulhall v. Berg, 95 Iowa 60, 63 NW 573.

Ky.—Luigart v. Luigart, 199 Ky. 98, 250 SW 796, 799 [cit Cyc]; Powell v. Swan, 5 Dana 1; Allen v. Randle, 5 Ky. Op. 215.

Md.—Brown v. White, 27 A 315.

Mass.—Perry v. Gray, 106 Mass. 206.

Mo.—Balmer v. Sunder, 11 Mo. A. 454.

N. J.—Conlon v. Hornstra, 82 N. J. L. 355, 83 A 183.

N. Y.—Hauxhurst v. Ritch, 119 N. Y. 621, 23 NE 176; Redmond v. Hughes, 151 App. Div. 99, 135 NYS 843; Fitzmahony v. Caulfield, 25 App. Div. 119, 49 NYS 196; Olmsted v. Elder, 4 N. Y. Super. 325 [rev on other grounds 5 N. Y. 144]; McKible v. Shepherd, 164 NYS 830; Beattie v. Meeker, 149 NYS 453 [aff 164 App. Div. 964 mem, 149 NYS 1070 mem].

N. C.—Johnson v. Gooch, 116 N. C. 64, 21 SE 39.

Oh.—Hughes v. Hind, Wright 650.

Pa.—Salus v. Curson, 28 Pa. Dist. 462.

Philippine.—Toribio v. Foz, 34 Philippine 913; Pinon v. De Osorio, 30 Philippine 365; Ramos v. Ledesma, 12 Philippine 656; Bantug v. Del Rosario, 11 Philippine 511; Chua Chienco v. Vargas, 11 Philippine 219.

S. C.—Gowdy v. Gowdy, 83 S. C. 349, 65 SE 385; Boyce v. Lake, 17 S. C. 481, 43 AmR 618.

Tenn.—Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694.

Tex.—Hutton v. Pederson, (Civ. A.) 153 SW 176.

Vt.—Hamblet v. Bliss, 55 Vt. 535.

Va.—Dashiell v. Merchants', etc., Sav. Bank, 22 SE 169.

Wash.—Brooks v. James, 16 Wash. 335, 47 P 751.

Wis.—Somervail v. Gillies, 31 Wis. 152.

Eng.—Brembridge v. Osborne, 1 Stark. 374, 2 ECL 145, 171 Reprint 501.

[a] **Reason for rule.**—"Men do not pay their debts and leave the evidence of them in the hands of their creditors." Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 735, 69 SW 345, 91 AmSR 769, 58 LRA 694.

14. Levey v. Henderson, 177 Cal. 21, 169 P 673; Light v. Stevens, 159 Cal. 288, 113 P 659. See Hutton v. Pederson, (Tex. Civ. A.) 153 SW 176, 178 [cit Cyc].

15. See Bills and Notes § 1320.

16. See Bonds § 223.

17. See Chattel Mortgages § 433; Mortgages § 915.

18. Northrop v. Knott, 114 Cal. 612, 46 P 599.

19. Lammer v. Stoddard, 103 N. Y. 672, 9 NE 328.

[a] **Illustration.**—Where, although a mortgage was not canceled upon the record, the bond and mortgage were not produced by the persons claiming thereunder, and in addition thereto considerably more than twenty years had elapsed since the making of the loan and during much of that time the mortgagor was amply able to pay while the mortgagee did not possess much means and presumably needed the money, it was held that there was "very satisfactory and conclusive evidence" of payment of the mortgage. Lammer v. Stoddard, 103 N. Y. 672, 9 NE 328.

Presumptions arising from nonproduction of evidence generally see Evidence §§ 53–59.

20. Joint debtor claiming right to contribution see Contribution § 34.

21. Liddell v. Wright, 72 Ga. 899; Bracken v. Miller, 4 Watts & S. (Pa.) 102. And see cases infra note 23.

22. Rebuttal of presumptions see infra § 234.

23. U. S.—Vermont L. & T. Co. v. Dygert, 89 Fed. 123; Lonsdale v. Brown, 15 F. Cas. No. 8,492, 3 Wash. C. C. 404.

Ala.—Smith v. Pitts, 167 Ala. 461, 470, 52 S 402 [cit Cyc]; Lipscomb v. De Lemos, 68 Ala. 592; Penn v. Edwards, 50 Ala. 63; Hill v. Gayle, 1 Ala. 275; Ort v. Stewart, 13 Ala. A. 542, 69 S 649.

Ark.—Finney v. Rollins, 192 SW 210; Continental Gin Co. v. Benton, 104 Ark. 367, 149 SW 528; Excelsior Mfg. Co. v. Owens, 58 Ark. 556, 25 SW 868; Hollenberg v. Lane, 47 Ark. 394, 1 SW 687.

Cal.—Turner v. Turner, 79 Cal. 565, 21 P 959; Smith v. Harper, 5 Cal. 329.

Colo.—Hall v. King, 2 Colo. 711.

Del.—Star Loan Assoc. v. Moore, 20 Del. 308, 55 A 946.

Fla.—Perez v. Key West Bank, 36 Fla. 467, 18 S 590.

Ga.—Liddell v. Wright, 72 Ga. 899; Osborn v. Herron, 28 Ga. 313. See Martin v. Walker, 102 Ga. 72, 29 SE 132 (possession of purchase-money notes given by predecessor in title).

Ill.—Grimes v. Hilliary, 150 Ill. 141, 36 NE 977; Tedens v. Schumers, 112 Ill. 263; Walker v. Douglas, 70 Ill. 445; Sutphen v. Cushman, 35 Ill. 186; Short v. Weisenborn, 193 Ill. A. 183, 189 [cit Cyc]; Hawkins v. Harding, 37 Ill. A. 564 [rev on other grounds 141 Ill. 572, 31 NE 307, 33 AmSR 347].

Ind.—Fellows v. Kress, 5 Blackf. 536.

Iowa.—Dougherty v. Deeney, 41 Iowa 19; Burrows v. Cook, 17 Iowa 436.

Ky.—Callahan v. Louisville First Nat. Bank, 78 Ky. 604, 39 AmR 262, 1 KyL 342; Wells v. Robb, 9 Bush 26; Powell v. Swan, 5 Dana 1; Slavin v. Dunn, 3 Ky. Op. 316.

La.—Wilkinson v. Phelps, 16 La. 304; Bell v. Norwood, 7 La. 96; Walton v. Young, 26 La. Ann. 164; Nor-

sometimes embodied in express statute.[24] The rule has been applied to bills and notes,[25] bonds,[26] mortgages,[27] checks,[28] and orders for the payment of money in the possession of the person on whom drawn.[29]

Possession consistent with nonpayment. The presumption of payment which ordinarily arises from the obligor's possession of the instrument evidencing his obligation is not important where the facts and circumstances surrounding such possession are shown by the evidence.[30] No presumption of payment arises where the obligor's possession is entirely consistent with nonpayment,[31] as in a case where the obligor has access to the papers of the obligee and might thus have acquired possession of the obligation without payment.[32] A fortiori, the finding of the obligation in a place to which both obligor and obligee had access and in which papers belonging to both of them were kept does not raise a presumption of payment.[33] Where one issues orders on

ton's Succ., 18 La. Ann. 36; Penny v. Bloom, 14 La. Ann. 194; Skannel v. Taylor, 12 La. Ann. 773; Miller v. Reynolds, 5 Mart. N. S. 665; Benson v Shipp, 5 Mart. N. S. 154; De L'Homme v. De Kerlegand, 4 La. 353; Lindsey Mercantile Co., Inc. v. Lindsey, 5 La. A. 195. Compare Brown v. Sadler, 16 La. Ann. 206 (mere possession of notes insufficient to establish payment where circumstances indicate fraud and maker was without the means of payment).

Md.—Lawson v. Burgee, 131 Md. 436, 103 A. 516; Carroll v. Bowie, 7 Gill 34; Usher v. Gaither, 2 Harr. & M. 457.

Mass.—Grimes v. Kimball, 3 Allen 518; Richardson v. Cambridge, 2 Allen 118, 79 AmD 767; McGee v. Prouty, 9 Metc. 547, 43 AmD 409; Crocker v. Thompson, 3 Metc. 224; Baring v. Clark, 19 Pick. 220.

Mich.—Riverside Iron-Works v. Hall, 64 Mich. 165, 31 NW 152; Ormsby v. Barr, 21 Mich. 474.

Miss.—Curry v. Kurtz, 33 Miss. 24; Johnson v. Nations, 26 Miss. 147.

Mo.—Wellman v. Kaiser Inv. Co., 262 Mo. 285, 171 SW 370; Lawson v. Gudgel, 45 Mo. 480; Stephenson v. Richards, 45 Mo. A. 544; McFall v. Dempsey, 43 Mo. A. 369.

Nebr.—Smith v. Gardner, 36 Nebr. 741, 55 NW 245.

N. H.—Drew v. Phelps, 18 N. H. 572; Smith v. Smith, 15 N. H. 55.

N. J.—Chapman v. Hunt, 18 N. J Eq. 414.

N. Y.—Braman v. Bingham, 26 N. Y. 483; McMurray v. McMurray, 63 Hun 133, 17 NYS 657; Levy v. Merrill, 52 HowPr 360 [aff 14 Hun 145]; Every v. Merwin, 6 Cow. 360.

N. C.—Poston v. Jones, 122 N. C. 536, 29 SE 951; Allen v. Allen, 114 N. C. 121, 19 SE 269; Jones v. Bobbitt, 90 N. C. 391.

Oh.—Larimore v. Wells, 29 Oh. St. 13; Marietta Bank v. Haynes, 23 Oh. St. 637.

Okl.—Caulk v. Carlson, 44 Okl. 532, 145 P 335, 337 [cit Cyc].

Or.—Jones v. Hill, 62 Or. 53, 124 P 206; Hedges v. Strong, 3 Or. 18.

Pa.—Clark v. Spheen, 271 Pa. 91, 114 A 496; Wick v. Roop, 253 Pa. 264, 98 A 555; Clymer v. Groff, 220 Pa. 580, 69 A 1119, 14 AnnCas 256; Porter v. Nelson, 121 Pa. 628. 15 A 852; Eckert v. Cameron, 43 Pa. 120; Heffner v. Wenrich, 32 Pa. 423; Union Canal Co. v. Loyd, 4 Watts & S. 393; Bracken v. Miller, 4 Watts & S. 102; Craig v. Craig, 3 Rawle 472, 24 AmD 390; Ziegler v. Gray, 12 Serg. & R. 42; Weidner v. Schweigart, 9 Serg. & R. 385.

Philippine.—Ramos v. Ledesma, 12 Philippine 656.

S. C.—Spann v. Ballard, 24 S. C. L. 440.

S. D.—Rock Island Plow Co. v. Balderson, 26 S. D. 399, 128 NW 482.

Tenn.—Planters' Bank v. Massey, 2 Heisk. 360; Vaughn v. Tate, (Ch. A.) 36 SW 748.

Tex.—Halfin v. Winkleman, 83 Tex. 165, 18 SW 433; Hays v. Samuels, 55 Tex. 560; Close v. Fields, 9 Tex. 422; Close v. Fields, 2 Tex. 232; J. W. Jenkins' Sons' Music Co. v. Truex, (Civ. A.) 204 SW 872.

Va.—Lindsay v. McCormick, 82 Va. 479, 5 SE 534.

Wash.—Seattle First Nat. Bank v. Harris, 7 Wash. 139, 34 P 466.

W. Va.—McCleary v. Grantham, 29 W. Va. 301, 11 SE 949.

Eng.—Harmer v. Steele, 4 Exch. 1, 154 Reprint 1100, 4 ERC 515.

[a] **Reasons for rule.**—(1) "Ordinarily the owner of a note retains it until it is paid." Grimes v. Hilliary, 151 Ill. 141, 149, 36 NE 977 [quot Clymer v. Groff, 220 Pa. 580, 584, 69 A 1119, 14 AnnCas 256]. (2) "The law assumes that an evidence of debt given by one person to another will be found, not in the possession of the debtor, but in the hands of the creditor. Therefore, when the reverse is the case, that is, when the evidence of debt is found in the possession of the debtor, a strong presumption arises that the debt has been canceled either by payment or gift." Hall v. O'Brien, 160 App. Div. 851, 853, 146 NYS 551 [aff 218 N. Y. 50, 112 NE 569].

[b] **Where a vendee gives a note** for the price, which is a lien on the land sold, the possession of such note by one purchasing the land from the vendee is prima facie evidence of payment by one of them. Potts v. Coleman, 86 Ala. 94, 5 S 780.

24. See statutory provisions.

[a] **Statute applicable.**—Under statutes providing that it will be presumed that an obligation delivered to the debtor has been paid and that things in the possession of a person are owned by him, a mortgagor's possession of the note secured by the mortgage, together with the abstract of title to the premises, raises a strong presumption that the mortgage debt has been paid. Jones v. Hill, 62 Or. 53, 124 P 206.

25. See Bills and Notes § 1319.

26. See Bonds § 223.

27. See Chattel Mortgages § 483; Mortgages § 916.

28. Peavey v. Hovey, 16 Nebr. 416, 20 NW 272.

[a] **The possession of a canceled bank check** by the drawer is prima facie proof of the payment of a debt for the same amount as that named therein, for whose payment the drawer testified that it was given. Peavey v. Hovey, 16 Nebr. 416, 20 NW 272.

[b] **Possession of unindorsed check by bank.**—Possession by a bank of an unindorsed check drawn on it in favor of complainant or his order, coupled with evidence that it was not its custom to require a payee to indorse the check when paid to him in person, is not sufficient to show payment to him, when denied by him. Pickle v. Muse, 88 Tenn. 380, 12 SW 919, 17 AmSR 900, 7 LRA 93.

29. Ark.—Lane v. Farmer, 13 Ark. 63.

Mich.—Beardslee v. Horton, 3 Mich. 560.

Miss.—Witherspoon v. Cain, 1 Miss. 407.

Mo.—McFall v. Dempsey, 43 Mo. A. 369.

N. C.—Blount v. Starkey, 1 N. C. 157.

Oh.—Wilson v. Goodin, Wright 219

Or.—Raski v. Wise, 56 Or. 72, 107 P 984.

Pa.—Breidegam v. Enterprise Sav. Assoc., 141 Pa. 112, 21 A 526; Zeigler v. Gray, 12 Serg. & R. 42.

[a] **Sum not specified.**—A written order directing the drawee to pay what money he has of the drawer's, without specifying any sum, is not of itself proof in the hands of the drawee of the payment of any sum, but proves only authority to pay to the person named in the order. Beardslee v. Horton, 3 Mich. 560.

[b] **Indorsement by payee unnecessary.**—Zeigler v. Gray, 12 Serg. & R. (Pa.) 42.

30. Smith v. Pitts, 167 Ala. 461, 470, 52 S 402 [cit Cyc].

[a] **Mistake.**—Where the obligation came into the possession of the obligor by mistake, no presumption of payment arises. In re Dixon, [1899] 2 Ch. 561.

31. Warthen v. Withers, 161 Ga. 864, 132 SE 65; Grimes v. Hilliary, 150 Ill. 141, 36 NE 977; Wellman v. Kaiser Inv. Co., 262 Mo. 285, 171 SW 370; Clymer v. Groff, 220 Pa. 580, 69 A 1119. 14 AnnCas 256.

[a] **Illustration.**—Where a wife received notes of a third person for part of a debt which her husband owed to her, no presumption of payment of the notes arises from the fact that she subsequently lent them to her husband to be used as collateral security for a loan to him. Wellman v. Kaiser Inv. Co., 262 Mo. 285, 171 SW 370.

32. Ill.—Grimes v. Hilliary, 150 Ill. 141, 36 NE 977.

Mo.—Erhart v. Dietrich, 118 Mo. 418, 24 SW 188.

N. Y.—Grey v. Grey, 47 N. Y. 552 [rev 2 Lans. 173]; Rogers v. McGuire, 90 Hun 455, 37 NYS 76 [aff 153 N. Y. 343, 47 NE 452].

Pa.—Clymer v. Groff, 220 Pa. 580, 584, 69 A 1119, 14 AnnCas 256.

W. Va.—Mynes v. Mynes, 47 W. Va. 681, 35 SE 935.

Compare Larimore v. Wells, 29 Oh. St. 13 (mere opportunity to obtain possession of the written evidence of indebtedness unlawfully does not as a matter of law destroy the presumption of payment arising from its possession by the obligor, but the effect to be given to such opportunity is for the determination of the jury).

"Where the maker has access to the papers of the holder, and may have acquired the note as well without payment as with, the presumption of payment does not arise. There is no presumption prejudicial to the maker from the possession, simply, for the reason that the presumption of innocence would repel it. There is simply no presumption that the note is, or is not, paid." Grimes v. Hilliary, 150 Ill. 141, 149, 36 NE 977 [quot Clymer v. Groff, supra].

33. Clymer v. Groff, supra; Mynes v. Mynes, 47 W. Va. 681, 35 SE 935.

[a] **Safe deposit box used by both husband and wife.**—Where a husband executed a mortgage on his real estate to his attorney, who assigned it to the mortgagor's wife, and the mortgage was recorded, but after the death of the mortgagor, the mortgage, together with the bond and assignment, was found in a safe deposit box of the mortgagor, to which both he and his wife had access and a key, there was no presumption that the mortgage was paid. Clymer v. Groff, 220 Pa. 580, 69 A 1119, 14 AnnCas 256.

[b] **Trunk in which papers of husband and wife kept.**—Where a husband executed and delivered to his wife three bonds or notes and a deed of trust securing them, and

a merchant for delivery of goods to a third person, the fact that such orders are in the possession of the person by whom they were issued does not raise a presumption that he has paid for goods delivered pursuant thereto.[34]

[§ 191] **c. Acts Inconsistent with Existence of Indebtedness—(1) In General.** Even though it is proved or admitted that there was at one time an indebtedness from one person to another, subsequent acts of the persons concerned, inconsistent with the continued existence of such indebtedness, may raise a rebuttable[35] presumption that the debt has been paid.[36] Thus, where one person pays money to another[37] or executes and delivers to such other his written obligation for the payment of money,[38] it will be presumed that any preëxisting indebtedness of the latter to the former has been paid, unless the situation is such that the payment is consistent with the continued existence of the debt.[39]

[§ 192] **(2) Cancellation of Obligation.** Cancellation by the creditor of the evidence of indebtedness, by destruction, mutilation, or otherwise, raises a presumption of payment.[40] But detaching matured coupons from a bond before pledging it as security raises no presumption that the coupons are paid or canceled.[41]

[§ 193] **d. Duty To Pay and To Collect United in Same Person.** It has been held that, where the same person has, in one capacity, the obligation to pay a debt and the means to pay it, and, in another capacity, the duty and authority to demand and receive payment of such debt, it will be presumed that the debt has been paid,[42] although it has also been considered that such a presumption can arise only in cases where the individual has no remedy except by retainer.[43]

[§ 194] **e. Creditor's Possession of Debtor's Money.** The fact that a creditor has money in his hands belonging to his debtor tends to raise a presumption of payment,[44] and the presumption is stronger where there are corroborating circumstances.[45]

[§ 195] **f. Remittance by Mail.** The usual presumption that mail matter, properly addressed, stamped, and mailed, was received by the addressee[46] has been held to be applicable in the case of money sent by mail.[47] But it has also been held that, in the absence of any showing that the creditor directed money to be sent to him by mail, a presumption of payment does not arise from the mere fact that money, inclosed in a proper wrapper, properly addressed and stamped, was mailed to the creditor.[48]

after his death they were found, together with other papers of his, as well as papers of the wife, in a trunk, the key of which was in the wife's possession, there was no presumption of payment. Mynes v. Mynes, 47 W. Va. 681, 35 SE 935.

34. Mayo v. Martin, 186 N. C. 1, 118 SE 830.

[a] **Illustration.**—Where a mill owner, sued by a storekeeper for goods furnished his employees on orders or "brass plucks" issued by him against plaintiff, was shown to be in possession of such orders or "plucks," such possession by him did not raise a presumption of payment. Mayo v. Martin, 186 N. C. 1, 118 NE 830.

35. Rebuttal of presumption see infra § 234.

36. Ind.—State Bank v. Ensminger, 7 Blackf. 105.

Iowa.—Whisler v. Drake, 35 Iowa 103.

La.—Downes v. Scott, 3 La. Ann. 278; Hagan v. Brent, 2 La. 26.

Me.—Mathews v. Light, 40 Me. 394.

Mo.—Ham v. Barret, 28 Mo. 388.

N. Y.—Read v. Smith, 1 Hun 263, 3 Thomps. & C. 760.

Pa.—Reynolds v. Richards, 14 Pa. 205.

Porto Rico.—Porto Rican American Tobacco Co. v. Canel, 32 Porto Rico 509.

Va.—Lindsay v. McCormick, 82 Va. 479, 5 SE 534.

[a] **Payment of a subsequently accruing indebtedness** raises a presumption that a prior indebtedness has been paid. Coe v. Anderson, 92 Iowa 515, 61 NW 177; Mathews v. Light, 40 Me. 394; Ham v. Barret, 28 Mo. 388; Read v. Smith, 1 Hun (N. Y.) 263, 3 Thomps. & C. 760; Lindsay v. McCormick, 82 Va. 479, 5 SE 534.

[b] **Where land was to be conveyed upon payment of a note** given for the purchase money, an order from the vendor directing the execution of a conveyance raised a presumption that the note had been paid. Reynolds v. Richards, 14 Pa. 205.

[c] **Entering a new service** raises no presumption of payment for previous services. Printup v. James, 73 Ga. 583.

37. Lodge v. Ainscow, 17 Del. 327, 41 A 187; Baldwin v. Walden, 30 Ga. 829; Steitz v. Priddis, 81 Hun 229, 30 NYS 762; Duguid v. Ogilvie, 3 E. D. Smith (N. Y.) 527, 1 AbbPr 145; Beekman v. Beekman, Anth. N. P. (N. Y.) 169.

38. Ala.—Graves v. Shulman, 59 Ala. 406.

Del.—Callaway v. Hearn, 6 Del. 607.

Ga.—McIntyre v. Meldrim, 63 Ga. 58; Brown v. Horn, 32 Ga. A. 95, 122 SE 710; Fletcher v. Young, 10 Ga. A. 183, 73 SE 38.

Ind.—Long v. Straus, 124 Ind. 84, 24 NE 664; Gregg v. Union County Nat. Bank, 87 Ind. 238; Dodds v. Dodds, 57 Ind. 293; Wilkins v. Ferguson, 47 Ind. 136; Kirchner v. Lewis, 27 Ind. 22; Gaskin v. Wells, 15 Ind. 253; Coon v. Brown, 13 Ind. 150; Boffandick v. Raleigh, 11 Ind. 136.

Iowa.—Downs v. Downs, 102 NW 431; French v. French, 84 Iowa 655, 51 NW 145, 15 LRA 300; Allen v. Bryson, 67 Iowa 591, 25 NW 820, 56 AmR 358; Grimmell v. Warner, 21 Iowa 11; Smith v. Bissell, 2 Greene 379.

Ky.—Barnes v. Green, 12 SW 277, 11 KyL 422.

Mo.—Kinman v. Cannefax, 34 Mo. 147.

Mont.—J. I. Case Threshing Mach. Co. v. Hamilton, 55 Mont. 276, 176 P 152.

N. Y.—Maxon v. Scott, 55 N. Y. 247; Lake v. Tysen, 6 N. Y. 461; Matter of Wood, 207 App. Div. 41, 201 NYS 716; Dimmers v. Armitage, 33 App. Div. 626, 53 NYS 357; Hart v. Riley, 58 Hun 602, 11 NYS 435; Sherman v. McIntyre, 7 Hun 592; Dutcher v. Porter, 63 Barb. 15; Duguid v. Ogilvie, 3 E. D. Smith 527, 1 AbbPr 145; Freese v. Veith, 7 NYS 134; De Freest v. Bloomingdale, 5 Den. 304; Gould v. Chase, 16 Johns. 226.

S. C.—Gowdy v. Gowdy, 83 S. C. 349, 352, 65 SE 385 [cit Cyc]; Chewning v. Proctor, 7 S. C. Eq. 11.

Tenn.—Robertson v. Branch, 3 Sneed 506.

Tex.—Rowe v. Collier, 25 Tex. Suppl. 252.

39. Mechanics' Bank v. Wright, 53 Mo. 153.

[a] **Payment for services rendered by joint debtor.**—Where, after the maturity of a debt, one of several joint debtors performs services for the creditor and the creditor pays him therefor, there is no presumption that the debt is paid, as it is not to be presumed that the joint debtor settled what was not exclusively his own debt. Mechanics' Bank v. Wright, 53 Mo. 153.

40. Pitcher v. Patrick, 1 Stew. & P. (Ala.) 478.

[a] **Where an agent for collection cancels the obligation** of the debtor, it will be presumed, in the absence of evidence, that he did so in consideration of the face amount of the claim. Lexington Bank v. Phenix Ins. Co., 74 Nebr. 548, 104 NW 1146.

41. Rhawn v. Edge Hill Furnace Co., 201 Pa. 637, 51 A 360.

42. Sampson v. Fox, 109 Ala. 662, 19 S 896, 55 AmSR 950; Burwell's Est., 91 Pa. Super. 183, 185 [cit Cyc].

[a] **Illustration.**—When one indebted to a testator or to an intestate qualifies as executor or obtains a grant of administration, his debt is in contemplation of law paid, inasmuch as the obligation to pay and the duty and authority to demand and receive payment coexist. Sampson v. Fox, 109 Ala. 662, 19 S 896, 55 AmSR 950; Miller v. Irby, 63 Ala. 477.

43. Byers v. Fowler, 14 Ark. 86.

[a] **Illustration.**—Where one is agent of a creditor and administrator of the debtor, the law will not presume that he has elected to retain as agent a sufficient amount of the money in his hands as administrator to pay the debt, until he manifests such intention by some affirmative action. Byers v. Fowler, 14 Ark. 86.

44. Walls v. Walls, 170 Pa. 48, 32 A 649.

[a] **Reason for rule.**—"In the ordinary course of human events a creditor having moneys in his hands belonging to his debtor will be likely to pay himself out of the funds." McMichan's Est., 33 Pa. Co., 273.

45. Beldon v. State, 103 N. Y. 1, 8 NE 363; McMichan's Est., 33 Pa. Co. 273.

[a] **Lapse of time.**—"The existence of means of payment in the hands of the creditor, and the lapse of time, are conclusive evidence of the pre-existing fact of an actual discharge of the accruing debt, or are of themselves facts which require a court of equity to adjudge such application to have been made." Belden v. State, 103 N. Y. 1, 8 NE 363, 365. Lapse of time generally see infra §§ 198–213.

46. See Evidence §§ 36–44.

47. Adams v. Sovereign Camp W. O. W., 201 Ala. 166, 77 S 692; Olney v. Blosier, 12 NYSt 211.

48. Crane v. Pratt, 12 Gray (Mass.) 348; Boyd v. Reed, 6 Heisk. (Tenn.) 631. See Masterson v. Union Bank, etc., Co., 86 Wash. 560, 564,

[§ 196] **g. Nonproduction of Documents.** In accordance with the usual rules as to the presumptions arising from the nonproduction of evidence,[49] where one claiming to be a creditor whose debt is evidenced by a written instrument fails to produce such instrument or satisfactorily to account for its nonproduction,[50] a presumption arises that the debt has been paid;[51] and, on the other hand, where a debtor claims that he paid the debt and took a receipt therefor, his failure to produce such receipt or account for its nonproduction creates an inference unfavorable to his claim of payment.[52]

[§ 197] **h. Accounts.** Where a creditor renders an account in which a particular item is not included, it will be presumed that such item has been paid,[53] and where an account of transactions between two persons is kept by one of them, and the other has access to them and inspects them, it may be presumed that an indebtedness not represented in such account has been paid.[54] But the absence of entries in an account book with respect to particular payments will not raise a presumption that they were not made in the face of positive testimony that they were made.[55]

[§ 198] **i. Lapse of Time—(1) In General.** It is a universally recognized rule[56] that mere lapse of time may raise a presumption of payment of a debt.[57] Such a presumption exists at common

150 P 1126, LRA1918A 531 ("the delivery in the mails of a package containing the money, addressed to the consignee, in the absence of some showing of an agreement or custom to that effect, does not raise a presumption that the carrier was the consignee's agent. The presumption is the other way; the money is presumed to belong to the sender until actually received by the person to whom it is sent").

49. See Evidence §§ 49-59.

50. See cases infra this note; and infra note 51.

[a] **Mortgage eaten by rats.**—Where plaintiff accounted for the nonproduction of a mortgage on the ground that it had been eaten by rats, the presumption of payment was not rebutted, as the fact that the mortgage was placed within the reach of rats would lead to the conclusion that it had been paid and was of no other value than as food for rats. Ward v. Greinlds, (N. J. Ch.) 10 A 374.

51. Ill.—Merrick v. Hulbert, 17 Ill. A. 90.

Mass.—Page v. Page, 15 Pick. 368.

Mich.—Ward v. Munson, 105 Mich. 647, 63 NW 498; Bassett v. Hathaway, 9 Mich. 28; Bailey v. Gould, Walk. 478.

N. J.—Ward v. Greinlds, (Ch.) 10 A 374; Eckel v. Eckel, 49 N. J. Eq. 587, 27 A 433.

N. Y.—Lammer v. Stoddard, 103 N. Y. 672, 9 NE 328; Bergen v. Urbahn, 83 N. Y. 49.

S. C.—Butler v. Washington, 28 S. C. 607, 5 SE 601.

[a] **The mere absence of a coupon interest note,** unaccounted for, of itself raises a prima facie presumption of payment. Merrick v. Hulbert, 17 Ill. A. 90.

52. Isola v. Sorani, 47 Nev. 365, 222 P 796.

53. See Accounts and Accounting § 333.

54. Grant v. Keator, 117 N. Y. 369, 22 NE 1055.

[a] **Illustration.**—Two brothers owned land as tenants in common and one of them sold his interest to the other for the price of thirty-three hundred dollars. Thereafter the brothers lived together and the vendee brother kept an account of their mutual transactions which the vendor brother had opportunities to inspect, and did occasionally inspect. At the time of the death of the vendor brother, the account showed a balance in his favor of sixteen hundred and eighty-three dollars and fourteen cents. It was held that it would be presumed that annual balances of the account in favor of the vendee brother were applied in payment of the purchase price of the land and interest thereon, but that no such presumption could be indulged in as to items added to the account after the death of the vendor brother. Grant v. Keator, 117 N. Y. 369, 22 NE 1055.

55. Schwarze v. Roessler, 40 Ill. A. 474.

56. Morse v. National Cent. Bank, 150 Md. 142, 147, 132 A 598.

"This presumption of payment arising from lapse of time is universally recognized." Morse v. National Cent. Bank, supra.

57. U. S.—Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889].

Ala.—Patterson v. Weaver, 216 Ala. 686, 114 S 301; Roach v. Cox, 160 Ala. 425, 49 S 578, 135 AmSR 107.

Cal.—Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 P 67.

Colo.—Dietemann v. Peo., 76 Colo. 378, 232 P 676.

Del.—Parsons v. Cannon, 27 Del. 298, 88 A 470.

Ga.—Tumlin v. Guest, 31 Ga. A. 250, 120 SE 442, 443 [cit Cyc].

Ill.—Langworthy v. Baker, 23 Ill. 484; Morgan v. Whiteside, 216 Ill. A. 566.

Ind.—Hommell v. Gamewell, 5 Blackf. 5.

Iowa.—Manning v. Meredith, 69 Iowa 430, 29 NW 336.

Kan.—Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592.

La.—Kuhn v. Bercher, 114 La. 602, 38 S 468; Wells v. Compton, 3 La. 164; Peytavin v. Maurin, 2 La. 480; Imwolde v. Stern, 2 La. A. (Orleans) 343.

Me.—Potter v. Titcomb, 7 Me. 302.

Md.—Morse v. National Cent. Bank, 150 Md. 142, 132 A 598.

N. J.—Northern R. Co. v. Demarest, 94 N. J. L. 68, 108 A 376; Christy v. New York Cent., etc., R. Co., 90 N. J. L. 540, 101 A 372; Parisen v. New York, etc., R. Co., 65 N. J. L. 413, 47 A 477.

N. Y.—Dowling v. Hastings, 211 N. Y. 199, 105 NE 194; House v. Carr, 185 N. Y. 453, 78 NE 171, 113 AmSR 936, 6 LRANS 510, 7 AnnCas 185; Martin v. Stoddard, 127 N. Y. 61, 27 NE 285; Macaulay v. Palmer, 125 N. Y. 742 mem, 26 NE 912, 4 Silv. A. 339 [aff 3 Silv. Sup. 245, 6 NYS 402]; In re Neilley, 95 N. Y. 382; Belmont v. O'Brien, 12 N. Y. 394; Ouvrier v. Mahon, 117 App. Div. 749, 102 NYS 981; Rosenstock v. Dessar, 109 App. Div. 10, 95 NYS 1064; Matter of Looram, 73 Hun 177, 25 NYS 877; Mutual L. Ins. Co. v. U. S. Hotel Co., 82 Misc. 632, 144 NYS 476.

N. C.—Olds v. Richmond Cedar Works, 173 N. C. 161, 91 SE 846; Spruill v. Davenport, 27 N. C. 663.

Or.—Wood v. Davin, 122 Or. 74, 257 P 690.

Pa.—In re Shelley, 287 Pa. 105, 134 A 468; Lenhart v. Wright, 286 Pa. 351, 133 A 495; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; In re Miller, 243 Pa. 328, 90 A 77; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; Bentley's App., 99 Pa. 500; Delany v. Robinson, 2 Whart. 503; Durdon v. Gaskill, 2 Yeates 268; Wilson v. Eckman, 55 Pa. Super. 403; Sheirich's Est., 7 Pa. Dist. & Co. 433; Van Eman v. Walker, 20 Pa. Dist. 1101; Jackson v. Utz, 18 Pa. Dist. 163.

S. C.—Wilson v. Wilson, 29 S. C. 260, 7 SE 490.

Tenn.—Bender v. Montgomery, 8 Lea 586; Rowsey v. Burkhead, 3 Tenn. Civ. A. 361; Lovelace v. Buckner, 2 Tenn. Civ. A. 337.

Tex.—Duncan v. Rawls, 16 Tex. 478; McKinney v. Freestone County, (Commn. A.) 291 SW 529; Perez v. Maverick, (Civ. A.) 202 SW 199; Hume v. Le Compte, (Civ. A.) 142 SW 934.

Utah.—Hawkley v. Heaton, 54 Utah 314, 180 P 440.

Vt.—Evarts v. Nason, 11 Vt. 122.

Va.—Clendenning v. Thompson, 91 Va. 518, 22 SE 233.

W. Va.—Carder v. Johnson, 84 W. Va. 709, 100 SE 502.

[a] **Basis of rule.**—"The presumption of payment is based upon the experience of mankind that vouchers, acquittances and evidences of payment are not usually preserved from one generation to another; that creditors usually desire their own without waiting a score of years upon their debtors; and that, where there has been no recognition of the claim by the debtor, and the creditor has forborne to assert a right for so long a time, it is most probable that his claim has been in some way satisfied." Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592.

[b] **Origin of rule.**—The rule "is of equitable origin, founded on experience of the ordinary course of business and human affairs, and adopted by the law in the interests of repose and the ending of litigation." In re Ash, 202 Pa. 422, 424, 51 A 1030, 90 AmSR 658.

[c] **A rule of public policy.**—The presumption is a "well-settled and excellent rule of public policy that punishes a plaintiff for excessive delay in asserting his right." Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 908, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889]. To like effect Van Loon v. Smith, 103 Pa. 238.

[d] **Defendant's failure to testify as to payment** does not affect the presumption of payment arising from the lapse of twenty years. Gilmore v. Alexander, 268 Pa. 415, 112 A 9.

[e] **The creditor's ignorance** of the whereabouts of the debtor, or of any property of the debtor which may be subjected to his claim, does not affect the presumption of payment arising from the lapse of twenty years. Roach v. Cox, 160 Ala. 425, 49 S 578, 135 AmSR 107.

[f] **Failure to reduce wife's choses in action.**—No presumption of payment arises from the mere neglect of a husband to reduce his wife's choses in action to his possession for the lapse of time ordinarily sufficient to create a presumption of payment. Cartmell v. Perkins, 2 Del. Ch. 102.

[g] **Effect of testamentary provision.**—"A man who holds overdue obligations certainly may not prevent . . . a presumption of payment from being established by lapse of time after his death by providing in his will that his executor shall not institute any proceedings to enforce such obligations or take any steps to collect the same during the lifetime of an individual named, or during any other period, measured in any

law,[58] but there are also to be found statutes creating such presumptions and fixing definite periods after the lapse of which they shall arise.[59] The presumption is not abrogated by statutes limiting the time within which actions must be brought,[60] but may arise, although the particular debt is not barred by limitations,[61] where the statutory period had been extended by reason of the circumstances of the particular case.[62] Conversely, the fact that a debt is barred by limitations raises no presumption that it has actually been paid.[63] It would seem, however, that, where action on a claim is barred by statute, no necessity exists for relying upon the presumption of payment from lapse of time.[64]

Presumption prevails in equity. The presumption of payment from the lapse of time obtains in courts of equity as well as in courts of law.[65]

Statute precluding presumption. Where a statute expressly provides that lapse of time shall not be set up as a defense to any claim made under it, the presumption of payment arising from lapse of time cannot be indulged.[66]

[§ 199] **(2) Nature of Presumption.** The presumption of payment arising from lapse of time is one of fact,[67] and differs essentially from the bar of the statute of limitations.[68] This presumption is usually drawn from the evidence in support of the claim,[69] and amounts to nothing more than a rule of evidence[70] affecting the burden of going forward with the evidence on the issue of payment or nonpayment.[71]

Statutes creating presumptions of payment after the lapse of a specified time[72] are sometimes regarded as being in effect statutes of limitation, so that the lapse of the prescribed period renders the claim nonexistent as a cause of action enforceable in the courts regardless of whether or not actual payment has been made.[73]

[§ 200] **(3) Effect of Presumption.** The presumption of payment arising from lapse of time is equivalent to direct proof of payment,[74] but it cannot operate to divest or invest title to real-

way." Swinley v. Force, 78 N. J. Eq. 52, 61, 78 A 249.

[b] **A decree of probate court,** on the petition of a distributee, partially settling the accounts of an administrator, distributing assets, and directing the payment of a debt, the only object of the proceeding being such distribution, neither the administrator nor any creditor being served with process, or in any way made parties, will not prevent the presumption of payment of the debt arising from lapse of time. Wilson v. Wilson, 29 S. C. 260, 7 SE 490.

Period necessary to create presumption see infra §§ 204–208.

58. Wright v. Hull, 83 Oh. St. 385, 94 NE 813; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; Holway v. Sanborn, 145 Wis. 151, 130 NW 95. And see cases supra note 57.

[a] **"This presumption is an artificial and arbitrary rule** of the law, derived by analogy from the English statute of limitations; it originated in equity, but was afterwards engrafted into the common law, and has since been steadily maintained." Gregory v. Com., 121 Pa. 611, 621, 15 A 452, 6 AmSR 804 [quot Van Eman v. Walker, 20 Pa. Dist. 1101, 1102]. To same effect Wilson v. Eckman, 55 Pa. Super. 403.

59. See statutory provisions.

[a] **Statute applicable.**—The statute relative to the presumption of payment from the lapse of time in actions on "sealed instruments for the payment of money" applies to sealed articles of agreement for the sale and purchase of land. Morey v. Farmers' L. & T. Co., 18 Barb. 401 [rev on other grounds 14 N. Y. 302].

Period necessary to create presumption under statute see infra § 204.

60. Mo.—Carr v. Dings, 54 Mo. 95.

S. C.—Wright v. Mars, 22 S. C. 585.

Va.—Brewis v. Lawson, 76 Va. 36; Booker v. Booker, 29 Gratt. (70 Va.) 605, 26 AmR 401.

W. Va.—Hale v. Pack, 10 W. Va. 145.

Wis.—Sanderson v. Olmsted, 2 Pinn. 224, 1 Chandl. 190.

61. Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889]; Patterson v. Phillips, 18 F. Cas. No. 10,829a, Hempst. 69; Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592; Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153.

[a] **Thus** the presumption of payment may arise from lapse of time although the statute of limitations has not run in favor of the obligor because of his nonresidence. Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153.

[b] **The payment of interest** will not be presumed after a lapse of twenty years where the obligation itself is saved from the bar of limitations by other interest payments. Chubb v. Patchin, 20 OhNPNS 338, 342 ("The note and the interest are all under one contract, and the interest is an increment of the note and it is a part of the note and to hold that the payments of interest were barred by the common law presumption would be dividing this note into two separate contracts, one for the principal, and the other for the interest due upon the principal, and in effect it would be holding that the note was in full force and effect as to principal and barred by the common law presumption of payment with respect to interest thereon, and the holding of the court is against the defendants on that proposition").

62. No presumption of payment short of statutory period provided for bringing action see infra § 208.

63. Fellman v. Interstate Land Co., 163 La. 529, 112 S 405. See Criss v. Criss, 28 W. Va. 388 (right of entry barred).

64. Spruill v. Davenport, 27 N. C. 663.

65. Ind.—O'Brien v. Holland, 3 Blackf. 490.

Kan.—Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592.

Ky.—Taylor v. Bate, 4 Dana 198; Tibbs v. Clark, 5 T. B. Mon. 526.

Md.—Boyd v. Harris, 2 Md. Ch. 210.

Mass.—Andrews v. Sparhawk, 13 Pick. 393.

Miss.—Doe v. Gildart, 6 Miss. 606.

N. J.—Magee v. Bradley, 54 N. J. Eq. 326, 35 A 103; Bird v. Inslee, 23 N. J. Eq. 363.

N. Y.—Jackson v. Sackett, 7 Wend. 94; Kingsland v. Roberts, 2 Paige 193; Giles v. Baremore, 5 Johns. Ch. 545; Ellison v. Moffatt, 1 Johns. Ch. 46; Clark v. Bogardus, 2 Edw. 387.

Oh.—Wright v. Hull, 83 Oh. St. 385, 94 NE 813.

Pa.—In re Ash, 202 Pa. 422, 51 A 1030, 90 AmSR 658.

S. C.—Nobles v. Hogg, 36 S. C. 322, 15 SE 359; Montgomery v. Cloud, 27 S. C. 188, 3 SE 196.

[a] **"Both at common law and in equity,** after the lapse of twenty years from the maturity of an indebtedness, a presumption that it has been paid arises, and in the absence of rebutting evidence, the presumption is so far controlling that the court may dismiss the petition or direct a verdict." Wright v. Hull, 83 Oh. St. 385, 397, 94 NE 813.

66. State v. Abbey, 15 Oh. Cir. Ct. N. S. 261.

67. See infra § 235.

68. See Limitations of Actions § 4.

69. Chesapeake, etc., Canal Co. v. U. S., 223 Fed. 926, 928, 139 CCA 406, LRA1916B 734.

"This is a different subject from the limitation of actions. Statutes of limitation presuppose an established substantive right, but forbid the plaintiff from enforcing it by the customary remedies. The statute is a weapon of defense, and ordinarily must be pleaded and relied on by the defendant, while the presumption or inference of payment arising from the lapse of time—generally from the lapse of 20 years—is usually drawn from the plaintiff's own case, and when so drawn it can hardly be regarded as a matter of affirmative defense. If the plaintiff cannot make out a prima facie case without showing also the fact of nonpayment for more than 20 years, the presumption of payment immediately arises, attaches at once to his evidence, and weakens it to such an extent that he cannot recover unless he goes further and undertakes to prove facts tending to repel the presumption. The defendant is not required to repeat the proof that 20 years have elapsed without payment, for that has already appeared; he need only call the court's attention thereto, and may then rest upon the presumption or inference of fact arising therefrom until the plaintiff has strengthened the weak point in his own attack. If, however, the plaintiff makes no effort so to do, he fails altogether, but he fails solely for the reason that he has not made out his case—in other words, because his evidence lacks persuasive power." Chesapeake, etc., Canal Co. v. U. S., supra.

70. Dietemann v. Peo., 76 Colo. 378, 232 P 676. And see cases infra note 71.

71. Ill.—Luther v. Crawford, 116 Ill. A. 351 [aff 213 Ill. 596, 73 NE 430].

Pa.—Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; In re Ash, 202 Pa. 422, 51 A 1030; In re Devereux, 184 Pa. 429, 39 A 225; Burwell's Est., 91 Pa. Super. 183; Sheirich's Est., 7 Pa. Dist. & Co. 433.

Tex.—Perez v. Maverick, (Civ. A.) 202 SW 199.

Va.—Clendenning v. Thompson, 91 Va. 518, 22 SE 233.

Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

"The rule arises from public policy and by substituting itself as presumptive evidence of payment, the burden is shifted upon the party in default." Van Loon v. Smith, 103 Pa. 238, 241.

72. See statutory provisions.

73. Lawrence v. Ball, 14 N. Y. 477; Morey v. Farmers' L. & T. Co., 14 N. Y. 302 [rev 18 Barb. 401]; Matter of Van Tassell, 119 Misc. 478, 196 NYS 491; Jackson v. Sackett, 7 Wend. (N. Y.) 94.

74. Morey v. Farmers' L. & T. Co., 14 N. Y. 302 [rev 18 Barb. 401];

ty.[75] The presumption prima facie obliterates the debt,[76] and is conclusive in the absence of any evidence tending to show payment.[77] It does not, however, create an absolute bar[78] or conclusively extinguish the debt,[79] and, indeed, the presumption does not arise, or is completely destroyed, where the fact of nonpayment is admitted or proved.[80] The presumption of payment arising from lapse of time may outweigh any presumption of nonpayment arising from the obligee's possession of an instrument providing for the payment of money.[81]

[§ 201] **(4) Who May Take Advantage of Presumption.** Only the alleged debtor can take advantage of the presumption of payment arising from lapse of time,[82] and it cannot be invoked by third persons whose rights or liabilities might be affected by the fact of payment or nonpayment by the debtor.[83] Where, however, the presumption arises in favor of one of several obligors, it inures to the benefit of all.[84] The presumption applies in favor of fiduciaries as well as those who are debtors in the individual capacity,[85] and is as strong in favor of the personal representative of a deceased debtor as it would be in favor of the debtor himself, if alive.[86] But it has been held that a trustee of an express trust cannot rely on the lapse of time as raising a presumption of payment by him in execution of the trust.[87]

[§ 202] **(5) Against Whom Presumption Available.** The presumption of payment arising from lapse of time is not limited to claims in favor of private individuals or corporations,[88] but applies also to claims in favor of, or debts due to, the United States government,[89] or to the various states of the

Wohanka v. Nelson, 127 Misc. 636, 217 NYS 207; Mutual L. Ins. Co. v. U. S. Hotel Co., 82 Misc. 632, 144 NYS 476; Titusville Second Nat. Bank v. Thompson, 44 Pa. Super. 200; Tucker v. Hunt, 27 S. C. Eq. 183; Thompson v. Thompson, 2 Head (Tenn.) 405.

75. Rankin v. Dean, 157 Ala. 490, 47 S 1015.

[a] **Illustration.**—Where a deed to realty provided that it should be null and void unless several notes of the vendee were paid, a presumption of payment after the lapse of twenty years from maturity could not avail the vendee to defeat an action of ejectment by subsequent vendees of the same vendor. Rankin v. Dean, 157 Ala. 490, 47 S 1015.

76. Titusville Second Nat. Bank v. Thompson, 44 Pa. Super. 200.

77. Ala.—Graham v. Graham, 202 Ala. 56, 79 S 450; Spencer v. Hurd, 201 Ala. 269, 77 S 683, 1 ALR 761; Roach v. Cox, 160 Ala. 425, 49 S 578, 135 AmSR 107; Harrison v. Heflin, 54 Ala. 552.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46; Langworthy v. Baker, 23 Ill. 484.

Iowa.—Wilson v. Else, 204 Iowa 857, 216 NW 33; Hendricks v. Wallis, 7 Iowa 224.

N. Y.—Morey v. Farmers' L. & T. Co., 14 N. Y. 302 [rev 18 Barb. 401]; Wohanka v. Nelson, 127 Misc. 636, 217 NYS 207; Mutual L. Ins. Co. v. U. S. Hotel Co., 82 Misc. 632, 144 NYS 476; Owen v. Calhoun, 8 NYS 447.

N. C.—Alston v. Hawkins, 105 N. C. 3, 11 SE 164, 18 AmSR 874; Woodhouse v. Simmons, 73 N. C. 30; Walker v. Wright, 47 N. C. 155.

Oh.—Wright v. Hull, 83 Oh. St. 385, 94 NE 813.

Or.—Beekman v. Hamlin, 19 Or. 383, 24 P 195, 20 AmSR 827, 10 LRA 454.

Pa.—Richards v. Walp, 221 Pa. 412, 70 A 815; Hart v. Bucher, 186 Pa. 384, 40 A 511; Porter v. Nelson, 121 Pa. 628, 15 A 852; Breneman's App., 121 Pa. 641, 15 A 650; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; Hayes' App., 113 Pa. 380, 6 A 144; Peters' App., 106 Pa. 340; Bentley's App., 99 Pa. 500.

S. C.—McKinlay v. Gaddy, 26 S. C. 573, 2 SE 497; Dickson v. Gourdin, 26 S. C. 391, 2 SE 303; Boyce v. Lake, 17 S. C. 481, 43 AmR 618; Stover v. Duren, 34 S. C. L. 448, 51 AmD 634; Tucker v. Hunt, 27 S. C. Eq. 183; Riddlehoover v. Kinard, 10 S. C. Eq. 376.

Tenn.—Thompson v. Thompson, 2 Head 405; Yarnell v. Moore, 3 Coldw. 173.

Tex.—McKinney v. Freestone County, (Commn. A.) 291 SW 529 [rev (Civ. A.) 285 SW 340].

Eng.—Gratwick v. Simpson, 2 Atk. 144, 26 Reprint 491; Willaume v. Gorges, 1 Campb. 217, 170 Reprint 935.

And see cases infra § 205 note 95.

"The presumption of payment after 20 years, without recognition of liability is conclusive." Graham v. Graham, 202 Ala. 56, 59, 79 S 450. To same effect Snodgrass v. Snodgrass, 176 Ala. 276, 58 S 201.

78. In re Ash, 202 Pa. 422, 51 A 1030, 90 AmSR 658; Sheirich's Est., 7 Pa. Dist. & Co. 433.

"This presumption does not bar the debt." Sheafer v. Woodside, 257 Pa. 276, 280, 101 A 753, 1 ALR 775.

"The presumption . . . is not a bar to an action on the original contract, and therefore a new promise is not necessary to sustain the suit." Wilson v. Eckman, 55 Pa. Super. 403, 405. To same effect Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804 [quot Van Eman v. Walker, 20 Pa. Dist. 1101, 1102].

79. Gravier v. Gravier, 2 La. 457; McDowell v. North Side Bridge Co., 247 Pa. 190, 93 A 280; Rowsey v. Burkhead, 3 Tenn. Civ. A. 361.

[a] **A lapse of thirty years** does not necessarily extinguish all debts. Gravier v. Gravier, 2 La. 457.

80. Chesapeake, etc., Canal Co. v. U. S., 223 Fed. 926, 929, 139 CCA 406, LRA1916B 734; Delano v. Smith, 142 Mass. 490, 8 NE 644; Reed v. Reed, 46 Pa. 239.

"To a plea of the statute of limitations, the plaintiff cannot successfully reply that the debt is still unpaid. The defendant may admit nonpayment without impairing the effect of the plea in the least; but if he makes such an admission, or if the plaintiff offers affirmative proof to the same effect, this is a complete reply to the presumption, and establishes the right to recover." Chesapeake, etc., Canal Co. v. U. S., supra.

[a] **Where the debtor expressly alleges nonpayment,** there is no presumption of payment from the lapse of more than twenty years. Delano v. Smith, 142 Mass. 490, 8 NE 644.

Rebuttal of presumption see infra §§ 235-249.

81. Matter of Lewis, 190 App. Div. 891, 179 NYS 349; Hart v. Bucher, 186 Pa. 384, 40 A 511.

[a] **Illustrations.**—(1) On an accounting of the estate of a decedent, two notes in his possession at the time of his death, one of which was then twenty-four years past due and the other twenty-eight years past due, were presumed to have been paid. Matter of Lewis, 190 App. Div. 891, 179 NYS 349. (2) Where, in an action on a certificate of deposit, brought twenty-four years after its date, there was no circumstance tending to show nonpayment except possession of the paper by the payee at his death, while other circumstances indicated payment during his lifetime, it was held that the presumption of payment arising from lapse of time was not overcome. Rosenstock v. Dessar, 33 Misc. 419, 67 NYS 657 [rev on other grounds 85 App. Div. 501, 83 NYS 334].

Cross references:

Obligee's possession of instrument, together with other circumstances, as rebutting presumption of payment arising from lapse of time see infra § 239.

Presumption of nonpayment arising from obligee's possession of obligation see supra § 189.

82. See cases infra note 83.

83. Ill.—Emory v. Keighan, 88 Ill. 482.

N. Y.—New York L. Ins., etc., Co. v. Covert, 29 Barb. 435 [rev on other grounds 3 Abb. Dec. 350, 3 Transcr. A. 24, 6 AbbPrNS 154, 33 HowPr 619].

N. C.—Outlaw v. Garner, 139 N. C. 190, 51 SE 925.

R. I.—Glezen v. Haskins, 23 R. I. 601, 51 A 219.

Vt.—Appleton v. Edson, 8 Vt. 239.

Compare Van Loon v. Smith, 103 Pa. 238, 241 ("The presumption of payment arising from lapse of time . . . applies . . . between the plaintiff in the judgment and intervening creditors of the defendant").

[a] **Illustration.**—A defendant in ejectment, claiming adverse possession against plaintiff and his mortgagor, cannot rely on a presumption of payment of the mortgage from lapse of time between the giving and the foreclosure of such mortgage. Glezen v. Haskins, 23 R. I. 601, 51 A 219.

[b] **Not like actual payment.**—A presumption of payment is not like an actual payment which satisfies the debt as to all the debtors, but it operates as a payment only in favor of the party entitled to the benefit of the presumption. New York L. Ins., etc., Co. v. Covert, 29 Barb. (N. Y.) 435 [rev on other grounds 3 Abb. Dec. 350, 3 Transcr. A. 24, 6 AbbPrNS 154].

84. Pearsall v. Houston, 48 N. C. 346.

85. Gaines v. Miller, 111 U. S. 395, 4 SCt 426, 28 L. ed. 466; Reynell Coates' Est., 2 Pars. Eq. Cas. (Pa.) 253; Ingraham v. Cox, 1 PaLJ 464; Nobles v. Hogg, 39 S. C. 322, 15 SE 359.

[a] **Annual payments to beneficiary.**—It is to be presumed, after a lapse of twenty years, that a trustee has paid interest payable annually to a cestui que trust for life. Nobles v. Hogg, 36 S. C. 322, 15 SE 359.

86. Gaines v. Miller, 111 U. S. 395, 4 SCt 426, 28 L. ed. 466.

87. Williams v. Williams, 82 Wis. 393, 52 NW 803.

88. See cases infra notes 89-92.

89. Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889]; Chesapeake, etc., Canal Co. v. U. S., 223 Fed. 926, 929, 139 CCA 406, LRA1916B 734.

"In courts of justice, facts must be proved in the same manner and by the same means, no matter who the litigants may be. The government is not privileged merely to lay its claim

Union,[89] counties,[91] or municipal corporations.[92]

[§ 203] **(6) Purposes for Which Presumption Available.** The presumption of payment arising from lapse of time is available only for the purpose of defeating the collection of an alleged debt through judicial action,[93] and cannot be taken advantage of in support of a claim for any affirmative relief.[94]

[§ 204] **(7) Period Necessary To Create Presumption—(a) Under Statute.** Where the period which shall give rise to a presumption of payment is prescribed by statute,[95] such provisions, of course, govern with respect to the length of the period.[96]

[§ 205] **(b) Apart from Statute—aa. Lapse of Time Alone.** The mere lapse of a period of twenty years after maturity of a debt, without recognition thereof by the debtor or assertion thereof by the creditor, is sufficient, without any other circumstances, to raise a presumption of payment,[97] and

before such a tribunal, and demand allowance forthwith. Speaking generally, it must offer the same evidence as an individual, both in quantity and quality; and if it offers none, or if the evidence be insufficient, it fails precisely as the individual fails in similar circumstances. The property of a citizen can only be taken according to the rules and forms of law, and, even if it be the sovereign who is striving to take it by an action in court, we think the sovereign also should be required to prove his right, and to prove it with the same strictness and according to the same rules as prevail in other cases." Chesapeake, etc., Canal Co. v. U. S., supra.

[a] **Contrary view.**—U. S. v. Williams, 28 F. Cas. No. 16,721, 5 McLean 133, 28 F. Cas. No. 16,720, 4 McLean 567.

90. In re Ash, 202 Pa. 422, 424, 51 A 1030, 90 AmSR 658; Sheirich's Est., 7 Pa. Dist. & Co. 433; State v. Sais, 60 Tex. 87; McKinney v. Freestone County, (Tex. Commn. A.) 291 SW 529 (set out and quoted infra note 91); Graves v. Stone, 76 Wash. 88, 135 P 810, AnnCas1915D 182, 72 Wash. 382, 130 P 369.

"When the commonwealth comes into its courts, it is subject like all other suitors to the established rules of evidence. . . . In all such respects it stands upon the same footing as ordinary litigants." In re Ash, supra.

91. McKinney v. Freestone County, (Tex. Commn. A.) 291 SW 529.

[a] **Statutory presumption.**—(1) A statute providing that, after the lapse of four years from the maturity of the indebtedness, the purchase money of land shall be conclusively presumed to have been paid, in a suit to recover such land or enforce a lien thereon for purchase money applies in a suit by a county to recover land sold by it. McKinney v. Freestone County, (Tex. Commn. A.) 291 SW 529, 531 [rev (Civ. A.) 285 SW 340] ("It is thoroughly settled that when the state or any arm of sovereignty comes into the court, it is subject to all the rules of evidence usually applicable to ordinary parties, including this very presumption under discussion"). (2) A contrary view has been asserted on the ground that the constitution denies to the legislature the power "to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any incorporation or individual, to this state, or to any county or other municipal corporation therein," and that provision is broad enough to cover a statute which would in effect release or extinguish such an obligation whether this is effected by creating a period of limitations or a rule of evidence. West v. Cameron County, (Tex. Civ. A.) 4 SW (2d) 111, 116 [refusing to follow McKinney v. Freestone County, supra, on the ground that "the Supreme Court did not approve the ruling of the Commission of Appeals, but merely approved the result"].

92. Fisher v. New York, 67 N. Y. 73; Dorgeloh v. Bassford, 50 N. Y. Super. 450; Leake v. Dallas, (Tex. Civ. A.) 197 SW 472.

93. See cases infra note 94.

94. Ala.—Patterson v. Weaver, 216 Ala. 686, 114 S 301; Rankin v. Dean, 157 Ala. 490, 47 S 1015.

Ill.—Fagan v. Bach, 253 Ill. 588, 97 NE 1087, AnnCas1913A 505.

Md.—Cacy v. Slay, 127 Md. 493, 96 A 690, 1 ALR 764.

N. Y.—In re Willett, 70 N. Y. 490; Lawrence v. Ball, 14 N. Y. 477; Morey v. Farmers' L. & T. Co., 14 N. Y. 302 [rev 18 Barb. 401]; Matter of Serrill, 9 Hun 233.

N. C.—Outlaw v. Garner, 139 N. C. 190, 51 SE 925.

Oh.—Allen v. Everly, 24 Oh. St. 97.

Pa.—Louchbaum's Est., 7 Pa. Dist. 100, 101.

"The rule is never more than a means of defence. It would violate every principle of equality and equity, and be a perversion of the purpose of the rule, to allow him who provokes the contest to use it as a means of attack." Louchbaum's Est., supra.

[a] **Attack on street assessment.**—Under a statute which prohibits the vacation of an assessment for irregularity except in the case of an assessment for repaving a street, for the paving of which an assessment has once been paid, one who seeks to vacate a repaving assessment cannot rely upon a presumption of payment of a previous paving assessment arising from lapse of time but must prove actual payment. In re Willett, 70 N. Y. 490; Matter of Serrill, 9 Hun (N. Y.) 233.

[b] **In a suit to compel release of a mortgage** as a cloud on title, the presumption of payment arising from the mortgagor's possession for twenty years after maturity of the mortgage, without any claim being made by the holders of the mortgage, is not sufficient to warrant relief in the absence of any affirmative evidence of payment. Cacy v. Slay, 127 Md. 493, 96 A 690, 1 ALR 764.

[c] **Suit to establish title under Burnt Records Act.**—The presumption of payment of a debt, such as the price of land, after the lapse of twenty years after it becomes due without demand, is available to a vendee in a suit against him by the vendor's heir to establish and register title under the Burnt Records Act, where the vendee and his heirs have been in undisturbed possession for more than twenty years since the debt became due. Fagan v. Bach, 253 Ill. 588, 594, 97 NE 1087, AnnCas1913A 505 ("In this case no cross-petition was filed and the defendants asked no affirmative relief. The appellants, at most, sought to repel the attack made upon their title by the appellee, and if it were conceded that the presumption of payment may only be used as a shield and for the purpose of defense and that it cannot be used as a sword and for the purpose of attack, we are unable to see how it can be said that presumption is sought to be used for the purpose of attack in this case").

95. See statutory provisions.

[a] **The object of such a statute** is not to create a presumption which did not exist before but merely to shorten and accurately define the time within which such presumption shall arise. Woodhouse v. Simmons, 73 N. C. 30.

96. Ark.—Rector v. Morehouse, 17 Ark. 131; Woodruff v. Sanders, 15 Ark. 143.

Colo.—Dietemann v. Peo., 76 Colo. 378, 232 P 676 [cit Sess. L. (1902) p 57, providing that inheritance taxes shall be presumed to have been paid if not sued for within five years after they have become due].

Me.—Knight v. Macomber, 55 Me. 132.

Mo.—Morgan v. Pott, 124 Mo. A. 371, 101 SW 717.

N. Y.—Martin v. Stoddard, 127 N. Y. 61, 27 NE 285; Fisher v. New York, 67 N. Y. 73 [rev 6 Hun 64]; Ingraham v. Baldwin, 9 N. Y. 45; Carll v. Hart, 15 Barb. 565; Malloy v. Vanderbilt, 4 AbbNCas 127.

N. C.—Boone v. Peebles, 126 N. C. 824, 36 SE 193 (stating repeal of early statute); Ex p. Walker, 107 N. C. 340, 12 SE 136; Pemberton v. Simmons, 100 N. C. 316, 6 SE 122; Rogers v. Clements, 98 N. C. 180, 3 SE 512; Hall v. Gibbs, 87 N. C. 4; Grant v. Burgwyn, 84 N. C. 560; Woodhouse v. Simmons, 73 N. C. 30; Brown v. Becknall, 58 N. C. 423; Haws v. Cragie, 49 N. C. 394; Wilfong v. Cline, 46 N. C. 499; McKeethan v. Atkinson, 46 N. C. 421; Powell v. Brinkley, 44 N. C. 154; Roberts v. Welch, 43 N. C. 287; McCraw v. Fleming, 40 N. C. 348; Spruill v. Davenport, 27 N. C. 663; Johnson v. England, 20 N. C. 70.

Pa.—In re De Haven, 215 Pa. 549, 64 A 779; Wingett's App., 122 Pa. 486, 15 A 863.

Tex.—McKinney v. Freestone County, (Commn. A.) 291 SW 529 [rev (Civ. A.) 285 SW 340].

Vt.—Whitney v. French, 25 Vt. 663.

[a] **A mortgage bond** is a sealed instrument for the payment of money within the meaning of a statute providing that a presumption of payment shall arise after a lapse of twenty years. New York L. Ins., etc., Co. v. Covert, 3 Abb. Dec. (N. Y.) 350, 3 Transcr. A. 24, 6 AbbPrNS 154, 33 HowPr 619 [rev 29 Barb. 435].

[b] **A mortgage** containing no covenants for the payment of money is not a sealed instrument for the payment of money within the meaning of such a statute. New York L. Ins., etc., Co. v. Covert, 3 Abb. Dec. (N. Y.) 350, 3 Transcr. A. 24, 6 AbbPrNS 154, 33 HowPr 619 [rev 29 Barb. 435].

[c] **Bond executed in another state.**—The presumption of payment arising from the lapse of time which is applicable in an action on a bond executed in another state is that allowed by the laws of North Carolina, and not that which prevails in the state where the bond was executed. Haws v. Cragie, 49 N. C. 394.

[d] **Single bills** are embraced in the instruments and demands to which, under the statute, a presumption of payment attaches after ten years. Rogers v. Clements, 98 N. C. 180, 3 SE 512.

97. U. S.—Gaines v. Miller, 111 U. S. 395, 4 SCt 426, 28 L. ed. 466; Brobst v. Brock, 10 Wall. 519, 19 L. ed. 1002, Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Dunlop v. Ball, 2 Cranch 180, 2 L. ed. 246; Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889]; Chesapeake, etc., Canal Co. v. U. S., 223 Fed. 926, 139 CCA 406, LRA1916B 734; Idler v. Borgmeyer, 65 Fed. 910, 13 CCA 198 [writ of error dism 159 U. S. 408, 16 SCt 34, 40 L. ed. 199]; Denniston v. McKeen, 7 F. Cas. No. 3,803, 2 McLean 253; Didlake v. Robb, 7 F. Cas. No. 3,899, 1 Woods 680; Goldhawk v. Duane, 10 F. Cas. No. 5,511, 2 Wash. C. C. 323; Hopkirk v. Page, 12 F. Cas. No. 6,697, 2 Brock. 20; Kirkpatrick v.

Langphier, 14 F. Cas. No. 7,849, 1 Cranch C. C. 85; Miller v. Evans, 17 F. Cas. No. 9,569, 2 Cranch C. C. 72; Martin v. U. S., 28 Ct Cl. 137.

Ala.—Patterson v. Weaver, 216 Ala. 686, 114 S 301; Bromberg v. Hoffman, 207 Ala. 144, 92 S 114; Graham v. Graham, 205 Ala. 644, 89 S 25; Graham v. Graham, 202 Ala. 56, 79 S 450; Spencer v. Hurd, 201 Ala. 269, 77 S 683, 1 ALR 761; Loper v. Dickey, 190 Ala. 554, 67 S 255; Gay v. Fleming, 182 Ala. 511, 62 S 523; Shockley v. Christopher, 180 Ala. 140, 60 S 317; Snodgrass v. Sncdgrass, 176 Ala. 276, 58 S 201; Semple v. Glenn, 91 Ala. 245, 6 S 46, 9 S 265, 24 AmSR 894; Solomon v. Solomon, 83 Ala. 394, 3 S 679.

Cal.—Gage v. Downey, 79 Cal. 140, 21 P 527, 855.

Conn.—O'Connor v. Waterbury, 69 Conn. 206, 73 A 499; Boardman v. De Forest, 5 Conn. 1; Lynde v. Denison, 3 Conn. 387.

Del.—Parsons v. Cannon, 27 Del. 298, 88 A 470; De Ford v. Green, 15 Del. 316, 49 A 1120; Robinson v. Tunnell, 7 Del. 138; Campbell v. Carey, 5 Del. 427; Farmers' Bank v. Leonard, 4 Del. 536; State v. Lobb, 3 Del. 421; Durham v. Greenly, 2 Del. 124; Morrow v. Robinson, 4 Del. Ch. 521.

Ga.—Patterson v. Campbell, 136 Ga. 664, 71 SE 1117; Burt v. Casey, 10 Ga. 178.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46; Fagan v. Bach, 253 Ill. 588, 97 NE 1087. AnnCas1913A 505; Locke v. Caldwell, 91 Ill. 417; McCormick v. Evans, 33 Ill. 327; Langworthy v. Baker, 23 Ill. 484; Morgan v. Whiteside, 216 Ill. A. 566; Luther v. Crawford, 116 Ill. A. 351 [aff 213 Ill. 596, 73 NE 430]; Parker v. Parker, 52 Ill. A. 333.

Ind.—O'Brien v. Holland, 3 Blackf. 490; O'Brien v. Coulter, 2 Blackf. 421.

Iowa.—Wilson v. Else, 204 Iowa 857, 216 NW 33.

Kan.—Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592.

Ky.—Anderson v. Smith, 3 Metc. 491; Waters v. Waters, 1 Metc. 519; Taylor v. Bate, 4 Dana 198; Helm v. Jones, 3 Dana 86; Doty v. Jameson, 93 SW 638, 29 KyL 507.

Me.—Abbott v. Fellows, 116 Me. 173, 100 A 657; Talbot v. Hathaway, 113 Me. 324, 93 A 834; Chick v. Rollins, 44 Me. 104.

Md.—Morse v. National Cent. Bank, 150 Md. 142, 132 A 598, 600 [cit Cyc]; Cacy v. Slay, 127 Md. 493, 96 A 690, 1 ALR 764.

Mass.—Crowley v. Adams, 226 Mass. 582, 116 NE 241; Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552; Denny v. Eddy, 22 Pick. 533; Bass v. Bass, 8 Pick. 187.

Mich.—Longe v. Kinney, 171 Mich. 312, 137 NW 119.

Miss.—Stark v. Gildart, 6 Miss. 606.

Mo.—Bobb v. Taylor, 184 SW 1028; Williams v. Mitchell, 112 Mo. 300, 20 SW 647; Carr v. Dings, 54 Mo. 95; Smith v. Benton, 15 Mo. 371; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717.

N. H.—Frye v. Hubbell, 74 N. H. 358, 68 A 325, 17 LRANS 1197; Roberts v. Dover, 72 N. H. 147, 55 A 895; Tripe v. Marcy, 39 N. H. 439; Clark v. Clement, 33 N. H. 563; Hopkinton v. Springfield, 12 N. H. 328; Bartlett v. Bartlett, 9 N. H. 398.

N. J.—Ryan v. Estes, 143 A 431; Parisen v. New York, etc., R. Co., 65 N. J. L. 413, 47 A 477; Thorpe v. Corwin, 20 N. J. L. 311; Ward v. Greinlds, (Ch.) 10 A 374; Fisher v. Gerndt, 94 N. J. Eq. 53, 118 A 584; Wilbur v. Win, 89 N. J. Eq. 278, 103 A 985; Metlar v. Williams, 86 N. J. Eq. 330, 97 A 961; Wallace v. Coward, 79 N. J. Eq. 243, 81 A 739; Swinley v. Force, 78 N. J. Eq. 52, 78 A 249; Mathews v. Kelly, 70 N. J. Eq. 796, 67 A 1075; Magee v. Bradley, 54 N. J. Eq. 326, 35 A 103; Downs v. Sooy, 28 N. J. Eq. 55; Peacock v. Black, 4 N. J. Eq. 61 [mod on other grounds 5 N. J. Eq. 535].

N. Y.—Conkling v. Weatherwax, 181 N. Y. 258, 73 NE 1028, 2 AnnCas 740; Martin v. Stoddard, 127 N. Y. 61, 27 NE 285; In re Kendrick, 107 N. Y. 104, 13 NE 762; In re Neilley, 95 N. Y. 382; Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153; Fisher v. New York, 67 N. Y. 73 [rev 6 Hun 64]; Lyon v. Odell, 65 N. Y. 28; Central Bank v. Heydorn, 48 N. Y. 260; Morey v. Farmers' L. & T. Co., 14 N. Y. 302 [rev 18 Barb. 401]; Matter of Lewis, 190 App. Div. 891, 179 NYS 349; Redmond v. Hughes, 151 App. Div. 99, 135 NYS 843; Greenfield v. Mills, 123 App. Div. 43, 107 NYS 705; Berger v. Waldbaum, 110 App. Div. 915 mem, 96 NYS 1114 mem [aff 46 Misc. 4, 93 NYS 352]; Rosenstock v. Dessar, 109 App. Div. 10, 95 NYS 1064; Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124; Lyon v. Adde, 63 Barb. 89; New York L. Ins., etc., Co. v. Covert, 29 Barb. 435 [rev on other grounds 3 Abb. Dec. 350, 3 Transcr. A. 24, 6 Abb PrNS 154, 33 HowPr 619]; Macauley v. Palmer, 3 Silv. Sup. 245, 6 NYS 402 [aff 125 N. Y. 742, 26 NE 912, 4 Silv. A. 339]; Wohanka v. Nelson, 127 Misc. 636, 217 NYS 207; Matter of Van Tassell, 119 Misc. 478, 196 NYS 491; Mutual L. Ins. Co. v. U. S. Hotel Co., 82 Misc. 632, 144 NYS 476; Berger v. Waldbaum, 46 Misc. 4, 93 NYS 352; Rosenstock v. Dessar, 33 Misc. 419, 67 NYS 657 [rev on other grounds 85 App. Div. 501, 83 NYS 334]; Owen v. Calhoun, 8 NYS 447; Malloy v. Vanderbilt, 4 AbbNCas 127; Bailey v. Jackson, 16 Johns. 210, 8 AmD 309; Grant v. Duane, 9 Johns. 591; Livingston v. Livingston, 4 Johns. Ch. 287, 8 AmD 562; Kingsland v. Roberts, 2 Paige 193.

N. C.—Kerlee v. Corpening, 97 N. C. 330, 2 SE 664; Graham v. Davidson, 22 N. C. 155; Ridley v. Thorpe, 3 N. C. 343.

Oh.—Wright v. Hull, 83 Oh. St. 385, 94 NE 813; Allen v. Everly, 24 Oh. St. 97.

Or.—Wood v. Davin, 122 Or. 74, 257 P 690; Beekman v. Hamlin, 19 Or. 383, 24 P 195, 20 AmSR 827, 10 LRA 454.

Pa.—In re Shelley, 287 Pa. 105, 134 A 468; Brankin v. Philadelphia, etc., R. Co., 286 Pa. 331, 133 A 563; In re Bartram, 282 Pa. 536, 128 A 511; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; Camp v. John, 259 Pa. 38, 102 A 285; Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; In re Miller, 243 Pa. 328, 90 A 77; In re Yocum, 242 Pa. 82, 88 A 919; Cannon v. Hileman, 229 Pa. 414, 78 A 932; Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; Richards v. Walp, 221 Pa. 412, 70 A 815; In re De Haven, 215 Pa. 549, 64 A 779; O'Hara v. Corr, 210 Pa. 341, 59 A 1099; White v. White, 200 Pa. 565, 50 A 157; Smith's Est., 152 Pa. 102, 25 A 315; Stewart's Est., 147 Pa. 383, 23 A 599; Lash v. Von Neida, 109 Pa. 207; Peters' App., 106 Pa. 340; Van Loon v. Smith, 103 Pa. 238; Bentley's App., 99 Pa. 500; In re Potter, 54 Pa. 465; Brock v. Savage, 31 Pa. 410; Holman's App., 24 Pa. 174; Morrison v. Funk, 23 Pa. 421; Kline v. Kline, 20 Pa. 503; Drysdale's App., 14 Pa. 531; Taylor v Megargee, 2 Pa. 225; Shepherd's App., 2 Grant 402; Okeson's App., 2 Grant 303; Foulk v. Brown, 2 Watts 209; McLean v. Findley, 2 Penr. & W. 97; Wilson v. Eckman, 55 Pa. Super. 403; Titusville Second Nat. Bank v. Thompson, 44 Pa. Super. 200; Barnhart v. Barnhart, 22 Pa. Super. 206; Geiger's Est., 14 Pa. Super. 523; Monroe's Est., 4 Pa. Dist. & Co. 8; Hair v. Thomas, 19 Pa. Dist. 424; Devereux's Est., 6 Pa. Dist. 195, 19 Pa. Co. 267; Parker's Est., 2 Pa. Dist. 101, 12 Pa. Co. 436; Duggan v. Strange, 40 Pa. Co. 425; Leibert v. McKnight, 32 LegInt 291; Ingraham v. Cox, 3 PaLJ 128, 1 PaLJR 464; Bailey v. Vehmeier, 7 WklyNC 195; Eckert's App., 6 WklyNC 21.

R. I.—Glezen v. Haskins, 23 R. I. 601, 51 A 219.

S. C.—Merchants', etc., Nat. Bank v. Hunter, 113 S. C. 394, 102 SE 720; Miller v. Cramer, 48 S. C. 282, 26 SE 657; Simms v. Kearse, 42 S. C. 43, 20 SE 19; McKinlay v. Gaddy, 26 S. C. 573, 2 SE 497; Sartor v. Beaty, 25 S. C. 293; Kinard v. Baird, 20 S. C. 377; Shubrick v. Adams, 20 S. C. 49; Boyce v. Lake, 17 S. C. 481, 43 AmD 618; Smithpeter v. Ison, 38 S. C. L. 203, 53 AmD 732; Stover v. Duren, 34 S. C. L. 448, 51 AmD 634; Levy v. Hampton, 12 S. C. L. 145; Haskell v. Keen, 11 S. C. L. 160; Weatherford v. Tate, 21 S. C. Eq. 27.

Tenn.—Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694; Gwyn v. Porter, 5 Heisk. 253.

Tex.—Weems v. Masterson, 80 Tex. 45, 15 SW 590; Foot v. Silliman, 77 Tex. 268, 13 SW 1032; State v. Sais, 60 Tex. 87; McKinney v. Freestone County, (Commn. A.) 291 SW 529 [rev (Civ. A.) 285 SW 340]; Leake v. Dallas, (Civ. A.) 197 SW 472; Mensing v. Fidelity Lumber Co., (Civ. A.) 194 SW 208; Strickland v. Duffie, (Civ. A.) 191 SW 622; Fulshear v. Deadman, (Civ. A.) 154 SW 616; Buckley v. Runge, 57 Tex. Civ. A. 322, 122 SW 596; Milwee v. Phelps, 53 Tex. Civ. A. 195, 115 SW 891; Shotwell v. McCardell, 19 Tex. Civ. A. 174, 47 SW 39; Owen v. New York, etc., Land Co., 11 Tex. Civ. A. 284, 32 SW 189.

Utah.—Hawkley v. Heaton, 54 Utah 314, 180 P 440.

Vt.—Fletcher v. Fletcher, 72 Vt. 268, 47 A 777; Tudor v. Taylor, 26 Vt. 444; Evarts v. Nason, 11 Vt. 122; Rogers v. Judd, 5 Vt. 236, 26 AmD 301; Payne v. Hathaway, 3 Vt. 212.

Va.—Taylor v. Carter, 117 Va. 845, 86 SE 120; Doyle v. Beasley, 99 Va. 428, 39 SE 152; White v. Offield, 90 Va. 336, 18 SE 436; King v. King, 90 Va. 177, 17 SE 894; Tunstall v. Withers, 86 Va. 892, 11 SE 565; Scott v. Isaacs, 85 Va. 712, 8 SE 678; Updike v. Lane, 78 Va. 132; Booker v. Booker, 29 Gratt. (70 Va.) 605, 26 AmR 401; Robertson v. Read, 17 Gratt. (58 Va.) 544; Tomlin v. How, Gilm. (21 Va.) 1; Ross v. Darby, 4 Munf. (18 Va.) 428; Young v. Price, 2 Munf. (16 Va.) 534.

W. Va.—Seymour v. Alkire, 47 W. Va. 302, 34 SE 953; Burbridge v. Sadler, 46 W. Va. 39, 32 SE 1028; Calwell v. Prindle, 11 W. Va. 307; Sadler v. Kennedy, 11 W. Va. 187; Hale v. Pack, 10 W. Va. 145.

Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95; Pritchard v. Howell, 1 Wis. 131, 60 AmD 363; Sanderson v. Olmsted, 2 Pinn. 224.

Eng.—Lacon v. Briggs, 3 Atk. 105, 26 Reprint 864; Gratwick v. Simpson, 2 Atk. 144, 26 Reprint 491; Carpenter v. Tucker, 1 Ch. Rep. 78, 21 Reprint 512; Oswald v. Leigh, 1 T. R. 270, 99 Reprint 1089; Leman v. Newnham, 1 Ves. 51, 27 Reprint 884; Hillary v. Waller, 12 Ves. Jr. 239, 33, Reprint 92.

"This rule is unbending, universal and invariable." Van Eman v. Walker, 20 Pa. Dist. 1101, 1102. To same effect Hair v. Thomas, 19 Pa. Dist. 424.

[a] **Reason for presumption.**—The presumption has been said to stand upon clear principle, built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this, that every person, individual and corporate, will naturally possess and enjoy what belongs to him. Grantham v. Canaan, 38 N. H. 268.

[b] **"The presumption of payment is based upon** the experience of mankind that vouchers, acquittances and evidences of payment are not usually preserved from one generation to another; that creditors usually desire their own without waiting a score of years upon their debtors; and that, where there has been no recognition of the claim by the debtor, and the creditor has forborne to assert a right for so long a time, it is most probable that his claim has been in some way satisfied." Courtney v. Staudenmayer, 56 Kan. 392, 398, 43 P 758, 54 AmSR 592 [quot Milwee v. Phelps, 53 Tex. Civ. A. 195, 200, 115

it is equally well established that the lapse of any shorter period is not, standing alone, sufficient to raise such presumption,[98] except in Tennessee, where it is held that a lapse of sixteen years is sufficient to raise the presumption,[99] although there is some authority in favor of the adoption of a shorter period in analogy to shorter periods fixed by statutes of limitations in the jurisdiction.[1]

The death of the debtor does not interrupt the running of the period necessary to raise a presumption of payment.[2]

Debtor as administrator of creditor's estate. Where twenty years have not elapsed from the maturity of a debt to the death of the creditor, and the debtor becomes administrator of the creditor's estate, the time subsequent to the issuing of letters of administration cannot be added to the prior period in order to extend the time to the twenty years necessary to raise a presumption of payment.[3]

[§ 206] **bb. Lapse of Time in Connection with Other Circumstances—(aa) In General.** While, in the absence of any statute fixing a shorter period at the end of which a presumption of payment shall arise,[4] the mere lapse of any period short of twenty years will not, of itself, raise any presumption of payment,[5] the lapse of a period of less than twenty

SW 891].

[c] **A rule of convenience and policy.**—"The rule that after the lapse of 20 years debts of every kind are presumed to be paid is a rule of convenience and policy, resulting from a necessary regard for the peace and security of society, and also for the debtor, who shou'd not be called upon to defend stale claims at a time when witnesses are dead, and papers lost or destroyed." Sheafer v. Woodside, 257 Pa. 276, 280, 101 A 753, 1 ALR 775.

[d] **"The rule . . . is applicable** both at law and in equity, in the common pleas and in the orphans' court." Hair v. Thomas, 19 Pa. Dist. 424.

[e] **Leading case.**—Gregory v. Com., 121 Pa. 611, "may now be considered as the leading case on this subject." Van Eman v. Walker, 20 Pa. Dist. 1101, 1102.

98. U. S.—Dox v. U. S. Postmaster-Gen., 1 Pet. 318, 7 L. ed. 160; Dunlop v. Ball, 2 Cranch 180, 2 L. ed. 246; Goldhawk v. Duane, 10 F. Cas. No. 5,511, 2 Wash. C. C. 323; Holmes v. The Lodemia, 12 F. Cas. No. 6,642, Crabbe 434.

Ala.—Wilkerson v. Sorsby, 208 Ala. 345, 94 S 481; Girard v. Futterer, 84 Ala. 323, 4 S 292; Phillips v. Adams, 78 Ala. 225.

Conn.—Belknap v. Gleason, 11 Conn. 160, 27 AmD 721.

Ga.—Thomas v. Hunnicutt, 54 Ga. 337.

Ill.—Aultman v. Connor, 25 Ill. A. 654.

Ind.—Swatts v. Bowen, 141 Ind. 322, 40 NE 1057; Dodds v. Dodds, 57 Ind. 293.

Iowa.—Wilson v. Else, 204 Iowa 857, 216 NW 33; Ludwig v. Blackshere, 102 Iowa 366, 71 NW 356; Walker v. Russell, 73 Iowa 340, 35 NW 443; Nash v. Gibson, 16 Iowa 305; Forsyth v. Ripley, 2 Greene 181.

Ky.—Stockton v. Johnson, 6 B. Mon. 408; Poston v. Smith, 8 Bush 589. Compare Stanford Nat. Bank v. Hocker, 11 Ky. Op. 416 ("The delay on the part of the bank for the period of eight or nine years conduces strongly to show that some settlement had been made with reference to the note in controversy").

Me.—Thayer v. Mowry, 36 Me. 287.

Md.—Morse v. National Cent. Bank, 150 Md. 142, 132 A 598, 600 [cit Cyc].

Mich.—Bennett's Est., 52 Mich. 415, 18 NW 195; Adair v. Adair, 5 Mich. 204, 71 AmD 779.

Mo.—West v. Brison, 99 Mo. 684, 13 SW 95; Hensler v. Gordon, 152 Mo. A. 498, 133 SW 631.

N. J.—Snediker v. Everingham, 27 N. J. L. 143; Boon v. Pierpont, 28 N. J. Eq. 7.

N. Y.—Daby v. Ericsson, 45 N. Y. 786; Ingraham v. Baldwin, 9 N. Y. 45 [aff 12 Barb. 9]; Lowe v. Leary, 184 App. Div. 421, 171 NYS 637 [aff 227 N. Y. 629 mem, 125 NE 920 mem]; Redmond v. Hughes, 151 App. Div. 99, 135 NYS 843; Newcombe v. Fox, 1 App. Div. 389, 37 NYS 294 [aff 154 N. Y. 754 mem, 49 NE 1101 mem]; Jackson v. De Lancey, 11 Johns. 365; Clark v. Bogardus, 2 Edw. 387. But see Jackson v. Sackett, 7 Wend. 94 (dictum).

N. C.—Lenox v. Greene, 4 N. C. 261.

Or.—Thompson v. Larsen, 118 Or. 421, 247 P 139.

Pa.—In re Devereux, 184 Pa. 429, 39 A 225; Walls v. Walls, 170 Pa. 48, 32 A 649; Morrison v. Collins, 127 Pa. 28, 17 A 753, 14 AmSR 827; Moore v. Smith, 81 Pa. 182; Brubaker v. Taylor, 76 Pa. 83; Hughes v. Hughes, 54 Pa. 240; Rogers v. Burns, 27 Pa. 525; Strohm's App., 23 Pa. 351; Diamond v. Tobias, 12 Pa. 312; King v. Coulter, 2 Grant 77; McCarty v. Gordon, 4 Whart. 321; Tilghman v. Fisher, 9 Watts 441; Adlum v. Yard, 1 Rawle 163, 18 AmD 608; Cope v. Humphreys, 14 Serg. & R. 15; Henderson v. Lewis, 9 Serg. & R. 379, 11 AmD 733; Lesley v. Nones, 7 Serg. & R. 410; Boltz v. Bullman, 1 Yeates 584; Dehart v. Gard, Add. 344; Burwell's Est., 91 Pa. Super. 183; Clapier v. Maupay, 2 Miles 137; Reynell Coates' Est., 2 Pars. Eq. Cas. 258; Shilling v. Beidler, 2 Woodw. 160.

Porto Rico.—Ramirez v. Schroder, 16 Porto Rico 589.

S. C.—Robinson v. Robinson, 20 S. C. 567; Bradley v. Jennings, 49 S. C. L. 34; Smithpeter v. Ison, 38 S. C. L. 203, 53 AmD 732; Wightman v. Butler, 29 S. C. L. 357; Blake v. Quash, 14 S. C. L. 340.

S. D.—Newton v. McGee, 31 S. D. 216, 140 NW 252.

Tex.—Ware v. Bennett, 18 Tex. 794.

Vt.—Fletcher v. Fletcher, 72 Vt. 268, 47 A 777; Grafton Bank v. Doe, 19 Vt. 463, 47 AmD 697; Graves v. Weeks, 19 Vt. 178; Sparhawk v. Buell, 9 Vt. 41; Mattocks v. Bellamy, 8 Vt. 463. Compare Bennett v. Delphia, 98 Vt. 492, 129 A 234 (mortgage presumed paid after expiration of fifteen years from date of last payment); Sowles v. Minot, 82 Vt. 344, 355, 73 A 1025, 137 AmSR 1010 ("The lapse of fifteen years without payment or other recognition, and without an enforcement of the security in any manner, will defeat the mortgagee's right").

Va.—Cheatham v. Aistrop, 97 Va. 457, 34 SE 57; Tunstall v. Withers, 86 Va. 892, 11 SE 565; Massie v. Heiskell, 80 Va. 789; Norvell v. Little, 79 Va. 141; Erskine v. North, 14 Gratt. (55 Va.) 60; Dabney v. Dabney, 2 Rob. (41 Va.) 622, 40 AmD 761.

W. Va.—Calwell v. Prindle, 19 W. Va. 604; Sadler v. Kennedy, 11 W. Va. 187.

Wis.—Pritchard v. Howell, 1 Wis. 131, 60 AmD 363.

[a] **Close approximation to twenty years.**—The rule applies, although the period which has elapsed closely approximates twenty years. Boyd v. Boyd, 9 Misc. 161, 29 NYS 7 (nineteen years); Bradley v. Jennings, 49 S. C. L. 34 (nineteen years and nine months); Calwell v. Prindle, 19 W. Va. 604 (period one day short of twenty years).

[b] **Seven years.**—"It is hardly reasonable to ask the courts to infer payment from the forbearance of the plaintiff to bring this suit for more than seven years from the date of the loan." Ramirez v. Schroder, 16 Porto Rico 589, 592.

[c] **The fact that a mortgage is more than six years past due** does not raise a presumption that the mortgage debt has been paid. Newton v. McGee, 31 S. D. 216, 140 NW 252.

[d] **A delay of over five years** before suing on an alleged contract for work and labor performed raised no presumption of payment. Thompson v. Larsen, 118 Or. 421, 247 P 139.

[e] **Lapse of less period and departure from state** is not sufficient. Dehart v. Gard, Add. (Pa.) 344.

[f] **Lapse of less period without suit** is not sufficient. McCarty v. Gordon, 4 Whart. (Pa.) 321.

99. Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694; Kilpatrick v. Brashear, 10 Heisk. (Tenn.) 372; Lyon v. Guild, 5 Heisk. (Tenn.) 175; Carter v. Wolfe, 1 Heisk. (Tenn.) 694; Yarnell v. Moore, 3 Coldw. (Tenn.) 173; McDaniel v. Goodall, 2 Coldw. (Tenn.) 391; Anderson v. Settle, 5 Sneed (Tenn.) 202; Atkinson v. Dance, 9 Yerg. (Tenn.) 424, 30 AmD 422; Blackburn v. Squib, Peck (Tenn.) 60. See Didlake v. Robb, 7 F. Cas. No. 3,899, 1 Woods 680 (holding that a presumption of payment arises after sixteen years and a conclusive presumption after the lapse of twenty years. This case is supported by no other cases except those in Tennessee, and the statement of the court that "it is now well settled" seemed to be a mistake).

[a] **Any period short of sixteen years** does not of itself raise the presumption. Anderson v. Settle, 5 Sneed (Tenn.) 202; Mobile, etc., R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125.

1. Graves v. Stone, 76 Wash. 88, 135 P 810, AnnCas1915D 182, 72 Wash. 382, 130 P 369.

[a] **In an action for a partnership accounting** in respect of a partnership dissolved by the death of a partner, it has been held that after the lapse of the period of limitation for bringing actions against the estate of the deceased partner it will be presumed that the debts of the partnership have been paid. Purvis v. Johnson, 163 Ga. 698, 137 SE 50 (holding that such a presumption arose after the lapse of nine years, under statutes providing that actions upon open accounts or for breach of contract not under the hands of the party sought to be charged or upon any implied assumpsit or undertaking should be brought within four years and that the time between the death of a person and representation taken upon his estate, not exceeding five years, should not be counted as against creditors).

2. Jackson v. Utz, 18 Pa. Dist. 163.

[a] **Reason for rule.**—"The mere fact of the debtor's death ought not to be a sufficient explanation of the creditor's delay. Immediately, he may make claim against his debtor's estate." Bentley's App., 99 Pa. 500, 505 [quot Jackson v. Utz, 18 Pa. Dist. 163, 166].

3. Burwell's Est., 91 Pa. Super. 183, 185.

"The time which elapsed after letters of administration were granted to accountant cannot be added to the time during which the decedent failed to prosecute her claim on the note in order to establish the twenty year period required to raise a presumption of payment. Any such doctrine would be shocking to our sense of justice." Burwell's Est., supra.

4. See supra § 204.

5. See supra § 205 text and note 98.

years may, in connection with other circumstances indicating payment, raise a presumption of payment,[6] even though such other circumstances, in and of themselves, would not be sufficient to raise any such presumption.[7]

[§ 207] **(bb) Circumstances Aiding To Raise Presumption.** It is not possible to define with any exactness what circumstances, in connection with lapse of time, will be sufficient to create the presumption of payment,[8] for the force of the mere lapse of time varies according to the time which has elapsed, strengthening as this period approaches twenty years,[9] and, naturally, the increasing force of the circumstance of lapse of time correspondingly decreases the requirements as to the additional circumstances which are necessary to establish the presumption.[10] The effect of lapse of time may be aided by such matters as a recital of payment in a deed,[11] declarations of the creditor that the debt has been paid,[12] failure of the creditor to include an obligation among his taxable assets,[13] failure of the drawee of a draft to return it,[14] or the creditor's failure to return, or offer to return, an obligation of a third person given to him by the debtor for collection.[15] The debtor's ability to pay will not, of itself, aid in creating a presumption of payment,[16] but such ability, coexisting with a need of money on the part of the creditor, may give rise to

6. U. S.—U. S. v. Laub, 12 Pet. 1, 9 L. ed. 977 [aff 26 F. Cas. No. 15,568, 4 Cranch C. C. 703]; Jones v. Wilkey, 78 Fed. 532; Denniston v. McKeen, 7 F. Cas. No. 3,803, 2 McLean 253; Goldhawk v. Duane, 10 F. Cas. No. 5,511, 2 Wash. C. C. 323; Miller v. Evans, 17 F. Cas. No. 9,569, 2 Cranch C. C. 72.

Ala.—Phillips v. Adams, 78 Ala. 225; May v. Wilkinson, 76 Ala. 543; Toney v. Moore, 4 Stew. & P. 347.

Conn.—Perkins v. Kent, 1 Root 312.

Del.—Fleming v. Rothwell, 5 Del. 46.

Fla.—Buckmaster v. Kelley, 15 Fla. 180.

Ga.—Norton v. Aiken, 134 Ga. 21, 24, 67 SE 425 [cit Cyc]; Milledge v. Gardner, 33 Ga. 397.

Ill.—Seacord v. Matteson, 56 Ill. A. 439.

Ind.—Jacobs v. State, 127 Ind. 77, 26 NE 675; Long v. Straus, 124 Ind. 84, 24 NE 664; Garnier v. Renner, 51 Ind. 372; De Vay v. Dunlap, 7 Ind. A. 690, 35 NE 195.

Iowa.—Wilson v. Else, 204 Iowa 857, 216 NW 33; Manning v. Meredith, 69 Iowa 430, 29 NW 336.

Kan.—Love v. Love, 72 Kan. 658, 83 P 201; Pattie v. Wilson, 25 Kan. 326.

Ky.—Burns v. Ross, 30 SW 641, 17 KyL 181; Wilson v. Suggett, 10 SW 382, 10 KyL 731; Shields v. Pringle, 2 Bibb 387; Moore v. Pogue, 1 Duv. 327; Poston v. Smith, 8 Bush 589; Burks v. Strader, 13 Ky. Op. 101.

La.—Wood v. Egan, 39 La. Ann. 684, 2 S 191; Wooten v. Harrison, 9 La. Ann. 234; Davenport v. Labauve, 5 La. Ann. 140; Bethany v. His Creditors, 7 Rob. 61; Abat v. Buisson, 9 La. 418; Goddard v. Urquhart, 6 La. 659; Denaule v. Nunez, 6 La. 27; Wells v. Compton, 3 La. 164; Peytavin v. Maurin, 2 La. 480.

Mass.—Inches v. Leonard, 12 Mass. 379.

Mich.—Day v. Cole, 65 Mich. 129, 31 NW 823.

Minn.—Lang v. Ferrant, 55 Minn. 415, 57 NW 140.

Mo.—West v. Brison, 99 Mo. 684, 13 SW 95; Baker v. Stonebraker, 36 Mo. 338; Hensler v. Gordon, 152 Mo. A. 498, 133 SW 631; Mercantile Bank v. Hawe, 33 Mo. A. 214.

N. H.—Gould v. White, 26 N. H. 178.

N. J.—Snediker v. Everingham, 27 N. J. L. 143; Eckel v. Eckel, 49 N. J. Eq. 587, 27 A 433.

N. Y.—Dowling v. Hastings, 211 N. Y. 199, 105 NE 194; Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124; Lawrence v. Elmendorf, 5 Barb. 73; Bander v. Snyder, 5 Barb. 63; Jackson v. Sackett, 7 Wend. 94; Jackson v. Pratt, 10 Johns. 381; Flagg v. Ruden, 1 Bradf. Surr. 192; Farrington v. King, 1 Bradf. Surr. 182.

Pa.—Walls v. Walls, 170 Pa. 48, 32 A 649; Lee v. Newell, 107 Pa. 283; Briggs' App., 93 Pa. 485; Moore v. Smith, 81 Pa. 182; Brubaker v. Taylor, 76 Pa. 83; Birkey v. McMakin, 64 Pa. 343; Connelly v. McKean, 64 Pa. 113; Hamilton v. Hamilton, 18 Pa. 20, 55 AmD 585; Diamond v. Tobias, 12 Pa. 312; Sailor v. Hertzog, 4 Whart. 259; Tilghman v. Fisher, 9 Watts 441; Schoonover's Est., 44 Pa. Super. 76; Kelly's Est., 6 Pa. Dist. 685; Kohler's Est., 18 Pa. Co. 184; Erdman's Est., 7 Pa. Co. 306; Cobb v. Cobb, 2 LackLegN 217; Beecher's Est., 29 PittsbLegJNS 84; Larzalere's App., 17 WklyNC 282.

S. C.—Miller v. Cramer, 48 S. C. 282, 26 SE 657; Butler v. Washington, 28 S. C. 607, 5 SE 601; Bradley v. Jennings, 49 S. C. L. 34; Wightman v. Butler, 29 S. C. L. 357; Blake v. Quash, 14 S. C. L. 340; Shaw v. Bowie, 5 S. C. L. 409; Wherry v. McCammon, 33 S. C. Eq. 337, 91 AmD 240; Williams v. Sims, 18 S. C. Eq. 53; Barnwell v. Barnwell, 11 S. C. Eq. 228; Winstanley v. Savage, 7 S. C. Eq. 435.

Tenn.—Atkinson v. Dance, 9 Yerg. 424, 30 AmD 422; Leiper v. Erwin, 5 Yerg. 97; Husky v. Maples, 2 Coldw. 25, 88 AmD 588; Crank v. Flowers, 4 Heisk. 629; Stanley v. McKinzer, 7 Lea 454.

Tex.—Walker v. Emerson, 20 Tex. 706, 73 AmD 207; Hutton v. Pederson, (Civ. A.) 153 SW 176, 177 [quot Cyc]; Hume v. Le Compte, (Civ. A.) 142 SW 934.

Va.—Cheatham v. Aistrop, 97 Va. 457, 34 SE 57; Tunstall v. Withers, 86 Va. 892, 11 SE 565; Norvell v. Little, 79 Va. 141; Barbour v. Duncanson, 77 Va. 76; Ross v. Darby, 4 Munf. (18 Va.) 428.

W. Va.—Calwell v. Prindle, 19 W. Va. 604; Sadler v. Kennedy, 11 W. Va. 187.

Eng.—Lacon v. Briggs, 3 Atk. 105, 26 Reprint 864; Rex v. Stephens, 1 Burr. 433, 97 Reprint 388; Hillary v. Waller, 12 Ves. Jr. 239, 33 Reprint 92.

N. B.—Graves v. Dunfield, 28 N. B. 143.

Que.—Allard v. Legault, 13 LCJur 80.

"Although the legal presumption of payment does not arise in less than twenty years, yet circumstances may be shown to have occurred, which, taken in connection with the time that has elapsed, will render satisfaction probable and be sufficient to justify a conclusion of payment in fact. And the lapse of time taken in connection with the additional circumstances, when short of twenty years, will have more or less influence in justifying such a conclusion, as the time within that period happens to be shorter or longer." Kohler's Est., 18 Pa. Co. 184, 186.

[a] **The presumption is especially applicable** where witnesses whose testimony probably would have conclusively proved the fact of payment have died. Barbour v. Duncanson, 77 Va. 76.

7. Iowa.—Wilson v. Else, 204 Iowa 857, 216 NW 33.

La.—Baker v. Towles, 11 La. 432.

N. Y.—Hall v. Thompson, 24 NYS 86; Jackson v. Sackett, 7 Wend. 94.

Pa.—Schoonover's Est., 44 Pa. Super. 76.

Tex.—Hutton v. Pederson, (Civ. A.) 153 SW 176, 177 [quot Cyc].

8. Diamond v. Tobias, 12 Pa. 312.

9. Baker v. Stonebraker, 36 Mo. 338; Hensler v. Gordon, 152 Mo. A. 498, 133 SW 631; King v. Coulter, 2 Grant (Pa.) 77; Kohler's Est., 18 Pa. Co. 184.

[a] **Less than five years,** together with additional circumstances tending to prove payment, cannot be considered as sufficient ground for a presumption of payment of an account. Hensler v. Gordon, 152 Mo. A. 498, 133 SW 631.

10. See cases supra note 9; and infra this note.

[a] **Custom not to give receipts.**—The fact that it is not usual for domestics to give receipts for sums paid to them, in connection with the lapse of three years, does not raise a presumption of payment, under an agreement for a certain sum per week, to be paid weekly. Snediker v. Everingham, 27 N. J. L. 143.

[b] **Circumstances held sufficient** to raise presumption of payment in less than twenty years. May v. Wilkinson, 76 Ala. 543; Jacobs v. State, 127 Ind. 77, 26 NE 675; Russell v. Pedigo, 30 SW 393, 17 KyL 68; Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124; U. S. Trust Co. v. Stanton, 8 NYS 756; Shaw v. Bowie, 5 S. C. L. 409.

[c] **Circumstances held insufficient** to raise presumption of payment in less than twenty years. McFadden v. Wallace, 38 Cal. 51.

11. Janes v. Patterson, 62 Ga. 527 (recital of payment and continuous possession under deed).

12. Burks v. Strader, 13 Ky. Op. 101; Brubaker v. Taylor, 76 Pa. 83.

[a] **Illustrations.**—(1) Declarations of a creditor, made to the debtor, to the effect that the evidences of indebtedness should have been delivered up and that he regarded them as satisfied, justified the court in submitting to the jury the presumption of payment from lapse of time of a period of less than twenty years. Brubaker v. Taylor, 76 Pa. 83. (2) When the creditor made no attempt to collect for fourteen years and repeatedly declared that the debt was paid, a presumption of payment arose. Burks v. Strader, 13 Ky. Op. 101.

13. Norton v. Aiken, 134 Ga. 21, 67 SE 425.

14. Hunt v. Stephenson, 1 A. K. Marsh. (Ky.) 570.

Effect of debtor's possession of obligation generally see supra § 190.

15. Day v. Clarke, 1 A. K. Marsh. (Ky.) 521.

16. Moore v. Pogue, 1 Duv. (Ky.) 327; Ryans v. Hospes, 167 Mo. 342, 67 SW 285; Daby v. Ericsson, 45 N. Y. 786; Alexander v. Dutcher, 7 Hun 439 [aff 70 N. Y. 385]; Morrison v. Collins, 127 Pa. 28, 17 A 753, 14 AmSR 827.

[a] **Where no plea of payment is interposed,** no presumption of payment for services arose from the fact that the persons to whom they were rendered were very wealthy and there was no reason why they should not have paid for the services from time to time. Ryans v. Hospes, 167 Mo. 342, 67 SW 285.

a presumption of payment after a considerable lapse of time,[17] and the necessitous circumstances of the creditor together with unexplained delay in attempting to enforce the obligation may raise a presumption of payment, although there is no showing as to the financial condition of the debtor.[18]

[§ 208] **(c) Period Short of Statutory Limitation of Action.** The common-law presumption of payment cannot arise from the lapse of any period shorter than that prescribed by the statute of limitations for bringing action upon the particular character of the debt or claim involved.[19]

[§ 209] **(8) Time from Which Period Runs.**[20] Ordinarily, the period necessary to raise a presumption of payment from lapse of time does not begin to run until a cause of action has accrued by reason of maturity of the debt,[21] but, under special circumstances, the period may commence to run prior to the accrual of the cause of action.[22] Where the instrument evidencing an obligation fixes a date for payment, the period will run from such date although, by the terms of the instrument, the entire amount might have become due prior to such date.[23] Where an instrument provides for payment "within" a certain time, payment will be presumed after the lapse of twenty years from the expiration of such time.[24]

Where a debt is payable on demand, the period may run, although no demand has been made.[25]

[§ 210] **(9) Debts or Obligations to Which Presumption Applicable—(a) In General.** The presumption of payment from lapse of time applies to all indebtedness, however evidenced,[26] and whether secured or unsecured.[27] Among debts or obligations to which the presumption has been applied are bonds,[28]

Creditor's possession of debtor's money see supra § 194.

17. Bander v. Snyder, 5 Barb. (N. Y.) 63; Flagg v. Ruden, 1 Bradf. Surr. (N. Y.) 192; Morrison v. Collins, 127 Pa. 28, 17 A 753, 14 AmSR 827; Mertz's App., (Pa.) 7 A 187; Haines' App., 1 Pa. Cas. 558, 4 A 338.

18. Phillips v. Adams, 78 Ala. 225; Huff v. Simmers, 114 Md. 548, 555, 79 A 1003.

"The fact that the plaintiff during the period when he might have enforced his claim by suit, if he had one, was in indigent circumstances and needed the use of the money, is a circumstance tending to justify the presumption that the demand has been paid or otherwise satisfied." Huff v. Simmers, supra.

[a] **Illustration.**—Where a vendor of land, although he was in necessitous circumstances, did not file a bill to enforce his lien until nineteen years after the date of the contract of sale and fourteen years after the death of the purchaser, and showed no excuse for the delay, a presumption arose that the purchase money had been paid. Phillips v. Adams, 78 Ala. 225.

19. Ala.—Sullivan v. Hobbs, 19 Ala. A. 465, 98 S 307 [certiorari den 210 Ala. 372, 98 S 309].

Ga.—Thomas v. Hunnicutt, 54 Ga. 337; Hobbs v. Citizens' Bank, 32 Ga. A. 522, 124 SE 72.

Ill.—Locke v. Caldwell, 91 Ill. 417; Aultman v. Connor, 25 Ill. A. 654.

Iowa.—Hendricks v. Wallis, 7 Iowa 274.

Mich.—Smith's App., 52 Mich. 415, 18 NW 195.

N. J.—Snediker v. Everingham, 27 N. J. L. 143.

N. Y.—Ingraham v. Baldwin, 9 N. Y. 45 [aff 12 Barb. 9].

Vt.—Grafton Bank v. Doe, 19 Vt. 463, 47 AmD 697.

[a] **This rule applies although** suit is not brought until the last day before the debt would become barred by limitations. Newcombe v. Fox, 1 App. Div. 389, 37 NYS 294 [aff 154 N. Y. 754 mem, 49 NE 1101 mem].

Presumption may arise although debt not actually barred see supra § 198 text and note 61.

20. As against infant creditors see infra § 242.

21. N. Y.—Redmond v. Hughes, 151 App. Div. 99, 135 NYS 843; Sullivan v. Fosdick, 10 Hun 173; Williams v. Clements, 19 NYS 613 [aff 137 N. Y. 560 mem, 33 NE 338 mem].

N. C.—Treadgill v. West, 35 N. C. 310; Spruill v. Davenport, 27 N. C. 663.

Pa.—Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; Finfrock v. Kahl, 9 LancLRev 313; Com. v. Wagner, 24 WklyNC 171.

S. C.—Smith v. Steen, 38 S. C. 361, 16 SE 1003.

Vt.—Dwight v. Eastman, 62 Vt. 398, 20 A 594; Smith v. Niagara F. Ins. Co., 60 Vt. 682, 15 A 353, 6 AmSR 144, 1 LRA 216.

[a] **Note payable at maker's death.**—Where a mortgage was given to secure a note payable on or before the death of the maker and another, no presumption of payment will arise from lapse of time before the decease of both, nor will the statute of limitations begin to run. Dwight v. Eastman, 62 Vt. 398, 20 A 594.

[b] **Where a trust is created** for the payment of certain claims, there is no presumption of payment, from lapse of time, before a settlement of the trust estate. In re North American Land Co.'s Est., 83 Pa. 493.

22. Morse v. National Cent. Bank, 150 Md. 142, 132 A 598.

[a] **Bank deposit.**—The period from the running of which payment of a bank deposit to the depositor or on his order may be presumed may commence prior to the accrual of any cause of action by demand upon the bank and refusal to pay, as in a case where the depositor, although in poor circumstances, takes no steps either to withdraw interest on the deposit or to have it credited on his bank book. Morse v. National Cent. Bank, 150 Md. 142, 132 A 598.

23. Smith v. Timmons, 50 Pa. Super. 486; Bennett v. Delphia, 98 Vt. 492, 129 A 234.

[a] **Installment mortgage.**—(1) Where a mortgage consists of a single instrument, covering a single indebtedness, and payable by installments, the twenty years necessary to raise a presumption of payment will begin to run from the date fixed by the contract for payment of the last installment, and not from a date thirty days after a default in the payment of an installment or interest, although the mortgage contains a clause providing that on such default for a period of thirty days the whole of the principal and interest shall become due and payable. Smith v. Timmons, 50 Pa. Super. 486. (2) With respect to a mortgage, the time necessary to create a presumption of payment runs from the date of the last payment and does not arise until the full period has elapsed from the date of such payment, even though the mortgagor remains in possession. Bennett v. Delphia, 98 Vt. 492, 129 A 234.

24. Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428.

[a] **Illustration.**—Where a mortgage was given by a mother to a son, payable "within" five years, after the expiration of more than twenty-six years from the execution of the mortgage and twenty-three years from the mother's death, it will be presumed to have been paid before the maturity of the mortgage, especially where, in the account filed by the mother's executor, no credit was taken for the amount of the mortgage, and it was not even mentioned, and where neither the mortgage nor bond appeared among the effects of the son turned over to his committee in lunacy nearly a year after his mother's death. Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428.

25. Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124 (the debtor would have the right to pay without a demand although the creditor might not have the right to sue until after demand was made).

26. Kip v. Hirsh, 103 N. Y. 565, 9 NE 317, 18 AbbNCas 167; Van Eman v. Walker, 20 Pa. Dist. 1101. And see cases infra notes 27–49.

27. Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552; Hayes' App., 113 Pa. 380, 6 A 144. And see cases infra notes 28–49.

28. U. S.—Higginson v. Mein, 4 Cranch 415, 2 L. ed. 664; Cottle v. Payne, 6 F. Cas. No. 8,268, 3 Day (Conn.) 289.

Del.—Fleming v. Rothwell, 5 Del. 46; Durham v. Greenly, 2 Del. 124.

Ind.—O'Brien v. Coulter, 2 Blackf. 421.

Ky.—Moore v. Pogue, 1 Duv. 327.

Md.—Boyd v. Harris, 2 Md. Ch. 210.

N. H.—Bartlett v. Bartlett, 9 N. H. 398.

N. Y.—New York L. Ins., etc., Co. v. Covert, 3 Abb. Dec. 350, 3 Transcr. A. 24, 6 AbbPrNS 154, 33 HowPr 619 [rev 29 Barb. 435]; Bander v. Snyder, 5 Barb. 63; Clark v. Hopkins, 7 Johns. 556; Smedes v. Hooghtaling, 3 Cai. 48, 2 AmD 250; McDowl v. Charles, 6 Johns. Ch. 132; Flagg v. Ruden, 1 Bradf. Surr. 192; Farrington v. King, 1 Bradf. Surr. 182.

N. C.—Rogers v. Clements, 98 N. C. 180, 3 SE 512; Hall v. Gibbs, 87 N. C. 4.

Oh.—McBride v. Moore, Wright 524.

Pa.—In re Yocum, 242 Pa. 82, 88 A 919; In re Devereux, 184 Pa. 429, 39 A 225 [aff 6 Pa. Dist. 195, 19 Pa. Co. 267]; Mertz's App., 7 A 187; Van Loon v. Smith, 103 Pa. 238; Hughes v. Hughes, 54 Pa. 240; Reed v. Reed, 46 Pa. 239; McLean v. Findley, 2 Penr. & W. 97; Van Eman v. Walker, 20 Pa. Dist. 1101; Devereux's Est., 6 Pa. Dist. 195, 19 Pa. Co. 267; Finfrock v. Kahl, 9 LancLRev 313.

S. C.—Burnside v. Donnon, 34 S. C. 289, 13 SE 465; Agnew v. Renwick, 27 S. C. 562, 4 SE 223; Dickson v. Gourdin, 26 S. C. 391, 2 SE 303; Willingham v. Chick, 14 S. C. 93; Wightman v. Butler, 29 S. C. L. 357; Frazer v. Perdrieau, 17 S. C. L. 172; Kennedy v. Denoon, 5 S. C. L. 476; Brewton v. Cannon, 1 S. C. L. 482; Winstanley v. Savage, 7 S. C. Eq. 435.

Tenn.—Blackburn v. Squib, Peck 60; Thompson v. Thompson, 2 Head 405.

Vt.—Mattocks v. Bellamy, 8 Vt. 463; Rogers v. Judd, 5 Vt. 236, 26 AmD 301.

Va.—Norvell v. Little, 79 Va. 141; Tinsley v. Anderson, 3 Call (7 Va.) 329; Booker v. Booker, 29 Gratt. (70 Va.) 605, 26 AmR 401; Perkins v.

recognizances,[29] and other specialties;[30] bills and notes;[31] judgments;[32] claims against executors or administrators for debts of decedent or for legacies or distributive shares of the estate;[33] claims of a ward against his guardian;[34] bank deposits;[35] certificates of deposit;[36] bounties;[37] purchase price of land;[38] rent;[39] ground rent;[40] taxes and assessments;[41] dividends on corporate stock;[42] interest coupons issued with corporate bonds;[43] accounts;[44] claims for compensation for services;[45] compensation for land appropriated for public use;[46] damages awarded in condemnation proceedings;[47] a claim of an abutting owner to compensation for damages sustained by the location of a highway;[48] and a claim against an attorney for money collected by him.[49]

[§ 211] **(b) Mortgages and Deeds of Trust.** A presumption of payment from lapse of time may arise with respect to a debt secured by a mortgage[50]

Hawkins, 9 Gratt. (50 Va.) 649.

W. Va.—Calwell v. Prindle, 11 W. Va. 307.

[a] **Where a bond was executed in another state,** the presumption arising from lapse of time is that allowed in the state where the action is brought. Haws v. Cragie, 49 N. C. 394.

Presumptions as to payment of bonds generally see Bonds § 223.

Presumption of performance of condition of bond arising from lapse of time see Bonds § 222.

29. Ankeny v. Penrose, 18 Pa. 190.

30. U. S.—Gaines v. Miller, 111 U. S. 395, 4 SCt 426, 28 L. ed. 466; Higginson v. Mein, 4 Cranch 415, 2 L. ed. 664; Cottle v. Payne, 6 F. Cas. No. 3,268, 3 Day (Conn.) 289; Dennistón v. McKeen, 7 F. Cas. No. 3,803, 2 McLean 253.

Del.—De Ford v. Green, 15 Del. 316, 40 A 1120; Stockley v. Bewley, 10 Del. 587; State v. Lobb, 3 Del. 421; Durham v. Greenly, 2 Del. 124.

Ind.—Smith v. Buskirk, 7 Blackf. 477; Rogers v. Bishop, 5 Blackf. 108.

Mo.—Williams v. Mitchell, 112 Mo. 300, 20 SW 647; Smith v. Benton, 15 Mo. 371.

N. H.—Bartlett v. Bartlett, 9 N. H. 398.

N. Y.—Van Rensselaer v. Livingston, 12 Wend. 490; Jackson v. Hotchkiss, 6 Cow. 401; Smedes v. Hooghtaling, 3 Cai. 48, 2 AmD 250; McBride v. Moore, Wright 524.

Pa.—In re Devereux, 184 Pa. 429, 39 A 225; Smith's Est., 152 Pa. 102, 25 A 315; Lash v. Von Neida, 109 Pa. 207; Beale v. Kirk, 84 Pa. 415; Reed v. Reed, 46 Pa. 239; Sellers v. Holman, 20 Pa. 321; Ankeny v. Penrose, 18 Pa. 190; Shepherd's App., 2 Grant 402; King v. Coulter, 2 Grant 77; In re Cremer, 5 Watts & S. 331; Backestoss v. Com., 8 Watts 286; Galbraith v. Galbraith, 6 Watts 112; Diemer v. Sechrist, 1 Penr. & W. 419; Rickert v. Geistwite, 1 Pittsb. 153.

S. C.—Gibson v. Lowndes, 28 S. C. 285, 5 SE 727; Agnew v. Renwick, 27 S. C. 562, 4 SE 223; Sartor v. Beaty, 25 S. C. 293; Wallace v. Campbell, 17 S. C. 596; Boyce v. Lake, 17 S. C. 481, 43 AmR 618; Hinton v. Kennedy, 3 S. C. 459; Charleston Dist. Ordinary v. Steedman, 16 S. C. L. 287, 18 AmD 652; Levy v. Hampton, 12 S. C. L. 145; Smith v. Richardson, 11 S. C. L. 166 note a; Haskell v. Keen, 11 S. C. L. 160; Palmer v. Dubois, 8 S. C. L. 178; Brewton v. Cannon, 1 S. C. L. 482.

Vt.—Rogers v. Judd, 5 Vt. 236, 26 AmD 301.

Va.—Norvell v. Little, 79 Va. 141; Tinsley v. Anderson, 3 Call (7 Va.) 329; Booker v. Booker, 29 Gratt. (70 Va.) 605, 26 AmR 401; Perkins v. Hawkins, 9 Gratt. (50 Va.) 649.

Eng.—Gratwick v. Simpson, 2 Atk. 144, 26 Reprint 491; Rex v. Stephens, 1 Burr. 433, 97 Reprint 388; Dennis v. Nourse, 1 Ch. Rep. 106, 21 Reprint 521; Geofrey v. Thorn, 1 Ch. Rep. 88, 21 Reprint 515; Carpenter v. Tucker, 1 Ch. Rep. 78, 21 Reprint 512; Humphreys v. Humphreys, 3 P. Wms. 395, 24 Reprint 1116; Oswald v. Legh, 1 T. R. 270, 99 Reprint 1089; Fladong v. Winter, 19 Ves. Jr. 196, 34 Reprint 491; Hillary v. Waller, 12 Ves. Jr. 239, 33 Reprint 92.

31. See Bills and Notes § 1318.

32. See Judgments §§ 1069, 1070.

33. See Executors and Administrators § 2171.

34. Matter of Lewis, 36 Misc. 741, 74 NYS 469.

[a] **Twenty years after the final account** of a guardian of a deceased lunatic has been allowed, it will be presumed that the balance in the hands of the guardian has been distributed among those entitled to it. Mathews v. Kelly, 70 N. J. Eq. 796, 67 A 1075.

35. Morse v. National Cent. Bank, 150 Md. 142, 132 A 598; Ashton v. Philadelphia Nat. Bank, 2 Chest. Co. (Pa.) 479.

36. Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124.

37. O'Connor v. Waterbury, 69 Conn. 206, 37 A 499.

38. Ill.—McCormick v. Evans, 33 Ill. 327.

Mo.—Williams v. Mitchell, 112 Mo. 300, 20 SW 647.

N. Y.—Jackson v. Hotchkiss, 6 Cow. 401.

Pa.—Rothrock v. Rothrock, 195 Pa. 529, 46 A 90; Smith's Est., 152 Pa. 102, 25 A 315; Pryor v. Wood, 31 Pa. 142.

Tex.—Mills v. Alexander, 21 Tex. 154; Owen v. New York, etc., Land Co., 11 Tex. Civ. A. 284, 32 SW 189.

Va.—Whitlock v. Johnson, 87 Va. 323, 12 SE 614; Cox v. Carr, 79 Va. 28.

W. Va.—Burbridge v. Sadler, 46 W. Va. 39, 32 SE 1028.

[a] **A purchase-money note reserving a lien** on the property sold is presumptively paid after the lapse of over thirty years, unless the presumption is rebutted by evidence of nonpayment. Buckley v. Runge, 57 Tex. Civ. A. 322, 122 SW 596.

[b] **Extinguishment of vendor's lien.**—Lapse of time may create a presumption of payment of the purchase price of land resulting in the extinguishment of a vendor's lien thereon. Buckley v. Runge, (Tex. Civ. A.) 136 SW 533.

39. Bailey v. Jackson, 16 Johns. (N. Y.) 210, 214, 8 AmD 309 ("there is no reason to exempt a lease, reserving a pecuniary rent, from the operation of the rule").

40. See Ground Rents § 78.

41. N. H.—Andover v. Merrimack County, 37 N. H. 437; Colebrook v. Stewartstown, 28 N. H. 75; Dalton v. Bethlehem, 20 N. H. 505; Hopkinton v. Springfield, 12 N. H. 328.

N. Y.—Fisher v. New York, 67 N. Y. 73 [rev 6 Hun 64]; Matter of Serrill, 9 Hun 233; Dorgeloh v. Bassford, 50 N. Y. Super. 450.

Pa.—Stewart's Est., 147 Pa. 383, 23 A 599; Mellon's App., 114 Pa. 564, 8 A 183; McLaughlin v. Kain, 45 Pa. 113; Woodburn v. Farmers', etc., Bank, 5 Watts & S. 447.

Tex.—Leake v. Dallas, (Civ. A.) 197 SW 472.

Wash.—Graves v. Stone, 76 Wash. 88, 135 P 810, AnnCas1915D 182, 72 Wash. 382, 130 P 369.

[a] **Personal property tax.**—Graves v. Stone, 76 Wash. 88, 135 P 810, AnnCas1915D 182, 72 Wash. 382, 130 P 369.

[b] **Collateral inheritance tax.**—Stewart's Est., 147 Pa. 383, 23 A 599; Sheirich's Est., 7 Pa. Dist. & Co. 433; Monroe's Est., 4 Pa. Dist. & Co. 8; Fasig's Est., 20 Pa. Dist. 77.

Availability of presumption against government, states, counties, etc. see supra § 202.

42. Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889].

43. McDowell v. North Side Bridge Co., 247 Pa. 190, 93 A 280.

44. Bass v. Bass, 8 Pick. (Mass.) 187.

45. Bromberg v. Hoffman, 207 Ala. 144, 92 S 114; Wilson v. Else, 204 Iowa 357, 216 NW 33.

46. Brankin v. Philadelphia, etc., R. Co., 286 Pa. 331, 133 A 563.

47. Northern R. Co. v. Demarest, 94 N. J. L. 68, 108 A 376.

[a] **Possession for over fifty years.**—Where a railroad has been in actual possession of land condemned for over fifty years, there is a presumption that an award of damages made has been paid. Northern R. Co. v. Demarest, 94 N. J. L. 68, 108 A 376.

48. Lenhart v. Wright, 286 Pa. 351, 133 A 495.

[a] **"Particularly is this conclusion to be reached** where the enabling act provided that the owner should ask for the appointment of viewers within one year, if he felt himself aggrieved by the location of the new highway, and [he] failed to do so." Lenhart v. Wright, 286 Pa. 351, 356, 133 A 495.

49. Roberts v. Armstrong, 1 Bush (Ky.) 263, 89 AmD 624.

50. Ala.—Graham v. Graham, 205 Ala. 644, 89 S 25; Graham v. Graham, 202 Ala. 56, 79 S 450; Spencer v. Hurd, 201 Ala. 269, 77 S 683, 1 ALR 761; Loper v. Dickey, 190 Ala. 554, 67 S 255; Gay v. Fleming, 182 Ala. 511, 62 S 523; Shockley v. Christopher, 180 Ala. 140, 60 S 317.

Kan.—Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592.

Me.—Abbott v. Fellows, 116 Me. 173, 100 A 657; Knight v. McKinney, 84 Me. 107, 24 A 744; Philbrook v. Clark, 77 Me. 176.

Md.—Cacy v. Slay, 127 Md. 493, 96 A 690, 1 ALR 764.

Mass.—Crowley v. Adams, 226 Mass. 582, 116 NE 241; Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552; Anthony v. Anthony, 161 Mass. 343, 37 NE 386; Delano v. Smith, 142 Mass. 490, 8 NE 644; Cheever v. Perley, 11 Allen 584.

Mich.—Baent v. Kennicutt, 57 Mich. 268, 23 NW 808; Lyon v. McDonald, 51 Mich. 435, 16 NW 800; Cowie v. Fisher, 45 Mich. 629, 8 NW 586; Abbott v. Godfroy, 1 Mich. 178.

Mo.—Bobb v. Taylor, 184 SW 1028; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717.

N. H.—Frye v. Hubbell, 74 N. H. 358, 68 A 325, 17 LRANS 1197; Barker v. Jones, 62 N. H. 497, 13 AmSR 413.

N. J.—Ryan v. Estes, 143 A 431; Rockhill v. Rockhill, (Ch.) 14 A 760; Fisher v. Gerndt, 94 N. J. Eq. 53, 118 A 584; Wilbur v. Winn, 89 N. J. Eq. 278, 103 A 985; Wallace v. Coward, 79 N. J. Eq. 243, 81 A 739; Swinley v. Force, 78 N. J. Eq. 52, 78 A 249; Stimis v. Stimis, 54 N. J. Eq. 17, 33 A 468.

N. Y.—Martin v. Stoddard, 127 N. Y. 61, 27 NE 285; New York L. Ins., etc., Co. v. Covert, 3 Abb. Dec. 350, 3 Transcr. A. 24, 6 AbbPrNS 154, 33 HowPr 619 [rev 29 Barb. 435]; Greenfield v. Mills, 123 App. Div. 43, 107 NYS 705; Ouvrier v. Mahon, 117 App.

or deed of trust,[51] where the mortgagor has remained in possession of the land,[52] with no payment on account of the mortgage debt,[53] no recognition of it as a subsisting obligation,[54] and no attempt to enforce it,[55] for twenty years or more,[56] or even for a less period where there are circumstances other than the lapse of time indicating payment.[57]

The fact that a note is barred by limitations does not raise any presumption that a mortgage securing such note has been paid.[58]

Div. 749, 102 NYS 981; Harrington v. Slade, 22 Barb. 161; Wohanka v. Nelson, 127 Misc. 636, 217 NYS 207; Mutual L. Ins. Co. v. U. S. Hotel Co., 82 Misc. 632, 144 NYS 476; Jackson v. Sackett, 7 Wend. 94; Jackson v. Slater, 5 Wend. 295; Jackson v. Pierce, 10 Johns. 414; Heyer v. Pruyn, 7 Paige 465, 34 AmD 355; Park v. Peck, 1 Paige 477.

Pa.—Camp v. John, 259 Pa. 38, 102 A 285; Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; Van Loon v. Smith, 103 Pa. 238; Van Eman v. Walker, 20 Pa. Dist. 1101; Brown v. Wagner, 23 WklyNC 250.

Tex.—Fulshear v. Deadman, (Civ. A.) 154 SW 616.

Vt.—Bennett v. Delphia, 98 Vt. 492, 129 A 234.

Eng.—Stewart v. Nicholls, Taml. 307, 12 EngCh 307, 48 Reprint 122.

Ont.—McIntosh v. Rogers, 12 Ont. Pr. 389.

[a] **In an action to try title** to land, the presumption that a debt secured by a mortgage was paid, and the mortgage thereby satisfied will arise from its existence for a long time before suit. Hume v. Le Compte, (Tex. Civ. A.) 142 SW 934.

[b] **Absolute deed intended as mortgage.**—The rule as to presumption of payment from lapse of time applies where the security, although in the form of an absolute deed, is shown to have been intended as a mortgage. Swart v. Service, 21 Wend. (N. Y.) 36, 34 AmD 211.

[c] **Nonpayment of interest.**—Payment of the principal of a mortgage cannot be presumed from the fact that no interest has been paid for nineteen years. Boon v. Pierpont, 28 N. J. Eq. 7.

[d] **A contrary view** has been asserted upon the ground that the mortgagee is supposed to be in possession and possession by the mortgagor is only as tenant at will of the mortgagee. Toplis v. Baker, 2 Cox Ch. 119, 30 Reprint 55.

Presumptions as to payment of mortgage generally see Mortgages § 915.

51. Graham v. Graham, 205 Ala. 644, 89 S 25; Mensing v. Fidelity Lumber Co., (Tex. Civ. A.) 194 SW 208.

52. See cases supra note 50; infra this note; and note 56.

[a] **Where the mortgagor is not in possession,** this fact may prevent the presumption of payment from arising or operate to rebut any such presumption. Crooker v. Crooker, 49 Me. 416 (premises in possession of life tenant claiming under superior title); Jackson v. Slater, 5 Wend. (N. Y.) 295 (premises occupied by stranger to title); Jackson v. Pierce, 10 Johns. (N. Y.) 414.

[b] **Where the mortgagee is in possession** of the mortgaged premises, either actually or constructively, no presumption of payment results from the lapse of time. Brobst v. Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002; Crooker v. Jewell, 31 Me. 306; Baldwin v. Cullen, 51 Mich. 33, 16 NW 191; Becker v. McCrea, 149 App. Div. 211, 133 NYS 771 [app dism 209 N. Y. 572 mem, 103 NE 1121 mem]; Jackson v. De Lancey, 11 Johns. (N. Y.) 365; Mahar v. Fraser, 17 U. C. C. P. (Ont.) 408.

[c] **Remainderman as mortgagor.**—The rule that continued possession by the mortgagor for twenty years after the mortgage debt is payable, without any entry or claim by the mortgagee, creates a presumption that the mortgage debt is paid has no application where the mortgagor was a remainderman, and his only possession was in connection with the life tenant, since, until the death of the life tenant, the mortgagee had no right of entry. Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552.

53. Effect of payment on account see infra § 241.

54. Effect of recognition of debt see infra § 240.

55. Effect of proceedings to enforce payment see infra § 247.

56. U. S.—Brobst v. Brock, 10 Wall. 519, 19 L. ed. 1002; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Burnham v. Hewey, 4 F. Cas. No. 2,-175, 1 Hask. 372; Ransdale v. Grove, 20 F. Cas. No. 11,570, 4 McLean 282.

Ala.—Goodwyn v. Baldwin, 59 Ala. 127.

Ark.—Duke v. State, 56 Ark. 485, 20 SW 600.

Ill.—Locke v. Caldwell, 91 Ill. 417; Blaisdell v. Smith, 3 Ill. A. 150.

Kan.—Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592; Pattie v. Wilson, 25 Kan. 326.

Ky.—Murray v. Fishback, 5 B. Mon. 403; Hunt v. Forman, 2 Dana 471.

Me.—Knight v. McKinney, 84 Me. 107, 24 A 744; Jarvis v. Albro, 67 Me. 310; Crooker v. Crooker, 49 Me. 416; Chick v. Rollins, 44 Me. 104; Mathews v. Light, 40 Me. 394; Blethen v. Dwinal, 35 Me. 556; Sweetser v. Lowell, 33 Me. 446; Crooker v. Jewell, 31 Me. 306; Joy v. Adams, 26 Me. 330.

Md.—Boyd v. Harris, 2 Md. Ch. 210.

Mass.—Anthony v. Anthony, 161 Mass. 343, 37 NE 386; Kellogg v. Dickinson, 147 Mass. 432, 18 NE 223, 1 LRA 346; Inches v. Leonard, 12 Mass. 379; Cheever v. Perley, 11 Allen 584; Creighton v. Proctor, 12 Cush. 433; Ayres v. Waite, 10 Cush. 72; Howland v. Shurtleff, 2 Metc. 26, 35 AmD 384.

Mich.—Baent v. Kennicutt, 57 Mich. 268, 23 NW 808; Baldwin v. Cullen, 51 Mich. 33, 16 NW 191; Cowie v. Fisher, 45 Mich. 629, 8 NW 586; Michigan Ins. Co. v. Brown, 11 Mich. 265; Abbott v. Godfroy, 1 Mich. 178.

Mo.—Wilson v. Albert, 89 Mo. 537, 1 SW 209; Moreau v. Detchemendy, 18 Mo. 522; Lewis v. Schwenn, 15 Mo. A. 342 [aff 93 Mo. 26, 2 SW 391, 3 AmSR 511].

N. H.—Barker v. Jones, 62 N. H. 497, 13 AmSR 586; Gould v. White, 26 N. H. 178.

N. J.—Rockhill v. Rockhill, (Ch.) 14 A 760; Ward v. Greinlds, (Ch.) 10 A 374; Blue v. Everett, 55 N. J. Eq. 329, 36 A 960 [aff 56 N. J. Eq. 455, 39 A 765]; Magee v. Bradley, 54 N. J. Eq. 326, 35 A 103; Stimis v. Stimis, 54 N. J. Eq. 17, 33 A 468; Murphy v. Coates, 33 N. J. Eq. 424; Downs v. Sooy, 28 N. J. Eq. 55; Barned v. Barned, 21 N. J. Eq. 245; Hayes v. Whitall, 13 N. J. Eq. 241; Evans v. Huffman, 5 N. J. Eq. 354; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 AmD 748.

N. Y.—Martin v. Stoddard, 127 N. Y. 61, 27 NE 285; Lynch v. Pfeiffer, 110 N. Y. 33, 17 NE 402; Lammer v. Stoddard, 103 N. Y. 672, 9 NE 328; Barnard v. Onderdonk, 98 N. Y. 158; Belmont v. O'Brien, 12 N. Y. 394; Katz v. Kaiser, 10 App. Div. 137, 41 NYS 776; Townshend v. Townshend, 1 AbbNCas. 81; Jackson v. Wood, 12 Johns. 242, 7 AmD 315; Jackson v. De Lancey, 11 Johns. 365; Jackson v. Pierce, 10 Johns. 414; Jackson v. Pratt, 10 Johns. 381; Collins v. Torry, 7 Johns. 278, 5 AmD 273; Jackson v. Hudson, 3 Johns. 375, 3 AmD 500; Kellogg v. Wood, 4 Paige 578; Dunham v. Minard, 4 Paige 441; Giles v. Baremore, 5 Johns. Ch. 545; Newcomb v. St. Peter's Church, 2 Sandf. Ch. 636.

N. C.—Fowler v. Osborne, 111 N. C. 404, 16 SE 470; Ray v. Pearce, 84 N. C. 485; Roberts v. Welch, 43 N. C. 287.

Oh.—Allen v. Everly, 24 Oh. St. 97.

Pa.—Sawyer v. Link, 193 Pa. 424, 44 A 457; Hart v. Bucher, 182 Pa. 604, 38 A 472; Brock v. Savage, 31 Pa. 410; Smith v. Nevin, 31 Pa. 238; Green v. Fricker, 7 Watts & S. 171; Michener v. Michener, 1 Pa. Cas. 391, 2 A 508; Lancaster v. Flowers, 11 Pa. Dist. 495; McCrudden's Est., 12 Phila. 69; In re Liggett, 33 PittsbLegJNS 164; Brown v. Wagner, 23 WklyNC 250; Philadelphia v. Comber, 15 Wkly NC 502.

R. I.—Staples v. Staples, 20 R. I. 264, 38 A 498.

S. C.—Simms v. Kearse, 42 S. C. 43 20 SE 19; Agnew v Renwick, 27 S. C. 562, 4 SE 223.

Tex.—Foot v. Silliman, 77 Tex. 268, 13 SW 1032; Fessenden v. Barrett, 9 Tex. 475.

Vt.—Atkinson v. Patterson, 46 Vt. 750.

Va.—Bell v. Wood, 94 Va. 677, 27 SE 504; Jones v. Comer, 5 Leigh 350.

W. Va.—Pickens v. Love, 44 W. Va. 725, 29 SE 1018; Criss v. Criss, 28 W. Va. 388; Edwards v. Chilton, 4 W. Va. 352.

Eng.—Trash v. White, 3 Bro. Ch. 289, 29 Reprint 542; Hele v. Hele, 2 Ch. Cas. 28, 22 Reprint 831; Sibson v. Fletcher, 1 Ch. Rep. 59, 21 Reprint 507; Christophers v. Sparke, 2 Jac. & W. 223, 37 Reprint 612; Hillary v. Waller, 12 Ves. Jr. 239, 33 Reprint 92.

Can.—Re Caverhill, 8 CanLJNS 50.

Ont.—Imperial Bank v. Metcalfe, 11 Ont. 467; Doe v. Hawke, 5 U. C. Q. B. O. S. 496.

[a] **On a scire facias sur mortgage,** where it appears that the suit was brought more than twenty years after the mortgage became due, and there is nothing on the face of the pleadings to rebut the presumption of payment from the lapse of twenty years, no judgment can be entered against defendant or the terre tenants either for want of an affidavit of defense, or for want of appearance, or for want of a plea. If such a judgment is entered it may be stricken off at the instance of a terre tenant against whom the judgment was entered. Duggan v. Strange, 40 Pa. Co. 425.

[b] **A lapse of twenty years after a decree of foreclosure** without any attempt to enforce it by a sale raises a presumption of payment. Barnard v. Onderdonk, 98 N. Y. 158. Presumption of payment of judgment generally see Judgments §§ 1069, 1070.

57. McMurray v. McMurray, 63 Hun 183, 17 NYS 657; Brownell v. Oviatt, 215 Pa. 514, 64 A 670; Butler v. Washington, 28 S. C. 607, 5 SE 601.

[a] **Payment may be presumed** where there has been a lapse of: (1) Fifteen years without any effort to enforce the mortgage, and there is evidence that the mortgagor was at all times solvent and able to pay the debt. McMurray v. McMurray, 63 Hun 183, 17 NYS 657. (2) Thirteen years, with corroborating circumstances. Butler v. Washington, 28 S. C. 607, 5 SE 601.

[b] **Circumstances insufficient to raise presumption.**—A delay of sixteen years in bringing an action to reform and foreclose a mortgage will not raise a presumption of payment where the mortgagee was a member of the mortgagor's household and the mortgagor never demanded his mortgage. Davison v. Dennis, 176 Ala. 435, 58 S 401.

58. Wilkinson v. Flowers, 37 Miss. 579, 75 AmD 78.

No presumption of payment of barred debt generally see supra § 198.

[§ 212] **(c) Obligation To Make Periodical Payments.** Mere lapse of time during which no attention is paid to an obligation to make periodical payments will not alone raise a presumption that the obligation to make such payments has been discharged,[59] although such a presumption may arise from lapse of time in connection with other circumstances,[60] and mere lapse of time may raise a presumption that particular payments pursuant to such obligation have been made.[61] Where there has been an agreement for the discharge of such an obligation by the payment of a fixed sum, lapse of time after the making of such agreement may raise a presumption that the sum agreed on was paid and the obligation discharged.[62]

[§ 213] **(d) Indebtedness between Husband and Wife.**[63] The presumption of payment from lapse of time does not ordinarily arise in the case of an indebtedness between husband and wife;[64] but there are cases in which such presumption has been indulged with respect to an obligation running to a trustee for the wife, and securing an indebtedness from the husband to the wife.[65]

[§ 214] **2. Full or Partial Payment—a. In General.** A payment made by a debtor to a creditor will be presumed to be in full unless the contrary appears,[66] and accordingly, the payment of a particular debt may raise a presumption that an earlier debt has been paid.[67] As a general rule it is held that, where a debtor gives a promissory note to his creditor, it will be presumed that all matured debts of inferior degree between the parties were settled at the date of the note and that it was given for the balance due,[68] although there is authority for the view that no such presumption arises,[69] unless the note is given for the particular account in question or on a general settlement of accounts between the parties.[70]

A claim that part payment has been made raises a presumption that payment in full has not been made.[71]

[§ 215] **b. Regular Payments as Full Settlement.** Where the relations of the parties are such as call for periodical payments by one to the other, and periodical payments are made, there is a rebuttable[72] presumption that each payment was in full settlement of all claims arising out of such relation up to the date of such payment.[73]

59. Cornwall v. Hoyt, 7 Conn. 428; Van Ness v. Ransom, 83 Misc. 178, 144 NYS 420 [aff 164 App. Div. 483, 150 NYS 251 (aff sub nom. Parsons v. Macfarlane, 220 N. Y. 605 mem, 115 NE 1046 mem)].

60. Van Ness v. Ransom, supra.

[a] **Failure to enforce judgment for alimony.**—Where after a judgment awarding alimony at a certain rate per year, there has been no recognition by either party of any obligation for about forty years, and during that time the wife to whom alimony was awarded has made no attempt to enforce payment, although under the statute she had a remedy by merely applying to the court for leave to issue execution, it will be presumed that the obligation to pay alimony has been discharged. Van Ness v. Ransom, 83 Misc. 178, 144 NYS 420 [aff 164 App. Div. 483, 150 NYS 251 (aff sub nom. Parsons v. Macfarlane, 220 N. Y. 605 mem, 115 NE 1046 mem)].

61. State v. Lobb, 3 Del. 421; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; Smallman v. Hamilton, 2 Atk. 71, 26 Reprint 443.

62. Van Ness v. Ransom, 83 Misc. 178, 144 NYS 420 [aff 164 App. Div. 483, 150 NYS 251 (aff sub nom. Parsons v. Macfarlane, 220 N. Y. 605 mem, 115 NE 1046 mem)].

63. Presumptions in actions between husband and wife generally see Husband and Wife § 782.

64. Metlar v. Williams, 86 N. J. Eq. 330, 97 A 961; Morrish v. Morrish, 262 Pa. 192, 105 A 83; Stelts v. Martin, 90 S. C. 14, 72 SE 550; In re Dixon, [1899] 2 Ch. 561.

[a] **Reason for rule.**—"One ground for a presumption of payment growing out of lapse of time is that a man is always ready to enjoy what is his own. . . . The ground stated . . . cannot in justice be applied to a wife, for however ready she may be to enjoy what is her own, or to reclaim it from her husband, she is ever subject to his counsel and advice, and his refusal to pay must be submitted to by her, if domestic peace and happiness are to be preserved. . . . To require the wife to enforce her right by legal proceedings against her husband in order to prevent the conclusive presumption of payment contended for here, will introduce a doctrine tending to provoke litigation between husband and wife, while the settled policy of the law is in favor of its prevention." Ayres v. Ayres, 69 N. J. Eq. 343, 345, 60 A 422 [aff 69 N. J. Eq. 842, 66 A 1133].

[b] **"The best considered decisions** upon the subject in hand, even since the Married Woman's Property Acts, are to the effect that, owing to the social importance of maintaining the family relation, in suits between a wife and her husband for the protection of the former's property, statutes of limitation, as also presumptions or estoppels by lapse of time do not ordinarily affect the rights of the wife, since she cannot be expected to treat her husband as a stranger; as certain courts have well said, any other policy would be apt to beget disagreements and contentions in the family fatal to domestic peace." Morrish v. Morrish, 262 Pa. 192, 201, 105 A. 83.

[c] **Where a husband holds a mortgage from his wife,** payment cannot be presumed from his failure to foreclose the mortgage for many years while he and his wife were living together. "Nor is it to be presumed from his failure to sue his wife after their separation, which occurred six or seven years before the action was brought; for nonaction might well be attributed to delicacy of feeling." Stelts v. Martin, 90 S. C. 14, 18, 72 SE 550.

65. Graham v. Graham, 205 Ala. 644, 89 S 25; In re Yocum, 242 Pa. 82, 88 A 919.

[a] **Bond.**—Where a husband gave a bond to a trustee to secure the repayment of a loan made to him by his wife, a presumption of payment of the bond arose after the lapse of twenty years. In re Yocum, 242 Pa. 82, 88 A 919.

[b] **Trust deed.**—Where a husband executed a trust deed to secure a debt owing to his wife, but remained in possession with his wife for more than thirty years after the maturity of the debt, and until his death, and there was no evidence to show possession of the land by the wife, or by the husband for the wife, there is a presumption that the mortgage debt and deed were extinguished after the lapse of more than twenty years after maturity. Graham v. Graham, 205 Ala. 644, 89 S 25.

66. Pulver v. Esselstyn, 22 Misc. 429, 50 NYS 756.

67. Ham v. Barret, 28 Mo. 388.

68. Ariz.—Walker v. Gray, 6 Ariz. 359, 57 P 614.

Iowa.—Grimmell v. Warner, 21 Iowa 11; Smith v. Bissell, 2 Greene 379.

N. Y.—In re Callister, 153 N. Y. 294, 47 NE 268, 60 AmSR 620; Dimmers v. Armitage, 33 App. Div. 626, 53 NYS 357; Wright v. Wright, 74 Hun 138, 26 NYS 238; Eighmie v. Strong, 49 Hun 16, 1 NYS 502, 15 NYCivProc 119; Campbell Printing Press, etc., Co. v. Yorkston, 11 Misc. 340, 32 NYS 263.

Okl.—Johns v. Edwards, 120 Okl. 85, 250 P 1012.

S. C.—Morse v. Ellerbe, 38 S. C. L. 600.

Tex.—Rowe v. Collier, 25 Tex. Suppl. 252.

[a] **For balance of account.**—Where a note with securities is given for the balance of an account on a settlement, it will be presumed that it covers all the items of the maker's account previously existing. Rowe v. Collier, 25 Tex. Suppl. 252.

[b] **A note given by a debtor after a demand for payment** of a debt is presumptive evidence of settlement and payment of all previous demands. Maxon v. Scott, 55 N. Y. 247.

Presumption as to whether note accepted as absolute or conditional payment see infra § 216.

69. Ankeny v. Pierce, 1 Ill. 289, 12 AmD 174 [foll Crabtree v. Rowand, 33 Ill. 421].

70. White v. Jones, 38 Ill. 159, 165 ("The giving of a promissory note does not, of itself, raise a presumption of a satisfaction of an antecedent account, or settlement of all accounts between the parties. But if it appeared that the note was given for the account or upon a settlement of accounts between the parties, the presumption would be that it was intended as a settlement and satisfaction of the antecedent demands").

71. Combs v. Krish, 84 SW 562, 27 KyL 154.

72. Rebuttal of presumptions see infra § 234.

73. Cal.—Johnstone v. Mulcahy, 132 Cal. 606, 64 P 1077, 65 P 383.

Del.—Morrow v. Franklish, 27 Del. 534, 89 A 740.

Ill.—Phenix v. Hallcock, 175 Ill. A. 113.

Me.—Mathews v. Light, 40 Me. 394.

Mass.—Brewer v. Knapp, 1 Pick. 332.

Nebr.—Ottens v. Fred Krug Brewing Co., 58 Nebr. 331, 78 NW 622.

N. Y.—Robinson v. Munn, 206 App. Div. 576, 201 NYS 655 [rev on other grounds 238 N. Y. 40, 143 NE 784].

Pa.—Reynolds v. Richards, 14 Pa. 205.

Que.—Montreal v. Geddes, 5 Montr. Leg. N. 203.

[a] **Such a presumption arises in case of payments of:** (1) Board. Morrow v. Frankish, 27 Del. 534, 89 A 740. (2) Wages. Robinson v.

[§ 216] **3. Absolute or Conditional Payment**[74]**—a. Bills, Notes, Etc.—(1) Of Debtor.** In some states the rule is that, where a debtor gives to his creditor his negotiable[75] bill of exchange,[76] order for the payment of money,[77] or promissory note,[78] there is a rebuttable[79] presumption that such bill or note is accepted as payment.[80] The more generally accepted rule, however, is that no such presumption arises,[81] but, on the contrary, there is a rebuttable[82] presumption that a bill of exchange,[83] order for the payment of money,[84] or promissory note,[85] given by a debtor to his creditor for an original indebtedness." Hadley v. Bordo, 62 Vt. 285, 288, 19 A 476.

Munn, 206 App. Div. 576, 201 NYS 655 [rev on other grounds 238 N. Y. 40, 143 NE 784]; Reilly v. Burkelman, 149 App. Div. 548, 134 NYS 13. (3) Rent. Mathews v. Light, 40 Me. 394; Patterson v. O'Hara, 2 E. D. Smith (N. Y.) 58; Decker v. Livingston, 15 Johns. (N.Y.) 479; Terry v. Bale, 1 Dem. Surr. (N. Y.) 452; Reynolds v. Richards, 14 Pa. 205. (4) Taxes. Hodgdon v. Wight, 36 Me. 326; Attleborough v. Middleborough, 10 Pick. (Mass.) 378; Montreal v. Geddes, 5 Montr. Leg. N. 203.

74. Bill or note as payment generally see supra §§ 40–49.

75. See cases infra this note; and notes 76–78.

[a] **A nonnegotiable note** of the debtor is not presumed to have been accepted in payment of the debt. Bradway v. Groenendyke, 153 Ind. 508, 55 NE 434; State v. Hullihan, (Ind. A.) 157 NE 282.

[b] **An order for payment out of a particular fund** being nonnegotiable, no presumption arises that it was accepted as payment of a debt of the person by whom it was drawn. Brill v. Hoile, 53 Wis. 537, 11 NW 42.

76. Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420 (stating rule in Massachusetts); Ward v. Bourne, 56 Me. 161.

77. Fowler v. Ludwig, 34 Me. 455; Brill v. Hoile, 53 Wis. 537, 11 NW 42 (dictum, the order involved in the case being not negotiable); Lewis v. England, 14 Wyo. 128, 82 P 869, 2 LRANS 401.

[a] **Order on treasurer of debtor.**—Where a corporate debtor delivers to its creditor a negotiable order to draw upon its treasurer, it is presumed that such order was accepted as payment. Fowler v. Ludwig, 34 Me. 455 [foll Varner v. Nobleborough, 2 Me. 121, 11 AmD 48].

78. U. S.—The Yankton, 7 F. (2d) 384 (decided in Massachusetts and recognizing the doctrine prevailing in that state); Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420; Hudson v. Bradley, 12 F. Cas. No. 6,833, 2 Cliff. 130 (both stating rule in Massachusetts).

Ark.—Toulmin v. Underwood, 172 Ark. 813, 290 SW 377; Carlton v. Buckner, 28 Ark. 66; Costar v. Davies, 8 Ark. 213, 46 AmD 311.

Ill.—Morrison v. Smith, 81 Ill. 221; Smalley v. Edey, 19 Ill. 207; McConnell v. Stettinius, 7 Ill. 707; U. S. v. Leach, 191 Ill. A. 346. Compare Heartt v. Rhodes, 66 Ill. 351, 356 (quoting, with approval, a statement of the contrary rule in Story Promissory Notes § 104).

Ind.—State v. Adams, 187 Ind. 165, 118 NE 680; Bradway v. Groenendyke, 153 Ind. 508, 55 NE 434; Sutton v. Baldwin, 146 Ind. 361, 45 NE 518; Jouchert v. Johnson, 108 Ind. 436, 9 NE 413; Maxwell v. Day, 45 Ind. 509; State v. Hullihan, (A.) 157 NE 282; State v. Traylor, 77 Ind. A. 419, 132 NE 608; Stevenson v. Stunkard, 44 Ind. A. 716, 90 NE 106; Beach v. Huntsman, 42 Ind. A. 205, 85 NE 523.

Me.—Bean v. Camden Lumber, etc., Co., 124 Me. 102, 126 A 285; Delano Mill Co. v. Warren, 123 Me. 408, 123 A 417; Clark v. Downes, 119 Me. 252, 110 A 364; Roy v. Bellevieu, 118 Me. 495, 108 A 70; Spitz v. Morse, 104 Me. 447, 72 A 178.

Mass.—Giligian v. New England Truck Co., 163 NE 651; Stebbins v. North Adams Trust Co., 243 Mass. 69, 136 NE 880; Baldwin v. Porter, 217 Mass. 15, 104 NE 492; Cary Brick Co. v. Wheeler, 210 Mass. 338, 96 NE 800; American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526; Wood v. Bodwell, 12 Pick. 268; Jones v. Kennedy, 11 Pick. 125; Reed v. Upton, 10 Pick. 522, 20 AmD 545.

Okl.—Bowles v. Biffles, 50 Okl. 587, 151 P 193.

Vt.—Manley Bros. Co. v. Somers, 100 Vt. 292, 137 A 336; Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85; Taplin v. Marcy, 81 Vt. 428, 71 A 72.

Wyo.—Lewis v. England, 14 Wyo. 128, 82 P 869, 2 LRANS 401.

[a] **"It is a well settled rule of law** in this State and Massachusetts that a negotiable promissory note, given for a simple contract debt, is prima facie to be deemed a payment or satisfaction of such debt as between the parties thereto, which simply means, that without further evidence of intent than the giving and receiving of such note, it is construed to be payment. Equally well settled is the rule that this presumption of payment, which is a presumption of fact, may be rebutted by evidence showing a contrary intention. These two rules are usually stated together." Spitz v. Morse, 104 Me. 447, 450, 72 A 178.

[b] **Basis of rule.**—"It is founded on the consideration, that when a note is given for goods, even if it is not negotiated, it is equally convenient to the creditor (and generally more so) to sue on the note, as on the original consideration. and so there is no reason for considering the original simple contract as still subsisting and in force; and therefore a presumption arises, that it was intended by the parties that the note should be deemed a satisfaction." Curtis v. Hubbard, 9 Metc. (Mass.) 322, 328 [quot Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 234, 60 NE 548, 88 AmSR 375, 54 LRA 435].

[c] **The reason of the rule** is the protection of the debtor who might otherwise be compelled to pay both the note and the debt. Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 60 NE 548, 88 AmSR 375, 54 LRA 435; Davis v. Parsons, 157 Mass. 584, 32 NE 1117.

[d] **"The rule is variously expressed** in the cases. It is sometimes said that the circumstances raise a presumption of payment and sometimes that they afford presumptive evidence of payment. What is always meant is that a party makes out a prima facie case of payment when he shows a negotiable note given and received for an antecedent debt without more." Rutland R., etc., Co. v. Williams, 90 Vt. 276, 279, 98 A 85.

[e] **"In simple contract debts,** . . . a promissory note given by a debtor to his creditor is presumed to be a payment." Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 234, 60 NE 548, 88 AmSR 375, 54 LRA 435.

[f] **The giving of a new note in place of an old one** is prima facie a payment of the old note but it is not a payment where it is shown that it was not taken and received as payment and was not intended by the parties as payment. Fox v. Terre Haute Nat. Bank, 78 Ind. A. 666, 129 NE 33.

[g] **Third person as payee.**—A negotiable note executed by the debtor to a third person at the request of the creditor is prima facie payment of a preëxisting debt. Beach v. Huntsman, 42 Ind. A. 205, 85 NE 523. To same effect Smalley v. Edey, 19 Ill. 207.

[h] **Note given on accrual of debt.**—"A promissory note given for a debt which accrued at the time the note was given is presumptive evidence of the payment of the debt, so that no action can be maintained upon the

79. Rebuttal of presumption see infra § 234.

80. See cases supra notes 76–78.

[a] **The rule "ought to be very cautiously applied** in all cases where the remedy upon the new security is not as effectual and comprehensive as upon the one for which it was substituted." Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420, 423.

[b] **Where the note is not the obligation of all the parties liable** for the debt, the presumption that it was given and accepted in payment does not arise. Baldwin v. Porter, 217 Mass. 15, 104 NE 492; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 AmD 59; Hoeflinger v. Wells, 47 Wis. 628, 3 NW 589.

[c] **Effect of agreement.**—Where it is expressly agreed that notes shall not be regarded as payment, there is no presumption that new notes given "in replacement" of the old notes are accepted as payment of the debt. Giligian v. New England Truck Co., (Mass.) 163 NE 651.

[d] **What law governs.**—Where the rule that delivery of a note by a debtor to his creditor raises a presumption of payment is not the law of the state where the creditor resides and where the note was accepted it is not applicable unless the contract was to be performed in Massachusetts. American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526.

81. U. S.—Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420 (stating, however, that the law of Massachusetts is otherwise).

Ala.—Manser v. Sims, 157 Ala. 167, 47 S 270; Marshall v. Marshall, 42 Ala. 149; Mooring v. Mobile Mar. Dock, etc., Ins. Co., 27 Ala. 254.

Cal.—Palmer v. Emanuel, 77 Cal. A. 766, 247 P 609.

Colo.—Globe Express Co. v. Taylor, 61 Colo. 430, 158 P 717.

Minn.—Farmers', etc., State Bank v. Nummedahl, 166 Minn. 144, 207 NW 313; Merrill v. Zimmerman, 152 Minn. 333, 188 NW 1019; Way v. Mooers, 135 Minn. 339, 160 NW 1014, LRA1918B 559; Washington Slate Co. v. Burdick, 60 Minn. 270, 62 NW 285; McArdle v. McArdle, 12 Minn. 98.

Mont.—Edwards v. Muri, 73 Mont. 339, 237 P 209.

N. D.—C. A. Finch Lumber Co. v. Weishaar, 55 N. D. 695, 215 NW 155.

R. I.—Nightingale v. Chafee, 11 R. I. 609, 23 AmR 531.

Tex.—Rushing v. Citizens' Nat. Bank, (Civ. A.) 162 SW 460.

82. Rebuttal of presumption see infra § 234.

83. Darnall v. Morehouse, 36 HowPr 511 [rev on other grounds 45 N. Y. 64]; Busch v. Manahan, 56 N. D. 491, 217 NW 658; Sayre v. King, 17 W. Va. 562; Denny v. Nozick, 15 Alta. L. 288, 48 DomLR 310, [1919] 3 WestWkly 366 [app allowed on other grounds 60 Can. S. C. 646, 56 DomLR 694, [1921] 2 WestWkly 157].

84. Chena Lumber, etc., Co. v. Laymon, 4 Alaska 221; Preston v. Jones, 3 Ill. A. 632; American Luxfer Prism Co. v. Bartolicius Star Iron Works, Inc., 152 NYS 1014; Garrett v. Patton, 81 W. Va. 771, 95 SE 437.

85. U. S.—Freeman v. W. B. Moses & Sons, Inc., 285 Fed. 898; In re Wegman Piano Co., 221 Fed. 128; In re Rafio, 217 Fed. 313; U. S. v. Hocking Valley R. Co., 194 Fed. 234 [aff 210 Fed. 735, 127 CCA 285 (certiorari den 234 U. S. 757 mem, 34 SCt 675 mem, 58 L. ed. 1579 mem)]; Beall v. Hudson County Water Co., 185 Fed. 179; A. Leschen, etc., Rope

antecedent debt, is not accepted by the creditor as absolute payment,[86] but is accepted merely as collateral security,[87] or as conditional payment,[88] leaving the original debt unpaid until actual payment of the bill or note.[89]

[§ 217] **(2) Of Third Person.** In most jurisdictions,[90] where a debtor gives to his creditor a bill, acceptance, or note of a third person, the presumption is that the creditor does not accept it as absolute payment,[91] but that it is accepted by him merely as collateral security[92] or as conditional payment,[93] especially where the debtor guarantees payment of the obligation[94] or where the creditor retains notes of the debtor previously given by him for the amount of the debt.[95]

Obligation given when debt created. In some jurisdictions the rule which has been stated is subject to the exception that, where, at the time an indebtedness is created, the creditor accepts the note, bill of exchange, or other obligation of a third person for the debt, the presumption is that such note is accepted in payment,[96] unless the debtor

Co. v. Mayflower Gold Min., etc., Co., 173 Fed. 855, 97 CCA 465, 35 LRANS 1; Baker v. Draper, 2 F. Cas. No. 766, 1 Cliff. 420 (stating the general law to be in conformity with the text, but that the rule in Massachusetts is to the contrary).

Cal.—Bridge v. Connecticut Mut. L. Ins. Co., 167 Cal. 774, 141 P 375; Duke v. Levy, (A.) 274 P 1031; Palmer v. Emanuel, 77 Cal. A. 766, 247 P 609; Clark v. Berlin Realty Co., 33 Cal. A. 50, 164 P 333.

Kan.—Moody v. Stubbs, 94 Kan. 250, 253, 146 P 346 [cit Cyc].

Ky.—Allen v. Randle, 5 Ky. Op. 215.

Minn.—Empire Cream Separator Co. v. Marshall, 158 Minn. 236, 197 NW 216; Mikolas v. Val Blatz Brewing Co., 147 Minn. 230, 180 NW 109.

N. Y.—American Woolen Co. v. Friedman, 97 Misc. 593, 163 NYS 162 (notes indorsed by third person).

N. C.—Benson Bank v. Jones, 147 N. C. 419, 61 SE 193, 16 LRANS 343; Hyman v. Devereux, 63 N. C. 624.

Pa.—Alexander v. Righter, 21 Pa. Dist. 842; Wisconsin Chair Co. v. Heilbronner, 30 Pa. Co. 299.

W. Va.—Sayre v. King, 17 W. Va. 562.

Alta.—Denny v. Nozick, 15 Alta. L. 288, 48 DomLR 310, [1919] 3 WestWkly 366 [app allowed on other grounds 60 Can. S. C. 646, 56 DomLR 694, [1921] 2 WestWkly 157].

[a] **In admiralty** the rule is that the acceptance of a note by a lienor does not extinguish the lien. The Yankton, 7 F. (2d) 384.

[b] **A renewal of a note** does not constitute payment thereof. Moody v. Stubbs, 94 Kan. 250, 253, 146 P 346 [cit Cyc].

86. See cases supra notes 83-85.

[a] **Secured note.**—Where a debtor on account delivers to the creditor his note, secured by chattel mortgage, for the amount due, the presumption is that the old obligation is paid. Keys v. Keys, 217 Mo. 48, 116 SW 537 ("We can see a difference between a case where additional security is given and one where a simple note is given to take up an account. In the latter there would be no consideration for the change of the nature of the obligation whilst in the former there would be ample consideration").

[b] **Note of one of several joint debtors.**—"The acceptance of the note of one of two or more debtors jointly and severally bound does not presumptively constitute a settlement of the claim." Craswell v. Pure Bred Cattle Commn. Co., 148 Iowa 9, 11, 126 NW 908 [appr Edwards v. Trulock, 37 Iowa 244; McLaren v. Hall, 26 Iowa 297] (individual note of managing partner for firm debt).

87. Ala.—Manser v. Sims, 157 Ala. 167, 47 S 270.

N. Y.—American Luxfer Prism Co. v. Bartolicius Star Iron Works, Inc., 152 NYS 1014.

Pa.—Wisconsin Chair Co. v. Heilbronner, 30 Pa. Co. 299.

W. Va.—Garrett v. Patton, 81 W. Va. 771, 95 SE 437.

Alta.—Denny v. Nozick, 15 Alta. L. 288, 48 DomLR 310, [1919] 3 WestWkly 366 [app allowed on other grounds 60 Can. S. C. 646, 56 DomLR 694, [1921] 2 WestWkly 157].

"An order drawn by a debtor upon a third party, and delivered to his creditor for a debt, is presumptively taken by such creditor as collateral security for such debt." Garrett v. Patton, supra.

[a] **"Where a non-negotiable note or bond is given** by a debtor to his creditor for an existing debt, such bond or note is prima facie not a conditional payment but collateral security for such debt." Hoge v. Vintroux, 21 W. Va. 1.

88. U. S.—A. Leschen, etc., Rope Co. v. Mayflower Gold Min., etc., Co. 173 Fed. 855, 97 CCA 465, 35 LRANS 1.

Cal.—Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 P 922.

Conn.—Webster v. Howe Mach. Co., 54 Conn. 394, 8 A 482.

Mich.—Valade v. Masson, 135 Mich. 41, 97 NW 59.

Minn.—Empire Cream Separator Co. v. Marshall, 158 Minn. 236, 197 NW 216; Washington Slate Co. v. Burdick, 60 Minn. 270, 62 NW 285.

N. D.—Busch v. Manahan, 56 N. D. 491, 217 NW 658; C. A. Finch Lumber Co. v. Weishaar, 55 N. D. 695, 215 NW 155.

Pa.—U. S. v. Hegeman, 204 Pa. 438, 54 A 344; Mechanics' Nat. Bank v. Kielkopf, 22 Pa. Super. 128.

S. D.—Baker v. Baker, 2 S. D. 261, 49 NW 1064, 39 AmSR 776.

Tex.—Middlekauff v. State Banking Bd., 111 Tex. 561, 242 SW 442.

W. Va.—Sayre v. King, 17 W. Va. 562.

[a] **This presumption is strengthened** where the creditor holds security for the debt. A. Leschen, etc., Rope Co. v. Mayflower Gold Min., etc., Co., 173 Fed. 855, 858, 97 CCA 465, 35 LRANS 1 ("Where the extinguishment of a debt has the effect to strike down a lien or a title securing its payment, the presumption that it is not discharged by the acceptance of the note of the debtor in payment of it is strengthened, because in such a case the discharge of a lien is more unusual and unreasonable").

[b] **The fact that a note is unsecured** raises a strong presumption against the claim that it was given in full satisfaction of a secured indebtedness. Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 P 922.

[c] **Joinder of third persons.**—The rule is the same, although third persons join in the note. Empire Cream Separator Co. v. Marshall, 158 Minn. 236, 197 NW 216.

89. See cases supra note 88.

90. **Minority view** see infra text and notes 2, 3.

91. Youngs v. Stahelin, 34 N. Y. 258; Noel v. Murray, 13 N. Y. 167; Pinchot v. Roskam, 123 Misc. 253, 204 NYS 782; Sigler v. Smith, 4 E. D. Smith (N. Y.) 280. See American Woolen Co. v. Friedman, 97 Misc. 593, 163 NYS 162 (notes indorsed by third person).

"Where . . . the obligation is received for a precedent debt, the presumption is that it was not taken in payment." Dibble v. Richardson, 171 N. Y. 131, 138, 63 NE 829 [quot Lee v. Larkin, 125 App. Div. 302, 303, 109 NYS 480].

92. Hatfield Bank v. Bruce, 164 Ark. 576, 262 SW 665; D. B. Martin Co. v. Strickler, 57 Pa. Super. 236.

93. U. S.—U. S. v. Sunday Creek Co., 194 Fed. 252 [aff 210 Fed. 747, 127 CCA 297 (certiorari den 234 U. S. 757 mem, 34 SCt 675 mem, 58 L. ed. 1579 mem)].

Ark.—Hume v. Indiana Nat. L. Ins. Co., 155 Ark. 466, 245 SW 19; Malpas v. Lowenstine, 46 Ark. 552.

Cal.—Clark v. Berlin Realty Co., 33 Cal. A. 50, 164 P 333.

Ill.—Short v. Weisenborn, 193 Ill. A. 133; Smith v. Bankers Engineering Co., 186 Ill. A. 115.

Minn.—Devlin v. Chamblin, 6 Minn. 468. See Empire Cream Separator Co. v. Marshall, 158 Minn. 236, 197 NW 216 (joinder of third person in note of debtor).

N. Y.—Dibble v. Richardson, 171 N. Y. 131, 63 NE 829; Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480; Smith v. Applegate, 1 Daly 51; Finlay v. Heyward, 34 Misc. 818, 69 NYS 648 [rev on other grounds 35 Misc. 266, 71 NYS 779]; Darnall v. Morehouse, 36 HowPr 511 [rev on other grounds 45 N. Y. 64].

Pa.—Hunter v. Moul, 98 Pa. 13, 42 AmR 610; League v. Waring, 85 Pa. 244; Nace v. Hartman, 3 Pa. Super. 203.

94. Monroe v. Hoff, 5 Den. (N. Y.) 360; Stone v. Miller, 16 Pa. 450; Torrey v. Baxter, 13 Vt. 452. See Union Bank v. Smiser, 1 Sneed (Tenn.) 501, 514 ("The omission of the creditor to have the notes endorsed by the party from whom he received them is prima-facie evidence of an agreement to take them at his own risk").

[a] **Void guaranty.**—The rule applies, even though the guaranty is void. Monroe v. Hoff, 5 Den. (N. Y.) 360.

95. Crumbaugh v. Kugler, 3 Oh. St. 544.

Effect of surrender of original obligation see infra § 219.

96. U. S.—The President Arthur, 22 F. (2d) 534 [aff 25 F. (2d) 648]; New York, etc., SS. Co. v. Texas Co., 282 Fed. 221; U. S. v. Sunday Creek Co., 194 Fed. 252 [aff 210 Fed. 747, 127 CCA 297 (certiorari den 234 U. S. 757 mem, 34 SCt 675 mem, 58 L. ed. 1579 mem)]; Atlas SS. Co. v. Colombian Land Co., 102 Fed. 358, 42 CCA 398.

N. Y.—Dibble v. Richardson, 171 N. Y. 131, 63 NE 829; Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Shaw v. Republic L. Ins. Co., 69 N. Y. 286 [aff 67 Barb. 586]; Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397 [rev 53 Barb. 191]; Youngs v. Stahelin, 34 N. Y. 258; Noel v. Murray, 13 N. Y. 167 [aff 8 N. Y. Super. 385, and foll Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802 (rev 40 Hun 580, 2 NYSt 303); Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397; Manning v. Lyon, 70 Hun 345, 24 NYS 265; Williams v. Aylesworth, 4 Silv. Sup. 44, 7 NYS 111, 8 NYS 113; Vacheron v. Hildebrant, 39 Misc. 61, 78 NYS 771]; Lee v. Larkin, 125 App. Div. 302, 109 NYS 480; McLean v. Griot, 118 App. Div. 100, 103 NYS 129; Kirkham v. Bank of America, 26 App. Div. 110, 49 NYS 767 [aff 165 N. Y. 132, 58 NE 753, 80 AmSR 714]; Torry v. Hadley, 27 Barb. 192; Vacheron v. Hildebrant, 39 Misc. 61, 78 NYS 771; Blum v. Sadofsky, 86 NYS 22;

signs or indorses such obligation[97] or guarantees payment thereof.[98]

Election to take draft rather than money. Where a person entitled to receive a payment is given his choice between payment in money and a draft of a third person for the amount, and elects to take the draft, there is a presumption that he receives it as absolute payment.[99]

Long retention of obligation. It has been considered that the retention for several years of the obligation of a third person may raise a presumption that it was accepted in payment of the debt.[1]

Presumption of payment. In a few jurisdictions where the rule is that a negotiable bill, note, or other obligation of the debtor is presumed to be accepted in payment,[2] the same presumption is held to arise where the creditor accepts the bill, note, or other obligation of a third person.[3]

[§ 218] **b. Checks.**[4] Ordinarily the delivery of the check of the debtor[5] or of a third person[6] will not be presumed to have been accepted as absolute payment of the debt,[7] but the presumption is that it was accepted merely as conditional payment[8] or as collateral security,[9] so that the debt is not discharged until the check is paid[10] to the creditor or some person authorized by him to receive payment.[11]

Rew v. Barber, 3 Cow. 272; Whitbeck v. Van Ness, 11 Johns. 409, 6 AmD 383.

N. C.—Delafield v. Lewis Mercer Constr. Co., 118 N. C. 105, 24 SE 10.

Vt.—Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85; Farr v. Stevens, 26 Vt. 299.

Wis.—Gallagher v. Ruffing, 118 Wis. 284, 95 NW 117; Challoner v. Boyington, 83 Wis. 399, 53 NW 694; Ford v. Mitchell, 15 Wis. 304.

Eng.—Ward v. Evans, 2 Ld. Raym. 928, 92 Reprint 120.

"Where a creditor accepts the obligation of a third party for a debt contracted contemporaneously, the presumption is that it was taken in payment." Dibble v. Richardson, 171 N. Y. 131, 138, 63 NE 829 [quot Lee v. Larkin, 125 App. Div. 302, 303, 109 NYS 480].

"Where upon the sale and delivery of goods the vendor receives from the purchaser the note of a third person, the presumption is that the note was accepted in payment and satisfaction of the purchase price." McLean v. Griot, 118 App. Div. 100, 103, 103 NYS 129.

[a] **"The rule is settled that,** when a note of a third party is taken at the time of the creation of a debt, as upon a sale of goods, the presumption is that it was taken in payment." The President Arthur, 22 F. (2d) 584 [aff 25 F. (2d) 648].

[b] **Leading case.—**"In support of this proposition, no case has been more frequently cited than Whitbeck v. Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383, a decision which was clearly right upon the facts involved." Dille v. White, 132 Iowa 327, 334, 109 NW 909, 10 LRANS 510.

[c] **Prior agreement to receive obligations.—**Where goods are sold and delivered and the obligations of third persons are received in pursuance of a prior agreement to that effect, they should be regarded as having been received contemporaneously with the contracting of the debt. Youngs v. Stahelin, 34 N. Y. 258.

97. Whitney v. Goin, 20 N. H. 354; Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Breed v. Cook, 15 Johns. (N. Y.) 241.

98. Allen v. Bantel, 2 Thomps. & C. (N. Y.) 342.

99. Gibson v. Tobey, 46 N. Y. 637, 7 AmR 397 [rev 53 Barb. 191]. To same effect Union Bank v. Smiser, 1 Sneed (Tenn.) 501.

1. Hapgood Plow Co. v. Martin, 16 Nebr. 27, 19 NW 512.

[a] **Note of insolvent person.—**Where a creditor takes, as collateral security for his debt, the note of an insolvent person, the retention thereof, for however long a period, will not authorize the inference of payment of the original debt. Powell v. Henry, 27 Ala. 612.

Presumptions arising from lapse of time generally see supra §§ 198–213.

2. See supra § 216.

3. Spitz v. Morse, 104 Me. 447, 72 A 178; Brown v. Bishop, 225 Mass. 276, 114 NE 316; American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526; Quimby v. Durgin, 148 Mass. 104, 19 NE 14, 1 LRA 514; Williams v. Ketchum, 21 Wis. 432.

[a] **The debtor's guaranty of such notes** is not prima facie evidence that they were received merely as collateral and not as payment. Williams v. Ketchum, 21 Wis. 432.

4. Presumption that check is payment rather than gift or loan see infra § 221.

5. U. S.—In re Raflo, 217 Fed. 313.

Ala.—Alabama Western R. Co. v. Foshee, 183 Ala. 182, 62 S 500; Steiner v. Jeffries, 118 Ala. 573, 24 S 37.

Ill.—In re Cunningham, 311 Ill. 311, 142 NE 740 [mod 227 Ill. A. 124]; Heartt v. Rhodes, 66 Ill. 351.

Ind.—Baughman v. Lowe, 41 Ind. A. 1, 83 NE 255.

Kan.—Mullins v. Brown, 32 Kan. 312, 4 P 305.

Minn.—Belle Plaine First Nat. Bank v. McConnell, 103 Minn. 340, 342, 114 NW 1129, 123 AmSR 336, 14 LRANS 616, 14 AnnCas 396 [cit Cyc].

Miss.—Citizens' Bank v. Kretschmar, 91 Miss. 608, 44 S 930.

Nebr.—Omaha Nat. Bank v. Brady State Bank, 113 Nebr. 711, 204 NW 796.

N. Y.—Baird v. Spence, 8 Misc. 535, 28 NYS 774 [aff 10 Misc. 772, 31 NYS 1125].

Okl.—Bowles v. Biffles, 50 Okl. 587, 151 P 193.

Or.—Matlock v. Scheuerman, 51 Or. 49, 93 P 823, 17 LRANS 747.

Pa.—Morris, etc., Steel Co. v. Pittsburgh Bank, 277 Pa. 81, 120 A 698.

S. D.—Gay v. Sundquist, 42 S. D. 327, 175 NW 190.

Tenn.—Springfield v. Green, 7 Baxt. 301.

Eng.—Thompson v. Pitman, 1 F. & F. 339.

See Groomer v. McMillan, 143 Mo. A. 612, 128 SW 285 (quoting, with approval, a statement in Tiedeman Sales § 145 in conformity with the text).

[a] **Reason for rule.—**"The drawer can stop payment, at any time before acceptance or payment by bank, by serving notice on the bank. This follows from the fact that a check does not assign any part of the funds that may be in the bank to the credit of the drawer; and the bank does not become liable to the payee, unless and until the bank accepts or certifies the check. . . . Furthermore, the bank may, even without right, refuse to honor the check, thus leaving the drawer liable on the original debt. The above facts must be presumed to be known to both parties to the check; and they are also presumed to know that it is within the power of one to make, and the other to require, an absolute payment." Gay v. Sundquist, 42 S. D. 327, 330, 175 NW 190.

[b] **The retention** of a check and failure to give notice of its dishonor does not raise a presumption that the check was received as an absolute payment. Holmes v. Briggs, 131 Pa. 233, 18 A 928, 17 AmSR 804.

[c] **Contrary view.—**In an action on a bill of exchange where there was a special plea denying consideration it was proved that the drawer gave the acceptor a check, and it was held unnecessary to prove payment, the court saying: "It is enough to produce a cheque if it is once shown to have been in circulation." Thompson v. Pitman, 1 F. & F. 339.

6. Smith v. Bankers Engineering Co., 186 Ill. A. 115; Lloyd Mortg. Co. v. Davis, 51 N. D. 336, 199 NW 869, 870, 36 ALR 465 [cit Cyc]; McIntyre v. Kennedy, 29 Pa. 448.

[a] **Postdated check.—**"The taking of a . . . . post-dated check of a third party for an existing debt is treated prima facie as a conditional payment and is payment of such indebtedness only when paid." Smith v. Bankers Engineering Co., 186 Ill. A. 115, 116.

7. See cases supra notes 5, 6; and infra this note.

"That a payment by check should not be held to be an absolute payment in the absence of proof of an agreement that it is given and received as such is perfectly clear." Gay v. Sundquist, 42 S. D. 327, 330, 175 NW 190.

"No presumption of fact or of law that the giving of a check . . . for an existing debt is payment arises out of the mere circumstance of the check . . . having been given." In re Raflo, 217 Fed. 313, 314.

8. Ga.—National City Co. v. Athens, 38 Ga. A. 491, 144 SE 336.

Ill.—Heartt v. Rhodes, 66 Ill. 351.

Minn.—Belle Plaine First Nat. Bank v. McConnell, 103 Minn. 340, 342, 114 NW 1129, 123 AmSR 336, 14 LRANS 616, 14 AnnCas 396 [cit Cyc].

Or.—Matlock v. Scheuerman, 51 Or. 49, 93 P 823, 17 LRANS 747.

Tex.—Middlekauff v. State Banking Bd., 111 Tex. 561, 242 SW 442.

[a] **The presumption is** "that the payee of a check takes it for collection and application, rather than as payment in and of itself." National City Co. v. Athens, 38 Ga. A. 491, 144 SE 336.

[b] **There must be a debt,** either precedent or contemporaneous, to make this rule applicable. Matlock v. Scheuerman, 51 Or. 49, 93 P 823, 17 LRANS 747.

[c] **The rule that taking a promissory note is prima facie conditional payment** only "should apply with even greater force in the case of the taking of a check." Heartt v. Rhodes, 66 Ill. 351, 356.

9. Morris, etc., Steel Co. v. Pittsburgh Bank, 277 Pa. 81, 120 A 698.

10. Belle Plaine First Nat. Bank v. McConnell, 103 Minn. 340, 342, 114 NW 1129, 123 AmSR 336, 14 LRANS 616, 14 AnnCas 396 [cit Cyc].

11. Dowdall v. Borgfeldt, 113 NYS 1069 [aff 134 App. Div. 954 mem, 118 NYS 1103 mem].

[a] **Unauthorized indorsement.—**In an action for goods sold and delivered, where the defense was payment and it appeared that defendant had sent plaintiff a check in payment for the goods, which was received in plaintiff's absence by a person in his employ, and that this employee forged the indorsement of plaintiff on the check and deposited it in his own bank and misappropriated the proceeds, and defendant did not produce sufficient evidence to prove that the employee was the authorized agent of plaintiff to indorse checks, it was held that, defendant having failed to show payment, plaintiff was entitled to recover. Dowdall v. Borgfeldt, 113 NYS 1069 [aff 134 App. Div. 954 mem,

Where, however, the creditor has received a check, and does not deny that he cashed it, and fails to return it or make any protest to the debtor of nonpayment, it will be presumed that he collected the money.[12]

Where the creditor procures certification of the debtor's check by the bank on which it is drawn, an implication of law arises that the debt of the drawer of the check is discharged.[13]

Where a debt has been garnished and the garnishee has paid the amount into court by its check, which has been, by the court, indorsed over to plaintiff in the garnishment proceeding, it will be presumed, as between the debtor and the original creditor, that the check was accepted as payment and was in fact paid.[14]

[§ 219] **c. Surrender or Cancellation of Original Evidence of Indebtedness.** It is usually considered that the presumption that a check, bill of exchange, note, or other obligation of the debtor[15] or of a third person[16] is not accepted by the creditor as absolute payment will obtain, even though the creditor surrenders or cancels the original written evidence of the indebtedness,[17] although it has been held that, where creditors surrender notes of their debtor on receiving notes of third persons for the amount, it will be presumed that the latter notes were received in payment of the debt.[18]

[§ 220] **d. Transfer of Property.** Where property other than money,[19] such as a chose in action,[20] is transferred by the debtor to the creditor, it will not generally be presumed that it was accepted as an absolute payment.

[§ 221] **4. Character of Transaction as Payment, Loan, or Gift.** Where one person transfers money to another, there is a rebuttable[21] presumption that the transaction constitutes the payment of a debt,[22]

118 NYS 1103 mem].

12. Bledsoe v. Stuckey, 47 Cal. A. 95, 190 P 217.

13. See Groomer v. McMillan, 143 Mo. A. 612, 128 SW 285 (quoting, with approval, a statement to this effect in Tiedeman Sales § 145).

Effect of certification of check generally see Banks and Banking §§ 435-443.

14. Beatty v. Lehigh Valley R. Co., 134 Pa. 294, 19 A 745.

15. See supra §§ 216, 218.

16. See supra §§ 217, 218.

17. U. S.—Cleve v. Craven Chemical Co., 18 F. (2d) 711, 52 ALR 980.

Ala.—St. Mary Bank v. St. John, 25 Ala. 566.

Ark.—Henry v. Conley, 48 Ark. 267, 3 SW 181.

Cal.—Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 P 922; Steinhart v. National Bank, etc., 94 Cal. 362, 29 P 627, 28 AmSR 132; Welch v. Allington, 23 Cal. 322.

Ill.—Flower v. Elwood, 66 Ill. 438; Heartt v. Rhodes, 66 Ill. 351; Darst v. Bates, 51 Ill. 439; Strong v. King, 35 Ill. 9, 85 AmD 336; Belleville Sav. Bank v. Bornman, 10 NE 552.

Kan.—Inter-State Nat. Bank v. Ringo, 72 Kan. 116, 83 P 119, 115 AmSR 176, 3 LRANS 1179.

Mass.—Holmes v. Fall River First Nat. Bank, 126 Mass. 353.

Miss.—Wade v. Thrasher, 18 Miss. 358.

Mo.—Christian v. Newberry, 61 Mo. 446; Lippold v. Held, 58 Mo. 213; Powell v. Blow, 34 Mo. 485.

N. H.—Randlet v. Herren, 20 N. H. 102.

N. Y.—Burkhalter v. Erie Second Nat. Bank, 42 N. Y. 538, 40 HowPr 324; Winsted Bank v. Webb, 39 N. Y. 325, 100 AmD 435; Turner v. Fox Lake Bank, 4 Abb. Dec. 434, 3 Keyes 425, 2 Transcr. A. 344; Chittenango First Nat. Bank v. Morgan, 6 Hun 346 [aff 73 N. Y. 593]; Van Eps v. Dillaye, 6 Barb. 244; Johnson v. Bank of North America, 28 N. Y. Super. 554; Kobbi v. Underhill, 3 Sandf. Ch. 277; Olcott v. Rathbone, 5 Wend. 490.

N. C.—Wilson v. Jennings, 15 N. C. 90.

Pa.—Canonsburg Iron Co. v. Union Nat. Bank, 3 Pa. Cas. 46, 6 A 574.

R. I.—Nightingale v. Chafee, 11 R. I. 609, 23 AmR 531.

Tex.—Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. A. 535, 23 SW 728.

Va.—Moses v. Trice, 21 Gratt. (62 Va.) 556, 8 AmR 609.

W. Va.—Hopkins v. Detwiler, 25 W. Va. 734; Hess v. Dille, 23 W. Va. 90; Merchants Nat. Bank v. Good, 21 W. Va. 455.

Wis.—Racine First Nat. Bank v. Case, 63 Wis. 504, 22 NW 833.

"An agreement that a check is to be received in absolute payment is not to be implied from the fact that upon its receipt evidences of debt are marked paid and surrendered or a receipt is given." Cleve v. Craven Chemical Co., 18 F. (2d) 711, 712, 52 ALR 980.

[a] **Illustration.**—Where a check is given to pay a note and the note is surrendered and the maker's name is torn off, the check, dishonored for want of funds, is presumed, in absence of proof, to have been taken, not as payment, but as the means of payment, and the note may be treated as still subsisting. Heartt v. Rhodes, 66 Ill. 351.

18. Crumbaugh v. Kugler, 3 Oh. St. 544.

19. Ala.—McWilliams v. Phillips, 71 Ala. 80.

Cal.—Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32.

N. Y.—Green v. Disbrow, 79 N. Y. 1, 35 AmR 496.

Pa.—Perit v. Pittfield, 5 Rawle 166.

N. B.—Little v. Caie, 16 N. B. 386, 388.

"Prima facie goods delivered are not a payment." Little v. Caie, supra.

[a] **Where shares of stock are transferred** by a debtor to a creditor, the presumption is that they are assigned as collateral security for the debt, and not as payment thereof. Berger v. Berger, 44 Pa. Super. 305.

[b] **Presumption is that property was given as collateral.**—Unless there is some evidence tending to show an intention on the part of the debtor to give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as a collateral security. Borland v. Nevada Bank, 99 Cal. 89, 33 P 737, 37 AmSR 32.

[c] **Transfer of property by partner.**—Where, in an action against the executor of a deceased partner, there is positive uncontradicted evidence that another partner personally transferred certain realty in payment of one half of a partnership obligation, proof that the true value of the property was sufficient to discharge the whole debt raises no presumption that such transfer wiped out the debt. Leggat v. Leggat, 79 App. Div. 141, 80 NYS 327 [aff 176 N. Y. 590 mem, 68 NE 1119 mem].

[d] **Payment from fund other than one specially created for the purpose.**—If land is conveyed in order that the grantee may sell it and reimburse himself for certain moneys paid for the grantor, who afterward dies and makes the grantee his executor, who receives his personal estate, there is no legal presumption, in the absence of positive proof, that there was any fund applied to the payment of the debt of the grantee other than the one specially created for the purpose. Bracken v. Miller, 4 Watts & S. (Pa.) 102.

[e] **Where a pledgee of stock transfers it to his own name** after the death of the insolvent pledgor, the transfer will be presumed to be made in payment of the debt. Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536.

20. U. S.—Wilson v. Hurst, 30 F. Cas. No. 17,809, Pet. C. C. 441.

Md.—Pearce v. Wallace, 1 Harr. & J. 48.

Okl.—Bowles v. Biffles, 50 Okl. 537, 151 P 193.

Pa.—Leas v. James, 10 Serg. & R. 307; Sax v. Thompson, 1 Pa. C. Pl. 131; D. B. Martin Co. v. Strickler, 57 Pa. Super. 296.

W. Va.—Hoge v. Vintroux, 21 W. Va. 1.

[a] **Life insurance** taken out by a debtor in favor of a near relative, the creditor, without the knowledge of the creditor, and for less than half the debt, will be considered as a gift rather than a partial payment. Kendrick's Est., 3 Pa. Dist. 402.

[b] **A bond** (1) will be presumed to have been given as collateral security only rather than as payment. Pearce v. Wallace, 1 Harr. & J. (Md.) 48; Abrams v. Musgrove, 12 Pa. 292; Hoge v. Vintroux, 21 W. Va. 1; Sayre v. King, 17 W. Va. 562. (2) Bonds, assigned to be applied to the discharge of a debt for which a suit is brought, cannot be considered as payment, although they are not returned to the assignor, it being proved that the consideration of the bonds had failed, and that they had been acknowledged by the assignor to be of no value. Wilson v. Hurst, 30 F. Cas. No. 17,809, Pet. C. C. 441.

[c] **Bonds of a corporation** are within the rule. Gallitzin First Nat. Bank v. McNeelis, 37 Pa. Super. 84.

[d] **"A higher security for a debt,** given by different parties, or for a different sum will, in the absence of proof of the intention of the parties, be presumed to have been accepted as collateral security, and not in satisfaction of the debt." McIntyre v. Kennedy, 29 Pa. 448, 451.

21. Rebuttal of presumptions see infra § 234.

22. Ill.—Minor v. Lynch, 185 Ill. A. 86.

Iowa.—Hansen v. Kirtley, 11 Iowa 565.

Ky.—Castleman v. Rustenholtz, 145 Ky. 146, 140 SW 170.

La.—Hymel's Succ., 48 La. Ann. 737, 19 S 742; Gruntz v. Hubert, 7 La. A. 648 (quoted infra note 23).

N. Y.—Leask v. Hoagland, 205 N. Y. 171, 98 NE 395, AnnCas1913D 1199; King v. Briarwood Land Co., 131 NYS 946.

And see cases infra notes 23, 24.

"Where one pays money or delivers a check for money to another and there is no explanation of the cause

rather than a loan[23] or a gift.[24] This presumption is usually applied in cases where the person transferring the money appears to be indebted to the person to whom it is transferred;[25] but it is also applicable without any direct proof as to the existence of any indebtedness as between the parties.[26] It has been considered, however, that the presumption arises only when the relation between the parties is purely of a business character[27] or where there is nothing to explain the relation between them,[28] and that intimate personal relations between the parties may create a presumption that the expenditure of money by one for the benefit of the other was intended as a gift.[29]

Where a check is given by one person to another, the presumption that the transaction constitutes a payment arises the same as though there were a transfer of actual money.[30]

Where a receipt is given for produce, it will be presumed that the produce was received in payment of an antecedent debt rather than that it was purchased.[31]

[§ 222] **5. Time of Payment.**[32] It has been held that, where payment is proved or admitted, but there is no showing as to the time of payment, it will be presumed that payment was made at the maturity of the debt;[33] but it has also been considered that, where it is shown that a payment on account was made in a certain year but the particular date of payment is not shown, it will be presumed, for the purpose of giving credit to the person making such payment, that the payment was made on the last day of the year.[34] Where a person draws an order in favor of another, it will be presumed that the consideration for it was paid or secured at the time it was drawn.[35] Where it appears that a draft attached to a bill of lading was actually paid, it will be presumed that it was promptly presented and paid.[36]

[§ 223] **6. Place of Payment.** Where no place of payment is designated, the presumption is that payment should be made to the creditor at his place of business or at his residence, or wherever he is found.[37]

[§ 224] **7. Mode of Payment.** Under suitable circumstances, a presumption may arise that a creditor assented to a mode of payment other than an

of such payment, and if business relations only exist between the parties, the ordinary presumption is that the money was paid because it was due and owing." Miller v. Pratz, 179 Ill. A. 204, 208.

[a] **Reason for rule.**—"One who pays is presumed to owe." Dykes-Breathwit Lumber Co. v. Thaxton, 5 La. A. 488.

23. Cal.—McKay v. McKay, 184 Cal. 742, 195 P 385; Rolland v. Porterfield, 183 Cal. 466, 191 P 913; Tipps v. Landers, 182 Cal. 771, 190 P 173.

Ill.—Bromwell v. Bromwell, 139 Ill. 424, 28 NE 1057.

La.—Rohrbacker v. Schilling, 12 La. Ann. 17.

Mo.—Miller v. Miller, 169 Mo. A. 432, 155 SW 76.

Nev.—Horgan v. Indart, 41 Nev. 228, 168 P 953.

N. J.—Park v. Miller, 27 N. J. L. 338.

N. Y.—Nay v. Curley, 113 N. Y. 575, 21 NE 698; Stimson v. Vroman, 99 N. Y. 74, 1 NE 147; Gaylord v. Gibson, 36 App. Div. 548, 55 NYS 670; Matter of Baldwin, 11 App. Div. 551, 42 NYS 642; Matter of O'Donnell, 119 Misc. 580, 197 NYS 826; In re Vrooman, 17 NYWklyDig 118; Bradner v. Fitzhugh, 4 NYWklyDig 516.

Pa.—Lowrey v. Robinson, 141 Pa. 189, 21 A 513; Bougher v. Conn, 17 Phila. 81.

Va.—Terry v. Ragsdale, 33 Gratt. (74 Va.) 342.

Wis.—Somervail v. Gillies, 31 Wis. 152.

Eng.—Boswell v. Smith, 6 C. & P. 60, 25 ECL 321, 172 Reprint 1146; Fletcher v. Manning, 12 M. & W. 571, 152 Reprint 1326; Welch v. Seaborn, 1 Stark. 474, 2 ECL 182, 171 Reprint 534; Aubert v. Walsh, 4 Taunt. 293, 128 Reprint 342.

"That one hands another a sum of money is presumptive evidence of the payment of an antecedent debt and not of a loan." Gruntz v. Hubert, 7 La. A. 648.

[a] **Payment of draft.**—Marks v. Kellogg, 170 App. Div. 464, 156 NYS 120, 123 [aff 220 N. Y. 615 mem, 115 NE 1044 mem].

Presumptions as to loan generally see Money Lent § 18.

24. U. S.—Glover v. Patten, 165 U. S. 394, 17 SCt 411, 41 L. ed. 760.

Conn.—Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935.

Iowa.—Hansen v. Kirtley, 11 Iowa 565.

La.—Hymel's Succ., 48 La. Ann. 737, 19 S 742.

Mass.—Brightman v. Buffington, 184 Mass. 401, 68 NE 828.

Mo.—Miller v. Miller, 169 Mo. A. 432, 155 SW 76.

N. Y.—Lynch v. Lyons, 131 App. Div. 120, 115 NYS 227 [aff 197 N. Y. 595 mem, 91 NE 1116 mem]; Hayden v. Pierce, 71 Hun 593, 25 NYS 55 [aff 144 N. Y. 512, 39 NE 638, 1 NY AnnCas 205]; Matter of Paris, 16 Misc. 405, 39 NYS 722.

N. C.—Haglar v. McCombs, 66 N. C. 345.

Oh.—Conahan v. Purcell, 8 Oh. Dec. (Reprint) 161, 6 CincLBul 122.

Pa.—Masser v. Bowen, 29 Pa. 128, 72 AmD 619; Stewart's Est., 3 Pa. Dist. 747, 15 Pa. Co. 380.

Va.—Kelly v. Kelly, 6 Rand. (27 Va.) 176, 18 AmD 710.

Eng.—Wood v. Briant, 2 AtK. 521, 26 Reprint 713; Plunkett v. Lewis, 3 Hare 316, 25 EngCh 316, 67 Reprint 403; Breton v. Cope, Peake 43, 170 Reprint 72; Mackdowell v. Halfpenny, 2 Vern. Ch. 484, 23 Reprint 911; Seed v. Bradford, 1 Ves. 501, 27 Reprint 1167; Chave v. Farrant, 18 Ves. Jr. 8, 34 Reprint 220.

[a] **Where a father is indebted to his children** and transfers or conveys to them property, the value of which nearly equals the debt or is in excess thereof, the transfer will be presumed to have been in reduction or satisfaction of the debt. Stewart's Est., 3 Pa. Dist. 747, 15 Pa. Co. 380; Kelly v. Kelly, 6 Rand. (26 Va.) 176, 18 AmD 710.

25. Stewart's Est., 3 Pa. Dist. 747, 15 Pa. Co. 380.

[a] **The fact that an indebtedness has not matured** at the time of a transfer of money from the debtor to the creditor does not prevent the arising of a presumption of satisfaction of the debt. Stewart's Est., 3 Pa. Dist. 747, 15 Pa. Co. 380.

26. Lynch v. Lyons, 131 App. Div. 120, 115 NYS 227 [aff 197 N. Y. 595 mem, 91 NE 1116 mem]; Matter of O'Donnell, 119 Misc. 580, 197 NYS 826.

27. Miller v. Pratz, 179 Ill. A. 204 (quoted supra note 22); Swain v. Ettling, 32 Pa. 486.

28. Swain v. Ettling, supra.

29. Hamby v. Brooks, 86 Ark. 448, 111 SW 277; Swain v. Ettling, 32 Pa. 486.

[a] **Husband and wife.**—Where a husband purchases property and has it conveyed to his wife or expends money in improving her property, the sum so expended will be presumed to be a gift, and there is no presumption that he intended thereby to repay a debt which he owed to his wife. Hamby v. Brooks, 86 Ark. 448, 111 SW 277.

[b] **Expenditures by a man for his mistress** are not presumed to be in payment of debts to her. Swain v. Ettling, 32 Pa. 486.

[c] **Where a father pays money for his son,** there is no presumption that the transaction was a payment of a debt to the son. Swain v. Ettling, 32 Pa. 486 (dictum).

30. Ill.—Miller v. Pratz, 179 Ill. A. 204; Kinahan v. Butler, 133 Ill. A. 459.

Ky.—Castleman v. Rustenholtz, 145 Ky. 146, 140 SW 170.

Mo.—Groomer v. McMillan, 143 Mo. A. 612, 128 SW 285.

N. J.—Park v. Miller, 27 N. J. L. 338.

N. Y.—Leask v. Hoagland, 205 N. Y. 171, 98 NE 395, AnnCas1913D 1199; Nay v. Curley, 113 N. Y. 575, 21 NE 698; Stimson v. Vroman, 99 N. Y. 74, 1 NE 147; Poucher v. Scott, 98 N. Y. 422 [aff 33 Hun 223]; Van Buren v. Decker, 204 App. Div. 138, 198 NYS 297; Boyd v. Daily, 85 App. Div. 581, 83 NYS 539 [aff 176 N. Y. 613 mem, 68 NE 1114 mem]; Gaylord v. Gibson, 36 App. Div. 548, 55 NYS 670; Mills v. McMullen, 4 App. Div. 27, 38 NYS 705; Hutson v. Title Guarantee, etc., Co., 118 Misc. 795, 195 NYS 316; Gutman v. Wolfsohn, 107 NYS 546.

Pa.—Masser v. Bowen, 29 Pa. 128, 72 AmD 619; Moyle's Est., 7 Kulp 215.

Va.—Clarke v. Clarke, 125 Va. 68, 99 SE 664; Terry v. Ragsdale, 33 Gratt. (74 Va.) 342.

Eng.—Cary v. Gerrish, 4 Esp. 9, 170 Reprint 624; Aubert v. Walsh, 4 Taunt. 293, 128 Reprint 342.

Presumption as to whether check accepted as absolute or conditional payment see supra § 218.

31. Abrams v. Taylor, 21 Ill. 102 (where it is intimated that, except for the fact that a price was stated, the presumption would have been that the produce was received simply for safe-keeping).

32. Presumption that payment is to be made upon delivery of goods sold see Sales [35 Cyc 264].

33. Johnson v. Carpenter, 7 Minn. 176; Andrews v. Bond, 16 Barb. (N. Y.) 633; Minter v. Pounds, (Tex. Civ. A.) 3 SW (2d) 830.

34. Byers v. Fowler, 14 Ark. 86.

35. Smith v. Poor, 37 Me. 462.

36. Shippers' Compress, etc., Co. v. Cumby Mercantile, etc., Co., (Tex. Civ. A.) 172 SW 744.

37. State v. Richland County Seventh Judicial Dist. Ct., 55 Mont. 330, 176 P 613.

[a] **Reason for rule.**—It is the duty of the debtor to seek the creditor.

actual transfer of money to him.[38]

[§ 225] **8. Medium of Payment.** In the absence of any showing to the contrary it will be presumed that the medium for payment of a debt is money,[39] and where a debt is extinguished, it will be presumed that it was discharged by the payment of money or its equivalent.[40] Where a debt or obligation is payable in a currency which has the same name, but is of different values in different countries, the currency of the country where it is payable is presumed to be intended by the parties.[41] A debt will not be presumed to be payable in gold unless such implication can be found in the language of the contract.[42] Where a payment is indorsed in the same monetary terms that are used in the evidence of indebtedness itself, the presumption is that it was intended to be credited in the same circulating medium.[43]

[§ 226] **9. To Whom Payment Made.** Where it appears that a payment has been made, it will be presumed that it was made to one who was lawfully authorized to receive the money.[44] But where goods are sold by an agent, it will not be presumed that payment therefor was made to the principal unless such payment would be expected by reason of the nature of the business or the usual mode of transacting it.[45] Where a check is paid by the bank on which it is drawn, the presumption is that the payee's indorsement was regular, and that he received the money,[46] and where there are several indorsements on the check, the prima facie presumption is that payment was made to the last indorser.[47]

[§ 227] **10. By Whom Payment Made.** Where it appears that a payment has been made, the presumption is that it was made by the person bound to make it rather than by a third person.[48]

[§ 228] **11. Fund from Which Payment Made.** Where the drawee of a draft pays it, a presumption arises that payment was made from the funds of the drawer in the hands of the drawee.[49] Where a payment is made by representatives of the debtor, at the direction of the debtor, out of funds in their hands, it will be considered as made out of a fund over which the debtor had control rather than from a fund as to which he had relinquished all control to such representatives.[50]

[§ 229] **12. Acceptance of Payment.** Where a payment has been made, there is no presumption that it was not accepted.[51]

[§ 230] **13. Application of Payments.**[52] Gener-

State v. Richland County Seventh Judicial Dist. Ct., 55 Mont. 330, 176 P 613.

38. Cook v. Robinson, 194 Fed. 753, 114 CCA 473; Simonton v. Minneapolis First Nat. Bank, 24 Minn. 216; Crowell v. Simpson, 52 N. C. 285.

[a] **Where a debtor deposits gold dust** in a bank to the credit of his creditor, it will be presumed that the creditor assented to such deposit in payment of the debt. Cook v. Robinson, 194 Fed. 753, 114 CCA 473.

[b] **Deposit with third person.**—Where money is deposited by the debtor with a third person for the payment of a debt, the assent of the creditor thereto, where the arrangement is beneficial for him, may be presumed when he has knowledge of such deposit, but such knowledge will not be presumed merely from proof of the transaction between the debtor and depositary. Simonton v. Minneapolis First Nat. Bank, 24 Minn. 216.

[c] **Where a purchaser sold property and took a note** for the price, and there was a lien upon the property at the time of the sale and the purchaser paid the price to the holder of the lien, it was held that it would be presumed that he had authority from the seller to make such payment and that it operated as a payment of the note given for the price. Crowell v. Simpson, 52 N. C. 285.

39. Hughes v. Keokuk, etc., Bridge Co., 204 Iowa 1229, 1231, 210 NW 451 [cit Cyc]; Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 AmD 756; Fell v. H. Fell Poultry Co., 69 N. J. L. 429, 55 A 236.

[a] **Services.**—In the absence of proof to the contrary it will be presumed that payment for services is to be made in money. Fell v. H. Fell Poultry Co., 69 N. J. Eq. 429, 55 A 236.

[b] **Civil War contracts.**—For presumption with respect to whether contracts entered into in the southern states during the Civil War contemplated payment in United States money or in Confederate States notes see the following cases: Cook v. Lillo, 103 U. S. 792, 26 L. ed. 460; Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275; Atlantic, etc., R. Co. v. Carolina Nat. Bank, 19 Wall. (U. S.) 548, 22 L. ed. 196; Hightower v. Maull, 50 Ala. 495; Bonner v. Nelson, 57 Ga. 433; Harvey v. Walden, 23 La. Ann. 162; Clark v. Norwood, 19 La. Ann. 116; Taylor v. Turley, 33 Md. 500; Mezeix v. McGraw, 44 Miss. 100; Cowan v. McCutchen, 43 Miss. 207; Herrod v. Davis, 43 Miss. 102; Smith v. Smith, 101 N. C. 461, 8 SE 128, 131, 133; Abernathy v. Phifer, 84 N. C. 711; Brickell v. Bell, 84 N. C. 82; Melvin v. Stevens, 84 N. C. 78; Duke v. Williams, 84 N. C. 74; Palmer v. Love, 82 N. C. 478; Alexander v. Atlantic, etc., R. Co., 67 N. C. 198; McKesson v. Jones, 66 N. C. 258; Robeson v. Brown, 63 N. C. 554; Austin v. Kinsman, 34 S. C. Eq. 259; Miller v. McKinney, 5 Lea (Tenn.) 93; Atcheson v. Scott, 51 Tex. 213; Diltz v. Sadler, 37 Tex. 137; Chambers v. Bonner, 33 Tex. 511; Miller v. Lacy, 33 Tex. 351; Hansbrough v. Utz, 75 Va. 959; Dyerle v. Stair, 28 Gratt. (69 Va.) 800; Effinger v. Kenney, 24 Gratt. (65 Va.) 116; Omohundro v. Crump, 18 Gratt. (59 Va.) 703.

40. Bradley v. Richardson, 3 F. Cas. No. 1,786, 2 Blatchf. 343, 23 Vt. 720.

41. Mountain Lumber Co. v. Davis, 9 F. (2d) 478 [aff 11 F. (2d) 219 (certiorari den 271 U. S. 674 mem, 46 SCt 488 mem, 70 L. ed. 1145 mem)].

42. Maryland v. Baltimore, etc., R. Co., 22 Wall. (U. S.) 105, 22 L. ed. 713.

[a] **Foreign debt.**—A debt contracted in Germany is presumed to be payable in gold. Bohn v. Broadhagen, 2 Cinc. Super. (Oh.) 2.

43. Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275.

44. Lipscomb v. De Lemos, 68 Ala. 592; District of Columbia v. Jones, 38 App. (D. C.) 560.

[a] **Notation of payment to person then deceased.**—Where land was condemned for public use, and the record of the condemnation proceedings showed an award to a certain person, and a notation thereon recited payment to him on a certain date, but it appeared that on such date he was dead, leaving a will by which he gave his entire estate to his wife for life, with power to use so much as was necessary for her support, with a gift over of what remained after her death, it would be presumed, after the lapse of more than fifty years, that payment of the award was made to the widow and accepted by her as a satisfactory adjustment. District of Columbia v. Jones, 38 App. (D. C.) 560.

Burden of proof as to authority where payment made to person other than creditor see supra § 184.

45. Hathaway v. Burr, 21 Me. 567, 38 AmD 278.

46. Knutson v. Hansen, 141 Wash. 623, 251 P 852.

47. Hodges v. Westmoreland, 209 Ala. 498, 96 S 573.

48. Chicago Title, etc., Co. v. Central Trust Co., 312 Ill. 396, 144 NE 165; Amis v. Merchants Ins. Co., 2 La. Ann. 594.

[a] **Person primarily bound.**—When a note is shown by record evidence to be paid, but it does not appear who paid it, the presumption is indulged that it was paid by parties primarily liable thereon, and not by one who agreed to see it paid. Chicago Title, etc., Co. v. Central Trust Co., 312 Ill. 396, 144 NE 165.

49. Griffin v. Spengler, 176 Ill. A. 429; White v. Ambler, 8 N. Y. 170, Seld. 84.

[a] **Check.**—The presumption arising from the drawing and payment of a check is that it was drawn upon and paid from funds of the drawer in possession of the bank. White v. Ambler, 8 N. Y. 170, Seld. 84.

50. Low v. Mussey, 36 Vt. 183.

[a] **Illustration.**—Where one assigned part of his property to certain creditors for the purpose of paying the debts he owed them, and turned over to them also a fund to be applied at his direction upon other debts, and pursuant to his request the creditors paid a debt which was usurious, the law will presume, from the conduct of the parties and in the absence of any contrary evidence, that such debt was paid out of the fund held by the creditors for the debtor's benefit rather than that held by them for their own benefit, so that the debtor can recover back the usurious payment. Low v. Mussey, 36 Vt. 183.

51. Hegan v. Beckley, 105 SW 969, 32 KyL 349.

[a] **Illustration.**—Where partners have submitted their differences to arbitrators, giving the latter power to distribute the partnership assets, and the umpire selected by the arbitrators has paid money into bank to the credit of one of the partners, it cannot be presumed, in the absence of any showing on the subject, that such partner did not accept the payment so made, there being nothing to show that he offered to return the money. Hegan v. Beckley, 105 SW 969, 32 KyL 349.

52. Generally see supra §§ 84-127.

ally there is no presumption that a payment was applied to the particular obligation in suit;[53] but where there was only one indebtedness between the parties, it will be presumed that payments made were to apply thereon,[54] although such indebtedness was unmatured at the time of the payment,[55] and notwithstanding such indebtedness arose out of illegal sales.[56] The general rule is that it will be presumed that a payment was intended to be applied, or was actually applied, in such manner as was just and proper at the time when the payment was made.[57] Accordingly, it has been held that it will be presumed that a payment was intended to be applied or was actually applied to a demand admitted rather than to one in dispute;[58] to interest rather than to principal;[59] to an interest-bearing demand rather than to one not bearing interest;[60] to an unsecured debt rather than to a secured debt;[61] to the weaker of two secured claims;[62] to an existing debt rather than to one for which the debtor holds a receipt;[63] to a matured debt rather than to an unmatured debt;[64] to the oldest items of an account due at the time of payment;[65] and to the contract price of labor and materials rather than to extra items.[66] It will be presumed that the proceeds of sales of mortgaged property are applied to satisfy the mortgage debt,[67] and, where a holder of notes surrenders some, but not all, of them at the time of a payment, that the payment was made and applied on the surrendered notes.[68] Failure of a creditor to indorse payments on a note has been held to justify the presumption that it was understood that such payments were intended to be applied on other indebtedness.[69] It will not be presumed that a payment was intended to be applied on a debt not due,[70] unless there was no other indebtedness between the parties,[71] or on an alleged debt not proved to exist;[72] that money of the principal drawn from a bank by his agent was applied by the agent to any particular indebtedness;[73] or, where a creditor appropriates a payment to a particular debt, that the debtor directed application to another debt.[74] Application by the creditor on his books does not, however, raise the presumption that the debtor so applied the payment where the latter had no access to the books and had no knowledge of the application.[75] Where a debtor makes a payment to his creditor by means of checks signed by the debtor as executor of a named estate, no presumption of payment of the individual debt arises.[76]

[§ 231] **14. Acquiescence in Condition.** Where a payment is conditional and the creditor fails to object, it will be presumed that he acquiesces in the condition.[77]

[§ 232] **15. Set-Off of Demands.** Where cross demands exist, there is no presumption of satisfaction by setting off one against the other.[78]

[§ 233] **16. Knowledge of Facts.** A payment shown or admitted to have been made will be presumed to have been made with full knowledge of all the relevant facts.[79]

[§ 234] **17. Rebuttal of Presumptions—a. In General.** As a general rule, presumptions with respect to payment or nonpayment are merely presumptions of fact,[80] and, although they are controlling in the absence of evidence to the contrary,[81] they are rebuttable by evidence showing that the

53. White v. Bean, 16 Ala. A. 330, 77 S 924; Light v. Stevens, 159 Cal. 288, 113 P 659; Robison v. Bailey, 113 Ill. A. 123; Humble Oil, etc., Co. v. Michiels, 2 La. A. 337, 339.

"In view of the fact that there were other transactions to which this might have applied, we cannot presume, in the absence of all proof, that it did apply to the account sued on, especially as the real defense in the suit seems inconsistent with this claim." Humble Oil, etc., Co. v. Michiels, supra.

54. Cal.—Light v. Stevens, 159 Cal. 288, 113 P 659.

Ill.—Frick v. School Trustees, 99 Ill. 167.

Ind.—Harvey v. Quick, 9 Ind. 258.

Mich.—Gerasimos v. Wartell, 234 Mich. 102, 207 NW 919.

Oh.—Epply v. Von Phul, 28 Oh. Cir. Ct. 449.

[a] **"Where the debt is in the form of a lien** reserved in a deed, and specific application was made by the parties of the early payments to the extinguishment of the lien, subsequent payments in the absence of circumstances indicating the contrary will be presumed to have been made for the same purpose." Epply v. Von Phul, 28 Oh. Cir. Ct. 449.

55. Briggs v. Steele, 91 Ark. 458, 121 SW 754.

[a] **Unmatured notes.**—It will be presumed that the parties intended that a payment made should be applied on notes, although none of them had then matured, where that was the only debt then owing by the debtor. Briggs v. Steele, 91 Ark. 458, 121 SW 754.

56. Hall v. Clement, 41 N. H. 166.

[a] **Illustration.**—Where there is an indebtedness on a running account due partly for legal sales and partly for illegal sales, and a payment is made exceeding the amount due for legal sales, it will not be presumed that the excess was an advance payment to be applied on future legal sales rather than a payment on the illegal sales. Hall v. Clement, 41 N. H. 166.

57. Clark v. Wheeler, 81 N. H. 34, 121 A 588. And see cases infra notes 58–68.

58. Perot v. Cooper, 17 Colo. 80, 28 P 391, 31 AmSR 258; Culkin v. Matz, 27 Colo. A. 198, 149 P 270.

59. Kissam v. Burrall, Kirby (Conn.) 326.

60. Perot v. Cooper, 17 Colo. 80, 28 P 391, 31 AmSR 258.

61. Hare v. Stegall, 60 Ill. 380.

62. Ayers v. Staley, (N. J. Ch.) 18 A 1046.

63. Chapman v. Smoot, 66 Md. 8, 5 A 462.

64. Pospishil v. Jensen, 205 Iowa 1360, 219 NW 507; Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216.

65. Conn.—Dulles v. De Forest, 19 Conn. 190.

Ga.—Shafer v. Carson, 33 Ga. A. 418, 126 SE 735.

Me.—Thurlow v. Gilmore, 40 Me. 378.

Mass.—Snell v. Rousseau, 257 Mass. 559, 154 NE 70; Crompton v. Pratt, 105 Mass. 255.

N. H.—Bancroft v. Holton, 59 N. H. 141.

N. Y.—Durland v. Crawford, 183 App. Div. 763, 171 NYS 135; Hurd v. Wing, 93 App. Div. 62, 86 NYS 907.

See Janney v. Stephen, 2 Patt. & H. (Va.) 11 (oldest judgment).

[a] **Reason for rule.**—"This application is made by the law because it is most just and equitable between the parties; and, being in accordance with the ordinary and usual course of business dealing, is presumed to be the intentions of the parties." Snell v. Rousseau, 257 Mass. 559, 562, 154 NE 70, 71.

[b] **Items accruing during infancy.**—The rule applies where payments are made by one of full age on an account which commenced before he reached his majority and continued thereafter. Thurlow v. Gilmore, 40 Me. 378.

66. Smith v. Morrison, 203 Iowa 245, 212 NW 567.

[a] **Illustration.**—Where, in an action on a contract for materials and labor, the original contract was for certain material and the other items are for labor, etc., and the credits shown by the petition exceed the total amount of the original contract price, it will be presumed, in the absence of any allegations to the contrary, that the payments were applied on the original contract until the amount due thereon was fully paid. Smith v. Morrison, 203 Iowa 245, 212 NW 567.

67. Stanwix v. Leonard, 125 App. Div. 299, 301, 109 NYS 804 ("There is . . . a presumption that payments made from proceeds of sales by a mortgagor of mortgaged property pursuant to instructions from the mortgagee are intended by the mortgagor to be applied, and by the mortgagee actually are applied, to satisfy the specific obligations on account of which the mortgage liens were created").

68. King v. Dorsey, 145 Ky. 176, 140 SW 183.

69. Munson v. Plummer, 54 Iowa 758, 7 NW 95; Wells v. Ayers, 84 Va. 341, 5 SE 21.

70. Henderson v. Maysville Guano Co., 15 Ga. A. 69, 82 SE 588; Pargoud v. Amberson, 10 La. 352.

71. See supra text and note 55.

72. Henderson v. Maysville Guano Co., 15 Ga. A. 69, 82 SE 588.

73. Ward v. Andrews, 10 Heisk. (Tenn.) 116.

74. Powers v. McKnight, (Tex. Civ. A.) 73 SW 549.

75. Richmond Second Nat. Bank v. Fitzpatrick, 111 Ky. 228, 63 SW 459, 23 KyL 610, 62 LRA 599.

76. Ball v. Elliott, 143 NYS 938.

77. Hall v. Holden, 116 Mass. 172.

78. Hill v. Roberts, 86 Ala. 523, 6 S 39.

79. Peterborough v. Lancaster, 14 N. H. 382.

80. See cases infra notes 81–97; and § 235 note 99.

Presumptions of fact generally see Evidence §§ 26–60.

81. State v. Traylor, 77 Ind. A. 419,

actual fact is otherwise than as would be presumed in the absence of any opposing evidence.[82] This rule applies to the presumptions that regular payments were in full up to the date of each payment;[83] that a debt evidenced by a written instrument which the creditor fails to produce or account for has been paid;[84] that a transfer of money was in payment of a debt rather than a gift or a loan;[85] that a debt has been paid when the acts of the parties have been inconsistent with its continued existence;[86] that items of indebtedness not included in a general settlement and accounting between the parties have been paid;[87] that a note given by a debtor to his creditor is in settlement of all debts of inferior degree then matured;[88] that a debt evidenced by a written obligation is paid where the obligation is in the possession of the obligor[89] or unpaid where it is in the possession of the obligee;[90] that the medium of payment for a debt is lawful money;[91] that services were paid for at regular intervals;[92] that the payee of a note was not indebted to the maker at the time when the note was given;[93] that debts antedating other debts proved or admitted to have been paid have also been paid;[94] that a bill

132 NE 608.

Probative force of presumptions generally see Evidence §. 88.

82. Elliott v. Banks, 115 Ga. 926, 42 SE 218; Reserve Loan L. Ins. Co. v. Dulin, 69 Ind. A. 363, 122 NE 3; Reynolds v. Richards, 14 Pa. 205; Morgan's Est., 11 Pa. Co. 536. And see cases infra notes 83–97.

[a] **Thus,** if the acceptance of a certificate of deposit by a creditor from a debtor bank raises a presumption of payment, the presumption is rebuttable. Reserve Loan L. Ins. Co. v. Dulin, 69 Ind. A. 363, 122 NE 3.

83. Morrow v. Frankish, 27 Del. 534, 89 A 740.

Presumption that regular payments are in full see supra § 215.

84. Page v. Page, 15 Pick. (Mass.) 368.

Presumptions arising from nonproduction of documents see supra § 196.

85. Cal.—McKay v. McKay, 184 Cal. 742, 195 P 385.

Iowa.—Dougherty v. Deeney, 45 Iowa 443.

Mass.—Brightman v. Buffington, 184 Mass. 401, 68 NE 828.

N. J.—Park v. Miller, 27 N. J. L. 338.

N. Y.—Leask v. Hoagland, 205 N. Y. 171, 98 NE 395, AnnCas1913D 1199; Stimson v. Vroman, 99 N. Y. 74, 1 NE 147; Gaylord v. Gibson, 36 App. Div. 548, 55 NYS 670; Hayden v. Pierce, 71 Hun 593, 25 NYS 55 [aff 144 N. Y. 512, 39 NE 638, 1 NYAnnCas 205]; Matter of Brown, 130 Misc. 865, 226 NYS 1 [mod on other grounds 225 App. Div. 759, 232 NYS 371]; Hutson v. Title Guarantee, etc., Co., 118 Misc. 795, 195 NYS 316; Matter of Paris, 16 Misc. 405, 39 NYS 722.

Oh.—Conahan v. Purcell, 8 Oh. Dec. (Reprint) 161, 6 CincLBul 122.

Pa.—Moyles' Est., 7 Kulp 215.

Va.—Hall Bldg. Corp. v. Edwards, 142 Va. 209, 128 SE 521; Terry v. Ragsdale, 33 Gratt. (74 Va.) 342.

Eng.—Boswell v. Smith, 6 C. & P. 60, 25 ECL 321, 172 Reprint 1146.

[a] **Strong evidence is required** to repel the presumption that a transfer of money was a payment rather than a loan. Terry v. Ragsdale, 33 Gratt. (74 Va.) 342.

[b] **Check from one partner to another.**—Where one alleged partner gave checks to another alleged partner, the attempt of one of the alleged partners to prove that the checks were issued in a joint enterprise destroyed the presumption that the checks were given in payment of a debt. Van Buren v. Decker, 204 App. Div. 138, 198 NYS 297.

Presumption of payment rather than gift or loan see supra § 221.

86. Ala.—Graves v. Shulman, 59 Ala. 406.

Ark.—Texarkana, etc., R. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 SW 944.

Del.—Lodge v. Ainscow, 17 Del. 327, 41 A 187; Callaway v. Hearn, 6 Del. 607.

Iowa.—Downs v. Downs, 102 NW 431.

N. Y.—Duguid v. Ogilvie, 3 E. D. Smith 527, 1 AbbPr 145.

Presumption of payment arising from acts inconsistent with continuing indebtedness see supra §§ 191, 192.

87. Wheeler v. Alexander, 32 S. C. L. 61; Bushee v. Allen, 31 Vt. 631.

Presumption of payment of items not included in general accounting see supra § 197.

88. Walker v. Gray, 6 Ariz. 359, 57 P 614.

Presumption of full settlement see supra § 214.

89. Ala.—Potts v. Coleman, 67 Ala. 221; Orr v. Stewart, 13 Ala. A. 542, 69 S 649.

Ark.—Finney v. Rollins, 192 SW 210; Excelsior Mfg. Co. v. Owens, 58 Ark. 556, 25 SW 868.

Cal.—Banks v. Marshall, 23 Cal. 223.

Colo.—Hall v. King, 2 Colo. 711.

Ill.—Allen v. Sawyer, 88 Ill. 414; Sutphen v. Cushman, 35 Ill. 186; Teeter v. Poe, 48 Ill. A. 158.

Ind.—Fellows v. Kress, 5 Blatchf. 536.

Iowa.—Milo Bank v. Mertz, 96 Iowa 725, 65 NW 318.

Ky.—Graves v. Wood, 3 B. Mon. 34.

Md.—Brown v. White, 27 A 315.

Mass.—Parks v. Smith, 155 Mass. 26, 28 NE 1044; Crocker v. Thompson, 3 Metc. 224.

Mo.—Stephenson v. Richards, 45 Mo. A. 544.

Nebr.—Smith v. Gardner, 36 Nebr. 741, 55 NW 245.

N. Y.—Anderson v. Culver, 127 N. Y. 377, 28 NE 32; Fitzmahony v. Caulfield, 87 Hun 66, 33 NYS 876; Reynale v. Harrison, 25 NYWklyDig 558.

N. C.—Poston v. Jones, 122 N. C. 536, 29 SE 951; Jones v. Bobbitt, 90 N. C. 391.

Oh.—Larimore v. Wells, 29 Oh. St. 13.

Pa.—Clark v. Spheen, 271 Pa. 91, 114 A 496; Wick v. Roop, 253 Pa. 264, 98 A 555; Clymer v. Groff, 220 Pa. 580, 69 A 1119, 14 AnnCas 256.

S. C.—Spann v. Ballard, 24 S. C. L. 440.

Tenn.—Fisher v. Philips, 4 Baxt. 243; Vaughn v. Tate, (Ch. A.) 36 SW 748.

Tex.—Emerson v. Mills, 83 Tex. 385, 18 SW 805; Halfin v. Winkleman, 83 Tex. 165, 18 SW 433.

W. Va.—McCleary v. Grantham, 29 W. Va. 301, 11 SE 949.

[a] **Possession accounted for.**—"If the possession and production of the note can be satisfactorily accounted for, upon any other hypothesis than that of the payment of it to the holder, it will rebut such presumption." Crocker v. Thompson, 3 Metc. (Mass.) 224, 231 [quot Clymer v. Groff, 220 Pa. 580, 584, 69 A 1119, 4 AnnCas 256]. To same effect Wick v. Roop, 253 Pa. 264, 98 A 555.

Presumption of payment arising from debtor's possession of obligation see supra § 190.

90. Cal.—McKenzie v. Ray, 168 Cal. 618, 143 P 1018.

Ill.—Humpeler v. Hickman, 13 Ill. A. 537.

Iowa.—Elliott v. Capital City State Bank, 149 Iowa 309, 128 NW 369.

Ky.—Allen v. Randle, 5 Ky. Op. 215.

Md.—Brown v. White, 27 A 315.

Oh.—Hughes v. Hind, Wright 650.

Philippine.—Toribio v. Foz, 34 Philippine 913; Bantug v. Del Rosario, 11 Philippine 511.

Wis.—Somervail v. Gillies, 31 Wis. 152.

[a] **Presumption rebutted.**—(1) In an action to enforce a vendor's lien for the amount of a note purporting to have been given by defendant's father, for the price of land conveyed to him by plaintiff, the evidence showed that plaintiff had delayed bringing the action eleven years, and until after defendant's father and the only other witness, except plaintiff, of the transaction, had died, with no excuse for the delay, except that defendant's father disputed the claim; that, on the day of the purchase, defendant's father drew from a bank the amount of the entire price; and that plaintiff had stated to two persons that defendant's father paid for the land in full. It was held that the evidence was sufficient to rebut the presumption in favor of plaintiff arising from his possession of the note, and plaintiff could not recover. Brown v. White, (Md.) 27 A 315. (2) The presumption is sufficiently rebutted where receipts in full for all claims due to the obligee are admitted by his failure to deny their genuineness or validity. McKenzie v. Ray, 168 Cal. 618, 143 P 1018.

[b] **Payments not identified.**—The presumption of nonpayment arising from the payee's possession of a note is not overcome by proof of payments of money by the maker to the payee, without further showing that there were no other dealings between the parties upon which such payments might have been made. Somervail v. Gillies, 31 Wis. 152.

[c] **Unauthorized surrender to obligor.**—Where a bond and mortgage were in the hands of the mortgagee at the time of his death, the fact that they were surrendered to the mortgagor by a person without authority does not rebut the presumption of nonpayment. Fitzmahony v. Caulfield, 25 App. Div. 119, 49 NYS 196.

Presumption of nonpayment arising from creditor's possession of obligation see supra § 189.

91. Hightower v. Maull, 50 Ala. 495.

Presumption as to medium of payment see supra § 225.

92. Kerr v. Wilson, 284 Pa. 541, 131 A 468; Caskey v. Kineavy, 60 Pa. Super. 87.

[a] **Showing sufficient to rebut presumption.**—The presumption that a domestic servant has been paid, where no demand has been made for wages for a considerable period after the service has terminated, may be rebutted by evidence that there had been a demand for payment, that no payment had been made, and that a promise had been given for future payment. Schreiber v. Northam, 60 Pa. Super. 483.

93. Brown v. Horn, 32 Ga. A. 95, 122 SE 710; Fletcher v. Young, 10 Ga. A. 183, 73 SE 38; Downs v. Downs, (Iowa) 102 NW 431; Matter of Wood, 207 App. Div. 41, 201 NYS 716; Duguid v. Ogilvie, 3 E. D. Smith (N. Y.) 527, 1 AbbPr 145.

Presumptions arising from acts inconsistent with nonpayment see supra §§ 191, 192.

94. Garriott v. Brandenburg Constr. Co., 199 Ky. 673, 251 SW 935;

of exchange, order for the payment of money, or promissory note, of the debtor or of a third person was accepted by the creditor as payment of the debt,[95] or that a check, bill of exchange, promissory note, or other like obligation was accepted merely as collateral security or conditional payment and not as absolute payment;[96] and that a payment was applied or was intended to be applied upon a particular indebtedness.[97]

[§ 235] **b. Presumption from Lapse of Time—(1) Subject to Rebuttal.** The presumption of payment from lapse of time, like other presumptions of payment,[98] is merely a presumption of fact,[99] and, although it is conclusive in the absence of any

Ham v. Barret, 28 Mo. 388; Patterson v. O'Hara, 2 E. D. Smith (N. Y.) 58.

[a] **Check reciting full payment.**—Although a check which has been received and cashed by the payee recites that it is in full payment of all amounts due, this is not conclusive upon the party receiving such payment, but he may show that there were other amounts due. Garriott v. Brandenburg Constr. Co., 199 Ky. 673, 251 SW 935.

[b] **Receipts "on account of rent."**—The presumption of payment of previous rent arising from the production of receipts for subsequently accruing rent is not rebutted by a production of prior receipts, given in terms "on account of rent" and "for rent" only. Patterson v. O'Hara, 2 E. D. Smith (N. Y.) 58.

Presumption of full settlement see supra § 214.

95. U. S.—The Yangton, 7 F. (2d) 384; Hudson v. Bradley, 12 F. Cas. No. 6,833, 2 Cliff. 130; Palmer v. Elliott, 18 F. Cas. No. 10,690, 1 Cliff. 63.

Ark.—Carlton v. Buckner, 28 Ark. 66; Camp v. Gullett, 7 Ark. 524.

Ind.—State v. Adams, 187 Ind. 165, 118 NE 680; Jouchert v. Johnson, 108 Ind. 436, 9 NE 413; State v. Hullihan, (A.) 157 NE 282; State v. Traylor, 77 Ind. A. 419, 132 NE 608; Stevenson v. Stunkard, 44 Ind. A. 716, 90 NE 106; Keck v. State, 12 Ind. A. 119, 39 NE 899.

Me.—Bean v. Camden Lumber, etc., Co., 124 Me. 102, 126 A 285; Delano Mill Co. v. Warren, 123 Me. 408, 123 A 417; Roy v. Bellevieu, 118 Me. 495, 108 A 70; Spitz v. Morse, 104 Me. 447, 72 A 178; Parkhurst v. Jackson, 36 Me. 404; Shumway v Reed, 34 Me. 560, 56 AmD 679; Fowler v. Ludwig, 34 Me. 455; Varner v. Nobleborough, 2 Me. 121, 11 AmD 48.

Mass.—Giligian v. New England Truck Co., 163 NE 651; Brown v. Bishop, 225 Mass. 276, 114 NE 316; Baldwin v. Porter, 217 Mass. 15, 104 NE 492; American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526; Paddock, etc., Co. v. Simmons, 186 Mass. 152, 71 NE 298; Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 60 NE 548, 88 AmSR 375, 54 LRA 435; Green v. Russell, 132 Mass. 536; Parham Sewing Mach. Co. v. Brock, 113 Mass. 194; Appleton v. Parker, 15 Gray 173; Mellédge v. Boston Iron Co., 5 Cush. 158, 51 AmD 59; Curtis v. Hubbard, 9 Metc. 322; Butts v. Dean, 2 Metc. 76, 35 AmD 389; Wood v. Bodwell, 12 Pick. 268; Jones v. Kennedy, 11 Pick. 125; Reed v. Upton, 10 Pick. 522, 20 AmD 545; Maneely v. McGee, 6 Mass. 143, 4 AmD 105.

N. Y.—In re Utica Nat. Brewing Co., 154 N. Y. 268, 48 NE 521; Newburgh Nat. Bank v. Bigler, 83 N. Y. 51 [aff 18 Hun 400]; Youngs v. Stahelin, 34 N. Y. 258; Noel v. Murray, 13 N. Y. 167; Torrey v. Hodley, 27 Barb. 192; Beckwith v. Burlingame, 16 Misc. 217, 39 NYS 191; Thorman v. Polya, 1 Misc. 176, 20 NYS 689.

Pa.—Van Haagen Soap Mfg. Co.'s Est., 8 Pa. Co. 84.

R. I.—Sweet v. James, 2 R. I. 270.

Vt.—Manley Bros. Co. v. Somers, 100 Vt. 292, 137 A 336; Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85.

Wis.—Gallagher v. Ruffing, 118 Wis. 284, 95 NW 117; Brill v. Hoile, 53 Wis. 537, 11 NW 42.

Wyo.—Lewis v. England, 14 Wyo. 128, 82 P 869, 2 LRANS 401.

[a] **The presumption may be rebutted by:** (1) Direct testimony that the parties agreed otherwise. Bradway v. Groenendyke, 153 Ind. 508, 55 NE 434; Jouchert v. Johnson, 108 Ind. 436, 9 NE 413; State v. Traylor, 77 Ind. A. 419, 132 NE 608. (2) Showing circumstances from which it may be inferred that the intention of the parties was that the obligation accepted should not be regarded as payment of the debt. Wallace v. Agry, 29 F. Cas. No. 17,096, 4 Mason 336; Bradway v. Groenendyke, supra; Jouchert v. Johnson, supra [in effect overr Teal v. Spangler, 72 Ind. 380; Smith v. Bettger, 68 Ind. 254, 34 AmR 256]; Appleton v. Parker, 15 Gray (Mass.) 173; Butts v. Dean, 2 Metc. (Mass.) 76, 35 AmD 389.

[b] **Mistake.**—(1) The presumption may be rebutted by showing that the note was taken under a misunderstanding of the facts. Wemet v. Missisquoi Lime Co., 46 Vt. 458. (2) When a party takes the note supposing that other parties are bound by it who are not, then the intention of treating it as payment is rebutted, and the party may sue upon the original debt. Bunker v. Barron, 79 Me. 62, 8 A 253, 1 AmSR 282; Wait v. Brewster, 31 Vt. 516.

[c] **Proof of deceit not necessary.**—Where the creditor claims that he accepted the note of a third person from the debtor as conditional payment only, it is not necessary for him to prove that he was misled by the debtor's deceit to accept the note. Brown v. Bishop, 225 Mass. 276, 114 NE 316.

[d] **Indorsement by the debtor** of the note of a third person, given to the creditor when the debt is created, overcomes the presumption that it was accepted as payment. Gallagher v. Ruffing, 118 Wis. 284, 95 NW 117.

[e] **Loss of substantial benefit.**—The presumption may be rebutted by showing that to permit it to operate would deprive the creditor of a substantial benefit. State v. Hullihan, (Ind. A.) 157 NE 282; State v. Traylor, 77 Ind. A. 419, 132 NE 608; Beach v. Huntsman, 42 Ind. A. 205, 85 NE 523; Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 60 NE 548, 88 AmSR 375, 54 LRA 435; Curtis v. Hubbard, 9 Metc. (Mass.) 322.

[f] **Loss of security.**—(1) The presumption is rebutted where it is made to appear that to regard the transaction as payment would result in the creditor losing the advantage of some security. Barry v. Stone, 5 F. (2d) 769; Scott v. Edgar, 159 Ind. 38, 63 NE 452; Jouchert v. Johnson, 108 Ind. 436, 9 NE 413; State v. Hullihan, (Ind. A.) 157 NE 282; State v. Traylor, 77 Ind. A. 419, 132 NE 608; Beach v. Huntsman, 42 Ind. A. 205, 85 NE 523; Delano Mill Co. v. Warren, 123 Me. 408, 123 A 417; Clark v. Downes, 119 Me. 252, 110 A 364; Titcomb v. McAllister, 81 Me. 399, 17 A 315; Bunker v. Barron, 79 Me. 62, 8 A 253, 1 AmSR 282; Crosby v. Redman, 70 Me. 56; Paine v. Dwinel, 53 Me. 52, 87 AmD 533; Kidder v. Knox, 48 Me. 551; Giligian v. New England Truck Co., (Mass.) 163 NE 651; Stebbins v. North Adams Trust Co., 243 Mass. 69, 136 NE 880; Brewer Lumber Co. v. Boston, etc., R. Co., 179 Mass. 228, 60 NE 548, 88 AmSR 375, 54 LRA 435; McLean v. Wiley, 176 Mass. 233, 57 NE 347; Dodge v. Emerson, 131 Mass. 467; Lovell v. Williams, 125 Mass. 439; Taft v. Boyd, 13 Allen (Mass.) 84; Sweet v. James, 2 R. I. 270. (2) "It is well settled that the presumption of payment of a pre-existing debt by the giving of a note is met and controlled when it is shown that such a presumption would deprive the creditor of the benefit of his security." Giligian v. New England Truck Co., (Mass.) 163 NE 651, 653. (3) The presumption does not arise under such circumstances. Roy v. Bellevieu, 118 Me. 495, 108 A 70; Baldwin v. Porter, 217 Mass. 15, 104 NE 492. (4) The presumption is "not to be applied as of course to the case of a debt secured by any kind of pledge or lien." Cary Brick Co. v. Wheeler, 210 Mass. 338, 340, 96 NE 800.

[g] **Loss of mechanic's lien.**—Where a contract for the erection by plaintiff of a furnace in defendant's house provided that the contract price was to be paid by certain notes payable to plaintiff and by another note payable to a third person, it was held that as there was nothing in the contract to show that the notes were accepted as constituting payment in themselves, and as the note to the third person, in the hands of the creditor, would not be available without the indorsement of such third person, it would not be presumed that the creditor accepted the notes in payment and thus deprived himself of his right to a mechanic's lien on the property. Beach v. Huntsman, 42 Ind. A. 205, 85 NE 523.

[h] **Indorsement not shown to afford security.**—Any presumption that the creditor's taking of the debtor's note indorsed by his wife was a discharge of his prior indebtedness, and therefore a release of the creditor's lien as pledgee on the debtor's insurance policy, was overcome by the absence of any showing that the wife's indorsement afforded any adequate security for the indebtedness, together with the fact that the policy was left in the hands of the creditor for many years after the new note was given. Clark v. Downes, 119 Me. 252, 110 A 364.

Presumption of acceptance as payment see supra §§ 216, 217.

96. U. S.—Freeman v. W. B. Moses & Sons, Inc., 285 Fed. 898.

Ala.—Goodkin v. Richardson, 11 Ala. 889, 46 AmD 232.

Ind.—Baughman v. Lowe, 41 Ind. A. 1, 83 NE 255.

N. Y.—Youngs v. Stahelin, 34 N. Y. 258; Noel v. Murray, 13 N. Y. 167.

N. D.—C. A. Finch Lumber Co. v. Weishaar, 55 N. D. 695, 215 NW 155.

Pa.—D. B. Martin Co. v. Strickler, 57 Pa. Super. 296; Mechanics' Nat. Bank v. Kielkopf, 22 Pa. Super. 128.

W. Va.—Hoge v. Vintroux, 21 W. Va. 1; Sayre v. King, 17 W. Va. 562.

[a] **The presumption cannot overcome proved facts** inconsistent therewith. Baughman v. Lowe, 41 Ind. A. 1, 83 NE 255.

Presumption against acceptance as payment see supra §§ 216-218.

97. Dulles v. De Forest, 19 Conn. 190; Crompton v. Pratt, 105 Mass. 255; Gerasimos v. Wartell, 234 Mich. 102, 207 NW 919.

[a] **Presumption not rebutted.**—The presumption that payments made on an account current are to be applied in discharge of the earliest items in the account is not rebutted by the fact that those items are for goods sold on condition that they shall not become the property of the purchaser until paid for, although a memorandum of the condition is entered by the seller in his books containing the account. Crompton v. Pratt, 105 Mass. 255.

Presumptions as to applications of payments see supra § 230.

98. See supra § 234.

99. Me.—Talbot v. Hathaway, 113 Me. 324, 93 A 834.

N. Y.—Rosenstock v. Dessar, 85 App. Div. 501, 83 NYS 334 [rev on other grounds 33 Misc. 419, 67 NYS 657].

evidence tending to show payment,[1] it is rebuttable,[2] its effect being merely to make a prima facie case in favor of the debtor as to payment and to place upon the creditor the burden of introducing evidence showing, or tending to show, the fact of nonpayment.[3] Nevertheless, the presumption of payment after a lapse of twenty years is a strong one,[4] and the evidence to rebut it must be satisfactory and convincing,[5] although it does not require such strong evidence to rebut the presump-

Pa.—Van Loon v. Smith, 103 Pa. 238.
S. C.—McQueen v. Fletcher, 25 S. C. Eq. 152.
Vt.—Graves v. Weeks, 19 Vt. 178.
Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95; Delaney v. Brunette, 62 Wis. 615, 23 NW 22.
And see cases infra note 2.

1. See supra § 200.

2. U. S.—Brobst v. Brock, 10 Wall. 519, 19 L. ed. 1002; Higginson v. Mein, 4 Cranch 415, 2 L. ed. 664; Dunlop v. Ball, 2 Cranch 180, 2 L. ed. 246; Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889]; McCormick v. Eliot, 43 Fed. 469; Burnham v. Hewey, 4 F. Cas. No. 2,175, 1 Hask. 372; Cottle v. Payne, 6 F. Cas. No. 3,268, 3 Day (Conn.) 289; Hopkirk v. Page, 12 F. Cas. No. 6,697, 2 Brock. 20; In re Morris, 17 F. Cas. No. 9,825, Crabbe 70.
Ala.—Gay v. Fleming, 182 Ala. 511, 62 S 523; Semple v. Glenn, 91 Ala. 245, 6 S 46, 9 S 265, 24 AmSR 894.
Ark.—Duke v. State, 56 Ark. 485, 20 SW 600.
Cal.—Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 P 67.
Colo.—Dietemann v. Peo., 76 Colo. 378, 232 P 676.
Conn.—Fanton v. Middlebrook, 50 Conn. 44; Daggett v. Tallman, 8 Conn. 168; Boardman v. De Forest, 5 Conn. 1; Lynde v. Denison, 3 Conn. 387.
Del.—Moore v. Carey, 15 Del. 401, 41 A 75; De Ford v. Green, 15 Del. 316, 40 A 1120; Stockley v. Bewley, 10 Del. 587; Farmers' Bank v. Leonard, 4 Del. 536.
Ga.—Tumlin v. Guest, 31 Ga. A. 250, 120 SE 442, 443 [cit Cyc].
Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46; Luther v. Crawford, 116 Ill. A. 351 [aff 213 Ill. 596, 73 NE 430]; Parker v. Parker, 52 Ill. A. 333.
Ind.—Smith v. Buskirk, 7 Blackf. 477.
Kan.—Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592.
Ky.—Waters v. Waters, 1 Metc. 519; Taylor v. Bate, 4 Dana 198; Helm v. Jones, 3 Dana 86; Herndon v. Bartlett, 7 T. B. Mon. 449; Shields v. Pringle, 2 Bibb 387.
La.—Tilghman's Succ., 7 Rob. 387.
Me.—Abbott v. Fellows, 116 Me. 173, 100 A 657; Talbot v. Hathaway, 113 Me. 324, 93 A 834; Knight v. McKinney, 84 Me. 107, 24 A 744; Philbrook v. Clark, 77 Me. 176; Jarvis v. Albro, 67 Me. 310; Howe v. Saunders, 38 Me. 350; Joy v. Adams, 26 Me. 330; McLellan v. Crofton, 6 Me. 307.
Md.—Morse v. National Cent. Bank, 150 Md. 142, 132 A 598; Cacy v. Slay, 127 Md. 493, 96 A 690, 1 ALR 764; Brown v. Hardcastle, 63 Md. 484.
Mass.—Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552; Fuller v. Cushman, 170 Mass. 286, 49 NE 631; Anthony v. Anthony, 161 Mass. 343, 37 NE 386; Delano v. Smith, 142 Mass. 490, 8 NE 644; Knapp v. Knapp, 134 Mass. 353; Cheever v. Perley, 11 Allen 584; Denny v. Eddy, 22 Pick. 533; Bass v. Bass, 8 Pick. 187.
Mich.—Baent v. Kennicutt, 57 Mich. 268, 23 NW 808; Lyon v. McDonald, 51 Mich. 435, 16 NW 800; Cowie v. Fisher, 45 Mich. 629, 8 NW 586; Abbott v. Godfroy, 1 Mich. 178.
Miss.—Mann v. Manning, 20 Miss. 615.
Mo.—Bobb v. Taylor, 184 SW 1028; Lewis v. Schwenn, 93 Mo. 26, 2 SW 391, 3 AmSR 511.
N. H.—Frye v. Hubbell, 74 N. H. 358, 68 A 325, 17 LRANS 1197; Barker v. Jones, 62 N. H. 497, 13 AmSR 413; Haverhill v. Orange, 47 N. H. 273; Grantham v. Canaan, 38 N. H. 268; Clark v. Clement, 33 N. H. 563.
N. J.—Christy v. New York Cent., etc., R. Co., 90 N. J. L. 540, 101 A 372; Rockhill v. Rockhill, (Ch.) 14 A 760; Metlar v. Williams, 86 N. J. Eq. 330, 97 A 961; Swinley v. Force, 78 N. J. Eq. 52, 78 A 249; Magee v. Bradley, 54 N. J. Eq. 326, 35 A 103; Stimis v. Stimis, 54 N. J. Eq. 17, 33 A 468; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 AmD 748.
N. Y.—Macaulay v. Palmer, 125 N. Y. 742 mem, 26 NE 912, 4 Silv. A. 339 [aff 3 Silv. Sup. 245, 6 NYS 402]; Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153; Morey v. Farmers' L. & T. Co., 14 N. Y. 302 [rev 18 Barb. 401]; Waddell v. Elmendorf, 10 N. Y. 170; New York L. Ins., etc., Co. v. Covert, 3 Abb. Dec. 350, 3 Transcr. A. 24, 6 AbbPrNS 154, 33 HowPr 619 [rev 29 Barb. 435]; Peo. v. Freeman, 110 App. Div. 605, 97 NYS 343; Sheldon v. Heaton, 88 Hun 535, 34 NYS 856; Hall v. Roberts, 63 Hun 473, 18 NYS 480; Fisher v. New York, 6 Hun 64 [rev on other grounds 67 N. Y. 138]; Tyler v. Heidorn, 46 Barb. 439; Harrington v. Slade, 22 Barb. 161; Henderson v. Cairns, 14 Barb. 15; Mead v. Mead, 1 Silv. Sup. 368, 5 NYS 302; Austin v. Tompkins, 5 N. Y. Super. 22; Boyd v. Boyd, 9 Misc. 161, 29 NYS 7; Henderson v. Henderson, 3 Den. 314; Cole v. Paterson, 25 Wend. 456; Morris v. Wadsworth, 17 Wend 103; Van Rensselaer v. Livingston, 12 Wend. 490; Jackson v. Sackett, 7 Wend. 94; Jackson v. Slater, 5 Wend. 295; Jackson v. Hotchkiss, 6 Cow. 401; Bailey v. Jackson, 16 Johns. 210, 8 AmD 309; Jackson v. Pierce, 10 Johns. 414; Smedes v. Hooghtaling, 3 Cai. 48, 2 AmD 250; Heyer v. Pruyn, 7 Paige 465, 34 AmD 355; Park v. Peck, 1 Paige 477; McDowl v. Charles, 6 Johns. Ch. 132; Giles v. Baremore, 5 Johns. Ch. 545; Arden v. Arden, 1 Johns. Ch. 313.
N. C.—Currie v. Clark, 101 N. C. 329, 7 SE 805; Wood v. Deen, 23 N. C. 230; McKinder v. Littlejohn, 23 N. C. 66; Williams v. Peal, 20 N. C. 471; Gee v. Cumming, 3 N. C. 398; Quince v. Ross, 3 N. C. 180.
Oh.—Allen v. Everly, 24 Oh. St. 97; Bissell v. Jaudon, 16 Oh. St. 498 McBride v. Moore, Wright 524.
Or.—Beekman v. Hamlin, 23 Or 313, 31 P 707, 20 Or. 352, 25 P 672.
Pa.—In re Bartram, 282 Pa. 536, 128 A 511; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; Richards v. Walp, 221 Pa. 412, 70 A 815; O'Hara v. Corr, 210 Pa. 341, 59 A 1099; In re Devereux, 184 Pa. 429, 39 A 225; Smith's Est., 177 Pa. 437, 35 A 680; Philadelphia Trust, etc., Co. v. Philadelphia, etc., R. Co., 160 Pa. 590, 28 A 960; Van Loon v. Smith, 103 Pa. 238; Reed v. Reed, 46 Pa. 239; McQuesney v. Hiester, 33 Pa. 435; Rogers v. Burns, 27 Pa. 525; Morrison v. Funk, 23 Pa. 421; Ankeny v. Penrose, 18 Pa. 190; Eby v. Eby, 5 Pa. 435; Unangst v. Kraemer, 3 Watts & S. 391; Levers v. Van Buskirk, 7 Watts & S. 70; Foulk v. Brown, 2 Watts 209; Summerville v. Holliday, 1 Watts 507; McLean v. Findley, 2 Penr. & W. 97; McDowell v. McCullough, 17 Serg. & R. 51; Scull v. Wallace, 15 Serg. & R. 231; McCullough v. Montgomery, 7 Serg. & R. 17; Durdon v. Gaskill, 2 Yeates 268; Boltz v. Bullman, 1 Yeates 584; Snyder v. Steinmetz, 6 Pa. Super. 341; Van Eman v. Walker, 20 Pa. Dist. 1101; Devereux's Est., 6 Pa. Dist. 195, 19 Pa. Co. 267; Finfrock v. Kahl, 9 LancLRev 313; Brown v. Wagner, 23 WklyNC 250; Griffith's Est., 14 WklyNC 486.
R. I.—Glezen v. Haskins, 23 R. I. 601, 51 A 219.
S. C.—Newman v. Clyburn, 41 S. C. 534, 19 SE 913; Hagood's App., 38 S. C. 361, 16 SE 1003; Nobles v. Hogg, 36 S. C. 322, 15 SE 359; Burnside v. Donnon, 34 S. C. 289, 13 SE 465; Hall v. Woodward, 26 S. C. 557, 2 SE 401; Dickson v. Gourdin, 26 S. C. 391, 2 SE 303; Strickland v. Bridges, 21 S. C. 21; Boyce v. Lake, 17 S. C. 481, 43 AmSR 618; Brewton v. Cannon, 1 S. C. L. 482; McQueen v. Fletcher, 25 S. C. Eq. 152; North v. Drayton, 5 S. C. Eq. 34.
Tenn.—Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694; Stanley v. McKinzer, 7 Lea 454; Mason v. Spurlock, 4 Baxt. 554; Fisher v. Philips, 4 Baxt. 243; Black v. Carpenter, 3 Baxt. 350; Lyon v. Guild, 5 Heisk. 175; Yarnell v. Moore, 3 Coldw. 173; Anderson v. Settle, 5 Sneed 202; Rowsey v. Burkhead, 3 Tenn. Civ. A. 361.
Tex.—Perez v. Maverick, (Civ. A.) 202 SW 199; Mensing v. Fidelity Lumber Co., (Civ. A.) 194 SW 208; Buckley v. Runge, 57 Tex. Civ. A. 322, 122 SW 596; Shotwell v. McCardell, 19 Tex. Civ. A. 174, 47 SW 39; McCamant v. Roberts, (Civ. A.) 25 SW 731.
Vt.—Graves v. Weeks, 19 Vt. 178; Evarts v. Nason, 11 Vt. 122.
Va.—Taylor v. Carter, 117 Va. 845, 86 SE 120; Jameson v. Rixey, 94 Va. 342, 26 SE 861, 64 AmSR 726; Clendenning v. Thompson, 91 Va. 518, 22 SE 233; Norvell v. Little, 79 Va. 141; Cole v. Ballard, 78 Va. 139; Updike v. Lane, 78 Va. 132; Brewis v. Lawson, 76 Va. 36; Bowie v. Westmoreland Poor School Soc., 75 Va. 300; Booker v. Booker, 29 Gratt. (70 Va.) 605, 26 AmR 401; Com. v. Lilly, 1 Leigh (28 Va.) 525; Tinsley v. Anderson, 3 Call (7 Va.) 329; Eustace v. Gaskins, 1 Wash. (1 Va.) 188; Winston v. Street, 2 Patt. & H. 169.
W. Va.—Carder v. Johnson, 84 W. Va. 709, 100 SE 502; McCleary v. Grantham, 29 W. Va. 301, 11 SE 949; Criss v. Criss, 28 W. Va. 388; Calwell v. Prindle, 19 W. Va. 604; Hale v. Pack, 10 W. Va. 145.
Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95; Delaney v. Brunette, 62 Wis. 615, 23 NW 22; Stark v. Brown, 12 Wis. 572, 78 AmD 762; Pritchard v. Howell, 1 Wis. 131, 60 AmD 363; Sanderson v. Olmsted, 2 Pinn. 224.
Eng.—Barrington v. Searle, 3 Bro. P. C. 593, 1 Reprint 1518; Stewart v. Nicholls, Taml. 307, 12 EngCh 307, 48 Reprint 122; Oswald v. Leigh, 1 T. R. 270, 99 Reprint 1089; Fladong v. Winter, 19 Ves. Jr. 196, 34 Reprint 491; Hillary v. Waller, 12 Ves. Jr. 239, 33 Reprint 92.
Ont.—McIntosh v. Rogers, 12 Ont. Pr. 389.

"The presumption is disputable, not conclusive." Chesapeake, etc., Canal Co. v. U. S., 223 Fed. 926, 929, 139 CCA 406, LRA1916B 734.

"The principle, upon which the presumption of payment arises from the lapse of time, is a reasonable principle, and may be rebutted by any facts which destroy the reason of the rule." Dunlop v. Ball, 2 Cranch (U. S.) 180, 182, 2 L. ed. 246 [quot McLellan v. Crofton, 6 Me. 307, 334].

3. See supra § 199.

4. Wilson v. Eckman, 55 Pa. Super. 403. And see cases infra note 5.

"After twenty years the presumption of payment is strong." In re Bartram, 282 Pa. 536, 538, 128 A 511.

[a] **The presumption is weaker than the presumption of innocence.**—Potter v. Titcomb, 7 Me. 302.

5. U. S.—Chesapeake, etc., Canal

tion as it does to take a case out of the statute of limitations.[6] As the period extends beyond twenty years the presumption of payment grows stronger[7] and the proof required to rebut it must also be stronger.[8] While it has never been definitely determined that any lapse of time will render the presumption so conclusive that it may not be rebutted,[9] it has been considered that after the lapse of thirty years or more the presumption is well-nigh conclusive,[10] although rebuttal is permissible no matter how long a period has elapsed.[11]

A statutory presumption of payment after lapse of a specified time is rebuttable,[12] unless made conclusive by the terms of the statute itself,[13] in which event the presumption must be given the conclusive effect which the statute requires.[14]

[§ 236] **(2) How Rebutted—(a) In General.** The presumption of payment arising from lapse of time may be rebutted by showing directly that payment has not been made,[15] or by showing facts and circumstances which account for or explain the delay of the creditor in asserting and attempting to enforce payment.[16]

Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889].

Ill.—Luther v. Crawford, 116 Ill. A. 351 [aff 213 Ill. 596, 73 NE 430].

Ky.—Edmonson v. Green, 11 Ky. Op. 433.

La.—Imwolde v. Stern, 2 La. A. (Orleans) 343.

N. C.—Holly v. Freeman, 24 N. C. 218.

Pa.—Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804.

S. C.—McKinlay v. Gaddy, 26 S. C. 573, 2 SE 497.

Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

"The evidence . . . must carry conviction to the mind of the court." Wilson v. Eckman, 55 Pa. Super. 403, 405.

[a] **No precise rule.**—"The courts have not attempted to lay down with precision how much evidence is necessary before the question of payment should be submitted to a jury. In this respect every case must stand on its own footing." Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 910, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889].

[b] **Proof of nonpayment required.**—(1) To rebut the presumption the creditor must not only produce evidence of the indebtedness or satisfactorily account for its absence, but he must also introduce evidence which will convince the court or jury that the debt is still unpaid. Luther v. Crawford, 116 Ill. A. 351 [aff 213 Ill. 596, 73 NE 430]. (2) Where a testator executed a will six years before his death devising a church and lot to his daughter until the congregation paid the daughter the balance due the testator, she then to give a clear deed of conveyance to the congregation, and a devisee of the daughter, sixty-four years after the date of the will, brought ejectment for the lot, it was held that she was bound to overcome the presumption of payment by evidence not only that no payment had been made to herself or the testator's devisee, but also that no payment had been made to the testator himself during the six years between his death and the date of the will. Cannon v. Hileman, 229 Pa. 414, 78 A 932.

[c] **Equally strong presumption of nonpayment must be established.**—The presumption of payment from lapse of twenty years cannot be rebutted except by evidence which will create at least an equally strong presumption of nonpayment. Titusville Second Nat. Bank v. Thompson, 44 Pa. Super. 200.

[d] **After death of debtor.**—The requirement is especially applicable where suit is not brought until after the death of the debtor. Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804.

[e] **Evidence held insufficient to rebut presumption.**—Holly v. Freeman, 24 N. C. 218 (defendant "believed" that note had been paid); In re Bartram, 282 Pa. 536, 128 A 511; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; Peters' App., 106 Pa. 340; Cooke's App., 8 Pa. 508; McKinlay v. Gaddy, 26 S. C. 573, 2 SE 497; Tucker v. Hunt, 27 S. C. Eq. 183.

[f] **Evidence held sufficient to rebut presumption.**—Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889]; Hopkirk v. Page, 12 F. Cas. No. 6,697, 2 Brock. 20; Loper v. Dickey, 190 Ala. 554, 67 S 255; Brewer v. Thomes, 28 Me. 81; Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 AmD 309; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; McQuesney v. Hiester, 33 Pa. 435; Titusville Second Nat. Bank v. Thompson, 44 Pa. Super. 200; Parker's Est., 2 Pa. Dist. 101, 12 Pa. Co. 436.

6. Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Levers v. Van Buskirk, 7 Watts & S. (Pa.) 70.

7. Luther v. Crawford, 116 Ill. A. 351 [aff 213 Ill. 596, 73 NE 430]; Wells v. Compton, 3 La. 164; Peytavin v. Maurin, 2 La. 480; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; Cannon v. Hileman, 229 Pa. 414, 78 A 932; Richards v. Walp, 221 Pa. 412, 70 A 815; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804 (quoted infra note 8); Peters' App., 106 Pa. 340; Barnhart v. Barnhart, 22 Pa. Super. 206; Geiger's Est., 14 Pa. Super. 523; Hartman's Est., 7 Pa. Dist. & Co. 489; Van Eman v. Walker, 20 Pa. Dist. 1101; Hair v. Thomas, 19 Pa. Dist. 424; Hawkley v. Heaton, 54 Utah 314, 180 P 440.

"It [the presumption] gains strength with age." In re Bartram, 282 Pa. 536, 538, 128 A 511.

8. See cases supra note 7.

"The presumption will gather strength with each succeeding year, and the evidence to overthrow it must of course be correspondingly increased." Gregory v. Com., 121 Pa. 611, 622, 15 A 452, 6 AmSR 804 [quot Van Eman v. Walker, 20 Pa. Dist. 1101, 1103].

9. Gregory v. Com., 121 Pa. 611, 622, 15 A 452, 6 AmSR 804.

"After what lapse of time beyond twenty years, if ever, this presumption which is disputable will be conclusive has never been determined, and as the law now stands each case must stand on its particular facts and circumstances." Gregory v. Com., supra [quot Van Eman v. Walker, 20 Pa. Dist. 1101, 1103].

[a] **Fifty years.**—Continuous possession of mortgaged premises for more than fifty years, during which time there has been no recognition of the mortgages as subsisting obligations and no attempt to enforce them, raises a conclusive presumption of payment in the absence of proof of payment of either principal or interest within that time. Wohanka v. Nelson, 127 Misc. 636, 217 NYS 207.

10. Fagan v. Bach, 253 Ill. 588, 97 NE 1087, AnnCas1913A, 505; Peters' App., 106 Pa. 340.

"After thirty years it requires very clear and explicit proof to dislodge it [the presumption of payment]." In re Bartram, 282 Pa. 536, 538, 128 A 511.

[a] **Thirty-one years.**—The presumption of payment of the purchase price of land is so strong as to be almost conclusive where the vendees took possession and remained in possession for thirty-one years after the purchase money was due. Fagan v. Bach, 253 Ill. 588, 97 NE 1087, Ann Cas1913A 505.

11. Courtney v. Staudenmayer, 56 Kan. 392, 397, 43 P 758, 54 AmSR 592.

"The presumption may be rebutted by sufficient evidence, no matter how long the time may be." Courtney v. Staudenmayer, supra.

12. Ark.—Rector v. Morehouse, 17 Ark. 131.

La.—Tilghman's Succ., 7 Rob. 387.

Me.—Knight v. Macomber, 55 Me. 132.

Mass.—Denny v. Eddy, 22 Pick. 533.

N. Y.—Waddell v. Elmendorf, 10 N. Y. 170; Henderson v. Henderson, 3 Den. 314; Jackson v. Slater, 5 Wend. 295.

N. C.—Ex p. Walker, 107 N. C. 340, 12 SE 136; Wilson v. Pearson, 102 N. C. 290, 9 SE 707; Currie v. Clark, 101 N. C. 329, 7 SE 805; Rowland v. Windley, 86 N. C. 36; Wheeler v. Smith, 55 N. C. 408; Williams v. Alexander, 51 N. C. 137.

[a] **Mode of rebuttal.**—Where the statute provides that the presumption can be rebutted only in certain ways, it cannot be rebutted in other ways. Fisher v. New York, 67 N. Y. 73 [rev 6 Hun 64]; Morey v. Farmers' L. & T. Co., 14 N. Y. 302.

13. See statutory provisions.

[a] **Statute creating conclusive presumption.**—A statute, providing that debts of a certain character shall be presumed to have been paid if suit thereon is not brought within a certain time after they become due, creates a conclusive presumption of payment. Dietemann v. Peo., 76 Colo. 378, 232 P 676 (so holding with respect to Sess. L. [1902] p 57, providing that inheritance taxes shall be presumed to have been paid if not sued for within five years after they have become due).

14. McKinney v. Freestone County, (Tex. Commn. A.) 291 SW 529, 532 [appr Cathey v. Weaver, 111 Tex. 515, 242 SW 447; Bunn v. Laredo, (Tex. Commn. A.) 245 SW 426; Pecos Mercantile Co. v. McKnight, (Tex. Civ. A.) 256 SW 933] (the statute "establishes a definite rule of evidence, the effect of which is to make final and conclusive the presumption of payment by reason of lapse of time").

[a] **Contrary view.**—Even though the statute provides that there shall be a conclusive presumption of payment after the lapse of a certain time, this presumption cannot apply where the facts show that the debt has not been paid. West v. Cameron County, (Tex. Civ. A.) 4 SW (2d) 111.

15. Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889]; Rowland v. Windley, 86 N. C. 36; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; Richards v. Walp, 221 Pa. 412, 70 A 815; In re Devereux, 184 Pa. 429, 39 A 225; Titusville Second Nat. Bank v. Thompson, 20 Pa. Dist. 39 [aff 44 Pa. Super. 200]; Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

[a] **Proof must extend through entire period.**—Where actual nonpayment is relied on to rebut the presumption of payment arising from lapse of time, the proof must run through the entire period, and proof of nonpayment during a part of such period is insufficient. Rowland v.

force his claim,[16] or which legitimately tend to create an inference that the debt has not been paid.[17] It has been considered that it is necessary to show facts which would take the case out of the operation of the statute of limitations,[18] but the weight of authority is to the effect that this is not necessary.[19]

[§ 237] **(b) Particular Facts or Circumstances—aa. Relationship of Parties.** The fact that the debtor and creditor are relatives is usually regarded as a circumstance proper for consideration in rebuttal of the presumption of payment arising from lapse of time,[20] because such relationship may furnish a reason for not enforcing payment of the debt,[21] especially where an earlier enforcement would have caused distress to the debtor.[22] But it has also been considered that the mere fact of family relationship between the parties is not of itself sufficient to rebut the presumption,[23] and even that no particular importance should attach to such relationship.[24]

[§ 238] **bb. Financial Condition of Debtor.**[25] The financial condition of the debtor is a circum-

Windley, 86 N. C. 36.

16. U. S.—Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889].

Me.—Talbot v. Hathaway, 113 Me. 324, 93 A 834.

Mo.—Dickensheets v. Patrick, 217 Mo. A. 171, 274 SW 891.

N. J.—Swinley v. Force, 78 N. J. Eq. 52, 78 A 249.

N. Y.—Bailey v. Jackson, 16 Johns. 210, 8 AmD 309.

N. C.—McNair v. Ragland, 16 N. C. 533.

Pa.—Burwell's Est., 91 Pa. Super. 183.

S. C.—Newman v. Clyburn, 41 S. C. 534, 19 SE 913.

Va.—Eustace v. Gaskins, 1 Wash. (1 Va.) 188.

"The presumption may be repelled by any facts which destroy the reason for it." Talbot v. Hathaway, 113 Me. 324, 327, 93 A 834.

[a] **The presumption does not arise** where there are circumstances that sufficiently account for the delay of the creditor. Dickensheets v. Patrick, 217 Mo. A. 171, 274 SW 891; Reed v. Reed, 46 Pa. 239; Burwell's Est., 91 Pa. Super. 183.

[b] **A showing that the debtor induced the delay** may rebut the presumption of payment. Newman v. Clyburn, 41 S. C. 534, 19 SE 913, Eustace v. Gaskins, 1 Wash. (1 Va.) 188.

[c] **Where the debtor is the administrator of the creditor's estate,** this fact sufficiently accounts for his failure to sue on the obligation and prevents the presumption of payment arising from lapse of time. Burwell's Est., 91 Pa. Super. 183.

[d] **Doubt as to confiscation.**—A delay by a British creditor to sue, which occurred during the doubts in relation to confiscation attendant upon the American Revolution, will not be permitted to raise the presumption of payment. McNair v. Ragland, 16 N. C. 533.

[e] **Assignee's ignorance of assignment.**—Where a mother assigned a mortgage to her daughters and had the assignment recorded, and the daughters were unaware of the assignment until a search of the record disclosed it, and they were requested to cancel it, which was more than twenty years after the execution of the mortgage, the presumption of payment after twenty years' repose was overcome. Fischer v. Gerndt, 94 N. J. Eq. 53, 118 A 584.

[f] **Explanation of delay necessary.**—Even indisputable evidence that the debt has not in fact been paid will not avail against the presumption of payment arising from the lapse of twenty years, unless the delay is sufficiently accounted for or explained. Swinley v. Force, 78 N. J. Eq. 52, 78 A 249. But see Chesapeake, etc., Canal Co. v. U. S., 240 Fed. 903, 153 CCA 589 [aff 250 U. S. 123, 39 SCt 407, 63 L. ed. 889] (plaintiff is not bound, as a prerequisite of proving the actual fact of nonpayment, to make separate proof explaining or excusing the delay).

17. U. S.—Chesapeake, etc., Canal Co. v. U. S., supra.

Del.—De Ford v. Green, 15 Del. 316, 40 A 1120.

Ky.—Shields v. Pringle, 2 Bibb 387.

Me.—Talbot v. Hathaway, 113 Me. 324, 93 A 834; Philbrook v. Clark, 77 Me. 176; Sweetser v. Lowell, 33 Me. 446.

Mass.—Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552.

N. H.—Smith v. Smith, 15 N. H. 55.

N. J.—Fischer v. Gerndt, 94 N. J. Eq. 53, 118 A 584.

N. Y.—Waddell v. Elmendorf, 12 Barb. 585 [aff 10 N. Y. 170]; Bailey v. Jackson, 16 Johns. 210, 8 AmD 309.

N. C.—Woodhouse v. Simmons, 73 N. C. 30.

Pa.—Gilmore v. Alexander, 268 Pa. 415, 112 A 9; Richards v. Walp, 221 Pa. 412, 70 A 815; In re Devereux, 184 Pa. 429, 39 A 225; Van Eman v. Walker, 20 Pa. Dist. 1101; Titusville Second Nat. Bank v. Thompson, 20 Pa. Dist. 39 [aff 44 Pa. Super. 200]; In re Hagan, 33 PittsbLegJNS 49.

S. C.—Newman v. Clyburn, 41 S. C. 534, 19 SE 913.

Tenn.—Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694.

Tex.—Buckley v. Runge, (Civ. A.) 136 SW 533.

Va.—Hutsonpiller v. Stover, 12 Gratt. (53 Va.) 579.

W. Va.—Hale v. Pack, 10 W. Va. 145.

Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95; Stark v. Brown, 12 Wis. 572, 78 AmD 762.

[a] **Circumstances indicating an improbability that payment was made** may rebut the presumption. De Ford v. Green, 15 Del. 316, 49 A 1120; Robinson v. Tunnell, 7 Del. 387; Anthony v. Anthony, 161 Mass. 343, 37 NE 386; Walker v. Robinson, 136 Mass. 280; Waddell v. Elmendorf, 12 Barb. 585 [aff 10 N. Y. 170]; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 AmD 309; James v. Jarrett, 17 Pa. 370; Yarnell v. Moore, 3 Coldw. (Tenn.) 173; Hutsonpiller v. Stover, 12 Gratt. (53 Va.) 579; Winston v. Street, 2 Patt. & H. (Va.) 169; Hale v. Pack, 10 W. Va. 145.

[b] **That notes were treated as part of the assets of the payee's estate** in the probate court is a fact which may rebut the presumption of payment arising from lapse of time. Buckley v. Runge, (Tex. Civ. A.) 136 SW 533.

[c] **Statutory requirements.**—Where a statute providing for a presumption of payment after the lapse of twenty years further provides that such presumption may be repelled by "competent proof" of an acknowledgment, it is for the court to say what circumstances are sufficient to repel the presumption; but where the statute provides that the presumption may be rebutted "by proof of payment of some part, or by proof of a written acknowledgment," this excludes every description of rebutting evidence except that mentioned. Morey v. Farmers' L. & T. Co., 14 N. Y. 302, 306 [rev 18 Barb. 401].

18. Latimer v. Trowbridge, 52 S. C. 193, 29 SE 634, 68 AmSR 893; Boyce v. Lake, 17 S. C. 481, 487, 43 AmR 618.

"This presumption, though rebuttable, has a much stronger foothold than to be overthrown by a mere balance of probabilities or by an adverse conclusion or belief deduced simply from the weight of testimony. . . . The facts relied on for this rebuttal must be stronger than mere belief deduced from the weight of testimony being on that side. They must be of a character which would revive an unsealed note barred by the statute of limitations." Boyce v. Lake, supra.

19. See cases supra notes 15–17; and infra this note.

[a] **New promise or acknowledgment need not be shown.**—"Nor is it essential that the evidence to rebut the presumption should contain any new promise on the part of the debtor or positive act of unequivocal recognition of the debt by him within the period." Talbot v. Hathaway, 113 Me. 324, 327, 93 A 834.

[b] **The presumption of payment of a mortgage debt** after the lapse of twenty years may be controlled by any kind of evidence tending to show that the note has not been paid, and it is not necessary that any unequivocal recognition of the debt be made. Jenkins v. Andover Theological Seminary, 205 Mass. 376, 91 NE 552.

20. Me.—Knight v. McKinney, 84 Me. 107, 24 A 744.

N. J.—Stimis v. Stimis, 54 N. J. Eq. 17, 33 A 468; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 AmD 748.

Pa.—Brown v. Wagner, 16 A 834.

Tenn.—Lyon v. Guild, 5 Heisk. 175; Yarnell v. Moore, 3 Coldw. 173; Vaughn v. Tate, (Ch. A.) 36 SW 748.

Va.—Updike v. Lane, 78 Va. 132.

Wis.—Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

Eng.—Hillary v. Waller, 12 Ves. Jr. 239, 33 Reprint 92.

21. See cases supra note 20.

22. Knight v. McKinney, 84 Me. 107, 24 A 744; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 AmD 748.

23. Magee v. Bradley, 54 N. J. Eq. 326, 35 A 103 (brother and sister).

[a] **Mere kinship** between a mortgagor and a mortgagee, although accompanied by intimate confidential relations, does not prevent the presumption of payment after twenty years. Swinley v. Force, 78 N. J. Eq. 52, 78 A 249.

24. Spencer v. Hurd, 201 Ala. 269, 77 S 683, 1 ALR 761; Devereux's Est., 6 Pa. Dist. 195, 19 Pa. Co. 267.

"All arguments based upon the relationship of the parties as affecting the presumption of payment may be thrown aside. That species of reasoning is always illusive, because it works with equal efficiency in either direction. A son would not be likely to harass his parent with demands for payment which the father was unable to meet, and this circumstance would favor the presumption of nonpayment. On the other hand, a father, in failing fortunes, would be tempted to protect his son even at the expense of other creditors, and this would strengthen the theory of payment." Devereux's Est., supra.

[a] **The fact that a mortgagor and mortgagee were closely related** does not affect the presumption of payment arising from the lapse of twenty years during which the mortgagee took no action and the mortgagor recognized no liability. Spencer v. Hurd, 201 Ala. 269, 77 S 683, 1 ALR 761.

25. As circumstance aiding to

stance bearing upon the probability of payment of the debt.[26] Insolvency of the debtor may, of itself, rebut the presumption of payment;[27] and poverty or financial embarrassment of the debtor is a circumstance tending to rebut the presumption,[28] although, according to some authorities, it is not, of itself, where it falls short of actual insolvency, sufficient as a conclusive rebuttal.[29] It is usually considered that, in order for insolvency to rebut the presumption of payment arising from lapse of time, it must be shown that the insolvency continued throughout the entire period relied on to raise the presumption,[30] but it has also been held that proof of insolvency for a long period rebuts any presumption of payment during that period, and if the remaining time, as to which no proof is made, is not alone sufficient to raise the presumption, it does not arise.[31]

In the case of joint debtors, proof of the insolvency of one only does not repel the presumption of payment arising from lapse of time.[32]

Secured indebtedness. It has been held that, when the indebtedness is secured by mortgage or other security, proof of the continuous insolvency of the debtor will not rebut the presumption of payment, as the debtor's insolvency cannot affect the creditor's power to enforce payment,[33] but in other cases no distinction has been made between secured and unsecured indebtedness.[34]

[§ 239] **cc. Obligee's Possession of Obligation.** While the presumption of payment arising from lapse of time is stronger than the presumption of nonpayment arising from the obligee's possession of an obligation for the payment of money,[35] the presumption from lapse of time may be rebutted where the obligation remains in the possession of the obligee and there are other circumstances tending to show nonpayment.[36]

Where the debtor is a corporation, the creditor's possession of the obligation is more effective to rebut the presumption of payment arising from lapse of time than would be the case if the debtor were an individual.[37]

[§ 240] **dd. Acknowledgment by Debtor.** The presumption of payment arising from lapse of time may be rebutted by the fact that, within the period prior to the action necessary to create such presumption,[38] the debtor has made an unqualified acknowledgment or admission[39] of the existence and justice

raise presumption of payment see supra § 207.

26. Knight v. McKinney, 84 Me. 107, 24 A 744.

27. Conn.—Boardman v. De Forest, 5 Conn. 1.

Del.—De Ford v. Green, 15 Del. 316, 49 A 1120; Robinson v. Tunnell, 7 Del. 387; Farmers' Bank v. Leonard, 4 Del. 536.

Me.—Knight v. McKinney, 84 Me. 107, 24 A 744; Knight v. Macomber, 55 Me. 132; Noble v. Merrill, 48 Me. 140.

Miss.—Mann v. Manning, 20 Miss. 615.

N. J.—Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 AmD 748.

N. Y.—Waddell v. Elmendorf, 10 N. Y. 170 [aff 12 Barb. 585]; Austin v. Tompkins, 5 N. Y. Super. 22.

N. C.—Rowland v. Windley, 86 N. C. 36; Grant v. Burgwyn, 84 N. C. 560; Woodhouse v. Simmons, 73 N. C. 30; Woodbury v. Taylor, 48 N. C. 504; McKinder v. Littlejohn, 23 N. C. 66.

Pa.—In re Bartram, 282 Pa. 536, 128 A 511; Guillou v. Redfield, 205 Pa. 293, 54 A 886; In re Devereux, 184 Pa. 429, 39 A 225; Taylor v. Megargee, 2 Pa. 225; Tilghman v. Fisher, 9 Watts 441; Fisher's Est., 7 LancL Rev 333; Griffith's Est., 14 WklyNC 456.

Tenn.—Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694; Yarnell v. Moore, 3 Coldw. 173.

Va.—Updike v. Lane, 78 Va. 132.

Eng.—Fladong v. Winter, 19 Ves. Jr. 196, 34 Reprint 491; Hillary v. Waller, 12 Ves. Jr. 239, 33 Reprint 92.

[a] **Inability to pay all debts must be shown.**—"Before the fact of insolvency can be used to rebut the presumption of payment, it must be shown that the debtor was absolutely unable to pay not only this debt but all debts during the entire period of twenty years, or as long as the debt was in existence." In re Bartram, 282 Pa. 536, 538, 128 A 511.

[b] **Ability to pay debt sued on.**—If a debtor has had the means or ability to pay the debt sued for during twelve or fifteen years before suit is brought, this is sufficient to meet the effect of reputed insolvency, which was relied on to repel the presumption of payment from the lapse of time, although he may not have been able to pay his other debts during that time. Walker v. Wright, 47 N. C. 155.

[c] **Never able to pay.**—The presumption is rebutted where the evidence goes to the extent of showing that from the time of the creation of the debt the debtor never had sufficient money or property with which to pay it. Devereux's Est., 6 Pa. Dist. 195, 19 Pa. Co. 267, ("The evidence, while uncontradicted, is a flat bar to the presumption of payment, because it proves as a substantive fact that payment was impossible. It makes out a case not merely of insolvency, for, as was said in Griffith's Estate, 14 W. N. 496, 'a man may pay one creditor and be unable to pay ten creditors;' nor of poverty, for a debtor may impoverish himself by paying the very debt which is in controversy, but a case in which, after the entry of the judgment, no fund was in existence out of which it could be satisfied").

28. Boyd v. Boyd, 9 Misc. 161, 29 NYS 7; Taylor v. Megargee, 2 Pa. 225; Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 Am SR 769, 58 LRA 694; Fladong v. Winter, 19 Ves. Jr. 196, 34 Reprint 491.

29. Kline v. Kline, 20 Pa. 503; Taylor v. Megargee, 2 Pa. 225; Rogers v. Judd, 5 Vt. 236, 26 AmD 301; Willaume v. Gorges, 1 Campb. 217, 170 Reprint 935.

30. Farmers' Bank v. Leonard, 4 Del. 536; Alston v. Hawkins, 105 N. C. 3, 11 SE 164, 18 AmSR 874; Rowland v. Windley, 86 N. C. 36 [expl McKinder v. Littlejohn, 26 N. C. 560; Walker v. Burgwyn, 84 N. C. 560; Walker v. Wright, 47 N. C. 155; Guillou v. Redfield, 205 Pa. 293, 54 A 886; Taylor v. Megargee, 2 Pa. 225; Fisher's Est., 7 LancLRev (Pa.) 333.

"Insolvency, to be available to rebut the presumption, must continue during the whole period of the existence of the debt, and it must be shown with the force of a substantive fact." In re Bartram, 282 Pa. 536, 538, 128 A 511.

[a] **The proof must apply to the last twenty years,** since proof of the insolvency of the debtor more than twenty years before the institution of the action to enforce the indebtedness will not rebut the presumption. De Ford v. Green, 15 Del. 316, 49 A 1120.

31. Woodbury v. Taylor, 48 N. C. 504.

32. Boardman v. De Forest, 5 Conn. 1.

33. Hunt v. Forman, 2 Dana (Ky.) 471; Wiley v. Lineberry, 89 N. C. 15.

34. Knight v. McKinney, 84 Me. 107, 24 A 744; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 AmD 748.

35. See supra § 200.

36. Unangst v. Kraemer, 8 Watts & S. (Pa.) 391; Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694; Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

[a] **Where the debtor was in necessitous circumstances** during the entire period and in addition thereto the obligation remained in the hands of the creditor, the presumption of payment from lapse of time is rebutted. Connecticut Mut. L. Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 SW 345, 91 AmSR 769, 58 LRA 694.

37. McDowell v. North Side Bridge Co., 247 Pa. 190, 93 A 280 (coupons from corporate bonds in possession of the payee).

38. See cases infra this note; and note 41.

"The facts and circumstances relied on to rebut the presumption must necessarily be within twenty years before suit is brought, and, as the recollection of the exact words and import of an oral admission must necessarily become more indistinct with the lapse of years, the force of such an admission will in general be lessened as the time from its occurrence increases." Gregory v. Com., 121 Pa. 611, 622, 15 A 452, 6 AmSR 804 [quot Van Eman v. Walker, 20 Pa. Dist. 1101, 1103].

[a] **The acknowledgment fixes a new starting point** for the running of the time necessary to create the presumption of payment. Dickson v. Gourdin, 26 S. C. 391, 2 SE 303; Roberts v. Smith, 21 S. C. 455.

[b] **Admission twenty years before foreclosure suit.**—An admission by the mortgagor that the debt was unpaid is not sufficient to rebut the presumption, where it was made more than twenty years before suit was brought to foreclose. Simms v Kearse, 42 S. C. 43, 20 SE 19.

[c] **The lapse of twenty years between maturity of the debt and the acknowledgment** does not prevent the rebuttal of the presumption of payment by an acknowledgment made within twenty years prior to the commencement of the action. Eby v. Eby, 5 Pa. 435.

39. See cases infra this note; and note 41.

[a] **An admission of nonpayment in a pleading may** overcome the presumption of payment from lapse of time. Palethorp's Est., 14 Pa. Co. 287.

[b] **Failure to deny allegation.**—It may be shown in rebuttal of the presumption of payment arising from lapse of time that in a former action

of the claim,[40] and that it is still due and unpaid,[41] although such acknowledgment or admission was not accompanied by any promise to pay the debt,[42] or even though it was accompanied by a declaration of intention not to pay[43] or a refusal to pay.[44]

Necessity of writing. The acknowledgment need not be in writing in order to rebut the common-law presumption of payment,[45] but in the case of a statutory presumption it has been held that the acknowledgment must be written in order to be effective.[46]

An acknowledgment made to a third person is usually regarded as sufficient to rebut the presumption of payment,[47] although an admission that the debt is unpaid will not be as readily implied from vague and equivocal language addressed to a stranger as from language addressed to the creditor in reply to a demand for the debt.[48] But it has also been held that the presumption cannot be rebutted by an acknowledgment which was not made to the creditor or to his agent or anyone acting in his be-

between the same parties it was alleged in the complaint that the debt was unpaid and such allegation was not denied in the answer. Grant v. Gooch, 105 N. C. 278, 11 SE 571.

[c] **A general direction in the will of a debtor** for the payment of his debts is not such an acknowledgment of, or promise to pay, any particular debt as will prevent the arising of a presumption of payment from lapse of time. Martin v. Gage, 9 N. Y. 398.

[d] **Inquiry as to purchase of judgment.**—In an action brought in 1885, to revive a judgment obtained in 1861, evidence that the judgment debtor came to the judgment creditor in 1870, and asked him what sum he would take for his judgment, does not show such an acknowledgment that the debt is due and unpaid as to defeat the presumption of payment. Colvin v. Phillips, 25 S. C. 228.

[e] **Recording a defeasance bond ten years after recording the deed** is not an admission that the mortgage debt has not been paid, but is to be construed as an act in support of the mortgagor's title. Short v. Caldwell, 155 Mass. 57, 28 NE 1124.

[f] **Express acknowledgment required.**—"Such an acknowledgment must be an express acknowledgment of an existing debt." Hudson v. Williams, 22 Del. 550, 554, 72 A 985.

[g] **Act recognizing validity.**—The presumption of payment of a mortgage arising from twenty years' unexplained and undisturbed possession by the mortgagor is repelled by any act on his part recognizing the validity of the mortgage. Frye v. Hubbell, 74 N. H. 358, 68 A 325, 17 LRANS 1197.

40. See case infra this note; and cases infra note 41.

[a] **Dispute as to existence of debt.**—Where a debt is claimed by plaintiff, and is disputed by defendant, who admits that it has not been paid, lapse of time cannot raise a presumption of payment, but may afford a presumption against the original existence of the debt. Christopher v. Sparke, 2 Jac. & W. 223, 37 Reprint 612.

41. U. S.—Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142.

Ala.—Werborn v. Austin, 82 Ala. 498, 8 S 280.

Del.—Parsons v. Cannon, 27 Del. 298, 88 A 470; Hudson v. Williams, 22 Del. 550, 72 A 985; De Ford v. Green, 15 Del. 316, 40 A 1120; Stockley v. Bewley, 10 Del. 587; Robinson v. Tunnell, 7 Del. 387; Burton v. Cannon, 5 Del. 13; Farmers' Bank v. Leonard, 4 Del. 536.

Ga.—Arline v. Miller, 22 Ga. 330.

Ill.—Parker v. Parker, 52 Ill. A. 333.

Ind.—Smith v. Buskirk, 7 Blackf. 477; O'Brien v. Coulter, 2 Blackf. 421.

Me.—Knight v. Macomber, 55 Me. 132.

Md.—Cacy v. Slay, 127 Md. 493, 96 A 690, 1 ALR 764.

Mass.—Cheever v. Perley, 11 Allen 584.

Mich.—Lyon v. McDonald, 51 Mich. 435, 16 NW 800.

Mo.—Cape Girardeau County v. Harbison, 58 Mo. 90.

N. J.—Wilbur v. Winn, 89 N. J. Eq. 278, 103 A 985; Metlar v. Williams, 86 N. J. Eq. 330, 97 A 961; Ayres v. Ayres, 69 N. J. Eq. 343, 60 A 422 [aff 69 N. J. Eq. 842, 66 A 1133]; Murphy v. Coates, 33 N. J. Eq. 424.

N. Y.—In re Kendrick, 107 N. Y. 104, 13 NE 762; Lyon v. Adde, 63 Barb. 89; Harrington v. Slade, 22 Barb. 161; Carll v. Hart, 15 Barb. 565; Van Rensselaer v. Livingston, 12 Wend. 490; Jackson v. Wood, 12 Johns. 242, 7 AmD 315; Jackson v. Pierce, 10 Johns. 414; Livingston v. Roosevelt, 4 Johns. 251, 4 AmD 273; Smedes v. Hooghtaling, 3 Cai. 48, 2 AmD 250; Park v. Peck, 1 Paige 477; Clark v. Bogardus, 2 Edw. 387.

N. C.—Cartwright v. Kerman, 105 N. C. 1, 10 SE 870; Morris v. Osborne, 104 N. C. 609, 10 SE 476; Tucker v. Baker, 94 N. C. 162; Hinsaman v. Hinsaman, 52 N. C. 510; Buie v. Buie, 24 N. C. 87.

Oh.—Bissell v. Jaudon, 16 Oh. St. 498.

Pa.—Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; O'Hara v. Corr, 210 Pa. 341, 59 A 1099; White v. White, 200 Pa. 565, 50 A 157; Smith v. Schoenberger, 176 Pa. 95, 34 A 954; Runner's App., 121 Pa. 649, 15 A 647; Breneman's App., 121 Pa. 641, 15 A 650; Porter v. Nelson, 121 Pa. 628, 15 A 647; Frear v. Drinker, 8 Pa. 520; Eby v. Eby, 5 Pa. 435; Stout v. Levan, 3 Pa. 235; Kitchen v. Deardoff, 2 Pa. 481; Postens v. Postens, 3 Watts & S. 127; Wilson v. Eckman, 55 Pa. Super. 403; De Haven's Est., 41 Pa. Super. 382.

S. C.—Merchants, etc., Nat. Bank v. Hunter, 113 S. C. 394, 102 SE 720; Nobles v. Hogg, 36 S. C. 322, 15 SE 359; Sartor v. Beaty, 25 S. C. 293; Colvin v. Phillips, 25 S. C. 228; Shaw v. Barksdale, 25 S. C. 204; Roberts v. Smith, 21 S. C. 455; Kinard v. Baird, 20 S. C. 377; Stover v. Duren, 34 S. C. L. 448, 51 AmD 634; Wright v. Eaves, 31 S. C. Eq. 582; Tucker v. Hunt, 27 S. C. Eq. 183; McQueen v. Fletcher, 25 S. C. Eq. 152; North v. Drayton, 5 S. C. Eq. 34.

Tenn.—Stanley v. McKinzer, 7 Lea 454; Lyon v. Guild, 5 Heisk. 175.

Vt.—Martin v. Bowker, 19 Vt. 526.

Va.—Updike v. Lane, 78 Va. 132; Brewis v. Lawson, 76 Va. 36.

Eng.—Christophers v. Sparke, 2 Jac. & W. 223, 37 Reprint 612.

[a] **A statement by an executor** that he had not paid a debt which matured one year before the debtor's death will not rebut the presumption of payment, as it might have been paid by the debtor. Rowland v. Windley, 86 N. C. 36.

[b] **The admissions of the mortgagor's widow,** who remained in possession of the land until her death, are admissible to overcome the presumption of payment from lapse of time. Anthony v. Anthony, 161 Mass. 343, 37 NE 386.

[c] **Offer of payment.**—To rebut the presumption of payment from lapse of time, proof may be given that pending the suit defendant proposed to pay the bond in property. Smith v. Buskirk, 7 Blackf. (Ind.) 477.

42. Breneman's App., 121 Pa. 641, 15 A 650.

43. Wilson v. Eckman, 55 Pa. Super. 403, 405.

"It is of no consequence that the admission of nonpayment is accompanied by a refusal to pay, or a declaration of an intention not to do so." Wilson v. Eckman, supra.

44. Wilson v. Eckman, supra (quoted supra note 43).

"It is of no consequence that the admission of non-payment is accompanied by a refusal to pay; the action is not founded on a new promise, but on the original indebtedness; the question, as against the presumption, is whether or not the debt is in fact unpaid." Gregory v. Com., 121 Pa. 611, 622, 15 A 452, 6 AmSR 804 [quot Sheafer v. Woodside, 257 Pa. 276, 282, 101 A 753, 1 ALR 775].

45. Carll v. Hart, 15 Barb. (N. Y.) 565; Van Rensselaer v. Livingston, 12 Wend. (N. Y.) 490; Porter v. Nelson, 121 Pa. 628, 15 A 647.

46. Fisher v. New York, 67 N. Y. 73; Dorgeloh v. Bassford, 50 N. Y. Super. 450.

47. Del.—Burton v. Cannon, 5 Del. 13.

Mo.—Cape Girardeau County v. Harbison, 58 Mo. 90.

N. J.—Swinley v. Force, 78 N. J. Eq. 52, 78 A 249.

N. C.—Hinsaman v. Hinsaman, 52 N. C. 510.

Pa.—Runner's App., 121 Pa. 649, 15 A 647; Wilson v. Eckman, 55 Pa. Super. 403.

[a] **Reason for rule.**—An acknowledgment by a debtor of the existence of a debt, made to a third person, is "a statement against interest which stands as evidence of a fact." Swinley v. Force, 78 N. J. Eq. 52, 64, 78 A 249.

[b] **Admission after lapse of twenty years.**—Assuming, without deciding, that a distinct and unequivocal acknowledgment of the existence of the debt, made by the debtor to a stranger, even though without the intent that such acknowledgment shall be communicated to the creditor, may avoid the presumption of payment arising from lapse of time, an acknowledgment made to a stranger under such circumstances, after the lapse of twenty years, "is entitled to comparatively little evidentiary force and standing by itself would not avail to rebut the presumption." Swinley v. Force, 78 N. J. Eq. 52, 65, 78 A 249.

48. Wilson v. Eckman, 55 Pa. Super. 403.

[a] **Recital in mortgages.**—Where the heirs of a decedent executed a conveyance of his land to one of their number, charging the land with a certain sum, the interest to be paid to decedent's widow during her life and the principal to the heirs after her death, a reference by the grantee to the land as subject to dower in a mortgage to a stranger is not sufficient to rebut a statutory presumption of payment of a ground rent or other charge on realty after twenty-one years without payment thereon or acknowledgment of its existence. In re De Haver, 215 Pa. 549, 64 A 779.

[b] **Admission not connected with indebtedness sued on.**—A letter written by the obligor in a bond to a third person acknowledging that he is in debt, but in no way connecting the indebtedness mentioned in the letter with the bond sued on, is not sufficient to prevent the presumption of payment of such bond arising from lapse of twenty years. Alston v.

half, and was not intended to be communicated to him or to influence his conduct.[49]

An acknowledgment by one coöbligor, made in the absence of another coöbligor, has been held insufficient to rebut, as to the latter, the presumption of payment arising from lapse of time,[50] but it has also been held that an admission by one executor that a legacy has not been paid is sufficient to rebut the presumption of payment as to all the executors.[51]

[§ 241] **ee. Part Payment.** A part payment by the debtor within the period prior to the commencement of the action which is relied on to raise a presumption of payment rebuts any such presumption,[52] or, as it has been expressed, fixes a new date from which the full period necessary to create a presumption of payment of the balance must run.[53]

An entry of part payment made by the obligee, without other evidence tending to show that it was made at a time when it was against his interest to make such entry, is not of itself sufficient to repel the presumption of payment arising from lapse of time.[54]

Credits indorsed upon a written obligation for the payment of money may defeat the presumption of payment arising from lapse of time,[55] if, but not unless, it is made to appear that such indorsements were made by the creditor before the expiration of the period required to raise the presumption and at a time when it was against the interest of the creditor to make them.[56]

Acknowledgment of right to set-off. An acknowledgment of the holder of an obligation, without the knowledge of the obligee, that the latter is entitled to a set-off, is not a part payment which will defeat the presumption of nonpayment arising from lapse of time.[57]

Part payment by one obligor, within the period prior to the action necessary to create the presumption, is usually held sufficient to rebut the presumption with respect to coöbligors,[58] but it has been held that, after the death of one of several joint

Hawkins, 105 N. C. 3, 11 SE 164, 18 AmSR 874.

49. In re Kendrick, 107 N. Y. 104, 13 NE 762.

50. Rogers v. Clements, 98 N. C. 180, 3 SE 512; Rowland v. Windley, 86 N. C. 36.

51. Arden v. Arden, 1 Johns. Ch. (N. Y.) 313.

52. U. S.—Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142.

Ark.—Duke v. State, 56 Ark. 485, 20 SW 600.

Del.—Vaughan v. Marshall, 6 Del. 604; Burton v. Cannon, 5 Del. 13; Latimer v. Peterson, 2 Del. 366.

Md.—Peters v. Hignutt, 138 Md. 24, 113 A 586.

Mass.—Denny v. Eddy, 22 Pick. 533.

N. H.—Howard v. Hildreth, 18 N. H. 105.

N. J.—Metlar v. Williams, 86 N. J. Eq. 330, 97 A 961; Swinley v. Force, 78 N. J. Eq. 52, 78 A 249; Betts v. Van Dyke, 40 N. J. Eq. 149.

N. Y.—Fisher v. New York, 67 N. Y. 73; New York L. Ins., etc., Co. v. Covert, 3 Abb. Dec. 350, 3 Transcr. A. 24, 6 AbbPrNS 154, 33 HowPr 619; Carll v. Hart, 15 Barb. 565; Henderson v. Cairns, 14 Barb. 15; Dorgeloh v. Bassford, 50 N. Y. Super. 450.

N. C.—White v. Beaman, 96 N. C. 122, 1 SE 789; Belo v. Spach, 85 N. C. 122; Woodhouse v. Simmons, 73 N. C. 30; Hughes v. Blackwell, 59 N. C. 73; Hamlin v. Hamlin, 56 N. C. 191; Lowe v. Sowell, 48 N. C. 67; McKeethan v. Atkinson, 46 N. C. 421.

Oh.—Bissell v. Jaudon, 16 Oh. St. 498.

Pa.—Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; In re Darlington, 13 Pa. 430; Eby v. Eby, 5 Pa. 435; Kitchen v. Deardoff, 2 Pa. 481; Guldin v. Faber, 1 Walk. 435; Emlen v. Middleton, 5 Leg&InsR 4.

S. C.—Merchants, etc., Nat. Bank v. Hunter, 113 S. C. 394, 102 SE 720; Dickson v. Gourdin, 29 S. C. 343, 7 SE 510, 1 LRA 628; Pyles v. Bell, 20 S. C. 365; Nixon v. Bynum, 17 S. C. L. 148; Wright v. Eaves, 31 S. C. Eq. 582.

Tenn.—Lyon v. Guild, 5 Heisk. 175.

Vt.—Hollister v. York, 59 Vt. 1, 9 A 2; Martin v. Bowker, 19 Vt. 526.

Va.—Rowe v. Hardy, 97 Va. 674, 34 SE 625, 75 AmSR 811; Bell v. Wood, 94 Va. 677, 27 SE 504; Updike v. Lane, 78 Va. 132; Dabney v. Dabney, 2 Rob. (41 Va.) 622, 40 AmD 761.

Eng.—Loftus v. Swift, 2 Sch. & Lef. 642.

[a] **Reason for rule.**—"A partial payment made within the twenty-year period surely is a sufficient 'explanation.' It is unexplained delay to enforce any right under the mortgage continuously for twenty years which establishes the presumption." Swinley v. Force, 78 N. J. Eq. 52, 69, 78 A 249.

[b] **A payment of interest** (1) will have the same effect. Chubb v. Patchin, 20 OhNPNS 338; Simpson v. Broomall, 1 Del. Co. (Pa.) 229; Jennings v. Parr, 62 S. C. 306, 40 SE 683; Dickson v. Gourdin, 29 S. C. 343, 7 SE 510, 1 LRA 628; Barrington v. Searle, 3 Bro. P. C. 593, 1 Reprint 1518. (2) Interest regularly paid rebuts the presumption. Nixon v. Bynum, 17 S. C. L. 148.

[c] **A part payment by a mortgagor** upon the indebtedness secured by the mortgage will rebut any presumption of payment which might otherwise have arisen in favor of his grantee of the equity of redemption. Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142; Emlen v. Middleton, 5 Leg&InsR (Pa.) 4; Nixon v. Bynum, 17 S. C. L. 148.

[d] **Part payment by heirs or devisees** upon the bond of their ancestor does not rebut the presumption of payment as against the estate. Gibson v. Lowndes, 28 S. C. 285, 5 SE 727; Blake v. Quash, 14 S. C. L. 340.

[e] **Part payment by an assignee** (1) in bankruptcy may be sufficient. Belo v. Spach, 85 N. C. 122; Hamlin v. Hamlin, 56 N. C. 191. (2) Payment of a dividend to the creditor by the assignees of an insolvent debtor, in the ordinary execution of their trust, is not such a part payment of the debt as will repel the presumption of payment from the lapse of twenty years. Boardman v. De Forest, 5 Conn. 1.

[f] **Credit given by creditor.**—The fact that the creditor, after the maturity of the debt, becomes indebted to the debtor, and of his own accord and without any agreement with his debtor credits the amount thereof upon the debt from the debtor to himself, cannot be considered such a part payment by the debtor as to rebut the presumption of payment. Vaughan v. Marshall, 6 Del. 604.

[g] **Receipts given by a beneficiary** for interest to which he was equitably entitled, paid on bonds in the hands of a commissioner in equity, prevent the presumption of payment attaching to the bonds. Jennings v. Parr, 62 S. C. 306, 40 SE 683.

53. Dickson v. Gourdin, 26 S. C. 391, 2 SE 303.

54. Woodhouse v. Simmons, 73 N. C. 30; Merchants', etc., Nat. Bank v. Hunter, 113 S. C. 394, 102 SE 720.

[a] **Reason for rule.**—"Otherwise the presumption might be evaded by a false entry at any time." Woodhouse v. Simmons, 73 N. C. 30, 33.

[b] **A mere formal entry on the record** by the holder of a mortgage of a credit on account will not defeat the presumption. Merchants', etc., Nat. Bank v. Hunter, 113 S. C. 394, 102 SE 720.

55. Williams v. Alexander, 51 N. C. 137; Cole v. Ballard, 78 Va. 139; Dabney v. Dabney, 2 Rob. (41 Va.) 622, 40 AmD 761; Barrington v. Searle, 3 Bro. P. C. 593, 1 Reprint 1518.

56. Roseboom v. Billington, 17 Johns. (N. Y.) 182; Hart v. Bucher, 182 Pa. 604, 38 A 472 [foll Hart v. Bucher, 186 Pa. 384, 40 A 511]; Runner's App., 121 Pa. 649, 15 A 647; Lash v. Von Neida, 109 Pa. 207; In re Cremer, 5 Watts & S. (Pa.) 331.

57. Woodhouse v. Simmons, 73 N. C. 30, 33 ("A part payment is necessarily made by the obligor or with his privity. It may be fairly construed as an acknowledgment of the bond as a valid subsisting debt, and as equivalent to a promise to pay the residue. But this cannot be said of an appropriation by the obligee alone, and without the privity of the obligor, of a set-off in favor of the obligor, as a part payment on a bond. This is exclusively the act of the obligee, of which the obligor has no knowledge, and it cannot be held as an acknowledgment by him of the validity of the debt, or as his promise to pay it").

58. Denny v. Eddy, 22 Pick. (Mass.) 533; Campbell v. Brown, 86 N. C. 376, 41 AmR 464; Lowe v. Sowell, 48 N. C. 67; McKeethan v. Atkinson, 46 N. C. 421; Guldin v. Faber, 1 Walk. 435; Dickson v. Gourdin, 29 S. C. 343, 7 SE 510, 1 LRA 628; Hall v. Woodward, 26 S. C. 557, 2 SE 401 [disappr on this point Langston v. Shands, 23 S. C. 149]; Higginson v. Air, 1 S. C. Eq. 427. Compare Hudson v. Williams, 22 Del. 550, 72 A 985 (in an action on a note executed to plaintiff's intestate by defendant and another, and more than twenty years overdue, testimony by plaintiff that intestate got some oyster shells from the other maker of the note, which were to be applied in part payment thereof, was inadmissible).

[a] **Reason for rule.**—"If such payment be made by one of several joint obligors, it enures to the benefit of all, and is regarded as the act of all. They all have a common interest that the payment should be made, and they are all, therefore, bound by it." Dickson v. Gourdin, 29 S. C. 343, 351, 7 SE 510, 1 LRA 628.

[b] **Payment by assignee in bankruptcy.**—Part payments on a bond, by the assignee in bankruptcy of one of the obligors, repel the presumption arising from lapse of time. Belo v. Spach, 85 N. C. 122.

[c] **Payment by the principal** on a joint and several obligation rebuts the presumption of its payment at the expiration of twenty years from maturity as to both principal and surety. Dickson v. Gourdin, 29 S. C. 343, 7 SE 510, 1 LRA 628 [exp] Dickson v. Gourdin, 26 S. C. 391, 2 SE 303,

obligors, a payment by the survivor will not defeat a presumption of payment which has arisen in favor of the estate of the deceased obligor by reason of lapse of time after the maturity of the debt.[59]

[§ 242] **ff. Disability of Creditor To Sue.** The presumption from lapse of time may be rebutted by the fact that the creditor was under a legal disability to sue within the period or for a portion of the time.[60]

Coverture. That the period of coverture should be excluded in computing the time necessary to raise a presumption of payment has been both asserted[61] and denied.[62]

Infancy. With respect to an infant creditor it has been held that the period runs from the maturity of the debt[63] and also that it does not begin to run until the creditor attains majority.[64]

Existence of state of war. Where a state of war has existed between the countries of which the debtor and creditor respectively are citizens or subjects, and by reason thereof the creditor has been unable to enforce his claim by civil action, this fact may rebut the presumption of payment which otherwise would have arisen from lapse of time,[65] or, as it has been expressed, the period during which the state of war existed is to be excluded in computing the period necessary to give rise to the presumption.[66] As between citizens of the same country, the period of the war is not to be deducted if the courts were open to the creditor, as the creditor's remedy to enforce his claim was not suspended,[67] although the fact that war was flagrant in the neighborhood where the creditor and the debtor resided, during a part of the time relied on to raise the presumption of payment. may be considered in rebuttal of the presumption,[68] and may justify the exclusion of such time in the computation of twenty years, where, during that time, the courts were closed to the creditor.[69]

Suspension of statute of limitations. It has been both asserted[70] and denied[71] that the period during which the statutes of limitations were suspended in consequence of the Civil War should be excluded in computing the period necessary to raise a presumption of payment.

[§ 243] **gg. Nonresidence or Absence—(aa) Creditor.** Nonresidence of the creditor does not affect the presumption of payment arising from lapse of time.[72]

[§ 244] **(bb) Debtor.** With respect to the effect of nonresidence or absence of the debtor on the presumption of payment arising from lapse of time the cases are not in accord.[73] Some authorities hold that, under such circumstances, the presumption is rebutted[74] whether the debtor is in an adjoining or a remote state,[75] although the absence from the state of one of two joint debtors will not repel the presumption where the other debtor is within the state and accessible.[76] Other authorities hold that such absence or nonresidence of the debtor does not, of itself, affect the presumption,[77] although it may, in connection with other circumstances, be effective in rebuttal.[78]

Where a debtor absconds soon after the accrual of

and dist Walters v. Kraft, 23 S. C. 578, 55 AmR 44].

[d] **A recovery of judgment against one obligor** does not rebut the presumption of payment as against another obligor. Langston v. Shands, 23 S. C. 149 [appr on this point Hall v. Woodward, 26 S. C. 557, 2 SE 401].

59. Shubrick v. Adams, 20 S. C. 49.

60. Lynde v. Denison, 3 Conn. 387; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 AmD 309; Shubrick v. Adams, 20 S. C. 49; Criss v. Criss, 28 W. Va. 388. Compare Boyce v. Lake, 17 S. C. 481, 43 AmR 618 (where the court, being of the opinion that the presumption could be rebutted only by circumstances which would take the case out of the operation of the statute of limitations, held that it was error to charge that the presumption could be rebutted by proof of such fact as the lunacy of plaintiff).

[a] **Reason for rule.**—The presumption of payment from lapse of time is not grounded on any supposed punctuality of the debtor in the payment of his debts, but is founded on the fact that the creditor has the power of compelling a performance, and after the lapse of twenty years the law will presume that he has done it. Lynde v. Denison, 3 Conn. 387.

61. Lynde v. Denison, supra.

62. Johnson v. England, 20 N. C. 199.

63. Bartlett v. Bartlett, 9 N. H. 398.

64. Wilkerson v. Dunn, 52 N. C. 125; Kohler's Est., 18 Pa. Co. 184.

65. Brewton v. Cannon, 1 S. C. L. 482; Tunstall v. Withers, 86 Va. 892, 11 SE 565.

66. Dunlop v. Ball, 2 Cranch (U. S.) 180, 2 L. ed. 246; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 AmD 309; Jackson v. Pierce, 10 Johns. (N. Y.) 414; Norvell v. Little, 79 Va. 141.

67. Shubrick v. Adams, 20 S. C. 49; Criss v. Criss, 28 W. Va. 388.

68. Lyon v. Guild, 5 Heisk. (Tenn.) 175.

69. Kilpatrick v. Brashear, 10 Heisk. (Tenn.) 372; Hale v. Pack, 10 W. Va. 145.

70. Penrose v. King, 1 Yeates (Pa.) 344; Mason v. Spurlock, 4 Baxt. (Tenn.) 554; Gwyn v. Porter, 5 Heisk. (Tenn.) 253; Tunstall v. Withers, 86 Va. 892, 11 SE 565; Norvell v. Little, 79 Va. 141.

[a] **Suspension of statute not applicable.**—In a case to which the law suspending the statute of limitations is not applicable, the period of such suspension should not be excluded. Kilpatrick v. Brashear, 10 Heisk. (Tenn.) 372.

71. Philippi v. Philippe, 115 U. S. 151, 5 SCt 1181, 29 L. ed. 336; Harrison v. Heflin, 54 Ala. 552; Shubrick v. Adams, 20 S. C. 49.

72. Rogers v. Bishop, 5 Blackf. (Ind.) 108; Cox v. Brower, 114 N. C. 422, 19 SE 365.

73. See cases infra notes 74–78.

74. U. S.—Brobst v. Brock, 10 Wall. 519, 19 L. ed. 1002; Kibbe v. Thompson, 14 F. Cas. No. 7,754, 5 Biss. 226.

Conn.—Daggett v. Tallman, 8 Conn. 168; Boardman v. De Forest, 5 Conn. 1.

Del.—De Ford v. Green, 15 Del. 316, 40 A 1120; Farmers' Bank v. Leonard, 4 Del. 536.

Iowa.—Ludwig v. Blackshere, 102 Iowa 366, 71 NW 356; Hendricks v. Wallis, 7 Iowa 224.

Ky.—Herndon v. Bartlett, 7 T. B. Mon. 449; Shields v. Pringle, 2 Bibb. 387; Whitaker v. Kesler, 3 Ky. Op. 236.

Me.—Talbot v. Hathaway, 113 Me. 324, 327, 93 A 834 [cit Cyc]; McLellan v. Crofton, 6 Me. 307.

Miss.—Mann v. Manning, 20 Miss. 615.

Eng.—Newman v. Newman, 1 Stark. 101, 2 ECL 47, 171 Reprint 414.

[a] **Occasional absences.**—The fact that during the twenty years the debtor made several trading voyages to the West Indies and back would not justify the jury in taking the times of such absences into account, in order to repel the presumption of payment. Boardman v. De Forest, 5 Conn. 1.

[b] **Nonresidence must be during the last twenty years.**—De Ford v. Green, 15 Del. 316, 40 A 1120.

[c] **Availability of attachment.**—The fact that the nonresident debtor had land within the jurisdiction which the creditor might have attached will not prevent a presumption of payment arising from lapse of time "Because one who has a just claim against a non-resident who owns property in the county of the claimant's residence does not resort to a suit by attachment to secure it, is no reason for holding that a presumption arises that his claim has been paid or satisfied. To sue out an attachment, one must furnish a bond, and the uncertainties of the litigation which might follow such action are such that a failure to so act should not be held to raise any presumption against the holder of the claim against such non-resident." Ludwig v. Blackshere, 102 Iowa 366, 374, 71 NW 356.

75. Daggett v. Tallman, 8 Conn. 168.

76. Boardman v. De Forest, 5 Conn. 1.

77. Ala.—Roach v. Cox, 160 Ala. 425, 49 S 578, 135 AmSR 107.

Kan.—Courtney v. Staudenmayer, 56 Kan. 392, 43 P 758, 54 AmSR 592.

Mo.—Cobb v. Houston, 117 Mo. A. 645, 94 SW 299 (statutory presumption).

N. Y.—Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153; Macauley v. Palmer, 3 Silv. Sup. 245, 6 NYS 402 [aff 125 N. Y. 742, 26 NE 912].

N. C.—Alston v. Hawkins, 105 N. C. 3, 11 SE 164, 18 AmSR 874.

Pa.—Kline v. Kline, 20 Pa. 503; Budd v. Conard, 2 Phila. 175.

Tenn.—Thompson v. Thompson, 2 Head 405.

Wis.—Sanderson v. Olmsted, 2 Pinn. 224, 1 Chandl. 190.

[a] **Especially is this so where** the debt is payable beyond the limits of the state and the creditor resides outside of the state. Campbell v. Brown, 86 N. C. 376, 41 AmR 464; McKinder v. Littlejohn, 26 N. C. 198.

78. Alston v. Hawkins, 105 N. C. 3, 11 SE 164, 18 AmSR 874; Camp-

the cause of action and his residence is unknown, until the commencement of a suit against him, no presumption of payment arises from lapse of time.[79]

[§ 245] **hh. Death and Want of Administration.** If the creditor has died, and no administration is granted on his estate for many years, the time during which there was no person to whom payment could be made is not to be included.[80] It has also been held that the presumption arising from lapse of time is rebutted where the debtor has died and there has been no administration on his estate so that there was no person against whom suit could be brought.[81]

[§ 246] **ii. Demands for Payment.** That a mere demand for payment by the creditor during the period relied on as creating a presumption of nonpayment will be sufficient to rebut the presumption of payment has been both asserted[82] and denied.[83]

[§ 247] **jj. Proceedings To Enforce Payment.** The presumption of payment resulting from lapse of time is rebutted where it is made to appear that during the period relied on to raise such presumption the creditor has instituted legal proceedings to enforce payment of his claim,[84] provided such proceedings were instituted in good faith and not merely for the purpose of rebutting the presumption,[85] and such proceedings have been prosecuted with reasonable diligence.[86]

Where a claim is reduced to judgment, there can be no presumption of payment until the lapse of the required period after entry of the judgment.[87]

In case of coöbligors the presumption of payment with respect to one obligor is not rebutted by the fact that proceedings to collect have been instituted against another obligor,[88] or even that the claim has been reduced to judgment against another obligor.[89]

[§ 248] **E. Admissibility of Evidence*[90]—1. In General.** Subject to the rules governing the relevancy, materiality, competency, and admissibility of evidence generally,[91] and to the rules governing proof of payment or nonpayment when the issue of payment has been properly raised,[92] any circumstance which tends to make the proposition of payment either more or less probable is relevant and admissible in evidence on the issue of payment,[93] as is evidence of every link in a chain of circumstances tending to show payment.[94] Defendant may testify that the obligation sued upon has in fact been paid,[95] as may any person who actually made

bell v. Brown, 86 N. C. 376, 41 AmR 464; McKinder v. Littlejohn, 26 N. C. 198; Budd v. Conard, 2 Phila. (Pa.) 175.

79. Dunning v. Chamberlin, 6 Vt. 127.

80. McLellan v. Crofton, 6 Me. 307; Abbott v. Godfroy, 1 Mich. 178; Sheldon v. Heaton, 88 Hun 535, 34 NYS 856; Long v. Clegg, 94 N. C. 763. See Woodhouse v. Simmons, 73 N. C. 30, 32 ("the fact that there was no person authorized to receive payment was of course sufficient").

[a] **Where there has been a person entitled to demand and receive payment,** although, in order to sue, such person would have been required to obtain official authorization by letters of administration or otherwise, the presumption of payment arises. Idler v. Borgmeyer, 65 Fed. 910, 13 CCA 198 [writ of error dism 159 U. S. 408, 16 SCt 34, 40 L. ed. 199].

81. Long v. Clegg, 94 N. C. 763; Buie v. Buie, 24 N. C. 87.

82. Waters v. Waters, 1 Metc. (Ky.) 519 (there being no circumstance tending to show payment except lapse of time); Shields v. Pringle, 2 Bibb (Ky.) 387.

83. Sellers v. Holman, 20 Pa. 321 (payment refused on ground of prior payment).

84. U. S.—McCormick v. Eliot, 43 Fed. 469.

Ala.—Loper v. Dickey, 190 Ala. 554, 67 S 255.

Mass.—Anthony v. Anthony, 161 Mass. 343, 37 NE 386.

Mich.—Baldwin v. Cullen, 51 Mich. 33, 16 NW 191.

N. Y.—Driggs v. Williams, 15 Abb Pr 477; Jackson v. Slater, 5 Wend. 295; Jackson v. De Lancey, 11 Johns. 365.

N. C.—Wilson v. Pearson, 102 N. C. 290, 9 SE 707.

Pa.—Levers v. Van Buskirk, 4 Pa. 309 [aff 7 Watts & S. 70]; Foulk v. Brown, 2 Watts 209.

S. C.—Adams v. Richardson, 32 S. C. 139, 10 SE 931.

Tenn.—Bender v. Montgomery, 8 Lea 586.

"No presumption of payment from the lapse of 20 years can arise in this case, in which the only evidence bearing upon this question is the testimony of the plaintiff's clerk that the claim was never paid, and the records showing uninterrupted attempts by the plaintiff to enforce it by judicial process." McCormick v. Eliot, 43 Fed. 469, 473.

[a] **Irregular proceedings** may have this effect. McCormick v. Eliot, 43 Fed. 469; Allen v. Sawtelle, 7 Gray (Mass.) 165; James v. Jarrett, 17 Pa. 370; McCullough v. Montgomery, 7 Serg. & R. (Pa.) 17.

[b] **An unsuccessful suit** may be sufficient to rebut the presumption of payment. McCormick v. Eliot, 43 Fed. 469; Allen v. Sawtelle, 7 Gray (Mass.) 165; James v. Jarrett, 17 Pa. 370, 372 [quot In re Miller, 243 Pa. 328, 90 A 77] ("Where a party has a debt against another evidenced by a specialty or a record, and to which no statute of limitation applies, the burden of proving it unpaid is not thrown upon him who claims it, even in a suit brought more than twenty years after it has become payable, if within the twenty years a fair effort, though an unsuccessful one, has been made to recover it, by suing out legal process for that purpose").

[c] **An attempt to foreclose a mortgage** (1) within the twenty-year period rebuts the presumption of payment which would arise from lapse of time. Loper v. Dickey, 190 Ala. 554, 67 S 255; Gay v. Fleming, 182 Ala. 511, 62 S 523. (2) Where a mortgagee has actively asserted his right to foreclose, no presumption of payment arises. Baldwin v. Cullen, 51 Mich. 33, 16 NW 191.

85. James v. Jarrett, 17 Pa. 370, 372. See In re Miller, 243 Pa. 328, 90 A 77 (recognizing, but not applying, the rule).

"A former legal proceeding will not be allowed to have this effect if it was instituted for the sole purpose of repelling the presumption, and not in good faith, with the sincere object of recovering the debt claimed." James v. Jarrett, supra.

86. See cases supra note 84; and infra this note.

[a] **Abandonment of suit.**—The mere commencement of a suit which is subsequently abandoned will not rebut the presumption. Palmer v. Dubois, 8 S. C. L. 178.

[b] **Case dropped from calendar.**—Where an action was commenced against the debtor's estate but seven years thereafter it was dropped from the calendar by the judge and was never restored, the presumption of payment is not rebutted. Langston v. Shands, 23 S. C. 149.

87. Stockley v. Bewley, 10 Del. 587; McConnel v. Gates, 4 Pennyp. (Pa.) 377; Shaw v. Barksdale, 25 S. C. 204.

[a] **Reason for rule.**—"A judgment having been entered before the bar was operative, the debt passed to one of a higher grade, that of a judgment, and any future bar based on the presumption of payment from the lapse of time must run from the date of the judgment and not from that of the bond." Stockley v. Bewley, 10 Del. 587, 594.

[b] **Judgment by confession.**—(1) The rule applies to a judgment by confession entered pursuant to a warrant of attorney before the period necessary to raise the presumption of payment has expired. Stockley v. Bewley, 10 Del. 587. (2) But the entry of such a judgment after the period necessary to raise the presumption has elapsed will not rebut the presumption. Stockley v. Bewley, supra.

Judgment against one of several coöbligors see infra text and note 89.

88. Langston v. Shands, 23 S. C. 149.

89. See cases infra this note.

[a] **A judgment confessed** by one of two obligors does not rebut the presumption of payment in favor of the other. Frazer v. Perdrieau, 17 S. C. L. 172.

[b] **A judgment by default against one obligor** does not rebut the presumption of payment in favor of his coöbligor. Rogers v. Clements, 98 N. C. 180, 3 SE 512.

90. Payment of particular classes of obligations or liabilities see cross references ante p 584.

91. See Evidence §§ 89-1729.

92. Issues, proof, and variance see supra §§ 161-175.

93. Conn.—Wheeler v. Thomas, 67 Conn. 577, 35 A 499.

Ga.—Norton v. Aiken, 134 Ga. 21, 24, 67 SE 425 [cit Cyc].

Ind.—Morgan v. Weir, 119 Ind. 178, 21 NE 656; Supreme Tribe of Ben Hur v. Hall, 24 Ind. A. 316, 56 NE 780, 79 AmSR 262.

Iowa.—Minnesota Land Co. v. Conner, 136 Iowa 674, 112 NW 820.

Md.—Morse v. National Cent. Bank, 150 Md. 142, 132 A 598, 603 [quot Cyc].

N. Y.—Frindel v. Schaikewitz, 1 App. Div. 214, 37 NYS 172.

94. Lust v. Lust, (Mo.) 202 SW 564; Walls v. Walls, 170 Pa. 48, 32 A 649.

95. McCord v. Bridges, 209 Ala. 529, 96 S 432.

[a] **Illustration.**—In detinue to recover a portable sawmill and other machinery for which defendant had given plaintiff a purchase-money mortgage, testimony by defendant that the mortgage in question was

*By Fred. G. Krivonos (§§ 248-260).

the claimed payment,[96] or who saw the money paid,[97] or to whom the money was paid,[98] or who has knowledge of such fact.[99] Further, it is always competent to prove that no money was in fact received by the creditor,[1] or paid,[2] although the party offering the evidence may have given a receipt acknowledging payment.[3] Under these rules, various circumstances[4] have been held admissible[5] or inadmissible[6] upon the issue.

paid in full before suit was brought was admissible as a statement of the fact of payment. McCord v. Bridges, 209 Ala. 529, 96 S 432.

96. Corcoran v. Renehan, 24 App. (D. C.) 411.

97. Corcoran v. Renehan, supra. But see Rumford v. Upton, 113 Me. 543, 95 A 226 (evidence that witness saw check drawn by alleged debtor to claimant, for sum of money in payment of claim, is not admissible).

98. Corcoran v. Renehan, 24 App. (D. C.) 411.

99. Corcoran v. Renehan, supra.

1. O'Brien v. Coon, 103 Nebr. 836, 174 NW 513.

[a] **Illustration.**—Where plaintiff's receipt of money deposited in hands of a third person to satisfy plaintiff's claim for damages would have satisfied his claim, evidence that he had not received the money was competent on issue whether he agreed to accept arrangement and release debtor. O'Brien v. Coon, 103 Nebr. 836, 174 NW 513.

2. Rice v. Rice, 10 Ky. Op. 490.

3. See Evidence §§ 1520–1525.

Receipts generally see supra §§ 75–83.

4. **Admissibility of particular circumstances to prove payment or nonpayment** see infra §§ 250–257.

5. See cases infra this note.

[a] **Details of prior related transactions** between the parties are admissible. Ottens v. Fred Krug Brewing Co., 58 Nebr. 331, 78 NW 622; Druss v. Rosen, 84 NYS 174.

[b] **Source of payment.**—(1) The source of the money which the debtor claims he paid the creditor at a certain time is admissible. Morgan v. Weir, 119 Ind. 178, 21 NE 656; Estes v. Fry, 22 Mo. A. 53. (2) Evidence that the sum loaned was taken from funds held by plaintiff as treasurer of a school district, and that he borrowed money from a bank to take the place of the district's money thus loaned, and paid the bank shortly after defendant claims to have paid plaintiff, is admissible upon the issue. Koltze v. Messenbrink, 74 Iowa 242, 37 NW 179. (3) Where defendant claimed that at a specified time he made a payment on a note with money borrowed from a third person, whom he had given his note therefor, the note so given, and the testimony of such third person as to the date and amount of the loan are admissible. Turrentine v. Grigsby, 118 Ala. 380, 23 S 666.

[c] **The debtor's access to the safe of another** with authority to take therefrom money for his needs may be shown. Supreme Tribe of Ben Hur v. Hall, 24 Ind. A. 316, 56 NE 780, 79 AmSR 262.

[d] **Creditor's failure to include debt in listing assets.**—(1) The fact that the creditor has failed to include the debt sued on in enumerating his assets may be admitted in evidence to show that it has been paid. Norton v. Aiken, 134 Ga. 21, 24, 67 SE 425 [cit Cyc]; Marshall v. Marshall, 12 B. Mon. (Ky.) 459. (2) Failure of a creditor to include a note in a tax inventory is admissible as evidence that it has been paid. Norton v. Aiken, supra; Morse v. Bruce, 70 Vt. 378, 40 A 1034.

[e] **A creditor's failure to file a claim** against an insolvent estate is admissible as a circumstance determining whether payment has been made. Kelly v. Hancock, 75 Ala. 229.

[f] **Fact of money being in hands of maker's administrator,** in connection with fact that payee's executor did not present it as a claim, is admissible as a circumstance corroborating evidence of payment. Lust v. Lust, (Mo.) 202 SW 564.

[g] **Receipt of consideration by debtor.**—(1) In an action on a land contract, whereby one of the parties was to receive a deed of land on payment, a deed to him was properly received in evidence as proof of payment therefor. Iowa-Minnesota Land Co. v. Conner, 136 Iowa 674, 112 NW 820. (2) But there is authority to the contrary. Roberts v. Cocke, 120 N. C. 465, 27 SE 143.

[h] **Deposit in bank.**—In an action on a note, when defendant asserts that before suit he deposited the amount due on the note, evidence that the money deposited in the bank was withdrawn by him on his own check is admissible to show that it was not deposited to pay the note, but for defendant's own use. Low v. Warden, 77 Cal. 94, 19 P 235.

[i] **Bond to show payment of interest.**—Where a note was given for the interest on a bond, and afterward another bond and note were made in lieu of the former, in an action on the latter note, the first bond is admissible in evidence to ascertain if the interest thereon had been paid otherwise than by the note. Smith v. Taylor, 39 Me. 242.

[j] **Verified account of executor.**—A verified account, filed by an executor for final settlement, in which he charged himself with money collected on a note given for property sold, is admissible to show payment of the note. Wharton v. Thomason, 78 Ala. 45.

[k] **Order drawn on debtor.**—In an action against a debtor for the whole sum originally due under a contract, an order drawn on him by his creditor, and accepted by him, is admissible in evidence. Hillyard v. Crabtree, 11 Tex. 264, 62 AmD 475.

[l] **Reason for delay in suing.**—In a suit on a receipt for money on deposit, when defendant denies receipt of the money, and also pleads payment of what he did receive, plaintiff may testify why she has delayed bringing suit so long. De Vay v. Dunlap, 7 Ind. A. 690, 35 NE 195.

[m] **Payment by mistake.**—On an issue as to whether payment of a note by the bank at which it was made payable was made by mistake, evidence offered to show that the bank's cashier applied to the maker of the note to have his account made good, so as to cover the payment of the note, and that it was only on discovery of the maker's insolvency that the cashier concluded to protest the note is admissible. Whiting v. Rochester City Bank, 77 N. Y. 363.

[n] **Items of account arising more than six years before suit.**—In an action to recover the balance due on a general account containing debit and credit items, it is error to exclude evidence of all items of charge, which arose more than six years before suit, since there is a presumption that the subsequent payments made within six years of the dates of such items were applied to these earlier items. Maloney v. Bartlett, 172 Pa. 284, 33 A 553.

[o] **Miscellaneous circumstances held admissible.**—(1) To prove nonpayment, evidence is admissible to show conduct on the part of the debtor inconsistent with the defense. Wheeler v. Thomas, 67 Conn. 577, 35 A 499. (2) Plaintiff may testify concerning an order given upon defendant to a third party and that defendant then made no claim of payment. Wheeler v. Thomas, supra. (3) Where the books in which a claimant of property seized on execution kept accounts against his vendor of the land claimed were lost, evidence that the accounts were open until the controversy in question arose is admissible on the question whether the land was paid for by extinguishing claimant's account against his vendor. Sharp v. Hicks, 94 Ga. 624, 21 SE 208. (4) The surety on a note may introduce evidence tending to show payment by the maker in having earned a commission for selling certain property for plaintiff. Padavic v. Vanderboom, 207 Ill. A. 600. (5) That settlement took place between defendant and agents of plaintiff in which every item in account sued upon was settled and satisfied. Dunn v. Stanwood, 17 Ind. 480. (6) That debt in issue was in fact paid without first showing settlement of independent joint venture between parties under agreement to pay such debt out of debtor's proceeds of such joint venture. Aultman v. Teeple, 98 Iowa 186, 67 NW 236. (7) Where it is shown that there is some connection between the debt sued upon and plaintiff's execution of a trust deed on his property some years after the creation of the debt to the sureties of his bond as guardian, in which capacity he was defendant's creditor, defendant may be permitted to introduce the trust deed in evidence to show plaintiff's motive in executing such a deed because of his claimed payment prior thereto. Shockley v. Van Eaton, 81 Iowa 417, 46 NW 1097. (8) Where plaintiff affirmatively asserts that no payments were made except those which he admits were made, and defendant denies this, claiming to have made other payments, for which he asserts a counterclaim, the latter may introduce evidence in support of his claim. Allison v. McClun, 40 Kan. 525, 20 P 125. (9) Where the payment of certain money into a bank is in dispute, it is not error to admit the testimony of the bookkeeper of the bank that he made all the entries of money received at the bank, and had made an examination of the bank books, and that they showed no such payment. Woods v. Hamilton, 39 Kan. 69, 17 P 335. (10) In an action on a note, evidence conducing to prove payment of money mentioned in an entry of credit on the note, which was subsequently erased, and the direction of the payer to appropriate it to the payment of the note, is competent. Graves v. Moore, 7 T. B. Mon. (Ky.) 341, 18 AmD 181. (11) Where, in an action of debt on a specialty, defendant gave in evidence under a plea of payment a specialty of a later date, executed by plaintiff to defendant, to rebut the presumption of payment thus arising, plaintiff may show the consideration of the latter specialty and the circumstances under which it was given. Johnson v. White, 8 Leigh (35 Va.) 214.

6. See cases infra this note.

[a] **That the debtor borrowed money** to pay a debt is not admissible in evidence. Reed v. Pierson, 3 N. J. L. 681.

[b] **Mere evidence of a demand of payment** is not admissible to show nonpayment. Conkling v. Weatherwax, 90 App. Div. 585, 86 NYS 139 [aff 181 N. Y. 258, 73 NE 1028].

[c] **Debtor's disposition of funds.**—The mere fact that the debtor used money received for sale of notes belonging to plaintiff to purchase a lot in plaintiff's name, and that he built a house thereon, is not admissible in evidence to show payment in the absence of evidence that such purchase and construction were actu-

Admissions and declarations.[7] Admissions of the creditor or of his authorized agent are admissible to show payment,[8] and admissions of the debtor are admissible to show nonpayment.[9] Under the general rule[10] self-serving declarations of either the debtor or creditor are not admissible.[11] Thus an entry made by the debtor in his own favor is inadmissible to prove payment,[12] even where offered in evidence after his death.[13] Declarations of a third person not a party to the suit are not admissible.[14] Statements made by the debtor and creditor at the time of the examination of accounts and agreement on a balance due are admissible in a subsequent suit on the debt;[15] and declarations of partner to the effect that the debtor was a member of the firm are admissible to show that the creditor took a firm note under misapprehension without intending to release the debtor.[16] Declarations of defendant, if made under circumstances warranting no inference that they were made for self-serving purposes,[17] may be admissible when relevant to the issue of payment;[18] but evidence merely preliminary to the admission of

ally made in payment of the debt and authorized by the creditor. Hamby v. Brooks, 86 Ark. 448, 111 SW 277. And see Husband and Wife §§ 298–300.

[d] **Payment to other claimants.**—Evidence that other employees on the same job at the same time were paid by the employer is not admissible to show payment to the employee seeking to recover therefor. Filer v. Peebles, 8 N. H. 226.

[e] **Disproving payment of claim not in suit.**—Where a witness testifies to facts tending to prove payment of the demand in suit and of other demands not in suit, it is not competent to produce one of such claims not in suit for the purpose of disproving payment of such claim. Hadjo v. Gooden, 13 Ala. 718.

[f] **Miscellaneous circumstances held inadmissible.**—(1) Where the note sued on was pledged as collateral for another note, evidence as to the consideration of the principal note is irrelevant. Wharton v. Thomason, 78 Ala. 45. (2) In trover for conversion of a slave, evidence of value of services of a slave given to plaintiff as security for obligation, whose services were to pay interest thereon, is inadmissible in absence of claim of usury by defendant who claims payment of obligation by reason of cash payment coupled with such services. Hamer v. Harrell, 2 Stew. & P. (Ala.) 323. (3) In an action on an account in which plaintiff attached defendant's stock of merchandise, where the only issue was whether defendant owed plaintiff anything, the return of the writ showing what articles had been attached was irrelevant. Steinfeld v. Wing Wong, 14 Ariz. 336, 128 P 354. (4) Where defendant contends that he paid plaintiff's claim by means of a check, and the bank upon which the check was drawn fails before presentment, admission of a certificate that such bank paid fifteen per cent in dividends to a third person, a depositor therein, is inadmissible as being wholly irrelevant. Campbell v. Shark, (Ida.) 267 P 458. (5) Evidence offered by defendant to show payment of an account for labor is properly excluded where there is no evidence to show that the debt sued upon had any connection with the account. Moseley v. Waite, 180 Ill. A. 408. (6) In an action on a note, testimony of defendant's bookkeeper that she saw payments made and made entries thereof in defendant's books at his direction, but did not know for what purpose the payments were made, is improperly admitted. Mugler v. Hirsch, 187 Ill. A. 279. (7) On an issue as to whether payment was made at a certain time, evidence that on other occasions the creditor had forgotten or was mistaken about the payment made to him is not admissible. Shockley v. Van Eaton, 81 Iowa 417, 46 NW 1097; Bradley v. Freed, (Tenn. Ch. A.) 51 SW 124. (8) That plaintiff was sick and prostrated because of the condition of his accounts about the time the action was commenced, and five years after the date of the claimed payment, is not admissible. Shockley v. Van Eaton, supra. (9) In an action against an executor on a note assigned by his testator, evidence that any person had agreed to pay for the testator is not admissible to show payment. Abercrombie v. Sheldon, 8 Allen (Mass.) 532. (10) In an action on a note executed by defendant's testator, evidence that testator had made a list of his debts, in which the note in question was not included, is not admissible to show payment of the note in question. Abercrombie v. Sheldon, supra. (11) In a suit by a banker against the acceptor of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, was not admissible as evidence in favor of the acceptor to show a payment or satisfaction by the drawer. Citizens' Bank v. Carson, 32 Mo. 191. (12) Conversation of agent of plaintiff with banker in depositing receipt in anticipation of payment by defendant, and conversation of agent of defendant with same banker when actually making payment for defendant. Crowley v. Gossett, 32 Mo. A. 17. (13) In an action by an administrator to recover upon a receipt and duebill found among the papers of his intestate, where defendant's evidence tends to show that he paid a portion of the amount named in the receipt and gave the duebill for the balance and had subsequently paid the duebill in full, a letter written by defendant to the intestate in reference to a sum of money handed by him to the intestate, which has no connection with the payments claimed to have been made to defendant and contains no language indicating that it was to be applied upon the receipt, is not competent as evidence on behalf of plaintiff to attack defendant's theory that the bill was given for the balance unpaid on the receipt. Fisk v. Fisk, 60 N. Y. 631. (14) Evidence is not admissible to show by the records that the creditor had not listed the note sued on for purposes of taxation where it appears that no tax return was ever made by him. Young v. Doherty, 183 Pa. 179, 38 A 587. (15) Evidence that in other instances the creditor had attempted to assert unjust claims is inadmissible. Young v. Doherty, supra. (16) Testimony as to the result of computations tending to show payment is not admissible where the testimony shows the data on which the results were based, the results being only arithmetical reckonings. Morse v. Bruce, 70 Vt. 378, 40 A 1034.

7. Admissions and declarations generally see Evidence §§ 166–509.

As to payment of particular classes of obligations or liabilities see cross references ante p 584.

To aid or rebut presumption from lapse of time see infra § 255.

8. Xenia First Nat. Bank v. Stewart, 114 U. S. 224, 5 SCt 845, 29 L. ed. 101; Ballance v. Frisby, 3 Ill. 63; Applegate v. Baxley, 93 Ind. 147.

[a] **Payment by one joint debtor** of the whole debt may be proved by the admission of the creditor. Ballance v. Frisby, 3 Ill. 63.

[b] **"Settled."**—An admission that a money demand has been "settled" is evidence tending to show payment. Applegate v. Baxley, 93 Ind. 147.

9. Ala.—Steiner v. Jeffries, 118 Ala. 573, 24 S 37.

Conn.—Peck v. Pierce, 63 Conn. 310, 28 A 524.

Ga.—Hatcher v. Bowen, 74 Ga. 840.

Me.—McCobb v. Healy, 17 Me. 158.

Mass.—Batchelder v. Rand, 117 Mass. 176.

Mont.—Isman v. Altenbrand, 42 Mont. 188, 111 P 849, 851 [cit Cyc].

N. Y.—Frindel v. Schaikewitz, 1 App. Div. 214, 37 NYS 172; Kenworthy v. Phillips, 51 N. Y. Super. 43.

N. D.—Benjamin v. Northwestern El. Co., 6 N. D. 254, 69 NW 296.

Pa.—Swan v. Scott, 11 Serg. & R. 155.

Tex.—Dwyer v. Rippetoe, 72 Tex. 520, 10 SW 668.

[a] **Illustrations.**—(1) An offer to pay an award of arbitrators within the time allowed for an appeal, partly in bonds and partly in money, is not in the nature of a compromise, but a mode of payment; and therefore, in an action on a bond given in satisfaction of the award, such offer may be given in evidence to show acknowledgment of the validity of the debt. Swan v. Scott, 11 Serg. & R. (Pa.) 155. (2) Defendant's admission of his inability to pay and his willingness to do so, as embodied in a letter, is admissible. Kenworthy v. Phillips, 51 N. Y. Super. 43. (3) An offer to pay a debt by a transfer of property is admissible as a direct acknowledgment of the claim. Hatcher v. Bowen, 74 Ga. 840.

10. See Evidence §§ 193–208.

11. Ga.—Norton v. Aiken, 134 Ga. 21, 24, 67 SE 425 [cit Cyc].

Ky.—Wheatly v. Phelps, 3 Dana 302.

Mass.—Abercrombie v. Sheldon, 8 Allen 532.

N. Y.—Newcombe v. Fox, 1 App. Div. 389, 37 NYS 294 [aff 154 N. Y. 754 mem, 49 NE 1101 mem]; Schwartz v. Allen, 7 NYS 5.

Tenn.—Bradley v. Freed, (Ch. A.) 51 SW 124.

Tex.—Kennedy v. Yoe, (Civ. A.) 39 SW 946.

[a] **Illustrations.**—(1) That the debtor made a list of his debts in which that which plaintiff claims to be due him was not included is not admissible to prove payment. Abercrombie v. Sheldon, 8 Allen (Mass.) 532. (2) When a payment testified to by the debtor is denied by the creditor, declarations by the debtor consistent with his claim of payment are not admissible even to corroborate his testimony. Bradley v. Freed, (Tenn. Ch. A.) 51 SW 124.

[b] **Death of debtor.**—The testimony of one who heard a debtor say that he had paid a debt is not rendered admissible to show payment, after the death of the debtor. Schwartz v. Allen, 7 NYS 5.

12. Schwartz v. Allen, supra.

Admissibility of book entries generally on issue of payment see infra text and notes 26, 27.

13. Schwartz v. Allen, 7 NYS 5.

14. Gandolfo v. Appleton, 40 N. Y. 533; Stewart v. Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 AmD 628; Sterling v. Marietta, etc., Trading Co., 11 Serg. & R. (Pa.) 179.

15. Holcomb v. Campbell, 118 N. Y. 46, 22 NE 1107.

16. Tozier v. Crafts, 123 Mass. 480.

17. See supra text and notes 11–13.

18. Dunham v. Cox, 81 Conn. 268, 70 A 1033.

[a] **Defendant's declaration of intention.**—Evidence that defendant in taking certain money from a safe declared that he was about to take such

such declarations, although admissible when offered for such purpose,[19] is not admissible when not so offered,[20] nor under a claim that it is part of the res gestæ of the fact of payment,[21] nor under a claim that it is relevant to the time of payment when such time is not in issue.[22]

Documentary evidence,[23] although not reciting payment, may be admissible as a fact, having some tendency, however slight, to show payment,[24] but such evidence is inadmissible where it has no circumstantial bearing upon the issue of payment.[25] A book of account is generally held inadmissible to prove, from the absence of an entry therein, that certain money was not paid,[26] although there is authority to the contrary.[27]

Judicial records bearing on the issue of payment are admissible.[28]

Parol evidence is admissible to show that a debt has been paid, although the debt is evidenced by a writing.[29]

[§ 249] **2. Payment by or to Third Persons.** Evidence of payment by a third person is inadmissible,[30] unless it is also shown that it was made for the debtor and accepted by the creditor as payment.[31] In the same manner, evidence of payment to a third person not shown to be authorized by the creditor to accept payment is not admissible,[32] unless shown to be made with the creditor's consent.[33] But payment of certain amounts of money to the attorneys of the creditors to be applied on the debt may be shown,[34] and defendant may show payment to an employee of claimant,[35] or to claimant's wife.[36]

[§ 250] **3. Financial Condition of Parties**[37]**—a. Of Debtor.** The admissibility of evidence as to the debtor's financial condition has been held to be within the reasonable discretion of the trial court.[38] Although it has been held that evidence of the debtor's ability to pay is not admissible to show payment,[39] there is substantial authority that evidence

money to pay plaintiff may be admissible as relevant to the issue of payment. Dunham v. Cox, 81 Conn. 268, 70 A 1033.

19. Dunham v. Cox, supra.

20. Dunham v. Cox, supra.

[a] **Thus,** mere evidence that a certain conversation related to defendant's business is not admissible without a claim that it is preliminary to the admission of evidence of defendant's declaration of an intention to pay plaintiff with money he then took from a safe. Dunham v. Cox, 81 Conn. 268, 70 A 1033.

21. Dunham v. Cox, supra.

Res gestæ see Evidence §§ 535-559.

22. Dunham v. Cox, 81 Conn. 268, 70 A 1033.

23. See Evidence §§ 900-1218.

24. Harwood v. Harper, 54 Ala. 659.

25. See Boyd v. Wilson, 3 F. Cas. No. 1,751, 2 Cranch C. C. 525 (holding that the books of a bank, which do not show whether the checks drawn upon it were payable to bearer or to order, or the names of the persons in whose favor they were drawn, are not competent evidence of money paid to any particular person); Boothe v. Scriber, 48 Or. 561, 87 P 887, 90 P 1002 (holding that, where defendant bank cashier testified that at various times he deposited sums to the credit of plaintiff, and offered in evidence deposit slips, made out in his handwriting, which he testified he took from the bank files, it not being shown that any of them were ever delivered to the bank or that it became liable for such deposits, the slips were incompetent evidence); Butler v. Kirby, 53 Wis. 188, 10 NW 373 (holding that books of the debtor containing entry of payments are immaterial where the only question is as to the amount of wages which plaintiff was to receive).

26. Schwarze v. Roessler, 40 Ill. A. 474; Riley v. Boehm, 167 Mass. 183, 45 NE 84; Carroll v. Deimel, 95 N. Y. 252.

Admissibility of book entries: Generally see Evidence §§ 1033-1090. Absence of entry as proof of negative see Evidence § 1064.

27. Peck v. Pierce, 63 Conn. 310, 28 A 524; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 NW 671. See Chesapeake, etc., Canal Co. v. U. S., 250 U. S. 123, 39 SCt 407, 63 L. ed. 889 (printed books of the treasury department kept pursuant to the constitution and presumptively containing records of all payments made are admissible to show nonpayment by the absence of entry of payment); Harbison v. Hall, 124 N. C. 626, 32 SE 964 (holding that in an action for goods sold, where the defense is payment, plaintiff may show by his bookkeeper, in corroboration of his own testimony, that the amount has not been paid, his usage in regard to his system of entries in his books, when checks and money have been received, and that the books fail to show any evidence of payment).

Admissibility of books of account to show cash items in dealings see Evidence § 1063.

28. Griel v. Solomon, 82 Ala. 85, 2 S 322, 60 AmR 733; Harrison v. Henderson, 12 Ga. 19; Bradley v. Briggs, 22 Vt. 95; Pasley v. Bromley, 32 W. Va. 21, 9 SE 40.

29. Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032, 1036 [quot Cyc].

30. Goldstein v. Smiley, 168 Ill. 438, 48 NE 203; King v. Bush, 36 Ill. 142; Whittier v. Eager, 1 Allen (Mass.) 499.

[a] **Illustration.**—A direction by letter, from a third person to the payees of a note, to pay the same out of the proceeds of certain property in the hands of the payees belonging to such third person, is inadmissible as evidence of the payment of the note, without showing that the request has been complied with. King v. Bush, 36 Ill. 142.

31. Porter v. Chicago, etc., R. Co., 99 Iowa 351, 68 NW 724; Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032; Hayes v. Cummings, 115 Or. 13, 235 P 304, 236 P 756; Gray v. Herman, 75 Wis. 453, 44 NW 248, 6 LRA 691.

[a] **Illustrations.**—(1) In an action for the price of goods sold, where the debtor purchased them for the benefit of a third person, evidence that the creditor had been paid by such third person is admissible, although the latter is not a party to the suit and did not act as defendant's agent in making the payment. Gray v. Herman, 75 Wis. 453, 44 NW 248, 6 LRA 691. (2) Evidence of the payment or settlement of a claim by a third person, who is deeply interested therein, and an acceptance of it by the creditor in satisfaction of the debt, is admissible. Porter v. Chicago, etc., R. Co., 99 Iowa 351, 68 NW 724. (3) Evidence is admissible to show payment by a third person, not a party to the contract out of which the claim arose and not in privity with the debtor, where such payment is accepted by the creditor. Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032. (4) Testimony is admissible to defeat a counterclaim that demand recovered by defendant in a former suit against a third party was the debt of the present plaintiff and was paid to defendant. Hayes v. Cummings, 115 Or. 13, 235 P 304, 236 P 756.

32. Hooks v. Frick, 75 Ga. 715; Bluntzer v. Dewees, 79 Tex. 272, 15 SW 29.

[a] **Deposit in bank.**—In an action for breach of a sales contract, evidence that defendant had and drew checks upon certain bankers is inadmissible to show that a deposit with them to his credit was a lawful payment to him and constituted performance of plaintiff's agreement to make a first payment by a certain time. Bluntzer v. Dewees, 79 Tex. 272, 15 SW 29.

Admissibility of payments to third persons to show application see infra § 260 note 31 [h].

33. Parsons v. Hughes, 16 NYS 702 [aff 137 N. Y. 629, 33 NE 745].

34. Davis v. Frederick, 6 Mont. 300, 12 P 664.

35. A. A. Cooper Wagon, etc., Co. v. Barnt, 123 Iowa 32, 98 NW 356.

[a] **Authority of employee.**—Where a certain employee accepted and receipted payments made to the creditor, it was competent for him to testify whether any person other than himself had anything to do with payments made to the creditor. A. A. Cooper Wagon, etc., Co. v. Barnt, 123 Iowa 32, 98 NW 356.

36. Mitchell v. Brown, 18 Cal. A. 117, 122 P 426.

[a] **Illustration.**—In an action to establish a claim against a decedent's estate for the support by a husband of a child of his wife by a former husband after the adoption of the child by decedent, evidence of payment by decedent to claimant's wife is admissible to show payment on the claim. Mitchell v. Brown, 18 Cal. A. 117, 122 P 426.

37. To aid or rebut presumption from lapse of time see infra § 256.

38. Coulter v. Goulding, 98 Minn. 68, 107 NW 823, 8 AnnCas 778.

[a] **Exclusion of evidence held proper.**—The trial court may properly exclude evidence tending to show that the debtor was not financially well off and was in need of available money during the time plaintiff's claim arose. Coulter v. Goulding, 98 Minn. 68, 107 NW 823, 8 AnnCas 778.

39. U. S.—Xenia First Nat. Bank v. Stewart, 114 U. S. 224, 5 SCt 845, 29 L. ed. 101.

Ala.—Fidelity Mut. L. Ins. Co. v. Satterfield, 162 Ala. 291, 50 S 132.

Md.—Brady v. Brady, 110 Md. 656, 73 A 567.

Mass.—Atwood v. Scott, 99 Mass. 177, 96 AmD 728; Veazie v. Hosmer, 11 Gray 396; Hilton v. Scarborough, 5 Gray 422.

N. Y.—Dick v. Marvin, 188 N. Y. 426, 81 NE 162, 11 NYAnnCas 109; Daby v. Ericsson, 45 N. Y. 786.

Vt.—Farmer v. Williams, 92 Vt. 132, 102 A 932.

[a] **Reasons for rule.**—(1) "Ex-

tending to show that defendant had money from which a claimed payment might have been made is admissible to show that fact.[40] Where plaintiff has introduced proof of defendant's inability to pay, evidence of his possession of the means of payment is admissible in rebuttal.[41] Evidence of the debtor's inability to pay is admissible to show nonpayment,[42] although there is authority that such evidence may be admitted only to show that the debtor had not paid all his debts,[43] and is not admissible to show that he had not paid a particular debt.[44] Evidence of the bad financial condition of the debtor at the time the contract was made is admissible on the issue as to whether payment was to be made before or after delivery of the property contracted for.[45] Where payment is alleged to have been made from the salary of the debtor, evidence as to the amount of salary received by him is admissible to disprove his testimony.[46]

[§ 251] **b. Of Creditor.** Evidence that the creditor's financial condition was necessitous is admissible to show payment.[47] The creditor may be asked what money or means he had preceding, at the time of, and within a reasonable period following the transaction when payment was claimed to have been made, and the sources from which he derived money subsequently gained.[48] But evidence of the amount of money the creditor had shortly before his death is not admissible to show a payment made at that time.[49] Evidence that the creditor had funds of the debtor in his possession after the maturity of the debt is admissible to show payment,[50] and to show nonpayment it may be proved that the creditor made no considerable deposits in any of the banks where she did business at the time of the claimed payment.[51]

[§ 252] **4. Habits of Parties as to Promptness.**[52] Although it has been variously held that the admissibility of evidence of the debtor's business habits is within the discretion of the trial court,[53] and that evidence of the debtor's habit of promptness in paying his bills is admissible to show payment,[54] the prevailing view is that such evidence is not admissible.[55] Evidence that defendant at other times and with other persons had delayed payment of bills is not admissible to show nonpayment.[56]

[§ 253] **5. To Explain Reception of Commercial Paper or Property**[57]**—a. In General.** To determine whether the delivery of a commercial paper by the debtor amounts to absolute payment, evidence of the intention of the parties is admissible.[58] Further, to prove that a bill, note, or check was received as an

perience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it." Atwood v. Scott, 99 Mass. 177, 178, 96 AmD 728. (2) "The fact of the reputed wealth of the defendant, and his supposed ability to pay whenever called upon, might have furnished the very reasons operating on the plaintiff's mind to allow the note to remain uncollected." Hilton v. Scarborough, 5 Gray (Mass.) 422, 423.

[b] **Solvency of debtor** is not admissible to prove payment. Xenia First Nat. Bank v. Stewart, 114 U. S. 224, 5 SCt 845, 29 L. ed. 101.

40. Ill.—Orr v. Jason, 1 Ill. A. 439.

Ind.—Hasper v. Weitcamp, 167 Ind. 371, 79 NE 191; Hedge v. Talbott, 8 Ind. A. 597, 36 NE 437.

Md.—Huff v. Simmers, 114 Md. 548, 79 A 1003.

N. Y.—Dishno v. Reynolds, 17 Hun 137.

Tenn.—Planters' Bank v. Massey, 2 Heisk. 360.

Vt.—Strong v. Slicer, 35 Vt. 40.

Wash.—McAllister v. Chambers, 71 Wash. 521, 129 P 85.

[a] **Illustrations.**—(1) Evidence is admissible that the debtor had a sum much larger than the amount of the debt in the bank and was loaning money at a lower rate of interest than the debt carried. Hedge v. Talbott, 8 Ind. A. 597, 36 NE 437. (2) In an action on a note, where the defendants pleaded payment and contended that they were abundantly able to pay the claim at any time within eight years of the commencement of the action, a question as to how much mortgage there was on their farm was relevant and competent. Hasper v. Weitcamp, 167 Ind. 371, 79 NE 191. (3) Evidence that the debtor was loaning his own money at interest at the time of the claimed payment is admissible to show payment. McAllister v. Chambers, 71 Wash. 521, 129 P 85. (4) It may be shown that the deceased debtor assembled his children and divided his property among them prior to his death. McAllister v. Chambers, supra. (5) Where, in an action to establish a claim against a decedent's estate for services rendered in managing a bakery of decedent, the evidence showed that decedent had not been indebted to claimant in any way other than for such services, and that claimant was a married man, and that his principal work was that of baker, evidence that during the period covered by the bill for services he had received from decedent checks which he had cashed or had deposited to his credit was admissible to show payment. Huff v. Simmers, 114 Md. 548, 79 A 1003.

41. Dick v. Marvin, 188 N. Y. 426, 81 NE 162, 11 AnnCas 109; Phillips v. Lewis, 12 App. Div. 460, 42 NYS 707.

[a] **Evidence of third person** that he had loaned money to defendant at about the time of a claimed payment is admissible to show defendant's ability to pay, in rebuttal of plaintiff's evidence of his inability to do so. Dick v. Marvin, 188 N. Y. 426, 81 NE 162, 11 AnnCas 109.

42. Shook v. Benson, 209 Ala. 303, 96 S 224, 225 [cit Cyc]; Pollak v. Winter, 197 Ala. 173, 72 S 386; Fidelity Mut. L. Ins. Co. v. Satterfield, 162 Ala. 291, 50 S 132; Hedge v. Talbott, 8 Ind. A. 597, 36 NE 437; Brady v. Brady, 110 Md. 656, 73 A 567 (dictum); Atwood v. Scott, 99 Mass. 177, 96 AmD 728.

[a] **Illustrations.**—(1) Letter of defendant saying that he was "broke" and asking for a loan is admissible as evidence of his inability to pay and consequent nonpayment. Pollak v. Winter, 197 Ala. 173, 72 S 386. (2) Defendant may be asked if there was a mortgage on property owned by him at the time of the claimed payment. Shook v. Benson, 209 Ala. 303, 96 S 224.

43. Xenia First Nat. Bank v. Stewart, 114 U. S. 224, 5 SCt 845, 29 L. ed. 101.

44. Xenia First Nat. Bank v. Stewart, supra.

[a] **Insolvency of debtor** is not admissible to prove nonpayment, since it is common for both solvent and insolvent men to pay some of their debts and leave some unpaid. Xenia First Nat. Bank v. Stewart, 114 U. S. 224, 5 SCt 845, 29 L. ed. 101.

45. Beckley v. Jarvis, 55 Vt. 348.

46. Frindel v. Schaikewitz, 1 App. Div. 214, 37 NYS 172.

47. Orr v. Jason, 1 Ill. A. 439; Elliott v. Capital City State Bank, 149 Iowa 309, 128 NW 369.

[a] **Illustration.**—In an action on a certificate of deposit, where the certificate was found uncanceled, evidence of the poverty of the holder was properly admitted to show by inference that a duplicate of the certificate had been issued and paid as claimed by the bank and to rebut the presumption of nonpayment arising from its possession uncanceled. Elliott v. Capital City State Bank, 149 Iowa 309, 128 NW 369.

Presumptions in actions upon deposits see Banks and Banking § 375.

Evidence admissible in actions on deposits see Banks and Banking § 376.

48. Reynall v. Harrison, 5 NYSt 450.

49. Trude v. Meyer, 82 Ill. 535.

50. Walls v. Walls, 170 Pa. 48, 32 A 649.

51. Richards v. Osborne, (Tex. Civ. A.) 164 SW 392.

52. To aid or rebut presumption from lapse of time see infra § 257.

53. Coulter v. Goulding, 98 Minn. 68, 107 NW 823, 8 AnnCas 778.

[a] **Evidence held properly excluded.**—The trial court may properly exclude evidence that it was the custom and habit of the debtor to meet his obligations promptly. Coulter v. Goulding, 98 Minn. 68, 107 NW 823, 8 AnnCas 778.

54. Orr v. Jason, 1 Ill. A. 439; Waugh v. Riley, 8 Metc. (Mass.) 290.

55. Ill.—Parker v. Parker, 52 Ill. A. 333.

Ind. T.—Fletcher v. Dulaney, 1 Ind. T. 674, 43 SW 955.

Iowa.—Martin v. Shannon, 92 Iowa 374, 60 NW 645.

Mass.—Abercrombie v. Sheldon, 8 Allen 532.

Pa.—Rosencrance v. Johnson, 191 Pa. 520, 43 A 360; Doak v. Curry, 4 PittsbLegJ 829.

Vt.—Strong v. Slicer, 35 Vt. 40.

[a] **Custom to pay cash.**—Evidence offered by defendant to prove that "it was his general custom to pay cash for all stone that he bought" had no tendency to prove that he had paid plaintiff's demand for stone sold and delivered by plaintiff to defendant, and was properly rejected. Doak v. Curry, 4 PittsbLegJ (Pa.) 829.

56. Fleck v. Neerenberg, 85 NYS 370.

57. Delivery of commercial paper as payment see supra §§ 40–53.

58. Schneider Marble Co. v. Knight, 37 Ga. A. 646, 141 SE 420; Kruse v. Seiffert, etc., Lumber Co., 108 Iowa 352, 79 NW 118.

[a] **Illustrations.**—(1) Evidence is admissible to show that a note had been given by the creditor, and

absolute payment, evidence of an express agreement to that effect is admissible,[59] and, in the absence of an express agreement,[60] evidence is admissible as to the circumstances attending the transaction[61] as well as to the subsequent acts and conduct of the parties.[62] Evidence is also admissible on behalf of the creditor to show that a bill, note, or check accepted by the creditor was not taken as an absolute payment.[63] Where the note of a third person is given to the creditor, evidence is admissible to show fraudulent misrepresentations of the debtor that the maker of the note was solvent,[64] or to show his knowledge of such insolvency at the time the note was transferred and his concealment of such fact from the creditor.[65]

[§ 254] **b. As Payment or Security.**[66] To show that a bill or note was given in payment of a debt, rather than as collateral security, evidence of the circumstances attending the transaction,[67] as well as of the subsequent conduct of the creditor,[68] or of the debtor,[69] is admissible. On the other hand, evidence which shows that commercial paper was taken as security, and not in payment, may be admitted.[70] Evidence of the debtor's insolvency is admissible to show that the creditor had refused to accept as payment a note claimed to have been given in discharge of the debt, but rather had accepted it as security.[71] Evidence which in no sense throws any light upon the issue of whether a bill or note was accepted as payment or security is not admissible.[72] Parol evidence is admissible to show that an assignment, although absolute on its face, was taken simply as security;[73] evidence is admissible to show that a transfer of property by the debtor to the creditor was made as security only, and not as payment;[74] and it may be shown that a mortgage upon the debtor's property was given merely to secure the purchase price of other property purchased and not in payment.[75]

[§ 255] **6. To Aid or Rebut Presumption from Lapse of Time—a. In General.** The presumption of payment arising from the lapse of time[76] may be fortified or rebutted by circumstances,[77] and the greatest liberality, consistent with the rule of evidence, should be indulged in in the proof of circumstances relevant to the question of aiding or rebutting this presumption.[78] Evidence fairly tending to support or rebut the presumption is admissible,[79] as is testimony explaining and contradicting evidence tending to support or rebut such presumption,[80] although, under some of the statutes,[81] the evidence which may be given in rebuttal is limited.[82] Any competent evidence, which tends to show that the debt is in fact unpaid is admissible for the pur-

accepted by the debtor, not in payment, but as a matter of bookkeeping, and that such was the intention of the parties. Schneider Marble Co. v. Knight, 37 Ga. A. 646, 141 SE 420. (2) On an issue as to whether a note was accepted as absolute payment, the creditor may testify as to the intent with which he took the note. Kruse v. Seiffert, etc., Lumber Co., 108 Iowa 352, 79 NW 118.

59. Hotchin v. Secor, 8 Mich. 494.

60. Macomber v. Macomber, (R. I.) 31 A 753.

61. Macomber v. Macomber, supra.

62. Ely v. James, 123 Mass. 36.

[a] **Presentation of note as claim against bankrupt.**—Evidence of proof of a note in bankruptcy against the maker's estate is competent as tending to show that plaintiff, who had taken it from defendant, treated it as his own, and originally accepted it as a payment. Ely v. James, 123 Mass. 36.

63. Ill.—Preston v. Jones, 3 Ill. A. 632.

Ind.—Thom v. Wilson, 27 Ind. 370 (written agreement between maker of note, a third person, and the creditor).

La.—Turner v. Lewis, 6 La. Ann. 774.

Mass.—Folsom v. Ballou Banking Co., 160 Mass. 561, 36 NE 469.

Mich.—Hutchinson v. Hutchinson, 102 Mich. 635, 61 NW 60.

N. J.—Park v. Miller, 27 N. J. L. 338.

S. D.—Grissel v. Woonsocket Bank, 12 S. D. 93, 80 NW 161.

Vt.—Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85.

[a] **Illustrations.**—(1) Under an issue whether certain notes were accepted as payment, evidence that plaintiff customarily credited accounts with the amount of notes received, and charged it back if the notes were unpaid, is admissible to explain why the notes were credited when not received as payment. Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85. (2) Check may be shown to have been delivered as an advance, and not payment. Park v. Miller, 27 N. J. L. 338. (3) Evidence is admissible to show whether or not an order from a third person was accepted by the creditor in satisfaction of the debt. Preston v. Jones, 3 Ill. A. 632.

64. Mann v. Stowell, 3 Pinn. (Wis.) 220, 3 Chandl. 243.

65. Sebastian May Co. v. Codd, 77 Md. 293, 26 A 316.

66. Delivery of commercial paper as security as not constituting payment see supra §§ 40, 50.

Delivery of property for another purpose as not constituting payment see supra §§ 1, 62.

67. Manser v. Sims, 157 Ala. 167, 47 S 270.

68. Manser v. Sims, supra.

69. Bates v. Hazen, 63 N. H. 618.

[a] **Letter.**—On an issue as to whether plaintiff had taken the note of one N as collateral security, or whether he had agreed to take it in payment of the debt, provided N promised to pay the note to him, a letter from N to plaintiff, promising to pay the note, was competent evidence. Bates v. Hazen, 63 N. H. 618.

70. Taplin v. Marcy, 81 Vt. 428, 71 A 72.

[a] **Illustration.**—In an action for the price of goods alleged to have been sold to defendant through a third person as his agent, where an issue was whether the third person was acting as defendant's agent or whether the sales were to him personally, evidence was competent to show that lien notes taken in the name of the third person by plaintiffs were taken merely to hold title to the goods until they should reach their destination and were paid for, and were not taken in payment for the goods. Taplin v. Marcy, 81 Vt. 428, 71 A 72.

71. Farmers' Nat. Bank v. Wilkerson, 1 KyL 351, 10 Ky. Op. 810.

72. Farmers' Nat. Bank v. Wilkerson, supra.

[a] **Illustration.**—Evidence that the cashier of the creditor bank had accepted other notes of the debtor as payment is not relevant to show acceptance of the note in issue as payment. Farmers' Nat. Bank v. Wilkerson, 1 KyL 351, 10 Ky. Op. 810.

73. Butman v. Howell, 144 Mass. 66, 10 NE 504; Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032, 1036 [quot Cyc].

74. National State Bank v. Delahaye, 82 Iowa 34, 47 NW 999.

75. Granger v. Brydon-Jack, 58 Can. S. C. 491.

76. Presumption of payment from lapse of time see supra §§ 198-213.

77. Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153.

78. Bean v. Tonnele, supra.

79. Ga.—Norton v. Aiken, 134 Ga. 21, 25, 67 SE 425 [cit Cyc].

Ind.—Smith v. Buskirk, 7 Blackf. 477.

Md.—Morse v. National Cent. Bank, 150 Md. 142, 132 A 598, 603 [quot Cyc].

N. Y.—Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153.

Pa.—Van Loon v. Smith, 103 Pa. 238; Levers v. Van Buskirk, 4 Pa. 309; Unangst v. Kraemer, 8 Watts & S 391; Rodman v. Hoops, 1 Dall. 85, 1 L. ed. 47; Winton v. Mulley, 1 LackLegN 276.

Tenn.—Blackburn v. Squib, Peck 60.

[a] **Illustrations.**—(1) The failure of a creditor to include a note in his tax returns is a relevant circumstance in aid of the presumption of payment from lapse of time. Norton v. Aiken, 134 Ga. 21, 25, 67 SE 425 [cit Cyc]. (2) Evidence that work and labor had been done by defendant for plaintiff is admissible as a circumstance to corroborate the presumption of payment from lapse of time. Blackburn v. Squib, Peck (Tenn.) 60. (3) The proposal of the debtor to pay the debt in property is admissible to rebut the presumption. Smith v. Buskirk, 7 Blackf. (Ind.) 477. (4) An entry made nineteen years previous to the trial, in the debtor's books, that a note of twenty-three years' standing was paid, was allowed to be read in evidence, to support the general presumption of payment after such a length of time. Rodman v. Hoops, 1 Dall. (Pa.) 85, 1 L. ed. 47.

80. Morse v. National Cent. Bank, 150 Md. 142, 132 A 598, 603 [quot Cyc]; Van Loon v. Smith, 103 Pa. 238; Levers v. Van Buskirk, 4 Pa. 309.

81. See statutory provisions.

82. Morey v. Farmers' L. & T. Co., 14 N. Y. 302.

[a] **Illustration.**—Where the statute provides that the presumption "can be repelled only by proof of part payment, or a written acknowledgment of the right of action," oral evidence of a written acknowledgment of the right of action is not admissible. Morey v. Farmers' L. & T. Co., 14 N. Y. 302.

pose of rebutting the presumption of payment;[83] and any evidence, the legitimate tendency of which is to render it more probable than otherwise, in the judgment of the jury, that payment has not been made, is admissible to repel the presumption of payment arising from the lapse of time.[84] Documentary evidence is admissible even though it shows the existence of a debt presumed to be paid from lapse of time, since the presumption may be afterward rebutted by other evidence.[85] Where lapse of time less than twenty years is relied on to raise a presumption of payment, evidence of conduct of the creditor inconsistent with the supposition of payment should not be excluded, although connected with a different matter from that in suit.[86] Evidence that the creditor has other notes of the debtor which he had not sued on, although they were many years overdue, throws no light on the question of payment and is inadmissible to rebut the presumption of payment from long delay.[87]

Admissions.[88] The evidence to rebut the presumption may consist of the debtor's admissions made to the creditor himself,[89] to his agent, or to a stranger,[90] but to overcome the presumption of payment from the lapse of time of more than twenty years, the creditor cannot introduce part only of defendant's affidavit of defense.[91]

[§ 256] **b. Financial Condition of Parties.**[92] **To aid presumption.** Although there is authority that to raise or aid the presumption of payment from lapse of time evidence of the debtor's ability to pay is not admissible,[93] the general rule is that to aid the presumption it may be shown that the debtor was able to pay,[94] or that he had the means of payment,[95] or that he was solvent.[96] Further, in aid of the presumption, evidence is admissible of the indigent circumstances of the creditor,[97] or of his financial embarrassment.[98]

To rebut presumption. To rebut the presumption, evidence is admissible on behalf of the creditor to show that the debtor had not the means[99] or opportunity[1] of paying the debt during the period of time claimed to raise the presumption of payment.

[§ 257] **c. Habits of Parties as to Promptness.**[2] To aid the presumption of payment from lapse of time the debtor may introduce evidence of his promptness in paying his debts,[3] and evidence of the character of the creditor for promptness in collecting his debts is admissible in aid of the presumption,[4] although there is authority to the contrary.[5]

[§ 258] **7. Medium of Payment—a. In General.** Evidence is admissible to show that the agreement was to pay in a certain medium[6] or that a certain medium was accepted as payment,[7] but the creditor may also show that such an acceptance was under protest.[8] Where payment is claimed to have been

83. Sheafer v. Woodside, 257 Pa. 276, 101 A 735, 1 ALR 775; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; Eby v. Eby, 5 Pa. 435; Wilson v. Eckman, 55 Pa. Super. 403; Van Eman v. Walker, 20 Pa. Dist. 1101.

84. Grantham v. Canaan, 38 N. H. 268; Morey v. Farmers' L. & T. Co., 14 N. Y. 302; Allison v. Wood, 104 Va. 765, 52 SE 559; Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

[a] **Illustration.**—Plaintiff may testify as to directions given to his attorney, in respect of collecting the debt sued upon, such evidence being fairly within the field of competency as a circumstance bearing on the evidentiary effect of presumption of payment from lapse of time. Holway v. Sanborn, 145 Wis. 151, 130 NW 95.

85. Lewis v. Schwenn, 93 Mo. 26, 2 SW 391, 3 AmSR 511.

86. Garnier v. Renner, 51 Ind. 372.

87. Worthington v. Miller, 4 KyL 252, 11 Ky. Op. 708.

88. Admissions and declarations to prove payment or nonpayment generally see supra § 248.

89. Van Eman v. Walker, 20 Pa. Dist. 1101.

90. Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; Reed v. Reed, 46 Pa. 239; Morrison v. Funk, 23 Pa. 421; Wilson v. Eckman, 55 Pa. Super. 403; Van Eman v. Walker, 20 Pa. Dist. 1101.

91. Hart v. Bucher, 186 Pa. 384, 40 A 511.

92. Evidence of financial condition generally see supra §§ 250, 251.

93. Hilton v. Scarborough, 5 Gray (Mass.) 422.

[a] **The debtor's ability to pay during the period essential to raise the presumption** (see supra §§ 204-208) is not admissible in evidence in aid of the presumption, since no presumption arises from nonpayment during a period less than the period of limitations. Wolf v. Ellison, 201 Ill. A. 138; Rogers v. Burns, 27 Pa. 525.

94. Hasper v. Weitcamp, 167 Ind. 371, 79 NE 191; Thompson v. Larsen, 118 Or. 421, 247 P 139; Strong v. Slicer, 35 Vt. 40.

[a] **Amount of mortgage.**—On the issue as to whether lapse of time less than twenty years is sufficient to show payment in connection with other circumstances, where the debtor contends that he was abundantly able to pay the claim for several years before the commencement of the action, a question as to how much of a mortgage was on his premises was relevant. Hasper v. Weitcamp, 167 Ind. 371, 79 NE 191.

95. Winton v. Mulley, 1 LackLegN (Pa.) 276; Strong v. Slicer, 35 Vt. 40.

96. Matter v. Keenan, 73 Hun 177, 25 NYS 877; Van Loon v. Smith, 103 Pa. 238; King v. Coulter, 2 Grant (Pa.) 77 (holding that evidence is admissible to show the solvency of the debtor and his residence near that of the creditor).

97. Thompson v. Larsen, 118 Or. 421, 247 P 139.

98. Bean v. Tonnele, 94 N. Y. 381, 46 AmR 153; Matter of Keenan, 73 Hun 177, 25 NYS 877; Daniel v. Whitfield, 44 N. C. 294; Levers v. Van Buskirk, 4 Pa. 309; Strong v. Slicer, 35 Vt. 40.

[a] **Conditions rendering it burdensome and inconvenient** for the creditor to leave the debt unpaid because of his financial embarrassment may be shown. Strong v. Slicer, 35 Vt. 40.

99. Farmers' Bank v. Leonard, 4 Del. 536; Grantham v. Canaan, 38 N. H. 268; Wood v. Deen, 23 N. C. 230; McKinder v. Littlejohn, 23 N. C. 66, 26 NE 198; In re Devereux, 184 Pa. 429, 39 A 225. But see Rogers v. Judd, 5 Vt. 236, 26 AmD 301 (the circumstances admissible to rebut the presumption should be such as are in the way of recovering a judgment and not merely such as render the collection of a debt improbable, like the debtor's poverty).

[a] **Insolvency in connection with other circumstances.**—Where a debtor relies upon the presumption of payment from the lapse of time, and the creditor endeavors to rebut that presumption by showing his insolvency, the creditor may also offer in evidence the circumstance of the debtor's living at a great distance from him, as tending to show that, although the debtor may have had property for a short time, yet the creditor had not an opportunity of knowing that fact and of getting satisfaction out of that property. McKinder v. Littlejohn, 26 N. C. 198.

1. McKinder v. Littlejohn, 23 N. C. 66.

2. Evidence as to prompt habits generally see supra § 252.

3. See Parker v. Parker, 52 Ill. A. 333 (dictum).

4. Leiper v. Erwin, 5 Yerg. (Tenn.) 97; Husky v. Maples, 2 Coldw. (Tenn.) 25, 88 AmD 588.

5. Norton v. Aiken, 134 Ga. 21, 25, 67 SE 425 [cit Cyc]; Young v. Doherty, 183 Pa. 179, 38 A 587.

6. Carey v. Philadelphia, etc., Petroleum Co., 33 Cal. 694 (agreement to pay in gold coin); Holcomb v. Campbell, 118 N. Y. 46, 22 NE 1107 (agreement to credit debtor with creditor's obligation to him); Brown v. Cahalin, 3 Or. 45 (agreement to pay by cancellation of transferor's debt to transferee, and by assumption of firm debts).

Medium of payment see supra §§ 15-66.

7. Ansley v. Carlos, 9 Ala. 973; Cuthbert v. Newell, 7 Ala. 457; Fisher v. George S. Jones Co., 93 Ga. 717, 21 SE 152; Henry v. Scott, 3 Ind. 412; Jones v. Thomas, 5 Coldw. (Tenn.) 465.

[a] **Parol evidence** that promissory notes were delivered and accepted in payment is admissible, without producing the notes or accounting for their nonproduction. Fisher v. George S. Jones Co., 93 Ga. 717, 21 SE 152.

[b] **Evidence of laches,** in connection with other circumstances, is admissible to show consent or acquiescence of the creditor to the receipt of payment in a certain medium by his agent. Ansley v. Carlos, 9 Ala. 973.

[c] **Where payment in goods** is alleged, general evidence of the delivery of goods by the debtor to the creditor is admissible. Henry v. Scott, 3 Ind. 412.

[d] **Transfer of accounts and claims.**—Evidence that plaintiff received from defendant accounts and claims for collection and in payment, to a much larger amount than the debt sued on, is admissible as an initial step toward proving payment, that is, toward showing actual collection by plaintiff of such claims and accounts in payment of defendant's debt. Cuthbert v. Newell, 7 Ala. 457.

8. Mobile County v. Linch, 198 Ala. 57, 73 S 423.

[a] **Illustration.**—Where defendant offered evidence of plaintiff's acceptance of conditional warrants in payment for work done for a county, it was proper for plaintiff to show acceptance under protest. Mobile County v. Linch, 198 Ala. 57, 73 S 423.

made by rendition of services,[9] the character of such services may be shown;[10] but evidence that the debtor had been paid for such services other than by credits upon his indebtedness may also be admitted.[11] Generally, evidence to show that a written instrument is payable otherwise than its terms indicate is inadmissible;[12] nor is evidence admissible to show that payment was intended in a particular medium where the instrument upon which the action is based fails to specify such a medium.[13] But where a statute defines the meaning of "current lawful money," parol evidence is inadmissible to show what kind of money was intended in a contract using such phrase.[14] And it has been held that it may be shown the parties had expressly agreed upon the medium of payment, although the instrument sued upon purports to be payable in dollars generally;[15] and evidence has been held to be admissible to show that an agreement worded for payment "in dollars" was intended to mean payment in Confederate dollars.[16] Evidence that a certain kind of money was the only currency generally in circulation in a certain locality at the time of a certain payment is admissible to establish a payment in such currency to corroborate other evidence tending to the same end.[17] Evidence that brokers and merchants refused to receive bank bills when presented by the creditor, which he had received from the debtor in discharge of a debt, is admissible to show a failure of payment in that they were not current or available to the creditor as money.[18]

[§ 259] **b. Value of Medium.** Where it is claimed that payment was agreed to be made in a certain medium, evidence of its value is admissible;[19] and where property is delivered in part payment of a debt, evidence is admissible on behalf of the debtor to show its value at the place of delivery, in the absence of any agreement as to the price.[20] Where the question is whether certain personalty was transferred with land in payment of a debt, evidence of the value of the land is admissible.[21] Where payment is agreed to be made in the money of an unrecognized foreign government, evidence of a decree of such government fixing the value of such currency is not admissible.[22] Where the obligation was payable in Confederate money and an action was brought after the close of the Civil War, evidence has been held to be admissible to show the value of the specified sum in lawful money.[23] Under the scaling statutes passed in some of the Confederate states after the Civil War, making the value of property sold during a specified period of the war the basis of liability,[24] it is competent to show what estimate was put on the property by the parties themselves at the time of the sale.[25] Where the statute expressly provides that evidence should be admissible of the consideration and its value of contracts made during a specified period of the war, and of the intention of the parties as to the currency in which payment was to be made, and its value at any time,[26] evidence is admissible as to the consideration for such a contract,[27] and its value;[28] and evidence of the value of Confederate currency in which payment was to be made cannot be restricted to evidence of its value at the time and place of the execution of the contract sued upon.[29]

[§ 260] **8. Application of Payments.**[30] Evidence is admissible where it tends to show the application of a payment as between two or more debts.[31] Evidence of declarations of the debtor previous or sub-

9. Payment in services see supra § 64.

10. Owens v. Owens, 52 SW 943, 21 KyL 679.

11. Owens v. Owens, supra.

12. See Evidence §§ 1448, 1640.

13. Langenberger v. Krœger, 48 Cal. 147, 17 AmR 418.

[a] **Gold or silver.**—(1) Where the writing evidencing the indebtedness does not specify the particular kind of money in which it is payable, evidence is not admissible that it was understood and agreed that it should be paid in either gold or silver (Langenberger v. Krœger, 48 Cal. 147, 17 AmR 418), (2) nor is evidence of a mercantile usage making it payable in gold or silver (Langenberger v. Krœger, supra).

14. Lee v. Biddis, 1 Dall. (Pa.) 175, 1 L. ed. 88.

15. Sowers v. Earnhart, 64 N. C. 96.

[a] **That express agreement to pay "in good money after the war"** may be shown in evidence as to the medium of payment for transfer of a tract of land made in the south during the Civil War. Sowers v. Earnhart, 64 N. C. 96.

16. Effinger v. Kenney, 115 U. S. 566, 6 SCt 179, 29 L. ed. 495; Atlantic, etc., R. Co. v. Carolina Nat. Bank, 19 Wall. (U. S.) 548, 22 L. ed. 196; Thorington v. Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361; Heilbroner v. Douglass, 45 Tex. 402.

[a] **Reason for rule.**—"We are clearly of opinion that such evidence must be received in respect to such contracts, in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States." Thorington v. Smith, 8 Wall. (U. S.) 1, 14, 19 L. ed. 361.

[b] **Circumstantial evidence** is admissible to show that a contract was to be discharged in Confederate money. Heilbroner v. Douglass, 45 Tex. 402.

Admissibility of evidence as to payment in Confederate money generally see Evidence §§ 1488 note 62 [a], 1640.

Payment in Confederate money see supra §§ 32, 33.

Proof of value of Confederate money see infra § 259.

17. Melvin v. Stevens, 84 N. C. 78.

18. Kottwitz v. Bagby, 16 Tex. 656.

19. Brown v. Cahalin, 3 Or. 45.

20. Manchester Commercial Bank v. Chisholm, 14 Miss. 457; Phillips v. Commercial Bank, 9 Miss. 636.

21. Ludwig v. Blackshere, 102 Iowa 366, 71 NW 356.

22. Rasst v. Morris, 135 Md. 243, 108 A 787.

[a] **Illustration.**—The consul general in New York of the Carranza government of Mexico, unrecognized by the United States, cannot be permitted to testify as to decrees by such government fixing the value of its money, to show the value of such money agreed upon by the parties as the medium of payment. Rasst v. Morris, 135 Md. 243, 108 A 787.

23. Short v. Abernathy, 42 Tex. 94.

24. See statutory provisions.

25. Ogburn v. Teague, 67 N. C. 355.

26. See statutory provisions.

27. Bartow County v. Conyers, 108 Ga. 559, 34 SE 351.

28. Bartow v. County v. Conyers, supra.

29. Bartow County v. Conyers, supra.

30. Application of payments by creditor or debtor see supra §§ 84–127.

31. Ala.—Taylor v. Cockrell, 80 Ala. 236.

Ariz.—Steinfeld v. Wing Wong, 14 Ariz. 336, 128 P 354.

Cal.—Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Clarke v. Scott, 45 Cal. 86.

Fla.—Walker v. Humphrey, 118 S 917; Consolidated Naval Stores Co. v. McNeill, 60 Fla. 38, 53 S 843.

Ga.—Smith v. Camp, 84 Ga. 117, 10 SE 539.

Ida.—Darry v. Cox, 28 Ida. 519, 155 P 660.

Iowa.—Thorn v. Moore, 21 Iowa 285.

La.—Gardere v. Fisk, 6 Mart. N. S. 387.

N. Y.—Riche v. Martin, 1 Misc. 285, 20 NYS 693; Torregiani v. Russo Barba Realty Co., 150 NYS 691; Averbuck v. Becher, 140 NYS 483; Schneekloth v. Crown Silk Mfg. Co., 120 NYS 67; Evans v. Deming, 2 NYSt 349.

N. C.—Long v. U. S. Fidelity, etc., Co., 178 N. C. 503, 101 SE 11.

Oh.—Whitney v. Denton, 1 Cinc. Super. 417.

R. I.—Harris v. Gilbert, 46 R. I. 350, 128 A 11.

Tex.—Darling v. Temple, 22 Tex. Civ. A. 478, 55 SW 40; Hendricks v. Leopold, (A.) 18 SW 638.

Vt.—Palmer v. Lawrence, 72 Vt. 14, 47 A 159.

Wash.—McAllister v. Chambers, 71 Wash. 521, 129 P 85.

Wis.—Stone v. Talbot, 4 Wis. 442.

[a] **Statements of account.**—(1) An account showing that certain payments were made upon it and were credited accordingly is admissible to show application of payments to such account and not to a mortgage. Smith v. Camp, 84 Ga. 117, 108 SE 539. (2) A statement of account rendered by the creditor to a third person who it is claimed paid the debt is admissible to show how the payment was credited. Steinfeld v. Wing Wong, 14 Ariz. 336, 128 P 354.

[b] **The account books of the creditor,** although not conclusive, are competent evidence to show the application intended by him of payments by the debtor, where there are several debts. Missouri Cent. Lumber Co. v. Stewart, 78 Mo. A. 456; Van Rensselaer v. Roberts, 5 Den. (N. Y.) 470.

sequent to the time of payment is admissible;[32] but self-serving declarations[33] are not admissible to show a claimed application.[34] Although writings of the debtor to the creditor directing the mode of application are the best evidence,[35] the evidence to show application is not confined to evidence of express declarations.[36] Parol evidence has been held to be admissible to show the intent of the debtor, with notice of such intent to the creditor;[37] but evidence of the intent of the debtor is not admissible unless it is also shown that the intent was at the time known to the creditor.[38] A letter from the creditor to the debtor showing the application of payment, together with evidence that no objection to such application was made by the debtor, is admissible against the debtor.[39] So evidence as to the bringing of an action on one debt and its subsequent dismissal is admissible to show that the payment was not applied by the creditor to such debt where it was sufficient to cancel it.[40] Where an appropriation is to be made by the court, evidence of the debts to which the payment might be applied is admissible.[41]

[§ 261] **F. Weight and Sufficiency of Evidence***[42] **—1. In General.** In accordance with general rules,[43] while payment may be established by proof of facts and circumstances from which the inference may be drawn,[44] it must, when in issue, be proved by a preponderance of the evidence.[45] The same

[c] **Recitals in a written instrument** as to the balance remaining unpaid on a former indebtedness are admissible as an admission by the debtor that payments had been properly applied. Taylor v. Cockrell, 80 Ala. 236.

[d] **Book entries** are admissible to show that payment was on principal and not payment of interest. McAllister v. Chambers, 71 Wash. 521, 129 P 85.

[e] **Agreement.**—(1) An oral agreement between the parties as to application of payments may be shown as evidence of a direction by the debtor to apply payments, as specified in the agreement, to a particular obligation. Ray v. Borgfeldt, 169 Cal. 253, 146 P 679. (2) Evidence of a verbal agreement as to application of payments is admissible to show the intention of the debtor to continue such application to payments made. Clarke v. Scott, 45 Cal. 86. (3) Evidence of an agreement as to application of payment is admissible to show intent of the parties in making periodic payments. Schneekloth v. Crown Silk Mfg. Co., 120 NYS 67. (4) In an action by a subcontractor on a contractor's bond for balance due, there being an issue as to application of payments made by the contractor to plaintiff, it was competent for plaintiff, notwithstanding on checks from the contractor there was the entry "S. Contr." or "S. Hotel," that being the contract on which the bond in suit was given, to show that there was a subsisting agreement between himself and the contractor concerning the application of payments, or a working arrangement, under which plaintiff was at liberty to apply the proceeds of the checks when collected to open account, and not the S contract, if he chose to do, the entry upon the checks being a mere memorandum, capable of explanation. Long v. U. S. Fidelity, etc., Co., 178 N. C. 503, 101 SE 11.

[f] **A contract other than that sued on** may be read in evidence to show that payments were made on account of such other contract. Stone v. Talbot, 4 Wis. 442.

[g] **Time of services rendered.**—In an action for services rendered from August 28 to December 28 it is not error, on the question of application of payments, to admit evidence that there was a continuing service beginning on April 6, and that payments made were for services from April 6 to August 28. Consolidated Naval Stores Co. v. McNeill, 60 Fla. 38, 53 S 843.

[h] **Payment of debt of third person.**—(1) Where defendant sued on a note, claiming that plaintiff did not produce it in demanding payment, and that defendant paid by delivering two notes to D to deliver to plaintiff on production of the note, plaintiff is entitled to testify to a conversation with D showing that plaintiff received one of the notes from D in payment of an obligation owing by D. Averbuck v. Becher, 140 NYS 483. (2) Where the owner of real property paid a materialman at the request of a contractor who was erecting a building thereon, evidence is admissible to show that such owner knew that the payment was of the contractor's debt, and that he knew such payment was to be applied to the contractor's debt to the materialman for materials furnished for his property and not upon the contractor's debts to the materialman generally, and that he made the payment with such an intention. Harris v. Gilbert, 46 R. I. 350, 128 A 11.

[i] **Conclusion of fact.**—Where defendant, in an action on a nonnegotiable note, sets up payment by a deceased joint maker, testimony of plaintiff as to whether the payment was or was not made on the note is competent, under an objection that it called for a conclusion of fact of which the jury are the sole judges. Evans v. Deming, 2 NYSt 349.

32. Waters v. Tompkins, 2 C. M. & R. 723, 150 Reprint 306.

33. Self-serving declarations: Generally see Evidence §§ 193-208. To show payment or nonpayment see supra § 248.

34. Craig v. Miller, 103 Ill. 605.

[a] **Illustration.**—The entry of a payment by the creditor on a particular debt is not admissible as evidence in his favor on an issue as to how the debtor directed the application. Craig v. Miller, 103 Ill. 605.

35. Mitchell v. Dall, 2 Harr. & G. (Md.) 159.

36. Snell v. Cottingham, 72 Ill. 124; Bayley v. Wynkoop, 10 Ill. 449; Howland v. Rench, 7 Blackf. (Ind.) 236.

37. Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Wittkowsky v. Reid, 82 N. C. 116; Bray v. Crain, 59 Tex. 649.

38. Brice v. Hamilton, 12 S. C. 32.

39. Sweeney v. Pratt, 70 Conn. 274, 39 A 182.

40. Frazer v. Miller, 7 Wash. 521, 35 P 427.

41. Robinson v. Allison, 36 Ala. 525.

42. Cross references: Evidence to aid or rebut presumption of payment from lapse of time see supra § 235 et seq. Evidence to show part payment tolling statute of limitations see Limitations of Actions § 782. Receipts see supra §§ 78-83.

43. See Evidence § 1743 et seq.

44. Phillips v. Adams, 78 Ala. 225; Vickery v. Baggett, 20 Ala. A. 143, 101 S 102 [rev on other grounds 211 Ala. 610, 101 S 104]; Dorroh v. Wall, (Mo. A.) 297 SW 705. But see Atkinson v. Mullis, 28 Ga. A. 176, 110 SE 509 (evidence of certain payments held insufficient without evidence connecting them with the indebtedness sued on).

[a] **Degree of proof required.**—(1) Payment may be established by circumstances that would satisfy a jury that the continued existence of debt was not probable. Vickery v. Baggett, 20 Ala. A. 143, 101 S 102 [rev on other grounds 211 Ala. 610, 101 S 104]. (2) To authorize inference of payment, facts and circumstances should be inconsistent with any other reasonable hypothesis. Dorroh v. Wall, (Mo. A.) 297 SW 705.

45. Ala.—Shulman v. Brantley, 50 Ala. 81.

Colo.—Perot v. Cooper, 17 Colo. 80, 28 P 391, 31 AmSR 258.

Ill.—Boon v. Bliss, 98 Ill. A. 341.

Iowa.—Youtsey v. Lemley, 169 Iowa 401, 151 NW 491.

Nebr.—Mullally v. Dingman, 62 Nebr. 702, 87 NW 543.

Wis.—Meyer v. Hafemeister, 119 Wis. 539, 97 NW 165, 100 AmSR 900.

And see cases infra note 46 et seq.

[a] **Mere probability** is insufficient. Sigur v. Burguieres, 111 La. 1077, 36 S 134.

[b] **Reasonable certainty.**—Moreira's Succession, 16 La. Ann. 368.

[c] **Evidence must be so clear as to leave no reasonable doubt** in the minds of the jury. Massey-Harris Co., Ltd. v. Merrithew, 39 N. B. 544.

[d] **Where the evidence is equally balanced,** there is no preponderance. Shulman v. Brantley, 50 Ala. 81; Mullally v. Dingman, 62 Nebr. 702, 87 NW 543.

[e] **Number of witnesses.**—(1) Payment of an obligation over five hundred dollars may be proved by a single witness, as it is not proof of a contract or agreement of that value within the terms of the statute. De St. Romes v. New Orleans, 18 La. Ann. 210; Jones v. Fleming, 15 La. Ann. 522; O'Brien v. Flynn, 8 La. Ann. 307. (2) Where complainant files a bill to recover distributive shares of his former wards and defendant alleges payment to complainant and receipt therefor, and complainant by amended bill denies payment and alleges that the receipt was fraudulently obtained by defendant and asks that the receipt may be canceled, the answer to the amended bill denying the allegations therein and averring payment as stated in the receipt, the deposition of a single witness is insufficient to sustain the allegations of the amended bill, especially when contradicted by other circumstances. Silver v. Hedges, 3 Dana (Ky.) 439.

[f] **Testimony of incompetent witness.**—To sustain the burden of proof of payment there must be testimony to aid the inference other than that of a witness probably incompetent under Code (1924) § 11257, because of the death of the other party to the transaction. Slezak v. Krisinger, 202 Iowa 422, 210 NW 436.

[g] **Evidence held sufficient.**—(1) Generally. Charouleau v. Charouleau, 5 Ariz. 192, 50 P 112; Rose v. King, 170 Ark. 209, 279 SW 373; Erwin v. Stith, (Ark.) 263 SW 376; Ah Gett v. Carr, 3 Cal. A. 47, 84 P 458; Holden v. Collier, 5 Ga. A. 555, 63 SE 586; Lueders v. Darling, 239 Ill. A. 492; Baretti v. Theurer, 206 Ill. A. 164; Citizens Bank v. Carr, 194 Ill. A. 273; Dime Sav., etc., Co. v. Jacobson, 191 Ill. A. 275; Johnson v. Allispaugh, 58 Ind. A. 83, 107 NE 686; Farmer v. Cornett, 174 Ky. 560, 192 SW 628; McGrew v. Congleton, 139 Ky. 515, 102 SW 1185, 31 KyL 609; Hensley v. Lewis, 41 SW 440, 19 KyL 633; Griswold v. Lambert, 89 Me. 534, 36 A

*By Rudy J. Brossman (§§ 261-266).

rule applies as to a controverted issue of nonpayment,[46] or as to the amount of payment,[47] or as to payment in property or services;[48] as to whether payment was in full,[49] as to whether a transaction was a loan or a payment[50] or payment of indebted-

1046; Gasta v. Farmers' State Sav. Bank, 218 Mich. 106, 187 NW 311 (receipt); Korf v. Korf, 125 Mich. 259, 84 NW 130 (purchase or payment); Wherley v. Rowe, 106 Minn. 494, 119 NW 222; Blundell v. Vaughan, 20 Miss. 625; Atlantic City R. Co. v. Wood, 78 N. J. Eq. 298, 81 A 1132 [aff 65 N. J. Eq. 530, 56 A 337]; Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 A 337; Chapman v. Hunt, 18 N. J. Eq. 414; Burroughs v. Straus, 48 App. Div. 584, 62 NYS 1119; Lombard v. Moore, 6 Misc. 469, 27 NYS 523; Dreisin v. Gaynor & Rosenbaum, Inc., 220 NYS 595 [rev on other grounds 224 NYS 788 mem]; Levine v. Litowitch, 147 NYS 340; Fish v. Martin, 132 NYS 783; Fleck v. Neerenberg, 85 NYS 379; Galvin v. Gaussen, 31 Oh. Cir. Ct. 565; Garcia v. Santos, 29 Porto Rico 820; Archambault v. Lemoine, (R. I.) 93 A 644; Seabrook v. Hammond, 39 S. C. L. 160; Alsup v. Thompson, (Tenn. Ch. A.) 52 SW 324; Key v. Jones, (Tex. Civ. A.) 191 SW 736; Cushman v. Hall, 28 Vt. 656; Hepburn v. Dundas, 13 Gratt. (54 Va.) 219; McGraw v. Franklin, 2 Wash. 17, 25 P 911, 26 P 810; Kinsey v. Carr, 60 W. Va. 449, 55 SE 1004; Schatz v. Pfeil, 56 Wis. 429, 14 NW 628. (2) Documentary evidence. Ward v. Claxton, 5 Ky. Op. 314; Milford Spinning, etc., Corp. v. Manowitz, 203 App. Div. 415, 196 NYS 611; Mitchell v. Farley, 142 NYS 541; Scranton v. Campbell, 45 Tex. Civ. A. 388, 101 SW 285. (3) Receipt. Smith v. Taylor, 144 Ark. 569, 222 SW 1062; Gasta v. Farmers' State Sav. Bank, 218 Mich. 106, 187 NW 311; Schoonover's Est., 44 Pa. Super. 76. (4) Sufficient evidence of payment of a subsequent quarter's rent is prima facie evidence of payment for all former quarters. Brewer v. Knapp, 1 Pick. (Mass.) 332. (5) Evidence of an agreement that an item in the nature of a cross demand should be credited as a payment pro tanto will sustain a decree allowing the item to be credited on the claim in suit. McCurdy v. Middleton, 90 Ala. 99, 7 S 655. (6) Payment of a note is sufficiently shown by the testimony of two witnesses to the fact that a certain amount of money was paid, which amount would extinguish the note, notwithstanding the maker afterward paid interest on a balance claimed to be due, and the payee did not surrender the note. Ritter v. Schenk, 101 Ill. 387. (7) Proof of the payment by defendant of orders drawn by plaintiffs upon him in favor of third persons is sufficient as proof of payment to plaintiffs. Webber v. Howe, 36 Mich. 150, 24 AmR 590.

[h] **Evidence held insufficient.**—(1) Generally. Arnold v. Arnold, 124 Ala. 550, 27 S 465, 82 AmSR 199; Smith v. Berkau, 123 Ark. 90, 184 SW 429; Connerly v. Inman, (Ark.) 95 SW 138; Texarkana, etc., R. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 SW 944; Light v. Stevens, 159 Cal. 288, 113 P 659; Kutcher v. Love, 19 Colo. 542, 36 P 152; O'Loughlin v. Poli, 82 Conn. 427, 74 A 763; Darby v. Miller, 116 Ga. 952, 43 SE 374; McGovern v. Chicago, 202 Ill. A. 139 [aff 281 Ill. 264, 118 NE 3]; Henry v. Britt, 197 Ill. A. 167; Bartholomae, etc., Brewing, etc., Co. v. South Side Trust, etc., Bank, 194 Ill. A. 654; Moseley v. Waite, 180 Ill. A. 408; Roby v. Pipher, 109 Ind. 345, 9 NE 604; Youtsey v. Lemley, 169 Iowa 401, 151 NW 491; Monarch v. Greenville First Nat. Bank, (Ky.) 115 SW 186; Combs v. Krish, 84 SW 562, 27 KyL 154; Houeye v. Henkel, 115 La. 1066, 40 S 460; Louisiana Tire Co., Inc. v. Todd, 8 La. A. 676; Essex Fertilizer Co. v. Danforth, 111 Me. 212, 88 A 651; Carter v. Weber, 138 Mich. 576, 101 NW 818; Baldwin v. Clock, 68 Mich. 201, 35 NW 904; Beardslee v. Horton, 3 Mich. 560; Lang v. Ferrant, 55 Minn. 415, 57 NW 140; Curtis v. Moore, 162 Mo. 442, 63 SW 80; Bentley v. Bentley, 185 Mo. A. 586, 172 SW 486; Drake v. Critz, 83 Mo. A. 650; Sanders v. Clifford, 72 Mo. A. 548; Crawford v. Spencer, 36 Mo. A. 78; Tonn v. Pier, 82 N. J. Eq. 422, 89 A 510; Van Ness v. Ransom, 164 App. Div. 483, 150 NYS 251 [aff 83 Misc. 178, 144 NYS 420, and aff sub nom. Parsons v. Macfarlane, 220 N. Y. 605 mem, 115 NE 1046 mem]; Gaylord v. Gibson, 36 App. Div. 548, 55 NYS 670; Cameron v. Leonard, 11 App. Div. 631, 42 NYS 73; Metropolitan Bank v. Smith, 27 N. Y. Super. 229; Miller v. Smith, 23 Misc. 648, 52 NYS 91; Schwartz v. Allen, 7 NYS 5; Outlaw v. Garner, 139 N. C. 190, 51 SE 925; Robertson v. Chapel, 116 Okl. 217, 243 P 931; Panezzi's Est., 40 Pa. Super. 282; Geesey's Est., 18 YorkLegRec (Pa.) 85; Rhoades v. Crozier, (Tenn. Ch. A.) 59 SW 211; Cunningham v. Davis, (Tenn. Ch. A.) 47 SW 140; Feder v. Ervin, (Tenn. Ch. A.) 38 SW 446, 36 LRA 335; Henderson v. Landa, 79 Tex. 39, 14 SW 891; J. W. Jenkins' Sons' Music Co. v. Truex, (Tex. Civ. A.) 204 SW 872; Garrett v. Robinson, (Tex. Civ. A.) 43 SW 288; McCamant v. Roberts, (Tex. Civ. A.) 25 SW 731; Cherry v. Butler, (Tex. A.) 17 SW 1090; Flick v. Fridley, 83 Va. 777, 3 SE 380; Chapman v. Carrothers, 21 Wyo. 152, 129 P 434; Lewis v. England, 14 Wyo. 128, 82 P 869, 2 LRANS 401; Cator v. Croydon Canal Co., 4 Y. & C. Exch. 405, 160 Reprint 1064. (2) Documentary evidence. Church v. Church, 122 Me. 459, 120 A 428; True v. Harding, 12 Me. 193; Crain v. Barnes, 1 Md. Ch. 151; Rogers v. Priest, 74 Wis. 538, 43 NW 510. (3) Payment to person unauthorized to receive it. Heiskell v. Curtis, 49 App. (D. C.) 91, 259 Fed. 987; Fountain v. Carlton, 88 N. J. Eq. 593, 103 A 387; Ravid v. Karo, 121 NYS 272; Harry E. Keeler Electric Co., Inc., v. Rodriguez, 44 Philippine 19. (4) Evidence showing gift instead of payment. Brightman v. Buffington, 184 Mass. 401, 68 NE 828. (5) Proof of separate debts unlike in character, and amount which on final adjustment might show balance due from plaintiff. Vrusho v. Vrusho, 258 Mass. 185, 154 NE 843. (6) Evidence not showing that money placed by decedent in the hands of defendant, with whom decedent had made his home for a comparatively short time, was payment for support. Root v. Close, 83 W. Va. 600, 98 SE 733. (7) Evidence that plaintiffs at some time had in their possession a certain amount of money belonging to defendant does not show payment thereof to them in part payment of their claim against defendant. Simons v. Martin, etc., Mfg. Co., 25 Misc. 788, 54 NYS 560. (8) Evidence that a debtor ordered her agent to send the money, and, hearing nothing more about it, supposed that it was paid, is not sufficient to show payment, especially where there is inferential evidence to the contrary. McCurdy v. Middleton, 82 Ala. 131, 2 S 721. (9) The word "settled," written under an account in a book of accounts, and signed by both parties, does not of itself necessarily import payment. Reynolds v. Williams, 9 Kulp (Pa.) 380.

[i] **Lapse of time.**—(1) Delay by a creditor in enforcing his demands is evidence to support a plea of payment. Dowling v. Hastings, 211 N. Y. 199, 105 NE 194. (2) Payment shown by lapse of time and other circumstances. Welsh v. Briggs, 204 Mass. 540, 90 NE 1146; Rothrock v. Rothrock, 195 Pa. 529, 46 A 90; Hawkley v. Heaton, 54 Utah 314, 180 P 440. (3) Evidence insufficient to rebut presumption of payment from lapse of time. Richards v. Walp, 221 Pa. 412, 70 A 815. (4) Evidence showing payment on mortgage within twenty years. Peters v. Hignutt, 138 Md. 24, 113 A 586.

[j] **Evidence insufficient to show debt payable in Confederate money.**—Jackson v. Jackson, 47 Ga. 99; Morgan v. Otey, 21 Gratt. (62 Va.) 619.

46. See cases infra this note.

[a] **Evidence held sufficient to show nonpayment.**—Blount v. U. S., 21 Ct. Cl. 274; Winter v. Pollak, 188 Ala. 153, 66 S 11; Hanson v. Brown, 139 Ark. 60, 213 SW 12; Jewett Lumber Co. v. Anderson Coal Co., 181 Iowa 950, 165 NW 211; Bower v. Collinsworth, 187 Ky. 1, 218 SW 455; In re Clapp, 167 NYS 1082; Swan v. Brewster, 1 NYS 584; Kerr v. Wilson, 284 Pa. 541, 131 A 468; Schuey v. Schaeffer, 130 Pa. 16, 18 A 544, 549.

[b] **Evidence held insufficient to show nonpayment.**—(1) Francis v. Brown, 22 Wyo. 528, 145 P 750. (2) Testimony of the officer who took the acknowledgment of a deed that he saw no payment made is no evidence that the consideration was not paid, even if he had seen the deed delivered. Dickson v. Dickson, 180 Ky. 423, 202 SW 891, LRA1918F 765.

47. Ind.—Todd v. Guffin, 55 Ind. A. 605, 104 NE 519.

Nebr.—Tallman v. Miller, 32 Nebr. 559, 49 NW 459.

N. Y.—Greenberg v. Eisenberg, 154 NYS 119; Schuchman v. Hochstim, 104 NYS 374; Arnett v. Hill, 11 NYS 381.

R. I.—O'Loughlin v. Anderson, 118 A 578.

Tex.—Dicken v. Cruse, (Civ. A.) 176 SW 655.

[a] **Failure to account** for the proceeds of property delivered by the debtor to the creditor to be sold and applied on the debt does not show a payment in full. Conrad v. Huff, 58 Tex. 205.

48. See cases infra this note.

[a] **Evidence held sufficient to show payment.**—Craig v. Ellsaesser, 113 Kan. 416, 215 P 454; Curtis v. Nash, 88 Me. 476, 34 A 273; Seighman v. Marshall, 17 Md. 550; Pasaporte v. Marin, 12 Philippine 148.

[b] **Evidence held insufficient to show payment.**—(1) Generally. Joiner v. Enos, 23 Ill. A. 224; Allison v. Allison, 99 Va. 472, 39 SE 130. (2) Mere acceptance of an assignment of a mechanic's lien. Singer v. Strompf, 88 Misc. 103, 150 NYS 660. (3) An unexecuted agreement by a mortgagee of realty, with two of the three mortgagors, to take the mortgaged premises in payment of the mortgage notes, is not sufficient evidence to show payment of those notes, in a suit by the mortgagee against the indorser of them. Green v. Davis, 44 N. H. 71.

49. Galvin v. Gaussen, 31 Oh. Cir. Ct. 565.

50. See cases infra this note.

[a] **Checks.**—(1) The presumption that plain checks constituted payments on a debt, rather than loans from the drawer to the payee, is rebutted by evidence of their nonappearance in the payee's book account against the drawer, their indorsement to wholesale merchants of whom the payee bought, and the fact that the payee was a retail merchant, and did not lend money. Moyles' Est., 7 Kulp (Pa.) 215. (2) That a certain check made by plaintiff's intestate to defendant was a loan, and not a payment, was sufficiently proved where a memorandum, in the handwriting of decedent, produced by defendant, showed a loan to defendant of the sum named in such check, on the date therein specified. Gaylord v. Gibson, 36 App. Div. 548, 55 NYS 670.

[b] **Book entries held insufficient** to show that check was given as a loan. Sallada v. Mock, 277 Pa. 285,

ness rather than the payment of a stock dividend,[51] or as to the application of a payment to a particular debt.[52] While it has been held that evidence which is uncertain as to the time and amount of payment is insufficient to establish the fact thereof,[53] it has been held to the contrary that it is not in all cases essential to prove the exact dates and amounts of partial payments,[54] or to show the time and place[55] or manner[56] of payment.

[§ 262] **2. Admissions of Parties.** Admissions of the debtor may be sufficient to show nonpayment,[57] as may admissions of the creditor or his agents to show payment.[58] Where a creditor admitted the receipt of money from his debtor, but stated it to be a loan, the admission taken together does not amount to proof of payment.[59]

[§ 263] **3. Testimony of Parties.** The positive testimony of a creditor may be sufficient of itself to show nonpayment,[60] even when met by indefinite testimony of the debtor.[61] The testimony of the debtor may also be sufficient to show payment,[62] but where his testimony is contradicted by the other party,[63] or by a disinterested witness, the issue will be determined against the debtor, since he has the burden of proof.[64] Where the only testimony is that of the debtor and the creditor, which is in irreconcilable conflict, the possession by the debtor, unexplained, of the obligation evidencing the debt,

121 A 54.

51. Gillingham v. Frank C. Gillingham, etc., Co., 260 Pa. 559, 103 A 991.

52. Ala.—Pearce v. Walker, 103 Ala. 250, 15 S 568; Kent v. Marks, 101 Ala. 350, 14 S 472.

Ark.—Houser v. Burchart, 130 Ark. 178, 197 SW 28.

Cal.—Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Los Angeles Trust, etc., Bank v. Forve, 45 Cal. A. 298, 187 P 438.

Ga.—Cox v. Wall, 84 Ga. 456, 11 SE 137; Green v. Ford, 79 Ga. 130, 3 SE 624; Atkinson v. Mullis, 28 Ga. A. 176, 110 SE 509.

Ida.—Smith v. Thomas, 42 Ida. 375, 245 P 399.

Ill.—Continental, etc., Trust, etc., Bank v. Lantry Contracting Co., 189 Ill. A. 296.

Iowa.—Pospishil v. Jensen, 205 Iowa 1360, 219 NW 507; Goodman v. Logan First Nat. Bank, 187 NW 441; Barendregt v. Van den Brink, 186 NW 449; Brooks v. Jones, 114 Iowa 385, 82 NW 434, 86 NW 300; Sankey v. Cook, 78 Iowa 419, 43 NW 280 (where only one debt shown).

Mass.—Swett v. Boyce, 134 Mass. 381.

Mich.—Lewis v. Noble, 93 Mich. 345, 53 NW 396.

Nebr.—Moore v. Pollock, 50 Nebr. 900, 70 NW 541; Johnson v. Blazer, 33 Nebr. 841, 51 NW 239.

N. H.—Lauten v. Rowan, 59 N. H. 215; Price v. Dearborn, 34 N. H. 481.

N. J.—Coleman v. Howell, (Ch.) 16 A 202; Woodruff v. McIntyre, (Ch.) 14 A 572.

N. Y.—Grant v. Keator, 117 N. Y. 369, 22 NE 1055; Eberlin v. Palmer, 10 NYS 660.

N. D.—Fargo First Nat. Bank v. Roberts, 2 N. D. 195, 49 NW 722.

Pa.—Harmony Creamery Co. v. Bickerton, 57 Pa. Super. 651.

S. C.—Turner v. Washington Realty Co., 125 S. C. 100, 118 SE 30.

Tex.—Hinkle v. Higgins, 83 Tex. 615, 19 SW 147; Compton v. Ahrens, etc., Mfg. Co., (Civ. A.) 151 SW 884.

Wash.—Ross-Higgins Co. v. Rook, 65 Wash. 546, 118 P 744.

Wis.—Otto v. Klauber, 23 Wis. 471.

Eng.—Jones v. Gretton, 8 Exch. 773, 155 Reprint 1565.

N. B.—Mahoney v. McSweeney, 31 N. B. 672.

[a] **Direction to apply to account of another.**—Wyandotte Coal, etc., Co. v. Wyandotte Pav., etc., Co., 97 Kan. 203, 154 P 1012, AnnCas1917C 580; Artificial Ice Co. v. Pratt, 42 S. D. 502, 176 NW 45; Munday Trading Co. v. J. M. Radford Grocery Co., (Tex. Civ. A.) 190 SW 520; Munday Trading Co. v. J. M. Radford Grocery Co., (Tex. Civ. A.) 178 SW 49.

[b] **Payment made by another.**—Paragould, etc., R. Co. v. Smith, 93 Ark. 224, 124 SW 776.

[c] **Acquiescence in application by creditor to another debt.**—Hawkins v. Bouic, 121 Md. 147, 88 A 126.

[d] **Evidence showing that debtor had no right to direct application.**—McCord v. Bridges, 209 Ala. 529, 96 S 432.

[e] **Evidence showing payment not applied to another debt.**—Royal Colliery Co. v Alwart Bros. Coal Co., 276 Ill. 193, 114 NE 499 [rev 198 Ill. A. 67]; Castleman v. Rustenholtz, 145 Ky. 146, 140 SW 170.

[f] **Joint or several account.**—(1) Evidence held not to overcome presumption that payment by person jointly liable on note, not credited on such note, was made on his individual note. Well v. Ayers, 84 Va. 341, 5 SE 21. (2) Where one indebted as a partner and individually gave his note in payment and took a receipt as follows: "Received from F. S. Brewer his ninety-day note for three hundred dollars," such receipt has no bearing one way or the other on the question whether the note was appropriated on the joint or on the several account. Hunt v. Brewer, 68 Me. 262.

[g] **Slight evidence** is sufficient to overcome the presumption that a preëxisting debt was settled by a payment. Lynch v. Lyons, 131 App. Div. 120, 115 NYS 227 [aff 197 N. Y. 595 mem, 91 NE 1116 mem].

[h] **The misapplication of payments** cannot be proved by vague and conjectural proof, in opposition to explicit denial and documentary evidence. Vimont v. Welch, 2 A. K. Marsh. (Ky.) 110.

[i] **A bank check** in the usual form is not, even when paid and returned to the drawer, an acknowledgment that the money therein mentioned has been received for and applied to a particular purpose. Ottens v. Fred Krug Brewing Co., 58 Nebr. 331, 78 NW 622.

[j] **Corroborative circumstances.**—The fact that timber was mortgaged to secure the debt sued on strengthens defendant's testimony that the proceeds of the timber were paid on that debt, and not on other debts due plaintiff, and is sufficient, with such testimony, to sustain the plea of payment. Chaney v. Ramey, 43 SW 235, 19 KyL 1258.

53. Pierce v. Parks, 76 Or. 58, 147 P 929.

[a] **For example,** the testimony of a witness that he saw defendant pay plaintiff's intestate some money when trying to make a settlement, but could not tell how much, is insufficient to support an allegation of payment. Magenau v. Bell, 14 Nebr. 7, 14 NW 664.

[b] **General statements** of payment have no probative value. Rosenberger v. Simons, 185 NYS 317.

54. Fletcher v. Dulaney, 1 Ind. T. 674, 43 SW 955.

55. Fletcher v. Young, 10 Ga. A. 183, 73 SE 38.

56. Armour Fertilizer Works v. Dwight, 22 Ga. A. 144, 95 SE 746.

57. Ga.—Amos v. Flournoy, 80 Ga. 771, 6 SE 696.

N. Y.—Van Norden Trust Co. v. Spar, 111 NYS 674; Wiltsie v. Wiltsie, 1 NYS 559.

Pa.—Souder's Est., 169 Pa. 239, 32 A 417.

S. C.—Martin v. Fowler, 51 S. C. 499, 29 SE 261.

Tex.—Bennett v. Henderson, (Civ. A.) 280 SW 622.

58. Kelly v. Butterworth, 103 Ill. A. 87; Koontz v. Koontz, 79 Md. 357, 32 A 1054; Rauth v. Scheer, 20 Misc. 689, 46 NYS 539; Hall v. Thompson, 24 NYS 86; Womble v. Fraps, 77 N. C. 198; State Bank v. Wilson, 12 N. C. 484. See Perkins v. Chambers, 49 SW 544, 20 KyL 1506 (the report of a commissioner that his predecessor had paid him a certain fund is not conclusive in the latter's favor on a plea of payment, although the reporting commissioner may be liable therefor on his bond); Block v. Cross, 36 Miss. 549 (mere declaration of a trustee, who was a member of a mercantile firm, that his cestui que trust, a married woman, owed the firm nothing, by reason of his having collected of her assets a sufficiency to pay the debt, will not establish a payment of the debt, in the absence of all evidence, showing an appropriation of such assets to the use of the firm).

[a] **Possession of funds of debtor.**—Where plaintiff admits having money in his hands belonging to defendant, but fails to disclose how much, it will be presumed that he has sufficient to liquidate a balance due by defendant to him. Pulver v. Esselstyn, 22 Misc. 429, 50 NYS 756.

[b] **Book entries of payments** on note are not conclusive on maker. Bertig Mercantile Co. v. Williams, (Mo. A.) 286 SW 150.

59. Oldham v. Henderson, 4 Mo. 295.

60. Magee v. Bradley, 54 N. J. Eq. 326, 35 A 103; Roussel v. Mathews, 62 App. Div. 1, 70 NYS 886 [aff 171 N. Y. 634 mem, 63 NE 1122 mem].

[a] **Conflicting statements.**—Testimony of a mortgagee, suing to foreclose, that the debt for which the mortgage was given existed at the execution of the latter, corroborated by testimony of an attorney who has been authorized to collect the debt, is not overcome by evidence of statements made by the mortgagee prior to taking the mortgage that the debt was paid, and that he and the debtor were "square." Johnson v. Johnson, 101 Iowa 405, 70 NW 598.

61. Van Norden Trust Co. v. Spar, 111 NYS 674.

62. Collins v. Stocking, 98 Mo. 290, 11 SW 750; Hallenbeck v. Saugerties, 33 App. Div. 635, 53 NYS 626; Mayo v. Davidge, 4 NYS 77 [aff 1 NYS 792]; In re Burk, 205 Pa. 332, 54 A 998.

[a] **When not conclusive, although uncontradicted.**—But testimony of defendant, although uncontradicted as to payment, is not conclusive on the jury, where, on trial, neither the absence of the receipt for such payment nor the check on which the money to make the payment was claimed to have been procured was satisfactorily accounted for, and defendant admitted that the date of the payment as sworn to in his answer was false. Newcombe v. Hyman, 16 Misc. 25, 37 NYS 649.

63. Freeman v. Benedict, 37 Conn. 559.

64. Loyd Mercantile Co. v. Long, 123 La. 777, 49 S 521.

[a] **The character, temperament, and habits of two litigants** and the surrounding circumstances may make it more probable that one has forgotten the debt due him by the other than that the other should have paid it and have preserved no record showing

is conclusive on the question of payment.[65]

[§ 264] **4. Remittance by Mail.** Evidence that a remittance was "mailed," in different jurisdictions, may,[66] or may not,[67] be sufficient to show that it was received by the person to whom it was addressed. In any event such evidence, when taken in connection with other circumstances, may be sufficient to show receipt of the remittance.[68] The mailing of a remittance is not evidence that it was received on that day.[69] Where a letter containing a remittance was improperly addressed, the evidence is insufficient to show that the remittance was received by the creditor.[70]

[§ 265] **5. Possession of Evidence of Debt.** Possession of the evidence of the debt by the creditor is some evidence that the debt has not been discharged by payment,[71] and on the other hand, possession of the evidence of the debt by the debtor is evidence that it has been paid;[72] but possession in the former case,[73] as well as in the latter,[74] may be explained.

[§ 266] **6. Payment by Bill, Note, or Check.** The evidence to show that a bill, note, order, or check was or was not accepted as absolute payment according to whether payment in such a case is or is not presumed[75] must be clear and convincing,[76] but such fact may be established by competent, direct, or circumstantial evidence.[77] Entries on the cred-

how, when, where, or to whom such payment was made. Sigur v. Burguieres, 111 La. 1077, 36 S 134.

65. Hawkins v. Harding, 37 Ill. A. 564.

66. Model Mill Co. v. Webb, 164 N. C. 87, 80 SE 232.

[a] **In New York** the rule appears to be that evidence of the mailing of a remittance is insufficient to establish payment in the absence of a showing that the letter containing it was properly addressed, sealed, stamped, and deposited, or that the person to whom it was addressed received it. Barnes v. Courtright, 37 Misc. 60, 74 NYS 203; Brown v. Hess, 33 Misc. 750, 67 NYS 169.

67. Selz v. Shipman, (Tex. Civ. A.) 230 SW 842.

68. Waydell v. Velie, 1 Bradf. Surr. (N. Y.) 277; Selz v. Shipman, (Tex. Civ. A.) 230 SW 842.

69. Johnson v. Central Vermont R. Co., 84 Vt. 486, 79 A 1095.

70. Fleming, etc., Co. v. Evans, 9 Kan. A. 858, 61 P 503; Jenkins v. Clopton, 141 Mo. A. 74, 121 SW 759.

71. Redmond v. Hughes, 151 App. Div. 99, 135 NYS 843.

72. Grant v. Fletcher, 283 Fed. 243; Pierce v. Davis, 155 Ky. 270, 159 SW 781; Chandler v. Davis, 47 N. H. 462; Caulk v. Carlson, 44 Okl. 532, 145 P 335.

[a] **Thus,** where, in an action brought by an administrator, it appears that his intestate and defendant gave their joint notes, and that the notes were found among his intestate's papers after his death, the possession of the notes by the intestate is prima facie evidence that he paid the whole of them. Chandler v. Davis, 47 N. H. 462.

[b] **Corroborating evidence held sufficient to overcome denial of payment.**—Pierce v. Davis, 155 Ky. 270, 159 SW 781.

73. Maurin v. Alltmont, 5 La. A. 660.

74. Wick v. Roop, 253 Pa. 264, 98 A 555.

75. See supra §§ 216-218.

76. In re Wegman Piano Co., 221 Fed. 128; Lowenstein v. Bresler, 109 Ala. 326, 19 S 860.

[a] **Mutual intent.**—Payment of a debt, by giving notes therefor, is not established by showing the debtor's intention that the notes should so operate, for the understanding must be mutual. Rutland R., etc., Co. v. Williams, 90 Vt. 276, 98 A 85.

[b] **Evidence held sufficient to show acceptance as absolute payment.**—Case Mfg. Co. v. Soxman, 138 U. S. 431, 11 SCt 360, 34 L. ed. 1019; Richmond v. Irons, 121 U. S. 27, 7 SCt 788, 30 L. ed. 864; Manser v. Sims, 157 Ala. 167, 47 S 270; Whitley v. Dunham Lumber Co., 89 Ala. 493, 7 S 810; Toulmin v. Underwood, 172 Ark. 813, 290 SW 377; Jenne v. Burger, 120 Cal. 444, 52 P 706; Union Tool Co. v. Porter, 83 Cal. A. 798, 257 P 163; California Nat. Supply Co. v. Porter, 83 Cal. A. 758, 257 P 161; Bartholomew v. Emerson-Brantingham Impl. Co., 68 Colo. 244, 187 P 538; Rice v. Georgia Nat. Bank, 64 Ga. 173; State v. Hullihan, (Ind. A.) 157 NE 282; Gilmore v. Geiger, (Iowa) 220 NW 7; Kramer v. Norman, (Iowa) 202 NW 433; Gafford v. American Mortg., etc., Co., 77 Iowa 736, 42 NW 550; American Malting Co. v. Souther Brewing Co., 194 Mass. 89, 80 NE 526; Peo. v. Davis, 237 Mich. 165, 211 NW 36; Northern Oil Co. v. Advanced Petroleum Corp., 232 Mich. 11, 204 NW 692; Harry Graff, Inc. v. Abram, 167 Minn. 244, 208 NW 801; Jamison v. Ray, 73 Minn. 249, 75 NW 1049; Wiley v. Dean, 67 Minn. 62, 69 NW 629; Goenen v. Schroeder, 18 Minn. 66; Partee v. Bedford, 51 Miss. 84; Valley Mercantile Co. v. Bailey, 68 Mont. 79, 216 P 789; Hammond v. Jewett, 22 Nebr. 363, 35 NW 188; Roberts v. Fisher, 53 Barb. 69 [rev on other grounds 43 N. Y. 159, 3 AmR 680]; Union Stove Works v. Robinson, 113 NYS 608; Kirkpatrick v. Puryear, 93 Tenn. 409, 24 SW 1130, 22 LRA 785; Robinson v. Hurlburt, 34 Vt. 115; Hughes v. Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. (Ont.) 221; Geohegan v. Lawson, 13 U. C. Q. B. (Ont.) 495.

[c] **Evidence held sufficient to show that acceptance was not as absolute payment.**—Union Electric Steel Co. v. Imperial Bank, 286 Fed. 857; Freeman v. W. B. Moses & Sons, Inc., 285 Fed. 898; Beall v. Hudson County Water Co., 185 Fed. 179; Hatfield Bank v. Bruce, 164 Ark. 576, 262 SW 665; Churchill v. Yeatman-Gray Grocer Co., 111 Ark. 529, 164 SW 283; Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 P 922; Tyson v. Reinecke, 25 Cal. A. 696, 145 P 153; Rogers v. Tiedeman, 9 Ga. A. 811, 72 SE 285; Reserve Loan L. Ins. Co. v. Dulin, 69 Ind. A. 363, 122 NE 3; Martin County Mitchelltree School Tp. v. Carnahan, 42 Ind. A. 473, 84 NE 520; Cox v. Hayes, 18 Ind. A. 220, 47 NE 844; Ware v. Bennett, 143 Ky. 743, 137 SW 532; Ten Day Grocery Co., Inc. v. Smoot, 8 La. A. 757; Spitz v. Morse, 104 Me. 447, 72 A 178; Bunker v. Barron, 79 Me. 62, 8 A 253, 1 AmSR 282; National Wholesale Grocery Co. v. Mann, 251 Mass. 238, 146 NE 791; Feinberg v. Levine, 237 Mass. 185, 129 NE 393; Davis v. Parsons, 157 Mass. 584, 32 NE 1117; Quinby v. Durgin, 148 Mass. 104, 19 NE 14, 1 LRA 514; Sheldon Axle Co. v. Scofield, 85 Mich. 177, 48 NW 511; Felt v. Fink, 174 Minn. 53, 218 NW 166; Miller v. Farmers' State Bank, 165 Minn. 339, 206 NW 930; L. Cohen Grocer Co. v. Pattee, (Mo. A.) 213 SW 889; Thompson Co. v. Baldwin, 62 Nebr. 530, 87 NW 307; Potts v. Mayer, 74 N. Y. 594 mem [rev 43 N. Y. Super. 544, 53 HowPr 368]; Davis v. Allen, 3 N. Y. 168; Van Eps v. Dillaye, 6 Barb. (N. Y.) 244; Allen v. Bantel, 2 Thomps. & C. (N. Y.) 342; Carroll v. Sweet, 57 N. Y. Super. 100, 5 NYS 572 [rev on other grounds 128 N. Y. 19, 27 NE 763, 13 LRA 43]; Cantasano v. Courtney, 98 Misc. 623, 163 NYS 156; Siegel v. Kovinsky, 93 Misc. 541, 157 NYS 340; Finlay v. Heyward, 34 Misc. 818, 69 NYS 648 [rev on other grounds 35 Misc. 266, 71 NYS 779]; Beal v. American Diamond Rock Boring Co., 16 Misc. 540, 38 NYS 743; Baird v. Spence, 8 Misc. 535, 28 NYS 774 [aff 10 Misc. 772, 31 NYS 1125]; American Luxfer Prism Co. v. Bartolicius Star Iron Works, Inc., 152 NYS 1014; Olcott v. Rathbone, 5 Wend. (N. Y.) 490; Piedmont Bank v. Wilson, 124 N. C. 561, 32 SE 889; Finch Lumber Co. v. Weishaar, 55 N. D. 695, 215 NW 155; Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008; Ellison v. Hosie, 147 Pa. 336, 23 A 455; Patton v. Ash, 7 Serg. & R. (Pa.) 116; American Engraving, etc., Co. v. Deichler, 23 Pa. Dist. 608; Pinson v. Puckett, 35 S. C. 178, 14 SE 393; Perry v. Williamson, (Tenn.) 56 SW 826; Reclamation Co. v. Simmons, (Tex. Civ. A.) 293 SW 194; Bluthenthal v. Green, (Tex. Civ. A.) 109 SW 1133; Johnson v. Vaughn, 57 Utah 253, 193 P 1100; Taplin v. Marcy, 81 Vt. 428, 71 A 72; McVeigh v. Chamberlain, 94 Va. 73, 26 SE 395; Blenz v. Fogle, 127 Wash. 224, 220 P 790.

[d] **Laches in presenting check for payment.**—Campbell v. Shark, (Ida.) 267 P 458; Republic Metalware Co. v. Smith, 218 Ill. A. 130; Dehoust v. Lewis, 128 App. Div. 131, 112 NYS 559.

77. Ill.—National L. Ins. Co. v. McDermott, 186 Ill. A. 157.

Ind.—Gates v. Fauvre, (A.) 119 NE 155.

Iowa.—Rohrbach v. Hammill, 162 Iowa 131, 143 NW 872.

Mich.—Fremont Co-op. Produce Co. v. Lipman, 226 Mich. 387, 197 NW 544.

N. C.—Federal Land Bank v. Barrow, 189 N. C. 303, 127 SE 3.

Tenn.—Kirkpatrick v. Puryear, 93 Tenn. 409, 24 SW 1130, 22 LRA 785.

Va.—Morriss v. Harveys, 75 Va. 726.

[a] **Debt secured by lien.**—The fact that the indebtedness for which a bill was given was secured by a lien is a strong circumstance to show that it was not the intention of the creditor to receive the bill as payment. Cutting v. Whittemore, 72 N. H. 107, 54 A 1098; Wheeler v. Schroeder, 4 R. I. 383; Sweet v. James, 2 R. I. 270; Hopkins v. Detwiler, 25 W. Va. 734.

[b] **Giving up or retention of security.**—(1) In the absence of proof of a special agreement, the giving up or retention of the original security will in general be a decisive circumstance in determining the intention of the parties as to whether a bill, note, or check was accepted as an absolute payment. Kirkpatrick v. Puryear, 93 Tenn. 409, 24 SW 1130, 22 LRA 785; Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1, 9 SE 759, 19 AmSR 858; Morriss v. Harveys, 75 Va. 726. (2) "The fact that the unpaid note was not surrendered before suit tends to show that it and not the original debt was considered to be the basis of liability." U. S. v. Leach, 191 Ill. A. 346, 352. (3) Agreement to accept check as absolute payment is not implied from surrender of evidences of debt or giving of receipt. Cleve v. Craven Chemical Co., 18 F. (2d) 711, 52 ALR 980.

[c] **The indorsement of a draft** by the debtor of itself shows that the creditor did not take it at his own risk as payment. Darnall v. Morehouse, 36 HowPr 511 [rev on other grounds 45 N. Y. 64].

itor's books showing payment of the debts are not conclusive of the question whether a note of the debtor,[78] or of a third person, constitutes payment of the debt.[79] When checks are shown to have been paid, transfer of their sum to the payee is proved.[80]

[§ 267] **G. Trial*[81]—1. In General.** The trial of an issue of payment is governed by the usual rules relative to the trial of civil actions generally, so far as applicable thereto.[82]

[§ 268] **2. Reception and Exclusion of Evidence.** In accordance with the rules relating to the order of proof in the trial of civil actions generally,[83] evidence of nonpayment should be withheld, unless it is a necessary part of a cause of action, until evidence of payment is introduced,[84] and then adduced in rebuttal.[85] As in other civil actions,[86] evidence as to payment which is insufficient as a matter of law may be stricken out on proper motion.[87]

[§ 269] **3. Questions for Court and Jury[88]—a. In General.** In accordance with the general rules relating to the respective provinces of court and jury in the trial of civil actions,[89] the question of payment is ordinarily one of fact,[90] and therefore is for the jury;[91] and questions as to the genuineness of a receipt,[92] whether the payment evidenced by it was in fact made,[93] and whether it represents a full or only a partial payment,[94] are likewise for the jury on conflicting evidence. But the legal effect of acts done, as to whether or not a payment is thereby effectuated, is a question of law for the

[d] **In "lieu of cash."**—In testimony that note was received in lieu of cash, phrase "in lieu of" is equivalent to "instead of," and does not imply that taking of note extinguished debt. Holt Mfg. Co. v. Brotherton, 91 Wash. 354, 157 P 849.

[e] **Mere statement of parties.**—A check not being payment unless received as such or cashed, a mere statement of one that he made a payment by a check drawn by him, without production thereof or of the books of the bank, does not prove payment. Tschopick v. Lippincott, (Tenn. Ch. A.) 48 SW 128.

[f] **The mere fact that the debtor has failed to indorse the note** which is claimed to constitute an absolute payment is not a controlling circumstance. Freeman v. Benedict, 37 Conn. 559.

[g] **Recital of payment in full in check** is subject to explanation. Southern Ins. Co. v. Wilson, 214 Ala. 373, 108 S 5.

[h] **Construction of evidence.**—Where the debtor requested the creditor not to present a check immediately, as the drawer's account was not good, testimony of the creditor that he took it in payment must be construed to mean as conditional payment. Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 P 28.

78. Brigham v. Lally, 130 Mass. 485.

79. Farmers', etc., State Bank v. Nummedahl, 165 Minn. 144, 207 NW 313.

80. Castleman v. Rustenholtz, 145 Ky. 146, 140 SW 170; Haslam v. Perry, 115 Me. 295, 98 A 812; Wilcox v. Crawford, (Tex. Civ. A.) 231 SW 1104.

[a] **Check made payable to one, "or bearer," and not indorsed** by the payee, in absence of a showing that the named payee had been in possession of the check, is no evidence against such payee in an action to charge him with the check or its proceeds. Crockett v. Ohio Valley Banking, etc., Co., 174 Ky. 409, 192 SW 487.

[b] **Where a check has been destroyed** and is not in evidence, the fact that the check named a particular person as payee, and was returned to the drawer after payment, is not evidence that the person named in the check received the money thereon, in the absence of evidence that the indorsement of the check was in the handwriting of such payee. Peo. v. Wiggins, 201 N. Y. 151, 94 NE 610 [rev 138 App. Div. 917 mem, 123 NYS 1135 mem, and motion to amend remittitur den 203 N. Y. 609 mem, 96 NE 1125 mem].

81. Of actions on particular classes of obligations or liabilities see cross references ante p 584.

82. See cases infra §§ 268-278.

Trial generally see Trial [38 Cyc 1238].

83. See Trial [38 Cyc 1532 et seq].

84. Frindel v. Schaikewitz, 1 App. Div. 214, 37 NYS 172.

85. Frindel v. Schaikewitz, supra.

86. See Trial [38 Cyc 1402].

87. White v. Knowles, 1 Silv. Sup. 118, 6 NYS 579.

88. In actions on particular classes of obligations or liabilities see cross references ante p 584.

89. See Trial [38 Cyc 1511].

90. Ark.—Wilson v. Morgan, 180 SW 469.

Ind.—Barrett v. Sipp, 50 Ind. A. 304, 98 NE 310.

Mass.—Gerrish Dredging Co. v. Bethlehem Shipbuilding Corp., 247 Mass. 162, 141 NE 867.

Minn.—Krost v. Moyer, 166 Minn. 153, 207 NW 311.

N. H.—Grantham v. Canaan, 38 N. H. 268.

Pa.—Schoonover's Est., 44 Pa. Super. 76; Boyd v. Boyd, 34 Pa. Super. 405.

Va.—Hall Bldg. Corp. v. Edwards, 142 Va. 209, 128 SE 521.

And see cases infra note 91.

91. Ala.—Adams v. Sovereign Camp W. O. W., 201 Ala. 166, 77 S 692; Penney v. Grant, 16 Ala. A. 510, 79 S 271.

Ariz.—Steinfeld v. Wing Wong, 14 Ariz. 336, 128 P 354.

Cal.—Light v. Stevens, 159 Cal. 288, 113 P 659.

Ga.—Standard Cooperage Co. v. O'Neill, 146 Ga. 235, 91 SE 82; Fletcher v. Young, 10 Ga. A. 183, 73 SE 38.

Iowa.—Dougherty v. Deeney, 45 Iowa 443.

Kan.—Tennison v. Platt, 50 Kan. 631, 32 P 369.

Ky.—Williamson v. McGinnis, 11 B. Mon. 74, 52 AmD 561.

Mich.—Linsell v. Linsell, 138 Mich. 64, 100 NW 1009.

Mo.—J. W. Jenkins Sons Music Co. v. Johnson, 175 Mo. A. 355, 162 SW 308.

N. Y.—Fulton Grain, etc., Co. v. Anglim, 34 App. Div. 164, 54 NYS 632; Thompson v. Welde, 10 App. Div. 125, 41 NYS 819.

N. C.—Dewey v. Margolis, 195 N. C. 307, 142 SE 22; Carolina Bagging Co. v. Byrd, 185 N. C. 136, 116 SE 90; Norment v. Brown, 79 N. C. 363.

Pa.—Flaccus v. Wood, 260 Pa. 161, 103 A 549; Reynolds v. Richards, 14 Pa. 205; Jones v. Johnson, 3 Watts & S. 276, 38 AmR 760; German Ins. Co. v. Davenport, 6 Pa. Cas. 441, 9 A 517; Ransom v. Crawford, 44 Pa. Super. 592.

S. C.—Simons v. Walter, 12 S. C. L. 97.

Wash.—South Bend First International Bank v. Rockey, 117 Wash. 663, 202 P 268.

And see cases supra note 90; and infra §§ 270-274.

[a] **Payment or purchase** (1) of a note is generally a question for the jury. Dougherty v. Deeney, 45 Iowa 443. (2) Purchase of debt distinguished from payment see supra § 2.

[b] **Whether debtor's check was paid by drawee** (1) is a question for the jury when the evidence is conflicting. Dewey v. Margolis, 195 N. C. 307, 142 SE 22. (2) Payment or honor of check by drawee as effectuating payment of debt for which check was given see supra § 50.

[c] **Payment to third person to whom creditor was indebted.**—(1) Whether a debtor's payment, at his creditor's request, of a debt due from the creditor to a third person, was intended as an extinguishment pro tanto of the creditor's claim, is for the jury. Norment v. Brown, 79 N. C. 363. (2) Payment to one to whom creditor is indebted as discharge of creditor's claim see supra § 5.

[d] **Sufficiency of evidence to raise jury question.**—(1) To raise the issue of payment for the jury, a prima facie showing of payment is required. Hali Music Co. v. Robinson, (Tex. Civ. A.) 7 SW (2d) 625. (2) Testimony of plaintiff that defendant still owed him a specified amount, although in a sense a testimonial conclusion, is sufficient, when in conflict with evidence of defendant, to require the submission of the issue to the jury. Price v. Hendricks, 207 Ala. 267, 92 S 431. (3) Defendant's statement that he had paid the items in controversy is sufficient to carry the issue to the jury. Dorroh v. Wall, (Mo. A.) 297 SW 705. (4) Positive testimony by defendant that he had paid the debt for which recovery was sought warranted submission of the issue of payment to the jury, even though there was apparent conflict between his testimony on direct and cross examination. McCord v. Bridges, 209 Ala. 529, 96 S 432. (5) Where there is evidence that certain goods were delivered in payment of a note, although defendant's agent who delivered the goods testified that he sold them to plaintiff, the question of payment should have been left to the jury. Carson v. Lineburger, 70 N. C. 173.

92. Paige v. Paige, 53 Pa. Super. 311; Gunn v. McCabe, (R. I.) 139 A 916.

93. Ala.—Penney v. Grant, 16 Ala. A. 510, 79 S 271.

Cal.—Cowan v. Abbott, 92 Cal. 100, 28 P 213.

Ga.—Mallard v. Moody, 105 Ga. 400, 31 SE 45.

N. Y.—Mosel v. William H. Frank Brewing Co., 2 App. Div. 93, 37 NYS 525.

Pa.—Walker v. Tupper, 152 Pa. 1, 25 A 172; Israel v. Label, 87 Pa. Super. 191.

Wis.—Twohy Mercantile Co. v. McDonald, 108 Wis. 21, 83 NW 1107.

[a] **Receipt given under mistake of fact.**—Where there is evidence on the part of the creditor that payments or collections shown by a receipt were not in fact made and that the receipt was given under a mistake of fact, the question is for the jury. Penney v. Grant, 16 Ala. A. 510, 79 S 271.

Operation and conclusiveness of receipt see supra §§ 78-83.

94. Cal.—Doolittle v. McConnell, 178 Cal. 697, 174 P 305.

Ill.—Herkimer v. Nigh, 10 Ill. A. 372.

Iowa.—McGuire v. Interurban R. Co., 199 Iowa 203, 200 NW 55.

*By EUSTACE W. TOMLINSON (§§ 267-279).

court;[95] and when a receipt is unquestioned it is for the court to determine its meaning and effect.[96]

[§ 270] **b. Particular Matters—(1) Presumption of Payment.**[97] The question whether a payment is to be presumed is ordinarily one of fact for the jury.[98]

Rebuttal of presumption.[99] Whether the evidence to rebut a presumption of payment is true is a question for the jury;[1] but whether the facts and circumstances relied on, if true, are sufficient to give rise to a presumption of nonpayment or rebut the presumption of payment is a question of law for the court.[2] So, when the evidence is uncontradicted,[3] and there is no question of credibility of the witness,[4] it is the duty of the court to pass upon its sufficiency and not to submit the issue to the jury; and if the debtor himself proves such facts as repel the presumption,[5] he cannot demand that the issue be submitted to the jury.[6]

[§ 271] **(2) Manner, Form, and Medium of Payment[7]—(a) In General.** The questions whether a remittance by mail is the usual mode, when a creditor in general terms directs his debtor to remit money to him, without prescribing the mode,[8] and whether payments by the debtor to a third person were made with the creditor's consent or agreement that the debt should be thereby discharged pro tanto,[9] are questions of fact for the jury. What is lawful money is a question of law for the court;[10] but it is a question for the jury to determine, when the matter is in dispute, in what medium a debt or obligation is to be paid or discharged,[11] as whether or not a contract or bond made during the Civil War calling for the payment of dollars contemplated Confederate dollars.[12]

[§ 272] **(b) Payment Other than in Money.**[13] Whether or not there was an agreement or consent on the part of the creditor to receive payment in some other medium than money,[14] as in goods and chattels[15] or real estate,[16] or a certificate of deposit,[17] is a question of fact; and so it is for the jury to determine whether a bill[18] or note,[19] includ-

Mass.—MacDonald v. Kavanaugh, 259 Mass. 439, 156 NE 740.
Miss.—Potts v. McPeters, 140 Miss. 97, 103 S 202.
Mo.—Cloos v. Prussman, (A.) 300 SW 315.
Pa.—Sahm v. Long, 51 Pa. Super. 428.
See also Henderson v. Hayter, 2 F. & F. 128 (applying the principle).

95. Frost v. Martin, 29 N. H. 306; Teall v. Consolidated Electric Light Co., 119 N. Y. 654, 23 NE 985; Farmers', etc., Bank v. Sherman, 33 N. Y. 69 [aff 19 N. Y. Super. 181]; Balcom v. O'Brien, 13 S. D. 425, 83 NW 562.

Taking case from jury see infra § 275.

96. McKenzie v. Ray, 168 Cal. 618, 143 P 1018; Winter Cigar Co. v. Berman, 67 Colo. 487, 186 P 285. See also Atchison v. Atchison, 67 Conn. 35, 34 A 761 (applying the principle).

97. Generally see supra §§ 188–233.

98. Ky.—Waters v. Waters, 1 Metc. 519; Shields v. Pringle, 2 Bibb 387.
N. J.—Christy v. New York Cent., etc., R. Co., 90 N. J. L. 540, 101 A 372.
N. Y.—Macaulay v. Palmer, 125 N. Y. 742, 26 NE 912; Hall v. Roberts, 63 Hun 473, 18 NYS 480.
N. C.—Williams v. Peal, 20 N. C. 609.
Oh.—McBride v. Moore, Wright 524.
Pa.—O'Hara v. Corr, 210 Pa. 341, 59 A 1099; Lee v. Newell, 107 Pa. 283.
Tenn.—Lyon v. Guild, 5 Heisk. 175.
Vt.—Kimball v. Ives, 17 Vt. 430, 433.

"The payment of a debt, or the settlement of an account, is never to be presumed, except in accordance with the rational probabilities of the case. It is, therefore, but just and reasonable it should be judged of by the triers of the fact." Kimball v. Ives, supra.

[a] **Presumption from lapse of time distinguished from bar of statute of limitations.**—"There is a manifest distinction between those cases where length of time operates as a bar to the action, and those in which it can be used only as matter of evidence. In a case coming within the statute of limitations, the lapse of time prescribed by the statute is pleadable as a bar to the action, and the jury would be concluded by it, although they were convinced that the debt still remained due and unpaid. But where length of time is not per se a bar, but used merely as evidence, it is a matter for the consideration of the jury to credit it or not, and to draw their inference the one way or the other, according to circumstances." Shields v. Pringle, 2 Bibb (Ky.) 387.

Taking issue from jury see infra § 275.

99. Generally see supra §§ 234–247.

1. Hudson v. Williams, 22 Del. 550, 72 A 985; Hinsaman v. Hinsaman, 52 N. C. 510; Camp v. John, 259 Pa. 38, 102 A 285; Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; McDowell v. North Side Bridge Co., 247 Pa. 190, 93 A 280; Fidelity Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; Richards v. Walp, 221 Pa. 412, 70 A 815; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; McQuesney v. Hiester, 33 Pa. 435; Keller v. Trout, 17 Pa. Dist. 326; Buckley v. Runge, 57 Tex. Civ. A. 322, 122 SW 596.

[a] **Identity of debt admitted.**—Where the evidence shows that the debtor admitted he owed the creditor a note, it is proper to leave it to the jury to say whether the note sued on was the one referred to. Hinsaman v. Hinsaman, 52 N. C. 510.

2. Woodbury v. Taylor, 48 N. C. 504; Buie v. Buie, 24 N. C. 87; In re Bartram, 282 Pa. 536, 128 A 511; Gilmore v. Alexander, 268 Pa. 415, 112 A 9; Flaccus v. Wood, 260 Pa. 161, 103 A 549; Camp v. John, 259 Pa. 38, 102 A 285; Sheafer v. Woodside, 257 Pa. 276, 101 A 753, 1 ALR 775; Fidelity, Title, etc., Co. v. Chapman, 226 Pa. 312, 75 A 428; Richards v. Walp, 221 Pa. 412, 70 A 815; Gregory v. Com., 121 Pa. 611, 15 A 452, 6 AmSR 804; Peters' App., 106 Pa. 340; Beale v. Kirk, 84 Pa. 415; Reed v. Reed, 46 Pa. 239; Backestoss v. Com., 8 Watts (Pa.) 286; Delany v. Robinson, 2 Whart. (Pa.) 503; Keller v. Trout, 17 Pa. Dist. 326. But see The Yankton, 7 F. (2d) 384 (where the court says the question is one of fact to be determined from a consideration of all the facts and circumstances of the case); Summerville v. Holliday, 1 Watts (Pa.) 507 (holding that, where there is some circumstance offered in evidence to account for a delay or lapse of time which might otherwise raise a presumption of payment, it is the duty of the court to refer it to the jury, as an open question of fact, to determine as to actual payment); McLean v. Findley, 2 Penr. & W. (Pa.) 97 (holding that there is no general rule by which the force of circumstances of counter-presumption may be safely determined, and the court may properly leave the question to the jury as a matter purely of fact). To same effect Jackson v. Sackett, 7 Wend. (N. Y.) 94.

3. Grant v. Burgwyn, 84 N. C. 560; Gilmore v. Alexander, 268 Pa. 415, 112 A 9.

4. Gilmore v. Alexander, supra.

5. Facts rebutting presumption see supra §§ 234–247.

6. McQuesney v. Hiester, 33 Pa. 435.

7. Manner and mode generally see supra §§ 3–14.

Form and medium see supra §§ 15–66.

8. Gross v. Criss, 3 Gratt. (44 Va.) 262.

Remittance by mail generally see supra § 9.

9. Anspach v. Christman, 44 Pa. Super. 99.

Payment to third person see supra §§ 4–6.

10. Chesapeake Bank v. Swain, 29 Md. 483.

11. See cases infra note 12.

12. Chalmers v. Jones, 23 S. C. 463; Effinger v. Kenney, 24 Gratt. (65 Va.) 116.

Payment in Confederate money generally see supra §§ 32, 33.

13. Generally see supra §§ 39–64.

Of particular classes of obligations and liabilities see cross references ante p 584.

14. Just v. Porter, 64 Mich. 565, 31 NW 444; Gardner v. Gorham, 1 Dougl. (Mich.) 507; Hayden v. Pierce, 71 Hun 593, 25 NYS 55 [aff 144 N. Y. 512, 39 NE 638]; and cases infra notes 15–23.

Necessity of agreement or consent to receive other medium as payment see supra § 39.

15. National State Bank v. Delahaye, 82 Iowa 34, 47 NW 999; Anspach v. Christman, 44 Pa. Super. 99.

[a] **The value of the property,** as compared with the amount of the debt, should be considered by the jury in determining whether the property was transferred as payment or as security. National State Bank v. Delahaye, 82 Iowa 34, 47 NW 999.

Payment in goods and chattels see supra § 62.

16. Marchesa v. Lobue, 168 NYS 610.

Payment by conveyance of realty see supra § 63.

17. Chase v. Brundage, 58 Oh. St. 517, 51 NE 31; Union Bank v. Smiser, 1 Sneed (Tenn.) 501.

Payment by certificate of deposit or of indebtedness see supra § 54.

18. Craddock v. Dwight, 85 Mich. 587, 48 NW 644; Hall v. Stevens, 40 Hun 578 [rev on other grounds 116 N. Y. 201, 22 NE 374, 5 LRA 802]; Jones v. Johnson, 3 Watts & S. (Pa.) 276, 38 AmD 760; Grubbe v. Pierce, 156 Wis. 29, 145 NW 207, 51 LRANS 358, AnnCas1915C 1199.

Bill as payment see supra §§ 40–49.

19. U. S.—Lyman v. U. S. Bank, 12 How. 225, 13 L. ed. 965; The Yankton, 7 F. (2d) 384.
Ala.—Keel v. Larkin, 72 Ala. 493;

ing that of a third person,[20] or a check,[21] or an order on a third person,[22] delivered to the creditor, was received as payment or only as conditional payment or additional security,[23] and whether a delay by the creditor in refusing to accept such paper as payment or in returning it was unreasonable, so that he must be deemed to have accepted it as such.[24]

[§ 273] **(3) Effect of Payment.**[25] Whether an inference of an admission of continued indebtedness may be drawn from a part payment is a question of fact for the jury.[26]

[§ 274] **(4) Application of Payment.**[27] In general, the intention of the parties as to which of two or more debts a payment is to be applied upon, or, when only one debt is shown, whether the payment was to be applied thereon, is a question of fact for the jury;[28] and so where the creditor has applied a payment otherwise than as directed by the debtor, it is for the jury to determine whether the debtor acquiesced in such application;[29] but if there is no conflict in the evidence, the question is one for the court.[30] Where neither party has applied the payment or manifested any intention as to how it should be applied, its application is a question of law for the court.[31]

Whether a debt was due at the time of a payment, so that the creditor could at his option apply the payment thereon,[32] is a question of fact for the jury.[33]

[§ 275] **4. Taking Issue from Jury.**[34] A verdict may be directed, in an action in which payment is in issue, in any circumstances proper therefor under the rules relating to the trial of civil actions

Myatts v. Bell, 41 Ala. 222; Fulford v. Johnson, 15 Ala. 385.

Ark.—Harnwell v. Arnold, 128 Ark. 10, 193 SW 506.

Cal.—Rodgers v. Pacific Coast Casualty Co., 33 Cal. A. 70, 164 P 1115.

Fla.—Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 AmR 667.

Ill.—Archibald v. Argall, 53 Ill. 307; White v. Jones, 38 Ill. 159; Rayfield v. Tincher, 180 Ill. A. 454; Stone v. Evangelical Lutheran St. Paul's Church, 92 Ill. A. 77; Hoyt v. Hasse, 80 Ill. A. 187.

Mass.—Giligian v. New England Truck Co., 163 NE 651; Stebbins v. North Adams Trust Co., 243 Mass. 69, 136 NE 880; See v. Kolodny, 227 Mass. 446, 116 NE 888; Spooner v. Roberts, 180 Mass. 191, 62 NE 4; Casey v. Weaver, 141 Mass. 280, 6 NE 372; Corner v. Pratt, 138 Mass. 446; Howland v. Coffin, 9 Pick. 52.

Minn.—Miller v. Farmers' State Bank, 165 Minn. 339, 206 NW 930.

Miss.—Keerl v. Bridgers, 18 Miss. 612.

Mo.—McMurray v. Taylor, 30 Mo. 263, 77 AmD 611; The Charlotte v. Hammond, 9 Mo. 59, 43 AmD 536; Walls v. Crocker State Bank, 205 Mo. A. 323, 220 SW 671; State v. Lichtman-Goodman, 131 Mo. A. 65, 109 SW 819.

N. H.—Foster v. Hill, 36 N. H. 526.

N. Y.—Shattuck v. Buek, 77 Misc. 95, 136 NYS 103.

Okl.—Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032, 1037 [quot Cyc]; Ohio Cultivator Co. v. Dunkin, 67 Okl. 58, 168 P 1002.

Pa.—Ramlack v. Wolf, 178 Pa. 356, 25 A 879; Horner v. Hower, 49 Pa. 475; Schilling v. Durst, 42 Pa. 126; Seltzer v. Coleman, 32 Pa. 493; Stone v. Miller, 16 Pa. 450; Mason v. Wickersham, 4 Watts & S. 100; Bixler v. Lesh, 6 Pa. Super. 459; Williams v. Moore, 9 Kulp 310.

W. Va.—Bowyer v. Knapp, 15 W. Va. 277.

Wis.—Grubbe v. Pierce, 156 Wis. 29, 145 NW 207, 51 LRANS 358, Ann Cas1915C 1199.

Ont.—Port Darlington Harbour Co. v. Squair, 18 U. C. Q. B. 533.

See also Norman v. Meeker, 91 Wash. 534, 158 P 78, AnnCas1917D 462 (where the court said that "it is here a mixed question of law and fact").

Compare National Cash Register Co. v. Riley, 23 Del. 355, 74 A 362 (holding that no question as to payment is raised by evidence showing merely the delivery of a note to the creditor to extend the time of payment, and the issue need not be submitted to the jury).

Note as payment see supra §§ 40–49.

20. Iowa.—Upton v. Paxton, 72 Iowa 295, 33 NW 773.

Mass.—Vickery v. Ritchie, 207 Mass. 318, 93 NE 578; Quimby v. Durgin, 148 Mass. 104, 19 NE 14, 1 LRA 514.

Mich.—Fremont Co-op. Produce Co. v. Lipman, 226 Mich. 387, 197 NW 544.

Miss.—Crow v. Burgin, 38 S 625.

N. H.—Wilson v. Hanson, 20 N. H. 375.

N. Y.—Darnall v. Morehouse, 45 N. Y. 64 [rev 36 HowPr 511]; Johnson v. Weed, 9 Johns. 310, 6 AmD 279.

Pa.—Cridland v. Stevens, 9 Pa. Super. 41, 43 WklyNC 243. See also Raken v. Henry, 16 Pa. Dist. 207 (applying the rule).

Bill or note of third person as payment see supra § 58.

21. Mich.—Garavaglio v. Verona Min. Co., 210 Mich. 675, 178 NW 32.

Minn.—Goodall v. Norton, 88 Minn. 1, 92 NW 445.

N. J.—Ollemar v. Irvington Bd. of Education, (Sup.) 135 A 696.

N. C.—Federal Land Bank v. Barrow, 189 N. C. 303, 127 SE 3.

Pa.—Holmes v. Briggs, 131 Pa. 233, 18 A 928, 17 AmSR 804; Briggs v. Holmes, 118 Pa. 283, 12 A 355, 4 AmSR 597; Lingenfelter v. Williams, 7 Pa. Cas. 70, 9 A 653.

R. I.—National Park Bank v. Levy, 17 R. I. 746, 24 A 777, 19 LRA 475.

Va.—Blair v. Wilson, 28 Gratt. (69 Va.) 165.

Wash.—Megrath v. Gilmore, 10 Wash. 339, 39 P 131.

Check as payment see supra §§ 50–53.

22. Bond v. McMahon, 94 Mich. 557, 54 NW 281; O'Connor v. Stevenson, 39 App. Div. 664, 57 NYS 320; Iron River Bank v. Iron River School Directors, 91 Wis. 596, 65 NW 368.

Order on third person as payment see supra § 56.

23. Presumption of payment or nonpayment by receipt of commercial paper see supra §§ 216–218.

Taking issue from jury see infra § 275.

24. Western Pac. Land Co. v. Wilson, 19 Cal. A. 338, 125 P 1076; Magee v. Carmack, 13 Ill. 289; Simms v. Clark, 11 Ill. 137; Ollemar v. Irvington Bd. of Education, (N. J. Sup.) 135 A 696; Acme Harvester Co. v. Axtell, 5 N. D. 315, 65 NW 680.

[a] **Reasonable time for return of worthless bill.**—(1) What is a reasonable time for the return of a bill of a broken bank (Magee v. Carmack, 13 Ill. 289), (2) or a counterfeit bill (Simms v. Clark, 11 Ill. 137), which has been received by a creditor in payment of his debt, is a question for the jury.

Delay in refusing or returning bill, note, or check see supra §§ 51, 72.

25. Generally see supra §§ 67–70.

26. Barrett v. Sipp, 50 Ind. A. 304, 98 NE 310.

Effect of part payment see supra § 68.

27. Generally see supra §§ 84–127.

Payments of or on particular classes of obligations and liabilities see cross references ante p 584.

28. U. S.—In re Bell Engraving Co., 214 Fed. 510.

Ala.—Penney v. Grant, 16 Ala. A. 510, 79 S 271.

Cal.—Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Light v. Stevens, 159 Cal. 288, 113 P 659.

Ga.—Phillips v. McGuire, 73 Ga. 517; Alexander v. Atlanta, 37 Ga. A. 788, 142 SE 170.

Ill.—Drake v. Lux, 233 Ill. 522, 84 NE 693; Robison v. Bailey, 113 Ill. A. 123. See Royal Colliery Co. v. Alwart Bros. Coal Co., 198 Ill. A. 67 [rev on other grounds 276 Ill. 193, 114 NE 499].

Iowa.—Bishop v. Hart, 114 Iowa 96, 86 NW 218.

Kan.—Watkins Medical Co. v. Hamm, 89 Kan. 138, 130 P 650.

Ky.—Ditto v. Hopkins, 164 Ky. 412, 175 SW 658.

Me.—Treadwell v. Moore 34 Me. 112.

Md.—Fowke v. Bowie, 4 Harr. & J. 566.

Mass.—Rand v. Farquhar, 226 Mass. 91, 115 NE 286.

Mo.—Wear v. Schmelzer, 92 Mo. A. 314; Dick Bros. Quincy Brewing Co. v. Finnell, 39 Mo. A. 276.

Mont.—Conrad Mercantile Co. v. Siler, 75 Mont. 36, 241 P 617.

N. J.—Otis El. Co. v. Stafford, 95 N. J. L. 79, 111 A 695.

N. Y.—Johnston v. Dahlgren, 166 N. Y. 354, 59 NE 987; Reich v. Reich, 6 Misc. 628, 27 NYS 137.

N. C.—Long v. U. S. Fidelity, etc., Co., 178 N. C. 503, 101 SE 11.

Pa.—Brown v. Burr, 160 Pa. 458, 28 A 828; West Branch Bank v. Moorehead, 5 Watts & S. 542; Moorehead v. West Branch Bank, 3 Watts & S. 550; Dickinson College v. Church, 1 Watts & S. 462; Women's Wear Mfg. Coöp. Banking Assoc. v. Lochter, 65 Pa. Super. 324.

S. C.—Heyward-Williams Co. v. Zeigler, 106 S. C. 425, 91 SE 298.

Tex.—Watson v. Dodson, (Civ. A.) 143 SW 329.

Vt.—Lapham v. Kelly, 35 Vt. 195.

Wis.—Yahr, etc., Drug Co. v. Draper, 187 Wis. 347, 203 NW 360.

Eng.—Lysaght v. Walker, 5 Bligh N. S. 1, 5 Reprint 208.

Can.—St. John v. Rykert, 10 Can. S. C. 278.

[a] **Form of entry** in creditor's books, although corroborative, is not conclusive of application claimed by debtor to have been made. Yahr, etc., Drug Co. v. Draper, 187 Wis. 347, 203 NW 360.

Application by parties see supra §§ 87–105.

29. Root v. Kelley, 39 Misc. 530, 80 NYS 482.

30. Gillett v. Knowles, 97 Mich. 77, 56 NW 218; Mittleman v. Todd, 155 App. Div. 924, 140 NYS 650.

31. Rogers v. State, 99 Ind. 218; Nutall v. Brannin, 5 Bush (Ky.) 11.

Application by court see supra §§ 106–122.

32. Right of creditor to apply payment to debt due see supra § 94.

33. North American Fisheries, etc. v. Green, 195 App. Div. 250, 186 NYS 313.

34. Questions for court or jury see supra §§ 269–274.

generally,[35] as where there is no material conflict in the evidence tending to show payment or nonpayment,[36] or the evidence is insufficient to justify submission of the issue to the jury,[37] or where a presumption of payment arises from lapse of time and the evidence is such that a contrary verdict would be set aside;[38] but uncontradicted evidence of payment of the principal of a debt does not entitle the debtor to a general peremptory instruction in his favor where payment of interest which was due is not shown.[39]

[§ 276] **5. Instructions—a. In General.** The rules relating to instructions in civil actions in general govern the necessity and propriety of instructions as to payment.[40] Thus, where payment is pleaded and evidence to support it is introduced, the court must call the jury's attention to the defense;[41] and the instructions must be applicable to the issues,[42] and must not be misleading, even though, abstractly considered, they state correct propositions of law,[43] and must not invade the province of the jury,[44] nor assume as facts matters not proved,[45] nor give undue prominence to a slight and inconclusive circumstance.[46] Where payment is neither pleaded nor proved, no instruction relating thereto should be given.[47]

[§ 277] **b. Particular Matters.** Payment being required to be proved by a preponderance of the evidence,[48] an instruction which permits the jury to speculate upon the probabilities as to whether it has been made or not is erroneous.[49] An instruction that if the jury believe that the creditor has been fully paid he cannot recover has been held, however, not so general as to be objectionable.[50]

Burden of proof.[51] Where payment is in issue, the court may properly instruct the jury that the burden is on the one pleading payment to prove it,[52] except where there is a presumption of payment,[53] in which case such instruction should not be given;[54] but where it is contended that payment was made by a third person who assumed the debt, an instruction that the debtor has the burden of providing a discharge both of himself and of such third person is erroneous.[55] Where inconsistent instructions on the burden of proof are given, the judgment must be reversed, it being impossible to determine which instruction the jury followed.[56]

Presumptions.[57] Where the jury are instructed relative to the presumption of payment arising from lapse of time,[58] and facts tending to account for the interval or delay or showing an admission of nonpayment are in evidence, the jury should also be instructed to consider such facts as tending to rebut the presumption.[59] In a case in which the character of the debtor's possession of an obligation is in controversy, as to whether it is rightful or fraudulent, it is error to instruct that possession of an obligation is presumptive evidence of payment.[60] Where the nonproduction of an obligation is not the sole fact in evidence bearing on the question of payment, there is no occasion to charge on any presumption that would or would not arise from that fact alone.[61]

Medium of payment.[62] When an obligation is payable in Confederate currency, it is error not to charge the jury on the provisions of a scaling act fixing the rate of payment in federal money.[63] An instruction upon payment in a medium other than money which leaves out of consideration the necessity of consent or agreement to receive such medium in payment is erroneous.[64] There is no error in

35. See cases infra notes 36–38.
Generally see Trial [38 Cyc 1563].

36. Northern Oil Co. v. Advanced Petroleum Corp., 232 Mich. 11, 204 NW 692; Seiberling v. Demaree, 27 Nebr. 854, 44 NW 46; Hall v. Stevens, 116 N. Y. 201, 22 NE 374, 5 LRA 802; Smith v. Smith, 2 Silv. Sup. 373, 6 NYS 90; Schierl v. Baumel, 75 Wis. 69, 43 NW 724.

37. Huff v. Powell, 48 Tex. Civ. A. 582, 107 SW 364.

38. Owen v. Calhoun, 8 NYS 447; Brotherson v. Jones, Lalor (N. Y.) 171.

Presumption of payment from lapse of time see supra §§ 198–213.

39. Turner v. Osborn, 106 Miss. 737, 64 S 721.

40. See cases infra notes 41–46; and infra § 277.

Instructions generally see Trial [38 Cyc 1594].

Peremptory instruction or direction of verdict see supra § 275.

41. Teasley v. Bradley, 110 Ga. 497, 35 SE 782, 78 AmSR 113.

42. Brown v. Bishop, 225 Mass. 276, 114 NE 316; Sheldon v. Heaton, 22 App. Div. 308, 47 NYS 1124.

43. Ala.—Porter v. Watkins, 196 Ala. 333, 71 S 687.

Ark.—Black v. Roberson, 112 SW 402.

Cal.—Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Low v. Warden, 77 Cal. 94, 19 P 235.

Ga.—Hartridge v. Fry, 41 Ga. 104.

Ill.—Hopkins v. Chittenden, 36 Ill. 112; Andrews v. Votaw, 240 Ill. A. 311; Swift v. Mutter, 115 Ill. A. 374. See Howell v. Empire State Surety Co., 183 Ill. A. 220.

Iowa.—Upton v. Paxton, 29 NW 809.

Ky.—Stockton v. Johnson, 6 B. Mon. 408.

Mass.—Sullivan v. Sheehan, 173 Mass. 361, 53 NE 902; Ives v. Farmers' Bank, 2 Allen 236.

N. Y.—North American Fisheries, etc. v. Green, 195 App. Div. 250, 186 NYS 313.

Or.—Boothe v. Scriber, 48 Or. 561, 87 P 887, 90 P 1002.

R. I.—Earle v. Berry, 27 R. I. 221, 61 A 671, 1 LRA 867.

Tenn.—Rollings v. Cate, 1 Heisk. 97; Bender v. Montgomery, 8 Lea 586.

Tex.—Garrett v. Robinson, 93 Tex. 406, 55 SW 564; Reed v. Corry, (Civ. A.) 61 SW 157.

Vt.—Belknap v. Billings, 78 Vt. 214, 62 A 56.

[a] **A slight inaccuracy which could not have misled the jury,** however, is not ground for objection to the instruction. Black v. Roberson, (Ark.) 112 SW 402; Ray v. Borgfeldt, 169 Cal. 253, 146 P 679; Garrett v. Robinson, 93 Tex. 406, 55 SW 564.

44. English v. English, 69 Ga. 636; Benton v. Toler, 109 N. C. 238, 13 SE 763; Gay v. McGuffin, 9 Tex. 501. See also Patterson v. Campbell, 136 Ga. 664, 71 SE 1117 (apparently applying the principle).

[a] **Charge on weight of evidence.**—In an action to set aside a deed, it was proper to refuse to charge that, if the vendor acknowledged full payment of the purchase money, it was equivalent to proof that the purchase money had been paid. English v. English, 69 Ga. 636.

Province of jury generally see supra §§ 269–274.

45. Swift v. Mutter, 115 Ill. A. 374; Ludwig v. Blackshere, 102 Iowa 366, 71 NW 356.

46. Aultman v. Connor, 25 Ill. A. 654.

47. Clonan v. Thornton, 21 Minn. 380; Exchange Nat. Bank v. Daley, (Mo. A.) 237 SW 846.

48. See supra § 261.

49. Boon v. Bliss, 98 Ill. A. 341. See Howell v. Empire State Surety Co., 183 Ill. A. 220.

50. Evans v. Collier, 79 Ga. 319, 4 SE 266.

51. Generally see supra §§ 176–187.

52. Peirce v. Sholtey, 180 Ill. A. 581; Kines v. Jamison, (Mo. A.) 277 SW 969; Adamski v. Naurot, (N. J. Sup.) 138 A 305.

53. Presumptions generally see supra §§ 188–247.

54. Weakley v. Mizell, 193 Ill. A. 494.

55. Crow v. Burgin, (Miss.) 38 S 625.

Payment by third person generally see supra § 3.

56. Lasswell v. Gahan, 122 Ill. A. 513 (where the trial court instructed the jury at the request of plaintiff that the burden of proof was on defendants to show payment, and on behalf of defendants that the burden of proof was on plaintiff to show by a preponderance of the evidence that the amounts claimed were unpaid).

57. Generally see supra §§ 188–247.

58. Presumption of payment from lapse of time see supra §§ 198–213.

59. Patterson v. Campbell, 136 Ga. 664, 71 SE 1117; Stockton v. Johnson, 6 B. Mon. (Ky.) 408.

Rebuttal of presumption from lapse of time see supra §§ 235–247.

60. Caulk v. Carlson, 44 Okl. 532, 145 P 335.

Presumption of payment from possession of obligation see supra §§ 189, 190.

61. Thompson v. Thompson, 77 Ga. 692, 3 SE 261.

Presumptions from failure to produce obligation see supra § 196.

62. Generally see supra §§ 15–66.

63. Hood v. Townsend, 40 Ga. 70.

64. Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 P 28; White v. Panama Lumber, etc., Co., 136 Wash. 554, 240 P 913.

Necessity of consent or agreement see supra § 15.

refusing to instruct that a debt is discharged if the creditor accepted a specified medium under the agreement that it should constitute payment, where there is no evidence on which to found such an instruction.[65]

Application of payment.[66] Where the application of a payment is a question of fact, the court should instruct the jury to take into consideration all the evidence in determining the intention of the parties,[67] and should direct how the payment should be applied on the state of facts found by the jury to exist;[68] and it is ordinarily proper to state the general rule that the oldest item of an account will be first paid.[69] Where there is conflicting evidence as to whether a payment was directed or agreed to be applied to a particular debt or obligation, it is error to instruct the jury how to apply it without first requiring them to find whether any direction or agreement as to its application was made;[70] and the court should not charge that the money received by the creditor became his property, since the jury might believe therefrom that he was not bound to apply it as directed or agreed.[71] An instruction that the creditor cannot recover on a debt upon which the debtor had expressly directed a payment to be applied is erroneous where there is evidence showing that the debtor had theretofore acquiesced in its application to other debts.[72] The court is authorized to give instructions relating to the creditor's right to apply a payment on other debts or obligations than the one in suit where the evidence shows their existence.[73]

Receipts.[74] Where a receipt or receipted bill is in evidence, it is the duty of the court to give specific instructions as to its legal effect in discharging the burden of proof.[75] An instruction that a receipt is evidence of the highest and most satisfactory character is not justified, in view of the rebuttability of the receipt;[76] and an instruction that a receipt is conclusive in the absence of a showing of misrepresentation, fraud, or mistake is too narrow.[77] It is not error to refuse to instruct that a receipt will stand where the evidence is equally balanced, since the instruction does not exclude the receipt in comparing the weight of the evidence on one side with that on the other.[78]

Definition of words or phrases used.[79] An instruction as to the necessity of returning the bills of a suspended bank given in payment,[80] which fails to define "a reasonable time" is erroneous.[81]

Curing error by further instructions. An erroneous instruction that a receipt of payment of accounts is prima facie evidence of payment of notes is not cured by a subsequent instruction that the burden of proving payment of the notes is on the creditor,[82] since according to the first instruction he had done that by producing the receipt.[83] But if, when the instructions given are considered as a whole, no error appears, the inaccuracy or incompleteness of one of them is not ground for objection.[84]

[§ 278] **6. Verdict and Findings.** A verdict of a jury, or findings by the court or a referee, upon an issue of payment, is governed by the rules relating to verdicts and findings in civil actions generally.[85]

Verdict. The determination by the jury of an issue of payment may ordinarily be expressed by a general verdict for the creditor for the amount found due after deducting all payments admitted or proved.[86] Where the evidence as to payment is conflicting, the general rule as to the conclusiveness of a verdict based on conflicting evidence is applicable.[87]

Findings. In accordance with the general rules relating to findings of fact,[88] a finding that payment has not been made in full leaves open the question whether it has been made in part.[89] A finding that notes were given "in compromise, settlement and cancellation" of a debt amounts to a finding that they were given and received in payment;[90] but a finding merely that the creditor received a bill or note for the amount of his debt,[91] or that he accepted a note as evidence of the debt,[92] is not equivalent to a finding that it was accepted in payment. The application of a payment according to the agreement of the parties is not established by a finding that it was applied in accordance with such agreement "and the state of the accounts."[93]

[§ 279] **H. Judgment, New Trial, and Review.** The rules governing the judgment,[94] new trial,[95] and review on appeal[96] of civil actions generally are applicable to actions in which payment is in issue.[97] Thus a new trial cannot be had by a debtor on account of the creditor's failure to produce a note given for the amount of the debt,[98] where no objection to the nonproduction was made at the trial;[99] and the grant or refusal of a new trial on a ground within the court's discretion will not be reviewed

65. McMurray v. Taylor, 30 Mo. 263, 77 AmD 611.

66. **Generally** see supra §§ 84–127.

67. Snell v. Cottingham, 72 Ill. 124 (holding charge not open to objection that it directed the jury that they must find the application from the conduct of the parties and excluding the operation of the rule of law making the application in the absence of any being made by the parties).

Application as question of fact see supra § 274.

68. Hoskins v. Brown, 84 SW 767, 27 KyL 216.

69. Lawton v. Blitch, 83 Ga. 663, 10 SE 353.

General rule of application to oldest debt see supra § 94.

70. Turrentine v. Grigsby, 118 Ala. 380, 23 S 666.

71. Reed v. Corry, (Tex. Civ. A.) 61 SW 157.

Misleading instructions generally see supra § 276.

72. Boyd v. Jones, 96 Ala. 305, 11 S 405, 38 AmSR 100.

73. Marshall Dental Mfg. Co. v. Harkenson, 84 Iowa 117, 50 NW 559.

74. **Generally** see supra §§ 75–83.

75. Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680.

Operation and conclusiveness of receipt see supra §§ 78–83.

76. Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680.

Conclusiveness and rebuttal of receipts see supra § 82.

77. Holcombe v. Laurel Creek Coal Co., 95 W. Va. 473, 123 SE 248.

78. Eagle Brewing Co. v. Colaluca, 38 R. I. 224, 94 A 680.

79. **In instructions generally** see Trial [38 Cyc 1686].

80. **Generally** see supra § 30.

81. Townsends v. Racine Bank, 7 Wis. 185.

82. Miller v. Craig, 23 Ill. A. 128 [rev on other grounds 103 Ill. 605].

83. Miller v. Craig, supra.

84. Jones v. General Constr. Co., 150 Iowa 194, 129 NW 830.

85. Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032, 1037 [quot Cyc]; and cases infra notes 86–93.

Verdict and findings generally see Trial [38 Cyc 1868, 1953].

Weight and sufficiency of evidence to support verdict or findings see supra §§ 261–266.

86. Rohr v. Anderson, 51 Md. 205.

Award of damages for breach of contract to pay money see Damages § 177.

87. Atkinson v. Murphy, (Ark.) 199 SW 907; Smith v. Camp, 84 Ga. 117, 10 SE 539; Wipperman v. Hardy, 17 Ind. A. 142, 46 NE 537; Bradley, etc., Co. v. McLaughlin, 87 Okl. 34, 208 P 1032, 1037 [quot Cyc].

Conclusiveness of verdict generally see Appeal and Error §§ 2836, 2837; Trial [38 Cyc 1902].

88. See Trial [38 Cyc 1907, 1953].

89. Barnes v. Brown, 69 N. C. 439.

90. Wiley v. Dean, 67 Minn. 62, 69 NW 629.

91. Crane v. McDonald, 45 Barb. (N. Y.) 354.

92. State v. Adams, 187 Ind. 165, 118 NE 680.

93. Ballantine v. Fenn, 88 Vt. 166, 92 A 3.

94. See Judgments 33 C. J. p 1042.

95. See New Trial 46 C. J. p 46.

96. See Appeal and Error 3 C. J. p 256.

97. See cases infra notes 98–3.

98. **Production and return of medium received as conditional payment** see supra §§ 72, 73.

99. Bill v. Porter, 9 Conn. 23.

Necessity of objections to rulings, evidence, or instructions see New Trial §§ 84–88.

where no abuse of discretion is shown.[1] A judgment will not be reversed for harmless error[2] nor for an irregularity to which appellant has assented.[3]

IX. RECOVERY OF PAYMENTS*[4]

[§ 280] **A. Voluntary Payments—1. Recoverability in General.** Except where otherwise provided by statute[5] it is a well settled general rule that a person cannot, either by way of set-off or counterclaim,[6] or by direct action,[7] recover back money which he has voluntarily paid with a full knowledge

1. Cargyle v. Belcher, 43 Ga. 207.
2. Huston v. Vail, 84 Ind. 262; Hinkle v. Higgins, 83 Tex. 615, 19 SW 147.
3. Smith v. Bankers Engineering Co., 186 Ill. A. 115.

[a] **Creditor's retention of check.** —Defendant's contention that plaintiff cannot insist that a check given by defendant was not in payment of the amount due because plaintiff retained the check in his possession is without merit where at the trial the check was put in evidence, and by consent of defendant a copy of the check was substituted for the original. Smith v. Bankers Engineering Co., 186 Ill. A. 115.

Harmless error generally see Appeal and Error §§ 2878–3055.

4. **Recovery of payments made:**
As secret preference on composition with creditors see Compositions with Creditors §§ 90–95.
By:
Agent see Agency §§ 566–574.
Surety see Principal and Surety [32 Cyc 236].
Third person to defendant for use of plaintiff see Money Received 41 C. J. p 26.
United States see United States [39 Cyc 752].
For:
Goods sold see Sales [35 Cyc 602 et seq].
Land sold see Vendor and Purchaser [39 Cyc 2001 et seq].
Use of another see Money Paid 41 C. J. p 11.
Of:
Assessments for public improvements see Drains § 274; Municipal Corporations §§ 3425–3435, 3595.
Bills and notes see Bills and Notes §§ 842–847.
Charges of carrier see Carriers §§ 708–720, 806, 1093–1099.
Claims against county see Counties § 374.
Claims against decedent's estate see Executors and Administrators § 1258.
Consular fees see Ambassadors and Consuls § 49.
Costs see Costs §§ 782, 783.
Customs duties see Customs Duties §§ 222–303.
Fees by client see Attorney and Client § 308.
Fees or compensation paid to officers see Army and Navy § 106; Counties § 176; Municipal Corporations § 1185; Officers §§ 285, 286; Sheriffs and Constables [35 Cyc 1610]; States [36 Cyc 865].
Fines see Fines, Forfeitures and Penalties §§ 38, 39.
Forged or altered paper by bank see Banks and Banking §§ 417–421.
Gambling debts see Gaming §§ 314–331, 334.
Insurance premiums or assessments see Insurance §§ 403–421; Fire Insurance §§ 148, 149; Life Insurance § 122; Mutual Benefit Insurance §§ 51, 52.
Internal revenue taxes see Internal Revenue §§ 265–272, 275.
License fees or taxes:
In general see Licenses §§ 130–134.
On intoxicating liquor see Intoxicating Liquors §§ 178–180.
Loss under insurance policy see Fire Insurance § 616; Insurance § 711; Life Insurance § 360.
Pensions see Pensions §§ 37–44.
Of:—Continued.
Rent see Landlord and Tenant §§ 1286–1288.
Rent or charge for gas see Gas § 51.
Taxes see Municipal Corporations §§ 4450–4454, 4525–4529; Taxation [37 Cyc 1174 et seq].
Usury see Usury [39 Cyc 1030 et seq].
Water rents and charges see Waters [40 Cyc 805].
Wharfage fees see Wharves [40 Cyc 909].
On mortgage debt see Mortgages § 912.
To distributee of decedent's estate see Executors and Administrators §§ 1424–1437.
To, or collected by, sheriff see Sheriffs and Constables [35 Cyc 1610].
To redeem from:
Execution sale see Executions § 761.
Tax sale see Municipal Corporations § 3578; Taxation [37 Cyc 1415].

5. See statutory provisions.

[a] **In Louisiana** the word "knowingly," as used in Civ. Code art 2301 (2279), providing that he who receives what is not due to him, whether through error or knowingly, obliges himself to restore it to him from whom he has unduly received it, does not imply necessarily the idea of wrongdoing or bad faith, but means only "with knowledge." New Orleans Drain. Commn. v. National Contracting Co., 136 Fed. 780.

6. U. S.—Cleveland, etc., Coal Co. v. Main Island Creek Coal Co., 297 Fed. 60 [certiorari den 265 U. S. 588 mem, 44 SCt 634 mem, 68 L. ed. 1194 mem]; U. S. v. Clement, 25 F. Cas. No. 14,815, Crabbe 499.

Ariz.—Merrill v. Gordon, 15 Ariz. 521, 532, 140 P 496 [quot Cyc].

Colo.—Heert v. Ridenour-Raymond Grocer Co., 48 Colo. 42, 47, 108 P 968, 139 AmSR 259 [cit Cyc].

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555, 557 [quot Cyc].

Ill.—Southern Hardwood Lumber Co. v. Scott, 46 Ill. A. 285.

Miss.—Menge v. Gulf, etc., R. Co., 97 Miss. 810, 53 S 424.

Nebr.—Desevet Nat. Bank v. Nuckolls, 30 Nebr. 754, 47 NW 202.

N. C.—Pardue v. Absher, 174 N. C. 676, 679, 94 SE 414 [quot Cyc].

Or.—Gabel v. Armstrong, 88 Or. 84, 171 P 190.

Pa.—Philadelphia Co. v. Long, 38 Pa. Co. 76, 77 [quot Cyc].

Tex.—Hunt County v. Greer, (Civ. A.) 214 SW 605, 606 [quot Cyc]; Ravenna First State Bank v. Barnett, 48 Tex. Civ. A. 82, 106 SW 182; Coates v. Clayton, 23 Tex. Civ. A. 62, 56 SW 118.

Wash.—Northern Pac. R. Co. v. Department of Public Works, 125 Wash. 428, 217 P 13, 14 [quot Cyc].

Wis.—Spear v. Dey, 5 Wis. 193.

Set-off and counterclaim generally see Set-Off and Counterclaim [34 Cyc 618].

7. U. S.—Little v. Bowers, 134 U. S. 547, 10 SCt 620, 33 L. ed. 1016; Moffitt v. Garr, 1 Black 273, 17 L. ed. 207 [aff 17 F. Cas. No. 9,690, 1 Bond 315, 1 Fish. Pat. Cas. 610]; Synthetic Patents Co. v. Sutherland, 22 F. (2d) 494 [certiorari den 276 U. S. 630 mem, 48 SCt 324 mem, 72 L. ed. 741 mem]; Detroit Edison Co. v. Main Island Creek Coal Co., 293 Fed. 495; Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489, 494 [cit Cyc]; Producers' Coke Co. v. McKeefrey Iron Co., 267 Fed. 22, 29 [certiorari den 254 U. S. 650 mem, 41 SCt 147 mem, 65 L. ed. 457 mem, and cit Cyc]; Lipman v. Phœnix Assur. Co., 258 Fed. 544, 169 CCA 484; Knudsen-Ferguson Fruit Co. v. Chicago, etc., R. Co., 149 Fed. 973, 79 CCA 483 [certiorari den 204 U. S. 670 mem, 27 SCt 786 mem, 51 L. ed. 672 mem]; The Agathe, 71 Fed. 528; Bonsack Mach. Co. v. Hess, 68 Fed. 119, 15 CCA 303; Atkins v. Peaslee, 2 F. Cas. No. 603, 1 Cliff. 446; Corkle v. Maxwell, 6 F. Cas. No. 3,231, 3 Blatchf. 413; Elliott v. U. S., 37 Ct. Cl. 136; Arthur v. U. S., 16 Ct. Cl. 422; White's Case, 11 Ct. Cl. 578 [aff 154 U. S. 661 mem, 14 SCt 1192 mem, 26 L. ed. 178 mem].

Ala.—Faulk v. Hobbie Grocery Co., 178 Ala. 254, 59 S 450; Prichard v. Sweeney, 109 Ala. 651, 19 S 730; Welch v. Marion, 48 Ala. 291; Rutherford v. McIvor, 21 Ala. 750; Hinds v. Wiles, 12 Ala. A. 596, 68 S 556.

Ariz.—Merrill v. Gordon, 15 Ariz. 521, 532, 140 P 496 [quot Cyc].

Ark.—Turpin v. Antonio, 153 Ark. 377, 240 SW 1076; Blackburn v. Texarkana Gas, etc., Co., 102 Ark. 152, 143 SW 588; Ritchie v. Bluff City Lumber Co., 86 Ark. 175, 110 SW 591; Connerly v. Inman, 95 SW 138; Larrimer v. Murphy, 72 Ark. 552, 82 SW 168; Crenshaw v. Collier, 70 Ark. 5, 65 SW 709; Vick v. Shinn, 49 Ark. 70, 4 SW 60, 4 AmSR 26.

Cal.—Hanford Gas, etc., Co. v. Hanford, 163 Cal. 108, 124 P 727; Holt v. Thomas, 105 Cal. 273, 38 P 891; Harralson v. Barrett, 99 Cal. 607, 34 P 342; Rodgers v. Wittenmyer, 88 Cal. 553, 26 P 369; Brumagim v. Tillinghast, 18 Cal. 265, 79 AmD 176; Boggs v. Fowler, 16 Cal. 559, 76 AmD 561; McMillan v. Richards, 9 Cal. 365, 70 AmD 655; Harker v. Rickershauser, (A.) 271 P 912, 915 [cit Cyc]; Shelley v. San Francisco Bd. of Trade, (A.) 262 P 403; McDougall v. Roberts, 43 Cal. A. 553, 185 P 483.

Colo.—Houston v. Snyder, 68 Colo. 214, 188 P 749; Heert v. Ridenour-Raymond Grocer Co., 48 Colo. 42, 108 P 968, 139 AmSR 259; Mitchell v. Danielson, 38 Colo. 63, 89 P 823; Lewis v. Hughes, 12 Colo. 208, 20 P 621; Steck v. Northern Colorado Irr. Co., 4 Colo. A. 323, 35 P 919.

Conn.—Sheldon v. South School Dist., 24 Conn. 88; Barkhamsted v. Case, 5 Conn. 528, 13 AmD 92; Bulkley v. Stewart, 1 Day 130, 2 AmD 57.

Del.—West v. Houston, 4 Del. 170.

D. C.—Rogers v. Garland, 19 D. C. 24; Georgetown College v. District of Columbia, 11 D. C. 43; Henelley v. Rittenhouse, 7 D. C. 76.

Fla.—Jefferson County v. Hawkins, 23 Fla. 223, 2 S 362.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555, 557 [quot Cyc]; Estes v. Thompson, 90 Ga. 698, 17 SE 98; McCarty v. Mobley, 14 Ga. A. 225, 80 SE 523.

Ida.—Kimpton v. Studebaker Bros. Co., 14 Ida. 552, 94 P 1039, 125 AmSR 185, 14 AnnCas 1126.

Ill.—Flower v. Beveridge, 161 Ill. 53, 43 NE 722; Lake v. Brown, 116 Ill. 83, 4 NE 773; St. Louis, etc., R. Co. v. Thomas, 85 Ill. 464; Puterbaugh v. Winchester, 29 Ill. 194; Gloyd v. Hotel La Salle Co., 221 Ill. A. 104; Lockwood, etc., Co. v. Chicago, 203 Ill. A. 336 [rev on other grounds 279 Ill. 445, 117 NE 81]; World Pub. Co. v. Fisher, 197 Ill. A. 641; Horttman v. Illinois State Trust Co., 173 Ill. A. 234, 240 [cit Cyc]; Convert v. Bishop, etc., Co., 152 Ill. A. 516; Alton Light, etc., Co. v.

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Rose, 117 Ill. A. 83; Sullivan v. Hudson, 109 Ill. A. 122; Sullivan v. Whitfield, 109 Ill. A. 120; Lamson v. Boyden, 57 Ill. A. 232 [aff 160 Ill. 613, 43 NE 781]; Holder v. Galena, 19 Ill. A. 409.

Ind.—Emery v. Royal, 117 Ind. 299, 20 NE 150; Lemans v. Wiley, 92 Ind. 436; Hollingsworth v. Stone, 90 Ind. 244; Brown v. Fodder, 81 Ind. 491; Powell v. Bunger, 79 Ind. 468; Worley v. Moore, 77 Ind. 567; Ferguson v. Hirsch, 54 Ind. 337; Stedman v. Boone, 49 Ind. 469; Ligonier v. Ackerman, 46 Ind. 552, 15 AmR 323; Indianapolis v. Langsdale, 29 Ind. 486; Woodburn v. Stout, 28 Ind. 77; Patterson v. Cox, 25 Ind. 261; Egbert v. Rush, 7 Ind. 706; Cummins v. White, 4 Blackf. 356; Watson v. Cunningham, 1 Blackf. 321.

Iowa.—Hartnett v. Van Alstine, 213 NW 595; Stevens v. Pels, 191 Iowa 176, 175 NW 303; Carter v. Iowa State Business Men's Bldg., etc., Assoc., 135 Iowa 368, 112 NW 828; Kellenberger v. Oskaloosa Nat. Bldg., etc., Assoc., 129 Iowa 582, 105 NW 836; Sheldon v. Steele, 114 Iowa 616, 87 NW 683; Garner v. Fry, 104 Iowa 515, 73 NW 1079; Weaver v. Stacey, 93 Iowa 683, 62 NW 22; Sewell v. Mead, 85 Iowa 343, 52 NW 227; Baldwin v. Foss, 71 Iowa 389, 32 NW 389; Dawson v. Mann, 49 Iowa 596; Muscatine v. Keokuk Northern Line Packet Co., 45 Iowa 185; Murphy v. Creighton, 45 Iowa 179; Montgomery v. Gibbs, 40 Iowa 652; Dickerman v. Lord, 21 Iowa 338, 89 AmD 579.

Kan.—Kelly v. Miami County, 85 Kan. 38, 45, 116 P 477 [cit Cyc]; Cummings Harvester Co. v. Sigerson, 63 Kan. 340, 65 P 639.

Ky.—Morganfield v. Wathen, 202 Ky. 641, 261 SW 12; Monarch v. Greenville First Nat. Bank, 115 SW 186; Aultman, etc., Co. v. Mead, 109 Ky. 583, 60 SW 294, 22 KyL 1189; Covington v. Powell, 2 Metc. 226; Tyler v. Smith, 18 B. Mon. 793; Lehan v. Kiley, 54 SW 727, 21 KyL 1186; Hunt v. Martin, 2 Litt. 82.

La.—Strange v. Continental Supply Co., 165 La. 20, 115 S 353; New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 33 S 51, 94 AmSR 395; Rivers v. New Orleans Water Works Co., 35 La. Ann. 822; Bingaman v. Cocks, 16 La. Ann. 249.

Me.—Hayes v. Lamond, 84 A 411; Ash v. McLellan, 101 Me. 17, 62 A 598; Wilcox v. Cheviott, 92 Me. 239, 42 A 403; Parker v. Lancaster, 84 Me. 512, 24 A 952; Bragdon v. Freedom, 84 Me. 431, 24 A 895; Wilson v. Barker, 50 Me. 447; Jordan v. McKenney, 48 Me. 104; Jenks v. Mathews, 31 Me. 318; Smith v. Readfield, 27 Me. 145; Norris v. Blethen, 19 Me. 348; Norton v. Marden, 15 Me. 45, 32 AmD 132; Groton v. Waldoborough, 11 Me. 306, 26 AmD 530; Rawson v. Porter, 9 Me. 119; Gilpatrick v. Sayward, 5 Me. 465.

Md.—Chipman v. Farmers', etc., Nat. Bank, 121 Md. 343, 88 A 151; Schwarzenbach v. Odorless Excavating Apparatus Co. 65 Md. 34, 3 A 676, 57 AmR 301; George Creek Coal, etc., Co. v. Allegany County, 59 Md. 255; Awalt v. Eutaw Bldg. Assoc. No. 4, 34 Md. 435; Baltimore, etc., R. Co. v. Faunce, 6 Gill 68, 46 AmD 655.

Mass.—Beacon Mfg. Co. v. Barnard Mfg. Co., 261 Mass. 397, 158 NE 751; Richardson v. Brown, 260 Mass. 509, 157 NE 603; French v. Kemp, 253 Mass. 75, 148 NE 442; Underwood v. Lennox, 242 Mass. 357, 136 NE 343; Alton v. Webster First Nat. Bank, 157 Mass. 341, 32 NE 228, 34 AmSR 285, 18 LRA 144; Regan v. Baldwin, 126 Mass. 485, 30 AmR 689; Benson v. Monroe, 7 Cush. 125, 54 AmD 716; Forbes v. Appleton, 5 Cush. 115; Hill v. Green, 4 Pick. 114.

Mich.—Lamb v. Rathburn, 118 Mich. 636, 77 NW 268; Francis v. Hurd, 113 Mich. 250, 71 NW 582; Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 NW 690; Walker v. Conant, 69 Mich. 321, 37 NW 292, 13 AmSR 391; Wheeler v. Hatheway, 58 Mich. 77, 24 NW 780; McArthur v. Luce, 43 Mich. 435, 5 NW 451, 38 AmR 204.

Minn.—Quinn v. U. S. Fidelity, etc., Co., 163 Minn. 320, 204 SW 156; Williams v. Bushnell, 157 Minn. 459, 196 NW 491; Peebles v. Sherman, 148 Minn. 282, 181 NW 715; Harper v. Carroll, 66 Minn. 487, 69 NW 610, 1069; Carson v. Cochran, 52 Minn. 67, 53 NW 1130; De Graff v. Ramsey County, 46 Minn. 319, 48 NW 1135; Smith v. Schroeder, 15 Minn. 35.

Miss.—Union Land, etc., Co. v. Pearl River County, 141 Miss. 131, 106 S 277; Wesson v. Collins, 72 Miss. 844, 18 S 360, 917; Jackson v. Newman, 59 Miss. 385, 42 AmR 367; Tupelo v. Beard, 56 Miss. 532; Hope v. Evans, Sm. & M. Ch. 195.

Mo.—Ferguson v. Butler County, 297 Mo. 20, 247 SW 795, 26 ALR 1519; Clowdis v. Hannibal, etc., R. Co., 71 Mo. 510; Irving v. St. Louis County, 33 Mo. 575; Claflin v. McDonough, 33 Mo. 412, 84 AmD 54; Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59; Pritchard v. People's Bank, 198 Mo. A. 597, 200 SW 665; Rhodes v. Dickerson, 95 Mo. A. 395, 69 SW 47; Wear v. Schmelzer, 92 Mo. A. 314; State v. Stonestreet, 92 Mo. A. 214; Kane v. Dauernheim, 60 Mo. A. 64; Buchanan v. Sahlein, 9 Mo. A. 552; Union Sav. Assoc. v. Kehlor, 7 Mo. A. 158.

Nebr.—Renfrew v. Willis, 33 Nebr. 98, 49 NW 1095; Lathrope v. McBride, 31 Nebr. 289, 47 NW 922; Gerecke v. Campbell, 24 Nebr. 306, 38 NW 847; Herman v. Edson, 9 Nebr. 152, 2 NW 368.

Nev.—Bowman v. Boyd, 21 Nev. 281, 30 P 823; Adams v. Smith, 19 Nev. 259, 9 P 337, 10 P 353.

N. H.—Clough v. Boston, etc., R. Co., 77 N. H. 222, 90 A 863, AnnCas 1915B 1195; Brown v. Marden, 61 N. H. 15; Peterborough v. Lancaster, 14 N. H. 382.

N. J.—Whitall-Tatum Co. v. Vineland, 102 N. J. L. 28, 131 A 65; Koewing v. West Orange, 89 N. J. L. 539, 99 A 203; Shoemaker v. Gloucester City Bd. of Health, 83 N. J. L. 425, 426, 85 A 312 [cit Cyc]; Camden v. Green, 54 N. J. L. 591, 25 A 357, 33 AmSR 686; Eaton v. Eaton, 35 N. J. L. 290; Bellisfield v. Holcombe, (Ch.) 139 A 817.

N. Y.—McClure v. Trask, 161 N. Y. 82, 55 NE 407; Gilford v. New York, 129 N. Y. 674, 30 NE 66; Redmond v. New York, 125 N. Y. 632, 26 NE 727, 26 AbbNCas 341; Flynn v. Hurd, 118 N. Y. 19, 22 NE 1109; Pierson v. Crooks, 115 N. Y. 539, 22 NE 349, 12 AmSR 831; Bennett v. Bates, 94 N. Y. 354 [mod 26 Hun 364]; Peo. v. Stephens, 71 N. Y. 527 [aff 51 HowPr 235]; Quincey v. White, 63 N. Y. 370; Doll v. Earle, 59 N. Y. 638 [aff 65 Barb. 298]; Flower v. Lance, 59 N. Y. 603; Buffalo, etc., R. Co. v. Stevens, 51 N. Y. 659 mem; New York v. Erben, 38 N. Y. 305, 3 Abb. Dec. 255, 7 Transcr. A. 270; New York, etc., R. Co. v. Marsh, 12 N. Y. 308; Hartford Acc. etc., Co. v. Proctor, 206 App. Div. 510, 201 NYS 420; Burne v. Van Raalte Co., 202 App. Div. 189, 195 NYS 601; Kienle v. Fred Gretsch Realty Co., 133 App. Div. 391, 117 NYS 500; F. H. Mills Co. v. State, 110 App. Div. 843, 97 NYS 676 [aff 187 N. Y. 552 mem, 80 NE 1109 mem]; Consolidated Fruit Jar Co. v. Wisner, 103 App. Div. 453, 93 NYS 128; Neufeld v. New York, 93 App. Div. 591, 87 NYS 900; Griswold v. Kile, 11 App. Div. 418, 42 NYS 367; Gilman v. New York First Nat. Bank, 63 Hun 480, 18 NYS 495; Cunningham v. Massena Springs, etc., R. Co., 63 Hun 439, 18 NYS 600 [aff 138 N. Y. 614 mem, 33 NE 1082 mem]; Starr v. Starr, 54 Hun 300, 7 NYS 580 [aff 132 N. Y. 154, 30 NE 384]; Windbiel v. Carroll, 16 Hun 101; Hayes v. Huffstater, 65 Barb. 530; Commercial Bank v. Rochester, 42 Barb. 488; Brown v. Rich, 40 Barb. 28; Wyman v. Farnsworth, 3 Barb. 369; Fleetwood v. New York, 4 N. Y. Super. 475; Fajen v. Hudson Transp. Co., 95 Misc. 629, 159 NYS 1066 [aff 188 App. Div. 961 mem, 176 NYS 897 mem]; Herald Square Cloak, etc., Co. v. Rocca, 48 Misc. 650, 96 NYS 189; Seymour v. Warren, 47 Misc. 316, 93 NYS 651 [rev on other grounds 114 App. Div. 813, 100 NYS 267 (aff 190 N. Y. 512 mem, 83 NE 1131 mem)]; Matter of Delaney, 27 Misc. 398, 58 NYS 924; Crommette v. Berg, 111 NYS 666; Lowber v. Selden, 11 HowPr 526; Abell v. Douglass, 4 Den. 305; Mowatt v. Wright, 1 Wend. 355, 19 AmD 508; Pangburn v. Bull, 1 Wend. 345; Waite v. Leggett, 8 Cow. 195, 18 AmD 441; Sprague v. Birdsall, 2 Cow. 419; Sherril v. Crosby, 14 Johns. 358; Hall v. Shultz, 4 Johns. 240, 4 AmD 270; Bazen v. Roget, 3 Johns. Cas. 87.

N. C.—Pardue v. Absher, 174 N. C. 676, 679, 94 SE 414 [quot Cyc]; Beck v. Thomasville Bank, 161 N. C. 201, 208, 76 SE 722 [cit Cyc]; Jones v. Provident Sav. L. Assur. Soc., 147 N. C. 540, 61 SE 388, 25 LRANS 803; Brummitt v. McGuire, 107 N. C. 351, 12 SE 191; Devereux v. Rochester German Ins. Co., 98 N. C. 6, 3 SE 639; Adams v. Reeves, 68 N. C. 134, 12 AmR 627; Matthews v. Smith, 67 N. C. 374; Newell v. March, 30 N. C. 441; Pool v. Allen, 29 N. C. 120.

N. D.—Rising v. Tollerud, 34 N. D. 88, 157 NW 696; Wessel v. D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 NW 922, 44 AmSR 529.

Oh.—Prudential Co-op. Realty Co., Inc. v. Youngstown, 118 Oh. St. 204, 160 NE 695; Brumbaugh v. Chapman, 45 Oh. St. 368, 13 NE 584; Stephan v. Daniels, 27 Oh. St. 527; Mays v. Cincinnati, 1 Oh. St. 268; Commercial Bank v. Reed, 11 Oh. 498; Mt. Adams, etc., R. Co. v. Cincinnati, 10 Oh. Dec. (Reprint) 679, 23 CincL Bul 68; Ashley v. Ryan, 6 Oh. Cir. Ct. 208, 3 Oh. Cir. Dec. 418 [aff 49 Oh. St. 504, 31 NE 721 (aff 153 U. S. 436, 14 SCt 865, 38 L. ed. 773)].

Okl.—Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 53 ALR 943; American Surety Co. v. Steen, 86 Okl. 252, 208 P 212.

Or.—Cram v. Powell, 100 Or. 708, 197 P 280; Thorsen v. Hooper, 50 Or. 497, 93 P 361.

Pa.—Pepperday v. Citizens' Nat. Bank, 183 Pa. 519, 38 A 1030, 63 Am SR 769, 39 LRA 529; Bryson v. Home for Disabled, etc., Soldiers, 168 Pa. 352, 31 A 1003; Armstrong v. Latimer, etc., Co., 165 Pa. 398, 30 A 990; Krumbhaar v. Yewdall, 153 Pa. 476, 26 A 219; Edgar v. Shields, 1 Grant 361; Irvine v. Hanlin, 10 Serg. & R. 219; Craig v. Lininger, 61 Pa. Super. 339, 343 [cit Cyc]; Bobst v. Gring, 32 Pa. Super. 541; Hazleton v. McGroarty, 2 Pa. Dist. 288; Philadelphia Co. v. Long, 38 Pa. Co. 76, 77 [quot Cyc].

Porto Rico.—Ponce, etc., R. Co. v. American R. Co., 7 Porto Rico Fed. 131; American R. Co. v. Wolkers, 22 Porto Rico 264; Arandes v. Báez, 20 Porto Rico 364.

R. I.—Fairbanks v. Mann, 19 R. I. 499, 34 A 1112; Second Universalist Soc. v. Providence, 6 R. I. 235.

S. C.—Goodlett v. Goodlett, 100 S. C. 84, 84 SE 414; Hardaway v. Southern R. Co., 90 S. C. 475, 489, 73 SE 1020, AnnCas1913D 266 [quot Cyc]; Shuck v. Interstate Building, etc., Assoc., 63 S. C. 134, 41 SE 28; Kenneth v. South Carolina R. Co., 49 S. C. L. 284, 98 AmD 382; Smith v. Hutchinson, 42 S. C. L. 260; Robinson v. Charleston, 31 S. C. L. 317, 45 AmD 739; Postell v. Ramsay, 5 S. C. L. 381.

S. D.—Michel Brewing Co. v. State, 19 S. D. 302, 103 NW 40, 70 LRA 911; Evans v. Hughes County, 3 S. D. 244, 52 NW 1062, 3 S. D. 580, 54 NW 603.

Tenn.—Hubbard v. Martin, 8 Yerg. 498; Gaar v. Stark, (Ch. A.) 36 SW 149.

Tex.—Taylor v. Hall, 71 Tex. 213, 9 SW 141; Gilliam v. Alford, 69 Tex. 267, 6 SW 757; Galveston City Co. v. Galveston, 56 Tex. 486; Galveston County v. Gorham, 49 Tex. 279; Farmers' Nat. Bank v. Harper, (Civ. A.) 261 SW 160; Exporters', etc., Compress, etc., Co. v. Spivey, (Civ. A.) 249 SW 1086; Downing v. Texas Co.,

of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed. In accordance with the general rule, if a person voluntarily pays what the law will not compel him to pay, but which in equity and good conscience he ought to pay, he cannot recover it back,[8] although the parties differ as to its application;[9] and on the other hand it has been held that action to recover money paid voluntarily will lie only where equity and good conscience require the return of the money.[10]

From third person. But the fact that a payment was voluntarily made does not prevent its recovery from a third person whose breach of contract made it necessary to make the payment to the payee.[11]

[§ 281] **2. What Constitutes Voluntary Payment in General.** A voluntary payment, within the meaning of the rule that such a payment cannot be recovered,[12] means a payment made by a person of his own motion, without compulsion;[13] a payment made without a mistake of fact[14] or fraud,[15] duress, coercion, or extortion,[16] on a demand which is not enforceable against the payor,[17] instead of invoking any remedy or defense which the law affords against such demand;[18] and whether in a given case a payment is voluntary depends on the facts of the particular case, as indicating an intention on the part of the payor to waive his legal rights.[19] A voluntary payment implies a legitimate cause;[20] and, in the absence of compulsion, it includes a payment

(Civ. A.) 239 SW 636; Hunt County v. Greer, (Civ. A.) 214 SW 605, 606 [quot Cyc]; Coates v. Clayton, 23 Tex. Civ. A. 62, 56 SW 118; Wunsch v. Boldt, (A.) 15 SW 193.

Utah.—Richey v. Clark, 11 Utah 467, 40 P 717; Flack v. National Bank of Commerce, 8 Utah 193, 30 P 746, 17 LRA 583.

Vt.—Strong v. Oldsmobile Co., 96 Vt. 355, 120 A 100; Gillett v. Brewster, 62 Vt. 312, 20 A 105; Sowles v. Soule, 59 Vt. 131, 7 A 715; Williams v. Colby, 44 Vt. 40; Gilson v. Bingham, 43 Vt. 410, 5 AmR 289; Taggart v. Rice, 37 Vt. 47; Wheatley v. Waldo, 36 Vt. 237; Strong v. McConnell, 10 Vt. 231.

Va.—Wessel v. Winborne, 125 Va. 502, 99 SE 719; Briggs v. Barnett, 108 Va. 404, 61 SE 797; Staples v. Staples, 85 Va. 76, 7 SE 199; Richmond v. Judah, 5 Leigh (32 Va.) 305; Lee v. Stuart, 2 Leigh (29 Va.) 76, 21 AmD 599.

Wash.—Northern Pac. R. Co. v. Department of Public Works, 125 Wash. 428, 217 P 13, 14 [quot Cyc]; Shedden v. Sylvester, 88 Wash. 348, 153 P 1; Thomas v. McCue, 19 Wash. 287, 53 P 161; Montgomery v. Cowlitz County, 14 Wash. 230, 44 P 259.

W. Va.—Gaffney v. Stowers, 73 W. Va. 420, 80 SE 501; Beard v. Beard, 25 W. Va. 486, 52 AmR 219; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434; Haigh v. U. S. Bldg., etc., Assoc., 19 W. Va. 792.

Wis.—Meeme Mut. Home Protective F. Ins. Co. v. Lorfeld, 194 Wis. 322, 216 NW 507; Burgess v. Commercial Nat. Bank, 144 Wis. 59, 128 NW 436; Gage v. Allen, 89 Wis. 98, 61 NW 361; Custin v. Viroqua, 67 Wis. 314, 30 NW 515; Buffalo v. O'Malley, 61 Wis. 255, 20 NW 913, 50 AmR 137; Powell v. St. Croix County, 46 Wis. 210, 50 NW 1013; Clancy v. McEnery, 17 Wis. 177; Spear v. Dey, 5 Wis. 193.

Eng.—Finck v. Tranter, [1905] 1 K. B. 427; Wilson v. Ray, 10 A. & E. 82, 37 ECL 67, 113 Reprint 32; East India Co. v. Tritton, 3 B. & C. 280, 10 ECL 134, 107 Reprint 738; Hamlet v. Richardson, 9 Bing. 644, 23 ECL 742, 131 Reprint 756; Bilbie v. Lumley, 2 East 470, 102 Reprint 448; Fulham v. Down, 6 Esp. 26 note, 170 Reprint 820; Cartwright v. Rowley, 2 Esp. 723, 170 Reprint 509; Marriott v. Hampton, 2 Esp. 546, 170 Reprint 450; Brown v. McKinally, 1 Esp. 279, 170 Reprint 356; Goodman v. Sayers, 2 Jac. & W. 249, 37 Reprint 622; Whiteley v. Regem, 101 L. T. Rep. N. S. 741; Slater v. Burnley, 59 L. T. Rep. N. S. 636; Brisbane v. Dacres, 5 Taunt. 143, 1 ECL 82, 128 Reprint 641.

Can.—Petry v. La Caisse D'Economie, 19 Can. S. C. 713.

Man.—Pople v. Dauphin, 31 Man. 125; Hughes v. Chambers, 14 Man. 163.

Ont.—Wakeman v. Metropolitan L. Ins. Co., 30 Ont. 705; Morton v. Corbett, 6 U. C. C. P. 251; Owen v. Taylor, 39 U. C. Q. B. 358; Montreal Assur. Co. v. McCormick, 25 U. C. Q. B. 440; Snarr v. Small, 13 U. C. Q. B. 125; Doe v. Boyer, 9 U. C. Q. B. 318.

Que.—Scott v. Hull, 39 Que. Super. 207.

Sask.—Burns v. MacDonalds Cons. Ltd., [1925] 3 DomLR 418; Court v. Glenn, 6 Sask. L. 140.

[a] **"The reason of the rule** is obvious. If a claim is to be litigated at all, it ought to be litigated promptly. By delay, the recollection of witnesses is liable to become indistinct, and documentary evidence is liable to become lost or destroyed, and witnesses are liable to die. And on many accounts, it may be important to the claimant to have the validity of his claim determined promptly and without delay; and if the other party should be allowed to pay a claim first and then litigate it afterwards, it would give him the power to select his own time for the litigation; and, by delaying it, to place his adversary at a great disadvantage." Parker v. Lancaster, 84 Me. 512, 515, 24 A 952.

Actions for recovery of payments generally see infra §§ 332–341.

8. Cal.—Price v. Manuel, 81 Cal. A. 267, 253 P 746.

Ga.—Strange v. Franklin, 126 Ga. 715, 55 SE 943.

Mass.—Putnam v. Bolster, 216 Mass. 367, 103 NE 942.

N. J.—Eaton v. Eaton, 35 N. J. L. 290.

N. Y.—New York v. Erben, 23 N. Y. Super. 189, 24 HowPr 358 [aff 38 N. Y. 305, 3 Abb. Dec. 255, 7 Transcr. A. 270].

Pa.—Clark v. Davidson, 3 Pa. Dist. & Co. 730 [aff 83 Pa. Super. 79].

Eng.—Bize v. Dickason, 1 T. R. 285, 99 Reprint 1097.

9. Price v. Manuel, 81 Cal. A. 267, 253 P 746.

Application of payments generally see supra §§ 84–127.

10. Vincennes Bridge Co. v. Atoka County, 248 Fed. 93, 160 CCA 233; W. P. Brown, etc., Lumber Co., Inc. v. Exchange Nat. Bank, 8 La. A. 328; Williamson v. Johnson, 5 N. J. Eq. 537; Moses v. Macferlan, 2 Burr. 1005, 97 Reprint 676. See Johnston v. Miller, 31 N. S. 83.

[a] **In Louisiana,** under the code, where one erroneously pays more than he owes, the person receiving is obliged to return it. W. P. Brown, etc., Lumber Co., Inc. v. Exchange Nat. Bank, 8 La. A. 328.

Money paid generally see Money Paid 41 C. J. p 11.

11. Devine v. Meramec Portland Cement, etc., Co., (Mo. A.) 253 SW 444.

[a] **Rule applied.**—In an action against a seller to recover the freight paid by the buyer because of the seller's failure to ship the goods over the railroad for whose lines they were to be used and which was to transport them free, a requested instruction to find for defendant unless plaintiff notified defendant and demanded defendant pay the freight charges before they were paid by plaintiff, or that plaintiff was actually under duress so that the payment was not voluntary, was properly refused. Devine v. Meramec Portland Cement, etc., Co., (Mo. A.) 253 SW 444.

12. See supra § 280.

13. Engelken v. Eden Tp. Justice Ct., 50 Cal. A. 157, 195 P 265; Hammond v. Oregon, etc., R. Co., 117 Or. 244, 243 P 767; Cram v. Powell, 100 Or. 708, 197 P 280; Com. v. Morse, 9 Pa. Dist. & Co. 41; Amsden v. Danielson, 19 R. I. 533, 35 A 70.

Compulsory payments see infra §§ 293–310.

14. Payments under mistake of fact see infra §§ 318–329.

15. Payments induced by fraud see infra § 311.

16. Compulsory payments see infra §§ 293–310.

17. Ala.—McLendon v. Western Union Tel. Co., 15 Ala. A. 230, 73 S 120.

Ark.—Ritchie v. Bluff City Lumber Co., 86 Ark. 175, 110 SW 591.

Cal.—Leahy v. Warden, 163 Cal. 178, 124 P 825; Shelley v. San Francisco Bd. of Trade, (A.) 262 P 403; McTigue v. Arctic Ice Cream Supply Co., 20 Cal. A. 708, 130 P 165.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555.

Kan.—Wabaunsee County v. Walker, 8 Kan. 431.

Ky.—Louisville Gas, etc., Co. v. Bosworth, 169 Ky. 824, 185 SW 125.

N. Y.—Kienle v. Fred Gretsch Realty Co., 133 App. Div. 391, 117 NYS 500.

Okl.—Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 53 ALR 943.

Vt.—Strong v. Oldsmobile Co., 96 Vt. 355, 120 A 100.

Va.—Wessel v. Winborne, 125 Va. 502, 99 SE 719.

And see cases supra note 7.

[a] **Payments held voluntary.**—(1) Payment for a telegram after examining the message knowing of a delay in delivery. McLendon v. Western Union Tel. Co., 15 Ala. A. 230, 73 S 120. (2) Bank depositor's payment of a protested cashier's check given to pay a third party's check deposited for collection. Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 53 ALR 943. (3) Payment for war risk insurance, where the payor had an option to pay or else have a sale contract rescinded. Wessel v. Winborne, 125 Va. 502, 99 SE 719.

18. See infra § 310.

19. Engelken v. Eden Tp. Justice Ct., 50 Cal. A. 157, 195 P 265; Adrico Realty Corp. v. New York, 250 N. Y. 29, 164 NE 732, 733.

"This rule of voluntary payment is dependent upon what is considered voluntary and what duress, also upon what is a mistake of law, as distinguished from a mistake of fact, and the determination of these questions varies the application of the rule." Adrico Realty Corp. v. New York, supra.

20. North Western Employment Agency v. Putnick, 24 Que. K. B. 285.

made on an illegal claim or demand with knowledge of its illegality or groundlessness;[21] and also includes a payment made on a moral obligation,[22] or on a natural obligation, that is, one which, although invalid for want of form or some reason of general policy, is not in itself immoral or unjust.[23]

Essential elements. It is essential to a voluntary payment that the payor must have had the freedom of exercising his will,[24] and must have acted with a full knowledge of all the material facts,[25] although he may have been in ignorance of his legal rights.[26]

Payments not voluntary or not included. A payment is not voluntary if it is made under any species of compulsion;[27] and a voluntary payment does not include the mere indorsement of a draft on delivery,[28] or an overpayment on a running account.[29] The retention by a debtor of part of a debt due a creditor, although made with the knowledge of the creditor, is in no sense a voluntary payment of the amount retained,[30] especially where this is done contrary to the wishes of the alleged debtor and it is found that nothing is due from him.[31] A denial of a right of set-off in favor of the debtor is not a voluntary payment by the debtor to the creditor of the amount of such set-off, so as to preclude the debtor's subsequent recovery thereon.[32]

[§ 282] **3. Applications of Rules to Particular Payments in General.** The general rule that a voluntary payment cannot be recovered back[33] has been held to apply to voluntary payments by a corporation,[34] or by an officer thereof;[35] to a payment to an agent for the payee, which could not have been recovered back if it had been paid to the payee directly;[36] to a voluntary payment for services rendered,[37] or for an option;[38] to tips paid over by an employee to his employer, and not claimed until after the employment is terminated;[39] and to the repayment, by one indicted for larceny, of the sum alleged to have been stolen, although he is afterward tried and acquitted.[40] A bankrupt, although discharged, cannot recover back payments voluntarily made by him on his indebtedness,[41] but this does not prevent him from recovering payments made, without his authority, by the custodian of his funds[42]

Claim or color of right. Money voluntarily paid on a claim of right with knowledge of the facts by the payor cannot be recovered on the ground that

21. Ark.—Williford v. Eason, 110 Ark. 303, 161 SW 498.

Cal.—Hanford Gas, etc., Co. v. Hanford, 163 Cal. 108, 124 P 727; Shelley v. San Francisco Bd. of Trade, (A.) 262 P 403; Engelken v. Eden Tp. Justice Ct., 50 Cal. A. 157, 195 P 265; McTigue v. Arctic Ice Cream Supply Co., 20 Cal. A. 708, 130 P 165.

Ida.—Kimpton v. Studebaker Bros. Co., 14 Ida. 552, 94 P 1039, 125 AmSR 185, 14 AnnCas 1126.

Ky.—Morganfield v. Wathen, 202 Ky. 641, 261 SW 12.

N. Y.—Peyser v. New York, 70 N. Y. 497, 26 AmR 624 [rev 8 Hun 413]; Davis v. Kling, 77 Hun 598, 28 NYS 1026.

[a] **Thus,** where an illegal demand is made against the person or property of an individual, which can be enforced only by a judgment therefor in an action at law, wherein he may contest its legality, or if made under a threatened sale of his property, and he can contest the validity of the proceedings whenever an attempt is made to disturb his possession, and he pays the claim or demand rather than be subjected to such action or to have his property sold, such payment is voluntary, and cannot be recovered. Trower v. San Francisco, 152 Cal. 479, 92 P 1025, 15 LRANS 183.

22. Whiteside v. Verity, 269 Fed. 227; Sando v. Smith, 237 Ill. A. 570; Monarch v. Greenville First Nat. Bank, (Ky.) 115 SW 186.

[a] **No legal obligation immaterial.**—The fact "that the one making the payment was in fact under no legal obligation to pay and that the other had no right to receive the payment is of no consequence and will not entitle the one making the payment to sue for a recovery of the money." Sando v. Smith, 237 Ill. A. 570, 580.

23. Banta v. McSpadden, 147 La. 847, 86 S 287; Wagnon v. Schick, 139 La. 347, 71 S 534; Bowers v. Hale, 14 La. Ann. 419; Coxe v. Rowley, 12 Rob. (La.) 273; Worsley v. New Orleans Second Municipality, 9 Rob. (La.) 324, 41 AmD 333; Hills v. Kernion, 7 Rob. (La.) 522; Slidell v. Pritchard, 5 Rob. (La.) 101; Rosenda v. Zabriskie, 4 Rob. (La.) 493; Flower v. Millaudon, 19 La. 185; Kenner v. Holliday, 19 La. 154; Merchants' Bank v. Gove, 15 La. 378; Poydras v. Turgeau, 14 La. 34; Perrillat v. Puech, 2 La. 428.

[a] **Illustrations.**—(1) A debtor, although released on a partial payment, is under a natural obligation to pay the balance, which, therefore, if paid, he cannot recover back. Jamison v. Ludlow, 3 La. Ann. 492. (2) Funds a curator retains for his claim for counsel fees, to which he is not legally entitled, are not a payment within the rule forbidding the recovery of money paid under a natural obligation. Key's Succ., 5 La. Ann. 567.

24. Scholey v. Mumford, 60 N. Y. 498; Clancy v. Dutton, 129 App. Div. 23, 113 NYS 124.

25. U. S.—Producers' Coke Co. v. McKeefrey Iron Co., 267 Fed. 22, 29 [certiorari den 254 U. S. 650 mem, 41 SCt 147 mem, 65 L. ed. 457 mem, and cit Cyc].

Ala.—Beasley v. Beasley, 206 Ala. 480, 481, 90 S 347, 348 [cit Cyc].

Cal.—Leahy v. Warden, 163 Cal. 178, 124 P 825; Engelken v. Eden Tp. Justice Ct., 50 Cal. A. 157, 195 P 265.

Ga.—McCarty v. Mobley, 14 Ga. A. 225, 80 SE 523.

Ky.—Morganfield v. Wathen, 202 Ky. 641, 261 SW 12.

N. Y.—Lake v. Artisans Bank, 3 Abb. Dec. 10, 3 Keyes 276, 1 Transcr. A. 71, 3 AbbPrNS 209, 32 HowPr 617; Waite v. Leggett, 8 Cow. 195, 18 AmD 441.

N. D.—Nollman v. Evenson, 5 N. D. 344, 65 NW 686.

Pa.—Com. v. Morse, 9 Pa. Dist. & Co. 41; Philadelphia Co. v. Long, 38 Pa. Co. 76, 77 [quot Cyc].

Vt.—Strong v. Oldsmobile Co., 96 Vt. 355, 120 A 100.

Payment under mistake of fact see infra §§ 318–329.

26. McCarty v. Mobley, 14 Ga. A. 225, 80 SE 523; Sando v. Smith, 237 Ill. A. 570; World Pub. Co. v. Fisher, 197 Ill. A. 641; Bobst v. Gring, 32 Pa. Super. 541.

Payment under mistake of law generally see infra §§ 312–317.

27. See infra §§ 293–310.

28. Rawson v. Bethesda Baptist Church, 221 Ill. 216, 77 NE 560, 6 LRANS 448.

Recovery of payments made of bills and notes generally see Bills and Notes §§ 842–847.

29. Farrell v. Burbank, 57 Minn. 395, 59 NW 485.

[a] **Thus** where plaintiff is in the employ of defendants, who are advancing him money from time to time on his wages, an overpayment by them to him cannot be considered within the rule as to voluntary payments in the sense that they cannot require him to account for it. Farrell v. Burbank, 57 Minn. 395, 59 NW 485.

30. Reed v. Hayward, 82 App. Div. 416, 81 NYS 608; Sondheimer v. Troy, etc., R. Co., 3 NYS 444; Ponce, etc., R. Co. v. American R. Co., 7 Porto Rico Fed. 634; Ward v. Wallis, [1900] 1 Q. B. 675.

31. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 NYS 52, 103 App. Div. 453, 93 NYS 128.

32. Carscaden v. Shore, 17 U. C. C. P. (Ont.) 493.

33. See supra § 280.

34. Commonwealth Brokerage Co. v. Oil Fields Corp., 174 Ark. 746, 296 SW 714; Southern Hardwood Lumber Co. v. Scott, 46 Ill. A. 285; Pardue v. Absher, 174 N. C. 676, 679, 94 SE 414 [cit Cyc]; Macon County v. Jackson County, 75 N. C. 240.

[a] **Thus** a corporation, without mistake, paying money on demand not enforceable against it for another corporation cannot recover the amount paid. Commonwealth Brokerage Co. v. Oil Fields Corp., 174 Ark. 746, 296 SW 714.

By or to public corporation see infra § 286.

35. Schaedel v. Liberty Trust Co., 99 N. J. L. 380, 123 A 714.

[a] **Illustration.**—Where a director of a trust company paid, at the instance of the president, his proportion of the loss sustained by a customer's overdraft, such amount cannot be recovered from the trust company. Schaedel v. Liberty Trust Co., 99 N. J. L. 380, 123 A 714.

36. Niblo v. Binsse, 3 Abb. Dec. (N. Y.) 375, 1 Keyes 476.

Liability of agent to third person for money paid to him generally see Agency §§ 495–497.

37. Whiteside v. Verity, 269 Fed. 227.

38. Bunch v. Elizabeth City Lumber Co., 134 N. C. 116, 46 SE 24, 131 N. C. 830, 42 SE 1040.

[a] **Thus** money paid for an option to cut timber during a certain period cannot be recovered back by the purchaser of the option or his assignee merely because he fails to take advantage of the option. Bunch v. Elizabeth City Lumber Co., 134 N. C. 116, 46 SE 24, 131 N. C. 830, 42 SE 1040.

39. Gloyd v. Hotel La Salle Co., 221 Ill. A. 104.

40. Puckett v. Roquemore, 55 Ga. 235.

41. Horowitz v. Cohen, 172 App. Div. 700, 159 NYS 325.

42. Horowitz v. Cohen, supra.

[a] **Thus** delivery by a bank of plaintiff's money, after his adjudication in bankruptcy, without his knowledge or consent, to defendant in

the claim was invalid or unenforceable,[43] although the payor protests at the time against his liability.[44]

[§ 283] **4. Payment between Parties to Fiduciary Relation.** An exception to the general rule exists where a fiduciary relation exists between the payee and the payor.[45] A payment to the agent of the payor to be paid over to a third person is not a voluntary payment so as to preclude the payor from recovering the money from his agent before he has paid it over to such third person.[46]

[§ 284] **5. Payment of Debt of Third Person.**[47] If a person, with full knowledge of the facts, voluntarily pays the debt of a third person, he cannot recover back the amount so paid;[48] and in the absence of ratification he cannot recover such payment from the debtor.[49]

[§ 285] **6. Money Paid on Contract in General.**[50] Where a person has acted with full knowledge of all the material facts, he cannot recover money which he had voluntarily paid under a contract,[51] and this rule applies, even though the contract is an illegal one, if the contract is executed and the parties are in pari delicto.[52] A recovery, however, as for money had and received may be had of money paid on a contract, the consideration for which has wholly failed,[53] or where the contract is one which plaintiff has rescinded or has a right to rescind.[54]

[§ 286] **7. Payments by or to Public Corporations.**[55] The rule that voluntary payments cannot

payment of a note executed by plaintiff to defendant's intestate before the bankruptcy proceedings, is not a voluntary payment precluding recovery. Horowitz v. Cohen, 172 App. Div. 700, 159 NYS 325.

43. Ala.—Hinds v. Wiles, 12 Ala. A. 596, 68 S 556.

Ill.—Sando v. Smith, 237 Ill. A. 570; Convert v. Bishop, etc., Co., 152 Ill. A. 516.

Kan.—Kelly v. Miami County, 85 Kan. 38, 116 P 477.

Me.—Gooding v. Morgan, 37 Me. 419.

Mass.—French v. Kemp, 253 Mass. 75, 148 NE 442.

Pa.—Wagner v. Beaver Valley Water Co., Inc., 9 Pa. Dist. & Co. 90; Commonwealth Bldg., etc., Assoc. v. Stroh, 12 Pa. Dist. 509.

44. French v. Kemp, 253 Mass. 75, 148 NE 442.

Effect of protest generally see infra § 305.

45. Blue v. Smith, 46 Ill. A. 166.

[a] **Illustration.**—An administrator occupies a fiduciary relation to the widow of his intestate; and, when he procures an excessive amount of fees and costs from the widow, he cannot defend an action for the recovery of the excess on the ground that the payment was voluntary, and that it was her duty to investigate the facts before making payment. Blue v. Smith, 46 Ill. A. 166.

Compensation of executor or administrator generally see Executors and Administrators §§ 2394-2444.

46. Bunger v. Roddy, 70 Ind. 26.

Cross references:

Duty of agent to deliver funds or property to principal generally see Agency § 402.

Recovery back of commissions paid agent see Agency § 452.

Recovery of payments made by agent see Agency §§ 566-574.

47. Recovery of money paid generally see Money Paid 41 C. J. p 11.

48. U. S.—George v. Thompson, 285 Fed. 902.

Cal.—Capitol Woolen Co. v. Berger, (A.) 262 P 351.

Ill.—Flower v. Beveridge, 161 Ill. 53, 43 NE 722.

Kan.—Linscott State Bank v. Fidelity, etc., Co. 94 Kan. 30, 145 P 868.

La.—Thompson v. Chretien, 3 La. Ann. 116; Amezago v. Vallego, 1 La. 216.

Mo.—Devine v. Meramec Portland Cement, etc., Co., (A.) 253 SW 444.

Mont.—Watterson v. Hill, 276 P 948.

N. Y.—McNamee v. Zimmett, 207 App. Div. 60, 202 NYS 372 [aff 239 N. Y. 602, 147 NE 213]; Armondi v. Lockman, 133 Misc. 390, 232 NYS 635; Taylor v. Baldwin, 10 Barb. 626; Fowler v. Moller, 23 N. Y. Super. 374; Schlaefer v. Heiberger, 4 NYS 74.

Pa.—Boas v. Updegrove, 5 Pa. 516, 47 AmD 425.

Tex.—Central Texas Min., etc., Co. v. Weems, 73 Tex. 252, 11 SW 270; Hunt County v. Greer, (Civ. A.) 214 SW 605, 606 [quot Cyc].

Va.—Traders, etc., Bank v. Black, 108 Va. 59, 60 SE 743.

Wash.—Mutual Sales Agency v. Hori, 145 Wash. 236, 259 P 712; Northern Pac. R. Co. v. Department of Public Works, 125 Wash. 428, 217 P 13, 14 [quot Cyc]; Stahl v. Schwartz, 81 Wash. 293, 142 P 651.

Ont.—Levinson v. Gault, 9 OntWN 14.

Que.—Roberts v. Morissette, 61 Que. Super. 430.

But see Tucker v. Denton, 106 SW 280, 32 KyL 521, 15 LRANS 289 (holding that, where plaintiff paid defendants a sum of money to relieve her parents from a supposed enforceable contract for the sale of their land, plaintiff was not a mere volunteer in making such payment so as to preclude her recovery thereof because the land contract was unenforceable).

"One person cannot make himself the creditor of another by voluntarily paying a demand of that other which he is under no obligation to pay." Mutual Sales Agency v. Hori, 145 Wash. 236, 259 P 712, 714.

[a] **Husband paying for wife.**—A contract made between a wife and the proprietor of a school for the education of a daughter can be contested only by those in privity to it, and the fact that the husband made a payment thereon for the convenience of his wife does not establish any privity between him and the school which entitles him to contest the contract, so as to recover such payment. George v. Thompson, 285 Fed. 902.

[b] **A prepayment of freight** by the consignor on demand of the carrier is not a voluntary payment and may be recovered from the consignee who had contracted to pay it. Keeling v. Connally, (Tex. Civ. A.) 157 SW 232. Recovery of charges paid carrier generally see Carriers §§ 708-720, 806, 1093-1099.

49. Maryland Casualty Co. v. Givens, 177 Ky. 131, 197 SW 497.

Recovery of money paid without previous request or ratification generally see Money Paid §§ 3-15.

50. Recovery of payments on illegal contracts see Contracts § 440 et seq.

51. U. S.—Cleveland, etc., Coal Co. v. Main Island Creek Coal Co., 297 Fed. 60 [certiorari den 265 U. S. 588 mem, 44 SCt 634 mem, 68 L. ed. 1194 mem]; Benton Harbor-St. Joseph Gas, etc., Co. v. Middle West Coal Co., 271 Fed 216; Lazarus Liquor Co. v. Kessler, 269 Fed. 520; Camden Iron Works v. U. S., 50 Ct. Cl. 191.

Ark.—Banks v. Walters, 95 Ark. 501, 130 SW 519.

Colo.—Steck v. Northern Colorado Irr. Co., 4 Colo. A. 323, 35 P 919.

Ill.—Illinois Glass Co. v. Chicago Tel. Co. 234 Ill. 535, 85 NE 200, 18 LRANS 124.

Iowa.—Carter v. Iowa State Business Men's Bldg., etc., Assoc., 135 Iowa 368, 112 NW 828.

Me.—Appleton v. Chase, 19 Me. 74

Mo.—Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59.

N. J.—Loesser Mfg. Co. v. Julius Schmid, Inc., 100 N. J. L. 123, 125 A 30; McCrory Stores Corp. v. S. M. Braunstein, Inc., 99 N. J. L. 166, 122 A 814; New Jersey Brick Co. v. A. M. Krantz Co., 94 N. J. L. 255, 109 A 350.

N. Y.—Payne v. Witherbee, 200 N. Y. 572 mem, 93 NE 954; F. H. Mills Co. v. State, 110 App. Div. 843, 97 NYS 676 [aff 187 N. Y. 522 mem, 80 NE 1109 mem]; Cunningham v. Massena Springs, etc., R. Co., 63 Hun 439, 18 NYS 600 [aff 138 N. Y. 614 mem, 33 NE 1082 mem]; Smith v. Zeigler, 17 NYS 338.

Oh.—Cincinnati v. Cincinnati Gas Light, etc., Co., 53 Oh. St. 278, 41 NE 239.

Tex.—Jones v. Gardner, (Civ. A.) 112 SW 826.

[a] **Illustrations.**—(1) Plaintiff cannot recover money paid defendant building and loan association in excess of the amount claimed by plaintiff to be due, where the payments are voluntarily made by plaintiff under a claim by defendant that they are owing, and no fraud or misrepresentations on defendant's part is shown. Carter v. Iowa State Business Men's Bldg., etc., Assoc., 135 Iowa 368, 112 NW 828. (2) The refusal of the secretary of the navy to cancel a contractor's bond and to notify the surety thereof is no ground for recovery from the United States of premiums paid, where it nowhere appears that the contractor was obligated to pay premiums until such cancellation. Bethlehem Steel Co. v. U. S., 246 U. S. 523, 38 SCt 347, 62 L. ed. 866 [aff 51 Ct. Cl. 394]. (3) Where plaintiff, who had purchased land and was unable to pay for it, induced defendants to pay the balance due and take a deed and allow him to pay them for the land in installments, and he overpays, such overpayment will be regarded as a voluntary payment, and he will not be entitled to recover the same. Banks v. Walters, 95 Ark. 501, 130 SW 519.

[b] **Telephone overcharge.**—A customer of a telephone company cannot recover excessive charges for services voluntarily paid without fraud, mistake of fact, or other ground for annulling the contract. Illinois Glass Co. v. Chicago Tel. Co., 234 Ill. 535, 85 NE 200, 18 LRANS 124.

[c] **Overcharge for electricity.**—An overpayment or payment of an excessive rate for electricity cannot be recovered. Swift v. Columbia R., etc., Co., 17 F. (2d) 46, 51 ALR 983; Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59; Payne v. Witherbee, 200 N. Y. 572 mem, 93 NE 954.

52. See Contracts § 440.

53. See infra § 330.

Action for money had and received see Money Received § 11.

54. Appleton v. Chase, 19 Me. 74; Putnam v. Bolster, 216 Mass. 367, 103 NE 942.

Action for money had and received see Money Received § 17.

55. Recovery of payments made:

be recovered back[56] applies to payments by a private individual or corporation to the United States, state, county, town, city, or other public corporation, or to an officer thereof as such.[57] On the other hand, while the rule has been applied to payments by public officers as such,[58] the general rule is that, where a wrongful payment is made by the agent or officer of a public corporation, without authority therefor, it is not a voluntary payment by the corporation and may be recovered back by it,[59] and accordingly if a public officer pays out public funds in satisfaction of the debts of another, the debtor will be bound to reimburse the public corporation.[60]

[§ 287] **8. Payment to Officer of Court.**[61] The general rule[62] does not apply to, but recovery may be had of, payments made to an officer of the court under a misapprehension as to legal rights,[63] or under protest against arbitrary action on the part of such officer,[64] except to the extent that the money has been paid out in good faith under the direction of the court.[65]

[§ 288] **9. Payment of Interest.**[66] Where a party voluntarily and without mistake of fact pays interest in excess of what is legally due, it is governed by the rule applicable to any other voluntary payment and cannot be recovered back,[67] except that in some jurisdictions where the payment is of usurious interest it may be recovered back.[68] In accordance with this rule one who makes a voluntary payment of interest is not entitled to have the excess over the amount actually due applied on the principal, since to do so would be equivalent to holding that it could be recovered back.[69] It has been held that the payment by a customer to his broker of interest in excess of the agreed rate in order to procure the return of his collateral is not a voluntary

By United States see United States [39 Cyc 952].
Of:
Assessments for public improvements see Drains § 274; Municipal Corporations §§ 3425-3435, 3595.
Fees or compensation paid to officers see Army and Navy § 106; Counties § 176; Municipal Corporations § 1185; Officers §§ 285, 286; Sheriffs and Constables [35 Cyc 1610]; States [36 Cyc 98].
Internal revenue taxes see Internal Revenue §§ 265-272.
Taxes see Municipal Corporations §§ 4450-4454, 4525-4529; Taxation [37 Cyc 1174 et seq].

56. See supra § 280.

57. U. S.—U. S. v. Wilson, 168 U. S. 273, 18 SCt 85, 42 L. ed. 464 [rev 31 Ct. Cl. 471]; Selby v. U. S., 47 Fed. 800.
Ill.—Alton Light, etc., Co. v. Rose, 117 Ill. A. 83.
Iowa.—Harbeck v. Sioux City, 199 Iowa 763, 202 NW 507.
N. Y.—Drennan v. Hampton, 191 App. Div. 576, 181 NYS 777 [aff 232 N. Y. 576 mem, 134 NE 578 mem].
Pa.—Com. v. Morse, 9 Pa. Dist. & Co. 41; Lakeland Stables v. Kaufman, 13 Pa. Dist. 569.
Ont.—Benjamin v. Elgin County, 26 U. C. Q. B. 660; Austin v. Simcoe County, 22 U. C. Q. B. 73.

[a] **Money paid to a public officer** (1) in the sett'ement of his accounts cannot ordinarily be recovered back; but if he opens the settlement by bringing a suit for compensation which at the time it was supposed that he was not entitled to receive, he opens the whole case and defendants can maintain a counterclaim for moneys erroneously paid him. Yoes v. U. S., 31 Ct. Cl. 293. (2) Custody and accounting for funds generally see Officers §§ 310-325.

58. Garretson v. Joseph, 100 Ala. 279, 13 S 948; Warren County v. Gregory, 42 Ind. 32.

[a] **Thus,** where the county commissioners allow an excessive claim for printing, and there is no mistake of fact, the test being before them and it being their duty to know the facts, the money cannot be recovered back. Warren County v. Gregory, 42 Ind. 32.

[b] **A justice of the peace,** who accepts a judgment debtor's check payable to himself personally in payment of the judgment rendered by him, satisfies the judgment on his record, and pays to the successful party the amount due him, cannot, on dishonor of the check, recover of such party the money paid him. Garretson v. Joseph, 100 Ala. 279, 13 S 948.

59. U. S.—Eslin v. District of Columbia, 29 Ct. Cl. 370.
Ala.—Demopolis v. Marengo County, 195 Ala. 214, 70 S 275.
Colo.—Farr v. Peo., 58 Colo. 483, 146 P 238; Ward v. Barnum, 10 Colo. A. 496, 52 P 412.
Iowa.—Pocahontas County v. Katz-Craig Contracting Co., 181 Iowa 1313, 165 NW 422; State v. Young, 134 Iowa 505, 110 NW 292.
Kan.—Logan County School Dist. No. 49 v. Thomas County Community High School, 126 Kan. 51, 54, 267 P 23 [cit Cyc]; Ritchie v. Topeka, 91 Kan. 615, 138 P 618.
Mich.—Wayne County v. Reynolds, 126 Mich. 231, 85 NW 574, 86 AmSR 541 [dist Advertiser, etc., Co. v. Detroit, 43 Mich. 116, 5 NW 72, and overr Wayne County v. Randall, 43 Mich. 37, 5 NW 75].
N. J.—Lodi v. Van Bussom, 7 N. J. L. J. 42.
N. Y.—Ft. Edward v. Fish, 156 N. Y. 363, 50 NE 973; Richmond County v. Van Clief, 60 N. Y. 645; Richmond County v. Ellis, 59 N. Y. 620; New York v. Erben, 38 N. Y. 305, 3 Abb. Dec. 255, 7 Transcr. A. 270, 35 HowPr 644 [aff 23 N. Y. Super. 189, 24 How Pr 358]; Donohue v. New York, 10 Hun 37; Cayuga County v. State, 112 Misc. 517, 183 NYS 646; Erie County v. Tonawanda, 95 Misc. 663, 159 NYS 714 [aff 176 App. Div. 942, 162 NYS 994 (aff 221 N. Y. 656 mem, 117 NE 1066 mem)]. Contra Onondaga v. Briggs, 2 Den. 26.
N. D.—Wiles v. McIntosh County, 10 N. D. 594, 88 NW 710.
Tex.—Cameron County v. Fox, (Commn. A.) 2 SW (2d) 433, 436 [cit Cyc].
Va.—Com. v. Field, 84 Va. 26, 3 SE 882.

[a] **Thus,** where the funds of a municipal corporation are used by its officers without its authority for the purpose of making a payment which is illegal, because forbidden by statute, to a person who receives it with knowledge of the illegality, the corporation does not really make the payment and is not in pari delicto with the person to whom the payment is made, nor is the payment a voluntary one, so as to prevent the corporation from recovering the amount so paid. Ft. Edward v. Fish, 156 N. Y. 363, 50 NE 973.

Recovery by government of money paid under mistake, through fraud, or in violation of law see United States [39 Cyc 752].

60. District of Columbia v. Washington, etc., R. Co., 15 D. C. 214.

61. **Withdrawal or reclaim of deposit in court** see Deposits in Court §§ 35, 36, 47.

62. See supra § 280.

63. Trower v. San Francisco, 152 Cal. 479, 92 P 1025, 15 LRANS 183; Sando v. Smith, 237 Ill. A. 570; In re Home Provident Safety Fund Assoc., 129 N. Y. 288, 29 NE 323; Peo. v. New York Bldg. Loan Banking Co., 45 Misc. 4, 9 NYS 809; Ex p. James, L. R. 9 Ch. 609.

64. Title Guarantee, etc., Co. v. Goeller, 93 N. J. Eq. 612, 117 A 831.

65. In re Home Provident Safety Fund Assoc., 129 N. Y. 288, 29 NE 323.

66. **Interest generally** see Interest 33 C. J. p 173.

67. U. S.—Van Vleet v. Sledge, 45 Fed. 743.
Ark.—Hatfield v. Faulkner County School Dist. No. 58, 10 SW (2d) 374.
Cal.—Leahy v. Warden, 163 Cal. 178, 124 P 825.
Conn.—Skelly v. Bristol Sav. Bank, 63 Conn. 83, 26 A 474, 38 AmSR 340, 19 LRA 599.
Ky.—Turner v. Johnson, 106 Ky. 460, 50 SW 675, 20 KyL 2009. But see Fenley v. Kendall, 18 SW 637, 13 KyL 836 (administrator held entitled to recover amount of interest paid on note in excess of legal rate after maker's death).
Mass.—Reed v. Boston Loan Co., 160 Mass. 237, 35 NE 677.
Minn.—Carson v. Cochran, 52 Minn. 67, 53 NW 1130.
Mo.—Wilkins v. Look, (A.) 246 SW 1000.
N. Y.—Church v. Kidd, 3 Hun 254, 5 Thomps. & C. 454; Torretto v. Mutual Aid Soc., 116 NYS 740.
Or.—Southern Oregon Co. v. Gage, 100 Or. 424, 197 P 276.
Pa.—Keener v. U. S. Bank, 2 Pa. 237; Lowenstein v. Bache, 17 Pa. Dist. 551.
Wis.—Burgess v. Commercial Nat. Bank, 144 Wis. 59, 128 NW 436.
Can.—Union Bank v. McHugh, 44 Can. S. C. 473 [aff 3 Alta. L. 166].

[a] **Under verbal agreement.**—A statute making the legal rate of interest six per cent and providing that "contracts may be made in writing" for the payment of ten per cent, only prevents the recovery of more than six per cent, unless the contract is in writing, and does not give the right to recover back more than six per cent voluntarily paid under a verbal agreement. Van Vleet v. Sledge, 45 Fed. 743.

[b] **On mortgage.**—(1) Payments of interest in excess of the amount due made to avoid a foreclosure of the mortgage securing the debt are voluntary, and cannot be recovered back. Leahy v. Warden, 163 Cal. 178, 124 P 825. (2) Where a mortgagee, entitled to twenty days' notice of intention to pay, told the mortgagor that he would accept the money on any day, but on closing the transaction the mortgagee insisted on receiving interest for twenty days before delivering satisfaction, a payment by the mortgagor of such interest was voluntary and not recoverable. Scheer-Ginsberg Realty, etc., Co. v. Devin, 76 Misc. 201, 134 NYS 505. (3) Recovery back of payment on mortgage generally see Mortgages § 912.

68. See Usury [39 Cyc 1030 et seq].

69. Bennett v. Bates, 94 N. Y. 354 [mod 26 Hun 364]; Wilcox v. Van Voorhis, 58 Hun 575, 12 NYS 617; Whitson v. Peekskill Nat. Bank, 120 Misc. 39, 197 NYS 528; New York L. Ins., etc., Co. v. Manning, 3 Sandf. Ch. (N. Y.) 58.

payment, so as to preclude its recovery.[70]

Compound interest voluntarily paid cannot be recovered back,[71] as where it has been paid under an agreement to pay compound interest, which has been executed.[72]

[§ 289] **10. Payment by Way of Compromise.**[73] Money paid, with full knowledge of the facts, on a fair and deliberate compromise between parties standing on equal terms cannot be recovered back;[74] and this rule applies, although the payor was mistaken as to a fact material to his liability, if the mistake was not mutual.[75]

[§ 290] **11. Payments Not Indorsed or Applied.** Where a debtor pays money to his creditor to be indorsed and applied on the demand in suit, but suffers the creditor to take judgment for the whole amount, he cannot recover the money back.[76] But if, after the creditor thus neglects to indorse or apply it, he has the means of collecting the whole debt without giving the debtor any day in court, and does so collect it, the debtor may recover back the money which has thus been paid and not applied.[77]

[§ 291] **12. Payment on Judgment or Decree.** It is a well settled general rule that, where a judgment or decree has been recovered before a competent court, even though it is erroneous or illegal, any payment that is voluntarily made thereon, with a full knowledge of the facts, cannot be recovered back, while the judgment or decree remains in force,[78] and it is immaterial that the recovery was fraudulent,[79] unless the payment itself was procured

70. Walz v. Muir, 218 App. Div. 495, 218 NYS 529. But see Lowenstein v. Bache, 17 Pa. Dist. 551 (holding that in the absence of fraud, mistake, or duress, a customer cannot recover from his broker an overcharge of interest which he has paid under protest to get his collateral back).

71. Turner v. Johnson, 106 Ky. 460, 50 SW 675, 20 KyL 2009; Dow v. Drew, 3 N. H. 40; Spain v. Talcott, 165 App. Div. 815, 152 NYS 611.

[a] **Payment held not voluntary** so as to preclude recovery. Spain v. Talcott, 165 App. Div. 815, 152 NYS 611.

72. Ritter v. Phillips, 53 N. Y. 586.

73. Compromises generally see Compromise and Settlement 12 C. J. p 312.

74. U. S.—Sturges v. U. S., Dev. Ct. Cl. 20.

Ala.—Troy v. Bland, 58 Ala. 197; Hinds v. Wiles, 12 Ala. A. 596, 68 S 556.

Ark.—Odell v. Heinrich, 143 Ark. 435, 221 SW 865.

D. C.—Henelley v. Rittenhouse, 7 D. C. 76.

Ga.—Leader v. Mathews, 135 Ga. 468, 69 SE 721.

Ky.—Scobee v. Brent, 185 Ky. 734, 216 SW 76; Hall v. Farmers Bank, 65 SW 365, 23 KyL 1450.

La.—Strange v. Continental Supply Co., 165 La. 20, 115 S 353.

Mass.—Stuart v. Sears, 119 Mass. 143.

Mo.—Rogers v. Nee, 194 Mo. A. 163, 186 SW 566.

N. H.—Keazar v. Colebrook Nat. Bank, 75 N. H. 278, 73 A 170; Pearl v. Whitehouse, 52 N. H. 254.

N. Y.—Hurlburt v. Durant, 88 N. Y. 121, 2 NYCivProc 115 [rev 25 Hun 119, 12 NYWklyDig 477]; Brown v. Rich, 40 Barb. 28.

[a] **Illustration.**—Where a plaintiff is legally bound for damages for a breach of contract, he cannot recover back the damages after having confessed a breach of the contract and paid money, and executed a note as settlement of the damages. Scobee v. Brent, 185 Ky. 734, 216 SW 76.

75. Hinds v. Wiles, 12 Ala. A. 596, 68 S 556.

Recovery of payments made under mistake of fact generally see infra §§ 318–329.

76. Ala.—Broughton v. McIntosh, 1 Ala. 103.

Ill.—Loveless v. Mechling, 4 Ill. A. 353.

Me.—Weeks v. Thomas, 21 Me. 465.

Mass.—McMurtrie v. Keenan, 109 Mass. 185; Jordan v. Phelps, 3 Cush. 545, 50 AmD 747; Loring v. Mansfield, 17 Mass. 394.

Vt.—Corey v. Gale, 13 Vt. 639.

[a] **Where defendant fails to plead a partial payment** and thereafter pays a judgment for the debt in full, he cannot subsequently sue to recover the part payment. Broughton v. McIntosh, 1 Ala. 103; Bronson v. Rugg, 39 Vt. 241; Strong v. McConnell, 10 Vt. 231.

77. McMurtrie v. Keenan, 109 Mass. 185.

78. U. S.—Moffitt v. Garr, 1 Black 273, 17 L. ed. 207.

Ala.—Alabama Univ. v. Keller, 1 Ala. 406; Broughton v. McIntosh, 1 Ala. 103; Jones v. Watkins, 1 Stew. 81.

Cal.—Kohler v. Wells, 26 Cal. 606.

Conn.—Carter v. Canterbury First Ecclesiastical Soc., 3 Conn. 461; Peck v. Woodridge, 3 Day 30; Brunson v. Bacon, 1 Root 210.

Ga.—West v. Brown, 165 Ga. 187, 140 SE 500.

Ill.—Elston v. Chicago, 40 Ill. 514, 89 AmD 361.

Ind.—Hollingsworth v. Stone, 90 Ind. 244; Ambs v. Towle, 1 Ind. A. 426, 27 NE 625.

Iowa.—Weaver v. Stacey, 105 Iowa 657, 75 NW 640.

Ky.—Williams v. Shelbourne, 102 Ky. 579, 44 SW 110, 19 KyL 1924; Hunt v. Boyier, 1 J. J. Marsh. 484, 19 AmD 116.

La.—First Presby. Church v. New Orleans, 30 La. Ann. 259, 31 AmR 224.

Me.—Brogdon v. Somerby, 55 Me. 92; Footman v. Stetson, 32 Me. 17, 52 AmD 634; Morton v. Chandler, 7 Me. 44.

Md.—Gordon v. Baltimore, 5 Gill 231.

Mass.—People's Sav. Bank v. Heath, 175 Mass. 131, 55 NE 1807, 78 AmSR 481; Wilbur v. Sproat, 2 Gray 431. But see Lazell v. Miller, 15 Mass. 207 (held recoverable as mistake of fact).

Mo.—Busche v. McElroy, 12 Mo. A. 598; Eoff v. Clay, 9 Mo. A. 176.

Nebr.—Deseret Nat. Bank v. Nuckolls, 30 Nebr. 754, 47 NW 202; Gerecke v. Campbell, 24 Nebr. 306, 38 NW 847.

N. H.—Holden v. Curtis, 2 N. H. 61; Tilton v. Gordon, 1 N. H. 33.

N. J.—Hevener v. Kerr, 4 N. J. L. 65.

N. Y.—Tripler v. New York, 125 N. Y. 617, 26 NE 721, 26 AbbNCas 325; Wood v. Amory, 105 N. Y. 278, 11 NE 636; Converse v. Sickles, 74 Hun 429, 26 NYS 590 [rev on other grounds 146 N. Y. 200, 40 NE 777, 48 AmSR 790]; Third Ave. R. Co. v. Klinker, 28 NYS 136, 29 NYCivProc 51; White v. Ward, 9 Johns. 232; Cobb v. Curtiss, 8 Johns. 470.

N. C.—Pardue v. Absher, 174 N. C. 676, 679, 94 SE 414 [quot Cyc].

N. D.—Gold-Stabeck Loan, etc., Co. v. Kinney, 33 N. D. 495, 157 NW 482.

Oh.—Wilson v. Taylor, 9 Oh. St. 595, 75 AmD 488; Job v. Collier, 11 Oh. 422.

Pa.—Ogle v. Baker, 137 Pa. 378, 20 A 998, 21 AmSR 886; Ditman v. Raule, 134 Pa. 480, 19 A 676; Sherman v. Delaware, etc., Tel., etc., Co., 36 Pa. Super. 487; Wagner v. Beaver Valley Water Co., Inc., 9 Pa. Dist. & Co. 90.

S. C.—James v. Cavit, 4 S. C. L. 174.

Tenn.—Kirklan v. Brown, 4 Humphr. 174, 40 AmD 635.

Va.—Legrand v. Francisco, 3 Munf. (17 Va.) 83.

W. Va.—Beard v. Beard, 25 W. Va. 486, 52 AmR 219.

Eng.—De Medina v. Grove, 10 Q. B. 152, 59 ECL 151, 116 Reprint 59; Cadaval v. Collins, 4 A. & E. 858, 31 ECL 376, 111 Reprint 1006; Marriott v. Hampton, 2 Esp. 546, 170 Reprint 450. But see Farrow v. Mayes, 18 Q. B. 516, 83 ECL 516, 118 Reprint 195 (assignee in bankruptcy held entitled to recover money paid by bankrupt on void judgment).

Sask.—Burns v. MacDonalds Cons. Ltd., [1925] 3 DomLR 418.

[a] **Illustrations.**—(1) Where a judgment debtor, with knowledge of a mistake made by the referee before whom the action was tried, whereby the amount of the recovery was increased, pays the judgment without protest, or any claim in any way of the existence of the mistake, the payment is substantially a voluntary payment after knowledge of the facts, and cannot be recovered back, although the judgment creditor had knowledge of the mistake at the time of the payment and failed to make disclosure thereof. Wood v. Amory, 105 N. Y. 278, 11 NE 636. (2) Payment on a default judgment in consideration of the withdrawal of execution and opening default is not recoverable after a subsequent dismissal of the action in the absence of a provision therefor in the agreement. Burns v. MacDonalds Cons. Ltd., (Sask.) [1925] 3 DomLR 418.

[b] **No execution.**—Payment of a judgment on which no execution has been issued by which its collection can be enforced is voluntary and not compulsory. Elston v. Chicago, 40 Ill. 514, 89 AmD 361.

[c] **Loss of receipt.**—Assumpsit does not lie to recover back money claimed as having been erroneously recovered by defendant, in a judgment against plaintiff, in consequence of plaintiff's not being able to produce a receipt, which was afterward found. James v. Cavit, 4 S. C. L. 174.

[d] **Effect of assignment.**—Where a creditor assigns his claim to a third person to secure a lesser debt without the consent of the debtor, and recovers judgment for the amount of the claim less the secured debt, but subsequently levies execution for the full amount of the claim which is paid by the debtor under protest, the debtor cannot recover such payment, as the partial assignment is good as against the debtor and assignor and the payment to the assignor will be treated as being made for the benefit of the assignee, although made under a void execution. West v. Brown, 165 Ga. 187, 140 SE 500.

79. Walker v. Ames, 2 Cow. (N. Y.) 428; Ogle v. Baker, 137 Pa. 378, 20 A 998, 21 AmSR 886.

[a] **In Kentucky,** however, where a judgment has been procured by fraud and payment thereof has been

through fraud.[89] The payment of a judgment is voluntarily within the meaning of this rule, unless it is made to procure the release of the person or goods of the party making the payment after seizure, or to prevent their seizure by an officer armed with the authority or apparent authority to seize them.[81]

Payment on execution. If the payment on the judgment is otherwise voluntary, the fact that it is made under the compulsion of an execution does not authorize its recovery;[82] and this rule applies, although the execution is irregular, but not void.[83] But where a judgment is irregularly entered, money collected by an execution thereon may be recovered.[84]

Effect of reversal. If the judgment or decree is afterward reversed or vacated, money paid thereon can be recovered back.[85]

[§ 292] **13. Agreement To Repay; Reservation of Rights.** Of course if there is an agreement to repay on a certain condition, a recovery back is authorized after the happening of such condition.[86] Such recovery, however, can be had only upon the condition agreed on.[87] A payment made to avoid delay on the condition that the difference as to the amount due shall be adjusted later is not a voluntary payment, and may be recovered as money received.[88]

Subsequent promise. Where there is a moral obligation to refund the money, it may be recovered on a subsequent promise to do so.[89]

Reservation of rights. A payment made with the express reservation of the right to recover the same by suit authorizes a recovery thereof.[90]

[§ 293] **B. Compulsory Payments[91]—1. Recoverability in General.** As contradistinguished from voluntary payments,[92] it is equally well settled that payments coerced under duress or unlawful compulsion may be recovered back,[93] that is, money which has been paid through duress, extortion, or oppression, or where undue and unconscionable advantage has been taken of a situation or of the pressing necessity of a person, by means whereof payment has been coerced, and which the payee ought not to retain, may be recovered back;[94] and it has been

coerced from the debtor by execution, the amount may be recovered in equity without the necessity of first vacating or setting aside such judgment. Ellis v. Kelly, 8 Bush 621; West v. Kerby, 4 J. J. Marsh. 56.

80. Hunt v. Boyier, 1 J. J. Marsh. (Ky.) 484, 19 AmD 116.

Recovery of payments procured by fraud generally see infra § 311.

81. West v. Brown, 165 Ga. 187, 140 SE 500; Ritchie v. Carter, 89 Mo. A. 290; Pardue v. Absher, 174 N. C. 676, 679, 94 SE 414 [quot Cyc]; Finnell v. Armoura, 39 Utah 316, 117 P 49.

[a] **Payment held not voluntary.**—Where a judgment debtor, who had obtained a discharge in bankruptcy releasing him from liability on the judgment, delivered to an officer threatening to levy on the entire business of the debtor to satisfy the judgment a check, on the understanding that it should be deposited with the clerk of the court to be returned to the debtor on his establishing his claim that the liability was discharged, the delivery of the check was not a voluntary payment, and the debtor could recover the check. Finnell v. Armoura, 39 Utah 316, 117 P 49.

[b] **In Pennsylvania** it has been held that, where defendant in a judgment, desiring to be relieved of a lien on a portion of his real estate, pays a judgment and secures thereby a release of his lien, his payment is voluntary and he cannot thereafter recover the amount of it, although the judgment is subsequently stricken off as having been illegal; since in such a case payment by defendant is not the only means available to effect the lien, inasmuch as he might proceed before such payment to have the judgment stricken off. Wagner v. Beaver Valley Water Co., Inc., 9 Pa. Dist. & Co. 90.

Payment to prevent unlawful taking or detention of person or property generally as compulsory see infra §§ 296–298.

82. Ind.—Hollingsworth v. Stone, 90 Ind. 244.

Ky.—Hunt v. Boyier, 1 J. J. Marsh. 484, 19 AmD 116.

N. J.—Hevener v. Kerr, 4 N. J. L 58.

Pa.—Herring v. Adams, 5 Watts & S. 459.

Sask.—Burns v. MacDonalds Cons. Ltd., [1925] 3 DomLR 418.

83. Bobb v. Dillon, 20 Mo. A. 309; Gerecke v. Campbell, 24 Nebr. 306, 38 NW 847; Roth v. Schloss, 6 Barb. (N. Y.) 308.

[a] **It is immaterial** that the execution issued on a valid judgment by virtue of which the party's goods were seized was irregularly issued, both parties at the time supposing it to be regular, especially where the defect in the execution is amendable. Roth v. Schloss, 6 Barb. (N. Y.) 308.

84. Judson v. Eslava, Minor (Ala.) 71, 12 AmD 32.

85. See Appeal and Error § 3298; Judgments § 1115.

86. U. S.—Peninsular, etc., SS. Co. v. Atlantic Mut. Ins. Co., 185 Fed. 172 [aff 194 Fed. 84, 114 CCA 162 (certiorari den 225 U. S. 704 mem, 32 SCt 837 mem, 56 L. ed. 1265 mem)].

Cal.—Putnam v. Dungan, 89 Cal. 231, 26 P 904.

Ill.—Stipp v. Johnston, 68 Ill. 176.

Iowa.—Lyman v. Lauderbaugh, 75 Iowa 481, 39 NW 812.

Kan.—Juneau v. Stunkle, 40 Kan. 756, 20 P 473.

Mo.—American Brewing Co. v. St. Louis, 209 Mo. 600, 108 SW 1.

N. Y.—Eno v. Woodworth, 4 N. Y. 249, 53 AmD 370, CodeRepNS 262; Ellis v. Jacob, 17 App. Div. 471, 45 NYS 177; Art Color Printing Co. v. Little, 164 NYS 24.

Pa.—Bruch v. Shafer, 45 Pa. Super. 612.

Porto Rico.—Ponce, etc., R. Co. v. American R. Co., 7 Porto Rico Fed. 131.

S. C.—Gwynn v. Gwynn, 31 S. C. 482, 10 SE 221.

Utah.—Finnell v. Armoura, 39 Utah 316, 117 P 49.

Wis.—Wooley v. Chicago, etc., R. Co., 150 Wis. 183, 136 NW 616.

87. Swain v. Jacks, 125 Cal. 215, 57 P 989.

88. Bailey v. Minge, 16 Ala. A. 269, 77 S 419; Carter v. Riggs, 112 Iowa 245, 83 NW 905; Davis v. Fowler, 20 App. Div. 633, 47 NYS 221.

[a] **Illustration.**—Where there is a controversy between the parties as to the amount required to redeem property, and the greater amount is paid and accepted with the agreement that the party paying will sue for the excess payment, it is equivalent to an agreement to hold as trustee and to adjudicate the amount in court, and the payment is not voluntary. Bailey v. Minge, 16 Ala. A. 269, 77 S 419.

[b] **Payment by an agent** of a larger sum than authorized by the principal, where the agent informs the payee that he remits the larger sum claimed by the latter to avoid delay "leaving difference to be adjusted later," is not a voluntary one. Carter v. Riggs, 112 Iowa 245, 83 NW 905.

89. Bentley v. Morse, 14 Johns. (N. Y.) 468; Lamarre v. Rex, [1923] Can. Exch. 174.

[a] **Illustration.**—Where money has been paid and a receipt taken, and afterward, on a suit for the same money, judgment is recovered therefor by reason of the party's omission to produce the receipt, the money may be recovered back, on the promise of the judgment creditor to refund it. Bentley v. Morse, 14 Johns. (N. Y.) 468.

90. Empire Engineering Co., Inc. v. U. S., 59 Ct. Cl. 904.

91. Duress as affecting reality of consent to contract see Contracts §§ 310–325.

92. See supra §§ 280–292.

93. Swift, etc., Co. v. U. S., 111 U. S. 22, 4 SCt 244, 28 L. ed. 341; U. S. Bank v. Washington Bank, 6 Pet. (U. S.) 8, 8 L. ed. 299; Falkner v. Hunt, 16 Cal. 167; McMillan v. Richards, 9 Cal. 365, 70 AmD 655; Hays v. Hogan, 5 Cal. 241; Volker v. Fisk, 75 N. J. Eq. 497, 72 A 1011; Bowers v. Missouri, etc., R. Co., (Tex. Civ. A.) 241 SW 509. And see cases infra note 94.

[a] **Illustration.**—A vendor of land, who has been compelled by a decree avoiding the sale to repay the commissions paid directly to his agent by the purchaser as a part of the consideration, can recover them from the agent, the payment being compulsory and not voluntary. Volker v. Fisk, 75 N. J. Eq. 497, 72 A 1011.

94. U. S.—Synthetic Patents Co. v. Sutherland, 22 F. (2d) 494 [certiorari den 276 U. S. 630 mem, 48 SCt 324 mem, 72 L. ed. 741 mem]; Lipman v. Phœnix Assur. Co., 258 Fed. 544, 169 CCA 484.

Cal.—McTigue v. Arctic Ice Cream Supply Co., 20 Cal. A. 708, 130 P 165.

Colo.—Adams v. Schiffer, 11 Colo. 15, 17 P 21, 7 AmSR 202.

Ga.—Fenwick Shipping Co. v. Clarke, 133 Ga. 43, 65 SE 140; Stevens v. Nisbet, 88 Ga. 456, 14 SE 711.

Ill.—Chicago v. Northwestern Mut. L. Ins. Co., 218 Ill. 40, 75 NE 803, 1 LRANS 770; Pemberton v. Williams, 87 Ill. 15; La Salle County v. Simmons, 10 Ill. 513; Pittsburgh Steel Co. v. Hollingshead, 202 Ill. A. 177; Helberg v. Odell, 192 Ill. A. 266.

Ind.—Stanley v. Dunn, 143 Ind. 495, 42 NE 908; Krouse v. Krouse, 48 Ind. A. 3, 95 NE 262.

Iowa.—Pocahontas County v. Katz-Craig Contracting Co., 181 Iowa 1313, 165 NW 422; Anderson v. Cameron, 122 Iowa 183, 97 NW 1085.

Mass.—Chandler v. Sanger, 114 Mass. 364, 19 AmR 367; Joyner v. Egremont School Dist. No. 3, 3 Cush. 567; Bliss v. Thompson, 4 Mass. 488.

Mich.—Francis v. Hurd, 113 Mich. 250, 71 NW 582; Vyne v. Glenn, 41 Mich. 112, 1 NW 997; Sturgis First Nat. Bank v. Watkins, 21 Mich. 483.

Minn.—Mearkle v. Hennepin County, 44 Minn. 546, 47 NW 165.

Mo.—Missouri Lincoln Trust Co. v.

held immaterial that the payment was made with full knowledge of all the facts.[95] But in order to recover moneys paid under duress, it must be shown not only that there was duress,[96] but also that the demand or duress was illegal, unjust, or oppressive,[97] and that it is against equity and good conscience for the payee to retain the money;[98] and in accordance with this rule, if any sum was due from the payor, he may recover only the excess which was wrongfully and unlawfully procured from him.[99]

Estoppel. If, after making a compulsory payment, the payor voluntarily makes further payments or in any way affirms its validity, he precludes himself from then avoiding it.[1]

Duress per minas is a personal matter, and one person ordinarily cannot recover money paid by reason of duress to another,[2] but there are exceptions to this rule based on nearness of family relations.[3]

[§ 294] **2. What Constitutes Compulsion[4]—a. In General.** Originally, at common law, "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to enable the party to recover back money paid.[5] Subsequently, however, the courts of law, in analogy to the rules of the courts of equity as to setting aside contracts for duress,[6] gradually extended the doctrine so as to recognize duress of property as a sort of moral duress which might, equally with duress of the person, entitle a party to recover back money paid under its influence;[7] and in accordance with this view the rule was thereafter laid down that payment is not made under duress, and hence is not recoverable unless made to release the person or property of the payor from detention, or to prevent a seizure of either by one having apparent authority to seize without resorting to an action.[8]

The modern authorities go even further and generally declare that the duress may be exercised by threats as well as force,[9] and that, irrespective of the manifestation or apprehension of physical force, such pressure or constraint as compels a man to go against his will, virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, constitutes duress.[10] In other words, there must be some actual

St. Louis Third Nat. Bank, 154 Mo. A. 89, 133 SW 357.

N. H.—Clough v. Boston, etc., R. Co., 77 N. H. 222, 90 A 863, AnnCas 1915B 1195.

N. M.—Cadwell v. Higginbotham, 20 N. M. 482, 151 P 315.

N. Y.—Scholey v. Mumford, 60 N. Y. 498; Harmony v. Bingham, 12 N. Y. 99, 62 AmD 142; Reed v. Hayward, 82 App. Div. 416, 81 NYS 608; Independent Belotzerkower Aid Soc. v. Lurie, 187 NYS 59; Colon v. Hebbard, 105 NYS 805; Mowatt v. Wright, 1 Wend. 355, 19 AmD 508.

Oh.—Baker v. Cincinnati, 11 Oh. St. 534.

Or.—Cram v. Powell, 100 Or. 708, 197 P 280.

Pa.—Lehigh Coal, etc., Co. v. Brown, 100 Pa. 338; Mathers v. Pearson, 13 Serg. & R. 258; Hazleton v. McGroarty, 2 Pa. Dist. 288.

S. C.—Alston v. Durant, 33 S. C. L. 257, 49 AmD 596; Bulow v. Goddard, 10 S. C. L. 45, 9 AmD 663; Bours v. Watson, 8 S. C. L. 393.

S. D.—Michel Brewing Co. v. State, 19 S. D. 302, 103 NW 40, 70 LRA 911.

Tex.—Exporters', etc., Compress, etc., Co. v. Spivey, (Civ. A.) 249 SW 1086; Early Foster Co. v. Trueba, (Civ. A.) 243 SW 995, 996 [quot Cyc].

Eng.—Atlee v. Backhouse, 3 M. & W. 633, 150 Reprint 1298; Snowdon v. Davis, 1 Taunt. 359, 127 Reprint 872.

Man.—Pople v. Dauphin, 31 Man. 125.

Ont.—Little v. Dundas, etc., Macadamized Road Co., 2 U. C. C. P. 399; O'Hara v. Foley, 3 U. C. Q. B. 216.

Que.—Quebec v. Caron, 10 LCJur 317.

95. Pittsburgh Steel Co. v. Hollingshead, 202 Ill. A. 177. But see Schlensker v. State, (Ind. A.) 161 NE 643 (duress held not controlling where dealer, with full knowledge, repaid money to state which investigating committee claimed was overcharge).

96. Chicago v. Malkan, 119 Ill. A. 542 [aff 217 Ill. 471, 75 NE 548, 2 LRA NS 788, 3 AnnCas 404]; Missouri Lincoln Trust Co. v. St. Louis Third Nat. Bank, 154 Mo. A. 89, 133 SW 357.

97. See infra § 307.

98. Koenig v. Peoples Gas Light, etc., Co., 153 Ill. A. 432; Chicago v. Malkan, 119 Ill. A. 542; Link v. Aiple-Hemmelmann Real Est. Co., 182 Mo. A. 531, 165 SW 832; Richmond v. Union Steamboat Co., 87 N. Y. 240; Shelton v. Trigg, (Tex. Civ. A.) 226 SW 761, 775 [quot Cyc]; Hahl v. Hutcheson, (Tex. Civ. A.) 196 SW 262, 266 [cit Cyc].

[a] **Equitable doctrine.**—The doctrine that money paid under duress may be recovered is equitable on the theory that it would be against conscience for money or property so obtained to be withheld. Link v. Aiple-Hemmelmann Real Est. Co., 182 Mo. A. 531, 165 SW 832.

99. Wilbur v. Blanchard, 22 Ida. 517, 126 P 1069; Cunningham v. Hussey, 122 Me. 565, 119 A 869.

1. Campbell v. Chabot, 115 Me. 247, 98 A 746.

2. Flynt v. J. Waterman Co., 123 Me. 320, 122 A 862.

3. Flynt v. J. Waterman Co., supra. And see infra § 301.

4. Duress as affecting validity of contracts see Contracts §§ 310-325; and cross references under Duress 19 C. J. p 838.

5. Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376; Brown v. Worthington, 162 Mo. A. 508, 517, 142 SW 1082 [quot Cyc]; Cram v. Powell, 100 Or. 708, 197 P 280.

6. See Contracts §§ 310-325.

7. Ill.—Illinois Merchants Trust Co. v. Harvey, 248 Ill. A. 498.

Minn.—Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.

Mo.—Brown v. Worthington, 162 Mo. A. 508, 517, 142 SW 1082 [quot Cyc].

N. Y.—Stenton v. Jerome, 54 N. Y. 480.

Wis.—Minneapolis, etc., R. Co. v. Wisconsin R. Commn., 183 Wis. 47, 56, 197 NW 352.

"The old rule that there could be duress only where there was a threat of loss of life, limb, or liberty has been so changed that duress may sometimes be implied when a payment is made . . . to prevent great property loss or heavy penalties when there seems no adequate remedy except to submit to an unjust or illegal demand and then seek redress in the courts" Minneapolis, etc., R. Co. v. Wisconsin R. Commn., supra.

8. U. S.—Lonergan v. Buford, 148 U. S. 581, 13 SCt 684, 37 L. ed. 569; Radich v. Hutchins, 95 U. S. 210, 24 L. ed. 409; Maxwell v Griswold, 10 How. 242, 13 L. ed. 405.

Cal.—Phelan v. San Francisco, 120 Cal. 1, 52 P 38; Bucknall v. Story, 46 Cal. 589, 13 AmR 220; Brumagin v. Tillinghast, 18 Cal. 265, 79 AmD 176.

Ill.—Stover v. Mitchell, 45 Ill. 213; Elston v. Chicago, 40 Ill. 514, 89 AmD 361; Lamson v. Boyden, 57 Ill. A. 232 [aff 160 Ill. 613, 43 NE 781].

Ind.—Edinburg v. Hackney, 54 Ind. 83; Sullivan v. McCammon, 51 Ind. 264; Ligonier v. Ackerman, 46 Ind. 552, 15 AmR 323.

Kan.—Kansas Pac. R. Co. v. Wyandotte County, 16 Kan. 587; Wabaunsee County Comrs. v. Walker, 8 Kan. 431; Phillips v. Jefferson County, 5 Kan. 412.

Ky.—Morganfield v. Wathen, 202 Ky. 641, 261 SW 12.

Md.—Baltimore v. Lefferman, 4 Gill 425, 45 AmD 145.

Mich.—Francis v. Hurd, 113 Mich. 250, 71 NW 582.

Minn.—De Graff v. Ramsey County, 46 Minn. 319, 48 NW 1135.

Mo.—Wolfe v. Marshal, 52 Mo. 167; Irving v. St. Louis County, 33 Mo. 575; Claflin v. McDonough, 33 Mo. 412, 84 AmD 54; Pritchard v. People's Bank, 198 Mo. A. 597, 200 SW 665; Brown v. Worthington, 162 Mo. A. 508, 517, 142 SW 1082 [quot Cyc].

N. D.—Wiles v. McIntosh County, 10 N. D. 594, 88 NW 710; Wessel v. D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 NW 922, 44 AmSR 529.

Oh.—Mays v. Cincinnati, 1 Oh. St. 268; Matthews v. Briggs, 7 Oh. Dec. (Reprint) 23, 1 CincLBul 31.

Pa.—De la Cuesta v. Insurance Co. of North America, 136 Pa. 62, 658, 20 A 505, 9 LRA 631.

Tex.—Ladd v. Southern Cotton Press, etc., Co., 53 Tex. 172; Goodhue v. Hawkins, (Civ. A.) 133 SW 288.

Eng.—Fulham v. Down, 6 Esp. 26 note, 170 Reprint 820.

Payment to prevent unlawful taking or detention of property generally see infra §§ 296-298.

Payment under duress of person generally see infra § 295.

9. Kamenitsky v. Corcoran, 97 Misc. 384, 161 NYS 756 [rev on other grounds 177 App. Div. 605, 164 NYS 297]. And see cases infra note 10.

10. U. S.—Robertson v. Frank Bros. Co., 132 U. S. 17, 10 SCt 5, 33 L. ed. 236; Maxwell v. Griswold, 10 How. 242, 13 L. ed. 405; In re Meyer, 106 Fed. 828.

Cal.—Garrison v. Tillinghast, 18 Cal. 404.

Colo.—Taylor v. Kelleher, 43 Colo. 424, 97 P 253.

Conn.—Crittenden v. Royce, 100 Conn. 617, 124 A 215.

Ida.—Wilbur v. Blanchard, 22 Ida. 517, 126 P 1069.

Ill.—Pittsburgh Steel Co. v. Hollingshead, 202 Ill. A. 177.

Ind.—Indiana Natural, etc., Gas Co. v. Anthony, 26 Ind. A. 307, 58 NE 868.

Kan.—Manhattan Milling Co. v. Manhattan Gas, etc., Co., 115 Kan. 712, 225 P 86.

Ky.—Hamilton v. Kentucky Title

or threatened exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment, over the person or property of the person making the payment, from which the latter has no other means of immediate relief than by submitting to the unreasonable or unjust demand and making the payment.[11]

Dependent on facts. Under these rules "duress" as a ground for the recovery of money paid is a relative, rather than a positive, term,[12] and no definite and exact rule of universal application can be laid down by which to determine whether a payment is voluntary or involuntary,[13] but from the very nature of the subject, each case must depend somewhat upon its own peculiar facts and circumstances[14] and may often be a question of difficulty.[15] The real and ultimate fact to be determined in every case is whether or not the party paying really had a choice, that is, whether he had his freedom of exercising his will,[16] and where there is a necessity

Sav. Bank, etc., Co., 159 Ky. 680, 167 SW 898, LRA1915B 498.

La.—New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 33 S 51, 94 AmSR 395.

Mich.—Welch v. Beeching, 193 Mich. 338, 159 NW 486.

Minn.—Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.

Mo.—Link v. Aiple-Hemmelmann Real Est. Co., 182 Mo. A. 531, 165 SW 832; Brown v. Worthington, 162 Mo. A. 508, 517, 142 SW 1082 [quot Cyc].

Mont.—Marcellus v. Wright, 65 Mont. 580, 212 P 299.

Nebr.—David City First Nat. Bank v. Sargeant, 65 Nebr. 594, 91 NW 595, 59 LRA 296.

N. M.—Cadwell v. Higginbotham, 20 N. M. 482, 151 P 315.

N. Y.—Gilford v. New York, 129 N Y. 674, 30 NE 66; Tripler v. New York, 125 N. Y. 617, 26 NE 721, 26 AbbNCas 325; Scholey v. Mumford, 60 N. Y. 498; Horner v. State, 42 App. Div. 430, 59 NYS 96; Buckley v. New York, 30 App. Div. 463, 52 NYS 452 [aff 159 N. Y. 558 mem, 54 NE 1089 mem]; Secor v. Clark, 54 N. Y. Super. 494 [aff 115 N. Y. 666 mem, 22 NE 1126 mem]; Bates v. New York Ins. Co., 3 Johns. Cas. 238.

Or.—Cram v. Powell, 100 Or. 708, 197 P 280.

Pa.—Motz v. Mitchell, 91 Pa. 114.

Tex.—Dale v. Simon, (Commn. A.) 267 SW 467 [aff (Civ. A.) 248 SW 703].

Vt.—Beckwith v. Frisbie, 32 Vt. 559; Sartwell v. Horton, 28 Vt. 370.

Wis.—Coon v. Metzler, 161 Wis. 328, 154 NW 377, LRA1916B 667; Wooley v. Chicago, etc., R. Co., 150 Wis. 183, 136 NW 616; Price v. Poynette Bank, 144 Wis. 190, 128 NW 895; Galusha v. Sherman, 105 Wis. 263, 81 NW 495, 47 LRA 417.

"The cases in which the question has most frequently arisen, are where the liberty of the person or the possession of his property has been involved, and in such cases it is perfectly proper to say (as it has been said, without intending to imply that the law will recognize no other sort of coercion or compulsion), that to make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party, having apparent authority to do so, without resorting to an action of law. This statement of the law is accurate enough when applied to the facts of the cases in which it has been made, but it is not a full statement of the law." Hazleton v. McGroarty, 2 Pa. Dist. 288, 290.

[a] **Reason for rule.**—"The modern rule with reference to payments made under duress . . . has resulted from the efforts of courts to avoid a multiplicity of suits and to administer law and equity by the same tribunal and in the same action, and it will be seen from a consideration of the authorities that it is a blending of both the legal and equitable remedies in one action." Wilbur v. Blanchard, 22 Ida. 517, 528, 126 P 1069.

[b] **It is sufficient,** if the constraint in the particular instance destroys free agency, whether relief was formerly obtainable by common-law action for duress or by suit in equity for wrongful compulsion. Manhattan Milling Co. v. Manhattan Gas, etc., Co., 115 Kan. 712, 225 P 86.

[c] **Payments held compulsory.**—(1) Payment for stamps put on bills of lading and on passage tickets. Garrison v. Tillinghast, 18 Cal. 404; Brumagim v. Tillinghast, 18 Cal. 265, 79 AmD 176. (2) Payment of gas bill to prevent the shutting off of the gas. Indiana Natural, etc., Gas Co. v. Anthony, 26 Ind. A. 307, 58 NE 868. (3) Payment of customs duties. Maxwell v. Griswold, 10 How. (U. S.) 242, 13 L. ed. 405. (4) Excess payment to undertaker, on refusal to perform services until received. Independent Belotzerkower Aid Soc. v. Lurie, 187 NYS 59. (5) Where an officer pays over money collected to an attorney, and afterward pays it again to the client because he has lost the attorney's receipt, the second payment is not voluntary but may be recovered back on finding the receipt. Bradford v. White, 1 Phila. (Pa.) 26.

[d] **Payments held voluntary and not compulsory.**—(1) In general. Crittenden v. Royce, 100 Conn. 617, 124 A 215; New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 33 S 51, 94 AmSR 395; Marcellus v. Wright, 65 Mont. 580, 212 P 299; Sieber v. Weiden, 17 Nebr. 582, 24 NW 215; Williams v. Rutherfurd Realty Co., 159 App. Div. 171, 144 NYS 357; F. H. Mills Co. v. State, 110 App. Div. 843, 97 NYS 676 [aff 187 N. Y. 552 mem, 80 NE 1109 mem]; Buck v. Houghtaling, 110 App. Div. 52, 96 NYS 1034; Jones Co. v. Mt. Vernon Bd. of Education, 30 App. Div. 429, 51 NYS 950. (2) Payment of excessive amount for surrender of pledge. Burgess v. Commercial Nat. Bank, 144 Wis. 59, 128 NW 436. (3) Money paid by a debtor to a creditor for a postponement of a sale under a decree of court, and for an extension of time to prevent such sale by payment of the original debt. Foster v. Central Nat. Bank, 93 NYS 603. (4) Payment for permit to construct vaults under sidewalk. Wood v. New York, 25 App. Div. 577, 49 NYS 622.

[e] **Payment made by a subordinate officer** under an order of a superior officer is not a voluntary payment which will prevent its recovery back by the latter. Ellsworth v. U. S., 14 Ct. Cl. 382.

[f] **Violation of constitutional provision.**—A payment made in accordance with the provisions of a state constitution, which is in conflict with the federal constitution, is not a payment under duress but is voluntary, and cannot be recovered back. Sonoma County Tax Case, 13 Fed. 789, 8 Sawy. 312.

11. U. S.—Lonergan v. Buford, 148 U. S. 581, 13 SCt 684, 37 L. ed. 569; Radich v. Hutchins, 95 U. S. 210, 24 L. ed. 409; Detroit Edison Co. v. Main Island Creek Coal Co., 293 Fed. 495; Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489.

Ark.—Turpin v. Antonio, 153 Ark. 377, 240 SW 1076; Hahn v. Gould Southwestern R. Co., 113 Ark. 537, 168 SW 1064.

Cal.—Hanford Gas, etc., Co. v. Hanford, 163 Cal. 108, 124 P 727; Wheeler v. Plumas County, 149 Cal. 782, 87 P 802; Garrison v. Tillinghast, 18 Cal. 404; Brumagim v. Tillinghast, 18 Cal. 265, 79 AmD 176.

Colo.—Taylor v. Kelleher, 43 Colo. 424, 97 P 253.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555; Finch v. J. M. Cox Co., 19 Ga. A. 256, 91 SE 281.

Iowa.—Harbeck v. Sioux City, 199 Iowa 763, 202 NW 507; Cantonwine v. Bosch, 148 Iowa 496, 127 NW 657.

Ky.—Morganfield v. Wathen, 202 Ky. 641, 261 SW 12.

Minn.—State v. Nelson, 41 Minn. 25, 42 NW 548, 4 LRA 300; Kraemer v. Deustermann, 37 Minn. 469, 35 NW 276.

Mo.—Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59.

N. Y.—Adrico Realty Corp. v. New York, 250 N. Y. 29, 164 NE 732; Blanchard v. Blanchard, 201 N. Y. 134, 94 NE 630, 37 LRANS 783; Kilpatrick v. Germania L. Ins. Co., 183 N. Y. 163, 75 NE 1124, 111 AmSR 722, 2 LRANS 574; Peyser v. New York, 70 N. Y. 497, 26 AmR 624 [rev 8 Hun 413]; Harmony v. Bingham, 12 N. Y. 99, 62 AmD 142; Williams v. Rutherfurd Realty Co., 159 App. Div. 171, 144 NYS 357; Kamenitsky v. Corcoran, 97 Misc. 384, 161 NYS 756 [rev on other grounds 177 App. Div. 605, 164 NYS 297].

Pa.—Union Ins. Co. v. Allegheny, 101 Pa. 250; Carhill Petroleum Co., Inc. v. Ennis-Bayard Petroleum Co., 81 Pa. Super. 486; Lowenstein v. Bache, 41 Pa. Super. 552; Doolittle v. Luzerne County, 1 Pa. Dist. 782.

S. C.—Shuck v. Interstate Bldg., etc., Assoc., 63 S. C. 134, 41 SE 28.

Tex.—Dale v. Simon, (Commn. A.) 267 SW 467 [aff (Civ. A.) 248 SW 703].

Utah.—Buford v. Lonergan, 6 Utah 301, 22 P 164 [aff 148 U. S. 581, 13 SCt 684, 37 L. ed. 569].

12. Coon v. Metzler, 161 Wis. 328, 154 NW 377, LRA1916B 667.

13. Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376; Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 53 ALR 943.

14. Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376; Coon v. Metzler, 161 Wis. 328, 332, 154 NW 377, LRA1916B 667.

"Acts which might fall far short of duress under certain conditions might be ample under other conditions. The threat of an enraged boy to commence a criminal prosecution might be unworthy of notice; the same threat by a man of experience in the world might well cause anxiety; while the same threat by the state's official prosecutor could hardly fail to cause deep solicitude if not actual terror. It is apparent also that a threat which would have no serious effect on a strong, experienced business man would be terrifying in the extreme to a nervous or weak person with little or no experience in the world. There are no arbitrary and unbending rules which can be applied in every case to determine the question." Coon v. Metzler, supra.

15. Brumagim v. Tillinghast, 18 Cal. 265, 79 AmD 176; Hazleton v. McGroarty, 2 Pa. Dist. 288.

16. Md.—Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278.

Minn.—Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.

Mo.—Brown v. Worthington, 162 Mo. A. 508, 517, 142 SW 1082 [quot Cyc].

N. Y.—Scholey v. Mumford, 60 N. Y. 498.

Wis.—Galusha v. Sherman, 105 Wis. 263, 278, 81 NW 495, 47 LRA 417.

"There is no legal standard of resistance which a party so circumstanced must exercise at his peril

of acting at once, less may be considered to amount to such compulsion than in other cases.[17]

Nature of compulsion. The compulsion, however, need not be an actual, or complete, or irresistible compulsion;[18] and although there must be something more than a mere threat and peril of pecuniary loss,[19] the compulsion need not amount to the duress necessary to the avoidance of a contract,[20] but may consist of a virtual or moral duress,[21] or of any species of compulsion.[22]

Applications of rules. A recovery may be allowed where the payment of an unlawful demand has been obtained by taking an undue advantage of the situation of the payor,[23] or under an enforced satisfaction of a judgment;[24] or where it has been made to avoid proceedings to enforce a penalty,[25] or to prevent an injury to one's property rights;[26] or where it is illegally demanded by one who is in a position to dictate terms under color of a statute or of an office;[27] or where it is paid on a wrongful demand to save the party paying from some great or irreparable mischief or damage, from which he could not otherwise be saved;[28] or where it is extorted through threats of exposure to public disgrace.[29]

[§ 295] **b. Duress of Person in General.**[30] The rule is well settled that, where one is compelled by duress of his person to pay an unjust or illegal demand, and he makes the payment under protest, such payment is compulsory and may be recovered back.[31] Thus a payment is compulsory and may be recovered back where it is made of an unjust or illegal demand to obtain release from imprisonment,[32] or from an arrest and threatened imprisonment by one having power to enforce his threat.[33]

to protect himself. The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained. The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the result an inference of law." Galusha v. Sherman, supra.

17. North v. Walthamstow Urban Dist. Council, 67 L. J. Q. B. 972; Pople v. Dauphin, 31 Man. 125.

18. Parcher v. Marathon County, 52 Wis. 388, 9 NW 23, 38 AmR 745; North v. Walthamstow Urban Dist. Council, 67 L. J. Q. B. 972; Pople v. Dauphin, 31 Man. 125.

[a] **"Involuntary payment"** includes any payment which is made under a claim involving the use of force as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that a person will desist after once making demand. Parcher v. Marathon County, 52 Wis. 388, 9 NW 23, 38 AmR 745.

19. U. S.—Dennehy v. McNulta, 86 Fed. 825, 30 CCA 422, 41 LRA 609 [certiorari den 176 U. S. 683 mem, 20 SCt 1026 mem, 44 L. ed. 638 mem].

N. Y.—Sawyer v. Gruner, 60 N. Y. Super. 285, 17 NYS 465.

Pa.—Union Ins. Co. v. Allegheny, 101 Pa. 250.

S. C.—Shuck v. Interstate Bldg., etc., Assoc., 63 S. C. 134, 41 SE 28.

Utah.—Buford v. Lonergan, 6 Utah 301, 22 P 164 [aff 148 U. S. 581, 13 SCt 684, 37 L. ed. 569].

20. Clough v. Boston, etc., R. Co., 77 N. H. 222, 90 A 863, AnnCas1915B 1195.

Duress as affecting contracts generally see Contracts §§ 310-325.

21. Robertson v. Frank Bros. Co., 132 U. S. 17, 10 SCt 5, 33 L. ed. 236. But see Kelly v. Miami County, 85 Kan. 38, 116 P 477 (holding that, where a candidate for a state office, being charged with misconduct as county clerk some years previously, requested the county board to investigate and determine how much he owed, and agreed to accept its findings, and on its report paid the amount claimed by the board to be due from him to the county, there was no duress, except the moral pressure on him, due to his candidacy to office, which ceased with the ensuing election).

22. Cal.—Engelken v. Eden Tp., Justice Ct., 50 Cal. A. 157, 195 P 265.

Iowa.—Lade v. Hancock County, 183 Iowa 1026, 166 NW 586.

N. Y.—Scholey v. Mumford, 60 N. Y. 498; Clancy v. Dutton, 129 App. Div. 23, 113 NYS 124.

Or.—Hammond v. Oregon, etc., R. Co., 117 Or. 244, 243 P 767.

Ont.—Aitchison v. Elma Tp., 19 OntWN 497, 498.

"There may be a practical compulsion as well as an actual legal compulsion." Aithison v. Elma Tp., supra.

[a] **Failure to make change.**—Where, for the purpose of making a payment a person tenders more than the proper amount, asking for the return of the change, there is no voluntary payment except to the amount that he expresses his desire to pay, so that where change is refused an action may be maintained for the balance. Edmonds v. Abeel, 20 Hun (N. Y.) 441.

23. Ill.—Rees v. Schmits, 164 Ill. A. 250.

Kan.—Kelly v. Miami County, 85 Kan. 38, 45, 116 P 477 [quot Cyc].

N. Y.—Horner v. State, 42 App. Div. 430, 59 NYS 96; Bates v. New York Ins. Co., 3 Johns. Cas. 238.

S. D.—Redford v. Weller, 27 S. D. 334, 131 NW 296.

Vt.—Beckwith v. Frisbie, 32 Vt. 559.

[a] **If one legally or illegally represents that he has the power** to take away another's news stand license, and the other believes he has such power, and acts accordingly, it is immaterial whether he in fact had such power. Kamenitsky v. Corcoran, 97 Misc. 384, 161 NYS 756 [rev on other grounds 177 App. Div. 605, 164 NYS 297].

24. Engelken v. Eden Tp. Justice Ct., 50 Cal. A. 157, 195 P 265; Finkelstone v. Lanzke, 63 Misc. 330, 117 NYS 183; Ft. Frances Pulp, etc., Co. v. Telegram Printing Co., 34 Man. 619, [1925] 1 DomLR 463, [1925] 1 WestWkly 245.

Payment on judgment or decree generally see supra § 291.

25. Robertson v. Frank Bros. Co., 132 U. S. 17, 10 SCt 5, 33 L. ed. 236; St. Johns Electric Co. v. St. Augustine, 81 Fla. 588, 88 S 387.

Payments made under apprehension or threat of legal proceedings generally see infra §§ 299-301.

26. Carew v. Rutherford, 106 Mass. 1, 8 AmR 287; Interurban Constr. Co. v. Hayes, 191 Mo. 248, 89 SW 927; Horner v. State, 42 App. Div. 430, 59 NYS 96; Buckley v. New York, 30 App. Div. 463, 52 NYS 452 [aff 159 N. Y. 558 mem, 54 NE 1089 mem]; Bates v. New York Ins. Co., 3 Johns. Cas. (N. Y.) 238; Dale v. Simon, (Tex. Commn. A.) 267 SW 467 [aff (Civ. A.) 248 SW 703].

27. Trower v. San Francisco, 152 Cal. 479, 92 P 1025, 15 LRANS 183; Lewis v. San Francisco, 2 Cal. A. 112, 82 P 1106; Atchison v. Elman Tp., 19 OntWN 497.

28. Lipman v. Phœnix Assur. Co., 258 Fed. 544, 169 CCA 484.

29. Tuller v. Fox, 46 Ill. A. 97; Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

[a] **Compounding of felony as defense.**—Where a physician falsely charged with abortion pays money demanded to avoid the disgrace and fearing a false written statement by a subject of abortion supposed to be dying, the compounding of a felony is not a defense in an action to recover the money. Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

30. **Apprehension or threat of arrest and imprisonment** see infra § 301.

As affecting contract see Contracts §§ 313-320.

31. U. S.—Devlin's Case, 12 Ct. Cl. 266.

Ark.—Durr v. Howard, 6 Ark. 461.

Cal.—Wheeler v. Plumas County, 149 Cal. 782, 87 P 802.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555; Stevens v. Nisbet, 88 Ga. 456, 14 SE 711; White v. Tifton, 1 Ga. A. 569, 57 SE 1038.

Ill.—Schommer v. Farwell, 56 Ill. 542.

Ky.—Morganfield v. Wathen, 202 Ky. 641, 261 SW 12; Voiers v. Stout, 4 Bush 572.

La.—Pilie v. New Orleans, 19 La. Ann. 274.

Mass.—Sweet v. Kimball, 166 Mass. 332, 44 NE 243, 55 AmSR 406.

N. H.—Severance v. Kimball, 8 N. H. 386.

Pa.—Carhill Petroleum Co., Inc. v. Ennis-Bayard Petroleum Co., 81 Pa. Super. 486; Lowenstein v. Bache, 41 Pa. Super. 552; Pace v. Plymouth, 7 Kulp 239.

Eng.—Cadaval v. Collins, 4 A. & E. 858, 31 ECL 376, 111 Reprint 1007; Payne v. Chapman, 4 A. & E. 364, 31 ECL 171, 111 Reprint 824.

32. U. S.—Devlin v. U. S., 12 Ct. Cl. 266.

Ark.—Williford v. Eason, 110 Ark. 303, 161 SW 498.

Ill.—Schommer v. Farwell, 56 Ill. 542.

N. H.—Severance v. Kimball, 8 N. H. 386.

Eng.—De Mesnil v. Dakin, L. R. 3 Q. B. 18.

N. S.—Richards v. Taylor, 28 N. S. 311.

Apprehension or threat of arrest and imprisonment see infra § 301.

33. Pace v. Plymouth Borough, 7 Kulp (Pa.) 239.

This is so not only where the arrest is without just cause,[34] but also where there is an arrest for a just cause without legal authority,[35] and also where there is an arrest for a just cause and under lawful authority but for an improper purpose.[36] Where, however, the arrest and imprisonment are by lawful authority for a just cause and for a proper purpose, a payment made to procure his discharge or release is not a payment under duress,[37] and this is also true where a person under arrest in a civil proceeding voluntarily pays money in settlement of the case.[38]

[§ 296] **c. Payments To Prevent Unlawful Taking or Detention of Property—(1) Personal Property—(a) In General.** A payment procured by duress of goods or personal property may be involuntary in the eye of the law the same as if procured by duress of the person;[39] and therefore it is a well settled rule that, where a person unlawfully demanding a payment is in a position to seize or detain the goods or other personal property of a person against whom the claim is made, without a resort to judicial proceedings in which the parties may contest the validity of the claim, payment under protest to prevent a seizure or to recover the property will be considered as made under compulsion, and the money may be recovered back,[40] especially where a failure to get or retain immediate possession and con-

34. Sweet v. Kimball, 166 Mass. 332, 44 NE 243, 55 AmSR 406; Richardson v. Duncan, 3 N. H. 508.

35. U. S.—Foy v. Talburt, 9 F. Cas. No. 5,020, 5 Cranch C. C. 124.

Ark.—Durr v. Howard, 6 Ark. 461.

Miss.—Fossett v. Wilson, 59 Miss. 1.

N. H.—Richardson v. Duncan, 3 N. H. 508.

Oh.—Reinhard v. Columbus, 49 Oh. St. 257, 31 NE 35.

Wis.—Heckman v. Swartz, 64 Wis. 48, 24 NW 473.

[a] **Want of jurisdiction.**—Foy v. Talburt, 9 F. Cas. No. 5,020, 5 Cranch C. C. 124.

[b] **Imprisonment under void judgment.**—Durr v. Howard, 6 Ark. 461.

[c] **Void warrant.**—Fossett v. Wilson, 59 Miss. 1.

[d] **An arrest is not illegal** merely because the complaint and warrant are insufficient. Heckman v. Swartz, 64 Wis. 48, 24 NW 473.

[e] **It is no defense** that the prosecution was illegal where defendant received the avails of it. Heckman v. Swartz, 50 Wis. 267, 6 NW 891.

36. Mont.—Clifford v. Great Falls Gas Co., 68 Mont. 300, 216 P 1114.

N. H.—Richardson v. Duncan, 3 N. H. 508.

Pa.—Fillman v. Ryon, 168 Pa. 484, 32 A 89.

Tex.—Phelps v. Zuschlag, 34 Tex. 371.

Wis.—Beekman v. Swartz, 64 Wis. 48, 24 NW 473.

37. U. S.—Hill v. U. S., 9 Ct. Cl. 178.

Ga.—White v. Tifton, 1 Ga. A. 569, 57 SE 1038.

Ill.—Taylor v. Cottrell, 16 Ill. 93.

Ind.—Harrison Tp. v. Addison, 176 Ind. 389, 96 NE 146, 149 [cit Cyc].

Mass.—Felton v. Gregory, 130 Mass. 176.

Mo.—MacDonald v. Leffingwell, 8 Mo. A. 234.

Tex.—Diller v. Johnson, 37 Tex. 47.

Vt.—Meacham v. Newport, 70 Vt. 67, 39 A 631.

[a] **Illustrations.**—(1) An action will not lie against an officer to recover back money paid under arrest on a capias, inadvertently issued instead of a fieri facias, ordered by the court, the court having power to issue either. MacDonald v. Leffingwell, 8 Mo. A. 234. (2) Where a trustee of a township who failed to account in his final settlement for all the moneys received was indicted for embezzlement, and it is not shown that the prosecution is unjust, or that any improper purpose prompted it, and he employed counsel, and voluntarily promised to pay what a disinterested accountant might find that he owed on condition that the prosecution should cease, and when the accountant had reported, he asked the court to review it, which was done, and he then paid the amount as thus fixed, the payment could not be recovered back on the ground that it was made under duress. Harrison Tp. v. Addison, 176 Ind. 389, 96 NE 146.

38. Mayer v. Hoffman, 67 Wis. 279, 30 NW 355.

[a] **Illustration.**—Money paid by plaintiff to defendant's daughter while he was under arrest on a charge of bastardy cannot be recovered as having been paid under duress, although he denies being the father of the child, which he did not do when the payment was made. Mayer v. Hoffman, 67 Wis. 279, 30 NW 355.

39. See supra § 294.

40. U. S.—Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; The John Francis, 184 Fed. 746; Mariposa Co. v. Bowman, 16 F. Cas. No. 9,089, Deady 228; Oceanic SS. Co. v. Tappan, 18 F. Cas. No. 10,405, 16 Blatchf. 296; Tutt v. Ide, 24 F. Cas. No. 14,275b, 3 Blatchf. 249.

Ala.—Southwestern Alabama R. Co. v. Maddox, 146 Ala. 539, 41 S 9.

Cal.—Shelley v. San Francisco, (A.) 262 P 403; McTigue v. Arctic Ice Cream Supply Co., 20 Cal. A. 708, 130 P 165.

Conn.—Cobb v. Charter, 32 Conn. 358, 87 AmD 178; Carey v. Prentice, 1 Root 91.

Fla.—Fuller v. Roberts, 35 Fla. 110, 17 S 359.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555; Fenwick Shipping Co. v. Clarke, 133 Ga. 43, 65 SE 140; Du Vall v. Norris, 119 Ga. 947, 47 SE 212; Barnett v. Central Line of Boats, 51 Ga. 439; Finch v. J. M. Cox Co., 19 Ga. A. 256, 91 SE 281.

Ill.—Illinois Merchants Trust Co. v. Harvey, 248 Ill. A. 498.

Ind.—Snell v. State, 43 Ind. 359; Lafayette, etc., R. Co. v. Pattison, 41 Ind. 312.

Ky.—Hamilton v. Kentucky Title Sav. Bank, etc., Co., 159 Ky. 680, 686, 167 SW 898, LRA1915B 498 [quot Cyc].

Me.—Whitlock Mach. Co. v. Holway, 92 Me. 414, 42 A 799; Chamberlain v. Reed, 13 Me. 357, 29 AmD 506; Chase v. Dwinal, 7 Me. 134, 20 AmD 352.

Md.—Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278.

Mich.—McCabe v. Shaver, 69 Mich. 25, 36 NW 800; Cox v. Welcher, 68 Mich. 263, 36 NW 69, 13 AmSR 339; Hackley v. Headley, 45 Mich. 569, 8 NW 511.

Minn.—Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 681, 16 LRA 376; Fargusson v. Winslow, 34 Minn. 384, 25 NW 942.

Mo.—Wolfe v. Marshal, 52 Mo. 167; Quinnett v. Washington, 10 Mo. 53; Pritchard v. Peoples Bank, 198 Mo. A. 597, 200 SW 665; Loomis v. Wabash, etc., R. Co., 17 Mo. A. 340.

Nebr.—Karschner v. Latimer, 108 Nebr. 32, 187 NW 83, 84 [cit Cyc]; Nelson v. Nelson, 99 Nebr. 456, 156 NW 1036; Weber v. Kirkendall, 44 Nebr. 766, 63 NW 35; Fitzgerald v. Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 NW 899 [writ of error dism 160 U. S. 556, 16 SCt 389, 40 L. ed. 36].

N. J.—Berger v. Bonnell Motor Car Co., (Sup.) 133 A 778; Teeter v. Veitch, (Ch.) 61 A 14.

N. Y.—Cowley v. Fabien, 204 N. Y. 566 mem, 97 NE 458 [motion to amend remittitur granted 204 N. Y. 639 mem, 98 NE 1136 mem]; Baldwin v. Liverpool, etc., SS. Co., 74 N. Y. 125, 30 AmR 277 [aff 11 Hun 496]; Scholey v. Mumford, 64 N. Y. 521; Scholey v. Mumford, 60 N. Y. 498; Briggs v. Boyd, 56 N. Y. 289 [aff 65 Barb. 197]; Stenton v. Jerome, 54 N. Y. 480; Harmony v. Bingham, 12 N. Y. 99, 62 AmD 142; Spain v. Talcott, 165 App. Div. 815, 152 NYS 611; Clancy v. Dutton, 129 App. Div. 23, 113 NYS 124; Gould v. Farmers' L. & T. Co., 23 Hun 322; U. S. Nickel Co. v. Barrett, 86 Misc. 337, 148 NYS 325; Clinton v. Strong, 9 Johns. 370.

Okl.—Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 1103, 53 ALR 943 [quot Cyc].

Or.—Darling-Singer Lumber Co. v. Oriental Nav. Co., 272 P 275, 278 [cit Cyc]; Siverson v. Clanton, 88 Or. 261, 170 P 933, 171 P 1051.

Pa.—Motz v. Mitchell, 91 Pa. 114; White v. Heylman, 34 Pa. 142; Carhill Petroleum Co. v. Ennis-Bayard Petroleum Co., 81 Pa. Super. 486; Lowenstein v. Bache, 41 Pa. Super. 552.

S. C.—Kenneth v. South Carolina R. Co., 49 S. C. L. 284, 98 AmD 382; Alston v. Durant, 33 S. C. L. 257, 49 AmD 596.

Tenn.—Johnson v. Ford, 147 Tenn. 63, 245 SW 531; West Constr. Co. v. Seaboard Air Line R. Co., 141 Tenn. 342, 210 SW 633, 635 [quot Cyc].

Tex.—Clark v. Pearce, 80 Tex. 146, 15 SW 787; Taylor v. Hall, 71 Tex. 213, 9 SW 141; Smith v. Houston Nat. Exch. Bank, (Civ. A.) 202 SW 131; Goodhue v. Hawkins, (Civ. A.) 133 SW 288.

Utah.—Buford v. Lonergan, 6 Utah 301, 22 P 164 [aff 148 U. S. 581, 13 SCt 684, 37 L. ed. 569].

Vt.—Sowles v. Soule, 59 Vt. 131, 7 A 715; Beckwith v. Frisbie, 32 Vt. 559.

Eng.—Maskell v. Horner, [1915] 3 K. B. 106; Wakefield v. Newbon, 6 Q. B. 276, 51 ECL 276, 115 Reprint 107; Ashmole v. Wainwright, 2 Q. B. 837, 42 ECL 938, 114 Reprint 325; Green v. Duckett, 11 Q. B. D. 275; Shaw v. Woodcock, 7 B. & C. 73, 14 ECL 43, 108 Reprint 652; Hills v. Street, 5 Bing. 37, 15 ECL 459, 130 Reprint 973; Gibbon v. Gibbon, 13 C. B. 205, 76 ECL 205, 138 Reprint 1176; Oates v. Hudson, 6 Exch. 346, 155 Reprint 576; Fraser v. Pendlebury, 31 L. J. C. P. 1; Hooper v. Exeter, 56 L. J. Q. B. 457; Close v. Phipps, 7 M. & G. 586, 49 ECL 586, 135 Reprint 236; Atlee v. Backhouse, 3 M. & W. 633, 150 Reprint 1298; Astley v. Reynolds, Str. 915, 93 Reprint 939; Snowdon v. Davis, 1 Taunt. 359, 127 Reprint 872; Irving v. Wilson, 4 T. R. 485, 100 Reprint 1132.

Man.—Pople v. Dauphin, 31 Man. 125, 129, 60 DomLR 30, [1921] 2 WestWkly 276 [cit Cyc].

N. S.—Johnston v. Miller, 31 N. S. 83.

Ont.—Marsh v. Port Hope Harbour Co., 6 U. C. Q. B. O. S. 100.

Sask.—Campbell v. Halverson, 12 Sask. L. 420, 49 DomLR 463, [1919] 3 WestWkly 657 [dism app 11 Sask. L. 58, [1918] 1 WestWkly 462].

"Where one man, in any capacity, avails himself of the possession of another's goods, to wring from that other an unlawful payment of money, as the condition, and the only one, upon which the goods will be re-

trol of the property, in pursuit of any legal remedy he may have, will be attended with serious loss or great inconvenience.[41] This coercion is generally embraced in the term "duress of goods;"[42] and to constitute such duress there must be a threat to do some act which the threatening party has no legal right to do, some illegal exaction, fraud, or deception, and restraint must be imminent and such as to destroy free agency without a present means of protection,[43] although it is immaterial that the acts claimed to constitute duress do not amount to technical duress.[44] The payment, however, is not under duress where the party asserting the claim or making the demand must resort to the courts to enforce it,[45] and where the payor has a complete and adequate remedy at law, which he could pursue instead of making the payment.[46] A payment made to obtain a release of goods, which by the terms of a mortgage the payor is prohibited from removing, is not a payment under duress.[47]

Payment by third person. Where goods are released on the promise of a third party to pay the charges against the same, and he pays such charges, the recovery of the money back by the party for whom the payment was made is not prevented if the third party is reimbursed.[48]

[§ 297] **(b) Under Legal Process.** As a general rule a payment of an unlawful or oppressive demand or claim may be recovered back, as being compulsory, where it is made in order to retain or obtain the possession of property seized or about to be seized under legal process,[49] as where the payment is made, after the issuance of an execution, to prevent a levy upon, or a sale of, the property,[50] or where it is made to procure the release of property wrongfully seized by an officer.[51] The mere fact, however, that claimant has resorted to legal process to enforce his claim does not entitle the payor to recover back a payment which he has in fact made voluntarily

stored, such payment shall not be voluntary in the eye of the law." Alston v. Durant, 33 S. C. L. 257, 264, 49 AmD 596.

"When we speak of duress in this connection, it does not necessarily mean personal fear or the use of force, but rather that pressure of circumstances which compels the will of man to yield to an exaction or a payment to release his property from some illegal hold upon it." Adrico Realty Corp. v. New York, 250 N. Y. 29, 33, 164 NE 732.

[a] **"For this rule to apply** it must appear that the payment was unlawfully demanded, and that it was made under protest." Hamilton v. Kentucky Title Sav. Bank, etc., Co., 159 Ky. 680, 686, 167 SW 898, LRA1915B 498 [quot Cyc].

[b] **Rule applied to:** (1) Overpayment to attorney for delivery of lease. Smith v. Sleap, 12 M. & W. 585, 152 Reprint 1332. (2) Payment to attorney withholding title deeds upon an unfounded claim of lien. Richardson v. Williamson, L. R. 6 Q. B. 276. (3) Overcharge of tolls. Parker v. Great Western Co., 7 M. & G. 253, 49 ECL 253, 135 Reprint 107. (4) Exaction of illegal tolls. Chase v. Dwinal, 7 Me. 134, 20 AmD 352; Maskell v. Horner, [1915] 3 K. B. 106. (5) Payment to broker of illegal interest on money advanced. Lowenstein v. Bache, 41 Pa. Super. 552. (6) Money paid in excess of contract price for repair of automobile. Berger v. Bonnell Motor Car Co., (N. J. Sup.) 133 A 778. (7) Payment by a mechanic to obtain possession of his tools of trade. Cobb v. Charter, 32 Conn. 358, 87 AmD 178.

[c] **A payment made to release impounded goods** under circumstances which show that it was not voluntarily made may be recovered back as money had and received. Campbell v. Halverson, 12 Sask. L. 420, 49 DomLR 463, [1919] 3 WestWkly 657 [dism app 11 Sask. L. 58, [1918] 1 WestWkly 462]; Fogde v. Parsenau, 10 Sask. L. 423, 37 DomLR 758.

41. Cal.—Shelley v. San Francisco, (A.) 262 P 403; McTigue v. Arctic Ice Cream Supply Co., 20 Cal. A. 708, 130 P 165.

Md.—Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278, 282 [cit Cyc].

Nebr.—Karschner v. Latimer, 108 Nebr. 32, 187 NW 83, 84 [cit Cyc]; Nelson v. Nelson, 99 Nebr. 456, 156 NW 1036; Weber v. Kirkendall, 44 Nebr. 766, 63 NW 35.

Okl.—Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 1103, 53 ALR 943 [quot Cyc].

Tenn.—West Constr. Co. v. Seaboard Air Line R. Co., 141 Tenn. 342, 210 SW 633, 635 [quot Cyc].

And see cases supra note 40.

42. See Contracts § 321; Duress 19 C. J. p 838 note 82 [b].

43. McGuire v. H. G. Vogel Co., 164 App. Div. 173, 149 NYS 756 [rev 86 Misc. 22, 148 NYS 176]; Stanford v. U. S. Inv. Corp. Ltd., (Tex. Civ. A.) 272 SW 568. And see generally supra § 294.

[a] **A mere threat** to take the property of another, between whom and the threatener no relations exist such as would give peculiar force to such threat, does not constitute "duress." McGuire v. H. G. Vogel Co., 164 App. Div. 173, 149 NYS 756 [rev 86 Misc. 22, 148 NYS 176].

44. Karschner v. Latimer, 108 Nebr. 32, 187 NW 83, 84 [cit Cyc]; Weber v. Kirkendall, 44 Nebr. 766, 63 NW 35.

45. Stanford v. U. S. Inv. Corp., Ltd., (Tex. Civ. A.) 272 SW 568.

46. Boss v. Hutchinson, 182 App. Div. 88, 169 NYS 513. And see generally infra § 310.

[a] **Illustration.**—Where goods were shipped under contract whereby title did not pass until a draft attached to the bill of lading was paid, and the buyer, on presentation of the draft, disputed the price, but finally paid the draft under protest, the payment was voluntary, and not under duress of goods, as he had a complete and adequate remedy at law for the breach of the contract. Boss v. Hutchinson, 182 App. Div. 88, 169 NYS 513.

47. Lamb v. Rathburn, 118 Mich. 666, 77 NW 268.

48. Cadwell v. Higginbotham, 20 N. M. 482, 151 P 315.

49. U. S.—Nichols v. Knowles, 17 Fed. 494, 3 McCrary 477; De Bow v. U. S., 11 Ct. Cl. 672 [aff 97 U. S. 164].

Cal.—Kaiser v. Barron, 153 Cal. 474, 95 P 879.

Ga.—Fenwick Shipping Co. v Clarke, 133 Ga. 43, 65 SE 140; Finch v. J. M. Cox Co., 19 Ga. A. 256, 91 SE 281.

Iowa.—Chambliss v. Hass, 125 Iowa 484, 101 NW 153, 68 LRA 126.

Mich.—Sturgis First Nat. Bank v. Watkins, 21 Mich. 483.

Minn.—MacLean v. Reynolds, 175 Minn. 112, 220 NW 435.

Mo.—State v. Slayback, 90 Mo. A. 300.

N. Y.—Freeman v Grant, 132 N. Y. 22, 30 NE 247; Bruecher v. Port Chester, 101 N. Y. 240, 4 NE 272, 17 Abb NCas 361; Coady v. Curry, 8 Daly 58.

Pa.—Williams v. Williams, 2 Walk. 519.

S. C.—Treasurers v. Buckner, 27 S. C. L. 327; Murray v. Moorer, 25 S. C. L. 111.

Tenn.—Cocke v. Porter, 2 Humphr. 15.

Tex.—Clark v. Pearce, 80 Tex. 146, 15 SW 787.

Vt.—Hopkinson v. Sears, 14 Vt. 494, 39 AmD 236.

Eng.—Maskell v. Horner, [1915] 3 K. B. 106; Valpy v. Manley, 1 C. B. 594, 50 ECL 592, 135 Reprint 673. But see Clyesdale Bank, Ltd. v. Schröder, [1913] 2 K. B. 1 (money paid under compulsion and protest in order to recover property seized is not recoverable).

Man.—Pople v. Dauphin, 31 Man. 125, 129, 60 DomLR 30, [1921] 2 WestWkly 276 [cit Cyc].

[a] **Illustrations.**—(1) Where a sheriff, having writs which authorize him to collect, exacts from the debtor more than is lawfully required, even without levy, the payment is not voluntary. Treasurers v. Buckner, 27 S. C. L. 327. (2) Where property was taken from plaintiff on process against a third person on the false assumption that the property belonged to defendant in execution, a payment by plaintiff on demand that it would be sold unless payment was made is involuntary and may be recovered back. State v. Slayback, 90 Mo. A. 300. (3) Where a man's goods are in the possession of an officer who has no authority to retain them, yet exacts a payment as a condition of restoring them, the payment, in contemplation of law, is not voluntary, although both parties believe it to be legal; in fact, acting in ignorance of law. De Bow v. U. S., 11 Ct. Cl. 672. (4) Where after the execution and delivery of an assignment the sheriff levies upon and threatens to sell goods of the assignors remaining in his hands, and the assignee makes payments to obtain possession of the goods, the payments are involuntary. Freeman v. Grant, 132 N. Y. 22, 30 NE 247.

[b] **A payment under protest to a sheriff** in order to obtain possession of goods held by him and to prevent a sale of such goods to satisfy certain executions in his hands is not voluntary and, where the sheriff has no right to retain possession of the goods under such executions, a promise by him to repay is implied. Freeman v. Grant, 132 N. Y. 22, 30 NE 247.

[c] **A threat to seize the property** must at least indicate some present purpose to execute it. State v. Stonestreet, 92 Mo. A. 214.

50. MacLean v. Reynolds, 175 Minn. 112, 220 NW 435; Knox County Bank v. Doty, 9 Oh St. 505, 75 AmD 479.

51. Clark v. Pearce, 80 Tex. 146, 15 SW 787.

[a] **In New Hampshire** it has been held that assumpsit does not lie to recover back money paid for the release of goods illegally taken by virtue of a warrant of distress. Webber v. Aldrich, 2 N. H. 461.

with a full knowledge of the facts;[52] and it has been held that if the payment on a judgment is otherwise voluntary, it is not recoverable as being compulsory by reason of the fact that it is made under the compulsion of an execution,[53] or under a threat to levy execution.[54]

Attachment.[55] The fact that the payment is coerced by a threat to attach[56] or by an attachment[57] of goods does not render the payment compulsory; and this is equally true, although the attachment is issued in a state foreign to the residence of the payor.[58] Where, however, the attachment is threatened or sued out in bad faith by one with knowledge that he has no cause of action or who makes an excessive demand, for the purpose of extorting money from defendant, a payment to discharge the attachment is considered compulsory, and an action will lie for its recovery back.[59]

[§ 298] **(2) Real Property.** It has been stated that there cannot be such a thing as duress with respect to real property, so as to render a payment coerced thereby compulsory;[60] and it has been held that, where a person holding the title to land under an express or implied agreement to reconvey upon the payment of a particular sum refuses to convey unless an excessive sum is paid, payment to obtain the title is not compulsory.[61] By the weight of authority, however, a payment may be coerced by duress as to real property as well as to personal property, and, when so coerced, may be recovered back.[62] For example, a payment is compulsory and may be recovered back where it is made to remove or prevent a cloud upon the title of the payor;[63] or where a mortgagee in possession requires the mortgagor or his assignee to pay more than is legally due in order to redeem;[64] or where a party redeems from a

52. Ala.—Ewing v. Peck, 26 Ala. 413.
Ga.—Cohen v. Troy Laundry, etc., Co., 99 Ga. 289, 25 SE 689.
Ind.—Hollingsworth v. Stone, 90 Ind. 244.
Ky.—Hunt v. Boyier, 1 J. J. Marsh. 484, 19 AmD 116.
N. J.—Turner v. Barber, 66 N. J. L. 496, 49 A 676.
N. Y.—Herald Square Cloak, etc., Co. v. Rocca, 48 Misc. 650, 96 NYS 189.
Pa.—Commonwealth Bldg., etc., Assoc. v. Stroh, 12 Pa. Dist. 509.
Sask.—Burns v. MacDonalds Cons., Ltd., [1925] 3 DomLR 418.

[a] **Payment to prevent a levy** on an execution is not made under duress where the payor might have obtained a supersedeas. Cohen v. Troy Laundry, etc., Co., 99 Ga. 289, 25 SE 689.

[b] **Payment after return day.**—If the money was voluntarily paid after the return day of the execution, and under no mistake by the party paying it as to his rights, he cannot recover it; but it does not follow that the payment was voluntary, merely because it was made after the return day of the execution, when there was a subsisting levy on the defendant's land; whether it was voluntary or not, under such circumstances, is a question for the determination of the jury Ewing v. Peck, 26 Ala. 413.

53. See supra § 291.

54. West v. Brown, 165 Ga. 187, 140 SE 500.

55. Attachment generally see Attachment 6 C. J. p 1.

56. Ala.—Lehman v. Shackleford, 50 Ala. 437.
Conn.—Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co., 97 Conn. 129, 115 A 629, 18 ALR 1230.
Ga.—West v. Brown, 165 Ga. 187, 140 SE 500.
Iowa.—Paulson v. Barger, 132 Iowa 547, 109 NW 1081.
Utah.—Flack v. Commerce Nat. Bank, 8 Utah 193, 30 P 746, 17 LRA 583.

[a] **A mere threat** to begin a civil suit and attach property in aid of such suit does not constitute such duress as to make payment made on account thereof an involuntary one. Paulson v. Barger, 132 Iowa 547, 109 NW 1081.

57. Kohler v. Wells, 26 Cal. 606; Lyman v. Lauderbaugh, 75 Iowa 481, 39 NW 812; Dickerman v. Lord, 21 Iowa 338, 87 AmD 579.

58. Dickerman v. Lord, supra; Adams v. Reeves, 68 N. C. 134, 12 AmR 627.

[a] **Mere attachment not sufficient.**—The mere fact, there being no element of fraud or other means of oppression, that one is sued by attachment in the state where plaintiff resides, but which is foreign to the residence of defendant, will not of itself make the payment of money to avoid such a judgment compulsory in such a sense that it can be recovered back if it can be shown not to be due. Dickerman v. Lord, 21 Iowa 338, 89 AmD 579.

59. Conn.—Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co., 97 Conn. 129, 115 A 629, 18 ALR 1230.
Ga.—Finch v. J. M. Cox Co., 19 Ga. A. 256, 91 SE 281.
Mass.—Chandler v. Sanger, 114 Mass. 364, 19 AmR 367.
Nebr.—Weber v. Kirkendall, 39 Nebr. 193, 57 NW 1026.
N. C.—Adams v. Reeves, 68 N. C. 134, 12 AmR 627.

[a] **Illustration.**—Money may be recovered back where it is paid by reason of fear that if not paid the party making the demand will attach his goods, especially where the effect thereof would probably be to destroy the financial credit and reputation of the debtor, and it is immaterial that such payment is not technically made under duress of property. Weber v. Kirkendall, 39 Nebr. 193, 57 NW 1026.

Remedies for wrongful attachment generally see Attachment §§ 1162–1341.

60. Fleetwood v. New York, 4 N. Y. Super. 475; Forrest v. New York, 13 AbbPr (N. Y.) 350.

61. Gilpatrick v. Sayward, 5 Me. 465; Congdon v. Preston, 49 Mich. 204, 13 NW 516; Pearl v. Whitehouse, 52 N. H. 254; Hall v. Shultz, 4 Johns. (N. Y.) 240, 4 AmD 270.

[a] **Rule applied** to payment of taxes by owner to keep title good, and demanded of purchaser see Congdon v. Preston, 49 Mich. 204, 13 NW 516.

62. U. S.—Lonergan v. Buford, 148 U. S. 581, 13 SCt 684, 37 L. ed. 569; Mariposa Co. v. Bowman, 16 F. Cas. No. 9,089, Deady 228.
Cal.—Rowland v. Watson, 4 Cal. A. 476, 88 P 495.
Iowa.—Manning v. Poling, 114 Iowa 20, 83 NW 895, 86 NW 30.
Minn.—Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.
Mo.—Wells v. Adams, 88 Mo. A. 215; Fout v. Gira'din, 64 Mo. A. 165.
Nebr.—David City First Nat. Bank v. Sargeant, 65 Nebr. 594, 91 NW 595, 59 LRA 296.
N. J.—Teeter v. Veitch, (Ch.) 61 A 14.
Okl.—Hubbard v. Jones, 103 Okl. 276, 229 P 516.
Pa.—Motz v. Mitchell, 91 Pa. 114.
Tex.—Stanford v. U. S. Inv. Corp., Ltd., (Civ. A.) 272 SW 568.
Eng.—Fraser v. Pendlebury, 31 L. J. C. P. 1; Close v. Phipps, 7 M. & G. 586, 49 ECL 586, 135 Reprint 236.

[a] **Rule applied to:** (1) Payment to induce release of land from record of forfeited lease. Hubbard v. Jones, 103 Okl. 276, 229 P 516. (2) Payment made for preservation of or permission to use deed in defending title. Motz v. Mitchell, 91 Pa. 114. (3) Overpayment for land sold see Vendor and Purchaser [39 Cyc 2016].

[b] **Where a party has paid a large sum of money for property,** and in order to obtain possession and protect the property against loss is compelled to pay an additional sum, such payment constitutes compulsory payment. Lonergan v. Buford, 148 U. S. 581, 13 SCt 684, 37 L. ed. 569.

[c] **Payment to lift mechanic's lien.**—While the filing of a mechanic's lien does not interfere with the possession of the land, yet where it effectually deprives the owner of the use of it for the purposes for which he needed it, payment to satisfy the lien founded on an unjust claim, in order to clear the title of record, is paid under duress of real property. Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.

[d] **Redemption from judgment sale.**—Where one is obliged to choose between making redemption from a judgment sale, and yielding possession of the land, his payment is not considered a voluntary one. Manning v. Poling, 114 Iowa 20, 83 NW 895, 86 NW 30.

[e] **Payment to release property.**—Where a party was compelled to make a payment or lose a voluntary sale of his property at advantageous figures, and he was utterly unable to meet his obligation except by a sale of the land, the legal title to which was held by one as security, and he demanded the payment of more than was due as a condition of releasing the property, such a payment is compulsory and may be recovered back. David City First Nat. Bank v. Sargeant, 65 Nebr. 594, 91 NW 595, 59 LRA 296.

63. Maskey v. Lackmann, 146 Cal. 777, 81 P 115; Hays v. Hogan, 5 Cal. 241; Stover v. Mitchell, 45 Ill. 213; American Baptist Missionary Union v. Hastings, 67 Minn. 303, 69 NW 1078.

[a] **Payment not compulsory.**—The levy of an execution upon the land of one person, issued on a judgment against another, will not render compulsory a payment by the owner of the land to prevent the sale, as it cannot create any cloud upon his title. Stover v. Mitchell, 45 Ill. 213.

64. Mass.—McMurtrie v. Keenan, 109 Mass. 185; Cazenove v. Cutler, 4 Metc. 246.
Mich.—Klein v. Bayer, 81 Mich. 233, 45 NW 991.
Minn.—Bennett v. Healey, 6 Minn. 240.
Mo.—Voelpel v. Phœnix Mut. L. Ins. Co., (A.) 183 SW 679; Fout v. Gira'din, 64 Mo. A. 165.
Nebr.—David City First Nat. Bank v. Sargeant, 65 Nebr 594, 91 NW 595, 59 LRA 296.
N. Y.—Kilpatrick v. Germania L. Ins. Co., 183 N. Y. 163, 75 NE 1124, 111 AmSR 722, 2 LRANS 574; Homecrest B'dg. Co., Inc. v. Weinstein, 165 NYS 176.
Okl.—Union Cent. L. Ins. Co. v. Er-

foreclosure sale in order to protect his liens and titles.[65] So where a person entitled to redeem from a real estate mortgage pays, upon the demand of the mortgagee, and under protest, more interest than is due in order to prevent expiration of the time for redemption, he may recover such interest back.[66] And where a purchaser refuses to allow a redemption from a foreclosure sale, except upon payment of more than is due, the amount so paid in excess of what was actually due may be recovered back.[67]

[§ 299] **d. Apprehension or Threat of Legal Proceedings—(1) Of Civil Proceedings in General.** As a general rule, mere apprehension[68] or threats[69] of a civil proceeding to enforce a claim, unaccompanied by any act of hardship or oppression, does not render a payment in response thereto involuntary in the sense that it can be recovered back; and this rule also applies, although the payment is not made until after legal proceedings to recover on the asserted claim have actually been instituted in good faith.[70] But it has been held that, where civil proceedings are instituted on a fictitious claim for the legality, or if, made under a threatened sale of his property, and he can contest the validity of the proceedings whenever an attempt is made to disturb his possession, and he pays the claim or demand rather than be subjected to such action or to have his property sold, such payment is voluntary, to the extent that it cannot be recovered in an action therefor." Lewis v. San Francisco, 2 Cal. A. 112, 115, 82 P 1106 [quot Charles E. Trower v. San Francisco, 152 Cal. 479, 482, 92 P 1025, 15 LRANS 183].

win, 44 Okl. 768, 145 P 1125.

Eng.—Sawyer v. Goodwin, 1 Ch. D. 351; Chapple v. Mahon, Ir. R. 5 Eq. 225; Taylor v. Waters, 1 Myl. & C. 266, 13 EngCh 266, 40 Reprint 376.

[a] **Illustrations.**—(1) Where the mortgagee, after the mortgagor's default, has secured the payment of a bonus before releasing the mortgage lien, the mortgagor may recover the amount thereof. Union Cent. L. Ins. Co. v. Erwin, 44 Okl. 768, 145 P 1125. (2) Where a purchaser of land from a mortgagor, without notice of an unrecorded extension agreement between the mortgagor and mortgagee calling for payment of a higher rate of interest and a bonus, pays the mortgagee, under protest, such higher rate and also the bonus in order to release the land from the lien of the mortgage so that he might secure advancements upon it to enable him to pay the price and avoid forfeiture of the cash paid, he may recover such higher interest and bonus from the mortgagee. Voelpel v. Phœnix Mut. L. Ins. Co., (Mo. A.) 183 SW 679. (3) A payment by mortgagors, who as additional security have assigned the rents of the property, of a sum in excess of the amount due, demanded by the mortgagee as a condition of reassigning the rents or surrendering control over the property, is made under duress and may be recovered back. Fout v. Giraldin, 64 Mo. A. 165.

Compulsory redemption generally see Mortgages § 2090.

Payment under apprehension or threat of foreclosure see infra § 299.

65. Bovey-Shute Lumber Co. v. Farmers, etc., Bank, 43 N. D. 66, 173 NW 455.

66. Whitcomb v. Harris, 90 Me. 206, 38 A 138.

67. Bennett v. Healy, 6 Minn. 240.

68. Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555, 557 [quot Cyc].

Ind.—Ligonier v. Ackerman, 46 Ind. 552, 15 AmR 323.

Iowa.—Muscatine v. Keokuk Northern Line Packet Co., 45 Iowa 185.

Mich.—Francis v. Hurd, 113 Mich. 250, 71 NW 582.

Mo.—Pritchard v. Peoples Bank, 198 Mo. A. 597, 200 SW 665.

Nebr.—Weber v. Kirkendall, 44 Nebr. 766, 63 NW 35.

Or.—Cram v. Powell, 100 Or. 708, 197 P 280.

Tex.—Laredo v. Loury, (A.) 20 SW 89.

[a] **"The payment of money into a public treasury,** where the payer is under no other stress or menace than that of a personal action against him for the recovery of such amount . . . is voluntary, rather than under duress." Harbeck v. Sioux City, 199 Iowa 763, 764, 202 NW 507.

[b] **Payment for child.**—Payment made to the owner of goods taken by a child cannot be recovered on the ground of duress where there is no threat of a prosecution of the child for a criminal offense. Francis v. Hurd, 113 Mich. 250, 71 NW 582.

69. U. S.—Marshall v. Redfield, 16 F. Cas. No. 9,131, 4 Blatchf. 221.

Ala.—Cahaba v. Burnett, 34 Ala. 400.

Ark.—Shirey v. Beard, 62 Ark. 621, 37 SW 309; Vick v. Shinn, 49 Ark. 70, 4 SW 60, 4 AmSR 26.

Cal.—Hanford Gas, etc., Co. v. Hanford, 163 Cal. 108, 124 P 727; Holt v. Thomas, 105 Cal. 273, 38 P 891; Bucknall v. Story, 46 Cal. 589, 13 AmR 220.

Conn.—Monroe Nat. Bank v. Catlin, 82 Conn. 227, 73 A 3.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555, 557 [quot Cyc]; Daniel Bros. Co. v. Richardson, (A.) 146 SE 505.

Ill.—Helmick v. Carter, 171 Ill. A. 25.

Ind.—Thompson v. Doty, 72 Ind. 336; Brazil v. Kress, 55 Ind. 14; Cummins v. White, 4 Blackf. 356.

Iowa.—Harbeck v. Sioux City, 199 Iowa 763, 202 NW 507; Muscatine v. Keokuk Northern Line Packet Co., 45 Iowa 185.

La.—New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 33 S 51, 94 AmSR 395; Laterrade v. Kaiser, 15 La. Ann. 296.

Me.—Parker v. Lancaster, 84 Me. 512, 24 A 952.

Md.—Lester v. Baltimore, 29 Md. 415, 96 AmD 542.

Mass.—Regan v. Baldwin, 126 Mass. 485, 30 AmR 689; Emmons v. Scudder, 115 Mass. 367; Forbes v. Appleton, 5 Cush. 115; Boston, etc., Glass Co. v. Boston, 4 Metc. 181; Preston v. Boston, 12 Pick. 7.

Minn.—Minneapolis Stock-Yards, etc., Co. v. Cunningham, 59 Minn. 325, 61 NW 329; Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.

Mo.—Wolfe v. Marshal, 52 Mo. 167; Pritchard v. Peoples Bank, 198 Mo. A. 597, 200 SW 665.

Nebr.—Weber v. Kirkendall, 44 Nebr. 766, 63 NW 35.

N. H.—Evans v. Gale, 18 N. H. 397.

N. Y.—Quincey v. White, 63 N. Y. 370 [rev 5 Daly 327]; Kamenitsky v. Corcoran, 177 App. Div. 605, 164 NYS 297 [rev on the facts 97 Misc. 384, 161 NYS 756]; McGuire v. H. G. Vogel Co., 164 App. Div. 173, 149 NYS 756 [rev 86 Misc. 22, 148 NYS 176]; Grady v. Crook, 2 AbbNCas 53 [aff 72 N. Y. 612 mem].

N. C.—Matthews v. Smith, 67 N. C. 374.

Or.—Portland First Nat. Bank v. Multnomah Lumber, etc., Co., 125 Or. 598, 268 P 63; Siverson v. Clanton, 88 Or. 261, 170 P 933, 171 P 1051.

Pa.—Peebles v. Pittsburgh, 101 Pa. 304, 47 AmR 714; Colwell v. Peden, 3 Watts 327; Steere v. Oakley, 5 Pa. Super. 46 [rev on other grounds 186 Pa. 582].

Tex.—Thrower v. Brownlee, (Commn. A.) 12 SW (2d) 184; Cameron County Water Impr. Dist. No. 1 v. Handley, (Civ. A.) 275 SW 298.

Utah.—Flack v. Commerce Nat. Bank, 8 Utah 193, 30 P 746, 17 LRA 583.

Vt.—Meacham v. Newport, 70 Vt. 67, 39 A 631; Burnham v. Strafford, 53 Vt. 610; Taggart v. Rice, 37 Vt. 47.

Eng.—Brown v. McKinally, 1 Esp. 279, 170 Reprint 356; Knibbs v. Hall, 1 Esp. 84, 170 Reprint 287. But see Unwin v. Leaper, 1 M. & G. 747, 39 ECL 1006, 133 Reprint 533 (threatened penal action held sufficient coercion to warrant recovery).

"When an illegal demand is made against the person or property of an individual which can be enforced only by a judgment therefor in an action at law wherein he can contest its

[a] **A statement of intention** to resort to the courts, or to public officials, however unjustified, in order to extort money from another, is not a threat in a legal sense. Kamenitsky v. Corcoran, 177 App. Div. 605, 164 NYS 297 [rev on other grounds 97 Misc. 384, 161 NYS 756].

[b] **Rule applied.**—Where a creditor, believing his debtor would carry out threats to file a petition in bankruptcy and give false testimony that a prior payment was made under such circumstances as to constitute an unlawful preference under the Bankruptcy Act, executes an order directing the holder in escrow of a sum deposited pending an accounting between the parties to pay the same to such debtor in liquidation and settlement of all accounts between them, he cannot recover the amount so paid on the ground of duress. Kalbfleisch v. Anderson, 116 Misc. 361, 190 NYS 18 [aff 201 App. Div. 158, 194 NYS 692 (aff 235 N. Y. 505 mem, 139 NE 712 mem)].

[c] **A threat to file a mechanic's lien** if payment is not made does not constitute duress. Crossways Apartments Corp. v. Amante, 213 App. Div. 430, 210 NYS 346.

70. U. S.—Blumenthal v. U. S., 4 F. (2d) 808.

Ind.—Watson v. Cunningham, 1 Blackf. 321.

Mass.—Benson v. Monroe, 7 Cush. 125, 54 AmD 716.

Minn.—Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.

N. J.—Turner v. Barber, 66 N. J. L. 496, 49 A 676.

Or.—Siverson v. Clanton, 88 Or. 261, 170 P 933, 171 P 1051.

Vt.—Wheatley v. Waldo, 36 Vt. 237.

W. Va.—Beard v. Beard, 25 W. Va. 486, 52 AmR 219.

Eng.—Moore v. Fulham, [1895] 1 Q. B. 399; Milnes v. Duncan, 6 B. & C. 671, 13 ECL 302, 108 Reprint 598; Hamlet v. Richardson, 9 Bing. 644, 23 ECL 742, 131 Reprint 756; Brown v. McKinally, 1 Esp. 279, 170 Reprint 356.

"The coercion which results from a prosecution in court, in good faith, with full right of appeal, does not constitute legal duress." Blumenthal v. U. S., 4 F. (2d) 808, 809.

[a] **Before final judgment.**—"The payment of a claim, on account of being sued on it, at any stage before final judgment and execution, is regarded voluntary, and, if made with full knowledge of the facts, cannot be recovered back any more than if it had been made on demand, without suit." Wheatley v. Waldo, 36 Vt. 237, 243.

[b] **Filing a mechanic's lien** is not the commencement of judicial proceedings within the rule that the

purpose of extortion, a payment coerced thereby is compulsory and may be recovered back.[71]

Foreclosure of mortgage.[72] Mere apprehension of foreclosure or threats by the mortgagee to foreclose a mortgage will not render compulsory a payment by the mortgagor of an excessive amount claimed by the mortgagee.[73]

[§ 300] **(2) Of Criminal Prosecution in General.** Where no warrant has been issued or proceedings begun, and there is no immediate danger, a payment with full knowledge of the facts will not, as a general rule, be deemed compulsory so as to entitle the payor to recover it back, by reason of the fact that the payment is made under a mere apprehension,[74] or threat[75] of a criminal prosecution. However, demands and threats of persons clothed with governmental authority to carry them into execution by arrest and prosecution stand on a different footing from demands and threats of private individuals, and money paid because thereof, if unwarranted, may generally be recovered back,[76] as in such cases the parties do not stand on an equal footing.[77]

[§ 301] **(3) Of Arrest and Imprisonment.**[78] A payment made under threat of arrest and imprisonment, provided the duress provokes fear sufficient to overcome the will of a man of ordinary firmness and constancy,[79] is considered compulsory, and may be recovered back;[80] and this rule is especially applicable where the payor, because of his age, intellect, or disposition, is particularly susceptible to

commencement of a judicial proceeding for the enforcement of a claim is not duress. Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376.

[c] **In New York** it has been held that, where a debtor, on being brought before a referee in supplementary proceedings, sought an adjournment to procure counsel, which was refused him until certain questions were asked by the creditor's attorney, whereupon he sought to pay the amount demanded under protest, which was not allowed, and he thereupon paid the amount and costs, such payment was pursuant to legal duress, and was therefore recoverable. Matter of Stoddard, 128 App. Div. 759, 113 NYS 157.

71. Welch v. Beeching, 193 Mich. 338, 159 NW 486; Sartwell v. Horton, 28 Vt. 370; Cadaval v. Collins, 4 A. & E. 858, 31 ECL 376, 111 Reprint 1006.

[a] **Parties.**—In an action to recover money paid under duress of a threatened lawsuit, if the case could go to the jury at all, it should be submitted both as against the holder of the alleged claim and the attorney who threatened the suit, who had an agreement with the owner for half the proceeds. Welch v. Beeching, 193 Mich. 338, 159 NW 486.

72. Foreclosure of mortgages generally see Mortgages §§ 1003-1199.

Payment to redeem from mortgage see supra § 298.

73. Cal.—Burke v. Gould, 105 Cal. 277, 38 P 733; Rodgers v. Wittenmyer, 88 Cal. 553, 26 P 369.

Ga.—Savannah Sav. Bank v. Logan, 99 Ga. 291, 25 SE 692.

Ill.—Helmick v. Carter, 171 Ill. A. 25; Keeley v. Pope, 160 Ill. A. 492.

Mich.—Vereycken v. Vanden Brooks, 102 Mich. 119, 60 NW 687.

N. D.—Gold-Stabeck Loan, etc., Co. v. Kinney, 33 N. D. 495, 157 NW 482.

Or.—Portland First Nat. Bank v. Multnomah Lumber, etc., Co., 125 Or. 598, 268 P 63; Cram v. Powell, 100 Or. 708, 197 P 280.

S. C.—Shuck v. Interstate Bldg., etc., Assoc., 63 S. C. 134, 41 SE 28.

But see McMurtrie v. Keenan, 109 Mass. 185 (holding that, where the mortgagee threatens to sell under the power of sale and the mortgagor pays interest a second time under protest, he may recover back such second payment); Close v. Phipps, 7 M. & G. 586, 49 ECL 586, 135 Reprint 236 (where the mortgage was to be foreclosed by sale under a power contained therein, and the mortgagee refused to stop the sale unless a payment in excess of the mortgage debt was made, the payment of such excessive amount should be considered compulsory).

[a] **Illustration.**—Where a mortgagee threatens foreclosure if the installments past due are not paid, and at the same time refuses to cancel the mortgage unless the entire debt, including the installments not due, is paid, it does not amount to duress nor render involuntary the payment by the debtor of the whole debt, even though such payment is made for the purpose of having the mortgage canceled. Savannah Sav. Bank v. Logan, 99 Ga. 291, 25 SE 692.

74. U. S.—Hall's Case, 9 Ct. Cl. 270.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555, 559 [quot Cyc].

Ill.—St. Louis, etc., R. Co. v. Thomas, 85 Ill. 464.

Mass.—Felton v. Gregory, 130 Mass. 176.

Mo.—Claflin v. McDonough, 33 Mo. 412, 84 AmD 54.

N. Y.—Sprague v. Birdsall, 2 Cow. 419.

Vt.—Comstock v. Tupper, 50 Vt. 596.

[a] **Apprehension of court martial.**—Payment by an officer of the United States of a balance claimed from him by the treasury department, induced by the suspension of his official functions and compensation and by his apprehension of being tried by a court-martial, is not deemed to be made under duress so as to be recoverable back. Hall's Case, 9 Ct. Cl. 270.

75. Ala.—Southern R. Co. v. Florence, 141 Ala. 493, 37 S 844, 3 AnnCas 106.

Ark.—Bosley v. Shanner, 26 Ark. 280.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555, 558 [quot Cyc].

Ill.—Patoka Loan, etc., Assoc. v. Holland, 63 Ill. A. 58.

Ind.—Hines v. Hamilton County, 93 Ind. 266; Thompson v. Doty, 72 Ind. 336; Darling v. Hines, 5 Ind. A. 319, 32 NE 109.

Me.—Campbell v. Chabot, 115 Me. 247, 98 A 746; Hilborn v. Bucknam, 78 Me. 482, 7 A 272, 57 AmR 816; Higgins v. Brown, 78 Me. 473, 5 A 269; Harmon v. Harmon, 61 Me. 227, 14 AmR 556.

Mass.—Preston v. Boston, 12 Pick. 7.

Mich.—Voorhees v. Nelson, 189 Mich. 684, 155 NW 708; Betts v. Reading, 93 Mich. 77, 52 NW 940.

Mo.—Buchanan v. Sahlein, 9 Mo. A. 552.

Nev.—Frame v. Harris, 45 Nev. 59, 197 P 702; Hostetler v. Harris, 45 Nev. 43, 197 P 697.

N. Y.—Knapp v. Hyde, 60 Barb. 80; Sternback v. Friedman, 23 Misc. 173, 50 NYS 1025 [mod on other grounds 34 App. Div. 534, 54 NYS 608].

[a] **In Kentucky** it has been said "that threats of a prosecution for an offense of which the party is actually guilty, if they induce the threatened party to pay money that he would not have voluntarily paid, amount to duress for which a recovery can be had." American R. Express Co. v. Hicks, 198 Ky. 549, 557, 249 SW 342.

Threat of criminal prosecution as affecting contracts see Contracts § 315.

76. D. C.—District of Columbia v. Chapman, 25 App. 95.

Ga.—Strachan Shipping Co. v. Savannah, 147 SE 555, 558 [quot Cyc].

Ill.—Harvey v. Olney, 42 Ill. 336; Kraetsch v. Chicago, 198 Ill. A. 395; Chicago v. Waukesha Imperial Spring Brewing Co., 97 Ill. A. 583.

Ky.—American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342.

Mich.—Sturgis First Nat. Bank v. Watkins, 21 Mich. 483.

Mont.—Clifford v. Great Falls Gas Co., 68 Mont. 300, 216 P 1114.

N. Y.—Deshong v. New York, 176 N. Y. 475, 68 NE 880; Spanier v. Lazar, 124 Misc. 551, 208 NYS 458.

Oh.—Toledo v. Buechele, 21 Oh. Cir. Ct. 429, 11 Oh. Cir. Dec. 419.

Wash.—Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

Wis.—Neumann v. La Crosse, 94 Wis. 103, 68 NW 654.

[a] **A payment to prevent the arrest of employees** of the person making the payment has been held not a voluntary one. Chicago v. Waukesha Imperial Spring Brewing Co., 97 Ill. A. 583.

[b] **Payment under unlawful ordinance.**—Where a person might be arrested unless the payment exacted under an unlawful ordinance is made, and, if not arrested but proceeded against by summons, might be fined and imprisoned, if the fine is not paid, the payment is made under duress. Rath v. Chicago, 207 Ill. A. 117.

77. Strachan Shipping Co. v. Savannah, (Ga.) 147 SE 555; Clifford v. Great Falls Gas Co., 68 Mont. 300, 216 P 1114.

78. Payment to obtain release from arrest and imprisonment see supra § 295.

79. Campbell v. Chabot, 115 Me. 247, 98 A 746.

[a] **Whether a precept has been issued** or is about to be issued is an important factor in determining the sufficiency of the acts to show duress. Campbell v. Chabot, 115 Me. 247, 98 A 746.

80. Ky.—American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342.

Me.—Campbell v. Chabot, 115 Me. 247, 98 A 746.

Mich.—Voorhees v. Nelson, 189 Mich. 684, 155 NW 708; Nelson v. Leszczynski-Clark Co., 177 Mich. 517, 143 NW 606; Cribbs v. Sowle, 87 Mich. 340, 49 NW 587, 24 AmSR 166.

Mont.—Clifford v. Great Falls Gas Co., 68 Mont. 300, 216 P 1114.

N. Y.—Deshong v. New York, 176 N. Y. 475, 68 NE 880.

Wash.—Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

[a] **The presumption of want of duress** in the making of contracts does not apply to the payment of money under threat of imprisonment where not claimed under a shadow of right. Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

[b] **Defenses.**—In an action to recover money paid to defendants under duress of threatened arrest, an answer alleging that one of the plaintiffs was personally liable under his contract of employment with defendant for the amount which he was required to pay because an express package was lost through his negligence constitutes no defense to the cause of action alleged in the petition. American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342.

fear from such a threat.[81] Even though the person threatened is guilty of the crime charged, if an excessive or illegal payment is extorted from him under threats of arrest and imprisonment, such payment is compulsory and may be recovered.[82] So, also, a threat to arrest a child[83] or husband[84] of the payor makes the payment involuntary and recoverable, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment.[85]

[§ 302] **e. Business Necessities.** Where, in an emergency which arises through no fault of his own,[86] a person is compelled, through the necessity of protecting his business interests, to pay an unlawful demand, the payment is compulsory and may be recovered back,[87] such as a payment made to avoid a great financial loss,[88] or under a business necessity to free property of some duress or lien.[89] In the absence, however, of a demand or some element of coercion or duress, a payment is not rendered compulsory by the mere fact that it is made in order to enable the payor to carry on his business.[90]

81. Baldwin v. Hutchison, 8 Ind. A. 454, 35 NE 711; Cribbs v. Sowle, 87 Mich. 340, 49 NW 587, 24 AmSR 166; Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 NE 7, 15 AmSR 447, 6 LRA 491.

[a] **Thus** duress is established where it is proved that plaintiff, a man seventy-two years old and ignorant of the law, was threatened by defendant with prosecution, imprisonment, and fine for selling cider without a license, unless he would pay defendant one hundred and fifty dollars, and that plaintiff, on being confronted with several men who claimed that he had sold them cider, and on being informed by defendant that the men would so testify, under the influence of such threats paid the one hundred and fifty dollars without any consideration. Cribbs v. Sowle, 87 Mich. 340, 49 NW 587, 24 AmSR 166.

82. Wilbur v. Blanchard, 22 Ida. 517, 126 P 1069; American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342.

83. American R. Express Co. v. Hicks, supra; National Surety Co. v. McLeod, 240 Mich. 360, 215 NW 341; Schultz v. Culbertson, 49 Wis. 122, 4 NW 1070; St. Hilaire v. Turcotte, 40 Que. K. B. 262.

[a] **Father-in-law.**—One wronged by a crime cannot threaten employment of the criminal law to obtain private pecuniary composition with the father-in-law of the one claimed guilty. National Surety Co. v. McLeod, 240 Mich. 360, 215 NW 341.

84. Waynesboro Bank v. Walters, 135 Ga. 643, 70 SE 244; Mills v. Hudgins, 97 Ga. 417, 24 SE 146; Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 NE 7, 15 AmSR 447, 6 LRA 491; Jaeger v. Koenig, 30 Misc. 580, 62 NYS 803 [aff 29 Misc. 780, 61 NYS 505].

85. Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 NE 7, 15 AmSR 447, 6 LRA 491.

[a] **Money paid for a city permit** (1) illegally demanded by an inspector under threats that unless the money was paid the workmen would be arrested by the police and the work stopped is compulsory and may be recovered back. Deshong v. New York, 176 N. Y. 475, 68 NE 880; Title Guarantee, etc., Co. v. New York, 185 App. Div. 688, 173 NYS 718; Buckley v. New York, 30 App. Div. 463, 52 NYS 452 [aff 159 N. Y. 558 mem, 54 NE 1089 mem]. (2) But it has been held that, where a policeman threatened arrest if the work was continued without a permit and the owner thereupon signed an application for a permit and obtained it on payment of the sum offered in his application, the payment was not compulsory. Wolff v. New York, 92 App. Div. 449, 87 NYS 214 [aff 179 N. Y. 580 mem, 72 NE 1153 mem].

86. Manhattan Milling Co. v. Manhattan Gas, etc., Co., 115 Kan. 712, 225 P 86. And see cases infra note 87.

87. U. S.—Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013; Swift, etc., Co. v. U. S., 111 U. S. 22, 4 SCt 244, 28 L. ed. 341.

Cal.—Rowland v. Watson, 4 Cal. A. 476, 88 P 495.

Colo.—Galvin v. Stokes, 68 Colo. 376, 191 P 117.

Hawaii.—Seattle Brewing, etc., Co. v. Campbell, 17 Hawaii 364.

Ill.—La Salle County v. Simmons, 10 Ill. 513; Pittsburgh Steel Co. v. Hollingshead, 202 Ill. A. 177.

Iowa.—Scottish Union, etc., Ins. Co. v. Herriott, 109 Iowa 606, 80 NW 665, 77 AmSR 548 [app dism 187 U. S. 651 mem, 23 SCt 841 mem, 47 L. ed. 349 mem].

Kan.—Manhattan Milling Co. v. Manhattan Gas, etc., Co., 115 Kan. 712, 225 P 86.

La.—New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 33 S. 51, 94 AmSR 395.

Mass.—Carew v. Rutherford, 106 Mass. 1, 8 AmR 287; Cunningham v. Munroe, 15 Gray 471.

Mo.—American Brewing Co. v. St. Louis, 187 Mo. 367, 86 SW 129, 2 Ann Cas 821; Westlake v. St. Louis, 77 Mo. 47, 46 AmR 4; Voelpel v. Phœnix Mut. L. Ins. Co., (A.) 183 SW 679; Brown v. Worthington, 162 Mo. A. 508, 517, 142 SW 1082 [cit Cyc].

N. Y.—American Exch. F. Ins. Co. v. Britton, 21 N. Y. Super. 148.

N. C.—Newland v. Buncombe Turnp. Co., 26 N. C. 372.

Oh.—Ratterman v. American Express Co., 49 Oh. St. 608, 32 NE 754; Toledo v. Buechele, 21 Oh. Cir. Ct 429, 11 Oh. Cir. Dec. 479.

Pa.—Lehigh Coal, etc., Co. v. Brown, 100 Pa. 338; Hazleton v. McGroarty, 2 Pa. Dist. 288.

S. D.—Redford v. Weller, 27 S. D. 334, 131 NW 296.

Tenn.—Johnson v. Ford, 147 Tenn. 63, 245 SW 531.

Tex.—Early Foster Co. v. Trueba, (Civ. A.) 243 SW 995.

Wash.—Sunset Copper Co. v. Black, 115 Wash. 132, 196 P 640.

Wis.—Guetzkow Bros. Co. v. Breese, 96 Wis. 591, 72 NW 45, 65 AmSR 83.

Eng.—Fulham v. Down, 6 Esp. 26 note, 170 Reprint 820.

[a] **In other words,** under such circumstances, it may be found as a fact that the party paying has not had his freedom of exercising his will and paid the money under moral duress, in which event, if it is against equity and good conscience for the money to be withheld from plaintiff, it may be recovered. Brown v. Worthington, 162 Mo. A. 508, 517, 142 SW 1082 [cit Cyc].

[b] **Illustrations.**—(1) When the alternative presented to a party is to submit to a city's exactions or discontinue his business within the corporate limits, money paid under such circumstances is not money paid voluntarily. Chicago v. Waukesha Imperial Spring Brewing Co., 97 Ill. A. 583. (2) Money paid to a collector of a port under protest, and on the certainty that if not paid clearance of vessels necessarily sailing on a definite schedule would be refused, to the great damage of the owner, is paid involuntarily, and can, if unlawfully exacted, be recovered. Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013. (3) Where the county commissioners, while the law then in force authorized them, in granting a ferry license, to impose an annual tax, not exceeding one hundred dollars, gave notice that they would grant a ferry license to the person who would give the largest sum to the county as a donation, and, several offers being made, the person who had previously kept the ferry offered and paid five hundred dollars, such sum may be recovered back. La Salle County v. Simmons, 10 Ill. 513.

[c] **Electrical service.**—Where it is necessary to obtain electrical service in order to carry on a business and it is necessary that an excessive charge be paid to receive future service, such payments are involuntary. Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59.

[d] **A payment made to an actor** after the bills for the evening have been issued, under a threat of not performing, is not voluntary. Dana v. Kemble, 17 Pick. (Mass.) 545.

[e] **A payment of tolls** cannot be said to be voluntary and not compulsory, when made by the party to enable him to obtain a passage for the United States mail, which he is bound to carry, and to keep his property from being taken from him by distress. Newland v. Buncombe Turnp. Co., 26 N. C. 372.

[f] **Deposit in escrow.**—Where, to protect his business, plaintiff gave securities in escrow on demand of defendant from whom plaintiff's associate in business had embezzled and defendant realized thereon, plaintiff may recover the proceeds regardless of the validity of the escrow agreement, since duress was used preventing a voluntary payment. Galvin v. Stokes, 68 Colo. 376, 191 P 117.

88. Furness Shipping, etc., Co. v. Barber, 6 F. (2d) 779; Rowland v. Watson, 4 Cal. A. 476, 88 P 495; Johnson v. Ford, 147 Tenn. 63, 245 SW 531.

[a] **Fees to railroad commission.**—Where a railroad engaged in interstate commerce was required to obtain the permission of the railroad commission to issuance of securities and to pay the commission fees as provided for by statutes declaring issues of securities void unless authorized by the commission and imposing heavy penalties for noncompliance, and the railroad paid the fees under protest with notice that it would promptly take steps to recover back the money paid, the payment of the fees was under duress and not voluntary. Minneapolis, etc., R. Co. v. State R. Commn., 183 Wis. 47, 197 NW 352.

89. Exporters', etc., Co. v. Spivey, (Tex. Civ. A.) 249 SW 1086.

[a] **Illustration.**—Permitting a cotton purchaser to deduct from the purchase price, pursuant to a custom known to a warehouseman, a storage fee charged by the latter in excess of that agreed on with the seller is a payment under such stress of business, in order to release a lien, as entitles the seller to recover from the warehouseman the charges wrongfully paid. Exporters', etc., Co. v. Spivey, (Tex. Civ. A.) 249 SW 1086.

90. U. S.—Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489.

Cal.—Standard Box Co. v. Mutual Biscuit Co., 10 Cal. A. 746, 103 P 938.

Colo.—Hawthorne v. Hendrie, etc., Mfg., etc., Co., 50 Colo. 342, 116 P 122.

Iowa.—Hipp v. Crenshaw, 64 Iowa 404, 20 NW 492.

Nebr.—Lathorpe v. McBride, 31 Nebr. 289, 47 NW 922.

N. Y.—Kamenitsky v. Corcoran, 97 Misc. 384, 161 NYS 756 [rev on other

Suspension from board of trade. Payment of an illegal demand growing out of a transaction on a board of trade made under apprehension of suspension, in default thereof, from the privileges of the board of trade, is not compulsory.[91]

[§ 303] **f. Threat or Fear of Loss of Employment.** A payment under a threat[92] or fear[93] of discharge from employment has been held not to have been made under duress.

[§ 304] **g. Payment To Compel Performance of Contract in General.**[94] As a general rule, a payment exacted as a condition to the performance of a contract cannot be considered compulsory.[95] Where, however, the nonperformance of the contract would have resulted in serious loss to the payor, and he had no other adequate remedy, the payment has been considered compulsory.[96]

[§ 305] **h. Effect of Protest.** In the absence of a statutory provision otherwise, a payment cannot be recovered back as being compulsory or involuntary by reason of the mere fact that it is paid unwillingly,[97] and that the payor at the time of payment makes a protest against the payment.[98] But where a receipt taken for the money paid expressly

grounds 177 App. Div. 605, 164 NYS 297]; Matthews v. William Frank Brewing Co., 26 Misc. 46, 55 NYS 241; Hess v. Cohen, 20 Misc. 333, 45 NYS 934.

Pa.—Harvey v. Girard Nat. Bank, 119 Pa. 212, 13 A 202.

[a] **Illustrations.**—(1) Payment of a judgment lien on real estate because the owner's necessities force him to make a loan thereon is not payment under duress. Hipp v. Crenshaw, 64 Iowa 404, 20 NW 492. (2) Where plaintiff had secured a judgment in the state court foreclosing a mechanic's lien on a bankrupt's real estate, and filed such judgment as a claim against the bankrupt's estate, and the trustee in bankruptcy and the creditors all found it to the creditors' advantage to relieve the estate of the lien, and for this reason the trustee was directed to pay the amount of the lien, such payment is neither coercive nor under duress. Hawthorne v. Hendrie, etc., Mfg., etc., Co., 50 Colo. 342, 116 P 122. (3) The fact that plaintiff, a public service corporation, because of being engaged in furnishing its services to manufactories engaged in war work for the government, was compelled by the nature of its business and the then condition of the coal market to pay additional sums demanded in excess of the contract price does not show such compulsion as will warrant a recovery, where defendant did not known of the character of plaintiff's business or did no act or brought no pressure on plaintiff. Detroit Edison Co. v. Main Island Creek Coal Co., 293 Fed. 495; Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489.

[b] **Payment to preserve credit.**—Where a payment is made merely to preserve the credit of the debtor, such payment is not necessarily compulsory. Harvey v. Girard Nat. Bank, 119 Pa. 212, 13 A 202.

[c] **Payment of head money.**—(1) Where the owner of a vessel carrying alien passengers is shown the statute and told by the superintendent of alien passengers that he is liable to pay head money for each of such passengers, but no force or threats are used, and the owner, through fear that if he refuses to pay such money his passengers will not be allowed to land and his business will be broken up, makes such payment, the payment is voluntary and not under duress. Cunningham v. Boston, 15 Gray (Mass.) 468. (2) But where the superintendent demands head money on these passengers, under color of his office but without lawful authority, and tells the master that if he does not comply with the demand he cannot land his passengers, the payment is by compulsion and the owner of the vessel may maintain an action to recover it back. Cunningham v. Munroe, 15 Gray (Mass.) 471.

91. Lamson v. Boyden, 57 Ill. A. 232 [aff 160 Ill. 613, 43 NE 781]; Quincey v. White, 63 N. Y. 370 [rev 5 Daly 327]; Sawyer v. Gruner, 60 N. Y. Super. 285, 17 NYS 465.

[a] **Thus,** a member of a stock board, against whom a claim is made by another member of the board, for a deficiency arising on a sale of stock under the rules of the board, who, on being cited to appear before the arbitration committee of the board, pays the claim, with full knowledge of all the facts, cannot maintain an action to recover it back, as fear of the committee is not duress. Quincey v. White, 63 N. Y. 370 [rev 5 Daly 327].

92. Day v. Studebaker Bros. Mfg. Co., 13 Misc. 320, 34 NYS 463. But see Fuerst v. Musical Mut. Protective Union, 95 NYS 155 (holding that a threat made by the officers of a union of musicians that, unless a member paid an illegal fine imposed, he would be expelled, causing a member to fear that, unless he paid the fine, he would be expelled and deprived of his means of earning a living, amounts to duress, entitling him to maintain an action for the fine paid).

93. Siegel v. Schueck, 67 Ill. A. 296; Gross v. Cincinnati, 4 ObS&CP 393.

94. Duress as to contracts generally see Contracts §§ 310–325.

Payments on contract as voluntary see supra § 285.

95. Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376; Armstrong v. Latimer, etc., Co., 165 Pa. 398, 30 A 990.

96. U. S.—Lonergan v. Buford, 148 U. S. 581, 13 SCt 684, 37 L. ed. 569.

Cal.—McTigue v. Arctic Ice Cream Supply Co., 20 Cal. A. 708, 130 P 165.

Mo.—Niedermeyer v. State Univ., 61 Mo. A. 654.

N. Y.—Horner v. State, 42 App. Div. 430, 59 NYS 96.

Utah.—Buford v. Lonergan, 6 Utah 301, 22 P 164 [aff 148 U. S. 581, 13 SCt 684, 37 L. ed. 569].

[a] **Illustrations.**—(1) Payment of an excessive amount in order to secure delivery of cattle in pursuance of a contract of sale has been held to be compulsory. Buford v. Lonergan, 6 Utah 301, 22 P 164 [aff 148 U. S. 581, 13 SCt 684, 37 L. ed. 569]. (2) Where a seller, to prevent a failure to consummate the sale, which would have resulted in great loss, paid a claim of a party having possession of part of the property, the payment was not voluntary, and, where the claim was unfounded, was recoverable. McTigue v. Arctic Ice Cream Supply Co., 20 Cal. A. 708, 130 P 165.

97. Singer Sewing Mach. Co. v. Teasley, 198 Ala. 673, 676, 73 S 969; Cantonwine v. Bosch, 148 Iowa 496, 127 NW 657. And see cases infra note 98.

"When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense, and many payments are held to be voluntary which are made unwillingly and only as a choice of evils or of risks." 2 Cooley Tax. p 1501 [quot Singer Sewing Mach. Co. v. Teasley, supra].

98. U. S.—Union Pac. R. Co. v. Dodge County, 98 U. S. 541, 25 L. ed. 196; Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; Freiberg Co. v. Dawson, 274 Fed. 420 [aff 255 U. S. 288, 41 SCt 272, 65 L. ed. 638].

Ala.—Welch v. Marion, 48 Ala. 291; Bailey v. Minge, 16 Ala. A. 269, 77 S 419.

Ark.—Turpin v. Antonio, 153 Ark. 377, 240 SW 1076; Vick v. Shinn, 49 Ark. 70, 4 SW 60, 4 AmSR 26.

Cal.—Justice v. Robinson, 142 Cal. 199, 75 P 776; Phelan v. San Francisco, 120 Cal. 1, 52 P 38; Rodgers v. Wittenmyer, 88 Cal. 553, 26 P 369; Brumagim v. Tillinghast, 18 Cal. 265, 79 AmD 176; McMillan v. Vischer, 14 Cal. 232; McMillan v. Richards, 9 Cal. 365, 70 AmD 655.

Conn.—Sheldon v. South School Dist., 24 Conn. 88.

D. C.—Georgetown College v. District of Columbia, 11 D. C. 43.

Fla.—Jefferson County v. Hawkins, 23 Fla. 223, 2 S 362.

Ga.—West v. Brown, 165 Ga. 187, 140 SE 500; Estes v. Thompson, 90 Ga. 698, 17 SE 98.

Hawaii.—Seattle Brewing, etc., Co. v. Campbell, 17 Hawaii 364.

Ind.—Connecticut Mut. L. Ins. Co. v. Stewart, 95 Ind. 588; Patterson v. Cox, 25 Ind. 261.

Iowa.—Anderson v. Cameron, 122 Iowa 183, 97 NW 1085; Newcomb v. Davenport, 86 Iowa 291, 53 NW 232; Baldwin v. Foss, 71 Iowa 389, 32 NW 389; Muscatine v. Keokuk Northern Line Packet Co., 45 Iowa 185; Dickerman v. Lord, 21 Iowa 338, 89 AmD 579.

Kan.—Kansas Pac. R. Co. v. Wyandotte County, 16 Kan. 587; Wabaunsee County v. Walker, 8 Kan. 431.

Ky.—Morganfield v. Wathen, 202 Ky. 641, 261 SW 12.

La.—New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 33 S 51, 94 AmSR 395.

Md.—Awalt v. Eutaw Bldg. Assoc. No. 4, 34 Md. 435.

Mass.—Rosenfeld v. Boston Mut. L. Ins. Co., 222 Mass. 284, 110 NE 304; Regan v. Baldwin, 126 Mass. 485, 30 AmR 689; Emmons v. Scudder, 115 Mass. 367; Benson v. Monroe, 7 Cush. 125, 54 AmD 716; Forbes v. Appleton, 5 Cush. 115; Boston, etc., Glass Co. v. Boston, 4 Metc. 181.

Mich.—Warren v. Federal L. Ins. Co., 198 Mich. 342, 164 NW 449; Vereycken v. Vanden Brooks, 102 Mich. 119, 60 NW 687; Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 NW 690; Detroit v. Martin, 34 Mich. 170, 22 AmR 512.

Minn.—De Graff v. Ramsey County, 46 Minn. 319, 48 NW 1135; Shane v. St. Paul, 26 Minn. 543, 6 NW 349.

Mo.—Ferguson v. Butler County, 297 Mo. 20, 247 SW 795, 26 ALR 1519; Robins v. Latham, 134 Mo. 466, 36 SW 33; Claflin v. McDonough, 33 Mo. 412, 84 AmD 54; Pritchard v. People's Bank, 198 Mo. A. 597, 200 SW 665.

Nebr.—McBride v. Lathrop, 24 Nebr. 93, 38 NW 32.

N. J.—Koewing v. West Orange, 89 N. J. L. 539, 99 A 203, 204 [quot Cyc]; Shoemaker v. Gloucester City Bd. of Health, 83 N. J. L. 425, 85 A 312.

N. Y.—Phelps v. New York, 112 N. Y. 216, 19 NE 408, 2 LRA 626; Quincey v. White, 63 N. Y. 370 [rev 5 Daly 327]; Flower v. Lance, 59 N. Y. 603; Boss v. Hutchinson, 182 App. Div. 88, 169 NYS 513; Wood v. New York, 25 App. Div. 577, 49 NYS 622; Davis Provision Co. v. Fowler Bros., Ltd., 20 App. Div. 626 mem, 47 NYS 205 [aff 163 N. Y. 580 mem, 57 NE 1108 mem]; Peo. v. Wilmerding, 62 Hun 391, 17 NYS 102 [rev on other grounds 136 N. Y. 363, 32 NE 1099]; Peyser v. New York, 8 Hun 413 [rev on other grounds 70 N. Y. 497, 26 AmR 624]; Fleetwood v. New York, 4 N. Y. Super. 475; Matthews v. William Frank Brewing Co., 26 Misc. 46,

states that the payment is under protest and does not defeat the right to sue and recover the money, it may be recovered back regardless of whether the facts amount to payment under duress or not.[99]

Protest as evidence. If there is duress or coercion of some character and there is doubt, under the circumstances, as to whether or not the payment was voluntary, the fact that a protest was made may be taken into account in determining the question.[1]

[§ 306] **i. Necessity of Protest.** As a general rule, if money is paid under compulsion, no protest against paying is necessary to lay the foundation of an action to recover the payment,[2] except where the payment is made to a public officer to prevent some adverse official action,[3] and the officer has no notice of the facts which render the demand illegal;[4] or except where it is made under an illegal statute or ordinance,[5] or is made to prevent the unlawful seizure or retention of the payor's property.[6] A protest is not essential to recover an illegal payment required by a public utility for service.[7]

Where there is a series of payments, the first of which is paid under duress, in order to recover for subsequent payments it must appear either that every payment was made under threat or compulsion, or that all the payments were made under protest.[8]

Sufficiency of protest. Whenever a protest is necessary, it has been held that it must state the grounds upon which the party paying the money claims that the payment is illegal;[9] and a protest served at the time of payment, in order to be effective as evidence, must specify the amount and show on its face that it refers to the payment in question.[10]

[§ 307] **3. Illegality of Duress.** To render a payment compulsory the duress must be illegal, unjust, or oppressive.[11] For instance, one cannot recover back money paid under compulsion if it is just what

55 NYS 241; Gerry v. Siebrecht, 88 NYS 1034; Forrest v. New York, 13 AbbPr 350.

N. C.—Devereux v. Rochester German Ins. Co., 98 N. C. 6, 3 SE 639.

N. D.—Fargo Diocese v. Cass County, 28 N. D. 209, 217, 148 NW 541 [quot Cyc]; Wessel v. D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 NW 922, 44 AmSR 529.

Oh.—Prudential Co-op. Realty Co., Inc. v. Youngstown, 118 Oh. St. 204, 160 NE 695; Whitbeck v. Minch, 48 Oh. St. 210, 31 NE 743; Marietta v. Slocomb, 6 Oh. St. 471; Ashley v. Ryan, 6 Oh. Cir. Ct. 208, 3 Oh. Cir. Dec. 418; Gross v. Cincinnati, 4 OhS&CP 393.

Pa.—Armstrong v. Latimer, etc., Co., 165 Pa. 398, 30 A 990; De la Cuesta v. Insurance Co. of North America, 136 Pa. 62, 658, 20 A 505, 9 LRA 631; Harvey v. Girard Nat. Bank, 119 Pa. 212, 13 A 202; Peebles v. Pittsburgh, 101 Pa. 304, 47 AmR 714; Union Ins. Co. v. Allegheny, 101 Pa. 250; Wharton v. Birmingham, 37 Pa. 371; Oliver v. Bredl, 25 Pa. Super. 653; Lowenstein v. Bache, 17 Pa. Dist. 551; Hazleton v. McGroarty, 2 Pa. Dist. 288.

Tex.—Galveston City Co. v. Galveston, 56 Tex. 486; Stanford v. U. S. Ins. Corp., Ltd., (Civ. A.) 272 SW 568; Dale v. Simon, (Civ. A.) 248 SW 703 [aff (Commn. A.) 267 SW 467]; Gaar v. Shannon, 52 Tex. Civ. A. 634, 115 SW 361 [aff 223 U. S. 468, 32 SCt 236, 56 L. ed. 510]; Laredo v. Loury, (A.) 20 SW 89.

Vt.—Meacham v. Newport, 70 Vt. 67, 39 A 631; Williams v. Colby, 44 Vt. 40; Taggart v. Rice, 37 Vt. 47.

Wash.—Montgomery v. Cowlitz County, 14 Wash. 230, 44 P 259.

Eng.—Brown v. McKinally, 1 Esp. 279, 170 Reprint 356.

Ont.—Benjamin v. Elgin County, 26 U. C. Q. B. 660; Doe v. Boyer, 9 U. C. Q. B. 318.

[a] **Thus** one paying an illegal demand, with knowledge of the facts rendering it illegal, without any immediate necessity therefor, and not to release his person or property from detention, or to prevent an immediate seizure, makes a voluntary payment which he cannot recover back, although at the time of making the payment he filed a written protest. Morganfield v. Wathen, 202 Ky. 641, 261 SW 12; Gaar v. Shannon, 52 Tex. Civ. A. 634, 115 SW 361 [aff 223 U. S. 468, 32 SCt 236, 56 L. ed. 510].

99. Lobit v. Marcoulides, (Tex. Civ. A.) 225 SW 757.

1. U. S.—Union Pac. R. Co. v. Dodge County, 98 U. S. 541, 25 L. ed. 196.

Mich.—McCabe v. Shaver, 69 Mich. 25, 36 NW 800.

Minn.—De Graff v. Ramsey County, 46 Minn. 319, 48 NW 1135.

N. J.—Koewing v. West Orange, 89 N. J. L. 539, 99 A 203, 204 [quot Cyc].

N. D.—Fargo Diocese v. Cass County, 28 N. D. 209, 217, 148 NW 541 [quot Cyc]; Wessel v. D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 NW 922, 44 AmSR 529.

Okl.—Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 53 ALR 943.

Pa.—Hazleton v. McGroarty, 2 Pa. Dist. 288.

[a] **Protest as incidental.**—"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances." Union Pac. R. Co. v. Dodge County, 98 U. S. 541, 544, 25 L. ed. 196.

[b] **"A protest is usually necessary** in order to show that the legality of the demand is not conceded, that the payment was not voluntarily made, and that the party protesting intends to claim it back." Hazleton v. McGroarty, 2 Pa. Dist. 288, 290.

[c] **Rule applied.**—Money paid, under protest, to obtain a draft which had been fully paid before, accompanied by a statement that the draft was already paid, may be recovered. McCabe v. Shaver, 69 Mich. 25, 36 NW 800.

2. U. S.—Southern Pac. Co. v. California Adjustment Co., 237 Fed. 954, 150 CCA 604 [certiorari dism 248 U. S. 595 mem, 39 SCt 182 mem, 63 L. ed. 438 mem]; Healey v. U. S., 29 Ct. Cl. 115.

Cal.—Meek v. McClure, 49 Cal. 623.

Ill.—Chicago v. Sperbeck, 69 Ill. A. 562.

Me.—S. D. Warren Co. v. Maine Cent. R. Co., 126 Me. 23, 135 A 526.

Mich.—Klein v. Bayer, 81 Mich. 233, 45 NW 911; Detroit v. Martin, 34 Mich. 170, 22 AmR 512; Atwell v. Zeluff, 26 Mich. 118.

Minn.—De Graff v. Ramsey County, 46 Minn. 319, 48 NW 1135.

Mo.—American Brewing Co. v. St. Louis, 187 Mo. 367, 86 SW 129, 2 AnnCas 821.

N. J.—Koewing v. West Orange, 89 N. J. L. 539, 99 A 203, 204 [quot Cyc].

N. D.—Fargo Diocese v. Cass County, 28 N. D. 209, 217, 148 NW 541 [quot Cyc].

[a] **Money paid under demand by an officer** holding legal process purporting to authorize arrest or seizure of property to enforce collection may be recovered back without proof of a protest made against it, although no actual arrest or seizure was made. McKee v. Campbell, 27 Mich. 497; Atwell v. Zeluff, 26 Mich. 118.

3. U. S.—Hamilton v. Dillin, 11 F. Cas. No. 5,979 [aff 21 Wall. 73, 22 L. ed. 528].

Cal.—Meek v. McClure, 49 Cal. 623.

Hawaii.—Seattle Brewing, etc., Co. v. Campbell, 17 Hawaii 364.

Ind.—Ligonier v. Ackerman, 46 Ind. 552, 15 AmR 323.

N. D.—Fargo Diocese v. Cass County, 28 N. D. 209, 217, 148 NW 541 [quot Cyc].

Oh.—Prudential Co-op. Realty Co., Inc. v. Youngstown, 118 Oh. St. 204, 160 NE 695.

Wis.—Minneapolis, etc., R. Co. v. State R. Commn., 183 Wis. 47, 197 NW 352.

[a] **If illegal exactions** are made by officers of the government involving the payment of money, and the money is paid without objection, it cannot afterward be recovered. Hamilton v. Dillin, 11 F. Cas. No. 5,979 [aff 21 Wall. 73, 22 L. ed. 528]; White v. U. S., 11 Ct. Cl. 578 [aff 154 U. S. 661 mem, 14 SCt 1192 mem, 26 L. ed. 178 mem].

4. Meek v. McClure, 49 Cal. 623.

5. McGuire v. Chicago, 209 Ill. A. 493; Rath v. Chicago, 207 Ill. A. 117; Johnson v. Grand Forks County, 16 N. D. 363, 113 NW 1071, 125 AmSR 662.

[a] **Rule applied.**—Where a person pays, under protest, the fee required by an unconstitutional statute for printing of his name as a candidate on a primary election to the county auditor, who demands it before he is allowed to file his petition as a candidate, he may recover the fee by an action at law. Johnson v. Grand Forks County, 16 N. D. 363, 113 NW 1071, 125 AmSR 662.

6. See supra § 296.

7. S. D. Warren Co. v. Maine Cent. R. Co., 126 Me. 23, 135 A 526. But see Monongahela Nav. Co. v. Wood, 194 Pa. 47, 45 A 73 (holding that an illegal payment of tolls collected by a navigation company cannot be recovered unless notice was given that the shippers would demand repayment of the excessive amount paid).

8. Kamenitsky v. Corcoran, 177 App. Div. 605, 164 NYS 297 [rev 97 Misc. 384, 161 NYS 756].

[a] **Express protest not required.**—"While no express words of protest are necessary, it must appear from the circumstances attending the payments subsequent to the first . . . that it was the intention of the plaintiff to preserve the right to dispute the legality of the defendant's demand." Kamenitsky v. Corcoran, 177 App. Div. 605, 609, 164 NYS 297 [rev 97 Misc. 384, 161 NYS 756].

9. Meek v. McClure, 49 Cal. 623.

10. Scott v. Hull, 39 Que. Super. 207.

11. U. S.—In re Meyer, 106 Fed. 828.

he ought to have paid voluntarily.[12] In other words, the money paid cannot be recovered unless it is against conscience for defendant to retain it.[13]

[§ 308] **4. Source of Duress.** The compulsion or coercion must come from the party to whom or by whose direction the payment is made;[14] and the payment cannot be recovered from a person who did not exercise the duress or have knowledge thereof at the time of receiving the money.[15] Where the only coercion influencing the payor's mind is the fear of the consequences of his own acts, it is not a legal duress.[16]

[§ 309] **5. Time of Duress.** The duress must have existed at the time the payment was actually made;[17] and a prior compulsion will not render the payment compulsory[18] unless its influence continues up to the time of the payment.[19] Thus, where a promise to pay in the future is obtained by compulsion, and after such compulsion is removed, the payment is made in accordance with the promise, the payment under such circumstances cannot be considered compulsory.[20]

[§ 310] **6. Existence of Other Remedy.** The general rule is that, where an unfounded or illegal demand is made upon a person, and the law furnishes him adequate protection against it, or gives him an adequate remedy, and, instead of taking the protection the law gives him or the remedy it furnishes, he pays what is demanded, such payment is deemed to be a voluntary, and not a compulsory, payment,[21] as where the party making the demand is compelled to resort to the courts in order to enforce it, and the payor settles and pays the claim without presenting any defense.[22] Where, however, although there is a legal remedy, the payor's situation or the situation of his property is such that the remedy would not be adequate to protect him from serious or irreparable injury, the payment will be deemed to have been involuntary.[23]

[§ 311] **C. Payments Obtained by Fraud.**[24] The general rule that a voluntary payment cannot be recovered back[25] has no application where the payment was induced by fraud on the part of the payee,[26] for, subject to the general rules as to what

Iowa.—Dickerman v. Lord, 21 Iowa 338, 89 AmD 579.
Mich.—Laidlaw v. Detroit, 110 Mich. 1, 67 NW 967.
Mo.—Missouri Lincoln Trust Co. v. St. Louis Third Nat. Bank, 154 Mo. A. 89, 133 SW 357.
N. Y.—Deshong v. New York, 176 N. Y. 475, 68 NE 880; McGuire v. H. G. Vogel Co., 86 Misc. 22, 148 NYS 176 [rev on other grounds 164 App. Div. 173, 149 NYS 756].
Tex.—Diller v. Johnson, 37 Tex. 47; Dale v. Simon, (Commn. A.) 267 SW 467 [aff (Civ. A.) 248 SW 703]; Cameron County Water Impr. Dist. No. 1 v. Handley, (Civ. A.) 275 SW 298.

[a] **Payment of lien.**—Where one having in his possession property of another demands as a condition of its restoration the payment of a sum for which he is legally entitled to a lien thereon, the owner cannot be said to have made such payment under duress so as to give him any right to its recovery on that ground. In re Meyer, 106 Fed. 828.

12. Conn.—McVane v. Williams, 50 Conn. 548.
N. J.—Mee v. Montclair, 84 N. J. L. 400, 402, 86 A 261 [rev 83 N. J. L. 274, 83 A 764, and cit Cyc].
N. Y.—Upshaw v. Mutual Loan Assoc., 29 Misc. 143, 60 NYS 242.
Oh.—Coleman v. Merchant's Nat. Bank, 6 Oh. Dec. (Reprint) 1063, 10 AmLRec 49.
Tex.—Dale v. Simon, (Civ. A.) 248 SW 703 [aff (Commn. A.) 267 SW 467].

[a] **Illustration.**—Where a policeman is fined and told to indorse his salary check to the town in payment thereof, and the fine is not illegal, and the chief of police uses no coercion to compel the indorsement of the check, the payment is voluntary, and cannot be recovered. Mee v. Montclair, 84 N. J. L. 400, 86 A 261 [rev 83 N. J. L. 274, 83 A 764].

13. See supra § 293.

14. Cal.—Garrison v. Tillinghast, 18 Cal. 404; Brumagim v. Tillinghast, 18 Cal. 265, 79 AmD 176.
Md.—Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278.
Minn.—Smith v. Schroeder, 15 Minn. 35.
N. Y.—Williams v. Rutherfurd Realty Co., 159 App. Div. 171, 144 NYS 357.
Or.—Cram v. Powell, 100 Or. 708, 197 P 280.
Pa.—Taylor v. Philadelphia Bd. of Health, 31 Pa. 73, 72 AmD 724.

[a] **Payment to a third person,** at the direction of the party by whom the duress is imposed, is compulsory. Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278.

15. Cram v. Powell, 100 Or. 708, 197 P 280.

16. Felton v. Gregory, 130 Mass. 176.

17. Savannah v. Feeley, 66 Ga. 31; Brown v. Worthington, 152 Mo. A. 351, 133 SW 93; Baldwin Co. v. Savage, 81 Or. 379, 159 P 80; Schultz v. Culbertson, 49 Wis. 122, 4 NW 1070; Schultz v. Culbertson, 46 Wis. 313, 1 NW 19.

18. Baldwin Co. v. Savage, 81 Or. 379, 159 P 80; Heckman v. Swartz, 64 Wis. 48, 24 NW 473.

[a] **Illustration.**—A payment voluntarily made in the discharge of a note and mortgage cannot be recovered although the note and mortgage were procured by duress, consisting of threats of imprisonment. Baldwin Co. v. Savage, 81 Or. 379, 159 P 80.

19. Hablichtel v. Yambert, 75 Iowa 539, 39 NW 877; Chamberlain v. Reed, 13 Me. 357, 29 AmD 506; Nelson v. Leszczynski-Clark Co., 177 Mich. 517, 143 NW 606; Heckman v. Swartz, 50 Wis. 267, 6 NW 891.

[a] **Illustration.**—Where a person is coerced by duress to execute his note, which is subsequently paid by him, he may recover the payment as compulsory where such payment was made in continued existence of the duress which coerced the execution of the note. Hablichtel v. Yambert, 75 Iowa 539, 39 NW 877.

[b] **Threats made on the day previous** to the payment, of a continuing nature, are sufficient. Nelson v. Leszczynski-Clark Co., 177 Mich. 517, 143 NW 606.

20. Teem v. Ellijay, 89 Ga. 154, 15 SE 33; Fellows v. Fayette School Dist. No. 8, 39 Me. 559; Cunningham v. Boston, 15 Gray (Mass.) 468; Schultz v. Culbertson, 46 Wis. 313, 1 NW 19. But see Heckman v. Swartz, 50 Wis. 267, 6 NW 891 (holding that, where one M gave his note to defendant to induce the latter to withdraw a threatened criminal prosecution against plaintiff, plaintiff becoming liable to M for the amount of the note, the fact that M's note was paid to defendant after plaintiff was discharged, and all duress had ceased, is no defense to an action by plaintiff to recover the amount from defendant).

21. Ark.—Turpin v. Antonio, 153 Ark. 377, 240 SW 1076.
Colo.—Taylor v. Kelleher, 43 Colo. 424, 97 P 253.
Ida.—Gess v. Nampa, etc., Irr. Dist., 33 Ida. 189, 192 P 474.
Iowa.—Manning v. Poling, 114 Iowa 20, 83 NW 895, 86 NW 30.
Minn.—De Graff v. Ramsey County, 46 Minn. 319, 48 NW 1135.
N. J.—D'Aloia v. Summit, 89 N. J. L. 154, 97 A 722; Turner v. Barber, 66 N. J. L. 496, 49 A 676.
N. Y.—Boss v. Hutchinson, 182 App. Div. 88, 169 NYS 513, 515 [quot Cyc].
N. C.—Smithwick v. Whitley, 152 N. C. 369, 67 SE 913.
N. D.—Gold-Stabeck Loan, etc., Co. v. Kinney, 33 N. D. 495, 157 NW 482, 486 [quot Cyc]; Wessel v. D. S. B. Johnston Land, etc., Co., 3 N. D. 160, 54 NW 922, 44 AmSR 529.
Pa.—Lowenstein v. Bache, 17 Pa. Dist. 551; Walton v. Robb, 1 Ashm. 43.
Tex.—Dale v. Simon, (Commn. A.) 267 SW 467 [aff (Civ. A.) 248 SW 703]; Stanford v. U. S. Inv. Corp., Ltd., (Civ. A.) 272 SW 568.

[a] **The delay, inconvenience, and expense** to which a party may be subjected by resisting a demand does not amount to legal compulsion. Hess v. Cohen, 20 Misc. 333, 45 NYS 934.

[b] **Ability to give bond.**—Where property of the debtor is seized to secure a claim in litigation, payment to release the property cannot be said to be compulsory where the party was of ample pecuniary ability to give a sufficient bond to release the property so seized. Turner v. Barber 66 N. J. L. 496, 49 A 676.

22. Ward v. Scarborough, (Tex. Commn. A.) 236 SW 434; Stanford v. U. S. Inv. Corp., Ltd., (Tex. Civ. A.) 272 SW 568. And see cases supra note 21.

23. Ida.—Gess v. Nampa, etc., Irr. Dist., 33 Ida. 189, 192 P 474.
Me.—Chase v. Dwinal, 7 Me. 134, 20 AmD 352.
Md.—Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278, 282 [cit Cyc].
Minn.—Joannin v. Ogilvie, 49 Minn. 564, 52 NW 217, 32 AmSR 581, 16 LRA 376; De Graff v. Ramsey County, 46 Minn. 319, 48 NW 1135.
Mo.—Wells v. Adams, 88 Mo. A. 215.
N. M.—Cadwell v. Higginbotham, 20 N. M. 482, 512, 151 P 315, 323 [quot Cyc].
N. Y.—Horner v. State, 42 App. Div. 430, 59 NYS 96; Buckley v. New York, 30 App. Div. 463, 52 NYS 452 [aff 159 N. Y. 558 mem, 54 NE 1089 mem].
Pa.—Carhill Petroleum Co., Inc. v. Ennis-Bayard Petroleum Co., 81 Pa. Super. 486.
Eng.—Astley v. Reynolds, Str. 915, 93 Reprint 939.

24. Fraud generally see Fraud 26 C. J. p 1050.
Money received generally see Money Received 41 C. J. p 26.

25. See supra § 280.

26. Bradshaw v. Glasscock, 91

constitutes fraud,[27] it is a well settled rule that, where a payment of money which the payee ought not to retain is induced by fraud and deceit, it may be recovered back by the payor,[28] and if the fraud is the inducement for the payment, the rule applies, although it is not the sole producing cause.[29] In case of conflicting claims to the money, a recovery is not prevented by the fact that the payment was made to the payee upon his false representations, instead of into court, in order that a third person's claim to the money might be litigated.[30] Where, however, a payment is made with full knowledge of the facts, and the fraud, if any, is not an inducement to the payment, the rule as to voluntary payments[31] applies, and such payment cannot be recovered back on the ground of such fraud,[32] as where the fraud relates to the execution of a bill or note and the payment thereof is voluntarily made with full knowledge of the facts.[33] So, also, a payment cannot be recovered back where it is made as a part of a fraudulent transaction, to which the payor is a party,[34] except where he became such by the persuasion that plaintiff was not entitled to practice medicine unless the evidence tended to show that plaintiff had falsely represented himself to be a practicing physician, and had thereby induced defendant to employ and pay him for professional services. Gaither v. Lindsey, (Tex. Civ. A.) 83 SW 225.

Kan. 11, 13, 136 P 933 [cit Cyc]. And see cases infra note 28.

27. See Fraud §§ 1–115.

28. U. S.—Synthetic Patents Co. v. Sutherland, 22 F. (2d) 494 [certiorari den 276 U. S. 630 mem, 48 SCt 324 mem, 72 L. ed. 741 mem]; Lipman v. Phœnix Assur. Co., 258 Fed. 544, 169 CCA 484; Derk P. Yonkerman Co. v. Charles H. Fuller's Adv. Agency, 135 Fed. 613; In re Arnold, 133 Fed. 789.

Ala.—Tuscaloosa County v. Foster, 132 Ala. 392, 31 S 587.

Conn.—Sheldon v. South School Dist., 24 Conn. 88.

D. C.—Strauss v. Hensey, 9 App. 541.

Ill.—Lincoln Electric Heating Appliances, Inc. v. Schultz, 203 Ill. A. 340; Sallee v. Werner, 171 Ill. A. 96; Kashgarian v. Janjigian, 160 Ill. A. 294; Bull v. Quincy, 52 Ill. A. 186 [rev on other grounds 155 Ill. 566, 40 NE 1035]; Tuller v. Fox, 46 Ill. A. 97.

Ind.—Ingalls v. Miller, 121 Ind. 188, 22 NE 995; Reynolds v. Rochester, 4 Ind. 43.

Iowa.—Durband v. Nicholson, 205 Iowa 1264, 216 NW 278, 219 NW 318; McCord v. Mitchell, 182 Iowa 196, 165 NW 453; Johnson v. Saum, 181 Iowa 138, 114 NW 618; Slothower v. McFarland Grain Co., 117 Iowa 213, 90 NW 620; Chickasaw County Farmers' Mut. F. Ins. Co. v. Weller, 98 Iowa 731, 68 NW 443.

Kan.—Bradshaw v. Glasscock, 91 Kan. 11, 13, 136 P 933 [cit Cyc].

Ky.—Marrowbone Coal, etc., Co. v. Coleman, 156 Ky. 425, 161 SW 238.

Me.—Rundlett Co. v. Morrison, 120 Me. 439, 115 A 247; Parker v. Lancaster, 84 Me. 512, 24 A 952; Handly v. Call, 30 Me. 9.

Md.—Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278, 283 [quot Cyc].

Mass.—Stuart v. Sears, 119 Mass. 143; Bliss v. Thompson, 4 Mass. 488.

Minn.—Call v. Terminal Supply Co., 171 Minn. 274, 213 NW 917; Brathwait v. Bain, 66 Minn. 325, 69 NW 4; Schaller v. Borger, 47 Minn. 357, 50 NW 247.

Mo.—St. Louis Third Nat. Bank v. St. Charles Sav. Bank, 244 Mo. 554, 149 SW 495; Priddy v. Miners', etc., Bank, 132 Mo. A. 279, 111 SW 865.

Nebr.—Klein v. Pederson, 65 Nebr. 452, 91 NW 281; Weber v. Kirkendall, 39 Nebr. 193, 57 NW 1026.

N. Y.—Buffalo Rubber Mfg. Co. v. Batavia Rubber Co., 90 Misc. 418, 153 NYS 779; Rosenblum v. Liener, 49 Misc. 559, 98 NYS 836; Colon v. Hebbard, 105 NYS 805; Fischer v. Burns, 30 NYS 437; Mowatt v. Wright, 1 Wend. 355, 19 AmD 508.

N. C.—Mitchell v. Moore, 194 N. C. 352, 139 SE 593.

Or.—Beach v. Guaranty Sav. Assoc., 44 Or. 530, 76 P 16, 1 AnnCas 418.

Pa.—Mathers v. Pearson, 13 Serg. & R. 258; Smith v. Sayre Nat. Bank, 59 Pa. Super. 272; Dotterer v. Scott, 29 Pa. Super. 553.

R. I.—Havens v. Baker, 68 A 430; Davis v. National Eagle Bank, 50 A 530.

S. C.—Bulow v. Goddard, 10 S. C. L. 45, 9 AmD 663; Bours v. Watson, 8 S. C. L. 393.

Tex.—Exporters', etc., Co. v. Spivey, (Civ. A.) 249 SW 1086; Price v. Horton, 4 Tex. Civ. A. 526, 23 SW 501.

Vt.—Johnson v. Cate, 77 Vt. 218, 59 A 830.

Wash.—Scandinavian American Bank v. Puget Sound Mach. Depot, 79 Wash. 599, 140 P 901.

Wis.—Sleep v. Heymann, 57 Wis. 495, 16 NW 17.

Eng.—Johnson v. Rex, [1904] A. C. 817.

N. S.—Fraser v. McLanders, 25 N. S. 542.

Que.—Daoust v. Boileau, 17 RevdeJur 8.

[a] **Rule applied to:** (1) Excessive sum voluntarily paid in belief, fraudulently induced, that it was correct amount. Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278, 287 [quot Cyc]. (2) Excess payment made by principal to surety. Price v. Horton, 4 Tex. Civ. A. 526, 23 SW 501. (3) Overpayment by contractor on concealment of fact by subcontractor. Watson Co. v. Bleeker, (Tex. Civ. A.) 283 SW 260. (4) Payment induced by falsely antedating an attachment upon real estate, so as to make it appear of record that it was prior to a conveyance. Handly v. Call, 30 Me. 9. (5) Payment of notes given by a customer to his stockbroker in reliance upon a fraudulent account stated. Stiebel v. Lissberger, 166 App. Div. 164, 151 NYS 822 [motion to dism app den on condition 215 N. Y. 685 mem, 109 NE 1093 mem, and aff 222 N. Y. 604 mem, 118 NE 1078 mem]. (6) Excess payment to an actor who, by misrepresentation, obtains better terms than he otherwise would, and is paid accordingly. Dana v. Kemble, 17 Pick. (Mass.) 545.

[b] **Misstatements.**—Where statements are made by a defendant which induce plaintiff to act in making a payment, if they are untrue he may recover, although no fraud is charged or proved. Ely v. Padden, 13 NYSt 53.

[c] **Concealment.**—(1) Where money is paid in ignorance of circumstances with which the receiver is acquainted and does not disclose, and which, if disclosed, would have avoided the payment, the receiver acts fraudulently, and the money may be recovered back. George v. Taylor, 55 Tex. 97. (2) Where one who had a bill, the genuineness of which had been questioned, procured specie for it from another, for the purpose of making change with a customer, without calling his attention in any way to the genuineness of the bill, the money could be recovered back. Chalmers v. Harris, 22 Tex. 265.

[d] **Money paid by the United States** on a fraudulent voucher may be recovered back on a plea of counterclaim. Charles v. U. S., 19 Ct. Cl. 316.

[e] **From drunken person.**—If moneys are obtained from a person when he is in such a state of inebriation as to be incapable of transacting business, or of knowing what he is doing or the force of his acts, it is a clear fraud, and the money may be recovered back. Hayes v. Huffstater, 65 Barb. (N. Y.) 530.

[f] **For physician's services.**—In an action on a contract for physician's services, defendant was not entitled to recover the amount paid on such contract under a plea in recon-

29. McCord v. Mitchell, 182 Iowa 196, 165 NW 453.

[a] **Rule applied** to payment induced by a false statement although doubtful as to the truth of the statement, and influenced to some extent by desire to avoid a lawsuit. McCord v. Mitchell, 182 Iowa 196, 165 NW 453.

30. Bradshaw v. Glasscock, 91 Kan. 11, 136 P 933.

31. See supra §§ 280–292.

32. Ga.—Leader v. Mathews, 135 Ga. 468, 69 SE 721.

Ill.—Helmick v. Carter, 171 Ill. A. 25.

Me.—Rundlett Co. v. Morrison, 120 Me. 439, 115 A 247.

N. Y.—Wood v. Amory, 105 N. Y. 278, 11 NE 636.

Tex.—Tucker v. Smellage, (Civ. A.) 297 SW 875; Kelsey v. Collins, 49 Tex. Civ. A. 230, 108 SW 793.

B. C.—Clark v. Milligan, 28 B. C. 22, [1920] 1 WestWkly 1044.

[a] **Money paid under an agreement for a sale of timber** cannot be recovered on the ground that there was a misrepresentation as to title, where the purchaser pays the money voluntarily with knowledge of the facts and receives benefits under the contract. Clark v. Milligan, 28 B. C. 22, [1920] 1 WestWkly 1044.

[b] **Acts not constituting fraud.**—(1) Threats to begin foreclosure proceedings on a mortgage given to secure notes alleged to carry usurious interest. Helmick v. Carter, 171 Ill. A. 25. (2) The mere failure of the judgment creditor and his assignee to inform the judgment debtor of a mistake of the referee in reporting the amount owing is not a fraud entitling the judgment debtor to recover back a payment made on the judgment. Wood v. Amory, 105 N. Y. 278, 11 NE 636. (3) It is immaterial to the right to recover back money paid that the payee's counsel represented that the claim was enforceable, and that, in fact, it was barred by the statute, his assertion being merely an expression of opinion; and it is especially unimportant where it was not relied on, and the payor had the advice of counsel. Parker v. Lancaster, 84 Me. 512, 24 A 952.

[c] **Knowledge held insufficient.**—The fact that defendants' attorney on foreclosure was told by his grantor that he thought the time for payment of the note and mortgage had been extended beyond the time of suit, but without producing the papers to show it, did not constitute sufficient notice of the extension, which had in fact been made, to bar recovery of the money paid by plaintiff's attorney in reliance on the misrepresentations of plaintiff's counsel to the contrary. Kelsey v. Collins, 49 Tex. Civ. A. 230, 108 SW 793.

33. Baldwin v. Foss, 71 Iowa 389, 32 NW 389.

34. Patterson v. Hamilton, 42 SW 88, 19 KyL 825; Campbell v. Boyers,

sion and influence of the payee who is a person with a stronger mind.[35]

Restoration of benefits.[36] It has been held that a victim of fraud, who is unable, because of changed circumstances, to make full restoration to the wrongdoer of the benefits received, may still recover what he has paid,[37] except where his liability to restore such benefits arises from his having had complete enjoyment of them, and, in so doing, consuming them.[38]

Property transferred in payment. Where, through the fraud of a creditor, a debtor transfers property in settlement of an indebtedness, when in fact nothing is due, the debtor's measure of recovery is the reasonable market value of the property,[39] except in a case where exemplary damages are allowable.[40]

From third person. The defrauded payor cannot recover the money from a third person who has received it in good faith from the defrauding payee.[41-42]

[§ 312] **D. Mistake*[43]—1. Of Law—a. In General.** Except where it is otherwise provided by statute,[44] it is held by the great preponderance of adjudged cases that, where one under a mistake of law, or in ignorance of law, but with full knowledge of all the facts, and in the absence of fraud[45] or improper conduct upon the part of the payee, voluntarily and without compulsion[46] pays money on a demand not legally enforceable against him, he cannot recover it back;[47] and the rule has been applied

241 Mo. 421, 145 SW 807.

[a] **Thus,** where the entire transaction by which defendant obtained title to plaintiff's property was fraudulent, his payments for repairs, etc., were voluntary for which he cannot be reimbursed in a suit in equity to set aside the entire transaction. Campbell v. Boyers, 241 Mo. 421, 145 SW 807.

[b] **Money paid as a bribe** by the beneficiaries in a fire insurance policy to a detective employed by the company, whereby a settlement of the loss has been effected, cannot be recovered on the ground of fraud. Patterson v. Hamilton, 42 SW 88, 19 KyL 825.

35. Klein v. Pederson, 65 Nebr. 452, 91 NW 281.

36. **As condition to suing for:** Fraud generally see Fraud § 130. Money received see Money Received § 48.

37. Heckscher v. Edenborn, 203 N. Y. 210, 96 NE 441; Butler v. Prentiss, 158 N. Y. 49, 52 NE 652; Masson v. Bovet, 1 Den. (N. Y.) 69, 43 AmD 651.

38. Schank v. Schuchman, 212 N. Y. 352, 106 NE 127.

39. Johnson v. Saum, 137 Iowa 138, 114 NW 618.

[a] **Thus,** where, through fraud of his creditor, a debtor is induced to believe that an account containing an item which has been paid represents the correct amount of his indebtedness, and therefore transfers a valuable mare to the creditor in settlement of the indebtedness, when in fact nothing is due, the measure of the debtor's recovery is the value of the mare, and not the alleged balance of the debt, under the rule that a party wrongfully deprived of his property may hold the party at fault only for its reasonable market value, except in instances in which exemplary damages are allowable. Johnson v. Saum, 137 Iowa 138, 114 NW 618.

40. Johnson v. Saum, supra.

41-42. Gale v. Chase Nat. Bank, 104 Fed. 214, 43 CCA 496.

43. **Cross references:**
Equitable relief against mistake of law in general see Equity § 61.
Mistake or ignorance of law of foreign state or country as mistake of fact see infra § 319.
Payment under decree subsequently set aside as payment under mistake of fact see infra § 319.
Recovery of payment of particular classes of debts or obligations made under mistake of law see cross references ante p 584.

44. See statutory provisions.

[a] **In California** (1) in view of Civ. Code § 1578, providing that a misapprehension of the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake as to the law, is such a mistake as to destroy the reality of consent to a contract, money paid under such a mistake of law may be recovered by the payor. Gregory v. Clabrough, 129 Cal. 475, 62 P 72. (2) But such statute does not apply to payments made under an invalid or unconstitutional statute. See infra § 317 note 78. (3) Under the law as it existed prior to the enactment of such statute, no recovery of money paid under a mistake of law could be had. Christy v. Sullivan, 50 Cal. 337, 19 AmR 655.

[b] **In Louisiana** (1) Civ. Code art 2301 provides that one who receives what is not due him, whether through error or knowingly, shall restore it, and art 2302, that he who has paid through mistake, believing himself a debtor, may reclaim what he has paid; but it is further provided (art 2303) that to acquire the right to recover, it is necessary that the thing paid be not due in any manner, either civilly or naturally, and a natural obligation to pay will be sufficient to prevent recovery. Bagur v. Bagur, 160 La. 718, 107 S 502; Newgass v. New Orleans, 38 La. Ann. 119, 58 AmR 168. (2) But as to cases not coming within the provisions of the code, the general rule would seem to apply. See Carey v. Commonwealth Bldg., etc., Assoc., 145 La. 1, 81 S 734.

45. **Fraud as ground for recovery of payment** see supra § 311.

46. **Involuntary or compulsory payments** see supra §§ 293-310.

47. U. S.—U. S. v. Wilson, 168 U. S. 273, 18 SCt 85, 42 L. ed. 464; Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; U. S. Bank v. Daniel, 37 U. S. 32, 9 L. ed. 989; Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; Blumenthal v. U. S., 4 F. (2d) 808; Royal Italian Govt. v. National Brass, etc., Tube Co., 294 Fed. 23 [certiorari den 264 U. S. 587 mem, 44 SCt 402 mem, 68 L. ed. 863 mem]; Carpenter v. Southworth, 165 Fed. 428, 91 CCA 378; Washington v. Barber, 29 F. Cas. No. 17,224, 5 Cranch C. C. 157; De Bow v. U. S., 11 Ct. Cl. 672.

Ala.—Traweek v. Hagler, 199 Ala. 664, 75 S 152; Hemphill v. Moody, 64 Ala. 468; Cahaba v. Burnett, 34 Ala. 400; State University v. Keller, 1 Ala. 406; Jones v. Watkins, 1 Stew. 81.

Ariz.—West Virginia Copper Belle Min. Co. v. Gleeson, 14 Ariz. 548, 134 P 285, 48 LRANS 481.

Ark.—Maryland Casualty Co. v. Little Rock R. etc., Co., 92 Ark. 306, 122 SW 994; Rector v. Collins, 46 Ark. 167, 55 AmR 571.

Colo.—Gillett v. Patterson, 74 Colo. 501, 223 P 27; Gillett v. Moore, 74 Colo. 484, 223 P 21.

Del.—Farmers' Bank v. Grantham, 3 Del. 289.

D. C.—U. S. v. Skinner, etc., Corp., 28 F. (2d) 373; Heckman v. Dawes, 56 App. 213, 12 F. (2d) 154; U. S. v. Mason, 33 App. 350.

Fla.—Jefferson County v. Hawkins, 23 Fla. 223, 2 S 362.

Ida.—State First Nat. Bank v. Reins, 42 Ida. 720, 728, 248 P 9 [cit Cyc].

Ill.—Peo. v. Foster, 133 Ill. 496, 23 NE 615; Elston v. Chicago, 40 Ill. 514, 89 AmD 361; Sando v. Smith, 237 Ill. A. 570; Gloyd v. Hotel La Salle Co., 221 Ill. A. 104; Alton Light, etc., Co. v. Rose, 117 Ill. A. 83. See World Pub. Co. v. Fisher, 197 Ill. A. 641.

Ind.—Bond v. Coats, 16 Ind. 202; Snelson v. State, 16 Ind. 29; Downs v. Donnelly, 5 Ind. 496; Parker v. Ft. Wayne First Nat. Bank, 59 Ind. A. 189, 109 NE 75.

Iowa.—Painter v. Polk County, 81 Iowa 242, 47 NW 65, 25 AmSR 489.

Me.—Houlehan v. Kenebec County, 108 Me. 397, 81 A 449, AnnCas1913B 435; Coburn v. Neal, 94 Me. 541, 48 A 178; Livermore v. Peru, 55 Me. 469; Norris v. Blethen, 19 Me. 348; Norton v. Marden, 15 Me. 45, 32 AmD 132.

Md.—Galard v. Winans, 74 A 626; Lester v. Baltimore, 29 Md. 415, 96 AmD 542; Baltimore v. Lefferman, 4 Gill 425, 45 AmD 145.

Mass.—Taber v. New Bedford, 177 Mass. 197, 58 NE 640; Alton v. Webster First Nat. Bank, 157 Mass. 341, 32 NE 228, 34 AmSR 285, 18 LRA 144; Bancroft v. Abbott, 3 Allen 524.

Minn.—Erkens v. Nicolin, 39 Minn. 461, 40 NW 567.

Miss.—Graham McNeil Co. v. Scarborough, 135 Miss. 59, 99 S 502; Tiffany v. Johnson, 27 Miss. 227.

Mo.—State v. Fulks, 296 Mo. 614, 247 SW 129; Lamar Tp. v. Lamar, 261 Mo. 171, 174, 169 SW 12, AnnCas1916D 740 [cit Cyc]; Needles v. Burk, 81 Mo. 569, 51 AmR 251; Mutual Sav. Inst. v. Enslin, 46 Mo. 200; Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59; Wilkins v. Bell, (A.) 261 SW 927, 928 [quot Cyc]; Warren v. Order R. Conductors, 199 Mo. A. 200, 201 SW 368; Missouri Lincoln Trust Co. v. St. Louis Third Nat. Bank, 154 Mo. A. 89, 133 SW 357; Campbell v. Clark, 44 Mo. A. 249.

Nebr.—Baker v. Fairbury, 33 Nebr. 674, 50 NW 950.

N. H.—Keazar v. Colebrook Nat. Bank, 75 N. H. 278, 73 A 170; Strafford Sav. Bank v. Church, 69 N. H. 582, 44 A 105; Evans v. Gale, 17 N. H. 573, 43 AmD 614; Peterborough v. Lancaster, 14 N. H. 382; Bean v. Jones, 8 N. H. 149.

N. J.—D'Aloia v. Summit, 89 N. J. L. 154, 97 A 722; Camden v. Greene, 54 N. J. L. 591, 25 A 357, 33 AmSR 686.

N. M.—Terr. v. Newhall, 15 N. M. 141, 147, 103 P 982 [quot Cyc].

N. Y.—Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 201 N. Y. 379, 94 NE 871; Payne v. Witherbee, 200 N. Y. 572, 93 NE 954; Belloff v. Dime Sav. Bank, 191 N. Y. 551, 85 NE 1106; Newburgh Sav. Bank v. Woodbury, 173 N. Y. 55, 65 NE 858; Vanderbeck v. Rochester, 122 N. Y. 285, 25 NE 408; Flynn v. Hurd, 118 N. Y. 19, 22 NE 1109; Doll v. Earle, 59 N. Y. 638 mem [aff 65 Barb. 298]; Flower v. Lance, 59 N. Y. 603; Belloff v. Williamsburgh Dime Sav. Bank, 118 App. Div. 20, 103 NYS 273 [aff 191 N. Y. 551 mem, 85 NE 1106 mem]; Peo. v. Wilmerding, 62 Hun 391, 17 NYS 102 [rev on other grounds 136 N. Y. 363, 32 NE 1099]; Wolek v. New York, 131 Misc. 37, 225 NYS 669; Smith v. Hellman Motor Corp., 122 Misc. 422, 204 NYS 229; Hebron v. New York, 78

*By WILLIAM HORGAN (§§ 312-341).

even to what the courts term "hard cases," and those in which it is against conscience for the payee to retain the payment.[48] Where the rule stated obtains, no difference is ordinarily recognized, so far

Misc. 653, 138 NYS 1010; Van Hise v. Rensselaer County, 21 Misc. 572, 48 NYS 874; Haynes v. McKee, 19 Misc. 511, 43 NYS 1126; Onondaga v. Briggs, 2 Den. 26; Silliman v. Wing, 7 Hill 159; Mowatt v. Wright, 1 Wend. 355, 19 AmD 508; Clarke v. Dutcher, 9 Cow. 674; Elting v. Scott, 2 Johns. 157. Compare Bishop v. Corning, 37 App. Div. 345, 57 NYS 697 (where it was held that, where plaintiff's son accidentally set fire to defendant's property and she transferred her bank book to defendant, not willingly, but because of some supposed legal liability on account of the son's act, defendant having merely asked her if she could not make some recompense for its loss, and asked her to sign a writing transferring the book, the rule of voluntary payment did not apply).

N. C.—Winston First Nat. Bank v. Taylor, 122 N. C. 569, 29 SE 831; Newell v. March, 30 N. C. 441; Filgo v. Penny, 6 N. C. 182.

N. D.—Chrysler Light, etc., Co. v. Belfield, 224 NW 871 [cit Cyc]; Jacobson v. Mohall Tel. Co., 34 N. D. 213, 157 NW 1033. LRA1916F 532.

Oh.—Phillips v. McConica, 59 Oh. St. 1, 51 NE 445, 69 AmSR 753; Cincinnati v. Gas Light, etc., Co., 53 Oh. St. 278, 41 NE 239; Valley R. Co. v. Lake Erie Iron Co., 46 Oh. St. 44, 18 NE 486, 1 LRA 412; L. R. & J. Smith Co. v. Cleveland, 16 Oh. Cir. Ct. N. S. 77; Metzger v. Greiner, 9 Oh. Cir. Ct. N. S. 364, 29 Oh. Cir. Ct. 447.

Okl.—Hadley v. Farmers' Nat. Bank, 125 Okl. 250, 257 P 1101, 53 ALR 943; American Surety Co. v. Steen, 86 Okl. 252, 208 P 212.

Or.—Scott v. Ford, 52 Or. 288, 97 P 99, 68 LRA 469; Johnson v. McGinness, 1 Or. 292.

Pa.—Millard v. Delaware, etc., R. Co., 224 Pa. 448, 73 A 904; Gould v. McFall, 118 Pa. 455, 12 A 336, 4 AmSR 606; Real Est. Sav. Inst. v. Linder, 74 Pa. 371; Natcher v. Natcher, 47 Pa. 496; Kerr v. Kitchen, 7 Pa. 486; Ege v. Koontz, 3 Pa. 109; Espy v. Allison, 9 Watts 462; Booker v. Ennis, 86 Pa. Super. 145. Contra Craig v. Lininger, 61 Pa. Super. 339; Johnson v. Hernig, 53 Pa. Super. 179; Bobst v. Gring, 32 Pa. Super. 541; Commonwealth Bldg., etc., Assoc. v. Stroh, 12 Pa. Dist. 509; Com. v. Lancaster County Live Stock Ins. Co., 6 Pa. Dist. 371, 19 Pa. Co. 373, 1 Dauph. Co. 210; Beale v. Green, 16 Pa. Co. 607.

R. I.—Nelson v. Swenson, 46 R. I. 26, 124 A 468.

S. C.—Columbia R., etc., Co. v. Jones, 119 S. C. 480, 112 SE 267; Hardaway v. Southern R. Co., 90 S. C. 475, 73 SE 1020, AnnCas1913D 266; Kenneth v. South Carolina R. Co., 49 S. C. L. 284, 98 AmD 382; Smith v. Hutchinson, 42 S. C. L. 260; Robinson v. Charleston, 31 S. C. L. 317, 45 AmD 739.

S. D.—Evans v. Hughes County, 3 S. D. 244, 52 NW 1062.

Tex.—Gilliam v. Alford, 69 Tex. 267, 6 SW 757; Galveston County v. Gorham, 49 Tex. 279; St. Louis Southwestern R. Co. v. White, (Civ. A.) 211 SW 315; Texarkana, etc., R. Co. v. Sabine Tram Co., (Civ. A.) 129 SW 198 [aff 105 Tex. 32, 143 SW 143]; Scott v. Slaughter, 35 Tex. Civ. A. 524, 80 SW 643.

Va.—Barrow v. Prince Edward County, 121 Va. 1, 92 SE 910; Richmond v. Judah, 5 Leigh (32 Va.) 305.

Wash.—Lincoln v. Kuskokwim Fishing, etc., Co., 118 Wash. 137, 203 P 62; Peacock Mill Co. v. Honeycutt, 55 Wash. 18, 103 P 1112.

W. Va.—Petty v. United Fuel Gas Co., 76 W. Va. 268, 85 SE 523; Gaffney v. Stowers, 73 W. Va. 420, 80 SE 501; Beard v. Beard, 25 W. Va. 486, 52 AmR 219.

Wis.—Conway v. Grand Chute, 162 Wis. 172, 155 NW 953; Gage v. Allen, 89 Wis. 98, 61 NW 361; Birkhauser v. Schmitt, 45 Wis. 316, 30 AmR 740; Hurd v. Hall, 12 Wis. 112.

Eng.—Holt v. Markham, [1923] 1 K. B. 504; In re Hatch, [1919] 1 Ch. 351; Dew v. Parsons, 1 Chitty 296, 18 ECL 164; Bilbie v. Lumley, 2 East 469, 102 Reprint 448; Platt v. Bromage, 24 L. J. Exch. 63; Kelly v. Solari, 9 M. & W. 54, 152 Reprint 24; Clifton v. Cockburn, 3 Myl. & K. 76, 10 EngCh 76, 40 Reprint 30; Brisbane v. Dacres, 5 Taunt. 143, 1 ECL 82, 128 Reprint 641.

Alta.—Sletto v. Adams, [1926] 3 DomLR 891.

Ont.—O'Grady v. Toronto, 37 Ont. L. 139, 10 OntWN 249, 31 DomLR 632; Bethune v. Rex, 26 Ont. L. 117, 21 OntWR 559, 4 DomLR 229; Baker v. Atkinson, 14 Ont. A. 409; Stewart v. Ferguson, 31 Ont. 112; Baldwin v. Kingstone, 16 Ont. 341; Perry v. Newcastle Dist. Mut. F. Ins. Co., 8 U. C. Q. B. 363.

Sask.—Marshall v. Marshall, 17 Sask. L. 274, [1923] 4 DomLR 175, [1923] 2 WestWkly 820; Burns v. MacDonalds Cons., Ltd., [1925] 3 DomLR 418. But see Connick v. Carmichael, 17 Sask. L. 560, 563, [1923] 4 DomLR 994, [1923] 3 WestWkly 1244 (where it was said: "Even if the moneys had been paid under a pure mistake of law, the Court has still power to grant relief, and will, in a proper case, direct a return of the moneys paid." The case, however, was decided as one of mistake of fact).

[a] **Reasons for rule.**—(1) "The reason for the rule . . . is . . . bottomed upon some considerations which are logical and well settled. Among these . . . is the maxim ignorantia legis neminem excusat. Likewise the rule touches nearly upon the doctrines of accord and satisfaction, and of estoppel; as also upon the rule forbidding the unsettling of things settled." Lamar Tp. v. Lamar, 261 Mo. 171, 186, 169 SW 12, AnnCas1916D 740. (2) "It is a maxim, born of necessity, that all men are conclusively presumed to know the law. Without this, legal accountability could not be enforced, and judicial administration would be embarrassed at every step." Hemphill v. Moody, 64 Ala. 468, 473.

[b] **Knowledge of the facts** does not mean knowledge by the payee of "facts as to the existence or validity or meaning of the law, for all these he is presumed to know, but the facts, events, and circumstances which relate to the persons and transactions involved;" and where these facts are known there can be no recovery of a payment made in ignorance of the law or under a mistake as to its validity or meaning. Evans v. Hughes County, 3 S. D. 244, 253, 52 NW 1062.

[c] **Rule applied.**—(1) To the payment of encumbrances. Peters v. Florence, 38 Pa. 194; Boas v. Updegrove, 5 Pa. 516, 47 AmD 425; Espy v. Allison, 9 Watts (Pa.) 462; Haigh v. U. S. Building, etc., Assoc., 19 W. Va. 792. (2) To the payment of interest at more than the legal rate after maturity under a mistake as to the legal effect of a phrase used in the note. Rector v. Collins, 46 Ark. 167, 55 AmR 571. (3) To the payment of interest on a note secured by a mortgage, which, by reason of the inclusion of an invalid clause providing for the payment of the mortgage tax by the mortgagor, released the mortgagor from the obligation to pay interest, it being held that interest paid on the note was paid in mistake of law, or in waiver of effect of the invalid clause, and could not be recovered back or applied as a payment on the unpaid principal. Harralson v. Barrett, 99 Cal. 607, 34 P 342. But see Hall v. Jackson County, 5 Ill. A. 609 [aff 95 Ill. 352] (where it was held that, where interest is paid under a mistake of law as to liability therefor, while it cannot be recovered back, yet where the principal is not paid in full, the amount paid as interest should be credited on the principal in determining the amount due on the contract). (4) Where a depositor in an insolvent bank paid his note, in ignorance of his right to set off his deposit against it. Westfield v. Houtzdale Bank, 1 Pa. Dist. 767; Westfield v. Dill, 12 Pa. Co. 30. (5) Where a contract was made for the sale of linseed oil with the understanding that 7.50 pounds constituted a gallon by custom among oil manufacturers, and plaintiff received and paid for oil on that basis, whereas by statute the weight of a gallon was fixed at 7.761 pounds. Heath, etc., Mfg. Co. v. National Linseed Oil Co., 197 Ill. 632, 64 NE 732. (6) In an action for sums paid for freight overcharge where freight was shipped under a written contract. Lincoln v. Kuskokwim Fishing, etc., Co., 118 Wash. 137, 203 P 62. (7) Where incorporation fees were paid to secretary of state under an erroneous construction of a statute, there being no duress. Alton Light, etc., Co. v. Rose, 117 Ill. A. 83. (8) To payment of an increased rate by consumer of electrical current supplied by a municipality in the belief that an ordinance enacted by the municipality authorized the increase. Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59. (9) To the payment of a debt barred by the statute of limitation. Wheatfield Tp. v. Brush Valley Tp., 25 Pa. 112.

[d] **Mutual mistake.**—This rule also applies to a mutual mistake of law by the parties. Washington v. Barber, 29 F. Cas. No. 17,224, 5 Cranch C. C. 157; Parker v. Lancaster, 84 Me. 512, 24 A 952; Jacobson v. Mohall Tel. Co., 34 N. D. 213, 157 NW 1033, LRA1916F 532 [cit Cyc].

[e] **In Tennessee** (1) recovery of payment made under mistake of law has been denied. Leach v. Cowan, 125 Tenn. 182, 140 SW 1070, AnnCas1913C 188; Dickins v. Jones, 6 Yerg. 483, 27 AmD 488; Walker v. Walker, 3 Tenn. Civ. A. 670. (2) But it has been stated that "there may be such a recovery, even though the transaction was made under a mistake of law; but it must be under such circumstances as the court can see that it would be unconscionable for the party who obtained the advantage in such transaction or settlement to retain that advantage, and e converso, although there was a clear mistake of law, yet if the party benefiting by the transaction may retain the advantage in good conscience, neither a court of law nor equity will give relief to the complaining party." Leach v. Cowan, supra.

[f] **In Porto Rico** Civ. Code § 1796, which provides that if a thing is received when there is no right to claim it and which, through an error, has been unduly received, there arises an obligation to restore it, refers to an error of fact and not of law, and does not permit the recovery of a payment made under a mistake of law. Marin v. Arecibo, 28 Porto Rico 477; American R. Co. v. Wolkers, 22 Porto Rico 264.

48. Parker v. Lancaster, 84 Me. 512, 24 A 952; Norris v. Blethen, 19 Me. 348; Regan v. Baldwin, 126 Mass. 485, 30 AmR 689; Clarke v. Dutcher, 9 Cow. (N. Y.) 674; Beard v. Beard, 25 W. Va. 486, 52 AmR 219. See also cases supra text and note 47.

[a] **In Pennsylvania** it has been expressly held that, where one makes a payment under a mere mistake of law, with a knowledge or means of knowledge of the facts, even though it be against conscience for defendant to retain it, there can be no recovery back. Millard v. Delaware, etc., R.

as concerns the right to recover voluntary payment, between ignorance and mistake of law.[49] The rule is held to apply to corporations as well as to natural persons,[50] and to be applicable in equity as well as in law.[51] In a few jurisdictions, however, it has been held that a recovery of money paid under a pure mistake of law, or in ignorance of law, will be allowed where in equity and in good conscience the payee had no right to retain it;[52] but where in conscience and justice no recovery should be had, the action does not lie.[53]

[§ 313] **b. Limitations of, and Exceptions to, Rule Denying Recovery—(1) In General.** The rule obtaining in most jurisdictions that money paid under a mistake of law cannot be recovered back[54] is not without limitations,[55] and is confined to cases falling strictly within its scope.[56] Thus it does not apply to a payment made under a misapprehension of legal liability induced by an absence of full knowledge of the facts,[57] or by fraud,[58] nor to a payment made under a promise that it would be refunded if it should be found that the payor was under no liability to make it;[59] and it does not prevent recovery of money deposited only as security.[60]

[§ 314] **(2) Payments by Public Officers and Municipalities.**[61] Although there are decisions to the contrary,[62] the general rule is that payments made by public officers under mistake of law may be recovered back,[63] and that action may be maintained to recover public funds paid without authority, al-

Co., 224 Pa. 448, 73 A 904; Gould v. McFall, 118 Pa. 455, 12 A 336, 4 AmSR 606. But see Union Trust Co. v. Gilpin, 235 Pa. 524, 530, 84 A 448 (where the court adopts the opinion of the lower court, which quotes with approval the case of Northrop v. Graves, 19 Conn. 548: "We mean distinctly to assert that where money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back . . . whether such mistake be one of fact or law; and this we insist may be done both upon principle of Christian morals and the common law," but which opinion, however, further says: "We are not called upon to decide whether the present case falls outside the general rule. It was tried on the theory of mistake of fact only").

49. Me.—Parker v. Lancaster, 84 Me. 512, 24 A 952; Norris v. Blethen, 19 Me. 348.

Mo.—Wilkins v. Bell, (A.) 261 SW 927, 928 [quot Cyc].

N. M.—Terr. v. Newhall, 15 N. M. 141, 147, 103 P 982 [quot Cyc].

N. Y.—Jacobs v. Morange, 47 N. Y. 57; Champlin v. Laytin, 18 Wend. 407, 31 AmD 382; Clarke v. Dutcher, 9 Cow. 674.

Or.—Scott v. Ford, 52 Or. 288, 97 P 99, 68 LRA 469.

Pa.—Commonwealth Bldg., etc., Assoc. v. Stroh, 12 Pa. 509; Johnson v. Hernig, 53 Pa. Super. 179; Bobst v. Gring, 32 Pa. Super. 541; Beale v. Green, 16 Pa. Co. 607. Contra Com. v. Lancaster County Live Stock Ins. Co., 6 Pa. Dist. 371, 19 Pa. Co. 373, 1 Dauph. Co. 210.

Ont.—O'Grady v. Toronto, 37 Ont. L. 139, 10 OntWN 249, 31 DomLR 632.

But see Lawrence v. Beaubien, 18 S. C. L. 623, 23 AmD 155 (where, in a suit on a bond, a distinction is drawn between mistake of law and ignorance of law).

And see cases supra note 47.

50. Painter v. Polk County, 81 Iowa 242, 47 NW 65, 25 AmSR 489; Wilkins v. Bell, (Mo. A.) 261 SW 927, 928 [quot Cyc]; Payne v. Witherbee, 200 N. Y. 572, 93 NE 954; New York, etc., R. Co. v. Marsh, 12 N. Y. 308; Valley R. Co. v. Lake Erie Iron Co., 46 Oh. St. 44, 18 NE 486, 1 LRA 412.

Payments by municipal corporations see infra § 314.

51. Hemphill v. Moody, 64 Ala. 468; West Virginia Copper Belle Min. Co. v. Gleeson, 14 Ariz. 548, 134 P 285, 48 LRANS 481; Tiffany v. Johnson, 27 Miss. 227.

Right to relief in equity generally from consequence of act done or contract entered into under mistake of law see Equity § 69.

52. Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302; Gilpatric v. Hartford, 98 Conn. 471, 120 A 317; Monroe Nat. Bank v. Catlin, 82 Conn. 227, 73 A 3; Mansfield v. Lynch, 59 Conn. 320, 22 A 313, 12 LRA 285; Kane v. Moorhouse, 46 Conn. 300; Northrup v. Graves, 19 Conn. 548, 50 AmD 264 (leading case); Robertson v. Jefferson County, 205 Ky. 479, 266 SW 27; Greene v. Taylor, 184 Ky. 739, 212 SW 925; Supreme Council C. K. of A. v. Fenwick, 169 Ky. 269, 183 SW 906; Spalding v. Lebanon, 156 Ky. 37, 160 SW 751, 49 LRANS 387; Polites v. Barlin, 149 Ky. 376, 149 SW 828, 41 LRANS 1217; Kentucky Title Sav. Bank, etc., Co. v. Langan, 144 Ky. 46, 137 SW 846; Scott v. New Castle, 132 Ky. 616, 116 SW 788, 21 LRANS 112; Covington Public Library v. Covington Bd. of Education, 75 SW 225, 25 KyL 341; Capital Gas, etc., Co. v. Gaines, 49 SW 462, 20 KyL 1464; Lyon v. Mason, etc., Co., 102 Ky. 594, 44 SW 135, 19 KyL 1642; Bruner v. Stanton, 102 Ky. 459, 43 SW 411, 19 KyL 1514; McMurtry v. Kentucky Cent. R. Co., 84 Ky. 462, 1 SW 815, 8 KyL 455; Louisville v. Henning, 1 Bush (Ky.) 381; Ray v. Commonwealth Bank, 3 B. Mon. (Ky.) 510, 39 AmD 479; Covington v. Powell, 2 Metc. (Ky.) 226; Stanford v. Hite, 2 KyL 386, 11 Ky. Op. 145.

"We do not decide, that money paid by a mere mistake in point of law, can be recovered back. . . . But we mean distinctly to assert, that, when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of indebitatus assumpsit, whether such mistake be one of fact or of law; and this we insist, may be done, both upon the principle of Christian morals and the common law." Northrop v. Graves, 19 Conn. 548, 553, 50 AmD 264.

[a] **In Georgia** (1) a distinction is made between ignorance and mistake of law and it is held that money paid by mistake of law may be recovered back where there is a full knowledge of all the facts, provided the mistake is clearly proved, and defendant cannot in good conscience retain the payment. Whitehurst v. Mason, 140 Ga. 148, 78 SE 938; Culbreath v. Culbreath, 7 Ga. 64, 50 AmD 375. (2) But where a payment is made through mere ignorance of the law, where all the facts are known, and there is no misplaced confidence, and no artifice, deception, or fraudulent practice is used by the other party, an action will not lie to recover it back. Strange v. Franklin, 126 Ga. 715, 55 SE 943; Arnold v. Georgia R., etc., Co., 50 Ga. 304; McCarty v. Mobley, 14 Ga. A. 225, 80 SE 523. (3) This principle denying relief in the case of payment made in ignorance of law has been embodied in Civ. Code § 3723. Arnold v. Georgia R., etc., Co., supra.

53. Hubbard v. Hickman, 4 Bush (Ky.) 204, 96 AmD 297; Louisville v. Zanone, 1 Metc. (Ky.) 151; Rupple v. Kissel, 74 SW 220, 24 KyL 2371. See Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 307, 128 A 302 (where it was said by the court: "We do not question or weaken the authority of Northrop v. Graves, 19 Conn. 548, and our many other decisions holding that money paid under a mistake of fact or of law, which the recipient has no right in good conscience to retain, may be recovered back. We do hold that when the parties to a written contract stand on an equal footing as to means of knowledge of their contract obligations, money paid by one to the other, in part performance of the contract, in response to a claim made in good faith and based upon a permissible but erroneous construction of the contract, cannot be recovered back as money paid under a mistake of law").

54. See supra § 312.

55. Conway v. Grand Chute, 162 Wis. 172, 155 NW 953. See Bush v. Carloading, etc., Co., 210 Ill. A. 399; cases infra notes 57–71; and infra §§ 313–315.

56. Burlingame v. Hardin County, 180 Iowa 919, 164 NW 115; Barker v. Clark, 12 AbbPrNS (N. Y.) 106; Ward v. Ward, 12 Oh. Cir. Dec. 59.

57. Bradshaw v. Glasscock, 91 Kan. 11, 136 P 933; Adrico Realty Corp. v. New York, 250 N. Y. 29, 164 NE 732.

Recovery of payments made under mistake of fact in general see infra §§ 318–329.

58. Kan.—Bradshaw v. Glasscock, 91 Kan. 11, 136 P 933.

Minn.—Call v. Terminal Supply Co., 171 Minn. 274, 213 NW 917.

N. Y.—Barker v. Clark, 12 AbbPr NS 106. See Haviland v. Willets, 141 N. Y. 35, 35 NE 958 (where it was supposed in the beginning of negotiations for a release that plaintiff had no interest in testator's estate, but the executor, being afterward informed that a certain legacy had lapsed and that plaintiff as testator's heir was entitled to it, procured plaintiff's release of all claims against the estate on the terms before proposed, it being clear that plaintiff did not understand his rights, it was held that, although the mistake was one of law, there was express concealment of a vital point and the release was voidable, and plaintiff was entitled to recover payments made by the executor in administering the estate up to the time plaintiff discovered his rights).

Oh.—Metzger v. Greiner, 9 Oh. Cir. Ct. N. S. 364, 29 Oh. Cir. Ct. 447.

Tenn.—Walker v. Walker, 3 Tenn. Civ. A. 670.

Tex.—Lumpkin v. Brown, (Civ. A.) 206 SW 217.

Recovery of payment induced by fraud see supra § 311.

59. Burlingame v. Hardin County, 180 Iowa 919, 164 NW 115; Lyman v. Lauderbaugh, 75 Iowa 481, 39 NW 812.

60. Morgan Park v. Gahan, 35 Ill. A. 646 [rev on other grounds 136 Ill. 515, 26 NE 1085].

61. Recovery of compensation unlawfully paid to, or exacted by public officers see Officers §§ 285, 286.

62. Morgan Park v. Knopf, 199 Ill. 444, 65 NE 322; Terr. v. Newhall, 15 N. M. 141, 103 P 982.

63. U. S.—Wisconsin Cent. R. Co. v. U. S., 164 U. S. 190, 17 SCt 45, 41 L. ed. 399; Hunter v. U. S., 5 Pet. 173, 8 L. ed. 86; U. S. v. Gillmore, 189

though paid under a mistake of law.[64] Similarly, while it has been held that the general rule denying recovery applies to municipalities as well as to private corporations and natural persons,[65] the preponderance of authority is that payments made by municipal subdivisions of the state under mistake of law may be recovered back,[66] and that, where municipal officers have no authority to allow a bill or pass on its validity, the act is void, and the voluntary character of the payment is no defense to a suit by the municipality to recover the money which has thus been illegally paid.[67] However, it has been held that, where payments are allowed and made by municipal authorities acting within the scope of their authority, but under a mistake of law, there can be no recovery.[68]

[§ 315] **(3) Payments to or by Officers of Court.** The general rule denying recovery of payments made under a mistake of law[69] does not apply to payments to an officer of the court,[70] and such payments may be recovered;[71] but payments made by such officers under mistake of law are not recoverable.[72]

[§ 316] **c. What Constitutes Mistake of Law[73]—(1) In General.** It is often difficult to distinguish between mistakes of law and of fact.[74] A mistake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of,[75] or comes to an erroneous conclusion as to,[76] their legal effect.

[§ 317] **(2) Payment under Unconstitutional or**

Fed. 761; Florida Cent., etc., R. Co. v. U. S., 43 Ct. Cl. 572. But see Badeau v. U. S., 130 U. S. 439, 9 SCt 579, 32 L. ed. 997 (holding that, where a payment was for services to one who was an officer de facto, although not de jure, there could be no recovery).

Ala.—Demopolis v. Marengo County, 195 Ala. 214, 70 S 275.

D. C.—White v. U. S., 38 App. 131.

Ida.—Independent School Dist. No. 6 v. Mittry, 39 Ida. 282, 226 P 1076; Ada County v. Gess, 4 Ida. 611, 43 P 71 [dist Badeau v. U. S., 130 U. S. 439, 9 SCt 579, 32 L. ed. 997].

Ind.—Huntington County v. Heaston, 144 Ind. 583, 41 NE 457, 43 NE 651, 55 AmSR 192; Booth v. Cass County, 84 Ind. 428; Holtsclaw v. State, 46 Ind. A. 238, 92 NE 121; Kerr v. Regester, 42 Ind. A. 375, 85 NE 790; Eder v. Kreiter, 40 Ind. A. 542, 82 NE 552; Huntington County v. Buchanan, 21 Ind. A. 178, 51 NE 939.

Iowa.—Pocahontas County v. Katz-Craig Contracting Co., 181 Iowa 1313, 165 NW 422; State v. Young, 134 Iowa 505, 110 NW 292; Heath v. Albrook, 123 Iowa 559, 98 NW 619 [overr in effect Painter v. Polk County, 81 Iowa 242, 47 NW 65, 25 AmSR 489].

Kan.—Logan County School Dist. No. 49 v. Community High School, 126 Kan. 51, 54, 267 P 23 [cit Cyc].

Mich.—Ellis v. State Auditors, 107 Mich. 528, 65 NW 577 [overr in effect Wayne County v. Randall, 43 Mich. 137, 5 NW 75].

Mo.—State v. Hackmann, 305 Mo. 342, 265 SW 532, 536 [quot Cyc]; Barker v. Scott, 270 Mo. 146, 192 SW 90; Lamar Tp. v. Lamar, 261 Mo. 171, 173, 169 SW 12, AnnCas1916D 740 [quot Cyc].

N. Y.—Richmond County v. Ellis, 59 N. Y. 620.

N. D.—Bismarck v. Burleigh County, 49 N. D. 205, 190 NW 811.

Oh.—County Comrs. v. Dunn, 4 OhS &CP 260; State v. Weaver, 12 OhNP NS 41.

Pa.—Allegheny County v. Grier, 179 Pa. 639, 36 A 353.

[a] **Reason for rule.**—The doctrine that money paid in mistake of law cannot be recovered back is not so generally applicable to public officers as to individuals, because the authority and duty of public officers are elements of which all persons dealing with them are bound to take notice. Florida Cent., etc., Co. v. U. S., 43 Ct. Cl. 572.

64. Ind.—Huntington County v. Heaston, 144 Ind. 583, 41 NE 457, 43 NE 651, 55 AmSR 192.

Kan.—Logan County School Dist. No. 49 v. Community High School, 126 Kan. 51, 267 P 23.

Mich.—Wayne County v. Reynolds, 126 Mich. 231, 85 NW 574, 86 AmR 541 [overr Wayne County v. Randall, 43 Mich. 137, 5 NW 75].

Pa.—Allegheny County v. Grier, 179 Pa. 639, 36 A 353.

Va.—Com. v. Field, 84 Va. 26, 3 SE 882.

65. L. R. & J. Smith Co. v. Cleveland, 16 Oh. Cir. Ct. N. S. 77 (money paid to a contractor by a city under a misconstruction of the terms of a contract was paid under mistake of law and could not be recovered back).

66. Ala.—Demopolis v. Marengo County, 195 Ala. 214, 70 S 275.

Colo.—Ward v. Barnum, 10 Colo. A. 496, 52 P 412.

Ida.—Independent School Dist. No. 6 v. Mittry, 39 Ida. 282, 226 P 1076.

Ill.—Moffett v. Peo., 134 Ill. A. 550; McLean v. Montgomery County, 32 Ill. A. 131.

Iowa.—Pocahontas County v. Katz-Craig Contracting Co., 181 Iowa 1313, 165 NW 422.

Minn.—Chaska v. Hedman, 53 Minn. 525, 55 NW 737.

Mo.—Lamar Tp. v. Lamar, 261 Mo. 171, 169 SW 12, AnnCas1916D 740.

N. Y.—Ft. Edward v. Fish, 156 N. Y. 363, 50 NE 973; Donohue v. New York, 10 Hun 37; Cayuga County v. State, 112 Misc. 517, 183 NYS 646; Erie County v. Tonawanda, 95 Misc. 663, 159 NYS 714.

N. D.—Chrysler Light, etc., Co. v. Belfield, 224 NW 871.

Wis.—Frederick v. Douglas County, 96 Wis. 411, 71 NW 798.

See Com. v. Newton Tp., 276 Pa. 172, 120 A 123 (where it was held that the state could recover money paid to a township by mistake, its position as a territorial subdivision of the state being different from what it would have been if the transaction had been between individuals).

[a] **Reason for rule.**—Such a payment is not voluntarily made by the corporation, but by its agent, in excess of his authority, and in defiance of its rights. It is not the act of the corporation itself, but of one without authority, who assumed to act for it. Erie County v. Tonawanda, 95 Misc. 663, 159 NYS 714.

67. Ward v. Barnum, 10 Colo. A. 496, 52 P 412; Richmond County v. Ellis, 59 N. Y. 620; Peo. v. Fields, 58 N. Y. 491.

Recovery of municipal moneys or property generally see Municipal Corporations §§ 1220, 4089, 4564.

68. Snelson v. State, 16 Ind. 29; Onondaga v. Briggs, 2 Den. (N. Y.) 26; Philadelphia v. Gilbert, 14 Phila. (Pa.) 212; Tacoma v. Lillis, 4 Wash. 797, 31 P 321, 18 LRA 372.

69. See supra § 312.

70. Carpenter v. Southworth, 165 Fed. 428, 91 CCA 378; Sando v. Smith, 237 Ill. A. 570; Ex p. James, L. R. 9 Ch. 609; Ex p. Simmonds, 16 Q. B. D. 308; In re Opera, Ltd., [1891] 2 Ch. 154; Wells v. Wells, [1914] P. 157; London Guarantee, etc., Co., Ltd. v. Henderson, 25 Man. 617, 23 DomLR 38, 32 WestLR 61, 8 WestWkly 1260; and cases infra this note.

[a] **Payments to particular officers.**—(1) Administrator or executor. Sando v. Smith, 237 Ill. A. 570. (2) Attorney. London Guarantee, etc., Co., Ltd. v. Henderson, 25 Man. 617, 23 DomLR 38, 32 WestLR 61, 8 WestWkly 1260. (3) Receiver. Gillig v. Grant, 23 App. Div. 596, 49 NYS 78; Com. v. Lancaster County Live Stock, etc., Ins. Co., 6 Pa. Dist. 371. (4) Trustee in bankruptcy. Carpenter v. Southworth, 165 Fed. 428, 91 CCA 378; Ex p. Simmonds, 16 Q. B. D. 308.

71. See cases supra note 70.

72. Phillips v. McConica, 59 Oh. St. 1, 51 NE 445, 69 AmSR 753; Metzger v. Greiner, 9 Oh. Cir. Ct. N. S. 364, 29 Oh. Cir. Ct. 447; Leach v. Cowan, 125 Tenn. 182, 140 SW 1070, AnnCas1913C 188.

Recovery of payment or distribution made by executor or administrator under mistake of law see Executors and Administrators § 1345.

73. **"Mistake of law" defined** see Mistake 40 C. J. p 1228.

Mistake as to ownership or title as mistake of fact see infra § 319.

74. See Barker v. Clark, 12 AbbPr NS (N. Y.) 106 (where the matter is discussed).

Mistake of fact see infra §§ 318-329.

75. Mowatt v. Wright, 1 Wend. (N. Y.) 335, 19 AmD 508.

Mistake and ignorance of law not distinguished see supra § 312.

76. Smith v. Hellman Motor Corp., 122 Misc. 422, 204 NYS 229; Hurd v. Hall, 12 Wis. 112; and cases infra this note.

[a] **Illustrations.**—(1) Where, after the making of a will devising all of testator's property to his wife, a child was born, and the widow assumed to convey certain real estate owned by the testator, which after mesne conveyances the then assumed owner mortgaged to defendant, and thereafter conveyed to plaintiffs, who paid the mortgage, plaintiffs were not entitled to recover the amount so paid, upon the ground of mistaken belief that their deed conveyed title in fee to the premises, and that the mortgage was a valid lien thereon, the mistake having been as to a matter of law. Belloff v. Williamsburgh Dime Sav. Bank, 118 App. Div. 20, 103 NYS 273 [aff 191 N. Y. 551 mem, 85 NE 1106 mem]. (2) Where a shipment of lumber had a final destination beyond the limits of a state, but was not by the shipping contract in question started on its final journey, nor committed to a connecting carrier for transportation beyond the state, it was intra-state commerce and subject to the rates fixed by the state railroad commission, and the mistake, if any, in applying interstate commission rates instead of the state commission rate, to the shipment, was one of law and not of fact. Texarkana, etc., R. Co. v. Sabine Tram Co., (Civ. A.) 129 SW 198 [aff 105 Tex. 32, 143 SW 143]. (3) Where defendant in a suit, with full knowledge of the facts, voluntarily paid part of the demand, and a judgment rendered against him for the balance was reversed on appeal, the payment was held to have been made in mistake of law. Beard v. Beard, 25 W. Va. 486, 52 AmR 219.

[b] **Erroneous construction of contract.**—A payment made by rea-

Invalid Statute or Ordinance.[77] Money paid under an unconstitutional or invalid statute or ordinance, without any circumstances of compulsion is paid under a mistake of law,[78] and so cannot be recovered,[79] except in so far as recovery is permitted under the rule adopted in most states that payments made by public officers under mistake of law are recoverable.[80]

[§ 318] **2. Of Fact**[81]**—a. In General.** As a general rule, a payment made under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back,[82] even though made

son of a wrong construction of the terms of a contract is made under a mistake of law. Beasley v. Beasley, 206 Ala. 480, 90 S 347; Traweek v. Hagler, 199 Ala. 664, 75 S 152, 154 [cit Cyc]; Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302; Cincinnati v. Cincinnati Gas Light, etc., Co., 53 Oh. St. 278, 41 NE 239; Lincoln v. Kuskokwim Fishing, etc., Co. 118 Wash. 137, 203 P 62, 64 [cit Cyc]; Gasson v. Cole, 26 T. L. R. 468.

Mistake of law see supra §§ 312-315.

77. **Of license fee or tax** see Licenses §§ 256, 257.

Of special assessment see Municipal Corporations § 3430.

Of taxes see Taxation [37 Cyc 1180].

78. U. S.—Blumenthal v. U. S., 4 F. (2d) 808; Woodman v. U. S., 15 Ct. Cl. 541.

Ill.—Rath v. Chicago, 207 Ill. A. 117.

Ind.—Jenks v. Lima Tp., 17 Ind. 326.

Md.—Baltimore v. Lefferman, 4 Gill 425, 45 AmD 145.

Mass.—Benson v. Monroe, 7 Cush. 125, 54 AmD 716.

N. Y.—Newburgh Sav. Bank v. Woodbury, 173 N. Y. 55, 65 NE 858 [aff 64 App. Div. 305, 72 NYS 222]; Tripler v. New York, 125 N. Y. 617, 26 NE 721; Vanderbeck v. Rochester, 122 N. Y. 285, 25 NE 408; Doll v. Earle, 59 N. Y. 638 mem; Peo. v. Wilmerding, 62 Hun 391, 17 NYS 102 [rev on other grounds 136 N. Y. 363, 32 NE 1099]; Palmer v. Syracuse, 26 Misc. 561, 57 NYS 600 [rev on other grounds 67 App. Div. 267, 73 NYS 378].

N. D.—Chrysler Light, etc., Co. v. Belfield, 224 NW 871, 876 [cit Cyc].

Tenn.—Hubbard v. Martin, 8 Yerg. 498.

Wis.—Van Buren v. Downing, 41 Wis. 122.

B. C.—Colwood Park Assoc., Ltd. v. Oak Bay, [1928] 3 DomLR 812, [1928] 2 WestWkly 593.

Ont.—Cushen v. Hamilton, 4 Ont. L. 265, 1 OntWR 441.

[a] **In California** (1) Civ. Code § 1758, providing that under certain circumstances a mistake of law is such a mistake as renders an apparent consent to a contract not real or free, cannot be invoked to sustain an action for the recovery of fees voluntarily paid under a statute which is afterward declared unconstitutional. Wingerter v. San Francisco, 134 Cal. 547, 66 P 730, 86 AmSR 294. (2) And prior to the enactment of such statute no recovery of such a payment was permitted. Garrison v. Tillinghast, 18 Cal. 404; Brumagim v. Tillinghast, 18 Cal. 265, 79 AmD 176. (3) Recovery of money paid by mistake of law under California statute in general see supra § 312 note 44.

[b] **Rule applied.**—Payment of an alien passenger tax under a law afterward declared unconstitutional, but which had previously been held valid, is not recoverable. Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; Benson v. Monroe, 7 Cush. (Mass.) 125, 54 AmD 716.

79. See cases supra note 78.

80. Ellis v. Bd. of State Auditors, 107 Mich. 528, 65 NW 577.

Payment made by public officer under mistake of law see supra § 314.

81. **Equitable relief against mistake of fact in general** see Equity §§ 62-68.

82. U. S.—Meyer v. Richards, 163 U. S. 385, 16 SCt 1148, 41 L. ed. 199; Sanborn v. U. S., 135 U. S. 271, 10 SCt 812, 34 L. ed. 112; Little v. Bowers, 134 U. S. 547, 10 SCt 620, 33 L. ed. 1016; U. S. v. Barlow, 132 U. S. 271, 10 SCt 77, 33 L. ed. 346; Royal Italian Govt. v. National Brass, etc., Tube Co., 294 Fed. 23 [certiorari den 264 U. S. 587 mem, 44 SCt 402 mem, 68 L. ed. 863 mem]; U. S. v. D'Olier Engineering Co., 215 Fed. 209; Union Nat. Bank v. McKey, 102 Fed. 662, 42 CCA 583; Brown v. Tillinghast, 84 Fed. 71; Bohl v. Carson, 63 Fed. 26, 11 CCA 16; In re Farmers', etc., Bank, 13 Fed. 361; U. S. v. National Park Bank, 6 Fed. 852; Andressen v. Northfield First Nat. Bank, 2 Fed. 122, 1 McCrary 252; Williams v. Mobile Sav. Bank, 29 F. Cas. No. 17,729, 2 Woods 501; Duval v. U. S., 25 Ct. Cl. 47; Brown v. District of Columbia, 17 Ct. Cl. 402; Neitzey's Case, 17 Ct. Cl. 111.

Ala.—Ledger Pub. Co. v. Miller, 170 Ala. 437, 54 S 52; Merrill v. Brantley, 133 Ala. 537, 31 S 847; Beard v. Horton, 86 Ala. 202, 5 S 207; Young v. Lehman, 63 Ala. 519; Pendry v. Brundridge, 57 Ala. 574; Yarborough v. Wise, 5 Ala. 292; Hinds v. Wiles, 12 Ala. A. 596, 68 S 556; Russell v. Richard, 6 Ala. A. 73, 60 S 411.

Ariz.—Martin v. Wells, 3 Ariz. 57, 20 P 673.

Ark.—Hayes v. Bishop, 141 Ark. 155, 216 SW 298; Blackburn v. Texarkana Gas, etc., Co., 102 Ark. 152, 143 SW 588; Chicago, etc., R. Co. v. Lena Lumber Co., 99 Ark. 105, 137 SW 562.

Cal.—Corson v. Berson, 86 Cal. 433, 25 P 7; Lutz v. Rothschild, 4 Cal. Unrep. Cas. 888, 38 P 360; Burckard v. Smith, 80 Cal. A. 104, 251 P 663; Thresher v. Lopez, 52 Cal. A. 219, 198 P 419; Dunham v. McDonald, 34 Cal. A. 744, 168 P 1063; Gay v. Milwaukee Brewery, 34 Cal. A. 75, 166 P 1017; Horne v. Hughes, 19 Cal. A. 6, 124 P 736; Kiefhaber Lumber Co. v. Consolidated Lumber Co., 13 Cal. A. 111, 108 P 1024.

Colo.—Stewart v. Kindel, 15 Colo. 539, 25 P 990; Lewis v. Hughes, 12 Colo. 208, 20 P 621; Schon v. Crouch, 24 Colo. A. 367, 133 P 765.

Conn.—Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 A 302; Hogben v. Metropolitan L. Ins. Co., 69 Conn. 503, 38 A 214, 61 AmSR 53; Stanley Rule, etc., Co. v. Bailey, 45 Conn. 464; Vernon v. Vernon West School Dist., 38 Conn. 112; Post v. Clark, 35 Conn. 339.

Del.—West v. Houston, 4 Del. 170.

D. C.—Prowinsky v. Second Nat. Bank, 49 App. 363, 265 Fed. 1003; Hibbs v. Beall, 41 App. 592; Strauss v. Hensey, 9 App. 541.

Fla.—Holbrook v. Allen, 4 Fla. 87.

Ga.—Sheppard v. Lang, 122 Ga. 607, 50 SE 371; McRae Oil, etc., Co. v. Stone, 119 Ga. 516, 46 SE 668; Haralson County v. Golden, 104 Ga. 19, 30 SE 380; Collins v. Powell, 87 Ga. 571, 13 SE 552; Logan v. Sumter, 28 Ga. 242, 73 AmD 755; Law v. Nunn, 3 Ga. 90; Atlanta Tel., etc., Co. v. Fain, 16 Ga. A. 475, 85 SE 791; Pine Belt Lumber Co. v. Morrison, 13 Ga. A. 453, 79 SE 363.

Ida.—Rohn v. Gilmore, 37 Ida. 544, 217 P 602.

Ill.—Peo. v. Foster, 133 Ill. 496, 23 NE 615; Wolf v. Beaird, 123 Ill. 585, 15 NE 161, 5 AmSR 565; Stempel v. Thomas, 89 Ill. 146; McLean County Bank v. Mitchell, 88 Ill. 52; Devine v. Edwards, 87 Ill. 177; Tyler v. Goddard, 207 Ill. A. 526; J. S. Hulse Hardware Co. v. American Express Co., 65 Ill. A. 596; Horney v. Coldbrook, 65 Ill. A. 477; Burlock v. Cook, 20 Ill. A. 154; International Bank v. Bartalott, 11 Ill. A. 620 [aff 119 Ill. 259, 9 NE 898]; Hall v. Jackson County, 5 Ill. A. 609 [aff 95 Ill. 352]. See West Frankfort Bank, etc., Co. v. Baretti, 206 Ill. A. 261; Lincoln Electric Heating Appliances, Inc. v. Schultz, 203 Ill. A. 340; White Brass Castings Co. v. Automatic Recording Safe Co., 198 Ill. A. 425.

Ind.—Stotsenburg v. Fordice, 142 Ind. 490, 41 NE 813, 810; Ingall's v. Miller, 121 Ind. 188, 22 NE 995; Worley v. Moore, 97 Ind. 15; Cross v. Herr, 96 Ind. 96; Smith v. Smith, 76 Ind. 236; Lewellen v. Garrett, 58 Ind. 442, 26 AmR 74; Brown v. College Corner, etc., Gravel Road Co., 56 Ind. 110.

Iowa.—Anderson v. Spaulding, 197 Iowa 858, 197 NW 1000; Cosswiller v. Jansen, 179 Iowa 806, 162 NW 45; Shoenhair v. Merrill, 165 Iowa 384, 145 NW 919; Fidelity Sav. Bank v. Reeder, 142 Iowa 373, 120 NW 1029; Johnson v. Saum, 137 Iowa 138, 114 NW 618, 123 Iowa 145, 98 NW 599; Chickasaw County Farmers' Mut. F. Ins. Co. v. Weller, 98 Iowa 731, 68 NW 443; Johnson v. Leffingwell, 74 Iowa 114, 37 NW 10; Holmes v. Lucas County, 53 Iowa 211, 4 NW 918.

Kan.—Bradshaw v. Glasscock, 91 Kan. 11, 136 P 933; Wood v. Spurgeon, 85 Kan. 696, 118 P 869; Lowe v. Wells, 78 Kan. 105, 96 P 74.

Ky.—Robertson v. Jefferson County, 205 Ky. 479, 266 SW 27; Greene v. Taylor, 184 Ky. 739, 212 SW 925; Supreme Council C. K. of A. v. Fenwick, 169 Ky. 269, 183 SW 906; Marrowbone Coal, etc., Co. v. Coleman, 156 Ky. 425, 161 SW 238; Kentucky Title Sav. Bank, etc., Co. v. Langan, 144 Ky. 46, 137 SW 846; Edward v. Fuson, 66 SW 715, 23 KyL 2111; Rhodes v. Lambert, 58 SW 608, 22 KyL 691; Nevin v. Mankini, 45 SW 669, 20 KyL 224; Moore v. Moore, 88 Ky. 683, 11 SW 780, 11 KyL 210; McMurtry v. Kentucky Cent. R. Co., 84 Ky. 462, 1 SW 815, 8 KyL 455; Louisville v. Henning, 1 Bush 381; Covington v. Powell, 2 Metc. 226; Louisville v. Zanone, 1 Metc. 151; Ray v. Commonwealth Bank, 3 B. Mon. 510, 39 AmD 479; Wake v. Commonwealth Bank, 2 Dana 394; Feemster v. Markham, 2 J. J. Marsh. 303, 19 AmD 131; Ashbrook v. Watkins, 3 T. B. Mon. 82; Mercer v. Clark, 3 Bibb. 224; Edwards v. Fuson, 66 SW 715, 23 KyL 2111; Rhodes v. Lambert, 58 SW 608, 22 KyL 691; Nevin v. Mankini, 45 SW 669, 20 KyL 224; Higdon v. Bradshaw, 1 Ky. Op. 589.

La.—Beasley v. Allen, 11 Rob. 502; Massias v. Gasquet, 4 Rob. 137; Ligon v. Orleans Nav. Co., 2 La. 128; Greenfield Box Co. v. Independence Veneer, etc., Mfg. Co., 4 La. A. 690; Thompson v. Short Lumber Co., 3 La. A. 508.

Me.—Millett v. Holt, 60 Me. 169; Starbird v. Curtis, 43 Me. 352; Gooding v. Morgan, 37 Me. 419; Osgood v. Jones, 23 Me. 312; Goddard v. Putnam, 22 Me. 363; Norton v. Marden, 15 Me. 45, 32 AmD 132; Clark v. Sylvester, 13 A 404.

Md.—Lester v. Baltimore, 29 Md. 415, 96 AmD 542; Baltimore, etc., R. Co. v. Faunce, 6 Gill 68, 46 AmD 655; Chase v. Taylor, 4 Harr. & J. 54.

Mass.—Rosenfeld v. Boston Mut. L. Ins. Co., 222 Mass. 284, 110 NE 304; Johnson, etc., Co. v. Longley Luncheon Co., 207 Mass. 52, 92 NE 1035; Montgomery Door, etc., Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 NE 71; Moors v. Bird, 190 Mass. 400, 77 NE 643; Minneapolis First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 65 NE 24, 94 AmSR 637; Blanchard v. Low, 164 Mass. 118, 41 NE 118; Trecy v. Jefts, 149 Mass. 211, 21 NE 360; Quimby v. Carr, 7 Allen 417; Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92; Whitcomb v. Williams, 4 Pick. 228; Lazell v. Miller, 15 Mass. 207; Bond v. Hays, 12 Mass. 34.

Mich.—Stowell v. Ames, 148 Mich. 439, 111 NW 1070; Truax v. Bliss, 139 Mich. 153, 102 NW 635; Klein v. Bayer, 81 Mich. 233, 45 NW 991; Byrnes v. Martin, 67 Mich. 399, 34 NW 688; Walker v. Conant, 65 Mich. 194, 31 NW 786; Lane v. Pere Marquette Boom Co., 62 Mich. 63, 28 NW 786; McGoren v. Avery, 37 Mich. 120; Little v. Derby, 7 Mich. 325.

Minn.—Call v. Terminal Supply Co., 171 Minn. 274, 213 NW 917; Grand Lodge A. O. U. W. v. Towne, 136 Minn. 72, 161 NW 403, LRA1917E 344; Ætna L. Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 NW 955; Parks v. Fogleman, 97 Minn. 157, 105 NW 560, 114 AmSR 703, 4 LRANS 703; Braithwait v. Bain, 66 Minn. 325, 69 NW 4; Lund v. Davies, 47 Minn. 290, 50 NW 79; Sibley v. Pine County, 31 Minn. 201, 17 NW 337.

Miss.—Belmont Bank v. Judson Lumber Co., 143 Miss. 86, 108 S 440; Bessler Movable Stairway Co. v. Leakesville Bank, 140 Miss. 537, 106 S 445; Louisiana Bank v. Ballard, 8 Miss. 371.

Mo.—American Brewing Co. v. St. Louis, 187 Mo. 367, 86 SW 129, 2 Ann Cas 821; Williams v. Carroll County, 167 Mo. 9, 66 SW 955; Norton v. Bohart, 105 Mo. 615, 16 SW 598; McDonald v. Lynch, 59 Mo. 350; Columbus Ins. Co. v. Walsh, 18 Mo. 229; Ethel Bank v. Colmen, (A.) 290 SW 1022; Columbia Bldg., etc., Assoc. v. Gill, (A.) 285 SW 181; Home Coal Co. v. Macon, 216 Mo. A. 590, 262 SW 59; Missouri Pac. R. Co. v. Askew Saddlery Co., 215 Mo. A. 277, 256 SW 566; Picotte v. Mills, 200 Mo. A. 127, 203 SW 825; Bone v. Friday, 180 Mo. A. 577, 167 SW 599; Jones v. Miners, etc., Bank, 144 Mo. A. 428, 128 SW 829; Miller v. Missouri Fire Brick Co., 139 Mo. A. 25, 119 SW 976; E. E. Souther Iron Co. v. Laclede Power Co., 109 Mo. A. 353, 84 SW 450; Connell v. Hudson, 53 Mo. A. 418; Jordan v. Harrison, 46 Mo. A. 172; Morley v. Carlson, 27 Mo. A. 5; Yeater v. Hines, 24 Mo. A. 619; Hanson v. Jones, 20 Mo. A. 595; Davis v. Krum, 12 Mo. A. 279; Budd v. Eyermann, 10 Mo. A. 437.

Nebr.—Merchants'-Mechanics First Nat. Bank v. Cavers El. Co., 105 Nebr. 321, 180 NW 588; Douglas County v. Keller, 43 Nebr. 635, 62 NW 60; Campbell v. Baxter, 41 Nebr. 729, 60 NW 90; Renfrew v. Willis, 33 Nebr. 98, 49 NW 1095, Tallman v. Miller, 32 Nebr. 559, 49 NW 459; Nebraska, etc., Ins. Co. v. Segard, 29 Nebr. 354, 45 NW 681; Foster v. Pierce County, 15 Nebr. 48, 17 NW 261; Garrison v. Murphy, 2 Nebr. (Unoff.) 696, 89 NW 766.

Nev.—Smart v. Valencia, 50 Nev. 359, 261 P 655.

N. H.—Spencer v. Goddard, 62 N. H. 702; Peterborough v. Lancaster, 14 N. H. 382.

N. J.—Egan v. Abbett, 64 A 991.

N. M.—Elgin v. Gross-Kelly, 20 N. M. 450, 150 P 922, LRA1916A 711.

N. Y.—Ball v. Shepard, 202 N. Y. 247, 95 NE 719; Woodruff v. H. B. Claflin Co., 198 N. Y. 470, 91 NE 1003, 28 LRANS 440, 19 AnnCas 791; Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153, 113 AmSR 909, 13 LRANS 273; Martin v. Home Bank, 160 N. Y. 190, 54 NE 717; Flynn v. Hurd, 118 N. Y. 19, 22 NE 1109; Frank v. Lanier, 91 N. Y. 112; Sharkey v. Mansfield, 90 N. Y. 227, 43 AmR 161; Mayer v. New York, 63 N. Y. 455; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 AmD 516; New York v. Erben, 38 N. Y. 305, 3 Abb. Dec. 255, 7 Transcr. A. 270; North v. Bloss, 30 N. Y. 374; Rheel v. Hicks, 25 N. Y. 289; Martin v. McCormick, 8 N. Y. 331 [rev on other grounds 6 N. Y. Super. 366]; Bank of Commerce v. Union Bank, 3 N. Y. 230; Freeman v. Ralph Realty Corp., 198 App. Div. 788, 191 NYS 72; Title Guarantee, etc., Co. v. New York, 185 App. Div. 688, 173 NYS 718; Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84; Kessler v. Herklotz, 115 App. Div. 522, 101 NYS 418 [rev on other grounds 190 N. Y. 24, 82 NE 739]; Clausen v. Puvogel, 114 App. Div. 455, 100 NYS 49; Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 107 App. Div. 548, 95 NYS 421; Lesster v. New York, 33 App. Div. 350, 53 NYS 934 [aff 161 N. Y. 628 mem, 55 NE 1097 mem]; Ashner v. Abenheim, 31 App. Div. 623, 52 NYS 270; Munroe v. Bonanno, 16 App. Div. 421, 45 NYS 61; Masonic Life Assoc. v. Crandall, 9 App. Div. 400, 41 NYS 497; Davis v. Kling, 77 Hun 598, 28 NYS 1026; Sheffield v. Hamlin, 26 Hun 237; Paine v. Upton, 21 Hun 306 [aff 87 N. Y. 327, 41 AmR 371]; Southwick v. Memphis First Nat. Bank, 20 Hun 349 [rev on other grounds 84 N. Y. 420, 61 HowPr 164]; Van Santen v. Standard Oil Co., 17 Hun 140 [aff 81 N. Y. 171]; Calkins v. Griswold, 11 Hun 208; Graves v. Brinkerhoff, 4 Hun 305, 6 Thomps. & C. 630; Scott v. Warner, 2 Lans. 49; Rosboro v. Peck, 48 Barb. 92; Thompson v. Otis, 42 Barb. 461; Pitcher v. Turin Plank-Road Co., 10 Barb. 436; Metropolitan Bank v. Smith, 27 N. Y. Super. 229; Renard v. Fielder, 10 N. Y. Super. 318; Merchants' Bank v. McIntyre, 4 N. Y. Super. 431; Goddard v. Merchants' Bank, 4 N. Y. Super. 247 [aff 4 N. Y. 147]; Potter v. Everett, 2 N. Y. Super. 276; Gibbons v. Perkins, 132 Misc. 583, 230 NYS 273; Smith v. Hellman Motor Corp., 122 Misc. 422, 204 NYS 229; New York Bank v. Simmons, 117 Misc. 103, 190 NYS 602; Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Gombossy v. Katz, 18 Misc. 359, 41 NYS 411; Normandy Waist Co., Inc. v. Palmer, 176 NYS 465; Isaacs v. Kobre, 145 NYS 919; Moran v. Brown, 113 NYS 1038; Dieckerhoff v. Alder, 39 NYS 599 [aff 158 N. Y. 689 mem, 53 NE 1124 mem]; Ransom v. Masten, 4 NYS 781; First Presb. Soc. v. Ayer, 4 NYSt 388; Barker v. Clark, 12 AbbPrNS 106; Syracuse Sav. Bank v. Hess, 23 NY WklyDig 280; Boyer v. Pack, 2 Den. 107; Orleans Bank v. Smith, 3 Hill 560, 7 Hill 595; Wheadon v. Olds, 20 Wend. 174; Burr v. Veeder, 3 Wend. 412; Mowatt v. Wright, 1 Wend. 355, 19 AmD 508; Clarke v. Dutcher, 9 Cow. 674; Waite v. Leggett, 8 Cow. 195, 18 AmD 441; Morton v. Ludlow, 1 Edw. 639 [aff 5 Paige 519].

N. C.—Simms v. Vick, 151 N. C. 78, 65 SE 621, 24 LRANS 517, 18 Ann Cas 669; Montgomery County v. Fry, 127 N. C. 258, 37 SE 259; Worth v. Stewart, 122 N. C. 258, 29 SE 579; Houser v. McGinnas, 108 N. C. 631, 13 SE 139; Brummitt v. McGuire, 107 N. C. 351, 12 SE 191; Lyle v. Siler, 103 N. C. 261, 9 SE 491; Adams v. Reeves, 68 N. C. 134, 12 AmR 627; Tow v. Elliott, 33 N. C. 51; Mitchell v. Walker, 30 N. C. 243; Pool v. Allen, 29 N. C. 120.

N. D.—Chrysler Light, etc., Co. v. Belfield, 224 NW 871; James River Nat. Bank v. Weber, 19 N. D. 702, 708, 124 NW 952, 954 [cit Cyc]; Wiles v. McIntosh County, 10 N. D. 594, 88 NW 710; Fegan v. Great Northern R. Co., 9 N. D. 30, 81 NW 39; Nollman v. Evenson, 5 N. D. 344, 65 NW 686.

Oh.—Marietta v. Slocomb, 6 Oh. St. 471; Rogers v. Weaver, Wright 174; McKeown v. Irish Bldg. Assoc., 9 Oh. Dec. (Reprint) 257, 12 CincLBul 6; Norman v. Will, 1 Oh. Dec. (Reprint) 261, 5 WestLJ 508.

Okl.—Davis v. Mose, 112 Okl. 38, 239 P 447.

Or.—Security Sav., etc., Co. v. King, 69 Or. 228, 138 P 465; Scott v. Ford, 52 Or. 288, 97 P 99, 68 LRA 469; Thorsen v. Hooper, 50 Or. 497, 93 P 361; Scott v. Ford, 45 Or. 531, 78 P 742, 80 P 899, 68 LRA 469.

Pa.—Mt. Union Borough v. Kunz, 290 Pa. 356, 139 A 118; Mosser v. Cherry River Boom, etc., Co., 290 Pa. 67, 138 A 85; Kunkel v. Kunkel, 267 Pa. 163, 110 A 73; Donner v. Sackett, 251 Pa. 524, 97 A 89; Reed v. Horn, 143 Pa. 323, 22 A 877; Oil-Well Supply Co. v. Exchange Nat. Bank, 131 Pa. 100, 18 A 935; Bestwick v. Ormsby Coal Co., 129 Pa. 592, 18 A 538; Horton v. Harbridge, 127 Pa. 11, 17 A 675; Johnson v. Rutherford, 10 Pa. 455; Thomas v. Brady, 10 Pa. 164; McDonald v. Todd, 1 Grant 17; Potter v. Lehigh Valley R. Co., 80 Pa. Super. 237; Smith v. Sayre Nat. Bank, 59 Pa. Super. 272; Merritt v. U. S. Funeral Assoc., 52 Pa. Super. 112; Kurtz v. Bubeck, 39 Pa. Super. 370; Dotterer v. Scott, 29 Pa. Super. 553; Girard Trust Co. v. Harrington, 23 Pa. Super. 615; Mifflin v. Columbia Water Co., 3 Pa. Dist. & Co. 646; Roth's Est., 23 Pa. Dist. 428; Shiel's Case, 43 Pa. Co. 657; Philadelphia Co. v. Long, 38 Pa. Co. 76 [quot Cyc]; Kurtz v. Bubeck, 33 Pa. Co. 294; Kerr v. Ames, 39 LegInt 392; Meredith v. Haines, 14 WklyNC 364.

Porto Rico.—Marin v. Arecibo, 28 Porto Rico 477 (construing Civ. Code § 1796).

R. I.—Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805; Phetteplace v. Bucklin, 18 R. I. 297, 27 A 211; Arnold v. Garst, 16 R. I. 4, 11 A 167; Hazard v. Franklin Mut. F. Ins. Co., 7 R. I. 429.

S. C.—Glenn v. Shannon, 12 S. C. 570; Charleston Bank v. State Bank, 47 S. C. L. 291; Beadenbaugh v. Cooper, 47 S. C. L. 42; Henderson v. Planters' Bank, 45 S. C. L. 44.

Tenn.—Wilson v. Greer, 7 Humphr. 513; Neal v. Read, 7 Baxt. 333; Guild v. Baldridge, 2 Swan 295; Dickins v. Jones, 6 Yerg. 483, 27 AmD 488; Walker v. Walker, 3 Tenn. Civ. A. 670.

Tex.—Cleveland School Furniture Co. v. Hotchkiss, 89 Tex. 117, 33 SW 855; Gilliam v. Alford, 69 Tex. 267, 6 SW 757; Alston v. Richardson, 51 Tex. 1; City Bank v. Houston First Nat. Bank, 45 Tex. 203; Clark v. Bradley, (Civ. A.) 270 SW 1050; Rio Grande F. Ins. Co. v. Concordia F. Ins. Co., (Civ. A.) 199 SW 824; Jewett State Bank v. Corsicana Nat. Bank, (Civ. A.) 167 SW 747; Houston, etc., R. Co. v. Hughes, (Civ. A.) 133 SW 731, 732 [quot Cyc]; Hummel v. Flores, (Civ. A.) 39 SW 309; Barth v. Jester, 3 Tex. A. Civ. Cas. § 222.

Vt.—Strong v. Oldsmobile Co., 96 Vt. 355, 120 A 100; Holt v. Ruleau, 92 Vt. 74, 102 A 934; Varnum v. Highgate, 65 Vt. 416, 26 A 628; Gillett v. Brewster, 62 Vt. 312, 20 A 105.

Va.—Hibbs v. Alexandria First Nat. Bank, 133 Va. 94, 112 SE 669, 25 ALR 120; City Nat. Bank v. Peed, 32 SE 34; Richmond v. Judah, 5 Leigh (32 Va.) 305.

Wash.—Pacific Coal, etc., Co. v. Pierce County, 133 Wash. 278, 233 P 953.

W. Va.—Shinn v. Shinn, 78 W. Va. 44, 88 SE 610, LRA1918E 618; Simmons v. Looney, 41 W. Va. 738, 24 SE 677.

Wis.—Ficks v. Purcell, 164 Wis. 596, 160 NW 1058; Peterson v. Stoughton State Bank, 78 Wis. 113, 47 NW 368; Harrison v. Milwaukee, 49 Wis. 247, 5 NW 326.

Eng.—R. E. Jones, Ltd. v. Waring & Gillow, Ltd., [1926] A. C. 670; Johnson v. Rex, [1904] A. C. 817; British American Continental Bank v. British Bank for Foreign Trade, [1926] 1 K. B. 328; Ward v. Wallis, [1900] 1 Q. B. 675; Durrant v. Ecclesiastical Comrs., 6 Q. B. D. 234; Baylis v. London, [1912] 2 Ch. 318 [aff 29 T. L. R. 59]; Milnes v. Duncan, 6 B. & C. 671, 13 ECL 302, 108 Reprint 598; Wilkinson v. Johnson, 3 B. & C. 428, 10 ECL 198, 107 Reprint 792; Barber v. Brown, 1 C. B. N. S. 121, 87 ECL 121, 140 Reprint 50; Lorymer v. Stephens, 1 C. M. & R. 62, 149 Reprint 994; Mills v. Alderbury Union, 3 Exch. 590, 154 Reprint 980; Lamb v. Cranfield, 43 L. J. Ch. 408; Kerrison v. Glyn, 81 L. J. K. B. 465; Hooper v. Exeter, 56 L. J. Q. B. 457; Stanley v. Nuneaton Corp., 107 L. T. Rep. N. S. 760 [rev on other grounds

during the pendency of a suit on the demand.[83] The right of recovery under such circumstances is known to the civil and Roman law, as well as to the common law,[84] and is bottomed upon the equitable doctrine that an action will lie for the recovery of money received by one to whom it does not in good conscience belong, the law presuming a promise to repay.[85] The rule applies to payments made to or by public and governmental agencies as well as private persons.[86]

Payments other than in money.[87] The general rule applies to payments made in a medium other than money,[88] in which case the medium paid, or its value, may be recovered.[89]

Mistakes both of law and of fact. The right to recover a payment because of a mistake of fact is not prejudiced by the existence also of a mistake of law in the transaction.[90]

Qualifications of rule. The rule permitting recovery of payments made under mistake of fact being founded upon considerations of equity and good conscience,[91] there can be no recovery of a payment from which the payor has received a substantial benefit,[92] or which the payee has received in good faith and may in good conscience retain,[93]

108 L. T. Rep. N. S. 986]; Kleinwort v. Dunlop Rubber Co., 97 L. T. Rep. N. S. 263; Continental Caoutchouc, etc., Co. v. Kleinwort, 90 L. T. Rep. N. S. 474; Bell v. Gardiner, 4 M. & G. 11, 43 ECL 16, 134 Reprint 5; Lucas v. Worswick, 1 M. & Rob. 293; Kelly v. Solari, 9 M. & W. 54, 152 Reprint 24; Pope v. Wray, 4 M. & W. 451, 150 Reprint 1506; Bailey & Whites, Ltd. v. House, 31 T. L. R. 583; Meadows v. Grand Junction Waterworks, 21 T. L. R. 538; Bize v. Dickason, 1 T. R. 285, 99 Reprint 1097.

Alta.—Alberta Pac. Grain Co. v. Dominion Bank, 66 DomLR 735.

Man.—Cancilla v. Orr, 24 Man. 355, 16 DomLR 115, 27 WestLR 122, 5 WestWkly 1294; Confederation Life Assoc. v. Merchants' Bank, 10 Man. 67.

N. B.—Bond v. Maritime Nail Co., 51 N. B. 343.

N. S.—Smith v. Halifax Pilot Comrs., 51 N. S. 241, 35 DomLR 765.

Ont.—E. J. Maxwell, Ltd. v. Nova Scotia Bank, 62 Ont. L. 660, [1928] 4 DomLR 490; U. S. Fidelity, etc., Co. v. Union Bank, 39 Ont. L. 338, 36 DomLR 724, 12 OntWN 141; Toronto Bank v. Hamilton, 28 Ont. 51; Michaelson v. Babb, 15 OntWN 86; Canadian Express Co. v. O'Niel, 14 OntWR 287; McDermott v. Hickling, 1 OntWR 768; Canada Farmers' Mut. Ins. Co. v. Watson, 25 U. C. C. P. 1; Mingaye v. White, 34 U. C. Q. B. 82; Upper Canada Law Soc. v. Toronto, 25 U. C. Q. B. 199; Sessions v. Strachan, 23 U. C. Q. B. 492; Scott v. Kelly, 17 U. C. Q. B. 306.

Que.—Harbec v. Menard, 22 Que. K. B. 320.

Sask.—Connick v. Carmichael, 17 Sask. L. 560, [1923] 4 DomLR 994, [1923] 3 WestWkly 1244.

And see cases infra this note.

[a] **Mistake induced by third person.**—The rule stated in the text applies to payment made under a mistake of fact induced by a third person. Evans v. Garlock, 37 Hun (N. Y.) 588; Mulligan v. Harlam, 46 Misc. 571, 92 NYS 765; R. E. Jones, Ltd. v. Waring & Gillow, Ltd., [1926] A. C. 670.

[b] **Defense that payment was voluntary is not available** (1) where the payment was made under mistake of fact. Thresher v. Lopez, 52 Cal. A. 219, 198 P 419; Bradshaw v. Glasscock, 91 Kan. 11, 136 P 933; Woodruff v. H. B. Claflin Co., 198 N. Y. 470, 91 NE 1103, 28 LRANS 440, 19 AnnCas 791. (2) Recovery of voluntary payment generally see supra §§ 280–292.

[c] **Recovery from estate of deceased payee.**—In case of the death of the person to whom a payment under mistake of fact was made, recovery may be had from his estate. Spencer v. Goddard, 62 N. H. 702; Philadelphia Co. v. Long, 38 Pa. Co. 76.

Interest on money paid under mistake of fact see Interest § 125.

Recovery of payment or distribution made by executor or administrator under mistake of fact see Executors and Administrators §§ 1235, 1343.

What constitutes mistake of fact see infra § 319.

83. Hinds v. Wiles, 12 Ala. A. 596, 68 S 556.

84. New Orleans Drain. Commn. v. National Contracting Co., 136 Fed. 780; American R. Co. v. Wolkers, 22 Porto Rico 264; Menier v. Viau, 41 Que. Super. 298.

Restoration of unearned increment at civil law see Modern Civil Law § 121.

85. Ga.—Citizens' Bank v. Rudisill, 4 Ga. A. 37, 60 SE 818.

Mich.—Walker v. Conant, 65 Mich. 194, 31 NW 786.

N. Y.—Graves v. Brinkerhoff, 4 Hun 305, 6 Thomps. & C. 630; Normandy Waist Co., Inc. v. Palmer, 176 NYS 465.

N. D.—Chrysler Light, etc., Co. v. Belfield, 224 NW 871.

Va.—Hibbs v. Alexandria First Nat. Bank, 133 Va. 94, 112 SE 669, 25 ALR 120.

And see cases infra this note.

[a] **The true ground of recovery** is that the payment has been made without any consideration; and there is a moral obligation resting upon every person, natural or artificial, to make restitution where he has received without consideration the money of another which he has no right to retain. Mitchell v. Stoddard County Bank, 65 SW 839, 23 KyL 1562; Underwood v. Brockman, 4 Dana (Ky.) 309, 29 AmD 407; Little v. Derby, 7 Mich. 325; Sibley v. Pine County, 31 Minn. 201, 17 NW 337.

Equitable relief against mistake of fact generally see Equity §§ 62–69.

86. U. S.—U. S. v. D'Olier Engineering Co., 215 Fed. 209; Betts v. District of Columbia, 20 Ct. Cl. 445; Neitzey v. District of Columbia, 17 Ct. Cl. 111.

D. C.—U. S. v. Phillips, 21 D. C. 309.

Ga.—Haralson County v. Golden, 104 Ga. 19, 30 SE 380.

Mass.—Com. v. Haupt, 10 Allen 38.

Minn.—Duluth v. McDonnell, 61 Minn. 288, 63 NW 727.

N. H.—Manchester v. Burns, 45 N. H. 482.

N. Y.—New York v. Erben, 38 N. Y. 305.

N. C.—Worth v. Stewart, 122 N. C. 258, 29 SE 579.

Pa.—Pittsburgh, etc., Turnp. R. Co. v. Com., 2 Watts 433; Shiel's Case, 43 Pa. Co. 657.

87. **Generally** see supra §§ 39–64.

88. See cases infra note 89.

89. Iowa.—Johnson v. Saum, 137 Iowa 138, 114 NW 618; Johnson v. Saum, 123 Iowa 145, 98 NW 599.

Me.—Gooding v. Morgan, 37 Me. 419; Dole v. Hayden, 1 Me. 152.

Md.—Baltimore, etc., R. Co. v. Faunce, 6 Gill 68, 46 AmD 655.

Mass.—Cardinal v. Hadley, 158 Mass. 352, 33 NE 575, 35 AmSR 492.

Mo.—Davis v. Krum, 12 Mo. A. 279.

N. Y.—Donohue v. New York, 10 Hun 37. But see Roberts v. Ellwood, 24 NYWklyDig 135 [aff 116 N. Y. 651, 22 NE 453, 2 Silv. A. 410] (holding that, where a mortgagor in settlement of his debt conveyed the mortgaged property to the mortgagee, and in the transaction was not allowed a payment previously made on the debt, he could not recover the amount of such payment as money paid by mistake, his remedy, if any, being in equity).

But see Hendricks v. Goodrich, 15 Wis. 679 (holding that, where a creditor accepted a horse valued at a certain sum in payment of a balance, which he knew his debtor mistakenly thought to be of the same amount as the value of the horse, when in truth it was a much lesser amount, the debtor could not recover the difference between the true amount and the value of the horse in an action to recover money paid by mistake of fact, as his remedy was to rescind the contract on account of fraud, and he must do so in toto; and could not affirm the contract in part and disaffirm it as to the rest).

[a] **Negotiable paper.**—(1) Where the amount of negotiable certificates of indebtedness, given and received in payment of a debt, were by mistake of fact larger than the amount due, and the certificates have been negotiated to a bona fide purchaser, so that the maker will be forced to pay them, the amount of such excess may be recovered from the person to whom the certificates were issued. Donohue v. New York, 10 Hun (N. Y.) 37. (2) The amount of a note, given and received in payment of an account previously paid, through mistake and without knowledge of the previous payment, may be recovered as money paid by mistake of fact. Gooding v. Morgan, 37 Me. 419. (3) Where a promissory note was given for a larger amount than was due in settlement of mutual accounts, the excess is recoverable as money paid by mistake. Dole v. Hayden, 1 Me. 152.

90. Barker v. Clark, 12 AbbPrNS (N. Y.) 106; Scott v. Ford, 45 Or. 531, 78 P 742, 80 P 899, 68 LRA 469.

Recovery of payment made under mistake of law see supra §§ 312–317.

91. See supra text and note 85.

92. U. S.—Journal, etc., Co. v. U. S., 53 Ct. Cl. 612.

Ala.—Traweek v. Hagler, 199 Ala. 664, 75 S 152, 154 [cit Cyc].

Ga.—Jackson v. Atlanta, 61 Ga. 228; Law v. Nunn, 3 Ga. 90.

La.—Sientes v. Odier, 17 La. Ann. 153.

Me.—Norton v. Marden, 15 Me. 45, 32 AmD 132.

93. U. S.—Shipman v. District of Columbia, 119 U. S. 148, 7 SCt 134, 30 L. ed. 337; Synthetic Patents Co. v. Sutherland, 22 F. (2d) 494 [certiorari den 276 U. S. 630 mem, 48 SCt 324 mem, 72 L. ed. 741 mem]; Texarkana Casket Co. v. Binswanger, 3 F. (2d) 611.

Ga.—Stern v. Howell, 33 Ga. A. 693, 127 SE 775.

Ky.—Mitchell v. Stoddard County Bank, 65 SW 839, 23 KyL 1562.

La.—Jackson v. Ferguson, 2 La. Ann. 723.

Me.—Norton v. Marden, 15 Me. 45, 32 AmD 132.

Minn.—Langevin v. St. Paul, 49 Minn. 189, 51 NW 817, 15 LRA 766.

N. J.—Behring v. Somerville, 63 N. J. L. 568, 44 A 641, 49 LRA 578.

N. M.—Elgin v. Gross-Kelly, 20 N. M. 450, 452, 150 P 922, LRA1916A 711 [cit Cyc].

N. Y.—Kingston Bank v. Eltinge, 66 N. Y. 625 mem [aff 5 Hun 653]; Davis Provision Co. v. Fowler Bros., Ltd., 20 App. Div. 626 mem, 47 NYS 205 [aff 163 N. Y. 580 mem, 57 NE 1108 mem]; Jackson v. McKnight, 17

or which was due to him in honor and conscience,[94] although it was made under a mistake of fact.

[§ 319] **b. What Constitutes Mistake of Fact.**[95] A mistake of fact, within the meaning of the rule allowing recovery of payments made thereunder,[96] is such error or want of knowledge as to a fact, past or present,[97] or such belief in the past or present existence as a fact of that which never existed,[98]

Hun 2.

N. D.—Lark Equity Exch. v. Jones, 42 N. D. 145, 171 NW 863; Dickey County v. Hicks, 14 N. D. 73, 103 NW 423.

Pa.—Boas v. Updegrove, 5 Pa. 516, 47 AmD 425; Geddis v. Irvine, 5 Pa. 508; Edgar v. Shields, 1 Grant 361; Espy v. Allison, 9 Watts 462; Taylor v. Beaver County, 3 Penr. & W. 112; Carson v. McFarland, 2 Rawle 118, 19 AmD 627; Diechman v. Northampton Bank, 1 Rawle 54; Rogers v. Huntingdon Bank, 12 Serg. & R. 77.

Tenn.—Guild v. Baldridge, 2 Swan 295.

Eng.—Moore v. Eddowes, 2 A. & E. 133, 29 ECL 80, 111 Reprint 52; Brisbane v. Dacres, 5 Taunt. 143, 1 ECL 82, 128 Reprint 641.

See also Leavitt v. Leighton, 219 Mass. 183, 106 NE 634 (apparently applying the principle stated in the text).

And see cases infra this note.

[a] **Where the payee does not share in the mistake**, but receives money in good faith in the regular course of business, and for a valuable consideration, it cannot be recovered by the payor on the ground of mistake of fact. Ball v. Shepard, 202 N. Y. 247, 95 NE 719; Nassau Bank v. Newburgh Nat. Bank, 159 N. Y. 456, 54 NE 66; Goshen Nat. Bank v. State, 141 N. Y. 379, 36 NE 316; Southwick v. Memphis First Nat. Bank, 84 N. Y. 420; Stephens v. Brooklyn Bd. of Education, 79 N. Y. 183, 35 AmR 511; Mayer v. New York, 63 N. Y. 455; Lincoln v. Kuskokwim Fishing, etc., Co., 118 Wash. 137, 203 P 62.

[b] **Illustration.**—Where certain defendants contracted to buy timber land of small value from another defendant, and conspired to sell the timber to plaintiffs for a large sum by showing plaintiffs other valuable timber land as land they had contracted to buy, and plaintiff gave one of the conspirators a check for the price to be delivered to defendant selling timber on the execution of a bill of sale, and such defendant, knowing nothing of the fraudulent scheme, executed the bill, deducted from the check the amount due him under his contract with the other defendants, and paid them the difference between the contract price and the check of plaintiff, defendant who contracted to sell the timber land to the conspirators and who was innocent of the scheme to defraud was not liable to plaintiff for the amount which he had received out of the transaction as for money paid by mistake. Deering v. Terry, (Ky.) 114 SW 759.

94. U. S.—Synthetic Patents Co. v. Sutherland, 22 F. (2d) 494 [certiorari den 276 U. S. 630 mem, 48 SCt 324 mem, 72 L. ed. 741 mem]; Gloucester Water Supply Co. v. Freeman, 211 Fed. 349.

Ala.—Traweek v. Hagler, 199 Ala. 664, 75 S 152, 154 [cit Cyc].

Fla.—Pensacola, etc., R. Co. v. Braxton, 34 Fla. 471, 16 S 317.

Ky.—Mitchell v. Stoddard County Bank, 65 SW 839, 23 KyL 1562.

La.—Sientes v. Odier, 17 La. Ann. 153.

Mass.—Underwood v. Lennox, 242 Mass. 357, 136 NE 343; Endicott-Johnson Co. v. Simpson, 206 Mass. 14, 91 NE 1012.

Mich.—Walker v. Conant, 65 Mich. 194, 31 NW 786.

Mo.—Foster v. Kirby, 31 Mo. 496; Ashley v. Jennings, 48 Mo. A. 142.

N. Y.—Youmans v. Edgerton, 16 Hun 28 [aff 91 N. Y. 403].

W. Va.—Gardner v. Nichols, 80 W. Va. 738, 93 SE 817.

Eng.—Steam Saw Mills Co., Ltd. v. Baring Bros. & Co., Ltd., [1922] 1 Ch. 244; Aiken v. Short, 1 H. & N. 210, 156 Reprint 1180.

Ont.—Ontario Trusts Corp. v. Toronto, 30 Ont. 209.

And see cases infra this note.

[a] **Illustrations.**—(1) Where the fact is equally unknown to both parties, and where each has equal means of information, money paid upon a mistake of fact cannot, in the absence of fraud, be recovered back, the money being due to the payee. Behring v. Somerville, 63 N. J. L. 568, 44 A 641, 49 LRA 578. (2) When a debtor pays his debt without being aware that anything has been realized by the creditor on collateral security, and the creditor subsequently returns the collaterals and tenders back the amount he has collected thereon, no action will lie on the part of the debtor to recover of the creditor the money paid him. Youngs v. Stahelin, 34 N. Y. 258. (3) An innocent purchaser of a stolen automobile cannot recover an amount paid to satisfy a mortgage given to secure a note executed by the thief for a bona fide loan by mortgagee, the debt secured being actual and enforceable, although the mortgage was invalid, so that the payment was not without consideration, or made by mistake as to the indebtedness paid. Gaffner v. American Finance Co., 120 Wash. 76, 206 P 916, 28 ALR 624.

[b] **Payment of a debt barred by limitations** cannot be recovered back on a plea of mistake of fact. Hubbard v. Hickman, 4 Bush (Ky.) 204, 96 AmD 297.

[c] **Mistake induced by third person.**—(1) In accordance with the rule stated in the text, it has been held that a payment, made under a mistake induced by fraud of a third person, to one to whom it is honestly due from such third person and who therefore has an equitable right to receive and retain it cannot be recovered from him (Deering v. Terry, (Ky.) 114 SW 759; Merchants' Ins. Co. v. Abbott, 131 Mass. 397; Walker v. Conant, 69 Mich. 321, 37 NW 292, 13 AmSR 391; Ball v. Shepard, 202 N. Y. 247, 95 NE 719; Nassau Bank v. Newburgh Nat. Bank, 159 N. Y. 456, 54 NE 66; Stephens v. Brooklyn Bd. of Education, 79 N. Y. 183, 35 AmR 511; Gaffner v. American Finance Co., 120 Wash. 76, 206 P 916, 28 ALR 624), (2) especially where he has changed his position to his prejudice in reliance upon the payment (Walker v. Conant, supra). (3) On the other hand, it has been held that recovery may be had from the payee in such case, on the ground that both parties were innocent in the transaction and the payee has money of the payor which he had no right to receive from him. Strauss v. Hensey, 9 App. (D. C.) 541; Grand Lodge A. O. U. W. v. Towne, 136 Minn. 72, 161 NW 403, LRA1917E 344; Rio Grande F. Ins. Co. v. Concordia F. Ins. Co., (Tex. Civ. A.) 199 SW 824. See also Russell v. Richard, 6 Ala. A. 73, 60 S 411 (dictum).

95. "Mistake of fact" defined see Mistake 40 C. J. p 1228 text and notes 81-86.

96. See supra § 318.

97. Ala.—Beasley v. Beasley, 206 Ala. 480, 90 S 347.

Ark.—Hayes v. Bishop, 141 Ark. 155, 216 SW 298.

Iowa.—Shoenhair v. Merrill, 165 Iowa 384, 145 NW 919.

Kan.—Logan County School Dist. No. 49 v. Community High School, 126 Kan. 51, 267 P 23; Lowe v. Wells, 78 Kan. 105, 96 P 74.

Mo.—Missouri Pac. R. Co. v. Askew Saddlery Co., 215 Mo. A. 277, 256 SW 566.

N. Y.—Rheel v. Hicks, 25 N. Y. 289; Title Guarantee, etc., Co. v. New York, 185 App. Div. 688, 173 NYS 718; Armour Packing Co. v. Edison Electric Illum. Co., 115 App. Div. 51, 100 NYS 605; Lesster v. New York, 33 App. Div. 350, 53 NYS 934 [aff 161 N. Y. 628 mem, 55 NE 1097 mem]; Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Normandy Waist Co., Inc. v. Palmer, 176 NYS 465; Isaacs v. Kobre, 145 NYS 919; Mowatt v. Wright, 1 Wend. 355, 19 AmD 508.

Pa.—William F. Mosser Co. v. Cherry River Boom, etc., Co., 290 Pa. 67, 138 A 85.

Wis.—Hurd v. Hall, 12 Wis. 125.

See West Frankfort Bank, etc., Co. v. Baretti, 206 Ill. A. 261.

And see cases infra this note.

[a] **Rule applied to particular facts.**—(1) Amount due after assumption of mortgage. Shoenhair v. Merrill, 165 Iowa 384, 145 NW 919. (2) Date of maturity of note. Isaacs v. Kobre, 145 NYS 919. (3) Period covered by surety bond and identity of person. U. S. Fidelity, etc., Co. v. Union Bank, 39 Ont. L. 338, 36 DomLR 724, 12 OntWN 141. (4) Supposition that check would be returned. Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811. (5) Discrimination in rates of electric company. Armour Packing Co. v. Edison Electric Illum. Co., 115 App. Div. 51, 100 NYS 605. (6) Time of passing of title to property. Lesster v. New York, 33 App. Div. 350, 53 NYS 934 [aff 161 N. Y. 628 mem, 55 NE 1097 mem]. (7) Date of expiration of lease. Normandy Waist Co., Inc. v. Palmer, 176 NYS 465. (8) Issuance of permit for construction of vault. Title Guarantee, etc., Co. v. New York, 185 App. Div. 688, 173 NYS 718. (9) Bankruptcy of payee. Kerrison v. Glyn, 81 L. J. K. B. 465. (10) Loss of goods in shipment. Missouri Pac. R. Co. v. Askew Saddlery Co., 215 Mo. A. 277, 256 SW 566. (11) Location of place within jurisdiction. Smith v. Halifax Pilot Comrs., 51 N. S. 241, 35 DomLR 765.

98. Ala.—Beasley v. Beasley, 206 Ala. 480, 90 S 347.

Ark.—Blackburn v. Texarkana Gas, etc., Co., 102 Ark. 152, 143 SW 588.

Ill.—Tyler v. Goddard, 207 Ill. A. 526.

Iowa.—Anderson v. Spaulding, 197 Iowa 858, 197 NW 1000.

Kan.—Lowe v. Wells, 78 Kan. 105, 96 P 74.

Mo.—Casner v. Heaton, (A.) 237 SW 1042; Warren v. Order R. Conductors, 199 Mo. A. 200, 201 SW 368.

N. Y.—Kingston Bank v. Eltinge, 40 N. Y. 391, 100 AmD 516; Rheel v. Hicks, 25 N. Y. 289; Potter v. Everett, 2 N. Y. Super. 276; Smith v. Hellman Motor Corp., 122 Misc. 422, 204 NYS 229; Mowatt v. Wright, 1 Wend. 355, 19 AmD 508.

W. Va.—Simmons v. Simmons, 91 W. Va. 32, 112 SE 189.

And see cases infra this note.

[a] **Illustrations.**—(1) Payment of a judgment for the amount of a life insurance policy under the mistaken belief that insured was dead may be recovered. Warren v. Order R. Conductors, 199 Mo. A. 200, 201 SW 368. (2) Where one entitled to the money on a second execution assented to its payment to plaintiff on the first execution, on the mistaken assumption that the property sold had been seized by the sheriff on the first execution within the time allowed by law and while the lien of the first judgment existed, such payment was made under a mistake of fact. Kingston Bank v. Eltinge, 40 N. Y. 391, 100 AmD 516. (3) Where an automobile delivered to a conditional buyer was not equipped with a lock called for by the contract of purchase, and was stolen, and thereafter,

or such real and honest forgetfulness of a fact once known,[99] as that a true recollection or knowledge of the fact, or of its existence or nonexistence, would have caused the payor to refrain from making the payment. Accordingly, the mistake must be in respect of a material fact,[1] which operated to influence the payor's judgment at the time the payment was made,[2] and the existence or nonexistence of which was relied upon in making it.[3] A mistake which authorizes recovery exists only when the payor is unconscious of any error or ignorance,[4] and not where he is conscious of a want of knowledge of the facts,[5] or is uncertain or doubtful or speculates concerning them,[6] nor where they are disputed,[7] except where there was an agreement for return of the payment if mistake on the part of the payor should appear.[8] It is not essential to the right of recovery that the mistake should be caused by any wrongful or fraudulent act or conduct of the payee.[9]

Failure to foresee a future event is not a mistake of fact.[10]

Ignorance of means of proving facts. Mistake of fact is to be distinguished from ignorance of the means of proving facts,[11] for if the payor has knowledge of the facts themselves, and lacks only a knowledge of proof of them, there is no mistake of fact,[12]

Payment under contract. While an erroneous construction of the terms of a contract is a mistake of law and not a mistake of fact,[13] a mistake in mak-

because of the seller's threats to sue on the note, the buyer paid installments due under the belief that the automobile was equipped with such lock, he was entitled to recover the payments made. Smith v. Hellman Motor Corp., 122 Misc. 422, 204 NYS 229. (4) A payment made to an express company by the father of a messenger in belief that the messenger had by carelessness lost an express package between the train and the office, whereas in fact the package had been delivered by him to the office and stolen therefrom by another employee, as to whom the company was protected by a surety bond, was made under a mistake of fact. Lowe v. Wells, 78 Kan. 105, 96 P 74. (5) Where, under a broker's contract of employment, his commission was not earned by merely obtaining a purchaser's signature to an executory contract of purchase which the purchaser was unable to perform, money paid at the time the contract was executed under a mistaken belief that the purchaser was able to perform was made under a mistake of fact. Anderson v. Spaulding, 197 Iowa 858, 197 NW 1000. (6) Where the purchaser of a private bank paid for the invested capital and surplus of the bank a sum equal to the amount thereof as represented by the sellers, the excess of the amount so paid over the actual amount of the invested capital and surplus was recoverable. Tyler v. Goddard, 207 Ill. A. 526. (7) A partial payment of the agreed price for drilling a well made at a time when it had reached the depth at which the contractor had guaranteed a certain delivery of water, but before the well had been tested, was made under mistake of fact and therefore was recoverable when it was determined by test that the well was not of the capacity guaranteed. Blackburn v. Texarkana Gas, etc., Co., 102 Ark. 152, 143 SW 588. (8) Where the payee of certain notes, secured by a deed of trust, fraudulently induced the maker of the notes to execute duplicate notes, and a purchaser of the property subject to the deed of trust made payment of one of the fraudulent notes to the payee's transferee under the mistaken belief that the note was one of the genuine notes secured by the deed of trust, the payment could be recovered. Casner v. Heaton, (Mo. A.) 237 SW 1042.

99. U. S.—Beatty v. U. S., Dev. Ct. Cl. 20.

Colo.—Stewart v. Kindel, 15 Colo. 539, 25 P 990.

Ga.—Citizens' Bank v. Rudisill, 4 Ga. A. 37, 60 SE 818.

Iowa.—Gosswiller v. Jansen, 179 Iowa 806, 162 NW 45.

Mo.—Lyle v. Shinnebarger, 17 Mo. A. 66.

N. Y.—Normandy Waist Co., Inc. v. Palmer, 176 NYS 465.

N. C.—Simms v. Vick, 151 N. C. 78, 80, 65 SE 621, 24 LRANS 517, 18 Ann Cas 669 [quot Cyc].

Oh.—Norman v. Will, 1 Oh. Dec. (Reprint) 261, 5 WestLJ 508.

Pa.—Kunkel v. Kunkel, 267 Pa. 163, 110 A 73; Roth's Est., 23 Pa. Dist. 428; Philadelphia Co. v. Long, 38 Pa. Co. 76, 77 [quot Cyc]; Meredith v. Haines, 14 WklyNC 364.

Tenn.—Guild v. Baldridge, 2 Swan 295.

Va.—City Nat. Bank v. Peed, 32 SE 34.

Eng.—Lucas v. Worswick, 1 M. & Rob. 293; Kelly v. Solari, 9 M. & W. 54, 152 Reprint 24.

Ont.—Perry v. Newcastle Dist. Mut. F. Ins. Co., 8 U. C. Q. B. 363.

See Lincoln Electric Heating Appliances, Inc. v. Schultz, 203 Ill. A. 340.

1. Me.—Livermore v. Peru, 55 Me. 469.

Mass.—Boylston Nat. Bank v. Richardson, 101 Mass. 287.

Mo.—Needles v. Burk, 81 Mo. 569, 51 AmR 251.

N. Y.—Southwick v. Memphis First Nat. Bank, 84 N. Y. 420; Flower v. Lance, 59 N. Y. 603; Barker v. Clark, 12 AbbPrNS 106.

Wis.—Buffalo v. O'Malley, 61 Wis. 255, 20 NW 913, 50 AmR 137.

Eng.—Aiken v. Short, 1 H. & N. 210, 156 Reprint 1180.

2. Lewellen v. Garrett, 58 Ind. 442, 26 AmR 74; Meeme Mut Home Protective F. Ins. Co. v. Lorfeld, 194 Wis. 322, 216 NW 507; Kelly v. Solari, 9 M. & W. 54, 152 Reprint 24.

3. Kessler v. Herklotz, 190 N. Y. 24, 82 NE 739; Maskell v. Horner, [1915] 3 K. B. 106.

4. Meeme Mut. Home Protective F. Ins. Co. v. Lorfeld, 194 Wis. 322, 216 NW 507; Kowalke v. Milwaukee Electric R., etc., Co., 103 Wis. 472, 79 NW 762, 74 AmSR 877.

5. Meeme Mut. Home Protective F. Ins. Co. v. Lorfeld, 194 Wis. 322, 216 NW 507; Kowalke v. Milwaukee Electric R. etc., Co., 103 Wis. 472, 79 NW 762, 74 AmSR 877. Compare Guild v. Baldridge, 2 Swan (Tenn.) 295 (where it was said that recovery cannot be resisted on the ground that at the time of payment plaintiff may have entertained and expressed a vague belief, resting on no evidence and amounting to nothing like conviction or moral certainty, that the fact existed which would exempt him from the payment).

Want of care or diligence in ascertaining facts see infra §§ 325, 326.

6. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co., 146 Fed. 232, 76 CCA 598 [certiorari den 205 U. S. 545 mem, 27 SCt 792 mem, 51 L. ed. 923 mem]; New York L. Ins. Co. v. Chittenden, 134 Iowa 613, 112 NW 96, 120 AmSR 444, 11 LRANS 233, 13 AnnCas 408; Sears v. Grand Lodge A. O. U. W., 163 N. Y. 374, 57 NE 613, 50 LRA 204. And see cases infra this note.

[a] **Illustrations.**—(1) Where a life insurance company paid money on the assumption from insured's absence for over seven years that he was dead, it could not recover it, on his reappearance, on the ground of mistake, the assumption having been known to both parties to be doubtful and the payment having been voluntary, and there having been no fraud or concealment by the payees. New York L. Ins. Co. v. Chittenden, 134 Iowa 613, 112 NW 96, 120 AmSR 444, 11 LRANS 233, 13 AnnCas 408. (2) Where a contract for the assignment of leases on iron land provided for payment of seven cents per gross ton for all iron ore discovered or shown to exist by the completed explorations reasonably and fairly made, based on a customary assumption that a drill hole would properly disclose the condition of the earth within a radius of one hundred feet, etc., but, notwithstanding accurate calculations and computations, it turned out that such assumption was erroneous, or that any other assumed fact on which the exploration was based was false, plaintiff was not entitled to recover a portion of the consideration paid as the result of such computations, on the theory that the payment was made by a mistake of fact. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co., 146 Fed. 232, 76 CCA 598 [certiorari den 205 U. S. 545 mem, 27 SCt 792 mem, 51 L. ed. 923 mem].

[b] **Doubtful title.**—The rule applies to the purchase of real estate the title to which is believed by the purchaser and the grantor to be doubtful. Granger v. Olcott, 1 Lans. (N. Y.) 169.

7. Frambers v. Risk, 2 Ill. A. 499; McArthur v. Luce, 43 Mich. 435, 5 NW 451, 38 AmR 204; Windbiel v. Carroll, 16 Hun (N. Y.) 101; Strawbridge v. Vandenburgh, 10 NYS 610, 32 NYSt 493; Emerson v. Loveland, 9 NYS 768.

[a] **Payment of disputed claim.**—Where one purchased property and as part of the consideration agreed to make settlement of a claim asserted against, but disputed by, the vendor, and in part settlement of such claim made a payment, he could not recover back the amount paid on the ground that the claim was not enforceable, the payment having been made with full notice and without inquiry. Emerson v. Loveland, 9 NYS 768.

8. Juneau v. Stunkle, 40 Kan. 756, 20 P 473; Steere v. Oakley, 186 Pa. 582, 40 A 815. But see Guild v. Baldridge, 2 Swan (Tenn.) 295 (holding that such an agreement was immaterial, and that plaintiff's right to recover was to be determined irrespective of such an understanding).

9. Hinds v. Wiles, 12 Ala. A. 596, 68 S 556; Blackburn v. Texarkana Gas, etc., Co., 102 Ark. 152, 143 SW 588; Montgomery Door, etc., Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 NE 71; Billings v. McCoy, 5 Nebr. 187; Michalke v. Brown, (Tex. Civ. A.) 185 SW 429.

Mistake induced by fraud of third person see cases supra § 318 note 82 [a].

Recovery of payment induced by fraud see supra § 311.

10. Bethune v. Rex, 26 Ont. L. 117, 21 OntWR 559, 4 DomLR 229.

11. See cases infra note 12.

12. Citizens' Bank v. Rudisill, 4 Ga. A. 37, 60 SE 818; Ball v. James, 176 Iowa 647, 158 NW 684; Windbiel v. Carroll, 16 Hun (N. Y.) 101.

13. See cases supra § 316 note 76 [b].

ing a payment called for by a contract is a mistake of fact;[14] but a payment made in accordance with the terms of a contract erroneously entered into is not a payment under mistake of fact within the rule permitting recovery.[15]

Order or decree subsequently set aside. Money paid under an order or decree of court subsequently set aside is paid under a mistake of fact, and not of law.[16]

Ownership of, and title to, property. While the ownership of, and title to, property is ordinarily a mixed question of law and fact,[17] a payment made under mistake in relation thereto is usually treated as made under a mistake of fact rather than a mistake of law.[18]

Ignorance of foreign law. Ignorance of the law of a foreign nation or of another state is ignorance of fact rather than ignorance of law.[19]

Ignorance of set-off or counterclaim. The fact that one pays money in ignorance of facts showing a right of set-off or counterclaim against the payee is not such a mistake of fact as will authorize the recovery of the amount paid.[20]

[§ 320] **c. Mutuality of Mistake.** It is held in some jurisdictions that to authorize recovery of money paid under a mistake of fact it is not essential that the mistake be mutual;[21] but in other jurisdictions the rule is that there can be no recovery of a payment made under a unilateral mistake,[22] except where there has been fraud or misconduct

14. Tyler v. Goddard, 207 Ill. A. 526; Graves v. Brinkerhoff, 4 Hun (N. Y.) 305, 6 Thomps. & C. 630; Normandy Waist Co., Inc. v. Palmer, 176 NYS 465; Union Trust Co. v. Gilpin, 235 Pa. 524, 84 A 448. See Chicago v. Weir, 165 Ill. 582, 46 NE 725 [aff 67 Ill. A. 247] (apparently applying the rule). Compare Morrison v. Payton, 104 SW 685, 31 KyL 992 (holding that, where the owner of property entered into a contract for the construction of a house thereon at a specified price, agreeing to advance the money for the materials, and paid to the materialman, who relied on the agreement, for such materials an aggregate sum in excess of the contract price for the house, such excess was not paid by mistake either of fact or of law and cannot be recovered back).

[a] **Mistake in reading instrument not mistake of construction.**—A payment made as the result of a mistake in reading a will is to be distinguished from a payment made under a mistaken construction of the will, and is made under a mistake of fact and not a mistake of law. Union Trust Co. v. Gilpin, 235 Pa. 524, 84 A 448.

15. Norton v. Bohart, 105 Mo. 615, 16 SW 598; Mason v. Commerce Trust Co., 192 Mo. A. 528, 183 SW 707; Miller v. Missouri Fire Brick Co., 139 Mo. A. 25, 119 SW 976; Markowitz v. Messner, 18 Misc. 256, 41 NYS 512; Borough Paper Co., Inc. v. Scher, 170 NYS 395; De Voin v. De Voin, 76 Wis. 66, 44 NW 839.

16. Lichtwadt v. Murphy, 182 Ky. 490, 206 SW 771; Simmons v. Simmons, 91 W. Va. 32, 112 SE 189; Blackpool, etc., Tramroad Co. v. Bishpham, [1910] 1 K. B. 592.

[a] **Void judgment.**—Where one pays a void judgment, by mistake of law and fact, believing it legally enforceable against him, he can recover back the amount so paid. Lichtwadt v. Murphy, 182 Ky. 490, 206 SW 771.

[b] **Reason for rule.**—(1) So long as the decree remains in force, or remains unreversed, even though it may be erroneous, or may be void, it may be said that the money was paid under a mistake as to the legal effect of the decree, and the party paying it is not entitled to have it restored to him; but when the decree requiring its payment is set aside by a court having jurisdiction to the end, there is no longer any decree, and instead of the money being paid under a mistake of law it was paid under a mistake of fact, for it was paid in the mistaken belief that there was a decree requiring its payment, when in fact there is no such decree. Simmons v. Simmons, 91 W. Va. 32, 112 SE 189. (2) But where plaintiff paid a judgment and secured a release so that he might be relieved of the lien upon a portion of his real estate which he desired to convey, upon the judgment being afterward stricken off by the court as being illegally entered, plaintiff being liable for the payment of the money irrespective of the judgment in question, it was held that the payment was voluntary and there could be no recovery. Wagner v. Beaver Valley Water Co., 9 Pa. Dist. & Co. 90.

Compelling restitution upon reversal of order or judgment see Appeal and Error §§ 3248, 3293-3298.

17. See cases infra note 18.

18. Picotte v. Mills, 200 Mo. A. 127, 203 SW 825; Ward v. Ward, 12 Oh. Cir. Dec. 59, 64; Varnum v. Highgate, 65 Vt. 416, 26 A 628. And see cases infra this note.

"The tendency of the courts is to treat mistakes as to legal rights as mistakes of fact, or mistakes of mixed fact and law, wherever it is possible to do so without disturbing well-settled precedents." Ward v. Ward, supra.

[a] **Illustrations.**—(1) While a mistake as to title is generally one of law when the facts are known, yet the error may be as to some fact lying at the foundation of the title and necessary to its existence; so, where rents of property leased were payable to an administrator in his representative capacity, and a receiver appointed of such administrator's individual property collected the rents by representing that he was entitled thereto, and the tenants paid them in reliance upon such representation, it not appearing that the tenants were aware of the proceedings under which the receiver was appointed, the money so paid was paid under a mistake of fact and could be recovered back. Barker v. Clark, 12 AbbPrNS (N. Y.) 106. (2) It being established that the sale of certain stone by defendant to plaintiff was under a mutual mistake of the parties as to the ownership of the stone and the right of plaintiff to sell, the mistake was one of fact, although it may have arisen because the parties misjudged the law, private ownership being a matter of fact notwithstanding it may result from a question of law. Varnum v. Highgate, 65 Vt. 416, 26 A 628.

19. Me.—Norton v. Marden, 15 Me. 45, 32 AmD 132.

Mass.—Haven v. Foster, 9 Pick. 112, 19 AmD 353.

Mo.—Lyle v. Shinnebarger, 17 Mo. A. 66.

N. Y.—Vinal v. Continental Constr., etc., Co., 53 Hun 247, 6 NYS 595; Chillicothe Bank v. Dodge, 8 Barb. 233.

Tenn.—Walker v. Walker, 138 Tenn. 679, 200 SW 825; King v. Doolittle, 1 Head 77.

But see Scott v. Ford, 52 Or. 288, 97 P 99, 68 LRA 469 (where it was said that, the common law being presumed to be in force in a sister state, when no statute is pleaded, the court will hold an erroneous payment made with full knowledge of the facts, and with reference to the law of such other state, a mistake of law).

20. Endicott-Johnson Co. v. Simpson, 206 Mass. 14, 91 NE 1012; Carnegie Trust Co. v. New York First Nat. Bank, 213 N. Y. 301, 107 NE 693; Franklin Bank v. Raymond, 3 Wend. (N. Y.) 69.

21. Cal.—State Nat. Bank v. Miner, 167 Cal. 532, 140 P 27; Palace Hardware Co. v. Smith, 134 Cal. 381, 66 P 474.

Conn.—Mansfield v. Lynch, 59 Conn. 320, 22 A 313, 12 LRA 285.

Ind.—Stotsenburg v. Fordice, 142 Ind. 490, 41 NE 313, 810.

N. Y.—Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153, 113 AmSR 909; National Bank of Commerce v. National Mechanics' Banking Assoc., 55 N. Y. 211, 14 AmR 232; Gibbons v. Perkins, 132 Misc. 583, 230 NYS 273; Moran v. Brown, 113 NYS 1038.

Pa.—Philadelphia Co., v. Long, 38 Pa. Co. 76.

[a] **Rule stated.**—"It is well settled that if one party to a contract seeks to set it aside for mistake he must show one of two things, viz.: (1) Either that there was a mutual mistake of fact, or (2) such mistake on the part of the party seeking to set aside the contract, and conduct on the part of the other party amounting to fraud in taking advantage of a mistake which he knows is being made by the one with whom he is dealing. In regard to payments of money on a contract, a party seeking to set aside the payment is not compelled to prove so much. It is sufficient if he prove that he alone made a mistake (even though negligently) in paying the money, unless the circumstances are such that it would be unfair and inequitable to compel the party, receiving the payment, to return it." Gibbons v. Perkins, 132 Misc. 583, 587, 230 NYS 273.

22. U. S.—U. S. v. D'Olier Engineering Co., 215 Fed. 209.

Colo.—Stewart v. Kindel, 15 Colo. 539, 25 P 990.

Iowa.—Conn v. Converse, 164 Iowa 604, 146 NW 49.

Mo.—Norton v. Bohart, 105 Mo. 615, 16 SW 598; Mathews v. Kansas, 80 Mo. 231; Mason v. Commerce Trust Co., 192 Mo. A. 528, 183 SW 707; Miller v. Missouri Fire Brick Co., 139 Mo. A. 25, 119 SW 976.

Wis.—De Voin v. De Voin, 76 Wis. 66, 44 NW 839.

Sask.—Burns v. MacDonalds Cons., Ltd., [1925] 3 DomLR 418.

[a] **Rule stated.**—"Ordinarily, when recovery is sought on the ground of complainant's mistake alone, the action is not maintainable if the defendant would not be left in statu quo, or unless he had been guilty of some fraud, misrepresentation or would secure some unconscionable advantage by withholding the money. In the instance of a mutual mistake the party paying thereunder may ordinarily recover without regard to the special equities involved as to where the loss will fall. In such a case it is mainly a question of fact. The inquiry is, were both parties in error as to the real facts, and did both act thereon? The answer to this question controls the issue." Mathews v. Kansas, 80 Mo. 231, 235.

upon the part of the payee,[23] or the parties are not on equal terms,[24] or unless the recovery would leave defendant in statu quo.[25]

[§ 321] **d. Applications of Rule[26]—(1) Payment of Interest.** Recovery of a payment of interest may be had where, by mistake of fact, the interest was computed on a principal sum on part or all of which no interest was demandable,[27] or compound instead of simple interest was paid,[28] or a larger amount of interest was paid than was due,[29] or the interest had already been paid.[30]

[§ 322] **(2) Payment of Lien or Encumbrance.** Subject to the qualification that a payment honestly due to the payee or which he may in equity and good conscience retain is not recoverable,[31] a payment of an apparent lien or encumbrance on property which the payor owns or in which he has an interest may be recovered from the payee when made under a mistake of fact.[32] Similarly, one who pays a supposed lien upon his property, when in fact none exists, may recover the amount paid.[33]

[§ 323] **(3) Overpayment.**[34] Where one by mistake of fact pays more than is due upon a debt or obligation, he may recover the overpayment.[35]

[§ 324] **(4) Payment to Wrong Person.** Money paid by mistake of fact to the wrong person may ordinarily be recovered.[36] But, in accordance with the rule denying recovery of a payment which the payee receives in good faith and may in conscience retain,[37] where the payor owes the payee a debt which is due and which equals or exceeds the amount of the payment, and the payment is received by the payee in good faith, it cannot be recovered, although made to him by mistake.[38]

[§ 325] **e. Want of Care in Ascertaining Facts—(1) In General.** Notwithstanding the rule, sometimes applied, precluding recovery of a payment made by mistake by one who failed to use available means of obtaining knowledge,[39] it is generally held that negligence of the payor in failing to discover the facts will not prevent recovery when the payment was actually made under mistake of fact,[40]

23. Johnson v. Saum, 123 Iowa 145, 98 NW 599; Mason v. Commerce Trust Co., 192 Mo. A. 528, 183 SW 707; Miller v. Missouri Fire Brick Co., 139 Mo. A. 25, 119 SW 976; Cancilla v. Orr, 24 Man. 355, 16 DomLR 115, 27 WestLR 122, 5 WestWkly 1294; Burns v. McDonalds Cons., Ltd., (Sask.) [1925] 3 DomLR 418. See Michaelson v. Babb, 15 OntWN 86 (where a recovery was permitted in a case where there was a mistake as to quantity upon the part of the purchaser, of which the seller had knowledge).

Payment induced by fraud see supra § 311.

24. Wood v. Spurgeon, 85 Kan. 696, 118 P 869.

25. Mathews v. Kansas, 80 Mo. 231; Boas v. Updegrove, 5 Pa. 516, 47 AmD 425; Guild v. Baldridge, 2 Swan (Tenn.) 295; Richey v. Clark, 11 Utah 467, 40 P 717.

26. To payment of:

Bill or note see Bills and Notes §§ 843–846.

Check see Banks and Banking §§ 417–421.

Other particular classes of obligations and liabilities see cross references ante p 584.

Interest generally see Interest 33 C. J. p 173.

27. La.—Hill v. Hill, 121 La. 578, 46 S 657.

Mo.—Jordan v. Harrison, 46 Mo. A. 172.

Nebr.—Garrison v. Murphy, 2 Nebr. (Unoff.) 696, 89 NW 766.

N. C.—Montgomery County v. Fry, 127 N. C. 258, 37 SE 259.

S. D.—Iowa Loan, etc., Co. v. Schnose, 19 S. D. 248, 103 NW 22.

Vt.—Hathaway v. Hagan, 59 Vt. 75, 8 A 678.

[a] **Judgment including both principal and interest.**—Where a judgment was rendered for an aggregate amount of principal and interest, and at the time of payment thereof the creditor calculated the interest on the total amount of the judgment instead of on the principal only, the excess payment of interest was made under mistake of fact and can be recovered. Montgomery County v. Fry, 127 N. C. 258, 37 SE 259.

[b] **Partial payments of principal not deducted before computing interest.**—Recovery may be had of excess interest paid, where the interest was computed on the original principal sum and then partial payments of the principal deducted from the total, instead of deducting the part payments from the principal before computing interest. Hill v. Hill, 121 La. 578, 46 S 657.

28. Williams v. Carroll County, 167 Mo. 9, 66 SW 955.

29. Ind.—Stotsenburg v. Fordice, 142 Ind. 490, 41 NE 313, 810; Worley v. Moore, 97 Ind. 15.

La.—Major v. Tardos, 14 La. Ann. 10; Chatters v. Spiro, 7 La. A. 566.

Me.—Goddard v. Putnam, 22 Me. 363.

Mo.—Williams v. Carroll County, 167 Mo. 9, 66 SW 955; Boon v. Miller, 16 Mo. 457.

Nebr.—Garrison v. Murphy, 2 Nebr. (Unoff.) 696, 89 NW 766.

N. Y.—Boyer v. Pack, 2 Den. 107. But see Jackson v. McKnight, 17 Hun 2 (where it was held that one overpaying interest by mistake on an existing debt could not recover it back because he would always be entitled to a credit of the amount paid, and could protect himself whenever sued on the debt, if credit was not voluntarily given him).

N. C.—Montgomery County v. Fry, 127 N. C. 258, 37 SE 259.

Ont.—Barber v. Clark, 20 Ont. 522.

Recovery of overpayment generally see infra § 323.

30. Hummel v. Flores, (Tex. Civ. A.) 39 SW 309.

31. See supra § 318.

32. International Bank v. Bartalott, 11 Ill. A. 620; Clark v. Sylvester, (Me.) 13 A 404. See also McDermott v. Hickling, 1 OntWR 768 (apparently applying the rule).

[a] **Payment in excess of amount of lien.**—(1) Where a purchaser pays a part of the price of goods purchased by him to one who has a lien on them, but such payment is in excess of the lien, he may recover such excess from the lienor. Clark v. Sylvester, (Me.) 13 A 404. (2) Recovery of overpayment generally see infra § 323.

[b] **Second payment.**—The grantee of premises subject to a mortgage, who, after the mortgage has been paid unknown to him, pays it again in order to free his estate from the encumbrance, can recover the amount paid from the mortgagee. International Bank v. Bartalott, 11 Ill. A. 620.

33. Handly v. Call, 30 Me. 9; Priddy v. Miners', etc., Bank, 132 Mo. A. 279, 111 SW 865.

34. Of interest see supra § 321.

Of lien or encumbrance see supra § 322 note 32.

35. U. S.—Omaha First Nat. Bank v. Mastin Bank, 48 Fed. 433, 2 McCrary 438.

Ga.—Haralson County v. Golden, 104 Ga. 19, 30 SE 380.

Iowa.—Gosswiller v. Jansen, 179 Iowa 806, 162 NW 45; Nothem v. Londergan, 157 Iowa 146, 137 NW 927.

Kan.—Wood v. Spurgeon, 85 Kan. 696, 118 P 869.

Md.—Baltimore, etc., R. Co. v. Faunce, 6 Gill 68, 46 AmD 655.

N. Y.—Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Ransom v. Masten, 4 NYS 781.

Pa.—William F. Mosser Co. v. Cherry River Boom, etc., Co., 290 Pa. 67, 138 A 85.

Wis.—Burroughs v. Richland Joint School Dist. No. 2, 155 Wis. 426, 144 NW 977.

Eng.—Continental Caoutchouc, etc., Co. v. Kleintwort, 90 L. T. Rep. N. S. 474.

Compare Chicago v. Weir, 165 Ill. 582, 46 NE 725 [aff 67 Ill. A. 247] (holding that, where a sum larger than that due is paid upon an existing contract, the excess will be applied to the payment of other amounts due under the contract).

[a] **Overpayment by public officer.**—Where a contractor doing public work for a county is, by oversight or mistake of fact of the ordinary, overpaid, it is the right of the county to recover back its money thus improperly disbursed. "This is in accord with a plain and simple rule of natural right and justice which would be applicable to transactions between private individuals; and there is no more reason why a person should be entitled to retain money of the public, by mistake paid to him, than he would money in like manner unjustly obtained from a fellow-citizen." Haralson County v. Golden, 104 Ga. 19, 20, 30 SE 380.

36. Conn.—Northrop v. Graves, 19 Conn. 548, 50 AmD 264.

Miss.—Louisiana Bank v. Ballard, 8 Miss. 371.

Oh.—Crofton v. Cincinnati Bd. of Education, 5 Oh. Dec. (Reprint) 348, 7 AmLRec 768.

Tex.—Clack v. Taylor County, 3 Tex. A. Civ. Cas. § 201.

Eng.—Kleinwort v. Dunlop Rubber Co., 97 L. T. Rep. N. S. 263; Continental Caoutchouc, etc., Co. v. Kleintwort, 90 L. T. Rep. N. S. 474.

37. See supra § 318.

38. Pensacola, etc., R. Co. v. Braxton, 34 Fla. 471, 16 S 317.

39. See infra § 326.

40. Cal.—State Nat. Bank v. Miner, 167 Cal. 532, 140 P 27; Burckard v. Smith, 80 Cal. A. 104, 251 P 663; Thresher v. Lopez, 52 Cal. A. 219, 198 P 419; Dunham v. McDonald, 34 Cal. A. 744, 168 P 1063.

Conn.—New York, etc., R. Co. v. Ansonia Electrical Co., 83 Conn. 462, 76 A 1004; Mansfield v. Lynch, 59 Conn. 320, 22 A 313, 12 LRA 285.

Mich.—Pingree v. Mutual Gas Co., 107 Mich. 156, 65 NW 6; Walker v. Conant, 65 Mich. 194, 31 NW 786.

Miss.—Belmont Bank v. Judson Lumber Co., 143 Miss. 86, 108 S 440.

Mo.—Picotte v. Mills, 200 Mo. A. 127, 203 SW 825.

Nev.—Smart v. Valencia, 50 Nev. 359, 261 P 655, 656 [cit C. J.].

N. Y.—Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153, 113 Am SR 909, 13 LRANS 273; Mayer v. New York, 63 N. Y. 455; National Bank of Commerce v. National Mechanics'

unless the payee has changed his position in reliance upon the payment.[41]

[§ 326] **(2) Failure To Inquire, and Waiver.** It has been held in some cases that, where one has the means of obtaining knowledge of the facts, and, through failure to avail himself of that knowledge, has been led into the payment of money by mistake, it cannot be recovered from the payee.[42] The weight of authority, however, is to the effect that mere failure to avail oneself of means of knowledge will not prevent recovery,[43] unless it appears that

Banking Assoc., 55 N. Y. 211, 14 AmR 232; Duncan v. Berlin, 46 N. Y. 685 mem, 11 AbbPrNS 116; Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84; Gibbons v. Perkins, 132 Misc. 583, 230 NYS 273; Moran v. Brown, 113 NYS 1038.

Pa.—Kunkel v. Kunkel, 267 Pa. 163, 110 A 73; Union Trust Co. v. Gilpin, 235 Pa. 524, 84 A 448; Greenwich Bank v. Commercial Banking Corp., 85 Pa. Super. 161; Potter v. Lehigh Valley R. Co., 80 Pa. Super. 237.

Wis.—Chicago, etc., R. Co. v Malleable Iron Range Co., 187 Wis. 93, 203 NW 738.

Can.—Dominion Bank v. Union Bank, 40 Can. S. C. 366.

Ont.—Upper Canada Law Soc. v. Toronto, 25 U. C. Q. B. 199.

[a] **In Massachusetts** (1) it would appear from the language used in some cases that plaintiff's negligence would prevent a recovery in case of a payment made by mistake of fact (Rosenfeld v. Boston Mut. L. Ins. Co., 222 Mass. 284, 110 NE 304; Blanchard v. Low, 164 Mass. 118, 41 NE 118); (2) but it has been held that plaintiff's negligence, which caused no damage to defendant, was not a ground of defense in an action to recover money paid under mistake of fact (Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92); (3) that the negligence of one paying a draft in failing to discover want of indorsement would not prevent recovery, the negligence being merely a failure to discover an error made by the payee (Quimby v. Carr, 7 Allen 417); (4) and that failure to take disinterested legal advice or to make full investigation of the validity of an assignment was not such negligence as would prevent recovery of a payment made upon the assumption that the assignment was invalid (Montgomery Door, etc., Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 NE 71).

[b] **Where the payee is also negligent,** a payment made under a mistake of fact may be recovered even though the payor was also guilty of negligence, and even though the payee has altered his portion in reliance upon the payment, if the payor's laches grew out of the payee's error or mistake. Union Bank v. U. S. Bank, 3 Mass. 74; Dominion Bank v. Union Bank, 40 Can. S. C. 366.

[c] **Rule applied.**—(1) In an action by a railroad company to recover money paid by it to the consignor of certain goods under the mistaken supposition that they had been lost, defendant's plea of plaintiff's negligence was no defense in the absence of any showing that defendant was injured thereby. New York, etc., R. Co. v. Ansonia Electrical Co., 83 Conn. 462, 76 A 1004. (2) Where a bank negligently paid by mistake to a bona fide holder a certified check, which after certification had been fraudulently altered by raising the amount, it can recover back the sum thus paid, regardless of its negligence, unless the holder had suffered a loss in consequence of the mistake. National Bank of Commerce v. National Mechanics' Banking Assoc., 55 N. Y. 211, 14 AmR 232.

41. See infra § 327.

42. Conn.—Stanley Rule, etc., Co. v. Bailey, 45 Conn. 464; Post v. Clark, 35 Conn. 339; Cobb v. Charter, 32 Conn. 358, 87 AmD 178; Sheldon v. Suffield South School Dist., 24 Conn. 88; East Haddam Bank v. Scovil, 12 Conn. 303.

Del.—West v. Houston, 4 Del. 170.

La.—Carey v. Commonwealth Bldg., etc., Assoc., 145 La. 1, 81 S 734.

Me.—Ash v. McLellan, 101 Me. 17, 62 A 598; Wilcox v. Cheviott, 92 Me. 239, 22 A 403; Gooding v. Morgan, 37 Me. 419.

N. H.—Peterborough v. Lancaster, 14 N. H. 382.

N. Y.—Campbell v. Vandervoort, 2 NYCityCt 315.

Vt.—Stevens v. Head, 9 Vt. 174, 31 AmD 617.

W. Va.—Simmons v. Looney, 41 W. Va. 738, 24 SE 677; Harner v. Price, 17 W. Va. 523.

[a] **In Massachusetts** the rule is that, where the facts are equally open for the inquiry and judgment of both parties, the payee has a right to assume that the payor relied wholly on his own means of information and there can be no recovery. Alton v. Webster First Nat. Bank, 157 Mass. 341, 32 NE 228, 34 AmSR 285, 18 LRA 144.

[b] **In North Carolina** the rule is that, if the payment is made in ignorance or mistake of fact, it cannot be recovered back where the means of knowledge or information is in reach of the party paying, and he is negligent in obtaining it. Brummitt v. McGuire, 107 N. C. 351, 12 SE 191; Adams v. Reeves, 68 N. C. 134, 12 AmR 627. But see Simms v. Vick, 151 N. C. 78, 80, 65 SE 621, 24 LRANS 517, 18 Ann Cas 669 (where the rule was said to be: "Nor is it sufficient to preclude a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the fact." The facts in that case were that an illiterate debtor in making final payment of his debt forgot one of his payments and the receipt therefor, so that he paid more than was due by reason of his forgetfulness).

[c] **"Means of knowledge" defined.**—"The means of knowledge which the law requires are such as the party may avail himself of as then present, without calling to his aid other assistance." Norton v. Marden, 15 Me. 45, 47, 32 AmD 132.

[d] **"Means of knowledge" equivalent to "knowledge."**—(1) "There may be such full and complete means of knowledge as to be equivalent to knowledge itself." Stanley Rule, etc., Co. v. Bailey, 45 Conn. 464, 466. (2) "Full and adequate means of knowledge are equivalent to knowledge itself under ordinary circumstances." Post v. Clark, 35 Conn. 339, 342.

43. U. S.—Dyer v. International Banking Corp., 262 Fed. 292; Brown v. Tillinghast, 84 Fed. 71.

Ala.—Beasley v. Beasley, 206 Ala. 480, 90 S 347, 348 [quot Cyc]; Merrill v. Brantley, 133 Ala. 537, 31 S 847; Rutherford v. McIvor, 21 Ala. 750; Hinds v. Wiles, 12 Ala. A. 596, 68 S 556; Russell v. Richard, 6 Ala. A. 73, 60 S 411.

Ind.—Stotsenburg v. Fordice, 142 Ind. 490, 41 NE 813, 810; Brown v. College Corner, etc., Gravel Road Co., 56 Ind. 110.

Ky.—German Security Bank v. Columbia Finance, etc., Co., 85 SW 761, 27 KyL 581.

Md.—Baltimore, etc., R. Co. v. Faunce, 6 Gill 68, 46 AmD 655.

Mo.—Koontz v. Central Nat. Bank, 51 Mo. 275; Picotte v. Mills, 200 Mo. A. 127, 203 SW 825. But see Union Sav. Assoc. v. Kehlor, 7 Mo. A. 158, 165 (where the court said: "The rule is generally adopted, in Missouri and elsewhere, that a sum of money paid voluntarily, under no mistake of fact, cannot be recovered back. And the same rule applies when the person acts in ignorance of facts which he has means of knowing;" but it would seem that the matter in dispute between the parties was a subject of frequent discussion between them, and that all of the facts must have been known to both parties, and must have been well known by the plaintiff when the money was voluntarily paid to the defendant).

Nebr.—Douglas County v. Keller, 43 Nebr. 635, 62 NW 60.

Nev.—Smart v. Valencia, 50 Nev. 359, 261 P 655.

N. Y.—Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153, 113 AmSR 909; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 AmD 516; National L. Ins. Co. v. Jones, 1 Thomps. & C. 466 [aff 59 N. Y. 649]; Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Citizens' Cent. Nat. Bank v. New Amsterdam Nat. Bank, 109 NYS 872 [aff 128 App. Div. 554, 112 NYS 973 (aff 198 N. Y. 520 mem, 92 NE 1080 mem)]; Waite v. Leggett, 8 Cow. 195, 18 AmD 441.

N. D.—James River Nat. Bank v. Weber, 19 N. D. 702, 124 NW 952.

Or.—Scott v. Ford, 45 Or. 531, 78 P 742, 80 P 899, 68 LRA 469.

Pa.—Kunkel v. Kunkel, 267 Pa. 163, 110 A 73; McKibben v. Doyle, 173 Pa. 579, 34 A 455, 51 AmSR 785; Girard Trust Co. v. Harrington, 23 Pa. Super. 615; Roth's Est., 23 Pa. Dist. 428; Philadelphia County v. Long, 38 Pa. Co. 76.

Tenn.—Neal v. Read, 7 Baxt. 333.

Tex.—Alston v. Richardson, 51 Tex. 1; Clark v. Bradley, (Civ. A.) 270 SW 1050; Houston, etc., R. Co. v. Hughes, (Civ. A.) 133 SW 731.

Va.—City Nat. Bank v. Peed, 32 SE 34.

Wis.—Chicago, etc., R. Co. v. Malleable Iron Range Co., 187 Wis. 93, 203 NW 738.

Eng.—R. E. Jones, Ltd. v. Waring & Gillow, Ltd., [1926] A. C. 670; Townsend v. Crowdy, 8 C. B. N. S. 477, 98 ECL 477, 141 Reprint 1251; Bell v. Gardiner, 4 M. & G. 11, 43 ECL 16, 134 Reprint 5; Kelly v. Solari, 9 M. & W. 54, 152 Reprint 24; Davis v. Watson, 2 L. J. K. B. 175; Home, etc., Ins. Co. v. London Guarantee, etc., Co., 45 T. L. R. 134; Bailey & Whites, Ltd. v. House, 31 T. L. R. 583.

Man.—Ste. Rose v. Royal Bank, [1928] 1 WestWkly 663.

[a] **Illustrations.**—(1) Where a railroad company has paid a claim relying upon a false affidavit, it is not precluded from recovery because a reasonable inquiry would have shown the true facts. Chicago, etc., R. Co. v. Malleable Iron Range Co., 187 Wis. 93, 203 NW 738. (2) Where, at the time a railroad company paid a named sum in settlement of a claim for a supposed loss of goods in shipment, it had data from which it could get car information, and failed to do so, but at the time of payment it was without actual knowledge of the true situation, the payment so made was under a mistake of fact, not of law. Missouri Pac. R. Co. v. Askew Saddlery Co., 215 Mo. A. 277, 256 SW 566, 571 [cit Cyc]. (3) Where defendant presented a check, drawn in his own favor, to the teller of a bank and represented that he had the sum on deposit, when as a matter of fact he had previously withdrawn the amount, the bank's means of knowing the fact does not preclude it from recovering back the amount paid on the check without actual knowledge of the previous withdrawal. James River Nat. Bank v. Weber, 19 N. D. 702, 124 NW 952.

the payor intended to waive inquiry into the facts,[44] or unless he was under a legal duty to ascertain them,[45] or is by law presumed to have had knowledge of them.[46]

[§ 327] **f. Change of Payee's Status.**[47] In general, where a payee has changed his position to his prejudice in reliance upon the payment and cannot be placed in statu quo, the payment cannot be recovered, although made under a mistake of fact;[48] and so, where the payee has irrevocably changed his position in reliance upon a payment made by the payor under a mistake of fact caused by his own negligence or lack of diligence in taking advantage of means and knowledge available to him, there can be no recovery,[49] except when the payor's negligence was induced by negligence on the part of the payee,[50] and except, in some jurisdictions,[51] but not in all,[52] where both parties are equally innocent or guilty of negligence or lack of care.

[§ 328] **g. Money Paid Over or Spent by Payee.** With the exception hereinafter mentioned,[53] it is no defense to an action for the recovery of a payment made under mistake of fact that the money or property has been paid over to another[54] or spent[55] by the payee.

By agent or representative. Money paid by mistake to an agent, stakeholder, or other person acting only in a representative capacity cannot be recovered back from him if he has settled his accounts or paid it over to his principal before notice, and the loss would fall on him individually,[56] although a payment over after the mistake is discovered and

44. Ill.—Frambers v. Risk, 2 Ill. A. 499.

Me.—Ash v. McLellan, 101 Me. 17, 62 A 598.

N. C.—Simms v. Vick, 151 N. C. 78, 65 SE 621, 24 LRANS 517, 18 AnnCas 669.

Or.—Scott v. Ford, 45 Or. 531, 78 P 742, 80 P 899, 68 LRA 469.

Tenn.—Neal v. Read, 7 Baxt. 333.

Wis.—Meeme Mut. Home Protection F. Ins. Co. v. Lorfeld, 194 Wis. 322, 216 NW 507.

Eng.—Kelly v. Solari, 9 M. & W. 54, 152 Reprint 24.

[a] **Payment after investigation of the facts.**—In a few cases it has apparently been held that, where one, after investigation, pays a claim made in good faith, the payment cannot be recovered back if the facts afterward turn out different than he supposed them. Wheeler v. Hatheway, 58 Mich. 77, 24 NW 780; McArthur v. Luce, 43 Mich. 435, 5 NW 451, 38 AmR 204.

Doubt or conscious want of knowledge not mistake see supra § 319.

45. U. S. Trust Co. v. David, 36 App. (D. C.) 549; Bartlett v. Liberty Glass Co., 124 Okl. 104, 253 P 997; Simmons v. Looney, 41 W. Va. 738, 24 SE 677. See also Bissell v. Edwards, 5 Day (Conn.) 94 (apparently applying the rule).

46. Behring v. Somerville, 63 N. J. L. 568, 44 A 641, 49 LRA 578; McCardell v. Miller, 22 R. I. 96, 46 A 184.

[a] **Rule applied.**—Where an insurance company attempted to recover back the amount paid by it on a policy because of its ignorance of facts entitling it to avoid the policy, the payment not being induced by any fraud upon the part of insured, it will be presumed that the company either knew the facts or intended to waive any such defense and voluntarily paid the money, for otherwise there would be no end of controversy and litigation, and insured would hold the money subject to a lawsuit until the statute of limitations intervened. Kansas City L. Ins. Co. v. Blackstone, (Tex. Civ. A.) 143 SW 702.

47. Change of status as creating estoppel see Estoppel 21 C. J. p 1052.

Payment over by payee to another see infra § 328.

48. U. S.—Espy v. Cincinnati First Nat. Bank, 18 Wall. 604, 21 L. ed. 947.

Ala.—Traweek v. Hagler, 199 Ala. 664, 75 S 152; Wilson v. Sergeant, 12 Ala. 778; Yarborough v. Wise, 5 Ala. 292.

Ariz.—West Virginia Copper Belle Min. Co. v. Gleeson, 14 Ariz. 548, 556, 134 P 285, 48 LRANS 481 [cit Cyc].

Ark.—Deisch v. Wooten-Agee Co., 95 Ark. 279, 280, 129 SW 819 [quot Cyc].

La.—Pelletier v. State Nat. Bank, 117 La. 335, 41 S 640.

Mass.—Welch v. Goodwin, 123 Mass. 71, 25 AmR 24. See also Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92 (dictum).

Mich.—Kennedy v. Murphy Iron Works, 91 Mich. 500, 51 NW 1120; Walker v. Conant, 69 Mich. 321, 37 NW 292, 13 AmSR 391.

Minn.—Grand Lodge A. O. U. W. v. Towne, 136 Minn. 72, 161 NW 403, LRA1917E 344.

Mo.—Union Sav. Assoc. v. Kehlor, 7 Mo. A. 158.

N. J.—Behring v. Somerville, 63 N. J. L. 568, 44 A 641, 49 LRA 578.

N. C.—Houser v. McGinnas, 108 N. C. 631, 13 SE 139.

N. D.—Fegan v. Great Northern R. Co., 9 N. D. 30, 81 NW 39.

Pa.—Union Trust Co. v. Gilpin, 235 Pa. 524, 84 A 448; Boas v. Updegrove, 5 Pa. 516, 47 AmD 425; Tybout v. Thompson, 2 Browne 27.

S. C.—Atlantic Coast Line R. Co. v. Schirmer, 87 S. C. 309, 69 SE 439.

Tenn.—Guild v. Baldridge, 2 Swan 295.

Utah.—Richey v. Clark, 11 Utah 467, 40 P 717.

Va.—Rose v. Shore, 1 Call (5 Va.) 540.

[a] **Rule applied.**—Where a shipper of goods, being informed by the consignee that the shipment had not been delivered, claimed its value from the railroad company, which paid the claim, and one year after payment notified the shipper that the shipment had been delivered before the claim was filed, and the consignee had since gone out of business so that the shipper was unable to locate him, the railroad could not recover the payment from the shipper. Atlantic Coast Line R. Co. v. Shirmer, 87 S. C. 309, 69 SE 439.

[b] **Only where payee has irrevocably changed position before demand** will the payor's negligence or laches bar recovery of money paid by mistake of fact. Union Trust Co. v. Gilpin, 235 Pa. 524, 84 A 448.

49. D. C.—Hibbs v. Beall, 41 App. 592.

Ga.—Citizens' Bank v. Rudisill, 4 Ga. A. 37, 60 SE 818.

Ky.—German Security Bank v. Columbia Finance, etc., Co., 85 SW 761, 27 KyL 581.

Miss.—Bessler Movable Stairway Co. v. Leakesville Bank, 140 Miss. 537, 540, 106 S 445 [cit Cyc].

N. Y.—Levy v. Terwilliger, 10 Daly 194; New York Bank v. Simmons, 117 Misc. 103, 190 NYS 602. See also Mayer v. New York, 63 N. Y. 455 (dictum).

N. D.—Fegan v. Great Northern R. Co., 9 N. D. 30, 81 NW 39.

Pa.—Pappas' Est., 25 Pa. Dist. 1019.

R. I.—Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805.

Va.—Hibbs v. Alexandria First Nat. Bank, 133 Va. 94, 112 SE 669, 25 ALR 120.

Eng.—Barclay's Bank, Ltd. v. Malcolm, 133 L. T. Rep. N. S. 512.

"The party who has received the money must not, through the negligence or misconduct of the person who paid it, be placed in a worse condition than if the money had not been paid." Girard Trust Co. v. Harrington, 23 Pa. Super. 615, 620.

[a] **Illustration.**—Where a payment is made by mistake through the negligence of the payor, and the payee has in the meantime paid the money to another person, not entitled thereto, the insolvency of the second payee is a defense to an action by the payor against the original payee to recover the money. New York Bank v. Simmons, 117 Misc. 103, 190 NYS 602.

Negligence or want of diligence in discovering facts see supra § 325.

50. Union Bank v. U. S. Bank, 3 Mass. 74; Dominion Bank v. Union Bank, 40 Can. S. C. 366.

51. Lesster v. New York, 161 N. Y. 628, 55 NE 1097; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 AmD 516; Mulligan v. Harlam, 46 Misc. 571, 92 NYS 765; Clark v. Bradley, (Tex. Civ. A.) 270 SW 1050; R. E. Jones, Ltd. v. Warring & Gillow, Ltd., [1926] A. C. 670; Durrant v. Ecclesiastical Comrs., 6 Q. B. D. 234; Continental Caoutchouc, etc., Co. v. Kleinwort, 90 L. T. Rep. N. S. 474; Toronto Bank v. Hamilton, 28 Ont. 51.

52. Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805.

[a] **Although both parties are equally to blame or equally innocent** in respect of the mistake, an irrevocable change of position by the payee as a result of the payment will prevent a recovery. Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805.

53. See infra text and note 56.

54. Moors v. Bird, 190 Mass. 400, 77 NE 643; Donner v. Sackett, 251 Pa. 524, 97 A 89; Smith v. Gruber Lumber Co., 81 Wash. 111, 142 P 493; Baylis v. London, [1913] 1 Ch. 127; Continental Caoutchouc, etc., Co. v. Kleinwort, 90 L. T. Rep. N. S. 474.

55. Picotte v. Mills, 200 Mo. A. 127, 203 SW 825; Kunkel v. Kunkel, 267 Pa. 163, 110 A 73; Union Trust Co. v. Gilpin, 235 Pa. 524, 84 A 448.

56. U. S.—Mountain Lumber Co. v. Davis, 9 F. (2d) 478; U. S. v. Pinover, 3 Fed. 305.

Ala.—Yarborough v. Wise, 5 Ala. 292.

D. C.—Hibbs v. Beall, 41 App. 592.

Mo.—Mason v. Commerce Trust Co., 192 Mo. A. 528, 183 SW 707. Compare Koontz v. Central Nat. Bank, 51 Mo. 275 (recognizing the rule stated in the text, but allowing recovery from an agent who had paid money over to its principal where the original payor's mistake was induced by the agent's own mistake).

N. H.—Winslow v. Anderson, 78 N. H. 478, 102 A 310, LRA1918C 173.

N. Y.—National City Bank v. Westcott, 118 N. Y. 468, 23 NE 900, 16 AmSR 771; Bixby v. Drexel, 56 HowPr 478. See also Rheel v. Hicks, 25 N. Y. 289 (apparently recognizing the rule where money paid by mistake of fact to a public officer was by him paid over to the county treasury, but allowing recovery on the facts of the case).

S. C.—Massey v. Massey, 11 S. C. Eq. 492.

Tex.—Clark v. Bradley, (Civ. A.)

the cause of action accrues is no defense;[57] and where the agent is not a conduit solely, but takes a personal benefit from the payment, the rule does not apply.[58] Money duly paid over may be recovered, however, from the principal,[59] regardless of whether or not he knew at the time it was received by him that it had been paid to his agent under a mistake;[60] or if it comes back into the hands of the agent it may be recovered from him.[61]

[§ 329] **h. Ratification of Payment.** Where the conduct of the payor, after discovering the mistake, amounts to ratification of the payment, or is inconsistent with his claim of right to recover, there can be no recovery.[62]

[§ 330] **E. Failure of Consideration.**[63] In general, a payment made upon a consideration which fails may be recovered.[64] Thus there may be a recovery of money paid in consideration of the performance of some act which is not done,[65] as, for ex-

270 SW 1050.

Va.—Hibbs v. Alexandria First Nat. Bank, 133 Va. 94, 112 SE 669, 25 ALR 120.

Eng.—British-American Bank v. British Bank for Foreign Trade, [1926] 1 K. B. 328; Holland v. Russell, 4 B. & S. 14, 116 ECL 14, 122 Reprint 365; Shand v. Grant, 15 C. B. N. S. 324, 109 ECL 324, 143 Reprint 809; Kleinwort v. Dunlop Rubber Co., 97 L. T. Rep. N. S. 263; Continental Caoutchouc, etc., Co. v. Kleinwort, 90 L. T. Rep. N. S. 474; Greenway v. Hurd, 4 T. R. 553, 100 Reprint 1171.

[a] **That the agency was undisclosed to the payor** at the time he made the payment does not give him the right to recover it after it has been paid over to the principal. Hibbs v. Beall, 41 App. (D. C.) 592.

Liability of agent for return of money in general see Agency §§ 495–497.

57. Rheel v. Hicks, 25 N. Y. 289.

58. Newall v. Tomlinson, L. R. 6 C. P. 405; Cox v. Prentice, 3 M. & S. 344, 105 Reprint 641; Alberta Pac. Grain Co. v. Dominion Bank, (Alta.) 66 DomLR 735.

[a] **Where principal was indebted to agent,** and the agent receiving the payment credited it to the principal's indebtedness, the agent was not a mere intermediary, but was to receive a benefit from the payment, and accordingly the making of such credit would not prevent recovery by the payor who had acted under mistake of fact. Alberta Pac. Grain Co. v. Dominion Bank, (Alta.) 66 DomLR 735.

59. Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 AmD 92; Evans v. Garlock, 37 Hun (N. Y.) 588; Shand v. Grant, 15 C. B. N. S. 324, 109 ECL 324, 143 Reprint 809.

Against whom action should be brought in general see infra § 334.

60. Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 AmD 92; Evans v. Garlock, 37 Hun (N. Y.) 588.

61. British American Continental Bank v. British Bank for Foreign Trade, [1926] 1 K. B. 328.

[a] **Thus,** where money was paid to the payee's agent, and by the principal's direction paid over to a bank, and the principal became bankrupt, and the payor then requested the bank to return the money, which was returned by it to the agent, the payor is entitled to recover such money from the agent on account of a mistake of fact in the payment. British American Continental Bank v. British Bank, [1926] 1 K. B. 328.

62. Brookings Lumber, etc., Co. v. Manufacturers' Automatic Sprinkler Co., 173 Cal. 679, 161 P 266; Hibbs v. Beall, 41 App. (D. C.) 592; Barclay's Bank, Ltd. v. Malcolm, 133 L. T. Rep. N. S. 512.

[a] **Illustrations.**—(1) A stockbroker, who sold stock and paid the proceeds to his customer under the erroneous belief that he was dealing with stock of another company, cannot recover back the amount paid where, after discovering the mistake and taking back the stock from the purchaser, he surrendered the certificates and procured the issuance to him of certificates of smaller denomination "in order to handle the same better in case there should be any value to the stock," and delayed for thirteen months thereafter to take any action against the customer, his conduct not being consistent with his claim of rescission. Hibbs v. Beall, 41 App. (D. C.) 592, 599. (2) Where a purchaser of goods, having made a partial payment of the purchase price, claimed that it was made by mistake, but afterward in a statement of account itemized such payment by the payment on account, the payment was ratified and could not be recovered. Brookings Lumber, etc., Co. v. Manufacturers' Automatic Sprinkler Co., 173 Cal. 679, 161 P 266.

63. Action for money had and received see Money Received § 11.

Failure of consideration generally see Contracts §§ 242–244.

Recovery of purchase money paid for:

Goods see Sales [35 Cyc 602].

Real estate see Vendor and Purchaser [39 Cyc 2001].

64. U. S.—U. S. v. Barlow, 132 U. S. 271, 10 SCt 77, 33 L. ed. 346; Winters v. Armstrong, 37 Fed. 508; Currance v. McQueen, 6 F. Cas. No. 3,488, 2 Paine 109; Boston Bank Cases, 10 Ct. Cl. 519 [aff 96 U. S. 30, 24 L. ed. 647].

Ala.—Harper v. Claxton, 62 Ala. 46; Pharr v. Bachelor, 3 Ala. 237.

Ark.—Gates v. Richie, 162 Ark. 484, 258 SW 397; Glasscock v. Rosengrant, 55 Ark. 376, 18 SW 379; Murray v. Clay, 9 Ark. 39, 47 AmD 731.

Cal.—Hayes v. Los Angeles County, 99 Cal. 74, 33 P 766; Rose v. Foord, 96 Cal. 152, 30 P 1114; Sutro v. Rhodes, 92 Cal. 117, 28 P 98; Santa Clara Valley Peat Fuel Co. v. Tuck, 53 Cal. 304; Redington v. Woods, 45 Cal. 406, 13 AmR 190; Allen v. Citizens' Steam Nav. Co., 22 Cal. 28; Reina v. Cross, 6 Cal. 29.

Conn.—Dean v. Mason, 4 Conn. 428, 10 AmD 162; Pettibone v. Roberts, 2 Root 258.

Ill.—Tyler v. Bailey, 71 Ill. 34; Demesmey v. Gravelin, 56 Ill. 93; Parker v. Fisher, 39 Ill. 164; Steele v. Hobbs, 16 Ill. 59; Critzer v. McConnel, 15 Ill. 172.

Ind.—Bales v. Weddle, 14 Ind. 349; Metropolitan L. Ins. Co. v. Bowser, 20 Ind. A. 557, 50 NE 86.

Kan.—Mabry v. Harp, 53 Kan. 398, 36 P 743.

Ky.—Woodward v. Fels, 1 Bush 162; Robinson v. Bright, 3 Metc. 30; Gray v. Gray, 2 J. J. Marsh. 21.

La.—Mouton v. Noble, 1 La. Ann. 192.

Me.—Judkins v. Earl, 7 Me. 9.

Md.—Johnson v. Evans, 8 Gill 155, 50 AmD 669; Cloherty v. Creek, 3 Harr. & J. 428.

Mass.—Brewster v. Burnett, 125 Mass. 68, 28 AmR 203; Welch v. Goodwin, 123 Mass. 71, 25 AmR 24; Carpenter v. Northborough Nat. Bank, 123 Mass. 66; Hotchkiss v. Judd, 12 Allen 447; Griggs v. Morgan, 9 Allen 37; Earle v. Bickford, 6 Allen 549, 83 AmD 651; Earle v. De Witt, 6 Allen 520; Murray v. McHugh, 9 Cush. 158; Strong v. Bliss, 6 Metc. 393; Woodward v. Cowing, 13 Mass. 216; Spring v. Coffin, 10 Mass. 31; Young v. Adams, 6 Mass. 182.

Mich.—Goodspeed v. United Shoe Mach. Co., 141 Mich. 672, 104 NW 982; Fitzpatrick v. Hoffman, 104 Mich. 228, 62 NW 349; Murphy v. McGraw, 74 Mich. 318, 41 NW 917; Wright v. Dickinson, 67 Mich. 580, 35 NW 164, 11 AmSR 602; Davis v. Strobridge, 44 Mich. 157, 6 NW 205; Detroit, etc., R. Co. v. McKenzie, 43 Mich. 609, 5 NW 1031; Child v. Pierce, 37 Mich. 155; Friend v. Dunks, 37 Mich. 25; Campau v. Shaw, 15 Mich. 226; Catlin v. Birchard, 13 Mich. 110.

Minn.—Godfrey v. New York L. Ins. Co., 70 Minn. 224, 73 NW 1; Valentine v. St. Paul, 34 Minn. 446, 26 NW 457; Taylor v. Read, 19 Minn. 372.

Mo.—Kerrigan v. Kelly, 17 Mo. 275; Philipson v. Bates, 2 Mo. 116, 22 AmD 444; Vincent v. Morrison, 58 Mo. A. 497; Fisher v. During, 53 Mo. A. 548; Sharp v. Carthage, 48 Mo. A. 26.

Nebr.—Chamberlain v. Tecumseh, 43 Nebr. 221, 61 NW 632; Rogers v. Walsh, 12 Nebr. 28, 10 NW 467.

N. H.—Lebanon v. Heath, 47 N. H. 353; Leach v. Tilton, 40 N. H. 473; King v. Hutchins, 28 N. H. 561; Holden v. Curtis, 2 N. H. 61.

N. Y.—Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74, 43 AmR 655; Moody v. Smith, 70 N. Y. 598; Hoag v. Owen, 57 N. Y. 644 mem [aff 60 Barb. 34]; Schwinger v. Hickok, 53 N. Y. 280; Herrington v. Robertson, 7 Hun 368 [aff 71 N. Y. 280]; Churchill v. Stone, 58 Barb. 233; Evans v. Wilcox, 39 Barb. 136; Briggs v. Vanderbilt, 19 Barb. 222; Cutler v. American Exch. Nat. Bank, 53 N. Y. Super. 163 [aff 113 N. Y. 593, 21 NE 710, 4 LRA 328]; Kinney v. Winter, 1 Edm. Sel. Cas. 109 [rev on other grounds 1 N. Y. 365]; Putnam v. Westcott, 19 Johns. 73; Rice v. Peet, 15 Johns. 503; Gillet v. Maynard, 5 Johns. 85, 4 AmD 329; Howes v. Barker, 3 Johns. 506, 3 AmD 526; Weaver v. Bentley, 1 Cai. 47.

N. C.—Bahnsen v. Clemmons, 79 N. C. 556; Page v. Einstein, 52 N. C. 147.

Oh.—Middleport Woolen Mills Co. v. Titus, 35 Oh. St. 253; French v. Millard, 2 Oh. St. 44; Taft v. Wildman, 15 Oh. 123.

Or.—Hoxter v. Poppleton, 9 Or. 481.

Pa.—Marshal v. Sprott, Add. 360; Hook v. Robison, Add. 271.

R. I.—Hazard v. Franklin Mut. F. Ins. Co., 7 R. I. 429.

S. C.—Randolph v. Planters', etc., Bank, 41 S. C. L. 134; Duncan v. Bell, 11 S. C. L. 153; Wharton v. O'Hara, 11 S. C. L. 65; Lacoste v. Flotard, 8 S. C. L. 467.

Tenn.—Cardin v. Boyd, 11 Heisk. 176; McLean v. Houston, 2 Heisk. 37; Conner v. Crunk, 2 Head 246; Mullins v. Jones, 1 Head 517; Rosson v. Hancock, 3 Sneed 434; Hurst v. Means, 2 Swan 594; Clarke v. Locke, 11 Humphr. 300; Buchanan v. Alwell, 8 Humphr. 516; Charlton v. Lay, 5 Humphr. 496; Allen v. Anderson, 3 Humphr. 581, 39 AmD 197; Williams v. Hurt, 2 Humphr. 68; Pipkin v. James, 1 Humphr. 325, 34 AmD 652; Henderson v. Overton, 2 Yerg. 394, 24 AmD 492; Boyd v. Anderson, 1 Overt. 438, 3 AmD 762.

Tex.—Merryfield v. Willson, 14 Tex. 224, 65 AmD 117.

Vt.—Barnes v. Baylies, 18 Vt. 430; Weeks v. Hunt, 13 Vt. 144.

Va.—Newberry Land Co. v. Newberry, 95 Va. 119, 27 SE 899.

Wis.—Potter v. Necedah Lumber Co., 105 Wis. 25, 80 NW 88, 81 NW 118; Paul v. Kenosha, 22 Wis. 266, 94 AmD 598.

Eng.—De Bernales v. Fuller, 2 Campb. 426, 170 Reprint 1206, 14 East 590 note, 104 Reprint 728.

65. U. S.—Nash v. Towne, 5 Wall. 689, 18 L. ed. 527.

ample, failure to render services,[66] or to fulfill a condition upon which the payment was made.[67] However, where the thing in contemplation is not contracted for, or warranted, and becomes impossible of performance through no fault of the party,[68] or performance thereof has been waived,[69] there can be no recovery. Nor can there by a recovery by the payor where he is in default.[70]

[§ 331] **F. Payment upon Void or Illegal Contract.** The right to recover money paid under the terms of an illegal or void contract has been treated elsewhere in this work.[71]

[§ 332] **G. Actions[72]—1. In General.** Generally an action as law[73] may be maintained for the recovery of money, the payment of which was induced by threats or duress,[74] fraud,[75] or mistake,[76] under circumstances which give rise to the right of recovery. And the principles controlling an action for money had and received still govern in those jurisdictions where the distinction between forms of action have been abolished.[77] Where a recovery is permissible, it may be by way of counterclaim or set-off as well as by a direct action.[78] One to whom money should have been paid cannot maintain an action for its recovery from one to whom it was paid,[79] as there is no privity between them.[80] Nor can an action be maintained against one benefiting from a payment made to another.[81] Where the payment sought to be recovered was paid in installments, they should all be included in one cause of action.[82]

Ala.—Maddera v. Smith, 3 Stew. 119.

Cal.—Allen v. Citizens' Steam Nav. Co., 22 Cal. 28; Reina v. Cross, 6 Cal. 29.

Conn.—Lyon v. Annable, 4 Conn. 350.

Fla.—Bacon v. Green, 36 Fla. 325, 18 S 870.

Ind.—Jewett v. Lawrenceburgh, etc., R. Co., 10 Ind. 539.

Mass.—Brown v. Harris, 2 Gray 359; Carter v. Carter, 14 Pick. 424; Eames v. Savage, 14 Mass. 425; Davis v. Marston, 5 Mass. 199.

Mo.—Kerrigan v. Kelly, 17 Mo. 275.

N. H.—King v. Hutchins, 28 N. H. 561; Randlet v. Herren, 20 N. H. 102.

N. J.—Trenton Public School v. Bennett, 27 N. J. L. 513, 72 AmD 373.

N. Y.—Tompkins v. Dudley, 25 N. Y. 272, 82 AmD 349; Graves v. Wait, 1 Thomps. & C. 16 addenda [aff 59 N. Y. 156]; Bean v. Carleton, 12 NYS 519 [aff 126 N. Y. 642 mem, 27 NE 852 mem]; Wheeler v. Board, 12 Johns. 363.

Okl.—Midland Sav., etc., Co. v. Foss Impr. Co., 34 Okl. 564, 126 P 720.

Pa.—Mosser v. Cherry River Boom, etc., Co., 290 Pa. 67, 138 A 85; Filbert v. Behney, 45 Pa. Super. 24.

Ont.—Corp v. Schlemmer, 18 Ont WN 63.

[a] **Illustration.**—Under a contract to build and find material for a building at an entire price, payable in installments as the work progresses if the building, either by fault of the builder, or by inevitable accident, is destroyed before completion, the owner may recover back the installments he has paid. Trenton Public School v. Bennett, 27 N. J. L. 513, 72 AmD 373.

66. U. S.—U. S. v. Barlow, 132 U. S. 271, 10 SCt 77, 33 L. ed. 346.

Ala.—Wheelock v. Wright, 4 Stew. & P. 163.

Minn.—Farrell v. Burbank, 57 Minn. 395, 59 NW 485.

N. Y.—Wheeler v. Board, 12 Johns. 363.

Oh.—McCammon v. Peck, 9 Oh. Cir. Ct. 589, 6 Oh. Cir. Dec. 504.

67. Conway v. Grand Chute, 162 Wis. 172, 155 NW 953.

Recovery back of subscriptions made conditionally see Subscriptions [37 Cyc 501].

68. Blakeley v. Muller, 88 L. T. Rep. N. S. 90.

[a] **Illustration.**—Where seats were purchased from which to view a coronation procession, which failed to take place on account of the sickness of the king, there could be no recovery of the amount paid for them. Blakeley v. Muller, 88 L. T. Rep. N. S. 90.

69. Lehan v. Kiley, 54 SW 727, 21 KyL 1186.

[a] **Illustration.**—Payments voluntarily made by defendant on the contract price after seeing the work as it progressed, and after full opportunity for consultation with his architect, cannot be recovered by way of counterclaim on the ground that the work was not in accordance with the plans and specifications. Lehan v. Kiley, 54 SW 727, 21 KyL 1186.

70. Ala.—Abercrombie v. Skinner, 42 Ala. 633.

Ill.—Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 82, 48 NE 331 [aff 67 Ill. A. 169].

Me.—Alden v. Goddard, 73 Me. 345; Morton v. Chandler, 6 Me. 142; Grimes v. Goud, 10 A 116.

Mass.—Donahue v. Parkman, 161 Mass. 412, 37 NE 205, 42 AmSR 415; Sargent v. Adams, 3 Gray 72, 63 AmD 718.

Mich.—Curry v. Tawas Tp., 81 Mich. 355, 45 NW 831.

Nebr.—Farmers' Mut. Ins. Co. v. Home F. Ins. Co., 54 Nebr. 740, 74 NW 1101; Lexington Mill, etc., Co. v. Neuens, 42 Nebr. 649, 60 NW 893.

N. Y.—Wright v. Smith, 13 App. Div. 536, 43 NYS 728; Monroe v. Reynolds, 47 Barb. 574; Haynes v. Hart, 42 Barb. 58.

Oh.—Ashbrook v. Hite, 9 Oh. St. 357, 75 AmD 468.

Wis.—Hague v. Ashland, 91 Wis. 629, 65 NW 508.

N. S.—Maritime Gypsum Co., Ltd. v. Redden, 46 N. S. 285, 8 DomLR 155, 11 EastLR 586.

[a] **Failure to carry out a compromise** will not give rise to a right to recover money paid thereunder by the party in default. Abercrombie v. Skinner, 42 Ala. 633.

71. See Contracts §§ 440–480.

Right to recover payment made see supra § 300.

72. Limitations of actions see Limitations of Actions 37 C. J. p 666.

73. Clark v. Sipple, 10 Del. Ch. 51, 84 A 1. See Pappas' Est., 25 Pa. Dist. 1019 (where, money having been paid to an administrator under an apparent mistake of fact, and the administrator having brought the money into court, the orphans' court held that it had jurisdiction to entertain and pass on a petition for the recovery of the payment, because it had jurisdiction over its officer, the administrator, and the money was within the custody of the court as part of decedent's estate).

Action for money received see Money Received 41 C. J. p 26.

Jurisdiction of equity to decree return of money paid where relief is granted on ground of fraud or mistake see Equity §§ 117–129.

74. Finch v. J. M. Cox Co., 19 Ga. A. 256, 91 SE 281; Siverson v. Clanton, 88 Or. 261, 170 P 933, 171 P 1051; Bowers v. Missouri, etc., R. Co., (Tex. Civ. A.) 241 SW 509.

75. Schank v. Schuchman, 212 N. Y. 352, 106 NE 127; Pierce v. Drake, 15 Johns. (N. Y.) 475. See Kashgarian v. Janjigian, 160 Ill. A. 294 (holding that, where money has been obtained by false pretenses, assumpsit lies to recover it).

Right to waive tort and sue in contract in case of fraud see Actions § 164; Fraud § 128.

76. Ala.—Blackwood v. Rutherford, 212 Ala. 630, 103 S 689; Russell v. Richard, 6 Ala. A. 73, 60 S 411.

Del.—Clark v. Sipple, 10 Del. Ch. 51, 84 A 1.

Miss.—Bessler Movable Stairway Co. v. Leakesville Bank, 140 Miss. 537, 106 S 445.

Mo.—Picotte v. Mills, 200 Mo. A. 127, 203 SW 825.

N. Y.—Bodner v. Crecco, 119 NYS 223.

Pa.—Donner v. Sackett, 251 Pa. 524, 97 A 89.

Vt.—Holt v. Ruleau, 92 Vt. 74, 102 A 934.

[a] **In case of double payment of a debt,** the payee being in possession of money which in equity and good conscience he ought not to retain, an action for money had and received will lie for its recovery. Jewett State Bank v. Corsicana Nat. Bank, (Tex. Civ. A.) 167 SW 747.

[b] **Money paid in bona fide forgetfulness or ignorance of fact** may be recovered in an action for money had and received. Normandy Waist Co., Inc. v. Palmer, 176 NYS 465.

Form of action for recovery of money paid by mistake generally see Money Received § 37.

77. Siverson v. Clanton, 88 Or. 261, 170 P 933, 171 P 1051.

Abolition of distinction between forms of action generally see Actions §§ 128, 129.

Nature and form of action generally see Money Received §§ 46–86.

78. Charles v. U. S., 19 Ct. Cl. 316; Brown v. District of Columbia, 17 Ct. Cl. 402; Bledsoe v. Stuckey, 47 Cal. A. 95, 190 P 217; Bracken v. Dillon, 64 Ga. 243, 37 AmR 70.

Recovery by way of set-off and counterclaim generally see Set-off and Counterclaim [34 Cyc 653].

79. Witmer v. Neilson, 28 Pa. Dist. 452.

80. George v. Thompson, 52 App. (D. C.) 168, 285 Fed. 902; Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 AmD 92; Witmer v. Neilson, 28 Pa. Dist. 452.

[a] **Privity as between subagent and employer of agent.**—Where payment was made to a subagent, whose employment was in fact not known to defendant who was the employer of the agent, there was such privity between the payor (plaintiff) and defendant as would support an action for the recovery of the money by plaintiff. Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 AmD 92.

[b] **Privity as between husband and one to whom he makes payment for wife.**—Where a husband made a payment on a contract for the convenience of his wife this does not establish any privity between him and the other contracting party so as to entitle him to maintain an action to recover such payment. George v. Thompson, 52 App. (D. C.) 168, 285 Fed. 902.

81. Mattlage v. Lewi, 6 Misc. 150, 26 NYS 17.

82. Higgins v. Pelton, 4 Oh. Dec. (Reprint) 521, 2 ClevLRep 306.

[§ 333] **2. Conditions Precedent.** Notice,[82] demand,[84] and restoration of the status quo,[85] as a condition precedent to an action for the recovery of money paid, have been treated elsewhere in this work.

[§ 334] **3. Parties.** As in actions for money had and received generally,[86] the rules relating to parties in civil actions generally apply to actions for the recovery of payments made.[87]

Plaintiff. The action must be brought by the person actually entitled to recover.[88] So an action may be maintained by an assignee of the payor.[89]

Defendant. The action should be against the person actually receiving the payment.[90]

[§ 335] **4. Pleading.**[91] In accordance with the rules relating to pleadings in civil actions generally,[92] the declaration, complaint, or petition in an action for the recovery of a payment made must set forth facts showing a right of recovery,[93] alleged with certainty and without ambiguity,[94] and not

Splitting causes of action see Actions §§ 275-307.

83. See Money Received § 49.

84. See Money Received §§ 50-58.

Necessity of demand before suit generally see Actions §§ 74-83.

85. See Money Received § 48.

No recovery can be had if defendant cannot be placed in statu quo see supra § 327 text and note 48.

86. See Money Received §§ 63-65.

Money had and received as proper form of action for recovery of payments see Money Received §§ 37, 38.

87. See cases infra note 88 et seq.

Parties to actions generally see Parties 47 C. J. p 1.

88. Farrar v. Perkins, 116 Kan. 374, 226 P 714; Ritchie v. Topeka, 91 Kan. 615, 138 P 618; Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 AmD 92; American Trotting Assoc. v. Reynolds, 141 Mich. 340, 104 NW 578; Kingston Bank v. Eltinge, 66 N. Y. 625 [aff 5 Hun 653]; Bodner v. Crecco, 119 NYS 223. See Buck v. Carlisle, 98 Ala. 580, 13 S 585 (holding that one who paid money on a written contract for the purchase of an option in the name of a third person could not maintain an action for the recovery of the money, unless the contract was assigned to him); Lee v. Venice, 206 Ill. A. 376; Ina v. Kelley, 206 Ill. A. 168.

[a] **Illustrations.**—(1) The city is a proper party plaintiff in an action to recover money overpaid to a contractor out of the proceeds of improvement bonds issued by a city and binding the municipality as a whole, although only the property in the benefit district would be assessed for the payment of the improvement bonds. Ritchie v. Topeka, 91 Kan. 625, 138 P 618. (2) Where a party who was the real defendant in an action paid a judgment against a nominal defendant, which judgment was afterward vacated, the real defendant could maintain an action for the recovery of the money paid. Stevens v. Fitch, 11 Metc. (Mass.) 248.

[b] **An agent having money of his principal in his hands,** who pays it by mistake to a third party, may maintain an action in his own name for its recovery. Parks v. Fogleman, 97 Minn. 157, 105 NW 560, 114 AmSR 703, 4 LRANS 703.

89. Title Guarantee, etc., Co. v. Goeller, 93 N. J. Eq. 612, 117 A 831.

90. Briggs v. Lewiston, 29 Me. 472; McDermott v. Hickling, 1 OntWR 768. See Balls v. Haines, 3 Ind. 461 (holding that, where money was paid to attorneys of record, and the nominal party of record who had no knowledge of the suit never received the payment, and the judgment was reversed, an action could not be brought against such nominal party).

[a] **Action for fees paid into state treasury by officer who illegally exacted them** should be brought against state. Pacific Livestock Co. v. Cochran, 73 Or. 417, 144 P 668.

Against agent who has paid payment to him over to his principal see supra § 328.

91. In actions for money had and received see Money Received §§ 66-71.

92. See Pleading [31 Cyc 1].

93. U. S.—Mountain Lumber Co. v. Davis, 11 F. (2d) 219 [aff 9 F. (2d) 478, and certiorari den 271 U. S. 674 mem, 46 SCt 488 mem, 70 L. ed. 1145 mem]; Lipman v. Phœnix Assur. Co., 258 Fed. 544, 169 CCA 484.

Ala.—O'Brien v. Anniston Pipe-Works, 93 Ala. 582, 9 S 415.

Cal.—Spreckels v. Gorrill, 152 Cal. 383, 92 P 1011; Allen v. Garrill, 92 P 1017; Thresher v. Lopez, 52 Cal. A. 219, 198 P 419; Bledsoe v. Stuckey, 47 Cal. A. 95, 190 P 217.

D. C.—U. S. v. Mason, 33 App. 350.

Fla.—Forbes Pioneer Boat Line v. Everglades Drain. Dist. Comrs., 77 Fla. 742, 82 S 346.

Ga.—Williams v. Stewart, 115 Ga. 864, 42 SE 256; Charleston, etc., R. Co. v. Augusta Stockyard Co., 115 Ga. 70, 41 SE 598; Camp v. Phillips, 49 Ga. 455; Daniel Bros. Co. v. Richardson, (A.) 146 SE 505.

Ill.—Alton Light, etc., Co. v. Rose, 117 Ill. A. 83.

Ind.—Brazil v. Kress, 55 Ind. 14; Parker v. Ft. Wayne First Nat. Bank, 59 Ind. A. 189, 109 NE 75; Darling v. Hines, 5 Ind. A. 319, 32 NE 109.

Iowa.—Benton v. Morningside College, 202 Iowa 15, 209 NW 516; Harbeck v. Sioux City, 199 Iowa 763, 202 NW 507.

Kan.—Logan County School Dist. No. 49 v. Community High School, 126 Kan. 51, 267 P 23; Farrar v. Perkins, 116 Kan. 374, 226 P 714.

Ky.—Supreme Council C. K. of A. v. Fenwick, 169 Ky. 269, 183 SW 906.

Minn.—Goodwin First Nat. Bank v. Marshall State Bank, 172 Minn. 571, 216 NW 231.

Mo.—American Brewing Co. v. St. Louis, 209 Mo. 600, 108 SW 1; Williams v. Carroll County, 167 Mo. 9, 66 SW 955; Missouri Pac. R. Co. v. Askew Saddlery Co., 215 Mo. A. 277, 256 SW 566; Missouri Lincoln Trust Co. v. St. Louis Third Nat. Bank, 154 Mo. A. 89, 133 SW 357; E. E. Souther Iron Co. v. Laclede Power Co., 109 Mo. A. 353, 84 SW 450.

Mont.—Kozasa v. Northern Pac. R. Co., 61 Mont. 233, 201 P 682.

Nebr.—Farmers', etc., Irr. Co. v. Brumbaugh, 81 Nebr. 641, 116 NW 512.

Nev.—Adams v. Smith, 19 Nev. 259, 9 P 337, 10 P 353.

N. Y.—Schank v. Schuchman, 212 N. Y. 352, 106 NE 127; Title Guarantee, etc., Co. v. New York, 205 N. Y. 496, 99 NE 160; Crossways Apartments Corp. v. Amante, 213 App. Div 430, 210 NYS 346; Kalbfleisch v. Anderson, 201 App. Div. 158, 194 NYS 692 [aff 235 N. Y. 505 mem, 139 NE 712 mem]; National City Bank v. Partola Mfg. Co., 191 App. Div. 424, 181 NYS 464; McGuire v. H. G. Vogel Co., 164 App. Div. 173, 149 NYS 756; Williams v. Rutherfurd Realty Co., 159 App. Div. 171, 144 NYS 357; Kurtz v. American Mills Co., 185 NYS 755; Burchell v. Culgin, 4 NYS 131.

Or.—Siverson v. Clanton, 88 Or. 261, 170 P 933, 171 P 1051.

Pa.—Mosser v. Cherry River Boom, etc., Co., 290 Pa. 67, 138 A 85; Lowenstein v. Bache, 41 Pa. Super. 552.

Tex.—Witherspoon v. Cory, (Civ. A.) 250 SW 199; Bowers v. Missouri, etc., Co., (Civ. A.) 241 SW 509; Michalke v. Brown, (Civ. A.) 185 SW 429.

W. Va.—Gardner v. Nichols, 80 W. Va. 738, 93 SE 817.

Wis.—Scheuer v. R. J. Schwab, etc., Co., 170 Wis. 630, 176 NW 75.

Can.—St. Gabriel-de-Brandon v. St. Gabriel-de-Brandon, 25 RevLegNS 118.

Que.—Northwest Employment Agency v. Putnick, 24 Que. K. B. 285.

[a] **Nonexistence of supposed facts.**—A petition for the recovery of money paid under a material mistake of fact, which does not distinctly allege the nonexistence of the supposed fact on which plaintiff relied, sets forth no cause of action and is demurrable. Charleston, etc., R. Co. v. Augusta Stockyard Co., 115 Ga. 70, 41 SE 598.

[b] **Mutuality of mistake.**—(1) Where a mistake of fact, in order to authorize recovery, must be mutual, a complaint alleging mistake on the part of plaintiff, but failing to show mistake or fraud on the part of defendant does not state a cause of action. National City Bank v. Partola Mfg. Co., 191 App. Div. 424, 181 NYS 464. (2) Necessity that mistake be mutual see supra § 320.

[c] **Performance of condition precedent.**—(1) Where demand is necessary as a condition precedent to an action for recovery back of money paid, such demand should be alleged. Norris v. Milwaukee Dock Co., 21 Wis. 130, 91 AmD 464. (2) Conditions precedent to recovery see supra § 333.

[d] **A promise to repay need not be alleged** in an action to recover money paid by mistake. Russo-Chinese Bank v. National Bank of Commerce, 187 Fed. 80, 109 CCA 398.

[e] **Pleading held sufficient.**—(1) To show fraud. Spreckels v. Gorrill, 152 Cal. 383, 92 P 1011; Scheuer v. R. J. Schwab, etc., Co., 170 Wis. 630, 176 NW 75. (2) To show duress of person. Lipman v. Phœnix Assur. Co., 258 Fed. 544, 169 CCA 484; Farrar v. Perkins, 116 Kan. 374, 226 P 714; Kalbfleisch v. Anderson, 201 App. Div. 158, 194 NYS 692 [aff 235 N. Y. 505 mem, 139 NE 712 mem]. (3) To show duress of goods. Bowers v. Missouri, etc., R. Co., (Tex. Civ. A.) 241 SW 509.

[f] **Pleading held insufficient.**—(1) To show involuntary payment. Mountain Lumber Co. v. Davis, 11 F. (2d) 219 [certiorari den 271 U. S. 674 mem, 46 SCt 488 mem, 70 L. ed. 1145 mem]. (2) To show duress. Title Guarantee, etc., Co. v. New York, 205 N. Y. 496, 99 NE 160. (3) To show fraud. Kurtz v. American Mills Co., 185 NYS 755.

94. Cal.—Applegarth v. Dean, 68 Cal. 491, 13 P 587.

Ga.—Charleston, etc., R. Co. v. Augusta Stockyard Co., 115 Ga. 70, 41 SE 598.

Ky.—Polites v. Barlin, 149 Ky. 376, 149 SW 828, 41 LRANS 1217.

N. Y.—Maloy v. Bannon, 169 App. Div. 716, 155 NYS 712.

Tex.—Shepherd State Bank v. San Jacinto County, (Civ. A.) 221 SW 324.

[a] **What constitutes sufficient certainty.**—A complain in an employee's action to recover tips paid over to his employer under a misapprehension of his rights which alleges that he received as tips an average of two dollars a week, or one hundred dollars a year, and that during five years and ten months he worked for defendant, he received altogether five hundred and seventy-five dollars, is sufficiently definite. Polites v. Barlin, 149 Ky. 376, 149 SW 828, 41 LRANS 1217.

mere conclusions.[95] Where recovery of a payment is sought by way of cross demand, the facts necessary to establish the right to recover must be alleged with the same particularity as in the case of an original demand.[96]

Plea or answer. The answer, or other pleading by way of defense, must contain allegations or denials of facts sufficient to bar recovery.[97]

[§ 336] **5. Evidence—a. Burden of Proof.** In accordance with the rules relating to the burden of proof in civil actions generally,[98] the burden is upon one seeking to recover payments made to prove the facts entitling him to recovery;[99] and the burden rests upon the party resisting recovery to show matters of affirmative defense,[1] such as ratification of the payment,[2] or that it would be inequitable to require restitution.[3] So the burden rests upon the payee to prove facts to bring the payment within the exception,[4] that no recovery of a payment may be had when the payor receives substantial benefit therefrom, or the payee may in good conscience retain it.[5]

[§ 337] **b. Presumptions.**[6] In actions to recover payments made, it will ordinarily be presumed that money belongs to him who received it, when it is voluntarily paid him,[7] and that payment was not made under duress.[8] Failure to call an available witness, possessing peculiar knowledge of essential facts, will give rise to an inference that the testimony of such witness would be unfavorable.[9] The fact that the payor had available to him means of knowledge of the facts creates no presumption

95. U. S.—Carpenter v. Southworth, 165 Fed. 428, 91 CCA 378.
Cal.—Hanford Gas, etc., Co. v. Hanford, 163 Cal. 108, 124 P 727; Lewis v. San Francisco, 2 Cal. A. 112, 82 P 1106.
Ill.—Alton Light, etc., Co. v. Rose, 117 Ill. A. 83.
Iowa.—Benton v. Morningside College, 202 Iowa 15, 209 NW 516.
Minn.—Rand v. Hennepin County, 50 Minn. 391, 52 NW 901; Kraemer v. Deusterman, 37 Minn. 469, 35 NW 276.
Mont.—Kozasa v. Northern Pac. R. Co., 61 Mont. 233, 201 P 682.
N. Y.—Kamenitsky v. Corcoran, 177 App. Div. 605, 164 NYS 297; Commercial Bank v. Rochester, 41 Barb. 341 [aff 41 N. Y. 619 note].
Wis.—Burgess v. Commercial Nat. Bank, 144 Wis. 59, 128 NW 436.
But see Holst v. Stewart, 161 Mass. 516, 518, 37 NE 755, 42 AmSR 442 (holding that a count for money had and received, with a bill of particulars, claiming cash paid "by mistake and under misapprehension of facts at the time of the conveyance," etc., is, in the absence of a motion for further particulars, sufficient on demurrer).

[a] **Allegations of "threat" and "duress" mere conclusions.**—It is not sufficient merely to characterize defendant's conduct as "threat" or to allege that the payments were made "under duress." The complaint must state facts which constitute a legal basis for the charge of compulsion or involuntary payment, so that the court can see that the pleader's conclusion of law is justified. Kamenitsky v. Corcoran, 177 App. Div. 605, 164 NYS 297.

96. Dunham v. McDonald, 34 Cal. A. 744, 168 P 1063; Tillman v. Morton, 65 Ga. 386; Bracken v. Dillon, 64 Ga. 243, 37 AmR 70; Logan County School Dist. No. 49 v. Community High School, 126 Kan. 51, 267 P 23; Maloy v. Bannon, 169 App. Div. 716, 155 NYS 712; and cases supra this note.

[a] **Allegation of mutual misunderstanding** (1) is not equivalent to an allegation of a mistake of fact. Maloy v. Bannon, 169 App. Div. 716, 155 NYS 712. (2) A pleading, by way of counterclaim, to recover money paid, alleging that it was paid under a mutual misunderstanding of the parties is insufficient, as this is not equivalent to an allegation that it was paid under a mistake of fact. Maloy v. Bannon, supra.

[b] **To show mistake of fact** a plea of set-off for money paid by defendant to plaintiff on a note, not knowing it to be without consideration, is fatally defective if it does not specify how the note was without consideration or why defendant was ignorant thereof. Tillman v. Morton, 65 Ga. 386.

Statement of cross demand generally see Pleading [31 Cyc 226].

97. New York, etc., R. Co. v. Ansonia Electrical Co., 83 Conn. 462, 76 A 1004; American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342; Priddy v. Miners' etc., Bank, 132 Mo. A. 279, 111 SW 865

[a] **Negligence in making demand for repayment,** occasioning injury to defendant should be pleaded. New York, etc., R. Co. v. Ansonia Electrical Co., 83 Conn. 462, 76 A 1004.

[b] **Frivolous allegation.**—In an action for the recovery of money paid by mistake, an allegation in the answer that the payment made was voluntary and not under duress is frivolous. Jaeger v. New York, 39 Misc. 543, 80 NYS 356.

Plea or answer generally see Pleading [31 Cyc 126].

98. See Evidence §§ 13–24.

99. U. S.—Russo-Chinese Bank v. National Bank of Commerce, 187 Fed. 80, 109 CCA 398; Barnard v. District of Columbia, 20 Ct. Cl. 257.
Ala.—Beasley v. Beasley, 206 Ala. 480, 90 S 347; Smith v. Yancey, 198 Ala. 221, 73 S 477; Wise v. Fuller, 11 Ala. A. 427, 66 S 827.
Cal.—Maxwell v. San Luis Obispo County, 71 Cal. 466, 12 P 484; Kohler v. Wells, 26 Cal. 606.
Ida.—Nez Perce County v. Woelflen, 270 P 617.
Ill.—Koenig v. Peoples Gas Light, etc., Co., 153 Ill. A. 432.
Ind.—Stanley v. Dunn, 143 Ind. 495, 42 NE 908.
Iowa.—Thompson v. Burnsmeyer, 171 NW 584; McCord v. Mitchell, 182 Iowa 196, 165 NW 453; Conn v. Converse, 164 Iowa 604, 146 NW 49; Gibbs v. Farmers', etc., State Bank, 123 Iowa 736, 99 NW 703; Murphy v. Creighton, 45 Iowa 179.
La.—Urquhart v. Gove, 4 Rob. 207.
Mo.—American Brewing Co. v. St. Louis, 209 Mo. 600, 108 SW 1.
Nebr.—Merchants'-Mechanics' First Nat. Bank v. Cavers El. Co., 105 Nebr. 321, 180 NW 588.
N. Y.—Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153, 113 AmSR 909, 13 LRANS 273; Mayer v. New York, 63 N. Y. 455; Briggs v. Boyd, 56 N. Y. 289; Payne v. Witherbee, 132 App. Div. 579, 117 NYS 15 [mod on other grounds 200 N. Y. 572 mem, 93 NE 954 mem]; Buck v. Houghtaling, 110 App. Div. 52, 96 NYS 1034; Davis Provision Co. v. Fowler Bros., Ltd., 20 App. Div. 626 mem, 47 NYS 205 [aff 163 N. Y. 580 mem, 57 NE 1108 mem]; Wyman v. Farnsworth, 3 Barb. 369; Taylor v. Beavers, 4 E. D. Smith 215; Gibbons v. Perkins, 132 Misc. 583, 230 NYS 273; Murphy v. Knickerbocker Ice Co., 22 Misc. 360, 49 NYS 279; Normandy Waist Co., Inc. v. Palmer, 176 NYS 465; Bodner v. Crecco, 119 NYS 223; Moran v. Brown, 113 NYS 1038.
Pa.—Ward v. McCue, 31 PittsbLegJ 160.
R. I.—Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805; Phetteplace v. Bucklin, 18 R. I. 297, 27 A 211.
Tenn.—Yowell v. Union Central L. Ins. Co., 141 Tenn. 70, 206 SW 334.
Wash.—Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65; Johnson v. Mann, 72 Wash. 651, 131 P 213.
W. Va.—Gardner v. Nichols, 80 W. Va. 738, 93 SE 817.
Sask.—Garden River v. Montreuil, [1928] 3 WestWkly 22; Godin v. Briggs, 29 RevLegNS 290.

[a] **Fraud.**—Moran v. Brown, 113 NYS 1038.

[b] **Promise to repay.**—In an action to recover money paid under mistake of fact it is not necessary to prove consideration for a promise made by defendant to repay, as the law presumes a promise to repay. Russo-Chinese Bank v. National Bank of Commerce, 187 Fed. 80, 109 CCA 398; Normandy Waist Co. v. Palmer, 176 NYS 465.

1. Brown v. Worthington, 162 Mo. A. 508, 142 SW 1082; Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153, 113 AmSR 909, 13 LRANS 273; Payne v. Witherbee, 132 App. Div. 579, 117 NYS 15 [mod on other grounds 200 N. Y. 572 mem, 93 NE 954 mem]; Gibbons v. Perkins, 132 Misc. 583, 230 NYS 273; Schoellhamer v. Rometsch, 26 Or. 394, 38 P 344; Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805.

2. Brown v. Worthington, 162 Mo. A. 508, 142 SW 1082; Schoellhamer v. Rometsch, 26 Or. 394, 38 P 344.

3. Payne v. Witherbee, 132 App. Div. 579, 117 NYS 15 [mod on other grounds 200 N. Y. 572 mem, 93 NE 954 mem]; Gibbons v. Perkins, 132 Misc. 583, 230 NYS 273; Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805.

4. See supra § 318.

5. Merchants'-Mechanics' First Nat. Bank v. Cavers El. Co., 105 Nebr. 321, 180 NW 588; Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153, 113 AmSR 909, 13 LRANS 273; Mayer v. New York, 63 N. Y. 455; Payne v. Witherbee, 132 App. Div. 579, 117 NYS 15 [mod on other grounds 200 N. Y. 572 mem, 93 NE 954 mem]; Davis Provision Co. v. Fowler Bros., Ltd., 20 App. Div. 626 mem, 47 NYS 205 [aff 163 N. Y. 580 mem, 57 NE 1108 mem]; Gibbons v. Perkins, 132 Misc. 583, 230 NYS 273; Hatton v. Howard Braiding Co., 47 R. I. 47, 129 A 805; Phetteplace v. Bucklin, 18 R. I. 297, 27 A 211. But see Lark Equity Exch. v. Jones, 42 N. D. 145, 171 NW 863 (holding that to entitle a plaintiff to recover moneys paid under mistake, he must not only prove that he has paid the money without receiving the equivalent contemplated by him, but he must also show that defendant has acted inequitably and against conscience).

6. In civil actions generally see Evidence 22 C. J. p 1.

Presumptions arising from facts proved see Evidence §§ 25–48.

7. Mulready v. Shelton, 140 Wash. 233, 248 P 416.

8. Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

[a] **Presumption that payment was not made under duress does not prevail** where payment is induced by threats made in bad faith to cause prosecution on an unfounded criminal charge. Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

9. Sisenwein v. Workman, 161 NYS 298.

against him, but is a circumstance to be considered in determining whether there was in fact a want of knowledge.[10]

[§ 338] **c. Admissibility, Weight, and Sufficiency.** The general rules relating to the competency, relevancy, and materiality of evidence,[11] and its weight and sufficiency,[12] in civil actions are applicable in actions for the recovery of payments made.

[§ 339] **6. Trial—a. Province of Court and Jury.** In an action to recover money paid, as in other civil

Presumption arising from failure to call or examine witnesses generally see Evidence § 56.

10. Young v. Lehman, 63 Ala. 519; Stotsenburg v. Fordice, 142 Ind. 490, 41 NE 313, 810; Brown v. College Corner, etc., Gravel Road Co., 56 Ind. 110.

11. See cases infra this note.

[a] **Evidence held admissible to show:** (1) Duress. American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342 (threats to child communicated to parent from whom money was obtained); Welch v. Beeching, 193 Mich. 338, 159 NW 486 (environment of person subjected); Fargusson v. Winslow, 34 Minn. 384, 25 NW 942 (importance of speedily obtaining possession of goods detained); Dale v. Simon, (Tex. Civ. A.) 248 SW 703 [aff (Commn. A.) 267 SW 467] (oral testimony of subject matter of contracts entered into in reliance on oil lease, as reason for making payment not due on lease). (2) Fraud. Richardson v. Gilson, 55 N. H. 623 (the contract between the parties, in a suit to recover amount paid in settlement of pretended claim); Smith v. Sayre Nat. Bank, 59 Pa. Super. 272 (false representations inducing mistake); Ryan v. Dowell, 86 Wash. 76, 149 P 343 (duplicate copies of receipts fraudulently obtained); Roesler v. Shastri, 168 Wis. 153, 169 NW 282 (injurious effect of medical treatment as to which alleged false representations were made, although lack of benefit admitted). (3) Mistake. Smith v. Yancey, 198 Ala. 221, 73 S 477 (true consideration of note, to aid in computing interest); Wise v. Fuller, 11 Ala. A. 427, 66 S 827 (that the witness kept the book containing an account between plaintiff and defendant and was present when the account was examined and its correctness agreed to by defendant); Burckard v. Smith, 80 Cal. A. 104, 251 P 663 (letter showing mistake had been made in credit, and that money sued for was property of plaintiff's assignor); Logan v. Sumter, 28 Ga. 242, 73 AmD 755 (exemplification of judgment and execution to show payment thereof); Pine Belt Lumber Co. v. Morrison, 13 Ga. A. 453, 79 SE 363 (transactions between the parties and how mistake came to be made); Stowell v. Ames, 148 Mich. 439, 111 NW 1070 (supposition of party that he was buying a whole crop of wheat, and not a half interest therein); Kessler v. Herklotz, 190 N. Y. 24, 82 NE 739 (telegram instructing payment); Rauch v. Scholl, 68 Pa. 234 (value of unquarried stone where price agreed to be paid for stone quarried and delivered is in dispute). See West Frankfort Bank, etc., Co. v. Baretti, 206 Ill. A. 261. (4) Overpayment. Konz v. Henson, (Tex. Civ. A.) 156 SW 593 (payment for plaintiff's benefit by third person). (5) Right to retain payment. New York v. Erben, 23 N. Y. Super. 189, 24 HowPr 358 [aff 38 N. Y. 305, 3 Abb. Dec. 255, 7 Transcr. A. 270] (facts showing that defendant was misled and lulled into silence until after the period when he could correct the mistake, and only received what in equity and good conscience he was entitled to). (6) Failure of consideration. Beier v. Spaulding, 92 Hun 388, 36 NYS 1056 (interview between plaintiff and defendant's agent, and representations of agent). (7) Irrevocable change of payee's position. New York Bank v. Simmons, 117 Misc. 103, 190 NYS 602 (that second payee to whom fund was paid as result of original mistake was out of county and there could be no recovery from him).

[b] **Evidence held inadmissible to show:** (1) Duress. Jett v. Jett, 171 Ky. 548, 188 SW 669 (testimony to prove slanderous words spoken, in action to recover money alleged to have been paid under threat to sue for slander). (2) Fraud. Gilliam v. Alford, 69 Tex. 267, 6 SW 757 (that parties making settlement were in need of money to prevent sale of property under lien). (3) Mistake. H. F. Dangberg Land, etc., Co. v. Day, 247 Fed. 477, 159 CCA 531 (statement not made in presence of defendant that a carbon copy was a copy of the original contract); George v. Thompson, 52 App. (D. C.) 168, 285 Fed. 902 (that husband did not know terms of wife's contract upon which he made payment for her convenience); McRae Oil, etc., Co. v. Stone, 119 Ga. 516, 46 SE 668 (that vendor of cotton seed, where mistake of weight was alleged, did not consent that it should be reweighed); Wilson v. Storm, 164 Ill. A. 13 (negotiations preceding a trade of land, and value of the land involved); Eslow v. Albion, 153 Mich. 720, 117 NW 328, 22 LRANS 872 (receipt, agreement, and protest relative to payment of previous license). (4) Freedom from mistake. Gardner v. Nichols, 80 W. Va. 738, 93 SE 817 (purpose of issuance of warrant claimed to have been paid by mistake).

[c] **Cross-examination.**—(1) Wife who testified that she was compelled by threats and duress to pay a debt that she claimed she was not under legal obligation to pay may be asked on cross-examination whether she had not admitted that the debt was her own, and that she always intended to pay it. Stanley v. Dunn, 143 Ind. 495, 42 NE 908. (2) It is error, in an action to recover an overpayment, to allow an agent, to whom a payment had been made and who had carried it without paying it over, to be cross-examined as to his financial standing. Ryan v. Conway, 93 Iowa 513, 61 NW 924.

[d] **Account books.**—(1) In an action to recover overpayment, account books could be introduced in evidence only on complying with statute, and showing correctness thereof, but witness could refresh his recollection from such books within the rule. Thompson v. Burnsmeyer, (Iowa) 171 NW 584. (2) Defendant cannot introduce his own cash book, in corroboration of his testimony to show the amount received by him. Townsend Bank v. Whitney, 3 Allen (Mass.) 454.

[e] **Evidence in support of ground of recovery not alleged.**—Where a mistake was made in settling an account, it cannot be shown in absence of pleading alleging the mistake. Third St. Impr. Co. v. McLelland, 23 Cal. A. 369, 137 P 1089.

Competency, relevancy, and materiality of evidence generally see Evidence §§ 89-162.

12. See cases infra this note.

[a] **Evidence held sufficient.**—(1) To show voluntary payment. Keeley v. Pope, 160 Ill. A. 492; Schlensker v. State, (Ind. A.) 161 NE 643; Hayes v. Lamond, (Me.) 84 A 411; Ferguson-McKinney Dry Goods Co. v. Beuckman, 198 Mo. A. 41, 198 SW 504; Rising v. Tollerud, 34 N. D. 88, 157 NW 696; Southern Oregon Co. v. Gage, 100 Or. 424, 197 P 276. (2) To show duress of person. Quinn v. U. S. Fidelity, etc., Co., 163 Minn. 320, 204 NW 156. (3) To show duress of property. Atchison, etc., R. Co. v. West, 176 Cal. 148, 167 P 868; Pittsburgh Steel Co. v. Hollingshead, 202 Ill. A. 177; Manhattan Milling Co. v. Manhattan Gas, etc., Co., 115 Kan. 712, 225 P 86; Call v. Terminal Supply Co., 171 Minn. 274, 213 NW 917; Huggins v. Hill, (Mo. A.) 245 SW 1105; Glass v. Hoffmeister, 141 NYS 482; Hubbard v. Jones, 103 Okl. 276, 229 P 516; Dale v. Simon, (Tex. Commn. A.) 267 SW 467 [aff (Civ. A.) 248 SW 703]; Sanborn v. Babcock, 33 Wis. 400. (4) To show fraud. McCord v. Mitchell, 182 Iowa 196, 165 NW 453; Call v. Terminal Supply Co., 171 Minn. 274, 213 NW 917; Scandinavian American Bank v. Puget Sound Mach. Depot, 79 Wash. 599, 140 P 901; Roesler v. Shastri, 168 Wis. 153, 169 NW 282. (5) To show mistake. Neitzey v. District of Columbia, 17 Ct. Cl. 111; Martin v. Wells, 3 Ariz. 57, 20 P 673; Atchison, etc., R. Co. v. West, 176 Cal. 148, 167 P 868; Sheppard v. Lang, 122 Ga. 607, 50 SE 371; Schlapkohl v. Schlapkohl, 194 Iowa 330, 189 NW 734; Nothem v. Londergan, 157 Iowa 146, 137 NW 927; Levy v. Nelson, 212 Ky. 444, 279 SW 620; Missouri Pac. R. Co. v. Askew Saddlery Co., 215 Mo. A. 277, 256 SW 566; Ruskaup v. Brinkman, (Mo. A.) 195 SW 1048; Jones v. Miners, etc., Bank, 144 Mo. A. 428, 128 SW 829; Whiting v. Rochester City Bank, 77 N. Y. 363; Moran v. Brown, 113 NYS 1038; Dieckerhoff v. Alder, 39 NYS 599 [aff 158 N. Y. 689 mem, 53 NE 1124 mem]; Stair v. Marquart, 45 N. D. 384, 178 NW 121; Haubert v. Navajo Refining Co., 129 Okl. 195, 264 P 151; Park Addition Co. v. Sawyer, 117 Okl. 141, 245 P 829; Smith v. Sayre Nat. Bank, 59 Pa. Super. 272; Wood v. Humble Oil, etc., Co., (Tex. Civ. A.) 268 SW 981; Witherspoon v. Cory, (Tex. Civ. A.) 250 SW 199; Michalke v. Brown, (Tex. Civ. A.) 185 SW 429. (6) To show either mistake or fraud. Stewart v. Kindel, 15 Colo. 539, 25 P 990; Tucker v. Denton, 106 SW 280, 32 KyL 521, 15 LRANS 289; Norton v. Bohart, 105 Mo. 615, 16 SW 598; Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Michaelson v. Babb, 15 OntWN 86; Connick v. Carmichael, 17 Sask. L. 560, [1923] 4 DomLR 994, [1923] 3 WestWkly 1244. (7) To show overpayment. Burckard v. Smith, 80 Cal. A. 104, 251 P 663; Lucas v. Case, 150 Minn. 45, 184 NW 837; Roam v. Crocker State Bank, (Mo. A.) 206 SW 585; North Pac. Trading, etc., Co. v. Mar Dong, 148 Wash. 509, 269 P 833. (8) To show agreement to repay. Rodgers v. Wittenmyer, 88 Cal. 553, 26 P 369. (9) To show change of payee's status. Atlantic Coast Line R. Co. v. Schirmer, 87 S. C. 309, 69 SE 439.

[b] **Evidence held insufficient:** (1) To show voluntary payment. Glass v. Hoffmeister, 141 NYS 482. (2) To show duress of person. Flynt v. J. Waterman Co., 123 Me. 320, 122 A 862; Campbell v. Chabot, 115 Me. 247, 98 A 746; Ottenwess v. Simkins, (Mich.) 222 NW 742; Marcellus v. Wright, 65 Mont. 580, 212 P 299; Brush v. Helena, 54 Mont. 254, 169 P 285. (3) To show duress of property. Flinn v. Mechanics' Bldg. Assoc., 93 Mo. A. 444, 67 SW 729; Karschner v. Latimer, 108 Nebr. 32, 187 NW 83. (4) To show fraud. Nez Perce County v. Woelflen, (Ida.) 270 P 617. (5) To show mistake. Leavitt v. Leighton, 219 Mass. 183, 106 NE 634; Farmers', etc., Irr. Co. v. Brumbaugh, 81 Nebr. 641, 116 NW 512; Kessler v. Herklotz, 190 N. Y. 24, 82 NE 739; James River Nat. Bank v. Weber, 19 N. D. 702, 124 NW 952. (6) To show overpayment. Campbell v. Collins, 152 Iowa 608, 132 NW 381; Gibbs v. Farmers', etc., State Bank, 123 Iowa 736, 99 NW 703; Fish v. Martin, 132 NYS 783; Willis v. Wilbur, 22 S. C.

actions,[13] questions of fact are for the jury.[14] Thus it is for the jury to determine, where the evidence is conflicting, whether the payment was made under duress,[15] was voluntary or involuntary,[16] was induced by fraud,[17] or was made under a mistake of fact,[18] or whether there was an overpayment.[19] Similarly, whether the facts disclose a ratification of the payment,[20] an estoppel,[21] or a waiver of the right to assert that a payment was made under such circumstances as will permit of its recovery,[22] is likewise to be determined by the jury upon conflicting evidence.

Where the facts are undisputed, however, the question as to whether the payment may be recovered is one of law.[23]

[§ 340] **b. Instructions.** As in other civil actions,[24] the instructions in actions for the recovery of payments made must clearly state the law of the case,[25] must be applicable to the issues,[26] and not misleading.[27] Requested instructions stating correct propositions of law should be given by the court where justified by the evidence,[28] unless fully and fairly covered by instructions already given.[29]

[§ 341] **c. Verdict and Findings.** The general rules as to verdicts and findings in civil actions[30] apply in actions to recover money paid.[31] A finding of facts insufficient to show the nature of a payment cannot be aided by a statement therein, by way of conclusion, that it was involuntary.[32] A finding that a payment was voluntary will not support a conclusion that it was made under a mistake of law, since it might have been induced by mistake of fact.[33]

Conclusiveness. Where there is conflict in the

L. 243. (7) To show promise to repay. Whitney v. Bertoglio Mercantile Co., 65 Mont. 358, 211 P 323.

Weight and sufficiency of evidence generally see Evidence §§ 1730–1806.

13. See Trial [38 Cyc 1511].

14. See cases infra notes 15–22.

15. Ill.—Pemberton v. Williams, 87 Ill. 15.

Ky.—Jett v. Jett, 171 Ky. 548, 188 SW 669.

Md.—Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278.

Mich.—Welch v. Beeching, 193 Mich. 338, 159 NW 486; Nelson v. Leszczynski-Clark Co., 177 Mich. 517, 143 NW 606; Cribbs v. Sowle, 87 Mich. 340, 49 NW 587, 24 AmSR 166.

Mo.—Link v. Aiple-Hemmelmann Real Est. Co., 182 Mo. A. 531, 165 SW 832; Brown v. Worthington, 162 Mo. A. 508, 142 SW 1082.

Mont.—Clifford v. Great Falls Gas Co., 68 Mont. 300, 216 P 1114.

N. Y.—Spanier v. Lazar, 124 Misc. 551, 208 NYS 458.

Wash.—Bertschinger v. Campbell, 99 Wash. 142, 168 P 977, LRA1918C 65.

Wis.—Coon v. Metzler, 161 Wis. 328, 154 NW 377, LRA1916B 667; Wooley v. Chicago, etc., R. Co., 150 Wis. 183, 136 NW 616.

[a] **Question of law and fact distinguished.**—What constitutes duress is wholly a matter of law. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly a matter of fact, although the means may be so oppressive as to render the result an inference of law. Wooley v. Chicago, etc., R. Co., 150 Wis. 183, 136 NW 616.

[b] **Whether statement was threat or mere warning.**—In an action to recover money paid to the creditor who called debtor's attention to his violation of a criminal statute, it is for the jury to determine whether the statement was made to compel payment of the debt or was merely to call debtor's attention to the fact that he was liable to prosecution. Clifford v. Great Falls Gas Co., 68 Mont. 300, 216 P 1114.

16. Ewing v. Peck, 26 Ala. 413; Smith v. Sayre Nat. Bank, 53 Pa. Super. 368.

17. Tuscaloosa County v. Foster, 132 Ala. 392, 31 S 587; Roesler v. Shastri, 168 Wis. 153, 169 NW 282.

[a] **Whether representations were an expression of opinion or fraudulent statement of facts** is a question for the jury. Tuscaloosa County v. Foster, 132 Ala. 392, 31 S 587.

18. Blackwood v. Rutherford, 212 Ala. 630, 103 S 689; Beasley v. Beasley, 206 Ala. 480, 90 S 347 [cit Cyc]; Bertig Mercantile Co. v. Williams, (Mo. A.) 286 SW 150; Strong v. Oldsmobile Co., 96 Vt. 355, 120 A 100.

19. Cazenove v. Cutler, 4 Metc. (Mass.) 246.

20. Brown v. Worthington, 162 Mo. A. 508, 142 SW 1082.

21. Jones v. Sherwood Distilling Co., 150 Md. 24, 132 A 278.

22. Wooley v. Chicago, etc., R. Co., 150 Wis. 183, 136 NW 616.

23. Merrill v. Gordon, 15 Ariz 521, 140 P 496; Eslow v. Albion, 153 Mich. 720, 117 NW 328, 22 LRANS 872; Betts v. Reading, 93 Mich. 77, 52 NW 940.

24. See Trial [38 Cyc 1594].

25. Ala.—Blackwood v. Rutherford, 212 Ala. 630, 103 S 689.

Ark.—Williford v. Eason, 110 Ark. 303, 161 SW 498.

Ill.—Tyler v. Goddard, 207 Ill. A. 526; Koenig v. Peoples Gas Light, etc., Co., 153 Ill. A. 432.

Iowa.—Fidelity Sav. Bank v. Reeder, 142 Iowa 373, 120 NW 1029.

Mich.—McCabe v. Shaver, 69 Mich. 25, 36 NW 800.

N. Y.—Dieckerhoff v. Alder, 12 Misc. 445, 33 NYS 698.

Vt.—Johnson v. Cate, 77 Vt. 218, 59 A 830.

[a] **In an action by a wife to recover her money paid by her husband under duress** in settlement of an alleged cause of an action against him for slander, instructions were held correct which told the jury, in substance, that if they believed from the evidence that the defendants, either or both of them, by threats or violence, by duress or by putting him in fear, compelled plaintiff's husband to sign and deliver to them a check for one thousand two hundred and fifty dollars, and that defendants received the money thereon; and if they should further believe from the evidence that the money was the property of plaintiff, they should find for her against the defendants in the sum of one thousand two hundred and fifty dollars, with interest, and unless the jury so believed, they should find for defendants; and further if the jury believed from the evidence that the defendants obtained the money sued for in the manner described, and further believed from the evidence that the money, or any part thereof was the money of the plaintiff, then they should find for her in an amount equal to so much of the fund as they might believe from the evidence, if any, was the money of plaintiff, not exceeding the amount sued for and interest. Jett v. Jett, 171 Ky. 548, 188 SW 669.

[b] **In an action to recover money paid to prevent sale of land.**—Plaintiff's attorney having paid certain notes for him, which were secured by deed of trust on his homestead, had them indorsed by the holder in blank, and, without the knowledge or consent of plaintiff, sold them to defendant and appropriated the proceeds to his own use. Plaintiff in order to prevent defendant selling the property under foreclosure of the deed of trust paid the amount of the notes and then brought suit to recover on the theory that it was paid under duress. An instruction, that if defendant bought the notes in question after maturity, and they were sold by the attorney without plaintiff's knowledge or authority, and plaintiff on demand having refused to pay the notes, defendant advertised the property for sale under deed of trust, and that in order to prevent the sale of the land under the deed of trust plaintiff paid the notes a second time, then he was entitled to recover is erroneous. Link v. Aiple-Hemmelmann Real Est. Co., 182 Mo. A. 531, 165 SW 832.

26. Fidelity Sav. Bank v. Reeder, 142 Iowa 373, 120 NW 1029; Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216; American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342.

[a] **An instruction that plaintiff could recover the whole amount claimed or nothing** is erroneous, where there was evidence under which he might have recovered part of the demand, although he failed as to the remainder. Cain v. Vogt, 138 Iowa 631, 116 NW 786, 128 AmSR 216.

[b] **Fraud.**—Instruction permitting recovery if money was obtained by fraud or duress is improper where there was no allegation or evidence of fraud. American R. Express Co. v. Hicks, 198 Ky. 549, 249 SW 342.

27. Stewart v. Kindel, 15 Colo. 539, 25 P 990; Tyler v. Goddard, 207 Ill. A. 526; Gwinn v. Crawford, 42 Iowa 63; Schultz v. Culbertson, 46 Wis. 313, 1 NW 19.

28. Blackwood v. Rutherford, 212 Ala. 630, 103 S 689; Russell v. Richard, 6 Ala. A. 73, 60 S 411; Devine v. Meramec Portland Cement, etc., Co., (Mo. A.) 253 SW 444.

[a] **In an action to recover money paid to defendant through the latter's fraud,** it is the court's duty, in leaving the question of fraud to the jury, to explain to them what they can consider in determining it, and what will constitute such fraud as will authorize the relief. Klein v. Bayer, 81 Mich. 233, 45 NW 991.

29. Hablichtel v. Yambert, 75 Iowa 539, 39 NW 877.

[a] **Illustration.**—Where plaintiff sued to recover money which he claimed he had paid under duress, and where the court charged that he could recover only in case he proved that he was compelled by duress to pay a debt he did not owe, or if in a settlement defendants misrepresented the amount of such indebtedness and caused an overpayment to be made, the refusal of a charge on voluntary payment was held not error,—the charge given fairly presenting the issues which were determined by the jury. Nelson v. Leszczynski-Clark Co., 177 Mich. 517, 143 NW 606.

30. See Trial [38 Cyc 1907].

31. See cases infra notes 32–36.

32. Harrison Tp. v. Addison, 176 Ind. 389, 96 NE 146.

33. St. Louis Southwestern R. Co. v. White, (Tex. Civ. A.) 211 SW 315.

evidence,[34] a finding of a trial court has the weight of a special finding of a jury,[35] and will not be disturbed unless against clear preponderance of the evidence.[36]

***PAYMENT INTO COURT.**[1] The act of depositing property with an officer of the court for safekeeping, pending litigation;[2] for example, until a question as to the person entitled to its possession is determined;[3] a deposit of money in court.[4] Payment of money into court may be an acknowledgment of the right of action to the amount of the sum brought in;[5] but beyond that it acknowledges nothing.[6] The payment does not waive the benefit of any defense,[7] even to the whole cause of action.[8]

PAY ROLL. A roll or list of persons entitled to payment, with the amounts due.[9]

P. C. An abbreviation for "Pleas of the Crown;" sometimes also for "Privy Council," "Parliamentary Cases," "Patent Cases," "Practice Cases," "Penal Code," or "Political Code."[10]

PD. An abbreviation for paid.[11]

PEACE.[12] [§ 1] **A. In General.** The tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members;[13] the tranquillity enjoyed by a political society internally by the good order which reigns among its members.[14] It is the natural right of all persons in a political society.[15]

In its legal signification, quiet, orderly behavior of individuals to one another and toward the government;[16] public quiet, order, and security;[17] public tranquillity and obedience to law.[18] Hence, that public order and security which is commanded by the laws of a particular sovereign, lord, or superior, and hence, analogously, of the peace established by any laws.[19]

In a technical sense, as applied to the internal regulations of a nation, not merely a state of repose or security as opposed to one of violence or warfare, but likewise a state of public order and decorum;[20] the quiet, security, good order, and decorum which is guaranteed by the constitution of civil society and by the law.[21]

Phrases: "Against the peace and contrary to the statute,"[22] "against the peace and dignity of the State,"[23] "contrary to the laws of the State, the good order, peace, and dignity thereof,"[24] "necessary for the peace, good order, health and safety of the town,"[25] "peace and quiet,"[26] "peace and quietude,"[27] "peace, health, and safety;"[28] also, "ten days after peace is made."[29]

[§ 2] **B. In the British Dominions.** A quiet and harmless behavior towards the king and his people.[30]

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34. Arsenal Garage Co. v. Fraley, 84 Pa. Super. 7.

35. Rising v. Tollerud, 34 N. D. 88, 157 NW 696.

36. Rising v. Tollerud, supra.

1. Payment see ante p 577

2. Morgan v. Willman, (Mo.) 1 SW (2d) 193, 202. See Holmes v. Kansas City, 209 Mo. 513, 108 SW 9, 14, 1134, 123 AmSR 495; St. Louis, etc., R. Co. v. Fowler, 113 Mo. 458, 20 SW 1069, 1073.

3. Rapalje & L. L. D. [quot Morgan v. Willman, (Mo.) 1 SW (2d) 193, 202]. See also Depositaries 18 C. J. p 560.

[a] **"Paid into court."**—Warren v. Matthews, 96 Ala. 183, 187, 11 S 285. And see Paid 46 C. J. p 1168.

4. See Deposits in Court § 1.

5. Elliott v. Lycoming County Mut. Ins. Co., 66 Pa. 22, 5 AmR 323, 326; Baltimore, etc., R. Co. v. Veltri, 37 Pa. Super. 399, 404.

[a] **In effect** it is an admission of an indebtedness to the extent of the payment; a satisfaction of the debt to the extent of the amount paid. Orth v. Zion's Co-op. Mercantile Inst., 5 Utah 419, 422, 16 P 590.

[b] **When the declaration is on a special contract,** it admits a contract so far as to supersede the necessity of proving it at the trial. Elliott v. Lycoming County Mut. Ins. Co., 66 Pa. 22, 5 AmR 323, 326.

6. Hall v. Blackburn, 173 Pa. 310, 313, 34 A 18; Elliott v. Lycoming County Mut. Ins. Co., 66 Pa. 22, 5 AmR 323, 326; Baltimore, etc., R. Co. v. Veltri, 37 Pa. Super. 399, 404.

7. Elliott v. Lycoming County Mut. Ins. Co., 66 Pa. 22, 5 AmR 323, 326.

8. In re Wilkinsburg Borough School Dist., 247 Pa. 449, 93 A 489; Elliott v. Lycoming County Mut. Ins. Co., 66 Pa. 22, 5 AmR 323, 326; Baltimore, etc., R. Co. v. Veltri, 37 Pa. Super. 399, 404. See also Pleading 49 C. J.; Tender [38 Cyc 162, 163].

9. Webster New Int. D.

[a] **Signing pay roll** as constituting a receipt and a release of a right of action see Hahs v. Cape Girardeau, etc., R. Co., 147 Mo. A. 262, 126 SW 524, 526.

10. Black L. D.

11. Ankeny v. Albright, 20 Pa. 157, 158.

"Paid" see 46 C. J. p 1168.

12. Peace:

Bill of see Bill of Peace 7 C. J. p 1180.

Breach of see Breach of the Peace 9 C. J. p 385.

Conclusion against the peace, etc. see Indictments and Informations §§ 102–104.

Conservator of see Conservator of the Peace 12 C. J. p 522.

Homicide committed in preserving see Homicide §§ 190–204.

Justices of see Justices of the Peace 35 C. J. p 435.

Officer see Peace Officer post p 776; Sheriffs and Constables [35 Cyc 1455].

Riot as a disturbance of see Riot [34 Cyc 1771].

Treaties of see War [40 Cyc 393].

13. Neola v. Reichart, 131 Iowa 492, 494, 109 NW 5; Delk v. Com., 166 Ky. 39, 44, 178 SW 1129, 1131, 1132, LRA1916B 1117, AnnCas1917C 884; Peo. v. Rounds, 67 Mich. 482, 485, 35 NW 77; Davis v. Burgess, 54 Mich. 514, 517, 20 NW 540, 542, 52 AmR 828; Louisiana v. Bottoms, (Mo. A.) 300 SW 316, 317 [cit C. J.]; Miles v. State, 30 Okl. Cr. 302, 236 P 57, 59, 44 ALR 129; Stewart v. State, 4 Okl. Cr. 564, 109 P 243, 245, 32 LRANS 505; State v. White, 18 R. I. 473, 478, 28 A 968; State v. Reichman, 135 Tenn. 685, 188 SW 597, 601; State v. Dean, 98 W. Va. 88, 126 SE 411, 412 [cit C. J.]; State v. Long, 88 W. Va. 669, 108 SE 279, 285 [cit C. J.]. See Peo. v. Ruiz, 29 Porto Rico 68, 71. And see Breach of the Peace § 1 text and note 4.

"Tranquillity" see [38 Cyc 937].

14. State v. Brooks, 146 La. 325, 83 S 637, 639.

15. Neola v. Reichart, 131 Iowa 492, 109 NW 5, 6; Peo. v. Rounds, 67 Mich. 482, 485, 35 NW 77, 79; Davis v. Burgess, 54 Mich. 514, 517, 20 NW 540, 542, 52 AmR 828; Louisiana v. Bottoms, (Mo. A.) 300 SW 316, 317; Miles v. State, 30 Okl. Cr. 302, 236 P 57, 59, 44 ALR 129; Stewart v. State, 4 Okl. Cr. 564, 109 P 243, 245, 32 LRANS 505.

16. Abbott L. D.; Burrill L. D. [both quot Corvallis v. Carlile, 10 Or. 139, 142, 45 AmR 134]; State v. Brooks, 146 La. 325, 83 S 637, 639 [quot Cyc].

17. Webster New Int. D. [quot Weakley v. State, 168 Ark. 1087, 1096, 273 SW 374].

18. Webster New Int. D. [quot Weakley v. State, supra].

19. Webster New Int. D. [quot Weakley v. State, supra].

20. Bouvier L. D. [quot Rex v. Magee, 17 Sask. L. 501, 503, 40 CanCrCas 10, [1923] 3 WestWkly 55].

21. Black L. D. [quot State v. Brooks, 146 La. 325, 83 S 637, 639].

"Decorum" see 18 C. J. p 31.

"Good order" see Good 28 C. J. p 719 text and note 20.

"Security" see [35 Cyc 1284].

22. State v. Tibbetts, 86 Me. 189, 191, 29 A 979 (equivalent to "unlawfully").

23. Miles v. State, 30 Okl. Cr. 302, 236 P 57, 59, 44 ALR 129.

24. Hardin v. State, 106 Ga. 384, 387, 32 SE 365, 71 AmSR 269 (said to be equivalent to the English usage "against the peace of our Lord the King").

25. Cochran v. Frostburg, 81 Md. 54, 61, 31 A 703, 48 AmSR 479, 27 LRA 728.

26. State v. Brooks, 146 La. 325, 83 S 637, 639.

[a] **Having traits of "peace and quiet"** is equivalent to "law-abiding." State v. Lindsey, (Mo.) 7 SW (2d) 253, 254.

27. Weakley v. State, 168 Ark. 1087, 1096, 273 SW 374.

28. State v. Clausen, 85 Wash. 260, 274, 148 P 28, AnnCas1916B 810 (coordinate words referring to perils which may beset the state or its citizens).

29. Chapman v. Wacaser, 64 N. C. 532, 533.

30. Stroud Jud. D. [quot Rex v. Magee, 17 Sask. L. 501, 503, 40 CanCr Cas 10, [1923] 3 WestWkly 55].

[a] **"Peace, order and good government of Canada"** see Re Board of Commerce Act, etc., 60 Can. S. C. 456, 54 DomLR 354, 365, [1920] 3 West Wkly 658; John Deere Plow Co. v. Wharton, (Can.) 18 DomLR 353, 359, 29 WestLR 917, 7 WestWkly 635, 706.

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*By WILLIAM QUINBY DEFUNIAK (Payment into Court—Penalties inclusive except the Spanish words and phrases).

"The King's Peace" is the legal name of the normal state of society.[31]

"The Peace" is the king's peace in its widest sense; the general peace and order of the realm as provided for by law.[32]

[§ 3] **C. Public Peace.**[33] A condition of order that conforms to the requirements of the laws;[34] public tranquillity[35] and that quiet, order, and freedom from agitation or disturbance which is guaranteed by the laws;[36] that invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted;[37] that sense of security and tranquillity so necessary to one's comfort, which every person feels under the protection of the law.[38]

In the British dominions, it may be taken as equivalent to "the King's Peace" in its broader and later signification.[39]

[§ 4] **D. Time of Peace.** When the courts of justice are open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all.[40] In contradistinction to time of war, it means not a mere cessation of hostilities, but peace in the complete sense, officially declared.[41]

PEACEABLE.[42] A word which is broad and flexible in meaning, and takes on color from the facts.[43] Being in or at peace;[44] free from, or not disposed to, war, disorder, or excitement;[45] not quarrelsome;[46] peaceful;[47] quiet.[48]

Peaceable entry.[49] An entry not opposed by the person claiming the premises;[50] an intrusion, although peaceable, on another's actual possession.[51]

Peaceable occupation.[52] An occupation commenced without threats or force, and continued without any attempt being made to interrupt it.[53]

Peaceable possession.[54] A possession acquiesced in by all others, including rival claimants, and which need not be maintained by force or threats;[55] possession continuous and not interrupted by adverse suit to recover the estate;[56] a possession so clear that no one denies the fact of the possession, whether actual or constructive;[57] a possession undisturbed by any act of a person in or upon the locus in quo, for which act such person would be suable in an action by which the title to the property could be determined;[58] any possession where a person, although setting up a claim of title, has not interfered with possession by any act suable at law by a suit which may or will involve his claim of title;[59] an undisturbed possession of unbroken continuity;[60] an uninterrupted possession.[61] The expression has a meaning very similar to, if not the same as, "quiet enjoyment."[62]

31. Rex v. Magee, 17 Sask. L. 501, 503, 40 CanCrCas 10, [1923] 3 West Wkly 55.

[a] **"In the King's peace"** see State v. Dunkley, 25 N. C. 116, 121.

32. Murray New Eng. D. [quot Rex v. Magee, 17 Sask. L. 501, 503, 40 CanCrCas 10, [1923] 3 WestWkly 55].

33. Public peace:
Disorderly conduct as disturbing or endangering see Disorderly Conduct § 4.
Preservation of by municipality in exercise of public power see Municipal Corporations § 208.

[a] **Phrases:** (1) "Necessary for the immediate preservation of the public peace, health or safety." State v. Becker, 289 Mo. 660, 680, 233 SW 641. (2) "Public peace, public safety, and public justice." Ward Baking Co. v. Western Union Tel. Co., 205 App. Div. 723, 724, 200 NYS 865.

34. Funk & Wagnalls D. [quot Weakley v. State, 168 Ark. 1087, 1096, 273 SW 374].

35. State v. Brooks, 146 La. 325, 83 S 637, 639.

36. State v. Brooks, supra; State v. Becker, 289 Mo. 660, 705, 233 SW 641; Neuendorff v. Duryea, 6 Daly (N. Y.) 276, 280.

37. Miles v. State, 30 Okl. Cr. 302, 236 P 57, 59, 44 ALR 129; State v. Reichman, 135 Tenn. 685, 188 SW 597, 601; State v. Benedict, 11 Vt. 236, 239, 34 AmD 688. And see State v. Coffin, 64 Vt. 25, 23 A 632.

[a] **Causing a report to be spread** that a certain person is dead, and having a church bell rung and tolled, is not a disturbance of the "public peace," within Vermont statutes. State v. Riggs, 22 Vt. 321, 323.

38. State v. Mancini, 91 Vt. 507, 101 A 581, 583.

39. Rex v. Magee, 17 Sask. L. 501, 503, 40 CanCrCas 10, [1923] 3 West Wkly 55. See supra § 2.

40. 3 Coke Litt. p 249 [quot Skeen v. Monkeimer, 21 Ind. 1, 3].

41. Kahn v. Anderson, 255 U. S. 1, 9, 41 SCt 224, 226, 65 L. ed. 469; McElrath v. U. S., 102 U. S. 426, 438, 26 L. ed. 189.

[a] **"Except in time of peace."**—Kahn v. Anderson, 255 U. S. 1, 10, 41 SCt 224, 226, 65 L. ed. 469; McElrath v. U. S., 102 U. S. 426, 438, 26 L. ed. 189.

[b] **"In time of peace."**—Kahn v. Anderson, 255 U. S. 1, 9, 41 SCt 224, 226, 65 L. ed. 469.

42. Peaceable:
Assembly see Constitutional Law §§ 482–484.
Possession as:
Element of adverse possession see Adverse Possession § 322.
Necessary requisite to maintaining an action to quiet title see Quieting Title [32 Cyc 1340].
Sufficient prior possession upon which to base an action for forcible entry and detainer see Forcible Entry and Detainer § 53.

43. Hafner Mfg. Co. v. St. Louis, 262 Mo. 621, 172 SW 28, 34.

[a] **"Peaceable passenger."**—Rex v. Allen, 15 Sask. L. 487, 69 DomLR 500, 501, 38 CanCrCas 237, [1922] 2 WestWkly 606.

44. Webster New Int. D. [quot State v. Lindsey, (Mo.) 7 SW (2d) 253, 254].

45. Webster New Int. D. [quot State v. Lindsey, supra].

46. Webster D. [quot Richardson v. State, 94 Tex. Cr. 616, 253 SW 273, 277]; Webster New Int. D. [quot State v. Lindsey, (Mo.) 7 SW (2d) 253, 254].

47. Webster New Int. D. [quot State v. Lindsey, supra].

"Peaceful" see post p 776.

48. Webster New Int. D. [quot State v. Lindsey, (Mo.) 7 SW (2d) 253, 254].

"Quiet" see [32 Cyc 1295].

49. Entry in Real Property Law see Entry 20 C. J. p 1275.

50. Thompson v. Kenyon, 100 Mass. 108, 111.

[a] **"Open and peaceable entry."**—Thompson v. Kenyon, 100 Mass. 108, 111.

51. Self v. Comer, 166 Ala. 68, 52 S 336, 337.

52. **"Occupation"** see 46 C. J. p 895.

53. Bowers v. Cherokee Bob, 45 Cal. 495, 501.

54. Peaceable possession as:
Element of adverse possession see Adverse Possession § 322.
Necessary requisite to maintaining an action to quiet title see Quieting Title [32 Cyc 1340].
Sufficient prior possession upon which to base an action for forcible entry and detainer see Forcible Entry and Detainer § 53.

"Possession" see [31 Cyc 923].

55. Bowers v. Cherokee Bob, 45 Cal. 495, 504

[a] **Contradistinguished from disputed or contested possession.**—Central of Georgia R. Co. v. Rouse, 176 Ala. 138, 57 S 706, 707; Geo. E. Wood Lumber Co. v. Williams, 157 Ala. 73, 47 S 202, 203; Southern R. Co. v. Hall, 145 Ala. 224, 226, 41 S 135 [quot Crosbie v. National Bank of Commerce, 86 Okl. 174, 207 P 311, 313]; Powell v. Mayo, 24 N. J. Eq. 178, 181.

[b] **Distinguished from tortious possession** see Hafner Mfg. Co. v. St. Louis, 262 Mo. 621, 172 SW 28, 34.

[c] **"Lawfully possessed of the premises"** in a statute is used in a restrictive sense and means "peaceable possession." Hafner Mfg. Co. v. St. Louis, 262 Mo. 621, 641, 172 SW 28.

[d] **"Peaceable and adverse possession."**—Vergara v. Myers, (Tex. Commn. A.) 239 SW 942, 943; Sellman v. Daniel, (Tex. Civ. A.) 110 SW 81; Hunter v. Malone, 49 Tex. Civ. A. 116, 108 SW 709, 713; Webb v. Lyerla, 43 Tex. Civ. A. 124, 94 SW 1095, 1096.

[e] **"Peaceable possession of mining property"** see Arapahoe Peak Min. Co. v. Ross, 76 Colo. 26, 227 P 568.

[f] **Peaceable possession of slaves** see Spencer v. McDonald, 22 Ark. 466, 473.

[g] **Where** the expression is used in a contract, under statute it must be presumed to be used in its ordinary and popular sense. Crosbie v. National Bank of Commerce, 86 Okl. 174, 207 P 311, 313.

56. Stanley v. Schwalby, 147 U. S. 508, 514, 13 SCt 418, 37 L. ed. 259; North Fort Worth Townsite Co. v. Taylor, (Tex. Civ. A.) 262 SW 505; Glover v. Pfeuffer, (Tex. Civ. A.) 163 SW 984, 986; Tex. Rev. St. (1895) art 3348 [quot Cox v. Sherman Hotel Co., (Tex. Civ. A.) 47 SW 808]; Vernon St. art 5680 [quot Colins v. Megason, (Tex. Civ. A.) 228 SW 583, 584]. And see Adverse Possession § 322 text and note 33.

57. Geo. E. Wood Lumber Co. v. Williams, 157 Ala. 73, 47 S 202, 203.

58. Bradley v. McPherson, (N. J. Ch.) 58 A 105, 106.

59. Oeding v. Schweinler, (N. J. Ch.) 138 A 379, 380; Allaire v. Ketcham, 55 N. J. Eq. 168, 170, 35 A 900. See Barry v. Tunick, 97 N. J. Eq. 281, 127 A 658.

60. Hays v. DeAtley, 65 Mont. 558, 212 P 296, 297; Mascall v. Murray, 76 Or. 637, 149 P 517, 519.

61. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P 1113, 1119.

62. Gittens v. Lowry, 15 Ga. 336, 338.

Peaceable and undisturbed possession. Actual and immediate possession; such possession as a man has of the house in which he lives, or the field he tills, or the land whereon he pastures his cattle. It is not essential that there be a continual personal presence on the land, but there must be exercised, at least, some actual physical control with the intent and apparent purpose of asserting dominion.[63]

PEACEABLE AND UNDISTURBED POSSESSION.[64]

PEACEABLE ASSEMBLY.[65]

PEACEABLE ENTRY.[66]

PEACEABLE OCCUPATION.[67]

PEACEABLE POSSESSION.[68]

PEACEFUL. Harmless; quiet.[69]

PEACEMAKERS' COURT.[70] A court established on certain Indian reservations in New York with jurisdiction to hear and determine such questions and actions between individual Indians residing thereon as are specified by statute.[71]

PEACE OFFICER.[72] A conservator of the peace;[73] an officer of the law;[74] a person employed for the preservation and maintenance of the public peace.[75] The term may include: Bailiffs and their assistants;[76] constables;[77] coroners;[78] detectives;[79] jailers;[80] marshals;[81] officers appointed to enforce prohibitory liquor laws ("enforcement officers");[82] persons employed in the execution of civil process;[83] policemen;[84] private persons especially appointed to execute criminal process;[85] sheriffs,[86] or deputy or under sheriffs;[87] and special policemen.[88] But the term has been held not to include an agent of a candidate in a municipal election,[89] a county clerk,[90] or a judge.[91]

63. Chezum v. Campbell, 42 Wash. 560, 85 P 48, 50, 7 AnnCas 921 ("the words 'peaceable' and 'undisturbed,' when applied to such possession, convey a clear meaning").

64. See "Peaceable" ante p 775 text and note 63.

65. See Constitutional Law §§ 482–484.

"Assembly" see 5 C. J. p 811.

66. See "Peaceable" ante p 775 text and notes 50, 51.

67. See "Peaceable" ante p 775 text and note 53.

68. See "Peaceable" ante p 775 text and notes 55–61.

69. Cyclopedic D. [quot Richardson v. State, 94 Tex. Cr. 616, 253 SW 273, 277].

[a] **"A peaceful man** is one who is quiet and harmless in his behavior." Richardson v. State, 94 Tex. Cr. 616, 625, 253 SW 273.

[b] **"One who is of a quiet and peaceful disposition** is not of a violent and dangerous one." Richardson v. State, 94 Tex. Cr. 616, 624, 253 SW 273.

[c] **"Peaceful and lawful."**—Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 SCt 172, 179, 65 L. ed. 349, 16 ALR 196.

[d] **"Peaceful picketing."**—Duplex Printing Press Co. v. Deering, 247 Fed. 192, 196; McCusker v. Smith, [1918] 2 Ir. 432. See Michaels v. Hillman, 112 Misc. 395, 183 NYS 195, 201. See also Conspiracy § 140; Injunctions § 265 et seq.

70. **"Courts"** see 15 C. J. p 693.

71. Terrance v. Gray, 165 App. Div. 636, 638, 151 NYS 136; Jones v. Gordon, 51 Misc. 305, 307, 99 NYS 958. "The only provision in the Indian Law for a Peacemakers' Court is found in article 4 (as amd. by Laws of 1914, chap. 508), relating to the Seneca Indians. Provision is there made for the election of three peacemakers for each of the reservations; the holding of the Peacemakers' Court of each such reservation, defining its authority; the making of rules and enforcing them; the bringing of parties and witnesses into court; administering oaths to witnesses; fixing the time within which the determination of the court must be made; the keeping of a record of the transactions of the court, and the power to award costs. However, the right of the court to award damages is limited to $100. As to the Allegany and Cattaraugus reservations of the tribe, the court is also given the exclusive power to grant divorces between the Indians residing upon the reservation, and to hear and determine all controversies between individual Indians residing thereon, involving the title to real estate on such reservations." Terrance v. Gray, supra.

[a] **"Appeal** may be taken from the decision of a Peacemakers' Court of the Seneca Nation to the council of the Seneca Nation, consisting of eight councilors for each of its reservations elected by the members of the tribe." Terrance v. Gray, 165 App. Div. 636, 639, 151 NYS 136.

72. **Officer generally** see Officers 46 C. J. p 911.

73. U. S. v. Viess, 273 Fed. 279, 281; Jones v. State, (Tex. Cr.) 65 SW 92; Williams v. Com., 142 Va. 667, 128 SE 572, 573.

"Conservator of the peace" see 12 C. J. p 522.

74. Bartels Northern Oil Co. v. Jackman, 29 N. D. 236, 150 NW 576, 579 (distinguishing "officer of the law" from "public officer").

75. Rex v. Magee, 17 Sask. L. 501, 503, 40 CanCrCas 10, [1923] 3 West Wkly 55.

76. Rex v. Polsky, 27 Man. 271, 31 DomLR 294, 296, 27 CanCrCas 319, [1917] 1 WestWkly 451.

"Bailiff" see 6 C. J. p 1079.

77. U. S. v. Viess, 273 Fed. 279, 281 [cit Cyc]; Com. v. McCann, 123 Ky. 247, 94 SW 645, 647, 29 KyL 707; Peo. v. Clinton, 28 App. Div. 478, 479, 51 NYS 115; Deyoe v. Ewen, 70 Hun 545, 546, 24 NYS 372; Newburn v. Durham, 10 Tex. Civ. A. 655, 661, 32 SW 112; Tippett v. State, 80 Tex. Cr. 373, 189 SW 485, 486; Messer v. State, 37 Tex. Cr. 635, 637, 40 SW 488; O'Brien v. State, 6 Tex. A. 665, 667.

[a] **Police constables** see Peo. v. Clinton, 28 App. Div. 478, 479, 51 NYS 115; Deyoe v. Ewen, 70 Hun 545, 546, 24 NYS 372.

[b] **Provincial constables** see Rex v. L., 51 Ont. L. 575, 69 DomLR 618, 38 CanCrCas 242.

[c] **Village constable** see Peo. v. Stillwater Auditors Bd., 126 App. Div. 487, 110 NYS 745, 746.

"Constables" see Sheriffs and Constables [35 Cyc 1455].

78. Com. v. McCann, 123 Ky. 247, 94 SW 645, 647, 29 KyL 707.

"Coroners" see 13 C. J. p 1239.

79. See Reising v. Portland, 57 Or. 295, 111 P 377, 378, AnnCas1912D 895.

"Detectives" see 18 C. J. p 979.

80. Com. v. McCann, 123 Ky. 247, 94 SW 645, 647, 29 KyL 707; Newburn v. Durham, 10 Tex. Civ. A. 655, 661, 32 SW 112; O'Brien v. State, 6 Tex. A. 665, 667.

"Jailer" see 33 C. J. p 832.

81. U. S. v. Viess, 273 Fed. 279, 281 [cit Cyc]; Com. v. McCann, 123 Ky. 247, 94 SW 645, 647, 29 KyL 707; Peo. v. Clinton, 28 App. Div. 478, 479, 51 NYS 115; Deyoe v. Ewen, 70 Hun 545, 546, 24 NYS 372; Newburn v. Durham, 10 Tex. Civ. A. 655, 661, 32 SW 112; Tippett v. State, 80 Tex. Cr. 373, 189 SW 485, 486; Messer v. State, 37 Tex. Cr. 635, 637, 40 SW 488; O'Brien v. State, 6 Tex. A. 665, 667.

[a] **One who has ceased to be a marshal** is no longer a peace officer in the actual discharge of his official duty so as to permit him to carry a pistol. Jones v. State, 91 Tex. Cr. 240, 238 SW 661, 662.

"Marshal" see 38 C. J. p 1363.

82. Rex v. Magee, 17 Sask. L. 501, 503, 40 CanCrCas 10, [1923] 3 West Wkly 55.

[a] **An enforcement officer** who searches premises without a search warrant is not a peace officer in the exercise of his duty so as to render one resisting the search guilty of obstructing a peace officer in the execution of his duty. Rex v. Richardson, 18 Sask. L. 209, [1924] 1 DomLR 1001, 1005, 42 CanCrCas 95, 1 West Wkly 920.

83. Rex v. Polsky, 27 Man. 271, 31 DomLR 294, 296, 27 CanCrCas 319, [1917] 1 WestWkly 451.

84. U. S. v. Viess, 273 Fed. 279, 281 [cit Cyc]; Springer v. State, 121 Ga. 155, 156, 48 SE 907; Comstock v. Maryland Casualty Co., (Iowa) 179 NW 962, 965; Com. v. McCann, 123 Ky. 247, 94 SW 645, 647, 29 KyL 707; Peo. v. Clinton, 28 App. Div. 478, 479, 51 NYS 115; Deyoe v. Ewen, 70 Hun 545, 546, 24 NYS 372; Reising v. Portland, 57 Or. 295, 111 P 377, 378, AnnCas1912D 895; Tippett v. State, 80 Tex. Cr. 373, 189 SW 485, 486; Messer v. State, 37 Tex. Cr. 635, 637, 40 SW 488. See Argetakis v. State, 24 Ariz. 599, 212 P 372, 374.

[a] **Chief of police** is a peace officer. Lee v. State, 47 Tex. Cr. 620, 85 SW 804, 805.

"Policeman" see [31 Cyc 901].

85. Newburn v. Durham, 10 Tex. Civ. A. 655, 661, 32 SW 112; Tippett v. State, 80 Tex. Cr. 373, 189 SW 485, 486; Messer v. State, 37 Tex. Cr. 635, 637, 40 SW 488; O'Brien v. State, 6 Tex. A. 665, 667.

86. U. S. v. Viess, 273 Fed. 279, 281 [cit Cyc]; Com. v. McCann, 123 Ky. 247, 94 SW 645, 647, 29 KyL 707; Peo. v. Clinton, 28 App. Div. 478, 479, 51 NYS 115; Deyoe v. Ewen, 70 Hun 545, 547, 24 NYS 372; State v. Brooks, 42 Tex. 62, 72; Newburn v. Durham, 10 Tex. Civ. A. 655, 661, 32 SW 112; Tippett v. State, 80 Tex. Cr. 373, 189 SW 485, 486; Messer v. State, 37 Tex. Cr. 635, 637, 40 SW 488; O'Brien v. State, 6 Tex. A. 665, 667.

Sheriff see Sheriffs and Constables [35 Cyc 1455].

87. U. S. v. Viess, 273 Fed. 279, 281 [cit Cyc]; Peo. v. Clinton, 28 App. Div. 478, 479, 51 NYS 115; Deyoe v. Ewen, 70 Hun 545, 546, 24 NYS 372; State v. Brooks, 42 Tex. 62, 72; Newburn v. Durham, 10 Tex. Civ. A. 655, 661, 32 SW 112; Jones v. State, 91 Tex. Cr. 240, 238 SW 661, 662 [cit Cyc]; Tippett v. State, 80 Tex. Cr. 373, 189 SW 485, 486; Messer v. State, 37 Tex. Cr. 635, 637, 40 SW 488; O'Brien v. State, 6 Tex. A. 665, 667.

Deputy or under sheriffs see Sheriffs and Constables [35 Cyc 1455].

88. Williams v. Com., 142 Va. 667, 128 SE 572, 573.

"Special policeman" see [36 Cyc 523].

89. Jobin v. Drolet, (Que.) 63 Dom LR 104, 106, 36 CanCrCas 382.

90. Lee v. State, 94 Tex. Cr. 233, 250 SW 678, 679.

91. In re Abbey, 28 Ariz. 383, 237

PEA COAL. Coal of a very small size, like peas; also called pease;[92] coal which has been passed through a screen with a small sized mesh.[93]

PEACOCK FEATHER.[94] A feather of the peacock, especially one of the long ocellated tail coverts.[95]

PEAJE. In Spanish law, a toll or passage tax.[96]

PEAK CONTRACT. A contract to furnish electricity whereby the customer takes what power he wants as and when he wants it, but pays on the basis of what is called "the peak," that is, on the basis of the number of watts or of horse power made use of by him at the instant of maximum use.[97]

PEAKED ROOF. One running up from all four sides of the building to a peak or ridge in the center.[98]

PEARL. A dense shelly concretion formed as an abnormal growth within the shell of some mollusks.[99]

Pearl beads, as understood in trade, refers to articles of glass made to imitate pearls, and does not include genuine pearls drilled.[1]

Pearl fishing may refer to the capture of fresh water mussels.[2]

PEBBLE. Among opticians, a lens of transparent quartz or rock crystal;[3] a colorless crystal used in spectacles.[4]

PECCATA CONTRA NATURAM SUNT GRAVISSIMA.[5]

PECCATA SUOS TENEANT AUCTORES, NEC ULTERIUS PROGREDIATUR METUS QUAM REPERIATUR DELICTUM.[6]

PECCAT MENS, NON CORPUS, ET UNDE CONSILIUM ABFUIT PŒNA ABEST.[7]

PECCATUM PECCATO ADDIT QUI CULPÆ QUAM FACIT PATROCINIA DEFENSIONIS ADJUNGIT.[8]

PE. CEN. Abbreviated words which are well understood to mean per cent.[9]

PECHERO. In Spanish law, one subject to tax; a commoner.[10]

PECIO. In the old Spanish law, a harbor fee collected of ships.[11]

PECUARIO (Latin, pecus). In Spanish law, pertaining to cattle.[12]

PECULADO. In Spanish law, embezzlement of public funds by an official.[13]

PECULATION.[14] In the civil law, the unlawful appropriation, by a depositary[15] of public funds, of the property of the government intrusted to his care, to his own use, or that of others.[16]

PECULIAR. While the word sometimes has an offensive meaning,[17] its natural and usual meaning is particular;[18] special.[19]

In ecclesiastical law, a parish or church in England which has jurisdiction of ecclesiastical matters within itself, and independent of the ordinary, and is subject only to the metropolitan.[20]

Peculiar benefits.[21] As applied to property, any enhancement of, or increase in, the market value of property not shared in by other property in the locality;[22] benefits direct and peculiar to the owner of the property, excluding those which he shares with other members of the community;[23] benefits that particularly and exclusively affect the particular property.[24]

Peculiar name. In the sense of a trade name, a fanciful designation having no relation to the kind, character, or quality of the goods, and which is of the maker's own invention, being peculiar to him and first put in use by him.[25]

Other phrases: "Peculiar circumstances,"[26] "peculiar damage,"[27] "peculiar knowledge,"[28] "peculiar urgency;"[29] also, "services . . . of a peculiar merit or character."[30]

PECULIO. In Spanish law, funds of a child

P 179, 181 (the functions of a judge and of a peace officer are entirely distinct, the former being wholly judicial, and the latter altogether executive or administrative, and a judge is said not to be a peace officer).

[a] **But in Texas** (1) the constitution specifically provides that county judges are conservators of the peace, and a conservator of the peace being synonymous with peace officer a county judge is said to be a peace officer. Jones v. State, (Cr.) 65 SW 92. (2) And this view has been extended to include the judge of a corporation court. Tippett v. State, 80 Tex. Cr. 373, 189 SW 485, 486.

92. Century D.

"Coal" see 11 C. J. p 934.

93. Cantrall Co-op. Coal Co. v. Level, 139 Ill. A. 104, 106; Glick v. Lehigh Valley Coal Co., 221 Pa. 428, 70 A 810, 811.

[a] **As defined in a contract.**—"Pea coal is hereby defined to be that coal which passes, with the dirt, through a screen of three-quarters of an inch mesh." Glick v. Lehigh Valley Coal Co., 221 Pa. 428, 430, 70 A 810.

[b] **Pea coal as "screenings"** see Cantrall Co-op. Coal Co. v. Level, 139 Ill. A. 104, 106.

"Screened coal" see [33 Cyc 1162].

94. See Feather 25 C. J. p 677.

95. Webster New Int. D.

[a] **Peacock feathers** dutiable as ornamental feathers see Silva v. U. S., 127 Fed. 781, 782.

96. Escriche Diccionario.

97. Atty.-Gen. v. Canadian Niagara Power Co., [1912] A. C. 852, [1912] A. C. (Can.) 317, 9 DomLR 191, 198 [aff 16 OntWR 35, 2 DomLR 425].

98. Hannen v. Pence, 40 Minn. 127, 129, 41 NW 657, 12 AmSR 717.

99. Webster New Int. D.

[a] **Half pearls,** chiefly used for jewelry settings, and not adapted for stringing, are dutiable as pearls in their natural state. U. S. v. Hahn, 135 Fed. 349, 68 CCA 120.

[b] **Loose pearls,** even though drilled and suitable for a necklace, are dutiable as pearls in their natural state and not as pearls set or strung. U. S. v. Citroen, 223 U. S. 407, 416, 32 SCt 259, 260, 56 L. ed. 486 [aff 166 Fed. 693, 697, 92 CCA 365]; U. S. v. Tiffany, 172 Fed. 300, 301; Neresheimer v. U. S., 136 Fed. 86, 88 68 CCA 654 [rev 131 Fed. 977].

1. U. S. v American Gem, etc., Co., 142 Fed. 283, 284.

"Beads" see 7 C. J. p 1017.

2. Gratz v. McKee, 258 Fed. 335, 337, 169 CCA 351.

Fishing see Fish 26 C. J. p 593.

3. Webster New Int. D.

4. Arthur v. Sussfield, 96 U. S. 128, 130, 24 L. ed. 772.

5. A maxim meaning "Crimes against nature are the most heinous." Black L. D.

6. A maxim meaning "Let offenses bind the transgressors only, and let not the fear of punishment for them extend beyond the crime itself." Morgan Leg. Max.

7. A maxim meaning "Where the mind sins, and not the body (as in the case where reason is wanting), there is no punishment." Morgan Leg. Max.

8. A maxim meaning "He adds fault to fault who sets up a defense of a wrong committed by him." Black L. D.

9. Gramer v. Joder, 65 Ill. 314, 315

Per cent see Per § 2.

10. Escriche Diccionario.

11. Escriche Diccionario.

12. Escriche Diccionario.

"Cattle" see 11 C. J. p 33.

13. Escriche Diccionario. See Embezzlement 20 C. J. p 405.

14. See Embezzlement 20 C. J. p 405.

15. **"Depositary"** see Depositaries 18 C. J. p 560.

16. Black L. D. [cit Domat. Suppl. au Droit Public 1, 3 tit 5]. See Bork v. Peo., 91 N. Y. 5, 16.

17. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 714, 96 SW 1011, 1015.

18. St. Louis, etc., R. Co. v. Continental Brick Co., supra.

"Particular" see 46 C. J. p 1387.

19. St. Louis, etc., R. Co v. Continental Brick Co., 198 Mo. 698, 714, 96 SW 1011, 1015; Powell v. Columbia, 154 Mo. A. 239, 134 SW 76, 77.

"Special" see [36 Cyc 517].

20. Black L. D.

21. See Benefits 7 C. J. p 1139 note 81 [d]; Eminent Domain § 259.

22. Kansas City Suburban Belt R. Co. v. McElroy, 161 Mo. 584, 61 SW 871, 872.

23. Grafton, etc., R. Co. v. Foreman, 24 W. Va. 662, 671, 672.

24. Blair v. Charleston, 43 W. Va. 62, 70, 26 SE 341, 64 AmSR 837, 35 LRA 852.

25. Falkinburg v. Lucy, 35 Cal. 52, 69, 95 AmD 76. And see Trade-Marks, Trade-Names, and Unfair Competition [38 Cyc 674].

26. Senat v. Findley, 51 Iowa 20, 23, 50 NW 575; McIntyre v. Crocker, 23 Ont. 369, 371.

27. Cabbell v. Williams, 127 Ala. 320, 326, 28 S 405.

"Damage" see 17 C. J. p 697.

28. Bemis v. Central Vermont R. Co., 58 Vt. 636, 641, 3 A 531.

"Knowledge" see 35 C. J. p 919.

29. Ex p. Baer, 20 F. (2d) 912, 913; In re Atcherley, 3 Hawaii Fed. 404, 405 (as warranting habeas corpus). See Habeas Corpus § 8.

30. Hammond v. Georgian Co., 133 Ga. 1, 3, 65 SE 124 (means substantially "special, unique, or extraordinary personal services or acts"). See

apart from the property of its father.[31]

PECUNIARILY Adverb of pecuniary.[32]

Pecuniarily able. With reference to a prospective purchaser it means that he is able to command the necessary money to close the deal on reasonable notice, or within a time limited, and not that he must have all the money in his pocketbook or to his credit at the bank.[33]

PECUNIARY[34] Consisting of money,[35] financial;[36] monetary;[37] relating to money.[38] It has been distinguished from "necessary."[39]

Pecuniary ability, with reference to a husband, means sufficient ability to provide suitable maintenance for a wife, whether derived from the income of property, personal labor, or any other source.[40]

Pecuniary aid. Money and everything that can be valued in money.[41]

Pecuniary benefits. Money and everything that can be valued in money.[42]

Pecuniary condition. Comprehends not only money in hand, but property and all other assets of value constituting an existing fact that go to make up financial responsibility as a basis of credit.[43]

Pecuniary provision. A provision consisting of money.[44]

Other phrases: "Pecuniary gain,"[45] "pecuniary interest,"[46] "pecuniary investment,"[47] "pecuniary legacy,"[48] "pecuniary legatees,"[49] "pecuniary liability,"[50] "pecuniary recompense,"[51] "pecuniary value."[52]

PED. A pannier or wicker basket.[53] Also a pedder or peddler.[54]

PEDAGIUM.[55]

PEDAL POSSESSION.[56]

PEDANEO. In Spanish law, of limited jurisdiction.[57]

PEDDLE.[58] Going around from house to house, or from customer to customer, and selling goods;[59] to sell at retail from place to place, going from house to house, carrying the goods to be offered for sale;[60] traveling about and selling small wares.[61] A single sale, if there is nothing more, scarcely comes under

also Injunctions §§ 310–314.

31. Escriche Diccionario.

32. Webster New Int. D. See Pecuniary post this page.

[a] **Pecuniarily interested.**—A policy holder of an insurance company is "pecuniarily interested" therein. State v. Jones, 15 Ariz. 215, 137 P 544, 549.

"Pecuniary interest" see Pecuniary post this page text and note 46.

33. McCabe v. Jones, 141 Wis. 540, 124 NW 486, 487.

"Pecuniary ability" see Pecuniary post this page text and note 49.

34. **Pecuniary condition of:**
Defendant in action for breach of promise to marry see Breach of Marriage Promise § 94.
Husband as affecting:
Amount of alimony see Divorce §§ 518, 587–594.
Award in suit by wife see Husband and Wife § 901.
Parties as affecting exemplary damage see Damages §§ 294–296.
Wife as affecting alimony see Divorce § 600.

Pecuniary consideration see Contracts § 152.

Pecuniary damage see Damages § 36; Nonpecuniary Damages 46 C. J. p 492 n 98.

Pecuniary injury see Injury § 16.

Pecuniary interest:
Agency coupled with see Agency §§ 154–156, 182.
Disqualifying:
Arbitrator see Arbitration and Award § 131.
Grand juror see Grand Juries § 26 text and note 18.
Judge see Judges §§ 134–149.
Juror see Juries §§ 324–330.
Justice of the peace see Justices of the Peace § 113.
Officer taking acknowledgment see Acknowledgments §§ 110–114.
Witness see Witnesses [40 Cyc 2244].
Effect on credibility of witness see Witnesses [40 Cyc 2651].
Insurable see Insurance § 204.
Of city officer:
In municipal contract:
In general see Municipal Corporations §§ 2169–2180.
Affecting eligibility for office see Municipal Corporations §§ 1026, 1027.
Ground for removal from office see Municipal Corporations § 1090.
In purchase of real estate by city as ground for removal from office see Municipal Corporations § 1089.

Pecuniary loss see Death §§ 193–224; Loss 38 C. J. p 245 text and note 34.

Pecuniary obligation see Obligation 46 C. J. p 850.

Pecuniary profit:
Association organized for as equivalent to a partnership see Associations § 4.
As purpose for organizing see Corporations § 1.
Charitable corporation or association as one not organized for see Charities § 9.
Club not formed for as distinguished from partnership see Clubs § 2 text and note 8.

Nonpecuniary:
Damages see Damages § 35; Nonpecuniary Damages 46 C. J. p 492 n 98.
Injury see Injury § 16.

35. Webster Int. D. [quot Apple v. Henry, 66 Mont. 244, 213 P 444, 445].

"Money" see 40 C. J. p 1489.

36. Grayhek v. Stern, 154 Ill. A. 385, 389.

"Financial" see 25 C. J. p 1132.

37. Grayhek v. Stern, 154 Ill. A. 385, 389. See Thiem v. Eckert, 165 Minn. 379, 381, 206 NW 721 (where, in discussing consideration of a pecuniary nature, the court said: "Pecuniary, as here used, means money").

38. Webster Int. D. [quot Apple v. Henry, 66 Mont. 244, 213 P 444, 445].

39. Browning v. Wabash Western R. Co., (Mo.) 24 SW 731, 736. But see Goss v. Missouri Pac. R. Co., 50 Mo. A. 614, 629 [cit Morgan v. Durfree, 69 Mo. 469, 478, 33 AmR 508].

"Necessary" see 45 C. J. p 580.

40. Jewett v. Jewett, 61 Vt. 370, 371, 17 A 734. See also Farnsworth v. Farnsworth, 58 Vt. 555, 556, 5 A 401.

"Ability" see 1 C. J. p 304.

"Pecuniarily able" see Pecuniarily ante this page text and note 33.

41. Missouri, etc., R. Co. v. Williams, (Tex. Civ. A.) 117 SW 1043, 1047. See International, etc., R. Co. v. White, (Tex. Civ. A.) 120 SW 958, 960.

"Aid" see 2 C. J. p 1022.

42. International, etc., R. Co. v. McVey, 99 Tex. 28, 87 SW 328, 329; El Paso Electric R. Co. v. Benjamin, (Tex. Civ. A.) 202 SW 996, 998; Missouri, etc., R. Co. v. Wallace, 53 Tex. Civ. A. 127, 115 SW 302, 303; Houston, etc., R. Co. v. Rutland, 45 Tex. Civ. A. 621, 101 SW 529, 533.

[a] **"Pecuniary benefit"** see Grayhek v. Stern, 154 Ill. A. 385, 389.

"Benefits" see 7 C. J. p 1139.

43. Dennis v. State, 16 Ala. A. 115, 75 S 707, 708.

"Condition" see 12 C. J. p 398.

44. Schnibbe v. Schnibbe, 109 Misc. 382, 179 NYS 54, 62. See Pinkham v. Pinkham, 95 Me. 71, 77, 49 A 48, 85 AmSR 392; Davis v. Davis, 61 Me. 395, 399.

[a] **"Pecuniary provision in lieu of dower."**—Haywood v. Haywood, 130 Misc. 742, 225 NYS 84.

45. Dillon v. St. Patrick's Cathedral, 234 N. Y. 225, 137 NE 311, 312; Mulford v. Pettit, 220 N. Y. 540, 116 NE 344; Goldberger v. Goldberger, 200 App. Div. 190, 192 NYS 727, 729.

"Gain" see 27 C. J. p 938.

46. Burdine v. Grand Lodge A. F. M., 37 Ala. 478, 481. And see Interest 33 C. J. p 265 text and note 42.

47. In re Price, [1905] 2 Ch. 55, 58, 5 BRC 529.

"Investment" see 33 C. J. p 808.

48. Williams' Est., 112 Cal. 521, 44 P 808, 809, 53 AmSR 254; Mathis v. Mathis, 18 N. J. L. 59, 61, 62, 66; Humphrey v. Robinson, 52 Hun 200, 5 NYS 164, 166; Lang v. Ropke, 10 NYLegObs 70, 75; Gaskin v. Rogers, L. R. 2 Eq. 284, 291; Kennedy v. Kennedy, 28 Ont. L. 1, 11 DomLR 329, 336, 4 OntWN 607. See Harlan's Trustee v. Harlan, (Ky.) 14 SW (2d) 397 (construing the term as used in St. § 2065); and generally Wills [40 Cyc 951].

49. Gaskin v. Rogers, L. R. 2 Eq. 284, 291 (term excludes specific legatees, that is, legatees of mere chattels; includes annuitants); Kennedy v. Kennedy, 28 Ont. L. 1, 11 DomLR 328, 336, 4 OntWN 607 (includes annuitants).

"Legatee" see Wills [40 Cyc 995].

50. Johnston v. Becker County, 27 Minn. 64, 67, 6 NW 411.

"Liability" see 36 C. J. p 1050.

51. Vicksburg v. McLain, 67 Miss. 4, 13, 6 S 774.

52. Louisville, etc., R. Co. v. Rush, 127 Ind. 545, 548, 26 NE 1010; Stoher v. St. Louis, etc., R. Co., 91 Mo. 509, 4 SW 389, 393.

"Value" see [39 Cyc 1117].

53. Wedgwood D. [quot Citizens' Bank v. Crittenden Record-Press, 150 Ky. 634, 150 SW 814, 815].

54. Wedgwood D. [quot Citizens' Bank v. Crittenden Record-Press, supra].

"Peddler" see Hawkers and Peddlers §§ 1–7.

55. See Chiminage 11 C. J. p 757.

56. See Pedis Possessio post p 779.

57. Escriche Diccionario. See Courts § 14.

58. See Hawkers and Peddlers 29 C. J. p 218.

[a] **"Conduct business" distinguished.**—Woodson v. Paulk, 139 Ga. 783, 78 SE 35, 36.

59. Du Boistown v. Rochester Brewing Co., 9 Pa. Co. 442, 443.

60. Dewitt v. State, 155 Wis. 249, 144 NW 253.

61. Webster D. [quot South Bend v. Martin, 142 Ind. 31, 41 NE 315, 317, 29 LRA 531].

[a] **To constitute peddling** (1) there must be selling and delivering

the denomination of "peddling."[62] The term "peddling" refers to the manner in which the business is carried on, and not to the business itself.[63] However, it has been defined as the occupation of an itinerant vendor of goods who sells and delivers the identical goods he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered and to be paid for wholly or in part upon their subsequent delivery.[64]

PEDDLER.[65]

PEDDLER'S NOTES.[66]

PEDDLING.[67]

PEDERASTIA. In Spanish law, sodomy.[68] By the ancient code known as "forum judicum,"[69] it was punished by castration.

PEDERASTY. As commonly understood, sodomy;[70] but more properly, as defined in the dictionaries, improper intimacy or sodomy between members of the male sex.[71]

PEDESTRIAN.[72] A walker; a foot traveler.[73]

PEDIDOS. In Spanish law, tribute from towns; donations sought by the sovereign in emergencies.[74]

PEDIGREE.[75] A word commonly called the "family tree;"[76] the history of family descent which is transmitted from one generation to another by both oral and written declaration;[77] a line of ancestors;[78] the lineage, descent, and succession of a family;[79] and the term embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened;[80] the order of descent in families, including births, marriages, and deaths;[81] a succession of the degrees from the origin; it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths.[82] The term is not limited to the human race, but is equally applicable whether the question concerns horses, cattle, dogs, or men.[83]

PEDIMENTO. In Spanish law, a forensic petition; first pleading.[84]

PEDIS POSITIO.[85]

PEDIS POSSESSIO or POSSESSIO PEDIS. Actual bona fide occupation;[86] actual occupancy;[87] actual possession;[88] a foothold upon land accompanied with the real and effectual enjoyment of the estate, with the reception of its fruits, its rents, issues, and profits;[89] occupancy in fact of the whole that is in possession;[90] subjection to the will and

to customers. Ex p. Noyd, 48 Nev. 120, 227 P 1020, 1025. (2) "According to the authorities the distinctive feature of peddling 'consists in the fact that the peddler goes from house to house or place to place carrying his merchandise with him; and concurrently sells and delivers it.'" State v. Dressner, 27 Del. 80, 85, 85 A 881.

62. Com. v. Edson, 2 Pa. Co. 377, 384.

63. Peo v. Marks, 64 Misc. 679, 684, 120 NYS 1106, 1109.

[a] **Delivering beer on orders** sent by one who solicited trade is not peddling. Du Boistown v. Rochester Brewing Co., 9 Pa. Co. 442, 443.

[b] **Selling oil from a tank wagon** to others than retail dealers is peddling. Com. v. Standard Oil Co., 129 Ky. 744, 112 SW 902, 903; Standard Oil Co. v. Com., 119 Ky. 1, 82 SW 970, 83 SW 557, 26 KyL 927, 1187.

[c] **Taking orders for goods to be manufactured** is not peddling. Spencer v. Whiting, 68 Iowa 678, 28 NW 13, 14.

64. Wrought Iron Range Co. v. Campen, 135 N. C. 506, 47 SE 658, 664; State v. Ninestein, 132 N. C. 1039, 43 SE 936, 938 [both quot State v. Lee, 113 N. C. 681, 18 SE 713, 37 AmSR 649].

65. See Hawkers and Peddlers 29 C. J. p 218.

66. See Hawkers and Peddlers § 26.

67. See Peddle ante p 778.

68. Escriche Diccionario. See Pederasty post this page.

69. Scott Transl. Bk. III tit V (V, VI).

70. Crutcher v. Crutcher, 86 Miss. 231, 235, 38 S 337.

"Sodomy" see [36 Cyc 501].

71. See Crutcher v. Crutcher, 86 Miss. 231, 235, 38 S 337.

72. See Footman 26 C. J. p 790; Foot Passenger 26 C. J. p 790.

73. Webster New Int. D. To same effect Eichinger v. Krouse, (N. J.) 144 A 638, 639.

[a] **One pushing a bicycle is a pedestrian** within the meaning of a statute requiring pedestrians to keep to the left side of public highways during certain hours. Benson v. Anderson, 129 Wash. 19, 223 P 1063, 1064.

[b] **One "repairing"** automobile in a street is not a pedestrian. Goff v. Eli Witt Cigar Co., (Fla.) 121 S 570.

[c] **Roller skates, ice skates, or stilts** attached to feet do not keep one from being a pedestrian. Eichinger v. Krouse, (N. J.) 144 A 638, 639.

74. Escriche Diccionario.

75. Pedigree:
Evidence as to see Evidence §§ 97–105, 226–248.
Giving false pedigree of breeding animal see Animals § 143.

76. Doe v. Peratt, 10 Bing. 198, 223, 25 ECL 99, 131 Reprint 879.

77. 2 Jones Evid. § 312 [quot In re Horgan, (Cal. A.) 268 P 1090, 1091]; State v. Miller, 71 Kan. 200, 204, 80 P 51; Young v. Shulenberg, 165 N. Y. 385, 388, 59 NE 135, 80 AmSR 730; Layton v. Kraft, 111 App. Div. 842, 98 NYS 72, 74, 18 NYAnnCas 228.

78. Borden v. U. S., 132 Fed. 205, 206.

"Ancestor" see 2 C. J. p 1333.

79. Washington v. New York Sav. Bank, 171 N. Y. 166, 173, 63 NE 831, 89 AmSR 800 [quot Harkrader v. Reed, 5 Alaska 668, 673]; Swink v. French, 11 Lea (Tenn.) 78, 80, 47 AmR 277.

"Descent" see Descent and Distribution § 1 text and notes 7–15.

"Lineage" see 37 C. J. p 1262.

"Succession" see Descent and Distribution § 1 text and notes 22–27; Succession [37 Cyc 511].

80. Greenleaf Evid. § 104 [quot In re Paulsen, 179 Cal. 528, 532, 178 P 143; People v. Mayne, 118 Cal. 516, 520, 50 P 654, 62 AmSR 256; Collins v. Grantham, 12 Ind. 440, 442; Travelers' Ins. Co. v. Henderson Cotton Mills, 120 Ky. 218, 85 SW 1090, 1091, 117 AmSR 585, 9 AnnCas 162; Copes v. Pearce, 7 Gill (Md.) 247, 264; Henderson v. Cargill, 31 Miss. 367, 418; Topper v. Perry, 197 Mo. 531, 541, 95 SW 203, 114 AmSR 777; Washington v. New York Sav. Bank, 171 N. Y. 166, 173, 63 NE 831, 89 AmSR 800; Eisenlord v. Clum, 126 N. Y. 552, 564, 27 NE 1024, 12 LRA 836; Putnam v. Lincoln Safe Deposit Co., 87 App. Div. 13, 18, 83 NYS 1091; Terwilliger v. Industrial Ben. Assoc., 83 Hun 320, 322, 31 NYS 938; American L. Ins., etc., Co. v. Rosenagle, 77 Pa. 507, 516; Simon v. New York L. Ins. Co., 70 Pa. Super. 408, 412; Mutual L. Ins. Co. v. Blodgett, 8 Tex. Civ. A. 45, 56, 27 SW 286; In re Hurlburt, 68 Vt. 366, 368, 35 A 77, 35 LRA 794]; Landers v. Hayes, 196 Ala. 533, 536, 72 S 106; Lincoln Reserve L. Ins. Co. v. Morgan, 126 Ark. 615, 191 SW 236, 237; Harvick v. Modern Woodmen of America, 158 Ill. A. 570, 577; Tuite v. Supreme Forest W. C., 193 Mo. A. 619, 187 SW 137, 140; Imboden v. St. Louis Union Trust Co., 111 Mo. A. 220, 86 SW 263, 267 [quot Copes v. Pearce, 7 Gill (Md.) 247, 264]; Washington v. Bank for Savings, 171 N. Y. 166, 173, 63 NE 833, 89 AmSR 804 [quot Harkrader v. Reed, 5 Alaska 668, 673]. And see Peo. v. Koerner, 154 N. Y. 355, 48 NE 730, 735; Rowan v. State, 57 Tex. Cr. 625, 124 SW 668, 136 AmSR 1005.

[a] **Includes** not merely the relationship of a family; but the dates of the births, deaths, and marriages of its members, when the object of such evidence is to trace relationship. Wharton Evid. § 208 [quot Hammond v. Noble, 57 Vt. 193, 203].

81. Harkrader v. Reed, 5 Alaska 668, 673.

82. Bouvier L. D. [quot Mason v. Massachusetts Ben. Life Assoc., 30 Ont. 716, 729].

83. Citizens' Rapid-Transit Co. v. Dew, 100 Tenn. 317, 325, 45 SW 790, 66 AmSR 754, 40 LRA 518.

[a] **Applied to horses.**—Borden v. U. S., 132 Fed. 205, 206.

84. Escriche Diccionario. See Pleading 49 C. J.

85. See Pedis Possessio post this page.

86. See Plume v. Seward, 4 Cal. 94, 97, 60 AmD 599. See also Adverse Possession § 2 text and note 20.

[a] **"Pedal possession."**—Cowley v. Simpson, 31 Ont. L. 200, 6 OntWN 192, 19 DomLR 463.

[a] **"Pedis positio."**—Churchill v. Onderdonk, 59 N. Y. 134, 136 (where the term is given as "pedis possessio or pedis positio," and "actual possession" is said to be the same thing).

87. Jackson v. Halstead, 5 Cow. (N. Y.) 216, 219. See Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 111, 9 S 537; Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 285, 13 AmD 525; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230, 234; Bailey v. Irby, 11 S. C. L. 343, 345, 10 AmD 609.

[a] **Does not require actual occupancy,** but implies inclosure and use of the ground inclosed. Porter v. Kennedy, 26 S. C. L. 354, 357.

88. Goldberg v. Bruschi, 146 Cal. 708, 713, 81 P 23. See Stevenson v. Anderson, 87 Ala. 228, 231, 6 S 285 [quot Churchill v. Onderdonk, 59 N. Y. 134, 136]; Shipman v. Baxter, 21 Ala. 456, 457; Dwinnell v. Dyer, 145 Cal. 12, 19, 78 P 247, 7 LRANS 763; Lawrence v. Fulton, 19 Cal. 683, 690; McFeters v. Pierson, 15 Colo. 201, 205, 24 P 1076, 22 AmSR 388; Kendrick v. Latham, 25 Fla. 819, 6 S 871, 876; O'Hara v. Parker, 27 Or. 156, 167, 39 P 1004; Waggoner v. Hastings, 5 Pa. 300, 303.

89. O'Hara v. Parker, 27 Or. 156, 167, 39 P 1004. And see Adverse Possession § 2 note 20 [a].

90. McColman v. Wilkes, 34 S. C. L. 465, 471, 51 AmD 637.

control;[91] substantial possession.[92] Pedis possessio is usually evidenced by occupation,[93] by a substantial inclosure,[94] by cultivation,[95] or by appropriate use according to the particular locality and quality of the property.[96]

PEEP-ABO A term that may imply libidinous conduct.[97]

PEERAGE. The actual state and dignity of a peer;[98] the status of a peer.[99]

PEERS.[1] In its ordinary meaning, equals; those who are a man's equals in rank and station;[2] members of the British nobility.[3] In its legal use, the word originally meant the vassals of a lord who sat in his court as judges of their covassals;[4] in this country the word really means citizens, and nothing more.[5]

PEG OUT. To mark or outline with pegs.[6]

PEGUJAL. In Spanish law, the fund which a father concedes to his son while still in his power.[7]

PEINE. Literally, punishment.[8] As used in French law the word does not correspond to our word "penalty," but corresponds more nearly to our expression "liquidated damages."[9]

PELTRY. Pelts or skins,[10] collectively, skins with the fur on them; furs.[11]

PEN.[12] **As a noun.** An inclosure[13] of greater or less dimensions and with no requisite form.[14]

"Pen" is also an abbreviation of "penitentiary."[15]

As a verb. To confine[16] in a small inclosure or narrow place.[17]

PENA. In Spanish law, penalty; punishment.[18]

PENAL.[19] A word which in its strict and primary sense denotes punishment, whether corporeal or pecuniary, imposed and enforced by the state for a crime or offense against its laws[20] Also commonly used as including any extraordinary liability to

91. McKenzie v. Brandon, 71 Cal. 209, 211, 12 P 428; Lawrence v. Fulton, 19 Cal. 683, 690; Horton v. Moore, 38 Cal. A. 623, 177 P 188, 190.

92. McColman v. Wilkes, 34 S. C. L. 465, 471, 51 AmD 637.

93. McKenzie v. Brandon, 71 Cal. 209, 211, 12 P 428; Lawrence v. Fulton, 19 Cal. 683, 690; Horton v. Moore, 38 Cal. A. 623, 177 P 188, 190; O'Hara v. Parker, 27 Or. 156, 167, 39 P 1004.

94. Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 285, 13 AmD 525; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230, 234; O'Hara v. Parker, 27 Or. 156, 167, 39 P 1004; Bailey v. Irby, 11 S. C. L. 343, 345, 10 AmD 609.

95. O'Hara v. Parker, 27 Or. 156, 167, 39 P 1004.

96. O'Hara v. Parker, supra.

97. State v. Avery, 7 Conn. 266, 268, 18 AmD 105.

[a] **"Played peep-abo."**—By such a statement used in a letter to the wife of another it was held that the writer meant that she had acted libidinously toward him, and invited him to adulterous intercourse and connection with him, and sought opportunities to effect it. State v. Avery, 7 Conn. 266, 268, 18 AmD 105.

98. Fermoy Peerage Claim, 5 H. L. Cas. 716, 752, 10 Reprint 1084.

[a] **Cannot be surrendered by its holder.**—Norfolk Peerage Claim, [1907] A. C. 10, 11.

[b] **Questions concerning can be tried only by the house of lords.**—Cowley v. Cowley, [1901] A. C. 450, 454, 459.

99. Fermoy Peerage Claim, 5 H. L. Cas. 716, 769, 790, 10 Reprint 1084.

[a] **Failure to establish claim** see Beauchamp Barony Claim, [1925] A. C. 153; St. John Peerage Claim, [1915] A. C. 282.

1. Judgment of his peers see 33 C. J. p 1041.

2. Black L. D.

3. Black L. D.

[a] **A peeress** is not entitled in her own right to sit in the house of lords. Rhondda's Claim, [1922] A. C. 339.

[b] **Right of a peer:** (1) To appear as counsel in an appeal to the house of lords see In re Kinross, [1905] A. C. 468. (2) To vote in an election for a member of the house of commons see Bristol v. Beck, 96 L. T. Rep. N. S. 55, 56.

4. Black L. D.

5. Matter of Grilli, 110 Misc. 45, 179 NYS 795, 797.

6. Webster New Int. D. And see Green v. Bibb County Road Bd., 126 Ga. 693, 698, 56 SE 59.

7. Escriche Diccionario.

8. Webster New Int. D.

[a] **Peine forte et dure.**—(1) Literally, strong and hard punishment. Webster New Int. D. (2) In old English law, a special form of punishment for those who, on being arraigned for felony, refused to plead. It was a combination of solitary confinement, slow starvation, and crushing the body with a heavy weight. Black L. D.

9. Canadian Gen. Electric Co. v. Canadian Rubber Co., 52 Can. S. C. 349, 351, 27 DomLR 294.

[a] **"Peine" and "penalty" distinguished.**—"I think any difficulty the case may present has arisen from the fact that similar terms have not perhaps quite the same meaning in English and in French law. In the latter the word 'peine' does not correspond to the word 'penalty' as construed by the English courts. Whilst the exact amount of the former may be recovered irrespective of damage, it is only so much of the latter as represents the actual damage sustained that the party in default can be made liable for. To some extent, therefore, the word 'peine' corresponds more nearly to 'liquidated damages' than to a penalty." Canadian Gen. Electric Co. v. Canadian Rubber Co., 52 Can. S. C. 349, 351, 27 DomLR 294.

Liquidated damages see Damages §§ 31, 231, 267.

10. "Skins" see [36 Cyc 463].

11. Webster New Int. D.

[a] **"Furs"** is a term "usually reserved for the short, fine hair of certain animals, whose skins are largely used for clothing; yet in a commercial sense furs have been regarded as including other skins, perhaps more properly designated by the term 'peltry.'" Seeberger v. Schlesinger, 152 U. S. 581, 585, 14 SCt 729, 38 L. ed. 560.

"Fur" see 27 C. J. p 930.

12. See Corral 14A C. J. p 1426.

13. See Inclosure 31 C. J. p 394.

14. Atchison, etc., R. Co. v. Veale, 39 Tex. Civ. A. 37, 87 SW 202, 203.

[a] **An inclosed lane** is a pen. Atchison, etc., R. Co. v. Veale, 39 Tex. Civ. A. 37, 87 SW 202, 203.

15. Denham v. Com., 119 Ky. 508, 84 SW 538, 539, 27 KyL 171.

Penitentiary see Prisons [32 Cyc 315].

16. See Confine 12 C. J. p 422.

17. Peo. v. Borda, 105 Cal. 636, 640, 38 P 1110 ("This need not necessarily be done by means of an artificial structure, but may also be done by means of, or through the agency of, men and dogs, either alone or in conjunction with natural or artificial barriers of an inanimate nature").

18. Escriche Diccionario. See Criminal Law § 3182 et seq; Fines, Forfeitures, and Penalties 25 C. J. p 1134.

[a] **The present code classifies penalties** as: First, afflictive or corporal, including death, imprisonment, (life or long) expulsion, perpetual and temporary, and disqualification, perpetual and temporary, from office, suffrage, and profession; second, correctional, including milder imprisonment, banishment, public censure, and suspension from office, suffrage, or profession; third, light, including brief imprisonment and private censure; and fourth, accessory, including degradation, civil interdiction, subjection to the surveillance of authorities; confiscation of the instruments and proceeds of crime; payment of costs. Spanish Pen. Code art 26 (providing that the penalties of caution and fine are common to the first three). See Philippine Pen. Code art 24.

[b] **Pena arbitraria** is a penalty not fixed by law (pena legal) but depending upon judicial discretion. Escriche Diccionario.

[c] **Pena capital** (ordinario) is the death penalty. Escriche Diccionario.

[d] **Pena convencional** is a contractual penalty designed to insure enforcement. Escriche Diccionario.

[e] **Pena de la nuestra merced** was a former penalty of royal disfavor. Escriche Diccionario.

[f] **Pena del talion** is retaliatory; similar to the crime. Escriche Diccionario.

[g] **Pena de pecho** is a compensatory penalty; opposed to pena de castigo, which is vindictive or deterrent. Escriche Diccionario.

[h] **Pena infamante** is an infamous, or specially disgracing, penalty. Escriche Diccionario.

[i] **Pena judicial** is a penalty imposed in consequence of a vow or undertaking in court. Escriche Diccionario.

[j] **Pena pecuniaria** is a fine; confiscation. Escriche Diccionario.

[k] **Penas de cámara** are the pecuniary penalties imposed on parties for the benefit of the royal treasury. Escriche Diccionario.

19. Penal:
Action see Actions § 14.
Institution see Prisons [32 Cyc 312]; Reformatories [34 Cyc 1002].
Judgment see Fines, Forfeitures, and Penalties §§ 140–150.
Law see Law § 15.
Statute see Statutes [36 Cyc 929].

[a] **Typographical error.**—"Penal," in a statute, should have read "final." Moody v. Stephenson, 1 Minn. 401, 402.

20. Huntington v. Attrill, 146 U. S. 657, 663, 13 SCt 224, 36 L. ed. 1123 [quot Schick v. U. S., 195 U. S. 65, 77, 24 SCt 826, 830, 49 L. ed. 99, 1 AnnCas 585 (dis. op.); Interstate, etc., Trust Co. v. Wyatt, 27 Colo. A. 217, 147 P 444, 446; Southern R. Co. v. Melton, 133 Ga. 277, 291, 65 SE 665, 671; State v. Warner, 197 Mo. 650, 94 SW 962, 964; Missouri, etc., R. Co. v. Dewey Portable Cement Co., 113 Okl. 142, 242 P 257, 259]; Blum v. Widdicomb, 90 Fed. 220, 221; Plumb v. Griffin, 74 Conn. 132, 134, 50 A 1; State v. Warner, 197 Mo. 650, 659, 94 SW 962; Kilton v. Providence Tool Co., 22 R. I. 605, 614, 48 A 1039. And

which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.[21] It is a much broader term than "criminal."[22]

Penal clause.[23] A secondary obligation entered into for the purpose of enforcing the performance of a primary obligation.[24]

Penal obligation.[25] In substance, an obligation is penal when its amount is measured neither by the obligee's loss nor by the valuation placed by him upon what he has given in exchange.[26]

Penal sum.[27] An amount greater than the value of the consideration—a forfeiture;[28] a sum of money payable as an equivalent or punishment for an injury.[29] The fact that a sum is called a "penal" sum does not make it so in legal contemplation.[30]

Other phrases: "Penal bond,"[31] "penal farm,"[32] "penal institutions of the state;"[33] also, "penal provisions."[34]

PENALIZE. To punish, or subject to some penalty, detriment, or disadvantage.[34½]

PENALTIES.[35]

***PENCIL.** An instrument with which we write without ink.[36]

Ink pencil. A pencil in which a solid indelible pigment takes the place of the usual lead.[37]

PENDENCY.[38] In practice, the state of an undetermined proceeding.[39]

PENDENCY OF ACTION.[40]

PENDENS. A Latin word[41] meaning "pending."[42]

PENDENTE LITE.[43] A Latin expression[44] defined as meaning, pending the continuance of an action; while litigation continues.[45]

PENDENTE LITE NIHIL INNOVETUR [INNOVANDUM].[46]

PENDING.[47] A term having different shades of

see Fines, Forfeitures, and Penalties § 72.

"Punishment" see [32 Cyc 1262].

21. Huntington v. Attrill, 146 U. S. 657, 663, 13 SCt 224, 36 L. ed. 1123 [quot Southern R. Co. v. Melton, 133 Ga. 277, 291, 65 SE 665, 671; State v. Warner, 197 Mo. 650, 94 SW 962, 964]; American Credit-Indemn. Co. v. Ellis, 156 Ind. 212, 221, 59 NE 679.

[a] **"In its ordinary acceptation,** the word 'penal' may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule." Huntington v. Attrill, [1893] A. C. 150, 156.

22. Marter v. Repp, 80 N. J. L. 530, 532, 77 A 1030 ("includes many statutory enforcements of police regulations, the violations of which are in no sense crimes").

"Criminal" see 15 C. J. p 1455.

23. **"Clause"** see 11 C. J. p 830.

24. La. Civ. Code (1900) art 2117 [quot Wagner Co. v. Monroe, 52 La. Ann. 2132, 2139, 28 S 229, 232].

"Obligation" see 46 C. J. p 846.

25. **"Obligation"** see 46 C. J. p 846.

26. In re Caponigri, 193 Fed. 291, 292.

27. **"Sum"** see [37 Cyc 526].

28. Nelson v. Ford, 5 Oh. 473, 475.

29. Rapalje & L. L. D. [quot Rogers v. Bonnett, 2 Okl. 553, 37 P 1078, 1080; Eason v. Witcofskey, 29 S. C. 239, 246, 7 SE 291]. See Madison v. American Sanitary Engineering Co., 118 Wis. 480, 482, 95 NW 1097.

30. Westbay v. Terry, 83 Ark. 144, 148, 103 SW 160, 161.

31. Carey v. Mackey, 82 Me. 516, 20 A 84, 85, 17 AmSR 500, 9 LRA 113.

"A bond promising to pay a named sum of money (the penalty) with a condition underwritten that, if a stipulated collateral thing, other than the payment of money, be done or forborne, as the case may be, the obligation shall be void." Black L. D. [quot Goffe v. National Surety Co., (Mo.) 9 SW (2d) 929, 939].

[a] **"Simplex obligatio" distinguished.**—Burnside v. Wand, 170 Mo. 531, 553, 71 SW 337, 62 LRA 427.

"Bond" see Bonds § 1.

32. Summers v. State, 198 Ind. 241, 151 NE 615, 616.

"Farm" see 25 C. J. p 670.

33. Bronk v. Riley, 2 NYS 266, 270.

Penal institution see Prisons [32 Cyc 312]; Reformatories [34 Cyc 1002].

34. Ex p. Brambini, 192 Cal. 19, 218 P 569, 575.

"Provision" see [32 Cyc 741].

34½. Wells v. English Electric Co., Ltd., 38 Austr. C. L. R. 295, 299.

35. See Fines, Forfeitures, and Penalties §§ 72–161.

36. Clason v. Bailey, 14 Johns. (N. Y.) 484, 491.

[a] **"Indelible pencil."**—Thrailkill v. Smith, 106 Oh. St. 1, 138 NE 532, 533.

[b] **"Soap pencils."**—U. S. v. American Express Co., 136 Fed. 594, 595, 69 CCA 368.

37. Standard D. [quot Thrailkill v. Smith, 106 Oh. St. 1, 138 NE 532, 533 (distinguishing lead pencil)].

38. See Pending post this page.

39. Peo. v. Roosevelt, 12 Misc. 622, 625, 34 NYS 228. See Montoya v. Gonzales, 232 U. S. 375, 34 SCt 413, 414, 58 L. ed. 645; Grannis v. San Francisco Super. Ct., 143 Cal. 630, 77 P 647, 649.

40. See Pending post this page.

41. Rice v. McCaulley, 12 Del. 226, 241, 31 A 240.

42. Black L. D.

"Pending" see post this page.

43. See Lis Pendens § 1; Pending post this page.

44. Herbetson v. Herbetson, 30 Pa. Dist. 692, 693.

45. Bouvier L. D. [quot Herbetson v. Herbetson, 30 Pa. Dist. 692, 693].

[a] **Similar definitions.**—"Pending a suit; during the actual progress of the suit; during litigation." In re Morrissey, 91 N. J. Eq. 289, 293, 107 A 70.

[b] **Purchaser pendente lite** is one who by purchase acquires an interest in the matter in litigation pending the suit. Whiting v. Beebe, 12 Ark. 421, 564.

46. A maxim meaning "Pending the suit nothing should be changed." Burrill L. D. [cit Coke Litt. 344b].

[a] **Applied or cited in:** Ashley v. Cunningham, 16 Ark. 168, 175; Powell v. National Bank of Commerce, 19 Colo. A. 57, 74 P 536, 538; McCabe v. Worthington, 16 Mo. 514, 517; Taylor v. Woodward, 10 N. J. L. 1, 3; Turner v. Houpt, 53 N. J. Eq. 526, 553, 33 A 28; Booraem v. Wood, 27 N. J. Eq. 371, 374; Lamont v. Cheshire, 65 N. Y. 30, 36; Crocker v. Lewis, 79 Hun 400, 404, 29 NYS 798; Fuller v. Scribner, 16 Hun (N. Y.) 130, 133; Jones v. Williams, 155 N. C. 179, 184, 71 SE 222, 36 LRANS 426; Butler v. Birkey, 13 Oh. St. 514, 522; Cirode v. Buchanan, 22 Gratt. (63 Va.) 205, 220; Bruff v. Thompson, 31 W. Va. 16, 20, 6 SE 352; Lynch v. Andrews, 25 W. Va. 751, 756; Hughes v. Hamilton, 19 W. Va. 366, 395; Zane v. Fink, 18 W. Va. 693, 720; Langdon v. Morris, 5 Sim. 247, 259, 9 EngCh 247, 58 Reprint 329; Metcalfe v. Purvertoft, 2 Ves. & B. 200, 204, 35 Reprint 295; Fisken v. Rutherford, 8 Grant Ch. (Ont.) 9, 28; Credit Foncier v. Redekope, 12 Sask. L. 83, 84, [1919] 1 WestWkly 494.

[b] **A "legal maxim."**—Jones v. Williams, 155 N. C. 179, 184, 71 SE 222, 36 LRANS 426.

Generally see Lis Pendens 38 C. J. p 1.

47. Cross references:

Abatement and Revival §§ 38–166 (another action pending as ground for abatement).

Actions §§ 382–447 (commencement, prosecution, and termination).

Adverse Possession §§ 165–177 (legal proceedings as interruption of).

Attachment § 529 (transfer of property pending proceedings).

Bankruptcy §§ 153–175 (custody and protection of property pending proceedings), §§ 239–244 (right of trustee as to pending action).

Contempt § 79 (other proceedings as affecting punishment for).

Continuances §§ 28–32 (another action pending as ground for in civil actions).

Courts § 606 (transfer of causes proper generally), § 617 (time for application for transfer).

Criminal Law § 442 (pendency of appeal or motion for new trial as affecting plea of former jeopardy), § 886 (pendency of civil suit involving same question as ground for continuance), § 887 (pendency of another indictment as ground for continuance), § 889 (pendency of appeal by material witness convicted for perjury as ground for continuance).

Depositions §§ 68–75 (application for in pending causes).

Divorce §§ 500–508 (at what stage temporary alimony allowed).

Ejectment § 56 (successive actions).

Executions § 948 (pendency of supplementary proceedings as bar to further proceedings).

Fraudulent Conveyances § 139 (conveyance pending suit as badge of fraud.

Habeas Corpus § 10 (trial of original proceeding still pending as affecting right to remedy).

Injunctions § 60 (injunction already in force or application pending therefor as affecting right to remedy).

Interest §§ 153–163 (suspension by pendency of litigation).

Justices of the Peace § 132 (another action pending as ground for abatement of action before justices of the peace).

Landlord and Tenant § 1801 (statutory suspension of dispossession proceedings during pendency of other proceedings).

Limitations of Actions § 447 et seq (effect of pendency of legal proceeding upon running of statute).

Lis Pendens §§ 36–61 (commencement), §§ 62–76 (continuance or duration).

Mandamus §§ 45–47 (pendency of other actions or proceedings as affecting right to remedy).

*By JUAN D. MIRANDA (Pencil—Pensionista inclusive except the Spanish words and phrases).

meaning,[48] susceptible of two interpretations,—the legal and technical, or the popular and liberal,[49]—variously defined as begun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment;[50] commenced and not terminated;[51] during; hence, during the pendency of, the completion of, or the like;[52] during the continuance of;[53] depending; not terminated;[54] remaining undecided;[55] under way;[56] also, during the time intervening before; awaiting; until.[57] Having recourse to the vernacular or to the derivation of the term, "pending" means "hanging."[58]

Phrases: "Arbitration pending,"[59] bill pending in the legislature,[60] "cause . . . pending,"[61] "causes now pending,"[62] "deemed pending,"[63] "no longer pending,"[64] "pending a petition for divorce,"[65] "pending . . . appeal,"[66] "pending at the termination of federal control,"[67] "pending at the time the commissioners are appointed,"[68] "pending business,"[69] "pending case,"[70] "pending cause [or causes],"[71] "pending contest or protest,"[72] "pending freight,"[73] "pending in settlement,"[74] "pending in the common pleas,"[74½] "pending in the courts,"[75] "pending proceeding [or proceedings],"[76] "pending repairs,"[77] "pending such hearing,"[78] "pending the disposal of school bonds,"[79] "pending therein,"[80] "pending the suit for divorce,"[81] "pending the time,"[82] "petition for administration . . . pending,"[83] "prosecution pending,"[84] "then

New Trial § 259 et seq (time for application).
Quieting Title [32 Cyc 1313 (pendency of action at law as affecting exercise of equitable jurisdiction)].
Receivers [34 Cyc 28 (necessity of pendency of cause for appointment), 171 (termination of receivership by dismissal, discontinuance, or termination of suit)].
References [34 Cyc 792 (condition of cause and time for application)].
Removal of Causes [34 Cyc 1273 (time for)].
Set-Off and Counterclaim [34 Cyc 674 (set-off of claims on which action is pending)].

48. Com. v. Day, 3 Pa. Dist. & Co. 749, 750.

49. Peo. v. Roosevelt, 12 Misc. 622, 34 NYS 228, 229.

[a] **Not employed in the technical sense of "pendens" but rather in the sense of "commenced."**—Rice v. McCaulley, 12 Del. 226, 241, 31 A 240.

50. Black L. D. [quot Midkiff v. Colton, 242 Fed. 373, 382, 155 CCA 149].

51. Thompson v. Reno County, (Kan.) 275 P 205, 208 [quot Cyc]. To same effect Morrison v. Lewis, (N. C.) 147 SE 729, 730.

52. Webster New Int. D. [quot Fireman's Fund Ins. Co. v. Jackson, 161 Ga. 559, 131 SE 359, 360].

53. Cincinnati, etc., R. Co. v. McCullom, 183 Ind. 556, 109 NE 206, 209, AnnCas1917E 1165 [cit Standard D.; Webster D.].

54. Century D.; Webster D. [both quot Badger v. Gilmore, 37 N. H. 457, 459; State v. Faircloth, (N. M.) 277 P 30; Stockard v. Hamilton, 25 N. M. 240, 245, 180 P 294]; Sanford v. Sanford, 28 Conn. 6, 22.

55. Century D.; Webster D. [both quot State v. Faircloth, (N. M.) 277 P 30; Stockard v. Hamilton, 25 N. M. 240, 245, 180 P 294]; Sanford v. Sanford, 28 Conn. 6, 22; Ex p. Munford, 57 Mo. 603, 606; Buswell v. Babbitt, 65 N. H. 168, 169, 18 A 748; Wentworth v. Farmington, 48 N. H. 207, 210; Clindenin v. Allen, 4 N. H. 385, 386.

[a] **"The word 'pending', legally speaking,** means a matter undecided." Smalley v. State, 59 Tex. Cr. 95, 98, 127 SW 225.

56. Thompson v. Reno County, (Kan.) 275 P 205, 208.

57. Cincinnati, etc., R. Co. v. McCullom, 183 Ind. 556, 109 NE 206, 209, AnnCas1917E 1165 [cit Standard D.; Webster D.].

[a] **"The appeal is 'pending' when undecided."**—Gordon v. Rhodes, (Tex. Civ. A.) 104 SW 786, 787.

58. Peo. v. Roosevelt, 12 Misc. 622, 625, 34 NYS 228.

59. In re Taylor, 23 Man. 268, 9 DomLR 695, 15 CanRCas 51, 23 WestLR 645, 650, 3 WestWkly 1072.

[a] **"Any arbitration now pending."**—In re Taylor, 23 Man. 268, 9 DomLR 695, 698, 15 CanRCas 51, 23 WestLR 645, 3 WestWkly 1072.

60. State v. Gear, 5 OhS&CP 569, 7 OhNP 551.

61. See Cause 11 C. J. p 40 text and note 26.

62. See Cause 11 C. J. p 40 text and note 29.

63. Moore v. Douglas, 230 Fed. 399, 401, 144 CCA 541.

64. Peo. v. Murphy, 194 App. Div. 530, 186 NYS 38, 42.

65. Cirtin v. Cirtin, (Ind.) 164 NE 493, 494 (as meaning that period of time intervening between the commencement of the action and the rendition of the final judgment).

66. See cases infra this note.

[a] **"Pending an appeal."**—Walters v. State, 18 Tex. A. 8, 11.

[b] **"Pending on appeal."**—Wright v. Walker County Fertilizer Co., 164 Ga. 260, 138 SE 151, 152.

[c] **"Pending such appeal."**—Cincinnati, etc., R. Co. v. McCullom, 183 Ind. 556, 564, 109 NE 206, AnnCas 1917E 1165.

67. Snow v. U. S. Railroad Administration, 209 App. Div. 308, 204 NYS 514, 516.

68. Noyes v. Pierce, 97 Vt. 188, 122 A 896, 899.

69. Schulder v. Dickson, 66 Utah 418, 243 P 377, 379.

70. Stockard v. Hamilton, 25 N. M. 240, 180 P 294, 295.

[a] **"All cases pending in said county."**—Bryant v. State, 158 Ala. 26, 48 S 543, 544.

[b] **"All cases, proceedings, and matters . . . pending."**—U. S. v. Taylor, 44 Fed. 2, 3 [quot Hupp v. Hock-Hocking Oil, etc., Gas Co., 88 Oh. St. 61, 101 NE 1053, 1056, AnnCas 1914B 1004].

[c] **"During the trial of any case pending."**—Peo. v. Valcourt, 18 Porto Rico 471, 475.

71. Browne v. Browne, 215 Mass. 76, 102 NE 329, 330; Williams v. Doolittle, 134 Miss. 870, 98 S 842, 844.

72. Lane v. Hoglund, 244 U. S. 174, 37 SCt 558, 61 L. ed. 1066; U. S. v. Lane, 49 App. (D. C.) 234, 263 Fed. 630, 631.

73. In re La Bourgogne, 117 Fed. 261, 265.

74. Bacon v. Thorp, 27 Conn. 251, 267.

74½. Driscoll v. McAlister, 294 Pa. 169, 144 A 89, 90.

75. State v. Morrow, 90 Oh. St. 202, 107 NE 515, 516.

[a] **"Pending before the Probate Court."**—Kenyon v. East Greenwich Probate Ct., 27 R. I. 566, 568, 65 A 267.

[b] **"Pending in County Court."**—Tilden v. Johnson, 52 Vt. 628, 630, 36 AmR 769.

[c] **"Pending in the County Court."**—Peo. v. Adel, 129 Misc. 82, 220 NYS 696, 704.

[d] **"Pending in the Supreme Court."**—Timken Roller Bearing Co. v. Pennsylvania R. Co., 274 U. S. 181, 47 SCt 550, 553, 71 L. ed. 989.

[e] **"It shall be lawful for the Court in which such action is pending."**—Holland v. Fox, 3 E. & B. 977, 985, 77 ECL 977, 118 Reprint 1407.

[f] **"Suit pending in the Court of Northumberland."**—Ulshafer v. Stewart, 71 Pa. 170, 174.

76. Harvey v. Atlanta, etc., Nat. Bank, 164 Ga. 625, 139 SE 147, 148; East Point Bank v. Dupre, 152 Ga. 547, 548, 110 SE 240; Bernstein v. Higginbotham, 148 Ga. 110, 111, 96 SE 1; Malsby v. Studstill, 127 Ga. 726, 728, 56 SE 988, 989; Ellis v. Stewart, 123 Ga. 242, 51 SE 321; Townsend v. Brinson, 117 Ga. 375, 43 SE 748, 750; Macon Nav. Co. v. Stallings, 110 Ga. 352, 35 SE 647, 648; Dade Coal Co. v. Anderson, 103 Ga. 809, 810, 30 SE 640, 641; Rounsaville v. McGinnis, 93 Ga. 579, 21 SE 123, 124; Peo. v. Murphy, 194 App. Div. 530, 186 NYS 38, 42; Peo. v. Fagan, 194 App. Div. 185, 186 NYS 23, 25; Gatto v. Murray, 116 Misc. 270, 190 NYS 360, 363; Matter of Iovinella, 88 Misc. 224, 150 NYS 689, 690; Hyman v. Gordon, 185 NYS 301, 302; Tyler Co. v. Rebic, 118 Oh. St. 522, 161 NE 790, 791; Toledo v. Marlow, 28 Oh. Cir. Ct. 298, 308, 8 Oh. Cir. Ct. N. S. 121.

[a] **"Action or proceeding is pending."**—Peo. v. Napoli, 7 Cal. A. 79, 80, 93 P 500.

[b] **"Affect any pending action or proceeding."**—Lehigh Valley R. Co. v. Comar, 151 Fed. 559, 560, 81 CCA 39.

[c] **"As to the legality of the pending proceeding."**—Downey v. Peo., 205 Ill. 230, 235, 68 NE 807.

[d] **"Pending action or proceeding."**—Peo. v. Adel, 129 Misc. 82, 220 NYS 696, 704.

[e] **"Pending the proceedings for the hearing and examination."**—Porter v. Ritch, 70 Conn. 235, 252, 39 A 169, 177, 39 LRA 353.

[f] **"Proceedings pending."**—O'Maley v. Reese, 1 Barb. (N. Y.) 643, 646.

77. Merriam v. Public Parks Bd., 22 Man. 107, 120, 2 DomLR 702, 20 WestLR 603, 1 WestWkly 1082.

78. Riggins v. Thompson, 96 Tex. 154, 159, 71 SW 14.

79. Quirk v. Sydney Mines, 56 N. S. 281, 283.

80. In re Departmental Reference, 59 Ct. Cl. 813, 816.

81. Smith v. Smith, 151 Mo. A. 649, 132 SW 312, 313.

[a] **"A suit for divorce is a pending suit** when the writ has been issued and returned executed and the bill has been filed, though both occurred on the same day." State v. Waugh, 93 W. Va. 28, 31, 116 SE 79.

[b] **"Action for divorce . . . pending."**—Bruce v. Bruce, 160 Cal. 28, 116 P 66, 67; Taylor v. Taylor, 33 Ida. 445, 449, 196 P 211; Roby v. Roby, 9 Ida. 371, 74 P 957, 3 AnnCas 50.

82. Fireman's Fund Ins. Co. v. Jackson, 161 Ga. 559, 131 SE 359, 360.

83. Carpenter v. Hadley, 118 Me. 437, 108 A 679, 680.

84. Reg. v. Verral, 16 Ont. Pr. 444, 445 [app dism 17 Ont. Pr. 61, 64].

[a] **"A criminal case is 'pending'** in the sense that a court may correct its records, until the judgment is fully satisfied." Ex p. Howland, 3 Okl. Cr. 142, 104 P 927, AnnCas1912A 840 [quot Dunn v. State, 18 Okl. Cr. 493, 196 P 739, 741; Breeding's Pet., 75 Okl. 169, 182 P 899, 900].

[b] **"As early as the arrest and**

pending."[85]

PENETRATION.[86]

PENHOLDER. A holder for pens or pen points; a handle or stock, with a device for retaining the pen; usually a socket of metal.[87]

PENITENTIARY.[88]

PENKNIFE. A small pocketknife; formerly, a knife used for making and mending quill pens.[89]

PENNY ARCADE. A place where a number of machines are kept for profit, each of which, by a mechanical arrangement, exhibits pictures to a person who drops a penny into a slot.[90]

PEÑO. In Spanish law, the subject of a pledge whether delivered or not.[91]

PENOSO. In Spanish law, laborious; that which causes hardship or involves great difficulty.[92]

PENSION. In Spanish law, a temporary or perpetual rent charge on land;[93] a royal or ecclesiastical revenue.[94]

PENSIONARIO. One who pays a pension.[95]

PENSIONISTA or **PENSIONADO.** One who is entitled to receive a pension.[96]

commitment, for a crime for which he is afterwards indicted, the cause or prosecution is pending." Hartnett v. State, 42 Oh. St. 568, 576. But see State v. Arlin, 39 N. H. 179, 180 (a criminal prosecution will not be deemed pending where no indictment has been filed but only preliminary proceedings begun before a magistrate).

85. Peo. v. Gilbert, 204 Ill. A. 97, 101.

86. See Rape [33 Cyc 1422]; Sodomy [36 Cyc 502].

87. Century D. [quot Schrader v. U. S., 180 Fed. 953].

88. See Prisons [32 Cyc 315].

89. Webster New Int. D. See Kastor v. U. S., 167 Fed. 993, 994.

90. Fichtenberg v. Atlanta, 126 Ga. 62, 54 SE 933.

91. Escriche Diccionario. See Pledges [31 Cyc 779].

92. U. S. v. Pico, 18 Philippine 386, 392.

[a] **Not synonymous with "painful."**—U. S. v. Pico, 18 Philippine 386, 392. See Painful 46 C. J. p 1170; Pena ante p 780.

93. Escriche Diccionario. See Ground Rents 28 C. J. p 832.

94. Escriche Diccionario.

95. Escriche Diccionario.

96. Escriche Diccionario.

PENSIONS

By William A. Martin

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 785]

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CROSS REFERENCES

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Assets of pensioner's estate see **Executors and Administrators** § 326.
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Control of pension money by soldiers' home see **Army and Navy** § 231.
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Exemption from:
Execution see **Exemptions** §§ 128–130.
Taxes see **Taxation** [37 Cyc 909].
Fireman's pension see **Municipal Corporations** § 1492 et seq.
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Pay of retired military or naval officer see **Army and Navy** § 80.
Police commissioner's pension see **Municipal Corporations** § 1282.
Policeman's pension see **Municipal Corporations** § 1407 et seq.
Right to pension as property see **Constitutional Law** § 988.
State aid to family of soldier, sailor, or marine see **Army and Navy** § 238.
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Teacher's pension see **Municipal Corporations** § 1581; **Schools and School Districts** [35 Cyc 1108].

I. DEFINITION

[§ 1] Within the scope of this title, a pension is a periodical allowance[1] of money granted by the government in consideration of services rendered,[2] or of loss or injury sustained in the public service.[3] The term "pension" has been compared and distinguished from "compensation,"[4] "corody,"[5] and "salary."[6]

1. [a] **"Accrued pensions,"** as used in the pension laws, means the amount of money unpaid by the government to which a pensioner, or one who had a valid pending claim for pension, would be entitled at his death. 19 Op. Atty.-Gen. pp 1, 2.

2. See cases infra this note; and infra § 2 text and note 13.

[a] **A pension has been defined as:** (1) "An annuity from the government for services rendered in the past." Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 59 SE 148, 152, 125 AmSR 818, 13 LRANS 1147. (2) "A periodical allowance of money granted by a government for services rendered, in particular to a soldier or sailor in connection with a war or with military operation." Anderson L. D. [quot Morse v. Robertson, 9 Hawaii 195, 197]. (3) "A regular allowance paid to an individual by the government in consideration of past services, or in recognition of merit." Hawkins v. Randolph, 149 Ark. 124, 133, 231 SW 556. (4) "A stated and certain allowance made and granted by the government for valuable services performed in its behalf; it is a reward for continuous faithfulness in the discharge of public duty, and is a compensation for the hazard of the employment." Roche v. Waldo, 141 App. Div. 872, 875, 126 NYS 766. (5) "A bounty for past services rendered to the public." Price v. Savings Soc., 64 Conn. 362, 366, 30 A 139, 42 AmSR 198.

3. Black L. D. (2d ed) [quot State v. Kimmel, 256 Mo. 611, 165 SW 1067, 1072]. See also infra § 2 text and note 14.

4. Dickey v. Jackson, 181 Iowa 1155, 1160, 165 NW 387 ("the words 'pension' and 'compensation' are not synonymous. . . . . The latter is ordinarily a gratuity from the government, or some of its subordinate agencies, in recognition of but not in payment for past services").

5. See Corody 13 C. J. p 1238.

6. In re Higgins, 21 Ch. D. 95 ("pension" is not synonymous with "salary," since the pensioner is not bound to render any services for his pension).

II. OBJECT AND NATURE

[§ 2] Pensions, it is said, are mainly designed to assist the pensioner in providing for his daily wants.[7] A pension is not a matter of contract,[8] and is not founded upon any legal liability.[9] No man has a legal vested right to a pension;[10] it is a mere bounty[11] or gratuity[12] given by the government in consideration or recognition of meritorious past services,[13] or of loss or damage sustained in the public service,[14] and "springing from the appreciation and graciousness of the sovereign."[15] It may be bestowed on such persons and upon such terms as the lawmaking body of the government prescribes.[16] And "its payment must be made and accepted in exact conformity with the terms of the grant, and must be subject to all the limitations, conditions, and exceptions therein contained."[17] It is, at most, an expectancy granted by the law.[18] And although existing pension laws may entitle one to a pension, the government may, at its pleasure, at any time, change the amount thereof[19] or revoke or destroy it altogether.[20]

III. STATUTORY PROVISIONS[21]

[§ 3] **A. Necessity and Validity.** Inasmuch as a pension is not a matter of contract, but a mere bounty or gratuity on the part of the government,[22] it necessarily follows that statutory authority for the giving of pensions is indispensable. However, the matter of granting pensions has been made the subject of legislation in England[23] and in the United States both by congress and some of the state legislatures;[24] and the validity of both federal[25] and

7. Price v. Society for Sav., 64 Conn. 362, 30 A 139, 42 AmSR 198; Peo. v. Keys, 178 App. Div. 677, 165 NYS 863; In re Smith, 130 N. C. 638, 639, 41 SE 802.

"Pensions . . . are not granted alone on the consideration of meritorious services rendered the public, but they are granted because of the necessities, condition and circumstances of the pensioners." In re Smith, supra.

8. U. S.—Harrison v. U. S., 20 Ct. Cl. 122; Donnelly v. U. S., 17 Ct. Cl. 105.

Ala.—Dale v. Governor, 3 Stew. 387.

D. C.—Rudolph v. U. S., 36 App. 379, 384.

Ill.—Eddy v. Morgan, 216 Ill. 437, 75 NE 174; Ryan v. Foreman, 181 Ill. A. 262 [aff 262 Ill. 175, 104 NE 189, AnnCas1915B 780].

Minn.—Gibbs v. Minneapolis Fire Dept. Relief Assoc., 125 Minn. 174, 145 NW 1075, AnnCas1915C 749.

Can.—Thomas v. Rex, [1928] Can. Exch. 26, [1928] 2 DomLR 535.

"The statute (providing for pensions) differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable." Rudolph v. U. S., supra.

9. Hodge v. Leaning, 2 Dem. Surr. (N. Y.) 553.

10. U. S.—Frisbie v. U. S., 157 U. S. 160, 15 SCt 586, 39 L. ed. 657; U. S. v. Teller, 107 U. S. 64, 2 SCt 39, 27 L. ed. 352; Walton v. Cotton, 19 How. 355, 15 L. ed. 658; In re Hoag, 227 Fed. 478; U. S. v. Moyers, 15 Fed. 411; Harrison v. U. S., 20 Ct. Cl. 122; 27 Op. Atty.-Gen. p 178.

Ala.—Dale v. Governor, 3 Stew. 387.

D. C.—Rudolph v. U. S., 36 App. 379; Macfarland v. Bieber, 32 App. 513.

Ill.—McCann v. Chicago Policemen's Annuity, etc., Retirement Bd., 331 Ill. 193, 162 NE 859 [rev 246 Ill. A. 471]; Peo. v. Hanson, 330 Ill. 79, 161 NE 145; Peo. v. Policemen's Annuity, etc., Retirement Bd., 326 Ill. 579, 158 NE 220, 54 ALR 940; Beutel v. Foreman, 288 Ill. 106, 123 NE 270; Stiles v. West Chicago Park Police Pension Fund Comrs., 281 Ill. 636, 118 NE 202; Pecoy v. Chicago, 265 Ill. 78, 106 NE 435; Hughes v. Traeger, 264 Ill. 612, 106 NE 431; Eddy v. Morgan, 216 Ill. 437, 75 NE 174; Ryan v. Foreman, 181 Ill. A. 262 [aff 262 Ill. 175, 104 NE 189, AnnCas1915B 780].

Kan.—Gleason v. Sedgwick County, 92 Kan. 632, 141 P 584.

Ky.—Head v. Jacobs, 150 Ky. 290, 150 SW 349.

Minn.—Gibbs v. Minneapolis Fire Dept. Relief Assoc., 125 Minn. 174, 145 NW 1075, AnnCas1915C 749; Stevens v. Minneapolis Fire Dept. Relief Assoc., 124 Minn. 381, 145 NW 35, 50 LRANS 1018.

N. Y.—Friel v. McAdoo, 101 App. Div. 155, 91 NYS 454.

Oh.—In re Price, 22 Oh. Cir. Ct. 48, 12 Oh. Cir. Dec. 273.

Pa.—Hall's Est., 20 Pa. Dist. 876.

Tex.—Chalk v. Darden, 47 Tex. 438.

Wash.—In re Snyder, 93 Wash. 59, 160 P 12, 3 ALR 1230; Whitaker v. Clausen, 57 Wash. 268, 106 P 745, 107 P 832.

Wis.—State v. Policemen's Pension Fund, 121 Wis. 44, 98 NW 954.

11. U. S.—U. S. v. Moyers, 15 Fed. 411.

Conn.—Price v. Society for Sav., 64 Conn. 362, 30 A 139, 42 AmSR 198.

Ill.—Peo. v. Policemen's Annuity, etc., Retirement Bd., 326 Ill. 579, 158 NE 220, 54 ALR 940; Stiles v. West Chicago Park Police Pension Fund Comrs., 281 Ill. 636, 118 NE 202; Eddy v. Morgan, 216 Ill. 437, 75 NE 174; Ryan v. Foreman, 181 Ill. A. 262 [aff 262 Ill. 175, 104 NE 189, AnnCas 1915B 780].

Iowa.—Manning v. Spry, 121 Iowa 191, 96 NW 873; Lawrence v. Nelson, 113 Iowa 277, 85 NW 84, 57 LRA 583.

Mo.—Wolfe v. Wolfe, 154 Mo. A. 218, 134 SW 33.

N. Y.—Peo. v. Keys, 178 App. Div. 677, 165 NYS 863.

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12. U. S.—U. S. v. Teller, 107 U. S. 64, 2 SCt 39, 27 L. ed. 352; Walton v. Cotton, 19 How. 355, 15 L. ed. 658; Harrison v. U. S., 20 Ct. Cl. 122; Donnelly v. U. S., 17 Ct. Cl. 105; 27 Op. Atty.-Gen. p 178.

D. C.—Macfarland v. Bieber, 32 App. 513.

Iowa.—Beatty v. Cook, 192 Iowa 542, 185 NW 360; Dickey v. Jackson, 181 Iowa 1155, 165 NW 387; Manning v. Spry, 121 Iowa 191, 96 NW 873.

Kan.—Gleason v. Sedgwick County, 92 Kan. 632, 141 P 584.

Mo.—Wolfe v. Wolfe, 154 Mo. A. 218, 134 SW 33.

N. Y.—Peo. v. Williams, 6 Misc. 185, 27 NYS 23.

N. C.—In re Smith, 130 N. C. 638, 41 SE 802.

Pa.—Hall's Est., 20 Pa. Dist. 876.

Va.—Burton v. Burton, 10 Leigh (37 Va.) 626.

13. Ark.—Hawkins v. Randolph, 149 Ark. 124, 231 SW 556.

Conn.—Price v. Society for Sav., 64 Conn. 362, 30 A 139, 42 AmSR 198.

Iowa.—Dickey v. Jackson, 181 Iowa 1155, 165 NW 387; Manning v. Spry, 121 Iowa 191, 96 NW 873.

Mo.—Wolfe v. Wolfe, 154 Mo. A. 218, 134 SW 33.

N. Y.—Peo. v. Keys, 178 App. Div. 677, 165 NYS 863.

14. Black L. D. (2d ed) [quot State v. Kimmel, 256 Mo. 611, 631, 165 SW 1067].

15. Peo. v. Policemen's Annuity, etc., Retirement Bd., 326 Ill. 579, 158 NE 220, 54 ALR 940; Eddy v. Morgan, 216 Ill. 437, 75 NE 174; Ryan v. Foreman, 181 Ill. A. 262 [aff 262 Ill. 175, 104 NE 189, AnnCas1915B 780].

16. Frisbie v. U. S., 157 U. S. 160, 15 SCt 586, 39 L. ed. 657; U. S. v. Teller, 107 U. S. 64, 2 SCt 39, 27 L. ed. 352; Walton v. Cotton, 19 How. (U. S.) 355, 15 L. ed. 658; 27 Op. Atty.-Gen. p 178; Stiles v. West Chicago Park Police Pension Fund Comrs., 281 Ill. 636, 118 NE 202; Pecoy v. Chicago, 265 Ill. 78; Ryan v. Foreman, 262 Ill. 175, 104 NE 189, AnnCas1915B 780; Eddy v. Morgan, 216 Ill. 437, 75 NE 174; Corkum v. Clark, (Mass.) 161 NE 912.

17. Donnelly v. U. S., 17 Ct. Cl. 105, 108; and cases supra note 16.

18. Pennie v. Reis, 132 U. S. 464, 10 SCt 149, 33 L. ed. 426; Peo. v. Hanson, 330 Ill. 79, 161 NE 145; Hughes v. Traeger, 264 Ill. 612, 106 NE 431.

19. See infra § 18.

20. See infra § 31.

21. Inchoate right to pension as property within due process clause see Constitutional Law § 988.

Repeal of statute:

As terminating right see infra § 31.

Pending application see infra § 26.

Pending prosecution see infra § 52.

Validity of statutes:

Making it an offense:

To exact excessive fees for prosecuting pension claims see infra § 46.

To withhold wrongfully pension money see infra § 9.

Providing for investigation of suspected attempts to defraud see infra § 45.

22. See supra § 2.

23. See infra § 9.

24. See statutory provisions.

25. U. S. v. Hall, 98 U. S. 343, 25 L. ed. 180; U. S. v. Van Leuven, 62 Fed. 52; U. S. v. Fairchilds, 25 F. Cas. No. 16,067, 1 Abb. 74; U. S. v. Marks, 26 F. Cas. No. 15,721, 2 Abb. 531.

[a] **Embezzling ward's pension money.**—An act of congress making it an offense for a guardian to embezzle or convert to his own use the pension of his ward is not unconstitutional, on the ground that, inasmuch as the state law authorizes the guardian to receive the pension money, accused could not be subjected to an indictment under an act of congress for embezzling it after he lawfully received it; or on the ground that a guardian is a state officer and as such is not subject to the laws of congress in the performance of his duty; or on the ground that the act is municipal in its character, oper-

state[26] pension laws has generally been upheld as against objections that they were in violation of the organic law of federal or state government, although some statutes have been declared invalid because in contravention of some constitutional provision.[27]

[§ 4] **B. Construction.** While it has been held that a statute making it a criminal offense to violate a pension law must receive strict construction,[28] it has been uniformly held that laws creating the right to pensions must be liberally construed[29] with the view of promoting the objects of the lawmaking body;[30] and their force and effect are not to be conformed to the literal terms of the statute.[31]

IV. PENSION AGENCIES AND PENSION AGENTS

[§ 5] **A. Pension Agencies.** Within certain limitations prescribed by statute, the president of the United States is vested with the power to establish agencies for the payment of pensions granted by the United States, whenever in his judgment the public interests and the convenience of the pensioners require it.[32] He also has power not only to create such agencies, but to enlarge the bounds thereof after their creation;[33] and this he may do by consolidating two or more pension agencies into one, or discontinuing some agencies and transferring the business thereof to others.[34] An incumbent of an agency, enlarged by the transfer thereto of the business of discontinued agencies, is competent, without any new appointment, to discharge the duties thereof as well after as before the enlargement.[35] So, also, the president has power to discontinue an agency,[36] in which event the functions of the incumbent cease.[37]

[§ 6] **B. Pension Agents—1. Appointment and Status.** Pension agents are officers of the department of the interior,[38] are appointed by the president of the United States with the advice and consent of the senate,[39] and take their instructions from the commissioner of pensions.[40]

[§ 7] **2. Bonds.** Where there exists a rule of the department requiring an accounting before a new bond is accepted, and a pension agent substitutes by permission a new bond for his official one, the approval of the secretary of the interior, indorsed on the second bond, does not constitute an acceptance of it to stand in lieu of the first bond.[41]

Liability on bond. The general rule that a surety is not bound beyond the scope of his liability[42] applies to a bond given by a pension agent for the faithful performance of his duty.[43] But where the boundaries of an agency are enlarged by the officer authorized to do so,[44] a bond conditioned for the faithful discharge of all the duties of the office "according to the laws and instructions which are now in force, or which shall be in force at any time during the continuance of the agent in office," is broad enough to cover the case of an incumbent of an agency which may be enlarged during his incumbency and upon whom increased duties may in consequence devolve.[45]

Actions on bond. A pensioner cannot maintain an action in his own name on the official bond of a pension agent, in the absence of a covenant in such bond for his benefit.[46] Where no demand has been

ating directly on the conduct of individuals, and that it assumes to take the place of ordinary state legislation; or on the ground that matters of police regulation are not surrendered to congress, but are exclusively within the state legislation; or on the ground that it assumes the power of making police regulations which belongs to the state. U. S. v. Hall, 98 U. S. 343, 25 L. ed. 180.

[b] **Retaining excessive fee.**—(1) An enactment making it an offense for an agent to retain a greater fee than that prescribed for procuring a pension is constitutional, the power to secure to the pensioner the residue of the pension granted being an incident of the power of congress to grant pensions. U. S. v. Fairchilds, 25 F. Cas. No. 15,067, 1 Abb. 74; U. S. v. Marks, 26 F. Cas. No. 15,721, 2 Abb. 531. (2) And such enactment does not trench on the right of a state to regulate contracts between its citizens. U. S. v. Van Leuven, 62 Fed. 52; U. S. v. Marks, supra.

Constitutionality of statutes repealing pension laws see infra § 31.

26. Peo. v. Policemen's Annuity, etc., Retirement Bd., 326 Ill. 579, 158 NE 220, 54 ALR 940; Bosworth v. Harp, 154 Ky. 559, 157 SW 1084, 45 LRANS 692, AnnCas1915C 277; Hammitt v. Gaynor, 144 NYS 123.

[a] **Change in the law affecting a pension** does not impair the obligation of a contract or take private personal property without due process of law within the meaning of the constitutional provisions of the state and federal governments. Peo. v. Policemen's Annuity, etc., Retirement Bd., 326 Ill. 579, 158 NE 220, 54 ALR 940.

27. In re Opinion of Justices, 78 N. H. 617, 100 A 49.

[a] **Illustrations.**—(1) Where the constitution provides that a pension shall never be granted for more than one year at a time, legislation in the same year whether in one bill or several granting in the whole pensions to the same persons for more than one year is beyond legislative power and wholly void. In re Opinion of Justices, 78 N. H. 617, 100 A 49. (2) Under a constitutional provision that no pension shall be granted but in consideration of actual services, a pension—so-called old-age pension—or a pension the right to which depends upon age alone, cannot be given by the legislature. In re Opinion of Justices, supra.

28. See infra §§ 46 et seq.

29. U. S.—Walton v. Cotton, 19 How. 355, 15 L. ed. 658; 4 Op. Atty.-Gen. p 496.

Cal.—O'Dea v. Cook, 176 Cal. 659, 169 P 366; Klench v. Stockton Pension Fund Comrs., 79 Cal. A. 171, 249 P 46; O'Neil v. Sykes, 61 Cal. A. 797, 231 P 754; Aitken v. Roche, 48 Cal. A. 753, 192 P 464.

Conn.—Price v. Society for Sav., 64 Conn. 362, 30 A 139, 42 AmSR 198.

D. C.—Logue v. Fenning, 29 App. 519.

Ill.—Peo. v. Oak Park Firemen's Pension Fund, 220 Ill. A. 242. See Ryan v. Foreman, 181 Ill. A. 262 [aff 262 Ill. 175, 104 NE 189, AnnCas1915B 780].

Mo.—Dahlin v. Missouri Commn. for Blind, (A.) 262 SW 420.

N. Y.—Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 23 NE 1108, 16 AmSR 855, 7 LRA 557.

And see Municipal Corporations §§ 1408, 1493 (as directly sustaining this proposition); and generally Statutes [36 Cyc 1173 et seq] (on question of liberal or strict construction).

[a] **In Georgia** L. (1918) p 154, neither as originally approved, nor in connection with the amendment (L. [1921] p 232), operated to repeal or modify by implication or otherwise L. (1908) p 66 with reference to the term of office of the commissioner of pensions and when the term begins. McGregor v. Clark, 155 Ga. 377, 116 SE 823.

30. Walton v. Cotton, 19 How. (U. S.) 355, 15 L. ed. 658; Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 23 NE 1108, 16 AmSR 855, 7 LRA 557.

"Where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress, it should be done." Walton v. Cotton, 19 How. (U. S.) 355, 358, 15 L. ed. 658.

31. Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 23 NE 1108, 16 AmSR 855, 7 LRA 557.

32. 15 Op. Atty.-Gen. p 246.

33. 15 Op. Atty.-Gen. p 246; 14 Op. Atty.-Gen. p 147.

34. 15 Op. Atty.-Gen. p 246; 14 Op. Atty.-Gen. p 147.

35. 15 Op. Atty.-Gen. p 246.

36. 15 Op. Atty.-Gen. p 246; 14 Op. Atty.-Gen. p 147.

37. 15 Op. Atty.-Gen. p 246.

"His hold on the office necessarily terminates with its extinguishment, and the tenure of office law no longer applies to him; he has no status under that law." 15 Op. Atty.-Gen. pp 246, 252.

38. 19 Op. Atty.-Gen. p 214; 17 Op. Atty.-Gen. p 339.

39. 15 Op. Atty.-Gen. p 246.

40. 19 Op. Atty.-Gen. p 214; 17 Op. Atty.-Gen. p 339. And see infra § 23.

41. U. S. v. Haynes, 26 F. Cas. No. 15,334, 9 Ben. 22.

42. See Principal and Surety [32 Cyc 109].

43. U. S. v. White, 28 F. Cas. No. 16,686, 4 Wash. C. C. 414.

[a] **Thus** the sureties on a bond given by a pension agent to the secretary of the navy for the faithful execution of his agency in paying invalid pensioners are not answerable for his defaults in not paying the navy and privateer pensions, although such principal was duly appointed agent for the two latter purposes. U. S. v. White, 28 F. Cas. No. 16,686, 4 Wash. C. C. 414.

44. See supra § 5 text and notes 33.

45. 15 Op. Atty.-Gen. p 246.

46. Hughes v. Cotton, 13 Bush (Ky.) 596.

[a] **Effect of state statute.**—A state statute, providing that suit may

made upon the surety to make good his principal's default, interest will be charged only from the date of the service of the writ.[47]

[§ 8] **3. Liability on Payment to Wrong Person.** Where money has been set apart to a claimant and the state pension agent directed to pay it and he takes the money and pays it to one not entitled to receive it, thus putting it beyond the power of the person entitled to it to collect it, the agent is liable therefor.[48]

V. PERSONS ENTITLED

[§ 9] **A. In General.** Congress has designated in minute detail the persons entitled to pensions from the United States government.[49]

"Line of duty." Where the pension is given to persons disabled by reason of any injury received or disease contracted in the service of the United States and "in the line of duty," a disease or injury cannot be regarded as having been contracted in the line of duty unless the service was the cause of the disease or injury.[50]

Pardon and removal of disabilities of one who has been discharged from the army rendering him eligible for reappointment does not operate to make the officer pardoned eligible to a pension under a statute which requires that an applicant must be "honorably discharged" from the army or navy of the United States.[51] Statutes, upheld as valid,[52] have been enacted by the legislatures of some of the southern states, providing for pensions for Confederate soldiers,[53] or for Confederate soldiers and their widows,[54] or for Confederate soldiers, sailors, and their widows,[55] or for Confederate soldiers or their widows and children.[56] And in some states provision has been made for the granting of pay for services performed by the Indian War veterans, the pension being limited by its terms to the veteran in propria persona.[57]

In England there is no statutory right to payment of pensions to persons in military or naval service. Such right, as it is, depends upon the king's regulations and admiralty instructions.[58] Pensions, however, are given by statute to designated persons in the various branches of the civil service.[59]

[§ 10] **B. Widow[60]—1. Remarriage.** Except where otherwise expressly provided by statute,[61] the remarriage of a widow to another, after the death of,[62] or divorce from,[63] the husband, as the wife of whom she was entitled to a pension, terminates her right to the pension thereafter, although her second husband is dead,[64] and although the second marriage was illegal when she did not repudiate it[65] or when she procured its dissolution by divorce instead of having it annulled for illegality.[66]

[§ 11] **2. Divorce.** Since the term "widow"

be brought from time to time on the bond of any officer for the benefit of any person injured by a breach thereof, relates only to the bonds of officers of the state, and has no application to bonds of officers of the United States. Hughes v. Cotton, 13 Bush (Ky.) 596.

47. U. S. v. Poulson, 30 Fed. 231.

48. Gallagher v. Mitchell, 7 Ky. Op. 722.

49. See statutory provisions; and infra §§ 10–14.

"Both as to the particular persons entitled and the particular circumstances giving the right to a pension, the laws are very precise, and they constitute a system of regulations for the whole subject." U. S. v. Scott, 25 Fed. 470, 471.

[a] **Service in militia.**—A person enlisted in a regiment of state militia under the president's call for volunteers, and who was engaged in the service of the United States under the command of an officer of the army, has a pensionable status, although the regiment was not actually mustered into service. 20 Op. Atty.-Gen. p 322.

[b] **Service after ratification of peace treaty.**—A statute giving a pension to soldiers who served for a certain length of time "in the war" does not contemplate service after the ratification of the treaty of peace. 16 Op. Atty.-Gen. p 134.

[c] **"Soldiers" and sailors.**—The word "soldier," in Pension Act June 27, 1890 § 1, was held to include sailors and marines. 19 Op. Atty.-Gen. p 586.

[d] **Officers and seamen of the revenue cutter service,** coöperating in the navy, are entitled to be placed on the navy pension list at the same rate of pension and under the same regulations and restrictions as are provided by law for the officers and seamen of the navy. 19 Op. Atty.-Gen. p 505; U. S. Rev. St. § 4741.

[e] **Pensions to Indian warriors** engaged on the side of the United States in the war with Great Britain were provided for. 7 Op. Atty.-Gen. p 619.

50. Rhodes v. U. S., 79 Fed. 740, 25 CCA 186; 17 Op. Atty.-Gen. p 172; 7 Op. Atty.-Gen. p 149.

"When the statute provides pension for disability or death occasioned by wounds or injuries received, casualty occurring, or disease contracted, in the line of duty, it intends that the performance of duty must have relation of causation or consociation, mediate or immediate, to the wound, the casualty, the injury, or the disease, which produces the disability or death." 7 Op. Atty.-Gen. p 149.

51. 27 Op. Atty.-Gen. 178 (a pardon cannot change an existing or accomplished fact, or operate as an honorable discharge from the army where, as a matter of fact, one was dishonorably discharged by the sentence of court-martial).

52. Elder v. Collier, 100 Ga. 342, 28 SE 116; Bladen County Bd. of Education v. Bladen, 113 N. C. 379, 18 SE 661.

53. See Elder v. Collier, 100 Ga. 342, 28 SE 116 (Act March 3, 1875).

54. See Bladen County Bd. of Education v. Bladen, 113 N. C. 379, 18 SE 661 (Acts [1889] c 198). See also infra §§ 10, 11.

55. See State v. Verner, 30 S. C. 277, 9 SE 113 (St. [1887] § 26). See also infra §§ 10, 11.

56. See Purifoy v. Teasley, 188 Ala. 416, 66 S 6 (Acts [1911] p 690). See also infra §§ 10–12.

[a] **Widow of a pensioner** who was drawing a pension under Acts (1911) p 690 is a pensioner within § 27 thereof, authorizing the probate judge to collect the pension upon a compliance with the provisions of the act. Purifoy v. Teasley, 188 Ala. 416, 66 S 6.

57. See Whitaker v. Clausen, 57 Wash. 268, 106 P 745, 107 P 832 (Acts [1909] c 238).

58. See 25 Halsbury L. Eng. tit Royal Forces § 61.

59. See Williams v. Delohery, [1913] A. C. 172; Williams v. Giddy, [1911] A. C. 381; Williams v. Macharg, [1910] A. C. 476; Walker v. Simpson, [1903] A. C. 208; Knill v. Dumergue, [1911] 2 Ch. 199.

60. Unlawful cohabitation as terminating right see infra § 33.

61. See statutory provisions.

[a] **Upon nothing short of positive and clear enactment,** it has been said, is a woman entitled to the pension of one husband, if she is being supported by another, because the government owes no support or maintenance to the wife of a private citizen. Poucher v. U. S., 1 Ct. Cl. 207.

[b] **Statute giving right.**—By the express provisions of some statutes (Act Aug. 23, 1842 § 1), the widow of a soldier who has remarried since his death is entitled to a pension even during the period of her second coverture, provided she be "a widow at the time she makes application." Poucher v. U. S., 1 Ct. Cl. 207 (the statute distinguishes between the title to the pension and the application for its money; an existing marriage bars the latter, but by the express words of the act does not bar the former).

62. State v. Verner, 30 S. C. 277, 9 SE 113.

63. See infra § 11.

64. State v. Verner, 30 S. C. 277, 9 SE 113 (a pension act which declares that the widow of any soldier while she remains unmarried shall be entitled to receive the benefit of the act does not include the widow of a soldier who has remarried, although her second husband is also dead).

[a] **"The word 'remains'** implies the idea of continuity, and the petitioner certainly did not continue unmarried after the death of her first husband. Conceding that she is still the widow of her first husband, notwithstanding her second marriage, and thus fulfils one of the conditions prescribed by the section, yet as she did not remain unmarried, the other condition is not fulfilled, and therefore she cannot claim." State v. Verner, 30 S. C. 277, 283, 9 SE 113.

65. U. S. v. Hays, 20 Fed. 710 (a second marriage of a wife deserted by one who enters and dies in the service of the United States and her continuing to live with the other party to such marriage after discovering her husband to be alive precludes her from claiming a pension, although she believed her first husband was dead at the time she entered into the second marriage).

66. 14 Op. Atty. Gen. p 220 (where a widow of a pensioner divorced from her second husband on the ground of intemperance and cruelty applied for a restoration of the pension on the ground that her second marriage was

means a wife that outlives her husband, one who intermarries a pensioner and afterward obtains a decree of divorce absolutely dissolving the marriage is not entitled on the death of the pensioner to be placed on the pension rolls as his widow.[67]

[§ 12] **C. Children.** The word "children" in a pension act declaring who shall be entitled to its benefits does not embrace an adopted child,[68] but it does embrace the grandchildren of deceased pensioners, whether their parents died before or after the decease of the pensioner.[69] Where grandchildren are not named in the statute, they are included in the equity of the statutes.[70] So, too, the word "children" in a pension act embraces an illegitimate child, if its parents afterward intermarried and the father acknowledged it, so that it thereby became legitimate under the laws of the state where the parents resided.[71] Where a pension is granted to a widow, the children have no interest in it during the mother's life.[72]

A surviving child, the widow and other children being dead, is entitled to the whole of the pension to which the father would be entitled if living.[73]

[§ 13] **D. Dependents.** Under an act providing that, if one has died entitled to a pension leaving persons dependent on him for support at the time of his death, such persons shall be entitled to the pension, one is regarded as a dependent when he requires for his support the use of certain realty in which the pensioner has an interest as heir.[74] But where the statute provides that the pension allowed to any person on account of dependence shall not be paid for any period during which it shall not be necessary as a means of adequate subsistence, an alleged dependent who has made a contract with a third person for her support is not entitled to any pension from the date of such contract.[75]

[§ 14] **E. Personal Representatives.** As elsewhere shown, claims for pensions, accrued pensions, or arrears of pensions, do not constitute assets of the pensioner's estate to be applied to his debts.[76] And where, by statute, payment is made to the personal representatives of the pensioner for the benefit of the children, they take and hold the same in trust for the children[77] and cannot retain it for the purposes of administration.[78] However, they are entitled to retain from the amount paid them a necessary incidental expense for the faithful execution of the trust.[79] Under statutes of this character, if the pensioner left no children, the representatives are not entitled to payment of arrears due the pensioner, because there are no persons for whose use they are entitled to receive the money.[80] Under a statute providing that "hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children, or dependent mother or father in the order named," and "that if none such should be discovered within one year said balance shall be paid to the post fund of the branch of said national home of which the pensioner was a member at the time of his death," the United States is not liable to the administrator of a deceased pensioner, for arrears of pension, paid a soldier's home of which the pensioner was an inmate, where he left surviving him no widow, minor child, or dependent father or mother.[81]

VI. RATE AND AMOUNT

[§ 15] **A. Discretion of Bureau Regarding.** The discretion of the head of the pension bureau to interpret the laws relating to pensions includes the rate due a claimant for a given disability.[82]

[§ 16] **B. Total Disability.** Under a statute providing that the widow of a pensioner shall be entitled to the pension that he would have been entitled to had he been totally disabled, she is not entitled to a pension in excess of that amount regardless of the amount of pension which he was receiving.[83]

[§ 17] **C. Double Pension.** In the absence of express provision to the contrary, the pension laws will be so interpreted as to prevent any person from receiving a double pension.[84] However, it has been held that allowances under a statute providing for payment of money benefits to disabled enlisted men and petty officers in the navy or marine corps in

illegal and her right to the pension not determined thereby, and on such application she alleged that her second husband, at the time of her marriage with him, had a wife living, and that she was cognizant of this fact when she instituted her suit for divorce, but remained silent, it was held that, by permitting the suit against her second husband and procuring a decree which in effect affirmed the validity of her marriage while declaring its dissolution, claimant rendered the objection of illegality of the second marriage unavailable in support of the claim for pension so long as the decree dissolving the second marriage stood unaffected or judicially unimpeached).

67. 11 Op. Atty.-Gen. p 1.

68. U. S. v. Skam, 27 F. Cas. No. 16,308, 5 Cranch C. C. 367.

69. Walton v. Cotton, 19 How. (U. S.) 355, 15 L. ed. 658. Compare Garland v. Thompson, 29 N. H. 396 (holding that, where the widow of a Revolutionary soldier, being entitled to a pension under the act of congress of July 4, 1836, died on Febr. 1, 1841, without having made application for the pension, and a certificate was afterward, on March 11, 1881, issued from the department of the interior in favor of her seven surviving children, one of whom died before receiving his share of such pension, leaving a widow and five children surviving him, such five children are not entitled to the share of their deceased father).

70. Walton v. Cotton, 19 How. (U. S.) 355, 15 L. ed. 658.

71. U. S. v. Skam, 27 F. Cas. No. 16,308, 5 Cranch C. C. 367.

72. Jones v. Porter, (Tex. Civ. A.) 30 SW 1119.

73. 17 Op. Atty.-Gen. p 339 ("The language of the statute is, 'if there be no widow, or in case of her death . . . his child or children under sixteen years of age shall be entitled to receive the same pension as the husband or father would have been entitled to,' etc. His child or children, one or many, shall be entitled. It is clear that the whole is given to the offspring of the father as a class. If there is more than one child, they have a joint estate, so to speak, in the pension. The statute disposes of the whole. No part of it reverts or falls back to the government until the last child arrives at the age of sixteen years or until his death before reaching that age").

74. U. S. v. Purdy, 38 Fed. 902 (holding further that, although the mother of a deceased soldier has some money of her own invested, she is not bound to use the capital for her support, for she can be dependent upon her son within the meaning of the statute and still keep her money at interest, using the income for her support as far as it will go).

75. U. S. v. Purdy, supra.

76. See Executors and Administrators § 326.

77. Shirley v. Walker, 31 Me. 541; Perkins v. Perkins, 46 N. H. 110; Fogg v. Perkins, 19 N. H. 101; Chapman v. Loveland, 11 Oh. St. 214.

78. Shirley v. Walker, 31 Me. 541.

79. Chapman v. Loveland, 11 Oh. St. 214.

80. 4 Op. Atty.-Gen. p 504.

81. O'Mara v. U. S., 47 Ct. Cl. 27.

82. U. S. v. Raum, 18 D. C. 556 [aff 135 U. S. 200, 10 SCt 820, 34 L. ed. 105].

83. Burnett v. U. S., 116 U. S. 158, 6 SCt 327, 29 L. ed. 586 [aff 20 Ct. Cl. 190]; 18 Op. Atty.-Gen. p 39.

84. 4 Op. Atty.-Gen. p 357; 4 Op. Atty.-Gen. p 91. See Decatur v. Paulding, 14 Pet. (U. S.) 497, 10 L. ed. 559, 609 (as sustaining this view).

[a] **Not to be drawn under both general and special acts.**—It was competent for congress to pass the act of July 25, 1882, providing that "no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive, in addition thereto, a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension." U. S. v. Teller, 107 U. S. 64, 67, 2 SCt 39, 27 L. ed 352.

lieu of maintenance in the Naval Home in Philadelphia, if they so elect, do not fall within the prohibition of a statute prohibiting more than one pension at the same time to the same person and may therefore be paid in addition to a pension under the pension laws.[85] So it has been held that, where a state government grants an annuity to the invalid daughter of a soldier of the Civil War by an act of the assembly which in no way limits or restricts the annuity, the right thereto is not affected by a subsequent grant of pension from the United States government.[86]

[§ 18] **D. Increase or Decrease.** The government may at any time change the amount of pensions granted by it.[87] Under an act increasing the pensions of all pensioners of a given class, such pensioners are entitled to the increase no matter when they make their application for it;[88] But the benefits of the act cannot be extended to pensioners who do not belong to such class at the time of the passage of the act.[89] A pension bureau may decrease the rate of pension being received by a pensioner under the ruling of a former bureau, on the ground that the proof of disability submitted did not entitle the pensioner to the rate granted.[90]

VII. COMPENSATION AND FEES FOR OBTAINING[91]

[§ 19] **A. Amount Recoverable.** The amount of the fee which any agent or attorney shall demand or receive for his services in prosecuting a claim for a pension granted by the United States is fixed by statute,[92] for the protection of the pensioner,[93] and has always been the subject of regulation by law of congress.[94] The statute prescribing the fee is not limited to persons who are recognized or known to the commissioner of pensions as attorneys or agents of applicants for pensions.[95] No person is entitled to demand or receive for services in procuring a pension more than the sum prescribed by law,[96] and if the services are such as are within the contemplation of the statute, they determine the amount of compensation.[97] Hence the agent or attorney cannot recover more than the prescribed fee on a quantum meruit,[98] and any contract for a larger fee for prosecuting a pension claim than is allowed by law whether made by the claimant himself or by a third person in his behalf is void and unenforceable.[99] Nor can the statute be evaded by any device or contrivance whatever,[1] such as an agreement, in consideration of services to be rendered in procuring a pension, to apply the pension when obtained toward an existing indebtedness,[2] or to submit to arbitration a demand for an excessive fee.[3] But the statute does not prevent reimbursement for money advanced for actual expenses incurred in prosecuting the pension claim,[4] or recovery for services rendered for the person claiming the pension after the certificate therefor is issued,[5] or recovery for services performed and expenses incurred by a guardian in procuring a pension for his ward.[6]

[§ 20] **B. Lien for Services.**[7] Since any pledge of any right, claim, or interest in any pension is void,[8] one who had been the means of procuring a pension has no lien on the certificate pledged by anticipation to secure compensation for his services and no right to retain it,[9] and if he refuses to deliver the certificate upon request he is liable in an action for recovery of its value or of damages resulting from its retention.[10]

[§ 21] **C. Payment by Third Person.** The intention of the statute is to prohibit the recovery from a third person as well as the pension claimant any compensation for services in procuring a pension, other or greater than that provided by statute.[11]

[§ 22] **D. Recovery Back of Excessive Amount.** Money taken from the pensioner in excess of the prescribed fee for services in obtaining a pension may, the parties not being regarded as standing in pari delicto,[12] be recovered back by the pensioner from the taker by direct suit[13] or as a set-off in an ac-

85. 31 Op. Atty.-Gen. p 268.
86. Walter's Annuity, 30 Pa. Co. 95.
87. In re Price, 22 Oh. Cir. Ct. 48, 12 Oh. Cir. Dec. 273; 17 Op. Atty.-Gen. p 327.
88. 17 Op. Atty.-Gen. p 327.
89. 16 Op. Atty.-Gen. p 594.
90. Lochren v. U. S., 6 App. (D. C.) 486.
91. **Criminal liability for:** Exacting excessive fee see infra § 46. Withholding pension money see infra § 49.
92. USCA tit 38 § 111.
93. Wolcott v. Frissell, 134 Mass. 1, 3, 45 AmR 272; Ladd v. Barton, 64 N. H. 613, 6 A 483.
"Whatever may be thought of the policy of establishing statutory fees for services that are not compulsory, such statutes, to be effectual in completely protecting the persons for whom the services are rendered, must prohibit all other compensation than that established by law, and thus compel persons either to receive only the statutory compensation or to abandon the business of rendering the service." Wolcott v. Frissell, supra.
94. Morgan v. Davis, 47 Vt. 610.
95. Caverly v. Robbins, 149 Mass. 16, 20 NE 450, 2 LRA 745.
96. Caverly v. Robbins, supra.
97. Caverly v. Robbins, supra.
98. Morgan v. Davis, 47 Vt. 610, 614.
"At common law, a reasonable compensation, such as the jury gave, would be implied, and the recovery would be correct. But these pensions are provided for by act of Congress, and not in any manner otherwise." Morgan v. Davis, supra.
99. U. S.—U. S. v. Brown, 40 Fed. 457; U. S. v. Moore, 18 Fed. 686.
Ky.—Christie v. Steger, 56 SW 521, 21 KyL 1799.
Me.—Smart v. White, 73 Me. 332, 40 AmR 356.
Mass.—Caverly v. Robbins, 149 Mass. 16, 20 NE 450, 2 LRA 745; Wolcott v. Frissell, 134 Mass. 1, 45 AmR 272.
Mich.—Hall v. Kimmer, 61 Mich. 269, 28 NW 96, 1 AmSR 575.
N. C.—Powell v. Jennings, 48 N. C. 547.
Vt.—Morgan v. Davis, 47 Vt. 610.
1. Smart v. White, 73 Me. 332, 40 AmR 356; Hall v. Kimmer, 61 Mich. 269, 28 NW 96, 1 AmSR 575.
2. Smart v. White, 73 Me. 332, 40 AmR 356.
3. Hall v. Kimmer, 61 Mich. 269, 28 NW 96, 1 AmSR 575.
4. Morgan v. Davis, 47 Vt. 610.
5. Adee v. Howe, 15 Hun (N. Y.) 20, 59 HowPr 459.
6. Southwick v. Evans, 17 R. I. 198, 21 A 104.
7. **"First draw"** defined in relation to compensation to agent for procuring pension see First 26 C. J. p 591.
8. See infra § 34.
9. Payne v. Woodhull, 13 N. Y. Super. 169.
10. Payne v. Woodhull, supra.
11. Wolcott v. Frissell, 134 Mass. 1, 3, 45 AmR 272.
"The principal object of these provisions of the statutes undoubtedly was to prevent oppressive charges, by determining the amount which should be received by attorneys for services in procuring pensions; and, for the security of the attorney, the amount was made payable to him directly out of the pension; but if attorneys were at liberty to make contracts for additional fees with third persons, this object of the law might in a great measure be evaded. The money paid by third persons, even if it were not paid at the request of the pensioners, or if paid at their request, even if it were held that, by reason of the statute, no legal obligation rested on them to repay it, would in fact often be repaid by them to satisfy the moral obligation arising from an acceptance of the services." Wolcott v. Frissell, supra.
12. Smart v. White, 73 Me. 332, 337, 40 AmR 356 ("The parties do not stand in pari delicto. The penalty of the statute is levelled at him and not at her. The punishment is to be inflicted upon the taker and not upon the giver. She is to be protected, not punished. Her ignorance of the law, or her folly, if not ignorant of it, is excusable, but his is not. He commits a wrong; she does not. She cannot defraud herself. The statute would be nullified by a different interpretation").
13. Smart v. White, supra; Ladd

tion against the pensioner.[14] The right of the pensioner to recover is necessary for the protection which the statute was intended to give him.[15] And the right to recover from the taker is unaffected by the fact that the excessive fee was obtained without any wrongful intent on the part of the taker,[16] or by the fact that the pensioner, when paying or allowing the fee, was not aware of the statutory protection.[17]

Recovery from subagent. It has been held, however, that, where a subagent receives from the general government a pension under an agreement with the pensioner that one half of it is to be paid to the agent's principal, and, before any demand or objection on the part of the pensioner, one half is accordingly paid to such principal, no action will lie for its recovery from the subagent.[18]

VIII. PROCEEDINGS TO PROCURE

[§ 23] **A. Jurisdiction.** Except in the case of certain benefits authorized to be paid to disabled enlisted persons or petty officers in the navy or marine corps in lieu of being provided with a home in the Naval Home and Asylum at Philadelphia, applications for which are required by statute to be made and passed on by the secretary of the navy,[19] the interior department is the special tribunal of judicial or quasi-judicial powers appointed by law to ascertain all the facts and to adjudicate and allow the pension to the party entitled,[20] and the entire administration of the pension laws is in the control of that department.[21] The commissioner of pensions is the officer whose special duty it is, under the direction of the secretary of the interior, to consider and determine all questions arising under the pension laws [22] and to administer and carry them into execution.[23] However, the pension bureau is not a court,[24] nor is the commissioner of pensions [25] or any other officer connected with the pension bureau [26] invested with judicial functions.

[§ 24] **B. Application or Declaration—1. In General.** The first regular substantial step taken by a claimant to obtain a pension [27] is the filing of his verified [28] declaration or application.[29] As regards its sufficiency, literal adherence to form is not required,[30] and, if claimant is identified,[31] the time and place of his service [32] and the injury or disease which constitutes the ground of his claim [33] are substantially set forth, it will be sufficient. The application is subject to amendment for defective statements.[34]

False statements in the application, even if they were intentionally false,[35] will not invalidate the pension,[36] except where it appears that they were material and necessary to the granting of the pension.[37]

[§ 25] **2. Proof.** The declaration or application must, of course, be supported by affidavits or other proof.[38] The statute being silent on the subject, the affidavits may, in accordance with regulations prescribed by the commissioner of pensions, be sworn to before any officer duly authorized to administer oaths for general purposes.[39] After the application is made, the necessary forms and instructions as to the proof of the claim are furnished to claimants by the commissioner of pensions.[40]

[§ 26] **3. Repeal of Statute pending Application.** An absolute repeal of a pension law leaves unfinished applications without any tribunal to pass upon them.[41]

[§ 27] **C. Effect of Decision.** Where the commissioner of pensions passes on a claim and finds claimant to be entitled to the pension, and directs it to be paid, such finding is conclusive as to the rights of claimant,[42] and puts him upon the footing of an acknowledged creditor of the government to an ascertained amount.[43] On the other hand, if the finding is against the right to claim a pension, the decision is equally conclusive.[44] A decision on the

v. Barton, 64 N. H. 613, 6 A 483; Powell v. Jennings, 48 N. C. 547.

14. Hall v. Kimmer, 61 Mich. 269, 28 NW 96, 1 AmSR 575.

15. Ladd v. Barton, 64 N. H. 613, 6 A 483.

16. Smart v. White, 73 Me. 332, 40 AmR 356.

17. Smart v. White, supra.

18. Bridgers v. McNeil, 51 N. C. 311.

[a] **Reason for rule.**—"This case is very analogous to the deposit of money with a stake-holder, on an illegal wager, which cannot be recovered from the stake-holder, by the loser, if, at his request, or by his consent, it has been paid over to the winner. But if it had been demanded of the stake-holder, before he paid it to the winner, the loser might recover it back." Bridgers v. McNeil, 51 N. C. 311, 313.

19. 31 Op. Atty.-Gen. p 127 (construing USCA tit 38 §§ 229, 230 [Rev. St. §§ 4756, 4757]).

[a] **Exclusive jurisdiction of secretary of navy.**—The secretary of the navy has exclusive jurisdiction of cases coming within the purview of the above mentioned statute, and his certificate is to be the warrant upon which the pension shall be paid by the commissioner of pensions. Davidson v. U. S., 21 Ct. Cl. 298; 31 Op. Atty.-Gen. p 127. See also 25 Op. Atty.-Gen. p 85.

20. U. S. v. Scott, 25 Fed. 470; U. S. v. Schindler, 10 Fed. 547, 18 Blatchf. 227; 17 Op. Atty.-Gen. p 339; USCA tit 38 § 1.

21. 20 Op. Atty.-Gen. p 178.

22. Miller v. Raum, 18 D. C. 556; 17 Op.-Gen. p 339.

"Under the secretary of the interior there is a commissioner of pensions and what is popularly known as a 'Pension Bureau.' To these officials belong the duties of ascertaining the persons entitled to this bounty of the government, the facts on which the claims may rest, and, in a word, all that is necessary to place the money where it belongs." U. S. v. Scott, 25 Fed. 470, 471.

[a] **Accounting officers of the treasury** (1) have no authority to construe the pension laws or direct the pension agents as to the amount that shall be paid to any class of pensioners or to whom payment shall be made (17 Op. Atty.-Gen. p 339), (2) and have no power to disallow the payments made by the agent in pursuance of the general jurisdiction of the commissioner of pensions (19 Op. Atty.-Gen. p 214).

[b] **Under earlier statutes,** the commissioner of pensions was subject to the direction of the secretary of war and navy. Stokely v. De Camp, 2 Grant (Pa.) 17.

23. 20 Op. Atty.-Gen. p 178.

24. In re McLean, 37 Fed. 648.

25. U. S. v. Lalone, 44 Fed. 475 [rev on other grounds 164 U. S. 255, 17 SCt 74, 41 L. ed. 425].

26. In re McLean, 37 Fed. 648.

27. 19 Op. Atty.-Gen. p 190.

28. 17 Op. Atty.-Gen. p 510 (application or declaration of pension claimants must be made before a court of record or before some officer thereof having custody of its seal, the officer being fully authorized and empowered to administer and certify any oath or affirmation relating to any claim for a pension or application therefor).

29. U. S. v. Scott, 25 Fed. 470.

30. 19 Op. Atty.-Gen. p 190.

31. 19 Op. Atty.-Gen p 190.

32. 19 Op. Atty.-Gen. p 190.

33. 19 Op. Atty.-Gen. p 190.

34. 19 Op. Atty.-Gen. p 190.

[a] **Thus** an original application which is sufficient only to identify the claim and claimant may be amended. 19 Op. Atty.-Gen. p 190.

35. U. S. v. Purdy, 38 Fed. 902.

36. U. S. v. Purdy, supra.

37. U. S. v. Purdy, supra.

38. 5 Op. Atty.-Gen p 711 (where the language of the Pension Law is not explicit on the subject, congress will be presumed to intend proof of indigence as well as of service on the part of those seeking its benefits, and not to intend that inquiry as to the indigence be made by the pension bureau).

39. U. S. v. Boggs, 31 Fed. 337.

[a] **Thus** a justice of the peace has competent authority to administer oaths to persons making affidavits in support of an application for a pension. U. S. v. Boggs, 31 Fed. 337.

40. U. S. v. Boggs, supra; 19 Op. Atty.-Gen p 190.

41. Chalk v. Darden, 47 Tex. 438.

42. U. S. v. Scott, 25 Fed. 470; U. S. v. Schindler, 10 Fed. 547, 18 Blatchf. 227; 4 Op. Atty.-Gen. p 238.

43. 4 Op. Atty.-Gen. p 515; 4 Op. Atty.-Gen. p 238.

44. Daily v. U. S., 17 Ct. Cl. 144; Stokely v. De Camp, 2 Grant (Pa.) 17.

[a] **Persons entitled to pension,**

right to claim a pension is not open to review by any court[45] or by the president,[46] but only by congress.[47]

[§ 28] **D. Review of Ruling of Former Bureau.** The bureau of pensions has the power to review the ruling of a former bureau granting a pension or an increase thereof.[48]

IX. COMMENCEMENT AND TERMINATION

[§ 29] **A. Commencement—1. In General.** In accordance with the general rule[49] a pension act operates prospectively, and not retrospectively, where there is nothing in the act to show a contrary legislative intent.[50] Under the act of March 26, 1804,[51] it was the settled rule of the commissioners of the navy pension fund, and later of the secretary of the navy when their powers were transferred to him by the act of July 10, 1832,[52] to provide that the pensions should commence from the time of completing the proofs.[53]

[§ 30] **2. Acquiescence of Pensioner.** Whenever a decision fixing the time for the commencement of a pension has been acquiesced in by the pensioner, it cannot after his death be contested by his personal representatives.[54]

[§ 31] **B. Termination—1. In General.** The government may terminate a pension at its pleasure,[55] as by repealing the statute under which the pension was granted,[56] without violating any constitutional provision.[57]

[§ 32] **2. Striking Name from Roll.** The power to strike from the pension roll a name placed thereon through fraud or fraudulent representations[58] extends to all pensioners and may be exercised on ex parte evidence.[59] And under an act by congress making it the duty of the secretary of war to strike from the list of pensioners the name of any person who, according to the evidence the schedule required by the act, ought not, in his opinion, to remain thereon, the secretary has no power to restore on subsequent and different evidence the name of any person who may have been stricken off on the evidence of the schedule.[60]

[§ 33] **3. Adulterous Cohabitation by Widow.** Open and notorious adulterous cohabitation by a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation.[61]

X. ASSIGNMENT, PLEDGE, OR OTHER TRANSFER[62]

[§ 34] **A. In General.** Except where prohibited by statute,[63] a pension granted for past services may

but not named in decree.—A decree awarding a pension to certain persons, specifically naming them therein, as children of a deceased widow, who was entitled to a pension under the act of July 4, 1836, but did not draw it, when in fact only part of the children were named, is conclusive upon those not named in the decree, and can only be corrected upon reëxamination by the commissioner at his discretion, subject to an appeal to the proper secretary. Stokely v. De Camp, 2 Grant (Pa.) 17.

45. Daily v. U. S., 17 Ct. Cl. 144; Corkum v. Clark, (Mass.) 161 NE 912; Stokely v. De Camp, 2 Grant (Pa.) 17.

46. 4 Op. Atty.-Gen. p 515.

47. Daily v. U. S., 17 Ct. Cl. 144; 2 Op. Atty.-Gen. p 309.

48. Lochren v. U. S., 6 App. (D. C.) 486.

49. See Statutes [36 Cyc 1205].

50. U. S. v. Alexander, 12 Wall. (U. S.) 177, 20 L. ed. 381; Clark v. U. S., 1 Ct. Cl. 179 (both to the effect that, under the Pension Act of Febr. 23, 1853, which awarded pension to the widows of Revolutionary soldiers who were married subsequent to a certain date specified in the act, the pension commences from and after the passage of the act and is not retrospective in its operation).

51. 2 U. S. St. at L. 293 (the commissioners of the navy pension fund were authorized and directed to make such rules and regulations as should appear to them expedient for the admission of persons on the roll of navy pensioners, and for the payment of such pensions).

52. 4 U. S. St. at L. 572 c 194 § 5.

53. 5 Op. Atty.-Gen. p 133; 5 Op. Atty.-Gen. p 41.

54. 5 Op. Atty.-Gen. p 248.

55. U. S.—U. S. v. Teller, 107 U. S. 64, 2 SCt 39, 27 L. ed. 352; In re Hoag, 227 Fed. 478.

Ala.—Dale v. Governor, 3 Stew. 387.

Cal.—Cohrn v. Henderson, 19 Cal. A. 89, 124 P 1037.

D. C.—Rudolph v. U. S., 36 App. 379.

Ill.—Peo. v. Hanson, 330 Ill. 79, 161 NE 145; Hughes v. Traeger, 264 Ill. 612, 106 NE 431.

Ky.—Head v. Jacobs, 150 Ky. 290, 150 SW 349.

Minn.—Gibbs v. Minneapolis Fire Dept. Relief Assoc., 125 Minn. 174, 145 NW 1075, AnnCas1915C 749.

N. Y.—Friel v. McAdoo, 101 App. Div. 155, 91 NYS 454.

Oh.—In re Price, 22 Oh. Cir. Ct. 48, 12 Oh. Cir. Dec. 273.

Pa.—Hall's Est., 20 Pa. Dist. 876.

Wash.—In re Snyder, 93 Wash. 59, 160 P 12, 3 ALR 1230.

Termination of pensions of:

Firemen and their dependents see Municipal Corporations § 1422 et seq.

Policemen and their dependents see Municipal Corporations § 1508.

56. U. S.—Frisbie v. U. S., 157 U. S. 160, 15 SCt 586, 39 L. ed. 657; Pennie v. Reis, 132 U. S. 464, 10 SCt 149, 33 L. ed. 426; Walton v. Cotton, 19 How. 355, 15 L. ed. 658.

Ala.—Dale v. Governor, 3 Stew. 387.

Cal.—Cohrn v. Henderson, 19 Cal. A. 89, 124 P 1037.

D. C.—Rudolph v. U. S., 36 App. 379.

Ill.—Eddy v. Morgan, 216 Ill. 437, 75 NE 174.

Ky.—Head v. Jacobs, 150 Ky. 290, 150 SW 349.

Minn.—Gibbs v. Minneapolis Fire Dept. Relief Assoc., 125 Minn. 174, 145 NW 1075, AnnCas1915C 749.

N. Y.—Friel v. McAdoo, 101 App. Div. 155, 91 NYS 454.

Oh.—In re Price, 22 Oh. Cir. Ct. 48, 12 Oh. Cir. Dec. 273.

Wash.—In re Snyder, 93 Wash. 59, 160 P 12, 3 ALR 1230.

"Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease." Eddy v. Morgan, 216 Ill. 437, 449, 75 NE 174.

57. Dale v. Governor, 3 Stew. (Ala.) 387; Gibbs v. Minneapolis Fire Dept. Relief Assoc., 125 Minn. 174, 145 NW 1075, AnnCas1915C 749.

Not a vested right see Constitutional Law § 647.

58. U. S. Rev. St. § 4739 (expressly empowering the secretary of the interior to strike from the pension roll the name of any person, whenever it appears by proof satisfactory that his name was placed thereon through fraud or fraudulent representations).

59. Harrison v. U. S., 20 Ct. Cl. 122.

60. 5 Op. Atty.-Gen. p 731.

61. USCA tit 18 § 199.

62. Cross references:

Dealings with respect to pension money as not constituting fraud upon creditors see Fraudulent Conveyances § 63.

Listing pension in schedule filed by bankrupt see Bankruptcy § 34.

Signing over pension to commissioners of soldiers' homes see Army and Navy § 231.

63. [a] **By express provision of an act of congress** (1) any pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension shall be void and of no effect. USCA tit 38 § 129. (2) In construing this statute it was held that, where defendant fraudulently obtained an assignment of a pension certificate and received the pension, it was not such an executed contract as the court would refuse to rescind. Lowe v. Moore, 6 S. C. Eq. 243.

[b] **State statute.**—A pension is not assignable under a state pension law providing that "any person who shall speculate or purchase for a less sum than that to which each may be entitled, the claim of any soldier or sailor, or widow of a deceased soldier or sailor, allowed under the provisions of this act, shall be guilty of a misdemeanor." Gill v. Dixon, 131 N. C. 87, 89, 42 SE 538 ("The legal meaning of the word 'claim,' without other qualifying language, is a demand for something as a right, something that could be in law the subject of a demand. These [there] are no words in the section quoted that extend or enlarge the legal meaning of 'claim,' and we must hold that it refers to a warrant issued for the pension").

[c] **In England** pensions granted by the crown were made nonassignable by statute. Lloyd v. Cheetham, 3 Giff. 171, 66 Reprint 370 (Geo. III c 25 § 1).

be assigned,[64] but the rule is otherwise where the pension is granted by the government to one who, although not at the time engaged in active duties, is still liable to actual service, and is therefore to be considered in the service of the government.[65]

[§ 35] **B. What Constitutes.** The act of congress[66] has been held to refer to the pension before it has been reduced to the possession of the pensioner and taken into his custody and control.[67] A voluntary gift of a check for pension money by the pensioner to his wife[68] or son,[69] or a verbal promise by a pension claimant to pay a debt when he receives his pension,[70] does not constitute such a pledge, mortgage, assignment, transfer, or sale of the pension claim as is forbidden by the acts of congress. And a rule of a soldiers' home requiring inmates to pay over to the home pension money in excess of a certain amount does not violate this statute, and is a valid regulation.[71] On the other hand, it has been held that any agreement by which an agent or attorney is to receive a part of the pension in payment for his services in procuring it is within the prohibition of the statute, and void;[72] but there is authority to the contrary.[73]

[§ 36] **C. Recovery of Certificate Pledged.** If a pension certificate has been pledged in violation of the statute, the pensioner may maintain an action against the pledgee to recover possession thereof.[74]

XI. PAYMENT

[§ 37] **A. In General.** The payment of pensions is within the jurisdiction of the commissioner of pensions.[75] He is required to issue certificates of pension and notify claimant or his attorney of the allowance made and the amount thereof and to forward the certificate to the pension agent who is to pay the money.[76]

[§ 38] **B. What Constitutes.** The receipt of a check by a pensioner which he has only indorsed, but which has not been transferred by him in his lifetime, is not a payment,[77] but is only one step in the process of payment.[78]

[§ 39] **C. To Whom Made—1. In General.** The pension laws expressly provide that no pension shall be paid to any person other than the pensioner entitled thereto.[79]

[§ 40] **2. Payment to Wrong Person.** One entitled to a pension is not deprived of his right thereto by the fact that a certificate for the pension has been issued and payment made to the wrong person,[80] and if the executor of a pensioner, not his widow, is entitled to his unpaid pension, then the payment to the widow by the government is in its own wrong and the executor may still justly demand payment to himself from the proper department.[81]

[§ 41] **3. Forbearance To Demand.** Forbearance of one during his life to demand payment of a pension granted to him upon proper application therefor does not extinguish the debt, but it remains due and can only be discharged by payment to his personal representatives.[82]

[§ 42] **D. Warrants.** Under a pension statute,[83] providing that the forms for pension warrants shall be prescribed by the comptroller and that they shall be uniform in size, arrangement, matter, form, etc., the comptroller has power to make such warrants negotiable or quasi-negotiable by making them payable to order.[84] And it was further held that a

64. Willcock v. Terrell, 3 Ex. D. 323; Wells v. Foster, 8 M. & W. 149, 151 Reprint 987; Davis v. Marlborough, 1 Swanst. 74, 36 Reprint 303, 2 Wils. Ch. 130, 37 Reprint 258. Compare Hare v. Groveton First Nat. Bank, (Tex. Civ. A.) 272 SW 261, 262 (where it was held that, under the pension laws of Texas, mortgages or other contracts for the purpose of impounding unmatured pensions and limiting pensioners' rights to receive the proceeds of warrants forwarded to them by the proper officers were void. It was said that "because of the peculiar conditions limiting the right to receive pensions in this state to the indigent, we think the general rule should not be given application, but, as has been said of the Act of Congress forbidding the sale or assignment or transfer of any right, claim, or interest in pensions granted thereby, our act should be given such a construction 'as will suppress the mischief—the mischief of preying upon the necessities of the poor and ignorant' ").

65. Willcock v. Terrell, 3 Ex. D. 323; Wells v. Foster, 8 M. & W. 149, 151 Reprint 987; Davis v. Marlborough, 1 Swanst. 74, 36 Reprint 303, 2 Wils. Ch. 130, 37 Reprint 258.

66. See supra § 34.

67. Omans v. Beeman, 66 Misc. 625, 627, 124 NYS 166.

"The provisions of this section protect the pension in transit from the United States Treasury to the pensioner, and no further." Omans v. Beeman, supra.

68. Farmer v. Turner, 64 Iowa 690, 21 NW 140.

[a] **Reason for rule.**—"The issuance of the check was evidence that the claim was settled, By the issuance, the process of payment was initiated, but not consummated. The check was designed to be negotiated to banks or others who would cash the same. The claim was so far settled that a transfer of the check could not be deemed prohibited by the statute." Farmer v. Turner, 64 Iowa 690, 691, 21 NW 140.

69. Schwab v. Ginkinger, 181 Pa. 8, 37 A 125.

70. Crane v. Linneus, 77 Me. 59.

71. Ball v. Evans, 98 Iowa 708, 68 NW 435; Loser v. Soldiers' Home Bd. of Managers, 92 Mich. 633, 52 NW 956; O'Donoghue v. Home for Disabled Soldiers, 65 N. J. L. 484, 47 A 452; Brooks v. Hastings, 192 Pa. 378, 43 A 1075. And see Army and Navy § 231.

72. Powell v. Jennings, 48 N. C. 547. See Schwab v. Ginkinger, 181 Pa. 8, 37 A 125 (where the court, in holding that a voluntary gift of a check for pension money is not illegal under the prohibitory provision of the pension laws, lays stress upon the fact that during the transaction there was nothing said about the donee having the check as a compensation for his services in procuring the pension). See also Payne v. Woodhull, 13 N. Y. Super. 169 (recognizing this rule). But see Jenkins v. Hooker, 19 Barb. (N. Y.) 435 infra note 73.

[a] **Reason for this view.**—"The act, being for the protection of those, who, in ninety-nine cases in a hundred, are poor, needy and ignorant, should receive such a construction as will carry out the benevolent intention of the donors of the bounty. Like the statute of frauds, it should receive a liberal construction; such a construction as is consistent with the words, and as will suppress the mischief—the mischief of preying upon the necessities of the poor and ignorant." Powell v. Jennings, 48 N. C. 547, 549.

73. Trimble v. Ford, 5 Dana (Ky.) 517; Jenkins v. Hooker, 19 Barb. (N. Y.) 435. But see Payne v. Woodhull, 13 N. Y. Super. 169 supra note 72.

[a] **Reason for this view.**—"It gives to the plaintiff no interest in the pension, either legal or equitable. It provides for no transfer or assignment. If the pension should be allowed, the pensioner himself, or his representatives, alone could receive it. Whether received or not, the pensioner, the moment the increase was allowed to him, became the debtor of the plaintiff in a sum equal to one third of its amount. The plaintiff had no claim upon the pension, the allowance of which he had thus obtained, for the payment of the amount due him upon the agreement, any more than any other creditor. Upon the death of the pensioner, his debt, like any other debt, could only be collected through a legal course of administration. He was to take his chance of payment with other creditors. The agreement fixed the amount in which the pensioner was to become indebted to the plaintiff for his services by the amount of the pension to be allowed, but it gave him no lien upon it. He had no security for his debt, beyond any other creditor." Jenkins v. Hooker, 19 Barb. (N. Y.) 435, 438.

74. Moffatt v. Van Doren, 17 N. Y. Super. 609 (holding further that proof of a grant of a pension certificate to plaintiff, that it is in possession of defendants, and that upon a demand made upon defendants to surrender it, they refusing so to do, not only entitles plaintiff to recover, but makes it a case which renders it impossible in the nature of things for defendants to prove any facts operating as a bar to the action or modifying in any respect plaintiff's right to the whole relief sought).

75. 17 Op. Atty.-Gen. p 339.

76. 17 Op. Atty.-Gen. p 339.

77. 19 Op. Atty.-Gen. p 1.

78. 19 Op. Atty.-Gen. p 1.

79. USCA tit 38 § 44.

80. 8 Op. Atty.-Gen. p 377.

81. 8 Op. Atty.-Gen. p 377.

82. 4 Op. Atty.-Gen. p 238.

83. Tex. Gen. L. (1910) c 17 § 26 subd 3.

84. Dreeben v. State, 71 Tex. Cr.

consideration of the several acts relating to pensions showed that the legislature intended to make, and did make, a distinction between pension warrants and all other pay warrants issued by the comptroller,[85] and that it is not necessary to the validity of pension warrants that they be countersigned by the state treasurer before they are issued and sent out by the comptroller.[86]

[§ 43] **E. Recovery Back—1. Grounds.** Pension moneys, paid to a claimant under mistake of law, cannot be recovered back.[87]

Mistake of fact or fraud. In accordance with well settled principles relating to the payment of money,[88] pension money paid by the government under a mistake of fact[89] or fraudulently obtained in payment of a false claim for a pension[90] may be recovered back. The government is not bound by the act of its executive officers in granting a pension upon improper or fraudulent testimony.[91] The United States can recover from a bank presenting pension checks to, and receiving the money therefor from, a subtreasury where the names of the payees have been forged;[92] and the right to recover is not conditioned upon either demand or the giving of notice of the discovery of facts which, by the operation of the legal warranty, were presumably within the knowledge of the bank;[93] but, in construing the act of congress of December 21, 1893,[94] it was held that the United States cannot recover from a bank which has cashed a number of pension checks drawn to the order of one who had been placed on the pension roll by reason of his fraudulent representations, while such pension was in force and before cancellation on notice.[95]

[§ 44] **2. Jurisdiction and Mode of Recovery.** The United States district court has jurisdiction of an action by the United States to recover money fraudulently obtained by defendant in payment of a false claim for a pension.[96] Pension moneys may be recovered back either by direct suit[97] or by way of set-off against a different claim in favor of the pensioner against the government.[98]

XII. INVESTIGATION OF SUSPECTED ATTEMPTS TO DEFRAUD

[§ 45] Methods for the investigation and ascertainment of fraud committed in obtaining or attempting to obtain pensions are provided for by the act of July 25, 1882.[99] Section 3 of this act[1] was originally held unconstitutional on the ground that congress is without authority to employ the courts to obtain evidence for the executive departments;[2] but the rule is now settled to the contrary and the validity of the statute upheld.[3] Application for the subpœna authorized by the act[4] may be considered as the foundation of the proceedings,[5] and it should be drawn with reasonable certainty and precision so that it should clearly appear upon its face to be in accordance with the act,[6] and the pension claims in which the testimony is required should be reasonably identified.[7] And the subpœna issued under it should follow the requirements of the application.[8] The examination con-

341, 162 SW 501.

85. Dreeben v. State, supra.

86. Dreeben v. State, supra.

87. Burton v. Burton, 10 Leigh (37 Va.) 597.

88. See Payment §§ 280–341.

89. U. S. v. Coffeyville First Nat. Bank, 82 Fed. 410; U. S. v. Onondaga County Sav. Bank, 39 Fed. 259; 2 Op. Atty.-Gen. p 345.

[a] **Thus** a bank which pays out moneys on a pension check which is void because the payee was dead at the time it was drawn, and which, through intermediate banks, collects the money from the government, which is ignorant of the facts, is liable to reimburse the government for such amount. U. S. v. Coffeyville First Nat. Bank, 82 Fed. 410.

90. Pooler v. U. S., 127 Fed. 519, 62 CCA 317; U. S. v. Lalone, 44 Fed. 475 [rev on other grounds 164 U. S. 255, 17 SCt 74, 41 L. ed. 425].

[a] **Statutory provision that a pension shall be deemed and held by all officers of the United States to be a vested right in the grantee,** and that payment thereof shall not be withheld or suspended until the commissioner of pensions after a hearing shall decide to annul or modify the decision by which it was granted, applies only to action by executive officers, and does not affect the right of the United States to proceed through the courts civilly to recover pension money, payment of which was induced by false testimony. Pooler v. U. S., 127 Fed. 509, 62 CCA 307.

[b] **Facts not authorizing recovery for fraud.**—The government cannot recover back pension money on the ground that it was obtained by false statement on the part of defendant that he contracted a certain disease in service and in the line of duty, where it appears that, although defendant might have contracted the disease before he enlisted in the service, yet he was cured of it, so that he was a sound man when he enlisted but subsequently contracted it again while in the service and in the line of his duty. Rhodes v. U. S., 79 Fed. 740, 25 CCA 186.

91. U. S. v. Lalone, 44 Fed. 475 [rev on other grounds 164 U. S. 255, 17 SCt 74, 41 L. ed. 425].

92. U. S. v. Providence Nat. Exch. Bank, 214 U. S. 302, 29 SCt 665, 53 L. ed. 1006, 16 AnnCas 1184 [rev 151 Fed. 402, 80 CCA 632].

[a] **Reason for rule.**—"The United States is not chargeable with the knowledge of the signatures of the vast numbers of persons entitled to receive pensions, and the exceptional rule as to certain classes of commercial paper that the person having knowledge of the genuine signature of the payee whose signature is forged is negligent in paying on such an indorsement and therefore cannot recover, does not apply to the United States in regard to pension checks." U. S. v. Providence Nat. Exch. Bank, 214 U. S. 302, 29 SCt 665, 53 L. ed. 1006, 16 AnnCas 1184.

93. U. S. v. Providence Nat. Exch. Bank, 214 U. S. 302, 29 SCt 665, 53 L. ed. 1006, 16 AnnCas 1184 [rev 151 Fed. 402, 80 CCA 632].

94. USCA tit 38 § 56 (providing that any pension granted under any law of the United States shall be deemed by all officers of the United States to be a vested right in the grantee to the extent that payment thereof shall not be withheld or suspended until, after due notice to the grantee, the commissioner of pensions shall decide to modify or vacate the decision granting the pension).

95. U. S. v. North Wilkesboro Bank, 183 Fed. 759, 760, 106 CCA 471 [dist U. S. v. Providence Nat. Exch. Bank, 214 U. S. 302, 29 SCt 665, 53 L. ed. 1006, 16 AnnCas 1184] ("This decision has, in our judgment, no relation whatever to the case at bar. Here the very person whom the government put upon its pension roll indorsed the checks and received the money. It is true that such person in order to get upon the roll had assumed a name not her own and had pretended to a past which was not hers. She had, however, succeeded in inducing the government to believe that her story was true").

96. Pooler v. U. S., 127 Fed. 519, 62 CCA 317.

97. U. S. v. Lalone, 44 Fed. 475 [rev on other grounds 164 U. S. 255, 17 SCt 74, 41 L. ed. 425]; 2 Op. Atty.-Gen. p 345.

98. 4 Op. Atty.-Gen. p 70.

99. USCA tit 38 § 121 (authorizing the commissioner of pensions to detail persons employed in his office to make special examination into the merits of such pension claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud either in the presentation or in procuring the allowance of such claims); § 124 (providing that any United States judge or clerk may, on application of the commissioner of pensions, issue a subpœna for a witness within the jurisdiction of the court to appear at the time and place stated in the subpœna before any officer authorized to make examination to be used in the court of the United States, or before any officer or clerk from the pension bureau designated or detailed to investigate into the merits of any pension claim and to make affidavits in such examination and to give full and true answers for such interrogatories or cross interrogatories as may be propounded, or to be orally examined or cross-examined upon the subject of such claims).

1. USCA tit 38 § 124.

2. In re McLean, 37 Fed. 648.

3. In re Gross, 78 Fed. 107 [foll analogous decision Interstate Commerce Commn. v. Brimson, 154 U. S. 447, 14 SCt 1125, 38 L. ed. 1047].

4. USCA tit 38 § 124.

5. In re Gross, 78 Fed. 107.

6. In re Gross, supra.

7. In re Gross, supra.

8. In re Gross, supra.

templated by the statute can be held only on notice to claimants,[9] and the witness is entitled to have an attorney present at the examination so long as he conducts himself properly.[10] The investigation need not be confined strictly to the merits of pension claims,[11] but must be upon the subject of pension claims.[12] A special pension examiner has neither power nor right to extort a confession of violations of the criminal provisions of the pension laws by a witness at a special examination,[13] although there is no intention of prosecuting the witness therefor.[14]

Fees. The fees of witnesses subpœnaed in proceedings of this character and also the fees of the commissioner by whom their testimony is taken may properly be allowed out of the judiciary fund.[15] The fees of the witnesses should be paid by the United States marshal of the district on the certificate or order of the commissioner,[16] and the fees of the commissioner should be paid as in ordinary course on settling his accounts at the treasury.[17]

XIII. OFFENSES UNDER PENSION LAWS

[§ 46] **A. Exacting Improper Fees[18]—1. In General.** By the act of congress of July 4, 1884 chapter 181 section three[19] and section four,[20] the constitutionality of which has been upheld,[21] the demanding, receiving, or retaining of certain fees by any agent, attorney, or other person is denounced and prohibited.

Object of the statutes is to protect the pension claimant from the exaction of exorbitant charges,[22] and also to protect the government by discouraging the prosecution of unjust claims.[23]

Construction. The statute, being a penal statute[24] and also being in derogation of the common-law right of every person to make his own bargain,[25] should receive a strict construction.[26]

Persons liable. Any person who is instrumental in the prosecution of the claim may be prosecuted for the violation of the statute,[27] and it is not essential to liability that he should be a pension agent or attorney.[28]

What constitutes offense. Neither fraud nor extortion[29] nor guilty intent[30] is an element of the offense of demanding or receiving a fee for obtaining a pension in excess of that prescribed by the statute; but the fact of its demand or receipt completes the offense,[31] without regard to the fact whether the pension money has or has not been received,[32] or to the fact that no demand was made for a return of the amount paid in excess of the legal fee.[33] Nor is it essential that there should be a formal demand for an excessive fee to constitute a violation of the statute;[34] any request, direct or indirect, by the agent for a larger fee than that prescribed will be sufficient.[35] The statute cannot be evaded by any device or contrivance whatever,[36] such as the making of a loan[37] or gift[38] or the execution of a mortgage.[39] But it is not violated if the pensioner, after obtaining his pension, voluntarily makes a bona fide gift or loan of a sum in excess of that prescribed, and such gift is not intended or received as a compensation for the donee's services.[40] Nor does the prohibition of the statute as to excessiveness of compensation cover reimbursement for money advanced and actual expenses incurred in prosecuting the pension claim,[41] or services entirely distinct from those usually required in prosecuting a claim for a pension.[42] And the statute does not apply to a claim for reimbursement out of an accrued pension by one who bore the expenses of the last sickness and burial of the deceased pensioner, nor to the agent or attorney of such claimant.[43] In an indictment for demanding and receiving compensation for prosecuting a pension claim before the claim is allowed,[44] it is unnecessary to allege that the amount so received was in excess of the sum legally chargeable,[45] or that the applicant for the pension had been in the military or naval service of the United States, as the statute does not make this a condition of receiving a pension.[46]

[§ 47] **2. Effect of Repeal of Statute.** By virtue of a federal statute[47] the repeal of a statute

9. In re O'Shea, 166 Fed. 180.
10. In re O'Shea, supra.
11. In re Gross, 78 Fed. 107.
12. In re Gross, supra.
13. In re O'Shea, 166 Fed. 180. Compare U. S. v. Bell, 81 Fed. 830 (where it was said that examinations under a statute are almost purely inquisitorial and no sufficient safeguards are thrown around the witness in respect of extortions or self-incriminating testimonies).
14. In re O'Shea, 166 Fed. 180.
15. 17 Op. Atty-Gen. p 247.
16. 17 Op. Atty-Gen. p 247.
17. 17 Op. Atty-Gen. p 247.
18. **False pretenses** 25 C. J. p 582. **Forgery** 26 C. J. p 893. **Perjury** post p 815. **Making or procuring of false claims against the United States** see United States [39 Cyc 769 et seq].
19. USCA tit 38 § 111 (providing that no agent, attorney, or other person shall demand or receive compensation for his services in procuring a pension until such pension shall be allowed).
20. USCA tit 38 § 112 (making it an offense for any agent or attorney or any other person instrumental in prosecuting any claim for a pension, who shall directly or indirectly contract for, demand or receive, or retain any greater compensation for his services in prosecuting the claim than is allowed by statute).
21. Frisbie v. U. S., 157 U. S. 160, 15 SCt 586, 39 L. ed. 657; U. S. v. Van Leuven, 62 Fed. 52; U. S. v. Fairchilds, 25 F. Cas. No. 15,067, 1 Abb. 74; U. S. v. Marks, 26 F. Cas. No. 15,721, 2 Abb. 531.
22. U. S. v. Van Leuven, 62 Fed. 52; U. S. v. Snow, 27 F. Cas. No. 16,350, 2 Flipp. 1.
23. U. S. v. Van Leuven, 62 Fed. 52.
24. See Statutes [36 Cyc 1180].
25. See Statutes [36 Cyc 1178].
26. U. S. v. Nicewonger, 20 Fed. 438; U. S. v. Starn, 17 Fed. 435; U. S. v. Snow, 27 F. Cas. No. 16,350, 2 Flipp. 1. And see Statutes [36 Cyc 1178, 1183].
27. U. S. v. Reynolds, 48 Fed. 721; U. S. v. Reynolds, 48 Fed. 215; U. S. v. Moyers, 15 Fed. 411.
[a] **Thus** an attorney who, at the request of the pensioner, fills out the vouchers necessary to obtain the first payment, and who forwards it then to the proper pension agent, receives the latter's check, and procures the indorsement thereto, and draws the money, is "a person instrumental in prosecuting the claim" within the meaning of the statute, although he had no hand in procuring the allowance of the pension. U. S. v. Reynolds, 48 Fed. 721.
28. Frisbie v. U. S., 157 U. S. 160, 166, 15 SCt 586, 39 L. ed. 657.
"It is immaterial what was his regular profession or avocation. It is sufficient that if even temporarily he engaged in the work of preparing, presenting, and prosecuting a claim for a pension. Doing that he brings himself within the requirements of the statute." Frisbie v. U. S., supra.
29. U. S. v. Moore, 18 Fed. 686; Smart v. White, 73 Me. 332, 40 AmR 356.
30. U. S. v. Koch, 21 Fed. 873; Smart v. White, 73 Me. 332, 40 AmR 356.
31. Frisbie v. U. S., 157 U. S. 160, 15 SCt 586, 39 L. ed. 657; U. S. v. Moore, 18 Fed. 686.
32. Frisbie v. U. S., 157 U. S. 160, 15 SCt 586, 39 L. ed. 657.
33. Frisbie v. U. S., supra.
34. U. S. v. Moyers, 15 Fed. 411.
35. U. S. v. Moyers, supra.
36. U. S. v. Moyers, supra. And see cases infra note 37.
37. U. S. v. Brown, 40 Fed. 457; U. S. v. Moore, 18 Fed. 686; U. S. v. Moyers, 15 Fed. 411.
38. U. S. v. Brown, 40 Fed. 457; U. S. v. Moore, 18 Fed. 686.
39. U. S. v. Brown, 40 Fed. 457.
40. U. S. v. Brown, supra; U. S. v. Moore, 18 Fed. 686.
41. U. S. v. Moore, supra.
42. U. S. v. Snow, 27 F. Cas. No. 16,350, 2 Flipp. 1.
[a] **As for instance,** services performed in causing the removal of a charge of desertion without which no pension could be recovered. U. S. v. Snow, 27 F. Cas. No. 16,350, 2 Flipp. 1.
43. U. S. v. Nicewonger, 20 Fed. 438.
44. USCA tit 38 §·111.
45. U. S. v. Van Leuven, 62 Fed. 52.
46. U. S. v. Van Leuven, supra.
47. USCA tit 1 § 29 (providing that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or

making it an offense for an agent or attorney to demand or receive for his services in a pension case a sum in excess of that prescribed by the statute[48] does not affect a prosecution for a previous violation of the statute, unless the contrary is expressly provided in the repealing act.[49]

[§ 48] **3. Indictment.**[50] An indictment for this statutory offense[51] may set forth the offense in the language of the statute creating it.[52] It is not necessary to allege malice,[53] or a guilty knowledge,[54] or intent;[55] nor how accused was instrumental, or what he did, in procuring the pension;[56] nor is it necessary to allege a demand for a return of the money wrongfully taken.[57] And the indictment need not negative the existence of a contract in regard to the fee, since under the statute it is unlawful to receive, even by contract, a fee in excess of that prescribed.[58]

[§ 49] **B. Wrongfully Withholding Pension Money—1. In General.** The act of congress making the wrongful withholding of pension money a criminal offense[59] is constitutional,[60] and is not rendered inoperative by the provision that no pension shall be paid to any person other than the pensioner entitled thereto.[61]

Purpose of the statute is to protect the pensioner against fraud until the unconditional payment of the money to him.[62]

Construction. The statute, being penal,[63] must be strictly construed,[64] and it is essential that the claim be plainly and unmistakably within the statute.[65]

Persons liable. In order to come within the statute, defendant must have been instrumental in prosecuting the pension claim as agent or attorney or otherwise.[66] But the statute applies to any agent or attorney, and not simply to the regular attorney for the pension claimant recognized as such at the pension office.[67]

What constitutes offense. To constitute the offense there must be some unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully as would constitute an unlawful withholding within the meaning of the law.[68] There must be an actual withholding of the money before it reaches the hands of the pensioner.[69] It is not enough that it is fraudulently obtained from him after it reached his hands.[70] It must also appear that the person from whom it is alleged the pension money is wrongfully withheld is a pensioner of the United States,[71] that the amount wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner,[72] and that accused is the person through whose instrumentality the claim was prosecuted.[73] However, the statute does not confine the offense to a wrongful withholding of money collected on the claim, but includes the holding against the will of the pensioner of the check or treasury warrants coming into the hands of the agent;[74] and where accused has wrongfully withheld pension money, a subsequent payment or an agreement to pay it all will not relieve the offense of its criminal character.[75]

[§ 50] **2. Limitation of Prosecution.**[76] Whenever an act or series of acts necessary to constitute a criminal withholding of pension money[77] have transpired, the crime is complete and from that date the statute of limitations begins to run against the prosecution.[78]

[§ 51] **3. Indictment.**[79] An indictment for withholding pension moneys which alleges that certain persons are pensioners, but does not allege a withholding of the pension from such persons, is fatally defective.[80]

liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability").

[a] **"Penalty," "forfeiture," and "liability,"** as used in U. S. Rev. St. § 13, are synonymous with "punishment" in connection with crime. U. S. v. Reisinger, 128 U. S. 398, 9 SCt 99, 32 L. ed. 480.

48. See supra § 46.

49. U. S. v. Reisinger, 128 U. S. 398, 9 SCt 99, 32 L. ed. 480; U. S. v. Mathews, 23 Fed. 74; U. S. v. Van Vliet, 23 Fed. 35, 22 Fed. 641. Contra U. S. v. Hague, 22 Fed. 706.

50. Indictment generally see Indictments and Informations 31 C. J. p 548.

51. See supra § 46.

52. U. S. v. Reynolds, 48 Fed. 215; U. S. v. Wilson, 29 Fed. 286.

[a] **Reason** is that the words of the statute duly set forth all the elements necessary to constitute the offense and apprise accused with reasonable certainty of the accusation against him. U. S. v. Wilson, 29 Fed. 286.

53. U. S. v. Koch, 21 Fed. 873.

54. Smart v. White, 73 Me. 332, 40 AmR 356.

55. U. S. v. Koch, 21 Fed. 873, 874; Smart v. White, 73 Me. 332, 40 AmR 356.

"The offense denounced by this section is charging and receiving more than the prescribed fee." U. S. v. Koch, supra.

56. U. S. v. Reynolds, 48 Fed. 215; U. S. v. Koch, 21 Fed. 873 (the gravamen of the offense is not that accused was instrumental in procuring the pension, but that, having been thus instrumental, he charged and received a fee in excess of that which the statute warrants, and hence, in an indictment therefor, it is only necessary to state that accused was the person instrumental in procuring the pension).

57. Frisbie v. U. S., 157 U. S. 160, 15 SCt 586, 39 L. ed. 657.

58. U. S. v. Van Leuven, 62 Fed. 52.

59. USCA tit 38 § 112 (making it an offense for any agent or attorney or any other person instrumental in prosecuting any claim for a pension wrongfully to withhold the whole or any part of the pension or claim allowed and due the pensioner or claimant).

60. U. S. v. Fairchilds, 25 F. Cas. No. 15,067, 1 Abb. 74.

61. U. S. v. Mason, 8 Fed. 412; U. S. v. Connally, 1 Fed. 779, 9 Biss. 338.

[a] **Reason for rule.**—It must be "presumed it was the intention, if under any circumstances while a person was instrumental in prosecuting a claim or a pension, and the money of a pensioner came into his hands and he unlawfully withheld it, he was to be subjected to punishment. To take any other view of the case would be to strike out of the Revised Statutes one of its sections obviously intended to be enforced." U. S. v. Connally, 1 Fed. 779, 783, 9 Biss. 338.

62. U. S. v. Ryckman, 12 Fed. 46.

63. See Statutes [36 Cyc 1180].

64. Ballew v. U. S., 160 U. S. 187, 16 SCt 263, 40 L. ed. 388; U. S. v. Hewitt, 11 Fed. 243. And see supra § 46; and Statutes [36 Cyc 1183].

65. Ballew v. U. S., 160 U. S. 187, 16 SCt 263, 40 L. ed. 388.

66. U. S. v. Howard, 26 F. Cas. No. 15,400, 7 Biss. 56.

[a] **Thus** an agent merely to collect a check for a pension paid to the pensioner by the pension agent is not within the statute. U. S. v. Howard, 26 F. Cas. No. 15,400, 7 Biss. 56.

67. U. S. v. Schindler, 10 Fed. 547, 18 Blatchf. 227.

68. U. S. v. Irvine, 98 U. S. 450, 25 L. ed. 193.

69. Ballew v. U. S., 160 U. S. 187, 16 SCt 263, 40 L. ed. 388.

70. Ballew v. U. S., supra.

71. U. S. v. Howard, 26 F. Cas. No. 15,400, 7 Biss. 56.

72. U. S. v. Howard, supra.

73. U. S. v. Howard, supra.

74. U. S. v. Ryckman, 12 Fed. 46, 49.

"The words of the statute . . . extend to 'the whole or any part of the pension or claim allowed or due such pensioner or claimant.' If the statute is to be restricted to withholding the money actually paid by the treasury on the check or warrant of the government to the agent, it would be very much limited in its operation as a protection to the pensioner." U. S. v. Ryckman, supra.

75. U. S. v. Moyers, 15 Fed. 411.

76. Of offenses generally see Criminal Law §§ 340-358.

77. See supra § 49.

78. U. S. v. Irvine, 98 U. S. 450, 25 L. ed. 193; U. S. v. Bennett, 24 F. Cas. No. 14,570, 12 Blatchf. 345.

[a] **Running of statute cannot be avoided by charging** in the indictment that accused withheld the money upon a later day and then proving that on that day he was still retaining the money. U. S. v. Irvine, 98 U. S. 450, 25 L. ed. 193.

79. Indictment generally see Indictments and Informations 31 C. J. p 548.

80. U. S. v. Chaffee, 25 F. Cas. No. 14,771, 4 Ben. 330.

[§ 52] **C. Making, or Procuring Making or Presentation, of False Affidavit Concerning Claim for Pension[81]—1. In General.** Under the act of congress, which makes it an offense for any person knowingly or willfully to make or aid in making or to procure the making or presentation of any false or fraudulent affidavit concerning any claim for persion or payment thereof,[82] an intent to defraud the United States is not an element of the offense described by this statute.[83] Nor is it essential that the pension claim, concerning which the false affidavit is presented, should itself be false.[84] Where the statements made in an affidavit in support of a pension claim are true, it is not a "false or fraudulent affidavit" merely because it was not in fact sworn to on the date shown in the notice or certificate.[85]

[§ 53] **2. Indictment.**[86] An indictment for making a false or fraudulent affidavit,[87] which merely charges that the affidavit was false, without a clear averment of the respects in which it was false, is insufficient.[88] The indictment for procuring the making or presentation of a false or fraudulent affidavit should state whether the false affidavit was presented by defendant or procured by him to be presented by another named;[89] and it is not sufficient to allege that defendant "did knowingly and wilfully procure the presentation . . . of a false and fraudulent paper writing, etc.;"[90] but the indictment need not charge that the affidavit was made for the purpose of defrauding the United States[91] or that the pension claim was false.[92]

[§ 54] **D. Postdating Vouchers.** An act of congress, providing that it shall be an offense for any person knowingly or willfully to make or cause to be made or to aid or assist in the making of, or to present or cause to be presented, any paper required as a voucher in drawing a pension, which paper bears a date subsequent to that on which it was actually signed or acknowledged by the pensioner,[93] covers the offense of making or assisting to make any false voucher concerning a claim for pension,[94] but does not cover the offense of using such a voucher,[95] which comes within the provisions of another statute providing that it shall be an offense if anyone "makes, uses, or causes to be made or used," any form of voucher for the purpose of obtaining the payment of a false claim against the United States.[96]

[§ 55] **E. Making False Certificate to Vouchers[97]—1. In General.** The act of congress making it a criminal offense to make a false certificate to pension claim papers[98] is violated by administering the oath immediately before the taking down of the statement thereunder,[99] equally with administering it after taking down such statement.[1]

[§ 56] **2. Indictment.**[2] An indictment for taking a false oath to enable another to obtain payment of a false pension claim under a former pension statute,[3] which described the offense in the very words of the statute, was not vitiated by a conclusion which incorrectly denominates the offense;[4] and, the offense being otherwise fully and correctly stated, the indictment was not vitiated by the conclusion "and so the jurors say . . . that the party did commit wilful and corrupt perjury,"[5] although the offense is technically perjury.[6]

[§ 57] **F. Evidence.** General rules relating to the relevancy, materiality, and competency,[7] and the weight and sufficiency,[8] of evidence, and as to judicial notice,[9] apply in prosecutions for violation of pension laws.

81. Perjury generally see Perjury post p 815.

82. USCA tit 38 § 126.

[a] **Pension Act (1820) c 51 § 2.** declaring that any person who shall swear falsely in the premises and be thereof convicted shall suffer as for willful and corrupt "perjury," does not make the offense one of technical perjury, but merely refers to it for the purpose of affixing the same punishment. U. S. v. Elliot, 25 F. Cas. No. 15,044, 3 Mason 156.

83. U. S. v. Van Leuven, 62 Fed. 69.

84. U. S. v. Adler, 49 Fed. 733.

85. U. S. v. Wood, 127 Fed. 171.

86. Indictment generally see Indictments and Informations 31 C. J. p 548.

87. See supra § 49.

88. U. S. v. Medina, 15 N. M. 204, 103 P 976.

89. Miller v. U. S., 136 Fed. 581, 69 CCA 355.

[a] **Reason assigned** is that the procuring or the making of a false affidavit by another is one offense, and the procuring or the presentation of a false affidavit is still another offense. "The indictment should charge whether the false affidavit was presented by himself or procured by him to be presented by another named. The indictment fails to declare the agency through which the presentation of the false affidavit was procured by the accused. How, then, can it be said that the offense is so stated that the accused can be fully apprised of the charge which he is to meet? He is not informed by the indictment of the manner of presentation, or the name of the person claimed by the prosecution to have been his agent in the presentation of the false affidavit, and would be obliged to go to trial without opportunity of meeting the testimony of any one of several persons whom the prosecution might then produce as the agent of the accused in such presentation. This is not that certainty in the charge of an offense which the law requires." Miller v. U. S., 136 Fed. 581, 582, 69 CCA 355.

90. Miller v. U. S., supra.

91. U. S. v. Van Leuven, 62 Fed. 69.

92. U. S. v. Adler, 49 Fed. 733.

93. USCA tit 38 § 126.

94. Pooler v. U. S., 127 Fed. 509, 62 CCA 307.

95. Pooler v. U. S., supra.

96. Pooler v. U. S., supra.

97. Perjury generally see Perjury post p 815.

98. USCA tit 38 § 126 (making it an offense for a person, before whom any affidavit, voucher, or other writing to be used in aid of the prosecution of a claim for a pension purports to have been executed, knowingly to certify that affiant or the witness named personally appeared before him, and was sworn thereto, or acknowledged the execution thereof, when, in fact, such affiant or witness did not personally appear before him, or was not sworn thereto, or did not acknowledge the execution thereof).

99. U. S. v. Medina, 15 N. M. 204, 103 P 976.

1. U. S. v. Medina, supra.

2. Indictment generally see Indictments and Informations 31 C. J. p 548.

3. Pension Act (1820) § 2 [3 U. S. St. at L. 569 c 53].

4. U. S. v. Elliot, 25 F. Cas. No. 15,044, 3 Mason 156, 157.

5. U. S. v. Elliot, supra ("it is but an inference of law from the premises; and if the jury mistook the nature of the offence, but have truly stated all the facts constituting it, it is sufficient, and the conclusion, 'and so the jurors say, &c.' may be rejected as surplusage").

6. U. S. v. Elliot, supra.

7. See Criminal Law §§ 1034-1102.

[a] **Admissibility.**—(1) In a prosecution for an attempt to defraud the government by procuring pensions on false and fraudulent affidavits, the application for the pension is admissible in evidence to show the use to which the false affidavits were to be applied and to prove the intent. U. S. v. Wentworth, 11 Fed. 52. (2) Where the indictment charges the receipt of a sum in excess of that legitimately chargeable, evidence is admissible to prove that accused sold the pensioner property for a sum largely in excess of its value, if supplemented by proof that the sale was a mere trick to obtain an unlawful fee. U. S. v. Koch, 21 Fed. 873. (3) On the trial of an indictment under USCA tit 38 § 112 for withholding pension money, parol evidence that the person from whom the money is withheld is a pensioner is not admissible, nor are the entries in the local pension agent's books to that effect copied from the certificate of the pensioner. U. S. v. Scott, 25 Fed. 470. (4) It is not competent to prove by parol that the checks received by the government's witness are for pensions due to her, but the checks themselves, or legally exemplified copies thereof, should be produced. U. S. v. Scott, supra.

8. See Criminal Law §§ 1559-1999.

[a] **Weight and sufficiency.**—The only testimony as to the retention of pension money by a pension agent being that of the person entitled thereto that defendant did not pay it to her, and that of defendant that he did, the verdict of the jury against defendant cannot be disturbed. U. S. v. Reynolds, 48 Fed. 215.

9. See Criminal Law §§ 948-992.

[a] **Courts will take judicial notice** of pension laws. U. S. v. Van Leuven, 62 Fed. 62; St. Louis, etc., R. Co. v. Maddry, 57 Ark. 306, 21 SW 472. And see Criminal Law § 967.

PENT ROADS

By William A. Martin

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 798]

ANALYSIS

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CROSS REFERENCES

Highways 29 C. J. p 353.
Private Roads [32 Cyc 363 et seq].
Right of way see **Easements** §§ 71-83; **Eminent Domain** §§ 43-53.
Street see **Municipal Corporations** §§ 3597-3999.
Turnpikes and Toll Roads [38 Cyc 361 et seq].

I. DEFINITION AND NATURE

[§ 1] A pent road is a road shut up or closed at its terminal points.[1] And all pent roads are public highways,[2] although not open highways.[3]

II. WHAT MAY BE TERMINI

[§ 2] A pent road laid out by selectmen may terminate at the farm line of a person for whose special convenience it is laid out, instead of being extended to his buildings.[4] Pent roads are frequently laid only to the lands of persons to be especially accommodated thereby while they construct connecting ways across their own land and thus secure the needed outlets;[5] and an objection that the public can have no beneficial use of the way which leads to nowhere from the highway with which it intersects but only to the farm line is untenable.[6]

III. ESTABLISHMENT

[§ 3] **A. Power To Establish.** No power to establish a pent road exists in the absence of statutory authority therefor.[7]

Selectmen. In Vermont the power is conferred by statute on the selectmen of towns to establish pent roads.[8]

1. French v. Holt, 53 Vt. 364; Wolcott v. Whitcomb, 40 Vt. 40.
[a] **A pent road is one** that may be inclosed by gates or bars. Bridgman v. Hardwick, 67 Vt. 132, 134, 31 A 33.
[b] **"Lane" compared.**—Bridgman v. Hardwick, 67 Vt. 132, 31 A 33.
2. Proctor v. Andover, 42 N. H. 348; Frenche v. Barre, 58 Vt. 567, 5 A 568; Wolcott v. Whitcomb, 40 Vt. 40; Whitingham v. Bowen, 22 Vt. 317.
"Highway" see Highways § 1.
3. Bridgman v. Hardwick, 67 Vt. 132, 31 A 33; Wolcott v. Whitcomb, 40 Vt. 40, 41.
"A road could not be a pent road if it was not shut up or closed at its terminal points; and the term 'pent' ('penned, shut up, confined, or closed,') is employed to distinguish such a road from an open road." Wolcott v. Whitcomb, supra.
4. Robinson v. Winch, 66 Vt. 110, 28 A 884; Brock v. Barnet, 57 Vt. 172.
5. Brock v. Barnet, supra.
6. Brock v. Barnet, supra.
7. Blakeslee v. Tyler, 55 Conn. 387, 11 A 291 (not provided for by the statutes of Connecticut).
8. Warren v. Bunnell, 11 Vt. 600.
[a] **Road for winter use.**—Selectmen can lay out a pent road for winter use over the land of one person

County court can, on appeal from the selectmen, establish a pent road,[9] the jurisdiction conferred on it by statute being substantially that of an appellate tribunal from the decision of the selectmen[10] and confined to the identical matter which the selectmen have acted upon.[11] The proceedings in the county court are merely a continuation of the proceedings commenced before the selectmen.[12]

[§ 4] **B. Proceedings for Establishment.** The selectmen may act without petition, or upon an improper one, and have their action good, because their action is the vital thing, however induced.[13] Accordingly, the fact that one of the petitioners was not a freeholder does not affect the validity of the action of selectmen in establishing the road.[14]

Notice. One who appears before selectmen and objects to any action by them on an application for the establishment of a pent road, but does not object for want of sufficient notice of the application, must be deemed to have waived that objection.[15] No notice or application to the mortgagee of the land through which the road, if established, will pass is necessary where he has a statutory remedy which is ample for the enforcement of his rights.[16]

Order. It is not essential that permission to inclose the land with gates or bars shall be included in the order establishing the road,[17] and the omission to give such permission in the order does not change the character of the road from that of a pent road to that of a public highway.[18]

Appeal to, and from, county court. While as already shown the jurisdiction of the county court over proceedings to establish a pent road is substantially that of an appellate tribunal from the decision of the selectmen,[19] the appeal is brought to the county court by petition and not by having it allowed and certified by the selectmen.[20] The judgment of the county court establishing a pent road will be sustained on appeal unless substantial injustice has been done, or unless the county court upon the facts stated could not in law have rendered the judgment it did.[21] Where it does not affirmatively appear from the record what kind of highway was established by the county court, the appellate court will not presume that it was an open highway which could not be legally established of less width than three rods, but will presume that the county court established by its order a pent road which might be legally established of the width of two rods.[22]

Opening of road. The opening of a pent road, under the statute, is not a mere taking down of obstructions to travel, but the road is deemed to be opened when the certificate of the opening of the road, signed by the selectmen, has been filed in the town clerk's office.[23]

IV. DAMAGES TO LANDOWNERS

[§ 5] When a pent road has been opened in the manner prescribed by statute, the damages occasioned thereby may be recovered by the owner of the land over which the road passes.[24] And it seems that the landowner can claim damages of the town, since pent roads are regarded as highways.[25]

V. MAINTENANCE AND REPAIR

[§ 6] Towns are bound to keep pent roads in repair, that is, in reasonable repair, taking into consideration their character and importance, and are liable for injuries arising from their not being in such a state of repair.[26]

VI. GATES AND BARS

[§ 7] **A. In General.** The power to establish a pent road implies the power to fix the place where gates and bars may be erected.[27] If the tribunal establishing the road fails to fix the points where inclosures may be made, the landowner has the right to erect gates and bars for the protection of his crops, if they do not interfere with the reasonable use of such road as a pent road,[28] or with any contract he may be under with any other person to keep his land open and uninclosed.[29]

Cost of erection and maintenance of gates. Statutes authorizing pent roads sometimes impose the duty of the erection and maintenance of such gates on the person at whose instance and for whose benefit the road is established.[30]

[§ 8] **B. Penalty[31] for Removing.** The right to recover the penalty given by statute against removing gates or bars across pent roads is not affected by the fact that no copy of the record of the county court establishing the road was recorded in the county clerk's office,[32] nor is the right lost by neglecting for a period of fifteen years to maintain a gate.[33]

Form of action. The penalty given by the statute against removing gates or bars across a pent road may be recovered in an action of debt.[34]

through a wood lot owned by another, although it is laid for the special convenience of such owner. Brock v. Barnet, 57 Vt. 172.

9. French v. Holt, 53 Vt. 364.
10. French v. Holt, supra; Whitingham v. Bowen, 22 Vt. 317.
11. French v. Holt, 53 Vt. 364; Whitingham v. Bowen, 22 Vt. 317.
12. French v. Holt, 53 Vt. 364.
13. Brock v. Barnet, 57 Vt. 172.
14. Brock v. Barnet, supra.
15. Brock v. Barnet, supra.
16. Brock v. Barnet, supra.
17. French v. Barre, 57 Vt. 567, 5 A 568.

[a] **Reason** is that the statute contemplates that the selectmen may give such permission in writing to inclose the road for such part of the year as they deem advisable, and make alterations therein at any time, as the convenience and necessity of the landowner may require, so far as it does not interfere with the reasonable use of the road for the purpose for which it was laid. French v. Barre, 58 Vt. 567, 573, 5 A 568.

18. French v. Barre, supra.
19. See supra § 3.
20. French v. Holt, 53 Vt. 364. See Whitingham v. Bowen, 22 Vt. 317 (as sustaining this view).
21. French v. Barre, 58 Vt. 567, 5 A 568.
22. French v. Barre, supra.
23. Warren v. Bunnell, 11 Vt. 600.
24. Warren v. Bunnell, supra.
25. Whitingham v. Bowen, 22 Vt. 317.
26. Proctor v. Andover, 42 N. H. 348; Loveland v. Berlin, 27 Vt. 713.
27. French v. Holt, 53 Vt. 364.
28. Bridgman v. Hardwick, 67 Vt. 132, 31 A 33; Carpenter v. Cook, 67 Vt. 102, 30 A 998; French v. Barre, 58 Vt. 567, 5 A 568; French v. Holt, 53 Vt. 364; Wolcott v. Whitcomb, 40 Vt. 40.
29. French v. Barre, 58 Vt. 567, 5 A 568.
30. Proctor v. Andover, 42 N. H. 362.
31. **Penalty generally** see Fines, Forfeitures, and Penalties §§ 72–161.
32. French v. Holt, 53 Vt. 364.
33. French v. Holt, supra.
34. French v. Holt, supra.

VII. USE OF ROAD

[§ 9] No person has a right to use a pent road until it has been legally opened.[35] The public has a right of access to a legally opened pent road.[36]

35. Warren v. Bunnell, 11 Vt. 600.

36. Proctor v. Andover, 42 N. H. 348; Wolcott v. Whitcomb, 40 Vt. 40; Loveland v. Berlin, 27 Vt. 713; Whitingham v. Bowen, 22 Vt. 317, 318; Warren v. Bunnell, 11 Vt. 600.

"Those highways, which are permitted to be pent, are . . . free to all persons, who may have occasion to pass along them." Whitingham v. Bowen, supra.

For **later cases, developments** and **changes** in the law see cumulative Annotations, same title, page and note number.

PEONAGE

By William A. Martin

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 801]

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CROSS REFERENCES

Compulsory service:
Apprentices § 79 et seq.
Army and Navy §§ 10, 27–32.
Seaman see **Constitutional Law** § 446.
Constitutionality of statute:
Making it an offense to:
Entice servant under contract to leave employment see **Master and Servant** § 1617.
Fraudulently obtain money in consideration of employment contract see **Constitutional Law** § 446; **Master and Servant** § 180.
Making mere breach of employment contract an offense see **Constitutional Law** §§ 446, 841; **Master and Servant** § 180.
Control of convict see **Convicts** §§ 15–18.
Convict:
Labor see **Convicts** §§ 20–33.
Labor contract see **Constitutional Law** § 446.
Imprisonment for debt see **Constitutional Law** §§ 447, 448.
Involuntary servitude as punishment for crime see **Constitutional Law** § 446.
Liability for inducing breach of service contract by servant see **Master and Servant** § 1617 et seq.
Slavery in general see **Slavery** [36 Cyc 465].

I. DEFINITIONS AND TERMINOLOGY

[§ 1] Peonage is a status or condition of compulsory[1] service based upon the indebtedness of the peon to his master.[2]

A **peon** is one who is compelled to work for his

1. See U. S. v. Reynolds, 235 U. S. 133, 35 SCt 86, 59 L. ed. 162; Goode v. Nelson, 73 Fla. 29, 74 S 17.

[a] **Voluntary or involuntary peonage.**—"Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude." U. S. v. Reynolds, 235 U. S. 133, 144, 35 SCt 86, 59 L. ed. 162.

[b] **Distinguished from voluntary service in payment of debt.**—"A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." Clyatt v. U. S., 197 U. S. 207, 215, 25 SCt 429, 49 L. ed. 726; In re Peonage Charge, 138 Fed. 686, 688.

2. Bailey v. Alabama, 219 U. S. 219, 31 SCt 145, 55 L. ed. 191; Clyatt v. U. S., 197 U. S. 207, 215, 25 SCt 429, 49 L. ed. 726; Taylor v. U. S., 244 Fed. 321, 156 CCA 607; U. S. v. Clement, 171 Fed. 974; U. S. v. Cole, 153 Fed. 801, 805; In re Peonage Charge, 138 Fed. 686, 687; Peonage Cases, 123 Fed. 671; Goode v. Nelson, 73 Fla. 29, 74 S 17; Young v. State, 4 Ga. A. 827, 62 SE 558; State v. Oliva, 144 La. 51, 52, 80 S 195.

[a] **Other definitions.**—(1) "Holding of any person to service or labor for the purpose of paying or liquidating an indebtedness due from the laborer or employé to the employer, when such employé desires to leave or quit the employment before the debt is paid off." Peonage Cases, 136 Fed. 707, 708. (2) "The exercise of dominion over their persons and liberties by the master, or employer, or

creditor until the debt is paid.[3]

"'Condition of peonage' means the actual status, physical and moral, with the inevitable incidents to which the employé, servant, or debtor was reduced under that system, when held to involuntary performance or liquidation of his obligation." [4]

"Peonism" is the state or condition of a peon.[5]

II. HISTORY AND ESSENTIALS

[§ 2] The peonage system was prevalent in the Spanish American colonies, including Mexico, from which we derived it when we acquired the territory of New Mexico as the result of the Mexican War.[6]

As a contract relation. The condition of peonage arose from contract. The peon, male or female, agreed with the master upon the nature of the service, the length of its duration, and the compensation to be paid. The peon then became bound to the master, according to the laws of New Mexico, "for an indebtedness founded upon an advancement in consideration of service." [7] In the earlier stages of the institution there, the person agreeing to perform service could put an end to the relation by paying at any time whatever he owed to the employer.[8] If the peon wished to change masters or service, he might find a new employer who would advance enough to pay the peon's debts to his then master, and the peon would then become bound in the new employer's service. So also the master could sell the service of the peon, for the term, to anyone who would pay his debts and assume the duties and obligations of the master. Under later laws the party could not abandon the contract except by mutual consent or "by some sufficient motive given by one party to another, such as having grievously injured him, or where the master kept the accounts in an ambiguous manner, so that the servant could not understand them." In these cases the contract could be rescinded by paying the amount due by one party to the other. If no such motive should be proved, the contract must be complied with, and the judge or court would order it carried into effect by imposing upon the party failing to comply with the contract, and who should persevere in doing so, that he should indemnify the other party for the injury resulting therefrom; and all resistance was punished by a fine or imprisonment, as the gravity of the circumstances and resistance might require. If the servant refused to comply, and owed any money to the master, and he refused and could not pay it, the court would compel him to pay the principal and interest to the other, and might order the sheriff to contract the services of the peon to the highest bidder.[9]

As a form of slavery. While peonage may be regarded as a form of slavery,[10] it was not chattel slavery [11] as that institution formerly existed in this country. The peon was not a slave; he was a freeman with political, as well as civil, rights.[12] He entered into the relation from choice, for a definite period, as the result of mutual contract.[13] The relation was not confined to any race.[14]

Child of a peon did not become a peon, nor could the father contract away the services of his minor child except in rare cases.[15]

III. CONSTITUTIONAL AND LEGISLATIVE PROHIBITIONS

[§ 3] **A. In General.** Peonage as it formerly existed [16] was wholly out of keeping with the spirit of the Thirteenth Amendment to the United States

creditor, to compel the discharge of the obligation, by service or labor, against the will of the person performing the service." Peonage Cases, 123 Fed. 671, 679.

[b] **The basal fact** on which peonage rests (1) is a debt due from the peon to his master. U. S. v. Reynolds, 235 U. S. 133, 35 SCt 86, 59 L. ed. 162; Bailey v. Alabama, 219 U. S. 219, 31 SCt 145, 55 L. ed. 191; Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; Davis v. U. S., 12 F. (2d) 253 [certiorari den 271 U. S. 688 mem, 46 SCt 639 mem, 70 L. ed. 1153 mem]; U. S. v. Cole, 153 Fed. 801; In re Peonage Charge, 138 Fed. 686; Young v. State, 4 Ga. A. 827, 62 SE 558; Jaremillo v. Romero, 1 N. M. 190; Ex p. Hollman, 79 S. C. 9, 60 SE 19, 21 LRANS 242, 14 AnnCas 1105. (2) Indebtedness is the cord by which the victim is bound to the master's service. Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; In re Peonage Charge, supra; State v. Oliva, 144 La. 51, 80 S 195; Jaremillo v. Romero, supra.

[c] **In Mexico** peonage is "the status of natives of Mexico whom their employers hold and compel to work on their lands in payment of debts incurred by such laborers." Universal French D. [quot 4 Columbia L. Rev. p 279 (article by William Wirt Howe)].

3. Bailey v. Alabama, 219 U. S. 219, 242, 31 SCt 145, 55 L. ed. 191.

[a] **Other definitions.**—(1) "A servant; especially, in some of the Spanish American countries, a debtor held by his creditor in a form of qualified servitude, to work out a debt." Webster Int. D. [foll Black L. D. (quot U. S. v. McClellan, 127 Fed. 971, 976)]. (2) "A common laborer; a servant; specifically, in Spanish America, one who is bound to serve his creditor until the debt is paid." Standard D. See 4 Columbia L. Rev. p 279 (article by William Wirt Howe). (3) "A species of serf, compelled to work for his creditor until his debts are paid." Century D. [quot In re Lewis, 114 Fed. 963, 967].

[b] **In New Mexico** peons, strictly speaking, were a class of servants bound to personal service for the payment of debts due their masters, but there seems to have been no law regulating their rights and duties under that specific denomination, and the term "peon" was there used as synonymous with "servant." Jaremillo v. Romero, 1 N. M. 190.

4. Peonage Cases, 123 Fed. 671, 679 [quot U. S. v. McClellan, 127 Fed. 971, 975].

[a] **Other definitions.**—(1) "The effect thereby produced upon the person, liberties, and rights of a man held in such a situation." Peonage Cases, 123 Fed. 671, 680. (2) "A person arbitrarily or forcibly held against his will for the purpose of compelling him to render personal services in discharge of a debt, is in a condition of peonage." Dis. op. in Hodges v. U. S., 203 U. S. 1, 33, 27 SCt 6, 51 L. ed. 65. To same effect U. S. v. McClellan, 127 Fed. 971, 979.

[b] **System of peonage.**—"Condition of peonage" does not import a system of peonage. A "general condition of peonage" might be synonymous with a "general system of peonage," but a citizen held and worked by lawless methods against his will for the purpose of compelling him in this manner to discharge a real or alleged obligation is, in contemplation of law, held in a condition of peonage. U. S. v. McClellan, 127 Fed. 971, 975.

5. Century D. And see Webster Int. D.

6. Peonage Cases, 136 Fed. 707; Peonage Cases, 123 Fed. 671; Jaremillo v. Romero, 1 N. M. 190; 4 Columbia L. Rev. p 279 (article by William Wirt Howe).

7. Peonage Cases, 123 Fed. 671, 673, 674.

8. Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; U. S. v. Cole, 153 Fed. 801; Peonage Cases, 123 Fed. 671, 674.

9. Peonage Cases, supra.

10. In re Peonage Charge, 138 Fed. 686, 687.

11. See Slaves [36 Cyc 465].

12. Peonage Cases, 123 Fed. 671.

13. See supra text and notes 7–9.

14. Peonage Cases, 123 Fed. 671.

15. Peonage Cases, supra; Bustamento v. Analla, 1 N. M. 255.

16. See supra § 2.

"The powers of justices of the peace, who succeeded to most of the jurisdiction of the alcaldes in the administration of the law [in New Mexico], were not clearly defined, and left very much to their discretion as to the return of persons to service, and the mode and quantum of judicial power which could be exercised to compel the service. There was often 'unscrupulous disregard' as to 'the legal rights of the unfortunate, the peon, and the feeble, when contesting with the wealthy and influential.' The improvidence and the needs of laborers and servants, the greed of employers, and the exercise, often corrupt, of almost irresponsible power of local magistrates, resulted in citizens becoming bound, in constantly increasing numbers and length of

constitution,[17] and since, notwithstanding the courts after the passage of the amendment released peons on writs of habeas corpus, little headway was made against the evil,[18] congress, in order not only to destroy the system as it existed in New Mexico, but to prevent in the future "in any Territory or State" the reappearance or reëstablishment of the evil conditions, enacted the statute of March 2, 1867[19] and of March 4, 1909[20] for that purpose, the constitutionality of which has been upheld,[21] and state statutes in conflict therewith have been declared invalid.[22]

[§ 4] **B. Rules of Construction.**[23] The meaning of the terms in the peonage statute must be sought in the light of the history of the institution in New Mexico, and the design of congress interpreted in the light of the evil condition that system developed, which the statute declared should not thereafter exist in any state or territory,[24] and the statute, like other statutes imposing penalties for the invasion of the rights of the citizen in order to protect him in his liberty and happiness, is not to be construed with the same strictness or on the same footing as those which regulate or restrain the exercise of a natural right or forbid the doing of things not intrinsically wrong.[25]

[§ 5] **C. In What Territory Operative.** The statute is not limited to the territories or other parts of the strictly national domain, but is operative in the states, and wherever the sovereignty of the United States extends.[26]

[§ 6] **D. Enumeration of Offenses Denounced by Statute.** By the express provisions of the statute[27] the offense may consist of holding or causing to be held,[28] of arresting or causing to be arrested,[29] or of returning or causing to be returned[30] any person to a condition of peonage.

[§ 7] **E. Elements of Offense—1. Indebtedness of Servant to Master.** Since the basal fact on which peonage rests is a debt due from the peon to his master,[31] a debt from the servant to the master is an indispensable element of the offenses denounced by the statute,[32] although the requirements of the statute will be satisfied whether the debt is real or pretended.[33] So the amount of the debt is immaterial,[34] and it is likewise immaterial whether the contract was made in consideration of a preëxisting indebtedness or for a loan made at the time the contract is made.[35]

An obligation to work cannot be reasonably con-

service, to compulsory 'service or labor' to coerce payment of debt or compel the performance of real or pretended obligations of personal service. The evils of the system not only degraded those who were subjected to the system, but exercised a baleful influence upon all other classes, which in innumerable ways fought against the industrial prosperity and moral advancement of the people among whom the 'system' was enforced." Peonage Cases, 123 Fed. 671, 674.

17. U. S. Const. Amendm. XIII (which forbids involuntary servitude except upon conviction of crime).

"While negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void." Slaughter House Cases, 16 Wall. (U. S.) 36, 72, 21 L. ed. 394 [foll Bailey v. Alabama, 219 U. S. 219, 31 SCt 145, 55 L. ed. 191; Robertson v. Baldwin, 165 U. S. 275, 17 SCt 326, 41 L. ed. 715; Plessy v. Ferguson, 163 U. S. 537, 16 SCt 1138, 41 L. ed. 256; Goode v. Nelson, 73 Fla. 29, 74 S 17].

[a] **"The plain intention** was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." Bailey v. Alabama, 219 U. S. 219, 241, 31 SCt 145, 55 L. ed. 191.

18. See Peonage Cases, 123 Fed. 671, 675 ("The courts of the territory, after the passage of the thirteenth amendment, holding that it destroyed the right formerly existing under the territorial laws to hold to service, released peons from compulsory service on writs of habeas corpus wherever applied to, but made little headway against the evil. Peons had become so degraded that in many instances they voluntarily returned to the compulsory service, being content to give control over their persons and freedom to masters who, in return, would feed and clothe them and their families. Masters, in many instances, resented the new order of things, 'which deprived them of proper control of their labor,' and exercised their old authority in spite of the new amendment, which was not then enforceable by criminal penalty. Officers of the army, particularly in the case of Indians, used the forces of the United States to hold or return them to the system of compulsory labor or service, in discharge of their contracts, debts, or obligations").

19. USCA tit 8 § 56; Rev. St. §§ 1990, 1991, 5526, 5527.

20. USCA tit 18 § 444; Rev. St § 5526.

"By these enactments Congress undertook to strike down all laws, regulations and usages in the States and Territories which attempted to maintain and enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in the liquidation of any debt or obligation." U. S. v. Reynolds, 235 U. S. 133, 143, 35 SCt 86, 59 L. ed. 162.

21. U. S. v. Reynolds, supra; Bailey v. Alabama, 219 U. S. 219, 31 SCt 145, 55 L. ed. 191; Clyatt v. U. S., 197 U. S. 207, 218, 25 SCt 429, 49 L. ed. 726; U. S. v. McClellan, 127 Fed. 971; In re Lewis, 114 Fed. 963.

"It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime." Clyatt v. U. S., supra.

22. U. S.—Ex p. Drayton, 153 Fed. 986. But see U. S. v. Eberhart, 127 Fed. 252.

Fla.—Butler v. Perry, 67 Fla. 405, 66 S 150 [aff 240 U. S. 328, 36 SCt 258, 60 L. ed. 672].

Ga.—Wilson v. State, 138 Ga. 489, 75 SE 619; Loeb v. Jennings, 133 Ga. 796, 67 SE 101, 18 AnnCas 376 [aff 219 U. S. 582 mem, 31 SCt 469 mem, 55 L. ed. 345 mem, and foll Dunbar v. Atlanta, 7 Ga. A. 434, 67 SE 107; Chicago v. Williams, 254 Ill. 360, 98 NE 666; Chicago v. Coleman, 254 Ill. 338, 98 NE 521]; Young v. State, 4 Ga. A. 827, 62 SE 558.

La.—State v. Murray, 116 La. 655, 40 S 930, 7 AnnCas 957.

Miss.—State v. Armstead, 103 Miss. 790, 60 S 778, AnnCas1915B 495.

S. C.—Ex p. Hollman, 79 S. C. 9, 60 SE 19, 21 LRANS 242, 14 AnnCas 1105.

23. Construction of statutes generally see Statutes [36 Cyc 1102 et seq].

24. Peonage Cases, 123 Fed. 671, 674.

25. Peonage Cases, supra.

26. Bailey v. Alabama, 219 U. S. 219, 31 SCt 145, 55 L. ed. 191; Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726 [impliedly overr U. S. v. Eberhart, 127 Fed. 252]; In re Peonage Charge, 138 Fed. 686. See U. S. v. McClellan, 127 Fed. 971; Peonage Cases, 123 Fed. 671.

27. USCA tit 8 § 56; USCA tit 18 § 444.

28. See cases infra this note.

[a] **One may hold another** in a state of peonage without ever having arrested him for that purpose. Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; In re Peonage Charge, 138 Fed. 686.

29. See cases infra this note.

[a] **One may be arrested** (1) for the purpose of placing him in a condition of peonage (Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; In re Peonage Charge, 138 Fed. 686) (2) whether he is the one to whom the involuntary servitude is to be rendered or simply employed for the purpose of making the arrest (Clyatt v. U. S., supra).

30. See Taylor v. U. S., 244 Fed. 321, 156 CCA 607; and cases infra this note.

[a] **Accused may be guilty of returning** a former peon to a condition of peonage whether he himself claims the service or acts simply as an agent of another to enforce the return. Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; In re Peonage Charge, 138 Fed. 686.

31. See supra § 1.

32. U. S. v. Reynolds, 235 U. S. 133, 35 SCt 86, 59 L. ed. 162; Taylor v. U. S., 244 Fed. 321, 156 CCA 607; Peonage Cases, 123 Fed. 671.

33. U. S. v. McClellan, 127 Fed. 971; Peonage Cases, 123 Fed. 671, 680. "'Otherwise,' (as used in the statute) in contradistinction to 'any debt or obligation,' cannot mean less than that the debt or obligation upon which the claim to compulsory service is based need not be real or of legal validity, but includes cases when the 'obligation,' performance of which is coerced by labor against the will of the servitor, is unfounded, concocted, or illegal, or arises from agreements or dealings with strangers claiming the right to his service." Peonage Cases, supra.

34. Bernal v. U. S., 241 Fed. 339, 154 CCA 219 [certiorari den 245 U. S. 672 mem, 38 SCt 192 mem, 62 L. ed. 540 mem].

35. Peonage Cases, 136 Fed. 707.

strued to mean a debt within the statute.[36]

[§ 8] **2. Condition of Peonage—a. Necessity.** By the express terms of the statute[37] a "condition of peonage" is an indispensable element of any of the offenses therein enumerated,[38] and it has accordingly been held that inasmuch as a "return" implies the prior existence of some state or condition,[39] there can be no conviction of returning another to a state of peonage unless the person so returned had actually been in a state of peonage prior to the alleged act of returning him thereto.[40]

[§ 9] **b. Mode of Creation—(1) In General.** However created, peonage is denounced and prohibited by the statutes, the mode of its creation being immaterial.[41] The statutes forbid slavery and involuntary servitude, however attempted, whether created by contract,[42] by force, intimidation, or coercion,[43] by municipal ordinances or state law,[44] or by local custom[45] or usage[46] creating a condition of peonage, or in violation, or without the sanction, of law,[47] and in whatever form or however named.[48]

[§ 10] **(2) Intent or Scienter.** In order to constitute the offense of holding one in peonage it is not necessary that defendant shall have acted corruptly.[49] However, a guilty knowledge of the unlawful purpose of an arrest within the contemplation of the statute is essential to the making out of the crime against the arresting officer.[50]

[§ 11] **F. Particular Acts Constituting Offenses and Persons Liable.** Within the principles heretofore enunciated[51] in the notes will be found decisions illustrative of the acts sufficient to constitute the offense denounced by the statute and to show what persons are liable therefor.[52]

36. Taylor v. U. S., 244 Fed. 321, 156 CCA 607.

37. See supra § 3.

38. See supra § 6.

39. Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726.

40. Clyatt v. U. S., supra; Taylor v. U. S., 244 Fed. 321, 156 CCA 607.

41. U. S. v Reynolds, 235 U S. 133, 35 SCt 86, 59 L. ed. 162; Bailey v. Alabama, 219 U. S. 219, 31 SCt 145, 55 L. ed. 191; Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; Bernal v. U. S., 241 Fed. 339, 154 CCA 219 [certiorari den 245 U. S. 672 mem, 38 SCt 192 mem, 62 L. ed. 540 mem]; U. S. v. Clement, 171 Fed. 974; In re Peonage Charge, 138 Fed. 686; Peonage Cases, 136 Fed. 707; Peonage Cases, 123 Fed. 671; State v. Oliva, 144 La. 51, 80 S 195.

42. Bailey v. Alabama, 219 U. S. 219, 242, 31 SCt 145, 55 L. ed. 191; In re Peonage Charge, 138 Fed. 686; Peonage Cases, 136 Fed. 707.

"The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor." Bailey v. Alabama, supra.

[a] **Voluntary or involuntary act of servant.**—It is immaterial whether the contract, whereby the laborer is to work out an indebtedness due from him to the employer, is entered into voluntarily or not. "The fact even that the laborer entered into that contract voluntarily and with full knowledge of the conditions of his employment is no excuse, for the law says that no person shall enter into such a contract, and, if he does, it shall be null and void." Peonage Cases, 136 Fed. 707, 709.

43. U. S. v. Reynolds, 235 U. S. 133, 35 SCt 86, 59 L. ed. 162; U. S. v. Clement, 171 Fed. 974; In re Peonage Charge, 138 Fed. 686.

[a] **What constitutes force, intimidation, or coercion** (1) such as, if effective, will render the service involuntary and create a condition of peonage within the meaning of the statute, is always a question of fact and each case must depend upon its own circumstances. U. S. v. Clement, 171 Fed. 974. (2) But in determining this question, the character and condition of life of the two parties (U. S. v. Clement, supra), (3) the relative inferiority or inequality between the persons contracting to perform the service and the persons exercising the force or influence to compel its performance (Peonage Cases, 123 Fed. 671), must always be taken into consideration.

44. U. S. v. Reynolds, 235 U. S. 133, 35 SCt 86, 59 L. ed. 162; Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726; In re Peonage Charge, 138 Fed. 686. And see Constitutional Law §§ 446, 841; Master and Servant § 180.

45. Peonage Cases, 123 Fed. 671.

46. U. S. v. Reynolds, 235 U. S. 133, 35 SCt 86, 59 L. ed. 162.

47. Peonage Cases, 123 Fed. 671.

48. In re Peonage Charge, 138 Fed. 686.

49. U. S. v. Clement, 171 Fed. 974.

50. In re Peonage Charge, 138 Fed. 686 (the arrest must be made knowingly, for the purpose of returning the person to a prior condition of peonage or servitude, or placing him therein to work out a debt).

51. See supra §§ 1–10.

52. See cases infra this note.

[a] **Acts constituting peonage.**—(1) A person who falsely pretends to another that he is accused of crime, and offers his good offices to prevent his conviction if he will pay a sum of money, thereby to satisfy the prosecutor, and thus induces such party to sign a contract obligating himself to work to reimburse the amount paid out or pretended to be paid out for this purpose, and to submit to restraint and deprivation of his liberty while he is performing the contract, is guilty of holding such person, or causing him to be held, to a condition of peonage, whenever such person, having so entered on performance of the contract, desires to leave it, but is compelled to remain and perform it by threats or punishment, subduing his freedom of will. Peonage Cases, 123 Fed. 671, 672. (2) A person who hires another or induces him to sign a contract by which he agrees during the term to be imprisoned or kept under guard, and under cover of such agreement afterward holds the party to the performance of the contract by threats or punishment or undue influence, subduing his free will, when he desires to abandon the service, is guilty of holding such person to "a condition of peonage." Peonage Cases, supra. (3) If a person carries another before a magistrate informing him that he is accused of crime, and the magistrate induces accused, being of weak mind, or of little intelligence, or confiding, to believe that he is being prosecuted in the court, and that he has been sentenced to hard labor for a fine, and that the party bringing him before the court has confessed judgment for the fine, in consequence of which the person believing himself lawfully sentenced to hard labor for the fine submits to restraint, and his will is subdued by reason of the fraud and the official character of the person before whom he is brought, because he believes himself to be a convict and restrained by the power which the law gives to a hirer over convicts, and he enters upon the service and works under the contract against his will, the persons so concerned are guilty of causing accused to be held in a condition of peonage, although no warrant issued, no offense in fact was charged, no judgment was rendered, and the person who carried him before the magistrate was only a private citizen. Peonage Cases, supra. (4) If a master desiring to have a servant returned to him to work out a debt causes such servant to be arrested, and after incarceration the master procures the servant's release on his promise to return to his master's employment to continue to work out a debt, the master is guilty of peonage, provided the servant was charged with the crime for the purpose of procuring his arrest and incarceration, and to enable the master to extort from the servant a promise to return and work out the debt. In re Peonage Charge, 138 Fed. 686.

[b] **Judicial officers.**—(1) A magistrate or other judicial officer is not criminally liable for an error of judgment or for any act honestly performed under an unconstitutional law (Peonage Cases, 123 Fed. 671), (2) but where he corruptly exercises his functions in order that a citizen may be convicted unlawfully, and sentenced, so that a particular person with whom he has an understanding, express or implied, by becoming surety on a confession of judgment may get the custody of the convict or make a profit out of a contract to be made between the convict and his surety in consequence of which the convict is restrained of his liberty and put to hard labor, such magistrate cannot escape criminal liability to the United States for the conspiracy and its natural and designed results in the holding of a citizen to a condition of peonage, because of the official character of his acts (Peonage Cases, supra). (3) And a magistrate cannot be convicted of returning a person to a condition of peonage where the person so returned had not actually been in a state of peonage prior to the alleged act of returning him thereto. Taylor v. U. S., 244 Fed. 321, 156 CCA 607.

[c] **Persons charged with aiding and abetting in the arrest and return** (1) of certain persons to a condition of peonage are not entitled to an acquittal on the ground that the actual arrest was effected by others before his arrival, since, under Comp. St. § 10506, one who aids and abets an offense is a principal. Davis v. U. S., 12 F. (2d) 253, 256. (2) So in a prosecution for this offense the fact that the arrest involved was not one made in the first instance but a rearrest after such person had escaped does not entitle defendant to an acquittal. "A rearrest is an arrest, and doubtless it would not be necessary to show a previous holding."

[§ 12] **G. Prosecution—1. Jurisdiction.** A federal court may entertain a prosecution for violation of the statute denouncing peonage, although a prosecution of the same acts under the name of kidnapping and false imprisonment might be held in the state courts.[53]

[§ 13] **2. Indictment, Evidence, and Trial.** General rules governing the requisites and sufficiency of indictments,[54] the admissibility,[55] weight and sufficiency of evidence,[56] and trial[57] apply in prosecutions for offenses denounced by the peonage statutes.

***PEONIA.** In Spanish law, a portion of land which was formerly given to a simple soldier on the conquest of a country. It is now a quantity of land of different size in different provinces. In the Spanish possessions in America it measured fifty feet front and one hundred feet deep.[1]

PEOPLE.[2] A word of varied significance,[3] subject to many different meanings,[4] depending upon the connection in which it is used[5] and the subject matter to which it relates,[6] and sometimes employed in a broad[7] and comprehensive[8] sense as referring to persons generally, an indefinite number of men and women, folks, population, or part of population.[9]

Davis v. U. S., supra.

[d] **Sureties for payment of fine and costs.**—(1) Where a person charged with crime has, after confession, been sentenced to pay a fine and costs and then been released on the payment of a fine by a surety with whom he has made an agreement to work continuously for a specified period for the specified amount so paid for the fine and costs, and he is liable to separate punishment if he fails to carry out the contract, he is in reality working for a debt which he owes the surety, the labor is performed under such coercion as to become a compulsory service for the discharge of a debt, and the relationship between him and the surety is that of peonage and falls within the prohibition of the Thirteenth Amendment and the laws enacted to enforce it. U. S. v. Reynolds, 235 U. S. 133, 35 SCt 86, 59 L. ed. 162 [rev 213 Fed. 352, and overr U. S. v. Broughton, 213 Fed. 345]. (2) Under a statute of Alabama which permits a person convicted of crime to sign a contract in open court, with the written approval of the judge, by which he submits himself to servitude to his surety, on confession of judgment by the latter for the fine and costs, until such fine and costs have been reimbursed by his labor, the provisions of the statute must be strictly followed, and the contract cannot be extended beyond the payment of the fine and costs, nor can it be transferred without the consent of the convict. If he is held thereunder against his will and by force or threats after the fine and costs have been paid, or by another to whom the contract has been transferred without his consent, the person so restraining him is guilty of holding him to a condition of peonage. Peonage Cases, 123 Fed. 671. (3) Although one may have confessed judgment for another on his conviction, the surety is not entitled on that account to detain him in custody against his will, as his bail would be before trial, unless the surety has complied with the statutes of the state, and made written contract in open court, approved by the judge in writing. This is a safeguard which the state exacts to prevent abuse and oppression when the surety intends to hold his principal to involuntary service to reimburse him for the payment of the fine and costs. As such an agreement involves personal trust and confidence on the part of the convict in the selection of a keeper, his surety has no authority, without his consent, to transfer the contract and custody of the convict to some other person, who repays to the surety the fine and costs, and enforces the performance of the service. If there is no written contract approved by the court, or if it is transferred without the consent of the convict, the convict cannot be held against his will to perform service to repay his fine and costs. If one holds another convicted of a misdemeanor, against his will, because he has confessed judgment for the fine and costs, without obtaining a written contract in open court, approval in writing by the judge, or holds him against his will, after the fine and costs have been worked out, for advances upon a further term of service, or prevents his leaving by force or threats as above defined, such person is guilty of holding the person in a condition of peonage. Peonage Cases, supra.

53. U. S. v. McClellan, 127 Fed. 971. See also Criminal Law § 482.

[a] **Jurisdiction of the two courts** is concurrent and no reason exists why either court with a case properly before it should refuse to proceed in the exercise of such jurisdiction. U. S. v. McClellan, 127 Fed. 971.

54. See Indictments and Informations §§ 170–311.

[a] **Indictment held sufficient.**—An indictment charging that defendant willfully and knowingly held three persons to a condition of peonage, that is to say, defendant kept and held them, by threats and putting them in fear, against their wills to perform labor to work out debts claimed to be due defendant, is in due form and sufficient in law. Bernal v. U. S., 241 Fed. 339, 154 CCA 219 [certiorari den 245 U. S. 672 mem, 38 SCt 192 mem, 62 L. ed. 540 mem].

55. See Criminal Law § 1034 et seq.

[a] **Admissibility.**—(1) Evidence that the principal defendant procured the arrest of some of the persons so held on petty charges, and at a hearing before the county judge induced pleas of guilty, paid costs assessed against them, and took them away, is admissible against all defendants, as proving a basal fact of indebtedness essential to peonage. Davis v. U. S., 12 F. (2d) 253. (2) On an indictment for returning certain persons to a condition of peonage, defendant may show that such persons had never been in a condition of peonage. Clyatt v. U. S., 197 U. S. 207, 25 SCt 429, 49 L. ed. 726.

56. See Criminal Law § 1559 et seq.

[a] **Weight and sufficiency.**—Evidence of the prosecuting witness, if believed by the jury, may be sufficient to show that defendant had forced her to work out a debt by threats and fear. Bernal v. U. S., 241 Fed. 339, 154 CCA 219 [certiorari den 245 U. S. 672 mem, 38 SCt 192 mem, 62 L. ed. 540 mem].

57. See Criminal Law §§ 2000–2614.

[a] **Trial.**—In a prosecution for aiding and abetting in the arrest and return of designated persons to a condition of peonage, peremptory instructions are properly denied where there is evidence sufficient to defendant's guilt to go to the jury. Davis v. U. S., 12 F. (2d) 253.

1. Bouvier L. D. See Strother v. Lucas, 12 Pet. (U. S.) 410, 444, 9 L. ed. 1137.

2. See Neutrality Laws § 11 note 48 [b].

3. Evans v. Willistown Tp., 15 Pa. Co. 326, 327 ("It is applied alike to a nation, to the inhabitants of a state and to the qualified voters only of a state").

"The word 'people' may have somewhat varying significations dependent upon the connection in which it is used. In some connections in the Constitution it is confined to citizens and means the same as citizens. It excludes aliens. It includes men, women and children. It comprehends not only the sane, competent, law-abiding and educated, but also those who are wholly or in part dependents and charges upon society by reason of immaturity, mental or moral deficiency or lack of the common essentials of education." In re Opinion of Justices, 226 Mass. 607, 115 NE 921, 922.

4. The Itata, 56 Fed. 505, 511, 5 CCA 608.

[a] **"Public" synonymous.**—Wyatt v. Larimer, etc., Irr. Co., 1 Colo. A. 480, 29 P 906, 911. "Public" see [32 Cyc 747].

5. The Itata, 56 Fed. 505, 511, 5 CCA 608; In re Opinion of Justices, 226 Mass. 607, 115 NE 921, 922; Evans v. Willistown Tp., 15 Pa. Co. 326, 327.

"The words 'the people' are not unfrequently employed in different senses, and their meaning must therefore be determined by the connection, and the circumstances of the particular case, in which they are used. In some cases they refer to the qualified voters, and in others to the state in its sovereign capacity." Black v. Trower, 79 Va. 123, 126.

6. The Itata, 56 Fed. 505, 511, 5 CCA 608.

7. In re Incurring State Debts, 19 R. I. 610, 37 A 14, 15 [quot Simpkin v. Rock Springs, 33 Wyo. 166, 237 P 245, 251].

8. The Itata, 56 Fed. 505, 511, 5 CCA 608; In re Incurring State Debts, 19 R. I. 610, 37 A 14, 15 [quot Simpkin v. Rock Springs, 33 Wyo. 166, 237 P 245, 251]; Rushton v. Woodham, 68 S. C. 110, 113, 46 SE 943 ("The term 'people' is here used in a comprehensive sense, clearly intended to embrace the inhabitants of the territory with respect to their personal and property rights and liabilities, and also all personal and property rights and liabilities over which the courts of the several old counties would have had jurisdiction, and concerning which the officers of the several old counties would have had power to act before the county of Lee was created").

[a] **Including "registry voters."**—In re Incurring State Debts, 19 R. I. 610, 37 A 14, 15 [quot Simpkin v. Rock Springs, 33 Wyo. 166, 237 P 245, 251].

[b] **Including "taxpayers."**—In re Incurring State Debts, 19 R. I. 610, 37 A 14, 15 [quot Simpkin v. Rock Springs, 33 Wyo. 166, 237 P 245, 251].

9. Webster D. [quot Matter of Silkman, 88 App. Div. 102, 110, 84 NYS 1025].

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*By JUAN D. MIRANDA (Peonia–Perjuro inclusive except the Spanish words and phrases).

In a political sense it may be employed as meaning the state;[10] the state or nation in its collective or political capacity;[11] the aggregate or mass of the individuals who constitute the state;[12] the entire body of the inhabitants of a state;[13] the ruling power of the country.[14] In a more restricted sense it may refer to electors or voters;[15] those who possess the qualifications of voters;[16] those and only those with whom the elective power is deposited;[17] that part of the entire body of inhabitants who, under the constitution, are intrusted with the exercise of the sovereign power and the conduct of the government;[18] that portion of the inhabitants who are intrusted with political power.[19]

PEOPLE'S PARTY.[20]

PEPPER. The product of plants of the genus Piper, consisting of berries which afford an aromatic and pungent condiment.[21]

PEPSIN. A ferment found in the rennets or stomachs of calves and hogs.[22]

PEPTONE. Any of a class of soluble and diffusible substances produced from proteids by peptic and tryptic digestion, by the action of acids and alkalies, by putrefaction, etc.; usually limited to the final products of proteid nature, intermediate products being called "proteoses."[23]

PER. [§ 1] **A. In General.** A preposition[24] defined as by;[25] by means of;[26] through.[27] In a distributive sense, for each; for every.[28]

[§ 2] **B. Latin Phrases.** The term is used in introducing various Latin phrases.[29]

Per annum. A Latin term which may mean by

10. U. S. v. Quincy, 6 Pet. (U. S.) 445, 467, 8 L. ed. 458 [quot Wyatt v. Larimer, etc., Irr. Co., 1 Colo. A. 480, 29 P 906, 911]; F. H. Mills Co. v. State, 110 App. Div. 843, 97 NYS 676, 681.

"State" see States [36 Cyc 826].

11. Rapalje & L. L. D. [quot The Itata, 56 Fed. 505, 511, 5 CCA 608]; The Three Friends, 166 U. S. 1, 62, 17 SCt 495, 41 L. ed. 897. To like effect Wyatt v. Larimer, etc., Irr. Co., 1 Colo. A. 480, 29 P 906, 911; Salina v. Blaksley, 72 Kan. 230, 83 P 619, 620, 115 AmSR 196, 3 LRANS 168, 7 AnnCas 925.

"In the true sense of the term 'the people' means the political society considered as a unit, comprising the entire population, of all ages, sexes and conditions." Peo. v. Sours, 31 Colo. 369, 438, 74 P 167, 102 AmSR 34.

[a] **"People" as "coextensive with the body politic."**—In re Opinion of Justices, 226 Mass. 607, 610, 115 NE 921.

[b] **"'The State' and 'The People of the State'** are equivalent expressions." Brown v. State, 5 Colo. 496, 499.

[c] **"The people of the state"** is used to signify "the people as a body politic or as a political entity called the 'state,' and not as meaning the people as the sovereign power in the state. The body politic or the state is, under our system, always subject to the control of the sovereign power—the people." F. H. Mills Co. v. State, 110 App. Div. 843, 97 NYS 676, 681. See Peo. v. Love, 19 Cal. 676, 681; Tevis v. Randall, 6 Cal. 632, 635, 65 AmD 547.

[d] **"While the phrase, 'the People of the State of New York'** is the usual and accepted one to designate the sovereign, and the phrase 'the State of New York' usually refers to the political subdivison or entity, I apprehend they might under certain circumstances be used interchangeably." Pickell v. Utica, 161 App. Div. 1, 4, 146 NYS 31.

12. Solon v. State, 54 Tex. Cr. 261, 114 SW 349, 353.

13. Anderson L. D. [quot The Itata, 56 Fed. 505, 511, 5 CCA 608]; Bouvier L. D. [quot Wyatt v. Larimer, etc., Irr. Co., 1 Colo. A. 480, 29 P 906, 911]; The Three Friends, 166 U. S. 1, 62, 17 SCt 495, 41 L. ed. 897.

[a] **As meaning "the whole and not a fraction of the people."**—Peo. v. Draper, 15 N. Y. 532, 566.

[b] **"The word 'people,' when not used as the equivalent of state or nation,** must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body." The Three Friends, 166 U. S. 1, 58, 17 SCt 495, 41 L. ed. 897.

[c] **"Subjects," "people," and "inhabitants"** may be used indiscriminately as synonymous. The Pizarro, 2 Wheat. (U. S.) 227, 246, 4 L. ed. 226 [quot Loi Hoa v. Nagle, 13 F. (2d) 80, 81].

[d] **"People . . . of that country".**—Strother v. Lucas, 12 Pet. (U. S.) 410, 446, 9 L. ed. 1137.

[e] **"People of the county."**—St. Louis County Ct. v. Griswold, 58 Mo. 175, 201; Jackson v. Cory, 8 Johns. (N. Y.) 385, 388.

[f] **"People of a town"** may be equivalent to the "inhabitants of the town." Walnut v. Wade, 103 U. S. 683, 693, 26 L. ed. 526.

[g] **"'People of Nebraska' . . . and the 'inhabitants'** . . . are the free white male inhabitants above the age of twenty-one years, actual residents of the territory, citizens of the United States, and those who have declared on oath their intention to become such, and shall have taken an oath to support the constitution of the United States." State v. Boyd, 31 Nebr. 682, 723, 48 NW 739, 51 NW 602.

14. The Three Friends, 166 U. S. 1, 62, 17 SCt 495, 41 L. ed. 897; Nesbitt v. Lushington, 4 T. R. 783, 787, 100 Reprint 1300.

[a] **"The words 'people of the United States' and 'citizens'** are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty." Scott v. Sandford, 19 How. (U. S.) 393, 404, 15 L. ed. 691 [quot Boyd v. Nebraska, 143 U. S. 135, 159, 12 SCt 375, 36 L. ed. 103]. "Citizen" see Citizens § 1.

15. Walnut v. Wade, 103 U. S. 683, 693, 26 L. ed. 526; Peo. v. Counts, 89 Cal. 15, 22, 26 P 612; Beverly v. Sabin, 20 Ill. 357, 362; Bryan v. Lincoln, 50 Nebr. 620, 622, 70 NW 252, 35 LRA 752.

16. Rogers v. Jacob, 88 Ky. 502, 505, 11 SW 513, 11 KyL 45.

[a] **"Qualified voters" implied.**—Tolbert v. Long, 134 Ga. 292, 67 SE 826, 828, 137 AmSR 222; Heuser v. Harris, 42 Ill. 425, 432; Blair v. Ridgely, 41 Mo. 63, 177, 97 AmD 248 [quot In re Opinion of Justices, 226 Mass. 607, 115 NE 921, 923]; State v. Albuquerque, 31 N. M. 576, 249 P 242, 247; Evans v. Willistown Tp., 15 Pa. Co. 326, 327.

[b] **"Vote of the people"** means the people of the whole state, and not of any particular localities of the state. Dupee v. Swigert, 127 Ill. 494, 499, 21 NE 622.

[c] **"Submitted to the vote of the people."**—Evans v. Willistown Tp., 15 Pa. Co. 326, 327.

Qualifications and disqualifications of voters see Elections §§ 24–52.

17. Heuser v. Harris, 42 Ill. 425, 432.

18. In re Opinion of Justices, 226 Mass. 607, 115 NE 921, 923.

[a] **"The people in the legal sense** must be understood to be those who, by the existing constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed." Cooley Const. Lim. [quot Koehler v. Hill, 60 Iowa 543, 617, 14 NW 738, 15 NW 609].

[b] **"The 'people' in the Constitution in a practical sense** means those who under the existing Constitution possess the right to the elective franchise and who, while that instrument remains in force unchanged, will be the sole organs through which the will of the body politic can be expressed." In re Opinion of Justices, 226 Mass. 607, 611, 115 NE 921.

19. Anderson L. D. [quot The Itata, 56 Fed. 505, 511, 5 CCA 608]; Blair v. Ridgely, 41 Mo. 63, 177, 97 AmD 248.

20. See Political Party.

21. Century D. See Frame v. U. S., 143 Fed. 692, 693.

[a] **"Pepper, white or black."**—U. S. v. Leggett, 124 Fed. 1015.

22. See case infra this note.

[a] **Compared with "chymosin."**—Blumenthal v. Burrell, 43 Fed. 667. "Chymosin" see 11 C. J. p 764.

23. Webster New Int. D. See Carl L. Jensen Co. v. Clay, 59 Fed. 290.

24. New Oxford D. [quot Finkbeiner v. Yeo, 26 Man. 22, 29, 25 DomLR 673, 33 WestLR 195, 9 West Wkly 891].

25. New Oxford D. [quot Finkbeiner v. Yeo, supra]; Lea v. Helgerson, (Tex. Civ. A.) 228 SW 992, 993; Johnson v. State, (Tex. Cr.) 99 SW 404, 405; Brown v. Howland, 9 Ont. 48, 58. See McClure v. Mississippi Valley Ins. Co., 4 Mo. A. 148, 157 ("J. W. Wickersham, agent, per Will. W. Kerr").

26. New Oxford D. [quot Finkbeiner v. Yeo, 26 Man. 22, 29, 25 Dom LR 673, 33 WestLR 195, 9 WestWkly 891]; Lea v. Hergerson, (Tex. Civ. A.) 228 SW 992, 993.

27. New Oxford D. [quot Finkbeiner v. Yeo, 26 Man. 22, 29, 25 Dom LR 673, 33 WestLR 195, 9 WestWkly 891]; Lea v. Helgerson, (Tex. Civ. A.) 228 SW 992, 993.

28. New Oxford D. [quot Finkbeiner v. Yeo, 26 Man. 22, 29, 25 Dom LR 673, 33 WestLR 195, 9 WestWkly 891].

29. [a] **Per accidens.**—By chance or accident. Webster New Int. D. See Nuisances § 5.

[b] **Per æs et libram.**—In Roman law, the sale per æs et libram (with copper and scales) was a ceremony used in transferring res mancipi, in the emancipation of a son or slave, and in one of the forms of making a will. The parties having assembled, with a number of witnesses, and one who held a balance or scales, the purchaser struck the scales with a copper coin, repeating a formula by which he claimed the subject matter of the transaction as his property, and handed the coin to the vendor.

the year;[30] every year;[31] through the year;[32] yearly;[33] also, during the year.[34]

Per capita.[35] By the heads or polls; according to the number of individuals; share and share alike.[36]

Per cent.[37] An abbreviation of the Latin "per centum," meaning by the hundred, or so many parts in the hundred, or so many hundredths.[38]

Per curiam.[39] By the court;[40] used to designate the opinion of the court in a case in which the judges are all of one mind, and the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion.[41]

Per diem. By the day.[42]

Per legem terræ. By due process of law.[43]

Per quod consortium amisit. Whereby he lost the company [of his wife], used in the old declarations

Black L. D.

[c] **Per alluvionem.**—In the civil law, by alluvion, or the gradual and imperceptible increase arising from deposit by water. Black L. D.

[d] **Per annulum et baculum.**—By ring and staff, or crozier; the symbolical mode of conferring an ecclesiastical investure. Black L. D. [cit 1 Blackstone Comm. pp 378, 379].

[e] **Per aversionem.**—(1) In the civil law, by turning away; a term applied to that kind of sale where the goods are taken in bulk, and not by weight or measure, and for a single price; or where a piece of land is sold as containing in gross, by estimation, a certain number of acres. Burrill L. D. (2) "A sale per aversionem conveys all of the property found within the boundaries given." Passera v. New Orleans, 167 La. 199, 118 S 887, 888.

[f] **Per consequens.**—By consequence; consequently. Black L. D.

[g] **Per considerationem curiæ.**—By the consideration (judgment) of the court. Black L. D. [cit Year Bk. M. 1 Edw. II 2].

[h] **Per eundem.**—By the same. This phrase is commonly used to express "by, or from the mouth of, the same judge." So "per eundem in eadem" means "by the same judge in the same case." Black L. D.

[i] **Per extensum.**—At length. Black L. D.

[j] **Per formam doni.**—In English law by the form of the gift; by the designation of the giver, and not by the operation of law. Black L. D. [cit 2 Blackstone Comm. pp 113, 191]. See Boys v. Bradley, 22 L. J. Ch. 617, 621.

[k] **Per fraudem.**—By fraud. Where a plea alleges matter of discharge, and the replication avers that the discharge was fraudulently obtained and is therefore invalid, it is called a "replication per fraudem." Black L. D.

[l] **Per incuriam.**—Through inadvertence. Black L. D.

[m] **Per industriam hominis.**—By human industry; a term applied to the reclaiming or taming of wild animals by art, industry, and education. Black L. D. [cit 2 Blackstone Comm. p 391].

[n] **Per infortunium.**—By misadventure. In criminal law, homicide per infortunium is committed where a man, doing a lawful act, without any intention of hurt, unfortunately kills another. Black L. D. [cit 4 Blackstone Comm. p 182].

[o] **Per legem Angliæ.**—By the law of England; by the curtesy. Black L. D. [cit Fleta lib 2 c 54 § 18].

[p] **Per metas et bundas.**—By metes and bounds. Black L. D.

[q] **Per minas.**—By threats. Black L. D.

[r] **Per pais.**—By the country. Webster New Int. D. See Juries 35 C. J. p 130.

[s] **Per quæ servitia.**—A real action by which the grantee of a seigniory could compel the tenants of the grantor to attorn to himself. Black L. D. (abolished by 3 & 4 Wm. IV c 27 § 35).

[t] **Per quod.**—Whereby. When the declaration in an action of tort, after stating the acts complained of, goes on to allege the consequences of those acts as a ground of special damage to plaintiff, the recital of such consequences is prefaced by these words, "per quod," whereby; and sometimes the phrase is used as the name of that clause of the declaration. Black L. D. See Piplack v. Mueller, (Fla.) 121 S 459.

[u] **Per saltum.**—By a leap or bound; by a sudden movement; passing over certain proceedings. Black L. D.

[v] **Per totam curiam.**—By the whole court. Black L. D.

[w] **Per universitatem.**—In the civil law, by an aggregate or whole; as an entirety. Black L. D.

[x] **Per vadium.**—By gage. Words in the old writs of attachment or pone. Black L. D.

[y] **Per verba de futuro.**—By words of the future (tense); a phrase applied to contracts of marriage. Black L. D.

[z] **Per verba de præsenti.**—By words of the present (tense). Burrill L. D. cit 1 Blackstone Comm. p 96]. See Reaves v. Reaves, 15 Okl. 240, 251, 82 P 490, 2 LRANS 353.

[aa] **Per visum ecclesiæ.**—By view of the church; under the supervision of the church. Black L. D.

[ab] **Per vivam vocem.**—By the living voice; the same with viva voce. Black L. D. [cit Bract. fol 95].

30. New Oxford D. [quot Finkbeiner v. Yeo, 26 Man. 22, 23, 25 Dom LR 673, 33 WestLR 195, 9 WestWkly 891]; Ramsdell v. Hulett, 50 Kan. 440, 445, 31 P 1092; State v. McFetridge, 64 Wis. 130, 138, 24 NW 140.

[a] **"Per annum" indicating period or term of employment.**—Haney v. Caldwell, 35 Ark. 156, 168; Stanford v. Fisher Varnish Co., 43 N. J. L. 151, 153; Miller v. Rodd, 285 Pa. 16, 21, 131 A 482.

31. New Oxford D. [quot Finkbeiner v. Yeo, 26 Man. 22, 23, 25 Dom LR 673, 33 WestLR 195, 9 WestWkly 891].

[a] **"The term 'five per cent per annum'** means interest payable annually." Murphy v. San Luis Obispo, 5 Cal. Unrep. Cas. 665, 669, 48 P 974.

[b] **"Annually" distinguished.**—"The words 'per annum' are used exclusively to designate rate of interest, while the word 'annually', in that connection, is an appropriate word to indicate the time of payment." Stronghurst First Nat. Bank v. Kirby, (Mo.) 175 SW 926, 929.

32. Ramsdell v. Hulett, 50 Kan. 440, 445, 31 P 1092.

[a] **"Per annum after due till paid."**—Allen v. Gray, 10 Sask. L. 393, 38 DomLR 41, 42, [1917] 3 WestWkly 1084.

[b] **"Seven per cent per annum."**—Federal Constr. Co. v. Wolfson, 186 Cal. 267, 278, 199 P 512, 29 ALR 1098.

[c] **"With interest at the rate of eight per cent. per annum."**—Kœhring v. Muemminghoff, 61 Mo. 403, 407, 21 AmR 402.

[d] **"At the rate of six per cent. per annum."**—Matheson v. Marion County Lumber Co., 95 S. C. 352, 355, 78 SE 970.

[e] **Designating rate of charge.**—In a contract between a city and a telephone company, whereby the company should not charge more than a certain amount "per annum" for a telephone in a party residence, the term "per annum" should be construed to designate the rate of charge, and not to imply that subscribers must make contracts on an annual basis. Colorado Tel. Co. v. Fields, 15 N. M. 431, 438, 110 P 571, 572, 30 LRA NS 1088.

33. New Oxford D. [quot Finkbeiner v. Yeo, 26 Man. 22, 23, 25 Dom LR 673, 33 WestLR 195, 9 WestWkly 891].

34. State v. McFetridge, 64 Wis. 130, 139, 24 NW 140.

35. See Descent and Distribution §§ 25–110.

"Capita" see 9 C. J. p 1278.

36. Black L. D.

[a] **"In their own right" synonymous.**—Rings v. Borton, 108 Oh. St. 280, 140 NE 515, 516.

[b] **"Equally per capita among."**—Russell v. Welch, 237 Mass. 261, 263, 129 NE 422.

[c] **Term employed in:** Pam-To-Pee v. U. S., 187 U. S. 371, 372, 23 SCt 142, 47 L. ed. 221; Eastern Band of Cherokee Indians v. U. S., 117 U. S. 288, 310, 6 SCt 718, 29 L. ed. 880; Broward v. Broward, (Fla.) 117 S 691, 693; Doherty v. Grady, 105 Me. 36, 72 A 869, 872; Proctor v. Lacy, (Mass.) 160 NE 441, 444; State v. Delaware Iron Co., 160 Minn. 382, 200 NW 475, 476; Hasse v. Morison, 110 Oh. St. 153, 143 NE 551, 554; Hoch's Est., 154 Pa. 417, 420, 26 A 610.

37. See generally Interest §§ 90–116.

38. Black L. D. See Hemple v. Raymond, 144 Fed. 796, 798, 75 CCA 526; Blakeslee v. Mansfield, 66 Ill. A. 116, 119 (" 'Per cent' is an abbreviation of the Latin term per centum and means by the hundred. It is so used and understood by mathematicians, accountants and all English speaking persons having occasion to use it").

[a] **"Per cent. per annum."**—Iowa Deposit, etc., Co. v. Matthews, 126 Iowa 743, 102 NE 817, 820.

[b] **"Eight per cent."**—Allen v. Gray, 10 Sask. L. 393, 38 DomLR 41, 42, [1917] 3 WestWkly 1084.

[c] **"Seven per cent payable monthly."**—Federal Constr. Co. v. Wolfson, 186 Cal. 267, 278, 199 P 512, 29 ALR 1098.

[d] **"Six per cent. off for cash."**—Linsley v. Lovely, 26 Vt. 123, 137.

[e] **The placing of the words "per cent" at the head of a column of decimal fractions,** apportioning such decimal fractional part of the total benefits as is received by the specific tract opposite such decimal fraction to it, does not indicate that the tax to be calculated thereon shall be computed by taking such decimal fractional part of one per cent of the entire cost of construction, but, instead, such decimal fractional part of the entire cost. The words "per cent" as so used mean the decimal fractional part or share by decimal part or percentage of the whole. Such schedule of apportionment of benefits by decimal fractional part or percentage thereof will be calculated under the usual interpretation instead of by a strained construction. Hackney v. Elliott, 23 N. D. 373, 137 NW 433, 439.

39. See Courts § 373.

40. Black L. D.

41. Clarke v. Western Assur. Co., 146 Pa. 561, 570, 23 A 248, 28 AmSR 821, 15 LRA 127. See Minor v. Fike, 77 Kan. 806, 807, 93 P 264.

42. Webster New Int. D.

[a] **"Per diem" and "salary" synonymous.**—Peay v. Nolan, (Tenn.) 7 SW (2d) 815, 817.

[b] **"Fees" compared.**—"Per diem is sometimes and by some courts held to be included in the term 'fees,' and sometimes otherwise, and that the two terms are not always synonymous." Anderson v. Beadle County, 51 S. D. 6, 211 NW 968, 969.

43. U. S. v. Kendall, 26 F. Cas. No. 15,517, 5 Cranch C. C. 163; Rhinehart v. Schuyler, 7 Ill. 473, 519; Lowry v. Rainwater, 70 Mo. 152, 156, 35 AmR 420; Ervine's App., 16 Pa. 256, 263, 55 AmD 499. See Constitutional Law

in actions of trespass by a husband for beating or ill-using his wife, descriptive of the special damage he had sustained.[44]

Per quod servitium amisit. Whereby he lost the service [of his servant], used in the old declarations in actions of trespass by a master, for beating or ill-using his servant, descriptive of the special damage he had himself sustained.[45]

Per se.[46] By itself;[47] in its own nature without reference to its relation;[48] in itself;[49] of itself;[50] simply as such;[51] taken alone.[52]

Per stirpes.[53] By or according to stock or root; by right of representation;[54] a term of the civil law, extensively used in the modern English and American law, to denote that mode of the distribution and descent of intestates' estates, where the parties entitled to take the shares which their stocks, (such as a father) if living, would have taken.[55]

[§ 3] **C. French Phrases.** The term is used in introducing various French law phrases.[56]

[§ 4] **D. English Phrases.** The term has also been made a part of certain English phrases,[57-58] "per acre,"[59] "per day,"[60] "per dozen,"[61] "per foot,"[62] "per mile,"[63] "per month,"[64] "per 100,"[65] "per pound,"[66] "per procuration,"[67] "per sample,"[68] "per the opinion of,"[69] "per thousand feet."[70]

Per ton.[71] A term which when used in a clause of admeasurement means an entire unit of the quantity designated, and not a fractional interest therein.[72]

Per year.[73] Ordinarily, annually; by the year.[74]

§ 956 et seq.

44. Black L. D. See Tinker v. Colwell, 193 U. S. 473, 482, 24 SCt 505, 48 L. ed. 754; Crocker v. Crocker, 98 Fed. 702, 703; Cook v. Peo., 2 Thomps. & C. (N. Y.) 404, 413; and generally Husband and Wife § 675.

45. Black L. D. See Gunn v. Fellows, 41 Hun (N. Y.) 257, 259; Lee v. Hodges, 13 Gratt. (54 Va.) 726, 734; Riddle v. McGinnis, 22 W. Va. 253, 270; Alteman v. Smith, 4 U. C. C. P. (Ont.) 500, 501; and generally Master and Servant § 612.

[a] **"The action for damages, per quod servitium amisit, pertains** to the relation of master and servant, and not to the mere relation of parent and child." Callaghan v. Lake Hopatcong Ice Co., 69 N. J. L. 100, 102, 54 A 223.

46. Per se:
Defamatory words see Libel and Slander §§ 17–19; and passim §§ 28–160. Negligence see Negligence § 4. Nuisance see Nuisances § 5.

47. Standard D. [quot Rowan v. Gazette Printing Co., 74 Mont. 326, 332, 239 P 1035 (quot Burr v. Winnett Times Pub. Co., 80 Mont. 70, 75, 258 P 242); Hargrove v. Oklahoma Press Pub. Co., 130 Okl. 76, 265 P 635, 636]; Piplack v. Mueller, (Fla.) 121 S 459; Kee v. Armstrong, (Okl.) 151 P 572, 574 [quot Findley v. Wilson, 115 Okl. 280, 242 P 565, 568].

48. Standard D. [quot Rogan v. Gazette Printing Co., 74 Mont. 326, 332, 239 P 1035 (quot Burr v. Winnett Times Pub. Co., 80 Mont. 70, 75, 258 P 242); Hargrove v. Oklahoma Press Pub. Co., 130 Okl. 76, 265 P 635, 636].

49. Kee v. Armstrong, (Okl.) 151 P 572, 574 [quot Findley v. Wilson, 115 Okl. 280, 242 P 565, 568].

50. O'Connor v. San Francisco United R. Cos., 168 Cal. 43, 141 P 809, 813.

51. Standard D. [quot Rowan v. Gazette Printing Co., 74 Mont. 326, 332, 239 P 1035 (quot Burr v. Winnett Times Pub. Co., 80 Mont. 70, 75, 258 P 242); Hargrove v. Oklahoma Press Pub. Co., 130 Okl. 76, 265 P 635, 636].

52. Kee v. Armstrong, (Okl.) 151 P 572, 574 [quot Findley v. Wilson, 115 Okl. 280, 242 P 565, 568].

53. See Deeds § 291; Descent and Distribution §§ 25–110; Wills [40 Cyc 1490].

"Per capita" see supra text and note 36.

54. Bouvier L. D. [quot Gee's Pet., 44 R. I. 132, 115 A 716, 717].

[a] **Term employed in:** Broward v. Broward, (Fla.) 117 S 691, 693; Lycett v. Thomas, 153 Md. 443, 138 A 225, 226; Proctor v. Lacy, (Mass.) 160 NE 441, 444; Kent v. St. Michael's Church, 136 N. Y. 10, 14, 32 NE 704, 32 AmSR 693, 18 LRA 331; Matter of Keogh, 112 App. Div. 414, 98 NYS 433, 435; Ward v. Stow, 17 N. C. 509, 513, 27 AmD 238; Hasse v. Morison, 110 Oh. St. 153, 143 NE 551, 554; Hoch's Est., 154 Pa. 417, 420, 26 A 610; Rogers v. Rogers, 11 R. I. 38, 65; Parrish v. Mills, (Tex. Civ. A.) 102 SW 184, 188; Ball v. Ball, 27 Gratt. (68 Va.) 325, 327; Gibson v. Fisher, L. R. 5 Eq. 51, 58; Re Simpson, [1928] Can. S. C. 329, [1928] 3 DomLR 773 [dism app 23 Alta. L. 374, [1927] 4 DomLR 817, [1927] 3 WestWkly 534 (allowing app [1927] 3 DomLR 46, [1927] 2 WestWkly 107)]; Re Carter, 20 Ont. L. 127, 14 OntWR 1244, 1247, 1 OntWN 275.

55. Burrill L. D. [cit 2 Blackstone Comm. pp 217, 218; 2 Kent Comm. p 420].

[a] **"In right of their parents" synonymous.**—Rings v. Borton, 108 Oh. St. 280, 283, 140 NE 515.

[b] **"The words 'per stirpes' are not strictly applicable** to named legatees, or legatees designated as a class, and are ordinarily, at least, appropriate, and are used with respect to substitutional gifts to substituted legatees in the case of the death of a primary legatee." Matter of Title Guarantee, etc., Co., 159 App. Div. 803, 808, 144 NYS 889.

[c] **"When issue are said to take per stirpes,** it is meant that the descendants of a deceased person take the property to which he was entitled, or would have been entitled if living." Rotmanskey v. Heiss, 86 Md. 633, 634, 39 A 415 [quot In re Shoch, 271 Pa. 165, 167, 114 A 505].

[d] **"Per stirpes and not per capita."**—Matter of Title Guarantee, etc., Co., 159 App. Div. 803, 804, 144 NYS 889; Gee's Pet., 44 R. I. 132, 115 A 716, 717.

56. [a] **Per autre vie.**—For or during another's life; for such period as another person shall live. Black L. D. See Estates §§ 59–129; Wills [40 Cyc 1612].

[b] **Per bouche.**—By the mouth; orally. Black L. D. [cit 3 Howell St. Tr. p 1024].

[c] **Per mitter le droit.**—One of the modes in which releases at common law were said to inure, as where a person who has been disseized releases to the disseizor, his heir or feofee. Miller v. Emans, 19 N. Y. 384, 387.

[d] **Per mitter l'estate.**—A common-law release described as follows: "Where two or more are seised, either by deed, devise or descent, as joint-tenants or 'coparceners' of the same estate, and one of them releases to the other." Miller v. Emans, 19 N. Y. 384, 388.

[e] **Per my et per tout.**—By the half and by all. Thornton v. Thornton, 3 Rand. (24 Va.) 179, 182 [cit Blackstone Comm.] (it is explained as being the estate by which joint tenants are seized, that is, that each of them have the entire possession, as well of every parcel as of the whole). See Miller v. Emans, 19 N. Y. 384, 388.

[f] **Per tout et non per my.**—By the whole, and not by the moiety. Black L. D.; Stalcup v. Stalcup, 137 N. C. 305, 307, 49 SE 210.

57.–58. [a] **Per and cui.**—When a writ of entry is brought against a second alienee or descendant from the disseizor, it is said to be in the per and cui, because the form of the writ is that the tenant has not entry but by and under a prior alienee, to whom the intruder himself demised it. Black L. D. [cit 3 Blackstone Comm. p 181].

[b] **Per and post.**—To come in in the per is to claim by or through the person last entitled to an estate; as the heirs or assigns of the grantee. To come in in the post is to claim by a paramount and prior title; as the lord by escheat. Black L. D.

[c] **Per misadventure.**—By mischance. Black L. D. [cit 4 Blackstone Comm. p 182]. "Misadventure" 40 C. J. p 1213.

59. Ward v. Foley, 141 Fed. 364, 367, 72 CCA 140; New York, etc., R. Co. v. Yard, 43 N. J. L. 121, 124.

"Acre" see 1 C. J. p 910.

60. Hinton v. Locke, 5 Hill (N. Y.) 437, 439.

"Day" see 17 C. J. p 1131; and also Time [38 Cyc 314].

61. Ward v. Foley, 141 Fed. 364, 367, 72 CCA 140.

"Dozen" see 19 C. J. p 597.

62. Com. v. Sanderson, 40 Pa. Super. 416, 459.

"Foot" see 26 C. J. p 790.

63. Cedar Rapids, etc., R. Co. v. Herring, 52 Iowa 687, 690, 3 NW 786.

"Mile" see 40 C. J. p 658.

64. Frazier v. Nashville Veterinary Hospital, 139 Tenn. 440, 201 SW 751, 752.

"Month" see Time [38 Cyc 311].

65. Gardiner v. McDonogh, 147 Cal. 313, 320, 81 P 964.

66. Ward v. Foley, 141 Fed. 364, 367, 72 CCA 140. See generally Weights and Measures [40 Cyc 879].

"Pound" see [31 Cyc 1030].

67. See cases infra this note.

[a] **Defined** (1) as meaning by procuration; by letter of attorney. Bouvier L. D. [quot Giles v. Newton, 21 F. (2d) 484, 487]. See Grant v. Norway, 10 C. B. 665, 689, 70 ECL 665, 138 Reprint 263. (2) It is sometimes abbreviated "per proc." or "p. p." Black L. D. See Morison v. London County, etc., Bank, Ltd., [1914] 3 K. B. 356, 364 ("per pro"). (3) "The expression 'per procuration,' does not always necessarily mean that the act is done under procuration. All that it in reality means is this, 'I am an agent not having any authority of my own.'" Smith v. McGuire, 3 H. & N. 554, 560, 157 Reprint 589.

68. Parker v. Palmer, 4 B. & Ald. 387, 391, 6 ECL 529, 106 Reprint 978.

"Sample" see [35 Cyc 405].

69. Lea v. Helgerson, (Tex. Civ. A.) 228 SW 992, 993.

70. Smith v. Aikin, 75 Ala. 209, 210.

71. **"Ton"** see [38 Cyc 405].

72. Ward v. Foley, 141 Fed. 364, 367, 72 CCA 140. See generally Weights and Measures [40 Cyc 879].

73. **"Year"** see [40 Cyc 2876]; and also Time [38 Cyc 310].

74. Larsson v. Augustana Colonization Assoc., Inc., 155 Minn. 1, 192 NW 108.

PER ALLUVIONEM ID VIDETUR ADJICI QUOD ITA PAULATIM ADJICITUR UT INTELLIGERE NON POSSUMUS QUANTUM QUOQUO MOMENTO TEMPORIS ADJICIATUR.[75]

PERAMBULATION. The custom of going around the boundaries of the manor or parish with witnesses to determine and preserve recollection of its extent, and to see that no encroachment had been made upon it, and that the landmarks have not been taken away.[76]

PERAMBULATIONE FACIENDA, WRIT DE. In English law, a writ sued by consent of both parties when they are in doubt as to the bounds of their respective estates.[77]

PER ANNUM.[78]

PER AVERSIONEM.[79]

PER CAPITA.[80]

PERCEIVE. To come to know by direct experience.[81]

PER CENT.[82]

PERCENTAGE. A certain rate per cent; the allowance, duty, rate of interest, discount, or commission, on a hundred; usually, a part or portion of a whole.[83]

PERCH.[84] In masonry, twenty-five cubic feet.[85]

PERCHERON. One of a breed of draft horses originating in Perche a district of France.[86]

PERCOLATE.[87] A term which may designate any flowage or subsurface water, other than that of a running stream, open, visible, clearly to be traced.[88]

PERCOLATING WATER.[89]

PERCOLATION. Act or process of percolating, or filtering; filtration; straining.[90]

PER CURIAM.[91]

PERDIDA. In Spanish law, loss.[92]

PER DIEM.[93]

PERDON. In Spanish law, pardon.[94]

PERDURABLE. As applied to an estate, lasting long or forever.[95]

PEREAT UNUS NE PEREANT OMNES.[96]

PÉREMPTION. In Quebec, a quashal; a nonsuit.[97]

PEREMPTORILY.[98] In a peremptory manner; so as to preclude further question or debate.[99]

PEREMPTORY.[1] Imperative; absolute; not admitting of question, delay, or reconsideration; positive; final; decisive; not admitting of any alternative; self-determined; arbitrary; not requiring any cause to be shown.[2]

Peremptory day. A day assigned for trial or hearing in court, absolutely and without further opportunity for postponement.[3]

Peremptory exception.[4] An exception which, without going to the merits of the cause, show that plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished.[5]

Peremptory nonsuit.[6] In the nature of a judgment for defendant on demurrer to evidence.[7]

Peremptory order. An order given on the footing that it is to be final unless some very special and urgent circumstances are brought forward as a reason for altering it.[8]

Peremptory paper. A list of the causes which were enlarged at the request of the parties, or which stood over from press of business in court.[9]

Peremptory rule. In practice, an absolute rule;

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[a] **"Annually" equivalent.**—Curtiss v. Howell, 39 N. Y. 211, 213 [quot Rhodes v. Mound City Gas, etc., Co., 80 Kan. 762, 104 P 851, 852]. See Annually 3 C. J. p 197.

[b] **"Per acre per year."**—O'Connor v. West Sacramento Co., 189 Cal. 7, 207 P 527, 529.

75. A maxim meaning "That is said to be added by alluvion which is so added little by little that we can not tell how much is added at any one moment of time." Black L. D. [cit Dig. 41, 1, 7, 1; Fleta 1, 3 c 2 § 6].

76. Greenville v. Mason, 57 N. H. 385, 392.

77. Black L. D.

78. See Per § 2.

79. See Per § 2.

80. See Per § 2.

81. Century D.

[a] **"Shall perceive to be necessary"** means "deem" or "judge" to be necessary. Griffith v. Follett, 20 Barb. (N. Y.) 620, 631.

82. See Per § 2.

83. Webster New Int. D.

[a] **"Penalty" not synonymous.**—Gottstein v. Kelly, (Cal. A.) 269 P 940, 943.

[b] **"Percentage" not given technical meaning.**—James v. Seattle, 49 Wash. 347, 95 P 273, 276.

[c] **"Percentage of" and "percentage on" distinguished.**—"A percentage of a sum means a portion of that sum; a percentage on a sum signifies the measure of what the sum in question will yield, and in no sense whatsoever imports a portion of such sum." Southern Boulevard R. Co. v. North New York City Tract. Co., 16 Misc. 263, 268, 39 NYS 266.

[d] **"Dividend or percentage of profits."**—Centennial Bd. of Finance v. Patterson, 5 F. Cas. No. 2,545.

84. See generally Weights and Measures [40 Cyc 879].

85. New Am. Encyc. [quot Harris v. Rutledge, 19 Iowa 388, 390, 391, 87 AmD 441]. See Baldwin Quarry Co. v. Clements, 38 Oh. St. 587, 593, 43 AmR 442 [cit Haswell Engineers & Mechanics' Book].

[a] **"A very common term** as applied to erections in masonry, whether more or less free from interstices, and it is a solid measure as much as a cubic yard, or any other term of solidity." Wood v. Vermont Cent. R. Co., 24 Vt. 608, 610.

[b] **Perch of stone or of masonry** is sixteen and one-half feet long, one and one-half feet wide, and one foot high, or twenty-four and three-fourths cubic feet. Robinson Arithmetic; Webster D. [both quot Harris v. Rutledge, 19 Iowa 388, 390, 391, 87 AmD 441].

[c] **"Perch of Paris"** is eighteen feet. Webster D. (Goodrich ed) [quot Sullivan v. Richardson, 33 Fla. 1, 114, 14 S 692]. See Arpent 5 C. J. p 372.

86. Webster New Int. D. See Imperial Bank v. Georges, 2 Alta. L. 386, 392.

87. See Percolation post this page; Waters [40 Cyc 625].

88. Mosier v. Caldwell, 7 Nev. 363, 367.

89. See Waters [40 Cyc 625].

90. Webster New Int. D. See Katz v. Walkinshaw, 141 Cal. 116, 126, 70 P 663, 74 P 766, 64 LRA 236, 99 Am SR 35 ("The deep cañons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks and slowly moves through the lands by the process usually termed percolation, forming what are practically underground reservoirs").

"Percolate" see ante this page.

Percolating water see Waters [40 Cyc 625].

91. See Per § 2.

92. Escriche Diccionario.

[a] **When something due is lost in the debtor's possession** it is presumed to have been through his fault. Philippine Civ. Code art 1183; Insular Govt. v. Bingham, 13 Philippine 558; Palacio v. Sudario, 7 Philippine 275 (affirming judgment of Lobingier, J.); Porto Rico Civ. Code § 1151.

93. See Per § 2.

94. Escriche Diccionario. See also Indulto 31 C. J. p 888.

95. Black L. D.

96. A maxim meaning "Let one perish, rather than all." Peloubet Leg. Max. [cit Wharton L. Lex. 764].

97. See Que. Code Civ. Proc. §§ 279–285; Toilet Laundry Co. v. Lefebvre, 31 Que. Pr. 169; L'Italien v. Rouleau, Ltd., 30 Que. Pr. 331; Hardy v. Morin, 30 Que. Pr. 323; Height of Fashion Ladies' Tailory v. New York Nat. Surety Co., 30 Que. Pr. 302.

98. See Peremptory post this page.

99. Century D. See Re Alger, etc., Oil Co., 21 Ont. 440, 445 [app dism 19 Ont. A. 446].

1. See Juries §§ 459–484 (challenge); Mandamus § 10.

"Peremptorily" see ante this page.

2. Black L. D.

[a] **"Immediate or peremptory."**—Tuck v. Chapple, 115 Oh. St. 177, 152 NE 660, 661.

3. Black L. D.

"Day" see 17 C. J. p 1131.

4. See generally Dismissal and Nonsuit § 73 et seq.

5. Cross Plead. p 156 [quot Labarre v. Burton-Swartz Cypress Co., 126 La. 982, 53 S 113, 116].

"Exception" see 23 C. J. p 180.

6. See generally Dismissal and Nonsuit § 73 et seq.

7. Jacques v. Fourthman, 137 Pa. 428, 429, 20 A 802, 803.

"Nonsuit" see Dismissal and Nonsuit § 3.

8. Fack v. Axthelm, 24 Q. B. D. 174, 177 [quot Re Alger, 21 Ont. 440, 446]. See Edwards v. Cunliffe, 1 Madd. 287, 289, 56 Reprint 106.

"Order" see Motions and Orders §§ 6–13.

9. Black L. D.

a rule without any condition or alternative of showing cause.[10]

Peremptory undertaking. An undertaking by a plaintiff to bring on a cause for trial at the next sittings or assizes.[11]

PEREMPTORY CHALLENGE.[12]

PEREMPTORY DAY.[13]

PEREMPTORY EXCEPTION.[14]

PEREMPTORY INSTRUCTION.[15]

PEREMPTORY MANDAMUS.[16]

PEREMPTORY NONSUIT.[17]

PEREMPTORY ORDER.[18]

PEREMPTORY PAPER.[19]

PEREMPTORY PLEA.[20]

PEREMPTORY RULE.[21]

PEREMPTORY UNDERTAKING.[22]

PERFECT.[23] [§ 1] **A. As an Adjective.** A relative term[24] which, although it does not convey the thought of absolute perfection,[25] has been defined as complete, entire, full, whole.[26] It may imply moral, physical, or mechanical perfection.[27]

Perfect deed. One proper to be recorded.[28]

Perfect equity. A term that has been applied to the equity of a vendee who has paid the purchase money.[29]

Perfect right.[30] A legal right;[31] that which is accompanied by the right of compelling those who refuse to fulfill the correspondent obligation.[32]

Perfect title.[33] A complete and perfect paper at least capable of being recorded, if not actually recorded;[34] a good title of record;[35] a grant of land which requires no further act from the legal authority to constitute an absolute title to the land taking effect in præsenti;[36] a merchantable or marketable title;[37] a title free from litigation, palpable defects, and grave doubts;[38] a title, such as a well informed and prudent man, paying full value for the property, would be willing to take;[39] a title which is perfect and safe to a moral certainty;[40] a title which does not disclose a patent defect suggesting the possibility of a law suit to defend it;[41] one in which the same person has both the "right of possession" and the "right of property;"[42] one that is good and valid beyond all reasonable doubt;[43] one which shows the absolute right of possession and of property in a particular person.[44] A perfect title consists of both legal and equitable title,[45] and should be fairly deducible of record.[46] To constitute a perfect title there must be union of possession, right of possession, and right of property.[47] Such title always carries with it, in legal contemplation, lawful seizin in possession.[48]

Perfect war. A war which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility.[49]

Other phrases: "Perfect condition,"[50] "perfect grant,"[51] "perfect horse,"[52] "perfect index,"[53] "perfect instrument,"[54] "perfect interval,"[55] "per-

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10. Black L. D.
11. Black L. D.
12. See Juries §§ 459–484.
13. See Peremptory ante p 809.
14. See Peremptory ante p 809.
15. See Instruction 32 C. J. p 944 text and note 58; and generally Criminal Law §§ 2353–2496; Trial [38 Cyc 1594].
16. See Mandamus § 10.
17. See Peremptory ante p 809.
18. See Peremptory ante p 809.
19. See Peremptory ante p 809.
20. See Pleading § 197.
21. See Peremptory ante p 809.
22. See Peremptory ante p 809.
23. See Imperfect 31 C. J. p 254; Perfectly post p 811.
Perfected gift see Gifts § 45.
Perfecting appeal see Appeal and Error § 1073; Criminal Law § 3356 et seq.
24. Electric Hammer Corp. v. Deddens, 206 Ky. 232, 267 SW 207, 209.
25. Electric Hammer Corp. v. Deddens, supra.
26. Century D.
27. Mallan v. Radloff, 17 C. B. N. S. 588, 600, 112 ECL 588, 144 Reprint 236.
28. Gardner v. Moore, 51 Ga. 268, 269.
"Deed" see Deeds § 1.
29. Smith v. Cockrell, 66 Ala. 64, 75; Shaw v. Lindsey, 60 Ala. 344, 350. See Vendor and Purchaser [39 Cyc 1996].
30. **"Right"** see [34 Cyc 1762].
31. Chicago City R. Co. v. Rohe, 118 Ill. A. 322, 325.
[a] **"Perfect right of self defence."**—Wallace v. U. S., 162 U. S. 466, 472, 16 SCt 859, 40 L. ed. 1039.
32. Aycock v. Martin, 37 Ga. 124, 128, 92 AmD 56; Sliosberg v. New York L. Ins. Co., 217 App. Div. 67, 216 NYS 215, 220.
Right of action see Actions §§ 46–71.
33. Cross references:
Brokers §§ 102, 103 (inability of vendor to convey as defense to action for commission).
Quieting Title [32 Cyc 1346–1387].
Sales [35 Cyc 389, 393].
Vendor and Purchaser [39 Cyc 1442, 1445, 1450, 1905].
"Title" see [38 Cyc 336].
34. Dixon v. Monroe, 112 Ga. 158, 159, 37 SE 180.
35. Gwin v. Calegaris, 139 Cal. 384, 73 P 851, 852.
36. Hancock v. McKinney, 7 Tex. 384, 457.
37. McCleary v. Chipman, 32 Ind. A. 489, 68 NE 320, 326; Dobson v. Zimmerman, 55 Tex. Civ. A. 394, 118 SW 236, 240.
[a] **"Marketable title" synonymous.**—Ross v. Smiley, 18 Colo. A. 204, 70 P 766, 767 [quot Pearce v. Freeman, 122 Okl. 285, 254 P 719, 720].
38. Campbell v. Harsh, 31 Okl. 436, 122 P 127, 129 [quot Satterthwaite v. Van Dissen, 99 Okl. 233, 226 P 583, 584; Seyfer v. Robinson, 93 Okl. 156, 219 P 902; Tucker v. Thraves, (Okl.) 151 P 598, 601].
39. Birge v. Bock, 44 Mo. A. 69, 77.
[a] **"A good and perfect title** is one which is not only good in point of fact, but it must also be apparently perfect when exhibited,—that is, free from any reasonable objection." Peckham v. Stewart, 97 Cal. 147, 153, 31 P 928 [quot Wurfel v. Bockler, 106 Or. 579, 583, 210 P 213].
[b] **"A perfect and satisfactory title,** or one to be made perfect and satisfactory, is such a title as is free from grave and reasonable objections, and such title as would satisfy a person of ordinary prudence who is capable of passing upon the title." Smith v. Lander, (Tex. Civ. A.) 106 SW 703, 704.
[c] **"A perfect title to the premises."**—Lewis v. White, 16 Oh. St. 444, 453.
[d] **"'Perfect title to the timber upon' the land."**—Camp v. Dixon, 111 Ga. 674, 675, 36 SE 878.
40. Birge v. Bock, 44 Mo. A. 69, 77; Gerhart v. Peck, 42 Mo. A. 644, 652 [quot Williams v. Ellis, (Mo. A.) 239 SW 157, 159].
41. Birge v. Bock, 44 Mo. A. 69, 77; Gerhart v. Peck, 42 Mo. A. 644, 652 [quot Williams v. Ellis, (Mo. A.) 239 SW 157, 159].
42. Wilcox Lumber Co. v. Bullock, 109 Ga. 532, 534, 35 SE 52.
43. Sheehy v. Miles, 93 Cal. 288, 292, 28 P 1046; Reynolds v. Borel, 86 Cal. 538, 542, 25 P 67; Turner v. McDonald, 76 Cal. 177, 179, 18 P 262, 9 AmSR 189 [quot Henderson v. Beatty, 124 Iowa 163, 99 NW 716, 718; Campbell v. Harsh, 31 Okl. 436, 122 P 127, 128].
44. Henderson v. Beatty, 124 Iowa 163, 167, 99 NW 716 [quot Campbell v. Harsh, 31 Okl. 436, 122 P 127, 129].
45. Campbell v. Harsh, supra [quot Satterthwaite v. Van Dissen, 99 Okl. 233, 226 P 583, 584; Seyfer v. Robinson, 93 Okl. 156, 219 P 902; Tucker v. Thraves, (Okl.) 151 P 598, 601].
46. Campbell v. Harsh, 31 Okl. 436, 122 P 127, 129 [quot Satterthwaite v. Van Dissen, 99 Okl. 233, 226 P 583, 584; Seyfer v. Robinson, 93 Okl. 156, 219 P 902; Tucker v. Thraves, (Okl.) 151 P 598, 601].
47. Donovan v. Pitcher, 53 Ala. 411, 417, 25 AmR 634; Converse v. Kellogg, 7 Barb. (N. Y.) 590, 597.
48. Altschul v. O'Neill, 35 Or. 202, 206, 58 P 95.
49. Miller v. The Resolution, 2 Dall. (U. S.) 19, 21, 1 L. ed. 271. See War [40 Cyc 303].
50. Peper v. St. Louis Brass Mfg. Co., 146 Mo. A. 187, 196, 123 SW 1012; Taylor v. New York, 82 N. Y. 10, 17.
"Condition" see 12 C. J. p 398.
51. Tuffree v. Polhemus, 108 Cal. 670, 675, 41 P 806; Sena v. American Turquoise Co., 14 N. M. 511, 98 P 170, 171.
Imperfect grant see Grant § 5 text and notes 86, 87.
52. Thompson v. Morse, 94 Me. 359, 360, 47 A 900 (one that is "kind and all right").
"Horse" see 30 C. J. p 458.
53. Abee v. Bargas, 45 Tex. Civ. A. 243, 100 SW 191, 193.
"Index" see 31 C. J. p 476.
54. Wilkins v. McCorkle, 112 Tenn. 688, 80 SW 834, 837.
"Instrument" see 32 C. J. p 944.
55. See infra this note.
[a] **"Perfect interval" is a term which, when applied to insane persons, means** an interval in which the mind, having thrown off the disease, had recovered its general habit. Atty.-Gen. v. Parnther, 3 Bro. Ch. 441, 444, 29 Reprint 632. See Insane Persons § 25.

fect machine,"[56] "perfect order,"[57] "perfect satisfaction,"[58] "perfect tenure,"[59] "true and perfect list."[60]

[§ 2] **B. As a Verb.** To accomplish; to carry through to a conclusion; to complete by equipment of all that is requisite to its nature and kind; to finish or complete so as to leave nothing wanting; to make perfect;[61] to complete in form of law.[62]

PERFECT DEED.[63]

PERFECT EQUITY.[64]

PERFECTING PRESS. A term applied to a printing press when at the same time it prints on both sides of the paper.[65]

PERFECT INVENTION.[66]

PERFECTLY.[67] In a perfect manner; fitly; rightly; correctly; also, completely; thoroughly; entirely.[68]

Perfectly safe. When applied to a person seeking credit in mercantile transactions, a term which means that such person is in such solvent condition that the debt in contemplation can be made, if necessary, by process of law.[69]

PERFECT OBLIGATION.[70]

PERFECT RIGHT.[71]

PERFECT TITLE.[72]

PERFECTUM EST CUI NIHIL DEEST SECUNDUM SUÆ PERFECTIONIS VEL NATURÆ MODUM.[73]

PERFECT WAR.[74]

PERFIDY. Faithlessness; treachery; violation of a promise or vow or a trust reposed.[75]

PERFORATION. A word which conveys the idea of a hole through an article;[76] a hole or aperture passing through a body;[77] an opening extending entirely through an object.[78]

PERFORM.[79] To accomplish; to carry through; to execute; to make complete; to perfect;[80] to act a part;[81] to execute the provisions, commands, or requirements of.[82] While the word, considered by itself, is more appropriate to express action than inaction,[83] when considered in the connection in which it is used, it may contemplate both the doing and not doing of those things required.[84]

Performed. Completed, furnished, or finished;[85] done, not begun or half done.[86]

PER FORMAM DONI.[87]

PERFORMANCE.[88] A word of settled mean-

"**Interval**" see 33 C. J. p 476.

56. See cases infra this note.

[a] "**Perfect machine," in the sense of the word as applied to inventions,** means a perfected invention; not a perfectly constructed machine, but a machine so constructed as to embody all the essential elements of the invention, in a form that would make them practical and operative so as to accomplish the result. American Hide, etc., Splitting, etc., Mach. Co. v. American Tool, etc., Co., 1 F. Cas. No. 302, Holmes 503 [quot Electric Hammer Corp. v. Deddens, 206 Ky. 232, 267 SW 207, 208]. "Machine" see 38 C. J. p 329.

57. Foster v. Peyser, 9 Cush. (Mass.) 242, 246, 57 AmD 43.

"**Order**" see 46 C. J. p 1131.

58. See infra this note.

[a] "**Perfect satisfaction" stronger than "entire satisfaction."**—Tobin v. Kells, 207 Mass. 304, 93 NE 596, 597.

"**Satisfaction**" see [35 Cyc 793].

59. Kavanaugh v. Cohoes Power, etc., Corp., 114 Misc. 590, 187 NYS 216, 231.

"**Tenure**" see [38 Cyc 183].

60. Orland v. County Comrs., 76 Me. 460, 461.

61. Webster New Int. D. [quot Electric Hammer Corp. v. Deddens, 206 Ky. 232, 267 SW 207, 208].

62. Black L. D.

[a] "**Perfect the organization**" refers to the duty of the directors to choose a president and to make and prescribe by-laws, or to their power to choose a clerk and treasurer and other officers, for those are duties and powers usually performed and exercised by directors. New Haven, etc., R. Co. v. Chapman, 38 Conn. 56, 65.

[b] "**Perfecting" not more extensive than "completing."**—Electric Hammer Corp. v. Deddens, 206 Ky. 232, 267 SW 207, 208 [quot Cyc]; Whitenack v. Tunison, 16 N. J. L. 77, 79.

[c] "**Perfecting the sale.**"—Klipper v. Schlossberg, 96 N. J. L. 397, 115 A 345.

63. See Perfect § 1.

64. See Perfect § 1.

65. Duplex Printing-Press Co. v. Campbell Printing-Press, etc., Co., 69 Fed. 250, 253, 16 CCA 220.

66. See Patents § 67 et seq.

67. See Perfect ante p 810.

68. Webster New Int. D.

[a] "**Perfectly impartial.**"—Hinkle v. State, 94 Ga. 595, 21 SE 595, 598; Woolfolk v. State, 85 Ga. 69, 11 SE 814, 816. "Impartial" see 31 C. J. p 253.

69. Felix v. Shirey, 60 Mo. A. 621, 623.

"**Safe**" see [34 Cyc 1824].

70. See Obligation § 4 text and note 27; and also Modern Civil Law § 104.

71. See Perfect § 1.

72. See Perfect § 1.

73. A maxim meaning "That is perfect which wants nothing according to the measure of its perfection or nature." Bouvier L. D. [cit Hob. p 151].

74. See Perfect § 1.

75. Webster D. [quot Streeter v. Emmons County Farmers' Press, (N. D.) 222 NW 455, 458].

76. Onderdonk v. Fanning, 9 Fed. 106, 108, 19 Blatchf. 363.

77. Michigan Cent. R. Co. v. Consolidated Car-Heating Co., 67 Fed. 121, 127, 14 CCA 232.

78. Brush Electric Co. v. Julien Electric Co., 41 Fed. 679, 690 ("The word may also have a meaning synonymous with 'cavities' or 'cells,' and it may mean a hole not passing entirely through, but into the center or interior").

79. See Performance post this page.

80. Webster D. [quot Job Iron, etc., Co. v. Clark, 150 Ky. 246, 150 SW 367, 369].

[a] "**Engaged in performing the work.**"—Sharman v. Sanders, 13 C. B. 166, 76 ECL 166, 138 Reprint 1161, 16 EngL&Eq 431, 436.

[b] "**Performing an important official function.**"—Sears v. U. S., 264 Fed. 257, 261.

81. Century D.

[a] "**Act, perform, or represent.**"—Daly v. Palmer, 7 F. Cas. No. 3,552, 6 Blatchf. 256, 263, 36 HowPr (N. Y.) 206.

82. Century D.; Old Colony Trust Co. v. Tacoma, 230 Fed. 389, 393, 144 CCA 531 [quot Cyc].

[a] **As meaning "abide."**—O'Brien v. Alford, 114 Ark. 257, 169 SW 774, 775.

[b] "**Abide by and perform an award.**"—Weeks v. Trask, 81 Me. 127, 131, 16 A 413, 2 LRA 532.

[c] "**Abide by and perform the judgment.**"—Cole v. Reilly, 28 Ga. 431, 433.

[d] "**Perform such duties as may be prescribed by law.**"—Hampton v. Logan County, 4 Ida. 646, 649, 43 P 324.

[e] "**Obey and perform.**"—Claflin v. Ball, 43 N. Y. 481, 486.

83. Old Colony Trust Co. v. Tacoma, 219 Fed. 775, 781.

84. Old Colony Trust Co. v. Tacoma, supra.

85. Cushwa v. Improvement Loan, etc., Assoc., 45 W. Va. 490, 505, 32 SE 259.

[a] **The word implies** (1) a complete performance, or full consummation of the work (Hinckley v. Southgate, 11 Vt. 428, 429; Boydell v. Drummond, 11 East 143, 146, 10 Rev. Rep. 450); (2) a full, effective, and complete performance (Bracegirdle v. Heald, 1 B. & Ald. 722, 726, 106 Reprint 266); (3) a full or complete execution (Squire v. Whipple, 1 Vt. 69, 73).

[b] "**Covenants performed.**"—Stewart v. Bedell, 79 Pa. 336, 339.

[c] "**For the purpose of performing upon or having the same performed upon.**"—Thiebes-Stierlin Music Co. v. Weiss, 142 Mo. A. 598, 607, 121 SW 1099.

[d] "**Usually performed.**"—Reg. v. Plunkett, 21 U. C. Q. B. (Ont.) 536, 541.

86. Kendall v. Garneau, 55 Nebr. 403, 405, 75 NW 852.

[a] "**Performed or represented.**"—Bloom v. Nixon, 125 Fed. 977, 978.

87. See Per § 2 note 29 [j].

88. See Perform ante this page.

Cross references:

Accord and Satisfaction §§ 17–23 (execution of accord).

Actions § 72 (conditions precedent to right of action generally).

Arbitration and Award §§ 544–554 (performance of award).

Bail § 71 et seq (discharge of sureties in civil actions), §§ 104–108 (liability of sureties in civil actions as dependent on performance of bond), §§ 279–291 (discharge of sureties in criminal prosecutions), §§ 292–304 (breach or performance of bond in criminal prosecutions).

Bonds §§ 111–131 (performance of condition).

Cancellation of Instruments §§ 45–53 (nonperformance as ground for granting or denying relief).

Contracts §§ 693–789 (performance or breach), § 847 (averment of fulfillment of condition precedent), §§ 848–857 (averment of performance by plaintiff), § 880 (plea of performance), §§ 952–958 (presumptions and burden of proof as to performance or breach), § 973 (admissibility of evidence as to performance or breach), § 986 (weight and sufficiency of evidence as to performance or breach), §§ 1011–1016 (performance or breach as question of law or fact).

Copyright and Literary Property § 314 (dramatic works), § 321 (musical works), § 333 (persons liable).

Covenants §§ 91–168 (performance or breach).

Deeds §§ 389–427 (performance or breach).

Frauds, Statute of §§ 84–128 (agreements not to be performed within year as within statute of frauds).

ing,[89] meaning the doing or completing of an act.[90] Also, such a thorough fulfillment of a duty as puts an end to obligations by leaving nothing more to be done.[91] Specifically a representation on the stage or before an audience or spectators; an exhibition of feats; any entertainment at a place of amusement.[92]

PERFUME.[93] A substance that emits a scent or odor, which affects agreeably the organs of smelling.[94]

PERFUMERY. Perfumes in general;[95] a substance which not only emits a scent or odor, but also one which is handled, bought and sold, and used for the purpose of obtaining from it such odor whenever required.[96]

PERGAMUNT ERSATZ. Imitation parchment.[97]

PERICULOSUM EST RES NOVAS ET INUSITATAS INDUCERE.[98]

PERICULOSUM EXISTIMO QUOD BONORUM VIRORUM NON COMPROBATUR EXEMPLO.[99]

PERICULUM REI VENDITÆ, NONDUM TRADITÆ, EST EMPTORIS.[1]

PERIL.[2] As a noun, instant or impending danger; risk; hazard; jeopardy; exposure to injury, loss, or destruction.[3] As a verb, to expose to danger; to hazard; to risk; to jeopard.[4]

PERILS OF NAVIGATION.[5]

PERILS OF THE RIVER.[6]

PERILS OF THE SEA.[7]

PERIMUS LICITIS.[8]

PERIOD. A measuring term,[9] compound of two Greek words, the first meaning "round, about," the other "a way,"[10] which, although having its etymological meaning,[11] also has a distinctive signification according to the subject in connection with which it may be used.[12] It has been defined as a stated and recurring interval of time;[13] a portion of time as limited and determined by some recurring phenomenon;[14] more generally, an interval of time specified or left indefinite;[15] also, a division of time in which something is completed.[16] The word may mean an indefinite time,[17] as well as a time specified.[18] It may be used to mean a continuous period of time,[19] and it is said that the general definition of the word, in reference to time, is to refer to a continuous period.[20] But the term may be used as not to mean a continuous cycle of time without intervention.[21]

Period of grace.[22] Ordinarily, a time allowed beyond that at which an obligation is payable.[23]

Other phrases: "A period of,"[24] "during such period as the said Board shall so forbid,"[25] "for a period during the war,"[26] "for a period not less than ten years,"[27] "longer period,"[28] "over the same period,"[29] "period of distribution,"[30] "period of exportation,"[31] "period of gesta-

§§ 427–445 (whether part performance takes agreement out of statute).
Highways § 349 (performance of contract for road work), § 353 (matters covered by contractor's bond).
Logs and Logging §§ 165–171 (lien for services performed).
Mechanics' Liens §§ 57–59 (performing services as giving right to lien generally), §§ 148–150 (performance of contract by contractor), § 160 (persons furnishing labor to contractor).
Mines and Minerals § 845 (persons performing labor in mines entitled to lien).
Specific Performance [36 Cyc 528].
Workmen's Compensation Acts § 74 (performing services incidental to employment).

89. Knudtson v. Robinson, 18 N. D. 12, 118 NW 1051, 1053.

90. Knudtson v. Robinson, supra.

[a] **"An offer to perform" and "performance" not synonymous.**—Knudtson v. Robinson, 18 N. D. 12, 118 NW 1051, 1053.

[b] **"In consideration of the performances hereinafter mentioned."**—Rogers v. Eagle Fire Co., 9 Wend. (N. Y.) 611, 644.

[c] **"Performance of the whole work."**—Fitzpatrick v. Ernst, 102 Minn. 195, 196, 113 NW 4.

91. Hare Contr. p 569 [quot McGuire v. J. Neils Lumber Co., 97 Minn. 293, 107 NW 130, 132]; Strauss v. Long Beach Est., 187 App. Div. 876, 176 NYS 447, 449.

[a] **"Performance of a written contract."**—Lamb v. Barnard, 16 Me. 364, 369.

[b] **"Performance of duty."**—Maitland v. Garfield Bd. of Police Comrs., 93 N. J. L. 150, 107 A 411, 412.

92. Standard D. [quot Remick v. American Auto. Accessories Co., 298 Fed. 628, 631].

93. See Perfumery post this page.

94. Fritzsche v. Magone, 40 Fed. 228, 230.

[a] **"Perfume materials."**—U. S. v. American Shipping Co., 13 Cust. A. 346, 348.

95. Fritzsche v. Magone, 40 Fed. 228, 230. See Perfume ante this page.

96. Fritzsche v. Magone, supra.

97. Germania Importing Co. v. U. S., 142 Fed. 215.

"Parchment" see 46 C. J. p 1178.

98. A maxim meaning "It is perilous to introduce new and untried things." Peloubet Leg. Max. [cit Coke Litt. p 379a].

99. A maxim meaning "I consider that dangerous which is not approved by the example of good men." Black L. D. [cit Reynel's Case, 9 Coke 95a, 97b, 77 Reprint 871].

1. A maxim meaning "The risk of a thing sold, and not yet delivered, is the purchaser's." Morgan Leg. Max. [cit Wharton L. Lex.].

[a] **Applied in:** Seath v. Moore, 55 L. J. P. C. 54, 62.

2. Cross references:
Marine Insurance §§ 268–303.
Negligence § 93 (peril of person sought to be charged as act in emergency), §§ 539–545 (doctrine of discovered peril).
Salvage [35 Cyc 721].
Shipping [36 Cyc 294, 376].

3. Webster D. [quot Hall v. Manson, 90 Iowa 585, 591, 58 NW 881]. See Terre Haute, etc., R. Co. v. Brunker, 128 Ind. 542, 552, 26 NE 178. ("Peril means exposure to injury, loss or destruction, imminent or impending danger, risk, hazard or jeopardy").

4. Hall v. Manson, 90 Iowa 585, 591, 58 NW 881.

5. See Marine Insurance § 272; Shipping [36 Cyc 294].

6. See Marine Insurance § 271; Shipping [36 Cyc 294].

7. See Marine Insurance § 268; Shipping [36 Cyc 294].

8. A maxim meaning "Those vices of which the law takes no cognizance are the most insidious and fatal." Morgan Leg. Max. [Maxim of Sir Matthew Hale].

9. Ellis v. Fraternal Aid Union, 108 Kan. 819, 197 P 189, 190.

10. Bowman's Est., 28 Pa. Dist. 766, 769.

11. Sampson v. Peaslee, 20 How. (U. S.) 571, 576, 579, 15 L. ed. 1022.

12. Sampson v. Peaslee, supra ("it may mean any portion of complete time, from a thousand years, or less, to the period of a day"). See In re Security Trust, etc., Co., 10 Del. Ch. 334, 335, 92 A 244 ("The word 'period' used in the statute does not mean the instant of the death of the life tenant, but is the time elapsing after the death of the life tenant").

13. Black L. D. [quot Ellis v. Fraternal Aid Union, 108 Kan. 819, 197 P 189, 190]; Bowman's Est., 28 Pa. Dist. 766, 769.

[a] **"A period of time** is a stated and recurring interval of time, a round or series of years, by which time is measured." Peo. v. Leask, 67 N. Y. 521, 528.

14. Bowman's Est., 28 Pa. Dist. 766, 769.

15. Bowman's Est., supra.

16. Bowman's Est., supra.

17. Parish v. Rogers, 20 App. Div. 279, 282, 46 NYS 1058.

18. Parish v. Rogers, supra.

19. Tyler v. London, etc., Docks Joint Committee, 9 T. L. R. 11, 12; Holz v. Bruno Clay Works, (Sask.) 62 DomLR 656, 657, [1922] 1 WestWkly 131.

20. Matter of Becker, 39 Misc. 756, 757, 80 NYS 1115.

21. Atchison, etc., R. Co. v. U. S., 177 Fed. 114, 118, 100 CCA 534.

22. Cross references:
Bills and Notes § 72 (nonnegotiable paper), § 182 (governing law), §§ 614–625 (maturity), § 876 (protest), § 1154 (pleading).
Evidence § 1955 (judicial notice).
Grace 28 C. J. p 753.
Time [38 Cyc 331] (last day of period falling on holiday).
Usury [39 Cyc 970] (taking interest on days of grace).
War [40 Cyc 343] (in maritime war).

23. Fusco v. Grand Lodge S. I. A., 104 Conn. 157, 163, 132 A 456.

24. Bowman's Est., 28 Pa. Dist. 766, 769.

25. State v. Strauss, 49 Md. 288, 299.

26. Ellis v. Fraternal Aid Union, 108 Kan. 819, 197 P 189, 190.

27. Tyler v. London, etc., Docks Joint Committee, 9 T. L. R. 11, 12.

28. Parish v. Rogers, 20 App. Div. 279, 282, 46 NYS 1058. See also Long 38 C. J. p 241 text and note 31.

29. Dosen v. East Butte Copper Min. Co., 78 Mont. 579, 254 P 880, 887.

30. Purl v. Purl, 108 Kan. 673, 197 P 185, 187.

31. Sampson v. Peaslee, 20 How. (U. S.) 571, 579, 15 L. ed. 1022 ("when used to designate an act to be done, or to be begun, though its completion may take an uncertain time, as, for instance, the act of exportation, it must mean the day on which the ex-

tion,"[32] "period of imprisonment,"[33] "period of maintenance,"[34] "period of probation,"[35] "periods of limitation;"[36] also, "pre-war period."[37]

PERIODICAL. As an adjective. Characterized by periods; recurring more or less regularly after a certain period of time.[38]

As a noun.[39] A magazine or other publication which appears at stated or regular intervals;[40] a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself.[41]

PERIODICALLY.[42] At stated or regularly recurring intervals.[43]

PERIODICAL OVERFLOW.[44]

PERIODIC TENANCY.[45] In cases where it arises merely as an inference from the conduct of the parties, nothing more than the name of a modified form of an estate at will, namely, one which, either by force of judicial decision or statute or both, cannot be terminated by either party without the giving of a notice of a certain duration.[46]

PERIPHERY. Generally, the outside or superficial part of a body.[47] When applied to a sphere, the whole of the exterior surface.[48] When applied to a disk, unless a larger meaning is clearly implied, the outer edge of the disk.[49]

PERISHABLE.[50] Liable to deteriorate from keeping;[51] liable to perish;[52] mortal;[53] subject to destruction or decay;[54] subject to speedy decay;[55] subject to speedy and natural decay;[56] especially liable to decay speedily;[57] that which, from its nature, decays in a short space of time, without reference to the care it receives.[58] The term may embrace property liable to material depreciation in value from other causes than decay;[59]

portation commences, or it would be an unmeaning and useless word in its connection in the statute").

32. Masters v. Marsh, 19 Nebr. 458, 461, 27 NW 438 [quot Souchek v. Karr, 78 Nebr. 488, 492, 111 NW 150] ("The period of gestation may be safely stated as a general proposition at from two hundred and fifty-two to two hundred and eighty-five days. Allowing the greatest latitude of enquiry I think it should be confined to a period of time between the lowest number of days above stated and that of three hundred days before the birth of the child").

Cross references:
Abortion § 23 (gestation as element of abortion).
Bastards § 129 (necessity for proof as to period).
Evidence § 758 (admissibility of opinion evidence as to gestation), § 1966 (judicial notice of period).
Gestation 28 C. J. p 615.
Mother 42 C. J. p 456 (woman as mother during period).
Perpetuities § 7 (in computing time for vesting of future interests).

33. In re Bailus, 8 Oh. Cir. Ct. N. S. 454, 29 Oh. Cir. Ct. 632. See Criminal Law § 3228.

34. Calne Union v. Wilts County, [1911] 1 K. B. 717, 729.

35. Peo. v. Kearney, 164 N. Y. 64, 66, 58 NE 14.

36. New York Cent. R. Co. v. Lazarus, 278 Fed. 900, 902; Lazarus v. New York Cent. R. Co., 271 Fed. 93, 95. See generally Limitations of Actions §§ 152–563.

37. Ehret Magnesia Mfg. Co. v. Lederer, 273 Fed. 689, 690 (as used in an excess profits tax statute, means the years 1911–1913).

38. Webster New Int. D.

[a] **"Periodical payments in the nature of income."**—Jones v. Ogle, L. R. 8 Ch. 192, 198; Rochester v. LeFanu, [1906] 2 Ch. 513, 520.

[b] **"Periodical" and "casual" vacancies.**—Mulcahy v. Payne, 27 Austr. C. L. R. 470.

39. Cross references:
Copyright and Literary Property § 102.
Customs Duties §§ 42, 54.
Newspapers § 2.
Post Office [31 Cyc 989].

40. Webster D. [quot Houghton v. Payne, 194 U. S. 88, 96, 24 SCt 590, 48 L. ed. 888].

41. Century D. [quot Houghton v. Payne, 194 U. S. 88, 97, 24 SCt 590, 48 L. ed. 888 ("A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects")].

[a] **"The noun periodical, according to the nice shade of meaning given to it by popular speech,** conveys at least a suggestion if not a promise of matter on a variety of topics, and certainly implies that no single number is contemplated as forming a book of itself." Smith v. Hitchcock, 226 U. S. 53, 58, 33 SCt 6, 57 L. ed. 109.

[b] **A book is readily distinguishable from a periodical,** not only because it usually has a more substantial binding (although this is by no means essential), but because of the fact that it ordinarily contains a story, essay, or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. Houghton v. Payne, 194 U. S. 88, 97, 98, 24 SCt 590, 48 L. ed. 888. "Book" see 9 C. J. p 136.

42. See Periodical ante this page.

43. Century D.

[a] **"Periodically, whether or not at regular intervals."**—Blair v. Barton, 26 F. (2d) 765, 768.

44. See Overflow 46 C. J. p 1161; Overflowed Lands 46 C. J. p 1161; Public Lands [32 Cyc 905].

45. See Landlord and Tenant § 47 et seq.

46. Sutherland v. Drolet, 154 Wis. 619, 143 NW 663, 665. See Wall v. Stimpson, 83 Conn. 407, 76 A 513, 514.

47. Motsinger Device Mfg. Co. v. Hendricks Novelty Co., 149 Fed. 995, 998, 79 CCA 505 [cit Century D.].

[a] **Other definition.**—"The circumference of a circle." Sacks v. Legg, 219 Ill. A. 144, 148.

48. Motsinger Device Mfg. Co. v. Hendricks Novelty Co., 149 Fed. 995, 998, 79 CCA 505.

49. Motsinger Device Mfg. Co. v. Hendricks Novelty Co., supra.

50. Perishable articles, goods, property, etc.:
Attachment § 356 (subject of), § 785 (sale of).
Bankruptcy § 175 note 61 [h] (subject of sale).
Carriers § 148 (damage to during transportation).
Customs Duties § 153 (allowance for shortage caused to).
Executions § 576 (premature sale of).
Executors and Administrators § 721 (sale of).
Landlord and Tenant § 1642 (distraint against).
Sales [35 Cyc 520] (resale of by seller on breach of buyer).
Sequestration [35 Cyc 1403].
Shipping [36 Cyc 257] (liability of carrier by water).

51. Jolley v. Hardeman, 111 Ga. 749, 751, 36 SE 952.

52. Standard D. [quot Poole Co. v. U. S., 9 Cust. A. 271, 275; Reinhart, etc., Co. v. State, 26 Oh. Cir. Ct. N. S. 429, 431]; Webster D. [quot Fisk v. Spring, 25 Hun 367, 369, 1 NY CivProc 378, 62 HowPr 510].

53. Standard D. [quot Poole Co. v. U. S., 9 Cust. A. 271, 275; Reinhart, etc., Co. v. State, 26 Oh. Cir. Ct. N. S. 429, 431].

54. Standard D. [quot Poole Co. v. U. S., 9 Cust. A. 271, 275; Reinhart, etc., Co. v. State, 26 Oh. Cir. Ct. N. S. 429, 431].

[a] **Similar definition.**—"Subject to decay or destruction." Webster D. [quot Fisk v. Spring, 25 Hun 367, 369, 1 NYCivProc 378, 62 HowPr 510].

55. Webster v. Peck, 31 Conn. 495, 498; Work v. Kinney, 5 Ida. 716, 718, 57 P 745.

56. Anderson L. D. [quot Callahan v. Danziger, 172 Cal. 738, 158 P 760, 761].

[a] **Consumable, or perishable, articles are of two classes:** First, those which are necessarily destroyed in their use, such as corn, hay, etc.; and second, those which are not so much so, as being productive, and the capital kept up by the increase, such as stock of horses, cattle, etc. Patterson v. Devlin, 16 S. C. Eq. 459, 466.

[b] **"Articles of a perishable nature** are those which, because of their inherent qualities, rapidly decompose or decay, and in so doing undergo material changes of form and quality which render them unsuitable for use and of little or no value. Such things as fruit, fresh fish, and the like, may properly be termed articles of a 'perishable nature' within the meaning of the above-cited section." Jolley v. Hardeman, 111 Ga. 749, 751, 36 SE 952 [quot Reinhart, etc., Co. v. State, 26 Oh. Cir. Ct. N. S. 429, 431].

[c] **"Articles perishable** in their own nature." Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202, 216.

57. Standard D. [quot Poole Co. v. U. S., 9 Cust. A. 271, 275; Reinhart, etc., Co. v. State, 26 Oh. Cir. Ct. N. S. 429, 431].

58. Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 67, 5 AmR 83.

59. Anderson L. D. [quot Callahan v. Danziger, 172 Cal. 738, 158 P 760, 761].

and it may be used to intend what is subject to an immediate, or nearly immediate, entire destruction.[60]

Perishable goods.[61] Articles which contain in themselves the elements of speedy decay;[62] goods which are lessened in value and become worse by being kept;[63] goods which decay and lose their value if not speedily put to their intended use;[64] such personal property as has in itself elements of destruction or decomposition.[65]

Perishable property.[66] A relative term,[67] defined as goods which decay and lose their value, if not speedily put to their intended use;[68] property which from its nature decays in a brief time notwithstanding the care it may receive.[69]

Matters considered perishable: Automobiles,[70] butter fat and kindred dairy products,[71] corn,[72] eggs,[73] fresh fish,[74] fruit,[75] goods used by fashionable tailors, the styles in which change every season, and which are liable to become hard and unsuitable for use, and moth-eaten and injured by dust,[76] potatoes,[77] slaves.[78]

Matters not considered perishable: Cotton,[79] hay,[80] leasehold interest,[81] lumber,[82] pickled fish.[83]

PERITOS. In Spanish law, experts[84] who may be called as appraisers.[85]

PER JUDICIUM JUS EST NOVITER REVELATUM QUOD DIU FIAT VELATUM.[86]

PERJURII PŒNA DIVINA EXITIUM; HUMANA DEDECUS.[87]

PERJURING THIEF. A person who robs by means of perjury, and not by means of larceny or other act.[88]

PERJURIO. In Spanish law, false swearing.[89]

PERJURI SUNT QUI SERVATIS VERBIS JURAMENTI DECIPIUNT AURES EORUM QUI ACCIPIUNT.[90]

PERJURO. One who is guilty of false swearing.[91]

60. Riegel v. Franzel, 191 NYS 126, 127.

61. **"Goods"** see 28 C. J. p 720.

62. McCreery v. Berney Nat. Bank, 116 Ala. 224, 229, 22 S 577, 67 AmSR 105; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 67, 5 AmR 83.

63. Reinhart, etc., Co. v. State, 26 Oh. Cir. Ct. N. S. 429, 431. See Schumann v. Davis, 13 NYS 575.

64. Black L. D. [quot Witherspoon v. Cross, 135 Cal. 96, 98, 67 P 18].

65. Steele v. Wyatt, 23 Ala. 764, 768, 58 AmD 317.

66. **"Property"** see [32 Cyc 639].

67. Browning v. River Farms Co., 82 Cal. A. 361, 368, 255 P 548, 551.

68. Browning v. River Farms Co., supra.

69. Century D. [quot Poole Co. v. U. S., 9 Cust. A. 271, 275].

[a] **"Not property** that is or may be subject or liable to loss by trespass, larceny or fire." Oneida Nat. Bank v. Paldi, 2 Mich. N. P. 221.

70. Marston v. Rue, 92 Wash. 129, 159 P 111, 113.

71. Marshall v. Kirschbraun, 100 Nebr. 876, 161 NW 577, 578 [cit Cyc].

72. Chesapeake, etc., R. Co. v. Saulsbury, 126 Ky. 179, 103 SW 254, 31 KyL 624, 12 LRANS 431.

73. Hunter v. Baltimore Packing, etc., Co., 75 Minn. 408, 410, 78 NW 11.

74. Jolley v. Hardeman, 111 Ga. 749, 752, 36 SE 952.

75. Jolley v. Hardeman, supra.

76. Schumann v. Davis, 13 NYS 575.

77. Robinson v. Commonwealth Ins. Co., 20 F. Cas. No. 11,949, 3 Sumn. 220; Williams v. Cole, 16 Me. 207, 208; Davis v. Ainsworth, 14 HowPr (N. Y.) 346; St. Louis, etc., R. Co. v. Dreyfus, 37 Okl. 492, 495, 132 P 491, 493, AnnCas1915C 507.

"Potatoes perish through deterioration, accelerated by improper handling or storage or freezing." Falmouth Co-op. Marketing Assoc. v. Pennsylvania R. Co., 237 Mich. 406, 411, 212 NW 84.

78. Steele v. Wyatt, 23 Ala. 764, 769, 58 AmD 317; Dugans v. Livingston, 15 Mo. 230, 234.

79. Weis v. Basket, 71 Miss. 771, 774, 15 S 659.

80. Newman v. Kane, 9 Nev. 234, 236.

81. Birmingham First Nat. Bank v. Consolidated Electric Light Co., 97 Ala. 465, 466, 12 S 71.

82. Mosher v. Bay County Cir. Judge, 108 Mich. 579, 580, 66 NW 478.

83. Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289, 290.

84. Escriche Diccionario. See Expert 25 C. J. p 176.

85. Spanish Civ. Code arts 266, 271; Philippine Civ. Code arts 266, 271; Porto Rico Civ. Code § 279. See Appraisal 4 C. J. p 1408; Appraiser 4 C. J. p 1408.

86. A maxim meaning "The law which has been veiled for a time is revealed anew by a trial." Morgan Leg. Max. [cit Halkerstone p 109].

87. A maxim meaning "The divine punishment of perjury is destruction; the human punishment is disgrace." Peloubet Leg. Max. [cit Lofft Max. p 46].

88. Burns v. Monell, 7 NYS 624.

89. Escriche Diccionario. See Perjury §§ 1–7.

90. A maxim meaning "They are perjured who, preserving the words of an oath, deceive the ears of those who receive it." Bouvier L. D. [cit 3 Inst. p 166].

91. Escriche Diccionario.

PERJURY

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 819]

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Suppression of evidence see **Obstructing Justice** §§ 28, 29.
Venue of offense see **Criminal Law** § 283.

I. DEFINITIONS AND DISTINCTIONS

[By Douglas Robinson Gray]

[§ 1] **A. Perjury[1]—1. At Common Law.** By the common law perjury is the willful and corrupt taking of a false oath, lawfully administered in a judicial proceeding or the course of justice in regard to a matter material to the issue or point of inquiry.[2] False swearing is a distinct offense at common law.[3]

[§ 2] **2. Statutory Provisions.** "Perjury" is often defined in the statutes,[4] some of which have been judicially declared to be merely codifications of the common law.[5] Where the statute prescribes a pun-

1. Cross references:
Accomplice in perjury see Criminal Law § 1391.
False oath in support of claim against government see infra § 6.
False swearing see infra §§ 3–5.
Falsifying evidence see infra § 7.
Foreswearing see infra § 3 text and notes 29–31.
Subornation of perjury see infra § 189.

2. Sealy v. Dussel, 157 La. 485, 102 S 581, 582 [quot Cyc]; U. S. v. Cañet, 30 Philippine 371, 379 [quot Cyc]; U. S. v. Estraña, 16 Philippine 520, 529 [quot Cyc].

[a] **Lord Coke's definition.**—"A crime committed when a lawful oath is administered, by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue or cause in question, by their own act, or by the subornation of others." 3 Coke Inst. p 164 [quot Hammer v. U. S., 6 F. (2d) 786, 788 (certiorari granted 267 U. S. 591 mem, 45 SCt 508 mem, 69 L. ed. 802 mem, and rev on other grounds 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118); Arden v. State, 11 Conn. 408, 411, 412; Beecher v. Anderson, 45 Mich. 543, 8 NW 539, 543; Peo. v. Fox, 25 Mich. 492, 496; Shevalier v. State, 85 Nebr. 366, 123 NW 424, 425, 19 AnnCas 361; Hamm v. Wickline, 26 Oh. St. 81, 83; State v. Wilson, 83 Wash. 419, 145 P 455, 456]. To same effect Chapman v. Gillet, 2 Conn. 40; State v. Thomas, 25 Del. 20, 78 A 640; State v. Shaffner, 22 Del. 576, 69 A 1004, 1005; State v. Fahey, 19 Del. 594, 54 A 690, 692; Com. v. Edison, 9 SW 161, 10 KyL 340.

[b] **"Hawkins says,** it seemeth to be a wilful, false oath, by one, who, being lawfully required to depose the truth, in any proceeding in a course of justice, swears absolutely to a matter of some consequence to the point in issue, whether he be believed or not. Hawk. P. C. lib. 1, c. 69, s. 1." Arden v. State, 11 Conn. 408, 412. To same effect U. S. v. Howard, 132 Fed. 325, 350; Chapman v. Gillet, 2 Conn. 40, 47; State v. Lavalley, 9 Mo. 834, 836; Com. v. Kuntz, 2 PaLJR 375, 4 PaLJ 163; State v. Byrd, 28 S. C. 18, 21, 4 SE 793, 13 AmSR 660; State v. Wilson, 83 Wash. 419, 145 P 455, 456.

[c] **Other definitions.**—(1) "An assertion upon an oath duly administered in a judicial proceeding, before a competent court, of the truth of some matter of fact, material to the question depending in that proceeding, which assertion the asserter does not believe to be true when he makes it, or on which he knows himself to be ignorant." Stephen Dig. Cr. L. p 91 [quot Hereford v. Peo., 197 Ill. 222, 227, 64 NE 310]. To same effect Klinger v. Markowitz, 54 App. Div. 299, 65 NYS 369, 66 NYS 1135 mem. (2) "A corrupt, willful, false oath, taken in a judicial proceeding, in regard to any matter or thing material to a point involved in the proceeding." Hood v. State, 44 Ala. 81, 86 [quot Shevalier v. State, 85 Nebr. 366, 368, 123 NW 424, 19 AnnCas 361]. To same effect Com. v. Williams, 1 LackLegRec (Pa.) 264. (3) The taking "of a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a . . . [court] of justice, swears absolutely in a matter of some consequence to the point in question, whether he believed [it] or not." 2 Archbold Cr. Pr. & Pl. (Pomeroy Notes) p 1714 [quot Peo. v. Martin, 77 App. Div. 396, 405, 79 NYS 340 (aff 175 N. Y. 315, 67 NE 589, 96 AmSR 628)]. (4) "The taking of a wilful false oath by any one, who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears [absolutely and] falsely, in a matter material to the point in question, whether he be believed or not." Wharton Am. Cr. L. p 746 (§ 2198) [quot Horn v. Foster, 19 Ark. 346, 350; Com. v. Powell, 2 Mete. (Ky.) 10, 12; State v. Brown, 79 N. C. 642, 643]. To same effect Miller v. State, 15 Fla. 577, 585; State v. Matlock, 48 La. Ann. 663, 664, 19 S 669; Com. v. Pollard, 12 Metc. (Mass.) 225; Com. v. Smith, 11 Allen (Mass.) 243, 253; Hopkins v. Smith, 3 Barb. (N. Y.) 599, 600; Langford v. State, 9 Tex. A. 283, 285; State v. Simons, 30 Vt. 620, 622. (5) "The willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding." Wharton Cr. L. (10th ed) § 1244 [quot Herring v. State, 119 Ga. 709, 715, 46 SE 876; U. S. v. Cañet, 30 Philippine 371, 379]. To same effect Canal Zone v. Kerr, 2 Canal Zone 262, 267. (6) "The willful giving, under oath, in a judicial proceeding or in the course of justice, of false testimony material to the issue." Com. v. Maynard, 91 Ky. 131, 132, 15 SW 52, 12 KyL 710 [quot Com. v. Combs, 125 Ky. 273, 278, 101 SW 312]. To same effect Com. v. Hinkle, 177 Ky. 22, 197 SW 455, 456; Com. v. Ransdall, 153 Ky. 334, 155 SW 1117, 1118; State v. Mercer, 101 Md. 535, 61 A 220, 221; U. S. v. Santisteban, 10 Porto Rico Fed. 509; State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918; State v. Rowell, 70 Vt. 405, 41 A 430; State v. Wilson, 83 Wash. 419, 145 P 455, 456.

[d] **"The crime is committed when** a lawful oath is administered in some judicial proceeding or due course of justice to a person who swears willfully, absolutely and falsely in a matter material to the issue or point in question." 3 Greenleaf Evid. § 188 [quot State v. Cline, 150 N. C. 854, 856, 64 SE 591; State v. Wilson, 87 Tenn. 693, 695, 11 SW 792].

[e] **Etymologically,** the signification of the word "perjury" is the false swearing upon oath lawfully administered in some judicial proceeding. U. S. v. Howard, 132 Fed. 325, 338.

3. See infra § 4.

4. See statutory provisions.

[a] **United States Criminal Code** defines perjury. USCA tit 18 § 231 [quot and construed in U. S. v. Noveck, 273 U. S. 202, 47 SCt 341, 71 L. ed. 610; U. S. v. Smull, 236 U. S. 405, 408, 35 SCt 349, 59 L. ed. 641; In re Loney, 134 U. S. 372, 10 SCt 584, 33 L. ed. 949; Hammer v. U. S., 6 F. (2d) 786 (certiorari granted 267 U. S. 591 mem, 45 SCt 508 mem, 69 L. ed. 802 mem, and rev on other grounds 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118); U. S. v. Hammer, 299 Fed. 1011 [aff 6 F. (2d) 786 (certiorari granted 267 U. S. 591 mem, 45 SCt 508 mem, 69 L. ed. 802 mem), and rev on other grounds 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118]; Levy v. U. S., 271 Fed. 942; Berry v. U. S., 259 Fed. 203, 170 CCA 271; Epstein v. U. S., 196 Fed. 354, 116 CCA 174 (certiorari den 223 U. S. 731 mem, 32 SCt 527 mem, 56 L. ed. 634 mem); U. S. v. Richards, 149 Fed. 443].

[b] **In Texas** see White Pen. Code § 201 et seq [quot and construed in State v. Perry, 42 Tex. 238; Shipp v. State, 81 Tex. Cr. 328, 196 SW 840, 842; Warren v. State, 57 Tex. Cr. 262, 263, 122 SW 541; Ferguson v. State, 36 Tex. Cr. 60, 35 SW 369; Langford v. State, 9 Tex. A. 283].

[c] **In the Philippines** see Act No. 1697 § 3 [quot and construed in U. S. v. Estraña, 16 Philippine 520; U. S. v. Concepcion, 13 Philippine 424].

5. Miller v. State, 15 Fla. 577; Peo. v. Martin, 77 App. Div. 396, 79 NYS 340 [aff 175 N. Y. 315, 67 NE 589, 96 AmSR 628] (Massachusetts statute).

[a] **In Louisiana** (1) the common and not the civil law controls as to criminal jurisprudence in the absence of statutory modification. Sealy v. Dussel, 157 La. 485, 102 S 581. (2) An act providing "that the debtor at the time of such examination shall be sworn to tell the truth in the same manner as a witness in the trial of civil cases under existing laws, and should he, during the course of the examination, knowingly testify falsely upon any material point, this shall constitute the crime of perjury, and he shall be subject to the penalties provided under the law with reference to that offense" does not amend the general definition of perjury at common law. Sealy v. Dussel, supra. (3) "The Legislature in this State has extended the crime to wilful false swearing to any deposition or affidavit taken or made pursuant to the laws of the state." State v. Matlock, 48 La. Ann. 663, 665, 19 S 669.

[b] **In Washington,** under statute (1) first degree perjury consists in a false statement in any action, proceeding, hearing, inquiry, or investigation in which an oath may lawfully be administered. State v. Wilson, 83 Wash. 419, 145 P 455; State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249. (2) Second degree perjury consists in a false statement made under oath in extrajudicial proceedings and investigations, and those held by quasi-judicial boards, commissions, and committees where a false oath could not be first degree perjury because it does not operate as an obstruction of justice in regular judicial proceedings. State v. Wilson, supra. (3) First and second degree perjury are distinct offenses, the first being true perjury as ordinarily defined in other jurisdictions whereas the second is in the nature of "false swearing" as such crime is ordinarily defined in other states. State v. Wilson, supra. (4) Prior to the statute creating degrees of perjury it was said that common-law perjury and perjury as defined by the Washington statute are substantially, if not identically, the same. State v. Eaid, 55 Wash. 302, 104 P 275, 33 LRANS 946 (holding a common-law indictment good under the statute). (5) The substantial identity of the common-law and statutory offenses is apparent with respect to the guilty knowledge of falsity or its equivalent reckless disregard for truth. State v. Eaid, supra. (6) The word "swear" in Remington & B. Code § 2353, defining perjury in the second degree, means to

ishment for perjury without defining the offense,[6] the common-law definition[7] remains in effect.[8] Many statutes define the term by enumerating the acts which shall constitute commission of the crime, including acts not within the common-law definition.[9] Under varying statutory provisions[10] it has been held that the intent of the legislature was to enlarge the scope of the common-law crime of perjury by eliminating the requirement of materiality of the statement,[11] or the requirement that it be made in a judicial proceeding.[12] Some statutes[13] eliminate both the requirement of materiality and that of a judicial proceeding,[14] and courts construing such statutes have indicated that such is their effect.[15] Other statutes eliminate the requirement of a judicial proceeding but preserve that of materiality,[16] the courts construing such statutes as making perjury the willful and corrupt assertion of a falsehood, under oath or affirmation administered by authority of law, in a material matter, the offense being enlarged and made to extend to other false oaths than those taken in the course of judicial proceedings.[17] A third type of statute[18] has been construed as preserving the requirement of a judicial proceeding but eliminating the requirement of materiality.[19] False swearing is a distinct statutory offense.[20]

[§ 3] **B. False Swearing[21]—1. In General.** "False swearing" has been defined as swearing to what deponent knows to be untrue,[22] corruptly[23] and intentionally,[24] in a manner that is morally and willfully false as distinguished from being merely mistaken.[25] In its common or popular meaning "false swearing" is synonymous with "perjury."[26] But in the technical or legal meaning of the term "false swearing" is something distinct from "perjury."[27]

Falso testimonio, under Spanish law, corresponds to false swearing under English law.[28]

"Foreswearing" is synonymous with "false swearing,"[29] but ordinarily[30] distinct from "perjury."[31]

state facts under the sanctity of an oath administered by an officer having authority to administer oaths in the particular proceeding. State v. Dallagiovanna, supra.

6. See statutory provisions.

7. See supra § 1.

8. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117; Com. v. Maynard, 91 Ky. 131, 15 SW 52, 12 KyL 710.

[a] **In Vermont** a section of a statute prescribing a punishment for perjury without defining it, and another section defining perjury and referring to the first section for the punishment thereof have been construed as (1) leaving in effect the common-law definition of perjury so far as the first section is concerned (State v. Smith, 63 Vt. 201, 22 A 604); and (2) making that perjury which was not perjury at common law, so far as the second section is concerned (State v. Rowell, 70 Vt. 405, 408, 41 A 430 ["Our statute § 5080, enlarges the common law definition and extends the crime to other matters than those involved in proceedings in courts of justice, as at common law and by V. S. § 5079, and provides that, 'A person of whom an oath is required by law, who wilfully swears falsely in regard to any matter or thing respecting which such oath is required, shall be guilty of perjury'"]; State v. Smith, supra). (3) The intent was not to enact an exclusive definition of perjury by the second section so as to eliminate common-law perjury, but merely to add to common-law perjury a statutory perjury as set forth in said second section. State v. Smith, supra.

9. See statutory provisions.

10. See statutory provisions.

11. State v. Miller, 26 R. I. 282, 285, 58 A 882, 3 AnnCas 943; State v. Byrd, 28 S. C. 18, 4 SE 793, 13 AmSR 660.

"Gen. Laws R. I. cap. 276, § 1, provides that: 'Every person of whom an oath or affirmation is or shall be required by law, who shall willfully swear or affirm falsely in regard to any matter or thing respecting which such oath or affirmation is or shall be required, shall be deemed guilty of perjury.' This language is very broad and comprehensive, and clearly indicates the intent of the legislature to enlarge the scope of the crime of perjury, as it exists at common law, and to make any willfully false swearing in judicial proceedings perjury, regardless of the question of its materiality to the issue; that is, in effect, to make it a statutory offence." State v. Miller, supra.

Materiality as element of perjury see infra §§ 32-47.

Statutory false swearing see infra § 5 text and note 43.

12. State v. Mercer, 101 Md. 535, 538, 61 A 220.

"By sec. 356 of Art. 7 of the Code false swearing in an affidavit required by law to be taken is also made perjury." State v. Mercer, supra.

Matter or proceeding in which statement made see infra §§ 53-60.

Vermont rule see supra text and note 8 [a].

13. See statutory provisions.

14. See statutory provisions.

15. State v. Byrd, 28 S. C. 18, 21, 4 SE 793, 13 AmSR 660.

"In 1833 the legislature of this State passed an 'act concerning perjury,' which (re-enacted as section 2534 of the General Statutes) provides as follows: 'Whoever shall wilfully and knowingly swear falsely, in taking any oath required by law and administered by any person directed or permitted by law to administer such oath, shall be deemed guilty of perjury, and, on conviction, incur the pains and penalties of that offense.' It will be observed that there is nothing in this act as to the necessity that the false swearing denounced should be material to the issue in a judicial proceeding. The only requirements are that the oath shall be required by law, administered by one authorized to do so, and that it was wilfully and knowingly false." State v. Byrd, supra.

Louisiana rule see supra note 5 [a].

Vermont rule see supra note 8 [a].

16. See statutory provisions.

17. U. S. v. Cañet, 30 Philippine 371, 379 [quot Cyc]; U. S. v. Estraña, 16 Philippine 520, 529 [quot Cyc].

"Perjury, as the offense, modified by statute, is now generally defined, is the corrupt assertion of a falsehood, under oath, or affirmation, and by legal authority, for the purpose of influencing the course of law." 2 Wharton Cr. L. (11th ed) § 1508 [quot U. S. v. Cañet, supra].

18. See statutory provisions.

19. State v. Miller, 26 R. I. 282, 58 A 882, 3 AnnCas 943; Rex v. Hayford, 14 Sask. L. 375, 62 DomLR 90, 35 Can CrCas 293, [1921] 2 WestWkly 990.

20. See infra § 5.

21. Cross references:

False affidavit in support of claim against government see infra § 6.

False swearing as offense against naturalization laws see Aliens §§ 168, 169.

"False swearing" as synonymous with "fraud" see Fraud § 1 text and note 10.

Falsifying evidence see infra § 7.

22. State v. Coleman, 117 La. 973, 976, 42 S 471, 8 AnnCas 880 [cit Cyc]; Mason v. Agricultural Mut. Assur. Assoc., 18 U. C. C. P. (Ont.) 19.

23. State v. Coleman, 117 La. 973, 976, 42 S 471, 8 AnnCas 880 [cit Cyc]; Mason v. Agricultural Mut. Assur. Assoc., 18 U. C. C. P. (Ont.) 19.

Corruption as an element of false swearing:

At common law see infra § 4 text and note 34.

Under statutes see infra § 5 text and note 48.

24. Linscott v. Orient Ins. Co., 88 Me. 497, 499, 34 A 405, 51 AmSR 435.

25. Ind.—Franklin Ins. Co. v. Culver, 6 Ind. 137.

La.—State v. Coleman, 117 La. 973, 976, 42 S 471, 8 AnnCas 880 [cit Cyc].

Me.—Linscott v. Orient Ins. Co., 88 Me. 497, 34 A 405, 51 AmSR 435.

Mo.—Marion v. Great Republic Ins. Co., 35 Mo. 148, 149; St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 284, 49 AmD 74.

N. Y.—Maher v. Hibernia Ins. Co., 67 N. Y. 283, 292.

Wis.—Meyer v. Home Ins. Co., 127 Wis. 293, 106 NW 1087.

Can.—Mason v. Canada Agricultural Mut. Assur. Assoc., 18 U. C. C. P. (Ont.) 19, 25.

26. Horn v. Foster, 19 Ark. 346; Com. v. O'Grady, 4 Pa. Dist. 732; Ray v. Times Pub. Co., (Tex. Commn. A.) 12 SW (2d) 165, 166.

"In common parlance the terms 'perjury' and 'false swearing' are interchangeable." Ray v. Times Pub. Co., supra.

Charge of "false swearing" libelous or slanderous as meaning "perjury" see Libel and Slander § 145.

27. State v. Coleman, 117 La. 973, 42 S 471, 8 AnnCas 880; Com. v. O'Grady, 4 Pa. Dist. 732; Ray v. Times Pub. Co., (Tex. Commn. A.) 12 SW (2d) 165.

[a] **Distinct offenses.**—False swearing is an indictable offense, and a law denouncing false swearing does not necessarily cover perjury, it being a separate and distinct offense. State v. Coleman, 117 La. 973, 42 S 471, 8 AnnCas 880.

Distinctions stated see infra §§ 4, 5.

28. U. S. v. Aragon, 5 Philippine 469.

29. Dalrymple v. Lofton, 29 S. C. L. 588.

30. See Fowle v. Robins, 12 Mass. 498, 501 (a slander action where the court said: "The distinction taken in the English books between the words forsworn and perjured must have been founded on this, that the word perjured implied that the false oath was taken in a judicial proceeding; whereas, a man might be forsworn in an oath taken on some other occasion, when it could not amount to perjury. Accordingly, when other words are added, showing that the oath spoken of was taken in a judicial court, the word forsworn, with this explanation, has been considered as importing a charge of perjury").

31. U. S. v. Howard, 132 Fed. 325.

[a] **Element of a judicial proceeding** essential to perjury is not required in foreswearing. U. S. v. How-

[§ 4] **2. At Common Law.** At common law false swearing is a separate and indictable offense,[32] the distinction between it and perjury lying in the fact that the false oath in perjury must be in a judicial proceeding, whereas in false swearing it need not be in such a proceeding.[33] Perjury is stubborn and corrupt, while false swearing is merely untrue.[34]

[§ 5] **3. Under Statutes.** Under statutes making false swearing a specific crime,[35] it is a separate offense,[36] and a person violating a false swearing statute must be prosecuted thereunder and not under a general perjury statute.[37] Statutory false swearing differs from common-law perjury,[38] or perjury as defined under statutes declaratory of the common law,[39] in that the statement to constitute false swearing need not be taken in a judicial proceeding.[40] It differs from perjury as defined both at common law[41] and under statutes declaratory of or modifying the common-law definition,[42] in that the false statement must be material to constitute perjury but need not be material to constitute false swearing.[43] Under statutes defining both perjury and false swearing as separate offenses it has been said that a false statement in a judicial proceeding may be perjury but cannot be false swearing,[44] and that while the oath in perjury must be required by law, in false swearing it may be voluntary.[45] But under statutes defining false swearing but containing no definition of perjury[46] it has been stated that false swearing may be committed in a judicial proceeding.[47] It has been said that the gist of both statutory false swearing and perjury lies in the corrupt intent to swear falsely.[48]

Repeal. A statute defining and punishing false swearing does not impliedly repeal an earlier statute relative to perjury,[49] nor does a statute providing

ard, 132 Fed. 325.

32. Miller v. State, 15 Fla. 577, 585; Com. v. Williamson, 4 Gratt. (45 Va.) 554; Reg. v. Hodgkiss, L. R. 1 C. C. 212; Reg. v. Chapman, 2 C. & K. 846, 61 ECL 846, 1 Den. C. C. 432, 169 Reprint 314; Reg. v. Darby, 7 Mod. 100, 87 Reprint 1121; Ex p. Overton, 2 Rose 257; Rex v. Cole, 3 Ont. L. 389, 5 CanCrCas 330; Reg. v. Clement, 26 U. C. Q. B. (Ont.) 297.

[a] **False oath before clerk by one applying for a marriage license.**— Com. v. Williamson, 4 Gratt. (45 Va.) 554.

33. State v. Coleman, 117 La. 973, 975, 42 S 471, 8 AnnCas 880.

"The following definition of false swearing is in substance approvingly given in Bouvier's Dictionary and in Black's: One who takes an oath before a person authorized to administer an oath upon a matter of public interest is guilty of swearing. It would have been perjury if taken in judicial proceedings, as where a person makes an affidavit under the English bill of sale act. Bishop says that false swearing is less than perjury. Volume 2, § 14, 1029. McClain: False swearing which covers cases outside of common-law perjury. Volume 2, 852. Wharton: It is an indictable offense. Section 1269." State v. Coleman, supra.

34. Miller v. State, 15 Fla. 577, 585; U. S. v. Estrafia, 16 Philippine 520.

Corrupt intent as essential to statutory false swearing see infra § 5 text and note 48.

35. See statutory provisions.

36. Ind.—State v. Runyan, 130 Ind. 208, 29 NE 779.

La.—State v. Coleman, 117 La. 973, 42 S 471.

Mo.—State v. Carpenter, 164 Mo. 588, 65 SW 255; State v. Miller, 44 Mo. A. 159; State v. Boland, 12 Mo. A. 74.

Tex.—O'Bryan v. State, 27 Tex. A. 339, 11 SW 443; Steber v. State, 23 Tex. A. 176, 4 SW 880; Langford v. State, 9 Tex. A. 283.

Can.—Rex v. Nier, 9 Alta. L. 353, 25 CanCrCas 241, 28 DomLR 373, 33 WestLR 180.

[a] **In Kentucky** (1) perjury and false swearing were formerly considered distinct offenses. Com. v. Hinkle, 177 Ky. 22, 197 SW 455; Com. v. Scowden, 92 Ky. 120, 17 SW 205, 13 KyL 404; Com. v. Maynard, 91 Ky. 131, 15 SW 52, 12 KyL 710; Kerfoot v. Com., 89 Ky. 174, 12 SW 189, 11 KyL 391; Com. v. Powell, 2 Metc. 10. (2) But in a later case false swearing is said to be "a degree . . . of perjury." Weiner v. Com., 221 Ky. 455, 458, 298 SW 1075 [overr Com. v. Hinkle, supra; Com. v. Scowden, supra] ("the common-law offense of perjury was so circumscribed that it did not reach false statements willfully made under oath except they were made in a matter judicially pending, and upon a question that was material to the issue. The statute broadened such circumscribing limitations and punished the offender if he knowingly made false statements under any of the circumstances enumerated in the statute, even though some of them were not made in proceedings 'judicially pending' or material to an issue in such pending proceedings. The manifest purpose was to punish the practice of willfully and knowingly making false statements in any and all matters upon which the witness might be sworn, or on which he was required to be sworn. It will thus be seen that facts necessary to constitute perjury always include false swearing, but the converse is not true, since false swearing in many instances does not include perjury. The two crimes therefore belong to the same class, are directed to the same vicious practice, and the statutory extension of the instances in which the offender could be punished was for the accomplishment of the same purpose as was the common-law crime of perjury; i. e., to procure the truth from one under oath, and to punish him if he knowingly and willfully falsifies. We therefore conclude that, since our opinions, supra, treat the two offenses as kindred in their nature and purpose so as to require application of the rules of common-law procedure in trials for perjury to trials for statutory crime of false swearing, and in view of the further universal pronouncement by the courts that perjury includes false swearing, the latter is a degree of the former"). (3) "Every perjury includes false swearing, and if the prosecution should elect to do so he might prosecute for the statutory offense in any case in which he could prosecute for perjury." Com. v. Smock, 10 Ky. Op. 430.

37. State v. Runyan, 130 Ind. 208, 29 NE 779.

38. "Common-law perjury" defined see supra § 1.

39. See supra § 2.

40. Gammage v. State, 119 Ga. 380, 46 SE 409; Com. v. Powell, 2 Metc. (Ky.) 10; Stamper v. Com., 100 SW 286, 30 KyL 992; State v. Boland, 12 Mo. A. 74.

[a] **In Texas** (1) "false swearing," as distinguished from "perjury," as these terms have been defined by the legislature, is outside all pending cases, and has no reference to that character of oath or affirmation, but is confined to matters in which oaths or affirmations are made and taken when not required by law. Campbell v. State, 43 Tex. Cr. 602, 68 SW 513. To same effect Shipp v. State, 81 Tex. Cr. 328, 196 SW 840; Biard v. State, 54 Tex. Cr. 440, 113 SW 275; Campbell v. State, 43 Tex. Cr. 602, 68 SW 513; O'Bryan v. State, 27 Tex. A. 339, 11 SW 443; Langford v. State, 9 Tex. A. 283. (2) Character of perjury see supra § 2 text and note 4.

41. See supra § 1.

42. See supra § 2.

Statutes eliminating materiality as an element of perjury see supra § 2; and infra § 32.

43. Gammage v. State, 119 Ga. 380, 46 SE 409; Sullivan v. Com., 158 Ky. 536, 165 SW 696; Com. v. Ransdall, 153 Ky. 334, 155 SW 1117; Com. v. Powell, 2 Metc. (Ky.) 10; Stamper v. Com., 100 SW 286, 30 KyL 992; Milstead v. Com., 51 SW 451, 21 KyL 358; McClannohan v. Com., 10 Ky. Op. 72; State v. Boland, 12 Mo. A. 74; Wilson v. State, 49 Tex. Cr. 496, 497, 93 SW 547.

"We understand any false oath as to something past or present, affords the basis of false swearing. It is not necessary that it be on a material question, as in perjury." Wilson v. State, supra.

Materiality as element of perjury or false swearing see infra §§ 32-47.

44. Warren v. State, 57 Tex. Cr. 262, 122 SW 541; Langford v. State, 9 Tex. A. 283; State v. Smith, 63 Vt. 201, 22 A 604.

45. O'Bryan v. State, 27 Tex. A. 339, 11 SW 443; Davidson v. State, 22 Tex. A. 372, 3 SW 662.

"The distinction between perjury and false swearing is this, viz.: if the false statement be made in an oath or affidavit 'required by law,' or made in 'the course of a judicial proceeding,' the offense is perjury; if the false voluntary oath or affidavit is 'not required by law or made in the course of a judicial proceeding,' then it is false swearing. . . . Most clearly the clerk had authority to administer the oath, and a written declaration, or affidavit, as it is called, of Bratton, was a legitimate subject upon which to assign a charge of 'false swearing,' though not of perjury." Davidson v. State, supra.

46. See supra § 2 text and note 6.

47. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117.

[a] **For instance,** false swearing may be committed in a judicial proceeding but the materiality of the evidence is not essential to conviction. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117.

48. Williams v. Com., 113 Ky. 652, 655, 68 SW 871, 24 KyL 465.

"The crime of false swearing is committed under the statute when the defendant 'shall willfully and knowingly swear, depose, or give in evidence that which is false.' Kentucky Statutes, section 1174. The corrupt intent to swear falsely is the gist of the offense no less than of the crime of perjury." Williams v. Com., supra.

Corrupt intent as not essential to false swearing at common law see supra § 4 text and note 34.

49. State v. Coleman, 117 La. 973, 42 S 471, 8 AnnCas 880.

that false swearing in any investigation held under such statute shall be perjury impliedly repeal an earlier and general statute as to false swearing.[50] A statute defining and prescribing a punishment for false swearing in a particular proceeding impliedly repeals a general false swearing statute in so far as the latter was applicable to the particular offense so defined and punished.[51]

Willful and corrupt false swearing may be made a distinct offense under statute.[52]

[§ 6] **C. False Oath in Support of Claim against Government.**[53] A United States statute providing punishment for false swearing in support of claims against the government[54] has been construed as not creating or punishing the crime of perjury but as creating a new and distinct offense.[55]

Under a state statute specifically punishing false oaths in support of a specified class of claims against the government,[56] one making a false oath in support of such claim cannot be punished for perjury,[57] but must be prosecuted under the specific statute.[58]

[§ 7] **D. Falsifying Evidence.** Under a statute[59] making it a felony to attempt to induce another to give false testimony, and silent as to whether such testimony must be perjury, an offense is created apart from perjury or subornation of perjury,[60] and it is not necessary that the false testimony be material where the statute does not expressly so provide.[61]

II. NATURE OF OFFENSE

[By Douglas Robinson Gray]

[§ 8] **A. In General.** It has been said that perjury is malum in se,[62] and an offense at common law.[63]

[§ 9] **B. Felony or Misdemeanor.** While perjury was regarded as a misdemeanor at common law,[64]

[a] **Reason for rule.**—Since false swearing and perjury are distinct offenses, a statute defining and punishing false swearing does not impliedly repeal an earlier statute punishing perjury. State v. Coleman, 117 La. 973, 42 S 471 (Acts [1906] No. 118 p 200, relating to willful, corrupt, and false swearing, and providing that whoever shall be found guilty of that offense shall be punished, etc., does not repeal Rev. St. § 857, a general statute regarding perjury).

50. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117.

[a] **For example,** Act March 11, 1912 (L. [1912] c 18), providing that false swearing in any investigation of fires in the state by the insurance commissioner, fire marshal, or his assistants shall be perjury, does not repeal St. § 1174, punishing false swearing. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117.

51. Head v. Com., 165 Ky. 603, 177 SW 731.

[a] **For example,** St. (1915) §§ 1174, 1175, creating the offense of false swearing, and declaring that, where any written statement is sworn to as required by law, and it is false in any material part, the person making the statement with knowledge of its falsity shall be guilty of false swearing, are, as to false swearing to reports of banks, repealed by the act of 1912, as amended in 1914, embodied in St. (1915) § 165a, creating a banking department, requiring reports from banks verified by the oath of officers, and imposing penalties for making false reports recoverable in action by the attorney-general and repealing conflicting acts. Head v. Com., 165 Ky. 603, 177 SW 721.

[b] **Not a degree of false swearing.**—The crime of willfully making or transmitting a false bank report, as defined by a banking statute, is not a degree of false swearing but is a separate and distinct offense. Head v. Com., 165 Ky. 603, 117 SW 731.

52. See statutory provisions.

[a] **In Louisiana** "Act 118 of 1906 creates, defines, and punishes the crime of willful and corrupt false swearing. Section 2 of the act defines false swearing as follows: 'Be it further enacted, etc., that whenever any person shall testify under oath to a certain state of material facts upon a subject matter under investigation by a grand jury or committing magistrate, or in an affidavit presented to a district attorney as a basis for a bill of information, for the purpose of the procurement of the indictment or commitment of, or a bill of information against, any person charged with the violation of any criminal statute of this state, and who shall subsequently testify under oath to a materially different fact or state of facts . . . to which he had first testified, as above stated, on the trial of the person so charged, shall be deemed guilty of willful and corrupt false swearing.'" Sealy v. Dussel, 157 La. 485, 490, 102 S 581.

53. False affidavit in support of claim for pensions see Pensions § 52.

54. See statutory provisions.

55. U. S. v. Bailey, 9 Pet. (U. S.) 238, 254, 9 L. ed. 113 (holding also that one making a cross affidavit before a justice of the peace of the state, in order to establish a claim against the United States, is indictable under the act of congress passed March 1, 1823, to prevent false swearing touching public money, although such affidavit was not expressly authorized by an act of congress, but allowed by the secretary of the treasury to be made before a justice of the peace).

"That act does not create or punish the crime of perjury, technically considered; but it creates a new and substantive offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had judicial jurisdiction, so as to make the false swearing perjury. It would be sufficient, that it might be lawfully administered by the magistrate, and was not in violation of his official duty." U. S. v. Bailey, supra.

[a] **"Perjury," in Pension Act (1820) c 51 § 2,** declaring that any person who shall swear falsely in the premises and be thereof convicted shall suffer as for willful and corrupt perjury, does not mean the technical offense of perjury, but merely refers to it for the purpose of affixing the same punishment as for technical perjury. U. S. v. Elliot, 25 F. Cas. No. 15,044, 3 Mason 156.

Cross references:

Claim against government as matter in which perjury may be committed see infra § 71.

False swearing generally see supra §§ 3–5.

Offenses incident to making or procuring false claims against United States see United States [39 Cyc 769 et seq].

56. See statutory provisions.

57. State v. Runyan, 130 Ind. 208, 29 NE 779 (claim against township for damages by sheep killing dogs).

58. State v. Runyan, supra.

59. See statutory provisions.

[a] **In Ontario,** under a general law empowering the legislature to enact statutes for enforcing a liquor license law, the legislature lacks power to make the attempt to induce false evidence a statutory crime, such crime being already indictable at common law as subornation of perjury. Reg. v. Lawrence, 43 U. C. Q. B. 164.

60. Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175.

[a] **Illustration.**—Where an early statute, under the general title relating to perjury and subornation of perjury, provided that every person who shall, by the offer of any valuable consideration, attempt unlawfully to procure another to commit perjury as a witness in any cause, shall, upon conviction, be punished by imprisonment, etc., and the provision was incorporated into Pen. Code § 113 (Penal Law [Consol. Laws, c 40] § 2440), under the new title "Falsifying Evidence," and amended to provide that a person giving or offering to any witness or person about to be called as a witness any bribe, upon an understanding that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce a witness to give false testimony, or to withhold true testimony, is guilty of a felony, the intent was to make it an offense to induce another to testify falsely, even though it does not fall within the statutes relating to perjury. Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 21 LRANS 120, 17 Ann Cas 1175.

Attempt to suborn see infra §§ 196, 197.

Subornation see infra §§ 189–195.

61. Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175.

Materiality as element of perjury see infra §§ 32–47.

62. Anonymous, 1 F. Cas. No. 475, 1 Wash. C. C. 84; In re Spenser, 22 F. Cas. No. 13,234, 5 Sawy. 195, 197.

"Perjury is not only malum prohibitum, but malum in se. At both the civil and common law it was classed among the crimina falsi." In re Spenser, supra.

[a] **"Perjury is a heinous crime."**—Rex v. Johnson, 2 Show. 1, 4, 89 Reprint 735.

[b] **Perjury is an offense against public justice.**—Hoch v. Peo., 3 Mich. 552; Pegram v. Stoltz, 76 N. C. 349.

63. State v. Shaffner, 22 Del. 576, 69 A 1004. See also supra § 1.

Punishment at early common law see infra § 188.

64. Cal.—Ex p. McCarthy, 29 Cal. 395.

Ill.—Peo. v. Ashbrook, 276 Ill. 382, 387, 114 NE 922, 923 [cit Cyc].

La.—State v. Matlock, 48 La. Ann. 663, 19 S 669.

Miss.—Wile v. State, 60 Miss. 260, 262.

under the statutes of most jurisdictions[65] it is now a felony.[66]

III. ELEMENTS OF OFFENSE

[By Douglas Robinson Gray]

[§ 10] **A. In General.** Subject to common-law and statutory differences heretofore explained,[67] it may be stated generally that the elements of perjury are the statement,[68] its falsity[69] and materiality;[70] the oath, its authorization[71] and administration;[72] the matter or proceeding in which the statement and oath occur, which must be such as to come within the common-law or statutory definition of the offense;[73] and the criminal intent of deponent.[74] But neither the specific motive of accused[75] nor the prejudice resulting to another from the false statement[76] is an essential element of the crime. Reference to these elements, in whole or in part, frequently has been made by the courts as being essential to the offense both at common law[77] and under the statutes.[78]

False swearing.[79] The essential elements of false swearing, under statute,[80] have been said to consist in (1) a willful false oath (2) upon a matter as to which a party could legally be sworn, (3) administered by a person legally authorized to administer oaths.[81]

[§ 11] **B. Particular Elements—1. Statement[82]—a. In General.** Obviously, from the very nature of the definition of the crime,[83] some statement made or testimony given, under oath[84] and false,[85] is a necessary ingredient of perjury.[86] Several false statements made in the same proceeding constitute but one perjury.[87]

[§ 12] **b. Fact or Opinion—(1) In General.** To constitute perjury or false swearing[88] the false statement must be one of fact, and not of opinion.[89] But in so far as the existence or nonexistence of an opinion or belief is in itself a material matter of fact, a false statement of opinion or belief may con-

Mo.—State v. Terry, 30 Mo. 368; State v. Williams, 30 Mo. 364.

"Perjury was not a felony at common law." Peo. v. Ashbrook, supra.

"The crime of perjury was a misdemeanor at common law." Wile v. State, supra.

65. See statutory provisions.

66. Ark.—Nelson v. State, 32 Ark. 192.

Ga.—A. v. B., R. M. Charlt. 228.

Ky.—Com. v. Swanger, 108 Ky. 579, 57 SW 10, 22 KyL 276; Com. v. Powell, 2 Metc. 10.

La.—State v. Lazarus, 37 La. Ann. 401.

Mass.—Com. v. Smith, 11 Allen 243.

Miss.—Wile v. State, 60 Miss. 260.

Mo.—State v. Terry, 30 Mo. 368; State v. Williams, 30 Mo. 364.

N. C.—State v. Shaw, 117 N. C. 764, 23 SE 246.

"The statute has made it a graver offence, and it is now felony by implication." State v. Matlock, 48 La. Ann. 663, 664, 19 S 669.

67. See supra §§ 1, 2.

68. See infra §§ 11–18.

69. See infra §§ 19–22.

70. See infra §§ 32–47.

71. See infra §§ 49–52.

72. See infra §§ 77–94.

73. See infra §§ 53–60.

74. See infra §§ 23–30.

75. See infra § 31.

76. See infra § 48.

77. Del.—State v. Rash, 25 Del. 77, 78 A 405.

Ill.—Peo. v. Glenn, 294 Ill. 333, 128 NE 532.

Oh.—In re Franklin County, 5 OhS &CP 691, 7 OhNP 450.

Pa.—Com. v. Kuntz, 2 PaLJR 375, 4 PaLJ 163.

Tex.—Johnson v. State, 71 Tex. Cr. 428, 160 SW 964.

Eng.—Rex v. Dunn, 1 D. & R. 10, 16 ECL 10; Rex v. Aylett, 1 T. R. 63, 69, 99 Reprint 973 [quot State v. Wilson, 83 Wash. 419, 145 P 455, 456].

2 Bishop Cr. Proc. (3d ed) § 901 [quot Peo. v. Tatum, 60 Misc. 311, 112 NYS 36, 22 N. Y. Cr. 557].

78. Ala.—Goolsby v. State, 17 Ala. A. 545, 86 S 137.

Minn.—Schmidt v. Witherick, 29 Minn. 156, 12 NW 448.

N. Y.—Krauskopf v. Tallman, 38 App. Div. 273, 276, 56 NYS 967 [aff 170 N. Y. 561 mem, 62 NE 1096 mem, and quot Peo. v. Goodheim, 188 App. Div. 148, 176 NYS 468, 470]; Peo. v. Tillman, 63 Misc. 461, 118 NYS 442, 23 N. Y. Cr. 401 [rev on other grounds 139 App. Div. 572, 124 NYS 44, 25 N. Y. Cr. 32 (aff 201 N. Y. 598 mem, 95 NE 1136 mem)]; Peo. v. Osborne, 158 NYS 330.

N. D.—State v. Singleton, 53 N. D. 573, 207 NW 226.

Okl.—Campbell v. State, 23 Okl. Cr. 250, 214 P 738.

[a] **In the Philippine Islands,** "in order that a defendant may be convicted under article 321 of the Penal Code for giving false testimony, the following facts must be shown: First. The testimony must be given in a civil cause. Second. The testimony must relate to the issues presented in said cause. Third. The testimony must be false. Fourth. The false testimony must be given by the defendant knowing the same to be false. Fifth. Such testimony must be malicious and given with an intent to affect the issues presented in said cause." U. S. v. Aragon, 5 Philippine 469, 476.

[b] **In Porto Rico,** under statutory provisions, "wilfulness, falsity, lawful oath, judicial proceedings, absolute assertion, and materiality . . . are the elements of perjury." U. S. v. Santisteban, 10 Porto Rico Fed. 509, 510. To same effect Peo. v. Lopez, 8 Porto Rico 546; Peo. v. Pabon, 7 Porto Rico 379.

79. Defined and distinguished from "perjury" see supra §§ 3–5.

80. See statutory provisions; and supra § 5.

81. Com. v. Bradshaw, 210 Ky. 405, 276 SW 124; Com. v. Ransdall, 153 Ky. 334, 155 SW 1117; Stamper v. Com., 100 SW 286, 30 KyL 992.

82. Falsity see infra §§ 19–22.

Materiality see infra §§ 32–47.

Matter or proceeding in which made see infra §§ 53–60.

83. See supra § 1 et seq.

84. See infra § 77 et seq.

85. See infra § 19 et seq.

86. See cases passim infra §§ 12–18.

[a] **Philippine Act No. 1697 § 3** "does not impliedly require as an essential element of the crime of perjury that a defendant who is prosecuted for having violated these provisions should have testified twice in any case or in any investigation, his second testimony being contradictory of his first, but he can be charged and convicted of the crime of perjury if he willfully testifies, under oath, as provided in said section, to any material matter which he does not believe to be true." U. S. v. Estraña, 16 Philippine 520, 526.

87. Black v. State, 13 Ga. A. 541, 79 SE 173.

[a] **"Subsequent falsehoods under the same oath** do not make new perjuries, but only exhibit additional ways in which the perjury was committed." Black v. State, 13 Ga. A. 541, 543, 79 SE 173.

Acquittal of perjury respecting one statement as bar to prosecution for another statement in same proceeding see infra § 97.

88. Distinction between perjury and false swearing see supra §§ 4, 5.

89. U. S.—U. S. v. Demos, 291 Fed. 104; Nickell v. U. S., 161 Fed. 702, 88 CCA 562.

Cal.—In re Howell, 114 Cal. 250, 46 P 159; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40.

Ind.—Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 104 NE 579; State v. Henderson, 90 Ind. 406.

Ky.—Com. v. Bray, 123 Ky. 336, 96 SW 522, 29 KyL 757.

Mo.—State v. Fannon, 158 Mo. 149, 59 SW 75.

Mont.—State v. Roosevelt County Twentieth Judicial Dist. Ct., 75 Mont. 476, 244 P 280.

Okl.—Ex p. Ellis, 3 Okl. Cr. 220, 105 P 184, 25 LRANS 653, AnnCas1912A 863.

Or.—Trullinger v. Dooly, 125 Or. 269, 265 P 1117, 266 P 909.

Porto Rico.—Peo. v. Acevedo, 10 Porto Rico 30.

Eng.—Rex v. Crespigny, 1 Esp. 280, 170 Reprint 357.

"Perjury is always of some matter of fact." U. S. v. Moore, 26 F. Cas. No. 15,803, 2 Lowell 232, 236.

[a] **Aim of the statute** was not to repress freedom of thought, or in anywise to control the exercise of the judgment. But it was to prevent the giving, in evidence or sworn statements, a verity to facts which did not exist, upon which judgment and mental speculation were to be indulged. Com. v. Bray, 123 Ky. 336, 338, 96 SW 522, 29 KyL 757 ("where the statement which is the basis of the accusation is a matter of construction, or a deduction from given facts, that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts, cannot constitute it false swearing").

[b] **Statement of what would have occurred** if one automobile had not struck another is a mere expression of opinion which cannot be perjury whether right or wrong. Trullinger v. Dooly, 125 Or. 269, 265 P 1117, 266 P 909.

[c] **Value.**—State v. Fannon, 158 Mo. 149, 59 SW 75.

[d] **Held statement of fact.**—A statement that another made no attempt to bribe the speaker to conceal evidence, made no promise to pay him money, and never did offer or promise him money on a certain day is not a mere conclusion. Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173.

False statement of knowledge or belief see infra § 19 text and note 23.

stitute the offense.[90]

An honest but erroneous expression of opinion is not perjury.[91]

[§ 13] **(2) Conclusions of Law.**[92] Ordinarily a statement as to the legal effect of certain facts, or mere conclusion of law, cannot constitute perjury.[93] Thus a misconception or mistake in swearing to the construction of a written instrument is not sufficient to warrant a conviction of perjury.[94] Whether a statement is one of fact or law will depend upon the nature of the statement and the circumstances of the case.[95] But a false statement of the opinion of the witness as to the validity of a contract may be perjury.[96]

While an expert's opinion as to law may be perjury if intentionally false,[97] his honest but erroneous opinion as to law is not perjury.[98]

[§ 14] **(3) Memory.** A statement that one does not remember certain facts, when he really does remember them, may be perjury.[99] Conversely, it would seem that swearing one remembers something, when in fact he has no recollection of it, is also perjury.[1]

[§ 15] **c. Promissory Statements.**[2] A promissory statement cannot ordinarily[3] constitute perjury or false swearing.[4]

[§ 16] **d. Form of Question and Answer.**[5] Even though a question is too general in form to serve as

90. U. S.—U. S. v. Moore, 26 F. Cas. No. 15,803, 2 Lowell 232.

Cal.—In re Howell, 114 Cal. 250, 46 P 159; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40.

Ga.—Stewart v. State, 37 Ga. A. 386, 140 SE 415.

Ky.—Com. v. Bray, 123 Ky. 336, 96 SW 522, 29 KyL 757; Com. v. Edison, 9 SW 161, 10 KyL 340.

Mass.—Com. v. Dunham, Thach. Cr. 519.

N. Y.—Peo. v. Doody, 172 N. Y. 165, 64 NE 807 [aff 72 App. Div. 372, 76 NYS 606]; Peo. v. Reed, 66 Misc. 425, 123 NYS 305.

S. C.—Patrick v. Smoke, 34 S. C. L. 147.

Utah.—U. S. v. Brown, 6 Utah 115, 21 P 461.

W. Va.—State v. Berkeley, 41 W. Va. 455, 23 SE 608.

Eng.—Reg. v. Schlesinger, 10 Q. B. 670, 2 Cox C. C. 200, 59 ECL 670, 116 Reprint 255; Rex v. Pedley, Leach C. C. 325, 168 Reprint 265.

See Peo. v. Acevedo, 10 Porto Rico 30, 32 (an "opinion, even though sworn to falsely, would not constitute the crime of perjury, which consists in stating as true under oath any material matter knowing it to be false").

"Belief may be a fact." U. S. v. Moore, 26 F. Cas. No. 15,803, 2 Lowell 232, 236.

[a] **Thus** (1) "a witness may swear falsely or commit perjury with reference thereto, in stating on oath that such and such was his opinion concerning a matter about which his opinion became a fact, and was receivable as such as a matter of evidence, when in truth such was not his opinion, and he wilfully, knowingly, and corruptly, falsely stated that as his opinion which was not his opinion." Com. v. Bray, 123 Ky. 336, 338, 96 SW 522, 29 KyL 757. (2) "It may be difficult to prove, but it is perjury for a witness to testify that he thinks or believes a certain thing to be true when he does not so think or believe it." Peo. v. Reed, 66 Misc. 425, 431, 123 NYS 305. To same effect Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Herring v. State, 119 Ga. 709, 46 SE 876 [quot Stewart v. State, 37 Ga. A. 386, 140 SE 415, 416]. (3) "A witness may commit perjury by falsely and corruptly stating to be what is not his opinion of a matter about which the law authorizes witnesses to give their opinion, and the jury and court to act upon them." Com. v. Edison, 9 SW 161, 10 KyL 340.

[b] **Belief in polygamy.**—U. S. v. Brown, 6 Utah 115, 21 P 461.

[c] **Whether or not a person was drunk** may be a matter of fact forming the subject matter of perjury. Com. v. Edison, 9 SW 161, 10 KyL 340.

Oath in form on information and belief see infra § 90.

Verification of pleadings on belief see infra § 75 text and note 20.

91. In re Howell, 114 Cal. 250, 46 P 159; Smith v. Hubbell, 142 Mich. 637, 106 NW 547.

[a] **Value and collectability of debts.**—In re Howell, 114 Cal. 250, 46 P 159.

92. Advice of counsel as bearing on intent see infra § 30.

93. U. S.—U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277.

Ark.—Harp v. State, 59 Ark. 113, 26 SW 714.

Cal.—Bell v. Brown, 22 Cal. 671.

Ind.—State v. Henderson, 90 Ind. 406, 408.

N. Y.—Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181.

Porto Rico.—Peo. v. Acevedo, 10 Porto Rico 30.

Tenn.—Goad v. State, 106 Tenn. 175, 161 SW 79.

Tex.—Schoenfeld v. State, 56 Tex. Cr. 103, 119 SW 101, 133 AmSR 956, 22 LRANS 1216.

"Where a witness is called to testify solely in reference to facts, and where it is not a case calling for expert evidence as to questions of law, the witness cannot be guilty of perjury in giving, voluntarily or otherwise, an opinion upon a point of law, or, what is the same thing, an opinion concerning the legal consequences of any admitted or disputed fact." State v. Henderson, supra.

[a] **Opinion respecting capacity of another party to be registered as an elector.**—Peo. v. Acevedo, 10 Porto Rico 30.

94. U. S.—Anonymous, 1 F. Cas. No. 475, 1 Wash. C. C. 84.

Ind.—State v. Woolverton, 8 Blackf. 452.

N. Y.—Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181, 8 NY WklyDig 547.

Tex.—Schoenfeld v. State, 56 Tex. Cr. 103, 119 SW 101, 133 AmSR 956, 22 LRANS 1216.

Eng.—Rex v. Crespigny, 1 Esp. 280, 170 Reprint 357.

[a] **Contract.**—Where a witness denies that he has made a contract obligating him to perform certain acts, but does not deny any specific statements or terms, perjury cannot be assigned on such denial because it is nothing more than the speaker's construction of the contract. Schoenfeld v. State, 56 Tex. Cr. 103, 119 SW 101, 133 AmSR 956, 22 LRANS 1216.

[b] **Deed.**—Perjury cannot be assigned upon mere opinions as to the construction of a deed. State v. Woolverton, 8 Blackf. (Ind.) 452; Rex v. Crespigny, 1 Esp. 280, 170 Reprint 357.

95. See cases infra this note.

[a] **Conviction of felony.**—A statement as to whether a witness had been convicted of felony was a statement of fact and not a mere conclusion of law, and therefore a charge of perjury could be predicated on its falsity. Peo. v. Paden, 71 Cal. A. 247, 234 P 920.

[b] **Statement that person "stole."**—Falsely swearing that B "feloniously stole, took," etc., is an oath as to facts, and not merely as to a conclusion of law. Hoch v. Peo., 3 Mich. 552.

96. Peo. v. Reed, 66 Misc. 425, 123 NYS 305 (a statement that a witness believes a certain contract to be valid, if in fact he does not so believe, is a false statement of the fact of the witness' opinion and may constitute perjury).

97. State v. Henderson, 90 Ind. 406, 408.

"A jurist, called in a proper case to testify as to a foreign law, might be guilty of perjury, if he swore falsely, the same as a witness testifying as to a fact." State v. Henderson, supra.

98. Smith v. Hubbell, 142 Mich. 637, 106 NW 547.

[a] **Village attorney's statement that bill was a legal charge against village.**—Smith v. Hubbell, 142 Mich. 637, 106 NW 547.

99. State v. Adams, 119 Kan. 509, 240 P 955; Peo. v. Doody, 172 N. Y. 165, 64 NE 807 [aff 72 App. Div. 372, 76 NYS 606]; Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120.

"We have no doubt that a charge of perjury may be based upon the testimony of a witness upon a judicial trial who has sworn that he did not remember the facts material to the inquiry, if it be shown by competent proof that he did remember them. It may be difficult to prove the charge in many cases, but in this case there was no lack of proof." Peo. v. Doody, 172 N. Y. 165, 173, 64 NE 807.

1. See Carroll v. Charter Oak Ins. Co., 1 Abb. Dec. (N. Y.) 316, 323, 10 AbbPrNS 166 [aff 40 Barb. 292] (where, in a suit on a contract, the court said: "It is also insisted by the defendants, that the judge erred in charging the jury that Burns could not truly swear to the notice unless he recollected it, because it was an affirmative fact, and that unless he recollected it, he had committed perjury in swearing to it. I discover no ground of objection to this portion of the charge. Clearly, it was an affirmative fact in giving notice—an act done by the party, which he swore to positively; and he could not shield himself from a charge of perjury, established by satisfactory evidence, by claiming a want of memory. His positive affirmation that he gave notice would not be in accordance with the truth, if he simply did not recollect. And if he swore without recollection, then it was legal false swearing"); Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120 (dictum).

2. Official oaths see infra § 17.

3. Under statutes see infra § 17 text and notes 13, 14.

4. U. S. v. Glover, 25 F. Cas. No. 15,218, 4 Cranch C. C. 190; Jackson v. State, 90 Ark. 577, 119 SW 1129; Com. v. Hinkle, 177 Ky. 22, 197 SW 455; State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

[a] **Illustration.**—To bring an affidavit within a statute creating the offense of false swearing it must relate to a material existing fact, and a promissory statement which the court had no right to require of affiant is insufficient. Com. v. Hinkle, 177 Ky. 22, 197 SW 455.

[b] **Affidavit that appeal is not taken for purposes of delay** is promissory in its nature and cannot constitute perjury. Jackson v. State, 90 Ark. 577, 119 SW 1129.

[c] **An insolvent's oath to deliver up his property** cannot be the subject of an indictment for perjury. U. S. v. Glover, 25 F. Cas. No. 15,218, 4 Cranch C. C. 190.

Distinction between perjury and false swearing see supra §§ 4, 5.

5. Form of oath see infra §§ 88-90.

a basis for impeachment of the witness,[6] a false answer thereto may constitute perjury.[7] An indirect answer to a question may constitute perjury.[8]

[§ 17] **e. Official Oaths.**[9] In accordance with the general rule that promissory statements cannot serve as the basis for a charge of perjury,[10] it is ordinarily held that an official oath cannot be the subject of perjury in so far as such oath involves statements purely promissory.[11] But in so far as an official oath involves statements of present facts, it may serve as the predicate for perjury.[12]

Under statute expressly providing that violation of an official oath shall constitute perjury,[13] one coming within the scope of the statute may be convicted of perjury for violation of the promissory provisions of an official oath.[14]

[§ 18] **f. Tax Returns.**[15] An affidavit that a tax return contains all income subject to tax under the law is perjury if the taxpayer intentionally excludes income which he believes to be and which is subject to tax,[16] but not if he excludes income in law subject to tax which he honestly but mistakenly believes not subject to tax.[17] An erroneous computation of the tax cannot constitute perjury.[18]

[§ 19] **2. Falsity—a. In General.** To constitute perjury or false swearing[19] the matter sworn to must be false in fact.[20] But perjury may be committed with respect to a statement true in fact where defendant falsely asserts that he knows it to be true when he really believes it to be false,[21] or lacks any

6. See Witnesses [40 Cyc 2626 et seq].

7. McDonough v. State, 47 Tex. Cr. 227, 233, 84 SW 594, 122 AmSR 684.

"The court having jurisdiction to make the inquiry, in general terms, any deliberate and wilful false statement of a witness in answer to questions concerning the same would constitute a good assignment for perjury; and this, although the question might be too general to form the basis for the impeachment of the witness. The contrary doctrine announced in Meeks v. State, 32 Tex. Cr. 420, 24 SW 98, followed by McMurtry v. State, 38 Tex. Cr. 521, 43 SW 1010, and Higgins v. State, 38 Tex. Cr. 539, 43 SW 1012, is hereby overruled." McDonough v. State, supra.

[a] **Effect of generality of question.**—A willful false statement in answer to a question propounded constitutes a good assignment of perjury, although the question asked is too general to form a basis for the impeachment of the witness. The generality of the question may, however, be a circumstance to show that the evidence was not given willfully and deliberately—that it was given under a mistake or misapprehension; but a witness having boldly answered a question and answered it falsely, as well as deliberately and willfully, cannot afterward avail himself of the generality of the question to defeat a prosecution for perjury. McDonough v. State, 47 Tex. Cr. 227, 84 SW 594, 122 AmSR 684.

8. State v. Kellis, 193 Ind. 619, 141 NE 337.

[a] **Negative answer.**—Where a witness was asked if he had heard certain shots fired on a certain date in New Albany, and, instead of answering the question directly, stated that he was not in New Albany on such date, his reply, although not couched in direct terms, amounted to a negative answer to the question and could constitute perjury. State v. Kellis, 193 Ind. 619, 141 NE 337.

9. Official oaths in particular matters or proceedings see passim infra §§ 65-76.

10. See supra § 15.

11. State v. Dayton, 23 N. J. L. 49, 53 AmD 270. But see Norton v. State, 5 Ga. A. 586, 63 SE 662 (where the court held election officials, who promised under oath to conduct an election impartially and then without further oath certified false returns, guilty of false swearing; and in the course of its opinion stated that a "promissory oath" could be perjury or false swearing, as in the case of a witness who promised to tell the truth and then lied, the court not recognizing the distinction that in the case of the witness the statements are of present or past facts even though the oath is promissory, whereas in the case before the court both the oath and the statements made thereunder were promissory).

12. U. S. v. Neale, 14 Fed. 767; State v. Roberts, 22 Wash. 1, 60 P 65.

[a] **Judge of election.**—A false statement by one in taking oath as judge of election that he was not interested in any bet on such election may constitute perjury. State v. Roberts, 22 Wash. 1, 60 P 65.

[b] **Ownership of stock qualifying deponent to serve as bank director.**—U. S. v. Neale, 14 Fed. 767.

13. See statutory provisions.

14. Com. v. Megee, 2 Phila. (Pa.) 396.

[a] **Bank director.**—Under a statute expressly providing that a bank director violating his official oath should be deemed guilty of perjury, a director who took oath of office not to deal in promissory notes on his personal account, and thereafter did deal in such securities for his personal account, was guilty of perjury. Com. v. Megee, 2 Phila. (Pa.) 396.

15. Tax proceedings as matter or proceeding in which perjury can be committed see infra § 74.

16. U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277.

17. U. S. v. Smith, supra.

18. U. S. v. Demos, 291 Fed. 104.

[a] **Illustration.**—Even if the form of an affidavit to a tax return is sufficient to sustain a charge of perjury if the affidavit was false, an affidavit to a return which contained a correct statement of the items listed for taxation, but made an erroneous calculation of the tax based on those items, does not support a charge of perjury. U. S. v. Demos, 291 Fed. 104.

19. Distinction between perjury and false swearing see supra §§ 4, 5.

20. U. S.—U. S. v. Neale, 14 Fed. 767.

Ark.—Harp v. State, 59 Ark. 113, 26 SW 714.

Cal.—Peo. v. Wong Fook Sam, 146 Cal. 114, 79 P 840; Ex p. Meyer, 40 P 953.

Del.—State v. Thomas, 25 Del. 20, 78 A 640.

Ga.—Thomas v. State, 71 Ga. 252.

Ind.—Rothchild v. State, 165 NE 60; Indianapolis Tract., etc., Co. v. Henby, 178 Ind. 239, 97 NE 313, 319 [cit Cyc].

Iowa.—State v. Hulsman, 147 Iowa 572, 126 NW 700.

Ky.—Weiner v. Com., 221 Ky. 455, 298 SW 1075, 1077 [quot Cyc]; Yarberry v. Com., 209 Ky. 15, 272 SW 24; Com. v. Morton, 145 Ky. 521, 140 SW 685; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683.

Mass.—Com. v. Dunham, Thach. Cr. 519.

N. Y.—Peo. v. Corrigan, 129 App. Div. 62, 113 NYS 504, 23 N. Y. Cr. 51 [aff 195 N. Y. 1, 87 NE 792]; Peo. v. Dishler, 38 Hun 175, 4 N. Y. Cr. 188; Peo. v. Tillman, 63 Misc. 461, 118 NYS 442, 23 N. Y. Cr. 401 [rev on other grounds 139 App. Div. 572, 124 NYS 44, 25 N. Y. Cr. 32 (aff 201 N. Y. 598 mem, 95 NE 1136 mem)]; Peo. v. Tatum, 60 Misc. 311, 112 NYS 36, 22 N. Y. Cr. 557.

N. C.—State v. Houston, 103 N. C. 383, 9 SE 669; State v. Lawson, 98 N. C. 759, 4 SE 134.

Oh.—Vinson v. State, 115 Oh. St. 304, 152 NE 669; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450.

Okl.—Pate v. State, 10 Okl. Cr. 100, 133 P 1132.

Or.—Trullinger v. Dooly, 125 Or. 269, 265 P 1117, 266 P 909.

Pa.—Com. v. Clark, 157 Pa. 257, 27 A 723.

Philippine.—U. S. v. Aragon, 5 Philippine 469.

Porto Rico.—U. S. v. Santisteban, 10 Porto Rico Fed. 509.

S. C.—State v. Cockran, 17 S. C. L. 50.

Tex.—Waddle v. State, 69 Tex. Cr. 334, 153 SW 882; Butler v. State, 36 Tex. Cr. 444, 37 SW 746.

Utah.—U. S. v. Brown, 6 Utah 115, 21 P 461.

Vt.—State v. Trask, 42 Vt. 152; State v. J. B., 1 Tyler 269.

Wis.—Sommers v. Hamburger, 91 Wis. 107, 64 NW 880.

Eng.—Rex v. De Beauvoir, 7 C. & P. 17, 32 ECL 477, 173 Reprint 8.

Can.—Rex v. Moraes, (B. C.) 12 CanCrCas 145, 5 WestLR 285.

[a] **"False"** means "false in fact" as distinct from "legal falsity." Peo. v. Wong Fook Sam, 146 Cal. 114, 79 P 848.

[b] **"Drawing an ax."**—Before one can be convicted of falsely swearing in a prosecution for breach of the peace that he did not draw an ax on a certain party, it must appear that accused's act of drawing the ax amounted to an "assault," which is defined as an attempt or demonstration or effort, in striking distance, to strike another, although the person threatened may not be actually stricken, and mere proof that accused while considerably beyond striking distance had an ax in his hand is not sufficient to show that he "drew an ax" in the sense intended in a prosecution for breach of the peace. Yarberry v. Com., 209 Ky. 15, 272 SW 24.

[c] **Falsity shown.**—(1) If an importer, making affidavit that nothing had been concealed or suppressed whereby the United States might be defrauded, had knowledge of any document which, if known, would have led the United States to fix the customs duties higher than those based on the values stated in the consular invoice, his statement was so far false as to constitute perjury even though such suppressed document was not the usual consular invoice. U. S. v. Salen, 216 Fed. 420. (2) Where a third person executed to accused a mortgage note for six hundred and fifty dollars, without consideration, such six hundred and fifty dollar note being given merely to prevent creditors from levying on a crop, and also gave an unsecured note for eighty dollars, the testimony of accused on the examining trial of the third person for disposing of mortgaged property that the third person owed him the six hundred and fifty dollar note was false, and sustained a charge of perjury. Waddle v. State, 69 Tex. Cr. 334, 153 SW 882.

21. Ind.—State v. Cruikshank, 6 Blackf. 62.

Ky.—Weiner v. Com., 221 Ky. 455,

knowledge of its truth or falsity,[22] the perjury in such cases resting upon the false statement of affiant's knowledge or belief.[23] To constitute perjury it is not essential that the statement be false in all respects, providing it is false in at least one material[24] respect.[25]

A statement substantially true but literally false is not necessarily perjury.[26]

[§ 20] **b. Ambiguous Statements.** A statement true in one sense and false in another is not perjury unless false in the sense used by accused.[27] But a defendant using unambiguous language in an unauthorized and twisted sense cannot escape conviction on the specious plea that his statement was true in the sense used.[28]

[§ 21] **c. Half Truths.** Neither perjury[29] nor false swearing[30] can be assigned upon statements literally true, although not the whole truth touching the matter,[31] especially where accused sets forth the whole truth immediately after making the incomplete statement.[32] But it has been held that, where a witness takes oath to tell the whole truth, a half truth may constitute perjury.[33]

298 SW 1075.

N. H.—State v. Gates, 17 N. H. 373.

N. Y.—Peo. v. McKinney, 3 Park. Cr. 510.

Eng.—Rex v. Edwards, 1 Russell Cr. 293; 1 Hawkins P. C. c 69 § 6.

"Where a man swears that a thing is so or that he believes it to be so, when, in truth, he does not believe it to be so, the oath is false though the fact really be as stated." State v. Cruikshank, 6 Blackf. (Ind.) 62, 63.

False statement honestly believed to be true see infra § 27.

22. Ga.—Davis v. State, 7 Ga. A. 680, 67 SE 839.

Kan.—State v. Brooks, 33 Kan. 708, 7 P 591 (dictum).

Ky.—Com. v. Miles, 140 Ky. 577, 131 SW 385, 140 AmSR 401.

N. Y.—Peo. v. McKinney, 3 Park. Cr. 510.

N. C.—State v. Knox, 61 N. C. 312.

Pa.—Com. v. Cornish, 6 Binn. 249; Com. v. O'Grady, 4 Pa. Dist. 732.

But see Rex v. Hinton, 3 Mod. 122, 87 Reprint 78 (where the court said: "There is a difference when a man swears a thing which is true in fact, and yet he doth not know it to be so, and to swear a thing to be true which is really false; the first is perjury before God, and the other is an offence of which the law takes notice").

"If one willfully and corruptly swears to a fact as of his own knowledge, when he in truth had not the knowledge, it is perjury, if the matter be under judicial investigation, and the testimony be material to the issue. Nor does it matter that the statement be true, if the witness did not know it to be so." Com. v. Miles, 140 Ky. 577, 579, 131 SW 385, 140 AmSR 401.

[a] **Thus,** where a witness testified as of his own knowledge that a certain person was not in a certain church at a specified time, and the witness neither knew nor had reasonable grounds for believing that such person was not in such church at such time, the witness was guilty of perjury even though the person was in truth absent as stated. Com. v. Miles, 140 Ky. 577, 131 SW 385, 140 AmSR 401.

23. Davis v. State, 7 Ga. A. 680, 67 SE 839.

Expressions of opinion see supra §§ 12-14.

24. Materiality as element of perjury see infra §§ 32-47.

25. Cox v. State, 164 Ark. 126, 261 SW 303; State v. Jones, 185 Ind. 234, 113 NE 755, 1 ALR 1136.

[a] **Application for marriage license.**—To constitute perjury in making an affidavit for a marriage license it was not necessary that all the statements in the affidavit be false, it being sufficient that the material statement as to the age of an infant party to the marriage was false. Cox v. State, 164 Ark. 126, 261 SW 303.

[b] **Where, in an affidavit for continuance,** defendant swore that facts as to which witnesses would testify were true, when they were in fact false to his knowledge, this constituted perjury, even though the further statement in such affidavit that the witnesses would testify to such facts was true. State v. Jones, 185 Ind. 234, 113 NE 755, 1 ALR 1136.

26. Vinson v. State, 115 Oh. St. 304, 152 NE 669.

[a] **"Check" called "cash."**—An oath by a savings and loan company official to an annual report to a state officer as to cash on hand, which included the amount of a check as part of the cash, the check being one which the official reasonably believed good, was not perjury. Vinson v. State, 115 Oh. St. 304, 152 NE 669.

Half truths see infra § 21.

27. Rex v. Hayford, 14 Sask. L. 375, 62 DomLR 90, 35 CanCrCas 293, [1921] 2 WestWkly 990. See Lafontaine v. Fournier, 48 Que. Super. 113.

[a] **Double meaning of "agreement."**—Where defendant denied that he had made a certain agreement, and the facts were that he had gone through the form of making such agreement but it was void and not a legal or binding agreement because made on Sunday in violation of statute, defendant may have meant that he had made no "agreement" in the technical legal sense of the word, and therefore could not be convicted of perjury in the absence of proof that he had used the word "agreement" in its popular, and not in its technical, sense. Rex v. Hayford, 14 Sask. L. 375, 62 DomLR 90, 35 CanCrCas 293, [1921] 2 WestWkly 990.

28. Barnett v. State, 89 Ala. 165, 7 S 414; U. S. v. Brown, 6 Utah 115, 21 P 461.

[a] **Illustration.**—Where defendant was being examined as to his qualifications to act as a grand juror, a person believing in polygamy being disqualified, and stated that he did not "believe" that polygamy was right, his statement was false where he did believe it right, and could not be deemed true on the specious quibble that defendant did not "believe" polygamy to be right but went beyond "belief" and "knew" it to be right. U. S. v. Brown, 6 Utah 115, 21 P 461.

[b] **"Signature" including "mark."**—Where a person is indicted for perjury in falsely testifying that another person by false pretenses obtained his signature to a paper, it is no defense that defendant's signature consisted in making his mark only. Barnett v. State, 89 Ala. 165, 7 S 414.

29. Peo. v. Criscuoli, 164 App. Div. 119, 149 NYS 819, 32 N. Y. Cr. 172; Peo. v. Gillette, 126 App. Div. 665, 111 NYS 133, 22 N. Y. Cr. 400; Lamden v. State, 5 Humphr. (Tenn.) 83.

[a] **Denial of payment.**—An oath that certain notes were due and unpaid, and that deponent had received nothing in payment thereof, does not negative the existence and justice of a set-off. Lamden v. State, 5 Humphr. (Tenn.) 83.

[b] **Not subpœnaed "today."**—A witness does not commit perjury in testifying that he was not subpœnaed "today," when he was subpœnaed for the day before and merely to return on the day in question, his statement being literally true and not amounting to a statement that he was never subpœnaed at all. Peo. v. Criscuoli, 164 App. Div. 119, 149 NYS 819, 32 N. Y. Cr. 172.

30. Weiner v. Com., 221 Ky. 455, 298 SW 1075. But see Jennings v. Com., 222 Ky. 95, 300 SW 353 (where defendant stated in an affidavit to secure special registration for voting that on the regular registration day "he was ill and unable to attend the place of registration," and the statement of fact that he was ill was literally true because he had been ill for part of such day, but the court sustained a conviction of false swearing on the theory that defendant's statement was false because he was well part of the day, the court reading into the affidavit that portion of the Registration Act which specified illness as an excuse where the voter was "ill during said time," and construing "during" to mean "all during" such time).

[a] **Illustration.**—Where defendant was asked as a witness: "Did you know that a part of your tobacco was left in the barn?" and answered: "No; I did not," proof that there was left in the barn tobacco belonging jointly to defendant's wife and her tenant, in which defendant had no proprietary interest, was not sufficient to convict defendant of having sworn falsely in a civil suit against him and his wife for services rendered by a third party in connection with tobacco grown on a farm of which defendant was manager and his wife owner. Had the question referred to "the" tobacco, instead of "your" tobacco, the answer would have been false. But as it referred to "your"—that is, defendant's—tobacco, and he personally owned no tobacco, his answer was literally true and could not constitute false swearing. Weiner v. Com., 221 Ky. 455, 298 SW 1075.

31. Statement substantially true but literally false see supra § 19 text and note 26.

32. Peo. v. Gillette, 126 App. Div. 665, 111 NYS 133, 22 N. Y. Cr. 400.

[a] **For instance,** where a witness was asked if a certain bank account was his personal account and answered in the affirmative, which was literally true since the account was in his name as an individual, perjury could not be assigned thereon even though the money in the account was a trust fund, because: First, the statement was literally true; and second, shortly after and before leaving the stand the witness went on to explain fully the trustee nature of his interest in such account, and thereby corrected any deception resulting from his literally true but incomplete answer. Peo. v. Gillette, 126 App. Div. 665, 111 NYS 133, 22 N. Y. Cr. 400.

Correction of false testimony generally see infra § 22.

33. Flowers v. State, 13 Okl. Cr. 221, 163 P 558; Ostendorf v. State, 8 Okl. Cr. 360, 128 P 143.

[a] **Suppression of truth.**—"When a person is placed in a position where it is his duty to tell the entire truth, and he willfully suppresses part of it, this is just as criminal in morals and in law as an affirmative statement of a falsehood. It was for this crime that Ananias and Sapphira died. Their crime consisted in not telling all of the truth when they should have done so." Ostendorf v. State, 8 Okl. Cr. 360, 386, 128 P 143. To same

[§ 22] **d. False Statement Subsequently Corrected.** Perjury will not be predicated upon false statements corrected before submission of the case in which made,[34] especially where the statement as originally made was more incomplete than literally untrue.[35] Even a bona fide but incompleted attempt to correct false testimony may show absence of the criminal intent essential to perjury.[36]

[§ 23] **3. Knowledge and Intent[37]—a. In General.** To constitute perjury or false swearing[38] the false statement must be made with criminal intent.[39] In other words, the false statement must be made with intent to deceive;[40] the mens rea, or guilty knowledge, must be present,[41] and the statement must be willfully,[42] deliberately,[43] knowingly,[44] and

effect Flowers v. State, 13 Okl. Cr. 221, 163 P 558.

34. Bijur v. Bendix, 285 Fed. 974; Brannen v. State, 94 Fla. 656, 114 S 429; Henry v. Hamilton, 7 Blackf. (Ind.) 506; Peo. v. Brill, 100 Misc. 92, 165 NYS 65.

[a] **Reasons for rule.**—(1) "A judicial investigation or trial has for its sole object the ascertainment of the truth that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury." Peo. v. Gillette, 126 App. Div. 665, 673, 111 NYS 133, 22 N. Y. Cr. 400 [quot Brannen v. State, 94 Fla. 656, 114 S 429, 431]. (2) "The false assertion, after being explained or corrected by the witness, formed no part of his testimony; and cannot be brought forward to sustain a plea of justification charging him with perjury." Henry v. Hamilton, 7 Blackf. (Ind.) 506, 509.

35. See supra § 21 text and note 32.

36. Thrasher v. State, (Okl. Cr.) 237 P 139.

[a] **Dissuaded by attorneys.**—Where defendant testified that a party accused of homicide was "constantly" on her porch from 7:30 P. M. to 10 P. M., when as a matter of fact she merely saw him there at 7:30 and again on her return at 10, and assumed that he stayed there in the interval, and after leaving the stand without explaining told her attorneys the facts and expressed a desire to return so as to correct her testimony but was dissuaded by such attorneys, who told her it was unimportant, she was not guilty of perjury in her incorrect but honest statement, assuming she had in good faith desired to correct it. Thrasher v. State, (Okl. Cr.) 237 P 139.

Criminal intent generally see infra §§ 23–30.

37. Intent to use affidavit as essential to perjury in making false affidavit see infra § 58.

Knowledge of materiality see infra § 47.

38. Distinction between perjury and false swearing see supra §§ 4, 5.

39. U. S.—U. S. v. Neale, 14 Fed. 767; U. S. v. Babcock, 24 F. Cas. No. 14,488, 4 McLean 113; U. S. v. Conner, 25 F. Cas. No. 14,847, 3 McLean 573; U. S. v. Moore, 26 F. Cas. No. 15,803, 2 Lowell 232; U. S. v. Shellmire, 27 F. Cas. No. 16,271, Baldw. 370; U. S. v. Smith, 27 F. Cas. No. 16,336; U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277; U. S. v. Stanley, 27 F. Cas. No. 16,376, 6 McLean 409.

Ala.—Green v. State, 41 Ala. 419; Ogletree v. State, 28 Ala. 693.

Ariz.—Ayers v. State, 20 Ariz. 189, 178 P 782.

Ark.—Jackson v. State, 90 Ark. 577, 119 SW 1129.

Cal.—Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155.

Conn.—Page v. Camp, Kirby 7.

Del.—State v. Dryden, 26 Del. 466, 84 A 1037.

Fla.—Miller v. State, 15 Fla. 577.

Ga.—Rowe v. State, 99 Ga. 706, 27 SE 710; Thomas v. State, 71 Ga. 252.

Ill.—Wilkinson v. Peo., 226 Ill. 135, 80 NE 699; Coyne v. Peo., 124 Ill. 17, 14 NE 668, 7 AmSR 324; Bell v. Senneff, 83 Ill. 122; Pollard v. Peo., 69 Ill. 148.

Ind.—Indianapolis Tract., etc., Co. v. Henby, 178 Ind. 239, 97 NE 313; Henry v. Hamilton, 7 Blackf. 506.

Iowa.—State v. Loos, 145 Iowa 170, 123 NW 962.

Kan.—State v. Rupp, 96 Kan. 446, 151 P 1111, LRA1916B 848.

Ky.—Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465; Scott v. Cook, 1 Duv. 314.

Me.—State v. Henry, 118 Me. 495. 108 A 49.

Md.—State v. Mercer, 101 Md. 535, 61 A 220.

Mass.—Com. v. Brady, 5 Gray 78; Com. v. Douglass, 5 Metc. 241; Com. v. Dunham, Thach. Cr. 519.

Mich.—Smith v. Hubbell, 142 Mich. 637, 106 NW 547.

Minn.—Schmidt v. Witherick, 29 Minn. 156, 12 NW 448.

Miss.—Brown v. State, 57 Miss. 424.

Mo.—State v. Higgins, 124 Mo. 640, 28 SW 178; Schaller v. State, 14 Mo. 502; Martin v. Miller, 4 Mo. 47, 28 AmD 342.

Mont.—In re McCue, 80 Mont. 537, 261 P 341.

Nev.—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102.

N. H.—State v. Gates, 17 N. H. 373.

N. Y.—Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181; Peo. v. Doody, 72 App. Div. 372, 76 NYS 606 [aff 172 N. Y. 165, 64 NE 807]; Krauskopf v. Tallman, 38 App. Div. 273, 56 NYS 967 [aff 170 N. Y. 561 mem, 62 NE 1096 mem]; Peo. v. Dishler, 38 Hun 175, 4 N. Y. Cr. 188; Dempsey v. Peo., 20 Hun 261; Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133; Peo. v. Osborne, 158 NYS 330; Peo. v. Robertson, 3 Wheel. Cr. 180.

N. C.—State v. Carland, 14 N. C. 114.

Oh.—In re Franklin County, 5 OhS &CP 691, 7 OhNP 450.

Okl.—Downard v. State, 26 Okl. Cr. 274, 223 P 718.

Or.—State v. Smith, 47 Or. 485, 83 P 865.

Pa.—Com. v. Clark, 157 Pa. 257, 27 A 723; Com. v. O'Grady, 4 Pa. Dist. 732.

Philippine.—U. S. v. Chaves, 14 Philippine 565.

Porto Rico.—U. S. v. Santisteban, 10 Porto Rico Fed. 509.

S. C.—State v. Cochran, 17 S. C. L. 50.

Tenn.—Goad v. State, 106 Tenn. 175, 161 SW 79.

Tex.—McDonough v. State, 47 Tex. Cr. 227, 84 SW 594, 122 AmSR 684; Foster v. State, 32 Tex. Cr. 39, 22 SW 21; Lyle v. State, 31 Tex. Cr. 103, 19 SW 903; Hill v. State, 22 Tex. A. 579, 3 SW 764.

Va.—Com. v. Cook, 1 Rob. (40 Va.) 729.

W. Va.—State v. Berkeley, 41 W. Va. 455, 23 SE 608.

Wyo.—Fletcher v. State, 20 Wyo. 284, 123 P 80.

Eng.—Reg. v. Moreau, 11 Q. B. 1028, 63 ECL 1028, 116 Reprint 757; Rex v. De Beauvoir, 7 C. & P. 17, 32 ECL 477, 173 Reprint 8; Wyld v. Cookman, Cro. Eliz. 492, 78 Reprint 743; Jackson's Case, 1 Lew. C. C. 270, 168 Reprint 1037; Reg. v. Muscot, 10 Mod. 192, 88 Reprint 689; Rex v. Smith, 2 Show. 165, 89 Reprint 864.

Can.—Rex v. Cieslenski, (Alta.) 41 CanCrCas 195, [1924] 1 WestWkly 82; Reg. v. Murphy, 9 Montr. Leg. N. (Que.) 95; Reg. v. Denault, 8 Montr. Leg. N. (Que.) 250; Rex v. Lapalme, 31 RevdeJur (Que.) 414; Rex v. Hayford, 14 Sask. L. 375, 62 DomLR 90, 35 CanCrCas 293, [1921] 2 WestWkly 990; Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

"It is not the fact but the intention that renders a person guilty." Rex v. Trempe, 28 RevLeg (Que.) 282, 38 CanCrCas 13, 14.

"There must be criminal intent. It is not necessary to establish any other intent than that specified in the statute, but the testimony must be given willfully and knowingly, and the affiant must know that the testimony is false." Peo. v. Rendigs, 123 Misc. 32, 35, 205 NYS 133. To same effect Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792.

[a] **In the Philippines,** to convict accused of the statutory crime of giving false testimony, it must appear, inter alia, that the testimony was knowingly false, malicious, and given with intent to affect the issues present in the case. U. S. v. Aragon, 5 Philippine 469.

Criminal intent generally see Criminal Law §§ 41–50.

40. Herring v. State, 119 Ga. 709, 46 SE 876; Peo. v. Glenn, 294 Ill. 333, 128 NE 532; Rex v. Trempe, 28 Rev Leg (Que.) 282, 38 CanCrCas 13; Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

41. Rex v. Trempe, 28 RevLeg (Que.) 282, 38 CanCrCas 13, 14.

"If mens rea were not the principal element, the gist of the offense, and if its presence were not absolutely necessary in order to constitute the crime of perjury, anyone who made even an error as to date in a sworn or solemn declaration would be a perjurer. This one example is sufficient to decide the question. If a man does not take the precaution to make sure before swearing that the thing he believes to be true is false, he does not thereby become a criminal, but he becomes liable for the damages which may thereby be caused to others." Rex v. Trempe, supra.

42. U. S.—U. S. v. Howard, 132 Fed. 325.

Ariz.—Ayers v. State, 20 Ariz. 189, 178 P 782.

Ark.—Nelson v. State, 32 Ark. 192.

Cal.—Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155.

Del.—State v. Dryden, 26 Del. 466, 84 A 1037.

Ky.—Johnson v. Featherstone, 141 Ky. 793, 133 SW 753.

N. Y.—Byrnes v. Byrnes, 102 N. Y. 4, 5 NE 776; Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120.

Or.—Trullinger v. Dooly, 125 Or. 269, 265 P 1117, 266 P 909.

Porto Rico.—U. S. v. Santisteban, 10 Porto Rico Fed. 509.

Can.—Rex v. Cieslenski, (Alta.) 41 CanCrCas 195, [1924] 1 WestWkly 82.

[a] **Evasive replies** in an investigation of misconduct of prisoners were not perjury because they lacked the willful intent essential where all parties knew the misconduct existed and the examiner had previously elicited all the facts from other witnesses in defendant's presence. Peo. v. Osborne, 158 NYS 330.

Statements made under duress or threats see infra § 29.

43. Ferguson v. State, 36 Tex. Cr. 60, 35 SW 369; Rex v. Trempe, 28 RevLeg (Que.) 282, 38 CanCrCas 13.

44. See infra § 24.

corruptly[45] false. In characterizing the essential intent the courts have stated that defendant must be shown to have sworn knowingly and corruptly,[46] willfully and knowingly,[47] willfully and deliberately,[48] willfully and contrary to oath,[49] willfully and corruptly,[50] willfully, corruptly, and intentionally,[51] or willfully, corruptly, and maliciously.[52]

Terms defined. It has been held that "willfully" means intentionally,[53] deliberately,[54] with evil intent and legal malice;[55] implies a purpose of willingness to commit the act;[56] and is equivalent to "knowingly."[57] The word "deliberately" implies meditated as distinguished from inadvertent action.[58]

[§ 24] **b. Elements Bearing on Intent[59]—(1) Knowledge of Falsity.** To constitute perjury a false statement must be knowingly false.[60] That is, it must appear that accused knew his statement to be false or was consciously ignorant of its truth.[61]

[§ 25] **(2) Ignorance of Truth[62]—(a) In General.** Perjury may consist in the positive affirmation of a fact of the truth or falsity of which the speaker is consciously ignorant,[63] although there is author-

45. U. S.—Epstein v. U. S., 271 Fed. 282.
Ark.—Nelson v. State, 32 Ark. 192.
Ga.—Herring v. State, 119 Ga. 709, 46 SE 876.
Ky.—Johnson v. Featherstone, 141 Ky. 793, 133 SW 753.
Md.—State v. Mercer, 101 Md. 535, 61 A 220.
N. Y.—Peo. v. Grout, 85 Misc. 570, 147 NYS 591.
Okl.—Pate v. State, 10 Okl. Cr. 100, 133 P 1132.
Can.—Rex v. Cieslenski, (Alta.) 41 CanCrCas 195, [1924] 1 WestWkly 82.
"It is . . . fundamental that the false statement be made with a corrupt intent." Epstein v. U. S., 271 Fed. 282, 283.
Corrupt motive see infra § 31.

46. Rose v. State, 8 Okl. Cr. 294, 312, 127 P 873; Pilgrim v. State, 3 Okl. Cr. 49, 62, 104 P 383; Fletcher v. State, 20 Wyo. 284, 123 P 80.
"One can be convicted of perjury only where the false testimony was given corruptly, with knowledge of its falsity." Pilgrim v. State, supra [quot Rose v. State, supra].

47. Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; Byrnes v. Byrnes, 102 N. Y. 4, 5 NE 776; Peo. v. Barbuti, 207 App. Div. 285, 202 NYS 126; Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120; Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133; State v. Berkeley, 41 W. Va. 455, 23 SE 608.

48. Johnson v. State, 71 Tex. Cr. 428, 160 SW 964; Garza v. State, (Tex. Cr.) 47 SW 983.

49. Campbell v. State, 23 Okl. Cr. 250, 214 P 738.

50. U. S.—In re Rainsford, 20 F. Cas. No. 11,537.
Ala.—Goolsby v. State, 17 Ala. A. 545, 86 S 137; Hannegan v. State, 5 Ala. A. 142, 59 S 376.
Ark.—Jackson v. State, 90 Ark. 577, 119 SW 1129; Harp v. State, 59 Ark. 113, 26 SW 714; Nelson v. State, 32 Ark. 192.
Ill.—Peo. v. Glenn, 294 Ill. 333, 128 NE 532.
Ind.—Indianapolis Tract., etc., Co. v. Henby, 178 Ind. 239, 97 NE 313.
Iowa.—State v. Lazarus, 181 Iowa 625, 164 NW 1037.
Me.—State v. Henry, 118 Me. 495, 108 A 49.
Miss.—Cothran v. State, 39 Miss. 541.
Nev.—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102.
Okl.—Cassady v. State, 18 Okl. Cr. 568, 197 P 171; Mathes v. State, 15 Okl. Cr. 382, 177 P 120; Pilgrim v. State, 3 Okl. Cr. 49, 104 P 383.
Or.—State v. Smith, 47 Or. 485, 83 P 865.
Can.—Rex v. Cieslenski, (Alta.) 41 CanCrCas 195, [1924] 1 WestWkly 82.
"To constitute perjury, both at common and statute law, the false testimony must have been given wilfully and corruptly." State v. Henry, 118 Me. 495, 108 A 49.
[a] **A willful but not corrupt swearing** is not perjury. The false swearing must not only be willful, but must also be corrupt in the sense of being intentionally false. Cothran v. State, 39 Miss. 541.
Corrupt motive see infra § 31.

51. State v. Loos, 145 Iowa 170, 123 NW 962.

52. Peo. v. Pellot, 15 Porto Rico 423.

53. Rex v. Ryan, 110 L. T. Rep. N. S. 779.

54. Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Krauskopf v. Tallman, 38 App. Div. 273, 56 NYS 967 [aff 170 N. Y. 561 mem, 62 NE 1096 mem]; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450; Com. v. Cornish, 6 Binn. (Pa.) 249; Com. v. O'Grady, 4 Pa. Dist. 732.

55. Welch v. State, 71 Tex. Cr. 17, 19, 157 SW 946.
"The term wilfully . . . means that the statement must have been made with evil intent and legal malice and without reasonable grounds for believing it to have been lawful, and without legal justification." Welch v. State, supra.

56. Ayers v. State, 20 Ariz. 189, 178 P 782; Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155.

57. Garza v. State, (Tex. Cr.) 47 SW 983. See Indianapolis Tract., etc., Co. v. Henby, 178 Ind. 239, 254, 97 NE 313 (where the action was for malicious prosecution and in the course of the opinion the court discussed perjury and said: "Wilfully swearing falsely, necessarily implies that the oath was knowingly false").
"'Willfully,' in this connection, is tantamount to 'knowingly,' and is distinguished from a statement made through inadvertence or mistake or under agitation." Garza v. State, supra.

58. Welch v. State, 71 Tex. Cr. 17, 19, 157 SW 946; Ferguson v. State, 36 Tex. Cr. 60, 35 SW 369.
"The term deliberately . . . means that the statement must have been made with deliberation and after meditation, and that it was not made hastily through inadvertence or by mistake." Welch v. State, supra. To same effect Ferguson v. State, supra.

59. Attempt to correct false testimony as showing absence of criminal intent see supra § 22 text and note 36.

60. U. S.—U. S. v. Richards, 149 Fed. 443; U. S. v. Evans, 19 Fed. 912; U. S. v. Smith, 27 F. Cas. No. 16,336.
Ala.—State v. Lea, 3 Ala. 602.
Conn.—Page v. Camp, Kirby 7.
Del.—State v. Dryden, 26 Del. 466, 84 A 1037; State v. Thomas, 25 Del. 20, 78 S 640.
Mass.—Com. v. Douglass, 5 Metc. 241.
Mont.—In re McCue, 80 Mont. 537, 261 P 341.
N. Y.—Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181 [rev 14 Hun 512].
Okl.—Thompson v. State, (Cr.) 268 P 314; Downard v. State, 26 Okl. Cr. 274, 223 P 718; Campbell v. State, 23 Okl. Cr. 250, 214 P 738; Mathes v. State, 15 Okl. Cr. 382, 177 P 120.
Pa.—Com. v. Clark, 157 Pa. 257, 27 A 723.
Va.—Com. v. Cook, 1 Rob. (40 Va.) 789.
Can.—Rex v. Trempe, 28 RevLeg 282, 38 CanCrCas 13; Rex v. Hayford, 14 Sask. L. 375, 62 DomLR 90, 35 CanCrCas 293, [1921] 2 WestWkly 990.
See Indianapolis Tract., etc., Co. v. Henby, 178 Ind. 239, 97 NE 313 (a malicious prosecution case where the text rule is stated).
"It is an elementary proposition that knowledge of the falsity of the alleged perjured testimony is an essential and indispensable element of the crime of perjury." Mathes v. State, 15 Okl. Cr. 382, 384, 177 P 120.
[a] **It is essential** to show "that the defendant stated as true, what he knew to be false." U. S. v. Smith, 27 F. Cas. No. 16,336.
[b] **Rule applied** to a misstatement of another's age in an application for a marriage license. State v. Dryden, 26 Del. 466, 84 A 1037.

61. U. S.—U. S. v. Demos, 291 Fed. 104.
Mont.—In re McCue, 80 Mont. 537, 261 P 341.
Okl.—Downard v. State, 26 Okl. Cr. 274, 223 P 718.
Or.—State v. Smith, 47 Or. 485, 83 P 865.
Porto Rico.—Peo. v. Pellot, 15 Porto Rico 423.
[a] **To sustain a charge of perjury** it is essential to show "either that the defendant knew his statement to be false or that it was an unqualified statement of what he did not know to be true." Peo. v. Pellot, 15 Porto Rico 423, 425. To same effect Downard v. State, 26 Okl. Cr. 274, 223 P 718.
Honest mistake see infra § 27.
Ignorance of truth see infra §§ 25, 26.

62. True statement believed false or not known to be true see supra § 19.

63. U. S.—U. S. v. Atkins, 24 F. Cas. No. 14,474, 1 Sprague 558.
Cal.—Peo. v. Phillips, 56 Cal. A. 291, 205 P 40.
Fla.—Miller v. State, 15 Fla. 577.
Kan.—State v. Rupp, 96 Kan. 446, 151 P 1111, 1112, LRA1916B 848 [cit Cyc]. See State v. Brooks, 33 Kan. 708, 7 P 591 (dictum).
N. H.—State v. Gates, 17 N. H. 373.
N. Y.—Byrnes v. Byrnes, 102 N. Y. 4, 5 NE 776; Klinger v. Markowitz, 54 App. Div. 299, 633 mem, 65 NYS 369, 66 NYS 1125 mem, 1135 mem].
Oh.—In re Franklin County, 5 OhS &CP 691, 7 OhNP 450.
Pa.—Com. v. Cornish, 6 Binn. 249.
Eng.—Reg. v. Schlesinger, 10 Q. B. 670, 59 ECL 670, 116 Reprint 255; Allen v. Westley, Het. 97; Rex v. Pedley, Leach C. C. 325, 168 Reprint 265; Ockley, etc., Case, Palm. 294, 81 Reprint 1089.
See State v. Faulkner, 185 Mo. 673, 84 SW 967 (where the court quoted with approval from a conspiracy case to the effect that, in a perjury case, the knowledge which a witness must have in order to render him guilty of perjury need not be actual knowledge, but may be knowledge with which he is chargeable by reason of association with the transaction which constitutes the subject of the investigation).
"A man is even guilty of perjury if he swears to a particular fact, without knowing at the time whether it is true or false." 2 Wharton Cr. L. § 2201 [quot Klinger v. Markowitz, 54 App. Div. 299, 300, 633 mem, 65 NYS 369, 66 NYS 1125 mem, 1135 mem].
[a] **Reason for rule.**—"He who makes a positive affidavit to a particular condition thereby holds himself out as having some reasonably reliable information on the subject, and for one to swear to a fact, of the existence of which he knows himself to be entirely ignorant, is rightly held

ity to the contrary.[64] In the absence of a bona fide belief in the truth of a statement ignorance of its falsity is no excuse.[65] But reasonable ground for believing the statement to be true may furnish an adequate defense.[66] Under statutes so providing[67] it has been held that an unqualified statement of what one does not know to be true is equivalent to a statement of that which he knows to be false;[68] but such a provision must be read in connection with the statutes defining perjury, and under such statutes no one can be convicted unless such statement was made willfully,[69] maliciously,[70] and corruptly.[71]

[§ 26] **(b) Reckless Statements.** The weight of authority holds that a reckless statement made in ignorance of its falsity, but with an honest, though unreasonable, belief in its truth, is not perjury;[72] and, according to this view, the negligent failure to ascertain the truth of what one actually believes, on insufficient grounds, is not criminal.[73] But the minority rule holds that the positive affirmation of the truth of a statement false in fact and mistakenly believed to be true without reasonable cause for such belief is perjury.[74]

[§ 27] **(3) Honest Mistake.** A false statement which was obviously the result of an honest mistake,[75] such as one which has been made inadvert-

to constitute perjury." State v. Rupp, 96 Kan. 446, 449, 151 P 1111, LRA 1916B 848.

64. Gibson v. State, (Tex. A.) 15 SW 118.

65. Peo. v. Phillips, 56 Cal. A. 291, 296, 205 P 40.

"It is only where it is possible to have a belief contrary to the fact that such belief may not be assigned as perjurious." Peo. v. Phillips, supra.

[a] **In Kansas,** "under the statute making it a misdemeanor to swear falsely in an affidavit that the persons for whom a marriage certificate is asked are of lawful age, a conviction may be had, notwithstanding the affiant did not know his statement to be untrue. In order that the maker of a false affidavit in that connection may be protected from prosecution by reason of a mistake on his part, he must, while acting in good faith and upon reasonable grounds, have believed the facts to be as he stated them." State v. Rupp, 96 Kan. 446, 151 P 1111, LRA 1916B 848.

66. In re McCue, 80 Mont. 537, 261 P 341.

[a] **Plausible reasons** for believing a false statement to be true preclude a conviction of perjury. In re McCue, 80 Mont. 537, 261 P 341.

67. See statutory provisions.

68. Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Peo. v. Dishler, 38 Hun 175, 4 N. Y. Cr. 188; Cutler v. Terr., 8 Okl. 101, 56 P 861; Peo. v. Pellot, 15 Porto Rico 423.

69. Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120; Cutler v. Terr., 8 Okl. 101, 56 P 861; Rose v. State, 8 Okl. Cr. 294, 127 P 873; Pilgrim v. State, 3 Okl. Cr. 49, 104 P 383; Steber v. State, 23 Tex. A. 176, 4 SW 880. See also supra § 23.

[a] **Rule explained.**—Such statutes merely go to the evidence by which a criminal intent may be shown and do not change the rule that a perjurious statement must be willfully and corruptly false. In other words the element of willfulness is just as necessary in the case of an unqualified statement not known to be true as in the case of a statement known to be false. Rose v. State, 8 Okl. Cr. 294, 127 P 873.

[b] **Testifying to facts told speaker by others.**—If witness who testified to facts told him by others believed what had been told him, his testimony, although false, was not willfully so, and therefore not perjury, under Penal L. § 1620, requiring that the testimony be given willfully, that is, with a criminal intent, notwithstanding a section providing that an unqualified statement of what one does not know to be true is perjury. Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120.

70. Peo. v. Pellot, 15 Porto Rico 423.

71. Rose v. State, 8 Okl. Cr. 294, 312, 127 P 873; Pilgrim v. State, 3 Okl. Cr. 49, 62, 104 P 383; Peo. v. Pellot, 15 Porto Rico 423. See also supra § 23.

"One can be convicted of perjury only where the false testimony was given corruptly, with knowledge of its falsity, and . . . it is not enough that the defendant in a perjury prosecution testified positively to that which he did not know to be true." Pilgrim v. State, supra [quot Rose v. State, supra].

72. U. S.—U. S. v. Atkins, 24 F. Cas. No. 14,474, 1 Sprague 558; U. S. v. Moore, 26 F. Cas. No. 15,803, 2 Lowell 232; U. S. v. Shellmire, 27 F. Cas. No. 16,271, Baldw. 370; U. S. v. Smith, 27 F. Cas. No. 16,336; U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277.

Ariz.—Ayers v. State, 20 Ariz. 189, 178 P 782.

Cal.—Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155.

Ga.—Thomas v. State, 71 Ga. 252.

Ky.—Scott v. Cook, 1 Duv. 314.

Mass.—Com. v. Brady, 5 Gray 78.

Okl.—Cassady v. State, 18 Okl. Cr. 568, 197 P 171; Mathes v. State, 15 Okl. Cr. 382, 177 P 120; Rose v. State, 8 Okl. Cr. 294, 127 P 873; Pilgrim v. State, 3 Okl. Cr. 49, 50, 104 P 383.

Porto Rico.—Peo. v. Pellot, 15 Porto Rico 423.

S. C.—State v. Cockran, 17 S. C. L. 50.

Tex.—Butler v. State, 36 Tex. Cr. 444, 37 SW 746.

"One who . . . rashly or inconsiderately swears to something that is not true, if he honestly believes it to be true, is not guilty of perjury." Ayers v. State, 20 Ariz. 189, 191, 178 P 782.

"Perjury consists in swearing willfully and corruptly, contrary to the belief of the witness, not in swearing rashly and inconsiderately according to his belief." Pilgrim v. State, supra [quot Cassady v. State, 18 Okl. Cr. 568, 570, 197 P 171; Mathes v. State, 15 Okl. Cr. 382, 177 P 120].

73. U. S. v. Moore, 26 F. Cas. No. 15,803, 2 Lowell 232; U. S. v. Shellmire, 27 F. Cas. No. 16,271, Baldw. 370; Ayers v. State, 20 Ariz. 189, 178 P 782; Com. v. Brady, 5 Gray (Mass.) 78.

[a] **Genuineness of signature.**—Where defendant examined a long list of signatures, found one he knew to be false because the signer was deceased, and asked that it be stricken from the list, and thereafter without reexamining the list swore to the genuineness of all signatures, including the false one which had not in fact been stricken, he could not be convicted of perjury if he believed such false signature had been stricken as he requested and that all signatures on the list were genuine. Ayers v. State, 20 Ariz. 189, 178 P 782.

74. Johnson v. Peo., 94 Ill. 505; State v. Knox, 61 N. C. 312; Com. v. Cornish, 6 Binn. (Pa.) 249; Com. v. Shields, 50 Pa. Super. 1, 15; Com. v. O'Grady, 4 Pa. Dist. 732; State v. Berkeley, 41 W. Va. 455, 459, 23 SE 608.

"One commits perjury where he swears falsely to a matter, the truth of which, though he believed, yet he had no probable cause for believing, and might with little trouble have ascertained the fact." 3 Greenleaf Ev. § 200 [quot State v. Berkeley, supra]. To same effect 2 Wharton Cr. L. §§ 1246-1248 [quot State v. Berkeley, supra], Com. v. Shields, supra.

[a] **"Law implies malice"** in such cases. State v. Knox, 61 N. C. 312, 313; Com. v. Cornish, 6 Binn. (Pa.) 249, 251.

[b] **An unfounded and reckless belief** in the accuracy of a sworn statement of an official account by a sheriff will not protect him from conviction of perjury for its falsity. Com. v. Shields, 50 Pa. Super. 1.

75. U. S.—Anonymous, 1 F. Cas. No. 475, 1 Wash. C. C. 84; U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277.

Ariz.—Ayers v. State, 20 Ariz. 189, 178 P 782.

Ga.—Herring v. State, 119 Ga. 709, 46 SE 876; Jesse v. State, 20 Ga. 156.

Iowa.—State v. Lazarus, 181 Iowa 625, 164 NW 1037.

Ky.—Johnson v. Featherstone, 141 Ky. 793, 133 SW 753; Scott v. Cook, 1 Duv. 314.

Md.—State v. Mercer, 101 Md. 535, 61 A 220.

Mass.—Com. v. Dunham, Thach. Cr. 519.

Mich.—Peo. v. German, 110 Mich. 244, 68 NW 150.

Mo.—State v. Higgins, 124 Mo. 640, 28 SW 178.

N. Y.—Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181 [rev 14 Hun 512]; Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120; Peo. v. Grout, 174 App. Div. 608, 161 NYS 718 [app dism 222 N. Y. 521 mem, 118 NE 1072 mem]; Peo. v. Dishler, 38 Hun 175, 4 N. Y. Cr. 188.

Oh.—State v. Fairbault, 20 OhNP NS 499.

Okl.—Cutler v. Terr., 8 Okl. 101, 56 P 861; Thrasher v. State, (Cr.) 237 P 139.

Pa.—Com. v. O'Grady, 4 Pa. Dist. 732.

Philippine.—U. S. v. De Chaves, 14 Philippine 565.

Tenn.—Goad v. State, 106 Tenn. 175, 161 SW 79.

Tex.—Johnson v. State, 71 Tex. Cr. 428, 160 SW 964; Welch v. State, 71 Tex. Cr. 17, 157 SW 946; Porter v. State, 48 Tex. Cr. 301, 88 SW 359; Garza v. State, (Cr.) 47 SW 983; Butler v. State, 36 Tex. Cr. 444, 37 SW 746; Aguierre v. State, 31 Tex. Cr. 519, 21 SW 256; Sisk v. State, 28 Tex. A. 432, 13 SW 647; Brookin v. State, 27 Tex. A. 701, 11 SW 645; Hill v. State, 22 Tex. A. 579, 3 SW 764; Davidson v. State, 22 Tex. A. 372, 3 SW 662.

Eng.—Jackson's Case, Lew. C. C. 270, 168 Reprint 1037; Reg. v. Muscot, 10 Mod. 192, 88 Reprint 689.

Can.—Rex v. Trempe, 28 RevLeg 282, 38 CanCrCas 13.

See Bell v. Senneff, 83 Ill. 122 (civil suit for perjury); Indianapolis Tract., etc., Co. v. Henby, 178 Ind. 239, 97 NE 313 [cit Cyc on the text point in a malicious prosecution action].

"An honest oath, though untrue, is not perjury." Herring v. State, 119 Ga. 709, 714, 46 SE 876.

"The offense consists in the swearing falsely and corruptly and not through mistake." State v. Mercer, 101 Md. 535, 538, 61 A 220.

[a] **Good faith and reasonable grounds for belief** in the truth of a

ently[76] or under agitation,[77] is not perjury, and this rule has been embodied in statutes in some jurisdictions.[78]

An illiterate person who swears to the contents of a false affidavit, relying in good faith upon the representations of others as to its contents and believing it to be true, is not guilty of perjury.[79]

[§ 28] **(4) Mental and Physical Condition.** Insanity depriving accused of the mental power to distinguish right from wrong,[80] or impairing his memory as to the matters stated,[81] precludes the deliberation and knowledge essential to commission of the crime of perjury. But mere physical illness is ordinarily no defense.[82]

Incapacity arising from the use of liquor[83] or drugs,[84] rendering accused incapable of having the necessary intent, is a valid defense.

[§ 29] **(5) Duress and Threats.**[85] A false statement made under duress is not perjury.[86] But threats falling short of actual duress are no defense.[87]

Legal compulsion to testify against the will or desire of the witness is not duress preventing a false statement from being perjury.[88] It is immaterial whether the witness appeared and testified voluntarily or under compulsion of a subpœna.[89]

[§ 30] **(6) Advice of Counsel.** If one accused of perjury or false swearing[90] fully and in good faith lays the facts before counsel, and upon them is advised, as a matter of law, that a certain statement may be made which will be the truth, and, acting on this advice, the client swears to the statement, believing that he has been correctly advised, it cannot be said that the oath is willfully and corruptly false, and hence a charge of perjury cannot be predicated upon it.[91] If, however, he fails to communicate all the material facts within his knowledge, advice of counsel furnishes him no defense;[92] nor is such advice a defense where it was sought as a mere cover to secure immunity from the penalty of the crime.[93] Advice of counsel as to a matter present-

false statement preclude the willful and corrupt intent essential to perjury. State v. Fairbault, 20 OhNPNS 499.

[b] **Ignorance of language.**—Where a witness testified falsely by mistake arising from her ignorance of the language in which the questions were asked and from her failure fully to understand the purport of such questions, she was not guilty of perjury. U. S. v. De Chaves, 14 Philippine 565.

[c] **Literate person signing without reading.**—Where accused answered questions asked him orally, and the questioner inserted the answers in writing, and then accused, without reading the affidavit, signed and swore to it in ignorance that it contained false statements inserted by the questioner through error, accused was not guilty of perjury. Porter v. State, 48 Tex. Cr. 301, 88 SW 359.

[d] **Mistaken identity.**—Where accused swore that at a certain time he saw one Agilbert Theoret enter a certain building, and in fact it was not said Agilbert but another that accused saw, the falsity of his statement did not render it perjury where the proof showed that accused merely made a mistake and was absolutely sincere in his belief that it was said Agilbert he had seen. Rex v. Trempe, 28 RevLeg (Que.) 282, 38 CanCrCas 13.

[e] **Misunderstanding question.**—A false answer arising from defendant's honest failure to understand the meaning of the question asked is not perjury. Thrasher v. State, (Okl. Cr.) 237 P 139.

76. Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; and cases infra note 77.

77. Johnson v. State, 71 Tex. Cr. 428, 160 SW 964; Welch v. State, 71 Tex. Cr. 17, 157 SW 946; Garza v. State, (Tex. Cr.) 47 SW 983; Sisk v. State, 28 Tex. A. 432, 13 SW 647; Steber v. State, 23 Tex. A. 176, 4 SW 880; Hill v. State, 22 Tex. A. 579, 3 SW 764; Davidson v. State, 22 Tex. A. 372, 3 SW 662.

78. See statutory provisions.

79. Davis v. State, 7 Ga. A. 680, 67 SE 839; Byrnes v. Byrnes, 102 N. Y. 4, 5 NE 776; Hernandez v. State, 18 Tex. A. 134, 51 AmR 295; Rex v. Hailey, 1 C. & P. 258, 12 ECL 155, 171 Reprint 1186.

[a] **Where one who could neither read nor write** was indicted for perjury, assigned on his affidavit, the evidence must show that the affidavit was read to him before he swore to its truth, or that he then knew and understood its contents. Davis v. State, 7 Ga. A. 680, 67 SE 839.

Literate person signing without reading see supra note 75 [c], and supra § 26 note 73 [a].

Reading affidavit to one knowing contents see infra § 94.

80. Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

Insanity generally see Crimínal Law §§ 71–89.

81. Leaptrot v. State, 51 Fla. 57, 40 S 616.

82. Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

[a] **Stomach ache.**—In a prosecution for uttering a false affidavit, the fact that accused was suffering from bowel trouble at the time does not present the issue that it was not willfully and deliberately made. Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

83. Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465; Lytle v. State, 31 Oh. St. 196. See Schaller v. State, 14 Mo. 502, 508 (where a defendant with the habit of gross intemperance was actually sober at the time of swearing falsely and the court said that the habit of drunkenness was no defense in perjury, and further that "drunkenness is no excuse for crime"); Ex p. Lindsay, (N. B.) 30 CanCrCas 387 (applying rule of strict construction to a New Brunswick statute requiring oath by intoxicated person as to where he obtained liquor). Contra Peo. v. Willey, 2 Park. Cr. (N. Y.) 19.

[a] **Overindulgence in whisky.**—One giving false testimony cannot be guilty of perjury if at the time he is so intoxicated from drinking whisky as to incapacitate him from understanding his testimony or willfully and knowingly swearing falsely. Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465.

[b] **In Texas** (1) it has been stated, without discussion of a penal statute then in force, that intoxication of defendant is properly considered under a charge that a false statement under mistake, agitation, or inadvertence is not perjury, the implication being that intoxication precluding a deliberate intent to falsify is an adequate defense. Sisk v. State, 28 Tex. A. 432, 13 SW 647. (2) It has been held under a penal statute providing that "neither intoxication nor temporary insanity of the mind produced by the voluntary recent use of ardent spirits shall constitute any excuse . . . for the commission of crime" that drunkenness without insanity is a defense to perjury because in the absence of deliberation, impossible to a drunken man, there can be no commission of perjury, and therefore no commission of "crime" within the meaning of such statute providing that drunkenness is "no excuse for the commission of crime." Lyle v. State, 31 Tex. Cr. 103, 112, 19 SW 903. (3) In a subsequent case construing the same statute, and stated by the official reporter to overrule the Lyle case, supra, the court expressly denied the soundness of the reasoning of the Lyle case. But said subsequent case was not an indictment for perjury but an indictment for homicide. See Evers v. State, 31 Tex. Cr. 318, 20 SW 744, 37 AmSR 811, 18 LRA 421.

Intoxication generally see Criminal Law §§ 81–87.

84. Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465.

[a] **Cocaine.**—Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465.

Use of narcotics or other drugs as affecting responsibility for crime generally see Criminal Law § 88.

85. Willfulness:

As element see supra § 23 text and note 42.

Defined see supra § 23 text and notes 53–57.

86. U. S. v. Howard, 132 Fed. 325.

[a] **Cannot be "willful" perjury.**—U. S. v. Howard, 132 Fed. 325.

87. Bain v. State, 67 Miss. 557, 7 S 408.

[a] **Previous threats against life.**—On indictment for perjury it is no defense that defendant was induced to testify falsely by threats against his life made out of court and sometime before the trial. Bain v. State, 67 Miss. 557, 7 S 408.

88. Hardin v. State, 85 Tex. Cr. 220, 211 SW 233, 4 ALR 1308.

[a] **Where a witness before a grand jury** is compelled against his will to testify, and testifies falsely, he cannot escape conviction for perjury on the ground that the statement was not voluntarily made. Hardin v. State, 85 Tex. Cr. 220, 211 SW 233, 4 ALR 1308.

89. Com. v. Knight, 12 Mass. 274, 7 AmD 72.

90. Distinction between perjury or false swearing see supra §§ 4, 5.

91. U. S.—U. S. v. Conner, 25 F. Cas. No. 14,847, 3 McLean 573; U. S. v. Stanley, 27 F. Cas. No. 16,376, 6 McLean 409. See In re Rainsford, 20 F. Cas. No. 11,537 (although an oath made under advice of counsel cannot be perjury, if affiant swore willfully false in the sense of deliberate intention, he violated the Bankruptcy Act).

Ala.—Barnett v. State, 89 Ala. 165, 7 S 414.

Iowa.—State v. McKinney, 42 Iowa 205.

N. Y.—Tuttle v. Peo., 36 N. Y. 431, 2 Transcr. A. 306.

Pa.—Com. v. Clark, 157 Pa. 257, 27 A 723.

92. State v. Allen, 94 Mo. A. 508, 69 SW 604.

93. Tuttle v. Peo., 36 N. Y. 431; Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

[a] **For instance,** in a prosecution for false swearing it is no defense that accused made a false affidavit, deliberately and with knowledge of its falsity, because his attorney suggested this means of getting the case

ing no question of law is not a defense.[94]

[§ 31] 4. **Motive.** While there are some statements to the effect that "corrupt motive" is indispensable to perjury,[95] nevertheless, under the general rule,[96] the specific motive[97] or ultimate object to be attained by the false statement[98] is immaterial to the commission of the crime, where the necessary criminal intent[99] and other elements of the crime[1] are present.

[§ 32] 5. **Materiality of Statement[2]—a. Necessity That Statement Be Material.** At common law[3] and under statutes preserving the common-law rule in this respect,[4] a false statement must be material to the issue or question under consideration in order to constitute perjury.[5] Irrelevant testimony, although false, cannot be made the basis of a charge

dismissed or continued. Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

94. Barnett v. State, 89 Ala. 165, 7 S 414.

Conclusions of law as a subject matter of perjury see supra § 13.

95. In re Franklin County, 5 OhS&CP 691, 7 OhNP 450; Thompson v. State, (Okl. Cr.) 268 P 314; Com. v. O'Grady, 4 Pa. Dist. 732.

"Corrupt motive is indispensable to perjury." Pilgrim v. State, 3 Okl. Cr. 49, 50, 104 P 383 [quot Downard v. State, 26 Okl. Cr. 274, 279, 223 P 718].

[a] **"Intent and corrupt motive** are the very foundation of the crime of perjury." State v. Cerfoglio, 46 Nev. 332, 339, 205 P 791, 213 P 102.

[b] **Wrongful purpose.**—"Corruptly," as used in a statute requiring an oath to be willfully and corruptly false in order to constitute perjury, means "knowingly and intentionally so with a wrongful purpose to acquire some advantage." McDaniel v. State, 13 Ala. A. 318, 321, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018].

96. See Criminal Law § 43.

97. State v. Malone, 174 Ind. 746, 751, 93 NE 170; Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240.

"The specific purpose [or object] in mind at the making of the affidavit or oath is immaterial." State v. Malone, supra.

[a] **Lying like a gentleman.**—Where defendant in a bastardy proceeding falsely testified that he was not married, the fact that he did so to save his wife and mother from disgrace was no defense to a charge of perjury, if the fact that he was married was material, as his object or motive was unimportant. Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240.

[b] **Motive and intent.**—While criminal intent is essential to perjury, a bad motive is not required. Peo. v. Corrigan, 195 N. Y. 1, 13, 87 NE 792.

98. Peo. v. Corrigan, supra.

"That the ultimate object to be attained by the perjury may be beneficent or indifferent in no way absolves or qualifies the criminality of the act. One may not commit a crime because he hopes or expects that good will come of it. It is no defense to a charge of intentionally committing an act prohibited by law even that the dictates of his religious belief require one to do the act." Peo. v. Corrigan, supra.

99. Corrupt intent see supra § 23 text and notes 45, 46, 50–52.

1. See supra §§ 10–30; and infra §§ 32–94.

2. Materiality of oath see infra § 49 text and note 21.

3. See supra § 1.

4. See supra § 2.

5. U. S.—Clayton v. U. S., 284 Fed. 537, 540 [quot Cyc]; U. S. v. Cameron, 282 Fed. 684; Morris v. U. S., 261 Fed. 175; U. S. v. Howard, 37 Fed. 666; U. S. v. Landsberg, 23 Fed. 585, 21 Blatchf. 159; U. S. v. Shinn, 14 Fed. 447, 8 Sawy. 403.

Ala.—Urquhart v. State, 103 Ala. 90, 16 S 17; Banks v. State, 78 Ala. 14; Williams v. State, 68 Ala. 551; Hood v. State, 44 Ala. 81; Gibson v. State, 44 Ala. 17; McMurry v. State, 6 Ala. 324; Pressley v. State, 18 Ala. A. 40, 88 S 291; Goolsby v. State, 17 Ala. A. 545, 86 S 137; McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018].

Ark.—Lednum v. State, 169 Ark. 396, 275 SW 699; Harris v. State, 119 Ark. 408, 177 SW 1144; Reidhar v. State, 86 Ark. 525, 111 SW 1127; Gardner v. State, 80 Ark. 264, 97 SW 48.

Cal.—Peo. v. Jones, 123 Cal. 299, 55 P 992; Peo. v. Howard, 111 Cal. 655, 44 P 342; Peo. v. Lem You, 97 Cal. 224, 32 P 11; Peo. v. Ah Sing, 95 Cal. 657, 30 P 797; Peo. v. Perazzo, 64 Cal. 106, 28 P 62; Peo. v. McDermott, 8 Cal. 288; In re Clark, 54 Cal. A. 507, 202 P 50; Peo. v. Schweichler, 16 Cal. A. 738, 117 P 939.

Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.

Conn.—State v. Greenberg, 92 Conn. 657, 103 A 897.

Dak.—U. S. v. Robinson, 4 Dak. 72, 23 NW 90.

Del.—State v. Thomas, 25 Del. 20, 78 A. 640.

Fla.—Fields v. State, 94 Fla. 490, 114 S 317; Yarbrough v. State, 79 Fla. 256, 83 S 873; Miller v. State, 15 Fla. 577.

Ga.—Cox v. State, 13 Ga. A. 687, 79 SE 909; Black v. State, 13 Ga. A. 541, 79 SE 173; Aaron v. State, 12 Ga. A. 40, 76 SE 753.

Hawaii.—In re French, 28 Hawaii 47.

Ill.—Peo. v. Glenn, 294 Ill. 333, 128 NE 532; Wilkinson v. Peo., 226 Ill. 135, 80 NE 699; Young v. Peo., 134 Ill. 37, 24 NE 1070; Mackin v. Peo., 115 Ill. 312, 3 NE 222, 56 AmR 167; Pollard v. Peo., 69 Ill. 148; Pankey v. Peo., 2 Ill. 80.

Ind.—State v. Hunt, 137 Ind. 537, 37 NE 409; State v. Cunningham, 116 Ind. 209, 18 NE 613; State v. Reynolds, 108 Ind. 353, 9 NE 287.

Iowa.—State v. Swafford, 98 Iowa 362, 67 NW 284; State v. Aikens, 32 Iowa 403.

Kan.—State v. Smith, 40 Kan. 631, 20 P 529.

Ky.—Renan v. Com., 10 Ky. Op. 959.

La.—State v. Spencer, 45 La. Ann. 1, 12 S 135.

Me.—State v. Ela, 91 Me. 309, 39 A 1001.

Md.—Weinstein v. State, 146 Md. 80, 125 A 889.

Mass.—Com. v. Smith, 11 Allen 243; Com. v. Parker, 2 Cush. 212; Com. v. Pollard, 12 Metc. 225; Com. v. Farley, Thach. Cr. 654.

Mich.—Peo. v. Almashy, 229 Mich. 227, 201 NW 231; Peo. v. Dowdall, 124 Mich. 166, 82 NW 810; Peo. v. Ostrander, 110 Mich. 60, 67 NW 1079.

Minn.—State v. Larson, 171 Minn. 246, 213 NW 900.

Miss.—Long v. State, 58 S 485; McNiece v State, 101 Miss. 366, 58 S 3; Sloan v. State, 71 Miss. 459, 14 S 262; Nelson v. State, 47 Miss. 621; Jennings v. State, 7 S 462.

Mo.—State v. Hardiman, 277 Mo. 229, 209 SW 879; State v. Moran, 216 Mo. 550, 115 SW 1126; State v. Bailey, 34 Mo. 350; Martin v. Miller, 4 Mo. 47, 28 AmD 342; Hinch v. State, 2 Mo. 158. See Harris v. Quincy, etc., R. Co., 172 Mo. A. 261, 157 SW 893 (malicious prosecution).

Nebr.—Shevalier v. State, 85 Nebr. 366, 123 NW 424, 19 AnnCas 361.

Nev.—Ex p. Sheldon, 44 Nev. 268, 193 P 967.

N. H.—State v. Hobbs, 40 N. H. 229; State v. Norris, 9 N. H. 96.

N. Y.—Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175; Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; Wood v. Peo., 59 N. Y. 117; Peo. v. Barbuti, 207 App. Div. 285, 202 NYS 126; Peo. v. Glass, 191 App. Div. 483, 181 NYS 547; Peo. v. Goodheim, 188 App. Div. 148, 176 NYS 468; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240; Peo. v. Gillette, 126 App. Div. 665, 111 NYS 133, 22 N. Y. Cr. 400; Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133; Peo. v. Brill, 100 Misc. 92, 165 NYS 65; Peo. v. Tillman, 63 Misc. 461, 118 NYS 442, 23 N. Y. Cr. 401 [rev on other grounds 139 App. Div. 572, 124 NYS 44, 25 N. Y. Cr. 32 (aff 201 N. Y. 598 mem, 95 NE 1136 mem)]; Peo. v. Tatum, 60 Misc. 311, 112 NYS 36, 22 N. Y. Cr. 557.

N. C.—State v. Cline, 150 N. C. 854, 64 SE 591; State v Harris, 145 N. C. 456, 59 SE 115; State v. Lawson, 98 N. C. 759, 4 SE 134; Studdard v. Linville, 10 N. C. 474; State v. Dodd, 7 N. C. 226; State v. Ammons, 7 N. C. 123.

N. D.—State v. Falk, 34 N. D. 520, 159 NW 10.

Oh.—State v. Mullaney, 11 OhS&CP 120, 8 OhNP 165. See Hamm v. Wickline, 26 Oh. St. 81 (slander case).

Okl.—Rich v. U. S., 1 Okl. 354, 33 P 804; Stanley v. U. S., 1 Okl. 336, 33 P 1025; Downard v. State, 26 Okl. Cr. 274, 223 P 718; Soper v. State, 22 Okl. Cr. 27, 208 P 1044; Huffine v. State, 13 Okl. Cr. 239, 163 P 557; Pate v. State, 10 Okl. Cr. 100, 133 P 1132.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174. See Trullinger v. Dooly, 125 Or. 269, 265 P 1117, 266 P 909 (malicious prosecution).

Pa.—Com. v. Garvey, 65 Pa. Super. 56; Com. v. Nailor, 29 Pa. Super. 275; Com. v. O'Grady, 4 Pa. Dist. 732; Com. v. Rupple, 1 Pa. Co. 663. See Marshall v. Carr, 271 Pa. 271, 114 A 500 (ejectment).

Philippine.—U. S. v. Ballena, 18 Philippine 382.

Porto Rico.—U. S. v. Santisteban, 10 Porto Rico Fed. 509; Peo. v. Barbosa, 29 Porto Rico 433; Gandia v. Peo., 29 Porto Rico 101.

S. C.—State v. Keenan, 42 S. C. L. 456; State v. Hattaway, 11 S. C. L. 118, 10 AmD 580.

Tex.—Campbell v. State, 104 Tex. Cr. 596, 285 SW 820; Wynne v. State, 60 Tex. Cr. 660, 133 SW 682; Barton v. State, 50 Tex. Cr. 161, 95 SW 110; Pyles v. State, 47 Tex. Cr. 435, 83 SW 811; Liggett v. State, 47 Tex. Cr. 450, 83 SW 807; Maroney v. State, 45 Tex. Cr. 524, 78 SW 696; Henry v. State, 43 Tex. Cr. 176, 63 SW 642; McAvoy v. State, 39 Tex. Cr. 684, 47 SW 1000; Garrett v. State, 37 Tex. Cr. 198, 38 SW 1017, 39 SW 108; Misener v. State, 34 Tex. Cr. 588, 31 SW 858; Cravey v. State, 33 Tex. Cr. 557, 28 SW 472; Williams v. State, 28 Tex. A. 301, 12 SW 1103; Davidson v. State, 22 Tex. A. 372, 3 SW 662; Martinez v. State, 7 Tex. A. 394; Lawrence v. State, 2 Tex. A. 479.

Utah.—Peo. v. Greenwell, 5 Utah 112, 13 P 89.

Vt.—State v. Rosenberg, 88 Vt. 223, 92 A 145; State v. Trask, 42 Vt. 152.

Va.—Rhodes v. Com., 78 Va. 692; Crump v. Com., 75 Va. 922.

Wash.—State v. Carpenter, 130 Wash. 23, 225 P 654. But see State v. Wilson, 83 Wash. 419, 145 P 455 (distinguishing between perjury in the first and second degrees).

Wis.—Plath v. Braunsdorff, 40 Wis. 107.

Wyo.—Fletcher v. State, 20 Wyo. 284, 123 P 80.

of perjury;[6] nor will a false oath as to superfluous and immaterial matter sustain an indictment for this offense.[7]

Under statutes changing the common-law rule in this respect,[8] materiality is not an element of the crime of perjury.[9]

False swearing. Materiality is not an element of the statutory crime of false swearing,[10] and the distinction in this respect between false swearing and perjury as it is usually defined has heretofore been pointed out.[11] It has been said, however, that the false swearing must be relevant.[12]

[§ 33] **b. What Constitutes—(1) In General.** A statement can be neither material nor immaterial in itself, but its materiality must be determined in accordance with its relation to some extraneous matter.[13] False testimony relative to a nonexistent issue cannot be material.[14] But any statement which is relevant to the matter under investigation is sufficiently material to form the basis of a charge of perjury.[15] The test of materiality is whether a false statement can influence the tribunal[16]—not whether it does.[17]

Contradiction of a material statement is itself necessarily material.[18]

[§ 34] **(2) Degree of Materiality.** The degree of materiality is unimportant.[19] False testimony directly pertinent to the main issue is of course ma-

[a] **"It is fundamental** that in order to constitute the crime of perjury the testimony given, which is charged to be false, must be material to the issue presented at the trial." State v. Dineen, 203 Mo. 628, 634, 102 SW 480. To same effect Com. v. Garvey, 65 Pa. Super. 56.

[b] **"From time immemorial** the common law has made the materiality of false testimony an essential ingredient of the crime of perjury. From their earliest beginnings our statutes have always embodied that rule. Our penal laws, but recently recodified, have continued it. That, in short, is the unquestioned law of this state." Peo. v. Teal, 196 N. Y. 372, 376, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175 [quot Peo. v. Goodheim, 188 App. Div. 148, 150, 176 NYS 468].

[c] **Directly or indirectly pertinent.**—Where a person is indicted for perjury, it must appear that the matter testified to was either directly pertinent to the issue or point in question, or tended to prove such issue or point. State v. Thomas, 25 Del. 20, 78 A 640.

[d] **In England** (1) it was originally held that to constitute perjury the false statement must be material to the issue. Reg. v. Holden, 12 Cox C. C. 166; Reg. v. Tate, 12 Cox C. C. 7; Reg. v. Alsop, 11 Cox C. C. 264; Reg. v. Townsend, 10 Cox C. C. 356; Reg. v. Fairlie, 9 Cox C. C. 209; Reg. v. Ball, 6 Cox C. C. 360; Reg. v. Owen, 6 Cox C. C. 105; Reg. v. Murray, 1 F. & F. 80; Rex v. Griepe, Holt. K. B. 535, 90 Reprint 1194, 1 Ld. Raym. 256, 91 Reprint 1067, 12 Mod. 139, 88 Reprint 1220; Reg. v. Muscot, 10 Mod. 192, 88 Reprint 689; Rex v. Benesech, Peake 93, 170 Reprint 205; Rex v. Dunston, R. & M. 109, 21 ECL 712, 171 Reprint 960. (2) But under the Perjury Act of 1911 it has been held that the question is not whether the statement was material to the issue, but whether it was material in the proceedings. Rex v. Wheeler, [1917] 1 K. B. 283.

Materiality as element of false swearing see infra text and notes 10-12.

6. McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018]; State v. Brown, 68 N. H. 200, 38 A 731.

7. Ala.—Hood v. State, 44 Ala. 81; Gibson v. State, 44 Ala. 17.

Ill.—Pollard v. Peo., 69 Ill. 148.

Mass.—Com. v. Hatfield, 107 Mass. 227.

Miss.—White v. State, 9 Miss. 149.

Mo.—State v. Hardiman, 277 Mo. 229, 209 SW 879.

N. Y.—Peo. v. Peck, 146 App. Div. 266, 130 NYS 967, 26 N. Y. Cr. 268; Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

Tex.—Ramey v. State, 99 Tex. Cr. 132, 268 SW 476.

[a] **In the Philippines** (1) in order to constitute perjury the false statement must relate to a material matter. U. S. v. Ballena, 18 Philippine 382; U. S. v. Estraña, 16 Philippine 526. (2) It is an essential element of the statutory crime of giving false testimony in a civil cause that the testimony relate to the issues in the cause in which given. U. S. v. Aragon, 5 Philippine 469.

Materiality as element of false swearing see infra text and notes 10-12.

8. See supra § 2.

9. State v. Miller, 26 R. I. 282, 58 A 882; State v. Byrd, 28 S. C. 18, 4 SE 793, 13 AmSR 660; Reg. v. Ross, 1 Montr. Q. B. (Que.) 227, 28 LCJur 261.

[a] **In second degree perjury** materiality is not necessary. State v. Wilson, 83 Wash. 419, 145 P 455.

10. Gammage v. State, 119 Ga. 380, 46 SE 409; Sullivan v. Com., 158 Ky. 536, 165 SW 696; Partin v. Com., 154 Ky. 701, 159 SW 542; Com. v. Ransdall, 153 Ky. 334, 155 SW 1117; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; Milstead v. Com., 51 SW 451, 21 KyL 358; State v. Boland, 12 Mo. A. 74; Wilson v. State, 49 Tex. Cr. 496, 93 SW 547. See U. S. v. Hammer, 299 Fed. 1011, 1012 [aff 6 F. (2d) 786 (certiorari granted 267 U. S. 591 mem, 45 SCt 508 mem, 69 L. ed. 802 mem, and rev on other grounds 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118)] (where, without deciding whether the crime charged was perjury or false swearing, the court said: "A violation of section 29b (2) of the Bankruptcy Act does not require that the false swearing should be with reference to a material matter").

11. See supra §§ 4, 5.

12. Partin v. Com., 154 Ky. 701, 705, 159 SW 542.

"On a trial for false swearing it is not necessary that the alleged false testimony be material. It is only necessary that it be relevant." Partin v. Com., supra.

13. Peo. v. Barbosa, 29 Porto Rico 433, 434.

"For practical purposes a statement may be regarded as true or false independently of any other matter or thing. But the word 'material,' as used in our Code, is a relative term. Ordinarily, at least, the alleged false statement constituting the gist of the offense is not intrinsically material or material per se or material in any absolute sense or material to itself, but must be material to some external situation, issue or subject matter. Hence, to say simply that the matter is material is meaningless." Peo. v. Barbosa, supra.

14. U. S. v. Rhodes, 212 Fed. 518; State v. Larson, 171 Minn. 246, 213 NW 900; Long v. State, (Miss.) 58 S 485; McNiece v. State, 101 Miss. 366, 58 S 3; Huffine v. State, 13 Okl. Cr. 239, 163 P 557.

[a] **Where there is no issue pending or question in controversy,** a statement under oath, although it be false, cannot be made the basis of a charge of perjury. Huffine v. State, 13 Okl. Cr. 239, 163 P 557.

[b] **"After a plea of guilty** there is no longer any issue of fact to be tried and any testimony introduced is immaterial and cannot be the foundation of a prosecution for perjury." State v. Larson, 171 Minn. 246, 248, 213 NW 900. See Huffine v. State, 13 Okl. Cr. 239, 163 P 557 (applying this rule).

[c] **Ex parte examination.**—False testimony of bankrupts on their examination before a referee as to matters concerning their bankruptcy and concerning statements made in their examination relevant to their schedules cannot be assigned as perjury, the proceedings being in the nature of an ex parte examination in which there was no issue. U. S. v. Rhodes, 212 Fed. 518.

Rule in England see supra § 32 note 5 [d].

15. Cal.—In re Braynard, 52 Cal. 631, 199 P 576; Peo. v. Chand, 75 Cal. A. 459, 243 P 38.

Colo.—Peo. v. Howland, 63 Colo. 414, 167 P 961.

Fla.—Fields v. State, 94 Fla. 490, 491, 114 S 317.

Okl.—Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

R. I.—State v. Miller, 26 R. I. 282, 58 A 882, 3 AnnCas 943 (stating text rule, although decided under a statute eliminating materiality as an element of perjury).

"It may be laid down as a general rule that any testimony which is relevant in the trial of a case, whether to the main issue or some secondary issue, is so far material as to render a witness who knowingly and wilfully falsifies in giving it guilty of perjury." Fields v. State, supra.

16. Cal.—In re Braynard, 52 Cal. A. 631, 199 P 576.

Conn.—State v. Greenberg, 92 Conn. 657, 103 A 897.

Fla.—Fields v. State, 94 Fla. 490, 114 S 317.

N. Y.—Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240; Peo. v. Hebberd, 96 Misc. 617, 162 NYS 80.

Oh.—Barnes v. State, 8 Oh. Cir. Dec. 153.

Tex.—Frazier v. State, 61 Tex. Cr. 647, 135 SW 583; Rahm v. State, 30 Tex. A. 310, 17 SW 416, 28 AmSR 911.

See Harris v. Quincy, etc., R. Co., 172 Mo. A. 261, 157 SW 893 (malicious prosecution).

"The test is whether the statement made could have influenced the tribunal on the issue before it." Fields v. State, 94 Fla. 490, 114 S 317.

[a] **If the testimony would, if believed, tend to affect verdict of jury,** it meets the test of materiality. State v. Greenberg, 92 Conn. 657, 103 A 897.

17. Actual effect of false statement as unimportant see infra §§ 36, 48.

18. Aaron v. State, 12 Ga. A. 40, 76 SE 753.

Contradictory statements as material on issue of credibility of witness see infra § 38.

Denial of prior immaterial testimony see infra § 35 text and note 34.

19. Cal.—Peo. v. Albert, (A.) 267 P 587; In re Braynard, 52 Cal. A. 631, 199 P 576.

Conn.—State v. Greenberg, 92 Conn. 657, 103 A 897.

Fla.—Robinson v. State, 18 Fla. 898.

Okl.—Wright v. State, 30 Okl. Cr.

terial.[20] But it is not necessary that the false statement should bear directly upon the main issue.[21] It is sufficient if the statement is collaterally,[22] remotely,[23] corroboratively,[24] or circumstantially[25] material, or has a legitimate tendency to prove or disprove any material fact in the chain of evidence,[26] even though not in itself sufficient to establish

425, 236 P 633; Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Pa.—Com. v. Bobanic, 62 Pa. Super. 40, 43.

Tex.—Logan v. State, 96 Tex. Cr. 601, 258 SW 830; Lawrence v. State, 2 Tex. A. 479.

See State v. Miller, 26 R. I. 282, 58 A 882, 3 AnnCas 943 (stating text rule, but decided under a statute eliminating materiality as an element of perjury).

"There is no fixed limit within which the question of materiality may be distinctly confined." Com. v. Bobanic, supra.

[a] **"The extent of the materiality** is entirely unimportant. 'Any testimony in a case that tends of itself, or in connection with other testimony, to influence the result on a direct or a collateral issue, is material.'" Wharton Cr. L. § 89 [quot State v. Greenberg, 92 Conn. 657, 661, 103 A 897]. To same effect Miller v. State, 9 Okl. Cr. 196, 131 P 181.

[b] **Statement must be wholly immaterial** to sustain the defense that it is not sufficiently material to constitute perjury. Logan v. State, 96 Tex. Cr. 601, 258 SW 830; Bell v. State, 75 Tex. Cr. 401, 171 SW 239.

20. U. S.—U. S. v. Hampton, 101 Fed. 714, 41 CCA 625; U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Ala.—Jones v. State, 100 Ala. 35, 14 S 98.

Ark.—Lewis v. State, 78 Ark. 567, 94 SW 613.

Cal.—Peo. v. Rodley, 131 Cal. 240, 63 P 351.

Ga.—Pence v. State, 36 Ga. A. 270, 136 SE 820.

Hawaii.—In re French, 28 Hawaii 47, 56 [quot Cyc].

Ill.—Greene v. Peo., 182 Ill. 278, 55 NE 341.

Iowa.—State v. John, 93 NW 61.

La.—State v. Smith, 126 La. 135, 138, 52 S 244 [quot Cyc].

Mich.—Peo. v. Albers, 137 Mich. 678, 100 NW 908; Peo. v. Macard, 109 Mich. 623, 67 NW 968.

N. Y.—Peo. v. Doody, 172 N. Y. 165, 64 NE 807 [aff 72 App. Div. 372, 76 NYS 606].

N. C.—State v. Murphy, 101 N. C. 697, 8 SE 142; State v. Green, 100 N. C. 419, 5 SE 422; State v. Hare, 95 N. C. 682; State v. Deaver, 51 N. C. 563.

Tex.—Foreman v. State, 47 Tex. Cr. 179, 85 SW 809; Jernigan v. State, 43 Tex. Cr. 114, 63 SW 560; George v. State, 40 Tex. Cr. 646, 50 SW 374, 51 SW 378.

Vt.—State v. Marsh, 73 Vt. 176, 50 A 861.

Eng.—Reg. v. Berry, Bell C. C. 46, 169 Reprint 1161; Reg. v. Naylor, 11 Cox C. C. 13; Reg. v. Mullany, L. & C. 593, 169 Reprint 1528.

21. Cal.—Peo. v. Albert, (A.) 267 P 587; Peo. v. Chand, 75 Cal. A. 459, 243 P 38; Peo. v. Patterson, 64 Cal. A. 223, 221 P 394; Peo. v. Dunstan, 59 Cal. A. 574, 211 P 813; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Peo. v. Senegram, 27 Cal. A. 301, 149 P 786.

Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.

Fla.—Fields v. State, 94 Fla. 490, 114 S 317; Herndon v. State, 72 Fla. 108, 72 S 833.

Kan.—State v. Fail, 121 Kan. 855, 250 P 311; State v. Adams, 119 Kan. 509, 240 P 955.

Mo.—State v. Hardiman, 277 Mo. 229, 209 SW 879; State v. Moran, 216 Mo. 550, 115 SW 1126.

N. Y.—Wood v. Peo., 59 N. Y. 117; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240; Peo. v. Root, 94 App. Div. 84, 87 NYS 962.

Okl.—Lawson v. State, (Cr.) 254 P 110; Wright v. State, 30 Okl. Cr. 425, 236 P 633; Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513; Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Pa.—Com. v. Bobanic, 62 Pa. Super. 40.

Vt.—State v. Rosenberg, 88 Vt. 223, 92 A 145.

Wash.—State v. Carpenter, 130 Wash. 23, 225 P 654.

Wyo.—Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

"It is sufficient if it be material to any collateral matter or inquiry." State v. Lavelley, 9 Mo. 834 [quot Ex p. Metcalf, 8 Okl. Cr. 605, 617, 129 P 675, 44 LRANS 513]. To same effect State v. Hardiman, 277 Mo. 229, 209 SW 879, 880.

[a] **"It is well settled** that, to constitute perjury, it is not necessary that the matter sworn to should be directly and immediately material, but it is sufficient if it is so connected with the matter at issue as to have a legitimate tendency to prove or disprove some fact that is material." Lawson v. State, (Okl. Cr.) 254 P 110, 111.

[b] **Reason for rule.**—"It is but common knowledge that it frequently occurs in the trial of causes that inquiries are made of witnesses touching matters which do not directly concern the commission of the acts which constitute the offense, yet such inquiries and answers may be material and highly important to the end that the triers of the fact may properly and intelligently weigh the testimony in the cause. If it is so connected with the matter at issue as to have a legitimate tendency to prove or disprove some fact that is material by giving weight or probability to, or detracting from, the testimony of a witness thereto, it is sufficient and makes the testimony material." Fields v. State, 94 Fla. 490, 491, 114 S 317.

22. Ark.—Smith v. State, 91 Ark. 200, 120 SW 985.

Fla.—Fields v. State, 94 Fla. 490, 114 S 317.

Kan.—State v. Fail, 121 Kan. 855, 250 P 311; State v. Adams, 119 Kan. 509, 240 P 955.

N. Y.—Peo. v. Brill, 100 Misc. 92, 165 NYS 65; Peo. v. Hebberd, 96 Misc. 617, 162 NYS 80.

Okl.—Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

Pa.—Com. v. Bobanic, 62 Pa. Super. 40.

Tex.—Logan v. State, 96 Tex. Cr. 601, 258 SW 830.

Vt.—State of Rosenberg, 88 Vt. 223, 92 A 145.

Wyo.—Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

[a] **"'Collateral' as here used** does not mean unrelated or immaterial but is used to signify testimony which although not direct proof upon the issue yet has substantial bearing upon the testimony relating to the issues." Peo. v. Brill, 100 Misc. 92, 96, 165 NYS 65.

[b] **Under a penal law** defining "perjury," and providing that a person charged must have willingly and knowingly testified falsely in a material matter, the word "material" is not limited to testimony bearing directly on issue, but includes collateral questions. Peo. v. Hebberd, 96 Misc. 617, 162 NYS 80.

23. Logan v. State, 96 Tex. Cr. 601, 258 SW 830.

24. Wheeler v. Peo., 63 Colo. 209, 165 P 257; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450; U. S. v. Ballena, 18 Philippine 382; U. S. v. Estraña, 16 Philippine 520; Peo. v. Greenwell, 5 Utah 112, 13 P 89.

[a] **"Material matter"** means the main fact which was the subject of inquiry, or any circumstance which tends to prove that fact or any fact or circumstance which tends to corroborate or strengthen the testimony relative to the subject of the inquiry. Wheeler v. Peo., 63 Colo. 209, 165 P 257; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450; U. S. v. Ballena, 18 Philippine 382; U. S. v. Estraña, 16 Philippine 520; Peo. v. Greenwell, 5 Utah 112, 13 P 89.

25. Ala.—Williams v. State, 68 Ala. 551.

Ark.—Robertson v. State, 54 Ark. 604, 16 SW 582.

Cal.—Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Peo. v. Albert, (A.) 267 P 587; Peo. v Dunstan, 59 Cal. A. 574, 211 P 813; Peo. v. Schweichler, 16 Cal. A. 738, 741, 117 P 939 [quot Cyc]; Peo. v. Collins, 6 Cal. A. 492, 92 P 513.

Fla.—Herndon v. State, 72 Fla. 108, 72 S 833; Robinson v. State, 18 Fla. 898.

Ill.—Henderson v. Peo., 117 Ill. 265, 7 NE 677.

Iowa.—State v. Brown, 128 Iowa 24, 102 NW 799.

Mass.—Com. v. Grant, 116 Mass. 17; Com. v. Farley, Thach. Cr. 654.

Mo.—State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Day, 100 Mo. 242, 12 SW 365.

N. Y.—Wood v. Peo., 59 N. Y. 117; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240; Peo. v. Davis, 122 App. Div. 569, 107 NYS 426, 21 N. Y. Cr. 573 [aff 191 N. Y. 514 mem, 84 NE 1116 mem]; Peo. v. Root, 94 App. Div. 84, 87 NYS 962.

N. C.—State v. Brown, 79 N. C. 642.

Okl.—Miller v. State, 9 Okl. Cr. 196, 131 P 181; Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

Pa.—Com. v. Rush, 17 Pa. Dist. 225.

Tex.—Logan v. State, 96 Tex. Cr. 601, 258 SW 830; Davidson v. State, 22 Tex. A. 372, 3 SW 662; Bradberry v. State, 7 Tex. A. 375.

Utah.—Peo. v. Greenwell, 5 Utah 112, 13 P 89.

Vt.—State v. Rosenberg, 88 Vt. 223, 92 A 145.

Wis.—Hanscom v. State, 93 Wis. 273, 67 NW 419.

Eng.—Rex v. Griepe, Holt K. B. 535, 90 Reprint 1194, 1 Ld. Raym. 256, 91 Reprint 1067, 12 Mod. 139, 88 Reprint 1220; Reg. v. Rhodes, 2 Ld. Raym. 886, 92 Reprint 92.

"If it is but circumstantially material, it will be perjury." Rex v. Griepe, 1 Ld. Raym. 256, 258, 91 Reprint 1067, 12 Mod. 139, 88 Reprint 1220 [quot Com. v. Rush, 17 Pa. Dist. 225, 226].

"It is perjury to swear falsely in any circumstances which conduceth to the issue, or to the discovery of the truth; though if it be only in some impertinent or minute circumstance." Rex v. Griepe, Holt K. B. 535, 90 Reprint 1194, 1 Ld. Raym. 256, 91 Reprint 1067, 12 Mod. 139, 88 Reprint 1220 [quot State v. Rosenberg, 88 Vt. 223, 230, 92 A 145].

[a] **"If the statement tend** even circumstantially to the proof of the issue, it will be deemed material." Davidson v. State, 22 Tex. A. 372, 381, 3 SW 662 [quot Frazier v. State, 61 Tex. Cr. 647, 650, 135 SW 583]. To same effect Wood v. Peo., 59 N. Y. 117, 123 [quot Peo. v. Davis, 122 App. Div. 569, 107 NYS 426, 429; Miller v. State, 9 Okl. Cr. 196, 131 P 181, 182]; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240; Peo. v. Root, 94 App. Div. 84, 87 NYS 962.

26. U. S.—U. S. v. Rosenstein, 211 Fed. 738; U. S. v. Shinn, 14 Fed. 447, 8 Sawy. 403.

Ark.—Robertson v. State, 54 Ark. 604, 16 SW 582; Marvin v. State, 53

lish the issue.[27] False testimony relative to a collateral matter may be perjury irrespective of the truth or falsity of the main fact at issue.[28] But if the false statement is not even circumstantially material it cannot be perjury.[29]

[§ 35] **(3) Time.** In testing materiality of testimony charged to be false, reference must be had to the issue as it existed when the oath was administered to the witness.[30] The fact that the issue concerning which the witness testifies falsely is afterward admitted does not render the testimony immaterial so as to prevent a conviction of perjury therefor;[31] but admission of the fact before the false testimony is given renders such testimony immaterial.[32] Subsequent change in the issues, rendering material a false statement which was immaterial when given, does not make such statement perjury.[33]

Denial of prior immaterial testimony may be material.[34]

[§ 36] **(4) Actual Effect of Statement as Bearing on Materiality.**[35] The actual effect of a false

Ark. 395, 14 SW 87.

Cal.—Peo. v. Prather, 134 Cal. 436, 66 P 589, 863; Peo. v. Chand, 75 Cal. A. 459, 243 P 38; Peo. v. Patterson, 64 Cal. A. 223, 221 P 394; Peo. v. Dunstan, 59 Cal. A. 574, 211 P 813; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Matter of Braynard, 52 Cal. A. 798 mem, 199 P 578 mem; In re Braynard, 52 Cal. A. 631, 199 P 576; Peo. v. Senegram, 27 Cal. A. 301, 149 P 786; Peo. v. Schweichler, 16 Cal. A. 738, 117 P 939.

Colo.—Peo. v. Howland, 63 Colo. 414, 167 P 961; Wheeler v. Peo., 63 Colo. 209, 165 P 257, 258 [cit Cyc]; Thompson v. Peo., 26 Colo. 496, 59 P 51.

Fla.—Fields v. State, 94 Fla. 490, 114 S 317; Herndon v. State, 72 Fla. 108, 72 S 833; Robinson v. State, 18 Fla. 898.

Ga.—Black v. State, 13 Ga. A. 541, 79 SE 173.

Hawaii.—In re French, 28 Hawaii 47, 56 [quot Cyc].

Ind.—State v. Hunt, 137 Ind. 537, 37 NE 409.

Iowa.—State v. Shupe, 16 Iowa 36, 85 AmD 485.

Kan.—State v. Fail, 121 Kan. 855, 250 P 311; State v. Adams, 119 Kan. 509, 240 P 955, 956 [cit Cyc].

La.—State v. Smith, 126 La. 135, 138, 52 S 244 [quot Cyc].

Mass.—Com. v. Grant, 116 Mass. 17; Com. v. Parker, 2 Cush. 212.

Miss.—Slade v. State, 119 SW 355.

Mo.—State v. Ruddy, 287 Mo. 52, 228 SW 760; State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Day, 100 Mo. 242, 12 SW 365; State v. Wakefield, 73 Mo. 549; State v. Lavalley, 9 Mo. 834.

N. Y.—Wood v. Peo., 59 N. Y. 117.

N. C.—Studdard v. Linville, 10 N. C. 474.

Okl.—Lawson v. State, (Cr.) 254 P 110; Wright v. State, 30 Okl. Cr. 425, 236 P 633; Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513; Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Pa.—Com. v. Rogo, 71 Pa. Super. 109; Com. v. Bobanic, 62 Pa. Super. 40; Com. v. De Cost, 35 Pa. Super. 88; Com. v. Moore, 27 Pa. Dist. 22; Com. v. Albert, 16 Pa. Dist. 759, 32 Pa. Co. 540.

S. C.—State v. Hattaway, 11 S. C. L. 118, 10 AmD 580.

Tex.—Jones v. State, 76 Tex. Cr. 398, 174 SW 1071; Frazier v. State, 61 Tex. Cr. 647, 135 SW 583; Downing v. State, 61 Tex. Cr. 519, 136 SW 471; McLeod v. State, (Cr.) 75 SW 522; Bradberry v. State, 7 Tex. A. 375.

Utah.—Peo. v. Greenwell, 5 Utah 112, 13 P 89.

Vt.—State v. Rosenberg, 88 Vt. 223, 92 A 145.

Wyo.—Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

Eng.—Reg. v. Altass, 1 Cox C. C. 17; Rex v. Griepe, Holt K. B. 535, 90 Reprint 1194, 1 Ld. Raym. 256, 91 Reprint 1067, 12 Mod. 139, 88 Reprint 1220.

"In general terms, it may be said that testimony may be assigned for perjury either where it directly tends to prove or disprove one side or the other of the main issue, or where, under the established rules of evidence, it indirectly tends to do so by crediting or discrediting other evidence, or the testimony of another witness. In the former case, the materiality may frequently be determined by reference to the pleadings, without regard to the other testimony; in the latter case, the testimony being given on some secondary issue of fact arising on the trial of the case, its materiality can only be determined by an examination of the other testimony which it is intended to corroborate or contradict." Com. v. Bossard, 2 Kulp (Pa.) 113, 114 [quot Com. v. Rogo, 71 Pa. Super. 109, 112; Com. v. De Cost, 35 Pa. Super. 88, 92; Com. v. Rush, 17 Pa. Dist. 225, 226].

[a] **Illustration.**—Where, in a prosecution for rape, prosecutrix claimed that she had been infected with gonorrhea by defendant who assaulted her, the question of whether or not defendant had that disease at the time of the rape was a fact in issue, and false testimony of defendant that he had never been infected with such disease legitimately tended to prove that he was not so infected at the date of the crime, and was therefore material as tending to disprove a fact in issue. Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

[b] **"A link in a chain of evidence,** even of no effect alone yet helpful in combination with other evidence, is so far material as to be the subject of perjury." State v. Rosenberg, 88 Vt. 223, 232, 92 A 145.

[c] **Bolstering testimony.**—"It is sufficient if it is material to any proper matter of inquiry, and is calculated and intended to prop or bolster the testimony of a witness on some material point." Fields v. State, 94 Fla. 490, 494, 114 S 317.

[d] **"Mere details** (1) introduced with the apparent purpose of giving verisimilitude to a narrative are material." State v. Fail, 121 Kan. 855, 856, 250 P 311. (2) In a prosecution for illegal fishing, testimony by a constable that he saw defendant at a creek with his hand on the pole of a dip net, used in fishing, was material so as to make the constable guilty of perjury if his testimony was willfully false, the materiality of the testimony resting upon the fact that it concerned details of the alleged fishing and tended to enhance the probability of the constable's story that defendant had been illegally fishing. Com. v. Albert, 16 Pa. Dist. 759, 32 Pa. Co. 540.

[e] **Authorities reviewed.**—Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

27. Cal.—Peo. v. Schweichler, 16 Cal. A. 738, 741, 117 P 939 [quot Cyc].

Fla.—Robinson v. State, 18 Fla. 898.

Mass.—Com. v. Pollard, 12 Metc. 225.

Mo.—State v. Ruddy, 287 Mo. 52, 228 SW 760; State v. Jennings, 278 Mo. 544, 213 SW 421; State v. Wakefield, 73 Mo. 549, 554.

N. H.—State v. Norris, 9 N. H. 96.

Tex.—Rahm v. State, 30 Tex. A. 310, 17 SW 416, 28 AmSR 911; Lawrence v. State, 2 Tex. A. 479.

"Whether all the links in the chain of circumstantial evidence necessary to its completion are supplied or not, a witness who has sworn falsely in a witness who has sworn falsely in regard to any link is as guilty as if the evidence fully supplied that and all the other parts. A criminal charge is proved step by step." State v. Wakefield, supra [quot State v. Ruddy, 287 Mo. 52, 62, 228 SW 760; State v. Jennings, 278 Mo. 544, 552, 213 SW 421].

28. Downing v. State, 61 Tex. Cr. 519, 136 SW 471; Bradberry v. State, 7 Tex. A. 375.

29. Harris v. State, 119 Ark. 408, 177 SW 1144; Peo. v. McDermott, 8 Cal. 288; Peo. v. Schweichler, 16 Cal. A. 738, 117 P 939; State v. Dineen, 203 Mo. 628, 102 SW 480.

[a] **Whether one stole the cow with the crumpled horn** being the point in issue on a trial for grand larceny, and the theory of the state being that crumpled horns found near the larceny defendant's house were those of the stolen and subsequently butchered cow, testimony of a witness that he had personally bought another cow with a crumpled horn and butchered it near the larceny defendant's house could be attacked by cross-examination as to how many cows the witness had bought and what disposition he had made of same, but false testimony as to the precise number of cows the witness had bought was not even circumstantially material and so could not form the basis of a conviction for perjury. Harris v. State, 119 Ark. 408, 177 SW 1144.

[b] **"Value received"** is not material in a note; therefore defendant cannot be guilty of perjury in swearing that he made a note, but not with those words, and so that the note set out in the complaint in a suit thereof was not his. Peo. v. McDermott, 8 Cal. 288.

30. Peo. v. Lem You, 97 Cal. 224, 32 P 11; State v. Fail, 121 Kan. 855, 857, 250 P 311 [cit Cyc] (in statutory rape case); Bullock v. Koon, 4 Wend. (N. Y.) 531.

"The materiality of the false testimony is to be determined in view of conditions at the time it is given, although subsequent developments may deprive it of any substantial bearing upon the ultimate question to be decided." State v. Fail, supra.

31. Peo. v. Hitchcock, 104 Cal. 482, 38 P 198.

32. Peo. v. Redmond, 179 App. Div. 127, 165 NYS 821 [order resettled 179 App. Div. 905 mem, 165 NYS 1104 mem].

[a] **Testimony as to fact admitted in counsel's opening.**—Peo. v. Redmond, 179 App. Div. 127, 165 NYS 821 [app dism 225 N. Y. 206, 121 NE 785].

33. Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175.

[a] **"It would be highly dangerous** to make the charge of perjury dependent upon issues or events arising after testimony has been given. If this were the rule it would be unsafe to testify with the utmost truthfulness upon any issue which might, by any possibility, be changed by subsequent events. No such shifting rule ought ever to be engrafted upon a system of jurisprudence in which the protection of individual rights is a cardinal principle." Peo. v. Teal, 196 N. Y. 372, 378, 89 NE 1086, 25 LRA NS 120, 17 AnnCas 1175.

34. State v. Mooney, 65 Mo. 494.

[a] **Testimony on former trial.**—The denial falsely by a witness, on a trial where it is material, that he gave certain testimony in a former trial, is perjury, although such testimony was immaterial on the former trial. State v. Mooney, 65 Mo. 494.

Contradiction of prior material testimony see supra § 33 text and note 18.

35. Cross references:

statement has no bearing on its materiality,[36] and the guilt of one who has falsely sworn does not depend upon the result of the proceedings in which it occurred.[37] It does not lie with the perjurer to say that if he had sworn the truth the case for other reasons would have failed;[38] and if a person swears falsely in respect of any fact relevant to the issue, he is guilty of perjury, although failure of the case was caused by defect in proof of a different fact.[39] Conversely, the fact that the case is won in spite of defendant's false testimony will not render the testimony immaterial.[40]

That the false testimony was unnecessary to accomplish the end in view will not render it immaterial.[41]

Administering officer's knowledge of falsity. One indicted for false swearing may be convicted, although the officer who administered the oath knew at the time that it was false and was made to obtain funds to which affiant was not entitled, and such officer administered the oath for the purpose of instituting criminal proceedings.[42]

[§ 37] **(5) Testimony Affecting Witness—(a) Qualification.** False testimony affecting the qualification of a witness is so far material that it may constitute perjury.[43]

[§ 38] **(b) Credibility.** Perjury may be assigned upon testimony going to the credit of a material witness in a cause,[44] even though such evidence is legal-

Actual use of false affidavit not essential to perjury see infra § 58.
Damage or prejudice not essential see infra § 48.
Nonexistence of issue as affecting materiality see supra § 33 text and note 14.
Possible effect as governing question of materiality see supra § 33 text and note 16.

36. Ind.—State v. Kellis, 193 Ind. 619, 141 NE 337.
Ky.—Com. v. Fortues, 9 Ky. Op. 527.
Minn.—State v. Larson, 171 Minn. 246, 213 NW 900.
N. Y.—Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792.
Pa.—Com. v. Rush, 17 Pa. Dist. 225.
Porto Rico.—Peo. v. Pabón, 7 Porto Rico 379.

[a] **Even though it had no effect** on the case, false testimony may be perjury provided it was so far material that it could have been utilized to affect the case. Peo. v. Pabon, 7 Porto Rico 379.

[b] **"It is sufficient** that it was material and might have affected the proceeding." State v. Larson, 171 Minn. 246, 248, 213 NW 900.

[c] **"The fact that the pleading was defective** or that the plaintiff may have been entitled to a judgment notwithstanding the testimony of the party charged with perjury will not relieve the witness from a prosecution for perjury when he has sworn falsely and corruptly." Com. v. Fortues, 9 Ky. Op. 527.

[d] **"An incompetent witness** may commit perjury, and so of a witness who swears wilfully and falsely in a matter material to the case, although the one party or the other may have been entitled to a judgment without any testimony being heard." Com. v. Fortues, 9 Ky. Op. 527.

[e] **Insurance report.**—Under insurance law provisions, requiring an insurance company to file annually with the superintendent of insurance a verified statement showing its condition on December 31 preceding, and containing such statements as such superintendent shall prescribe, and where the superintendent prescribed that the report contain a statement of loans by the company secured by collateral, a false statement that there were no such loans was material, although the security for the loans was in fact good. Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792.

Rule applied to grand jury proceedings see infra § 43.

37. Colo.—Peo. v. Howland, 63 Colo. 414, 167 P 961, 962 [cit Cyc].
Ill.—Mackin v. Peo., 115 Ill. 312, 3 NE 222, 56 AmR 167.
Iowa.—State v. Schill, 27 Iowa 263.
Kan.—State v. Hoel, 77 Kan. 334, 94 P 267.
Mo.—State v. Wakefield, 73 Mo. 549 [aff 9 Mo. A. 326].

[a] **In the Philippines** (1) under early statutes a conviction for the distinct statutory crimes of giving false testimony in a criminal cause in favor of, against, or neither favorable nor prejudicial to, defendant could not be had prior to determination of such criminal case, since before judgment therein it could not be determined what the effect of the false testimony was. U. S. v. Adolfo, 12 Philippine 296; U. S. v. Opinión, 6 Philippine 662. (2) But later legislation has impliedly repealed statutes of the foregoing character so that now one may be convicted of perjury irrespective of the result of the proceedings in which he testified. U. S. v. Concepcion, 13 Philippine 424 (referring to Adolfo and Opinión cases, supra).

38. Beavers v. State, 124 Ark. 38, 186 SW 300; Scott v. State, 77 Ark. 455, 92 SW 241; Wood v. Peo., 59 N. Y. 117.

39. Scott v. State, 77 Ark. 455, 92 SW 241; Peo. v. Howland, 63 Colo. 414, 167 P 961, 962 [cit Cyc]; Wood v. Peo., 59 N. Y. 117; Peo. v. Grimshaw, 33 Hun 505, 2 N. Y. Cr. 390; Gordon v. State, 158 Wis. 32, 34, 147 NW 998.

"A wilful false swearer is not purged of crime because a successful defense exists concerning which he gave no testimony." Gordon v. State, supra.

[a] **Illustration.**—In prosecution under St. (1913) § 1567 for giving whisky to an Indian there were two issues: First, did defendant give the witness any whisky? Second, was the witness an Indian? Where the witness testified falsely that accused did not give her any whisky, the witness was guilty of perjury, even though she was not in fact an Indian. Gordon v. State, 158 Wis. 32, 147 NW 998.

40. Beavers v. State, 124 Ark. 38, 186 SW 300.

[a] **Subsequent plea of guilty nullifying effect of false statement.**—In a prosecution for gaming, the witness, who swore falsely for the defense in respect of any material fact, was guilty of perjury, although a judgment of conviction of gaming could have been entered upon a plea of guilty afterward made by defendants charged with gaming. Beavers v. State, 124 Ark. 38, 186 SW 300.

41. State v. Berliawsky, 106 Me. 506, 76 A 938.

[a] **Another defense available.**—Where a person was charged with perjury, because he set up a claim for money loaned in defense to an action by way of set-off, and testified in support of it, and the testimony was false, the fact that he need not have done so, because of another available defense, did not make the claim immaterial matter. State v. Berliawsky, 106 Me. 506, 76 A 938.

42. Thompson v. State, 120 Ga. 132, 47 SE 566.

43. State v. Rosenberg, 88 Vt. 223, 92 A 145; State v. Carpenter, 130 Wash. 23, 225 P 654.

[a] **Even though a witness does not testify** to anything else before or after falsely stating that he has never been convicted of perjury, such false statement is material since under statute one convicted of perjury is disqualified to testify, and his qualification as a witness is in itself a material matter. State v. Carpenter, 130 Wash. 23, 225 P 654.

[b] **Witness' testimony on voir dire** examination that he had not violated rule excluding witnesses from court room was material and sufficient to support a charge of perjury, even if such violation without the connivance of the party would not render the witness incompetent, since the disobedience of the rule or order was one of the facts pertinent to the competence of the witness. State v. Rosenberg, 88 Vt. 223, 92 A 145.

44. Cal.—Peo. v. Barry, 63 Cal. 62; Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192.
Conn.—State v. Greenberg, 92 Conn. 657, 103 A 897.
Del.—State v. Rash, 25 Del. 77, 78 A 405.
Fla.—Fields v. State, 94 Fla. 490, 114 S 317.
Ga.—Wilson v. State, 115 Ga. 206, 41 SE 696, 90 AmSR 104.
Ind.—State v. Cary, 159 Ind. 504, 65 NE 527; State v. Sutton, 147 Ind. 158, 46 NE 468; State v. Hunt, 137 Ind. 537, 37 NE 409.
La.—State v. Smith, 126 La. 135, 138, 52 S 244 [quot Cyc].
Mo.—State v. Moran, 216 Mo. 550, 115 SW 1126; State v. Faulkner, 175 Mo. 546, 75 SW 116.
Nev.—Ex p. Sheldon, 44 Nev. 268, 269, 193 P 967 [quot Cyc].
N. H.—State v. Brown, 68 N. H. 200, 38 A 731; State v. Norris, 9 N. H. 96.
N. Y.—Peo. v. Courtney, 94 N. Y. 490 [aff 31 Hun 199]; Peo. v. Davis, 122 App. Div. 569, 107 NYS 426, 21 N. Y. Cr. 573 [aff 191 N. Y. 514 mem, 84 NE 1116 mem].
N. C.—State v. Cline, 150 N. C. 854, 64 SE 591; State v. Strat, 5 N. C. 124.
Oh.—In re Franklin County, 5 OhS &CP 691, 7 OhNP 450.
Okl.—Coleman v. State, 6 Okl. Cr. 252, 118 P 594.
Pa.—Com. v. Rogo, 71 Pa. Super. 109.
R. I.—State v. Miller, 26 R. I. 282, 58 A 882, 3 AnnCas 943 (supporting text but decided under a statute eliminating materiality as an element of perjury).
Tex.—Williams v. State, 28 Tex. A. 301, 12 SW 1103; Washington v. State, 22 Tex. A. 26, 3 SW 228.
Wash.—State v. Carpenter, 130 Wash. 23, 225 P 654, 656 [cit Cyc].
Wis.—Hanscom v. State, 93 Wis. 273, 67 NW 419.
Eng.—Reg. v. Overton, C. & M. 655, 41 ECL 355; Rex v. Griepe, Holt K. B. 535, 90 Reprint 1194, 1 Ld. Raym. 256, 91 Reprint 1067, 12 Mod. 139, 88 Reprint 1220; Rex v. Greepe, 2 Salk. 513, 91 Reprint 437; Reg. v. Gibbons, L. & C. 109, 169 Reprint 1324.

"It is generally held to be perjury to swear falsely to anything affecting the credibility of the witness himself or the credibility of another witness in the case." Miller v. State, 9 Okl. Cr. 196, 198, 131 P 181.

[a] **If it either supports or at-**

ly inadmissible and ought not to be received,[45] as where the question was in such a form that the witness should have refused to answer it.[46] So also perjury may be predicated on a false answer of a witness that he had never been convicted of a felony,[47] nor imprisoned for crime,[48] as such issue affects his credibility and is therefore material to the issue, provided the evidence of conviction is not too remote.[49] But where the testimony of the witness impeached is in itself immaterial, false statements affecting its credibility are not so far material as to constitute perjury.[50]

Contradictory statements. Denial of past statements contradictory to present statements is material on the issue of credibility.[51] In like manner testimony may be material which contradicts the testimony or affects the credit of another witness whose testimony is material.[52]

The name of a witness has been regarded as material on the question of credibility.[53]

[§ 39] **(6) Inadmissible and Excluded Evidence —(a) In General.** False testimony may be sufficiently material to constitute perjury, although it was legally inadmissible[54] and subsequently with-

tacks credibility of a witness false testimony may be perjury. Fields v. State, 94 Fla. 490, 114 S 317. To same effect Peo. v. Collins, 6 Cal. A. 492, 92 P 513.

[b] **"Where testimony tends, although indirectly, to corroborate or discredit** the witness or the testimony of another witness it may be material and may become the basis of a prosecution for perjury." Com. v. Bobanic, 62 Pa. Super. 40, 43.

45. State v. Smith, 126 La. 135, 138, 52 S 244 [quot Cyc]; Ex p. Sheldon, 44 Nev. 268, 269, 193 P 967 [quot Cyc]; State v. Carpenter, 130 Wash. 23, 225 P 654, 656 [quot Cyc]; Reg. v. Gibbons, L. & C. 109, 169 Reprint 1324.

Inadmissible evidence as constituting perjury generally see infra §§ 39-41.

46. State v. Cary, 159 Ind. 504, 65 NE 527.

[a] **Illustration.**—Defendant on trial for crime, falsely testifying in response to questions on cross-examination for the purpose of impeachment by showing an inconsistent statement made to a third person, is guilty of "perjury," although the impeaching questions did not specify the time and place of the making of the statement, so that he might have refused to answer them. State v. Cary, 159 Ind. 504, 65 NE 527.

47. U. S.—U. S. v. Landsberg, 23 Fed. 585, 21 Blatchf. 159.

Cal.—Peo. v. Paden, 71 Cal. A. 247, 234 P 920.

Fla.—Herndon v. State, 72 Fla. 108, 72 S 833.

Kan.—State v. Park, 57 Kan. 431, 46 P 713.

La.—State v. Smith, 126 La. 135, 138, 52 S 244 [quot Cyc].

Mass.—Com. v. Johnson, 175 Mass. 152, 55 NE 804.

Mo.—State v. Moran, 216 Mo. 550, 115 SW 1126.

N. Y.—Peo. v. Courtney, 94 N. Y. 490 [aff 31 Hun 199]; Peo. v. Link, 4 NYS 436, 6 N. Y. Cr. 185.

Tex.—Williams v. State, 28 Tex. A. 301, 12 SW 1103.

Wash.—State v. Carpenter, 130 Wash. 23, 225 P 654, 656 [quot Cyc].

Eng.—Reg. v. Baker, [1895] 1 Q. B. 797; Reg. v. Lavey, 3 C. & K. 26; Reg. v. Overton, C. & M. 655, 41 ECL 355.

48. U. S. v. Landsberg, 23 Fed. 585, 21 Blatchf. 159; Williams v. State, 28 Tex. A. 301, 12 SW 1103; Woodson v. State, 24 Tex. A. 153, 6 SW 184; Reg. v. Lavey, 3 C. & K. 26.

49. Herndon v. State, 72 Fla. 108, 72 S 833; State v. Smith, 126 La. 135, 138, 52 S 244; Busby v. State, 48 Tex. Cr. 83, 86 SW 1032.

[a] **Held too remote.**—"Testimony which would merely impeach a witness, [concerning facts] occurring sixteen years before the witness is being examined, is too remote; and therefore immaterial, and hence not a proper predicate for perjury." Busby v. State, 48 Tex. Cr. 83, 85, 86 SW 1032.

[b] **Held not too remote.**—"The lapse of thirteen years did not destroy the materiality of the testimony." Herndon v. State, 72 Fla. 108, 115, 72 S 833.

50. Leak v. State, 61 Ark. 599, 33 SW 1067; Shevalier v. State, 85 Nebr. 366, 372, 123 NW 424, 19 AnnCas 361; Stanley v. U. S., 1 Okl. 336, 33 P 1025.

"In order to assign perjury upon false testimony that goes to the credit of a witness, the assignment must be with respect to a witness who has given material testimony on the trial." Shevalier v. State, supra.

[a] **Illustrations.**—(1) Where the evidence of a witness is immaterial, perjury cannot be based on his testimony, given on cross-examination, as to matters affecting his credibility only. Stanley v. U. S., 1 Okl. 336, 33 P 1025. (2) Where accused swore before a grand jury that one Dave Henry had sold him whisky, and on such testimony said Henry was indicted, and on the trial of said Henry defendant falsely denied making said statements before the grand jury, and the case against Henry failed for total lack of proof, defendant was not guilty of perjury since his denial of his previous testimony was immaterial. Even had accused admitted his previous testimony, while on the trial denying he knew said Henry, the latter could not have been convicted, and for this reason the denial of the previous testimony was without materiality. Leak v. State, 61 Ark. 599, 33 SW 1067.

51. Ala.—Williams v. State, 68 Ala. 551.

Ark.—Robertson v. State, 54 Ark. 604, 16 SW 582.

Cal.—Peo. v. Barry, 63 Cal. 62.

Del.—State v. Rash, 25 Del. 77, 78 A 405.

La.—State v. Smith, 126 La. 135, 52 S 244.

Mo.—State v. Mooney, 65 Mo. 494.

Tex.—George v. State, 40 Tex. Cr. 646, 50 SW 374, 51 SW 378.

Wis.—Hanscom v. State, 93 Wis. 273, 67 NW 419.

[a] **For example** (1) where a witness has given testimony material to the issue, and in answer to a question as to whether he had not previously made a different statement he denies having done so, the charge of perjury may be founded on such denial. State v. Smith, 126 La. 135, 52 S 244. (2) Where in a prosecution for perjury, the state offered evidence that the defendant stated under oath to a deputy attorney-general, who was investigating a charge of election bribery, that a person named had attempted to influence defendant's vote by the use of money, and upon this testimony an indictment was filed against the person named, charging him with having offered defendant money for his vote, and defendant, when sworn as a witness in that case, denied having made the alleged statements before the deputy attorney-general, if defendant made such absolute and false denial of having made the alleged statements to the deputy attorney-general, then the denial was material to the trial of the bribery case, in that it affected his credibility as a witness. State v. Rash, 25 Del. 77, 78 A 405.

52. Peo. v. Lem You, 97 Cal. 224, 32 P 11.

53. Com. v. Rush, 17 Pa. Dist. 225; Reg. v. Mullany, L. & C. 593, 169 Reprint 1528. See Reg. v. Worley, 3 Cox C. C. 535, 542 (where a witness falsely denied that he had ever been known by a certain name and the court said: "I do not think that the evidence of materiality is sufficient. I do not mean to say that a false answer, given under such circumstances as those proved, might not support a charge of perjury, but I am of opinion that in this case enough has not been shown on the part of the prosecution to connect the false answer with the issue on which the evidence was given. It might have been material, but we cannot clearly see that it was so").

[a] **Reason for rule.**—"Shall a witness have the right to bar all inquiry as to his identity by giving an assumed name? He may have been convicted of perjury, or other facts seriously bearing upon his credibility might appear through the knowledge of his name; but if the rule is that he can give a false name, any investigation as to such facts is completely stopped." Com. v. Rush, 17 Pa. Dist. 225, 226.

[b] **Where a detective** under cross-examination stated that his name was Howard Rush, when in fact it was Rush Brader, such false statement was sufficiently material to constitute perjury, since the name of the witness was important in facilitating investigation of the antecedents of the witness with a view to attacking his credibility. Com. v. Rush, 17 Pa. Dist. 225.

54. Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175; Peo. v. Brill, 100 Misc. 92, 165 NYS 65; Meyers v. U. S., 5 Okl. 173, 48 P 186; Reg. v. Philpotts, 2 Den. C. C. 302, 169 Reprint 514; Reg. v. Gibbons, L. & C. 109, 169 Reprint 1324.

[a] **Reason for rule.**—"The evidence received need not satisfy auxiliary tests as to form or competency or rules of procedure. The evidence having been received, the precise question as to whether or not it may be a foundation for the charge of perjury is confined to the question whether it is material. If 'relevant' be defined as a broader term than 'material,' even matter received as relevant would not support the charge unless it was also material. It is in this sense that the language in the leading case of Peo. v. Teal, 196 N. Y. 372, 377, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175, is applicable. Judge Werner . . . says: 'We may pass without discussion the elements of irrelevancy and incompetency. These could have been waived. They are, moreover, not essential to the commission of perjury as defined in the statute.'" Peo. v. Brill, 100 Misc. 92, 96, 165 NYS 65.

[b] **"The test** . . . is not whether as a matter of formality the testimony might have been excluded under the rules of procedure or whether it was correctly admitted under the rules of evidence but rather, having been received, being false, whether it was material matter, that is whether it had probative value rationally to influence the result upon the merits." Peo. v. Brill, 100 Misc. 92, 98, 165 NYS 65.

[c] **Testimony which might have been excluded.**—"If the testimony is wilfully false and is material for any purpose under the issue and is received, even though it might have been excluded under some rule of admissibility, it is perjury." Peo. v. Brill, 100 Misc. 92, 95, 165 NYS 65.

drawn.[55] But false testimony actually excluded,[56] or which should have been excluded on the ground of immateriality,[57] is not perjury.

Testimony going to the admissibility of documentary evidence is ordinarily material.[58]

Error in the order of admission of testimony does not prevent such testimony from constituting perjury if false.[59]

[§ 40] **(b) Incompetent Testimony.**[60] Incompetent testimony may constitute perjury.[61] A party has a right to waive all objections to the competency of a witness produced against him, and, having done so, the evidence becomes as competent and material as though no such objection had existed, and the witness will be guilty of perjury if he testifies falsely.[62] It has been held that, although testimony ought by law to be taken in writing, yet, if it is received orally, perjury may nevertheless be assigned on it;[63] but there is contrary authority.[64] But where authority exists to swear only a competent witness, and an incompetent witness is sworn, his testimony cannot be criminal because in this case the incompetency goes to the legal authority for administration of the oath.[65]

[§ 41] **(c) Irrelevant Testimony.**[66] Irrelevant testimony cannot constitute perjury,[67] even though it is "material" in the sense of having probative force.[68]

Testimony in rebuttal of irrelevant testimony is immaterial, and therefore perjury cannot be assigned upon it if false.[69]

[§ 42] **(7) Materiality to Particular Matters or Proceedings**[70]**—(a) Criminal Prosecutions**[71]**—aa. In General.** In accordance with, and subject to, the general rules above stated,[72] particular statements have been held to be either material[73] or immate-

55. Reg. v. Phillpotts, 2 Den. C. C. 302, 169 Reprint 514.

56. Com. v. Kuntz, 2 PaLJR 375, 4 PaLJ 163.

57. Peo. v. Brill, 100 Misc. 92, 165 NYS 65.

Incompetent and irrelevant testimony see infra §§ 40, 41.

58. State v. Stilwell, 109 Or. 643, 221 P 174. But see Com. v. Rupple, 1 Pa. Co. 663 (holding that testimony relative to the execution of a power of attorney, which power was defectively executed and therefore inadmissible in evidence, cannot constitute perjury because the said instrument being inadmissible testimony respecting it relates to an immaterial matter).

[a] **Identification of document.**—Where, in an action on an oral contract, plaintiff, when shown a writing purporting to be signed by himself and defendant, testified, "I never saw that before," and that defendant did not sign it in his presence, his statement was material, and would have been material even though plaintiff by such testimony had succeeded in preventing the introduction of the exhibited contract in evidence. State v. Stilwell, 109 Or. 643, 221 P 174.

59. Slade v. State, (Miss.) 119 S 355.

[a] **For example,** since under Hemingway Code (1927) § 2161 a judge or chancellor in a habeas corpus trial is merely required to inquire into cause of imprisonment or detention, the fact that the sheriff in such proceeding took the initiative and introduced evidence first did not affect the materiality of testimony, so as to preclude conviction for perjury therein, particularly since proceeding in such manner was, at the most, a mere error in procedure. Slade v. State, (Miss.) 119 S 355.

60. Inadmissible evidence relative to credibility of witness as constituting perjury see supra § 38 text and notes 45, 46.

61. U. S.—U. S. v. Grottkau, 30 Fed. 672.

Ky.—Com. v. Fortues, 9 Ky. Op. 527.

N. H.—State v. Langley, 34 N. H. 529.

N. Y.—Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175; Chamberlain v. Peo., 23 N. Y. 85, 80 AmD 255; Peo. v. Bowe, 34 Hun 528, 3 N. Y. Cr. 149; Peo. v. Brill, 100 Misc. 92, 165 NYS 65; Van Steenbergh v. Kortz, 10 Johns. 167.

Oh.—Montgomery v. State, 10 Oh. 220. But see State v. Budd, 65 Oh. St. 1, 60 NE 988 (where the court said that the testimony must be competent to afford a basis for perjury).

Or.—State v. Woolridge, 45 Or. 389, 78 P 333.

Pa.—Com. v. Cieslack, 26 Pa. Dist. 631, 632.

Tenn.—Haley v. McPherson, 3 Humphr. 104; Sharp v. Wilhite, 2 Humphr. 434.

Tex.—Pipes v. State, 26 Tex. A. 318, 9 SW 614.

See State v. Molier, 12 N. C. 263 (recognizing rule).

"Though a witness is in law incompetent, if in fact the court admits him, he commits perjury when what he testifies to is wilfully false." 2 Bishop Cr. L. (8th ed) § 1019 [quot Com. v. Cieslack, supra].

[a] **Wife incompetent to give testimony implicating husband** is liable for perjury on such testimony. Com. v. Cieslack, 26 Pa. Dist. 631.

[b] **In England** it has been held that, where a defendant in a trial for illegal gambling represented himself as his own son and then gave false testimony, he was not indictable for perjury because he had in reality been defendant in the gambling case and so had been incompetent to testify. Reg. v. Clegg, 19 L. T. Rep. N. S. 47.

62. Cronk v. Peo., 131 Ill. 56, 22 NE 862; Chamberlain v. Peo., 23 N. Y. 85, 80 AmD 255; Peo. v. Bowe, 34 Hun 528, 3 N. Y. Cr. 149; Van Steenbergh v. Kortz, 10 Johns. (N. Y.) 167; Montgomery v. State, 10 Oh. 220; Haley v. McPherson, 3 Humphr. (Tenn.) 104; Sharp v. Wilhite, 2 Humphr. (Tenn.) 434.

63. Covey v. State, 23 Tex. A. 388, 5 SW 283.

64. State v. Trask, 42 Vt. 152.

65. Com. v. Bradshaw, 210 Ky. 405, 276 SW 124.

[a] **For instance** a false statement on an application for a marriage license made by a person not a competent witness, and whom the clerk therefore had no authority to swear, is not false swearing. Com. v. Bradshaw, 210 Ky. 405, 276 SW 124.

[b] **Witness held competent.**—An entryman is a competent witness to prove a homestead claim, so that authority exists to swear him in this connection. Hallock v. U. S., 185 Fed. 417, 107 CCA 487 [certiorari den 220 U. S. 613 mem, 31 SCt 717 mem, 55 L. ed. 610 mem].

Legal provision for oath generally see infra §§ 49–52.

66. Relevant testimony as material see supra § 33 text and note 15.

67. Peo. v. Barbuti, 207 App. Div. 285, 202 NYS 126.

[a] **"Material" and "relevant" are interchangeable terms** within the meaning of the rule that false statements must be "material" to constitute perjury. Peo. v. Barbuti, 207 App. Div. 285, 289, 202 NYS 126.

68. Peo. v. Barbuti, supra.

"Evidence, to be material, must, in addition to having probative force or persuasive character, be relative to the issue or properly material. The evidence must properly tend to establish some fact at issue upon the trial, and not merely to disparage the defendant when the issue of his character is not presented." Peo. v. Barbuti, supra.

[a] **Illustration.**—Where, in a prosecution for receiving stolen property, evidence that an automobile was taken with the owners' consent and by their direction in order to defraud an insurance company was erroneously admitted to show guilty knowledge, false testimony relating to such transaction was not "material," and did not support a prosecution for perjury, since evidence, to be material, must, in addition to having probative force, be relevant to the issue. Peo. v. Barbuti, 207 App. Div. 285, 202 NYS 126.

69. State v. Brown, 68 N. H. 200, 38 A 731.

70. Matter or proceeding in which statement is made and oath administered as an element of perjury see infra §§ 53–60, 65–76.

71. Application to serve as bail see infra § 46 text and notes 8–11.

72. See supra §§ 33–41.

73. See cases infra this note.

[a] **Arson.**—State v. Smith, 119 Minn. 107, 137 NW 295 (testimony relative to attempt to commit is material to prosecution for commission, since by statute former may be proved under indictment for latter).

[b] **Assault and battery.**—Fields v. State, 94 Fla. 490, 114 S 317 (number of blows struck).

[c] **Burglary.**—Sanders v. Peo., 124 Ill. 218, 16 NE 81 (false affidavit on motion for continuance that a certain missing witness was the only person who could testify to defendant's alibi).

[d] **Crop removal without payment of rent.**—State v. Harris, 145 N. C. 456, 59 SE 115 (in a prosecution for removing crops without having paid the rent, where defendant claimed that he paid the rent to an assignee thereof, the landlord's testimony that he made no assignment of the rent, and did not instruct defendant to pay it to a third party, was so material to the issue as to support a charge of perjury).

[e] **Disorderly house, maintenance of.**—Shaffer v. State, 87 Md. 124, 39 A 313 (false denial of knowledge of reputation of house and keeper thereof).

[f] **Felonious assault.**—Wheeler v. Peo., 63 Colo. 209, 165 P 257 (presence of accused at place where assault occurred); Henry v. State, 43 Tex. Cr. 176, 63 SW 642 (denial by witness that he gave assault defendant the stick with which the felonious assault was made).

[g] **Gambling.**—Mares v. State, 71 Tex. Cr. 303, 158 SW 1130 (presence of accused in house at time of unlawful betting).

[h] **Homicide.**—Peo. v. Hitchcock, 104 Cal. 482, 38 P 198; Peo. v. Patterson, 64 Cal. A. 223, 221 P 394 (statement material to secondary issue sufficient); In re Braynard, 52 Cal. A.

rial[74] to criminal prosecutions for various offenses.

Testimony tending to prove an alibi is generally held material to a criminal prosecution so as to sustain a charge of perjury based upon its falsity.[75]

Testimony bearing on the question of punishment is ordinarily deemed material.[76]

[§ 43] **bb. Proceedings before Grand Jury.**[77] On an investigation before a grand jury of an alleged crime, any testimony tending to establish either that such crime has been in fact committed, or that it has not been committed, is material, and perjury may be assigned upon the testimony of a witness before that body which is willfully false in respect of any fact tending to establish or disprove the commission of such crime.[78] This rule has been applied to grand jury investigations of conspiracy,[79]

631, 199 P 576 (where one had pleaded guilty of murder and sought to withdraw his plea and enter a plea of not guilty on the ground of coercion, threats, etc., alleging in his affidavit that he had been assaulted by a deputy district attorney, false testimony by another witness that a party acting under the sheriff as an armed guard struck such prisoner with his fist was material testimony, since the issue was whether defendant reasonably feared violence at the hands of such attorney or a mob as alleged, rendering the witness guilty of perjury so as to authorize denial of a petition for habeas corpus); Wright v. State, 30 Okl. Cr. 425, 236 P 633 (testimony weakening evidence of witness by placing him outside instead of inside room where murder was committed); Com. v. Rogo, 71 Pa. Super. 109 (testimony respecting dying declaration).

[i] **Larceny.**—Peo. v. Albert, (Cal. A.) 267 P 587 (statements relative to defendant's purchase of goods stolen and explanation of reasons for nonpayment); Herndon v. State, 72 Fla. 108, 72 S 833 (conviction of similar offense); State v. Easter, 185 Iowa 476, 170 NW 748 (presence of witness when defendant took possession of stolen goods and alleged purchase of goods from third parties); Martinez v. State, 39 Tex. Cr. 479, 46 SW 826 (statement that witness did not see larceny defendant driving away the hogs he was accused of stealing); Cravey v. State, 33 Tex. Cr. 557, 28 SW 472 (time of branding stolen cattle).

[j] **Liquor law violation.**—Peo. v. Dunstan, 59 Cal. A. 574, 211 P 813; Aaron v. State, 12 Ga. A. 40, 76 SE 753 (ownership of liquor by another than accused); State v. Young, 153 Iowa 4, 132 NW 813, AnnCas1913E 70 (the false testimony of one charged with having given in a county generally whisky to a person in the habit of becoming intoxicated that he had not given such person whisky in a barn or paint shop is material, although no one testified otherwise, and he may be convicted of perjury); State v. Adams, 119 Kan. 509, 240 P 955 (denial on trial of statements made at inquisition relative to receipt of intoxicating liquors from accused); Robinson v. State, 146 Miss. 753, 112 S 167 (denial of possession).

[k] **Malicious mischief.**—State v. Jennings, 278 Mo. 544, 213 SW 421 (common agreement of defendant and associates to throw rocks at street car).

[l] **Perjury.**—Weinstein v. State, 146 Md. 80, 125 A 889 (in a prosecution for swearing falsely as to his interest in certain property, when defendant offered self as bail for an accused, defendant's testimony that he did not receive money for becoming security was material as respected the issues of the perjury trial, so as to justify a second charge of perjury based upon perjury in the first perjury trial); Reg. v. Alsop, 11 Cox C. C. 264 (false testimony by A in trial of C for perjury, in C's affidavit, which C denied swearing to, relative to public announcement in C's presence that such affidavit was made by C).

[m] **Rape.**—Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448 (diseased condition of accused).

[n] **Receiving stolen goods.**—Peo. v. Senegram, 27 Cal. A. 301, 149 P 786.

[o] **Robbery.**—Lawson v. State, (Okl. Cr.) 254 P 110 (presence of third person at attempted robbery material on preliminary hearing before magistrate).

[p] **Seduction.**—State v. Blize, 111 Mo. 464, 20 SW 210 (false statement by witness that he had had intercourse with seduced girl prior to her alleged seduction by defendant).

74. See cases infra this note.

[a] **Assault and battery.**—Pressley v. State, 18 Ala. A. 40, 88 S 291 (in a prosecution for assault and battery false statements that accused did not arrest and detain the victim, and did not represent himself to be the high sheriff, are not material to the only issue—of whether the victim was touched by accused—and therefore cannot form the basis of a conviction for perjury); Reg. v. Tate, 12 Cox C. C. 7 (false statement of facts which might have provoked, but which would not have legally justified, the assault).

[b] **Burglary.**—Bledsoe v. State, 64 Ark. 474, 42 SW 899 (false statement as to size of hole in safe immaterial where no evidence to show safe was in building burglarized).

[c] **Corrupt Practices Act prosecution.**—U. S. v. Cameron, 282 Fed. 684 (the Corrupt Practices Act limits the amount of money a candidate for public office may lawfully expend but not the amount he may receive in aid of his candidacy, and therefore a false statement as to the amount received is not so far material as to warrant conviction under a statute making a false oath as to a material matter perjury).

[d] **Disorderly conduct.**—State v. Dineen, 203 Mo. 628, 102 SW 480 (testimony relative to disorderly conduct in a place other than that where defendant was accused of having been disorderly).

[e] **Liquor law violation.**—Lednum v. State, 169 Ark. 396, 275 SW 699 (making of whisky in county other than that involved in alleged violation of law); Campbell v. State, 104 Tex. Cr. 596, 285 SW 820 (statement immaterial in prosecution for possession and transportation of liquor).

[f] **Perjury.**—Weinstein v. State, 146 Md. 80, 125 A 889 (in a prosecution for perjury in having falsely deposed as to his interest in certain property, in criminal proceedings against M for purpose of qualifying as bail, defendant's alleged false testimony that he did not receive money for going bail for R, charged with crime in proceeding separate from those against M, was immaterial, and could not found a second charge of perjury based upon perjury in the first perjury trial).

75. Ark.—Barre v. State, 99 Ark. 629, 139 SW 641.

Ill.—Sanders v. Peo., 124 Ill. 218, 16 NE 81.

Ind.—Masterson v. State, 144 Ind. 240, 43 NE 138; Galloway v. State, 29 Ind. 442.

Kan.—State v. Fail, 121 Kan. 855, 250 P 311.

Ky.—Com. v. Miles, 140 Ky. 577, 131 SW 385, 140 AmSR 401.

Mich.—Peo. v. Macard, 109 Mich. 623, 67 NW 968.

Miss.—Brown v. State, 57 Miss. 424.

Mont.—State v. Gibbs, 10 Mont. 213, 25 P 289, 10 LRA 749.

Eng.—Reg. v. Tyson, L. R. 1 C. C. 107.

[a] **Burglary.**—Masterson v. State, 144 Ind. 240, 43 NE 138.

[b] **Disturbance of religious gathering.**—Com. v. Miles, 140 Ky. 577, 131 SW 385, 140 AmSR 401.

[c] **Malicious mischief.**—State v. Gibbs, 10 Mont. 213, 25 P 289, 10 LRA 749.

[d] **Murder.**—Barre v. State, 99 Ark. 629, 139 SW 641.

[e] **Rape.**—State v. Fail, 121 Kan. 855, 250 P 311 (statutory).

[f] **Partial alibi.**—(1) "Perjury may be assigned with respect to testimony concerning the whereabouts at a particular time of one charged with crime, although it may fail utterly to establish an alibi by reason of important intervals not accounted for." State v. Fail, 121 Kan. 855, 250 P 311. (2) In a trial upon a charge of statutory rape, where complainant told of a series of acts of sexual intercourse over a period of some six weeks preceding that relied upon for conviction, and such defendant during that time was living elsewhere than with his wife, and promised to marry her when he got a divorce, perjury was properly assigned with respect to false testimony by his wife (who said she and her husband had been living together practically all the time since their marriage) that about a week before the act for which he was prosecuted he had visited a neighboring town with her, spent the night there, and on the next morning accompanied her on a shopping trip, paying for a dress and other articles which she bought. State v. Fail, supra.

76. McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018]; State v. Keenan, 42 S. C. L. 456; Stephens v. State, 1 Swan (Tenn.) 157; Rex v. Wheeler, [1917] 1 K. B. 283.

[a] **Carrying arms.**—Whether accused was armed when he left premises he was accused of burglarizing is material, because even if it did not tend to connect accused with commission of the crime of burglary it was competent as part of the res gestæ of such crime and material on the question of punishment, and false swearing as to that matter constitutes perjury. McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018].

77. Grand jury proceeding as matter or proceeding in which perjury may be committed see infra § 67.

78. U. S.—Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173.

Ark.—Smith v. State, 91 Ark. 200, 120 SW 985.

Colo.—Peo. v. Howland, 63 Colo. 414, 167 P 961, 962 [quot Cyc].

Hawaii.—U. S. v. Mau Sing, 3 Hawaii Fed. 385.

Ill.—Mackin v. Peo., 115 Ill. 312, 3 NE 222, 56 AmR 167.

Ind.—State v. Turley, 153 Ind. 345, 55 NE 30.

Ky.—Com. v. Smock, 10 Ky. Op. 430.

Mo.—State v. Burnett, 253 Mo. 341, 161 SW 680.

Or.—State v. Carothers, 69 Or. 382, 138 P 1077.

Tex.—Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544; Butler v. State, 36 Tex. Cr. 444, 37 SW 746.

Utah.—Peo. v. Greenwell, 5 Utah 112, 13 P 89.

Vt.—State v. Sargood, 80 Vt. 415, 68 A 49, 130 AmSR 995, 13 AnnCas 367.

79. Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173.

[a] **False testimony relative to attempted bribery to conceal evidence.**—On investigation by a grand jury of a charge of conspiracy to commit an offense against the United States, testimony that accused attempted to bribe an employee of the government to conceal evidence was mate-

gambling,[80] homicide,[81] smuggling,[82] keeping a disorderly house,[83] and violations of liquor laws.[84] The fact that at the time the testimony was given, the grand jury had already voted to indict in the case under consideration,[85] although they had not actually done so, but were still considering the case,[86] does not render such testimony immaterial, so as to be incapable of supporting the charge of perjury. Nor can a witness who falsely denies before the grand jury any knowledge of a fact material to the investigation defend a charge of perjury on the ground that the evidence sought from him would have been merely cumulative.[87] Any testimony which might properly affect the bringing of an indictment is material,[88] irrespective of whether or not an indictment is found,[89] and irrespective of the guilt or innocence of accused.[90] On the other hand, false testimony as to matters not pertinent to the investigation are immaterial and cannot constitute perjury.[91] If the grand jury have no legal authority to inquire into a particular matter false testimony in relation to such matter is immaterial.[92]

Testimony tending to impede or suspend the investigation is material to a grand jury inquiry.[93]

Form of question. Even though the question asked is too general to form the basis for impeachment of the witness, a false answer thereto may be perjury.[94]

Meaning of "point in question." A statute requiring testimony to be material to "the point in ques-

rial, and false testimony before the grand jury relative thereto constituted perjury. Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173.

80. State v. Carothers, 69 Or 382, 138 P 1077 (testimony held material).

81. State v. Kellis, 193 Ind. 619, 141 NE 337 (presence of witness when shots were fired).

82. U. S. v. Mau Sing, 3 Hawaii Fed. 385.

[a] **Statements held material.**—(1) In a grand jury investigation of smuggling of certain knives of foreign manufacture false statements of defendant that some of such knives in his possession had been found by him, and some purchased from an unknown party on a wharf, were pertinent to the issue of where he obtained such knives, and where he obtained them was material to the investigation, so that defendant's false statements were perjury. U. S. v. Mau Sing, 3 Hawaii Fed. 385. (2) False statements that defendant did not know whether or not such knives had been smuggled, when he actually did know that the knives in his possession were not smuggled, would constitute perjury. U. S. v. Mau Sing, supra.

83. State v. Burnett, 253 Mo. 341, 161 SW 680.

[a] **Acting as panderer.**—Where a hotel proprietor was suspected of keeping a bawdyhouse and on a grand jury investigation defendant, a porter in the hotel, falsely denied that he had acted as panderer and brought men and women together in the hotel for immoral purposes, such false testimony was material and constituted perjury. State v. Burnett, 253 Mo. 341, 161 SW 680.

84. State v. Ruddy, 287 Mo. 52, 228 SW 760; State v. Ackerman, 214 Mo. 325, 113 SW 1087, 22 LRANS 1192; Logan v. State, 96 Tex. Cr. 601, 258 SW 830; Jones v. State, 76 Tex. Cr. 398, 174 SW 1071; Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544.

[a] **False statement as to persons present at an illegal sale of liquor** is material to a grand jury investigation of liquor law violations. Logan v. State, 96 Tex. Cr. 601, 258 SW 830.

[b] **Hauling beer to illegal seller.**—On an investigation by the grand jury as to persons illegally selling intoxicating liquors, testimony of a drayman as to whether he had hauled beer at various times during the nighttime to the persons charged with illegal sales, and to the places where the sales were alleged to have been made, was material, and perjury could be predicated thereon, although it had no reference to the actual illegal selling. State v. Ackerman, 214 Mo. 325, 113 SW 1087, 22 LRANS 1192.

[c] **Presence of witness at speakeasy when liquor was not being sold** was collaterally material. State v. Ruddy, 287 Mo. 52, 228 SW 760.

[d] **Securing liquor from accused.**—Testimony before a grand jury investigating illegal sales of liquor that defendant had not secured liquor from the one charged with its sale was sufficiently material to sustain a conviction of perjury. Jones v. State, 76 Tex. Cr. 398, 174 SW 1071.

[e] **Storing liquor in house of witness.**—Where the grand jury investigating violations of the law prohibiting the sale and storing of intoxicating liquors investigated whether certain persons had received and stored liquor in a house rented by a witness, and whether he knew that the persons had received liquor on a designated date and stored it in the house, the false testimony of the witness that no liquor had been received and stored in his house was material to the inquiry. Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544.

85. State v. Lehman, 175 Mo. 619, 75 SW 139; State v. Faulkner, 175 Mo. 546, 75 SW 116.

86. State v. Lehman, 175 Mo. 619, 75 SW 139.

87. In re French, 28 Hawaii 47, 56 [quot Cyc]; State v. Faulkner, 175 Mo. 546, 75 SW 116.

88. Peo. v. Howland, 63 Colo. 414, 418, 167 P 961; State v. Kellis, 193 Ind. 619, 141 NE 337; State v. Sargood, 80 Vt. 415, 68 A 49, 130 AmSR 995, 13 AnnCas 367.

"In an inquiry by the grand jury the rule in respect to what is material is of necessity much broader than that governing the trial of a cause. The rule as applied to testimony before the grand jury is laid down in State v. Sargood, 80 Vt. 415, 68 A 49, 130 AmSR 995, 13 AnnCas 367, as follows: 'False statements by a witness are sufficiently material to the issue to sustain a prosecution for perjury where the statements may probably have influenced the jury in reaching their conclusions.'" Peo. v. Howland, supra.

89. State v. Carothers, 69 Or. 382, 138 P 1077.

Actual effect of testimony as bearing on materiality generally see supra § 36.

90. State v. Carothers, 69 Or. 382, 138 P 1077.

[a] **Illustration.**—Testimony before a grand jury investigating gambling that the witness had not seen poker played in a certain building for money was material irrespective of whether or not an indictment was found and irrespective of the guilt or innocence of the party whose alleged gambling activities were being investigated. State v. Carothers, 69 Or. 382, 138 P 1077.

91. Clayton v. U. S., 284 Fed. 537.

[a] **Liquor law violation.**—In a grand jury inquiry as to violations of the National Prohibition Act by persons other than the witness, a question to him whether he had been intoxicated within the year and a half preceding the inquiry was not material to the inquiry so that a false answer thereto by the witness did not render him liable to conviction for perjury. Clayton v. U. S., 284 Fed. 537.

92. Pankey v. Peo., 2 Ill. 80.

Lack of authority as bearing on proceeding considered as element of crime of perjury see infra § 67.

93. Carroll v. U. S., 16 F. (2d) 951 [certiorari den 273 U. S. 763 mem, 47 SCt 477 mem, 71 L. ed. 880 mem]; Smith v. State, 153 Ark. 645, 241 SW 37; Smith v. State, 91 Ark. 200, 205, 120 SW 985; State v. Kellis, 193 Ind. 619, 141 NE 337.

"It is perjury to swear falsely to what, if true, would merely cause the particular proceeding to be abated." 2 Bishop New Cr. L. § 1032 [quot Smith v. State, supra].

[a] **"The test** of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation, and, if it does, an indictment for perjury may be predicated upon it." Carroll v. U. S., 16 F. (2d) 951, 953 [certiorari den 273 U. S. 763 mem, 47 SCt 477 mem, 71 L. ed. 880 mem].

[b] **Illustration.**—Whatever evidence tends to influence the result on the direct or any collateral issue is material; and, where the grand jury had heard that a witness had been seen with whisky, and had given whisky to another and were endeavoring to discover from whom he had purchased it, in order to ascertain whether it had been sold without a license, his false testimony that he had not given that person any whisky, but that he and the person had ordered whisky from a certain place, which testimony prevented the investigation, was material, and perjury could be predicated thereon. Smith v. State, 91 Ark. 200, 120 SW 985.

[c] **Occupant of champagne bath.**—Where defendant, in proceedings to ascertain whether a violation of the National Prohibition Act had been committed, testified that a bath tub placed on the stage at a theater party and from which various people drank contained ginger ale and not champagne, and was acquitted of perjury as to the aforesaid statement, but also testified that no one was in such tub, when as a matter of fact a nude woman was in such tub, his false statement relative to the presence or absence of an occupant of the tub was so far material to the grand jury investigation as to constitute perjury, its materiality consisting in its tendency to prevent the grand jury from learning the identity of an additional witness who could testify as to the contents of the tub. Carroll v. U. S., 16 F. (2d) 951 [certiorari den 273 U. S. 763 mem, 47 SCt 477 mem, 71 L. ed. 880 mem].

94. Scott v. State, 72 Tex. Cr. 26, 160 SW 960.

[a] **For example,** that the question asked a witness before the grand jury was too general to form the basis for his impeachment will not preclude a false answer from being ground for a conviction of perjury. Scott v. State, 72 Tex. Cr. 26, 160 SW 960.

Form of question generally see supra § 16.

tion"[95] has been construed as meaning by "point" the subject matter of the inquiry in a grand jury investigation rather than the particular question asked.[96]

[§ 44] **(b) Civil Actions—aa. In General.** In accordance with, and subject to, the general rules above stated,[97] particular statements have been held material[98] or immaterial[99] to sundry civil actions or suits.

[§ 45] **bb. Testimony Affecting Damages.** In accordance with, and subject to, the general rules above stated,[1] testimony relevant to the issue of damages is material,[2] as where it tends either to aggravate[3] or mitigate[4] the same.

[§ 46] **(c) Other Matters or Proceedings.** In accordance with, and subject to, the general rules above stated,[5] particular statements have been held material[6] or immaterial[7] to miscellaneous matters or

95. See statutory provisions.

96. State v. Kellis, 193 Ind. 619, 141 NE 337.

[a] **Held material to subject matter of inquiry.**—Testimony in answer to questions asked by a grand jury engaged in investigating a murder, as to who had fired certain pistol shots, that witness was not present at the time, but was in another place, where he had gone before the difficulty occurred, was not collateral to the point under investigation but was directly material to the subject matter of the inquiry. State v. Kellis, 193 Ind. 619, 141 NE 337.

97. See supra §§ 33-41.

98. See cases infra this note.

[a] **Annulment of marriage.**—Peo. v. Reitz, (Cal. A.) 261 P 526 (cohabitation with knowledge of fraud for which annulment sought).

[b] **Attachment.**—State v. Madigan, 57 Minn. 425, 59 NW 490 (statement that affiant was attorney for party seeking attachment).

[c] **Bankruptcy proceedings.**—Epstein v. U. S., 271 Fed. 282 (statements tending to delude and injure creditors); U. S. v. Coyle, 229 Fed. 256 (disposition of bankrupt's property).

[d] **Breach of contract.**—Com. v. Aronson, 250 Mass. 521, 146 NE 14; Peo. v. McElheny, 206 Mich. 51, 172 NW 546; State v. Stilwell, 109 Or. 643, 221 P 174.

[e] **Conversion.**—State v. Meader, 54 Vt. 126 (statement bearing circumstantially on title to converted property).

[f] **Divorce.**—Hicks v. State, 86 Ala. 30, 5 S 425 (adultery between same parties before marriage showing adulterous disposition in persons implicated); State v. Singleton, 53 N. D. 573, 207 NW 226 (evidence material to cross bill).

[g] **Goods sold and delivered.**—State v. Berliawsky, 106 Me. 506, 76 A 938 (statement in support of set-off).

[h] **Lease.**—Com. v. Bobanic, 62 Pa. Super. 40 (statement collaterally material to action on lease).

[i] **Money had and received.**—Peo. v. Chand, 75 Cal. A. 459, 243 P 38 (purpose for which money was received).

[j] **Mortgage foreclosure.**—Com. v. Stern, 58 Pa. Super. 591 (authority to receive payment); Rex v. Pepys, Peake 187, 170 Reprint 124 (false statement in verified answer to mortgage redemption bill).

[k] **Personal injury action.**—Peo. v. Phillips, 56 Cal. A. 291, 205 P 40 (testimony bearing inferentially on injured wife's capacity to render husband services).

[l] **Promissory note.**—Pence v. State, 36 Ga. A. 270, 136 SE 820 (denial of maker that he signed note sued upon); Downing v. State, 61 Tex. Cr. 519, 136 SW 471 (date of signing note by indorser in an action on note brought by indorsee).

[m] **Property damage.**—Black v. State, 13 Ga. A. 541, 79 SE 173 (statement inferentially supporting claim of witness that he was present when a fire started).

[n] **Seduction.**—State v. Swafford, 98 Iowa 362, 67 NW 284 (false statement of witness that he had had intercourse with plaintiff nine months before birth of child alleged to be that of plaintiff and defendant in seduction action).

99. See cases infra this note.

[a] **Bankruptcy proceedings.**—Morris v. U. S., 261 Fed. 175.

[b] **Bastardy proceeding.**—Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240 (married man denying marriage).

[c] **Claim and delivery.**—Peo. v. Perazzo, 64 Cal. 106, 28 P 62 (statement respecting loan without hearing on issues of action of claim and delivery for recovery of personal property).

[d] **Malicious prosecution.**—State v. Hattaway, 11 S. C. L. 118, 10 AmD 580 (residence of witness who testified that he sold to plaintiff the cow which defendant had accused plaintiff of stealing and for which alleged theft plaintiff had been prosecuted); Rhodes v. Com., 78 Va. 692 (date of alleged confession by plaintiff of the crime for which defendant had had him prosecuted).

[e] **Patent application.**—Patterson v. U. S., 181 Fed. 970, 104 CCA 434 ("sole" inventor; see U. S. v. Patterson, 172 Fed. 241 contra).

[f] **Promissory note.**—State v. Hobbs, 40 N. H. 229 (statement, made on motion for continuance of action on note, which would not have justified continuance even if true); Ramey v. State, 99 Tex. Cr. 132, 268 SW 476 (false statements as to usury in suit to collect vendor's lien notes).

[g] **Replevin.**—Reidhar v. State, 86 Ark. 525, 111 SW 1127 (defendant in replevin of cattle by his mortgagee having relied on payment and death of the cattle, his testimony that he did not sign the mortgage, and authorize his signature, if false, was immaterial, and hence not perjury).

1. See supra §§ 33-41.

2. State v. Swafford, 98 Iowa 362, 67 NW 284; State v. Norris, 9 N. H. 96; State v. Snyder, 93 N. J. L. 18, 107 A 167 [aff 94 N. J. L. 277, 109 A 925]; Jones v. State, 76 Tex. Cr. 398, 174 SW 1071. See Salmons v. Tait, 31 Ga. 676 (recognizing rule).

3. Salmons v. Tait, supra.

4. State v. Swafford, 98 Iowa 362, 67 NW 284; State v. Snyder, 93 N. J. L. 18, 107 A 167 [aff 94 N. J. L. 277, 109 A 925].

[a] **Alienation of affections.**—Evidence showing lack of affection prior to alleged alienation, and thus reducing pecuniary value of affections alienated. State v. Snyder, 93 N. J. L. 18, 107 A 167 [aff 94 N. J. L. 277, 109 A 925].

5. See supra §§ 33-41.

6. See cases infra this note.

[a] **Acknowledgment.**—Ex p. Carpenter, 64 Cal. 267, 30 P 816 (false statement by person acknowledging deed that he was the person who had signed it).

[b] **Application for letters of administration.**—State v. Mercer, 101 Md. 535, 61 A 220 (false statement respecting intestacy of decedent).

[c] **Cost bond application.**—State v. Clough, 111 Iowa 714, 83 NW 727 (statement that plaintiff was a corporation material under statute requiring corporation to furnish cost bond).

[d] **Customs declaration.**—U. S. v. Salen, 216 Fed. 420 (statement as to absence of suppressed facts by which United States might be defrauded).

[e] **Disbarment proceedings.**—Brown v. Peo., 145 Ill. A. 263 [aff 254 Ill. 260, 98 NE 535] (existence and identity of person to whom attorney claimed he delivered a check).

[f] **Election proceeding.**—Peo. v. Ellenbogen, 114 App. Div. 182, 99 NYS 897 [aff 186 N. Y. 603 mem, 79 NE 1112 mem] (residence of electors).

[g] **Habeas corpus.**—Slade v. State, (Miss.) 119 S 355 (testimony tending to support or negative facts alleged in petition was material, and, if false, constituted perjury, although not in fact identifying person being restrained of his liberty).

[h] **Highway, proceeding to establish.**—State v. Schultz, 57 Ind. 19 (length of time road had been in public use).

[i] **Insurance report.**—Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792 (statement relative to existence of loans in annual report of insurance company filed with state superintendent of insurance).

[j] **Land patent application.**—Meyers v. U. S., 5 Okl. 173, 48 P 186 (holding that if the statements in an affidavit in a land contest are such as to call for judicial action, and are of sufficient importance to require action, and are pertinent to the issue under consideration, perjury will lie. Where a sworn statement in a land contest affidavit is sufficient to order a contest, or influence the action of the department of the interior in withholding a patent or in deferring action upon the patent, perjury may be properly assigned upon such statement).

[k] **Marriage license, application for.**—Peo. v. Torterice, 66 Cal. A. 115, 225 P 760 (age of applicant's fiancee); State v. Randall, 166 Minn. 381, 208 NW 14 (age and residence of applicant's bride to be); Field v. State, 29 Oh. Cir. Ct. 302 (number of times applicant previously married).

[l] **Passport application.**—State v. Woerndle, 109 Or. 461, 209 P 604, 220 P 744 (a disbarment proceeding in which an attorney's false statement on application for a passport that he was about to go abroad and intended to return to the United States within a year when in fact his intention was to give the passport to a German reserve officer to enable the latter to travel under defendant's name was held sufficiently material to constitute perjury serving as ground for disbarment).

[m] **Police force, application for appointment to.**—Peo. v. Link, 4 NYS 436, 6 N. Y. Cr. 185 (denial that applicant had ever been indicted for crime, bearing on moral fitness for position).

[n] **Recording instrument.**—Tuttle v. Peo., 36 N. Y. 431, 2 Transcr. A. 306 (where a person, from corrupt motives, erases the signature of the subscribing witness to a deed, and procures the instrument to be recorded by falsely swearing that he himself is the subscribing witness, he is guilty of perjury; and the fact that the deed is void for uncertainty in the description does not alter the case where the deed is nevertheless material as record evidence of the execution and contents of the instrument).

[o] **Selective Service Act proceedings.**—Whiteside v. U. S., 257 Fed. 509, 168 CCA 513 (false statement that registrant had a wife dependent upon him for support, made to secure exemption from military service).

[p] **Supplemental proceedings.**—Spann v. U. S., 252 Fed. 517, 164 CCA 433.

[q] **Voir dire.**—Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133 (prospective juror's denial of personal acquaintance with defendants).

7. See infra this note.

[a] **Election proceedings.**—Peo. v. Schweichler, 16 Cal. A. 738, 117 P 939 (false statement as to working for

proceedings.

On an application to serve as bail false statements relative to the value of applicant's property,[8] or the nature of his title thereto,[9] or the extent of his liabilities,[10] are so far material as to constitute perjury. But the fact that the testimony alleged to be false caused the court to accept the party as bail will not supply or constitute an equivalent for a want of materiality in the testimony charged to be false.[11]

[§ 47] **c. Knowledge of Materiality.**[12] Knowledge of the materiality of a false statement is not an element of perjury.[13]

[§ 48] **6. Damage or Prejudice.**[14] It is not necessary that the false oath be credited, or that the party against whom it is given be prejudiced thereby,[15] for the prosecution is not grounded on the damage to the party, but on the abuse of public justice.[16]

[§ 49] **7. Legal Provision for Oath and Matter or Proceeding in Which Statement Is Made**[17]**—a. Legal Provision for Oath—(1) In General.** A voluntary oath neither required nor authorized—that is, not provided for—by law, cannot constitute perjury.[18] The oath must have been administered upon an occasion permitting of its lawful administration.[19] In other words, it must appear not only that the statement is material,[20] but also that the oath itself is material[21] in the sense of being required or authorized by law. The oath is "required by law" if the statement must be sworn to before it can be

a certain party not material to issue of residence in precinct).

8. Com. v. Butland, 119 Mass. 317; Peo. v. Davis, 122 App. Div. 569, 107 NYS 426, 21 N. Y. Cr. 573 [aff 191 N. Y. 514 mem, 84 NE 1116 mem].

9. Peo. v. Gazelle, 299 Ill. 58, 132 NE 273.

[a] **Fee ownership of realty.**—Defendant's false statement that he owned certain property in fee, whereas in fact he had only a contract to purchase it, was material. Peo. v. Gazelle, 299 Ill. 58, 132 NE 273.

10. Peo. v. Almashy, 229 Mich. 227, 201 NW 231.

11. Pollard v. Peo., 69 Ill. 148.

12. **Knowledge of falsity** see supra § 24 et seq.

13. State v. Larson, 171 Minn. 246, 213 NW 900; Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133; Peo. v. Pabón, 7 Porto Rico 379; State v. Sargood, 80 Vt. 415, 419, 68 A 49, 130 AmSR 995, 13 AnnCas 367. See Barber v. State, 64 Tex. Cr. 96, 100, 142 SW 577 ("in perjury, if one offers an instrument in evidence that is totally worthless, yet, if the offerer, believing it to be apparently valid as a defense, swears it was executed by the other party at a time of a payment of the money referred to in it, this is perjury if the other party did not in fact execute it, although it is and always was totally void. A mistake of law in this line will hardly excuse").

"We are referred to no authority, and have seen none, that treats knowledge of the materiality as an element of the crime." State v. Sargood, supra.

[a] **Ignorance of the importance** of the falsity of his testimony is no defense to a prosecution of the witness for perjury. Peo. v. Pabón, 7 Porto Rico 379.

14. **Actual effect of statement as bearing on materiality** see supra § 36.

15. Conn.—Arden v. State, 11 Conn. 408.

Ill.—Pollard v. Peo., 69 Ill. 148.

Mass.—Com. v. Carel, 105 Mass. 582.

Mich.—Hoch v. Peo., 3 Mich. 552.

N. H.—State v. Whittemore, 50 N. H. 245, 9 AmR 196.

N. Y.—Peo. v. Williams, 92 Hun 354, 36 NYS 511 [aff 149 N. Y. 1, 43 NE 407].

Okl.—Meyers v. U. S., 5 Okl. 173, 48 P 186; Arnold v. State, (Cr.) 132 P 1123.

Tex.—Washington v. State, 23 Tex. A. 336, 5 SW 119.

Vt.—State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918.

Eng.—Hamper's Case, 3 Leon. 230, 74 Reprint 651. Bacon Abr. tit "Perjury;" 1 Hawkins P. C. c 69 §§ 1, 22.

16. See cases supra note 15.

17. **Administration and form of oath** see infra §§ 77–94.

18. U. S.—Williamson v. U. S., 207 U. S. 425, 28 SCt 163, 52 L. ed. 278 [rev sub nom. Van Gesner v. U. S., 153 Fed. 46, 82 CCA 180]; U. S. v. Robertson, 257 Fed. 195; Patterson v. U. S., 181 Fed. 970, 104 CCA 434; Robnett v. U. S., 169 Fed. 778, 95 CCA 244; U. S. v. Bedgood, 49 Fed. 54; U. S. v. Manion, 44 Fed. 800; U. S. v. Howard, 37 Fed. 666; U. S. v. Grottkau, 30 Fed. 672; U. S. v. Babcock, 24 F. Cas. No. 14,488, 4 McLean 113; U. S. v. Nickerson, 27 F. Cas. No. 15,878, 1 Sprague 232.

Cal.—Peo. v. Howard, 111 Cal. 655, 44 P 342.

Colo.—Klug v. McPhee, 16 Colo. A. 39, 63 P 709.

Fla.—Collins v. State, 33 Fla. 446, 15 S 220.

Ind.—Smith v. State, 125 Ind. 440, 25 NE 958.

La.—State v. Varnado, 154 La. 575, 97 S 865.

Md.—Warner v. Fowler, 8 Md. 25.

Mich.—Peo. v. Titmus, 102 Mich. 318, 60 NW 693; Beecher v. Anderson, 45 Mich. 543, 8 NW 539; Peo. v. Gaige, 26 Mich. 30; Peo. v. Fox, 25 Mich. 492.

Minn.—State v. Larson, 171 Minn. 246, 213 NW 900; State v. McCarthy, 41 Minn. 59, 42 NW 599.

Mo.—Mahan v. Berry, 5 Mo. 21; State v. Miller, 44 Mo. A. 159.

N. Y.—Foreman v. Union, etc., Co., 83 Hun 385, 31 NYS 947; Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328 [rev on other grounds 77 App. Div. 396, 79 NYS 340 (aff 175 N. Y. 315, 67 NE 589, 96 AmSR 628)]; Peo. v. Travis, Sheld. 545, 4 Park. Cr. 213; Peo. v. Grout, 85 Misc. 570, 147 NYS 591; Peo. v. Martin, 38 Misc. 67, 76 NYS 953 [rev on other grounds 77 App. Div. 642 mem, 79 NYS 1141 mem].

N. C.—Pegram v. Stoltz, 76 N. C. 349.

Oh.—Waggoner v. Richmond, Wright 173.

Pa.—Linn v. Com., 96 Pa. 285; Shaffer v. Kintzer, 1 Binn. 537, 2 AmD 488; Com. v. Polluck, 6 Pa. Dist. 559; Com. v. Lawrence, 4 Del. Co. 27.

S. C.—State v. Helle, 20 S. C. L. 290; Pegram v. Styron, 17 S. C. L. 595; State v. Hattaway, 11 S. C. L. 118, 10 AmD 580.

Tenn.—Lamden v. State, 5 Humphr. 83.

Wis.—State v. Lloyd, 77 Wis. 630, 46 NW 898.

Can.—Rex v. Moynes, (Man.) 33 CanCrCas 303; Reg. v. McIntosh, 12 N. B. 372; Ex p. Lindsay, (N. B.) 30 CanCrCas 387; Reg. v. Martin, 7 Rev Leg (Que.) 672, 21 LCJur 156; Reg. v. Gibson, 7 RevLeg (Que.) 573; Rex v. Rutherford, 17 Sask. L. 345, 41 Can CrCas 240, [1923] 2 WestWkly 963; Reg. v. Skelton, 3 Terr. L. 58, 4 Can CrCas 467.

"False testimony, given under an oath which is neither required nor authorized by law, does not constitute perjury." State v. Larson, 171 Minn. 246, 249, 213 NW 900.

[a] **"It is elementary** that perjury cannot be assigned of an oath not required by law." U. S. v. Dupont, 176 Fed. 823, 824.

[b] **A merely gratuitous oath,** which the law does not recognize as of any force, and to which it gives no more effect than if the statement was unsworn, cannot constitute perjury. State v. McCarthy, 41 Minn. 59, 42 NW 599.

[c] **Impious oath.**—"There can be no doubt, but that an extra-judicial oath, or one relating to a matter utterly immaterial, or even an impious oath, taken in idle conversation, may be as offensive in the eye of heaven, as the most solemn oath taken in a court of justice. But there are many offenses against morality and religion which are not cognizable in courts of justice. For such offense, a man is answerable only to his God, and not to the laws of his country. And our duty is to determine what the law considers a public offense, and not to declare what ought to be so considered." State v. Hattaway, 11 S. C. L. 118, 119, 10 AmD 580.

[d] **Where a criminal about to be sentenced** was examined under oath, without following the procedure prescribed by statute for such examinations, and there was no other statute authorizing the administration of an oath under these circumstances, his false statements were not perjury because the oath was not authorized by law. State v. Larson, 171 Minn. 246, 213 NW 900.

[e] **Under the Canada Evidence Act** the permission to receive a solemn declaration includes the authority to make it, so that the statement is not voluntary but is authorized and can therefore constitute a criminal offense if false. Rex v. Phillips, 14 B. C. 194, 14 CanCrCas 239, 9 WestLR 634; Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

Promissory and official oaths see supra §§ 15, 17.

19. State v. Varnado, 154 La. 575, 97 S 865; Peo. v. Tillman, 63 Misc. 461, 118 NYS 442, 23 N. Y. Cr. 401 [rev on other grounds 139 App. Div. 572, 124 NYS 44, 25 N. Y. Cr. 32 (aff 201 N. Y. 598 mem, 95 NE 1136 mem)].

20. See supra § 32.

21. U. S.—U. S. v. Maid, 116 Fed. 650; U. S. v. Bedgood, 49 Fed. 54; U. S. v. Babcock, 24 F. Cas. No. 14,488, 4 McLean 113; U. S. v. Nickerson, 27 F. Cas. No. 15,878, 1 Sprague 232.

Cal.—Peo. v. Howard, 111 Cal. 655, 44 P 342; Peo. v. Millsap, 85 Cal. A. 732, 260 P 378.

Colo.—Klug v. McPhee, 16 Colo. A. 39, 63 P 709.

Fla.—Collins v. State, 33 Fla. 446, 15 S 220.

Mich.—Peo. v. Almashy, 229 Mich. 227, 201 NW 231; Beecher v. Anderson, 45 Mich. 543, 552, 8 NW 539; Peo. v. Gaige, 26 Mich. 30; Peo. v. Fox, 25 Mich. 492.

N. C.—State v. Cline, 146 N. C. 640, 61 SE 522; State v. Houston, 103 N. C. 383, 9 SE 699.

Oh.—Silver v. State, 17 Oh. 365.

Pa.—Linn v. Com., 96 Pa. 285.

S. C.—State v. Kennerly, 44 S. C. L. 152.

Tenn.—Lamden v. State, 5 Humphr. 83.

Eng.—Reg. v. Bishop, C. & M. 302, 41 ECL 169.

"The materiality of the false oath

used for the legal purpose intended.[22] It is not necessary that the oath be required by statute law,[23] it being sufficient if it is required under decisions of the courts, which constitute a part of the laws pursuant to which a sworn statement must be made in order to constitute perjury.[24]

An oath authorized by necessary implication may serve as the basis of a prosecution for perjury.[25]

If an oath is permitted, although not required by statute, intentional false swearing therein is perjury.[26]

Oath forbidden by statute cannot serve as the basis for a charge of perjury.[27]

Oaths required by regulation of a governmental department, without aid of statute, are not so far authorized by law as to furnish the foundation of a prosecution for perjury.[28] But oaths required by departmental regulation pursuant to statute expressly or by necessary implication authorizing such regulation are so far authorized by law as to furnish adequate basis for a charge of perjury.[29]

Oath authorized by statute subsequent to enactment of the perjury statute may constitute perjury.[30]

[§ 50] **(2) Laws of Foreign Jurisdiction.** A willful false oath taken in one state pursuant to the laws of another may be the subject of a prosecution for perjury in the former.[31] But it has been held that an oath administered in a foreign country cannot serve as the predicate for perjury.[32]

[§ 51] **(3) False Swearing.**[33] A voluntary oath, not required by law, may constitute false swearing.[34] Under a statute providing for punishment of false swearing on a subject on which affiant can legally be sworn or on which he is required to be sworn,[35] the crime of false swearing cannot be committed in the absence of both of such statutory requirements;[36] but it has been said that, even though the subject was not one on which affiant could legally be sworn, the crime of false swearing may be committed if the false testimony was on a subject

is . . . one of the essential elements of the crime of perjury." State v. Cline, 146 N. C. 640, 642, 61 SE 522.

"The facts sworn to may be material, and yet the false swearing be no perjury because the oath performed no office in the case, and was wholly unimportant and immaterial." Beecher v. Anderson, 45 Mich. 543, 552, 8 NW 539.

[a] **Well considered case.**—Peo. v. Howard, 111 Cal. 655, 44 P 342.

[b] **Both the oath and the facts sworn to** must be material. Peo. v. Almashy, 229 Mich. 227, 201 NW 231.

[c] **Materiality in particular proceeding.**—Not every false swearing constitutes perjury, even though it is as to material facts, and perjury cannot be predicated of a false oath which was not material in the particular proceeding in which it was taken. Peo. v. Millsap, 85 Cal. A. 732, 260 P 378.

[d] **Verified answer in chancery.**—"Under the late act, an affidavit of the truth of an answer in Chancery, has no legal effect, unless the bill expressly calls for such answer on oath. Unless called for on oath, the affidavit of the truth of the answer is wholly immaterial; it neither benefits the respondent. . . [nor] injures the complainant. The answer has the same effect, and nothing more, than it would have had, had it not been sworn to." Silver v. State, 17 Oh. 365, 368.

22. Langford v. State, 9 Tex. A. 283, 287.

"We are not to understand that the law must require the defendant, or any particular individual, to make the oath; but, if the law requires such an instrument to be sworn to (before it can have a legal standing) by any person, then, if taken, it would be under circumstances required by law." Langford v. State, supra.

23. State v. Varnado, 154 La. 575, 97 S 865.

24. State v. Varnado, supra.

25. U. S. v. Nelson, 199 Fed. 464, 472.

"Nor is it essential to the offense of perjury that the oath falsely taken should be particularly pointed out or directly prescribed by express statute. It is sufficient if, indirectly or by necessary implication, the laws of the United States require or permit the oath to be taken." U. S. v. Nelson, supra.

26. U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277; Cox v. State, 164 Ark. 126, 261 SW 303.

[a] **Oath in discretion of administering official.**—Under a statute providing that, if a county clerk is in doubt as to the true age of a party applying for a marriage license, he may require an affidavit to be made on the subject, an oath required on such subject by a clerk in doubt as to the age is authorized by law so as to constitute a valid basis for a charge of perjury. Cox v. State, 164 Ark. 126, 261 SW 303.

27. Biard v. State, 54 Tex. Cr. 440, 113 SW 275.

[a] **Illustration.**—Where a statute provided that one accused of crime could not be compelled to make any preliminary statement, but that he might voluntarily do so if he desired, and that such voluntary statement should be signed but not sworn to, and should be admissible as evidence, and accused made such a statement and swore to it, the falsity thereof could not constitute perjury because the oath was taken contrary to the law governing voluntary statements of this character. "By the very terms of the statute it is provided that said statement shall not be sworn to by him. The statute prohibiting the justice of the peace from swearing him to a voluntary statement, if he swears him to it, then he performs an illegal act, provided it is a voluntary statement. If it is not a voluntary statement, then certainly the utmost the State could insist upon would be a prosecution for false swearing." Biard v. State, 54 Tex. Cr. 440, 442, 113 SW 275.

28. U. S. v. Manion, 44 Fed. 800.

29. U. S. v. Smull, 236 U. S. 405, 35 SCt 349, 59 L ed. 641; Caha v. U. S., 152 U. S. 211, 14 SCt 513, 38 L. ed. 415; U. S. v. Nelson, 199 Fed. 464.

[a] **Oath authorized under land office regulation** pursuant to statute impliedly authorizing such regulation. U. S. v. Nelson, 199 Fed. 464.

Officers authorized by regulation to administer oath see infra § 87.

30. U. S. v. Nihols, 27 F. Cas. No. 15,880, 4 McLean 23.

[a] **For instance,** under a statute providing that false statements under oaths authorized by law shall be perjury, the fact that the false oath prosecuted was not authorized at the date of the enactment of the perjury statute is no defense, since the latter should be construed as applying to all oaths authorized by law at the time of their administration, and applies as much to oaths authorized by statutes passed after its enactment as to oaths authorized at the time of its enactment. U. S. v. Nihols, 27 F. Cas. No. 15,880, 4 McLean 23.

31. Peo. v. Martin, 175 N. Y. 315, 67 NE 589, 96 AmSR 628 (Pen. Code § 96, relating to perjury and providing that a person who swears that any affidavit or other writing by him subscribed is true, on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, and who on such occasion willfully and knowingly deposes falsely in any material matter, or states in his affidavit any material matter to be true which he knows to be false, is guilty of perjury, includes, not only any and every false and corrupt oath and affidavit taken or made in New York which is permitted or required by its statutes, but also includes any and every oath or affidavit so taken or made, if permitted or required by the laws of any other state of the Union, whenever under the general law of comity which exists between the states they would be considered and given effect in New York; and hence an officer of a foreign corporation, who is required by a statute of the state where it was created to take an oath as to the amount of capital stock paid in, who swears falsely to such amount before a notary public in New York, is guilty of the crime of perjury).

State officer authorized to administer oath under laws of United States see infra § 80 text and notes 72–74.

32. Re Godson, 16 Ont. 275.

[a] **For example,** an oath administered by a judge in a foreign country has no legal significance, and a false statement made by a person sworn before him under such circumstances is not perjury. Re Godson, 16 Ont. 275.

33. Distinction between false swearing and perjury see supra §§ 4, 5.

Second degree perjury see infra § 52.

34. Welch v. State, 71 Tex. Cr. 17, 19, 157 SW 946.

"Our law provides that if any person shall deliberately and wilfully, under oath legally administered, make a false statement by a voluntary declaration or affidavit which is not required by law or made in the course of a judicial proceeding he is guilty of false swearing." Welch v. State, supra.

35. See statutory provisions.

36. Com. v. Bradshaw, 210 Ky. 405, 276 SW 124; Com. v. Hinkle, 177 Ky. 22, 197 SW 455; Com. v. Ransdall, 153 Ky. 334, 155 SW 1117; Kerfoot v. Com., 89 Ky. 174, 12 SW 189, 11 KyL 391.

[a] **Illustration.**—As one who was not an attesting witness is not a competent witness to prove execution of parents' consent to the issuance of a marriage license to a person under twenty-one, the county clerk has no authority, under St. § 2106, nor § 380, to examine him under oath with reference thereto, and an indictment for false swearing as to the execution of such paper cannot stand. Com. v. Bradshaw, 210 Ky. 405, 276 SW 124.

upon which affiant was required to be sworn.[37]

[§ 52] **(4) Second Degree Perjury.** A statute, defining second degree perjury as a knowingly false statement made under oath by "a volunteer,"[38] has been construed as rendering second degree perjury false swearing in any matter whatsoever,[39] even though the oath was not required by law.[40] Courts construing this statute have stated that second degree perjury is equivalent to the crime called "false swearing" in other jurisdictions.[41]

[§ 53] **b. Matter or Proceeding in Which Statement Is Made[42]—(1) General Rule—(a) At Common Law.** At common law a charge of perjury can be predicated only upon an oath administered in a judicial proceeding,[43] or one of like nature.[44] But it has been said that an oath is administered in a judicial proceeding if it is administered under authority of the court,[45] and that it is not necessary that the proceeding shall be before a judicial tribunal, but it suffices to render a false oath perjury that it be taken in a proceeding in a course of justice.[46]

Statements made in the absence of the presiding judicial officer are not made in the course of judicial proceedings, and cannot be perjury.[47]

[§ 54] **(b) Under Statute—aa. Declaratory of Common Law.** Under statutes declaratory of the common law,[48] or punishing perjury without defining it,[49] the offense is limited to false oaths in judicial proceedings.[50] It has been said that the phrase "judicial proceeding" refers to proceedings held under the laws of the state.[51]

Unauthorized judge. A proceeding is not judicial if held before a judge without authority to preside over the case in question.[52]

Continuance. The fact that the case is continued because of accused's false statement does not prevent the statement from occurring at a stage in judicial proceedings.[53]

Testimony taken during the absence of the presiding judicial officer ordinarily is not taken in the course of judicial proceedings, and cannot constitute

37. Sullivan v. Com., 158 Ky. 536, 165 SW 696; Com. v. Turner, 98 Ky. 526, 33 SW 88, 17 KyL 925.

38. See statutory provisions; and supra § 2.

39. State v. Howard, 91 Wash. 481, 158 P 104.

[a] **"The plain purpose of . . . [the statute]** is the prevention by punishment of reckless, voluntary, false swearing, upon the faith of which others may act to their injury, as well as to prevent false swearing in extrajudicial proceedings or investigations, and in proceedings or investigations authorized by law held by quasi judicial boards, committees and the like having the power to compel the attendance of witnesses. The legislature evidently recognized that there is as much moral turpitude and may be as great resulting injury in the one case as the other. When the extensive use of sworn statements and affidavits in the business world, though not required by law, is remembered, when the prior law, the mischief and the remedy are considered, it is clear that the legislature used the broad language of our statute advisedly to the end that the sanctity of the oath might be preserved and that no wilfully false oath concerning any matter whatsoever might be used to another's detriment with impunity." State v. Howard, 91 Wash. 481, 485, 158 P 104.

Similar statute re crime distinct from perjury see infra § 56 text and notes 66, 67.

40. State v. Howard, 91 Wash. 481, 158 P 104.

41. State v. Howard, supra; State v. Wilson, 83 Wash. 419, 145 P 455.

False swearing see supra §§ 3-5, 51.

42. Naturalization proceedings see Aliens §§ 168, 169.

43. U. S.—Anonymous, 1 F. Cas. No. 475, 1 Wash. C. C. 84.

Conn.—Arden v. State, 11 Conn. 408.

Ill.—Hereford v. Peo., 197 Ill. 222, 64 NE 310.

N. J.—State v. Dayton, 23 N. J. L. 49, 53 AmD 270. See Clark v. Clark, 51 N. J. Eq. 404, 26 A 1012 (application for discharge of writ of ne exeat).

Okl.—Peters v. U. S., 2 Okl. 116, 33 P 1031.

Pa.—Com. v. O'Grady, 4 Pa. Dist. 732.

Porto Rico.—U. S. v. Santisteban, 10 Porto Rico Fed. 509.

S. C.—Pegram v. Styron, 17 S. C. L. 595; State v. Stephenson, 15 S. C. L. 165.

Vt.—State v. Simons, 30 Vt. 620; State v. Chamberlin, 30 Vt. 559.

Eng.—Reg. v. Castro, L. R. 9 Q. B. 350; Reg. v. Hurrell, 3 F. & F. 271; Rex v. Aylett, 1 T. R. 63, 99 Reprint 973; Bacon Abr. tit "Perjury;" 4 Blackstone Comm. p 137; 3 Inst. p 164; 1 Hawkins P. C. c 69 § 1.

Can.—Thomas v. Platt, 1 U. C. Q. B. (Ont.) 217.

[a] **Well considered case.**—State v. Wilson, 83 Wash. 419, 145 P 455 (stating common-law rule but decided under statute).

44. State v. McCroskey, 14 S. C. L. 308.

45. Hereford v. Peo., 197 Ill. 222, 64 NE 310.

[a] **"Judicial proceeding,"** as used in the statement that perjury is an assertion upon oath duly administered in a judicial proceeding, means a proceeding which takes place in, or under the authority of, the court of justice, or which relates in some way to the administration of justice, or which legally ascertains any right or liability. Hereford v. Peo., 197 Ill. 222, 64 NE 310.

46. Com. v. Warden, 11 Metc. (Mass.) 406. See Chapman v. Gillet, 2 Conn. 40, 49 (a slander case where the court said: "Upon principles of common law, perjury may be committed before any tribunal, in which an oath may be lawfully administered; for where the law will sanction an oath, it will not refuse its aid to punish a wilful and corrupt violation of it. And this point I understand to have been fully settled by this Court, some time since, in sustaining an action of slander upon a charge of taking a false oath before arbitrators").

47. Reg. v. Lloyd, 56 L. J. M. C. 119.

48. See supra § 2.

49. See supra § 2.

50. Ala.—Goolsby v. State, 17 Ala. A. 545, 86 S 137.

Ga.—Rowe v. State, 99 Ga. 706, 27 SE 710; Pennaman v. State, 58 Ga. 336.

Ky.—Woolsey v. Com., 11 Ky. Op. 776.

Mo.—State v. Koslowesky, 228 Mo. 351, 128 SW 741; State v. Boland, 12 Mo. A. 74.

Pa.—Com. v. O'Grady, 4 Pa. Dist. 732.

Wash.—State v. Wilson, 83 Wash. 419, 145 P 455 (perjury in first degree).

Can.—Drew v. Rex, 33 Can. S. C. 228, 6 CanCrCas 424 [dism app 11 Que. K. B. 477, 6 CanCrCas 241]; Rex v. T——, 12 B. C. 223, 11 CanCrCas 274, 4 WestLR 454.

[a] **Proceeding held judicial on the evidence.**—Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

[b] **In England** (1) under the Perjury Act of 1911, the false oath must be made in a judicial proceeding. Rex v. Castiglione, 106 L. T. Rep. N. S. 1023. (2) A statement made after conviction but before sentence in a criminal case is made at a stage in judicial proceedings so as to constitute perjury. Rex v. Wheeler, [1917] 1 K. B. 283. (3) Under the Commissioners for Oaths Act of 1889 false statements made in nonjudicial proceedings may be perjury. Rex v. Castiglione, supra. (4) Where an affiant made a false affidavit in a law suit against a nonexistent defendant, he was guilty of perjury under the Commissioners for Oaths Act of 1889 covering cases where false statements are made in nonjudicial proceedings even if the nonexistence of defendant prevented the proceeding in which the oath was taken from being judicial. But by dictum the court said the proceeding was judicial notwithstanding the nonexistence of defendant. Rex v. Castiglione, supra.

51. Ex p. Bridges, 4 F. Cas. No. 1,862, 2 Woods 428 ("judicial proceeding" in Ga. Code § 4660, defining perjury as false swearing, etc., in judicial proceedings, refers to judicial proceedings under the laws of the state, and its own tribunals of justice). See Musgrave v. Medex, 19 Ves. Jr. 652, 34 Reprint 657 (perjury is not assignable upon a foreign affidavit).

[a] **"A 'judicial proceeding' is a** proceeding in a legally constituted court." Garrett v. State, 18 Ga. A. 360, 89 SE 380.

52. Garrett v. State, supra.

[a] **Illustration.**—Where a judge of the criminal court of Atlanta undertook to act as judge of the city court, when the judge of the city court was not disqualified, and there was no agreement by both judges that he should sit in accordance with statutory provisions, testimony was not in judicial proceedings, and perjury could not be committed. Garrett v. State, 18 Ga. A. 360, 89 SE 380.

53. Poulter v. State, 70 Tex. Cr. 197, 157 SW 166.

[a] **Continued for "surprise."**—False testimony by accused in an action against him in the justice's court, that he was an infant at the time he incurred the obligation sued on, constitutes perjury under Pen. Code (1911) arts 304, 308, defining the offense as a false statement under oath in any stage of a judicial proceeding, although the cause was not then tried, but was continued on plaintiff's claim of surprise. Poulter v. State, 70 Tex. Cr. 197, 157 SW 166.

False statement on motion for continuance as constituting perjury see

perjury.[54] But under statutes permitting examination of a witness out of court by consent of the parties,[55] it has been held that perjury may be committed on an examination not in the presence of the presiding judicial officer.[56]

False swearing otherwise than in judicial proceedings is punished generally as a distinct offense.[57]

[§ 55] **bb. Modifying Common Law.** Under statutes modifying the common law in this respect,[58] the crime of perjury has been extended so as to include false oaths authorized by law and legally administered irrespective of whether or not they were taken in the course of judicial proceedings.[59] But even under the latter type of statute the proceeding in which the oath is administered must be one authorized by law,[60] and one in which the administration of an oath is also authorized.[61] Under a statute punishing as perjury false swearing in a "proceeding before a court, tribunal or officer," the statement need not be made in a suit or action in order to constitute perjury.[62]

[§ 56] **cc. Offense Distinct from Perjury.**[63] Under statutes[64] false swearing otherwise than in judicial proceedings is often punishable as a distinct offense.[65] A statute punishing the making of any false and sworn certificate, affidavit, or statement of any nature, for any purpose,[66] has been construed as making it criminal to swear falsely in any legitimate affair or transaction affecting the rights of individuals or the welfare of the public.[67]

In Canada, under a statute providing that a statement made under oath, affirmation, or solemn declaration, and required or authorized by law, which would amount to perjury if made in judicial proceedings, shall be an indictable offense,[68] a statutory declaration authorized by the Canada Evidence Act[69] is a crime.[70]

[§ 57] **(2) Affidavits, Certificates, Declarations,**

infra § 76 text and note 31.

54. Rex v. Rulofson, 14 B. C. 79, 14 CanCrCas 253, 9 WestLR 197; Rex v. Allen, (Man.) 43 CanCrCas 118, [1925] 1 DomLR 57, [1925] 1 WestWkly 718; Rex v. Kohel, 21 Sask. L. 280, 46 CanCrCas 279, [1926] 3 WestWkly 478.

[a] **For instance,** where the judge ordered an examination to be taken before the registrar of the court, and after swearing the witness such registrar left the room, the proceedings ceased to be judicial when he left, and therefore statements subsequently made by the witness could not constitute perjury. Rex v. Rulofson, 14 B. C. 79, 14 CanCrCas 253, 9 WestLR 197.

55. See statutory provisions.

56. Rex v. Howley, 20 CanCrCas 36 [aff 22 CanCrCas 108, 8 DomLR 1025].

[a] **Witness sworn by prothonotary but examined in advocate's robing room** in the absence of the prothonotary and without objection by the parties, on examination for discovery. Rex v. Howley, 20 CanCrCas 36 [aff 22 CanCrCas 108, 8 DomLR 1025].

57. See infra § 56; and supra §§ 3–5.

58. See supra § 2.

59. U. S.—U. S. v. Noveck, 273 U. S. 202, 47 SCt 341, 71 L. ed. 610; U. S. v. Smull, 236 U. S. 405, 35 SCt 349, 59 L. ed. 641; Caha v. U. S., 152 U. S. 211, 14 SCt 513, 38 L. ed. 415; In re Loney, 134 U. S. 372, 10 SCt 584, 33 L. ed. 949; U. S. v. Ambrose, 108 U. S. 336, 2 SCt 682, 27 L. ed. 746; U. S. v. Nickerson, 17 How. 204, 15 L. ed. 219; U. S. v. Wood, 14 Pet. 430, 10 L. ed. 527; U. S. v. Bailey, 9 Pet. 238, 9 L. ed. 113; U. S. v. Hammer, 299 Fed. 1011 [aff 6 F. (2d) 786 (certiorari granted 267 U. S. 591 mem, 45 SCt 508 mem, 69 L. ed. 802 mem, and rev on other grounds 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118)]; Epstein v. U. S., 196 Fed. 354, 116 CCA 174 [certiorari den 223 U. S. 731 mem, 32 SCt 527 mem, 56 L. ed. 634 mem]; U. S. v. Richards, 149 Fed. 443; U. S. v. Howard, 37 Fed. 666; Babcock v. U. S., 34 Fed. 873; U. S. v. Boggs, 31 Fed. 337; U. S. v. Neale, 14 Fed. 767; U. S. v. Bartow, 10 Fed. 873, 20 Blatchf. 351; U. S. v. Clark, 25 F. Cas. No. 14,804, 1 Gall. 497; U. S. v. Kendrick, 26 F. Cas. No. 15,519, 2 Mason 69; U. S. v. Nihols, 27 F. Cas. No. 15,880, 4 McLean 23; U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277; U. S. v. Stanley, 27 F. Cas. No. 16,376, 6 McLean 409; U. S. v. Volz, 28 F. Cas. No. 16,627, 14 Blatchf. 15; U. S. v. Winchester, 28 F. Cas. No. 16,739, 2 McLean 135.

Ark.—Lednum v. State, 169 Ark. 396, 275 SW 699; Thomas v. State, 149 Ark. 68, 231 SW 200; State v. Kirkpatrick, 32 Ark. 117, 122; Horn v. Foster, 19 Ark. 346.

Cal.—Peo. v. Simpton, 133 Cal. 367, 65 P 834; Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155.

Canal Zone.—Canal Zone v. Kerr, 2 Canal Zone 262.

D. C.—Johnson v. U. S., 26 App. 128.

Ill.—Hereford v. Peo., 197 Ill. 222, 64 NE 310; Young v. Peo., 134 Ill. 37, 24 NE 1070; Coyne v. Peo., 124 Ill. 17, 4 NE 668, 7 AmSR 324.

La.—State v. Varnado, 154 La. 575, 97 S 865.

Md.—State v. Bixler, 62 Md. 354.

Minn.—State v. Larson, 171 Minn. 246, 213 NW 900.

Nebr.—Shevalier v. State, 85 Nebr. 366, 123 NW 424, 19 AnnCas 361.

N. J.—State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

N. Y.—Chamberlain v. Peo., 23 N. Y. 85, 80 AmD 255; Peo. v. Teal, 133 App. Div. 35, 117 NYS 743 [rev on other grounds 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175]; Peo. v. Corrigan, 129 App. Div. 62, 113 NYS 504, 23 N. Y. Cr. 51 [aff 195 N. Y. 1, 87 NE 792]; Peo. v. Doody, 72 App. Div. 372, 76 NYS 606 [aff 172 N. Y. 165, 64 NE 807]; Foreman v. Union, etc., Co., 83 Hun 385, 31 NYS 947; Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328 [aff 135 N. Y. 639 mem, 32 NE 647 mem]; Peo. v. Dishler, 38 Hun 175, 4 N. Y. Cr. 188; Peo. v. Martin, 38 Misc. 67, 76 NYS 953 [rev 77 App. Div. 396, 79 NYS 340 (aff 175 N. Y. 315, 67 NE 589, 96 AmSR 628)].

N. C.—State v. Witherow, 7 N. C. 153.

Oh.—Ruch v. State, 111 Oh. St. 580, 146 NE 67.

Okl.—Rich v. U. S., 2 Okl. 146, 37 P 1083; Campbell v. State, 23 Okl. Cr. 250, 214 P 738; Rose v. State, 8 Okl. Cr. 294, 127 P 873; Gray v. State, 4 Okl. Cr. 292, 111 P 825, 32 LRANS 142.

Or.—State v. Smith, 47 Or. 485, 83 P 865.

Philippine.—U. S. v. Soliman, 36 Philippine 5; U. S. v. Go Chanco, 23 Philippine 641; U. S. v. De Chaves, 14 Philippine 565.

Porto Rico.—Peo. v. Acevedo, 10 Porto Rico 30.

Tenn.—State v. Wilson, 87 Tenn. 693, 11 SW 792.

Wash.—State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249 (second degree perjury).

Wis.—Lappley v. State, 170 Wis. 356, 174 NW 913, 7 ALR 1279.

Can.—U. S. v. Snyder, 57 N. S. 421, 43 CanCrCas 92, [1925] 1 DomLR 200; Rex v. Morrison, 49 N. S. 446, 26 CanCrCas 26, 28 DomLR 113.

"The statute includes perjury committed either by judicial or by nonjudicial oath, and the essence of the crime is the false, willful, and corrupt swearing in either case." State v. Varnado, 154 La. 575, 585, 97 S 865.

False swearing in nonjudicial proceedings as distinct crime under different statutes see infra § 56.

60. Peo. v. Osborne, 158 NYS 330; Ruch v. State, 111 Oh. St. 580, 593, 146 NE 67; State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249 (second degree perjury).

"It must undoubtedly be an authorized proceeding in which the alleged false testimony is given." Ruch v. State, supra.

[a] **Second degree perjury before investigating committee appointed by municipal council.**—Where there was nothing to show that the matters investigated by a special committee appointed by an acting mayor and the city council were within the jurisdiction of either the council or that delegated by it to the committee, second degree perjury could not be committed by false swearing before such a committee. State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249.

[b] **Where single member of state prison commission** made an unauthorized investigation of misconduct of prisoners, defendant's evasive and false answers to his questions could not constitute perjury because the proceeding was not one authorized by law. Peo. v. Osborne, 158 NYS 330.

Jurisdiction of proceeding see infra §§ 61–64.

61. Peo. v. Gillette, 126 App. Div. 665, 111 NYS 133, 22 N. Y. Cr. 400.

Authority to administer oath see infra §§ 78–87.

Legal provision for oath see supra §§ 49–52.

62. Ruch v. State, 111 Oh. St. 580, 146 NE 67.

[a] **"Proceeding"** is a term of much broader signification than either the term "suit" or "action." It has been broadly defined as any act done by the authority or direction of the court. The term as used in this statute should not be construed in any technical sense, but should include all methods of invoking the action of courts and embrace any controversy which may or may not rise to the dignity of a suit or action. Ruch v. State, 111 Oh. St. 580, 146 NE 67.

63. Oath before committee lacking jurisdiction as not second degree perjury see supra § 55 note 60 [a].

64. See statutory provisions.

65. State v. Lynes, 194 Mo. A. 184, 185 SW 535; State v. Boland, 12 Mo. A. 74.

Distinction between false swearing and perjury see supra §§ 4, 5.

66. See statutory provisions.

67. State v. Lynes, 194 Mo. A. 184, 185 SW 535.

Similar statute re crime of second degree perjury see supra § 52 text and notes 38–40.

68. See Cr. Code § 175.

69. Act of 1893 § 26.

70. Rex v. Nier, 9 Alta. L. 353, 25 CanCrCas 241, 28 DomLR 373, 33 West LR 180; Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

and Depositions[71]**—(a) In General.** Perjury may be assigned upon false testimony in the giving of a deposition authorized by law.[72] It has been held that a statute punishing a false "deposition" as perjury[73] does not include false "affidavits;"[74] but there is authority to the contrary.[75]

[§ 58] **(b) Intent and Use or Delivery.** In order that a false affidavit, certificate, or deposition may constitute perjury or false swearing,[76] it must be made with the intent that it shall be uttered or published as true.[77] In the absence of statute to the contrary,[78] the crime is complete the moment an affidavit is made with the requisite intent.[79] It is ordinarily[80] immaterial that the instrument was never used for the purpose intended,[81] or was insufficient for such purpose,[82] or that it failed to effectuate the particular purpose of affiant.[83]

Under statutes declaring that the making of a false and sworn written statement of this character is complete when it is delivered by accused to some other person with intent that it be uttered or published as true,[84] the mere taking of the false oath is not perjury.[85] But, in the absence of actual use, it must also appear that accused delivered the affidavit[86] with the statutory intent, such delivery being essential to complete the "making" of the instrument.[87] But under statutes not expressly or impliedly requiring either use or delivery for use,[88] perjury may be committed by a false affidavit which was neither used nor delivered for use.[89]

[§ 59] **(c) Defects and Irregularities.**[90] An unauthorized affidavit cannot constitute perjury.[91] But false affidavits may constitute perjury, even though so far defective as to prevent their introduction as evidence.[92] While it has been held that, where a deposition is illegal because not taken as authorized, perjury cannot be assigned thereon,[93] it has been held that irregularities in the taking of depositions will not necessarily preclude conviction of perjury for their falsity.[94]

[§ 60] **(d) Incomplete Statements.** A complete statement may support a charge of perjury if falsely sworn to either before or after it has been reduced to writing;[95] but an incomplete statement made, reduced to writing, sworn to by one person, and thereafter completed by another without reswearing the former, cannot constitute an indictable offense.[96]

71. Affidavits, certificates, declarations, and depositions in particular proceedings or matters see passim infra §§ 65-76.
Verification of written statements see infra §§ 91-94.

72. State v. Woolridge, 45 Or. 389, 78 P 333.

73. See statutory provisions.

74. State v. Dayton, 23 N. J. L. 49, 53 AmD 270.
[a] **Affidavit in nonjudicial matter.**—State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

75. Peo. v. Robles, 117 Cal. 681, 49 P 1042; Peo. v. Carroll, 39 Cal. A. 654, 180 P 49; Peo. v. Cajiao, 18 Porto Rico 55.
[a] **Affidavit in judicial proceeding.**—Peo. v. Robles, 117 Cal. 681, 49 P 1042.
[b] **Affidavit in nonjudicial matter.**—Peo. v. Cajiao, 18 Porto Rico 55.

76. Distinction between perjury and false swearing see supra §§ 4, 5.

77. Peo. v. Cajiao, 18 Porto Rico 55; State v. Dalzell, 135 Wash. 621, 238 P 635.
[a] **In Georgia** accused must have sworn falsely, willfully, and knowingly, and with knowledge that his affidavit was to be used in a particular judicial proceeding and with the intent that it be so used. Rowe v. State, 99 Ga. 706, 27 SE 710.
[b] **In England,** under a section of the Perjury Act requiring a false certificate of death to be "willfully" made in order to constitute perjury, it is not essential that such certificate should be made with intent to use for the specific purposes of the vital statistics statute, but it is sufficient if it was made with the intent that it be used for other purposes and with the knowledge that it could be used under such statute. Rex v. Ryan, 110 L. T. Rep. N. S. 779.

Affidavit by illiterate see supra § 27 text and note 70.

Criminal intent generally see supra §§ 23-30.

78. See infra text and note 84 et seq.

79. U. S.—U. S. v. Noveck, 273 U. S. 202, 47 SCt 341, 71 L. ed. 610; Steinberg v. U. S., 14 F. (2d) 564.
La.—State v. Varnado, 154 La. 575, 97 S 865.
Mass.—Com. v. Carel, 105 Mass. 582.
N. Y.—Peo. v. Williams, 149 N. Y. 1, 43 NE 407.
Tex.—Welch v. State, 71 Tex. Cr. 17, 157 SW 946.
Eng.—Rex v. Hailey, 1 C. & P. 258, 12 ECL 155, 171 Reprint 1186.

80. Delivery of affidavit as essential under statute see infra text and note 86.

81. U. S.—U. S. v. Noveck, 273 U. S. 202, 47 SCt 341, 71 L. ed. 610; Steinberg v. U. S., 14 F. (2d) 564; Levin v. U. S., 5 F. (2d) 598; Berry v. U. S., 259 Fed. 203, 170 CCA 271.
Ga.—Herring v. State, 119 Ga. 709, 46 SE 876.
La.—State v. Varnado, 154 La. 575, 97 S 865.
N. H.—State v. Whittemore, 50 N. H. 245, 9 AmR 196.
N. Y.—Flandrow v. Hammond, 148 N. Y. 760 mem, 43 NE 987 mem [den rearg 148 N. Y. 129, 42 NE 511]; Belden v. Burke, 148 N. Y. 760 mem, 43 NE 985 mem; McCready v. Metropolitan L. Ins. Co., 83 Hun 526, 32 NYS 480 [aff 148 N. Y. 761 mem, 43 NE 988 mem].
Tex.—Welch v. State, 71 Tex. Cr. 17, 157 SW 946.
Eng.—Rex v. Hailey, 1 C. & P. 258, 12 ECL 155, 171 Reprint 1186; Rex v. White, M. & M. 271, 22 ECL 519; Rex v. Crossley, 7 T. R. 315, 101 Reprint 994.
"It is immaterial and irrelevant that the false affidavit is never used." Steinberg v. U. S., 14 F. (2d) 564, 567.
[a] **Signing and swearing** to a false affidavit may constitute false swearing, even though such affidavit was never used for the purpose intended. Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

82. State v. Hopper, 133 Ind. 460, 32 NE 878; State v. Flagg, 27 Ind. 24; State v. Dayton, 23 N. J. L. 49, 53 AmD 270.
Effect of irregularities see infra § 59.

83. Com. v. Carel, 105 Mass. 582.
Actual effect of false statement as bearing on materiality see supra § 36.
Damage to another as not essential to perjury see supra § 48.

84. See statutory provisions.

85. Peo. v. Williams, 149 N. Y. 1, 43 NE 407.

86. Peo. v. Robles, 117 Cal. 681, 49 P 1042; Peo. v. Williams, 149 N. Y. 1, 43 NE 407; Peo. v. Cajiao, 18 Porto Rico 55, 57.
"It is necessary that the false affidavit or deposition leave the hand of the person making it and be delivered to some other person with the intent that it be uttered or published as true." Peo. v. Cajiao, supra.

87. Peo. v. Williams, 149 N. Y. 1, 43 NE 407.

88. See statutory provisions.

89. Peo. v. Carroll, 39 Cal. A. 654, 180 P 49.

90. Irregularities in:
Administration of oath generally see infra § 89.
Proceedings in which oath was administered see infra §§ 62-64.

91. Braeutigam v. State, 63 N. J. L. 38, 42 A 748.
[a] **Trying case by affidavit.**—If defendant filed an affidavit, for use in the trial of a pending case, upon a material question of fact which should have been settled in the usual way by oral testimony, such affidavit was without probative force, and perjury could not be predicated upon its falsity. Braeutigam v. State, 63 N. J. L. 38, 42 A 748.

92. Jacobs v. State, 61 Ala. 448; Meyers v. U. S., 5 Okl. 173, 48 P 186; Arnold v. State, (Okl. Cr.) 132 P 1123; Rex v. Hailey, 1 C. & P. 258, 12 ECL 155, 171 Reprint 1186.
Perjury based upon inadmissible evidence generally see supra §§ 39-41.

93. Reg. v. Lloyd, 19 Q. B. D. 213; Reg. v. Martin, 7 RevLeg (Can.) 672, 21 LCJur 156; Reg. v. Gibson, 7 RevLeg (Can.) 573.

94. State v. Woolridge, 45 Or. 389, 78 P 333.
[a] **"Irregularities occurring in the manner of giving notice** to take depositions or in the mode of taking them may be waived by appearing without objection and giving testimony." State v. Woolridge, 45 Or. 389, 402, 78 P 333.

95. Markey v. State, 47 Fla. 38, 37 S 53. See State v. Daniels, 38 S. D. 81, 160 NW 723 (where defendant was sworn before testifying at a magistrate's hearing, and after he had testified his statements were reduced to writing and then subscribed and sworn to by him in such form, perjury could be predicated on the first oath and the statements made thereunder, irrespective of the subsequent written testimony).
Signing and swearing to written statement generally see infra § 93.

96. Rives v. State, 107 Tex. Cr. 370, 296 SW 576.
[a] **Not "affidavit."**—Where an application for a loan from a bank was incomplete when sworn to, and the statements necessary to complete the instrument were inserted afterward without reswearing defendant, the statement was not an affidavit and so could not constitute false swearing under a statute punishing as false swearing false statements by voluntary declaration or affidavit. Rives

[§ 61] **c. Jurisdiction of Matter or Proceeding[97]—(1) Necessity.** In the absence of some statute changing or modifying the rule,[98] it is well settled that to constitute the crime of perjury[99] or false swearing[1] it is essential that the false statement be made in a proceeding or with respect to a matter within the jurisdiction of the court, tribunal, or officer before or by whom the matter may be considered. It must further appear that the person assuming to act was an incumbent of the judicial or other office having jurisdiction over the matter or proceeding,[2] and that the tribunal or officer was competent to act.[3] Even though the presiding officer has jurisdiction of the general matter or proceeding, perjury cannot be assigned on testimony as to matters not within the scope of such matter or proceeding.[4]

[§ 62] **(2) Nonjurisdictional Defects or Irregularities[5]—(a) In General.** Perjury or false swearing[6] may be committed in proceedings open to ob-

v. State, 107 Tex. Cr. 370, 296 SW 576.

97. Cross references:

Miscellaneous particular matters or proceedings in which perjury may be committed see infra §§ 65–76.

Particular persons or officers authorized to administer oaths see infra §§ 84–87.

98. See statutory provisions; and supra § 2 et seq.

99. U. S.—West v. U. S., 258 Fed. 413, 169 CCA 429.

Ala.—Collins v. State, 78 Ala. 433; Thomas v. State, 13 Ala. A. 421, 69 S 413, 414 [cit Cyc].

Ark.—Buell v. State, 45 Ark. 336.

D. C.—U. S. v. Jackson, 20 D. C. 424.

Fla.—Wilds v. State, 79 Fla. 575, 84 S 664; Markey v. State, 47 Fla. 38, 37 S 53.

Ga.—Renew v. State, 79 Ga. 162, 4 SE 19; Johnson v. State, 58 Ga. 397.

Hawaii.—Rex v. Papa, 1 Hawaii 346.

Ill.—Maynard v. Peo., 135 Ill. 416, 25 NE 740; Pankey v. Peo., 2 Ill. 80.

Ind.—Weston v. Lumley, 33 Ind. 486; State v. Hall, 7 Blackf. 25.

Iowa.—State v. Clough, 111 Iowa 714, 83 NW 727.

Ky.—Com. v. Hillenbrand, 96 Ky. 407, 29 SW 287, 16 KyL 485.

La.—State v. Wymberly, 40 La. Ann. 460, 4 S 161; Flower v. Swift, 8 Mart. N. S. 449.

Me.—State v. Hall, 49 Me. 412; State v. Furlong, 26 Me. 69.

Mass.—Com. v. White, 8 Pick. 453.

Mich.—Peo. v. Titmus, 102 Mich. 318, 60 NW 693.

Minn.—State v. Mandehr, 168 Minn. 139, 209 NW 750.

Mo.—State v. Lavalley, 9 Mo. 334.

N. J.—State v. Lawson, 98 N. J. L. 593, 121 A 705 [aff 100 N. J. L. 185, 124 A 926, and cit Cyc].

N. Y.—Elkin v. Peo., 28 N. Y. 177; Peo. v. Collins, 57 App. Div. 257, 68 NYS 151, 15 N. Y. Cr. 305; Peo. v. Tracy, 9 Wend. 265.

N. C.—State v. Gates, 107 N. C. 832, 12 SE 319; State v. Knight, 84 N. C. 789; State v. Alexander, 11 N. C. 182; Boling v. Luther, 4 N. C. 635; State v. Wyatt, 3 N. C. 56.

Oh.—Hamm v. Wickline, 26 Oh. St. 81; Montgomery v. State, 10 Oh. 220; Brown v. State, 18 Oh. Cir. Ct. N. S. 198.

Okl.—Morford v. Terr., 10 Okl. 741, 63 P 958, 54 LRA 513; Rich. v. U. S., 1 Okl. 354, 33 P 804.

Or.—State v. Walton, 53 Or. 557, 99 P 431, 101 P 389, 102 P 173.

S. C.—State v. Jenkins, 26 S. C. 121, 1 SE 437.

Tex.—Emery v. State, 57 Tex. Cr. 423, 123 SW 133, 136 AmSR 988; Manning v. State, 46 Tex. Cr. 326, 81 SW 957; Wilks v. State, (Cr.) 66 SW 787; Curtley v. State, 42 Tex. Cr. 227, 59 SW 44; Butler v. State, 36 Tex. Cr. 483, 38 SW 46; Anderson v. State, 24 Tex. A. 705, 7 SW 40.

Eng.—Reg. v. Fletcher, L. R. 1 C. C. 320; Reg. v. Proud, L. R. 1 C. C. 71; Reg. v. Simmons, Bell C. C. 168, 169 Reprint 1214; Reg. v. Pearce, 3 B. & S. 531, 113 ECL 531, 122 Reprint 200; Reg. v. Lewis, 12 Cox C. C. 163; Reg. v. Chugg, 11 Cox C. C. 558; Reg. v. Bacon, 11 Cox C. C. 540; Reg. v. Shaw, L. & C. 579, 169 Reprint 1522; Reg. v. Senior, 9 Cox C. C. 469; Reg. v. Hughes, Dears. & B. 188, 169 Reprint 971; Reg. v. Millard, Dears. C. C. 166, 169 Reprint 681; Reg. v. Cooke, 2 Den. C. C. 462, 169 Reprint 583; Paine's Case, Yelv. 111, 80 Reprint 76.

Can.—Reg. v. McIntosh, 12 N. B. 372; McAdams v. Weaver, 4 N. B. 176; Reg. v. Row, 14 U. C. C. P. (Ont.) 307; Reg. v. Doty, 13 U. C. Q. B. (Ont.) 398.

"It cannot be controverted that to constitute perjury it must be shown that the false swearing occurred before a court or magistrate having jurisdiction of the matter under investigation." State v. Lawson, 98 N. J. L. 593, 594, 121 A 705 [aff 100 N. J. L. 185, 124 A 926]. To same effect State v. Mandehr, 168 Minn. 139, 209 NW 750.

[a] **Reason for rule.**—"The administration of an oath in a case over which the court has no jurisdiction is like every other part of the proceeding, a mere nullity." McClannohan v. Com., 10 Ky. Op. 72, 73.

[b] **Proceedings before magistrate's court.**—State v. Lawson, 98 N. J. L. 593, 121 A 705 [aff 100 N. J. L. 185, 124 A 926]. See infra note [c] (1). Magistrate's hearing as a proceeding in which perjury may be committed see infra § 69.

[c] **Jurisdiction shown.**—(1) State v. Lawson, 98 N. J. L. 593, 121 A 705 [aff 100 N. J. L. 185, 124 A 926]; Etheridge v. State, 76 Tex. Cr. 473, 175 SW 702; Reg. v. Walker, 21 U. C. Q. B. (Ont.) 34. (2) The fact that the grand jury which had indicted defendant for perjury had previously indicted him for bigamy, and that both charges involved the fact that defendant married a certain woman on a specified date, did not deprive the court of jurisdiction to try such perjury charge, so as to make it impossible for accused to have committed perjury on such trial. Peo. v. Collins, 6 Cal. A. 492, 92 P 513. (3) A tax board of equalization is acting within its statutory jurisdiction in conducting an investigation as to whether property has been omitted from tax lists, so that a false and sworn statement in such proceedings is perjury. State v. Wood, 110 Ind. 82, 10 NE 639.

1. Smiddy v. Com., 214 Ky. 100, 102, 282 SW 774; Harkleroad v. Com., 207 Ky. 552, 269 SW 724; McClannohan v. Com., 10 Ky. Op. 72.

"Before punishment for false swearing can be imposed it is requisite that the matter concerning which the alleged false testimony is given must be 'judicially pending' and that the evidence must be given on a subject in which the defendant can be 'legally sworn.' Both of those requisite elements were lacking." Smiddy v. Com., supra (construing St. § 1174).

[a] **Rule applied.**—Defendant was not guilty of false swearing even if his testimony in a trial in a county court for drunkenness was false, as drunkenness is not a public offense since the enactment of Rash-Gullion Act (1922) c 33, and the court was therefore without jurisdiction. Harkleroad v. Com., 207 Ky. 552, 269 SW 724.

[b] **Proceedings before magistrate.**—(1) The rule has been applied in proceeedings before a magistrate (Smiddy v. Com., 214 Ky. 100, 282 SW 774) (2) or police court (Smiddy v. Com., supra).

[c] **Common-law crime of taking false oath.**—Where magistrates were authorized by statute to administer oaths only in duly authorized proceedings, and where they held a meeting to consider issuance of liquor licenses at a time other than that prescribed by statute for such meetings, the meeting was without jurisdiction and the oath there administered was without authority of law, and could not serve as a basis for a prosecution for the common-law misdemeanor of taking a false oath. Rex v. Shaw, 104 L. T. Rep. N. S. 112.

Distinction between perjury and false swearing see supra §§ 4, 5.

2. State v. Gross, 175 Ind. 597, 95 NE 117.

[a] **Where one neither a de jure nor a de facto judge,** but merely the mayor of a city, attempted to sit as presiding judge over a trial which could be held only before a city judge, perjury could not be committed in proceedings before such unauthorized person. State v. Gross, 175 Ind. 597, 95 NE 117.

3. Com. v. Hillenbrand, 96 Ky. 407, 29 SW 287, 16 KyL 485; Peo. v. Albertson, 8 HowPr (N. Y.) 363; Rich v. U. S., 1 Okl. 354, 33 P 804.

[a] **Committee illegally constituted.**—An indictment will not lie for perjury for false swearing before a committee illegally constituted. Com. v. Hillenbrand, 96 Ky. 407, 29 SW 287, 16 KyL 485.

[b] **In Canada** (1) under Cr. Code § 145, punishing perjury in a judicial proceeding, and declaring that every proceeding is judicial within the meaning of the section which is held before any person acting as a court, justice, or tribunal having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid, it was held perjury to give false testimony before a justice of the peace holding a judgment proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offense took place. Drew v. Rex, 33 Can. S. C. 228, 6 Can CrCas 424 [dism app 11 Que. K. B. 477, 6 CanCrCas 241]. (2) By force of Cr. Code § 171 perjury can be committed in proceedings of an election registration board, notwithstanding irregular appointment of the registrar, the proceedings being none the less judicial. Rex v. Mitchell, 27 Ont. L. 615, 618, 10 DomLR 717.

4. Peo. v. Hebberd, 96 Misc. 617, 162 NYS 80.

[a] **Commissioner going beyond statutory jurisdiction.**—An examination of a witness in an investigation by a commissioner appointed by the governor under the Executive Law, with respect to matters not within the lawful scope of the investigation, is beyond the jurisdiction of the commissioner and consequently perjury cannot be assigned respecting testimony on such matters. Peo. v. Hebberd, 96 Misc. 617, 162 NYS 80.

Inadmissible testimony see supra §§ 39–41.

Materiality of statement generally see supra §§ 32–47.

5. Irregularities affecting: Administration of oath see infra § 89. Affidavits and similar instruments see supra § 59.

6. Distinction between perjury and false swearing see supra §§ 4, 5.

jection for defects or irregularities of a nonjurisdictional character,[7] even though the irregularities are such as may require reversal on appeal.[8] If the court has jurisdiction to take cognizance of the case in the first instance, perjury may be committed therein, even though facts later appear defeating jurisdiction,[9] as in the case of a divorce proceeding where residence essential to jurisdiction is shown in the pleadings but disproved in the testimony.[10]

Waiver. Nonjurisdictional defects waived by the parties will not preclude a charge of perjury.[11]

[§ 63] **(b) Particular Defects or Irregularities.**[12] In accordance with the general rule that nonjurisdictional defects or irregularities will not preclude conviction for perjury,[13] it has been held that perjury may be committed in the matter or proceeding involved notwithstanding irregularities such as a wrong date of original entry in the final proof of a homestead claim;[14] an invalid warrant in bail proceedings;[15] error in the order of introduction of testimony;[16] failure to swear the jury on the trial in which the false testimony was given;[17] defendant's failure to plead;[18] erroneous refusal of a continuance;[19] and trial without a jury in a case where defendant was entitled thereto.[20]

Defects in pleadings. Perjury or false swearing may be committed in a hearing or trial actually held notwithstanding a defect in the pleadings therein,[21] as where the complaint, declaration, indictment, or other pleading was bad on demurrer or motion in

7. U. S.—West v. U. S., 258 Fed. 413, 169 CCA 429.
Ala.—Boynton v. State, 77 Ala. 29.
Ark.—Gardner v. State, 80 Ark. 264, 97 SW 48.
Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.
Fla.—Wilds v. State, 79 Fla. 575, 84 S 664; Markey v. State, 47 Fla. 38, 37 S 53.
Ill.—Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922; Maynard v. Peo., 135 Ill. 416, 25 NE 740.
Ind.—Weston v. Lumley, 33 Ind. 486; Henry v. Hamilton, 7 Blackf. 506; State v. Hall, 7 Blackf. 25.
Iowa.—State v. Perry, 117 Iowa 463, 91 NW 765.
Kan.—State v. Lewis, 10 Kan. 157.
Ky.—Jarboe v. Com., 204 Ky. 737, 265 SW 298.
La.—State v. Gregg, 123 La. 610, 49 S 211.
Md.—Weinstein v. State, 146 Md. 80, 125 A 889.
Mich.—In re Smith, 110 Mich. 435, 68 NW 228.
Minn.—State v. Mandehr, 168 Minn. 139, 209 NW 750.
Miss.—Robinson v. State, 146 Miss. 753, 112 S 167.
Mo.—State v. Lavalley, 9 Mo. 834.
N. H.—State v. Brown, 68 N. H. 200, 38 A 731.
N. Y.—Van Steenbergh v. Kortz, 10 Johns. 167.
N. C.—State v. Peters, 107 N. C. 876, 12 SE 74; State v. Ledford, 28 N. C. 5; State v. Molier, 12 N. C. 263.
Okl.—Morford v. Terr., 10 Okl. 741, 63 P 958, 54 LRA 513.
Or.—State v. Walton, 53 Or. 557, 99 P 431, 101 P 389, 102 P 173.
S. D.—State v. Daniels, 38 S. D. 81, 160 NW 723, 724 [cit Cyc].
Tex.—Etheridge v. State, 76 Tex. Cr. 198, 173 SW 1031; Manning v. State, 46 Tex. Cr. 326, 81 SW 957; Murphy v. State, 33 Tex. Cr. 314, 26 SW 395; Smith v. State, 31 Tex. Cr. 315, 20 SW 707; Cordway v. State, 25 Tex. A. 405, 8 SW 670; Anderson v. State, 24 Tex. A. 705, 7 SW 40.
Vt.—State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918.
Eng.—Pippet v. Hearn, 5 B. & Ald. 634, 7 ECL 346, 106 Reprint 1322; Rex v. Christian, C. & M. 388, 41 ECL 214.
Can.—Rex v. Howley, 20 CanCrCas 36, 39 [aff 22 CanCrCas 108, 8 DomLR 1025, and quot Cyc]; Rex v. Yaldon, 17 Ont. L. 179, 12 OntWR 384; Reg. v. Downie, 3 Montr. Q. B. (Que.) 360.
"The law seems to be well settled that perjury may be committed in a proceeding, even though there are defects and irregularities therein which would render the proceedings voidable, provided such defects and irregularities are not jurisdictional, and are such as might be amended or have been waived." State v. Daniels, 38 S. D. 81, 85, 160 NW 723. To same effect Maynard v. Peo., 135 Ill. 416, 25 NE 740 [quot Wilds v. State, 79 Fla. 575, 84 S 664, 666; Markey v. State, 47 Fla. 38, 52, 37 S 53].
[a] **Reason for rule.**—"It would be most unreasonable to require that all proceedings of a court, in which a witness testified falsely, should be in strict conformity to law before the witness could be proceeded against for perjury. Such a rule would change the parties and issues, and, instead of trying a perjurer for false swearing, the court would be called upon to review the judgment of the court in which the false swearing occurred." State v. Walton, 53 Or. 557, 568, 99 P 431, 101 P 389, 102 P 173.
[b] **"Mere irregularities or informalities** in such proceedings not of a character as would oust the jurisdiction of the court or prevent it from attaching in the first instance, constitute no defense to a charge of perjury." Thomas v. State, 13 Ala. A. 421, 424, 69 S 413.
[c] **Testifying in division of court different from that in which sworn.**—A party summoned to appear in one division of the superior court of Montreal, to answer upon faits et articles, and who has appeared and been sworn in another division of the same court, where he has given his answers, may be convicted of perjury on the answers so given. Reg. v. Downie, 3 Montr. Q. B. (Que.) 360.
[d] **Unless the proceedings are void** on the face of the record, perjury may be committed. State v. Gregg, 123 La. 610, 49 S 211.

8. U. S.—West v. U. S., 258 Fed. 413, 169 CCA 429.
Ala.—Thomas v. State, 13 Ala. A. 421, 69 S 413, 414 [quot Cyc].
Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.
Okl.—Morford v. Terr., 10 Okl. 741, 63 P 958, 54 LRA 513.
Or.—State v. Walton, 53 Or. 557, 99 P 431, 101 P 389, 102 P 173.

9. U. S.—West v. U. S., 258 Fed. 413, 169 CCA 429.
Ark.—Gardner v. State, 80 Ark. 264, 97 SW 48.
Fla.—Markey v. State, 47 Fla. 38, 37 S 53.
Mich.—Peo. v. McCaffrey, 75 Mich. 115, 42 NW 681.
Minn.—State v. Mandehr, 168 Minn. 139, 209 NW 750.
Oh.—Stewart v. State, 22 Oh. St. 477.
[a] **Improper arrest.**—Even though a defendant in a criminal investigation was improperly arrested and brought before the police court, the latter had jurisdiction to hear and determine the case so that perjury could be committed in such proceeding. Gardner v. State, 80 Ark. 264, 97 SW 48.
[b] **Invalidity of an ordinance** under which a trial is had does not destroy the jurisdiction of the court to hear and determine the case, including the question of the invalidity of the ordinance, and so perjury may be committed in such a trial. State v. Mandehr, 168 Minn. 139, 209 NW 750.
[c] **Jurisdiction dependent on diversity of citizenship.**—False swearing by a witness on hearing of a motion for preliminary injunction in a federal court constituted perjury, where the bill alleged facts showing diversity of citizenship which gave the court jurisdiction, although the testimony developed an identity of interest between complainant and one of defendants which required the latter's alignment with complainant and defeated jurisdiction. West v. U. S., 258 Fed. 413, 169 CCA 429.

10. Markey v. State, 47 Fla. 38, 37 S 53; Peo. v. McCaffrey, 75 Mich. 115, 42 NW 681; Stewart v. State, 22 Oh. St. 477.

11. In re Smith, 110 Mich. 435, 68 NW 228; Ruch v. State, 111 Oh. St. 580, 146 NE 67.
[a] **Stipulation.**—Where by stipulation of the parties the testimony was taken before the judge when out of the county in which the action was pending, this was a mere irregularity pursuant to express waiver and such testimony could be the predicate for perjury. In re Smith, 110 Mich. 435, 68 NW 228.

12. Particular irregularities held jurisdictional see infra § 64 text and notes 30–35.

13. See supra § 62.

14. Dunlap v. U. S., 12 F. (2d) 868.

15. Jarboe v. Com., 204 Ky. 737, 265 SW 298.
[a] **If the bail applicant swore falsely** on a subject on which he could legally be sworn and before a person authorized to administer the oath, invalidity of the warrant for arrest of the principal, or invalidity of the bond, will not prevent conviction for false swearing. Jarboe v. Com., 204 Ky. 737, 265 SW 298.

16. Slade v. State, (Miss.) 119 S 355.
[a] **Defect must be jurisdictional.**—"Since under Hemingway's Code 1927, § 2161 (Code 1906, § 2461), judge or chancellor in habeas corpus trial is merely required to inquire into cause of imprisonment or detention, the fact that sheriff in such proceeding took initiative and introduced evidence first did not affect materiality of testimony, so as to preclude conviction for perjury therein, particularly since proceeding in such manner was, at the most, a mere error in procedure." Slade v. State, (Miss.) 119 S 355.

17. Schooler v. State, 52 Tex. Cr. 331, 106 SW 359; Smith v. State, 31 Tex. Cr. 315, 20 SW 707. But see Curtley v. State, 42 Tex. Cr. 227, 59 SW 44.

18. State v. Lewis, 10 Kan. 157; State v. Walton, 53 Or. 557, 99 Or. 431, 101 P 389, 102 P 173.
Defects in pleading see infra text and notes 21–25.

19. Murphy v. State, 33 Tex. Cr. 314, 26 SW 395.

20. Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922.

21. Ala.—Thomas v. State, 13 Ala. A. 421, 69 S 413.
Ark.—Gardner v. State, 80 Ark. 264, 97 SW 48.
Md.—Weinstein v. State, 146 Md. 80, 125 A 889.
N. Y.—State v. Brown, 68 N. H. 200, 38 A 731.
S. D.—State v. Daniels, 38 S. D. 81, 160 NW 723.

arrest of judgment,[22] or should have been quashed,[23] or was subsequently adjudged insufficient on appeal.[24] The entire absence of the necessary form of pleading will not prevent conviction of perjury for false testimony in a criminal trial actually held before a court having jurisdiction of the offense and of defendant where the latter interposed no objection.[25]

[§ 64] **(3) Jurisdictional Defects.**[26] In accordance with the rule that the court, tribunal, or officer must have jurisdiction,[27] it is settled that perjury or false swearing[28] cannot be committed in proceedings void for want of jurisdiction.[29]

Particular defects or irregularities held jurisdictional include taking evidence on a felony trial in the absence of defendant;[30] holding a hearing on an application for letters of administration while the probate of the will is still unrevoked;[31] proceeding with a trial after the action has abated;[32] conducting a bastardy proceeding on an affidavit showing on its face that the mother is married instead of unmarried as required by the bastardy statute;[33] holding proceedings before a justice of the peace acting outside his territorial jurisdiction;[34] and a sworn accusation made to commence a prosecution, which is deficient in facts required by statute to be shown to give the tribunal jurisdiction.[35]

[§ 65] **d. Particular Matters or Proceedings**[36]**— (1) Acknowledgment and Execution of Instrument.**[37] Under statutes extending common-law perjury to include extrajudicial oaths,[38] it has been held to be perjury for a person to swear falsely to his identity as grantor on examination by an officer authorized to administer the oath on taking the acknowledgment of a deed;[39] or to swear falsely to the execution of a deed as an attesting witness.[40]

[§ 66] **(2) Bankruptcy; Insolvency.**[41] In construing the Bankruptcy Act of 1898 it has been held that, irrespective of the specific penalty for a false oath therein imposed,[42] false swearing in bankruptcy proceedings constitutes the distinct crime of perjury.[43] Taking a false oath, under a state insolvent

Tex.—Herndon v. State, 82 Tex. Cr. 232, 198 SW 788.

Vt.—State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmR 918.

See Peo. v. Chadwick, 4 Cal. A. 63, 87 P 384, 389 (holding that where defendant was informed against for sending a forged telegram, and the court held such information sufficient, defendant could not again object that the information was insufficient in a subsequent prosecution for perjury committed on the trial for sending such telegram).

"The authorities hold that where the court has jurisdiction, and the indictment is irregular, but the case is tried, perjury can be committed on the trial." Kelley v. State, 51 Tex. Cr. 507, 509, 103 SW 189.

[a] **Omission of the word "willful"** from the charging part of an indictment for arson did not prevent false testimony on the arson trial from constituting perjury. Herndon v. State, 82 Tex. Cr. 232, 198 SW 788.

[b] **Collateral attack.**—Where court in which indictments were found for perjury had jurisdiction of subject matter and of person of defendant, and in pursuance of its general powers sustained sufficiency of indictments, they could not be made subject of collateral attack in subsequent prosecution for perjury, based on defendant's testimony in former prosecutions. Weinstein v. State, 146 Md. 80, 125 A 889.

22. Ala.—Thomas v. State, 13 Ala. A. 421, 69 S 413, 414 [quot Cyc].

Ark.—Gardner v. State, 80 Ark. 264, 97 SW 48.

N. H.—State v. Brown, 68 N. H. 200, 38 A 731; State v. Whittemore, 50 N. H. 245, 9 AmR 196.

S. D.—State v. Daniels, 38 S. D. 81, 160 NW 723, 724 [cit Cyc].

Tex.—Kelley v. State, 51 Tex. Cr. 507, 103 SW 189.

Eng.—Reg. v. Meek, 9 C. & P. 513, 38 ECL 302, 173 Reprint 935.

23. Waddle v. State, 73 Tex. Cr. 501, 165 SW 591.

24. State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918.

25. Etheridge v. State, 76 Tex. Cr. 198, 173 SW 1031; Rex v. Yaldon, 17 Ont. L. 179, 12 OntWR 384. See Anderson v. State, 24 Tex. A. 705, 7 SW 40 (perjury may be committed in a trial before a magistrate on a complaint void because not sworn to).

[a] **Trial without information.**—Accused, although charged in the county court with a gaming offense only by complaint, was guilty of perjury in giving materially false testimony, where he consented to go to trial without the filing of an information, as required by local practice. Etheridge v. State, 76 Tex. Cr. 198, 173 SW 1031.

[b] **Trial held after reading warrant to accused but without filing of information** is a proceeding in which perjury may be committed where defendant interposed no objection to the absence of an information. Rex v. Yaldon, 17 Ont. L. 179, 12 OntWR 384.

Defendant's failure to plead in criminal case see supra text and note 18.

26. Irregularities affecting:
Administration of oath see infra § 89.
Affidavits and similar instruments see supra § 59.

27. See supra § 61.

28. Distinction between perjury and false swearing see supra §§ 4, 5.

29. Ala.—Collins v. State, 78 Ala. 433; Ex p. Banks, 28 Ala. 28.

Ark.—Buell v. State, 45 Ark. 336.

Ga.—Garrett v. State, 18 Ga. A. 360, 89 SE 380.

Hawaii.—Rex v. Papa, 1 Hawaii 346.

Mich.—Peo. v. Titmus, 102 Mich. 318, 60 NW 693.

Oh.—Brown v. State, 18 Oh. Cir. Ct. N. S. 198.

Okl.—Berry v. State, 10 Okl. Cr. 308, 136 P 195.

Or.—State v. Walton, 53 Or. 557, 99 P 431, 101 P 389, 102 P 173.

Tex.—Emery v. State, 57 Tex. Cr. 423, 123 SW 133, 136 AmSR 988.

Eng.—Reg. v. Pearce, 3 B. & S. 531, 113 ECL 531, 122 Reprint 200; Reg. v. Ewington, C. & M. 319, 41 ECL 178, 2 Moody C. C. 223, 169 Reprint 88.

Can.—Reg. v. Row, 14 U. C. C. P. (Ont.) 307; Reg. v. Doty, 13 U. C. Q. B. (Ont.) 398.

"Perjury cannot be committed in a . . . proceeding absolutely void for want of jurisdiction." State v. Walton, 53 Or. 557, 567, 99 P 431, 101 P 389, 102 P 173.

30. Emery v. State, 57 Tex. Cr. 423, 123 SW 133, 136 AmSR 988.

31. Rex v. Papa, 1 Hawaii 346.

32. Rex v. Cohen, 1 Stark. 511, 2 ECL 195, 171 Reprint 546.

[a] **If a coplaintiff die,** the suit will abate unless the death be suggested. Therefore a trial without such suggestion is extrajudicial and void, and perjury cannot be committed therein. Rex v. Cohen, 1 Stark. 511, 2 ECL 195, 171 Reprint 546.

33. Brown v. State, 18 Oh. Cir. Ct. N. S. 198.

34. Berry v. State, 10 Okl. Cr. 308, 136 P 195.

35. Johnson v. State, 58 Ga. 397.

[a] **Deposition required to give jurisdiction.**—(1) Where a deposition on oath of the charge contained in the information is required by statute to confer jurisdiction, perjury cannot be committed in a proceeding informal for the want of such a deposition. Reg. v. Scotton, 5 Q. B. 493, 48 ECL 493, 114 Reprint 1335. (2) Where, however, no deposition or information on oath is necessary as a prerequisite to jurisdiction, the rule is otherwise. Reg. v. Hughes, 4 Q. B. D. 614; Reg. v. Shaw, L. & C. 579, 169 Reprint 1522.

36. Cross references:
Affidavits, certificates, declarations, and depositions in general see supra §§ 57-60.
Materiality of statements to particular matters or proceedings see supra §§ 42-46.
Particular persons or officers authorized to administer oaths see infra §§ 84-87.
Perjury in naturalization proceedings see Aliens §§ 168, 169.

37. Verification of instruments see infra §§ 75, 91-94.

38. See supra § 55.

39. Ex p. Carpenter, 64 Cal. 267, 30 P 816.

40. Tuttle v. Peo., 36 N. Y. 431.

41. Prosecution under Bankruptcy Act for false oath see Bankruptcy § 793.

42. See Bankruptcy § 793.

[a] **Under the Bankruptcy Act of 1800** (1) it was held that false swearing in bankruptcy proceedings was not perjury. Anonymous, 1 F. Cas. No. 475, 1 Wash. C. C. 84. (2) Repeal of the act barred a prosecution for false statements made under the act before its repeal, whether such prosecution was for an offense under the act, under penal statutes, or at common law. U. S. v. Passmore, 27 F. Cas. No. 16,005, 4 Dall. (Pa.) 372, 1 L. ed. 871. (3) Where defendant swore falsely in a bankruptcy proceeding while there was in force a bankruptcy act providing punishment for false oaths in such proceedings and also another general statute covering perjury and inflicting a heavier punishment, he could have been punished under the first statute but not under the second, and on repeal of the first statute he remained innocent under the second, the general perjury statute, and could not be convicted under the first because it had been repealed. Anonymous, supra.

[b] **Under the act of 1841** (1) it was perjury for a bankrupt to swear falsely to his schedule (U. S. v. Nichols, 27 F. Cas. No. 15,880, 4 McLean 23. Contra U. S. v. Dickey, Morr. (Iowa) 412), (2) or to make false statements in regard to it in answer to interrogatories proposed to him in his examination (U. S. v. Dickey, supra).

43. Hammer v. U. S., 6 F. (2d) 786 [certiorari granted 267 U. S. 591 mem, 45 SCt 508 mem, 69 L. ed. 802 mem, and rev on other grounds 271 U. S.

debtor's act,[44] is perjury both at common law and under the statutes.[45] One willfully omitting property from his schedule in insolvency was held guilty of perjury.[46]

In England perjury may be committed in proceedings before commissioners in bankruptcy.[47]

[§ 67] **(3) Grand Jury Proceedings.**[48] A false and sworn statement before a grand jury acting within its authority may be perjury[49] both under the common-law rule restricting perjury to judicial oaths,[50] and under statutes including both judicial and nonjudicial oaths,[51] since a grand jury is regarded as a competent tribunal[52] and a branch of judicial justice.[53] But false swearing respecting a matter as to which the grand jury had no authority to conduct an investigation is not perjury.[54]

Presence of an unauthorized person at a grand jury proceeding does not render it void so as to prevent false swearing before the grand jury from being perjury.[55]

A witness unlawfully compelled to testify with respect to a matter that tends to incriminate him cannot be convicted of perjury if the grand jury investigation was directed against him, as in that case the oath could not be legally administered to him.[56]

[§ 68] **(4) License Application.** Under general rules, and subject to their qualifications, above stated,[57] perjury or false swearing, as the case may be,[58] may be predicated on a false affidavit or statement made under oath on an application for a liquor license,[59] a marriage license,[60] a motor vehicle or driver's license,[61] or a physician's license.[62]

620, 46 SCt 603, 70 L. ed. 1118]; Epstein v. U. S., 196 Fed. 354, 356, 116 CCA 174 [certiorari den 223 U. S. 731 mem, 32 SCt 527 mem, 56 L. ed. 634 mem]; U. S. v. Liberman, 176 Fed. 161.

"False swearing in bankruptcy proceedings is perjury, nothing more or less. Section 5392 (section 125 of the Penal Code) clearly covers that and every other way of committing the crime. Section 29 of the Bankruptcy Act simply singles out that one form for a milder punishment. Two sections cover the offense, one generically, the other specifically. So the specific section has effect only in restricting punishment. Combined, the effect is exactly as if there were only one section denouncing and punishing perjury." Epstein v. U. S., supra.

44. See statutory provisions.

45. Peo. v. Maxwell, 118 Cal. 50, 50 P 18; Arden v. State, 11 Conn. 408; Com. v. Alden, 14 Mass. 388; Com. v. Calvert, 1 Va. Cas. 181.

46. Peo. v. Berman, (Cal.) 7 P 3; Peo. v. Platt, 67 Cal. 21, 7 P 1.

47. Reg. v. Ewington, C. & M. 310, 41 ECL 178.

48. **Magistrate's hearing** see infra § 69.

Materiality of statement before grand jury see supra § 43.

49. Ala.—Barnett v. State, 89 Ala. 165, 7 S 414.

Ark.—Smith v. State, 163 Ark. 223, 259 SW 404; State v. Green, 24 Ark. 591.

Conn.—State v. Fasset, 16 Conn. 457.

Fla.—Craft v. State, 42 Fla. 567, 29 S 418.

Ga.—Nance v. State, 126 Ga. 95, 54 SE 932.

Ill.—Mackin v. Peo., 105 Ill. 312, 56 AmR 167.

Ind.—State v. Turley, 153 Ind. 345, 55 NE 30; State v. McCormick, 52 Ind. 169; State v. Offutt, 4 Blackf. 355.

Iowa.—State v. Schill, 27 Iowa 263.

Ky.—Com. v. Smock, 10 Ky. Op. 430.

La.—State v. Sweat, 159 La. 769, 106 S 298; State v. Williams, 135 La. 692, 65 S 898.

Md.—Izer v. State, 77 Md. 110, 26 A 282.

Mo.—State v. Faulkner, 185 Mo. 673, 84 SW 967; State v. Terry, 30 Mo. 368.

N. Y.—Peo. v. Glasser, 60 Misc. 410, 112 NYS 323, 22 N. Y. Cr. 568.

Oh.—In re Franklin County, 5 OhS &CP 691, 7 OhNP 450.

Porto Rico.—U. S. v. Cruz, 1 Porto Rico Fed. 445.

Tex.—Wilks v. State, (Cr.) 66 SW 787; Pipes v. State, 26 Tex. A. 318, 9 SW 614.

Utah.—Peo. v. Greenwell, 5 Utah 112, 13 P 89.

Eng.—Reg. v. Hughes, 1 C. & K. 519, 47 ECL 519.

"Both at the common law and under our statute, false swearing as to a material matter before a grand jury, in investigations which it may make, is perjury." Smith v. State, 163 Ark. 223, 227, 259 SW 404.

50. See supra §§ 53, 54.

51. See supra § 55.

52. U. S. v. Cruz, 1 Porto Rico Fed. 445.

53. Com. v. Smock, 10 Ky. Op. 430; State v. Sweat, 159 La. 769, 106 S 298; State v. Williams, 135 La. 692, 65 S 898.

[a] **A grand jury investigation is a judicial proceeding.**—Com. v. Smock, 10 Ky. Op. 430.

[b] **Under a statute failing to define perjury** but prescribing a punishment for the crime as known at common law, and punishing false oaths in "any controversy, matter or cause depending in any of the courts of this state," false swearing before a grand jury constitutes perjury. State v. Williams, 135 La. 692, 65 S 898.

54. Clayton v. U. S., 284 Fed. 537, 541 [quot Cyc]; Banks v. State, 78 Ala. 14; Craft v. State, 42 Fla. 567, 29 S 418; Pankey v. Peo., 2 Ill. 80.

[a] **An inquisitorial investigation** beyond the authority of the grand jury to make is not a proceeding in which perjury can be committed. Banks v. State, 78 Ala. 14.

55. Peo. v. Glasser, 60 Misc. 410, 112 NYS 323, 22 N. Y. Cr. 568.

56. Peo. v. Gillette, 126 App. Div. 665, 111 NYS 133, 22 N. Y. Cr. 400.

Testimony tending to incriminate generally see infra §§ 100, 101.

57. See supra §§ 49-64.

58. **Perjury and false swearing distinguished** see supra §§ 4, 5.

59. [a] **May be predicated.**—(1) Under statutes extending common-law perjury to include extrajudicial oaths, it has been held that a false affidavit on application for a liquor license may constitute perjury (State v. Scatena, 84 Minn. 281, 87 NW 764), (2) except where made under oath not required by law (State v. Parrish, 129 La. 547, 56 S 503, 39 LRANS 96).

[b] **Oath that applicant had not violated any law of state or municipality** not required by law and therefore its falsity could not be perjury. State v. Parrish, 129 La. 547, 56 S 503, 39 LRANS 96.

60. [a] **May be predicated.**—(1) Under statutes extending the common-law rule so as to include false oaths in extrajudicial proceedings, a false statement in a sworn application for a marriage license may constitute perjury. State v. Floto, 81 Md. 600, 32 A 315; State v. Randall, 166 Minn. 381, 208 NW 14; Warwick v. State, 25 Oh. St. 21; Call v. State, 20 Oh. St. 330; Field v. State, 29 Oh. Cir. Ct. 302; Reg. v. Barnes, 10 Cox C. C. 539; Rex v. Alexander, Leach C. C. 63, 168 Reprint 134; Rex v. Foster, R. & R. 459, 168 Reprint 897; Rex v. Moraes, (B. C.) 12 CanCrCas 145, 5 WestLR 285. But see Reg. v. Chapman, 2 C. & K. 846, 61 ECL 846, 1 Den. C. C. 432, 169 Reprint 314 (holding that a false oath before a surrogate for the purpose of obtaining a marriage license is a misdemeanor, but whether perjury, quære), (2) Since Pen. Code § 118, defining perjury does not limit the oath to court proceedings and in view of Civ. Code § 69, stating requisites for issuance of license to marry a female under the age of eighteen years, an information alleging that defendant, to obtain a license, made an affidavit that the female was then of the age of nineteen years, well knowing that statement of age was false, stated a public offense, namely that of perjury. Peo. v. Torterice, 66 Cal. A. 115, 225 P 760. (3) Under a section of the Domestic Relations Law expressly providing that willful false swearing upon an application for a marriage license respecting material facts as to the competency of persons to marry shall be perjury, it has been said that the only punishment for a marriage of persons under age is that imposed by such section. Kellogg v. Kellogg, 122 Misc. 734, 203 NYS 757. (4) Under statutes creating the distinct crime of false swearing with respect to oaths in extrajudicial proceedings, a false statement in a sworn application for a marriage license may constitute the crime of false swearing. Harkreader v. State, 35 Tex. Cr. 243, 33 SW 117, 60 AmSR 40; Steber v. State, 23 Tex. A. 176, 4 SW 880; Davidson v. State, 22 Tex. A. 372, 3 SW 662.

[b] **May not be predicated.**—(1) Under the common-law doctrine that the false statement must be made in a judicial proceeding, a false statement made in a sworn application for a marriage license is not perjury (Harkreader v. State, 36 Tex. Cr. 243, 33 SW 117, 60 AmSR 40; Steber v. State, 23 Tex. A. 176, 4 SW 880; Davidson v. State, 22 Tex. A. 372, 3 SW 662; Com. v. Williamson, 4 Gratt. (45 Va.) 554), (2) although it may be a distinct offense (Com. v. Williamson, supra; Reg. v. Chapman, 2 C. & K. 846, 61 ECL 846, 1 Den. C. C. 432, 169 Reprint 314).

61. [a] **May be predicated.**—(1) False swearing in an application for the registration of a motor vehicle, or the issuance of a license to drive the same, may be punishable as perjury under statutes extending common-law perjury to include nonjudicial oaths (Peo. v. Lorenzo, 233 NYS 337) (2) or as a distinct offense under a statute relating specifically to false oaths in such applications (Peo. v. Lorenzo, supra). (3) And it has been held that the enactment of a statute specifically punishing a false oath in such a proceeding does not impliedly repeal an earlier general perjury statute in respect to its application to such false oaths. Peo. v. Lorenzo, supra.

62. [a] **May not be predicated.**—Under statutes making it perjury to make a false statement under an oath required by law or in proceedings specified in the statutes, and silent as to oaths in applications for a license to practice osteopathy, a false statement under oath in an application to practice osteopathy is not

[§ 69] **(5) Magistrate's Hearing.**[63] A false statement made on a preliminary hearing before a committing magistrate may constitute perjury,[64] because such a hearing is ordinarily regarded as a "proceeding"[65] or "judicial proceeding"[66] as these terms are used in perjury statutes. Since the distinct crime of false swearing is ordinarily confined to nonjudicial oaths,[67] a false statement on such a preliminary hearing does not constitute the crime of false swearing.[68]

If a complaint fails to charge any crime against defendant, false testimony at a preliminary hearing thereon before a magistrate is not perjury.[69] Nor is it perjury to made a false affidavit which charges no offense.[70]

An unauthorized oath before a magistrate cannot constitute perjury.[71]

Mayor's court. Under a statute making a mayor a court with the jurisdiction of a magistrate,[72] perjury may be committed in proceedings before a mayor's court.[73]

[§ 70] **(6) Public Land Office.**[74] Under the statute making perjury a false statement under an oath authorized by the laws of the United States,[75] false and sworn statements made in proceedings before the United States land office may constitute perjury.[76] False swearing in such proceedings has also been held perjury under a statute[77] expressly declaring the making of false affidavits or the giving of false testimony in or to be used in land offices, in connection with the disposal of public land, to be perjury.[78]

An unauthorized oath in a proceeding before the land office cannot be perjury.[79]

[§ 71] **(7) Public Money Claims.** Under statutes enlarging common-law perjury so as to include false oaths not made in judicial proceedings,[80] a false and extrajudicial oath in support of a claim against the government may constitute perjury,[81]

perjury. Simmons' Case, 38 Pa. Co. 195.

63. Grand jury proceedings see supra § 67.

64. Cal.—In re Clark, 54 Cal. A. 507, 202 P 50 (recognizing rule).
Ga.—Herring v. State, 119 Ga. 709, 46 SE 876.
Ind.—Shell v. State, 148 Ind. 50, 47 NE 144.
Kan.—State v. Smith, 84 Kan. 646, 114 P 1074.
Oh.—State v. Bronson, 1 Oh. Dec. (Reprint) 31 (recognizing rule).
S. C.—State v. Cockran, 17 S. C. L. 50.
Tex.—Clay v. State, 52 Tex. Cr. 555, 107 SW 1129; Langford v. State, 9 Tex. A. 283.
Can.—Rex v. Moynes, (Man.) 33 CanCrCas 303 (recognizing rule); Rex v. Yaldon, 17 Ont. L. 179, 12 OntWR 384.

[a] **Thus** it is perjury to make a false affidavit charging an offense against another to procure his arrest or institute a criminal prosecution against him. Herring v. State, 119 Ga. 709, 46 SE 876; Pennaman v. State, 58 Ga. 336; Davis v. State, 7 Ga. A. 680, 67 SE 839; Shell v. State, 148 Ind. 50, 47 NE 144; State v. Cockran, 17 S. C. L. 50; Simpson v. State, 46 Tex. Cr. 77, 79 SW 530; Rambo v. State, 43 Tex. Cr. 271, 64 SW 1039; Langford v. State, 9 Tex. A. 283.

65. State v. Smith, 84 Kan. 646, 114 P 1074.

[a] **Under a statute** making it perjury to swear falsely and corruptly in any "cause, matter or proceeding before any court, tribunal or public body or officer," a preliminary hearing before a magistrate was regarded as a "proceeding" in which a false oath constituted perjury. State v. Smith, 84 Kan. 646, 652, 114 P 1074.

66. Langford v. State, 9 Tex. A. 283; Rex v. Yaldon, 17 Ont. L. 179, 12 OntWR 384; Reg. v. Mason, 29 U. C. Q. B. (Ont.) 431.

[a] **Even though no summons has been issued** nor steps taken to bring accused before the magistrate, if a complaint has been issued there is a case or hearing before the magistrate so that a false and sworn statement thereat may constitute perjury. Reg. v. Mason, 29 U. C. Q. B. (Ont.) 431.

67. See supra §§ 4, 5.

68. Langford v. State, 9 Tex. A. 283.

69. In re Clark, 54 Cal. A. 507, 202 P 50.

70. State v. Bronson, 1 Oh. Dec. (Reprint) 31, 1 WestLJ 222.

71. Rex v. Moynes, (Man.) 33 CanCrCas 303.

Jurisdiction of magistrate over proceeding as essential see supra § 61 notes 99 [b], 1 [b].

72. See statutory provisions.

73. State v. Peters, 107 N. C. 876, 12 SE 74.

74. Other crimes in connection with acquisition of public lands see Public Lands [32 Cyc 1085, 1086].

75. See USCA tit 18 §§ 231, 232; Cr. Code §§ 125, 126.

76. U. S. v. Morehead, 243 U. S. 607, 37 SCt 458, 61 L. ed. 926; Caha v. U. S., 152 U. S. 211, 14 SCt 513, 38 L. ed. 415; U. S. v. Nelson, 199 Fed. 464; Hallock v. U. S., 185 Fed. 417, 107 CCA 487 [certiorari den 220 U. S. 613 mem, 31 SCt 717 mem, 55 L. ed. 610 mem]; Nickell v. U. S., 161 Fed. 702, 88 CCA 562, 167 Fed. 741, 93 CCA 229 [certiorari den 214 U. S. 517 mem, 29 SCt 699 mem, 53 L. ed. 1064 mem]; Van Gesner v. U. S., 153 Fed. 46, 82 CCA 180 [rev on other grounds 207 U. S. 425, 28 SCt 163, 52 L. ed. 278]; U. S. v. Brace, 149 Fed. 869; U. S. v. Manion, 44 Fed. 800.

"A charge of perjury may be based upon § 125 of the Criminal Code where the affidavit is required either expressly by an act of Congress or by an authorized regulation of the General Land Office." U. S. v. Smull, 236 U. S. 405, 409, 35 SCt 349, 59 L. ed. 641.

[a] **Reason for rule.**—"We have . . . a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land; a specific act of Congress authorizing contests before the local land offices in cases of preëmption; rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both preëmption and homestead entries; and the frequent recognition by acts of Congress of such contests in respect to homestead entries. Clearly then, within the scope of § 5392, the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered. This is not a case in which the violation of a mere regulation of a department is adjudged a crime." Caha v. U. S., 152 U. S. 211, 218, 14 SCt 513, 38 L. ed. 415.

[b] **Soldier's homestead.**—Where, by regulation of the land office relative to acquisition of a soldier's homestead, an oath was required to establish evidence of facts necessary to be proved under the homestead statute, the oath was one required by a law of the United States, and therefore perjury could be predicated on its falsity. U. S. v. Morehead, 243 U. S. 607, 37 SCt 458, 61 L. ed. 926.

77. Act of March 3, 1857 (11 U. S. St. at L. 250).

[a] **Impliedly repealed.**—This statute, it has been said, was repealed and superseded by the general perjury statute. U. S. v. Nelson, 199 Fed. 464. Contra Peters v. U. S., 2 Okl. 116, 33 P 1031.

78. U. S. v. Wood, 70 Fed. 485; Babcock v. U. S., 34 Fed. 873; U. S. v. Hearing, 26 Fed. 744; U. S. v. Shinn, 14 Fed. 447, 8 Sawy. 403; Peters v. U. S., 2 Okl. 116, 33 P 1031; Finch v. U. S., 1 Okl. 396, 33 P 638; Fisher v. U. S., 1 Okl. 252, 31 P 195.

79. U. S. v. George, 228 U. S. 14, 33 SCt 412, 57 L. ed. 712; U. S. v. Bedgood, 49 Fed. 54.

[a] **Homestead claimant's statement as to residence and cultivation.**—Where a homestead claimant made a false affidavit as to residence and cultivation in a paper filed pursuant to a regulation of the land department, but under statute such facts could be proved only by two disinterested witnesses and not by claimant himself, the false affidavit was not perjury because the oath thereto was not required or authorized by law. U. S. v. George, 228 U. S. 14, 33 SCt 412, 57 L. ed. 712.

[b] **Congress cannot confer on the secretary of the interior or commissioner of the land office** power to make rules and regulations, such as prescribing by whom the oath is to be administered to one making preëmption entry, or the facts to be contained in the affidavit, so as to make it perjury for the preëmptor to make a false affidavit, when the facts sworn to are not required by statute to be sworn to, and the statute does not authorize the oath to be administered by the person who administers it. U. S. v. Bedgood, 49 Fed. 54.

Oaths authorized by regulations generally see supra § 49 text and notes 28, 29.

80. See supra § 55.

81. U. S. v. Ambrose, 108 U. S. 336, 2 SCt 682, 27 L. ed. 746; U. S. v. Hampton, 101 Fed. 714, 41 CCA 625; U. S. v. Boggs, 31 Fed. 337; Vance v. State, 62 Miss. 137; Peo. v. Bowe, 34 Hun 528, 3 N. Y. Cr. 149; Shely v. State, 35 Tex. Cr. 190, 32 SW 901; O'Bryan v. State, 27 Tex. A. 339, 11 SW 443.

[a] **Affidavit of a deputy sheriff** for expenses in conveying a witness from one county to another under Acts (1891) p 138, providing that for such service the sheriff shall be entitled to his expenses, the amount to be stated by him under oath, is "an oath necessary for the prosecution of a private right," within Pen. Code art 188, declaring that a false statement under oath for the prosecution or defense of any private right is perjury, although not an oath "in a judicial proceeding," within art 192, providing that a false oath in a judicial proceeding shall constitute perjury. Shely v. State, 35 Tex. Cr. 190, 32 SW 901.

[b] **Clerk of court.**—The account of services rendered the United States by a clerk of the district court is a

except where made under oath not required by law.[82] Sometimes such a false oath is made punishable as a distinct offense and does not fall within the statute punishing perjury.[83]

[§ 72] **(8) Reports and Examinations Respecting Banks and Other Corporations or Associations.** Under statutes extending common-law perjury to include false oaths in extrajudicial proceedings,[84] false swearing in the report of a bank,[85] or other corporation,[86] or association,[87] may constitute perjury. It has been held that such a report may be perjury despite the existence of other statutes specifically punishing false reports of this nature.[88] False swearing by an officer of a fraternal beneficial society on his examination before a state superintendent of insurance is perjury.[89] A false oath as to his ownership of stock, etc., by one qualifying as a national bank director, may constitute perjury.[90] On an indictment against an officer of a bank for perjury in falsely making affidavit to the truth of the report of the bank's condition, defendant cannot object that the affidavits of other persons to the report are defective, and therefore not legal, so long as his own affidavit was in compliance with the law.[91]

Foreign corporation. Under a statute providing that a false oath "required by law" may be perjury,[92] false swearing before a local notary as to a corporate report required by the law of a foreign jurisdiction may constitute perjury.[93]

Oath not required by law. False statements in bank reports made under oath not required by law[94] cannot constitute perjury,[95] although, under statutes dividing perjury into degrees and making second degree perjury akin to false swearing,[96] they may constitute second degree perjury.[97]

[§ 73] **(9) Surety's Justification.**[98] If a surety on a bail bond or recognizance testifies falsely and knowingly in an affidavit or on examination as to his ownership of property or other qualifications, he is guilty of perjury both at common law and under the statutes,[99] and the same is true of one who swears

"declaration" or "certificate" within the meaning of U. S. Rev. St. (1878) § 5392 (USCA tit 18 § 231) making the false verification thereof perjury. U. S. v. Ambrose, 108 U. S. 336, 2 SCt 682, 27 L. ed. 746.

[c] **Pension claim.**—The offense of perjury as defined by U. S. Rev. St. § 5392 (USCA tit 18 § 231) may be predicated upon an affidavit to support a pension claim sworn to before a justice of the peace. U. S. v. Boggs, 31 Fed. 337.

[d] **Public school teacher.**—(1) Where a teacher who had taught a number of days in excess of the regular term, for which he could not legally receive compensation, exaggerated the number of scholars at the next term, so as to entitle him to an amount sufficient to pay for the extra days' teaching, and made oath to such report, it was held that he was guilty of perjury. Vance v. State, 62 Miss. 137. (2) Where a public school teacher, on making affidavit as required by law to the check drawn by the trustees on the county treasurer for his pay, makes a false statement, he is guilty of perjury under Pen. Code art 188, defining perjury as a false statement made under the sanction of an oath under circumstances in which an oath is required by law. O'Bryan v. State, 27 Tex. A. 339, 11 SW 443.

[e] **Sheriff's claim for support of indigent prisoners.**—Peo. v. Bowe, 34 Hun 528, 3 N. Y. Cr. 149.

82. Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

[a] **Under a state finance statute** providing that each statement of accounts must be verified by the person presenting it to the effect that it is just, true, and correct, and under Pen. L. § 1620, making perjury the act of swearing or affirming any material matter to be true, which is known to be false, on an occasion in which an oath is required by law, even though a statement in a verified voucher for a machine sold to the state that no item in the claim was charged at more than its fair value was false, such a statement was not required by law, and was therefore immaterial, and did not support a charge of perjury. Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

83. See supra § 6.

84. See supra § 55.

85. U. S. v. Bartow, 10 Fed. 873, 20 Blatchf. 351; State v. Malone, 174 Ind. 746, 93 NE 170; Com. v. Dunham, Thach. Cr. (Mass.) 519; Peo. v. Trumpbour, 64 Hun 346, 19 NYS 331 [app dism 135 N. Y. 638 mem, 32 NE 646 mem]; Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328 [aff 135 N. Y. 639 mem, 32 NE 647 mem]; Peo. v. Vail, 6 AbbNCas (N. Y.) 206, 57 How Pr 81.

[a] **National banking association.**—A willful and corrupt false statement under oath by an officer of a national bank in a report to the comptroller of the currency has been held perjury. U. S. v. Bartow, 10 Fed. 873, 20 Blatchf. 351.

[b] **State bank.**—Report by officer to state superintendent of banks is within the rule. Com. v. Dunham, Thach. Cr. (Mass.) 519; Peo. v. Trumpbour, 64 Hun 346, 19 NYS 331 [app dism 135 N. Y. 638 mem, 32 NE 646 mem]; Peo. v. Vail, 6 AbbNCas (N. Y.) 206, 57 HowPr 81.

[c] **Private bank.**—State v. Malone, 174 Ind. 746, 93 NE 170 (special report).

False reports or returns of banks generally see Banks and Banking § 194.

86. See infra text and note 93.

Making false corporate report as crime distinct from perjury see Corporations §§ 2024–2026.

87. State v. Williams, 104 Oh. St. 232, 135 NE 651.

[a] **Building and loan association.**—State v. Williams, 104 Oh. St. 232, 135 NE 651.

88. State v. Williams, supra.

[a] **For instance,** despite the existence of another statute specifically punishing a false oath in the report of a building and loan association, a false statement meeting the general requirements of the perjury statute constituted the crime of perjury. State v. Williams, 104 Oh. St. 232, 135 NE 651.

89. Peo. v. Reed, 66 Misc. 425, 123 NYS 305.

90. U. S. v. Neale, 14 Fed. 767 (under U. S. Rev. St. [1878] § 5392 [USCA tit 18 § 231] if accused took an oath in which he stated that he was bona fide owner in his own right of the number of shares of stock then standing in his name on the books of the bank, and that such shares were not hypothecated or in any way pledged as security for any loan or debt; and if he took it willfully, and not believing that he was stating the truth, it was perjury, if in point of fact he was not the owner of such stock, or had pledged the same for a loan or debt).

91. Peo. v. Trumpbour, 135 N. Y. 639, 32 NE 647; Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328 [aff 135 N. Y. 639 mem, 32 NE 647 mem].

92. See statutory provisions; and supra § 50.

93. Peo. v. Martin, 175 N. Y. 315, 67 NE 589, 96 AmSR 628.

[a] **Reason for rule.**—"The evident purpose of the legislature was to adopt a statute which would include and provide for the punishment of the act of taking a false and corrupt oath in this state whenever it was required or permitted by our laws or by the laws of any other state or commonwealth that might be regarded or treated as valid here." Peo. v. Martin, 175 N. Y. 315, 319, 67 NE 589, 96 AmSR 628.

94. Legal provision for oath see supra §§ 49–52.

95. Peo. v. Grout, 85 Misc. 570, 147 NYS 591.

[a] **For instance,** false swearing in a bank report prepared for publication but not required to be verified under the Banking Law is not perjury. Peo. v. Grout, 85 Misc. 570, 147 NYS 591.

96. See supra § 52.

Distinction between perjury and false swearing see supra §§ 4, 5.

97. State v. Howard, 91 Wash. 481, 158 P 104.

[a] **For instance,** false affidavit as to the condition of a private bank is second degree perjury, even though the report is not regarded as having been given in a proceeding, judicial or extrajudicial, and even though the oath is not one required by law. State v. Howard, 91 Wash. 481, 158 P 104.

98. Materiality of statements see supra § 46.

99. U. S.—Hodgkinson v. U. S., 5 F. (2d) 628 [certiorari den 269 U. S. 554 mem, 46 SCt 18 mem, 70 L. ed. 408 mem]; U. S. v. Volz, 28 F. Cas. No. 16,627, 14 Blatchf. 15.

Ill.—Peo. v. Gazelle, 298 Ill. 58, 132 NE 273; Pollard v. Peo., 69 Ill. 148.

Mass.—Com. v. Butland, 119 Mass. 317; Com. v. Hatfield, 107 Mass. 227; Com. v. Hughes, 5 Allen 499.

Mich.—Peo. v. Almashy, 229 Mich. 227, 201 NW 231.

Mo.—State v. Lavalley, 9 Mo. 834. N. M.—Terr. v. Weller, 2 N. M. 470.

N. Y.—Peo. v. Davis, 122 App. Div. 569, 107 NYS 426, 21 N. Y. Cr. 573 [aff 191 N. Y. 514 mem, 84 NE 1116 mem]; Peo. v. Froelich, 110 App. Div. 873, 96 NYS 488 [aff 185 N. Y. 615 mem, 78 NE 1108 mem]; Stratton v. Peo., 20 Hun 288 [aff 81 N. Y. 629 mem].

Pa.—Com. v. Miller, 6 Pa. Super. 35.

Tenn.—State v. Wilson, 87 Tenn. 693, 11 SW 792.

Tex.—Warren v. State, 57 Tex. Cr. 262, 122 SW 541.

[a] **Nature of proceeding.**—(1) An inquiry by a United States commissioner as to the solvency of a surety on a bail bond for the appearance of an accused before the district court is a judicial proceeding, and a willfully false oath made by the surety therein constitutes perjury. "The proceeding in which an inquiry is had as to the solvency of the surety is judicial." Hodgkinson v. U. S., 5 F.

falsely on justifying as surety on an appeal bond or recognizance.[1] So, under the act of congress extending the crime of perjury,[2] one may be guilty of that offense in swearing falsely as to his qualifications to become a surety on a distiller's bond,[3] or a match stamp bond,[4] before an internal revenue collector.

False swearing. It has been held that swearing falsely on application to serve as surety on a replevin bond is not an oath made in a judicial proceeding, but may constitute the distinct crime of false swearing.[5] On the other hand, a false oath in an application to serve as bail bondsman is in a judicial proceeding, and therefore perjury,[6] but not false swearing.[7]

[§ 74] **(10) Tax Proceedings.**[8] Under statutes extending common-law perjury to include false oaths in extrajudicial proceedings,[9] perjury may be committed in tax proceedings or returns,[10] such as proceedings before a tax board.[11]

Income and excess profits. A false statement in a sworn income[12] or excess profit[13] tax return may constitute perjury. A provision of the income tax statute punishing any attempt to evade the tax does not prevent a false statement in a tax return from being perjury,[14] since the two offenses are distinct.[15] Perjury may be committed by swearing falsely to an income tax return with the necessary intent,[16] even though the false return is not in fact used.[17]

[§ 75] **(11) Verified Pleadings.**[18] Perjury may be committed in the verification of a pleading,[19] even when made upon belief.[20] It has been both affirmed[21] and denied[22] that the verification must be compulsory in order to serve as the predicate for perjury. Perjury may be assigned upon a false oath to an answer in chancery,[23] provided the bill called for an answer under oath.[24] It is equally perjury to make a false charge or averment in the charging part as to make a false statement in the stating part of a bill.[25]

[§ 76] **(12) Other Matters or Proceedings.** In accordance with general rules, and subject to their qualifications,[26] perjury or false swearing, as the case may be,[27] may or may not be predicated on an affidavit for attachment,[28] certiorari,[29] change of venue,[30] continuance,[31] writ of habeas cor-

(2d) 628, 629 [certiorari den 269 U. S. 554 mem, 46 SCt 18 mem, 70 L. ed. 408 mem]. (2) The false statement as to the property owned by him, made by one justifying as a cognizor in a criminal prosecution, is in a judicial proceeding, within White Annot. Pen. Code art 205, which includes, as a basis of the offense of perjury, all oaths or affirmations legally taken in such proceedings. Warren v. State, 57 Tex. Cr. 262, 122 SW 541.

Common-law and statutory rules as to nature of proceeding in which perjury may be committed see supra §§ 53–55.

1. Territory v. Weller, 2 N. M. 470; State v. Wilson, 87 Tenn. 693, 11 SW 792.

2. See supra § 55.

3. U. S. v. Hardison, 135 Fed. 419 (decided under U. S. Rev. St. [1878] § 5392 [U. S. Comp. St. (1901) p 3653]).

4. Ralph v. U. S., 9 Fed. 693, 11 Biss. 88.

5. Stamper v. Com., 100 SW 286, 30 KyL 992.

Judicial proceeding not an element of false swearing see supra §§ 4, 5, 56.

6. See supra text and note 99.

7. Warren v. State, 57 Tex. Cr. 262, 122 SW 541.

[a] **For example,** a false statement as to the property owned by him, made by one justifying as cognizor in a criminal prosecution, is perjury, rather than false swearing. Warren v. State, 57 Tex. Cr. 262, 122 SW 541.

8. **Statements in tax returns constituting mere expressions of opinion** see supra § 18.

9. See supra § 55.

10. See cases infra text and notes 11–17.

11. State v. Wood, 110 Ind. 82, 10 NE 639.

[a] **County board of equalization.**—State v. Wood, 110 Ind. 82, 10 NE 639.

12. Levin v. U. S., 5 F. (2d) 598, 599; Levy v. U. S., 271 Fed. 942.

"There can be no question but that perjury . . . is an offense which may be committed in making out a false return to an income tax statement." Levin v. U. S., supra.

Erroneous calculation as not constituting perjury see supra § 18 text and note 18.

13. Levy v. U. S., 271 Fed. 942.

14. U. S. v. Noveck, 273 U. S. 202, 47 SCt 341, 71 L. ed. 610.

15. U. S. v. Noveck, supra.

[a] **Distinction stated.**—"The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or act. Each involves an element not found in the other. . . . The crime of perjury is complete when the oath is taken with the necessary intent, although the false affidavit is never used. . . . The making of a false affidavit, without presentation thereof, does not constitute an attempt to evade the tax law. . . . The crime of attempting to defeat or evade the Revenue Law may be committed without verification of a false tax return. Congress, having power to make both the false swearing and the use of the false affidavit punishable . . . did so. . . . The fact that perjury is a felony, while filing a false return is only a misdemeanor, presented no obstacle. . . . There is nothing in the history of the revenue legislation which should lead us to a different conclusion." U. S. v. Noveck, 273 U. S. 202, 206, 47 SCt 341, 71 L. ed. 610.

16. **Criminal intent generally** see supra §§ 23–30.

17. U. S. v. Noveck, 273 U. S. 202, 47 SCt 341, 71 L. ed. 610; Steinberg v. U. S., 14 F. (2d) 564; Levin v. U. S., 5 F. (2d) 598.

Use of affidavits generally see supra §§ 57–60.

18. **Cross references:**

Affidavit, certificate, declaration, and deposition generally see supra §§ 57–60.

Verification of written statement generally see infra §§ 91–94.

19. Ala.—Cowan v. State, 15 Ala. A. 87, 72 S 578.

Mich.—Peo. v. McCaffrey, 75 Mich. 115, 42 NW 681.

N. Y.—Peo. v. Christopher, 4 Hun 805.

Or.—State v. Luper, 95 P 811, 814.

Tenn.—State v. Roberts, 11 Humphr. 539.

Wis.—Lappley v. State, 170 Wis. 356, 174 NW 913, 7 ALR 1279.

Eng.—Reg. v. Yates, C. & M. 132, 41 ECL 77.

"The verification to a pleading . . . is clearly an oath authorized by law." State v. Luper, supra.

[a] **Falsely swearing to a petition for letters of administration** before a probate court constitutes perjury. Cowan v. State, 15 Ala. A. 87, 72 S 578.

20. State v. Luper, (Or.) 95 P 811.

[a] **Divorce complaint** sworn to be true as plaintiff "verily believed" in accordance with statutory requirement may constitute a basis for a charge of perjury. State v. Luper, (Or.) 95 P 811.

False statement of belief or opinion generally see supra § 12.

21. Peo. v. Millsap, 85 Cal. A. 732, 260 P 378; Beecher v. Anderson, 45 Mich. 543, 8 NW 539; Peo. v. Gaige, 26 Mich. 30; Silver v. State, 17 Oh. 365.

[a] **For instance,** false statements in a verified answer, which would have been as effective if unverified, cannot constitute perjury because the verification or oath is immaterial. Peo. v. Millsap, 85 Cal. A. 732, 260 P 378.

22. Lappley v. State, 170 Wis. 356, 174 NW 913, 7 ALR 1279.

[a] **Reason for this view.**—"It is argued that the verification by defendant of his complaint as a pleading in the civil action on which the charge is predicated was a wholly immaterial oath within the contemplation of the perjury statute, because under sec. 2665 pleadings may or may not be verified, and, whether verified or not, the facts therein stated to which defendant swore do not by operation of law make such oath a material matter or thing in such action. This claim wholly disregards the terms and significance of sec. 4471. A complaint in a civil action pending in a court having jurisdiction to hear the cause is a material matter in the proceeding, and an oath verifying it is one in regard to a matter before a court and is authorized by law." Lappley v. State, 170 Wis. 356, 359, 174 NW 913, 7 ALR 1279.

[b] **That verification of a complaint is optional** does not prevent the oath thereto from being one authorized by law so that if false it may constitute perjury. Lappley v. State, 170 Wis. 356, 174 NW 913, 7 ALR 1279.

23. Reg. v. Yates, C. & M. 132, 41 ECL 77.

24. Silver v. State, 17 Oh. 365.

25. Smith v. Clark, 4 Paige (N. Y.) 368.

26. See supra §§ 49–64.

27. **Perjury and false swearing distinguished** see supra §§ 4, 5.

28. [a] **May be predicated.**—State v. Madigan, 57 Minn. 425, 59 NW 490.

29. [a] **May be predicated.**—Pratt v. Price, 11 Wend. (N. Y.) 127.

30. [a] **May not be predicated.**—It has been said that perjury cannot be assigned upon an alleged false affidavit as to the prejudice of a judge in support of a motion for a change of venue, because subjecting such an affiant to a possible prosecution for perjury would nullify the constitutional guaranty of an impartial trial. Ex p. Ellis, 3 Okl. Cr. 220, 105 P 184, 25 LRANS 653, AnnCas1912A 863.

31. [a] **May be predicated.**—(1) False swearing to a material point in an affidavit for the continuance of a

pus,[32] injunction,[33] new trial,[34] passport,[35] search warrant,[36] or service of process by publication;[37] or on an affidavit in proceedings by a landlord to remove his tenant;[38] or an affidavit to an account,[39] to secure an appeal,[40] or to verify a chattel mortgage;[41] or on a false answer under oath as to the competency of a juror;[42] or on a false statement at a coroner's inquest,[43] in an application for a civil service examination,[44] in contempt proceedings,[45] in proceedings before fence viewers,[46] in proceedings before a fire marshal,[47] in proceedings before a legislative body,[48] in proceedings before a local marine board,[49] in proceedings before an ecclesiastical tribunal,[50] in proceedings before a military tribunal,[51] in proceedings

cause may constitute perjury. Holmes v. U. S., 269 Fed. 96; State v. Winstandley, 151 Ind. 316, 51 NE 92; State v. Flagg, 27 Ind. 24; State v. Johnson, 7 Blackf. (Ind.) 49; State v. Shupe, 16 Iowa 36, 85 AmD 485; State v. Matlock, 48 La. Ann. 663, 19 S 669. (2) By the common law and the law of Texas when it was admitted as a state, applications for continuance in criminal cases were required to be supported by oath, and a prosecution for perjury under Rev. St. § 5392 may be based on a false oath to such an application in a federal court in Texas, which follows that procedure. Holmes v. U. S., 269 Fed. 96.

Effect of continuance on perjury committed in testifying see supra § 54 text and note 53.

32. [a] **May be predicated.**—White v. State, 9 Miss. 149.

33. [a] **May be predicated.**—Rex v. White, M. & M. 271, 22 ECL 519.

34. [a] **May be predicated.**—(1) A false affidavit in support of a petition for a new trial may constitute perjury. Arnold v. State, (Okl. Cr.) 132 P 1123; State v. Chandler, 42 Vt. 446. (2) Under statutes extending common-law perjury to include nonjudicial oaths (see supra § 55), a false affidavit taken in advance of a motion for a new trial to be used thereon may constitute perjury (State v. Varnado, 154 La. 575, 97 S 865).

[b] **For example,** the making of a false affidavit before a notary public for use on a motion for a new trial in a criminal case constituted perjury, even though the motion had not been presented to the court when the affidavit was made. State v. Varnado, 154 La. 575, 97 S 865.

[c] **Under a false swearing statute** providing that if any person on any subject on which he can legally be sworn shall willfully and knowingly swear false he shall be imprisoned, one making a false affidavit in support of a motion for a new trial may be convicted of the crime of false swearing. Neal v. Com., 217 Ky. 334, 335, 289 SW 242 ("statements contained in an affidavit supporting a defendant's motion for a new trial are subjects concerning which the affiant can legally be sworn").

35. [a] **May not be predicated.**—A prosecution for perjury in connection with a passport application cannot be predicated upon an unauthorized oath. U. S. v. Robertson, 257 Fed. 195.

[b] **Length of time witness knew applicant.**—The presidential rule for the issuance of passports, requiring an affidavit from a credible witness who has known the applicant two years, does not require the affiant to swear to acquaintance with the applicant, although that is in the form prescribed by the secretary of state, and making false affidavit as to acquaintance is not perjury because not in a case in which a law authorizes an oath to be administered, within Criminal Code § 125 (USCA tit 18 § 231). U. S. v. Robertson, 257 Fed. 195.

36. [a] **May be predicated.**—(1) Carpenter v. State, 5 Miss. 163, 34 AmD 116. (2) An affidavit to procure a search warrant, charging a felony, is, if false, perjury, although it charges the felony to no particular person. Carpenter v. State, supra.

37. [a] **May be predicated.**—An affidavit of nonresidence to secure an order for service by publication sworn to before the action has been begun, by filing the bill, may constitute perjury. Clarke v. Wayne Cir. Judge, 193 Mich. 33, 159 NW 387 (construing Howell St. Annot. § 4719).

38. [a] **May be predicated.**—Sewell v. State, 61 Ga. 496.

39. [a] **May be predicated.**—A false affidavit to an account for the purpose of having it passed by the orphans' court may constitute perjury. U. S. v. Thomas, 28 F. Cas. No. 16,475, 3 Cranch C. C. 293.

40. [a] **May not be predicated.**—Perjury cannot be assigned upon an affidavit to secure an appeal that the appeal is not taken for purposes of delay. Jackson v. State, 90 Ark. 577, 119 SW 1129.

[b] **Reason for rule.**—Although Const. art 7 § 42 provides for appeals from justices of the peace, and Kirby Dig. § 4666 provides for an affidavit that the appeal is not taken for delay, perjury cannot be assigned on such an affidavit, as the good faith of the applicant is not susceptible of that degree of proof requisite to constitute perjury, and if the affidavit is made by a third party it would at most be a mere expression of opinion that the applicant took the appeal in good faith. Jackson v. State, 90 Ark. 577, 119 SW 1129.

41. [a] **May be predicated.**—(1) Under statutes extending common-law perjury to include extrajudicial oaths (see supra § 55) a false affidavit pursuant to statutory requirements respecting verification of chattel mortgages (see Chattel Mortgages § 125) (2) may constitute perjury (State v. Estabrooks, 70 Vt. 412, 41 A 499).

Affidavits and similar instruments generally see supra §§ 57–60.

42. [a] **May be predicated.**—In re De Martini, 47 Cal. A. 228, 190 P 468; State v. Howard, 63 Ind. 502; Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133; Finch v. U. S., 1 Okl. 396, 33 P 638; Hilliard v. State, 14 Lea (Tenn.) 648; State v. Wall, 9 Yerg. (Tenn.) 347; Com. v. Stockley, 10 Leigh (37 Va.) 678.

43. [a] **May be predicated.**—False swearing on an inquest before a deputy coroner may constitute perjury. Reg. v. Johnson, L. R. 2 C. C. 15.

44. [a] **May be predicated.**—A willfully false answer by the applicant to a question in an application for civil service examination may constitute perjury. U. S. v. Crandol, 233 Fed. 331; Johnson v. U. S., 26 App. (D. C.) 128 (holding it perjury under the federal statute for a civil service applicant to swear falsely as to whether he had ever been in government service and, if so, whether he resigned or was discharged).

45. [a] **May be predicated.**—(1) U. S. v. Dodge, 25 F. Cas. No. 14,975, 2 Gall. 313; Ex p. Biggers, 85 Fla. 322, 95 S 763; Ex p. Earman, 85 Fla. 297, 95 S 755, 31 ALR 1226; Ray v. State, 186 Ind. 396, 114 NE 866. (2) Even though of an irregular character. Ruch v. State, 111 Oh. St. 580, 146 NE 67.

[b] **Irregularities waived.**—Ruch v. State, 111 Oh. St. 580, 146 NE 67.

Jurisdictional and nonjurisdictional irregularities see supra §§ 62–64.

46. [a] **May be predicated.**—Jones v. Daniels, 15 Gray (Mass.) 438, 440 ("Perjury may be committed by a person testifying falsely and corruptly as a witness at a hearing before a board of fence-viewers legally assembled to adjudicate upon the rights of adjacent landowners as to their division fences").

47. [a] **May be predicated.**—Harris v. Peo., 64 N. Y. 148 [aff 4 Hun 1, 6 Thomps. & C. 206].

[b] **May not be predicated.**—But false testimony before such official pursuant to an unauthorized oath is not a criminal offense. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117.

[c] **Fire outside state.**—Where a fire occurs outside the state a fire marshal is not authorized to investigate it, and consequently false and sworn statements in proceedings before a fire marshal investigating such a fire cannot constitute false swearing because the oath is neither legally administered nor on a subject as to which an oath is required. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117.

48. [a] **May be predicated.**—(1) Under statutes extending common-law perjury to include extrajudicial oaths (see supra § 55), perjury may be predicated upon false swearing in proceedings before a legislative body (Ex p. McCarthy, 29 Cal. 395; Peo. v. Backer, 113 Misc. 400, 185 NYS 459), (2) even when held by a committee sitting by due authority after adjournment of the legislature (Peo. v. Backer, supra). (3) A witness before a joint legislative committee created by a concurrent resolution of the senate and assembly, empowered to function after the adjournment of the legislature, may be guilty of perjury in his testimony before it, given between sessions of the legislature. Peo. v. Backer, supra.

49. [a] **May be predicated.**—Reg. v. Tomlinson, L. R. 1 C. C. 49.

50. [a] **May be predicated.**—In a common-law jurisdiction taking cognizance of ecclesiastical courts (see Cognizance 11 C. J. p 948 note 43 [b], [c]; Religious Societies [34 Cyc 1182 et seq]) it would seem that perjury may be committed in proceedings before an ecclesiastical tribunal. See Chapman v. Gillet, 2 Conn. 40 (so holding in an action for slander in accusing a man of perjury before an ecclesiastical council).

51. See cases infra this note.

[a] **Court-martial.**—False swearing before a court-martial may constitute perjury. Reg. v. Heane, 4 B. & S. 947, 116 ECL 947, 122 Reprint 714. See State v. Gregory, 6 N. C. 69 (on a trial for perjury committed before a court-martial it is not necessary to produce the military commission of the presiding officer in order to prove the legality of the court-martial).

[b] **Proceedings under draft acts.**—(1) Perjury may be committed in proceedings under military draft acts pursuant to an oath authorized by regulations promulgated under such acts. Hardwick v. U. S., 257 Fed. 505, 168 CCA 509; U. S. v. Sonachall, 27 F. Cas. No. 16,352, 4 Biss. 425. (2) Under Selective Service Regulations (1917) §§ 91, 94, 95, a registrant who swore to the affidavit verifying his questionnaire, which falsely stated that he had a wife dependent on him for support, committed perjury, despite his claim that there is no statute authorizing such an oath, and no authorization by the regulations. Whiteside v. U. S., 257 Fed. 509, 168 CCA 513.

[c] **Civil War draft.**—U. S. v. Sonachall, 27 F. Cas. No. 16,352, 4 Biss. 425.

Authority of draft board officials to administer oath see infra § 87 text and note 28.

before a referee[52] or an arbitrator;[53] in proofs of loss under an insurance policy;[54] in a return under an oleomargarine act;[55] on a false statement or affidavit made in election proceedings or as to matters concerning an election;[56] on a false statement made at an examination for discovery before[57] or after[58] trial; or on false testimony, given instead of an affidavit, on a hearing to dissolve an injunction.[59]

Special statute authorizing oath. Under statutes extending common-law perjury to include nonjudicial oaths,[60] a false affidavit in extrajudicial proceedings under a special statute providing for proof by affidavit may constitute perjury.[61]

[§ 77] **8. Administration and Form of Oath—a. Actual Administration.** It is essential to the commission of perjury and kindred crimes[62] that defendant shall have been sworn or affirmed.[63] In other words, to constitute a valid oath, for the falsity of which perjury will lie, there must be, in the presence of a person authorized to administer it,[64] an unequivocal act by which affiant consciously takes upon himself the obligation of an oath.[65] An oath not administered in respect of the facts stated can-

52. [a] **May be predicated.**—State v. Keene, 26 Me. 33; Bonner v. McPhail, 31 Barb. (N. Y.) 106 (holding, however, that an order of reference made after the report has been filed, with the consent of both parties that it be entered nunc pro tunc, will not relate back so as to give an extrajudicial oath the effect of an oath legally administered, on which a charge of perjury can be sustained).

53. [a] **May be predicated** where the investigation is of a matter submitted to arbitrators by rule of court. State v. Stephenson, 15 S. C. L. 165; Reg. v. Ball, 6 Cox C. C. 360.

[b] **May not be predicated,** it has been held, where the submission is not by rule of court. Mahan v. Berry, 5 Mo. 21.

[c] **Arbitration under Workmen's Compensation Act.**—(1) It has been held that false swearing in an arbitration before a judge under a workmen's compensation act is punishable as common-law perjury in a judicial proceeding (Rex v. Crossley, [1909] 1 K. B. 411) (2) and not as an offense under arbitration acts punishing false testimony before an arbitrator to whom a dispute is referred by consent (Rex v. Crossley, supra).

54. [a] **May be predicated.**—(1) False swearing in proofs of loss to an insurance company may be punishable as perjury under statutes extending common-law perjury to include extrajudicial oaths (Avery v. Ward, 150 Mass. 160, 22 NE 707; Reg. v. Gagan, 17 U. C. C. P. (Ont.) 530) (2) or as a distinct offense (Rex v. Nier, 9 Alta. L. 353, 25 CanCrCas 241, 28 DomLR 373, 33 WestLR 180, 9 WestWkly 838) (3) under statutes making it a misdemeanor to swear to any false certificate, affidavit, or other statement (State v. Lynes, 194 Mo. A. 184, 185 SW 535).

[b] **Under a particular statute** punishing statements which would be perjury if made in judicial proceedings but which are made elsewhere pursuant to oath, affirmation, or solemn declaration required or authorized by law, a false statutory declaration relative to proof of an insurance claim is punishable even if not required by a special insurance act where it is in a form authorized by the Canada Evidence Act. Rex v. Nier, 9 Alta. L. 353, 25 CanCrCas 241, 28 DomLR 373, 33 WestLR 180, 9 WestWkly 838.

55. [a] **May not be predicated.**—False and sworn statements made in a return under an oleomargarine act cannot constitute perjury where the oath was not authorized by law. U. S. v. Lamson, 165 Fed. 80 (under the Oleomargarine Act the governmental department authorized to require statements or returns relative to its investigations is not authorized to require sworn statements, and therefore a false sworn statement made pursuant to a departmental regulation is not perjury within the United States perjury statute because not under oath required or authorized by law).

56. [a] **May be predicated.**—(1) Reg. v. Chamberlain, 10 Man. 261. (2) A state statute making it unlawful to make a false affidavit concerning a petition for a state recall election applies to a petition for a municipal recall election under a charter expressly making all general state laws applicable to municipal elections. Peo. v. Carroll, 39 Cal. A. 654, 180 P 49. (3) Under a statute punishing a false and sworn statement for "any purpose," a false affidavit made in connection with proceedings of a political party relative to election of party officials is an indictable offense. State v. Breitweiser, 88 Mo. A. 648. (4) Under a statute making it an indictable offense to make under oath, affirmation, or solemn declaration required or authorized by law any statement which would amount to perjury if made in judicial proceedings, a false and solemn declaration voluntarily made before a justice of the peace relative to alleged improper acts of an election official is punishable. Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

[b] **May not be predicated.**—U. S. v. Cameron, 282 Fed. 684.

[c] **Statement not required under Corrupt Practices Act.**—Since the adoption of the Seventeenth Amendment, providing for election of senators by popular vote, a candidate at such election is not a "candidate for nomination at any primary election or nominating convention or for indorsement at any general or special election or election by the Legislature of any state," and is not required by the terms of Corrupt Practices Act § 8 (Comp. St. § 195), to file a statement of receipts and expenditures, and an indictment for perjury cannot be predicated on a false oath to any statement made by him under such provision. U. S. v. Cameron, 282 Fed. 684.

Liability of persons not "electors" see infra § 96.

57. [a] **May be predicated.**—Where a statement made upon oath by a person on his examination for discovery before trial in an action forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of a statute punishing perjury. Rex v. Howley, 20 CanCrCas 36, 39 [aff 22 Can CrCas 108, 8 DomLR 1025, and quot Cyc]; Rex v. Thickens, 11 CanCrCas 274, 12 B. C. 223, 4 WestLR 454.

[b] **Reason for rule.**—"Every statement made upon oath by the person examined, during his examination for discovery, forms part of his evidence, within the meaning of section 145. I am unable to see that a witness under cross-examination may not give evidence as effectually as under examination-in-chief. Nor do I agree with the further contention of Mr. McPhillips, that as the Registrar, who holds the proceeding, i. e., the examination for discovery, makes no adjudication, he cannot be misled and therefore perjury cannot be committed. But, as the evidence given in the proceeding is taken down and may be used on the trial of the action, the court might be misled, and the circumstances would clearly be such as are intended to be covered by the definition. I think, however, that the definition of 'judicial proceeding' in subsection 3 of section 145 leaves no room for argument on this point. It seems to me only necessary to quote the first part of the sub-section: 'Every proceeding is judicial within the meaning of this section which is held in or under the authority of any court of justice.'" Rex v. T——, 12 B. C. 223, 224, 11 CanCrCas 274, 4 WestLR 454.

58. [a] **May be predicated.**—Under a statute making it a crime to give false testimony in a "civil cause," it is criminal to give false testimony in supplementary proceedings. U. S. v. Gutierrez, 12 Philippine 529.

59. [a] **May be predicated.**—State v. Budd, 65 Oh. St. 1, 60 NE 988.

[b] **Although the statute permits the use of affidavits** on the hearing of a motion to dissolve an injunction before a judge of the common pleas court sitting in chambers, the oral testimony of witnesses is competent on a hearing of that character; and one who knowingly and willfully testifies falsely in a material matter in giving such testimony is guilty of perjury. State v. Budd, 65 Oh. St. 1, 60 NE 988.

60. See statutory provisions; and supra § 55.

61. State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

[a] **Special act re particular bank.**—Where defendant made a false affidavit as to the cash capital of a state bank under a special statute requiring a sworn affidavit as to the bank's cash capital in order to permit it to resume business, he was guilty of perjury since the oath was authorized and required, even though not taken in a judicial proceeding. State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

62. Definitions and distinctions respecting perjury and similar crimes see supra §§ 1-7.

63. U. S.—Levy v. U. S., 271 Fed. 942; U. S. v. Baer, 6 Fed. 42, 18 Blatchf. 493; U. S. v. Coons, 25 F. Cas. No. 14,860, 1 Bond 1.

Ala.—Smith v. State, 18 Ala. A. 45, 88 S 350.

Cal.—Peo. v. Cohen, 118 Cal. 74, 50 P 20.

Fla.—Markey v. State, 47 Fla. 38, 37 S 53.

Ind.—Hitesman v. State, 48 Ind. 473.

Miss.—Sloan v. State, 71 Miss. 459, 14 S 262.

N. Y.—Case v. Peo., 76 N. Y. 242, 6 AbbNCas 151; Peo. v. Tatum, 60 Misc. 311, 112 NYS 36.

N. C.—State v. Glisson, 93 N. C. 506.

Tex.—Curtley v. State, 42 Tex. Cr. 227, 59 SW 44.

Can.—Lafontaine v. Fournier, 48 Que. Super. 113.

64. See infra § 78 et seq.

65. U. S. v. Mallard, 40 Fed. 151, 5 LRA 816; Goolsby v. State, 17 Ala. A. 545, 547, 86 S 137; Markey v. State, 47 Fla. 38, 37 S 53; O'Reilly v. Peo., 86 N. Y. 154, 40 AmR 525, 10 AbbNCas 53; Peo. v. Swasey, 122 Misc. 388, 391, 203 NYS 22; Peo. v. Nolte, 19 Misc. 674, 44 NYS 443, 12 N. Y. Cr. 252.

"To constitute a valid oath, for the falsity of which perjury will lie, there must be an unequivocal and present act in some form in the presence of an officer authorized to administer oaths." O'Reilly v. Peo., supra [quot Goolsby v. State, supra; Peo. v. Swasey, supra].

[a] **Facts held sufficient to show conscious taking of obligation of an oath.**—State v. Ruskin, 117 Oh. St.

not serve as the basis of a prosecution for perjury.[66]

[§ 78] **b. By Whom Administered—(1) Necessity of Power To Administer—(a) In General.** It is an essential prerequisite to the establishment of the guilt of one accused of the crime of perjury or false swearing, as the case may be,[67] that the oath shall have been administered by a person authorized by law to administer it, and where the oath was administered by a person having no legal authority to do so, as by a person acting merely in a private capacity, or by one who had authority to administer certain oaths, but not the one in question, or by one who had authority seemingly colorable, but no authority in fact, there can be no conviction, for the oath is altogether idle.[67½]

Consent to administration of an oath by an unauthorized person will not render it a predicate for perjury.[68] Where, under local practice, written consent is required to authorize administration of the oath by a particular officer in a particular type of proceeding, perjury cannot be committed under an oath administered by such officer without such consent.[69]

[§ 79] **(b) Ministerial Acts.** The competency of the person who reads the words of the oath to the witness and does the ministerial part of its administration is immaterial.[70]

[§ 80] **(c) Under Laws of United States.** To constitute perjury or false swearing under the laws of the United States, it must appear that the officer administering the oath was authorized so to do by the laws of the United States.[71] Where the particular United States statute applicable to the matter or proceeding involved authorizes administration of the oath by an officer empowered to take oaths under state laws,[72] such state officer is authorized to administer oaths under the laws of the United States within the meaning of this rule, the authorization being found in the particular United States statute,[73] or statute and regulation,[74] applicable to the case.

426, 159 NE 568, 56 ALR 403.

66. Rex v. Tremblay, 26 Que. K. B. 37, 28 CanCrCas 21, 35 DomLR 209.

[a] **For instance,** where a bailiff made a false statement of facts respecting an expense account, and such statement purported to be sworn to under his previous oath of office, it could not be perjury, as such oath related only to the promise to fulfill his duties and could not serve as an oath to extraneous statements of fact. Rex v. Tremblay, 26 Que. K. B. 37, 28 CanCrCas 21, 35 DomLR 209.

Oath of office as not basis for perjury because of its promissory character see supra § 17.

67. Perjury and false swearing distiguished see supra §§ 4, 5.

67½. U. S.—U. S. v. Curtis, 107 U. S. 671, 2 SCt 507, 27 L. ed. 534; Levy v. U. S., 271 Fed. 942; U. S. v. Garcelon, 82 Fed. 611; U. S. v. Law, 50 Fed. 915; U. S. v. Bedgood, 49 Fed. 54; U. S. v. Manion, 44 Fed. 800; U. S. v. Howard, 37 Fed. 666; U. S. v. Babcock, 24 F. Cas. No. 14,488, 4 McLean 113; U. S. v. Coons, 25 F. Cas. No. 14,860, 1 Bond 1; U. S. v. Winchester, 28 F. Cas. No. 16,739, 2 McLean 135.

Ala.—Walker v. State, 107 Ala. 5, 18 S 393; Hood v. State, 44 Ala. 81.

Cal.—Peo. v. Cohen, 118 Cal. 74, 50 P 20.

Fla.—Campbell v. State, 92 Fla. 775, 109 S 809; Adkinson v. State, 59 Fla. 1, 51 S 818.

Ill.—Maynard v. Peo., 135 Ill. 416, 25 NE 740; Van Dusen v. Peo., 78 Ill. 645; Morrell v. Peo., 32 Ill. 499.

Ind.—Masterson v. State, 144 Ind. 240, 43 NE 138; McGragor v. State, 1 Ind. 232; Muir v. State, 8 Blackf. 154.

Iowa.—State v. Phippen, 62 Iowa 54, 17 NW 146.

Ky.—Com. v. Bradshaw, 210 Ky. 405, 276 SW 124; Kerfoot v. Com., 89 Ky. 174, 12 SW 189, 11 KyL 391; Biggerstaff v. Com., 11 Bush 169.

La.—State v. Theriot, 50 La. Ann. 1187, 24 S 179; State v. Dreifus, 38 La. Ann. 877.

Mo.—State v. Carpenter, 164 Mo. 588, 65 SW 255; State v. Cannon, 79 Mo. 343.

N. J.—State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

N. Y.—Lambert v. Peo., 76 N. Y. 220, 6 AbbNCas 181, 32 AmR 293; Peo. v. Tillman, 63 Misc. 461, 118 NYS 442 [rev on other grounds 139 App. Div. 572, 124 NYS 44, 25 N. Y. Cr. 32 (aff 201 N. Y. 598 mem, 95 NE 1136 mem)]; Peo. v. Martin, 38 Misc. 67, 76 NYS 953 [rev on other grounds 77 App. Div. 396, 79 NYS 340 (aff 175 N. Y. 315, 67 NE 589, 96 AmSR 628)]; Peo. v. Osborne, 158 NYS 330; Peo. v. Albertson, 8 HowPr 363; Jackson v. Humphrey, 1 Johns. 498.

N. C.—State v. Wyatt, 3 N. C. 56.

Oh.—Staight v. State, 39 Oh. St. 496; State v. Jackson, 36 Oh. St. 281; Warwick v. State, 25 Oh. St. 21.

Or.—State v. Craig, 94 Or. 302, 185 P 764.

Pa.—Com. v. Polluck, 6 Pa. Dist. 559; Com. v. Lawrence, 4 Del. Co. 27.

S. C.—State v. McCroskey, 14 S. C. L. 308; State v. Hayward, 10 S. C. L. 546.

Tenn.—State v. Wilson, 87 Tenn. 693, 11 SW 792; State v. Brady, 1 Swan 36; Lamden v. State, 5 Humphr. 83.

Tex.—State v. Powell, 28 Tex. 626; Faubion v. State, 104 Tex. Cr. 78, 282 SW 597; Williams v. State, (Cr.) 96 SW 47; Davidson v. State, 22 Tex. A. 372, 3 SW 662; Stewart v. State, 6 Tex. A. 184.

Vt.—State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918.

Va.—Com. v. Williamson, 4 Gratt. (45 Va.) 554.

Eng.—Reg. v. Dunn, 12 Q. B. 1026, 64 ECL 1026, 116 Reprint 1155; Rex v. Verelst, 3 Camph. 432, 170 Reprint 1435; Reg. v. Stone, Dears. C. C. 251, 169 Reprint 715; Reg. v. ———, 1 Cox C. C. 250; Rex v. Hanks, 3 C. & P. 419, 14 ECL 641, 172 Reprint 482; Custodes v. Gwinn, Style 336, 82 Reprint 756.

Can.—Reg. v. McIntosh, 12 N. B. 372; Re Godson, 16 Ont. 275; Reg. v. Downie, 3 Montr. Q. B. (Que.) 360.

"It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury." U. S. v. Curtis, 107 U. S. 671, 672, 2 SCt 507, 27 L. ed. 534 [quot Campbell v. State, 92 Fla. 775, 109 S 809, 810].

[a] **Common-law misdemeanor of taking a false oath** cannot be committed unless the person administering the oath was legally authorized to do so. Rex v. Shaw, 104 L. T. Rep. N. S. 112.

[b] **Perjury in the second degree.**—State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249.

68. Phillipi v. Bowen, 2 Pa. 20.

69. Reg. v. Martin, 7 RevLeg (Que.) 672, 21 LCJur 156; Reg. v. Gibson, 7 RevLeg (Que.) 573.

[a] **For instance,** where, under local practice, written consent was required in order that an examination could be conducted before a prothonotary instead of before the judge, and no such consent was given, an oath taken at the examination before the prothonotary was voluntary and perjury could not be assigned thereon. Reg. v. Martin, 7 RevLeg (Que.) 672, 21 LCJur 156.

[b] **Subsequent waiver** of the required consent cannot relate back so as to make that perjury which was not perjury at the time the oath was taken. Reg. v. Martin, 7 RevLeg (Que.) 672, 21 LCJur 156.

70. Ala.—Walker v. State, 107 Ala. 5, 18 S 393.

Md.—State v. Mercer, 101 Md. 535, 61 A 220.

Pa.—Com. v. McCue, 46 Pa. Super. 416.

Tenn.—Stephens v. State, 1 Swan 157.

Can.—Reg. v. Coleman, 30 Ont. 93, 2 CanCrCas 523.

[a] **Physical administration of the oath by one not an officer** has been held sufficient to serve as a basis for perjury where the unauthorized person acted merely as the mouthpiece of an authorized person who was present and regarded as himself administering the oath in contemplation of law. Walker v. State, 107 Ala. 5, 18 S 393; Stephens v. State, 1 Swan (Tenn.) 157; Reg. v. Coleman, 30 Ont. 93, 2 CanCrCas 523.

71. U. S. v. Curtis, 107 U. S. 671, 2 SCt 507, 27 L. ed. 534; U. S. v. Madison, 21 Fed. 628.

[a] **Justice of the peace** has authority to administer an oath to an answer in chancery in the federal courts, the authority being expressly given by the ninth rule prescribed by the supreme court for the equity practice of the circuit courts, so that a false statement under such an oath may be perjury. U. S. v. Cowing, 25 F. Cas. No. 14,880, 4 Cranch C. C. 613.

[b] **Register of land office.**—Under a statute empowering the register of the land office to administer oaths in the discharge of his duties, a prosecution for perjury may be based upon an oath so administered by such officer. U. S. v. Brace, 149 Fed. 869.

72. See statutory provisions.

73. Patterson v. U. S., 202 Fed. 208, 120 CCA 650; U. S. v. Madison, 21 Fed. 628; U. S. v. Shinn, 14 Fed. 447, 8 Sawy. 403.

[a] **Civil Service Act.**—U. S. v. Crandol, 233 Fed. 331 (a recorder acting as representative of the civil service commission and duly authorized by it to administer oaths).

[b] **Homestead Act.**—U. S. v. Hearing, 26 Fed. 744 (county clerk).

[c] **Patent act.**—Patterson v. U. S., 202 Fed. 208, 120 CCA 650.

[d] **Timber Culture Act.**—U. S. v. Madison, 21 Fed. 628; U. S. v. Shinn, 14 Fed. 447, 8 Sawy. 403.

74. U. S. v. Morehead, 243 U. S. 607, 37 SCt 458, 61 L. ed. 926. See U. S. v. Bailey, 9 Pet. (U. S.) 238, 9 L.

Notaries public can administer oaths[75] and take affidavits[76] on which perjury can be predicated in a federal court, only in cases and to the extent authorized by the federal statutes.

[§ 81] **(2) Who Empowered To Administer[77]—(a) In General.** Perjury or false swearing[78] cannot be assigned upon an oath administered by an officer who has failed to qualify[79] or who is incompetent to hold the office,[80] or whose power to administer the oath has expired by limitation of time;[81] or who is acting outside of his territorial jurisdiction,[82] unless his power to administer oaths is not territorially limited.[83]

Defendant swearing himself. In the absence of express statutory authority[84] one cannot be convicted of false swearing for a false statement made under an oath administered by himself to himself.[85]

[§ 82] **(b) De Facto Officers.**[86] That perjury or false swearing, as the case may be,[87] may be predicated upon a false statement made under an oath administered by a de facto officer has been both affirmed[88] and denied.[89] If the person administering the oath is not even an officer de facto,[90] he cannot administer an oath serving as the basis of a prosecution for perjury.[91]

[§ 83] **(c) Deputies.** Where an officer has authority to appoint deputies, if necessary for the discharge of the duties of his office, a false oath taken before such a deputy is as much perjury as if taken before the officer himself.[92]

[§ 84] **(d) Particular Persons or Officers[93]—aa. Court or Court Officer.** An oath administered by the clerk or other officer of a court, in open court and under the direction of the court, is an oath administered by the court so that false testimony under such oath may be perjury.[94]

ed. 113 ("false swearing" may be committed under an oath administered by a state magistrate pursuant to a United States treasury department regulation); State v. Woerndle, 109 Or. 461, 209 P 604, 220 P 744 (perjury in passport application serving as ground for disbarment of attorney).

[a] **Regulation of the land department** that declaratory statements in homestead proceedings "may be executed before any officer having a seal and authorized to administer oaths generally" is consistent with United States statutes requiring such statements to be in affidavit form and specifying certain officers authorized to administer oaths, and a charge of perjury in such declaratory statements may be based upon oaths administered by notaries public or clerks of state courts pursuant to such regulations. U. S. v. Morehead, 243 U. S. 607, 37 SCt 458, 61 L. ed. 926.

Oath authorized by implication see supra § 49 text and note 25.

75. See cases infra this note.

[a] **Investigation by post office.**—U. S. Rev. St. § 1778, authorizing notaries public to administer oaths in all cases in which justices of the peace have power to administer them, gives no power to administer an oath in investigation by the post-office department as to the alleged loss of a registered letter, for there is no statute giving justices such power, and hence no indictment for perjury can be based upon false statements in an affidavit made before a notary in such an investigation. U. S. v. Law, 50 Fed. 915.

[b] **Proceedings before land office.**—Notaries public are not authorized by any law of the United States to administer oaths to affidavits required by the rules and regulations prescribed by the commissioner of the general land office; and perjury cannot therefore be assigned upon such an affidavit. U. S. v. Manion, 44 Fed. 800.

76. See cases infra this note.

[a] **Act Congr. Aug. 15, 1876 c 304** provides that notaries public of the several states shall be authorized to take affidavits in the same manner and with the same effect as commissioners of the United States circuit court may lawfully take or do. U. S. v. Hardison, 135 Fed. 419.

[b] **Prior to the passage of Act Congr. Febr. 26, 1881,** authorizing notaries public to administer oaths in certain cases, notaries public had no authority under the laws of the United States to administer oaths in such cases. U. S. v. Curtis, 107 U. S. 671, 2 SCt 507, 27 L. ed. 534.

77. Particular persons or officers see infra §§ 84–87.

78. Distinction between perjury and false swearing see supra §§ 4, 5.

79. State v. Phippen, 62 Iowa 54, 17 NW 146; Biggerstaff v. Com., 11 Bush (Ky.) 169; State v. Hayward, 10 S. C. L. 546.

80. Lambert v. Peo., 76 N. Y. 220, 6 AbbNCas 181, 32 AmR 293.

81. State v. Cannon, 79 Mo. 343.

[a] **For example,** where an officer is authorized to administer an oath in the performance of his duties during a prescribed period only, perjury cannot be assigned on an oath administered by him at some other time. State v. Cannon, 79 Mo. 343.

82. Van Dusen v. Peo., 78 Ill. 645; State v. Tate, 77 Miss. 469, 27 S 619; Jackson v. Humphrey, 1 Johns. (N. Y.) 498.

83. Com. v. Frank, 7 Pa. Dist. 143, 21 Pa. Co. 120.

[a] **For example,** perjury may be assigned upon an oath administered by an officer outside his territorial jurisdiction where his power to administer oaths is not territorially limited. Com. v. Frank, 7 Pa. Dist. 143, 21 Pa. Co. 120.

84. See statutory provisions.

85. Phillips v. State, 5 Ga. A. 597, 63 SE 667.

86. Acting crown timber agent see infra § 87 text and note 36.

87. Perjury and false swearing distinguished see supra §§ 4, 5.

88. Cal.—Peo. v. McLeod, 30 Cal. A. 435, 158 P 506.

Ill.—Hereford v. Peo., 197 Ill. 222, 64 NE 310; Greene v. Peo., 182 Ill. 278, 55 NE 341.

Kan.—State v. Thornhill, 99 Kan. 808, 163 P 145 [cit Cyc]; State v. Williams, 61 Kan. 739, 60 P 1050, 60 Kan. 837, 58 P 476.

Md.—Izer v. State, 77 Md. 110, 26 A 282.

Nebr.—Brunke v. State, 105 Nebr. 343, 180 NW 560.

N. H.—State v. Hascall, 6 N. H. 352.

N. Y.—Peo. v. Cook, 8 N. Y. 67, 59 AmD 451; Howard v. Sexton, 1 Den. 440 [rev on other grounds 4 N. Y. 157].

Okl.—Morford v. Terr., 10 Okl. 741, 63 P 958, 54 LRA 513.

Tex.—Woodson v. State, 24 Tex. A. 153, 6 SW 184.

Can.—Drew v. Rex, 33 Can. S. C. 228, 6 CanCrCas 424 [aff 6 CanCrCas 241, 11 Que. K. B. 477]; Rex v. Mitchell, 27 Ont. L. 615, 10 DomLR 717.

See Keator v. Peo., 32 Mich. 484 (in a collateral proceeding such as perjury it is enough that a person acting as deputy clerk in administering the oath was a de facto officer).

"In this country the de facto doctrine applies to the fullest extent, and we can think of no good reason why an exception should be made for the protection of those guilty of swearing falsely when their testimony may be made the basis of a conclusive judgment in either civil or criminal proceedings." State v. Williams, 61 Kan. 739, 744, 60 P 1050.

[a] **Justice of the peace.**—State v. Thornhill, 99 Kan. 808, 163 P 145.

[b] **Master in chancery.**—Greene v. Peo., 182 Ill. 278, 55 NE 341.

[c] **Notary.**—Peo. v. McLeod, 30 Cal. A. 435, 158 P 506.

[d] **Registrar under Manhood Suffrage Act.**—Rex v. Mitchell, 27 Ont. L. 615, 10 DomLR 717.

[e] **Tax assessor.**—Brunke v. State, 105 Nebr. 343, 180 NW 560.

89. Ala.—Walker v. State, 107 Ala. 5, 18 S 393.

Ind.—Muir v. State, 8 Blackf. 154.

Ky.—Biggerstaff v. Com., 11 Bush 169.

Oh.—Staight v. State, 39 Oh. St. 496.

S. C.—State v. Hayward, 10 S. C. L. 546.

Eng.—Rex v. Verelst, 3 Campb. 432, 170 Reprint 1435.

[a] **Leading case.**—Rex v. Verelst, 3 Campb. 432, 170 Reprint 1435.

90. See Officers § 366.

91. Lambert v. Peo., 76 N. Y. 220, 6 AbbNCas 181, 32 AmR 293; Peo. v. Albertson, 8 HowPr (N. Y.) 363; Faubion v. State, 104 Tex. Cr. 78, 282 SW 597.

[a] **Appointment to elective office.**—Where the constitution requires vacancies to be filled by election, perjury cannot be assigned of testimony given before an officer appointed to fill a vacancy, since such appointment confers no color of title to office. Peo. v. Albertson, 8 HowPr (N. Y.) 363.

[b] **Nonresident appointed notary.**—Lambert v. Peo., 76 N. Y. 220, 6 Abb NCas 181, 32 AmR 293.

92. U. S.—U. S. v. Barton, 24 F. Cas. No. 14,534, Gilp. 439.

Cal.—Peo. v. Waite, 102 Cal. 251, 36 P 518.

Ill.—Hereford v. Peo., 197 Ill. 222, 64 NE 310.

Ind.—Server v. State, 2 Blackf. 35.

Md.—Izer v. State, 77 Md. 110, 26 A 282.

Oh.—Warwick v. State, 25 Oh. St. 21.

Can.—Reg. v. Chamberlain, 10 Man. 261.

93. General rules as to authority to administer oath on which to predicate perjury see supra §§ 78–83.

94. U. S.—U. S. v. Babcock, 24 F. Cas. No. 14,488, 4 McLean 113; U. S. v. Nihols, 27 F. Cas. No. 15,880, 4 McLean 23.

Ala.—Walker v. State, 107 Ala. 5, 18 S 393.

Ind.—Masterson v. State, 144 Ind. 240, 43 NE 138.

Mich.—Keator v. Peo., 32 Mich. 484.

N. Y.—Peo. v. Nolte, 19 Misc. 674, 44 NYS 443, 12 N. Y. Cr. 252.

N. C.—State v. Knight, 84 N. C. 789.

Okl.—Cutler v. Terr., 8 Okl. 101, 56 P 861.

Tenn.—Stephens v. State, 1 Swan 157.

[a] **Ministerial act by another.**—Although an oath administered by one not a court officer cannot serve as the basis for a charge of perjury, where such a person performs merely the physical act of administering the oath in the presence and by direction of the court clerk, who personally signs the jurat, the oath will be regarded as having been in law

Administered by the clerk in the absence of the court an oath may be sufficient on which to predicate perjury.[95]

Court stenographer. Under statute authorizing a court stenographer to administer oaths in the discharge of his duties,[96] perjury may be predicated upon an oath so administered by him,[97] provided he has been sworn if required by statute.[98]

Judge. Perjury may be predicated upon an oath administered by a circuit judge.[99]

Prosecuting attorney. Perjury may be assigned upon an oath administered by a prosecuting attorney in the discharge of his duties.[1] Under statutes[2] abolishing the usual rule of strict construction applicable to penal statutes,[3] and providing that a county attorney shall have power to compel persons to appear before him to testify respecting alleged violations of gambling laws, power of such attorney to administer an oath will be implied, and violation of such oath may constitute perjury.[4] But a false statement pursuant to an oath administered by a county solicitor to a witness not brought before him by court process is made under an oath administered without authority, and is therefore not perjury.[5]

United States commissioner.[6] Under laws of the United States granting to United States commissioners power to administer oaths,[7] an oath administered by such an official may serve as the predicate for perjury,[8] unless he acted beyond his authority.[9]

[§ 85] **bb. Justice of the Peace.**[10] Where a justice of the peace is empowered to administer the oath,[11] false statements under oath administered by a justice may constitute perjury[12] or false swearing.[13] But oaths administered by justices of the peace beyond their jurisdiction cannot be made the basis of a charge of perjury.[14]

Capacity in which justice acts. It is not necessary that a justice should act in his judicial capacity in administering the oath, it being sufficient to authorize a charge of perjury if he administered the oath in his official capacity.[15]

[§ 86] **cc. Notary Public.**[16] A false statement pursuant to an oath administered by a notary public acting within his authority to administer oaths[17] may constitute perjury[18] or false swearing.[19] But perjury cannot be assigned upon a false oath taken before a notary lacking authority to administer it.[20] One whose application for a notary's commission has been approved, but who has not qualified[21] within the time prescribed by statute,[22] cannot administer an oath which will serve as the basis for a charge of false swearing,[23] not being regarded as even a de facto officer[24] within the rule permitting punishment for false statements made under oath administered by a de facto officer.[25]

[§ 87] **dd. Other Officials.** Among other persons or officers, in addition to those already mentioned,[26] who have been held to possess the power to admin-

administered by the clerk so that a false statement under such oath is perjury. Walker v. State, 107 Ala. 5, 18 S 393. See also supra § 79.

95. State v. Dreifus, 38 La. Ann. 877.

[a] **Even though in the presence of the court** his administration thereof would not have been sufficient as the basis for perjury. State v. Dreifus, 38 La. Ann. 877.

96. See statutory provisions.

97. Reg. v. Downie, 3 Montr. Q. B. (Que.) 360; Reg. v. Leonard, 3 Montr. Leg. N. (Que.) 211.

98. Reg. v. Downie, 3 Montr. Q. B. (Que.) 360; Reg. v. Leonard, 3 Montr. Leg. N. (Que.) 211.

99. In re Smith, 110 Mich. 435, 436, 68 NW 228 ("circuit judges have the power to administer oaths").

1. Peo. v. Pabón, 7 Porto Rico 379; Rambo v. State, 43 Tex. Cr. 271, 64 SW 1039; Bailey v. State, 41 Tex. Cr. 157, 53 SW 117.

2. See statutory provisions.

3. See Statutes [36 Cyc 1183].

4. Barnes v. State, 68 Tex. Cr. 498, 152 SW 1043. See Bradberry v. State, 7 Tex. A. 375 (under an earlier act expressly authorizing administration of the oath by a county attorney, perjury could be assigned upon an oath administered by such officer).

5. Campbell v. State, 92 Fla. 775, 109 S 809.

6. Powers and functions of United States commissioners generally see United States Commissioners [39 Cyc 793-795].

7. See statutory provisions.

8. Safford v. U. S., 252 Fed. 471, 164 CCA 655.

[a] **Oath administered in preliminary hearing.**—Safford v. U. S., 252 Fed. 471, 164 CCA 655.

9. U. S. v. Garcelon, 82 Fed. 611.

[a] **For instance,** under United States statutes construed as authorizing a United States circuit court commissioner to administer oaths only for purposes for which a justice of the peace could administer them in the state of the jurat, an oath administered by a United States commissioner in a matter and state where a justice of the peace could not have administered the oath cannot serve as the basis of a prosecution for perjury. U. S. v. Garcelon, 82 Fed. 611.

10. Administration by de facto justice see supra § 82 text and note 88 [a].

11. See Justices of the Peace § 27. See also supra § 80.

12. U. S. v. Cowing, 25 F. Cas. No. 14,880, 4 Cranch C. C. 613; Com. v. Hughes, 5 Allen (Mass.) 499; State v. Stephenson, 15 S. C. L. 165; Clay v. State, 52 Tex. Cr. 555, 107 SW 1129.

13. Wilson v. State, 49 Tex. Cr. 496, 93 SW 547.

Distinction between perjury and false swearing see supra §§ 4, 5.

14. Rex v. Shaw, 104 L. T. Rep. N. S. 112; Reg. v. Row, 14 U. C. C. P. (Ont.) 307.

15. Pennaman v. State, 58 Ga. 336; Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

16. Under federal statutes see supra § 80.

17. See Notaries §§ 23-25.

18. U. S.—U. S. v. Morehead, 243 U. S. 607, 37 SCt 458, 61 L. ed. 926; Patterson v. U. S., 202 Fed. 208, 120 CCA 650; U. S. v. Neale, 14 Fed. 767; U. S. v. Sonachall, 27 F. Cas. No. 16,352, 4 Biss. 425.

Cal.—Ex p. Carpenter, 64 Cal. 267, 30 P 816.

La.—State v. Varnado, 154 La. 575, 97 S 865.

Minn.—State v. Scatena, 84 Minn. 281, 87 NW 764.

Mo.—State v. Boland, 12 Mo. A. 74.

Tex.—Manning v. State, 46 Tex. Cr. 326, 81 SW 957.

See State v. Woerndle, 109 Or. 461, 209 P 604, 220 P 744 (perjury justifying attorney's disbarment).

[a] **Notary administering oath in judicial proceeding.**—Notaries being competent to administer oaths, not only in statutory proceedings, but also "in all cases," which necessarily includes all civil and criminal cases in which affidavits may be required by law, a false statement pursuant to an oath administered by a notary in an affidavit on motion for a new trial may constitute perjury. State v. Varnado, 154 La. 575, 97 S 865.

[b] **In Washington,** in prosecutions for perjury in the second degree (1) it has been held that a notary is authorized to take affidavits not required by law and that the voluntary maker of a false affidavit before a notary is subject to prosecution for perjury in the second degree. State v. Howard, 91 Wash. 481, 158 P 104. (2) Earlier authority is to the effect that a notary is without authority to administer an oath not required by law and that consequently an oath administered by a notary in a proceeding held by an investigating committee acting beyond its legal powers could not be second degree perjury. State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249 (a further ground for this decision was that the proceeding was unauthorized and therefore not of the character in which a false statement can constitute perjury. Necessity that proceeding be authorized see supra § 55 text and notes 60, 61.

19. Anderson v. Com., (Ky.) 117 SW 364 (in a prosecution under the Banking Act providing that a false and sworn report of a bank's condition should constitute the crime of false swearing, it was held that the notary was authorized to administer the oath so that violation thereof constituted the crime of false swearing).

Distinction between perjury and false swearing see supra §§ 4, 5.

20. U. S. v. Law, 50 Fed. 915; U. S. v. Manion, 44 Fed. 800; State v. Jackson, 36 Oh. St. 281.

[a] **Under a statutory arbitration,** the oath to the witnesses must be administered by a judge or justice of the peace, and perjury cannot be assigned on the testimony of a witness in such a case, where the oath was administered by a notary public, notwithstanding the general language of Rev. St. § 118, empowering notaries public to administer oaths in all cases required or authorized by law. State v. Jackson, 36 Oh. St. 281.

21. See Notaries § 10.

22. See statutory provisions.

23. Faubion v. State, 104 Tex. Cr. 78, 282 SW 597.

24. Faubion v. State, supra.

Administration by de facto notary see supra § 82 note 88 [c].

25. See supra § 82.

26. See supra §§ 84-86.

ister an oath or take an affidavit on which perjury or false swearing may be predicated are an alderman,[27] a draft board official,[28] an election official,[29] a foreman of a grand jury,[30] a school commissioner,[31] a special commissioner or master appointed in bankruptcy proceedings,[32] and a tax official.[33] But in the absence of statutory authorization[34] an arbitrator[35] or an acting crown timber agent,[36] lacks power to administer such an oath.

[§ 88] **c. Form of Oath—(1) In General.** No particular form of oath is necessary as the basis of a prosecution for perjury,[37] it being sufficient if defendant takes any form of oath or affirmation customary to persons of his race or belief,[38] and indicating that he is making a sworn statement as distinguished from a mere assertion.[39] It will be presumed that the mode which a witness adopted in taking the oath was the one which accorded with his belief, and which he considered binding on his conscience,[40] and where at the time he was sworn

27. Com. v. Frank, 7 Pa. Dist. 143, 21 Pa. Co. 120 (an alderman has the same power to administer oaths as a justice of the peace, and perjury may be predicated upon a false statement made under an oath administered by an alderman outside his own township).

28. Hardwick v. U. S., 257 Fed. 505, 168 CCA 509 (an oath administered by an associate member of the legal advisory board, serving as advisers to a military draft board, pursuant to regulations promulgated under the Selective Service Act, may serve as the basis of a prosecution for perjury).

Perjury in proceedings under draft acts see supra § 76 text and note 51.

29. See cases infra this note.

[a] **Thus** (1) under statutes authorizing election officials to administer oaths in the discharge of their duties, a false statement under an oath administered by an election official may constitute perjury. Territory v. Anderson, 2 Ida. (Hasb.) 573, 21 P 417; Reg. v. Chamberlain, 10 Man. 261. (2) Under a statute authorizing election officials to administer the oath to each other, an official cannot administer the oath to himself so as to be guilty of false swearing under an oath so administered. Phillips v. State, 5 Ga. A. 597, 63 SE 667.

[b] **Registrar of elections.**—Smith v. Anderson, 2 Ida. (Hasb.) 537, 21 P 412.

Capacity of persons not "electors" to commit perjury under statutes providing for the swearing of "electors" see infra § 96 text and notes 84-87.

Perjury in election proceedings see supra § 76 text and note 56.

30. U. S. v. Cruz, 1 Porto Rico Fed. 445.

[a] **Under direction of foreman.**—Under a statute providing that an oath may be administered under the direction of the foreman of a grand jury, any other member of the jury or any person authorized by law to attend the proceedings may, when acting under direction of the foreman, administer an oath upon which a charge of perjury can be predicated. Barnes v. State, 68 Tex. Cr. 498, 152 SW 1043 (county attorney).

Oaths administered by deputies or assistants generally see supra § 83.

Perjury in grand jury proceedings see supra § 67.

31. Lavender v. State, 85 Ga. 539, 11 SE 861 (under a statute providing that county school commissioners shall be empowered to administer such oaths as may be necessary in transacting school business; an oath administered by a school commissioner within the scope of his official duties may serve as the basis of a prosecution for false swearing).

[a] **Oath to account for services presented by teacher.**—Lavender v. State, 85 Ga. 539, 11 SE 861.

Claims against government as matter or proceeding in which perjury may be committed see supra § 71.

32. See cases infra this note.

[a] **Under the Bankruptcy Act** (1) a special commissioner (U. S. v. Liberman, 176 Fed. 161) (2) or special master (U. S. v. Coyle, 229 Fed. 256) may administer oaths in proceedings before him upon which perjury may be assigned.

[b] **Referee in bankruptcy acting as special master.**—U. S. v. Coyle, 229 Fed. 256.

Perjury in bankruptcy proceedings see supra § 66.

33. See cases infra this note.

[a] **Thus** (1) a tax official empowered by statute to administer oaths in the discharge of his duties may administer an oath serving as the basis for a charge of perjury. State v. Wood, 110 Ind. 82, 10 NE 639; State v. Phippen, 62 Iowa 54, 17 NW 146. (2) But where the tax official lacks such power under the governing statutes, an oath administered by him in the course of his duties cannot serve as a basis of a prosecution for perjury. State v. Craig, 94 Or. 302, 185 P 764.

[b] **Any member of a board.**—State v. Wood, 110 Ind. 82, 10 NE 639 (under terms of particular statute).

[c] **Township assessor.**—State v. Phippen, 62 Iowa 54, 17 NW 146.

[d] **Neither express nor implied authority.**—Where a tax statute provided that the assessor should "require" a return of real and personal property to be sworn to by the taxpayer, but was silent as to who should administer the oath, and a general statute specified various officers authorized to administer oaths but omitted the tax assessor, the latter lacked authority to administer an oath on a tax return which could serve as the basis of a charge of perjury. State v. Craig, 94 Or. 302, 185 P 764.

Perjury in tax proceedings see supra § 74.

34. See statutory provisions.

35. State v. McCroskey, 14 S. C. L. 308 (at common law an arbitrator lacks power to administer an oath that can serve as the basis of a prosecution for perjury).

Perjury in proceedings before referees and arbitrators see supra § 76 text and notes 52, 53.

36. Rex v. Johnston, 2 OntWN 106, 17 OntWR 78.

[a] **For instance,** under a statute requiring returns as to the number of trees cut to be filed with the commissioner of crown lands and to be sworn to before a justice of the peace, an acting crown timber agent, who is neither a commissioner, notary, nor justice of the peace, cannot administer an oath on such return which can be the basis of a charge of perjury. Rex v. Johnston, 2 OntWN 106, 17 OntWR 78.

37. U. S.—Holy v. U. S., 278 Fed. 521; U. S. v. Mallard, 40 Fed. 151, 5 LRA 816; U. S. v. Baer, 6 Fed. 42, 18 Blatchf. 493.

Cal.—Peo. v. Rodley, 131 Cal. 240, 63 P 351.

Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.

Fla.—Markey v. State, 47 Fla. 38, 37 S 53.

Ga.—Cox v. State, 13 Ga. A. 687, 79 SE 909.

Ill.—Greene v. Peo., 182 Ill. 278, 55 NE 341.

Iowa.—State v. Hulsman, 147 Iowa 572, 574, 126 NW 700 [cit Cyc].

Me.—State v. Keene, 26 Me. 33.

Minn.—State v. Day, 108 Minn. 121, 121 NW 611.

N. Y.—Peo. v. Cook, 8 N. Y. 67, 59 AmD 451.

N. C.—State v. Whisenhurst, 9 N. C. 458.

Oh.—Walker v. State, 18 Oh. Cir. Ct. N. S. 1.

S. C.—Patrick v. Smoke, 34 S. C. L. 147.

Can.—Rex v. Shajoo Ram, 20 B. C. 581, 23 CanCrCas 334, 19 DomLR 313, 30 WestLR 65 [app dism 51 Can. S. C. 392, 25 CanCrCas 69, 26 DomLR 267, 8 WestWkly 613].

"If the defendant was sworn, the oath need not be in any particular form." Holy v. U. S., 278 Fed. 521.

[a] **Reasons for rule.**—(1) "The purpose of an oath is to secure the truth, and hence any form thereof which is ordinarily calculated to appeal to the conscience of the person to whom it is administered, and by which he signifies that his conscience is bound, is sufficient." State v. Hulsman, 147 Iowa 572, 573, 126 NW 700. (2) "The essential thing is that the party taking the oath shall go through some declaration, or formality, before the officer which indicates to him that the applicant consciously asserts or affirms the truth of the fact to which he gives testimony." State v. Day, 108 Minn. 121, 124, 121 NW 611.

[b] **"Witnesses in open court** who are sworn to testify in trials seldom say anything, but the clerk of the court administers to them an oath, to which afterwards on their part they are held to have assented, and if having gone through with this ceremony they wilfully testify to what is false, they have committed perjury, although no word was used by them in the taking of an oath." Walker v. State, 18 Oh. Cir. Ct. N. S. 1, 9.

[c] **Rule applied to statutory declaration.**—Rex v. Nier, 9 Alta. L. 353, 25 CanCrCas 241, 28 DomLR 373, 33 WestLR 180, 9 WestWkly 838.

Rules under statute see infra text and notes 44-47.

38. U. S. v. Mallard, 40 Fed. 151, 5 LRA 816; Rex v. Shajoo Ram, 20 B. C. 581, 23 CanCrCas 334, 19 Dom LR 313, 30 WestLR 65 [app dism 51 Can. S. C. 392, 25 CanCrCas 69, 26 DomLR 267, 8 WestWkly 613]; Rex v. Lai Ping, 11 B. C. 102, 8 CanCr Cas 467.

[a] **Chinese oath.**—Writing his name on paper and burning it, while being told that he is to tell the truth or his soul will burn in hell just as the paper is burning. Rex v. Lai Ping, 11 B. C. 102, 8 CanCrCas 467.

[b] **Hindu oath.**—Raising his hand and affirming that he would tell the truth. Rex v. Shajoo Ram, 20 B. C. 581, 23 CanCrCas 334, 19 DomLR 313, 30 WestLR 65 [app dism 51 Can. S. C. 392, 25 CanCrCas 69, 26 DomLR 267, 8 WestWkly 613].

[c] **Oath may be administered on the Book,** or with uplifted hand, or in any mode peculiar to the religious belief of the person swearing, or in any form binding on his conscience. U. S. v. Mallard, 40 Fed. 151, 5 LRA 816.

39. U. S. v. Mallard, supra.

[a] **"The underlying principle** . . . is that whenever the attention of the person who comes up to swear is called to the fact that the statement is not a mere asseveration, but must be sworn to, and, in recognition of this, he is asked to do some corporal act, and does it, this is a statement under oath. And this, without kissing any book, or raising his hand, or doing any religious act." U. S. v. Mallard, 40 Fed. 151, 5 LRA 816.

40. Peo. v. Parent, 139 Cal. 600, 73

he made no objection to the form of its administration, but took it and testified under it, he will not be allowed, in order to escape the penalty for perjury, to claim that it was not administered in strict conformity with law.[41] But where the witness states before he is sworn the form of oath that he considers binding on his conscience, and is sworn by a different form of oath, perjury cannot be assigned on the latter.[42]

Where a foreign language contains no equivalent for the English word "conscience," it is sufficient that the witness be sworn to speak the truth according to his moral sense.[43]

Even where statute prescribes form of oath,[44] a substantial compliance therewith is sufficient;[45] but perjury cannot be predicated upon an oath[46] or on a solemn declaration[47] which is not even in substantial compliance with statutory requirements.

[§ 89] **(2) Irregularities.**[48] It is no defense that the oath was taken or administered in an irregular manner,[49] especially not under statutes[50] expressly providing that irregularities in the administration of an oath shall be no defense to a prosecution for perjury;[51] but such statutes cannot put the breath of legal life into a nonexistent oath.[52]

Particular formalities. It is ordinarily no defense to a prosecution for perjury that the witness failed to raise his hand,[53] or to swear with one hand on the Bible,[54] or to kiss the Book,[55] or to stand with the rest of the witnesses;[56] nor that the customary phrase, "So help you God," was omitted;[57] nor that the administering officer used inexact language respecting the matter as to which the witness was to testify.[58]

P 423; Markey v. State, 47 Fla. 38, 37 S 53; Patrick v. Smoke, 34 S. C. L. 147.

41. Cal.—Peo. v. Parent, 139 Cal. 600, 73 P 423.
Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257, 259 [cit Cyc].
Me.—State v. Keene, 26 Me. 33.
N. Y.—Peo. v. Cook, 8 N. Y. 67, 59 AmD 451.
N. C.—State v. Whisenhurst, 9 N. C. 458.
Can.—Curry v. Rex, 48 Can. S. C. 532, 22 CanCrCas 191, 15 DomLR 347, 13 EastLR 550 [dism app 47 N. S. 176, 21 CanCrCas 273, 12 DomLR 13, 13 EastLR 11].

[a] **General, instead of restricted, oath.**—Where a party willfully testifies untruly as to matters material to the issue, it is perjury, although he was sworn generally, but without objection, to tell the whole truth, instead of being sworn to make true answers to such questions as should be asked. State v. Keene, 26 Me. 33.

42. Rex v. Lee Tuck, 4 Alta. L. 388, 19 CanCrCas 471, 5 DomLR 629, 21 WestLR 669, 2 WestWkly 605.

[a] **Christian taking Chinese oath.**—Where a Chinaman stated before being sworn that he was a Christian and desired to be sworn upon the Bible, and instead he was sworn by burning paper and saying that if he lied his soul should burn in hell just as the paper burned, in accordance with the Chinese form of oath, perjury could not be predicated upon an oath so administered. Rex v. Lee Tuck, 4 Alta. L. 388, 19 CanCrCas 471, 5 DomLR 629, 21 WestLR 669, 2 West Wkly 605.

43. Rex v. Shajoo Ram, 20 B. C. 581, 23 CanCrCas 334, 19 DomLR 313, 30 WestLR 65 [app dism 51 Can. S. C. 392, 25 CanCrCas 69, 26 DomLR 267, 8 WestWkly 613].

44. See statutory provisions.

45. Ga.—Johnson v. State, 76 Ga. 790.
N. H.—State v. Gates, 17 N. H. 373.
N. J.—State v. Dayton, 23 N. J. L. 49, 53 AmD 270.
N. Y.—Tuttle v. Peo., 36 N. Y. 431, 2 Transcr. A. 306.
N. C.—State v. Whisenhurst, 9 N. C. 458.
Tenn.—Sharp v. Wilhite, 2 Humphr. 434.

[a] **Swearing on the "Holy Scriptures," instead of "Gospels"** held sufficient, even though "Gospels" was the word prescribed by statute. Tuttle v. Peo., 36 N. Y. 431, 2 Transcr. A. 306.

46. Peo. v. Cohen, 118 Cal. 74, 50 P 20; Aldridge v. State, (Ga. A.) 147 SE 414. See Ashburn v. State, 15 Ga. 246 (holding that a defendant accused of gambling could not be indicted upon testimony of witnesses who were not sworn in substantial compliance with the form prescribed by statute, since perjury could not be predicated upon such oaths).

[a] **For example,** Pen. Code § 121, providing that "it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner," does not excuse the necessity of an oath in substantial form administered by a person of competent authority. Peo. v. Cohen, 118 Cal. 74, 75, 50 P 20.

[b] **Defective oath before grand jury.**—Where, by statute, it was provided that the following oath should be administered to one testifying before the grand jury: "The evidence you shall give the grand jury on this bill of indictment (or presentment, as the case may be—here state the case) shall be the truth, the whole truth, and nothing but the truth. So help you God," and the foreman administered an oath repeating the statutory words with the exception of those referring to the grand jury and bill of indictment, the oath was not even in substantial compliance with the statute because it omitted reference to the case, and therefore could not serve as the predicate for perjury. Aldridge v. State, (Ga. A.) 147 SE 414, 415.

47. Rex v. Phillips, 14 B. C. 194, 14 CanCrCas 239, 9 WestLR 634.

[a] **Illustration.**—Where, under local statutes, a "solemn declaration" may take the place of a sworn statement, such declaration must be in the form authorized by statute in order that a charge of perjury may be predicated on its falsity. Rex v. Phillips, 14 B. C. 194, 14 CanCrCas 239, 9 West LR 634.

48. Irregularities affecting:
Affidavits and similar instruments see supra § 59.
Jurisdiction of court see supra §§ 62–64.

49. Ala.—Walker v. State, 107 Ala. 5, 18 S 393.
Cal.—Peo. v. Rodley, 131 Cal. 240, 63 P 351.
Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.
Ga.—Cox v. State, 13 Ga. A. 687, 79 SE 909.
Iowa.—State v. Hulsman, 147 Iowa 572, 126 NW 700.
Me.—State v. Keene, 26 Me. 33.
Minn.—State v. Day, 108 Minn. 121, 121 NW 611.
Tex.—Clay v. State, 52 Tex. Cr. 555, 107 SW 1129.
Can.—Curry v. Rex, 48 Can. S. C. 532, 22 CanCrCas 191, 15 DomLR 347, 13 EastLR 550.

50. See statutory provisions.

51. Peo. v. Torterice, 66 Cal. A. 115, 225 P 760; State v. Day, 108 Minn. 121, 121 NW 611.

[a] **Failure to raise hand.**—The failure to raise the hand, as required by Rev. L. (1905) § 2681, providing that the mode of administering an oath commonly practiced in the place where taken shall be followed, including the uplifting of the hand, is a mere irregularity, which, under § 4832, declaring that it shall not be a defense to a charge of perjury that the oath has been administered in an irregular manner, is no defense to such a charge. State v. Day, 108 Minn. 121, 121 NW 611.

52. Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

[a] **For instance,** a statute, providing that "it is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner,' applies only to cases where some oath was administered, but administered in a manner defective in form. It does not create the obligation of an oath where it has not been consciously assumed in some form; it cannot cure that which never had life enough to be sick." Peo. v. Swasey, 122 Misc. 388, 391, 203 NYS 22.

53. Wheeler v. Peo., 63 Colo. 209, 165 P 257; Cox v. State, 13 Ga. A. 687, 79 SE 909; State v. Day, 108 Minn. 121, 121 NW 611.

54. Cox v. State, 13 Ga. A. 687, 79 SE 909.

55. Curry v. Rex, 48 Can. S. C. 532, 22 CanCrCas 191, 15 DomLR 347, 13 EastLR 550 [aff 47 N. S. 176, 21 CanCr Cas 273, 12 DomLR 13, 13 EastLR 11].

[a] **Scotch oath.**—Where, without objection, a witness was sworn by "the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath," instead of using the more modern form by kissing the Book, which latter form was customary in the jurisdiction, he could nevertheless be convicted of perjury because the form used was sufficient to bind his conscience. Curry v. Rex, 48 Can. S. C. 532, 22 Can CrCas 191, 15 DomLR 347, 13 EastLR 550 [dism app 47 N. S. 176, 21 CanCr Cas 273, 12 DomLR 13, 13 EastLR 11].

56. Cox v. State, 13 Ga. A. 687, 688, 79 SE 909 ("if he appeared as a witness and a lawful oath was administered to him, and he assented to it, the fact that he consciously took upon himself the obligation of the oath could be implied; and it would be immaterial whether he was standing with the rest of the witnesses, or by himself in another part of the courtroom").

57. Peo. v. Parent, 139 Cal. 600, 73 P 423; State v. Hulsman, 147 Iowa 572, 126 NW 700. See Rex v. Shajoo Ram, 20 B. C. 581, 23 CanCrCas 334, 19 DomLR 313, 30 WestLR 65 [app dism 51 Can. S. C. 392, 25 CanCrCas 69, 26 DomLR 267, 8 WestWkly 613] (invocation of Deity unnecessary in administering oath to Hindu).

58. Clay v. State, 52 Tex. Cr. 555, 107 SW 1129.

[a] **Illustration.**—Where, on an examination before a justice of the peace authorized to examine the witness respecting violations of the penal laws, he administered an oath to a witness, "Do you solemnly swear . . . concerning the penal laws of Texas," it was a sufficient oath on which to predicate perjury, although

[§ 90] **(3) Oath on Information and Belief.**[59] One who swears to a matter as to the best of his knowledge, information, and belief is guilty of perjury where he did not believe that the matter sworn to was true.[60]

[§ 91] **d. Verification of Written Statements**[61]**—(1) In General.** Under statutes requiring certain testimony to be in writing,[62] it has been both affirmed[63] and denied[64] that oral testimony of the statutory character can constitute perjury. Under a statute requiring specified examinations to be made under oath, but permissive as to whether or not the statements shall be reduced to writing,[65] a statement on such examination made under oath but not reduced to writing may constitute false swearing.[66]

[§ 92] **(2) Attachment to Other Papers.** It is not necessary that a false affidavit of verification shall itself state the facts sworn to, but they may be stated in the report or pleading to which the affidavit is attached.[67] But whether or not an affidavit complete in itself as respects statement of facts, and filed in a judicial proceeding, is attached to other documents, in connection with which it is to be used, is immaterial.[68]

[§ 93] **(3) Signing and Swearing.**[69] **Signing without swearing.** Merely signing and delivering a paper in affidavit form without actually swearing to the truth thereof ordinarily cannot serve as the basis for a charge of perjury,[70] even though the jurat was later signed by the officer.[71] But if affiant is told that by signing the statement he thereby swears to it, his signature may be a sufficient oath.[72]

Swearing without signing. Swearing to an affidavit without signing is ordinarily sufficient to support a charge of perjury.[73] If signed, however, the oath must be taken by the person who signs it.[74]

[§ 94] **(4) Reading Instrument.**[75] A false affidavit may constitute perjury, even though read neither to nor by affiant, provided he knew the contents thereof when swearing to it.[76]

IV. DEFENSES

[By Douglas Robinson Gray]

[§ 95] **A. In General.** The defense of limitations,[77] and matters of defense consisting in the absence of a necessary element of the crime,[78] are treated elsewhere.

he might have added "touching violations of the penal laws." Clay v. State, 52 Tex. Cr. 555, 557, 107 SW 1129.

59. False statement of opinion, belief, and memory as perjury see supra §§ 12-15.

Pleadings verified on belief see supra § 75.

60. Mass.—Com. v. Dunham, Thach. Cr. 519.

N. Y.—Peo. v. Grout, 85 Misc. 570, 147 NYS 591, 31 N. Y. Cr. 264.

Oh.—State v. Fairbault, 20 OhNP NS 499.

Okl.—Cassady v. State, 18 Okl. Cr. 568, 197 P 171.

S. C.—Patrick v. Smoke, 34 S. C. L. 147.

Eng.—Rex v. Pedley, 1 Leach C. C. 325, 168 Reprint 265.

[a] **Thus,** where the falsity of a statement that personal articles are lost, when in fact they are not lost, is apparent, it is perjury irrespective of whether made on personal knowledge or on information and belief. State v. Fairbault, 20 OhNPNS 499.

[b] **False bank report** verified by affiant "to the best of his knowledge and belief" may be perjury despite use of the quoted form of oath. Peo. v. Grout, 85 Misc. 570, 577, 147 NYS 591, 31 N. Y. Cr. 264.

61. Cross references:

Affidavit, certificate, declaration, or deposition as instrument on which to predicate perjury see supra §§ 57-60.

Verified pleading see supra § 75.

62. See statutory provisions. See also Affidavits § 50.

Incomplete statements see supra § 60.

63. Com. v. O'Neill, 5 Pa. Co. 209; Clay v. State, 52 Tex. Cr. 555, 107 SW 1129; Covey v. State, 23 Tex. A. 388, 5 SW 283.

[a] **For example,** the fact that the oath was not reduced to writing as required by law is no bar to a conviction for perjury, for the failure of the officer administering the oath to do his duty cannot avail defendant. Com. v. O'Neill, 5 Pa. Co. 209.

64. State v. Trask, 42 Vt. 152.

65. See statutory provisions.

66. Jarboe v. Com., 204 Ky. 737, 265 SW 298.

[a] **Bail.**—Where the statute is mandatory as to examination of bail under oath, but merely permissive as to reducing it to writing, false swearing thereon is punishable although the matter is not written. Jarboe v. Com., 204 Ky. 737, 265 SW 298.

67. Peo. v. Torterice, 66 Cal. A. 115, 225 P 760; Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328. See Matter of Washington Park, 52 N. Y. 131, 136 (which was not a prosecution for perjury, but where the court said: "There was a verification of all the matters which were declared by the petition to be thereinafter stated, and which were stated in the annexed sheets, and perjury could be assigned in respect to them as if they had been inserted in the body of the petition").

[a] **Marriage license.**—In a prosecution for perjury, the contention that if defendant only swore to the truth of facts contained in the application blank for a marriage license it would not constitute a crime was without merit. Peo. v. Torterice, 66 Cal. A. 115, 225 P 760.

68. Shipp v. State, 81 Tex. Cr. 328, 343, 196 SW 840.

"It is the falsity of the paper that is to be used that is the criterion, and the mere fact that it is or is not attached to some other paper in the case does not affect the falsity of the document." Shipp v. State, supra.

[a] **For example,** that a false affidavit, filed in judicial proceeding, such as a motion for new trial, was or was not attached to the motion did not affect the question of perjury. Shipp v. State, 81 Tex. Cr. 328, 196 SW 840.

69. Incomplete statements see supra § 60.

70. Goolsby v. State, 17 Ala. A. 545, 86 S 137; O'Reilly v. Peo., 86 N. Y. 154, 40 AmR 525, 10 AbbNCas 53 [rev 9 AbbNCas 77, 61 HowPr 3]; Case v. Peo., 76 N. Y. 242, 6 AbbNCas 151.

[a] **Mere delivery of a signed affidavit to an officer** to be certified by him as sworn to is not taking an oath. O'Reilly v. Peo., 86 N. Y. 154, 40 AmR 525, 10 AbbNCas 53; Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

[b] **Statutory declaration.**—The mere signing of a statement, without a declaration of its truth before the administering officer, is insufficient to constitute a solemn declaration upon which a charge may be based for its falsity. Rex v. Schultz, 15 Sask. L. 434, 37 CanCrCas 301, 69 DomLR 267, [1922] 2 WestWkly 582.

[c] **In Arkansas,** under a statute providing that every person falsely and corruptly swearing, affirming, or declaring in any form authorized by law shall be guilty of perjury, one not formally sworn but signing an affidavit for the purpose of swearing to it, and knowing that the administering officer regarded his signing as a method of making affirmation, may be convicted of perjury. Cox v. State, 164 Ark. 126, 261 SW 303.

71. Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

[a] **"Independent of the jurat,** proof of the taking of an oath is requisite to sustain the charge of perjury." Peo. v. Swasey, 122 Misc. 388, 391, 203 NYS 22.

72. U. S. v. Mallard, 40 Fed. 151, 5 LRA 816.

[a] **Defendant making his mark.**—Where the administering officer read over a statement to an illiterate person and then said: "If you swear to this statement, put your mark here," and defendant made his mark accordingly, this was a sufficient oath to serve as the basis for a charge of perjury. U. S. v. Mallard, 40 Fed. 151, 5 LRA 816.

73. Com. v. Carel, 105 Mass. 582; Campbell v. State, 23 Okl. Cr. 250, 214 P 738.

[a] **Rule applied.**—"In a prosecution for perjury for falsely swearing to the age of the girl in order to obtain a marriage license, the failure of the clerk to require the affiant to subscribe to the affidavit before the marriage license was delivered was an irregularity which formed no defense to the prosecution." Campbell v. State, 23 Okl. Cr. 250, 251, 214 P 738.

[b] **Signature is no part of the affidavit,** but merely authenticates it. Com. v. Carel, 105 Mass. 582.

74. U. S. v. Kendrick, 26 F. Cas. No. 15,519, 2 Mason 69.

75. Knowledge and intent generally see supra §§ 23-30.

76. Cox v. State, 164 Ark. 126, 261 SW 303.

[a] **For example,** for defendant to be guilty of perjury in making an affidavit for a marriage license it was not necessary, as required by his requested instruction, that the affidavit should have been read to or by him, if he knew that it contained the recital about which the clerk was inquiring—that the girl was eighteen years old. Cox v. State, 164 Ark. 126, 261 SW 303.

Ignorance of contents of affidavit as bearing on intent see supra § 27 and notes 73 [a], 75 [c] and text and note 79.

77. See Criminal Law §§ 340-358.

78. See supra §§ 10-94.

A statute making it contempt of court to swear falsely in open court does not prevent the same false swearing from being punishable as perjury.[79]

[§ 96] **B. Capacity To Commit the Crime.**[80] The general capacity of particular parties to commit perjury[81] or crime generally[82] is treated elsewhere.

Under election statutes.[83] Under a statute authorizing election officers to administer the oath, respecting his qualifications, "to any elector offering to vote,"[84] it has been held that one not qualified as an elector cannot commit perjury in swearing falsely as to his qualifications because he is not an "elector" to whom alone the oath may be administered;[85] and that a third person cannot commit perjury under such statute because he is not "the elector offering to vote."[86] But a similar statute has been construed as permitting administration of the oath to anyone offering himself as an elector.[87]

[§ 97] **C. Former Acquittal or Conviction—1. For Same Offense.** While under the general former jeopardy rule[88] an acquittal or conviction for perjury bars a subsequent prosecution therefor,[89] the offenses must be identical to permit the defense of former jeopardy;[90] and hence a prior prosecution for perjury will not bar a subsequent prosecution for a different and distinct perjury.[91]

[§ 98] **2. In Proceeding in Which Perjury Committed.** The general rule is that acquittal in the cause in which false testimony was given does not bar subsequent prosecution for perjury[92] or false swearing,[93] such prior acquittal being regarded as establishing neither the defense of former jeopardy,[94] nor that of res judicata.[95] To hold other-

79. Peo. v. Fourquet, 17 Porto Rico 1037.

80. Persons liable see infra §§ 99–101.

81. Cross references:
Drug addict see supra § 28.
Drunkard see supra § 28.
Insane person see supra § 28.
Married woman see Husband and Wife § 419 text and note 17 [d], § 420½ text and note 64.

82. See Criminal Law §§ 71–89.
Corporation see Corporations §§ 3024–3057.
Infant see Infants §§ 211–247.

83. Perjury in election proceedings generally see supra § 76 text and note 56.

84. See statutory provisions.
Power to adminster oath on which perjury may be predicated see supra § 87 text and note 29.

85. Com. v. Polluck, 6 Pa. Dist. 559.

86. Com. v. Lawrence, 4 Del. Co. (Pa.) 27.

87. Reg. v. Chamberlain, 10 Man. 261 (in this case the prisoner was convicted on an indictment for perjury, in having sworn before the deputy returning officer at an election for membership of the house of commons for the city of Winnipeg that he was the person whom he represented himself to be, named on the list of electors for the polling subdivison. He was not an elector, nor entitled to vote in the constituency, and at the trial his counsel contended that there was no authority for the deputy returning officer, under the Dominion Elections Act [Can. Rev. St. c 8 § 45], to administer an oath to any person but an elector, and the judge reserved the case for the opinion of the court as to whether the prisoner had been properly convicted. It was held that the statute must receive a reasonable construction, that authority was intended to be conferred upon the officer to administer the oath to any person presenting himself and claiming to be an elector entitled to vote, and that, under Cr. Code [1892] § 148, the prisoner had been properly convicted of perjury).

88. See Criminal Law §§ 359–490.

89. See cases infra this section recognizing the rule.

90. See Criminal Law §§ 443–487. But compare infra § 98 text and notes 99–1.

[a] **Rule applied.**—"It is . . . urged that after appellant had been convicted of the offense of unlawfully having intoxicating liquor in his possession he could not be prosecuted for the crime of perjury growing out of any testimony he gave in that case. The mere statement of this propositon carries its own refutation. The two offenses are separate and distinct and are as dissimilar as two offenses could well be. Although appellant interposed in this case no plea of former conviction, yet had he done so, the trial court would have been compelled to disallow it." Hatton v. Com., 212 Ky. 811, 812, 280 SW 103.

91. Woodward v. State, 198 Ind. 70, 152 NE 277.

[a] **Rule applied.**—An acquittal on a charge of perjury in a prosecution of one Jones for possessing liquor with intent to sell, which prosecution was dismissed without trial, is not a bar to prosecution for perjury in a trial of such Jones for the sale of liquor. Woodward v. State, 198 Ind. 70, 152 NE 277.

92. Ala.—Jay v. State, 15 Ala. A. 255, 73 S 137 [certiorari den 198 Ala. 691, 73 S 1000].
Colo.—Peo. v. Hardy, 64 Colo. 499, 174 P 1117.
Conn.—State v. Vandemark, 77 Conn. 201, 58 A 715, 1 AnnCas 161.
Fla.—Yarbrough v. State, 79 Fla. 256, 83 S 873.
Ill.—Peo. v. Niles, 300 Ill. 458, 133 NE 252, 254, 37 ALR 1284 [cit Cyc].
Ind.—State v. Cary, 159 Ind. 504, 65 NE 527.
Kan.—State v. Bingham, 124 Kan. 61, 257 P 951; State v. Williams, 60 Kan. 837, 58 P 476.
Ky.—Hatton v. Com., 212 Ky. 811, 280 SW 103 (recognizing rule).
Mich.—Peo. v. Albers, 137 Mich. 678, 100 NW 908.
Minn.—State v. Smith, 119 Minn. 107, 137 NW 295.
Mo.—State v. Clinkingbeard, 296 Mo. 25, 247 SW 199; State v. Tedder, 294 Mo. 390, 242 SW 889.
N. M.—State v. Archuleta, 29 N. M. 25, 217 P 619.
Tex.—Murff v. State, 76 Tex. Cr. 5, 12, 172 SW 238; Hutcherson v. State, 33 Tex. Cr. 67, 24 SW 908.
Wyo.—Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.
See Reichard's Case, 2 LegGaz (Pa.) 142.

"An accused has no more right to commit perjury on any trial wherein he is tried for an offense and testifies falsely and then go scot-free, than any other witness." Murff v. State, supra.

[a] **"The authorities seem now to be unanimous** in holding that an acquittal of one charged with crime is no bar to a prosecution for perjury for false testimony given by him at the trial." Peo. v. Niles, 300 Ill. 458, 464, 133 NE 252, 37 ALR 1284.

[b] **Acquittal of particular crimes.**—(1) Arson. State v. Smith, 119 Minn. 107, 137 NW 295. (2) Assault with intent to murder. Miles v. State, 73 Tex. Cr. 493, 165 SW 567. (3) Burglary. McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018]. (4) Conspiracy. State v. Vandemark, 77 Conn. 201, 58 A 715, 1 AnnCas 161. (5) Forgery. Peo. v. Hardy, 64 Colo. 499, 174 P 1117. (6) Game law violation. State v. Bevill, 79 Kan. 524, 100 P 476, 131 AmSR 345, 17 AnnCas 753. (7) Homicide. State v. Archuleta, 29 N. M. 25, 217 P 619. (8) Larceny. Yarbrough v. State, 79 Fla. 256, 83 S 873; State v. Bingham, 124 Kan. 61, 257 P 951. (9) Rape. Murff v. State, 76 Tex. Cr. 5, 172 SW 238; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448. (10) Receiving stolen property. Peo. v. Niles, 295 Ill. 525, 129 NE 97.

93. Hatton v. Com., 212 Ky. 811, 280 SW 103; Teague v. Com., 172 Ky. 665, 189 SW 908, LRA1917B 738 [overr Cooper v. Com., 106 Ky. 909, 51 SW 789, 59 SW 524, 21 KyL 546, 90 AmSR 275, 45 LRA 216; Petit v. Com., 57 SW 14, 22 KyL 262].

[a] **Liquor law violations.**—Teague v. Com., 172 Ky. 665, 189 SW 908, LRA1917B 738.

94. Hatton v. Com., 212 Ky. 811, 280 SW 103; State v. Clinkingbeard, 296 Mo. 25, 247 SW 199; State v. Tedder, 294 Mo. 390, 242 SW 889; Murff v. State, 76 Tex. Cr. 5, 172 SW 238; Miles v. State, 73 Tex. Cr. 493, 165 SW 567; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

95. Ala.—Jay v. State, 15 Ala. A. 255, 73 S 137 [certiorari den 198 Ala. 691, 73 S 1000].
Colo.—Peo. v. Hardy, 64 Colo. 499, 174 P 1117.
Kan.—State v. Bevill, 79 Kan. 524, 100 P 476, 131 AmSR 345, 17 AnnCas 753.
Ky.—Teague v. Com., 172 Ky. 665, 189 SW 908, LRA1917B 738.
Minn.—State v. Smith, 119 Minn. 107, 137 NW 295.
N. M.—State v. Archuleta, 29 N. M. 25, 217 P 619.
Tex.—Murff v. State, 76 Tex. Cr. 5, 172 SW 238. See Estill v. State, 38 Tex. Cr. 255, 42 SW 305.
Vt.—State v. Sargood, 80 Vt. 415, 68 A 49, 130 AmSR 995, 13 AnnCas 367 (recognizing rule).
See also Judgments §§ 1386–1389.

[a] **The issues are different.**—In the first case the issue is the guilt or innocence of the particular crime charged, and in the second the truthfulness of the testimony. State v. Archuleta, 29 N. M. 25, 217 P 619.

[b] **Public policy.**—"The doctrine of res judicata springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation—the maxim is, 'Interest reipublicæ ut sit finis litium.' Keeping in view the basic principle and underlying reason—public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of res judicata, yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of res judicata, it also, on the other, requires that per-

wise would be to put a premium on perjury,[96] and to make immunity from punishment for perjury rest upon success in commission of the crime.[97] Some authorities hold the rule applicable, even though conviction of perjury necessarily involves a flat contradiction of the prior verdict of acquittal.[98] Other authorities, while admitting that double jeopardy is not involved,[99] hold that prior acquittal bars a subsequent conviction of perjury based upon a direct contradiction of the prior verdict.[1] Irrespective of this conflict the authorities agree that a prior acquittal is no bar to a subsequent prosecution for perjury upon a matter collateral[2] or subordinate[3] to the main issue of guilt or innocence, or where the charge of perjury is not necessarily based upon the assumption that defendant is guilty of the crime of which he was acquitted.[4]

A third person giving false testimony as a witness in the trial of another cannot plead the other's acquittal as a bar to his own prosecution for false swearing at such trial.[5]

V. PERSONS LIABLE[6]

[By Douglas Robinson Gray]

[§ 99] **A. In General.** Generally speaking[7] every person joining in a false statement, the other elements of the offense being present,[8] and such person being legally capable of committing the crime,[9] may be prosecuted for perjury or false swearing[10] therein.[11]

jurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guaranty immunity to criminals, and that is just what we are asked to do in extending the doctrine of res judicata to perjury. It is a maxim of the law that when the reason ceases the law ceases." Jay v. State, 15 Ala. A. 255, 73 S 137, 139 [certiorari den 198 Ala. 691, 73 S 1000].

96. Ill.—Peo. v. Niles, 300 Ill. 458, 133 NE 252, 37 ALR 1284.

Kan.—State v. Bingham, 124 Kan. 61, 257 P 951; State v. Bevill, 79 Kan. 524, 100 P 476, 131 AmSR 345, 17 AnnCas 753.

Ky.—Teague v. Com., 172 Ky. 665, 189 SW 908, LRA1917B 738.

Mich.—Peo. v. Albers, 137 Mich. 678, 100 NW 908.

Tex.—Murff v. State, 76 Tex. Cr. 5, 172 SW 238.

97. Peo. v. Niles, 300 Ill. 458, 133 NE 252, 37 ALR 1284; State v. Bingham, 124 Kan. 61, 257 P 951; State v. Bevill, 79 Kan. 524, 100 P 476, 131 AmSR 345, 17 AnnCas 753.

98. Jay v. State, 15 Ala. A. 255, 73 S 137 [certiorari den 198 Ala. 691, 73 S 1000]; Peo. v. Niles, 300 Ill. 458, 133 NE 252, 37 ALR 1284; State v. Clinkingbeard, 296 Mo. 25, 247 SW 199.

[a] **For instance,** where acquittal of a seduction charge necessarily involved a finding as to the truth of defendant's denial of sexual intercourse with complainant, defendant could nevertheless be prosecuted for perjury based upon the assumption that such denial was false. Jay v. State, 15 Ala. A. 255, 73 S 137 [certiorari den 198 Ala. 691, 73 S 1000].

[b] **Necessary contradiction.**—Acquittal is no bar to a prosecution for perjury for false testimony given by accused, although a convicton of perjury would necessarily contradict the verdict of not guilty. Peo. v. Niles, 300 Ill. 458, 133 NE 252, 37 ALR 1284. Compare infra text and note 1.

[c] **Testimony based on same facts.**—The rule applies even though the testimony on both trials is based upon substantially the same facts. State v. Clinkingbeard, 296 Mo. 25, 247 SW 199.

99. Allen v. U. S., 194 Fed. 664, 666, 114 CCA 357, 39 LRANS 385; Rex v. Quinn, 11 Ont. L. 242, 6 OntWR 1011.

"The defendant says that he has been twice put in jeopardy for the same offense. With this contention we cannot agree. Passing or trying to pass in February counterfeit coins upon various residents of Winston-Salem is not the same offense as forswearing one's self in June in the United States District Court at Greensboro." Allen v. U. S., supra.

[a] **Autrefois acquit.**—If defendant applied for a ballot at the polls under a false name, he committed the crime of false personation, and acquittal of a charge of false personation would not establish the plea of autrefois acquit so as to bar upon this particular ground a subsequent prosecution for perjury based upon defendant's later act of taking oath at the polls that he was the person he had represented himself to be, as the two offenses of false personation and perjury were distinct and separate. Rex v. Quinn, 11 Ont. L. 242, 6 OntWR 1011.

General double jeopardy rule see supra text and note 94.

1. Allen v. U. S., 194 Fed. 664, 114 CCA 357, 39 LRANS 385; Chitwood v. U. S., 178 Fed. 442, 101 CCA 342; U. S. v. Butler, 38 Fed. 498; Rex v. Quinn, 11 Ont. L. 242, 6 OntWR 1011. See State v. Smith, 119 Minn. 107, 108, 137 NW 295 (where the court held a former acquittal no bar under the facts and said: "An acquittal upon a prosecution for a crime is not a bar to a subsequent prosecution for perjury predicated upon testimony given upon such former prosecution, unless a conviction of the charge of perjury would necessarily import a contradicton of the jury's verdict upon the former trial"); Murff v. State, 76 Tex. Cr. 5, 172 SW 238 (holding that there must be evidence additional to that offered in the previous prosecution).

[a] **For example,** a person cannot be convicted of perjury in swearing to a state of facts which a jury in another case against him has found to be true. U. S. v. Butler, 38 Fed. 498.

[b] **Mere denial of guilt.**—Where the testimony alleged to be false is as broad and general as the charge of the crime, in other words, a mere denial of guilt, an acquittal bars a subsequent prosecution for perjury because the perjury trial is in effect a second trial of the same matter. Chitwood v. U. S., 178 Fed. 442, 101 CCA 342.

[c] **Res judicata.**—Where defendant was accused of applying for a ballot as a person other than himself, and acquitted of the crime of false personation, and later prosecuted for the distinct crime of perjury in having sworn falsely that he was such person, his acquittal, while not establishing the defense of autrefois acquit, did establish that of res judicata because it necessarily involved a finding that defendant was the person he represented himself to be, and therefore such acquittal barred a subsequent prosecution for perjury. Rex v. Quinn, 11 Ont. L. 242, 6 OntWR 1011.

[d] **Same subject and evidence.**—A defendant acquitted in the trial in which alleged false testimony was given cannot be convicted of perjury on the same subject and evidence that resulted in his acquittal. Allen v. U. S., 194 Fed. 664, 114 CCA 357, 39 LRANS 385.

General res judicata rule see supra text and note 95.

2. McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018]; State v. Bevill, 79 Kan. 524, 100 P 476, 131 AmSR 345, 17 AnnCas 753; State v. Williams, 60 Kan. 837, 58 P 476.

[a] **Armed or unarmed burglar.**—An acquittal of burglary will not preclude a conviction of perjury where accused falsely testified that at the time of his arrest he was unarmed, the question as to whether or not defendant was armed being collateral to his innocence or guilt of burglary. McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018].

3. Youngblood v. U. S., 266 Fed. 795; Chitwood v. U. S., 178 Fed. 442, 101 CCA 342.

[a] **Evidentiary matter.**—A defendant, who testified in his own defense, may be prosecuted for false testimony as to a subordinate evidential matter, not a mere denial of the entire charge, notwithstanding an acquittal in the case in which the testimony was given. Youngblood v. U. S., 266 Fed. 795.

4. Yarbrough v. State, 79 Fla. 256, 83 S 873; State v. Smith, 119 Minn. 107, 137 NW 295.

[a] **Possession of stolen automobile.**—An acquittal on an indictment charging larceny of an automobile is not a bar to a subsequent conviction for perjury committed by defendant as a witness in his own behalf on the former trial by swearing falsely that he had not seen and did not have such automobile in his possession, since the charge of perjury is not necessarily based upon assumption of guilt of larceny, and acquittal of larceny does not necessarily mean all material testimony in defendant's favor was true. Yarbrough v. State, 79 Fla. 256, 83 S 873.

5. Partin v. Com., 154 Ky. 701, 159 SW 542.

[a] **For example,** that a person accused of violating the Local Option Law is acquitted on the perjured testimony of a witness is not a bar to a subsequent prosecution of such witness for false swearing. Partin v. Com., 154 Ky. 701, 159 SW 542.

6. Persons liable for subornation see infra § 195.

7. Privileged witness see infra §§ 100, 101.

8. See supra §§ 10–94.

9. See supra § 96.

10. Distinction between perjury and false swearing see supra §§ 4, 5.

11. Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

[a] **An affidavit signed by more than one person** stating that "we" declare something to be true is not ambiguous as to who makes which statement therein, but is to be construed as the statement of each signer, rendering each liable to punishment. Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

[§ 100] **B. Privileged Witnesses[12]—1. In General.** A privileged witness,[13] such as a defendant in a criminal trial[14] or a person whose testimony may tend to incriminate him,[15] may be prosecuted for perjury or false swearing[16] if he waives his privilege and testifies falsely. A fortiori, where there is no privilege, the witness cannot escape liability for false testimony.[17] But, if he has the privilege and does not waive it but testifies because illegally compelled to do so, he is not liable for perjury so committed.[18]

What constitutes waiver. It has been both affirmed[19] and denied[20] that a witness who testifies without objecting on a subject which may tend to incriminate him thereby waives his privilege and may be held for perjury if he testifies falsely.

[§ 101] **2. Under Immunity Statutes.** Under Immunity statutes protecting a witness from prosecution for offenses as to which he is compelled to incriminate himself,[21] a witness compelled to testify on a self-incriminatory matter may be held for perjury if he swears falsely.[22]

VI. PROSECUTION AND PUNISHMENT*[23]

[§ 102] **A. Prosecution pending Proceeding in Which Alleged Perjury Committed.**[24] It is not nec-

12. See Witnesses [40 Cyc 2531–2553].

Inadmissible testimony see supra §§ 39–41.

13. Ill.—Mackin v. Peo., 115 Ill. 312, 3 NE 222, 56 AmR 167.

Ind.—State v. Turley, 153 Ind. 345, 55 NE 30.

Kan.—State v. Park, 57 Kan. 431, 46 P 713.

Ky.—Allison v. Com., 13 SW (2d) 769.

La.—State v. Maxwell, 28 La. Ann. 361.

Mass.—Com. v. Johnson, 175 Mass. 152, 55 NE 804.

Miss.—Robinson v. State, 146 Miss. 753, 112 S 167.

Mo.—State v. Lehman, 175 Mo. 619, 75 SW 139.

N. Y.—Peo. v. Courtney, 31 Hun 199 [aff 94 N. Y. 490].

N. C.—State v. Hawkins, 115 N C. 712, 20 SE 623.

Oh.—State v. Cox, 87 Oh. St. 313, 101 NE 135.

Tex.—Murphy v. State, 33 Tex. Cr. 314, 26 SW 395; Pipes v. State, 26 Tex. A. 318, 9 SW 614; Mattingly v. State, 8 Tex. A. 345.

14. Robinson v. State, 146 Miss. 753, 112 S 167; Brandon v. Peo., 42 N. Y. 265, 1 Cow. Cr. 207; State v. Hawkins, 115 N. C. 712, 20 SE 623; Murphy v. State, 33 Tex. Cr. 314, 26 SW 395.

[a] **Defendant voluntarily testifying** in his own trial for a crime is guilty of perjury if he swears falsely. Robinson v. State, 146 Miss. 753, 112 S 167.

[b] **In the Philippines** (1) it has been said that perjury committed by a party in his own cause would not be punishable under Spanish legislation because under such legislation no one was a witness in his own cause and therefore could not become guilty of giving false testimony therein. U. S. v. Soliman, 36 Philippine 5; U. S. v. Gutierrez, 12 Philippine 529. (2) But under statutes authorizing a party to testify in his own behalf, one so doing may be held for perjury committed in either a civil (U. S. v. Gutierrez, supra; U. S. v. Brondial, 11 Philippine 363) (3) or a criminal (U. S. v. Soliman, supra) proceeding. (4) Neither the possibility that liability for perjury may expose defendants acquitted of one charge to vexatious prosecution for perjury by disappointed prosecuting officials, nor that fear of subsequent prosecution for perjury may embarrass accused persons testifying in their own behalf is sufficient to change the rule of liability for perjury committed by a defendant in a criminal proceeding. U. S. v. Soliman, supra.

15. Ill.—Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240; Mackin v. Peo., 115 Ill. 312, 3 NE 222, 56 AmR 167.

Ind.—State v. Turley, 153 Ind. 345, 55 NE 30.

Ky.—Allison v. Com., 13 SW (2d) 769; Com. v. Turner, 98 Ky. 526, 33 SW 88, 17 KyL 925.

La.—State v. Maxwell, 28 La. Ann. 361.

Tex.—Mattingly v. State, 8 Tex. A. 345.

Incriminating testimony before grand jury generally see supra § 67 text and note 56.

16. Distinction between perjury and false swearing see supra §§ 4, 5.

17. State v. Wood, 99 Vt. 490, 134 A 697, 48 ALR 985.

18. U. S. v. Bell, 81 Fed. 830; Claborn v. State, 115 Ark. 387, 171 SW 862. See Pipes v. State, 26 Tex. A. 318, 321, 9 SW 614 (where, in a case in which the text rule was held inapplicable on the facts, the court said: "Let us suppose that a witness is forced to testify before a grand jury or court to facts tending to criminate himself, and perjury is attempted to be assigned upon statements made by him under such state of case, could the prosecution be legally sustained? We think not. This state of case, however, does not appear"). But see State v. Lehman, 175 Mo. 619, 75 SW 139; State v. Faulkner, 175 Mo. 546, 75 SW 116 (in both of which the decision turned on the point that defendant had failed to claim his privilege and thereby waived it, but wherein there is dicta to the effect that if defendant had claimed his privilege and still been compelled to testify, he could nevertheless have been convicted of perjury, as he should have kept still and gone to jail for contempt and then tried to get out on habeas corpus).

[a] **Reason for rule.**—"A procedure compelling one to accuse or convict himself of crime is contrary to the genius of modern criminal jurisprudence and harks back somewhat to the spirit and methods of the Spanish inquisition. Our Constitution, statutes and decisions show clearly that it is the policy of our laws to protect all persons from criminal proceedings of any character based upon evidence obtained from the persons themselves, unless such evidence has been freely and voluntarily given." Claborn v. State, 115 Ark. 387, 391, 171 SW 862 ("an indictment for perjury based upon alleged false swearing in a criminal proceeding pending before the grand jury against the person himself giving the alleged false testimony, is fatally defective unless it alleges that the accused voluntarily appeared before the grand jury to give the testimony upon which the indictment for perjury is predicated").

[b] **Ignorance of rights.**—Where a negro without knowledge of his privilege of refusal to incriminate himself was privately examined in connection with a pension claim, without being advised by the examiner of such privilege, and swore falsely, he could not be prosecuted for perjury because under these circumstances no waiver of the privilege was shown, and in the absence of waiver testimony of a privileged witness cannot constitute perjury. Truthtelling may be the highest virtue, but constitutional privileges cannot be violated to enforce it. U. S. v. Bell, 81 Fed. 830.

[c] **In Kentucky,** under a statute making it false swearing for an affiant to testify falsely on a subject upon which he can legally be sworn or on which he is required to be sworn, it has been held that a defendant may be convicted of false swearing where he was required against his objection to testify as to a matter which might tend to incriminate him, on the theory that the statute punished false swearing, not only on subjects upon which the affiant could legally be sworn, but also on subjects upon which he was required to be sworn, even though such requirement was illegal. Com. v. Turner, 98 Ky. 526, 33 SW 88, 17 KyL 925.

19. State v. Lehman, 175 Mo. 619, 75 SW 139; State v. Faulkner, 175 Mo. 546, 75 SW 116; Peo. v. Cahill, 193 N. Y. 232, 86 NE 39, 20 LRANS 1084; State v. Cox, 87 Oh. St. 313, 101 NE 135; Lindsey v. State, 69 Oh. St. 215, 69 NE 126.

20. Claborn v. State, 115 Ark. 387, 171 SW 862.

21. See Witnesses [40 Cyc 2543].

22. Glickstein v. U. S., 222 U. S. 139, 32 SCt 71, 56 L. ed. 128; Peo. v. Cahill, 193 N. Y. 232, 86 NE 39, 20 LRANS 1084.

[a] **Provision of the Bankruptcy Act** (1) to the effect that no testimony given by a bankrupt shall be offered in evidence against him in any criminal proceeding has been construed as not granting immunity from punishment for perjury in such proceedings (Cameron v. U. S., 231 U. S. 710, 34 SCt 244, 58 L. ed. 448; Glickstein v. U. S., 222 U. S. 139, 32 SCt 71, 56 L. ed. 128; Cameron v. U. S., 192 Fed. 548, 113 CCA 20 [certiorari granted 223 U. S. 729 mem, 32 SCt 527 mem, 56 L. ed. 633 mem, and rev on other grounds 231 U. S. 710, 34 SCt 244, 58 L. ed. 448]) (2) since the constitutional privilege as to self-incriminatory evidence extends to past crimes and not to a crime committed in the course of giving testimony (Glickstein v. U. S., supra. Contra U. S. v. Simon, 146 Fed. 89).

Perjury in bankruptcy proceedings generally see supra § 66.

23. Cross references:

Criminal prosecution in general see Criminal Law 16 C. J. p 1.

False swearing as contempt of court see Contempt § 31.

Jurisdiction of prosecution for perjury as between state and federal court see Criminal Law §§ 187, 188.

Prosecution of false swearing in naturalization proceedings see Aliens §§ 168, 169.

Venue of trial for perjury see Criminal Law § 283.

24. Pendency of, or recovery in, civil action based on criminal acts as defense to criminal prosecution see Criminal Law § 68.

*By WILLIAM G. BANNON (§§ 102–149).

essary that the action or proceeding in which the perjury was committed shall have terminated before the prosecution for perjury is commenced,[25] as by the filing of an information or finding an indictment;[26] and the court trying the perjury charge may, in its sound discretion, proceed to trial and final verdict, notwithstanding the other action or proceeding is still pending.[27] Nevertheless in practice the prosecution for perjury is frequently continued until the proceeding in which the perjury is alleged to have been committed has been ended,[28] and finding indictments against parties or witnesses for alleged perjury in a civil action while proceedings are still pending in such action has been disapproved.[29] It has been held that a person may be tried for an alleged perjury in a coroner's inquest where such inquest has terminated and the prosecution for perjury is wholly distinct from the proceeding at the inquest, although an indictment against accused for a different offense, based on the same general transaction, is pending.[30]

[§ 103] **B. Indictment or Information[31]—1. Form and Requisites in General—a. General Rules.** The general rule, that an indictment or information must allege specifically and with sufficient certainty every fact and circumstance necessary to constitute the offense,[32] governs with respect to indictments or informations for perjury or false swearing[33] whether committed in, or in connection with, trials of civil actions,[34] trials of criminal actions,[35] examinations before grand juries,[36] in preliminary ex-

25. See cases infra this note; and note 26.

[a] **In the Philippines** (1) this is the rule now. U. S. v. Estrana, 16 Philippine 520; U. S. v. Concepcion, 13 Philippine 424. (2) But a different rule formerly obtained under provisions of the penal code, since repealed. U. S. v. Estrana, supra; U. S. v. Opinion, 6 Philippine 662.

26. U. S. v. Pettus, 84 Fed. 791; Hereford v. Peo., 197 Ill. 222, 64 NE 310; Peo. v. Jones, 1 Mich. N. P. 141; Finch v. U. S., 1 Okl. 396, 33 P 638.

27. Hereford v. Peo., 197 Ill. 222, 64 NE 310; Greene v. Peo., 182 Ill. 278, 55 NE 341; State v. Hayes, 140 N. Y. 484, 35 NE 951, 37 AmSR 572, 23 LRA 830; Eighmy v. Peo., 79 N. Y. 546.

[a] **In Pennsylvania** (1) in some earlier cases the rule was laid down that a prosecution for perjury would not be tried until the termination of the action or proceeding in which the alleged false oath was made. Com. v. Garvey, 65 Pa. Super. 56; Com. v. Houser, 17 LancLRev 414; Com. v. Dickinson, 3 PaLJR 265, 5 PaLJ 164. (2) But it has finally been settled that it is not absolutely necessary that a judgment should have been entered in the civil proceeding before the trial of the criminal case. Com. v. Hilton, 265 Pa. 353, 108 A 828. See Com. v. Moore, 27 Pa. Dist. 22. (3) Where judgment had not been entered in the civil action merely because of a failure to pay the jury fee, a continuance was properly denied. Com. v. Hilton, 265 Pa. 353, 108 A 828 [rev 69 Pa. Super. 222]. (4) Continuance need not be granted where the perjury charged is in swearing to a false statement in the petition in the civil suit. Com. v. Bennett, 30 Pa. Dist. 746. (5) On examination of a bankrupt, where it appeared that perjury had been committed, it was held not necessary to wait until the examination was finished before cognizance could be taken of the offense. Respublica v. Wright, 1 Yeates 205.

28. Ill.—Hereford v. Peo., 197 Ill. 222, 64 NE 310; Greene v. Peo., 182 Ill. 278, 55 NE 341.

N. Y.—Peo. v. Hays, 140 N. Y. 484, 35 NE 951, 37 AmSR 572, 23 LRA 830.

Pa.—Com. v. Hilton, 265 Pa. 353, 108 A 828; Com. v. McKniff, 15 Pa. Dist. 902; Com. v. Moore, 9 Pa. Co. 501.

Wash.—State v. Eaid, 55 Wash. 302, 104 P 275, 33 LRANS 946.

Eng.—Reg. v. Ingham, 14 Q. B. 396, 68 ECL 396, 117 Reprint 156; Rex v. Ashburn, 8 C. & P. 50, 34 ECL 603, 173 Reprint 394.

Can.—Rex v. T——, 12 B. C. 223, 11 CanCrCas 274, 4 WestLR 454; Rex v. Cohn, 36 N. S. 240, 6 CanCrCas 386.

[a] **Reasons for practice.**—(1) In the English courts the policy of the law forbids that a witness in a civil action pending should be made infamous through a conviction for perjury, obtained upon the testimony of a party to the suit while pending. Eighmy v. Peo., 79 N. Y. 546. (2) It "enables the Commonwealth to procure the best evidence of the alleged perjured testimony by producing the completed record of the trial in which it occurred, and also furnishes the means of determining whether or not the alleged false testimony was material to the issue involved, an essential element of the crime of perjury." Com. v. Hilton, 265 Pa. 353, 355, 108 A 828.

[b] **This practice is one of convenience only.**—Greene v. Peo., 182 Ill. 278, 55 NE 341; Peo. v. Hayes, 140 N. Y. 484, 35 NE 951, 37 AmSR 572, 23 LRA 830; Com. v. Hilton, 265 Pa. 353, 108 A 828.

[c] **Even holding to bail** has been refused while the action was pending. Com. v. McKniff, 15 Pa. Dist. 902; Com. v. Davis, 1 Pa. Dist. 173; Com. v. Davis, 10 Pa. Co. 596; Com. v. Stine, 2 LackLegN (Pa.) 179. But see Com. v. Sundheim, 21 Pa. Dist. 654, 40 Pa. Co. 262 (where, however, the return did not show whether or not the civil action had been terminated).

Continuances in criminal cases in general see Criminal Law §§ 819–946.

Pendency of civil action involving question involved in criminal prosecution as ground for continuance in general see Criminal Law § 886.

29. Chadd v. Meagher, 24 U. C. C. P. (Ont.) 54.

30. Com. v. Nailor, 29 Pa. Super. 275.

31. Cross references:

Indictment:

For making false oath in bankruptcy proceeding see Bankruptcy § 799.

Under statute for false swearing in naturalization proceeding see Aliens § 168.

Joinder of:

Defendants see Indictments and Informations § 315.

Offenses see Indictments and Informations §§ 320–356.

32. See Indictments and Informations §§ 180, 238–271.

33. U. S.—Markham v. U. S., 160 U. S. 319, 16 SCt 288, 40 L. ed. 441; U. S. v. Pettus, 84 Fed. 791; U. S. v. Walsh, 22 Fed. 644.

Ark.—Harp v. State, 59 Ark. 113, 26 SW 714; Thomas v. State, 54 Ark. 584, 16 SW 568.

Fla.—Humphreys v. State, 17 Fla. 381.

Ill.—Morrell v. Peo., 32 Ill. 499.

La.—State v. Gibson, 26 La. Ann. 71.

Me.—State v. Mace, 76 Me. 64.

Md.—State v. Bixler, 62 Md. 354.

Miss.—Copeland v. State, 23 Miss. 257.

Philippine.—U. S. v. Go Chanco, 23 Philippine 641.

Vt.—State v. Rowell, 70 Vt. 405, 41 A 430; State v. McCone, 59 Vt. 117, 7 A 406.

Va.—Com. v. Roach, 1 Gratt. (42 Va.) 561.

Wash.—State v. Roberts, 22 Wash. 1, 60 P 65; State v. See, 4 Wash. 344, 30 P 327, 746.

W. Va.—State v. Aley, 94 W. Va. 529, 119 SE 549; Stofer v. State, 3 W. Va. 689.

Can.—Rex v. Cohn, 36 N. S. 240, 6 CanCrCas 386.

34. Ala.—Smith v. State, 103 Ala. 57, 15 S 866; Floyd v. State, 30 Ala. 511.

Ga.—Baker v. State, 97 Ga. 347, 23 SE 829.

Ind.—State v. Walls, 54 Ind. 407.

Kan.—State v. Bunker, 38 Kan. 737, 17 P 651.

Me.—State v. Corson, 59 Me. 137.

Mass.—Com. v. Knight, 12 Mass. 274, 7 AmD 72.

Mo.—State v. Nelson, 146 Mo. 256, 48 SW 84; State v. Huckeby, 87 Mo. 414.

Nebr.—Gandy v. State, 23 Nebr. 436, 36 NW 817.

N. J.—State v. Voorhis, 52 N. J. L. 351, 20 A 26.

N. C.—State v. Cline, 146 N. C. 640, 61 SE 522.

Vt.—State v. Smith, 63 Vt. 201, 22 A 604.

Can.—Rex v. Coote, 10 B. C. 285, 8 CanCrCas 199; Reg. v. Ross, 1 Montr. Q. B. (Que.) 227, 28 LCJur 261.

See U. S. v. Fonseca, 20 Philippine 191 (complaint filed by prosecuting attorney, under Act No. 1697 § 3 of the commission, upheld).

[a] **Answer to bill of discovery.**—Com. v. Warden, 11 Metc. (Mass.) 406.

35. Ala.—Williams v. State, 68 Ala. 551; Taylor v. State, 20 Ala. A. 133, 101 S 93.

Cal.—Peo. v. De Carlo, 124 Cal. 462, 57 P 383; Peo. v. Ah Bean, 77 Cal. 12, 18 P 815.

Ky.—Com. v. Tracenrider 140 Ky. 660, 131 SW 495; Goslin v. Com., 90 SW 223, 28 KyL 683.

Mass.—Com. v. Wright, 166 Mass. 174, 44 NE 129; Com. v. Bouvier, 164 Mass. 398, 41 NE 651.

Mich.—Peo. v. Macard, 109 Mich. 623, 67 NW 968.

Miss.—State v. Jolly, 73 Miss. 42, 18 S 541; Lea v. State, 64 Miss. 278, 1 S 235.

Mo.—State v. Tedder, 294 Mo. 390, 242 SW 889; State v. Walker, 194 Mo. 367, 91 SW 899.

N. C.—State v. Peters, 107 N. C. 876, 12 SE 74; State v. Bobbitt, 70 N. C. 81.

Pa.—Com. v. Williams, 149 Pa. 54, 24 A 158.

S. D.—State v. Reidt, 222 NW 677.

Tex.—King v. State, 32 Tex. Cr. 463, 24 SW 514; Kitchen v. State, 26 Tex. A. 165, 9 SW 461; Washington v. State, 22 Tex. A. 26, 3 SW 228; Cox v. State, 13 Tex. A. 479.

36. Ala.—Barnett v. State, 89 Ala. 165, 7 S 414.

Ark.—Smith v. State, 163 Ark. 223, 259 SW 404.

Ill.—Kimmel v. Peo., 92 Ill. 457.

Iowa.—State v. Schill, 27 Iowa 263.

Mo.—State v. Bradford, 314 Mo. 684, 285 SW 496.

Okl.—Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Tenn.—Lawson v. State, 3 Lea 309.

Tex.—Pipes v. State, 26 Tex. A. 318, 9 SW 614.

aminations before justices of the peace,[37] or in other proceedings,[38] hearings,[39] or examinations,[40] or in respect of other matters;[41] and an indictment for the statutory offense of false swearing which fails to bring the offense charged within the provisions of the statute is insufficient.[42] Prior to the modification of the strict common-law rules great particularity was required;[43] and this rule applied to averments in respect of matters of inducement.[44] Under the modern rules of procedure an indictment or information is sufficient in general if it avers the essential elements of the offense,[45] as set forth in the statute describing or defining the offense,[46] as for example the statutory offense of false swearing,[47] in such a manner as to inform accused of the charge or proof which he must meet,[48] and as to permit an acquittal thereunder to be pleaded in bar of a further prosecution for the same offense,[49] although inartificially or informally drawn.[50] It is usually required that the indictment or information should contain averments showing that the false oath was authorized or required by law;[51] describing or identifying the proceeding or matter in which, or in respect of which, the alleged false testimony or assertion was given;[52] showing the jurisdiction of the court or officer in respect of such proceeding or matter;[53] showing the authority of the administering officer to administer the oath;[54] describing or identifying the court or tribunal in which the alleged offense occurred;[55] describing or identifying the officer who administered the oath;[56] showing the due administration of the oath;[57] showing the subject matter of the alleged false testimony or assertion;[57½] showing the materiality of such testimony or assertion,[58] and also assigning perjury thereon.[59]

Matters of evidence. It is sufficient to allege the substantial and specific facts constituting the offense, without setting forth the evidence by which the truth of the averments is to be maintained.[60]

Negativing proviso or exception. A proviso which is not a part of the statutory definition of perjury need not be negatived.[61]

Averments showing either perjury or false swearing. The fact that the accusatory part of the indictment designates the offense as "false swearing" and that the descriptive part alleges a common-law perjury does not necessarily render the indictment insufficient.[62]

37. Peo. v. Brilliant, 58 Cal. 214; State v. Booth, (Iowa) 88 NW 344; Com. v. Combs, 101 SW 312, 30 KyL 1300.

38. See cases infra this note.

[a] **In proceedings for:** (1) Contempt of court. U. S. v. Cuddy, 39 Fed. 696. (2) Habeas corpus. Deckard v. State, 38 Md. 186. (3) New trial. Com. v. McLaughlin, 122 Mass. 449; Hernandez v. State, 18 Tex. A. 134, 51 AmR 295.

39. State v. Schultz, 57 Ind. 19 (hearing before county commissioners on petition to establish highway).

40. See cases infra this note.

[a] **In examination before register of land office.**—Fisher v. U. S., 1 Okl. 252, 31 P 195.

[b] **In examination of juror on his voir dire.**—State v. Howard, 63 Ind. 502; Com. v. Stockley, 10 Leigh (37 Va.) 712.

[c] **In justification as surety.**—Com. v. Sargent, 129 Mass. 115; State v. Champion, 116 N. C. 987, 21 SE 700.

41. See cases infra this note.

[a] **In affidavit:** (1) Before justice of the peace to procure warrant of arrest. Pennaman v. State, 58 Ga. 336. (2) For presentation to public officer, as to amount owing by directors to bank of which defendant was an officer. State v. Kelly, 113 Miss. 461, 74 S 325. (3) In support of claim against decedent's estate. Waters v. State, 30 Tex. A. 284, 17 SW 411. (4) To procure marriage license. Harkreader v. State, 35 Tex. Cr. 243, 33 SW 117, 60 AmSR 40.

[b] **In claim to public lands as next of kin of deceased soldier.**—U. S. v. Buete, 24 F. Cas. No. 14,680a, 2 Hayw. & H. 49.

42. Allison v. Com., (Ky.) 13 SW (2d) 769; Com. v. Hinkle, 177 Ky. 22, 197 SW 455; Com. v. Bray, 123 Ky. 336, 96 SW 522, 29 KyL 757.

43. State v. Gallimon, 24 N. C. 372; Lawson v. State, 3 Lea (Tenn.) 309; State v. Stillman, 7 Coldw. (Tenn.) 341; Com. v. Lodge, 2 Gratt. (43 Va.) 579; Reg. v. Carter, 6 Mod. 167, 87 Reprint 924; Rex v. Dowlin, 5 T. R. 311, 101 Reprint 174. Compare State v. Hayward, 10 S. C. L. 546, 552 ("In this State, the Court believes the precedents have been according to the forms which were authorized in the English Courts, by the statute of Geo. 2"); St. Clare v. State, 11 Tex. A. 297 (to the effect that the rules embodied in Eng. St. [23 Geo. II c 11] are in force in Texas, although the statute was not adopted).

44. State v. Gallimon, 24 N. C. 372.

45. U. S.—Venlinio v. U. S., 276 Fed. 12; U. S. v. Coyle, 229 Fed. 256.

Ala.—Barnett v. State, 89 Ala. 165, 7 S 414.

Ark.—State v. Green, 24 Ark. 591.

Cal.—Peo. v. De Vries, 52 Cal. A. 705, 199 P 867.

Fla.—Fields v. State, 94 Fla. 490, 114 S 317.

Ga.—Roddenberry v. State, 37 Ga. A. 359, 140 SE 386.

Ill.—Kimmel v. Peo., 92 Ill. 457.

Ind.—Stefani v. State, 124 Ind. 3, 24 NE 254.

Kan.—State v. Gregory, 46 Kan. 290, 26 P 747.

Md.—Deckard v. State, 38 Md. 186.

Minn.—State v. Smith, 119 Minn. 107, 137 NW 295.

N. Y.—Tuttle v. Peo., 36 N. Y. 431, 2 Transcr. A. 306; Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133.

N. D.—State v. Scott, 37 N. D. 105, 163 NW 810.

Okl.—Dunn v. State, 15 Okl. 245, 176 P 86; Stanley v. U. S., 1 Okl. 336, 33 P 1025.

Or.—State v. Luper, 95 P 811.

Pa.—Com. v. Briscoe, 19 Pa. Dist. 422; Com. v. Jermon, 29 LegInt 165.

S. D.—State v. Reidt, 222 NW 677.

Tex.—Robertson v. State, 68 Tex. Cr. 243, 150 SW 893; Barber v. State, 64 Tex. Cr. 96, 142 SW 577; Anderson v. State, 56 Tex. Cr. 360, 120 SW 462; Stanley v. State, (Cr.) 95 SW 1076; Adellberger v. State, (Cr.) 39 SW 103; Cravey v. State, 33 Tex. Cr. 557, 28 SW 472; Brown v. State, 9 Tex. A. 171; Bradberry v. State, 7 Tex. A. 375.

46. U. S.—Noah v. U. S., 128 Fed. 270, 62 CCA 618; U. S. v. Cuddy, 39 Fed. 696.

Cal.—Peo. v. Parsons, 6 Cal. 487.

Ind.—State v. Hopper, 133 Ind. 460, 32 NE 878.

N. Y.—Peo. v. Williams, 92 Hun 354, 36 NYS 511 [aff 149 N. Y. 1, 43 NE 407].

Oh.—Crusen v. State, 10 Oh. St. 258.

Philippine.—U. S. v. Go Chanco, 23 Philippine 641.

Wash.—State v. Eaid, 55 Wash. 302, 104 P 275, 33 LRANS 946.

[a] **Charge in language of statute.**—Peo. v. Parsons, 6 Cal. 487; U. S. v. Go Chanco, 23 Philippine 641.

[b] **Common-law indictment** is good where the common-law and statutory crimes are substantially the same. State v. Eaid, 55 Wash. 302, 104 P 275, 33 LRANS 946.

47. Day v. Com., 195 Ky. 790, 243 SW 1051; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; Richey v. Com., 81 Ky. 524; Com. v. Lashley, 74 SW 658, 25 KyL 58; Speck v. State, 97 Tex. Cr. 472, 262 SW 1119.

Statutory provisions as to false swearing in general see supra § 5.

48. U. S.—Venlinio v. U. S., 276 Fed. 12; Hogue v. U. S., 184 Fed. 245, 106 CCA 387.

Ark.—Harp v. State, 59 Ark. 113, 26 SW 714; Thomas v. State, 54 Ark. 584, 16 SW 568; State v. Green, 24 Ark. 591.

Cal.—Peo. v. De Vries, 52 Cal. A. 705, 199 P 867.

Fla.—Fields v. State, 94 Fla. 490, 114 S 317; Ward v. State, 83 Fla. 311, 91 S 189; Jarvis v. State, 73 Fla. 635, 74 S 794; Bennett v. State, 65 Fla. 84, 61 S 127.

Ky.—Day v. Com., 195 Ky. 790, 243 SW 1051; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; Ross v. Com., 20 SW 1043, 14 KyL 590; Sikes v. Com., 4 KyL 619, 11 Ky. Op. 890.

Me.—State v. Mace, 76 Me. 64.

Minn.—State v. Smith, 119 Minn. 107, 137 NW 295.

N. Y.—Peo. v. Phelps, 5 Wend. 9.

Okl.—Dunn v. State, 15 Okl. Cr. 245, 176 P 86.

Philippine.—U. S. v. Go Chanco, 23 Philippine 641.

S. D.—State v. Reidt, 222 NW 677.

Tex.—Foreman v. State, 47 Tex. Cr. 179, 85 SW 809.

Can.—Reg. v. Trudel, 14 Que. L. 193; Reg. v. Thompson, 2 Terr. L. 383, 4 CanCrCas 265; Reg. v. Dewar, 2 Terr. L. 194.

[a] **Indictment held sufficient.**—Herndon v. State, 82 Tex. Cr. 232, 198 SW 788.

49. Venlinio v. U. S., 276 Fed. 12; Fields v. State, 94 Fla. 490, 114 S 317; Ward v. State, 83 Fla. 311, 91 S 189; Jarvis v. State, 73 Fla. 635, 74 S 794; Bennett v. State, 65 Fla. 84, 61 S 127.

50. State v. Hopper, 133 Ind. 460, 32 NE 878; Deckard v. State, 38 Md. 186.

51. See infra § 107.

52. See infra §§ 109, 110, 115.

53. See infra §§ 116–120.

54. See infra §§ 121, 122.

55. See infra § 123.

56. See infra § 124.

57. See infra §§ 125, 126.

57½. See infra § 127.

58. See infra §§ 128–131.

59. See infra §§ 132–137.

60. Tuttle v. Peo., 36 N. Y. 431.

61. Brown v. State, 9 Tex. A. 171. See generally Indictments and Informations §§ 269, 270.

62. Weiner v. Com., 221 Ky. 455, 298 SW 1075; Com. v. Maynard, 91 Ky. 131, 15 SW 52, 12 KyL 710.

Concluding averment. At common law the indictment closed with a formal allegation to the effect that "the accused did commit willful and corrupt perjury."[63] But this concluding averment is ordinarily not required under the modern rules of procedure.[64] Where an indictment sufficiently charges a common-law perjury, the use of the words "contra formam statuti" does not necessarily invalidate it;[65] and where there is but one statute defining and punishing the crime of perjury, an indictment which concludes "against the form of the statute" is good.[66]

Surplusage. Matter in the indictment or information which could have been omitted without injury to the sense or detriment to the essential averments may be disregarded as surplusage.[67]

[§ 104] **b. Under Specific Statutes.** In England in order to remedy difficulties in procuring a conviction for perjury because of the technical and complicated form of allegations required by the common-law procedure,[68] a statute was enacted which regulated the method of making the necessary allegations in an indictment for perjury.[69] In some jurisdictions in this country this statute was not recognized as a part of the common law,[70] and some earlier decisions were to the effect that the indictment must comply with common-law requirements,[71] although there is authority apparently to the contrary.[72] In many jurisdictions in this country statutes, similar to the English statute, have been enacted which provide what allegations or averments are necessary or sufficient.[73] In general an indictment or information is sufficient, which in its allegations or averments complies with the statutes applicable to indictments for perjury, and which sets forth all the elements of the offense with sufficient particularity to show on its face that a crime has been committed and to enable accused to know with reasonable certainty what is the charge or matter of fact which he must meet.[74] But a statute cannot make valid and sufficient an indictment in which the accusation does not meet these requirements.[75] Under such statutes matters of inducement may be charged in general terms,[76] but the allegations which charge the offense itself should be direct and specific.[77]

[§ 105] **2. Time of Making Statement.** In the absence of a statute affecting the rule the day on which the offense was committed must be truly laid,[78] and an indictment is bad where it is wholly

63. Henderson v. Peo., 117 Ill. 265, 268, 7 NE 677. See generally Indictments and Informations §§ 102-112.

[a] **Construction.**—The phrase "the jurors aforesaid," when used in the conclusion of an indictment, was construed as referring to the grand jury by whom the indictment was found, and not to a certain jury of the country before whom, it was alleged, defendant committed perjury. Com. v. Kelly, 123 Mass. 417.

64. U. S. v. Wood, 44 Fed. 753; Henderson v. Peo., 117 Ill. 265, 7 NE 677; Massie v. State, 5 Tex. A. 81.

65. Respublica v. Newell, 3 Yeates (Pa.) 407, 2 AmD 381; State v. Kennerly, 44 S. C. L. 152.

66. State v. Hoyle, 28 N. C. 1.

67. Ind.—Smith v. State, 145 Ind. 176, 42 NE 1019.

Iowa.—State v. John, 124 Iowa 230, 100 NW 193.

Kan.—State v. Hoel, 77 Kan. 334, 94 P 267.

Md.—Deckard v. State, 38 Md. 186.

Mass.—Com. v. Wright, 166 Mass. 174, 44 NE 129.

N. H.—State v. Langley, 34 N. H. 529.

N. C.—State v. Hawley, 186 N. C. 433, 119 SE 888; State v. Peters, 107 N. C. 876, 12 SE 74.

N. D.—State v. Scott, 37 N. D. 105, 163 NW 810.

S. C.—State v. Kennerly, 44 S. C. L. 152.

Eng.—Reg. v. Child, 5 Cox C. C. 197.

See generally Indictments and Informations §§ 300-307.

68. See supra § 103.

69. St. 23 Geo. II c 11.

[a] **Reasons for this enactment** are discussed in U. S. v. Walsh, 22 Fed. 644; Peo. v. Phelps, 5 Wend. (N. Y.) 9; State v. Terline, 23 R. I. 530, 51 A 204, 91 AmSR 650.

[b] **Subsequently similar provisions were embodied** in 14 & 15 Vict. c 100 § 20 and 1 & 2 George V c 6 § 12.

70. State v. Ela, 91 Me. 309, 39 A 1001; State v. Hayward, 10 S. C. L. 546; Fitch v. Com., 92 Va. 824, 24 SE 272; Com. v. Lodge, 2 Gratt. (43 Va.) 580.

English statutes adopted in general see Common Law § 22.

71. State v. Ela, 91 Me. 309, 39 A 1001; State v. Hanson, 39 Me. 337; Com. v. Lodge, 2 Gratt. (43 Va.) 580.

Particularity required in common-law indictment for perjury in general see supra § 103 text and note 43.

72. Herring v. State, 119 Ga. 709, 46 SE 876; Deckard v. State, 38 Md. 186. Compare Lamden v. State, 5 Humphr. (Tenn.) 83 (to the effect that the action of the courts, even in the absence of statute, in adopting the modified form of indictment which arose under the statutes of England and North Carolina, was binding).

73. See statutory provisions.

Constitutionality of statute regulating form of indictment in general see Indictments and Informations § 171.

74. U. S.—Noah v. U. S., 128 Fed. 270, 62 CCA 618; U. S. v. Cuddy, 39 Fed. 696; U. S. v. Walsh, 22 Fed. 644.

Ala.—Smith v. State, 103 Ala. 57, 18 S 866; Walker v. State, 96 Ala. 53, 11 S 401; Barnett v. State, 89 Ala. 165, 7 S 414; Hicks v. State, 86 Ala. 30, 5 S 425; Taylor v. State, 20 Ala. A. 133, 101 S 93.

Ark.—Smith v. State, 163 Ark. 223, 259 SW 404; Beavers v. State, 124 Ark. 38, 186 SW 300.

Cal.—Peo. v. Ah Bean, 77 Cal. 12, 18 P 815.

Ill.—Peo. v. Berry, 309 Ill. 511, 141 NE 132.

Ind.—Masterson v. State, 144 Ind. 240, 43 NE 138; State v. Walls, 54 Ind. 407.

Iowa.—State v. Booth, 88 NW 344; State v. Schill, 27 Iowa 263.

Ky.—Com. v. Combs, 101 SW 312, 30 KyL 1300.

La.—State v. Smith, 149 La. 700, 90 S 28.

Me.—State v. Mace, 76 Me. 64; State v. Corson, 59 Me. 137.

Md.—Deckard v. State, 38 Md. 186.

Minn.—State v. Thomas, 19 Minn. 484.

Miss.—State v. Jolly, 73 Miss. 42, 18 S 541.

Mo.—State v. Martin, 295 SW 543; State v. Bradford, 314 Mo. 684, 285 SW 496; State v. Rhodes, 220 Mo. 9, 119 SW 391; State v. Moran, 216 Mo. 550, 115 SW 1126; State v. Gordon, 196 Mo. 185, 95 SW 420; State v. Walker, 194 Mo. 367, 91 SW 899; State v. Huckby, 87 Mo. 414.

N. C.—State v. Cline, 146 N. C. 640, 61 SE 522.

Okl.—Fisher v. U. S., 1 Okl. 252, 31 P 195.

Or.—State v. Ah Lee, 18 Or. 540, 23 P 424.

Porto Rico.—Peo. v. Ayala, 13 Porto Rico 195.

R. I.—State v. Terline, 23 R. I. 530, 51 A 204, 91 AmSR 650.

Vt.—State v. Webber, 78 Vt. 463, 62 A 1018; State v. Camley, 67 Vt. 322, 31 A 840.

Wash.—State v. Eaid, 55 Wash. 302, 104 P 275, 33 LRANS 946.

Wyo.—Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

Eng.—Rex v. Dowlin, 5 T. R. 311, 101 Reprint 174.

Can.—Reg. v. Skelton, 3 Terr. L. 58, 4 CanCrCas 467.

[a] **Indictments following the specific form** (1) set forth in the statute have been upheld. Peterson v. State, 74 Ala. 34; Johnson v. State, 3 Ala. A. 98, 57 S 389; State v. Thomas, 19 Minn. 484; State v. Cline, 146 N. C. 640, 61 SE 522; State v. Harris, 145 N. C. 456, 59 SE 115; State v. Thompson, 113 N. C. 638, 18 SE 211; State v. Peters, 107 N. C. 876, 12 SE 74; State v. Gates, 107 N. C. 832, 12 SE 319; State v. Woolridge, 45 Or. 389, 78 P 333; State v. Ah Lee, 18 Or. 540, 23 P 424; Rex v. Morrison, 49 N. S. 446, 26 CanCrCas 26, 28 DomLR 113; Rex v. Legros, 17 Ont. L. 425, 12 OntWR 983, 14 CanCrCas 161; Rex v. Yaldon, 17 Ont. L. 179, 12 Ont WR 384; Rex v. Hinman, 7 Terr. L. 186. See State v. Flowers, 109 N. C. 841, 13 SE 718 (fact that a prescribed averment was omitted was not ground for quashing). See also 5 & 6 Geo. V c 90 form 21. (2) As to when which one of several statutory forms is to be used see State v. Baker, 64 Vt. 355, 24 A 98.

75. U. S.—Markham v. U. S., 160 U. S. 319, 16 SCt 288, 40 L. ed. 441; Hilliard v. U. S., 24 F. (2d) 99; Hogue v. U. S., 184 Fed. 245, 106 CCA 387.

Ariz.—State v. Broshears, 18 Ariz. 356, 161 P 873.

Ark.—State v. Green, 24 Ark. 591.

La.—State v. Brown, 110 La. 591, 34 S 698.

Me.—State v. Mace, 76 Me. 64.

N. C.—State v. Cline, 150 N. C. 854, 64 SE 591.

Vt.—State v. Webber, 78 Vt. 463, 62 A 1018.

[a] **Indictment held insufficient.**—Even after verdict of guilty, an indictment charging defendant with having committed the crime of perjury "by falsely swearing to material matter in a writing signed by him" has been held insufficient. State v. Mace, 76 Me. 64.

Power of legislature to prescribe form of indictment or information in general see Indictments and Informations § 171.

76. U. S. v. Cuddy, 39 Fed. 696; State v. Booth, (Iowa) 88 NW 344; Williams v. State, 14 Okl. Cr. 100, 167 P 763.

77. U. S. v. Cuddy, 39 Fed. 696.

78. U. S. v. Law, 50 Fed. 915; U. S. v. Bowman, 24 F. Cas. No. 14,631, 2 Wash. C. C. 328; State v. Offutt, 4 Blackf. (Ind.) 355; State v. Fenlason, 79 Me. 117, 8 A 459; Rhodes v. Com., 78 Va. 692. See State v. Ah Lee, 18

uncertain as to which of two dates was the date on which the offense was committed;[79] but allegations may be sufficient where the day may be gathered from a consideration of the indictment as a whole,[80] as where the particular day is set forth in the concluding part of the indictment.[81] Under statutes modifying the strict common-law rules as to averments of time,[82] an indictment or information is not necessarily insufficient because the averments do not fix the time precisely,[83] or because the averments as to time are imperfect,[84] or are omitted.[85]

Surplusage. Where a date mentioned has apparently no connection with the other language of the indictment or is a clerical error, it may be rejected as surplusage.[86]

[§ 106] **3. Place of Making Statement.** General rules in respect of averments as to the venue or place of a crime[87] apply to an indictment or information for perjury or false swearing.[88] The omission of the venue from the affidavit on which an indictment is based does not affect the sufficiency of the indictment where the indictment itself contains a sufficient averment as to the place where the affidavit was made.[89]

[§ 107] **4. Oath Authorized or Required.**[90] The indictment or information should show in some manner that the oath in respect of which the offense is charged was authorized or required in the particular matter or proceeding in the case both of perjury[91] and false swearing.[92] Thus an indictment or information based on an affidavit, verified instrument, or extrajudicial verified statement should show that the oath was authorized or required by law.[93] The allegation of facts from which the ultimate fact definitely appears is sufficient to show that the oath was required or authorized.[94] Where, under a statute, perjury may be committed in testifying or affirming in any cause, matter, or proceeding before any court, tribunal, body corporate, or other officer having authority to administer oaths, the indictment need not refer to the statute pursuant to which the oath was administered.[95]

[§ 108] **5. Compulsory or Voluntary Character of Testimony.** While the fact that accused gave the false testimony must be averred in some form,[96] and, under certain conditions, the circumstances under which accused gave the testimony before the grand jury,[97] or on the trial of a case in which he was defendant,[98] should be shown, it has been held that the indictment or information need not show whether accused appeared as a witness voluntarily or under compulsion,[99] or affirmatively that he was

Or. 540, 23 P 424 (where the court declined to express an opinion as to whether the rule requiring that the time should be truly stated was changed by Hill Code § 1274); Rex v. Aylett, 1 T. R. 63, 99 Reprint 973.

[a] **Averments insufficient.**—(1) At a certain term of the supreme court. State v. Fenlason, 79 Me. 117, 8 A 459. (2) On the "—— day of September, 1891." U. S. v. Law, 50 Fed. 915.

79. Com. v. Nailor, 29 Pa. Super. 275.

80. State v. Schultz, 57 Ind. 19. See State v. Thibodaux, 49 La. Ann. 15, 21 S 127 (when time has been mentioned, it may be referred to by using the word "then," and it is not necessary to use such word in conjunction with "there").

81. Jackson v. State, 1 Ind. 184.

82. See Indictments and Informations § 209.

83. Shell v. State, 148 Ind. 50, 47 NE 144; State v. John, 124 Iowa 230, 100 NW 193; State v. Perry, 117 Iowa 463, 91 NW 765; State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848. But see McCoy v. State, 43 Tex. Cr. 606, 68 SW 686 (where an indictment was defective in stating the date as "on or about" a certain date).

[a] **Illustrations.**—(1) An allegation that the crime was committed "on or about" a specified date is sufficient as to the time, it not being necessary to allege the precise date, except when the date is a material ingredient of the crime. State v. Perry, 117 Iowa 463, 91 NW 765. (2) "At the April term of the Hendricks Circuit Court, in the year 1867," has been held sufficient since the terms of the circuit court are fixed by statute, and it is only necessary to show that the crime was committed within the statute of limitations. State v. Thrift, 30 Ind. 211.

[b] **False swearing.**—It seems that in an indictment for statutory false swearing the time need not be alleged otherwise than that the offense occurred before the finding of the indictment. Richey v. Com., 81 Ky. 524; Goslin v. Com., 90 SW 223, 28 KyL 683.

84. Shell v. State, 148 Ind. 50, 47 NE 144; Lucas v. State, 27 Tex. A. 322, 11 SW 443.

85. Shell v. State, 148 Ind. 50, 47 NE 144 (where the crime was shown to have been committed within the statute of limitations).

86. Smith v. State, 145 Ind. 176, 42 NE 1019; State v. John, 124 Iowa 230, 100 NW 193.

87. See Indictments and Informations §§ 198-208.

88. See infra this note.

[a] **Averments held sufficient.**—State v. Walls, 54 Ind. 407; Com. v. Kane, 92 Ky. 457, 18 SW 7, 13 KyL 655; State v. Thibodaux, 49 La. Ann. 15, 21 S 127; Wood v. Peo., 1 Hun 381, 3 Thomps. & C. 506 [rev on other grounds 59 N. Y. 117, 1 Cow. Cr. 116]; State v. Witherow, 7 N. C. 153.

[b] **Poor prisoner's oath** need not be alleged to have been administered within the limits of the prison. Com. v. Alden, 14 Mass. 388.

89. State v. Hopper, 133 Ind. 460, 32 NE 878.

90. Cross references:
Accused as witness, and compulsory or voluntary character of testimony see infra § 108.
Authorization or requirement of oath as element of offense see supra §§ 49-52.

91. Morrell v. Peo., 32 Ill. 499; State v. Schill, 27 Iowa 263; State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249.

Showing that oath was taken in judicial proceedings see infra § 111.

92. Allison v. Com., (Ky.) 13 SW (2d) 769; Com. v. Hinkle, 177 Ky. 22, 197 SW 455; Kerfoot v. Com., 89 Ky. 174, 12 SW 189, 11 KyL 391.

93. Ala.—Jacobs v. State, 61 Ala. 448.

Ark.—Thomas v. State, 54 Ark. 584, 16 SW 568.

Ga.—Thompson v. State, 120 Ga. 132, 47 SE 566.

Mich.—Peo. v. Gaige, 26 Mich. 30; Peo. v. Fox, 25 Mich. 492.

Miss.—State v. Kelly, 113 Miss. 461, 74 S 325.

Mo.—State v. Crumb, 68 Mo. 206.

N. J.—Heintz v. Union County Ct. Gen. Quarter Sess. of Peace, 45 N. J. L. 523.

N. Y.—Ortner v. Peo., 4 Hun 323, 6 Thomps. & C. 548, 2 Cow. Cr. 268; Peo. v. Allen, 9 NYSt 622 [aff 108 N. Y. 623 mem, 15 NE 74 mem].

Vt.—State v. Dow, 74 Vt. 119, 52 A 419; State v. Estabrooks, 70 Vt. 412, 41 A 499; State v. Rowell, 70 Vt. 405, 41 A 430; State v. Collins, 62 Vt. 195, 19 A 368.

See Com. v. Hinkle, 177 Ky. 22, 197 SW 455 (indictment for false swearing insufficient).

[a] **Purpose for which affidavit was made** should be alleged where this is necessary to show that the extrajudicial affidavit or oath on which the charge is based was authorized or required by law. Peo. v. Fox, 25 Mich. 492; Ortner v. Peo., 4 Hun (N. Y.) 323, 6 Thomps. & C. 548, 2 Cow. Cr. 268; Peo. v. Allen, 9 NYSt 622 [aff 108 N. Y. 623 mem, 15 NE 74 mem].

[a] **Verified bill in equity.**—An information for perjury charged to have been committed in swearing to a bill in equity, which failed to show that the bill was one of a character required by law to be verified, was held insufficient. Peo. v. Gaige, 26 Mich. 30.

[b] **Voluntary character of oath negatived.**—Indictment for perjury in making an affidavit, which alleged that it was made to assist defendants in obtaining a new trial and to furnish a basis for motion therefor, sufficiently negatived the idea that it was a mere voluntary affidavit. State v. Varnado, 154 La. 575, 97 S 865.

[c] **Averments held sufficient.**—Com. v. Coakley, 96 SW 876, 29 KyL 948; State v. Williams, 104 Oh. St. 232, 135 NE 651.

94. Cox v. State, 164 Ark. 126, 261 SW 303; Thompson v. State, 120 Ga. 132, 47 SE 566; State v. Kelly, 113 Miss. 461, 74 S 325.

[a] **In an indictment for statutory false swearing,** which is equivalent to perjury not committed in a judicial proceeding, it is not necessary to allege expressly that the oath was not taken in a judicial proceeding, when it is shown unequivocally by the facts set out in the indictment. Thompson v. State, 120 Ga. 132, 47 SE 566.

95. Cox v. State, 164 Ark. 126, 261 SW 303.

96. Menasco v. State, (Tex. A.) 11 SW 898.

[a] **Averments held sufficient.**—Ice v. State, 84 Tex. Cr. 418, 208 SW 345.

97. Pigg v. State, 71 Tex. Cr. 600, 160 SW 691.

98. State v. Hamilton, 7 Mo. 300.

99. Com. v. Knight, 12 Mass. 274, 7 AmD 72.

[a] **Allegation that accused was called and sworn as a witness** necessarily implies that he was lawfully required to depose the truth in a proceeding in the course of justice. Com. v. Wright, 166 Mass. 174, 44 NE 129.

warned that he could not be compelled to testify against himself.[1] In some jurisdictions, while an indictment based on testimony given by accused before the grand jury on the investigation of a specific charge against him,[2] or on testimony given by him on the trial of a charge against him[3] must aver or show that he voluntarily gave such testimony, such averment is not necessary where the indictment shows that the investigation before the grand jury did not involve a specific charge against accused and he could have been compelled to testify under an immunity statute protecting him from prosecution in respect of such testimony.[4]

[§ 109] **6. Occasion of Giving Testimony or of Administering Oath in General.** An indictment or information for perjury should set forth specifically the occasion of the administration of the oath.[5] But a failure specifically to aver that the grand jury was in session when the oath was administered and the testimony given does not render the indictment insufficient where that fact may be inferred from the averments made.[6]

[§ 110] **7. Description, Subject Matter, Status, and Result of Proceeding in Which Testimony Given[7]—a. In General.** The indictment or information should describe or identify the proceeding in which the perjury was committed.[8] A general description has been regarded as sufficient.[9] An averment that the testimony was given at the "trial of an action" has been regarded as sufficient to include a "preliminary trial" before a magistrate.[10] A mere technical defect in the description does not render the indictment insufficient.[11]

Name or style of case. Under modern statutes and rules of procedure, an averment of the name or style of the case has been regarded as sufficient,[12] and, according to some cases, is necessary.[13]

Surplusage. Allegations which are mere surplusage may be disregarded,[14] and such allegations need not be stricken where they do not prejudice accused.[15]

Status of proceeding. An indictment involving a judicial proceeding must show as a rule that the judicial proceeding was pending in court at the time the oath was taken and the false statement made,[16] but a specific allegation that the proceeding was pending is not necessary where the pendency appears from averments made.[17] An indictment based on evidence given on a voir dire examination need not contain an averment that there was a challenge.[18]

Case at issue or on trial. Failure specifically to aver that the case in which the false testimony was given was at issue,[19] or on trial,[20] is not a fatal defect where these facts are necessarily inferable from the averments made. Moreover, where it is alleged that issue was joined in a criminal case, it is not necessary to aver that accused had entered a plea of not guilty.[21] It is not necessary specifically to aver that the trial was held in or before the court where that fact appears from the averments made.[22]

[§ 111] **b. Nature of Proceeding.** It should appear in the indictment or information that the oath was taken, and the false swearing committed, in a

1. State v. Cox, 87 Oh. St. 313, 101 NE 135; Robertson v. State, 68 Tex. Cr. 243, 150 SW 893.

2. Claborn v. State, 115 Ark. 387, 171 SW 862.

[a] **Reason for rule.**—The decision of the court is apparently based on the right of a person to protection from self-incrimination under constitutional provisions. See Claborn v. State, 115 Ark. 387, 171 SW 862.

3. Slay v. State, 161 Ark. 90, 255 SW 292.

4. Smith v. State, 163 Ark. 223, 259 SW 404; Warren v. State, 153 Ark. 497, 241 SW 15; State v. Roberts, 148 Ark. 328, 230 SW 15.

5. Hicks v. State, 86 Ala. 30, 5 S 425; Jacobs v. State, 61 Ala. 448; Com. v. Kane, 92 Ky. 457, 18 SW 7, 13 KyL 655; Reg. v. Ross, 5 N. S. 683.

[a] **Averments held sufficient.**—Hicks v. State, 86 Ala. 30, 5 S 425.

Description or identification of proceeding in which testimony given see infra § 110.

6. Clower v. State, (Ark.) 236 SW 265; St. Clair v. State, 11 Tex. A. 297.

7. Proceeding in which perjury may be committed in general see supra §§ 53–56.

8. U. S.—Hendricks v. U. S., 223 U. S. 178, 32 SCt 313, 56 L. ed. 394.

Ala.—Jacobs v. State, 61 Ala. 448.

Ark.—State v. Leatherman, 125 Ark. 243, 188 SW 545.

Cal.—Peo. v. Ennis, 137 Cal. 263, 70 P 84.

Ga.—Wilson v. State, 115 Ga. 206, 41 SE 696, 90 AmSR 104.

Ill.—Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922.

Ind.—Galloway v. State, 29 Ind. 442.

Kan.—State v. Adams, 119 Kan. 509, 240 P 955.

Me.—State v. Hanson, 39 Me. 337.

Mo.—State v. Koslowesky, 228 Mo. 351, 128 SW 741.

N. Y.—Eighmy v. Peo., 79 N. Y. 546.

N. C.—State v. Peters, 107 N. C. 876, 12 SE 74.

Okl.—McFarland v. State, 12 Okl. Cr. 201, 153 P 619.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

S. D.—State v. Reidt, 222 NW 677.

Tenn.—State v. Bowlus, 3 Heisk. 29.

Tex.—State v. Oppenheimer, 41 Tex. 82.

Vt.—State v. Bishop, 1 D. Chipm. 120.

Va.—Conner v. Com., 2 Va. Cas. (4 Va.) 30.

Wash.—State v. See, 4 Wash. 344, 30 P 327, 746.

Can.—Reg. v. Ross, 5 N. S. 683.

[a] **"The purpose . . . is** to show that it was a judicial proceeding of which the court had jurisdiction and that the false testimony was material." Peo. v. Ashbrook, 276 Ill. 382, 385, 114 NE 922.

[b] **Averments held insufficient.**—An indictment which charged accused with having sworn falsely on certain proceedings before justices, wherein he was examined as a witness, where the allegation of materiality averred that "the said D. R. (accused) being so sworn as aforesaid, it then and there became material to enquire and ascertain, etc.," was held bad as not sufficiently showing that the alleged perjury was committed at such proceedings. Reg. v. Ross, 5 N. S. 683.

[c] **Averments held sufficient.**—Hendricks v. U. S., 223 U. S. 178, 32 SCt 313, 56 L. ed. 394; U. S. v. Wood, 44 Fed. 753; Hicks v. State, 86 Ala. 30, 5 S 425; State v. Leatherman, 125 Ark. 243, 188 SW 545; Peo. v. Ennis, 137 Cal. 263, 70 P 84; Peo. v. Carpenter, 136 Cal. 391, 68 P 1027; Maynard v. Peo., 135 Ill. 416, 25 NE 740; State v. Adams, 119 Kan. 509, 240 P 955; Ramey v. State, 99 Tex. Cr. 132, 268 SW 476. See Pennaman v. State, 58 Ga. 336 (on motion for arrest of judgment).

9. Peo. v. Gazelle, 299 Ill. 58, 132 NE 273; Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922.

10. State v. Peters, 107 N. C. 876, 12 SE 74.

11. Cohen v. U. S., 214 Fed. 23, 130 CCA 417 [certiorari den 235 U. S. 696 mem, 35 SCt 199 mem, 59 L. ed. 430 mem]; State v. Bishop, 1 D. Chipm. (Vt.) 120.

12. Peo. v. Ah Bean, 77 Cal. 12, 18 P 815; Peo. v. Paden, 71 Cal. A. 247, 234 P 920.

13. Jacobs v. State, 61 Ala. 448; Cowan v. State, 15 Ala. A. 87, 72 S 578.

[a] **Allegations held sufficient.**—Dennison v. State, 15 Ala. A. 84, 72 S 589; Lawley v. State, 3 Ala. A. 670, 57 S 96; Maddox v. State, 2 Ala. A. 244, 57 S 95.

14. Com. v. Wright, 166 Mass. 174, 44 NE 129; State v. Hawley, 186 N. C. 433, 119 SE 888.

15. State v. Hoel, 77 Kan. 334, 94 P 267.

16. State v. Hanson, 39 Me. 337; State v. Oppenheimer, 41 Tex. 82; Reg. v. Pearson, 8 C. & P. 119, 34 ECL 642, 173 Reprint 424. Compare Respublica v. Newell, 3 Yeates (Pa.) 407, 2 AmD 381 (on a rule to show cause why an attachment should not issue for contempt, perjury may be assigned on the answers to interrogatories addressed to defendant before the attachment issues).

Showing pendency of proceeding where charge based on affidavit see infra § 115.

17. Eighmy v. Peo., 79 N. Y. 546; Reg. v. Gardiner, 8 C. & P. 737, 34 ECL 992, 173 Reprint 696.

18. Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133.

19. State v. Nelson, 146 Mo. 256, 48 SW 84; State v. Reidt, (S. D.) 222 NW 677.

20. State v. Reidt, supra. See State v. McLain, 43 Wash. 124, 86 P 388 (an information, alleging that a certain information was pending against accused, that issue was joined thereon, that the cause was tried in due form before a jury, and that accused was sworn to testify as a witness and to testify to certain facts, sufficiently alleges that the testimony was given on the trial of an actual cause).

21. Montgomery v. State, (Tex. Cr.) 40 SW 805.

22. Peo. v. Niles, 295 Ill. 525, 129 NE 97; Galloway v. State, 29 Ind. 442.

judicial proceeding,[23] or in the course of justice,[24] or on some other occasion in which an oath was authorized or required.[25] However, it is not necessary specifically to aver that the perjury was committed in,[26] or in the course of, a judicial proceeding[27] where that fact appears from the facts alleged.

[§ 112] **c. Subject Matter and Issues.**[28] The statutory provision that it shall be sufficient to set forth the substance of the controversy or matter in respect of which the perjury was committed[29] has been construed to require a statement of the subject matter of the controversy or inquiry,[30] but in other jurisdictions in which this statutory provision is in force, such particularity is not required.[31] According to some cases, the criminal charge or offense involved in a trial or hearing in which the perjury was committed should be set forth with some degree of certainty,[32] but under modern statutes and rules of procedure a designation or description of such offense or charge which informs accused of the matter in respect of which the alleged perjury was committed is sufficient,[33] and a detailed description is not necessary.[34] Where the punishment for perjury committed on a trial for a felony is especially provided for by statute,[35] the indictment must show that the offense involved was a felony.[36]

Ground on which proceeding was based need not be alleged according to some cases.[37]

Issues. While the view has been taken that the substance of the issue in the proceeding in which the perjury was committed must be set out,[38] it has been held that failure to show what the specific issue was does not of itself render the indictment insufficient.[39]

Proceedings before grand jury.[40] The indictment or information should set forth the subject matter of the investigation by the grand jury, in which the false testimony was given, in the case both of perjury[41] and of statutory false swearing.[42] According to some cases the indictment should set forth the specific matter under investigation,[43] but there is authority for the view that it is not necessary to

23. U. S.—Hogue v. U. S., 184 Fed. 245, 106 CCA 387; U. S. v. Wood, 44 Fed. 753.
Ill.—Morrell v. Peo., 32 Ill. 499.
Kan.—State v. Ayer, 40 Kan. 43, 19 P 403.
Md.—State v. Mercer, 101 Md. 535, 61 A 220.
Mass.—Com. v. Wright, 166 Mass. 174, 44 NE 129.
N. C.—State v. Peters, 107 N. C. 876, 12 SE 74.
Oh.—Crusen v. State, 10 Oh. St. 258.
Okl.—Peters v. U. S., 2 Okl. 116, 33 P 1031.
Vt.—State v. Chamberlain, 30 Vt. 559.
Wash.—State v. McLain, 43 Wash. 124, 86 P 388.
Wis.—State v. Lloyd, 77 Wis. 630, 46 NW 898; State v. Lamont, 2 Wis. 437.
Eng.—Reg. v. Bishop, C. & M. 302, 41 ECL 169; Reg. v. Gardiner, 8 C. & P. 737, 34 ECL 992, 173 Reprint 696, 2 Moody C. C. 95, 169 Reprint 38; Reg. v. Pearson, 8 C. & P. 119, 34 ECL 642, 173 Reprint 424.
Can.—Reg. v. Kennedy, 7 Newfoundl. 91.

[a] **Notwithstanding the statute liberalizing the method of charging the offense** of perjury, the necessity for showing distinctly that the false oath is in a judicial proceeding is not dispensed with. Reg. v. Overton, 4 Q. B. 83, 45 ECL 83, 114 Reprint 828.

[b] **Averments held sufficient.**—Peo. v. Robertson, 3 Wheel. Cr. (N. Y.) 180; Rex v. Aylett, 1 T. R. 63, 99 Reprint 973.

24. Hogue v. U. S., 184 Fed. 245, 106 CCA 387.

[a] **Averments held sufficient.**—Com. v. Warden, 11 Metc. (Mass.) 406.

25. See supra § 107.

26. Com. v. Wright, 166 Mass. 174, 44 NE 129; Com. v. Bouvier, 164 Mass. 398, 41 NE 651.

27. Kizer v. Peo., 211 Ill. 407, 71 NE 1035.

28. Averments as to materiality of inquiry or question as to which testimony given see infra § 128.

29. See statutory provisions.

[a] **Substance of matter or controversy stated sufficiently.**—Burk v. State, 81 Ind. 128; State v. Walls, 54 Ind. 407; State v. Booth, (Iowa) 88 NW 344; Woods v. State, 14 Lea (Tenn.) 460.

30. State v. Witham, 6 Or. 366; State v. Argo, 118 Tenn. 377, 100 SW 106; State v. Owens, 2 Tenn. Cas. 534.

[a] **Purpose of making statement** (1) is to enable the court to see whether the testimony on which the charge is based is material. State v. Witham, 6 Or. 366; State v. Argo, 118 Tenn. 377, 100 SW 106; State v. Owens, 2 Tenn. Cas. 534. (2) Averring materiality of testimony in general see infra §§ 128-131.

31. Peo. v. Ah Bean, 77 Cal. 12, 18 P 815.

[a] **Purpose of the requirement** is to inform defendant of the offense with which he is charged. Peo. v. Hill, 36 Cal. A. 574, 172 P 1114.

[b] **Substance of controversy or matter stated sufficiently.**—Peo. v. Ah Bean, 77 Cal. 12, 18 P 815; Peo. v. Hill, 36 Cal. A. 574, 172 P 1114; Peo. v. Collins, 6 Cal. A. 492, 92 P 513.

32. U. S. v. Wilcox, 28 F. Cas. No. 16,692, 4 Blatchf. 391; Davis v. State, 79 Ala. 20. See Peo. v. Niles, 295 Ill. 525, 129 NE 97 (charge not bad because it set forth certain matters as to the offense in the original case in which accused had been acquitted). But see Cope v. Com., 47 SW 436, 20 KyL 721 (holding that the indictment need not state the precise offense involved on the trial of which defendant swore falsely).

33. Bradford v. State, 134 Ala. 141, 32 S 742; Thomas v. State, 13 Ala. A. 421, 69 S 413; Sweat v. Com., 96 SW 843, 29 KyL 1067; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; State v. Jennings, 278 Mo. 544, 213 SW 421; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448. See Peo. v. Paden, 71 Cal. A. 247, 234 P 920 (averments held sufficient); Mares v. State, 71 Tex. Cr. 303, 158 SW 1130 (holding that certain omissions did not render the indictment insufficient); Bailey v. State, 41 Tex. Cr. 157, 53 SW 117 (indictment based on testimony given in an investigation by the county attorney upheld).

[a] **In a prosecution for false swearing** (1) the rule applies. Sweat v. Com., 96 SW 843, 29 KyL 1067; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683. (2) The fact that the designation of the offense involved in the earlier case is different from the description used in such case does not render the indictment bad where the averments are sufficient to inform accused as to the matter concerning which he is charged with testifying falsely. Ferrell v. Com., (Ky.) 127 SW 162.

[b] **The venue** (1) of the offense need not be specifically alleged. State v. Jennings, 278 Mo. 544, 213 SW 421. (2) And this rule applies in a prosecution for false swearing. Singleton v. Com., 210 Ky. 456, 276 SW 141.

34. Ala.—Thomas v. State, 13 Ala. A. 421, 69 S 413.
Ill.—Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922.
Iowa.—State v. Perry, 117 Iowa 463, 91 NW 765.
Mo.—State v. Jennings, 278 Mo. 544, 213 SW 421.
Tex.—Kelley v. State, 51 Tex. Cr. 507, 103 SW 189.
Wyo.—Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.
Can.—Reg. v. Macdonald, 17 U. C. C. P. (Ont.) 635.

35. See infra § 188.

36. Hinch v. State, 2 Mo. 158.

37. Peters v. U. S., 2 Okl. 138, 37 P 1081.

38. State v. Silverberg, 78 Miss. 858, 29 S 761. See State v. Ela, 91 Me. 309, 39 A 1001 (at common law the charge must also set forth enough of the issue between the parties to show the materiality of the testimony).

[a] **Allegations held sufficient.**—State v. Voorhis, 52 N. J. L. 351, 20 A 26.

39. Peo. v. Grimshaw, 33 Hun 505, 2 N. Y. Cr. 390; State v. Miller, 26 R. I. 282, 58 A 882; Covey v. State, 23 Tex. A. 388, 5 SW 283. See Markey v. State, 47 Fla. 38, 37 S 53 (an indictment, based on alleged false swearing by defendant as a witness in his own behalf in an action for divorce, need not allege that the ground for the divorce was not adultery).

40. Showing that matter under investigation is violation of law see infra § 119.

41. Ind.—State v. McCormick, 52 Ind. 169.
Ky.—Com. v. Taylor, 96 Ky. 394, 29 SW 138, 16 KyL 482.
Miss.—Chenault v. State, 122 S 98.
Or.—State v. Witham, 6 Or. 366.
Vt.—State v. Webber, 78 Vt. 463, 62 A 1018.
See Com. v. Pickering, 8 Gratt. (49 Va.) 628, 56 AmD 158.
Compare Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887] (an averment to the effect that accused was examined as a witness before the grand jury has been regarded as a sufficient averment of the "substance of the proceedings" within the meaning of a statutory provision).

[a] **Averments held sufficient.**—Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887]; State v. Roberts, 148 Ark. 328, 230 SW 15; State v. Sweat, 159 La. 769, 106 S 298.

42. Sanlin v. Com., 212 Ky. 394, 279 SW 648; Ketcham v. Com., 210 Ky. 469, 276 SW 139; Sizemore v. Com., 210 Ky. 401, 276 SW 123; Childress v. Com., 197 Ky. 641, 247 SW 705; Ford v. Com., 29 SW 446, 16 KyL 528; Com. v. Taylor, 96 Ky. 394, 29 SW 138, 16 KyL 482. Contra Blakey v. Com., 183 Ky. 493, 209 SW 516.

[a] **Averments held sufficient.**—Richey v. Com., 81 Ky. 524.

43. Peo. v. Morrison, 98 Misc. 555, 164 NYS 712; Peo. v. Tatum, 60 Misc.

state the specific offense.[44] It is not necessary to aver the facts constituting the offense,[45] and a description in terms ordinarily used to describe a criminal offense is sufficient.[46] It is not necessary to state the name of a specified defendant,[47] or to allege that some person was guilty of an offense in regard to which the testimony was given[48] or that the person charged was or was not guilty.[49] Where the subject matter of the investigation is otherwise fully identified, an error in respect of certain descriptive matter is not fatal.[50]

[§ 113] **d. Setting Out Record.** At common law, where the alleged false oath was taken in court, it was necessary to set forth in the indictment with great particularity the pleadings, records, and proceedings on the trial, and the whole evidence.[51] To remedy the embarrassment to prosecutions by reason of this requirement as to particularity,[52] a statute was passed which dispensed with the necessity of setting out in the indictment the pleadings or any part of the record or proceedings.[53] Similar statutes have been enacted in many jurisdictions in this country.[54] Some of the statutes declare that it is sufficient to set forth the substance of the proceedings,[55] or the substance of the controversy or matter in respect of which the offense was committed.[56]

[§ 114] **e. Result of Proceeding.**[57] An indictment for perjury need not aver that the action or proceeding in which the false oath or statement was made has been finally determined,[58] or that any final judgment has been entered therein.[59]

[§ 115] **8. Form, Sufficiency, Purpose, and Use of Instrument in Which False Statement Made.** An indictment or information based on an affidavit or extrajudicial verified statement, in addition to showing that the oath was authorized or required by law,[60] should show that such affidavit or statement was made under the circumstances prescribed by, or that it is within, the applicable statute;[61] but the charge is sufficient in this regard where the facts alleged show that the affidavit or oath was so made.[62] Where the writing is set out in the indictment, the fact that a word used to characterize the instrument is one which might equally be applicable to other instruments does not render the indictment bad where accused cannot be misled by such characterization.[63]

Pending proceedings. Where an affidavit apparently was to be used in a judicial proceeding, an indictment based on such affidavit should show that such proceeding was pending or that the affidavit was the commencement of such proceeding.[64] But where the affidavit may be made before the commencement of the action, it is not necessary to allege that any proceeding was pending when the affidavit was made.[65]

Purpose for which affidavit was made should be alleged where this is necessary to show that the extrajudicial affidavit or oath on which the charge is

311, 112 NYS 36, 22 N. Y. Cr. 557. See Peo. v. Gillette, 126 App. Div. 665, 111 NYS 133 (per McLaughlin, J.).

[a] **Averment held sufficient.**—Peo. v. Goodheim, 188 App. Div. 148, 176 NYS 468.

44. Bell v. State, 75 Tex. Cr. 401, 171 SW 239.

45. State v. Schill, 27 Iowa 263.

46. Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887].

47. Hendricks v. U. S., 223 U. S. 178, 32 SCt 313, 56 L. ed. 394.

48. Harden v. State, 85 Tex. Cr. 200, 211 SW 233, 4 ALR 1308.

49. State v. Schill, 27 Iowa 263.

50. Richey v. Com., 81 Ky. 524.

[a] **Averment as to date of the offense.**—Richey v. Com., 81 Ky. 524.

51. Jacobs v. State, 61 Ala. 448; State v. Hoyle, 28 N. C. 1; State v. Gallimon, 24 N. C. 372; State v. Stillman, 7 Coldw. (Tenn.) 341; Com. v. Lodge, 2 Gratt. (43 Va.) 579.

[a] **Thus** an indictment for perjury, for swearing to an answer in chancery, should set out the whole bill and answer. Com. v. Lodge, 2 Gratt. (43 Va.) 579.

52. Jacobs v. State, 61 Ala. 448; and supra text and note 51.

53. St. Geo. II c 11 § 8.

[a] **Subsequent statutes.**—14 & 15 Vict. c 100 § 20 and 1 & 2 Geo. V c 6 § 12.

54. See statutory provisions.

[a] **Indictment held sufficient notwithstanding omission of details.**—Peo. v. Gazelle, 299 Ill. 58, 132 NE 273; Burk v. State, 81 Ind. 128; State v. Booth, (Iowa) 88 NW 344; State v. Hoyle, 28 N. C. 1; State v. Luper, (Or.) 95 P 811. See Lamden v. State, 5 Humphr. (Tenn.) 83 (to the effect that it is only necessary to set forth so much of the proceedings as will make manifest the materiality of the oath taken).

55. See statutory provisions.

[a] **Purpose of setting forth substance of proceedings** is that it may distinctly appear that the oath was not extrajudicial. Jacobs v. State, 61 Ala. 448.

[b] **Substance of proceedings not sufficiently set forth.**—Cowan v. State, 15 Ala. A. 87, 72 S 578.

56. See statutory provisions.

Sufficiency of averments as to substance of controversy or matter see supra § 112.

57. **Prosecution pending proceeding in general** see supra § 102.

58. State v. Keene, 26 Me. 33; Finch v. U. S., 1 Okl. 396, 33 P 638; Com. v. Moore, 9 Pa. Co. 501, 20 Phila. 390. Compare Pennsylvania cases supra § 102.

59. See cases supra note 58.

60. See supra § 107.

61. Cal.—Peo. v. Robles, 117 Cal. 681, 49 P 1042.

Ind.—State v. Trook, 172 Ind. 558, 88 NE 930.

Kan.—State v. Ayer, 40 Kan. 43, 19 P 403.

Miss.—State v. Kelly, 113 Miss. 461, 74 S 325.

N. Y.—Ortner v. Peo., 4 Hun 323, 6 Thomps. & C. 548, 2 Cow. Cr. 268; Peo. v. Allen, 9 NYSt 622 [aff 108 N. Y. 623 mem, 15 NE 74 mem].

Porto Rico.—Peo. v. Cajiao, 18 Porto Rico 55.

Tex.—Shely v. State, 35 Tex. Cr. 190, 32 SW 901.

Vt.—State v. Dow, 74 Vt. 119, 52 A 419; State v. Estabrooks, 70 Vt. 412, 41 A 499; State v. Roweli, 70 Vt. 405, 41 A 430.

Wash.—State v. Epstein, 138 Wash. 118, 244 P 388; State v. Dalzell, 135 Wash. 621, 238 P 635; State v. Smith, 3 Wash. 14, 27 P 1028.

[a] **Intent.**—(1) Where under the statute the making of the affidavit "with intent that it be uttered or published as true" is an essential ingredient of the offense (see supra § 58), this intent must be alleged. Peo. v. Robles, 117 Cal. 681, 49 P 1042; Peo. v. Cajiao, 18 Porto Rico 55; State v. Dalzell, 135 Wash. 621, 238 P 635. (2) A mere allegation that it was made or executed is insufficient. Peo. v. Robles, supra; Peo. v. Teixeira, 59 Cal. A. 598, 211 P 470; Peo. v. Cajiao, supra. (3) But under a similar statute in another jurisdiction it was held that an allegation that the affidavit was "made and is entitled in an action or special proceeding" is sufficient, without stating that it was delivered to be uttered or published as true. Peo. v. Williams, 149 N. Y. 1, 43 NE 407.

62. U. S.—Noah v. U. S., 128 Fed. 270, 62 CCA 618; U. S. v. Walsh, 22 Fed. 644.

Cal.—Peo. v. Carroll, 39 Cal. A. 654, 180 P 49.

Ga.—Thompson v State, 120 Ga. 132, 47 SE 566.

Ill.—Peo. v. Gazelle, 299 Ill. 58, 132 NE 273.

Ind.—Masterson v. State, 186 Ind. 609, 117 NE 645; State v. Malone, 174 Ind. 746, 93 NE 170; State v. Hopper, 133 Ind. 460, 32 NE 878.

Ky.—Com. v. Powell, 2 Metc. 10.

Minn.—State v. Madigan, 57 Minn. 425, 59 NW 490.

Miss.—State v. Kelly, 113 Miss. 461, 74 S 325.

Mo.—State v. Lynes, 194 Mo. A. 184, 185 SW 535.

N. J.—State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

Oh.—State v. Williams, 104 Oh. St. 232, 135 NE 651.

[a] **Thus** the allegation of facts from which the ultimate fact definitely appears is sufficient to show that it was made under circumstances bringing it within the applicable statute. State v. Kelly, 113 Miss. 461, 74 S 325.

[b] **Specifying statute.**—In an indictment in the United States courts it is not necessary to aver what particular act or acts of congress required the oath to be taken since the court is bound to take judicial notice of all acts of congress. U. S. v. Nickerson, 17 How. (U. S.) 204, 15 L. ed. 219.

[c] **Statutory offense of false swearing.**—Com. v. Powell, 2 Metc. (Ky.) 10.

[d] **Statutory offense of making false affidavit.**—State v. Lynes, 194 Mo. A. 184, 185 SW 535.

63. U. S. v. Ambrose, 108 U. S. 336, 2 SCt 682, 27 L. ed. 746.

64. Morrell v. Peo., 32 Ill. 499; State v. Lamont, 2 Wis. 437.

[a] **Motion in judicial proceeding.**—Where it appears that the affidavit was to be used on a certain motion in a judicial proceeding, the indictment should show that such motion was pending. Morrell v. Peo., 32 Ill. 499.

65. Peo. v. Robertson, 3 Wheel. Cr. (N. Y.) 180; King v. Reg., 14 Q. B. 31, 68 ECL 31, 117 Reprint 13.

[a] **Perjury in affidavit to hold to bail.**—An affidavit to hold to bail may be sworn before the issuing of the

based was authorized or required by law,[66] but in the case of a voluntary affidavit, which under the statute may be the basis of a charge of perjury if made for any purpose, an allegation as to a specific purpose is not required.[67]

Use, filing, and effect. Where the use or filing of the affidavit[68] or the acceptance thereof, or action thereon, by another[69] is not an element of the offense,[70] it is not necessary to allege such use, filing, or acceptance. It has been held, however, that it should be shown either that the affidavit was intended by accused for use in the proceeding with which it is sought to connect it,[71] or that it was subsequently so used by him[72] or by some one with his consent.[73]

Knowledge on part of accused. According to some cases, there should be averments showing that accused had knowledge of the proceeding in which the affidavit was made,[74] and that the affidavit was to be used in such proceeding.[75]

Writing. The view has been taken that it is not necessary specifically to allege that the affidavit or statement in question was in writing where that fact is a necessary implication from the facts alleged.[76]

[§ 116] **9. Jurisdiction or Authority in Respect of Proceeding or Matter[77]—a. Jurisdiction of Court—(1) In General—(a) At Common Law.** At common law an indictment for perjury committed in a judicial proceeding must affirmatively show the jurisdiction of the court over such proceedings,[78] which may be done either by a direct allegation to that effect,[79] or by the allegation of facts from which the jurisdiction appears.[80] Where on the face of the indictment it appears that the court or judicial officer before whom the alleged perjury occurred did not have jurisdiction of the proceedings, the indictment is bad.[81]

[§ 117] **(b) Under Statutes in General.** Under the English statutes and similar statutes in this country,[82] declaring what shall constitute sufficient allegations in an indictment or information for perjury, it is not necessary expressly to state that the court had jurisdiction of the case in which the alleged false testimony was given, but an allegation that the court[83] or, according to some cases, the

writ of summons in the action; and therefore an indictment for perjury committed in such an affidavit need not state that any action was pending. King v. Reg., 14 Q. B. 31, 68 ECL 31, 117 Reprint 13.

66. See supra § 107.

67. State v. Malone, 174 Ind. 746, 93 NE 170.

68. U. S.—Noah v. U. S., 128 Fed. 270, 62 CCA 618.

Cal.—Peo. v. Carroll, 39 Cal. A. 654, 180 P 49.

Ga.—Herring v. State, 119 Ga. 709, 46 SE 876.

Ind.—State v. Hopper, 133 Ind. 460, 32 NE 878.

N. H.—State v. Whittemore, 50 N. H. 245, 9 AmR 196.

Eng.—Rex v. Crossley, 7 T. R. 315, 101 Reprint 994.

69. Berry v. U. S., 259 Fed. 203, 170 CCA 271.

[a] **Affidavit made in connection with a desert land entry.**—Berry v. U. S., 259 Fed. 203, 170 CCA 271.

70. See supra § 58.

71. Peo. v. Fox, 25 Mich. 492; State v. Smith, 3 Wash. 14, 27 P 1028. See State v. Lloyd, 77 Wis. 630, 46 NW 898 (indictment should allege that the affidavit made to qualify accused as a voter was intended to be used in, or was material to, some judicial proceedings or inquiry before some officer having cognizance thereof); Rex v. Foster, R. & R. 459, 168 Reprint 897. Compare Hoffman v. Allegan Cir. Judge, 150 Mich. 58, 113 NW 584 (as to sufficiency of preliminary complaint in a prosecution based on a verified answer in a suit in equity).

72. State v. Smith, 3 Wash. 14, 27 P 1028.

73. State v. Smith, supra.

74. Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

[a] **Averments held sufficient.**—Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

75. Sistrunk v. State, supra.

[a] **Averments held sufficient.**—Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

76. Cox v. State, 164 Ark. 126, 261 SW 303; State v. Kelly, 113 Miss. 461, 74 S 325; State v. Foulks, 57 Mo. 461. But see Thomas v. State, 54 Ark. 584, 586, 16 SW 568 (where the court said: "And upon the authorities it may well be questioned whether the indictment is not insufficient because of its failure to state that the affidavit was in writing").

[a] **Affidavit to procure marriage license.**—An indictment for perjury was not bad for not alleging that the affidavit was in writing in view of an allegation that the affidavit was material to secure the marriage license applied for, and so necessarily was the affidavit required by statute, and of the statute defining an affidavit as "a written declaration," etc. Cox v. State, 164 Ark. 126, 261 SW 303.

77. Jurisdiction as element of offense see supra §§ 61-64.

78. Fla.—State v. Blitch, 120 S 355; Wilds v. State, 79 Fla. 575, 84 S 664; Bedsole v. State, 59 Fla. 3, 52 S 1.

Ga.—Franklin v. State, 91 Ga. 712, 17 SE 987.

Ky.—Roundtree v. Roundtree, Ky. Dec. 56.

Me.—State v. Plummer, 50 Me. 217; State v. Thurstin, 35 Me. 205, 58 AmD 695.

Mass.—Com. v. Warden, 11 Metc. 406.

N. Y.—Eighmy v. Peo., 79 N. Y. 546.

N. C.—State v. Gallimon, 24 N. C. 372.

S. C.—State v. Farrow, 44 S. C. L. 165.

Tenn.—State v. Stillman, 7 Coldw. 341.

Tex.—State v. Oppenheimer, 41 Tex. 82; State v. Webb, 41 Tex. 67.

See State v. Lamont, 2 Wis. 437, 442 (where the alleged perjury occurred in a proceeding before a justice of the peace, it would be safer "to set forth in the indictment the facts which give the justice jurisdiction of the proceedings").

79. Franklin v. State, 91 Ga. 712, 17 SE 987; Anderson v. State, 18 Tex. A. 17.

80. Franklin v. State, 91 Ga. 712, 17 SE 987; Ruff v. State, 17 Ga. A. 337, 86 SE 784; State v. Farrow, 44 S. C. L. 165; Anderson v. State, 18 Tex. A. 17. See U. S. v. Mau Sing, 3 Hawaii Fed. 385 (an allegation that a grand jury "was duly and regularly empaneled, sworn and charged by the said district court," referring to the particular court, is a sufficient averment that the court was acting in an official and judicial capacity); Thomas v. Com., 175 Ky. 38, 193 SW 653 (not necessary to allege that a certain magistrate was presiding where facts alleged show that he was presiding); Com. v. Warden, 11 Metc. (Mass.) 406 (indictment based on verified answer in equity sufficient to show that accused legally became a party to the proceeding); Eighmy v. Peo., 79 N. Y. 546 (where an indictment does not aver the commencement and pendency of a civil action in which the prisoner was sworn so as to give the court jurisdiction of the subject matter of the persons and parties, but charges that a referee was duly and legally appointed in an action then pending in the supreme court, naming the parties, it is a sufficient statement to show that the court had jurisdiction of the parties).

[a] **Allegations held sufficient.**—Ruff v. State, 17 Ga. A. 337, 86 SE 784.

81. State v. Furlong, 26 Me. 69; State v. Knight, 84 N. C. 789; State v. Alexander, 11 N. C. 182.

82. See statutory provisions.

83. U. S.—Baskin v. U. S., 209 Fed. 740, 126 CCA 464. See U. S. v. Cuddy, 39 Fed. 696 (where allegations that certain matter was pending in a district court entitled as stated and that laws of the United States authorized the oath to be administered were held sufficient).

Ala.—Thomas v. State, 13 Ala. A. 421, 69 S 413.

Ark.—Loudermilk v. State, 110 Ark. 549, 550, 162 SW 569 [quot Cyc].

Cal.—State v. De Carlo, 124 Cal. 462, 57 P 383. Compare Peo. v. Howard, 111 Cal. 655, 44 P 342 (as to sufficiency of a complaint before a magistrate, upon which the prosecution was founded).

Colo.—Thompson v. State, 26 Colo. 496, 59 P 51.

Ill.—Kizer v. Peo., 211 Ill. 407, 71 NE 1035; Maynard v. Peo., 135 Ill. 416, 25 NE 740.

Iowa.—State v. Newton, 1 Greene 160, 48 AmD 367.

Ky.—Com. v. Combs, 125 Ky. 273, 101 SW 312, 30 KyL 1300.

La.—State v. Aenspacker, 130 La. 717, 58 S 520.

Mass.—Com. v. Knight, 12 Mass. 274, 7 AmD 72.

Minn.—State v. Stein, 48 Minn. 466, 51 NW 474.

Mo.—State v. Stegall, 300 SW 714; State v. Belew, 79 Mo. 584; State v. Keel, 54 Mo. 182.

N. Y.—Eighmy v. Peo., 79 N. Y. 546. See Peo. v. Tredway, 3 Barb. 470; Peo. v. Phelps, 5 Wend. 9 (in both of which cases it was held that, under a general statute as to indictments, jurisdiction was sufficiently alleged by averring that there was authority to administer the oath).

N. C.—State v. Green, 100 N. C. 419, 5 SE 422; State v. Roberson, 98 N. C. 751, 4 SE 511.

Okl.—Williams v. State, 14 Okl. Cr. 100, 167 P 763 (recognizing rule).

Utah.—Peo. v. Greenwell, 5 Utah 112, 13 P 89.

Va.—Fitch v. Com., 92 Va. 824, 24 SE 272.

Wash.—State v. Douetto, 31 Wash. 6, 71 P 556.

Eng.—Lavey v. Reg., 17 Q. B. 496, 7 EngL&Eq 401, 79 ECL 496, 117 Reprint 1372; Rex v. Callanan, 6 B. & C. 102, 9 D. & R. 97, 13 ECL 57, 108

clerk of the court[84] had authority to administer the oath is sufficient. Under such a statute the view has been taken that a general statement as to jurisdiction is sufficient without reciting facts from which such jurisdiction appears.[85] In any event the indictment is sufficient if the jurisdiction and authority of the court fully and substantially appear from the facts set forth.[86] But in the absence of an allegation as to authority to administer the oath, or of any other allegation showing the jurisdiction of the court, the information is insufficient.[87]

[§ 118] **(2) How Jurisdiction Acquired.** While under the modern rules of pleading, an indictment which alleges the jurisdiction of the court in which the perjury was committed over the offense then on trial need not state whether jurisdiction was acquired by indictment or information,[88] formerly the rule was otherwise.[89]

Commission or authority. Notwithstanding under the present statutes it may not be necessary to show the commission or authority on which the jurisdiction of the court depends,[90] the view has been expressed that if there is an attempt to set out the commission it must be set out correctly.[91]

[§ 119] **b. Organization and Authority of Grand Jury.** The due organization or existence of the grand jury before whom the alleged perjury occurred should, according to some cases, be shown in a prosecution for perjury[92] or statutory false swearing[93] by direct and positive averments,[94] although the view has been taken that all the facts showing due organization or existence need not be set out.[95] Although under some statutes the rule may be otherwise,[96] the view has been taken that it should appear that the investigation, in connection with which the testimony on which the charge is based was given, was one which the grand jury had authority to make,[97] and that, where it appears on the face of the indictment that the investigation was not within their authority, the indictment is insufficient;[98] but the want of authority need not be negatived.[99]

[§ 120] **c. Authority of Ministerial or Legislative Officer or Board.** The view has been taken that an indictment for perjury in a proceeding before a ministerial officer or board need not allege the facts showing jurisdiction, if it charges that the officer or board was authorized to administer the oath.[1] So also, when the court can take judicial notice of

Reprint 390; Reg. v. Lawlor, 6 Cox C. C. 187. See Reg. v. Child, 5 Cox C. C. 197, 198.

[a] **Court of general jurisdiction.**—It is not necessary in an indictment for perjury committed before a court of general jurisdiction to set out all the facts to show its jurisdiction; and it is sufficient to aver that it had authority to administer the oath. Eighmy v. Peo., 79 N. Y. 546.

[b] **Territorial jurisdiction.**—An indictment for perjury before a recorder in a criminal case need not show that the offense on the trial of which the perjury was committed was perpetrated within the jurisdiction of the recorder, in view of Code (1907) § 7161 form 81. Thomas v. State, 13 Ala. A. 421, 69 S 413.

84. Gray v. State, 4 Okl. Cr. 292, 111 P 825, 32 LRANS 142.

85. Peo. v. Paden, 71 Cal. A. 247, 234 P 920; State v. Aenspacker, 130 La. 717, 58 S 520. See Williams v. State, 14 Okl. Cr. 100, 167 P 763 (indictment upheld). But see Moore v. U. S., 144 Fed. 962, 964, 75 CCA 670 (where the court said: "It is not sufficient to allege in general terms that the tribunal named had jurisdiction over the issue alleged to have been involved, because such an allegation includes matters of law as well as fact").

[a] **Information containing a description of the offense,** not in the exact words of the statute defining the offense, was sufficient to show jurisdiction where there was also a general allegation as to jurisdiction. State v. Aenspacker, 130 La. 717, 58 S 520.

86. Ark.—Davis v. State, 131 Ark. 542, 199 SW 902.

Ill.—Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922.

La.—State v. Thibodaux, 49 La. Ann. 15, 21 S 127.

Md.—Deckard v. State, 38 Md. 186.

Mass.—Com. v. Bouvier, 164 Mass. 398, 41 NE 651; Com. v. Butland, 119 Mass. 317.

Mich.—Flint v. Peo., 35 Mich. 491.

See State v. Smith, 84 Kan. 646, 114 P 1074 (an information was not bad because it failed to allege that the county attorney who subpœnaed accused to testify before a justice of the peace in respect of violations of law had reason to believe that accused knew of such violations); Walker v. Reg., 8 E. & B. 439, 92 ECL 439, 120 Reprint 163 (where an indictment for alleged perjury in an insolvency proceeding was upheld).

[a] **Allegation that a jury was waived** in trial for a misdemeanor was unnecessary in order to show jurisdiction as the failure to waive did not affect jurisdiction. Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922.

[b] **Judicial notice.**—The view has been expressed that, where an indictment in the same court in which the perjury was committed sufficiently sets forth the facts, the court may take judicial notice of its jurisdiction and authority to administer the oath, and it need not be alleged. State v. Thibodaux, 49 La. Ann. 15, 21 S 127; State v. Grover, 38 La. Ann. 567; State v. Schlessinger, 38 La. Ann. 564.

87. Peo. v. Teixeira, 59 Cal. A. 598, 211 P 470. See State v. Stillman, 7 Coldw. (Tenn.) 341 (allegations in respect of jurisdiction of a military commission were insufficient).

88. State v. Grover, 38 La. Ann. 567; State v. Byrd, 28 S. C. 18, 4 SE 793, 13 AmSR 660; State v. Wise, 3 Lea (Tenn.) 38.

[a] **In Texas** (1) there are intimations in some of the cases that the indictment should show whether the prosecution in the original proceeding was under an indictment. State v. Oppenheimer, 41 Tex. 82; State v. Webb, 41 Tex. 67. (2) But it has been held that it was not necessary to allege that the original prosecution was by indictment where there was an express allegation that the court had jurisdiction of such original prosecution. Powers v. State, 17 Tex. A. 428. (3) An indictment for giving false testimony in the county court on accused's trial for crime need not charge that the information in the county court was based on a complaint therein. Mares v. State, 71 Tex. Cr. 303, 158 SW 1130; Curtis v. State, 46 Tex. Cr. 480, 81 SW 29. (4) An indictment charging accused with perjury, by giving false testimony on his trial in the county court, need not allege that he was charged by information, nor by complaint and information, nor by indictment where a valid trial could be had on a complaint. Etheridge v. State, 76 Tex. Cr. 473, 175 SW 702; Etheridge v. State, 76 Tex. Cr. 198, 173 SW 1031.

89. Steinston v. State, 6 Yerg. (Tenn.) 531 (absence of allegation held fatal).

90. See statutory provisions.

[a] **Indictment held sufficient.**—Baskin v. U. S., 209 Fed. 740, 126 CCA 464; Com. v. Hatfield, 107 Mass. 227; State v. Stegall, (Mo.) 300 SW 714.

91. Rex v. Dowlin, 5 T. R. 311, 101 Reprint 174.

92. Chenault v. State, (Miss.) 122 S 98; State v. Hamilton, 65 Mo. 667. See Woolsey v. Com., 4 KyL 353, 11 Ky. Op. 776. Compare Com. v. Smock, 10 Ky. Op. 430 (holding that it was not necessary to allege that the grand jury was sworn).

93. Allison v. Com., (Ky.) 13 SW (2d) 769.

94. Chenault v. State, (Miss.) 122 S 98; State v. Hamilton, 65 Mo. 667.

95. Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240; St. Clair v. State, 11 Tex. A. 297.

[a] **That the grand jury was selected at a meeting of the board of supervisors** properly convened need not be alleged. Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240.

96. State v. Keel, 54 Mo. 182 (under the statute it need not appear that the grand jury had jurisdiction of the subject matter of the inquiry).

[a] **Venue** of the offense and investigation need not be alleged. State v. Keel, 54 Mo. 182.

97. Com. v. Taylor, 96 Ky. 394, 29 SW 138, 16 KyL 482; Chenault v. State, (Miss.) 122 S 98; Alt v. State, 83 Tex. Cr. 337, 203 SW 53; Com. v. Pickering, 8 Gratt. (49 Va.) 628, 56 AmD 158.

[a] **Showing where offense committed.**—It is necessary to show on the face of the indictment that the offense as to which accused gave evidence was committed within the county. Com. v. Pickering, 8 Gratt. (49 Va.) 628, 56 AmD 158.

[b] **Violation of law.**—According to some cases it should be shown that the matter under investigation was a violation of law. Chenault v. State, (Miss.) 122 S 98; Pigg v. State, 71 Tex. Cr. 600, 160 SW 691. See Carpenter v. State, 81 Tex. Cr. 298, 195 SW 199 (per Prendergast, J.).

[c] **False swearing.**—Com. v. Taylor, 96 Ky. 394, 29 SW 138, 16 KyL 482.

[d] **Averments held sufficient.**—Francis v. State, 57 Tex. Cr. 555, 123 SW 1114; Peo. v. Greenwell, 5 Utah 112, 13 P 89.

Setting out subject matter of investigation in general see supra § 112.

98. State v. Hamilton, 65 Mo. 667; Gallegos v. State, 50 Tex. Cr. 190, 95 SW 123.

99. Timmins v. State, 82 Tex. Cr. 263, 199 SW 1106; Bell v. State, 75 Tex. Cr. 401, 171 SW 239. But see Carpenter v. State, 81 Tex. Cr. 298, 195 SW 199 (it is better, if not necessary, that the indictment contain an allegation that the grand jury was investigating whether an offense had been committed in the county).

1. State v. Belew, 79 Mo. 584; Burns v. Peo., 59 Barb. (N. Y.) 531; Peo. v. Tredway, 3 Barb. (N. Y.) 470; Peo. v. Phelps, 5 Wend. (N. Y.) 9.

the fact that the officer or board had jurisdiction of the proceeding in question, it is not necessary to show by facts stated or by a distinct averment that jurisdiction existed in the particular case.[2] Moreover, the failure specifically to allege that the officer or board which acted in the particular matter had jurisdiction or authority[3] or was legally organized[4] does not render the information bad where such authority or organization appears from the allegations made. On the other hand in various cases in which the jurisdiction of a particular body over certain proceedings or to investigate certain matters is special, it has been held that the facts showing such jurisdiction should be alleged.[5] Moreover, it has been held that an indictment for false swearing should show facts from which it will appear that the subject matter of an investigation was within the authority of the ministerial or legislative officers who made such investigation.[6] In any event, where it appears on the face of the indictment that the tribunal before which the trial, in which the alleged perjury was committed, occurred, did not have jurisdiction of the subject matter, the indictment is insufficient.[7]

[§ 121] **10. Authority To Administer Oath[8]—a. In General.** In an indictment or information for perjury[9] or false swearing[10] the authority of the officer or other person to administer the oath must be set forth by proper averment; and, if this is not done, the indictment or information will be fatally defective.[11]

Form and method of alleging authority. The authority may be set out by an express averment that the officer had authority,[12] or by setting out such facts as make it judicially appear that he had such authority.[13] Where such facts are alleged, the view usually taken is that the formal allegation of authority is unnecessary.[14] Where such facts are alleged and also the general authority of the officer to administer an oath, it is not necessary specifically to allege that he had authority to administer the oath

2. Rich v. U. S., 2 Okl. 146, 37 P 1083, 1 Okl. 354, 33 P 804; Peters v. U. S., 2 Okl. 138, 37 P 1081; State v. Jewett, 48 Or. 577, 85 P 994. See Markham v. U. S., 160 U. S. 319, 16 SCt 288, 40 L. ed. 441 (authority of commissioner of pensions to institute inquiry in which alleged perjury was committed need not be set forth); Nurnberger v. U. S., 156 Fed. 721, 84 CCA 377 (indictment based on affidavit in proceeding in land office sufficient after verdict).

3. Peo. v. Torterice, 66 Cal. A. 115, 225 P 760.

[a] **Issuance of marriage license.**—Peo. v. Torterice, 66 Cal. A. 115, 225 P 760.

4. Johnson v. Peo., 94 Ill. 505.

5. State v. McCone, 59 Vt. 117, 7 A 406; State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249.

[a] **Investigation by municipal council.**—State v. Dallagiovanna, 69 Wash. 84, 124 P 209, 40 LRANS 249.

6. Com. v. Ransdall, 153 Ky. 334, 155 SW 1117; Com. v. Hillenbrand, 96 Ky. 407, 29 SW 287, 16 KyL 485.

[a] **Investigation by board of aldermen.**—Com. v. Hillenbrand, 96 Ky. 407, 29 SW 287, 16 KyL 485.

7. State v. Stillman, 7 Coldw. (Tenn.) 341.

[a] **Military commission before which a civil action was tried.**—State v. Stillman, 7 Coldw. (Tenn.) 341.

8. Authority as element of offense see supra §§ 78-80.

9. U. S.—Hilliard v. U. S., 24 F. (2d) 99.

Ark.—Beavers v. State, 124 Ark. 38, 186 SW 300.

Cal.—Peo. v. Dunlap, 113 Cal. 72, 45 P 183.

Fla.—State v. Blitch, 120 S 355; Campbell v. State, 92 Fla. 775, 109 S 809; Wilds v. State, 79 Fla. 575, 84 S 664; Bedsole v. State, 59 Fla. 3, 52 S 1; Adkinson v. State, 59 Fla. 1, 51 S 818; Craft v. State, 42 Fla. 567, 29 S 418; Freeman v. State, 19 Fla. 552.

Ill.—Morrell v. Peo., 32 Ill. 499.

Ind.—State v. Hopper, 133 Ind. 460, 32 NE 878.

Iowa.—State v. Cunningham, 66 Iowa 94, 23 NW 280; State v. Nickerson, 46 Iowa 447.

Ky.—Com. v. Combs, 125 Ky. 273, 101 SW 312, 30 KyL 1300.

La.—State v. Harlis, 33 La. Ann. 1172.

Me.—State v. Furlong, 26 Me. 69.

Mass.—Com. v. Smith, 11 Allen 243.

Miss.—Chenault v. State, 122 S 98.

Mo.—State v. Owen, 73 Mo. 440.

N. M.—U. S. v. Hall, 5 N. M. 178, 21 P 85.

N. C.—State v. Knight, 84 N. C. 789.

Or.—State v. Woolridge, 45 Or. 389, 78 P 333.

Pa.—Com. v. O'Neill, 5 Pa. Co. 209.

Tex.—Jefferson v. State, (Cr.) 29 SW 1090; Stewart v. State, 6 Tex. A. 184.

Wash.—State v. Epstein, 138 Wash. 118, 244 P 388.

W. Va.—Stofer v. State, 3 W. Va. 689.

Eng.—Reg. v. Overton, 4 Q. B. 83, 45 ECL 83, 114 Reprint 828; Rex v. Callanan, 6 B. & C. 102, 13 ECL 57, 108 Reprint 390; Rex v. McDonald, 21 Cox C. C. 70.

Can.—Rex v. Morrison, 49 N. S. 446, 28 DomLR 113, 26 CanCrCas 26.

[a] **Allegation that oath was administered by a "coroner,"** without stating that it was by a justice acting as coroner, fails to show that it was by lawful authority, the office of coroner not having existed since the adoption of the constitution of 1869. Stewart v. State, 6 Tex. A. 184.

10. Sanlin v. Com., 212 Ky. 394, 279 SW 648; Com. v. Ransdall, 153 Ky. 334, 155 SW 1117; Com. v. Kane, 92 Ky. 457, 18 SW 7; Green v. State, 86 Tex. Cr. 556, 217 SW 1043.

11. Iowa.—State v. Phippen, 62 Iowa 54, 17 NW 146.

La.—State v. Theriot, 50 La. Ann. 1187, 24 S 179.

Me.—State v. Furlong, 26 Me. 69.

Mo.—State v. Owen, 73 Mo. 440.

N. M.—U. S. v. Hall, 5 N. M. 178, 21 P 85.

N. C.—State v. Knight, 84 N. C. 789.

[a] **Want of authority on particular date.**—Where a township assessor was not authorized to enter upon the duties of his office before a certain time, an allegation that accused committed perjury by swearing falsely before the assessor previously to that time was bad, since the assessor had no authority to administer the oath. State v. Phippen, 62 Iowa 54, 17 NW 146.

12. U. S.—Nurnberger v. U. S., 156 Fed. 721, 84 CCA 377; U. S. v. Boggs, 31 Fed. 337.

Ark.—State v. Leatherman, 125 Ark. 243, 188 SW 545, 546 [quot Cyc]; Beavers v. State, 124 Ark. 38, 186 SW 300; Londermilk v. State, 110 Ark. 549, 550, 162 SW 569 [quot Cyc].

Ind.—Hall v. State, 178 Ind. 448, 99 NE 732; State v. Hopper, 133 Ind. 460, 32 NE 878. But see McGregor v. State, 1 Ind. 232 (where the authority of the clerk of the circuit court to administer an oath was limited to special cases, a general averment of authority was insufficient).

Iowa.—State v. Cunningham, 66 Iowa 94, 23 NW 280.

Ky.—Com. v. Combs, 125 Ky. 273, 101 SW 312, 30 KyL 1300. See Com. v. Weingartner, 27 SW 815, 16 KyL 221.

La.—State v. Maxwell, 28 La. Ann. 361.

Or.—State v. Woolridge, 45 Or. 389, 78 P 333.

Pa.—Com. v. O'Neill, 5 Pa. Co. 209.

Tex.—Waters v. State, 30 Tex. A. 284, 17 SW 411.

W. Va.—Stofer v. State, 3 W. Va. 689.

But see Peo. v. Cohen, 118 Cal. 74, 50 P 20 (holding that, where the alleged perjury occurred on a preliminary examination before a magistrate, the indictment must show that the magistrate directed another officer to administer the oath in order to show the authority of such officer).

[a] **Allegation that oath was administered by a justice of the peace,** who had authority to administer such oath, is sufficient without a further allegation of facts showing that authority to administer an oath existed in the instance in question, such facts being proper to be offered in evidence at the trial. Com. v. Combs, 125 Ky. 273, 101 SW 312, 30 KyL 1300.

[b] **Person authorized by foreman of grand jury.**—An indictment charging perjury before the grand jury, which alleged that the oath was administered by a specified person "under the direction of the foreman of said grand jury, as he was then and there authorized by law to do," is sufficient. Eoff v. State, 75 Tex. Cr. 244, 170 SW 707.

13. Ark.—Clower v. State, 151 Ark. 359, 236 SW 265.

Cal.—Peo. v. Collins, 6 Cal. A. 492, 92 P 513.

Ind.—Masterson v. State, 144 Ind. 240, 43 NE 138; State v. Hopper, 133 Ind. 460, 32 NE 878.

Iowa.—State v. Cunningham, 66 Iowa 94, 23 NW 280.

Ky.—Com. v. Kane, 92 Ky. 457, 18 SW 7.

La.—State v. Thibodaux, 49 La. Ann. 15, 21 S 127.

Mass.—Com. v. Smith, 11 Allen 243; Com. v. Hughes, 5 Allen 499.

Tex.—St. Clair v. State, 11 Tex. A. 297.

Can.—Rex v. Morrison, 49 N. S. 446, 28 DomLR 113, 26 CanCrCas 26.

[a] **Deputy clerk.**—Peo. v. Bradbury, 155 Cal. 808, 103 P 215.

14. U. S.—U. S. v. Eddy, 134 Fed. 114.

Ark.—Clower v. State, 151 Ark. 359, 236 SW 265.

Ind.—Masterson v. State, 144 Ind. 240, 43 NE 138; State v. Hooper, 133 Ind. 460, 32 NE 878.

Iowa.—State v. Harter, 131 Iowa 199, 108 NW 232.

Ky.—Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683.

Can.—Reg. v. Callaghan, 19 U. C. Q. B. (Ont.) 364.

in the particular proceeding.[15] There is, however, authority for the view that the circumstance under which an oath was administered should have been set out in order to determine whether the officer who administered the oath had authority.[16]

[§ 122] **b. How Authority Acquired.** Under the modern statutes it is not necessary to set forth the commission or authority of the person or persons before whom the perjury was committed,[17] the statement that such person had authority being sufficient;[18] and this is the rule in some jurisdictions even in the absence of statutory regulation in this regard.[19] An indictment charging false swearing during an examination by a magistrate to ascertain who has committed a certain offense is not defective for failure to allege the issuance of a summons for the examination since the issuance of the summons is not necessary to authorize the magistrate to administer the oath.[20] Where the authority to administer the oath depends upon certain ordinances, it is not necessary to set forth such ordinances in hæc verba.[21]

Surplusage. Allegations as to the source of authority which add nothing to the actual authority of the officer to administer the oath may be rejected as surplusage.[22]

[§ 123] **11. Description or Identification of Court or Tribunal Having Jurisdiction.** The indictment or information must correctly designate or describe the court or tribunal before which the alleged perjury was committed[23] by setting forth the name or style of such court.[24] But there is authority for the view that the mere fact that the description is not in the words of the statute creating the court does not render the indictment bad where judicial notice may be taken in respect of what court was intended.[25] Moreover, it is not necessary directly to allege before what board the proceeding was conducted where that fact clearly appears from the averments made.[26] The person holding the court need not be named,[27] although it is not error to give the name of such person.[28]

Surplusage. Certain minor defects in the description of the court have been disregarded as surplusage.[29]

[§ 124] **12. Description of Person Who Administered Oath.** Although under the statutory form of indictment prescribed in some jurisdictions it may not be necessary to show by whom the oath was administered,[30] the general rule is that the indictment or information should, by proper designation, show by whom the oath was administered,[31] and the omission of such showing is fatal.[32]

Naming officer. While such designation may call for an averment of the name of such officer,[33] it is generally held that, where the offense was committed in a judicial proceeding, it is not necessary to name the officer before whom the false oath was taken,[34] designating the court being considered sufficient;[35] and where the court or presiding judicial officer acts through another in administering the oath, an averment that the oath was administered by the court or by the presiding judicial officer is sufficient.[36]

15. Barnard v. U. S., 162 Fed. 618, 89 CCA 376.

16. Rex v. McDonald, 21 Cox C. C. 70.

17. See statutory provisions.

18. Ark.—State v. Leatherman, 125 Ark. 243, 188 SW 545.
Cal.—Peo. v. De Carlo, 124 Cal. 462, 57 P 383.
Ill.—Johnson v. Peo., 94 Ill. 505.
Ind.—Burk v. State, 81 Ind. 128.
Mo.—State v. Marshall, 47 Mo. 378.
N. H.—State v. Langley, 34 N. H. 529.
N. C.—State v. Bryson, 4 N. C. 115.
Oh.—Halleck v. State, 11 Oh. 400.
Eng.—Rex v. Callanan, 6 B. & C. 102, 13 ECL 57, 108 Reprint 390.
See Cowan v. State, 15 Ala. A. 87, 72 S 578 (apparently recognizing rule).
But see U. S. v. Wilcox, 28 F. Cas. No. 16,692, 4 Blatchf. 391 (holding that, where it was not alleged that the officer held an office which apparently conferred upon him the right to administer the oath in question, the indictment was bad where it failed to allege that he had authority to administer the particular oath involved).

19. State v. Peters, 42 Tex. 7; Bradberry v. State, 7 Tex. A. 375; Stewart v. State, 6 Tex. A. 184.

20. Hollen v. Com., 185 Ky. 582, 215 SW 174.

21. State v. Dineen, 203 Mo. 628, 102 SW 480.
[a] **Clerk of police court.**—An indictment for perjury in a police court is not bad for failing to set forth in hæc verba the provision of the ordinances creating the police court and authorizing the appointment of a clerk of that court and authorizing him to administer oaths where the ordinances are referred to by number and their general tenor recited. State v. Dineen, 203 Mo. 628, 102 SW 480.

22. State v. Langley, 34 N. H. 529.

23. U. S.—Clayton v. U. S., 284 Fed. 537.
Ala.—Cowan v. State, 15 Ala. A. 87, 72 S 578.
Colo.—Smith v. Peo., 32 Colo. 251, 75 P 914.
Ind.—State v. Gross, 175 Ind. 597, 95 NE 117.
Ky.—Woolsey v. Com., 4 KyL 353, 11 Ky. Op. 776.
La.—State v. Harlis, 33 La. Ann. 1172.
Minn.—State v. Stein, 48 Minn. 466, 51 NW 474.
Mo.—State v. Nelson, 146 Mo. 256, 48 SW 84.
N. Y.—Guston v. Peo., 4 Lans. 487, 61 Barb. 35.
N. C.—State v. Street, 5 N. C. 156, 3 AmD 682.
Okl.—Schlumbohm v. State, 5 Okl. Cr. 36, 113 P 235.
Tex.—State v. Oppenheimer, 41 Tex. 82.
Va.—Conner v. Com., 2 Va. Cas. (4 Va.) 30.
[a] **Regimental court of inquiry.**—Under an indictment for perjury in taking a false oath before a regimental court of inquiry, the indictment must set forth of what number of officers such court consisted and what was their respective rank, so that the court may see whether the court of inquiry was legally constituted or not. Conner v. Com., 2 Va. Cas. (4 Va.) 30.
[b] **Descriptions held sufficient.**—Clayton v. U. S., 284 Fed. 537; U. S. v. Walsh, 22 Fed. 644; Smith v. Peo., 32 Colo. 251, 75 P 914; State v. Stein, 48 Minn. 466, 51 NW 474; State v. Nelson, 146 Mo. 256, 48 SW 84.

24. Ala.—Cowan v. State, 15 Ala. A. 87, 72 S 578.
Ky.—Woolsey v. Com., 4 KyL 353.
N. Y.—Guston v. Peo., 4 Lans. 487, 61 Barb. 35.
N. C.—State v. Street, 5 N. C. 156, 3 AmD 682.
Tex.—State v. Oppenheimer, 41 Tex. 82.

25. Thomas v. State, 13 Ala. A. 421, 69 S 413.

26. State v. Jewett, 48 Or. 577, 85 P 994.

27. West v. U. S., 258 Fed. 413, 169 CCA 429; U. S. v. Walsh, 22 Fed. 644; State v. Flowers, 109 N. C. 841, 13 SE 718; Schlumbohm v. State, 5 Okl. Cr. 36, 113 P 235.

28. State v. Flowers, 109 N. C. 841, 13 SE 718.

29. Reg. v. Child, 5 Cox C. C. 197.

30. State v. Sargood, 80 Vt. 415, 68 A 49, 130 AmSR 995, 13 AnnCas 367. See Jackson v. State, 156 Ala. 161, 47 S 77 (dictum); McClerkin v. State, 105 Ala. 107, 17 S 123 (dictum).

31. U. S.—Hilliard v. U. S., 24 F. (2d) 99.
Ga.—Wilson v. State, 115 Ga. 206, 41 SE 696, 90 AmSR 104.
Ill.—Kerr v. Peo., 42 Ill. 307.
Ind.—State v. Gross, 175 Ind. 597, 95 NE 117; Hitesman v. State, 48 Ind. 473.
La.—State v. Harlis, 33 La. Ann. 1172.
Mo.—State v. Thothos, 147 Mo. A. 596, 126 SW 797.
Tex.—Jefferson v. State, (Cr.) 29 SW 1090.
[a] **Averments held sufficient.**—Wilson v. State, 115 Ga. 206, 41 SE 696, 90 AmSR 104.

32. Kerr v. Peo., 42 Ill. 307.

33. Davis v. State, 193 Ind. 650, 141 NE 458; Jefferson v. State, (Tex. Cr.) 29 SW 1090.

34. U. S.—West v. U. S., 258 Fed. 413, 169 CCA 429 (trial in court). But see U. S. v. Wilcox, 28 F. Cas. No. 16,692, 4 Blatchf. 391 (as to description of a United States commissioner).
Colo.—Smith v. Peo., 32 Colo. 251, 75 P 914.
Ga.—Ruff v. State, 17 Ga. A. 337, 86 SE 784.
Iowa.—State v. Harter, 131 Iowa 199, 108 NW 232.
Okl.—Schlumbohm v. State, 5 Okl. Cr. 36, 113 P 235.
Or.—State v. Spencer, 6 Or. 152.
See also infra text and note 35.
[a] **Illustration.**—Allegation that accused "was then and there duly sworn before the duly authorized clerk of said court" is sufficient. State v. Harter, 131 Iowa 199, 108 NW 232, 9 AnnCas 764.

35. Com. v. Kane, 92 Ky. 457, 18 SW 7; Schlumbohm v. State, 5 Okl. Cr. 36, 113 P 235; State v. Spencer, 6 Or. 152.

36. Cain v. State, 10 Ga. A. 473, 73 SE 623; State v. Caywood, 96 Iowa 367, 65 NW 385.
Proof and variance see infra § 144.

Official title. The view has been taken that the official title of the officer administering the oath need not be set forth;[37] but there is authority to the contrary.[38]

Perjury before grand jury. An indictment for perjury before the grand jury need not allege the name of the foreman.[39]

[§ 125] **13. Administration and Making of Oath[40]—a. In General.** An indictment or information for perjury[41] or false swearing[42] must show that accused was sworn in the proceedings in which the false testimony was given. Where perjury is assigned in swearing to an affidavit, the indictment must allege that accused made the affidavit in question.[43] The indictment is bad where it appears on the face thereof that the oath administered was not a lawful oath.[44]

[§ 126] **b. Sufficiency of Averments.** It has frequently been stated in general terms that the fact that accused was sworn should be alleged directly and positively, and not by way of inference or recital;[45] but the courts under modern rules of procedure have not in some instances held the prosecution strictly to this requirement.[46] Moreover, an averment that the oath was taken "before" the officer who administered it has been regarded as sufficient.[47]

As to form and manner of administration. Under the modern practice it is not necessary to allege in what particular form accused was sworn to testify,[48] and an averment which describes an oath which is in substantial compliance with the applicable statute is sufficient.[49] It has been held that it is sufficient to allege that accused was "duly sworn,"[50]

37. Com. v. O'Neill, 5 Pa. Co. 209.

38. U. S. v. Wilcox, 28 F. Cas. No. 16,692, 4 Blatchf. 391.

[a] **There is not a fatal repugnance** between an allegation in an indictment to the effect that the oath was taken before a designated person acting as justice of the peace and ex officio notary public, and the jurat to the affidavit involved which was set forth describing such person only as a justice of the peace. Waters v. State, 30 Tex. A. 284, 17 SW 411.

39. St. Clair v. State, 11 Tex. A. 297.

40. Administrator of oath: Authority of see supra § 121. Description of see supra § 124.

41. U. S.—Hogue v. U. S., 184 Fed. 245, 106 CCA 387; U. S. v. McConaughy, 33 Fed. 168, 13 Sawy. 141; U. S. v. Hearing, 26 Fed. 744.

Cal.—Peo. v. Simpton, 133 Cal. 367, 65 P 834; Peo. v. Dunlap, 113 Cal. 72, 45 P 183.

Fla.—State v. Blitch, 120 S 355; Campbell v. State, 92 Fla. 775, 109 S 809; Wilds v. State, 79 Fla. 575, 84 S 664; Bedsole v. State, 59 Fla. 3, 52 S 1; Adkinson v. State, 59 Fla. 1, 51 S 818; Craft v. State, 42 Fla. 567, 29 S 418.

La.—State v. Eddens, 52 La. Ann. 1461, 27 S 742.

Miss.—Chenault v. State, 122 S 98.

N. H.—State v. Divoll, 44 N. H. 140.

Tex.—Pigg v. State, 71 Tex. Cr. 600, 160 SW 691; Parker v. State, 44 Tex. Cr. 147, 69 SW 75; Curtley v. State, 42 Tex. Cr. 227, 59 SW 44.

Eng.—Rex v. Stevens, 5 B. & C. 246, 11 ECL 448, 108 Reprint 92; Reg. v. Goodfellow, C. & M. 569, 41 ECL 310.

See State v. Hamilton, 7 Mo. 300 (in an indictment against a party to a suit, it was necessary to show that he was sworn under circumstances which authorized him to be sworn as a witness in the case in view of the fact that the general rule was that a party could not testify except under the special circumstances set forth in the statute then in force); State v. Epstein, 138 Wash. 118, 244 P 388 (where an information which contained no averment that accused was sworn was held insufficient, but there were other grounds on which the demurrer was sustained).

42. Sanlin v. Com., 212 Ky. 394, 279 SW 648.

43. Copeland v. State, 23 Miss. 257.

44. Phillips v. State, 5 Ga. A. 597, 63 SE 667.

[a] **Rule applied** where an indictment for false swearing charged that one of defendants administered to himself, along with others, an oath as election manager as to which the false swearing was charged. Phillips v. State, 5 Ga. A. 597, 63 SE 667.

45. U. S.—U. S. v. McConaughy, 33 Fed. 168, 13 Sawy. 141; U. S. v. Hearing, 26 Fed. 744.

Mo.—State v. Hamilton, 65 Mo. 667.

N. H.—State v. Divoll, 44 N. H. 140.

Tex.—Green v. State, 86 Tex. Cr. 556, 217 SW 1043.

Wis.—Brown v. State, 91 Wis. 245, 64 NW 749.

Eng.—Rex v. Stevens, 5 B. & C. 246, 11 ECL 448, 108 Reprint 92; Rex v. Richards, 7 D. & R. 665, 16 ECL 313.

[a] **Applying rule** to an indictment for false swearing. Green v. State, 86 Tex. Cr. 556, 217 SW 1043.

[b] **Allegation that defendant did "depose and swear"** to a deposition set forth is not sufficient to show that he had been duly sworn. U. S. v. McConaughy, 33 Fed. 168, 13 Sawy. 141.

[c] **Averment held insufficient.—** "Made and subscribed in open court, wickedly, falsely, willfully, corruptly and knowingly, the following false and corrupt oath, which is in substance as follows," etc., was held not a sufficient allegation that the party was sworn. State v. Divoll, 44 N. H. 140.

[d] **Averment held sufficient.—**Allegation that an affidavit was subscribed and sworn to and that an associate member of the legal advisory board administered the oath. Whiteside v. U. S., 257 Fed. 509, 168 CCA 513.

46. State v. Varnado, 154 La. 575, 97 S 865; State v. Scott, 78 Minn. 311, 81 NW 3. See State v. Corson, 59 Me. 137 (where an indictment which followed the statutory form was upheld, but the question as to failure to aver that accused was sworn was apparently not specifically raised).

[a] **In California.—**Peo. v. Ennis, 137 Cal. 263, 70 P 84. But see Peo. v. Dunlap, 113 Cal. 72, 45 P 183 (where demurrer to indictment was sustained).

[b] **In Vermont** (1) in recognizing the sufficiency of a form prescribed by statute, failure directly to aver that accused was sworn was held not to render the indictment bad. State v. Webber, 78 Vt. 463, 62 A 1018; State v. Camley, 67 Vt. 322, 31 A 840. (2) Allegation that accused committed perjury was held to imply an oath legally administered. State v. Webber, supra; State v. Camley, supra. (3) This rule applies whether the crime charged is common-law perjury or statutory false swearing. State v. Webber, supra.

47. Cal.—Peo. v. Ennis, 137 Cal. 263, 70 P 84.

Ind.—State v. Ellison, 8 Blackf. 225.

La.—State v. Varnado, 154 La. 575, 97 S 865.

Md.—State v. Mercer, 101 Md. 535, 61 A 220.

Minn.—State v. Scott, 78 Minn. 311, 81 NW 3.

Tex.—Flournoy v. State, (Cr.) 59 SW 902.

See Campbell v. Peo., 8 Wend. (N. Y.) 636 (dictum).

48. Ark.—State v. Roberts, 148 Ark. 328, 230 SW 15.

Ga.—Sistrunk v. State, 18 Ga. A. 42, 88 SE 796; Broadwater v. State, 10 Ga. A. 458, 73 SE 691.

N. Y.—Tuttle v. Peo., 36 N. Y. 431, 2 Transcr. A. 306; Burns v. Peo., 5 Lans. 189, 59 Barb. 531.

Or.—State v. Luper, 95 P 811.

Tex.—Jackson v. State, 15 Tex. A. 579.

See also infra text and notes 50–53.

[a] **Averment held sufficient.—**In a case in which the verification of a complaint in which, it was alleged, the false assertions were made was not set out in the information, an averment that accused swore to "facts" stated in a complaint is not defective as charging the verification of the true statements only. State v. Luper, (Or.) 95 P 811.

49. Johnson v. State, 76 Ga. 790; Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328 [aff 135 N. Y. 639 mem, 32 NE 647 mem].

50. Ala.—Jackson v. State, 156 Ala. 161, 47 S 77 (dictum).

Ark.—State v. Roberts, 148 Ark. 328, 230 SW 15; State v. Green, 24 Ark. 591.

Iowa.—State v. O'Hagan, 38 Iowa 504.

Mass.—Com. v. Carel, 105 Mass. 582.

Minn.—State v. Smith, 153 Minn. 167, 190 NW 48.

N. H.—State v. Divoll, 44 N. H. 140.

N. J.—Dodge v. State, 24 N. J. L. 455.

N. Y.—Burns v. Peo., 5 Lans. 189, 59 Barb. 531.

Or.—State v. Woolridge, 45 Or. 389, 78 P 333.

Pa.—Respublica v. Newell, 3 Yeates 407, 2 AmD 381.

S. C.—State v. Farrow, 44 S. C. L. 165.

Tex.—Lamar v. State, 49 Tex. Cr. 563, 95 SW 509; Beach v. State, 32 Tex. Cr. 240, 22 SW 976; Jackson v. State, 15 Tex. A. 579.

Eng.—Rex v. McCarther, Peake 155, 170 Reprint 132.

[a] **In California** (1) because of the wording of a particular statutory definition of "perjury," it has been held that there should be a showing that accused had been sworn to testify, disclose, or certify truly. Peo. v. Simpton, 133 Cal. 367, 65 P 834. (2) But an indictment, alleging that accused was duly sworn before the superior court that the evidence he should give should be the truth, the whole truth, and nothing but the truth, charges that accused was sworn to testify truly. Peo. v. Bradbury, 155 Cal. 808, 103 P 215. (3) An indictment charging that a specified officer administered an oath to accused and that the oath was that accused would testify to the truth, the whole truth, and nothing but the truth, although not precisely in the form prescribed by the code, was held sufficient. Peo. v. Collins, 6 Cal. A. 492, 92 P 513. (4) In a prosecution under Pen. Code § 118a,

was solemnly sworn,[51] or that the oath was administered in due form of law,[52] or that a lawful oath was administered,[53] provided, according to some cases, the indictment states the circumstances under which the oath was required and the occasion on which it was made, so as to show that its violation was perjury.[54] According to some cases, in the absence of the words of the oath, there should be an averment that accused was "duly sworn" or words of equivalent import,[55] although the view has been taken that the failure to allege in a prosecution for false swearing that accused was "duly" sworn is not fatal.[56] The failure to aver whether the oath was administered in person or through an interpreter does not render the indictment insufficient.[57]

[§ 127] **14. Setting Forth False Statement.** While the indictment or information should in some form set out the statement or testimony alleged to be false,[58] and, where necessary, should show that the testimony or statement is one on which perjury may be predicated,[59] under the English statutes, and similar statutes in this country, it has been held that it is not necessary to set out the exact language used by accused, it being sufficient to allege the substance and effect thereof.[60] But the charge should at least set forth the substance of the false testimony,[61] and not merely the conclusion of the pleader or the meaning of the testimony;[62] and, according to some cases, it should set forth the false testimony as nearly as possible in the language of accused.[63] In any event it may properly set forth the exact language.[64] It is not necessary to set out the whole of the false matter;[65] such parts as are alleged to have been false and are material are all that are required.[66] Nor is it necessary to set forth the questions in answer to which the perjury is charged to have been committed;[67] nor to show whether the false testimony was given in answer to a specific question[68] or in the course of accused's narrative of the facts.[69] The allegations should clearly identify the false testimony on which the charge is based.[70] Moreover, the matter alleged to be false must be set out sufficiently and with such particularity as to inform the court and accused of the particular offense charged.[71]

and based upon the making of a false affidavit to be used to obtain a new trial in a criminal case, an information, failing to allege that defendant first took the oath to testify or depose truly, was not defective for that reason. Peo. v. Teixeira, 59 Cal. A. 598, 211 P 470.

[b] **In Florida** an allegation that accused was "duly sworn according to law" is a sufficient allegation that he was "lawfully required to depose the truth," as used in the statute defining "perjury." Settles v. State, 75 Fla. 296, 78 S 287.

[c] **Failure to allege that oath was administered.**—An indictment alleging that that defendant was "duly sworn" is not objectionable on the ground that it does not charge the oath to have been administered by any one. State v. O'Hagan, 38 Iowa 504.

51. Ruch v. State, 111 Oh. St. 580, 146 NE 67.

[a] **Even though it is not affirmatively shown that accused received the administration of oath as a witness,** the indictment is sufficient if it alleges that the false statement was made by a person who then and there was solemnly sworn. Ruch v. State, 111 Oh. St. 580, 146 NE 67.

52. Tuttle v. Peo., 36 N. Y. 431.

53. Sistrunk v. State, 18 Ga. A. 42, 88 SE 796; Broadwater v State, 10 Ga. A. 458, 73 SE 691.

54. State v. Umdenstock, 43 Tex. 554.

Proceeding in which oath administered and necessity or authority for oath see supra passim §§ 49–60.

55. Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919.

[a] **The court criticized** the use of the words "sworn as a witness," but did not decide whether the indictment was fatally defective in this regard. Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919.

56. Thomas v. Com., 175 Ky. 38, 193 SW 653.

57. U. S. v. Mau Sing, 3 Hawaii Fed. 385.

58. U. S.—Hogue v. U. S., 184 Fed. 245, 106 CCA 387.

Ark.—State v. Roberts, 148 Ark. 328, 230 SW 15.

Cal.—Peo. v. Bradbury, 155 Cal. 808, 103 P 215.

Ga.—Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

Ill.—Peo. v. Wright, 324 Ill. 29, 154 NE 408.

Ind.—Coppack v. State, 36 Ind. 513.

Ky.—Yarberry v. Com., 209 Ky. 15, 272 SW 24.

Me.—State v. Mace, 76 Me. 64.

Mass.—Com. v. Knight, 12 Mass. 274, 7 AmD 72.

Mo.—State v. Neal, 42 Mo. 119.

N. Y.—Peo. v. Ostrander, 64 Hun 335, 19 NYS 324 [aff 135 N. Y. 639 mem, 32 NE 647 mem].

N. C.—State v. Groves, 44 N. C. 402.

Oh.—McCaffrey v. State, 105 Oh. St. 508, 138 NE 61.

Pa.—Com. v. De Cost, 35 Pa. Super. 88.

Porto Rico.—Peo. v. Acevedo, 10 Porto Rico 30.

R. I.—State v. Terline, 23 R. I. 530, 51 A 204, 91 AmSR 650.

Tex.—State v. Umdenstock, 43 Tex. 554; Shely v. State, 35 Tex. Cr. 190, 32 SW 901.

Vt.—State v. Bishop, 1 D. Chipm. 120.

Eng.—Reg. v. Thomas, 2 C. & K. 806, 61 ECL 806.

Can.—Reg. v. Trudel, 14 Que. L. 193.

[a] **Allegations held sufficient.**—McCaffrey v. State, 105 Oh. St. 508, 138 NE 61.

59. Peo. v. Acevedo, 10 Porto Rico 30; Peo. v. Hernandez, 9 Porto Rico 477.

60. U. S.—Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem]; U. S. v. Walsh, 22 Fed. 644.

Ark.—State v. Roberts, 148 Ark. 328, 230 SW 15; Beavers v. State, 124 Ark. 38, 186 SW 300.

Cal.—Peo. v. Bradbury, 155 Cal. 808, 103 P 215.

Ill.—Peo. v. Wright, 324 Ill. 29, 154 NE 408; Peo. v. Berry, 309 Ill. 511, 141 NE 132; Peo. v. Niles, 295 Ill. 525, 129 NE 97; Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240. But see Wilkinson v. Peo., 226 Ill. 135, 80 NE 699 (where the court said that it is not sufficient to state the substance of the alleged false testimony).

N. Y.—Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328; Peo. v. Warner, 5 Wend. 271; Peo. v. Robertson, 3 Wheel. Cr. 180.

N. C.—State v. Groves, 44 N. C. 402.

Pa.—Com. v. De Cost, 35 Pa. Super. 88.

R. I.—State v. Terline, 23 R. I. 530, 51 A 204.

Eng.—Reg. v. Thomas, 2 C. & K. 806, 61 ECL 806.

Can.—Reg. v. Trudel, 14 Que. L. 193.

See Com. v. Bouvier, 164 Mass. 398, 41 NE 651 (averments construed and exceptions overruled).

[a] **False testimony given in foreign language.**—An indictment is not bad for failing to set out the words of the foreign language, when it gives in English the substance of such testimony. State v. Terline, 23 R. I. 530, 51 A 204; Reg. v. Thomas, 2 C. & K. 806, 61 ECL 806.

[b] **"In substance and to the effect following."**—(1) Where the allegation is "in substance and to the effect following," an exact recital is not necessary. Peo. v. Wright, 324 Ill. 29, 154 NE 408; Peo. v. Niles, 295 Ill. 525, 129 NE 97; Peo. v. Warner, 5 Wend. (N. Y.) 271. (2) The charge is not rendered indefinite because of the presence of the words "to the effect," which as here used mean purport, meaning, or intent. Peo. v. Berry, 309 Ill. 511, 141 NE 132.

61. Fry v. State, 36 Tex. Cr. 582, 37 SW 741, 38 SW 168.

62. Schoenfeld v. State, 56 Tex. Cr. 103, 119 SW 101, 133 AmSR 956, 22 LRANS 1216.

63. Higgins v. State, 50 Tex. Cr. 433, 97 SW 1054.

64. Peo. v. Bradbury, 155 Cal. 808, 103 P 215.

65. See infra text and note 66.

66. State v. Neal, 42 Mo. 119; Campbell v. State, 8 Wend. (N. Y.) 636; State v. Murphy, 101 N. C. 697, 8 SE 142; Gabrielsky v. State, 13 Tex. A. 428. See Peo. v. Bradbury, 155 Cal. 808, 103 P 215 (allegations held sufficient).

67. Clay v. State, 52 Tex. Cr. 555, 107 SW 1129; Lamar v. State, 49 Tex. Cr. 563, 95 SW 509; State v. Bishop, 1 D. Chipm. (Vt.) 120.

[a] **Question directing accused's attention to particular matter.**—An indictment based on the testimony of an accused relative to a game of cards on or about a certain date with certain persons was not bad for failure to show the questions put to defendant, and that they were so put as to direct his attention to a particular time and place and to call his attention to the transaction in question. Clay v. State, 52 Tex. Cr. 555, 107 SW 1129.

68. Com. v. Knight, 12 Mass. 274, 7 AmD 72.

69. Com. v. Knight, supra.

70. Higgins v. State, 50 Tex. Cr. 433, 97 SW 1054; Ross v. State, 40 Tex. Cr. 349, 50 SW 336; State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918. See Carpenter v. State, 81 Tex. Cr. 298, 195 SW 199 (per Prendergast, J.).

[a] **Concise allegations.**—While it is permissible to set out in detail the alleged false testimony on which the perjury is predicated, such testimony should be concisely alleged in order to avoid confusion on the part of the judge and jury. Higgins v. State, 50 Tex. Cr. 433, 97 SW 1054.

71. Hogue v. U. S., 184 Fed. 245, 106 CCA 387; Harp v. State, 59 Ark. 113, 26 SW 714; Thomas v. State, 54 Ark. 584, 16 SW 568; State v. Mace,

Perjury assigned upon written instrument. Where perjury is assigned on an affidavit or other written instrument, it is necessary that the instrument be set out in some form.[72] Ordinarily, however, it is not necessary to set forth a copy,[73] but it is sufficient to allege the substance and effect thereof,[74] and to set forth only the matter which is claimed to be false and material.[75] However, in some jurisdictions by virtue of statute, an exact copy must be set out.[76] A partial misdescription of the instrument involved does not necessarily render the indictment insufficient[77] or show that it is based upon another instrument which would correspond to such misdescription.[78] The mere fact that the affidavit set forth contains contradictory statements does not render the indictment bad.[79]

[§ 128] **15. Materiality of False Statement[80]—a. In General.** Materiality being an element of the offense,[81] an indictment or information for perjury, in the absence of a statute to the contrary, must allege or show that the false statement on which the charge is based was material to the issue or matter involved,[82] or it will be fatally defective.[83] However, in upholding a form of indictment prescribed

76 Me. 64; Reg. v. Trudel, 14 Que. L. 193. See Carpenter v. State, 81 Tex. Cr. 298, 195 SW 199 (in an indictment based on testimony that another had signed an order for goods, before the grand jury investigating a charge of forgery against the witness, it is advisable to set forth the alleged forged order).

[a] **Averments held sufficient.**—State v. Roberts, 148 Ark. 328, 230 SW 15.

[b] **Indictment for false swearing** is within this rule. Yarberry v. Com., 209 Ky. 15, 272 SW 24 (a charge that accused falsely swore that he did not "abuse" or "threaten" another was too broad and general in its terms; the indictment, instead of using the words "abuse" or "threaten," should be more specific and set out the language constituting the abuse or conveying the threat).

72. State v. Umdenstock, 43 Tex. 554; Shely v. State, 35 Tex. Cr. 190, 32 SW 901; Rohrer v. State, 13 Tex. A. 163.

73. U. S. v. Law, 50 Fed. 915; U. S. v. Walsh, 22 Fed. 644; Harris v. Peo., 4 Hun 1, 6 Thomps. & C. 206, 2 Cow. Cr. 224 [aff 64 N. Y. 148]; Peo. v. Warner, 5 Wend. (N. Y.) 271; Simpson v. State, 46 Tex. Cr. 77, 79 SW 530; Gabrielsky v. State, 13 Tex. A. 428.

74. Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328 [aff 135 N. Y. 639 mem, 32 NE 647 mem]; Peo. v. Warner, 5 Wend. (N. Y.) 271; Gabrielsky v. State, 13 Tex. A. 428; Rex v. Callanan, 6 B. & C. 102, 13 ECL 57, 108 Reprint 390.

75. U. S. v. Chapman, 25 F. Cas. No. 14,784, 3 McLean 390; Rex v. Callanan, 6 B. & C. 102, 13 ECL 57, 108 Reprint 390. See Peo. v. Platt, 67 Cal. 21, 7 P 1; Peo. v. Phelps, 5 Wend. (N. Y.) 9 (in each case indictment based on omissions from statement was upheld).

76. Coppack v. State, 36 Ind. 513.

[a] **"Set forth."**—It is provided by statute that, in an indictment for perjury in swearing to any written instrument, it shall only be necessary to "set forth" that part of the instrument alleged to have been falsely sworn to. Under this statute it has been held that an instrument, or a part of it, cannot be set forth in any other way than to give the tenor thereof, or, in other words, an exact copy. State v. Blackstone, 74 Ind. 592; Coppack v. State, 36 Ind. 513.

77. Peo. v. Grout, 174 App. Div. 608, 161 NYS 718 [app dism 222 N. Y. 521 mem, 118 NE 1072 mem].

78. Peo. v. Grout, supra.

79. Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

80. Description, status, subject matter, and result of proceeding in which perjury committed see supra §§ 110-114.

81. See supra § 32.

82. U. S.—U. S. v. Salen, 216 Fed. 420; U. S. v. Rhodes, 212 Fed. 518; Ammerman v. U. S., 185 Fed. 1, 108 CCA 1; Hogue v. U. S., 184 Fed. 245, 106 CCA 387; U. S. v. Singleton, 54 Fed. 488; U. S. v. Bedgood, 49 Fed. 54.

Ala.—Jones v. State, 100 Ala. 35, 14 S 98.

Ark.—Marvin v. State, 53 Ark. 395, 14 SW 87.

Cal.—Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Peo. v. Ross, 103 Cal. 425, 37 P 379; Peo. v. Schweichler, 16 Cal. A. 738, 741, 117 P 939 [quot Cyc].

Fla.—Yarbrough v. State, 79 Fla. 256, 83 S 873; Parrish v. State, 18 Fla. 902; Robinson v. State, 18 Fla. 898.

Ga.—King v. State, 103 Ga. 263, 30 SE 30; Broadwater v. State, 10 Ga. A. 458, 73 SE 691.

Ill.—Pollard v. Peo., 69 Ill. 148; Morrell v. Peo., 32 Ill. 499.

Ind.—State v. Kellis, 193 Ind. 619, 141 NE 337; Burk v. State, 81 Ind. 128; State v. Thrift, 30 Ind. 211; Weathers v. State, 2 Blackf. 278.

Iowa.—State v. Cunningham, 66 Iowa 94, 23 NW 280.

Kan.—State v. Smith, 40 Kan. 631, 20 P 529.

Ky.—Com. v. McClelland, 83 Ky. 686, 7 KyL 769.

La.—State v. Smith, 126 La. 135, 52 S 244.

Me.—State v. Ela, 91 Me. 309, 39 A 1001.

Md.—Deckard v. State, 38 Md. 186.

Mass.—Com. v. Byron, 14 Gray 31.

Mich.—Peo. v. Vogt, 156 Mich. 594, 121 NW 293; Peo. v. Collier, 1 Mich. 137, 48 AmD 699.

Miss.—State v. Booker, 84 Miss. 187, 36 S 241.

Mo.—State v. Holden, 48 Mo. 93.

N. J.—State v. Beard, 25 N. J. L. 384.

N. Y.—Wood v. Peo., 59 N. Y. 117, 1 Cow. Cr. 116 [rev 1 Hun 381, 3 Thomps. & C. 506]; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240; Peo. v. Peck, 146 App. Div. 266, 130 NYS 967, 26 N. Y. Cr. 268 [aff 206 N. Y. 669 mem, 99 NE 1114 mem]; Guston v. Peo., 4 Lans. 487, 61 Barb. 35; Peo. v. Tatum, 60 Misc. 311, 112 NYS 36, 22 N. Y. Cr. 557.

N. C.—State v. Dodd, 7 N. C. 226.

Oh.—McCaffrey v. State, 105 Oh. St. 508, 138 NE 61.

Okl.—Downard v. State, 26 Okl. Cr. 274, 223 P 718.

Or.—State v. Witham, 6 Or. 366.

Pa.—Com. v. Wood, 2 Pa. Dist. 823, 13 Pa. Co. 477.

Philippine.—U. S. v. Estraña, 16 Philippine 520.

S. C.—State v. Hayward, 10 S. C. L. 546.

Tenn.—State v. Argo, 118 Tenn. 377, 100 SW 106; State v. Bowlus, 3 Heisk. 29; State v. Moffatt, 7 Humphr. 250; State v. Wall, 9 Yerg. 347; State v. Owens, 2 Tenn. Cas. 534.

Tex.—Alt v. State, 83 Tex. Cr. 337, 203 SW 53; Cox v. State, 76 Tex. Cr. 326, 174 SW 1067; Yardley v. State, 55 Tex. Cr. 486, 117 SW 146; Higgins v. State, 50 Tex. Cr. 433, 97 SW 1054; Morris v. State, 47 Tex. Cr. 420, 83 SW 1126; Moroney v. State, 45 Tex. Cr. 524, 78 SW 696; McAvoy v. State, 39 Tex. Cr. 684, 47 SW 1000; Dorrs v. State, (Cr.) 40 SW 311; Weaver v. State, 34 Tex. Cr. 554, 31 SW 400; Ross v. State, 40 Tex. Cr. 349, 50 SW 336; Buller v. State, 33 Tex. Cr. 551, 28 SW 465; Agar v. State, 29 Tex. A. 605, 16 SW 761; Donohoe v. State, 14 Tex. A. 638; Martinez v. State, 7 Tex. A. 394. See Pigg v. State, 71 Tex. Cr. 600, 160 SW 691.

Vt.—State v. McCone, 59 Vt. 117, 7 A 406; State v. Chandler, 42 Vt. 446; State v. Trask, 42 Vt. 152.

Va.—Fitch v. Com., 92 Va. 824, 24 SE 272; Com. v. Pickering, 8 Gratt. (49 Va.) 628, 56 AmD 158.

Wash.—State v. Guse, 21 Wash. 269, 57 P 831.

W. Va.—State v. Aley, 94 W. Va. 529, 119 SE 549.

Eng.—Rex v. Nicholl, 1 B. & Ad. 21, 20 ECL 381, 109 Reprint 695.

[a] **Oath in supplemental proceedings.**—A charge that the debtor had, at the time of his examination, property of a certain amount, is insufficient, without an allegation that such property, or some part of it, was subject to execution in the county. State v. Cunningham, 116 Ind. 209, 18 NE 613.

[b] **Oaths taken before taxing officers.**—An indictment charging perjury in making a false return of personal property to an assessor that does not aver that the property which defendant is charged with having concealed was assessable by the assessor or of that township is bad for failure to show the materiality of the matter. State v. Wood, 110 Ind. 82, 10 NE 639; State v. Reynolds, 108 Ind. 353, 9 NE 287; State v. Cunningham, 66 Iowa 94, 23 NW 280; State v. Crumb, 68 Mo. 206; State v. Smith, 43 Tex. 655.

[c] **Oaths before registration officer.**—An indictment for perjury in making a false affidavit before a registering officer is defective when it does not show whether the place at which defendant testified that the person desiring to vote lived was within the precinct where it was alleged that he voted. Com. v. McClelland, 83 Ky. 686, 7 KyL 769.

[d] **Averments in respect of materiality held sufficient.**—Ulmer v. U. S., 219 Fed. 641, 134 CCA 127 [certiorari den 238 U. S. 638 mem, 35 SCt 940 mem, 59 L. ed. 1500 mem]; Sistrunk v. State, 18 Ga. A. 42, 88 SE 796; Com. v. Wright, 166 Mass. 174, 44 NE 129; Com. v. McCarthy, 152 Mass. 577, 26 NE 140; State v. Rhodes, 220 Mo. 9, 119 SW 391; Peo. v. Reed, 66 Misc. 425, 123 NYS 305; State v. Woolridge, 45 Or. 389, 78 P 333; Logan v. State, 96 Tex. Cr. 601, 258 SW 830; Reg. v. Schlesinger, 10 Q. B. 670, 59 ECL 670, 116 Reprint 255; Reg. v. Smith, 1 F. & F. 98.

83. U. S.—U. S. v Rhodes, 212 Fed. 518; U. S. v. Singleton, 54 Fed. 488.

Cal.—Peo. v. Teixeira, 59 Cal. A. 598, 211 P 470.

Ga.—Hembree v. State, 52 Ga. 242.

Ind.—State v. Anderson, 103 Ind. 170, 2 NE 332; State v. McCormick, 52 Ind. 169.

La.—State v. Gibson, 26 La. Ann. 71.

Mass.—Com. v. Byron, 14 Gray 31.

N. J.—State v. Beard, 25 N. J. L. 384.

Philippine.—U. S. v. Estraña, 16 Philippine 520, 528 [cit Cyc].

Tex.—McMurtry v. State, 38 Tex. Cr. 521, 43 SW 1010; Martin v. State, 33 Tex. Cr. 317, 26 SW 400.

W. Va.—State v. Aley, 94 W. Va. 529, 119 SE 549.

Eng.—Rex v. Nicholl, 1 B. & Ad. 21, 20 ECL 381, 109 Reprint 695.

by statute,[84] it has been held that a failure to allege, or to show by facts alleged, materiality is not fatal.[85] And, where under certain statutes defining the offense materiality is not an element,[86] a showing of materiality need not be made either in the case of perjury,[87] or of false swearing.[88]

Complete or partial materiality. There is authority for the view that the fact that some of the statements on which perjury is assigned are not material does not necessarily vitiate the indictment.[89] But a general statement of materiality is insufficient where part of the testimony set forth is immaterial.[90] It has also been held that the indictment must show the materiality of each of several distinct parts of the testimony, where perjury is assigned on each of such parts.[91]

Method and form of averment in general.[92] It has frequently been held or stated that the showing as to materiality may be made either by a general averment to that effect or by the allegation of facts from which its materiality will appear;[93] and hence, as hereinafter pointed out, where either method is used, the indictment or information is not bad for failure to use the other also,[94] and the sufficiency of indictments or informations in which both methods of showing materiality were used has been recognized.[95] In some jurisdictions the substance of the issues involved in the proceeding in which the perjury was committed must be set forth,[96] and the statutory provision that it shall be sufficient to give the substance of the controversy or matter in respect of which the perjury was committed has been construed by some courts to require a statement of the matter in issue in order that the court may see the materiality of the testimony.[97]

Materiality of inquiry or question. According to some cases the indictment should set forth the inquiry as to which the testimony which, it is alleged, is material, was given,[98] and that such inquiry was material;[99] and, where such averment is made, the indictment is insufficient if it appears on the face thereof that such inquiry or issue was not material.[1] There is authority for the view that the statement of the question involved may be made in the alternative or disjunctive.[2] The fact that the word "question" is used in referring to several distinct matters of inquiry is not fatal.[3]

[§ 129] **b. General Averment of Materiality.** It is sufficient to charge generally that the false statement was material to, or was in respect of, a matter material to the issue or inquiry, without setting out the facts from which such materiality appears.[4] But

84. See infra § 104.

85. State v. Hawley, 186 N. C. 433, 119 SE 888 [overr State v. Cline, 150 N. C. 854, 64 SE 591]; State v. Thompson, 113 N. C. 638, 18 SE 211. But see State v. Cline, 150 N. C. 854, 64 SE 591 (indictment held insufficient).

[a] **Averment that accused committed perjury** involves the charge that the testimony was material. State v. Cline, 146 N. C. 640, 61 SE 522.

86. See supra § 32.

87. Masterson v. State, 186 Ind. 609, 117 NE 645; State v. Flagg, 25 Ind. 243; State v. Byrd, 28 S. C. 18, 4 SE 793, 13 AmSR 660.

88. Gammage v. State, 119 Ga. 380, 46 SE 409; Richey v. Com., 81 Ky. 524; Ford v. Com., 29 SW 446, 16 KyL 528; Sikes v. Com., 11 Ky. Op. 890; Urben v. State, 77 Tex. Cr. 261, 178 SW 514.

[a] **But an indictment is insufficient** where it merely alleges that accused falsely swore before the grand jury, unless it also shows that the matter sworn to was in some manner connected with the offense under investigation. Allison v. Com., (Ky.) 13 SW (2d) 769; Ford v. Com., 29 SW 446, 16 KyL 528.

89. State v. Williams, 60 Kan. 837, 58 P 476, 61 Kan. 739, 60 P 1050; Mares v. State, 71 Tex. Cr. 303, 158 SW 1130; Jefferson v. State, (Tex. Cr.) 49 SW 88; Dorrs v. State, (Tex. Cr.) 40 SW 311.

Joinder of assignments of perjury in general see infra § 137.

90. State v. Crocker, 106 Me. 369, 76 A 703; Donohoe v. State, 14 Tex. A. 638.

91. Weinstein v. State, 146 Md. 80, 125 A 889.

92. **General averment** see infra § 129.

Statement of facts showing see infra § 130.

93. U. S.—Berry v. U. S., 259 Fed. 203, 170 CCA 271; U. S. v. Salen, 216 Fed. 420; U. S. v. Nelson, 199 Fed. 464; U. S. v. Singleton, 54 Fed. 488; U. S. v. Cowing, 25 F. Cas. No. 14,880, 4 Cranch C. C. 613.

Ark.—Smith v. State, 91 Ark. 200, 120 SW 985.

Cal.—Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Peo. v. Ah Bean, 77 Cal. 12, 18 P 815; Peo. v. Schweichler, 16 Cal. A. 738, 117 P 939 (recognizing rule).

Fla.—Gibson v. State, 47 Fla. 34, 36 S 706; Brown v. State, 47 Fla. 16, 36 S 705.

Ill.—Peo. v. Berry, 309 Ill. 511, 141 NE 132; Peo. v. Brown, 254 Ill. 260, 98 NE 535; Kizer v. Peo., 211 Ill. 407, 71 NE 1035.

Ind.—State v. Kellis, 193 Ind. 619, 141 NE 337; State v. Hopper, 133 Ind. 460, 32 NE 878; State v. Cunningham, 116 Ind. 209, 18 NE 613; State v. Flagg, 25 Ind. 243.

Iowa.—State v. Cunningham, 66 Iowa 94, 23 NW 280.

Kan.—State v. Adams, 119 Kan. 509, 240 P 955; State v. Horine, 70 Kan. 256, 78 P 411.

La.—State v. Varnado, 154 La. 575, 97 S 865; State v. Smith, 126 La. 135, 52 S 244; State v. Brown, 111 La. 170, 35 S 501.

Md.—Weinstein v. State, 146 Md. 80, 125 A 889 (recognizing rule); Deckard v. State, 38 Md. 186.

Mass.—Com. v. McCarty, 152 Mass. 577, 26 NE 140.

Mich.—Peo. v. Collier, 1 Mich. 137, 48 AmD 699.

Miss.—State v. Booker, 84 Miss. 187, 36 S 241.

N. J.—State v. Voorhis, 52 N. J. L. 351, 20 A 26.

N. Y.—Wood v. Peo., 59 N. Y. 117.

Okl.—Downard v. State, (Cr.) 223 P 718 (recognizing rule).

Philippine.—U. S. v. Estraña, 16 Philippine 520, 528 [cit Cyc].

Tex.—Bell v. State, 75 Tex. Cr. 401, 171 SW 239 (recognizing rule); Tellis v. State, 42 Tex. Cr. 574, 61 SW 717; Partain v. State, 22 Tex. A. 100, 2 SW 854; Mattingly v. State, 8 Tex. A. 345.

Va.—Fitch v. Com., 92 Va. 824, 24 SE 272.

Wash.—State v. Guse, 21 Wash. 269, 57 P 831.

W. Va.—State v. Lake, 147 SE 473.

Eng.—Rex v. Nicholl, 1 B. & Ad. 21, 20 ECL 381, 109 Reprint 695; Reg. v. Cutts, 4 Cox C. C. 435; Rex v. McKeron [cit Rex v. Dowlin, 5 T. R. 316 note, 101 Reprint 177].

See State v. McCone, 59 Vt. 117, 7 A 406 (where an indictment in which the material question in the original could be gathered only by inference was held insufficient).

94. See infra §§ 129, 130.

95. Ala.—Jones v. State, 100 Ala. 35, 14 S 98.

Cal.—Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192.

Ill.—Kizer v. Peo., 211 Ill. 407, 71 NE 1035.

Ind.—State v. Turley, 153 Ind. 345, 55 NE 30.

Kan.—State v. Bingham, 124 Kan. 61, 257 P 951.

Mass.—Com. v. McCarty, 152 Mass. 577, 26 NE 140; Com. v. Flynn, 3 Cush. 525.

N. J.—State v. Sweeten, 83 N. J. L. 369, 85 A 311; State v. Voorhis, 52 N. J. L. 351, 20 A 26.

N. Y.—Peo. v. Webber, 76 Misc. 581, 137 NYS 239, 27 N. Y. Cr. 342.

Tex.—Davis v. State, 107 Tex. Cr. 389, 296 SW 605; Cox v. State, 76 Tex. Cr. 326, 174 SW 1067; Tellis v. State, 42 Tex. Cr. 574, 61 SW 717.

96. See supra § 112.

97. See supra § 112.

98. Conner v. Com., 2 Va. Cas. (4 Va.) 30.

99. Chenault v. State, (Miss.) 122 S 98.

Cross references:

Averment as to materiality of inquiry as sufficient or necessary general averment of materiality see infra § 129.

Describing subject matter of proceeding in which alleged offense occurred see supra § 112.

Setting forth record of proceedings in which alleged offense occurred see supra § 113.

1. Morris v. State, 83 Tex. Cr. 521, 204 SW 106.

[a] **Averments held sufficient.**—Bell v. State, 75 Tex. Cr. 401, 171 SW 239; Collins v. State, 51 Tex. Cr. 347, 101 SW 992. See Francis v. State, 57 Tex. Cr. 555, 123 SW 1114.

2. Dodge v. State, 24 N. J. L. 455; Fry v. State, 36 Tex. Cr. 582, 37 SW 741, 38 SW 168. But see Adamson v. State, 90 Tex. Cr. 221, 234 SW 532 (to the effect that an allegation that a material inquiry "was whether or not" a certain thing had occurred is not good pleading).

3. Com. v. Johns, 6 Gray (Mass.) 274.

[a] **Form of averment.**—When more than one question is relied on as material, it is usual to aver that certain "questions" became and were material, namely, whether, etc., "and" whether, etc., or "and also" whether, etc., but this form is not essential, and where the averment is that a "question" became material, several questions may well be set forth without a collective particle. Com. v. Johns, 6 Gray (Mass.) 274.

4. U. S.—Hendricks v. U. S., 223 U. S. 178, 32 SCt 313, 56 L. ed. 394; Markham v. U. S., 160 U. S. 319, 16 SCt 288, 40 L. ed. 441; U. S. v. Rosenstein, 211 Fed. 738; Baskin v. U. S.,

if it clearly appears from other averments that the statement was not material, a formal allegation of materiality will not save the indictment or information,[5] although, according to some cases, the fact that the testimony was not material must affirmatively appear in order to render the charge insufficient.[6]

Form and method of making general averment. In many jurisdictions an averment that the issue or matter concerning which the testimony was given was material, or a similar averment, is a sufficient and proper general allegation as to materiality.[7] But according to other cases an averment to the effect that a certain matter was a material inquiry or

209 Fed. 740, 126 CCA 464.

Ala.—Williams v. State, 68 Ala. 551; Williams v. State, 17 Ala. A. 429, 85 S 595; Thomas v. State, 13 Ala. A. 421, 69 S 413; McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018]; Todd v. State, 13 Ala. A. 301, 69 S 325.

Ark.—Cox v. State, 164 Ark. 126, 261 SW 303; State v. Roberts, 148 Ark. 328, 230 SW 15; State v. Leatherman, 125 Ark. 243, 188 SW 545; Loudermilk v. State, 110 Ark. 549, 162 SW 569; Smith v. State, 91 Ark. 200, 120 SW 985.

Cal.—Peo. v. Ennis, 137 Cal. 263, 70 P 84; Peo. v. Rodley, 131 Cal. 240, 63 P 351; Peo. v. De Carlo, 124 Cal. 462, 57 P 383; Peo. v. Dunstan, 59 Cal. A. 574, 211 P 813; Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192.

Colo.—Thompson v. Peo., 26 Colo. 496, 59 P 51.

Fla.—Markey v. State, 47 Fla. 38, 37 S 53.

Ill.—Peo. v. Berry, 309 Ill. 511, 141 NE 132; Peo. v. Gazelle, 299 Ill. 58, 132 NE 273; Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922; Peo. v. Brown, 254 Ill. 260, 98 NE 535; Peo. v. Threewitt, 251 Ill. 509, 96 NE 242; Kizer v. Peo., 211 Ill. 407, 71 NE 1035; Kimmel v. Peo., 92 Ill. 457.

Ind.—State v. Sutton, 147 Ind. 158, 46 NE 468.

Kan.—State v. Bingham, 124 Kan. 61, 257 P 951; State v. Brownfield, 67 Kan. 627, 73 P 925.

La.—State v. Rogers, 138 La. 867, 70 S 863; State v. Jean, 42 La. Ann. 946, 8 S 480; State v. Gonsoulin, 42 La. Ann. 579, 7 S 633; State v. Maxwell, 28 La. Ann. 361.

Md.—Shaffer v. State, 87 Md. 124, 39 A 313.

Mass.—Com. v. McCarty, 152 Mass. 577, 26 NE 140; Com. v. Farley, Thach. Cr. 654.

Mich.—Peo. v. Mankin, 225 Mich. 246, 196 NW 426; Flint v. Peo., 35 Mich. 491; Hoch v. Peo., 3 Mich. 552.

Miss.—Lea v. State, 64 Miss. 278, 1 S 235.

Nebr.—Shevalier v. State, 85 Nebr. 366, 369, 123 NW 424, 19 AnnCas 361 [quot Cyc]; Gandy v. State, 23 Nebr. 436, 36 NW 817.

N. M.—Terr. v. Lockhart, 8 N. M. 523, 45 P 1106 [overr Terr. v. Remuzon, 3 N. M. 368, 9 P 598].

N. Y.—Peo. v. Tillman, 139 App. Div. 572, 124 NYS 44, 25 N. Y. Cr. 32 [aff 201 N. Y. 598 mem, 95 NE 1136 mem]; Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133; Peo. v. Webber, 76 Misc. 581, 137 NYS 239, 27 N. Y. Cr. 342; Peo. v. Burroughs, 1 Park. Cr. 211.

N. C.—State v. Davis, 69 N. C. 495; State v. Mumford, 12 N. C. 519, 17 AmD 573.

Oh.—Dilcher v. State, 39 Oh. St. 130; Barnes v. State, 15 Oh. Cir. Ct. 14.

Okl.—Cutler v. Terr., 8 Okl. 101, 56 P 861; Rich v. U. S., 1 Okl. 354, 33 P 804; Cornelson v. State, (Cr.) 257 P 1109; Thomas v. State, (Cr.) 253 P 514; Miller v. State, 9 Okl. Cr. 196, 131 P 181.

S. C.—State v. Hayward, 10 S. C. L. 546 (recognizing rule).

Tex.—Davis v. State, 107 Tex. Cr. 389, 296 SW 605; Jones v. State, 76 Tex. Cr. 398, 174 SW 1071; Johnson v. State, 71 Tex. Cr. 428, 160 SW 964; Anderson v. State, 56 Tex. Cr. 360, 120 SW 462; Yardley v. State, 55 Tex. Cr. 486, 117 SW 146; Henry v. State, 43 Tex. Cr. 176, 63 SW 642; Jernigan v. State, 43 Tex. Cr. 114, 63 SW 560; Chavarria v. State, (Cr.) 63 SW 312; Scott v. State, 35 Tex. Cr. 11, 29 SW 274; Adams v. State, (Cr.) 29 SW 270; Cravey v. State, 33 Tex. Cr. 557, 28 SW 472; Sisk v. State, 28 Tex. A. 432, 13 SW 647; Partain v. State, 22 Tex. A. 100, 2 SW 854; Washington v. State, 22 Tex. A. 26, 3 SW 228. See Pyles v. State, 47 Tex. Cr. 435, 83 SW 811 (where, however, the evidence was not sufficient to show materiality). Compare McVicker v. State, 52 Tex. Cr. 508, 107 SW 834 (as to showing of materiality).

Vt.—State v. Sleeper, 37 Vt. 122.

Va.—Fitch v. Com., 92 Va. 824, 24 SE 272.

Wash.—State v. McLain, 43 Wash. 124, 86 P 388; State v. Douette, 31 Wash. 6, 71 P 556.

W. Va.—Stofer v. State, 3 W. Va. 689.

Wyo.—Wilde v. State, 20 Wyo. 302, 123 P 85; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

Eng.—Reg. v. Schlesinger, 10 Q. B. 670, 59 ECL 670, 116 Reprint 255; Reg. v. Scott, 2 Q. B. D. 415; Reg. v. Bennett, 2 Den. C. C. 240, 169 Reprint 489; Reg. v. Goodfellow, C. & M. 569, 41 ECL 310; Reg. v. Gardiner, 8 C. & P. 737, 34 ECL 992, 173 Reprint 696, 2 Moody C. C. 95, 169 Reprint 38; Reg. v. Dowlin, 5 T. R. 311, 101 Reprint 174.

[a] **In Georgia** (1) in a case in the supreme court it was laid down that it is sufficient to charge generally that the testimony was in relation to a matter material to the point or question in issue. King v. State, 103 Ga. 263, 30 SE 30. See Goodwin v. State, 118 Ga. 770, 45 SE 620 (where an indictment was upheld in respect of materiality). (2) But it has been said that the statement in King v. State, supra is dictum. Herndon v. State, 17 Ga. A. 558, 87 SE 812. (3) It has been stated or held in cases in the court of appeals that it must appear how and wherein the testimony alleged to be false was in fact material to the trial of the issue when such testimony was given. Marion v. State, 21 Ga. A. 193, 94 SE 61; Sistrunk v. State, 18 Ga. A. 42, 88 SE 796; Herndon v. State, supra; Black v. State, 13 Ga. A. 541, 79 SE 173 (recognizing rule); Askew v. State, 3 Ga. A. 79, 59 SE 311. (4) But it is not essential that the materiality of the testimony should be demonstrated by an argument incorporated in the indictment. Ruff v. State, 17 Ga. A. 337, 86 SE 784.

[b] **In Missouri** (1) the text rule is applicable by virtue of statute. State v. Stegall, 300 SW 714; State v. Martin, 317 Mo. 313, 295 SW 543; State v. Tedder, 294 Mo. 390, 242 SW 889; State v. Ruddy, 287 Mo. 52, 228 SW 760; State v. Nelson, 146 Mo. 256, 48 SW 84; State v. Powers, 136 Mo. 194, 37 SW 936. (2) Prior to the statute a general averment as to materiality was not sufficient. State v. Ruddy, supra; State v. Shanks, 66 Mo. 560; State v. Keel, 54 Mo. 182; State v. Wakefield, 9 Mo. A. 326 [aff 73 Mo. 549].

[c] **In Porto Rico** (1) the text rule is recognized. Peo. v. Barbosa, 29 Porto Rico 433. (2) It is sufficient that the fiscal allege that such act is material or essential, and it is not necessary to state the act tending to show such materiality or essential character. Peo. v. Ayala, 13 Porto Rico 195. But see Peo. v. Colón, 10 Porto Rico 197 (where materiality did not appear). (3) But the information must allege, not only that false testimony is material, but also that it is material to some external situation, issue, or subject matter. See Peo. v. Barbosa, supra.

[d] **Rule applied** in respect of affidavit to secure marriage license. Cox v. State, 164 Ark. 126, 261 SW 303.

[e] **Averments held sufficient.**—State v. Adams, 119 Kan. 509, 240 P 955; Shaffer v. State, 87 Md. 124, 39 A 313; Johnson v. State, 34 Tex. Cr. 555, 31 SW 397; Fitch v. Com., 92 Va. 824, 24 SE 272; State v. Vane, 105 Wash. 170, 177 P 728.

5. U. S.—U. S. v. Rhodes, 212 Fed. 518; Hogue v. U. S., 184 Fed. 245, 106 CCA 387; U. S. v. Pettus, 84 Fed. 791.

Cal.—Peo. v. Brilliant, 58 Cal. 214; Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192 (recognizing rule).

Ind.—State v. Sutton, 147 Ind. 158, 46 NE 468.

Kan.—State v. Smith, 40 Kan. 631, 20 P 529.

Me.—State v. Ela, 91 Me. 309, 39 A 1001.

Md.—Weinstein v. State, 146 Md. 80, 125 A 889.

Mich.—Peo. v. Gaige, 26 Mich. 30.

Mo.—State v. Bailey, 34 Mo. 350.

Nebr.—Shevalier v. State, 85 Nebr. 366, 369, 123 NW 424, 19 AnnCas 361 [quot Cyc].

N. Y.—Peo. v. Morrison, 98 Misc. 555, 164 NYS 712.

Pa.—Com. v. Wood, 2 Pa. Dist. 823, 13 Pa. Co. 477, 7 Kulp 141.

Tex.—Hays v. State, 76 Tex. Cr. 213, 173 SW 671; Wynne v. State, 60 Tex. Cr. 660, 133 SW 682; Lowe v. State, 59 Tex. Cr. 557, 129 SW 842.

[a] **Affidavit to dissolve injunction.**—An indictment that accused made a false affidavit in order to dissolve an injunction asked for, and that the statement contained therein would have been material on the hearing of a motion to dissolve, but which does not aver that the injunction asked for had been awarded, or that the averments of the affidavit were material otherwise than on a motion to dissolve, is insufficient. Com. v. Wood, 2 Pa. Dist. 823, 13 Pa. Co. 477, 7 Kulp 141.

6. U. S. v. Nelson, 199 Fed. 464; Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192; Peo. v. Collins, 6 Cal. A. 492, 92 P 513; Peo. v. Tillman, 139 App. Div. 572, 124 NYS 44, 25 N. Y. Cr. 32 [aff 201 N. Y. 598 mem, 95 NE 1136 mem]; State v. Sleeper, 37 Vt. 122. See Peo. v. Naylor, 82 Cal. 607, 23 P 116 (information held sufficient). Compare State v. Wall, 9 Yerg. (Tenn.) 347 (holding, in a prosecution apparently based on an examination of accused for jury duty, that an averment that the matter sworn to was material did not supply the omission to allege that an issue or question touching the competency and qualification of accused as a juror was submitted to the court).

[a] **Averments not negativing materiality.**—Peo. v. Rendigs, 123 Misc. 32, 205 NYS 133.

[b] **Averments as to materiality held sufficient.**—U. S. v. Coyle, 229 Fed. 256; State v. Clogston, 63 Vt. 215, 22 A 607.

7. Fla.—Markey v State, 47 Fla. 38, 37 S 53.

Ind.—State v. Sutton, 147 Ind. 158, 46 NE 468.

Mich.—Peo. v. Collier, 1 Mich. 137, 48 AmD 699.

Mo.—State v. Martin, 317 Mo. 313, 295 SW 543; State v Ruddy, 287 Mo. 52, 228 SW 760; State v. Holden, 48 Mo. 93.

Vt.—State v. Sleeper, 37 Vt. 122.

Va.—Fitch v. Com., 92 Va. 824, 24

issue in the case,[8] or that the evidence was given on a material issue,[9] is not sufficient, but it must directly be alleged that the evidence given or assertion made was material.[10] A statement that an affidavit was "competent" evidence is not a sufficient allegation that it was material.[11] In any event the allegation as to materiality must refer to the testimony given.[12]

[§ 130] **c. Averment of Facts Showing Materiality.** Where it is apparent from the averments in the indictment or information that the statement charged to be false was material, it is not essential to state the legal conclusion by alleging that it was material.[13] A proper method in this regard is to set forth the issue and the testimony so that the court can see whether the testimony is material.[14] So also, where the averments as to the materiality of what is alleged to have been sworn falsely are defective, the indictment is nevertheless good, if such materiality sufficiently appears on its face.[15]

[§ 131] **d. Competency of Testimony.** An indictment or information for perjury need not show affirmatively that the alleged false testimony was admissible and competent, and could not have been excluded on any legal ground.[16]

[§ 132] **16. Assignment of Perjury[17]—a. Falsity—(1) In General.** That part of the indictment or information which alleges the falsity of the statement is technically called the "assignment."[18] The assignment is of the substance or gist of the offense, and is not mere inducement.[19] Therefore, both at common law and under the statutes, it is necessary to negative the truth of the alleged false matter.[20] According to some cases the negation or denial must

SE 272; Conner v. Com., 2 Va. Cas. (4 Va.) 30.

See Johnson v. State, 76 Ga. 790 (averments as to materiality of issue or inquiry held sufficient).

[a] **In Illinois** (1) ordinarily the allegation is in the form of one substantially to the effect that the particular matter, question, or inquiry as to which the testimony was given was material. See supra text and note 4. (2) A general allegation that the testimony was material to the issue has been held insufficient. Wilkinson v. Peo., 226 Ill. 135, 80 NE 699. But see Greene v. Peo., 182 Ill. 278, 55 NE 341 (where a general averment to the effect that accused gave certain evidence "in a matter material to the issue" was held sufficient). (3) Allegation as to "a material matter in issue" is equivalent to allegation as to "a matter material to the issue." Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922. (4) Allegation as to "material question" has been upheld. Kizer v. Peo., 211 Ill. 407, 71 NE 1035.

[b] **In West Virginia** (1) it has been held that, where the perjury occurred in an ex parte proceeding, it was sufficient to allege that "it then and there became material to" accused to take a certain oath. Stofer v. State, 3 W. Va. 689. (2) But it has been laid down generally that the allegation that "it then and there became material to inquire" as to a certain matter is not a sufficient allegation that the testimony in question was material to the issue. State v. Aley, 94 W. Va. 529, 119 SE 549.

[c] **Ascertainment of truth.**—The usual form, when an express allegation of materiality is made, is to state that it became a material question whether such a thing happened or not. It is improper to state that it became material to ascertain the truth of what the witness stated. Peo. v. Collier, 1 Mich. 137, 139, 48 AmD 699; Reg. v. Goodfellow, C. & M. 569, 41 ECL 310. See Peo. v. Vogt, 156 Mich. 594, 121 NW 293.

8. Ammerman v. U. S., 185 Fed. 1, 108 CCA 1; Highsaw v. State, 90 Tex. Cr. 200, 234 SW 220; Rosebud v. State, 50 Tex. Cr. 475, 98 SW 858; State v. Aley, 94 W. Va. 529, 119 SE 549. See Crow v. State, 49 Tex. Cr. 103, 90 SW 650 (where defendant's contentions as to the insufficiency of the indictment, one of which contentions was that a certain allegation as to materiality was a mere conclusion, were sustained).

9. State v. Varnado, 154 La. 575, 97 S 865; State v. Morrough, 132 La. 655, 61 S 726.

10. Ammerman v. U. S., 185 Fed. 1, 108 CCA 1; State v. Varnado, 154 La. 575, 97 S 865; State v. Morrough, 132 La. 655, 61 S 726; Bell v. State, 90 Tex. Cr. 400, 235 SW 879; Adamson v. State, 90 Tex. Cr. 221, 234 SW 532; Highsaw v. State, 90 Tex. Cr. 200, 234 SW 220; Scott v. State, 75 Tex. Cr. 396, 171 SW 243; Bell v. State, 75 Tex. Cr. 401, 171 SW 239; Rosebud v. State, 50 Tex. Cr. 475, 98 SW 858; State v. Aley, 94 W. Va. 529, 119 SE 549.

[a] **Affidavit for new trial.**—An indictment alleging that it was a material inquiry whether a certain person knew certain facts, and that defendant falsely swore that he heard such person tell another that such person did not know the facts in question, did not charge the materiality of the false oath. Rosebud v. State, 50 Tex. Cr. 475, 98 SW 858.

[b] **Mere statement in the concluding averment** of the indictment that accused "did dispose and state material matters" is not a sufficient statement in specific terms that the evidence was material. Ammerman v. U. S., 185 Fed. 1, 108 CCA 1.

11. Peo. v. Teixeira, 59 Cal. A. 598, 211 P 470.

12. Peo. v. Vogt, 156 Mich. 594, 121 NW 293.

13. U. S.—Ammerman v. U. S., 185 Fed. 1, 108 CCA 1.

Ark.—State v. Nees, 47 Ark. 553, 2 SW 184.

Cal.—Peo. v. Kelly, 59 Cal. 372.

Ga.—Pence v. State, 36 Ga. A. 268, 136 SE 821.

Ill.—Peo. v. Berry, 309 Ill. 511, 141 NE 132.

Ind.—State v. Hopper, 133 Ind. 460, 32 NE 878; Galloway v. State, 29 Ind. 442; Hendricks v. State, 26 Ind. 493; State v. Johnson, 7 Blackf. 49; State v. Hall, 7 Blackf. 25.

Ky.—Com. v. Tracenrider, 140 Ky. 660, 131 SW 495.

La.—State v. Sweat, 159 La. 769, 106 S 298; State v. Varnado, 154 La. 575, 97 S 865; State v. Grover, 38 La. Ann. 567; State v. Schlessinger, 38 La. 564.

Md.—State v. Mercer, 101 Md. 535, 61 A 220.

Mass.—Com. v. Knight, 12 Mass. 274, 7 AmD 72.

Minn.—State v. Madigan, 57 Minn. 425, 59 NW 490.

Mo.—State v. Marshall, 47 Mo. 378.

N. J.—State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

N. Y.—Peo. v. Peck, 146 App. Div. 266, 130 NYS 967, 26 N. Y. Cr. 268 [aff 206 N. Y. 669 mem, 99 NE 1114 mem]; Peo. v. Webber, 76 Misc. 581, 137 NYS 239, 27 N. Y. Cr. 342; Campbell v. Peo., 8 Wend. 636; Peo. v. Robertson, 3 Wheel. Cr. 180.

Okl.—Cooper v. State, 27 Okl. Cr. 278, 226 P 1066.

Pa.—Com. v. Jermon, 29 LegInt 165.

S. C.—State v. Hayward, 10 S. C. L. 546.

Tex.—Ice v. State, 84 Tex. Cr. 418, 208 SW 345.

Vt.—State v. Chamberlin, 30 Vt. 559.

W. Va.—State v. Aley, 94 W. Va. 529, 119 SE 549.

Eng.—Reg. v. Harvey, 8 Cox C. C. 99; Rex v. Dunn, 1 D. & R. 10, 16 ECL 10.

See State v. Falk, 34 N. D. 520, 159 NW 10 (dictum).

[a] **Averments of facts held sufficient to show materiality.**—Berry v. U. S., 259 Fed. 203, 170 CCA 271; Ammerman v. U. S., 185 Fed. 1, 108 CCA 1; Barnard v. U. S., 162 Fed. 618, 89 CCA 376; U. S. v. Singleton, 54 Fed. 488; Com. v. Tracenrider, 140 Ky. 660, 131 SW 495; State v. Sweat, 159 La. 769, 106 S 298; Com. v. McCarty, 152 Mass. 577, 26 NE 140; Cooper v. State, 27 Okl. Cr. 278, 226 P 1066; Ice v. State, 84 Tex. Cr. 418, 208 SW 345; Rahm v. State, 30 Tex. A. 310, 17 SW 416, 28 AmSR 911; Brooks v. State, 29 Tex. A. 582, 16 SW 542; Mattingly v. State, 8 Tex. A. 345; Reg. v. Batholomew, 1 C. & K. 366, 47 ECL 366; Reg. v. Cutts, 4 Cox C. C. 137.

[b] **Averments of facts held insufficient to show materiality.**—Noah v. U. S., 128 Fed. 270, 62 CCA 618; Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Peo. v. Teixeira, 59 Cal. A. 598, 211 P 470; Peo. v. Schweichler, 16 Cal. A. 738, 117 P 939; State v. Hopper, 133 Ind. 460, 32 NE 878; State v. Anderson, 103 Ind. 170, 2 NE 332; State v. Smith, 126 La. 135, 52 S 244; State v. Mercer, 101 Md. 535, 61 A 220; State v. Cave, 81 Mo. 450; Peo. v. Peck, 146 App. Div. 266, 130 NYS 967, 26 N. Y. Cr. 268 [aff 206 N. Y. 669 mem, 99 NE 1114 mem]; Peo. v. Root, 94 App. Div. 84, 87 NYS 962; State v. Hayward, 10 S. C. L. 546; Bell v. State, 75 Tex. Cr. 401, 171 SW 239; Martinez v. State, 39 Tex. Cr. 479, 46 SW 826; Buller v. State, 33 Tex. Cr. 551, 28 SW 465; State v. Clogston, 63 Vt. 215, 22 A 607; State v. Chamberlin, 30 Vt. 559; State v. Aley, 94 W. Va. 529, 119 SE 549.

14. Peo. v. Ah Bean, 77 Cal. 12 18 P 815; Peo. v. Berry, 309 Ill. 511, 141 NE 132.

Setting forth issue in general see supra § 112.

15. Ammerman v. U. S., 185 Fed. 1, 108 CCA 1; U. S. v. McHenry, 26 F. Cas. No. 15,681, 6 Blatchf. 503; State v. Varnado, 154 La. 575, 97 S 865.

16. State v. Spencer, 45 La. Ann. 1, 12 S 135. But see Com. v. Rupple, 1 Pa. Co. 663 (where an indictment based on alleged false testimony as to the execution of a power of attorney which was not duly executed and therefore not admissible in evidence was held bad on demurrer).

Incompetency of evidence as affecting materiality in general see supra § 40.

17. Setting forth matter alleged to be false see supra § 127.

18. De Bernie v. State, 19 Ala. 23; Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919; State v. Coyne, 214 Mo. 344, 114 SW 8, 21 LRANS 993.

19. Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919; Perdue v. Com., 96 Pa. 311.

20. U. S.—Hilliard v. U. S., 24 F. (2d) 99; Hogue v. U. S., 184 Fed. 245, 106 CCA 387.

Ala.—De Bernie v. State, 19 Ala. 23.

Ark.—Thomas v. State, 54 Ark. 584,

be by a specific or particular averment,[21] and should designate the particulars wherein the matter sworn to was false,[22] at least where parts of the testimony or assertions of accused which are set out are evidently not false or may be true.[23] So a mere general averment of falsity of the testimony or assertions of accused has been regarded as insufficient,[24] and it has been asserted that the denial or traverse should not be indirect, argumentative, or implicit,[25] but according to some cases an indirect or argumentative denial or traverse does not necessarily render the charge insufficient,[26] and is regarded at most as a defect of form and not of substance;[27] and in general, under modern statutes and procedure the tendency is not to hold the prosecution with extreme strictness to technical rules where the averments are sufficient to give accused notice of the

16 SW 568.
Cal.—Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565.
Del.—State v. Marvel, 131 A 313 [aff 131 A 317, 42 ALR 1058].
Fla.—State v. Blitch, 120 S 355.
Ga.—Rea v. State, 17 Ga. A. 476, 87 SE 685.
Ill.—Kimmel v. Peo., 92 Ill. 457.
Iowa.—State v. Hulsman, 147 Iowa 572, 126 NW 700.
Ky.—Com. v. Compton, 36 SW 1116, 18 KyL 479.
La.—State v. Williams, 111 La. 1033, 36 S 111; State v. Brown, 110 La. 591, 34 SW 698; State v. Gibson, 26 La. Ann. 71.
Me.—State v. Ela, 91 Me. 309, 39 A 1001.
Md.—State v. Bixler, 62 Md. 354.
Mass.—Com. v. Wright, 166 Mass. 174, 44 NE 129.
Mich.—Peo. v. Vogt, 156 Mich. 594, 121 NW 293.
Minn.—State v. Nelson, 74 Minn. 409, 77 NW 223.
Miss.—Chenault v. State, 122 S 98; State v. Silverberg, 78 Miss. 858, 29 S 761.
Mo.—State v. Coyne, 214 Mo. 344, 114 SW 8, 21 LRANS 993.
N. J.—Heintz v. Union County Ct. Gen. Quart. Sess. of Peace, 45 N. J. L. 523.
N. M.—Terr. v. Lockhart, 8 N. M. 523, 45 P 1106.
N. Y.—Peo. v. Tatum, 60 Misc. 311, 112 NYS 36, 22 N. Y. Cr. 557.
N. C.—State v. Mumford, 12 N. C. 519, 17 AmD 573.
Oh.—Dilcher v. State, 39 Oh. St. 130.
Pa.—Perdue v. Com., 96 Pa. 311; Com. v. Cauffiel, 84 Pa. Super. 278.
S. D.—State v. Reidt, 222 NW 677.
Tenn.—State v. Moffatt, 7 Humphr. 250.
Tex.—State v. Powell, 28 Tex. 626; Juaraqui v. State, 28 Tex. 625; Hart v. State, 73 Tex. Cr. 362, 166 SW 152 (recognizing rule); Waddle v. State, 69 Tex. Cr. 334, 153 SW 882; Turner v. State, 30 Tex. A. 691, 18 SW 792. See Carpenter v. State, 81 Tex. Cr. 298, 195 SW 199 (per Prendergast, J.).
Vt.—State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918.
Wash.—State v. Smails, 63 Wash. 172, 115 P 82.
Eng.—Rex v. Harris, 5 B. & Ald. 926, 7 ECL 504, 106 Reprint 1430; Reg. v. Oxley, 3 C. & K. 317; Reg. v. Burraston, 4 Jur. 697. See also infra text and notes 21–25.

[a] **This requirement is not technical, or a mere matter of form,** but of the very essence of the indictment, and necessary in order to inform accused of the nature and cause of the accusation against him. State v. Nelson, 74 Minn. 409, 77 NW 223.

[b] **Averments held insufficient.**—Thomas v. State, 54 Ark. 584, 16 SW 568; Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565; Rea v. State, 17 Ga. A. 476, 87 SE 685; Com. v. Weingartner, 27 SW 815, 16 KyL 221; State v. Bixler, 62 Md. 354; Burns v. Peo., 59 Barb. (N. Y.) 531; Knight v. State, 71 Tex. Cr. 36, 158 SW 543; Maddox v. State, 28 Tex. A. 533, 13 SW 861.

[c] **Averments held sufficient.**—Hardwick v. U. S., 257 Fed. 505, 168 CCA 509; De Bernie v. State, 19 Ala. 23; Peo. v. Rodley, 131 Cal. 240, 63 P 351; Kimmel v. Peo., 92 Ill. 457; State v. Brown, 128 Iowa 24, 102 NW 799; Com. v. Schweiters, 122 Ky. 874, 93 SW 592, 29 KyL 417; Com. v. Lashley, 74 SW 658, 25 KyL 58; State v. Brown, 8 Rob. (La.) 566; Com. v. Wright, 166 Mass. 174, 44 NE 129; Com. v. Sargent, 129 Mass. 115; Peo. v. Mankin, 225 Mich. 246, 196 NW 426; State v. Scott, 78 Minn. 311, 81 NW 3; State v. Kelly, 113 Miss. 461, 74 S 325; Peo. v. Ostrander, 64 Hun 335, 19 NYS 324, 328 [aff 135 N. Y. 639 mem, 32 NE 647 mem]; Dilcher v. State, 39 Oh. St. 130; Hart v. State, 73 Tex. Cr. 362, 166 SW 152; Barber v. State, 64 Tex. Cr. 96, 142 SW 577; Chase v. State, (Tex. Cr.) 28 SW 952; State v. Smails, 63 Wash. 172, 115 P 82; Reg. v. Schlesinger, 10 Q. B. 670, 59 ECL 670, 116 Reprint 255; Reg. v. London, 12 Cox C. C. 50.

21. U. S.—Hilliard v. U. S., 24 F. (2d) 99.
Fla.—State v. Blitch, 120 S 355; Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919.
Iowa.—State v. Gallaugher, 123 Iowa 378, 98 NW 906.
Ky.—Com. v. Weingartner, 27 SW 815, 16 KyL 221.
Me.—State v. Ela, 91 Me. 309, 39 A 1001.
Mich.—Peo. v. Vogt, 156 Mich. 594, 121 NW 293.
N. J.—Heintz v. Union County Ct. Gen. Quart. Sess. of Peace, 45 N. J. L. 523.

22. U. S.—U. S. v. Pettus, 84 Fed. 791.
Cal.—Peo. v. De Vries, 52 Cal. A. 705, 199 P 867.
Del.—State v. Marvel, 131 A 313 [aff 131 A 317, 42 ALR 1058].
Ga.—King v. State, 103 Ga. 263, 30 SE 30.
Iowa.—U. S. v. Morgan, Morr. 341, 41 AmD 234.
N. J.—Heintz v. Union County Ct. Gen. Quart. Sess. of Peace, 45 N. J. L. 523.
N. M.—Terr. v. Lockhart, 8 N. M. 523, 45 P 1106.
N. Y.—Peo. v. Tatum, 60 Misc. 311, 112 NYS 36, 22 N. Y. Cr. 557.
Tex.—Gabrielsky v. State, 13 Tex. A. 428.
See Gibson v. State, 44 Ala. 17 (dictum).
But see Com. v. Dunham, Thach. Cr. (Mass.) 519 (where there was a general assignment as to the falsity of a return as to the condition of a bank).

[a] **Where contradictory matter** is set out, it is necessary to show what is true and what is false. Hilliard v. U. S., 24 F. (2d) 99.

[b] **Averments held sufficient.**—Johnson v. State, 71 Tex. Cr. 428, 160 SW 964.

23. U. S.—Hilliard v. U. S., 24 F. (2d) 99.
Ala.—Gibson v. State 44 Ala. 17.
Me.—State v. Mahoney, 115 Me. 251, 98 A 750; State v. Crocker, 106 Me. 369, 76 A 703; State v. Ela, 91 Me. 309, 39 A 1001. But see State v. Corson, 59 Me. 137 (where an indictment purporting to follow the statutory form was upheld).
Mo.—State v. Morgan, (A.) 225 SW 129.
Tex.—Morris v. State, 47 Tex. Cr. 420, 83 SW 1126; Harrison v. State, 41 Tex. Cr. 274, 53 SW 863; Gabrielsky v. State, 13 Tex. A. 428.
Vt.—State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918. Compare State v. Camley, 67 Vt. 322, 31 A 840 (as explained by State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918).

[a] **Averment held sufficient.**—State v. Smith, 63 Vt. 201, 22 A 604.

24. U. S.—Hilliard v. U. S., 24 F. (2d) 99.
Del.—State v. Marvel, 131 A 313 [aff 131 A 317, 42 ALR 1058].
Me.—State v. Ela, 91 Me. 309, 39 A 1001.
Mich.—Peo. v. Vogt, 156 Mich. 594, 121 NW 293.
N. J.—State v. Voorhis, 52 N. J. L. 351, 20 A 26; Heintz v. Union County Ct. Gen. Quarter Sessions of Peace, 45 N. J. L. 523.
N. M.—Terr. v. Lockhart, 8 N. M. 523, 45 P 1106.
N. C.—State v. Mumford, 12 N. C. 519, 17 AmD 573.
Tex.—Morris v. State, 47 Tex. Cr. 420, 83 SW 1126; Harrison v. State, 41 Tex. Cr. 274, 53 SW 863; Gabrielsky v. State, 13 Tex. A. 428.
Vt.—State v. Rowell, 72 Vt. 28, 47 A 111, 82 AmSR 918.
See Gibson v. State, 44 Ala. 17 (dictum).

[a] **Allegations held sufficiently specific.**—State v. Voorhis, 52 N. J. L. 351, 20 A 26; State v. Mumford, 12 N. C. 519, 17 AmD 573.

25. U. S.—Bartlett v. U. S., 106 Fed. 884, 46 CCA 19.
Fla.—Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919.
Iowa.—State v. Gallaugher, 123 Iowa 378, 98 NW 906.
Ky.—Com. v. Weingartner, 27 SW 815, 16 KyL 221.
Miss.—Chenault v. State, 122 S 98.
Tenn.—State v. Moffatt, 7 Humphr. 250.
Tex.—State v. Powell, 28 Tex. 626; Juaraqui v. State, 28 Tex. 625. But see Chavarria v. State, (Cr.) 63 SW 312 (where the indictment was attacked on the ground that there was no positive statement of falsity).

[a] **Allegation that accused "well knew"** (1) the reverse of the facts to which he testified, instead of alleging the negative of the oath, has been held insufficient. State v. Gallaugher, 123 Iowa 378, 98 NW 906; Com. v. Weingartner, 27 SW 815, 16 KyL 221; State v. Moffatt, 7 Humphr. (Tenn.) 250. See Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565 (where an averment that defendant knew that the testimony was false was apparently not regarded as an averment that it was false). Compare Baskin v. U. S., 209 Fed. 740, 126 CCA 464 (where an averment that accused "well knew" the truth was disregarded as surplusage). (2) But similar averments have been held sufficient. Com. v. Tracenrider, 140 Ky. 660, 131 SW 495; State v. Wells, Mann. Unrep. Cas. (La.) 242; Com. v. Devine, 155 Mass. 224, 29 NE 515. See State v. Lindenburg, 13 Tex. 27 (where an indictment containing the allegation that accused "well knew" the facts was upheld). (3) See Kentucky cases involving prosecutions for false swearing infra note 30 [a].

[b] **Assignment held not argumentative.**—Com. v. McLaughlin, 122 Mass. 449.

26. State v. Marvel, (Del.) 131 A 313 [aff 131 A 317, 42 ALR 1058]; State v. Ruddy, 287 Mo. 52, 228 SW 760.

[a] **An averment that accused "well knew"** the reverse of the facts to which he testified, while not technically correct, is not fatally defective. State v. Marvel, (Del.) 131 A 313 [aff 131 A 317, 42 ALR 1058].

27. State v. Marvel, supra; Peo. v. Clements, 107 N. Y. 205, 13 NE 782.

[a] **Rule applied** to averments that defendant well knew that the facts were other than as stated by

charge which he must meet.[28] But in any event averments in this regard must be sufficiently definite to apprise accused of the charge against him.[29]

In a prosecution for "false swearing" as defined by statute, the view has been taken that the charge should directly negative the truth of the testimony;[30] that a mere general averment as to falsity is not sufficient;[31] and that averments should show wherein the testimony or statement was false.[32] But it has been held that the traverse or denial is sufficient if it gives accused notice of the charge against him.[33]

An innuendo is that part of the charge which is inserted for the purpose of explaining the assertion or testimony which, it is alleged, is false;[34] and where there is doubt as to such meaning, the use of an innuendo is proper.[35]

"Falsely" swore or testified. In some of the cases, especially where the statutory definition contains the word "falsely," the view has been taken that it should be alleged that accused swore or testified "falsely."[36] There is, however, authority for the view that the charge is not fatally defective because the word "falsely" is omitted where equivalent words are used,[37] and where the statutory form was followed it has been held that the omission of the word does not render the indictment insufficient.[38]

[§ 133] **(2) Setting Forth Truth.** At common law and even under statutes regulating indictments and informations in some jurisdictions the assignment of perjury should set forth the truth by way of antithesis.[39] However, according to other cases, under modern rules of procedure, an indictment or information is not necessarily insufficient because it fails affirmatively to aver what the truth was.[40] In any event the form of averment in question may

him. Peo. v. Clements, 107 N. Y. 205, 13 NE 782.

28. U. S.—Berry v. U. S., 259 Fed. 203, 170 CCA 271; Ulmer v. U. S., 219 Fed. 641, 134 CCA 127 [certiorari den 238 U. S. 638 mem, 35 SCt 940 mem, 59 L. ed. 1500 mem]; U. S. v. Salen, 216 Fed. 420.

Cal.—Peo. v. Collins, 6 Cal. A. 492, 92 P 513.

Ill.—Peo. v. Gazelle, 299 Ill. 58, 132 NE 273.

Mich.—Peo. v. Mankin, 225 Mich. 246, 196 NW 426.

Minn.—State v. Smith, 153 Minn. 167, 190 NW 48 [disappr State v. Nelson, 74 Minn. 409, 77 NW 223, in so far as that case requires strict requirement with certain technical rules].

Mo.—State v. Ruddy, 287 Mo. 52, 228 SW 760.

N. Y.—Peo. v. Williams, 2 NYS 382.

N. C.—State v. Murphy, 101 N. C. 697, 8 SE 142.

S. D.—State v. Reidt, 222 NW 677.

Tenn.—Lawson v. State, 3 Lea 309.

[a] **In Arkansas** (1) certain of the earlier cases decided, however, after the enactment of the statute regulating indictments for perjury, laid down the strict rule that the particulars wherein the testimony or assertions of accused were false must be specifically pointed out. Harp v. State, 59 Ark. 113, 26 SW 714; Thomas v. State, 54 Ark. 584, 16 SW 568. See Thomas v. State, 51 Ark. 138, 10 SW 193 (as to effect of assignment following in all details the statement of the matter sworn to). (2) Later cases have taken a more liberal view and have upheld general averments of falsity. Smith v. State, 163 Ark. 223, 259 SW 404; Atkinson v. State, 133 Ark. 341, 202 SW 709; Davis v. State, 131 Ark. 542, 199 SW 902; Loudermilk v. State, 110 Ark. 549, 162 SW 569. (3) Moreover an indictment has been held not fatally defective although there was not strict conformity between the averment of matter falsely sworn and the traverse thereof. Cox v. State, 164 Ark. 126, 261 SW 303. (4) Other indictments held sufficient. Clower v. State, 151 Ark. 359, 236 SW 265; Blevins v. State, 85 Ark. 195, 107 SW 393.

[b] **Entire indictment should be considered** in determining whether there is a sufficient assignment of perjury. Peo. v. Collins, 6 Cal. A. 492, 92 P 513.

[c] **General averment held sufficient.**—Venlinio v. U. S., 276 Fed. 12; Berry v. U. S., 259 Fed. 203, 170 CCA 271; Lawson v. State, 3 Lea (Tenn.) 309.

29. State v. Cunningham, 116 Ind. 209, 18 NE 613; State v. Joiner, 128 La. 876, 55 S 560; State v. Mahoney, 115 Me. 251, 98 A 750.

[a] **Averments held sufficient.**—State v. Joiner, 128 La. 876, 55 S 560.

30. Com. v. Bennett, 207 Ky. 300, 269 SW 321; Coulter v. Com., 154 Ky. 793, 159 SW 557; Com. v. Porter, 32 SW 138, 17 KyL 544; Com. v. Still, 83 Ky. 275; Ferguson v. Com., 1 SW 435, 8 KyL 257.

[a] **Averment that accused "well knew"** that alleged statements were false has been held fatally defective. Com. v. Bennett, 207 Ky. 300, 269 SW 321. But see Blakey v. Com., 183 Ky. 493, 209 SW 516 (where the view was taken that an averment that when accused made the false statements he knew that they were not true was equivalent to an averment that they were not true); Com. v. Lashley, 74 SW 658, 25 KyL 58 (where similar allegations with reference to the falsity of the matter testified to were held sufficient). Contra Thomas v. Com., 175 Ky. 38, 193 SW 653.

[b] **Conflicting testimony or assertions.**—An indictment is not sufficient where it charges that defendant on different occasions swore to conflicting statements, and that which of them was false is unknown to the grand jury. Coulter v. Com., 154 Ky. 793, 159 SW 557.

[c] **Averments held sufficient.**—Com. v. Ransdall, 153 Ky. 334, 155 SW 1117.

31. Com. v. Still, 83 Ky. 275; Shackelford v. Com., 79 SW 192, 25 KyL 1830; Ferguson v. Com., 1 SW 435, 8 KyL 257.

32. Com. v. Still, 83 Ky. 275; Shackelford v. Com., 79 SW 192, 25 KyL 1830. See Tudor v. Com., 134 Ky. 186, 119 SW 816.

[a] **Averments held insufficient.**—Sizemore v. Com., 210 Ky. 401, 276 SW 123; Pitman v. Com., 198 Ky. 826, 250 SW 114.

[b] **Averments held sufficient.**—Dennington v. State, 98 Tex. Cr. 332, 265 SW 698.

33. Anderson v. Com., (Ky.) 117 SW 364.

34. See infra text and note 35.

35. Peo. v. Bradbury, 155 Cal. 808, 103 P 215; Peo. v. German, 110 Mich. 244, 68 NW 150; Rex v. Aylett, 1 T. R. 63, 99 Reprint 973.

[a] **Innuendo held properly to express meaning of matter sworn to.**—State v. Lea, 3 Ala. 602; Bell v. State, 75 Tex. Cr. 401, 171 SW 239.

36. State v. Morse, 90 Mo. 91, 2 SW 137; Juaraqui v. State, 28 Tex. 625; State v. Aley, 94 W. Va. 529, 119 SE 549; Reg. v. Oxley, 3 C. & K. 317; Rex v. Perrott, 2 M. & S. 379, 105 Reprint 422. See State v. Nickerson, 46 Iowa 447 (where the court suggested that the word "falsely" should be used since it appeared in the statute).

[a] **In Virginia** (1) the rule has been laid down in accordance with the text. Fitch v. Com., 92 Va. 824, 24 SE 272; Thomas v. Com., 2 Rob. (41 Va.) 795. (2) But it seems that under the statute it is sufficient if the averment that accused swore "falsely" appears in any part of the indictment. See State v. Aley, 94 W. Va. 529, 119 SE 549.

[b] **The charging part** of the indictment should contain the word "falsely" according to some cases. State v. Aley, 94 W. Va. 529, 119 SE 549.

37. State v. Anderson, 103 Ind. 170, 2 NE 332; State v. Bowers, 8 OhS&CP 324, 6 OhNP 529. See Respublica v. Newell, 3 Yeates (Pa.) 406, 2 AmD 381.

38. State v. Corson, 59 Me. 137; State v. Camley, 67 Vt. 322, 31 A 840.

[a] **Equivalent terms.**—(1) In such jurisdictions the averment that defendant committed "perjury" has been construed as sufficiently averring that defendant testified falsely. State v. Corson, 59 Me. 137; State v. Camley, 67 Vt. 322, 31 A 840. (2) The term "corruptly" implies that the testimony was false. State v. Smith, 63 Vt. 201, 22 A 604.

39. State v. Blitch, (Fla.) 120 S 355; Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919; Chenault v. State, (Miss.) 122 S 98; Willoughby v. State, 101 Miss. 60, 57 S 361; Moore v. State, 91 Miss. 250, 44 S 817, 124 AmSR 652; State v. Silverberg, 78 Miss. 858, 29 S 761; Crow v. State, 49 Tex. Cr. 103, 90 SW 650; Turner v. State, 30 Tex. A. 691, 18 SW 792; Gabrielsky v. State, 13 Tex. A. 428. See Peo. v. Bradbury, 155 Cal. 808, 103 P 215 (where it was said that on proper demurrer accused was entitled to have the indictment made more specific by a recital of certain facts).

[a] **Matter of substance.**—This requirement is regarded as a matter of substance. Fudge v. State, 57 Fla. 7, 49 S 128, 17 AnnCas 919.

[b] **In Kentucky** (1) the rule of the text has been recognized in the case both of perjury (Com. v. Compton, 36 SW 1116, 18 KyL 479) (2) and false swearing (Com. v. Porter, 32 SW 138, 17 KyL 554; Howell v. Com., 104 SW 685, 31 KyL 983). (3) But in a prosecution for false swearing it has been stated that it is not indispensably necessary that the indictment should set out that accused had not done the thing he said he had done. Blakey v. Com., 183 Ky. 493, 209 SW 516.

Indirect or argumentative denial or traverse see supra § 132.

40. Ark.—Atkinson v. State, 133 Ark. 341, 202 SW 709; Davis v. State, 131 Ark. 542, 199 SW 902; Loudermilk v. State, 110 Ark. 549, 162 SW 569.

Ga.—Johnson v. State, 76 Ga. 790.

Kan.—State v. Saunders, 122 Kan. 840, 253 P 572.

N. M.—State v. Herrera, 28 N. M. 155, 207 P 1085, 24 ALR 1134.

Okl.—Gray v. State, 4 Okl. Cr. 292, 111 P 825, 32 LRANS 142.

S. D.—State v. Reidt, 222 NW 677.

[a] **In the federal courts** the cases are not in agreement. (1) In some the view has been taken that the truth must affirmatively be alleged. Bartlett v. U. S., 106 Fed. 884, 46 CCA 19; U. S. v. Pettus, 84 Fed. 791. (2) In other cases the view has been taken that such averment is not necessary if other averments are

properly be used to point out the particulars wherein the testimony or assertions of accused were false,[41] and a like rule applies in a prosecution for false swearing.[42]

[§ 134] **(3) Negativing Information or Belief.** The indictment or information, when the testimony was given upon information, knowledge, and belief, must negative, not only the truth of the oath, but also the information and belief.[43] So where accused has testified as to his "belief," the "belief" should be negatived.[44] But where accused swore in respect of his belief as to a certain matter, it has been held that it is sufficient to negative his belief without negativing the matter itself.[45] Under the federal statute it should be alleged that accused did not believe that the matter to which he testified was true.[46]

[§ 135] **b. Intent.**[47] While it has been held that it is not necessary expressly to allege that there was an intention to testify falsely,[48] the indictment or information must show in some form that the alleged offense was committed with criminal intent in the case both of perjury[49] and of false swearing;[50] and accordingly the view usually taken is that the indictment or information should charge the testimony or assertion to have been "willfully"[51] and "corruptly"[52] false, at least where such words are a part of the statutory definition or description of the offense.[53] But there is authority to the effect that the word "willful" is not absolutely necessary in a charge of perjury,[54] even, according to some cases, where the statute defining the offense uses the word "willful" or "willfully,"[55] and that equivalent words, or words from which the willfulness may be implied, may be used.[56] Moreover, it has been held that it is not necessary to use the word

sufficient to inform accused of the offense charged. Sharron v. U. S., 11 F. (2d) 689; U. S. v. Salen, 216 Fed. 420; U. S. v. Freed, 179 Fed. 236; U. S. v. Howard, 132 Fed. 325. See Ulmer v. U. S., 219 Fed. 641, 134 CCA 127 [certiorari den 238 U. S. 638 mem, 35 SCt 940 mem, 59 L. ed. 1500 mem] (where an objection as to the manner in which the truth was set forth was regarded as lacking in substance); Kovoloff v. U. S., 202 Fed. 475, 120 CCA 605 [certiorari den 226 U. S. 609 mem, 33 SCt 217 mem, 57 L. ed. 380 mem] (where the indictment was upheld although the allegations as to truth did not expressly traverse the alleged false testimony).

41. U. S.—U. S. v. Cuddy, 39 Fed. 696. See Gregorat v. U. S., 249 Fed. 470, 161 CCA 428 (where an indictment for false swearing in a naturalization proceeding attacked for failure directly to set forth truth was upheld).

Ark.—State v. Leatherman, 125 Ark. 243, 188 SW 545; Smith v. State, 91 Ark. 200, 120 SW 985.

Iowa.—State v. Loos, 145 Iowa 170, 123 NW 962; State v. Roche, 137 Iowa 387, 114 NW 1034.

Kan.—State v. Hoel, 77 Kan. 334, 94 P 267.

La.—State v. Edwards, 149 La. 679, 90 S 21; State v. Brown, 8 Rob. 566.

Mass.—Com. v. McLaughlin, 122 Mass. 449.

N. C.—State v. Murphy, 101 N. C. 697, 8 SE 142.

Pa.—Com. v. Rupple, 1 Pa. Co. 663.

Tex.—Hart v. State, 73 Tex. Cr. 362, 166 SW 152.

Vt.—State v. Smith, 63 Vt. 201, 22 A 604.

Wash.—State v. Smails, 63 Wash. 172, 115 P 82.

[a] **Statement that an act was not done** is a sufficient denial of the testimony of one who says he saw it done. Com. v. McLaughlin, 122 Mass. 449; State v. Smith, 63 Vt. 201, 22 A 604.

[b] **Averments held sufficient.**—Baskin v. U. S., 209 Fed. 740, 126 CCA 464; State v. Loos, 145 Iowa 170, 123 NW 962; State v. Roche, 137 Iowa 387, 114 NW 1034; State v. Brown, 128 Iowa 24, 102 NW 799; State v. Hoel, 77 Kan. 334, 94 P 267; State v. Edwards, 149 La. 679, 90 S 21; State v. Joiner, 128 La. 876, 55 S 560; State v. Brown, 8 Rob. (La.) 566; Bell v. State, 75 Tex. Cr. 401, 171 SW 239; Hart v. State, 73 Tex. Cr. 362, 166 SW 152; Barber v. State, 64 Tex. Cr. 96, 142 SW 577; Gonzales v. State, 54 Tex. Cr. 230, 112 SW 941; Donohoe v. State, 14 Tex. A. 638.

42. Barrett v. Com., 215 Ky. 722, 286 SW 1047; Dennington v. State, 98 Tex. Cr. 332, 265 SW 698.

[a] **Averment need not be more specific** than the affidavit on which the charge is based. Barrett v. Com., 215 Ky. 722, 286 SW 1047.

[b] **Averments held sufficient.**—Barrett v. Com., 215 Ky. 722, 286 SW 1047; Howell v. Com., 104 SW 685, 31 KyL 983; Urben v. State, 77 Tex. Cr. 261, 178 SW 514.

43. Lambert v. Peo., 76 N. Y. 220, 32 AmR 293 [rev 14 Hun 512].

44. State v. Coyne, 214 Mo. 344, 114 SW 8, 21 LRANS 993. See Gibson v. State, 44 Ala. 17 (dictum); Fitch v. Com., 92 Va. 824, 24 SE 272 (where accused swore that he "thought" certain facts were true, it is proper to negative that he so thought).

[a] **Averments held sufficient.**—State v. Ellison, 8 Blackf. (Ind.) 225; Peo. v. Mankin, 225 Mich. 246, 196 NW 426.

45. State v. Cruikshank, 6 Blackf. (Ind.) 62.

46. Daniels v. U. S., 196 Fed. 459, 116 CCA 233.

[a] **Averment held sufficient.**—Daniels v. U. S., 196 Fed. 459, 116 CCA 233.

47. In general see Indictments and Informations §§ 244–246.

48. King v. State, 103 Ga. 263, 30 SE 30.

[a] **Averment that accused willfully testified falsely** sufficiently implies that he did so intentionally. King v. State, 103 Ga. 263, 30 SE 30.

[b] **In Canada,** where the form of charge prescribed by statute is followed, it is not necessary expressly to allege an intent to mislead or deceive. Rex v. Yaldon, 17 Ont. L. 179, 12 OntWR 384; Rex v. Hinman, 7 Terr. L. 186; Reg. v. Skelton, 3 Terr. L. 58.

49. State v. Williams, 111 La. 1033, 36 S 111; Allen v. State, 42 Tex. 12. See also infra text and notes 51, 52.

50. Tudor v. Com., 134 Ky. 186, 119 SW 816.

51. U. S.—U. S. v. Eddy, 134 Fed. 114.

Fla.—Parrish v. State, 18 Fla. 902; Robinson v State, 18 Fla. 898; Miller v. State, 15 Fla. 577.

Mo.—State v. Day, 100 Mo. 242, 12 SW 365; State v. Morse, 90 Mo. 91, 2 SW 137.

N. C.—State v. Davis, 84 N. C. 787; State v Carland, 14 N. C. 114.

Va.—Thomas v. Com., 2 Rob. (41 Va.) 795.

[a] **Indictment for false swearing.**—Com. v. Taylor, 96 Ky. 394, 29 SW 138, 16 KyL 482.

[b] **"Corruptly"** is not the equivalent of "willfully." U. S. v. Edwards, 43 Fed. 67; Williams v. Peo., 26 Colo. 272, 57 P 701.

52. U. S.—U. S. v. Babcock, 24 F. Cas. No. 14,488, 4 McLean 113.

Ill.—Wilkinson v Peo., 226 Ill. 135, 80 NE 699.

Miss.—Chenault v. State, 122 S 98.

Mo.—State v. Morse, 90 Mo. 91, 2 SW 137.

N. C.—State v. Davis, 84 N. C. 787; State v. Carland, 14 N. C 114.

Va.—Thomas v. Com., 2 Rob. (41 Va.) 795.

[a] **"Willfully and corruptly" gave evidence** is a sufficient averment. State v. Bobbitt, 70 N. C. 81.

[b] **Averment held sufficient in indictment for false swearing.**—Singleton v. Com., 210 Ky. 456, 276 SW 141.

53. U. S.—U. S. v. Lake, 129 Fed. 499; U. S. v. Edwards, 43 Fed. 67.

Cal.—Peo. v. Turner, 122 Cal. 679, 55 P 685.

Pa.—Com. v. Nailor, 29 Pa. Super. 275.

W. Va.—State v. Aley, 94 W. Va. 529, 119 SE 549.

Eng.—Rex v. Cox, Leach C. C. 71, 168 Reprint 138.

See also supra text and notes 51, 52.

[a] **"Corruptly."**—Com. v. Nailor, 29 Pa. Super. 275.

[b] **"Willfully."**—U. S. v. Lake, 129 Fed. 499; U. S. v. Edwards, 43 Fed. 67; Peo. v. Turner, 122 Cal. 679, 55 P 685; Com. v. Nailor, 29 Pa. Super. 275; State v. Aley, 94 W. Va. 529, 119 SE 549; Rex v. Cox, Leach C. C. 71, 168 Reprint 138.

[c] **The charging part** of the indictment should contain the word "willfully" according to some cases. Peo. v. Turner, 122 Cal. 679, 55 P 685; State v. Aley, 94 W. Va. 529, 119 SE 549.

54. State v. Spencer, 45 La. Ann. 1, 12 S 135. See Respublica v. Newell, 3 Yeates (Pa.) 406 (where the word "willfully" was not used in the charging part). But see State v. Gibson, 26 La. Ann. 71 (where neither "willfully" nor equivalent words were used).

[a] **At common law.**—Rex v. Cox, Leach C. C. 71, 168 Reprint 138.

[b] **In Vermont** an indictment which follows the form prescribed by statute is sufficient although the word "willfully" does not appear, since the word "perjury" is regarded as sufficient to include a charge that accused testified "willfully." State v. Camley, 67 Vt. 322, 31 A 840.

[c] **In Canada** an indictment which follows the statutory form is not insufficient because it omits the word "willfully," even though the statutory definition of "perjury" includes such word. Rex v. Morrison, 49 N. S. 446, 26 CanCrCas 26, 28 DomLR 113.

55. Blevins v. State, 85 Ark. 195, 107 SW 393; Williams v. Peo., 26 Colo. 272, 57 P 701.

56. Blevins v. State, 85 Ark. 195, 107 SW 393; Williams v. Peo., 26 Colo. 272, 57 P 701; State v. Spencer, 45 La. Ann. 1, 12 S 135.

[a] **Thus** (1) "feloniously" has been regarded as the equivalent of "willfully." Williams v. Peo., 26 Colo. 272, 57 P 701. (2) An averment that the testimony was feloniously, falsely, and corruptly given necessarily implied that it was willfully or intentionally given, especially where the indictment concluded with the statement "said testimony

"corruptly" where equivalent words are used,[57] or where the statutory definition does not contain the word "corrupt" or "corruptly."[58] But according to some cases the omission of both "willfully" and "corruptly" is never allowed.[59]

"Deliberately and willfully." Where the words "deliberately and willfully" are used in a statute defining the offense of perjury, those terms should be used in charging the offense.[60]

"Voluntarily." It has been held that the omission of the word "voluntarily" from an indictment for false swearing is not fatal where equivalent words are used.[61]

"Feloniously." Perjury being generally made a felony by statute, it is held in some cases that an indictment therefor must allege that it was "feloniously" committed.[62] Other cases, however, hold that the use of the word "feloniously" is unnecessary,[63] and that a charge in the words of the statute is sufficient.[64]

Negativing inadvertence or mistake. It is unnecessary to negative that the false statement or testimony was made through inadvertence, under agitation, or by mistake, where the statutory provision that a statement so made shall not constitute perjury is not a part of the statutory definition of the offense.[65]

[§ 136] **c. Knowledge of Falsity or Recollection of Facts.**[66] It has frequently been held or stated that an express averment of knowledge of falsity is not necessary to an indictment for perjury,[67] except where the false testimony is given on information and belief.[68] But according to some cases knowledge must expressly be alleged,[69] at least where knowledge of the falsity of the testimony given is made an element of the offense by statute,[70] as for example in the case of the statutory offense of false swearing.[71] In any event, under modern rules of pleading, no particular or stereotyped phrase is essential in charging the scienter of accused in perjury cases.[72]

[§ 137] **d. Joinder of Assignments.**[73] Several assignments of perjury may be contained in a single count of an indictment or information,[74] and in

being wilfully and corruptly false." Blevins v. State, 85 Ark. 195, 107 SW 393.

57. State v. Anderson, 92 Iowa 764, 60 NW 630.

[a] **Averments held sufficient.**—Averment that defendant willfully and intentionally testified falsely, with intent to have the magistrate before whom he was giving his testimony act thereon. State v. Anderson, 92 Iowa 764, 60 NW 630.

[b] **In Vermont** (1) an indictment which follows the form prescribed by statute is sufficient although the word "corruptly" does not appear, since the word "perjury" is regarded as sufficient to include a charge that accused testified "corruptly." State v. Camley, 67 Vt. 322, 31 A 840. (2) But it has been held that, in an indictment for perjury in making oath to a chattel mortgage, an averment that the mortgage was not made to secure an honest debt, but "for some other purpose," does not sufficiently charge a wrongful motive in the execution of the mortgage. State v. Collins, 62 Vt. 195, 19 A 368.

[c] **In Canada** an indictment which follows the statutory form is not insufficient because it omits the word "corruptly," even though the statutory definition of "perjury" includes such word. Rex v. Morrison, 49 N. S. 446, 26 CanCrCas 26, 28 DomLR 113. But see Rex v. Cohn, 36 N. S. 240, 6 CanCrCas 386 (where the charge was held insufficient).

58. U. S. v. Hearing, 26 Fed. 744; State v. Bixler, 62 Md. 354.

59. Rex v. Stevens, 5 B. & C. 246, 11 ECL 448, 108 Reprint 92; Rex v. Richards, 7 D. & R. 665, 16 ECL 313.

60. State v. Perry, 42 Tex. 238; Allen v. State, 42 Tex. 12; State v. Webb, 41 Tex. 67; State v. Powell, 28 Tex. 626; Juaraqui v. State, 28 Tex. 625; Smith v. State, 1 Tex. A. 620.

61. Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

[a] **Equivalent words.**—"Unlawfully, deliberately, corruptly, and wilfully made." Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

62. Nelson v. State, 32 Ark. 192; Com. v. Swanger, 108 Ky. 579, 57 SW 10, 22 KyL 276; Wile v. State, 60 Miss. 260; State v. Terry, 30 Mo. 368; State v. Williams, 30 Mo. 364.

Use of "feloniously" in indictment or information in general see Indictments and Informations §§ 247–250.

63. See infra text and note 64.

[a] **In North Carolina** (1) it is not necessary to use the term "feloniously" because such term does not appear in the statutory form of indictment. State v. Harris, 145 N. C. 456, 59 SE 115. (2) Earlier cases decided after the enactment of the statute prescribing such form took a contrary view. State v. Bunting, 118 N. C. 1200, 24 SE 118; State v. Shaw, 117 N. C. 764, 23 SE 246.

[b] **Equivalent words.**—The indictment need not be in the exact words of the statute, but other words conveying the same meaning may be used; and an indictment in the words of the statute, except for omission of the word "feloniously," is good, especially where it is also averred that the statements sworn to were false, and known to be so by the party making them. State v. Anderson, 103 Ind. 170, 2 NE 332.

64. Peo. v. Parsons, 6 Cal. 487; Peo. v. Ashbrook, 276 Ill. 382, 114 NE 922; State v. Matlock, 48 La. Ann. 663, 19 S 669.

65. Brown v. State, 9 Tex. A. 171.

66. Allegations as to knowledge in general see Indictments and Informations §§ 241, 242.

67. U. S.—U. S. v. Pettus, 84 Fed. 791. But see U. S. v. Babcock, 24 F. Cas. No. 14,488, 4 McLean 113 (where an indictment was held insufficient).

Ark.—Atkinson v. State, 133 Ark. 341, 202 SW 709.

Ida.—Terr. v. Anderson, 2 Ida. (Hasb.) 537, 21 P 417.

Ill.—Johnson v. Peo., 94 Ill. 505.

Iowa.—State v. Gallaugher, 123 Iowa 378, 98 NW 906; State v. Raymond, 20 Iowa 582. But see State v. Morse, 1 Greene 503 (where, however, a statutory definition involving knowledge was considered).

Miss.—Brown v. State, 57 Miss. 424.

Or.—State v. Ah Lee, 18 Or. 540, 23 P 424.

Tex.—Ferguson v. State, 36 Tex. Cr. 60, 35 SW 369 [overr State v. Powell, 28 Tex. 626].

Vt.—State v. Sleeper, 37 Vt. 122.

[a] **"Willfully"** implies intention as well as deliberation of purpose, and if the purpose was to swear falsely, it must follow that it was done knowingly. Johnson v. Peo., 94 Ill. 505; State v. Sleeper, 37 Vt. 122.

[b] **In Minnesota,** in a case in which the form prescribed by statute was followed, the words "willfully and corruptly false" were regarded as sufficient to include "knowingly," although the latter word was used in the statutory definition. State v. Stein, 48 Minn. 466, 51 NW 474.

[c] **In Canada** (1) where the statutory form is followed, knowledge need not be alleged. Rex v. Yee Mock, 6 Alta. L. 231, 21 CanCrCas 400, 13 DomLR 220, 4 WestWkly 1342. See Rex v. Morrison, 49 N. S. 446, 26 CanCrCas 26, 28 DomLR 113 (where the statutory form was followed and the charge was held sufficient). But see Rex v. Cohon, 36 N. S. 240, 6 Can CrCas 386 (where a charge which omitted an averment as to knowledge was held insufficient). (2) It has been held that an indictment or charge in which it is alleged that accused committed perjury by falsely, willfully, and with intent to mislead the magistrate, swearing to a certain statement, involves a charge that accused knew such statement to be false and will not be quashed for failure more specifically to charge such knowledge. Rex v. Doyle, (N. S.) 12 CanCrCas 69.

68. Gibson v. State, 44 Ala. 17; State v. Lea, 3 Ala. 602; State v. Gallaugher, 123 Iowa 378, 98 NW 906; State v. Raymond, 20 Iowa 582; Brown v. State, 57 Miss. 424 (recognizing rule); Rex v. Perrott, 2 M. & S. 379, 105 Reprint 422. See State v. Marvel, (Del.) 131 A 313 [aff 131 A 317, 42 ALR 1058] (it is proper to aver that accused knew that his statement was false where he swore to his belief in that regard).

69. State v. Williams, 111 La. 1033, 36 S 111; State v. Brown, 110 La. 591, 34 S 698; State v. Morgan, (Mo. A.) 225 SW 129; Com. v. Cook, 1 Rob. (40 Va.) 789.

70. Peo. v. Root, 94 App. Div. 84, 87 NYS 962; State v. Champion, 116 N. C. 987, 21 SE 700; State v. Flowers, 109 N. C. 841, 13 SE 718 (recognizing rule). See Peo. v. Hernández, 9 Porto Rico 477.

71. Com. v. Taylor, 96 Ky. 394, 29 SW 138, 16 KyL 482; Adams v. Com., 94 SW 664, 29 KyL 683.

[a] **Averment held insufficient.**—Sizemore v. Com., 210 Ky. 401, 276 SW 123; Pipes v. Com., 148 Ky. 174, 146 SW 38; Tudor v. Com., 134 Ky. 186, 119 SW 816.

[b] **Averment held sufficient.**—Singleton v. Com., 210 Ky. 456, 276 SW 141; Fisher v. Com., 152 Ky. 411, 153 SW 417; Ferrell v. Com., (Ky.) 127 SW 162.

72. See cases infra this note.

[a] **Averments as to knowledge or recollection held sufficient.**—State v. Wood, 17 Iowa 18; State v. Hoel, 77 Kan. 334, 94 P 267; Com. v. Miles, 140 Ky. 577, 131 SW 385, 140 AmSR 401; State v. Varnado, 154 La. 575, 97 S 865; State v. Smith, 149 La. 700, 90 S 28; State v. Edwards, 149 La. 679, 90 S 21; State v. Smalls, 63 Wash. 172, 115 P 82.

73. Joinder of:

Distinct statements in one count as constituting single offense see Indictments and Informations § 323.

Offenses in general see Indictments and Informations §§ 320–356.

74. Smith v. State, 163 Ark. 223, 259 SW 404; Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Woodward v. State,

this connection the indictment or information may embrace in a single count all the particulars in which accused is alleged to have sworn falsely,[75] where the assignments relate to the same transaction;[76] but, according to some cases, each fact sworn to should be stated in distinct and separate assignments, and each traversed, so that if either assignment is proved, the indictment may be sustained.[77] It has been held, however, that it is improper to join in one count assignments as to several and independent perjuries.[78]

If one assignment of perjury is sufficient, an improper assignment in connection with it will not vitiate the indictment or information.[79]

Election. The state cannot be compelled to elect upon which separate statement it will proceed where the statements are closely connected and are dependent on one another.[80]

[§ 138] **C. Issues, Proof, and Variance—1. In General.** While it may not be necessary to prove a matter which does not constitute an element of the offense,[81] it is necessary, in accordance with rules elsewhere stated,[82] to prove all the constituent elements of perjury,[83] and in general the averments of the indictment or information and the proof must correspond;[84] and these rules apply in a prosecution for false swearing.[85] Strictness of proof is required in all matters which constitute the essence of the crime,[86] and a substantial variance in this regard is fatal;[87] but strict proof is not required as to immaterial averments,[88] or it has been stated, as to those which are not descriptive of the offense;[89] and a variance in respect of such matters is not fatal.[90] Certain variances considered material at common law by force of statute may be immaterial.[91]

Several counts. Where the indictment contains several counts, proof of guilt under any one of them is sufficient to warrant a verdict of guilty.[92]

Evidence admissible under pleadings. Under general rules[93] evidence is, of course, admissible to prove averments as to material facts.[94]

[§ 139] **2. Time of Making Statement.** Under modern rules strict proof that the perjury charged was committed on the day alleged is not essential,[95] except when necessary to identify the record, deposition, or affidavit in which the oath was taken.[96] But there is authority for the view that, where an averment charges the alleged perjury as of the wrong term of court, the variance is fatal.[97] A charge based on oral testimony given in open court is not within the rule making the date material if the charge is based on a record.[98]

[§ 140] **3. Description and Nature of Proceeding**

198 Ind. 70, 152 NE 277. See Peo. v. Senegram, 27 Cal. A. 301, 149 P 786 (recognizing rule); Dodge v. State, 24 N. J. L. 455 (where a refusal to charge that there was but one assignment in the indictment of perjury was upheld); Rex v. Yee Mock, 6 Alta. L. 231, 21 CanCrCas 400, 13 Dom LR 220, 4 WestWkly 1342 (where joinder is held proper but method of joinder is not shown in opinion).

75. Ark.—Smith v. State, 163 Ark. 223, 259 SW 404.
Cal.—Peo. v. Follette, 74 Cal. A. 178, 240 P 502.
Ga.—McLaren v. State, 4 Ga. A. 643, 62 SE 138.
Kan.—State v. Bingham, 124 Kan. 61, 257 P 951.
La.—State v. Joiner, 128 La. 876, 55 S 560.
Mass.—Com. v. Johns, 6 Gray 274.
Mo.—State v. Taylor, 202 Mo. 1, 100 SW 41; State v. Gordon, 196 Mo. 185, 95 SW 420.
N. C.—State v. Bordeaux, 93 N. C. 560.
Okl.—Dunn v. State, 15 Okl. Cr. 245, 176 P 86, 88 [quot Cyc].
Vt.—State v. Bishop, 1 D. Chipm. 120.
See Cover v. Com., 5 Pa. Cas. 79, 8 A 196 (indictment held sufficient).

76. Atkinson v. State, 133 Ark. 341, 202 SW 709; Woodward v. State, 198 Ind. 70, 152 NW 277; State v. Taylor, 202 Mo. 1, 100 SW 41; State v. Anderson, 35 Utah 496, 101 P 385. See also supra text and note 75.

77. Higgins v. State, 50 Tex. Cr. 433, 97 SW 1054.

Effect of proof of one assignment see infra § 149.

78. Weinstein v. State, 146 Md. 80, 125 A 889.

79. Ala.—De Bernie v. State, 19 Ala. 23.
Mass.—Com. v. McLaughlin, 122 Mass. 449; Com. v. Johns, 6 Gray 274.
Mich.—Hoffman v. Allegan Cir. Judge, 150 Mich. 58, 113 NW 584.
Minn.—State v. Smith, 153 Minn. 167, 190 NW 48.
Tex.—Fry v. State, 36 Tex. Cr. 582, 37 SW 741, 38 SW 168.
Vt.—State v. Smith, 63 Vt. 201, 22 A 604.
Eng.—Rex v. Rhodes, 2 Ld. Raym. 886, 92 Reprint 92.

80. Hanscom v. State, 93 Wis. 273, 67 NW 419. See Day v. Com., 195 Ky. 790, 243 SW 1051 (denial of application to make commonwealth elect in a prosecution for false swearing upheld).

81. Mares v. State, 71 Tex. Cr. 303, 158 SW 1130; Schooler v. State, 52 Tex. Cr. 331, 106 SW 359.

82. See Indictments and Informations §§ 435, 451.

83. Peo. v. Williams, 149 N. Y. 1, 43 NE 407; Fletcher v. State, 20 Wyo. 284, 123 P 80. See State v. Bolyn, 143 S. C. 63, 141 SE 165 (per Carter, J.).

84. Blevins v. State, 85 Ark. 195, 107 SW 393; Peo. v. Pellot, 15 Porto Rico 423; Waddle v. State, (Tex. Cr.) 153 SW 882.

[a] **No variance shown.**—Stefani v. State, 124 Ind. 3, 24 NE 254. See Peo. v. Trujillo, 24 Porto Rico 120.

85. Warren v. State, 57 Tex. Cr. 262, 122 SW 541.

86. Com. v. Monahan, 9 Gray (Mass.) 119; State v. Tappan, 21 N. H. 56; State v. Harvell, 49 N. C. 55; Waul v. State, 33 Tex. Cr. 228, 26 SW 199.

87. Peo. v. Pellot, 15 Porto Rico 423. See also supra text and note 86.

88. U. S.—Dunlap v. U. S., 12 F. (2d) 868.
Cal.—Peo. v. Prather, 134 Cal. 436, 66 P 589, 863.
Kan.—State v. Williams, 60 Kan. 837, 58 P 476.
N. M.—State v. Herrera, 28 N. M. 155, 207 P 1085, 24 ALR 1134.
Tex.—Jefferson v. State, (Cr.) 49 SW 88.
See State v. Jennings, 278 Mo. 544, 213 SW 421 (in a prosecution for alleged perjury in a former prosecution against accused for throwing rocks at a street car, it was unnecessary to show that the owner of the car was a corporation).

89. State v. Williams, 60 Kan. 837, 58 P 476.

90. Ky.—Henderson v. Com., 91 SW 1141, 28 KyL 1212.
Mass.—Com. v. McLaughlin, 122 Mass. 449.
Mo.—State v. Faulkner, 175 Mo. 546, 75 SW 116.
N. M.—State v. Herrera, 28 N. M. 155, 207 P 1085, 24 ALR 1134.
N. Y.—Peo. v. Robertson, 3 Wheel. Cr. 180.

[a] **Variance in respect of averments which are surplusage** and do not constitute a part of the description of the offense is not fatal. State v. Herrera, 28 N. M. 155, 207 P 1085, 24 ALR 1134.

91. Com. v. Terry, 114 Mass. 263.

92. State v. Rash, 25 Del. 77, 78 A 405.

93. See Indictments and Informations § 448.

94. Herndon v. State, 82 Tex. Cr. 232, 198 SW 788.

95. U. S.—Matthews v. U. S., 161 U. S. 500, 16 SCt 640, 40 L. ed. 786 [aff 68 Fed. 880]. But see U. S. v. McNeal, 26 F. Cas. No. 15,700, 1 Gall. 387 (where the date set forth in the indictment was prior to the day when the court was first convened for the year in question).
Iowa.—State v. Perry, 117 Iowa 463, 91 NW 765.
Ky.—Com. v. Davis, 94 Ky. 612, 23 SW 218, 15 KyL 262; Cope v. Com., 47 SW 436, 20 KyL 721.
Mich.—Keator v. Peo., 32 Mich. 484.
Miss.—Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155.
Nev.—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.
N. Y.—Wood v. Peo., 1 Hun 381, 3 Thomps. & C. 506 [rev on other grounds 59 N. Y. 117]; Peo. v. Hoag, 2 Park. Cr. 9.
Tex.—Lucas v. State, 27 Tex. A. 322, 11 SW 443.
Vt.—State v. Clark, 2 Tyler 277.
Eng.—Rex v. Coppard, 3 C. & P. 59, 14 ECL 450, 172 Reprint 322, M. & M. 118, 173 Reprint 1101.
See Veronneau v. Rex, 25 Que. K. B. 275, 26 CanCrCas 278, 31 DomLR 332 [app dism 54 Can. S. C. 7, 27 Can CrCas 211, 33 DomLR 68] (where the propriety of an amendment was recognized).

96. Matthews v. U. S., 161 U. S. 500, 16 SCt 640, 40 L. ed. 786 [aff 68 Fed. 880]; Dill v. Peo., 19 Colo. 469, 36 P 229, 41 AmSR 254; State v. Perry, 117 Iowa 463, 91 NW 765; Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155 (recognizing rule).

[a] **Variance as to date of affidavit** sworn to, which is set out in hæc verba, is material. Dill v. Peo., 19 Colo. 469, 36 P 229, 41 AmSR 254.

97. Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155 (recognizing rule); State v. Lewis, 93 N. C. 581.

98. State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.

in Which Testimony Given. In order to sustain an indictment for perjury, there must be proof to identify the proceeding or matter in which, or in connection with which, the false testimony or assertion was given or made.[99] The description or identification must be proved substantially as laid;[1] and a substantial variance in this regard is fatal.[2] But an immaterial variance in respect of the description is not fatal,[3] and a like rule applies in a prosecution for the statutory offense of false swearing.[4] Under such statutes, if the identity of the proceeding is evident, and the purport thereof is given sufficiently to prevent any prejudice to accused, a variance will not be deemed material.[5]

[§ 141] **4. Jurisdiction of Proceeding in Which Testimony Given.** The jurisdiction of the court or tribunal over the proceedings in which the alleged perjury was committed must be proved,[6] although it may not be necessary to prove how accused was brought before the court[7] or, in the case of a grand jury, to prove the steps preliminary to its organization.[8]

[§ 142] **5. Authority To Administer Oath.** It is necessary to prove the authority of the officer who administered the oath,[9] and a material variance in this regard is fatal.[10] Under an averment that the officer was authorized and empowered by law to administer the oath, the facts essential to his authority to administer it may be shown.[11]

[§ 143] **6. Description of Court or Tribunal in Which Testimony Given.** The description of the court in which the perjury was committed must be substantially proved as averred,[12] and a material variance in this regard is fatal.[13]

[§ 144] **7. Description of Person Who Administered Oath.** The description of the person who administered the oath must be substantially proved as alleged,[14] and a material variance in this regard is fatal.[15] But proof that an oath was administered by the clerk, or some other officer of the court, will sustain an allegation that the person was sworn by the court, or in court.[16] Likewise a charge that the

99. Taylor v. State, 20 Ala. A. 133, 101 S 93; Dennison v. State, 15 Ala. A. 84, 72 S 589; and cases infra notes 1, 2:

[a] **How proof made.**—Proof of the procedure pursued in a case in which, it was alleged, the false testimony was given may not be made by evidence at variance with the records of the court in which such case was tried. Taylor v. State, 20 Ala. A. 133, 101 S 93.

1. Ala.—Walker v. State, 96 Ala. 53, 11 S 401; Taylor v. State, 20 Ala. A. 133, 101 S 93; Dennison v. State, 15 Ala. A. 84, 72 S 589; Barr v. State, 7 Ala. A. 92, 61 S 39.

Cal.—Peo. v. Strassman, 112 Cal. 683, 45 P 3.

Ga.—Wilson v. State, 115 Ga. 206, 41 SE 696, 90 AmSR 104.

Ill.—Peo. v. Glenn, 294 Ill. 333, 128 NE 532.

Mo.—State v. Koslowesky, 228 Mo. 351, 128 SW 741.

N. Y.—Smith v. Peo., 1 Park. Cr. 317.

N. C.—State v. Green, 100 N. C. 547, 6 SE 402.

Oh.—State v. Hayes, 8 Oh. Dec. (Reprint) 454, 8 CincLBul 26.

Okl.—McFarland v. State, 12 Okl. Cr. 201, 153 A 619.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

Pa.—Com. v. Focht, 38 Pa. Super. 211.

[a] **Where the record of the cause was set forth,** it was held that it must be proved as laid. State v. Ammons, 7 N. C. 123.

2. See cases supra note 1. See also Peo. v. Scharfstein, 162 App. Div. 642, 147 NYS 946, 31 N. Y. Cr. 262 (one indicted for perjury at the trial of a third person cannot be convicted of perjury for giving false testimony before the grand jury indicting the third person).

[a] **Illustrations of fatal variance.**—(1) Where the indictment charges perjury committed in a prosecution for grand larceny, and the evidence shows the prosecution to have been for robbery. Peo. v. Strassman, 112 Cal. 683, 45 P 3. (2) Where the indictment charges perjury in a pending action, and the proof shows that accused swore falsely in an affidavit for replevin, until the filing of which no action was begun. State v. Hayes, 8 Oh. Dec. (Reprint) 454, 8 CincLBul 26. (3) Where the information charged perjury by falsely testifying as a witness at a trial, and the proof showed that the false statement was made in an affidavit for a continuance. McFarland v. State, 12 Okl. Cr. 201, 153 P 619. (4) Where the indictment for perjury set out in full the indictment in the case in which perjury was assigned, and the evidence tended to prove that in the original case the indictment was different in respect of the ownership of property involved. Brown v. State, 47 Ala. 47. (5) Where the names of the parties to the proceeding are essential to its identity, and they are incorrectly stated. Jacobs v. State, 61 Ala. 448; State v. Green, 100 N. C. 547, 6 SE 402. (6) Where the indictment charged perjury in an action between a certain plaintiff and accused, and the proof corresponded thereto, except that there was an additional party defendant. Dennison v. State, 15 Ala. A. 84, 72 S 589. (7) Where an indictment averred that accused falsely made an affidavit for a new trial in an action by a specified person against accused, and there was proof that the action was by such specified person and others. Walker v. State, 96 Ala. 53, 11 S 401.

[b] **No variance shown.**—State v. Perry, 117 Iowa 463, 91 NW 765.

[c] **Cure of variance.**—A variance in respect of the title of the case could not be cured by showing that no case such as that specified in the indictment was pending when the testimony was given. Dennison v. State, 15 Ala. A. 84, 72 S 589.

3. U. S.—Baskin v. U. S., 209 Fed. 740, 126 CCA 464.

Ark.—Gardner v. State, 80 Ark. 264, 97 SW 48.

Ind.—Strong v. State, 1 Blackf. 193.

Iowa.—State v. Perry, 117 Iowa 463, 91 NW 765.

Mass.—Com. v. Farley, Thach. Cr. 654.

N. M.—State v. Archuleta, 29 N. M. 25, 217 P 619.

N. Y.—Peo. v. Burroughs, 1 Park. Cr. 211.

N. C.—State v. Hester, 122 N. C. 1047, 29 SE 330; State v. Peters, 107 N. C. 876, 12 SE 74; State v. Collins, 85 N. C. 511; State v. Alexander, 13 N. C. 470.

Okl.—Williams v. State, 14 Okl. Cr. 100, 167 P 763.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

Tex.—Poulter v. State, 70 Tex. Cr. 197, 157 SW 166; King v. State, 32 Tex. Cr. 463, 24 SW 514.

[a] **Parties to proceeding.**—(1) Variance between an indictment alleging perjury committed in a case against three defendants and proof showing that one of the persons named was not a defendant was regarded as immaterial. State v. Herrera, 28 N. M. 155, 207 P 1085, 24 ALR 1134. (2) A variance between a charge of perjury committed in a former prosecution against accused and proof that the former prosecution was against accused and one other person was regarded as immaterial. State v. Archuleta, 29 N. M. 25, 217 P 619. (3) But see supra note 2 [a].

[b] **Nature of proceeding.**—A variance between an indictment alleging that accused gave false testimony while on trial for disorderly conduct and for carrying a pistol and the proof that accused testified falsely on a trial for disorderly conduct was regarded as immaterial. Gardner v. State, 80 Ark. 264, 97 SW 48.

4. Wolf v. Com., 143 Ky. 273, 136 SW 193.

5. Com. v. Soper, 133 Mass. 393.

[a] **In Canada** (1) there is no variance between charging false testimony on an inquest before a coroner and proof of false testimony before the coroner and a jury. Reg. v. Thompson, 2 Terr. L. 383, 4 CanCrCas 265. (2) Where the civil suit in which the perjury was charged to have been committed was described as "Emilie Lamoureux et David Léonard," whereas it should have been "Didier Léonard," and this error was twice repeated, this error was held subject to amendment. Reg. v. Leonard, 3 Montr. Leg. N. 138.

6. Gardner v. State, 80 Ark. 264, 97 SW 48; Eighmy v. Peo., 79 N. Y. 546; State v. Ledford, 28 N. C. 5 (recognizing rule); Reg. v. Mason, 29 U. C. Q. B. (Ont.) 431.

7. Reg. v. Mason, supra.

8. Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240.

[a] **Thus** it was not necessary to prove that the grand jury was selected at a meeting of the board of supervisors properly convened. Peo. v. Miller, 264 Ill. 148, 106 NE 191, Ann Cas1915B 1240.

9. Reg. v. Gagan, 17 U. C. C. P. (Ont.) 530. See Eighmy v. Peo., 79 N. Y. 546 (under an indictment for perjury in testimony given by accused before a referee, proof of the entry of the order of reference is not required where the granting of the order by the court gave the referee jurisdiction).

10. Reg. v. Hewins, 9 C. & P. 786, 38 ECL 455, 173 Reprint 1053.

11. State v. Cunningham, 66 Iowa 94, 23 NW 280.

Allegations as to authority of officer in general see supra §§ 121, 122.

12. State v. Gross, 175 Ind. 597, 95 NE 117; State v. Ledford, 28 N. C. 5.

13. State v. Gross, 175 Ind. 597, 95 NE 117.

[a] **Fatal variance as to tribunal not shown.**—Reg. v. Thompson, 2 Terr. L. 383, 4 CanCrCas 265.

14. State v. Gross, 175 Ind. 597, 95 NE 117.

15. State v. Gross, supra.

[a] **Variance as to person who administered oath not shown.**—Mahon v. State, 46 Tex. Cr. 234, 79 SW 28.

16. Iowa.—State v. Caywood, 96 Iowa 367, 65 NW 385.

Mich.—Keator v. Peo., 32 Mich. 484.

N. Y.—Peo. v. Nolte, 19 Misc. 674, 44 NYS 443.

Okl.—Cutler v. Terr., 8 Okl. 101, 56 P 861.

S. D.—State v. Pratt, 21 S. D. 305,

oath was administered in open court by a deputy clerk is sustained by proof that the oath was administered in open court by a person who was performing the duties of a deputy clerk.[17] Where the indictment specifically avers that defendant was sworn before a certain person, or a particular officer, such allegation must be proved as laid;[18] and proof that some other person or officer administered the oath is a fatal variance.[19]

[§ 145] **8. Administration, Form, and Making of Oath.** It must, of course, be proved that an oath in some form was administered.[20] While it is not necessary that the indictment should set forth the form of the oath, it being sufficient to allege that defendant was duly sworn,[21] which latter allegation will permit the introduction of evidence as to the form of the oath,[22] it is usually held that if the form of the oath,[23] or the manner of administering it,[24] is set forth, the proof must correspond, and that a material variance in these matters is fatal.[25] The view has been taken that a variance in respect of the form of the oath,[26] or the method of administering it,[27] is not fatal.

[§ 146] **9. Matter Sworn To.** The matter sworn to must be proved substantially as alleged,[28] and a material variance in this regard is fatal.[29] But it is not necessary to prove the exact words of the accused in giving the false testimony, it being sufficient to prove substantially what he said;[30] and it is not necessary that the proof as to the alleged false testimony shall correspond literally with the allegations of the indictment,[31] and a variance between the averment and proof in respect of immaterial matters is not fatal.[32] There is authority for the view that it is necessary to prove only that part of accused's testimony which is referable to the issue in respect of which perjury is assigned.[33]

In a prosecution for false swearing the exact words charged in the indictment need not be proved,[34] it being sufficient to prove the substance,[35] and if substantially proved any variance will be immaterial.[36]

Where perjury is committed in a written instrument, which is set forth in the indictment according to its tenor, it must be proved as laid, and a material variance is fatal.[37] But where the substance of an affidavit is set out in the indictment, a variance as

112 NW 152.
Wyo.—Fletcher v. State, 20 Wyo. 284, 123 P 80.
See West v. U. S., 258 Fed. 413, 169 CCA 429 (where, however, the decision finally turned on the fact that variance, if any, was not fatal).

17. State v. Townley, 67 Oh. St. 21, 65 NE 149, 93 AmSR 636.

18. Ala.—Jackson v. State, 156 Ala. 161, 47 S 77; McClerkin v. State, 105 Ala. 107, 17 S 123.
Ind.—Davis v. State, 193 Ind. 650, 141 NE 458.
Mo.—State v. Thothos, 147 Mo. A. 596, 126 SW 797.
Okl.—Cutler v. Terr., 8 Okl. 101, 56 P 861.
Tex.—Jefferson v. State, (Cr.) 29 SW 1090.

19. See cases supra note 18.
[a] **Thus** there is a fatal variance between an averment that accused was sworn "by the clerk of such county," and evidence that the officer who administered the oath was a clerk in a certain city. McClerkin v. State, 105 Ala. 107, 17 S 123.
[b] **Fatal variance not shown.**—An indictment describing the officer administering the oath as "one of the special justices," and proof that his official designation was "a special justice for preserving the peace in the city of New York," were not variant. Peo. v. Robertson, 3 Wheel. Cr. (N. Y.) 180.

20. Markey v. State, 47 Fla. 38, 37 S 53; O'Reilly v. Peo., 86 N. Y. 154, 40 AmR 525, 10 AbbNCas 53 [rev 9 AbbNCas 77, 61 HowPr 3].

21. See supra § 126.

22. Com. v. Jarboe, 89 Ky. 143, 12 SW 138, 11 KyL 344; State v. Norris, 9 N. H. 96; Beach v. State, 32 Tex. Cr. 240, 22 SW 976.
[a] **Illustrations.**—(1) An indictment alleging that accused took his corporal oath and was duly sworn is sustained by evidence of an oath taken in the usual form. Com. v. Jarboe, 89 Ky. 143, 12 SW 138, 11 KyL 344; State v. Norris, 9 N. H. 96; (2) Under an allegation that accused was duly sworn, evidence is competent that he swore that the statement alleged to be false was true to the best of his knowledge and belief. Beach v. State, 32 Tex. Cr. 240, 22 SW 976.

23. State v. Gates, 17 N. H. 373; Smith v. Peo., 1 Park. Cr. (N. Y.) 317; Williams v. State, 7 Humphr. (Tenn.) 47; Beach v. State, 32 Tex. Cr. 240, 22 SW 976; Massie v. State, 5 Tex. A. 81.

24. N. H.—State v. Gates, 17 N. H. 373.
N. C.—State v. Davis, 69 N. C. 383.
S. C.—State v. Porter, 20 S. C. L. 611.
Tenn.—Williams v. State, 7 Humphr. 47.
Tex.—Beach v. State, 32 Tex. Cr. 240, 22 SW 976; Massie v. State, 5 Tex. A. 81.
[a] **Indictment charging the oath to have been taken on the gospels** is not sustained by proof of an oath taken in any other form. State v. Davis, 69 N. C. 383; State v. Porter, 20 S. C. L. 611; Williams v. State, 7 Humphr. (Tenn.) 47.
[b] **Terms "corporal oath" and "solemn oath" are synonymous,** and an oath taken with the uplifted hand is properly described by either term in an indictment for perjury. Jackson v. State, 1 Ind. 184.

25. See supra text and notes 23, 24.

26. Reg. v. Southwood, 1 F. & F. 356.

27. Rex v. McCarther, 1 Peake 211, 170 Reprint 132; Rex v. Rowley, R. & M. 299, 21 ECL 756, 171 Reprint 1027.

28. Ark.—Blevins v. State, 85 Ark. 195, 107 SW 393.
Ill.—Roberts v. Peo., 99 Ill. 275.
Mass.—Com. v. Hughes, 5 Allen 499.
Miss.—Willoughby v. State, 101 Miss. 60, 57 S 361.
Mo.—State v. Frisby, 90 Mo. 530, 2 SW 833.
Nebr.—Gandy v. State, 23 Nebr. 436, 36 NW 817.
N. Y.—Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181, 8 NYWklyDig 547 (per Miller, J.).
N. C.—State v. Groves, 44 N. C. 402.
Or.—State v. Ah Sam, 7 Or. 477.
Tex.—Stanley v. State, 48 Tex. Cr. 565, 89 SW 829; Medlock v. State, (Cr.) 82 SW 508; Leverette v. State, 32 Tex. Cr. 471, 24 SW 416.
Wyo.—Fletcher v. State, 20 Wyo. 284, 123 P 80.
Eng.—Rex v. Leefe, 2 Campb. 134, 170 Reprint 1106.
Can.—Reg. v. Trudel, 14 Que. L. 193.

29. See cases supra note 28.
[a] **Illustrations of variance held material.**—Robertson v. State, 54 Ark. 604, 16 SW 582; Roberts v. Peo., 99 Ill. 275; Com. v. Hughes, 5 Allen (Mass.) 499; State v. Ah Sam, 7 Or. 477; Ray v. State, 49 Tex. Cr. 173, 90 SW 632; Leverette v. State, 32 Tex. Cr. 471, 24 SW 416; Reg. v. Trudel, 14 Que. L. 193.

30. Bradford v. State, 134 Ala. 141, 32 S 742; Taylor v. State, 48 Ala. 157; Harper v. State, 16 Ala. A. 538, 79 S 632 [certiorari den 202 Ala. 85, 79 S 633]; McLaren v. State, 4 Ga. A. 643, 62 SE 138; Hereford v. Peo., 197 Ill. 222, 64 NE 310; Stanley v. State, 48 Tex. Cr. 565, 89 SW 829.

31. U. S.—Baskin v. U. S., 209 Fed. 740, 126 CCA 464.
Ala.—Harper v. State, 16 Ala. A. 538, 79 S 632 [certiorari den 202 Ala. 85, 79 S 633].
Ark.—Grissom v. State, 88 Ark. 115, 113 SW 1011.
Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.
Ga.—Cain v. State, 10 Ga. A. 473, 73 SE 623; McLaren v. State, 4 Ga. A. 643, 62 SE 138.
Ill.—Martinatis v. Peo., 223 Ill. 117, 79 NE 55.
Mass.—Com. v. Aronson, 250 Mass. 521, 146 NE 14; Com. v. Butland, 119 Mass. 317.
Miss.—Willoughby v. State, 101 Miss. 60, 57 S 361 (recognizing rule).
N. C.—State v. Groves, 44 N. C. 402.
Okl.—Meierholtz v. Terr., 14 Okl. 359, 78 P 90.
Wash.—State v. Smails, 63 Wash. 172, 115 P 82.
See Rex v. Munton, 3 C. & P. 498, 14 ECL 682, 172 Reprint 519 (where a case, in which there was no evidence showing verbatim all of accused's testimony, was submitted to the jury).

32. Ala.—Bradford v. State, 134 Ala. 141, 32 S 742.
Ark.—Grissom v. State, 88 Ark. 115, 113 SW 1011.
Mass.—Com. v. Butland, 119 Mass. 317.
Mich.—Peo. v. Fay, 89 Mich. 119, 50 NW 752.
Mo.—State v. Higgins, 124 Mo. 640, 28 SW 178.
Tex.—Stanley v. State, (Cr.) 95 SW 1076.
[a] **Illustrations of variance held immaterial.**—Bradford v. State, 134 Ala. 141, 32 S 742; State v. Lea, 3 Ala. 602; Com. v. Butland, 119 Mass. 317; Peo. v. Fay, 89 Mich. 119, 50 NW 752; State v. Higgins, 124 Mo. 640, 28 SW 178; State v. Wakefield, 73 Mo. 549 [aff 9 Mo. A. 326]; Stanley v. State, (Tex. Cr.) 95 SW 1076.

33. Rex v. Rowley, R. & M. 299, 21 ECL 756, 171 Reprint 1027.

34. Fugate v. Com., 177 Ky. 794, 198 SW 240.

35. Fugate v. Com., supra.

36. Fugate v. Com., supra.

37. U. S.—U. S. v. Coons, 25 F. Cas. No. 14,860, 1 Bond 1.
Colo.—Dill v. Peo., 19 Colo. 469, 36 P 229, 41 AmSR 254.
Ga.—Thompson v. State, 118 Ga. 330, 45 SE 410.

to an immaterial assertion is not fatal.[38]

[§ 147] **10. Materiality of Statement.** To sustain an indictment there must be proof that the false statement on which perjury is predicated was material to the issue or matter concerning which it was made,[39] at least where there is merely a general allegation of materiality and the information does not show on its face how the testimony was material,[40] unless by statute materiality is unnecessary.[41] According to some cases it must be proved that issue was joined in the case in which the testimony was given;[42] and where it is alleged that the perjury was committed upon the trial of an issue duly joined under a plea of not guilty, it must be proved that the testimony was given on an issue in the case;[43] and where the indictment sets out the identical issues to which the testimony was material, then the evidence offered must correspond with the averments of the indictment,[44] and must be confined to the point at issue;[45] but it is not necessary that there should be proof bearing directly on the main issue where the false testimony was material on a subordinate issue.[46]

[§ 148] **11. Falsity, Intent, and Knowledge.** In order to sustain an indictment, there must be proof of the falsity of the testimony or assertion on which the perjury[47] or false swearing[48] is predicated, corresponding with the averments;[48½] and a material variance between the averments and proof in this regard is fatal;[49] but it is sufficient if the proof conform substantially to the charge.[50] Where the truth is alleged,[51] it has been held that it is necessary to prove it as alleged,[52] although there is authority to the contrary,[53] on the theory that allegations as to the truth are not necessary;[54] but it has been said that there need not be strict proof in respect of averments as to the truth,[55] and that an immaterial variance in this regard is not fatal.[56]

Knowledge and intent. Where willfulness,[57] knowledge and falsity,[58] or corruptness[59] are elements, such elements must be proved.

[§ 149] **12. Several Assignments or Statements.** The view usually taken is that, where in an indictment there are several distinct assignments of perjury[60] or false swearing,[61] proof of any one of them is sufficient to support the indictment; and a like

Ind.—Tardy v. State, 4 Blackf. 152.
N. M.—Wohlgemuth v. U. S., 6 N. M. 568, 30 P 854.

38. Harris v. Peo., 4 Hun 1, 6 Thomps. & C. 206 [aff 64 N. Y. 148]. See Rex v. Callanan, 6 B. & C. 102, 13 ECL 57, 108 Reprint 390 (the fact that on the introduction of the affidavit in which the alleged false statements were made it appeared that certain parts had been omitted from the averments in the indictment purporting to set forth the substance of the false testimony did not show a material variance).

39. Ark.—Gardner v. State, 80 Ark. 264, 97 SW 48; Bledsoe v. State, 64 Ark. 474, 42 SW 899.
Fla.—Yarbrough v. State, 79 Fla. 256, 83 S 873; Gibson v. State, 47 Fla. 34, 36 S 706; Brown v. State, 47 Fla. 16, 36 S 705.
Ga.—Black v. State, 13 Ga. A. 541, 79 SE 173; Askew v. State, 3 Ga. A. 79, 59 SE 311.
Ill.—Young v. Peo., 134 Ill. 37, 24 NE 1070.
Ind.—State v. Kellis, 193 Ind. 619, 141 NE 337.
Iowa.—State v. Aikens, 32 Iowa 403.
Mass.—Com. v. Pollard, 12 Metc. 225.
Mich.—Peo. v. Ostrander, 110 Mich. 60, 67 NW 1079.
N. Y.—Wood v. Peo., 59 N. Y 117; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240.
N. C.—State v. Cline, 146 N. C. 640, 61 SE 522.
N. D.—State v. Falk, 34 N. D. 520, 159 NW 10.
Okl.—Rich v. U. S., 1 Okl. 354, 33 P 804.
Or.—State v. Stilwell, 109 Or. 643, 221 P 174.
Tex.—Jones v. State, 76 Tex. Cr. 398, 174 SW 1071; Lawrence v. State, 2 Tex. A. 479.
W. Va.—State v. Lake, 147 SE 473.
See Reg. v. Bennett, 2 Den. C. C. 240, 169 Reprint 489 (apparently recognizing rule).

[a] **Ordinance creating offense.**—Where the perjury was committed on a trial for the violation of a city ordinance, it is essential, in establishing the materiality of the false testimony, to show that such an ordinance creating the offense existed. Gardner v. State, 80 Ark. 264, 97 SW 48.

[b] **How proved.**—The indictment upon the trial upon which the perjury was committed should have been placed in evidence, where without it it was impossible for judge and jury legally to determine that the evidence upon which the conviction was based was a "material matter." Peo. v. Glass, 191 App. Div. 483, 181 NYS 547.

40. Wilde v. State, 20 Wyo. 302, 123 P 85; Fletcher v. State, 20 Wyo. 284, 123 P 80; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

41. Reg. v. Ross, 1 Montr. Q. B. (Que.) 227, 28 LCJur 261.

42. Fletcher v. State, 20 Wyo. 284, 123 P 80.

43. Wilde v. State, 20 Wyo. 302, 123 P 85; Fletcher v. State, 20 Wyo. 284, 123 P 80.

44. State v. Stilwell, 109 Or. 643, 221 P 174.

45. State v. Stilwell, supra.

46. Fletcher v. State, 20 Wyo. 284, 123 P 80.

[a] **Where the charge is based on testimony tending to establish an alibi** for defendant in a criminal case, it is not necessary to prove the presence of such defendant at the scene of the crime when it was committed. Fletcher v. State, 20 Wyo. 284, 123 P 80.

47. Ala.—Taylor v. State, 20 Ala. A. 133, 101 S 93.
Ark.—Blevins v. State, 85 Ark. 195, 107 SW 393.
Cal.—Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565.
Iowa.—State v. Hulsman, 147 Iowa 572, 126 NW 700.
Nebr.—Gandy v. State, 23 Nebr. 436, 36 NW 817.
Okl.—Blakemore v. State, (Cr.) 265 P 152.

[a] **In the case of contradictory sworn statements** (1) it is necessary to prove which one was false. Blakemore v. State, (Okl. Cr.) 265 P 152. (2) But the view has been taken that in a prosecution for perjury in an affidavit containing contradictory statements, the charge is sustained if one of the statements is shown to be within the definition of perjury. Sistrunk v. State, 18 Ga. A. 42, 88 SE 796.

48. Howell v. Com., 104 SW 685, 31 KyL 983.

48½. Peo. v. Grout, 174 App. Div. 608, 161 NYS 718.

49. See cases supra notes 47, 48.

[a] **Material variance not shown.**—Peo. v. Bradbury, 155 Cal. 808, 103 P 215.

50. State v. Thomas, 25 Del. 20, 78 A 640; State v. Smith, 84 Kan. 646, 114 P 1074.

51. **Setting forth truth** see supra § 133.

52. Portwood v. State, 71 Tex. Cr. 447, 160 SW 345.

53. State v. Herrera, 28 N. M. 155, 207 P 1085, 24 ALR 1134.

54. U. S. v. Salen, 216 Fed. 420; State v. Herrera, 28 N. M. 155, 207 P 1085, 24 ALR 1134.

55. Daniels v. U. S., 196 Fed. 459, 116 CCA 233.

56. Daniels v. U. S., supra.

[a] **In Massachusetts,** by virtue of statute, a variance which might have been fatal at common law may be immaterial. Com. v. Terry, 114 Mass. 263.

57. Peo. v. Von Tiedeman, 120 Cal. 128, 52 P 155; Peo. v. Pellot, 15 Porto Rico 423.
Necessary element see supra § 23.

58. Peo. v. Pellot, 15 Porto Rico 423; Goad v. State, 106 Tenn. 175, 61 SW 79; Fletcher v. State, 20 Wyo. 284, 123 P 80.
Necessary element see supra § 24.

59. Fletcher v. State, 20 Wyo. 284, 123 P 80.
Necessary element see supra § 23.

60. Ala.—Bradford v. State, 134 Ala. 141, 32 S 742.
Ark.—Smith v. State, 163 Ark. 223, 259 SW 404; Atkinson v. State, 133 Ark. 341, 202 SW 709; Marvin v. State, 53 Ark. 395, 14 SW 87.
Cal.—Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Peo. v. Senegram, 27 Cal. A. 301, 149 P 786.
Del.—State v. Thomas, 25 Del. 20, 78 A 640.
Ga.—McLaren v. State, 4 Ga. A. 643, 62 SE 138.
Ill.—Peo. v. Gazelle, 299 Ill. 58, 132 NE 273; Peo. v. Melnick, 274 Ill. 616, 113 NE 971; Hereford v. Peo., 197 Ill. 222, 64 NE 310.
Ind.—Woodward v. State, 198 Ind. 70, 73, 152 NE 277 [cit Cyc].
La.—State v. Joiner, 128 La. 876, 55 S 560.
Miss.—Page v. State, 59 Miss. 474.
Mo.—State v. Taylor, 202 Mo. 1, 100 SW 41; State v. Gordon, 196 Mo. 185, 95 SW 420; State v. Day, 100 Mo. 242, 12 SW 365.
N. H.—State v. Blaisdell, 59 N. H. 328; State v. Hascall, 6 N. H. 352.
N. Y.—Harris v. Peo., 64 N. Y. 148.
N. D.—State v. Scott, 37 N. D. 105, 163 NW 810 [cit Cyc].
Tex.—Logan v. State, 96 Tex. Cr. 601, 258 SW 830; Urben v. State, 77 Tex. Cr. 261, 178 SW 514; Mares v. State, 71 Tex. Cr. 303, 158 SW 1130; Young v. State, 70 Tex. Cr. 434, 157 SW 151; Barber v. State, 64 Tex. Cr. 96, 142 SW 577; Adams v. State, 49 Tex. Cr. 361, 91 SW 225; Adelberger v. State, (Cr.) 39 SW 103; Moore v. State, 32 Tex. Cr. 405, 24 SW 95; Beach v. State, 32 Tex. Cr. 240, 22 SW 976.
Utah.—State v. Anderson, 35 Utah 496, 101 P 385.
See Dodge v. State, 24 N. J. L. 455 (if one material averment is charged in a variety of forms, if any statement involved is proved false, it is sufficient to warrant a conviction).
Verdict in case of more than one assignment see infra § 185.

61. Day v. Com., 195 Ky. 790, 243 SW 1051; Campbell v. State, 43 Tex. Cr. 602, 68 SW 513.

rule applies, according to some cases, in respect of a portion of one assignment.[62] But if the indictment is in one assignment, failure to prove all the statements substantially as alleged is fatal to the prosecution,[63] and it has been held that if a count undertakes to set out continuously the substance and effect of what defendant swore, it is necessary, in support of this count, to prove that in substance and effect he swore the whole of that which is thus set out as his evidence, although the count thereafter sets forth several distinct assignments of perjury.[64] Where there are a number of allegations of perjury in one affidavit made by accused it is error to consider each charge separately, without reference to the other allegations in the affidavit.[65]

[§ 150] **D. Evidence*—1. Presumptions and Burden of Proof.** As in other criminal prosecutions,[66] the burden is on the state to establish every essential element of the crime charged,[67] such as the facts that accused was sworn,[68] that he was sworn in a matter where an oath was authorized or required by law,[69] that the oath was administered by a person having authority to do so,[70] that accused swore willfully and corruptly[71] to that which was false,[72] and that the swearing was as to a material matter.[73] In the absence of evidence to the contrary it will be presumed that the oath was properly administered,[74] and that the proceedings were regular.[75] The materiality of the matter sworn to cannot be left to presumption or inference;[76] nor is there any presumption as to its truth or falsity.[77] By statute in some jurisdictions falsity of his testimony may be established presumptively by sworn written statements made by accused to the contrary.[78]

After a prima facie case has been established, the burden rests on accused to show that the falsity of his testimony was occasioned by surprise, inadvertence, or mistake, and did not proceed from a corrupt motive on his part.[79]

[§ 151] **2. Admissibility—a. In General.** General rules[80] govern the admissibility of evidence in prosecutions for perjury,[81] including the admissibility of affidavits,[82] conduct,[83] confes-

62. State v. Jennings, 278 Mo. 544, 213 SW 421.

63. Welch v. State, 88 Tex. Cr. 346, 227 SW 301; Adams v. State, 49 Tex. Cr. 361, 91 SW 225 (recognizing rule); Brown v. State, 40 Tex. Cr. 48, 48 SW 169; Rex v. Jones, Peake 51, 170 Reprint 75. See Peo. v. Senegram, 27 Cal. A. 301, 149 P 786, 787 [quot Cyc]; State v. Saunders, 122 Kan. 840, 253 P 572 (where there was evidence to support the falsity of all statements).

64. Rex v. Leefe, 2 Campb. 134, 170 Reprint 1106.

65. Rex v. Cohn, 36 N. S. 240, 6 CanCrCas 386.

66. See Criminal Law § 993 et seq.

67. State v. Cline, 150 N. C. 854, 64 SE 591; and cases infra notes 68-73.

[a] **Pendency of action.**—Brittian v. Com., 200 Ky. 461, 255 SW 59.

[b] **Joinder of issue.**—Fletcher v. State, 20 Wyo. 284, 123 P 80.

68. U. S. v. Coons, 25 F. Cas. No. 14,860, 1 Bond 1.

Fla.—Markey v. State, 47 Fla. 38, 37 S 53.

Ga.—Cox v. State, 13 Ga. A. 687, 79 SE 909.

Miss.—Sloan v. State, 71 Miss. 459, 14 S 262.

N. Y.—Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181 [rev 14 Hun 512]; Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

Or.—State v. Kalyton, 29 Or. 375, 45 P 756.

[a] **Presumption that accused was sworn** does not arise from the fact that he was a witness. Cox v. State, 13 Ga. A. 687, 79 SE 909.

69. U. S. v. Coons, 25 F. Cas. No. 14,869, 1 Bond 1.

70. U. S. v. Coons, supra; Morrell v. Peo., 32 Ill. 499; Biggerstaff v. Com., 11 Bush (Ky.) 169; Com. v. Schwieters, 93 SW 592, 29 KyL 417; Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181.

[a] **Where, however, it appears prima facie** that the officer who administered the oath had legal authority to do so, the burden of establishing lack of legal authority is on accused. Biggerstaff v. Com., 11 Bush (Ky.) 169.

71. State v. Henry, 118 Me. 495, 108 A 49; Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544; Fletcher v. State, 20 Wyo. 284, 123 P 80; Rex v. Hayford, 14 Sask. L. 375, 35 CanCrCas 293, 62 DomLR 90, [1921] 2 West Wkly 990.

72. U. S.—Kahn v. U. S., 20 F. (2d) 782; U. S. v. Coons, 25 F. Cas. No. 14,860, 1 Bond 1.

Ark.—Baker v. State, 87 Ark. 564, 113 SW 205.

Fla.—Yarbrough v. State, 79 Fla. 256, 83 S 873.

Mich.—Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52.

Tex.—Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544.

Can.—Rex v. Hayford, 14 Sask. L. 375, 35 CanCrCas 293, 62 DomLR 90, [1921] 2 WestWkly 990.

73. Ark.—Nelson v. State, 32 Ark. 192.

Cal.—Peo. v. Phillips, 56 Cal. A. 291, 205 P 40.

Fla.—Yarbrough v. State, 79 Fla. 256, 83 S 873.

Ill.—Mackin v. Peo., 115 Ill. 312, 3 NE 222, 56 AmR 167.

Ind.—State v. Kellis, 193 Ind. 619, 141 NE 337.

Iowa.—State v. Aikens, 32 Iowa 403.

N. Y.—Wood v. Peo., 59 N. Y. 117; Peo. v. Barbuti, 207 App. Div. 285, 202 NYS 126; Peo. v. Goodheim, 188 App. Div. 148, 176 NYS 468; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240.

N. D.—State v. Falk, 34 N. D. 520, 159 NW 10.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

Porto Rico.—Gandia v. Peo., 29 Porto Rico 101.

Tex.—Garrett v. State, 37 Tex. Cr. 198, 38 SW 1017, 39 SW 108.

Wyo.—Wilde v. State, 20 Wyo. 302, 123 P 85; Fletcher v. State, 20 Wyo. 284, 123 P 80.

[a] **Where perjury is as to a collateral fact** material to a main issue, it is sufficient to prove its falsity without regard to the truth or falsity of the fact or issue to which it is collateral. Peo. v. Phillips, 56 Cal. A. 291, 205 P 40. See Fletcher v. State, 20 Wyo. 284, 123 P 80.

74. Wheeler v. Peo., 63 Colo. 209, 165 P 257; State v. Mace, 86 N. C. 668.

75. State v. Ledford, 28 N. C. 5.

76. Nelson v. State, 32 Ark. 192; State v. Aikens, 32 Iowa 403; State v. Stilwell, 109 Or. 643, 221 P 174; U. S. v. Estraña, 16 Philippine 520, 529 [quot Cyc].

77. Anderson v. State, 56 Tex. Cr. 360, 120 SW 462.

78. See statutory provisions.

[a] **Affidavit.**—Disclaimer of knowledge as to matters testified to, made in an affidavit after the trial, raises the presumption. Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120.

[b] **Inapplicability of statute.**—Penal L. § 1627 applies only where the previous contradictory statement was in writing subscribed by defendant, and not where the witness' statement on cross-examination is contradictory to his direct testimony. Peo. v. Glass, 191 App. Div. 483, 181 NYS 547.

79. State v. Chamberlin, 30 Vt. 559.

80. See Criminal Law § 1054 et seq.

81. See cases infra this note.

[a] **Evidence held admissible.**—(1) Evidence contradicting that previously introduced by prosecution. Ammerman v. U. S., 185 Fed. 1, 108 CCA 1 [rev 176 Fed. 635]. (2) Evidence of assault, in prosecution for false testimony before grand jury in assault proceedings. Davis v. State, 107 Tex. Cr. 389, 296 SW 605. (3) Evidence showing truth of statement, although it collaterally questions guilt or innocence of another. Evans v. Com., 10 Ky. Op. 331. (4) In prosecution for perjury based on statement before grand jury in its investigation of charge against another for rape, testimony of the prosecutrix that she was afraid of such other, and of her father as to what he said to defendant in such other's hearing, was admissible. Cozby v. State, 80 Tex. Cr. 323, 189 SW 957. (5) Evidence of a third person as to the acts and declarations of the prosecuting witness in a perjury case, where such evidence does not tend to corroborate his testimony. Kitchen v. State, 29 Tex. A. 45, 14 SW 392.

[b] **Evidence held inadmissible.**—(1) Evidence that the false testimony was not considered by the court in giving its judgment. Barnes v. State, 15 Oh. Cir. Ct. 14, 8 Oh. Cir. Dec. 153. (2) Statements made by a judge in giving judgment. Reg. v. Britton, 17 Cox C. C. 627. (3) On a trial for falsely testifying before the grand jury investigating the sale of liquor to a minor, evidence that the minor sold liquor, without showing that he was selling it as an occupation. Robertson v. State, 68 Tex. Cr. 243, 150 SW 893. (4) On a trial for falsely swearing that he did not understand or read a purported confession, evidence showing his guilt of a crime of which he was acquitted. Chitwood, v. U. S., 178 Fed. 442, 101 CCA 342.

82. See cases infra this note.

[a] **Evidence held admissible.**—Johnson v. State, 3 Ala. A. 98, 57 S 389; Musick v. State, 106 Tex. Cr. 207, 292 SW 223; Urben v. State, 77 Tex. Cr. 261, 178 SW 514.

[b] **Evidence held inadmissible.**—State v. Fannon, 158 Mo. 149, 59 SW 75 (unsigned affidavit, when prosecution is for swearing falsely at a trial).

83. Harden v. State, 85 Tex. Cr. 220, 211 SW 233, 4 ALR 1308 (conduct

*By JOSEPH W. ROUSE (§§ 150-166).

sions,[84] declarations,[85] or depositions[86] of accused, and documentary evidence.[87] The evidence that was admissible on the trial of the action in which the perjury was committed is admissible on the trial of an indictment for the perjury,[88] but it is not essential to retry the case,[89] and the evidence admitted should be limited to such evidence as tends to establish the perjury.[90] Evidence not connected with,[91] or having no bearing on the guilt or innocence of,[92] accused should be rejected. Evidence showing the motive underlying a prosecution for perjury is inadmissible.[93]

Res gestæ. As in the case of criminal[94] or civil[95] cases generally, matters constituting a part of the res gestæ are admissible in evidence,[96] but evidence too remote should not be admitted.[97]

Record of proceedings in which perjury was committed,[98] while admissible to establish the elements of the crime as necessarily appear therein,[99] is not admissible to show the falsity of the testimony.[1]

[§ 152] **b. Intent, Knowledge, and Motive.**[2] Since willfulness and a corrupt intent are essential elements of perjury,[3] evidence tending to prove such issues is admissible as going to the very substance of the offense.[4] Evidence to rebut the existence of a corrupt intent is admissible in favor of accused,[5]

relative to crime, in the investigation of which the perjury is alleged to have been committed, is admissible).

84. State v. Rose, (N. J. Sup.) 130 A 461 (signed unsworn confession of accused, accused having sworn he signed no confession).

85. See cases infra this note.

[a] **Evidence held admissible.**—Spencer v. Com., 22 SW 559, 15 KyL 182; Tuttle v. Peo., 36 N. Y. 431.

[b] **Evidence held inadmissible.**—Fleming v. State, 98 Ala. 69, 13 S 288.

[c] **Declarations of accused's partner** were held inadmissible. Wilde v. State, 20 Wyo. 302, 123 P 85 (as to when they would go to work).

86. Urben v. State, 77 Tex. Cr. 261, 178 SW 514 (held admissible).

87. See cases infra this note.

[a] **Charter and amendments of corporation,** plaintiff in an action in which perjury was committed, were held admissible. Poulter v. State, 70 Tex. Cr. 197, 157 SW 166.

[b] **Deed,** although not officially witnessed and recorded, was admitted. Mallard v. State, 19 Ga. A. 99, 90 S 1044.

[c] **Promissory note.**—In a prosecution for perjury committed in an action on a note made by accused to another, the note, being fully identified, is admissible in evidence, although not marked with a file mark. Johnson v. State, 71 Tex. Cr. 428, 160 SW 964.

88. U. S.—Chitwood v. U. S., 178 Fed. 442, 101 CCA 342.

Ala.—Jordan v. State, 16 Ala. A. 51, 74 S 864, 865 [cit Cyc].

Ill.—Peo. v. Niles, 300 Ill. 458, 133 NE 252, 37 ALR 1284.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

Eng.—Reg. v. Harrison, 9 Cox C. C. 503.

89. State v. Stilwell, 109 Or. 643, 221 P 174.

90. Chitwood v. U. S., 178 Fed. 442, 101 CCA 342; Jordan v. State, 16 Ala. A. 51, 74 S 864; Peo. v. Niles, 300 Ill. 458, 133 NE 252, 37 ALR 1284.

91. Mitchell v. Com., 25 SW 884, 15 KyL 803; Ice v. State, 84 Tex. Cr. 418, 208 SW 345; Roberts v. State, 83 Tex. Cr. 139, 201 SW 998; Downing v. State, 61 Tex. Cr. 519, 136 SW 471; Hardin v. State, 55 Tex. Cr. 631, 117 SW 974.

92. Fleming v. State, 98 Ala. 69, 13 S 288; State v. Fannon, 158 Mo. 149, 59 SW 75.

[a] **Rule applied to:** (1) Conversations not tending to prove falsity of testimony. Wilkinson v. Peo., 226 Ill. 135, 80 NE 699. (2) Evidence bearing only on merits of case in which perjury was alleged to have been committed. Peyton v. State, (Tex. Cr.) 32 SW 892. (3) Evidence, given in a trial in which accused was a juror, to show that accused violated his oath to try case on the evidence. Peo. v. De Martini, 50 Cal. A. 109, 194 P 506. (4) Evidence of goods sold to accused in prosecution for making false affidavit as to fire loss. State v. Lynes, 194 Mo. A. 184, 185 SW 535. (5) Evidence of knowledge of other facts than those about which accused denied knowledge. Scott v. State, 72 Tex. Cr. 26, 160 SW 960. (6) Evidence of lack of consent to marriage by one in loco parentis, the alleged perjury being a false statement of the consent of the deceased mother. Steber v. State, 23 Tex. A. 176, 4 SW 880. (7) Evidence of negligence and delay of prior inventor in applying for patent in a prosecution based on an affidavit that affiant believed that he was first inventor. Patterson v. U. S., 202 Fed. 208, 120 CCA 650. (8) Evidence of ownership of land, in a prosecution for falsely swearing that a credit was indorsed on a note given for the land. Miller v. State, 42 Tex. Cr. 383, 60 SW 673. (9) Evidence showing the guilt of a person for whom accused swore to an alibi alleged to be false. Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155. (10) Testimony as to accused's mental state, there being no plea of insanity. Logan v. State, 96 Tex. Cr. 601, 258 SW 830. (11) Testimony as to the family of accused, and of what it consisted. State v. Aenspacker, 130 La. 717, 58 S 520. (12) When accused falsely swore that complainant in an assault case was armed, evidence of complainant's prior improper proposals to accused's wife has no bearing on the perjury. Pearson v. State, (Tex. Cr.) 33 SW 224.

[b] **Judgment in trial other than that in which perjury committed.**—Gibson v. State, (Tex. A.) 15 SW 118.

93. Peo. v. Casanova, 54 Cal. A. 439, 202 P 45.

94. See Criminal Law § 1114 et seq.

95. See Evidence §§ 535–559.

96. See cases infra this note.

[a] **Evidence held admissible.**—(1) Antecedent acts and declarations of defendant. Tuttle v. Peo., 36 N. Y. 431. (2) Circumstances surrounding an event about which accused testified. Hannegan v. State, 5 Ala. A. 142, 59 S 376. (3) Part of original statement upon which the perjury is predicated. Jernigan v. State, 43 Tex. Cr. 114, 63 SW 560. (4) Pass books and signature books, on a trial for perjury, as to the existence of deposits in a bank. Peo. v. Hurst, 41 Mich. 328, 1 NW 1027. (5) Statements made by accused to a justice when applying for the affidavit to which he is alleged to have sworn falsely. Spencer v. Com., 22 SW 559, 15 KyL 182.

97. Com. v. Shooshanian, 210 Mass. 123, 96 NE 70, AnnCas1912C 1073 (evidence too remote to show attempt to intimidate accused).

98. See generally Criminal Law § 1521.

99. See infra §§ 153–157.

[a] **Testimony given at trial.**—Com. v. Aronson, 250 Mass. 521, 146 NE 14 (to show issues raised by pleading and submitted to jury).

1. State v. Brown, 111 La. 170, 35 S 501; State v. Justesen, 35 Utah 105, 99 P 456.

[a] **Reversal of judgment in trial in which perjury committed.**—Peo. v. Williams, 92 Hun 354, 36 NYS 511 [aff 149 N. Y. 1, 43 NE 407] (immaterial to show guilt or innocence).

2. Cross references:

Averment in indictment see supra §§ 135, 136.

Burden of proof see supra § 150.

Issues, proof, and variance see supra § 148.

Sufficiency of proof see infra § 160.

3. See supra §§ 23–30.

4. Ala.—Hannegan v. State, 5 Ala. A. 142, 59 S 376.

Iowa.—State v. Raymond, 20 Iowa 582.

Mich.—Peo. v. Macard, 109 Mich. 623, 67 NW 968.

Nev.—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848 [quot Cyc].

N. H.—State v. Hascall, 6 N. H. 352.

N. J.—Dodge v. State, 24 N. J. L. 455.

Tex.—Poulter v. State, 72 Tex. Cr. 140, 161 SW 475; Scott v. State, 72 Tex. Cr. 26, 160 SW 960; Moore v. State, 65 Tex. Cr. 453, 144 SW 598; McDonough v. State, 47 Tex. Cr. 227, 84 SW 594, 122 AmSR 684; Foster v. State, 32 Tex. Cr. 39, 22 SW 21; Davidson v. State, 22 Tex. A. 372, 3 SW 662.

Eng.—Reg. v. Boynes, 1 C. & K. 65, 47 ECL 65; Rex v. Munton, 3 C. & P. 498, 14 ECL 682, 172 Reprint 519.

[a] **Evidence of other perjury,** relating to the same oath and subject matter of the perjury charged, may be properly considered by the jury in determining the question of corrupt intent in swearing to the false matter upon which the perjury was assigned. State v. Raymond, 20 Iowa 582.

[b] **Expressions of malice** used by accused toward the person against whom he gave the false evidence are admissible. Rex v. Munton, 3 C. & P. 498, 14 ECL 682, 172 Reprint 519.

[c] **Falsity of other and even immaterial testimony** is admissible, in order to exclude the idea of mistake, and as tending to show corrupt intention. Dodge v. State, 24 N. J. L. 455; Jefferson v. State, (Tex. Cr.) 29 SW 1090.

[d] **Palpable nonexistence** of fact stated may be shown for this purpose. Hannegan v. State, 5 Ala. A. 142, 59 S 376.

[e] **Preventing witnesses from testifying.**—In a prosecution for perjury alleged to have been committed at the trial of accused's brother for murder, testimony that accused had endeavored to prevent witnesses from testifying against his brother is admissible to show corrupt motive. Peo. v. Macard, 109 Mich. 623, 67 NW 968.

[f] **Prior contradictory statements.**—Hunter v. State, 95 Tex. Cr. 394, 254 SW 993 (as to chastity of prosecutrix in trial for rape, where defendant swore she was unchaste).

[g] **Testimony of accused on cross-examination** is admissible for this purpose. McDonough v. State, 47 Tex. Cr. 227, 84 SW 594, 122 AmSR 684.

[h] **Testimony of grand juror** is admissible to show that accused acted deliberately and willfully. Poulter v. State, 72 Tex. Cr. 140, 161 SW 475; Scott v. State, 72 Tex. Cr. 26, 160 SW 960; Robertson v. State, 68 Tex. Cr. 243, 150 SW 893.

[i] **Testimony of suborned witnesses** is admissible to show that defendant swore willfully and corruptly. State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.

5. Ala.—Hood v. State, 44 Ala. 81.

Iowa.—State v. Lazarus, 181 Iowa 625, 164 NW 1037; State v. Loos, 145 Iowa 170, 123 NW 962; State v. Mc-

as, for example, that the statement was made through mistake[6] or duress,[7] or by advice of counsel,[8] or because of loss of memory.[9]

Knowledge. To show accused's knowledge of the falsity of his testimony or statement[10] the prosecution may introduce any proper evidence tending to show such knowledge;[11] and accused may, without knowledge of its falsity, offer evidence in proof of his good faith in making the statement.[12]

Motive. Under and subject to rules elsewhere stated,[13] evidence to show the motive of accused for committing the perjury is admissible on behalf of the prosecution,[14] which of course accused may rebut by proper evidence.[15]

[§ 153] **c. Proceeding in Which Oath Administered.**[16] To identify the case or proceeding in which the perjury is alleged to have been committed[17] the record or transcript of such case or proceeding[18]

Kinney, 42 Iowa 205.

Mo.—State v. Coyne, 214 Mo. 344, 114 SW 8, 21 LRANS 993.

N. C.—State v. Curtis, 34 N. C. 270.

Tex.—Brookin v. State, 27 Tex. A. 701, 11 SW 645.

Wash.—State v. Wilson, 83 Wash. 419, 426, 145 P 455 [cit Cyc].

[a] **Thus** accused was entitled to ask the attorney who drew the written stipulation of settlement why, in preparing the same, he did not include therein the agreement as to costs which he testified was made. State v. Loos, 145 Iowa 170, 123 NW 962.

[b] **Accused may testify** that he had no intention to swear falsely. Mathes v. State, 15 Okl. Cr. 382, 177 P 120.

6. State v. Lazarus, 181 Iowa 625, 164 NW 1037; Mangan v. State, 94 Tex. Cr. 459, 251 SW 1071.

[a] **Illustrations.**—(1) A surety on a bail bond charged with swearing falsely as to ownership of property may show his understanding that rented property was not part of the homestead, and that its value exceeded the obligation assumed by him (State v. Lazarus, 181 Iowa 625, 164 NW 1037), (2) and as evidence of good faith in so swearing he may show that he received no consideration for signing the bond (State v. Lazarus, supra). (3) Where accused was charged with falsely swearing to the age of a person, he may show that he thought he was swearing to the age of another person of the same name, who appeared to be of the age he swore to (Mangan v. State, 94 Tex. Cr. 459, 251 SW 1071); (4) or, if accused had met the person in question and had concluded from her appearance that she was over the age to which he made affidavit, that fact would be material as showing mistake (Mangan v. State, supra). (5) Where accused was charged with falsely testifying as to an alleged oral agreement as to payment of costs accompanying a written agreement of settlement signed by him, he was entitled to testify that he understood that the writing embodied the entire agreement, and that no term thereof rested in parol. State v. Loos, 145 Iowa 170, 123 NW 962.

7. Carroll v. State, 16 Ala. A. 454, 78 S 717.

8. Hood v. State, 44 Ala. 81.

9. State v. Coyne, 214 Mo. 344, 114 SW 8, 21 LRANS 993.

10. See supra § 24.

11. U. S.—Holmes v. U. S., 269 Fed. 96; U. S. v. Gardiner, 25 F. Cas. No. 15,186a, 2 Hayw. & H. 89.

Ala.—Floyd v. State, 30 Ala. 511; Hannegan v. State, 5 Ala. A. 142, 59 S 376.

La.—State v. Smith, 149 La. 700, 90 S 28.

Minn.—State v. Day, 108 Minn. 121, 121 NW 611.

N. Y.—Peo. v. Grout, 174 App. Div. 608, 161 NYS 718 [app dism 222 N. Y. 521 mem, 118 NE 1072 mem]; Peo. v. Doody, 72 App. Div. 372, 76 NYS 606 [aff 172 N. Y. 165, 64 NE 807].

Or.—State v. Smith, 47 Or. 485, 83 P 865.

[a] **Evidence held admissible.**—(1) That accused knew that his sworn statement as to age of girl was false may be shown by a school report made out by him setting out a different age. State v. Day, 108 Minn. 121, 121 NW 611 (false swearing on application for marriage license). (2) In a prosecution for making false oath to an application for continuances containing statements of what would be testified to by an absent witness, evidence tending to show that accused knew that such testimony, if given, would not be the truth, was held admissible on the issue as to whether he believed his statement to be true. Holmes v. U. S., 269 Fed. 96. (3) Where accused was asked by a grand jury investigating prostitution, at a certain hotel, whether he had taken anyone to the hotel for the purpose of prostitution, etc., and was charged with perjury in answering that he had not, testimony of a grand juror that, when taken to such hotel, he asked accused if he had any girls, and he said he had one, etc., was held relevant to show accused's knowledge that a prostitute had been at the hotel, and that he had solicited trade for her. State v. Smith, 149 La. 700, 90 S 28.

[b] **Articles of incorporation of store,** showing stock of goods on hand, was admitted to show that defendant knowingly testified that he had not ordered the goods shipped. Kahn v. U. S., 20 F. (2d) 782.

[c] **Evidence incompetent.**—In a prosecution for having made a false report to the superintendent of banks, although items of evidence may be competent in proving that the items specified in the indictment were included at their face values in the report, as alleged, that fact does not make competent evidence that such values were excessive or then known to defendant to be so. Peo. v. Grout, 174 App. Div. 608, 161 NYS 718 [app dism 222 N. Y. 521 mem, 118 NE 1072 mem].

12. Ayers v. State, 20 Ariz. 189, 178 P 782; State v. Lazarus, 181 Iowa 625, 164 NW 1037; State v. Loos, 145 Iowa 170, 123 NW 962; State v. Coyne, 214 Mo. 344, 114 SW 8, 21 LRANS 993; State v. Allen, 94 Mo. A. 508, 69 SW 604; Mangan v. State, 94 Tex. Cr. 459, 251 SW 1071; Luna v. State, 44 Tex. Cr. 482, 72 SW 378.

[a] **Evidence held admissible.**—(1) Under Code (1897) § 4872, where a surety on a bail bond was charged with swearing falsely that he owned certain property, evidence that he did not know the terms of a decree quieting title in others was admissible to show good faith. State v. Lazarus, 181 Iowa 625, 164 NW 1037. (2) In a prosecution for perjury in verifying the genuineness of signatures on a recall petition, accused should have been permitted to state his belief as to the genuineness of the signatures, uninfluenced by any adverse decision or criticism of the court, and if he chose should have been permitted to state the circumstances inducing that belief. Ayers v. State, 20 Ariz. 189, 178 P 782.

13. See Criminal Law § 1048.

14. Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173; Peo. v. Cahill, 193 N. Y. 232, 86 NE 39, 20 LRANS 1084; Com. v. Bobanic, 62 Pa. Super. 40; Kitchen v. State, 26 Tex. A. 165, 9 SW 461.

[a] **Evidence held admissible as showing motive.**—(1) Testimony as to a statement by defendant to another grand jury witness that witness could get a sum of money for going away somewhere. Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173. (2) Defendant was charged with perjury in having falsely sworn, in an examination before the superintendent of elections as to the alleged illegal registration of defendant and M and W that all three had slept in a certain building during a given time. M was permitted to testify that on defendant's telling him to register he stated that he was not of age, whereupon defendant said that he himself voted when he was sixteen, and told witness to go ahead and register and he would see that no harm came to him. W testified that defendant told him to register, and that if any harm came to him he would see that he got out. It was held that the evidence was competent as establishing a motive for defendant's testimony before the superintendent that each man was qualified by residence to register. Peo. v. Cahill, 193 N. Y. 232, 86 NE 39, 20 LRA NS 1084. (3) The record of a former conviction for a crime against the United States in a prosecution instituted by the same person who was the prosecutrix in the perjury case is admissible as showing the state of the prisoner's mind in its relation to the false testimony which he gave against her in the civil suit. Com. v. Bobanic, 62 Pa. Super. 40.

15. Carroll v. State, 16 Ala. A. 454, 78 S 717; McCord v. State, 83 Ga. 521, 10 SE 437; Com. v. Brady, 7 Gray (Mass.) 320.

[a] **Evidence held not admissible.**—Evidence that the person in whose behalf accused testified when the alleged perjury was committed was insolvent, or of limited means, is not admissible to repel imputation of bribery. McCord v. State, 83 Ga. 521, 10 SE 437.

16. Cross references:

Averment in indictment see supra §§ 110–114.

Burden of proof see supra § 150.

Issues, proof, and variance see supra § 140.

Sufficiency of proof see infra § 161.

17. Necessity for identification see supra § 53.

18. U. S.—Offner v. U. S., 209 Fed. 749, 126 CCA 473; Baskin v. U. S., 209 Fed. 740, 126 CCA 464; U. S. v. Walsh, 22 Fed. 644.

Ala.—Boynton v. State, 77 Ala. 29; Jordan v. State, 16 Ala. A. 51, 74 S 864; Todd v. State, 13 Ala. A. 301, 69 S 325.

Cal.—Peo. v. Bradbury, 155 Cal. 808, 103 P 215; Peo. v. Reitz, (A.) 261 P 526.

Ga.—Nance v. State, 126 Ga. 95, 54 SE 932.

Kan.—State v. Horine, 70 Kan. 256, 78 P 411.

Ky.—Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683.

Mich.—Peo. v. Macard, 109 Mich. 623, 67 NW 968.

Miss.—Davis v. State, 90 Miss. 56, 43 S 81.

Pa.—Com. v. Williams, 41 Pa. Super. 326.

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Tex.—Hunter v. State, 95 Tex. Cr. 394, 254 SW 993; Stanley v. State, (Cr.) 95 SW 1076; Ross v. State, 40 Tex. Cr. 349, 50 SW 336, Martinez v. State, 39 Tex. Cr. 479, 46 SW 826; Smith v. State, 31 Tex. Cr. 315, 20 SW 707; Partain v. State, 22 Tex. A. 100, 2 SW 854.

Utah.—State v. Justesen, 35 Utah

or other competent evidence[19] is admissible, although it has been held that the proceeding can be shown only by the record.[20] The admissibility of the record is not affected by an amendment correcting an error therein.[21] The record of some case other than that in which the perjury was committed is inadmissible.[22]

[§ 154] **d. Jurisdiction and Authority To Administer Oath.**[23] For the purpose of showing the jurisdiction of the court, tribunal, or body to try or hear the case, in which or to investigate the matter concerning which the perjury was committed,[24] the record of the action or proceeding,[25] or other competent evidence,[26] is admissible, and accused may introduce any competent evidence to show lack of jurisdiction.[27] The right of the officer administering the oath to act as such may be proved by parol evidence,[28] or by the deputation showing his appointment.[29] Evidence showing the right of a justice of the peace to preside over an inquest is admissible.[30] Accused may introduce evidence to show that the officer was never legally appointed,[31] but where perjury is assignable on an oath administered by a de facto officer,[32] evidence impeaching his right to office is inadmissible.[33]

[§ 155] **e. Administration, Form, and Making of Oath.**[34] Any competent evidence is admissible to prove the administration of the oath to accused,[35] and it is proper for the person who administered the

105, 99 P 456.

Can.—Rex v. Judge, 24 Que. K. B. 115, 24 CanCrCas 354.

[a] **Grand jury proceeding.**—Nance v. State, 126 Ga. 95, 54 SE 932 (indictment or special presentment); Cozby v. State, 80 Tex. Cr. 323, 189 SW 957 (complaint warrant for arrest, and bond for appearance); Waddle v. State, 73 Tex. Cr. 501, 165 SW 591.

[b] **Plea as part of record.**—As part of the record of a suit against defendant and his wife, in which he is charged to have committed perjury, her plea of coverture therein is admissible. Powell v. State, 5 Ala. A. 150, 59 S 328.

[c] **Pleadings.**—Edwards v. State, 71 Tex. Cr. 417, 160 SW 709, 49 LRA NS 563, AnnCas1916D 361; Spearman v. State, 68 Tex. Cr. 449, 152 SW 915, 44 LRANS 243; Downing v. State, 61 Tex. Cr. 519, 136 SW 471.

[d] **Judgment:** (1) Of acquittal. Kitchen v. State, 26 Tex. A. 165, 9 SW 461 (acquittal of one of two joint defendants on whose trial alleged perjury was committed). (2) Of conviction. Hunter v. State, 95 Tex. Cr. 394, 254 SW 993 (admissibility not affected by reversal).

[e] **Warrant and complaint** in an action in which alleged false testimony was given are admissible. State v. Horine, 70 Kan. 256, 78 P 411; Waddle v. State, 73 Tex. Cr. 501, 165 SW 591.

[f] **Information** is admissible in evidence notwithstanding a variance between it and an unnecessary allegation in the indictment for perjury which would be ignored as surplusage. Kelley v. State, 51 Tex. Cr. 507, 103 SW 189.

[g] **Files of the case** may be admitted to show the regularity of the proceeding in which the perjury was committed. Peo. v. Macard, 109 Mich. 623, 67 NW 968.

[h] **Falsity of record** cannot be shown by testimony of clerk. U. S. v. Walsh, 22 Fed. 644.

[i] **In Canada** the judicial proceedings, in which the alleged perjury took place, may be shown by production of exemplified copies of the writ, pleadings, and judgment roll, without the notice required in the case of certified copies. Reg. v. Kobold, 37 Man. 37, 48 CanCrCas 290, [1927] 3 WestWkly 294.

19. See cases infra this note.

[a] **Testimony:** (1) Of deputy clerk. Peo. v. Reitz, (Cal. A.) 261 P 526 (to show regularity of proceedings). (2) Of witness swearing out warrant. Barton v. Com., 32 SW 171, 396, 17 KyL 580.

[b] **Where it appeared on a trial for perjury at an inquest** that the alleged false testimony was given on a date other than that of the certificate of inquest, it was proper to 90 SW 223, 28 KyL 683; Davis v. State, 90 Miss. 56, 43 S 81.

[a] **Rule applied.**—On a trial for perjury, based on testimony given by show that such certificate was erroneously dated. Rogers v. State, 35 Tex. Cr. 221, 32 SW 1044.

20. Goslin v. Com., 121 Ky. 698, accused on a trial of a third person before a justice, testimony of the justice as to what the charge was for which the third person was on trial was inadmissible, the record itself being the only proper evidence. Davis v. State, 90 Miss. 56, 43 S 81.

[b] **Testimony of justice who presided** at the trial, at which accused was charged with falsely swearing as to the character and pendency of such trial, should have been excluded, where it appeared that he had a record of such trial and the warrant issued therein. Partin v. Com., 154 Ky. 701, 159 SW 542.

21. Smith v. State, 103 Ala. 57, 15 S 866; Williams v. State, 68 Ala. 551; Hannegan v. State, 5 Ala. A. 142, 59 S 376.

22. Wilkinson v. Peo., 226 Ill. 235, 80 NE 699.

[a] **Rule applied.**—The record of a civil suit for damages is not admissible on a trial for perjury alleged to have been committed on a trial for conspiracy to extort money from defendant of the civil action. Wilkinson v. Peo., 226 Ill. 135, 80 NE 699.

23. Cross references:
Averment in indictment see supra §§ 116–122.
Burden of proof see supra § 150.
Issues, proof, and variance see supra §§ 141, 142.
Sufficiency of proof see infra § 162.

24. As element of offense see supra § 49 et seq.

25. Ala.—Jordan v. State, 16 Ala. A. 51, 74 S 864.

Cal.—Peo. v. Bradbury, 155 Cal. 808, 103 P 215; Peo. v. Reitz, (A.) 261 P 526.

La.—State v. Brown, 111 La. 170, 35 S 501.

N. H.—State v. Blaisdell, 59 N. H. 328.

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Tex.—Waddle v. State, 73 Tex. Cr. 501, 165 SW 591.

Utah.—State v. Justesen, 35 Utah 105, 99 P 456.

[a] **Grand jury proceeding.**—Cozby v. State, 80 Tex. Cr. 323, 189 SW 957.

[b] **Complaint, warrant, and bond for appearance** admissible to show jurisdiction of grand jury. Cozby v. State, 80 Tex. Cr. 323, 189 SW 957.

[c] **Warrant and complaint.**—Waddle v. State, 73 Tex. Cr. 501, 165 SW 591.

[d] **Where perjury was committed on an appeal** (1) the transcript and judgment of conviction of the trial court are not necessary to show jurisdiction of the court in which the perjury was committed (Warren v. State, 57 Tex. Cr. 518, 123 SW 1115), (2) although it is proper in such case to introduce the complaint (Warren v. State, supra).

26. See cases infra this note.

[a] **Evidence held admissible.**—Ruff v. State, 17 Ga. A. 337, 86 SE 784 (tax return showing domicile of defendant); Rex v. Yaldon, 17 Ont. L. 179, 12 OntWR 384 (oral testimony, there being no formal record or information).

27. Moss v. State, 47 Tex. Cr. 459, 83 SW 829, 11 AnnCas 710.

28. Ala.—Moore v. State, 52 Ala. 424.

Kan.—State v. Thornhill, 99 Kan. 808, 163 P 145.

N. H.—State v. Hascall, 6 N. H. 352.

N. J.—State v. Monetti, 90 N. J. L. 582, 101 A 206.

Tex.—Mahon v. State, 46 Tex. Cr. 234, 79 SW 28; Woodson v. State, 24 Tex. A. 153, 6 SW 184.

[a] **Challenger at election.**—Since the fact that a person acted as a challenger at an election, and was recognized as such by the managers, other officials, and the people, is prima facie evidence of his authority, and dispenses with the production of a commission, it is proper to allow a witness to testify that he was a challenger and acted as such after receiving oral notice of his appointment. Moore v. State, 52 Ala. 424.

29. Mahon v. State, 46 Tex. Cr. 234, 79 SW 28; Rex v. Judge, 24 Que. K. B. 115, 24 CanCrCas 354 (copy of judgment appointing commissioner of investigation).

30. Carroll v. State, 16 Ala. A. 454, 78 S 717.

31. Muir v. State, 8 Blackf. (Ind.) 154; Lambert v. State, 76 N. Y. 220, 32 AmR 293; Peo. v. Albertson, 8 HowPr (N. Y.) 363; Staight v. State, 39 Oh. St. 496; Rex v. Verelst, 3 Campb. 432, 170 Reprint 1435.

[a] **Rule applied.**—Where the evidence to show that the officer was one de jure or de facto is at best but prima facie, proof that he was a nonresident and was incapable of holding the office is competent to rebut any presumption arising from such evidence. Lambert v. Peo., 76 N. Y. 220, 32 AmR 293, 6 AbbNCas 181 [rev 14 Hun 512].

32. See supra § 82.

33. Markey v. State, 47 Fla. 38, 37 S 53; Greene v. Peo., 182 Ill. 278, 55 NE 341; State v. Williams, 61 Kan. 739, 60 P 1050, 60 Kan. 837, 58 P 476.

[a] **Illustration.**—Where an officer has been legally appointed and has color of office and a semblance of authority, he is to be regarded as an officer de facto, and evidence as to subsequent disability, nonresidence, or the like is inadmissible in a perjury case. State v. Williams, 61 Kan. 739, 60 P 1050, 60 Kan. 837, 58 P 476.

34. Cross references:
Averment in indictment see supra §§ 125, 126.
Burden of proof see supra § 150.
Issues, proof, and variance see supra § 145.
Sufficiency of proof see infra § 163.

35. See cases infra this section.

[a] **Evidence held inadmissible.**—(1) Caption of deposition of accused, stating he had been duly sworn before testifying. Rex v. Landry, 34 Que. K. B. 441, 40 CanCrCas 16, [1923] 4 DomLR 430. (2) Certificate of stenographer taking deposition in shorthand. Rex v. Landry, supra. (3) Testimony of witnesses as to

oath so to testify;[36] and so also may one who saw the oath administered.[37] Where the services of an interpreter were required, he may testify that he was sworn as interpreter and interpreted the oath to accused.[38] The subpœna docket,[39] or accused's signature to affidavits filed in the proceeding in which the perjury was committed, is admissible to prove the fact that he was sworn as a witness in the case.[40] Where the perjury is based on the verification of a civil complaint, the complaint is admissible to show that it was verified by accused.[41] Where it appears that accused was sworn by a particular officer or in a certain county, evidence is admissible to show that in fact he was sworn by a different officer,[42] or in a different county.[43]

[§ 156] **f. Materiality of Statement.**[44] The materiality of the false testimony[45] may be shown by the record of the proceedings in which the testimony was given,[46] or by the testimony there given,[47] or by all or so much of the pleadings therein as show the issues,[48] together with such other facts proved on the trial as tend to show the testimony to be on a material issue.[49] When the opening statement of counsel presented an issue of fact to the jury, it is admissible to show the materiality of the false testimony given in support of it.[50] But testimony aliunde the record showing the state of the cause at the time the alleged false testimony was introduced is admissible to demonstrate the materiality of the testimony.[51] The opinion of a witness who heard the testimony is not admissible as evidence to prove its materiality or lack of materiality.[52] And evidence, offered by defendant to show immateriality of his false testimony, that has or can have no effect or bearing on the materiality is inadmissible.[53]

[§ 157] **g. Matter Sworn To.**[54] Where a witness is indicted for perjury, the prosecution may prove by parol evidence what accused swore to,[55] although such testimony was not reduced to writing[56] or signed[57] as required by statute. The statements made may be shown by the testimony of the court reporter or stenographer who took down the testi-

what accused swore to. Rex v. Landry, supra.

36. Markey v. State, 47 Fla. 38, 37 S 53; State v. Miller, 80 Wash. 75, 141 P 293.

37. Peo. v. Reitz, (Cal. A.) 261 P 526; Clay v. State, 52 Tex. Cr. 555, 107 SW 1129; State v. Miller, 80 Wash. 75, 141 P 293.

[a] **Court reporter** may testify to show administration of oath. Peo. v. Reitz, (Cal. A.) 261 P 526.

[b] **Presiding judge** at the trial in which alleged perjury was committed may testify that the oath was administered by a deputy clerk. State v. Miller, 80 Wash. 75, 141 P 293.

38. Trevinio v. State, 48 Tex. Cr. 350, 88 SW 356.

39. Smith v. State, 103 Ala. 57, 15 S 866; Hannegan v. State, 5 Ala. A. 142, 59 S 376.

40. Schmidt v. U. S., 133 Fed. 257, 66 CCA 389.

41. Lappley v. State, 170 Wis. 356, 174 NW 913, 7 ALR 1279.

42. Jefferson v. State, (Tex. Cr.) 49 SW 88; Jefferson v. State, (Tex. Cr.) 29 SW 1090.

[a] **Rule applied.**—The cost bill containing the clerk's charge for swearing a witness is admissible to show that the clerk, and not the judge, administered the oath. Jefferson v. State, (Tex. Cr.) 49 SW 88.

43. State v. Chamberlin, 30 Vt. 559.

44. Cross references:
Averment in indictment see supra § 128.
Burden of proof see supra § 150.
Issues, proof, and variance see supra § 147.
Sufficiency of proof see infra § 164.

45. As element of offense see supra § 32 et seq.

46. Peo. v. Bradbury, 155 Cal. 808, 103 P 215; Peo. v. Reitz, (Cal. A.) 261 P 526; State v. Justesen, 35 Utah 105, 99 P 456.

47. Cal.—Peo. v. Lem You, 97 Cal. 224, 32 P 11.

Conn.—State v. Campbell, 93 Conn. 3, 104 A 653; State v. Vandemark, 77 Conn. 201, 58 A 715.

Mich.—Peo. v. Macard, 109 Mich. 623, 67 NW 968.

Mont.—State v. Gibbs, 10 Mont. 213, 25 P 289, 10 LRA 749.

Pa.—Com. v. Hilton, 74 Pa. Super. 20; Com. v. Rogo, 71 Pa. Super. 109; Com. v. De Cost, 35 Pa. Super. 88.

Vt.—State v. Camley, 67 Vt. 322, 31 A 840.

Wyo.—Fletcher v. State, 20 Wyo. 284, 123 P 80; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

[a] **Rule applied.**—To show materiality of perjured testimony, other testimony given in the same trial need not be confined to the subordinate issue on which the charged perjured testimony was given. State v. Campbell, 93 Conn. 3, 104 A 653.

48. Ga.—Nance v. State, 126 Ga. 95, 54 SE 932.

La.—State v. Brown, 111 La. 170, 35 S 501.

Nebr.—Pinn v. State, 107 Nebr. 417, 186 NW 544.

N. D.—State v. Falk, 34 N. D. 520, 524, 159 NW 10 [quot Cyc].

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

Pa.—Com. v. Hilton, 74 Pa. Super. 20.

Porto Rico.—Peo. v. Alvarado, 19 Porto Rico 827.

Tex.—Moroney v. State, 45 Tex. Cr. 524, 78 SW 696.

49. State v. Falk, 34 N. D. 520, 159 NW 10, 11 [quot Cyc]; State v. Stilwell, 109 Or. 643, 221 P 174; Com. v. Hilton, 74 Pa. Super. 20; Moroney v. State, 45 Tex. Cr. 524, 78 SW 696. But see Freeman v. State, 43 Tex. Cr. 580, 67 SW 499 (holding that, on a prosecution for perjury alleged to have been committed while testifying at a certain trial, evidence of what other witnesses testified to on such trial is inadmissible).

50. Ruch v. State, 34 Oh. Cir. Ct. 675, 2 Oh. A. 150.

51. State v Stilwell, 109 Or. 643, 221 P 174; State v. Kalyton, 29 Or. 375, 45 P 756.

52. Foster v. State, 32 Tex. Cr. 39, 22 SW 21; Washington v. State, 23 Tex. A. 336, 5 SW 119.

53. Peo. v. Collins, 6 Cal. A. 492, 92 P 513.

54. Cross references:
Averment in indictment see supra § 127.
Burden of proof see supra § 150.
Issues, proof, and variance see supra § 146.
Sufficiency of proof see infra § 165.

55. U. S.—Schonfeld v. U. S., 277 Fed. 934 [certiorari den 258 U. S. 623 mem, 42 SCt 316 mem, 66 L ed. 796 mem]; Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173; Schmidt v. U. S., 133 Fed. 257, 66 CCA 389.

Cal.—Peo. v. Curtis, 50 Cal. 95.

Fla.—Settles v. State, 75 Fla. 296, 78 S 287; Leaptrot v. State, 51 Fla. 57, 40 S 616.

Ill.—Peo. v. Berry, 309 Ill. 511, 141 NE 132.

Mass.—Com. v. Shooshanian, 210 Mass. 123, 96 NE 70, AnnCas1912C 1073.

Mont.—State v. Gibbs, 10 Mont. 212, 25 P 289.

Or.—State v. Carothers, 69 Or. 382, 138 P 1077; State v. Woolridge, 45 Or. 389, 78 P 333.

Pa.—Com. v. Stern, 58 Pa. Super. 591.

Tex.—Ice v. State, 84 Tex. Cr. 418, 208 SW 345; Roberts v. State, 83 Tex. Cr. 511, 204 SW 866; Herndon v. State, 82 Tex. Cr. 232, 198 SW 788; Schley v. State, (Cr.) 181 SW 470; Smith v. State, 70 Tex. Cr. 68, 156 SW 645; Downing v. State, 61 Tex. Cr. 519, 136 SW 471; Stanley v. State, (Cr.) 95 SW 1076; Simpson v. State, 46 Tex. Cr. 77, 79 SW 530; Stanley v. State, (Cr.) 74 SW 318.

Wash.—State v. Miller, 80 Wash. 75, 141 P 293.

Eng.—Reg. v. Morgan, 6 Cox C. C. 107.

Can.—Rex v. Doyle, 12 CanCrCas 69; Rex v. Prasiloski, 15 B. C. 29.

[a] **Thus** questions to, and answers by, an accused juror on his voir dire examination may properly be proved by the state's attorney, clerk of the court, or any other competent witness who heard the same. Leaptrot v. State, 51 Fla. 57, 40 S 616.

[b] **Perjury before grand jury.**—(1) Matter sworn to before the grand jury may be shown by the testimony of a member of that body (State v. Carothers, 69 Or. 382, 138 P 1077; Ice v. State, 84 Tex. Cr. 418, 208 SW 345) (2) or by the clerk of the grand jury (State v. Carothers, supra). (3) Evidence of a sworn statement made to the county attorney is admissible as persuasive of the fact that the same statement was made before the grand jury. Logan v. State, 96 Tex. Cr. 601, 258 SW 830. (4) A statute providing that a grand juror may be required to disclose the testimony of a witness before the grand jury on a trial of such witness for perjury has been held not to make the testimony of the juror admissible on a trial for false swearing, where false swearing is an offense distinct from perjury. Com. v. Scowden, 92 Ky. 120, 17 SW 205, 13 KyL 404. (5) In England a member of a grand jury cannot testify as to what accused swore to before that body (Reg. v. Hughes, 1 C. & K. 519, 47 ECL 519; Reg. v. Gazard, 8 C. & P. 595, 34 ECL 911, 173 Reprint 633), (6) but another witness on the same indictment who was in the grand jury room while such person was under examination is competent to prove what he swore to (Reg. v. Hughes, supra), (7) and so is a police officer who was stationed within the grand jury room door, these persons not being sworn to secrecy as are the members of the grand jury (Reg. v. Hughes, supra).

56. Peo. v. Curtis, 50 Cal. 95; Stanley v. State, (Tex. Cr.) 74 SW 318.

57. State v. Woolridge, 45 Or. 389, 78 P 333.

mony of accused,[58] or by the testimony of the presiding judge,[59] or by the introduction of the transcript of the testimony;[60] and such portions of the record as are necessary to show what the false testimony was may be read by the court reporter.[61] Under some circumstances the affidavit of another party is admissible for the purpose of showing what the prisoner swore to.[62] The fact that a witness is unable to give the entire testimony given by accused does not prevent him from testifying to the particular part of his testimony on which the perjury is assigned.[63]

Retraction. When it has been shown that accused testified as charged, evidence that he subsequently testified the same way without being again sworn is admissible to show that he did not explain, qualify, or retract his former testimony.[64]

[§ 158] **h. Falsity or Truth of Statement.**[65] The falsity of the statement made by accused may be shown by any evidence which is competent against him,[66] such as statements either verbal or in writing, under oath or not, which conflict with the statement on which the indictment or information is founded,[67] and matters constituting a part of the

58. Brzezinski v. U. S., 198 Fed. 65, 117 CCA 173; Roberts v. State, 83 Tex. Cr. 511, 204 SW 866; Herndon v. State, 82 Tex. Cr. 232, 198 SW 788; Downing v. State, 61 Tex. Cr. 519, 136 SW 471; State v. Miller, 80 Wash. 75, 141 P 293.

[a] **Stenographic notes** (1) may be read (Peo. v. Berry, 309 Ill. 511, 141 NE 132 [reporter's notes read by state's attorney where reporter was sworn as witness and testified they were correct]; Hereford v. Peo., 197 Ill. 222, 64 NE 310 [written transcript of his notes read by stenographer]), (2) or used to refresh the memory (Com. v. Stern, 58 Pa. Super. 591; Herndon v. State, 82 Tex. Cr. 232, 198 SW 788; State v. Miller, 80 Wash. 75, 141 P 293).

59. State v. Miller, supra.

[a] **Notes of evidence taken by a judge on a trial** are not admissible in evidence to prove what was said on the trial. Reg. v. Child, 5 Cox C. C. 197.

60. Smith v. State, 163 Ark. 223, 259 SW 404; State v. Mitchell, (Mo.) 267 SW 873; Teague v. State, 13 Okl. Cr. 270, 163 P 954.

[a] **Transcript showing all testimony as to the material matters** is not inadmissible because it also shows that answers of accused to matters not pertinent to the issue in the prosecution for perjury were interrupted and incomplete. Teague v. State, 13 Okl. Cr. 270, 163 P 954.

61. State v. Archuleta, 29 N. M. 25. 217 P 619.

62. U. S. v. Buete, 24 F. Cas. No. 14,680a, 2 Hayw. & H. 49.

63. Com. v. Shooshanian, 210 Mass. 123, 96 NE 70, AnnCas1912C 1073; Com. v. Farley, Thach. Cr. (Mass.) 674; Hutcherson v. State, 33 Tex. Cr. 67, 24 SW 908.

[a] **In England** the whole of accused's testimony must be proved; not merely the part on which the perjury is assigned. Rex v. Dowlin, 1 Peake 227, 170 Reprint 138 (entire cross-examination); Rex v. Jones, 1 Peake 51, 170 Reprint 75.

64. Maynard v. State, 135 Ill. 416, 25 NE 740.

65. Cross references:
Averment in indictment see supra §§ 132–134.
Burden of proof see supra § 150.
Issues, proof, and variance see supra § 148.
Sufficiency of proof see infra § 166.

66. U. S.—Venlinio v. U. S., 276 Fed. 12; Spann v. U. S., 252 Fed. 517, 164 CCA 433; Daniels v. U. S., 196 Fed. 459, 116 CCA 233; Sullivan v. U. S., 161 Fed. 253, 88 CCA 289.

Ala.—Bradford v. State, 134 Ala. 141, 32 S 742; Jordan v. State, 16 Ala. A. 51, 74 S 864; Hannegan v. State, 5 Ala. A. 142, 59 S 376.

Cal.—Peo. v. Reitz, (A.) 261 P 526; Peo. v. DeVries, 52 Cal. A. 705, 199 P 867.

Kan.—State v. Adams, 119 Kan. 509, 240 P 955.

Ky.—Blakey v. Com., 183 Ky. 493, 209 SW 516.

La.—State v. Smith, 149 La. 700, 90 S 28; State v. Edwards, 149 La. 679, 90 S 21.

Md.—Hodel v. State, 112 Md. 115, 75 A 1056.

Mass.—Com. v. Butland, 119 Mass. 317.

Nev.—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.

N. J.—State v. Snyder, 93 N. J. L. 18, 107 A 167 [aff 94 N. J. L. 277, 109 A 925].

N. Y.—Peo. v. Moy He, 173 App. Div. 396, 159 NYS 303.

Oh.—Ruch v. State, 34 Oh. Cir. Ct. 675, 2 Oh. A. 150.

Pa.—Com. v. Rogo, 71 Pa. Super. 109.

Tex.—Gray v. State, 109 Tex. Cr. 481, 5 SW (2d) 518; Cozby v. State, 80 Tex. Cr. 323, 189 SW 957; Reed v. State, 76 Tex. Cr. 335, 174 SW 1065; Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544; Spearman v. State, 68 Tex. Cr. 449, 152 SW 915, 44 LRANS 243; Barber v. State, 64 Tex. Cr. 96, 142 SW 577; Downing v. State, 61 Tex. Cr. 519, 136 SW 471; Stanley v. State, (Cr.) 95 SW 1076; Foreman v. State, 47 Tex. Cr. 179, 85 SW 809; McDonough v. State, 47 Tex. Cr. 227, 84 SW 594, 122 AmSR 684; McLeod v. State, (Cr.) 75 SW 522; Rogers v. State, 35 Tex. Cr. 221, 32 SW 1044.

Vt.—State v. Marsh, 73 Vt. 176, 50 A 861.

Wis.—Komp v. State, 129 Wis. 20, 108 NW 46.

Wyo.—Wilde v. State, 20 Wyo. 302, 123 P 85; Fletcher v. State, 20 Wyo. 284, 123 P 80; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

"Any fact which tends to prove the falsity or the truth of the sworn statement for which he stands indicted is relevant." Hannegan v. State, 5 Ala. A. 142, 148, 59 S 376.

[a] **Thus** "the falsity of the evidence of a person charged with false swearing may be shown by the evidence of living witnesses or . . . by documentary or written evidence or it may be shown by facts that clearly and convincingly establish the falsity of the statements made by the accused." Blakey v. Com., 183 Ky. 493, 499, 209 SW 516.

[b] **Rule applied** to testimony that accused lived with his wife, as contradicting accused's testimony in marriage annulment proceeding. Peo. v. Reitz, (Cal. A.) 261 P 526.

[c] **Book entries and the like.**—Falsity of statement may be shown by: (1) Books and papers of accused kept under his control and subject to his inspection. Jacobs v. U. S., 31 F. (2d) 568; U. S. v. Mayer, 26 F. Cas. No. 15,753, Deady 127. (2) Book entries of his employer coupled with the fact that accused drew full pay for the day in question, as showing that he was not present at the time and place of an occurrence which he testified he had seen. Jordan v. State, 16 Ala. A. 51, 74 S 864. (3) Ship's manifest, as showing the date of an alien's entry into the United States concerning which accused had sworn. Sullivan v. U. S., 161 Fed. 253, 88 CCA 289.

[d] **Physical condition of accused** at reasonable time after commission of offense on trial for which he falsely testified he was free from a certain disease at time of offense. Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448 (time when he became infected immaterial except as showing infection at time of offense).

[e] **Testimony of physician.**—Peo. v. Reitz, (Cal. A.) 261 P 526 (physical condition of wife, to show falsity of husband's statement in marriage annulment proceeding); Reed v. State, 76 Tex. Cr. 335, 174 SW 1065 (as to chastity, in prosecution for falsely testifying as to sexual intercourse with prosecutrix).

[f] **Testimony of son.**—State v. Snyder, 94 N. J. L. 277, 109 A 925 [aff 93 N. J. L. 18, 107 A 167] (as to true reason for separation, in alienation suit by wife of defendant).

[g] **Testimony of suborned witness.**—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848 (to lay foundation that defendant's testimony was false).

[h] **Testimony of wife.**—Spearman v. State, 68 Tex. Cr. 449, 152 SW 915, 44 LRANS 243 (to show falsity of husband's testimony in divorce action).

[i] **In a prosecution for perjury for denying the execution of a mortgage,** evidence of the genuineness of the signature of an attesting witness who had died, admitted to prove the execution of the mortgage in accordance with the formalities required by law, cannot be considered as evidence that accused signed the mortgage. Walker v. State, 107 Ala. 5, 18 S 393.

[j] **Evidence of corroborative circumstances** is not rendered inadmissible by the fact that it also tends to prove another distinct offense. Maynard v. State, 135 Ill. 416, 25 NE 740.

[k] **Cognate perjuries.**—The prosecution, to sustain a proper assignment of perjury, may show the falsity of statements regarding other and correlative facts. Brown v. State, 57 Miss. 424; Anderson v. State, 24 Tex. A. 705, 7 SW 40 [overr State v. Buie, 43 Tex. 532]; Reg. v. Gardiner, 8 C. & P. 737, 34 ECL 992, 173 Reprint 696, 2 Moody C. C. 95, 169 Reprint 38.

[l] **Opinion of witness as to falsity.**—On a trial for perjury, a witness for the state, after reciting what accused testified to when the alleged perjury was committed, may state that it was false, at the same time stating facts which conclusively show that it was false. Adams v. State, 93 Ga. 166, 18 SE 553; Rogers v. State, 35 Tex. Cr. 221, 32 SW 1044.

67. Ark.—State v. Binkley, 123 Ark. 240, 185 SW 279.

Kan.—State v. Adams, 119 Kan. 509, 240 P 955.

La.—State v. Smith, 149 La. 700, 90 S 28; State v. Edwards, 149 La. 679, 90 S 21.

Mass.—Com. v. Barronian, 235 Mass. 364, 126 NE 833.

Mo.—State v. Blize, 111 Mo. 464, 20 SW 210.

N. J.—State v. Snyder, 93 N. J. L. 18, 107 A 167 [aff 94 N. J. L. 277, 109 A 925]; Dodge v State, 24 N. J. L. 455.

Tex.—Logan v. State, 96 Tex. Cr. 601, 258 SW 330; Hunter v. State, 95 Tex. Cr. 394, 254 SW 993; Poulter v. State, 70 Tex. Cr. 197, 157 SW 166; Cordway v. State, 25 Tex. A. 405, 8 SW 670; Littlefield v. State, 24 Tex. A. 167, 5 SW 650.

Sufficiency of contradictory statements as evidence see infra § 166.

res gestæ of the fact or issue in regard to which accused testified falsely.[68] The truth of the matter sworn to is admissible only to show the falsity thereof.[69] Evidence of the result of the trial in which the perjury was committed is ordinarily inadmissible to show truth or falsity;[70] but where accused swore to an alibi, evidence of the guilt of the person in whose favor he swore falsely may be shown to establish the falsity of the testimony.[71] Evidence of the conduct of defendant at, and prior to, his trial at which accused's statements were made,[72] and confessions of guilt by such person made in the absence of defendant,[73] are inadmissible, although the contrary has been held.[74] To prove the truth of his testimony, accused is entitled to introduce any competent,[75] but not incompetent,[76] evidence in rebuttal of evidence of falsity. Self-serving declarations are inadmissible.[77]

[§ 159] **3. Weight and Sufficiency—a. In General.** As in the case of other criminal prosecutions[78] the perjury must be proved beyond a reasonable doubt.[79] Illustrations of evidence held to be sufficient[80]

68. Ala.—Hannegan v. State, 5 Ala. A. 142, 59 S 376.
Ga.—Heflin v. State, 88 Ga. 151, 14 SE 112, 30 AmSR 147.
La.—State v. Williams, 34 La. Ann. 959.
N. Y.—Eighmy v. Peo., 79 N. Y. 546.
Pa.—Com. v. Rogo, 71 Pa. Super. 109.
Tex.—Freeman v. State, 44 Tex. Cr. 496, 72 SW 1001.

69. Sharron v. U. S., 11 F. (2d) 689.

70. Iowa.—State v. Caywood, 96 Iowa 367, 65 NW 385.
Kan.—State v. Williams, 60 Kan. 837, 58 P 476.
Miss.—Hemphill v. State, 71 Miss. 877, 16 S 261.
Okl.—Gray v. State, 4 Okl. Cr. 292, 111 P 825, 32 LRANS 142.
Tex.—Brown v. State, 95 Tex. Cr. 343, 254 SW 995; Clayton v. State, 78 Tex. Cr. 158, 180 SW 1089; Poulter v. State, 72 Tex. Cr. 140, 161 SW 475; Hardin v. State, 55 Tex. Cr. 631, 117 SW 974; Hutcherson v. State, 33 Tex. Cr. 67, 24 SW 908.
[a] **Acquittal** is not admissible to show accused's innocence. State v. Williams, 60 Kan. 837, 58 P 476.
[b] **Conviction.**—The state could not show that accused was tried for simple assault in a difficulty wherein decedent was killed, since conviction would not involve moral turpitude, nor show per se that accused swore falsely as to the killing, and accused could not show that the assault case was dismissed on appeal. Hardin v. State, 55 Tex. Cr. 631, 117 SW 974.

71. Galloway v. State, 29 Ind. 442; McCoy v. State, (Tex. Cr.) 73 SW 1057.

72. Galloway v. State, 29 Ind. 442; Hardin v. State, 55 Tex. Cr. 631, 117 SW 974.

73. Brown v. State, 57 Miss. 424; Reavis v. State, 6 Wyo. 240, 44 P 62.

74. Martin v. State, 33 Tex. Cr. 317, 26 SW 400.

75. Cal.—Peo. v. Burcham, 69 Cal. A. 614, 232 P 149.
Ga.—Flemister v. State, 48 Ga. 170.
Ill.—Maynard v. State, 135 Ill. 416, 25 NE 740.
Iowa.—State v. Swafford, 98 Iowa 362, 67 NW 284; State v. Seaton, 8 Iowa 138.
Ky.—Smith v. Com., 154 Ky. 613, 157 SW 1089.
La.—State v. Faulk, 30 La. Ann. 831.
Mo.—State v. Davis, (A.) 256 SW 125.
N. M.—State v. Archuleta, 29 N. M. 25, 217 P 619.
N. C.—State v. Smith, 119 N. C. 856, 25 SW 871; State v. Jones, 91 N. C. 629.
Tex.—Parker v. State, 25 Tex. A. 743, 9 SW 42.
Wyo.—Wilde v. State, 20 Wyo. 302, 123 P 85.
B. C.—Rex v. Coote, 10 B. C. 285.
[a] **Rule applied.**—(1) In a prosecution for perjury in testifying as to transactions with alleged fictitious person, express company records showing shipment of goods to, and receipt by, the supposedly fictitious person and orders for goods signed in his name and identified as received in ordinary course of business, are admissible to rebut testimony that there was no such individual. Peo. v. Burcham, 69 Cal. A. 614, 232 P 149. (2) Where the perjury is based on some part of the testimony given by the accused he may introduce such other parts as may be explanatory of the alleged perjured statement. State v. Archuleta, 29 N. M. 25, 217 P 619; Rex v. Coote, 10 B. C. 285.
[b] **Opportunity to do as sworn.**—Defendant may show, to establish the truth of his oath, that he had opportunity to do what he said he did do. State v. Swafford, 98 Iowa 362, 67 NW 284.

76. Hodgkinson v. U. S., 5 F. (2d) 628 [certiorari den 269 U. S. 554 mem, 46 SCt 18 mem, 70 L. ed. 408 mem]; Peo. v. Casanova, 54 Cal. A. 439, 202 P 45.
[a] **Attempt to impeach witness.**—Where accused was charged with testifying that he did not know that a hotel was being used for immoral purposes, testimony that one witness had used hotel for such purpose with another witness who testified for the state, and that such witness for state had told the other witness that she did not want accused to know of her immoral conduct at the hotel, was held inadmissible. Peo. v. Casanova, 54 Cal. A. 439, 202 P 45.
[b] **Immaterial evidence.**—In a prosecution of the surety on a bail bond for making a false oath as to the value of real estate owned by him and subject to execution, evidence of the market value of real estate which he had sold under contracts requiring him to give title on completion of the payments was properly excluded. Hodgkinson v. U. S., 5 F. (2d) 628 [certiorari den 269 U. S. 554 mem, 46 SCt 18 mem, 70 L. ed. 408 mem].

77. See Criminal Law § 635.

78. See Criminal Law § 1590 et seq.

79. Ala.—Goolsby v. State, 17 Ala. A. 545, 86 S 137.
Ark.—Mason v. State, 55 Ark. 529, 18 SW 827.
Cal.—Peo. v. Galbraith, 66 Cal. A. 761, 226 P 983.
Conn.—State v. Campbell, 93 Conn. 3, 104 A 653.
Fla.—Ellis v. State, 83 Fla. 322, 91 S 192 (larceny).
Ind.—Hann v. State, 185 Ind. 56, 113 NE 304.
Iowa.—State v. Raymond, 20 Iowa 582.
Ky.—Brake v. Com., 218 Ky. 747, 292 SW 305; Walker v. Com., 162 Ky. 111, 172 SW 109; Howell v. Com., 104 SW 685, 31 KyL 983.
Mich.—Peo. v. Dowdall, 124 Mich. 166, 82 NW 810.
Miss.—Sloan v. State, 71 Miss. 459, 14 S 262.
Mo.—State v. Faulkner, 175 Mo. 546, 75 SW 116.
Nebr.—Gandy v. State, 23 Nebr. 436, 36 NW 817.
N. M.—Terr. v. Remuzon, 3 N. M. 368, 9 P 598.
N. C.—State v. Cline, 150 N. C. 854, 64 SE 591.
Oh.—Crusen v. State, 10 Oh. St. 258.
Okl.—Wright v. State, 30 Okl. Cr. 425, 236 P 633.
Or.—State v. Stilwell, 109 Or. 643, 221 P 174.
Philippine.—U. S. v Pablo, 35 Philippine 94.
Porto Rico.—U. S. v. Cruz, 1 Porto Rico Fed. 445.
S. C.—State v. Bolyn, 143 S. C. 63, 141 SE 165.
Tenn.—Goad v. State, 106 Tenn. 175, 61 SW 79.
Tex.—Williams v. State, 109 Tex. Cr. 116, 3 SW (2d) 94.
Wash.—State v. Rutledge, 37 Wash. 523, 79 P 1123.

80. [a] **False affidavit:** (1) Smith v. State, 38 Ga. A. 748, 145 SE 526; Thomas v. Com., 175 Ky. 38, 193 SW 653. (2) Accusing another of assault. Simpson v. State, 46 Tex. Cr. 77, 79 SW 530. (3) As to issuance of receipt for debt. State v. Vazquez, 26 Philippine 479. (4) Before election board. Com. v. McCue, 46 Pa. Super. 416. (5) Contradicting affidavit sworn to for purpose of obtaining warrant of arrest. Davis v. State, 7 Ga. A. 680, 67 SE 839. (6) For marriage license. Stiles v. State, (Okl. Cr.) 264 P 226. (7) For new trial. Neal v. Com., 217 Ky. 334, 289 SW 242. (8) In application for examination for police service. U. S. v. Molina, 29 Philippine 119. (9) In report to commissioner of banking. Com. v. Moyer, 76 Pa. Super. 20. (10) Of justification as surety on bail bond. Peo. v. Davis, 122 App. Div. 569, 107 NYS 426, 21 N. Y. Cr. 573 [aff 191 N. Y. 514 mem, 84 NE 1116 mem]. (11) To obtain insurance. State v. Lynes, 194 Mo. A. 184, 185 SW 535. (12) To secure release from jail without payment of fine. Sharron v. U. S., 11 F. (2d) 689.
[b] **False testimony:** (1) At preliminary examination. Peo. v. Veld, 154 App. Div. 752, 139 NYS 788, 29 N. Y. Cr. 5; Waddle v. State, 73 Tex. Cr. 501, 165 SW 591. (2) Before grand jury. Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887]; Smith v. State, 163 Ark. 223, 259 SW 404; McLaren v. State, 4 Ga. A. 643, 62 SE 138; Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240; Blakey v. Com., 183 Ky. 493, 209 SW 516; Flowers v. State, 13 Okl. Cr. 221, 163 P 558; Allen v. State, 82 Tex. Cr. 416, 199 SW 633; Jones v. State, 76 Tex. Cr. 398, 174 SW 1071; Gonzales v. State, 54 Tex. Cr. 230, 112 SW 941. (3) Before referee. Gordon v. U. S., 5 F. (2d) 943; Eighmy v. Peo., 79 N. Y. 546. (4) In action or proceeding for habeas corpus. Slade v. State, (Miss.) 119 S 355. (5) For maintenance and support. Peo. v. Collins, 6 Cal. A. 492, 92 P 513. (6) For personal injuries. Parham v. State, 3 Ga. A. 468, 60 SE 123. (7) For slander. Cox v. State, 76 Tex. Cr. 326, 174 SW 326. (8) To recover bank balance. Atkinson v. State, 133 Ark. 341, 202 SW 709. (9) To recover for work done. Pinn v. State, 107 Nebr. 417, 186 NW 544. (10) To recover on draft (Peo. v. Dahrooge, 173 Mich. 375, 139 NW 22) (11) or note (Iden v. State, 112 Nebr. 454, 199 NW 734). (12) In peace bond proceedings. State v. Saunders, 122 Kan. 840, 253 P 572. (13) In prosecution for gambling (Beavers

or insufficient[81] to support a conviction may be found in the notes.

Oral evidence, when exclusively relied on, must be by two witnesses, or one witness corroborated by circumstances proved by independent testimony.[82]

Documentary evidence with circumstances showing corrupt intent may, in some jurisdictions, dispense with the necessity of testimony by a living witness,[83] but the documentary evidence must be equally as clear and convincing as oral evidence.[84]

Circumstantial evidence alone may, in some jurisdictions, be sufficient,[85] where such evidence is sufficient to establish guilt beyond a reasonable doubt;[86] but the circumstances must be consistent with guilt and inconsistent with innocence.[87] But in jurisdictions where positive testimony of two witnesses or one witness and corroborating circumstances is required,[88] positive evidence is necessary to establish guilt,[89] and purely circumstantial evidence alone is never sufficient.[90] But circumstantial evidence may be sufficient to fulfill the requirement of corroboration of a witness, even though not sufficient to establish guilt.[91]

[§ 160] **b. Intent and Knowledge of Falsity.**[92] To convict of perjury it must be shown beyond reasonable doubt that the testimony of accused was given willfully and corruptly,[93] and with knowledge of the falsity of the matter sworn to.[94] Knowledge may be shown by circumstantial evidence.[95]

v. State, 124 Ark. 38, 186 SW 300; Peo. v. Threewitt, 251 Ill. 509, 96 NE 242; Howell v. Com., (Ky.) 113 SW 881; Rose v. State, 8 Okl. Cr. 294, 127 P 873), (14) larceny (Peo. v. Hill, 36 Cal. A. 574, 172 P 1114; Ward v. State, 83 Fla. 311, 91 S 189; State v. Bingham, 124 Kan. 61, 257 P 951; Dunn v. State, 15 Okl. Cr. 245, 176 P 86), (15) liquor violation (State v. Lyon, 176 Iowa 171, 157 NW 742; State v. Norris, 297 Mo. 268, 249 SW 78; State v. Clinkingbeard, 296 Mo. 25, 247 SW 199), (16) maintaining disorderly house (Peo. v. Casanova, 54 Cal. A. 439, 202 P 45), (17) murder (Baker v. Com., 223 Ky. 616, 4 SW (2d) 416; Sullivan v. Com., 158 Ky. 536, 165 SW 696; Peo. v. Moy He, 173 App. Div. 396, 159 NYS 303), (18) obstructing highway and disorderly conduct (Peo. v. Matlock, 303 Ill. 399, 135 NE 767), (19) obtaining money under false pretenses (Peo. v. Paden, 71 Cal. A. 247, 234 P 920), (20) seduction (U. S. v. Lumampao, 20 Philippine 168).

81. Peo. v. De Martini, 50 Cal. A. 109, 194 P 506 (testimony of juror in trial of felony, in answer to questions on voir dire as a prospective juror); State v. Ewen, (N. J. Sup.) 140 A 449 (false testimony as to signing of receipt); U. S. v. Aragon, 5 Philippine 469 (false testimony in civil action for rent).

[a] **False testimony** alleged to have been given: (1) Before grand jury. Pilgrim v. State, 3 Okl. Cr. 49, 104 P 383. (2) In prosecution for burglary and larceny (Peo. v. Alkire, 321 Ill. 28, 151 NE 518), (3) drunkenness (Harkleroad v. Com., 207 Ky. 552, 269 SW 724), (4) homicide (Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565; Hansford v. Com., 170 Ky. 700, 186 SW 498), (5) larceny (Hann v. State, 185 Ind. 56, 113 NE 304), (6) robbery (Peo. v. Burcham, 62 Cal. A. 649, 217 P 558), (7) unlawful intercourse with woman (Brannen v. State, 94 Fla. 656, 114 S 429), (8) violating liquor laws (Thompson v. State, (Okl. Cr.) 268 P 314; Hays v. State, 76 Tex. Cr. 213, 173 NW 671).

82. See infra § 168 et seq.

83. U. S. v. Wood, 14 Pet. (U. S.) 430, 10 L. ed. 527; U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

[a] **Cases in which living witness is unnecessary.**—A living witness may be dispensed with and documentary or written testimony be relied upon to convict in cases where a person is charged with the perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing a corrupt intent; in cases where the perjury charged is contradicted by the public record proved to have been well known to defendant when he took the oath, the oath only being proved to have been taken; in cases where a party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating the facts sworn to, or by other written testimony existing and being found in the possession of defendant, and which has been treated by him as containing the evidence of the fact recited in it. U. S. v. Wood, 14 Pet. (U. S.) 430, 10 L. ed. 527.

84. Sullivan v. U. S., 161 Fed. 253, 88 CCA 289; Peo. v. Maxwell, 118 Cal. 50, 50 P 18.

[a] **Rule applied.**—On trial for falsely testifying that accused had known an applicant for naturalization for five years prior to the hearing, during which time he had been a resident of the United States, a ship's manifest, showing that applicant had arrived in this country as an alien less than five years prior to the proceeding, and that he stated, not under oath, that he had never been in the United States, is insufficient alone to warrant a conviction. Sullivan v. U. S., 161 Fed. 253, 88 CCA 289.

85. Del.—Marvel v. State, 131 A 317, 42 ALR 1058 [aff 131 A 313].

Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510.

Ky.—Wolford v. Com., 218 Ky. 420, 291 SW 366; Blakey v. Com., 183 Ky. 493, 209 SW 516.

Minn.—State v. Storey, 148 Minn. 398, 182 NW 613, 15 ALR 629.

Mo.—State v. Faulkner, 175 Mo. 546, 75 SW 116.

Nev.—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.

N. Y.—Peo. v. Doody, 172 N. Y. 165, 64 NE 807.

Okl.—Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

Tex.—Williams v. State, 109 Tex. Cr. 116, 3 SW (2d) 94; Hart v. State, 73 Tex. Cr. 362, 166 SW 152; Miles v. State, 73 Tex. Cr. 493, 165 SW 567; Maroney v. State, 45 Tex. Cr. 524, 78 SW 696; Rogers v. State, 35 Tex. Cr. 221, 32 SW 1044; Plummer v. State, 35 Tex. Cr. 202, 33 SW 228; Beach v. State, 32 Tex. Cr. 240, 22 SW 976. See also Maines v. State, 26 Tex. A. 14, 9 SW 51 (recognizing rule, but holding particular evidence insufficient to show falsity of statement).

Can.—Rex v. Natanson, 21 Sask. L. 505, 48 CanCrCas 158, [1927] 3 DomLR 308, [1927] 2 WestWkly 127.

[a] **Corroboration is necessary.**—Rex v. Natanson, 21 Sask. L. 505, 18 CanCrCas 158, [1927] 3 DomLR 308, [1927] 2 WestWkly 127.

86. State v. Storey, 148 Minn. 398, 182 NW 613, 15 ALR 629.

87. State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.

88. See infra § 169.

89. See infra § 169.

90. Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Peo. v. Burcham, 69 Cal. A. 614, 232 P 149.

[a] **Statute construed.**—Code Civ. Proc. § 1968, requiring direct evidence in perjury cases, means that there must be direct evidence only as to the falsity of the testimony charged to be perjury. Peo. v. Rodley, 131 Cal. 240, 63 P 351.

91. See infra § 173.

92. Cross references:

As element of offense see supra §§ 23-30.

Averment in indictment see supra §§ 135, 136.

Burden of proof see supra § 150.

Evidence admissible to prove see supra § 152.

93. Ark.—Mason v. State, 55 Ark. 529, 18 SW 827.

Ill.—Peo. v. Melnick, 274 Ill. 616, 113 NE 971.

Ky.—Botner v. Com., 219 Ky. 272, 292 SW 805; Thomas v. Com., 175 Ky. 38, 193 SW 653; Walker v. Com., 162 Ky. 111, 172 SW 109; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683.

Nebr.—Iden v. State, 112 Nebr. 454, 199 NW 734.

N. Y.—Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792.

Okl.—Pilgrim v. State, 3 Okl. Cr. 49, 104 P 383.

Porto Rico.—Peo. v. Colón, 17 Porto Rico 973.

Tenn.—Goad v State, 106 Tenn. 175, 61 SW 79.

Tex.—Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544.

[a] **Evidence held sufficient** to show corrupt intent in swearing falsely: (1) In action on promissory notes. Iden v. State, 112 Nebr. 454, 199 NW 734. (2) In prosecution for larceny and receiving stolen goods. Peo. v. Melnick, 274 Ill. 616, 113 NE 971. (3) In trial for mayhem. Peo. v. Colón, 17 Porto Rico 973.

[b] **Evidence held insufficient to show corrupt intent:** (1) In assault and battery case. Fields v. State, 94 Fla. 490, 114 S 317. (2) In partition proceedings. Peo. v. Redmond, 189 App. Div. 96, 178 NYS 120. (3) In trial for horse theft. State v. Vane, 105 Wash. 170, 177 P 728.

[c] **Evidence that accused had no reasonable ground for believing the fact** to which he testified is sufficient to show a corrupt motive in giving such testimony. State v. Clough, 111 Iowa 714, 83 NW 727.

94. Botner v. Com., 219 Ky. 272, 292 SW 805; Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; Peo. v. Grout, 174 App. Div. 608, 161 NYS 718 [app dism 222 N. Y. 521 mem, 118 NE 1072 mem]; Peo. v. Gillete, 126 App. Div. 665, 111 NYS 133, 22 N. Y. Cr. 400; Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544.

[a] **Inability to read.**—If perjury is assigned on the affidavit of one who cannot read, his understanding of its statements must be proved. Hernandez v. State, 18 Tex. A. 134, 51 AmD 295.

95. State v. Dryden, 26 Del. 466, 84 A 1037; Trinkle v. State, 71 Tex. Cr. 64, 158 SW 544; Rex v. Natanson, 21 Sask. L. 505, [1927] 3 DomLR 308, 48 CanCrCas 158, [1927] 2 WestWkly 127.

[a] **"Knowledge is an intangible thing** resting in the mind, the possession of which may be admitted by the party or be shown by proof of facts,

[§ 161] **c. Proceedings in Which Oath Was Administered.**[96] Since it is necessary to prove the identity of the proceeding in which the perjury was committed,[97] evidence sufficient to identify the proceedings must be introduced by the prosecution.[98] Thus in order to convict a witness of perjury alleged to have been committed on the trial of a case or other proceeding in a court of record, the record of the case, or a duly authenticated transcript thereof, is necessary to prove the judicial proceeding in the course of which the alleged perjury was committed,[99] unless such formal proof is waived.[1] But it has been held that, where the court trying the perjury is the court before which the perjury was committed, the record is not necessary to identify the case, as the court is presumed to know its own record.[2] Where the pendency of the action in which the false testimony was given has been shown by the records, and the trial thereof by oral testimony, the trial and disposition of the case need not be shown by record.[3]

[§ 162] **d. Jurisdiction and Authority To Administer Oath.**[4] The burden of proof being on the prosecution to establish the false swearing before an officer or tribunal having authority to administer the oath,[5] the prosecution must introduce sufficient evidence to establish such authority.[6] As to the authority of the officer administering the oath, it is sufficient to prove that he was acting as such,[7] without putting in evidence his commission or other facts giving jurisdiction.[8]

[§ 163] **e. Administration, Form, and Making of Oath.**[9] Not only must the prosecution prove that accused was sworn,[10] but the evidence must be sufficient to prove beyond a reasonable doubt the administration of the oath;[11] but circumstantial evi-

circumstances and surroundings from which it may reasonably and rationally be inferred." State v. Dryden, 26 Del. 466, 468, 84 A 1037.

96. Cross references:
As element of offense see supra § 49 et seq.
Averment in indictment see supra §§ 110–114.
Burden of proof see supra § 150.
Evidence admissible to prove see supra § 153.

97. See supra § 150.

98. See cases infra this section.

[a] **Evidence held sufficient.**—(1) Record prepared for use of the judge at the trial, and testimony of the clerk that the case was tried. Gurditta v. Rex, (Can.) [1927] 2 DomLR 577, 47 CanCrCas 154. (2) Testimony of the justice as to the trial of the case, in which false statements were made. Pence v. State, 36 Ga. A. 270, 136 SE 820.

[b] **Evidence held insufficient.**—Whittle v. State, 79 Miss. 327, 30 S 722; State v. Koslowesky, 228 Mo. 351, 128 SW 741.

[c] **Information with indorsement of plea of not guilty** was insufficient. Fletcher v. State, 20 Wyo. 284, 123 P 80.

[d] **Plea in civil action.**—The nonproduction by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein defendant is alleged to have given false testimony, is not material where the assignment of perjury has no reference to the pleadings, but defendant, if he wishes, may, in case the plea is not produced, prove its contents by secondary evidence. Reg. v. Ross, 28 L. C. Jur. (Que.) 261, 1 Montr. Q. B. 227.

[e] **Proof that defendant was sworn and testified in the case** will not dispense with the necessity of legally proving the existence of the case by the record thereof. Heflin v. State, 88 Ga. 151, 14 SE 112, 30 AmSR 147.

[f] **Testimony of stenographer of grand jury** as to the subject matter under investigation at the time was insufficient to disclose the subject matter of the investigation. Peo. v. Goodheim, 188 App. Div. 148, 176 NYS 468.

[g] **Writ of summons** is not necessary to prove the proceeding. Rex v. Gurditta, 38 B. C. 66, 47 CanCrCas 103, [1927] 1 WestWkly 273 [motion to app to Can. Sup. Ct. refused [1927] 2 DomLR 577, 47 CanCrCas 154].

99. U. S.—Baskin v. U. S., 209 Fed. 740, 126 CCA 464.
Ala.—McMurry v. State, 6 Ala. 324.
Ga.—Heflin v. State, 88 Ga. 151, 14 SE 112, 30 AmSR 147.
Pa.—Respublica v. Goss, 2 Yeates 479.
Eng.—Reg. v. Dillon, 14 Cox C. C. 4.
Can.—Rex v. Farrell, 20 Ont. L. 182, 15 OntWR 15, 17 AnnCas 261; Rex v. Legros, 17 Ont. L. 425, 12 OntWR 983; Rex v. Drummond, 10 Ont. L. 546, 6 OntWR 211, 10 CanCrCas 340.

[a] **Bankruptcy proceedings.**—Docket and entries therein are sufficient. Offner v. U. S., 209 Fed. 749, 126 CCA 473; Baskin v. U. S., 209 Fed. 740, 126 CCA 464.

[b] **Facts need not be stated.**—In a prosecution for perjury upon an application for naturalization, it is immaterial that the record does not show the facts necessary to give the court jurisdiction, as its jurisdiction does not depend upon the facts stated, but is derived from the statutes of the United States. U. S. v. Walsh, 22 Fed. 644.

1. Heflin v. State, 88 Ga. 151, 14 SE 112, 30 AmSR 147; King v. State, 32 Tex. Cr. 463, 24 SW 514.

2. U. S. v. Erskine, 25 F. Cas. No. 15,057, 4 Granch C. C. 299.

3. Barnes v. State, 15 Oh. Cir. Ct. 14, 8 Oh. Cir. Dec. 153.

4. Cross references:
As element of offense see supra § 61 et seq.
Averment in indictment see supra §§ 116–122.
Burden of proof see supra § 150.
Evidence admissible to prove see supra § 154.

5. See supra § 150.

6. See cases infra this section.

[a] **Evidence held sufficient.**—(1) On a trial for perjury in making an affidavit, if the state and county are given in the venue of the affidavit, this is ample evidence, in the absence of contrary proof, to show that the oath was administered in the county named in the venue. Van Dusen v. Peo., 78 Ill. 645. (2) In a prosecution for perjury before a grand jury, the record sufficiently shows that all of the jurors were sworn. Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240.

[b] **Evidence held insufficient.**—(1) Judgment of justice in magistrate's court. Goins v. Com., 167 Ky. 603, 181 SW 184 (warrant served in proceedings should be produced). (2) To show authority of stenographer taking deposition. Reg. v. Downie, 3 Montr. Q. B. 360 (authority must be proved by record or proceedings).

[c] **Offense on licensed premises.**—On a trial for perjury alleged to have been committed before justices on information against a public house keeper for an offense against the licensing acts, the license must be produced in order to show the jurisdiction of the justices. Reg. v. Evans, 17 Cox C. C. 37; Reg. v. Lewis, 12 Cox C. C. 163.

[d] **Special term of court.**—Where the case in which the alleged perjury was committed was tried at a special term of court, it is not necessary to report or prove the order of the judge directing such special term to be held, nor the governor's appointment of the particular judge holding it. State v. Ledford, 28 N. C. 5.

[e] **Jurat of affidavit.**—To sustain a conviction for perjury it is not necessary that the jurat of the affidavit upon which the perjury is assigned should contain the place at which the affidavit was sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material. Reg. v. Atkinson, 17 U. C. C. P. (Ont.) 295.

7. Ind.—Masterson v. State, 144 Ind. 240, 43 NE 138.
Iowa.—State v. Clough, 111 Iowa 714, 63 NW 727.
Kan.—State v. Geer, 48 Kan. 752, 30 P 236.
Ky.—Dowdy v. Com., 17 SW 187, 13 KyL 350.
Mich.—Keator v. Peo., 32 Mich. 484.
N. Y.—Peo. v. Ellenbogen, 114 App. Div. 182, 99 NYS 897 [aff 186 N. Y. 603 mem, 79 NE 1112 mem].
N. C.—State v. Ledford, 28 N. C. 5; State v. Gregory, 6 N. C. 69.
Tex.—Woodson v. State, 24 Tex. A. 153, 6 SW 184.
Eng.—Reg. v. Newton, 1 C. & K. 469, 47 ECL 469; Reg. v. Roberts, 14 Cox C. C. 101; Rex v. Howard, 1 M. & Rob. 187. See also Reg. v. Verelst, 3 Campb. 432, 170 Reprint 1435 (prima facie sufficient to show authority).

[a] **Rule applied.**—In a prosecution for false swearing before a deputy state superintendent of elections, proof of the appointment by the acting superintendent of the deputy before whom the oath was taken, and that such officer was administering oaths as a deputy, is sufficient to cast the burden on defendant of showing that no oath of office had been taken by the superintendent or deputy. Peo. v. Ellenbogen, 114 App. Div. 182, 99 NYS 897 [aff 186 N. Y. 603 mem, 79 NE 1112 mem].

8. State v. Geer, 48 Kan. 752, 30 P 236; State v. Gregory, 6 N. C. 69.

9. Cross references:
As element of offense see supra § 77 et seq.
Averment in indictment see supra §§ 125, 126.
Burden of proof see supra § 150.
Evidence admissible to prove see supra § 155.

10. See supra § 150.

11. Goolsby v. State, 17 Ala. A. 545, 86 S 137; Sloan v. State, 71 Miss. 459, 14 S 262.

[a] **Evidence held sufficient.**—(1) Affidavit of accused, testimony of witnesses, and jurat of election judge. Com. v. McCue, 46 Pa. Super. 416. (2) Oral testimony of witnesses who were present when oath was administered. Peo. v. Wright, 324 Ill. 29, 154 NE 408 (clerk of court and court reporter); Cronk v. Peo., 131 Ill. 56, 22 NE 862; Gray v. State, 109

dence is sufficient for this purpose.[12] Proof that accused was sworn as a witness establishes, in the absence of proof to the contrary, that a binding oath was administered to him;[13] but proof that he testified as a witness is not sufficient evidence that he was sworn as a witness.[14] In a prosecution for false swearing to an affidavit the testimony of the officer, whose jurat is attached to the false affidavit, that he swore the accused,[15] or that it was his general practice to administer a proper oath under the circumstances and he is certain the custom was followed in the particular instance,[16] is sufficient; and the official certificate of a notary, magistrate, or other officer, together with proof of the authenticity of the signatures of affiant and the officer, is prima facie proof of the proper execution of the affidavit,[17] and is sufficient unless contradicted by accused;[18] but where the jurat is signed at a later time and not in the presence of accused, other proof independent of the jurat is necessary.[19] Evidence that the oath was never actually administered must be strong and convincing to justify the court in taking the case from the jury.[20]

Form. On a trial for false swearing at a preliminary examination before a justice of the peace, the testimony of the justice showing that the oath administered was in statutory form is sufficient without proving that accused held up his right hand.[21]

[§ 164] **f. Materiality of Testimony or Assertion.**[22] Since the prosecution must prove that accused swore falsely as to a material matter,[23] the evidence must clearly show the materiality of the false testimony.[24] Where the perjury went to the very gist of the case, further evidence that it was material is unnecessary.[25] The fact that the testimony was received is not, standing alone, sufficient.[26] In no event can the materiality of the testimony or assertion assigned as perjury be established by the opinions of witnesses.[27]

[§ 165] **g. Matter Sworn To.**[28] The prosecution must prove beyond a reasonable doubt that accused testified as charged.[29] It is sufficient if the prosecution proves the statements substantially as made.[30] Ambiguous evidence is not sufficient to show the matter sworn to.[31]

[§ 166] **h. Falsity of Oath.**[32] The falsity of the statements constituting the alleged perjury must be proved beyond a reasonable doubt,[33] and in some

Tex. Cr. 481, 5 SW (2d) 518. (3) Record of proceeding in which accused testified. U. S. v. Vazquez, 26 Philippine 479.

[b] **Evidence held insufficient.**—(1) Testimony of clerk as to swearing to application for marriage license. Reg. v. Barnes, 10 Cox C. C. 539. (2) Testimony of foreman of grand jury, showing that oath actually administered was illegal. Aldridge v. State, (Ga. A.) 147 SE 414. (3) Testimony of officer showing his uncertainty as to whether or not he administered oath. Goolsby v. State, 17 Ala. A. 545, 86 S 137.

[c] **Mere production of deposition** stating that accused had been duly sworn, there being no evidence that accused was in fact sworn as a witness, was insufficient. Rex v. Landry, 34 Que. K. B. 441, [1923] 4 DomLR 430, 40 CanCrCas 16.

12. U. S. v. Gardiner, 25 F. Cas. No. 15,186a, 2 Hayw. & H. 89.

13. Greene v. Peo., 182 Ill. 278, 55 NE 341; State v. Glisson, 93 N. C. 506.

14. Curtley v. State, 42 Tex. Cr. 227, 59 SW 44.

15. Dennington v. State, 98 Tex. Cr. 332, 265 SW 698.

16. State v. Rupp, 96 Kan. 446, 151 P 1111, LRA1916B 848; Com. v. Kimball, 108 Mass. 473; State v. Day, 108 Minn. 121, 121 NW 611; Komp v. State, 129 Wis. 20, 108 NW 46.

17. U. S.—U. S. v. Baer, 6 Fed. 42, 18 Blatchf. 493.

Cal.—Peo v. McLeod, 30 Cal. A. 435, 158 P 506.

Fla.—Markey v. State, 47 Fla. 38, 37 S 53.

Mass.—Com. v. Warden, 11 Metc. 406.

Minn.—State v. Day, 108 Minn. 121, 121 NW 611; State v. Madigan, 57 Minn. 425, 59 NW 490.

N. H.—State v. Hascall, 6 N. H. 352.

Wis.—Komp v. State, 129 Wis. 20, 108 NW 46.

Eng.—Rex v. Morris, 2 Burr. 1189, 1 Leach C. C. 60; Rex v. Spencer, 1 C. & P. 260, R. & M. 97, 12 ECL 157.

18. Peo. v. McLeod, 30 Cal. A. 435, 158 P 506.

[a] **Evidence sufficient to overcome presumption.**—Proof that accused merely signed his name, and the officer signed the jurat later and not in the presence of defendant. Peo. v. Swasey, 122 Misc. 388, 203 NYS 22.

19. Case v. Peo., 76 N. Y. 242, 6 AbbNCas 151 [rev 14 Hun 503]; Peo. v. Swasey, 122 Misc. 388. 203 NYS 22.

[a] **Rule applied.**—Where the notary identified the genuineness of the authentication, but could not otherwise positively or directly swear that he administered an oath, and accused and three others swore that no oath was administered, but that the affidavit was signed by accused and carried out of the room to the notary, who then affixed his jurat, a conviction of perjury cannot be sustained. Case v. Peo., 76 N. Y. 242, 6 AbbNCas 151.

20. Komp v. State, 129 Wis. 20, 108 NW 46.

21. State v. Thornhill, 99 Kan. 808, 163 P 145.

22. Cross references:
As element of offense see supra § 32 et seq.
Averment in indictment see supra §§ 128–131.
Burden of proof see supra § 150.
Evidence admissible to prove see supra § 156.

23. See supra § 150.

24. Cox v. State, 76 Tex. Cr. 326, 174 SW 1067.

[a] **Evidence held sufficient** to show materiality of statement made: (1) Before grand jury. Warren v. State, 153 Ark. 497, 241 SW 15; Jones v. State, 76 Tex. Cr. 398, 174 SW 1071. (2) In civil action. Peo. v. Alvarado, 19 Porto Rico 827. (3) In slander suit. Cox v. State, 76 Tex. Cr. 326, 174 SW 1067. (4) In prosecution for assault. Wilde v. State, 20 Wyo. 302, 123 P 85. (5) In prosecution for larceny and receiving stolen goods. Peo. v. Melnick, 274 Ill. 616, 113 NE 971.

[b] **Evidence held insufficient** to show materiality of statement made: (1) Before grand jury. Peo. v. Goodheim, 188 App. Div. 148, 176 NYS 468. (2) In bastardy proceeding. Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240. (3) In ejectment suit. Young v. Peo., 134 Ill. 37, 24 NE 1070. (4) In murder trial. Pate v. State, 10 Okl. Cr. 100, 133 P 1132. (5) In probate proceeding. Shevalier v. State, 85 Nebr. 366, 123 NW 424, 19 AnnCas 361. (6) In trial for seduction. Kelly v. State, 101 Tex. Cr. 81, 273 SW 848.

25. Grissom v. State, 88 Ark. 115, 113 SW 1011.

26. Com. v. Pollard, 12 Metc. (Mass.) 225; State v. Stilwell, 109 Or. 643, 221 P 174; Lawrence v. State, 2 Tex. A. 479.

27. Silver v. State, 17 Oh. 365; Washington v. State, 23 Tex. A. 336, 5 SW 119.

[a] **Rule applied** to materiality of oath to answer to bill in equity. Silver v. State, 17 Oh. 365 (opinion of witness that bill in equity called for answer under oath).

28. Cross references:
As element of offense see supra §§ 11–18.
Averment in indictment see supra § 127.
Burden of proof see supra § 150.
Evidence admissible to prove see supra § 157.

29. Botner v. Com., 219 Ky. 272, 292 SW 805; State v. Stilwell, 109 Or. 643, 654, 221 P 174 [cit Cyc]; State v. Bolyn, 143 S. C. 63, 141 SE 165.

[a] **Evidence held sufficient to show that accused testified as charged.**—Van Camp v. State, 125 Ark. 532, 189 SW 173; Wolford v. Com., 218 Ky. 420, 291 SW 366; Fugate v. Com., 177 Ky. 794, 198 SW 240; State v. Smith, 149 La. 700, 90 S 28; Rex v. Bogh Singh, 18 B. C. 144, 12 DomLR 626, 21 CanCrCas 323, 24 WestLR 941.

[b] **Where a joint affidavit** made by accused and one D stated "Each for himself maketh oath and saith, that, &c.; and that he this deponent is not aware of any adverse claim to or occupation of said lot," and accused was convicted of perjury on this latter allegation, it was held that there was neither ambiguity nor doubt in what each deponent said, but that each in substance stated that he was not aware of any adverse claim to, or occupation of, such lot. Reg. v. Atkinson, 17 U. C. C. P. (Ont.) 295.

[c] **Perjury in deposition taken by stenographer.**—On a reserved case arising out of a conviction for perjury had upon the evidence of the stenographer who took the deposition, it was held that while accused could not be convicted upon the notes of the stenographer, because they were not read or signed by accused, he was nevertheless properly convicted on the evidence of the stenographer given from his recollection of what accused said, and this notwithstanding some slight irregularities in the original suit. Reg. v. Leonard, 3 Montr. Leg. N. (Que.) 138, 211.

30. See supra § 159.

31. Reg. v. Bird, 17 Cox C. C. 387.

32. Cross references:
As element of offense see supra § 19 et seq.
Averment in indictment see supra §§ 132–137
Burden of proof see supra § 150.
Evidence admissible to prove see supra § 158.

33. Walker v Com., 162 Ky. 111, 172 SW 109; State v Stilwell, 109 Or. 643, 221 P 174.

[a] **Evidence held sufficient to show falsity of oath.**—Smith v. State,

jurisdictions may be established by circumstantial evidence.[34] Where no motive is shown for the giving of the false testimony, its falsity must be clearly and convincingly established.[35] The evidence showing the falsity of the oath must, to be sufficient, be identified with the particular matter about which the alleged false testimony was given.[36] Mere proof of the improbability of the truth of the statement, without affirmative proof of its falsity, is insufficient to establish the falsity.[37] It is not, however, necessary that the whole of the testimony given by accused at the time of the alleged perjury should be given in evidence; so much thereof as relates to the particular fact on which the perjury is assigned is sufficient.[38]

Contradictory statements. A statement of accused, directly contradicting that upon which the perjury is assigned, is not sufficient evidence of the falsity of the latter,[39] but other additional extrinsic evidence is necessary to establish its falsity.[40]

[§ 167] **4. Number of Witnesses and Corroboration*—a. Early Rule.** It was formerly held that a conviction for perjury could not be had except upon the direct testimony of two witnesses.[41]

[§ 168] **b. Modern Rule—(1) In General.** The early rule[42] has been repudiated, and now a charge of perjury may be sustained, either by the testimony of two witnesses[43] or by that of one witness and

91 Ark. 200, 120 SW 985; Peo. v. Bradbury, 155 Cal. 808, 103 P 215; Peo. v. Parent, 139 Cal. 600, 73 P 423; Peo. v. Rodley, 131 Cal. 240, 63 P 351; Peo. v. Torterice, 66 Cal. A. 115, 225 P 760; Peo. v. McLeod, 30 Cal. A. 435, 158 P 506; Peo. v. Melnick, 274 Ill. 616, 113 NE 971; Singleton v. Com., 210 Ky. 456, 276 SW 141; State v. Norris, 297 Mo. 268, 249 SW 78; State v. Faulkner, 185 Mo. 673, 84 SW 967; State v. Hunter, 181 Mo. 316, 80 SW 955; State v. Davis, (Mo. A.) 256 SW 125; Peo. v. Moy He, 173 App. Div. 396, 159 NYS 303; U. S. v. Go Chanco, 23 Philippine 641; U. S. v. Aragon, 5 Philippine 469; State v. Daniels, 38 S. D. 81, 160 NW 723; Musick v. State, 106 Tex. Cr. 207, 292 SW 223; Jones v. State, 76 Tex. Cr. 398, 174 SW 1071; Hart v. State, 73 Tex. Cr. 362, 166 SW 152; Simpson v. State, 46 Tex. Cr. 77, 79 SW 530; Freeman v. State, 44 Tex. Cr. 496, 72 SW 1001; Martinez v. State, 39 Tex. Cr. 479, 46 SW 826; Lomax v. State, (Tex. Cr.) 40 SW 999; Rogers v. State, 35 Tex. Cr. 221, 32 SW 1044.

[b] **Evidence held insufficient to show falsity of oath.**—Smith v. State, 18 Ala. A. 45, 88 S 350; Baker v. State, 87 Ark. 564, 113 SW 205; Blevins v. State, 85 Ark. 195, 107 SW 393; Thomas v. State, 51 Ark. 138, 10 SW 193; Peo. v. Maxwell, 118 Cal. 50, 50 P 18; Peo. v. Strassman, 112 Cal. 683, 45 P 3; Peo. v. Porter, 104 Cal. 415, 38 P 88; Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565; Harkleroad v. Com., 207 Ky. 552, 269 SW 724; State v. Lupton, 102 N. J. L. 530, 133 A 861; Peo. v. Peck, 146 App. Div. 266, 130 NYS 967, 26 N. Y. Cr. 268 [aff 206 N. Y. 669 mem, 99 NE 1114 mem]; Shoemaker v. State, 29 Okl. Cr. 184, 233 P 489; U. S. v. Antonio, 1 Philippine 251; State v. Bolyn, 143 S. C. 63, 141 SE 165; State v. Pratt, 21 S. D. 305, 112 NW 152; Wooten v. State, 91 Tex. Cr. 107, 237 SW 921; Medlock v. State, (Tex. Cr.) 82 SW 508; Meeks v. State, 32 Tex. Cr. 420, 24 SW 98; Gabe v. State, (Tex. A.) 18 SW 413; Cerns v. Terr., 3 Wyo. 270, 21 P 699; Rex v. Segal, (Man.) 33 CanCrCas 297, [1920] 2 WestWkly 29; Rex v. Cohn, 36 N. S. 240, 6 CanCrCas 386; Reg. v. Cowan, 24 U. C. Q. B. (Ont.) 606.

[c] **Positive and direct evidence** is necessary to prove the falsity of the sworn statement. Clayton v. U. S., 284 Fed. 537.

Number of witnesses see infra §§ 167-175.

34. State v. Wilhelm, 114 Kan. 349, 219 P 510; State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848; Shoemaker v. State, 29 Okl. Cr. 184, 233 P 489.

Circumstantial evidence as corroboration see infra § 173.

Necessity for positive and direct testimony see infra §§ 168, 169.

35. State v. Daniels, 38 S. D. 81, 160 NW 723.

36. Pugh v. Com., 217 Ky. 511, 289 SW 1086; Jarboe v. Com., 204 Ky. 737, 265 SW 298.

[a] **Rule applied.**—Testimony that accused was seen shooting on the highway during the twelve-month period before trial was held insufficient to prove that a denial of the shooting at the trial was false swearing. Pugh v. Com., 217 Ky. 511, 289 SW 1086.

Materiality see supra § 32 et seq.

37. Blevins v. State, 85 Ark. 195, 107 SW 393.

38. U. S. v. Erskine, 25 F. Cas. No. 15,057, 4 Cranch C. C. 299; Dodge v. State, 24 N. J. L. 455; State v. Stilwell, 109 Or. 643, 221 P 174; Rex v. Rowley, R. & M. 299, 21 ECL 756, 171 Reprint 1027. See Rex v. Dowlin, 1 Peake 227, 170 Reprint 138 (cross-examination).

39. U. S.—Clayton v. U. S., 284 Fed. 537; U. S. v. Mayer, 26 F. Cas. No. 15,753, Deady 127.

Ala.—Peterson v. State, 74 Ala. 34.

Ark.—McGuire v. State, 171 Ark. 238, 283 SW 980; State v. Binkley, 123 Ark. 240, 185 SW 279; Baker v. State, 87 Ark. 564, 113 SW 205.

Fla.—Freeman v. State, 19 Fla. 552.

Ga.—Roddenberry v. State, 37 Ga. A. 359, 140 SE 386.

Ill.—Peo. v. Glenn, 294 Ill. 333, 128 NE 532.

Mich.—Peo. v. Kennedy, 221 Mich. 1, 190 NW 749; Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52.

Mo.—State v. Carter, 315 Mo. 215, 285 SW 971; State v. Williams, 30 Mo. 364.

Okl.—Thompson v. State, (Cr.) 268 P 314; Blakemore v. State, (Cr.) 265 P 152.

Or.—State v. Buckley, 18 Or. 228, 22 P 838.

Pa.—Com. v. Latsch, 9 Pa. Dist. & Co. 409.

S. C.—State v. Burns, 120 S. C. 523, 113 SE 351, 25 ALR 414.

Tenn.—Paytes v. State, 137 Tenn. 129, 191 SW 975, LRA1917C 954.

Tex.—Miles v. State, 73 Tex. Cr. 493, 165 SW 567; Billingsley v. State, (Cr.) 95 SW 520; Agar v. State, 29 Tex. A. 605, 16 SW 761; Brooks v. State, 29 Tex. A. 582, 16 SW 542.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

Eng.—Reg. v. Hughes, 1 C. & K. 519, 47 ECL 519; Reg. v. Wheatland, 8 C. & P. 238, 34 ECL 710; Jackson's Case, 1 Lew. C. C. 270, 168 Reprint 1037. But see Rex v. Knill, 5 B. & Ald. 929 note, 7 ECL 505 note, 106 Reprint 1431 note (apparently holding the contrary).

Can.—Rex v. Brewer, 16 Alta. L. 400, 60 DomLR 588, 34 CanCrCas 341, [1921] 2 WestWkly 100.

[a] **In New York** it has been held that contradictory statements are sufficient. Peo. v. Burden, 9 Barb. 467.

Contradictory statements as corroboration see infra § 174.

40. Ill.—Peo. v. Glenn, 294 Ill. 333, 128 NE 532.

Mich.—Peo. v. Kennedy, 221 Mich. 1, 190 NW 749.

Okl.—Thompson v. State, (Cr.) 268 P 314; Blakemore v. State, (Cr.) 265 P 152.

S. C.—State v. Burns, 120 S. C. 523, 113 SE 351, 25 ALR 414.

Tex.—Billingsley v. State, 49 Tex. Cr. 620, 95 SW 520, 13 AnnCas 730; Agar v. State, 29 Tex. A. 605, 16 SW 761; Brooks v. State, 29 Tex. A. 582, 16 SW 542.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

41. Canal Zone.—Canal Zone v. Kerr, 2 Canal Zone 262.

Ill.—Hereford v. Peo., 197 Ill. 222, 64 NE 310.

Iowa.—State v. Raymond, 20 Iowa 582.

N. M.—Terr. v. Remuzon, 3 N. M. 368, 9 P 598.

N. Y.—Peo. v. Stone, 32 Hun 41, 2 N. Y. Cr. 445.

Eng.—Reg. v. Roberts, 2 C. & K. 607, 61 ECL 607 (holding, however, that it is not necessary to prove by two witnesses every fact necessary to make out the assignment of perjury); 4 Blackstone Comm. p 538.

42. See supra § 167.

43. U. S.—Cohen v. U. S., 27 F. (2d) 713; Clayton v. U. S., 284 Fed. 537; Allen v. U. S., 194 Fed. 664, 114 CCA 357, 39 LRANS 385; U. S. v. Hall, 44 Fed. 864, 10 LRA 324; U. S. v. Coons, 25 F. Cas. No. 14,860, 1 Bond 1.

Ala.—Peterson v. State, 74 Ala. 34; Wofford v. State, 21 Ala. A. 521, 109 S 836 [certiorari den 215 Ala. 106, 109 S 887] (two witnesses to the corpus delicti); Pressley v. State, 18 Ala. A. 40, 88 S 291.

Ark.—Clower v. State, 151 Ark. 359, 236 SW 265; Atkinson v. State, 133 Ark. 341, 202 SW 709.

Cal.—Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Peo. v. Burcham, 69 Cal. A. 614, 232 P 149; Peo. v. Burcham, 62 Cal. A. 649, 217 P 558; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Peo. v. Chadwick, 4 Cal. A. 63, 87 P 384.

D. C.—Cook v. U. S., 26 App. 427, 6 AnnCas 810.

Fla.—Ellis v. State, 83 Fla. 322, 91 S 192; Ward v. State, 83 Fla. 311, 91 S 189; Yarbrough v. State, 79 Fla. 256, 83 S 873; McClerkin v. State, 20 Fla. 879.

Ga.—Haines v. State, 109 Ga. 526, 35 SE 141; Roddenberry v. State, 37 Ga. A. 359, 140 SE 386; Mallard v. State, 19 Ga. A. 99, 90 SE 1044; Cox v. State, 13 Ga. A. 687, 79 SE 909.

Ind.—Woodward v. State, 198 Ind. 70, 152 NE 277; Hann v. State, 185 Ind. 56, 113 NE 304.

Iowa.—State v. Raymond, 20 Iowa 582.

Ky.—Botner v. Com., 219 Ky. 272, 292 SW 805; Brake v. Com., 218 Ky. 747, 292 SW 305; Day v. Com., 195 Ky. 790, 243 SW 1051; Smith v. Com., 180 Ky. 240, 202 SW 635, LRA 1918E 927; Fugate v. Com., 177 Ky. 794, 198 SW 240; Hansford v. Com., 170 Ky. 700, 186 SW 498; Goins v. Com., 167 Ky. 603, 181 SW 184; Walker v. Com., 162 Ky. 111, 172 SW 109; Partin v. Com., 154 Ky. 701, 159 SW 542; Howell v. Com., 104 SW 685, 31 KyL 983; Sweat v. Com., 96 SW 843, 29 KyL 1067; Adams v. Com., 123 Ky. 258, 94 SW 664, 29 KyL 683; Gos-

*By GILBERT G. FINLEY (§§ 167-175).

corroborating circumstances,[44] or, where the statute | so provides, by accused's own confession in open

lin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465; Wadlington v. Com., 59 SW 851, 22 KyL 1108; Barton v. Com., 32 SW 171, 396, 17 KyL 580; Com. v. Davis, 92 Ky. 460, 18 SW 10, 13 KyL 676; Wells v. Com., 6 SW 150, 9 KyL 658.

La.—State v. Jean, 42 La. Ann. 946, 8 S 480.

Miss.—Johnson v. State, 122 Miss. 16, 84 S 140; Lee v. State, 105 Miss. 539, 62 S 360; Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155; Whittle v. State, 79 Miss. 327, 30 S 722; Brown v. State, 57 Miss. 424.

N. C.—State v. Hawkins, 115 N. C. 712, 20 SE 623; State v. Swain, 97 N. C. 462, 2 SE 68; State v. Ricketts, 74 N. C. 187.

Oh.—State v. Courtright, 66 Oh. St. 35, 63 NE 590.

Okl.—Goltry v. State, 24 Okl. Cr. 127, 216 P 485; Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

Pa.—Com. v. Bobanic, 62 Pa. Super. 40.

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Tenn.—Coulter v. Stuart, 2 Yerg. 225.

Tex.—Brown v. State, 101 Tex. Cr. 639, 276 SW 929; Wooten v. State, 91 Tex. Cr. 107, 237 SW 921; Godby v. State, 88 Tex. Cr. 360, 227 SW 192; Timmins v. State, 82 Tex. Cr. 263, 199 SW 1106; Reed v. State, (Cr.) 183 SW 1168; Hays v. State, 76 Tex. Cr. 213, 173 SW 671; Anderson v. State, 56 Tex. Cr. 360, 120 SW 462; Kelley v. State, 51 Tex. Cr. 507, 103 SW 189; Cleveland v. State, 50 Tex. Cr. 6, 95 SW 521; Billingsley v. State, 49 Tex. Cr. 620, 95 SW 520, 13 AnnCas 730; Lee v. State, (Cr.) 70 SW 425; Wilkerson v. State, (Cr.) 55 SW 49; Carter v. State, (Cr.) 43 SW 996; Butler v. State, 36 Tex. Cr. 483, 38 SW 46; Whitaker v. State, 37 Tex. Cr. 479, 36 SW 253; Taylor v. State, (Cr.) 22 SW 974; Aguierre v. State, 31 Tex. Cr. 519, 21 SW 256; Waters v. State, 30 Tex. A. 284, 17 SW 411; Grandison v. State, 29 Tex. A. 186, 15 SW 174; Brookin v. State, 27 Tex. A. 701, 11 SW 645; Wilson v. State, 27 Tex. A. 47, 10 SW 749, 11 AmSR 180; Maines v. State, 26 Tex. A. 14, 9 SW 51; Anderson v. State, 24 Tex. A. 705, 7 SW 40; Smith v. State, 22 Tex. A. 196, 2 SW 542; Washington v. State, 22 Tex. A. 26, 3 SW 228; Hernandez v. State, 18 Tex. A. 134, 51 AmR 295.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

Can.—Rex v. Curry, 47 N. S. 176, 12 DomLR 13, 21 CanCrCas 273, 13 EastLR 11 [app dism 48 Can. S. C. 532, 15 DomLR 347, 22 CanCrCas 550, 13 EastLR 550].

[a] **Evidence held sufficient** where the alleged false oath related to two or more facts and one witness contradicted accused as to one fact and another witness as to another fact. Goins v. Com., 167 Ky. 603, 181 SW 184; Barton v. Com., 32 SW 171, 396, 17 KyL 580; Com. v. Davis, 92 Ky. 460, 18 SW 10, 13 KyL 676; Rex v. Curry, 47 N. S. 176, 12 DomLR 13, 21 CanCrCas 273, 13 EastLR 11 [app dism 48 Can. S. C. 532, 15 DomLR 347, 22 CanCrCas 550, 13 EastLR 550].

[b] **Testimony as to admissions.**—Testimony of witnesses that accused, while a witness, admitted the falsity of an affidavit made by him, is not proof by two witnesses of its falsity. Butler v. State, (Tex. Cr.) 38 SW 46.

44. U. S.—U. S. v. Wood, 14 Pet. 430, 10 L. ed. 527; Cohen v. U. S., 27 F. (2d) 713; Clayton v. U. S., 284 Fed. 537 (where oral testimony is relied upon); Holy v. U. S., 278 Fed. 521; Allen v. U. S., 194 Fed. 664, 114 CCA 357, 39 LRANS 385; Hashagen v. U. S., 169 Fed. 396, 94 CCA 618; U. S. v. Hall, 44 Fed. 864, 10 LRA 324; U. S. v. Coons, 25 F. Cas. No. 14,860, 1 Bond 1.

Ala.—Peterson v. State, 74 Ala. 34; Williams v. State, 68 Ala. 551; Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887]; Pressley v. State, 18 Ala. A. 40, 88 S 291; McDaniel v. State, 13 Ala. A. 318, 69 S 351, 353 [certiorari den 193 Ala. 678, 69 S 1018, and cit Cyc].

Ark.—Clower v. State, 151 Ark. 359, 236 SW 265; Lamb v. State, 135 Ark. 275, 205 SW 653; Atkinson v. State, 133 Ark. 341, 202 SW 709; Marvin v. State, 53 Ark. 395, 14 SW 87.

Cal.—Peo. v. Rodley, 131 Cal. 240, 63 P 351; Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Peo. v. Burcham, 69 Cal. A. 614, 232 P 149; Peo. v. Burcham, 62 Cal. A. 649, 217 P 558; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Peo. v. Chadwick, 4 Cal. A. 63, 87 P 384.

Canal Zone.—Canal Zone v. Kerr, 2 Canal Zone 262.

Conn.—State v. Campbell, 93 Conn. 3, 104 A 653.

D. C.—Cook v. U. S., 26 App. 427, 6 AnnCas 810.

Fla.—Ward v. State, 83 Fla. 311, 91 S 189; Yarbrough v. State, 79 Fla. 256, 83 S 873; McClerkin v. State, 20 Fla. 879.

Ga.—Haines v. State, 109 Ga. 526, 35 SE 141; Roddenberry v. State, 37 Ga. A. 359, 140 SE 386; Cox v. State, 13 Ga. A. 687, 79 SE 909.

Ill.—Peo. v. Alkire, 321 Ill. 28, 151 NE 518; Peo. v. Niles, 295 Ill. 525, 129 NE 97; Hereford v. Peo., 197 Ill. 222, 64 NE 310; Mackin v. Peo., 115 Ill. 312; 3 NE 222, 56 AmR 167.

Ind.—Woodward v. State, 198 Ind. 70, 152 NE 277; Hann v. State, 185 Ind. 56, 113 NE 304.

Iowa.—State v. Young, 153 Iowa 4, 132 NW 813, AnnCas1913E 70; State v. Raymond, 20 Iowa 582.

Ky.—Botner v. Com., 219 Ky. 272, 292 SW 805; Brake v. Com., 218 Ky. 747, 292 SW 305; Day v. Com., 195 Ky. 790, 243 SW 1051; Smith v. Com., 180 Ky. 240, 202 SW 635, LRA1918E 927; Fugate v. Com., 177 Ky. 794, 198 SW 240; Goins v. Com., 167 Ky. 603, 181 SW 184; Walker v. Com., 162 Ky. 111, 172 SW 109; Partin v. Com., 154 Ky. 701, 159 SW 542; Howell v. Com., 104 SW 685, 31 KyL 983; Stamper v. Com., 100 SW 286, 30 KyL 992; Sweat v. Com., 96 SW 843, 29 KyL 1067; Adams v. Com., 123 Ky. 258, 94 SW 664, 29 KyL 683; Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465; Wadlington v. Com., 59 SW 851, 22 KyL 1108; Wells v. Com., 6 SW 150, 9 KyL 658.

La.—State v. Jean, 42 La. Ann. 946, 8 S 480.

Mass.—Com. v. Butland, 119 Mass. 317; Com. v. Parker, 2 Cush. 212.

Miss.—Johnson v. State, 122 Miss. 16, 84 S 140; Lee v. State, 105 Miss. 539, 62 S 360; Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155; Whittle v. State, 79 Miss. 327, 30 S 722; Brown v. State, 57 Miss. 424.

Mo.—State v. Caperton, 276 Mo. 314, 207 SW 795; State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Heed, 57 Mo. 252.

Mont.—State v. Gibbs, 10 Mont. 213, 25 P 289, 10 LRA 749.

Nev.—State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.

N. J.—State v. Ewen, (Sup.) 140 A 449.

N. M.—Terr. v. Remuzon, 3 N. M. 368, 9 P 598.

N. Y.—Peo. v. Henry, 196 App. Div. 177, 187 NYS 673 (where oral evidence is relied upon); Peo. v. Hayes, 70 Hun 111, 24 NYS 194 [aff 140 N. Y. 484, 35 NE 951, 37 AmSR 572, 23 LRA 830]; Peo. v. Stone, 32 Hun 41, 2 N. Y. Cr. 445.

N. C.—State v. Hawkins, 115 N. C. 712, 20 SE 623; State v. Swain, 97 N. C. 462, 2 SE 68.

Oh.—State v. Courtright, 66 Oh. St. 35, 63 NE 590; Ruch v. State, 2 Oh. A. 150, 18 Oh. Cir. Ct. N. S. 391, 24 Oh. Cir. Dec. 675; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450.

Okl.—Stiles v. State, (Cr.) 264 P 226; Wright v. State, 30 Okl. Cr. 425, 236 P 633; Goltry v. State, 24 Okl. Cr. 127, 216 P 485; Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

Pa.—Com. v. Rogo, 71 Pa. Super. 109; Com. v. Bobanic, 62 Pa. Super. 40.

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Tenn.—Coulter v. Stuart, 2 Yerg. 225.

Tex.—Brown v. State, 101 Tex. Cr. 639, 276 SW 929; Godby v. State, 88 Tex. Cr. 360, 227 SW 192; Timmins v. State, 82 Tex. Cr. 263, 199 SW 1106; Cozby v. State, 80 Tex. Cr. 323, 189 SW 957; Reed v. State, (Cr.) 183 SW 1168; Hays v. State, 76 Tex. Cr. 213, 173 SW 671; Anderson v. State, 56 Tex. Cr. 360, 120 SW 462; Conant v. State, 51 Tex. Cr. 610, 103 SW 897; Kelley v. State, 51 Tex. Cr. 507, 103 SW 189; Cleveland v. State, 50 Tex. Cr. 6, 95 SW 521; Billingsley v. State, 49 Tex. Cr. 620, 95 SW 520, 13 AnnCas 730; Lee v. State, (Cr.) 70 SW 425; Chavarria v. State, (Cr.) 63 SW 312; Wilkerson v. State, (Cr.) 55 SW 49; Carter v. State, (Cr.) 43 SW 996; Butler v. State, 36 Tex. Cr. 483, 38 SW 46; Whitaker v. State, 37 Tex. Cr. 479, 36 SW 253; Taylor v. State, (Cr.) 22 SW 974; Grandison v. State, 29 Tex. A. 186, 15 SW 174; Brookin v. State, 27 Tex. A. 701, 11 SW 645; Wilson v. State, 27 Tex. A. 47, 10 SW 749, 11 AmSR 180; Maines v. State, 26 Tex. A. 14, 9 SW 51; Anderson v. State, 24 Tex. A. 705, 7 SW 40; Smith v. State, 22 Tex. A. 196, 2 SW 542; Washington v. State, 22 Tex. A. 26, 3 SW 228; Hernandez v. State, 18 Tex. A. 134, 51 AmR 295.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

Wash.—State v. Smails, 63 Wash. 172, 115 P 82.

Eng.—Rex v. Mayhew, 6 C. & P. 315, 25 ECL 450; Reg. v. Braithwaite, 8 Cox C. C. 254; Reg. v. Boulter, 3 C. & K. 236.

[a] **An accomplice:** (1) May be the one witness. Peo. v. Rodley, 131 Cal. 240, 63 P 351. (2) May not be the one witness. Godby v. State, 88 Tex. Cr. 360, 227 SW 192. (3) Must be criminally connected with the crime on trial. Wooten v. State, 91 Tex. Cr. 107, 237 SW 921.

[b] **Living witness** is required. Canal Zone v. Kerr, 2 Canal Zone 262.

[c] **Competent witnesses** are all those permitted to testify on trial. Madden v. State, 26 Okl. Cr. 251, 223 P 716.

[d] **Competency of witnesses** to the alleged perjury is not affected by the rule. State v. Ricketts, 74 N. C. 187.

[e] **False swearing in bankruptcy proceeding** may be shown by evidence which contradicts the testimony of defendant and preponderates it so as to justify the jury in finding the latter false and made knowingly and fraudulently by defendant. Kahn v. U. S., 214 Fed. 54, 130 CCA 494 [certiorari den 234 U. S. 763 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem].

[f] **Directed verdict** should be given where the rule is not complied with. Waters v. State, 30 Tex. A. 284, 17 SW 411.

[g] **Element of offense which must be so proved** is falsity of material matter sworn to. Ward v. State, 83 Fla. 311, 91 S 189.

[h] **Rule applies only:** (1) To cases in which oral evidence is relied on to convict, and where one oath is placed against another. U. S. v. Wood, 14 Pet. (U. S.) 430, 10 L. ed. 527; Mallard v. State, 19 Ga. A. 99, 90 SE 1044. (2) Where conviction is based upon oath against oath, and does not preclude conviction by circumstantial evidence alone. State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102, 27 ALR 848.

[i] **Rule does not apply** in cases where proof must of necessity be

court;[45] and it has been said that the rule has been so relaxed that indubitable facts absolutely incompatible with the truth of the testimony charged to be false are sufficient.[46] In jurisdictions where the guilt of accused may be established by circumstantial evidence[47] the facts constituting such circumstantial evidence must be sworn to by at least one witness supported by corroborating evidence.[48]

[§ 169] **(2) Necessity of Positive Testimony of One Witness.** Except in jurisdictions where circumstantial evidence alone may be sufficient to convict,[49] or where a living witness may be dispensed with altogether,[50] positive and direct testimony[51] of at least one[52] credible[53] witness is absolutely necessary in a prosecution for perjury; and the testimony of the single witness must absolutely and in positive terms contradict the statement of the accused assigned for perjury.[54] Direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by accused, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him.[55]

[§ 170] **(3) Corroboration—(a) In General.—aa. Necessity.** It is a general rule, incorporated in the statutes of some jurisdictions,[56] that in no case can a conviction for perjury be secured and sustained on the uncorroborated testimony of one witness to the falsity of the matter on which the perjury is assigned.[57] The underlying principle of this rule is

based on circumstantial evidence. Mallard v. State, 19 Ga. A. 99, 90 SE 1044; Peo. v. Doody, 172 N. Y. 165, 64 NE 807.

[j] **Prosecutions for false swearing** are within the rule. Hansford v. Com., 170 Ky. 700, 186 SW 498; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; Aguierre v. State, 31 Tex. Cr. 519, 21 SW 256 (statutory false swearing).

45. Wilkerson v. State, (Tex. Cr.) 55 SW 49; Butler v. State, 36 Tex. Cr. 483, 38 SW 46; Whitaker v. State, 37 Tex. Cr. 479, 36 SW 253; Wilson v. State, 27 Tex. A. 47, 10 SW 749, 11 AmSR 180.

[a] **Confession in open court:** (1) Means that the party must be charged with the crime confessed, that the confession must be made in open court after the party has been properly cautioned as the law requires, and must be made in the case pending against the confessor. Butler v. State, 36 Tex. Cr. 483, 38 SW 46. (2) Does not mean a confession in another court as a witness in another case. Butler v. State, supra.

Confession in general see Criminal Law §§ 1464-1518.

46. Gordon v. U. S., 5 F. (2d) 943.

47. See supra § 159.

48. Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513; Plummer v. State, 35 Tex. Cr. 202, 33 SW 228.

49. See supra § 159.

50. See supra § 159.

51. See cases infra note 52.

[a] **Rule means** that there must be direct evidence only as to the falsity of the testimony charged to be perjury. Peo. v. Rodley, 131 Cal. 240, 63 P 351.

[b] **Direct evidence** "is declared in section 1831 of the Code of Civil Procedure to be 'that which proves the fact in dispute directly without an inference or presumption and which in itself, if true, conclusively establishes that fact.'" Peo. v. Chadwick, 4 Cal. A. 63, 70, 87 P 384.

[c] **Testimony directly to the corpus delicti** is required. Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887]; Canal Zone v. Kerr, 2 Canal Zone 262.

[d] **Evidence held direct.**—Peo. v. Chadwick, 4 Cal. A. 63, 87 P 384.

52. U. S.—Clayton v. U. S., 284 Fed. 537; Kahn v. U. S., 214 Fed. 54, 130 CCA 494 [certiorari den 234 U. S. 763 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem]; Allen v. U. S., 194 Fed. 664, 114 CCA 357, 39 LRANS 385.

Ala.—Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887].

Ark.—Grissom v. State, 88 Ark. 115, 113 SW 1011.

Cal.—Peo. v. Rodley, 131 Cal. 240, 63 P 351; Peo. v. Maxwell, 118 Cal. 50, 50 P 18; Peo. v. Porter, 104 Cal. 415, 38 P 88; Peo. v. Wells, 103 Cal. 631, 37 P 529; Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Peo. v. Casanova, 54 Cal. A. 439, 202 P 45; Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565; Peo. v. Chadwick, 4 Cal. A. 63, 87 P 384.

Canal Zone.—Canal Zone v. Kerr, 2 Canal Zone 262.

Conn.—State v. Campbell, 93 Conn. 3, 104 A 653.

D. C.—Cook v. U. S., 26 App. 427, 6 AnnCas 810.

Fla.—McClerkin v. State, 20 Fla. 879.

Ill.—Peo. v. Alkire, 321 Ill. 28, 151 NE 518.

Ind.—Woodward v. State, 198 Ind. 70, 152 NE 277; Hann v. State, 185 Ind. 56, 113 NE 304.

Ky.—Com. v. Davis, 92 Ky. 460, 18 SW 10, 13 KyL 676.

Mass.—Com. v. Parker, 2 Cush. 212.

Mont.—State v. Gibbs, 10 Mont. 213, 25 P 289, 10 LRA 749.

Nebr.—Gandy v. State, 27 Nebr. 707, 43 NW 747, 44 NW 408.

N. J.—State v. Ewen, (Sup.) 140 A 449.

Oh.—State v. Courtright, 66 Oh. St. 35, 63 NE 590.

Pa.—Williams v. Com., 91 Pa. 493.

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Wash.—State v. Rutledge, 37 Wash. 523, 79 P 1123.

53. See cases infra this note.

[a] **The witness who testifies directly to the falsity of the statement** on which perjury is assigned must, it has been held in several jurisdictions, be a credible witness. Clower v. State, 151 Ark. 359, 236 SW 265; Madden v. State, 26 Okl. Cr. 251, 223 P 716; Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513; State v. Pratt, 21 S. D. 305, 112 NW 152; Eldridge v. State, (Tex. Cr.) 14 SW (2d) 1036; Brown v. State, 101 Tex. Cr. 639, 276 SW 929; Wooten v. State, 91 Tex. Cr. 107, 237 SW 921; Godby v. State, 88 Tex. Cr. 360, 227 SW 192; Timmins v. State, 82 Tex. Cr. 263, 199 SW 1106; Cozby v. State, 80 Tex. Cr. 323, 189 SW 957; Reed v. State, (Tex. Cr.) 183 SW 1168; Hays v. State, 76 Tex. Cr. 213, 173 SW 671; Anderson v. State, 56 Tex. Cr. 360, 120 SW 462; Conant v. State, 51 Tex. Cr. 610, 103 SW 897; Kelley v. State, 51 Tex. Cr. 507, 103 SW 189; Cleveland v. State, 50 Tex. Cr. 6, 95 SW 521; Lee v. State, (Tex. Cr.) 70 SW 425; Chavarria v. State, (Tex. Cr.) 63 SW 312; Wilkerson v. State, (Tex. Cr.) 55 SW 49; Carter v. State, (Tex. Cr.) 43 SW 996; Butler v. State, 36 Tex. Cr. 483, 38 SW 46; Whitaker v. State, 37 Tex. Cr. 479, 36 SW 253; Taylor v. State, (Tex. Cr.) 22 SW 974; Aguierre v. State, 31 Tex. Cr. 519, 21 SW 256; Waters v. State, 30 Tex. A. 284, 17 SW 411; Grandison v. State, 29 Tex. A. 186, 15 SW 174; Brookin v. State, 27 Tex. A. 701, 11 SW 645; Wilson v. State, 27 Tex. A. 47, 10 SW 749, 11 AmSR 180; Maines v. State, 26 Tex. A. 14, 9 SW 51; Anderson v. State, 24 Tex. A. 705, 7 SW 40; Smith v. State, 22 Tex. A. 196, 2 SW 542; Washington v. State, 22 Tex. A. 26, 3 SW 228; Hernandez v. State, 18 Tex. A. 134, 51 AmR 295.

[b] **"Credible witness"** may include: (1) One who, being competent to give evidence, is worthy of belief. Madden v. State, 26 Okl. Cr. 251, 223 P 716; Brown v. State, 101 Tex. Cr. 639, 276 SW 929; Godby v. State, 88 Tex. Cr. 360, 227 SW 192; Anderson v. State, 56 Tex. Cr. 360, 120 SW 462; Kitchen v. State, 29 Tex. A. 45, 14 SW 392; Wilson v. State, 27 Tex. A. 47, 10 SW 749, 11 AmSR 180; Smith v. State, 22 Tex. A. 196, 2 SW 542. (2) One who is not an accomplice. Eldridge v. State, (Tex. Cr.) 14 SW (2d) 1036; Wooten v. State, 91 Tex. Cr. 107, 237 SW 921; Godby v. State, 88 Tex. Cr. 360, 227 SW 192; Conant v. State, 51 Tex. Cr. 610, 103 SW 897. (3) One who may be a participant in the offense relative to which the perjury was committed. Wooten v. State, supra. (4) Not one whose testimony is directly contradicted by that of defendant and an unimpeached and disinterested witness, and whose reputation for truth and veracity is bad. Godby v. State, supra.

[c] **Witness is competent** where there is no proof of immunity agreement with him, but merely evidence from which such understanding could be inferred. Timmins v. State, 82 Tex. Cr. 263, 199 SW 1106.

54. Peo. v. Porter, 104 Cal. 415, 38 P 88; Cook v. U. S., 26 App. (D. C.) 427, 6 AnnCas 810; Gandy v. State, 27 Nebr. 707, 43 NW 747, 44 NW 108.

[a] **Testimony in the alternative** constitutes no basis for corroborative evidence. Gandy v. State, 27 Nebr. 707, 43 NW 747, 44 NW 108 (no amount of corroboration will be sufficient to sustain a conviction where the testimony of the witness to be corroborated is in the alternative, doubtful, and equivocal).

55. Kahn v. U. S., 214 Fed. 54, 56, 130 CCA 494 [certiorari den 234 U. S. 763 mem, 34 SCt 997 mem, 58 L. ed. 1581 mem, and quot Cyc]; Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Peo. v. Casanova, 54 Cal. A 439, 202 P 45; Peo. v. Chadwick, 4 Cal. A. 63, 87 P 384; Hann v. State, 185 Ind. 56, 113 NE 304.

56. See Cal. Pen. Code § 1103a; Parks Annot. Code Ga. (1914) § 1017; Or. L. (1920) § 801; Tex. Code Cr. Proc. (1911) art 806; Perjury Act (1 & 2 Geo. V c 6) § 13; Can. Cr. Code pt XIX § 1002.

57. U. S.—Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118 [rev 6 F. (2d) 786 (aff 299 Fed. 1011)]; U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Ala.—Peterson v. State, 74 Ala. 34; Williams v. State, 68 Ala. 551; Pressley v. State, 18 Ala. A. 40, 88 S 291; McDaniel v. State, 13 Ala. A. 318, 69 S 351 [certiorari den 193 Ala. 678, 69 S 1018].

Ark.—Clower v. State, 151 Ark. 359, 236 SW 265; Atkinson v. State, 133 Ark. 341, 202 SW 709; Brooks v. State, 91 Ark. 505, 121 SW 740; Thomas v. State, 51 Ark. 138, 10 SW 193.

Cal.—Peo. v. Davis, 61 Cal. 536.

that, if there be but one witness to prove the allegation of falsity, then oath is placed against oath and if remains doubtful where the truth lies, the oath of accused, which is alleged to be false, being sufficient to counterpoise the testimony of a single witness.[58] However, this requirement of corroboration applies only to proof of the falsity of the oath,[59] and not to other elements of the offense,[60] no corroboration being necessary to establish the taking of the oath,[61] the matter sworn to,[62] or the venue[63] or time[64] of the offense.

[§ 171] **bb. Degree.** Where a conviction is sought on the testimony of one witness and corroborating evidence, the corroboration must be of material matter charged in the indictment.[65] While in many cases it has been held that the witness must be strongly corroborated,[66] it has also been held, al-

Canal Zone.—Canal Zone v. Kerr, 2 Canal Zone 262.
Colo.—Thompson v. Peo., 26 Colo. 496, 59 P 51.
Conn.—State v. Campbell, 93 Conn. 3, 104 A 653 (testifying to the falsity).
D. C.—Cook v. U. S., 26 App. 427, 6 AnnCas 810.
Fla.—Yarbrough v. State, 79 Fla. 256, 83 S 873.
Ga.—Haines v. State, 109 Ga. 526, 35 SE 141; Roddenberry v. State, 37 Ga. A. 359, 140 SE 386; Pence v. State, 36 Ga. A. 270, 136 SE 820; Manning v. State, 33 Ga. A. 610, 127 SE 475; Mallard v. State, 19 Ga. A. 99, 90 SE 1044; Parham v. State, 3 Ga. A. 468, 60 SE 123.
Ill.—Peo. v. Niles, 295 Ill. 525, 129 NE 97.
Ind.—Galloway v. State, 29 Ind. 442.
Ky.—Botner v. Com., 219 Ky. 272, 292 SW 805; Goins v. Com., 167 Ky. 603, 181 SW 184; Walker v. Com., 162 Ky. 111, 172 SW 109; Stamper v. Com., 100 SW 286, 30 KyL 992; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683.
La.—State v. Jean, 42 La. Ann. 946, 8 S 480.
Miss.—Johnson v. State, 122 Miss. 16, 84 S 140; Lee v. State, 105 Miss. 539, 62 S 360.
Mo.—State v. Carter, 315 Mo. 215, 285 SW 971; State v. White, 263 SW 192; State v. Hardiman, 277 Mo. 229, 209 SW 879; State v. Caperton, 276 Mo. 314, 207 SW 795; State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Blize, 111 Mo. 464, 20 SW 210; State v. Heed, 57 Mo. 252; State v. Miller, 44 Mo. A. 159.
Mont.—State v. Gibbs, 10 Mont. 213, 25 P 289, 10 LRA 749.
N. J.—State v. Lupton, 102 N. J. L. 530, 133 A 861; State v. Dayton, 23 N. J. L. 49, 53 AmD 270.
N. M.—Territory v. Williams, 9 N. M. 400, 54 P 232.
N. Y.—Eighmy v. Peo., 79 N. Y. 546; Peo. v. Henry, 196 App. Div. 177, 187 NYS 673; Peo. v. Stone, 32 Hun 41, 2 N. Y. Cr. 445.
N. C.—State v. Molier, 12 N. C. 263.
Oh.—State v. Courtright, 66 Oh. St. 35, 63 NE 590; Ruch v. State, 2 Oh. A. 150, 18 Oh. Cir. Ct. N. S. 391, 24 Oh. Cir. Dec. 675; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450.
Okl.—Wright v. State, 30 Okl. Cr. 425, 236 P 633; Goltry v. State, 24 Okl. Cr. 127, 216 P 485.
Or.—State v. Buckley, 18 Or. 228, 22 P 838.
Pa.—Williams v. Com., 91 Pa. 493 [rev 1 LackLegRec 264]; Com. v. Rogo, 71 Pa. Super. 109; Com. v. O'Grady, 4 Pa. Dist. 732.
Philippine.—U. S. v. Lozano, 7 Philippine 142; U. S. v. McGovern, 4 Philippine 451.
S. C.—State v. Hayward, 10 S. C. L. 546.
Tenn.—Coulter v. Stuart, 2 Yerg. 225.
Tex.—Cleveland v. State, 50 Tex. Cr. 6, 95 SW 521; Lee v. State, (Cr.) 70 SW 425; Chavarria v. State, (Cr.) 63 SW 312; Butler v. State, 36 Tex. Cr. 444, 37 SW 746; Taylor v. State, (Cr.) 22 SW 974.
Vt.—State v. Sargood, 80 Vt. 415, 68 A 49, 130 AmSR 995, 13 AnnCas 367.
Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.
Wash.—State v. Rutledge, 37 Wash. 523, 79 P 1123.
Eng.—Rex v. Threlfall, 24 Cox C. C. 230; Reg. v. Shaw, 10 Cox C. C. 66; Reg. v. Braithwaite, 8 Cox C. C. 254; Champney's Case, 2 Lew. C. C. 258, 168 Reprint 1146; Reg. v. Muscot, 10 Mod. 192, 88 Reprint 689; Rex v. Gaskell, 29 T. L. R. 108.
Can.—Rex v. Brewer, 16 Alta. L. 400, 60 DomLR 588, 34 CanCrCas 341, [1921] 2 WestWkly 100; Rex v. Peterson, 9 Sask. L. 432, 32 DomLR 295, 27 CanCrCas 3, [1917] 1 WestWkly 600 [app dism 55 Can. S. C. 115, 28 CanCrCas 332, [1917] 3 WestWkly 345].
See Newbit v. Statuck, 35 Me. 315, 58 AmD 706 (same rule applied in action for slander).
But see State v. Miller, 24 W. Va. 802 (where the court said that it was doubtful whether the rule that prevailed in other states was the rule there).
"This is an old rule of evidence, and therefore a rule of law, applicable to the rights of persons as well as to the rights of property. It is not merely a technical rule, but one of substantial justice, and founded upon a safe and wise public policy." Goslin v. Com., 121 Ky. 698, 703, 90 SW 223, 28 KyL 683.

[a] **Rule applies only** to cases in which oral evidence is relied upon to convict, and where one oath is placed against another. Mallard v. State, 19 Ga. A. 99, 90 SE 1044.

[b] **Elements requiring corroboration:** (1) Falsity of material matters sworn to. Yarbrough v. State, 79 Fla. 256, 83 S 873. (2) Material matter charged in indictment. State v. Lupton, 102 N. J. L. 530, 133 A 861. (3) Generally the testimony on assignments of perjury. Atkinson v. State, 133 Ark. 341, 202 SW 709.

[c] **No corroboration shown** in a prosecution for perjury as to statements of the state's witness, where evidence showed that such statements, if made, were false in fact. Lee v. State, 105 Miss. 539, 62 S 360.

58. Ark.—Brooks v. State, 91 Ark. 505, 121 SW 740.
Canal Zone.—Canal Zone v. Kerr, 2 Canal Zone 262.
Iowa.—State v. Waddle, 100 Iowa 57, 69 NW 279.
Mo.—State v. Hardiman, 277 Mo. 229, 209 SW 879; State v. Richardson, 248 Mo. 563; 154 SW 735, 44 LRANS 307.
Okl.—Goltry v. State, 24 Okl. Cr. 127, 216 P 485.

59. See cases supra note 57; and infra note 60.

60. See cases infra notes 61-64.
"It is true, also, that in a case of perjury every material allegation in the indictment may be shown by a single witness, except the allegation that the evidence of the prisoner in question was false, and that he did not believe it to be true." U. S. v. Hall, 44 Fed. 864, 869, 10 LRA 324.

[a] **Proof beyond a reasonable doubt** is sufficient for elements other than false swearing. Brake v. Com., 218 Ky. 747, 292 SW 305.

[b] **Production of record of court of record** of which deposition containing statements charged as perjury forms a part is alone sufficient. Spires v. Rex, 24 Que. K. B. 547, 28 DomLR 146, 25 CanCrCas 172.

[c] **In South Carolina** (1) an early case held that one witness was sufficient to prove the terms of the oath sworn to. State v Hayward, 10 S. C. L. 546. (2) A later case, decided in 1827, held that two witnesses were required to prove the facts sworn to. State v. Howard, 15 S. C. L. 159.

61. U. S.—U. S. v. Hall, 44 Fed. 864, 10 LRA 324.
Ala.—Williams v State, 68 Ala. 551.
Ark.—Clower v. State, 151 Ark. 359, 236 SW 265; Brooks v. State, 91 Ark. 505, 121 SW 740; Thomas v. State, 51 Ark. 138, 10 SW 193.
Iowa.—State v. Raymond, 20 Iowa 582; State v. Wood, 17 Iowa 18.
Ky.—Brake v. Com., 218 Ky. 747, 292 SW 305; Smith v. Com., 140 Ky. 568, 131 SW 493.
Mass.—Com. v. Pollard, 12 Metc. 225.
N. Y.—Peo. v. Hayes, 70 Hun 111, 24 NYS 194 [aff 140 N. Y. 484, 35 NE 951, 37 AmSR 572, 23 LRA 830].
Tex.—Hambright v. State, 49 Tex. Cr. 162, 91 SW 232; Adams v. State, 49 Tex. Cr. 361, 91 SW 225.
Eng.—Rex v. Threlfall, 24 Cox C. C. 230.
Can.—Spires v. Rex, 24 Que. K. B. 547, 28 DomLR 146, 25 CanCrCas 172.

62. See cases supra note 61.

63. Atkinson v. State, 133 Ark. 341, 202 SW 709.

64. Atkinson v. State, supra. See Hart v. State, 73 Tex. Cr. 362, 166 SW 152 (in a prosecution for falsely stating that a certain person was in a certain house between certain hours on a certain night, when in truth such person was at that time on a certain street corner and then and there committed a theft, it was not necessary to prove by two witnesses or by one witness strongly corroborated by circumstances that accused was at the place of the theft, or that such person committed the theft).

65. U. S.—U. S. v. Hall, 44 Fed. 864, 10 LRA 324 (some material particular).
Ala.—Pressley v. State, 18 Ala. A. 40, 88 S 291.
Ark.—Lamb v. State, 135 Ark. 275, 205 SW 653.
Ind.—Galloway v. State, 29 Ind. 442.
N. J.—State v. Lupton, 102 N. J. L. 530, 133 A 861.
Tex.—State v. Buie, 43 Tex. 532.
"This corroboration, to be sufficient, must be of the very act—the corpus delicti—the giving of material testimony which is willfully and corruptly false." Peterson v. State, 74 Ala. 34, 36 [quot Pressley v. State, 18 Ala. A. 40, 43, 88 S 291].

[a] **Evidence held corroborative.**—State v. Lupton, 102 N. J. L. 530, 133 A 861.

66. U. S.—Allen v. U. S., 194 Fed. 664, 114 CCA 357, 39 LRANS 385; U. S. v. Hall, 44 Fed. 864, 10 LRA 324.
Ala.—Peterson v. State, 74 Ala. 34; Wofford v. State, 21 Ala. A. 521, 109 S 886 [certiorari den 215 Ala. 106, 109 S 887]; Pressley v. State, 18 Ala. A. 40, 88 S 291; Powell v. State, 5 Ala. A. 150, 59 S 328.
Ark.—Clower v. State, 151 Ark. 359, 236 SW 265.
Canal Zone.—Canal Zone v. Kerr, 2 Canal Zone 262.
Conn.—State v. Campbell, 93 Conn. 3, 104 A 653.
D. C.—Cook v. U. S., 26 App. 427, 6 AnnCas 810.
Fla.—Ellis v. State, 83 Fla. 322, 91 S 192; Ward v. State, 83 Fla. 311, 91 S 189; McClerkin v. State, 20 Fla. 879.
Iowa.—State v. Young, 153 Iowa 4, 132 NW 813, AnnCas1913E 70; State v. Raymond, 20 Iowa 582.

though there is authority to the contrary,[67] that it need not be so strong as to equal the positive testimony of another witness,[68] nor so strong that standing alone it would justify a conviction in a case where the testimony of a single witness would suffice for that purpose,[69] but it must be sufficient to connect accused with the perpetration of the offense and lead to the inference of his guilt.[70] Evidence confirmatory of the one witness in some slight particulars only is not sufficient.[71] But evidence is sufficient if of such a character as to turn the scale and overcome the oath of accused and the legal presumption of his innocence,[72] or if, when taken in connection with all the other testimony, the falsity of accused's sworn statements is established beyond a reasonable doubt.[73] It has been said that there can

Ky.—Baker v. Com., 223 Ky. 616, 4 SW (2d) 416; Botner v. Com., 219 Ky. 272, 292 SW 805; Brake v. Com., 218 Ky. 747, 292 SW 305; Day v. Com., 195 Ky. 790, 243 SW 1051; Smith v. Com., 180 Ky. 240, 202 SW 635, LRA 1918E 927; Fugate v. Com., 177 Ky. 794, 198 SW 240; Hansford v. Com., 170 Ky. 700, 186 SW 498; Goins v. Com., 167 Ky. 603, 181 SW 184; Walker v. Com., 162 Ky. 111, 172 SW 109; Partin v. Com., 154 Ky. 701, 159 SW 542; Howell v. Com., 104 SW 685, 31 KyL 983; Sweat v. Com., 96 SW 843, 29 KyL 1067; Adams v. Com., 123 Ky. 258, 94 SW 664, 29 KyL 683; Goslin v. Com., 121 Ky. 698, 90 SW 223, 28 KyL 683; Wadlington v. Com., 59 SW 851, 22 KyL 1108; Wells v. Com., 6 SW 150, 9 KyL 658.

Mass.—Com. v. Parker, 2 Cush. 212.

Mo.—State v. Rhoten, 259 Mo. 424, 168 SW 590; State v. Hunter, 181 Mo. 316, 80 SW 955; State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Heed, 57 Mo. 252; State v. Miller, 44 Mo. A. 159.

Nebr.—Gandy v. State, 27 Nebr. 707, 43 NW 747, 44 NW 408.

N. M.—Terr. v. Remuzon, 3 N. M. 368, 9 P 598.

N. Y.—Peo. v. Sturgis, 110 App. Div. 1, 96 NYS 1046.

Oh.—Ruch v. State, 2 Oh. A. 150, 18 Oh. Cir. Ct. N. S. 391, 24 Oh. Cir. Dec. 675; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450.

Okl.—Madden v. State, 26 Okl. Cr. 251, 223 P 716; Ex p. Metcalf, 8 Okl. Cr. 605, 129 P 675, 44 LRANS 513.

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Tex.—State v. Buie, 43 Tex. 532; Eldridge v. State, (Cr.) 14 SW (2d) 1036; Musick v. State, 106 Tex. Cr. 207, 292 SW 223; Brown v. State, 101 Tex. Cr. 639, 276 SW 929; Wooten v. State, 91 Tex. Cr. 107, 237 SW 921; Godby v. State, 88 Tex. Cr. 360, 227 SW 192; Timmins v. State, 82 Tex. Cr. 263, 199 SW 1106; Cozby v. State, 80 Tex. Cr. 323, 189 SW 957; Reed v. State, (Cr.) 183 SW 1168; Hays v. State, 76 Tex. Cr. 213, 173 SW 671; Anderson v. State, 56 Tex. Cr. 360, 120 SW 462; Conant v. State, 51 Tex. Cr. 610, 103 SW 897; Kelley v. State, 51 Tex. Cr. 507, 103 SW 189; Cleveland v. State, 50 Tex. Cr. 6, 95 SW 521; Billingsley v. State, 49 Tex. Cr. 620, 95 SW 520, 13 AnnCas 730; Grady v. State, 49 Tex. Cr. 3, 90 SW 38; Lee v. State, (Cr.) 70 SW 425; Chavarria v. State, (Cr.) 63 SW 312; Wilkerson v. State, (Cr.) 55 SW 49; Carter v. State, (Cr.) 43 SW 996; Butler v. State, 36 Tex. Cr. 483, 38 SW 46; Whitaker v. State, 37 Tex. Cr. 479, 36 SW 253; Taylor v. State, (Cr.) 22 SW 974; Aguierre v. State, 31 Tex. Cr. 519, 21 SW 256; Waters v. State, 30 Tex. A. 284, 17 SW 411; Grandison v. State, 29 Tex. A. 186, 15 SW 174; Brookin v. State, 27 Tex. A. 701, 11 SW 645; Wilson v. State, 27 Tex. A. 47, 10 SW 749, 11 AmSR 180; Maines v. State, 26 Tex. A. 14, 9 SW 51; Anderson v. State, 24 Tex. A. 705, 7 SW 40; Smith v. State, 22 Tex. A. 196, 2 SW 542; Washington v. State, 22 Tex. A. 26, 3 SW 228; Hernandez v. State, 18 Tex. A. 134, 51 AmR 295; Gabrielsky v. State, 13 Tex. A. 428.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

[a] **Corroborative evidence:** (1) Held sufficient. Powell v. State, 5 Ala. A. 150, 59 S 328 (incriminating statements of defendant); Baker v. Com., 223 Ky. 616, 4 SW (2d) 416; Fugate v. Com., 177 Ky. 794, 198 SW 240; Musick v. State, 106 Tex. Cr. 207, 292 SW 223; Cozby v. State, 80 Tex. Cr. 323, 189 SW 957; Kelley v. State, 51 Tex. Cr. 507, 103 SW 189. (2) Held insufficient. Pressley v. State, 18 Ala. A. 40, 88 S 291; State v. Rhoten, 259 Mo. 424, 168 SW 590; Grady v. State, 49 Tex. Cr. 3, 90 SW 38.

[b] **The words "strongly corroborative"** mean that the corroborating evidence must relate to a material matter, that is, it must tend to show the falsity of defendant's oath, and, taken altogether, it must be so cogent, powerful, and forcible as to be calculated to make a deep impression upon the mind. Eldridge v. State, (Tex. Cr.) 14 SW (2d) 1036; Hernandez v. State, 18 Tex. A. 134, 51 AmR 295.

67. Ellis v. State, 83 Fla. 322, 91 S 192; Ward v. State, 83 Fla. 311, 91 S 189; McClerkin v. State, 20 Fla. 879; Gandy v. State, 23 Nebr. 436, 36 NW 817; Grady v. State, 49 Tex. Cr. 3, 4, 90 SW 38.

"Perjury requires the corroborative testimony to be tantamount to a witness." Grady v. State, supra.

68. U. S.—U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Ind.—Galloway v. State, 29 Ind. 442; Hendricks v. State, 26 Ind. 493.

Ky.—Goins v. Com., 167 Ky. 603, 181 SW 184; Stamper v. Com., 100 SW 286, 30 KyL 992; Barton v. Com., 32 SW 171, 396, 17 KyL 580; Com. v. Davis, 92 Ky. 460, 18 SW 10, 13 KyL 676.

La.—State v. Jean, 42 La. Ann. 946, 8 S 480.

Mo.—State v. Hunter, 181 Mo. 316, 80 SW 955; State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Heed, 57 Mo. 252; State v. Miller, 44 Mo. A. 159.

N. C.—State v. Peters, 107 N. C. 876, 12 SE 74.

Oh.—State v. Courtright, 66 Oh. St. 35, 63 NE 590; Crusen v. State, 10 Oh. St. 258; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450. See Silver v. State, 17 Oh. 365 (in perjury it requires two witnesses or at least what is equivalent).

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Wash.—State v. Rutledge, 37 Wash. 523, 79 P 1123.

Eng.—Reg. v. Towey, 8 Cox C. C. 328.

69. U. S.—U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Ga.—Nance v. State, 126 Ga. 95, 54 SE 932.

Ky.—Williams v. Com., 113 Ky. 652, 68 SW 871, 24 KyL 465.

Mo.—State v. Hunter, 181 Mo. 316, 80 SW 955; State v. Heed, 57 Mo. 252.

Oh.—Crusen v. State, 10 Oh. St. 258; In re Franklin County, 5 OhS&CP 691, 7 OhNP 450.

70. Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Nance v. State, 126 Ga. 95, 54 SE 932.

[a] **Corroboration is the same** as that required of an accomplice under Pen. Code § 1111. Peo. v. Follette, 74 Cal. A. 178, 240 P 502; Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565.

[b] **Corroborating evidence:** (1) Held sufficient. Peo. v. Follette, 74 Cal. A. 178, 240 P 502. (2) Held insufficient. Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565.

71. Ark.—Brooks v. State, 91 Ark. 505, 121 SW 740; Thomas v. State, 51 Ark. 138, 10 SW 193.

D. C.—Cook v. U. S., 26 App. 427, 6 AnnCas 810.

Iowa.—State v. Raymond, 20 Iowa 582.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

Eng.—Reg. v. Yates, 1 C. & M. 132, 41 ECL 77.

72. U. S.—Hashagen v. U. S., 169 Fed. 396, 94 CCA 618; U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Ky.—Com. v. Davis, 92 Ky. 460, 18 SW 10, 13 KyL 676.

Mass.—Com. v. Butland, 119 Mass. 317; Com. v. Parker, 2 Cush. 212.

N. Y.—Peo. v. Stone, 32 Hun 41, 2 N. Y. Cr. 445 (evidence sufficient to destroy the equilibrium produced by the two oaths).

N. C.—State v. Hawkins, 115 N. C. 712, 20 SE 623; State v. Peters, 107 N. C. 876, 12 SE 74.

Oh.—In re Franklin County, 5 OhS&CP 691, 7 OhNP 450.

Okl.—Wright v. State, 30 Okl. Cr. 425, 236 P 633.

Pa.—Com. v. Rogo, 71 Pa. Super. 109.

S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

Wash.—State v. Miller, 80 Wash. 75, 141 P 293; State v. Smails, 63 Wash. 172, 115 P 82; State v. Rutledge, 37 Wash. 523, 79 P 1123.

Eng.—Reg. v. Boulter, 3 C. & K. 236 (there must be something in the case to make the oath of the prosecutor preferable, on the whole, to the oath of the prisoner).

[a] **Corroborative evidence held sufficient** to show falsity of oath. Hashagen v. U. S., 169 Fed. 396, 94 CCA 618; State v. Hawkins, 115 N. C. 712, 20 SE 623; Com. v. Rogo, 71 Pa. Super. 109; State v. Miller, 80 Wash. 75, 141 P 293.

73. Ark.—Lamb v. State, 135 Ark. 275, 205 SW 653.

Cal.—Peo. v. Phillips, 56 Cal. A. 291, 205 P 40.

Conn.—State v. Campbell, 93 Conn. 3, 104 A 653.

Ga.—Flemister v. State, 81 Ga. 768, 7 SE 642.

Ind.—Woodward v. State, 198 Ind. 70, 152 NE 277; Galloway v. State, 29 Ind. 442.

Iowa.—State v. Raymond, 20 Iowa 582.

Ky.—Botner v. Com., 219 Ky. 272, 292 SW 805; Hansford v. Com., 170 Ky. 700, 186 SW 498.

Nebr.—Gandy v. State, 23 Nebr. 436, 36 NW 817.

N. M.—Terr. v. Remuzon, 3 N. M. 368, 9 P 598.

N. Y.—Peo. v. Hayes, 70 Hun 111, 24 NYS 194 [aff 140 N. Y. 484, 35 NE 951, 37 AmSR 572, 23 LRA 830].

N. C.—State v. Swaim, 97 N. C. 462, 2 SE 68.

Oh.—Crusen v. State, 10 Oh. St. 258.

Okl.—Wright v. State, 30 Okl. Cr. 425, 236 P 633.

Tex.—Hernandez v. State, 18 Tex. A. 134, 51 AmR 295.

Wash.—State v. Rutledge, 37 Wash. 523, 79 P 1123.

Can.—Peterson v. Rex, 55 Can. S. C. 115, 28 CanCrCas 332, [1917] 3 WestWkly 345 [dism app 9 Sask. L. 432, 32 DomLR 295, 27 CanCrCas 3, [1917] 1 WestWkly 600].

[a] **Corroborative evidence:** (1) Held sufficient. Lamb v. State, 135 Ark. 275, 205 SW 653; Peo. v. Albert, (Cal. A.) 267 P 587; Peo. v. Galbraith, 66 Cal. A. 761, 226 P 983; Flemister v. State, 81 Ga. 768, 7 SE 642; Peo. v. Hayes, 70 Hun 111, 24 NYS 194 [aff 140 N. Y. 484, 35 NE

be no rule laid down by the law as to what facts or circumstances amount to corroboration.[74]

Interested witness. A witness who corroborates the state's witness is an interested witness if his corroboration of accused's testimony would be an admission of his own guilt.[75]

[§ 172] **cc. Manner—(aa) In General.** The general rule is that the corroborative evidence means evidence aliunde which tends to show the perjury independent of any declaration or admission of accused[76] or of the witness to be corroborated.[77] The corroboration must be by proof of material and independent facts and circumstances, which, taken and considered together, tend in confirmation of the testimony of the single witness to establish the falsity of the oath;[78] and evidence merely showing that the account of the witness is probable will not do.[79] Such support may be furnished by record,[80] by writing,[81] or by facts and circumstances.[82] But it has been held the corroboration cannot be supplied by the testimony of one who is not a credible witness, such as an accomplice.[83]

[§ 173] **(bb) By Circumstances.** The corroboration may be by circumstantial evidence.[84] The corroborating circumstances need not be proved by direct testimony specifically corroborating the testimony of the main witness,[85] but may consist of proof of independent facts which together tend to establish the main fact, that is, the falsity of the oath, and which together strongly corroborate the truth of the testimony of the single witness who has testified to such falsity.[86]

[§ 174] **(cc) By Declarations or Admissions of Accused.** While proof of a contradictory statement of accused concerning the matter in issue is not alone sufficient to sustain a conviction for perjury,[87] yet such proof together with the testimony of a single witness,[88] or such proof supported by other corroborating circumstances,[89] may be sufficient to establish the falsity of the matter alleged. Evidence of other

951, 37 AmSR 572, 23 LRA 830]; State v. Swaim, 97 N. C. 462, 2 SE 68; Ruch v. State, 2 Oh. A. 150, 18 Oh. Cir. Ct. N. S. 391, 24 Oh. Cir. Dec. 675; Reed v State, (Tex. Cr.) 183 SW 1168; Franklin v. State, 38 Tex. Cr. 346, 43 SW 85; Reg. v. Gardiner, 8 C. & P. 737, 34 ECL 992; Peterson v. Rex, 55 Can. S. C. 115, 28 CanCrCas 332, [1917] 3 WestWkly 345 [dism app 9 Sask. L. 432, 32 DomLR 295, 27 CanCrCas 3, [1917] WestWkly 600]; Rex v. Curry, 47 N. S. 176, 12 DomLR 13, 21 CanCrCas 273, 13 EastLR 11 [aff 48 Can. S. C. 532, 15 DomLR 347, 22 CanCrCas 550, 13 EastLR 550]. (2) Held insufficient. Brooks v. State, 91 Ark. 505, 121 SW 740; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Peo. v. Smith, 3 Cal. A. 68, 84 P 452; Hansford v. Com., 170 Ky. 700, 186 SW 498; Wright v. State, 30 Okl. Cr. 425, 236 P 633; Maines v. State, 26 Tex. A. 14, 9 SW 51; Reg. v. Owen, 6 Cox C. C. 105. See Botner v. Com., 219 Ky. 272, 292 SW 805 (single witness corroborated by copies of tax assessment lists).

74. Parham v. State, 3 Ga. A. 468, 472, 60 SE 123. See Reg. v. Shaw, 10 Cox C. C. 66 (any attempt to define the degree of corroboration necessary would be illusory).

"If the jury are satisfied with the weight of the corroborating circumstances, it is enough." Parham v. State, supra.

75. Peo. v. Henry, 196 App. Div. 177, 187 NYS 673.

76. Ga.—Roddenberry v. State, 37 Ga. A. 359, 140 SE 386; Bell v. State, 5 Ga. A. 701, 63 SE 860.

Mo.—State v. Hardiman, 277 Mo. 229, 209 SW 879; State v. Rhoten, 259 Mo. 424, 168 SW 590; State v. Hunter, 181 Mo. 316, 80 SW 955.

Okl.—Shoemaker v. State, 29 Okl. Cr. 184, 233 P 489.

Or.—State v. Buckley, 18 Or. 228, 22 P 838.

Va.—Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

[a] **Additional statements of accused** are not sufficient. Shoemaker v. State, 29 Okl. Cr. 184, 233 P 489; Schwartz v. Com., 27 Gratt. (68 Va.) 1025, 21 AmR 365.

[b] **Proof by many witnesses** of different and conflicting statements is not corroborative proof of the corpus delicti. State v. Hunter, 181 Mo. 316, 80 SW 955.

Corroboration of contradictory statements see infra § 174.

77. Parham v. State, 3 Ga. A. 468, 60 SE 123; State v. Hardiman, 277 Mo. 229, 209 SW 879; State v. Rhoten, 259 Mo. 424, 168 SW 590; Gabrielsky v. State, 13 Tex. A. 428.

78. D. C.—Cook v. U. S., 26 App. 427.

Ga.—Bell v. State, 5 Ga. A. 701, 63 SE 860.

Iowa.—State v. Raymond, 20 Iowa 582.

N. J.—State v. Lupton, 102 N. J. L. 530, 133 A 861; State v. Wallace, (Sup.) 133 A 865.

N. Y.—Peo. v. Stone, 32 Hun 41, 2 N. Y. Cr. 445.

[a] **Evidence held not corroborative.**—State v. Wallace, (N. J. Sup.) 133 A 865 (defendant's admission of purchase of liquor from witness held not corroborative of witness' testimony of defendant's purchase from another).

79. State v. Raymond, 20 Iowa 582.

80. Day v. Com., 195 Ky. 790, 243 SW 1051.

81. Holy v. U. S., 278 Fed. 521 (documentary evidence); Day v. Com., 195 Ky. 790, 243 SW 1051; Reg. v. Webster, 1 F. & F. 515 (private memorandum of witness).

82. See infra § 173.

83. Eldridge v. State, (Tex. Cr.) 14 SW (2d) 1036; Melton v. State, 84 Tex. Cr. 398, 207 SW 316.

84. U. S.—U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Cal.—Peo. v. Galbraith, 66 Cal. A. 761, 226 P 983.

D. C.—Cook v. U. S., 26 App. 427, 6 AnnCas 810.

Iowa.—State v. Clough, 111 Iowa 714, 83 NW 727.

Mo.—State v. Hardiman, 277 Mo. 229, 209 SW 879.

N. Y.—Eighmy v. Peo., 79 N. Y. 546.

Oh.—State v. Courtright, 66 Oh. St. 35, 63 NE 590.

Okl.—Madden v. State, 26 Okl. Cr. 251, 223 P 716.

Tex.—Maines v. State, 26 Tex. A. 14, 9 SW 51.

Can.—Peterson v. Rex, 55 Can. S. C. 115, 28 CanCrCas 332, [1917] 3 WestWkly 345.

85. Peo. v. Galbraith, 66 Cal. A. 761, 226 P 983.

86. U. S.—U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Cal.—Peo. v. Galbraith, 66 Cal. A. 761, 226 P 983.

D. C.—Cook v. U. S., 26 App. 427.

Iowa.—State v. Clough, 111 Iowa 714, 83 NW 727; State v. Raymond, 20 Iowa 582.

Tex.—Hernandez v. State, 18 Tex. A. 134, 51 AmR 295.

Can.—Peterson v. Rex, 55 Can. S. C. 115, 28 CanCrCas 332, [1917] 3 WestWkly 345 (evidence that accused cashed check which he swore he never received).

[a] **In Oklahoma** the corroborating circumstances must be directly and positively sworn to. Wright v. State, 30 Okl. Cr. 425, 236 P 633.

87. See supra § 166.

88. Ala.—Peterson v. State, 74 Ala. 34; Pressley v. State, 18 Ala. A. 40, 88 S 291.

Ark.—Brooks v. State, 91 Ark. 505, 121 SW 740; Grissom v. State, 88 Ark. 115, 113 SW 1011. See State v. Binkley, 123 Ark. 240, 185 SW 279 (contradictory statements or admissions of defendant are competent testimony).

Ga.—Davis v. State, 7 Ga. A. 680, 67 SE 839.

Ill.—Hereford v. Peo., 197 Ill. 222, 64 NE 310.

Iowa.—State v. Swafford, 98 Iowa 362, 67 NW 284.

Mass.—Com. v. Parker, 2 Cush. 212.

Miss.—Hemphill v. State, 71 Miss. 877, 16 S 261; Vance v. State, 62 Miss. 137.

Mo.—State v. Blize, 111 Mo. 464, 20 SW 210.

N. C.—State v. Molier, 12 N. C. 263.

Okl.—Shoemaker v. State, 29 Okl. Cr. 184, 233 P 489.

Tex.—Musick v. State, 106 Tex. Cr. 207, 292 SW 223.

W. Va.—State v. Miller, 24 W. Va. 802.

Eng.—Rex v. Mayhew, 6 C. & P. 315, 25 ECL 450; Reg. v. Towey, 8 Cox C. C. 328; Reg. v. Hook, 8 Cox C. C. 5.

Can.—Rex v. Brewer, 16 Alta. L. 400, 60 DomLR 588, 34 CanCrCas 341, [1921] 2 WestWkly 100; Rex v. Nash, 7 Alta. L. 449, 17 DomLR 725, 23 CanCrCas 38, 28 WestLR 960, 6 WestWkly 1390 [app dism (Can.) 8 WestWkly 632]; Rex v. Bogh Singh, 18 B. C. 144, 12 DomLR 626, 21 CanCrCas 323, 24 WestLR 941.

[a] **Evidence held sufficient.**—(1) One witness and confession of defendant. Davis v. State, 7 Ga. A. 680, 67 SE 839; Musick v. State, 106 Tex. Cr. 207, 292 SW 223; Rex v. Bogh Singh, 18 B. C. 144, 12 DomLR 626, 21 CanCrCas 323, 24 WestLR 941. (2) One witness and letter or writings of defendant. Com. v. Parker, 2 Cush. (Mass.) 212; Rex v. Mayhew, 6 C. & P. 315, 25 ECL 450. (3) Testimony of two witnesses and evidence of contradictory statement by defendant is more than sufficient. Grissom v. State, 88 Ark. 115, 113 SW 1011. (4) Where a prisoner testifies in his own behalf, his manner of giving testimony may be sufficient corroboration to justify conviction on the testimony of one witness for the prosecution. State v. Miller, 24 W. Va. 802; Rex v. Nash, 7 Alta. L. 449, 17 DomLR 725, 23 CanCrCas 38, 28 WestLR 960, 6 WestWkly 1390 [app dism (Can.) 8 WestWkly 632].

[b] **Evidence held not sufficient.**—(1) Assertion in statement concerning murder that it was made voluntarily and without threat or promise, and testimony of witness to that effect. Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565. (2) One witness and testimony by relatives of the witness as to inconsistent statements of defendant. Pressley v. State, 18 Ala. A. 40, 88 S 291.

89. Peo. v. Kennedy, 221 Mich. 1, 190 NW 749; Shoemaker v. State, 29 Okl. Cr. 184, 233 P 489; State v. Burns, 120 S. C. 523, 113 SE 351, 25

false and contradictory statements, however, is not sufficient to corroborate the testimony of a single witness.[90]

[§ 175] **(b) Corroboration between Assignments.** Where there are several assignments of perjury,[91] the testimony of a single witness must be corroborated with respect to the assignment concerning which he testified.[92] Proof of one assignment is not corroborated by proof of another,[93] even though all the perjuries were committed at the same time and place.[94] Where, however, there is one assignment of a continuous nature, the rule is otherwise.[95]

[§ 176] **E. Trial, Review, and Punishment*—1. Questions of Law and Fact—a. Questions of Law—(1) In General.** The sufficiency of facts and circumstances to constitute material confirmatory proof of a single witness' testimony is a question of law for the court.[96] Where the pleadings show the pendency of the judicial proceeding in which the false testimony was given and the joinder of issue therein, the questions as to pendency and joinder of issue become matters of law.[97]

[§ 177] **(2) Jurisdiction.** Whether the court trying the case in which the perjury was committed had jurisdiction thereof is a question of law for the court.[98] So it is for the court to determine whether the officer administering the oath to accused had authority to do so,[99] and whether the oath as administered was most binding upon the conscience of the witness.[1]

[§ 178] **(3) Materiality of False Testimony.**[2] Although there is some authority to the contrary,[3] the materiality[4] or relevancy[5] of a statement or testimony assigned as false is a question of law for the court, and should not be submitted to the jury.[6] But, like any other question of law, the question of materiality may be so mingled with the facts that the court should submit it to the jury, with proper instructions upon the law.[7]

Harmless error. The fact that the question of materiality was erroneously submitted to the jury is no ground for reversal if they determined the question as the court should have done.[8]

ALR 414; U. S. v. Brown, 6 Utah 115, 21 P 461.

[a] **Acquittal of person against whom false testimony was given** does not furnish corroborating circumstances. State v. Burns, 120 S. C. 523, 113 SE 351, 25 ALR 414.

90. Smith v. Com., 180 Ky. 240, 202 SW 635, LRA1918E 927.

91. See supra § 137.

92. Marvin v. State, 53 Ark. 395, 14 SW 87; Lea v. State, 64 Miss. 278, 1 S 235; Williams v. Com., 91 Pa. 493 [rev 1 LackLegReg 264]; Com. v. De Cost, 35 Pa. Super. 88; Reg. v. Parker, C. & M. 639, 41 ECL 346.

93. Lea v. State, 64 Miss. 278, 1 S 235; Williams v. Com., 91 Pa. 493 [rev 1 LackLegReg 264].

94. See cases supra note 93.

95. Com. v. Davis, 92 Ky. 460, 462, 18 SW 10, 13 KyL 676; Reg. v. Hare, 13 Cox C. C. 174.

"If the evidence be corroborative of the fact that the accused swore falsely it is sufficient." Com. v. Davis, supra.

96. State v. Lupton, 102 N. J. L. 530, 133 A 861.

97. Spearman v. State, 68 Tex. Cr. 449, 152 SW 915, 44 LRANS 243.

98. State v. Clough, 111 Iowa 714, 83 NW 727; Howell v. Com., (Ky.) 113 SW 881; State v. Tate, 77 Miss. 469, 27 S 619; State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.

[a] **Police judge.**—Howell v. Com., (Ky.) 113 SW 881.

99. State v. Clough, 111 Iowa 714, 83 NW 72; Howell v. Com., (Ky.) 113 SW 881; State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307; State v. Scott, 37 N. D. 105, 163 NW 810.

1. Rex v. Lee Tuck, 4 Alta. L. 388, 5 DomLR 629, 19 CanCrCas 471, 21 WestLR 669, 2 WestWkly 605.

2. **Materiality generally** see supra §§ 32–47.

3. Cox v. State, 13 Ga. A. 687, 79 SE 909.

4. U. S.—Carroll v. U. S., 16 F. (2d) 951 [certiorari den 273 U. S. 763 mem, 47 SCt 477 mem, 71 L. ed. 880 mem]; U. S. v. Singleton, 54 Fed. 488; U. S. v. Shinn, 14 Fed. 447, 8 Sawy. 403.

Ark.—Beavers v. State, 124 Ark. 38, 186 SW 300; Barre v. State, 99 Ark. 629, 139 SW 641; Brooks v. State, 91 Ark. 505, 121 SW 740; Grissom v. State, 88 Ark. 115, 113 SW 1011; State v. Nees, 47 Ark. 553, 2 SW 184; Nelson v. State, 32 Ark. 192.

Cal.—Peo. v. Bradbury, 155 Cal. 808, 103 P 215; Peo. v. Lem You, 97 Cal. 224, 32 P 11; Peo. v. Ah Sing, 95 Cal. 657, 30 P 797; Peo. v. Clementshaw, 59 Cal. 385; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Peo. v. Chadwick, 4 Cal. A. 63, 87 P 384.

Conn.—State v. Greenberg, 92 Conn. 657, 103 A 897.

Ill.—Peo. v. Berry, 309 Ill. 511, 141 NE 132; Peo. v. Niles, 295 Ill. 525, 129 NE 97; Peo. v. Glenn, 294 Ill. 333, 128 NE 532; Peo. v. Melnick, 274 Ill. 616, 113 NE 971; Peo. v. Threewitt, 251 Ill. 509, 96 NE 242.

Iowa.—State v. Brown, 128 Iowa 24, 102 NW 799; State v. Clough, 111 Iowa 714, 83 NW 727; State v. Swafford, 98 Iowa 362, 67 NW 284; State v. Caywood, 96 Iowa 367, 65 NW 385.

Kan.—State v. Bingham, 124 Kan. 61, 257 P 951; State v. Lewis, 10 Kan. 157.

Ky.—Walker v. Com., 162 Ky. 111, 172 SW 109; Renan v. Com., 2 KyL 66, 10 Ky. Op. 959.

Mich.—Peo. v. Jones, 1 Mich. N. P. 141.

Miss.—Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155; Cothran v. State, 39 Miss. 541.

Mo.—State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307; State v. Moran, 216 Mo. 550, 115 SW 1126; State v. Dineen, 203 Mo. 628, 102 SW 480; State v. Faulkner, 175 Mo. 546, 75 SW 116; State v. Fannon, 158 Mo. 149, 59 SW 75; State v. Williams, 30 Mo. 364.

N. J.—State v. Lupton, 102 N. J. L. 530, 133 A 861; Gordon v. State, 48 N. J. L. 611, 7 A 476.

N. Y.—Peo. v. Corrigan, 195 N. Y. 1, 87 NE 792; Peo. v. Barbuti, 207 App. Div. 285, 202 NYS 126; Peo. v. Moris, 155 App. Div. 711, 140 NYS 887, 29 N. Y. Cr. 240.

N. D.—State v. Scott, 37 N. D. 105, 114, 163 NW 810 [cit Cyc].

Oh.—Barnes v. State, 15 Oh. Cir. Ct. 14, 8 Oh. Cir. Dec. 153.

Okl.—Peters v. U. S., 2 Okl. 138, 37 P 1081; Stanley v. U. S., 1 Okl. 336, 33 P 1025; Soper v. State, 22 Okl. Cr. 27, 208 P 1044; Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

Pa.—Steinman v. McWilliams, 6 Pa. 170; Com. v. Garvey, 65 Pa. Super. 56; Com. v. Stern, 58 Pa. Super. 591, 600 [cit Cyc]; Com. v. Bossard, 2 Kulp 113.

Tex.—Martin v. State, 101 Tex. Cr. 77, 273 SW 855; Jones v. State, 76 Tex. Cr. 398, 174 SW 1071; Maroney v. State, 45 Tex. Cr. 524, 78 SW 696; Luna v. State, 44 Tex. Cr. 482, 72 SW 378; Foster v. State, 32 Tex. Cr. 39, 22 SW 21; Smith v. State, 27 Tex. A. 50, 10 SW 751; Davidson v. State, 22 Tex. A. 372, 3 SW 662; Jackson v. State, 15 Tex. A. 579; Donohoe v. State, 14 Tex. A. 638; Lawrence v. State, 2 Tex. A. 479.

Vt.—State v. Wood, 99 Vt. 490, 134 A 697, 48 ALR 985.

Wash.—State v. Carpenter, 130 Wash. 23, 225 P 654, 656 [cit Cyc]; State v. Douette, 31 Wash. 6, 71 P 556.

Wyo.—Fletcher v. State, 20 Wyo. 284, 123 P 80; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448.

Eng.—Reg. v. Courtney, 7 Cox C. C. 111; Reg. v. Southwood, 1 F. & F. 356; Rex v. Dunston, R. & M. 109, 21 ECL 712.

[a] **Legality of questions** to which false answers were made is for the court. Walker v. Com., 162 Ky. 111, 172 SW 109.

[b] **Where record is produced before court,** the materiality of the false statement to the issue in that cause is a question of law for the court. Cothran v. State, 39 Miss. 541.

5. Partin v. Com., 154 Ky. 701, 159 SW 542 (prosecution or false swearing).

6. Peo. v. Melnick, 274 Ill. 616, 113 NE 971; Com. v. Hollander, 200 Mass. 73, 85 NE 844; Fletcher v. State, 20 Wyo. 284, 123 P 80; and cases infra note 7.

[a] **Instruction held not erroneous** as leaving issue of materiality to jury. Peo. v. Phillips, 56 Cal. A. 291, 205 P 40.

7. U. S.—U. S. v. Shinn, 14 Fed. 447, 8 Sawy. 403.

Ill.—Wilkinson v. Peo., 226 Ill. 135, 80 NE 699; Young v. Peo., 134 Ill. 37, 24 NE 1070.

La.—State v. Spencer, 45 La. Ann. 1, 12 S 135.

N. Y.—Peo. v. Redmond, 179 App. Div. 127, 165 NYS 821 [app dism 225 N. Y. 206, 121 NE 785].

Okl.—Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Or.—State v. Stilwell, 109 Or. 643, 221 P 174.

Tex.—McAvoy v. State, 39 Tex. Cr. 684, 47 SW 1000; Washington v. State, 23 Tex. A. 336, 5 SW 119. See also Luna v. State, 44 Tex. Cr. 482, 72 SW 378 (recognizing rule, but holding it inapplicable in instant case).

Eng.—Reg. v. Goddard, 2 F. & F. 361.

8. Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257; Thompson v. Peo., 26 Colo. 496, 59 P 51.

Kan.—State v. Lewis, 10 Kan. 157.

Okl.—Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Tex.—Montgomery v. State, (Cr.)

*By FELIX C. GRABER (§§ 176–188).

[§ 179] **b. Questions of Fact.** Under the general rules[9] all questions of fact arising during the trial are for the jury.[10] Thus, whether the oath of accused[11] and the statement made or testimony given thereunder[12] was knowingly and corruptly false is a question for the jury.

[§ 180] **2. Instructions—a. In General.** General rules as to instructions[13] apply in prosecutions for perjury.[14] Accordingly the instructions should be clear and explicit,[15] easy of interpretation,[16] and not liable to mislead.[17] They should not assume facts not proved,[18] submit issues not in the case,[19]

40 SW 805; Jackson v. State, 15 Tex. A. 579.

Wash.—State v. Douette, 31 Wash. 6, 71 P 556.

Eng.—Reg. v. Courtney, 7 Cox C. C. 111.

9. See Criminal Law § 2272 et seq.

10. U. S.—Kahn v. U. S., 20 F. (2d) 782.

Ala.—Williams v. State, 17 Ala. A. 429, 85 S 595; Storey v. State, 14 Ala. A. 127, 72 S 267.

Ark.—Smith v. State, 153 Ark. 645, 241 SW 37.

Cal.—Peo. v. De Vries, 52 Cal. A. 705, 199 P 867.

Del.—State v. Thomas, 25 Del. 20, 78 A 640.

Kan.—State v. Bingham, 124 Kan. 61, 257 P 951.

Ky.—Walker v. Com., 162 Ky. 111, 172 SW 109.

La.—State v. Brown, 111 La. 170, 35 S 501.

Mich.—Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52; Peo. v. Ostrander, 110 Mich. 60, 67 NW 1079; Peo. v. McCaffrey, 75 Mich. 115, 42 NW 681.

Minn.—State v. Smith, 153 Minn. 167, 190 NW 48.

Mo.—State v. Martin, 317 Mo. 313, 295 SW 543; State v. Bradford, 314 Mo. 684, 285 SW 496; State v. Davis, (A.) 256 SW 125.

N. Y.—Peo. v. Redmond, 179 App. Div. 127, 165 NYS 821 [app dism 225 N. Y. 206, 121 NE 785]; Peo. v. Gilhooley, 108 App. Div. 234, 95 NYS 636 [aff 187 N. Y. 551, 80 NE 1116].

Okl.—Lawson v. State, (Cr.) 254 P 110; Campbell v. State, 23 Okl. Cr. 250, 214 P 738.

Or.—State v. Carothers, 69 Or. 382, 138 P 1077.

Tex.—Williams v. State, 109 Tex. Cr. 116, 3 SW (2d) 94; Urben v. State, (Cr.) 178 SW 514.

Wash.—State v. Miller, 80 Wash. 75, 141 P 293.

[a] **Rule applied** to question as to: (1) Whether accused had testified as alleged. State v. Bingham, 124 Kan. 61, 257 P 951. (2) Whether accused was sworn as a witness in the trial in which he committed alleged perjury. Williams v. State, 17 Ala. A. 429, 85 S 595.

[b] **Defective hearing of accused.**—State v. Carothers, 69 Or. 382, 138 P 1077.

[c] **Drunkenness of accused.**—State v. Brown, 111 La. 170, 35 S 501.

[d] **Duress of accused.**—Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52.

[e] **Existence of conspiracy.**—Peo. v. Ostrander, 110 Mich. 60, 67 NW 1079.

[f] **How oath was administered.**—Peo. v. McCaffrey, 75 Mich. 115, 42 NW 681.

[g] **Time of administration of oath.**—Campbell v. State, 23 Okl. Cr. 250, 214 P 783.

[h] **Demurrer to evidence** is properly overruled where the state produced clear and convincing proof tending to show perjury on the part of defendant. State v. Bradford, 314 Mo. 684, 285 SW 496.

[i] **Evidence held sufficient to require submission** of case to jury. Kahn v. U. S., 20 F. (2d) 782; Carroll v. U. S., 16 F. (2d) 951 [certiorari den 273 U. S. 763 mem, 47 SCt 477 mem, 71 L. ed. 880 mem]; Schonfeld v. U. S., 277 Fed. 934 [certiorari den 258 U. S. 623 mem, 42 SCt 316 mem, 66 L. ed. 796 mem]; Vedin v. U. S., 257 Fed. 550, 168 CCA 534 [certiorari den 250 U. S. 663 mem, 40 SCt 11 mem, 63 L. ed. 1196 mem]; Leyer v. U. S., 183 Fed. 102, 105 CCA 394; Storey v. State, 14 Ala. A. 127, 72 S 267; McDaniel v. State, 13 Ala. A. 318, 69 S 351; Neal v. Com., 217 Ky. 334, 289 SW 242; Barrett v. Com., 215 Ky. 722, 286 SW 1047; Gatewood v. Com., 215 Ky. 360, 285 SW 193; Sullivan v. Com., 158 Ky. 536, 165 SW 696; Peo. v. McElheny, 206 Mich. 51, 172 NW 546; State v. Smith, 153 Minn. 167, 190 NW 48; Williams v. State, 109 Tex. Cr. 116, 3 SW (2d) 94, Urben v. State, 77 Tex. Cr. 261, 178 SW 514; State v. Rosenberg, 88 Vt. 223, 92 A 145. See Day v. Com., 195 Ky. 790, 243 SW 1051 (evidence sufficiently corroborative of a witness to authorize submission if other evidence were sufficient).

[j] **Evidence held insufficient to require submission** of case to jury. Thomas v. State, 13 Ala. A. 421, 69 S 413; Allison v. Com., 227 Ky. 557, 13 SW (2d) 769; Yarberry v. Com., 209 Ky. 15, 272 SW 24; Day v. Com., 195 Ky. 790, 243 SW 1051; Case v. Peo., 76 N. Y. 242, 6 AbbNCas 151 [rev 14 Hun 503]; Peo. v. Grout, 174 App. Div. 608, 161 NYS 718 [app dism 222 N. Y. 521 mem, 118 NE 1072 mem]; State v. Bolyn, 143 S. C. 63, 141 SE 165.

11. U. S.—Epstein v. U. S., 271 Fed. 282; U. S. v. Smith, 27 F. Cas. No. 16,341, 1 Sawy. 277.

Ala.—Carroll v. State, 16 Ala. A. 454, 78 S 717.

Ariz.—Ayers v. State, 20 Ariz. 189, 178 P 782.

Ky.—Neal v. Com., 217 Ky. 334, 289 SW 242.

N. Y.—Peo. v. Doody, 172 N. Y. 165, 64 NE 807.

Can.—Reg. v. Murphy, 9 Montr. Leg. N. (Que.) 95; Reg. v. Denault, 8 Montr. Leg. N. (Que.) 250.

[a] **Good faith.**—In a prosecution for perjury in verifying the genuineness of signatures to recall a petition, if there was any evidence tending to show that the defendant believed that a particular signature was genuine, it was error to deprive him of the right to have it passed on by jury. Ayers v. State, 20 Ariz. 189, 178 P 782.

12. Ark.—Smith v. State, 153 Ark. 645, 241 SW 37.

Kan.—State v. Bingham, 124 Kan. 61, 257 P 951.

Mo.—State v. Martin, 317 Mo. 313, 295 SW 543.

Okl.—Lawson v. State, (Cr.) 254 P 110.

Wash.—State v. Miller, 80 Wash. 75, 141 P 293.

[a] **Thus** whether accused, charged with falsely testifying that he had never been convicted of a felony except on one occasion in the state, was the person who had been convicted of felonies in sister states was for the jury. State v. Miller, 80 Wash. 75, 141 P 293.

[b] **Evidence to be considered.**—On a trial for perjury, consisting of a denial of the making of a written statement before the attorney-general, all the testimony adduced at the trial in such perjury case respecting the statement to the attorney-general, as well as that given in the proceedings in which the denial was made, should be considered by the jury. State v. Thomas, 25 Del. 20, 78 A 640.

13. See Criminal Law §§ 2353–2517.

14. See cases infra this section.

[a] **Instructions based on competent evidence** are properly given. State v. Cerfoglio, 46 Nev. 332, 205 P 791, 213 P 102.

[b] **Instruction referring to stenographer's notes** as "the record of a former judicial proceeding" as the best evidence of the alleged false testimony on the trial is erroneous. Peo. v. Glenn, 294 Ill. 333, 128 NE 532.

[c] **Instructions considered as a whole.**—It is sufficient if the instructions as a whole fully and fairly announce the law applicable to the theory of the prosecution and of the defense. Peo. v. Senegram, 27 Cal. A. 301, 149 P 786; Quigg v. Peo., 211 Ill. 17, 71 NE 886; State v. Smails, 63 Wash. 172, 115 P 82.

15. Peterson v. State, 74 Ala. 34; Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52.

[a] **Ambiguous as to materiality.**—Gandy v. State, 23 Nebr. 436, 36 NW 817.

[b] **Confusing:** (1) As to materiality. State v. Shinovich, (Wyo.) 276 P 172. (2) As to magistrate's right in approving bail bonds to assume that persons are what they purport to be. Peo. v. Follette, 74 Cal. A. 178, 240 P 502.

[c] **Lack of definiteness as to time.**—Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52.

[d] **Reference to special statute** need not be made when reference is made to the general statute which itself refers to the special statute. Peo. v. Gazelle, 299 Ill. 58, 132 NE 273 (perjury under the provisions of the Bond Act, by making a false and fictitious schedule of property when offering to become surety on a bond).

16. Peterson v. State, 74 Ala. 34.

17. Peterson v. State, supra.

[a] **Misleading:** (1) As limiting inquiry of jury. Gandy v. State, 23 Nebr. 436, 36 NW 817; State v. Lawson, 98 N. C. 759, 4 SE 134. (2) As to burden of proof. State v. Cline, 150 N. C. 854, 64 SE 591. (3) As to effect of a supposed confession. McClure v. Com., 5 KyL 861, 12 Ky. Op. 601. (4) As to materiality. Young v. Peo., 134 Ill. 37, 24 NE 1070; Gandy v. State, supra; State v. Shinovich, (Wyo.) 276 P 172. (5) As to proceedings in which alleged perjury was committed. Robertson v. State, 54 Ark. 604, 16 SW 582.

[b] **Not misleading:** (1) As to burden of proof. State v. Adams, 119 Kan. 509, 240 P 955. (2) Instruction that "you ought to accept as the law" the instructions which the court has given. Com. v. Stern, 58 Pa. Super. 591, 603.

[c] **Instructions properly refused.**—State v. Sloan, 309 Mo. 498, 274 SW 734.

18. Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565; Hitesman v. State, 48 Ind. 473.

19. U. S.—Holmgren v. U. S., 156 Fed. 439, 84 CCA 301 [aff 217 U. S. 509, 30 SCt 588, 54 L. ed. 861, 19 AnnCas 778].

Cal.—Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565.

Ky.—Yarberry v. Com., 209 Ky. 15, 272 SW 24.

Mich.—Peo. v. Almashy, 229 Mich. 227, 201 NW 231.

Mo.—State v. Moran, 216 Mo. 550, 115 SW 1126.

Okl.—Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

Tex.—Francis v. State, 57 Tex. Cr. 555, 123 SW 1114; Bridgers v. State, 44 Tex. Cr. 294, 70 SW 767.

[a] **Instructions held improper.**—Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565; Yarberry v. Com., 209 Ky. 15, 272 SW 24; McClure v. Com., 5 KyL 861, 12 Ky. Op. 601; State v. Moran, 216 Mo. 550, 115 SW 1126; Shipp v. State, 81 Tex. Cr. 328, 196 SW 840; Francis v. State, 57 Tex. Cr. 555, 123 SW 1114.

[b] **Instruction properly refused** (1) for raising question of defendant's good character generally (Coleman v. State, 6 Okl. Cr. 252, 118 P 594), (2) as without the issues (Francis v. State, 57 Tex. Cr. 555, 123 S 1114).

[c] **Instruction held proper as to**

or invade the province of the jury.[20] Where an instruction has once been given, it need not be repeated,[21] but because requested instructions correspond in part with instructions given, accused is not deprived of the right to have that portion given which brings pertinently to the jury the issue involved.[22]

[§ 181] **b. As to Material Allegations and Facts To Be Proved.** The court should inform the jury what the material allegations of the indictment are,[23] and also what facts must be established before they can convict.[24]

Where there are several assignments,[25] the jury should ordinarily be informed as to which assignment or assignments of false testimony are submitted to them as a basis for their verdict.[26] Where the assignments of perjury are severable, it is proper for the court to select some of them to the exclusion of the others, and submit them to the jury on which to predicate a conviction.[27] When not severable, an instruction submitting all such predicates in solido is proper.[28] It is error to instruct that, if the prosecution shall prove any of the alleged assignments of perjury in manner and form as charged in the indictment, then accused should be found guilty, since this instruction ignores entirely the materiality of the testimony,[29] and it is reversible error for the court, upon its attention being specifically called thereto, to refuse to withdraw from the consideration of the jury defective or unsustained assignments.[30]

[§ 182] **c. As to Intent and Knowledge of Falsity.** A corrupt intent being an essential element of the crime of perjury,[31] the court must instruct the jury that, in order to convict, the false testimony must have been given willfully and corruptly, or other language must be used indicating that the swearing must have been intentionally false.[32]

Knowledge of falsity. So also it is error to omit the element of knowledge of the falsity of the testimony given,[33] and to fail or refuse to instruct that, if accused testified honestly in the belief of his

effect of accused's reputation in community for truth and veracity. Coleman v. State, 6 Okl. Cr. 252, 118 P 594.

20. Peo. v. Fong Ching, 78 Cal. 169, 20 P 396; Johnson v. Peo., 94 Ill. 505; State v. Allen, 94 Mo. A. 508, 69 SW 604. See also Criminal Law §§ 2307–2352½.

[a] **Instructions held proper.**—Leyer v. U. S., 183 Fed. 102, 105 CCA 394; Peo. v. Miller, 264 Ill. 148, 106 NE 191, AnnCas1915B 1240; Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

[b] **Cautionary instructions.**—An instruction reminding the jury of the grave nature of the crime of perjury and that by each acquittal of a guilty person the safeguard erected by society for its protection is weakened is not erroneous. Ruch v. State, 2 Oh. A. 150, 18 Oh. Cir. Ct. N. S. 391, 34 Oh. Cir. Ct. 675.

21. Bennett v. State, 65 Fla. 84, 61 S 127; Martin v. State, 101 Tex. Cr. 77, 273 SW 855; Urben v. State, 77 Tex. Cr. 261, 178 SW 514; Fox v. State, (Tex. Cr.) 87 SW 157; Chase v. State, (Tex. Cr.) 28 SW 952.

[a] **Rule applied.**—Where the court has correctly defined a term, it is not erroneous to refuse defendant's requested definition. Urben v. State, 77 Tex. Cr. 261, 178 SW 514.

[b] **Converse of instruction given.**—Where the court charged, in the language of the statute, that corroboration was necessary in order to convict defendant, and further adequately instructed the jury on reasonable doubt, it was not necessary for the court to charge on the converse of the requirement of corroboration. Fox v. State, (Tex. Cr.) 87 SW 157.

22. Porter v. State, 48 Tex. Cr. 301, 88 SW 359.

23. Gandy v. State, 23 Nebr. 436, 36 NW 817; State v. Stilwell, 109 Or. 643, 221 P 174; Donohoe v. State, 14 Tex. A. 638.

24. Ga.—Cox v. State, 13 Ga. A. 687, 79 SE 909.

Mich.—Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52.

Nebr.—Gandy v. State, 23 Nebr. 436, 36 NW 817.

Tex.—Scott v. State, 72 Tex. Cr. 26, 160 SW 960; Portwood v. State, 71 Tex. Cr. 447, 160 SW 345.

Wash.—State v. Smails, 63 Wash. 172, 115 P 82.

[a] **Instruction held erroneous.**—Butler v. State, 36 Tex. Cr. 483, 38 SW 46.

[b] **Instructions properly refused.**—Cox v. State, 164 Ark. 126, 261 SW 303.

[c] **Instructions held not erroneous.**—Peo. v. Torterice, 66 Cal. A. 115, 225 P 760; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Blakey v. Com., 183 Ky. 493, 209 SW 516; State v. Storey, 148 Minn. 398, 182 NW 613, 15 ALR 629; State v. Day, 108 Minn. 121, 121 NW 611; State v. Sloan, 309 Mo. 498, 274 SW 734; Green v. State, 60 Tex. Cr. 530, 132 SW 806; Clay v. State, 52 Tex. Cr. 555, 107 SW 1129; State v. Smails, 63 Wash. 172, 115 P 82.

[d] **Instructions improperly refused.**—Scott v. State, 72 Tex. Cr. 26, 160 SW 960; Portwood v. State, 71 Tex. Cr. 447, 160 SW 345.

25. See supra § 137.

26. Peo. v. Scharfstein, 162 App. Div. 642, 147 NYS 946, 31 N. Y. Cr. 262; Conant v. State, 51 Tex. Cr. 610, 103 SW 897.

[a] **Instruction held erroneous.**—Peo. v. Scharfstein, 162 App. Div. 642, 147 NYS 946, 31 N. Y. Cr. 262.

[b] **Instruction held unobjectionable.**—Portwood v. State, 71 Tex. Cr. 447, 160 SW 345.

27. McCord v. State, 83 Ga. 521, 10 SE 437; Young v. State, 70 Tex. Cr. 434, 157 SW 151; Robertson v. State, 68 Tex. Cr. 243, 150 SW 893; Foreman v. State, 47 Tex. Cr. 179, 85 SW 809; Stanley v. State, (Tex. Cr.) 74 SW 318; Dorrs v. State, (Tex. Cr.) 40 SW 311; Sisk v. State, 28 Tex. A. 432, 13 SW 647.

[a] **Stressing material matter.**—Where an assignment of perjury embraces several particulars, it is not prejudicial to defendant for the court to stress one of them, as being the main material matter, in charging the jury. McCord v. State, 83 Ga. 521, 10 SE 437.

28. Adams v. State, 49 Tex. Cr. 361, 91 SW 225.

29. Wilkinson v. Peo., 226 Ill. 135, 80 NE 699; Donohoe v. State, 14 Tex. A. 638.

30. Wood v. Peo., 59 N. Y. 117 [rev 1 Hun 381, 3 Thomps. & C. 506].

31. See supra § 23.

32. Colo.—Wheeler v. Peo., 63 Colo. 209, 165 P 257.

Fla.—Leaptrot v. State, 51 Fla. 57, 40 S 616.

Miss.—Cothran v. State, 39 Miss. 541.

Porto Rico.—Peo. v. Pellot, 15 Porto Rico 423.

Tex.—Roberts v. State, 83 Tex. Cr. 139, 201 SW 998.

Wyo.—State v. Shinovich, 276 P 172.

[a] **"Knowingly."**—An instruction that accused is guilty if he knowingly swore falsely is not defective in omitting to state that the swearing must have been willful and corrupt, since the word "knowingly" implies willfulness and corruption. Wheeler v. Peo., 63 Colo. 209, 165 P 257, 259 [cit Cyc]; Morgan v. State, 63 Miss. 162.

[b] **"Willfully."**—(1) Where the jury have been instructed that accused's statement must have been willfully false, there is no error in refusing to instruct that it must have been corruptly false, since the former implies the latter. Brown v. State, 57 Miss. 424. But see Cothran v. State, 39 Miss. 541 (holding that an instruction authorizing conviction if the jury believe the swearing was willful, although not corrupt, was error). (2) Omitting the word "willfully" may not make an instruction erroneous. Gatewood v. Com., 215 Ky. 360, 285 SW 193.

[c] **"Wilfully" and "deliberately."**—Under a statute providing that false swearing, to be indictable, must be done "wilfully" and "deliberately" the court should define the terms "wilfully" and "deliberately." Roberts v. State, 83 Tex. Cr. 139, 201 SW 998; Hays v. State, 76 Tex. Cr. 213, 173 SW 671; Windon v. State, 56 Tex. Cr. 198, 119 SW 309; Holt v. State, 48 Tex. Cr. 559, 89 SW 838; Mahon v. State, 46 Tex. Cr. 234, 79 SW 28; Steber v. State, 23 Tex. A. 176, 4 SW 880.

[d] **Mental condition of accused.**—(1) Where the evidence justifies it, accused is entitled to an instruction, if he properly requests it, requiring the jury to consider his mental condition at the time of committing the alleged perjury, whether normal or failing, and his memory, whether good or bad, as bearing on the question of willful perjury. Leaptrot v. State, 51 Fla. 57, 40 S 616; Kidd v. State, 102 Tex. Cr. 432, 278 SW 195; Knight v. State, 71 Tex. Cr. 36, 158 SW 543. (2) Instruction held sufficient. Welch v. State, 71 Tex. Cr. 17, 157 SW 946.

[e] **Instruction held insufficient.**—State v. Shinovich, (Wyo.) 276 P 172.

[f] **Instruction held misleading.**—Wootan v. State, 96 Tex. Cr. 129, 256 SW 287.

[g] **Instruction properly refused.**—Reed v. State, 79 Tex. Cr. 222, 183 SW 1168.

[h] **Instructions held not erroneous.**—Holmgren v. U. S., 156 Fed. 439, 84 CCA 301 [aff 217 U. S. 509, 30 SCt 588, 54 L. ed. 861, 19 AnnCas 778]; Peo. v. Phillips, 56 Cal. A. 291, 205 P 40; Davis v. State, 7 Ga. A. 680, 67 SE 839; Baker v. Com., 223 Ky. 616, 4 SW (2d) 416; Peo. v. Ellenbogen, 114 App. Div. 182, 99 NYS 897 [aff 186 N. Y. 603 mem, 79 NE 1112 mem]; Johnson v. State, 71 Tex. Cr. 428, 160 SW 964; State v. Wilson, 83 Wash. 419, 145 P 455.

33. Ga.—Goodwin v. State, 118 Ga. 770, 45 SE 620.

Iowa.—State v. Loos, 145 Iowa 170, 123 NW 963.

Ky.—Walker v. Com., 162 Ky. 111, 172 SW 109; Williams v. Com., 113 Ky. 652, 68 SW 871.

Mich.—Peo. v. German, 110 Mich.

statements, he would not be guilty.[34] However, it has been said that accused may admit his knowledge of the falsity of his testimony, and put the prosecution upon proof only of the question as to whether the alleged false testimony was in fact true or false; in which case an instruction omitting the element of knowledge would not be erroneous.[35]

[§ 183] **d. As to Effect of Evidence.** Where evidence is erroneously admitted, it is error to fail to charge that such evidence should be disregarded.[36]

Admitted for particular purpose. Where evidence is only admissible on a particular issue, but might be considered for other purposes, it is proper[37] on request[38] to limit the consideration thereof to such issue, and error to fail to do so.[39] Thus, where evidence is competent only as impeaching evidence, and is not material as substantive evidence, the court should so instruct.[40] So, also, if the judgment in the proceeding in which the perjury was committed is admitted on behalf of the prosecution, the court should give instructions limiting the effect of such evidence,[41] but, if the record of the judgment of conviction is not introduced, such instructions are not necessary.[42]

[§ 184] **e. As to Degree of Proof Required.** The court should instruct the jury as to the degree of proof[43] and the number and corroboration of witnesses[44] required to support a conviction for perjury, but it has been held that, in the absence of a request for such an instruction, there is no error in a failure to give it.[45] The necessity for a charge that the falsity of the oath must be proved by two witnesses or by one witness and corroborating circumstances is not obviated by the fact that more than one witness testified to the perjury,[46] but, under such circumstances, it has been held that the

244, 68 NW 150.
Mo.—State v. Lynes, 194 Mo. A. 184, 185 SW 535.
Okl.—Downard v. State, 26 Okl. Cr. 274, 223 P 718.
Tex.—Glasscock v. State, 101 Tex. Cr. 499, 276 SW 430; Knight v. State, 71 Tex. Cr. 36, 158 SW 534; Mason v. State, 57 Tex. Cr. 319, 122 SW 871; Porter v. State, 48 Tex. Cr. 301, 88 SW 359; Luna v. State, 44 Tex. Cr. 482, 72 SW 378; Aguierre v. State, 31 Tex. Cr. 519, 21 SW 256.
Can.—Rex v. Cohn, 36 N. S. 240, 6 CanCrCas 386.

34. See cases supra note 33.

[a] **Honest belief.**—Instruction that accused should be acquitted if he honestly believed the statement made is not erroneous by use of the word "honestly," for that added nothing to the word "believed." State v. Lynes, 194 Mo. A. 184, 185 SW 535.

[b] **Evidence of belief.**—Where accused was charged with perjury in falsely testifying regarding an alleged oral agreement as to payment of costs accompanying a written agreement of settlement signed by him, the refusal of a requested charge that the jury might consider the written agreement for what they might find it worth, as bearing on accused's understanding of the agreement, was error. State v. Loos, 145 Iowa 170, 123 NW 962.

[c] **Inadvertence, agitation, or mistake.**—(1) It is proper to tell the jury that a false statement made through inadvertence, or under agitation, or by mistake, is not perjury. Mares v. State, 71 Tex. Cr. 303, 158 SW 1130. (2) Failure to give such instruction, when there is evidence on which to base it, is error. Glasscock v. State, 101 Tex. Cr. 499, 276 SW 430; Mason v. State, 57 Tex. Cr. 319, 122 SW 871. (3) A charge is sufficient without calling special attention to accused's intoxicated condition. Sisk v. State, 28 Tex. A. 432, 13 SW 647.

[d] **Intoxication.**—Where justified by the evidence, an instruction should be given to acquit accused if at the time of the act accused was so intoxicated by cocaine or liquor as to be incapable of willfully and knowingly swearing false. Williams v. Com., 113 Ky. 652, 68 SW 871.

35. Peo. v. Wong Fook Sam, 146 Cal. 114, 79 P 848.

[a] **Thus,** where an indictment charged, not only that the testimony given was false, but that it was willfully given with knowledge on defendant's part that it was false, and the court charged in terms that all the allegations of the information except the falsity of the testimony were admitted, an instruction that if the jury believed beyond all reasonable doubt by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances, that the testimony in question was false, they should convict, did not constitute reversible error, on an appeal on the judgment roll alone. Peo. v. Wong Fook Sam, 146 Cal. 114, 79 P 848.

36. Hollins v. State, (Tex. Cr.) 69 SW 594.

37. State v. Austin, 132 N. C. 1037, 43 SE 905.

38. Gray v. State, 4 Okl. Cr. 292, 111 P 825, 32 LRANS 142 (it is not error to omit to give instructions limiting the consideration of testimony if no request therefor is made).

39. Roberts v. State, 83 Tex. Cr. 139, 201 SW 998; Mahon v. State, 46 Tex. Cr. 234, 79 SW 28; State v. Justesen, 35 Utah 105, 99 P 456.

[a] **Instruction held not erroneous.**—State v. Smith, 153 Minn. 167, 190 NW 48.

40. State v. Austin, 132 N. C. 1037, 43 SE 905.

41. Estill v. State, 38 Tex. Cr. 255, 42 SW 305; Kitchen v. State, 26 Tex. A. 165, 9 SW 461; Higgenbotham v. State, 24 Tex. A. 505, 6 SW 201; Littlefield v. State, 24 Tex. A. 167, 5 SW 650; Maines v. State, 23 Tex. A. 568, 5 SW 123; Washington v. State, 23 Tex. A. 336, 5 SW 119; Davidson v. State, 22 Tex. A. 372, 3 SW 662.

42. Franklin v. State, 38 Tex. Cr. 346, 43 SW 85.

[a] **Illustration.**—Where so much of the record as will show the organization of the court and the nature of the accusation is introduced in evidence, but not the record of the judgment of conviction, it is not error to omit to instruct the jury limiting the use of such evidence. Franklin v. State, 38 Tex. Cr. 346, 43 SW 85.

43. U. S.—Venlinio v. U. S., 276 Fed. 12.
Cal.—Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565.
Ga.—Pennaman v. State, 58 Ga. 336.
Ill.—Mackin v. Peo., 115 Ill. 312, 3 NE 222, 56 AmR 167.
Tex.—Kitchen v. State, 26 Tex. A. 165, 9 SW 461.

[a] **Instruction held sufficient.**—Venlinio v. U. S., 276 Fed. 12.

Weight and sufficiency of evidence see supra §§ 159–166.

44. U. S.—Allen v. U. S., 194 Fed. 664, 114 CCA 357, 39 LRANS 385.
Ark.—Clower v. State, 151 Ark. 359, 236 SW 265; Atkinson v. State, 133 Ark. 341, 202 SW 709.
Cal.—Peo. v. Woodcock, 52 Cal. A. 412, 199 P 565.
Colo.—Thompson v. Peo., 26 Colo. 496, 59 P 51.
Ga.—Haines v. State, 109 Ga. 526, 35 SE 141; Pence v. State, 36 Ga. A. 270, 136 SE 820; Manning v. State, 33 Ga. A. 610, 127 SE 475; Cox v. State, 13 Ga. A. 687, 79 SE 909.
Ky.—Brake v. Com., 218 Ky. 747, 292 SW 305; Walker v. Com., 162 Ky. 111, 172 SW 109; Partin v. Com., 154 Ky. 701, 159 SW 542; Goslin v. Com., 90 SW 223, 28 KyL 683; Wadlington v. Com., 59 SW 851, 22 KyL 1108.
Mich.—Peo. v. McClintic, 193 Mich. 589, 160 NW 461, LRA1917C 52.
Minn.—State v. Smith, 153 Minn. 167, 190 NW 48.
Miss.—Saucier v. State, 95 Miss. 226, 48 S 840, 21 AnnCas 1155; Brown v. State, 57 Miss. 424.
Mo.—State v. Caperton, 276 Mo. 314, 207 SW 795; State v. Thornton, 245 Mo. 436, 150 SW 1048; State v. Hunter, 181 Mo. 316, 80 SW 955.
N. J.—State v. Lupton, 102 N. J. L. 530, 133 A 861.
Okl.—Madden v. State, 26 Okl. Cr. 251, 223 P 716.
Tex.—Brown v. State, 101 Tex. Cr. 639, 276 SW 929; Shipp v. State, 81 Tex. Cr. 328, 196 SW 840; Knight v. State, 71 Tex. Cr. 36, 158 SW 543; Whitaker v. State, 37 Tex. Cr. 479, 36 SW 253; Aguierre v. State, 31 Tex. Cr. 519, 21 SW 256; Grandison v. State, 29 Tex. A. 186, 15 SW 174; Brookin v. State, 27 Tex. A. 701, 11 SW 645; Miller v. State, 27 Tex. A. 497, 11 SW 485; Washington v. State, 22 Tex. A. 26, 3 SW 228.
Wash.—State v. Rutledge, 37 Wash. 523, 79 P 1123.

[a] **Credibility of witness.**—(1) In such jurisdictions as require a conviction for perjury to be based on the testimony of "credible" witnesses, it is error to fail to instruct the jury that a conviction must depend on their belief in the "credibility" of the witnesses. Kitchen v. State, 29 Tex. A. 45, 14 SW 392; Smith v. State, 22 Tex. A. 196, 2 SW 542. (2) It is not necessary to define the word "credible," it being a word of ordinary significance. Chavarria v. State, (Tex. Cr.) 63 SW 312.

[b] **Meaning of "corroborated."**—An instruction on the number and corroboration of witnesses should tell the jury what is meant by "corroborated." State v. Hunter, 181 Mo. 316, 80 SW 955.

[c] **Instructions held proper.**—Haines v. State, 109 Ga. 526, 35 SE 141; Brown v. State, 101 Tex. Cr. 639, 276 SW 929.

[d] **Instructions held sufficient.**—O'Leary v. U. S., 158 Fed. 796, 86 CCA 56; Peo. v. Follette, 74 Cal. A. 178, 240 P 502.

[e] **Instructions held improper:** (1) As too general. Atkinson v. State, 133 Ark. 341, 202 SW 709. (2) As to the effect of what accused said against himself. State v. Caperton, 276 Mo. 314, 207 SW 795. (3) As submitting the question as to whether certain evidence was sufficient corroboration when such evidence was not corroborative at all. State v. Lupton, 102 N. J. L. 530, 133 A 861. (4) For failure to charge that corroboration cannot embody admissions of accused. State v. Thornton, 245 Mo. 436, 150 SW 1048. (5) For failure to require strong corroboration. Brake v. Com., 218 Ky. 747, 292 SW 305.

Number of witnesses and corroboration see supra §§ 167–175.

45. Stiles v. State, (Okl. Cr.) 264 P 226.

46. State v. Rutledge, 37 Wash. 523, 79 P 1123.

failure so to charge may be harmless.[47]

[§ 185] **3. Verdict and Conviction.** General rules[48] govern the form and sufficiency of verdicts in prosecutions for perjury.[49] Thus the verdict in a perjury case must be responsive to the issues,[50] and not inconsistent.[51]

General verdict. Proof of the falsity of any one of several matters alleged in an information containing several assignments supports a general verdict of guilty,[52] although other assignments are not sustained.[53] So one good assignment of perjury will ordinarily support a general verdict of guilty,[54] although other assignments contained in the indictment are defective;[55] but when the attention of the trial court is specifically called to the question, it is reversible error to refuse to withdraw from the consideration of the jury such defective assignments;[55½] and it has been held that a general verdict on two counts is bad where the assignment in the second count is defective and the evidence on the first count is so contradictory as to leave room for doubt whether the jury would have found a verdict of guilty on that count if it had stood alone,[56] notwithstanding, if the first count had stood alone, the verdict could not have been touched.[57] A conviction for perjury need not allege that accused had knowledge of the falsity of the testimony on which the charge is founded.[58]

[§ 186] **4. New Trial.** General rules[59] govern as to new trials in prosecutions for perjury.[60] Thus it is ground for a new trial that the proceeding in which the perjury was committed was not proved by legal evidence[61] or that there was prejudicial error in the giving of instructions.[62]

[§ 187] **5. Appeal and Error.** The usual rules[63] are applicable to appeals or writs of error in prosecutions for perjury,[64] such as rules relating to the necessity for presenting objections in the lower court,[65] matters reviewable,[66] and harmless error.[67]

[§ 188] **6. Sentence and Punishment.** Although not originally punishable by the courts as a crime,[68] perjury has for a long time been considered a crime triable and punishable as such.[69] The punishment now is usually a matter of statutory provision.[70] A

[a] **Instruction held not misleading.**—Thompson v. Peo., 26 Colo. 496, 59 P 51.

47. Manning v. State, 33 Ga. A. 610, 127 SE 475. See Montgomery v. State, (Tex. Cr.) 40 SW 805 (where three witnesses testified directly as to the falsity of defendant's statement, it was only necessary to charge that the state must prove its case by at least two witnesses).

48. See Criminal Law §§ 2580–2605.

49. See cases infra this section.

[a] **Where there are several assignments of perjury,** a verdict of guilty, without a finding specifying upon which assignment the conviction was had, is bad, unless the evidence is sufficient to justify a verdict of guilty upon each or any one of them. Peo. v. Root, 94 App. Div. 84, 87 NYS 962.

50. Brown v. Peo., 145 Ill. A. 263; Barton v. Com., 32 SW 171, 396, 17 KyL 580; State v. Avera, 4 N. C. 669; State v. Mayson, 5 S. C. L. 284. See also Criminal Law § 2587.

[a] **Unresponsive verdicts.**—(1) Where the indictment assigns the perjury as committed before A, a verdict of "guilty of perjury before T and A" is bad. State v. Mayson, 5 S. C. L. 284. (2) Where perjury is assigned on the oath of accused that he did not execute a certain deed, a special verdict finding him guilty of perjury in denying his signature is bad, as a deed may be executed without being signed. State v. Avera, 4 N. C. 669.

[b] **Verdict is responsive** where it finds accused guilty of false swearing (there being no degrees thereof) and fixes his punishment, although it does not recite "as charged in the indictment." Barton v. Com., 32 SW 171, 396, 17 KyL 580.

51. Harris v. Peo., 64 N. Y. 148 [aff 4 Hun 1, 6 Thomps. & C. 206]. See also Criminal Law § 2596.

[a] **Consistent verdict.**—Where the indictment contained two counts, the first charging perjury in giving oral testimony before the fire commissioner, and the other charging perjury in swearing to an affidavit containing in substance the same matter, before the same officer, a verdict of "not guilty under the first count" and "guilty under the second" was held not to be inconsistent. Harris v. Peo., 64 N. Y. 148, 154.

52. Urben v. State, 77 Tex. Cr. 261, 178 SW 514; Moore v. State, 32 Tex. Cr. 405, 24 SW 95; State v. Anderson, 35 Utah 496, 101 P 385.

53. See cases supra note 52.

54. Ala.—De Bernie v. State, 19 Ala. 23.

Ark.—Marvin v. State, 53 Ark. 395, 14 SW 87.

Mass.—Com. v. McLaughlin, 122 Mass. 449; Com. v. Johns, 6 Gray 274.

Mo.—State v. Blize, 111 Mo. 464, 20 SW 210.

N. H.—State v. Blaisdell, 59 N. H. 328.

Tex.—Adellberger v. State, (Cr.) 39 SW 103.

55. See cases supra note 54.

55½. Wood v. Peo., 59 N. Y. 117 [rev 1 Hun 381, 3 Thomps. & C. 506].

56. Reg. v. Bain, 23 L. C. Jur. 327.

57. Reg. v. Bain, supra.

58. Rex v. Yee Mock, 6 Alta. L. 231, 13 DomLR 220, 21 CanCrCas 400, 4 WestWkly 1342.

59. See Criminal Law §§ 2615–2767.

60. See cases infra this section.

[a] **There was no abuse of discretion** in granting a new trial upon an information charging an attorney with having testified falsely, in an action against him by clients, that he "had not received anything on account of" a judgment specified, in view of evidence that the judgment had been vacated and did not exist. Peo. v. McLeod, 29 Cal. A. 539, 156 P 970.

61. Rex v. Drummond, 10 Ont. L. 546, 6 OntWR 211, 10 CanCrCas 340.

62. U. S. v. Burkhardt, 31 Fed. 141, 12 Sawy. 433; Rex v. Brewer, 16 Alta. L. 400, 60 DomLR 588, 34 CanCrCas 341, [1921] 2 WestWkly 100.

[a] **Improper withdrawal of evidence from jury** is ground for new trial. Rex v. Brewer, 16 Alta. L. 400, 60 DomLR 588, 34 CanCrCas 341, [1921] 2 WestWkly 100.

63. See generally Criminal Law §§ 3258–3778.

64. See cases infra this section.

65. State v. Moore, 111 La. 1006, 36 S 100; U. S. v. Jamias, 21 Philippine 632.

[a] **Thus** an objection that the information does not sufficiently set forth that issue was joined in the suit wherein the perjury was charged comes too late when first raised on appeal. State v. Moore, 111 La. 1006, 36 S 100.

66. See cases infra this note.

[a] **Conclusion of jury on question of fact** cannot be reviewed when the evidence bearing upon the issue is fairly considered. Peo. v. Doody, 172 N. Y. 165, 64 NE 807.

[b] **Materiality of testimony** cannot be considered on appeal unless all evidence presented to the jury is laid before the appellate court. Peo. v. Garcia, 24 Porto Rico 652.

67. See cases infra this note.

[a] **Erroneous admission or exclusion of evidence.**—(1) A judgment will not be reversed on account of the erroneous admission or exclusion of evidence which did not prejudice accused. Settles v. State, 75 Fla. 296, 78 S 287; State v. Booth, 121 Iowa 710, 97 NW 74; Cope v. Com., 47 SW 436, 20 KyL 721; State v. Allen, 94 Mo. A. 508, 69 SW 604; Ross v. State, 40 Tex. Cr. 349, 50 SW 336; Dickerson v. State, 18 Wyo. 440, 111 P 857, 116 P 448. (2) If, however, accused was, or might have been, prejudiced, it constitutes reversible error. Davis v. State, 193 Ind. 650, 141 NE 458; Peo. v. Goodheim, 188 App. Div. 148, 176 NYS 468; Peo. v. Grout, 174 App. Div. 608, 161 NYS 718 [app dism 222 N. Y. 521 mem, 118 NE 1072 mem]; Peo. v. Gibson, 24 App. Div. 12, 48 NYS 861.

[b] **Nonprejudicial erroneous instruction.**—Coleman v. State, 6 Okl. Cr. 252, 118 P 594. See also supra § 178.

[c] **Refusal to quash indictment** for misrepresenting a corporation's resources, and for perjury, is not error although it failed to give the name of the official administering the oath, or to show whether defendant was prosecuted for statutory perjury. State v. Bolyn, 143 S. C. 63, 141 SE 165.

68. U. S. v. Hall, 44 Fed. 864, 10 LRA 324; Damport v. Sympson, Cro. Eliz. 520, 78 Reprint 769; Onslowe's Case, 2 Dyer 242b, 73 Reprint 537.

[a] **Anciently** jurors were merely a body of witnesses, whose verdict was based entirely on their own personal knowledge, and in no respect on the evidence of others testifying before them in court, and the only method whereby they could be punished was by writ of attaint. 3 Blackstone Comm. pp 389, 404; 2 Pollock & M. Hist. Eng. L. p 539 et seq; Damport v. Sympson, Cro. Eliz. 520, 78 Reprint 769; Onslowe's Case, 2 Dyer 242b, 73 Reprint 537.

[b] **Perjury was deemed a sin rather than a crime,** and its punishment was supposed to reside with the offended deity who had been solemnly invoked and the solemn invocation to whom had been disregarded. U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

Punishable as contempt see Contempt § 31.

69. U. S. v. Hall, 44 Fed. 864, 10 LRA 324.

[a] **Modes of punishment** (1) formerly were death (Rex v. Johnson, 2 Show. 1, 4, 89 Reprint 753), (2) afterward, cutting out the tongue (Rex v. Johnson, supra), (3) and still later fine, imprisonment, and pillory (U. S. v. Snow, 27 F. Cas. No. 16,349, 1 Cranch C. C. 123).

70. See statutory provisions.

[a] **Statutory punishment is less**

sentence imposing a penalty of greater or less severity than that provided for by statute is error,[71] but such error constitutes no ground for reversal when the penalty is smaller than that prescribed.[72]

Imposing incapacity as witness. Under early English[73] and American[74] statutes, the practice was to make the disability of accused to give testimony a part of the sentence,[75] and under some modern statutes[76] a person is rendered incompetent as a witness by a conviction of perjury or subornation of perjury.[77] Assuming that such disability is properly a part of the sentence, its omission is not ground for reversal at the instance of accused.[78]

Where accused pleads guilty, the practice of imposing one half the maximum penalty has been approved.[79]

Irregularity cured. Where accused was sentenced out of term, the irregularity was cured by again sentencing him in court.[80]

VII. SUBORNATION OF PERJURY AND ATTEMPTS TO SUBORN[81]

[By William G. Bannon]

[§ 189] **A. Definitions and Distinctions, and Nature and Elements of Offenses—1. Subornation—a. Definition.** By the common law, subornation of perjury consists in procuring or instigating another to commit the crime of perjury.[82] In general the statutory definitions are in substance the same as the common-law definition,[83] although some definitions are broader in operation.[84]

[§ 190] **b. Nature of Offense.** It has been stated that subornation of perjury is but a particular form of perjury,[85] or is in substance the same as perjury,[86] and that it is accessorial in nature.[87] But it has been asserted or recognized that subornation is an offense at common law,[88] and usually under the statutes it is an offense separate and distinct from perjury[89] and false swearing;[90] and the view has been taken that one guilty of subornation may not be regarded as an accessory to the offense of perjury.[91]

Suborner as principal in perjury. A general statutory provision making a person who aids, abets, or procures the commission of an offense a principal has been construed as rendering the suborner a principal in the offense of perjury.[92] But it has been held that a statute making a principal offender of an accessory before the fact, although not present when the crime was committed, is not applicable to the crime of perjury where the offense of subornation is separately defined by statute.[93]

Felony or misdemeanor. At common law subornation of perjury is a misdemeanor,[94] but under some statutes it is a felony.[95] Where the offense, with the procurement of the commission of which accused is charged, is technically false swearing and a misdemeanor, under the federal laws the offense charged is also a misdemeanor.[96-97]

severe than that of the common law, "because few were then convicted by reason of the compassion of the juries, and the punishment was lessened that more perjuries might be detected; but when we have found them out and the party convict, and no certain penalty, but left to the discretion of the Court, we ought to make them examples; for as anger does not become a Judge, so neither doth pity, for one is the mark of a foolish woman, as the other is of a passionate man." Rex v. Johnson, 2 Show. 1, 4, 89 Reprint 753.

[b] **Federal Naturalization Act** of June 29, 1906 (USCA tit 8 § 414), provides punishment of perjury in naturalization proceedings in preliminary stages as well as in final hearing. U. S. v. Dupont, 176 Fed. 823.

[c] **In Oklahoma** punishment for making false affidavit for a new trial is that prescribed by Rev. L. (1910) § 2219 par 2. Arnold v State, (Cr.) 132 P 1123 (construing the words "in or on any other trial or proceeding in a court of justice").

[d] **Repeal of statute.**—(1) Where penalties in a reënacting statute are repugnant to those in the earlier act, the latter is repealed. State v. Thomas, 149 La. 654, 89 S 887. (2) The penalty as prescribed by the act of 1839 (Clay Dig. p 71 § 4) was changed by the subsequent act of 1841 (Clay Dig. p 427 § 2). De Bernie v. State, 19 Ala. 23.

[e] **Penalty held excessive** in view of attendant circumstances. U. S. v. De los Santos, 32 Philippine 401; Rex v. Natanson, (Sask.) [1927] 2 West Wkly 154.

[f] **Sentence held proper** and in form prescribed by statute. Robinson v. State, 18 Fla. 898.

[g] **Repugnant penalties.**—In a prosecution under statute for false swearing in a sheriff's report and affidavit, the fact that the act also provided a different punishment for other violations of it did not prevent imposition of the punishment for false swearing, on the ground that the statute prescribed two repugnant penalties, so as to prevent the imposition of either. Hodel v. State, 112 Md. 115, 75 A 1056.

71. Brown v. State, 47 Ala. 47.
72. Coleman v. State, 6 Okl. Cr. 252, 118 P 594.
73. St. 5 Eliz. c 9; 2 & 18 Geo. II.
74. See statutory provisions.
75. Hinch v. State, 2 Mo. 158.
76. See statutory provisions.
77. See Witnesses [40 Cyc 2205–2207].
78. Dodge v. State, 24 N. J. L. 455.
79. U. S. v. Santisteban, 10 Porto Rico Fed. 509.
80. Reg. v. Castro, L. R. 9 Q. B. 350.
81. **Cross references:**
Attempt to suborn see infra § 196.
Conspiracy to commit the crime of subornation of perjury under federal statute see Conspiracy § 24.
Indictment for subornation of perjury see infra §§ 198–200.
Offense of procuring false evidence in general see Obstructing Justice § 21.
82. State v. Shaffner, 22 Del. 576, 69 A 1004; State v. Fahey, 19 Del. 594, 54 A 690; State v. Wykert, 198 Iowa 1219, 199 NW 331; State v. Chambers, 180 N. C. 705, 709, 104 SE 670 [quot Cyc]. To same effect State v. Johnson, 26 Del. 472, 84 A 1040.
"Subornation of perjury by the common law is an offense in procuring a man to take a false oath amounting to perjury, who actually takes such oath." Bacon Abr. Perjury. To same effect 4 Blackstone Comm. p 138; Stephen Dig. Cr. L. art 136.
83. See statutory provisions.
84. See Henderson v. Com., 91 SW 1141, 28 KyL 1212.
Operation and construction of statutes in general see infra § 191.
85. U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39; State v. Lomack, 130 Iowa 79, 106 NW 386.
86. Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118 [rev 6 F. (2d) 786 (aff 299 Fed. 1011)].
87. State v. Lomack, 130 Iowa 79, 106 NW 386; Com. v. Smith, 11 Allen (Mass.) 243.
88. State v. Shaffner, 22 Del. 576, 69 A 1004; Reg. v. Lawrence, 43 U. C. Q. B. (Ont.) 164; Bacon Abr. Perjury; 4 Blackstone Comm. p 138.
89. Ark.—Thomas v. State, 149 Ark. 68, 231 SW 200.
Ga.—Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145.
Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510.
Ky.—Henderson v. Com., 122 Ky. 296, 91 SW 1141, 28 KyL 1212.
Mo.—State v. White, 263 SW 192.
N. C.—State v. Chambers, 180 N. C. 705, 709, 104 SE 670 [quot Cyc].
Or.—State v. Jewett, 48 Or. 577, 85 P 994.
S. D.—State v. Pratt, 21 S. D. 305, 112 NW 152.
Utah.—State v. Justesen, 35 Utah 105, 99 P 456.
[a] **Distinction stated.**—"In perjury and subornation of perjury the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct. The two crimes both culminate in the delivery of false testimony. Still the offenses are dual, each having in it elements not common to the other. There is sufficient inherent difference between the two to warrant the lawmaking power in separating the act into its component parts, making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer." Stone v. State, 118 Ga. 705, 707, 45 SE 630, 98 AmSR 145.
90. Henderson v. Com., 91 SW 1141, 28 KyL 1212.
91. Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145; State v. Justesen, 35 Utah 105, 99 P 456.
Accessories before the fact in general see Criminal Law §§ 125–132.
92. Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118 [rev 6 F. (2d) 786 (aff 299 Fed. 1011)]; Walker v. State, 18 Oh. Cir. Ct. N. S. 1.
93. State v. Pratt, 21 S. D. 305, 112 NW 152.
94. State v. Chambers, 180 N. C. 705, 709, 104 SE 670 [quot Cyc]. See Stephen Dig. Cr. L. art 137.
95. See State v. Shaffner, 22 Del. 576, 69 A 1004; State v. Fahey, 19 Del. 594, 54 A 690; Com. v. Smith, 11 Allen (Mass.) 243.
96–97. Hallock v. U. S., 185 Fed. 417, 107 CCA 487 [certiorari den 220 U. S. 613 mem, 31 SCt 717 mem, 55 L. ed. 610 mem].

[§ 191] **c. Construction of Applicable Statutes in General.** The federal statute defining "subornation of perjury" embraces subornation of every sort of perjury.[98] Other statutory definitions of subornation of perjury have been construed to include the procuring of the commission of the offense of false swearing.[99]

[§ 192] **d. Elements of Offense—(1) In General.** In general, where the elements of perjury are present,[1] and there is a showing that the commission of the perjury was induced or procured by accused,[2] he is chargeable with the offense of subornation.[3]

[§ 193] **(2) Perjury.** To sustain an indictment for subornation of perjury, it is necessary that perjury shall have been in fact committed.[4] This rule applies in respect of a requirement that the oath must have been taken in a matter or proceeding in which an oath was authorized or required,[5] that the testimony must have been given in a judicial proceeding or in due course of justice;[6] that the court or tribunal must have had jurisdiction of the proceeding;[7] that the person who administered the oath must have had authority to administer it;[8] that the witness must have been duly sworn;[9] that the statement must have been material[10] and false;[11] and that it must have been made willfully,[12] or willfully and corruptly,[13] and with the suborned person's knowledge of its falsity.[14]

Determination as to existence of elements of perjury. In general, in determining whether the offense of subornation has been committed, the rules in respect of the perjury are the same as in the case of the offense of perjury itself.[15]

[§ 194] **(3) Acts and Intent of Suborner.** It is necessary that accused should have known or believed that the testimony given would be false;[16] that he should have known or believed that the witness would testify willfully and corruptly,[17] and

98. Hammer v. U. S., 6 F. (2d) 786 [rev on other grounds 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118]; Epstein v. U. S., 196 Fed. 354, 116 CCA 174 [certiorari den 223 U. S. 731 mem, 32 SCt 527 mem, 56 L. ed. 634 mem].

[a] **Thus** (1) it includes perjury committed in bankruptcy proceedings (Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118; Epstein v. U. S., 196 Fed. 354, 116 CCA 174 [certiorari den 223 U. S. 731 mem, 32 SCt 527 mem, 56 L. ed. 634 mem]); (2) and in an affidavit by an entryman on public lands (Nickell v. U. S., 161 Fed. 702, 88 CCA 562, 167 Fed. 741, 93 CCA 229 [certiorari den 214 U. S. 517 mem, 29 SCt 699 mem, 53 L. ed. 1064 mem]; Babcock v. U. S., 34 Fed. 873; U. S. v. Thompson, 31 Fed. 331, 12 Sawy. 438).

99. Henderson v. Com., 91 SW 1141, 28 KyL 1212.

1. See infra § 193.

2. See infra § 194.

3. McClelland v. Peo., 49 Colo. 538, 113 P 640, 32 LRANS 1069; State v. Chambers, 180 N. C. 705, 104 SE 670; U. S. v. Morandarte, 23 Philippine 358.

4. U. S.—Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118; Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem, and quot Cyc]; Epstein v. U. S., 196 Fed. 354, 116 CCA 174 [certiorari den 223 U. S. 731 mem, 32 SCt 527 mem, 56 L. ed. 634 mem]; U. S. v. Evans, 19 Fed. 912.

Ark.—Thomas v. State, 149 Ark. 68, 231 SW 200.

Cal.—Peo. v. Ross, 103 Cal. 425, 37 P 379.

Colo.—McClelland v. Peo., 49 Colo. 538, 113 P 640, 32 LRANS 1069.

Del.—State v. Fahey, 19 Del. 594, 54 A 690.

Ga.—Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145 (recognizing rule); Garrett v. State, 18 Ga. A. 360, 89 SE 380; Bell v. State, 5 Ga. A. 701, 63 SE 860.

Ind.—State v. Trook, 172 Ind. 558, 88 NE 930; Smith v. State, 125 Ind. 440, 23 NE 598.

Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.

Kan.—State v. Geer, 46 Kan. 529, 26 P 1027.

La.—State v. Wymberly, 40 La. Ann. 460, 4 S 161.

Minn.—State v. Renswick, 85 Minn. 19, 88 NW 22.

Miss.—Smith v. State, 107 Miss. 404, 65 S 642.

Mo.—State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.

N. Y.—Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 Ann Cas 1175; Elkin v. Peo., 28 N. Y. 177; Peo. v. Berkowitz, 121 Misc. 40, 200 NYS 823 (recognizing rule).

N. C.—State v. Chambers, 180 N. C. 705, 104 SE 670.

Oh.—State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403.

Philippine.—U. S. v. Laserna, 21 Philippine 168; U. S. v. Ballena, 18 Philippine 382.

Porto Rico.—Peo. v. Colon, 10 Porto Rico 197.

Va.—Maybush v. Com., 29 Gratt. (70 Va.) 857.

5. Williamson v. U. S., 207 U. S. 425, 28 SCt 163, 52 L. ed. 278; Dwyer v. U. S., 170 Fed. 160, 95 CCA 416; Robnett v. U. S., 169 Fed. 778, 95 CCA 244.

[a] **In respect to certain statements in proceedings before the land office,** it has been held that an oath was not and could not be required. Williamson v. U. S., 207 U. S. 425, 28 SCt 163, 52 L. ed. 278; Dwyer v. U. S., 170 Fed. 160, 95 CCA 416; Robnett v. U. S., 169 Fed. 778, 95 CCA 244. Compare U. S. v. Brace, 149 Fed. 869 (where proof under oath as to certain matters involved on final hearing as to entry on public lands was held to be authorized by regulation of the land office).

6. Garrett v. State, 18 Ga. A. 360, 89 SE 380; State v. Wykert, 198 Iowa 1219, 199 NW 331.

7. State v. Wymberly, 40 La. Ann. 460, 4 S 161; Elkin v. Peo., 28 N. Y. 177.

8. State v. Wymberly, 40 La. Ann. 460, 4 S 161; Elkin v. Peo., 28 N. Y. 177.

9. State v. Wykert, 198 Iowa 1219, 199 NW 331; State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403; U. S. v. Ballena, 18 Philippine 382.

10. Colo.—McClelland v. Peo., 49 Colo. 538, 113 P 640, 32 LRANS 1069.

Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.

Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510; State v. Geer, 46 Kan. 529, 26 P 1027.

N. Y.—Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175.

Philippine.—U. S. v. Ballena, 18 Philippine 382.

Porto Rico.—Peo. v. Colon, 10 Porto Rico 197.

11. U. S.—Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118; Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem, and quot Cyc]; U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39.

Del.—State v. Fahey, 19 Del. 594, 54 A 690.

Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.

Miss.—Smith v. State, 107 Miss. 404, 65 S 642.

N. C.—State v. Chambers, 180 N. C. 705, 104 SE 670.

Philippine.—U. S. v. Ballena, 18 Philippine 382.

12. U. S. v. Evans, 19 Fed. 912; State v. Wilhelm, 148 Kan. 349, 219 P 510.

13. U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39; State v Fahey, 19 Del. 594, 54 A 690; State v. Wykert, 198 Iowa 1219, 199 NW 331; State v Chambers, 180 N. C. 705, 104 SE 670.

14. U. S.—U. S. v. Evans, 19 Fed. 912; U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39.

Ark.—Thomas v. State, 149 Ark. 68, 231 SW 200.

Cal.—Peo. v. Ross, 103 Cal. 425, 37 P 379.

Del.—State v. Fahey, 19 Del. 594, 54 A 690.

Miss.—Smith v. State, 107 Miss. 404, 65 S 642.

N. C.—State v. Chambers, 180 N. C. 705, 104 SE 670.

15. See cases infra this note.

[a] **Authority to administer oath.**—Authority shown. Com. v. Smith, 11 Allen (Mass.) 243; Com. v. Frank, 7 Pa. Dist. 143, 21 Pa. Co. 120.

[b] **Due administration of oath.**—Oath duly administered. State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403; State v. Jewett, 48 Or. 577, 85 P 994.

[c] **Due subscription of affidavit.**—Affidavit duly subscribed. Nurnberger v. U. S., 156 Fed. 721, 84 CCA 377.

[d] **Materiality of false statement.**—(1) Statement material. Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192; Ex p. Sheldon, 44 Nev. 268, 193 P 967. See State v. Kemp, 154 La. 353, 97 S 475 (per Land, J.) (to the effect that subornation of perjury may be predicated on a false affidavit made by a juror for use on a motion for a new trial to impeach his verdict, although he was not a competent witness for that purpose). (2) Statement not material. McClelland v. Peo., 49 Colo. 538, 113 P 640, 32 LRANS 1069.

[e] **Matter one as to which perjury could be committed.**—Rex v. Castiglione, 106 L. T. Rep. N. S. 1023.

16. U. S.—Boren v. U. S., 144 Fed. 801, 75 CCA 531; U. S. v. Evans, 19 Fed. 912; U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39.

Del.—State v. Fahey, 19 Del. 594, 54 A 690.

Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.

Miss.—Smith v. State, 107 Miss. 404, 65 S 642.

N. C.—State v. Chambers, 180 N. C. 705, 104 SE 670.

Oh.—Stewart v. State, 22 Oh. St. 477.

17. U. S.—Boren v. U. S., 144 Fed. 801, 75 CCA 531; U. S. v. Evans, 19 Fed. 912; U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39.

Del.—State v. Fahey, 19 Del. 594, 54 A 690.

Ind.—State v. Trook, 172 Ind. 558, 88 NE 930.

Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.

with knowledge of falsity;[18] and that he should have knowingly[19] and willfully[20] induced or procured the witness to give such false testimony.[21]

Knowledge as to pendency of proceeding and prospective calling of witness. It has been held that it is not necessary that accused should have known that a proceeding was pending,[22] or that the subborned witness was to be called as a witness.[23]

Means of procurement. A person is guilty of subornation where he procures another by threats to commit perjury and the other elements of subornation are present.[24]

Presence of accused. It is not necessary that accused should have been present when the false statement was made in order that he may be guilty of subornation.[25]

[§ 195] **e. Persons Liable.**[26] Under a general statutory provision making all persons who aid or assist in the commission of a crime principals,[27] one who aids or assists another in procuring the commission of perjury is chargeable as a principal in respect of the offense of subornation.[28] According to some cases, one who acts through a third person in inducing the commission of the offense of perjury may be guilty of subornation.[29]

[§ 196] **2. Attempts To Suborn and Incitement To Commit Perjury**[30]**—a. In General.** An attempt to commit subornation of perjury consists in attempting or endeavoring to induce another to do an act which, if committed, would itself amount to perjury.[31] While there is authority for the view that an attempt to suborn perjury is not the name of an offense,[32] in the absence of a statutory provision therefor,[33] the view has been expressed that an attempt or endeavor to procure the commission of perjury[34] or incitement to perjury[35] is an offense at common law, although perjury was not in fact committed. In some jurisdictions statutes provide for the punishment of anyone who attempts or endeavors to procure another to commit perjury.[36]

Felony or misdemeanor. At common law an attempt to suborn was a misdemeanor,[37] and a statute which makes offenses, not especially provided for, misdemeanors has been applied to this offense.[38] Under some special statutes the offense is a misdemeanor,[39] but in some jurisdictions the statutory offense of endeavoring to incite or procure the commission of perjury is a felony.[40]

Distinctions. The statutory offense of attempting to induce the giving of false testimony has been distinguished from the offense of attempting to procure the commission of perjury, in that the former offense may be committed even though the giving of the testimony would not constitute perjury.[41] Incitement to give false evidence or to give particular evidence regardless of its truth or falsity has been distinguished from an attempt to commit the offense of subornation of perjury.[42]

The entrapment of accused has been regarded as sufficient to relieve him from liability for an attempt to suborn.[43]

[§ 197] **b. Elements of Offense.** The attempt to

Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510.
Mass.—Com. v. Douglass, 5 Metc. 241.
N. C.—State v. Chambers, 180 N. C. 705, 104 SE 670.
Oh.—Stewart v. State, 22 Oh. St. 477.

18. U. S.—U. S. v. Evans, 19 Fed. 912.
Cal.—Peo. v. Ross, 103 Cal. 425, 37 P 379.
Ill.—Coyne v. Peo., 124 Ill. 17, 14 NE 668, 7 AmSR 324.
Ind.—State v. Trook, 172 Ind. 558, 88 NE 930.
Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510.
Mass.—Com. v. Douglass, 5 Metc. 241.
Oh.—Stewart v. State, 22 Oh. St. 477.

19. U. S. v. Ballena, 18 Philippine 382.

20. State v. Renswick, 85 Minn. 19, 88 NW 22; U. S. v. Ballena, 18 Philippine 382.

21. U. S.—Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem, and quot Cyc].
Del.—State v. Fahey, 19 Del. 594, 54 A 690.
Ga.—Bell v. State, 5 Ga. A. 701, 63 SE 860.
Ind.—State v. Trook, 172 Ind. 558, 88 NE 930; Smith v. State, 125 Ind. 440, 25 NE 598.
Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.
Mass.—Com. v. Douglass, 5 Metc. 241.
Minn.—State v. Renswick, 85 Minn. 19, 88 NW 22.
Mo.—State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.
N. Y.—Peo. v. Nichols, 108 App. Div. 362, 95 NYS 736.
N. C.—State v. Chambers, 180 N. C. 705, 104 SE 670.
Philippine.—U. S. v. Ballena, 18 Philippine 382.

22. State v. Magyar, 96 N. J. L. 9, 114 A 252.
[a] **Particular proceeding involved.**—Where accused acted as attorney for the husband of a witness who, it was charged, was suborned to testify falsely at a preliminary hearing before a United States commissioner, based on a charge against the husband, it was no objection to accused's conviction that the witness had not been arrested when accused was charged with having committed the crime, or that such witness did not know that she would be arrested, where it appeared that accused's advice to the witness had reference to the examination of the husband. Cohen v. U. S., 214 Fed. 23, 130 CCA 417 [certiorari den 235 U. S. 696 mem, 35 SCt 199 mem, 59 L. ed. 430 mem].

23. State v. Magyar, 96 N. J. L. 9, 114 A 252.
"The mere fact that a person having knowledge of material facts bearing upon an investigation pending before the grand jury has not been subpœnaed as a witness, and may perhaps not be called, is immaterial." State v. Magyar, supra.

24. State v. Geer, 48 Kan. 752, 30 P 236; State v. Chambers, 180 N. C. 705, 104 SE 670.

25. Babcock v. U. S., 34 Fed. 873. See Walker v. State, 18 Oh. Cir. Ct. N. S. 1 (a person could be guilty of aiding and abetting perjury, although not personally present when the perjury was committed).

26. Nature of offense see supra § 190.

27. See Criminal Law § 103.

28. State v. Wykert, 198 Iowa 1219, 199 NW 331.

29. Com. v. Smith, 11 Allen (Mass.) 243.

30. Indictment see infra § 201.

31. Nicholson v. State, 97 Ga. 672, 25 SE 360.
Elements of offense see infra § 197.

32. Peo. v. Thomas, 63 Cal. 482.

33. State v. Stutzner, 153 La. 233, 95 S 701. See U. S. v. Laserna, 21 Philippine 168 (where, under a charge for subornation, it was held that accused was not guilty, as perjury had not been committed and the language used indicated that an attempt was not punishable).
[a] **Effect of statute as to perjury and subornation.**—Under a statute making it a felony to commit perjury or to procure the commission of perjury, it is not a criminal offense to attempt to procure a person to commit perjury. State v. Stutzner, 153 La. 233, 95 S 701.

34. State v. Johnson, 26 Del. 472, 84 A 1040; State v. Shaffner, 22 Del. 576, 69 A 1004; State v. Holding, 12 S. C. L. 31; Reg. v. Clement, 26 U. C. Q. B. (Ont.) 297. See Rex v. Higgins, 2 East 5, 17, 102 Reprint 269 (apparently recognizing rule); Rex v. Johnson, 2 Show. 1, 89 Reprint 753 (where a conviction was upheld).

35. Bacon Abr. Perjury.

36. See statutory provisions.
[a] **Statute construed.**—(1) The words "cause, matter or proceeding," as used to designate the matter in which the perjury might be committed, have been construed as broad enough to include the examination and justification of persons offering themselves as bail in criminal or other cases. Stratton v. Peo., 20 Hun 288 [aff 81 N. Y. 629 mem]. (2) The word "witness," as used in such a statute, has been construed as including all persons who could be properly examined on oath upon any inquiry or investigation. Stratton v. Peo., supra.
[b] **Attempt to suborn perjury and attempt to suborn false swearing** discussed and distinguished. See Shipp v. State, 81 Tex. Cr. 328, 196 SW 840.

37. Peo. v. Clement, 127 Mich. 130, 86 NW 535.

38. State v. Shaffner, 22 Del. 576, 69 A 1004.

39. See statutory provisions.

40. Peo. v. Clement, 127 Mich. 130, 86 NW 535.

41. Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175; Peo. v. Berkowitz, 121 Misc. 40, 200 NYS 823.

42. Rex v. Cole, 3 Ont. L. 389, 1 OntWR 117, 5 CanCrCas 330, 22 CanLTOccNotes 132.
Falsification of evidence as offense in general see Obstructing Justice § 28.

43. Com. v. Bickings, 28 Pa. Co. 271.
Entrapment in general see Criminal

suborn must have reference to such an act as would have been perjury if successful,[44] and this is the rule under some statutory provisions defining the crime of endeavoring to incite or procure the commission of perjury;[45] a mere general attempt to induce another to swear falsely is not sufficient.[46] However, under some statutes, it has been held that the offense may be committed even though an element of the offense of perjury would not have been present.[47]

Pending proceeding. Under a statute making it an offense for a person to attempt to procure or entice another to commit perjury in any cause, matter, or proceeding, it has been held that the pendency of a proceeding is an element of the offense,[48] and under other statutes an endeavor or attempt to procure another to commit perjury in some proceeding, if the proceeding should be commenced sometime in the future, is not sufficient.[49]

[§ 198] **B. Prosecution—1. Indictments and Informations—a. Subornation—(1) In General.** General rules[50] apply to an indictment or information for subornation of perjury.[51] Statutes regulating indictments and informations for subornation of perjury, similar to those applicable to indictments and informations for perjury,[52] have been enacted in some jurisdictions,[53] and under such statutes and the modern rules of practice the tendency is to uphold an indictment or information in respect of the averments as to the elements of the crime if such averments are such as will inform accused of the charge which he is expected to meet.[54]

Joinder with charge of perjury. A charge of subornation against the suborner and a charge of perjury against the person suborned may be joined in the same indictment.[55]

[§ 199] **(2) Averment as to Perjury.** In general the indictment or information should contain the averments required in an indictment or information for perjury,[56] including averments of the essential elements of perjury.[57] In applying this rule it has been held or stated that the indictment or information should set forth, show, or describe the fact that the oath was in relation to a matter as to which an oath was required;[58] the proceeding or matter in which, or in connection with which, the alleged perjury was committed;[59] the pendency of such proceeding;[60] the jurisdiction of the proceeding or matter;[61] the court,[62] or officer,[63] in which, or before whom, the false oath was taken; the due administration of the oath;[64] the materiality[65] and the falsity[66] of the testimony or assertion; and that

Law § 57.

44. State v. Johnson, 26 Del. 472, 84 A 1040; State v. Shaffner, 22 Del. 576, 69 A 1004; Nicholson v. State, 97 Ga. 672, 25 SE 360; Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175. See Peo. v. Thomas, 63 Cal. 482 (where, in addition to an assertion that there was no offense denominated "attempting to suborn perjury," the court pointed out that there was nothing to indicate that subornation of perjury would have resulted if the alleged attempt had been successful).

[a] **Want of materiality of testimony.**—(1) A person cannot be convicted of an attempt to suborn perjury, where he has attempted to induce another to testify falsely as to a matter which was entirely immaterial to the issue in the case as then set forth in the complaint. Peo. v. Teal, 196 N. Y. 372, 89 NE 1086, 25 LRANS 120, 17 AnnCas 1175. (2) The fact that the testimony might have been material if the complaint had been amended does not affect the situation. Peo. v. Teal, supra.

45. Coyne v. Peo., 124 Ill. 17, 14 NE 668, 7 AmSR 324; State v. Waddle, 100 Iowa 57, 69 NW 279.

[a] **Witness' knowledge of falsity.**—It must appear that the person approached knew that what he was asked to swear to was false. Coyne v. Peo., 124 Ill. 17, 14 NE 668, 7 AmSR 324.

[b] **Materiality shown.**—In proceedings to disbar an attorney for drawing a spurious check and delivering it to a bank to obtain fictitious credit to cover up his wrong, evidence bearing on the claim that the attorney had turned over the check to a third person for investigation would have been material. Peo. v. Brown, 254 Ill. 260, 98 NE 535.

46. State v. Johnson, 26 Del. 472, 84 A 1040; Nicholson v. State, 97 Ga. 672, 25 SE 360.

[a] **Attempt must have reference to swearing falsely in a particular case.**—State v. Johnson, 26 Del. 472, 84 A 1040.

47. Peo. v. Clement, 127 Mich. 130, 86 NW 535.

[a] **Witness' knowledge of falsity.**—The fact that the witness did not know that the testimony would be false is not material. Peo. v. Clement, 127 Mich. 130, 86 NW 535.

48. State v. Howard, 137 Mo. 289, 38 SW 908.

[a] **A proceeding is not pending** where a person is under recognizance for appearance in case he should be indicted for an offense. State v. Howard, 137 Mo. 289, 38 SW 908.

49. State v. Joaquin, 69 Me. 218.

50. See Indictments and Informations 31 C. J. p 548.

51. See cases passim this section.

[a] **Indictment held sufficient.**—Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118; Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem]; U. S. v. Brace, 149 Fed. 869; Boren v. U. S., 144 Fed. 801, 75 CCA 531; Babcock v. U. S., 34 Fed. 873; Winchester v. State, 20 Ala. A. 431, 102 S 595; Peo. v. Carpenter, 136 Cal. 391, 68 P 1027; Herring v. State, 119 Ga. 709, 46 SE 876; Com. v. Devine, 155 Mass. 224, 29 NE 515; State v. White, (Mo.) 263 SW 192; Dilcher v. State, 39 Oh. St. 130; State v. Jewett, 48 Or. 577, 85 P 994. See Nurnberger v. U. S., 156 Fed. 721, 84 CCA 377 (no substantial defect).

[b] **Indictment held insufficient.**—Smith v. State, 125 Ind. 440, 25 NE 598; Peo. v. Colon, 10 Porto Rico 197.

52. See supra § 104.

53. See statutory provisions.

54. Cohen v. U. S., 214 Fed. 23, 130 CCA 417 [certiorari den 235 U. S. 696 mem, 35 SCt 199 mem, 59 L. ed. 430 mem]; Herring v. State, 119 Ga. 709, 46 SE 876; State v. Smith, 153 Minn. 167, 190 NW 48; State v. Jewett, 48 Or. 577, 85 P 994.

55. Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118; Com. v. Devine, 155 Mass. 224, 29 NE 515; State v. Lea, 1 Coldw. (Tenn.) 175.

Joinder of parties in general see Indictments and Informations §§ 312–319.

56. See cases infra notes 57–69.

57. U. S.—U. S. v. Howard, 132 Fed. 325.

Ala.—Winchester v. State, 20 Ala. A. 431, 432, 102 S 595 [cit Cyc].

Ark.—Davis v. State, 131 Ark. 542, 199 SW 902.

Cal.—Peo. v. Ross, 103 Cal. 425, 37 P 379.

Dak.—U. S. v. Robinson, 4 Dak. 72, 23 NW 90.

Ill.—Peo. v. Brown, 254 Ill. 260, 98 NE 535.

Ind.—Smith v. State, 125 Ind. 440, 25 NE 598.

Kan.—State v. Geer, 46 Kan. 529, 26 P 1027.

La.—State v. Kemp, 154 La. 353, 97 S 475.

Mass.—Com. v. Smith, 11 Allen 243.

Minn.—State v. Smith, 153 Minn. 167, 190 NW 48.

Mo.—State v. Stegall, 300 SW 714.

Nev.—Ex p. Sheldon, 44 Nev. 268, 193 P 967.

N. Y.—Elkin v. Peo., 28 N. Y. 177.

Okl.—Thomas v. State, (Cr.) 253 P 514.

Or.—State v. Jewett, 48 Or. 577, 85 P 994.

Pa.—Com. v. Frank, 7 Pa. Dist. 143, 21 Pa. Co. 120.

Porto Rico.—Peo. v. Colon, 10 Porto Rico 197.

Tex.—Miller v. State, 43 Tex. Cr. 367, 65 SW 908.

Vt.—State v. Simons, 30 Vt. 620.

Wis.—Thompson v. State, 89 Wis. 253, 61 NW 565.

See also cases infra passim notes 58–69.

58. State v. Trook, 172 Ind. 558, 88 NE 930.

59. U. S. v. Robinson, 4 Dak. 72, 23 NW 90; Smith v. State, 125 Ind. 440, 25 NE 598; Thompson v. State, 89 Wis. 253, 61 NW 565.

60. State v. Simons, 30 Vt. 620.

61. Thomas v. State, (Okl. Cr.) 253 P 514.

62. U. S. v. Howard, 132 Fed. 325; Peo. v. Carpenter, 136 Cal. 391, 68 P 1027.

[a] **Averments held insufficient.**—Where the caption and commencement show the court in which the indictment was found, further averments with reference to the proceedings in which the alleged perjury was committed, reciting them to have been in "said court," are not sufficient. U. S. v. Howard, 132 Fed. 325.

63. U. S. v. Cobban, 134 Fed. 290; Babcock v. U. S., 34 Fed. 873.

64. U. S. v. Howard, 132 Fed. 325; State v. Jewett, 48 Or. 577, 85 P 994.

65. U. S.—U. S. v. Howard, 132 Fed. 325.

Cal.—Peo. v. Ross, 103 Cal. 425, 37 P 379.

Kan.—State v. Geer, 46 Kan. 529, 26 P 1027.

Porto Rico.—Peo. v. Colon, 10 Porto Rico 197.

Tex.—Miller v. State, 43 Tex. Cr. 367, 65 SW 908.

66. U. S. v. Howard, 132 Fed. 325; U. S. v. Evans, 19 Fed. 912; Winchester v. State, 20 Ala. A. 431, 102 S 595. See State v. Kemp, 154 La. 353, 97 S 475 (per Land, J.).

the person who committed the perjury did knowingly[67] and willfully[68] swear or testify falsely.[69]

Sufficiency of averments. A charge for subornation is governed by the rules applicable to indictments and informations for perjury[70] in determining the sufficiency of the various averments as to the perjury.[71] Thus under modern rules of procedure matters of inducement may be pleaded in general terms,[72] and in general the averments as to the perjury are sufficient if they are in such form and in such definite and specific language as would be sufficient in an indictment for perjury.[73] The indictment need not specify the statutory provision under which the person who swore falsely was guilty of perjury.[74]

[§ 200] **(3) Averment as to Acts and Intent of Suborner.** It should be averred that accused procured another to commit perjury;[75] that accused knew that the testimony of the witness would be false,[76] and that accused knew that the witness knew such testimony was false;[77] and that accused knew that the witness would corruptly and willfully give the testimony.[78] It has been held, however, that the failure expressly to charge that accused knew that the witness would swear falsely does not render the indictment insufficient where equivalent words are used,[79] and that failure specifically to allege that the person who swore falsely knew when he was suborned, or, when he gave his testimony, that he was committing the crime of perjury does not render the indictment insufficient.[80]

Means of procurement. The view has been taken that it is not necessary to set forth the means of procuring or inducing the perjury,[81] but the recital of the means does not render the indictment bad.[82]

[§ 201] **b. Attempts To Suborn and Incitement To Commit Perjury.** While it has been held that the indictment need not particularly specify the matter to which accused attempted to procure a witness to swear,[83] according to some cases it must appear that the false swearing would have amounted to perjury;[84] and there is authority for the view that a charge based on an alleged offer of money to induce a person to commit perjury should be as specific, definite, and certain as an indictment for perjury.[85] But it has been held that a charge, under a statute making an endeavor to suborn perjury a crime, is sufficient if laid in the words of the statute,[86] and it is not necessary to aver that the prospective witness had knowledge that the testimony which it was sought to procure was false.[87] In general an indictment containing averments showing that perjury would have been committed if the attempt had been successful and also that the case is within the statutes in respect of endeavors or attempts to suborn is sufficient.[88] So under some statutes the charge is sufficient where the offense is set out with such certainty that a conviction or acquittal under it could be successfully pleaded in bar of another prosecution for the same offense.[89]

Pending proceeding. Under the wording of some statutes the charge must show that the proceeding in which the perjury was to be committed was pending,[90] and an indictment for an attempt or endeavor to incite another to commit perjury is insufficient where it shows that perjury was to be committed in

67. U. S. v. Evans, 19 Fed. 912; U. S. v. Wilcox, 28 F. Cas. No. 16,693, 4 Blatchf. 393; Peo. v. Ross, 103 Cal. 425, 37 P 379.

68. Peo. v. Ross, supra.

[a] **In the federal courts** (1) the rule as to a showing of "willfulness" has been asserted. U. S. v. Howard, 132 Fed. 325; U. S. v. Wilcox, 28 F. Cas. No. 16,693, 4 Blatchf. 393. (2) But it has been held that the omission of the word "willfully" is not fatal in view of the provision of USCA tit 18 § 556 and the averment in the subornation clause that the oath had been "willful." Link v. U. S., 2 F. (2d) 709.

69. State v. Leach, 27 Vt. 317.

70. See supra §§ 103-137.

71. U. S. v. Howard, 132 Fed. 325; Thomas v. State, (Okl. Cr.) 253 P 514.

[a] **Materiality.**—An indictment for subornation must show that the testimony was material, either by the averment in terms that it was material, or by stating facts showing its materiality. U. S. v. Howard, 132 Fed. 325.

72. Thomas v. State, (Okl. Cr.) 267 P 1040.

73. See cases infra this note.

[a] **Indictment or information held sufficient or not fatally defective** in respect of: (1) Administration of oath. Peo. v. Carpenter, 136 Cal. 391, 68 P 1027; State v. Smith, 153 Minn. 167, 190 NW 48; State v. Jewett, 48 Or. 577, 85 P 994. (2) Authority of officer to administer oath. Nurnberger v. U. S., 156 U. S. 721, 84 CCA 377; Com. v. Smith, 11 Allen (Mass.) 243. (3) Description or identity of court or tribunal. Peo. v. Carpenter, supra; State v. Jewett, supra. (4) Description or subject matter of proceeding. Hendricks v. U. S., 223 U. S. 178, 32 SCt 313, 56 L. ed. 394; Cohen v. U. S., 214 Fed. 23, 130 CCA 417 [certiorari den 235 U. S. 696 mem, 35 SCt 199 mem, 59 L. ed. 430 mem]; Peo. v. Carpenter, supra. See also State v. Smith, 153 Minn. 167, 190 NW 48. (5) Falsity. Davis v. State, 131 Ark. 542, 199 SW 902; Com. v. Devine, 155 Mass. 224, 29 NE 515; Ex p. Sheldon, 44 Nev. 268, 193 P 967. (6) Jurisdiction of court or other tribunal. Nurnberger v. U. S., 156 Fed. 721, 84 CCA 377; Davis v. State, supra; Peo. v. Carpenter, 136 Cal. 391, 68 P 1027; State v. Stegall, (Mo.) 300 SW 714; State v. Jewett, 48 Or. 577, 85 P 994. (7) Knowledge of falsity. Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem]; U. S. v. Cobban, 134 Fed. 290; State v. Jewett, supra. (8) Materiality. Hendricks v. U. S., 223 U. S. 178, 32 SCt 313, 56 L. ed. 394; Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192; Peo. v. Brown, 254 Ill. 260, 98 NE 535; State v. Stegall, (Mo.) 300 SW 714; Ex p. Sheldon, 44 Nev. 268, 193 P 967; Thomas v. State, (Okl. Cr.) 253 P 514. (9) Pendency of proceeding. Com. v. Frank, 7 Pa. Dist. 143, 21 Pa. Co. 120. (10) Setting forth false testimony or matter. Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem].

74. Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118.

75. U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39; Smith v. State, 125 Ind. 440, 25 NE 598.

[a] **Averments held sufficient.**—State v. Geer, 48 Kan. 752, 30 P 236; Com. v. Devine, 155 Mass. 224, 29 NE 515.

76. U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39.

[a] **Averments held sufficient.**—State v. Jewett, 48 Or. 577, 85 P 994.

77. U. S.—U. S. v. Evans, 19 Fed. 912; U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39.

Cal.—Peo. v. Ross, 103 Cal. 425, 37 P 379.

Ind.—State v. Trook, 172 Ind. 558, 88 NE 930.

La.—State v. Williams, 111 La. 1033, 36 S 111.

Oh.—Stewart v. State, 22 Oh. St. 477.

[a] **Averments held sufficient.**—U. S. v. Cobban, 134 Fed. 290; U. S. v. Thompson, 31 Fed. 331, 12 Sawy. 438; Walker v. State, 18 Oh. Cir. Ct. N. S. 1; State v. Jewett, 48 Or. 577, 85 P 994.

78. U. S. v. Dennee, 25 F. Cas. No. 14,947, 3 Woods 39.

79. State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.

80. Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem].

81. State v. Porter, 105 Iowa 677, 75 NW 519. See Walker v. State, 18 Oh. Cir. Ct. N. S. 1 (a like rule has been applied in a prosecution of one aiding, abetting, and procuring another to commit perjury, as principal in the offense of perjury).

82. State v. Cox, 136 La. 1008, 68 S 107.

83. State v. Holding, 12 S. C. L. 31.

84. Nicholson v. State, 97 Ga. 672, 25 SE 360; State v. Booker, 84 Miss. 187, 36 S 241; State v. Tappan, 58 N. H. 152. See Peo. v. Thomas, 63 Cal. 482 (where, in addition to other reasons, the information was insufficient for failure to show that perjury would have been committed if the attempt had been successful).

[a] **Hence materiality of the testimony** (1) should be shown. State v. Booker, 84 Miss. 187, 36 S 241; State v. Tappan, 58 N. H. 152. (2) Allegations showing only that the testimony probably was material are insufficient. State v. Tappan, supra.

85. Rivers v. State, 97 Ala. 72, 12 S 434.

86. Peo. v. Clement, 127 Mich. 130, 86 NW 535.

87. Peo. v. Clement, supra.

88. Peo. v. Brown, 254 Ill. 260, 98 NE 535.

[a] **Averments held sufficient.**—Stratton v. Peo., 81 N. Y. 629 mem [aff 20 Hun 288]; Peo. v. Bloom, 149 App. Div. 295, 133 NYS 708, 27 N. Y. Cr. 97.

89. See statutory provisions.

[a] **Indictment held sufficient.**—Watson v. State, 5 Tex. A. 11.

90. State v. Howard, 137 Mo. 289, 38 SW 908. Compare Peo. v. Berkowitz, 121 Misc. 40, 200 NYS 823 (where the statute considered made

an action if such action should be brought.[91]

[§ 202] **2. Issues, Proof, and Variance.**[92] In a prosecution for subornation, the essential elements of the crime of perjury must be proved,[93] as well as the fact that accused procured or induced the commission of perjury with the requisite knowledge and intent.[94] In a prosecution for an attempt to suborn, according to some cases, the proof must show that the attempt had reference to some particular and specified judicial proceeding.[95] Where an indictment for an attempt to induce a person, who had already given testimony on the trial of a certain case, to give a false affidavit repudiating such testimony, alleged that such testimony was true, it was held that it was necessary to prove the truth of such testimony.[96]

Matter sworn to. In a prosecution for subornation, the matter sworn to must be substantially proved as alleged.[97]

Means. Where an indictment for subornation alleges more than one way in which accused tried to induce the commission of perjury, it is sufficient to prove only one of such means.[98] According to some cases a descriptive averment as to the means used, although unnecessary, must be proved as alleged in a prosecution either for subornation[99] or for an attempt to suborn.[1]

Variance. While it has been held in a prosecution for subornation that a variance as to matters not constituting the essence of the offense is not fatal,[2] a variance as to certain descriptive matter has been regarded as fatal, although it was not necessary to allege such matter.[3]

[§ 203] **3. Evidence—a. Presumptions and Burden of Proof.**[4] The general rule that a person charged with crime is presumed innocent[5] applies in a prosecution for subornation.[6] The burden of proof, under the general rule,[7] is on the state to establish the guilt of accused,[8] that is, to establish all the essential elements of the offense of subornation.[9]

[§ 204] **b. Admissibility.** General rules[10] govern the admissibility of evidence in prosecutions for subornation of perjury.[11] Also accused may introduce any competent evidence in rebuttal of the charge of subornation or attempt to procure false testimony.[12]

[§ 205] **c. Weight and Sufficiency—(1) In General.** General rules[13] apply as to the weight and sufficiency of evidence in prosecutions for subornation of perjury.[14]

Proof beyond reasonable doubt. As in criminal

no reference to a proceeding).

91. State v. Joaquin, 69 Me. 218.

92. Evidence:
Admissibility see infra § 204.
Sufficiency see infra § 205.

93. U. S.—Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118.
Colo.—McClelland v. Peo., 49 Colo. 538, 113 P 640, 32 LRANS 1069.
Ga.—Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145 (recognizing rule).
Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.
Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510.
Mo.—State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.
Philippine.—U. S. v. Ballena, 18 Philippine 382.
Va.—Maybush v. Com., 29 Gratt. (70 Va.) 857.

[a] **Materiality of testimony or assertion.**—McClelland v. Peo., 49 Colo. 538, 113 P 640, 32 LRANS 1069.

[b] **Witnesses' knowledge of falsity.**—State v. Wilhelm, 114 Kan. 349, 219 P 510.

94. Ga.—Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145 (recognizing rule); Bell v. State, 5 Ga. A. 701, 63 SE 860.
Iowa.—State v. Wykert, 198 Iowa 1219, 199 NW 331.
Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510.
Mo.—State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.
Oh.—Stewart v. State, 22 Oh. St. 477.

[a] **Accused's knowledge that witness knew that testimony would be false.**—State v. Wilhelm, 114 Kan. 349, 219 P 510.

95. Nicholson v. State, 97 Ga. 672, 25 SE 360.

96. Shipp v. State, 81 Tex. Cr. 328, 196 SW 840.

97. Harris v. State, 103 Miss. 739, 60 S 769; Peo. v. Frank, 128 App. Div. 99, 112 NYS 515.

98. Skinner v. State, 98 Tex. Cr. 424, 265 SW 1037.

99. Miller v. State, 43 Tex. Cr. 367, 65 SW 908.

1. Watson v. State, 5 Tex. A. 11.

2. Henderson v. Com., 91 SW 1141, 28 KyL 1212.

[a] **Name of person suborned.**—Where a certain name was given in the indictment as that of a person suborned to commit perjury, and the name of another person was proved, the variance was held to be immaterial. Henderson v. Com., 91 SW 1141, 28 KyL 1212.

3. Com. v. Stone, 152 Mass. 498, 25 NE 967.

[a] **Residence of person suborned.**—Com. v. Stone, 152 Mass. 498, 25 NE 967.

4. What must be proved in general see supra § 202.

5. See Criminal Law § 1006.

6. State v. Fahey, 19 Del. 594, 54 A 690.

7. See Criminal Law § 993 et seq.

8. State v. Fahey, 19 Del. 594, 54 A 690. See Shipp v. State, 81 Tex. Cr. 328, 196 SW 840 (burden was on prosecution to establish truth of certain testimony where truth was alleged in indictment for attempt to suborn).

9. State v. Wilhelm, 114 Kan. 349, 219 P 510.

[a] **Thus it is necessary for the prosecution to prove that the witness testified falsely on a material point of inquiry, and that defendant knew that the witness whom he suborned would willfully testify to what he knew was false.** State v. Wilhelm, 114 Kan. 349, 219 P 510.

Elements of offense see supra §§ 192-194.

10. See Criminal Law § 1034 et seq.

Evidence of other offenses see Criminal Law § 1192.

11. See cases infra this note.

[a] **Evidence admissible to show:** (1) Knowledge of falsity. Solomon v. U. S., 297 Fed. 82 (knowledge of perjurer shown by prior contradictory affidavit); State v. Smith, 153 Minn. 167, 190 NW 48 (knowledge of accused shown by testimony of perjurer at former trials). (2) Materiality of perjured testimony. State v. Wykert, 198 Iowa 1219, 199 NW 331 (testimony of other witnesses in proceeding where perjury was committed). (3) Motive of accused. State v. Chambers, 180 N. C. 705, 104 SE 670 (circumstances of trial).

[b] **Receipt of letters by suborned witness from suborner.**—The suborned witness may testify to receiving letters from accused where such witness stated that accused afterward told her he sent the letters. State v. Lodico, 88 N. J. L. 394, 95 A 626.

[c] **Record of plea of guilty of perjury of witness suborned** is inadmissible in a prosecution of the person alleged to have procured the perjury. State v. Justesen, 35 Utah 105, 99 P 456.

12. See cases infra this note.

[a] **Absence of corrupt intent.**—On a trial for subornation of perjury in procuring homestead entrymen to make the required oath that the entry was not made for the benefit of any other person, when in fact they had agreed to convey the land to accused for a stipulated price as soon as they obtained title, accused may show that he made no such agreement was. Nurnberger v. U. S., 156 Fed. 721, 84 CCA 377.

[b] **Attempt to procure false affidavit.**—On a prosecution for an attempt to procure a false affidavit that affiant's former testimony was false, accused may introduce evidence to prove the falsity of the testimony. Shipp v. State, 81 Tex. Cr. 328, 196 SW 840.

13. See Criminal Law §§ 1559-1999.

14. See cases infra this note.

[a] **Evidence sufficient to show:** (1) That accused had a particular proceeding in mind. Cohen v. U. S. 214 Fed. 23, 130 CCA 417 [certiorari den 235 U. S. 696 mem, 35 SCt 199 mem, 59 L. ed. 430 mem]. (2) That accused willfully and corruptly procured perjury. State v. Wilhelm, 114 Kan. 349, 219 P 510. (3) Due administration of oath. Link v. U. S., 2 F. (2d) 709; State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403. (4) Official character of the person who administered the oath. Link v. U. S., supra.

[b] **Evidence sufficient to warrant or require submission to jury:** (1) Of the question as to whether the attempt was to induce a person to commit perjury. Stratton v. Peo., 20 Hun 288 [aff 81 N. Y. 629 mem]. (2) Where defendant is charged with subornation of perjury, testimony given at his trial, on behalf of the people, by the person whom he procured to testify falsely, must, if corroborated, be submitted to the jury. Peo. v. Van Tassel, 26 App. Div. 445, 50 NYS 53 [aff 156 N. Y. 561, 51 NE 274].

[c] **Evidence held sufficient to sustain conviction.**—Cohen v. U. S., 214 Fed. 23, 130 CCA 417 [certiorari den 235 U. S. 696 mem, 35 SCt 199 mem, 59 L. ed. 430 mem] (investigation before United States commissioner); Babcock v. U. S., 34 Fed. 873 (procuring false affidavits for entering land); Peo. v. Metzler, 21 Cal.

cases in general,[15] in order to convict the jury must be satisfied beyond a reasonable doubt of the guilt of accused.[16]

[§ 206] **(2) Number of Witnesses and Corroboration.**[17] While there are cases which hold that a conviction for subornation of perjury may be sustained upon the testimony of a single witness without corroboration as to the commission of the perjury,[18] according to the weight of authority in a prosecution for subornation, as in a prosecution for perjury,[19] the uncorroborated testimony of a single witness is not sufficient to establish the falsity of the matter alleged as perjury,[20] as for example where the witness is the person suborned.[21] But the procuration or inducement may be established by the uncorroborated evidence of a single witness,[22] who, according to some cases, may be the suborned witness,[23] although apparently there is authority for the view that the uncorroborated testimony of the suborned witness is not sufficient.[24] In any event the testimony of the suborned witness when duly corroborated may be sufficient to support a conviction.[25]

Attempt or endeavor to suborn. In a prosecution for the statutory offense of endeavoring to incite or procure the commission of perjury, it has been held that the falsity of the proposed statement may be established by one witness,[26] but there is authority for the view that, in a prosecution for an attempt to suborn false swearing, corroboration of the testimony of the person in respect of whom the attempt was made may be required under certain conditions.[27]

[§ 207] **4. Trial.** General rules in respect of the trial of criminal cases,[28] including rules as to instructions,[29] apply in prosecutions for subornation of perjury[30] and for attempts to suborn perjury.[31]

Verdict. The general rules as to the verdict in a criminal case[32] apply in a prosecution for subornation of perjury[33] or for an attempt or endeavor to induce the commission of perjury.[34]

[§ 208] **5. Punishment.** Rules as to punishment similar to those applicable to prosecutions for perjury[35] apply in prosecutions for subornation of perjury and for attempts or endeavors to procure the commission of perjury.[36] At the present time in many jurisdictions the matter is regulated by statute.[37]

[§ 209] **6. Prosecution of Perjurer as Affecting Liability of Suborner.** The suborner of perjury may

A. 80, 130 P 1192 (procurement of perjury in civil trial); Peo. v. Brown, 254 Ill. 260, 98 NE 535 (disbarment proceedings); State v. Wykert, 198 Iowa 1219, 199 NW 331 (subornation in trial for burglary); State v. Wilhelm, 114 Kan. 349, 219 P 510 (larceny of automobile); State v. Renswick, 85 Minn. 19, 88 NW 22 (bastardy proceedings); U. S. v. Pizarro, 27 Philippine 638 (in investigation of gambling); U. S. v. Morandarte, 23 Philippine 358 (for procuring false testimony on trial for larceny); Fenelon v. State, 195 Wis. 416, 217 NW 711, 218 NW 830 (probate of will).

[d] **Evidence held insufficient to sustain conviction.**—State v. Smith, 159 Minn. 511, 199 NW 427 (divorce proceedings). See Peo. v. Bloom, 149 App. Div. 295, 133 NYS 708, 27 N. Y. Cr. 97 (larceny).

15. See Criminal Law § 1590.

16. Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118; State v. Fahey, 19 Del. 594, 54 A 690; State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403.

[a] **Due administration of the oath** to the suborned witness must be shown beyond reasonable doubt. State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403.

[b] **Falsity** of the testimony or statement must be established beyond reasonable doubt. Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118.

17. Accomplices in prosecution for subornation see Criminal Law § 1391. **Corroboration of accomplice** see Criminal Law §§ 1423–1461.

18. State v. White, (Mo.) 263 SW 192; State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.

19. See supra §§ 167–175.

20. U. S.—Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118 [rev 6 F. (2d) 786 (aff 299 Fed. 1011)]; Cohen v. U. S., 27 F. (2d) 713.

Ga.—Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145; Bell v. State, 5 Ga. A. 701, 63 SE 860.

Mass.—Com. v. Douglass, 5 Metc. 241.

Minn.—State v. Smith, 153 Minn. 167, 190 NW 48; State v. Renswick, 85 Minn. 19, 88 NW 22.

Oh.—State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403.

21. Hammer v. U. S., 271 U. S. 620, 46 SCt 603, 70 L. ed. 1118; State v. Fahey, 19 Del. 594, 54 A 690; Peo. v. Evans, 40 N. Y. 1; and cases supra note 20.

22. U. S.—Cohen v. U. S., 27 F. (2d) 713; Boren v. U. S., 144 Fed. 801, 75 CCA 531; U. S. v. Thompson, 31 Fed. 331, 12 Sawy. 438.

Ga.—Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145; Bell v. State, 5 Ga. A. 701, 63 SE 860.

Kan.—State v. Wilhelm, 114 Kan. 349, 219 P 510.

Mass.—Com. v. Douglass, 5 Metc. 241.

Minn.—State v. Smith, 153 Minn. 167, 190 NW 48; State v. Renswick, 85 Minn. 19, 88 NW 22.

Mo.—State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.

Oh.—State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403.

[a] **Reason for rule** that accused cannot be convicted on the uncorroborated testimony of a single witness does not apply to a case of subornation of perjury, for the reason that in such case the testimony does not consist of that of one person against that of another. The testimony of each witness for the prosecution involves, it is true, the impeachment of his own former sworn testimony, but it is direct evidence against accused as to the instigation of the perjury. Boren v. U. S., 144 Fed. 801, 75 CCA 531.

23. U. S.—Cohen v. U. S., 27 F. (2d) 713; Boren v. U. S., 144 Fed. 801, 75 CCA 531; U. S. v. Thompson, 31 Fed. 331, 12 Sawy. 438.

Ga.—Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145; Bell v. State, 5 Ga. A. 701, 63 SE 860.

Minn.—State v. Renswick, 85 Minn. 19, 88 NW 22.

Mo.—State v. White, (Mo.) 263 SW 192.

Oh.—State v. Ruskin, 117 Oh. St. 426, 159 NE 568, 56 ALR 403.

24. Peo. v. Evans, 40 N. Y. 1.

25. See cases infra this note.

[a] **Corroborative evidence held sufficient.**—Peo. v. Metzler, 21 Cal. A. 80, 130 P 1192; State v. Magyar, 96 N. J. L. 9, 114 A 252; Peo. v. Nichols, 108 App. Div. 362, 95 NYS 736; Peo. v. Gilhooley, 108 App. Div. 234, 95 NYS 636 [aff 187 N. Y. 551 mem, 80 NE 1116 mem]; Rex v. Threlfall, 24 Cox C. C. 230.

26. State v. Waddle, 100 Iowa 57, 60, 69 NW 279.

"When there is only one oath against another, it is as though there was no proof, and therefore, to establish perjury, there must be the evidence of another witness, or its equivalent. The reason for the rule fails when applied to a case like this, where the crime is complete, 'though no perjury be committed.'" State v. Waddle, supra.

27. Shipp v. State, 81 Tex. Cr. 328, 196 SW 840.

28. See Criminal Law § 2000 et seq.

29. See Criminal Law §§ 2307–2517.

30. See cases infra this note.

[a] **Instructions held proper or sufficient.**—(1) Defining the elements of the offense. Hallock v. U. S., 185 Fed. 417, 107 CCA 487 [certiorari den 220 U. S. 613 mem, 31 SCt 717 mem, 55 L. ed. 610 mem]. (2) Instructions as to the effect of coercion of the witness by the commissioner and district attorney. Cohen v. U. S., 214 Fed. 23, 130 CCA 417 [certiorari den 235 U. S. 696 mem, 35 SCt 199 mem, 59 L. ed. 430 mem]. (3) Instruction as to the degree of proof and corroboration. State v. Smith, 153 Minn. 167, 190 NW 48, Rex v. Saldanha, 26 Cox C. C. 630.

[b] **Instructions held insufficient or improperly omitted.**—(1) Failure to submit alleged matter of inducement. Skinner v State, 98 Tex. Cr. 424, 265 SW 1037. (2) Instruction misleading as to willfulness and corruptness of alleged perjurers' acts. Nurnberger v. U. S., 156 Fed. 721, 84 CCA 377

31. See case infra this note.

[a] **Instructions improperly omitted.**—Instructions as to corroboration. Shipp v. State, 81 Tex. Cr. 328, 196 SW 840.

32. See Criminal Law §§ 2571–2613.

33. See case infra this note.

[a] **Verdict held sufficient.**—A general verdict convicting of subornation of perjury is not insufficient for failing to determine which assignment of perjury accused was found guilty of suborning, where the information charges but one offense, although it specifies several false and perjured statements. State v. Richardson, 248 Mo. 563, 154 SW 735, 44 LRANS 307.

34. See case infra this note.

[a] **Verdict held sufficient.**—A verdict finding defendant guilty of "attempted subornation of perjury" is responsive to an indictment charging him with endeavoring to "incite" one to commit perjury. Brown v. Peo., 145 Ill. A. 263.

35. See supra § 188.

36. See Bacon Abr. Perjury; Stephen Dig. Cr. L. art 137.

[a] **Fine.**—For an attempt to procure the commission of perjury, fines have been imposed. Rex v. Johnson, 2 Show. 1, 89 Reprint 753.

37. See statutory provisions.

be tried before the conviction of the perjurer,[38] and the mere fact that an indictment against the perjurer is dismissed is not inconsistent with the guilt of the person charged with subornation.[39] But it has been held that the acquittal of the person charged with perjury entitles a person charged with suborning him to commit it, if already convicted thereof, to a new trial, since, if the testimony given was not perjury, there could not have been a subornation.[40]

VIII. CIVIL LIABILITY[41]

[By Douglas Robinson Gray]

[§ 210] **A. In the Absence of Statute.** There is authority that, without deciding whether or not a civil action for perjury will ever lie, merely holds that such an action will not lie where a necessary element of perjury is missing.[42] But the general rule, in the absence of statute,[43] is that no action lies to recover damages caused by perjury,[44] false swearing,[45] or subornation of perjury,[46] whether committed in the course of, or in connection with, a civil action or suit,[47] a criminal prosecution[48] or other proceeding,[49] and whether the perjurer was a party to,[50] or a witness in,[51] the proceeding.

38. Stone v. State, 118 Ga. 705, 45 SE 630, 98 AmSR 145. See State v. Chambers, 180 N. C. 705, 709, 104 SE 670 [cit Cyc].

39. Austin v. U. S., 19 F. (2d) 127 [certiorari den 275 U. S. 523 mem, 48 SCt 22 mem, 72 L. ed. 405 mem, and quot Cyc].

40. Maybush v. Com., 29 Gratt. (70 Va.) 857.

41. Obstruction of legal remedies generally see Torts [38 Cyc 515].
Perjury and subornation as a ground for:
Equitable relief against a judgment see Judgments § 744.
Opening or vacating judgment see Judgments § 497.

42. Page v. Camp, Kirby (Conn.) 7; Bell v. Senneff, 83 Ill. 122.

[a] **No criminal intent.**—Where defendant, in a former civil suit between the parties, testified falsely as a witness therein, but the falsity was inadvertent and not intentional, an action on the case for damages would not lie because the essential element of criminal intent was absent. This was true irrespective of the general question of whether such an action would lie in any event, such question being expressly left open because not necessary to a decision of the case before the court. Bell v. Senneff, 83 Ill. 122.

[b] **Falsity not shown.**—Page v. Camp, Kirby (Conn.) 7.

Elements of perjury see supra §§ 10–94.

43. Under statute see infra §§ 211–213.

44. Cal.—Taylor v. Bidwell, 65 Cal. 489, 4 P 491.
Ind.—Grove v. Brandenburg, 7 Blackf. 234.
Kan.—Horner v. Schinstock, 80 Kan. 136, 101 P 996, 23 LRANS 134, 18 AnnCas 21.
Ky.—Revill v. Pettit, 3 Metc. 314.
La.—Gusman v. Hearsey, 28 La. Ann. 709, 26 AmR 104.
Me.—Garing v. Fraser, 76 Me. 37; Dunlap v. Glidden, 31 Me. 435, 52 AmD 625. Under statute see infra §§ 211–213.
Md.—Schaub v. O'Ferrall, 116 Md. 131, 81 A 789, 39 LRANS 416, AnnCas 1913C 799.
Mass.—Phelps v. Stearns, 4 Gray 105, 64 AmD 61.
N. H.—Stevens v. Rowe, 59 N. H. 578, 47 AmR 231; Curtis v. Fairbanks, 16 N. H. 542.
N Y.—Young v. Leach, 27 App. Div. 293, 50 NYS 670, Morgan v. Morgan, 129 Misc. 212, 221 NYS 117; Silverman v. Doran, 23 Misc. 96, 51 NYS 731. See Verplanck v. Van Buren, 76 N. Y. 247 (recognizing the text rule at pp 259, 261, but holding it inapplicable on the facts).
N. C.—Godette v. Gaskill, 151 N. C. 52, 65 SE 612, 134 AmSR 964, 24 LRANS 265.
Pa.—Yoder v. Cole, 232 Pa. 509, 81 A 546.
Vt.—Cunningham v. Brown, 18 Vt. 123, 46 AmD 140.
Wis.—Abbott v. Bahr, 3 Pinn. 193, 3 Chandl. 210.
Eng.—Damport v. Sympson, Cro. Eliz 520, 78 Reprint 769; Eyres v. Sedgewicke, Cro. Jac. 160, 79 Reprint 513. But see Coxe v. Smithe, 1 Lev. 119, 83 Reprint 327 (holding that an action on the case will lie for damages resulting from a false oath causing plaintiff to lose the incumbency of a public office, where the action is really founded not on the oath, but on the malicious procurement to have plaintiff discharged, the oath serving merely to show malice).

[a] **There is no precedent** for maintenance of such an action. Godette v. Gaskill, 151 N. C. 52, 65 SE 612, 134 AmSR 964, 24 LRANS 265.

[b] **Under the early common-law doctrine** of merger of private wrong in the public wrong of a criminal offense (see Actions § 50), it was held that, one committing perjury being punishable under the criminal law, it would be unjust to permit an action on the case for damages arising from such perjury, since this would subject the perjurer to being twice punished for the one offense. Damport v. Sympson, Cro. Eliz. 520, 78 Reprint 769.

45. Silverman v. Doran, 23 Misc. 96, 51 NYS 731.

46. Peck v. Woodbridge, 3 Day (Conn.) 30, Bostwick v. Lewis, 2 Day (Conn.) 447; Stevens v. Rowe, 59 N. H. 578, 47 AmR 231; Young v. Leach, 27 App. Div. 293, 50 NYS 670; Silverman v. Doran, 23 Misc. 96, 51 NYS 731; Smith v. Lewis, 3 Johns. (N. Y.) 157, 3 AmD 469.

47. Kan.—Horner v. Schinstock, 80 Kan. 136, 101 P 996, 23 LRANS 134, 18 AnnCas 21.
La.—Gusman v. Hearsey, 28 La. Ann. 709, 26 AmR 104.
Me.—Dunlap v. Glidden, 31 Me. 435, 52 AmD 625. Under statute see infra §§ 211–213.
N. H.—Curtis v. Fairbanks, 16 N. H. 542.
N. Y.—Young v. Leach, 27 App. Div. 293, 50 NYS 670; Morgan v. Morgan, 129 Misc. 212, 221 NYS 117; Silverman v. Doran, 23 Misc. 96, 51 NYS 731.
N. C.—Godette v. Gaskill, 151 N. C. 52, 65 SE 612, 134 AmSR 964, 24 LRANS 265.
Vt.—Cunningham v. Brown, 18 Vt. 123, 46 AmD 140.
Eng.—Damport v. Sympson, Cro. Eliz. 520, 78 Reprint 769.
"There would be no end to litigation if such suits were countenanced." Gusman v. Hearsey, 28 La. Ann. 709, 710, 26 AmR 104.

[a] **Reason for rule is conclusiveness of judgment,** "and the judgment is equally conclusive when the question arises between the same parties, whether it is declared on as the foundation of a suit, pleaded as a bar, or given in evidence to establish the point decided. It is not competent for the party in any other action to deny, or plead any thing to the contrary of what has been found and adjudicated by the judgment." Lyford v. Demerritt, 32 N. H. 234, 236. To same effect Horner v. Schinstock, 80 Kan. 136, 101 P 996, 23 LRANS 134, 18 AnnCas 21, Stevens v. Roe, 59 N H. 578, 47 AmR 231; Curtis v. Fairbanks, 16 N. H. 542.

[b] **Retrying former case.**—To permit a tort action for perjury committed in a previous trial to which plaintiff was a party would be "overhaling" or retrying the other case. Horner v. Schinstock, 80 Kan. 136, 101 P 996, 23 LRANS 134, 18 AnnCas 21; Stevens v. Rowe, 59 N. H. 578, 47 AmR 231; Lyford v. Demerritt, 32 N. H. 234; Curtis v. Fairbanks, 16 N. H. 542; Smith v. Lewis, 3 Johns. (N. Y.) 157, 3 AmD 469; Godette v. Gaskill, 151 N. C. 52, 65 SE 612, 134 AmSR 964, 24 LRANS 265.

[c] **Rule applied where suit was discontinued** because of alleged perjury and subornation of perjury. Young v. Leach, 27 App. Div. 293, 50 NYS 670.

48. Taylor v. Bidwell, 65 Cal. 489, 4 P 491; Revill v. Pettit, 3 Metc. (Ky.) 314; Garing v. Fraser, 76 Me. 37.

49. Phelps v. Stearns, 4 Gray (Mass.) 105, 64 AmD 61; Abbott v. Bahr, 3 Pinn. (Wis.) 193, 3 Chandl. 210.

[a] **Perjury before the land office.**—The injury resulting from perjury in making a false affidavit before the officers of the land office, whereby affiant was enabled to enter and obtain title as preëmptor to land which had been previously entered by another, and to get such prior entry vacated, is not actionable. Abbott v. Bahr, 3 Pinn. (Wis.) 193, 3 Candl. 210.

[b] **Poor debtor's oath.**—Where a declaration alleged that a defendant lawfully committed to jail upon an execution in favor of plaintiff secured his release by perjury in connection with the poor debtor's oath, and thereby damaged plaintiff by depriving him of his lawful remedy to collect that debt, a demurrer thereto as insufficient in law should have been sustained because, in the absence of statute, such as that authorizing an action against a person for false swearing as trustee in the process of foreign attachment, no action will lie for damages caused by perjury. Phelps v. Stearns, 4 Gray (Mass.) 105, 64 AmD 61.

50. Horner v. Schinstock, 80 Kan. 136, 101 P 996, 23 LRANS 134, 18 Ann Cas 21; Gusman v. Hearsey, 28 La. Ann. 709, 26 AmR 104; Stevens v. Rowe, 59 N. H. 578, 47 AmR 231; Lyford v. Demerritt, 32 N. H. 234; Curtis v. Fairbanks, 16 N. H. 542; Silverman v. Doran, 23 Misc. 96, 51 NYS 731.

51. Ind.—Grove v. Brandenburg, 7 Blackf. 234.
Me.—Dunlap v. Glidden, 31 Me. 435, 52 AmD 625. Under statute see infra §§ 211–213.
Md.—Schaub v. O'Ferrall, 116 Md. 131, 81 A 789, 39 LRANS 416, AnnCas 1913C 799.
N. H.—Stevens v. Rowe, 59 N. H. 578, 47 AmR 231.
N. Y.—Morgan v. Morgan, 129 Misc. 212, 221 NYS 117; Silverman v. Doran, 23 Misc. 96, 51 NYS 731.
N. C.—Godette v. Gaskill, 151 N. C. 52, 65 SE 612, 134 AmSR 964, 24 LRANS 265.
Pa.—Yoder v. Cole, 232 Pa. 509, 81 A 546

[§ 211] **B. Under Statute—1. In General.** Under a statute allowing an action to recover damages sustained through perjury resulting in a judgment against the party suing,[52] the cause of action created is the obtaining of a judgment against another by perjury of a witness.[53]

[§ 212] **2. Elements of Cause of Action.** Under certain statutory provisions[54] it has been said that the elements of the tort are (1) a judgment against plaintiff,[55] (2) obtained by perjury of a witness introduced by the adverse party,[56] (3) resulting in damage to plaintiff.[57] No action will lie in the absence of an essential element.[58]

[§ 213] **3. Pleading.** A complaint is bad on demurrer if it does not affirmatively set forth the essential elements of the tort,[59] such as introduction of the perjured testimony by, or on behalf of, the adverse party.[60]

***PER LEGEM TERRÆ.**[1]

PERMANENCY.[2] A word that carries with it the idea of something that is durable, lasting, that never changes.[3] However, in the legal acceptation of the term, it does not include the idea of absolute, but only of practical, irremediability or perpetuity.[4]

PERMANENT.[5] [§ 1] **A. In General.** A word of Latin derivation from per,[6] meaning through, and maneo,[7] to remain.[8] The word is a relative one, and its signification depends upon the subject matter in connection with which it is employed.[9] It is to be construed in contradistinction from "temporary,"[10] "provisional,"[11] "shifting,"[12] or tran-

Vt.—Cunningham v. Brown, 18 Vt. 123, 46 AmD 140.

Eng.—Damport v. Sympson, Cro. Eliz. 520, 78 Reprint 769.

"It is clear from all the authorities that no action would lie against the witness, Pearl R. Ohle, even though such testimony was in pursuance of the conspiracy charged against the defendants, including the witness, in this suit." Schaub v. O'Ferrall, 116 Md. 131, 137, 81 A 789, 39 LRANS 416, AnnCas1913C 799.

[a] **"Public policy, and the safe administration of justice,** (1) require that witnesses, who are a necessary part of the judicial machinery, be privileged against any restraint, excepting that imposed by the penalty for perjury." Stevens v. Rowe, 59 N. H. 578, 579, 47 AmR 231. To same effect Godette v. Gaskill, 151 N. C. 52, 53, 65 SE 612, 134 AmSR 964, 24 LRANS 265; Yoder v. Cole, 232 Pa. 509, 511, 81 A 546. (2) "It would multiply and extend litigation if the matter could be re-examined by a new action between a party to the action and a witness therein; and, more than that, witnesses would be intimidated if their testimony is given under liability of themselves being subjected to the expense and annoyance of being sued by any party to the action to whom their testimony might not be agreeable. It would give a great leverage to litigants to intimidate witnesses." Godette v. Gaskill, supra [quot Yoder v. Cole, supra].

[b] **Relitigation of facts.**—Even though defendant in the suit for perjury was merely a witness for the adverse party in the previous case, and not himself a party to the proceedings, so that res judicata is inapplicable because of the difference in parties, nevertheless an action against such witness for perjury committed in the previous trial would necessarily involve a relitigation of the same facts, and will therefore not be permitted. Cunningham v. Brown, 18 Vt. 123, 46 AmD 140.

Responsibility for libel and slander see Libel and Slander § 237.

52. See statutory provisions.

53. Landers v. Smith, 78 Me. 212, 3 A 463.

[a] **Limitation of action.**—Such an action was held barred in three years under a proper construction of the statute creating the tort, the general six-year statute being inapplicable. Landers v. Smith, 78 Me. 212, 3 A 463.

54. See statutory provisions.

55. Cole v. Chellis, 122 Me. 262, 119 A 623.

[a] **Inapplicability of statute.**—"In case of 'judgment obtained by perjury' an action is under the statute maintainable to recover damages, but a defendant who authorizes the court to assume that the plaintiff's testimony is true for the purpose of passing on a motion for a nonsuit and agrees that if the nonsuit is refused final judgment may be entered for the plaintiff for the amount of his claim does not present a case within the intendment of the statute." Cole v. Chellis, 122 Me. 262, 265, 119 A 623.

[b] **Judgment obtained by consent** is not one obtained by perjury within the meaning of the statute, and therefore no action lies for perjury at proceedings resulting in a consent judgment. Cole v. Chellis, 122 Me. 262, 119 A 623.

56. Milner v. Hare, 126 Me. 14, 135 A 522; Cole v. Chellis, 122 Me. 262, 119 A 623.

57. Cole v. Chellis, supra.

[a] **Another statement of elements.**—"The essential elements of liability under the statute are (1) a judgment obtained against a party (2) by the perjury of a witness (3) introduced at the trial by the adverse party." Milner v. Hare, 126 Me. 14, 16, 135 A 522.

58. Milner v. Hare, supra; Cole v. Chellis, 122 Me. 262, 119 A 623.

59. Milner v. Hare, 126 Me. 14, 135 A 522.

60. Milner v. Hare, supra.

[a] **For instance,** where a complaint alleged perjury by the adverse party, but failed to aver who introduced the perjured testimony, and for aught that appeared plaintiff himself might have introduced such testimony, it was bad on demurrer. Milner v. Hare, 126 Me. 14, 135 A 522.

1. See Per § 2.

2. See Permanent post this page; Permanently post p 923.

Permanency:
"Establish" as conveying idea of see Establish § 9.
Of:
Absence of witness from court's jurisdiction as excuse for nonproduction see Evidence § 519 text and notes 20–22.
Fixture annexed to realty see Fixtures § 6.
Residence as qualification for voting see Elections § 27.

3. Indiana Co-Op. Canal Co. v. Gray, (Tex. Civ. A.) 184 SW 242, 243.

4. Coleman v Bennett, 111 Tenn. 705, 69 S 734, 737.

5. See Permanency ante; Permanently post.

Permanent:
Accession of fixture to realty see Fixtures § 6.
Alimony see Divorce §§ 495, 565–639.
Association see Building and Loan Associations § 7.
Damage see Damages § 37
Improvements see Improvement 31 C. J. p 266–304 notes 79–81.
Injury see Injury § 1.
Interest see Interest 33 C. J. p 265 text and note 43.
Location equivalent to abiding place see Abiding 1 C. J p 303 note 25 [a]
Merchant see Merchant § 9
Militia see Militia § 13.
Nuisance see Nuisances [29 Cyc 1154].
Object as natural monument see Boundaries § 9.
Policy see Policy of Insurance [31 Cyc 906 text and note 88].
Residence as qualification for voting see Elections § 27.
Statute see Statutes [36 Cyc 940 note 4].

6. See Per § 1.

7. See Maneat 38 C. J. p 957.

8. Ginell v. Prudential Ins. Co., 205 App Div. 494, 495, 200 NYS 261.

9. In re State, 39 Ala. 546, 548; Penn Mut. L. Ins. Co. v. Milton, 160 Ga. 168, 127 SE 140, 141, 40 ALR 1382; Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314; Ginell v. Prudential Ins. Co., 119 Misc. 467, 196 NYS 337, 338. See Texas, etc., R. Co. v Marshall, 136 U. S. 393, 403, 10 SCt 846, 34 L. ed. 385 [quot Boston, etc., R. Co. v. New York Cent. R. Co., 256 Mass. 600, 153 NE 19, 22].

10. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314, 315]; Webster Int. D. [quot Arentz v. Morse Dry Dock, etc., Co., 249 N. Y. 439, 164 NE 342, 344], Castle v. Logan, 140 Fed. 707, 709, 72 CCA 201; Feder v. Van Winkle, 53 N. J. Eq. 370, 375, 33 A 399, 400, 51 AmSR 628; Ginell v. Prudential Ins. Co., 119 Misc. 467, 196 NYS 337, 339; Southwestern Presb. Univ. v. Clarksville, 149 Tenn. 256, 259 SW 550, 553; Fowler v. Brown, 5 Tex. 407, 409; Yorkshire R. Wagon Co., Ltd. v Inland Revenue Comrs., 94 L. J. K. B. 134, 137. And see Permanently post p 923 text and note 39.

"Permanent is the antithesis of temporary." Penn Mut. L. Ins Co. v. Milton, 160 Ga. 168, 172, 127 SE 140, 40 ALR 1382; Serna v. State, (Tex. Cr.) 7 SW (2d) 543, 546.

[a] **Injuries,** although they may not, strictly speaking, be absolute perpetuities, and positively irremediable in the last possible degree, nevertheless in a legal sense may be "permanent" as contradistinguished from "temporary." Coleman v. Bennett, 111 Tenn. 705, 69 SW 734, 737.

[b] **Permanent situs** of taxable personal property as not meaning a situs of a temporary or fleeting character see Gromer v. Standard Dredging Co., 224 U. S. 362, 377, 32 SCt 499, 505, 56 L. ed. 801.

[c] **"Permanent form of government"** implies that prior systems had been temporary and provisional. State v. Harden, 62 W Va. 313, 58 SE 715, 723, 60 SE 394.

"Temporary" see [37 Cyc 1797].

11. See Hawkins v John Hancock Mut L. Ins. Co., 205 Iowa 760, 218 NW 313, 315 ("provisional" an antonym).

"Provisional" see [32 Cyc 742].

12. See Hawkins v John Hancock Mut L. Ins. Co., 205 Iowa 760, 218

*By WILLIAM QUINBY DEFUNIAK (Per Legem Terræ-Perpetuitatibus Lex Obsistit inclusive except the Spanish words and phrases).

sient."[13] "Permanent" has been defined as meaning abiding;[14] changeless;[15] constant;[16] continuing;[17] continuing in the same state, or without any change that destroys form or character;[18] durable;[19] fixed;[20] fixed or enduring in character, condition, state, position, occupation, use, or the like;[21] immovable;[22] lasting[23] or intended to last indefinitely;[24] not subject to change;[25] remaining;[26] remaining unaltered or unmoved;[27] something which lasts or endures;[28] stable;[29] without ending.[30] It has been said that, as applied to human affairs, it signifies appreciable durability and continuance, as opposed to what is merely transient,[31] and that it does not embrace the idea of absolute perpetuity.[32] Thus it has been said not to mean everlasting;[33] existing forever;[34] forever;[35] lasting forever;[36] lifelong;[37] never changing;[38] perpetual;[39] unchangeable;[40] or unending.[41]

[§ 2] **B. Permanent Abode.**[42] A domicile, a home, which a party is at liberty to leave, as interest or whim may dictate, but without any present intention of changing it;[43] a residence.[44]

[§ 3] **C. Permanent Agent.**[45] In the governmental service, an agent appointed by the president, with the advice and consent of the senate, as contradistinguished from one appointed by the head of a department, on some special occasion or service, and on such terms as such departmental head chooses to make.[46]

[§ 4] **D. Permanent Culvert.**[47] In Iowa, as defined by the state highway commission, any culvert exceeding thirty-six inches in diameter.[48]

NW 313, 315 ("shifting" an antonym).

13. Serva v. State, (Tex. Cr.) 7 SW (2d) 543, 546. See Ginell v. Prudential Ins. Co., 119 Misc. 467, 196 NYS 337, 338.

[a] **"Transient" an antonym.**—Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 315].

"Transient" see [38 Cyc 943].

14. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314, 315]; Webster D. [quot Washington, etc., R. Co. v. Patterson, 9 App. (D. C.) 423, 435; Hawkins v. John Hancock Mut. L. Ins. Co., supra]; Ten Eyck v. Albany, 65 Hun 194, 198, 20 NYS 157; Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834.

"Abiding" see 1 C. J. p 303.

15. Texas Employers' Ins. Assoc. v. Shilling, (Tex. Civ. A.) 259 SW 236, 239.

16. Webster D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314]; Webster Int. D. [quot Arentz v. Morse Dry Dock, etc., Co., 249 N. Y. 439, 164 NE 342, 344]. See St. Louis, etc., R. Co. v State, 86 Ark. 518, 521, 112 SW 150, 151 ("the use of the word 'permanent' in the act is inapt. The first use of it, 'where such work is permanently done,' means 'constantly'; and 'constant' is one of its synonyms")

"Constant" see 12 C. J. p 649.

17. Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834.

"Continuing" see Continue 13 C. J. p 203.

18. Webster D. [quot National Bank of Commerce v. Grenada, 44 Fed. 262, 266; Washington, etc., R. Co. v Patterson, 9 App. (D. C.) 423, 425; Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314]; Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834

19. Webster D. [quot Washington, etc., R. Co. v. Patterson, 9 App. (D. C.) 423, 435; Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314]; Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834.

20. Webster D. [quot Washington, etc., R. Co. v. Patterson, 9 App. (D. C.) 423, 435; Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314, Howser v. Chicago Great Western R. Co.. (Mo.) 5 SW (2d) 59, 63]; Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834.

"Fixed" see Fix § 2

21. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314, 315]

[a] **Similar definition.**—"Fixed or enduring in character, state or place." Ten Eyck v. Albany, 65 Hun 194, 198, 20 NYS 157

22. Howser v. Chicago Great Western R. Co., (Mo.) 5 SW (2d) 59, 63.

"Immovable" see 31 C. J. p 252

23. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314, 315]; Webster D. [quot Washington, etc., R. Co. v. Patterson, 9 App. (D. C.) 423, 435; Hawkins v. John Hancock Mut. L. Ins. Co., supra]; Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834.

[a] **As a "permanent" impression.**—Webster D. [quot Washington, etc., R. Co., v. Patterson, 9 App. (D. C.) 423, 425]; Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832.

24. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 213 NW 313, 314, 315].

25. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., supra]; Ten Eyck v. Protestant Episcopal Church, 65 Hun 194, 198, 20 NYS 157. Compare Southwestern Presb. Univ. v. Clarksville, 149 Tenn. 256, 259 SW 550, 553 (where it was said not to convey, in its ordinary acceptation, the idea of never changing).

26. Ten Eyck v. Albany, 65 Hun 194, 198, 20 NYS 157. See Remain [34 Cyc 1199].

27. Webster D. [quot National Bank of Commerce v. Grenada, 44 Fed. 262, 266; Washington, etc., R. Co. v. Patterson, 9 App. (D. C.) 423, 435; Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314]; Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834.

[a] **Similar definition.**—"Remaining or intended to remain unchanged or unremoved." Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 315].

28. Webster Int. D. [quot Arentz v. Morse Dry Dock, etc., Co., 249 N. Y. 439, 164 NE 342, 344].

29. Webster D. [quot Washington, etc., R. Co. v. Patterson, 9 App. (D. C.) 423, 435; Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314; Howser v. Chicago Great Western R. Co., (Mo.) 5 SW (2d) 59, 63].

30. Texas Employers' Ins. Assoc. v. Shilling, (Tex. Civ. A.) 259 SW 236.

31. Ginell v. Prudential Ins. Co., 119 Misc. 467, 196 NYS 337, 338.

32. Hascall v. Madison Univ., 8 Barb. (N. Y.) 174, 185, Coan v. Antongiorgi, 10 Porto Rico Fed. 430, 432, Miller v. Holmes, 89 Vt. 261, 95 A 541; Richmond v. Smith, 101 Va. 161, 43 SE 345, 347.

[a] **"Permanent" implies greater continuity than "maintain,"** and since "permanent" does not convey the idea of perpetuity, "maintain" cannot be construed to convey the idea of indefiniteness. Hasman v. Elk Grove Union High School, 76 Cal. A. 629, 245 P 464, 465. "Maintain" see 38 C. J. p 334

33. Yorkshire R. Wagon Co., Ltd v Inland Revenue Comrs., 94 L. J. K. B. 134, 137

34. Texas, etc., R. Co. v. Marshall, 136 U. S 393, 403, 10 SCt 846, 34 L. ed 385 [quot Hasman v. Elk Grove Union High School, 76 Cal. A. 629, 245 P 464, 465]. See Miller v. Holmes, 89 Vt. 261, 95 A 541.

"Existing" see Exist 25 C. J. p 167.

35. Texas, etc., R. Co. v. Marshall, 136 U. S. 393, 403, 10 SCt 846, 34 L. ed. 385 [quot Hasman v. Elk Grove Union High School, 76 Cal. A. 629, 245 P 464]; Lucas v. New York, etc., R. Co., 130 Fed. 436, 438, 64 CCA 638; Western Union Tel. Co. v. Pennsylvania Co., 129 Fed. 849, 867, 64 CCA 285, 68 LRA 968; Penn Mut. L. Ins. Co. v. Milton, 160 Ga. 168, 127 SE 140, 141, 40 ALR 1382, 1385. See Miller v. Holmes, 89 Vt. 261, 95 A 541.

"Forever" see 26 C. J. p 890.

36. Texas, etc., R. Co. v. Marshall, 136 U. S. 393, 403, 10 SCt 846, 34 L. ed. 385 [quot Hasman v. Elk Grove Union High School, 76 Cal. A. 629, 245 P 464, 465]; Lucas v. New York, etc., R. Co., 130 Fed. 436, 438, 64 CCA 638; Western Union Tel. Co. v. Pennsylvania Co., 129 Fed. 849, 867, 64 CCA 285, 68 LRA 968; Penn Mut. L. Ins. Co. v. Milton, 160 Ga. 168, 127 SE 140, 141, 40 ALR 1382. See Coan v. Antongiorgi, 10 Porto Rico Fed. 430, 432; Miller v. Holmes, 89 Vt. 261, 95 A 541; Richmond v. Smith, 101 Va. 161, 43 SE 345, 347.

37. Soule v. Soule, 4 Cal. A. 97, 105, 87 P 205.

38. Southwestern Presb. Univ. v. Clarksville, 149 Tenn. 256, 259 SW 550, 553. Compare Ten Eyck v. Albany, 65 Hun 194, 198, 20 NYS 157 (where it is defined as meaning "not subject to change").

39. Soule v. Soule, 4 Cal. A. 97, 105, 87 P 205; Boston, etc., R. Co. v. New York Cent. R. Co., 256 Mass. 600, 153 NE 19, 22; Trippeer v. Couch, 110 Or. 446, 220 P 1012, 1015; Southwestern Presb. Univ. v. Clarksville, 149 Tenn. 256, 259 SW 550, 553; Yorkshire R. Wagon Co., Ltd. v. Inland Revenue Comrs., 94 L. J. K. B. 134.

"Perpetual" see post.

40. Soule v. Soule, 4 Cal. A. 97, 105, 87 P 205.

41. Soule v. Soule, supra.

42. **"Abode"** see 1 C. J. p 304.

43. Moffett v. Hill, 131 Ill. 239, 22 NE 821, 823; Dale v. Irwin, 78 Ill. 170, 181 [quot Berry v. Wilcox, 44 Nebr. 82, 62 NW 249, 251, 48 AmSR 706]; Sullivan v. Detroit, etc., R. Co., 135 Mich. 661, 671, 98 NW 756, 760, 106 AmSR 403, 64 LRA 673; Klutts v. Jones, 21 N M. 720, 725, 158 P 490, LRA1917A 291 [quot Berry v. Wilcox, supra]; Coan v. Antongiorgi, 10 Porto Rico Fed. 430, 432.

"Domicile" see Domicile § 1.

"Home" see 29 C. J. p 767.

44. Anderson v. Pifer, 315 Ill. 164, 146 NE 171, 173, 37 ALR 134; Johnson v. Peo., 94 Ill. 505, 512, 513.

"Residence" see [34 Cyc 1647].

45. **"Agent"** see Agency 2 C. J. p 404.

46. Armstrong v. U. S., 1 F. Cas. No 548, Gilp. 399 (a navy agent appointed by the secretary of the navy is not a permanent agent).

47. **"Culvert"** see 17 C. J. p 399.

48. Cunningham v. Adair County,

[§ 5] **E. Permanent Disability[49] or Incapacity.**[50] An incapacity that never has and never will cease to exist;[51] an incapacity that is changeless and without ending;[52] a lasting disability which will not pass away;[53] the permanent reduction of an injured person's power to earn money, resulting from an injury caused by the negligent act of another.[54] There is also authority for the view that the phrase means a disability which, while not lasting or existing forever, exists continuously for a long period of time;[55] and this may be especially true in cases governed by statute.[56]

Similar phrases: "Permanent and total disability,"[57] "permanent total disability,"[58] "permanent total incapacity,"[59] "total and permanent disability,"[60] "total permanent disability"[61] "total permanent incapacity;"[62] also, "partial permanent, or total permanent disablement,"[63] "permanent partial disability"[64]

[§ 6] **F. Permanent Door.**[65] One used indefinitely, as long as it is necessary that it be maintained.[66]

[§ 7] **G. Permanent Employment.**[67] To ascertain what the parties to a contract for "permanent employment" intend by the term, it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would be commonly understood.[68] It does not mean employment for life,[69] or for any definite number of years,[70] although under special circumstances and conditions it may mean continuous or indefinite employment,

190 Iowa 913, 181 NW 20.

49. "Disability" see 18 C. J. p 1046.

Permanent disability as requisite for recovery under accident insurance policy see Accident Insurance § 174.

50. "Incapacity" see 31 C. J. p 372.

51. Maryland Casualty Co. v. Mueller, (Tex. Civ. A.) 247 SW 609, 610.

[a] **An instruction to a jury** that a disability or incapacity, to be deemed permanent, must be such that "it will exist throughout all time," was said by the supreme court on appeal not to be a construction of the word "permanent" of which insurer could complain as being unjust to himself, although the supreme court declared that it must not be understood that the supreme court itself approved of such construction. Grand Lodge B. L. F. v. Orrell, 206 Ill. 208, 69 NE 68, 69.

[b] **"Partial disability" distinguished.**—Fern Gold Min. Co. v. Murphy, 7 F. (2d) 613.

[c] **"Temporary," as distinguished from "permanent," disability** is a condition that exists until the injured person is as far restored as the permanent character of the injuries will permit. Consolidated Coal Co. v. Industrial Commn., 311 Ill. 61, 64, 142 NE 498, 500; Stromberg Motor Device Co. v. Industrial Commn., 305 Ill. 619, 624, 137 NE 462, 464; Mt. Olive Coal Co. v. Industrial Commn., 295 Ill. 429, 431, 129 NE 103, 104; Vishney v. Empire Steel, etc., Co., 87 N. J. L. 481, 95 A 143, 144.

[d] **"New and further disability"** may be included in the term "permanent disability." General Acc., etc., Assur Corp., Ltd. v. Industrial Acc. Commn., 77 Cal. A. 314, 246 P 570, 572.

[e] **Use of word as merely indicating character of disability** see Woodward v. Pittsburgh Engineering, etc., Co., 293 Pa. 338, 143 A 21, 23.

52. Texas Employers' Ins. Assoc. v. Shilling, (Tex. Civ. A.) 259 SW 236, 239.

53. Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 315; Ginell v. Prudential Ins. Co., 237 N. Y. 554, 143 NE 740.

[a] **Loss of an eye** is a permanent disability. Stephenville Mut. L. Ins. Assoc. v. Gant, (Tex. Civ. A.) 7 SW (2d) 119, 121.

54. Louisville, etc., R. Co. v. Mason, 72 SW 27, 28, 24 KyL 1623.

[a] **Under a British Workmen's Compensation Act.**—(1) "The incapacity referred to is the incapacity to earn full wages." Marshall v. Prince, [1914] 3 K. B. 1047, 1054. To same effect Calico Printers' Assoc. v. Higham, [1912] 1 K. B. 93, 100. (2) An incapacity is permanent, within the meaning of the Compensation Act, when the injured man's condition is stable and there is no probability that he will get better or worse. See Marshall v. Prince, supra; Calico Printers' Assoc., Ltd. v. Higham, supra. (3) "All these considerations strengthen me in the view that the meaning of the phrase 'the incapacity is permanent' is not that the physical injury is permanent, but that in all reasonable probability the weekly payments to which the man is entitled [under the Compensation Act] will never alter." Calico Printers' Assoc., Ltd. v. Higham, supra.

55. Penn Mut. L. Ins. Co. v. Milton, 160 Ga. 168, 127 SE 140, 142, 40 ALR 1382.

[a] **Permanent incapacity of a partner** as ground for dissolution of the partnership "does not and should not mean incurable and perpetual disability during the life of the partner. It means incapacity which is lasting rather than merely temporary, and the prospect of recovery from which is remote; which has continued or is reasonably certain to continue during so substantial a portion of the partnership period as to defeat or materially affect and obstruct the purpose of the partnership." Barclay v. Barrie, 209 N. Y. 40, 49, 102 NE 602, 605, 47 LRANS 839, AnnCas1913D 1143. Compare Ginell v. Prudential Ins. Co., 237 N. Y. 554, 143 NE 740 supra note 53.

56. See McKarnin v. Armour, 118 Kan. 738, 236 P 837, 838.

[a] **Where a compensation act** fixed the period for total disability for which a workman might receive compensation at eight years, it was not error to instruct a jury that a disability was permanent which extended for a period of eight years or more. McKarnin v. Armour, 118 Kan. 738, 236 P 837, 838.

57. Foglesong v. Modern Brotherhood of America, 121 Mo. A. 548, 97 SW 240, 241.

58. See Brooks v. Peerless Oil Co., 146 La. 383, 83 S 663, 664; State v. Blue Earth County Dist. Ct., 133 Minn. 439, 158 NW 700, 701; Yocum v. Union Builders Corp., 204 App. Div. 681, 198 NYS 651, 653; Neglia v. Zimmerman, 198 NYS 596, 597; Wilson Lumber Co. v. Wilson 77 Okl. 312, 188 P 666; Standard Oil Co. v. Sullivan, 33 Wyo. 223, 237 P 253, 254.

59. U. S. Fidelity, etc., Co. v. Weir, (Tex. Civ. A.) 286 SW 565, 567.

60. Shipp v. Metropolitan L. Ins. Co., 146 Miss. 18, 111 S 453, 454.

61. Calumet Fdy., etc., Co. v. Mroz, 80 Ind. A. 619, 141 NE 883, 884; Clark v. Forest Lumber Co., (La.) 120 S 88, 91.

[a] **"The words 'total' and 'permanent,'** as applied to disability, as defined by the War Risk Bureau, do not necessarily imply an incapacity to do any work at all." U. S. v. Eliasson, 20 F. (2d) 821, 823.

62. U. S. Fidelity, etc., Co. v. Weir, (Tex. Civ. A.) 286 SW 565, 567.

63. Hollobaugh v. People's Ins. Assoc., 138 Pa. 595, 605, 22 A 29.

64. McKarnin v. Armour, 118 Kan. 738, 236 P 837, 838; State v. Hennepin County Dist. Ct., 136 Minn. 147, 161 NW 391, 392; Carkey v. Island Paper Co., 177 App. Div. 73, 163 NYS 710, 711; E. K. Local Ins. Co. No. 1 v. Lilly, (Tex. Civ. A.) 1 SW (2d) 490, 493; Kostida v. Department of Labor, etc., 139 Wash. 629, 247 P 1014, 1015.

65. "Door" see 19 C. J. p 445.

66. Madison Coal Co. v. Hayes, 215 Ill. 625, 74 NE 755, 756.

67. "Employment" see 20 C. J. p 1245.

Permanent employment:
Contracts for see Master and Servant § 13.
Right to discharge for incompetency under contract for see Master and Servant § 83 text and notes 13, 14.
Termination of contract for see Master and Servant § 60 text and notes 58, 59.

68. Carnig v. Carr, 167 Mass. 544, 547, 46 NE 117, 57 AmSR 488, 35 LRA 512 [quot Rape v. Mobile, etc., R. Co., 136 Miss. 38, 100 S 585, 586, 35 ALR 1422; Minter v. Tootle, etc., Dry Goods Co., 187 Mo. A. 16, 173 SW 4, 7].

[a] **Statement by an employer** that a position would be a permanent one referred to the position itself rather than to the term of the employment, which was one at will severable by either party, in the absence of any evidence of a general custom or usage establishing a definite period of time. Milner v. Hill, 10 Oh. Cir Dec. 357, 359.

[b] **"Steady and permanent employment."**—"Words are to be taken in their most usual and known signification, but they get their meaning almost wholly from the time, place, and circumstances under which they are used. The words 'steady and permanent' usually signify stability and duration; and this is especially true when they are applied to the subject-matter, and the peculiar circumstances under which they are here used." Pennsylvania Co. v. Dolan, 6 Ind. A. 109, 32 NE 802, 805, 51 AmSR 289.

[c] **"Permanent above any one in the house."**—Where an agreement provided for the employment of one as a clerk at a monthly salary, the position to be "permanent above any one in the house," and it appeared that another clerk was employed for a year at a monthly salary, it was not error for the court to instruct the jury that a reasonable construction of the agreement for employment would be for a year. Roddy v. McGetrick, 49 Ala 159, 160.

69. Carnig v. Carr, 167 Mass. 544, 46 NE 117, 118, 57 AmSR 488, 35 LRA 512; Sullivan v. Detroit, etc., R. Co., 135 Mich. 661, 671, 98 NW 756, 760, 106 AmSR 403, 64 LRA 673; Minter v. Tootle, etc., Dry Goods Co., 187 Mo. A. 16, 173 SW 4, 8; Beck v. Walkers, 24 Pa. Co. 403, 406.

70. Beck v. Walkers, supra. But see Roddy v. McGetrick, 49 Ala. 159 supra note 68 [c].

[a] **A contract for permanent employment violates a statute** declaring invalid contracts of employment for

not terminable at the will of either party,[71] as where the matter is regulated by custom and usage,[72] or by the giving of an independent consideration other than the services contracted to be rendered.[73] Usually the term is construed to mean employment for an indefinite period which may be severed by either party,[74] where no consideration exists other than the services contracted to be rendered;[75] but where the employee gives a valuable consideration other than his services in return for the permanent employment, the term means something more than an employment for an indefinite time, and means employment as long as the employee is able, ready, and willing to perform such services as the employer may have for him to do.[76]

[§ 8] **H. Permanent Loan.**[77] Under a statutory definition, a loan of a permanent character which is secured by mortgages or debentures or otherwise on the assets or income of a company, and which, if subject to repayment, is subject to repayment at not less than three months' notice.[78]

[§ 9] **I. Permanent Loss.**[79] As used concerning the loss of an eye, limb, etc., means the taking away of the normal use of the member.[80]

[§ 10] **J. Permanent Roads.**[81] Roads surfaced with crushed rock, gravel, macadam, brick, concrete, asphalt-macadam, or any other hard surfacing material.[82]

[§ 11] **K. Permanent Sickness.**[83] The word "permanent" as so used imports a state of disability rather than an incurable sickness.[84]

[§ 12] **L. Permanent Structure.**[85] A structure of a durable character, intended to last indefinitely;[86] a stable and immovable structure.[87]

A permanent legal structure means a legally nonabatable structure.[88]

[§ 13] **M. Permanent Way.** A railroad term meaning a finished roadbed and track, including switches, crossings, bridges, viaducts, etc.[89]

[§ 14] **N. Other Phrases.** "Permanent alteration,"[90] "permanent buildings,"[91] "permanent easement,"[92] "permanent establishment,"[93] "permanent form of government,"[94] "permanent fund,"[95] "permanent guard,"[96] "permanent hospital,"[97] "perma-

more than three years. Perry v. New England Casualty Co., 78 N. H. 346, 100 A 605, 606.

71. Sullivan v. Detroit, etc., R. Co., 135 Mich. 661, 671, 98 NW 756, 760, 106 AmSR 403, 64 LRA 673.

72. See Milner v. Hill, 10 Oh. Cir. Dec. 357, 359.

[a] **In Texas,** where an offer is made of permanent employment for as long as the employee shall desire to retain such employment, and the services of the employee are satisfactory, the employee must fix the period of his service at the time he presents himself for work; otherwise the employment is merely at will. Hickey v. Kiam, (Civ. A.) 83 SW 716, 717.

73. See infra text and note 76.

74. Bouvier L. D. [quot Davidson v. Laughlin, 6 Cal. Unrep. Cas. 865, 68 P 101, 104; Sullivan v. Detroit, etc., R. Co., 135 Mich. 661, 671, 98 NW 756, 760, 106 AmSR 403, 64 LRA 673; Arentz v. Morse Dry Dock, etc., Co., 249 N. Y. 439, 164 NE 342, 344; McKelvy v. Choctaw Cotton Oil Co., 52 Okl. 81, 152 P 414, 415]; Lord v. Goldberg, 81 Cal. 596, 22 P 1126, 1128, 15 AmSR 82 [quot Faulkner v. Des Moines Drug Co., 117 Iowa 120, 90 NW 585, 586; Rape v. Mobile, etc., R. Co., 136 Miss. 38, 51, 100 S 585, 35 ALR 1422, 1426 (quot McKelvy v. Choctaw Cotton Oil Co., 52 Okl. 81, 152 P 414)]; Bentley v. Smith, 3 Ga. A. 242, 59 SE 720, 722; Minter v. Tootle, etc., Dry Goods Co., 187 Mo. A. 16, 173 SW 4, 7, 8; Milner v. Hill, 10 Oh. Cir. Dec. 357, 359; Beck v. Walkers, 24 Pa. Co. 403, 405. See Shuler v. Corl, 39 Cal. A. 195, 178 P 535, 536; Speeder Cycle Co. v. Teeter, 18 Ind. A. 474, 48 NE 595, 597.

[a] **"Permanent attorney and solicitor."**—An employment of one as a "permanent attorney and solicitor" is nothing more than a general employment as distinguished from an occasional employment in particular matters. The term means no more an enduring engagement than "standing counsel." Elderton v. Emmens, 4 C. B. 479, 493, 496, 136 Reprint 594. See Lord v. Goldberg, 81 Cal. 596, 22 P 1126, 1128, 15 AmSR 82. "Attorney" see Attorney and Client 6 C. J. p 556. "Solicitor" see Attorney and Client § 9.

75. Rape v. Mobile, etc., R. Co., 136 Miss. 38, 100 S 585, 586, 35 ALR 1422; Beck v. Walkers, 24 Pa. Co. 403, 405. And see cases supra note 74.

76. Pennsylvania Co. v. Dolan, 6 Ind. A. 109, 32 NE 802, 805, 51 AmSR 289 (relinquishment of claim for personal injuries); Louisville, etc., R. Co. v. Cox, 145 Ky. 667, 141 SW 389, 392 (relinquishment of claim for personal injuries); Carnig v. Carr, 167 Mass. 544, 547, 46 NE 117, 57 AmSR 488, 35 LRA 512 (giving up his own business of the same nature); Beck v. Walkers, 24 Pa. Co. 403, 405 (purchase of the employment). See Hall v. Hardaker, 61 Fla. 267, 55 S 977, 980 [cit Carnig v. Carr, supra]; Jessup v. Chicago, etc., R. Co., 82 Iowa 243, 247, 48 NW 77; Minter v. Tootle, etc., Dry Goods Co., 187 Mo. A. 16, 173 SW 4, 7; Harrington v. Kansas City Cable R. Co., 60 Mo. A. 223, 228 (promise of "steady and constant employment"); Carter White Lead Co. v. Kinlin, 47 Nebr. 409, 66 NW 536, 537; Perry v. New England Casualty Co., 78 N. H. 346, 100 A 605, 606.

[a] **An employment until the dissolution of a corporation** is a permanent employment, so far as it is legally and physically possible. Beeman v. Richardson, (Cal. A.) 189 P 790, 792.

77. **"Loan"** see 38 C. J. p 125.

78. Finance Act (1920) § 52 subs 3 [quot Yorkshire R. Wagon Co., Ltd. v. Inland Revenue Comrs., 94 L. J. K. B. 134, 136, 138].

79. **"Loss"** see 38 C. J. p 244.

80. Heaps v. Industrial Commn., 303 Ill. 443, 135 NE 742, 743. See Bristow Cotton Oil Co. v. State Industrial Commn. Co., 77 Okl. 316, 188 P 658.

[a] **"Permanent loss of the use of an eye."**—Stefan v. Red Star Mill, etc., Co., 106 Kan. 369, 187 P 861, 862.

[b] **"Permanent loss of the use of a hand."**—Rockwell v. Lewis, 168 App. Div. 674, 154 NYS 893, 894.

81. **"Road"** see Highways § 1 text and notes 12–56.

82. Okl. Sess. L. (1916) c 30 § 2 [quot Pine v. Baker, 76 Okl. 62, 184 P 445, 451].

[a] **Includes macadam highways.**—Trippeer v. Couch, 110 Or. 446, 220 P 1012, 1016.

[b] **Bridge as part of permanent road** see Stoppenback v. Multnomah County, 71 Or. 493, 142 P 832, 834 [quot Trippeer v. Couch, 110 Or. 446, 220 P 1012, 1015]. See Follmer v. Nuckolls County, 6 Nebr. 204, 212.

"Paved road" see ante p 557.

83. **"Sickness"** see [36 Cyc 436].

84. Ginell v. Prudential Ins. Co., 119 Misc. 467, 196 NYS 337, 339. See Beaufort v. Crawshay, L. R. 1 C. P. 699.

85. **"Structure"** see [37 Cyc 337].

86. Jarrett Lumber Corp. v. Christopher, 65 Fla. 379, 61 S 831; Chicago North Shore St. R. Co. v. Payne, 192 Ill. 239, 243, 61 NE 467, 468; Costello v. Pomeroy, 120 Iowa 213, 94 NW 490; Stein v. Chesapeake, etc., R. Co., 132 Ky. 322, 116 SW 733, 736; Pahlka v. Chicago, etc., R. Co., 62 Okl. 223, 161 P 544, 551; Langness v. Chicago, etc., R. Co., 40 S. D. 546, 168 NW 1050, 1052; Texas Cent. R. Co. v. Brown, 38 Tex. Civ. A. 610, 86 SW 659, 660; Norfolk County Water Co. v. Etheridge, 120 Va. 379, 91 SE 133, 134.

[a] **"Permanent and substantial" structure.**—Richmond v. Gentry, 136 Ky. 319, 124 SW 337, 338, 136 AmSR 255; Follmer v. Nuckolls County, 6 Nebr. 204, 212. Compare Richmond v. Smith, 101 Va. 161, 43 SE 345, 347 (a structure, although not erected for an indefinite period, was said to be permanent as contradistinguished from mere temporary structures).

87. Howser v. Chicago Great Western R. Co., (Mo.) 5 SW (2d) 59, 63.

88. Trinity Portland Cement Co. v. Horton, (Tex. Civ. A.) 214 SW 510, 511.

89. Century D. See Cass County v. Chicago, etc., R. Co., 25 Nebr. 348, 353, 41 NW 246, 2 LRA 188 ("Webster defines the word 'superstructure', referring to railroad engineering, to be, 'the sleepers, rails, and fastenings, in distinction from the road-bed—called also permanent way' ").

[a] **"Permanent way material."**—See Caledonia R. Co. v. North British R. Co., [1916] S. C. 332. "Material" see 39 C. J. p 1385.

"Road-bed" see [34 Cyc 1793].

"Track" see [38 Cyc 669].

90. Perry v. Wilson, 260 Mass. 519, 157 NE 579, 580.

"Alteration" see 2 C. J. p 1166.

91. Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P 238, 253.

"Building" see 9 C. J. p 683.

92. Ehler v. Stier, 205 Iowa 678, 216 NW 637, 638.

"Easement" see Easements 19 C. J. p 856.

93. Texas, etc., R. Co. v. Marshall, 136 U. S. 393, 403, 10 SCt 846, 34 L. ed. 385; Lucas v. New York, etc., R. Co., 130 Fed. 436, 438, 64 CCA 638; Western Union Tel. Co. v. Pennsylvania Co., 129 Fed. 849, 867, 64 CCA 285, 68 LRA 968, St. Louis, etc., R. Co. v. Houck, 120 Mo. A. 634, 97 SW 963, 968. See Sullivan v. Detroit, etc., R. Co., 135 Mich. 661, 671, 98 NW 756, 106 AmSR 403, 64 LRA 673.

"Establishment" see 21 C. J. p 903.

94. State v. Harden, 62 W. Va. 313, 58 SE 715, 723.

"Government" see 28 C. J. p 749.

95. In re Gay, 138 Cal. 552, 71 P 707, 708, 94 AmSR 70.

"Fund" see 27 C. J. p 926.

96. In re State, 39 Ala. 546, 548.

"Guard" see 28 C. J. p 1046.

97. Atwater v. Russell, 49 Minn. 57, 80, 51 NW 629, 631, 52 NW 26 (one

nent hotels and permanent additions to existing hotels,"[98] "permanent impairment of earning power,"[99] "permanent inability to labor,"[1] "permanent inhabitants,"[2] "permanent injunction,"[3] "permanent lease,"[4] "permanent leasehold,"[5] "permanent ordinance,"[6] "permanent park for public amusement,"[7] "permanent post,"[8] "permanent receiver,"[9] "permanent reduction in his power to earn money,"[10] "permanent residence,"[11] "permanent seat of justice,"[12] "permanent sidewalk,"[13] "permanent site,"[14] "permanent teacher,"[15] "permanent wave."[16]

PERMANENT ABODE.[17]
PERMANENT AGENT.[18]
PERMANENT CULVERT.[19]
PERMANENT DISABILITY.[20]
PERMANENT DOOR.[21]
PERMANENT EMPLOYMENT.[22]
PERMANENT HOSPITAL.[23]
PERMANENT INCAPACITY.[24]
PERMANENT INJUNCTION.[25]
PERMANENT LEASE.[26]
PERMANENT LEASEHOLD.[27]
PERMANENT LOAN.[28]
PERMANENT LOSS.[29]

PERMANENTLY.[30] A derivative of "permanent," having different meanings dependent upon the subject matter and connection of its use.[31] It has been defined as meaning constantly;[32] for an indefinite period;[33] in a permanent or lasting manner;[34] so as to remain.[35] It has been said both to mean perpetually,[36] and not to mean perpetually.[37] It is used in contradistinction to temporarily,[38] and is the converse of transient [ly].[39]

Phrases: "All men permanently employed,"[40] "employ permanently,"[41] "maintain permanently,"[42] "permanently and continuously,"[43] "permanently and totally disabled,"[44] "permanently crippled,"[45] "permanently disqualified,"[46] "permanently established,"[47] "permanently incapable of

which is in a continuing and lasting condition).

"Hospitals" see 30 C. J. p 461.

98. Bolivar County v. Merck, (Miss.) 120 S 839, 840.

99. Louisville, etc., R. Co. v. Stewart, 163 Ky. 164, 173 SW 757, 758.

"Earning capacity" see 19 C. J. p 853.

"Impairment" see 31 C. J. p 253.

"Power" see [31 Cyc 1031].

1. Louisville, etc., R. Co. v. Sights, 121 Ky. 203, 89 SW 132, 133, 28 KyL 186 (not precise equivalent of "permanent reduction in power to earn money").

2. In re Incorporation of Haines Mission, 3 Alaska 588, 592.

"Inhabitant" see 31 C. J. p 1194.

3. See cases infra this note.

[a] **Such an injunction** (1) would seem to be an injunction granted at the final determination of the suit (Miller v. Holmes, 89 Vt. 261, 95 A 541) (2) and not one which can be granted at an interlocutory hearing (Peebles v. Perkins, 165 Ga. 159, 160, 140 SE 360), (3) although it is not one having the quality of absolute perpetuity, but rather of indefiniteness, as construed in reference to the life of the subject matter (Miller v. Holmes, supra). (4) It has also been defined as an injunction which remains in force until the final termination of the suit (Riggins v. Thompson, 96 Tex. 154, 71 SW 14) (5) as distinguished from an injunction granted upon the final trial, which is called a "perpetual" injunction (Riggins v. Thompson, supra. See Injunctions § 3), (6) but this would seem to be similar to the definition of a "temporary" injunction, which is said to be an order operative usually until the final hearing of the case in which it is issued (see Temporary Injunction [37 Cyc 1798]. Compare Injunctions § 2 [an interlocutory or preliminary injunction, defined as a provisional remedy granted before a hearing on the merits]).

"Injunction" see Injunctions 32 C. J. p 1.

4. Ralston Steel Car Co. v. Ralston, 112 Oh. St. 306, 147 NE 513, 514, 517, 39 ALR 334 (a lease for a long term of years, usually ninety-nine years, which is renewable forever) See also Ground Rents 28 C. J. p 832.

"Lease" see Landlord and Tenant §§ 379–508.

5. Ralston Steel Car Co. v. Ralston, 112 Oh. St. 306, 147 NE 513, 514, 517, 39 ALR 334 (an estate in realty held under a lease for a long term of years, usually ninety-nine years, which is renewable forever). See also Ground Rents 28 C. J. p 832.

[a] **Similar to "ancient feud."**—Ralston Steel Car Co. v Ralston, 112 Oh. St. 306, 147 NE 513, 517, 39 ALR 334. "Feud" see 25 C. J. p 1084.

"Leasehold" see Landlord and Tenant § 384.

6. See cases infra this note.

[a] **An ordinance which endures until repealed.**—Michael v. State, 163 Ala. 425, 50 S 929, 933; El Dorado v. Citizens' Light, etc., Co., 158 Ark. 550, 250 SW 882, 884. "Ordinance" see Municipal Corporations § 796.

"Permanent statute" see Statutes [36 Cyc 940 note 4].

7. Com. v. Clarke, 138 Va. 101, 103, 121 SE 514.

"Park" see 46 C. J. p 1373.

8. Tyler v. Walker, 24 F. Cas. No. 14,311a, 2 Hayw. & H. 35. See Army and Navy 5 C. J. p 289.

"Post" see [31 Cyc 965].

9. Strauss v. Casey Mach., etc., Co., 68 Misc. 474, 124 NYS 32, 34 (a receiver appointed pursuant to a final judgment or a temporary receiver who is continued by a final judgment).

"Receiver" see Receivers [34 Cyc 1].

"Temporary receiver" see Receivers [34 Cyc 16 note 3].

10. Louisville, etc., R. Co. v. Sights, 121 Ky. 203, 89 SW 132, 133, 28 KyL 186 (not precise equivalent of "permanent inability to labor").

11. U. S. v. Tod, 292 Fed. 243, 247; Powers v. Bryant, 7 Port. (Ala.) 9, 15.

"Residence" see [34 Cyc 1647].

12. Odineal v. Barry, 24 Miss. 9, 22; Fowler v. Brown, 5 Tex. 407, 409.

13. Lowell v. French, 6 Cush. (Mass.) 223, 224 [quot Trippeer v. Couch, 110 Or. 446, 220 P 1012, 1015].

Construction or removal of sidewalks by city see Municipal Corporations §§ 2297–2299.

"Sidewalk" see [36 Cyc 440].

14. Fuquay v. Hopkins Academy, 58 SW 814, 22 KyL 744.

"Site" see [36 Cyc 462].

15. Alexander v. Manton Joint Union School Dist., 82 Cal. A. 360, 255 P 516, 519.

"Teacher" see Schools and School Districts [35 Cyc 817, 1064–1110].

16. Sweeten v. Friedman, (La. A.) 118 S 787, 788.

17. See Permanent § 2.

18. See Permanent § 3.

19. See Permanent § 4.

20. See Permanent § 5.

21. See Permanent § 6.

22. See Permanent § 7.

23. See Permanent § 14.

24. See Permanent § 5.

25. See Permanent § 14.

26. See Permanent § 14.

27. See Permanent § 14.

28. See Permanent § 8.

29. See Permanent § 9.

30. See Permanency, ante p 919; Permanent ante p 919.

31. Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 314.

[a] **Jewelry habitually kept in a safe deposit box,** although occasionally removed for short intervals, is "permanently" within the state for purposes of taxation. Matter of Gould, 123 Misc. 14, 205 NYS 158, 160.

32. See St. Louis, etc., R. Co. v. State, 86 Ark. 518, 112 SW 150, 151.

"Constantly" see 12 C. J. p 649.

33. Perry v. Wheeler, 12 Bush (Ky.) 541, 548.

34. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 315]. See Morton Trust Co. v. American Salt Co., 149 Fed. 540, 543.

35. Century D. [quot Hawkins v. John Hancock Mut. L. Ins. Co., 205 Iowa 760, 218 NW 313, 315].

36. Morton Trust Co. v. American Salt Co., 149 Fed. 540, 543 ("the words 'permanently' and 'forever' in the articles just cited are translations from the French phrase 'a perpétuelle demeure,' which may be rendered as 'to remain perpetually.' It is important to consider this idea of permanency and perpetuity," etc.).

"Perpetually" see post p 928.

37. Fisk v. People's Nat. Bank, 14 Colo. A. 21, 59 P 63, 65; Southwestern Presb. Univ. v. Clarksville, 149 Tenn. 256, 259 SW 550, 553.

38. Peacock v. Collins, 110 Ga. 281, 34 SE 611; Alvaton Mercantile Co. v. Caldwell, 34 Ga. A. 151, 128 SE 781, 783. And see Permanent § 1.

"Temporarily" see [37 Cyc 1797].

39. See Austen v. Crilly, 13 App. Div. 247, 249, 42 NYS 1097.

40. St. Louis, etc., R. Co. v. State, 86 Ark. 518, 521, 112 SW 150 (equivalent to "all men regularly employed").

41. Beeman v. Richardson, (Cal. A.) 189 P 790, 792.

"Permanent employment" see Permanent § 7.

"Employ" see 20 C. J. p 1238.

42. Harper v. Virginian R. Co., 76 W. Va. 788, 86 SE 919, 921, 922, Ann Cas1918D 1081.

"Maintain" see 38 C. J. p 334.

43. Penn Mut. L. Ins. Co. v. Milton, 160 Ga. 168, 127 SE 140, 141, 142, 40 ALR 1382.

"Continuously" see 13 C. J. p 209.

44. New York L. Ins. Co. v. McLean, (Ala.) 118 S 753, 754.

[a] **"Totally and permanently disabled."**—Glassberg v. Metropolitan L. Ins. Co., 133 Misc. 279, 232 NYS 417, 418. See Minnesota Mut. L. Ins. Co. v. Marshall, 29 F. (2d) 977, 978.

45. Hodsoll v. Stallebrass, 11 A. & E. 301, 39 ECL 178, 113 Reprint 429.

46. Switchmen's Union of North America v. Colehouse, 227 Ill. 561, 81 NE 696, 697.

"Disqualified" see Disqualify 18 C. J. p 1283.

47. Texas, etc., R. Co. v. Marshall, 136 U. S. 393, 402, 10 SCt 846, 34 L. ed. 385, Jones v. Newport News, etc., Co., 65 Fed. 736, 741, 13 CCA 95; Newton v. Mahoning County, 26 Oh. St. 618, 626 [aff 100 U. S. 548, 562, 25 L. ed. 710].

use,"[48] "permanently injure,"[49] "permanently located,"[50] "permanently reside,"[51] "permanently set aside,"[52] "seriously and permanently affected and injured,"[53] "to permanently deprive the owner,"[54] "totally and permanently incapacitated;"[55] also, "where such work is permanently done."[56]

PERMANENT ORDINANCE.[57]

PERMANENT RECEIVER.[58]

PERMANENT ROADS.[59]

PERMANENT SICKNESS.[60]

PERMANENT STRUCTURE.[61]

PERMANENT WAY.[62]

PERMISSION.[63] An allowance;[64] an authorization;[65] a sufferance;[66] a toleration.[67] A term which implies consent,[68] leave, or license.[69] It implies notice[70] or knowledge of the thing permitted,[71] or connotes some opportunity for knowledge.[72]

Phrases: "Permission of town,"[73] "permission to occupy . . . premises."[74]

PERMISSIVE.[75] Permitted, tolerated, suffered.[76]

Permissive use.[77] A license;[78] a license exercised in subordination to another's claim and ownership.[79]

PERMIT. [§ 1] **A. As a Noun.**[80] An allowance;[81] an authorization;[82] a leave;[83] a license;[84] a sufferance;[85] a toleration;[86] a warrant in writing.[87]

Phrases: "A permit to close a street to travel,"[88] "for lawful use and under government permit,"[89] "[water] permit."[90]

[§ 2] **B. As a Verb.**[91] Derived from the Latin word "permittere," which means to concede; to give leave; to grant.[92] It is a word of considerable elasticity. It lacks clear-cut and precise definiteness.[93] It is not a technical word, and in English it has two significations,[94] the first being where the mind consents to the act;[95] the second where the mind does not affirmatively agree to the act, but, having the right and the means to interfere to prevent it from transpiring, fails to do so.[96] It is a

[a] **"Permanently established grade."**—Henry v. La Crosse, 165 Wis. 625, 631, 162 NW 174.

"Establish" see 21 C. J. p 898.

48. Floccher's Case, 221 Mass. 54, 108 NE 1032.

"Incapable" see 31 C. J. p 371.

49. Reg. v. Bowman, (N. S.) 3 CanCrCas 410, 413.

"Injure" see 32 C. J. p 512.

"Permanent injury" see Injury § 17.

50. Mead v. Ballard, 7 Wall. (U. S.) 290, 294, 19 L. ed. 190; Hopkins v. Baker, 78 Md. 363, 370, 28 A 284, 22 LRA 477; Hooper v. Baltimore, 12 Md. 464, 472; Hascall v. Madison Univ., 8 Barb. (N. Y.) 174, 185; Farmers' State Bank v. North Oklahoma State Bank, 104 Okl. 248, 230 P 914, 915; Vinita First Nat. Bank v. Guess, 72 Okl. 125, 179 P 29, 30; Southwestern Presb. Univ. v. Clarksville, 149 Tenn. 256, 259 SW 550, 553.

"Located" see Locate 38 C. J. p 132.

51. Peacock v. Collins, 110 Ga. 281, 34 SE 611.

[a] **"To reside permanently in the United States."**—U. S. v. Tod, 292 Fed. 243, 247.

"Reside" see [34 Cyc 1645].

52. Bowers v. Slocum, 20 F. (2d) 350, 352.

"Set aside" see [35 Cyc 1439].

53. Bassett v. Johnson, 2 N. J. Eq. 154, 160.

54. State v. Mayer, 209 Mo. 391, 107 SW 1085, 1086.

"Deprive" see 18 C. J. p 784.

55. Grand Lodge B. L. F. v. Orrell, 97 Ill. A. 246, 252.

"Incapacitate" see 31 C. J. p 372.

56. St. Louis, etc., R. Co. v. State, 86 Ark. 518, 112 SW 150, 151 (means "constantly done").

"Done" see 19 C. J. p 444.

57. See Permanent § 14.

58. See Permanent § 14.

59. See Permanent § 10.

60. See Permanent § 11.

61. See Permanent § 12.

62. See Permanent § 13.

63. See Permit post this page.

64. Cowley v. Peo., 83 N. Y. 464, 471, 38 AmR 464.

65. Cowley v. Peo., supra.

[a] "**'Permission'** to do an act is 'authority' to do it." Peo. v. Howard, 31 Cal. A. 358, 367, 160 P 697.

66. Peo. v. Sheffield Farms-Slawson-Decker Co., 225 N. Y. 25, 31, 121 NE 474 ("we think the statute draws no distinction between sufferance and permission. . . . The two words are used indiscriminately"); Cowley v. Peo., 83 N. Y. 464, 471, 38 AmR 464.

67. Cowley v. Peo., supra.

68. Ball v. Campbell, 6 Ida. 754, 759, 59 P 559.

[a] **"Permission,** like sufferance, connotes something less than consent." Peo. v. Sheffield Farms-Slawson-Decker Co., 225 N. Y. 25, 31, 121 NE 474.

69. Ball v. Campbell, 6 Ida. 754, 759, 59 P 559.

[a] **"Permission involves leave and license** but it gives no right." Milauskis v. St. Louis Terminal R. Assoc., 286 Ill. 547, 555, 122 NE 78. To same effect Flaherty v. Nieman, 125 Iowa 546, 548, 101 NW 280.

70. State v. Emerson, 90 Wash. 565, 155 P 579, 582, LRA1916F 325.

71. Gray v. Stienes, 69 Iowa 124, 125, 28 NW 475; State v. Emerson, 90 Wash. 565, 155 P 579, 582, LRA 1916F 325.

72. See Peo. v. Sheffield Farms-Slawson-Decker Co., 225 N. Y. 25, 121 NE 474, 476.

73. Canton v. Westbourne Cemetery Corp., 251 Mass. 128, 146 NE 258, 259.

74. See Stockwell v. Washburn, 59 Misc. 543, 544, 111 NYS 413.

75. Permissive:

Occupancy see Adverse Possession §§ 226–232.

Waste see Waste [40 Cyc 498].

76. Webster New Int. D.

77. See Easements §§ 53, 54.

78. Novinger v. Shoop, (Mo.) 201 SW 64, 66.

79. Alper v. Tormey, 7 Cal. A. 8, 11, 93 P 402.

80. See Permission ante this page.

Permit:

Franchise distinguished from see Franchises § 19.

Indeterminate see 31 C. J. p 476 text and note 62.

Liquor see Intoxicating Liquors §§ 82–180.

81. Cowley v. Peo., 83 N. Y. 464, 471, 38 AmR 464; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 130, 212 NYS 630 [cit Cyc].

"Allowance" see 2 C. J. p 1157

82. Cowley v. Peo., 83 N. Y. 464, 471, 38 AmR 464; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 130, 212 NYS 630 [cit Cyc].

83. Motl v. Boyd, 116 Tex. 82, 286 SW 458, 475.

"Leave" see 36 C. J. p 973.

84. State v. Watson, 5 Blackf. (Ind.) 155, 156; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 130, 212 NYS 630 [cit Cyc]; Motl v. Boyd, 116 Tex. 82, 286 SW 458, 475; Neuman v. State, 76 Wis. 112, 116, 45 NW 30. See also Licenses § 1.

"License" see 37 C. J. p 161.

85. Cowley v. Peo., 83 N. Y. 464, 471, 38 AmR 464; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 130, 212 NYS 630 [cit Cyc].

"Sufferance" see [37 Cyc 516].

86. Cowley v. Peo., 83 N. Y. 464, 471, 38 AmR 464; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 130, 212 NYS 630 [cit Cyc].

87. Little Falls Fibre Co. v. Henry Ford & Son, Inc., supra.

"Warrant" see [40 Cyc 490].

88. Jones v. Boston, 188 Mass. 53, 74 NE 295, 297.

89. Ciocca-Lombardi Wine Co. v. Fucini, 204 App. Div. 392, 394, 198 NYS 114.

90. See Speer v. Stephenson, 16 Ida. 707, 102 P 365, 367.

91. Permitting another to drive automobile see Motor Vehicles §§ 831–905.

92. Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051.

"Permittere" see post p 927.

93. Dorris v. McKamy, 40 Cal. A. 267, 180 P 645, 649.

[a] **An instruction** that a defendant in a criminal action is "permitted" to be a witness in his own behalf is not erroneous as being used to express an idea antagonistic to the absolute right of defendant to testify in his own behalf. State v. Porter, 32 Or. 135, 49 P 964, 970.

94. Warberton v. Woods, 6 Mo. 8, 12.

95. Warberton v. Woods, supra.

[a] **"Permit" is often used in an affirmative sense.**—Baird v. Larabee Flour Mills Corp., 203 Mo. A. 432, 220 SW 988, 990.

96. Warberton v. Woods, 6 Mo. 8, 12 [quot Evans v. U. S. Fidelity, etc., Co., 195 Mo. A. 438, 192 SW 112].

[a] **A failure to prohibit** may be said to amount to a license or permission to do a particular act; and in this sense, the word "permit" is sometimes used. But this is believed to be its secondary, rather than its primary, signification. When thus used, it implies that the party has it in his immediate power to prevent the act or thing; and having failed to prohibit the same, it may well and safely be concluded that he permitted it. Abrahams v. State, 4 Iowa 541, 543.

[b] **"Permit" implies no affirmative act.**—It involves no intent. It is mere passivity; abstaining from preventive action. In re Thomas, 103 Fed. 272, 274; Dorris v. McKamy, 40 Cal. A. 267, 180 P 645, 649. See Aull v. Columbia, etc., R. Co., 42 S. C. 431, 436, 20 SE 302.

[c] **"It is synonymous with suffering an act to be done,** in the sense of being negligent or indifferent in respect to the violation." Peo. v. Sheffield Farms-Slawson-Decker Co., 180 App. Div. 615, 619, 167 NYS 958.

[d] **Mere passive nonresistance** by an insolvent debtor to a suit brought by a creditor is not "suffering or permitting" a creditor to obtain a preference through legal proceedings, within the meaning of a bankruptcy

word, therefore, ordinarily implying knowledge[97] and consent,[98] although such rule is not without exceptions.[99] Its various definitions have been given as follows: Not to hinder;[1] not to prohibit or prevent;[2] to abstain from taking preventive action;[3] to acquiesce in;[4] to allow[5] expressly[6] or knowingly;[7] to allow after notice or knowledge;[8] to allow by not prohibiting;[9] to allow by tacit consent, or

act. In re Ogles, 93 Fed. 426, 434.

[e] **Where it was not within the power** of an insolvent debtor to defeat a preference, he cannot be said to have "suffered or permitted" it within the meaning of a bankruptcy act. In re Nelson, 98 Fed. 76, 77.

[f] **"Permit" necessarily implies power to prevent.**—Mitchell Lime Co. v. Nickless, (Ind. A.) 85 NE 728, 729.

97. Minneapolis, etc., R. Co. v. U. S., 240 Fed. 315, 317, 153 CCA 241; Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180; Pittsburgh, etc., R. Co. v. Richardson, 40 Ind. A. 503, 82 NE 536, 537; Armstrong v. Sumne, etc., Co., 211 Ky. 750, 278 SW 111, 113; Allen v. Com., 178 Ky. 250, 198 SW 896, 897; Elkhorn Min. Corp. v. Com., 173 Ky. 417, 191 SW 256; Bunnell v. Com., 99 SW 237, 238, 30 KyL 491; State v. Pierce, (Me.) 15 A 68; Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124; Atwater v. Lober, 233 NYS 309, 313; Clover Creamery Co. v. Kanode, 142 Va. 542, 129 SE 222, 223. See Haller v. Quaker Oats Co., 181 Iowa 389, 164 NW 863, 868; La Belle v. Powers Mercantile Co., 103 Minn. 515, 114 NW 1131, 1132; State v. Wheeler, 38 N. D. 456, 165 NW 574, 577; Larson v. Christianson, 14 N. D. 476, 106 NW 51, 52; Kelly v. Wigzell, 5 Austr. C. L. R. 126, 129.

"The term 'permitting' presupposes the idea of knowledge." Texas, etc., R. Co. v. Geiger, 55 Tex. Civ. A. 1, 11, 118 SW 179.

[a] **Knowledge express or implied** is necessary to show that the owner of a building violated an injunction against "permitting" the sale of liquor in the building. Sawyer v. Mould, 144 Iowa 185, 122 NW 813, 814, 25 LRANS 602.

[b] **Used in a statute against gambling,** the word implies knowledge on the part of the one in control of the house in which the gambling took place. Stuart v. State, (Tex. Cr.) 60 SW 554. To same effect State v. Cure, 7 Iowa 479, 481; Lancaster Hotel Co. v. Com., 149 Ky. 443, 149 SW 942, 943; Bunnell v. Com., 99 SW 237, 238, 30 KyL 491.

[c] **Used in a statute against working employees overtime** it implies that the employer, in order to be guilty of violating the statute, had knowledge that the employees worked overtime. MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148. Compare U. S. v. Denver, etc., R. Co., 249 Fed. 464, 466, 161 CCA 422 (where it was held that a railroad company, which failed to see that an agent did not remain on duty for an excess period, "permitted" the employee to perform the excess service in violation of a statute); Minneapolis, etc., R. Co. v. U. S., 240 Fed. 315, 317, 319, 153 CCA 241 (where it was said that the knowledge of the employee that he is exceeding the authorized hours is notice to the employer railroad); U. S. v. Oregon Short Line R. Co., 228 Fed. 561, 562, 563; U. S. v. Oregon-Washington R., etc., Co., 213 Fed. 688, 690 (where it was pointed out, however, that the statute in question provided that the employer railroad "shall be deemed to have had knowledge, etc."); Perkins v. State, 80 Tex. Cr. 416, 190 SW 168, 169 (where it was said that the word "permit" in the sense in which it was used in the statute pertained to the authority or control of the employer or contractor over the employee or laborer; the word did not apply generally to any man who might have knowledge that the employee was working overtime).

[d] **Used in a statute regarding billiard playing by minors** (1) the owner of the billiard table must know that the player is a minor in order to be guilty of an offense. Com. v. Wills, 121 Ky. 103, 89 SW 144, 28 KyL 77. (2) However, the view seems also adopted that the mere fact that a minor plays imputes knowledge to the owner and renders him guilty of "permitting" a minor to play. State v. Schnables, 109 Ark. 429, 160 SW 388, 389; State v. Probasco, 62 Iowa 400, 17 NW 607; Com. v. Emmons, 98 Mass. 6.

[e] **One not shown to have known of the presence** of a drunken person on his "licensed premises" cannot be convicted of "permitting" drunkenness to take place there. Somerset v. Wade, [1894] 1 Q. B. 574, 576.

"Knowledge" see 35 C. J. p 919.

98. Minneapolis, etc., R. Co. v. U. S., 240 Fed. 315, 317, 153 CCA 241; Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180; Elkhorn Min. Corp. v. Com., 173 Ky. 417, 191 SW 256; State v. Pierce, (Me.) 15 A 68; Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124. See Peo. v. Conness, 150 Cal. 114, 88 P 821 [quot Peo. v. Duncan, 22 Cal. A. 430, 134 P 797, 798]; L'Engle v. Scottish Union etc., F. Ins. Co., 48 Fla. 82, 37 S 462, 465, 111 AmSR 70, 67 LRA 581, 5 AnnCas 748; State v. Wheeler, 38 N. D. 456, 165 NW 574, 577; Larson v. Christianson, 14 N. D. 476, 106 NW 51, 52.

[a] **As used in an ordinance** it implied at least acquiescence; passivity; abstaining from preventive action. Caspers v. Anglo-American Provision Co., 159 Ill. A. 573, 575. Acquiescence see 1 C. J. p 905.

[b] **In a statute against gaming** it means giving consent thereto, or having knowledge thereof. Stuart v. State, (Tex. Cr.) 60 SW 554 [quot Bunnell v. Com., 99 SW 237, 238, 30 KyL 491].

[c] **Affirmative assent** is necessary on the part of a landlord to render him guilty of "permitting" a tenant to use the premises for an illegal purpose. Mere inactivity, or mere failure to interfere, cannot be construed as permission or as acquiescence. State v. Abraham, 6 Iowa 117, 122, 71 AmD 399.

[d] **"Denotes a decided assent."**—Burns v. Columbus, 13 OhNPNS 508, 517 [cit Cyc].

[e] **"Implies consent given or leave granted."**—Loosey v. Orser, 17 N. Y. Super. 391, 404 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148].

[f] **"Includes the element of assent."**—State v. Robinson, 55 Minn. 169, 171, 56 NW 594.

"Consent" see 12 C. J. p 515.

99. Minneapolis, etc., R. Co. v. U. S., 240 Fed. 315, 317, 153 CCA 241. See Missouri, etc., R. Co. v. Keefe, 37 Tex. Civ. A. 588, 84 SW 679, 682. See also supra note 97.

[a] **Under a federal safety appliance act** knowledge was not necessary on the part of a railroad that cars hauled over its lines by a lumber company were defective to render it guilty of "permitting" defective cars to be hauled over its lines. U. S. v. Northwestern Pac. R. Co., 235 Fed. 965, 969.

1. In re Thomas, 103 Fed. 272, 274.

"Hinder" see 29 C. J. p 755.

2. Arms v. Knoxville, 32 Ill. A. 604, 607; Murphy v. Roney, 82 SW 396, 398, 26 KyL 634; Ball Ranch Co. v. Hendrickson, 50 Mont. 220, 146 P 278, 280; Peo. v. Harrison, 183 App. Div. 812, 814, 170 NYS 876. See U. S. v. Oregon-Washington R., etc., Co., 213 Fed. 688, 690.

[a] **Similar definition.**—"Not to prevent." Murray D. [quot Moseley v. Ketchum, 3 Sask. L. 29, 33, 12 WestLR 721]. See Holly v. Simmons, 38 Tex. Civ. A. 124, 85 SW 325, 327.

[b] **As inferring the power to prevent.**—Clark v. Ward, 2 Alta. L. 101, 107, 9 WestLR 657.

[c] **Implies express assent or license** to do an act, or a failure to prohibit or prevent it. State v. Probasco, 62 Iowa 400, 402, 17 NW 607.

"Prevent" see [31 Cyc 1170].

"Prohibit" see [32 Cyc 594].

3. Macartney v. Miller, 7 Terr. L. 367, 368, 2 WestLR 87 [quot Armour v. Marshall, 3 Sask. L. 394, 15 WestLR 173, 175, 176; Owen v. Dingwall, 3 Sask. L. 328, 14 WestLR 730, 732; Moseley v. Ketchum, 3 Sask. L. 29, 33, 12 WestLR 721].

"Abstain" see 1 C. J. p 364.

4. Adams v. Albert, 87 Hun 471, 473, 34 NYS 328.

"Acquiesce" see 1 C. J. p 905.

5. Webster New Int. D. [quot Minneapolis, etc., R. Co. v. U. S., 240 Fed. 315, 317, 153 CCA 241]; Webster D. [quot Stewart v. Burlington, etc., R. Co., 32 Iowa 561, 563; Armstrong v. Sumne, etc., Co., 211 Ky. 750, 278 SW 111, 113]; Worcester D. [quot Ft. Wayne v. De Witt, 47 Ind. 391, 394]; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330 [quot U. S. v. Innes, 218 Fed. 705, 706]; Louisville, etc., R. Co. v. Smith, 163 Ala. 141, 50 S 241, 244; Peo. v. Conness, 150 Cal. 114, 121, 88 P 821 [quot In re Jackson, 37 Nev. 167, 140 P 719, 720]; Elkhorn Min. Corp. v. Com., 173 Ky. 417, 191 SW 256; Murphy v. Roney, 82 SW 396, 398, 26 KyL 634; McHenry v. Winston, 105 Ky. 307, 49 SW 4, 971, 20 KyL 1194, 1195; Peo. v. Harrison, 183 App. Div. 812, 814, 170 NYS 876; Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Adams v. Albert, 87 Hun 471, 473, 34 NYS 328; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634 [cit Cyc].

[a] **"Permitted"** means practically the same as "allowed." Markham v. Hipke, 169 Wis. 37, 171 NW 300.

[b] **"Allow" distinguished.**—(1) Permit is more positive, denoting a decided assent. Chicago v. Stearns, 105 Ill. 554, 558; Peo. v. Warning, 142 Ill. A. 181, 183; Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124; Atwater v. Lober, 233 NYS 309, 313; Board of Education v. Board of Education, 3 OhS&CP 70, 2 OhNP 256. (2) "To 'permit' is more positive, denoting a decided assent, either directly or by implication. To 'allow' is more negative, and imports only acquiescence or abstinence from prevention." Webster D. [quot Curtis, etc., Co. v. Pigg, 39 Okl. 31, 39, 134 P 1125]. Compare In re Thomas, 103 Fed. 272, 274 (declaring that Webster defines "permit" as more negative than "allow;" that it imports only acquiescence or an abstinence from prevention).

"Allow" see 2 C. J. p 1154.

6. Century D. [quot U. S. v. Almond, 6 Philippine 306, 309]; Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051.

[a] **Similar definitions.**—(1) "To allow by express consent given." Steves v. South Vancouver, 6 B. C. 17, 37. (2) "To allow by express consent." Burns v. Columbus, 13 OhNPNS 508, 517 [cit Cyc].

"Expressly" see 25 C. J. p 223.

7. Armstrong v. Sumne, etc., Co., 211 Ky. 750, 278 SW 111, 113 [quot Wigginton v. Bruce, 174 Ky. 691, 192 SW 850].

"Knowingly" see 35 C. J. p 918.

8. Cramer v. Jenkins, 82 Cal. A. 269, 255 P 877, 878, 256 P 444 [cit Cyc]; Atwater v. Lober, 233 NYS 309, 313; Larson v. Christianson, 14 N. D. 476, 481, 106 NW 51.

9. State v. Schnables, 109 Ark. 429, 160 SW 388, 389; Wertz v. Mulloy, 144 Ill. A. 329, 334, Com. v. Curtis, 9 Allen (Mass.) 266, 271; Ball Ranch Co. v. Hendrickson, 50 Mont. 220, 146 P 278, 280. See Evans v. U. S. Fidel-

by not hindering;[10] to allow or consent to;[11] to allow or suffer to be done;[12] to allow without expressly authorizing;[13] to assent;[14] to authorize;[15] to consent[16] to;[17] to consent tacitly to;[18] to empower[19] expressly;[20] to give leave;[21] to give leave, liberty, or license to;[22] to give over;[23] to grant;[24] to grant express license or liberty to do an act;[25] to grant leave;[26] to grant leave or liberty to by express consent;[27] to grant permission;[28] to grant permission, liberty, or leave;[29] to leave;[30] to let;[31] to license;[32] to look on at, and allow a person to act or a thing to be done;[33] to put up with;[34] to refer;[35] to require;[36] to resign;[37] to sanction;[38] to suffer;[39] to suffer or allow without interference

ity, etc., Co., 195 Mo. A. 438, 192 SW 112.

10. Standard D. [quot Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180; Holly v. Simmons, 38 Tex. Civ. A. 124, 85 SW 325, 327]; Webster D. [quot Smallwood v. St. Louis-San Francisco R. Co., 217 Mo. A. 208, 263 SW 550, 558; Ball Ranch Co. v. Hendrickson, 50 Mont. 220, 146 P 278, 280]; State v. Peters, 112 Oh. St. 249, 147 NE 81, 84; Lemery v. Leonard, 99 Or. 670, 196 P 376, 378. See Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124.

[a] **Similar definitions.**—(1) "To allow by silent consent, or by not prohibiting." Webster D. [quot Stewart v. Burlington, etc., R. Co., 32 Iowa 561, 563]. (2) "To allow by silent consent or by not offering opposition or hindrance." Cramer v. Jenkins, 82 Cal. A. 269, 276, 255 P 877, 256 P 444 [quot Cyc]; Steves v. South Vancouver, 6 B. C. 17, 37 [quot Encyc. D.] (3) "To allow to be done by consent or by not prohibiting." Cramer v. Jenkins, supra [quot Cyc]. To same effect Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051.

11. U. S. v. San Francisco Bridge Co., 88 Fed. 891, 893; MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148; Atwater v. Lober, 233 NYS 309, 313.

12. Cramer v. Jenkins, 82 Cal. A. 269, 255 P 877, 880, 256 P 444 [cit Cyc]; Robertson v. Ongley Electric Co., 82 Hun 585, 589, 31 NYS 605.

[a] **Similar definition.**—"To allow to be done." Webster D. [quot State v. Kaufman, 50 S. D. 645, 211 NW 691, 692].

13. Century D. [quot U. S. v. Innes, 218 Fed. 705, 706; U. S. v. Almond, 6 Philippine 306, 309].

14. State v. Waxman, 93 N. J. L. 27, 107 A 150, 151.

"Assent" see 5 C. J. p 811.

15. Standard D. [quot Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180]; Webster D. [quot Armstrong v. Sumne, etc., Co., 211 Ky. 750, 278 SW 111, 113; State v. Kaufman, 50 S. D. 645, 211 NW 691, 692]; Worcester D. [quot Ft. Wayne v. De Witt, 47 Ind. 391, 394]; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330 [quot U. S. v. Innes, 218 Fed. 705, 706]; Sawyer v. Mould, 144 Iowa 185, 122 NW 813, 814, 25 LRANS 602; McHenry v. Winston, 105 Ky. 307, 49 SW 4, 971, 20 KyL 1194; Conner v. Fogg, 75 N. J. L. 245, 67 P 338, 339; Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634; Steves v. South Vancouver, 6 B. C. 17, 37. See Rex v. Irish, 18 Ont. L. 351, 353, 13 OntWR 769.

"Authorize" see 6 C. J. p 865.

16. Robertson v. Ongley Electric Co., 82 Hun 585, 589, 31 NYS 605.

[a] **Distinguished from "consent"** which implies some positive action, while the word "permit" implies mere passivity. Aull v. Columbia, etc., R. Co., 42 S. C. 431, 436, 20 SE 302.

"Consent" see 12 C. J. p 519.

17. Webster D. [quot State v. Kaufman, 50 S. D. 645, 211 NW 691, 692].

18. Standard D. [quot Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180; Holly v. Simmons, 38 Tex. Civ. A. 124, 85 SW 325, 327]; Webster D. [quot Smallwood v. St. Louis-San Francisco R. Co., 217 Mo. A. 208, 263 SW 550, 558; Ball Ranch Co. v. Hendrickson, 50 Mont. 220, 146 P 278, 280].

19. Worcester D. [quot Ft. Wayne v. De Witt, 47 Ind. 391, 394]; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330 [quot U. S. v. Innes, 218 Fed. 705, 706]; Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124; Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634.

"Empower" see 20 C. J. p 1246.

20. Standard D. [quot Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180; Holly v. Simmons, 38 Tex. Civ. A. 124, 85 SW 325, 327].

21. Webster D. [quot Armstrong v. Sumne, etc., Co., 211 Ky. 750, 278 SW 111, 113; State v. Kaufman, 50 S. D. 645, 211 NW 691, 692]; Sawyer v. Mould, 144 Iowa 185, 122 NW 813, 814, 25 LRANS 602; McHenry v. Winston, 105 Ky. 307, 49 SW 4, 971, 20 KyL 1194, 1195; Conner v. Fogg, 75 N. J. L. 245, 67 A 338, 339; Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634; Board of Education v. Board of Education, 3 OhS&CP 70, 2 OhNP 256; Oliver v. State, (Tex. Cr.) 144 SW 604, 609.

"Give" see 28 C. J. p 708.

22. Century D. [quot U. S. v. Almond, 6 Philippine 306, 309]; Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051.

[a] **Similar definitions.**—(1) "To give permission, leave, liberty or authority to another." Steves v. South Vancouver, 6 B. C. 17, 37. (2) "To give leave or liberty." Elkhorn Min. Corp. v. Com., 173 Ky. 417, 419, 191 SW 256; Atwater v. Lober, 233 NYS 309, 313.

23. Steves v. South Vancouver, 6 B. C. 17, 37.

24. Elkhorn Min. Corp. v. Com., 173 Ky. 417, 191 SW 256; Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634; Atwater v. Lober, 233 NYS 309, 313.

"Grant" see 28 C. J. p 821.

25. Webster D. [quot Armstrong v. Sumne, etc., Co., 211 Ky. 750, 278 SW 111, 113; State v. Kaufman, 50 S. D. 645, 211 NW 691, 692].

[a] **Similar definitions.**—(1) "To grant express license or liberty to do." Board of Education v. Board of Education, 3 OhS&CP 70, 71, 2 OhNP 256. (2) "To grant express license or liberty to." Oliver v. State, (Tex. Cr.) 144 SW 604, 609.

26. Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124.

27. Century D. [quot U. S. v. Almond, 6 Philippine 306, 309]; Webster D. [quot Stewart v. Burlington, etc., R. Co., 32 Iowa 561, 563].

[a] **Similar definitions.**—(1) "To grant leave or liberty to by express consent." Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051. (2) "To grant leave to by express consent or authorization." Standard D. [quot Elliott v. State, 19 Ariz. 1, 4, 164 P 1179; Holly v. Simmons, 38 Tex. Civ. A. 124, 128, 85 SW 325]; Lemery v. Leonard, 99 Or. 670, 678, 196 P 376.

28. Board of Education v. Board of Education, 3 OhS&CP 70, 71, 2 Oh NP 256; Oliver v. State, (Tex. Cr.) 144 SW 604, 609.

29. Worcester D. [quot Ft. Wayne v. De Witt, 47 Ind. 391, 394]; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330 [quot U. S. v. Innes, 218 Fed. 705, 706].

30. Steves v. South Vancouver, 6 B. C. 17, 37.

"Leave" see 36 C. J. p 974.

31. Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634.

"Let" see 36 C. J. p 991.

32. Worcester D. [quot Ft. Wayne v. De Witt, 47 Ind. 391, 394]; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330 [quot U. S. v. Innes, 218 Fed. 705, 706]; Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124; Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634.

"License" see 37 C. J. p 101.

33. Steves v. South Vancouver, 6 B. C. 17, 37.

34. Murphy v. Roney, 82 SW 396, 398, 26 KyL 634; Robertson v. Ongley Electric Co., 82 Hun 585, 589, 31 NYS 605.

35. Steves v. South Vancouver, 6 B. C. 17, 37.

"Refer" see [34 Cyc 769].

36. Loeser v. Savings Deposit Bank, etc., Co., 148 Fed. 975, 980, 78 CCA 597, 12 LRANS 1233.

[a] **To require** something includes the idea of "permitting" it. State v. Peters, 112 Oh. St. 249, 147 NE 81, 84.

[b] **"Require" distinguished.**—(1) "The words 'require' and 'permit' express different ideas; in the ordinary use of the English language the one does not include the other." In re Boyd, 213 Fed. 774, 775, 130 CCA 288. (2) "To 'require' an act to be done raises in the mind some order or other direction to do it. It is a positive act. To 'permit' an act to be done raises in the mind no positive order or direction, but only a failure to attempt to prevent the act from being done." State v. Peters, 25 OhNPNS 69, 71.

"Require" see [34 Cyc 1626].

37. Murphy v. Rouey, 82 SW 396, 398, 26 KyL 634; Steves v. South Vancouver, 6 B. C. 17, 37.

"Resign" see [34 Cyc 1663].

38. Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634.

39. Standard D. [quot Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180; Holly v. Simmons, 38 Tex. Civ. A. 124, 85 SW 325, 327]; Webster New Int. D. [quot Minneapolis, etc., R. Co. v. U. S., 240 Fed. 315, 317, 153 CCA 241]; Webster D. [quot Smallwood v. St. Louis-San Francisco R. Co., 217 Mo. A. 208, 263 SW 550, 558]; Worcester D. [quot Ft. Wayne v. De Witt, 47 Ind. 391, 394]; In re Arnold, 94 Fed. 1001, 1002; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330 [quot U. S. v. Inness, 218 Fed. 705, 706]; State v. Poplowski, 104 Conn. 493, 133 A 671, 672; Allen v. Com., 178 Ky. 250, 198 SW 896, 897 [quot Armstrong v. Sumne, etc., Co., 211 Ky. 750, 278 SW 111, 113, 114]; Bunnell v. Com., 99 SW 237, 239, 30 KyL 491; Murphy v. Roney, 82 SW 396, 398, 26 KyL 634; Conner v. Fogg, 75 N. J.

or prohibition,[40] to take no steps to prevent;[41] to tolerate;[42] to warrant in writing.[43] It has been distinguished from "cause;"[44] "do;"[45] "have;"[46] "occasion;"[47] and "procure."[48]

To be permitted. Used with consent.[49]

Phrases: "Cause or permit,"[50] "do or permit,"[51] "may permit,"[52] "permit an invoice to be false,"[53] "permit a verdict,"[54] "permit or suffer,"[55] "require or permit,"[56] "suffer and permit,"[57] "suffer or permit,"[58] "willfully permit;"[59] also, "allows or permits,"[60] "authorized and permitted,"[61] "employed, permitted, or suffered,"[62] "knowingly permitted,"[63] "obtained and permitted,"[64] "permits drunkenness,"[65] "permitted, allowed, and acquiesced,"[66] "permitted to be suddenly started,"[67] "permitted to resort;"[68] and "letting or permitting,"[69] "permitting to be carried,"[70] "permitting to be hauled,"[71] "water permitting."[72]

PERMITTERE.[73] A Latin word, meaning to concede; to give leave; to grant.[74]

PER MITTER LE DROIT.[75]

PER MITTER L'ESTATE.[76]

PERMUTA. In Spanish law, the contract of exchange or barter;[77] also, the renunciation of benefice with a prayer that it may be exchanged for another.[78]

PERMUTANTE. A party to the contract of permuta.[79]

PER MY ET PER TOUT.[80]

PERPENDICULAR. Exactly upright or vertical.[81]

L. 245, 67 A 338, 339; Peo. v. Harrison, 183 App. Div. 812, 813, 170 NYS 876; Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Adams v. Albert, 87 Hun 471, 473, 34 NYS 328; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634; Ferguson v. Greth, 195 Pa. 272, 45 A 735, 737, 78 AmSR 812; Ex p. Eyston, 7 Ch. D. 145, 149 [quot Peo. v. Harrison, 183 App. Div. 812, 814, 170 NYS 876]; Somerset v. Wade, [1894] 1 Q. B. 574, 576; Rex v. Dobie, 29 B. C. 188, 57 DomLR 290, 291, 35 CanCrCas 10, [1921] 1 WestWkly 723.

[a] **"It is perhaps sometimes used synonymously with 'suffer'** under certain circumstances, but ordinarily it implies knowledge and consent and means to grant leave; to tolerate; to empower; to license." Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124 [cit Gregory v. Marks, 10 F. Cas. No. 5,802, 8 Biss. 44].

[b] **"Suffer" not synonymous.**—In re Wilmington Hosiery Co., 120 Fed. 180, 184.

[c] **"Suffer" distinguished.**—(1) "Permit" and "suffer" are pseudosynonyms, there being a shade of difference between their meanings. "Permit" conveys the idea of affirmative action more than "suffer" does. Ft. Wayne v. De Witt, 47 Ind. 391, 394, 395. (2) "Permit" is more positive, denoting a decided assent. Chicago v. Stearns, 105 Ill. 554, 558; Peo. v. Warning, 142 Ill. A. 181, 183; Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124; Board of Education v. Board of Education, 3 OhS&CP 70, 2 OhNP 256. (3) "To permit is more positive, denoting a decided assent, either directly or by implication. . . . To suffer is used in cases where our feelings are adverse, but we do not think best to resist." Webster D. [quot Curtis, etc., Co. v. Pigg, 39 Okl. 31, 39, 134 P 1125]. (4) "Suffer" has a stronger passive and negative sense than "permit," and implies sometimes mere indifference. In re Thomas, 103 Fed. 272, 274. (5) "Permitted" does not imply passiveness any more than the word "suffered." In re Ogles, 93 Fed. 426, 434.

"Suffer" see [37 Cyc 515].

40. Cramer v. Jenkins, 82 Cal. A. 269, 255 P 877, 880, 256 P 444 [cit Cyc]; Terr. v. Stone, 2 Dak. 155, 4 NW 697, 700; Steves v. South Vancouver, 6 B. C. 17, 37.

[a] **Similar definition.**—"To suffer or allow to be, come to pass, or to take place, by tacit consent or by not prohibiting or hindering." Century D. [quot U. S. v. Innes, 218 Fed. 705, 706; U. S. v. Almond, 6 Philippine 306, 309].

41. Standard D. [quot Elliott v. State, 19 Ariz. 1, 164 P 1179, 1180; Holly v. Simmons, 38 Tex. Civ. A. 124, 85 SW 325, 327]; Webster D. [quot Smallwood v. St. Louis-San Francisco R. Co., 217 Mo. A. 208, 263 SW 550, 558; Ball Ranch Co. v. Hendrickson, 50 Mont. 220, 146 P 278, 280]; Lemery v. Leonard, 99 Or. 670, 196 P 376, 378.

42. Worcester D. [quot Ft. Wayne v. De Witt, 47 Ind. 391, 394; State v. Kaufman, 50 S. D. 645, 211 NW 691, 692]; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330 [quot U. S. v. Innes, 218 Fed. 705, 706]; Winslow v. Missouri, etc., R. Co., (Mo. A.) 192 SW 121, 124; Robertson v. Ongley Electric Co., 82 Hun 585, 589, 31 NYS 605; Burns v. Columbus, 13 OhNPNS 508, 517 [cit Cyc]; Steves v. South Vancouver, 6 B. C. 17, 37.

"Tolerate" see [38 Cyc 358].

43. Coon v. Froment, 25 App. Div. 250, 252, 49 NYS 305 [quot MacFarlane v. Mosier, 79 Misc. 460, 141 NYS 143, 148]; Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 NYS 630, 634.

"Warrant" see [40 Cyc 490].

44. Peo. v. Harrison, 183 App. Div. 812, 814, 170 NYS 876 (an act of omission as opposed to the commission implied in the word "cause").

45. Ex p. Eyston, 7 Ch. D. 145, 149, 150; Steves v. South Vancouver, 6 B. C. 17, 37.

"Do" see 19 C. J. p 379.

46. Thiebes-Stierlin Music Co. v. Weiss, 142 Mo. A. 598, 121 SW 1099, 1101 ("permitting" and "having" are not synonymous).

"Have," "Has," "Had," and "Having" see 29 C. J. p 219.

47. Evans v. U. S. Fidelity, etc., Co., 195 Mo. A. 438, 192 SW 112, 115.

"Occasion" see [29 Cyc 1340].

48. In re Ogles, 93 Fed. 426, 434 ("procured" is a stronger word than "permitted").

"Procure" see [32 Cyc 573].

49. State v. Pierce, (Me.) 15 A 68.

50. Korten v. West Sussex County, 88 L. T. Rep. N. S. 466, 470. See Hochstrasser v. Martin, 62 Hun 165, 168, 16 NYS 558 (failure of court to insert "or permitted" after "caused" in submitting a question as to a nuisance to the jury).

51. Steves v. South Vancouver, 6 B. C. 17, 36, 37.

52. Hyams v. Federal Coal, etc., Co., 152 Fed. 970, 973, 82 CCA 324 (does not mean "may require" or "may compel").

53. Korten v. West Sussex County, 88 L. T. Rep. N. S. 466, 471.

54. Brooks v. Boyd, 1 Ga. A. 65, 57 SE 1093, 1096 (no different from "direct a verdict").

55. Robertson v. Ongley Electric Co., 82 Hun 585, 589, 31 NYS 605; Berton v. Alliance Economic Inv. Co., Ltd., [1922] 1 K. B. 742, 754, 755.

[a] **"Permitted or suffered."**—Atkin v. Rose, [1923] 1 Ch. 522, 533, Rex v. Creighton, (Alta.) 29 CanCr Cas 161, 163, [1917] 3 WestWkly 499.

[b] **"Permitted or suffered to work."**—Clover Creamery Co. v. Kanode, 142 Va. 542, 545, 129 SE 222.

56. U. S. v. Oregon-Washington R., etc., Co., 213 Fed. 688, 690; State v. Peters, 112 Oh. St. 249, 147 NE 81, 84.

[a] **"Required or permitted."**—In re Boyd, 213 Fed. 774, 775, 130 CCA 288.

57. Lancaster Hotel Co. v. Com., 149 Ky. 443, 444, 149 SW 942; Hobson v. Middleton, 6 B. & C. 295, 302, 13 ECL 142, 108 Reprint 461.

58. In re Reichman, 91 Fed. 624 (as meaning "allows").

[a] **"Knowingly suffer or permit."**—Com. v. Wills, 121 Ky. 103, 104, 89 SW 144, 28 KyL 77.

59. Johnson v. U. S., 260 Fed. 783, 786, 171 CCA 509.

60. Peo. v. Duncan, 22 Cal. A. 430, 134 P 797, 798.

61. Barron County v. Beckwith, 142 Wis. 519, 524, 124 NW 1030, 135 AmSR 1079, 30 LRANS 810.

[a] **"Authorized or knowingly permitted."**—Wertz v. Mulloy, 144 Ill. A. 329, 334. See infra note 63.

62. Curtis, etc., Co. v. Pigg, 39 Okl. 31, 38, 134 P 1125.

63. Ryan v. Rogers, 14 Ida. 309, 94 P 427, 432 [quot Rocheleau v. Boyle, 11 Mont. 451, 28 P 872] (equivalent to "understood and agreed").

[a] **"Authorized or knowingly permitted."**—Wertz v. Mulloy, 144 Ill. A. 329, 334.

64. Ferguson v. Greth, 195 Pa. 272, 45 A 735, 737, 78 AmSR 812.

65. Warden v. Tye, 2 C. P. D. 74, 75 (an innkeeper who became drunk himself did not "permit drunkenness" on his premises within the meaning of the statute).

66. Hannan v. Ehrlich, 102 Oh. St. 176, 185, 131 NE 504.

67. Baird v. Larabee Flour Mills Corp., 203 Mo. A. 432, 220 SW 988, 990 (synonymous with "suddenly started").

68. State v. Poggmeyer, 91 Kan. 633, 138 P 593, 594.

69. Macartney v. Miller, 7 Terr. L. 367, 368, 2 WestLR 87.

70. See North Staffordshire R. Co. v. Waters, 110 L. T. Rep. N. S. 237.

71. U. S. v. Northwestern Pac. R. Co., 235 Fed. 965, 969.

72. Fletcher v. Prestwood, 143 Ala. 174, 38 S 847, 848.

73. See Permit ante p 924.

74. Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051.

"Grant" see 28 C. J. p 821.

75. See Per § 3.

76. See Per § 3.

77. Escriche Diccionario; Philippine Civ. Code art 1538; Porto Rico Civ. Code § 1441. See Sales [35 Cyc 1].

[a] **If greater part of purchase price is in money,** the contract is permuta; otherwise venta. Spanish Civ. Code art 1446; Philippine Civ. Code art 1446; Porto Rico Civ. Code § 1349.

78. Escriche Diccionario.

79. Spanish Civ. Code arts 1538–1541; Philippine Civ. Code arts 1538–1541; Porto Rico Civ. Code §§ 1441–1444.

80. See Per § 3.

81. Webster New Int. D.

[a] **"Perpendicular wash bank."**—Wyandot County v. Boucher, 98 Oh. St. 263, 265, 120 NE 700. Bank see 6 C. J. p 1178.

PERPETRATE.[82] A word used commonly in a bad sense;[83] and meaning to be guilty of;[84] commit, as a wicked deed;[85] as, to perpetrate a crime.[86]

PERPETRATION.[87] The act of perpetrating; the doing.[88]

Phrases: "Perpetration of burglary;"[89] also, "perpetration of a crime."[90]

PERPETRATOR.[91] One who commits an offense or crime;[92] one who is guilty of an act, usually in a bad sense.[93]

PERPETUAL.[94] A word, the meaning of which is to be construed according to the relation in which it is used, and the surrounding facts and circumstances.[95] Defined as meaning continued;[96] continuing forever in future time;[97] continuing or continued without intermission;[98] continuous;[99] destined to be eternal;[1] everlasting;[2] never ceasing;[3] unfailing;[4] uninterrupted.[5]

Perpetual curate.[6] A minister having, as to ecclesiastical matters, the same functions as a rector, a parson, or a vicar.[7] He is not the mere representative of the parson as a curate would be; but he is the minister and has the spiritual government of the parish.[8]

Other phrases: "Perpetual exclusive privilege;"[9] also, "perpetual right, power and authority."[10]

PERPETUAL CURATE.[11]

PERPETUA LEX EST NULLAM LEGEM HUMANAM AC POSITIVAM PEPETUAM ESSE; ET CLAUSULA QUÆ ABROGATIONEM EXCLUDIT AB INITIO NON VALET.[12]

PERPETUALLY.[13] A word which may mean forever or eternally;[14] or may simply express a lack of limitation.[15] When used in relation to rights and privileges of corporations, it means for the period of time fixed for the existence of the corporation.[16]

Phrases: "Perpetually binding on the owners of the land;"[17] also, "to remain in force perpetually."[18]

PERPETUATION OF TESTIMONY.[19]

PERPETUITATIBUS LEX OBSISTIT.[20]

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82. See Perpetration post this page; Perpetrator post this page.

83. New Standard D.; Webster New Int. D. [both quot Peo. v. Lovelace, (Cal. A.) 275 P 489, 490].

84. New Standard D. [quot Peo. v. Lovelace, supra].

85. New Standard D. [quot Peo. v. Lovelace, supra].

"Commit" see 12 C. J. p 148.

86. Webster New Int. D. [quot Peo. v. Lovelace, (Cal. A.) 275 P 489, 490].

[a] **"Perpetrated by means of poison."**—State v. Phinney, 13 Ida. 307, 311, 89 P 634, 12 LRANS 935, 12 AnnCas 1079.

87. See Perpetrate ante this page; Perpetrator post this page.

88. Webster New Int. D.

[a] **As used in a statute.**—"The word 'perpetration' as used in the English text means the commission of the act to which the word refers." Peo. v. Acosta, 11 Porto Rico 240, 246. "Commission" as used in criminal law see Commission 12 C. J. p 145 text and notes 99–3.

Murder or manslaughter in perpetration of other offense see Homicide §§ 70, 71.

89. Bissot v. State, 53 Ind. 408, 413.

[a] **"In the perpetration of the burglary."**—Conrad v. State, 75 Oh. St. 52, 67, 78 NE 957, 6 LRANS 1154, 8 AnnCas 966.

[b] **"Murder in the perpetration of a burglary."**—State v. Burzette, (Iowa) 222 NW 394, 399.

90. Peo. v. Lovelace, (Cal. A.) 275 P 489, 490.

91. See Perpetrate ante this page; Perpetration ante this page.

Perpetrator of homicide see Homicide §§ 8–53.

92. Webster Int. D. [quot Myers v. State, 19 Okl. Cr. 129, 197 P 884, 885, 18 ALR 1057].

[a] **"Not the wife of the perpetrator."**—Myers v. State, 19 Okl. Cr. 129, 134, 197 P 884, 885, 18 ALR 1057.

93. Webster Int. D. [quot Myers v. State, supra].

[a] **Railroad company killing employee** through negligence of coemployee is regarded as "perpetrator" under statute. Philo v. Illinois Cent. R. Co., 33 Iowa 47, 50. See Donaldson v. Mississippi, etc., R. Co., 18 Iowa 280, 286, 87 AmD 391.

94. See Perpetually post this page.

Perpetual:
Injunction see Injunctions § 3.
Lease see Landlord and Tenant § 144.
Lien for taxes see Taxation [37 Cyc 1147].
Permanent as equivalent to see Permanent § 1.
Succession see Corporations §§ 4, 182.

95. Crane v. Washington Water Power Co., 97 Wash. 7, 165 P 892, 894.

96. State v. Payne, 129 Mo. 468, 477, 31 SW 797, 33 LRA 576.

97. Century D. [quot Widener v. Sharp, 106 Nebr. 654, 184 NW 161, 163]; Webster D. [quot Scanlan v. Crawshaw, 5 Mo. A. 337, 339].

[a] **Similar definition.**—"Continuing forever or for an unlimited time." Webster New Int. D. [quot Widener v. Sharp, 106 Nebr. 654, 659, 184 NW 161].

98. Webster D. [quot Scanlan v. Crawshaw, 5 Mo. A. 337, 339].

99. Webster New Int. D. [quot Widener v. Sharp, 106 Nebr. 654, 184 NW 161, 163]; Fairchild v. Masonic Hall Assoc., 71 Mo. 526, 530.

1. Webster D. [quot Scanlan v. Crawshaw, 5 Mo. A. 337, 339].

[a] **Similar definition.**—"Destined to continue or to be continued through the ages." Century D. [quot Widener v. Sharp, 106 Nebr. 654, 659, 184 NW 161, 163].

2. Century D.; Webster New Int. D. [both quot Widener v. Sharp, supra]; State v. Payne, 129 Mo. 468, 471, 31 SW 797, 33 LRA 576.

3. Webster D. [quot Scanlan v. Crawshaw, 5 Mo. A. 337, 339]; Webster New Int. D. [quot Widener v. Sharp, 106 Nebr. 654, 184 NW 161, 163].

4. Webster New Int. D. [quot Widener v. Sharp, supra].

5. Webster D. [quot Scanlan v. Crawshaw, 5 Mo. A. 337, 339]; State v. Payne, 129 Mo. 468, 477, 31 SW 797, 33 LRA 576; Fairchild v. Masonic Hall Assoc., 71 Mo. 526, 530.

6. **"Curate"** see 17 C. J. p 402.

7. Reg. v. Allen, L. R. 8 Q. B. 69, 74.

Minister of religious society see Religious Societies [34 Cyc 1142–1149].

"Parson" see 46 C. J. p 1384.

"Rector" see [34 Cyc 765].

"Vicar" see [40 Cyc 201].

8. Reg. v. Allen, L. R. 8 Q. B. 69, 74.

9. Calumet Serv. Co. v. Chilton, 148 Wis. 334, 135 NW 131.

10. Crane v. Washington Water Power Co., 97 Wash. 7, 13, 165 P 892.

11. See Perpetual ante this page.

12. A maxim meaning "It is an everlasting law that no positive human law shall be perpetual (Peloubet Leg. Max.); and any part of an enactment which purports to admit of no repeal is void from the first" (Morgan Leg. Max. [cit Bacon Max. Reg. 19]).

13. See Perpetual ante this page.

14. Mobile Electric Co. v. Mobile, 201 Ala. 607, 79 S 39, 40 LRA1918F 667.

15. Weber v. Nonpareil Baking Co., (Colo.) 274 P 932, 934.

16. Mobile Electric Co. v. Mobile, 201 Ala. 607, 79 S 39, 40, 41, 42, LRA1918F 667; Peo. v. Economy Light, etc., Co., 241 Ill. 290, 89 NE 760, 777; McCarter v. Lehigh Valley R. Co., 78 N. J. Eq. 346, 79 A 93, 99.

17. Hickey v. Lake Shore, etc., R. Co., 51 Oh. St. 40, 50, 36 NE 672, 46 AmSR 545, 23 LRA 396.

18. Mobile Electric Co. v. Mobile, 201 Ala. 607, 609, 79 S 39, LRA1918F 667.

19. See Depositions §§ 8, 9.

20. A maxim meaning "The law is opposed to perpetuities." Morgan Leg. Max. [cit Halkerstone Max. 123].

PERPETUITIES

By Eustace W. Tomlinson

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 932]

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I. DEFINITIONS

[§ 1] Some confusion has arisen in the law through the use by the courts of the word "perpetuity" with two inconsistent meanings.[1] The term has sometimes been considered, in its common meaning of a perpetual or unreasonable continuance of an existing status,[2] to have reference to an indestructible and inalienable estate or interest,[3] and has been defined as any limitation tending to take the subject of it out of commerce for a longer period than permitted by law,[4] or "an estate inalienable, though all mankind join in the conveyance."[5] In its technical signification,[6] however, a perpetuity is any limitation by which the vesting of an estate or interest is unlawfully postponed,[7] or, more exactly,[8] a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the person for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.[9] It is only with this latter meaning that the word is properly applied to future interests in property.[10]

1. See infra § 18. Compare Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230; Thorndike v. Loring, 15 Gray (Mass.) 391; Pennsylvania L. Ins. Co. v. Price, 7 Phila. (Pa.) 465; Williams v. Herrick, 19 R. I. 197, 32 A 913 (in all of which the courts apparently confuse the unreasonable continuance of an estate with the doctrine prohibiting remoteness in the vesting of an estate).

2. See Hartford F. Ins. Co. v. Houston, (Tex. Civ. A.) 110 SW 973 (where the term is used in that sense); cases infra this note; infra § 19 text and note 42; and § 76.

[a] **As commonly understood** (1) although not technically exact, a "perpetuity" is something which may last forever, and the rule against perpetuities is a rule that prevents certain existing conditions from continuing for an indefinite period. Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570. (2) "A perpetuity is something which may last forever." Congdon v. Congdon, 160 Minn. 343, 364, 200 NW 76.

3. Morrison v. Rossignol, 5 Cal. 64; Diffenderfer v. St. Louis Public Schools, 120 Mo. 447, 25 SW 542; Blackmore v. Boardman, 28 Mo. 420; Maxcy v. Oshkosh, 144 Wis. 238, 128 NW 899, 31 LRANS 787. Compare Troutman v. DeBoissiere Odd Fellows' Orphans' Home, etc., 66 Kan. 1, 16, 71 P 286 (where it was said: "The rule against perpetuities . . . was devised to prevent the perpetual entailment of estates and to give them over to free conveyance"); In re Moller, 178 NYS 682 (where the court considered the contention that a charitable trust for the donor's poor relations "would create a perpetuity" for his family); Conley v. Daughters of Republic of Texas, (Civ. A.) 151 SW 877 [rev on other grounds 106 Tex. 80, 156 SW 197, 157 SW 937] (where the court apparently used the term as meaning an indestructible interest or one which might continue forever). And see cases infra this note; and notes 4, 5.

[a] **In Pennsylvania**, it has been said, the word "perpetuities" is used in its largest sense, including interests or estates that are inalienable or indestructible as well as those which are bad for remoteness. Morris v. Fischer, 8 Pa. Dist. 161 [rev on other grounds 46 A 1102 mem].

[b] **In early times**, when the term first came into the law, it was applied to indestructible and inalienable estates. Manning's Case, 8 Coke 94b, 77 Reprint 618; Chudleigh's Case, 1 Coke 120a, 76 Reprint 270; Corbet's Case, 1 Coke 83b, 76 Reprint 187. See McLaughlin v. Yingling, 90 Okl. 159, 213 P 552, 561 [quot Cyc] (where this statement is made).

4. Morgan v. Charleston Nat. Trust Bank, 331 Ill. 182, 162 NE 888; Branson v. Bailey, 246 Ill. 490, 92 NE 940; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142; Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230; Howe v. Hodge, 152 Ill. 252, 38 NE 1083; Hale v. Hale, 125 Ill. 399, 17 NE 470; Lunt v. Lunt, 108 Ill. 307; Waldo v. Cummings, 45 Ill. 421; Raymond v. Northern Trust Co., 150 Ill. A. 282; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989; Neely v. Brogden, (Tex. Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614]; West Texas Bank, etc., Co. v. Matlock, (Tex. Commn. A.) 212 SW 937 [reforming judgment (Civ. A.) 172 SW 162]; Anderson v. Menefee, (Tex. Civ. A.) 174 SW 904; Bouvier L. D.

Period of time permitted by law see infra §§ 5–8.

5. Scatterwood v. Edge, 1 Salk. 229, 91 Reprint 203 [crit Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408, as "obviously not correct"].

[a] **Similar definitions.**—(1) "A perpetuity is, where if all that have Interest, joyn, and yet cannot bar or pass the Estate. But if by the Concurrence of all having the Estate Tail may be barred, it is no Perpetuity." Washborn v. Downs, 1 Ch. Cas. 213, 22 Reprint 767. To the same effect Hart v. Seymour, 147 Ill. 598, 613, 35 NE 246 [cit Anderson L. D.]; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366. (2) "A limitation of property which renders it inalienable beyond the period allowed by law." Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 312, 24 L. ed. 450. (3) "A future limitation, restraining the owner of the estate from alienating the fee of the property, discharge of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise" (Stevens v. Annex Realty Co., 173 Mo. 511, 521, 73 SW 505. To same effect Perin v. Carey, 24 How. (U. S.) 465, 494, 16 L. ed. 701; London, etc., R. Co. v. Gomm, 20 Ch. D. 562), (4) it not being a perpetuity if that event or period be within the bounds prescribed by law (Perin v. Carey, supra). (5) "The condition of an estate being rendered perpetual or for any period of time inalienable by the act of proprietors." Maiben v. Bobe, 6 Fla. 381, 397. (6) "A perpetuity, as it is a legal word or term of art, is the limiting an estate either of inheritance or for years, in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time thereafter." Stanley v. Leigh, 2 P. Wms. 686, 688, 24 Reprint 917 [quot Pollock v. Booth, Ir. R. 9 Eq. 229, 243].

[b] **In the Duke of Norfolk's case** it was said: "A Perpetuity is the Settlement of an Estate or an Interest in Tail, with such Remainders expectant upon it, as are in no Sort in the Power of the Tenant in Tail in Possession, to dock by any Recovery or Assignment, but such Remainders must continue as perpetual Clogs upon the Estate; such do fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not of, and they are against the Reason and the Policy of the Law, and therefore not to be endured." Norfolk's Case, 3 Ch. Cas. 1, 31, 22 Reprint 931, 2 Swanst. 454, 36 Reprint 690. See also infra § 3.

6. See case infra this note.

[a] **"Perpetuity" has a technical signification,** denoting the period of time beyond which a future interest cannot vest. In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242.

7. Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Lunt v. Lunt, 108 Ill. 307; True Real Est. Co. v. True, 115 Me. 533, 99 A 627; Pulitzer v. Livingston, 89 Me. 359, 36 A 635; In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242; Geissler v. Reading Trust Co., 257 Pa. 329, 101 A 797; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470.

8. Smith's App., 88 Pa. 492; Hillyard v. Miller, 10 Pa. 326.

[a] **"A perfect definition of a perpetuity** has not been given." Hillyard v. Miller, 10 Pa. 326, 334 [quot Smith's App., 88 Pa. 492, 495]. See Graham v. Whitridge, 99 Md. 248, 274, 57 A 609, 58 A 36, 66 LRA 408 ("Perhaps a strictly accurate definition has never been given").

9. Ill.—Waldo v. Cummings, 45 Ill. 421.

Iowa.—Phillips v. Harrow, 93 Iowa 92, 61 NW 434.

Md.—Hollander v. Central Metal, etc., Co., 109 Md. 131, 71 A 442, 23 LRANS 1135; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316; Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—Smith's App., 88 Pa. 492; Hillyard v. Miller, 10 Pa. 326; Morris v. Fisher, 8 Pa. Dist. 161 [rev on other grounds 46 A 1102 mem]; Pennsylvania L. Ins. Co. v. Price, 7 Phila. 465.

Tenn.—Franklin v. Armfield, 2 Sneed 305.

Eng.—London, etc., R. Co. v. Gomm, 20 Ch. D. 562; In re Tyrrell, [1907] 1 Ir. 292; Redington v. Browne, L. R. 32 Ir. 347.

Ont.—Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

[a] **The nearest approach to a perfect definition** of a perpetuity is the one stated in the text. Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Smith's App., 88 Pa. 492; Hillyard v. Miller, 10 Pa. 326.

10. Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408 (criticizing the definition stated in Scatterwood v. Edge, 1 Salk. 229, 91 Reprint 203, as "obviously not correct"); Webster v. Morris, 66 Wis. 366, 28 NW 353, 57 AmR 278; Gray Perp. § 140. And see infra § 18.

"Before referring to the rule against perpetuities it is necessary to have an understanding of what is a perpetuity within the meaning of the

Perpetuities are so denominated not because the limitation, as written, would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title or of its vesting.[11]

II. THE RULE AGAINST PERPETUITIES

[§ 2] **A. Introductory Statement.** The rule against perpetuities is a restriction upon the jus disponendi of property,[12] and is by far the most important restraint which the law places upon the right to create future interests.[13] Whether a limitation of an interest or estate is void for remoteness depends upon whether it violates that rule.[14] Founded upon the public policy which disapproves the total exclusion of property from social commerce for long periods of time,[15] the rule is aimed against the unreasonable continuance of that sort of indirect restraint on alienation which is accomplished by the creation of future interests,[16] and its purpose is to cut out the limitations which, if allowed to take effect, would produce the consequences desired to be avoided.[17] The rule is in force in all of the states in which the common law prevails, except where modified or superseded by statute,[18] and is the same both at law and in equity.[19]

"Rule against remoteness." It has sometimes been said that, in order to avoid ambiguity and to express more clearly the nature of the rule against perpetuities, it should more properly be designated the "rule against remoteness."[20]

rule. Primarily a perpetuity is 'an inalienable, indestructible interest.' Secondarily, it is 'an interest which will not vest till a remote period.' The latter is the true meaning of the word when used in reference to the Rule against Perpetuities." Remsen Wills p 192.

11. Pulitzer v. Livingston, 89 Me. 359, 36 A 635; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470. To same effect Pennsylvania L. Ins. Co. v. Price, 7 Phila. (Pa.) 465.

12. U. S.—Perin v. Cary, 24 How. 465, 16 L. ed. 701; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. ed. 617.

Ala.—Ashurst v. Ashurst, 181 Ala. 401, 61 S 942.

Mass.—Hawley v. Northampton, 8 Mass. 3, 5 AmD 66.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

W. Va.—Prichard v. Prichard, 91 W. Va. 398, 404, 113 SE 256.

"The rule against perpetuities is an arbitrary one applied for the purpose of preventing an owner of property from controlling its devolution beyond a certain period." Prichard v. Prichard, supra.

13. Congdon v. Congdon, 160 Minn. 343, 200 NW 76; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas 1916D 570.

14. Kan.—Troutman v. DeBoissiere Odd Fellows' Orphans' Home, etc., 66 Kan. 1, 71 P 286.

Mass.—Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 77, 196 NW 976.

Mo.—Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

N. H.—McAllister v. Elliot, 140 A 708, 711.

N. J.—In re Smisson, 79 N. J. Eq. 233, 82 A 614.

"The test of whether the rule against perpetuities applies or not is the remoteness of time when, if ever, the estate vests." Michigan Trust Co. v. Baker, supra.

"The rule against perpetuities is the law limiting the time in which future interests can be created." Gray Perp. § 4 [quot McAllister v. Elliot, supra].

15. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Cal.—Goldtree v. Thompson, 79 Cal. 613, 22 P 50.

Kan.—Lasnier v. Martin, 102 Kan. 551, 171 P 645.

Ky.—Moore v. Howe, 4 T. B. Mon. 199.

Me.—Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Mass.—Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 NE 177; Hawley v. Northampton, 8 Mass. 3, 5 AmD 66.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

W. Va.—Woodall v. Bruen, 76 W. Va. 193, 85 SE 170.

Eng.—Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498.

16. Cal.—Strong v. Shatto, 45 Cal. A. 29, 187 P 159.

Conn.—H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138.

Ga.—Parker v. Churchill, 104 Ga. 122, 30 SE 642.

Ill.—Hart v. Taylor, 301 Ill. 344, 133 NE 857; Brown v. Brown, 247 Ill. 528, 93 NE 357.

Kan.—Troutman v. DeBoissiere Odd Fellows' Orphans' Home, etc., 66 Kan. 1, 71 P 286.

Md.—Bowerman v. Taylor, 126 Md. 203, 94 A 652.

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578.

"We recognize the distinction . . . between a perpetuity resulting from suspension of the power of alienation and remoteness of time for the vesting of an estate, as contemplated by the rule against perpetuities, as well as the confusion that has resulted in the decisions by failure to distinguish between the two doctrines. It may be said, nevertheless, that fundamentally the object of both rules is to prevent perpetuities, the tieing up of estates and the suspension of their free and full conveyance for long and indefinite periods of time, by directly suspending the power to alienate, in the one instance, and by holding up the investiture of a future estate in real property in the other." Strong v. Shatto, 45 Cal. A. 29, 35, 187 P 159.

17. Ill.—Hart v. Taylor, 301 Ill. 344, 133 NE 857.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094.

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578.

Pa.—Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570.

Eng.—Redington v. Browne, L. R. 32 Ir. 347.

"Its purpose is to prevent the creation of interests to take effect on the happening of remote contingencies." Hart v Taylor, 301 Ill. 344, 346, 133 NE 857.

Operation and effect of rule see infra §§ 58–60.

18. U. S.—Von Overbeck v. Dahlgren, 28 F. (2d) 936.

Colo.—Chilcott v Hart, 23 Colo. 40, 45 P 391, 35 LRA 41.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760; In re Smisson, 79 N. J. Eq. 233, 82 A 614.

Pa.—Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85.

Ont.—Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

[a] **In Alabama** the statute prescribing to whom lands may be conveyed and how long conveyances may extend has no application to personal property, and limitations of personalty are accordingly tested by the rule of the common law. Henderson v. Henderson, 210 Ala. 73, 97 S 353; Goodwyn v. Cassels, 207 Ala. 482, 93 S 405; Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Pearce v. Pearce, 199 Ala. 491, 74 S 952; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

[b] **In Connecticut** (1) a statute prescribing the persons to whom estates might be granted or devised having been repealed, the common-law rule against perpetuities is now in force. Duggan v. Slocum, 92 Fed. 806, 34 CCA 376; Hoadley v. Beardsley, 89 Conn. 270, 93 A 535; Healy v. Healy, 70 Conn. 467, 39 A 793. (2) And it has been said that it was in full force before the passage of the statute. H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138.

Provisions of civil law see infra §§ 160–164.

Statutory changes see infra §§ 92–157.

19. Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

Applicability to both legal and equitable interests see infra § 19 text and note 51.

20. Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375; Bancroft v. Maine State Sanatorium Assoc., 119 Me. 56, 109 A 585; Bender v. Bender, 225 Pa. 434, 74 A 246. See Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592; Hewitt v. Green, 77 N. J. Eq. 345, 77 A 25; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; London, etc., R. Co. v. Gomm, 20 Ch. D. 562 (per Jessel, M. R.) (where the rule is so designated). Compare Gray Perp. § 2 (where it was said: "It would have been better had it [the rule] been called the Rule against Remoteness").

"The rule against perpetuities . . . is less frequently but more expressively termed, the rule against remoteness." Bancroft v. Maine State Sanatorium Assoc., 119 Me. 56, 62, 109 A 585.

"It ought to have been called the Rule against Remoteness; in the old books 'perpetuity' means an inalienable interest and (more especially) a disposition by which land is settled on unborn descendants ad infinitum, so as to be inalienable. The two ideas of 'remoteness' and 'perpetuity' are constantly confused at the present day." 19 Mich. L. Rev. pp 235, 242 note (article by Rundell) [quot 18 Juridical Rev. p 132 (article by Sweet)].

"Had the name ['rule respecting remoteness'] been given the rule at its birth much confusion would have been avoided. As it was the rule went along increasing in stature and in favor with God and man but without a name so that its identity was sometimes in doubt until in some way

Prohibitions of, and restraints upon, alienation. The rule against perpetuities and the rules of law disfavoring or avoiding prohibitions of, or restrictions upon, the alienation of property[21] are separate and distinct, and must not be confused.[22] While their purposes are similar, in that both are aimed against the withdrawal of property from commerce,[23] they accomplish their ends by different means;[24] the latter rules directly and the former indirectly.[25] On account of the similarity of objects, the courts have sometimes adopted the period specified by the rule against perpetuities as a reasonable period for which the power of alienation may be restricted, where such restriction is otherwise valid;[26] but the mere fact that the period for which alienation is prohibited or restricted is not greater than that prescribed by the rule against perpetuities will not validate a prohibition or restriction which is unreasonable or so general as to be contrary to public policy.[27] In some jurisdictions, however, statutes, sometimes referred to as statutes against perpetuities, prescribe a period within, but not beyond, which the power of alienation may be suspended.[28]

The statutes of mortmain,[29] while often referred to by the courts, in connection with discussions of the rule against perpetuities, as one of the limitations upon the right to dispose of property, merely prohibit the holding of real property by a corporation without special authority so to do, and therefore have no connection with "perpetuities," as the term is used in its technical sense, although they were enacted for the purpose of preventing corporations, by means of their continuing existence, from holding large properties in perpetuity.[30]

Postponement of, and restraints upon, enjoyment. The general rule, obtaining in some jurisdictions, that it is against public policy to postpone one's possession or enjoyment of property in which no one but himself has any interest[31] has no connection with the rule against perpetuities,[32] which is not concerned with possession or enjoyment.[33] It has been suggested, however, that the period specified by the rule against perpetuities may be adopted, by analogy, as a reasonable period beyond which such a postponement or restraint, otherwise valid, will not be permitted to extend.[34]

[§ 3] **B. Origin and Development.** The rule against perpetuities took form in England in the discussion of cases arising on executory devises of chattels real,[35] and first was suggested at the bar in 1616,[36] although the word "perpetuity" had appeared in the reports as early as 1595.[37] At first the validity of contingent interests was made to de-

the rather inapt name of the rule against perpetuities became attached to it. A name acquired in this haphazard way, however, is not so easily lost and is likely to remain its customary name in the future. The accurate characterization of the rule as the 'rule respecting remoteness' is of great value, however, by whatever name the rule be called." 10 Iowa L. Bul. pp 275, 276 (article by Bordwell).

21. See Deeds § 378; Estates § 10; Wills [40 Cyc 1713].

22. Libby v. Winston, 207 Ala. 681, 93 S 631; Colonial Trust Co. v. Brown, 105 Conn. 261, 279, 135 A 555; Quilliam v. Union Trust Co., (Ind. A.) 132 NE 614 [den reh 131 NE 428]; Pulitzer v. Livingston, 89 Me. 359, 363, 36 A 635.

"This rule of restraint upon alienation has frequently been confounded with the rule against perpetuities. They are, however, separate and distinct rules, although their object is one and the same,—the prevention of property being taken out of commerce, locked up, or so held that it cannot be conveyed. It is important therefore in the consideration of cases to bear in mind that the two rules are independent and distinct." Pulitzer v. Livingston, supra.

"There are undoubtedly principles of public policy which cause courts to scrutinize with care efforts to impose restraints upon the alienation of property. The refusal to sanction such restraints has often been attributed to the rule against perpetuities and in fact legislation in many of the States, adopted in supposed modification of that rule, in terms forbids restraints upon alienation. . . . The rule against perpetuities and that against restraints upon alienation are in reality entirely distinct, the former being concerned only with the vesting of estates in right, and the latter with the limitation which may be imposed upon the enjoyment of the property." Colonial Trust Co. v. Brown, supra.

"These two doctrines, though having originally a common purpose, have had a separate development. The attempts to combine them have led to much confusion." Gray Perp. § 118a.

23. Strong v. Shatto, 45 Cal. A. 29, 187 P 159; Quilliam v. Union Trust Co., (Ind. A.) 132 NE 614 [den reh 131 NE 428]; Pulitzer v. Livingston, 89 Me. 359, 36 A 635; and cases supra note 15. Compare Skeen v. Clinchfield Coal Corp., 137 Va. 397, 404, 119 SE 89 (where an instance of confusion of the rules is given, and the court said: "These two rules [against restraints upon alienation and against perpetuities] are so similar in their underlying reason as that they necessarily often shade into each other").

24. Gray Perp. § 2a.

25. See supra text and note 16.

26. Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A 555. See Andrews v. Lincoln, 95 Me. 541, 545, 50 A 898, 56 LRA 103 ("The law permits the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being, and twenty-one years and nine months thereafter. If the vesting of the interest is postponed, or the power of alienation is suspended, for a longer period, it is unlawful, and the devise or grant is void"); Winsor v. Mills, 157 Mass. 362, 364, 32 NE 352 ("In this Commonwealth. . . a general restraint for a short time is held inconsistent with the ownership of an estate in fee simple; but where such a restraint is held permissible for a limited time, it would be deemed unreasonable, and contrary to the policy of the law, to allow it to continue beyond the period fixed by the rule against perpetuities"). Compare King v. Shelton, 36 App. (D. C.) 1 (holding that a trust for accumulation may be created to continue for a period not exceeding that of the rule against perpetuities, without offending the rules against restraints on alienation); Hale v. Hale, 125 Ill. 399, 17 NE 470; Rhoads v. Rhoads, 43 Ill. 239 (both holding to same effect). And see infra § 71 text and notes 17, 18.

"By analogy the same rule has been adopted for determining the length of time during which the alienation of lands may be lawfully restrained as is used in determining the period within which the estate must vest in order to be valid." Colonial Trust Co. v. Brown, 105 Conn. 261, 280, 135 A 555.

27. Manierre v. Welling, 32 R. I. 104, 78 A 507, AnnCas1912C 1311.

28. See infra §§ 97-157.

29. See Charities § 15; Mortmain 42 C. J. p 455 text and notes 10, 11.

30. Franklin v. Armfield, 2 Sneed (Tenn.) 305. Compare Blandford v. Thackerell, 2 Ves. Jr. 238, 30 Reprint 612 (where a bequest of property to establish a school, at which the testator's children and grandchildren should be educated up to the age of fourteen years, was held void under the Mortmain Act as to the general purpose of a permanent charity, but was allowed to continue until the last grandchild of the testator should reach fourteen years of age, that being an age which would necessarily be attained within twenty-one years after lives in being at the testator's death).

31. **Possession of trust property** see Trusts [39 Cyc 325].

Restrictions and conditions on estates granted or devised see Estates § 10; Wills [40 Cyc 1698 et seq].

32. Gray Perp. § 121. Compare Canda v. Canda, (N. J. Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029] ("assuming but not deciding" the principle stated in the text, but saying that a postponement of possession for an unreasonable time would be disregarded).

33. See infra § 16.

34. Canda v. Canda, (N. J. Ch.) 113 A 503, 509 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029, and quot Gray Perp. § 121i ("It is perhaps likely that the same period as that prescribed by the rule against perpetuities will be taken [to control such restraints], although it would seem quite open to the court to adopt some other period if found more convenient")]. See Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A 555 (where the period was applied as the test of the validity of such a provision, which, however, the court treated as a fetter on alienability rather than on enjoyment). And see infra § 71 text and notes 17, 18.

35. Dahlgren v. Pierce, 270 Fed. 507 [certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem]; Chilcott v. Hart, 23 Colo. 40, 45 P 391, 35 LRA 41; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1915D 570; Bender v. Bender, 225 Pa. 434, 74 A 246.

36. Bennet v. Lewknor, 1 Rolle 356, 81 Reprint 531.

37. Chudleigh's Case, 1 Coke 120a, 76 Reprint 270. See McLaughlin v. Yingling, 90 Okl. 159, 213 P 552, 561 [quot Cyc]; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570 (where the statement of the text is made).

pend upon the nature of the contingency upon which they were limited to take effect, and no question as to the remoteness of a limitation of a freehold estate arose until 1664.[38] The foundation of the modern rule against perpetuities is the Duke of Norfolk's case, decided in 1685, by which were established the points: (1) That the validity or invalidity of a future interest depended upon its remoteness, and not on the nature of the contingency. (2) That a future interest might be limited to commence on any contingency which must occur within lives in being.[39] Subsequently, the limits within which the contingency must occur were extended to cover the time necessary for the birth of a posthumous child, where gestation actually occurs, as every life is to be considered as beginning at the time of conception;[40] then twenty-one years were added to provide for the minority of children in esse at the expiration of the life estate.[41] At a later date the consideration of minority was lost sight of, and the period of twenty-one years was allowed in gross, without reference to the existence of a minority.[42] The rule was developed entirely by judicial decision,[43] although since declared or changed by statute in many jurisdictions.

38. Barton v. Thaw, supra.

39. Norfolk's Case, 3 Ch. Cas. 1, 22 Reprint 931, 2 Swanst. 454, 36 Reprint 690.

[a] **As to the maximum period permitted,** within which the vesting must take place, the chancellor, Lord Nottingham said: "It hath been urged at the bar, Where will you stop if you do not stop at Child v. Baylie, Cro. Jac. 459, 79 Reprint 393? I answer, I will stop everywhere when any inconvenience appears, nowhere before. It is not yet resolved what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare what are the utmost bounds to the springing trust of a term, for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known." Norfolk's Case, 3 Ch. Cas. 1, 22 Reprint 931, 2 Swanst. 454, 468, 36 Reprint 690.

40. Cal.—Goldtree v. Thompson, 79 Cal. 613, 22 P 50.

Colo.—Chillcott v. Hart, 23 Colo. 40, 45 P 391, 35 LRA 41.

Mich.—St. Amour v. Rivard, 2 Mich. 294.

N. Y.—Hawley v. James, 16 Wend. 61, 170.

Pa.—Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570.

Periods of gestation see infra § 7.

41. Goldtree v. Thompson, 79 Cal. 613, 22 P 50; Stephens v. Stephens, Cas. t. Talb. 228, 25 Reprint 751; Marlborough v. Godolphin, 1 Eden 404, 28 Reprint 341; Taylor v. Biddall, 2 Mod. 289, 86 Reprint 1078; Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)]. See Chillcott v. Hart, 23 Colo. 40, 45 P 391, 35 LRA 41; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570 (where the statement of the text is made). Compare Massingberd v. Ash, 2 Ch. Rep. 275, 21 Reprint 677; Stanley v. Leigh, 2 P. Wms. 686, 24 Reprint 917, Maddox v. Staines, 2 P. Wms. 421, 24 Reprint 796 (all holding that a limitation over to third persons, to take effect if the children of living persons should die before attaining their majority, was good).

[a] **Reason for rule.**—(1) It was said that, inasmuch as an infant could not, in any event, alienate his property, the power of alienation over it is restrained no longer by creating a future interest in favor of an unborn person when he reaches his majority than by creating it in favor of an unborn person immediately upon his birth. Stephens v. Stephens, Cas. t. Talb. 228, 25 Reprint 751; Marlborough v. Godolphin, 1 Eden 404, 28 Reprint 741. (2) But later cases, holding good a limitation over to third persons, to take effect if the children of living persons should die before attaining their majority, apparently overlooked the fact that this reasoning did not apply. Massingberd v. Ash, 2 Ch. Rep. 275, 21 Reprint 677, 1 Vern. Ch. 234, 257, 23 Reprint 437, 453; Stanley v. Leigh, 2 P. Wms. 686, 24 Reprint 917; Maddox v. Staines, 2 P. Wms. 421, 24 Reprint 796.

42. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Dahlgren v. Pierce, 270 Fed. 507 [certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem].

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Cal.—Goldtree v. Thompson, 79 Cal. 613, 22 P 50.

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309.

Kan.—Keeler v. Lauer, 73 Kan. 388, 85 P 541.

Mass.—Odell v. Odell, 10 Allen 1; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—Toms v. Williams, 41 Mich. 552, 2 NW 814; St. Amour v. Rivard, 2 Mich. 294.

N. Y.—Hawley v. James, 16 Wend. 61, 170.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Pa.—Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570.

Wis.—Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

Eng.—Cadell v. Palmer, 10 Bing. 140, 25 ECL 73, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 20 ERC 100; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523 (per Lord Brougham); Marks v. Marks, 10 Mod. 419, 88 Reprint 789; Loyd v. Carew, Prec. Ch. 72, 24 Reprint 35; Bengough v. Edridge, 1 Sim. 173, 2 EngCh 173, 57 Reprint 544; Beard v. Westcott, 5 Taunt. 393, 1 ECL 206, 128 Reprint 741; Goodtitle v. Wood, Willes 211, 125 Reprint 1136.

Man.—Fonseca v. Jones, 21 Man. 168, 18 WestLR 206.

Ont.—Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

[a] **Leading case.**—The decision that the term of twenty-one years may be allowed in gross and without reference to the infancy of some person interested in the estate was first definitely made in Cadell v. Palmer, 10 Bing. 140, 25 ECL 73, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 21 ERC 100 (which "is identified, in the tradition of the Chancery Bar, with the suit of Jarndyce v. Jarndyce in Dickens' well-known description of the procedure of the old Court of Chancery." 21 ERC 129).

[b] **Origin and development of twenty-one year period.**—(1) Limitations over to third persons to take effect a certain number of years, not more than twenty-one, after the death of living persons were at first supported on the idea that a "reasonable time" after lives in being might well be allowed. Toms v. Williams, 41 Mich. 552, 2 NW 814; Marks v. Marks, 10 Mod. 419, 88 Reprint 789; Loyd v. Carew, Prec. Ch. 72, 24 Reprint 35. Compare Stanley v. Leigh, 2 P. Wms 686, 24 Reprint 917 (where a "short or reasonable time" after lives in being is stated to be the period within which an estate must become alienable). (2) "It was while the courts were in doubt and uncertainty about the proper limitation, and the rule was fluctuating and unsettled, that some of the cases speak of a reasonable term of years." Hawley v. James, 16 Wend. (N. Y.) 61, 170. (3) Thereafter twenty-one years became accepted as the extent of this reasonable time. Goodman v. Goodright, 2 Burr. 873, 97 Reprint 608; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186; Marlborough v. Godolphin, 1 Eden 404, 28 Reprint 741; Thellusson v. Woodford, 4 Ves. Jr. 227, 31 Reprint 117 [aff 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498]. (4) "This limit of time within which an executory interest must take effect, was no doubt suggested by the fact that an estate tail, according to the English law, could not be made inalienable for any longer period. For example, A would settle his lands to himself for life, remainder to his eldest son, remainder to his second son in tail male, remainders over. Since an estate tail could be barred by common recovery, A in settling his estate in this manner, could only make the lands inalienable until the eldest son was born, and became of age. It would, therefore, at the farthest remain inalienable during his life and twenty-one years thereafter, viz., a life or lives in being, and twenty-one years; to this was added the nine months required for the gestation of a child en ventre sa mere, when posthumous children were declared capable of taking future estates." Hayes v. Martz, 173 Ind. 279, 282, 89 NE 303, 90 NE 309. See Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)] (to same effect). But compare Dungannon v. Smith, 12 Cl. & F. 546, 629, 8 Reprint 1523 (where it was said by Lord Brougham that "the rule of law is the term in gross of twenty-one years after the life or lives in being . . . I have a strong opinion, which I believe is joined in by the profession at large, that it arises out of an accidental circumstance, out of a confusion, I may say, a misapprehension in confounding together the nature of the estate with the remedy at law by fine and recovery, which could not be applied till a certain life came to twenty-one years; but still that has become inveterate"). And see Gray Perp. § 187 (to same effect). (5) "The law never meant to give a further term of twenty-one years, much less any period of gestation. The law never meant to say that there shall be twenty-one years added to the life or lives in being, and that within those limits you may entail the estate, but what the law meant to say was this: until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered, and consequently the discontinuance of the estate cannot be effected, and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one he could not cut off the entail. For that reason and in that way it has crept in by degrees: Communis error facit jus." Cole v. Sewell, 2 H. L. Cas. 186, 233, 9 Reprint 1062 [aff 4 Dr. & War. 1].

Period of postponement of vesting see infra §§ 5–8.

43. U. S.—Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. ed. 617.

ute in some jurisdictions,[44] and has been gradually established by the courts,[45] having its support in the practical needs of modern times.[46]

[§ 4] **C. The Rule at Common Law—1. Rule Stated.** The rule against perpetuities, at common law, is that no interest within its scope[47] is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest,[48] to which is added the period of gestation if gestation exists.[49] It has been well said that, while the rule is not complicated or difficult to understand,[50] it, like most general rules, is often found difficult to apply to the facts of a particular case;[51] and justification for such statement amply appears in the cases decided by the courts throughout the whole period since the establishment of the rule.[52]

[§ 5] **2. Period of Postponement of Vesting[53]—a. In General.** The period within which an estate or interest, to be good, must vest, or for which its vesting may be postponed, in the absence of statute, is, as stated by the rule against perpetuities,[54] that of a life or lives in being[55] at the time of the cre-

Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Cal.—Blakeman v. Mills, 136 Cal. 138, 68 P 587, 89 AmSR 120; Goldtree v. Thompson, 79 Cal. 613, 22 P 50.

Ill.—Hart v. Taylor, 301 Ill. 344, 133 NE 857.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

Mo.—Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

Pa.—Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; Bender v. Bender, 225 Pa. 434, 74 A 246; Morris v. Fisher, 8 Pa. Dist. 161 [rev on other grounds 46 A 1102 mem].

Eng.—In re Ridley, 11 Ch. D. 645. "It [the rule against perpetuities] is one of the most striking instances of a purely judge-made rule of law of comparatively modern origin." Kales Future Interests (2d ed) § 113.

44. See statutory provisions.

Statutory changes see infra §§ 92–157.

45. Goldtree v. Thompson, 79 Cal. 613, 22 P 50; Hart v. Taylor, 301 Ill. 344, 133 NE 857; Brown v. Brown, 247 Ill. 528, 93 NE 357; Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629.

46. Lasnier v. Martin, 102 Kan. 551, 171 P 645; Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Edgerly v. Barker, 66 N. H. 434, 31 A 900, 28 LRA 328; Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

[a] **"The reasons of the rule** [against perpetuities] are not fully stated in the authorities. Its application may require a wide view of public policy, including the legal nature and design of property, the reasonable extent of an owner's posthumous control, and the economic and moral effects of realty and personalty being largely held in trusts of long duration for mere accumulation, or for purposes of entailment. Divers evils could be materially increased and unduly perpetuated if the law allowed long-continued accumulations of estates in trust for future private use, or appropriations to maintain grantees or legatees, and their heirs, forever or for many generations, without effort or care on their part, and without ability to waste or lose the capital devoted to their support." Edgerly v. Barker, 66 N. H. 434, 459, 31 A 900, 28 LRA 328.

47. Interests subject to rule see infra §§ 18–42.

48. So stated in Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375; Easton v. Hall, 323 Ill. 397, 154 NE 216; Moroney v. Haas, 277 Ill. 467, 115 NE 648; Wood v. Wood, 276 Ill. 164, 114 NE 549; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; French v. Calkins, 252 Ill. 243, 96 NE 877; McCutcheon v. Pullman Trust, etc., Bank, 251 Ill. 550, 96 NE 510; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Butler v. Miller, 116 Kan. 351, 225 P 895; Nichols v. Day, 128 Miss. 756, 91 S 451; McAllister v. Elliot, (N. H.) 140 A 708; McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760; Closset v. Burtchaell, 112 Or. 585, 230 P 554; Ledwith v. Hurst, 284 Pa. 94, 130 A 315; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Schrack's Est., 26 Pa. Dist. 708; McCafferty's Est., 2 Pa. Dist. & Co. 29; Re Goodhue, 47 Ont. L. 178.

[a] **Rule similarly stated.**—(1) "Any limitation or provision the purpose or possible effect of which is to cause an estate to commence in the future is invalid if as a result thereof an estate may commence more than twenty-one years after a life or lives in being." Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 187, 143 NE 441. To same effect Rhodes' Est., 147 Pa. 227, 23 A 553. (2) No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest. Hanley v. Kansas, etc., Coal Co., 110 Fed. 62; Montpelier First Nat. Bank v. Sioux City Terminal R., etc., Co., 69 Fed. 441 [aff 82 Fed. 124, 27 CCA 73 (aff 173 U. S. 99, 19 SCt 341, 43 L. ed. 628)]; Van Roy v. Hoover, (Fla.) 117 S 887; Wood v. Wood, 276 Ill. 164, 114 NE 549; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127; Drury v. Drury, 271 Ill. 336, 111 NE 140; Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777; French v. Calkins, 252 Ill. 243, 96 NE 877; McCutcheon v. Pullman Trust, etc., Bank, 251 Ill. 550, 96 NE 510; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Hill v. Gianelli, 221 Ill. 286, 77 NE 458, 112 AmSR 182; Pitzel v. Schneider, 216 Ill. 87, 74 NE 779; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37; Owsley v. Harrison, 190 Ill. 235, 60 NE 89; Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356; Lawrence v. Smith, 163 Ill. 149, 45 NE 259 [quot Gray Perp. § 201]; Phillips v. Harrow, 93 Iowa 92, 61 NW 434; Keeler v. Lauer, 73 Kan. 388, 85 P 541; Closset v. Burtchaell, 112 Or. 585, 230 P 554; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85. (3) No bequest or devise is good unless it must vest, if at all, not later than twenty-one years and the usual fraction after some life or lives in being at the death of the testator. Dahlgren v. Pierce, 270 Fed. 507 [certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem]. To same effect Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 1003, 10 LRANS 564; Minot v. Pains, 230 Mass. 514, 120 NE 167, 1 ALR 365; Cattlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319. (4) "For remoteness a bequest or devise is void, if it shall not of necessity take effect, if it take effect at all, within the period of a life or lives in being and twenty-one years afterwards." Dungannon v. Smith, 12 Cl. & F. 546, 629, 8 Reprint 1523 (per Lord Broughham).

49. See infra § 7.

[a] **"The Rule requires** that future interests within its scope should vest within twenty-one years, exclusive of periods of gestation, after a life or lives in being." Klingman v. Gilbert, 90 Kan. 545, 548, 135 P 682 [quot Cyc]. To same effect Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570 [quot Cyc]; Brett Lead. Cas. Mod. Eq. p 47.

[b] **Other statements of rule.**—(1) "All future estates limited upon a life estate, which are not sure to take effect within twenty one years and the usual fraction, after the determination of the life estate, are void in their creation." Coggins' App., 124 Pa. 10, 29, 16 A 579, 10 AmSR 565. (2) No future interest in property can lawfully be created which does not necessarily vest within twenty-one years after some life or lives presently in being, excluding from such computation the incipient life of infants en ventre sa mere. Jocelyn v. Nott, 44 Conn. 55; Lasnier v. Martin, 102 Kan. 551, 171 P 645. (3) "No interest subject to a condition precedent is valid unless the condition must be fulfilled, if at all, within twenty-one years and the period of gestation after some life in being at the creation of the interest." Aldendifer v. Wylie, 306 Ill. 426, 430, 138 NE 143. To same effect Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37.

[c] **"No interest under a will** (1) subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years (and nine months, allowing for the period of gestation,) after some life in being at the creation of the interest." Chapman v. Cheney, 191 Ill. 574, 584, 61 NE 363. (2) "All limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty one years afterwards, as a term in gross, or, in case of a child en ventre sa mere, twenty one years and nine months, are void as too remote, and tending to create perpetuities." Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 152, 63 AmD 725.

[d] **"An estate in remainder** can not be created to take effect beyond the end of a life or lives in being and 21 years and 10 months thereafter." U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 385, 120 SW 328, 20 AnnCas 993.

Periods of gestation see infra § 7.

Statutory changes of rule see infra §§ 92–157.

50. Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

51. Shepperd v. Fisher, supra.

52. See passim infra §§ 5–91.

53. Postponement of enjoyment of estate or interest see infra § 16.

54. See supra § 4.

55. Fla.—Van Roy v. Hoover, 117 S 887; McLeod v. Dell, 9 Fla. 427.

Ill.—French v. Calkins, 252 Ill. 243, 96 NE 877.

Kan.—Lasnier v. Martin, 102 Kan. 551, 171 P 645.

Ky.—Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315.

Mich.—Palms v. Palms, 68 Mich. 355, 36 NW 419.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

Mo.—Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261.

N. J.—Dwyer v. National Newark, etc., Banking Co., (Ch.) 143 A 625.

N. Y.—Chwatal v. Schreiner, 148 N. Y. 683, 43 NE 166; Thomson v. Livingston, 6 N. Y. Super. 539; Paterson v. Ellis, 11 Wend. 259.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Pa.—In re McCaskey, 203 Pa. 497, 143 A 209.

ation of the interest,[56] and twenty-one years thereafter,[57] with the term of gestation added in case of posthumous birth;[58] and to come within the rule the estate must be one which will or may not vest

Lives in being see infra § 6.

56. In re Feeney, 293 Pa. 273, 142 A 284.

[a] **Lives must be in being at the creation of the interest,** and the statement in 2 Blackstone Comm. p 174 § 3 that all future devisees must be "in esse during the life of the first devisee," indicating that the lives in being can commence to run at any time during the life of the first life tenant, is not the rule. In re Feeney, 293 Pa. 273, 142 A 284.

Date of commencement of period see infra § 8.

57. U. S.—Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; Potter v. Couch, 141 U. S. 296, 11 SCt 1005, 35 L. ed. 721; McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 L. ed. 450; Goesele v. Bimeler, 14 How. 589, 14 L. ed. 554; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. ed. 617; Barnitz v. Casey, 7 Cranch 456, 3 L. ed. 403.

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Ark.—Cribbs v. Walker, 74 Ark. 104, 85 SW 244.

Colo.—Miller v. Weston, 67 Colo. 534, 189 P 610 [aff 25 Colo. A. 231, 138 P 424, and withdrawing on reh former op 61 Colo. 588, 157 P 1161]; Chilcott v. Hart, 23 Colo. 40, 45 P 391, 35 LRA 41.

Conn.—Bates v. Spooner, 75 Conn. 501, 54 A 305; Jocelyn v. Nott, 44 Conn. 55.

D. C.—Hazen v. American Security, etc., Co., 49 App. 297, 265 Fed. 447.

Fla.—Van Roy v. Hoover, 117 S 887; McLeod v. Dell, 9 Fla. 427.

Ill.—Keogh v. Peck, 316 Ill. 318, 147 NE 266, 38 ALR 1151; Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Hart v. Taylor, 301 Ill. 344, 133 NE 857; Haughn v. Haughn, 296 Ill. 305, 129 NE 807; Beal v. Higgins, 290 Ill. 229, 132 NE 542; Kolb v. Landes, 277 Ill. 440, 115 NE 539; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Drury v. Drury, 271 Ill. 336, 111 NE 140; Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777; French v. Calkins, 252 Ill. 243, 96 NE 877; Brown v. Brown, 247 Ill. 528, 93 NE 357; Branson v. Bailey, 246 Ill. 490, 92 NE 940; Mettler v. Warner, 243 Ill. 600, 90 NE 1099, 134 AmSR 388; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142; Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Hill v. Gianelli, 221 Ill. 286, 77 NE 458, 112 AmSR 182; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37; Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Chapman v. Cheney, 191 Ill. 574, 61 NE 383; Nevitt v. Woodburn, 190 Ill. 283, 60 NE 500 [aff 82 Ill. A. 649]; Owsley v. Harrison, 190 Ill. 235, 60 NE 89; Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230; Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; Howe v. Hodge, 152 Ill. 252, 38 NE 1033; Hart v. Seymour, 147 Ill. 598, 35 NE 246; Schaefer v. Schaefer, 141 Ill. 337, 31 NE 136; Hale v. Hale, 125 Ill. 399, 17 NE 470; Lunt v. Lunt, 108 Ill. 307; Waldo v. Cummings, 45 Ill. 421; Rhoads v. Rhoads, 43 Ill. 239; Raymond v. Northern Trust Co., 150 Ill. A. 282.

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309; Stephens v. Evans, 30 Ind. 39.

Iowa.—Todhunter v. Des Moines, etc., R. Co., 58 Iowa 205, 12 NW 267.

Kan.—Butler v. Miller, 116 Kan. 351, 225 P 895; Cain v. Vivier, 108 Kan. 69, 70, 193 P 1070 [quot Cyc]; Lasnier v. Martin, 102 Kan. 551, 171 P 645; Klingman v. Gilbert, 90 Kan. 545, 135 P 682, 683 [quot Cyc]; Keeler v. Lauer, 73 Kan. 388, 85 P 541.

Ky.—U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315; Ludwig v. Combs, 1 Metc. 128; Moore v. Howe, 4 T. B. Mon. 199.

Me.—Bancroft v. Maine State Sanatorium Assoc., 119 Me. 56, 109 A 585; True Real Est. Co. v. True, 115 Me. 533, 99 A 627; Towle v. Doe, 97 Me. 427, 54 A 1072; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103; Brooks v. Belfast, 90 Me. 318, 38 A 222; Pulitzer v. Livingston, 89 Me. 359, 36 A 635; Kimball v. Crocker, 53 Me. 263.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Bowerman v. Taylor, 126 Md. 203, 94 A 652; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094; Levenson v. Manly, 119 Md. 517, 87 A 261; Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816; Albert v. Albert, 68 Md. 352, 12 A 11; Goldsborough v. Martin, 41 Md. 488; Barnum v. Barnum, 26 Md. 119, 90 AmD 88; Biscoe v. Biscoe, 6 Gill & J. 232.

Mass.—Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 NE 177; Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365; Goddard v. Whitney, 140 Mass. 92, 31 NE 30; Hawley v. Northampton, 8 Mass. 3, 5 AmD 66; Otis v. McLellan, 13 Allen 339; Odell v. Odell, 10 Allen 1; Fosdick v. Fosdick, 6 Allen 41; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—Palms v. Palms, 68 Mich. 355, 36 NW 419; Toms v. Williams, 41 Mich. 552, 2 NW 814; St. Amour v. Rivard, 2 Mich. 294.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

Miss.—Thomas v. Thomas, 97 Miss. 697, 53 S 630; Caldwell v. Willis, 57 Miss. 555.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316; Mockbee v. Grooms, 300 Mo. 446, 254 SW 170; Landers Inv. Co. v. Brown, 300 Mo. 348, 254 SW 14, 30 ALR 908; Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Schee v. Boone, 295 Mo. 212, 243 SW 882; Melvin v. Hoffman, 290 Mo. 464, 235 SW 107; Koehler v. Rowland, 275 Mo. 573, 205 SW 217; Walter v. Dickmann, 274 Mo. 185, 202 SW 537; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261; Riley v. Jaeger, 189 SW 1168; Stewart v. Coshow, 238 Mo. 662, 142 SW 283; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625.

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578; Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. J.—Fischer v. Stuart, 138 A 873; Dwyer v. National Newark, etc., Banking Co., (Ch.) 143 A 625; McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760; Graves v. Graves, 94 N. J. Eq. 268, 120 A 420; In re Smisson, 79 N. J. Eq. 233, 82 A 614; Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 337 [aff 74 N. J. Eq. 848, 71 A 240].

N. Y.—Chwatal v. Schreiner, 148 N. Y. 683, 43 NE 166; Thomson v. Livingston, 6 N. Y. Super. 539; Paterson v. Ellis, 11 Wend. 259. But compare New York v. Stuyvesant, 17 N. Y. 34 (where a conveyance of land was made in trust to permit the grantor to enjoy the rents until it should be dedicated to the public as a park, provided, if such dedication were not so made within thirty years, the land should revert to the grantor; and the court, holding that all interest of the grantor was lost after the land had actually so been dedicated, apparently overlooked the rule that twenty-one years after lives in being is the limit permitted by the rule against perpetuities).

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Or.—Imbrie v. Hartrampf, 100 Or. 589, 198 P 521.

Pa.—In re McCaskey, 293 Pa. 497, 143 A 209; In re Fenney, 293 Pa. 273, 142 A 284; Ledwith v. Hurst, 284 Pa. 94, 130 A 315; In re Hunter, 279 Pa. 349, 123 A 865; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; In re Price, 260 Pa. 376, 103 A 893; Geissler v. Reading Trust Co., 257 Pa. 329, 101 A 797; Bender v. Bender, 225 Pa. 434, 74 A 246; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Rhodes' Est., 147 Pa. 227, 23 A 553; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Smith's App., 88 Pa. 492; Yard's App., 64 Pa. 95; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470; Davenport v. Harris, 3 Grant 164; Hubley v. Long, 2 Grant 268; Deihl v. King, 6 Serg. & R. 29, 9 AmD 407; Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287; Dawson v. Lancaster, 12 Pa. Dist. 501, 28 Pa. Co. 657.

S. C.—Mangum v. Piester, 16 S. C. 316; Lowry v. Muldrow, 29 S. C. Eq. 241.

Tenn.—Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36; Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640; Davis v. Williams, 85 Tenn. 646, 4 SW 8.

Tex.—Neely v. Brogden, (Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614]; West Texas Bank, etc., Co. v. Matlock, (Commn. A.) 212 SW 937 [reforming judgment (Civ. A.) 172 SW 162]; Anderson v. Menefee, (Civ. A.) 174 SW 904.

Vt.—In re Peck, 96 Vt. 183, 118 A 527.

Va.—Pleasants v. Pleasants, 2 Call (6 Va.) 319.

W. Va.—Prichard v. Prichard, 91 W. Va. 398, 113 SE 256; McCrerry v. Johnston, 90 W. Va. 80, 110 SE 464; Eary v. Raines, 73 W. Va. 513, 80 SE 806.

Wis.—Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

Eng.—In re Fane, [1913] 1 Ch. 404; Woodall v. Clifton, [1905] 2 Ch. 257; In re Wilmer, [1903] 1 Ch. 874 [aff [1903] 2 Ch. 411, 4 BRC 479]; In re Ridley, 11 Ch. D. 645; Hale v. Hale, 3 Ch. D. 643; In re Brown, 3 Ch. D. 156; Redington v. Browne, L. R. 32 Ir. 347; Merlin v. Blagrave, 25 Beav. 125, 53 Reprint 584; Cadell v. Palmer, 10 Bing. 140, 25 ECL 64, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 20 ERC 100; Long v. Blackall, 7 T. R. 100, 101 Reprint 875; Southampton v. Hertford, 2 Ves. & B. 54, 35 Reprint 239, 1 ERC 514; Blandford v. Thackerell, 2 Ves. Jr. 238, 30 Reprint 612; Goodman v. Goodright, W. Bl. 188, 96 Reprint 100; Smith v. Farr, 3 Y. & C. Exch. 328, 160 Reprint 728.

Man.—Fonseca v. Jones, 21 Man. 168, 18 WestLR 206. See Re Crichton, 23 Man. 594, 13 DomLR 169, 25 WestLR 18, 4 WestWkly 1184 (assuming the rule of the text, although not stating it).

Ont.—Re Goodhue, 47 Ont. L. 178; Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

Twenty-one years as term in gross see supra § 3 text and note 42.

58. U. S.—Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 L. ed. 450; Goesele v. Bimeler, 14 How. 589, 14 L. ed. 554; Barnitz v. Casey, 7 Cranch 456, 3 L. ed. 403.

Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Colo.—Chilcott v. Hart, 23 Colo. 40, 45 P 391, 35 LRA 41.

within such period.[59]

When lives in being form no part of the period of suspension or postponement of vesting, the limit of time under the rule against perpetuities is twenty-one years.[60]

"As long as legally possible." When a trust or estate for the benefit of designated persons then living is limited to continue "for as long a period as is legally possible," or an equivalent provision is made, it appears that the courts will consider the lives of the designated persons as those intended to be selected, and will uphold the interest or estate for the period of twenty-one years after the death

Conn.—Bates v. Spooner, 75 Conn. 501, 54 A 305; Jocelyn v. Nott, 44 Conn. 55.

Fla.—Van Roy v. Hoover, 117 S 887.

Ill.—Keogh v. Peck, 316 Ill. 318, 147 NE 266, 38 ALR 1151; Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Kolb v. Landes, 277 Ill. 440, 115 NE 539; French v. Calkins, 252 Ill. 243, 96 NE 877; Branson v. Bailey, 246 Ill. 490, 92 NE 940; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Hill v. Gianelli, 221 Ill. 286, 77 NE 458, 112 AmSR 182; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37; Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Chapman v. Cheney, 191 Ill. 574, 61 NE 383; Owsley v. Harrison, 190 Ill. 235, 60 NE 89; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; Howe v. Hodge, 152 Ill. 252, 38 NE 1083; Hart v. Seymour, 147 Ill. 598, 35 NE 246; Schaefer v. Schaefer, 141 Ill. 337, 31 NE 136; Lunt v. Lunt, 108 Ill. 307; Waldo v. Cummings, 45 Ill. 421; Smith v. McConnell, 17 Ill. 135, 63 AmD 340; Raymond v. Northern Trust Co., 150 Ill. A. 282.

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309; Stephens v. Evans, 30 Ind. 39. See also Swain v. Bowers, (A.) 158 NE 598 (applying the principle stated in the text).

Iowa.—Todhunter v. Des Moines, etc., R. Co., 58 Iowa 205, 12 NW 267.

Kan.—Keeler v. Lauer, 73 Kan. 388, 85 P 541.

Ky.—U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315; Ludwig v. Combs, 1 Metc. 128; Moore v. Howe, 4 T. B. Mon. 199.

Me.—Bancroft v. Maine State Sanatorium Assoc., 119 Me. 56, 109 A 585; True Real Est. Co. v. True, 115 Me. 533, 99 A 627; Towle v. Doe, 97 Me. 427, 54 A 1072; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103; Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Bowerman v. Taylor, 126 Md. 203, 94 A 652; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094; Levenson v. Manly, 119 Md. 517, 87 A 261; Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816; Albert v. Albert, 68 Md. 352, 12 A 11; Goldsborough v. Martin, 41 Md. 488; Barnum v. Barnum, 26 Md. 119, 90 AmD 88; Biscoe v. Biscoe, 6 Gill & J. 232.

Mass.—Hawley v. Northampton, 8 Mass. 3, 5 AmD 66; Fosdick v. Fosdick, 6 Allen 41; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—St. Amour v. Rivard, 2 Mich. 294.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

Miss.—Thomas v. Thomas, 97 Miss. 697, 53 S 630.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316; Mockbee v. Grooms, 300 Mo. 446, 254 SW 170; Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Schee v. Boone, 295 Mo. 212, 243 SW 882; Melvin v. Hoffman, 290 Mo. 464, 235 SW 107; Koehler v. Rowland, 275 Mo. 573, 205 SW 217; Riley v. Jaeger, 189 SW 1168; Stewart v. Coshow, 238 Mo. 662, 142 SW 283; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625.

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578; Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Or.—Imbrie v. Hartrampf, 100 Or. 589, 198 P 521.

Pa.—Ledwith v. Hurst, 284 Pa. 94, 130 A 315; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Geissler v. Reading Trust Co., 257 Pa. 329, 101 A 797; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Rhodes' Est., 147 Pa. 227, 23 A 553; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Smith's App., 88 Pa. 492; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470; Davenport v. Harris, 3 Grant 164; Hubley v. Long, 2 Grant 268; Deihl v. King, 6 Serg. & R. 29, 9 AmD 407.

S. C.—Mangum v. Piester, 16 S. C. 316.

Tenn.—Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36; Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640; Davis v. Williams, 85 Tenn. 646, 4 SW 8.

Tex.—Neely v. Brogdon, (Civ. A.) 214 SW 614 [aff (Commn. A.) 239 SW 192]; Anderson v. Menefee, (Civ. A.) 174 SW 904.

Vt.—In re Peck, 96 Vt. 183, 118 A 527.

W. Va.—Prichard v. Prichard, 91 W. Va. 398, 113 SE 256; McCreery v. Johnston, 90 W. Va. 80, 110 SE 464.

Wis.—Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

Eng.—Cadell v. Palmer, 10 Bing. 140, 25 ECL 64, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 20 ERC 100; Long v. Blackall, 7 T. R. 100, 101 Reprint 875; Southampton v. Hertford, 2 Ves. & B. 54, 35 Reprint 239, 1 ERC 514; Smith v. Farr, 3 Y. & C. Exch. 328, 160 Reprint 728.

Man.—Fonseca v. Jones, 21 Man. 168, 18 WestLR 206.

Ont.—Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

Periods of gestation see infra § 7.

59. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015. Compare Montpelier First Nat. Bank v. Sioux City Terminal R., etc., Co., 69 Fed. 441 [aff 173 U. S. 99, 19 SCt 341, 43 L. Ed. 628] (holding that, where the owner of property executed a lease thereof for a hundred years, and thereafter executed a mortgage of the property, the taking effect of the mortgage was immediate upon its delivery and was not postponed until after the expiration of the lease term, and therefore no perpetuity was created).

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Ill.—Hale v. Hale, 125 Ill. 399, 17 NE 470.

Kan.—Keeler v. Lauer, 73 Kan. 388, 85 P 541.

Me.—Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Md.—Robinson v. Bonaparte, 102 Md. 63, 61 A 212.

Mass.—Goddard v. Whitney, 140 Mass. 92, 3 NE 30.

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578.

Pa.—In re McCaskey, 293 Pa. 497, 143 A 209; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Yard's App., 64 Pa. 95; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470.

Wis.—Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

See Neely v. Brogden, (Tex. Commn. A.) 239 SW 192 (apparently recognizing the principle stated in the text).

Compare Morning Star Min. Co. v. Bennett, 164 Ark. 244, 261 SW 639; Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865 (in both of which a contract giving an agent the right to sell property of the principal, without restriction as to time, was held not to create a perpetuity because in no event could the agent's right or "interest" extend beyond his lifetime).

And compare Conley v. Daughters of Republic of Texas, (Civ. A.) 151 SW 877 [rev on other grounds 106 Tex. 80, 156 SW 197, 157 SW 937 (where it was said that an act of the legislature delivering certain property owned by the state into the custody and care of a patriotic society, to be by it maintained in good order and repair, did not create a perpetuity).

[a] **A limitation of a life estate,** including estates pur autre vie, where the cestuis que vie are alive at the time of its creation, cannot be too remote. Dulin v. Moore, 96 Tex. 135, 70 SW 742; Low v. Burron, 3 P. Wms. 262, 24 Reprint 1055. Compare Biscoe v. Biscoe, 6 Gill & J. (Md.) 232, 239 (holding that an executory bequest of a male slave upon condition that the first taker should die without heirs of his body, was not obnoxious to the rule against perpetuities, the court saying that although, in general, a limitation over upon failure of issue is too remote, "in this case, the subject of the bequest, the thing given, is a negro man, a life in being, and the limitation over could never by possibility take effect but in his life-time. May it not therefore be a reasonable construction to confine it to a failure of issue during a life in being, the life-time of the negro man himself, the subject of the bequest?") But see Matthews v. Daniel, 5 N. C. 42 (where a contrary conclusion was reached).

[b] **"At the expiration" of twenty-one years after a life estate.**—A bequest to be paid over to and vesting in the ultimate takers at the expiration of lives in being at the creation of the interest does not direct payment "after" the expiration of the period permitted by the rule against perpetuities, and therefore is not void for remoteness. Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

Necessity of vesting within period see infra §§ 9–12.

60. U. S.—Montpelier First Nat. Bank v. Sioux City Terminal R., etc., Co., 69 Fed. 441 [aff 173 U. S. 99, 19 SCt 341, 43 L. ed. 628].

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Conn.—Wilson v. D'Atro, 145 A 161; Hoadley v. Beardsley, 89 Conn. 270, 93 A 535.

Ill.—Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564. Compare Reid v. Voorhees, 216 Ill. 236, 74 NE 804, 3 AnnCas 946 (where it was agreed by counsel and noted by the court that a devise to vest thirty years after the testator's death offended the rule against perpetuities).

Ky.—Fidelity Trust Co. v. Lloyd, 78 SW 896, 25 KyL 1827; Coleman v. Coleman, 65 SW 832, 23 KyL 1476.

Me.—Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

N. J.—In re Helme, 95 N. J. Eq. 197, 123 A 43.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—In re McCaskey, 293 Pa. 497, 143 A 209; Linck v. Plankenhorn, 286 Pa. 319, 133 A 510; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Wise

of the survivor of such persons.[61]

[§ 6] **b. Lives in Being.** Where not otherwise provided by statute, there is no limitation on the number of lives in being upon which an estate may be limited or its vesting postponed, without violating the rule against perpetuities,[62] so long as "the candles are all burning at the same time,"[63] for the life of the survivor is but a single life.[64] While the persons upon whose lives an estate is limited must be selected by the instrument creating or granting it,[65] they need not be specifically named, provided they can be ascertained;[66] but they must be ascertainable and capable of being distinguished,[67] and it has been suggested that the fact of the death of the last survivor must be capable of being made out by reasonable evidence.[68] The selected lives need not be those of persons having an interest in the

v. Rupp, 269 Pa. 505, 112 A 548; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Barton v. Thaw, 41 Pa. Co. 396 [aff 246 Pa. 348, 92 A 312, AnnCas1916D 570]; McCafferty's Est., 2 Pa. Dist. & Co. 29.

Compare Woodruff Oil, etc., Co. v. Yarborough, 144 S. C. 18, 142 SE 50 (where a limitation to take effect fifty years after the testator's death was held void as violating the rule against perpetuities).

61. Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; Pownall v. Graham, 33 Beav. 242, 55 Reprint 360. Compare Kenrick v. Dempsey, 5 Grant Ch. (Ont.) 584 (where an absolute conveyance in trust was held good for the life of the trustee and twenty-one years thereafter, as against the grantor who sued for a reconveyance before such time).

Designation of lives in being see infra § 6 text and notes 65–67.

62. U. S.—Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Dahlgren v. Pierce, 270 Fed. 507 [certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem].

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Fla.—Van Roy v. Hoover, 117 S 887.

Ill.—Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356.

Mich.—Kemp v. Sutton, 233 Mich. 249, 206 NW 366; Toms v. Williams, 41 Mich. 552, 2 NW 814.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

N. J.—Camden Safe Deposit, etc., Co. v. Guerin, 87 N. J. Eq. 72, 99 A 105; In re Smisson, 79 N. J. Eq. 233, 82 A 614.

N. Y.—Hawley v. James, 16 Wend. 61, 170.

Pa.—Smith's App., 88 Pa. 492.

Eng.—In re Villar, [1928] Ch. 471; Pownall v. Graham, 33 Beav. 242, 55 Reprint 360; Robinson v. Hardcastle, 2 Bro. Ch. 22, 29 Reprint 11; Low v. Burron, 3 P. Wms. 262, 24 Reprint 1055; Scatterwood v. Edge, 1 Salk. 229, 91 Reprint 203; Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498.

See Chilcott v. Hart, 23 Colo. 40, 45 P 391, 35 LRA 41 (upholding the rule of the text, as against the contention that the rule prohibits the suspension of the fee for a longer period than that of one designated life in being).

Compare Cribbs v. Walker, 74 Ark. 104, 85 SW 244 (holding that the power of alienation may be suspended for the period of a life or lives in being without violating the rule against perpetuities).

And see cases infra this note.

[a] **Illustrations.**—(1) Nine lives. Thellusson v. Woodford, 4 Ves. Jr. 227, 31, Reprint 117 [aff 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498]. (2) Seventeen lives. Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356. (3) Twenty-eight lives. Cadell v. Palmer, 10 Bing. 140, 25 ECL 73, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 20 ERC 100. (4) Forty lives. Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202.

[b] **Death of last survivor of lineal descendants of Queen Victoria living at creation of estate.**—A postponement of vesting for a period "ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of" the testator's death is not void for remoteness, it being impossible to say it will be impracticable, having regard to the legal testimony probably available to ascertain the expiration of the period, although difficult questions arise, as for example, whether the children of the late tsaritsa of Russia are living; but the court said: "If I could have seen my way to hold this tying up invalid I would gladly have done so, but in my opinion I am not at liberty to do so." In re Villar, [1928] Ch. 471, 478.

[c] **Leading case.**—The great case of Thellusson v. Woodford (1798) involved a testamentary provision that certain property should be paid over upon the death of all the testator's sons, grandsons, and great-grandchildren, who were living at his death. Nine persons came within the classes designated. The house of lords, on the unanimous opinion of the judges, held the limitation over to be good. Thellusson v. Woodford, 4 Ves. Jr. 227, 31 Reprint 117 [aff 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498].

[d] **Basis of the rule.**—(1) Before the Duke of Norfolk's case it had been held that a term might be limited for successive life interests to any number of persons so long as they were all in being at its creation. Manning's Case, 8 Coke 94b, 77 Reprint 618; Goring v. Bickerstaffe, 2 Freem. Ch. 163, 22 Reprint 1132; Love v. Windham, 1 Sid. 450, 82 Reprint 1211. (2) There is, however, an obiter dictum in a later case that the time allowed for executory devises ought not to be longer than the life of one person in being. Luddington v. Kime, 1 Ld. Raym. 203, 91 Reprint 1031 (per Treby, C. J.).

[e] **In Georgia** it is provided by Civ. Code § 3102, now Park Code Annot. (1914) § 3678, that "limitations of estates may extend to any number of lives in being at the time when the limitations commence, and twenty one years, and the usual period of gestation added thereafter." Parker v. Churchill, 104 Ga. 122, 30 SE 642.

Statutory changes see infra §§ 92–157.

63. Mass.—Odell v. Odell, 10 Allen 1.

Mich.—Kemp v. Sutton, 233 Mich. 249, 206 NW 366.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

Pa.—Smith's App., 88 Pa. 492.

Eng.—Gooch v. Gooch, 3 De G. M. & G. 366, 52 EngCh 285, 43 Reprint 143. To same effect Love v. Windham, 1 Sid. 450, 82 Reprint 1211.

64. Goldtree v. Thompson, 79 Cal. 613, 22 P 50; Kemp v. Sutton, 233 Mich. 249, 206 NW 366; Smith's App. 88 Pa. 492; Love v. Wyndham, 1 Mod. 50, 86 Reprint 724; Low v. Burron, 3 P. Wms. 262, 24 Reprint 1055; Scatterwood v. Edge, 1 Salk. 229, 91 Reprint 203; Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498.

65. Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202.

66. Fitchie v. Brown, supra; Dohn v. Dohn, 110 Ky. 884, 62 SW 1033, 64 SW 352, 23 KyL 356. Compare Pownall v. Graham, 33 Beav. 242, 55 Reprint 360 (where the intention of a testator, who directed the continuance of a trust until "the law . . . admits of no further division" without designating the persons whose lives were to measure the term within the rule against perpetuities, was held to be to select the persons for whose benefit the trust was created as the lives in being, and the trust was held to expire twenty-one years after the death of the survivor of them).

[a] **Rule applied.**—Where a testator established a trust for the payment of certain annuities, to continue as long as legally possible, and then to be distributed, without naming the persons whose lives he selected for the limitation of the trust, the court held that, in view of the provisions for the annuitants mentioned in the will and their heirs, and the provision for ultimate distribution of the corpus, "the inference, we think, is very strong that the lives selected were the lives of the annuitants. A reading of the will fails to suggest any other set of lives that the testator could reasonably be supposed to have intended. The inference that he intended these lives is almost conclusive." Fitchie v. Brown, 211 U. S. 321, 331, 29 SCt 106, 53 L. ed. 202.

67. Fitchie v. Brown, supra; In re Moore, [1901] 1 Ch. 936.

[a] **Rule applied.**—A trust to continue until the period of twenty-one years from the death of the last survivor of all persons living at the date of the testator's death is void for uncertainty, for it is impossible to ascertain when the last life will be extinguished. In re Moore, [1901] 1 Ch. 936.

68. Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; Thellusson v. Woodford, 11 Ves. Jr. 112, 136, 32 Reprint 1030, 1 ERC 498. See In re Villar, [1928] Ch. 471 (where the question was discussed); Pownall v. Graham, 33 Beav. 242, 246, 55 Reprint 360 (where a trust of property, bequeathed to the survivor of the testator's brothers for life, and after his death the income to be applied as directed, and "after the law . . . admits of no further division" the property to be conveyed to a designated person, was held to expire twenty-one years after the death of the surviving brother, for, while the law would permit the trust to continue so long as any person living at the moment of the testator's death was in existence, and twenty-one years thereafter, "it would be impossible to ascertain when that period would cease," and therefore the trust could not be given effect). Compare In re Moore, [1901] 1 Ch. 936 (where the court held, of a trust term measured by the life of the survivor of all persons living at the date of the testator's death, that it would be impossible to ascertain when the last life would be extinguished).

"When such cases occur [that the individuals named compose very large bodies of men, or very extensive descriptions are made use of], they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described; and will be supported or avoided accordingly." Thellusson v. Woodford, supra.

property,[69] although they may be such.[70]

A child en ventre sa mère is treated as in being within the meaning of the rule,[71] even when it is prejudicial to its interests to be so considered.[72]

The life of a slave to whom freedom is given upon a future contingency[73] or who forms the subject of an executory limitation[74] has been allowed to be the life measuring the period within which the contingency must occur, if at all, with respect to the rule against perpetuities.[75]

A corporation or joint-stock company cannot constitute a life in being within the rule.[76]

Lives of animals. A trust for the maintenance of certain animals during their lives has been allowed to be good.[77]

[§ 7] **c. Periods of Gestation.**[78] It is often said that a future interest, under the rule against perpetuities, must vest within, or its vesting may be postponed until, twenty-one years and nine or ten months, or the period of gestation, after a life or lives in being.[79] The period of gestation, however, cannot be added in computing the time to which the vesting of a future interest may be postponed, unless gestation is in fact then taking place.[80] On the

69. U. S.—Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Dahlgren v. Pierce, 270 Fed. 507 [certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem].

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Ill.—French v. Calkins, 252 Ill. 243, 96 NE 877.

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309.

Mass.—Odell v. Odell, 10 Allen 1.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Eng.—Hopkins v. Hopkins, 1 Atk. 581, 26 Reprint 365; Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498.

Compare Overby v. Scarborough, 145 Ga. 875, 90 SE 67 (where a devise was held void because the contingency on which it was to vest might occur more than twenty-one years after the death of the preceding taker of a beneficial interest, although it would necessarily have occurred, if at all, during the lifetime of one to whom the property was given in trust; but the latter point appears to have been overlooked by the court). To same effect Shewmake v. Robinson, 148 Ga. 287, 96 SE 564.

70. Parker v. Churchill, 104 Ga. 122, 30 SE 642; De Freese v. Lake, 109 Mich. 415, 67 NW 505, 63 AmSR 584, 32 LRA 744; Dulin v. Moore, 96 Tex. 135, 70 SW 742.

71. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015.

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Ill.—Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; Smith v. McConnell, 17 Ill. 135, 63 AmD 340.

Mass.—Odell v. Odell, 10 Allen 1.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

Miss.—Caldwell v. Willis, 57 Miss. 555.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Eng.—In re Wilmer, [1903] 2 Ch. 411, 4 BRC 479; Storrs v. Benbow, 3 De G. M. & G. 390, 52 EngCh 304, 43 Reprint 153; Gulliver v. Wickett, 1 Wils. 105, 95 Reprint 517.

Compare Randolph v. Randolph, 40 N. J. Eq. 73 (holding that a child en ventre at the time of its grandfather's death is entitled to take under a provision in his will for those grandchildren "living at the time of my death").

72. In re Wilmer, [1903] 2 Ch. 411, 4 BRC 479.

[a] **Thus** a testatrix devised land in trust for M for life, and after M's death for her sons, born or to be born, successively for life, with the remainder upon the death of each son upon trust for his first and other sons successively in tail male. M had a son S who was begotten, but not born, at the death of the testatrix. It was held that S took a life estate, and the remainder to his sons was good, although it would have been for his advantage if he had been considered as unborn at the testatrix's death, for, on that supposition, the remainder to his sons would have been too remote. In re Wilmer, [1903] 2 Ch. 411, 4 BRC 479.

73. Williams v. Ash, 1 How. (U. S.) 1, 11 L. ed. 25.

74. Biscoe v. Biscoe, 6 Gill & J. (Md.) 232. But see Matthews v. Daniel, 3 N. C. 346, 5 N. C. 42 (refusing to allow the period to be measured by the life of the slave).

75. **Period of the rule** see supra § 5.

76. Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202.

77. In re Dean, 41 Ch. D. 552.

[a] **Illustration.**—A testator bequeathed a sum of money in trust for the maintenance of his horses and dogs for the term of fifty years after his death, if any of them should live so long. The question of a perpetuity was raised in argument but not discussed in the opinion, which held the trust to be valid, as against the residuary legatee. In re Dean, 41 Ch. D. 552.

78. **Unborn child as life in being** see supra § 6 text and notes 71, 72.

79. U. S.—Goesele v. Bimeler, 14 How. 589, 14 L. ed. 554; Barnitz v. Casey, 7 Cranch 456, 3 L. ed. 403.

Colo.—Chilcott v. Hart, 23 Colo. 40, 45 P 391, 35 LRA 41.

Conn.—Bates v. Spooner, 75 Conn. 501, 54 A 305.

Fla.—Van Roy v. Hoover, 117 S 887.

Ga.—Parker v. Churchill, 104 Ga. 122, 30 SE 642.

Ill.—Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Branson v. Bailey, 246 Ill. 490, 92 NE 940; Hill v. Gianelli, 221 Ill. 286, 77 NE 458, 112 AmSR 182; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37; Owsley v. Harrison, 190 Ill. 235, 60 NE 89; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; Schaefer v. Schaefer, 141 Ill. 337, 31 NE 136.

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309 [rev 45 Ind. A. 704, 84 NE 546, 87 NE 837]; Stephens v. Evans, 30 Ind. 39.

Ky.—Fidelity Trust Co. v. Lloyd, 78 SW 896, 25 KyL 1827; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315; Ludwig v. Combs, 1 Metc. 128; Brashear v. Macey, 3 J. J. Marsh. 89; Moore v. Howe, 4 T. B. Mon. 199.

Me.—Bancroft v. Maine State Sanatorium Assoc., 119 Me. 56, 109 A 585; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103; Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Md.—Hawkins v. Ghent, 154 Md. 261, 140 A 212; Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Bowerman v. Taylor, 126 Md. 203, 94 A 652; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094; Levenson v. Manly, 119 Md. 517, 87 A 261; Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816; Barnum v. Barnum, 26 Md. 119, 90 AmD 88; Biscoe v. Biscoe, 6 Gill & J. 232.

Mass.—Welsh v. Foster, 12 Mass. 93; Hawley v. Northampton, 8 Mass. 3, 5 AmD 66; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—St. Amour v. Rivard, 2 Mich. 294.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

Miss.—Thomas v. Thomas, 97 Miss. 697, 53 S 630.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316; Mockbee v. Grooms, 300 Mo. 446, 254 SW 170; Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Schee v. Boone, 295 Mo. 212, 243 SW 882; Melvin v. Hoffman, 290 Mo. 464, 235 SW 107; Koehler v. Rowland, 275 Mo. 573, 205 SW 217; Stewart v. Coshow, 238 Mo. 662, 142 SW 283; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625.

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578; Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. Y.—Chwatal v. Schreiner, 148 N. Y. 683, 43 NE 166; Tator v. Tator, 4 Barb. 431; Hill v. Hill, 4 Barb. 419; Thomson v. Livingston, 6 N. Y. Super. 539; Paterson v. Ellis, 11 Wend. 259.

Or.—Imbrie v. Hartrampf, 100 Or. 589, 198 P 521.

Pa.—In re Feeney, 293 Pa. 273, 142 A 284; Geissler v. Reading Trust Co., 257 Pa. 329, 101 A 797; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Yard's App., 64 Pa. 95; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470; Smith v. Townsend, 32 Pa. 434; Deihl v. King, 6 Serg. & R. 29, 9 AmD 407.

S. C.—Mangum v. Piester, 16 S. C. 316.

Tenn.—Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640.

Tex.—Neely v. Brogden, (Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614]; Anderson v. Menefee, (Civ. A.) 174 SW 904.

Va.—Stone v. Nicholson, 27 Gratt. (68 Va.) 1.

W. Va.—Prichard v. Prichard, 91 W. Va. 398, 113 SE 256; McCreery v. Johnston, 90 W. Va. 80, 110 SE 464; Woodall v. Bruen, 76 W. Va. 193, 85 SE 170; Eary v. Raines, 73 W. Va. 513, 80 SE 806.

Eng.—Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186; Wilkinson v. South, 7 T. R. 555, 101 Reprint 1129; Long v. Blackall, 7 T. R. 100, 101 Reprint 875.

"The law allows the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter." Pulitzer v. Livingston, 89 Me. 359, 364, 36 A 635 [quot True Real Est. Co. v. True, 115 Me. 533, 99 A 627, 630].

[a] **In Georgia** it is provided by Civ. Code (1910) § 3678 that "limitations of estates may extend through any number of lives in being at the time when the limitations commence, and twenty-one years, and the usual period of gestation added thereafter." Lamkin v. Hines Lumber Co., 158 Ga. 785, 124 SE 694; Overby v. Scarborough, 145 Ga. 875, 90 SE 67; Phinizy v. Wallace, 136 Ga. 520, 71 SE 896; Parker v. Churchill, 104 Ga. 122, 30 SE 642.

80. Goldtree v. Thompson, 79 Cal. 613, 22 P 50; Penfield v. Tower, 1 N. D. 216, 46 NW 413; Cadell v. Palmer, 10 Bing. 140, 151, 25 ECL 73, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 20 ERC 100; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523 (per Lord Brougham); Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)]. But see St. Amour v. Rivard, 2 Mich. 294 (dictum, misstating the

other hand, more than one period of gestation may be added in computing such time if it is in fact taking place.[81] It would, therefore, seem more accurate to say that, in computing the time within which future interests must vest, or for which their vesting may be postponed, periods of gestation are excluded.[82]

[§ 8] **d. Date of Commencement of Period.** The period within which an estate or interest must vest or for which its vesting may be postponed, being stated by the rule against perpetuities[83] with reference to the creation of the interest,[84] commences, in the case of creation by deed, at the date of the delivery of the deed,[85] and, in the case of creation by will, at the death of the testator,[86] and not at the date of the instrument.[87]

III. REQUIREMENTS OF THE RULE

[§ 9] **A. Vesting[88]—1. Necessity of Vesting within Permitted Period—a. In General—(1) Rule Stated.** To satisfy the requirements of the rule against perpetuities an interest or estate must be so limited that it will necessarily and in all possible contingencies vest,[89] if at all, within the limits thereby prescribed,[90] except where it is limited upon alternative contingencies, one of which will cause it to

effect of the decision in Cadell v. Palmer, supra).

"Upon the . . . [question] . . . whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or en ventre sa mere—the unanimous opinion of the judges is, that such a limitation would be void, as too remote. They consider twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists." Cadell v. Palmer, supra.

81. Penfield v. Tower, 1 N. D. 216, 46 NW 413; Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498. See Long v. Blackall, 7 T. R. 100, 101 Reprint 875 (sometimes cited in support of the principle, but where the question is not involved or decided). Compare Smith v. Farr, 3 Y. & C. Exch. 328, 160 Reprint 728 (where a hypothetical case involving three periods of gestation was discussed in argument, but no decision was given on the point).

82. Lasnier v. Martin, 102 Kan. 551, 171 P 645; and cases supra notes 80, 81.

83. Statement of rule see supra § 4.

84. Validity of future interest determined by circumstances existing at date of its creation see infra § 10 text and notes 99, 1.

85. Ala.—Henderson v. Henderson, 210 Ala. 73, 97 S 353; Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Mich.—Case v. Green, 78 Mich. 540, 44 NW 578.

N. Y.—New York L. Ins., etc., Co. v. Cary, 191 N. Y. 33, 83 NE 598; Hillen v. Iselin, 144 N. Y. 365, 39 NE 368.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Eng.—Cooke v. Cooke, 38 Ch. D. 202.

[a] **Rule applied.**—B by trust deed delivered a fund to a trustee, to pay the income to his daughter N for her life, the principal at her death to revert to B; and by will B directed his residuary estate to be held in trust for his wife during her lifetime and then for the lifetimes of his other children. B died during N's lifetime, and on the death of N the trust fund became a part of B's residuary estate. It was held that the trust deed took effect upon its delivery, and the will upon the death of the testator, and therefore the deed and the will were not to be construed together, there being nothing to show they were executed in furtherance of a scheme to tie up the trust fund for a longer period than that permitted by law; so that the resulting suspension of the absolute ownership of the fund for the lifetime of N, the lifetime of the wife, and the lifetime of one of the other children, was not a perpetuity in contravention of the Personal Property Law prohibiting suspension of absolute ownership during more than two lives in being. New York L. Ins., etc., Co. v. Cary, 191 N. Y. 33, 83 NE 598.

Deed takes effect upon delivery see Deeds § 126.

86. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Dahlgren v. Pierce, 270 Fed. 507 [certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem].

Ala.—Goodwyn v. Cassels, 207 Ala. 482, 93 S 405; Crawford v. Carlisle, 206 Ala. 379, 89 S 565 [overr Pearce v. Pearce, 199 Ala. 491, 74 S 952].

Cal.—In re Lux, 149 Cal. 200, 85 P 147; Matter of Steele, 124 Cal. 533, 57 P 564.

Ga.—Lamkin v. Hines Lumber Co., 158 Ga. 785, 124 SE 694.

Ill.—Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356.

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309 [rev 45 Ind. A. 704, 84 NE 546, 87 NE 837]; Stephens v. Evans, 30 Ind. 39; Quilliam v. Union Trust Co., (A.) 131 NE 428.

Ky.—Clay v. Anderson, 203 Ky. 384, 262 SW 604.

Me.—Cary v. Talbot, 120 Me. 427, 115 A 166.

Mass.—Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365; Hosea v. Jacobs, 98 Mass. 65; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—Mullreed v. Clark, 110 Mich. 229, 68 NW 138, 989.

Mo.—Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629.

N. J.—Hewitt v. Green, 77 N. J. Eq. 345, 77 A 25.

N. Y.—Hillen v. Iselin, 144 N. Y. 365, 39 NE 368; Everitt v. Everitt, 29 N. Y. 39; Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698 [rev on other grounds 195 N. Y. 28, 87 NE 783]; Griffen v. Ford, 14 N. Y. Super. 123; Lang v. Ropke, 7 N. Y. Super. 363 [foll Lang v. Wilbraham, 9 N. Y. Super. 171]; Tallman v. Tallman, 3 Misc. 465, 23 NYS 734; Butler v. Butler, 3 Barb. Ch. 304.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Williamson's Est., 3 Pa. Co. 239.

Tenn.—Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640.

Tex.—Neely v. Brogden, (Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614].

Eng.—Picken v. Matthews, 10 Ch. D. 264; Hale v. Hale, 3 Ch. D. 643; In re Wood, [1894] 3 Ch. 381; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Cattlin v. Brown, 11 Hare 372, 382, 45 EngCh 367, 68 Reprint 1319; Williams v. Teale, 6 Hare 239, 31 EngCh 239, 67 Reprint 1155; Faulkner v. Daniel, 3 Hare 199, 25 EngCh 199, 67 Reprint 355; Vanderplank v. King, 3 Hare 1, 25 EngCh 1, 67 Reprint 273.

"A trust therefore which would be void, if the testator died immediately after he made his will, may become valid if he lives until conditions change." Hewitt v. Green, 77 N. J. Eq. 345, 362, 77 A 25.

Will speaks from date of testator's death see Wills [40 Cyc 1424].

87. See cases supra note 86.

88. Possibility of remote appointment under power see infra § 63.

89. "Vesting" defined see Vest [40 Cyc 197].

90. U. S.—Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 L. ed. 450; Dahlgren v. Pierce, 270 Fed. 507 [certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem]; Russell v. Girard Trust Co., 171 Fed. 161 [aff 179 Fed. 446, 102 CCA 592]; Hanley v. Kansas, etc., Coal Co., 110 Fed. 62.

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Cal.—In re Maltman, 195 Cal. 643, 234 P 898; In re Van Wyck, 185 Cal. 49, 196 P 50.

Colo.—Miller v. Weston, 67 Colo. 534, 189 P 610 [aff 25 Colo. A. 231, 138 P 424, and withdrawing on reh former op 61 Colo. 588, 157 P 1161].

Conn.—Eaton v. Eaton, 88 Conn. 269, 91 A 191; Jocelyn v. Nott, 44 Conn. 55.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Ga.—Overby v. Scarborough, 145 Ga. 875, 90 SE 67; Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ill.—Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; Beal v. Higgins, 290 Ill. 229, 132 NE 542; Moroney v. Haas, 277 Ill. 467, 115 NE 648; Wood v. Wood, 276 Ill. 164, 114 NE 549; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Drury v. Drury, 271 Ill. 336, 111 NE 140; Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777; Quinlan v. Wickham, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230; Defrees v. Brydon, 198 Ill. A. 265, 275 [rev on other grounds 275 Ill. 530, 114 NE 336, and quot Cyc]; O'Hare v. Johnston, 194 Ill. A. 153 [rev on other grounds 273 Ill. 458, 113 NE 127].

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309; Stephens v. Evans, 30 Ind. 39.

Iowa.—Meek v. Briggs, 87 Iowa 610, 54 NW 456, 43 AmSR 410.

Kan.—Cain v. Vivier, 108 Kan. 69, 70, 193 P 1070 [quot Cyc]; Lasnier v. Martin, 102 Kan. 551, 171 P 645; Klingman v. Gilbert, 90 Kan. 545, 135 P 682, 683 [quot Cyc].

Ky.—Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Beall v. Wilson, 146 Ky. 646, 651, 143 SW 55 [cit Cyc]; Saulsberry v. Saulsberry, 140 Ky. 608, 131 SW 491; U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 97 SW 421, 30 KyL 110; Fidelity Trust Co., v. Lloyd, 78 SW 896, 25 KyL 1827; Ludwig v. Combs,

vest within the permitted period and the other may postpone its vesting beyond such period, and the former actually happens.[91]

[§ 10] **(2) Actual Events.** The question of remoteness, except, to a limited extent, in the case of a limitation upon alternative contingencies,[92] and in that of the exercise of a power of appointment,[93] is to be determined by reference to possible, not actual, events,[94] which is to say, to the remotest time at which, in any event or circumstance possible at its creation, and without regard to what actually happens, a devise or limitation might take effect.[95] If an interest is not good at its creation no subsequent accident or occurrence can make it

1 Metc. 128.

Me.—Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103; Brooks v. Belfast, 90 Me. 318, 38 A 222; Slade v. Patten, 68 Me. 380.

Md.—Ortman v. Dugan, 130 Md. 121, 100 A 82; Levenson v. Manly, 119 Md. 517, 87 A 261; Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Hollander v. Central Metal, etc., Co., 109 Md. 131, 71 A 442, 23 LRANS 1135; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Biscoe v. Biscoe, 6 Gill & J. 232.

Mass.—Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 NE 177; Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365; Bell v. Nesmith, 217 Mass. 254, 104 NE 721; Fosdick v. Fosdick, 6 Allen 41; Sears v. Russell, 8 Gray 86; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725. Compare Brandenburg v. Thorndike, 139 Mass. 102, 103, 28 NE 575 (holding that a testamentary provision creating a life estate for the testator's widow, and at the expiration of three years from her death, or earlier or later as might in the discretion of the trustees be found expedient and practicable, directing them to distribute the property to nieces and a nephew, naming them, was not void for remoteness, for the trustees are required to transfer the property and thus vest it in remaindermen within a time reasonably necessary to settle the estate, and "in no contingency could it be necessary or reasonable to delay the settlement and distribution of the estate for twenty-one years after the death of the widow. The estates of the nieces and nephew must vest within the limitation of time prescribed by the law against perpetuities").

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; Otis v. Arntz, 198 Mich. 196, 164 NW 498. But see Palms v. Palms, 68 Mich. 355, 36 NW 419 (apparently recognizing the principle stated in the text, but refusing to apply it to the particular facts of the case).

Mo.—Mockbee v. Grooms, 300 Mo. 446, 254 SW 170; Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Koehler v. Rowland, 275 Mo. 573, 205 SW 217; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625.

Nebr.—Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. H.—McAllister v. Elliot, 140 A 708.

N. J.—Canda v. Canda, (Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029]; McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760; Graves v. Graves, 94 N. J. Eq. 268, 120 A 420; Hewitt v. Green, 77 N. J. Eq. 345, 77 A 25.

N. Y.—Tator v. Tator, 4 Barb. 431.

N. C.—Springs v. Hopkins, 171 N. C. 486, 88 SE 774.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—Ledwith v. Hurst, 284 Pa. 94, 130 A 315; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; In re Penrose, 257 Pa. 231, 101 A 319; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; Rhodes' Est., 147 Pa. 227, 23 A 553; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Smith v. Townsend, 32 Pa. 434; Lammot v. Home of Merciful Saviour, 68 Pa. Super. 597; Echternacht's Est., 5 Pa. Dist. 298; McCafferty's Est., 2 Pa. Dist. & Co. 29; Williamson's Est., 3 Pa. Co. 239.

Tenn.—Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640.

Tex.—Neely v. Brogden, (Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614]; Anderson v. Menefee, (Civ. A.) 174 SW 904, 908 [cit Cyc].

Vt.—In re Peck, 96 Vt. 183, 118 A 527.

Va.—Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 SE 89; Stone v. Nicholson, 27 Gratt. (68 Va.) 1.

W. Va.—Prichard v. Prichard, 91 W. Va. 398, 113 SE 256; McCreery v. Johnston, 90 W. Va. 80, 110 SE 464, 467 [cit Cyc]; Woodall v. Bruen, 76 W. Va. 193, 85 SE 170.

Wis.—Eggleston v. Swartz, 145 Wis. 106, 129 NW 48.

Eng.—Hancock v. Watson, [1902] A. C. 14 [aff [1901] 1 Ch. 482]; In re Fane, [1913] 1 Ch. 404; In re Wood, [1894] 3 Ch. 381; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Thomas v. Thomas, 87 L. T. Rep. N. S. 58.

Ont.—Re Goodhue, 47 Ont. L. 178; Kennedy v. Kennedy, 28 Ont. L. 1, 4 OntWN 607, 11 DomLR 328 [mod 26 Ont. L. 105, 3 OntWN 924, 21 OntWR 501, 3 DomLR 536, and app dism 24 OntWR 943, 13 DomLR 707]; Foxwell v. Kennedy, 24 Ont. L. 189, 2 OntWN 1299, 19 OntWR 595 [aff 2 OntWN 821, 18 OntWR 782]; Kennedy v. Kennedy, 24 Ont. L. 183, 2 OntWN 1173, 1304, 19 OntWR 346, 605 [dism app 2 OntWN 625, 18 OntWR 442]; Meyers v. Hamilton Provident, etc., Co., 19 Ont. 358; Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

[a] **"The rule is not that it must of necessity vest** (1) within that period, but either that it never shall vest at all, or shall vest within the period, if at all." Dungannon v. Smith, 12 Cl. & F. 546, 630, 8 Reprint 1523. (2) Thus the fact that a limitation over to a state could not take effect until the state accepted it by proper legislation for the use mentioned in the will did not make the limitation itself too remote, since the acceptance, in order to be efficacious, must be made, if at all, within a reasonable time and within the period fixed by the rule against perpetuities. Bell v. Nesmith, 217 Mass. 254, 104 NE 721.

Commencement of period prescribed by rule see supra § 8.

91. See infra § 12.

92. See infra § 12.

93. See infra § 63; and § 65 text and note 74.

94. Cal.—Matter of Steele, 124 Cal. 533, 57 P 564. But see Goldtree v. Thompson, 79 Cal. 613, 22 P 50 (where, under a statute prohibiting suspending the absolute power of alienation beyond the lives of persons in being at the creation of the interest, a testamentary limitation, which in terms was broad enough to vest an interest at a time beyond such lives, was held valid where the only possible taker other than those living at the testator's death died before attaining the age at which, it seems, his interest would have vested; but the decision is based upon the apparently erroneous conclusion that the interest vested upon his birth, which occurred during lives in being at its creation).

Conn.—White v. Allen, 76 Conn. 185, 56 A 519.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276.

Ky.—Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 97 SW 421, 30 KyL 110; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315; Coleman v. Coleman, 65 SW 832, 23 KyL 1476; Ludwig v. Combs, 1 Metc. 128. But see Patterson v. Patterson, 135 Ky. 339, 344, 122 SW 169 (where it was said: "We think it safe to say that a limitation that would have been void under conditions existing when the deed was executed will not affect the ability of such a limitation, if by reason of circumstances happening subsequent to the execution of the deed but before the death of the grantor it does not offend the rule").

Md.—Ortman v. Dugan, 130 Md. 121, 100 A 82; Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Thomas v. Gregg, 76 Md. 169, 24 A 418.

Mass.—Lovering v. Lovering, 129 Mass. 97; Sears v. Russell, 8 Gray 86.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

Minn.—Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825.

Nebr.—Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. Y.—Matter of Trevor, 207 App. Div. 673, 202 NYS 862; Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698 [rev on other grounds 195 N. Y. 28, 87 NE 783]; Paterson v. Ellis, 11 Wend. 259.

N. C.—Moore v. Moore, 59 N. C. 132.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Rhodes' Est., 147 Pa. 227, 23 A 553; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Smith's App., 88 Pa. 492; Donohue v. McNichol, 61 Pa. 73; McCafferty's Est., 2 Pa. Dist. & Co. 29; Williamson's Est., 3 Pa. Co. 239.

S. C.—Robinson v. Harris, 73 S. C. 469, 53 SE 755, 6 LRANS 330; Lowry v. Muldrow, 29 S. C. Eq. 241.

Vt.—In re Peck, 96 Vt. 183, 118 A 527.

Eng.—Hancock v. Watson, [1902] A. C. 14 [aff [1901] 1 Ch. 482]; In re Wood, [1894] 3 Ch. 381; Dungannon v. Smith, 12 Cl. & F. 546, 629, 8 Reprint 1523; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186; Brudenell v. Elwes, 1 East 442, 102 Reprint 171, 21 ERC 452; Proctor v. Bath, 2 H. Bl. 358, 126 Reprint 594.

Ont.—Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

But see Herrmann v. Herrmann, (N. J. Ch.) 142 A 414 [aff 144 A 918] (where a limitation which apparently might have been too remote was held valid in view of the events which actually transpired).

"The law looks forward from the time the limitation is made to see what may be, not backward to see what has been. It regards the possible, not the actual." White v. Allen, 76 Conn. 185, 189, 56 A 519.

Possibility of issue see infra § 15.

95. In re Peck, 96 Vt. 183, 118 A 527; Patching v. Barnett, 49 L. J. Ch. 665, 670; Kennedy v. Kennedy, 28 Ont. L. 1, 4 OntWN 607, 11 DomLR 328 [mod 26 Ont. L. 105, 3 OntWN 924, 21 OntWR 501, 3 DomLR 536, and app dism 24 OntWR 943, 13 DomLR 707].

"The rule of law is that the limitation must be good on the face of the will, so that any lawyer taking up

so;[96] the validity of a limitation is accordingly to be determined under the circumstances then existing,[97] and the certainty that it will vest within the permitted period, if at all, must be discernible at that date.[98]

Circumstances existing at creation distinguished. While the validity of a future estate is determined by possible contingencies, and not by actual happenings after its creation,[99] a limitation of an estate which, under the particular circumstances existing at the creation of the estate, will necessarily vest, if ever, within the period of the rule against perpetuities is not obnoxious to the rule because under other circumstances a possibility of remoteness would have existed.[1]

[§ 11] **(3) Possibility of Nonvesting.** It is not sufficient that a future interest may or probably will vest within the limits of the rule against perpetuities,[2] nor, on the other hand, is it necessary, in order to call for the application of the rule, that it will

the will, without enquiring into the circumstances, could ask himself the question, 'Is that a limitation good upon the face of it, or is it bad?' and if it is a limitation which may, under any circumstances, exceed the life in being, and twenty-one years after, it is bad." Patching v. Barnett, supra.

96. Md.—Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

N. Y.—Simpson v. Trust Co. of America, 59 Misc. 96, 112 NYS 155.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366.

Eng.—Hancock v. Watson, [1902] A. C. 14 [aff [1901] 1 Ch. 482]; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186.

Ont.—Kennedy v. Kennedy, 28 Ont. L. 1, 4 OntWN 607, 11 DomLR 328 [mod 26 Ont. L. 105, 3 OntWN 924, 21 OntWR 501, 3 DomLR 536, and app dism 24 OntWR 943, 13 DomLR 707].

And see cases supra notes 94, 95.

"The devise or limitation must be good at the time of its creation; for if not good at its creation, it is well settled that no subsequent accident or occurrence can make it good." Pennington v. Pennington, 70 Md. 418, 438, 17 A 329, 3 LRA 816.

97. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015.

Ind.—Murphey v. Brown, 159 Ind. 106, 62 NE 275.

Md.—Goldberg v. Erich, 142 Md. 544, 121 A 365; Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816.

Mass.—Hosea v. Jacobs, 98 Mass. 65.

Nebr.—Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. J.—Van Riper v. Hilton, 78 N. J. Eq. 371, 78 A 1055; Hewitt v. Green, 77 N. J. Eq. 345, 77 A 25.

N. Y.—Griffen v. Ford, 14 N. Y. Super. 123; Adams v. McKee, 121 Misc. 215, 200 NYS 765; Tallman v. Tallman, 3 Misc. 465, 23 NYS 734.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Pa.—Ledwith v. Hurst, 284 Pa. 94, 130 A 315.

Tenn.—Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640.

Tex.—Neely v. Brogden, (Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614].

Vt.—In re Peck, 96 Vt. 183, 118 A 527.

Eng.—Von Brockdorff v. Malcolm, 30 Ch. D. 172; Picken v. Matthews, 10 Ch. D. 264; In re Lowman, [1895] 2 Ch. 348; In re Wood, [1894] 3 Ch. 381; Southern v. Wollaston, 16 Beav. 166, 276, 51 Reprint 740, 785; Peard v. Kekewich, 15 Beav. 156, 51 Reprint 500; Williams v. Teale, 6 Hare 239, 31 EngCh 239, 67 Reprint 1155; Vanderplank v. King, 3 Hare 1, 25 EngCh 1, 67 Reprint 273. See In re Rye, 10 Hare 106, 44 EngCh 102, 68 Reprint 858 (where the question was discussed but not decided).

Ont.—Kennedy v. Kennedy, 28 Ont. L. 1, 4 OntWN 607, 11 DomLR 328 [mod 26 Ont. L. 105, 3 OntWN 924, 21 OntWR 501, 3 DomLR 536, and app dism 24 OntWR 943, 13 DomLR 707].

"The law only looks to the situation at the time of the testator's death, to determine the effect of a will. A will may, therefore, be in violation of the statute against perpetuities when executed, and be void for that reason, when applied to the conditions then existing, but events may happen, before the death of the testator, that will remove all such objectionable features, and the estate created by the will at the death of the testator be valid." Murphey v. Brown, 159 Ind. 106, 117, 62 NE 275.

98. Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 97 SW 421, 30 KyL 110; Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; McCreery v. Johnston, 90 W. Va. 80, 110 SE 464; Kennedy v. Kennedy, 28 Ont. L. 1, 4 OntWN 607, 11 DomLR 328 [mod 26 Ont. L. 105, 3 OntWN 924, 21 OntWR 501, 3 DomLR 536, and app dism 24 OntWR 943, 13 DomLR 707]. Compare Nevitt v. Woodburn, 190 Ill. 283, 287, 60 NE 500 (where the court, holding void a limitation over to collateral heirs of the testator in case the remaindermen of a fund, who were the children, born and unborn, of the first taker thereof, should die childless, said: "It is clear that it could not be known at the time the testator died and the will took effect whether or not the estate would vest in such collaterals at all, much less within the period limited by the rule").

99. See supra text and notes 94-98.

1. Ind.—Murphey v. Brown, 159 Ind. 106, 62 NE 275.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294.

Mass.—Bullard v. Shirley, 153 Mass. 559, 27 NE 766, 12 LRA 110; Hosea v. Jacobs, 98 Mass. 65.

N. J.—Van Riper v. Hilton, 78 N. J. Eq. 371, 78 A 1055.

Pa.—In re Feeney, 293 Pa. 273, 142 A 284.

Eng.—Von Brockdorff v. Malcolm, 30 Ch. D. 172; Southern v. Wollaston, 16 Beav. 166, 276, 51 Reprint 740, 785; Peard v. Kekewich, 15 Beav. 165, 51 Reprint 500. But see Atty.-Gen. v. Gill, 2 P. Wms. 369, 370, 24 Reprint 770 (where a will devised property to A and his heirs, with a limitation over, and A died without issue in the life of the testator, the court, holding void such limitation over, said: "And the death of the first devisee in the life-time of the testator can make no alteration, if the will was void at the making").

[a] **Illustrations.**—(1) A testatrix bequeathed property to her son for life, and on his death to his widow and children, if any, during their lives, and upon their death, to a religious society. The son died unmarried, after which the testatrix executed a codicil confirming the will, and died. As against the objection that the bequest to the religious society was void for remoteness, since the son might have left children not in being at the death of the testatrix, it was held that the will spoke from the time of the death of the testatrix, and the objection of remoteness had been removed, especially in view of the codicil, which gave the will the same effect as if it had been executed after the death of the son. Hosea v. Jacobs, 98 Mass. 65. (2) Where a testator devised property in trust to his widow for life, with secondary life estates separately to the children of testator's brother who was living at the widow's death, with remainder to their children, the final remainder was valid as to those children of secondary life tenants who were living at the death of the testator. Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294. (3) A gift of property in trust for such of the testator's daughters as should survive him and attain the age of twenty-four is not void for remoteness where his youngest daughter was more than three years old at the time of his death. Von Brockdorff v. Malcolm, 30 Ch. D. 172. (4) Property was bequeathed in trust for F R for life, and after his death to those of his children living at his death who should have attained or should live to attain the age of twenty-five. The testator died in 1845, and F R in 1846, leaving three children, born respectively in 1823, 1824, and 1827. The gifts to such children were held not void for remoteness, under the circumstances of the case, as the estate would necessarily vest within due time. Southern v. Wollaston, 16 Beav. 166, 276, 51 Reprint 740, 785. (5) Under the rule that the donee of a power cannot appoint to any person to whom the original creator of the power could not have given the estate, an appointment by a donee to a son of the donor, to be accumulated until such son attained the age of twenty-three years, is valid, where such son was three years of age at the death of the donor by whose will the power was given. Peard v. Kekewich, 15 Beav. 165, 51 Reprint 500.

2. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Ill.—Easton v. Hall, 323 Ill. 397, 154 NE 216; Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143.

Ind.—Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309 [rev 45 Ind. A. 704, 84 NE 546, 87 NE 837]; Quilliam v. Union Trust Co., (A.) 131 NE 428.

Kan.—Malmquist v. Detar, 123 Kan. 384, 255 P 42.

Ky.—Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061; Fidelity, etc., Trust Co. v. Tiffany, 202 Ky. 618, 260 SW 357; Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Ludwig v. Combs, 1 Metc. 128.

Mass.—Lovering v. Lovering, 129 Mass. 97; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976. But see Palms v. Palms, 68 Mich. 355, 364, 36 NW 419 (where a testamentary provision creating a limitation over which would be void for remoteness if seven children died before the death of their father was held not to create a perpetuity, and the court said: "That such a possibility . . . exists cannot be denied, as all things are possible where death is concerned, but such a contingency is a very doubtful and most improbable thing. It would not be either good sense or good law, in my opinion, to defeat the plain intent and scheme of this will in toto, and from the beginning, because of the possible but doubtful happening of a very remote and unlikely event").

Mo.—Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

N. J.—Canda v. Canda, (Ch.) 113 A

probably or certainly vest beyond such limits;[3] a possibility that it may do so is fatal to its validity.[4]

[§ 12] **b. Alternative Contingencies.**[5] When a future interest or estate is limited upon alternative contingencies, one of which must occur, if ever, within the period specified by the rule against perpetuities, and the other will or may occur after the expiration of such period, the limitation is not to be held invalid pending the determination of the event,[6] and it will take effect or not according to the happening or nonhappening of the former contingency.[7]

Double contingency distinguished. The principle

503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029]; Stout v. Stout, 44 N. J. Eq. 479, 15 A 843.

N. Y.—Tator v. Tator, 4 Barb. 431.

N. C.—Moore v. Moore, 59 N. C. 132.

Pa.—Smith v. Townsend, 32 Pa. 434.

Va.—Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 SE 89; Stone v. Nicholson, 27 Gratt. (68 Va.) 1.

W. Va.—McCreery v. Johnston, 90 W. Va. 80, 110 SE 464.

Eng.—Hancock v. Watson, [1902] A. C. 14 [aff [1901] 1 Ch. 482]; In re Wood, [1894] 3 Ch. 381; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Griffiths v. Vere, 9 Ves. Jr. 127, 32 Reprint 550.

Ont.—Re Phillips, 28 Ont. L. 94, 11 DomLR 500; Ferguson v. Ferguson, 39 U. C. Q. B. 232 [app allowed on other grounds 1 Ont. A. 452 (app allowed on other grounds 2 Can. S. C. 497)].

And see cases infra this note.

"If it be possible that the fee will not vest within that time [specified by the rule] though probable that it will, the devise is nevertheless void." Aldendifer v. Wylie, 306 Ill. 426, 431, 138 NE 143.

[a] **Gift to executors or trustees upon probate of will.**—(1) A will appointing executors and trustees "to whom, on the admission of this will to probate, the title and ownership of my said property rights . . . shall go, in trust," violates the rule against perpetuities, for the vesting of the title is postponed until the probate of the will, which might never happen. Miller v. Weston, 67 Colo. 534, 537, 189 P 610 [aff 25 Colo. A. 231, 138 P 424, and withdrawing former op. 61 Colo. 588, 157 P 1161]. (2) A gift by a testatrix, to the executor of her will, of property to be held "from and after the date of the probate of this will," creates a perpetuity, for "whatever interest the executor took under it could not vest in him until the probate of the will, and while this event would, in the ordinary and usual course of events, probably occur within a few months, or at most a few years, after the death of the testatrix, yet it cannot be said that it is a condition that must inevitably happen within twenty-one years from the death of the testatrix." Johnson v. Preston, 226 Ill. 447, 457, 80 NE 1001, 10 LRANS 564. But see Mettler v. Warner, 243 Ill. 600, 90 NE 1099, 134 AmSR 388; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; White v. Williams, 172 Ill. A. 630 (in all of which the language of the will was held not to relate the vesting to the time of probate). (3) It has been held, however, that a will providing that upon the settlement of the accounts of the executor property of the estate should be paid over to a trustee, to be held by him "for the following fourteen years from the time he receives said funds from the executor," and then to be distributed, did not create a perpetuity, the court saying that the estate of a decedent is ordinarily settled within one or two years, taking into consideration the respective times provided by statute for the doing of the necessary acts and proceedings, and that in effect the fourteen-year period was to commence at the expiration of such time after the testator's death as would be reasonably sufficient for the settlement of his estate, and that the court could not presume that such settlement would or could be longer delayed. Belfield v. Booth, 63 Conn. 299, 27 A 585. See Gray Perp. § 214 et seq (where this decision was criticized).

3. Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 313, 24 L. ed. 450; Graves v. Graves, 94 N. J. Eq. 268, 120 A 420.

"If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect. Such is the law upon the subject." Ould v. Washington Hospital for Foundlings, supra.

4. Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Conn.—Daskam v. Lockwood, 103 Conn. 54, 130 A 92; H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138; Wheeler v. Fellowes, 52 Conn. 238; Alfred v. Marks, 49 Conn. 473; Rand v. Butler, 48 Conn. 293; Jocelyn v. Nott, 44 Conn. 55. Compare Daskam v. Lockwood, 103 Conn. 54, 130 A 92 (where it was said that a gift or devise or bequest which may by possibility offend against the statute prohibiting perpetuities is void).

Ill.—Nicol v. Morton, 332 Ill. 533, 164 NE 5; Morgan v. Charleston Nat. Trust Bank, 331 Ill. 182, 162 NE 888; Easton v. Hall, 323 Ill. 397, 154 NE 216; Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Beal v. Higgins, 290 Ill. 229, 132 NE 542; Hopkinson v. Swaim, 284 Ill. 11, 119 NE 985; Moroney v. Haas, 277 Ill. 467, 115 NE 648; Wood v. Wood, 276 Ill. 164, 114 NE 549; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37; Schaefer v. Schaefer, 141 Ill. 337, 31 NE 136. See Talcott v. American Bd. Comrs. for Foreign Missions, etc., 205 Ill. A. 339.

Ind.—Stephens v. Evans, 30 Ind. 39; Quilliam v. Union Trust Co., (A.) 131 NE 428.

Kan.—Malmquist v. Detar, 123 Kan. 384, 255 P 42.

Ky.—Fidelity, etc., Trust Co. v. Tiffany, 202 Ky. 618, 260 SW 357; Curd v. Curd, 163 Ky. 472, 173 SW 1148; Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 97 SW 421, 30 KyL 110; Fidelity Trust Co. v. Lloyd, 78 SW 896, 25 KyL 1827; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315; Coleman v. Coleman, 65 SW 832, 23 KyL 1476.

Me.—Slade v. Patten, 68 Me. 380.

Md.—Barnum v. Barnum, 26 Md. 119, 90 AmD 88.

Mass.—Fosdick v. Fosdick, 6 Allen 41; Sears v. Russell, 8 Gray 86; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

Mo.—Riley v. Jaeger, 189 SW 1168; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

N. J.—Graves v. Graves, 94 N. J. Eq. 268, 120 A 420. See Tichenor v. Mechanics, etc., Nat. Bank, 96 N. J. Eq. 560, 125 A 323 (applying the principle stated in the text).

N. Y.—Paterson v. Ellis, 11 Wend. 259.

N. C.—Moore v. Moore, 59 N. C. 132.

Pa.—In re Feeney, 293 Pa. 273, 142 A 284; In re Gageby, 293 Pa. 109, 141 A 842; Ledwith v. Hurst, 284 Pa. 94, 130 A 315; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Donohue v. McNichol, 61 Pa. 73; Smith v. Townsend, 32 Pa. 434.

Tex.—Neely v. Brogden, (Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614].

Va.—Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 SE 89.

W. Va.—Prichard v. Prichard, 91 W. Va. 398, 113 SE 256.

Eng.—In re Fane, [1913] 1 Ch. 404.

Ont.—Re Phillips, 28 Ont. L. 94, 11 DomLR 500.

And see supra § 10.

"A bare possibility that the condition upon which the estate is to vest may not happen within the prescribed limits is all that is necessary to bring . . . [a] devise in conflict with the rule." Johnson v. Preston, 226 Ill. 447, 457, 80 NE 1001, 10 LRANS 564.

[a] **"The question presented is:** 'Is it possible that the event or contingency upon which the estate must vest, may not occur or happen within the prescribed period limited by the rule?'" Riley v. Jaeger, (Mo.) 189 SW 1168, 1169.

5. Alternative powers see infra § 61.

6. In re Trevor, 239 N. Y. 6, 145 NE 66; Church v. Wilson, 152 App. Div. 844, 137 NYS 1002 [aff 209 N. Y. 553 mem, 103 NE 1122 mem]; Guernsey's Est., 25 Pa. Dist. 264; and cases infra note 7.

7. U. S.—Halsey v. Goddard, 86 Fed. 25; Perkins v. Fisher, 59 Fed. 801, 8 CCA 270.

Conn.—Holmes v. Connecticut Trust, etc., Co., 92 Conn. 507, 103 A 640.

Ill.—Moroney v. Haas, 277 Ill. 467, 115 NE 648; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216.

Ky.—Armstrong v. Armstrong, 14 B. Mon. 269.

Mass.—Brown v. Wright, 194 Mass. 540, 80 NE 612; Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Stone v. Bradlee, 183 Mass. 165, 66 NE 708; Seaver v. Fitzgerald, 141 Mass. 401, 6 NE 73; Jackson v. Phillips, 14 Allen 539.

N. J.—Merkel v. Capone, 81 N. J. Eq. 282, 87 A 95; Ackerman v. Vreeland, 14 N. J. Eq. 23.

N. Y.—In re Trevor, 239 N. Y. 6, 145 NE 66; Schettler v. Smith, 41 N. Y. 328; Church v. Wilson, 152 App. Div. 844, 137 NYS 1002 [aff 209 N. Y. 553 mem, 103 NE 1122 mem]; Matter of Wilcox, 125 App. Div. 152, 109 NYS 564 [rev on other grounds 194 N. Y. 288, 87 NE 497]; Matter of Murray, 75 App. Div. 246, 78 NYS 165; Fowler v. Depau, 26 Barb. 224.

Pa.—In re Whitman, 248 Pa. 285, 93 A 1062.

S. C.—Dunlap v. Dunlap, 4 S. C. Eq. 305.

Eng.—In re Davey, [1915] 1 Ch. 837; In re Bullock, [1915] 1 Ch. 493, 8 BRC 347; In re Bowles, [1905] 1 Ch. 371; Watson v. Young, 28 Ch. D. 436; Miles v. Harford, 12 Ch. D. 691; Re Thatcher, 26 Beav. 365, 53 Reprint 939; Cambridge v. Rous, 25 Beav. 409, 53 Reprint 693; Monypenny v. Dering, 2 De G. M. & G. 145, 51 EngCh 112, 42 Reprint 826; Williams v. Lewis, 6 H. L. Cas. 1013, 10 Reprint 1594; Goring v. Howard, 16 Sim. 395, 39 EngCh 395, 60 Reprint 926; Minter v. Wraith, 13 Sim. 52, 36 EngCh 52, 60 Reprint 21; Crompe v. Barrow, 4 Ves. Jr. 681, 31 Reprint 351, 21 ERC 445; Longhead v. Phelps, W. Bl. 704, 96 Reprint 414.

See Palms v. Palms, 58 Mich. 355, 36 NW 419; Stigler v. Shurlds, 131 Miss. 648, 95 SW 635 (both apparently applying the principle stated in the text).

"Where a limitation is to arise upon an alternative event, one branch of which is within and the other is not within the prescribed limits, it will take effect or not, ac-

hereinabove stated can be applied, however, only where contingencies are stated in the alternative by the instrument creating the interest or estate;[8] and where a limitation is upon one contingency, although depending upon a twofold event, the court will not split it up into two contingencies, one good and one bad, so as to give effect to the limitation on the ground that the good contingency has taken place,[9] except where a limitation was capable of taking effect under some circumstances as a remainder, in which case it would vest within the period of the rule, and under other circumstances as an executory devise, in which case it would be too remote, and the former contingency has happened,[10] and except where personal property is limited to a series of persons by words which, if the property were realty, would create successive estates tail, and the first donee does not come into being, in which case the limitation is so far regarded as separable as to permit the next donee to take.[11]

[§ 13] **2. Ascertainment of Beneficiaries.**[12] The principle that the contingency on which vesting of an estate or interest is to occur must necessarily happen, if ever, within the period specified by the rule against perpetuities[13] is equally applicable to the identification of the person who is to take the estate.[14] The rule does not demand that the particular individuals in whom a future estate is to vest shall be ascertainable at the creation of the estate,[15] and it is satisfied if it be certain that they will be definitely ascertainable within the period by it specified;[16] but where the beneficiary or beneficiaries of a limitation may possibly not be ascertained within such period, the gift is void for remoteness.[17]

[§ 14] **3. Ascertainment of Interests.** In accordance with the principle that in order to be valid a

cording to the event." Quinlan v. Wickman, 233 Ill. 39, 46, 84 NE 38, 17 LRANS 216.

[a] **Reason for rule.**—"In the creation of a limitation of this kind two events are contemplated, distinct from each other, on either of which the gift is intended to take effect, and the remoteness of one of which, therefore, does not affect the validity of the other, in case it should be actually realized; and it so far differs from all other limitations, in the construction to be put upon it, in reference to the laws of remoteness, that its validity depends entirely on subsequent events. The rule allowing such an exception seems to be founded upon the consideration that it is absolutely certain, at the time of the creation of the limitation to which it applies, that if it take effect at all it must take effect within the prescribed limits, and is consequently exempt from all objection on the ground of remoteness." Armstrong v. Armstrong, 14 B. Mon. (Ky.) 269, 280.

Alternative gift over on failure of preceding estate or on contingency void for remoteness see Estates § 226.

Circumstances causing limitation to take effect as remainder or executory devise see infra text and note 10.

8. In re Harvey, 39 Ch. D. 289, 299.

"The true inquiry is whether the . . . [testator] refers to one event or to two distinct events." In re Harvey, supra.

9. Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Siedler v. Syms, 56 N. J. Eq. 275, 38 A 424; Hancock v. Watson, [1902] A. C. 14 [aff [1901] 1 Ch. 482]; In re Norton, [1911] 2 Ch. 27; In re Hancock, [1901] 1 Ch. 482; In re Bence, [1891] 3 Ch. 242; In re Harvey, 39 Ch. D. 289; Miles v. Harford, 12 Ch. D. 691; Re Thatcher, 26 Beav. 365, 53 Reprint 939; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Re Johnson, 111 L. T. Rep. N. S. 130; Monypenny v. Dering, 2 De G. M. & G. 145, 51 EngCh 112, 42 Reprint 826; Proctor v. Bath, 2 H. Bl. 358, 126 Reprint 594; Ibbetson v. Ibbetson, 10 Sim. 495, 16 EngCh 495, 59 Reprint 707; Re Phillips, 28 Ont. L. 94, 11 DomLR 500.

[a] **Illustration.**—A limitation to A in case B should have no son who was a clergyman or in holy orders is void as depending on too remote a contingency, even though B died without having had any son; the contingency was one which might have happened beyond the period specified by the rule against perpetuities, or which might happen, as it did, within such period, but, the testator not having separated the two contingencies, the court cannot do so for him. Proctor v. Bath, 2 H. Bl. 358, 126 Reprint 594.

10. Halsey v. Goddard, 86 Fed. 25; Timanus v. Dugan, 46 Md. 402; Evers v. Challis, 7 H. L. Cas. 531, 11 Reprint 212. Compare In re Bence, [1891] 3 Ch. 242, 251 [overr Watson v. Young, 28 Ch. D. 436] (placing the case of Evers v. Challis, supra, on the distinction between a contingent remainder and an executory devise, saying: "The case is . . . no authority for the proposition that every gift over may be analyzed into as many events as are included within its language, and be held good or bad as the events happen"). To same effect Hancock v. Watson, [1902] A. C. 14 [aff [1901] 1 Ch. 482].

[a] **Thus,** where a gift over would take effect under certain circumstances as a remainder and under other circumstances as an executory devise, and as the former it would be good but as the latter it would be void for remoteness, then if it does in fact take effect as a remainder it is not obnoxious to the rule against perpetuities. Evers v. Challis, 7 H. L. Cas. 531, 11 Reprint 212.

Limitation alternatively effective as executory devise or contingent remainder see Estates § 207.

11. In re Lowman, [1895] 2 Ch. 348; Knight v. Ellis, 2 Bro. Ch. 570, 29 Reprint 312; Pelham v. Gregory, 3 Bro. P. C. 204, 1 Reprint 1271; Williams v. Lewis, 6 H. L. C. 1013, 10 Reprint 1594 [aff 3 Drew. 668, 61 Reprint 1059]; Phipps v. Mulgrave, 3 Ves. Jr. 613, 30 Reprint 1182.

12. Limitations to unborn persons see infra §§ 51–53.

13. See supra § 9.

14. In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366.

15. Bates v. Spooner, 75 Conn. 501, 54 A 305; Davis v. Buford, 3 SW 4, 8 KyL 693 mem; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

16. Bates v. Spooner, 75 Conn. 501, 54 A 305; Davis v. Buford, 3 SW 4, 8 KyL 693 mem; Van Driele v. Kotvis, 135 Mich. 181, 97 NW 700; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

[a] **Gift to those entitled to inherit.**—Where testator limited life estates to his widow and daughter, with remainder at their death to such person or persons as should by the laws then in force be entitled to inherit from him, and in the same proportions, the persons who will be entitled to such remainder will be ascertainable at the end of the life estates, since it may be safely assumed that there will always be some statutory provision as to who shall inherit property, and the statutes would clearly indicate the persons to whom such interests would go. Van Driele v. Kotvis, 135 Mich. 181, 97 NW 700.

17. Fidelity Trust Co. v. Lloyd, 78 SW 896, 25 KyL 1827; In re Feeney, 293 Pa. 273, 142 A 284; Linck v. Plankenhorn, 286 Pa. 319, 133 A 510; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Dawson v. Lancaster, 12 Pa. Dist. 501, 28 Pa. Co. 657; Rhode Island Hospital Trust Co. v. Peck, 41 R. I. 519, 101 A 430; In re Thompson, [1906] 2 Ch. 199; Blight v. Hartnoll, 19 Ch. D. 294; Curtis v. Lukin, 5 Beav. 147, 49 Reprint 533; Boughton v. James, 1 Coll. 26, 28 EngCh 26, 63 Reprint 306 [aff 1 H. L. C. 406, 9 Reprint 815]. See Becker v. Chester, 115 Wis. 90, 134, 91 NW 87, 650 ("We are not familiar with any authority for the proposition that the identity of all the persons entitled to participate in the distribution of a trust estate must be ascertained within the time limited by such rule;" but, as appears from the opinion, the court meant that, under the terms of a will providing that trustees should pay over a legacy to the children of a life tenant "at the expiration" of twenty-one years after his death, the fact that some time would necessarily be consumed after the expiration of such period in determining the identity of the persons to whom actual payment should be made would not render the bequest obnoxious to the rule against perpetuities, inasmuch as it must vest immediately upon the expiration of such period in those persons who were within the class to whom it was given). To same effect Swain v. Bowers, (Ind. A.) 158 NE 598. Compare In re Daveron, [1893] 3 Ch. 421, 424 (where the court found as a fact "that the objects of the testator's bounty could all be ascertained within the limits required by the rule against perpetuities").

[a] **Illustration.**—A limitation of property to the testator's grandchildren surviving at the time when encumbrances upon the property should be paid off and discharged by the accumulation of the rentals is void for remoteness; for while the limits of the class to take the property will necessarily be determined within lives in being (those of the testator's children) and the period of gestation thereafter, the encumbrances may not be paid off within such lives and twenty-one years thereafter, and therefore the class or individuals to take may not be ascertained within such period. "The rule against perpetuities requires, in my view, the ascertainment within the period not only of the extreme limits of the class of persons who may take, but of the very persons who are to take, and that because the rule is aimed at the practical object of telling who can deal with the property, and if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically

future interest or estate must necessarily vest within the period of the rule against perpetuities,[18] a gift or limitation is void unless the interests to be taken by the respective beneficiaries thereunder are capable of ascertainment within, or at the expiration of, such period.[19]

[§ 15] **4. Possibility of Issue.**[20] In determining whether an estate or interest may possibly[21] vest beyond the expiration of the period specified by the rule against perpetuities,[22] both men[23] and women[24] are considered capable of having issue so long as they live.

[§ 16] **B. Possession or Enjoyment.**[25] The rule against perpetuities, by its terms,[26] relates solely to the vesting of estates or interests and is not concerned with their possession or enjoyment;[27] so if a legal or equitable interest or estate in real or personal property is vested or must vest within the period prescribed by the rule,[28] the postponement of the actual possession or enjoyment beyond such period does not render the estate void for remoteness,[29] although such postponement may be obnoxious to oth-

tied up." Blight v. Hartnoll, 19 Ch. D. 294, 300.

[b] **Failure of beneficiaries; principle distinguished.**—When there is a gift to one for life with remainder over to a class, "if there should be no member of the class upon which the gift was to take effect in existence at the time of the death of the life tenant, the gift to the class would fail and the estate would vest in the heirs-at-law, not because of the rule against perpetuities but because there would be no member of the class." Haughn v. Haughn, 296 Ill. 305, 308, 129 NE 807.

Gifts to a class see infra §§ 44–47.

Gifts to persons upon arrival at a specified age see infra §§ 48–50.

18. See supra § 9.

19. In re Thompson, [1906] 2 Ch. 199; Redington v. Browne, L. R. 32 Ir. 347; Curtis v. Lukin, 5 Beav. 147, 49 Reprint 533; Meyers v. Hamilton Provident. etc., Co., 19 Ont. 358.

Limitations to classes which may open to let in other members see infra §§ 44–46.

20. Presumptions as to possibility of procreation see Evidence §§ 62, 63.

21. Question of remoteness determined by possibilities see supra § 11.

22. Period specified by the rule see supra § 5.

23. Conn.—White v. Allen, 76 Conn. 185, 56 A 519.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276.

Ky.—Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Beall v. Wilson, 146 Ky. 646, 143 SW 55.

Mich.—Rozell v. Rozell, 217 Mich. 324, 186 NW 489.

N. J.—Graves v. Graves, 94 N. J. Eq. 268, 120 A 420.

Eng.—Ward v. Van der Loeff, [1924] A. C. 653; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186.

24. U. S.—Flora v. Anderson, 67 Fed. 182.

Conn.—White v. Allen, 76 Conn. 185, 56 A 519.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276.

Ky.—Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Beall v. Wilson, 146 Ky. 646, 143 SW 55; U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 97 SW 421, 30 KyL 110.

Mass.—Lovering v. Lovering, 129 Mass. 97.

Mich.—Rozell v. Rozell, 217 Mich. 324, 186 NW 489.

Mo.—Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629.

N. J.—Graves v. Graves, 94 N. J. Eq. 268, 120 A 420; Stout v. Stout, 44 N. J. Eq. 479, 15 A 843.

Pa.—In re Gerber, 196 Pa. 366, 46 A 497; Rhodes' Est., 147 Pa. 227, 23 A 553; List v. Rodney, 83 Pa. 483; Williamson's Est., 3 Pa. Co. 239. But see In re Jones' Trust, 284 Pa. 90, 130 A 314 (where, "without passing upon the validity" of the contention that a settlor, being a woman sixty years of age, could not have children thereafter born, it was held that a trust deed for the benefit of the settlor and her husband and their children during their lives, and then for her grandchildren, absolutely, showed no intention to violate the rule against perpetuities and was not void thereunder).

W. Va.—Carney v. Kain, 40 W. Va. 758, 23 SE 650.

Eng.—Ward v. Van der Loeff, [1924] A. C. 653; In re Deloitte, [1926] Ch. 56; In re Dawson, 39 Ch. D. 155 [overr Cooper v. Laroche, 17 Ch. D. 368]; In re Sayer, L. R. 6 Eq. 319; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186.

Man.—Fonseca v. Jones, 21 Man. 168, 18 WestLR 206.

[a] **Instances of births to persons of advanced age** are given in a note appended to the report of Miller v. Macomb, 26 Wend. (N. Y.) 229, 234.

25. Accumulations see infra §§ 80–87.

26. Rule stated see supra § 4.

27. Wright v. Hill, 140 Ga. 554, 79 SE 546; and cases infra note 29.

28. Period within which estates must vest see supra § 5.

29. U. S.—Jones v. Habersham, 107 U. S. 174, 2 SCt 336, 27 L. ed. 401.

Conn.—Hoadley v. Beardsley, 89 Conn. 270, 93 A 535.

Ill.—Nicol v. Morton, 332 Ill. 533, 164 NE 5; Easton v. Hall, 323 Ill. 397, 154 NE 216; Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Brown v. Brown, 247 Ill. 528, 93 NE 357; Wagner v. Wagner, 244 Ill. 101, 91 NE 66, 18 AnnCas 490 [aff 149 Ill. A. 73]; Mettler v. Warner, 243 Ill. 600, 90 NE 1099, 134 AmSR 388; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142; Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Eldred v. Meek, 183 Ill. 26, 55 NE 536, 75 AmSR 86; Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356; Lunt v. Lunt, 108 Ill. 307; Houcks v. Herrick, 179 Ill. A. 274. See Threlkeld v. Inglett, 289 Ill. 90, 124 NE 368; Waldo v. Cummings, 45 Ill. 421 (both apparently applying the principle stated in the text); Guerin v. Guerin, 270 Ill. 239, 110 NE 402 (dictum).

Ind.—Swain v. Bowers, (A.) 158 NE 598. See Matlock v. Lock, (A.) 73 NE 171 (apparently applying the principle stated in the text).

Iowa.—Woodard v. Woodard, 184 Iowa 1178, 169 NW 464; Phillips v. Harrow, 93 Iowa 92, 61 NW 434.

Kan.—Salisbury v. Salisbury, 92 Kan. 644, 141 P 173; Klingman v. Gilbert, 90 Kan. 545, 135 P 682.

Me.—Strout v. Strout, 117 Me. 357, 104 A 577; Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Mass.—Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365; Boston Safe Deposit, etc., Co. v. Collier, 222 Mass. 390, 111 NE 163, AnnCas 1918C 962; Dodge v. Bennett, 215 Mass. 545, 102 NE 916; Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Stone v. Forbes, 189 Mass. 163, 75 NE 141; Seaver v. Fitzgerald, 141 Mass. 401, 6 NE 73; Loring v. Blake, 98 Mass. 253; Otis v. McLellan, 13 Allen 339. See Hale v. Herring, 208 Mass. 319, 94 NE 396 (applying the principle stated in the text).

Mich.—Hull v. Osborn, 151 Mich. 8, 113 NW 784.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316; Schee v. Boone, 295 Mo. 212, 243 SW 882; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261 [disappr Lockridge v. Mace, 109 Mo. 162, 18 SW 1145]; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625. See Mockbee v. Grooms, 300 Mo. 446, 254 SW 170 (apparently recognizing the principle stated in the text).

N. J.—Fischer v. Stuart, 138 A 873; Trippe v. National Newark, etc., Banking Co., 98 N. J. Eq. 462, 131 A 162 [aff 100 N. J. Eq. 356, 134 A 919]; Canda v. Canda, 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029; Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 337 [aff 74 N. J. Eq. 848, 71 A 240].

N. C.—Springs v. Hopkins, 171 N. C. 486, 88 SE 774.

Oh.—Sager v. Byrer, 24 Oh. N. P. N. S. 129.

Pa.—In re Brown, 289 Pa. 101, 137 A 132; In re Wickersham, 261 Pa. 121, 104 A 509; In re McKeown, 259 Pa. 216, 102 A 878; In re Smith, 210 Pa. 604, 60 A 255; Siddall's Est., 180 Pa. 127, 36 A 570; Cooper's Est., 150 Pa. 576, 24 A 1057, 30 AmSR 829; Rhodes' Est., 147 Pa. 227, 23 A 553 [aff 8 Pa. Co. 316]; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Barclay's Est., 23 Pa. Dist. 79; Horner's Est., 10 Pa. Dist. 729, 26 Pa. Co. 383; Siddall's Est., 5 Pa. Dist. 102; Williamson's Est., 3 Pa. Co. 239.

R. I.—Storrs v. Burgess, 29 R. I. 269, 67 A 731; Morgan v. Morgan, 20 R. I. 600, 40 A 736.

Tex.—Anderson v. Menefee, (Civ. A.) 174 SW 904.

Wash.—In re Galland, 103 Wash. 106, 173 P 740.

W. Va.—Bennett v. Bennett, 92 W. Va. 391, 115 SE 436; Cowherd v. Fleming, 84 W. Va. 227, 100 SE 84.

Wis.—Miller v. Douglass, 192 Wis. 486, 213 NW 320; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

Eng.—In re Cassel, [1926] Ch. 358; In re Lodwig, [1916] 2 Ch. 26; In re Turney, [1899] 2 Ch. 739; In re Edmondson, L. R. 5 Eq. 389; Redington v. Browne, L. R. 32 Ir. 347; Lachlan v. Reynolds, 9 Hare 796, 41 Eng Ch 796, 68 Reprint 738; Gilbertson v. Richards, 4 H. & N. 277, 157 Reprint 845 [aff 5 H. & N. 453, 157 Reprint 1258]; Hobbs v. Parsons, 2 Smale & G. 212, 65 Reprint 369. See Re Thatcher, 26 Beav. 365, 53 Reprint 939 (dictum).

Austr.—Carroll v. Perpetual Trustee Co., Ltd., 22 Austr. C. L. R. 423.

See Miller v. Weston, 67 Colo. 534, 189 P 610 [aff 25 Colo. A. 231, 138 P 424, and withdrawing former op. 61 Colo. 588, 157 P 1161]; Spreckels v. Spreckels, 21 Hawaii 556 (apparently applying the principle stated in the text).

Compare Earnshaw v. Daly, 1 App. (D. C.) 218, 223 (where it was said that a gift of a vested interest with enjoyment postponed is not invalid "so long as . . . it be not so long postponed in enjoyment as to come in conflict with the rule against perpetuities"); McLaughlin v. Yingling, 90 Okl. 159, 172, 213 P 552 (dictum, recognizing the principle stated in the text, but saying that "in order that a vested share, which is not to come into possession until a future time, shall escape the consequences of the rule against perpetuities, the vesting must be indefeasible").

er rules of law.[30]

The time required to convert realty into personalty, where such conversion is directed, will not render an otherwise valid limitation void for remoteness, since it postpones only the possession and not the vesting of the beneficial interest.[31]

[§ 17] **C. Continuance and Termination.** The rule against perpetuities, as appears by its statement,[32] relates only to the vesting of estates and interests, and not to their duration or ending.[33] Consequently, if an estate must vest, if ever, within the period specified by the rule,[34] it is immaterial, on the question of remoteness, how long it continues[35] or when, if ever, it terminates;[36] and it

"The inhibition [of the rule against perpetuities] is against the postponement of the vesting of estates and not against the postponement of possession." Dwyer v. Cahill, 228 Ill. 617, 625, 81 NE 1142. To same effect Armstrong v. Barber, 239 Ill. 389, 88 NE 246.

"The rule [against perpetuities] is not infringed where the time for vesting falls within the prescribed limits, however greatly the time for payment may transcend them." Williamson's Est., 3 Pa. Co. 239, 242.

[a] **Illustrations.**—(1) A devise to the testator's son for life, then to the son's widow for her life or until she remarried, with a remainder to the son's bodily heirs, is not obnoxious to the rule against perpetuities, notwithstanding the son might marry a woman born after the testator's death, because the estate of the son's heirs would vest as soon as their father died, although the possession might be postponed to a later date. Klingman v. Gilbert, 90 Kan. 545, 135 P 682. (2) A provision in a will postponing the distribution of the residue of the testator's estate until after the payment of his debt does not violate the rule. Canda v. Canda, 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029. (3) A gift of an income to one for life and at his death to his children, but not to be paid to such children until they respectively reach the age of twenty-five, is not within the rule. In re Edmondson, L. R. 5 Eq. 389. (4) "An owner in fee may by lease demise lands to A for a term of two lives or ninety-nine years, whichever shall longest continue, and by other deeds may grant the same lands to B for a term of 500 years, to commence from the expiration of the term limited by the lease; to C for a term of 1000 years, to commence from the expiration of the 500 years' term; and to D in fee. None of these limitations will be obnoxious to the rule against perpetuities. A, B, C, and D take immediate vested interests, and can between them dispose of the entire fee-simple of the lands at any time. The free and active circulation of property is not in any way impeded by dispositions such as these." Redington v. Browne, L. R. 32 Ir. 347, 356.

Vested future estates not too remote see infra §§ 26–33.

"Vesting in interest" and "vesting in possession" distinguished see Estates § 4 text and notes 77–79; Vested [40 Cyc 198 note 92].

30. Closset v. Burtchaell, 112 Or. 585, 230 P 554. See Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 312, 24 L. ed. 450 ("There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former"); Canda v. Canda, (N. J. Ch.) 113 A 503, 510 ("While I am precluded by the decision . . . in Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 332 [aff 74 N. J. Eq. 848, 71 A 240] from holding that the rule against perpetuities in its strictness applies to a postponement of possession or enjoyment as distinguished from ownership, nevertheless, as I conceive it, I am not precluded from holding that there is a limitation upon the time for which such possession and enjoyment may be severed from ownership. . . . I am of the opinion that where the direction of the will operates to withhold possession and enjoyment of an absolute gift for an unreasonable length of time it may be disregarded").

31. Bates v. Spooner, 75 Conn. 501, 54 A 305; Hope v. Brewer, 136 N. Y. 126, 32 NE 558, 18 LRA 458.

Equitable conversion generally see Conversion 13 C. J. p 850.

32. Rule stated see supra § 4.

33. Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

D. C.—Hazen v. American Security, etc., Co., 49 App. 297, 265 Fed. 447.

Fla.—Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 S 738.

Ill.—Nicol v. Morton, 332 Ill. 533, 164 NE 5; Easton v. Hall, 323 Ill. 397, 154 NE 216; Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Guerin v. Guerin, 270 Ill. 239, 110 NE 402; Mettler v. Warner, 243 Ill. 600, 90 NE 1099, 134 AmSR 388; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Marseilles Land, etc., Co. v. O'Neil, 218 Ill. A. 602.

Ind.—Swain v. Bowers, (A.) 158 NE 598; Quilliam v. Union Trust Co., (A.) 132 NE 614 [den reh 131 NE. 428].

Iowa.—Phillips v. Harrow, 93 Iowa 92, 61 NW 434.

Ky.—Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061.

Me.—Cary v. Talbot, 120 Me. 427, 115 A 166; Bancroft v. Maine State Sanatorium Assoc., 119 Me. 56, 109 A 585; Strout v. Strout, 117 Me. 357, 104 A 577; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103; Brooks v. Belfast, 90 Me. 318, 38 A 222; Pulitzer v. Livingston, 89 Me. 359, 36 A 635 [overr Slade v. Patten, 68 Me. 380].

Md.—Hawkins v. Ghent, 154 Md. 261, 140 A 212; Bowerman v. Taylor, 126 Md. 203, 94 A 652; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094.

Mass.—Dodge v. Bennett, 215 Mass. 545, 102 NE 916.

Mo.—Schee v. Boone, 295 Mo. 212, 243 SW 882; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261.

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578.

N. C.—Springs v. Hopkins, 171 N. C. 486, 88 SE 774.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—Ewalt v. Davenhill, 257 Pa. 385, 101 A 756; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; Bender v. Bender, 225 Pa. 434, 74 A 246; Dawson v. Lancaster, 12 Pa. Dist. 501, 28 Pa. Co. 657.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

Man.—Re Crichton, 23 Man. 594, 13 DomLR 169, 25 WestLR 18, 4 West Wkly 1184.

Ont.—Re Mountain, 26 Ont. L. 163, 3 OntWN 1011, 21 OntWR 866, 4 Dom LR 737 [aff 2 OntWN 246, 17 OntWR 448].

And see cases infra notes 35–37.

"The rule against perpetuities is concerned only with the time of vesting of an estate and not with the duration of an estate already vested." Closset v. Burtchaell, 112 Or. 585, 616, 230 P 554.

Vested interests not subject to rule see infra § 19 text and notes 53–60.

34. Period of postponement of vesting see supra § 5.

35. Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

D. C.—Hazen v. American Security, etc., Co., 49 App. 297, 265 Fed. 447.

Ill.—Nicol v. Morton, 332 Ill. 533, 164 NE 5; Easton v. Hall, 323 Ill. 397, 154 NE 216; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356.

Ind.—Swain v. Bowers, (A.) 158 NE 598.

Iowa.—Phillips v. Harrow, 93 Iowa 92, 61 NW 434.

Md.—Ortman v. Dugan, 130 Md. 121, 100 A 82; Bowerman v. Taylor, 126 Md. 203, 94 A 652. But see Barnum v. Barnum, 26 Md. 119, 171, 90 AmD 88 (where it was said that, if an estate is so limited as by possibility to extend beyond the period specified by the rule against perpetuities, it is void by that rule on the ground that if the contingency upon which the executory estate is to vest is not necessarily to happen within such period, then the "precedent" estate or estates are denominated a perpetuity, and "the executory estate or devise fails for want of a legal estate to support it"). To same effect Methodist Episcopal Church Missionary Soc. v. Humphreys, 91 Md. 131, 46 A 320, 80 AmSR 432; Thomas v. Gregg, 76 Md. 169, 24 A 418; Albert v. Albert, 68 Md. 352, 12 A 11; Goldsborough v. Martin, 41 Md. 488; Deford v. Deford, 36 Md. 168.

Mass.—Dodge v. Bennett, 215 Mass. 545, 102 NE 916.

Mo.—Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261; Stewart v. Coshow, 238 Mo. 662, 142 SW 283.

Pa.—In re Wickersham, 261 Pa. 121, 104 A 509; Bender v. Bender, 225 Pa. 434, 74 A 246; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

Ont.—Re Mountain, 26 Ont. L. 163, 3 OntWN 1011, 21 OntWR 866, 4 Dom LR 737 [aff 2 OntWN 246, 17 OntWR 448].

"The rule [against perpetuities] relates to the vesting of an estate, and does not affect its continuance after it has become vested." Phillips v. Harrow, 93 Iowa 92, 106, 61 NW 434.

[a] **If an estate were a perpetuity because it lasts forever,** then "every grant of land by the state, and every grant and transfer of property, would be perpetuities, because the titles pass forever from the grantors." Franklin v. Armfield, 2 Sneed (Tenn.) 305, 353.

Duration of trusts see infra § 71.

Lease for any term see infra § 22.

36. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Ill.—Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356.

Ky.—Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061.

Me.—Strout v. Strout, 117 Me. 357, 104 A 577; Pulitzer v. Livingston, 89 Me. 359, 36 A 635 [overr Slade v. Patten, 68 Me. 380].

Mass.—Seaver v. Fitzgerald, 141 Mass. 401, 6 NE 73.

N. C.—Springs v. Hopkins, 171 N. C. 486, 494, 88 SE 774 [cit Cyc].

Pa.—Bender v. Bender, 225 Pa. 434, 439, 74 A 246.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

Man.—Re Crichton, 23 Man. 594, 13 DomLR 169, 25 WestLR 18, 4 West Wkly 1184.

But see Thomson v. Livingston, 6 N. Y. Super. 539 (where it would appear, from an imperfect report of the case, than an interest commencing within the limits of the rule but not ending therein was held void as a perpetuity).

And see cases infra note 37.

may be so limited as to be determined on the happening of any event, however remote.[37]

IV. INTERESTS SUBJECT TO THE RULE

[§ 18] **A. Scope of the Rule.** There is some confusion among the authorities as to the meaning and scope of the rule against perpetuities.[38] According to the earlier and narrower view, a violation of the rule occurs only when the situation of the property is such that no one can sell or convey it until after the lapse of the period provided by law;[39] or, in other words, no future estate which can be released is too remote under the rule.[40] This view is based upon the erroneous[41] theory of the rule against perpetuities as a prohibition of restrictions which suspend the power of alienation beyond the period specified by the rule;[42] but the statutes of several of the states relating to perpetuities are founded upon it.[43] It was later held, more broadly, that a future interest is too remote, notwithstanding the holders of the respective rights have it within their power to combine them and convey the property, if it may not vest within the period fixed by the rule;[44] and this view has been adopted in England[45] and in a number

"The remoteness against which the rule is directed is remoteness in the commencement, or first taking effect of limitations, and not in the cesser or determination of them." Bender v. Bender, supra.

37. Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Closset v. Burtschaell, 112 Or. 585, 616, 230 P 554; Bender v. Bender, 225 Pa. 434, 74 A 246; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

"The remoteness against which the rule is directed is remoteness in the commencement or first taking and not in the cesser or determination of them. If the estate is to arise within the prescribed period it may be so limited as to be determined on the happening of any event, however remote." Closset v. Burtchaell, supra.

Estates upon condition subsequent generally see Estates § 39.

38. See Woodall v. Bruen, 76 W. Va. 193, 85 SE 170; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650 (where the varying theories are discussed); and cases infra notes 39–47.

Rule stated see supra § 4.

39. Md.—Conner v. Boonsborough Trinity Reformed Church, 129 Md. 360, 99 A 547.

Mass.—French v. Old South Soc., 106 Mass. 479; Lovering v. Worthington, 106 Mass. 86; Odell v. Odell, 10 Allen 1. Compare Brattle Square Church v. Grant, 3 Gray 142, 152 [disappr Winsor v. Mills, 157 Mass. 362, 32 NE 352] ("Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance").

Mo.—Stevens v. Annex Realty Co., 173 Mo. 511, 73 SW 505; Noel v. Hill, 158 Mo. A. 426, 138 SW 364.

Nebr.—Lamb v. Lynch, 56 Nebr. 135, 76 NW 428.

N. C.—Griffin v. Graham, 8 N. C. 96, 9 AmD 619.

Tenn.—Franklin v. Armfield, 2 Sneed 305.

Eng.—Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421; Avern v. Lloyd, L. R. 5 Eq. 383; Gooch v. Gooch, 3 De G. M. & G. 366, 52 EngCh 285, 43 Reprint 143; Gilbertson v. Richards, 4 H. & N. 277, 157 Reprint 845 [aff 5 H. & N. 453, 157 Reprint 1258]; Keppel v. Bailey, Coop. t. Brough. 293, 47 Reprint 106, 2 Myl. & K. 517, 7 EngCh 517, 39 Reprint 1042. See Marlborough v. Godolphin, 1 Eden 404, 28 Reprint 741; Curtis v. Lukin, 5 Beav. 147, 49 Reprint 533 (both apparently applying the principle stated in the text).

See Becker v. Chester, 115 Wis. 90, 91 NW 87, 650 (where such decisions are reviewed).

Compare Doty v. Mason, 244 Fed. 587, 593 ("The rule against perpetuities is directed against the withdrawal of real property from sale").

"It is only when there are no persons in being who can convey an absolute fee in possession, discharged of a future use or estate, that there is a perpetuity." Noel v. Hill, 158 Mo. A. 426, 443, 138 SW 364.

"A perpetuity which the Law would deem void, must be an estate so settled for private uses that by the very terms of its creation there is no potestas alienandi in the owner." Griffin v. Graham, 8 N. C. 96, 131, 9 AmD 619.

[a] **Illustrations.**—(1) A testator devised and bequeathed property to the bishop of a specified diocese, "and to his successors in the bishopric of said diocese," to be disposed of and used by him to the advantage of the church therein. In an appeal from a judgment denying probate of the will, the court said: "The illegality asserted is that the clause quoted creates a perpetuity. But we cannot read that clause in any manner even implying the slightest restraint on alienation, and it is only an undue restraint on alienation which creates a forbidden perpetuity. The grant to the present bishop and his successors is a limitation of the estate. It does not create estates in remainder to the various successors. Moreover there is an express grant of the power of alienation." Lamb v. Lynch, 56 Nebr. 135, 136, 76 NW 428. (2) A conveyance of real estate which recites that the grantor has laid out the property conveyed and adjacent property into building lots and imposed building restrictions thereon, and which in terms provides that after twenty-five years from the date of the deed such restrictions may be removed by consent of a majority of the then owners of the lots, is not obnoxious to the rule against perpetuities. "There is nothing in the deed restricting the owners of all these lots from at any time, by consent of all, removing them [the restrictions]. Hence an estate in perepetuity is not created by the deed." Noel v. Hill, 158 Mo. A. 426, 443, 138 SW 364.

40. Reid v. Barry, 93 Fla. 849, 112 S 846; Avern v. Lloyd, L. R. 5 Eq. 383; Gooch v. Gooch, 3 De G. M. & G. 366, 52 EngCh 285, 43 Reprint 143; Keppell v. Bailey, Coop. t. Brough. 293, 47 Reprint 106, 2 Myl. & K. 517, 7 EngCh 517, 39 Reprint 1042. See Ward v. McMath, 153 Ark. 506, 241 SW 3 (where the court appears to have applied the principle stated in the text); Stevens v. Annex Realty Co., 173 Mo. 511, 73 SW 505; Noel v. Hill, 158 Mo. A. 426, 138 SW 364 (both applying the rule). Compare Ward v. McMath, 153 Ark. 506, 513, 241 SW 3 (holding that a deed to designated individuals, their successors and assigns, for the use and benefit of an unincorporated association, vests the legal title in the trustees and the equitable title in those who then constituted the membership of the association, who could be readily ascertained, and the conveyance "was thus not obnoxious to the rule against perpetuities which prevents alienation").

41. Gray Perp. § 278; Perry Trusts (6th ed) § 377 note. Compare Libby v. Winston, 207 Ala. 681, 684, 93 S 631 ("The rule against perpetuities and the rule against the suspension of the power of alienation are the expressions of distinct conceptions that should not be confused").

"To suppose that the Rule against Perpetuities is needed to restrain a suspension of alienation, or that present interests in property might be made inalienable were it not for the Rule, is to throw the fundamentals of the law into confusion." Gray Perp. § 278.

"The chief reason why the rule against perpetuities has been so often regarded as aimed against restraints upon alienation seems to be that with few exceptions restraints upon the power to alienate an interest in property can be imposed only by making the interest conditional upon some future contingency. But attempted restraints upon power to alienate vested interests come under an entirely different rule." Perry Trusts (6th ed) § 377 note.

42. Morrison v. Rossignol, 5 Cal. 64; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650. See Washborn v. Downs, 1 Ch. Cas. 213, 22 Reprint 767 ("A Perpetuity is, where if all that have Interest, joyn, and yet cannot bar or pass the Estate"). And see supra § 1 text and notes 2–5.

43. Becker v. Chester, 115 Wis. 90, 108, 91 NW 87, 650.

"This erroneous theory is crystallized in the New York statutes." Gray Perp. § 748.

"When the view which finds its first definite expression in Washborn v. Downs, 1 Ch. Cas. 213, 22 Reprint 767 that so long as there are persons in being, no matter how numerous they may be, who by joining can convey a full title in possession to the realty, there is no offense against the doctrine of perpetuities—was supposed to be the law of England, the statutes of New York were framed; and that idea was made a part thereof so plainly that there is no good reason for going astray in respect thereto." Becker v. Chester, supra.

Statutes of New York and similar states see infra §§ 97–157.

44. London, etc., R. Co. v. Gomm, 20 Ch. D. 562 [overr Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421, and disappr Gilbertson v. Richards, 4 H. & N. 277, 157 Reprint 845]; In re Ramadge, [1919] 1 Ir. 205.

"In my opinion a present right to an interest in property which may arise at a period beyond the legal limit is void notwithstanding that the person entitled to it may release it. . . . It is impossible to assert as a general proposition that where the owner of an estate and the owner of such a contingent interest can together make a good title, or one can release to the other, the rule of perpetuities does not apply." London, etc., R. Co. v. Gomm, 20 Ch. D. 562, 573 (per Kay, J.).

"The Rule [against perpetuities] has been extended so as to cover all future interests whether alienable or not, and this extension, though not a logical necessary consequence of the establishment of the rule, is now well settled, and it is a reasonable extension." Gray Perp. § 268.

45. Edwards v. Edwards, [1909] A. C. 275; In re Hargreaves, 43 Ch. D. 401 [overr Avern v. Lloyd, L. R. 5 Eq. 383]; Trevelyan v. Trevelyan, 53 L. T. Rep. N. S. 853; Woodall v. Clif-

of American jurisdictions,[46] and would seem to be correct.[47]

[§ 19] **B. Nature of Interests—1. In General.** The rule against perpetuities, except as modified by statute,[48] is applicable alike to real and personal property,[49] including chattels real,[50] and to both legal and equitable interests therein,[51] however created.[52]

Vested interests[53] and estates.[54] It has many times been said that the rule has no application to vested estates or interests,[55] even though defeasi-

ton, [1904] W. N. 205.

46. Winsor v. Mills, 157 Mass. 362, 365, 32 NE 352 [dist Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 AmD 725, "in which a single ambiguous or inaccurate expression has sometimes led to a misunderstanding of the law intended to be stated"]; Theological Education Soc. v. Atty.-Gen., 135 Mass. 285; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas 1916D 570 [aff 41 Pa. Co. 396]; Woodall v. Bruen, 76 W. Va. 193, 85 SE 170; Starcher v. Duty, 61 W. Va. 373, 56 SE 524, 123 AmSR 990, 9 LRANS 913. See Welsh v. Foster, 12 Mass. 93 (apparently applying the principle). Compare In re Wilcox, 194 N. Y. 288, 87 NE 497 (stating the rule to be so at common law).

"The possibility or impossibility of obtaining releases is not the test by which to determine the validity or invalidity of a limitation." Winsor v. Mills, 157 Mass. 362, 366, 32 NE 352.

47. Gray Perp. § 275; Perry Trusts (6th ed) § 377 note.

"The true doctrine [has been] clearly stated by the Court of Appeal in London, etc., R. Co. v. Gomm, 20 Ch. D. 562." Gray Perp. § 275.

"It is frequently said that the purpose of the rule is to prevent restraints upon alienation of property by the creation of remote interests in it which are inalienable by nature; but, although this is undoubtedly a usual result of its operation, it seems better to regard the rule as aiming to prevent the creation of remote unvested interests rather than to prevent restraints upon alienation of the property itself or of vested interests in it." Perry Trusts (6th ed) § 377 note.

48. Statutory changes see infra §§ 92-157.

49. U. S.—Hanley v. Kansas, etc., Coal Co., 110 Fed. 62.

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Cal.—Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375. But compare Kingston v. Home L. Ins. Co., 11 Del. Ch. 258, 266, 101 A 898 (conceding that "in general the rule against remoteness in the time of vesting future interests applies to personalty as well as realty," but refusing to apply to a contract giving the exclusive option to purchase stock of a corporation, the court saying: "The real purpose of the rule was to prevent inalienability of the land, i. e., to prevent its being tied up for an unreasonably long period whereby it was kept out of commerce. Public policy was the reason for the rule. . . . Has it any relation to contracts as to shares of stock of a private business corporation? There is no principle of public policy involved. It can make no difference to the general public, or to any other than stockholders of that particular company. To tie up land, which is the source of all wealth, is quite a different thing from giving an unlimited option to buy all unissued shares of a corporation doing a private business").

Ill.—French v. Calkins, 252 Ill. 243, 96 NE 877; Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142; Waldo v. Cummings, 45 Ill. 421; Nevitt v. Woodburn, 82 Ill. A. 649 [aff 190 Ill. 283, 60 NE 500].

Ky.—U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Moore v. Howe, 4 T. B. Mon. 199.

Me.—Kimball v. Crocker, 53 Me. 263.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094; Johnson v. Negro Lish, 4 Harr. & J. 441.

Mass.—Sears v. Russell, 8 Gray 86.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

Miss.—Thomas v. Thomas, 97 Miss. 697, 53 S 630.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760.

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

Pa.—Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85.

Va.—Pleasants v. Pleasants, 2 Call (6 Va.) 319.

Eng.—Atkinson v. Hutchinson, 3 P. Wms. 258, 24 Reprint 1053.

See Matthews v. Daniel, 5 N. C. 42 (applying the rule).

And see cases infra §§ 20-42.

50. Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Hubley v. Long, 2 Grant (Pa.) 268; Pleasants v. Pleasants, 2 Call (6 Va.) 319; Doe v. Ewart, 7 A. & E. 636, 34 ECL 337, 112 Reprint 609. See Redington v. Browne, L. R. 32 Ir. 347; Hope v. Gloucester, 7 De G. M. & G. 647, 56 EngCh 501, 44 Reprint 252; Atkinson v. Hutchinson, 3 P. Wms. 258, 24 Reprint 1053 (all applying the rule to chattel interests in land).

[a] **A term of years** is within the rule as well as a freehold estate. Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Doe v. Ewart, 7 A. & E. 636, 34 ECL 337, 112 Reprint 609.

Chattels real see Chattels § 2 text and notes 12, 23; Chattel Interest 11 C. J. p 386; Landlord and Tenant § 47 text and note 72; Property [32 Cyc 668].

Covenants for renewal of lease see infra § 22.

51. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 L. ed. 450; Hanley v. Kansas, etc., Coal Co., 110 Fed. 62.

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Cal.—Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97.

Conn.—Bates v. Spooner, 75 Conn. 501, 54 A 305. Compare H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138 (holding the rule to be so under a statute, since repealed).

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Ill.—O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; French v. Calkins, 252 Ill. 243, 96 NE 877; Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142; Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230; Howe v. Hodge, 152 Ill. 252, 38 NE 1083.

Me.—Towle v. Doe, 97 Me. 427, 54 A 1072; Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Md.—Hawkins v. Ghent, 154 Md. 261, 140 A 212; Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094.

Miss.—Henry v. Henderson, 101 Miss. 751, 58 S 354.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470.

R. I.—Webster v. Wiggin, 19 R. I. 73, 31 A 824, 28 LRA 510.

Eng.—Norfolk's Case, 3 Ch. Cas. 1, 47, 22 Reprint 931, 2 Swanst. 454, 36 Reprint 690; Massingberd v. Ash, 2 Ch. Rep. 275, 21 Reprint 677, 1 Vern. Ch. 234, 257, 23 Reprint 437, 453. Compare Abbiss v. Burney, 17 Ch. D. 211 (supporting the principle stated in the text, but pointing out that a different result may be obtained from the application of the rule to corresponding legal and equitable interests. Where property was conveyed in trust for one for life and then for such of his children as should reach the age of twenty-five, the equitable executory interest or contingent remainder was held void, inasmuch as it might not become vested within twenty-one years after the death of the life tenant; but the court recognized that if a legal life estate had been created, with remainder to such of the life tenant's children as reached twenty-five, such remainder would have been good, for it would have vested upon the death of the life tenant in those of his children, if any, who had then reached twenty-five, and as to any other children would have been destroyed for want of a preceding estate).

And see cases infra §§ 20-42.

"A limitation that is valid in the case of a legal estate is valid in the case of an equitable estate. If an equitable estate, as for instance a trust, is so limited that it creates a perpetuity, a similar limitation of a legal estate equally creates a perpetuity." Pulitzer v. Livingston, 89 Me. 359, 364, 36 A 635.

"The Court agreed thus far: That in this Case it is all one, the Limitation of the Trust of a Term, or the Limitation of the Estate of a Term, all depends upon one and the same Reason." Norfolk's Case, supra.

[a] **"Equity follows this rule [against perpetuities] by way of analogy** in dealing with executory trusts; and those trusts which transgress the rule are called transgressive trusts, being in equity the substantial equivalent of what in law are called perpetuities." Pulitzer v. Livingston, 89 Me. 359, 364, 36 A 635; Philadelphia v. Girard, 45 Pa. 9, 27, 84 AmD 490.

Trusts see infra §§ 71-88.

52. Lyons v. Bradley, 168 Ala. 505, 53 S 244; Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142; Canda v. Canda, (Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029]; London, etc., R. Co. v. Gomm, 20 Ch. D. 562, 581.

"In my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference." London, etc., R. Co. v. Gomm, supra.

53. Defined see Interest 33 C. J. p 263 text and note 71.

54. "Vested estate" defined see Estates § 4 text and notes 75, 77-81; Vested Estate [40 Cyc 198]; Wills [40 Cyc 1648 et seq].

55. U. S.—Sioux City Terminal R. etc., Co. v. Trust Co. of North America, 82 Fed. 124, 27 CCA 73 [aff 173 U. S. 99, 19 SCt 341, 43 L. ed. 628].

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Cal.—In re McCray, 268 P 647;

ble,[56] but by its terms[57] relates only to interests which will vest, if at all, in the future,[58] and the character of an interest as vested or contingent is therefore a primary consideration.[59] This statement is, however, subject to the exceptions hereinafter mentioned.[60]

Contractual rights. The rule against perpetuities is one of property only, and has no application to mere personal contracts which do not create or transfer any right of property.[61] Where, however, a contract creates an interest in property which could, except for the rule, be enforced by a decree for specific performance, such interest is subject to the rule.[62]

A rent charge,[63] to commence in the future at a time beyond that specified by the rule against perpetuities,[64] considered either as a contract obligation[65] or as a restriction on the amount of the estate of the debtor,[66] is not within the rule.[67]

Strong v. Shatto, 45 Cal. A. 29, 187 P 159.

Conn.—Tarrant v. Backus, 63 Conn. 277, 28 A 46.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Ill.—Easton v. Hall, 323 Ill. 397, 154 NE 216; Hart v. Taylor, 301 Ill. 344, 133 NE 857; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Heisen v. Ellis, 247 Ill. 418, 93 NE 362; Brown v. Brown, 247 Ill. 528, 93 NE 357; Armstrong v. Barber, 239 Ill. 389, 88 NE 246.

Ind.—Swain v. Bowers, (A.) 158 NE 598.

Me.—Merrill v. Winchester, 120 Me. 203, 113 A 261; Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Mass.—Minot v. Burroughs, 223 Mass. 595, 112 NE 620.

Mich.—Hull v. Osborn, 151 Mich. 8, 113 NW 784; Toms v. Williams, 41 Mich. 552, 2 NW 814.

Miss.—Nichols v. Day, 128 Miss. 756, 91 S 451.

Mo.—Schee v. Boone, 295 Mo. 212, 243 SW 882; Walter v. Dickmann, 274 Mo. 185, 202 SW 537; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625.

N. H.—McAllister v. Elliot, 140 A 708.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—In re Hunter, 279 Pa. 349, 123 A 865; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Ewalt v. Davenhill, 257 Pa. 385, 101 A 756; Green v. Green, 255 Pa. 224, 99 A 801; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Yard's App., 64 Pa. 95; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470.

Wis.—Webster v. Morris, 66 Wis. 366, 28 NW 353, 57 AmR 278.

Eng.—Mann, Crossman & Paulin, Ltd., v. Land Registrar, [1918] 1 Ch. 202.

Vested future interests see infra §§ 26–33.

Rule does not require vested interests to end within period specified see supra § 17.

56. Me.—Merrill v. Winchester, 120 Me. 203, 113 A 261.

Mich.—Hull v. Osborn, 151 Mich. 8, 113 NW 784.

N. C.—Springs v. Hopkins, 171 N. C. 486, 88 SE 774.

Tex.—Anderson v. Menefee, (Civ. A.) 174 SW 904.

Austr.—Carroll v. Perpetual Trustee Co., Ltd., 22 Austr. C. L. R. 423.

[a] **An estate which vests within the period of the rule** is not obnoxious to the rule because it is subject to be divested. Springs v. Hopkins, 171 N. C. 486, 88 SE 774.

Estate may be vested, although defeasible see Estates § 4 text and notes 80, 81.

57. Rule stated see supra § 4.

58. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Fla.—Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 S 738.

Ill.—Easton v. Hall, 323 Ill. 397, 154 NE 216.

Ind.—Swain v. Bowers, (A.) 158 NE 598.

Me.—Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

Miss.—Nichols v. Day, 128 Miss. 756, 91 S 451.

Mo.—Schee v. Boone, 295 Mo. 212, 243 SW 882; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Ewalt v. Davenhill, 257 Pa. 385, 101 A 756; Green v. Green, 255 Pa. 224, 99 A 801; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

"The rule against perpetuities concerns only remote future and contingent estates and interests." Pulitzer v. Livingston, 89 Me. 359, 364, 36 A 635.

Contingent future interests see infra §§ 34–42.

59. Hull v. Osborn, 151 Mich. 8, 113 NW 784; Toms v. Williams, 41 Mich. 552, 562, 2 NW 814; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261; In re Kountz, 213 Pa. 390, 62 A 1103, 3 LRANS 639, 5 AnnCas 427.

"In all cases where the application of the rules against perpetuities is invoked, the character of the interest as vested or otherwise is the turning consideration." Toms v. Williams, supra.

60. See infra §§ 46, 60.

61. Conn.—H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138.

Ill.—Keogh v. Peck, 316 Ill. 318, 147 NE 266, 38 LRA 1151. See Threlkeld v. Inglett, 289 Ill. 90, 124 NE 368 (apparently applying the principle stated in the text).

Kan.—Miller v. Sooy, 120 Kan. 81, 242 P 140.

Pa.—Green v. Green, 255 Pa. 224, 99 A 801.

Eng.—Worthing Corp. v. Heather, [1906] 2 Ch. 532, 4 BRC 280; Mackenzie v. Childers, 43 Ch. D. 265; London, etc., R. Co. v. Gomm, 20 Ch. D. 562; In re Tyrrell, [1907] 1 Ir. 292; Witham v. Vane, 32 Wkly. Rep. 617 [reported Challis Real Prop. p 341]. See Borland v. Steel Bros. & Co., Ltd., [1901] 1 Ch. 279 (dictum); Walsh v. India Secretary of State, 10 H. L. Cas. 367, 11 Reprint 1068 (where the rule against perpetuities is not discussed, but the facts apparently call for the application of the principle stated in the text).

See Morning Star Min. Co. v. Bennett, 164 Ark. 244, 261 SW 639; Brownell v. Hanson, 109 Wash. 447, 186 P 873 (both apparently recognizing the principle stated in the text). Compare Rutherford v. Ott, 37 Cal. A. 47, 173 P 490 (where the court said, obiter, that an agreement to care for a cemetery plot perpetually would not constitute a perpetuity).

"The rule against perpetuities is a branch not of the law of contract but of property. . . . A contract not creating any estate or interest properly so called in property, at Law or Equity, is not, in my opinion, obnoxious to the rule." London, etc., R. Co. v. Gomm, 20 Ch. D. 562, 575, 580 (per Kay, J.).

"Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule." London, etc., R. Co. v. Gomm, supra (per Jessel, M. R.).

[a] **A contract of agency to sell property,** unrestricted as to time, is not within the rule against perpetuities. Morning Star Min. Co. v. Bennett, 164 Ark. 244, 261 SW 639; Brownell v. Hanson, 108 Wash. 447, 186 P 873. Compare Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865 (where such a contract is considered by the court from the standpoint of a restraint on alienation).

[b] **Covenants restricting the use of land** reserved or sold are not within the rule against perpetuities. Clem v. Valentine, (Md.) 141 A 710; Mackenzie v. Childers, 43 Ch. D 265; Keppell v. Bailey, Coop. t. Brough. 298, 47 Reprint 106, 2 Myl. & K. 517, 527, 7 EngCh 517, 39 Reprint 1042 ("The property, the subject matter of consideration here, is, not the estate fettered by the condition or covenant, but the benefit reserved by the condition, or secured by the covenant"); Coles v. Sims, 5 De G. M. & G. 1, 54 EngCh 1, 43 Reprint 768. Compare Wakefield v. Van Tassell, 202 Ill. 41, 66 NE 830, 95 AmSR 207, 65 LRA 511 (applying the principle stated).

[c] **Agreement to care for cemetery lot.**—A gift of money to the person in charge of a cemetery in consideration of an agreement to care perpetually for the donor's burial plot does not create a perpetuity, there being no tying up of property even though the agreement is to run for all time. Rutherford v. Ott, 37 Cal. A. 47, 173 P 490.

[d] **Transfer of contract; principle distinguished.**—"Although the Rule does not affect the creation of such a [personal] contract, it does apply to a transfer of the contract when created. Thus if the promisee in such a contract should bequeath it to A. on a remote contingency, the bequest would be void. The creation of an obligation is no part of the law of property; but the transfer of such obligation when created is as much part of the law of property as the transfer of a house or of a table." Gray Perp. § 329 note 4.

Equitable easements see infra § 23 text and note 91.

Leases and covenants for renewal see infra § 22.

62. Conn.—H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138.

Mass.—Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 NE 177.

N. J.—Canda v. Canda, (Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029].

W. Va.—Starcher v. Duty, 61 W. Va. 373, 56 SE 524, 123 AmSR 990, 9 LRANS 913.

Eng.—Worthing Corp. v. Heather, [1906] 2 Ch. 532, 4 BRC 280; London, etc., R. Co. v. Gomm, 20 Ch. D. 562; In re Tyrrell, [1907] 1 Ir. 292.

Applicability of rule to equitable interests see supra text and note 51.

Options and rights of preëmption see infra § 40.

63. Rent charges generally see Annuities § 3; Ground Rents § 4.

64. Period specified by rule see supra § 5.

65. Contractual rights see supra text and notes 61, 62.

66. Present interests not within rule see infra §§ 20–25.

67. Morgan v. Davey, Cab. & E. 114; Gilbertson v. Richards, 4 H. & N. 277, 157 Reprint 845 [aff 5 H. & N. 453, 157 Reprint 1258]. Compare Heald v. Ross, (N. J. Ch.) 47 A 575 (where a charge for the maintenance of a private park was held not within the rule against perpetuities).

Gifts of freedom to slaves[68] appear to be within the rule against perpetuities,[69] although there is authority to the contrary.[70]

[§ 20] **2. Present Interests—a. In General.** The rule against perpetuities, which by its express terms[71] relates to interests and estates that may not vest within the period therein specified,[72] has no application to present interests, legal or equitable, in realty or personalty,[73] whether alienable or not.[74]

[§ 21] **b. Charitable Gifts.**[75] Present gifts of real or personal estates to be devoted to charitable uses[76] commencing in præsenti are often supported as a supposed exception to the rule against perpetuities.[77] It would seem, however, that they are properly regarded as present interests, vested in the charitable institution, and consequently not within the scope of the rule.[78]

68. See Slaves [36 Cyc 489 et seq].

69. Williams v. Ash, 1 How. (U. S.) 1, 11 L. ed. 25; Ludwig v. Combs, 1 Metc. (Ky.) 128.

[a] **Rule applied.**—A deed emancipating a female slave when she should arrive at the age of twenty-five years, and providing that the children she might have were to be slaves until they arrived at the age of twenty-five years, when they and their increase to the last generation were also to be free, while valid as to such female, is void as to her children, since they might not reach the age specified within twenty-one years after the death of their mother. Ludwig v. Combs, 1 Metc. (Ky.) 128.

Life of slave as measuring period see supra § 6 text and notes 73–75.

70. Pleasants v. Pleasants, 2 Call (6 Va.) 319; Wood v. Humphreys, 12 Gratt. (53 Va.) 333. See Crawford v. Moses, 10 Leigh (37 Va.) 277 (dictum).

71. Rule against perpetuities stated see supra § 4.

72. See supra § 19 text and notes 55–60.

73. U. S.—Jones v. Habersham, 107 U. S. 174, 2 SCt 336, 27 L. ed. 401.

Conn.—Connecticut Trust, etc., Co. v. Hollister, 74 Conn. 228, 50 A 750.

Fla.—Reid v. Barry, 93 Fla. 849, 112 S 846; Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 S 738. See Fletcher v. Moriarty, 62 Fla. 482, 486, 56 S 437 (apparently applying the principle stated in the text).

Ill.—Buckner v. Carr, 302 Ill. 378, 134 NE 760; Lunt v. Lunt, 108 Ill. 307. See Threlkeld v. Inglett, 289 Ill. 90, 124 NE 368 (apparently applying the principle stated in the text).

Me.—Merrill v. Winchester, 120 Me. 203, 113 A 261; Singhi v. Dean, 119 Me. 287, 110 A 865; Pulitzer v. Livingston, 89 Me. 359, 36 A. 635 [overr Slade v. Patten, 68 Me. 380].

Mass.—Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316. Compare Stevens v. Annex Realty Co., 173 Mo. 511, 73 SW 505 (holding that a conveyance of land to trustees to lay out and hold title to private streets and parks in connection with a real estate development is not within the rule against perpetuities, although unlimited as to time, because the owners of adjoining lots have a present beneficial interest in the streets and parks, but basing the decision on the view that the rule is a rule against suspension of the power of alienation).

Pa.—Green v. Green, 255 Pa. 224, 99 A 801; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 62.

Wash.—In re Galland, 103 Wash. 106, 173 P 740, 742 [quot Cyc].

W. Va.—Bennett v. Bennett, 92 W. Va. 391, 115 SE 436.

Eng.—In re Clarke, [1901] 2 Ch. 110; Liley v. Hey, 1 Hare 580, 23 EngCh 580, 66 Reprint 1162.

Ont.—Re Mountain, 26 Ont. L. 163, 3 OntWN 1011, 21 OntWR 866, 4 DomLR 737 [aff 2 OntWN 246, 17 OntWR 448].

And see cases infra §§ 21–25.

[a] **Illustration.**—A devise of property to trustees to pay the income to certain persons for seventy-five years and then to transfer the corpus to them is not obnoxious to the rule against perpetuities, for the estate was presently vested by the will in such beneficiaries and only the possession or enjoyment suspended. In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

Particular present interests see infra §§ 21–25.

Vested future interests see infra §§ 26–33.

74. Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas 1916D 570.

Gifts to be devoted to charitable purposes see infra § 21.

Validity of restraints upon alienation see Deeds § 318; Estates § 10; Wills [40 Cyc 1715].

75. Charitable gifts generally see Charities 11 C. J. p 297.

Charitable trusts see infra §§ 78, 79.

Limitations to and over from charities see infra § 57.

76. What are charitable uses see Charities §§ 18–39.

77. U. S.—Jones v. Habersham, 107 U. S. 174, 2 SCt 336, 27 L. ed. 401; Russell v. Allen, 107 U. S. 163, 2 SCt 327, 27 L. ed. 397; Field v. Drew Theological Seminary, 41 Fed. 371.

Ala.—Henderson v. Henderson, 210 Ala. 73, 97 S 353.

Ariz.—Lowell v. Lowell, 29 Ariz. 138, 240 P 280.

Ark.—Biscoe v. Thweatt, 74 Ark. 545, 86 SW 432, 4 AnnCas 1136.

Cal.—In re Hinckley, 58 Cal. 457. Compare Rutherford v. Ott, 37 Cal. A. 47, 49, 173 P 490 (where the court said, of a testamentary gift of money to insure care of the testator's plot; "Such payments to a cemetery association, or to the person or persons who have charge of the upkeep of a cemetery, do not involve a perpetuity. The payment is made as a consideration for an agreement to give appropriate care to the cemetery plot, and, even if there be an agreement to care for that plot for all time, there is no tying up property giving rise to a perpetuity").

Colo.—Haggin v. International Trust Co., 69 Colo. 135, 169 P 138, LRA1918B 710. See Clayton v. Hallett, 30 Colo. 231, 70 P 429, 59 LRA 407, 97 AmSR 117 (dictum).

Ill.—Dickenson v. Anna, 310 Ill. 222, 141 NE 754, 30 ALR 582; Hart v. Taylor, 301 Ill. 344, 133 NE 857; Skinner v. Northern Trust Co., 288 Ill. 229, 123 NE 289; Franklin v. Hastings, 253 Ill. 46, 97 NE 265, Ann Cas1913A 135; Abend v. McKendree College Endowment Fund Comrs., 174 Ill. 96, 50 NE 1052; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 NE 183, 56 AmR 776; Garrison v. Little, 75 Ill. A. 402.

Iowa.—Wilson v. Independence First Nat. Bank, 164 Iowa 402, 145 NW 948, AnnCas1916D 481; In re Cleven, 161 Iowa 289, 142 NW 986.

Kan.—Troutman v. DeBoissiere Odd Fellows' Orphans' Home, etc., 66 Kan. 1, 71 P 286.

N. H.—Smart v. Durham, 77 N. H. 56, 86 A 821.

N. J.—Matawan Young Men's Christian Assoc. v. Appleby, 98 N. J. Eq. 704, 705, 130 A 921 [aff 97 N. J. Eq. 95, 127 A 25]; Smith v. Pond, 92 N. J. Eq. 211, 111 A 154 [rev 90 N. J. Eq. 445, 107 A 800]; MacKenzie v. Jersey City Presbytery, 67 N. J. Eq. 652, 61 A 1027, 3 LRANS 227; Mills v. Davidson, 54 N. J. Eq. 659, 35 A 1072, 55 AmSR 594, 35 LRA 113.

N. C.—State v. Gerard, 37 N. C. 210.

Pa.—In re Wright, 284 Pa. 334, 131 A 188; Yard's App., 64 Pa. 95; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470. See In re Close, 260 Pa. 269, 103 A 822 (apparently recognizing the principle stated in the text).

Tenn.—Franklin v. Armfield, 2 Sneed 305.

Tex.—Meadors v. Sherrill, (Civ. A.) 212 SW 546.

Utah.—Staines v. Burton, 17 Utah 331, 53 P 1015, 70 AmSR 788.

Eng.—Goodman v. Saltash, 7 App. Cas. 633; In re Clarke, [1901] 2 Ch. 110; In re St. Stephen, 39 Ch. D. 492. See Gillam v. Taylor, L. R. 16 Eq. 581 (apparently applying the principle stated in the text).

Ont.—Re Johnson, 5 Ont. L. 459. See Smith v. Heyward, 115 S. C. 145, 105 SE 275 (dictum).

78. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; Long v. Union Trust Co., 280 Fed. 686; Russell v. Girard Trust Co., 171 Fed. 161 [aff 179 Fed. 446, 102 CCA 592]; Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796 [aff 134 Fed. 513, 67 CCA 393]; Handley v. Palmer, 103 Fed. 39, 43 CCA 100.

D. C.—Washington L. & T. Co. v. Hammond, 51 App. 260, 278 Fed. 569.

Ill.—Walker v. Central Trust, etc., Bank, 318 Ill. 253, 149 NE 234; Harges v. Zander, 314 Ill. 170, 145 NE 363; Hart v. Taylor, 301 Ill. 344, 133 NE 857; Jansen v. Godair, 292 Ill. 364, 127 NE 97; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320.

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276; Dykeman v. Jenkines, 179 Ind. 549, 101 NE 1013, Ann Cas1915D 1011; Barr v. Geary, 82 Ind. A. 5, 142 NE 622.

Iowa.—Phillips v. Harrow, 93 Iowa 92, 61 NW 434.

Ky.—Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739.

Me.—Brooks v. Belfast, 90 Me. 318, 38 A 222.

Md.—Baltzell v. Baltimore City Church Home, etc., 110 Md. 244, 73 A 151.

Mo.—Stewart v. Coshow, 238 Mo. 662, 142 SW 283.

Pa.—In re Hunter, 279 Pa. 349, 123 A 865; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470.

Tex.—St. Basil Community of Priests v. Byrne, (Civ. A.) 236 SW 1016.

Wis.—Giblin v. Giblin, 173 Wis. 632, 182 NW 357.

Eng.—Chamberlayne v. Brockett, L. R. 8 Ch. 206; In re Swain, [1905] 1 Ch. 669, 2 BRC 872.

Ont.—Re Mountain, 26 Ont. L. 163, 3 OntWN 1011, 21 OntWR 866, 4 Dom LR 737 [aff 2 OntWN 246, 17 OntWN 448].

See In re Little, 143 Minn. 298, 173 NW 659 (a devise of property "in trust to" a religious corporation, without expressing any trusts, was construed to be a present gift to the corporation and therefore not invalid as creating a perpetuity).

Compare Lamb v. Lynch, 56 Nebr. 135, 136, 76 NW 428 (where a gift to a bishop and his successors in office, to be disposed of and used for the purposes of the church in his diocese, was held not bad as a perpetuity, the designation of the successors being con-

[§ 22] **c. Leases and Convenants for Renewal.** A lease for any term, taking effect in præsenti, does not violate the rule against perpetuities,[79] although it may be in violation of a statute designed to prevent perpetual or extended leases.[80]

A covenant for renewal of a lease perpetually[81] or at the end of a term in excess of the period specified by the rule against perpetuities[82] is not subject to the rule; although there is language in some cases[83] indicating that such agreements create "perpetuities," the matter there under discussion is the undesirability[84] of permitting interests to continue perpetually,[85] rather than any suspension of the power of alienation or postponement of the vesting of an interest. However, if the right represented by a covenant for renewal, or the right to call for a lease, is to arise or vest at a time beyond the period permitted by the rule, it, like other chattel interests,[86] is obnoxious to the rule.[87]

[§ 23] **d. Easements—(1) In General.** Easements,[88] whether being in gross[89] or appurtenant to land,[90] including so-called equitable ease-

sidered as a limitation of the estate and not as creating remainders in them; the ground of the decision, however, being stated to be that "it is only an undue restraint on alienation which creates a forbidden perpetuity," and here "there is an express grant of the power of alienation"). "The statement is often found in the books that the law against perpetuities does not apply to public charities. But the statement is misleading. . . . It must be remembered that the rule against perpetuities, in its proper legal sense, has relation only to the time of the vesting of an estate, and in no way affects its continuance after it is once vested. . . . It is the possibility that the estate left in trust for a charitable purpose, may not vest or begin within the limits of a life or lives in being and twenty-one years, that offends against the rule of 'perpetuity' or 'remoteness.'" Brooks v. Belfast, 90 Me. 318, 324, 38 A 222.

[a] **"A present gift to a charity** is never a perpetuity, though intended to be inalienable." Philadelphia v. Girard, 45 Pa. 9, 26, 84 AmD 470.

79. Ga.—Kirkland v. Odum, 156 Ga. 131, 118 SE 706.

Ill.—Henderson v. Virden Coal Co., 78 Ill. A. 437.

Iowa.—In re Hubbell, 135 Iowa 637, 113 NW 512, 13 LRANS 496, 14 Ann Cas 640. Compare Todhunter v. Des Moines, etc., R. Co., 58 Iowa 205, 12 NW 267 (a lease for nine hundred and ninety-nine years did not violate the rule against perpetuities, but the decision is based on the ground that the lessor and lessee together might convey a perfect title).

Mich.—Toms v. Williams, 41 Mich. 552, 2 NW 814.

W. Va.—Johnson v. Armstrong, 81 W. Va. 399, 94 SE 753; Wilson v. Reserve Gas Co., 78 W. Va. 329, 88 SE 1075.

See Sioux City Terminal R., etc., Co. v. Trust Co. of North America, 82 Fed. 124, 132, 27 CCA 73 [aff 173 U. S. 99, 19 SCt 341, 43 L. ed. 628] ("Leases for terms far longer than lives in being and 21 years are valid . . . at common law"); Fletcher v. Moriarty, 62 Fla. 482, 486, 56 S 437 (apparently applying the principle stated in the text).

Compare Gex v. Dill, 86 Miss. 10, 38 S 193 (holding that a lease under which rights are to commence at a reasonable time after its execution does not tend to create a perpetuity).

Rule concerned with beginning, and not with ending, of estates see supra § 17.

80. See Landlord and Tenant § 444.

81. Cal.—Becker v. Submarine Oil Co., 55 Cal. A. 698, 204 P 245.

Md.—Banks v. Haskie, 45 Md. 207. Compare Worthington v. Lee, 61 Md. 530; Myers v. Silljacks, 58 Md. 319 (where such leases are treated as valid, but the rule against perpetuities is not discussed).

Miss.—Nichols v. Day, 128 Miss. 756, 91 S 451.

Tex.—Rosson v. Bennett, (Civ. A.) 294 SW 660. Compare Hudgins v. Bowes, (Civ. A.) 110 SW 178 (holding that an agreement for perpetual renewal "in a lease binding only the parties to it, and not binding upon their heirs, does not create a perpetuity;" but the court appears to have confused the doctrine disfavoring covenants for perpetual renewal with the rule against perpetuities).

W. Va.—Thaw v. Gaffney, 75 W. Va. 229, 83 SE 983, 3 ALR 495.

Eng.—Hare v. Burges, 4 Kay & J. 45, 70 Reprint 19; Pollock v. Booth, Ir. R. 9 Eq. 229, 607. See Copper Min. Co. v. Beach, 13 Beav. 478, 51 Reprint 184; Sweet v. Anderson, 2 Bro. P. C. 256, 1 Reprint 927; Ross v. Worsop, 1 Bro. P. C. 281, 1 Reprint 568; Meller v. Stanley, 2 De G. J. & S. 183, 67 EngCh 143, 46 Reprint 345; Hare v. Burges, 4 Kay & J. 45, 70 Reprint 19 (in all of which the rule is apparently applied).

Compare Brush v. Beecher, 110 Mich. 597, 68 NW 420, 64 AmSR 373 (to same effect as Hudgins v. Bowes, (Tex. Civ. A.) 110 SW 178); Blackmore v. Boardman, 28 Mo. 420 (where such a covenant was held valid, but it does not appear that the court was speaking with specific reference to the rule against perpetuities).

"An estate for years . . . with a perpetual covenant for renewal is, so far as questions of remoteness are concerned, substantially a fee, and as such it is regarded." Nichols v. Day, 128 Misc. 756, 765, 91 S 451 [quot Gray Perp. § 230].

[a] **Reasons for rule.**—(1) It has been said that covenants to renew leases are to be treated as exceptions to the general rule against perpetuities, "exceptions for which it is very difficult to find a logical justification, but exceptions which have been probably recognized because they were in existence long before the rule had been developed." Woodall v. Clifton, [1905] 2 Ch. 257, 265. (2) On the other hand it has been held that "the covenant for renewal is only an incident to the lease," and, in effect, is a part of the possessory right acquired by the lessee. Blackmore v. Boardman, 28 Mo. 420, 426. Compare Gray Perp. § 230 ("It seems hardly necessary to create any exception to meet the case,—the covenant to renew is part of the lessee's present interest").

Covenants for perpetual renewal of leases see Landlord and Tenant § 144.

82. Keogh v. Peck, 316 Ill. 318, 147 NE 266, 38 ALR 1151; Rosson v. Bennett, (Tex. Civ. A.) 294 SW 660; Todd v. Manufacturers' Light, etc., Co., 90 W. Va. 40, 110 SE 446. See Woodall v. Clifton, [1905] 2 Ch. 257; Muller v. Trafford, [1901] 1 Ch. 54; London, etc., R. Co. v. Gomm, 20 Ch. D. 562 (per Jessel, M. R.) (dicta). Compare Hudgins v. Bowes, (Tex. Civ. A.) 110 SW 178 (holding that "a renewal clause in a lease binding only the parties to it, and not binding upon their heirs, does not create a perpetuity").

Period specified by rule see supra § 5.

83. U. S.—Winslow v. Baltimore, etc., R. Co., 188 U. S. 646, 23 SCt 443, 47 L. ed. 635.

Cal.—Morrison v. Rossignol, 5 Cal. 64.

Mo.—Drake v. St. Louis Bd. of Education, 208 Mo. 540, 106 SW 650, 123 AmSR 448, 14 LRANS 829, 13 AnnCas 1002; Diffenderfer v. St. Louis Public Schools, 120 Mo. 447, 25 SW 542.

N. Y.—Syms v. New York, 105 N. Y. 153, 11 NE 369; Piggot v. Mason, 1 Paige Ch. 412.

Wash.—Hoover v. Ford's Prairie Coal Co., 145 Wash. 295, 259 P 1079; Tischner v. Rutledge, 35 Wash. 285, 77 P 388.

Compare Brush v. Beecher, 110 Mich. 597, 602, 68 NW 420, 64 AmSR 373 ("In principle, there is no difference between an endless succession of five-year estates, and an endless succession of life estates, which the law prohibits").

84. Perpetual renewal of leases not favored see Landlord and Tenant § 144.

85. Continuance or termination of interests no concern of rule against perpetuities see supra § 17.

86. See supra § 19 text and note 50.

87. Redington v. Browne, L. R. 32 Ir. 347; Hope v. Gloucester, 7 De G. M. & G. 647, 56 EngCh 501, 44 Reprint 252. But compare Pollock v. Booth, Ir. R. 9 Eq. 229, 607 [dist Hope v. Gloucester, supra] (holding that a covenant that upon the expiration of a term the party in possession shall be entitled to demand a new lease to himself for a life which he shall nominate is not a remainder and not a violation of the rule against perpetuities, but only "a covenant for a peculiar form of renewal").

[a] **Illustration.**—An agreement, in a lease for a term of years, that upon expiration of it, and as often as any renewal should expire, the lessor would upon request of any heir of the body of the lessee renew the lease for a fixed period, is void as a perpetuity. Hope v. Gloucester, 7 De G. M. & G. 647, 56 EngCh 501, 44 Reprint 252. See to same effect Redington v. Browne, L. R. 32 Ir. 347, 358 (where the court said: "A covenant, not with a lessee but with a stranger to the lands, to grant to him at a remote period a lease for lives, with a covenant for perpetual renewal, does not in my opinion come within any exception from the rule against perpetuities").

88. Easements generally see Easements 19 C. J. p 856.

89. Merrill v. Winchester, 120 Me. 203, 113 A 261; Battelle v. Worcester, 236 Mass. 395, 128 NE 631.

[a] **Illustration.**—A devise of a building, reserving to certain other persons the use of an office and chairs therein "as long as they may desire," is an easement in gross, merely a personal right which is neither assignable nor inheritable, and does not violate the rule against perpetuities. Merrill v. Winchester, 120 Me. 203, 113 A 261.

Easement in gross see Easements § 5.

90. Heald v. Ross, (N. J. Ch.) 47 A 575, 579; Chapman v. American Rio Grande Land, etc., Co., (Tex. Civ. A.) 271 SW 392; Keppell v. Bailey, Coop. t. Brough. 298, 47 Reprint 106, 2 Myl. & K. 517, 7 EngCh 517, 39 Reprint 1042. Compare Stevens v. Annex Realty Co., 173 Mo. 511, 73 SW 505 (where it was held that a conveyance of land to trustees to hold parts of it as private parks and streets, for the benefit of building lots adjoining, in connection with a real estate development, and to make assessments upon the lots for the cost of maintenance, did not create a perpetuity, and an assessment so made is enforceable).

"The rule against perpetuities is invoked when the question is as to the validity of the limitation for the commencement of a future estate on

ments,[91] created in præsenti,[92] are present interests and not within the rule against perpetuities; and rights given to the owners of such easements to enter upon the servient tenements and abate any obstructions, although exercisable at a remote period, are good.[93]

[§ 24] **(2) Profits à Prendre.** Profits à prendre,[94] presently commencing, are not within the rule against perpetuities.[95]

[§ 25] **e. Curtesy[96] and Dower.**[97] Without regard to whether estates by the curtesy and dower are, strictly speaking, present estates or not, it would seem that they are not subject to the rule against perpetuities.[98]

[§ 26] **3. Future Interests—a. Vested Interests—(1) In General.** A vested future interest or estate[99] is not within the rule against perpetuities,[1] which by its terms[2] applies only to interests and estates which will vest, if at all, in the future,[3] except when such interest or estate is expectant upon an estate which is void for remoteness,[4] and except when it is vested in a class which may increase or diminish in membership at a remote time.[5]

[§ 27] **(2) Vested Remainders.**[6] The rule against perpetuities does not apply to vested remainders,[7] nor to the corresponding equitable interests commonly referred to as vested equitable remainders,[8] even though defeasible,[9] and although the preceding estate may not come to an end within the period specified by the rule,[10] except in the case of remainders vested in a class which may increase or diminish in membership at a time too remote,[11] and except in the case of those which follow upon estates void for remoteness.[12]

Interests in personal property analogous to vested remainders[13] are not within the rule,[14] except in

the termination of an existing estate, and I fail to see how . . . this rule . . . has any application to the case." Heald v. Ross, supra.

Easement appurtenant see Easements § 4.

91. Strong v. Shatto, 45 Cal. A. 29, 187 P 159 (dictum); Pierce v. St. Louis Union Trust Co., 311 Mo. 262, 278 SW 398; Mackenzie v. Childers, 43 Ch. D. 265; London, etc., R. Co. v. Gomm, 20 Ch. D. 562 (dictum). See Stevens v. Annex Realty Co., 173 Mo. 511, 73 SW 505; Noel v. Hill, 158 Mo. A. 426, 138 SW 364 (both apparently applying the principle stated in the text). Compare Aspden v. Seddon, 1 Ex. D. 496 (where such an easement, perpetually continuing, was held valid, but the rule against perpetuities was not discussed); Ex p. Ralph, De Gex 219, 225 (where, during the argument, the chief judge said: "There seems some difficulty in understanding the objection to such a modified enjoyment of property on the ground of its supposed tendency to a perpetuity," and the point was not further mentioned or decided).

[a] **Equitable easements** are distinguished and discussed in Hall v. Turner, 110 N. C. 292, 14 SE 791; Tulk v. Moxhay, 1 Hall & T. 105, 47 Reprint 1345, 2 Phil. 774, 22 EngCh 774, 41 Reprint 1143, 15 ERC 254. See Gray Perp. § 280 ("Covenants as to the use of land are often regarded in equity, according to the familiar doctrine of Tulk v. Moxhay, supra, and the numerous cases following it, as imposing a trust or burden on the land for the benefit of other land belonging to the grantor or to third persons. The rights thus created are sometimes called equitable easements").

Covenants restricting use of land see supra § 19 note 61[b].

92. Easements and profits to begin in futuro see infra § 39.

93. Tobey v. Moore, 130 Mass. 448. Compare Ex p. Ralph, De Gex 219 (where a deed, executed in pursuance to a contract to convey land subject to equitable easements, as actually drawn, limited the right to enter and abate any obstruction to the easements to the period of lives in being and twenty-one years, but no necessity for such restriction appears from the decree of the court).

94. Defined see Easements §§ 10–12.

95. Kirkland v. Odum, 156 Ga. 131, 118 SE 706; Council v. Sanderlin, 183 N. C. 253, 111 SE 365, 32 ALR 1527; Chapman v. American Rio Grande Land, etc., Co., (Tex. Civ. A.) 271 SW 392. See Fletcher v. Moriarty, 62 Fla. 482, 486, 56 S 437 (apparently applying the principle stated in the text).

[a] **Illustration.**—Hunting privileges, reserved to the grantor in a deed, over land thereby conveyed to the grantee, are present, not future, interests, and therefore the rule against perpetuities has no application. Council v. Sanderlin, 183 N. C. 253, 111 SE 365, 32 ALR 1527.

Profits in futuro see infra § 39.

96. Curtesy generally see Curtesy 17 C. J. p 412.

97. Dower generally see Dower 19 C. J. p 448.

98. See McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760 (dictum).

99. Defined see Estates § 26 text and notes 34, 35.

1. Swain v. Bowers, (Ind. A.) 158 NE 598; Klingman v. Gilbert, 90 Kan. 545, 549, 135 P 682 [cit Cyc]. And see infra §§ 27–33.

Particular vested future interests see infra §§ 27–33.

Postponement of possession immaterial see supra § 16.

Vested interest subject to trust for accumulation see infra § 80.

2. Rule stated see supra § 4.

3. See cases supra § 19 note 58.

4. See infra § 60.

5. See infra § 46.

6. Defined see Deeds § 286; Estates § 131; Vested Remainder [40 Cyc 199 note 94-4]; Wills [40 Cyc 1664 et seq].

7. Ala.—Isbell v. Maclin, 24 Ala. 315.

Conn.—Allen v. Almy, 87 Conn. 517, 89 A 205, AnnCas1917B 112; Johnson v. Edmonds, 65 Conn. 492, 33 A 503; Farnam v. Farnam, 53 Conn. 261, 2 A 325, 5 A 682.

Ga.—Lamkin v. Hines Lumber Co., 158 Ga. 785, 124 SE 694.

Ill.—Easton v. Hall, 323 Ill. 397, 154 NE 216; Brown v. Brown, 247 Ill. 528, 93 NE 357.

Mass.—Dodge v. Bennett, 215 Mass. 545, 102 NE 916; Seaver v. Fitzgerald, 141 Mass. 401, 6 NE 73; Loring v. Blake, 98 Mass. 253.

Mich.—Toms v. Williams, 41 Mich. 552, 2 NW 814.

Mo.—Melvin v. Hoffman, 290 Mo. 464, 235 SW 107; Cox v. Jones, 229 Mo. 53, 129 SW 495; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625. See Hudspeth v. Akers, 214 SW 868; Hudspeth v. Grumke, 214 SW 865 (both apparently recognizing the principle stated in the text).

Nebr.—Hill v. Hill, 106 Nebr. 17, 182 NW 578. See Hill v. Hill, 106 Nebr. 17, 182 NW 578 (apparently recognizing the principle stated in the text).

N. H.—McAllister v. Elliot, 140 A 708.

N. J.—Ogden v. McLane, 73 N. J. Eq. 159, 67 A 695.

Pa.—In re Gageby, 293 Pa. 109, 141 A 842; In re Bingaman, 281 Pa. 497, 127 A 73; In re Edwards, 255 Pa. 358, 99 A 1010; Morris v. Fisher, 46 A 1102 mem [rev 8 Pa. Dist. 161]; Rhodes' Est., 147 Pa. 227, 23 A 553; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Schrack's Est., 26 Pa. Dist. 708.

W. Va.—Cowherd v. Fleming, 84 W. Va. 227, 100 SE 84.

Eng.—Bandon v. Moreland, [1910] 1 Ir. 220; Wood v. Drew, 33 Beav. 610, 55 Reprint 505; Gore v. Gore, 2 P. Wms. 28, 24 Reprint 629.

[a] **A vested remainder to a charity** is not subject to the rule against perpetuities. Seaver v. Fitzgerald, 141 Mass. 401, 6 NE 73; In re Gageby, 293 Pa. 109, 141 A 842.

Contingent remainders vesting within period of rule see infra § 37.

8. Conn.—Johnson v. Edmond, 65 Conn. 492, 33 A 503.

Ill.—O'Hare v. Johnston, 273 Ill. 458, 113 NE 127; Armstrong v. Barber, 239 Ill. 389, 88 NE 246; Flanner v. Fellows, 206 Ill. 136, 68 NE 1057; Lunt v. Lunt, 108 Ill. 307.

Me.—Singhi v. Dean, 119 Me. 287, 110 A 865.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294.

Mass.—Dorr v. Lovering, 147 Mass. 530, 18 NE 412; Loring v. Blake, 98 Mass. 253.

N. H.—McAllister v. Elliot, 140 A 708.

Pa.—Williamson's Est., 3 Pa. Co. 239.

9. Isbell v. Maclin, 24 Ala. 315; Allen v. Almy, 87 Conn. 517, 89 A 205, AnnCas1917B 112; Anderson v. Menefee, (Tex. Civ. A.) 174 SW 904.

10. Easton v. Hall, 323 Ill. 397, 154 NE 216; In re Bingaman, 281 Pa. 497, 127 A 73; Schrack's Est., 26 Pa. Dist. 708; In re Daveron, [1893] 3 Ch. 421; Wood v. Drew, 33 Beav. 610, 55 Reprint 505; Gore v. Gore, 2 P. Wms. 28, 24 Reprint 629.

[a] **Thus** "a limitation of a term of one thousand years to A with remainder to B is good." In re Daveron, [1893] 3 Ch. 421, 42 Wkly. Rep. 24, 25.

Enjoyment of vested interest may be postponed without violating rule see supra § 16.

11. See infra § 46.

12. See infra § 60.

13. See Estates § 250 et seq; Wills [40 Cyc 1640].

14. Ala.—Isbell v. Maclin, 24 Ala. 315; Woodley v. Findlay, 9 Ala. 716.

Conn.—Allen v. Almy, 87 Conn. 517, 89 A 205, AnnCas1917B 112; Farnam v. Farnam, 53 Conn. 261, 2 A 325, 5 A 682.

Ill.—Lunt v. Lunt, 108 Ill. 307.

Kan.—Salisbury v. Salisbury, 92 Kan. 644, 645, 141 P 173 [cit Cyc].

Mass.—Loring v. Blake, 98 Mass. 253.

N. H.—McAllister v. Elliot, 140 A 708.

N. J.—Ogden v. McLane, 73 N. J. Eq. 159, 67 A 695.

N. Y.—In re Conger, 81 App. Div. 493, 80 NYS 933 [aff 40 Misc. 157, 81 NYS 733].

Eng.—Evans v. Walker, 3 Ch. D. 211.

the cases hereinabove mentioned.[15]

[§ 28] **(3) Reversions.**[16] Reversions, being vested estates,[17] are not subject to the rule against perpetuities.[18]

Interests in personal property analogous to reversions[19] are likewise outside the scope of the rule.[20]

Resulting trusts[21] upon express trusts which do not exhaust the equitable fee, as when only equitable life estates are created, have been said by a learned writer to be vested reversionary interests and therefore not within the rule.[22]

[§ 29] **(4) Possibilities of Reverter.**[23] Possibilities of reverter, upon determinable or qualified fees[24] or fees conditional at the common law,[25] are not within the rule against perpetuities.[26]

Resulting trusts[27] **upon determinable equitable fees** are, by analogy to possibilities of reverter, not subject to the rule.[28]

[§ 30] **(5) Rights of Entry for Condition Broken.**[29] In the United States, rights of entry for condition broken are regarded as of the nature of reversions,[30] and therefore are not within the scope of the rule against perpetuities;[31] but by the English law they are construed to be executory interests, and so void,[32] unless the condition must happen, if at all, within the period specified by the rule.[33]

Interests in personalty in the nature of rights of entry for condition broken are, in this country, it would seem, not within the rule.[34]

[§ 31] **(6) Escheat.**[35] It has been said by eminent authority, although without citation of judicial precedent, that rights of escheat in real property and rights in personalty analogous thereto are not within the rule against perpetuities.[36]

[§ 32] **(7) Equitable Interests.**[37] Equitable future interests in property are not subject to the rule against perpetuities when the legal interests to which they are analogous are not within its scope.[38]

See In re Gregory, 12 Cal. A. 309, 107 P 566 (apparently recognizing the principle stated in the text).

[a] **Thus** a present gift of corporate stock, the enjoyment to be postponed until the expiration of life estates therein, is not within the rule against perpetuities. In re Conger, 81 App. Div. 493, 80 NYS 933 [aff 40 Misc. 157, 81 NYS 733].

15. See supra text and notes 11, 12.

16. **Defined** see Estates § 179.

17. See Estates § 181 text and notes 47-49.

18. Cal.—Strong v. Shatto, 45 Cal. A. 29, 187 P 159.

Ga.—Forman v. Troup, 30 Ga. 496.

Ill.—Brown v. Brown, 247 Ill. 528, 532, 93 NE 357 [cit Cyc].

Ky.—Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739.

Mo.—Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625.

N. H.—McAllister v. Elliot, 140 A 708.

N. Y.—Duff v. Rodenkirchen, 110 Misc. 575, 182 NYS 35 [aff 193 App. Div. 898 mem, 183 NYS 947 mem].

See Singhi v. Dean, 119 Me. 287, 110 A 865 (dictum).

Postponement of possession of vested interest does not violate rule see supra § 16.

19. See Estates § 253.

20. Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739; McAllister v. Elliot, (N. H.) 140 A 708. See Tucker v. Stevens, 4 S. C. Eq. 532 (dictum).

21. See Trusts [39 Cyc 26, 104 et seq].

22. Gray Perp. § 327a.

23. **Defined** see Estates § 180.

24. See Estates § 18 text and notes 73-80.

25. See Estates § 19 text and note 98.

26. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739.

Mass.—North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 29 NE 524, 15 LRA 231.

Mo.—Schee v. Boone, 295 Mo. 212, 243 SW 882.

Pa.—Pennsylvania Horticultural Soc. v. Craig, 240 Pa. 137, 87 A 678.

Tenn.—Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36. See Fowlkes v. Wagoner, (Ch. A.) 46 SW 586 (dictum).

Tex.—Rosson v. Bennett, (Civ. A.) 294 SW 660.

But see Johnson v. Negro Lish, 4 Harr. & J. (Md.) 441 (holding that a provision in a deed of gift of a chattel, that in case of the death of the donee without issue the chattel should return to the donor, was held void for remoteness on the ground that "a limitation of a chattel, to take effect after an indefinite failure of issue, tends to a perpetuity, and is null and void").

"It has been expressly held by this court that . . . possibility of reverter upon breach of a condition subsequent is not within the rule against perpetuities. . . . If there is any distinction in this respect between such possibility of reverter and that which arises upon the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is not held void for remoteness, the other should not be." North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 175, 29 NE 524, 15 LRA 231.

Rights of entry for breach of condition subsequent see infra § 30.

27. See Trusts [39 Cyc 26, 104 et seq].

28. Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; St. Basil Community of Priests v. Byrne, (Tex. Civ. A.) 236 SW 1016, 1019 [quot Cyc]. See Webb v. Vercoe, 201 Cal. 754, 258 P 1099, 54 ALR 1200 (apparently applying the principle stated in the text); Palmer v. Union Bank, 17 R. I. 627, 24 A 109 (dictum). See also Schlessinger v. Mallard, 70 Cal. 326, 11 P 728; Brooks v. Belfast, 90 Me. 318, 38 A 222; Stone v. Framingham, 109 Mass. 303; Easterbrooks v. Tillinghast, 5 Gray (Mass.) 17; Daniel v. Jacoway, Freem. (Miss.) 59; Jenkins v. Jenkins Univ., 17 Wash. 160, 49 P 247, 50 P 785; Atty.-Gen. v. Pyle, 1 Atk. 435, 26 Reprint 278 (in all of which such resulting trusts were held valid, but without mention of the rule against perpetuities). But see In re Peel, [1921] 2 Ch. 218 (holding that a clause in a deed conveying property to be perpetually devoted to a specified charitable purpose, providing that it should revert to the donor if continuance of such purpose should ever cease or be defeated, was void as a perpetuity). Compare In re Randell, 38 Ch. D. 213, 218 (where by will a trust for a definite purpose was created, and it was held that a provision in the will that upon the ending of the purpose the money and income should fall into and be dealt with as part of the residuary estate was not void as a perpetuity, for "it would do so just as much if there was no such limitation as this in the will, as it does when the limitation exists. . . . In my opinion a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law"); In re Blunt, [1904] 2 Ch. 767 (to same effect).

[a] **For example,** where property has been given for a charitable purpose and that purpose has been accomplished, as where land was conveyed in trust for use only as a burial ground, and after forty years, by order of the board of health, the land ceased to be used for burial purposes and the bodies buried there were exhumed and removed, the resulting trust to the grantor and his heirs is not within the rule against perpetuities. Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739.

29. **Generally** see Estates § 39 text and note 64; § 41 text and note 81.

Limitations over on breach of condition subsequent see infra § 38.

30. Strong v. Shatto, 45 Cal. A. 29, 187 P 159; Palmer v. Union Bank, 17 R. I. 627, 24 A 109.

Reversions see supra § 28.

31. Ala.—Libby v. Winston, 207 Ala. 681, 93 S 631; Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Cal.—Strong v. Shatto, 45 Cal. A. 29, 187 P 159.

Ill.—Keogh v. Peck, 316 Ill. 318, 147 NE 266, 38 ALR 1151; Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230.

Mass.—French v. Old South Soc., 106 Mass. 479. See North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 29 NE 524, 15 LRA 231; Tobey v. Moore, 130 Mass. 448; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725 (dicta). Compare Indian Orchard Canal Co. v. Sikes, 8 Gray 562; Canal Bridge Co. v. Methodist Religious Soc., 13 Metc. 335 (in both of which the question of remoteness was argued by counsel but not decided by the court).

Mo.—Koehler v. Rowland, 275 Mo. 573, 205 SW 217.

Pa.—Erie v. Pennsylvania R. Co., 246 Pa. 238, 92 A 192.

R. I.—Palmer v. Union Bank, 17 R. I. 627, 24 A 109.

See Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760 (dicta).

Compare Sharon Iron Co. v. Erie, 41 Pa. 341; Lawe v. Hyde, 39 Wis. 435 (in both of which the question of remoteness was raised in argument but not decided by the court).

Possibilities of reverter see supra § 29.

Postponement of possession of vested interest does not violate rule see supra § 16.

32. In re Hollis' Hospital, [1899] 2 Ch. 540; Dunn v. Flood, 25 Ch. D. 629 [app dism 28 Ch. D. 586]; Matheson v. Mitchell, 46 Ont. L. 546, 17 OntWN 267, 51 DomLR 477; Re St. Patrick's Market, 1 OntWN 92, 14 OntWR 794. See In re Macleay, L. R. 20 Eq. 186 (dictum).

Contingent future interests see infra §§ 34-42.

33. In re Macleay, L. R. 20 Eq. 186.

Period specified by rule see supra § 5.

34. See Palmer v. Union Bank, 17 R. I. 627, 24 A 109 (dictum).

35. **Defined** see Escheat § 1.

36. Gray Perp. § 204.

37. **Present equitable interests** see supra § 20.

38. **Interests analogous to:** Possibilities of reverter see supra § 29 text and note 28.

[§ 33] **(8) Interests in Personalty.**[39] Future interests in personal property are not subject to the rule against perpetuities when such interests, if in real property, would not be subject thereto.[40]

[§ 34] **b. Nonvested or Contingent Interests—(1) Destructible Interests—(a) In General.** Future interests which may be destroyed at the pleasure of the owner of the present estate are not subject to the rule against perpetuities,[41] whether or not the power of destruction is actually exercised.[42] But it has been said that an interest destructible only by the fulfillment of an onerous condition is within the rule.[43]

Contingent remainders.[44] By a somewhat similar, but distinct, principle, contingent remainders which may not vest within the limits of the rule against perpetuities, but which, by the terms of their creation, must follow directly upon estates which will necessarily end within the period specified by the rule, being destroyed by operation of law unless they do vest upon the determination of such preceding estates,[45] are therefore not obnoxious to the rule.[46]

[§ 35] **(b) Limitations after Estates Tail.**[47] In accordance with the doctrine that future interests which are destructible at the pleasure of the owner of the present estate are not within the rule against perpetuities,[48] it has been held that a remainder limited after an estate tail commencing within the period of the rule which must vest, if at all, at[49] or

Reversions see supra § 28 text and note 22.
Vested remainders see supra § 27 text and note 8.
Resulting trusts see supra § 28 text and note 22; § 29 text and note 28.

39. Present interests in personalty see supra § 20.

40. Interests analogous to:
Escheat see supra § 31 text and note 36.
Reversions see supra § 28 text and note 20.
Rights of entry for condition broken see supra § 30 text and note 34.
Vested remainders see supra § 27 text and note 14.

41. U. S.—Goesele v. Bimeler, 14 How. 589, 14 L. ed. 554.
Conn.—H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138.
Me.—Pulitzer v. Livingston, 89 Me. 359, 36 A 635.
Pa.—Segall v. Soifer, 29 Pa. Dist. 729.
Eng.—Wallis v. Freestone, 10 Sim. 225, 16 EngCh 225, 59 Reprint 599.
See cases infra note 42; and § 35.

[a] **Reasons assigned.**—(1) "A future estate which at all times until it vests is in the control of the owner of the preceding estate, is, for every purpose of conveyancing, a present estate, and is therefore not obnoxious to the rule against perpetuities." Pulitzer v. Livingston, 89 Me. 359, 366, 36 A 635 [quot Gray Perp. § 443]. To same effect H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 532, 107 A 138. (2) "If a man has the present unconditioned right to acquire the present absolute interest, he is regarded by the rule against perpetuities as already having such interest. . . . A tenant in tail is such a person because he can destroy the future limitation by barring the entail. . . . A donee of a general power to be exercised by deed (not by will) is such a person because he can appoint to himself and therefore is practically the owner." H. J. Lewis Oyster Co. v. West, supra. See to same effect Mifflin's App., 121 Pa. 205, 222, 15 A 525, 1 LRA 453, 6 AmR 781.

[b] **Power of cestuis to revoke trust.**—A power given to the equitable owners of a trust estate to revoke and destroy the trusts at any time removes the case from the rule against perpetuities. Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

[c] **Agreement not to partition.**—An agreement among the members of a society to hold all property in common does not constitute a perpetuity, when the majority of the members, under the general rule that the majority governs the conduct of the society, may break up the association and require a partition or sale of the property. Goesele v. Bimeler, 14 How. (U. S.) 589, 14 L. ed. 554.

Destructible contingent remainders see infra text and notes 44–46.

42. Mifflin's App., 121 Pa. 205, 224, 15 A 525, 1 LRA 453, 6 AmR 781.
"The estate of M . . . was destructible by her own act. It was entirely within her power to become the owner in fee simple of the estates granted and to totally defeat any ulterior limitations. It proves nothing to say she did not exercise her power and that therefore the situation is the same as though she never had the power. For certain purposes and in certain cases that, of course, is true. But in considering merely the application of the rule against perpetuities, it is not true, because that rule requires that the estates in question should be indestructible, and an estate which can be destroyed by the person who holds it for the time being is not indestructible." Mifflin's App., supra.

43. Gray Perp. § 568 note. But see Segall v. Soifer, 29 Pa. Dist. 729 (where the court said, obiter, that, under a conveyance, subject to mortgage, providing that in the event of a foreclosure of such mortgage and sale of the property the proceeds, over and above the amount of the mortgage debt, should be paid to the grantor, the right of the grantor to receive such proceeds did not create a perpetuity, because the grantee would have the power to pay off the mortgage, at least upon its maturity, which in the instant case would occur within the period of the rule, and so the grantor's right was a contingent one which was destructible and was not subject to the rule against perpetuities).

44. Contingent remainders generally see infra § 37.

45. See Estates § 146.

46. Drury v. Drury, 271 Ill. 336, 111 NE 140; Abbiss v. Burney, 17 Ch. D. 211.

[a] **Illustration.**—Where property was conveyed in trust for one for life and then for such of his children as should reach the age of twenty-five, the equitable executory interest or contingent remainder was held void, inasmuch as it might not become vested within twenty-one years after the death of the life tenant; but the court recognized that if a legal life estate had been created, with remainder to such of the life tenant's children as reached twenty-five, such remainder would have been good, for it would have vested upon the death of the life tenant in those of his children, if any, who had then reached twenty-five, and as to any other children would have been destroyed for want of a preceding estate. Abbiss v. Burney, 17 Ch. D. 211.

Contingent remainders valid which must vest, if ever, within limits of rule see infra § 37 text and notes 73, 77.

47. Limitation over upon failure of issue see infra § 43.

48. See supra § 34.

49. Hawley v. Northampton, 8 Mass. 3, 5 AmD 66; De Wolf v. Middleton, 18 R. I. 810, 26 A 44, 31 A 271, 31 LRA 146; Heasman v. Pearse, L. R. 7 Ch. 275 [rev L. R. 11 Eq. 522]; In re Mountgarret, [1919] 2 Ch. 294; Bandon v. Moreland, [1910] 1 Ir. 220; Tregonwell v. Sydenham, 3 Dow 194, 3 Reprint 1035; Faulkner v. Daniel, 3 Hare 199, 25 EngCh 199, 67 Reprint 355; Ferguson v. Ferguson, 1 Ont. A. 452 [allowing app 39 U. C. Q. B. 232, and app allowed on other grounds 2 Can. S. C. 497]; and cases infra this note. See Forman v. Troup, 30 Ga. 496; Bennett v. Bennett, 2 Dr. & Sm. 266, 62 Reprint 623 (dicta). See also Arnold v. Brown, 7 R. I. 188 (apparently conceding the validity of the ultimate limitation over); Doe v. Ewart, 7 A. & E. 636, 34 ECL 337, 112 Reprint 609 (apparently assuming the validity of such limitation over as a remainder if it had not been destroyed by barring the entail). Compare Hawley v. Northampton, 8 Mass. 3, 5 AmD 66 (where limitations creating remainders after an estate tail were treated as valid, but the rule against perpetuities was not considered, the entailment having been barred by the tenant in tail). But see Morris v. Fisher, 8 Pa. Dist. 161 [rev 46 A 1102 mem by agreement of parties, the grounds not appearing] (holding that a remainder after a term of years which would otherwise be void for remoteness is not exempted from the operation of the rule against perpetuities by the fact that estates tail are carved out of the term of years and will exhaust the whole of such term).

[a] **All remainders** (1) whether vested or contingent, following an estate tail are good, for they must take effect, if at all, at the expiration of such estate. Barber v. Pittsburgh, etc., R. Co., 166 U. S. 83, 17 SCt 488, 41 L. ed. 925; Cole v. Sewell, 2 H. L. Cas. 186, 9 Reprint 1062; Jack v. Fetherstone, 2 Hud. & B. 320; Goodwin v. Clark, 1 Lev. 35, 83 Reprint 284; Morse v. Ormonde, 5 Madd. 99, 56 Reprint 833. (2) "The remainder expectant upon an estate tail was not affected at common law by the rule against perpetuities, because there was always someone who could cut off the entail and convert the estate into a fee, and when the tenant in tail destroyed the entail the remainder fell with it." Hickox v. Klaholt, 291 Ill. 544, 549, 126 NE 166.

[b] **In Pennsylvania** (1) the principle stated in the text was formerly applied. Stone v. McMullen, 1 Penny. 108, 10 WklyNC 541. See Taylor v. Taylor, 63 Pa. 481, 3 AmR 565 (dictum). But see Vaughan v. Dickes, 20 Pa. 509; Eichelberger v. Barnitz, 9 Watts 447 (in both of which limitations after estates tail were considered to be executory devises and therefore void for remoteness). (2) But after the Act of April 27, 1855, converting estates tail into fees simple, it was held that an attempted limitation over after the termination of such an estate by failure of issue could take effect only as an executory devise, and, not being necessarily to happen within the period prescribed by the rule against perpetuities, was void for

before[50] the expiration of the estate tail is good, for throughout the time it can remain contingent it is destructible.[51] If, however, an estate so limited may not vest until after the expiration of the preceding estate tail, it may become indestructible by failure of the tenant in tail to destroy it by barring or docking the entail, and therefore is void for remoteness,[52] unless by the terms of the limitation it will nevertheless necessarily vest, if at all, within the period after its creation prescribed by the rule against perpetuities.[53]

Executory interests.[54] An executory interest limited after an estate tail, not being destructible by the tenant in tail,[55] is not within the reason of the principle hereinbefore stated allowing remainders so limited to be good,[56] and is void because it will not necessarily vest within the period prescribed by the rule against perpetuities.[57]

[§ 36] **(2) Indestructible Interests[58]—(a) In General.** Broadly speaking, all indestructible[59] nonvested or contingent[60] future[61] interests and estates,[62] except interests and estates limited over from one charity to another,[63] are obnoxious to the rule against perpetuities, unless they must necessarily vest, if at all, within the period by it specified.[64]

Future interests in estates for life or term of years not exceeding twenty-one. It would seem that no future interests created in an existing estate for life or lives,[65] or, on the same principle, in a term of years which will necessarily terminate within twenty-one years from the creation of such future estates,[66] are obnoxious to the rule against perpetuities, for, as the res in which such interests are created must itself determine within the limits of the rule,[67] the future interests therein must necessarily vest, if at all, within such limits.

[§ 37] **(b) Nonvested or Contingent Remainders.**[68] Nonvested or contingent remainders[69] and

remoteness. Robinson's Est., 149 Pa. 418, 24 A 297; Reinoehl v. Shirk, 119 Pa. 108, 12 A 806.

[c] **Limitations prior to estates tail distinguished.**—(1) A limitation prior to an estate tail is not good unless it complies with the requirements of the rule against perpetuities, for barring the entail cannot destroy the preceding limitations. Case v. Drosier, 2 Keen 764, 15 EngCh 764, 48 Reprint 824 [aff 5 Myl. & C. 246, 46 EngCh 224, 41 Reprint 364]; Mainwaring v. Baxter, 5 Ves. Jr. 458, 31 Reprint 681. (2) And when a term in trust is prior to an estate tail, but the trusts of the term can operate only during the continuance of the estate tail, although the tenant in tail by barring the estate, while not thereby destroying the term, will make it impossible for any of the trusts of the term to take effect, yet such trusts have been held to be subject to the rule. Floyer v. Bankes, L. R. 8 Eq. 115; Cochrane v. Cochrane, L. R. 11 Ir. 361; Turvin v. Newcombe, 3 Kay & J. 16, 69 Reprint 1003; Scarisbrick v. Skelmersdale, 17 Sim. 187, 42 EngCh 187, 60 Reprint 1100; Browne v. Stoughton, 14 Sim. 369, 37 EngCh 369, 60 Reprint 401.

50. Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816; Nicolls v. Sheffield, 2 Bro. Ch. 214, 29 Reprint 121; Harrison v. Round, 2 De G. M. & G. 190, 51 EngCh 148, 42 Reprint 844; Carr v. Erroll, 6 East 58, 102 Reprint 1209.

Destructibility of remainder after estate tail see Estates § 163.

51. **Destructibility of remainder after estate tail** see Estates § 163.

52. Bandon v. Moreland, [1910] 1 Ir. 220; Lanesborough v. Fox, Cas. t. Talb. 262, 25 Reprint 768; Bankes v. Holme, 1 Russ. 394 note, 46 EngCh 352, 38 Reprint 156; Bristow v. Boothby, 2 Sim. & St. 465, 1 EngCh 466, 57 Reprint 424.

"In considering limitations after an estate tail an important point is to observe whether they can possibly vest at a time subsequent to the termination of the estate tail. If they can, they are bad. It is true that if the tenant in tail should bar the entail, such limitations would be destroyed; but if the estate tail should come to an end without being barred, and the remainder-man in fee come into possession, the limitations would be indestructible, and so obnoxious to the Rule against Perpetuities. As therefore the limitations might vest at a remote time, and might be incapable of destruction by the owner of the estate in possession, they are void altogether." Gray Perp. § 446.

[a] **Thus,** where land is given to A in tail, remainder to B in fee, but, if any holder of the property ceases to bear a certain name, then to C, the conditional limitation may take effect after the tenant in tail has died without issue, and when the remainderman or his grantee is in possession, and is therefore too remote. Hartopp v. Carbery [cit 1 Sanders Uses (5th ed) p 204]

[b] **Remainder in trust to one who may not be determined** until after the expiration of the estate tail is void. Tregonwell v. Sydenham, 3 Dow 194, 3 Reprint 1035.

53. In re Haygarth, [1912] 1 Ch. 510.

54. **Executory interests generally** see infra § 38.

55. Jordan v. Roach, 32 Miss. 481; Bells v. Gillespie, 5 Rand. (26 Va.) 273; Doe v. Ewart, 7 A. & E. 636, 34 ECL 337, 112 Reprint 609. See also Estates § 163 text and note 89.

56. See supra text and note 51.

57. See infra § 38.

58. **Particular limitations** see infra §§ 43-57.

59. **Destructible interests not within rule** see supra §§ 34, 35.

Perpetuity as indestructible interest see supra § 1 text and note 3.

60. **Cross references:**

"Contingent estate" defined see Estates § 4 text and note 76; Wills [40 Cyc 1648 et seq].

"Contingent future estate" defined see Estates § 26 text and note 36.

"Contingent interest" defined see Contingent 13 C. J. p 115 text and notes 28-31; Interest 33 C. J. p 263 text and note 70.

Vested future interests not within rule see supra §§ 26-33.

61. **Present interests not within rule** see supra §§ 20-25.

62. Swain v. Bowers, (Ind. A.) 158 NE 598. See Shepperd v. Fisher, 206 Mo. 208, 103 SW 989 ("The kind of the estates to which the rule [against perpetuities] applies are contingent remainders, conditional limitations, executory devises, and springing and shifting uses").

63. See infra § 57.

64. See cases infra notes 65, 66; and §§ 37-42.

Particular indestructible contingent interests see infra §§ 37-42.

Right of entry for condition broken see supra § 30 text and notes 32, 33.

Gifts subject to trust for accumulation see infra § 80.

65. Pendleton v. Kinney, 65 Conn. 222, 32 A 331; Low v. Burron, 3 P. Wms. 262, 24 Reprint 1055. Compare Williams v. Ash, 1 How. (U. S.) 1, 13, 11 L. ed. 25 (where a slave was bequeathed upon condition that if the legatee sold him or removed him from the state he should be free, and the court, holding the bequest of freedom to the slave to be a specific legacy, upon the condition specified, and not void for remoteness, because the contingency must occur, if at all, within the lifetime of the slave, said: "If, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold or removed out of the state by the first taker, it is evidence upon common law principles that the limitation over would have been good. . . . Now a bequest of freedom to the slave stands upon the same principles with a bequest over to a third person").

Executory gift of slave see supra § 6 text and note 74.

Future gift of freedom to slave see supra § 6 text and note 73.

66. McCutcheon v. Pullman Trust, etc., Bank, 251 Ill. 550, 96 NE 510.

Twenty-one years as limit of period where no lives intervene see supra § 5 text and note 60.

67. **Period limited by rule** see supra § 5.

68. **"Contingent remainder" defined** see Contingent 13 C. J. p 117 text and notes 43-45; Deeds § 287; Estates § 132; Wills [40 Cyc 1648 et seq].

Particular contingent remainders see infra §§ 43-57.

69. U. S.—Carnahan v. Peabody, 29 F. (2d) 412; Hanley v. Kansas, etc., Coal Co., 110 Fed. 62.

Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ill.—Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Eldred v. Meek, 183 Ill. 26, 55 NE 536, 75 AmSR 86. See Wood v. Wood, 276 Ill. 164, 114 NE 549 (dictum).

Kan.—Lasnier v. Martin, 102 Kan. 551, 171 P 645, 646 [cit Cyc].

Ky.—Fidelity, etc., Trust Co. v. Tiffany, 202 Ky. 618, 260 SW 357; U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993. See Haydon v. Layton, 128 SW 90 (dictum).

Md.—Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408.

Mass.—Hale v. Herring, 208 Mass. 319, 94 NE 396.

Mo.—Mockbee v. Grooms, 300 Mo. 446, 254 SW 170. See Shepperd v. Fisher, 206 Mo. 208, 103 SW 989 (dictum).

N. H.—Wood v. Griffin, 46 N. H. 230.

N. J.—Canda v. Canda, (Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029].

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—Crolius v. Kramer, 279 Pa. 275, 123 A 808; Geissler v. Reading Trust Co., 257 Pa. 329, 101 A 797; In re Kountz, 251 Pa. 582, 96 A 1097; In re Kountz, 213 Pa. 390, 62 A 1103, 3 LRANS 639, 5 AnnCas 427; Wetherill v. Schembs, 24 Pa. Dist. 847; McCafferty's Est., 2 Pa. Dist. & Co. 29.

W. Va.—Hooper v. Wood, 97 W. Va. 1, 125 SE 350; Prichard v. Prichard, 91 W. Va. 398, 113 SE 256.

Eng.—In re Ashforth, [1905] 1 Ch.

the corresponding equitable interests commonly referred to as contingent equitable remainders,[70] except those remainders which are limited to take effect, if ever, upon the expiration of estates tail,[71] and except those limited to a charity after a preceding gift to another charity,[72] are void, unless they must necessarily vest, if at all, within, or at the expiration of, the period specified by the rule against perpetuities.[73]

Interests in personal property analogous to non-

535; In re Frost, 43 Ch. D. 246. See London, etc., R. Co. v. Gomm, 20 Ch. D. 562 (dictum). Compare Cattlin v. Brown, 11 Hare 372, 374, 45 EngCh 367, 68 Reprint 1319 ("A contingent remainder cannot be limited as depending on the termination of a particular estate, whose determination will not necessarily take place within the period allowed by law"). But see Cole v. Sewell, 4 Dr. & War. 1, 28 [aff 2 H. L. Cas. 186, 9 Reprint 1062] ("If . . . it [a limitation] is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen, before, or at, the instant the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder"). To same effect Abbiss v. Burney, 17 Ch. D. 211, 217 (the vice chancellor adding: "Now why is this? If the particular estate be an estate for life, the remainder must vest during the continuance of that estate, and there never can be any danger of remoteness or tying-up of property, because the very instant when the estate comes into existence the tenant for life and the remainderman can bar the entail and bar the limitations depending on the estate tail. For that reason, therefore, a remainder never can be void for remoteness").

[a] **So long as contingent remainders were destructible** by the tenant of the preceding estate, it would seem that they were not obnoxious to the rule against perpetuities. See Caldwell v. Willis, 57 Miss. 555, 573 (where it was said that a limitation is void if it may not vest within the period of the rule, "except when the limitation is by way of contingent remainder, which may be cut off by the alienation of the particular tenant [which liability to be defeated in this way is the reason for the exception]"). See Gray Perp. §§ 134, 192, 285, 286 (for a discussion of the former rule).

Destructible remainders see supra § 34.

Indestructibility of contingent remainders see Estates § 167½.

70. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Ga.—Overby v. Scarborough, 145 Ga. 875, 90 SE 67.

Ill.—Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Bowerman v. Taylor, 126 Md. 203, 94 A 652.

N. J.—Tichenor v. Mechanics, etc., Nat. Bank, 96 N. J. Eq. 560, 125 A 323.

Pa.—Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287.

Eng.—In re Ashforth, [1905] 1 Ch. 535; In re Wood, [1894] 3 Ch. 381; Read v. Gooding, 21 Beav. 478, 52 Reprint 944; Bull v. Pritchard, 5 Hare 56, 26 EngCh 567, 67 Reprint 1036; Mainwaring v. Baxter, 5 Ves. Jr. 458, 31 Reprint 681.

71. Limitations after estates tail see supra § 35.

72. See infra § 57.

73. U. S.—Von Overbeck v. Dahlgren, 28 F. (2d) 936; Dorrance v. Dorrance, 238 Fed. 524, 151 CCA 460 [aff 227 Fed. 679, and reh den 238 Fed. 924, 151 CCA 658].

Ala.—Henderson v. Henderson, 210 Ala. 73, 97 S 353; Montgomery v. Wilson, 189 Ala. 209, 66 S 503.

Conn.—Bates v. Spooner, 75 Conn. 501, 54 A 305; Johnson v. Edmond, 65 Conn. 492, 33 A 503.

D. C.—Hazen v. American Security, etc., Co., 49 App. 297, 265 Fed. 447.

Fla.—McLeod v. Dell, 9 Fla. 427.

Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Hawaii.—Spreckels v. Spreckels, 21 Hawaii 556.

Ill.—Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; Randolph v. Wilkinson, 294 Ill. 508, 128 NE 525; Wood v. Wood, 276 Ill. 164, 114 NE 549; Drury v. Drury, 271 Ill. 336, 111 NE 140; Anderson v. Williams, 262 Ill. 308, 104 NE 659, AnnCas1915B 720; Branson v. Bailey, 246 Ill. 490, 92 NE 940; Wagner v. Wagner, 244 Ill. 101, 91 NE 66, 18 AnnCas 490 [aff 149 Ill. A. 73]; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Hill v. Gianelli, 221 Ill. 286, 77 NE 458, 112 AmSR 182.

Ind.—Edwards v. Bates, 79 Ind. A. 578, 139 NE 192.

Kan.—Butler v. Miller, 116 Kan. 351, 225 P 895; Cain v. Vivier, 108 Kan. 69, 70, 193 P 1070 [quot Cyc]; Klingman v. Gilbert, 90 Kan. 545, 135 P 682.

Ky.—Clay v. Anderson, 203 Ky. 384, 262 SW 604; U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Forsman v. Hofstetter, 107 SW 796, 32 KyL 1108.

Me.—Pulitzer v. Livingston, 89 Me. 359, 36 A 635 [overr Slade v. Patten, 68 Me. 380]. But see Towle v. Doe, 97 Me. 427, 54 A 1072 (where a testator bequeathed property in trust for his widow for life, then to his son and the son's children for their lives, and at their death to be divided among their heirs, and the life estate to the children was held bad on the ground that the remainder to their heirs was void under the rule against perpetuities, and that the trust was not separable and therefore was wholly invalid).

Md.—Hawkins v. Ghent, 154 Md. 261, 140 A 212; Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Bowerman v. Gibson, 144 Md. 1, 123 A 573; Bowerman v. Taylor, 126 Md. 203, 94 A 652; Timanus v. Dugan, 46 Md. 402; Turner v. Withers, 23 Md. 18.

Mass.—Brown v. Wright, 194 Mass. 540, 80 NE 612. But see Fosdick v. Fosdick, 6 Allen 41 (where an equitable life estate bequeathed to the testator's grandchildren, commencing when the youngest living grandchild should reach twenty-one, was held to be void as a perpetuity, although it would seem that such life interest must vest within twenty-one years after lives in being at the death of the testator).

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; Cary v. Toles, 210 Mich. 30, 177 NW 279.

Miss.—Stigler v. Shurlds, 131 Miss. 648, 95 S 635. See Bratton v. Graham, 146 Miss. 246, 111 S 353 (apparently recognizing the principle stated in the text).

Mo.—Landers Inv. Co. v. Brown, 300 Mo. 348, 254 SW 14, 30 ALR 908; Schee v. Boone, 295 Mo. 212, 243 SW 882; Lane v. Garrison, 293 Mo. 530, 239 SW 813; Walter v. Dickmann, 274 Mo. 185, 202 SW 537. See Hudspeth v. Grumke, 214 SW 865; Hudspeth v. Akers, 214 SW 868 (dictum). Compare Melvin v. Hoffman, 290 Mo. 464, 496, 235 SW 107 (where it was said: "The rule does not apply to . . . contingent remainders which vest within said time").

N. J.—Dwyer v. National Newark, etc., Banking Co., (Ch.) 143 A 625; In re Smisson, 79 N. J. Eq. 233, 82 A 614.

N. Y.—Hawley v. James, 16 Wend. 61 (per Cowen, J.); Butler v. Butler, 3 Barb. Ch. 304.

Pa.—In re Feeney, 293 Pa. 273, 142 A 284; Rhodes' Est., 147 Pa. 227, 23 A 553; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85 [overr Smith's App., 88 Pa. 492]; Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287. See In re Edwards, 255 Pa. 358, 99 A 1010 (dictum). But see Gardette's Est., 16 Phila. 264, 13 Wkly NC 315 (holding void an appointment to one who was not born at the death of the donor of the power but whose estate would have begun at the death of one living at that time).

R. I.—Storrs v. Burgess, 29 R. I. 269, 67 A 731.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709; Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640.

Eng.—Symes v. Symes, [1896] 1 Ch. 272; Abbiss v. Burney, 17 Ch. D. 211; In re Edmondson, L. R. 5 Eq. 389; Craig v. Stacey, Ir. Term R. 249.

Man.—Re Crichton, 23 Man. 594, 13 DomLR 169, 25 WestLR 18, 4 West Wkly 1184.

See Goldtree v. Thompson, 79 Cal. 613, 22 P 50 (basing its decision upon the principle stated in the text, although, it would seem, the court was erroneous in its conclusion as to the time of vesting under the limitation in question); Neely v. Brogden, (Tex. Commn. A.) 239 SW 192 [aff (Civ. A.) 214 SW 614] (apparently recognizing the principle stated in the text).

And see cases supra § 34 note 46. "Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities." In re Ashforth, [1905] 1 Ch. 535, 540.

[a] **Illustration.**—Where a testator devised property to his wife for life, remainder to his daughter for life, and remainder over to her issue, if any, living at her death, the contingent remainder to her possible issue is not void under the rule, since such remaindermen must be alive, if at all, at the death of the daughter, and their interests would vest at that time. Edwards v. Bates, 79 Ind. A. 578, 139 NE 192.

[b] **Rule applied; equitable interest bad where legal remainder would be good.**—Where property was conveyed in trust for one for life and then for such of his children as should reach the age of twenty-five, the equitable executory interest or contingent remainder was held void, inasmuch as it might not become vested within twenty-one years after the death of the life tenant; but the court recognized that if a legal life estate had been created, with remainder to such of the life tenant's children as reached twenty-five, such remainder would have been good, for it would have vested upon the death of the life tenant and in those of his children, if any, who had then reached twenty-five, and as to any other children would have been destroyed for want of a preceding estate. Abbiss v. Burney, 17 Ch. D. 211.

[c] **Successive contingent remainders** may be limited to as many persons as the donor thinks proper, provided they must all vest during the period fixed by the rule against perpetuities. In re Feeney, 293 Pa. 273, 142 A 284.

vested or contingent remainders,[74] except those limited to a charity after a preceding gift to another charity,[75] are likewise void[76] unless they must vest, if at all, within, or at the expiration of, such period.[77]

[§ 38] **(c) Executory Interests.**[78] Springing[79] and shifting[80] uses[81] and executory devises[82] and bequests[83] of legal and equitable interests, except

Cross references:
Contingent remainders following estates which must end within period of rule see supra § 34 text and notes 44-46.
Remainder over upon failure of issue within period of rule see infra § 43 text and notes 1-3.
Remainder to child of unborn person to take effect, if ever, within permitted period see infra § 53 text and note 76.
Vested remainders not subject to rule see supra § 27.

74. In re Ashforth, [1905] 1 Ch. 535.

Interests in personal property analogous to remainders see Estates § 250 et seq; Wills [49 Cyc 1640].

75. See infra § 57.

76. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Conn.—Bartlett v. Sears, 81 Conn. 34, 70 A 33.

Ga.—Shewmake v. Robinson, 148 Ga. 287, 96 SE 564.

Ill.—Easton v. Hall, 323 Ill. 397, 154 NE 216; Eldred v. Meek, 183 Ill. 26, 55 NE 536, 75 AmSR 86.

Ky.—U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993. See Haydon v. Layton, 128 SW 90 (dictum).

Md.—Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408.

Mass.—Bundy v. U. S. Trust Co., 257 Mass. 72, 153 NE 337.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

N. J.—Canda v. Canda, (Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029].

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—In re Kountz, 251 Pa. 582, 96 A 1097; Wetherill v. Schembs, 24 Pa. Dist. 847.

Tex.—Anderson v. Menefee, (Civ. A.) 174 SW 904.

Va.—Stone v. Nicholson, 27 Gratt. (68 Va.) 1.

Eng.—In re Ashforth, [1905] 1 Ch. 535; Read v. Gooding, 21 Beav. 473, 52 Reprint 944.

See Salisbury v. Salisbury, 92 Kan. 644, 141 P 173 (dictum).

[a] **Illustration.**—Where, by the exercise of a power, property given to the donee for life was appointed by her to two persons not in being at the date of the creation of the power, for their lives, with remainder over, in the event of their death without issue then surviving to another who was in being at the creation of the power, such contingent remainder was void, for, while the remainderman was in being within the rule, the remainder might take effect after his death and not within the period specified by the rule against perpetuities. Bundy v. U. S. Trust Co., 257 Mass. 72, 153 NE 337.

77. Ala.—Woodley v. Findlay, 9 Ala. 716.

Conn.—Bartlett v. Sears, 81 Conn. 34, 70 A 33.

D. C.—Hazen v. American Security, etc., Co., 49 App. 297, 265 Fed. 447.

Ga.—Palmer v. Neely, 162 Ga. 767, 135 SE 90; Robert v. West, 15 Ga. 122.

Ill.—Waldo v. Cummings, 45 Ill. 421.

Ky.—U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; Hull v. Osborn, 151 Mich. 8, 113 NW 784.

Mo.—Landers Inv. Co. v. Brown, 300 Mo. 348, 254 SW 14, 30 ALR 908.

N. J.—Dwyer v. National Newark, etc., Banking Co., (Ch.) 143 A 625.

Pa.—In re Price, 260 Pa. 376, 103 A 893; Barclay's Est., 23 Pa. Dist. 79. But compare Ledwith v. Hurst, 284 Pa. 94, 98, 130 A 315 (where a testator bequeathed the income from certain property to his widow and daughter M for their lives, remainder to the "issue and descendants" of M during the term of their natural lives, with remainder over upon the death of the last of such issue and descendants or in the event of the death of M without leaving issue or descendants, and the court said: "As M's children were not born at the testator's death, the title could not be held in abeyance longer than twenty-one years after her death and that of the widow; while the will attempts not only to continue the income to M's children for life, but also to her descendants without limit. . . . The life gift to M's children (none of whom was born prior to testator's death) is plainly violative of the rule, so the only life estates which apparently are not, are those to the widow and daughter").

S. C.—Tucker v. Stevens, 4 S. C. Eq. 532.

Tex.—Anderson v. Menefee, (Civ. A.) 174 SW 904.

Eng.—In re Harvey, 39 Ch. D. 289; In re Roberts, 19 Ch. D. 520 [aff 50 L. J. Ch. 265]; In re Merrick, L. R. 1 Eq. 551; Buchanan v. Harrison, 1 Johns. & H. 662, 70 Reprint 909; Hodson v. Ball, 14 Sim. 558, 37 EngCh 558, 60 Reprint 474; Lett v. Randall, 3 Smale & G. 83, 65 Reprint 572; Routledge v. Dorril, 2 Ves. Jr. 357, 30 Reprint 671.

Man.—Re Crichton, 23 Man. 594, 13 DomLR 169, 25 WestLR 18, 4 West Wkly 1184.

And see cases supra § 34 note 46.

Cross references see supra note 73.

78. Executory interests in general see Estates § 196.

Particular executory limitations see infra §§ 43-57.

79. Springing uses see Estates § 197.

80. Shifting uses see Estates § 198.

81. Cal.—Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97.

Ky.—Ludwig v. Combs, 1 Metc. 128. But see Patterson v. Patterson, 135 Ky. 339, 343, 122 SW 169 (where a shifting use, referred to by the court in its opinion as a "reversion," which might have taken effect at a time beyond that specified by the statute against perpetuities, was held not invalid under that statute where the contingency upon which it took effect occurred within the lifetime of the grantor in the deed creating it, the court holding that such circumstance freed it from the operation of the statute, which was designed "to prohibit unreasonable restraints upon alienation").

Mass.—North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 29 NE 524, 15 LRA 231. Compare Welsh v. Foster, 12 Mass. 93 (where it appears that a deed, for a valuable consideration to be paid whenever the deed should take effect but not otherwise, purported to convey a mill, but provided that the deed should not take effect until the mill pond should cease to be employed for the purpose of carrying two mill wheels, and the deed was held void on the ground that the condition upon which it should become effective might not occur within the period prescribed by the rule against perpetuities).

N. C.—Springs v. Hopkins, 171 N. C. 486, 88 SE 774.

Pa.—Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; Mifflin's App., 121 Pa. 205, 15 A 525, 6 AmSR 781, 1 LRA 453.

Tenn.—Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36; Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

Eng.—In re Da Costa, [1912] 1 Ch. 337; Savill Bros., Ltd. v. Bethell, [1902] 2 Ch. 523; Cadell v. Palmer, 10 Bing. 140, 25 ECL 73, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 21 ERC 100. See Bennett v. Bennett, 2 Dr. & Sm. 266, 62 Reprint 623; Cole v. Sewell, 2 H. L. Cas. 186, 9 Reprint 1052 [aff 4 Dr. & War. 1] (dicta).

See Barnum v. Barnum, 26 Md. 119, 90 AmD 88; Koehler v. Rowland, 275 Mo. 573, 205 SW 217; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989 (dicta).

And see cases infra § 43.

82. Ala.—Reynolds v. Love, 191 Ala. 218, 68 S 27. See Isbell v. Maclin, 24 Ala. 315 (dictum).

Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ind.—Stephens v. Evans, 30 Ind. 39.

Md.—Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816. See Barnum v. Barnum, 26 Md. 119, 171, 90 AmD 88 ("if the contingency upon which the executory estate is to vest, is not necessarily to happen within the time fixed by the rule as the legal boundary, then the precedent estate or estates are denominated a perpetuity, and the executory estate or devise fails for want of a legal estate to support it").

Mass.—Theological Education Soc. v. Atty.-Gen., 135 Mass. 285; Wells v. Heath, 10 Gray 17; Sears v. Russell, 8 Gray 86; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—St. Amour v. Rivard, 2 Mich. 294.

Nebr.—Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. H.—Wood v. Griffin, 46 N. H. 230.

N. Y.—Tator v. Tator, 4 Barb. 431; Paterson v. Ellis, 11 Wend. 259.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—Smith v. Townsend, 32 Pa. 434.

S. C.—Mangum v. Piester, 16 S. C. 316.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709; Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640; Davis v. Williams, 85 Tenn. 646, 4 SW 8; Booker v. Booker, 5 Humphr. 505.

Va.—Stone v. Nicholson, 27 Gratt. (68 Va.) 1; Bells v. Gillespie, 5 Rand. (26 Va.) 273.

Eng.—Edwards v. Edwards, [1909] A. C. 275; In re Whiteford, [1915] 1 Ch. 347; Cadell v. Palmer, 10 Bing. 140, 25 ECL 73, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 21 ERC 100; Bennett v. Bennett, 2 Dr. & Sm. 266, 62 Reprint 623; Thomas v. Thomas, 87 L. T. Rep. N. S. 58; Long v. Blackall, 7 T. R. 100, 101 Reprint 875. See In re Ashforth, [1905] 1 Ch. 535 (dictum).

Ont.—Foxwell v. Kennedy, 24 Ont. 189, 2 OntWN 1299, 19 OntWR 595 [aff 2 OntWN 821, 18 OntWR 782]; Kennedy v. Kennedy, 24 Ont. 183, 2 OntWN 1173, 1304, 19 OntWR 346, 605 [dism app 2 OntWN 625, 18 OntWR 442]; Meyers v. Hamilton Provident, etc., Co., 19 Ont. 358.

See Koehler v. Rowland, 275 Mo. 573, 205 SW 217 (dictum).

And see cases infra § 43.

"The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the Court have said that the estate shall not be unalienable by executory devises for a longer term than is allowed by the limitations of a common law conveyance." Long v. Blackall, 7 T. R. 100, 102, 101 Reprint 875.

Executory devises see Estates § 200; Wills [40 Cyc 1644].

83. Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ill.—Waldo v. Cummings, 45 Ill. 421.

Ky.—Ludwig v. Combs, 1 Metc. 128.

those limited to a charity after a preceding gift to another charity,[84] are void, unless they must become vested interests, if at all, within, or at the expiration of, the period specified by the rule against perpetuities.[85]

[§ 39] **(d) Easements and Profits Created in Futuro.**[86] In accordance with the principle that all nonvested or contingent indestructible future interests are subject to the operation of the rule against perpetuities,[87] it has been said by a learned writer on the subject that easements and profits created in futuro give true rights of property and therefore are obnoxious to the rule unless they must vest within the period thereby specified,[88] except, perhaps, when they are limited to a charity after a preceding gift to another charity.[89]

[§ 40] **(e) Options and Rights of Preëmption.** Generally, an option to purchase or repurchase[90] or

Md.—Biscoe v. Biscoe, 6 Gill & J. 232.

R. I.—Palmer v. Union Bank, 17 R. I. 627, 24 A 109.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

Eng.—In re Davies, [1915] 1 Ch. 543; In re Bowen, [1893] 2 Ch. 491; Bennett v. Bennett, 2 Dr. & Sm. 266, 62 Reprint 623; In re Staveley, 90 L. J. Ch. 111.

"This rule [against perpetuities] applies as well to executory bequests of personal property, as to executory devises of real estate." Biscoe v. Biscoe, 6 Gill & J. (Md.) 232, 235.

Executory bequests see Estates § 200 text and note 99, § 250; Wills [40 Cyc 1648].

84. See infra § 57.

85. Conn.—Pendleton v. Kinney, 65 Conn. 222, 32 A 331. Compare Tappan's App., 52 Conn. 412, 420 (where a limitation over to residuary legatees in case a religious society, to whom property was first given, failed to build a chapel within three years or "in case there shall be any good reason for extending the time beyond the three years," the judge of probate can extend the time, was held not obnoxious to a statute against perpetuities which prohibits gifts to persons other than those in being or their immediate issue or descendants, the further postponement beyond three years contemplating only a reasonable time).

Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ill.—Comstock v. Redmond, 252 Ill. 522, 96 NE 1073.

Ky.—Page v. Frazer, 14 Bush 205.

Md.—Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816.

Mass.—Hawley v. Northampton, 8 Mass. 3, 5 AmD 66.

Miss.—Thomas v. Thomas, 97 Miss. 697, 53 S 630.

Nebr.—Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. J.—Dwyer v. National Newark, etc., Banking Co., (Ch.) 143 A 825.

Pa.—Hubley v. Long, 2 Grant 268.

R. I.—Mainerre v. Welling, 32 R. I. 104, 78 A 507, AnnCas1912C 1311; Storrs v. Burgess, 29 R. I. 269, 67 A 731.

S. C.—Hudson v. Leathers, 141 S. C. 32, 139 SE 196; Mangum v. Piester, 16 S. C. 316.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709; Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640; Davis v. Williams, 85 Tenn. 646, 4 SW 8; Bramlet v. Bates, 1 Sneed 554; Booker v. Booker, 5 Humphr. 505.

Tex.—Anderson v. Menefee, (Civ. A.) 174 SW 904.

Va.—Pleasants v. Pleasants, 2 Call (6 Va.) 319; Bells v. Gillespie, 5 Rand. (26 Va.) 273.

Eng.—Cadell v. Palmer, 10 Bing. 140, 25 ECL 73, 131 Reprint 859, 7 Bligh N. S. 202, 5 Reprint 745, 1 Cl. & F. 372, 6 Reprint 956, 21 ERC 100; Bennett v. Bennett, 2 Dr. & Sm. 266, 62 Reprint 623; Wilkinson v. South, 7 T. R. 555, 101 Reprint 1129; Long v. Blackall, 7 T. R. 100, 102, 101 Reprint 875.

Compare Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261 (where a gift in trust, the income to be paid to the donor's children for thirty years and the corpus then distributed to them, with an executory devise of the beneficial interest to the issue of any child dying before the time for final distribution, was held not within the rule against perpetuities, apparently on the ground that it would become vested not later than the expiration of the life of a child in being, and so within the period of the rule).

And see cases infra § 43 text and notes 1-6.

"It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation." Long v. Blackall, supra. To same effect Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640.

[a] **"Whatever may be the number of limitations** after the first executory devise or limitation by deed by way of springing or shifting uses of the whole interest, any one of them which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event that no one of the preceding executory limitations which would carry the whole interest happens to vest." 2 Washburn Real Prop. p 354 [quot Brown v. Brown, 86 Tenn. 277, 294, 6 SW 869, 7 SW 640].

[b] **Gift of freedom to slave analogous to executory limitation.**—(1) When a slave is bequeathed to a legatee, with a provision that, if the latter sells him or takes him out of the state, the slave shall be free, the bequest of freedom is a specific legacy, analogous to a remainder over to another person upon the happening of the contingency, and it must take effect, if at all, within the life of the legatee, and so is not too remote. Williams v. Ash, 1 How. (U. S.) 1, 11 L. ed. 25. (2) But when a deed emancipates a female slave when she shall attain the age of twenty-five, and provides further that any children she may have shall be slaves until they respectively reach twenty-five, when they and their increase shall be emancipated, the grant of freedom to the children of the female is too remote, since they may not attain the age specified within twenty-one years after the death of their mother. Ludwig v. Combs, 1 Metc. (Ky.) 128. But see Wood v. Humphreys, 12 Gratt. (53 Va.) 333; Pleasants v. Pleasants, 2 Call (6 Va.) 319 (both holding that the rule against perpetuities does not apply to a bequest of freedom to slaves); Crawford v. Moses, 10 Leigh (37 Va.) 277 (dictum, to the same effect).

Limitation over upon failure of issue within period of rule see infra § 43 text and notes 1-6.

Limitation to child of unborn person to take effect, if ever, within permitted period see infra § 53 text and note 76.

86. Easements and profits commencing in præsenti see supra §§ 23, 24.

87. See supra § 36.

88. Gray Perp. § 316. But see Ardley v. St. Pancras Union, 39 L. J. Ch. 871 (where an easement was held to begin, according to the terms of a deed creating it, upon the sale of certain land adjoining the servient tenement, but no objection on the ground of remoteness was made).

Rule against perpetuities applies to chattels real see supra § 19 text and note 50.

89. See infra § 57.

90. Conn.—H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138.

Ga.—Turner v. Peacock, 153 Ga. 870, 113 SE 585.

Kan.—Henderson v. Bell, 103 Kan. 422, 173 P 1124.

Mass.—Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 NE 177; Winsor v. Mills, 157 Mass. 362, 32 NE 352.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570 [aff 41 Pa. Co. 396].

W. Va.—Woodall v. Bruen, 76 W. Va. 193, 85 SE 170; Starcher v. Duty, 61 W. Va. 373, 56 SE 524, 123 AmSR 990, 9 LRANS 913; Starcher v. Duty, 61 W. Va. 371, 56 SE 527.

Eng.—Worthing Corp. v. Heather, [1906] 2 Ch. 532, 4 BRC 280; Woodall v. Clifton, [1905] 2 Ch. 257 (per Warrington, J.); London, etc., R. Co. v. Gomm, 20 Ch. D. 562 [overr Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421]; In re Ramadge, [1919] 1 Ir. 205; In re Donoughmore, [1911] 1 Ir. 211; In re Tyrell, [1907] 1 Ir. 292 [overr Switzer & Co., Ltd. v. Rochford, [1906] 1 Ir. 399]; Redington v. Browne, L. R. 32 Ir. 347; Trevelyan v. Trevelyan, 53 L. T. Rep. N. S. 853.

New Zeal.—Kauri Timber Co. v. District Land Registrar, 21 New Zeal. L. 84.

See Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 SE 89 (dictum).

Compare Threlkeld v. Inglett, 289 Ill. 90, 124 NE 368 (recognizing the principle stated in the text, but holding that the facts of the case did not show such an option).

But see Kingston v. Home L. Ins. Co., 11 Del. Ch. 258, 101 A 898 (refusing to apply the rule against perpetuities to an option for the purchase of corporate stock, on the ground that it is based upon the public policy disapproving of keeping real estate out of commerce for an unreasonably long period, and that there is no principle of public policy involved in a contract giving an option to buy shares of a corporation doing a private business); Keogh v. Peck, 316 Ill. 318, 332, 147 NE 266, 38 ALR 1151 (holding that an option in a lease for ninety-nine years giving the lessee the right to purchase the demised premises at any time during the term of the lease is not obnoxious to the rule against perpetuities, because "in this State no title, legal or equitable, is granted, and no interest in land is created in the holder of the option by an option agreement"); Hollander v. Central Metal, etc., Co., 109 Md. 131, 159, 161, 71 A 442, 23 LRANS 1135 (holding that, in a lease for ninety-nine years, perpetually renewable, a convenant to convey to the lessee upon the payment of certain sums is not within the rule against perpetuities, and the court said: "Our predecessors, in view of the fact that titles to property of great value in Baltimore City, and elsewhere in the State, are held under [such] leases, . . . have somewhat relaxed the technical rules applicable to such es-

sell[91] property, or a contract for a right of preëmption,[92] which is not limited to the period specified by the rule against perpetuities, or which provides for renewal indefinitely or beyond such period,[93] is obnoxious to the rule, and is not enforceable by decree for specific performance, although damages may be recoverable at law for its breach.[94] But where the option is personal to the holder, and terminates at his death, it does not violate the rule.[95]

[§ 41] **(f) Equitable Interests.** Indestructible nonvested or contingent equitable future interests in property are void under the rule against perpetuities when the legal interests to which they are analogous are obnoxious thereto.[96]

[§ 42] **(g) Interests in Personalty.** Indestructible nonvested contingent future interests in personal property are obnoxious to the rule against perpetuities when such interests, if in real property, would be bad thereunder.[97]

V. PARTICULAR LIMITATIONS

[§ 43] **A. Limitations Over on Failure of Issue.**[98] A limitation or gift over of real or personal property which is to take effect upon a failure of issue[99] of the preceding taker or another, occurring within the period specified by the rule against perpetuities after the creation of the estate or interest,[1] as upon a failure of issue at the death of a person or persons by whose lives the period is measured,[2] or with-

tates, for the purpose of enforcing the contracts of the parties thereto. . . . We must adhere to the previous decisions of this Court, and hold that the lease in question did not place the property extra commercium, and that the rights of the parties under the covenants therein are 'not open to any of the objections against perpetuities' ").

"The right to call for a conveyance of the land is an equitable interest or equitable estate." London, etc., R. Co. v. Gomm, 20 Ch. D. 562, 581. See to same effect Redington v. Browne, L. R. 32 Ir. 347.

"A contract which attempts to grant a continuing option of purchase unlimited in point of time is void ab initio, because it attempts to create a contingent future interest which may not vest within the period limited by the rule against perpetuities." H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 530, 107 A 138.

[a] **A covenant to reconvey** (1) upon demand and the payment of a specified sum is to be treated as an option to purchase so far as concerns the application of the rule against perpetuities. London, etc., R. Co. v. Gomm, 20 Ch. D. 562. (2) Thus a covenant to reconvey land upon demand in ninety-nine years is void within the rule against perpetuities. Kauri Timber Co. v. District Land Registrar, 21 New Zeal. L. 84.

[b] **An option to redeem from a rent charge,** exercisable after the period prescribed by the rule against perpetuities, is void as a violation of that rule. In re Donoughmore, [1911] 1 Ir. 211; In re Tyrrell, [1907] 1 Ir. 292 [overr Switzer & Co., Ltd. v. Rochford, [1906] 1 Ir. 339].

[c] **Reason for rule.**—"Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a limitation, or a conditional limitation? Can it make any difference in substance whether it is this case, a limitation to A. in fee, with a provision that, whenever B., or his heirs, sends A., or his heirs, a notice in writing and pays £100., the estate shall vest in B. and his heirs, or a contract that if B. does give a notice and pays £100., then A. shall convey to B. and his heirs? It seems to me that in a court of equity it is impossible to suggest that there is any real distinction. If there is no distinction between those two cases, can there be any distinction when the option is put, not that B. shall buy, but that he shall be entitled to buy? There is the same fetter on the estate, and on the owners of the estate, for all time, and it seems to me to be plain that that ought to fall within the rule as to remoteness, which prohibits that kind of fetter for an indefinite period of time hanging over the estate." London, etc., R. Co. v. Gomm, 20 Ch. D. 562, 46 L. T. Rep. N. S. 449, 452 (per Jessel, M. R.).

[d] **The leading case,** reviewing the law of perpetuities in general and the prior decisions regarding options and covenants to reconvey, and establishing the present law on the subject, is London, etc., R. Co v. Gomm, 20 Ch. D. 562 [overr Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421].

91. Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 SE 89.

92. H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 531, 107 A 138. See Manchester Ship Canal Co. v. Manchester Racecourse Co., [1900] 2 Ch. 352 [aff [1901] 2 Ch. 37] (dictum).

"There is really no difference in this respect between a contract for a continuing option and a contract for a continuing right of preëmption." H. J. Lewis Oyster Co. v. West, supra.

93. Period permitted by rule see supra § 5.

94. Worthing Corp. v. Heather, [1906] 2 Ch. 532, 4 BRC 280; Bennett v. Stodgell, 36 Ont. L. 45, 9 OntWN 464, 28 DomLR 639.

[a] **Principle distinguished.**—"It is not in my opinion the contract which is void because it infringes the rule against perpetuities, but it is the limitation which, by the operation of the doctrines of the Court of Equity, it is the effect of the contract to create, that is void. The contract remains a valid contract in every respect, but it is the limitation it creates in the contemplation of the Court of Equity, and it is that alone, which is void." Worthing Corp. v. Heather, [1906] 2 Ch. 532, 540, 4 BRC 280.

95. Dodd v. Rotterman, 330 Ill. 362, 161 NE 756 (where a mother conveyed property to her daughter, who acted as manager of her mother's affairs, and who agreed in writing to reconvey upon the mother's demand, the privilege of demanding a reconveyance was personal to the mother, and did not purport to extend to her heirs or assigns, and consequently terminated with her death, and therefore was not within the rule against perpetuities); Weitzmann v. Weitzmann, (Ind. A.) 161 NE 385 (an option given by will to testator's son, to whom testator had also given his business and the furnishings of his store, to buy the store building for business purposes, was personal to the son and did not violate any rule against perpetuities).

Nonapplicability of rule to personal contracts see supra § 19 text and note 61.

96. Executory equitable interests see supra § 38.

Interests analogous to contingent remainders see supra § 37 text and note 70.

97. Executory bequests see supra § 38 text and note 83.

Interests analogous to contingent remainders see supra § 37 text and notes 74-77.

98. Executory limitations over upon failure of issue in general see Estates § 206.

Default of issue see 18 C. J. p 457.

Construction of limitations over as to definiteness or indefiniteness of failure of issue see Issue § 14 notes 85, 87; Wills [40 Cyc 1502].

99. See cases infra notes 1–9.

[a] **"There are three possible meanings of the phrase 'die without issue':** It may mean (a) die without ever having had issue, or (b) die without issue surviving the first taker, or (c) be dead without issue in any generation, however remote. The second is known as a definite failure of issue, and the third as an indefinite failure." Kales Future Interests (2d ed) § 542.

1. Ala.—Jemison v. Smith, 37 Ala. 185.

Ark.—Moody v. Walker, 3 Ark. 147. See Watkins v. Quarles, 23 Ark. 179 (dictum).

Ga.—Jossey v. Brown, 119 Ga. 758, 47 SE 350; Forman v. Troup, 30 Ga. 496.

Md.—Bowerman v. Gibson, 144 Md. 1, 123 A 573.

S. C.—Dunlap v. Dunlap, 4 S. C. Eq. 305.

See Eichelberger v. Barnitz, 9 Watts (Pa.) 447 (dictum).

And see cases infra notes 2–6.

Contingent remainders and executory limitations valid if they must take effect, if at all, within period of rule see supra § 37 text and notes 73, 77; § 38 text and note 85.

Period specified by rule see supra § 5.

2. Ala.—Edwards v. Bibb, 54 Ala. 475, 43 Ala. 666; Bethea v. Smith, 40 Ala. 415; Isbell v. Maclin, 24 Ala. 315; Flinn v. Davis, 18 Ala. 132; Williams v. Graves, 17 Ala. 62; Woodley v. Findlay, 9 Ala. 716; Doyle v. Bouler, 7 Ala. 246; Bell v. Hogan, 1 Stew. 536.

Ark.—Biscoe v. Thweatt, 74 Ark. 545, 86 SW 432; Clark v. Stanfield, 38 Ark. 347; Moody v. Walker, 3 Ark. 147. Compare Robinson v. Bishop, 23 Ark. 378; Slaughter v. Slaughter, 23 Ark. 356, 79 AmD 111 (in both of which it was said that limitations over of personal property upon the death of the first taker without issue then surviving were not void for remoteness, although they were held void on other grounds).

Conn.—Daskam v. Lockwood, 103 Conn. 54, 130 A 92; Butler v. Flint, 91 Conn. 630, 101 A 19; Clarke v. Terry, 34 Conn. 176; Hudson v. Wadsworth, 8 Conn. 348; Morgan v. Morgan, 5 Day 517. See Allen v. Almy, 87 Conn. 517, 89 A 205, AnnCas1917B 112 (apparently assuming the principle stated in the text).

Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896; Lillibridge v. Ross, 31 Ga. 730; Burton v. Black, 30 Ga. 638; Forman v. Troup, 30 Ga. 496; Griswold v. Greer, 18 Ga. 545; Carlton v. Price, 10 Ga. 495; Mayer v. Wiltberger, Ga. Dec. Pt. II 20. See Hill v. Alford, 46 Ga. 247; Groce v. Rittenberry, 14 Ga. 233 (in both of which the validity of such limitations

in twenty-one years thereafter,[3] or, according to some authorities, where the gift over is to a person in being at the creation of the interest,[4] or is to vest, if at all, at the birth of one who will necessarily be born, if ever, within the period of the rule,[5] or is of an interest which cannot continue

was assumed, but the question of remoteness was not discussed).

Ill.—Haughn v. Haughn, 296 Ill. 305, 129 NE 807; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Stisser v. Stisser, 235 Ill. 207, 85 NE 240; Metzen v. Schopp, 202 Ill. 275, 67 NE 36; Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356; Strain v. Sweeny, 163 Ill. 603, 45 NE 201; Glover v. Condell, 163 Ill. 566, 45 NE 173, 35 LRA 360.

Ind.—Huxford v. Milligan, 50 Ind. 542; Smith v. Hunter, 23 Ind. 580; Jones v. Miller, 13 Ind. 337; Cain v. Robertson, 27 Ind. A. 198, 61 NE 26. See Outland v. Bowen, 115 Ind. 150, 17 NE 281, 7 AmSR 420 (dictum).

Kan.—Coleman v. Coleman, 69 Kan. 39, 76 P 439.

Ky.—Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739; Daniel v. Thomson, 14 B. Mon. 662; Armstrong v. Armstrong, 14 B. Mon. 333; Atty.-Gen. v. Wallace, 7 B. Mon. 611; Birney v. Richardson, 5 Dana 424; Brown v. Brown, 1 Dana 39; Luke v. Marshall, 5 J. J. Marsh. 353; Brashear v. Macey, 3 J. J. Marsh. 89; Moore v. Howe, 4 T. B. Mon. 199.

Md.—Lednum v. Cecil, 76 Md. 149, 24 A 452; Hardy v. Wilcox, 58 Md. 180; Allender v. Sussan, 33 Md. 11, 3 AmR 171; Budd v. State, 22 Md. 48; Woodland v. Wallis, 6 Md. 151; Edelen v. Middleton, 9 Gill 161; Jones v. Sothoron, 10 Gill & J. 187; Biscoe v. Biscoe, 6 Gill & J. 232; Dashiell v. Dashiell, 2 Harr. & G. 127.

Mich.—Goodell v. Hibbard, 32 Mich. 47.

Miss.—Gray v. Bridgeforth, 33 Miss. 312; Jordan v. Roach, 32 Miss. 481.

Mo.—Naylor v. Godman, 109 Mo. 543, 19 SW 56. See Cox v. Jones, 229 Mo. 53, 129 SW 495 (apparently assuming the principle stated in the text).

N. H.—Kimball v. Penhallow, 60 N. H. 448; Pinkham v. Blair, 57 N. H. 226; Bell v. Scammon, 15 N. H. 381, 41 AmD 706; Hall v. Chaffee, 14 N. H. 215.

N. J.—Armstrong v. Kent, 21 N. J. L. 509; Den v. Allaire, 20 N. J. L. 6; Merkel v. Capone, 81 N. J. Eq. 282, 87 A 95; Ackerman v. Vreeland, 14 N. J. Eq. 23; Fairchild v. Crane, 13 N. J. Eq. 105; Cleveland v. Havens, 13 N. J. Eq. 101, 78 AmD 90.

N. Y.—Auburn Theological Seminary v. Kellogg, 16 N. Y. 83; Hill v. Hill, 4 Barb. 419; Lovett v. Buloid, 3 Barb. Ch. 137; Moffat v. Strong, 10 Johns. 12.

N. C.—Vinson v. Gardner, 185 N. C. 193, 116 SE 412; Lee v. Oates, 171 N. C. 717, 88 SE 889, AnnCas 1917A 514; O'Neal v. Borders, 170 N. C. 483, 87 SE 340; Blake v. Page, 60 N. C. 252; Baker v. Pender, 50 N. C. 351; Williams v. McComb, 38 N. C. 450; Threadgill v. Ingram, 23 N. C. 577; Watson v. Ogburn, 22 N. C. 353; Montgomery v. Wynns, 20 N. C. 667; Zollicoffer v. Zollicoffer, 20 N. C. 574; Miller v. Williams, 19 N. C. 500. See Springs v. Hopkins, 171 N. C. 486, 88 SE 774 (where limitations over upon a definite failure of issue were sustained, over the objection that they conflicted with the rule against perpetuities, but that rule was considered by the court with reference only to its application to the preceding estate and not to the limitations over).

Oh.—Stevenson v. Evans, 10 Oh. St. 307.

Pa.—Miller's Estate, 145 Pa. 561, 22 A 1044; Snyder's App., 95 Pa. 174; Middleswarth v. Blackmore, 74 Pa. 414; Berg v. Anderson, 72 Pa. 87; Taylor v. Taylor, 63 Pa. 481, 3 AmR 565; Nicholson v. Bettle, 57 Pa. 384; Bedford's Appeal, 40 Pa. 18; Rapp v. Rapp, 6 Pa. 45; De Haas v. Bunn, 2 Pa. 335, 44 AmD 201; Kelso v. Dickey, 7 Watts & S. 279; Deihl v. King, 6 Serg. & R. 29, 9 AmD 407; Winebrener's Est., 15 Pa. Co. 289; Scull's Estate, 9 Pa. Co. 347; Bentley v. Kaufman, 12 Phila. 435; Lovett v. Lovett, 10 Phila. 537.

R. I.—In re Tyler, 30 R. I. 590, 76 A 661; De Wolf v. Middleton, 18 R. I. 810, 26 A 44, 31 A 271, 31 LRA 146; Burrough v. Foster, 6 R. I. 534. See Arnold v. Brown, 7 R. I. 188 (dictum).

S. C.—Selman v. Robertson, 46 S. C. 262, 24 SE 187; Brummet v. Barber, 20 S. C. L. 543; Matthis v. Hammond, 27 S. C. Eq. 399; Badger v. Harden, 27 S. C. Eq. 147; Perry v. Logan, 26 S. C. Eq. 202; Terry v. Brunson, 18 S. C. Eq. 78; Hull v. Hull, 21 S. C. Eq. 174; Davidson v. Ruff, 11 S. C. Eq. 140; Cordes v. Ardrian, 10 S. C. Eq. 154; Mazyck v. Vanderhorst, 8 S. C. Eq. 48 note; Milledge v. Lamar, 4 S. C. Eq. 617; Tucker v. Stevens, 4 S. C. Eq. 532; Clifton v. Haig, 4 S. C. Eq. 330; Dunlap v. Dunlap, 4 S. C. Eq. 305; Cudworth v. Thompson, 3 S. C. Eq. 256, 4 AmD 617; Jones v. Price, 3 S. C. Eq. 165; Logan v. Ladson, 1 S. C. Eq. 271.

Tenn.—Armstrong v. Douglass, 89 Tenn. 219, 14 SW 604, 10 LRA 85; Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640; Booker v. Booker, 5 Humphr. 505; Williams v. Williams, 10 Heisk. 566; Turner v. Ivie, 5 Heisk. 222; Bramlet v. Bates, 1 Sneed 554; Williams v. Turner, 10 Yerg. 287.

Vt.—In re Wells, 69 Vt. 388, 38 A 83.

Va.—Randolph v. Wright, 81 Va. 608; Elys v. Wynne, 22 Gratt. (63 Va.) 224; Bells v. Gillespie, 5 Rand. (26 Va.) 273; Didlake v. Hooper, Gilm. (21 Va.) 194; Gresham v. Gresham, 6 Munf. (20 Va.) 187; Timberlake v. Graves, 6 Munf. (20 Va.) 174; Higgenbotham v. Rucker, 2 Call (6 Va.) 313; Dunn v. Bray, 1 Call (5 Va.) 338.

W. Va.—McCreery v. Johnston, 90 W. Va. 80, 110 SE 464.

Eng.—In re Lowman, [1895] 2 Ch. 348; In re Sanders, L. R. 1 Eq. 675; Stratford v. Powell, 1 Ball & B. 1; Lewis v. Templer, 33 Beav. 625, 55 Reprint 511; Taylor v. Clarke, 2 Eden 202, 28 Reprint 875; Baker v. Lucas, 1 Molloy 481; Pinbury v. Elkin, 1 P. Wms. 563, 24 Reprint 518; Rackstraw v. Vile, 1 Sim. & St. 604, 1 EngCh 604, 57 Reprint 238; Wilkinson v. South, 7 T. R. 555, 101 Reprint 1129.

See Ide v. Ide, 5 Mass. 500 (dictum).

Compare In re Rousseau, 48 S. D. 501, 205 NW 222 (treating a limitation over upon death without issue as good, apparently construing it as meaning failure of issue upon the death of the first taker).

"If the devise over is upon a failure of issue at a particular time fixed, as at the time of the death of the first taker, the gift over is good by way of executory devise; for it is not liable to the objection of remoteness, and does not tend to a perpetuity." Burrough v. Foster, 6 R. I. 534, 539.

[a] **Principle applied.**—A trust deed conveying property to trustees for the use of the grantor's children, with a limitation over in case all the children died leaving no issue then surviving, is not void for remoteness, since the word "children," in the absence of anything in the instrument indicating that the word was used with a different meaning, refers only to such persons as are in life when the deed is executed and delivered, and therefore did not include after-born children. True Real Est. Co. v. True, 115 Me. 533, 99 A 627.

"Definite failure of issue" defined see Definite 18 C. J. p 466 text and note 69.

3. Forman v. Troup, 30 Ga. 496, 498; Winebrener's Est., 15 Pa. Co. 289; Trickey v. Trickey, 3 Myl. & K. 560, 10 EngCh 560, 40 Reprint 213. Compare Egbert v. Schultz, 29 Ind. 242 (holding that a limitation over of real estate in case the heirs of A's body living at her death shall die before reaching the age of twenty-one is not void if A leaves no heirs of her body, but takes effect at her death).

"A devise on failure of issue within a life in being, and 21 years is good. . . . It need not be at the death of the first taker." Forman v. Troup, supra.

[a] **Principle applied.**—A limitation over of property given by will in case the first takers, grandchildren of the testator, should die "without leaving any children or the issue of any deceased child living at their death," or "if leaving such child or issue, all of them shall die under the age of twenty-one years, without issue," is not void for remoteness; the court, pointing out that in the first contingency the failure of issue of the grandchildren must certainly be determined at their death, said: "The alternative contingency . . . must as certainly happen within the period of twenty-one years after the death of the grandchild. The case is, perhaps, anomalous, because it is entirely possible that the daughter of the deceased grandchild (whose share is now in dispute) may marry and have a child and die in her minority, and that the child shall also die within twenty-one years after the death of its grandparent. We shall then have representatives of two generations, both of them born after the death of the testator, and both of them dying within the time prescribed by the rule. This possibility was noted in the adjudication, but inasmuch as it must happen, if at all, within twenty-one years after the end of a life which was in being at the death of the testator, it cannot impair the validity of the limitation." Winebrener's Est., 15 Pa. Co. 289.

4. See cases infra this note. But see Tator v. Tator, 4 Barb. (N. Y.) 431 (refusing to apply the principle stated in the text, except where the devise over to a person in being is of a life estate only). And see cases infra notes 7, 8, failing to admit the exception stated in the text.

[a] **"A limitation over for life to one in esse, after a dying without issue,** may be good. . . . Because the future limitation being only for life, of one in esse, it must take effect during that life or not at all, and therefore the failure of issue in that case, is confined to the compass of a life in being." Biscoe v. Biscoe, 6 Gill & J. (Md.) 232, 238. See to same effect Trafford v. Boehm, 3 Atk. 440, 26 Reprint 1054; Roe v. Jeffery, 7 T. R. 589, 101 Reprint 1147; Doe v. Lyde, 1 T. R. 593, 99 Reprint 1269. See also Ide v. Ide, 6 Mass. 500; Tator v. Tator, 4 Barb. (N. Y.) 431 (dicta).

[b] **A limitation over in fee** to persons in being at the creation of the estate, upon the failure of issue of the preceding taker, has been held not obnoxious to the rule against perpetuities, where "it is evident the testatrix contemplated the remainder to vest in them during their lives." Woodley v. Findlay, 9 Ala. 716, 720.

5. In re Lowman, [1895] 2 Ch. 348.

beyond lives in being,[6] is not obnoxious to that rule. However, a limitation or gift over which is to take effect upon a failure of issue that may occur at a period beyond that specified by the rule,[7] as upon an indefinite failure of issue, that is, a failure whenever it occurs at any time in the future,[8] may not vest within the period of the rule and consequently is void for remoteness,[9] except, in the case of real property, where the preceding estate is construed as an estate tail, upon the expiration of which the limitation over is to take effect as a remainder;[10] but in those jurisdictions in which estates tail are

6. See cases infra this note.

[a] **Executory bequest of slave.**—(1) An executory bequest of a male slave upon condition that the first taker should die without heirs of his body has been held not obnoxious to the rule against perpetuities, the court saying that, although, in general, a limitation over upon failure of issue is too remote, "in this case, the subject of the bequest, the thing given, is a negro man, a life in being, and the limitation over could never by possibility take effect, but in his life-time. May it not therefore be a reasonable construction to confine it to a failure of issue during a life in being, the life-time of the negro man himself, the subject of the bequest?" Biscoe v. Biscoe, 6 Gill & J. (Md.) 232, 239. See Royall v. Eppes, 2 Munf. (61 Va.) 479 (applying the principle to an executory bequest of slaves, both males and females, so far as appears from the opinion, where the increase of the slaves was not included in the bequest). (2) On the other hand, it has been said of a similar bequest that "this is in substance a limitation over after a dying without issue. The limitation is too remote." Matthews v. Daniel, 5 N. C. 42. (3) And when the legacy is a female slave and her increase, the reason given for exempting the executory limitation from the operation of the rule has no application, and the limitation is void. Hatton v. Weems, 12 Gill & J. (Md.) 832 [dist Biscoe v. Biscoe, supra].

Life of slave as measuring period of postponement of vesting see supra § 6 text and notes 73–75.

Gift over of life estate to living person see supra note 4.

Future interests in estates for life or term of years not exceeding twenty-one see supra § 36 text and notes 65–67.

7. Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ill.—Nevitt v. Woodburn, 190 Ill. 283, 60 NE 500; Post v. Rohrbach, 142 Ill. 600, 32 NE 687.

Ky.—Beall v. Wilson, 146 Ky. 646, 143 SW 55; Armstrong v. Armstrong, 14 B. Mon. 269; Atty. Gen. v. Wallace, 7 B. Mon. 611.

Md.—Ortman v. Dugan, 130 Md. 121, 100 A 82.

Mass.—Sears v. Russell, 8 Gray 86.

N. J.—Merkel v. Capone, 81 N. J. Eq. 282, 87 A 95.

Pa.—In re Penrose, 257 Pa. 231, 101 A 319.

Eng.—Hodson v. Ball, 14 Sim. 558, 37 EngCh 558, 60 Reprint 474.

And see cases infra note 8.

[a] **Definite failure of issue which may occur beyond period of rule.**—A limitation over to take effect on the death without issue then living of the children of the first taker of property is void for remoteness, since it is made to depend upon a contingency which might occur after the expiration of the period within which the rule against perpetuities requires an estate to become absolutely vested. Nevitt v. Woodburn, 190 Ill. 283, 60 NE 500; Ortman v. Dugan, 130 Md. 121, 100 A 82.

8. U. S.—Maxwell v. Call, 18 F. Cas. No. 9,323, 2 Brock. 119.

Ala.—Landman v. Snodgrass, 26 Ala. 593; Darden v. Burns, 6 Ala. 362. See Isbell v. Maclin, 24 Ala. 315 (dictum).

Ark.—Watkins v. Quarles, 23 Ark. 179; Moody v. Walker, 3 Ark. 147.

Ga.—Forman v. Troup, 30 Ga. 496; Robinson v. McDonald, 2 Ga. 116.

Ill.—O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Carpenter v. Hubbard, 263 Ill. 571, 105 NE 688.

Ind.—Huxford v. Milligan, 50 Ind. 542.

Ky.—Miller v. Miller, 151 Ky. 563, 152 SW 542.

Md.—Pennington v. Pennington, 70 Md. 418, 17 A 329, 3 LRA 816; Comegys v. Jones, 65 Md. 317, 4 A 567; James v. Rowland, 52 Md. 462; Josetti v. McGregor, 49 Md. 202; Wallis v. Woodland, 32 Md. 101; Ridgely v. Bond, 18 Md. 433; Tongue v. Nutwell, 13 Md. 415; Hatton v. Weems, 12 Gill & J. 832; Biscoe v. Biscoe, 6 Gill & J. 232; State v. Mann, 3 Harr. & J. 238; Davidge v. Chaney, 4 Harr. & M. 393; Jackson v. Dashiel, 3 Md. Ch. 257; Usilton v. Usilton, 3 Md. Ch. 36. Compare Johnson v. Negro Lish, 4 Harr. & J. 441, 442 (holding that a provision in a deed of gift of a chattel, that in case of the death of the donee without issue the chattel should return to the donor, was void for remoteness on the ground that "a limitation of a chattel, to take effect after an indefinite failure of issue, tends to a perpetuity, and is null and void").

Mass.—Hawley v. Northampton, 8 Mass. 3, 5 AmD 66; Albee v. Carpenter, 12 Cush. 382; Terry v. Briggs, 12 Metc. 17. See Gilkie v. Marsh, 186 Mass. 336, 71 NE 703; Brattle Square Chruch v. Grant, 3 Gray 142, 63 AmD 725 (dicta).

Miss.—Gully v. Neville, 55 S 289; Adams v. Farley, 18 S 390; Powell v. Brandon, 24 Miss. 343.

Mo.—Riley v. Jaeger, 189 SW 1168; State v. Tolson, 73 Mo. 320; Chism v. Williams, 29 Mo. 288.

N. H.—Merrill v. American Baptist Missionary Union, 73 N. H. 414, 62 A 647, 111 AmSR 632, 3 LRANS 1143; Hall v. Chaffee, 14 N. H. 215.

N. J.—Morehouse v. Cotheal, 22 N. J. L. 430; Den v. Allaire, 20 N. J. L. 6; Davies v. Steele, 38 N. J. Eq. 168; Condict v. King, 13 N. J. Eq. 375; Fairchild v. Crane, 13 N. J. Eq. 105; Cleveland v. Havens, 13 N. J. Eq. 101, 78 AmD 90.

N. Y.—Auburn Theological Seminary v. Kellogg, 16 N. Y. 83; Tator v. Tator, 4 Barb. 431; Hill v. Hill, 4 Barb. 419; Paterson v. Ellis, 11 Wend. 259; Moffat v. Strong, 10 Johns. 12; Macomb v. Miller, 9 Paige 265; Ferris v. Gibson, 4 Edw. 707; Conklin v. Conklin, 3 Sandf. Ch. 64.

N. C.—Porter v. Ross, 55 N. C. 196; Ferrand v. Howard, 38 N. C. 381; Weatherly v. Armfield, 30 N. C. 25; Hollowell v. Kornegay, 29 N. C. 261; Cox v. Marks, 27 N. C. 361; Brantley v. Whitaker, 27 N. C. 225; State v. Skinner, 26 N. C. 57; Brown v. Brown, 25 N. C. 134; Rice v. Satterwhite, 21 N. C. 69; Bailey v. Davis, 9 N. C. 108; Davidson v. Davidson, 8 N. C. 163; Matthews v. Daniel, 5 N. C. 42; Matthews v. Daniel, 3 N. C. 346; Sutton v. Wood, 1 N. C. 202. See O'Neal v. Borders, 170 N. C. 483, 87 SE 340 (dictum).

Or.—Imbrie v. Hartrampf, 100 Or. 589, 198 P 521.

Pa.—Ledwith v. Hurst, 284 Pa. 94, 130 A 315; Hackney v. Tracy, 137 Pa. 53, 20 A 560; Greenawalt v. Greenawalt, 71 Pa. 483; Vaughan v. Dickes, 20 Pa. 509; Toman v. Dunlop, 18 Pa. 72; Eichelberger v. Barnitz, 9 Watts 447; Train v. Fisher, 15 Serg. & R. 145; Schilling v. Kocher, 4 LancLRev 58.

R. I.—Cooke v. Bucklin, 18 R. I. 666, 29 A 840. See De Wolf v. Middleton, 18 R. I. 810, 26 A 44, 31 A 271, 31 LRA 146; Burrough v. Foster, 6 R. I. 534 (dicta).

S. C.—Mangum v. Piester, 16 S. C. 316; Mendenhall v. Mower, 16 S. C. 303; Curry v. Sims, 45 S. C. L. 489; Lyon v. Walker, 42 S. C. L. 307; Cox v. Buck, 39 S. C. L. 604; Norton v. Fripp, 28 S. C. L. 250; Guery v. Vernon, 10 S. C. L. 69; Moore v. Paul, 28 S. C. Eq. 358; Hay v. Hay, 24 S. C. Eq. 384; Barksdale v. Gamage, 24 S. C. Eq. 271; Lesly v. Collier, 24 S. C. Eq. 125; Shephard v. Shephard, 19 S. C. Eq. 142, 46 AmD 41; Adams v. Chaplin, 10 S. C. Eq. 265; Postell v. Postell, 8 S. C. Eq. 390; Mazyck v. Vanderhorst, 8 S. C. Eq. 48; Henry v. Felder, 7 S. C. Eq. 323.

Tenn.—Hamner v. Hamner, 3 Head. 398; Randolph v. Wendel, 4 Sneed 646; Bramlet v. Bates, 1 Sneed 554; Chester v. Greer, 5 Humphr. 26; Brooker v. Brooker, 5 Humphr. 505.

Va.—Nixon v. Rose, 12 Gratt. (53 Va.) 425; Deane v. Hansford, 9 Leigh (36 Va.) 253; Griffith v. Thomson, 1 Leigh (28 Va.) 321; Bells v. Gillespie, 5 Rand. (26 Va.) 273; Lynch v. Hill, 6 Munf. (20 Va.) 114; Williamson v. Ledbetter, 2 Munf. (16 Va.) 521; Wilkins v. Taylor, 5 Call (9 Va.) 150.

W. Va.—McCreery v. Johnston, 90 W. Va. 80, 110 SE 464.

Eng.—O'Mahoney v. Burdett, L. R. 7 H. L. 388; In re Thomas, [1921] 1 Ch. 306; In re Johnson, L. R. 2 Eq. 716; Doe v. Ewart, 7 A. & E. 636, 34 ECL 337, 112 Reprint 609; Boden v. Watson, Ambl. 398, 27 Reprint 266; Beauclerk v. Dormer, 2 Atk. 308, 26 Reprint 588; Candy v. Campbell, 8 Bligh N. S. 469, 5 Reprint 1017, 2 Cl. & F. 421, 6 Reprint 1213; Bigge v. Bensley, 1 Bro. Ch. 187, 28 Reprint 1074; Lanesborough v. Fox, Cas. t. Talb. 262, 25 Reprint 768; Windham v. Love, 2 Ch. Rep. 14, 21 Reprint 602, 1 Lev. 290, 83 Reprint 412; Harding v. Nott, 7 E. & B. 650, 90 ECL 650, 119 Reprint 1387; Bodens v. Galway, 2 Eden 297, 28 Reprint 912; Grey v. Montagu, 2 Eden 205, 28 Reprint 876; Love v. Wyndham, 1 Mod. 50, 86 Reprint 724; Bankes v. Holme, 1 Russ. 394 note, 46 EngCh 352, 38 Reprint 156; Burley v. Evelyn, 16 Sim. 290, 39 EngCh 290, 60 Reprint 885.

And see cases infra note 12.

[a] **"In the limitation of a term or other personal estate . . . a** disposition to take effect after failure of the heirs of the body or dying without issue generally, without other restriction, is too remote; for the law will no more admit of a perpetuity in one sort of estate or species of property than in another." Doe v. Ewart, 7 A. & E. 636, 646, 34 ECL 337, 112 Reprint 609.

[b] **If a limitation over upon indefinite failure of issue is construed as an executory devise,** which it cannot be if it is capable of taking effect as a remainder, it is void for remoteness. Vaughan v. Dickes, 20 Pa. 509; Eichelberger v. Barnitz, 9 Watts (Pa.) 447; Bells v. Gillespie, 5 Rand. (26 Va.) 273.

"Indefinite failure of issue" defined see Indefinite 31 C. J. p 415 text and note 28.

9. Possibility of nonvesting renders limitation void see supra § 11.

10. Hawley v. Northampton, 8 Mass. 3, 5 AmD 66; De Wolf v. Middleton, 18 R. I. 810, 26 A 44, 31 A 271, 31 LRA 146. See Forman v. Troup, 30 Ga. 496; Ide v. Ide, 5 Mass. 500 (dicta). Compare Arnold v. Brown, 7 R. I. 188 (apparently conceding the validity of the ultimate limitation over); Doe v. Ewart, 7 A. & E. 636, 34 ECL 337, 112 Reprint 609 (apparently assuming the validity of such limitation over as a remainder if it had not been destroyed by barring the entail).

Remainders after estates tail see supra § 35.

enlarged into fees by statute,[11] the limitation over could take effect only as an executory devise or shifting use and is therefore void for remoteness.[12]

[§ 44] **B. Limitations to Classes[13]—1. In General—a. Rule Stated.** A gift or limitation of an interest or estate in property to a class whose members will necessarily be ascertained and take vested interests, if at all, within, or at the end of, the period specified by the rule against perpetuities is not obnoxious to that rule;[14] but, except in the case of independent limitations to the members of a class,[15] a possibility that any one or more members may come within the description of the class and take a share or interest, or, having been within its description, cease to be so and thus fail to take a share or interest, at a time beyond that prescribed by the rule, will render the entire gift void,[16] inasmuch as the number of persons who will take and, consequently, the size of their respective shares may not be determined within the permitted period and the vesting of the estate may accordingly be unlawfully postponed.[17] In other words, if a gift or limitation is void as to any of the class to which it is given it is void as to all;[18] and, similarly, it seems that if a gift to a class and a designated individual in common is void as to any of the class it is void also as to such individual.[19]

[§ 45] **b. Vesting Postponed until Ascertainment**

11. See Estates § 58.

12. Ga.—Hertz v. Abrahams, 110 Ga. 707, 36 SE 409, 50 LRA 361.

Ind.—Quilliam v. Union Trust Co., 194 Ind. 521, 142 NE 214; Huxford v. Milligan, 50 Ind. 542.

Miss.—Jordan v. Roach, 32 Miss. 481.

N. Y.—Auburn Theological Seminary v. Kellogg, 16 N. Y. 83; Wilson v. Wilson, 32 Barb. 328, 20 HowPr 41; Tator v. Tator, 4 Barb. 431.

Va.—Bells v. Gillespie, 5 Rand. (26 Va.) 273; Carter v. Tyler, 1 Call (5 Va.) 165.

And see cases infra this note.

[a] **In Pennsylvania** (1) it was formerly held that a gift to one with a limitation over in the event of the indefinite failure of his issue created an estate tail in the first taker, and the limitation over took effect as a remainder and consequently was not void for remoteness. Stone v. McMullen, 10 WklyNC 541. See Taylor v. Taylor, 63 Pa. 481, 3 AmR 565 (dictum). But see Vaughan v. Dickes, 20 Pa. 509; Eichelberger v. Barnitz, 9 Watts 447 (in both of which such limitations over are treated as executory devises, and indestructible by the tenant in tail, and therefore void for remoteness). (2) Since the Act of April 27, 1855, repealing the statute de donis conditionalibus and converting estates tail into fees simple, however, it was said that the estate given to the first taker is converted into a fee simple, and that such a gift over on failure of issue, which could then take effect only as an executory limitation, is void for remoteness. Robinson's Est., 149 Pa. 418, 24 A 297; Hoff's Est., 147 Pa. 636, 23 A 890; Reinoehl v. Shirk, 119 Pa. 108, 12 A 806.

Executory interests after estates tail see supra § 35 text and notes 54-57.

13. Gifts to classes in general see Estates § 138; Wills [40 Cyc 1473 et seq].

Limitations to unborn persons see infra §§ 51-53.

14. Jemison v. Smith, 37 Ala. 185; Berry v. Lebus, 56 Cal. A. 378, 205 P 471; Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809; Bates v. Spooner, 75 Conn. 501, 54 A 305; Leake v. Robinson, 3 Meriv. 363, 36 Reprint 979. See In re Hunter, L. R. 1 Eq. 295 (apparently applying the principle). And see cases infra § 45 text and note 21; and § 46 text and notes 25, 28.

Cross references:

Effect of invalidity of gift to one member of class in general see Wills [40 Cyc 1421 text and note 61].

Limitations to children and grandchildren see infra §§ 48-53.

Necessity of ascertainment of beneficiaries of gift or limitation see supra § 13.

Period prescribed by rule see supra § 5.

15. See infra § 47.

16. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015.

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.

Md.—Goldberg v. Erich, 142 Md. 544, 121 A 365; Albert v. Albert, 68 Md. 352, 12 A 11; Goldsborough v. Martin, 41 Md. 488.

Mass.—Hills v. Simonds, 125 Mass. 536.

Oh.—Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327.

Pa.—In re Gerber, 196 Pa. 366, 46 A 497; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Williamson's Est., 3 Pa. Co. 239.

Eng.—Pearks v. Moseley, 5 App. Cas. 714; In re Game, [1907] 1 Ch. 276; Bentinck v. Portland, 7 Ch. D. 693; Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831; Seaman v. Wood, 22 Beav. 591, 52 Reprint 1236; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Leake v. Robinson, 2 Meriv. 363, 35 Reprint 979; Griffith v. Pownall, 13 Sim. 393, 36 EngCh 393, 60 Reprint 152; Porter v. Fox, 6 Sim. 485, 9 EngCh 485, 58 Reprint 676; In re Slark, 21 Wkly. Rep. 165.

And see cases infra notes 17-19; § 48 text and notes 42, 43; and §§ 51-53.

"Where the gift is a unit, because to a class, its validity will depend upon the eligibility of every member of that class, prospective as well as present, and possible as well as actual, to take under the rule." Williamson's Est., 3 Pa. Co. 239, 242.

[a] **"The reason** (1) why a gift to a class, as children or the like, is void when it may embrace some object too remote, is this:—there is no intention to give to any number short of the whole class; and, therefore, if the prescribed limit may be transgressed before the class is filled up, the whole gift fails, because it does not necessarily take effect within the prescribed period." Dungannon v. Smith, 12 Cl. & F. 546, 575, 8 Reprint 1523. Compare Leake v. Robinson, 2 Meriv. 363, 35 Reprint 979 (where the Master of the Rolls said: "I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests, what he never intended them to be, viz. a series of particular legacies to particular individuals"). (2) The reason for the principle is the difficulty of determining what would have been the intention of the donor if he had been advised of the existence of the rule against perpetuities, and what different disposition of his property he would have made in such case. Williamson's Est., 3 Pa. Co. 239.

Limitation to class which may increase or diminish see infra §§ 45, 46.

Limitations to unborn children and grandchildren see infra §§ 51-53.

17. Necessity of ascertainment of interests see supra § 14.

18. Md.—Goldberg v. Erich, 142 Md. 544, 121 A 365; Bowerman v. Taylor, 126 Md. 203, 94 A 652.

Miss.—Caldwell v. Willis, 57 Miss. 555.

Pa.—Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565.

Eng.—Gooch v. Gooch, 14 Beav. 565, 51 Reprint 402; Cattlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319; Porter v. Fox, 6 Sim. 485, 9 EngCh 485, 58 Reprint 676; Cromek v. Lumb, 3 Y. & C. Exch. 565, 160 Reprint 826.

Austr.—Reid v. Earle, 18 Austr. C. L. R. 493.

And see cases supra note 16; infra § 45 text and note 22; and § 46 text and notes 26, 27.

19. See cases infra this note.

[a] **Thus** (1) it has been held that, where a gift is limited to a class of persons by descriptive terms and to an individual by name, as tenants in common, the gifts to all are interdependent and all the beneficiaries together form a class, so that the gift to the individual, as well as to the described class, is void for remoteness if any member of the class may come within its description and take a share at a time beyond that specified by the rule against perpetuities. Porter v. Fox, 6 Sim. 485, 9 EngCh 485, 58 Reprint 676. (2) In a later case involving a similar limitation, but which was decided on other grounds, the court said, as to the validity of the gift to the designated individual: "If it had been necessary to deal with that argument, I confess that I should have some difficulty in following the decision in Porter v. Fox, supra, which seems to me not sustainable on an accurate view of what was said by Sir William Grant in Leake v. Robinson, 2 Meriv. 363, 35 Reprint 979. That great Judge carefully draws the distinction between a gift to an individual and a gift to a class. . . . I only wish to be understood as suggesting that, if the question should occur for decision, it should not be considered as concluded by authority. . . . Where there is a clear gift to an individual, and a gift to a class of persons who are to take along with him, the individual and each member of the class to take as tenants in common, what remains to be shewn is how, if the class be so described as that the gift to them cannot take effect, the gift to the individual should therefore also fail, any more than if, instead of the gift being to an individual and to a class of persons to take along with him, the gifts were to the individual and any other number of individuals to take with him as tenants in common, as to which other individuals the gift might happen to fail or be given in an ineffectual manner." James v. Wynford, 1 Smale & G. 39, 58, 65 Reprint 18. But see Gray Perp. § 380 (where this criticism is said to be "without just reason"). (3) Thereafter, however, a devise to designated grandsons by name and to any others thereafter born was held void for remoteness as to all, the Master of the Rolls (Sir John Romilly) saying: "I am . . . of opinion, upon the best consideration that I can give to this will, that the existing grandsons formed only a portion of a class," and inasmuch as the class might not be ascertained until a time too remote, the gift to them was void. Webster v. Bodding-

of Membership. In accordance with the principles governing the validity of limitations to classes,[20] where an interest or estate limited to a class is not to vest until the ascertainment of the individuals who will comprise the class, it is not too remote if the membership of the class will necessarily be ascertained within the period prescribed by the rule against perpetuities,[21] but if the membership of such class may possibly remain uncertain for a time beyond that specified by the rule the gift or limitation as a whole is void for remoteness.[22]

[§ 46] **c. Interest Vested in Membership Liable To Increase or Diminish.** In accordance with the principles governing the validity of limitations to classes,[23] where an interest or estate is or becomes vested[24] in the then existing members of a class to which it is limited, but the class is open to allow any persons afterward coming within its description to be included and take interests, thereby diminishing or in part divesting the shares of the original members, the gift or limitation is not too remote if the persons to take and, therefore, the number and size of the respective shares will necessarily be ascertained within the period prescribed by the rule,[25] but if the number of shares may possibly not be ascertained within such period the limitation is obnoxious to the rule.[26] On the other hand, although the extreme limits of a class are necessarily ascertainable within the period of the rule, if the individual members of it who will be within its description at the time of vesting or distribution and be entitled to take shares or interests may possibly not be ascertained within such period, the whole limitation is void for remoteness, inasmuch as the number of members may be diminished and the size of the respective shares be increased at a time beyond the

ton, 26 Beav. 128, 139, 53 Reprint 845.

Independent limitations see infra § 47.

20. See supra § 44.

21. Haughn v. Haughn, 296 Ill. 305, 129 NE 807; Drury v. Drury, 271 Ill. 336, 111 NE 140; Goodier v. Johnson, 18 Ch. D. 441; Lachlan v. Reynolds, 9 Hare 796, 41 EngCh 796, 68 Reprint 738.

[a] **Illustrations.**—(1) An executory devise of property to such of the testator's children as should be living at the time of the death or second marriage of his widow is not void for remoteness, inasmuch as it will become vested not later than the termination of a life in being at the testator's death. Lachlan v. Reynolds, 9 Hare 796, 41 EngCh 796, 68 Reprint 738. (2) "A gift to a class which will take effect, if at all, as a legal remainder of real estate at the termination of a life in being is not within the rule against perpetuities." Drury v. Drury, 271 Ill. 336, 339, 111 NE 140.

22. Ill.—Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777; Pitzel v. Schneider, 216 Ill. 87, 74 NE 779; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37.

Ky.—U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993.

Mass.—Fosdick v. Fosdick, 6 Allen 41.

N. J.—Stout v. Stout, 44 N. J. Eq. 479, 15 A 843.

R. I.—Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 101 A 430; Williams v. Herrick, 19 R. I. 197, 32 A 913.

Eng.—Blight v. Hartnoll, 19 Ch. D. 294; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186; Boughton v. Boughton, 1 H. L. Cas. 406, 9 Reprint 815.

[a] **Illustration.**—A devise of property to trustees upon trust that, when any son of the testator's two nephews should have attained the age of twenty-five years, the property should be divided into as many equal lots as there should be sons of such nephews then living, and such shares respectively paid over to them, is void for remoteness, inasmuch as the son who should first attain the age of twenty-five years might not do so within the period prescribed by the rule against perpetuities. Boughton v. Boughton, 1 H. L. Cas. 406, 9 Reprint 815.

Limitations to unborn persons to vest on attaining specified age see infra § 51 text and note 64.

23. See supra § 44.

24. Contingent character of so-called vested interest see infra note 26.

25. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015.

Conn.—Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809. Compare Hoadley v. Beardsley, 89 Conn. 270, 279, 93 A 535 (where a will provided that twenty-five years after the testatrix's death the residuary estate should be equally divided among the legal "issue" of certain named nephews and a niece of the testatrix, and the court, construing the word "issue" to mean children, said: "The gift over to the children of the nephews and niece vested in interest immediately upon the death of the testatrix, with the right of enjoyment postponed for a period of twenty-five years. It vested in the children who were then living as members of a class, which would open to admit other members, as persons answering the class description should thereafter, and until the termination of the twenty-five year period, be born," and the gift was held valid; but since all of such children would necessarily be born within lives in being at the testatrix's death, it would seem that the class could not remain open a longer period than that prescribed by the rule against perpetuities).

Ind.—Swain v. Bowers, (A.) 158 NE 598.

Md.—Bowerman v. Gibson, 144 Md. 1, 123 A 573.

Mass.—Pratt v. Alger, 136 Mass. 550; Hills v. Simonds, 125 Mass. 536.

N. Y.—Seitz v. Faversham, 141 App. Div. 903, 126 NYS 801 [mod on other grounds 205 N. Y. 197, 98 NE 385]; Macomb v. Miller, 9 Paige 265.

Eng.—Baldwin v. Rogers, 3 De G. M. & G. 649, 52 EngCh 506, 43 Reprint 255.

[a] **Thus** a devise of property to the testator's nephews and nieces, children of his brothers and sisters, for their lives in equal shares, with remainder to their children, is not too remote where the nephews and nieces were all alive at the testator's death, inasmuch as the latest period at which the estate could vest in their children is at the end of the lives of their respective ancestors, the tenants for life; but a limitation to the children of after-born nephews or nieces would be void for remoteness, for the share of each such child would not vest until the death of his parent who was not in being at the death of the testator, and this would not necessarily be within the period of the rule against perpetuities. Hills v. Simonds, 125 Mass. 536.

Limitation to children of living person see infra § 51.

Limitation to grandchildren of testator or other person not living see infra § 52 text and notes 65–70.

26. Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Ky.—Laughlin v. Elliott, 202 Ky. 433, 436, 259 SW 1031 [cit Cyc].

Mass.—Minot v. Doggett, 190 Mass. 435, 77 NE 629.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760.

Okl.—McLaughlin v. Yingling, 90 Okl. 159, 213 P 552.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Eng.—Bentinck v. Portland, 7 Ch. D. 693; Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831; Whitehead v. Rennett, 22 L. J. Ch. 1020.

Austr.—Reid v. Earle, 18 Austr. C. L. R. 493.

But see Belfield v. Booth, 63 Conn. 299, 27 A 585 (dictum to the contrary).

[a] **Illustrations.**—(1) A gift of a residuary estate to the testator's sons equally, as and when they should respectively attain twenty-four years of age, is a gift to a class which cannot be ascertained until all the members of it shall have attained twenty-four, and therefore the gift is void for remoteness. Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831. (2) A gift of property to a testator's widow for life or until her remarriage, with remainder to those children of a designated living person who should attain the age of twenty-five years, is void for remoteness as to such remainder, for at the death or remarriage of the widow the class of remaindermen would close if any of them had then attained the age of twenty-five, and such class might include children under the age of four years who consequently would not attain the age of twenty-five within the period allowed by the rule against perpetuities. Reid v. Earle, 18 Austr. C. L. R. 493.

[b] **Contingent character of technically "vested" interests.**—(1) "Gifts over to a class, where the class is open until some future time, are technically vested (unless they are made expressly subject to some other contingency), if there be one or more of the class in esse at the time of the making of the gift. Nevertheless, from the standpoint of the perpetuity rule, they stand on the same footing as purely contingent gifts, since the final membership of the class, and, hence, the actual ascertainment of the persons who will take, will not be determined until the time fixed for the closing of the class. And when the time fixed for the closing of the class is so remote as to conflict with the perpetuity rule, the gift is void." McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 665, 121 A 760. (2) "The placing this class of remainders under the head of vested remainders is to some extent artificial. Such a remainder is vested, in so far as it is certain that whenever and however the preceding estate determines there will be one or more persons who will surely come into possession of the land, but in so far as it is not certain what the number of those persons will be, or in other words as the number and consequent size of the shares is contingent, the remainder cannot be truly said to be in all respects vested. The imperfect character of the vesting in this class of cases is brought out by the application of the rule against perpetuities. Interests which are truly and in all respects vested, never come within the rule, but when there is

permitted period;[27] but if the number of shares will necessarily be determined within the period of the rule the limitation is not objectionable.[28]

[§ 47] **2. Independent Limitations.** When interests or estates in property are limited to the members of a class of persons in such terms that the amount or extent of the interest given to each member is unaffected by the number of members or the existence or nonexistence of the other members,[29] as where a definite sum of money is given to each of the persons who may be or come within a certain description or designation,[30] then a gift or share which will necessarily vest, if at all, in one member of the class within the limits specified by the rule against perpetuities is not rendered objectionable to that rule by the remoteness of a gift to another member.[31]

Limitations to independent classes. On the same principle, when interests or estates are limited to distinct classes, in each of which the number of members or shares is independent of the number in the others, although all the classes may be designated by the same general words of limitation, the validity of a limitation to a class in all of whose members the interest or estate limited will necessarily vest within the permitted period is unaffected by the remoteness of the gift to another of the classes.[32]

[§ 48] **3. Limitations to Persons Attaining Specified Age—a. In General.** When property is limited to such of the children or grandchildren of a designated living person as attain a specified age, and a living member of the class has attained that age at the time at which the limitation is created, the gift is not too remote,[33] the class consisting only of those children or grandchildren who are then alive,[34] so that they must attain the specified age, if at all, within lives (their own) in being at the creation of the estate.[35] A limitation to take effect at an age not greater than twenty-one years is not too remote when made to the children of a living person,[36] or to the grandchildren of a testator by whose will the gift is made or of another person dead at the time the estate is created,[37] although no member of the class then living has attained the specified age at that time, for, the class closing when any one member reaches the age specified,[38] it is consequently impossible for the ascertainment of the individuals who will attain the prescribed age to be postponed more than twenty-one years after lives (of their parents) in being at the creation of the estate.[39] And when the age at which the limitation is to vest

a gift in remainder to a class which has become vested in a living person, if the number of persons who will finally constitute the class may not be determined until a remote period, the remainder is void. . . . This is apparently an exception to the rule that vested interests are never too remote, but in truth remainders of this sort, although called vested are not really so; at a certain point, and on the point which the rule against perpetuities touches, they are, in fact, contingent." Gray Perp. § 110 a.

Limitation to children of person not in being see infra § 53.

Limitation to grandchildren of living person see infra § 52 text and note 72.

27. Blight v. Hartnoll, 19 Ch. D. 294. And see cases infra § 50 note 50.

[a] **Thus,** where testatrix directed the accumulation of income until existing encumbrances upon certain property should be paid off, the property then to be divided among such of her grandchildren as might then be surviving, although all of her grandchildren would necessarily be born within lives in being, the division of the property under the terms of the will might not be made within the period of the rule against perpetuities, and consequently the identity of the beneficiaries, the then surviving grandchildren, might not be ascertained within such period, so that the number and size of the respective shares might remain uncertain and the vesting of them be thereby postponed beyond the prescribed period. Blight v. Hartnoll, 19 Ch. D. 294.

28. Coleman v. Coleman, 69 Kan. 39, 76 P 439; and cases infra § 48 text and notes 33-41.

Gifts to children and grandchildren see infra § 48; and §§ 51, 52.

29. Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809; Bowerman v. Taylor, 126 Md. 203, 94 A 652; Wilkinson v. Duncan, 30 Beav. 111, 115, 54 Reprint 831; Cattlin v. Brown, 11 Hare 372, 377, 45 EngCh 367, 68 Reprint 1319; and cases infra note 30. See also Van Syckel's Est., 9 Pa. Dist. & Co. 485 (apparently applying the principle stated in the text).

"Where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law." Cattlin v. Brown, supra [quot Wilkinson v. Duncan, supra].

30. Wilkinson v. Duncan, supra; Storrs v. Benbow, 3 De G. M. & G. 390, 52 EngCh 304, 43 Reprint 153.

[a] **Illustration.**—A testamentary gift of two thousand pounds to each of the testator's daughters as and when they should respectively attain twenty-four years of age is valid as to such of the daughters as were three years of age or over at the death of the testator, but is void for remoteness as to the other daughters. Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831.

31. Effect of remoteness of limitation upon preceding and subsequent estates see infra §§ 59, 60.

32. Iowa.—Woodard v. Woodard, 184 Iowa 1178, 169 NW 464.

Md.—Bowerman v. Taylor, 126 Md. 203, 94 A 652; Albert v. Albert, 68 Md. 352, 12 A 11.

Mass.—Minot v. Doggett, 190 Mass. 435, 77 NE 629; Dorr v. Lovering, 147 Mass. 530, 18 NE 412; Hills v. Simonds, 125 Mass. 536. But see Lovering v. Lovering, 129 Mass. 97; Sears v. Russell, 8 Gray 86 (in both of which the principle stated in the text appears to have been overlooked).

S. C.—Lowry v. Muldrow, 29 S. C. L. 241.

Eng.—In re Russell, [1895] 2 Ch. 698; Von Brockdorff v. Malcolm, 30 Ch. D. 172; Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831; Storrs v. Benbow, 3 De G. M. & G. 390, 52 EngCh 304, 43 Reprint 153; Catlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319; Knapping v. Tomlinson, 10 Jur. N. S. 626; Wilson v. Wilson, 4 Jur. N. S. 1076; Griffith v. Pownall, 13 Sim. 393, 36 EngCh 393, 60 Reprint 152.

N. S.—McDonald v. Jones, 40 N. S. 232.

[a] **Illustration.**—A devise of property to the testator's nephews and nieces, children of his living brothers and sisters, in equal shares for life, with remainder at their death to their children, is in effect a gift of a separate share to each nephew and niece for life, with remainders to their children respectively, and therefore the remainders to the children of those nephews and nieces who were living at the testator's death are valid, the membership of the classes being determined at the deaths of their respective parents, although a remainder to the children of an after-born nephew or niece would be too remote, such children being a class whose members could not be determined until the death of their parent, a person born after the testator's death, and therefore not necessarily within a life in being and twenty-one years thereafter. Hills v. Simonds, 125 Mass. 536.

33. Picken v. Matthews, 10 Ch. D. 264; Re Barker, 92 L. T. Rep. N. S. 831; Brownfield v. Earle, 17 Austr. C. L. R. 615. See also Re Whitten, 62 L. T. Rep. N. S. 391 (dictum). Compare Pitzel v. Schneider, 216 Ill. 87, 74 NE 779 (refusing to apply the principle stated in the text, where the will by which the limitation was made specifically negatived the closing of the class upon arrival of the first member at the specified age).

[a] **Children of two persons as tenants in common.**—Where property was devised to such of the children of A and the children of B as should attain the age of twenty-five years, and at the testator's death A had three living children all of whom had attained such age, and B had five infant children, the class was ascertained and the limitation was good as to A's three children and as to those of B's five children who should attain the age of twenty-five. Picken v. Matthews, 10 Ch. D. 264.

34. See Estates § 138; Wills [40 Cyc 1480 text and note 11].

35. Limitation vested in class whose membership may diminish but is necessarily ascertainable within period of rule see supra § 46 text and note 28.

36. In re James, 245 Pa. 118, 91 A 511. See to same effect Edgerly v. Barker, 66 N. H. 434, 31 A 900, 28 LRA 328.

Limitations to unborn children of living person see infra § 51 text and notes 56-60.

37. Otterback v. Bohrer, 87 Va. 548, 12 SE 1013.

Limitations to unborn grandchildren see infra §§ 52, 53.

38. See Estates § 138; Wills [40 Cyc 1480 text and note 11].

39. Limitation remaining contingent until ascertainment of membership valid if necessarily vesting

is greater than twenty-one years, even though no person is alive at the creation of the estate who has then attained that age, the limitation is good if the class consists of the children of a testator by whose will the gift is made or of another person dead at the creation of the estate,[40] for the class is closed and its members will attain the specified age, if at all, within lives (their own) then in being.[41] But when the class to whom an estate is limited upon attaining a specified age includes the grandchildren of a person living at the creation of the estate, whether the specified age be under or over twenty-one years,[42] or when it includes the children of a living person, or the grandchildren of one deceased leaving a child or children him surviving, and the specified age is greater than twenty-one years,[43] and no member of the class living at the creation of the limitation has then attained the age specified, the limitation is void for remoteness, inasmuch as the first member of the class to attain such age may be one born after the creation of the estate, in the case of such a limitation to children, or the child of such a one, in the case of a limitation to grandchildren.[44]

[§ 49] **b. When Youngest Child or Grandchild Attains Specified Age.** A fortiori, upon the principles governing the validity of limitations to persons attaining a specified age,[45] a limitation to the children of a person living at the creation of the estate, or to the grandchildren of any person, whether living or not at its creation, except when both parent and grandparent are then dead,[46] to take effect when the youngest of them reaches an age exceeding twenty-one years, is too remote;[47] but a limitation vesting upon the attainment of an age not exceeding twenty-one years by the youngest child of a person living at the creation of the estate or the youngest grandchild of one then deceased is not obnoxious to the rule against perpetuities.[48]

[§ 50] **c. Limitations Over to Children of Children Dying under Specified Age.**[49] When an interest or estate in property is limited to such of the children of a designated person as attain a specified age, a limitation over of the share of any child dying under that age to such of his children as attain the age is void for remoteness, even though the age specified does not exceed twenty-one years,[50] for while the limits of the classes will necessarily be determined within a life (that of the designated parent) in being at the creation of the estate and twenty-one years thereafter, the individuals who will attain the specified age and, consequently, the minimum number of shares, may not be ascertainable until after the expiration of that period.[51]

[§ 51] **C. Limitations To and Over from Unborn Persons[52]—1. Limitations to Persons Not in Being —a. In General.** In accordance with the principles relating to limitations to classes,[53] a limitation or gift of an interest or estate, in fee or for life, to a person not in being at the creation thereof does not violate the rule against perpetuities if such person

within period of rule see supra § 45 text and note 21.

Limitation vested in class whose membership may diminish but is necessarily ascertainable within period of rule see supra § 46 text and note 25.

40. In re McCaskey, 293 Pa. 497, 143 A 209. See Lachlan v. Reynolds, 9 Hare 796, 41 EngCh 796, 68 Reprint 738 (where a limitation to such of the testator's children as should be living at the expiration of thirty years from his death is held free from any objection on the ground of remoteness).

41. Limitation vested in class whose membership may diminish but is necessarily ascertainable within period of rule see supra § 46 text and note 25.

42. Belfield v. Booth, 63 Conn. 299, 27 A 585; and cases infra § 52 note 72.

Limitation to unborn grandchildren of living person see infra § 52 text and notes 72, 73.

43. Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 875.

Ill.—Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37. Compare Pitzel v. Schneider, 216 Ill. 87, 74 NE 779 (holding void a limitation to such of the grandsons of the testator as should reach the age of twenty-five years, although one of them had attained such age at the death of the testator, where the will showed that the testator did not intend the class to close upon the arrival of the first member of the age specified, but intended it to remain open to admit any grandsons who should attain such age at any time).

Mass.—Hall v. Hall, 123 Mass. 120; Sears v. Putnam, 102 Mass. 5.

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 664, 121 A 760 [cit Cyc].

Pa.—Coggins' App., 124 Pa. 10, 16 A. 579, 10 AmSR 565 [overr Williamson's Est., 12 Phila. 64 (rev 3 Pa. Co. 239)]; Ward's Est., 8 Pa. Dist. 701; Davenport v. Harris, 3 Grant 164.

Eng.—In re Mervin, [1891] 3 Ch. 197; Thomas v. Wilberforce, 31 Beav. 299, 54 Reprint 1153; Webster v. Boddington, 26 Beav. 128, 53 Reprint 845; Rowland v. Tawney, 26 Beav. 67, 53 Reprint 822; Merlin v. Blagrave, 25 Beav. 125, 53 Reprint 584; Chance v. Chance, 16 Beav. 572, 51 Reprint 901; Bute v. Harman, 9 Beav. 320, 50 Reprint 367; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186; Boreham v. Bignall, 8 Hare 131, 32 Eng Ch 131, 68 Reprint 302; Pickford v. Brown, 2 Kay & J. 426, 69 Reprint 849; Whitehead v. Rennett, 22 L. J. Ch. 1020; Re Barker, 92 L. T. Rep. N. S. 831; Leake v. Robinson, 2 Meriv. 363, 35 Reprint 979; Vawdry v. Geddes, 1 Russ. & M. 203, 5 EngCh 203, 39 Reprint 78, Taml. 361, 12 EngCh 361, 48 Reprint 143; Comport v. Austen, 12 Sim. 218, 35 EngCh 185, 59 Reprint 1115; Newman v. Newman, 10 Sim. 51, 16 EngCh 51, 59 Reprint 531; Dodd v. Wake, 8 Sim. 615, 8 EngCh 615, 59 Reprint 244; Porter v. Fox, 6 Sim. 485, 9 EngCh 485, 58 Reprint 676; Cromek v. Lumb, 3 Y. & Ch. Exch. 565, 160 Reprint 826.

See Edgerly v. Barker, 66 N. H. 434, 31 A 900, 28 LRA 328 (where the court apparently recognized the invalidity, on the principle stated in the text, of a devise to the testator's grandchildren when the youngest should arrive at the age of forty years, but construed the will to allow the estate to vest at the age of twenty-one).

Compare Moore v. Moore, 59 N. C. 132 (holding that a bequest to any child or grandchild of the testator who might "come to suffering . . . so as to become an object of charity," is void for remoteness).

And see cases infra § 51 text and note 64.

Limitation to unborn persons upon attaining age greater than twenty-one years see infra § 51 text and notes 63, 64.

44. Limitation to class whose membership will not necessarily be determined within period of rule see supra § 44 text and notes 16–18.

45. See supra § 48.

46. Limitation to children attaining specified age where parent is dead see supra § 48 text and notes 40, 41.

47. Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Kates v. Walker, 82 N. J. L. 157, 82 A 301; Adams's Est., 23 Pa. Dist. 271.

48. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Gerke v. Colonial Trust Co., 114 Md. 289, 79 A 587; Otterback v. Bohrer, 87 Va. 548, 12 SE 1013. And see infra § 52 text and note 69.

49. Limitations over after gifts to unborn persons see infra § 54.

50. Pearks v. Moseley, 5 App. Cas. 714 [overr In re Moseley, L. R. 11 Eq. 499, where it was held that the gift to the children could be separated from the gift to the grandchildren]; Stuart v. Cockerell, L. R. 5 Ch. 713; Blight v. Hartnoll, 19 Ch. D. 294; In re Farncombe, 9 Ch. D. 652; Bentinck v. Portland, 7 Ch. D. 693; Hale v. Hale, 3 Ch. D. 643; Webster v. Boddington, 26 Beav. 128, 53 Reprint 845; Seaman v. Wood, 22 Beav. 591, 52 Reprint 1236; Re Whitten, 62 L. T. Rep. N. S. 391. Compare Trickey v. Trickey, 3 Myl. & K. 560, 10 EngCh 560, 40 Reprint 213 (holding that, after a limitation to the testator's daughter for life and after her death to all her children when they should respectively attain the age of twenty-one years, a limitation over of the share of any child dying under that age without issue then surviving to the other children of the daughter and such issue of any then dead as shall attain the age of twenty-one is not too remote, when the will is construed to include only issue born at the daughter's death, for the ultimate limitation will necessarily become vested, if at all, in the issue of the deceased children of the daughter within twenty-one years after her death).

51. Limitation vested in class which may decrease in membership at time beyond period permitted by rule see supra § 46 text and note 27.

52. Limitations to classes in general see supra §§ 44–50.

Limitations to surviving spouse see infra § 55.

53. See supra § 44.

must necessarily[54] come into being, if at all, and attain the age at which his interest or estate is to vest in him, within the period specified by the rule;[55] as if the gift or limitation be to the unborn child of a person in being,[56] to vest at his birth,[57] or at the death of the parent[58] or another living person,[59] or when the child shall attain an age not exceeding twenty-one years.[60] But if such interest or estate will not necessarily become vested within the period of the rule, it is void for remoteness.[61]

54. Certainty of vesting within permitted period see supra §§ 9–11.

55. See cases infra this note; and notes 56–60, 62.

[a] **It was formerly held** (1) that a devise of a life estate to the unborn children of a living person, with remainder over, was void under the rule against perpetuities, such holding apparently confusing the invalidity of the remainder over with the validity of the preceding life estate. Robinson v. Harris, 73 S. C. 469, 53 SE 755, 6 LRANS 330; Hayes v. Hayes, 4 Russ. 311, 4 EngCh 311, 38 Reprint 822. See Bradford v. Griffin, 40 S. C. 468, 19 SE 76; Deerhurst v. St. Albans, 5 Madd. 232, 56 Reprint 883 (dicta). (2) That doctrine has, however, been expressly denied (Hampton v. Holman, 5 Ch. D. 183 [overr Hayes v. Hayes, supra]; Williams v. Teale, 6 Hare 239, 31 EngCh 239, 67 Reprint 1155); (3) and the principle stated in the text is now generally followed (see cases infra notes 56–60).

[b] **Principle applied.**—A devise of a life estate upon condition to the sons of the testator, and upon breach of the condition to the inmates of a designated charitable institution for the residue of a life estate, is not obnoxious to the rule against perpetuities, even though some of such inmates may be unborn at the death of the testator, since the limitation over must take effect, if at all, within lives in being at the testator's death. Pendleton v. Kinney, 65 Conn. 222, 32 A 331.

Beneficiaries of gift or limitation must necessarily be ascertainable within period of rule see supra § 13.

Period specified by rule see supra § 5.

Postponement of possession or enjoyment immaterial see supra § 16.

56. Gifts to grandchildren see infra § 52.

57. Hoadley v. Beardsley, 89 Conn. 270, 93 A 535; Howe v. Hodge, 152 Ill. 252, 38 NE 1083; Wilson v. Cobley, [1870] W. N. 46.

58. U. S.—In re Youtsey, 260 Fed. 423.

Ala.—Woodley v. Findlay, 9 Ala. 716.

Cal.—Berry v. Lebus, 56 Cal. A. 378, 205 P 471.

Conn.—Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809; Holmes v. Connecticut Trust, etc., Co., 92 Conn. 507, 103 A 640, LRA1918E 368; Healy v. Healy, 70 Conn. 467, 39 A 793.

Fla.—McLeod v. Dell, 9 Fla. 427.

Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ill.—Haughn v. Haughn, 296 Ill. 305, 129 NE 807; Comstock v. Redmond, 252 Ill. 522, 96 NE 1073; Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356.

Kan.—Cain v. Vivier, 108 Kan. 69, 193 P 1070.

Ky.—Forsman v. Hofstetter, 107 SW 796, 32 KyL 1108; Ennen v. Air, 104 SW 960, 31 KyL 1184.

Md.—Bowerman v. Gibson, 144 Md. 1, 123 A 573; Bowerman v. Taylor, 126 Md. 203, 94 A 652.

Mass.—Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Minot v. Doggett, 190 Mass. 435, 77 NE 629; Seaver v. Fitzgerald, 141 Mass. 401, 6 NE 73; Hills v. Simonds, 125 Mass. 536; Lovering v. Worthington, 106 Mass. 86; Loring v. Blake, 98 Mass. 253; Otis v. McLellan, 13 Allen 339.

Miss.—Thompson v. Green, 145 Miss. 365, 110 S 788.

Mo.—Walter v. Dickmann, 274 Mo. 185, 202 SW 537; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625.

N. H.—Wood v. Griffin, 46 N. H. 230.

N. J.—Stout v. Stout, 44 N. J. Eq. 479, 15 A 843.

N. Y.—Macomb v. Miller, 9 Paige 265.

Pa.—In re Smith, 210 Pa. 604, 60 A 255; Lawrence's Est., 136 Pa. 354, 20 A 521, 11 LRA 85, 20 AmSR 925 [overr Smith's App., 88 Pa. 492]; Davenport v. Harris, 3 Grant 164; Owens' Pet., 3 Pa. Dist. 328 [disappr Smith's App., supra]; Ronckendorff's Est., 1 Pa. Dist. 258, 11 Pa. Co. 447. But see Ledwith v. Hurst, 284 Pa. 94, 130 A 315 (where a devise to the testator's widow and daughter for their lives, with remainder for life to the daughter's children, none of whom was born at the testator's death, was held void as to such children, the court saying only that the life gift to them "is plainly violative of the rule" against perpetuities).

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Tex.—Munger v. Munger, (Civ. A.) 298 SW 470.

Eng.—In re Powell, [1898] 1 Ch. 227; In re Bevan, 34 Ch. D. 716; In re Roberts, 19 Ch. D. 520; Hampton v. Holman, 5 Ch. D. 183 [overr Hayes v. Hayes, 4 Russ. 311, 4 Eng Ch 311, 38 Reprint 822]; Evans v. Walker, 3 Ch. D. 211; Avern v. Lloyd, L. R. 5 Eq. 383; In re Ramadge, [1919] 1 Ir. 205; Boughton v. James, 1 Coll. 26, 28 EngCh 26, 63 Reprint 306; Taylor v. Frobisher, 5 De G. & Sm. 191, 64 Reprint 1076; Cattlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319; Williams v. Teale, 6 Hare 239, 31 EngCh 239, 67 Reprint 1155; Mogg v. Mogg, 1 Meriv. 654, 35 Reprint 811.

Man.—Re Crichton, 23 Man. 594, 13 DomLR 169, 25 WestLR 18, 4 WestWkly 1184.

[a] **A devise to the heirs of a life tenant,** who is himself in being at the creation of the estate, is not void as creating a perpetuity. In re Youtsey, 260 Fed. 423; Healy v. Healy, 70 Conn. 467, 39 A 793.

Gifts to grandchildren see infra § 52.

59. Conn.—Tingier v. Woodruff, 84 Conn. 684, 81 A 967.

Fla.—McLeod v. Dell, 9 Fla. 427.

Ill.—Wood v. Wood, 276 Ill. 164, 114 NE 549; Branson v. Bailey, 246 Ill. 490, 92 NE 940.

Ky.—Forsman v. Hofstetter, 107 SW 796, 32 KyL 1108.

Mass.—Simonds v. Simonds, 112 Mass. 157.

N. Y.—Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561.

Pa.—In re McKeown, 259 Pa. 216, 102 A 878. See Bender v. Bender, 225 Pa. 434, 74 A 246 (applying the principle stated in the text, although there is dictum in the opinion apparently inconsistent therewith).

S. C.—Breeden v. Moore, 82 S. C. 534, 64 SE 604.

Eng.—Re Backhouse, [1921] 2 Ch. 51.

[a] **A devise to the testator's legal heirs,** to take effect upon the death of a life tenant, is not obnoxious to the rule against perpetuities, even though one or more of the heirs are born subsequent to the death of the testator. Tingier v. Woodruff, 84 Conn. 684, 81 A 967. See Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561 (to the same effect, in the case of a bequest to the testator's grandchildren living at the death of a life tenant).

60. Heald v. Heald, 56 Md. 300; Minot v. Doggett, 190 Mass. 435, 77 NE 629; In re James, 245 Pa. 118, 91 A 511.

Gifts to grandchildren see infra § 52.

Limitation to persons attaining specified age see supra §§ 48–50.

61. Conn.—Loomer v. Loomer, 76 Conn. 522, 57 A 167.

Md.—Deford v. Deford, 36 Md. 168.

Mass.—Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Sears v. Putnam, 102 Mass. 5.

Mo.—Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

N. H.—Wentworth v. Wentworth, 77 N. H. 400, 92 A 733.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Eng.—In re Atkinson, [1916] 1 Ch. 91; Blight v. Hartnoll, 19 Ch. D. 294; Gormanston v. Gormanston, [1923] 1 Ir. 137; Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186; Palmer v. Holford, 4 Russ. 403, 4 EngCh 403, 38 Reprint 857.

See Bunting v. Hromas, 104 Nebr. 383, 177 NW 190 (apparently applying the principle stated in the text).

And see cases infra note 64; § 52 note 71; § 53 notes 74, 75; and § 54 notes 88, 90.

[a] **Thus** (1) a testamentary gift of property to trustees to hold it for a period of twenty-five years after the testator's death and to pay the income to his children, or in case of their death to their children, offends the rule against perpetuities, for it is possible that an interest may vest more than twenty-one years, plus the period of gestation, after the death of the testator, in descendants of a deceased child who were not born or in being at the time of the testator's death. Closset v. Burtchaell, 112 Or. 585, 230 P 554. (2) A gift to trustees of property to be held by them for twenty-five years from the testator's death, the income to be payable to named persons and upon their death to their children, and at the end of twenty-five years the capital to be paid to such named persons or to the surviving children of any of them who should then be deceased, or to the survivors of the first takers in case of the death of one of them without issue surviving at the expiration of the term of twenty-five years, is void for remoteness, both as to principal and income, inasmuch as it cannot be determined, under all possibilities, within the life of a first taker and twenty-one years thereafter, whether the income or principal would go to her children, or, by reason of their decease, to the surviving first takers, and a share may therefore not vest within the period of the rule against perpetuities. Sears v. Putnam, 102 Mass. 5. (3) A testamentary gift to those children of the testator's son who should be living at the expiration of twenty-eight years from the death of the testator is void for remoteness; for if the son had any children born to him at any time within seven years from the testator's death, the vesting of their interests would be suspended for more than twenty-one years. Palmer v. Holford, 4 Russ. 403, 4 EngCh 403, 38 Reprint 857. (4) A gift to one and his issue, and upon the failure thereof to the daughters then living of a person in being at the creation of the estate, is void for remoteness as to the lim-

Life estates to unborn persons in succession are not in violation of the rule against perpetuities if they all must vest within the limits, after their creation, specified by that rule.[62]

Attainment of age beyond twenty-one. While a limitation or gift of an interest or estate to the unborn child of a person in being at the creation of the estate which is to vest in him when he shall attain an age not exceeding twenty-one years is valid,[63] a limitation to such child to vest only upon his attainment of an age beyond twenty-one years is void for remoteness.[64]

[§ 52] **b. Grandchildren.** A gift or limitation of an interest or estate in property to the unborn grandchildren of a testator by whose will the gift is made,[65] or of another person dead at the creation of

itation over, since it may not take effect within lives in being and twenty-one years thereafter. Jee v. Audley, 1 Cox Ch. 324, 29 Reprint 1186. (5) A direction in a will that the income from property should be accumulated for the purpose of paying off subsisting mortgages thereon, and thereafter claimant thereof should divide the property among such of the testator's grandchildren as might then be surviving, is void for remoteness, for the time at which the mortgages are paid off may or may not be within the period specified by the rule against perpetuities. Blight v. Hartnoll, 19 Ch. D. 294. (6) A devise to the testator's daughter for life, "and at her death to her bodily heirs, if the said bodily heirs have issue, forever," with remainder over in case such bodily heirs die without issue, is void for remoteness as to the fee thereby attempted to be given to the unborn issue of the daughter, since it remains contingent until the birth of a child of an unborn person, and therefore will not necessarily vest, if at all, within a life in being and twenty-one years thereafter. Shepperd v. Fisher, 206 Mo. 208, 242, 103 SW 989. See Bunting v. Hromas, 104 Nebr. 383, 177 NW 190 (apparently making a similar application of the principle stated in the text).

Cross references:

Cross limitations and cross remainders to unborn tenants in common see infra § 54 text and note 90.

Gift to a class subject to open and let in other members see supra § 46.

Gift to children of person not in being see infra § 53.

Gift to grandchildren of living person see infra § 52.

Limitation taking effect when unborn child attains an age in excess of twenty-one years see cases infra note 64.

Limitation to issue of unborn life tenant see infra § 54 text and note 88.

62. Madison v. Larmon, 170 Ill. 65, 48 NE 556, 62 AmSR 356.

Limitation of successive life estates construed to create estate tail by cy pres see infra § 91 text and note 84.

Limitation to series see infra § 56.

63. See supra text and note 60.

64. See cases infra this note; and supra § 48 note 43.

"Attempted testamentary devises or bequests to a parent for life and with remainder over to a child or children of such parent not in esse at the death of the testator, on such child attaining a specified age exceeding twenty-one years, is invalid, as being too remote and as possibly operating to create a perpetuity." Pitzel v. Schneider, 216 Ill. 87, 97, 74 NE 779.

[a] **Twenty-two years.**—Fidelity, etc., Trust Co. v. Tiffany, 202 Ky. 618, 260 SW 357; Thomas v. Wilberforce, 31 Beav. 299, 54 Reprint 1153; Re Bulley, 11 Jur. N. S. 847; Vawdry v. Geddes, 1 Russ. & M. 203, 5 EngCh 203, 39 Reprint 78, Tam. 361, 12 EngCh 361, 48 Reprint 143.

[b] **Twenty-three years.**—Smith v. Smith, L. R. 5 Ch. 342; In re Hume, [1912] 1 Ch. 693; Bowyer v. West, 24 L. T. Rep. N. S. 414; Bull v. Pritchard, 1 Russ. 213, 46 EngCh 188, 38 Reprint 83, 5 Hare 567, 26 EngCh 567, 67 Reprint 1036; Cromek v. Lumb, 3 Y. & C. Exch. 566, 160 Reprint 826.

[c] **Twenty-four years.**—Hale v. Hale, 3 Ch. D. 643; Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831; In re Blakemore, 20 Beav. 214, 52 Reprint 585; Newman v. Newman, 10 Sim. 51, 16 EngCh 51, 59 Reprint 531; Dodd v. Wake, 8 Sim. 615, 8 EngCh 615, 59 Reprint 244.

[d] **Twenty-five years.**—Pitzel v. Schneider, 216 Ill. 87, 74 NE 779; Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37; Eldred v. Meek, 183 Ill. 26, 55 NE 536, 75 AmSR 86; Lawrence v. Smith, 163 Ill. 149, 45 NE 259; Johnson v. Johnson, 79 SW 293, 25 KyL 2119; Ludwig v. Combs, 1 Metc. (Ky.) 128; Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; Kates v. Walker, 82 N. J. L. 157, 82 A 301; McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760; Hewitt v. Green, 77 N. J. Eq. 345, 77 A 25; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; In re Mervin, [1891] 3 Ch. 197; Re Thatcher, 26 Beav. 365, 53 Reprint 939; Rowland v. Tawney, 26 Beav. 67, 53 Reprint 822; Merlin v. Blagrave, 25 Beav. 125, 53 Reprint 584; Read v. Gooding, 21 Beav. 478, 52 Reprint 944; In re Morse, 21 Beav. 174, 52 Reprint 852; Chance v. Chance, 16 Beav. 572, 51 Reprint 901; Southern v. Wollaston, 16 Beav. 166, 51 Reprint 740; Griffith v. Blunt, 4 Beav. 248, 49 Reprint 334; Ring v. Hardwick, 2 Beav. 352, 17 EngCh 352, 48 Reprint 1217; Boughton v. James, 1 Coll. 26, 28 EngCh 26, 63 Reprint 306 [aff sub nom. Boughton v. Boughton, 1 H. L. Cas. 406, 9 Reprint 815]; Boreham v. Bignall, 8 Hare 131, 32 EngCh 131, 68 Reprint 302; Pickford v. Brown, 2 Kay & J. 426, 69 Reprint 849; Patching v. Barnett, 49 L. J. Ch. 665 [app dism 51 L. J. Ch. 74]; In re Ricketts, 103 L. T. Rep. N. S. 278; Re Whitten, 62 L. T. Rep. N. S. 391; Lushington v. Penrice, 18 L. T. Rep. N. S. 597; Leake v. Robinson, 2 Meriv. 363, 35 Reprint 979; Blagrove v. Hancock, 16 Sim. 371, 39 EngCh 371, 60 Reprint 917; Comport v. Austen, 12 Sim. 218, 35 EngCh 185, 59 Reprint 1115; Porter v. Fox, 6 Sim. 485, 9 EngCh 485, 58 Reprint 676; Judd v. Judd, 3 Sim. 525, 6 EngCh 525, 57 Reprint 1095; In re Slark, 21 Wkly. Rep. 165; Cam v. Salmon, 5 Wkly. Rep. 31. Compare Bute v. Harman, 9 Beav. 320, 50 Reprint 367 (where the master of the rolls is reported as having said that "he could hardly doubt of the validity" of a gift to such children of a life tenant as should attain the age of twenty-five years; but subsequently, in Boreham v. Bignall, 8 Hare 131, 32 EngCh 131, 68 Reprint 302, the case was cited by counsel, and according to a note of the reporter, "It was stated at the Bar that the decision in this case was against the gift; and that the report therefore should be corrected by altering the word 'validity' in the judgment . . . . to 'invalidity;'" and again, the case was cited in Southern v. Wollaston, 16 Beav. 166, 168, 51 Reprint 740, and the reporter notes that "The registrar's book was sent for, when it was found that the gift was declared void for remoteness").

[e] **Twenty-six years.**—Willson v. Cobley, [1870] W. N. 46.

[f] **Twenty-eight years.**—Ker v. Hamilton, 6 Vict. L. R. 172.

[g] **Thirty years.**—Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Doe v. McIsaac, 1 Pr. Edw. Isl. 353. See Howe v. Hodge, 152 Ill. 252, 38 NE 1083 (dictum).

[h] **Thirty-five years.**—Hall v. Hall, 123 Mass. 120; Hoyt v. Hoyt, 125 Misc. 95, 210 NYS 155 [aff 215 App. Div. 773 mem, 213 NYS 823 mem].

[i] **Forty years.**—Edgerly v. Barker, 66 N. H. 434, 31 A 900, 28 LRA 328.

[j] **Ten years after becoming of age** by youngest grandchild of testator. In re Kountz, 213 Pa. 390, 62 A 1103, 3 LRANS 639, 5 AnnCas 427.

[k] **In England** it is now provided by Law of Prop. Act (1925) § 163 in substance that "where in a will, settlement or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift is, or but for the section would be, rendered void for remoteness, the will, settlement or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument. This rule applies to any instrument executed after the end of 1925 and to any testamentary appointment (whether made in exercise of a general or special power), devise, or bequest contained in the will of a person dying after that date, whether the will was made before or after that date; and it applies without prejudice to any provision whereby the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement, or other instrument is attained." Halsbury L. Suppl. p 1741 § 693.

65. Conn.—Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809, Ill.—Howe v. Hodge, 152 Ill. 252, 38 NE 1083.

Ky.—Forsman v. Hofstetter, 107 SW 796, 32 KyL 1108; Ennen v. Air, 104 SW 960, 31 KyL 1184.

Md.—Heald v. Heald, 56 Md. 300.

Mass.—Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143.

Oh.—Sager v. Byrer, 24 OhNPNS 129.

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Va.—Otterback v. Bohrer, 87 Va. 548, 12 SE 1013; Woodruff v. Pleasants, 81 Va. 37.

Eng.—Re Backhouse, [1921] 2 Ch. 51.

[a] **Reason for rule.**—A remainder limited by will to the testator's grandchildren, to take effect after life estates of the testator's children, is valid, since the number of grandchildren must be ascertained at the death of the testator's children, and all his children must be begotten before his death. Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas

the limitation,[66] which is to vest, if at all, at or before the death of their parents, or other person or persons in being at the creation of the interest whose lives measure the period of postponement,[67] or at or before such grandchildren,[68] or the youngest of them,[69] attain an age not exceeding twenty-one years,[70] is not obnoxious to the rule against perpetuities, because the persons who are to take thereunder must necessarily be ascertained within the time permitted by the rule after the creation of the interest; but if it may remain contingent beyond such time it is too remote.[71] A limitation to the unborn grandchildren of a living person is void for remoteness,[72] except where it is restricted to those living at a time not later than the expiration of the period after its creation specified by the rule against perpetuities,[73] inasmuch as grandchildren may be born at a time beyond the period specified by the rule, to children yet unborn at the creation of the interest.

[§ 53] **c. Children of Person Not in Being.** A gift or limitation of an interest or estate to the child of a person not in being at the creation of the limitation is, when not restricted to a birth and vesting occurring within the period of the rule against perpetuities, void for remoteness,[74] inasmuch as such child may not be born within twenty-one years after the death of persons in being at such creation;[75] but if, by the terms of the gift or limitation, such unborn child must be born and take, if at all, within the period specified by the rule, the rule is not violated and the interest limited is not too remote.[76] It should be noted, however, that apart from the question of remoteness under the rule

1916B 240; Woodruff v. Pleasants, 81 Va. 37.

66. Belfield v. Booth, 63 Conn. 299, 27 A 585; In re McKeown, 259 Pa. 216, 102 A 878.

67. Macomb v. Miller, 9 Paige (N. Y.) 265; Sager v. Byrer, 24 OhNPNS 129; In re McKeown, 259 Pa. 216, 102 A 878; Re Backhouse, [1921] 2 Ch. 51.

68. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Heald v. Heald, 56 Md. 300; Otterback v. Bohrer, 87 Va. 548, 12 SE 1013; Woodruff v. Pleasants, 81 Va. 37.

69. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Gerke v. Colonial Trust Co., 114 Md. 289, 79 A 587; Otterback v. Bohrer, 87 Va. 548, 12 SE 1013. Compare Blandford v. Thackerell, 2 Ves. Jr. 238, 30 Reprint 612 (where a bequest to establish a school at which testator's grandchildren should be educated between the ages of seven and fourteen years was held not obnoxious to the rule against perpetuities, although in so far as it attempted to establish a permanent charity the bequest was held void under the mortmain acts).

[a] **Reason for principle.**—A testamentary limitation of property to the testator's grandchildren to take effect when the youngest grandchild then or thereafter born should reach, or if living would have reached, the age of twenty-one years, is not void for remoteness; the estate must vest within the period of lives in being and twenty-one years and the period of gestation thereafter, for there can be no child born to any of the testator's children who would not attain the age of twenty-one years within the period prescribed by the rule. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Otterback v. Bohrer, 87 Va. 548, 12 SE 1013.

70. Attainment of age in excess of twenty-one years see supra § 51 text and note 64.

71. Fidelity, etc., Trust Co. v. Tiffany, 202 Ky. 618, 260 SW 357; Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Hewitt v. Green, 77 N. J. Eq. 345, 77 A 25.

[a] **Thus** a devise of property to the testator's children for life, and to a surviving spouse of any such child for life, with remainder to the children of such child then surviving, is void for remoteness as to the remainder. Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143.

Limitations over after gift to surviving spouse see infra § 55 text and notes 1-3.

72. Ky.—West v. Ashby, 217 Ky. 250, 289 SW 228; Laughlin v. Elliott, 202 Ky. 433, 436, 259 SW 1031 [cit Cyc]; Curd v. Curd, 163 Ky. 472, 173 SW 1148; Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Lindner v. Ehrich, 147 Ky. 85, 143 SW 778; Brumley v. Brumley, 89 SW 182, 28 KyL 231.

Md.—Goldberg v. Erich, 142 Md. 544, 121 A 365.

Mass.—Greenough v. Osgood, 235 Mass. 235, 126 NE 461; Minot v. Doggett, 190 Mass. 435, 77 NE 629.

Mo.—Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Lockridge v. Mace, 109 Mo. 162, 18 SW 1145.

N. J.—Camden Safe Deposit, etc., Co. v. Guerin, 87 N. J. Eq. 72, 99 A 105.

Pa.—Geissler v. Reading Trust Co., 257 Pa. 329, 101 A 797; Davenport v. Harris, 3 Grant 164.

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Eng.—Ward v. Van Der Loeff, [1924] A. C. 653; In re Sayer, L. R. 6 Eq. 319; Gooch v. Gooch, 14 Beav. 565, 51 Reprint 402, 3 De G. M. & G. 366, 52 EngCh 285, 43 Reprint 143; Whitehead v. Rennett, 22 L. J. Ch. 1020.

See Wood v. Griffin, 46 N. H. 230 (dictum).

And see cases supra § 48 note 42.

[a] **Limitation by deed to grantor's grandchildren.**—A deed conveying a life estate in property to the grantor's daughter, with remainder at her death "to the grandchildren" of the grantor, the grantor having other children living, is void for remoteness so far as concerns the remainder, where there is no evidence of intention to confine it to those grandchildren who are in esse at the end of the life estate, inasmuch as the other children of the grantor might have children born more than twenty-one years and ten months after the expiration of the lives of both the grantor and life tenant, so that the class to whom the remainder was given would thereby be required to open and let in such new members at a time beyond the period permitted by the rule against perpetuities. Laughlin v. Elliott, 202 Ky. 433, 259 SW 1031; Goldberg v. Ehrich, 142 Md. 544, 121 A 365.

[b] **Gift to testator's great-grandchildren.**—A devise of property for life to a testatrix's children and grandchildren, with remainder at their death to her great-grandchildren, is void for remoteness. "It is obvious that each of the children of testatrix might have had children born after her death. . . . It is equally obvious that such afterborn grandchildren of testatrix might have children born to them more than 21 years and ten months after the death of their respective parents, hence it is clear that . . . the will attempted to postpone the vesting of these estates for more than a life or lives in being and twenty-one years and ten months thereafter, hence the limitation of the remainder in fee to testatrix's great-grandchildren created a perpetuity forbidden by the common law." West v. Ashby, 217 Ky. 250, 254, 289 SW 228; Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Gift to child of unborn person generally see infra § 53.

Limitation over to issue of unborn life tenants see infra § 54 text and note 88.

73. Ill.—Drury v. Drury, 271 Ill. 336, 111 NE 140; Comstock v. Redmond, 252 Ill. 522, 96 NE 1073.

Kan.—Cain v. Vivier, 108 Kan. 69, 193 P 1070.

Me.—Merrill v. Winchester, 120 Me. 203, 113 A 261.

Md.—Bowerman v. Gibson, 144 Md. 1, 123 A 573; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Albert v. Albert, 68 Md. 352, 12 A 11.

Eng.—Routledge v. Dorril, 2 Ves. Jr. 357, 30 Reprint 671.

[a] **Principle applied.**—(1) Where a life tenant who had a power of appointment under his father's will appointed the property to his two daughters for life, with remainder to their children, and both daughters were living at the death of the donor of the power, the remainder to the grandchildren of the donee was not void for remoteness. Albert v. Albert, 68 Md. 352, 12 A 11. (2) A devise of a life estate in property to the testator's granddaughter, with remainder to the testator's great-grandchildren, is not too remote as to the remainder over, since it must take effect, if at all, at the termination of a life in being, and therefore only those great-grandchildren who are then living can take interests. Drury v. Drury, 271 Ill. 336, 111 NE 140.

Remainders following estates which must end within period of rule see supra § 34 text and notes 44-46.

74. Ky.—West v. Ashby, 217 Ky. 250, 289 SW 228.

Md.—Bowerman v. Taylor, 126 Md. 203, 94 A 652.

Mass.—Greenough v. Osgood, 235 Mass. 235, 126 NE 461; Minot v. Doggett, 190 Mass. 435, 77 NE 629.

Mo.—Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629; Lockridge v. Mace, 109 Mo. 162, 18 SW 1145.

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Eng.—In re Clarke, [1916] 1 Ch. 467; In re Davey, [1915] 1 Ch. 837; Re Staveley, 90 L. J. Ch. 111.

See Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640 (dictum).

And see cases supra § 52 notes 71, 72; and infra § 54 notes 88, 90.

Gift to grandchild of living person see supra § 52 text and notes 71-73.

Limitation over to issue of unborn life tenant see infra § 54 text and notes 88, 89.

75. Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

76. U. S.—Dahlgren v. Pierce, 270 Fed. 507 [app dism 256 U. S. 682

against perpetuities, such limitations have sometimes been held invalid under the supposed rule prohibiting a possibility on a possibility.[77]

[§ 54] **2. Limitations Over after Limitation to Unborn Person.**[78] A remainder over, after a valid[79] preceding interest or estate limited to one not in being at the time of its creation,[80] is not too remote if it is vested[81] at its creation in an ascertained person[82] or corporation,[83] or will necessarily become so vested, if at all, within the period prescribed by the rule against perpetuities.[84] And an executory limitation over after an interest or estate previously so limited to one unborn at its creation is good if it must necessarily vest, if at all, within the period of the rule after its creation.[85] But if a contingent remainder or executory limitation over after such an interest or estate may not become vested until a time after its creation beyond the period specified by the rule against perpetuities,[86] as, for example, if its vesting may be postponed until the death of the unborn taker of the preceding estate,[87] it is void for remoteness. Thus a remainder over

mem, 41 SCt 534 mem, 65 L. ed. 1170 mem, and certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem].

Ill.—Comstock v. Redmond, 252 Ill. 522, 96 NE 1073.

Mo.—Lane v. Garrison, 293 Mo. 530, 239 SW 813.

Tenn.—Brown v. Brown, 86 Tenn. 277, 6 SW 869, 7 SW 640.

Eng.—In re Bowles, [1902] 2 Ch. 650. But see Whitby v. Mitchell, 42 Ch. D. 494 (dictum to the contrary).

And see cases supra § 52 text and note 73.

[a] **Illustrations.**—(1) A testamentary gift of property to the testator's grandson for life, with remainder at his death to his issue, is not void under the rule against perpetuities, for in order that any unborn child of an unborn child of the grandson may take thereunder, he must be living at the time of the grandson's death, and therefore he must be born and take, if he takes at all, within the period specified by the rule against perpetuities. Lane v. Garrison, 293 Mo. 530, 239 SW 813. (2) Under a marriage settlement giving life estates in property to the husband and wife, with remainder to the children of the marriage and any issue born in the lifetime of a survivor of the husband and wife in such shares and manner as they should jointly appoint, an appointment to the children of the marriage in equal shares for life and after their death to such of their children born in the lifetime of the husband and wife as should live to attain the age of twenty-one years is not void for remoteness. In re Bowles, [1902] 2 Ch. 650. (3) Where a testamentary trust was directed to terminate at the death of the survivor of three persons living at the testator's death, a provision for the payment of a share of the income of the trust property to a son of a grandson of the testator born after the latter's death does not violate the rule against perpetuities. Dahlgren v. Pierce, 270 Fed. 507 [app dism 256 U. S. 682 mem, 41 SCt 534 mem, 65 L. ed. 1170 mem, and certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem].

[b] **"The distinction resides in this:** A devise to the unborn child of an unborn child, eo nomine, is void, because it may not take effect within a life or lives in being, and twenty-one years and the fraction of a year thereafter; but when by the express terms of the devise the limitation over must take effect within the life or lives of persons in being, then the reason supporting the objection fails, and the limitation is good." Brown v. Brown, 86 Tenn. 277, 296, 6 SW 869, 7 SW 640.

77. See Whitby v. Mitchell, 44 Ch. D. 85, 89 (affirming a judgment which declared that limitations of legal estates to the children of an unborn child "were void, not on the ground that they were void for remoteness, but that they were limitations which the law does not allow of legal estates. . . . There is a rule in existence which does prevent the limitation from being good, namely, that you cannot have a possibility upon a possibility"). See also Gray Perp. §§ 125–133.

Possibility on a possibility see Estates § 166; Wills [40 Cyc 1052 text and notes 68, 69].

78. Life estates to unborn persons in succession see supra § 51 text and note 62.

Limitations over after limitation to surviving spouse see infra § 55.

79. Limitations subsequent to gifts void for remoteness see infra § 60.

80. Limitations to unborn persons see supra §§ 51–53.

81. Vested remainder not subject to rule against perpetuities see supra § 27.

82. In re Feeney, 293 Pa. 273, 142 A 284; Owens' Pet., 3 Pa. Dist. 328; In re Ashforth, [1905] 1 Ch. 535; Evans v. Walker, 3 Ch. D. 211. See Seaver v. Fitzgerald, 141 Mass. 401, 6 NE 73 (dictum).

83. Seaver v. Fitzgerald, supra. But see In re Roberts, 19 Ch. D. 520 (refusing to decide the validity of a limitation to a charitable corporation which, it seems, was subject only to the termination of a preceding life estate of one unborn at its creation).

84. Seaver v. Fitzgerald, 141 Mass. 401, 403, 6 NE 73; Loring v. Blake, 98 Mass. 253; In re Fenney, 293 Pa. 273, 142 A 284; In re Ashforth, [1905] 1 Ch. 535; Stuart v. Cockerell, L. R. 7 Eq. 363.

"There is no objection, on the ground of remoteness, to a gift to unborn children for life, and then to an ascertained person, provided the vesting of the estate in the latter is not postponed too long. . . . All that is required by the rule against perpetuities is, that the estate or interest shall vest within the prescribed period." Seaver v. Fitzgerald, supra.

[a] **Illustration.**—A testamentary gift of property to the testator's child for life, with remainder for life to the surviving spouse of such child, and, in default of appointment by such child, to those who would be the testator's heirs at law had he then died intestate, vests in such heirs upon the death of the child, although the possession is subject to a life estate of a spouse who may not have been born at the death of the testator, and is therefore not void for remoteness. Loring v. Blake, 98 Mass. 253.

Contingent remainder necessarily vesting, if at all, within period of rule is good see supra § 37 text and notes 73, 77.

Remainder over upon failure of issue within period of rule see supra § 43 text and notes 1–6.

85. Woodley v. Findlay, 9 Ala. 716; Trickey v. Trickey, 3 Myl. & K. 560, 10 EngCh 560, 40 Reprint 213.

[a] **Illustrations.**—(1) In a gift of property by will to the testator's daughter for life, and then to her child or children, a limitation over in case of the death of a child under twenty-one without legal issue is not too remote, as it extends only to a life in being and twenty-one years. Trickey v. Trickey, 3 Myl. & K. 560, 10 EngCh 560, 40 Reprint 213. (2) A gift of personal property to one of testator's daughters for life, and at her death to the issue of her body, and on failure of issue to her sisters, is not void for remoteness as to the ultimate executory limitation over, since it will vest in the sisters within their lives, if at all, and therefore within the period of the rule against perpetuities. Woodley v. Findlay, 9 Ala. 716.

Executory limitation necessarily vesting, if ever, within permitted period is good see supra § 38 text and note 85.

Limitation over upon failure of issue within period of rule see supra § 43 text and notes 1–6.

86. Loring v. Blake, 98 Mass. 253; In re Davey, [1915] 1 Ch. 837; Hodgson v. Halford, 11 Ch. D. 959; Stuart v. Cockerell, L. R. 7 Eq. 363 [disappr Ashley v. Ashley, 6 Sim. 358, 9 EngCh 358, 58 Reprint 628]; Re Whitten, 62 L. T. Rep. N. S. 391; Hodson v. Ball, 14 Sim. 558, 37 EngCh 558, 60 Reprint 474; Smidmore v. Smidmore, 3 Austr. C. L. R. 344; and cases infra notes 87, 88, 90.

[a] **A contrary dictum** of the vice chancellor in Stuart v. Cockerell, L. R. 7 Eq. 363, that "Property may be given by will, or secured by settlement, to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons," was repeated by him in Evans v. Walker, 3 Ch. D. 211, 213, and was quoted therefrom in Owens' Pet., 3 Pa. Dist. 328, but no decision in any case has been found which supports the dictum or is based upon it.

[b] **In England** it is now provided that "the rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in the land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities. This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of this Act." Law of Property Act of 1925 (15 Geo. V c 20) § 161.

87. Conn.—Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809.

Ga.—Phinizy v. Wallace, 136 Ga. 520, 71 SE 896.

Ill.—Howe v. Hodge, 152 Ill. 252, 38 NE 1083.

Ind.—Stephens v. Evans, 30 Ind. 39.

Ky.—Curd v. Curd, 163 Ky. 472, 173 SW 1148; Lindner v. Ehrich, 147 Ky. 85, 143 SW 778.

Mass.—Greenough v. Osgood, 235 Mass. 235, 126 NE 461; Loring v. Blake, 98 Mass. 253; Fosdick v. Fosdick, 6 Allen 41.

Mo.—Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

Nebr.—Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760.

Pa.—In re Feeney, 293 Pa. 273, 142 A 284; In re Penrose, 257 Pa. 231, 101 A 319. See also Van Syckel's Est., 9 Pa. Dist. & Co. 485 (apparently applying the principle stated in the text).

Eng.—Re Backhouse, [1921] 2 Ch. 51; Stuart v. Cockerell, L. R. 7 Eq. 363, 369; In re Ramadge, [1919] 1 Ir. 205; Taylor v. Frobisher, 5 De G. & Sm. 191, 64 Reprint 1076; Re Johnson, 30 T. L. R. 505.

See Angell v. Angell, 28 R. I. 592,

to the issue, as purchasers, of a person not in being at the creation of the interest to whom a preceding life estate is given, is void,[88] unless it be restricted to take effect only if the death of the life tenant shall occur within the period specified by the rule after the creation of the estate;[89] and a cross remainder or executory cross limitation to be effective upon the death without issue of one of two or more unborn tenants in common, who take in remainder after a life estate of one in being at the creation of the estate, is void,[90] unless it be confined to a death under twenty-one years of age.[91]

Possibility on a possibility. A limitation over after a gift to a person unborn at the creation of the interest may, aside from the question of remoteness under the rule against perpetuities, be void under the rule against a possibility on a possibility, in those jurisdictions where that rule obtains.[92]

[§ 55] **D. Limitations To and Over from Surviving Spouse.** The question of the validity of a limitation or gift of an interest or estate in property to the surviving spouse of a designated person arises out of the possibility that the individual who will bear that relation to such designated person at his death may not be born at the creation of the interest.[93] If the gift or limitation is to the surviving spouse of a person in being at the time of its creation, to take effect at or before his death, it is not too remote,[94] whether or not the surviving spouse was in being at the creation of the interest;[95] but if it may remain contingent beyond such period it would seem that it is void for remoteness.[96] Similarly, by the application of the principles relating to gifts to unborn persons[97] and to limitations over after such gifts,[98] a gift or limitation to the surviving spouse of a person unborn at the creation of the interest is, at least when not so restricted by its terms that it must vest, if at all, within the period after its creation specified by the rule against perpetuities, too remote, and therefore void.[99]

A limitation over after a gift to the surviving spouse of a designated person is void for remoteness,[1] upon the principles applying to limitations over after gifts to unborn persons,[2] unless it is vested, or will necessarily become so, if at all, within the period after its creation specified by the rule against perpetuities.[3]

[§ 56] **E. Limitations to Series.** A limitation of

68 A 583 (dictum).

And see cases infra notes 88, 90.

"A gift, therefore, to take effect at the expiration of lives not yet in being must necessarily be void." Stuart v. Cockerell, supra.

[a] **Illustration.**—In a devise of land to the testator's son for life, and then to his children, a proviso that if such children should die without issue the property should revert back to the testator's legal heirs is void for remoteness, since it might remain contingent until the death of the children of the first life tenant. Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

Limitations over to children of children dying under age at which interest vests see supra § 50.

88. Ky.—Curd v. Curd, 163 Ky. 472, 173 SW 1148; Lindner v. Ehrich, 147 Ky. 85, 143 SW 778; Haydon v. Layton, 128 SW 90; U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993.

Md.—Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Heald v. Heald, 56 Md. 300.

Mass.—Minot v. Doggett, 190 Mass. 435, 77 NE 629. See Hills v. Simonds, 125 Mass. 536 (dictum).

Miss.—Caldwell v. Willis, 57 Miss. 555.

Mo.—Lockridge v. Mace, 109 Mo. 162, 18 SW 1145.

N. J.—Stout v. Stout, 44 N. J. Eq. 479, 15 A 843.

Oh.—Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327.

Pa.—Geissler v. Reading Trust Co., 257 Pa. 329, 101 A 797; Boyd's Est., 10 Pa. Dist. 87 [aff 199 Pa. 487, 49 A 297]. See also In re James, 245 Pa. 118, 91 A 511 (dictum).

Eng.—In re Russell, [1895] 2 Ch. 698; In re Roberts, 19 Ch. D. 520 (per Jessel, M. R.); Stuart v. Cockerell, L. R. 7 Eq. 363; Gooch v. Gooch, 14 Beav. 565, 51 Reprint 402, 3 De G. M. & G. 366, 52 EngCh 285, 43 Reprint 143; Marlborough v. Godolphin, 1 Eden 404, 28 Reprint 741; Cattlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319. Compare Whitby v. Mitchell, 44 Ch. D. 85 (holding such a limitation void, not on the ground of remoteness, but as being in violation of the rule against a possibility upon a possibility).

Gifts to child of unborn person see supra § 53.

Gifts to grandchildren of living person see supra § 52 text and note 72.

Rule in Shelley's case see Deeds § 311; Trusts [39 Cyc 230]; Wills [40 Cyc 1602 et seq].

89. Cattlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319. See also supra § 52 text and note 73; and § 53 text and note 76.

Contingent remainder vesting within prescribed period see supra text and note 84.

90. Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809; Beall v. Wilson, 146 Ky. 646, 143 SW 55; Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327; Courtier v. Oram, 21 Beav. 91, 52 Reprint 793. See Stuart v. Cockerell, L. R. 7 Eq. 363 [disappr Ashley v. Ashley, 6 Sim. 358, 9 EngCh 358, 58 Reprint 628] (dictum).

Limitations over on failure of issue generally see supra § 43.

91. Stuart v. Cockerell, L. R. 7 Eq. 363. And see supra § 43 text and note 3.

92. Possibility on a possibility see Estates § 166; Wills [40 Cyc 1052 text and notes 68, 69]; and see supra § 53 text and note 77.

93. See cases infra notes 94, 99.

Limitations to and over from unborn persons see supra §§ 51–54.

94. Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061; Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Loring v. Blake, 98 Mass. 253; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625; Re Crichton, 23 Man. 594, 13 DomLR 169, 25 WestLR 18, 4 WestWkly 1184. But see Overby v. Scarborough, 145 Ga. 875, 90 SE 67 (where a devise to one in trust for his wife, naming her, during her lifetime, and after her death for any future wife the trustee might have, with remainder to the trustee's children, was held void for remoteness as to the life estate of the second wife on the ground that the trustee might not remarry within twenty-one years after the death of his first wife, the court apparently overlooking the fact that a second life interest must necessarily vest, if ever, within the lifetime of the trustee). To same effect Shewmake v. Robinson, 148 Ga. 287, 96 SE 564.

95. See supra § 51 text and notes 54, 55.

96. Gifts to unborn persons not vesting within period of rule are void see supra § 51 text and note 61.

97. See supra § 51.

98. See supra § 54.

99. Boyd's Est., 10 Pa. Dist. 87 [aff 199 Pa. 487, 49 A 297].

[a] **Illustration.**—(1) Under a testamentary power given to the testator's unmarried daughter to appoint, an appointment by the donee by her will to her son for life, and upon his death to his widow, is bad as to the appointment to the widow, as she by possibility might not come into being within twenty-one years after the death of the donee. Boyd's Est., 10 Pa. Dist. 87 [aff 199 Pa. 487, 49 A 297]. (2) Power to appoint see infra §§ 62–66.

1. Ga.—Overby v. Scarborough, 145 Ga. 875, 90 SE 67.

Ky.—Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061.

Mass.—Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143. See Loring v. Blake, 98 Mass. 253 (dictum).

N. J.—Camden Safe Deposit, etc., Co. v. Guerin, 87 N. J. Eq. 72, 99 A 105.

Va.—Stone v. Nicholson, 27 Gratt. (68 Va.) 1.

Eng.—In re Harvey, 39 Ch. D. 289; Buchanan v. Harrison, 1 Johns. & H. 662, 70 Reprint 909; Lett v. Randall, 3 Smale & G. 83, 65 Reprint 572. See Goodier v. Johnson, 18 Ch. D. 441; In re Merrick, L. R. 1 Eq. 551 (dicta). Compare Hodson v. Ball, 14 Sim. 558, 37 EngCh 558, 60 Reprint 474 (where a testamentary gift of property to the testator's children, in fee, provided that in case any of his children or their issue should die in the lifetime of any husband or wife with whom his children should have intermarried, the share of such child or issue should go to the surviving children and the issue of those dead, was held void for remoteness as to the executory limitation over, inasmuch as any one of the children might marry a person who was not born until after the testator's death, and the gift over is therefore not confined to a life in being and twenty-one years thereafter). To same effect Sears v. Russell, 8 Gray (Mass.) 86.

But see Stephens v. Evans, 30 Ind. 39 (where the principle was apparently overlooked, and remainders over after the death or remarriage of a surviving spouse were treated as valid in determining the validity of subsequent limitations).

2. See cases supra note 1.

Limitations over after gift to unborn person see supra § 54.

3. Overby v. Scarborough, 145 Ga. 875, 90 SE 67; Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Loring v. Blake, 98 Mass. 253; Gates v. Seibert, 157 Mo. 254, 57 SW 1065, 80 AmSR 625; In re Garnham, [1916] 2 Ch. 413

an interest or estate in property to a series of persons, as to those who from time to time may fill a certain position or answer a certain description, is to be distinguished from a limitation to a class of persons,[4] inasmuch as neither the extent nor the duration of the interest to be taken by one member of the series is affected by that of any other members.[5] It would seem, therefore, that as to interests which must necessarily become vested, if at all, in the first[6] and succeeding[7] members of the series within the period prescribed by the rule against perpetuities,[8] such a limitation is not obnoxious to that rule; but as to all interests attempted to be given to subsequent members it is void for remoteness.[9] And in some cases such limitations have been held void as to the entire series.[10]

[§ 57] **F. Limitations To and Over from Charities.**[11] In accordance with the general rule relating to future interests in property,[12] a contingent limitation of a legal or equitable interest or estate in real or personal property to a charitable institution, or to trustees for a charitable use,[13] or a con-

[disappr In re Park, [1914] 1 Ch. 595]; In re Bullock, [1915] 1 Ch. 493, 8 BRC 347. See In re Merrick, L. R. 1 Eq. 551 (semble).

[a] **Illustrations.**—(1) A devise of property to the testator's child for life, and at his death to his surviving spouse for life, and then to his children, is not void for remoteness, since the estate given to the children of the testator's child will vest, if at all, upon the death of such child, although the possession or enjoyment is postponed until the death of a surviving spouse who may not be born at the time of the testator's death. Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Loring v. Blake, 98 Mass. 253. (2) A devise to testator's unmarried son for life, and to "his wife if he should marry and after their decease to his children," is not repugnant to the rule against perpetuities, since the remainder to the children will vest within ten months after the son's death, although his wife survives him more than twenty-one years. Gates v. Seibert, 157 Mo. 254, 264, 57 SW 1065, 20 AmSR 625.

4. Limitations to classes see supra §§ 44–50.

5. Gray Perp. § 399.

6. Liley v. Hey, 1 Hare 580, 583, 23 EngCh 580, 66 Reprint 1162. See St. Paul's Church v. Atty.-Gen., 164 Mass. 188, 41 NE 231 (dictum); and cases infra this note. Compare Tollemache v. Coventry, 8 Bligh N. S. 547, 5 Reprint 1045, 2 Cl. & F. 611, 6 Reprint 1285 (which apparently assumes the validity of a limitation to the first member of a series, for the purpose of determining the validity of the limitation to a subsequent member, and which has sometimes been regarded as deciding that the gift to such first member was good); Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523 (where it is pointed out that the question was not decided in Tollemache v. Coventry, supra). But see Gray Perp. §§ 405–407 (where it was said by that learned authority that the limitation to the first member of the series in Tollemache v. Coventry, supra, was properly treated as valid).

"Where the will declares that objects are to take in succession, there is no reason why I should hold the will void, as to those objects to whom an interest not exceeding beyond their own lives is given immediately at the testator's death." Liley v. Hey, supra.

[a] **Particular limitations.**—(1) A gift to such clergyman as should be attached to a certain parish was held good as to the clergyman attached at the time of the testator's death, but not good as to successors. Dillon v. Reilly, Ir. R. 10 Eq. 152. (2) Where land was devised in trust for the benefit of such person as for the time being should succeed to the testator's baronetcy, so long as the rules of law and equity would permit, it was held that the testator's son and heir took a life estate, but the validity of subsequent interests was not decided. Bacon v. Proctor, Turn. & R. 31, 12 EngCh 31, 37 Reprint 1005. Compare Mackworth v. Hinxman, 2 Keen 658, 662, 15 EngCh 659, 48 Reprint 782 [crit Ker v. Dungannon, 1 Dr. & War. 509] (holding, "for the purpose of accomplishing the intention" under a similar limitation, that the son of the testator took an absolute interest in the property).

7. Gray Perp. §§ 410, 410c. See St. Paul's Church v. Atty.-Gen., 164 Mass. 188, 41 NE 231 (semble). Compare Deerhurst v. St. Albans, 5 Madd. 232, 56 Reprint 883 (where Lord Vere bequeathed chattels in trust for A, his son, for life, and on his death "for such person as shall from time to time be Lord Vere;" after A's death B, who was alive at the testator's death, became Lord V and enjoyed the chattels, and on his death C, his son, became Lord V; and it was held that the limitation was good as to C, his interest vesting at the end of a life in being at the testator's death, but on appeal, sub nom. Tollemache v. Coventry, 8 Bligh N. S. 547, 5 Reprint 1045, 2 Cl. & F. 611, 6 Reprint 1285, this decision was reversed, on the ground among others that A's successor as Lord V might not have been born in the lifetime of the testator, and consequently a gift over on the death of such successor might not have taken effect within the time after the testator's death permitted by the rule against perpetuities). See also Gray Perp. §§ 403, 404 (where the decision is discussed).

Life estates to succession of unborn persons which necessarily vest within permitted period see supra § 51 text and note 62.

8. Period prescribed by rule see supra § 5.

9. Amory v. Amherst College, 229 Mass. 374, 118 NE 933; St. Paul's Church v. Atty.-Gen., 164 Mass. 188, 41 NE 231; Tollemache v. Coventry, 8 Bligh N. S. 547, 5 Reprint 1045, 2 Cl. & F. 611, 6 Reprint 1285; Dillon v. Reilly, Ir. R. 10 Eq. 152; Wainman v. Field, Kay 507, 69 Reprint 215.

10. See cases infra this note.

[a] **Thus** (1) a gift of money in trust to make certain payments to the testator's widow during her life, and after her decease and until the fund should be exhausted, to make such payments "to the same persons that would inherit real estate from me under the present laws of the state of Rhode Island had I then died intestate, and in the same proportions that they would inherit such real estate from me," was held void so far as it provided for any payments after the death of the wife; and the court said: "Coming now to the time of the death of the wife . . . we find a gift of the residue of said payments as they become due for the benefit of a class composed of the persons who answer the description of his heirs at law. . . . Inasmuch as this gift is to a class which includes persons who might not be ascertained until after a life in being and twenty-one years afterward, it is void under the rule that a gift to a class is void unless the whole class must be ascertainable within the period allowed by the Rule." Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 522, 525, 101 A 430 [cit Williams v. Herrick, 19 R. I. 197, 32 A 913 (where property was given to the testator's wife for life and then to trustees to erect a building and to manage the estate and accumulate the income, and whenever the accumulation should reach such proportions that the trustees should deem it advisable to pay dividends therefrom to such of the testator's heirs as should present satisfactory proof of their rights thereto, and the whole limitation after the death of the wife was held void as a perpetuity; but it would seem clear that the first payment therein provided for might not be made within the period of the rule against perpetuities, and thus the rights of all members of the series would of course be too remote)]. (2) A testator gave bank stock to trustees to collect and receive, during the corporate existence of the bank, the dividends declared thereon from time to time, and upon the first days of January in each year to divide and distribute such dividends among all the employees of such bank, and the entire trust was held void on the ground that it was "to continue" more than twenty-one years from the death of the testator, since renewals of the corporate charter of the bank might cause it to continue in existence for a longer period. Siedler v. Syms, 56 N. J. Eq. 275, 38 A 424. But see Gray Perp. §§ 401b–401d (where it was said that "the decision in Siedler v. Syms, supra, seems to be due to the error which we have so often seen creeping in, the failure to bear in mind that the purpose of the Rule against Perpetuities is to prevent the creation of remote future interests, not to prevent restraints upon the alienation of present interests," and that the trust should have been allowed to be good as to the first twenty-one annual payments after the testator's death, inasmuch as the amount of each payment and its distribution were in no way affected by the existence or nonexistence, or the validity or invalidity, of any subsequent payment). (3) Where chattels were bequeathed in trust for the persons who should for the time being be entitled to certain realty, which was devised by the same instrument to A for life, remainder to B for life, remainder to B's first and other sons in tail, with remainders over, all interests in the chattels beyond the life interest of B were held void. Wainman v. Fields, Kay 507, 69 Reprint 215. But see Gray Perp. § 409 (asserting that the gift to the first tenant in tail, who must take on B's death, should have been held good). (4) Where a testator devised land to his son for his life, and after his death to his descendants for their lives, "and so on," with a limitation over in case of a death without posterity, the entire will was held void, on the ground that an executory devise which exceeds the limit permitted by the rule against perpetuities is wholly void, and cannot be held void as to the excess only and valid as to the preceding part, as would be the case in a direction for accumulation beyond the prescribed period. St. Amour v. Rivard, 2 Mich. 294.

11. Charitable trusts see infra §§ 78, 79.

Present gifts to charity see supra § 21.

12. See supra § 36.

13. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; Russell v. Girard Trust Co., 171 Fed. 161 [aff 179 Fed. 446, 102 CCA 592].

Ill.—Easton v. Hall, 323 Ill. 397, 154 NE 216; Jansen v. Godair, 292 Ill. 364, 127 NE 97.

Ind.—Reasoner v. Herman, 191 Ind.

tingent limitation over to an individual or private corporation after a limitation to a charitable institution or to trustees for such a use,[14] is ordinarily void for remoteness if the contingency may occur at a time beyond the period prescribed by the rule against perpetuities;[15] but an exception is made in the case of a limitation over from one charity to another, and it is not too remote, although it will or may take effect after the prescribed period.[16]

VI. OPERATION AND EFFECT OF THE RULE

[§ 58] **A. In General.**[17] A limitation of an interest or estate in property which will not necessarily[18] become vested within or at the end of the period prescribed by the rule against perpetuities[19] is wholly void ab initio,[20] and, unless otherwise provided by statute,[21] the property covered by such limitation passes to those persons who would have been entitled thereto had the limitation been omitted

642, 134 NE 276.

Me.—Brooks v. Belfast, 90 Me. 318, 38 A 222; Merritt v. Bucknam, 77 Me. 253.

Mass.—Roxbury, etc., Sav. Inst. v. Roxbury Home for Aged Women, 244 Mass. 583, 139 NE 301. See Odell v. Odell, 10 Allen 1, 7 (where it was said: "If a gift is made in the first instance to an individual, and then over, upon a contingency which may not happen within the prescribed limit, to a charity, the gift to the charity is void, not because the charity could not take at the remote period, but because it tends to create a perpetuity in the individual who is the first taker, by making the estate inalienable by him beyond the period allowed by law").

N. Y.—Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 328 mem].

Or.—In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242.

Pa.—Ledwith v. Hurst, 284 Pa. 94, 130 A 315; In re Penrose, 257 Pa. 231, 101 A 319; Smith v. Townsend, 32 Pa. 434.

Eng.—In re Bowen, [1893] 2 Ch. 491; In re Johnson, L. R. 2 Eq. 716; Charitable Donations, etc., Comrs. v. De Clifford, 1 Dr. & War. 245; Cherry v. Mott, 1 Myl. & C. 123, 132, 13 Eng Ch 123, 40 Reprint 323 [quot Chamberlayne v. Brockett, L. R. 8 Ch. 206] (where it was said: "There may no doubt be a conditional legacy to a charity as well as for any other purpose"); Atty.-Gen. v. Gill, 2 P. Wms. 369, 24 Reprint 770; Pewterers v. Christ's Hospital, 1 Vern. Ch. 161, 23 Reprint 388.

Ont.—Re Orr, 40 Ont. L. 567, 13 OntWN 154.

"It is the rule that if a gift in trust for a charity is conditioned upon a future and uncertain event, the rules applicable to such a gift are the same as apply to any other estate depending for its coming into existence upon a condition precedent." Jansen v. Godair, 292 Ill. 364, 374, 127 NE 97.

[a] **In other words,** "where the gift is contingent, or where it is not intended to vest until the happening of some inevitable future event, this being a condition precedent to the vesting of the beneficial interest, the test of the rule against remoteness is to be applied, and if the contingency, or the happening of the condition precedent, may by possibility be deferred beyond a life or lives in being and 21 years and a fraction thereafter, the limitation is bad under the rule, although the trust be charitable." Russell v. Girard Trust Co., 171 Fed. 161, 164 [aff 179 Fed. 446, 102 CCA 592].

14. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739.

Me.—Merritt v. Bucknam, 77 Me. 253.

Mass.—Theological Education Soc. v. Atty.-Gen., 135 Mass. 285; Wells v. Heath, 10 Gray 17; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725; Odell v. Odell, 10 Allen 1.

N. H.—Rolfe, etc., Asylum v. Lefebre, 69 N. H. 238, 45 A 1087.

Or.—In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242.

Pa.—St. Luke's Church's App., 1 Walk. 283.

R. I.—Palmer v. Union Bank, 17 R. I. 627, 24 A 109.

Eng.—In re Da Costa, [1912] 1 Ch. 337; In re Bowen, [1893] 2 Ch. 491.

15. Period prescribed by rule see supra § 5.

16. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739; Jones v. Habersham, 107 U. S. 174, 2 SCt 336, 27 L. ed. 401; Russell v. Allen, 107 U. S. 163, 2 SCt 327, 27 L. ed. 397; Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450; McDonogh v. Murdoch, 15 How. 367, 14 L. ed. 732; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. ed. 617; Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 67 CCA 393.

Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Conn.—Christ Church v. Donations, etc., for Church Purposes, 67 Conn. 554, 35 A 552; Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 A 141.

Ill.—Dickenson v. Anna, 310 Ill. 222, 141 NE 754, 30 ALR 587; Green v. Old People's Home, 190 Ill. A. 152.

Ind.—Herron v. Stanton, 79 Ind. A. 683, 147 NE 305 [op substituted for 128 NE 363].

Mass.—Roxbury, etc., Sav. Inst. v. Roxbury Home for Aged Women, 244 Mass. 583, 139 NE 301; Odell v. Odell, 10 Allen 1; Sanderson v. White, 18 Pick. 328, 29 AmD 591.

N. J.—MacKenzie v. Jersey City Presbytery, 67 N. J. Eq. 652, 61 A 1027, 3 LRANS 227.

N. Y.—Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

Or.—In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242.

Pa.—Lennig's Est., 154 Pa. 209, 25 A 1049.

Tex.—St. Basil Community of Priests v. Byrne, (Civ. A.) 236 SW 1016, 1019 [quot Cyc].

Eng.—In re Tyler, [1891] 3 Ch. 252; Christ's Hospital v. Grainger, 16 Sim. 83, 39 EngCh 83, 60 Reprint 804.

Ont.—Re Mountain, 26 Ont. L. 163, 3 OntWN 1011, 21 OntWR 866, 4 Dom LR 737 [varying 2 OntWN 246, 17 Ont WR 448].

See Gray Perp. §§ 597–603i (where this exception is criticized).

"It is said that the rule against perpetuities has no application to charitable trusts. It is, indeed, a striking characteristic of such trusts that they continue forever. They are not, however, exempt from the rule, barring one very important exception. . . . If a gift be to charity, then over to an individual, or to an individual, then over to charity, the rule is effective, and has perfect application. But a gift to charity, then over to charity, forms the exception, and this is sustained upon the reasoning that, as one charitable use may be made perpetual, speaking in a general and natural sense, the gift to two in succession can be of no longer duration or of greater evil. The property is taken out of commerce, and goes instantly into perpetual servitude to charity. While the form of charity may vary, and a succeeding form become effective, contrary to the rule, the primary object, that of charity, continues and is allowable, through the law's regard for charitable uses, and in consideration of the beneficial results flowing therefrom." In re John, 30 Or. 494, 511, 47 P 341, 50 P 226, 36 LRA 242.

[a] **Where there is no change of trustee,** but the beneficial interest is limited over from one charitable use to another upon a contingency which may happen beyond the limits of the rule against perpetuities, the same principle applies and the limitation to the second charity is not void for remoteness. Lennig's Est., 154 Pa. 209, 25 A 1049.

17. Effect of rule upon direction to accumulate beyond prescribed period see infra §§ 80, 84.

18. Necessity of vesting within permitted period see supra §§ 9–12.

19. Period prescribed by rule see supra § 5.

20. Ala.—Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Ill.—Pitzel v. Schneider, 216 Ill. 87, 74 NE 779; Nevitt v. Woodburn, 190 Ill. 283, 60 NE 500; Eldred v. Meek, 183 Ill. 26, 55 NE 536, 75 AmSR 86.

Ky.—Lasnier v. Martin, 102 Kan. 551, 171 P 645.

Ky.—Moore v. Howe, 4 T. B. Mon. 199.

Me.—Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103; Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Md.—Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408.

Mich.—St. Amour v. Rivard, 2 Mich. 294.

N. Y.—Knox v. Jones, 47 N. Y. 389; Burrill v. Boardman, 43 N. Y. 254, 3 AmR 694; Schettler v. Smith, 41 N. Y. 328.

Pa.—In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470; Davenport v. Harris, 3 Grant 164.

Eng.—In re Roberts, 19 Ch. D. 520; In re Edmondson, L. R. 5 Eq. 389; Courtier v. Oram, 21 Beav. 91, 52 Reprint 793; Speakman v. Speakman, 8 Hare 180, 32 EngCh 180, 68 Reprint 323; Hobbs v. Parsons, 2 Smale & G. 212, 65 Reprint 369.

Ont.—Re Goodhue, 47 Ont. L. 178; Re Phillips, 28 Ont. L. 94, 11 DomLR 500.

But see Edgerly v. Barker, 66 N. H. 434, 31 A 900, 28 LRA 328 (where a testator gave property in trust for the children of his daughter, to vest when the youngest should arrive at the age of forty years, and the court, holding the provision to be too remote, ordered the property to be distributed to the grandchildren when they should attain twenty-one, on the ground that the primary intent was to make the gift, and that this overrides the secondary intent that it should take effect at a period too remote); Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315 [foll Edgerly v. Barker, supra] (applying the same principle to a bequest of personalty made by a resident of New Hampshire and which was governed by the law of that state).

And see cases supra § 2 note 14; and passim throughout this treatise.

Certainty of vesting within prescribed period must be ascertainable at creation of interest see supra § 10 text and note 98.

Partial validity of trust created for excessive term see infra § 73 text and note 39.

21. See statutory provisions.

from the instrument containing it.[22]

[§ 59] **B. Effect of Remoteness of Limitation upon Other Limitations[23]—1. Prior Limitations.** Except when a series of limitations forms such a scheme of distribution that no one of them can be separated from the others without defeating the organic plan of the donor or testator,[24] the invalidity of a limitation on account of remoteness will not affect the validity of preceding limitations which are otherwise good,[25] but they will take effect as if the subsequent invalid limitation had not been made.[26] Thus, when a qualified or determinable legal or equitable interest or estate, or one less than a fee or absolute ownership, is followed by a limitation which is void for remoteness, the preceding estate takes effect and comes to an end by its own limitation,[27]

22. Lasnier v. Martin, 102 Kan. 551, 171 P 645; Fosdick v. Fosdick, 6 Allen (Mass.) 41; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; cases infra § 59 text and notes 26–29, 32; § 60 text and notes 36, 37; and § 80 text and note 80.

23. Effect of remoteness of limitation to member of a class upon interests of other members see supra §§ 44, 47.

Effect of remoteness of power upon limitations in default of appointment see infra § 64.

24. Conn.—Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809; Dotten v. Glennie, 93 Conn. 472, 106 A 824; Lepard v. Clapp, 80 Conn. 29, 66 A 780; White v. Allen, 76 Conn. 185, 56 A 519; Andrews v. Rice, 53 Conn. 566, 5 A 823.

Ill.—Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564; Pitzel v. Schneider, 216 Ill. 87, 74 NE 779; Eldred v. Meek, 183 Ill. 26, 55 NE 536, 75 AmSR 86. See Owsley v. Harrison, 190 Ill. 235, 60 NE 89 (apparently applying the principle stated in the text).

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976.

Mo.—Lockridge v. Mace, 109 Mo. 162, 18 SW 1145.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760.

N. Y.—Richards v. Moore, 5 Redf. Surr. 278.

Oh.—Hoopert v. Gugel, 25 OhNPNS 516.

Pa.—Ledwith v. Hurst, 284 Pa. 94, 130 A 315; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; In re Whitman, 248 Pa. 285, 93 A 1062; In re Kountz, 213 Pa. 390, 62 A 1103, 3 LRANS 639, 5 AnnCas 427; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Clapier's Est., 15 Pa. Dist. 540; McCafferty's Est., 2 Pa. Dist. & Co. 29.

S. C.—Buck v. Tolar, 146 S. C. 294, 144 SE 1.

Eng.—Raphael v. Boehm, 22 L. J. Ch. 299, 15 EngL&Eq 531.

Testamentary limitations forming inseparable scheme of distribution see Wills [40 Cyc 1418 et seq].

25. Conn.—Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809; Sumner v. Westcott, 86 Conn. 217, 84 A 921.

Ill.—Moroney v. Haas, 277 Ill. 467, 115 NE 648; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Keyes v. Northern Trust Co., 227 Ill. 354, 81 NE 384.

Ind.—Herron v. Stanton, (A.) 128 NE 363 [op substituted 79 Ind. A. 683, 147 NE 305]. But see Reasoner v. Herman, 191 Ind. 642, 134 NE 276 (where a testator devised his property to trustees perpetually "for charitable purposes," and directed that it be applied first for the benefit of such of his brothers and sisters and their wives and husbands and children as might need any aid or support, and then to other purposes of a charitable nature, and the court, holding that the trust was purely private as to the brothers and sisters, etc., and that children might be born to the living brothers and sisters after the testator's death and consequently their interests might not vest within the period permitted by the rule against perpetuities, held further that the whole gift for the benefit of the brothers and sisters was void for remoteness, and should be stricken out).

Ky.—Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061.

Md.—Hawkins v. Ghent, 154 Md. 261, 140 A 212; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Heald v. Heald, 56 Md. 300; Goldsborough v. Martin, 41 Md. 488.

Mass.—Greenough v. Osgood, 235 Mass. 235, 126 NE 461; Lovering v. Worthington, 106 Mass. 86.

Mich.—Rozell v. Rozell, 217 Mich. 324, 186 NW 489 [disappr St. Amour v. Rivard, 2 Mich. 294].

Miss.—Bratton v. Graham, 146 Miss. 246, 111 S 353; Reddoch v. Williams, 129 Miss. 706, 92 S 831.

N. J.—McGill v. New Jersey Trust Co., 94 N. J. Eq. 657, 121 A 760. See Ogden v. McLane, 73 N. J. Eq. 159, 67 A 695 (applying the principle stated in the text).

N. Y.—Denison v. Denison, 185 N. Y. 438, 78 NE 162.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; In re Price, 260 Pa. 376, 103 A 893; Ewalt v. Davenhill, 257 Pa. 385, 101 A 756; In re Whitman, 248 Pa. 285, 93 A 1062; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85 [overr Smith's App., 88 Pa. 492]; Hallowell's Est., 28 Pa. Dist. 323; Clapier's Est., 15 Pa. Dist. 540; Lackey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 587; McCafferty's Est., 2 Pa. Dist. & Co. 29. Compare Ledwith v. Hurst, 284 Pa. 94, 130 A 315 (recognizing the principle stated in the text, and sustaining certain life estates of persons in being at the creation of the estate, but holding life estates to their children who were unborn at the creation of the estate invalid on the ground that they formed part of a dominant scheme of distribution which was too remote and therefore failed in its entirety).

Tenn.—Hornberger v. Hornberger, 12 Heisk. 635.

Eng.—Hampton v. Holman, 5 Ch. D. 183 [overr Hayes v. Hayes, 4 Russ. 311, 4 EngCh 311, 38 Reprint 822]; Packer v. Scott, 33 Beav. 511, 55 Reprint 467; Gooding v. Read, 4 De G. M. & G. 510, 53 EngCh 398, 43 Reprint 606. Compare Raphael v. Boehm, 22 L. J. Ch. 299, 15 EngL&Eq 531 (allowing life estates to living persons to be good, but holding void remainders to their children on the ground that such remainders, with subsequent remote limitations, formed an entire scheme of distribution which must all fail); Blandford v. Thackerell, 2 Ves. Jr. 238, 30 Reprint 612 (where a bequest of property to establish a school, at which the testator's children and grandchildren should be educated up to the age of fourteen years, was held void under the Mortmain Act as to the general purpose of a permanent charity, but was allowed to continue until the last grandchild of the testator should reach fourteen years of age, that being an age which would necessarily be attained within twenty-one years after lives in being at the testator's death).

And see cases infra notes 26–29.

26. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Ga.—Wright v. Hill, 140 Ga. 554, 79 SE 546.

Ill.—Moroney v. Haas, 277 Ill. 467, 115 NE 648; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216.

Md.—Gambrill v. Gambrill, 122 Md. 563, 89 A 1094.

Mass.—Greenough v. Osgood, 235 Mass. 235, 126 NE 461; North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 29 NE 524, 15 LRA 231; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Mich.—Palms v. Palms, 68 Mich. 355, 36 NW 419.

Miss.—Bratton v. Graham, 146 Miss. 246, 111 S 353; Lazard v. Hiller, 145 Miss. 449, 110 S 855, 112 S 585; Scott v. Turner, 137 Miss. 636, 102 S 467; Reddoch v. Williams, 129 Miss. 706, 92 S 831.

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

Tenn.—Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36.

Eng.—Goodier v. Johnson, 18 Ch. D. 441.

And see cases infra notes 27–29.

"If future interests created by any instrument are avoided by the rule against perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument." Lyons v. Bradley, 168 Ala. 505, 520, 53 S 244; Quinlan v. Wickman, 233 Ill. 39, 45, 84 NE 38, 17 LRANS 216. To same effect North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 29 NE 524, 15 LRA 231.

[a] **Applying this principle,** "if the prior gift was in fee, the estate is vested in the first taker discharged of the limitation over; if for life, it takes effect as a life estate." Lovering v. Worthington, 106 Mass. 86, 88. See to same effect Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 AmD 725.

Effect of invalidity of future estate in general see Deeds § 295; Estates § 228; Wills [40 Cyc 1418, 1954].

27. Conn.—Beers v. Narramore, 61 Conn. 13, 22 A 1061.

Md.—Gambrill v. Gambrill, 122 Md. 563, 89 A 1094.

Mass.—Greenough v. Osgood, 235 Mass. 235, 126 NE 461; North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 29 NE 524, 15 LRA 231.

Mich.—Rozell v. Rozell, 217 Mich. 324, 186 NW 489 [disappr St. Amour v. Rivard, 2 Mich. 294].

N. H.—Wood v. Griffin, 46 N. H. 230.

N. Y.—Leonard v. Burr, 18 N. Y. 96; New York L. Ins., etc., Co. v. Cary, 120 App. Div. 264, 105 NYS 125 [rev on other grounds 191 N. Y. 33, 83 NE 598]; Schlereth v. Schlereth, 73 App. Div. 283, 76 NYS 676 [aff 173 N. Y. 444, 66 NE 130, 93 AmSR 616]. See Miller v. Macomb, 26 Wend. 229 (apparently applying the principle stated in the text).

Pa.—In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Tenn.—Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36.

Eng.—Whitehead v. Rennett, 22 L. J. Ch. 1020.

See Harris v. McLaran, 30 Miss. 533 (dictum).

But see Shewmake v. Robinson, 148 Ga. 287, 96 SE 564; Overby v. Scarborough, 145 Ga. 875, 90 SE 67; Caldwell v. Willis, 57 Miss. 555 (all holding that, under a limitation to one for life, followed by remainders which were held void for remoteness, the first taker took an absolute interest); Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 779, 97 SW 421, 30 KyL 110 (where a life tenant with power of appointment appointed property to her children "during their respective lives, and at the death of each" to the heirs of his or her body then surviving, and the remainder to such heirs being void for remoteness because the donee's children were not born at the creation of the power, it

and the remainder reverts to the donor or falls into his estate;[28] and where a preceding estate is subject to be divested or defeated by a limitation over which is void for remoteness, the divesting limitation alone fails and the preceding estate vests free of it.[29] In the latter case, the effect of holding the limitation over void for remoteness is to enlarge the preceding estate, but such enlargement is only incidental to the operation of the rule against perpetuities and arises out of the nature of the limitations and not out of the rule.[30]

Modifications of absolute gift rendering it in part remote. Upon the principle applicable to a divesting limitation which is too remote,[31] an absolute gift of an interest or estate, followed by an attempted modification which would make it in part too remote, is itself sustained, and the modification alone is rejected.[32]

was held that the appointment by the donee was valid only to the extent that it exercised the power conferred upon her, and that the attempted limitation of the children's estate to a life estate, with remainder to their issue, was void, and "hence" the donee's children took the property in fee).

"A limitation of a life estate, or other partial interest, with a remainder expectant upon it, which is void for remoteness, of course remains in statu quo prius; neither receiving enlargement nor suffering diminution." In re Johnston, 185 Pa. 179, 189, 39 A 879, 64 AmSR 621.

[a] **Illustration.**—Where land was conveyed to a church for so long a time as it should be continued to be used for church purposes, with an executory limitation over which was void for remoteness, the estate given to the church was unaffected by the invalidity of the subsequent limitation, and therefore upon the happening of the condition which caused it to determine there was a reversion to the original grantor. Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36.

28. Conn.—Beers v. Narramore, 61 Conn. 13, 22 A 1061.

Kan.—Lasnier v. Martin, 102 Kan. 551, 171 P 645.

Md.—Gambrill v. Gambrill, 122 Md. 563, 89 A 1094.

Mass.—Greenough v. Osgood, 235 Mass. 235, 126 NE 461; North Adams First Universalist Soc. v. Boland, 155 Mass. 171, 29 NE 524, 15 LRA 231. See Lovering v. Worthington, 106 Mass. 86 (dictum).

Mich.—Rozell v. Rozell, 217 Mich. 324, 186 NW 489.

N. H.—Wood v. Griffin, 46 N. H. 230.

N. Y.—Leonard v. Burr, 18 N. Y. 96; Farmers' L. & T. Co. v. Bostwick, 120 App. Div. 271, 105 NYS 130 [rev on other grounds 190 N. Y. 569 mem, 83 NE 1124 mem]; New York L. Ins., etc., Co. v. Cary, 120 App. Div. 264, 105 NYS 125 [rev on other grounds 191 N. Y. 33, 83 NE 598]; Schlereth v. Schlereth, 73 App. Div. 283, 76 NYS 676 [aff 173 N. Y. 444, 66 NE 130, 93 AmSR 616].

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Tenn.—Yarbrough v. Yarbrough, 151 Tenn. 221, 269 SW 36.

Eng.—Whitehead v. Rennett, 22 L. J. Ch. 1020; Garland v. Brown, 10 L. T. Rep. N. S. 292.

See Harris v. McLaran, 30 Miss. 533 (dictum).

But see Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939 (the modern rule is that a limitation will be given effect up to the point where it infringes upon the rule against perpetuities, and a fee vests in the last person who is authorized to take an estate; but the court points out that under the facts of the particular case the persons to whom the property goes are the same whether the rule as so stated is applied or the limitation is held void and the property distributed under the laws of descent and distribution); Curd v. Curd, 163 Ky. 472, 173 SW 1148; Lindner v. Ehrich, 147 Ky. 85, 143 SW 778 (in both of which a fee was held to vest in those persons who would be entitled thereto under the circumstances of the case, either under the principle above stated or under the law of descent and distribution).

Devolution of property of testator on failure of gift over see Wills [40 Cyc 1419, 1954].

Reversions generally see Estates § 179 et seq.

29. U. S.—Hopkins v. Grimshaw, 165 U. S. 342, 17 SCt 401, 41 L. ed. 739.

Conn.—Cody v. Staples, 80 Conn. 82, 67 A 1.

Ill.—Post v. Rohrbach, 142 Ill. 600, 32 NE 687; Nevitt v. Woodburn, 82 Ill. A. 649 [rev on other grounds 190 Ill. 283, 60 NE 500].

Ind.—Outland v. Bowen, 115 Ind. 150, 17 NE 281, 7 AmSR 420; Herron v. Stanton, (A.) 128 NE 363 [op substituted 79 Ind. A. 683, 147 NE 305]. Compare Reeder v. Antrim, 64 Ind. A. 83, 110 NE 568, 112 NE 551 (holding that a gift of a remainder with an invalid provision restraining the alienation thereof is good, the restraining provision only being destroyed).

Ky.—Lindner v. Ehrich, 147 Ky. 85, 143 SW 778.

Md.—Comegys v. Jones, 65 Md. 317, 4 A 567.

Mass.—Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246, 10 LRANS 1143; Theological Education Soc. v. Atty.-Gen., 135 Mass. 285; Fosdick v. Fosdick, 6 Allen 41; Sears v. Russell, 8 Gray 86; Brattle Square Church v. Grant, 3 Gray 142, 63 AmD 725.

Miss.—Lazard v. Hiller, 145 Miss. 449, 110 S 855, 112 S 585; Scott v. Turner, 137 Miss. 636, 102 S 467; Nicholson v. Fields, 111 Miss. 638, 71 S 900; Hudson v. Gray, 58 Miss. 882; Harris v. McLaran, 30 Miss. 533.

Nebr.—Bunting v. Hromas, 104 Nebr. 383, 177 NW 190.

N. J.—Drummond v. Drummond, 26 N. J. Eq. 234.

N. Y.—Dana v. Murray, 122 N. Y. 604, 26 NE 21; Tator v. Tator, 4 Barb. 431; Conklin v. Conklin, 3 Sandf. Ch. 64. See Leonard v. Burr, 18 N. Y. 96 (dictum).

Pa.—Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470; Smith v. Townsend, 32 Pa. 434.

R. I.—Palmer v. Union Bank, 17 R. I. 627, 24 A 109.

S. C.—Cox v. Buck, 39 S. C. L. 604.

Wis.—Saxton v. Webber, 83 Wis. 617, 53 NW 905, 20 LRA 509.

Eng.—Hodgson v. Halford, 11 Ch. D. 959; In re Brown, 3 Ch. D. 156; Ware v. Cann, 10 B. & C. 433, 21 ECL 187, 109 Reprint 511; Courtier v. Oram, 21 Beav. 91, 52 Reprint 793; Blease v. Burgh, 2 Beav. 221, 17 Eng Ch 221, 48 Reprint 1164; Hardcastle v. Hardcastle, 1 Hem. & M. 405, 71 Reprint 176; Hobbs v. Parsons, 2 Smale & G. 212, 65 Reprint 369.

See Wood v. Griffin, 46 N. H. 230 (dictum).

Compare Shewmake v. Robinson, 148 Ga. 287, 288, 96 SE 564 ("when an attempt is made to create a perpetuity the law gives effect to the limitations not too remote, declaring the others void, and thereby vests the fee in the last taker under the legal limitations").

"It is a rule of law and equity, that where a vested estate is distinctly given, and there are annexed to it conditions, limitations, powers, trusts (including trusts for accumulation), or other restraints relative to its use, management, or disposal, that are not allowed by law, it is these restraints, and the estates limited on them, that are void, and not the principal or vested estate." Philadelphia v. Girard, 45 Pa. 9, 27, 84 AmD 470. To same effect Nicholson v. Fields, 111 Miss. 638, 643, 71 S 900.

[a] **Illustration.**—Where an estate given to a person unborn at the creation thereof was subject to a limitation over in case he should forsake the Jewish religion, such limitation being void for remoteness, he did not forfeit his share by forsaking such religion but retained it free from the divesting limitation. Hodgson v. Halford, 11 Ch. D. 959.

Absolute gift with subsequent modifying clause rendering it in part too remote see infra text and notes 31, 32.

30. See cases supra note 29.

31. See supra text and note 29.

32. Ky.—Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061.

Me.—Towle v. Doe, 97 Me. 427, 54 A 1072. Compare Slade v. Patten, 68 Me. 380 (to the same effect; but where it would appear that the provisions were not too remote).

Mass.—Sears v. Putnam, 102 Mass. 5.

Miss.—Smith v. Muse, 134 Miss. 827, 98 S 436; Nicholson v. Fields, 111 Miss. 638, 71 S 900. See Lazard v. Hiller, 145 Miss. 449, 110 S 855, 112 S 585 (dictum).

N. Y.—Ferris v. Gibson, 4 Edw. 707.

S. D.—In re Rousseau, 48 S. D. 501, 205 NW 222.

Eng.—Hancock v. Watson, [1902] A. C. 14; In re Hancock, [1901] 1 Ch. 482; Cooke v. Cooke, 38 Ch. D. 202; Churchill v. Churchill, L. R. 5 Eq. 44; Courtier v. Oram, 21 Beav. 91, 52 Reprint 793; Gerrard v. Butler, 20 Beav. 541, 52 Reprint 712; Stephen v. Gadsden, 20 Beav. 463, 52 Reprint 682; Ring v. Hardwick, 2 Beav. 352, 17 EngCh 352, 48 Reprint 1217; Harvey v. Stracey, 1 Drew. 73, 61 Reprint 379; Marlborough v. Godolphin, 1 Eden 404, 28 Reprint 741; Kampf v. Jones, 2 Keen 756, 15 EngCh 756, 48 Reprint 821; Re Boyd, 63 L. T. Rep. N. S. 92; Carver v. Bowles, 2 Russ. & M. 301, 11 EngCh 301, 39 Reprint 409; Arnold v. Congreve, 1 Russ. & M. 209, 5 EngCh 209, 39 Reprint 80; Re Sondes, 2 Smale & G. 416, 65 Reprint 461; O'Brien's Est., 24 Vict. L. R. 360; Trustees' Co. v. Jenner, 22 Vict. L. R. 584. See Spencer v. Marlborough, 3 Bro. P. C. 232, 1 Reprint 1289 (apparently applying the principle stated in the text).

See Johnson v. Preston, 226 Ill. 447, 80 NE 1001, 10 LRANS 564 (apparently applying the principle stated in the text, where property was devised to designated persons, but a trust for their benefit which intervened and postponed their possession was void for remoteness); Saxton v. Webber, 83 Wis. 617, 53 NW 905, 20 LRA 509 (rejecting modifications which rendered a devise objectionable to the terms of a statute).

Compare In re Raphael, 3 N. S. Wales 196 (applying the same principle to a restriction appended to a power of sale which would make the power void for remoteness).

[a] **"In order, however, to apply this rule** of rejecting modifications which are too remote, there must be an absolute gift independent of the modifications." Gray Perp. § 431.

[b] **Where independent gifts are**

[§ 60] **2. Subsequent Limitations.**[33] Although it would seem that a vested interest, or an interest which will become vested, if at all, within the period of the rule against perpetuities,[34] should not be invalidated by the remoteness of a limitation of a preceding estate,[35] a limitation for life to a living person has been held void when it follows an interest which is too remote,[36] and in general it is the rule that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid.[37]

VII. POWERS[38]

[§ 61] **A. In General.** The rule against perpetuities applies as well to powers over property as to interests and estates therein.[39] A power which is exercisable only at a time within the period after its creation specified by the rule,[40] or, in the case of powers of appointment, a power under which the donee can appoint to himself at a time within the prescribed period,[41] is not open to objection on the ground of remoteness; but, with the exception mentioned as to powers of appointment,[42] a power is void if by the terms of its creation the event, if any, upon which it becomes operative may not happen within such period and the donee may be in existence at a time beyond such period, so that it is capable in any possible event of being exercised at a time beyond the limits of the rule.[43] Thus, when a power is given to a person or persons in being at the time of its creation, or to the survivor of them, if more than one, but not to their representatives or successors,[44] or when it can be exercised only in favor of a person living at the date of its creation,[45] it must necessarily be exercised, if at all, within, or at the end of, a life in being, and therefore is not objectionable on the ground of remoteness. Similar-

made to several persons by one description (1) a modifying clause will be rejected only as to those gifts which the modification would render too remote. In re Rousseau, 48 S. D. 501, 205 NW 222; In re Ferneley, [1902] 1 Ch. 543; In re Russell, [1895] 2 Ch. 698. (2) Independent gifts to members of a class see supra § 47.

33. Effect of failure of prior gift on subsequent gifts over in general see Estates §§ 222–227; Wills [40 Cyc 1954].

34. Period prescribed by rule see supra § 5.

35. Gray Perp. § 251 et seq.

Vested interests and interests vesting within period of rule are not too remote see supra §§ 26, 36.

36. In re Hewett, [1915] 1 Ch. 810; Beard v. Westcott, 5 B. & Ald. 801, 7 ECL 435, 106 Reprint 1383 [aff Turn. & R. 25, 12 EngCh 24, 37 Reprint 1002]; Re Thatcher, 26 Beav. 365, 53 Reprint 939; Monypenny v. Dering, 2 De G. M. & G. 145, 51 EngCh 112, 42 Reprint 826; Palmer v. Holford, 4 Russ. 403, 4 EngCh 403, 38 Reprint 857; Burley v. Evelyn, 16 Sim. 290, 39 EngCh 290, 60 Reprint 885. See Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216 (dictum). Compare Gray Perp. § 257 (where the cases supporting the statement of the text are examined and criticized, and the author concludes: "As it [the doctrine that a limitation for life to a living person is void if it follows an interest which is too remote] introduces an arbitrary element into the Rule against Perpetuities, and defeats the intentions of testators without any pretext of public policy, under the false pretence of supporting them, it is submitted that it ought not to be followed in America").

[a] **The leading case,** and the one in which the doctrine was first announced, is Beard v. Westcott, in which the limitation of the life estate was held good by the court of common pleas (5 Taunt. 393, 1 ECL 208, 128 Reprint 741), but on appeal was held void by the court of king's bench (5 B. & Ald. 801, 7 ECL 435, 106 Reprint 1383); and the certificate of the judges was later confirmed by the lord chancellor (Turn. & R. 25, 12 EngCh 24, 37 Reprint 1002), although it does not appear that the point mentioned was raised before him.

[b] **Reason for decisions.**—"The Court [of King's Bench] held [in Beard v. Westcott, supra] that the gift over was void, not because it was not within the line of perpetuity, but expressly on the ground . . . that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence, but could not take; and Lord Eldon affirmed that decision. This shows that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid." Monypenny v. Dering, 2 De G. M. & G. 145, 182, 51 EngCh 112, 42 Reprint 826 (per Lord St. Leonards, C., who as Sir Edward Sugden was of counsel in Beard v. Westcott, supra). But see Crozier v. Crozier, 3 Dr. & War. 353 (where it was held by Sugden, when lord chancellor of Ireland, that an appointment by the donee of a power to his wife, who was not an object of the power, for her life, and then to his oldest son, who was one of the objects of the power, in fee, was void as to the wife but good as to the son).

37. Overby v. Scarborough, 145 Ga. 875, 90 SE 67; Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216; Ledwith v. Hurst, 284 Pa. 94, 130 A 315; Re Backhouse, [1921] 2 Ch. 51; In re Davey, [1915] 1 Ch. 837; In re Abbott, [1893] 1 Ch. 54; In re Ramadge, [1919] 1 Ir. 205. See Quinlan v. Wickman, 233 Ill. 39, 84 NE 38, 17 LRANS 216 (dictum); and cases supra note 36.

"Where a devise is void for remoteness, all limitations ulterior to or expectant on such remote devise are also void." Quinlan v. Wickman, 233 Ill. 39, 46, 84 NE 38, 17 LRANS 216.

[a] **A bequest to charity** is void when it is dependent upon an estate which is too remote. Ledwith v. Hurst, 284 Pa. 94, 130 A 315.

[b] **"The reason appears to be** that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation." In re Abbott, [1893] 1 Ch. 54, 57.

Devolution of property of testator on failure of gift over see Wills [40 Cyc 1419, 1954].

Reversion of property when particular estate terminates see Estates § 179 et seq.

38. Powers generally see Powers [31 Cyc 1033]; Wills [40 Cyc 1820 et seq].

39. Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Eary v. Raines, 73 W. Va. 513, 517, 80 SE 806 [cit Cyc]; cases infra notes 40–54; and §§ 62–70.

40. Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; In re De Sommery, [1912] 2 Ch. 622; and cases infra notes 44–46.

Period specified by rule see supra § 5.

41. See infra § 62.

42. See infra § 62.

43. Conn.—Bartlett v. Sears, 81 Conn. 34, 70 A 33.

Ill.—Keyes v. Northern Trust Co., 227 Ill. 354, 81 NE 384.

Md.—Collins v. Foley, 63 Md. 158, 52 AmR 505.

Mass.—Woodbridge v. Winslow, 170 Mass. 388, 49 NE 738.

N. J.—Hartson v. Elden, 50 N. J. Eq. 522, 26 A 561.

Pa.—In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Dawson v. Lancaster, 12 Pa. Dist. 501, 28 Pa. Co. 657.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

Wis.—Miller v. Douglass, 192 Wis. 486, 213 NW 320.

Eng.—In re De Sommery, [1912] 2 Ch. 622; Blight v. Hartnoll, 19 Ch. D. 294; Heath v. Heath, 2 Eden 330, 28 Reprint 925; Bristow v. Boothby, 2 Sim. & St. 465, 1 EngCh 465, 57 Reprint 424.

Ont.—Re Phillips, 28 Ont. L. 94, 11 DomLR 500.

N. S. Wales.—In re Raphael, 3 N. S. Wales 196.

[a] **"This happens** when a donee of a power and the occasion on which it can be exercised may both by possibility be in existence beyond the limits of the rule." Dawson v. Lancaster, 12 Pa. Dist. 501, 502, 28 Pa. Co. 657.

44. Conn.—Bartlett v. Sears, 81 Conn. 34, 70 A 33.

Ill.—Keyes v. Northern Trust Co., 227 Ill. 354, 81 NE 384.

Md.—Collins v. MacTavish, 63 Md 166; Collins v. Foley, 63 Md. 158, 52 AmR 505.

Mass.—Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865.

Pa.—Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Myer's Est., 1 Pa. Dist. 140, 11 Pa. Co. 194.

Eng.—In re De Sommery, [1912] 2 Ch. 622.

Compare Morning Star Min. Co. v. Bennett, 164 Ark. 244, 261 SW 639 (a contract giving an agent the right to sell property of the principal, without restriction as to time, was held not to create a perpetuity because in no event could the agent's right extend beyond his lifetime).

45. In re De Sommery, [1912] 2 Ch. 622.

ly, if by the terms of the creation of a power a period not exceeding that prescribed by the rule against perpetuities is limited for its exercise, it cannot be too remote.[46] But if the donee of a power is or at any time within the period during which the power is exercisable may be a person not in being at the time of its creation, the power is invalid,[47] unless its exercise is expressly restricted to a time within the limits of the rule against perpetuities,[48] and except where the power is one of appointment and the donee can by deed appoint the property to himself in fee at a time within the period prescribed by the rule.[49]

Ascertainment of donee. In accordance with the principles just stated, and by analogy to the rules relating to the vesting of interests in property,[50] a power is void for remoteness if the donee is not a person necessarily ascertainable, if ever, within the period after the creation of the power prescribed by the rule against perpetuities.[51]

Alternative powers.[52] When two or more distinct powers of appointment are created over the same property, the one to be exercised in default of exercise of the other, one of them which will be necessarily exercised, if at all, within the period prescribed by the rule against perpetuities is good, notwithstanding another or others may be exercisable at a time too remote.[53] But a power will not be separated by the court where the donor himself has not done so.[54]

[§ 62] **B. Powers To Appoint[55]—1. Creation[56]—a. In General.** The general rule that a power is invalid if it is capable of being exercised at a time beyond the period specified by the rule against perpetuities[57] is subject to the exception that, when a general power to appoint property in fee is exercisable by the donee by deed at a time within the prescribed period, rather than by will or testament only, the power is equivalent to a grant of absolute ownership, since the donee can at any time appoint to himself,[58] and the power is therefore not bad even when given to one not in existence at the time of its creation, if he will necessarily come into being, if at all, and attain full age, within the period of the rule.[59] But such a power is void if it can be exercised only upon the performance of a condition or the happening of an event which may not occur at a time within the limits of the rule against perpetuities,[60] as when the donee is a person not in being at its creation and the power is exercisable only with the consent of other persons,[61] or only upon the marriage of the donee.[62]

[§ 63] **b. Possibility of Remote Appointment.** Only appointments actually made are to be considered in determining whether interests or estates in property limited by the donee of a power in its exercise are valid under the rule against perpetuities,[63] except, perhaps, when the direct and specific object of the power, according to its terms, is to create a perpetuity;[64] and the possibility that an appointment which would be too remote might be made under the terms of a power which may be completely executed without violating the rule will not invalidate the power itself or an appointment which satisfies the rule.[65]

46. In re De Sommery, supra.

Interests necessarily vesting, if ever, within prescribed period are not obnoxious to rule see supra § 37 text and notes 73, 77; and § 38 text and note 85.

47. Hartson v. Elden, 50 N. J. Eq. 522, 26 A 561; In re Hargreaves, 43 Ch. D. 401; Morgan v. Gronow, L. R. 16 Eq. 1; Webb v. Sadler, L. R. 14 Eq. 533; Wollaston v. King, L. R. 8 Eq. 165; Re Phillips, 28 Ont. L. 94, 11 DomLR 500. Compare Whitby v. Mitchell, 42 Ch. D. 494 [aff 44 Ch. D. 85] (where the donee of a power of appointment appointed the property to one for life with power to appoint the remainder, such second donee being a person unborn at the creation of the original power, the appointment by the first donee was therefore held void for remoteness).

[a] **A power exercisable only by the will of a person unborn** at the time of its creation is invalid, since it will not necessarily be exercised within twenty-one years after lives in being. Re Phillips, 28 Ont. L. 94, 11 DomLR 500.

48. See supra text and note 46.

49. See infra § 66.

50. See supra § 13.

51. In re Hargreaves, 43 Ch. D. 401.

52. Limitations upon alternative contingencies see supra § 12.

53. Ogden v. McLane, 73 N. J. Eq. 159, 67 A 695; In re De Sommery, [1912] 2 Ch. 622; Bandon v. Moreland, [1910] 1 Ir. 220; Attenborough v. Attenborough, 1 Kay & J. 296, 69 Reprint 470.

[a] **Thus,** where a power of appointment was given to one, and in default of his exercise of it to his successors as trustees of a certain trust, it may properly be divided and considered as two distinct powers, and the first donee's right to make a valid appointment is not affected by the remoteness of the grant of power to his successors. Attenborough v. Attenborough, 1 Kay & J. 296, 69 Reprint 470.

54. In re De Sommery, [1912] 2 Ch. 622.

55. Powers of appointment in general see Powers [31 Cyc 1058 et seq]; Wills [40 Cyc 1828 et seq].

56. Possibility of remote appointment does not invalidate power see infra § 63.

57. See supra § 61.

58. See cases infra note 59.

59. Conn.—Lewis Oyster Co. v. West, 93 Conn. 518, 107 A 138.

Pa.—Mifflin's App., 121 Pa. 205, 15 A 525, 6 AmSR 781, 1 LRA 453. See Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85 (dictum).

Wis.—Miller v. Douglass, 192 Wis. 486, 213 NW 320.

Eng.—In re Fane, [1913] 1 Ch. 404; Bray v. Hammersley, 3 Sim. 513, 6 EngCh 513, 57 Reprint 1090 [aff 8 Bligh N. S. 568, 5 Reprint 1053, 3 Cl. & F. 453, 6 Reprint 1225]. But see In re Norton, [1911] 2 Ch. 27 (where the principle was apparently overlooked by the court).

Ont.—Re Phillips, 28 Ont. L. 94, 11 DomLR 500.

[a] **A general power of appointment exercisable by deed** (1) and not by will only, is not within the rule against perpetuities. "If a man has the present unconditioned right to acquire the present absolute interest, he is regarded by the rule against perpetuities as already having such interest. . . . A donee of a general power to be exercised by deed (not by will) is such a person because he can appoint to himself and therefore is practically the owner." Lewis Oyster Co. v. West, 93 Conn. 518, 532, 107 A 138. (2) "If a man who has a vested limited interest in property has the present unconditioned right to turn that limited interest into an absolute interest, and thus to acquire the present unconditioned absolute interest, he is regarded by the rule against perpetuities as already having such interest. A tenant in tail is such a person; a life tenant with a general power exercisable by deed is also such a person. To this extent the rule sacrifices form to substance, but the substance must be there. There must be a person with a vested limited interest who has the immediate right to become the present absolute owner. Such is not the case when a life tenant has a power which he can exercise only by will. The general rule must govern unless the exception is made out, and the exception is not made out unless there be a present right to acquire the present absolute interest." Mifflin's App., 121 Pa. 205, 232, 15 A 525, 6 AmSR 781, 1 LRA 453.

Limitation vesting in unborn person at a time, if ever, within period of rule see supra §§ 51-53.

60. See cases infra notes 61, 62.

61. Webb v. Sadler, L. R. 14 Eq. 533 [aff L. R. 8 Ch. 419].

62. Morgan v. Gronow, L. R. 16 Eq. 1.

63. In re Fane, [1913] 1 Ch. 404; Attenborough v. Attenborough, 1 Kay & J. 296, 69 Reprint 470; Fonseca v. Jones, 21 Man. 168, 192, 18 WestLR 206; Re Goodhue, 47 Ont. L. 178; and cases infra note 65.

"The court would not be justified in assuming that the . . . [donees] will make an invalid exercise of their power and it will be time enough for the parties concerned to complain when that has been done." Fonseca v. Jones, supra.

64. Barnum v. Barnum, 26 Md. 119, 90 AmD 88; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85 (semble).

65. Conn.—Bartlett v. Sears, 81 Conn. 34, 70 A 33.

Ill.—Hopkinson v. Swaim, 284 Ill. 11, 119 NE 985.

Mass.—Stone v. Forbes, 189 Mass. 163, 75 NE 141.

N. Y.—Hillen v. Iselin, 144 N. Y. 365, 39 NE 368.

Pa.—Lawrence's Est., 136 Pa. 354,

[§ 64] **c. Effect of Remoteness of Power.**[66] Where a power of appointment is void for remoteness, a limitation to take effect in default of any appointment under the power is not thereby invalidated.[67]

[§ 65] **2. Execution**[68]**—a. In General.** An appointment of property made in the exercise of a power other than a general power of appointment exercisable by deed[69] is void unless the interest or estate appointed must nesessarily become vested in the appointee within the period prescribed by the rule against perpetuities,[70] reckoned from the date of the creation of the power, and not from the date of its exercise.[71] This is upon the principle that the vesting of property is in effect the act of the donor of the power and that he cannot confer upon another the right to do that which he himself could not do.[72] Accordingly, it has many times been said that limitations of property made in the exercise of a power of appointment are to be treated, so far as concerns questions of remoteness, as if they had been written into the instrument by which the power was created in place of the power itself;[73] but this statement is subject to the qualification that an interest or estate so appointed which, under the circumstances existing at the date of the appointment, will necessarily vest in the appointee within the prescribed time after the creation of the power will not be held invalid under the rule against perpetuities, because it was not apparent at such creation that an interest or estate so appointed would necessarily vest within such period, or because, under other circumstances which might have arisen subsequent to the creation of the power, such an appointment would have been void.[74]

20 A 521, 20 AmSR 925, 11 LRA 85.

Eng.—In re Fane, [1913] 1 Ch. 404; In re De Sommery, [1912] 2 Ch. 622; In re Davies, [1910] 2 Ch. 35; In re Bowles, [1905] 1 Ch. 371; Slark v. Dakyns, L. R. 15 Eq. 307 [aff L. R. 10 Ch. 35]; Bandon v. Moreland, [1910] 1 Ir. 220; Attenborough v. Attenborough, 1 Kay & J. 296, 69 Reprint 470; Griffith v. Pownall, 13 Sim. 393, 36 EngCh 393, 60 Reprint 152.

Man.—Fonseca v. Jones, 21 Man. 168, 18 WestLR 206.

Ont.—Re Goodhue, 47 Ont. L. 178.

66. Effect of remoteness of limitations upon other limitations in general see supra §§ 59, 60.

67. In re Abbott, [1893] 1 Ch. 54; Carr v. Atkinson, L. R. 14 Eq. 397; Wollaston v. King, L. R. 8 Eq. 165.

Gifts over or other dispositions of property in default of execution of power in general see Wills [40 Cyc 1837].

68. Consequences of nonexercise of power see Powers [31 Cyc 1147].

69. See infra § 66.

70. Period prescribed by rule see supra § 5.

71. Conn.—Bartlett v. Sears, 81 Conn. 34, 70 A 33.

Md.—Hawkins v. Ghent, 154 Md. 261, 140 A 212; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094.

Mass.—Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365. See Bundy v. U. S. Trust Co., 257 Mass. 72, 153 NE 337; Greenough v. Osgood, 235 Mass. 235, 126 NE 461; Dexter v. Atty.-Gen., 224 Mass. 215, 112 NE 946 (all applying the principle stated in the text).

Pa.—Ewalt v. Davenhill, 257 Pa. 385, 101 A 756; Cox v. Dickson, 256 Pa. 510, 100 A 947 [aff 25 Pa. Dist. 804]; Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Smith's App., 88 Pa. 492; Lammot v. Home of the Merciful Saviour, 68 Pa. Super. 597. See In re Boyd, 199 Pa. 487, 49 A 297 [aff 10 Pa. Dist. 87] (applying the principle stated in the text).

Eng.—In re Samuda, [1924] 1 Ch. 61; In re Whiteford, [1915] 1 Ch. 347; In re Wright, [1906] 2 Ch. 288; In re Thompson, [1906] 2 Ch. 199; Whitby v. Von Luedecke, [1906] 1 Ch. 783; In re Gage, [1898] 1 Ch. 498; Cooke v. Cooke, 38 Ch. D. 202; Morgan v. Gronow, L. R. 16 Eq. 1; In re Ramadge, [1919] 1 Ir. 205; Tredennick v. Tredennick, [1900] 1 Ir. 354; Hutchinson v. Tottenham, [1898] 1 Ir. 403 [aff [1899] 1 Ir. 344]; In re Powell, 39 L. J. Ch. 188. See In re Hallinan, [1904] 1 Ir. 452 (dictum). See also Wollaston v. King, L. R. 8 Eq. 165; Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831; Peard v. Kekewich, 15 Beav. 166, 51 Reprint 500; In re Crichton, 106 L. T. Rep. N. S. 588; Griffith v. Pownall, 13 Sim. 393, 36 EngCh 393, 60 Reprint 152 (all applying the principle stated in the text). But see Rous v. Jackson, 29 Ch. D. 521 [disappr In re Powell, 39 L. J. Ch. 188]; In re Flower, 55 L. J. Ch. 200 [foll Rous v. Jackson, supra] (in both of which it was held that the remoteness of future interests, created by the will of one who had a life estate in property with power to appoint it by his will, was to be determined with reference to the death of the donee and not the creation of the power).

Ont.—Re Phillips, 28 Ont. L. 94, 11 DomLR 500.

See City Nat. Bank v. Slocum, 272 Fed. 11 [certiorari den 257 U. S. 637 mem, 42 SCt 49 mem, 66 L. ed. 409 mem] (apparently applying the principle stated in the text).

But see Miller v. Douglass, 192 Wis. 486, 505, 213 NW 320, (holding that a life tenant having a power to dispose of the corpus of the property by his will was, in the case at bar, the equivalent of the actual owner, and the future interests created by his will were accordingly to be measured from the date of the exercise of the power rather than from the date of its creation; the court saying: "Each case must stand or fall upon its own particular facts").

And see cases infra note 73.

"No estate or interest can be limited under a particular power, which would have been too remote if limited in the deed or will creating the power." Lawrence's Est., 136 Pa. 354, 365, 20 A 521, 20 AmSR 925, 11 LRA 85.

[a] **An estate vesting immediately upon the donee's death, or within twenty-one years thereafter,** is not objectionable on the ground of remoteness where the donee was living at the time of the creation of the power, since it must vest immediately upon, or within twenty-one years after, the termination of a life in being. In re Thompson, [1906] 2 Ch. 199.

[b] **Appointment of life estate with power to appoint remainder.**— Where the donee of a power of appointment, appointed in favor of his daughter, who was not living at the creation of the power, for her life, and after her death as she should by will appoint, the power of appointment conferred upon the daughter was void, upon the same principle as if there had been a gift to her for her own benefit dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time, since she might not die within the period prescribed by the rule against perpetuities; and, a fortiori, a gift depending upon the exercise of the power by her at her death must be too remote also. Morgan v. Gronow, L. R. 16 Eq. 1.

72. Bartlett v. Sears, 81 Conn. 34, 44, 70 A 33; Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 97 SW 421, 30 KyL 110; Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

"One to whom a power of appointment is given by will stands to the testator substantially in the position of an agent toward his principal. An agent cannot do that which the principal cannot do." Bartlett v. Sears, supra.

73. Conn.—Heald v. Briggs, 83 Conn. 5, 74 A 1123.

Md.—Hawkins v. Ghent, 154 Md. 261, 140 A 212; Gambrill v. Gambrill, 122 Md. 563, 89 A 1094; Levenson v. Manly, 119 Md. 517, 87 A 261; Reed v. McIlvain, 113 Md. 140, 77 A 329; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Thomas v. Gregg, 76 Md. 174, 24 A 418; Albert v. Albert, 68 Md. 352, 12 A 11; Barnum v. Barnum, 26 Md. 119, 90 AmD 88.

N. Y.—Fargo v. Squiers, 154 N. Y. 250, 48 NE 509; Farmers' L. & T. Co. v. Kip, 120 App. Div. 347, 104 NYS 1092 [aff 192 N. Y. 266, 85 NE 59]; Maitland v. Baldwin, 70 Hun 267, 24 NYS 29; Thomson v. Livingston, 6 N. Y. Super. 539; Matter of Dodge, 129 Misc. 390, 222 NYS 247; Carlisle v. Rich, 100 Misc. 305, 165 NYS 601; Matter of Bankers' Trust Co., 82 Misc. 375, 143 NYS 843.

Pa.—Crolius v. Kramer, 279 Pa. 275, 123 A 808; Smith's App., 88 Pa. 492; Ingersoll's Est., 15 Pa. Co. 19; Ronckendorff's Est., 11 Pa. Co. 447; Gardette's Est., 16 Phila. 264, 13 WklyNC 315.

Wis.—Miller v. Douglass, 192 Wis. 486, 213 NW 320.

Eng.—In re Clarke, [1916] 1 Ch. 467; In re Davies, [1910] 2 Ch. 35; In re Fane, [1913] 1 Ch. 404; In re Brown, 3 Ch. D. 156; In re Ramadge, [1919] 1 Ir. 205; Hutchinson v. Tottenham, [1898] 1 Ir. 403 [aff [1899] 1 Ir. 344]; Massey v. Barton, 7 Ir. Eq. 95; D'Abbadie v. Bizoin, Ir. R. 5 Eq. 205; Re Staveley, 90 L. J. Ch. 111.

Ont.—Re Goodhue, 47 Ont. L. 178; Re Eliot, 4 OntWN 1198, 24 OntWR 494, 11 DomLR 34.

"In order to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power." In re Fane, [1913] 1 Ch. 404, 411. To same effect Thomas v. Gregg, 76 Md. 174, 24 A 418.

74. Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365; In re Boyd, 199 Pa. 487, 49 A 297 [aff 10 Pa. Dist. 87]; Slark v. Dakyns, L. R. 10 Ch. 35; Re Paul, [1921] 2 Ch. 1; In re Thompson, [1906] 2 Ch. 199; In re Coulman, 30 Ch. D. 186; Von Brockdorff v. Malcolm, 30 Ch. D. 172; Morgan v. Gronow, L. R. 16 Eq. 1; In re Hallinan, [1904] 1 Ir. 452; Wilkinson v. Duncan, 30 Beav. 111, 54 Reprint 831; Peard v. Kekewich, 15 Beav. 166, 51 Reprint 500; Re Eliot, 4 OntWN 1198, 24 OntWR 494, 11 DomLR 34. See Ernst v. Rivers, 233 Mass. 9, 123 NE 93; In re Fane, [1913] 1 Ch. 404 (both applying the principle stated in the text).

[a] **"The happily turned but ambiguous phrase** that an appointment should be considered 'as if written

[§ 66] **b. General Power Exercisable by Deed.**[75] When a donee is given a general power to appoint to whomsoever he may choose, which is exercisable by deed at a time within the period prescribed by the rule against perpetuities,[76] he is regarded as having the absolute ownership,[77] and the period within which an interest or estate appointed by him must vest in the appointee in order to avoid the objection of remoteness is computed from the date of the appointment rather than from the date of the creation of the power,[78] even though in fact the appointment is made by will.[79]

A general power exercisable only by will has in a few cases been held to make the donee so far the equivalent of the absolute owner that the remoteness of an appointment made by him is to be computed with reference to the date of the appointment rather than the date of the creation of the power;[80] but such decisions have been criticized,[81] and the weight of authority seems to be otherwise.[82]

[§ 67] **C. Powers To Sell and Similar Powers—1. In General.** Although it is a general rule that a power is void if it may possibly be exercised at a time beyond the limits prescribed by the rule against perpetuities,[83] a power to sell property, although unlimited as to time, is ordinarily considered not obnoxious to the rule, inasmuch as it must, unless otherwise provided, or otherwise required by the nature of the purposes for which it is created, be exercised within a reasonable time,[84] and a reasonable time is ordinarily less than the period specified by the rule;[85] and, a fortiori, a power to sell during, or at the expiration of, a life in being at its creation,[86] or within twenty-one years after its creation[87] or after such life,[88] or before or at, but not after, the expiration of an estate tail commencing within the prescribed time,[89] is not void for remoteness.[90] But if by its terms such a power is to be exercised at a time which may be beyond the expiration of such period, it is too remote.[91]

Remote limitation of proceeds. A power to sell property does not fail merely because of a direction to the donee to use the proceeds for a purpose which offends against the rule against perpetuities, but such proceeds are disposed of as in other cases of remote limitations.[92]

[§ 68] **2. Sale To Pay Debts or Legacies.**[93] A power to sell property in order that the proceeds thereof may be used for the payment of debts or legacies is ordinarily not objectionable to the rule against perpetuities, both because it must be exercised within a reasonable time,[94] and because the creditors or legatees have a present interest in the property or its proceeds, of the nature of a charge, and so may compel the donee of the owner to exercise it at once.[95]

into the original instrument' . . . is true if understood of the validity of an appointment. It is not true if understood of the meaning of the words used in making an appointment." Gray Perp. § 523b.

[b] **Thus** (1) when a life tenant with power of appointment appoints to his child, to vest when he reaches the age of twenty-five years, the appointment is good under the rule against perpetuities if such child will necessarily attain the specified age within twenty-one years after the death of his parent, but not otherwise. In re Boyd, 199 Pa. 487, 49 A 297 [aff 10 Pa. Dist. 87]; Re Paul, [1921] 2 Ch. 1; Re Eliot, 4 OntWN 1198, 24 OntWR 494, 11 DomLR 34. (2) Where the donee of a power appointed property to her surviving husband for life, and after his death to her sons who should reach the age of twenty-five years, and her sons were of such age at her death that they would necessarily reach such age, if at all, within twenty-one years thereafter, and, if not before, within twenty-one years after the death of the husband, both the donee and her husband having been in being at the creation of the power, the appointment to the sons was not void under the rule against perpetuities. Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365.

General rule that certainty of vesting within permitted period must be discernible at creation of estate see supra § 10.

75. Validity of general power exercisable by deed see supra § 62.

76. Period prescribed by rule see supra § 5.

77. See supra § 62 text and note 58.

78. Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Mifflin's App., 121 Pa. 205, 15 A 525, 6 AmSR 781, 1 LRA 453; Bray v. Bree, 8 Bligh N. S. 568, 5 Reprint 1053, 2 Cl. & F. 453, 6 Reprint 1225. See Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59; Re Phillips, 28 Ont. L. 94, 11 DomLR 500 (dicta); Gray Perp. § 524 et seq (for general discussion).

[a] **Reason for principle.**—"When a man has the present absolute interest in property, he can deal with it without regard to the previous history of the title. In applying the Rule against Perpetuities to any settlement or devise he may make, it is unnecessary to consider what limitations the property was subject to before it came into his hands. And if a man has the present unconditioned right to acquire the present absolute interest, he is regarded by the Rule against Perpetuities as already having such interest. A tenant in tail is such a person; a donee of a general power exercisable by deed is also such a person. To this extent the Rule sacrifices form to substance; but the substance must be there." Gray Perp. § 526b.

79. Mifflin's App., 121 Pa. 205, 15 A 525, 6 AmSR 781, 1 LRA 453; Bray v. Bree, 8 Bligh N. S. 568, 5 Reprint 1053, 2 Cl. & F. 453, 6 Reprint 1225.

80. Frear v. Pugsley, 9 Misc. 316, 30 NYS 149; Miller v. Douglass, 192 Wis. 486, 213 NW 320; Rous v. Jackson, 29 Ch. D. 521; In re Flower, 55 L. J. Ch. 200. Compare Miller v. Douglass, 192 Wis. 486, 505, 213 NW 320 (where it was said, as to the point stated in the text, that "each case must stand or fall upon its own particular facts;" and the court computed the period of the rule from the date of the execution of the power rather than the date of its creation).

81. Minot v. Paine, 230 Mass. 514, 120 NE 167, 1 ALR 365; Genet v. Hunt, 113 N. Y. 158, 21 NE 91; Re Phillips, 28 Ont. L. 94, 11 DomLR 500; Gray Perp. §§ 526–526c.

82. See supra § 65 text and note 71.

83. See supra § 61.

84. See Powers [31 Cyc 1111 et seq].

85. Ark.—Morning Star Min. Co. v. Bennett, 164 Ark. 244, 261 SW 639.

Colo.—Miller v. Weston, 67 Colo. 534, 189 P 610.

Ill.—Buckner v. Carr, 302 Ill. 378, 134 NE 760; Wagner v. Wagner, 244 Ill. 101, 91 NE 66, 18 AnnCas 490; Hart v. Seymour, 147 Ill. 598, 35 NE 246.

Mass.—Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865.

N. J.—Westfield Trust Co. v. Beekman, 97 N. J. Eq. 140, 128 A 791.

Pa.—Cooper's Est., 150 Pa. 576, 24 A 1057, 30 AmSR 829. But see Cresson v. Ferree, 70 Pa. 446 (contrary dictum).

W. Va.—Eary v. Raines, 73 W. Va. 513, 80 SE 806.

Eng.—In re Sudeley, [1894] 1 Ch. 334; Peters v. Lewes, etc., R. Co., 18 Ch. D. 429. See In re Tweedie, 27 Ch. D. 315 (apparently applying the principle stated in the text).

And see cases infra § 69 text and note 3.

"The mere fact that no time is fixed within which the power of sale must be exercised does not of itself create a perpetuity. It is sufficient to say that a power to sell and distribute the proceeds, created by a will, must be exercised within a reasonable time." Cooper's Est., 150 Pa. 576, 584, 24 A 1057, 30 AmSR 829.

86. In re Tweedie, 27 Ch. D. 315.

87. English v. Cliff, [1914] 2 Ch. 376.

88. Gerke v. Colonial Trust Co., 114 Md. 289, 79 A 587.

[a] **Thus** a direction to sell certain property after the death of the testator's last surviving daughter and when his youngest grandchild should become of age is not obnoxious to the rule against perpetuities, because such grandchild must be born within a life in being at the death of the testator. Gerke v. Colonial Trust Co., 114 Md. 289, 79 A 587.

89. Barber v. Pittsburgh, etc., R. Co., 166 U. S. 83, 17 SCt 488, 41 L. ed. 925; Briggs v. Oxford, 1 De G. M. & G. 363, 50 EngCh 278, 42 Reprint 592; Lantsbery v. Collier, 2 Kay & J. 709, 69 Reprint 967 [crit Ware v. Polhill, 11 Ves. Jr. 257, 32 Reprint 1087]. See Cresson v. Ferree, 70 Pa. 446; Cole v. Sewell, 4 Dr. & War. 1 (dicta). And see infra § 69 text and note 8.

90. Power exercisable only within period of rule see supra § 61 text and note 40.

91. See cases infra § 69 text and notes 98–1.

92. Kennedy v. Suydam, 36 Ont. L. 512, 10 OntWN 150, 30 DomLR 744.

Effect of remoteness of limitation see supra § 58.

93. Trusts for payment of debts or legacies see infra § 75.

94. See supra § 67.

95. Colo.—Miller v. Weston, 67 Colo. 534, 189 P 610 [aff 25 Colo. A.

[§ 69] **3. Sale, Lease, Mortgage, or Exchange of Settled Property.**[96] In accordance with the principle that a power is invalid if it is exercisable at a time beyond the period specified by the rule against perpetuities,[97] a power to sell, lease, mortgage, or exchange property settled in trust is, in general, void if, in view of the purposes for which it is created, it may be exercised more than twenty-one years after lives in being,[98] as during the lifetime of a person unborn at the creation of the power,[99] or at the end of a period or the happening of an event which may carry it beyond the limits prescribed by the rule.[1] But if a legal fee in the property covered by the power will necessarily become vested in possession within lives in being at the creation of the power, the purposes of the power in the usual case will be spent and the power cease at or within a reasonable time after such vesting,[2] and as a reasonable time is ordinarily less than twenty-one years, the power in such case is therefore not too remote;[3] and even when it is construed not so to cease, if such a power is thereafter exercisable only with the consent of the owner of the fee, it is not too remote, for such owner can at any time convey the fee and thereby render himself incapable of consenting to a sale under the power.[4] And when an equitable fee is vested in possession or will necessarily become so within the period prescribed by the rule, a power to sell is not obnoxious to the rule, for it will either cease, upon the same principles as in the case of a legal fee vested in possession,[5] or the equitable owner will be entitled to call for a conveyance of the legal title and thereby can destroy the power or cause it to cease.[6]

Power to raise money to discharge mortgage. Upon the same principles, a power to raise money out of property for the payment of a mortgage existing at the creation of the power is not too remote, although unlimited as to time, where the property is vested or will necessarily become so within the period of the rule against perpetuities, for the owner of the fee or tenant in tail can pay the encumbrance and thereby destroy the power.[7]

A power attendant upon an estate tail is good, for any tenant in tail can destroy it.[8]

[§ 70] **4. Sale of Mortgaged Property.** In accordance with the principles governing the validity of powers in general,[9] a power given in a mortgage to the mortgagee to sell the mortgaged property in case of default is clearly unobjectionable to the rule against perpetuities when the default must occur, if at all, within the period prescribed by the rule;[10]

231, 138 P 424, withdrawing former op 61 Colo. 588, 157 P 1161].

Ill.—Buckner v. Carr, 302 Ill. 378, 134 NE 760.

N. J.—Westfield Trust Co. v. Beekman, 97 N. J. Eq. 140, 128 A 791.

W. Va.—Eary v. Raines, 73 W. Va. 513, 517, 80 SE 806 [cit Cyc].

Eng.—Silk v. Prime, 1 Bro. Ch. 138 note, 28 Reprint 1037; Briggs v. Oxford, 1 De G. M. & G. 363, 50 EngCh 278, 42 Reprint 592.

96. Powers of sale, mortgage, lease, and exchange in general see Powers [31 Cyc 1074 et seq].

97. See supra § 61.

98. Ill.—Beatty v. Stanley, 298 Ill. 444, 131 NE 687.

Pa.—Dawson v. Lancaster, 12 Pa. Dist. 501, 28 Pa. Co. 657; Cooper's Est., 9 Pa. Co. 606.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

Eng.—In re Appleby, [1903] 1 Ch. 565; Floyer v. Bankes, L. R. 8 Eq. 115; Case v. Drosier, 2 Keen 764, 15 EngCh 764, 48 Reprint 824.

Ont.—Meyers v. Hamilton Provident, etc., Co., 19 Ont. 358.

And see cases infra notes 99, 1.

[a] **For example,** a devise to one in fee, with a direction to him to sell the property within three years after his youngest child attains the age of twenty-one, and to divide the proceeds among his children, violates the rule against perpetuities and is void, since the sale may not take place when the legacies become vested and twenty-one years after a life in being at the testator's death. Meyers v. Hamilton Provident, etc., Co., 19 Ont. 358.

99. In re Allott, [1924] 2 Ch. 498; In re Appleby, [1903] 1 Ch. 565; Goodier v. Edmunds, [1893] 3 Ch. 455; Goodier v. Johnson, 18 Ch. D. 441; Sykes v. Sykes, L. R. 13 Eq. 56.

1. Barnum v. Barnum, 26 Md. 119, 90 AmD 88; In re Wood, [1894] 2 Ch. 310; In re Daveron, [1893] 3 Ch. 421; In re Bewick, [1911] 1 Ch. 116; Bristow v. Boothby, 2 Sim. & St. 465, 1 EngCh 465, 57 Reprint 424; In re Raphael, 3 N. S. Wales 196. See Blight v. Hartnoll, 19 Ch. D. 294 (apparently supporting the principle stated in the text).

[a] **Illustrations.**—(1) A direction to trustees of a testator's estate "to carry on my businss of a gravel contractor until my gravel-pits are worked out, and then to sell the said gravel-pits," offends against the rule of perpetuities, although evidence was adduced to show that men working out the pits in the ordinary way would work them out within the limits of the rule, for on account of unexpected happenings or the voluntary acts of the trustees the pits might not be worked out for a very long time, and the sale thereby be postponed beyond the permitted limits. In re Wood, [1894] 2 Ch. 310. (2) A devise of real estate upon trust to receive the rents and to pay therefrom all taxes, the cost of repairs, and the mortgage charges existing thereon, and, when it should be clear of all charges, to sell it and divide the proceeds, was void for remoteness as to the direction to sell, although it is shown that the existing mortgages would probably be paid off within the period of the rule against perpetuities. In re Bewick, [1911] 1 Ch. 116.

2. Cesser of power when purpose of creation is accomplished see Powers [31 Cyc 1053].

3. Cresson v. Ferree, 70 Pa. 446; Githens' Est., 24 Pa. Co. 248; In re Sudeley, [1894] 1 Ch. 334; Peters v. Lewes, etc., R. Co., 18 Ch. D. 429 [rev 16 Ch. D. 703]; Cole v. Sewell, 4 Dr. & War. 1. See Lantsbery v. Collier, 2 Kay & J. 709, 69 Reprint 967 (dictum). And see supra § 67 text and note 85.

4. Biddle v. Perkins, 4 Sim. 135, 6 EngCh 135, 58 Reprint 52. See Powis v. Capron, 4 Sim. 139 note, 6 EngCh 139, 58 Reprint 53 (apparently to same effect).

5. See supra text and note 2.

6. Ill.—Hart v. Seymour, 147 Ill. 598, 35 NE 246.

Me.—Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

Mass.—Heard v. Read, 171 Mass. 374, 50 NE 638. See Seamans v. Gibbs, 132 Mass. 239 (apparently to same effect, although a different reason is assigned for the decision).

Pa.—Cooper's Est., 150 Pa. 576, 24 A 1057, 30 AmSR 829; Cresson v. Ferree, 70 Pa. 446.

Eng.—In re Appleby, [1903] 1 Ch. 565; In re Tweedie, 27 Ch. D. 315; In re Cotton, 19 Ch. D. 624.

[a] **"To sum up the law** as to powers in connection with settled property:—(1) Sometimes the power ceases as soon as the equitable fee or absolute interest vests in possession: (2) Sometimes the power can be exercised until the owner of the equitable fee or absolute interest calls for the legal estate: (3) Sometimes the power can be exercised within a reasonable time after the fee or absolute interest has vested in possession, such reasonable time being not over twenty-one years after lives in being: (4) Sometimes the power is created to be exercised on a contingency which may happen after the legal fee or absolute interest has vested in possession, and which may be more than twenty-one years after a life in being. In the first three cases the power is not void for remoteness; in the last case it is." Pulitzer v. Livingston, 89 Me. 359, 368, 36 A 635.

[b] **"The true reason for holding such powers good** is that the trusts to which they are attached must come to an end, or can be destroyed, within the limits fixed by the Rule against Perpetuities. This is the case in ordinary settlements or wills where the property is settled or devised for life with remainders in tail, or for life only, as is more common in America. The life estates are usually for lives in being; the estates tail can be barred; and when, by the expiration of the life estates and estates tail or by the barring of the estates tail, the ultimate remainder-man in fee is entitled to possession, he either gets the legal estate or he is entitled to call upon the trustee for a conveyance of it. If he gets the legal title, the power at once disappears. If he has only the equitable fee, but is entitled to call for the legal estate from the trustees, the power is sometimes considered as ceasing at once; and even if the intention is that the power shall continue in the trustees until conveyance, yet it is not too remote; for the owner of the equitable fee can destroy it at any time by demanding a conveyance." Gray Perp. § 490.

7. Briggs v. Oxford, 1 De G. M. & G. 363, 50 EngCh 278, 42 Reprint 592.

8. Barber v. Pittsburgh, etc., R. Co., 166 U. S. 83, 17 SCt 488, 41 L. ed. 925; Lantsbery v. Collier, 2 Kay & J. 709, 69 Reprint 967 [crit Ware v. Polhill, 11 Ves. Jr. 257, 32 Reprint 1087]; Waring v. Coventry, 1 Myl. & K. 249, 7 EngCh 249, 39 Reprint 675, 2 Myl. & K. 406, 7 EngCh 406, 39 Reprint 999; Wallis v. Freestone, 10 Sim. 225, 16 EngCh 225, 59 Reprint 599. And see supra § 67 text and note 89.

Validity of limitations after estates tail see supra § 35.

9. See supra § 61.

10. Sioux City Terminal R., etc., Co. v. Trust Co. of North America, 82 Fed. 124, 27 CCA 73 [aff 173 U. S. 99, 19 SCt 341, 43 L. ed. 628].

and it has been held that, even where the default may occur at a time beyond such period, the power of sale is not obnoxious to the rule, but is incidental to the present interest of the mortgagee.[11]

VIII. TRUSTS

[§ 71] **A. Private Trusts[12]—1. In General—a. Duration of Trusts.**[13] The length of time for which a trusteeship may be limited to continue is to be distinguished from the period for which the vesting of interests or estates in cestuis que trust may be postponed.[14] In general, there is no limitation under the rule against perpetuities upon the permissible duration of a validly created trust, so long as the interests of the cestuis will necessarily vest, if ever, within the period prescribed by the rule,[15] although in some jurisdictions the period for which a trust may be created is restricted by statute.[16] However, when the entire equitable interest or estate in property is absolutely and indefeasibly vested, it has been held that the legal title cannot be indestructibly limited to trustees for a period greater than twenty-one years after lives in being at the creation of the trust,[17] although the prohibition thereof probably arises not out of the rule against perpetuities but out of another rule, in the nature of a rule against suspending the enjoyment or absolute power of alienation, prescribing the same pe-

11. Gilbertson v. Richards, 5 H. & N. 453, 157 Reprint 1258. Compare Gray Perp. § 565 et seq (where it was said: "If there is a power in the mortgage deed authorizing the mortgagee to sell at any time after default, it may be said that as this power can be exercised at any time, it is exercisable at a period more than twenty-one years after lives in being, and is therefore void. But to this it may fairly be said that such power is merely a remedy given to a party to enforce a right which the law would otherwise enforce for him; and if he has a present right and a present remedy, the fact that he may not choose at once to exercise his remedy, and that therefore a title may not be acquired by a sale under the power till a period beyond the limits of remoteness, no more invalidates the power than it would invalidate a title acquired by a sale under order of court in a foreclosure suit. If the condition of the mortgage is such that a failure to fulfil it by the mortgagor may occur more than twenty-one years after lives in being, it will be found more difficult to sustain the rights of the mortgagee. . . . Mortgages in fee for the payment of money or the performance of other acts at a date more than twenty-one years after lives in being have probably been few. The question may be some day presented in connection with railroad mortgages. In view of the large interests likely to be involved, and the novelty of the question, the courts may perhaps sustain the validity of such mortgages. It is to be hoped, should this be the case, that they will frankly declare them an exception to the Rule against Perpetuities, and not, by attempting to reconcile them with the Rule, bring confusion into the Rule itself").

Present estates are not within rule see supra §§ 20–25.

12. Trusts and trusteeships in general see Trusts [39 Cyc 1].

13. Charitable trusts see infra §§ 78, 79.

Trusts for accumulation see infra §§ 80–87.

14. See cases infra this note; and notes 15–18.

[a] **Failure to make this distinction results in apparently conflicting statements of the law,** sometimes in the same opinion. For example, it is properly said that "there is no rule which limits the continuance of a trust for any period of time," so long as the beneficial interests will necessarily vest within the period permitted by the rule against perpetuities. And at another point in the opinion it is said that "private trusts . . . cannot be extended beyond the legal limitations of a perpetuity;" but it clearly appears from the context that the court meant that interests cannot be given under a trust in such manner that they may vest at a time beyond the limits of the rule. Closset v. Burtchaell, 112 Or. 585, 608, 614, 230 P 554. See Lyons v. Bradley, 168 Ala. 505, 53 S 244, 248 (where the latter statement is made, with the same meaning).

15. Conn.—Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A 555; Loomer v. Loomer, 76 Conn. 522, 57 A 167.

Ill.—Nicol v. Morton, 332 Ill. 533, 164 NE 5; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Guerin v. Guerin, 270 Ill. 239, 110 NE 402; Wagner v. Wagner, 244 Ill. 101, 91 NE 66, 18 AnnCas 490; Mettler v. Warner, 243 Ill. 600, 90 NE 1099, 134 AmSR 388; Armstrong v. Barber, 239 Ill. 389, 88 NE 246.

Me.—Strout v. Strout, 117 Me. 357, 104 A 577; Pulitzer v. Livingston, 89 Me. 359, 36 A 635 [disappr Slade v. Patten, 68 Me. 380]. Compare Hamlin v. Mansfield, 88 Me. 131, 138, 33 A 788 [foll Slade v. Patten, 68 Me. 380, later overr by Pulitzer v. Livingston, supra] (where a trust to continue so long as the testator's son and his children, then or thereafter born, should desire, was held "clearly obnoxious to the rule against perpetuities").

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294; Brown v. Reeder, 108 Md. 653, 71 A 417. But see Methodist Episcopal Church Missionary Soc. v. Humphreys, 91 Md. 131, 46 A 320, 80 AmSR 432; Deford v. Deford, 36 Md. 168; Barnum v. Barnum, 26 Md. 119, 90 AmD 88 (in all of which trusts were held void on the ground that they might continue beyond the time specified by the rule against perpetuities, although it appears that the beneficial interests necessarily vested within such period).

Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709. See Vines v. Vines, 143 Tenn. 517, 226 SW 1039 (apparently applying the principle stated in the text).

W. Va.—Bennett v. Bennett, 92 W. Va. 391, 115 SE 436.

Eng.—In re Daveron, [1893] 3 Ch. 421.

See Grossenbacher v. Spring, 108 Kan. 397, 195 P 884 (apparently applying the principle stated in the text).

And see cases infra § 72 notes 25, 26.

"There is no rule which limits the continuance of a trust to any period of time. A trust is no more invalid for the reason that it may continue thirty years than is a life estate or estate in fee simple. The essential thing is that the beneficial interest under the trust vest in the cestui que trust within the time limited by law for the vesting of legal estates." Loomer v. Loomer, 76 Conn. 522, 527, 57 A 167 [quot Closset v. Burtchaell, 112 Or. 585, 608, 230 P 554].

[a] **Thus** a devise to trustees to hold and manage property for a term of seventy-five years, and to pay the income annually to the testator's children, does not violate the rule against perpetuities, since the particular estate, both legal and equitable, vested at once. In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

Continuation and termination of interests in general see supra § 17.

16. See statutory provisions.

[a] **In Minnesota** (1) it is provided by Gen. St. (1923) § 8090 subd 6 that an express trust for the benefit of any person shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation and twenty-one years after the death of the survivor of them. Chapman's Application, 168 Minn. 1, 211 NW 325; Congdon v. Congdon, 160 Minn. 343, 200 NW 76; Minnesota L. & T. Co. v. Douglas, 135 Minn. 413, 161 NW 158; Shanahan v. Kelly, 88 Minn. 202, 92 NW 948. (2) When lives form no part of the period of such a trust, it is void if it may continue longer than twenty-one years. Chapman's Application, supra; Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825. (3) Thus, where property was conveyed to trustees to be held for a period of twenty-five years as a common trust for the use and benefit of the owners of certain adjacent property, the trust was void. Chapman's Application, supra.

17. Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A 555; Kempson v. Hoskins, 88 N. J. Eq. 153, 102 A 673 [aff 89 N. J. Eq. 205, 104 A 86] (semble); Pennsylvania L. Ins.-Co. v. Price, 7 Phila. (Pa.) 465. See Ortman v. Dugan, 130 Md. 121, 100 A 82 (dictum). See also Armstrong v. Barber, 239 Ill. 389, 88 NE 246 (where the question is discussed but not decided). Compare Liberty Nat. Bank, etc., Co. v. New England Investors Shares, 25 F. (2d) 493 (holding that a trust limited by its terms to a period of years less than twenty-one years does not create a perpetuity or impose any legal restraint upon alienation at common law); Hopkinson v. Swaim, 284 Ill. 11, 119 NE 985 (where a spendthrift trust created by the exercise of a testamentary power was held, when referred to the will creating the power, not to continue for a period greater than twenty-one years after lives in being at the donor's death, and therefore was valid within the rule concerning the time a trusteeship may be required to continue); Whiteley v. Babcock, (Mo.) 202 SW 1091 (where a trust to continue until the attainment of his majority by the youngest child of the beneficiary was held not to violate the rule against perpetuities, but it does not appear on what grounds a violation was asserted); Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 337 [aff 74 N. J. Eq. 843, 71 A 240] (where a trust of property to continue twenty-five years, the beneficial interest being vested, was treated as merely a provision postponing possession and therefore not within

riod.[18] But if each beneficiary has the power to terminate the trust as to his share at any time, the trust is unobjectionable;[19] and the same has been held of a trust terminable at the demand of two thirds of the persons beneficially interested thereunder,[20] but not of one terminable by a majority of them.[21]

[§ 72] **b. Vesting of Beneficial Interests—(1) In General.** Inasmuch as the rule against perpetuities is the same at law and in equity,[22] and applies equally to legal and equitable interests and estates,[23] the violation of it will no more be tolerated when an interest or estate is covered by a trust than when it is merely legal;[24] and while beneficial interests under a trust which are vested immediately, or will necessarily vest, if ever, within the period prescribed by the rule, are good,[25] even though the trust may continue beyond such time,[26] a limitation under a trust for a noncharitable purpose of an interest or estate which may not vest in the cestui que trust within such period is void for remoteness,[27] notwithstanding the trustee may be given power to sell and

the rule against perpetuities).

18. Gray Perp. § 121i; Kales Future Interests § 658. See Armstrong v. Barber, 239 Ill. 389, 88 NE 246 (where a testator vested the beneficial interest in property in his child immediately upon the taking effect of his will, a provision giving the legal title and control to a trustee for a time which might continue during the whole life of the child does not violate the rule against perpetuities, although it may violate some other rule regulating the length of time such a trust can continue; but the latter point is not decided); Pulitzer v. Livingston, 89 Me. 359, 36 A 635 [disappr Slade v. Patten, 68 Me. 380] (holding that a trust created by the owners of property for their own benefit, to continue indefinitely, did not violate the rule against perpetuities, both legal and equitable estates being vested, and the rule concerning itself only with the commencement, and not the termination, of estates; and suggesting that those decisions to the effect that such a trust must terminate within twenty-one years after lives in being are the result of confusing the rule against perpetuities with the rules disallowing restraints on alienation; but apparently putting the decision on the ground that the trust by its terms was destructible by each cestui as to his share and therefore did not create a perpetuity, which by definition is an indestructible interest). Compare In re Johnston, 185 Pa. 179, 188, 39 A 879, 84 AmSR 621 (where it was said, obiter, that a devise or property to trustees for a period of seventy-five years is not obnoxious to the rule against perpetuities where the equitable estate vested immediately at the testator's death; but the limitation was held void, along with the ultimate limitation in remainder at the end of the term, on the ground that "the testator's chief and controlling purpose throughout was to tie up his estate, and hold it intact beyond the power of either children or grandchildren to interfere with the final distribution he proposed at the end of seventy-five years"). And see cases supra note 17.

"The courts drifted naturally into fixing the limit of time during which the trusteeship of an absolute and indefeasible interest might be required to continue at lives in being and twenty one years after the creation of the interests. They not infrequently called it an application of the rule against perpetuities." Kales Future Interests § 658.

Restraints on alienation or enjoyment see supra § 2 text and notes 21–28, 31–34.

19. Pulitzer v. Livingston, 89 Me. 359, 36 A 635.

20. Cooper's Est., 150 Pa. 576, 24 A 1057, 30 AmSR 829.

21. Kempson v. Hoskins, 88 N. J. Eq. 153, 102 A 673 [aff 89 N. J. Eq. 205, 104 A 86].

22. See supra § 2 text and note 19.

23. See supra § 19 text and note 51.

24. Ill.—Morgan v. Charleston Nat. Trust Bank, 331 Ill. 182, 162 NE 888; O'Hare v. Johnston, 273 Ill. 458, 113 NE 127 [rev 194 Ill. A. 153]; Howe v. Hodge, 152 Ill. 252, 274, 38 NE 1083.

Mo.—Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261.

Oh.—Hoopert v. Gugel, 25 OhNPNS 516.

Tenn.—Eager v. McCoy, 143 Tenn. 693, 228 SW 709.

Eng.—Norfolk v. Howard, 1 Vern. Ch. 163, 23 Reprint 388.

"A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate, and courts of equity will not permit limitations of future equitable interests to transcend the limits assigned for the limitation of similar legal interests, or executory devises, and shifting and springing uses at law." Howe v. Hodge, supra.

[a] **"A perpetuity is a thing odious in law,** and destructive to the commonwealth; it would put a stop to commerce, and prevent the circulation of the riches of the kingdom; and therefore is not to be countenanced in equity. If in equity you should come nearer to a perpetuity, than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust; which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth." Norfolk v. Howard, 1 Vern. Ch. 163, 164, 23 Reprint 388.

25. U. S.—Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; Long v. Union Trust Co., 280 Fed. 686 [aff 272 Fed. 699]; Doty v. Mason, 244 Fed. 587; Dorrance v. Dorrance, 227 Fed. 679 [aff 238 Fed. 524, 151 CCA 460].

Ala.—Henderson v. Henderson, 210 Ala. 73, 97 S 353; Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

Ark.—Ward v. McMath, 153 Ark. 506, 241 SW 3.

Cal.—Berry v. Lebus, 56 Cal. A. 378, 205 P 471.

Conn.—Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A 555; White v. Fisk, 22 Conn. 31.

D. C.—Wills v. Maddox, 45 App. 128.

Ill.—Kolb v. Landes, 277 Ill. 440, 115 NE 539; Anderson v. Williams, 262 Ill. 308, 104 NE 659, AnnCas1915B 720 [aff 179 Ill. A. 398]; McCutcheon v. Pullman Trust, etc., Bank, 251 Ill. 550, 96 NE 510; Keyes v. Northern Trust Co., 130 Ill. A. 508 [aff 227 Ill. 354, 81 NE 384].

Iowa.—Damhoff v. Shambaugh, 200 Iowa 1155, 206 NW 248; Meek v. Briggs, 87 Iowa 610, 54 NW 456, 43 AmSR 410.

Kan.—Grossenbacher v. Spring, 108 Kan. 397, 195 P 884.

Ky.—Russell v. Meyers, 202 Ky. 593, 260 SW 377.

Me.—Hinds v. Hinds, 126 Me. 521, 140 A 189; Cary v. Talbot, 120 Me. 427, 115 A 166; True Real Est. Co. v. True, 115 Me. 533, 99 A 627.

Md.—Lyon v. Safe Deposit, etc., Co., 120 Md. 514, 87 A 1089.

Mass.—Ernst v. Rivers, 233 Mass. 9, 123 NE 93; Boston Safe Deposit, etc., Co. v. Collier, 222 Mass. 390, 111 NE 163, AnnCas1918C 962.

Miss.—Gwin v. Hutton, 100 Miss. 320, 56 S 446.

Mo.—Whiteley v. Babcock, 202 SW 1091; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261.

N. J.—Ocean City First Nat. Bank v. Rice, 101 N. J. Eq. 520, 139 A 396; Potter v. Watkins, 99 N. J. Eq. 538, 134 A 84; Camden Safe Deposit, etc., Co. v. Guerin, 87 N. J. Eq. 72, 99 A 105; Van Riper v. Hilton, 78 N. J. Eq. 371, 78 A 1055.

N. Y.—Chwatal v. Schreiner, 148 N. Y. 683, 43 NE 166.

Or.—In re Pittock, 102 Or. 159, 199 P 633, 202 P 216, 17 ALR 218; In re McGinnis, 91 Or. 407, 179 P 254.

Pa.—In re Jones, 284 Pa. 90, 130 A 314; Stephens v. Dayton, 220 Pa. 522, 70 A 127; Briggs v. Davis, *81 Pa. 470.

S. C.—Breeden v. Moore, 82 S. C. 534, 64 SE 604.

Tenn.—Vines v. Vines, 143 Tenn. 517, 226 SW 1039; Winters v. March, 139 Tenn. 496, 202 SW 73.

Tex.—Munger v. Munger, (Civ. A.) 298 SW 470.

Vt.—In re Peck, 96 Vt. 183, 118 A 527.

Eng.—In re Sampson, [1896] 1 Ch. 630.

[a] **Thus** (1) where property is given in trust to the testator's daughter until she shall become competent to manage it or shall marry, then to be paid over to her absolutely, the will is not open to the objection that the estate may not vest within a time fixed by statute, as, if not vested by the trustees in the cestui que trust in her lifetime, in any event it would vest in the heirs of the cestui que trust at her death. Meek v. Briggs, 87 Iowa 610, 54 NW 456, 43 AmSR 410. (2) A gift in trust to pay the income to the testator's four grandchildren and their survivors during their lives, and on their death the corpus to their heirs, is not too remote. Grossenbacher v. Spring, 108 Kan. 397, 195 P 884. (3) A trust to continue only until the death of the last survivor of certain designated persons in being at the creation of the trust is not a perpetuity. Stephens v. Dayton, 220 Pa. 522, 70 A 127; Briggs v. Davis, *81 Pa. 470. (4) A testamentary trust directing distribution when the testator's youngest child should reach the age of thirty years is not invalid as a perpetuity. In re McGinnis, 91 Or. 407, 179 P 254.

[b] **A trust to continue "as long as legally possible,"** the property then to be distributed, is not obnoxious to the rule against perpetuities. Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202.

26. U. S.—Doty v. Mason, 244 Fed. 587.

Conn.—Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A 555.

D. C.—Wills v. Maddox, 45 App. 128.

Me.—Cary v. Talbot, 120 Me. 427, 115 A 166.

Mass.—Boston Safe Deposit, etc., Co. v. Collier, 222 Mass. 390, 111 NE 163, AnnCas1918C 962.

27. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Conn.—Wheeler v. Fellowes, 52 Conn. 238; Jocelyn v. Nott, 44 Conn. 55.

Ga.—Overby v. Scarborough, 145 Ga. 875, 90 SE 67.

Ky.—Curd v. Curd, 163 Ky. 472, 173 SW 1148.

Me.—Towle v. Doe, 97 Me. 427, 54 A 1072; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103.

Md.—American Colonization Soc. v. Soulsby, 129 Md. 605, 99 A 944, LRA 1917C 937.

reinvest.[28] Thus a limitation of property to trustees, to be held by them indefinitely or for such a length of time that beneficial interests may vest at a time beyond the period prescribed by the rule against perpetuities, for the benefit of the heirs or descendants of the donor or another,[29] or such of them as may be or become destitute or in need of pecuniary assistance,[30] or for any other wholly or partially noncharitable purpose,[31] or, in the case of a trusteeship which by its terms will or may endure beyond the period specified by the rule, a limitation to trustees of property to be distributed to cestuis and to vest in them only upon its termination,[32] is void, not on account of the time for which the trusteeship may continue, but because interests or estates covered by it may vest at a time beyond the prescribed period.[33]

Discretionary powers of distribution. When by its terms a trust is to continue only for a period reasonably less than twenty-one years,[34] or only during the lives of persons in being at its creation,[35] a provision for the distribution of the trust property at the termination of the trust is not made too remote by reposing a discretion in the trustees as to the time of making it, inasmuch as they can be compelled to distribute within a reasonable time.[36] And it has been held that, where property is limited over to trustees

Mass.—Bundy v. U. S. Trust Co., 257 Mass. 72, 153 NE 337; Amory v. Amherst College, 229 Mass. 374, 118 NE 933; St. Paul's Church v. Atty.-Gen., 164 Mass. 188, 41 NE 231.

Mo.—Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 SW 261; Buchanan v. Kennard, 234 Mo. 117, 136 SW 415, 37 LRANS 993, AnnCas 1912D 50; Bradford v. Blossom, 207 Mo. 177, 105 SW 289.

N. J.—Camden Safe Deposit, etc., Co. v. Guerin, 87 N. J. Eq. 72, 99 A 105.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—Ewalt v. Davenhill, 257 Pa. 385, 101 A 756. See In re Shallcross, 200 Pa. 122, 49 A 936 (holding void a trust for the benefit of those grandchildren who should reach twenty-five, on the ground that it was to last too long; but it would seem that the rule was incorrectly applied because the children in question were in being at the testator's death).

R. I.—Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 101 A 430; Webster v. Wiggin, 19 R. I. 73, 31 A 824, 28 LRA 510.

Tex.—Munger v. Munger, (Civ. A.) 298 SW 470. Compare West Texas Bank, etc., Co. v. Matlock, (Commn. A.) 212 SW 937 (where it was held, on the ground that a trust is bad if it is possible that no equitable interest under it may vest within the limits of the rule against perpetuities, that a gift of a sum of money to trustees to be paid to the first railroad reaching a certain point would have been bad for remoteness had it not provided for a return of the fund to the donor if no railroad should be built to the designated point within a "reasonable time," and that therefore the terms of an agreement to establish a trust or deposit for such a railroad were fully complied with by a trust instrument containing the provision for return).

Eng.—In re Davey, [1915] 1 Ch. 837; In re Blew, [1906] 1 Ch. 624; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Wainman v. Field, Kay 507, 69 Reprint 215; Ibbetson v. Ibbetson, 5 Myl. & C. 26, 46 EngCh 23, 41 Reprint 281.

Pr. Edw. Isl.—Doe v. McIsaac, 1 Pr. Edw. Isl. 353.

And see cases infra notes 28–32.

[a] **"As in legal estates, it must appear** in order for a settlement in trust to be valid that the entire equitable estate has vested in a life in being at the date the settlement becomes effective or within twenty-one years thereafter." Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 696, 197 SW 261.

Charitable trusts see infra §§ 78, 79.

28. Wheeler v. Fellowes, 52 Conn. 238.

29. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Ill.—Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230.

La.—Steven's Succ., 36 La. Ann. 754.

Md.—Lee v. O'Donnell, 95 Md. 538, 52 A 979; Goldsborough v. Martin, 41 Md. 488.

Mass.—Amory v. Amherst College, 229 Mass. 374, 118 NE 933; St. Paul's Church v. Atty.-Gen., 164 Mass. 188, 41 NE 231; Kent v. Dunham, 142 Mass. 216, 7 NE 730, 56 AmR 667.

N. J.—Ocean City First Nat. Bank v. Rice, 101 N. J. Eq. 520, 139 A 396; Kempson v. Hoskins, 88 N. J. Eq. 153, 102 A 673 [aff 89 N. J. Eq. 205, 104 A 86].

R. I.—Angell v. Angell, 28 R. I. 592, 68 A 583; Williams v. Herrick, 19 R. I. 197, 32 A 913.

Eng.—Yeap Cheah Neo v. Ong Cheng Neo, L. R. 6 P. C. 381.

See White v. Fisk, 22 Conn. 31 (dictum).

30. Kent v. Dunham, 142 Mass. 216, 7 NE 730, 56 AmR 667; Smith v. Harrington, 4 Allen (Mass.) 566; Moore v. Moore, 59 N. C. 132.

31. U. S.—Korsstrom v. Barnes, 167 Fed. 216.

Ala.—Moseley v. Smiley, 171 Ala. 593, 55 S 143.

Cal.—In re Sutro, 155 Cal. 727, 102 P 920.

Mass.—Thorp v. Lund, 227 Mass. 474, 481, 116 NE 946, AnnCas1918B 1204.

N. J.—Kitchen v. Pitney, 94 N. J. Eq. 485, 119 A 675.

Pa.—In re Palethorp, 249 Pa. 389, 94 A 1060.

Eng.—In re Clifford, [1912] 1 Ch. 29.

Ont.—Re McLellen, 7 OntWN 477.

And see cases infra this note.

"An attempt to create a perpetual trust for a private use is a nullity." Thorp v. Lund, supra.

[a] **Particular trusts held void.**—A trust for: (1) Educating of members of the testator's family and name. Re McLellan, 7 OntWN 447. (2) Contribution toward the holiday expenses of the employees of a designated company. In re Drummond, [1914] 2 Ch. 90. (3) Employees of a bank. Siedler v. Syms, 56 N. J. Eq. 275, 38 A 424. (4) "Such benevolent purposes as the trustees shall direct," these terms embracing objects which are not charitable. Smith v. Pond, 90 N. J. Eq. 445, 107 A 800. (5) Support of a person to care for the testator's grave and monument. In re Palethorp, 249 Pa. 389, 94 A 1060. (6) Translation of ancient writings relating to theosophy. Korsstrom v. Barnes, 167 Fed. 216.

[b] **A trust partly charitable and partly noncharitable,** or in which the trustees can use the property partly for purposes not charitable, is invalid where beneficial interests may arise at a time in the future beyond that permitted by the rule against perpetuities. Kitchen v. Pitney, 94 N. J. Eq. 485, 119 A 675.

Trusts for maintenance of property or similar uses see infra § 76.

32. U. S.—Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592.

Kan.—Kirkpatrick v. Kirkpatrick, 112 Kan. 314, 211 P 146.

N. J.—Kates v. Walker, 82 N. J. L. 157, 82 A 301; Graves v. Graves, 94 N. J. Eq. 268, 120 A 420.

Pa.—In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621.

Ont.—Foxwell v. Kennedy, 24 Ont. L. 189, 2 OntWN 1299, 19 OntWR 595 [aff 2 OntWN 821, 18 OntWR 782]; Kennedy v. Kennedy, 24 Ont. L. 183, 2 OntWN 1173, 1304, 19 OntWR 346, 605 [dism app 2 OntWN 625, 18 OntWR 442].

[a] **For example** (1) where property is given to trustees to hold for seventy-five years, and then to distribute it to a class of persons to be ascertained by that time, such limitation is void for remoteness, the vesting being postponed too long. In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621. (2) A limitation of property to a testator's great-grandchildren, to take effect at the expiration of a trust which is to continue until the death of the last survivor of all the testator's grandchildren, whether born or unborn at his death, is void for remoteness inasmuch as the trust may not cease and the interests of the great-grandchildren vest within twenty-one years after lives in being when the will took effect. Graves v. Graves, 94 N. J. Eq. 268, 120 A 420.

33. Duration of trusteeship immaterial where beneficial interests vest within period of rule see supra § 71 text and note 15.

34. Duggan v. Slocum, 83 Fed. 244 [aff 92 Fed. 806, 34 CCA 676].

[a] **Thus,** when a fund was given to trustees to accumulate the income for a period of ten years or more, at their discretion, and then to be used for a designated charitable purpose, the provision for accumulation was held good over the objection that it contravened the rule against perpetuities, inasmuch as the trustees may, in their discretion, apply the fund to the designated purpose at any time after ten years, and, if they refuse to do so within a reasonable time thereafter, they can be compelled to make the application. Duggan v. Slocum, 83 Fed. 244 [aff 92 Fed. 806, 34 CCA 676].

Twenty-one years as permissible period when taken without reference to lives in being see supra § 5 text and note 60.

35. Brandenburg v. Thorndike, 139 Mass. 102, 28 NE 575; Myer's Est., 11 Pa. Co. 194.

[a] **Principle applied.**—Where a testator gave property in trust to pay an annuity to his wife, and "at the expiration of three years from the death of my wife, or at such time, whether earlier or later, as may, in the discretion of the trustees, be found expedient and practicable for the final settlement and distribution of my estate," to transfer and pay such property to designated nieces and nephews, the discretion of the trustees to delay the payment after the expiration of the three years is limited to such time as is reasonably necessary to settle the estate, and in case of unreasonable delay they would be compelled by a court of equity to make the payment and transfer; and in no contingency could it be necessary or reasonable to delay the settlement and distribution of the estate for twenty-one years after the death of the widow. Brandenburg v. Thorndike, 139 Mass. 102, 28 NE 575.

36. Rule against perpetuities inapplicable to possession or enjoyment see supra § 16.

upon the termination of a life in being at the creation of the estate, in trust to pay the income to such beneficiary as they shall select from a designated class, the discretion must be exercised within a reasonable time, and the trust is therefore not too remote.[37]

[§ 73] **(2) Effect of Remoteness.** Ordinarily a trust under which interests or estates may vest at a time too remote is entirely void and will not be given effect even for the period prescribed by the rule against perpetuities;[38] but when it provides for separate and distinct payments or transfers at different times, some of which are within and some without the permitted period, the trust is good for the purpose of those payments which are to be made within the period and is void only as to those which are too remote,[39] except when the series of limitations forms such a scheme of distribution that they cannot be separated without defeating the organic plan of the trust.[40]

Independent trusts. When a trust for one person or class is void for remoteness, an otherwise valid trust separately created by the same instrument for other purposes or beneficiaries will not thereby be rendered void unless it is so intimately connected with the failing scheme as to fail with it.[41]

[§ 74] **2. Particular Trusts[42]—a. Trusts To Sell.** So far as they concern questions of remoteness, trusts to sell are governed by the same principles as are powers to sell,[43] which have been considered elsewhere in this treatise.[44]

[§ 75] **b. Trusts To Pay Debts or Legacies.**[45] When property is given to trustees, in trust to raise money therefrom for the payment of debts or legacies, and then to transfer or convey the property to a designated person, the beneficial interest of such person is not postponed until the execution of the trust, but vests at once, subject to such payments, and consequently is not obnoxious to the rule against perpetuities.[46]

[§ 76] **c. Trusts for Maintenance of Property and Similar Uses.**[47] In a number of cases, trusts of indefinite duration for the maintenance or repair of private property not devoted to charitable uses,[48] or the care and preservation of a grave or monument,[49] or for other similar noncharitable purposes

37. New Haven Young Men's Inst. v. New Haven, 60 Conn. 32, 22 A 447.

[a] **Thus,** where a testator gave property to his wife and daughter for their lives, and upon the death of the survivors to the city of New Haven in trust to apply the income for the purchase of books for any public library which might from time to time exist in that city, "the city must of course forthwith commence to administer the trust by selecting the beneficiary and by the purchase of books for the library selected," and the trust is therefore not open to the objection that a selection may be made so as to vest the equitable estate after the period prescribed by the statute against perpetuities. New Haven Young Men's Inst. v. New Haven, 60 Conn. 32, 42, 22 A 447.

Executory trusts see infra § 88.

38. Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Hillyard v. Miller, 10 Pa. 326; Pennsylvania L. Ins. Co. v. Price, 7 Phila. (Pa.) 465. And see cases supra § 72 note 27.

Total invalidity ab initio of remote limitation in general see supra § 58.

39. Ala.—Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Md.—Turner v. Safe Deposit, etc., Co., 148 Md. 371, 129 A 294.

N. J.—Ocean City First Nat. Bank v. Rice, 101 N. J. Eq. 520, 139 A 396. But see Siedler v. Syms, 56 N. J. Eq. 275, 38 A 424 [crit Gray Perp. §§ 410b–410d] (where the court assumed that the principle stated in the text did not exist).

Pa.—Ewalt v. Davenhill, 257 Pa. 385, 101 A 756.

R. I.—Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 101 A 430.

[a] **Illustration.**—Where personal property was given in trust for a period of twenty-five years, to pay to each child living of the donor and to the heirs of each child not living one sixth of the income every six months, the trust must be sustained for a period of twenty-one years after its creation. Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Remoteness of limitation does not invalidate preceding estates see supra § 59.

40. See supra § 59 text and note 24.

41. Landram v. Jordan, 203 U. S. 56, 27 SCt 17, 51 L. ed. 88; Waterford First Presb. Church v. McKallor, 35 App. Div. 98, 54 NYS 740.

[a] **Thus,** where a testator gave all his property except one parcel in trust for his children, and that parcel was in trust to pay the income to a niece, with a provision that the trustee should make such income up to a specified sum from the property in the general trust, the fact that the general trust was void for remoteness did not render the trust for the niece also void. Landram v. Jordan, 203 U. S. 56, 27 SCt 17, 51 L. ed. 88.

Partial invalidity of trusts in general see Trusts [39 Cyc 89].

42. Trusts for accumulation see infra §§ 80–87.

43. Goodier v. Edmunds, [1893] 3 Ch. 455, 461.

"There is . . . no substantial difference, for the purpose of the rule against perpetuities, between a trust for sale and a power of sale, where the sale is intended to be completed by a conveyance to the purchaser of the legal estate vested in the trustees. A testator or settlor cannot (as I think) impose an obligation to sell where he cannot lawfully confer a power to do so; or escape from the rule against perpetuities by vesting in his trustees an imperative instead of a discretionary power of sale." Goodier v. Edmunds, supra.

44. Powers to sell see supra §§ 67–70.

45. Powers to sell to pay debts or legacies see supra § 68.

46. Plummer v. Roberts, 315 Mo. 627, 287 SW 316; Wade's Est., 19 Pa. Dist. 197; Morgan v. Morgan, 20 R. I. 600, 40 A 736; Massey v. O'Dell, 10 Ir. Ch. 22; Bacon v. Proctor, Turn. & R. 31, 12 EngCh 31, 37 Reprint 1005. See Potter v. Watkins, 99 N. J. Eq. 538, 134 A 84 (dictum).

Vested interests are not subject to rule against perpetuities see supra § 19 text and notes 53–59.

47. Charitable trusts see infra §§ 78, 79.

48. Mass.—Thorp v. Lund, 227 Mass. 474, 116 NE 946, AnnCas1918B 1204; In re Bartlett, 163 Mass. 509, 40 NE 899.

R. I.—Kelly v. Nichols, 17 R. I. 306, 21 A 906. Compare Moran v. Cornell, 142 A 605 (holding that a gift of money for life to one who was life tenant of a certain farm, to use the income for the expenses of, and improvements on, the farm, with remainder on the same conditions to one who was remainderman of the farm, is not a gift in perpetuity for a noncharitable trust, since a trust cannot exist where the same person possesses both the legal and the beneficial interests).

S. C.—Smith v. Heyward, 115 S. C. 145, 105 SE 275.

Eng.—Kennedy v. Kennedy, [1914] A. C. 215; In re Good, [1905] 2 Ch. 60; Thompson v. Shakespear, 1 De G. F. & J. 399, 62 EngCh 306, 45 Reprint 413; In re Gassiot, 70 L. J. Ch. 242. Compare Carne v. Long, 2 De G. F. & J. 75, 63 EngCh 59, 45 Reprint 550 (where a gift of property to trustees of a library association for the benefit and support of the library was held void as tending to a perpetuity, but the point was considered by the court from the standpoint of a restraint upon alienation).

Ont.—Kennedy v. Kennedy, 26 Ont. L. 105, 110, 3 OntWN 924, 21 OntWR 501, 3 DomLR 536, [mod on other grounds 28 Ont. L. 1, 4 OntWN 607, 11 DomLR 328, 49 CanLJ 456 (app dism 24 OntWR 945, 13 DomLR 707)]; Re McLellan, 7 OntWN 447.

"It is difficult to draw a distinction between a provision for keeping up a tomb as a resting place of the deceased members of the family and a provision for the indefinite keeping up of a residence as a habitation for the living members of the family." Kennedy v. Kennedy, supra.

[a] **Upkeep of personal property.**—(1) A bequest of money to the Vintners Company with the direction that the income be used to keep in proper repair a certain portrait and for cleaning and regilding its frame at least once every four years was held void as infringing the rule against perpetuities. In re Gassiot, 70 L. J. Ch. 242. (2) A trust for the purpose of keeping the testator's clock in repair is void. Kelly v. Nichols, 17 R. I. 306, 21 A 906.

49. Ala.—Johnson v. Holifield, 79 Ala. 423, 58 AmR 596.

Cal.—In re Gay, 138 Cal. 552, 71 P 707, 94 AmSR 70.

Conn.—Coit v. Comstock, 51 Conn. 352, 50 AmR 29.

Ill.—McCartney v. Jacobs, 288 Ill. 568, 123 NE 557, 4 ALR 1120; Burke v. Burke, 259 Ill. 262, 102 NE 293.

La.—Herber's Succ., 128 La. 111, 54 S 579.

Me.—Piper v. Moulton, 72 Me. 155.

Mass.—Bates v. Bates, 134 Mass. 110, 45 AmR 305.

N. J.—Hilliard v. Parker, 76 N. J. Eq. 447, 74 A 447; Hartson v. Elden, 50 N. J. Eq. 522, 26 A 561; Detwiller v. Hartman, 37 N. J. Eq. 347.

N. Y.—Driscoll v. Hewlett, 198 N. Y. 297, 91 NE 784; Matter of Davidge, 200 App. Div. 437, 193 NYS 245; Matter of Dewitt, 113 App. Div. 790, 99 NYS 415 [aff 188 N. Y. 567 mem, 80 NE 1108 mem].

Oh.—Hoopert v. Gugel, 25 OhNPNS 516.

R. I.—Todd v. St. Mary's Church, 45 R. I. 282, 120 A 577; Shippee v. Industrial Trust Co., 43 R. I. 115, 110 A 410, 14 ALR 115; Sherman v. Baker, 20 R. I. 446, 40 A 11, 40 LRA 717;

not for the benefit of any particular individuals,[50] have been held void as creating perpetuities; but it would seem that the term is used in its nontechnical sense of a continuing interest,[51] and that the real ground of the invalidity of such trusts is the want of a cestui.[52] Where statutes declare such trusts charitable or permit them to continue indefinitely,[53] any objection on the ground of remoteness is usually removed;[54] and a trust to pay the income of property to a cemetery company for such period as they shall maintain and keep up certain graves does not infringe the rule against perpetuities.[55]

[§ 77] **d. Business Trusts.**[56] Trusts in which the trustees are empowered to manage and control the trust property or carry on business, and in which the beneficial interests are represented by certificates, usually rendered transferable by the terms of the trust instrument, do not, it would seem, violate the rule against perpetuities, inasmuch as both the legal title and beneficial interests are vested immediately,[57] although the trust may continue for a period longer than that prescribed by the rule.[58]

[§ 78] **B. Charitable Trusts**[59]**—1. In General.** Trusts for charitable uses commencing in præsenti or within the period of the rule against perpetuities are not obnoxious to the rule, although they may continue forever and beneficial interests may arise under them at a remote time,[60] so long as the prop-

Kelly v. Nichols, 17 R. I. 306, 21 A 906.

S. C.—Smith v. Heyward, 115 S. C. 145, 105 SE 275.

Tenn.—Fite v. Beasley, 12 Lea 328.

Tex.—McIlvain v. Hockaday, 36 Tex. Civ. A. 1, 81 SW 54.

Eng.—Rickard v. Robson, 31 Beav. 244, 54 Reprint 1132.

See Street v. Cave Hill Inv. Co., 191 Ky. 422, 230 SW 536 (dictum).

Compare Lounsbury v. Square Lake Burial Assoc., (Mich.) 129 NW 36 (holding that a bequest to the trustees of a cemetery association, to be held on a perpetual fund and the interest to be used for the maintenance of testator's grave, was void; but another bequest to the trustees, to be used for the improvement of the cemetery, was held good, the corpus being alienable by the trustees and there appearing no intention to create a continuing trust); Re Laing, 38 B. C. 449, [1927] 1 WestWkly 699 (where gifts of property to voluntary unincorporated associations, incapable of contracting, upon the condition precedent that they should agree to maintain the donor's burial lots for all time, were held void on the ground that they "involve a perpetuity").

50. See cases infra this note.

[a] **Illustrations.**—(1) A trust for the purpose of keeping the testator's house open "for the reception and entertainment of ministers and others travelling in the service of truth." Kelly v. Nichols, 17 R. I. 306, 316, 21 A 906. (2) A trust for the erection and maintenance of a monument to a noted person. Re Jones, 79 L. T. Rep. N. S. 154. But see Lawrence v. Prosser, 89 N. J. Eq. 248, 104 A 772 [disappr Morristown Trust Co. v. Morristown, 82 N. J. Eq. 521, 91 A 736] (where a bequest for the construction of such a monument was held not to violate the rule against perpetuities, there being no direction or trust to maintain the monument). (3) A trust to provide a home and school for children of deceased members of a secret society. Troutman v. De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., 66 Kan. 1, 71 P 286.

51. "Perpetuity" as continuing interest or estate see supra § 1 text and notes 2-5.

Rule against perpetuities relates to beginning and not to continuance or termination of estates see supra § 17.

52. Gray Perp. §§ 237d, 898 et seq. See Methodist Episcopal Church Extension v. Smith, 56 Md. 362 (where such a bequest was held void for the reason stated in the text).

Necessity of cestui of private trust see Trusts [39 Cyc 35 text and notes 66, 67].

53. See statutory provisions.

54. U. S.—Iglehart v. Iglehart, 204 U. S. 478, 27 SCt 329, 51 L. ed. 575 [aff 26 App. (D. C.) 209, 6 AnnCas 732].

Ill.—Jansen v. Godair, 292 Ill. 364, 127 NE 97.

N. J.—Ocean City First Nat. Bank v. Rice, 101 N. J. Eq. 520, 139 A 396; Moore v. Moore, 50 N. J. Eq. 554, 25 A 403; Hartson v. Elden, 50 N. J. Eq. 522, 26 A 561.

N. Y.—Driscoll v. Hewlett, 198 N. Y. 297, 91 NE 784; Matter of Fellion, 132 Misc. 805, 231 NYS 9; Matter of Perkins, 68 Misc. 255, 124 NYS 998; In re Schuler, 24 NYS 847, 1 Pow. Surr. 490. But see Matter of Waldron, 57 Misc. 275, 109 NYS 681 (holding that a statute, providing that a village board of cemetery commissioners may take and hold any property given to it in trust to apply the property or its income for the preservation of tombs, monuments, etc., or for maintaining a lot "according to the terms of such grant, devise, or bequest," does not permit a trust for perpetual care, and empowers such cemetery commissioners to take such a gift in trust only in so far as the terms of the trust are consistent with other existing provisions of law relative to trusts, and is limited by the statutes restricting the time for which titles to property may be held in trust and by the statute against perpetuities).

Pa.—Smith's Est., 5 Pa. Dist. 327 [aff 181 Pa. 109, 37 A 114]. See Nauman v. Weidman, 182 Pa. 263, 37 A 863 (holding such a trust good, without referring to the statutes).

R. I.—In re Harris, 142 A 374; Rhode Island Hospital Trust Co. v. Warwick Town Council, 29 R. I. 393, 71 A 644. Compare Roberts v. Wright, 48 R. I. 139, 136 A 486 (holding a gift to a cemetery association for the perpetual care of a burial plot valid where such association had power under its charter to take and hold such gift).

See Street v. Cave Hill Inv. Co., 191 Ky. 422, 230 SW 536 (holding that a bequest of a fund to be used in keeping the testator's burial lot in good condition was within the terms of St. § 317 excepting gifts for charitable purposes and "any other charitable or humane purpose" from the operation of the rule against perpetuities).

Compare In re More, 179 Mich. 237, 146 NW 319 (where a gift to a cemetery association for the perpetual care of a burial lot was held valid where the association, by virtue of its charter, had power to take and hold gifts for such purposes).

Charitable trusts continuing forever are not remote see infra § 78 text and note 60.

55. In re Chardon, [1928] Ch. 464.

Trust valid when cestui's interest vested see supra § 71.

56. Business trusts generally see Trusts.

57. Doty v. Mason, 244 Fed. 587; Hart v. Seymour, 147 Ill. 598, 35 NE 246; Minot v. Burroughs, 223 Mass. 595, 112 NE 620; Howe v. Morse, 174 Mass. 491, 55 NE 213.

Trusts in which beneficial interests are vested see supra § 72 text and note 25.

58. See cases supra note 57.

Period prescribed by rule see supra § 5.

59. Cross references:

Charitable trusts generally see Charities 11 C. J. p 297.

Limitations to and over from charities see supra § 57.

Resulting trust when charitable purpose ends see supra § 29 text and notes 27, 28.

Trusts for accumulation for charitable uses see infra § 86.

What are charitable purposes see Charities §§ 18-39.

60. U. S.—Russell v. Allen, 107 U. S. 163, 2 SCt 327, 27 L. ed. 397; Bauer v. Myers, 244 Fed. 902, 157 CCA 252; Chew v. Wilmington First Presb. Church, 237 Fed. 219; Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592 [aff 171 Fed. 161].

Ala.—Crim v. Williamson, 180 Ala. 179, 60 S 293; Moseley v. Smiley, 171 Ala. 593, 55 S 143.

Ariz.—Lowell v. Lowell, 29 Ariz. 138, 240 P 280.

Colo.—Clarion v. Central Sav. Bank, etc., Co., 71 Colo. 482, 208 P 251; Haggin v. International Trust Co., 69 Colo. 135, 169 P 138, LRA1918B 710.

Del.—New Castle Common v. Megginson, 24 Del. 361, 77 A 565, AnnCas 1914A 1207.

D. C.—Washington L. & T. Co. v. Hammond, 51 App. 260, 278 Fed. 569.

Ill.—Morgan v. Charleston Nat. Trust Bank, 331 Ill. 182, 162 NE 888; Walker v. Central Trust, etc., Bank, 318 Ill. 253, 149 NE 234; Harges v. Zander, 314 Ill. 170, 145 NE 363; Hart v. Taylor, 301 Ill. 344, 133 NE 857; Jansen v. Godair, 292 Ill. 364, 127 NE 97; Skinner v. Northern Trust Co., 288 Ill. 229, 123 NE 289; Franklin v. Hastings, 253 Ill. 46, 97 NE 265, AnnCas1913A 135; French v. Calkins, 252 Ill. 243, 96 NE 877; Abend v. McKendree College Endowment Fund Comrs., 174 Ill. 96, 50 NE 1052; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; In re Scanlan, 230 Ill. A. 505.

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276; Dykeman v. Jenkines, 179 Ind. 549, 101 NE 1013, AnnCas1915D 1011.

Iowa.—Wilson v. Independence First Nat. Bank, 164 Iowa 402, 145 NW 948, AnnCas1916D 481; In re Cleven, 161 Iowa 289, 142 NW 986; Chapman v. Newell, 146 Iowa 415, 125 NW 324; Phillips v. Harrow, 93 Iowa 92, 61 NW 434.

Ky.—Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739; Gass v. Wilhite, 2 Dana 170, 26 AmD 446.

Md.—Evangelical Lutheran Church Bd. of Foreign Missions, etc., v. Shoemaker, 133 Md. 594, 105 A 748; Baltzell v. Baltimore City Church Home, etc., 110 Md. 244, 73 A 151; Ege v. Hering, 108 Md. 391, 70 A 221. Compare Waters v. Waters, 142 A 297 (where a gift to a religious corporation for educational and charitable purposes was held not to create a trust and not to violate the rule against perpetuities); Baltzell v. Baltimore City Church Home, etc., 110 Md. 244, 270, 73 A 151 (where a bequest to a hospital of property to be used in maintaining free beds therein was held not void as a perpetuity, the court saying that "there must be a trust . . . which creates

erty given in trust vests in the trustee immediately[61] or within the period prescribed by the rule,[62] even though the payment or application to the designated uses may be postponed;[63] and the court will ordinarily favor that construction of a gift in trust for charitable uses which makes it a vested interest, not subject to any condition precedent.[64] But a present gift to a trustee upon charitable uses which may not arise, until after the expiration of the period prescribed by the rule,[65] or a limitation of a

a perpetuity, in order to justify the Court in striking down a devise or bequest" on that ground, and that the devise in question was for one of the corporate purposes of the hospital and no trust would be created thereby in the absence of a clear intention to do so). But see Methodist Episcopal Church Missionary Soc. v. Humphreys, 91 Md. 131, 46 A 320, 80 AmSR 432 (where a devise to trustees to apply the income to certain incorporated charitable institutions was held void for remoteness, although the court said that a devise directly to the charitable institutions would have been good).

Mass.—Massachusetts Inst. of Technology v. Atty.-Gen., 235 Mass. 288, 126 NE 521; Howard v. Howard, 227 Mass. 395, 116 NE 937; Jackson v. Phillips, 14 Allen 539.

Mich.—Penny v. Croul, 76 Mich. 471, 43 NW 649, 5 LRA 858.

Mo.—Crow v. Clay County, 196 Mo. 234, 95 SW 369; Jamesport Farmers, etc., Bank v. Robinson, 96 Mo. A. 385, 70 SW 372.

Nev.—Nixon v. Brown, 46 Nev. 439, 214 P 524; In re Hartung, 40 Nev. 262, 160 P 782, 161 P 715.

N. H.—Smart v. Durham, 77 N. H. 56, 86 A 821.

N. J.—Van Syckel v. Johnson, (Ch.) 70 A 657; Matawan Y. M. C. A. v. Appleby, 97 N. J. Eq. 95, 127 A 25; Kitchen v. Pitney, 94 N. J. Eq. 485, 119 A 675; Smith v. Pond, 92 N. J. Eq. 211, 111 A 154; Smith v. Pond, 90 N. J. Eq. 445, 107 A 800; Lawrence v. Prosser, 89 N. J. Eq. 248, 104 A 772 [dist Morristown Trust Co. v. Morristown, 82 N. J. Eq. 521, 91 A 736]; Hilliard v. Parker, 76 N. J. Eq. 447, 74 A 447; Mills v. Davison, 54 N. J. Eq. 659, 35 A 1072, 55 AmSR 594, 35 LRA 113.

N. C.—State v. Gerard, 37 N. C. 210; State v. McGowen, 37 N. C. 9; Griffin v. Graham, 8 N. C. 96, 9 AmD 619.

N. D.—Hagen v. Sacrison, 19 N. D. 160, 123 NW 518, 26 LRANS 724.

R. I.—Rhode Island Hospital Trust Co. v. Warwick, 29 R. I. 393, 71 A 644; Sherman v. Baker, 20 R. I. 446, 40 A 11, 40 LRA 717.

Tenn.—Franklin v. Armfield, 2 Sneed 305; Hornberger v. Hornberger, 12 Heisk. 635. But see White v. Hale, 2 Coldw. 77 (where a gift upon charitable trusts, providing that the property should never be sold, was said to be void as a "perpetuity").

Tex.—Lightfoot v. Poindexter, (Civ. A.) 199 SW 1152.

W. Va.—Mercantile Banking, etc., Co. v. Showacre, 102 W. Va. 260, 135 SE 9, 48 ALR 1138.

Ont.—Re Orr, 40 Ont. L. 567, 13 OntWN 154; Re Kinny, 6 Ont. L. 459, 2 OntWR 881; Re Johnson, 5 Ont. L. 459, 2 OntWR 289; Re Short, 7 OntWN 525.

Austr.—Nelan v. Downes, 23 Austr. C. L. R. 546.

Compare New Haven Young Men's Inst. v. New Haven, 60 Conn. 32, 42, 22 A 447 (where it is said that, where a testator gave property to his wife and daughter for their lives, and upon the death of the survivors to the city of New Haven in trust to apply the income for the purchase of books for any public library which might from time to time exist in that city, "the city must of course forthwith commence to administer the trust by selecting the beneficiary and by the purchase of books for the library selected," and the trust is therefore not open to the objection that a selection may be made so as to vest the equitable estate after the period prescribed by the statute against perpetuities); Wentworth v. Fernald, 92 Me. 282, 42 A 550 (where upon the death of life tenants property was given to a trustee, who was directed to apply to the probate court for the appointment of additional trustees and with them to apply the income from the property under the direction of such court to the establishment and maintenance of an academy; and such gift was held not too remote, the trustee being required to make application to the court immediately upon the death of the life tenant or as soon as practicable thereafter, so that beneficial interests would not be too long postponed).

"Though a private trust cannot be created in perpetuity, that rule has no application to a gift for charitable uses." Franklin v. Hastings, 253 Ill. 46, 51, 97 NE 265, AnnCas 1913A 135.

[a] **In Pennsylvania,** under the provisions of the act of May 23, 1895, amending the act of April 26, 1855, no disposition of property for any religious, charitable, literary, or scientific use fails by reason of being given in perpetuity. In re Darlington, 289 Pa. 297, 137 A 268; Ledwith v. Hurst, 284 Pa. 94, 130 A 315; In re Hunter, 279 Pa. 349, 123 A 865; Lennig's Est., 154 Pa. 209, 25 A 1049; Ellis' Est., 9 Pa. Dist. & Co. 775; Smith's Est., 5 Pa. Dist. 327 [aff 181 Pa. 109, 37 A 114]. Compare In re Wright, 284 Pa. 334, 131 A 188; Nauman v. Weidman, 182 Pa. 263, 37 A 863; Yard's App., 64 Pa. 95; Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470 (supporting such trusts without referring to the statute).

[b] **"The statement is often found in the books that the law against perpetuities does not apply to public charities.** But the statement is misleading. It is undoubtedly true that the principle of public policy, which declares that estates shall not be indefinitely inalienable in the hands of individuals, is held inapplicable to public charities. . . . But it must be remembered that the rule against perpetuities, in its proper legal sense, has relation only to the time of the vesting of an estate, and in no way affects its continuance after it is once vested. The perpetual duration of a charitable trust, after it has become vested, is one of its distinctive characteristics. It is the possibility that the estate left in trust for a charitable purpose may not vest or begin within the limits of a life or lives in being and twenty-one years, that offends against the rule of 'perpetuity' or 'remoteness.' In this respect a gift in trust for charity is 'subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition . . . is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio.'" Brooks v. Belfast, 90 Me. 318, 324, 38 A 222. See In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242 (to same effect, but noting the exception in the case of a gift over from one charity to another, which is supported on grounds of public policy).

61. Present gifts to charity see supra § 21.

62. Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739.

Period prescribed by the rule see supra § 5.

63. Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320.

Postponement of possession or enjoyment in general see supra § 16.

64. Ill.—Harges v. Zander, 314 Ill. 170, 145 NE 363; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; Crerar v. Williams, 145 Ill. 625, 34 NE 467, 21 LRA 454.

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276.

N. Y.—Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

N. D.—Hagen v. Sacrison, 19 N. D. 160, 123 NW 518, 26 LRANS 724.

Tex.—Meadors v. Sherrill, (Civ. A.) 212 SW 546.

Construction of instruments with relation to rule against perpetuities see infra §§ 89–91.

Liberal construction of charitable gifts generally see Charities § 17.

65. U. S.—Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592.

Conn.—Jocelyn v. Nott, 44 Conn. 55. Compare Goodrich's App., 57 Conn. 275, 18 A 49 (apparently recognizing the principle stated in the text).

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276.

Kan.—Malmquist v. Detar, 123 Kan. 384, 255 P 42.

Eng.—In re Swain, [1905] 1 Ch. 669, 2 BRC 872; Charitable Donations, etc., Comrs. v. De Clifford, 1 Dr. & War. 245. See Sinnett v. Herbert, L. R. 7 Ch. 232 (where the validity of a gift in trust for a charitable purpose which might not come into being within the proper time was doubted by the lord chancellor, but the point was not decided, it appearing probable that such purpose would arise, the question was reserved). But see Chamberlayne v. Brockett, L. R. 8 Ch. 206, 210 (where it is said: "If there was an immediate gift of the whole residue for charitable uses . . . such gift was valid . . . although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity it is taken entirely out of the scope of the law of remoteness"). To same effect In re Swain, [1905] 1 Ch. 669, 2 BRC 872.

But see Meadors v. Sherrill, (Tex. Civ. A.) 212 SW 546, 547 (where a gift to trustees to hold until in their judgment it should be proper or necessary for a designated church to have a new building, and then to pay over the fund to such church, was held good as against the objection that the contingency might not happen within the period prescribed by the rule against perpetuities, on the ground that the gift took effect in præsenti and the only thing postponed was "the particular form or mode which the donor would have applied to the execution of the charity"); Re Orr, 40 Ont. L. 567, 598, 13 OntWN 154 (where it was said: "Where there is an immediate and effectual gift to charity, no question of remoteness can arise, although the particular object will not necessarily take effect within any assignable limit of time, and may never take effect at all;" but the gift in question was construed to be for the benefit of existing charitable institutions, and it was considered that only the particular form or mode in which the fund was to be applied was uncertain or left to future events).

[a] **Thus** (1) the gift of a fund to a trustee, in trust to hold and accumulate it until it should equal the amount of the debt at that time owed by the state of Pennsylvania, and then to pay it over to the state treasurer for the purpose of discharging such indebtedness, is void for remoteness, inasmuch as the gift may not become available for the public or charitable use within the period pre-

future interest or estate intended for charitable uses under which the title may not vest in the trustee within such period,[66] is void for remoteness, except in the case of an interest or estate limited over to charitable uses upon the expiration or termination of another limitation for charitable uses,[67] and except to some degree in the case of a gift to a charitable corporation to be thereafter formed.[68]

[§ 79] **2. Gifts to Corporations To Be Formed.**[69] A gift, effective presently or within the period prescribed by the rule against perpetuities,[70] to a corporation not in existence at the date of the gift but to be formed thereafter, of property to be held by it upon charitable trusts is ordinarily not obnoxious to the rule, although the time for the formation of such corporation is not restricted to the period prescribed by the rule, a reasonable time only being contemplated therefor.[71] Cases sometimes cited to

scribed by the rule against perpetuities. Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592. (2) A gift of money in trust to be held and invested until a hospital should be established in a designated city, and then to be paid over to such hospital, is void for remoteness, for no such hospital may come into existence within twenty-one years after a life or lives in being. Malmquist v. Detar, 123 Kan. 384, 255 P 42. (3) A gift of real estate to trustees, in trust to hold it until a church of a designated faith and discipline should be organized and should build a church edifice upon the land and until the trustees should be satisfied that the cost of the building had been paid and that the church was free from debt, and then to convey the property to the church, was void for remoteness, as no church might be established or perform the conditions within the period of the rule against perpetuities. Jocelyn v. Nott, 44 Conn. 55. But compare Harges v. Zander, 314 Ill. 170, 145 NE 363 (where a devise of a fund in trust to pay a certain sum to each church of a designated denomination in the city of Chicago which might at the testator's death or thereafter be building a church edifice in such city was held to be not in contravention of the rule against perpetuities, but a gift in præsenti and not upon a condition).

[b] **Dicta inconsistent with this statement** are found in some cases, in which the courts say in substance that a gift may be made in trust for a charity which is not in existence and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may not happen within a life or lives in being and twenty-one years thereafter, and still be valid, provided there is no gift of the property in the meantime to or for the benefit of any individual or private corporation; but the point decided in those cases is that a gift to a corporation to be thereafter formed, to be by it held upon charitable trusts, is not too remote because no time limit is fixed within which such corporation must be formed. Russell v. Allen, 107 U. S. 163, 2 SCt 327, 27 L. ed. 397; Franklin v. Hastings, 253 Ill. 46, 97 NE 265, AnnCas 1913A 135; Crerar v. Williams, 145 Ill. 625, 34 NE 467, 21 LRA 454; Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem]. See In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242 (where the dictum is stated, without any relation to the point decided). Compare Girard Trust Co. v. Russell, 179 Fed. 446, 453, 102 CCA 592 (where it was said: "It is urged . . . that the rule against perpetuities or remoteness is applicable to gifts to charity only where there is a prior gift or a 'first taker,' whose estate may continue for a period beyond the time limited by the rule against perpetuities or remoteness. As there is no 'first taker' in the case now in hand, it is said that the rule mentioned does not defeat the gift. The argument ignores the fact that . . . there is no gift, either to charity or to any other party, except upon a condition which contravenes the rule. If by the agreement there had been expressed an intention to make an absolute immediate gift to charity, we should have a very different case before us. There are many cases in the books where immediate gifts to charity have been sustained, although they have been made payable to corporations not formed when the gifts to charity took effect. So there are many cases where immediate gifts to charity have been sustained, notwithstanding illegal directions concerning the manner of administering the charity. But these cases are not in point"); Easton v. Hall, 323 Ill. 397, 154 NE 216 (holding that the principle stated in such dicta does not save a gift over to charities on a remote contingency after a gift to an individual for being void for remoteness).

[c] **Gifts to charity on "condition precedent."**—(1) On account of the anomalous nature of a "charitable trust" and the ambiguity of the phrase, some confusion has arisen in regard to dispositions of property to be devoted to charitable uses upon the happening of a certain event or the performance of a condition, especially when property is to individual trustees in trust to pay it over to a charitable organization or institution upon such an event or condition. Such a gift is sometimes discussed as if it involved a postponement of vesting, and so as clearly subject to the rule against perpetuities. Gray Perp. § 605. (2) By other authorities, however, the gift is treated as vested in the trustee, but upon a charitable use which is apparently regarded as an entity analogous to a beneficial interest under a private trust, and consequently void for remoteness if the happening of the event or the performance of the condition upon which payment over is to be made may occur beyond the limits prescribed by the rule. Jocelyn v. Nott, 44 Conn. 55. See also Gray Perp. § 596. (3) That the latter is the correct view of the question is indicated by the cases in which property is given to a charitable organization or institution to be applied to charitable uses which may arise in the future. In such cases there is clearly no postponement of vesting, and the question of remoteness can arise only as to the charitable use or beneficial interest. Thus, where property was given to a church to be used for the poor of its congregation who might be in need of assistance, the validity of the gift was attacked on the ground that no persons of the class designated were shown to be in existence or would necessarily become so within the period prescribed by the rule against perpetuities; but the court took judicial notice of "the certainty that the poor will always be among men" and held that "the law cannot determine that a charity which must go into operation as soon as there shall be a person in the parish needing pecuniary assistance in obtaining such food, clothing, fire and shelter as, according to the general understanding, are necessary, is so long postponed as to offend the law against perpetuities;" thus indicating that if the charitable use had been one which might not have arisen within the prescribed period the trust would have been bad. Goodrich's App., 57 Conn. 275, 284, 18 A 49.

Charitable gifts to corporations to be formed see infra § 79.

66. See cases supra § 57 note 13.
67. See supra § 57 text and note 16.
68. See infra § 79.
69. **Charitable gifts to corporations to be formed in general** see Charities § 53; Wills [40 Cyc 1471 text and notes 71, 72].
70. **Period prescribed by rule** see supra § 5.
71. U. S.—Jones v. Habersham, 107 U. S. 174, 2 SCt 336, 27 L. ed. 401; Russell v. Allen, 107 U. S. 163, 2 SCt 327, 27 L. ed. 397; Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Inglis v. Sailor's Snug Harbour, 3 Pet. 99, 7 L. ed. 617; Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796 [aff 134 Fed. 513, 67 CCA 393]; Field v. Drew Theological Seminary, 41 Fed. 371.

Colo.—Clayton v. Hallett, 30 Colo. 231, 70 P 429, 97 AmSR 117, 59 LRA 407.

Conn.—Tappan's App., 52 Conn. 412; Coit v. Comstock, 51 Conn. 352, 50 AmR 29.

Ga.—Cumming v. Reid Memorial Church, 64 Ga. 105.

Ill.—Jansen v. Godair, 292 Ill. 364, 127 NE 97; Franklin v. Hastings, 253 Ill. 46, 97 NE 265, AnnCas1913A 135; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; Crerar v. Williams, 145 Ill. 625, 34 NE 467, 21 LRA 454; Andrews v. Andrews, 110 Ill. 223.

Iowa.—Wilson v. Independence First Nat. Bank, 164 Iowa 402, 145 NW 948, AnnCas1916D 481; Miller v. Chittenden, 2 Iowa 315, 4 Iowa 252.

Me.—Wentworth v. Fernald, 92 Me. 282, 42 A 550; Dascomb v. Marston, 80 Me. 223, 13 A 888; Swasey v. American Bible Soc., 57 Me. 523.

Mass.—Codman v. Brigham, 187 Mass. 309, 72 NE 1008, 105 AmSR 394; Sherman v. Cong. Home Missionary Soc., 176 Mass. 349, 57 NE 702; Odell v. Odell, 10 Allen 1; Sanderson v. White, 18 Pick. 328, 29 AmD 591.

Mich.—In re Brown, 198 Mich. 544, 165 NW 929.

Mo.—Missouri Historical Soc. v. Academy of Science, 94 Mo. 459, 8 SW 346; Schmidt v. Hess, 60 Mo. 591.

N. J.—Matawan Y. M. C. A. v. Appleby, 97 N. J. Eq. 95, 127 A 25.

N. Y.—Allen v. Stevens, 161 N. Y. 122, 55 NE 568; Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem]; St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 NYS 808 [mod 191 N. Y. 254, 83 NE 981, 14 AnnCas 108 (rearg den 192 N. Y. 382, 85 NE 143, and writ of error dism 214 U. S. 19, 29 SCt 601, 53 L. ed. 892)].

Oh.—Williams v. Cincinnati First Presb. Soc., 1 Oh. St. 478; McIntire Poor School v. Zanesville Canal, etc., Co., 9 Oh. 203, 34 AmD 436.

Or.—In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242.

R. I.—Almy v. Jones, 17 R. I. 265, 21 A 616, 12 LRA 414.

Eng.—Chamberlayne v. Brockett, L. R. 8 Ch. 206; In re Davis, [1902] 1 Ch. 876; Atty.-Gen. v. Chester, 1 Bro. Ch. 444, 28 Reprint 1229; Atty.-Gen. v. Bowyer, 3 Ves. Jr. 714, 30 Reprint 1235.

Compare Literary Fund v. Dawson, 10 Leigh (37 Va.) 147 (where a will was construed to bequeath money to the Literary Fund of the state, an existing corporation which had no authority to take such bequest, provided a legislative act should be obtained giving it such authority; and a bill to declare such will void was dismissed, without prejudice to the rights of the parties in the event of the failure to procure the necessary legislative acts).

the contrary will be found to involve gifts to unincorporated voluntary associations,[72] or gifts to nonexistent donees,[73] without any indication of intention that a corporation be formed, and it would seem that the invalidity of such gifts arises out of the nonexistence of the donees or their incapacity to take and not from any question of remoteness.[74]

[§ 80] **C. Trusts for Accumulation[75]—1. In General.** No gift of money or property subject, as a condition precedent, to the accumulation of the interest or income therefrom is bad for remoteness if the period for which such accumulation is directed to continue after the creation of the gift does not exceed that prescribed by the rule against perpetuities;[76] and although the time for which accumulation may continue may be restricted by statute to a lesser period,[77] violation of such a statute will not affect the validity of the principal gift.[78] But if the length of time for which the accumulation is to continue may or will exceed the period of the rule, the gift is void for remoteness and the trust to accumulate fails with it ab initio,[79] and the property of which the income is directed to be accumulated passes to the person or persons who would have been entitled thereto had the gift and the direction to accumulate both been omitted from the instrument containing them.[80] A few cases apparently assume that the rule against perpetuities limits the period for which accumulations may be directed to continue even where the property out of which the income

[a] **The theory** on which "an executory gift to a charity, without a precedent gift to private persons, upon the organization of a corporation to execute the charity, is held valid . . . . [is] that the general charitable purpose of the donor being immediate, a court of equity, having the power from the beginning to execute the charity in its own way, notwithstanding the fact that the donor's method may cause delay, will regard the gift as immediate, involving neither postponement nor suspension. This theory explains why a similar gift made to follow a gift to private persons is held to be invalid. In that case the existence of an intent to make an immediate gift is conclusively denied by the act of the donor in interposing a prior gift." Matter of Potts, 205 App. Div. 147, 152, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

[b] **In Maryland** (1) it is provided by L. (1888) c 249 that no devise or bequest of property for charitable use shall be held void by reason of any uncertainty as to the donees where the will contains a direction for the formation of a corporation to take the gift, and where within twelve months from the probate of the will or from the expiration of intervening life estates, if any, a corporation shall be formed in accordance with such directions capable and willing to receive such devise or bequest; but it has been said that "it is perfectly clear that it was the purpose of the Legislature in passing this Act to abolish under certain conditions the rule as to uncertainty, in obedience to which so many devises to charitable uses have been stricken down by the Courts." Chase v. Stockett, 72 Md. 235, 239, 19 A 761. (2) Under this statute, a devise of real estate to trustees in trust to establish a home for destitute, aged, and infirm women, with a provision that the trustees might if they deemed it best become a body corporate, either under the general laws or a special charter, is good, although except for the statute it would have been void for "uncertainty as to the beneficiaries." Chase v. Stockett, supra.

[c] **Immediacy of gift.**—In the estimation of a court of equity the gift of an estate to a corporation to be thereafter formed is immediate. Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

[d] **Period for which incorporation may be delayed.**—(1) A church organized and incorporated seven years after a gift of property to be held by such a church, when organized, for its general purposes, has the right to take and hold the property and be the recipient of the charitable gift. Miller v. Chittenden, 2 Iowa 315, 4 Iowa 252. (2) A corporation formed to take and hold a gift for charitable uses which failed to complete its incorporation until eleven years after the date of the gift is entitled to acquire the gift, where no forfeiture was imposed by the donor in the event of nonincorporation within the time specified by him. Matawan Y. M. C. A. v. Appleby, 97 N. J. Eq. 95, 127 A 25.

Application of cy pres doctrine in construction and administration of charitable trusts generally see Charities §§ 76–78.

72. State v. Warren, 28 Md. 338; Rhodes v. Rhodes, 88 Tenn. 637, 13 SW 590; White v. Hale, 2 Coldw. (Tenn.) 77; Dickson v. Montgomery, 1 Swan (Tenn.) 348; Green v. Allen, 5 Humphr. (Tenn.) 170. Compare Needles v. Martin, 33 Md. 609 (where a gift to individuals in trust for the free colored persons of Baltimore was said to be a perpetuity because such colored persons were not a body corporate).

73. Carter v. Balfour, 19 Ala. 814.

74. Incapacity of unincorporated association to be trustee for charitable uses see Charities § 55.

75. "Accumulation" defined see 1 C. J. p 734 text and notes 35–37.

Testamentary trusts for accumulation see Wills [40 Cyc 1795].

76. Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739; Congdon v. Congdon, 160 Minn. 343, 200 NW 76; Peard v. Kekewich, 15 Beav. 166, 51 Reprint 500; Thellusson v. Woodford, 4 Ves. Jr. 227, 31 Reprint 117 [aff 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498]. See Griffiths v. Vere, 9 Ves. Jr. 127, 132, 32 Reprint 550 (where it was said that, prior to the passage of the Thellusson Act, "it was quite a settled notion . . . that you might by executory devise prevent an estate vesting for life or lives in being and 21 years, with that small addition at the end of the life . . . [the period of gestation] and it was always conceived, that for the period during which you could prevent the estate vesting, you might direct the rents and profits to accumulate"). Compare Fitchie v. Brown, 211 U. S. 321, 29 SCt 106, 53 L. ed. 202; Van Riper v. Hilton, 78 N. J. Eq. 371, 78 A 1055; Winters v. March, 139 Tenn. 496, 202 SW 73 (all apparently applying the principle stated in the text).

[a] **The leading case** is that of Thellusson v. Woodford, 4 Ves. Jr. 227, 31 Reprint 117 [aff 11 Ves. Jr. 112, 32 Reprint 1030, 1 ERC 498], in which a testator gave a large fortune in trust to accumulate until all of his sons and grandsons and grandsons' children who were living or en ventre sa mère at his death were dead, and then to be paid over; and while the case was argued elaborately and at great length the court was unanimous in sustaining the validity of the gift over. On account of the ingenuity with which the testator took advantage of the rule against perpetuities and the large amount of money included in the trust, which, it was estimated, would probably amount to more than £100,000,000 at the time for distribution, the case aroused great public interest, and the examination of the matters of policy involved in such a disposition of property resulted thereafter in the passage of St. 39 & 40 Geo. III c 98, governing the period and purposes for which trusts for accumulations may be created, which is accordingly commonly known as the Thellusson Act. Some modification of the Thellusson will was subsequently made by a private act of Parliament (3 & 4 Wm. IV No. 27).

Estates necessarily vesting within period of rule are not obnoxious thereto see supra § 36 text and note 64.

Period prescribed by rule see supra § 5.

77. Statutes restricting permissible period of accumulation see infra §§ 81–87.

78. See infra § 84 text and note 33.

79. U. S.—Carnahan v. Peabody, 29 F. (2d) 412; Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592.

Conn.—Wilson v. D'Atro, 145 A 161; Hoadley v. Beardsley, 89 Conn. 270, 93 A 535.

Me.—Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103.

Mass.—Fosdick v. Fosdick, 6 Allen 41; Thorndike v. Loring, 15 Gray 391.

Minn.—Congdon v. Congdon, 160 Minn. 343, 200 NW 76.

N. J.—Canda v. Canda, (Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029]; In re Helme, 95 N. J. Eq. 197, 123 A 43; McGill v. Trust Co., 94 N. J. Eq. 657, 664, 121 A 760 [cit Cyc].

Pa.—In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Wise v. Rupp, 269 Pa. 505, 112 A 548; In re Gerber, 196 Pa. 366, 46 A 497; In re Johnston, 185 Pa. 179, 39 A 879, 64 AmSR 621; Ward's Est., 8 Pa. Dist. 701; Rogers' Est., 18 Phila. 99.

Eng.—Smith v. Cunningham, L. R. 13 Ir. 480; Curtis v. Lukin, 5 Beav. 147, 49 Reprint 533; Griffith v. Blunt, 4 Beav. 248, 49 Reprint 334; Boughton v. Boughton, 1 H. L. Cas. 406, 9 Reprint 815; Turvin v. Newcome, 3 Kay & J. 16, 69 Reprint 1003; Palmer v. Holford, 4 Russ. 403, 4 EngCh 403, 38 Reprint 857; Scarisbrick v. Skelmersdale, 17 Sim. 187, 42 EngCh 187, 60 Reprint 1100; Browne v. Stoughton, 14 Sim. 369, 37 EngCh 369, 60 Reprint 401; Marshall v. Holloway, 2 Swanst. 432, 36 Reprint 681; Southampton v. Hertford, 2 Ves. & B. 54, 35 Reprint 239, 1 ERC 514.

Ont.—Baker v. Stuart, 28 Ont. 439.

See Howe v. Hodge, 152 Ill. 252, 38 NE 1083 (dictum).

"The gift of the accumulated fund is, as has been said, void; the direction to accumulate is also to be disregarded, and this can be done on either of two theories. It may be said that the trust to accumulate exists only for the sake of the gift of the accumulateed fund, and as the gift is void, the trust to accumulate fails also; or the trust to accumulate may be regarded as still existing, but as, subject to this trust, the property is in the heir or next of kin or residuary devisee or legatee, this latter can at once put an end to the trust." Gray Perp. § 671.

Interest vesting beyond prescribed period is void see supra § 58.

80. Rogers' Est., 18 Phila. (Pa.) 99.

Devolution of income when trust

arises is vested;[81] but the rule does not so apply,[82] and aside from the question of its invalidity as a restraint upon alienation,[83] any restriction upon the length of the period for which accumulation may be directed in such case is purely statutory.[84]

Gift for charitable uses.[85] Upon the principle hereinabove stated,[86] a gift for charitable uses which is to vest only upon the termination of a trust for accumulation is void for remoteness if the period for accumulation may possibly exceed that prescribed by the rule against perpetuities,[87] but, in the absence of statute, the gift is valid if such period cannot be exceeded;[88] and where a charitable gift is vested, directions to accumulate the income are not within the rule against perpetuities,[89] although they may be objectionable as restraints upon the use or enjoyment of the property,[90] and in some jurisdictions it has been held that the accumulation may be stopped by the courts of equity in a proper case under their general regulatory powers.[91]

[§ 81] **2. Statutory Restrictions—a. The Thellusson Act and Subsequent Enactments.** The first statutory restriction upon trusts for accumulation was made by the English statute sometimes known as Lord Loughborough's Act or, more commonly, as the Thellusson Act,[92] which was followed by the statute called the Accumulations Act.[93] These statutes have since been superseded, as to England and

for accumulation violates restrictive statutes see infra § 85.

81. Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739; Kimball v. Crocker, 53 Me. 263; Melvin v. Hoffman, 289 Mo. 464, 235 SW 107.

82. Goldtree v. Thompson, 79 Cal. 613, 22 P 50; cases infra this note; and note 84.

[a] **Accumulation to pay debts or legacies.**—(1) When property is directed to be accumulated to pay the donor's debts or to pay legacies to persons in being and ascertainable, the creditors or legatees can stop the accumulation, and it is not obnoxious to the rule against perpetuities. Morgan v. Morgan, 20 R. I. 600, 40 A 736; Williams v. Herrick, 19 R. I. 197, 32 A 913; Williams v. Lewis, 6 H. L. Cas. 1013, 10 Reprint 1594; Southampton v. Hertford, 2 Ves. & B. 54, 35 Reprint 239, 1 ERC 514. (2) But an accumulation to pay the debts of another is void if it may continue beyond the period of the rule against perpetuities, the reason seemingly being that it is for the benefit of such debtor rather than of his creditors, and neither being entitled to the corpus of the fund until the end of the period for accumulation, the trust for accumulation is not destructible. Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592; Canda v. Canda, (Ch.) 113 A 503 [aff 92 N. J. Eq. 423, 112 A 727, 13 ALR 1029].

83. Trusts for accumulation as restraints on alienation see infra §§ 122, 132.

84. Congdon v. Congdon, 160 Minn. 343, 200 NW 76. See Goldtree v. Thompson, 79 Cal. 613, 624, 22 P 50 ("It may be remarked that the accumulations of income on an invested fund are not forbidden because they tend to a perpetuity. . . . The prohibition of accumulations longer than the minority of the takers of the interest was made to prevent an unfeeling and selfish testator from so devising his estate as to make persons rich in the distant future, to the detriment of those during the period of limitation who had better claims on his bounty. The latter had to live in poverty in order that their children or grandchildren might be made rich at a distant future day").

Statutory restrictions see infra §§ 81–87.

85. Accumulation for charitable purposes see infra § 86.

Charitable trusts generally see supra §§ 78, 79.

86. See supra text and note 79.

87. Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592; Franklin's Est., 9 Pa. Co. 484; Rogers' Est., 18 Phila. (Pa.) 99.

[a] **Gift vesting when fund and accumulations reach specified amount.**—Where a settlor deposited money in trust, to be accumulated until it equalled the debt at that time owed by the state of Pennsylvania, and then to be paid over to such state for the purpose of discharging its debt, inasmuch as the state took no present interest in the fund but was to receive it only on a contingency which might never happen, or which might happen at a time beyond that limited by the rule against perpetuities, the trust was void ab initio. Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592.

Gifts to charity not vesting within period of rule are void see supra § 57 text and note 13.

88. Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739.

89. U. S.—Girard Trust Co. v. Russell, 179 Fed. 446, 102 CCA 592; Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 67 CCA 393; Handley v. Palmer, 103 Fed. 39, 43 CCA 100; Duggan v. Slocum, 92 Fed. 806, 34 CCA 676.

Conn.—Woodruff v. Marsh, 63 Conn. 125, 26 A 846, 38 AmSR 346.

Ill.—Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320.

Ind.—Reasoner v. Herman, 191 Ind. 642, 134 NE 276.

Mass.—Oldfield v. Atty.-Gen., 219 Mass. 378, 106 NE 1015; Norton Tax Collector v. Oldfield, 219 Mass. 374, 106 NE 1014; Ripley v. Brown, 218 Mass. 33, 105 NE 637; Codman v. Brigham, 187 Mass. 309, 72 NE 1008, 105 AmSR 394; Dexter v. Harvard College, 176 Mass. 192, 57 NE 371; St. Paul's Church v. Atty.-Gen., 164 Mass. 188, 41 NE 231; Odell v. Odell, 10 Allen 1.

Pa.—Philadelphia v. Girard, 45 Pa. 9, 84 AmD 470; Hillyard v. Miller, 10 Pa. 326; Franklin's Est., 9 Pa. Co. 484 [aff 150 Pa. 437, 24 A 626, 30 AmSR 817]; Curran v. Philadelphia Trust Co., 15 Phila. 84; Franklin's Est., 27 WklyNC 545.

Wash.—In re Galland, 103 Wash. 106, 173 P 740.

See Parkhurst v. Roy, 7 Ont. A. 614 (apparently applying the principle stated in the text).

[a] **Thus** a gift to trustees to accumulate and, at a time designated, to pay over to a charitable institution is not void as a perpetuity, the beneficial interest being immediately vested in the charity and only the possession postponed. Tincher v. Arnold, 147 Fed. 665, 77 CCA 649, 7 LRANS 471, 8 AnnCas 917; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320; In re Galland, 103 Wash. 106, 173 P 740.

90. Harbin v. Masterman, [1894] 2 Ch. 184 [aff [1895] A. C. 186 (overr L. R. 12 Eq. 559)].

Restraints on enjoyment see supra § 2 text and notes 31–34.

91. Reasoner v. Herman, 191 Ind. 642, 134 NE 276; Oldfield v. Atty.-Gen., 219 Mass. 378, 106 NE 1015; St. Paul's Church v. Atty.-Gen., 164 Mass. 188, 41 NE 231. See Girard Trust Co. v. Russell, 179 Fed. 446, 452, 102 CCA 592 (dictum; the court saying that such cases "rest on the doctrine that, since the rule against perpetuities is not applicable to a gift to charity, a direction to accumulate for a period longer than a life in being and 21 years shall not make the gift void, but that a court of equity may limit the period of accumulation where in its judgment a sound public policy demands that the period prescribed by the donor should be shortened").

Judicial supervision and administration of charities see Charities § 73.

92. St. 39 & 40 Geo. III c 98.

[a] **The Thellusson Act provides** in substance that "property cannot be settled or disposed of so that the rents, profits, or income are to be wholly or partially accumulated for any longer term than such one of the following periods as either is expressly chosen by the instrument or is appropriate to the disposition thereby made, namely:—(i) the life or lives of the grantor or grantors, settlor or settlors; (ii) the term of twenty-one years from the death of any such grantor or settlor, or of the testator; (iii) the minority or respective minorities of any person or persons living or en ventre sa mere at the time of the death of such grantor, settlor, or testator; (iv) the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument, would for the time being, if of full age, be entitled to the rents, profits, or income directed to be accumulated. These periods are alternative, and only one may be chosen; two or more of them cannot be made consecutive periods for accumulation. Any shorter period may be chosen." 22 Halsbury L. Eng. p 370.

[b] **For cases construing this act** (1) generally see In re Hurlbatt, [1910] 2 Ch. 553; In re Cattell, [1907] 1 Ch. 567; In re Heathcote, [1904] 1 Ch. 826; In re Stephens, [1904] 1 Ch. 322; In re Gardiner, [1901] 1 Ch. 697; In re Pope, [1901] 1 Ch. 64; In re Travis, [1900] 2 Ch. 541; In re Mason, [1891] 3 Ch. 467; Vine v. Raleigh, [1891] 2 Ch. 13; Watson v. Young, 28 Ch. D. 436; Jagger v. Jagger, 25 Ch. D. 729; Wadegery v. Handley, 1 Ch. D. 653 [aff 3 Ch. D. 374]; In re Lindsay, [1911] S. C. 584; Mackay v. Mackay, [1909] S. C. 139; Colquhoun v. Colquhoun, [1907] S. C. 346; Bryan v. Collins, 16 Beav. 14, 51 Reprint 680; Tench v. Cheese, 6 De G. M. & G. 453, 55 EngCh 354, 43 Reprint 1309; Moon v. Moon, 2 F. (Ct. Sess.) 201; Brown v. Perkins, 101 L. T. Rep. N. S. 345; Re Errington, 76 L. T. Rep. N. S. 616; In re Danson, 13 Reports 633; Gorst v. Lowndes, 11 Sim. 434, 34 EngCh 434, 59 Reprint 940; Marshall v. Holloway, 2 Swanst. 432, 36 Reprint 681; MacVean v. MacVean, 24 Vict. L. R. 835. (2) Effect of exceeding the statutory period see infra § 84. (3) Devolution of released income see infra § 85.

Origin of act and its name see supra § 80 note 76[a].

93. St. 55 & 56 Vict. c 58.

[a] **The Accumulations Act provides** in substance that "where the purpose of accumulation is the purchase of land only, the only period for accumulation allowed is the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument,

Wales,[94] by similar provisions of the Law of Property Act of 1925.[95] The Thellusson Act has been declared by statute to be in force in Ontario,[96] although the contrary had previously been held,[97] and in Scotland,[98] but in the latter jurisdiction it no longer obtains,[99] and in Ireland it has been held not to apply.[1]

[§ 82] **b. Other Statutory Restrictions—(1) In General.** In the United States statutes have been enacted in a number of jurisdictions restricting the persons for whose benefit a trust for accumulation may be created, or the length of time for which it may be directed to continue.[2] Most of such statutes are founded upon the Thellusson Act and embody

would for the time being, if of full age, be entitled to receive the rents, profits, or income directed to be accumulated." 22 Halsbury L. Eng. p 371.

[b] **For cases construing this act** see In re Llanover, [1903] 2 Ch. 330; In re Clutterbuck, [1901] 2 Ch. 285.

94. St. 15 Geo. V c 20 § 209 (3).
95. St. 15 Geo. V c 20 §§ 164, 166 (1).
96. St. 52 Vict. c 10. See Baker v. Stuart, 28 Ont. 439 (where the statute is construed and applied).
97. Harrison v. Spencer, 15 Ont. 692.
98. St. 11 & 12 Vict. c 36 § 41.
99. St. 4 & 5 Geo. V c 43 § 9.

1. Freke v. Carbery, L. R. 16 Eq. 461; Heywood v. Heywood, 29 Beav. 9, 54 Reprint 527; Ellis v. Maxwell, 12 Beav. 104, 50 Reprint 1000.

2. See statutory provisions.

[a] **In Alabama** (1) no trust of estate for the purpose of accumulation only can have any force or effect for a longer term than ten years, unless when for the benefit of a minor in being at the date of conveyance, or if by will at the death of the testator, in which case the trust may extend to the termination of such minority. Code (1907) § 3410. (2) This statute is sui generis, and relates only to trusts for "accumulation merely;" consequently the fact that in executing a trust there may be an incidental accumulation will not bring it within the statute. Henderson v. Henderson, 210 Ala. 73, 97 S 353.

[b] **In California** (1) an accumulation of the income of property, if directed to commence on the creation of the interest out of which the income is to arise, must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; and if directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it shall commence within the time permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority. All directions for the accumulation of the income of property except those above allowed are void. Civ. Code (1923) §§ 723, 724. (2) Particular trusts for accumulation have been held to comply with the statute in the following cases: In re Budd, 166 Cal. 286, 135 P 1131; Hornung v. Sedgwick, 164 Cal. 629, 130 P 212. (3) For other cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

[c] **In Illinois** (1) no real or personal property may be so settled or disposed of that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or for any longer than the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or for any longer than during the minority or respective minorities of any person or persons who shall be living, or en ventre sa mère at the time of the death of such grantor, devisor, or testator, or for any longer than during the minority or respective minorities only of any person or persons who, under the uses of trusts of the deed, will, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated. L. (1907) p 1. (2) For cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

[d] **In Indiana** (1) a provision for the accumulation or interest of money or other personal property is void, except if the accumulation be directed to commence from the date of the instrument or the death of the person executing it, it may be for the benefit of the minors then in being or in being at such death, and to terminate at the expiration of their minority; or if it be directed to commence at any period subsequent to the death of the person executing such period, it may be within the time allowed for the suspension of ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority. Burns St. Annot. (1914) § 9724. (2) A direction to accumulate until the beneficiaries respectively attain full age is not violative of the statute. Dyson v. Repp, 29 Ind. 482. (3) For other cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

[e] **In Michigan** (1) an accumulation of rents and profits of real estate, if directed to commence on the creation of the estate out of which the rents and profits are to arise, must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; and if directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority. All directions for the accumulation of rents and profits of real estate except those above allowed are void. Comp. L. (1915) §§ 11555, 11556. (2) For cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

[f] **In Minnesota** (1) the statutory provisions relating to accumulation are similar to those of Michigan. Gen. St. (1923) §§ 8067, 8068. (2) The provisions of such statute are wholly inapplicable to trusts for the accumulation of personal property, which are governed by the rules of the common law. Congdon v. Congdon, 160 Minn. 343, 200 NW 76. (3) For other cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

[g] **In Montana.**—Civ. Code (1907) § 4468, 4469 (similar to California statute).

[h] **In New York** (1) all directions for the accumulation of rents and profits of real property are void, except that such an accumulation may be directed as follows: if it be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority; if it be directed to commence at any time subsequent to the estate out of which the rents and profits are to arise, it must commence within the time permitted for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority. Real Prop. L. § 61. (2) An accumulation of the income of personal property is valid, if directed to commence from the date of the instrument or the death of the person executing it, and to be made for the benefit of one or more minors then in being or in being at such death, and to terminate at or before the expiration of their minority; or if directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority. All other directions for the accumulation of the income of personal property are void. Personal Prop. L. § 16. (3) The time within which an accumulation may be directed to commence differs according to whether the property out of which the income is to arise is real or personal, the statute having been construed to permit an accumulation of the rents and profits of realty to commence at the expiration of two lives in being when the accumulation is directed, but an accumulation of the income of personalty to commence only at some time during the continuance and before the expiration of two lives in being. Manice v. Manice, 43 N. Y. 303. See Mason v. Mason, 2 Sandf. Ch. 432, 475 [aff 2 Barb. 229] ("The accumulation may be postponed in its inception to any point of time within the compass of two lives in being, and then may continue till the end of the minority of the beneficiary"). (4) Particular provisions have been held not to direct unlawful accumulations in the following cases: Roe v. Vingut, 117 N. Y. 204, 22 NE 933; Horton v. Cantwell, 108 N. Y. 255, 15 NE 546; Matter of Raymond, 73 App. Div. 11, 76 NYS 355; Duncklee v. Butler, 38 App. Div. 99, 56 NYS 491; Arthur v. Arthur, 3 App. Div. 375, 38 NYS 1002; Morgan v. Durand, 51 Misc. 523, 101 NYS 1002; Matter of Keogh, 47 Misc. 37, 95 NYS 191 [mod on other grounds 112 App. Div. 414, 98 NYS 433 (aff 186 N. Y. 544 mem, 79 NE 1109 mem, and rearg den 186 N. Y. 610 mem, 79 NE 1109 mem)]; Matter of Stevens, 46 Misc. 623, 95 NYS 297 [aff 111 App. Div. 773, 98 NYS 28 (mod on other grounds 187 N. Y. 471, 80 NE 358, 12 LRANS 814, 10 AnnCas 511)]; Nichols v. Nichols, 42 Misc. 381, 86 NYS 719; In re McNeil, 1 NYS 20; Gott v. Cook, 7 Paige 521 [aff 24 Wend. 641, 35 AmD 641 note]. (5) For other cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

[i] **In Pennsylvania** (1) no real or personal property may be so settled or disposed of that the rents, issues, or profits thereof shall be wholly or partially accumulated for any longer term than the life or lives of the grantor or grantors, settlor or settlors, or testator, and the term of twenty-one years from the death of any such grantor, settlor, or testator, that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation, of any person or persons who under the uses or trusts of the deed, will, or other assurance directing

one or more of its provisions.[3] By them, it has been said, it was intended, not merely to restrict the term of accumulation previously permitted, but to uproot the entire doctrine of accumulation, with the exception or exceptions specifically permitted;[4] and accordingly they apply no less where the accumulation results by indirection or implication than where it is expressly ordered.[5] Whether or not a provision for accumulation is within the statute must be determined as of the time the instrument containing it takes effect.[6] It has been held that such a statute is controlling over a general statute permitting trusts for the beneficial interest of any person to continue for a longer period.[7]

[§ 83] **(2) Particular Provisions.** When a statute prohibits an accumulation except during the minority of the beneficiary,[8] a direction to accumulate offends if by its terms the accumulation is to begin before the birth of the person for whose benefit it is to be made,[9] or if it is to continue indefinitely,[10] or for the lifetime[11] or until the mar-

such accumulation, would for the time being, if of full age, be entitled unto the rents, issues, interests, and profits so directed to accumulate. St. (1920) § 1886S. (2) It seems that a provision for accumulation during a succession of minorities would be invalid, except, perhaps, for a period of twenty-one years after the creation of the estate. Furness' Est., 16 Phila. 357, 14 WklyNC 391. (3) For other cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

[j] **In Wisconsin** (1) an accumulation of rents and profits of real estate may be directed for the benefit of one or more persons as follows: if it be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being and terminate at the expiration of their minority; if it be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time permitted for the vesting of future estates and during the minority of the person for whose benefit it is directed, and shall terminate at the expiration of such minority; and it may be directed for the sole benefit of a literary or charitable corporation which shall have been organized under the laws of the state, but must terminate upon the expiration of twenty-one years from the time when it shall be directed to commence. All directions for the accumulations of rents and profits of real estate, except such as are above allowed, shall be void. St. (1921) §§ 2061, 2062. (2) There is no legal objection to accumulation of the income of personal estate for other purposes. In re Stark, 149 Wis. 631, 134 NW 389; Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 18. (3) For other cases construing these provisions see infra notes 3-7; and §§ 83-87 passim.

3. Ala.—Henderson v. Henderson, 210 Ala. 73, 97 S 353.

Cal.—Goldtree v. Thompson, 79 Cal. 613, 22 P 50.

Ill.—Kolb v. Landes, 277 Ill. 440, 115 NE 539; French v. Calkins, 252 Ill. 243, 96 NE 877.

Ind.—Porter v. Union Trust Co., 182 Ind. 637, 108 NE 117, AnnCas 1917D 427.

Mich.—Toms v. Williams, 41 Mich. 552, 2 NW 814.

N. Y.—Pray v. Hegeman, 92 N. Y. 508; Matter of Hartman, 126 Misc. 862, 215 NYS 802.

Pa.—Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85; Brown v. Williamson, 86 Pa. 338; Mitcheson's Est., 15 Phila. 523, 11 WklyNC 547.

"The origin of this limitation is traceable to the will of an English merchant who died in 1797. This will devised property worth about $3,000,000 to trustees, to accumulate the income during the lives of all his sons, grandsons and grandson's children living at his death, and then, at the death of the survivor, to transfer the property to the three living, oldest, male descendants of his three sons, and failing them to the Crown of England for the sinking fund. It was then estimated that the trust might last for 75 years and with most skillful management, the total accumulation could reach $125,000,000. It was held, however, that the trust did not conflict with the then existing rule against perpetuities. Thellusson v. Woodford, 4 Ves. 227, 31 Reprint 117. The danger to public interests of such possible accumulations caused Parliament to promptly enact the law of 39 and 40 Geo. III, Ch. 98, popularly called the Thellusson Act, and our statute (§ 9724 Burns 1914) is the outgrowth of that legislation." Porter v. Union Trust Co., 182 Ind. 637, 645, 108 NE 117, Ann Cas1917D 427.

The Thellusson Act see supra § 81.

4. Pray v. Hegeman, 92 N. Y. 508, 515.

"The main purpose of . . . the statute was not to limit the term of accumulation previously permitted. The legislature intended to uproot the doctrine that the rents and profits of property might be accumulated and the enjoyment postponed, with a single exception." Pray v. Hegeman, supra.

5. St. John v. Andrews Inst. for Girls, 191 N. Y. 254, 83 NE 981, 14 AnnCas 708; Dodge v. Pond, 23 N. Y. 69; Matter of Van Doren, 77 Misc. 44, 137 NYS 420, 9 Mills Surr. 290 [app dism 153 App. Div. 914 mem, 138 NYS 1147 mem]; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; In re Billings, 268 Pa. 71, 110 A 768; In re Neel, 252 Pa. 394, 97 A 502; In re Weinmann, 223 Pa. 508, 72 A 806; Eberly's App., 110 Pa. 95, 1 A 330; Schillo's Est., 64 Pa. Super. 85; Nagle's Est., 63 Pa. Super. 93; White's Est., 8 Pa. Dist. 33; Mitcheson's Est., 15 Phila. (Pa.) 523, 11 WklyNC 547. But see Pforr's Est., 144 Cal. 121, 77 P 825 (dictum to the contrary); Toms v. Williams, 41 Mich. 552, 2 NW 814 (where the court expressed doubt as to whether the statutes do so apply); Matter of Martinus, 65 Misc. 135, 121 NYS 106, 7 Mills Surr. 315 (holding that where there is no express requirement for accumulation, the mere fact that by the terms of a will there is no disposition of the income cannot impose upon the testator's scheme a feature which would result in its destruction, and the will is to be regarded as if it embodied a direction for payment of the income to the person presumptively entitled to the next eventual estate).

What constitutes direction to accumulate see Accumulation 1 C. J. p 734; Wills [40 Cyc 1785 et seq]; and see infra § 84 text and notes 41-44.

6. In re Billings, 268 Pa. 71, 110 A 768. But see Whitney v. Nealley, 55 Cal. A. 718, 204 P 235 (holding, under a statute permitting accumulations only for the benefit of minors, that, where a grantor conveyed property in trust to pay to himself out of the income thereof a sum sufficient for his support, for life, and upon his death to transfer the residue and remainder and "the proceeds thereof" to other persons, the validity of the provision would not be decided in a suit brought after the death of the grantor when it was shown that all the income had been used to provide for the grantor during life and that no accumulation had been made).

7. Hutchins v. Security Trust, etc., Bank, (Cal. A.) 270 P 219; Minnesota L. & T. Co. v. Douglas, 135 Minn. 413, 161 NW 158; Minneapolis Y. M. C. A. v. Horn, 120 Minn. 404, 139 NW 805.

8. Statutory provisions see supra § 82.

9. U. S. Trust Co. v. Soher, 178 N. Y. 442, 70 NE 970; Cochrane v. Schell, 140 N. Y. 516, 35 NE 971; Manice v. Manice, 43 N. Y. 303; Kilpatrick v. Johnson, 15 N. Y. 322; Cook v. Lowry, 29 Hun 20 [mod on other grounds 95 N. Y. 103]; Bean v. Hockman, 31 Barb. (N. Y.) 78; Matter of Van Doren, 77 Misc. 44, 137 NYS 420, 9 Mills Surr. 290 [app dism 153 App. Div. 914 mem, 138 NYS 1147 mem]; Haxtun v. Corse, 2 Barb. Ch. (N. Y.) 506; Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 18.

[a] **But persons unborn at the creation of the trust may be beneficiaries** of a direction to accumulate (1) if they will necessarily come into existence, if ever, and the accumulation be commenced, within the period permitted by law for the future commencement of trusts for accumulation, and if the accumulation will terminate upon their attaining their majority (Mason v. Mason, 2 Sandf. Ch. (N. Y.) 432 [aff 2 Barb. 229]; In re Cattell, [1907] 1 Ch. 567. See U. S. Trust Co. v. Soher, 178 N. Y. 442, 70 NE 970 [dictum]); (2) except where they are persons to whom the gift of the corpus is invalid under the statutes relating to suspension of absolute ownership or the power of alienation (Matter of Raab, 79 Misc. 185, 139 NYS 869).

10. Bean v. Hockman, 31 Barb. (N. Y.) 78; Mayer's Est., 13 Pa. Dist. 277. But see Rogers' Est., 179 Pa. 602, 609, 36 A 1130, 340 (where a direction to accumulate a fund until it should total a specified amount, for the benefit of certain minors, was held good, apparently on the ground that such total would probably be attained within the minority of such minors, and if not, that the trust would be void only for the period beyond their majority).

11. In re Whitney, 176 Cal. 12, 167 P 399; Wilson v. Odell, 58 Mich. 533, 25 NW 506; In re Chittick, 243 N. Y. 304, 153 NE 83; Hobson v. Hale, 95 N. Y. 588; Lovett v. Gillender, 35 N. Y. 617; Gilman v. Reddington, 24 N. Y. 9; Kilpatrick v. Johnson, 15 N. Y. 322; Kirk v. McCann, 117 App. Div. 56, 101 NYS 1093; Matter of Hoyt, 116 App. Div. 217, 101 NYS 557 [aff 189 N. Y. 511 mem, 81 NE 1166 mem]; Cook v. Lowry, 29 Hun 20 [mod on other grounds 95 N. Y. 103]; In re Dey Ermand, 24 Hun (N. Y.) 1; Robison v. Robison, 5 Lans. (N. Y.) 165; In re Kirby, 133 Misc. 152, 231 NYS 408; Matter of Armstrong, 109 Misc. 472, 179 NYS 186; Pruyn v. Sears, 96 Misc. 200, 161 NYS 58; Matter of Van Doren, 77 Misc. 44, 137 NYS 420, 9 Mills Surr. 290 [app dism 153 App. Div. 914 mem, 138 NYS 1147

riage[12] of a designated person, or for a term in gross without reference to any existing minority,[13] or during the minority of the youngest member of a class of beneficiaries,[14] or until the beneficiary attains an age in excess of his majority;[15] but a spendthrift trust for one who has attained his majority is not bad.[16] Where the permitted period is a fixed term of years after the creation of the estate, the statute is violated by a direction to accumulate for the lifetime of a designated person,[17] or for a term in excess of that specified;[18] but if the trust will necessarily cease within the period prescribed by the statute, it is not obnoxious thereto.[19] Statutes restricting trusts for accumulation to those created for the benefit of a specified class of persons are violated by a direction to accumulate for any persons other than members of such class, or for any purpose other than the benefit of such members.[20] Thus, when a statute prohibits an accumulation except for the benefit of a minor, a direction to accumulate for any other purpose,[21] such as the payment of debts or encumbrances[22] or of legacies,[23] is prohibited; and so is a direction to accumulate for the benefit partially or wholly of any person other than such minor,[24] as if a life interest or estate in the property of which the income is to be accumulated

mem]; Tobin v. Graf, 39 Misc. 412, 80 NYS 5; Garland v. Garland, 35 Misc. 147, 71 NYS 465; Matter of Roos, 4 Misc. 232, 24 NYS 862; In re Quay, 253 Pa. 80, 97 A 1029; In re Neel, 252 Pa. 394, 97 A 502; In re Edwards, 190 Pa. 177, 42 A 469; Schwartz's App., 119 Pa. 337, 13 A 212; Channon's Est., 28 Pa. Dist. 479; Mayer's Est., 13 Pa. Dist. 277; Levy's Est., 1 Pa. Dist. 217, 11 Pa. Co. 266; Price's Est., 42 Pa. Co. 66; Thouron's Est., 15 Phila. (Pa.) 521; Matter of Sergeant, 11 Phila. (Pa.) 8.

12. Grim's App., 109 Pa. 391, 1 A 212; Stille's App., 4 WklyNC (Pa.) 42 [aff 11 Phila. 31, 1 WklyNC 249].

13. Smith v. Chesebrough, 176 N. Y. 317, 68 NE 625; Matter of Robinson, 145 App. Div. 925, 130 NYS 259 [mod 71 Misc. 87, 129 NYS 1020, 8 Mills Surr. 51, and rev on other grounds 203 N. Y. 380, 96 NE 925, 37 LRANS 1023]; Stewart v. Wolley, 121 App. Div. 531, 106 NYS 99; Matter of Keogh, 112 App. Div. 414, 98 NYS 433 [aff 186 N. Y. 544 mem, 79 NE 1109 mem]; Matter of Hazelton, 119 Misc. 389, 196 NYS 333; Seligman v. Seligman, 89 Misc. 194, 151 NYS 889, 13 Mills Surr. 564; Matter of Pierce, 76 Misc. 85, 136 NYS 323, 9 Mills Surr. 118; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; Brandt v. Brandt, 13 Misc. 431, 34 NYS 684; In re Lilley, 272 Pa. 142, 116 A 392, 28 ALR 366. See Williamson's Est., 143 Pa. 150, 22 A 836 (semble).

14. Shriver v. Montgomery, 181 Ind. 108, 103 NE 945.

15. Ala.—Pearce v. Pearce, 199 Ala. 491, 74 S 952.

Cal.—In re Duffill, 180 Cal. 748, 183 P 337; In re Yates, 170 Cal. 254, 149 P 555; In re Haines, 150 Cal. 640, 89 P 606.

Mich.—Wilson v. Odell, 58 Mich. 533, 25 NW 506.

N. Y.—Thorn v. De Breteuil, 179 N. Y. 64, 71 NE 470; Schermerhorn v. Cotting, 131 N. Y. 48, 29 NE 980; Hull v. Hull, 24 N. Y. 647; Epstein v. Werbelovsky, 193 App. Div. 428, 184 NYS 330 [rev 108 Misc. 214, 177 NYS 554, and aff 233 N. Y. 525 mem, 135 NE 902 mem]; Simpson v. English, 1 Hun 559, 4 Thomps. & C. 80; Forsyth v. Rathbone, 34 Barb. 388; Bean v. Hockman, 31 Barb. 78; Matter of Sewell, 127 Misc. 202, 216 NYS 331; Matter of King, 121 Misc. 298, 200 NYS 829; Matter of Erickson, 113 Misc. 10, 183 NYS 779 [aff 198 App. Div. 999 mem, 190 NYS 923 mem]; Matter of Shea, 106 Misc. 222, 174 NYS 421; Matter of Kohler, 96 Misc. 433, 160 NYS 669 [mod on other grounds 193 App. Div. 8, 183 NYS 550 (rev on other grounds 231 N. Y. 353, 132 NE 114)]; Pruyn v. Sears, 96 Misc. 200, 161 NYS 58; Matter of O'Reilly, 59 Misc. 136, 112 NYS 208, 6 Mills Surr. 431; Cochrane v. Alexandre, 56 Misc. 212, 107 NYS 587; Tobin v. Graf, 39 Misc. 412, 80 NYS 5; In re Alexander, 186 NYS 242; Ruppert's Est., 1 Tuck. Surr. 480.

Pa.—In re Weinmann, 223 Pa. 508, 72 A 806; Schwartz's App., 119 Pa. 337, 13 A 212; Young's Est., 16 Pa. Dist. 541; Shallcross' Est., 9 Pa. Dist. 388; Ward's Est., 8 Pa. Dist. 701; Lare's Est., 8 Pa. Dist. 265; White's Est., 8 Pa. Dist. 33; Butler v. Butler, 9 Phila. 269. Compare Paxson's Est., 22 Pa. Dist. 358 (holding that the minor, on attaining majority, could terminate the accumulation and demand the corpus, and therefore the direction to accumulate was not bad).

[a] **But an accumulation for any number of persons until all should come of age** is really no more than for the minority of a single person, and is consistent with the requirements of the statute. Toms v. Williams, 41 Mich. 552, 2 NW 814.

16. Matter of Robinson, 145 App. Div. 925, 130 NYS 259 [mod 71 Misc. 87, 129 NYS 1020, 8 Mills Surr. 51, and rev on other grounds 203 N. Y. 380, 96 NE 925, 37 LRANS 1023]; In re McCaskey, 293 Pa. 497, 143 A 209. See In re Spring, 216 Pa. 529, 66 A 110; Barger's App., 100 Pa. 239 [crit Crim's Est., 15 Phila. (Pa.) 603, 12 WklyNC 354] (both holding that a discretionary power given to a trustee to accumulate for a period not sanctioned by the statute is valid). Contra Eberly's App., 110 Pa. 95, 1 A 330; Brown v. Williamson, 36 Pa. 338.

Spendthrift trusts generally see Spendthrift Trusts [36 Cyc 805]; Trusts [39 Cyc 40].

17. Schwartz's App., 119 Pa. 337, 13 A 212; Burt v. Sturt, 10 Hare 415, 44 EngCh 400, 68 Reprint 989; Wildes v. Davies, 1 Smale & G. 475, 65 Reprint 208.

18. Campbell v. Weakley, 121 Ala. 64, 25 S 694; Wise v. Rupp, 269 Pa. 505, 112 A 548; Lawson v. Kirk-Session, 8 Dunlop 1229. See Ashurst v. Ashurst, 181 Ala. 401, 61 S 942 (dictum).

19. Williams' Est., 13 Phila. (Pa.) 325.

20. See cases infra notes 21–26.

21. In re Kohler, 231 N. Y. 353, 132 NE 114; Matter of Schaefer, 112 Misc. 308, 182 NYS 732 [mod 110 Misc. 628, 180 NYS 638]; McKee's App., 96 Pa. 277; and cases infra notes 22, 23. But see In re Nesmith, 140 N. Y. 609, 35 NE 942 (where it was held that building necessary additions and improvements upon business property held in trust, thereby maintaining its efficiency and increasing its earnings, and paying therefor out of the income, did not constitute an unlawful accumulation).

[a] **Consent of parties ineffectual.** —In view of Personal Prop. L. § 16, providing that all directions for the accumulation of income not authorized by statute are void, the interested parties cannot disregard or waive the statute by consenting or agreeing to an unlawful accumulation, and the word "void" must be construed as it has been in other statutes, so that the court has no jurisdiction to legalize accumulations prohibited by the statutory provision. Matter of Schaefer, 112 Misc. 308, 182 NYS 732 [mod 110 Misc. 628, 180 NYS 638].

22. Hutchins v. Security Trust, etc., Bank, (Cal. A.) 270 P 219; Hascall v. King, 162 N. Y. 134, 56 NE 515, 76 AmSR 302; Mann-Vynne v. Equitable Trust Co., 201 App. Div. 149, 194 NYS 50; Appell v. Appell, 177 App. Div. 570, 164 NYS 246 [aff 221 N. Y. 602 mem, 117 NE 1060 mem]; Herzig v. Herzig, 140 App. Div. 514, 125 NYS 402; Matter of Jenkins, 132 App. Div. 339, 117 NYS 74; Kirk v. McCann, 117 App. Div. 56, 101 NYS 1093; Lowenhaupt v. Stanisics, 95 App. Div. 171, 88 NYS 537; Hafner v. Hafner, 62 App. Div. 316, 71 NYS 1 [aff 171 N. Y. 633 mem, 63 NE 1117 mem]; Cowen v. Rinaldo, 82 Hun 479, 31 NYS 554; Matter of Hoyt, 71 Hun 13, 24 NYS 577; Bean v. Hockman, 31 Barb. (N. Y.) 78; Matter of Hall, 130 Misc. 313, 224 NYS 376; Keyser v. Mead, 53 Misc. 114, 103 NYS 1091; Dresser v. Travis, 39 Misc. 358, 79 NYS 924 [aff 87 App. Div. 632 mem, 84 NYS 1124 mem (aff 177 N. Y. 371, 376, 69 NE 734, 736)]; Dodsworth v. Dam, 38 Misc. 684, 78 NYS 264; McComb v. Title Guarantee, etc., Co., 36 Misc. 370, 73 NYS 554 [aff 70 App. Div. 618 mem, 75 NYS 1128 mem]; Siefke v. Siefke, 34 Misc. 77, 69 NYS 514; Matter of Fisher, 4 Misc. 46, 25 NYS 79; Wells v. Wells, 24 NYS 874, 30 AbbNCas 225; In re Billings, 268 Pa. 71, 110 A 768; Bruntrager's Est., 2 Pa. Dist. & Co. 747; Lutz's Est., 18 Phila. (Pa.) 114, 20 Phila. 89, 27 WklyNC 403; Mitcheson's Est., 11 WklyNC (Pa.) 547. Compare Toms v. Williams, 41 Mich. 552, 2 NW 814 (where a direction to accumulate from the income of the trust property generally a sinking fund to pay for buildings upon a portion of the realty was held not to be unlawful in a jurisdiction in which there was no statutory restriction upon the accumulation of income of personal property, merely because it is possible that a portion of the rents and profits of real estate might become necessary to provide such fund); Becker v. Becker, 13 App. Div. 342, 43 NYS 17 (where a direction to apply income to the payment of encumbrances was held good, where the property subject to such encumbrances was given in trust for the donor's minor children, to be divided among them when they attained their majority).

[a] **Financial condition of the estate** of a testator who directs accumulation for the purpose of paying debts or encumbrances does not affect the question of the validity of such direction. In re Billings, 268 Pa. 71, 110 A 768.

23. Fischer v. Langlotz, 114 App. Div. 903, 100 NYS 573; In re Billings, 268 Pa. 71, 110 A 768.

24. In re Whitney, 176 Cal. 12, 167 P 399; Porter v. Union Trust Co., 182 Ind. 637, 108 NE 117, AnnCas1917D 427; In re Megrue, 224 N. Y. 284, 120 NE 651; St. John v. Andrews Inst. for Girls, 191 N. Y. 254, 83 NE 981, 14 AnnCas 708; Thorn v. De Breteuil, 179 N. Y. 64, 71 NE 470; Cochrane v. Schell, 140 N. Y. 516, 35 NE 971; Pray v. Hegeman, 92 N. Y. 508; Kilpatrick v. Johnson, 15 N. Y. 322; Harris v. Clark, 7 N. Y. 242; Matter of Murphy, 213 App. Div. 319, 210 NYS 531; Equitable Trust Co. v. Miller, 197 App. Div. 391, 189 NYS 293 [aff 233 N. Y. 650 mem, 135 NE 955 mem]; Hoskin v. Long Island L. & T. Co., 139 App. Div. 258, 123 NYS

is given to a minor, with remainder over to another person,[25] even where the gift over is conditioned upon the death of the minor during his minority,[26] although in the latter case there is authority to the contrary,[27] and in New York an exception is made where the property of which the income is to be accumulated is real estate.[28] Upon the death of a minor for whose benefit an accumulation has been directed, the provision for accumulation becomes inoperative.[29]

[§ 84] **(3) Operation and Effect.**[30] Where a trust for accumulation violates a restrictive statute merely in being directed to continue for a period in excess of that permitted,[31] it is not void in toto,[32] nor does it invalidate the gift of the principal,[33] provided the trust does not offend the rule against perpetuities[34] or any statute restricting suspensions

994 [aff 203 N. Y. 588 mem, 96 NE 1116 mem]; Matter of Hoyt, 116 App. Div. 217, 101 NYS 557 [aff 189 N. Y. 511 mem, 81 NE 1166 mem]; McGuire v. McGuire, 80 App. Div. 63, 80 NYS 497; Matter of Rogers, 22 App. Div. 428, 48 NYS 175 [aff 161 N. Y. 108, 55 NE 393]; Bean v. Hockman, 31 Barb. (N. Y.) 78; McGrath v. Van Stavoren, 8 Daly (N. Y.) 454; Bolton v. Jacks, 29 N. Y. Super. 166; Matter of Segura, 110 Misc. 624, 180 NYS 884; Epstein v. Werbelovsky, 108 Misc. 214, 177 NYS 554 [rev on other grounds 193 App. Div. 428, 184 NYS 330 (aff 233 N. Y. 525 mem, 135 NE 902 mem)]; Matter of Raab, 79 Misc. 185, 139 NYS 869; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; Tobin v. Graf, 39 Misc. 412, 80 NYS 5; Brandt v. Brandt, 13 Misc. 431, 34 NYS 684; Matter of Roos, 4 Misc. 232, 24 NYS 862; Richardson v. Hunt, 14 NYS 48; Matter of Sands, 3 NYS 67, 1 Conn. Surr. 259; McCormack v. McCormack, 60 HowPr (N. Y.) 196; Boynton v. Hoyt, 1 Den. (N. Y.) 53; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; In re Billings, 268 Pa. 71, 110 A 768; In re Roney, 227 Pa. 127, 75 A 1061; In re Farnum, 191 Pa. 75, 43 A 203; Grim's App., 109 Pa. 391, 1 A 212; Carson's App., 99 Pa. 325; McKee's App., 96 Pa. 277; In re Washington, 75 Pa. 102; Brubaker's App., 1 Mon. (Pa.) 447, 15 A 708; Nagle's Est., 63 Pa. Super. 93; Channon's Est., 28 Pa. Dist. 479; Weinmann's Est., 17 Pa. Dist. 489; Mayer's Est., 13 Pa. Dist. 277; White's Est., 8 Pa. Dist. 33; Levy's Est., 1 Pa. Dist. 217, 11 Pa. Co. 266; Howell's Est., 5 WklyNC (Pa.) 430; Stille's App., 4 WklyNC (Pa.) 42 [aff 11 Phila. 31, 1 WklyNC 249]; Grim's Est., 15 Phila. (Pa.) 603, 12 WklyNC 354; Matter of Sergeant, 11 Phila. (Pa.) 8; Minors' Est., 6 Phila. (Pa.) 357, 14 WklyNC 391; and cases infra notes 25, 26. But see Matter of Sewell, 127 Misc. 202, 204, 216 NYS 331 (where a testator gave property in trust to pay to his son, "for the living expenses of himself and his family," such portion of the income as the trustees should deem advisable until the testator's grandson, then a minor, should attain the age of twenty-five years, and then to pay to the son the principal, and it was held that "the difference between the amount fixed by the trustees for the support of the family and the amount earned by the trust fund may lawfully be accumulated during the minority of the infant . . . [grandson]. Beyond the date of his arriving at his majority, it becomes a void accumulation").

"The accumulation must not only be for infants, but it must be exclusively for infants, so much so that if an adult or person not in being is to share in the accumulation, then a trust for the accumulation is void." Matter of Rogers, 22 App. Div. 428, 431, 48 NYS 175 [aff 161 N. Y. 108, 55 NE 393].

[a] **The court will not assume that the beneficiaries are adults,** rather than minors, in the absence of any showing, nor declare the direction to accumulate invalid on such assumption. Matter v. Raymond, 73 App. Div. 11, 76 NYS 355.

25. Minnesota L. & T. Co. v. Douglas, 135 Minn. 413, 161 NW 158; Smith v. Parsons, 146 N. Y. 116, 40 NE 736; Barbour v. De Forest, 95 N. Y. 13; Pray v. Hegeman, 92 N. Y. 508 [disappr Meserole v. Meserole, 1 Hun 66, 3 Thomps. & C. 192]; Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99; In re Rogers, 22 App. Div. 428, 48 NYS 175 [aff 161 N. Y. 108, 55 NE 393]; Tweddell v. New York L. Ins., etc., Co., 82 Hun 602, 31 NYS 764; Epstein v. Werbelovsky, 108 Misc. 214, 177 NYS 554 [rev on other grounds 193 App. Div. 428, 184 NYS 330 (aff 233 N. Y. 525 mem, 135 NE 902 mem)]; Matter of Snyder, 35 Misc. 588, 72 NYS 61; Gilman v. Healy, 1 Dem. Surr. (N. Y.) 404; In re Farnum, 191 Pa. 75, 43 A 203; Carson's App., 99 Pa. 325; In re Washington, 75 Pa. 102; White's Est., 8 Pa. Dist. 33. See to same effect Hawley v. James, 16 Wend. (N. Y.) 61. Compare Matter of Ziegler, 82 Misc. 10, 143 NYS 682, 11 Mills Surr. 15 (where a trust to accumulate during the minority of testator's son, and then to pay him the net income but not to pay the corpus and accumulations until he should reach the age of twenty-five, with remainder to adults in case he should die before receiving the corpus, was held void as to that portion which directed retention of the accumulations after the minority of the beneficiary and their payment to adults); Penniman v. Howard, 71 Misc. 598, 128 NYS 910 (where it does not appear whether or not the life tenant was a minor). Contra Eldred v. Shaw, 112 Mich. 237, 70 NW 545.

"The argument that the words of the statute are satisfied by a limitation to the minor of the use of the accumulated fund, after his majority, for life, with remainder over, or, in other words, that it is not necessary that the accumulation should be for the sole benefit of the minor, if allowed to prevail would introduce great uncertainty and confusion. Under that construction the benefit of the infant might be the mere pretext and not the real reason for accumulation. . . . The principle which would sustain a limitation of the use of the accumulated fund to the minor after majority, for life, as an accumulation for his benefit, would sustain such a limitation for a term of years only. The accumulation in either case might be almost wholly for the benefit of the remainderman, depending upon the duration of the life of the person to whom the use was given after majority, or the term of years upon which the use was limited. It would be an equally uncertain rule to make the validity of the direction for accumulation depend on the consideration whether the minor's benefit was the primary object of the limitation, and the benefit of the remainderman only incidental and secondary. We are satisfied that the policy and language of the statute require, in order to sustain a direction for accumulation . . . that the accumulation must be for the sole benefit of the minor, and that this can only be true where the accumulated fund is given over to him absolutely when the period of accumulation ceases." Pray v. Hegeman, 92 N. Y. 508, 516.

[a] **Thus,** where a fund is limited to a minor for life with remainder over, and accumulation is directed until the minor becomes of age, the direction for accumulation is void under the statute, inasmuch as it is not for the sole benefit of the minor. "We are satisfied that the policy and language of the statute require . . . that the accumulation must be for the sole benefit of the minor, and that this can only be true where the accumulated fund is given over to him absolutely when the period of accumulation ceases." Pray v. Hegeman, 92 N. Y. 508, 517.

26. Manice v. Manice, 43 N. Y. 303; Scattergood's Est., 28 Pa. Dist. 130; Furness's Est., 16 Phila. (Pa.) 357, 14 WklyNC 391.

27. Hornung v. Sedgwick, 164 Cal. 629, 130 P 212; Smith v. Parsons, 146 N. Y. 116, 40 NE 736.

28. Manice v. Manice, 43 N. Y. 303; Bolton v. Jacks, 29 N. Y. Super. 166. But see Penniman v. Howard, 71 Misc. 598, 128 NYS 910 (where, however, it does not appear that the life tenant was a minor).

[a] **Reason for exception.**—Since the statute relating to suspension of the power of alienation of real property permits it to be made inalienable during two lives in being and during the minority of the first remainderman, by means of a contingent remainder over, a direction to accumulate for a minor during his minority, with a limitation over in case of his death before attaining full age, cannot cause any suspension of the power of alienation for a greater period of time than that permitted, and the minor during his minority has a vested, not a contingent, estate, although it is subject to be defeated by the condition subsequent of his dying under age; but in the case of personal property suspension of absolute ownership is permitted only for the duration of two lives in being, and therefore the reason does not apply. Manice v. Manice, 43 N. Y. 303.

29. Goebel v. Wolf, 113 N. Y. 405, 21 NE 388, 10 AmSR 464; Bolton v. Jacks, 29 N. Y. Super. 166.

30. Devolution of released income see infra § 85.

31. Statutory provisions see supra § 82.

32. Cal.—In re Haines, 150 Cal. 640, 89 P 606.

N. Y.—Pruyn v. Sears, 96 Misc. 200, 161 NYS 58.

Pa.—In re Neeb, 263 Pa. 197, 106 A 317; Rogers' Est., 179 Pa. 602, 36 A 1130; Stille's App., 4 WklyNC 42 [aff 11 Phila. 31, 1 WklyNC 249].

Wis.—Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 18.

Eng.—In re Cattell, [1907] 1 Ch. 567.

And see cases infra note 36.

33. In re Duffill, 180 Cal. 748, 183 P 337; In re Yates, 170 Cal. 254, 149 P 555; Whitney v. Nealley, 55 Cal. A. 718, 204 P 235; Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; French v. Calkins, 252 Ill. 243, 96 NE 877; Hascall v. King, 162 N. Y. 134, 56 NE 515, 76 AmSR 302; Barbour v. De Forest, 95 N. Y. 13; Kilpatrick v. Johnson, 15 N. Y. 322; Levy v. Levy, 40 Barb. 585 [rev on other grounds 33 N. Y. 97]; Robison v. Robison, 5 Lans. (N. Y.) 165; Matter of Raab, 79 Misc. 185, 139 NYS 869; Garland v. Garland, 35 Misc. 147, 71 NYS 465; In re Alexander, 186 NYS 242; Fonseca v. Jones, 21 Man. 168, 18 WestLR 206.

34. Trusts for accumulation offending rule against perpetuities see infra text and notes 37, 38; and supra § 80.

of alienability or ownership,[35] but is void only for the time in excess of the permitted period;[36] such statutes do not, however, render valid pro tanto a trust for accumulation which causes a violation of the rule against perpetuities,[37] and it is entirely void.[38] And a direction for accumulation which is violative of a statute in being directed for a purpose or for the benefit of a person thereby prohibited[39] is wholly void.[40] Such a statute does not, however, prevent a trustee from making such temporary accumulations of income as are a reasonable provision against future payments to be made by them, where there is not involved any ultimate accumulation or any permanent addition to the corpus;[41] and so, where the principal has been depleted, it may properly be replenished from income;[42] nor does such statute render void a trust for the support of an incompetent, merely because

35. Trusts for accumulation suspending alienability and ownership see infra §§ 122, 132.

36. Ala.—Pearce v. Pearce, 199 Ala. 491, 74 S 952.

Cal.—In re Duffill, 180 Cal. 748, 183 P 337; In re Yates, 170 Cal. 254, 149 P 555; In re Haines, 150 Cal. 640, 89 P 606.

Ill.—Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; French v. Calkins, 252 Ill. 243, 96 NE 877.

Ind.—Dyson v. Repp, 29 Ind. 482.

Mich.—Wilson v. Odell, 58 Mich. 533, 25 NW 506.

N. Y.—Hull v. Hull, 24 N. Y. 647; Gilman v. Reddington, 24 N. Y. 9; Epstein v. Werbelovsky, 193 App. Div. 428, 184 NYS 330 [rev 108 Misc. 214, 177 NYS 554, and aff 233 N. Y. 525 mem, 135 NE 902 mem]; Simpson v. English, 1 Hun 559, 4 Thomps. & C. 80; In re Kirby, 133 Misc. 152, 231 NYS 408; Matter of Sewell, 127 Misc. 202, 216 NYS 331; Matter of Allen, 111 Misc. 93, 181 NYS 398 [aff 202 App. Div. 810 mem, 194 NYS 913 mem]; In re Zimmermann, 104 Misc. 699, 168 NYS 729 [aff 183 App. Div. 939 mem, 171 NYS 1103 mem]; Matter of O'Reilly, 59 Misc. 136, 112 NYS 208, 6 Mills Surr. 431; Tobin v. Graf, 39 Misc. 412, 80 NYS 5; In re Alexander, 186 NYS 242; Ruppert's Est., 1 Tuck. Surr. 480. Compare Matter of Kohler, 193 App. Div. 8, 183 NYS 550 [mod 96 Misc. 433, 160 NYS 669, and rev on other grounds 231 N. Y. 353, 132 NE 114] (holding that, under a provision for the payment of a certain sum annually or a specified time out of the income and profits of a capital sum set apart therefor, as distinguished from a provision for its payment out of the estate generally, any surplus of income from such capital sum, over and above the annual payment, cannot be accumulated to make up a deficiency in any subsequent year if for any reason the income from the fund is diminished, but must be paid over to the presumptive taker of the next eventual estate).

Pa.—In re Neeb, 263 Pa. 197, 106 A 317; In re Leisenring, 237 Pa. 60, 85 A 80, LRA1916F 798, AnnCas1914B 84; Lennig's Est., 154 Pa. 209, 25 A 1049; Rhodes' Est., 147 Pa. 227, 23 A 553; McKee's App., 96 Pa. 277; Brown v. Williamson, 36 Pa. 338; Conrow's App., 3 Pennyp. 356; Paxson's Est., 35 Pa. Co. 44; Stille's App., 4 WklyNC 42 [aff 11 Phila. 31, 1 WklyNC 249]; Myer's Est., 17 Phila. 425, 16 WklyNC 83, 18 Phila. 103; Butler v. Butler, 9 Phila. 269.

Wis.—Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 18.

See Kimball v. Crocker, 53 Me. 263 (dictum).

"There is a wide difference between the gift infringing the rule against perpetuities, which is void in toto, and a trust for accumulation, which is good to the extent that it does not transgress the statute." Lennig's Est., 154 Pa. 209, 213, 25 A 1049.

[a] **Under the Thellusson Act** the rule is the same. Weatherall v. Thornburgh, 8 Ch. D. 261; Ellis v. Maxwell, 3 Beav. 587, 43 EngCh 587, 49 Reprint 231, 12 Beav. 104, 50 Reprint 1000; Evans v. Hellier, 5 Cl. & F. 114, 7 Reprint 347; Oddie v. Brown, 4 De G. & J. 179, 61 EngCh 142, 45 Reprint 70; Bective v. Hodgson, 10 H. L. Cas. 656, 11 Reprint 1181; Eyre v. Marsden, 2 Keen 564, 15 EngCh 564, 48 Reprint 744 [aff 4 Myl. & C. 231, 18 EngCh 231, 41 Reprint 91]; O'Neill v. Lucas, 2 Keen 313, 15 EngCh 313, 48 Reprint 649; McDonald v. Bryce, 2 Keen 276, 15 EngCh 276, 48 Reprint 634; Matter of Rosslyn, 16 Sim. 391, 39 EngCh 391, 60 Reprint 925; Elborne v. Goode, 14 Sim. 165, 37 EngCh 165, 60 Reprint 320; Crawley v. Crawley, 7 Sim. 427, 8 EngCh 427, 58 Reprint 901; Marshall v. Holloway, 2 Swanst. 432, 36 Reprint 681; Longdon v. Simson, 12 Ves. Jr. 295, 33 Reprint 113; Griffiths v. Vere, 9 Ves. Jr. 127, 32 Reprint 550; Fonseca v. Jones, 21 Man. 168, 18 WestLR 206.

37. Boughton v. James, 1 Coll. 26, 28 EngCh 26, 63 Reprint 306 [aff 1 H. L. Cas. 406, 9 Reprint 815]; Marshall v. Holloway, 2 Swanst. 432, 36 Reprint 681; Baker v. Stuart, 28 Ont. 439. See In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366 (applying the principle stated in the text).

38. See supra § 80 text and note 79.

39. Statutory provisions see supra § 82.

40. In re Whitney, 176 Cal. 12, 167 P 399; Minnesota L. & T. Co. v. Douglas, 135 Minn. 413, 161 NW 158; In re Kohler, 231 N. Y. 353, 132 NE 114; In re Megrue, 224 N. Y. 284, 120 NE 651; St. John v. Andrews Inst. for Girls, 191 N. Y. 254, 83 NE 981, 14 AnnCas 708; Thorn v. De Breteuil, 179 N. Y. 64, 71 NE 470; Hascall v. King, 162 N. Y. 134, 56 NE 515, 76 AmSR 302; Smith v. Parsons, 146 N. Y. 116, 40 NE 736; Hobson v. Hale, 95 N. Y. 588; Barbour v. De Forest, 95 N. Y. 13; Pray v. Hegeman, 92 N. Y. 508 [disappr Meserole v. Meserole, 1 Hun (N. Y.) 66, 3 Thomps. & C. 192]; Manice v. Manice, 43 N. Y. 303; Kilpatrick v. Johnson, 15 N. Y. 322; Harris v. Clark, 7 N. Y. 242; Equitable Trust Co. v. Miller, 197 App. Div. 391, 189 NYS 293 [aff 233 N. Y. 650 mem, 135 NE 955 mem]; Hoskin v. Long Island L. & T. Co., 139 App. Div. 258, 123 NYS 994 [aff 203 N. Y. 588 mem, 96 NE 1116 mem]; Kirk v. McCann, 117 App. Div. 56, 101 NYS 1093; Matter of Hoyt, 116 App. Div. 217, 101 NYS 557 [aff 189 N. Y. 511 mem, 81 NE 1166 mem]; Lowenhaupt v. Stanisics, 95 App. Div. 171, 88 NYS 537; McGuire v. McGuire, 80 App. Div. 63, 80 NYS 497; Hafner v. Hafner, 62 App. Div. 316, 71 NYS 1 [aff 171 N. Y. 633 mem, 63 NE 1117 mem]; Matter of Rogers, 22 App. Div. 428, 48 NYS 175 [aff 161 N. Y. 108, 55 NE 393]; Tweddell v. New York L. Ins., etc., Co., 82 Hun 602, 31 NYS 764; Cowen v. Rinaldo, 82 Hun 479, 31 NYS 554; Matter of Hoyt, 71 Hun 13, 24 NYS 577; Bean v. Hockman, 31 Barb. (N. Y.) 78; Bolton v. Jacks, 29 N. Y. Super. 166; McGrath v. Van Stavoren, 8 Daly (N. Y.) 454; Epstein v. Werbelovsky, 108 Misc. 214, 177 NYS 554 [rev on other grounds 193 App. Div. 428, 184 NYS 330 (aff 233 N. Y. 525, mem, 135 NE 902 mem)]; Pruyn v. Sears, 96 Misc. 200, 161 NYS 58; Matter of Ziegler, 82 Misc. 10, 143 NYS 682, 11 Mills Surr. 15; Matter of Raab, 79 Misc. 185, 139 NYS 869; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; Tobin v. Graf, 39 Misc. 412, 80 NYS 5; Dresser v. Travis, 39 Misc. 358, 79 NYS 924 [aff 87 App. Div. 632 mem, 84 NYS 1124 mem (aff 177 N. Y. 371, 376, 69 NE 734, 736)]; Dodsworth v. Dam, 38 Misc. 684, 78 NYS 264; McComb v. Title Guarantee, etc., Co., 36 Misc. 370, 73 NYS 554 [aff 70 App. Div. 618 mem, 75 NYS 1128 mem]; Matter of Snyder, 35 Misc. 588, 72 NYS 61; Siefke v. Siefke, 34 Misc. 77, 69 NYS 514; Brandt v. Brandt, 13 Misc. 431, 34 NYS 684; Matter of Roos, 4 Misc. 232, 24 NYS 862; Matter of Fisher, 4 Misc. 46, 25 NYS 79; Wells v. Wells, 24 NYS 874, 30 AbbNCas 225; Richardson v. Hunt, 14 NYS 48; Matter of Sands, 3 NYS 67, 1 Conn. Surr. 259; McCormack v. McCormack, 60 HowPr (N. Y.) 196; Boynton v. Hoyt, 1 Den. (N. Y.) 53; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Gilman v. Healy, 1 Dem. Surr. (N. Y.) 404; In re Billings, 268 Pa. 71, 110 A 768; In re Roney, 227 Pa. 127, 75 A 1061; In re Wright, 227 Pa. 69, 75 A 1026; In re Farnum, 191 Pa. 75, 43 A 203; Carson's App., 99 Pa. 325; McKee's App., 96 Pa. 277; In re Washington, 75 Pa. 102; Brubaker's App., 1 Mon. (Pa.) 447, 15 A 708; Nagle's Est., 63 Pa. Super. 93; Channon's Est., 28 Pa. Dist. 479; Scattergood's Est., 28 Pa. Dist. 130; Weinmann's Est., 17 Pa. Dist. 489; Mayer's Est., 13 Pa. Dist. 277; White's Est., 8 Pa. Dist. 33; Levy's Est., 1 Pa. Dist. 217, 11 Pa. Co. 266; Bruntrager's Est., 2 Pa. Dist. & Co. 747; Howell's Est., 5 WklyNC (Pa.) 430; Stille's App., 4 WklyNC (Pa.) 42 [aff 11 Phila. 31, 1 WklyNC 249]; Lutz's Est., 18 Phila. (Pa.) 114, 20 Phila. 89, 27 WklyNC 403; Grim's Est., 15 Phila. (Pa.) 603, 12 WklyNC 354; Mitcheson's Est., 15 Phila. (Pa.) 523, 11 WklyNC 547; Matter of Sergeant, 11 Phila. (Pa.) 8; Minors' Est., 6 Phila. (Pa.) 357, 14 WklyNC 391.

[a] **Rule applied.**—Where property was given in trust to accumulate the income for the benefit of two minors and to pay such accumulation to them when the younger should attain the age of twenty-one years, with remainder of the corpus to other persons, the provision for accumulation for the benefit of the older of such minors is void; and the contention that such direction is valid until such older minor should become twenty-one cannot be supported, for he is not entitled to receive the corpus. Epstein v. Werbelovsky, 108 Misc. 214, 177 NYS 554 [rev on other grounds 193 App. Div. 428, 184 NYS 330 (aff 233 N. Y. 525 mem, 135 NE 902 mem)]. To same effect Pruyn v. Sears, 96 Misc. 200, 161 NYS 58.

41. Livingston v. Tucker, 107 N. Y. 549, 14 NE 443; Dodge v. Pond, 23 N. Y. 69; Curtis v. Curtis, 184 App. Div. 274, 171 NYS 510; Camp v. Sackets Harbor Presb. Soc., 105 Misc. 139, 173 NYS 581; In re Spring, 216 Pa. 529, 66 A 110; Howell's Est., 180 Pa. 515, 37 A 181; Hibbs' Est., 143 Pa. 217, 22 A 882; Eberly's App., 110 Pa. 95, 1 A 330; Antelo's Est., 24 Pa. Dist. 181; Lafferty's Est., 20 Pa. Co. 632; Mitcheson's Est., 5 Pa. Co. 99 [overr on this point Mitcheson's Est., 15 Phila. 523]. But see Spencer v. Spencer, 38 App. Div. 403, 56 NYS 460; Matter of Tilden, 5 Dem. Surr. (N. Y.) 230; Grant v. Grant, 3 Redf. Surr. (N. Y.) 283 (in all of which it was held to be an unlawful accumulation for trustees, holding property in trust to pay annuities from the income thereof, to retain surplus income for the purpose of applying it on such annuities in subsequent years when the income might not be sufficient therefor).

42. Livingston v. Tucker, 107 N

the entire income from the property of the trust cannot properly be expended for his support but must of necessity be accumulated for him or for those who may eventually become entitled to his property.[43] The allocation of stock dividends to principal is not an accumulation within the meaning of the statute and is not prohibited thereby.[44]

[§ 85] **(4) Devolution of Released Income.**[45] Unless otherwise provided by law,[46] where a direction to accumulate is partially or wholly void under a restrictive statute, but not under the rule against perpetuities, the income released therefrom passes to the person or persons who would have been entitled thereto had no such excessive or invalid accumulation been directed,[47] and future interests or es-

Y. 549, 14 NE 443.

43. Matter of Bavier, 164 App. Div. 363, 149 NYS 731, 13 Mills Surr. 410; Matter of Langdon, 89 Misc. 333, 153 NYS 574, 14 Mills Surr. 21; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76.

[a] **Adjudication of incompetency unnecessary.**—Within the meaning of the rule stated in the text, an accumulation incidentally resulting from a provision giving trustees discretion to apply so much of the income as they may think necessary or proper for the benefit of one who is incompetent to manage his affairs is not in violation of the statute, although such beneficiary has not been judicially declared to be incompetent. Matter of Bavier, 164 App. Div. 363, 149 NYS 731, 13 Mills Surr. 410.

44. Equitable Trust Co. v. Prentice, 250 N. Y. 1, 164 NE 723.

45. Disposition of illegal accusations under testamentary trust see Wills [40 Cyc 1798 text and note 63].

46. See statutory provisions.

[a] **In New York** (1) under the provisions of Real Prop. L. § 63, when, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits belong to the persons presumptively entitled to the next eventual estate. Matter of Van Doren, 77 Misc. 44, 137 NYS 420, 9 Mills Surr. 290 [app dism 153 App. Div. 914 mem, 138 NYS 1147 mem]; Matter of Segura, 110 Misc. 624, 180 NYS 884. (2) The same principle applies to the income from personal property, in view of Personal Prop. L. § 11. In re Kohler, 231 N. Y. 353, 132 NE 114; In re Harteau, 204 N. Y. 292, 97 NE 726; Mills v. Husson, 140 N. Y. 99, 35 NE 422; Delafield v. Shipman, 103 N. Y. 463, 9 NE 184; Cook v. Lowry, 95 N. Y. 103; Manice v. Manice, 43 N. Y. 303; Gilman v. Reddington, 24 N. Y. 9; Hill v. New York Guaranty Trust Co., 163 App. Div. 374, 148 NYS 601; Hill v. Hill, 124 Misc. 98, 207 NYS 702; Matter of Allen, 111 Misc. 93, 181 NYS 398 [aff 202 App. Div. 810 mem, 194 NYS 913 mem]; Matter of Segura, 110 Misc. 624, 180 NYS 884; Matter of Armstrong, 109 Misc. 472, 179 NYS 186; Seligman v. Seligman, 89 Misc. 194, 151 NYS 889, 13 Mills Surr. 564; Tredwell v. Tredwell, 86 Misc. 104, 148 NYS 391; Cochrane v. Alexandre, 56 Misc. 212, 107 NYS 587; Craig v. Craig, 3 Barb. Ch. 76. (3) But in the case of personal property it can apply only where the income in question is derived from some specific fund or from property so situated that its income can be distinguished from that of all other property. Dodge v. Pond, 23 N. Y. 69. (4) The "next eventual estate" is the estate which is to take effect upon the happening of the event which terminates the accumulation. Manice v. Manice, 43 N. Y. 303; Young v. Barker, 141 App. Div. 801, 127 NYS 211; Pruyn v. Sears, 96 Misc. 200, 161 NYS 58; Tredwell v. Tredwell, 86 Misc. 104, 148 NYS 391. (5) And the "persons presumptively entitled" thereto are the persons presumptively entitled to the estate at the end of the period for accumulation. In re Kohler, 231 N. Y. 353, 132 NE 114; Ossman v. Von Roemer, 221 N. Y. 381, 117 NE 576; Bloodgood v. Lewis, 209 N. Y. 95, 102 NE 610; St. John v. Andrews Inst. for Girls, 191 N. Y. 254, 83 NE 981, 14 AnnCas 708; U. S. Trust Co. v. Soher, 178 N. Y. 442, 70 NE 970; In re Tompkins, 154 N. Y. 634, 49 NE 135; In re Crossman, 113 N. Y. 503, 21 NE 180; Embury v. Sheldon, 68 N. Y. 227; Manice v. Manice, 43 N. Y. 403 [rev 1 Lans. 348]; Schettler v. Smith, 41 N. Y. 328; Gilman v. Reddington, 24 N. Y. 9 [mod 1 Hilt. 492]; Staples v. Mead, 152 App. Div. 745, 137 NYS 847; Levi v. Scheel, 124 App. Div. 613, 109 NYS 182; Matter of Segura, 110 Misc. 624, 180 NYS 884; Matter of Cronk, 109 Misc. 516, 179 NYS 191; Tredwell v. Tredwell, 86 Misc. 104, 148 NYS 391; Matter of Van Doren, 77 Misc. 44, 137 NYS 420, 9 Mills Surr. 290 [app dism 153 App. Div. 914 mem, 138 NYS 1147 mem]; Matter of Ryder, 43 Misc. 476, 89 NYS 460. (6) When there is no person of whom it can be said that he is entitled to the next eventual estate, income released from accumulation by the statute is to be regarded as a fund undisposed of. Matter of Harteau, 53 Misc. 201, 104 NYS 586 [rev on other grounds 125 App. Div. 710, 110 NYS 59]. (7) But where the direction for an accumulation is void, and there is some other and legal disposition of the rents and profits, the statute does not apply, and the direction for accumulation should be eliminated from the instrument. Matter of Hoyt, 116 App. Div. 217, 101 NYS 557 [aff 189 N. Y. 511 mem, 81 NE 1166 mem].

[b] **In Wisconsin** (1) under St. (1921) § 2064 the same rule obtains as in New York. In re Stark, 149 Wis. 631, 134 NW 389. (2) So, where a testator's residuary estate was devised and bequeathed to his nieces and nephews who should be living at the death of his wife, income released from accumulation by operation of the statute belongs to the then living nieces and nephews as the persons presumptively entitled to the next eventual estate, although the ascertainment of the individuals comprising the residuary legatees was necessarily postponed until the distribution of the residue. In re Stark, supra.

47. In re Duffill, 180 Cal. 748, 183 P 337; Carlberg v. State Sav. Bank, etc., Co., 312 Ill. 181, 143 NE 441; Kolb v. Landes, 277 Ill. 440, 115 NE 539; French v. Calkins, 252 Ill. 243, 96 NE 877; Matter of Hoyt, 116 App. Div. 217, 101 NYS 557 [aff 189 N. Y. 511 mem, 81 NE 1166 mem]; In re Billings, 268 Pa. 71, 110 A 768; In re Thistle, 263 Pa. 60, 106 A 94; In re Quay, 253 Pa. 80, 97 A 1029; In re Neel, 252 Pa. 394, 97 A 502; In re Leisenring, 237 Pa. 60, 85 A 80, LRA1916F 798, AnnCas 1914B 84; In re Roney, 227 Pa. 127, 75 A 1061; In re Wright, 227 Pa. 69, 75 A 1026; In re Weinmann, 223 Pa. 508, 72 A 806; In re Farnum, 191 Pa. 75, 43 A 203; In re Edward, 190 Pa. 177, 42 A 469; In re Martin, 185 Pa. 51, 39 A 841; Howell's Est., 180 Pa. 515, 37 A 181; Rogers' Est., 179 Pa. 602, 36 A 1130; Schwartz's App., 119 Pa. 337, 13 A 212; Grim's App., 109 Pa. 391, 1 A 212; Brubaker's App., 1 Mon. (Pa.) 447, 15 A 708; Conrow's App., 3 Pennyp. (Pa.) 356; Schillo's Est., 64 Pa. Super. 85; Nagle's Est., 63 Pa. Super. 93; Channon's Est., 28 Pa. Dist. 479; Scattergood's Est., 28 Pa. Dist. 130; Weinmann's Est., 17 Pa. Dist. 489; Young's Est., 16 Pa. Dist. 541; Mayer's Est., 13 Pa. Dist. 277; Shallcross' Est., 9 Pa. Dist. 388; Ward's Est., 8 Pa. Dist. 701; Lare's Est., 8 Pa. Dist. 265; White's Est., 8 Pa. Dist. 33; Stiver's Est. 5 Pa. Co. 113; Wahl's Est., 20 Phila. (Pa.) 32; Myer's Est., 17 Phila. (Pa.) 425, 16 WklyNC 83, 18 Phila. 103; Mellon's Est., 16 Phila. 323 [aff 106 Pa. 288]; Mitcheson's Est., 15 Phila. (Pa.) 523, 11 WklyNC 547; Matter of Sergeant, 11 Phila. (Pa.) 8; Stille's App., 4 WklyNC (Pa.) 42 [aff 11 Phila. 31, 1 WklyNC 249]. And see cases infra this note. Compare Price's Est., 42 Pa. Co. 66 (holding that, where there are not sufficient assets in a testator's estate to pay pecuniary legacies, the income from a fund directed to be accumulated for a purpose void under the statute should be applied to the payment of the pecuniary legacies rather than go to the residuary legatees).

"The general rule with regard to accumulations liberated by the statute is thus expressed: Where the trust for accumulation is grafted upon an estate where vesting is deferred or made contingent until after the period of accumulation, the statute by stopping the accumulation does not hasten the vesting or possession, and the income goes to the residuary legatee, or if the gift is of the residuary estate to the next of kin, or heir, according as it is personal or real estate, until the vesting or possesion of the estate is matured. . . . But where there is a present gift in possession, and the direction for accumulation is merely to govern the mode of enjoyment, the result is to give to those entitled the present income—under the provision of the act that it 'shall go to and be received by such person or persons as would have been entitled if such accumulation had not been directed'—as if the direction had not been given. . . . And where there is a present gift for life with limitation over, the released accumulations go to the tenant for life during the continuance of his estate." Myer's Est., 18 Phila. (Pa.) 103.

[a] **Thus** (1) where a testator gave an absolute interest to his married daughter, and afterward superadded a direction to accumulate the income during the life of her husband for the benefit of herself and her children, the direction to accumulate becoming void at the end of twenty-one years after the testator's death, the daughter was entitled absolutely to the income for the balance of the lifetime of her husband. Coombe v. Hughes, 34 Beav. 127, 55 Reprint 532 [aff 2 De G. J. & S. 657, 67 EngCh 513, 46 Reprint 531]. (2) If a will creates a valid trust of property, and a codicil modifies this trust by provisions involving an illegal accumulation, the fund is to be held on the trusts of the will. Sharp's Est., 155 Pa. 289, 26 A 441; Lutz's Est., 9 Pa. Co. 294.

[b] **Although the property is vested, if the right to possession is postponed** until the termination of a trust for accumulation which is void under the statute, the owners of the property do not necessarily have the right to the income during the period for which accumulation

tates are not accelerated.[48]

[§ 86] **(5) Accumulation for Charitable Purposes.** A trust to accumulate for charitable purposes is usually excepted by the express terms of a restrictive statute from its provisions,[49] and when so excepted is not void thereunder;[50] but it is not thereby relieved from the operation of the rule against perpetuities.[51] Where no such exception is made by a statute permitting accumulation only for minors, an accumulation for charitable purposes is invalid,[52] and it is not saved by the provisions of a general statute that charitable gifts are not to be deemed invalid because of uncertainty of the beneficiaries.[53]

A present gift to a charitable corporation to be formed[54] is not, however, rendered invalid by a direction to accumulate the income until the incorporation shall be perfected,[55] for the gift to the corporation is immediate as to income as well as principal,[56] and the direction to accumulate is therefore unnecessary and may be disregarded.[57]

[§ 87] **(6) Retroactive Effect.**[58] When a statute restricting accumulation applies by its express terms to trusts therefor created by instruments executed after it becomes effective, it does not apply to those created by instruments theretofore executed;[59] hence, when a will directing accumulation is executed before such statute takes effect, it is not governed thereby, although the testator dies after the statute becomes effective.[60] In general, however, such a statute applies to a will made before its passage but coming into effect thereafter.[61]

[§ 88] **D. Executory Trusts.**[62] By a principle analogous to that governing powers,[63] an executory trust is invalid unless its execution must take place, if at all, within the period after its creation prescribed by the rule against perpetuities;[64] but if it must be executed, if ever, within such period, it is good so far as it can, according to its terms, be executed in favor of objects not too remote from the date of its creation.[65]

IX. CONSTRUCTION OF LIMITATIONS

[§ 89] **A. In General.**[66] The rule against perpetuities, being a restriction upon the jus disponendi of property,[67] is a rule of law and not one of construction.[68] Accordingly, the provisions of an instrument creating or transferring an interest or estate in property are to be construed in accordance with the usual principles of construction,[69] as if the rule against perpetuities did not exist,[70] except only

was directed, since it goes to, and is receivable by, such person or persons as would have been entitled thereto if accumulation had not been directed. In re Billings, 268 Pa. 71, 110 A 768.

[c] **Under the Thellusson Act** the principle stated in text applies. Mathews v. Keble, L. R. 3 Ch. 691; In re Deloitte, [1926] 1 Ch. 56; Weatherall v. Thornburgh, 8 Ch. D. 261; Talbot v. Jevers, L. R. 20 Eq. 255; Harbin v. Masterman, L. R. 12 Eq. 559; Coombe v. Hughes, 34 Beav. 127, 55 Reprint 532 [aff 2 De G. J. & S. 657, 67 EngCh 513, 46 Reprint 531]; In re Drakeley, 19 Beav. 395, 52 Reprint 403; Sewell v. Denny, 10 Beav. 315, 50 Reprint 603; Ellis v. Maxwell, 3 Beav. 587, 43 Eng Ch 587, 49 Reprint 231; Oddie v. Brown, 4 De G. & J. 179, 61 EngCh 142, 45 Reprint 70; Green v. Gascoygne, 4 De G. J. & S. 565, 69 Eng Ch 433, 46 Reprint 1038; Edwards v. Tuck, 3 De G. M. & G. 40, 52 Eng Ch 33, 43 Reprint 17; Morgan v. Morgan, 4 De G. & Sm. 164, 64 Reprint 781; Nettleton v. Stephenson, 3 De G. & Sm. 366, 64 Reprint 518; Lawson v. Kirk-Sesson, 8 Dunlop 1229; Jones v. Maggs, 9 Hare 605, 41 EngCh 605, 68 Reprint 654; Atty.-Gen. v. Poulden, 3 Hare 555, 25 Eng Ch 555, 67 Reprint 501; In re Clulow, 1 Johns. & H. 639, 70 Reprint 900; Eyre v. Marsden, 2 Keen 564, 15 EngCh 564, 48 Reprint 744 [aff 4 Myl. & C. 231, 18 EngCh 231, 41 Reprint 91]; O'Neill v. Lucas, 2 Keen 313, 15 EngCh 313, 48 Reprint 649; McDonald v. Bryce, 2 Keen 276, 15 EngCh 276, 48 Reprint 634; In re Phillips, 49 L. J. Ch. 198; Smith v. Lomas, 33 L. J. Ch. 578; Re Parry, 60 L. T. Rep. N. S. 489; Haley v. Bannister, 4 Madd. 275, 56 Reprint 707; Trickey v. Trickey, 3 Myl. & K. 560, 10 EngCh 560, 40 Reprint 213; Halford v. Stains, 16 Sim. 488, 39 EngCh 488, 60 Reprint 963; Elborne v. Goode, 14 Sim. 165, 37 Eng Ch 165, 60 Reprint 320; Bourne v. Buckton, 2 Sim. N. S. 91, 42 Eng Ch 91, 61 Reprint 275; Wildes v. Davies, 1 Smale & G. 475, 65 Reprint 208; Higginbotham v. Barrett, 14 Vict. L. R. 803.

Devolution of property subject to trust for accumulation which is void under rule against perpetuities see supra § 80 text and note 80.

48. In re Thistle, 263 Pa. 60, 106 A 94; Mayer's Est., 13 Pa. Dist. 277; White's Est., 8 Pa. Dist. 33; Grim's Est., 15 Phila. (Pa.) 603, 12 WklyNC 354; Nettleton v. Stephenson, 3 De G. & Sm. 366, 64 Reprint 518.

49. Statutory provisions see supra § 82.

50. In re Channon, 266 Pa. 417, 109 A 756; Young v. St. Mark's Lutheran Church, 200 Pa. 332, 49 A 887; Lennig's Est., 154 Pa. 209, 25 A 1049; Curran's App., 4 Pennyp. (Pa.) 331 [aff 15 Phila. 84]; Ferguson's Est., 17 Pa. Dist. 590.

51. Rogers' Est., 18 Phila. (Pa.) 99. See Ferguson's Est., 17 Pa. Dist. 590 (dictum).

Effect of rule against perpetuities upon trusts for accumulation see supra § 80.

52. St. John v. Andrews Inst. for Girls, 191 N. Y. 254, 83 NE 981, 14 AnnCas 708 [rearg den 192 N. Y. 382, 85 NE 143, and writ of error dism 214 U. S. 19, 29 SCt 601, 53 L. ed. 892]; Matter of Donchian, 120 Misc. 535, 199 NYS 107 [aff 209 App. Div. 806 mem, 204 NYS 903 mem].

53. St. John v. Andrews Inst. for Girls, 191 N. Y. 254, 83 NE 981, 14 AnnCas 708 [rearg den 192 N. Y. 382, 85 NE 143, and writ of error dism 214 U. S. 19, 29 SCt 601, 53 L. ed. 892].

54. Gift to charitable corporations to be formed generally see supra § 79.

55. Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

56. Maynard v. Farmers' L. & T. Co., 208 App. Div. 112, 203 NYS 83 [aff 238 N. Y. 592 mem, 144 NE 905 mem]; Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

Immediacy of gift of principal see supra § 79 note 71 [c].

57. Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

58. Retroactive operation of statute in general see Statutes [36 Cyc 1201 et seq].

59. Smith v. Thomas, 317 Ill. 150, 147 NE 788.

Prospective statute inapplicable to will executed before it takes effect see Wills [40 Cyc 1386 text and note 84].

60. Smith v. Thomas, 317 Ill. 150, 147 NE 788.

61. In re Llanover, [1903] 2 Ch. 330.

Validity of testamentary provision governed by law in force when will takes effect see Wills [40 Cyc 1385 text and note 78 et seq].

62. Defined see Trusts [39 Cyc 28].

63. Powers see supra §§ 61–70.

64. Gray Perp. § 422.

Period prescribed by rule see supra § 5.

65. Tregonwell v. Sydenham, 3 Dow 194, 3 Reprint 1035. See New Haven Young Men's Inst. v. New Haven, 60 Conn. 32, 22 A 447 (apparently applying the principle stated in the text).

66. Construction of particular limitations:

Upon alternative contingencies where one is too remote see supra § 12.

With respect to preceding or subsequent remote limitations see supra §§ 59, 60.

Under statutes relating to suspension of alienability and ownership see infra §§ 146–153.

67. See supra § 2 text and note 12.

68. Ill.—Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777.

Me.—Strout v. Strout, 117 Me. 357, 104 A 577; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103.

Md.—Bowerman v. Taylor, 126 Md. 203, 94 A 652.

Mich.—Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 NW 250.

Miss.—Lazard v. Hiller, 145 Miss. 449, 110 S 855, 112 S 585; Scott v. Turner, 137 Miss. 636, 102 S 467; Henry v. Henderson, 103 Miss. 48, 60 S 33, 101 Miss. 751, 58 S 354.

Pa.—Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; In re James, 245 Pa. 118, 91 A 511; Bender v. Bender, 225 Pa. 434, 74 A 246; In re Gerber, 196 Pa. 366, 46 A 497; Barclay's Est., 23 Pa. Dist. 79.

R. I.—Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 101 A 430.

W. Va.—Prichard v. Prichard, 91 W. Va. 398, 113 SE 256.

Austr.—Reid v. Earle, 18 Austr. C. L. R. 493.

And see cases infra notes 70, 73.

"It cannot be used to ascertain the intention. Its special purpose is to defeat the intention if in violation of the rule." Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 427, 98 NE 777.

69. See Deeds §§ 195–480; Evidence § 1570; Trusts [39 Cyc 194]; Wills [40 Cyc 1382 et seq].

70. Ala.—Ashurst v. Ashurst, 181 Ala. 401, 61 S 942.

when the doctrine of cy pres is applicable,[71] although there are some cases in which it seems that the construction of instruments has been influenced in the first instance by the desire to make their provisions unobjectionable to the rule.[72] When the effect of such provisions has been thus determined, the rule is to be applied to the interests or estates thereby created.[73]

[§ 90] **B. Ambiguous Provisions.** Notwithstanding the principle that the rule against perpetuities is not one of construction,[74] where there is any ambiguity in the provisions of an instrument creating or transferring an interest or estate in property, the courts will incline to such construction as makes it consistent with the rule,[75] under the doctrine that a construction should be favored which gives effect to

Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.
Ill.—Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777.
Kan.—Salisbury v. Salisbury, 92 Kan. 644, 645, 141 P 173 [cit Cyc].
Ky.—Beall v. Wilson, 146 Ky. 646, 143 SW 55.
Me.—Strout v. Strout, 117 Me. 357, 104 A 577; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103.
Md.—Bowerman v. Taylor, 126 Md. 203, 94 A 652.
Miss.—Lazard v. Hiller, 145 Miss. 449, 110 S 855, 112 S 585; Scott v. Turner, 137 Miss. 636, 102 S 467; Henry v. Henderson, 103 Miss. 48, 60 S 33, 101 Miss. 751, 58 S 354.
Mo.—Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 SW 629.
Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.
Pa.—Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; In re James, 245 Pa. 118, 91 A 511; Bender v. Bender, 225 Pa. 434, 74 A 246; In re Gerber, 196 Pa. 366, 46 A 497.
R. I.—Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 101 A 430.
Eng.—Ward v. Van Der Loeff, [1924] A. C. 653; Pearks v. Moseley, 5 App. Cas. 714; Heasman v. Pearse, L. R. 7 Ch. 275; Stuart v. Cockerell, L. R. 5 Ch. 713; In re Mervin, [1891] 3 Ch. 197; In re Wenmoth, 37 Ch. D. 266; Dungannon v. Smith, 12 Cl. & F. 546, 599, 8 Reprint 1523; Cattlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319; Re Johnson, 30 T. L. R. 505.
Austr.—Reid v. Earle, 18 Austr. C. L. R. 493.
And see cases infra note 73.

"Our first duty is to construe the will; and this we must do, exactly in the same way as if the rule against perpetuity had never been established, or were repealed when the will was made; not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it." Dungannon v. Smith, supra (per Parke, B.).

[a] **A provision void for remoteness is still to be resorted to in construing other provisions of a will.**—"It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found to be the testator's wishes must be taken to be his wishes, and if those wishes offend against the rule, the gifts would fail, and must fail accordingly; but they are not the less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established." Heasman v. Pearse, L. R. 7 Ch. 275, 283.

71. Doctrine of cy pres see infra § 91.

72. Carpenter v. Perkins, 83 Conn. 11, 74 A 1062; Du Bois v. Ray, 35 N. Y. 162; In re Coppard, 35 Ch. D. 350; Mogg v. Mogg, 1 Meriv. 654, 35 Reprint 811; Forth v. Chapman, 1 P. Wms. 663, 24 Reprint 559; Elliott v. Elliott, 12 Sim. 276, 35 EngCh 234, 59 Reprint 1137; Leach v. Leach, 2 Y. & Coll. 495, 21 EngCh 495, 63 Reprint 222. See Edgerly v. Barker, 66 N. H. 434, 31 A 900, 28 LRA 328 [criticized in Gray Perp. §§ 857–893] (where the primary intention to make a gift was held to control over a secondary intent that it take effect at a time which might be too remote). Compare Singhi v. Dean, 119 Me. 287, 289, 110 A 865 (where it was said: "Since its purpose, if applicable at all, is to defeat the intention of the testator, it may not be surprising that the courts in their desire to carry out the intent of a testator have in some instances failed to apply this Rule [against perpetuities] in all its rigor or have adopted constructions to avoid its application").

73. Ala.—Ashurst v. Ashurst, 181 Ala. 401, 61 S 942.
Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.
Ga.—Parker v. Churchill, 104 Ga. 122, 30 SE 642.
Ill.—Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Dime Sav., etc., Co. v. Watson, 254 Ill. 419, 98 NE 777; Reid v. Voorhees, 216 Ill. 236, 74 NE 804.
Kan.—Salisbury v. Salisbury, 92 Kan. 644, 645, 141 P 173 [cit Cyc].
Ky.—Beall v. Wilson, 146 Ky. 646, 143 SW 55.
Me.—Merrill v. Winchester, 120 Me. 203, 113 A 261; Singhi v. Dean, 119 Me. 287, 110 A 865; Strout v. Strout, 117 Me. 357, 104 A 577; Andrews v. Lincoln, 95 Me. 541, 50 A 898, 56 LRA 103.
Md.—Bowerman v. Taylor, 126 Md. 203, 94 A 652; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; In re Stickney, 85 Md. 79, 36 A 654, 60 AmSR 308, 35 LRA 693.
Miss.—Lazard v. Hiller, 145 Miss. 449, 110 S 855, 112 S 585; Scott v. Turner, 137 Miss. 636, 102 S 467; Henry v. Henderson, 103 Miss. 48, 60 S 33, 101 Miss. 751, 58 S 354.
Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316.
N. Y.—Van Horne v. Campbell, 100 N. Y. 287, 3 NE 316, 53 AmR 166.
Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.
Pa.—In re Feeney, 293 Pa. 273, 142 A 284; In re Lilley, 272 Pa. 143, 116 A 392, 28 ALR 366; Barton v. Thaw, 246 Pa. 348, 92 A 312, AnnCas1916D 570; In re James, 245 Pa. 118, 91 A 511; Bender v. Bender, 225 Pa. 434, 74 A 246; In re Gerber, 196 Pa. 366, 46 A 497; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Barclay's Est., 23 Pa. Dist. 79.
R. I.—Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 101 A 430.
W. Va.—Prichard v. Prichard, 91 W. Va. 398, 113 SE 256.
Eng.—Ward v. Van Der Loeff, [1924] A. C. 653; Heasman v. Pearse, L. R. 7 Ch. 275; In re Hume, [1912] 1 Ch. 693; Hutchinson v. Tottenham, [1898] 1 Ir. 403 [aff [1899] 1 Ir. 344]; Dungannon v. Smith, 12 Cl. & F. 546, 8 Reprint 1523; Cattlin v. Brown, 11 Hare 372, 45 EngCh 367, 68 Reprint 1319; Speakman v. Speakman, 8 Hare 180, 32 EngCh 180, 68 Reprint 323.
Man.—Fonseca v. Jones, 21 Man. 168, 18 WestLR 206.
Ont.—Re Goodhue, 47 Ont. L. 178.
And see cases infra § 90 notes 77, 78.

"We should not . . . assume that . . . [a testator] intended to violate a settled rule of law, and thus by the will itself frustrate his own declared intention; but, if the language which he used, upon its face, shows such an intention, it would, of course, be our duty to apply the rule 'remorselessly' . . . without regard to the consequences." In re Stickney, 85 Md. 79, 101, 36 A 654, 60 AmSR 308, 35 LRA 693.

[a] **"Undoubtedly the correct rule of application** is laid down in Andrews v. Lincoln, 95 Me. 541, 544, 50 A 898, 899, 56 LRA 103, adopting language of perhaps the highest authority on the subject, Gray on Perpetuities, 2nd Ed. Sec. 629: 'The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.'" Singhi v. Dean, 119 Me. 287, 289, 110 A 865.

[b] **"Where the language . . . is not ambiguous** and is clearly transgressive of the rule, it is useless to grope after a supposed intent of the testator. The rule itself must be sustained in all its integrity or abandoned. We prefer the former course." Coggins' App., 124 Pa. 10, 29, 16 A 579, 10 AmSR 565. See also infra § 90.

74. See supra § 89 text and note 68.

75. U. S.—Kissam v. McElligott, 280 Fed. 212.
Conn.—Shepard v. Union, etc., Trust Co., 106 Conn. 627, 138 A 809; Wallace v. Wallace, 103 Conn. 122, 130 A 116; Daskam v. Lockwood, 103 Conn. 54, 130 A 92; Wolfe v. Hatheway, 81 Conn. 181, 70 A 645; St. John v. Dann, 66 Conn. 401, 34 A 110; Woodruff v. Marsh, 63 Conn. 125, 26 A 846, 38 AmSR 346; Farnam v. Farnam, 53 Conn. 261, 2 A 325, 5 A 682.
Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375.
Ill.—McCutcheon v. Pullman Trust, etc., Bank, 251 Ill. 550, 96 NE 510; Heisen v. Ellis, 247 Ill. 418, 93 NE 362; Chapman v. Cheney, 191 Ill. 574, 61 NE 363; Ingraham v. Ingraham, 169 Ill. 432, 48 NE 561, 49 NE 320.
Ind.—Swain v. Bowers, (A.) 158 NE 598.
Kan.—Salisbury v. Salisbury, 92 Kan. 644, 141 P 173; Klingman v. Gilbert, 90 Kan. 545, 135 P 682.
Ky.—Haydon v. Layton, 128 SW 90.
Me.—Singhi v. Dean, 119 Me. 287, 110 A 865; Towle v. Doe, 97 Me. 427, 54 A 1072
Md.—In re Stickney, 85 Md. 79, 36 A 654, 60 AmSR 308, 35 LRA 693.
Mass.—Gray v. Whittemore, 192 Mass. 367, 78 NE 422, 116 AmSR 246.
Mich.—Van Driele v. Kotvis, 135 Mich. 181, 97 NW 700.
Minn.—In re Little, 143 Minn. 298, 173 NW 659.
Miss.—Bratton v. Graham, 146 Miss. 246, 111 S 353; Bullard v. Bullard, 132 Miss. 544, 97 S 1.
Mo.—Plummer v. Roberts, 315 Mo. 627, 287 SW 316.
N. Y.—Seitz v. Faversham, 205 N. Y. 197, 98 NE 385; Van Nostrand v. Moore, 52 N. Y. 12; Arthur v. Arthur, 3 App. Div. 375, 38 NYS 1002.
Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.
Pa.—In re James, 245 Pa. 118, 91 A 511; Siddall's Est., 180 Pa. 127, 36 A 570; McBride's Est., 152 Pa. 192, 25 A 513; Rhodes' Estate, 147 Pa. 227, 23 A 553; Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565; Cummins' Est., 3 Pa. Dist. & Co. 813; Wickersham's Est., 26 Pa. Dist. 772; Wolf's Est., 9 WklyNC 260.
Tex.—Hancock v. Butler, 21 Tex. 804; Anderson v. Menefee, (Civ. A.) 174 SW 904.

intention rather than one which defeats it.[76] But if the meaning is clear, it must be adopted even if the rule renders the gift so construed illegal,[77] and a forced or unnatural construction may not be made in order to avoid the application of the rule.[78]

[§ 91] **C. Doctrine of Cy Pres.**[79] Although it is a general principle that the construction of an instrument creating or transferring an interest or estate in property is to be made without reference to the rule against perpetuities,[80] certain qualifications thereof have become established in some cases of devises of real estate, under what is known as the doctrine of cy pres.[81] Thus, where a legal or equitable estate in realty is devised to an unborn person for life, with remainder to his children in tail, or to his sons in tail male, either successively or as tenants in common with cross remainders, the unborn person is held to take, in the first case, an estate tail, and, in the second case, an estate tail male,[82] for, if the devise was otherwise construed, the remainders would be too remote.[83] Similarly, where successive life estates in realty are devised to one and his issue forever, with cross remainders, the first generation of life tenants who were unborn at the creation of the estate take an estate tail by cy pres.[84] But the doctrine cannot be applied where the effect of so doing would be to make the estate devolve in a line of succession different from that which the testator has expressly designated,[85] either by the exclusion of persons to whom an interest is attempted to be devised,[86] or by the inclusion of others;[87] for a like reason, it is inapplicable to interests in personalty,[88] and it would seem that it cannot be applied in those jurisdictions in which an estate tail is converted by statute into an estate in fee.[89] The doctrine is applied only to limitations made by will and not to those made by deed;[90] and the courts incline against any extension of it.[91]

X. STATUTORY PROVISIONS[92]

[§ 92] **A. Introductory Statement.** In a number of jurisdictions statutes exist relative to the creation or limitation of future estates, which may be declaratory of, additional to, or substitutionary for, the rule against perpetuities at common law; and such statutes must be separately consulted as to each jurisdiction.[93] In so far as the construction and application of such statutes are similar to those of the common-law rule, the decisions under them have already been considered;[94] and, in so far as they diverge therefrom, the decisions construing and applying their provisions are treated in the

Vt.—In re Peck, 96 Vt. 183, 118 A 527.

W. Va.—Higgins v. Round Bottom Coal, etc., Co., 63 W. Va. 218, 59 SE 1064.

Eng.—Pearks v. Moseley, 5 App. Cas. 714; Martelli v. Holloway, L. R. 5 H. L. 532; In re Atkinson, [1916] 1 Ch. 91; In re Hume, [1912] 1 Ch. 693; In re Turney, [1899] 2 Ch. 739; In re Powell, [1898] 1 Ch. 227; In re Mervin, [1891] 3 Ch. 197; In re Bevan, 34 Ch. D. 716.

"If two constructions are fairly open, one of which will turn a bequest into an illegal perpetuity, and the other will make it valid and operative, the latter should be preferred." In re Peck, 96 Vt. 183, 187, 118 A 527. To same effect Singhi v. Dean, 119 Me. 287, 110 A 865.

76. See Charities § 12; Deeds § 200; Trusts [39 Cyc 194]; Ut Res Magis Valeat Quam Pereat [39 Cyc 1100]; Wills [40 Cyc 1407 et seq].

77. Del.—Taylor v. Crosson, 11 Del. Ch. 145, 98 A 375; Phillips v. Phillips, 10 Del. Ch. 314, 91 A 452.

Ill.—Aldendifer v. Wylie, 306 Ill. 426, 138 NE 143; Heisen v. Ellis, 247 Ill. 418, 93 NE 362; Chapman v. Cheney, 191 Ill. 574, 61 NE 363.

Ky.—Beall v. Wilson, 146 Ky. 646, 143 SW 55.

N. Y.—Van Nostrand v. Moore, 52 N. Y. 12, 18.

Or.—Closset v. Burtchaell, 112 Or. 585, 230 P 554.

Pa.—Coggins' App., 124 Pa. 10, 16 A 579, 10 AmSR 565.

Eng.—In re Hume, [1912] 1 Ch. 693.

"It is only where a word or clause is fairly capable of a double meaning that the effect of either construction on the validity of the instrument is a legitimate consideration. Where the meaning of the testator is apparent from the language used, the plain import of the language cannot be departed from, though it result in rendering the will invalid." Van Nostrand v. Moore, supra. To same effect Coggins' App., supra.

78. Heisen v. Ellis, 247 Ill. 418, 93 NE 362; Chapman v. Cheney, 191 Ill. 574, 61 NE 363; Beall v. Wilson, 146 Ky. 646, 143 SW 55; Pearks v. Moseley, 5 App. Cas. 714; In re Atkinson, [1916] 1 Ch. 91; In re Hume, [1912] 1 Ch. 693; In re Mervin, [1891] 3 Ch. 197; Reid v. Earle, 18 Austr. C. L. R. 493.

"It is the duty of courts to enforce the rule [against perpetuities], and not to fritter it away by adverse construction." Chapman v. Cheney, 191 Ill. 574, 584, 61 NE 363 [quot Heisen v. Ellis, 247 Ill. 418, 428, 93 NE 362].

79. Cy pres doctrine as applied in administration of charities see Charities §§ 74–78.

80. See supra § 89.

81. See cases infra notes 82, 84.

[a] **As used in this connection,** "cy pres" means "a method of modifying a testator's intention when it comes in conflict with the rule against perpetuities." Gray Perp. § 660.

[b] **"This [doctrine] must not be confounded** with the doctrine of cy pres in its application to charities." Gray Perp. § 643 note 4.

"Cy pres" defined see 17 C. J. p 695.

82. Jackson v. Brown, 13 Wend. (N. Y.) 437; In re Mountgarret, [1919] 2 Ch. 294; In re Hobbs, [1917] 1 Ch. 569; In re Mortimer, [1905] 2 Ch. 502; Hampton v. Holman, 5 Ch. D. 183; Pitt v. Jackson, 2 Bro. Ch. 51, 29 Reprint 27; Vanderplank v. King, 3 Hare 1, 25 EngCh 1, 67 Reprint 273; Monypenny v. Dering, 16 M. & W. 418, 153 Reprint 1252; Robinson v. Hardcastle, 2 T. R. 241, 100 Reprint 131; Ferguson v. Ferguson, 1 Ont. A. 452 [allowing app 39 U. C. Q. B. 232, and app allowed on other grounds 2 Can. S. C. 497].

[a] **Analogous application of the principle.**—(1) "The occasion for the construction cy pres of a devise to A. for life, remainder to his children in tail, as giving an estate tail to A., arises not only (1) when A. is unborn, and his children are therefore beyond the limits of the Rule against Perpetuities, but also (2) when A. is the object of a power, but his children are not. The same principles govern both classes of cases." Gray Perp. § 644. (2) The doctrine has been so applied in the following cases: Pitt v. Jackson, 2 Bro. Ch. 51, 29 Reprint 27; Stackpoole v. Stackpoole, 4 Dr. & War. 320; Line v. Hall, 43 L. J. Ch. 107; Griffith v. Harrison, 4 T. R. 737, 100 Reprint 1274.

83. Remoteness of limitation over to children of unborn person see supra § 53.

84. Gibson v. McNeely, 11 Oh. St. 131; In re Richardson, [1904] 1 Ch. 332 [dist Mortimer v. West, 2 Sim. 274, 2 EngCh 276, 57 Reprint 792]; Parfitt v. Hember, L. R. 4 Eq. 443; Humberston v. Humberston, 1 P. Wms. 332, 24 Reprint 412. See Allyn v. Mather, 9 Conn. 114 (apparently to the same effect); Forsbrook v. Forsbrook, L. R. 3. Ch. 93 (dictum). See also Gray Perp. §§ 652–660 (where the principle is discussed).

85. See Hampton v. Holman, 5 Ch. D. 183 (dictum); and cases infra notes 86, 87.

86. In re Mortimer, [1905] 2 Ch. 502; In re Rising, [1904] 1 Ch. 533; In re Richardson, [1904] 1 Ch. 332.

87. In re Mortimer, [1905] 2 Ch. 502; In re Rising, [1904] 1 Ch. 533; In re Richardson, [1904] 1 Ch. 332 [dist Mortimer v. West, 2 Sim. 274, 2 EngCh 276, 57 Reprint 792]; Seaward v. Willcock, 5 East 198, 102 Reprint 1046.

[a] **Thus** (1) when an estate is devised to an unborn person for life, with remainder to his first son in tail male, the devise cannot be construed to grant an estate tail male, which would permit the second and other sons of the first taker to inherit. Monypenny v. Dering, 16 M. & W. 418, 153 Reprint 1252. (2) Where a remainder in fee is given to the children of an unborn person, he cannot take a fee, which would let in his collateral heirs, in case he should be childless. Wood v. Griffin, 46 N. H. 230; Hale v. Pew, 25 Beav. 335, 53 Reprint 665.

88. Routledge v. Dorril, 2 Ves. Jr. 357, 30 Reprint 671.

89. St. Amour v. Rivard, 2 Mich. 294. But see Allyn v. Mather, 9 Conn. 114; Gibson v. McNeely, 11 Oh. St. 131 (where the doctrine seems to have been applied notwithstanding the existence of such statutes).

90. Brudenell v. Elwes, 1 East 442, 102 Reprint 171, 7 Ves. Jr. 382, 32 Reprint 155. See Stackpoole v. Stackpoole, 4 Dr. & War. 320 (semble).

91. In re Mortimer, [1905] 2 Ch. 502; In re Rising, [1904] 1 Ch. 533; Hale v. Pew, 25 Beav. 335, 53 Reprint 665; Brudenell v. Elwes, 1 East 442, 102 Reprint 171, 7 Ves. Jr. 382, 32 Reprint 155.

92. Trust for accumulation; statutory restrictions see supra §§ 81–87.

93. See statutory provisions.

94. See passim supra §§ 1–91.

following sections of this treatise.[95] Generally speaking, statutory additions or substitutions have been in the direction of increased stringency,[96] but it is not clear in every instance whether such provisions supersede the common law or are merely supplementary thereto,[97] and the difficulty is enhanced by the apparent tendency of some courts to be influenced by the common-law rule in their construction and application of statutes which in terms make no reference to remoteness of vesting.[98]

[§ 93] **B. Limitations to Grantor's Wife and Children.** A statute providing that lands may be conveyed to "the" wife and children, or children only, severally, successively, and jointly, and to the heirs of the body of the survivor, if they come of age, and in default thereof, over,[99] is apparently construed to refer to the wife and children of the grantor in the conveyance.[1] Under such statute, successive remainders to the grantor's children, contingent upon the death of each preceding taker without issue then surviving, with an ultimate remainder in fee, are valid.[2]

[§ 94] **C. Limitations to Two Successive Donees with Remainder to Heirs.** A statute providing that lands may be conveyed or devised to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple,[3] does not prescribe a formula to which conveyances must adhere,[4] and does not prohibit executory devises,[5] but requires only that the fee must vest within or at the end of the lives of not more than two persons.[6]

Donees. A donee to whom an estate for his life is reserved is not to be counted as one of the two donees permitted by statute,[7] and estates may be limited to two donees in succession, subject to a life estate so reserved, without violating the statute.[8] The devisee of an equitable estate is a donee, within the meaning of the statute,[9] and when a trust is created the persons to be numbered as donees are the beneficiaries, and not the trustee.[10]

Heirs. The word "heirs" as used in the statute means such persons as would inherit under statutes relating thereto;[11] but the heirs of a remainderman[12] or of the donor,[13] when an estate is limited to them, take by purchase and not by descent. A remainder to take effect in default of heirs of a remainderman need not be limited generally to the right heirs of the donor,[14] but may be limited to any designated one or ones of them,[15] whether the remainder be created by deed inter vivos or by will.[16]

Particular limitations. A remainder vesting upon the death of the first donee is not in violation of the statute,[17] nor is a limitation in fee to two persons, with an executory limitation over to one upon the death of the other without issue then surviving, and to the donor's heirs in case of the death of both without issue.[18] A remainder which can vest only at the termination of more than two lives is void;[19] but in some cases it has been held that a limitation for life to two or more persons and the survivor of them is measured by only one life, that of the survivor, within the meaning of the statute.[20] No remainder may be limited upon the deaths of two donees to one not an heir of such donee nor a right heir of the donor.[21]

Personalty. Such statute has no application to personal property.[22]

Relation to rule against perpetuities. Whether this odd and confused statute, as it has been designated,[23] is a substitute for, or only additional to, the common-law rule against perpetuities is uncertain.[24]

95. See infra §§ 93–157.

96. Lyons v. Bradley, 168 Ala. 505, 53 S 244. And see infra §§ 93–157.

97. See passim infra §§ 93–96; and § 97 text and notes 68–73.

98. See infra §§ 93–157 passim.

99. See statutory provisions.

1. Farr v. Perkins, 173 Ala. 500, 55 S 923.

2. Farr v. Perkins, supra.

3. See statutory provisions.

4. Middlesex Banking Co. v. Field, 84 Miss. 646, 37 S 139.

5. Middlesex Banking Co. v. Field, supra (per Calhoon, J.). Compare Thomas v. Thomas, 97 Miss. 697, 714, 53 S 630 [crit Bibby v. Broome, 116 Miss. 70, 76 S 835, 842] (dictum; that the statute does not affect executory devises).

6. Middlesex Banking Co. v. Field, 84 Miss. 646, 37 S 139. But see Cannon v. Barry, 59 Miss. 289; Dibrell v. Carlisle, 48 Miss. 691 (both holding that the statute is satisfied by the limitation of a remainder which will vest, if at all, twenty-one years and the period of gestation after the death of a preceding donee).

[a] **"Object of this statute** is to specify a time limit beyond which the grantor cannot go, but within which he can exercise unbounded discretion; that the purpose of the statute was to prescribe a limit of time beyond which the vesting of the estate in fee could not be suspended; that the lives of the two donees in being were the measure of time within which the ultimate fee must vest —in other words, that the statute prescribed a limit of time, and not a formula of conveyancing." Middlesex Banking Co. v. Field, 84 Miss. 646, 662, 37 S 139.

7. Middlesex Banking Co. v. Field, supra.

8. Middlesex Banking Co. v. Field, supra.

9. Henry v. Henderson, 101 Miss. 751, 58 S 354, 103 Miss. 48, 60 S 33.

10. Henry v. Henderson, supra. Compare Phillips v. Tynes, 114 Miss. 775, 75 S 775 (where the question is raised but not decided).

11. Henry v. Henderson, 101 Miss. 751, 58 S 354, 103 Miss. 48, 60 S 33 (per McLean, J.).

12. Dibrell v. Carlisle, 48 Miss. 691.

13. Henry v. Henderson, 101 Miss. 751, 58 S 354, 103 Miss. 48, 60 S 33 (per McLean, J.); Middlesex Banking Co. v. Field, 84 Miss. 646, 37 S 139.

14. Henry v. Henderson, 101 Miss. 751, 58 S 354, 103 Miss. 48, 60 S 33 (per McLean, J.); Middlesex Banking Co. v. Field, 84 Miss. 646, 37 S 139; and cases infra notes 15, 16.

15. Henry v. Henderson, 101 Miss. 751, 58 S 354, 103 Miss. 48, 60 S 33 (per McLean, J.); Middlesex Banking Co. v. Field, 84 Miss. 646, 662, 37 S 139; Cannon v. Barry, 59 Miss. 289.

"A limitation over to a specific person, being one of the right heirs of the donor, is valid." Middlesex Banking Co. v. Field, supra.

16. Middlesex Banking Co. v. Field, supra.

17. Bratton v. Graham, 146 Miss. 246, 111 S 353; Thompson v. Green, 145 Miss. 365, 110 S 788; Bullard v. Bullard, 132 Miss. 544, 97 S 1; Stigler v. Shurlds, 131 Miss. 648, 95 S 635.

18. Middlesex Banking Co. v. Field, 84 Miss. 646, 37 S 139.

19. Norfleet v. Norfleet, (Miss.) 119 S 306; Scott v. Turner, 137 Miss. 636, 102 S 467; Nicholson v. Fields, 111 Miss. 638, 71 S 900; Gully v. Neville, (Miss.) 55 S 289.

20. Bratton v. Graham, 146 Miss. 246, 111 S 353; Redmond v. Redmond, 104 Miss. 512, 61 S 552; Henry v. Henderson, 103 Miss. 48, 60 S 33, 101 Miss. 751, 58 S 354. But see Nicholson v. Fields, 111 Miss. 638, 71 S 900 (where the court did not apply the principle stated in the text).

[a] **A devise of property to seven children** in equal shares for life, providing that on the death of any child his share should be equally divided among those remaining, with remainder over on the death of the last child dying, is not a series of gifts to a succession of donees, but is one gift, and only the life of the longest liver is to be counted, and therefore the devise is not in violation of the statute. Redmond v. Redmond, 104 Miss. 512, 61 S 552.

21. Bibby v. Broome, 116 Miss. 70, 76 S 835, 842.

22. Powell v. Brandon, 24 Miss. 343.

23. Gray Perp. § 746 note.

"It may be confessed that . . . the original of this statute is obscurely drawn, and that the original draftsman of the statute had no conception of his own meaning, or of the common-law rules he was displacing. . . . From this fact follows, doubtless, the difficulty of harmonizing in all respects the decisions of this court in the construction of this statute." Middlesex Banking Co. v. Field, 84 Miss. 646, 664, 37 S 139.

24. See Bibby v. Broome, 116 Miss. 70, 76 S 835, 842 (where the question was raised but not decided);

[§ 95] **D. Limitations to Persons in Being and Immediate Issue or Descendants.** A statute providing that no estate in lands or tenements shall be given or granted by deed or will to any person or persons but such as are in being or to the immediate issue or descendants of such as are in being at the time of making such deed or will[25] is not an enabling act,[26] but is a limitation upon the jus disponendi,[27] and supersedes the common-law rule against perpetuities.[28] The statute has no reference to time,[29] but is a restriction of the persons who may take,[30] and only avoids limitations to persons other than those included within its terms.[31]

Persons in being. A child en ventré sa mère is in being within the meaning of the statute.[32]

Immediate issue or descendants. "Immediate issue" means only the children of the persons in being;[33] but "immediate descendants" includes remoter lineal and collateral descendants who would take immediately under the statute relating to descents,[34] and a limitation to the living descendants of such of the children of the first donee as have theretofore died is valid.[35] What persons are immediate issue or descendants is to be determined as of the date of vesting and not the time of death of the person in being.[36]

Particular limitations. No limitation to a person in being at its creation offends the statute;[37] and accordingly the limitation of an interest to a living person contingent upon his attainment of a specified age is valid.[38] Where all the members of a class to whom an interest is limited will necessarily be donees permitted by the statute, it is immaterial that the class may open and let in additional members subsequent to the creation of the limitation;[39] and a limitation to a class, some members of which are persons to whom the statute permits interests to be limited, and others are not, is valid as to the former and void only as to the latter.[40]

Time of making a will, within the meaning of the statute, is the time when it takes effect by the death of the testator and not the date of its formal execution.[41]

Applicability of statute. Such a statute applies only to real estate,[42] and has no application to personalty[43] nor to gifts of income from realty.[44]

Charitable trusts are not subject to the statute.[45]

[§ 96] **E. Conveyances Not To Extend beyond**

Middlesex Banking Co. v. Field, 84 Miss. 646, 665, 37 S 139 (where it was said: "It may . . . be conceded that it would have been wiser if this court had originally construed this statute, as intended, as a substitute for all common-law rules to which its provisions can apply, instead of as merely amendatory of the common law; but for us it must be enough that the long line of contrary decisions has become now crystallized into a rule of property"). And see cases supra note 6.

Rule against perpetuities at common law see supra §§ 2-91.

25. See statutory provisions.

26. Phillips v. Herron, 55 Oh. St. 478, 45 NE 720; Turley v. Turley, 11 Oh. St. 173.

27. Phillips v. Herron, 55 Oh. St. 478, 45 NE 720; Turley v. Turley, 11 Oh. St. 173, 180.

"The only object of the act . . . was to prevent the creation of perpetuities and impolitic clogs upon the jus disponendi of real estate." Turley v. Turley, supra.

28. Phillips v. Herron, 55 Oh. St. 478, 45 NE 720; Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 Cinc LBul 327.

29. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327. But see Lewis Oyster Co. v. West, 93 Conn. 518, 528, 107 A 138 (where it was said: "It is impossible to say that our statute was aimed at restraint on alienation to the exclusion of remoteness in vesting, for the test of its applicability to any case is remoteness, and this is the necessary result of its language"); Jocelyn v. Nott, 44 Conn. 55, 58 ("All estates . . . must vest during the life time of some person in being, or the life time of the issue of some person in being").

30. Von Overbeck v. Dahlgren, 28 F.(2d) 936.

31. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327.

32. Phillips v. Herron, 55 Oh. St. 478, 45 NE 720.

33. Turley v. Turley, 11 Oh. St. 173.

34. Turley v. Turley, supra.

35. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Von Overbeck v. Dahlgren, 28 F. (2d) 936; Turley v. Turley, 11 Oh. St. 173; Stevenson v. Evans, 10 Oh. St. 307.

[a] **In Connecticut,** however, under a similar statute formerly in force, it was held that a limitation under which a remainder or executory interest might go to one who was a grandchild or more remote descendant, rather than a child of a person in being at its creation, was void. Comstock v. Bridgeport Trust Co., 106 Conn. 514, 138 A 440; Daskam v. Lockwood, 103 Conn. 54, 130 A 92; O'Connell v. Remington, 102 Conn. 401, 128 A 710; Bridgeport Trust Co. v. Parker, 97 Conn. 245, 116 A 182; Harris v. Weed, 89 Conn. 214, 93 A 232; Rudkin v. Rand, 88 Conn. 292, 91 A 198; Eaton v. Eaton, 88 Conn. 269, 91 A 191; Sumner v. Westcott, 86 Conn. 217, 84 A 921; Allen v. Davies, 85 Conn. 172, 82 A 189; Hartford Trust Co. v. Wolcott, 85 Conn. 134, 81 A 1057; Pease v. Cornell, 84 Conn. 391, 80 A 86; Russell v. Hartley, 83 Conn. 654, 78 A 320; Carpenter v. Perkins, 83 Conn. 11, 74 A 1062; Wolfe v. Hatheway, 81 Conn. 181, 70 A 645; Bartlett v. Sears, 81 Conn. 34, 70 A 33; Gerard v. Beecher, 80 Conn. 363, 68 A 438, 15 LRANS 900; Cody v. Staples, 80 Conn. 82, 67 A 1; Harmon v. Harmon, 80 Conn. 44, 66 A 771; Lepard v. Clapp, 80 Conn. 29, 66 A 780; Grant v. Stimpson, 79 Conn. 617, 66 A 166; Gerard v. Ives, 78 Conn. 485, 62 A 607; Thomas v. Castle, 76 Conn. 447, 56 A 854; White v. Allen, 76 Conn. 185, 56 A 519; Buck v. Lincoln, 76 Conn. 149, 56 A 522; Lewis v. Lewis, 74 Conn. 630, 51 A 854, 92 AmSR 240; Blakeman v. Sears, 74 Conn. 516, 51 A 517; Tingier v. Chamberlin, 71 Conn. 466, 42 A 718; Security Co. v. Snow, 70 Conn. 288, 39 A 153, 66 AmSR 107; Johnson v. Webber, 65 Conn. 501, 33 A 506; Ketchum v. Corse, 65 Conn. 85, 31 A 486; Morris v. Bolles, 65 Conn. 45, 31 A 538; Tarrant v. Backus, 63 Conn. 277, 28 A 46; Landers v. Dell, 61 Conn. 189, 23 A 1083; Beers v. Narramore, 61 Conn. 13, 22 A 1061; Leake v. Watson, 60 Conn. 498, 21 A 1075; Andrews v. Rice, 53 Conn. 566, 5 A 823; Tappan's App., 52 Conn. 412; Wheeler v. Fellowes, 52 Conn. 238; Alfred v. Marks, 49 Conn. 473. See also St. John v. Dann, 66 Conn. 401, 34 A 110 (dictum).

36. Von Overbeck v. Dahlgren, 28 F. (2d) 936.

37. Butler v. Flint, 91 Conn. 630, 101 A 19; Wilde v. Bell, 86 Conn. 610, 87 A 8; and case infra note 38.

38. In re Youtsey, 260 Fed. 423.

39. Belfield v. Booth, 63 Conn. 277, 28 A 46; Farnam v. Farnam, 53 Conn. 261, 2 A 325, 5 A 682.

40. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Phillips v. Herron, 55 Oh. St. 478, 45 NE 720; Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327.

[a] **Rule applied.**—A "devise of their parent's share to the children of any grandchild deceased before the time of division would seem to be valid as to those great-grandchildren whose parent, a grandchild of the testator, was living at the time of his death, because they would be 'immediate issue' of a person in being at that time; and valid also to any great-grandchildren, whose parent, though born after the testator's death, had died before their grandparent, a child of the testator, because they would be, if not 'immediate issue,' certainly 'immediate descendants,' of that child, who was in being at that time; and invalid as to those great-grandchildren only, whose parent . . . born since the testator's death, died after their grandparent, and who, therefore, by reason of the interposition of the life of their parent, were neither 'immediate issue' nor 'immediate descendants' of a person in being when the testator died." McArthur v. Scott, 113 U. S. 340, 383, 5 SCt 652, 28 L. ed. 1015.

41. McArthur v. Scott, supra; Turley v. Turley, 11 Oh. St. 173. Compare Johnson v. Edmond, 65 Conn. 492, 499, 33 A 503 (where it was said: "Our statute against perpetuities, as it stood at the date of this will, forbade grants by deed or will to any persons except such, 'or the immediate issue or descendants of such, as are in being at the time of making such deed or will.' . . . The amendment passed in 1884 . . . by which the phrase 'at the time of the delivery of such deed or death of the testator,' was substituted for the words 'at the time of making such deed or will,' we regard as merely declaratory of their legal meaning").

42. Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327.

43. Dahlgren v. Pierce, 270 Fed. 507 [app dism 256 U. S. 682 mem, 41 SCt 534 mem, 65 L. ed. 1170 mem, and certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem]; Dayton v. Phillips, 11 Oh. Dec. (Reprint) 680, 28 CincLBul 327.

[a] **In Connecticut,** however, a similar statute formerly in force was applied to personal property. Alfred v. Marks, 49 Conn. 473; Rand v. Butler, 48 Conn. 293.

44. Dahlgren v. Pierce, 270 Fed. 507 [app dism 256 U. S. 682 mem, 41 SCt 534 mem, 65 L. ed. 1170 mem, and certiorari den 256 U. S. 692 mem, 41 SCt 534 mem, 65 L. ed. 1174 mem].

45. Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 A 141; Camp v. Crocker, 54 Conn. 21, 5 A 604; O'Neal v. Caulfield, 8 OhS&CP

Three Lives and Ten Years. A statute providing that conveyances cannot "extend" beyond three lives in being at their date, and ten years thereafter,[46] has been construed as prohibiting suspension of the power of alienation of real estate beyond the period specified,[47] and has also been treated as requiring the vesting of future interests within such period.[48] Thus an attempted suspension of the power of alienation for a greater period than that permitted by statute is void;[49] and a limitation to the children of a living person, as a class, with cross remainders upon the death of any taker under an age greater than ten years,[50] or a limitation to those of such class who may attain a specified age greater than ten years,[51] or who may be living at the end of a period in excess of that prescribed by the statute,[52] is void, inasmuch as the class may include children not in being at the creation of the limitation, who might not attain the age specified within ten years after the death of the parent;[53] but the limitation of an executory interest contingent upon the death without issue of not more than three persons is valid.[54]

Period not measured by lives. If the time of suspension or postponement is not measured by lives, it must not extend beyond ten years.[55] It seems that a fixed term not exceeding ten years is unobjectionable.[56]

Effect of exceeding statutory period. A limitation exceeding the statutory period is void ab initio,[57] and not merely for the excess.[58]

Charitable trusts. Such statute does not prohibit charitable trusts.[59]

[§ 97] **F. Statutory System Governing Suspension of Alienability or Ownership and Postponements of Vesting; New York and Similar Statutes[60]—1. In General.** At a time when the rule against perpetuities was regarded as requiring only the alienability of interests within or at the end of the period by it prescribed,[61] a statutory system was originated in New York,[62] requiring, as to realty, that the power of conveying the absolute fee in possession should not be suspended beyond the statutory period,[63] and that estates in remainder should be so limited that within the statutory period, if ever, they must vest in interest,[64] and, as to personalty, that the absolute ownership should not be suspended beyond the statutory period.[65] The New York system has since been copied or imitated, in part or in whole, in a number of other jurisdictions,[66] and the cases construing and applying the provisions of all such statutes, so far as similar to

248, 5 OhNP 149.

46. See statutory provisions.

[a] **Applicable only to realty.**—(1) A statute, providing that "lands may be conveyed to the wife and children, or children only . . . but conveyances to other than the wife and children, or children only, cannot extend beyond three lives in being, at the date of the conveyances, and ten years thereafter," applies only to real estate, and not to personal property, which is therefore governed by the common-law rule against perpetuities. Henderson v. Henderson, 210 Ala. 73, 97 S 353; Goodwyn v. Cassels, 207 Ala. 482, 93 S 405; Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Pearce v. Pearce, 199 Ala. 491, 74 S 952; Lyons v. Bradley, 168 Ala. 505, 53 S 244. (2) Common-law rule applies in absence of statute see supra § 2 text and note 18.

47. Ashurst v. Ashurst, 181 Ala. 401, 61 S 942; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

Statutes relating to suspensions of alienability in general see infra §§ 97-157.

48. Boshell v. Boshell, 218 Ala. 320, 118 S 553; Crawford v. Carlisle, 206 Ala. 379, 386, 89 S 565; and cases infra notes 49-52.

"The contingency [on which future estates may be conditioned] may be postponed for . . . three lives in being and 10 years thereafter." Crawford v. Carlisle, supra.

49. Ashurst v. Ashurst, 181 Ala. 401, 61 S 942.

50. Mehaffey v. Fies, 217 Ala. 127, 115 S 104.

51. Crawford v. Carlisle, 206 Ala. 379, 89 S 565.

52. Lyons v. Bradley, 168 Ala. 505, 53 S 244.

53. See cases supra notes 50-52.

Possibility of issue see supra § 15.

54. Montgomery v. Wilson, 189 Ala. 209, 66 S 503.

55. Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

[a] **An estate for twenty-five years,** suspending the power of alienation during its continuance, violates the statute. Ashurst v. Ashurst, 181 Ala. 401, 61 S 942.

56. Ashurst v. Ashurst, supra.

57. Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Pearce v. Pearce, 199 Ala. 491, 74 S 952; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

58. Crawford v. Carlisle, 206 Ala. 379, 89 S 565; Lyons v. Bradley, 168 Ala. 505, 53 S 244.

59. Henderson v. Henderson, 210 Ala. 73, 97 S 353.

Charitable trusts in general see supra §§ 78, 79.

60. Statutory regulation of accumulations see supra §§ 81-87.

61. See supra § 18 text and notes 39, 40.

62. See In re Brown, 198 Mich. 544, 165 NW 929; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650 (both so stating).

63. In re Wilcox, 194 N. Y. 288, 87 NE 497, 500 [quot Chaplin Suspension of Alien. (1st ed) p 1].

[a] **Statute quoted.**—(1) "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority." Real Prop. L. § 42. (2) "A disposition of the rents and profits of real property to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this article for future estates in real property." Real Prop. L. § 60.

64. In re Wilcox, 194 N. Y. 288, 87 NE 497, 500 [quot Chaplin Suspension of Alien. (1st ed) p 1].

[a] **Statute quoted.**—(1) "Subject to the provisions of this article, a freehold estate as well as a chattel real may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee or other less estate may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article." Real Prop. L. § 50. (2) "A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof." Real Prop. L. § 46.

65. Chaplin Suspension of Alien. (2d ed) § 7.

[a] **Statute quoted.**—(1) "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." Personal Prop. L. § 11. (2) "All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee." Real Prop. L. § 49.

66. See statutory provisions; cases infra this note and notes 68-78; and §§ 98-157 passim.

[a] **In Arizona** (1) statutes relative to suspension of the power of alienation apply only to real estate and chattels real, and limitations of interests in personalty other than chattels real are governed by the common-law rule against perpetuities. Lowell v. Lowell, 29 Ariz. 138, 240 P 280. (2) Rule against perpetuities at common law see supra §§ 2-91.

[b] **In California** a statute relative to suspensions of the power of alienation applies to personal property as well as to realty. Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97.

[c] **In the District of Columbia** a

one another, have been considered together in the following sections of this treatise.[67]

Statutes substitutionary for rule against perpetuities. There has been in the decisions some confusion of the statutes relating to suspensions of alienability or ownership with the common-law rule against perpetuities,[68] and in at least one jurisdiction such a statute has been said to be merely declaratory of that rule,[69] and to require the vesting of future interests within the period prescribed;[70]

statute providing that "every future estate" shall be void which shall or may suspend the power of alienation of the property beyond the period therein prescribed is applicable to both real and personal property. Iglehart v. Iglehart, 204 U. S. 478, 27 SCt 329, 51 L. ed. 575 [aff 26 App. (D. C.) 209, 6 AnnCas 732].

[d] **In Iowa** (1) a statute providing that "every disposition of property is void which suspends the absolute power of controlling the same" for a longer period than that therein specified is applicable to both personal and real property. Meek v. Briggs, 87 Iowa 610, 618, 54 NW 456, 43 AmSR 410. (2) The absolute power of control is the absolute power of alienation. "A disposition of property, within the meaning of this statute, is parting with it, transferring it to another, either by deed, or will, or lease. Now, if in so doing, the grantee or devisee is precluded, by the instrument by which he takes the property, from conveying it to another, or, in other words, in the language of the statute, from 'the absolute power of controlling the same' for a longer period than the time limited by law, the disposition is void." Todhunter v. Des Moines, etc., R. Co., 58 Iowa 205, 207, 12 NW 267. But see Jordan v. Woodin, 93 Iowa 453, 61 NW 948; Meek v. Briggs, supra (in both of which the court apparently regarded the statute as requiring vesting).

[e] **In Kentucky,** a statute providing that "the absolute power of alienation shall not be suspended" by any limitation or condition whatever for a longer period than during the continuance of a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter has been held to be only declaratory of the common-law rule against perpetuities. See cases infra notes 69, 70.

[f] **In Michigan** (1) the statutes regulating suspensions of alienability and ownership and postponements of vesting apply solely to real estate and chattels real. Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 NW 250; In re Brown, 198 Mich. 544, 165 NW 929. (2) And the validity of future interests in personalty other than chattels real is governed by the common-law rule against perpetuities. In re Brown, supra; Penny v. Croul, 76 Mich. 471, 43 NW 649, 5 LRA 858; Palms v. Palms, 68 Mich. 355, 36 NW 419; Toms v. Williams, 41 Mich. 552, 562, 2 NW 814 ("The statutes of Michigan contain no provisions concerning accumulations of the income of personal property, or concerning restraints on its alienation"). See also Becker v. Chester, 115 Wis. 90, 91 NW 87, 650 (construing Michigan statute). (3) Rule against perpetuities at common law see supra §§ 2–91.

[g] **In Minnesota** (1) the statutes regulating suspensions of alienability and ownership and postponements of vesting apply solely to real estate and chattels real. Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRA NS 825. (2) And the validity of future interests in personalty other than chattels real is governed by the common-law rule against perpetuities. In re Bell, 147 Minn. 62, 179 NW 650; In re Tower, 49 Minn. 371, 52 NW 27. (3) Rule against perpetuities at common law see supra §§ 2–91.

[h] **In Wisconsin** (1) prior to its amendment by L. (1925) c 287, providing that "limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property," the statute rendering void "every future estate" which should suspend the power of alienation for a longer period than that therein prescribed had no application to personal property other than chattels real, nor did the common-law rule against perpetuities apply thereto. Miller v. Douglass, 192 Wis. 486, 213 NW 320; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650 [disappr contrary or doubting dicta Webster v. Morris, 66 Wis. 366, 28 NW 353, 57 AmR 278; De Wolf v. Lawson, 61 Wis. 469, 21 NW 615, 50 AmSR 148]; Harrington v. Pier, 105 Wis. 485, 82 NW 345, 76 AmSR 924, 50 LRA 307; Dodge v. Williams, 46 Wis. 70, 1 NW 92, 50 NW 1103. (2) And limitations of interests in personal property, except chattels real, were subject to no restrictions whatsoever as to alienability or vesting. Miller v. Douglass, 192 Wis. 486, 213 NW 320; In re Smith, 176 Wis. 494, 186 NW 180; In re Kavanaugh, 143 Wis. 90, 126 NW 672, 28 LRANS 470; Gould v. Taylor Orphan Asylum, 46 Wis. 106, 50 NW 422; Dodge v. Williams, 46 Wis. 70, 1 NW 92, 50 NW 1103.

[i] **That the statutes were copied from, or modeled upon, that of New York,** directly or indirectly see Lowell v. Lowell, 29 Ariz. 138, 147, 240 P 280 ("The above two paragraphs [Civ. Code, tit. 46, §§ 4679, 4680], as indeed the whole of title 46 . . . as the marginal notes show, were lifted bodily from the statutes of Wisconsin"); In re Brown, 198 Mich. 544, 559, 165 NW 929 ("The provisions of this chapter [Comp. L. 1897 c 237, relating to estates in real property] were originally enacted in the State of New York, and later adopted literally into the statutes of Michigan"); Foster v. Stevens, 146 Mich. 131, 141, 109 NW 265 ("Our statute . . . relative to the suspension of the power of alienation of real property, was adopted from the New York statutes"); In re Tower, 49 Minn. 371, 375, 52 NW 27 ("Our statutes in relation to uses and trusts and estates in real property are substantially a transcript of the New York statutes on the same subjects"); Simpson v. Cook, 24 Minn. 180, 184 ("Its [the statute's] provisions were taken from the statutes of New York"); Penfield v. Tower, 1 N. D. 216, 221, 46 NW 413 ("Our statutes were taken from that state [New York]"); Danforth v. Oshkosh, 119 Wis. 262, 268, 97 NW 258 ("Our original statute . . . was taken in hæc verba from New York"); Becker v. Chester, 115 Wis. 90, 91 NW 87, 650 (to same effect); De Wolf v. Lawson, 61 Wis. 469, 475, 21 NW 615, 50 AmR 148 ("These provisions are derived from the statutes of New York"). And see notes to respective statutory provisions as to the sources thereof.

67. See infra §§ 98–157.

68. In re McCray, (Cal.) 268 P 647 [superseding (A.) 260 P 940]; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650; and cases infra notes 69, 70.

"The rule against restraints on alienation has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz. that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, ingrafted upon our system by the Constitution [art 20 § 9], relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time. The rule relating to restraints on alienation, on the other hand, is statutory in origin, and has reference to an undue prevention of the transfer of estates already vested." In re McCray, (Cal.) 268 P 647, 650.

[a] **"There is much want of harmony** in the decisions of courts and the writings of textwriters regarding statutes similar to ours, as to their being aimed, primarily, at the prevention of perpetuities, when, by the plain reading thereof, their object is to prevent restraints upon the power to convey real estate—to prevent absolutely taking the title thereto out of the field of business for a longer period than that named therein." Becker v. Chester, 115 Wis. 90, 106, 91 NW 87, 650.

[b] **Prof. Gray** said: "The Revised Statutes of New York were regarded with great complacency and admiration at the time of their enactment, but, at least on the subjects of trusts and remote limitations, they have produced a woeful amount of confusion and litigation. . . . It would be a great boon to the courts and people of New York, though it is, perhaps, too much to hope for, if the old law . . . of all trusts and of future estates could be restored." Perp. § 609 note 3.

Rule against perpetuities at common law see supra §§ 2–91.

69. Fidelity, etc., Trust Co. v. Tiffany, 202 Ky. 618, 260 SW 357; Cammack v. Allen, 199 Ky. 268, 250 SW 963; Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739; Coleman v. Coleman, 65 SW 832, 23 KyL 1476. See also Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 283, 164 SW 939 ("while the rule denouncing perpetuities has been in the form of a statute only since 1852, it was a doctrine well known and well established under the common law, and in force in Kentucky prior to the enactment of the statute of 1852").

Rule against perpetuities at common law see supra §§ 2–91.

70. Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061; West v. Ashby, 217 Ky. 250, 289 SW 223; Clay v. Anderson, 203 Ky. 384, 262 SW 604; Fidelity, etc., Trust Co. v. Tiffany, 202 Ky. 618, 260 SW 357; Cammack v. Allen, 199 Ky. 268, 250 SW 963; Curd v. Curd, 163 Ky. 472, 173 SW 1148 [foll Moore v. Howe, 4 T. B. Mon. (Ky.) 199, which was decided before the enactment of the statute]; Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Miller v. Miller, 151 Ky. 563, 152 SW 542; Lindner v. Ehrich, 147 Ky. 85, 143 SW 778; Beall v. Wilson, 146 Ky. 646, 143 SW 55; U. S. Fidelity, etc., Co. v. Douglas, 134 Ky. 374, 120 SW 328, 20 AnnCas 993; Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 SW 739; Forsman v. Hofstetter, 107 SW 796, 32 KyL 1108; Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 97 SW 421, 30 KyL 110; Brumley v. Brumley, 89 SW 182, 28 KyL 231; Coleman v. Coleman, 65 SW 832, 23 KyL 1476; Page v. Frazer, 14 Bush (Ky.) 205; Ludwig v. Combs, 1 Metc. (Ky.) 128. See Fidelity Trust Co. v. Lloyd, 78 SW 896, 898, 25 KyL 1827 ("If the vesting of the estate or interest is postponed or the power of alienation suspended for a longer period [than that prescribed by the statute] it is unlawful, and the devise or grant is void"). Compare Roberts "Kentucky's Statute Against Perpetuities," 16 Ky. L. J. p 97 (discussing the confusion resulting from the uncertainty of the courts as to whether the statute "is an attempt to restate the common law rule against perpetuities or whether it states a new rule as to the length of time a restriction on the power of alienation of an estate will be valid," and advancing the contention that the statute should be regarded as a provision against remoteness of vesting).

"Under this statute, and under the rule against the creation of perpetuities, the validity of any future es-

but the proper view appears to be that the statutes substitute a new rule for the common-law rule against perpetuities,[71] which was in force prior to their adoption;[72] and accordingly the only question which now arises in jurisdictions where such statutes have been enacted is as to what limitations are forbidden by them.[73]

The statutes are an expression of the public policy of the state,[74] and the consent of the parties does not authorize the court to enforce an attempt to exceed the statutory period.[75]

Certain other statutory restrictions upon future interests and estates also exist in most of such jurisdictions, and, without regard to whether or not they are strictly to be considered as part of the law against perpetuities,[76] are treated in subsequent sections of this treatise.[77]

Application of statutes. Statutes relating to suspensions of alienability or ownership and postponements of vesting apply equally to interests created by will and by other instruments.[78]

[§ 98] **2. The Statutory Period—a. Measurement—(1) Lives in Being—(a) In General.** Except only in those cases where an additional period of minority is permitted,[79] and except in those jurisdictions in which an alternative or additional fixed term of years is authorized by statute,[80] the time for which alienability or ownership of interests within the scope of the statute may be suspended or their vesting postponed is only during the continuance and until the termination of not more than the number of human lives, in being at the creation of the interest or estate, prescribed by the statute,[81] or, when the statute does not restrict the number, of any lives so in being,[82] or for a shorter period,[83] or until the happening of some more proximate event.[84]

The life of the longest liver of several designated persons, by the duration of which a term of suspension or postponement is measured, is equivalent to the number of lives of the persons so designated.[85]

[§ 99] **(b) What Lives May Measure the Period—aa. In General.** The lives by which a period of suspension of alienability or ownership or of postponement of vesting is measured may be those of any persons,[86] whether beneficiaries of the limita-

tate depends upon the certainty of its vesting within the prescribed period." Brown v. Columbia Finance, etc., Co., 123 Ky. 775, 781, 97 SW 421, 30 KyL 110. See Jordan v. Woodin, 93 Iowa 453, 61 NW 948; Meek v. Briggs, 87 Iowa 610, 54 NW 456, 43 AmSR 410 (in both of which it would seem that the court regarded the statute as directed against remoteness of vesting rather than against suspension of alienation).

71. Windiate v. Lorman, 236 Mich. 531, 211 NW 62; Mineral Land Inv. Co. v. Bishop Iron Co., 134 Minn. 412, 159 NW 966, LRA1917D 900; Buck v. Walker, 115 Minn. 239, 132 NW 205, AnnCas1912D 882; In re Wilcox, 194 N. Y. 288, 87 NE 497; Hawley v. James, 16 Wend. (N. Y.) 61; Miller v. Douglass, 192 Wis. 486, 213 NW 320 (construing New York statute). Compare Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 652, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706] ("The rule against perpetuities in this State is now a rule wholly directed against the suspension of the absolute ownership or power of alienation"). But see In re McCray, (Cal.) 268 P 647, 649 [superseding (A.) 260 P 940] (dictum, that, under Const. [1879] art XX § 9, providing that "no perpetuities shall be allowed except for eleemosynary purposes," the rule against perpetuities is "ingrafted upon" the California system of law, while the rule against restraints on alienation is statutory in origin).

[a] **Mr. Chaplin** says: "It is important to notice that the Revised Statutes did not affect a 'revival' of the common-law Rule against Perpetuities. The New York rules against undue suspension of alienability, and remoteness of vesting, rest solely upon statutory provisions. These provisions were obviously suggested in part by proposed modifications that had been set forth by English writers. With the aid of that material, and with changes originated by the Revisers themselves, a new plan of treatment was adopted. Upon this plan, the common law throws light. But the plan itself is local, independent, and purely statutory." Suspension of Alien. (3d ed) § 380.

72. Tyler v. Fidelity, etc., Trust Co., 158 Ky. 280, 164 SW 939; Gass v. Wilhite, 2 Dana (Ky.) 170, 26 AmD 446; Moore v. Howe, 4 T. B. Mon. (Ky.) 199; Chwatal v. Schreiner, 148 N. Y. 683, 43 NE 166; Auburn Theological Seminary v. Kellogg, 16 N. Y. 83; Tator v. Tator, 4 Barb. (N. Y.) 431; Hill v. Hill, 4 Barb. (N. Y.) 419; Thomson v. Livingston, 4 Sandf. (N. Y.) 539; Paterson v. Ellis, 11 Wend. (N. Y.) 259, 671; Moffat v. Strong, 10 Johns. (N. Y.) 12; Lovett v. Buloid, 3 Barb. Ch. (N. Y.) 137; Macomb v. Miller, 9 Paige 265; Ferris v. Gibson, 4 Edw. (N. Y.) 707; Conklin v. Conklin, 3 Sandf. Ch. (N. Y.) 64.

Rule against perpetuities in force in all common-law jurisdictions where not abrogated by statute see supra § 2 text and note 18.

73. In re Wilcox, 194 N. Y. 288, 87 NE 497; Hawley v. James, 16 Wend. (N. Y.) 61.

74. Carrier v. Carrier, 226 N. Y. 114, 123 NE 135.

75. Carrier v. Carrier, supra.

76. See In re Wilcox, 194 N. Y. 288, 299, 87 NE 497 (where it was said: "This . . . is a mere matter of nomenclature, of no importance. . . . The question is whether there are not also other limitations [than those restricting suspension of the power of alienation], call them what you may").

77. See infra §§ 154–157.

78. Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97; Williams v. Lande, 74 Hun 425, 26 NYS 703, 68 Hun 416, 22 NYS 1033 [mod on other grounds 148 N. Y. 519, 43 NE 57]; and cases infra §§ 119–138.

79. See infra § 109.

80. See statutory provisions.

81. In re Wilcox, 194 N. Y. 288, 87 NE 497; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Ward v. Ward, 105 N. Y. 68, 11 NE 373; Shipman v. Rollins, 98 N. Y. 311, 15 AbbNCas 288; Hobson v. Hale, 95 N. Y. 588; Leavitt v. Wolcott, 95 N. Y. 212; Colton v. Fox, 67 N. Y. 348; Everitt v. Everitt, 29 N. Y. 39; Jennings v. Jennings, 7 N. Y. 547; Farmers' L. & T. Co. v. Kip, 120 App. Div. 347, 104 NYS 1092 [aff 52 Misc. 407, 102 NYS 137, and aff 192 N. Y. 266, 85 NE 59]; In re Conger, 81 App. Div. 493, 80 NYS 933 [aff 40 Misc. 157, 81 NYS 733]; Bindrim v. Ullrich, 64 App. Div. 444, 72 NYS 239 [app dism 173 N. Y. 587 mem, 65 NE 1114 mem]; Almstaedt v. Bendick, 47 App. Div. 265, 61 NYS 1019; La Farge v. Brown, 31 App. Div. 542, 52 NYS 93; Cowen v. Rinaldo, 82 Hun 479, 31 NYS 554; Walsh v. Waldron, 63 Hun 315, 17 NYS 829 [aff 135 N. Y. 650 mem, 32 NE 647 mem]; Persons v. Snook, 40 Barb. (N. Y.) 144; Donaldson v. American Tract. Soc., 1 Thomps. & C. (N. Y.) addenda 15; O'Brien v. Mooney, 12 N. Y. Super. 51; Matter of Rohr, 130 Misc. 174, 223 NYS 782; Matter of Moore, 120 Misc. 825, 199 NYS 790; District Nursing Assoc. v. Koerner, 91 Misc. 265, 154 NYS 776, 15 Mills Surr. 161 [aff 173 App. Div. 1003 mem, 159 NYS 1109 mem]; In re Bruchaeser, 49 Misc. 194, 98 NYS 937; Hayden v. Sugden, 48 Misc. 108, 96 NYS 681; Matter of Lincoln Trust Co., 76 Misc. 421, 137 NYS 162, 9 Mills Surr. 279; In re Marcial, 15 NYS 89; Peo. v. Simonson, 7 NYS 861 [aff 126 N. Y. 299, 27 NE 380]; Matter of Russell, 8 NYSt 754, 5 Dem. Surr. 388; Storm v. Storm, 4 NYSt 670 [aff 113 N. Y. 646 mem, 21 NE 414 mem]; Giraud v. Giraud, 58 HowPr (N. Y.) 175; Hawley v. James, 16 Wend. (N. Y.) 61, 130; Van Vechten v. Van Vechten, 8 Paige (N. Y.) 104; Thorn v. Coles, 3 Edw. (N. Y.) 330; McSorley v. Leary, 4 Sandf. Ch. (N. Y.) 414; Richards v. Moore, 5 Redf. Surr. (N. Y.) 278; and cases passim infra §§ 99–138.

"During the continuance of not more than two lives, and until the termination of two lives, impart the same idea." Hawley v. James, supra.

[a] **"The only measure** for the suspension of the power of alienation, since the adoption of the revised statutes . . . [is] a life or lives." Hawley v. James, 16 Wend. (N. Y.) 61, 134.

[b] **Leading case.**—"The case of Hawley v. James, 16 Wend. (N. Y.) 61 is one of the landmarks in the exposition of the law of uses and trusts, as modified by the Revised Statutes." Cochrane v. Schell, 140 N. Y. 516, 529, 35 NE 971.

Statute quoted see supra § 97 notes 63–65.

82. In re Lux, 149 Cal. 200, 85 P 147.

83. In re Lux, supra; Hawley v. James, 16 Wend. (N. Y.) 61.

84. Everitt v. Everitt, 29 N. Y. 39.

Subordinate measures of statutory period see infra § 110.

85. In re Harrington, 142 Wis. 447, 125 NW 986. But see Truitt v. Battle Creek, 205 Mich. 180, 171 NW 338 (where an estate by the entirety, limited for their lives to a husband and wife, was held to suspend the power of alienation for only one life, that of the survivor).

Number of beneficiaries dying within statutory period immaterial see infra § 116.

86. Bailey v. Bailey, 97 N. Y. 460 [disappr Downing v. Marshall, 23 N. Y. 366, 80 AmD 290]; Crooke v. Kings County, 97 N. Y. 421; Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403; Bevins v. Riley, 24 NYWklyDig 35; and cases infra notes 87–89.

[a] **Life of a trustee** may be the life by which the duration of a trust

tion[87] or not,[88] including total strangers to the objects thereof.[89]

[§ 100] **bb. Existence at Creation of the Estate—(aa) In General.** The life or lives by whose continuance or termination a suspension of alienability or ownership or a postponement of vesting may be measured must be in being at the creation of the estate.[90]

[§ 101] **(bb) Unborn Persons—aaa. In General.** In accordance with the rule stated in the preceding section,[91] any limitation under which there might result a suspension or postponement during the lifetime of or until the attainment of a prescribed age by a person unborn and not in being at its creation,[92] as a child[93] or surviving spouse[94] of a living person, is illegal and the attempted suspension or postponement during the lifetime of such person is void.

[§ 102] **bbb. Children En Ventres Ses Mères.** For the purposes of statutes relating to suspensions and postponements,[95] a child en ventre sa mère at the time of the creation of the estate, and afterward born alive, is considered as a life then in being.[96]

[§ 103] **cc. Designation—(aa) In General.** While it is essential that the lives by which a period of suspension of alienability or ownership or of postponement of vesting be indicated in the instrument creating the limitation,[97] in such manner as to be capable of ascertainment,[98] and a suspension or postponement for "the time prescribed by the statute governing perpetuities" is insufficient,[99] it is not necessary that the measuring lives be expressly designated as such;[1] the term may be ascertained from the nature of the limitation when the latter is such as to effect a necessary restriction or termination of the period,[2] and accordingly, if the purpose of a limitation which effects a suspension or postponement must, in its nature, be accomplished during the life of ascertainable persons in being, the duration thereof is sufficiently designated.[3] The lives may, however, be expressly designated,[4] either by naming the persons in particular,[5] or by limiting the estate upon the first life or lives that shall fall in a class of several individuals;[6] and the lives may be designated as those of persons answering a cer-

term is measured. Crooke v. Kings County, 97 N. Y. 421.

87. Crooke v. Kings County, supra; Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403; In re Harrington, 142 Wis. 447, 125 NW 986.

88. In re Tower, 49 Minn. 371, 52 NW 27; Stringer v. Young, 191 N. Y. 157, 83 NE 690; Bailey v. Bailey, 97 N. Y. 460, 467 [disappr Downing v. Marshall, 23 N. Y. 366, 80 AmD 290]; Crooke v. Prince, 97 N. Y. 421; Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403; In re Harrington, 142 Wis. 447, 125 NW 986.

"We think that a correct interpretation of the . . . [statute] authorizes the naming of the lives of strangers as well as beneficiaries as the limitation of the devise. No reason exists why the lives named in a devise of this character should be confined to those who are interested in the estate." Bailey v. Bailey, supra.

Dispositions and beneficiaries within statutory period are not restricted see infra § 116.

89. Kahn v. Tierney, 135 App. Div. 897, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem].

90. In re Fay, 5 Cal. A. 188, 89 P 1065; Rozell v. Rozell, 217 Mich. 324, 186 NW 489; In re Wilcox, 194 N. Y. 288, 87 NE 497; Fargo v. Squiers, 154 N. Y. 250, 48 NE 509; Manice v. Manice, 43 N. Y. 303; Everitt v. Everitt, 29 N. Y. 39; Bean v. Hockman, 31 Barb. (N. Y.) 78; and cases infra §§ 101, 102.

91. See supra § 100.

92. See cases infra notes 93, 94.

93. In re Maltman, 195 Cal. 643, 234 P 898; Matter of Van Wyck, 185 Cal. 49, 196 P 50; Matter of Whitney, 176 Cal. 12, 167 P 399; In re Fay, 5 Cal. A. 188, 89 P 1065; Rozell v. Rozell, 217 Mich. 324, 186 NW 489; In re Chittick, 243 N. Y. 304, 153 NE 83; Seitz v. Faversham, 205 N. Y. 197, 98 NE 385; Schlereth v. Schlereth, 173 N. Y. 444, 66 NE 130, 93 AmSR 616; Fargo v. Squires, 154 N. Y. 250, 48 NE 509; Greenland v. Waddell, 116 N. Y. 234, 22 NE 367, 15 AmSR 400; Mount v. Mount, 196 App. Div. 508, 188 NYS 170 [mod 108 Misc. 156, 178 NYS 168, and aff 234 N. Y. 568 mem, 138 NE 449 mem]; Matter of Central Union Trust Co., 193 App. Div. 292, 183 NYS 671; Cheever v. Cheever, 172 App. Div. 353, 157 NYS 428; Brown v. Evans, 34 Barb. (N. Y.) 594; Bean v. Hockman, 31 Barb. (N. Y.) 78; Matter of Trowbridge, 124 Misc. 317, 208 NYS 662; Matter of Erickson, 113 Misc. 10, 183 NYS 779 [aff 198 App. Div. 999 mem, 190 NYS 923 mem]; Toher v. Crounse, 57 Misc. 252, 107 NYS 990 [aff 127 App. Div. 934 mem, 111 NYS 1147 mem]; Matter of Faile, 44 Misc. 619, 90 NYS 157; In re Finck, 171 NYS 573.

[a] **Rule applied.**—(1) Where property was given in trust to pay the income to one for life, and on his death to be divided into as many shares as there were surviving children of such life tenant and to pay the income from such shares to each child respectively for life, with remainder over, the subsequent life estates given to such children as might be born after the death of the testator whose will created the trust would be void as perpetuities. Mount v. Mount, 196 App. Div. 508, 188 NYS 170 [mod 108 Misc. 156, 178 NYS 168, and aff 234 N. Y. 568 mem, 138 NE 449 mem]. (2) A trust for the testator's daughter for life and for such of her children as should attain twenty-one years of age or marry is an attempt to extend the trust beyond lives in being, and the ulterior limitation cannot be sustained. Matter of Central Union Trust Co., 193 App. Div. 292, 183 NYS 671.

[b] **Execution of power.**—An attempt by the donee of a power of appointment to create life estates in favor of persons not in existence at the date of the creation of the power is violative of the statute. Fargo v. Squiers, 154 N. Y. 250, 48 NE 509; Cheever v. Cheever, 172 App. Div. 353, 157 NYS 428; Matter of Trowbridge, 124 Misc. 317, 208 NYS 662.

Child en ventre sa mère see infra § 102.

Possibility of issue see infra § 118.

94. In re Maltman, 195 Cal. 643, 234 P 898; Dean v. Mumford, 102 Mich. 510, 61 NW 7; Tiers v. Tiers, 98 N. Y. 568; Schettler v. Smith, 41 N. Y. 328; Hayden v. Sugden, 48 Misc. 108, 96 NYS 681; Wright v. Mercein, 34 Misc. 414, 69 NYS 936; Lee v. Lee, 2 HowPrNS (N. Y.) 76; Stevens v. Miller, 2 Dem. Surr. (N. Y.) 597. See Mason v. Jones, 2 Barb. (N. Y.) 229 [aff 2 Sandf. Ch. 432] (dictum). Compare Van Brunt v. Van Brunt, 111 N. Y. 178, 19 NE 60 (where a provision to suspend the power of alienation during the life of the surviving spouse of one who was married at the creation of the estate was held to include the spouse then living if she should survive and not to include one who might become a spouse by a subsequent marriage).

[a] **The surviving spouse might be a person not in being at the creation of the estate,** and consequently a suspension for his life would be invalid. Stevens v. Miller, 2 Dem. Surr. (N. Y.) 597.

95. **Statutory provisions** see supra § 97.

96. In re Spreckels, 162 Cal. 559, 123 P 371; Rozell v. Rozell, 217 Mich. 324, 186 NW 489; Schlereth v. Schlereth, 173 N. Y. 444, 66 NE 130, 93 AmSR 616; Cooper v. Heatherton, 65 App. Div. 561, 73 NYS 14; Mason v. Jones, 2 Barb. (N. Y.) 229 [aff 2 Sandf. Ch. 432].

97. Jennings v. Jennings, 7 N. Y. 547; Bindrim v. Ullrich, 64 App. Div. 444, 72 NYS 239 [app dism 173 N. Y. 587 mem, 65 NE 1114 mem]; Hawley v. James, 16 Wend. (N. Y.) 61; and cases infra notes 98, 99.

98. Simpson v. Cook, 24 Minn. 180; Everitt v. Everitt, 29 N. Y. 39.

99. Matter of Fisher, 8 NYS 10, 2 Conn. Surr. 75, 77 ("What the testatrix meant by this . . . phrase it is difficult to understand, as our statute, 1 R. S. 773, § 1 authorizes certain limitations based upon life or lives, and not at all upon time. There is, therefore, no valid limitation whatever to the trust in question").

1. See cases infra notes 2, 3.

2. Hopkins v. Kent, 145 N. Y. 363, 40 NE 4; In re Smith, 131 N. Y. 239, 30 NE 130, 27 AmSR 586.

3. In re Hendy, 118 Cal. 656, 659, 50 P 753; Locke v. Farmers' L. & T. Co., 140 N. Y. 135, 35 NE 578; Manice v. Manice, 43 N. Y. 303; Felter v. Ackerson, 35 App. Div. 282, 55 NYS 7.

"It matters not whether it be by express terms or by necessary construction that lives in being measure the duration of the trust. If it appear with certainty that the trust cannot longer continue, the law against perpetuities is not violated." In re Hendy, supra.

4. See cases infra notes 5, 6.

Measuring lives may be those of others than beneficiaries see supra § 99.

5. In re Tower, 49 Minn. 371, 52 NW 27; Simpson v. Cook, 24 Minn. 180; Jennings v. Jennings, 7 N. Y. 547; Bindrim v. Ullrich, 64 App. Div. 444, 72 NYS 239 [app dism 173 N. Y. 587 mem, 65 NE 1114 mem]; Hawley v. James, 16 Wend. (N. Y.) 61.

6. Simpson v. Cook, 24 Minn. 180; Jennings v. Jennings, 7 N. Y. 547; Bindrim v. Ullrich, 64 App. Div. 444, 72 NYS 239 [app dism 173 N. Y. 587 mem, 65 NE 1114 mem]; Meldon v. Devlin, 31 App. Div. 146, 53 NYS 172 [aff 167 N. Y. 573 mem, 60 NE 1116 mem]; Vandenburgh v. Vandenburgh, 35 Misc. 131, 147 NYS 244, 11 Mills Surr. 561; Hawley v. James, 16 Wend. (N. Y.) 61.

[a] **A trust for the "joint lives" of three persons** terminates upon the death of any one of them, and consequently the term is not illegal.

tain description,[7] as the youngest child or children, living at the creation of the estate, of a designated person.[8]

The ascertainment of a second life may be postponed until the expiration of the first, if provision is duly made for the positive ascertainment of such person at that time,[9] provided the person whose life is so designated must necessarily be one who was in being at the time of the creation of the estate.[10]

[§ 104] **(bb) Alternative Lives.** The persons by whose lives a period of suspension or postponement is to be measured may be designated in the alternative, upon a condition which must happen, if at all, at or before the time at which such lives begin to measure the period.[11]

[§ 105] **(c) Minorities.**[12] Except when a contrary intention appears,[13] a period of minority during which a suspension or postponement is directed to continue is not to be considered as a term of years equal to the possible duration of such minority,[14] but is the equivalent of a life,[15] within the meaning of the statutes restricting the length of time for which such suspensions and postponements may continue, inasmuch as the law reads into a limitation for such a period the alternative condition that the period shall terminate if the life of the minor should end before the expiration of his minority;[16] and therefore a suspension or postponement during a minority does not admit of a further suspension or postponement where such additional period would be invalid if the preceding period were measured by a life.[17] Accordingly, a suspension or postponement for the minorities of one[18] or two[19] persons, or for one life and one minority,[20] does not violate a statute restricting the duration of the period to that of two lives, provided such persons are in being at the

Meldon v. Devlin, 31 App. Div. 146, 53 NYS 172 [aff 167 N. Y. 573 mem, 60 NE 1116 mem].

7. See cases infra notes 8, 9.

8. Van Cott v. Prentice, 104 N. Y. 45, 10 NE 257; Eells v. Lynch, 21 N. Y. Super. 465; Dexter v. Watson, 54 Misc. 484, 106 NYS 80.

Necessity of existence of measuring lives at creation of estate see supra § 100.

9. Schermerhorn v. Cotting, 131 N. Y. 48, 29 NE 980; Lougheed v. Dykemans' Baptist Church, 129 N. Y. 211, 29 NE 249, 14 LRA 410; Van Cott v. Prentice, 104 N. Y. 45, 10 NE 257; Mount v. Mount, 196 App. Div. 508, 188 NYS 170 [mod 108 Misc. 156, 178 NYS 168, and aff 234 N. Y. 568 mem, 138 NE 449 mem]; Tonnele v. Wetmore, 124 App. Div. 686, 109 NYS 349 [rev on other grounds 195 N. Y. 436, 88 NE 1068]; Matter of Bahrenburg, 130 Misc. 196, 224 NYS 183 [aff 214 App. Div. 792, 210 NYS 824 (aff 244 N. Y. 561 mem, 155 NE 897 mem)]; Cogan v. McCabe, 23 Misc. 739, 52 NYS 48.

[a] **Rule applied.**—(1) Where property was given in trust to pay the income to one for life, and on his death to be divided into as many shares as there were surviving children of such life tenant and to pay the income from such shares to each child respectively for life, with remainder over, the trust was valid as to those children in being at the death of the testator whose will created the trust, and such provisions as to them did not create a perpetuity. Mount v. Mount, 196 App. Div. 508, 188 NYS 170 [mod 108 Misc. 156, 178 NYS 168, and aff 234 N. Y. 568 mem, 138 NE 449 mem]. (2) The testator's youngest child living at the death of his wife may constitute the second measuring life of a trust; such child is a life in being at the testator's death and would be determinable at the death of the wife, and consequently no illegal suspension is created. Matter of Bahrenburg, 130 Misc. 196, 224 NYS 183 [aff 214 App. Div. 792, 210 NYS 824 (aff 244 N. Y. 561 mem, 155 NE 897 mem)]. (3) Where a settlor created certain trusts for the period of his own life, and delivered with the deed a sealed paper to be opened at his death, which provided for the subsequent disposition of the estate during the life of a person therein designated, the instruments are to be construed together, as if the entire trust had been made known at the beginning, and it was not necessary that the second measuring life should be ascertained until the settlor's death. Van Cott v. Prentice, 104 N. Y. 45, 10 NE 257.

Alternative lives see infra § 104.

10. See cases supra note 9.

11. Schermerhorn v. Cotting, 131 N. Y. 48, 29 NE 980; Matter of Hart, 61 App. Div. 587, 70 NYS 933 [aff 168 N. Y. 640 mem, 61 NE 1130 mem] (semble).

[a] **Thus,** where a trust was created for the life of the testator's widow, with remainder, in the event of the death of the widow before the testator's son, to the son for life, and in the event of the death of the son before the widow, to the testator's daughter for life, "the two lives which govern the duration of the trust in one contingency are not the same two lives which govern its duration in the other. Does this circumstance render the trust void? I do not see why it should. In no event is there a suspension for more than two lives in being at the creation of the trust, and upon any contingency the trust must terminate upon the death of the survivor of two lives in being when it was created. . . . Where a trust is created which by no possibility and in no contingency can endure longer than during the existence of two lives in being, of what consequence can it be that if one contingency happen, the estate is to be measured by two named lives, and if the other contingency happen, the estate is still to be measured by two named lives, but one of them is different from the one named in the other contingency? So long as both contingencies cannot happen the number of lives upon whose duration the trust term is to be limited cannot be more than two actually named and in existence when the trust was created. I cannot discover any reason which forbids such a contingency and such a limitation imposed thereon. I have not been able to discover any authorities upon this precise point, and we must, therefore, rest our decision upon the general principle that so long as the trust can last but two lives, which two shall be the selected ones may be left to the happening of a contingency such as exists in this case." Schermerhorn v. Cotting, 131 N. Y. 48, 62, 29 NE 980.

12. Additional term of minority after two lives see infra § 109.

13. Term continuing until person would, if living, attain majority see infra § 107 text and note 46.

14. Matter of Lally, 136 App. Div. 781, 121 NYS 467 [aff 198 N. Y. 608 mem, 92 NE 1089 mem]; Becker v. Becker, 13 App. Div. 342, 43 NYS 17; Lang v. Ropke, 7 N. Y. Super. 363, 10 NYLegObs 70; Matter of Mikantowicz, 60 Misc. 273, 113 NYS 278, 6 Mills Surr. 516; Simpson v. Cook, 24 Minn. 180.

Suspension or postponement for fixed term invalid see infra § 107.

15. Jacoby v. Jacoby, 188 N. Y. 124, 80 NE 676; Benedict v. Webb, 98 N. Y. 460; Savage v. Burnham, 17 N. Y. 561; Matter of Hardgrove, 223 App. Div. 646, 229 NYS 193; Matter of Trevor, 209 App. Div. 1, 204 NYS 387 [mod 239 N. Y. 6, 145 NE 66 (rearg den 239 N. Y. 579 mem, 147 NE 203 mem)]; Matter of Trevor, 207 App. Div. 673, 202 NYS 862 [mod 120 Misc. 22, 197 NYS 719]; Matter of Lally, 136 App. Div. 781, 121 NYS 467 [aff 198 N. Y. 608 mem, 92 NE 1089 mem]; Becker v. Becker, 13 App. Div. 342, 43 NYS 17; Matter of Berry, 124 Misc. 145, 207 NYS 651; Matter of Moore, 120 Misc. 825, 199 NYS 790; Matter of Horner, 120 Misc. 450, 198 NYS 665 [aff 206 App. Div. 794, 200 NYS 928 (mod 237 N. Y. 489, 143 NE 655)]; Matter of Douglass, 120 Misc. 193, 198 NYS 792; Matter of Mikantowicz, 60 Misc. 273, 113 NYS 278, 6 Mills Surr. 516; Hayden v. Sugden, 48 Misc. 108, 115, 96 NYS 681; Galway v. Bryce, 10 Misc. 255, 30 NYS 985; Hawley v. James, 16 Wend. (N. Y.) 61; Scott v. Monell, 1 Redf. Surr. (N. Y.) 431; Thomas' Est., Tuck. Surr. (N. Y.) 367, 369; and cases infra notes 17–20, 23–25.

"A suspension for a minority is a suspension for a statutory life." Hayden v. Sugden, supra.

"Every limitation on a minority is a limitation on life. . . . A minority cannot exceed a life, and it may be less." Thomas' Est., supra.

[a] **The statute provides** (1) as to realty, that "for the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority" (Real Prop. L. § 42); (2) and as to personalty, that, except as therein otherwise provided, "limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property" (Personal Prop. L. § 11).

16. See infra § 153.

17. Savage v. Burnham, 17 N. Y. 561; and cases infra notes 23–25.

18. Simpson v. Cook, 24 Minn. 180; Jacoby v. Jacoby, 188 N. Y. 124, 80 NE 676; Stevenson v. Lesley, 70 N. Y. 512; Becker v. Becker, 13 App. Div. 342, 43 NYS 17; Stehlin v. Stehlin, 67 Hun 110, 22 NYS 40; Eells v. Lynch, 21 N. Y. Super. 465; McGowan v. McGowan, 9 N. Y. Super. 57; Lang v. Ropke, 7 N. Y. Super. 363, 10 NYLegObs 70; Matter of Fellion, 132 Misc. 805, 231 NYS 9.

19. Simpson v. Cook, 24 Minn. 180; Benedict v. Webb, 98 N. Y. 460; Oxley v. Lane, 35 N. Y. 340; Mansbach v. New, 58 App. Div. 191, 68 NYS 674 [aff 170 N. Y. 585 mem, 63 NE 1119 mem]; Thomas' Est., Tuck. Surr. (N. Y.) 367.

[a] **In Michigan** (1) under a statute similar to that of New York, the rule is the same. Toms v. Williams, 41 Mich. 552, 2 NW 814. (2) Michigan statute see supra § 97 note 66.

20. Palms v. Palms, 68 Mich. 355, 36 NW 419; Benedict v. Webb, 98 N. Y. 460; Kelso v. Lorillard, 85 N. Y. 177 [aff 8 Daly 300]; Galway v. Bryce, 10 Misc. 255, 30 NYS 985; In re Finck, 171 NYS 573; Matter of

creation of the estate;[21] but, except in certain cases, involving real estate or chattels real, in which an additional period of minority is permitted by statute,[22] an attempted suspension or postponement for the minorities of more than two persons,[23] or for a life and more than one minority,[24] or for a minority and more than one life,[25] violates such a statute, inasmuch as it may continue longer than the duration of the lives of two persons,[26] unless an earlier termination at the end of a proper period is also directed.[27]

[§ 106] **(d) Parts of Lives.**[28] A part of a life is regarded as a life, within the meaning of statutes relating to suspensions and postponements.[29] Any period within a designated life may be selected,[30] and so a suspension or postponement to continue until one[31] or two[32] designated living persons, or any other number of persons not greater than the number of lives specified by the statute,[33] shall attain any specified age does not violate such statute, since the limitation is construed as terminating upon his or their death before reaching such age, unless the contrary intention appears;[34] and, similarly, a suspension or postponement until a designated living person shall marry is unobjectionable,[35] the period terminating upon his dying unmarried.[36] But an attempted suspension or postponement which may continue until more than two persons shall have arrived at a designated age,[37] or shall marry,[38] or until the termination of more than one life and then until another person arrives at a specified age,[39] is void under a statute restricting the duration of the suspension or postponement to that of two lives, inasmuch as the term thereof may be longer than that permitted, unless an earlier termination at the end of a proper period is also directed.[40]

[§ 107] **(2) Terms of Fixed Duration.** Under a statute restricting the suspension of alienability or ownership of property or the postponement of vesting of interests or estates therein to a period not exceeding that of lives in being,[41] any provision which would or might occasion a suspension or postponement for a period of days,[42] months,[43] or years,[44]

Sands, 3 NYS 67, 1 Conn. Surr. 259.

21. Necessity of existence at creation of estate see supra § 100.

22. See infra § 109.

23. Simpson v. Cook, 24 Minn. 180; In re Horner, 237 N. Y. 489, 143 NE 655; Jacoby v. Jacoby, 188 N. Y. 124, 80 NE 676; In re Butterfield, 133 N. Y. 473, 31 NE 515; Jennings v. Jennings, 7 N. Y. 547; Matter of Lally, 136 App. Div. 781, 121 NYS 467 [aff 198 N. Y. 608 mem, 92 NE 1089 mem]; Whitefield v. Crissman, 123 App. Div. 233, 108 NYS 110; Ahern v. Ahern, 52 App. Div. 356, 65 NYS 81; Walsh v. Waldron, 63 Hun 315, 17 NYS 829 [aff 135 N. Y. 650 mem, 32 NE 647 mem]; Matter of Christie, 59 Hun 153, 13 NYS 202 [aff 133 N. Y. 473, 31 NE 515]; Eells v. Lynch, 21 N. Y. Super. 465; Jennings v. Jennings, 7 N. Y. Super. 174 [aff 7 N. Y. 547]; Matter of Berry, 124 Misc. 145, 207 NYS 651; Whitefield v. Crissman, 55 Misc. 468, 106 NYS 630 [aff 123 App. Div. 233, 108 NYS 110]; Matter of Sands, 3 NYS 67, 1 Conn. Surr. 259; Hawley v. James, 16 Wend. (N. Y.) 61; McSorley v. Leary, 4 Sandf. Ch. (N. Y.) 414; Thompson v. Clendening, 1 Sandf. Ch. (N. Y.) 387; Thomas' Est., Tuck. Surr. (N. Y.) 367.

[a] **Rule applied.**—A suspension to continue until a designated child of the testator should attain his majority, or, in case of his prior death, until either of testator's other two children should arrive at majority, depends upon three minorities, and is the equivalent of an estate limited on three lives, and consequently is void. Thomas' Est., Tuck. Surr. (N. Y.) 367.

24. Benedict v. Webb, 98 N. Y. 460; Mansbach v. New, 58 App. Div. 191, 68 NYS 674 [aff 170 N. Y. 585 mem, 63 NE 1119 mem]; Cowen v. Rinaldo, 82 Hun 479, 31 NYS 554; Levy v. Hart, 54 Barb. (N. Y.) 248; Matter of Douglass, 120 Misc. 193, 198 NYS 792; In re Bruchaeser, 49 Misc. 194, 98 NYS 937; Scott v. Monell, 1 Redf. Surr. (N. Y.) 431.

[a] **Thus** a suspension for the life of testator's widow and until two children should attain their majority is equivalent to a suspension for three lives and violates the statute. Matter of Douglass, 120 Misc. 193, 198 NYS 792.

[b] **But a term continuing for the minorities of two persons and then for the life of one of them** is unobjectionable, for the minority of a given individual and the remainder of his life is a single life, and accordingly the term cannot continue beyond the duration of two lives. Benedict v. Webb, 98 N. Y. 460; Hayden v. Sugden, 48 Misc. 108, 96 NYS 681.

25. Wilson v. Odell, 58 Mich. 533, 25 NW 506; Savage v. Burnham, 17 N. Y. 561; Matter of Moore, 120 Misc. 825, 199 NYS 790; Matter of Sands, 3 NYS 67, 1 Conn. Surr. 259.

26. Possibility of exceeding statutory period see infra §§ 117, 118.

27. Subordinate measures of statutory period see infra § 110.

28. Subordinate measures of statutory period see infra § 110.

29. See cases infra notes 30–33, 35–39.

30. Meek v. Briggs, 87 Iowa 610, 54 NW 456, 43 AmSR 410; Thomas' Est., Tuck. Surr. (N. Y.) 367.

31. Sawyer v. Cubby, 146 N. Y. 192, 40 NE 869; In re Purdy, 224 App. Div. 217, 231 NYS 611; Matteson v. Palser, 56 App. Div. 91, 67 NYS 612 [mod 173 N. Y. 404, 66 NE 110].

32. Matteson v. Palser, supra.

33. In re Lux, 149 Cal. 200, 85 P 147.

34. See infra § 153.

Term continuing until person would, if living, attain specified age see infra § 107 text and note 46.

35. In re Verplanck, 91 N. Y. 439.

36. In re Verplanck, supra.

37. Matteson v. Palser, 56 App. Div. 91, 67 NYS 612 [mod 173 N. Y. 404, 66 NE 110].

38. Matter of Sammis, 132 Misc. 710, 230 NYS 785.

39. In re Marcial, 15 NYS 89; Field v. Field, 4 Sandf. Ch. (N. Y.) 528.

40. Subordinate measures of statutory period see infra § 110.

41. Statutory provisions see supra § 97.

42. Thomas' Est., Tuck. Surr. (N. Y.) 367.

43. Williams v. Lande, 74 Hun 425, 26 NYS 703 [mod on other grounds 148 N. Y. 519, 43 NE 57].

44. Cal.—Crew v. Pratt, 119 Cal. 139, 51 P 38; Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97; In re Fay, 5 Cal. A. 188, 89 P 1065. Compare In re McCray, 268 P 647 [superseding (A.) 260 P 940] (holding that, under a statute permitting the power of alienation to be suspended for a period not to exceed twenty-five years from the time of the creation of the suspension, a suspension for a fixed period of years not greater than twenty-five is valid).

Ind.—Fowler v. Duhme, 143 Ind. 248, 42 NE 623; Phillips v. Heldt, 33 Ind. A. 388, 71 NE 520.

Mich.—Otis v. Arntz, 198 Mich. 196, 164 NW 498; Casgrain v. Hammond, 134 Mich. 419, 96 NW 510, 104 AmSR 610; State v. Holmes, 115 Mich. 456, 73 NW 548. See also Farrand v. Petit, 84 Mich. 671, 48 NW 156 (apparently applying the rule). But see Allen v. Merrill, 223 Mich. 467, 194 NW 131 (where a devise in trust to hold for five years and then to divide the property equally between the surviving children, the issue of one deceased taking by right of representation, was held valid, the life of the child taking each share being treated as one life in being and his issue, per stirpes, in case of his death, being treated as a second life).

Minn.—Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825.

N. Y.—In re Hitchcock, 222 N. Y. 57, 118 NE 220; Brown v. Quintard, 177 N. Y. 75, 69 NE 225; Smith v. Chesebrough, 176 N. Y. 317, 68 NE 625; Kalish v. Kalish, 166 N. Y. 368, 59 NE 917; Underwood v. Curtis, 127 N. Y. 523, 28 NE 585; Greene v. Greene, 125 N. Y. 506, 26 NE 739, 21 AmSR 743; Lee v. Tower, 124 N. Y. 370, 26 NE 943; Cruikshank v. Home for Friendless, 113 N. Y. 337, 21 NE 64, 4 LRA 140; Rice v. Barrett, 102 N. Y. 161, 6 NE 898; Garvey v. McDevitt, 72 N. Y. 556; Beekman v. Bonsor, 23 N. Y. 298, 575, 80 AmD 269 [aff 27 Barb. 260]; Dodge v. Pond, 23 N. Y. 69; Tucker v. Tucker, 5 N. Y. 408; Rose v. Rose, 4 Abb. Dec. 108; Matter of Keesey, 222 App. Div. 577, 226 NYS 712 [mod on other grounds 249 N. Y. 154, 163 NE 133 (rearg den 249 N. Y. 568 mem, 164 NE 586 mem)]; Markert v. Solomon, 217 App. Div. 275, 216 NYS 626; Goldsmith v. Haskell, 181 App. Div. 510, 169 NYS 185; Davis v. MacMahon, 161 App. Div. 458, 146 NYS 657, 13 Mills Surr. 33 [aff 214 N. Y. 614 mem, 108 NE 1092 mem]; Matter of Berry, 154 App. Div. 509, 139 NYS 186 [aff 209 N. Y. 540 mem, 102 NE 1099 mem]; Smith v. Smith, 154 App. Div. 313, 139 NYS 124; Walter v. Walter, 133 App. Div. 893, 118 NYS 268 [aff 60 Misc. 383, 113 NYS 465, and aff 197 N. Y. 606 mem, 91 NE 1122 mem]; Keenan v. Keenan, 122 App. Div. 435, 107 NYS 152; Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99; Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 NYS 228; McGuire v. McGuire, 80 App. Div. 63, 80 NYS 497; Matter of Murray, 75 App. Div. 246, 78 NYS 165; Trowbridge v. Metcalf, 5 App. Div. 318, 39 NYS 241 [aff 158 N. Y. 682 mem, 52 NE 1126 mem]; Williams v. Lande, 74 Hun 425, 26 NYS 703 [mod on other grounds 148 N. Y. 519, 43 NE 57]; Montignani v. Blade, 74 Hun 297, 26 NYS 670 [rev on other grounds 145 N. Y. 111, 39 NE 719]; Sawyer v. Cubby, 73 Hun 298, 26 NYS 426 [rev on other grounds 146 N. Y. 192, 40 NE 869]; Moore v. Moore, 47 Barb. 257 [aff 6 AlbLJ 173]; Titus v. Weeks, 37 Barb. 136; Morgan v. Masterton, 6 N. Y. Super. 442; Matter of Spitz, 129 Misc. 78, 220 NYS 816; Matter of Kuhrasch, 124 Misc.

or until a fixed future day,[45] or until a designated person, if living, would attain his majority or other specified age,[46] or for a period dependent in part upon life and in part upon a fixed term,[47] or for any other period of time,[48] however short,[49] not measured by the duration of a human life or lives, is prohibited, unless such definite or fixed term is further limited by a provision for an earlier termination of the suspension or vesting of the interests or estates within or at the end of a period properly measured by lives.[50]

Where a term of years is authorized by statute, during which a suspension or postponement may continue, after the expiration of lives in being,[51] a suspension or postponement which would or might exceed the permitted period after the termination of the measuring lives is wholly void;[52] thus a limitation which would suspend the alienability of property until the attainment by the children of a living person of an age greater than the statutory number of years is void,[53] in view of the possibility that such person may have issue at any time during his life,[54] and that a child may not attain the specified age after his death within the statutory period;[55] but a suspension for a term of years without reference to lives is valid if it does not exceed the number of years specified by the statute.[56] And where a period of years, in the alternative to a period measured by lives, is permitted by statute,[57] a suspension or postponement for a fixed period not greater than that prescribed is valid.[58]

[§ 108] **(3) Terms of Indefinite Duration.** Except where there is employed a controlling provision limiting the ultimate possible duration of a suspension of the alienability or ownership of property, or postponement of the vesting of interests or estates therein, to a period not greater than that permitted by statute,[59] any limitation which would or might occasion such a suspension or postponement for an indefinite time, not measured by the continuance or termination of a life or lives in being,[60] as, for example, a suspension or postponement for such time as trustees may deem proper,[61] or until the happening of an event which may not occur within the statutory period,[62] or until the payment of be-

117, 207 NYS 75; Matter of Wilber, 122 Misc. 472, 202 NYS 760; Matter of Douglass, 120 Misc. 193, 198 NYS 792; Woolley v. Hutchins, 114 Misc. 11, 186 NYS 769 [aff 198 App. Div. 964 mem, 189 NYS 959 mem]; Matter of Phillips, 108 Misc. 413, 177 NYS 663; Epstein v. Werbelovsky, 108 Misc. 214, 177 NYS 554 [rev on other grounds 193 App. Div. 428, 184 NYS 330 (aff 233 N. Y. 525 mem, 135 NE 902 mem)]; Matter of Kozlay, 104 Misc. 120, 171 NYS 669; Matter of Pierce, 76 Misc. 85, 136 NYS 323, 9 Mills Surr. 118; Stanley v. Payne, 65 Misc. 77, 119 NYS 570; Walter v. Walter, 60 Misc. 383, 113 NYS 465 [aff 133 App. Div. 893, 118 NYS 268 (aff 197 N. Y. 606 mem, 91 NE 1122 mem)]; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; Matter of Perry, 48 Misc. 285, 96 NYS 879; Brandt v. Brandt, 13 Misc. 431, 34 NYS 684; In re Scott, 204 NYS 478; In re Green, 167 NYS 1084; Farmers' L. & T. Co. v. Cummings, 108 NYS 882; Matter of Snyder, 21 NYS 430, 1 Pow. Surr. 185; Underhill's Will, 3 NYS 205, 6 Dem. Surr. 466; Gano v. McCunn, 56 HowPr 337; Bean v. Bowen, 47 HowPr 306; Hone v. Van Schaick, 20 Wend. 564; Hawley v. James, 16 Wend. 61; Field v. Field, 4 Sandf. Ch. 528; Matter of Starr, 2 Dem. Surr. 141; Butler v. Butler, Hoffm. 344; Thomas' Est., Tuck. Surr. 367.

Wis.—DeWolf v. Lawson, 61 Wis. 469, 21 NW 615, 50 AmR 148.

45. Staples v. Hawes, 39 App. Div. 548, 57 NYS 452 [aff 24 Misc. 475, 53 NYS 860]; Steinway v. Steinway, 10 Misc. 563, 32 NYS 183; De Kay v. Irving, 5 Den. (N. Y.) 646.

46. In re Steele, 124 Cal. 533, 57 P 564; In re Cavarly, 119 Cal. 406, 51 P 629; In re Hendy, 118 Cal. 656, 50 P 753; Jacoby v. Jacoby, 188 N. Y. 124, 80 NE 676; Haynes v. Sherman, 117 N. Y. 433, 22 NE 938; Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 NYS 228; Walsh v. Waldron, 63 Hun 315, 17 NYS 829 [aff 135 N. Y. 650 mem, 32 NE 647 mem]; Titus v. Weeks, 37 Barb. (N. Y.) 136; Davidge v. Wiggins, 137 NYS 127; Boynton v. Hoyt, 1 Den. (N. Y.) 53.

47. Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97; Field v. Field, 4 Sandf. Ch. (N. Y.) 528.

48. In re Brown, 198 Mich. 544, 165 NW 929; Fitz Gerald v. Big Rapids, 123 Mich. 281, 82 NW 56; Mineral Land Inv. Co. v. Bishop Iron Co., 134 Minn. 412, 159 NW 966, LRA 1917D 900; Matter of New York, 246 N. Y. 1, 157 NE 911; Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99; La Chapelle v. Burpee, 69 Hun 436, 23 NYS 453; Walsh v. Waldron, 63 Hun 315, 17 NYS 829 [aff 135 N. Y. 650 mem, 32 NE 647 mem]; Matter of Douglass, 120 Misc. 193, 198 NYS 792; Matter of Pierce, 76 Misc. 85, 136 NYS 323, 9 Mills Surr. 118; Washburn v. Acome, 74 Misc. 301, 131 NYS 963 [aff 151 App. Div. 948 mem, 136 NYS 1150 mem]; Stanley v. Payne, 65 Misc. 77, 119 NYS 570; Guaranty Trust Co. v. Goetting, 185 NYS 663; Hone v. Van Schaick, 20 Wend. (N. Y.) 564; and cases infra note 49.

Terms of indefinite duration see infra § 108.

49. Cal.—Crew v. Pratt, 119 Cal. 139, 51 P 38; In re Hendy, 118 Cal. 656, 50 P 753; Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97.

Ind.—Fowler v. Duhme, 143 Ind. 248, 42 NE 623; Phillips v. Heldt, 33 Ind. A. 388, 71 NE 520.

Mich.—In re Brown, 198 Mich. 544, 165 NW 929.

Minn.—Chapman's Application, 168 Minn. 1, 211 NW 325; Hause v. O'Leary, 136 Minn. 126, 161 NW 392; Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825; Simpson v. Cook, 24 Minn. 180.

N. Y.—Underwood v. Curtis, 127 N. Y. 523, 28 NE 585; La Chapelle v. Burpee, 69 Hun 436, 23 NYS 453; Walsh v. Waldron, 63 Hun 315, 17 NYS 829 [aff 135 N. Y. 650 mem, 32 NE 647 mem]; Titus v. Weeks, 37 Barb. 136; Washburn v. Acome, 74 Misc. 301, 131 NYS 963 [aff 151 App. Div. 948 mem, 136 NYS 1150 mem]; Dresser v. Travis, 39 Misc. 358, 79 NYS 924 [aff 87 App. Div. 632 mem, 633 mem, 84 NYS 1124 mem (aff 177 N. Y. 371, 376, 69 NE 734, 736)]; Staples v. Hawes, 24 Misc. 475, 53 NYS 860 [aff 39 App. Div. 548, 57 NYS 452]; Hone v. Van Schaick, 20 Wend. 564; Field v. Field, 4 Sandf. Ch. 528.

"A devise of land, which suspends the absolute power of alienation for a fixed period, however short, without reference to lives in being, is void; for no suspension of the power of alienation is valid, unless it must in every contingency terminate within the period of two lives." Rong v. Haller, 109 Minn. 191, 198, 123 NW 471, 806, 26 LRANS 825.

50. Subordinate measures of statutory period see infra § 110.

Trust for designated person for fixed term construed as ending at his death see infra § 153.

51. Statutory provisions see supra § 97.

52. Perry v. Metcalf, 216 Ky. 755, 288 SW 694; and case infra note 53.

53. Wills v. Maddox, 45 App. (D. C.) 128.

54. Possibility of issue see infra § 118.

55. Possibility of exceeding statutory period see infra § 117.

56. Danforth v. Oshkosh, 119 Wis. 262, 97 NW 258; In re Kopmeier, 113 Wis. 233, 89 NW 134.

57. Statutory provisions see supra § 97. See also supra § 104.

[a] **Constitutionality of statute.**— The contention that Civ. Code § 715 subd 2, permitting the power of alienation to be suspended for a period not exceeding twenty-five years from the creation of the limitation, is contrary to the provisions of Const. (1879) art XX § 20, providing that "No perpetuities shall be allowed except for eleemosynary purposes," in establishing a period for suspensions of alienability greater than the period prescribed for vesting by the common law against perpetuities, to which it is claimed the constitution refers, is without merit. In re McCray, (Cal.) 268 P 647 [superseding (A.) 260 P 940].

58. In re McCray, supra; Rice v. Barrett, 102 N. Y. 161, 6 NE 898; Keenan v. Keenan, 122 App. Div. 435, 107 NYS 152; Matter of Spitz, 129 Misc. 78, 220 NYS 816; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; De Wolf v. Lawson, 61 Wis. 469, 21 NW 615, 50 AmR 148. Compare Crew v. Pratt, 119 Cal. 139, 51 P 38; Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97; In re Fay, 5 Cal. A. 188, 89 P 1065 (all decided under a statute permitting the period of suspension or postponement to be measured by lives in being, and holding that a suspension for a fixed period is void, inasmuch as it might extend beyond the duration of lives).

59. See infra § 110.

60. Fairchild v. Edson, 154 N. Y. 199, 48 NE 541, 61 AmSR 609; Matter of O'Hara, 95 N. Y. 403, 47 AmR 53, 14 AbbNCas 71; Freeman v. Hanna, 178 App. Div. 630, 165 NYS 488; Gueutal v. Gueutal, 113 App. Div. 310, 98 NYS 1002; Matter of Rohr, 130 Misc. 174, 223 NYS 782; Fish v. Deady, 127 Misc. 332, 215 NYS 374; Matter of Douglass, 120 Misc. 193, 198 NYS 792; Allen v. Litchard, 93 Misc. 197, 157 NYS 19 [aff 179 App. Div. 959 mem, 166 NYS 1085 mem]; Matter of Pierce, 76 Misc. 85, 136 NYS 323, 9 Mills Surr. 118; Matter of Ackermann, 36 Misc. 752, 74 NYS 477; and cases infra notes 61-64.

61. Rosenstein v. Rosenstein, 103 Misc. 1, 170 NYS 280; Matter of Ackermann, 36 Misc. 752, 74 NYS 477.

62. Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238; Dodge v.

quests[63] or of debts or encumbrances,[64] or, except in the case of charitable gifts or trusts,[65] a perpetual suspension or postponement,[66] is unauthorized and void.

[§ 109] **(4) Additional Period of Minority.**[67] By some statutes[68] it is provided, as an exception to the rule that a suspension of alienability or ownership or a postponement of vesting cannot continue longer than during the continuance and until the termination of lives in being,[69] that, in the cases of real estate and chattels real, a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age.[70] Under such a provision, only one such contingent remainder can validly be created,[71] and successive remainders contingent upon death before majority are not permitted.[72] It is not essential thereunder that either the infant remainderman[73] or the ultimate remainderman[74] should be a person in being at the creation of the estate.

As to personal property other than chattels real, if the statute makes no exception to the general rule,[75] an attempted suspension or postponement for an additional period of minority after lives in being is void.[76]

[§ 110] **(5) Subordinate Measures of the Period.**[77] When the ultimate possible duration of a term of suspension or postponement is duly restricted to a period permitted by statute, any subordinate measure of the duration of such suspension or postponement may be employed.[78] Thus, under such a controlling restriction, it follows that a suspension or postponement for a fixed[79] or indefi-

Pond, 23 N. Y. 69.

63. Matter of Trotter, 104 App. Div. 188, 93 NYS 404 [aff 182 N. Y. 465, 75 NE 305].

64. Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238; Killam v. Allen, 52 Barb. (N. Y.) 605; Bean v. Hockman, 31 Barb. (N. Y.) 78; Dresser v. Travis, 39 Misc. 358, 79 NYS 924 [aff 87 App. Div. 632 mem, 633 mem, 84 NYS 1124 mem (aff 177 N. Y. 371, 376, 69 NE 734, 736)]; Dodsworth v. Dam, 38 Misc. 684, 78 NYS 264.

65. See infra §§ 144, 145.

66. In re Coleman, 167 Cal. 212, 138 P 992, AnnCas1915C 682; Dingwell v. Seymour, (Cal. A.) 267 P 327; Matter of MacDowell, 170 App. Div. 245, 156 NYS 387 [rev on other grounds 217 N. Y. 454, 112 NE 177, LRA1916E 1246, AnnCas1917E 853]; Matter of Dewitt, 113 App. Div. 790, 99 NYS 415 [aff 188 N. Y. 567 mem, 80 NE 1108 mem]; Walker v. Taylor, 15 App. Div. 452, 44 NYS 446.

67. Minority as one of measuring lives see supra § 105.

68. See statutory provisions.

69. See supra § 98.

70. Hayes v. Martz, 173 Ind. 279, 89 NE 303, 90 NE 309 [rev 45 Ind. A. 704, 84 NE 546, 87 NE 837]; Radley v. Kuhn, 97 N. Y. 26; Woodgate v. Fleet, 64 N. Y. 566; Manice v. Manice, 43 N. Y. 303; Matter of Howland, 75 App. Div. 207, 77 NYS 1025; Adams v. Berger, 18 NYS 33, 27 AbbNCas 429; Hawley v. James, 16 Wend. (N. Y.) 61.

[a] **"Such contingent remainder over operates** to reduce the absolute fee of the devisee first named, to a determinable fee. But the condition on which the remainder over is to take effect is a condition subsequent. It does not prevent the vesting of the fee in the first devisee, but merely renders such fee defeasible by condition subsequent." Radley v. Kuhn, 97 N. Y. 26, 35.

Statutes quoted see supra § 97 notes 63–65.

71. Temple v. Hawley, 1 Sandf. Ch. (N. Y.) 153. Compare Monypeny v. Monypeny, 202 N. Y. 90, 95 NE 1 (holding that the statutory provision permitting suspension for an additional term of minority cannot save a limitation of a remainder, after a life estate, to the youngest of the life tenant's children arriving at the age of twenty-one, inasmuch as the remainder which each of the several children would be entitled to is not given over on his failure to arrive at the age of twenty-one, but only on the failure of the arrival of the youngest at such age, which provision is not within the statutory exception). But see Adams v. Berger, 18 NYS 33, 27 AbbNCas 429 (holding that, where realty was devised for life to testator's daughter, with remainder in fee to her children who should survive her, provided such children should attain twenty-one years of age, and, in the event of the death of any such child before such age, remainder to the survivors, the statutory period for the limitation of future estates was not transcended, the suspension or postponement in no event being continued beyond the life of the daughter and the minority of her children).

[a] **Construction of statute.**— "One construction that has been suggested is, that the statute authorizes successive remainders over, in fee, in case of successive terminations of prior remainders during minority; or successive cross remainders over among the members of a class, in case of the termination of individual shares during minority, with a possible ultimate remainder over in case all the original shares are thus terminated. Another is, that it authorizes alternative ultimate remainders in fee, one or the other to vest, according to the contingency, in case of the failure of the prior remainder during minority. Another suggests the view that only one ultimate remainder can be provided for in any event. . . . The statute in question itself speaks of the remainder, upon the termination of which a fee may be limited over, as the 'first' remainder. . . . The use of the plural, in the statute quoted, is no doubt to be understood as referring to the fact that the remainder may be limited to tenants in common, in shares, each share to be judged on its own merits. It would seem quite clear, therefore, that in the exceptional case provided for, the suspension, or postponement of vesting, can in no event extend, in addition to two designated lives, beyond the majority, or earlier death, of one infant. By the end of two designated lives, and the majority or earlier death of the infant, the suspension and the postponement of vesting must cease." Chaplin Suspension of Alien. (2d ed) §§ 87, 90. See also op. cit. (3d ed) § 128 (to same effect).

72. Temple v. Hawley, 1 Sandf. Ch. (N. Y.) 153, 178; and cases supra note 71.

"It [the statute] does not permit the creation of a contingent remainder to take effect upon the death of the one who takes under the prior contingency, from the person to whom the first remainder is limited." Temple v. Hawley, supra.

73. Manice v. Manice, 43 N. Y. 303; Fowler v. Depau, 26 Barb. (N. Y.) 224; Adams v. Berger, 18 NYS 33, 27 AbbNCas 429 [disappr Roe v. Vingut, 117 N. Y. 204, 22 NE 933].

[a] **Thus,** where a will contained a devise of property to testator's daughter for life, with remainder to those children of the daughter who should survive her, provided such children attain the age of twenty-one years, with remainder over, the statute permits persons to be included within the first remainder who may be born after testator's death but prior to the death of the daughter. Adams v. Berger, 18 NYS 33, 27 AbbNCas 429.

74. Manice v. Manice, 43 N. Y. 303. See Adams v. Berger, 18 NYS 33, 27 AbbNCas 429 (apparently applying the rule stated in the text).

75. Statutory period in general see supra § 98.

76. Schlereth v. Schlereth, 173 N. Y. 444, 66 NE 130, 93 AmSR 616; Greenland v. Waddell, 116 N. Y. 234, 22 NE 367, 15 AmSR 400; Matter of Howland, 75 App. Div. 207, 211, 77 NYS 1025; Adams v. Berger, 18 NYS 33, 27 AbbNCas 429.

"It is hardly necessary to call attention to the difference between the rule governing real property and that governing personal property. The right to suspend the power of alienation of real property may continue through two lives and a minority. The absolute ownership of personal property can be suspended only for two lives." Matter of Howland, supra.

Minority as life see supra § 105.

77. Parts of lives see supra § 106. **Takers and beneficiaries during period** see infra § 116.

78. See cases infra notes 79–85.

79. Blossom v. Anketell, 275 Fed. 947 (Michigan statute); In re Hendy, 118 Cal. 656, 50 P 753; In re Drury, 249 N. Y. 154, 163 NE 133; Montignani v. Blade, 145 N. Y. 111, 39 NE 719; Schermerhorn v. Cotting, 131 N. Y. 48, 29 NE 980; Oxley v. Lane, 35 N. Y. 340; Anthony v. Van Valkenburgh, 154 App. Div. 380, 139 NYS 599; Kahn v. Tierney, 135 App. Div. 897, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem]; Keenan v. Keenan, 122 App. Div. 435, 107 NYS 152; Matter of Trotter, 104 App. Div. 188, 93 NYS 404 [aff 182 N. Y. 465, 75 NE 305]; Franklin v. Minertzhagen, 39 App. Div. 555, 57 NYS 401; Hunter v. Hunter, 17 Barb. (N. Y.) 25; In re Andrews, 133 Misc. 365, 232 NYS 198; Matter of Douglass, 120 Misc. 193, 198 NYS 792; Orange County Trust Co. v. Morrison, 56 Misc. 88, 106 NYS 940; Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403; Clark v. Goodridge, 51 Misc. 140, 100 NYS 824; Clancy v. O'Gara, 4 AbbNCas (N. Y.) 268; Hawley v. James, 16 Wend. (N. Y.) 61; McCosker v. Brady, 1 Barb. Ch. 329 [aff 1 N. Y. 214, How. A. Cas. 480]. See Matteson v. Matteson, 51 HowPr (N. Y.) 276 (apparently applying the principle stated in the text). Compare Smith v. Edwards, 88 N. Y. 92 (where a testator gave one thousand dollars each to all grandchildren born within twenty years after his death, and the gift was held to be valid, inasmuch as a gift to all the children of A, testator's eldest

nite[80] period of time, or until a designated future date,[81] or until any number of persons shall attain their majorities[82] or any other specified age,[83] or until a designated person would, if living, attain a specified age,[84] or until the happening of any other event,[85] is valid, inasmuch as at all events it must terminate within or at the end of the statutory period to which the period otherwise designated is made subordinate.

[§ 111] **(6) Circumstances at Creation of Limitation as Affecting Measurement of Period—(a) In General.** While the validity of a limitation directing a suspension or postponement is determined by the possibility of exceeding the statutory period and not by subsequent actual events,[86] the term for which such suspension or postponement might or could continue is computed with reference to the circumstances existing at the time the limitation takes effect.[87]

[§ 112] **(b) Predecease of Measuring Life.** In accordance with the rule just stated,[88] when a person by whose life a suspension or postponement is attempted to be measured is dead when the instrument takes effect, the limitation is to be read as if it contained no provision for suspension or postponement during such life;[89] and so where a will according to its terms would create a suspension for an excessive period, but before the death of the testator one or more of the measuring lives has expired, the limitation is not invalid if the remaining provisions do not create an illegal suspension.[90]

[§ 113] **(c) Prior Arrival at Majority or Specified Age.** In accordance with the rule stated above,[91] where a suspension or postponement is directed to continue for the minority of a designated person, and such person has reached full age at the time the limitation takes effect,[92] or where the suspension or postponement is directed to continue until the attainment by such person of a specified age, and he has attained such age,[93] the limitation is to be treated as if such person had not been designated as one of the measuring lives; thus, where a will fixes, as the termination of the period of suspension or postponement, the attainment of their majority or any other specified age by a greater number of persons than the number of lives specified by the statute, and at the death of the testator not more than the statutory number of persons remain minors or are under the age specified, the limitation does not violate the statute.[94]

[§ 114] **b. Successive Suspensions—(1) In General.** Where successive suspensions of alienability or ownership or successive postponements of vesting are occasioned by the terms of separate instruments which together form an entire scheme of disposition, the period of all such suspensions or postponements is to be computed, for the purpose of determining their legality, from the date upon which the first limitation took effect.[95] The owner of a remainder or reversion may, however, validly so limit

child, born within twenty years after testator's death, would be valid, for all persons entitled must come into being within the life of A; and a gift to all the testator's grandchildren is equivalent to so many separate gifts to the children of each child).

[a] **Rule applied.**—Where an estate, subject to a condition precedent, was devised to a designated person, and the devisee was given a fixed period of time to elect whether or not he would comply with the condition, the power of alienation is not illegally suspended, since the election must be made, if at all, within the lifetime of the devisee. Matter of Trotter, 104 App. Div. 188, 93 NYS 404 [aff 182 N. Y. 465, 75 NE 305]; Hunter v. Hunter, 17 Barb. (N. Y.) 25.

Terms of fixed duration generally see supra § 107.

80. Burrill v. Boardman, 43 N. Y. 254, 3 AmR 694; Jessup v. Pringle Memorial Home, 27 Misc. 427, 59 NYS 207 [aff 47 App. Div. 622, 62 NYS 308]. Compare Buschmann v. McDermott, 154 App. Div. 515, 139 NYS 314 (where an agreement among common owners that none would seek to have partition made of the property without the consent of all was held not to suspend the power of alienation in violation of the statute, inasmuch as the death of any one of such owners would terminate the agreement).

Terms of indefinite duration in general see supra § 108.

81. De Kay v. Irving, 5 Den. (N. Y.) 646.

Generally see supra § 107.

82. Provost v. Provost, 70 N. Y. 141; Kahn v. Tierney, 135 App. Div. 897, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem]; Levy v. Hart, 54 Barb. (N. Y.) 248; Sherman's Est., 15 NYSt 438.

Generally see supra § 105.

83. Kahn v. Tierney, 135 App. Div. 897, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem].

[a] **Thus** a trust to endure until three persons should attain a designated age, provided such event occurs within the life of a designated person in being, is valid. Kahn v. Tierney, 135 App. Div. 897, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem].

Generally see supra § 106.

84. Cushman v. Cushman, 116 App. Div. 763, 102 NYS 258 [aff 191 N. Y. 505 mem, 84 NE 1112 mem]; Matter of Rounds, 105 Misc. 273, 172 NYS 758.

Generally see supra § 107.

85. Simpson v. Cook, 24 Minn. 180; Dodge v. Pond, 23 N. Y. 69.

[a] **Illustration.**—A bequest conditioned upon the raising of a specified sum by others, if the period therefor were limited to the continuance of two lives in being, would be unobjectionable, although without such limitation it violates the statute. Dodge v. Pond, 23 N. Y. 69.

86. See infra § 117.

87. See cases infra §§ 112, 113. Compare Tonnele v. Wetmore, 124 App. Div. 686, 109 NYS 349 [motion to dism app den 192 N. Y. 583 mem, 85 NE 1116 mem, and rev on other grounds 195 N. Y. 436, 88 NE 1068] (holding that, where a gift to trustees, to take effect upon the expiration of a life estate, is subjected to an illegal restraint upon alienation before a certain date, such restraint does not cause the trust to fail where the life tenant did not die until after the expiration of the date before which alienation was prohibited).

88. See supra § 111.

89. Matter of Hoffman, 65 Misc. 126, 121 NYS 100, 7 Mills Surr. 306 [aff 140 App. Div. 121, 124 NYS 1089 (mod 201 N. Y. 247, 94 NE 990)]; and cases infra note 90.

90. Mullreed v. Clark, 110 Mich. 229, 68 NW 138, 989; Griffen v. Ford, 14 N. Y. Super. 123; Matter of Dodge, 129 Misc. 390, 222 NYS 247; Adams v. McKee, 121 Misc. 215, 200 NYS 765; Matter of Hoffman, 65 Misc. 126, 121 NYS 100, 7 Mills Surr. 306 [aff 140 App. Div. 121, 124 NYS 1089 (mod 201 N. Y. 247, 94 NE 990)]; Tallman v. Tallman, 3 Misc. 465, 23 NYS 734. But see Odell v. Youngs, 64 HowPr (N. Y.) 56 (where a will attempted to create a trust which would suspend the power of alienation for the lives of the testator's wife, son, and other children, and the court said: "It is true the wife and son named died during testator's lifetime, but that did not cure the invalidity of the devise. The provision must be judged as created in the instrument, unaffected by facts subsequently arising").

[a] **Thus** (1) where a testator devised property in trust for his wife for her life and then to his two grandchildren for their lives, but the wife died before the testator, there was no suspension of the power of alienation beyond the period permitted by the statute. "Whatever might have been the effect, had . . . his wife survived him, matters not, as, by her death before him, the legacies and devises to her lapsed and are not to be considered in estimating the terms within which alienation is restrained or the absolute ownership suspended. The death of the testator's wife before his death leaves it as if she had not been named in the will." Tallman v. Tallman, 3 Misc. 465, 472, 23 NYS 734. (2) Where, by the terms of a will, the power of alienation of property was suspended during the lives of three children of the testator, the court said: "Had all these [children] been living when the testator died, there would have been a clear suspension of the power of alienation beyond the statutory period. Two, only, of the children, however, were then living; and in applying the statutory rule to the provisions of a will, it is certain, that lives in being at the death of the testator, are alone to be considered." Griffen v. Ford, 14 N. Y. Super. 123, 137.

91. See supra § 111.

92. Oxley v. Lane, 35 N. Y. 340; Galway v. Bryce, 10 Misc. 255, 30 NYS 985.

Minorities generally see supra § 105.

93. Matteson v. Palser, 56 App. Div. 91, 67 NYS 612 [mod 173 N. Y. 404, 66 NE 110].

Attainment of specified age in general see supra § 106.

94. Oxley v. Lane, 35 N. Y. 340; Matteson v. Palser, 56 App. Div. 91, 67 NYS 612 [mod 173 N. Y. 404, 66 NE 110].

95. New York L. Ins., etc., Co. v.

his interest as to occasion a suspension or postponement for the full statutory period, notwithstanding any suspensions or postponements theretofore created in the limitation of such remainder or the reservation of such reversion,[96] except, it would seem, when such successive dispositions are made in furtherance of a general scheme to evade the statutory restrictions.[97] Thus one who suspends the alienability or ownership of his property, real or personal, for a valid period, retaining the reversion,[98] or the owner of a remainder limited on a suspension for a valid period,[99] may subsequently, and as a separate transaction, dispose of such reversion or remainder by limitations creating a suspension or postponement for the full statutory period, measured from the date of such subsequent disposition.

[§ 115] **(2) Execution of Power.**[1] Where a suspension or postponement is directed by the terms of an instrument disposing of property under a power theretofore conferred, the period for which such suspension or postponement may continue is to be reckoned from the date of the creation of the power and not from the time of its exercise,[2] except, perhaps, in the case of a power such that the donee becomes vested with an absolute fee,[3] in which case the term is to be computed only from the date of the exercise of the power.[4] It has accordingly been said that, with the exception just mentioned,[5] the validity of an appointment made under a power is determined by reading it as if it had been incorporated in the instrument conferring the power;[6] but the principle so stated is probably not a proper test in every case.[7]

[§ 116] **c. Takers and Beneficiaries during the Period.**[8] When by a controlling provision a valid restriction is placed upon the ultimate time for which any suspension of alienability or ownership or any postponement of vesting may continue, any interests may be limited, successively or concurrently, to or for the benefit of any number of persons,[9]

Cary, 191 N. Y. 33, 83 NE 598 (semble); and cases infra § 115.

96. See cases infra notes 98, 99.

97. New York L. Ins., etc., Co. v. Cary, 191 N. Y. 33, 83 NE 598.

98. New York L. Ins., etc., Co. v. Cary, supra; Farmers' L. & T. Co. v. Bostwick, 190 N. Y. 569 mem, 83 NE 1124 mem; Genet v. Hunt, 113 N. Y. 158, 168, 21 NE 91; U. S. Trust Co. v. Chauncey, 32 Misc. 358, 66 NYS 563.

"The reversion . . . would be property which she [the owner] could grant or devise, and limit future estates thereon in her discretion, subject only to the restriction that they must vest in absolute ownership within two lives in being at their creation." Genet v. Hunt, supra.

[a] **Rule applied.**—Where a donor created a trust for the life of his daughter to cease and revert to him upon her death without issue, he had an estate in expectancy, which by statute is alienable in the same manner as an estate in possession, and consequently when by his will he gave his residuary estate in trust for two lives, and his daughter died without issue so that her trust fund fell into the residuary estate, there was no suspension of the ownership beyond the statutory period. New York L. Ins., etc., Co. v. Cary, 191 N. Y. 33, 83 NE 598.

[b] **"It must freely be conceded that this conclusion permits** the owner of an expectant estate in personal property to suspend the absolute ownership for more than two lives in being by means of different instruments; but this result is by no means so alarming in contemplation as counsel seem to apprehend. . . . The question involved in this case is one of technical law pure and simple, and as Professor Gray has well said in his work on the Rule of Perpetuities: 'In no part of the law is the reasoning so mathematical in its character; none has so small a human element.'" New York L. Ins., etc., Co. v. Cary, 191 N. Y. 33, 42, 83 NE 598.

99. Livingston v. New York L. Ins., etc., Co., 13 NYS 105, 36 NYSt 566 [aff 151 N. Y. 667 mem, 46 NE 1149 mem].

1. Powers generally see Powers [31 Cyc 1033]; Wills [40 Cyc 1820 et seq].

2. Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59; Hillen v. Iselin, 144 N. Y. 365, 39 NE 368; Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238; Dana v. Murray, 122 N. Y. 604, 26 NE 21; Genet v. Hunt, 113 N. Y. 158, 21 NE 91; Beardsley v. Hotchkiss, 96 N. Y. 201; Everitt v. Everitt, 29 N. Y. 39; Matter of Dodge, 129 Misc. 390, 222 NYS 247; Matter of Trowbridge, 124 Misc. 317, 208 NYS 662; Matter of Pilsbury, 50 Misc. 367, 99 NYS 62 [aff 113 App Div. 893, 99 NYS 62 (aff 186 N. Y. 545 mem, 79 NE 1114 mem)]; N. Y. Real Prop. L. § 178. But see Frear v. Pugsley, 9 Misc. 316, 30 NYS 149 (holding that the remoteness of future interests, created by the will of a life tenant who had power to appoint the property by will, was to be determined with reference to the death of the donee and not the creation of the power).

[a] **The New York statute is declarative of the common law** (1) as to the computation of the statutory period, in the case of an appointment made under a power, from the effective date of the instrument creating the power. Miller v. Douglass, 192 Wis. 486, 213 NW 320. (2) Rule at common law see supra § 65 text and note 71.

3. See case infra note 4.

4. Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59 (semble); Chaplin Suspension of Alien. (3d ed) § 363.

5. See supra text and note 3.

6. In re Dows, 167 N. Y. 227, 60 NE 439, 88 AmSR 508, 52 LRA 433; Fargo v. Squiers, 154 N. Y. 250, 48 NE 509; Genet v. Hunt, 113 N. Y. 158, 21 NE 91; Tweddell v. New York L. Ins. Co., 49 App. Div. 258, 63 NYS 369 [aff 166 N. Y. 608 mem, 59 NE 1131 mem]; Maitland v. Baldwin, 70 Hun 267, 24 NYS 29; Matter of Dodge, 129 Misc. 390, 222 NYS 247; Matter of Trowbridge, 124 Misc. 317, 208 NYS 662; Matter of Bankers' Trust Co., 82 Misc. 375, 143 NYS 843, 11 Mills Surr. 234; Farmers' L. & T. Co. v. Shaw, 56 Misc. 201, 107 NYS 337 [aff 127 App. Div. 656, 111 NYS 1118 mem]; Miller v. Douglass, 192 Wis. 486, 213 NW 320.

7. Chaplin Suspension of Alien. (3d ed) § 362 ("As applied to most cases to which the statutory rule relates, this 'reading-in' formula is undoubtedly correct, and the employment of it would lead to the same result as would the use of the statutory rule for measuring the period merely by computation 'from the time of the creation of the power.' But it is believed that there is at least one class of cases where the use of the 'reading-in' formula would lead to a different and incorrect result. The rule relating to these exceptional cases may be summarized as follows: Where of two instruments, the one creating a power of disposition and the other exercising it, the former by its own terms occasions a suspension for one life and the latter attempts by its own terms to occasion a suspension for two or more lives, and the result of incorporating the provisions of the later into the earlier would be to eliminate from consideration the suspension which occasion the suspension under the earlier instrument, the reading-in formula is inapplicable"). And see supra § 65 text and note 74.

8. Subordinate measures of statutory period see supra § 110.

9. Truitt v. Battle Creek, 205 Mich. 180, 171 NW 338; Schermerhorn v. Cotting, 131 N. Y. 48, 29 NE 980; Bailey v. Bailey, 97 N. Y. 460; Crooke v. Kings County, 97 N. Y. 421; Provost v. Provost, 70 N. Y. 141; Woodgate v. Fleet, 64 N. Y. 566; Manice v. Manice, 43 N. Y. 303; Gilman v. Reddington, 24 N. Y. 9; Ripley v. Guaranty Trust Co., 165 App. Div. 481, 151 NYS 12, 14 Mills Surr. 195; Pryer v. Pryer, 145 App. Div. 928 mem, 126 NYS 393, 130 NYS 1126 mem; Ogilby v. Hickok, 144 App. Div. 61, 128 NYS 860 [aff 202 N. Y. 614 mem, 96 NE 1123 mem]; Levy v. Hart, 54 Barb. (N. Y.) 248; Hunter v. Hunter, 31 Barb. (N. Y.) 334; Rogers v. Tilley, 20 Barb. (N. Y.) 639; McGrath v. Van Stavoren, 8 Daly (N. Y.) 454; Matter of Fellion, 132 Misc. 805, 231 NYS 9; Matter of Spitz, 129 Misc. 78, 220 NYS 816; Matter of Allen, 111 Misc. 93, 181 NYS 398 [aff 202 App. Div. 810 mem, 194 NYS 913 mem (mod on other grounds 236 N. Y. 503 mem, 142 NE 260 mem)]; Matter of Mills, 107 Misc. 592, 176 NYS 883; Matter of Rounds, 105 Misc. 273, 172 NYS 758; Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974; Matter of Mikantowicz, 60 Misc. 273, 113 NYS 278, 6 Mills Surr. 516; Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403; Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 NYS 168; Fenton v. Fenton, 35 Misc. 479, 71 NYS 1083; De Peyster v. Beekman, 55 HowPr (N. Y.) 90; Grout v. Van Schoonhoven, 1 Sandf. Ch. (N. Y.) 336; and cases infra note 10.

"The fact that a number of persons are to be benefited under the trust . . . [during the measuring lives] does not create a trust beyond two lives in being contrary to the statute." Bailey v. Bailey, 97 N. Y. 460, 469.

[a] **A gift of income from a trust fund until a specified aggregate sum shall have been paid** creates no illegal suspension of the absolute ownership, where the trust fund from which the income so bequeathed is to be derived will by its terms end within the statutory period. Matter of Mills, 107 Misc. 592, 176 NYS 883.

[b] **A trust for the lives of nine persons** is made harmless by a provision for its expiration upon the death of a person in being. Crooke v. Kings County, 97 N. Y. 421.

[c] **A trust to cease on the death of the trustee** (1) does not unlawfully suspend the power of alienation, although for the benefit of more than two cestuis. Hunter v. Hunter, 31 Barb. (N. Y.) 334. But see Allen v. Litchard, 93 Misc. 197, 157 NYS 19 [aff 179 App. Div. 959 mem, 166 NYS 1085 mem] (where the court failed to apply this rule). (2) Un-

without regard to the number of lives that may run their course before the termination of the life or lives by whose duration the term is measured,[10] and whether or not such takers or beneficiaries are in being[11] or ascertainable[12] at the creation of the interests, provided they must become ascertained, if at all, during the term.[13]

A provision for changing trustees at a future time causes no unlawful suspension where the ultimate duration of the trust is properly restricted.[14]

[§ 117] **d. Possibility of Exceeding Statutory Period—(1) In General.** In determining whether a suspension of the alienability or ownership of property or a postponement of its vesting may continue for a longer period than that prescribed by statute,[15] there must be considered not what has actually happened since the creation of the limitation but what might have happened;[16] and any limitation which, in any contingency possible under the circumstances existing at its creation, may create a suspension or postponement for an illegal period is void,[17] even though in other contingencies the term would end within the period prescribed by statute.[18] Accordingly, to be valid, every interest must be so lim-

der a will giving property to the testator's wife for life, in trust for herself and a son, and on her death appointing a sister as trustee and giving her one third of the income during her life, the trust was limited to the lives of the widow and sister, and consequently did not offend the statute. Stewart v. Stewart, 205 App. Div. 587, 200 NYS 168.

[d] **Where the trust res is only a life estate,** the trust cannot create an illegal suspension, notwithstanding the number of beneficiaries named or the interests created, since it must terminate upon the death of the cestui que vie. Grout v. Van Schoonhoven, 1 Sandf. Ch. (N. Y.) 336.

[e] **A trust to pay income to the employees of a corporation** is valid where the trust term is restricted to the duration of the lives of two persons in being. Matter of Allen, 111 Misc. 93, 181 NYS 398 [aff 202 App. Div. 810 mem, 194 NYS 913 mem (mod on other grounds 236 N. Y. 503 mem, 142 NE 260 mem)].

[f] **A life estate by entirety,** limited to a husband and wife, can suspend the power of alienation no longer than the duration of one life, that of the survivor, who takes the whole estate, although both tenants enjoy the benefit of the property for their lives, and consequently a further life estate, with remainder over, can create no illegal suspension under a statute limiting the period to that of two lives. Truitt v. Battle Creek, 205 Mich. 180, 171 NW 338.

10. McInerny v. Haase, 163 Mich. 364, 128 NW 215; Bird v. Pickford, 141 N. Y. 18, 35 NE 938; Schermerhorn v. Cotting, 131 N. Y. 48, 29 NE 980; Hunter v. Hunter, 17 Barb. (N. Y.) 25; Matter of Allen, 111 Misc. 93, 112, 181 NYS 398 [aff 202 App. Div. 810 mem, 194 NYS 913 mem (mod on other grounds 236 N. Y. 503 mem, 142 NE 260 mem)]; Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 NYS 168; In re Harrington, 142 Wis. 447, 125 NW 986; and cases supra note 9.

"The validity of a suspension of the absolute ownership, or of the power of alienation does not depend on the number of lives of beneficiaries that may run their course while the suspension lasts, but only upon the number of lives by which the duration of the suspension is measured." Matter of Allen, supra.

"The period of suspension is not determined by the fact that more than two lives were in being when the estate was created who by a contingency might share in its distribution, but by the number of life estates between the creation of the estate and its enjoyment in possession." McInerny v. Haase, 163 Mich. 364, 367, 128 NW 215.

[a] **"The question is** not how many may die during the term of the suspension, but how many of those upon whose lives the suspension is made to depend. Otherwise, as thousands die every hour, there could be no suspension at all." Hunter v. Hunter, 17 Barb. (N. Y.) 25, 91.

11. Berry v. Lebus, 56 Cal. A. 378, 205 P 471; Swain v. Bowers, (Ind. A.) 158 NE 598; Edwards v. Bates, 79 Ind. A. 578, 139 NE 192; McInerny v. Haase, 163 Mich. 364, 128 NW 215; Torpy v. Betts, 123 Mich. 239, 81 NW 1094; Woodgate v. Fleet, 64 N. Y. 566; Gilman v. Reddington, 24 N. Y. 9; Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403; De Peyster v. Beekman, 55 HowPr (N. Y.) 90.

12. Gilman v. Reddington, 24 N. Y. 9.

13. See cases supra notes 11, 12.

14. Clark v. Goodridge, 51 Misc. 140, 100 NYS 824.

15. Statutory period see supra §§ 98–115.

16. In re Steele, 124 Cal. 533, 57 P 564; Fowler v. Duhme, 143 Ind. 248, 42 NE 623; Dean v. Mumford, 102 Mich. 510, 61 NW 7; In re Perkins, 245 N. Y. 478, 157 NE 750; In re Trevor, 239 N. Y. 6, 145 NE 66; In re Horner, 237 N. Y. 489, 143 NE 655; In re Wilcox, 194 N. Y. 288, 87 NE 497; In re Mount, 185 N. Y. 162, 77 NE 999; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Matter of Keesey, 222 App. Div. 577, 226 NYS 712 [mod on other grounds 249 N. Y. 154, 163 NE 133 (rearg den 249 N. Y. 568 mem, 164 NE 586 mem)]; Matter of Gallien, 221 App. Div. 409, 223 NYS 491 [rev on other grounds 247 N. Y. 195, 160 NE 8]; Rasquin v. Hamersley, 152 App. Div. 522, 137 NYS 578 [aff 208 N. Y. 630 mem, 102 NE 1112 mem]; Chastain v. Tilford, 138 App. Div. 746, 123 NYS 513 [aff 201 N. Y. 538, 94 NE 646]; Simpson v. Trust Co. of America, 129 App. Div. 200, 113 NYS 370 [aff 59 Misc. 96, 112 NYS 155, 112 NYS 370, and aff 197 N. Y. 586 mem, 91 NE 1120 mem]; Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698 [rev on other grounds 195 N. Y. 28, 87 NE 783]; New York L. Ins., etc., Co. v. Cary, 120 App. Div. 264, 105 NYS 125 [rev on other grounds 191 N. Y. 33, 83 NE 598]; Radley v. Kuhn, 28 Hun 573 [mod on other grounds 97 N. Y. 26]; Brown v. Evans, 34 Barb. (N. Y.) 594; Matter of Gallien, 128 Misc. 370, 218 NYS 687 [aff 221 App. Div. 409, 223 NYS 491 (rev on other grounds 247 N. Y. 195, 160 NE 8)]; Rosenstein v. Rosenstein, 103 Misc. 1, 170 NYS 280; District Nursing Assoc. v. Koerner, 91 Misc. 265, 154 NYS 776, 15 Mills Surr. 161 [aff 173 App. Div. 1003 mem, 159 NYS 1109 mem].

[a] **Election of widow to take under statute.**—Where a will attempted to set up a trust for the lifetimes of the testator's widow and of two other persons, the fact that the widow elected to take her distributed share under the statute rather than to accept the testamentary provisions for her benefit will not validate the trust, which was invalid when the will creating it took effect. Dean v. Mumford, 102 Mich. 510, 61 NW 7.

Circumstances existing at creation see supra §§ 111–113.

17. In re Maltman, 195 Cal. 643, 234 P 898; Matter of Whitney, 176 Cal. 12, 167 P 399; In re Steele, 124 Cal. 533, 57 P 564; In re Cavarly, 119 Cal. 406, 51 P 629; Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97; In re Brown, 198 Mich. 544, 165 NW 929; In re Perkins, 245 N. Y. 478, 157 NE 750; In re Horner, 237 N. Y. 489, 143 NE 655; In re Wilcox, 194 N. Y. 288, 87 NE 497; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Knox v. Jones, 47 N. Y. 389; Schettler v. Smith, 41 N. Y. 328; Jennings v. Jennings, 7 N. Y. 547; Matter of Hardgrove, 223 App. Div. 646, 229 NYS 193; Morris v. New York, 154 App. Div. 332, 139 NYS 93 [aff 208 N. Y. 556 mem, 101 NE 1111 mem]; Chastain v. Tilford, 138 App. Div. 746, 123 NYS 513 [aff 201 N. Y. 538, 94 NE 646]; Simpson v. Trust Co. of America, 129 App. Div. 200, 113 NYS 370 [aff 59 Misc. 96, 112 NYS 155, 112 NYS 370, and aff 197 N. Y. 586 mem, 91 NE 1120 mem]; Tonnele v. Wetmore, 124 App. Div. 686, 109 NYS 349 [motion to dism app den 192 N. Y. 583 mem, 85 NE 1116 mem, and rev on other grounds 195 N. Y. 436, 88 NE 1068]; Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698 [rev on other grounds 195 N. Y. 28, 87 NE 783]; Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99; Bindrim v. Ullrich, 64 App. Div. 444, 72 NYS 239 [app dism 173 N. Y. 587 mem, 65 NE 1114 mem]; Matter of Gallien, 128 Misc. 370, 218 NYS 687 [aff 221 App. Div. 409, 223 NYS 491 (rev on other grounds 247 N. Y. 195, 160 NE 8)]; Matter of Berry, 124 Misc. 145, 207 NYS 651; Matter of Douglass, 120 Misc. 193, 198 NYS 792; Rosenstein v. Rosenstein, 103 Misc. 1, 170 NYS 280; Matter of Turner, 82 Misc. 25, 143 NYS 692, 11 Mills Surr. 29; Matter of Perry, 48 Misc. 285, 96 NYS 879; Union Trust Co. v. Metcalfe, 37 Misc. 672, 76 NYS 375; Simpson v. Trust Co. of America, 112 NYS 370, 59 Misc. 96, 112 NYS 155 [aff 129 App. Div. 200, 113 NYS 370 (aff 197 N. Y. 586 mem, 91 NE 1120 mem)]; Matter of Russell, 8 NYSt 754, 5 Dem. Surr. 388; Hawley v. James, 16 Wend. (N. Y.) 61; Kane v. Gott, 7 Paige (N. Y.) 521 [aff 24 Wend. 641, 35 AmD 641]; Craig v. Hone, 2 Edw. (N. Y.) 554; Ford v. Ford, 70 Wis. 19, 33 NW 188, 5 AmSR 117, 72 Wis. 621, 40 NW 502.

"The law of this State requires all future estates to be so limited that in every possible contingency they will absolutely terminate within the period allowed or they will be void." In re Perkins, 245 N. Y. 478, 481, 157 NE 750. To same effect Kane v. Gott, 7 Paige (N. Y.) 521 [aff 24 Wend. 641, 35 AmD 641].

"In considering the validity of a disposition of real property under which an attempt is made to restrain alienation, the effect is to be considered as if the alienation was restrained for the longest period contemplated." Tonnele v. Wetmore, 124 App. Div. 686, 700, 109 NYS 349 [motion to dism app den 192 N. Y. 583 mem, 85 NE 1116 mem, and rev on other grounds 195 N. Y. 436, 88 NE 1068].

18. In re Horner, 237 N. Y. 489, 143 NE 655; In re Wilcox, 194 N. Y. 288, 87 NE 497; In re Mount, 185 N. Y. 162, 77 NE 999; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Knox v. Jones, 47 N. Y. 389; Schettler v. Smith, 41 N. Y. 328; Morris v. New York, 154 App. Div. 332, 139 NYS 93 [aff 208 N. Y. 556 mem, 101 NE 1111 mem]; Rasquin v. Hamersley, 152 App. Div. 522, 137 NYS 578 [aff 208 N. Y. 630 mem, 102 NE 1112 mem]; Chastain

ited that by no possibility can its alienability or ownership be suspended or its vesting be postponed beyond the statutory period.[19]

A power of appointment,[20] however, is not valid because an appointment may be made which would cause an illegal suspension or postponement, if the power can be completely exercised without violating the statute.[21]

[§ 118] **(2) Possibility of Issue.**[22] In determining whether by any possibility a suspension or postponement may continue beyond the statutory period,[23] it will not be assumed that any person may not have issue born in the future.[24]

[§ 119] **3. Suspension of Alienability—a. In General.** As a general rule, a suspension of the power of alienation of property occurs when, and only when, there are no persons in being and ascertainable by whom unitedly an absolute fee or interest in possession can be conveyed;[25] and, accordingly, when under the terms of a limitation every person who is or in any contingency may become entitled to any beneficial interest in the property can convey or transfer his interest or expectancy, there is no suspension of the power,[26] regardless of the number of

v. Tilford, 138 App. Div. 746, 123 NYS 513 [aff 201 N. Y. 538, 94 NE 646]; Brown v. Evans, 34 Barb. (N. Y.) 594; Rosenstein v. Rosenstein, 103 Misc. 1, 170 NYS 280; Matter of Turner, 82 Misc. 25, 143 NYS 692, 11 Mills Surr. 29; Matter of Perry, 48 Misc. 285, 96 NYS 879; Simpson v. Trust Co. of America, 112 NYS 370, 59 Misc. 96, 112 NYS 155 [aff 129 App. Div. 200, 113 NYS 370 (aff 197 N. Y. 586 mem, 91 NE 1120 mem)].

19. Fowler v. Duhme, 143 Ind. 248, 42 NE 623; Hause v. O'Leary, 136 Minn. 126, 161 NW 392; Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825; In re Perkins, 245 N. Y. 478, 157 NE 750; In re Hitchcock, 222 N. Y. 57, 118 NE 220; In re Wilcox, 194 N. Y. 288, 87 NE 497; In re Mount, 185 N. Y. 162, 77 NE 999; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Schettler v. Smith, 41 N. Y. 328; Matter of Trevor, 209 App. Div. 1, 204 NYS 387 [mod 239 N. Y. 6, 145 NE 66 (rearg den 239 N. Y. 579 mem, 147 NE 203 mem)]; Matter of Trevor, 207 App. Div. 673, 202 NYS 862 [mod 120 Misc. 22, 197 NYS 719]; Morris v. New York, 154 App. Div. 332, 139 NYS 93 [aff 208 N. Y. 556 mem, 101 NE 1111 mem]; Rasquin v. Hamersley, 152 App. Div. 522, 137 NYS 578 [aff 208 N. Y. 630 mem, 102 NE 1112 mem]; Chastain v. Tilford, 138 App. Div. 746, 123 NYS 513 [aff 201 N. Y. 538, 94 NE 646]; Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698 [rev on other grounds 195 N. Y. 28, 87 NE 783], Rosenstein v. Rosenstein, 103 Misc. 1, 170 NYS 280; Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561; Matter of Perry, 48 Misc. 285, 96 NYS 879; Matter of Russell, 8 NYSt 754, 5 Dem. Surr. 388; Eggleston v. Swartz, 145 Wis. 106, 129 NW 48; Tyson v. Tyson, 96 Wis. 59, 71 NW 94.

"The rule is that where, by the terms of an instrument creating an estate, there may be an unlawful suspension of the power of alienation or of the absolute ownership, the limitation is void, although it turn out by subsequent events that no actual suspension beyond the prescribed period would have taken place. In other words, to render such future estates created by will valid, they must be so limited that in every possible contingency they will absolutely terminate within the period of two lives in being at the death of the testator, or the estate will be held void." Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 99, 69 NE 283, 67 LRA 146.

20. Powers of appointment in general see Powers [31 Cyc 1058 et seq]; Wills [40 Cyc 1828 et seq].

21. Hillen v. Iselin, 144 N. Y. 365, 39 NE 368; Cheever v. Cheever, 172 App. Div. 353, 157 NYS 428.

22. Presumption as to possibility of procreation see Evidence §§ 62, 63.

23. Possibility of illegal term see supra § 117.

24. Rozell v. Rozell, 217 Mich. 324, 186 NW 489; Taggart v. Murray, 53 N. Y. 233; Miller v. Macomb, 26 Wend. (N. Y.) 229.

25. Cal.—Toland v. Toland, 123 Cal. 140, 55 P 681; Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97; Goldtree v. Thompson, 79 Cal. 613, 22 P 50.

Mich.—Russell v. Musson, 240 Mich. 631, 216 NW 428; Windiate v. Lorman, 236 Mich. 531, 211 NW 62; Otis v. Arntz, 198 Mich. 196, 164 NW 498; Casgrain v. Hammond, 134 Mich. 419, 96 NW 510, 104 AmSR 610; Fitz Gerald v. Big Rapids, 123 Mich. 281, 82 NW 56; State v. Holmes, 115 Mich. 456, 73 NW 548.

Minn.—Larson v. Johnston, 175 Minn. 502, 221 NW 871; Mineral Land Inv. Co. v. Bishop Iron Co., 134 Minn. 412, 159 NW 966, LRA1917D 900; Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825.

N. Y.—Williams v. Montgomery, 148 N. Y. 519, 43 NE 57; Sawyer v. Cubby, 146 N. Y. 192, 40 NE 869; Murphy v. Whitney, 140 N. Y. 541, 35 NE 930, 24 LRA 123, 31 AbbNCas 86; Genet v. Hunt, 113 N. Y. 158, 21 NE 91; Robert v. Corning, 89 N. Y. 225; Greene v. Fitzgerald, 178 App. Div. 941 mem, 165 NYS 36 [aff 223 N. Y. 718 mem, 120 NE 864 mem]; Farley v. Secor, 167 App. Div. 80, 152 NYS 787; Buschmann v. McDermott, 154 App. Div. 515, 139 NYS 314; Matter of Bray, 118 App. Div. 533, 102 NYS 989; Matter of Roberts, 112 App. Div. 732, 98 NYS 809; Morton v. Morton, 8 Barb. 18; Emmons v. Cairns, 3 Barb. 243; Matter of Perry, 48 Misc. 285, 96 NYS 879.

Wis.—Ford v. Ford, 70 Wis. 19, 33 NW 188, 5 AmSR 117, 72 Wis. 621, 40 NW 502.

And see cases infra §§ 120-129.

"The general test of alienability is that there are persons in being who can make a perfect title." Genet v. Hunt, 113 N. Y. 158, 172, 21 NE 91.

Postponement of possession see infra §§ 139, 140.

26. Ariz.—Lowell v. Lowell, 29 Ariz. 138, 240 P 280.

Cal.—In re Phelps, 182 Cal. 752, 190 P 17; Matter of Campbell, 149 Cal. 712, 87 P 573; Blakeman v. Miller, 136 Cal. 138, 68 P 587, 89 AmSR 120; Staacke v. Bell, 125 Cal. 309, 57 P 1012; Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 P 891; Toland v. Toland, 123 Cal. 140, 55 P 681; Camp v. Land, 122 Cal. 167, 54 P 839; Goldtree v. Thompson, 79 Cal. 613, 22 P 50; Withers v. Bousfield, 42 Cal. A. 304, 183 P 855. See Atlantic Trust Co. v. Woodbridge Canal, etc., Co., 86 Fed. 975 (construing California statute).

Ind.—Swain v. Bowers, (A.) 158 NE 598.

Iowa.—Todhunter v. Des Moines, etc., R. Co., 58 Iowa 205, 12 NW 267. See Montpelier First Nat. Bank v. Sioux City Terminal R., etc., Co., 69 Fed. 441 [aff 82 Fed. 124, 27 CCA 73 (aff 173 U. S. 99, 19 SCt 341, 43 L. ed. 628)] (construing Iowa statute)

Mich.—Russell v. Musson, 240 Mich. 631, 216 NW 428; Fitz Gerald v. Big Rapids, 123 Mich. 281, 82 NW 56; Case v. Green, 78 Mich. 540, 44 NW 578. See Ingersoll Engineering, etc., Co. v. Crocker, 228 Fed. 844, 143 CCA 242 (construing Michigan statute). See also Root v. Snyder, 161 Mich. 200, 126 NW 206 (apparently applying the rule in a case of joint tenancy).

Minn.—Larson v. Johnson, 175 Minn. 502, 221 NW 871; Mineral Land Inv. Co. v. Bishop Iron Co. 134 Minn. 412, 159 NW 966, LRA1917D 900; Buck v. Walker, 115 Minn. 239, 132 NW 205, AnnCas1912D 882.

N. Y.—In re Wilcox, 194 N. Y. 288, 87 NE 497; Williams v. Montgomery, 148 N. Y. 519, 43 NE 57; Murphy v. Whitney, 140 N. Y. 541, 35 NE 930, 24 LRA 123, 31 AbbNCas 86; Tucker v. Bishop, 16 N. Y. 402; Matter of Seif, 212 App. Div. 558, 209 NYS 341; Epstein v. Werbelovsky, 193 App. Div. 428, 184 NYS 330 [rev 108 Misc. 214, 177 NYS 554, and aff 233 N. Y. 525 mem, 135 NE 902 mem]; Buschmann v. McDermott, 154 App. Div. 515, 139 NYS 314; Wells v. Squires, 117 App. Div. 502, 102 NYS 597 [aff 191 N. Y. 529 mem, 84 NE 1122 mem]; Spitzer v. Spitzer, 38 App. Div. 436, 56 NYS 470; Buchanan v. Tebbetts, 69 Hun 81, 23 NYS 244; Matter of Stanton, 107 Misc. 326, 177 NYS 743; Durkee v. Smith, 90 Misc. 92, 153 NYS 316 [aff 171 App. Div. 72, 156 NYS 920 (motion to dism app den 218 N. Y. 619 mem, 112 NE 1057 mem, and aff 219 N. Y. 604 mem, 114 NE 1066 mem)]; Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561; Kane v. Gott, 7 Paige 521 [aff 24 Wend. 641, 35 AmD 641]. Compare Crehan v. Megargel, 234 N. Y. 67, 136 NE 296 (holding that in a trust agreement by the terms of which the trustee was to invest the trust funds in a partnership and become a special partner therein for five years, an agreement among the subscribers that if the partnership was dissolved by the death of their trustee, the special partner, they would enter into negotiations for the appointment of a new special partner and contribute as capital the sums they received or were entitled to upon the dissolution of the old partnership, did not suspend the absolute ownership of the fund beyond a life in being); Burt v. Oneida Community, 137 N. Y. 346, 33 NE 307, 19 LRA 297 (where a contract between the members of a communistic association under the terms of which the property of each become an inseparable part of the property held in common by the members of the community, no part of which could be demanded by a member upon withdrawal, was held to impose no unlawful restraint upon the alienation of property, for a title could be conveyed at any time by the united action of the members of the community).

Wis.—Baker v. Stern, 194 Wis. 233, 216 NW 147, 58 ALR 462.

See cases infra notes 27-29; and infra §§ 120-129.

"In order to avoid a suspension of alienability, it is sufficient if there are persons in being who, by combining the several estates, rights, interests, and possibilities that they represent or are authorized to speak for, can, if they all wish to, patch up an absolute fee." Matter of Stanton, 107 Misc. 326, 177 NYS 743, 745 [quot Chaplin Suspension of Alien. (2d ed) § 39].

[a] **Agreement by common owners not to partition.**—An agreement among the owners in common of certain real estate that none would bring an action for the partition thereof without the consent of all is not invalid as suspending the power of alienation, inasmuch as all the owners acting together can at any time they see fit convey title; and in addition the death of any one of the parties would terminate the agreement.

persons in whom the right of alienation resides,[27] how many or what estates are created or exist in the property,[28] and whether they are vested or contingent.[29]

This rule is, however, subject to the qualification that, if the proceeds of property so conveyed are by the terms of the limitation made inalienable, a suspension continues within the meaning of the statute notwithstanding the alienability of the particular property.[30]

The mere possibility of releasing or forfeiting an interest to which one is or may become entitled does not remove the interest from the scope of the statute,[31] such possibility not being the power of alienation contemplated by the statute.[32]

Methods of occasioning suspension. In general, the power of alienation may be suspended only by an express trust or power in trust or by a contingent limitation.[33] It should be noted, however, that not every such interest or limitation causes a suspension.[34]

[§ 120] **b. Legal Estates—(1) In General.** Under the rule and subject to the qualification above stated,[35] a vested remainder in real property causes no suspension of the power of alienation where the remaindermen and the owners of the prior estates have the power to convey an absolute fee;[36] and no suspension is occasioned by the limitation of any future legal estate on a contingency of time or event only, where the persons in whom the estate will vest, if at all, are in being and ascertainable,[37] nor on any other contingency, where all the persons who

Buschmann v. McDermott, 154 App. Div. 515, 139 NYS 314.

[b] **The grant or reservation of an equitable easement** for a term without a stated limit, or perpetually, does not suspend the power of alienation, since if all persons interested join in a deed a perfect title can be conveyed at any time. Ingersoll Engineering, etc., Co. v. Crocker, 228 Fed. 844, 143 CCA 242 [rev 205 Fed. 99] (construing Michigan statute).

Obviation of suspension by power of sale or transfer see infra § 123.

27. Chenoweth v. Bullitt, 224 Ky. 698, 6 SW (2d) 1061; Bowling v. Grace, 219 Ky. 496, 293 SW 964; Williams v. Montgomery, 148 N. Y. 519, 526, 43 NE 57; Buschmann v. McDermott, 154 App. Div. 515, 139 NYS 314; Durkee v. Smith, 90 Misc. 92, 153 NYS 316 [aff 171 App. Div. 72, 156 NYS 920 (motion to dism app den 218 N. Y. 619 mem, 112 NE 1057 mem, and aff 219 N. Y. 604 mem, 114 NE 1066 mem)]; Matter of Perry, 48 Misc. 285, 96 NYS 879; Baker v. Stern, 194 Wis. 233, 216 NW 147, 58 ALR 462.

"Where there are living parties who have unitedly the entire right of ownership, the statute has no application. . . . The ownership is absolute whether the power to sell resides in one individual or in several. If there is a present right to dispose of the entire interest, even if its exercise depends upon the consent of many persons, there is no unlawful suspension of the power of alienation. The ownership, although divided, continues absolute." Williams v. Montgomery, supra.

28. Matter of Campbell, 149 Cal. 712, 87 P 573; Matter of Perry, 48 Misc. 285, 96 NYS 879.

29. Swain v. Bowers, (Ind. A.) 158 NE 598; Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976; Buck v. Walker, 115 Minn. 239, 132 NW 205, AnnCas1912D 882; Matter of Perry, 48 Misc. 285, 96 NYS 879.

[a] **"The test** of suspension [of the power of alienation] . . . is not to be found in the distinction between vested and contingent estates, but solely in the existence, or nonexistence, of persons by whom an absolute fee in possession can be conveyed." Chaplin Suspension of Alien. (3d ed) § 10.

Contingent estates see infra § 120.

Requirement of vesting of remainders see infra § 138.

30. Chaplin Suspension of Alien. (3d ed) §§ 35, 36. See Matter of Allen, 111 Misc. 93, 181 NYS 398 [aff 202 App. Div. 810 mem, 194 NYS 913 mem (mod on other grounds 236 N. Y. 503 mem, 142 NE 260 mem)] (dictum); and cases infra § 123 note 62.

31. Hawley v. James, 16 Wend. (N. Y.) 61.

32. Hawley v. James, supra.

[a] **"This would not be a power to alien or assign,** but to destroy an estate; not to sell for value, but to make a gift . . . a very different power, in respect to the transmission of property, from the one to sell for value. . . . This cannot be the power of alienation contemplated in the 14th and 15th sections of the statute. They mean a power to sell and convey in the ordinary way for value." Hawley v. James, 16 Wend. (N. Y.) 61, 122.

33. Radley v. Kuhn, 97 N. Y. 26; Matter of Kalter, 86 Misc. 621, 148 NYS 921, 12 Mills Surr. 384; and cases infra this note.

[a] **In some cases it is said there are only two ways** (1) by which a suspension of alienation may be accomplished: Either by the creation of a trust which vests the estate in trustees, or by the creation of contingent estates vesting upon the occurrence of some future event. Wilber v. Wilber, 165 N. Y. 451, 59 NE 264; Murphy v. Whitney, 140 N. Y. 541, 35 NE 930, 24 LRA 123, 31 AbbNCas 86; Everitt v. Everitt, 29 N. Y. 39; Leonard v. Burr, 18 N. Y. 96; Matter of Roberts, 112 App. Div. 732, 98 NYS 809. (2) It would seem, however, that the possibility of suspension by powers is not intended to be denied by these cases. Thus, it has been said: "There are but two modes in which the absolute power of alienation can be suspended, viz.: by an express trust or power in trust . . . or by a contingent limitation." Radley v. Kuhn, 97 N. Y. 26, 34 [quot Matter of Kalter, 86 Misc. 621, 623, 148 NYS 921, 12 Mills Surr. 384].

34. See infra §§ 120-124.

35. See supra § 119.

36. Russell v. Musson, 240 Mich. 631, 216 NW 428; Kemp v. Sutton, 233 Mich. 249, 206 NW 366; Case v. Green, 78 Mich. 540, 44 NW 578; Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 736; In re Wilcox, 194 N. Y. 288, 87 NE 497; Wilber v. Wilber, 165 N. Y. 451, 59 NE 264; Durfee v. Pomeroy, 154 N. Y. 583, 49 NE 132; Corse v. Chapman, 153 N. Y. 466, 47 NE 812; Murphy v. Whitney, 140 N. Y. 541, 35 NE 930, 24 LRA 123, 31 AbbNCas 86; Bailey v. Bailey, 97 N. Y. 460; Matter of Bray, 118 App. Div. 533, 102 NYS 989; Thieler v. Rayner, 115 App. Div. 626, 100 NYS 993 [aff 190 N. Y. 546 mem, 83 NE 1133 mem]; Kent v. Kent, 99 App. Div. 112, 90 NYS 828; Tracy v. Ames, 4 Lans. (N. Y.) 500; Emmons v. Cairns, 3 Barb. (N. Y.) 243; Adams v. McKee, 121 Misc. 215, 200 NYS 765; Graham v. Graham, 49 Misc. 4, 97 NYS 779; Nichols v. Nichols, 42 Misc. 381, 86 NYS 719; Kessler v. Friede, 29 Misc. 187, 60 NYS 891; Jessup v. Pringle Memorial Home, 27 Misc. 427, 59 NYS 207 [aff 47 App. Div. 622, 62 NYS 308]; Jefferson v. Bangs, 144 NYS 1054 [aff 169 App. Div. 102, 154 NYS 439 (aff 226 N. Y. 612 mem, 123 NE 872 mem)]. Compare Mills v. Mills, 50 App. Div. 221, 63 NYS 771 (applying the rule stated in the text where a cestui's beneficial interest for life was capable of being merged into the remainder). Contra Hinckley v. Mayborne, 92 Hun 473, 36 NYS 958 (dictum).

[a] **Rule applied.**—(1) Where one conveyed certain property but reserved therefrom a parcel used for a lime kiln so long as the same should be used for the purpose of burning lime, a determinable fee was reserved and the grantee had a future executory estate in fee, reducible to possession in case the contingency should occur, and this being vested there was no suspension of the power of alienation. Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 736. (2) A gift in trust for the period of one life followed by a limitation of a legal life estate and vested remainder creates no suspension beyond one life. Durfee v. Pomeroy, 154 N. Y. 583, 49 NE 132. (3) Where a remainder is indefeasibly vested in a person in esse, three intervening life estates given to persons in being do not suspend the power of alienation. Jefferson v. Bangs, 144 NYS 1054 [aff 169 App. Div. 102, 154 NYS 439 (aff 226 N. Y. 612 mem, 123 NE 872 mem)]. (4) Where testatrix devised to her husband a legal estate for life, with remainder in trust for the lives of her two sons, with an ultimate remainder to the grandchildren of the testatrix who should be living at the death of both the sons, no illegal suspension of the power of alienation was caused, for the husband could convey his life estate at any time during its continuance; and if at the death of both sons the husband was already dead, the entire property would be released from the suspension; and if at the death of the sons the husband was still living, the ultimate remainder would vest absolutely in the grandchildren of testatrix then living, and they and the husband would, among them, hold the entire fee with power to convey absolutely. Matter of Hurlbut, 51 Misc. 263, 100 NYS 1098, 5 Mills Surr. 464.

37. Cal.—In re Phelps, 182 Cal. 752, 190 P 17.

Ky.—Patterson v. Patterson, 135 Ky. 339, 122 SW 169.

Mich.—Fitz Gerald v. Big Rapids, 123 Mich. 281, 82 NW 56.

N. Y.—Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 736; Sawyer v. Cubby, 146 N. Y. 192, 40 NE 869; Murphy v. Whitney, 140 N. Y. 541, 35 NE 930, 24 LRA 123, 31 AbbNCas 86; Beardsley v. Hotchkiss, 96 N. Y. 201; Mott v. Ackerman, 92 N. Y. 539; Everitt v. Everitt, 29 N. Y. 39; Eells v. Lynch, 21 N. Y. Super. 465. But see Allen v. Litchard, 93 Misc. 197, 157 NYS 19 [aff 179 App. Div. 959 mem, 166 NYS 1085 mem] (where a devise of real estate, subject to an agreement by the devisee to convey it to designated persons who were in being at the time the will took effect, was treated as a trust and was held to suspend the power of alienation).

Wis.—Hughes v. Hughes, 91 Wis. 138, 64 NW 851.

by any possibility might become entitled to any interest in the estate are in being and can be ascertained.[38] But the power of alienation is suspended by a limitation under which a person not in being may become entitled to an interest or estate in the property.[39]

A conditional limitation[40] operating to divest an estate otherwise absolute upon a future contingency does not suspend the power of alienation if the persons who will become entitled, if at all, under such limitation are in being and ascertainable;[41] but if any persons not in being may become entitled thereunder the power of alienation is suspended so long as such contingency exists.[42]

[§ 121] **(2) Reversions, Possibilities of Reverter, and Rights of Entry.** Reversions,[43] possibilities of reverter,[44] and rights of entry for condition bro-

And see cases infra note 41.

Requirement that remainders vest within statutory period see infra § 138.

38. Torpy v. Betts, 123 Mich. 239, 81 NW 1094; Wilson v. White, 109 N. Y. 59, 15 NE 749, 4 AmSR 420; Nellis v. Nellis, 99 N. Y. 505, 3 NE 59; Beardsley v. Hotchkiss, 96 N. Y. 201; Everitt v. Everitt, 29 N. Y. 39; Epstein v. Werbelovsky, 193 App. Div. 428, 184 NYS 330 [rev 108 Misc. 214, 177 NYS 554, and aff 233 N. Y. 525 mem, 135 NE 902 mem]; Greene v. Fitzgerald, 178 App. Div. 941 mem, 165 NYS 36 [aff 223 N. Y. 718 mem, 120 NE 864 mem]; Morton v. Morton, 8 Barb. (N. Y.) 18; Matter of Stanton, 107 Misc. 326, 177 NYS 743. But see Casgrain v. Hammond, 134 Mich. 419, 96 NW 510, 104 AmSR 610; State v. Holmes, 115 Mich. 456, 73 NW 548 (both holding that when it is uncertain in which of two or more persons in being a remainder will vest, they have nothing to convey, and therefore there are no persons in being who together can convey the entire fee); Dote v. Yost, 188 App. Div. 792, 177 NYS 332; Sanford v. Goodell, 82 Hun 369, 31 NYS 490; Bowers v. Beekman, 16 Hun (N. Y.) 268; Tayloe v. Gould, 10 Barb. (N. Y.) 388 (in all of which limitations apparently unobjectionable under the principle stated in the text were held void).

[a] **Illustrations.**—(1) A gift of property to testator's widow for life, and after her death to the use of testator's five children with remainder absolutely to the survivor of them, did not create any suspension of ownership or of the power of alienation, since every person who could by any possibility or contingency become the absolute owner was then in existence, and every estate, interest, right, and possibility, present and future, vested and contingent, in the property was represented by a living person capable of alienating and conveying at his option the estate and interest represented. Matter of Stanton, 107 Misc. 326, 177 NYS 743. (2) The gift of a remainder after a life estate to testator's daughters for their lives, providing that on their deaths their shares should pass to their children, or in case of death of any daughter without children, her share should go to the children of the others, caused no suspension of the power of alienation, since the remainders vested immediately upon the testator's death in the daughters' children living at that time, subject to open and let in after-born children. Greene v. Fitzgerald, 178 App. Div. 941 mem, 165 NYS 36 [aff 223 N. Y. 718 mem, 120 NE 864 mem].

[b] **Alternative remainders.**—Where property was given in trust for two children until the younger should reach the age of twenty-one, then to be conveyed to three brothers provided they should pay a designated sum within ninety days, otherwise to be conveyed to the two children absolutely, there was no suspension of the power of alienation beyond the minority of the younger child, since upon his reaching twenty-one, he, with the other child who would be older, could join with the brothers in a deed which would effectively pass title; and the trustees would have the power to convey, Civ. Pract. Act § 1400, providing that an infant's real property or interest therein shall not be sold contrary to the provisions of a will by which it was devised, having no application after the parties were no longer infants. Epstein v. Werbelovsky, 193 App. Div. 428, 184 NYS 330 [rev 108 Misc. 214, 177 NYS 554, and aff 233 N. Y. 525 mem, 135 NE 902 mem].

39. Cal.—Matter of Van Wyck, 185 Cal. 49, 196 P 50; Berry v. Lebus, 56 Cal. A. 378, 205 P 471.

Ind.—Huxford v. Milligan, 50 Ind. 542.

Mich.—Russell v. Musson, 240 Mich. 631, 216 NW 428; Cary v. Toles, 210 Mich. 30, 177 NW 279; Defreese v. Lake, 109 Mich. 415, 67 NW 505, 63 AmSR 584, 32 LRA 744; Trufant v. Nunneley, 106 Mich. 554, 64 NW 469. But see Van Gallow v. Brandt, 168 Mich. 642, 648, 134 NW 1018 (where it was held, in the case of a woman sixty-eight years old, that the power of alienation was not suspended by a remainder to her children, inasmuch as those living could, acting in conjunction, convey the whole fee in possession, "subject only to the rights of future offspring").

N. Y.—In re Silsby, 229 N. Y. 396, 128 NE 212; Seitz v. Faversham, 205 N. Y. 197, 98 NE 385; Dana v. Murray, 122 N. Y. 604, 26 NE 21; Wilson v. White, 109 N. Y. 59, 15 NE 749, 4 AmSR 420; Chipman v. Montgomery, 63 N. Y. 221; Matter of Hinchman, 141 App. Div. 95, 125 NYS 699; Wilber v. Wilber, 45 App. Div. 158, 60 NYS 1064 [aff 165 N. Y. 451, 59 NE 264]; Brown v. Evans, 34 Barb. 594; Matter of Trowbridge, 124 Misc. 317, 208 NYS 662; Brevoort v. Townsend, 91 Misc. 143, 154 NYS 1031, 15 Mills Surr. 125; Seligman v. Seligman, 89 Misc. 194, 151 NYS 889; Matter of Turner, 82 Misc. 25, 143 NYS 692, 11 Mills Surr. 29; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; Matter of Hurlbut, 51 Misc. 263, 100 NYS 1098, 5 Mills Surr. 464; Graham v. Fountain, 2 NYS 598.

Wis.—Eggleston v. Swartz, 145 Wis. 106, 129 NW 48; In re Harrington, 142 Wis. 447, 125 NW 986; In re Adelman, 138 Wis. 120, 119 NW 929; Tyson v. Tyson, 96 Wis. 59, 71 NW 94; Saxton v. Webber, 83 Wis. 617, 53 NW 905, 20 LRA 509; Ford v. Ford, 70 Wis. 19, 33 NW 188, 5 AmSR 117, 72 Wis. 621, 40 NW 502.

See cases infra this note; and note 42.

[a] **Rule applied.**—(1) A limitation to such of the issue of a designated person as may be living at the termination of a period in excess of that permitted by statute is invalid, inasmuch as such issue may not come into being and will not be ascertainable until the end of such period and the power of alienation is accordingly illegally suspended. In re Silsby, 229 N. Y. 396, 128 NE 212; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Vanderpoel v. Loew, 112 N. Y. 167, 19 NE 481; Manice v. Manice, 43 N. Y. 303; Benedict v. Salmon, 177 App. Div. 385, 163 NYS 846 [aff 223 N. Y. 707 mem, 120 NE 858 mem]; Monarque v. Requa, 53 HowPr (N. Y.) 438; Hone v. Van Schaick, 20 Wend. (N. Y.) 564; Thomas' Estate, Tuck. Surr. (N. Y.) 367. (2) Where property is limited to one for life with remainder to his children, if any, and if he leave no children then remainder to the children of two or more other persons, children who may become entitled in remainder may come into being at any time until the death of the life tenant and all such other persons, and the power of alienation is therefore suspended beyond two lives. Du Bois v. Ray, 35 N. Y. 162, 33 HowPr 292. To same effect Rasquin v. Hamersley, 152 App. Div. 522, 137 NYS 578 [aff 208 N. Y. 630 mem, 102 NE 1112 mem].

[b] **A gift vested in the living members of a class subject to open and let in after-born members** suspends the power of alienation. Wilber v. Wilber, 45 App. Div. 158, 60 NYS 1064 [aff 165 N. Y. 451, 59 NE 264]; Morris v. Porter, 52 HowPr (N. Y.) 1. Contra Tucker v. Bishop, 16 N. Y. 402.

[c] **Corporation not in existence.**—(1) By analogy to the rule relating to natural persons not in being, it would seem that a limitation to a corporation not in existence suspends the power of alienation, so that a limitation to a corporation thereafter to be formed is void unless such corporation must necessarily be formed, if at all, within the statutory period. See Tilden v. Green, 130 N. Y. 29, 28 NE 880, 27 AmSR 487, 14 LRA 33; Peo. v. Simonson, 126 N. Y. 299, 27 NE 380; Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238; Cruikshank v. Home for Friendless, 113 N. Y. 337, 21 NE 64, 4 LRA 140; Rose v. Rose, 4 Abb. Dec. (N. Y.) 108; Matter of New York, 55 Hun 204, 7 NYS 336 [aff 119 N. Y. 660 mem, 24 NE 852 mem] (all of which involved charitable corporations, but were decided prior to the removal of such restrictions from gifts to charitable corporations by the enactment of Real Prop. L. § 113); Leonard v. Burr, 18 N. Y. 96 (where the donee was a municipal corporation not in existence at the creation of the limitation). (2) Charitable gifts see infra §§ 144, 145.

40. See Estates § 42.

41. Russell v. Musson, 240 Mich. 631, 216 NW 428; Buel v. Southwick, 70 N. Y. 581; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241.

42. Herron v. Stanton, (Ind. A.) 128 NE 363; Du Bois v. Ray, 35 N. Y. 162, 33 HowPr 292 [rev 20 N. Y. Super. 244, 5 AbbPrNS 172]; Brown v. Evans, 34 Barb. (N. Y.) 594.

[a] **Thus,** where property was given absolutely, with an executory limitation over, in case the donee should have no lawful heirs who should attain the age of twenty-one years, to persons not necessarily in being at the creation of the estate, the ultimate ownership cannot be determined until it has been ascertained whether any children the donee might have would live to such age, and the title would be suspended during his life and during the lives of each of his children who should die under the prescribed age, and until one of them should attain that age; and the limitation over is consequently void. Brown v. Evans, 34 Barb. (N. Y.) 594.

43. Case v. Green, 78 Mich. 540, 44 NW 578; Floyd v. Carow, 88 N. Y. 560; Woodgate v. Fleet, 44 N. Y. 1.

Reversions generally see Estates § 179 et seq.

Suspension created by reversioner see supra § 114.

44. Bowling v. Grace, 219 Ky. 496, 293 SW 964; Patterson v. Patterson, 135 Ky. 339, 122 SW 169; Leonard v. Burr, 18 N. Y. 96; Lougheed v. Dykeman Baptist Church, etc., 40 NYS 586; Danforth v. Oshkosh, 119 Wis. 262, 97 NW 258. But see Duncan v. Web-

ken[45] do not suspend the alienability of property.

[§ 122] **c. Beneficial Interests[46]—(1) Under Trusts—(a) In General.** Under the rule and subject to the qualification above stated,[47] trusts, the beneficial interests in which are alienable by persons in being and capable of being ascertained, do not suspend the power of alienation;[48] but, except where a right of termination or revocation exists,[49] trusts in which the beneficial interests are inalienable occasion a suspension.[50] Thus, under statutes providing that the beneficiaries thereof shall acquire no interest in the trust property, or rendering their interests inalienable,[51] and statutes prohibiting conveyances by trustees in contravention of a trust,[52] trusts to receive income or rents and profits, and to pay or apply them to the use of any person,[53] or to

ster County Bd. of Education, 205 Ky. 86, 265 SW 489 (holding that by a provision, in a deed conveying one acre of land for school purposes, that when such property was no longer used therefor it should revert to the person then owning the tract out of which such one acre was conveyed, the absolute power of alienation was suspended, inasmuch as there was no one who could join with the school board to make a good title pending the cesser of the use for school purposes). Compare Calvary Presb. Church v. Putnam, 129 Misc. 506, 221 NYS 692 [aff 221 App. Div. 502, 224 NYS 651 (aff 249 N. Y. 111, 162 NE 601)] (dictum, that if the condition cannot be released, it suspends the power of alienation).

Possibilities of reverter generally see Estates § 180.

45. Strong v. Shatto, 45 Cal. A. 29, 187 P 159; Herron v. Stanton, (Ind. A.) 128 NE 363; Plumb v. Tubbs, 41 N. Y. 442; Nicoll v. New York, etc., R. Co., 12 N. Y. 121; La Chapelle v. Burpee, 69 Hun 436, 23 NYS 453; Kramer v. Nelson, 189 Wis. 560, 208 NW 252.

[a] **Where a corporation having a right of entry was dissolved,** the contention that the power of alienation is forever suspended because no one could convey the reversionary right cannot be maintained, because, whatever the present circumstances occasioned by the cesser of the corporation's existence, the conveyance when executed created no suspension of alienability. Kramer v. Nelson, 189 Wis. 560, 208 NW 252.

Rights of entry for condition broken generally see Estates § 39 text and note 64, § 41 text and note 11.

46. Trusts in general see Trusts [39 Cyc 1].

Charitable trusts see infra §§ 144, 145.

Trusts for accumulation see supra §§ 82-87.

47. See supra § 119.

48. Cal.—Staacke v. Bell, 125 Cal. 309, 57 P 1012; Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 P 891; Camp v. Land, 122 Cal. 167, 54 P 839; Withers v. Bousfield, 42 Cal. A. 304, 183 P 855. See Atlantic Trust Co. v. Woodbridge Canal, etc., Co., 86 Fed. 975 (construing California statute).

Ky.—Radford v. Fidelity, etc., Trust Co., 185 Ky. 453, 215 SW 285 (construing Indiana statute).

Mich.—Michigan Trust Co. v. Baker, 226 Mich. 72, 196 NW 976. Compare Lounsbury v. Square Lake Burial Assoc., 170 Mich. 645, 129 NW 36, 137 NW 513 (where a testamentary gift to the trustees of a cemetery association to be used for the improvement of the cemetery was held not to violate the statute, there being no restraint upon alienation of the corpus).

N. Y.—Radley v. Kuhn, 97 N. Y. 26; Peabody v. Kent, 153 App. Div. 286, 138 NYS 32 [mod 213 N. Y. 154, 107 NE 51]; Wells v. Squires, 117 App. Div. 502, 102 NYS 597 [aff 191 N. Y. 529 mem, 84 NE 1122 mem]; Matter of Stanton, 107 Misc. 326, 177 NYS 743; Hawley v. James, 16 Wend. 61. But see Allen v. Litchard, 93 Misc. 197, 157 NYS 19 [aff 179 App. Div. 959 mem, 166 NYS 1085 mem] (where a trust to convey real estate to designated persons in being at the creation of the trust, when they should arrive at a specified age, was held, if an active trust, to suspend the power of alienation).

Wis.—Baker v. Stern, 194 Wis. 233, 216 NW 147, 58 ALR 462; Miller v. Douglass, 192 Wis. 486, 213 NW 320; In re Adelman, 138 Wis. 120, 119 NW 929; Holmes v. Walter, 118 Wis. 409, 95 NW 380, 62 LRA 986.

"The mere creation of a trust does not ipso facto suspend the power of alienation." Wells v. Squires, 117 App. Div. 502, 504, 102 NYS 597 [aff 191 N. Y. 529 mem, 84 NE 1122 mem].

"Any trust whose beneficiary is under no statutory inability to effectuate the transfer of his beneficial rights, is also a trust whose trustee is under no statutory inability to convey. The two respective capacities, to transfer beneficial rights and to convey the legal title, usually go together." Chaplin Suspension of Alien. (2d ed) § 183.

[a] **A dry or passive trust** does not suspend the power of alienation, the property vesting immediately in the beneficiaries. Steinert v. Steinert, 161 App. Div. 841, 146 NYS 106, 13 Mills Surr. 1.

[b] **A business trust or "Massachusetts trust,"** so called, under which are issued trust certificates representing the right to receive rents and profits and to participate in the final distribution of the corpus of the trust property, does not suspend the power of alienation thereof, all the cestuis being persons in esse and the certificates being rendered transferable by the terms of the trust instrument; and the statute providing that no person beneficially interested in the trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest has no application, the holders of the trust certificates acquiring their rights by purchase rather than under the terms of the trust instrument, and being more properly regarded as purchasers than as beneficiaries. Baker v. Stern, 194 Wis. 233, 216 NW 147, 58 ALR 462.

49. See infra § 123.

50. In re Harrington, 142 Wis. 447, 125 NW 986; and cases infra notes 53-55. But see Matter of U. S. Trust Co., 86 Misc. 603, 606, 148 NYS 762 [aff 166 App. Div. 920 mem, 152 NYS 1147 mem] ("It is not the nonassignability of the interest of the trust beneficiary which now tends to a perpetuity, but the old statutory restriction on alienation by the trustee during the trust term").

51. See statutory provisions.

52. See statutory provisions.

[a] **"The fact that the court may . . . authorize the trustee to sell,** mortgage or exchange . . . does not obviate any suspension otherwise existing, for several reasons: for (1) the court is not a 'person' in the sense of the statute relating to suspension; (2) the granting of its consent is not in any sense participation in a conveyance, but a condition precedent to any conveyance; (3) the court cannot grant it at its option, but only in case it finds that certain facts exist; (4) the estate or fund would still remain subject to the same trust, notwithstanding the shift in the identity of its physical make-up." Chaplin Suspension of Alien. (2d ed) § 173 note 1. See to same effect op. cit. (3d ed) § 239 note 71.

53. Cal.—Matter of Rawitzer, 175 Cal. 585, 166 P 581; Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97. But see In re McCray, 268 P 647 [superseding (A.) 260 P 940] (holding that a trust to receive and pay over the income of property caused no suspension of the power of alienation where the fee was vested, subject only to the trust, in the same persons who were cestuis que trust).

Ky.—Carter v. Gettys, 138 Ky. 842, 129 SW 308.

Mich.—Allen v. Merrill, 223 Mich. 467, 194 NW 131; Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 NW 250; Palms v. Palms, 68 Mich. 355, 36 NW 419.

Minn.—Simpson v. Cook, 24 Minn. 180.

N. Y.—In re Drury, 249 N. Y. 154, 163 NE 133; In re Perkins, 245 N. Y. 478, 157 NE 750; In re Horner, 237 N. Y. 489, 143 NE 655; In re Wilcox, 194 N. Y. 288, 87 NE 497; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Hooker v. Hooker, 166 N. Y. 156, 59 NE 769; Fowler v. Ingersoll, 127 N. Y. 472, 28 NE 471; Genet v. Hunt, 113 N. Y. 158, 21 NE 91; Shipman v. Rollins, 98 N. Y. 311, 15 AbbNCas 288 [rev 33 Hun 89]; Leavitt v. Wolcott, 95 N. Y. 212; Van Nostrand v. Moore, 52 N. Y. 12; Beekman v. Bonsor, 23 N. Y. 298, 575, 80 AmD 269 [aff 27 Barb. 260]; Matter of Hicks, 221 App. Div. 378, 223 NYS 295; Matter of Beale, 213 App. Div. 13, 209 NYS 638 [rev 124 Misc. 96, 207 NYS 257]; Morris v. New York, 154 App. Div. 332, 139 NYS 93 [aff 208 N. Y. 556 mem, 101 NE 1111 mem]; Whitefield v. Crissman, 123 App. Div. 233, 108 NYS 110 [aff 55 Misc. 468, 106 NYS 630]; Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99; Fischer v. Langlotz, 114 App. Div. 903, 100 NYS 578; Gueutal v. Gueutal, 113 App. Div. 310, 98 NYS 1002; Reeves v. Seitz, 47 App. Div. 267, 62 NYS 101; Almstaedt v. Bendick, 47 App. Div. 265, 61 NYS 1019; Walker v. Taylor, 15 App. Div. 452, 44 NYS 446; Cowen v. Rinaldo, 82 Hun 479, 31 NYS 554; Persons v. Snook, 40 Barb. 144; Williams v. Conrad, 30 Barb. 524; Vail v. Vail, 7 Barb. 226 [aff 10 Barb. 69]; O'Brien v. Mooney, 12 N. Y. Super. 51; Matter of Aucaigne, 131 Misc. 723, 228 NYS 234; Matter of Ely, 130 Misc. 345, 224 NYS 446; Matter of Rohr, 130 Misc. 174, 223 NYS 782; Fish v. Deady, 127 Misc. 332, 215 NYS 374; Hoyt v. Hoyt, 125 Misc. 95, 210 NYS 155 [aff 215 App. Div. 773 mem, 213 NYS 823 mem]; Matter of Beale, 124 Misc. 96, 207 NYS 257 [rev on other grounds 213 App. Div. 13, 209 NYS 638]; Matter of McQueen, 99 Misc. 185, 163 NYS 287; Matter of Turner, 82 Misc. 25, 143 NYS 692, 11 Mills Surr. 29; Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974; Stanley v. Payne, 65 Misc. 77, 119 NYS 570; Jessup v. Witherbee Real Est., etc., Co., 63 Misc. 649, 117 NYS 276; Toher v. Crounse, 57 Misc. 252, 107 NYS 990 [aff 127 App. Div. 934 mem, 111 NYS 1147 mem]; In re Bruchaeser, 49 Misc. 194, 98 NYS 937; Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 NYS 168; Brooklyn v. Seaman, 30 Misc. 507, 62 NYS 601; Finch v. Wilkes, 17 Misc. 428, 41 NYS 227; Case v. Case, 16 Misc. 393, 39 NYS 530; Storm v. Storm, 4 NYSt 670 [aff 113 N. Y. 646 mem, 21 NE 414 mem]; Giraud v. Giraud, 58 HowPr 175; Coster v. Lorillard, 14 Wend. 265; Haxtun v. Corse, 2 Barb. Ch. 506; Kane v. Gott, 7 Paige 521 [aff 24 Wend. 641, 35 AmD 641]; Richards v. Moore, 5 Redf. Surr. 278; Scott v. Monell, 1 Redf. Surr. 431.

N. D.—Penfield v. Tower, 1 N. D.

pay annuities therefrom,[54] and trusts for accumulation,[55] suspend the power of alienation so long as they continue.

A trust to begin in the future causes a suspension of the power of alienation if the legal title or beneficial interests under it will be inalienable.[56]

[§ 123] **(b) Effect of Right To Sell, Revoke, or Terminate.** A suspension of alienability otherwise occasioned by a trust[57] is obviated by the reservation to the settlor of an absolute right to revoke the trust[58] or by a grant to the trustee of the absolute right to terminate it,[59] although the property still remains subject to any statutory requirements as to vesting.[60] Accordingly, a power given the trustee to sell and transfer the trust property obviates any suspension of the power of alienation, otherwise existing, where the alienability or ownership of the proceeds is not suspended;[61] but if the suspension continues as to the proceeds the power of sale does not remove the trust from the operation of the statute, although the particular property out of which they come is capable of being transferred,[62] the dispo-

216, 46 NW 413.

S. D.—In re Rousseau, 48 S. D. 501, 205 NW 222.

Wis.—In re Adelman, 138 Wis. 120, 119 NW 929; Saxton v. Webber, 83 Wis. 617, 53 NW 905, 20 LRA 509; Ford v. Ford, 70 Wis. 19, 33 NW 188, 5 AmSR 117, 72 Wis. 621, 40 NW 502; DeWolf v. Lawson, 61 Wis. 469, 21 NW 615, 50 AmR 148. See Danforth v. Oshkosh, 119 Wis. 262, 97 NW 258 (dictum).

Trusts to receive and pay over income as constituting mere postponement of possession see infra § 139.

54. Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 NW 250; Niles v. Mason, 126 Mich. 482, 85 NW 1100 [dist Thatcher v. St. Andrew's Church, 37 Mich. 264]; Dean v. Mumford, 102 Mich. 510, 61 NW 7; Wilson v. Odell, 58 Mich. 533, 25 NW 506; Robb v. Washington,' etc., College, 185 N. Y. 485, 78 NE 359; Brown v. Quintard, 177 N. Y. 75, 69 NE 225; Hooker v. Hooker, 166 N. Y. 156, 59 NE 769; Cochrane v. Schell, 140 N. Y. 516, 35 NE 971; Shipman v. Rollins, 98 N. Y. 311, 15 AbbNCas 288 [rev 33 Hun 89]; Matter of Trotter, 104 App. Div. 188, 93 NYS 404 [aff 182 N. Y. 465, 75 NE 305]; Matter of Fellion, 132 Misc. 805, 231 NYS 9; Matter of Gallien, 128 Misc. 370, 218 NYS 687 [aff 221 App. Div. 409, 223 NYS 491 (rev on other grounds 247 N. Y. 195, 160 NE 8)]; Matter of U. S. Trust Co., 86 Misc. 603, 148 NYS 762 [aff 166 App. Div. 920 mem, 152 NYS 1147 mem]; Hawley v. James, 16 Wend. (N. Y.) 61; McSorley v. Wilson, 4 Sandf. Ch. (N. Y.) 515; Mason v. Mason, 2 Sandf. Ch. (N. Y.) 432 [aff 2 Barb. 229]. But see Peoples' Trust Co. v. Flynn, 188 N. Y. 385, 80 NE 1098; Buchanan v. Little, 154 N. Y. 147, 47 NE 970 (both holding that annuities to be paid by trustees out of income constitute a mere charge upon the property, whether held in trust or freed therefrom by the expiration of the trust as otherwise provided, not prolonging the trust, and causing no suspension of the power of alienation).

Annuities payable out of principal see infra § 125.

55. In re Haines, 150 Cal. 640, 89 P 606; Wilson v. Odell, 58 Mich. 533, 25 NW 506; Hooker v. Hooker, 166 N. Y. 156, 59 NE 769; Hobson v. Hale, 95 N. Y. 588; Matter of Raab, 79 Misc. 185, 139 NYS 869; Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 18; and cases infra this note.

"At first sight . . . the present prohibition [by N. Y. Real Prop. Law § 103] on transfers would seem not to apply to the fourth class of trusts to receive rents and profits and accumulate them. Nevertheless it is believed that the prohibition still does apply, not only to trusts of the third class [to receive and apply rents] but also to trusts to accumulate." Chaplin Suspension of Alien. (3d ed) § 258.

[a] **"A trust for the receipt of the rents and profits of land,"** the beneficial interest under which is made inalienable by statute, includes trusts for accumulation, and such trusts suspend the power of alienation. Radley v. Kuhn, 97 N. Y. 26, 32; Vail v. Vail, 7 Barb. (N. Y.) 226 [aff 10 Barb. 69]; Mason v. Mason, 2 Sandf. Ch. (N. Y.) 432 [aff 2 Barb. 229]. To same effect Manice v. Manice, 43 N. Y. 303.

[b] **Trusts for accumulation subject to both general and special statutes.**—"The beginning, duration and termination of trusts for accumulation, are affected both by the general provisions of [New York] Real Property Law § 42, under which their term must be measured strictly by two lives in being, except in the one case there provided for relating to a further minority; and by the special provisions of Real Property Law § 61 [governing accumulations]. . . . The statutory provision that an accumulation of the rents and profits of real property directed to commence subsequent to the creation of the estate must commence within the time permitted for the vesting of future estates, means that it may commence either during the term of two designated lives in being (and either at or subsequent to the birth of the infant), or at the end, or immediately upon the termination of two such lives, and then continue through the minority of the infant by virtue of the special provision in Real Property Law § 42, for suspension during the minority, even after two lives in being." Chaplin Suspension of Alien. (3d ed) §§ 269, 270.

Other statutory restrictions on trusts for accumulation see supra §§ 82-87.

56. Garvey v. McDevitt, 72 N. Y. 556.

57. See supra § 122.

58. Equitable Trust Co. v. Pratt, 117 Misc. 708, 193 NYS 152 [aff 206 App. Div. 689 mem, 199 NYS 921 mem, and quot Cyc]; U. S. Trust Co. v. Chauncey, 32 Misc. 358, 66 NYS 563. Compare Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706] (holding that no suspension of alienability or ownership was caused by a trust which was terminable by the settlor upon payment to the trustee of a specified sum in cash, such sum to be held by the trustee in trust).

[a] **Rule applied.**—Where a trust was created for the benefit of the settlor during his life, and on his death for two other persons for their lives, with remainder over, and a power of revocation was reserved to the settlor, the absolute ownership was not suspended during the settlor's life, and would not be suspended until he should die without having revoked the trust, at which time ownership would be suspended only during the lives of two persons, and consequently the trust was valid. Equitable Trust Co. v. Pratt, 117 Misc. 708, 193 NYS 152 [aff 206 App. Div. 689 mem, 199 NYS 921 mem].

Revocation by settlor upon cestuis' consent see infra text and notes 74, 75.

59. See cases infra note 61.

60. See infra §§ 130, 138.

61. Ariz.—Lowell v. Lowell, 29 Ariz. 138, 240 P 280.

Mich.—Thatcher v. St. Andrews Church, 37 Mich. 264.

Minn.—In re Tower, 49 Minn. 371, 52 NW 27; Atwater v. Russell, 49 Minn. 22, 51 NW 624.

N. Y.—In re Wilcox, 194 N. Y. 288, 87 NE 497; Robert v. Corning, 89 N. Y. 225; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Tarditi v. Tomazzolli, 107 Misc. 664, 177 NYS 127; Stanley v. Payne, 65 Misc. 77, 119 NYS 570. See Keyser v. Mead, 53 Misc. 114, 103 NYS 1091 (dictum). Compare Pfaler v. Raberg, 3 Dem. Surr. 360 (holding that no suspension was caused by a gift of property to one in trust "to be devoted and applied in such sums and amounts as she may see fit, to preserve and keep in order my burial place or plot," since by its terms the corpus of the gift might be at once consumed). Contra McSorley v. Wilson, 4 Sandf. Ch. 515.

N. D.—Hagen v. Sacrison, 19 N. D. 160, 123 NW 518, 26 LRANS 724.

[a] **Power to sell need not be imperative,** nor is it essential that there be persons in being who can compel its exercise; it is sufficient in order to obviate suspension that the trustee has a discretionary right to sell the property and terminate the trust. Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

[b] **Where suspension of ownership of personalty is not restricted by statute,** a power given a trustee to sell the real estate of the trust at any time, and convert it into money, obviates the effect of an excessive suspension of the power of alienation of the land, since the trust of the proceeds of sale could cause no illegal suspension. In re Tower, 49 Minn. 371, 52 NW 27; Danforth v. Oshkosh, 119 Wis. 262, 97 NW 258; Holmes v. Walter, 118 Wis. 409, 95 NW 380, 62 LRA 986; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

[c] **Power to sell and devote proceeds to charity.**—(1) An unqualified power given to a trustee to sell realty and devote the proceeds to charitable uses obviates any suspension of alienability by the trust. Hagen v. Sacrison, 19 N. D. 160, 123 NW 518, 26 LRANS 724. (2) Charitable trusts occasion no suspension see infra § 144.

62. Cal.—In re Maltman, 195 Cal. 643, 234 P 898.

Mich.—Allen v. Merrill, 223 Mich. 467, 194 NW 131; Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 NW 250; Niles v. Mason, 126 Mich. 482, 85 NW 1100 [dist Thatcher v. St. Andrew's Church, 37 Mich. 264]. But see Fitz Gerald v. Big Rapids, 123 Mich. 281, 82 NW 56 (contrary dictum).

Minn.—In re Tower, 49 Minn. 371, 52 NW 27.

N. Y.—Allen v. Allen, 149 N. Y. 280, 43 NE 626; Fowler v. Ingersoll, 127 N. Y. 472, 28 NE 471; Haynes v. Sherman, 117 N. Y. 433, 22 NE 938; Peabody v. Kent, 153 App. Div. 286, 138 NYS 32 [mod 213 N. Y. 154, 107 NE 51]; Whitefield v. Crissman, 123 App. Div. 233, 108 NYS 110 [aff 55 Misc. 468, 106 NYS 630]; Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 NYS 228; Brewer v. Brewer, 11 Hun 147 [aff 72 N. Y. 603 mem]; Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974; Stanley v. Payne, 65 Misc. 77, 119 NYS 570; Bascom v. Weed, 53 Misc. 496, 105 NYS 459; Matter of Hurlbut, 51 Misc. 263, 100 NYS 1098, 5 Mills Surr. 464; Hayden v. Sugden, 48 Misc. 108, 96 NYS 681; Storm v. Storm, 4 NYSt 670 [aff 113 N. Y. 646 mem, 21 NE 414 mem]; Hawley v. James, 16 Wend. 61, 163; Thomas' Est., Tuck. Surr. 367. See Underwood v. Curtis, 127 N. Y. 523,

sition of the proceeds being the controlling factor.[63] If, however, the right of revocation or termination is dependent upon a contingency[64] or is exercisable only at a future time,[65] the suspension otherwise existing is not thereby obviated; but a provision that a power of sale be exercised at a specified time does not render it conditional where such provision is merely advisory or precatory and is not a restraint upon the power,[66] and a provision that no sale shall be made except after advertisement for a definite period is unobjectionable if it is a reasonable precaution to prevent a sacrifice of the property.[67]

Consent of cestuis to termination.[68] It has been held that, where trustees are authorized, upon the consent of beneficiaries who are ascertainable and sui juris, to sell or distribute the trust property and terminate the trust, a suspension of alienability, otherwise existing, is thereby obviated,[69] notwithstanding the number of the persons whose consent may be required[70] or the length of the time during which such consent may be given;[71] but there is authority to the contrary, where the beneficiary whose consent is essential might die before the expiration of the trust term, inasmuch as it would thereby become impossible to obtain his consent to an earlier termination.[72]

Termination in disregard of trust. A suspension otherwise caused by a trust is not obviated by an option given the trustee to distribute the property before the expiration of the specified term where such distribution, if made, would be in disregard of the trust purposes.[73]

Revocation upon consent of cestuis. Where by virtue of a statute trusts are revocable upon the written consent of all the beneficiaries,[74] such a trust occasions no suspension of the power to alienate the trust property during the life of the settlor.[75]

[§ 124] **(2) Under Powers.**[76] Under the rule and subject to the qualification above stated,[77] beneficial powers,[78] and powers in trust, the beneficial interests in which are alienable by persons in being and ascertainable,[79] cause no suspension of the power of alienation, even where they are to be ex-

28 NE 585; Matter of Kuhrasch, 124 Misc. 117, 207 NYS 75 (both apparently applying the rule). But see Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706] (holding that no suspension was caused by a trust which was terminable by the settlor by payment to the trustee of a specified sum of money, such sum to be held in trust and invested for the trust purposes).

N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.

"A power to exchange one piece of property for another, or to sell it for the purpose of investing the proceeds in a different manner, is not a power to alien the estate within the meaning of the statute." Hawley v. James, supra.

[a] **Power to sell and reinvest.**—A trust to hold, manage, and sell property and reinvest the proceeds and pay them over at the expiration of an illegal term is not relieved by the power of sale from the operation of the statute, for while the power to alienate the land is not suspended, the power to alienate the proceeds of sale is suspended for the illegal term. Peabody v. Kent, 153 App. Div. 286, 138 NYS 32 [mod 213 N. Y. 154, 107 NE 51].

[b] **Discretion of trustee to continue suspension.**—Where a trustee of a trust to receive rents and profits is given power of sale, but is authorized in his discretion to turn back the proceeds of sale into the improvement of the remaining real estate, and it is only the net profits remaining which he is to distribute to the beneficiaries during the term, an exercise of the power of sale would not ipso facto terminate the trust and consequently it does not obviate the suspension of the power of alienation. Stanley v. Payne, 65 Misc. 77, 119 NYS 570.

[c] **Suspension resulting from uncertainty as to distributees.**—A trust for lives, with remainder to testator's grandchildren who should be living at the end of such time, suspends the power of alienation, notwithstanding there is a power of sale, for the persons ultimately entitled to the proceeds could not be ascertained until the expiration of the lives. Matter of Hurlbut, 51 Misc. 263, 100 NYS 1098, 5 Mills Surr. 464.

63. Whitefield v. Crissman, 123 App. Div. 233, 108 NYS 110 [aff 55 Misc. 468, 106 NYS 630]; and cases supra note 62.

64. Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825; In re Perkins, 245 N. Y. 478, 157 NE 750; Fowler v. Ingersoll, 127 N. Y. 472, 28 NE 471; Genet v. Hunt, 113 N. Y. 158, 21 NE 91; Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99; Matter of Rohr, 130 Misc. 174, 223 NYS 782. But see Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706] (holding that a trust caused no suspension of alienability or ownership where by its terms the trustee was given authority to transfer the property in the event of default in certain payments to be made by the settlor).

[a] **Sale at prescribed price.**—A power of sale does not obviate a suspension where the power is restricted to a sale at a prescribed minimum price. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99.

[b] **Inability to lease advantageously.**—A trust to continue for three lives is not rendered valid by a provision giving the trustee power to set apart a separate trust fund for each of the three, where the right to sell the property and establish such funds is permissive only and conditioned upon the inability of the trustee to rent or lease the property for a reasonable amount. Matter of Rohr, 130 Misc. 174, 223 NYS 782.

[c] **Habits, capacity, and circumstances of beneficiaries.**—A trust otherwise directed to continue for three lives is not rendered unobjectionable by power given the trustee to terminate it and pay over the corpus to the beneficiaries whenever the trustee shall judge that such payment would be best for the beneficiaries, considering their habits, capacity, ability and circumstances. In re Perkins, 245 N. Y. 478, 157 NE 750.

[d] **Permission of court.**—(1) A power of sale exercisable only provided that the supreme court upon petition made to it should permit such sale to be made does not obviate a suspension. Fowler v. Ingersoll, 127 N. Y. 472, 28 NE 471. (2) A suspension caused by a trust for a married woman is not obviated by the provision of the Married Women's Act of 1848, as amended by Act (1849) § 2, providing that a trustee for a married woman may at her request convey the property to her if a justice of the supreme court certifies that he has made due inquiry into the circumstances and the capacity of the married woman, since the power to distribute is dependent upon the consent of a judge of the court and cannot be exercised by the conjoint action of the trustee and beneficiary. Genet v. Hunt, 113 N. Y. 158, 21 NE 91.

Consent of cestuis see infra text and notes 68-72.

65. In re Perkins, 245 N. Y. 478, 157 NE 750.

66. Deegan v. Wade, 144 N. Y. 573, 39 NE 692; Chandler v. New York El. R. Co., 34 App. Div. 305, 54 NYS 341; Stewart v. Hamilton, 37 Hun (N. Y.) 19; Hagen v. Sacrison, 19 N. D. 160, 123 NW 518, 26 LRANS 724. Compare Tonnele v. Wetmore, 124 App. Div. 686, 109 NYS 349 [motion to dism app den 192 N. Y. 583 mem, 85 NE 1116 mem, and rev on other grounds 195 N. Y. 436, 88 NE 1068] (holding that, where trustees were given absolute power to sell, a provision that they should not be required to make sale before a specified date was permissive only and did not restrain the power).

67. Robert v. Corning, 89 N. Y. 225.

68. Consent of cestuis to revocation by settlor see infra text and notes 74, 75.

69. Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Spitzer v. Spitzer, 38 App. Div. 436, 56 NYS 470.

70. Stoiber v. Stoiber, 40 App. Div. 156, 160, 57 NYS 916.

"No trust which can be terminated at any time at the discretion of a number of persons, however great, and no matter for how long a period that discretion may be given, can constitute a suspension of the power of alienation under our statute." Stoiber v. Stoiber, supra.

71. Stoiber v. Stoiber, supra.

72. In re Hitchcock, 222 N. Y. 57, 118 NE 220.

73. In re Hitchcock, supra.

74. See statutory provisions.

75. Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706].

76. Powers in general see Powers [31 Cyc 233].

77. See supra § 119.

78. Chaplin Suspension of Alien. (3d ed.) § 324.

"Beneficial powers" defined see Powers [31 Cyc 1041].

79. In re Phelps, 182 Cal. 752, 190 P 17; Matter of Campbell, 149 Cal. 712, 87 P 573; In re Pforr, 144 Cal. 121, 77 P 825; Toland v. Toland, 123 Cal. 140, 55 P 681; Greenland v. Waddell, 116 N. Y. 234, 22 NE 367, 15 AmSR 400; Henderson v. Henderson, 113 N. Y. 1, 20 NE 814; Vanderpoel v. Loew, 112 N. Y. 167, 19 NE 481; Van Brunt v. Van Brunt, 111 N. Y. 178, 19 NE 60; Weeks v. Cornwell, 104 N. Y. 325, 10 NE 431; Robert v. Corning, 89 N. Y. 225; Garvey v. McDevitt, 72 N. Y. 566; Heermans v. Robertson, 64 N. Y.

ercised at a future time.[80] But imperative powers in trust,[81] under which persons not in being,[82] or the trustee of a trust in which beneficial interests are inalienable,[83] may become beneficially interested suspend the power of alienation so long as they exist; and a power exercisable only after a specified time[84] or upon a contingency[85] suspends the power of alienation if the beneficial interest is inalienable in the interim.

[§ 125] **d. Annuities.**[86] Annuities, vesting immediately, and the payment of which is not restricted to income, occasion no suspension of the power of alienation,[87] since all the interests are immediately alienable,[88] or their present value may be ascertained and set aside or paid over.[89]

[§ 126] **e. Leases.** A lease does not suspend the power of alienation of the property demised.[90]

[§ 127] **f. Charges.**[91] A charge upon property does not suspend its alienability,[92] inasmuch as all the interests are immediately alienable.[93]

[§ 128] **g. Options.** An option to purchase or sell property does not suspend the power of alienation where the optionor and optionee are in being and ascertainable and can convey the entire title by their united action.[94]

[§ 129] **h. Liens.** A mere lien upon property does not suspend its alienability.[95]

[§ 130] **4. Suspension of Ownership—a. In General.** It has frequently been said that a suspension of the absolute ownership of property occurs only when there are no persons in being and ascertainable by whom unitedly an absolute interest in possession can be assigned or transferred.[96] But, while it is true that there can be no suspension of the power of

332; Manice v. Manice, 43 N. Y. 303; Post v. Hover, 33 N. Y. 593; In re Conger, 81 App. Div. 493, 80 NYS 933; Franklin v. Minertzhagen, 39 App. Div. 555, 57 NYS 401; Spitzer v. Spitzer, 38 App. Div. 436, 56 NYS 470; Buchanan v. Tebbetts, 69 Hun 81, 23 NYS 244; De Kay v. Irving, 5 Den. (N. Y.) 646; Keyser v. Mead, 53 Misc. 114, 103 NYS 1091.

"Powers in trust" defined see Powers [34 Cyc 1041].

80. Matter of Campbell, 149 Cal. 712, 87 P 573; In re Pforr, 144 Cal. 121, 77 P 825; Toland v. Toland, 123 Cal. 140, 55 P 681; Garvey v. McDevitt, 72 N. Y. 556; Buchanan v. Tebbetts, 69 Hun 81, 23 NYS 244; Hone v. Van Schaick, 20 Wend. (N. Y.) 564.

81. Imperative powers generally see Powers [31 Cyc 1094].

82. Dana v. Murray, 122 N. Y. 604, 26 NE 21; Haynes v. Sherman, 117 N. Y. 433, 22 NE 938; Trowbridge v. Metcalf, 5 App. Div. 318, 39 NYS 241 [aff 158 N. Y. 682 mem, 52 NE 1126 mem]; Kilpatrick v. Barron, 54 Hun 322, 7 NYS 542 [aff 125 N. Y. 751 mem, 26 NE 925 mem].

[a] **Corporation to be formed.**—(1) Where a corporation not in existence but thereafter to be formed may take a beneficial interest under the exercise of an imperative power, it would seem that such power is void unless the corporation must necessarily be formed, if at all, within the statutory period. See Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238 [dist Blanchard v. Blanchard, 4 Hun 287 (aff 70 N. Y. 615 mem)] (which involved a charitable corporation, but was decided prior to the removal of such restrictions from gifts to charitable corporations by the enactment of Real Prop. L. § 115). (2) Charitable gifts see infra §§ 144, 145.

83. Garvey v. McDevitt, 72 N. Y. 556; Peabody v. Kent, 153 App. Div. 286, 138 NYS 32 [mod 213 N. Y. 154, 107 NE 51].

Trusts in which beneficial interests are inalienable see supra § 122 text and note 50.

84. In re Butterfield, 133 N. Y. 473, 31 NE 515; Garvey v. McDevitt, 72 N. Y. 556; In re Scott, 204 NYS 478; Hone v. Van Schaick, 20 Wend. (N. Y.) 564; DeWolf v. Lawson, 61 Wis. 469, 21 NW 615, 50 AmR 148.

85. In re Perkins, 245 N. Y. 478, 157 NE 750; Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99; Epstein v. Werbelovsky, 108 Misc. 214, 177 NYS 554 [rev on other grounds 193 App. Div. 428, 184 NYS 330 (aff 233 N. Y. 525 mem, 135 NE 902 mem)]. See Spitzer v. Spitzer, 38 App. Div. 436, 56 NYS 470 (dictum).

[a] **Power of sale restricted as to amount and purchaser** (1) suspends the power of alienation pending its exercise, where the beneficial interests are inalienable in the meantime. Epstein v. Werbelovsky, 108 Misc. 214, 177 NYS 554 [rev on other grounds 193 App. Div. 428, 184 NYS 330 (aff 233 N. Y. 525 mem, 135 NE 902 mem)]. (2) Thus, a power to sell and convey premises at such time as the trustee might be able to obtain a specified sum therefor suspends the power of alienation, pending its exercise, when a part of the proceeds of the sale is to be held upon a trust of which the beneficial interest is inalienable. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99.

86. Annuity generally see Annuities 3 C. J. p 199; Wills [40 Cyc 1631].

87. See cases infra notes 88, 89.

As affecting suspension of ownership see infra § 134.

Trusts to pay annuities out of income see supra § 122.

88. Cole v. Lee, 143 Mich. 267, 106 NW 855; Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706]; Frazer v. Hoguet, 65 App. Div. 192, 72 NYS 840; Matthews v. Studley, 17 App. Div. 303, 45 NYS 201 [aff 161 N. Y. 633 mem, 57 NE 1117 mem]; William v. Allen, 52 Barb. (N. Y.) 605; Lang v. Ropke, 7 N. Y. Super. 363, 10 NYLegObs 70; Matter of Fenton, 123 Misc. 658, 206 NYS 210 [aff 214 App. Div. 754 mem, 209 NYS 831 mem]; Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 NYS 168; Roosevelt v. Porter, 36 Misc. 441, 73 NYS 800; Baldwin v. Palen, 24 Misc. 170, 53 NYS 520; Law v. May, 13 NYS 666; Hawley v. James, 16 Wend. (N. Y.) 61.

"The bequest of an annuity, to be paid by trustees, does not suspend the alienation of the lands upon which it is charged, even during the lifetime of the annuitant, since, by releasing to the persons entitled in remainder or reversion, he may extinguish the trust, or may unite with them and the trustees in conveying an absolute fee to a third person." Lang v. Ropke, 7 N. Y. Super. 363, 371, 10 NYLegObs 70.

89. Central Trust Co. v. Falck, 177 App. Div. 501, 164 NYS 473 [aff 223 N. Y. 705 mem, 120 NE 859 mem]; Matter of Fellion, 132 Misc. 805, 231 NYS 9.

[a] **Thus** a trust to pay the income in equal shares to two persons, with cross remainders, is not rendered invalid as creating an unlawful suspension by charging upon the property an annuity for the life of a third person, since upon the death of the measuring lives the value of the annuities could be ascertained and paid over, and the remainders distributed free from any trust. Central Trust Co. v. Falck, 177 App. Div. 501, 164 NYS 473 [aff 223 N. Y. 705 mem, 120 NE 859 mem].

90. Sioux City Terminal R., etc., Co. v. Trust Co. of North America, 82 Fed. 124, 27 CCA 73 [aff 173 U. S. 99, 19 SCt 341, 43 L. ed. 628]; In re Hubbell, 135 Iowa 637, 113 NW 512, 13 LRANS 496, 14 AnnCas 640; Todhunter v. Des Moines, etc., R. Co., 58 Iowa 205, 12 NW 267; Toms v. Williams, 41 Mich. 552, 2 NW 814; Gomez v. Gomez, 81 Hun 566, 573, 31 NYS 206 [aff 147 N. Y. 195, 41 NE 420].

"To give a lease upon a piece of real estate does not prevent the alienation of such property." Gomez v. Gomez, supra.

As affecting suspension of ownership see infra § 135.

91. Charge generally see Annuities § 3; Charge 11 C. J. p 292 text and note 78.

92. In re Rider, 199 Cal. 724, 251 P 799; In re Haines, 150 Cal. 640, 89 P 606; Toms v. Williams, 41 Mich. 552, 2 NW 814; Radley v. Kuhn, 97 N. Y. 26; Matter of Seif, 212 App. Div. 558, 209 NYS 341; Orr v. Orr, 147 App. Div. 753, 133 NYS 48 [aff 212 N. Y. 615 mem, 106 NE 1037 mem]; Franklin v. Minertzhagen, 39 App. Div. 555, 57 NYS 401; Hunter v. Hunter, 17 Barb. (N. Y.) 25; Mason v. Jones, 2 Barb. (N. Y.) 229; Eells v. Lynch, 21 N. Y. Super. 465; McGowan v. McGowan, 9 N. Y. Super. 57; In re Gray, 27 N. D. 417, 146 NW 722, LRA1917A 611.

[a] **Rule applied.**—Where the trustee of a trust for the benefit of testator's children for their lives was directed to pay two fifths of the income of each child's portion to the testator's widow for her life, the provision for the wife constituted a charge on the income from each portion, and her life is not to be considered on the question of whether the trusts were to continue for more than two lives in being. Orr v. Orr, 147 App. Div. 753, 133 NYS 48 [aff 212 N. Y. 615 mem, 106 NE 1037 mem].

As affecting suspension of ownership see infra § 136.

93. See cases supra note 92.

94. Blakeman v. Miller, 136 Cal. 138, 68 P 587, 89 AmSR 120; Windiate v. Lorman, 236 Mich. 531, 211 NW 62; Mineral Land Inv. Co. v. Bishop Iron Co., 134 Minn. 412, 159 NW 966, LRA1917D 900; Buck v. Walker, 115 Minn. 239, 132 NW 205, AnnCas1912D 882; Matter of New York, 246 N. Y. 1, 157 NE 911.

95. Hawley v. James, 16 Wend. (N. Y.) 61 (per Cowen, J.).

As affecting suspension of ownership see infra § 137.

96. Groub v. Blish, (Ind. A.) 152 NE 609; Williams v. Montgomery, 148 N. Y. 519, 43 NE 57; Sawyer v. Cubby, 146 N. Y. 192, 40 NE 869; Beardsley v. Hotchkiss, 96 N. Y. 201; Greene v. Fitzgerald, 178 App. Div. 941 mem, 165 NYS 36 [aff 223 N. Y. 718 mem, 120 NE 864 mem]; Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706]; Matter of Roberts, 112 App. Div. 732, 98 NYS 809; Morton v. Morton, 8 Barb. (N. Y.) 18; Emmons v. Cairns, 3 Barb. (N. Y.) 243; Matter of Allen, 111 Misc. 93, 181 NYS 398 [aff 202 App.

alienation except in such case,[97] subject to the qualification that a suspension continues notwithstanding alienability of the particular property if by the terms of the gift or limitation the proceeds of a sale or exchange are made inalienable,[98] the ownership is absolute only when the interests are all vested as well as alienable;[99] and an interest which is either contingent or inalienable is suspended in ownership.[1]

Methods of occasioning suspension. It has sometimes been said that the absolute ownership of property is suspended only by the creation of a trust which vests the title in trustees or by the creation of contingent estates vesting upon the occurrence of some future event.[2] It should be noted, however, that not every trust occasions a suspension,[3] and on the other hand that suspension may be caused in certain cases by the creation of powers.[4]

[§ 131] **b. Legal Interests.** Under the general rule above stated,[5] the absolute ownership of property is not suspended by the creation of vested particular interests or estates and a vested remainder;[6] but a limitation of a contingent interest suspends the absolute ownership so long as the contingency exists,[7] even though all the persons who might by any possibility become entitled thereto are in being and can be ascertained.[8] Thus, where it is uncertain in which of existing persons[9] or which members of a class[10] an interest will vest, or where persons not in being may become entitled to an in-

Div. 810 mem, 194 NYS 913 mem (mod on other grounds 236 N. Y. 503 mem, 142 NE 260 mem)]; Matter of Perry, 48 Misc. 285, 96 NYS 879. See Liberty Nat. Bank, etc., Co. v. New England Investors Shares, 25 F. (2d) 493 (construing Massachusetts and New York statutes); Ladd v. Mills, 20 Fed. 792 (construing New York statute); and cases infra this note.

"Unlawful suspension of the absolute ownership or power of alienation of personal property exists only where there are no persons in being by whom an absolute, unqualified interest in possession can be conveyed." Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 653, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706].

[a] **"The phrase 'suspension of absolute ownership,'** used in the statute in relation to personal property, is synonymous in signification with 'suspension of the power of alienation.'" Richards v. Moore, 6 Redf. Surr. (N. Y.) 278, 281. To same effect Ladd v. Mills, 20 Fed. 792; Emmons v. Cairns, 3 Barb. (N. Y.) 243.

[b] **Same test as to suspensions of alienability and ownership.**—(1) "These statutes [N. Y. Real Prop. L. § 42; Personal Prop. L. § 11] are in pari materia and by reason of this fact, as well as the fact of the reference by the one to the other, are to be construed together, and hence it has become the settled rule of law in this State, that the same general test applicable in determining whether there has been an unlawful suspension of power of alienation of real estate is applicable in determining whether there has been an unlawful suspension of the absolute ownership of personal property." Matter of Perry, 48 Misc. 285, 291, 96 NYS 879. (2) "The test of the suspension of absolute ownership of personalty is the same as the test of the power of alienation of realty. The ownership is suspended only so long as there are no persons in being who can by their joint act confer an absolute title to the personalty and to the proceeds of its sale or disposition." Matter of Allen, 111 Misc. 93, 181 NYS 398, 410 [aff 202 App. Div. 810 mem, 194 NYS 913 mem (mod on other grounds 236 N. Y. 503 mem, 142 NE 260 mem)]. To same effect Cochrane v. Schell, 140 N. Y. 516, 35 NE 971. (3) Test of alienability see supra § 119.

97. In re Wilcox, 194 N. Y. 288, 87 NE 497.

Suspension of power of alienation see supra § 119.

98. See supra § 119 text and note 30; and § 123.

99. Swain v. Bowers, (Ind. A.) 158 NE 598; In re Wilcox, 194 N. Y. 288, 87 NE 497; Henderson v. Henderson, 113 N. Y. 1, 20 NE 814.

"The first question is whether, in the case of personal property, the requirement of 'absolute ownership' by the end of the statutory period . . . involves both alienability and vesting. As to alienability, it has always been recognized that it is a necessary element of absolute ownership. . . . And in respect to vesting, it is also settled that so long as it remains uncertain which of two or more persons,—even though they are all in being and could together alienate the property—will turn out to be the particular one in whom it will vest at last, the absolute ownership is suspended. . . . The rule against remoteness of vesting, as relating to real property, is also applicable to personal property." Chaplin Suspension of Alien. (3d ed) § 464.

[a] **Construction of statute.**—(1) "The word 'absolute' was doubtless used as the opposite of 'conditional,' and in the same sense as 'perfect.' It signifies without any condition or incumbrance." Converse v. Kellogg 7 Barb. (N. Y.) 590, 597 [quot Williams v. Lande, 74 Hun 425, 428, 26 NYS 703]. (2) "This construes the statute as if it read: 'The unconditional and unincumbered ownership of personal property shall not be suspended by any limitation or condition whatever.'" Williams v. Lande, 74 Hun 425, 428, 26 NYS 703 [mod on other grounds 148 N. Y. 519, 43 NE 57].

1. See cases supra note 99; and infra §§ 131–133.

2. Steinway v. Steinway, 163 N. Y. 183, 57 NE 312; Everitt v. Everitt, 29 N. Y. 39; Matter of Roberts, 112 App. Div. 732, 98 NYS 809; In re Conger, 81 App. Div. 493, 80 NYS 933; Matter of Perry, 48 Misc. 285, 292, 96 NYS 879; Dorman v. Balestier, 175 NYS 677.

"It is now the settled law in this State that absolute ownership is suspended in only one of two ways: 1. By the creation of a trust which vests the estate in trustees. 2. By the creation of future estates, vesting upon the occurrence of some future and contingent event." Matter of Perry, supra.

3. See infra § 132.

4. See infra § 133.

5. See supra § 130.

6. Wilber v. Wilber, 165 N. Y. 451, 59 NE 264; Bliven v. Seymour, 88 N. Y. 469; Hatch v. Bassett, 52 N. Y. 359; In re Conger, 81 App. Div. 493, 80 NYS 933; Matter of Ryder, 41 App. Div. 247, 58 NYS 635; Blanchard v. Blanchard, 4 Hun 287 [aff 70 N. Y. 615]; Dorland v. Dorland, 2 Barb. (N. Y.) 63.

[a] **A will creating life estates but no remainder** vests the life estates in the legatees, and the corpus passes as intestate property to the next of kin, so that the two classes together are absolute owners of the property and there is no suspension of ownership. Hatch v. Bassett, 52 N. Y. 359.

[b] **The creation of three life estates** in personal property, with vested remainder, does not violate the statute restricting the term of suspension to the duration of two lives, inasmuch as there is no suspension of the absolute ownership. In re Conger, 81 App. Div. 493, 80 NYS 933.

7. Henderson v. Henderson, 113 N. Y. 1, 20 NE 814; Chipman v. Montgomery, 63 N. Y. 221 [aff 4 Hun 739]; In re Conger, 81 App. Div. 493, 80 NYS 933; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Matter of Raab, 79 Misc. 185, 139 NYS 869; Matter of Ackermann, 36 Misc. 752, 74 NYS 477; In re Scott, 204 NYS 478; Kane v. Gott, 24 Wend. (N. Y.) 641, 35 AmD 641; and cases infra notes 8–13.

[a] **Any contingency suspends absolute ownership.**—(1) "In the case of real property, the only contingencies which suspend the absolute power of alienation, are those which involve an absence of persons in being by whom an absolute fee in possession can be conveyed. That proposition applies also to personal property. In the case of real property, the rule against undue suspension of alienability is not the only rule affecting the validity of future estates. A future estate, to be valid, must be so limited that it will vest by the end of the statutory period. That proposition likewise applies to personal property, and if either the person to whom, or the event on which, a future interest is limited to take effect is uncertain, that interest is either contingent and inalienable, or contingent and alienable, and in either case the absolute ownership is suspended." Chaplin Suspension of Alien. (3d ed) § 473. (2) Suspension of alienability of real estate see supra §§ 119–129. (3) Postponement of vesting of real estate see infra § 138.

[b] **"For a contingent limitation of a remainder in personal property to be valid,** the contingency must be such as necessarily to occur within two lives in being at the death of the testator." In re Wilcox, 194 N. Y. 288, 306, 87 NE 497.

8. In re Wilcox, supra; Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238; Matter of Berry, 124 Misc. 145, 207 NYS 651. But see Sawyer v. Cubby, 146 N. Y. 192, 40 NE 869 (holding that, where an interest in personalty is contingent and may never vest, but the beneficiary in whom it will vest, if at all, is a designated person in being, the interest is alienable by him and no suspension of ownership occurs). To same effect Matter of Stanton, 107 Misc. 326, 177 NYS 743.

9. Matter of Hinchman, 141 App. Div. 95, 125 NYS 699; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Equitable Trust Co. v. Pratt, 117 Misc. 708, 193 NYS 152 [aff 206 App. Div. 689 mem, 199 NYS 921 mem] (semble); Evans v. Curtis, 103 Misc. 161, 170 NYS 800; Matter of Kalter, 86 Misc. 621, 148 NYS 921, 12 Mills Surr. 384; Matter of Pierce, 76 Misc. 85, 136 NYS 323, 9 Mills Surr. 118; and cases infra note 10.

10. In re Chittick, 243 N. Y. 304, 153 NE 83; Schlereth v. Schlereth, 173 N. Y. 444, 66 NE 130, 93 AmSR 616; Greenland v. Waddell, 116 N. Y. 234, 22 NE 367, 15 AmSR 400; Henderson v. Henderson, 113 N. Y. 1, 20 NE 814; Matter of Hardgrove, 223

terest,[11] the absolute ownership is suspended.

A gift subject to defeasance occasions a suspension,[12] inasmuch as neither the first donee nor the donee under the conditional limitation possesses absolute ownership, even though both are in being.[13]

[§ 132] **c. Beneficial Interests—(1) Under Trusts.**[14] Under the rule and subject to the qualification above stated,[15] trusts in which the beneficial interests are alienable by persons in being and capable of being ascertained occasion no suspension of the absolute ownership;[16] but, except where a right of termination or revocation exists,[17] ownership is suspended by trusts in which beneficial interests are inalienable.[18] Thus, under statutes providing that the beneficiaries thereof shall acquire no interest in the trust property, or rendering their interests nontransferrable,[19] and statutes prohibiting transfers by trustees in contravention of a trust,[20] trusts to receive income, and to pay or apply it to the use of any person,[21] or from it to pay annuities,[22] and trusts for accumulation,[23-24] suspend the ownership so long as they continue.

App. Div. 646, 229 NYS 193; Matter of Howland, 75 App. Div. 207, 77 NYS 1025; Matter of Berry, 124 Misc. 145, 207 NYS 651; Adams v. Berger, 18 NYS 33, 27 AbbNCas 429. But see Tucker v. Bishop, 16 N. Y. 402 (where it was held that the possible diminution, by subsequent births, of the shares of the members in esse of a class to whom personalty was given, could not have the effect of suspending the power of alienation).

11. In re Durand, 250 N. Y. 45, 164 NE 737; In re Chittick, 243 N. Y. 304, 153 NE 83; In re Silsby, 229 N. Y. 396, 128 NE 212; Matter of Hinchman, 141 App. Div. 95, 125 NYS 699; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Matter of Berry, 124 Misc. 145, 207 NYS 651; Seligman v. Seligman, 89 Misc. 194, 151 NYS 889; Matter of Pierce, 76 Misc. 85, 136 NYS 323, 9 Mills Surr. 118; Adams v. Berger, 18 NYS 33, 27 AbbNCas 429; Kane v. Gott, 24 Wend. (N. Y.) 641, 35 AmD 641.

[a] **Rule applied.**—A limitation to such of the issue of a designated person as may be living at the termination of a period in excess of that permitted by the statute is void as creating an unlawful suspension of the absolute ownership. Vanderpoel v. Loew, 112 N. Y. 167, 19 NE 481; Ward v. Ward, 105 N. Y. 68, 11 NE 373; Smith v. Edwards, 88 N. Y. 92; Savage v. Burnham, 17 N. Y. 561; Mansbach v. New, 58 App. Div. 191, 68 NYS 674 [aff 170 N. Y. 585 mem, 63 NE 1119 mem]; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Vail v. Vail, 7 Barb. (N. Y.) 226; Adams v. Berger, 18 NYS 33, 27 AbbNCas 429; Dayton v. Conklin, 2 ChSent (N. Y.) 54.

12. In re Wilcox, 194 N. Y. 288, 87 NE 497; Du Bois v. Ray, 35 N. Y. 162, 33 HowPr 292 [rev 20 N. Y. Super. 244, 5 AbbPrNS 172]; Matter of Howland, 75 App. Div. 207, 77 NYS 1025; Brown v. Evans, 34 Barb. (N. Y.) 594; Matter of Perry, 48 Misc. 285, 96 NYS 879. Compare Casey v. Casey, 161 App. Div. 427, 146 NYS 348, 13 Mills Surr. 46 (where a gift of personalty to testator's son, upon his promise that he would pay it over to such of testator's other children as should become sick, was treated by the court as a trust and was held to suspend the absolute ownership); Matter of Rust, 129 Misc. 394, 222 NYS 271 (where a bequest of money to designated persons in being, "to be held in trust for them" until the youngest should attain the age of twenty-one years, the amount to which one dying would be entitled to be divided equally among the survivors, was treated as a trust which would suspend the ownership). Contra Bliven v. Seymour, 88 N. Y. 469.

Gift to class of which membership is uncertain see supra text and note 10.

13. In re Wilcox, 194 N. Y. 288, 87 NE 497; Wilber v. Wilber, 165 N. Y. 451, 59 NE 264.

[a] **The creation of three life estates** in personal property, with vested remainder, does not violate the statute, restricting the term of suspension to the duration of two lives, inasmuch as there is no suspension of the absolute ownership. In re Conger, 81 App. Div. 493, 80 NYS 933.

14. Trusts in general see Trusts [39 Cyc 1].

Charitable trusts see infra §§ 144, 145.

Trusts for accumulation see supra §§ 82–87.

15. See supra § 130.

16. Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706]; Wells v. Squires, 117 App. Div. 502, 102 NYS 597 [aff 191 N. Y. 529 mem, 84 NE 1122 mem]; Matter of Stanton, 107 Misc. 326, 177 NYS 743. See Liberty Nat. Bank, etc., Co. v. New England Investors Shares, 25 F. (2d) 493 (construing New York statute). But see Casey v. Casey, 161 App. Div. 427, 146 NYS 348, 13 Mills Surr. 46 (where a trust to pay over the principal of a fund to those of the decedent's children who should be sick was held to suspend the ownership).

[a] **A dry or passive trust** does not suspend the power of alienation, the property vesting immediately in the beneficiaries. Steinert v. Steinert, 161 App. Div. 841, 146 NYS 106, 13 Mills Surr. 1.

17. See supra § 123.

18. See cases infra notes 21–23.

19. Statutory provisions see supra § 97.

20. Statutory provisions see supra § 97.

21. Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97; Whitney v. Dodge, 105 Cal. 192, 38 P 636; In re Durand, 250 N. Y. 45, 164 NE 737; In re Gallien, 247 N. Y. 195, 160 NE 8; In re Chittick, 243 N. Y. 304, 153 NE 83; In re Colegrove, 221 N. Y. 455, 117 NE 813; Bailey v. Buffalo Loan, etc., Co., 213 N. Y. 525, 107 NE 1043; Schey v. Schey, 194 N. Y. 368, 87 NE 817; Herzog v. Title Guarantee, etc., Co., 177 N. Y. 86, 69 NE 283, 67 LRA 146; Sawyer v. Cubby, 146 N. Y. 192, 40 NE 869; Underwood v. Curtis, 127 N. Y. 523, 28 NE 585; Genet v. Hunt, 113 N. Y. 158, 21 NE 91; Ward v. Ward, 105 N. Y. 68, 11 NE 373; Matter of Hicks, 221 App. Div. 378, 223 NYS 295; Matter of Beale, 213 App. Div. 13, 209 NYS 638 [rev 124 Misc. 96, 207 NYS 257]; Matter of Central Union Trust Co., 193 App. Div. 292, 183 NYS 671; Matter of MacDowell, 170 App. Div. 245, 156 NYS 387 [rev on other grounds 217 N. Y. 454, 112 NE 177, LRA1916E 1246, AnnCas1917E 853]; Davis v. MacMahon, 161 App. Div. 458, 146 NYS 657, 13 Mills Surr. 33 [aff 214 N. Y. 614 mem, 108 NE 1092 mem]; Morris v. New York, 154 App. Div. 332, 139 NYS 93 [aff 208 N. Y. 556 mem, 101 NE 1111 mem]; Simpson v. Trust Co. of America, 129 App. Div. 200, 113 NYS 370 [aff 59 Misc. 96, 112 NYS 155, 112 NYS 370, and aff 197 N. Y. 586 mem, 91 NE 1120 mem]; Whitefield v. Crissman, 123 App. Div. 233, 108 NYS 110 [aff 55 Misc. 468, 106 NYS 630]; Farmers' L. & T. Co. v. Bostwick, 120 App. Div. 271, 105 NYS 130 [rev on other grounds 190 N. Y. 569 mem, 83 NE 1124 mem]; New York L. Ins., etc., Co. v. Cary, 120 App. Div. 264, 105 NYS 125 [rev on other grounds 191 N. Y. 33, 83 NE 598]; Fischer v. Langlotz, 114 App. Div. 903, 100 NYS 578; In re Conger, 81 App. Div. 493, 80 NYS 933; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Mulry v. Mulry, 89 Hun 531, 35 NYS 618; Williams v. Conrad, 30 Barb. (N. Y.) 524; Matter of Ely, 130 Misc. 345, 224 NYS 446; Matter of Hackett, 130 Misc. 339, 224 NYS 435; Matter of Rohr, 130 Misc. 174, 223 NYS 782; Matter of Dodge, 129 Misc. 390, 222 NYS 247; Matter of Perkins, 127 Misc. 193, 216 NYS 426 [aff 219 App. Div. 807 mem, 220 NYS 908 mem (245 N. Y. 478, 157 NE 750)]; Hoyt v. Hoyt, 125 Misc. 95, 210 NYS 155 [aff 215 App. Div. 773 mem, 213 NYS 823 mem]; Matter of Moore, 120 Misc. 825, 199 NYS 790; Matter of Erickson, 113 Misc. 10, 183 NYS 779 [aff 198 App. Div. 999 mem, 190 NYS 923 mem]; Matter of McQueen, 99 Misc. 185, 163 NYS 287; Pruyn v. Sears, 96 Misc. 200, 161 NYS 58; Matter of Lincoln Trust Co., 76 Misc. 421, 137 NYS 162, 9 Mills Surr. 279; Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974; Toher v. Crounse, 57 Misc. 252, 107 NYS 990 [aff 127 App. Div. 934 mem, 111 NYS 1147 mem]; In re Finck, 171 NYS 573; Weiler v. O'Brien, 23 NYS 366; Livingston v. New York L. Ins., etc., Co., 13 NYS 105, 36 NYSt 566 [aff 151 N. Y. 667 mem, 46 NE 1149 mem]; De Peyster v. Clendining, 8 Paige (N. Y.) 295 [aff 26 Wend. 21]; In re Rousseau, 48 S. D. 501, 205 NW 222. Contra Keyes v. Manning, 89 Hun 98, 34 NYS 1021; Vail v. Vail, 7 Barb. (N. Y.) 226; Arnold v. Gilbert, 5 Barb. (N. Y.) 190 (dicta).

"Trusts of personalty in this state are now adjudged to suspend the power of alienation, modo et forma, as trusts of real property, and for the same reason." Matter of Lincoln Trust Co., 76 Misc. 421, 423, 137 NYS 162, 9 Mills Surr. 279.

Trusts to receive and pay over income as constituting mere postponement of possession see infra § 139.

22. In re Gallien, 247 N. Y. 195, 160 NE 8; In re Chittick, 243 N. Y. 304, 153 NE 83; Bailey v. Buffalo Loan, etc., Co., 213 N. Y. 525, 107 NE 1043; Robb v. Washington, etc., College, 185 N. Y. 485, 78 NE 359; Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974 [dist People's Trust Co. v. Flynn, 188 N. Y. 385, 80 NE 1098; Buchanan v. Little, 154 N. Y. 147, 47 NE 970]; De Peyster v. Clendining, 8 Paige (N. Y.) 295 [aff 26 Wend. 21]. Contra Bailey v. Buffalo Loan, etc., Co., 151 App. Div. 166, 135 NYS 344 [rev 75 Misc. 23, 132 NYS 513].

Annuities payable from principal see infra § 134.

23–24. Peabody v. Kent, 153 App. Div. 286, 138 NYS 32 [mod 213 N. Y. 154, 107 NE 51]; Matter of Raab, 79 Misc. 185, 139 NYS 869; and cases infra this note.

[a] **By analogy to suspension of alienability** (1) of real estate, under a statute providing that no person beneficially interested in "a trust for the receipt of the rents and profits of lands" could assign his interest, it has been held that trusts for the accumulation of the income of personal property suspend the absolute ownership of such personalty. Harris v. Clark, 7 N. Y. 242; Vail v. Vail, 7 Barb. (N. Y.) 226 [aff 10 Barb. 69]; Kane v. Gott, 7 Paige (N. Y.) 521 [aff 24 Wend. 641, 35 AmD 641]; Mason v. Mason, 2 Sandf. Ch. (N. Y.) 432 [aff 2 Barb. 229]. To same effect Manice v. Manice, 43 N. Y. 303. (2) Trusts for accumulation as suspending power of alienation see supra § 122 text and note 55.

Other restrictions on trusts for accumulation see supra §§ 82–87.

[§ 133] **(2) Under Powers.**[25] Under the rule and subject to the qualification above stated,[26] powers in trust, the beneficial interests in which are alienable by persons in being and capable of being ascertained, do not suspend the absolute ownership of property;[27] but an imperative power in trust[28] exercisable only upon the happening of a future contingency suspends the ownership if in the interim the beneficial interests are inalienable.[29]

[§ 134] **d. Annuities.**[30] Annuities, vesting immediately, and the payment of which is not restricted to income, occasion no suspension of ownership,[31] since all the interests are immediately alienable,[32] or their present value may be ascertained and set aside or paid over.[33]

[§ 135] **e. Leases.** A lease does not suspend the ownership of the property demised.[34]

[§ 136] **f. Charges.**[35] A charge upon property does not suspend its ownership,[36] inasmuch as all the interests are immediately alienable.[37]

[§ 137] **g. Liens.** A mere lien upon property does not suspend its ownership.[38]

[§ 138] **5. Postponement of Vesting.**[39] Under the statutes in New York and in some of the jurisdictions which have copied or imitated its system,[40] estates in remainder, whether limited on a fee,[41] on an estate for life,[42] or on an estate for years,[43] including remainders upon estates in trust,[44] must, in order to be valid, be so limited that they will vest in interest, if ever, within or at the end of the statutory period;[45] and it has been held that the requirement of such a statute is not confined to tech-

25. Powers in general see Powers [31 Cyc 233].

26. See supra § 130.

27. Steinway v. Steinway, 163 N. Y. 183, 57 NE 312; Vanderpoel v. Loew, 112 N. Y. 167, 19 NE 481; Tiers v. Tiers, 98 N. Y. 568; Bliven v. Seymour, 88 N. Y. 469 [overr Converse v. Kellogg, 7 Barb. (N. Y.) 590]; Smith v. Edwards, 88 N. Y. 92; Everitt v. Everitt, 29 N. Y. 39; Tucker v. Bishop, 16 N. Y. 402; Matter of Dippel, 71 App. Div. 598, 76 NYS 201; Quade v. Bertsch, 65 App. Div. 600, 72 NYS 916 [aff 173 N. Y. 615 mem, 66 NE 1115 mem]; Matter of Charlier, 22 App. Div. 71, 47 NYS 818; Matteson v. Armstrong, 11 Hun (N. Y.) 245; Dupre v. Thompson, 8 Barb. (N. Y.) 537; Burrill v. Sheil, 2 Barb. (N. Y.) 457; Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

"Powers in trust" defined see Powers [34 Cyc 1041].

28. Imperative powers generally see Powers [31 Cyc 1094].

29. In re Perkins, 245 N. Y. 478, 157 NE 750. See In re Scott, 204 NYS 478 (dictum).

30. Annuity generally see Annuities 3 C. J. p 199; Wills [40 Cyc 1631].

31. See cases infra notes 32, 33.

As affecting suspension of alienability see supra § 125.

Trusts to pay annuities out of income see supra § 132.

32. Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 NYS 1065 [aff 209 N. Y. 429, 103 NE 706]; Wells v. Squires, 177 App. Div. 502, 102 NYS 597 [aff 191 N. Y. 529 mem, 84 NE 1122 mem]; Matter of Fenton, 123 Misc. 658, 206 NYS 210 [aff 214 App. Div. 754 mem, 209 NYS 831 mem]; Seligman v. Seligman, 89 Misc. 194, 151 NYS 889, 13 Mills Surr. 564; Roosevelt v. Porter, 36 Misc. 441, 73 NYS 800.

[a] **Where a trust to pay annuities does not restrict the payment thereof to income,** the trust is not one in which the interest of beneficiaries is inalienable, and consequently there is no suspension of ownership, the annuitants in conjunction with the trustee being capable of conveying the estate to the remainderman, or they, with the remainderman, could convey to a third person; and if the annuitants and remainderman united in an assignment the trustee would be obliged to convey to the assignee. Wells v. Squires, 117 App. Div. 502, 102 NYS 597 [aff 191 N. Y. 529 mem, 84 NE 1122 mem].

33. Kane v. Gott, 7 Paige (N. Y.) 521 [aff 24 Wend. 641, 35 AmD 641].

34. Gomez v. Gomez, 81 Hun 566, 31 NYS 206 [aff 147 N. Y. 195, 41 NE 420].

As affecting suspension of alienability see supra § 126.

35. Charges generally see Annuities § 3; Charge 11 C. J. p 292 text and note 78.

36. Orr v. Orr, 147 App. Div. 753, 133 NYS 48 [aff 212 N. Y. 615 mem, 106 NE 1037 mem]; Matter of De Bolet Peraza, 72 Misc. 577, 132 NYS 264, 8 Mills Surr. 215.

As affecting suspension of alienability see supra § 127.

37. See cases supra note 36.

38. Hawley v. James, 16 Wend. (N. Y.) 61 (per Cowen, J.).

As affecting suspension of alienability see supra § 129.

39. Contingent remainders as suspending:
Alienability see supra § 120.
Ownership see supra § 131.

40. See statutory provisions.

New York system in other jurisdictions see supra § 97.

41. Quilliam v. Union Trust Co., 194 Ind. 521, 142 NE 214 [superseding 131 NE 428, 132 NE 614]; Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 726; Seitz v. Faversham, 205 N. Y. 197, 98 NE 385; Mott v. Ackerman, 92 N. Y. 539; Hatfield v. Sneden, 54 N. Y. 280; Leonard v. Burr, 18 N. Y. 96 (per Denio, J.).

[a] **Illustration.**—A future estate to take effect when the property should cease to be used and occupied by a lime kiln will not necessarily vest, if ever, within the statutory period, and consequently is void. Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 726.

Remainder in fee contingent on death before majority see supra § 109.

42. In re Wilcox, 194 N. Y. 288, 87 NE 497; Purdy v. Hayt, 92 N. Y. 446; Matter of Hicks, 221 App. Div. 378, 223 NYS 295; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Matter of Kohler, 96 Misc. 433, 160 NYS 669 [mod on other grounds 193 App. Div. 8, 183 NYS 550 (rev on other grounds 231 N. Y. 353, 132 NE 114)]; Faber v. Hauck, 80 Misc. 442, 141 NYS 153; Matter of Raab, 79 Misc. 185, 139 NYS 869. See Chipman v. Montgomery, 63 N. Y. 221 [aff 4 Hun 739] (apparently applying the rule). Compare Rozell v. Rozell, 217 Mich. 324, 331, 186 NW 489 (where a remainder limited upon the life of a person not in being at the creation of the estate was held to fail, "both the contingency upon which . . . [the remaindermen] were to have the fee and the estate itself being too remote;" but the court appears to have confused the statutory requirements as to suspension of alienability with the common-law rule against remoteness of vesting); Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561 (where a remainder upon a devise of life estates to testator's widow and two sons, and the survivor of them, was held invalid as to the share passing from the wife to the son first dying and then through the son dying second to the remainderman, on the ground that it suspended the power of alienation, the necessity of vesting within the statutory period being discussed only incidentally).

[a] **Rule applied.**—Where testator created a trust to receive income and apply it to the use of his daughter during her life, and after her death pay the income to her issue in equal shares, and as each child should attain majority one equal share of the principal to be paid to it, with the provision that if the daughter should die leaving no issue born to her who should attain majority the principal should be paid over to testator's other children, the remainder to the latter children was contingent, and although the power of alienation was not suspended, the remainder was void, because it was not so limited that it must vest, if ever, at the end of two lives in being at the creation of the estate. In re Wilcox, 194 N. Y. 288, 87 NE 497.

43. Henderson v. Henderson, 46 Hun 509 [rev on other grounds 113 N. Y. 1, 20 NE 814] (per Cullen, J.); Kane v. Gott, 7 Paige (N. Y.) 521 [aff 24 Wend. 641, 35 AmD 641]; Hone v. Van Schaick, 7 Paige (N. Y.) 221 [aff 20 Wend. 564]; Hawley v. James, 5 Paige (N. Y.) 318 [rev on other grounds 16 Wend. 61]; Butler v. Butler, 3 Barb. Ch. (N. Y.) 304.

44. In re Wilcox, 194 N. Y. 288, 87 NE 497; Fowler v. Ingersoll, 127 N. Y. 472, 28 NE 471; Knox v. Jones, 47 N. Y. 389; Stoiber v. Stoiber, 40 App. Div. 156, 57 NYS 916; Woolley v. Hutchins, 114 Misc. 11, 186 NYS 769 [aff 198 App. Div. 964 mem, 189 NYS 959 mem]; Matter of Raab, 79 Misc. 185, 139 NYS 869; Miller v. Douglass, 192 Wis. 486, 213 NW 320 ("assuming" that vesting within the statutory period is required by the New York statute, but criticizing the doctrine); and cases infra this note.

[a] **Rule applied.**—(1) Under a trust to continue for ten years to pay the income to two children, and in case of the death of one before that time the trust fund to pass to the survivor, with remainder over in case of the death of both within such period, the children have vested remainders each in one half of the trust fund, subject to defeasance in case of death within the ten years, and all contingent remainders will vest, if at all, upon the termination of their two lives. Matter of Hicks, 221 App. Div. 378, 223 NYS 295. (2) Under a trust for testator's wife for life, remainder to be divided between two daughters for their respective lives, with remainder at the death of one without issue to the issue of the survivor and in case of death of both without issue remainder over, the ultimate remainder over violates the rule, since at the death of the first daughter the other might not have any issue in whom the remainder could vest, and it would remain suspended until the death of the other daughter before remainder over could take effect as the surviving daughter might have issue born at any time during her life. Faber v. Hauck, 80 Misc. 442, 141 NYS 153.

45. See cases supra notes 41–44.

[a] **"What the statute means** is that the remainder must be so limited that by the terms of its creation it must either vest within the statu-

nical remainders as that term is used at common law,[46] but applies to all future legal estates upon a contingency.[47] It does not apply to reversions,[48] or to rights of entry for condition broken.[49]

Remainderman not in esse. It is no objection that a remainder is limited in favor of a person or persons not in being at its creation,[50] provided the contingency upon which the final vesting depends must happen, if ever, and the persons entitled to take be ascertained, within the statutory period for the vesting of estates.[51]

Effect of invalidity. When a remainder is invalid because in violation of a statutory requirement of vesting,[52] it would seem that the limitation is to be given effect as if such remainder had not been attempted to be created.[53]

[§ 139] **6. Disabilities Not within Statute—a. Postponement of Possession—(1) In General.** Mere postponement of the possession and enjoyment of an interest in real[54] or personal[55] property does not constitute a suspension of the alienability or ownership thereof, within the meaning of the statute, inasmuch as the postponement of possession does not prevent the interest from vesting or from being conveyed or transferred.[56]

[§ 140] **(2) Gifts Payable in Installments.** Under the rule relating to postponement of possession and enjoyment,[57] the fact that a gift or legacy, vested in interest and alienable, is to be paid or delivered in installments does not suspend its alienability or absolute ownership.[58]

tory period or else by the end of that time cease to be a possibility." Chaplin Suspension of Alien. (3d ed) § 401.

[b] **For a general discussion** of the statutory requirement of vesting, and of the former view that no such requirement was comprised in the statutes, see Chaplin Suspension of Alien. (3d ed) § 364 et seq.

Statutory period see supra §§ 98–118.

What constitutes vesting of remainder see Estates § 131; Vest [40 Cyc 197].

46. See cases infra note 47.

Remainders generally see Estates §§ 130–178.

47. Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 726.

[a] **Springing use.**—Where the owner of property conveyed it to another, reserving to himself a portion of it occupied by a lime kiln so long as the same should be occupied and used, the estate conveyed as to such portion of the property was a future estate which would not necessarily vest, if ever, at the end of the statutory period, and consequently was void. Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 726.

[b] **Statutory definition of remainder.**—"Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name." Real Prop. L. § 38.

48. Strong v. Shatto, 45 Cal. A. 29, 187 P 159.

[a] **Mr. Chaplin** says: "The New York rule in relation to remoteness of vesting applies to future estates created by a grant or devise. A reversion is not a future estate, and it is not created. It is an estate 'left . . . by the operation or construction of law,' in the grantor or devisor, or those claiming under him, and they are the persons who will ultimately take it in possession, quite irrespective of any question of remoteness. An attempt to hold it void for remoteness would be futile. If such an attempt were made, the estate would still have to go somewhere, and those same people would be the ones to whom it would belong." Suspension of Alien. (3d ed) § 394.

Suspension created by reversioner see supra § 114.

49. Strong v. Shatto, 45 Cal. A. 29, 187 P 159.

50. In re Lux, 149 Cal. 200, 85 P 147; Hillen v. Iselin, 144 N. Y. 365, 39 NE 368; Purdy v. Hoyt, 92 N. Y. 446; Wilber v. Wilber, 45 App. Div. 158, 60 NYS 1064 [aff 165 N. Y. 451, 59 NE 264]; Matter of Buttner, 125 Misc. 224, 210 NYS 729 [mod 215 App. Div. 62, 213 NYS 268 (mod 243 N. Y. 1, 152 NE 447)]; Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561; Matter of Bensel, 70 Misc. 279, 127 NYS 870; and cases supra § 109 notes 73, 74.

51. See cases supra note 50.

52. See supra text and notes 40–47.

53. Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 726.

[a] **Thus,** where the owner of property conveyed it, excepting and reserving a portion thereof occupied by a lime kiln so long as the same should be so used and occupied, and the future estate so attempted to be granted, being of the nature of a springing use, was void because it would not necessarily vest in the grantee, if ever, within the statutory period, it was held that the absolute fee remained in the grantor, and he could maintain an action in ejectment against the grantee's successor in title. Walker v. Marcellus, etc., R. Co., 226 N. Y. 347, 123 NE 726.

54. Wills v. Maddox, 45 App. (D. C.) 128; Matter of Bray, 118 App. Div. 533, 102 NYS 989; Doubleday v. Newton, 27 Barb. (N. Y.) 431; Matter of Gulick, 96 Misc. 410, 160 NYS 525; Faber v. Hauck, 80 Misc. 442, 141 NYS 153; Bascom v. Weed, 53 Misc. 496, 105 NYS 459; Nichols v. Nichols, 42 Misc. 381, 86 NYS 719; Galway v. Bryce, 10 Misc. 255, 30 NYS 985.

[a] **Rule applied.**—(1) A present gift, the possession of which is postponed until the last of four children shall attain his majority, creates no illegal suspension. Matter of Bray, 118 App. Div. 533, 102 NYS 989. (2) Where, at the death of a designated person in being, trustees are directed to pay over the corpus of property to his children, a provision that should any of the beneficiaries be infants, then their portion shall be paid to them as and when they severally reach the age of twenty-one, the income meantime to go to their support severally, does not prevent vesting of the remainder in such infants, and the postponement of possession created no suspension of the power of alienation. Bascom v. Weed, 53 Misc. 496, 105 NYS 459. (3) Where property is given on trust for the life of a designated person and the minority of another, to be divided among designated persons within one year after the termination of such minority, the one year allowed for division is not a suspension of the power of alienation, and consequently the trust is not invalid. Galway v. Bryce, 10 Misc. 255, 30 NYS 985.

55. In re Phelps, 182 Cal. 752, 190 P 17; Matter of Heberle, 155 Cal. 723, 102 P 935; Goldtree v. Thompson, 79 Cal. 613, 22 P 50; Swain v. Bowers, (Ind. A.) 158 NE 598; Hope v. Brewer, 136 N. Y. 136, 32 NE 538, 18 LRA 458; Greenland v. Waddell, 116 N. Y. 234, 22 NE 367, 15 AmSR 400; Bliven v. Seymour, 88 N. Y. 469 [disappr Converse v. Kellogg, 7 Barb. (N. Y.) 590]; Warner v. Durant, 76 N. Y. 133; Oxley v. Lane, 35 N. Y. 340; Church v. Wilson, 152 App. Div. 844, 137 NYS 1002 [aff 209 N. Y. 553 mem, 103 NE 1122 mem]; Matter of Roberts, 112 App. Div. 732, 98 NYS 809; In re Conger, 81 App. Div. 493, 80 NYS 933; Matter of Dippel, 71 App. Div. 598, 76 NYS 201; Quade v. Bertsch, 65 App. Div. 600, 77 NYS 916 [aff 173 N. Y. 615 mem, 66 NE 1115 mem]; Matter of Charlier, 22 App. Div. 71, 47 NYS 818; Matter of Berry, 124 Misc. 145, 207 NYS 651; Matter of Gulick, 96 Misc. 410, 160 NYS 525; Matter of Correll, 88 Misc. 377, 151 NYS 962, 13 Mills Surr. 312; Matter of Kalter, 86 Misc. 621, 148 NYS 921, 12 Mills Surr. 384; Faber v. Hauck, 80 Misc. 442, 141 NYS 153; Matter of Lincoln Trust Co., 76 Misc. 421, 137 NYS 162, 9 Mills Surr. 279; Matter of Becker, 59 Misc. 135, 112 NYS 221, 6 Mills Surr. 429; Orange County Trust Co. v. Morrison, 56 Misc. 88, 106 NYS 940; Bascom v. Weed, 53 Misc. 496, 105 NYS 459; Matter of Perry, 48 Misc. 285, 96 NYS 879; Nichols v. Nichols, 42 Misc. 381, 86 NYS 719; Clark v. Clark, 23 Misc. 272, 50 NYS 1041; Matter of Farmer, 2 NYS 639, 6 Dem. Surr. 433. See Hogg v. Maxwell, 229 Fed. 113, 143 CCA 389 [certiorari den 242 U. S. 646 mem, 37 SCt 240 mem, 61 L. ed. 543 mem] (applying New York statute); Matter of Chittick, 216 App. Div. 179, 214 NYS 467 [mod 243 N. Y. 304, 153 NE 83] (apparently applying the rule); and cases infra § 140.

"A mere postponement of the time of payment of a legacy or delivery of property does not make a legacy contingent or unlawfully suspend the power of alienation." Orange County Trust Co. v. Morrison, 56 Misc. 88, 91, 106 NYS 940.

[a] **Rule applied.**—(1) Where property is given in trust for two lives, with remainder absolutely to the issue of the second life tenant, to be paid to them as each child arrives at full age, there is no illegal suspension of ownership or of the power of alienation, the provision for payment merely suspending the power of enjoyment. Church v. Wilson, 152 App. Div. 844, 137 NYS 1002 [aff 209 N. Y. 553 mem, 103 NE 1122 mem]; Matter of Gulick, 96 Misc. 410, 160 NYS 525; Faber v. Hauck, 80 Misc. 442, 141 NYS 153. (2) Where property is presently given and only possession withheld by a trust for ten years to collect and pay over the income, there is no suspension of the power of alienation. Matter of Correll, 88 Misc. 377, 151 NYS 962, 13 Mills Surr. 312. (3) The fact that conversion of real estate into personalty, as directed by the terms of a will, might require a period of time, not measured by lives, does not create an unlawful perpetuity. Hope v. Brewer, 136 N. Y. 136, 32 NE 538, 18 LRA 458. (4) Where a will creates a testamentary trust otherwise valid, the time necessarily required for administrative work preliminary to the distribution of the property among the legatees will not render it invalid as possibly exceeding the statutory period. Hogg v. Maxwell, 229 Fed. 113, 143 CCA 389 [certiorari den 242 U. S. 646 mem, 37 SCt 240 mem, 61 L. ed. 543 mem].

56. See cases supra notes 54, 55.

57. See supra § 139.

58. In re Trumble, 199 N. Y. 454, 92 NE 1073.

[a] **Illustration.**—A gift of money to legatees, to be paid to them by trustees in monthly installments until the fund should be exhausted,

[§ 141] **b. Infancy.** The power of alienation or absolute ownership of an interest or estate in property is not suspended, within the meaning of the statute, by the infancy of a taker or beneficiary thereof.[59]

[§ 142] **c. Suspension of Civil Rights.** A suspension of the civil rights of a taker or beneficiary of an interest or estate in property by reason of his conviction of crime[60] does not constitute a suspension of ownership or alienability within the meaning of the statute.[61]

[§ 143] **d. Prohibition of Alienation.** No suspension of the alienability or ownership of property is effected merely by a provision prohibiting alienation by one to whom an absolute interest or estate is granted or devised.[62] While there is language in some cases to the effect that such a provision is void where the period of the prohibition may exceed the statutory period during which a suspension of alienability or ownership may legally continue,[63] nevertheless, where the point has actually been considered, it has been held that only the condition fails in such case, and the interest or estate granted is not thereby invalidated,[64] although it may be void for other reasons;[65] and so it would seem that, when such a prohibition is invalid, the real ground of its invalidity is its repugnancy to the estate granted or devised,[66] and that the statute regulating

constitutes a simple legacy with the time of payment postponed, and the gifts to the legatees are vested interests, transferable by them, so the ownership is not suspended. In re Trumble, 199 N. Y. 454, 92 NE 1073.

59. Matter of Campbell, 149 Cal. 712, 87 P 573; In re Trevor, 239 N. Y. 6, 145 NE 66; Beardsley v. Hotchkiss, 96 N. Y. 201, 214; Quade v. Bertsch, 65 App. Div. 600, 72 NYS 916 [aff 173 N. Y. 615 mem, 66 NE 1115 mem]; Hunter v. Hunter, 17 Barb. (N. Y.) 25; McGowan v. McGowan, 9 N. Y. Super. 57. See Doubleday v. Newton, 27 Barb. (N. Y.) 431 (semble).

"The statute is aimed only at the suspension of the power of alienation by the terms of the instrument, and not such as necessarily arises from the disability of infancy, or from other causes outside of the instrument." Beardsley v. Hotchkiss, supra.

60. See Convicts §§ 7, 8.

61. La Chapelle v. Burpee, 69 Hun 436, 23 NYS 453.

62. Larson v. Johnson, 175 Minn. 502, 221 NW 871; Rausch v. Rausch, 31 NYS 786 (where it is held, without discussion or citation of authority, that a testamentary direction that property given absolutely be never sold by the donee does not suspend the power of alienation). See Danforth v. Oshkosh, 119 Wis. 262, 97 NW 258 (dictum). Compare Matter of Bensel, 70 Misc. 279, 281, 127 NYS 870 (where testator devised successive life estates to two persons, "and they are not to sell or transfer it," with remainder to the heirs of the second donee; and the court, holding that no illegal suspension of the power of alienation was occasioned by the will, discussed its provisions from the standpoint of whether the remainder would become alienable in due time, without considering the prohibition of alienation by the life tenants).

"It may be stated with substantial confidence that such a prohibition, by itself alone, can never effect a suspension of alienability." Chaplin Suspension of Alien. (3d ed) § 173.

63. U. S.—Hubbird v. Goin, 137 Fed. 822, 70 CCA 320 (construing Iowa statute). Compare Kissam v. McElligott, 280 Fed. 212 (where it was said that a provision, in an assignment of property to two persons as joint tenants, that neither of them should have power to affect the right of the survivor to the property, if construed as a promise not to sever the joint tenancy by assignment, would be valid, but if construed as in restraint of alienation would be void under the New York statute).

Cal.—Maynard v. Polhemus, 74 Cal. 141, 15 P 451; Williams v. Williams, 73 Cal. 99, 14 P 394.

Ind.—Quilliam v. Union Trust Co., 194 Ind. 521, 142 NE 214 [superseding 131 NE 428, 132 NE 614]; Fowler v. Duhme, 143 Ind. 248, 42 NE 623; Vaubel v. Lang, 81 Ind. A. 96, 140 NE 69; Reeder v. Antrim, 64 Ind. A. 83, 110 NE 568, 112 NE 551. Compare Rush County v. Dinwiddie, 139 Ind. 128, 37 NE 795 (holding that a direction to trustees to retain bank stock as an investment so long as the bank should exist is to be regarded only as indicating testator's belief that such investment was safe and advisable, and does not conflict with the statute).

Ky.—Perry v. Metcalf, 216 Ky. 755, 288 SW 694; Anderson v. Simpson, 214 Ky. 375, 283 SW 941; Cooper v. Knuckles, 212 Ky. 608, 279 SW 1084; Sparrow v. Sparrow, 171 Ky. 101, 186 SW 904; Gillespie v. Winston, 170 Ky. 667, 186 SW 517; Pond Creek Coal Co. v. Runyan, 161 Ky. 64, 170 SW 501; Saulsberry v. Saulsberry, 140 Ky. 608, 131 SW 491; Holt v. Deshon, 126 Ky. 310, 103 SW 281, 31 KyL 744; Robsion v. Gray, 97 SW 347, 29 KyL 1296; Morton v. Morton, 120 Ky. 251, 85 SW 1188, 27 KyL 661; Johnson v. Merritt, 79 SW 293, 25 KyL 2119; Ernst v. Shinkle, 95 Ky. 608, 26 SW 813, 16 KyL 179; Henning v. Harrison, 13 Bush 723. But see Cammack v. Allen, 199 Ky. 268, 250 SW 963 (holding the statute inapplicable to such prohibition).

N. Y.—Booker v. Booker, 119 App. Div. 482, 104 NYS 21; Edson v. Hudson Motor Car Co., 132 Misc. 223, 228 NYS 582; Matter of Groth, 128 Misc. 905, 220 NYS 505; Matter of Wilber, 122 Misc. 472, 202 NYS 760; Matter of Fitzsimmons, 114 Misc. 71, 186 NYS 664; Morris v. Porter, 52 How Pr 1.

Wis.—Meinert v. Roeglin, 169 Wis. 531, 173 NW 224; In re Kopmeier, 113 Wis. 233, 89 NW 134.

See Hause v. O'Leary, 136 Minn. 126, 161 NW 392 (holding that a prohibition of alienation of property for five years by one to whom it was devised in fee was not a general suspension of the power of alienation, and did not apply to the estate, but merely was a personal restriction upon the devisee; and as it must terminate at his death it did not offend the statute). Compare In re Little, 143 Minn. 298, 302, 173 NW 659 (holding that a devise to a church of property used for burial purposes with the provision that it should never be sold does not violate the statute. "The law against suspending the power of alienation is hardly applicable to the plot of ground wherein rest the dead").

Statutory period see supra §§ 98-118.

64. Hubbird v. Goin, 137 Fed. 822, 70 CCA 320 (construing Iowa statute); Fowler v. Duhme, 143 Ind. 248, 42 NE 623; Vaubel v. Lang, 81 Ind. A. 96, 140 NE 69; Reeder v. Antrim, 64 Ind. A. 83, 110 NE 568, 112 NE 551; Perry v. Metcalf, 216 Ky. 755, 288 SW 694; Robsion v. Gray, 97 SW 347, 29 KyL 1296; Morton v. Morton, 120 Ky. 251, 85 SW 1188, 27 KyL 661; Johnson v. Merritt, 79 SW 293, 25 KyL 2119; Ernst v. Shinkle, 95 Ky. 608, 26 SW 813, 16 KyL 179; Henning v. Harrison, 13 Bush (Ky.) 723; Greene v. Greene, 125 N. Y. 506, 26 NE 739, 21 AmSR 743; Oxley v. Lane, 35 N. Y. 340; Goldsmith v. Haskell, 181 App. Div. 510, 169 NYS 185; Booker v. Booker, 119 App. Div. 482, 104 NYS 21; Edson v. Hudson Motor Car Co., 132 Misc. 223, 228 NYS 582; Matter of Groth, 128 Misc. 905, 220 NYS 505; Matter of Wilber, 122 Misc. 472, 202 NYS 760; Matter of Fitzsimmons, 114 Misc. 71, 186 NYS 664.

[a] **Illustrations.**—(1) Where an automobile was sold with the provisions, inter alia, that the interest of the buyer should not be assignable or transferable, and that on the nonperformance of any condition the seller might retake the car, the seller was not entitled to take the car solely on the ground that the buyer had sold it to another, the provision prohibiting alienation being void and ineffective, and the car belonged to the buyer, subject to the payment of the balance of the purchase price. Edson v. Hudson Motor Car Co., 132 Misc. 223, 228 NYS 582. (2) A devise of real estate to one on the condition that it should not be mortgaged, transferred, or sold during his lifetime but should go eventually to his children, gives a life estate to the first donee, with remainder to his children as a class, and the condition against a mortgage or transfer of the property is illegal and void. Matter of Groth, 128 Misc. 905, 220 NYS 505.

65. Morris v. Porter, 52 HowPr (N. Y.) 1 (where testator created successive life estates in four children with remainder to his grandchildren, and the devise was held void as illegally suspending the power of alienation, in that the class to which the remainder was given might open to receive additional members at any time during the lives of testator's children, and consequently all the interests might not be represented by persons in being until the end of four lives; and the case appears to have been decided upon this ground, although the court also discusses the effect of a provision that the property should not be sold by the life tenants).

66. Chaplin Suspension of Alien. (3d ed) §§ 173, 176. Compare Oxley v. Lane, 35 N. Y. 340, 346 (where it was said: "The restrictions as to the division, sale and conveyance . . . are inconsistent with the estate devised. It is well settled, that, at common law, a perpetual and total restriction upon the power of alienation of an estate in fee-simple is void, as repugnant to the estate, and its failure does not affect the validity of the grant or devise. . . . It is not necessary, in the present case, to pronounce against the validity of all partial restraints of alienation in the case of estates in fee; it is enough to say, that they cannot be sustained, when they go beyond the limits fixed by the law of perpetuities. As the restrictions in . . . the testator's will are repugnant to the devise, and may suspend the power of alienation beyond two lives, they are void; but the devise is good"); Hacker v. Hacker, 153

suspensions of alienability and ownership has no application to a mere prohibition of the alienation of a vested interest.[67]

[§ 144] **7. Charitable Gifts[68]—a. In General.** While, in the absence of any provision excepting charitable trusts from statutes restricting suspension of alienability and ownership, such trusts have been held to be subject thereto,[69] it is the rule in most jurisdictions, under specific statutory exceptions[70] or general statutes authorizing gifts and trusts for charitable uses,[71] that statutes relating to suspensions of alienability or ownership have no application to present gifts to charitable organizations or upon charitable trusts,[72] and accordingly such trusts may be perpetual.[73]

A charitable trust to commence in futuro at a time

App. Div. 270, 138 NYS 194 [rev 75 Misc. 380, 133 NYS 266] (where the lower court held a provision prohibiting alienation except within the donee's family void as an illegal suspension of alienability, but on appeal the invalidity was placed on the ground of repugnancy).

"The fact that a prohibition of alienation is to extend during more than two lives, or during a period not measured by lives, or through a long time, even though measured by one or by two lives, may constitute evidence of unreasonableness, or repugnancy to intent or to the law. But it is the fact of repugnancy, and not the theory of any undue suspension of alienability, that counts. If it is repugnant, it is void, and no suspension results. If it is not, repugnant, it is valid, and no suspension results. The two-lives measure for the term of suspension has no application to cases of mere prohibition of any alienation by an absolute owner, except as the proposed continuance of the prohibition may indicate that it is 'repugnant' to the estate granted or devised. There is no ground for a doctrine that all prohibitions are valid if confined within two lives in being." Chaplin, op. cit. § 176.

Repugnancy of restraint generally see Deeds § 378; Estates § 10; Wills [40 Cyc 1713].

67. Chaplin Suspension of Alien. (3d ed) § 176.

68. Trusts for upkeep of cemetery or burial plot see supra § 76.

69. Lowell v. Lowell, 29 Ariz. 138, 240 P 280; Newark M. E. Church v. Clark, 41 Mich. 730, 3 NW 207; Lane v. Eaton, 69 Minn. 141, 71 NW 1031, 65 AmSR 559, 38 LRA 669; Murray v. Miller, 178 N. Y. 316, 70 NE 870; Fairchild v. Edson, 154 N. Y. 199, 48 NE 541, 61 AmSR 609; Tilden v. Green, 130 N. Y. 29, 28 NE 880, 27 AmSR 487, 14 LRA 33; Peo. v. Simonson, 126 N. Y. 299, 27 NE 380; Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238; Read v. Williams, 125 N. Y. 560, 26 NE 730, 21 AmSR 748; Riker v. Leo, 115 N. Y. 93, 21 NE 719; Cottman v. Grace, 112 N. Y. 299, 19 NE 839, 3 LRA 145; Holland v. Smyth, 108 N. Y. 312, 16 NE 305, 2 AmSR 420; O'Hara v. Dudley, 95 N. Y. 403, 47 AmR 53; Kerr v. Dougherty, 79 N. Y. 327; Wetmore v. Parker, 52 N. Y. 450; Holmes v. Mead, 52 N. Y. 332 [overr Williams v. Williams, 8 N. Y. 525]; Adams v. Perry, 43 N. Y. 487; Bascom v. Albertson, 34 N. Y. 584; Levy v. Levy, 33 N. Y. 97; Dodge v. Pond, 23 N. Y. 69; Auburn Theological Seminary v. Kellogg, 16 N. Y. 83; Rose v. Rose, 4 Abb. Dec. (N. Y.) 108; Matter of Williams, 64 Hun 163, 18 NYS 820; Matter of Simonson, 55 Hun 204, 7 NYS 836 [aff 119 N. Y. 660 mem, 24 NE 852 mem]; Iseman v. Myres, 26 Hun (N. Y.) 651; Chamberlain v. Chamberlain, 3 Lans. 348 [mod on other grounds 43 N. Y. 424]; Wilson v. Lynt, 30 Barb. (N. Y.) 124, 16 HowPr 348; King v. Rundle, 15 Barb. (N. Y.) 139; Yates v. Yates, 9 Barb. (N. Y.) 324; Morgan v. Masterton, 6 N. Y. Super. 442; Matter of Williams, 1 Misc. 440, 23 NYS 150, 1 Pow. Surr. 414; Beecher v. Yale, 45 NYS 622; Matter of Schuler, 24 NYS 847, 1 Pow. Surr. 490; In re Strickland, 17 NYS 304 [aff 136 N. Y. 638 mem, 32 NE 1014 mem]; Matter of Fisher, 8 NYS 10, 2 Conn. Surr. 75; Matter of Johnson, 5 NYS 922, 1 Conn. Surr. 518; Shotwell v. Mott, 2 Sandf. Ch. (N. Y.) 46; Reform Soc. v. Case, 3 Dem. Surr. (N. Y.) 15; Matter of Starr, 2 Dem. Surr. (N. Y.) 141; Lawrence v. Elliott, 3 Redf. Surr. (N. Y.) 235; Danforth v. Oshkosh, 119 Wis. 262, 97 NW 258; Beurhaus v. Cole, 94 Wis. 617, 69 NW 986.

[a] **But a gift to an existing charitable corporation,** for uses within its corporate purposes, is not a trust and consequently not subject to the statute against perpetuities. Bird v. Merklee, 144 N. Y. 544, 39 NE 645, 27 LRA 423; Matter of Bogart, 43 App. Div. 582, 60 NYS 496; Danforth v. Oshkosh, 119 Wis. 262, 97 NW 258 [dist Beurhaus v. Cole, 94 Wis. 617, 69 NW 986]; Fadness v. Braunborg, 73 Wis. 257, 41 NW 84; Webster v. Morris, 66 Wis. 366, 28 NW 353, 57 AmSR 278. Compare Tabernacle Baptist Church v. Fifth Ave. Baptist Church, 60 App. Div. 327, 70 NYS 181 [aff 172 N. Y. 598 mem, 64 NE 1126 mem] (where a gift of personalty to a church to pay the income to another church for the term of ten years, and thereafter to use the income for its own work, was held not to be a trust, which would illegally suspend the ownership and be void, but to be a gift to the donee church, subject only to payment of the income to the other church for the term specified, and so not suspending the ownership).

70. See statutory provisions.

[a] **Gift to municipality for kindergarten.**—A gift to a municipality for the purpose of establishing and maintaining a kindergarten is not subject to the statutory provisions governing suspensions of the power of alienation, in view of L. (1901) c 95, expressly authorizing such trusts. Owatonna v. Rosebrock, 88 Minn. 318, 92 NW 1122.

[b] **Trusts for religious societies.**—Gen. St. (1894) § 3040, providing that property conveyed in trust for the use of a religious society for a meeting house, burying ground, or the residence of a preacher, shall descend in perpetual succession to and shall be held by the trustees in trust for such society, abrogates the rule regulating suspensions of alienability, so far as such rules might otherwise apply, and such a trust does not contravene the statute. Lane v. Eaton, 69 Minn. 141, 71 NW 1031, 65 AmSR 559, 38 LRA 669.

[c] **Trusts to maintain public parks and libraries.**—General Municipal L. art 7, relating to gifts for the creation and maintenance of public parks and libraries is, in effect, a repeal pro tanto of the statute against perpetuities. Durkee v. Smith, 90 Misc. 92, 153 NYS 316 [aff 171 App. Div. 72, 156 NYS 920 (motion to dism app den 218 N. Y. 619 mem, 112 NE 1057 mem, and aff 219 N. Y. 604 mem, 114 NE 1066 mem)]. To same effect Bullard v. Albion, 128 Misc. 292, 217 NYS 849.

71. See statutory provisions.

[a] **"Tilden Act."**—(1) Real Prop. L. § 113 and Personal Prop. L. § 12 (enacted as L. [1893] c 701, amended by L. [1901] § 291), authorizing trusts for charitable uses, are sometimes referred to as the Tilden Act. Matter of Davidge, 200 App. Div. 437, 193 NYS 245. (2) "The legislature in 1893 . . . had its attention sharply drawn to the subject by a comparatively recent decision of this court [Tilden v. Green, 130 N. Y. 29, 28 NE 880, 27 AmSR 487, 14 LRA 33], the effect of which was to deprive the public of a great charity, in which Samuel J. Tilden sought to employ the bulk of his fortune, aggregating millions. Looking back . . . the legislature could discover nothing but wrecks of original charities, charities that were dear to the hearts of their would-be founders, and the execution of which would have been of inestimable value to the public." Allen v. Stevens, 161 N. Y. 122, 140, 55 NE 568.

72. Cal.—Collier v. Lindley, 266 P 526; In re Coleman, 167 Cal. 212, 138 P 992, AnnCas1915C 682; Matter of Merchant, 143 Cal. 537, 77 P 475; In re Gay, 138 Cal. 552, 71 P 707, 94 AmSR 70; Peo. v. Cogswell, 113 Cal. 129, 45 P 270, 35 LRA 269; In re Hinckley, 58 Cal. 457; Spence v. Widney, 5 Cal. Unrep. Cas. 516, 46 P 463; Dingwell v. Seymour, (A.) 267 P 327; In re Wirt, (A.) 263 P 271.

D. C.—Washington L. & T. Co. v. Hammond, 51 App. 260, 278 Fed. 569.

Ind.—Richmond v. Davis, 103 Ind. 449, 3 NE 130; Phillips v. Heldt, 33 Ind. A. 388, 71 NE 520. See Long v. Union Trust Co., 280 Fed. 686 [aff 272 Fed. 699] (construing Indiana statute which, however, the court said, "is not different from the common law" except as to the term prescribed).

Iowa.—Wilson v. Independence First Nat. Bank, 164 Iowa 402, 145 NW 948, AnnCas1916D 481; In re Cleven, 161 Iowa 289, 142 NW 986; Chapman v. Newell, 146 Iowa 415, 125 NW 324; Phillips v. Harrow, 93 Iowa 92, 61 NW 434.

Ky.—Pullins v. Methodist Church Bd. of Education, 78 SW 457, 25 KyL 1715.

Mich.—Greenman v. Phillips, 241 Mich. 464, 217 NW 1; Peters v. Fowler, 202 Mich. 695, 168 NW 966; In re Brown, 198 Mich. 544, 165 NW 929.

N. Y.—In re MacDowell, 217 N. Y. 454, 112 NE 177, LRA1916E 1246, AnnCas1917E 853; In re Griffin, 167 N. Y. 71, 60 NE 284; Allen v. Stevens, 161 N. Y. 122, 55 NE 568; Matter of Davidge, 200 App. Div. 437, 193 NYS 245; Matter of Sayre, 179 App. Div. 269, 166 NYS 499; Decker v. Vreeland, 170 App. Div. 234, 156 NYS 442, 15 Mills Surr. 534 [rev on other grounds 220 N. Y. 326, 115 NE 989]; Butterworth v. Keeler, 169 App. Div. 136, 154 NYS 744 [aff 219 N. Y. 446, 114 NE 803]; Matter of Olmstead, 131 Misc. 238, 226 NYS 637; Van De Bogert v. Poughkeepsie Reformed Dutch Church, 128 Misc. 603, 220 NYS 50 [aff 219 App. Div. 220, 220 NYS 58]; Buell v. Gardner, 83 Misc. 513, 144 NYS 945; Matter of Durand, 56 Misc. 235, 107 NYS 393, 6 Mills Surr. 269 [aff 127 App. Div. 945 mem, 111 NYS 1118 mem]; Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241; Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 NYS 168; Potter v. Pike, 183 NYS 842.

N. D.—Hagen v. Sacrison, 19 N. D. 160, 123 NW 518, 26 LRANS 724.

Wis.—Giblin v. Giblin, 173 Wis. 632, 182 NW 357; Williams v. Oconomowoc, 167 Wis. 281, 166 NW 322.

"The rule of public policy which forbids estates to be indefinitely inalienable in the hands of individuals does not apply to charities." In re Cleven, 161 Iowa 289, 295, 142 NW 986.

73. See cases supra note **72.**

beyond the statutory period[74] is void if the alienability or ownership of the property is suspended in the interim.[75]

[§ 145] **b. To Corporations To Be Formed.** In jurisdictions in which charitable trusts presently commencing are held not to be subject to statutes relating to suspensions of alienability and ownership,[76] a gift of property upon trusts to form a charitable corporation and to transfer or convey the property thereto, without any gift of a beneficial interest in the trust pending the formation of such corporation, is not invalidated by the possibility that the corporation may not be formed within the statutory period,[77] the gift being regarded as immediate to charity.[78]

Where charitable trusts are subject to the statute,[79] however, such a gift in trust for the formation of a corporation it valid only if by its terms the corporation must necessarily be formed, if at all, and take the property within the statutory period;[80] and if the time for the formation of the corporation is not so restricted the gift is void.[81]

[§ 146] **8. Construction of Limitations**[82]**—a. In General.** While it has been said that the construction of a limitation must be made without reference to statutes relating to suspension of alienability or ownership or postponement of vesting, and to the instrument as so construed the statutes then applied,[83] the tendency of the courts has been toward a liberal construction with reference to the statute,[84] and it has become the established rule that, where two constructions are possible, under one of which the limitation would be valid and under the other it would offend against the statute, the former will be adopted.[85] But it is only where there is clearly room for two constructions that the court may adopt one

74. Statutory period see supra §§ 98–118.

75. Leonard v. Burr, 18 N. Y. 96. See Allen v. Stevens, 161 N. Y. 122, 55 NE 568 (dictum).

76. See supra § 144.

77. Matter of Potts, 205 App. Div. 147, 199 NYS 880 [aff 236 N. Y. 658 mem, 142 NE 323 mem].

78. Matter of Potts, supra.

79. See supra § 144 text and note 69.

80. See St. John v. Andrews Inst. for Girls, 191 N. Y. 254, 83 NE 981, 14 AnnCas 708; Tilden v. Green, 130 N. Y. 29, 28 NE 880, 27 AmSR 487, 14 LRA 33; Peo. v. Simonson, 126 N. Y. 299, 27 NE 380; Booth v. Christ Baptist Church, 126 N. Y. 215, 28 NE 238; Cruikshank v. Home for Friendless, 113 N. Y. 337, 21 NE 64, 4 LRA 140; Burrill v. Boardman, 43 N. Y. 254, 3 AmR 694; Rose v. Rose, 4 Abb. Dec. (N. Y.) 108; Matter of New York, 55 Hun 204, 7 NYS 836 [aff 119 N. Y. 660 mem, 24 NE 852 mem]; Southampton Hospital Assoc. v. Fordham, 72 Misc. 247, 131 NYS 91 [dist Allen v. Stevens, 161 N. Y. 122, 55 NE 568] (all holding that such a gift is valid when the time for the formation of the corporation is restricted to the duration of two lives).

81. Washburn v. Acome, 74 Misc. 301, 131 NYS 963 [aff 151 App. Div. 948 mem, 136 NYS 1150 mem].

82. Construction generally:

Of:
- Deed see Deeds §§ 195–480.
- Other instrument see appropriate titles throughout this work.
- Will see Wills [40 Cyc 1382 et seq].

With reference to common-law rule against perpetuities see supra §§ 89–91.

83. Cottman v. Grace, 112 N. Y. 299, 19 NE 839, 3 LRA 145; Van Nostrand v. Moore, 52 N. Y. 12; Rasquin v. Hamersley, 152 App. Div. 522, 137 NYS 578 [aff 208 N. Y. 630 mem, 102 NE 1112 mem]; Rosenstein v. Rosenstein, 103 Misc. 1, 170 NYS 280; Matter of Russell, 8 NYSt 754, 5 Dem. Surr. 388.

[a] **The statute is applied, in a suitable case, to defeat the intention** of the testator. "The words are not rejected against the rule that every word in a will shall, if possible, have a meaning, but because the testator has attempted to do what the law will not permit, or has made dispositions of property which are inconsistent with each other." Byng v. Strafford, 5 Beav. 558, 568, 49 Reprint 694 [quot Van Horne v. Campbell, 100 N. Y. 287, 295, 3 NE 316, 53 AmR 166].

84. In re Chittick, 243 N. Y. 304, 153 NE 83; Cochrane v. Schell, 140 N. Y. 516, 532, 35 NE 971; In re Gallien, 221 App. Div. 409, 223 NYS 491 [rev on other grounds 247 N. Y. 195, 160 NE 8]; and cases infra note 85.

"The reports show an increasing tendency in the direction of liberality in construing the statute, and while there has been no abatement by the courts of the strictness with which limitations are construed, which transgress the rule of perpetuity, arrangements within that limit, and dispositions by way of trust are sustained if they can fairly be brought within the spirit of the statute, although not within its literal language." Cochrane v. Schell, supra.

[a] **"The courts have gone quite far** to avoid the consequence of applying these provisions of the Personal Property and Real Property Laws [relating to suspensions of alienability and ownership]." In re Chittick, 243 N. Y. 304, 319, 153 NE 83.

85. Cal.—Toland v. Toland, 123 Cal. 140, 55 P 681; In re Cavarly, 119 Cal. 406, 51 P 629; Berry v. Lebus, 56 Cal. A. 378, 205 P 471.

Ind.—Amos v. Amos, 117 Ind. 19, 19 NE 539; Swain v. Bowers, (A.) 158 NE 598; Vaubel v. Lang, 81 Ind. A. 96, 140 NE 69.

Mich.—Foster v. Stevens, 146 Mich. 131, 109 NW 265; Van Driele v. Kotvis, 135 Mich. 181, 97 NW 700; Dean v. Mumford, 102 Mich. 510, 61 NW 7.

Minn.—Hause v. O'Leary, 136 Minn. 126, 161 NW 392; Simpson v. Cook, 24 Minn. 180.

N. Y.—Jacoby v. Jacoby, 188 N. Y. 124, 80 NE 676; Denison v. Denison, 185 N. Y. 438, 78 NE 162; Vanderpoel v. Loew, 112 N. Y. 167, 19 NE 481; Van Nostrand v. Moore, 52 N. Y. 12; Du Bois v. Ray, 35 N. Y. 162, 33 HowPr 292 [rev 20 N. Y. Super. 244, 5 AbbPrNS 172]; Rasquin v. Hamersley, 152 App. Div. 522, 137 NYS 578 [aff 208 N. Y. 630 mem, 102 NE 1112 mem]; Matter of Hinchman, 141 App. Div. 95, 125 NYS 699; Dillenbeck v. Dillenbeck, 134 App. Div. 720, 119 NYS 134; Matter of Spitz, 129 Misc. 78, 220 NYS 816; Matter of U. S. Trust Co., 86 Misc. 603, 148 NYS 762 [aff 166 App. Div. 920 mem, 152 NYS 1147 mem].

See cases infra this note; and §§ 147–153.

[a] **The general principle that a will should be construed so as to give effect to its limitations** (1) rather than to render them illegal, when two constructions are possible, applies to construction with reference to the statute against suspension. Bullard v. Albion, 128 Misc. 292, 217 NYS 849. (2) Generally see Charities § 12; Deeds § 200; Trusts [39 Cyc 194]; Ut Res Magis Valeat Quam Pereat [39 Cyc 1100]; Wills [40 Cyc 1407 et seq].

[b] **Rule applied.**—(1) Where a will gave property in trust for a designated person, and directed that it be invested "for his benefit during his natural life and for the benefit of his wife and his issue after his death," it will be construed to give a life estate to such person with remainder to his wife and issue, rather than to direct a trust to continue during the lives of his wife and children, contrary to the statute relating to suspension of the power of alienation. Mee v. Gordan, 187 N. Y. 400, 80 NE 353, 116 AmSR 613, 10 Ann Cas 172. (2) Where a will provided for an accounting by the trustees within two years after the expiration of the second measuring life, another trust to continue until the time fixed for such accounting is not invalid, as unduly suspending the power of alienation, as it should be construed to continue until the beginning of the two-year period, the will not requiring that the accounting be postponed for two years but only allowing that much time for the trustees to prepare the account. Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974. (3) Where a trust of his residuary estate created by one having a power of appointment would, if construed as executing such power, result in an illegal suspension, it has been held not to be an execution of the power, but to apply only to the testator's own property. Duff v. Rodenkirchen, 110 Misc. 575, 182 NYS 35 [aff 193 App. Div. 898 mem, 183 NYS 947 mem]. (4) Where the testator's father had given him seventy-one shares of certain stock for life, with power of appointment, and his mother had given him five hundred and twenty-seven shares of the same stock for life, with power of appointment, and the testator gave half his entire property in trust for his wife for life, and half in trust for his daughter for life, with remainders over, without specifying to which beneficiary the property appointed under each power should go, the will is construed as giving to the daughter who was not in being at the creation of the testator's father's power, but was in being at the creation of testator's mother's power, the stock, up to the amount of her share, which the testator had received from his mother, and as giving to his wife the balance of such stock and the stock received from the testator's father, thus avoiding a violation of the statute and consequent illegality of the trust for the daughter if the contrary construction were adopted. Cheever v. Cheever, 172 App. Div. 353, 157 NYS 428. (5) Where an executor was directed to sell property, "but not less than two years after my death," and to distribute the proceeds, the limitation of the power of sale should be treated as directory merely, and not as of the essence of the power itself, and consequently the will is valid. Matter of Fitzsimmons, 114 Misc. 71, 186 NYS 664. (6) A devise to the "issue" of a

to preserve rather than to overturn the limitation,[86] and it is not at liberty to read into a limitation provisions which would save it, on the ground that the creator was ignorant of its illegality,[87] or make a construction which amounts to rewriting the limitation for the purpose of evading the application of the statute.[88]

[§ 147] **b. Presumption of Legality.** In accordance with the general principle that a construction rendering an instrument valid is preferred to one making it violative of the statute,[89] the court will not assume, in the absence of proof, that the state of facts existing at the time of the creation of a limitation was such as to render the limitation invalid.[90]

[§ 148] **c. Severance of Invalid Limitations—(1) In General.** In accordance with the general principle that a construction rendering an instrument valid is preferred to one making it violative of the statute,[91] where a limitation or other provision is void for offending against statutory restrictions upon suspension of alienability or ownership or postponement of vesting, it may be severed from provisions and limitations otherwise valid, and effect given to the latter, if that may be done without destroying the scheme of distribution contemplated by the creator of the limitations;[92] but where the excision of a void provision defeats his primary pur-

designated person as joint tenants when the youngest should become twenty-one years old is properly construed as a valid devise to issue in being at the testator's death and not as including afterborn children where the latter construction would render the clause void as an illegal suspension of the power of alienation. Seitz v. Faversham, 205 N. Y. 197, 98 NE 385. (7) A devise of property to one for life, at his death "to be equally divided between" two others, with remainder in fee "at their death," does not violate the statute against perpetuities; "a fair interpretation of the devise is that one life estate is devised to both . . . to be enjoyed by them in common. In other words an undivided one-half to each." Woolfitt v. Preston, 203 Mich. 502, 169 NW 838, 840. (8) A testamentary provision directing trustees to distribute the estate "upon the death of my said wife and daughter and after the payment of all my said debts" does not suspend the power of alienation for a longer period than during the continuance of two lives; the statute requires the payment of debts of a decedent, and this will should not be construed to create a trust for that purpose, which might continue after the deaths of the testator's wife and daughter. McGraw v. McGraw, 176 Fed. 312, 316, 99 CCA 650 (construing Michigan statute); In re Rider, 199 Cal. 724, 251 P 799; Fitz Gerald v. Big Rapids, 123 Mich. 281, 82 NW 56 (both to same effect). (9) A provision, in an assignment of property to persons as joint tenants, that neither should have power to affect the right of the survivor, must be construed either as an idle promise or as an agreement not to exercise the power of severing the joint tenancy, and not as a restraint on alienation, where the latter construction would render it void. Kissam v. McElligott, 280 Fed. 212 (applying New York statute).

86. Cottman v. Grace, 112 N. Y. 299, 308, 19 NE 839, 3 LRA 145; Van Nostrand v. Moore, 52 N. Y. 12; Matter of Magnus, 179 App. Div. 359, 166 NYS 497.

"Where the language of a will is plain and unambiguous, we are not permitted to wrest it from its natural import in order to save a provision from condemnation." Cottman v. Grace, supra.

87. Matter of Gallien, 128 Misc. 370, 218 NYS 687 [aff 221 App. Div. 409, 223 NYS 491 (rev on other grounds 247 N. Y. 195, 160 NE 8)].

88. Hoyt v. Hoyt, 125 Misc. 95, 210 NYS 155 [aff 215 App. Div. 773 mem, 213 NYS 823 mem].

89. See supra § 146.

90. Swain v. Bowers, (Ind. A.) 158 NE 598; Matteson v. Palser, 173 N. Y. 404, 66 NE 110; Coston v. Coston, 118 App. Div. 1, 103 NYS 307; Matter of Raymond, 73 App. Div. 11, 76 NYS 355.

[a] **Excessive number of class below age specified.**—Where property was given in trust to pay the income to the testator's nieces and nephews until the youngest survivor of them should arrive at the age of thirty years, the fact that there was no proof as to the ages of the beneficiaries at the testator's death, and that none of them might then have been under thirty years of age, is a conclusive answer to the contention that by such provision the alienability and ownership might be suspended for five lives. Matteson v. Palser, 173 N. Y. 404, 66 NE 110. To same effect Coston v. Coston, 118 App. Div. 1, 103 NYS 307.

[b] **Adulthood of beneficiaries of accumulation.**—Where accumulation for the benefit of designated persons was directed, the court will not assume that such persons were adults rather than minors, and thereupon declare the trust for accumulation to be invalid. Matter of Raymond, 73 App. Div. 11, 76 NYS 355.

Validity governed by circumstances at creation of limitation see supra § 111.

91. See supra § 146.

92. In re Phelps, 182 Cal. 752, 190 P 17; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P 138; Nellis v. Rickard, 133 Cal. 617, 66 P 32, 85 AmSR 227; In re Hendy, 118 Cal. 656, 50 P 753; Swain v. Bowers, (Ind. A.) 158 NE 598; Vaubel v. Lang, 81 Ind. A. 96, 140 NE 69; Herron v. Stanton, (Ind. A.) 128 NE 363; Rozell v. Rozell, 217 Mich. 324, 186 NW 489; Van Driele v. Kotvis, 135 Mich. 181, 97 NW 700; Palms v. Palms, 68 Mich. 355, 36 NW 419; Toms v. Williams, 41 Mich. 552, 2 NW 814; In re Gallien, 247 N. Y. 195, 160 NE 8; In re Horner, 237 N. Y. 489, 143 NE 655; In re Mount, 185 N. Y. 162, 77 NE 999; Schlereth v. Schlereth, 173 N. Y. 444, 66 NE 130, 93 AmSR 616; Cross v. U. S. Trust Co., 131 N. Y. 330, 30 NE 125, 27 AmSR 597, 15 LRA 606; Onderdonk v. Onderdonk, 127 N. Y. 196, 27 NE 839; Kennedy v. Hoy, 105 N. Y. 134, 11 NE 390; Chipman v. Montgomery, 63 N. Y. 221 [aff 4 Hun 739]; Van Schuyver v. Mulford, 59 N. Y. 426; Harrison v. Harrison, 36 N. Y. 543, 2 Transcr. A. 348 [aff 42 Barb. 162]; Davis v. MacMahon, 161 App. Div. 458, 146 NYS 657, 13 Mills Surr. 33 [aff 214 N. Y. 614 mem, 108 NE 1092 mem]; Chastain v. Tilford, 138 App. Div. 746, 123 NYS 513 [aff 201 N. Y. 538, 94 NE 646]; Hardenbergh v. McCarthy, 130 App. Div. 538, 114 NYS 1073 [dist Simpson v. Trust Co. of America, 129 App. Div. 200, 113 NYS 370]; Duncklee v. Butler, 38 App. Div. 99, 56 NYS 491; Brown v. Richter, 76 Hun 469, 27 NYS 1094 [aff 144 N. Y. 706 mem, 39 NE 856 mem]; Matter of Sammis, 132 Misc. 710, 230 NYS 785; Matter of Fitzsimmons, 114 Misc. 71, 186 NYS 664; Davidge v. Wiggins, 137 NYS 127; Child v. Child, 1 NY LegObs 182; Haxtun v. Corse, 2 Barb. Ch. (N. Y.) 506; and cases infra this note.

[a] **Ulterior limitations** which are invalid may be separated from the preceding valid limitations and the latter upheld where they are not so involved with the former that they must fall with them. In re Colegrove, 221 N. Y. 455, 117 NE 813; Matter of Central Union Trust Co., 193 App. Div. 292, 183 NYS 671; Bailey v. Buffalo Loan, etc., Co., 151 App. Div. 166, 135 NYS 344 [rev 75 Misc. 23, 132 NYS 513]; In re Zimmerman, 168 NYS 729 [aff 183 App. Div. 939 mem, 171 NYS 1103 mem].

[b] **Remainders.**—(1) Where a valid trust provision was followed by an invalid remainder to the children of the beneficiaries, such remainder is severable and may be cut off to save the primary dispositions of the will., Matter of Erickson, 113 Misc. 10, 183 NYS 779 [aff 198 App. Div. 999 mem, 190 NYS 923 mem]. (2) Where the testator gave an estate for life to his daughter, with remainder to her children when they should reach the age of twenty-five, which remainder was void, the trust for the daughter is good. In re Chittick, 243 N. Y. 304, 153 NE 83. (3) Where a life tenant with power of appointment created a trust to pay the income to his widow who was in being at the creation of the power, until the child, who was born after such creation, should reach a designated age, when the corpus should be paid to him, the interest of the widow is not to be defeated by the invalidity of the remainder to the child, the good provision being separable from the bad. Matter of Bankers' Trust Co., 82 Misc. 375, 143 NYS 843, 11 Mills Surr. 234. (4) A limitation of successive life estates to the testator's son and daughter is not invalidated by the attempted limitation of a succeeding life estate to his grandchildren, with remainder over. Rozell v. Rozell, 217 Mich. 324, 186 NW 489.

[c] **Conditional limitation over.**—Where property was given absolutely to a designated person, with a provision for divesting of title and remainder over upon a contingency which would create an illegal suspension, the illegal remainder will be disregarded but the first gift and the divesting provision are not thereby invalidated, under the rule that invalid provisions may be eliminated and valid portions sustained where the general scheme can thereby be preserved. Matter of Phillips, 56 Misc. 96, 107 NYS 388, 6 Mills Surr. 241.

[d] **Trusts.**—(1) Where a will created an invalid trust which was intended merely to postpone payment of legacies for an illegal period, the trust provision could be expunged without destroying the general scheme and purpose, and such legacies were valid. In re Hitchcock, 222 N. Y. 57, 118 NE 220. (2) Where a valid testamentary trust for two lives was subsequently extended by a codicil so as to include another life, the provision for the third life will be excised, leaving the original scheme intact, within the rule that invalid limitations will be cut out when it can be done without in any manner interfering with the general scheme of disposition. Matter of Abbey, 131 App. Div. 395, 168 NYS 1047 [aff 98 Misc. 506, 164 NYS 934]. (3) Where a life tenant with power of appointment appointed property to be paid to a designated person in installments, with a direction that in the event of such person's death be-

pose or destroys the scheme of distribution the other limitations will fail also.[93]

[§ 149] **(2) Alternative Contingencies.** Under the general rules relating to the separation of valid limitations from those which are invalid,[94] where interests or estates are limited upon alternative contingencies, under one of which the limitation would be good and under the other it would violate a statute relating to suspension or postponement, the valid provision is separable from the invalid, and does not fail by reason of the latter's invalidity;[95] but only when the creator himself has limited interests in

fore all the property had been paid to her then the balance remaining should be given in trust for the life of a third person, the invalidity of the trust for such third person is not communicated to the other provisions, and the appointment to the first person designated is valid. Matter of Lang, 72 Misc. 589, 131 NYS 991. (4) Where a will established trusts for designated persons and provided that, in case the testator's estate should be worth more than estimated or in case any beneficiaries should die, the amounts given to the survivors should be proportionately increased, with remainder over on the death of the last beneficiary, the invalidity of the ulterior limitation did not invalidate the entire trust, but effect may be given thereto for the first two lives and thereafter the trust ceases and the property passes as intestate property. Matter of Aucaigne, 131 Misc. 723, 228 NYS 234. (5) A trust for the life of one in being at its creation, and for each of her children attaining the age of twenty-one years, while void as to the children who may not have been in being at the creation of the trust, is valid as to the life tenant, the trust for such life tenant being readily separable from the ulterior limitations. In re Wilcox, 194 N. Y. 288, 87 NE 497. (6) Under a trust to pay monthly sums to each sister during life and after her death to her heirs for their lives, the provisions for the heirs being void, the trust in favor of each sister is entirely independent of the provision for her heirs, and does not depend upon the validity of the disposition made of what remained of the fund after her death. Matter of Trumble, 137 App. Div. 483, 122 NYS 763 [mod on other grounds 199 N. Y. 454, 92 NE 1073]. (7) Where a trust to continue during the lives of the testator's two sons provided for the payment out of the income of annual sums to any after-born child of the testator during his minority, the provision for such after-born child will be upheld during the two measuring lives, although it is void as to the period after their expiration because attempting to suspend alienation for more than two lives in being. Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974. (8) Where a testator gave property in trust to pay fifty dollars out of the income to his daughter for her life, and the balance of the income to his widow for life and then to his son for life, with remainder over, the trust is good as to the share of income given to the widow and son, although it is invalid as to the portion given the daughter, which might continue for her life and then for the lives of the widow and son, and as to which the trust would exceed the statutory period. In re Gallien, 247 N. Y. 195, 160 NE 8. (9) Where property is given in trust for the life of the beneficiary, and after her death to be held in trust until the expiration of a period measured by two other lives, the life estate is not invalidated, but that part of the trust to continue after the death of the life tenant and until the expiration of the designated period should be cut off as invalid. Nester v. Nester, supra. (10) A trust to pay the income to the testator's widow for life and after her death to three designated persons or the survivor of them for life, while void as to such three persons, is valid as to the widow. Matter of Ely, 130 Misc. 345, 224 NYS 446. (11) A trust to pay the income to a husband for life and after his death to his wife, and after the death of the husband and wife to pay one half of the income to each of the daughters, is void as to the daughters, involving an illegal suspension of absolute ownership for more than two lives in being; but such invalidity does not affect the primary purpose of the trust, which was to maintain the family prior to the parents' deaths, and the trusts as to the husband and wife are valid. Carrier v. Carrier, 226 N. Y. 114, 123 NE 135. (12) Under a trust for the widow for life, the income then to be divided equally among the testator's children, with remainder to the children of a child dying, provided if a child should die without leaving children his share should go to the survivors for life, it is held that if one of the children dies leaving no child the provision for a further life estate to the surviving children violates the statute and cannot be sustained, but the effect would only be to destroy the trust beyond the second life. In re Silsby, 229 N. Y. 396, 128 NE 212; Church v. Wilson, 152 App. Div. 844, 137 NYS 1002 [aff 209 N. Y. 553 mem, 103 NE 1122 mem].

[e] **A provision for accumulation** to pay encumbrances may be cut out of a will where so doing will not wholly defeat the testator's intention, the only effect being that the beneficiaries will not be entitled to receive the whole net income from the beginning. Appell v. Appell, 177 App. Div. 570, 164 NYS 246 [aff 221 N. Y. 602 mem, 117 NE 1060 mem].

[f] **Independent provisions.**—(1) Where a will creates one or more invalid trusts and one or more valid and independent lawful trusts, not forming an essential part of the will as a whole, the invalid provisions may be annulled and the valid ones sustained. Davis v. MacMahon, 161 App. Div. 458, 146 NYS 657, 13 Mills Surr. 33 [aff 214 N. Y. 614 mem, 108 NE 1092 mem]. To same effect In re Mount, 185 N. Y. 162, 77 NE 999; Matter of Bankers' Trust Co., 82 Misc. 375, 143 NYS 843, 11 Mills Surr. 234. (2) Where separate trusts were created for such children of a designated person as should be living at a specified future time, the fact that among the children then living might be some born after the creation of the estate did not render the entire trust void, although the shares of such after-born children would be void; and where at the arrival of the time specified the only children living were those who were in being at the creation of the estate, the trust for each was valid. Mount v. Mount, 196 App. Div. 508, 188 NYS 170 [mod 108 Misc. 156, 178 NYS 168, and aff 234 N. Y. 568 mem, 138 NE 449 mem].

[g] **"The line of cleavage thus drawn between what is to be kept and what destroyed,** does not divide a mere continuum and split into parts a gift essentially unbroken. . . . It is not arbitrarily interjected by the court at a point where the testator had no thought of a resting place, a pause, a stage upon the journey. It follows seams and contacts suggested by the will itself. . . . We go along with the testator as far forward as we may." In re Horner, 237 N. Y. 489, 499, 143 NE 655.

Alternative contingencies see infra § 149.

93. D. C.—Wills v. Maddox, 45 App. 128.

Ind.—Phillips v. Heldt, 33 Ind. A. 388, 71 NE 520.

Mich.—Petit v. Flint, etc., R. Co., 114 Mich. 362, 72 NW 238.

Minn.—Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825.

N. Y.—In re Durand, 250 N. Y. 45, 164 NE 737; In re Horner, 237 N. Y. 489, 143 NE 655; Matter of Butterfield, 133 N. Y. 473, 31 NE 515; Tilden v. Green, 130 N. Y. 29, 28 NE 880, 27 AmSR 487, 14 LRA 33; Dana v. Murray, 122 N. Y. 604, 26 NE 21; Mann-Vynne v. Equitable Trust Co., 201 App. Div. 149, 194 NYS 50; Simpson v. Trust Co. of America, 129 App. Div. 200, 113 NYS 370 [aff 59 Misc. 96, 112 NYS 155, 112 NYS 370, and aff 197 N. Y. 586 mem, 91 NE 1120 mem]; La Farge v. Brown, 31 App. Div. 542, 52 NYS 93; Hoyt v. Hoyt, 125 Misc. 95, 210 NYS 155 [aff 215 App. Div. 773 mem, 213 NYS 823 mem]; Matter of Fitzsimmons, 114 Misc. 71, 186 NYS 664; Matter of Kalter, 86 Misc. 621, 148 NYS 921, 12 Mills Surr. 384; Davidge v. Wiggins, 137 NYS 127; Root v. Stuyvesant, 18 Wend. 257; Richards v. Moore, 5 Redf. Surr. 278; Thomas' Est., 1 Tuck. Surr. 367.

"In other words, if by drawing a knife between the good and the bad trusts, violence to the organic plan of the testator would result, this dissection should not be permitted and the whole should be declared void." Hoyt v. Hoyt, 125 Misc. 95, 100, 210 NYS 155 [aff 215 App. Div. 773 mem, 213 NYS 823 mem].

94. See supra § 148.

95. Palms v. Palms, 68 Mich. 355, 36 NW 419; In re Trevor, 239 N. Y. 6, 145 NE 66; In re Horner, 237 N. Y. 489, 143 NE 655; Morton Trust Co. v. Sands, 195 N. Y. 28, 87 NE 783; Kiah v. Grenier, 56 N. Y. 220; Faber v. Hauck, 80 Misc. 442, 141 NYS 153; Washburn v. Acome, 74 Misc. 301, 131 NYS 963 [aff 151 App. Div. 948 mem, 136 NYS 1150 mem].

[a] **"The rule is** (1) that if on a particular contingency the power of alienation is so suspended that it may possibly exceed the limits prescribed by law, the estate granted on that particular contingency is void; but this defect, which would affect the estate only if that contingency had occurred, can have no effect on it if that contingency does not occur; then that unlawful estate is not attempted. Accordingly, the good alternative estate is sustained notwithstanding the defect which would have been in the other, if the course of events had created it." Fowler v. Depau, 26 Barb. (N. Y.) 224, 236. (2) "But for the prohibition of the statute, both dispositions would have been lawful and valid, and either would have taken effect according to the happening of the events giving it vitality. The statute comes in and avoids one of the dispositions, leaving the other unaffected by its provisions. Why should not the latter take effect upon the occurrence of the events, upon which it was made to depend? The authorities sustain its validity. . . . Where a limitation is made to take effect on two alternative events, one of which is too remote and the other valid as within the prescribed limits, although the gift is void so far as it depends on the remote event, it will be allowed to take effect on the happening of the alternative one." Schettler v. Smith, 41 N. Y. 328, 336. (3) "Where the instrument provides for a future disposition of property,

the alternative can a contingency which would cause a violation of the statute be disregarded,[96] and where a gift depends upon a twofold event constituting but one contingency, the limitation cannot be split by the court into two contingencies, one good and one bad, and the limitation sustained where the good contingency has happened.[97]

[§ 150] **d. Separation of Shares in Trust.**[98] In accordance with the general principle that a construction rendering an instrument valid is preferred to one making it violative of the statute,[99] where a trust for the benefit of two or more persons, by the existence of which the alienability or ownership of the trust property is suspended,[1] is to cease as to each beneficiary at a time or upon a contingency specified by its terms, and his share of the corpus will thereupon be freed from the trust, the limitation is ordinarily construed as creating a separate trust for each beneficiary,[2] and the statutory period is accordingly to be separately computed as to each

by making alternative limitations, one or the other of which is to take effect according to the happening of specified alternative contingencies, the mere fact that the limitation over upon one contingency is invalid because it might involve undue suspension, or postponement of vesting, does not invalidate the other limitation which, if the contingency upon which it would become operative should occur, could not possibly occasion such undue suspension or postponement." Church v. Wilson, 152 App. Div. 844, 137 NYS 1002, 1006, 1007 [aff 209 N. Y. 553 mem, 103 NE 1122 mem, and quot Chaplin Suspension of Alien. (2d ed) §§ 430, 432]. (4) "And in such cases also, if the disposition of the precedent estate is so far separable as to be valid in any event, irrespective of which contingency may occur in future, then it may be sustained, and the determination of the validity of the future dispositions may be deferred, within the limits of the statutory period, until the events occur upon which the decision as to them must be based." Church v. Wilson, supra.

[b] **Thus** an alternative provision of a will, creating a contingent estate which would be invalid because absolute ownership might be suspended for four lives, does not invalidate the entire limitation where the contingency never occurred and the property actually became vested under a valid provision. In re Trevor, 239 N. Y. 6, 145 NE 66.

96. In re Wilcox, 194 N. Y. 288, 87 NE 497.

97. In re Wilcox, supra; Rose v. Rose, 4 Abb. Dec. (N. Y.) 108.

98. Shares accruing by survivorship see infra § 151.

99. See supra § 146.

1. Trusts suspending alienability or ownership see supra §§ 122, 132.

2. In re Phelps, 182 Cal. 752, 190 P 17; In re Steele, 124 Cal. 533, 57 P 564; Palms v. Palms, 68 Mich. 355, 36 NW 419; In re Drury, 249 N. Y. 154, 163 NE 133; In re Buttner, 243 N. Y. 1, 152 NE 447; In re Horner, 237 N. Y. 489, 143 NE 655; In re Colegrove, 221 N. Y. 455, 117 NE 813; Corse v. Chapman, 153 N. Y. 466, 47 NE 812; Allen v. Allen, 149 N. Y. 280, 43 NE 626; Locke v. Farmers' L. & T. Co., 140 N. Y. 135, 35 NE 578; Vanderpoel v. Loew, 112 N. Y. 167, 19 NE 481; Matter of Verplanck, 91 N. Y. 439; Wells v. Wells, 88 N. Y. 323; Moore v. Hegeman, 72 N. Y. 376; Stevenson v. Lesley, 70 N. Y. 512; Savage v. Burnham, 17 N. Y. 561; Markert v. Solomon, 217 App. Div. 275, 216 NYS 626; Matter of McGeehan, 200 App. Div. 739, 193 NYS 856 [aff 115 Misc. 737, 187 NYS 823, and aff 237 N. Y. 575 mem, 143 NE 748 mem]; Mount v. Mount, 196 App. Div. 508, 188 NYS 170 [mod 108 Misc. 156, 178 NYS 168, and aff 234 N. Y. 568 mem, 138 NE 449 mem]; Matter of Magnus, 179 App. Div. 359, 166 NYS 497; Pryer v. Pryer, 145 App. Div. 928 mem, 126 NYS 393, 130 NYS 1126 mem; Matter of Trumble, 137 App. Div. 483, 122 NYS 763 [mod 199 N. Y. 454, 92 NE 1073]; Post v. Bruere, 127 App. Div. 250, 111 NYS 51; Cushman v. Cushman, 116 App. Div. 763, 102 NYS 258 [aff 191 N. Y. 505 mem, 84 NE 1112 mem]; Fischer v. Langlotz, 114 App. Div. 903, 100 NYS 578; Matthews v. Studley, 17 App. Div. 303, 45 NYS 201 [aff 161 N. Y. 633 mem, 57 NE 1117 mem]; Foote v. Bruggerhof, 66 Hun 406, 21 NYS 509; Matter of Lapham, 37 Hun (N. Y.) 15; Brigham v. Jones, 25 Hun (N. Y.) 6; Mason v. Jones, 2 Barb. (N. Y.) 229 [aff 2 Sandf. Ch. 432]; Matter of Fellion, 132 Misc. 805, 231 NYS 9; Matter of Dodge, 129 Misc. 390, 222 NYS 247; Cary v. Carman, 116 Misc. 463, 190 NYS 193; Matter of Fidelity Trust Co., 94 Misc. 533, 160 NYS 193; Matter of U. S. Trust Co., 86 Misc. 603, 148 NYS 762 [aff 166 App. Div. 920 mem, 152 NYS 1147 mem]; Matter of Bankers' Trust Co., 82 Misc. 375, 143 NYS 843, 11 Mills Surr. 234; Bascom v. Weed, 53 Misc. 496, 105 NYS 459; Hayden v. Sugden, 48 Misc. 108, 96 NYS 681; Mendel v. Levis, 40 Misc. 271, 81 NYS 965; Neilson v. Brown, 31 Misc. 562, 65 NYS 585; Blaker's Will, 10 NYSt 210 [aff 12 NYSt 741]; Cromwell v. Cromwell, 2 Edw. (N. Y.) 495 [aff 3 ChSent 7]; Dickie v. Van Vleck, 5 Redf. Surr. (N. Y.) 284; Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 18. See also Haug v. Schumacher, 166 N. Y. 506, 60 NE 245; Mott v. Ackerman, 92 N. Y. 539; Monarque v. Monarque, 80 N. Y. 320; Bruner v. Meigs, 64 N. Y. 506; Kent v. Kent, 99 App. Div. 112; 90 NYS 828; Trolan v. Rogers, 79 Hun 507, 29 NYS 899; Gage v. Gage, 43 Hun 501 [aff 112 N. Y. 667 mem, 20 NE 414 mem]; Matter of Von Bernuth, 127 Misc. 705, 217 NYS 633; Denison v. Denison, 42 Misc. 295, 86 NYS 604 [aff 103 App. Div. 523, 86 NYS 604, 93 NYS 1128 mem (aff in 185 N. Y. 438, 78 NE 162)]; Matter of Blaker, 12 NYSt 741 (all apparently applying the rule stated in the text). But see Monarque v. Requa, 53 HowPr (N. Y.) 438 (where such construction was not adopted, although no intention preventing it appears).

[a] **Rule applied.**—(1) Where a trust for the benefit of six children by its terms ceases as to one sixth of the property on the death of each child, the trusts are separable and the statutory period is not exceeded. Fischer v. Langlotz, 114 App. Div. 903, 100 NYS 578. (2) A trust for several persons for their lives, to be distributed after the death "respectively" of all of such persons, denotes separation or segregation of the trust property into separate trusts, especially where the opposite construction would cause a violation of the statute against perpetuities. Matter of U. S. Trust Co., 86 Misc. 603, 148 NYS 762 [aff 166 App. Div. 920 mem, 152 NYS 1147 mem]. (3) Where a trust was created to pay income to testator's wife for life and then to his two sons in equal shares, and on the death of either to pay over one half of the corpus, the will is construed as creating two separate trusts and there is no illegal suspension of ownership. Post v. Bruere, 127 App. Div. 250, 111 NYS 51. (4) Where testator gave property in trust to pay one third of the income to each of three beneficiaries, and upon the death of the first to pay the income equally to the survivors, and upon the death of the second to divide the estate into equal parts and to pay one half to remaindermen and the other half to survivor of the three original beneficiaries with remainder at his death, the will contemplated a severance of the property into three independent trusts, the principals of each being simply held together for purposes of investment, and consequently the power of alienation was not suspended for more than two lives. In re Buttner, 243 N. Y. 1, 152 NE 447. (5) A trust to hold for the benefit of four persons until they respectively attain twenty-one years of age, when one fourth of the principal and accumulations should be paid over to each as he arrives at such age, is to be construed as creating four separate trusts, inasmuch as the principal of each trust fund is released from the trust provisions upon the beneficiary attaining the designated age, and consequently no illegal suspension is caused. Markert v. Solomon, 217 App. Div. 275, 216 NYS 626. (6) Under a will directing that one fourth of the income from a trust fund be paid to each of four persons for their lives, with remainder "after their deaths," the specification that each is to have one fourth only, without any attempt, upon the death of one, to give his one fourth of the income to the survivors, makes it clear that four equal separate trusts were intended to be created, the trust as to each beneficiary terminating upon his death, and consequently there was no illegal suspension. Matter of McGeehan, 200 App. Div. 739, 193 NYS 856 [aff 115 Misc. 737, 187 NYS 823, and aff 237 N. Y. 575 mem, 143 NE 748 mem]. (7) A trust for three persons, providing upon the death of any one for the payment of his share to a remainderman, is to be construed as though in terms it had created a separate trust for each beneficiary. Cushman v. Cushman, 116 App. Div. 763, 102 NYS 258 [aff 191 N. Y. 505 mem, 84 NE 1112 mem]. (8) Where property is given in trust to be divided into shares for separate and distinct beneficiaries, at the death of each of whom his share of the principal is released, each share must be regarded as a separate trust to be measured by its own term. Pryer v. Pryer, 145 App. Div. 928 mem, 126 NYS 393, 130 NYS 1126 mem. (9) Under a trust directing that one third of the income shall be paid to each of testator's sons during the period of his life, and, upon the death of one, one third of the principal to be given to his issue, or if he leave no issue to the surviving sons, to be applied to the principal of their shares, three separate and distinct trusts will be considered to have been created, although the fund has not been in express terms separated into three parts. Matter of Fidelity Trust Co., 94 Misc. 533, 160 NYS 193. (10) A trust to pay over a sum of money to each grandchild attaining twenty-one years of age suggests separate trusts, and they will be severed. In re Colegrove, 221 N. Y. 455, 117 NE 813.

[b] **Termination of trust as to each share and liberation of principal.**—(1) It is necessary, for the purpose of holding that separate and independent trusts are created for each of two or more persons, that each part of the principal fund shall be liberated from the trust upon the termination of the beneficial interest of each cestui. Leach v. Godwin, 198 N. Y. 35, 91 NE 288; Matter of Magnus, 179 App. Div. 359, 166 NYS 497. (2) The fact that a trust for the benefit of four persons is to terminate as to each beneficiary at his

share of the trust property;[3] and while an intention to create separate and independent trusts must be found within the instrument,[4] it does not militate against such construction that no direction for separation of the trust property is expressed,[5] or that the trust property is in the meantime to be held in solido or in a common fund for purposes of administration or investment.[6] But if a contrary intention appears, the trust cannot be construed to be separable,[7] and the statutory period must be computed with reference to the possible ultimate duration of the whole trust.[8]

[§ 151] **e. Shares Accruing by Survivorship.** In accordance with the general principle that a construction rendering an instrument valid is preferred to one making it violative of the statute,[9] where an interest or estate in property is limited to a class of individuals, with limitations over to the survivors upon the death of each member, it is held, unless a contrary intention appears,[10] that shares accruing to survivors at a death do not again go over at a second death.[11]

[§ 152] **f. Particular Provisions—(1) Youngest Surviving Child.** In accordance with the general principle that a construction rendering an instrument valid is preferred to one making it violative of the statute,[12] a suspension or postponement to continue until the attainment of a specified age by the youngest child of the creator of the limitation, or of another designated person, is construed to refer to the youngest child surviving at the creation of the limitation, and not the youngest surviving to attain the specified age,[13] except when a contrary intention appears.[14]

death, and that the property does not then go into or remain a part of the general fund but is given over absolutely, is alone sufficient to show that a separate trust was intended for each beneficiary, although no express separation or division is made and the creator contemplated control of the property as an entirety in one fund so long as practicable. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

3. See cases supra note 2.

Statutory period see supra §§ 98-118.

4. Leach v. Godwin, 198 N. Y. 35, 91 NE 288; Matter of Beale, 213 App. Div. 13, 209 NYS 638 [rev 124 Misc. 96, 207 NYS 257].

5. Stevenson v. Lesley, 70 N. Y. 512; Matter of Magnus, 179 App. Div. 359, 166 NYS 497; Post v. Bruere, 127 App. Div. 250, 111 NYS 51; Cary v. Carman, 116 Misc. 463, 190 NYS 193; Matter of Fidelity Trust Co., 94 Misc. 533, 160 NYS 193; Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

6. In re Colegrove, 221 N. Y. 455, 117 NE 813; Leach v. Godwin, 198 N. Y. 35, 91 NE 288; Central Trust Co. v. Egleston, 185 N. Y. 23, 77 NE 989; Locke v. Farmers' L. & T. Co., 140 N. Y. 135, 35 NE 578; Montague v. Curtis, 191 App. Div. 904, 181 NYS 709; Matter of Trumble, 137 App. Div. 483, 122 NYS 763 [mod on other grounds 199 N. Y. 454, 92 NE 1073]; Cushman v. Cushman, 116 App. Div. 763, 102 NYS 258 [aff 191 N. Y. 505 mem, 84 NE 1112 mem]; Matter of Fellion, 132 Misc. 805, 231 NYS 9; Cary v. Carman, 116 Misc. 463, 190 NYS 193; Mount v. Mount, 108 Misc. 156, 178 NYS 168 [mod 196 App. Div. 508, 188 NYS 170 (aff 234 N. Y. 568 mem, 138 NE 449 mem)]; Matter of U. S. Trust Co., 86 Misc. 603, 148 NYS 762 [aff 166 App. Div. 920 mem, 152 NYS 1147 mem]; Bascom v. Weed, 53 Misc. 496, 105 NYS 459; and cases supra note 2.

7. In re Durand, 250 N. Y. 45, 164 NE 737; Leach v. Godwin, 198 N. Y. 35, 91 NE 288; Central Trust Co. v. Egleston, 185 N. Y. 23, 17 NE 989; Colton v. Fox, 67 N. Y. 348; Matter of Beale, 213 App. Div. 13, 209 NYS 638 [rev 124 Misc. 96, 207 NYS 257]; Matter of Magnus, 179 App. Div. 359, 166 NYS 497; Walsh v. Waldron, 63 Hun 315, 17 NYS 829 [aff 135 N. Y. 650 mem, 32 NE 647 mem]; Thorn v. Coles, 3 Edw. (N. Y.) 330; Field v. Field, 4 Sandf. Ch. (N. Y.) 528.

[a] **Cross remainders to survivors.**—(1) A will establishing a trust for the benefit of three children during their lives, and upon the death of either with issue to pay one third of the principal to such issue, and upon the death of either without issue to divide the income among the survivors for their lives, cannot be construed as creating three separate trusts. Matter of Beale, 213 App. Div. 13, 209 NYS 638 [rev 124 Misc. 96, 207 NYS 257]. (2) Construction as to shares accruing by survivorship see infra § 151.

8. See cases supra note 7.

9. See supra § 146.

10. Matter of Rawitzer, 175 Cal. 585, 166 P 581; Matter of Beale, 213 App. Div. 13, 209 NYS 638 [rev 124 Misc. 96, 207 NYS 257]; Simpson v. Trust Co. of America, 129 App. Div. 200, 113 NYS 370 [aff 59 Misc. 96, 112 NYS 155, 112 NYS 370, and aff 197 N. Y. 586 mem, 91 NE 1120 mem]; Matter of Turner, 82 Misc. 25, 143 NYS 692, 11 Mills Surr. 29; Mendel v. Levis, 40 Misc. 271, 81 NYS 965.

[a] **Illustration.**—Where property is given in trust for the benefit of more than two persons, with cross remainders upon the death of each, with remainder over absolutely upon the death of the survivor, the will cannot be construed as not intending to continue in trust, upon the death of the second beneficiary dying, the subshare received by him from the first beneficiary dying, there being no provision for any absolute vesting of the subshare upon the death of the second life tenant, especially since such construction would result in partial intestacy, contrary to the rule that a construction which will result in intestacy is not to be adopted if a different construction is permissible. Simpson v. Trust Co. of America, 129 App. Div. 200, 113 NYS 370 [aff 59 Misc. 96, 112 NYS 155, 112 NYS 370, and aff 197 N. Y. 586 mem, 91 NE 1120 mem].

11. Schey v. Schey, 194 N. Y. 368, 87 NE 817; Vanderpoel v. Loew, 112 N. Y. 167, 19 NE 481; Beardsley v. Hotchkiss, 96 N. Y. 201; Moore v. Hegeman, 72 N. Y. 376; Everitt v. Everitt, 29 N. Y. 39; Orr v. Orr, 147 App. Div. 753, 133 NYS 48 [aff 212 N. Y. 615 mem, 106 NE 1037 mem]; Chastain v. Tilford, 138 App. Div. 746, 123 NYS 513 [aff 201 N. Y. 538, 94 NE 646]; Matter of Aucaigne, 131 Misc. 723, 228 NYS 234.

[a] **Rule applied.**—(1) Where property is given in trust for five beneficiaries for life, and it is provided that the share of one dying shall be divided between the survivors on the same trust, the will will not be construed as providing for the passage, upon the death of the second child, of a subshare received from the share of the first child dying, and as to such subshare the testator died intestate. Chastain v. Tilford, 138 App. Div. 746, 123 NYS 513 [aff 201 N. Y. 538, 94 NE 646]. (2) Where a testator created separate trusts for each of his five children, to pay the income of each such trust to them and to pay the principal to each child upon attaining the age of thirty, and provided that if any child died before attaining such age a new trust should be created of his share, to be divided into four equal parts and held for each of the four other children for the same uses and subject to the same conditions as their original one-fifth shares, such provision is not to be construed as creating an illegal suspension on the theory that if a second child died leaving no issue the fund would go to the remaining three children, with similar results upon the death of each of them without issue, so that the power of alienation might be suspended until the death of the last child; but it is to be construed so that, upon the death of a child who has received one fourth of the share of a deceased child, such one fourth shall not be distributed to the survivors. The testator "should not be convicted of having formulated an unlawful scheme in the attempted disposition of his property, if such conclusion properly can be avoided." Schey v. Schey, 194 N. Y. 368, 372, 87 NE 817.

12. See supra § 146.

13. Simpson v. Cook, 24 Minn. 180; Jacoby v. Jacoby, 138 N. Y. 124, 80 NE 676; Rose v. Vingut, 117 N. Y. 204, 22 NE 933; O'Keeffe v. Westphal, 139 App. Div. 79, 123 NYS 817; Coston v. Coston, 118 App. Div. 1, 103 NYS 307; Matteson v. Palser, 56 App. Div. 91, 67 NYS 612 [mod 173 N. Y. 404, 66 NE 110]; Burke v. Valentine, 52 Barb. (N. Y.) 412, 5 AbbPrNS 164; Matter of Fellion, 132 Misc. 805, 231 NYS 9; Matter of Rust, 129 Misc. 394, 222 NYS 271; Matter of Mikantowicz, 60 Misc. 273, 113 NYS 278, 6 Mills Surr. 516; Toher v. Crounse, 57 Misc. 252, 107 NYS 990 [aff 127 App. Div. 934 mem, 111 NYS 1147 mem]; Cogan v. McCabe, 23 Misc. 739, 52 NYS 48; Horndorf v. Horndorf, 13 Misc. 343, 34 NYS 560. See Stehlin v. Stehlin, 67 Hun 110, 22 NYS 40 (apparently applying the rule stated in the text). Compare Schmitt v. Kahrs, 1 Dem. Surr. (N. Y.) 114 (where the construction to be given such a provision is discussed but not decided).

[a] **Rule applied.**—(1) A trust to continue "until the youngest of my children shall have attained the age of twenty-one years" is not to be construed as meaning the youngest of the children who shall live that long, but the youngest of the children living at the testator's death. Matter of Mikantowicz, 60 Misc. 273, 274, 113 NYS 278, 6 Mills Surr. 516. (2) A testamentary trust providing for distribution "upon the arrival of the youngest child of mine surviving at the age of 21 years," is, in accordance with the rule that a will speaks as of the time of the testator's death, to be construed as referring to the youngest child surviving at the testator's death, and consequently suspending the power of alienation only until the majority of such child. O'Keeffe v. Westphal, 139 App. Div. 79, 123 NYS 817.

14. Matter of Van Wyck, 185 Cal. 49, 196 P 50; Whitefield v. Crissman, 55 Misc. 468, 106 NYS 630 [aff 123 App. Div. 233, 108 NYS 110]; Hawley v. James, 16 Wend. (N. Y.) 61.

[a] **For example,** a testamentary

[§ 153] **(2) Until Specified Time or Attainment of Specified Age.** In accordance with the general principle that a construction rendering an instrument valid is preferred to one making it violative of the statute,[15] a suspension of alienability or ownership or a postponement of vesting to continue until the attainment by a designated person of his majority or other specified age,[16] or a trust for the benefit of a designated person to continue for a fixed term[17] or until the happening of a specified event[18] or for a period measured by the lives of others than the beneficiary,[19] is construed as terminating at the time fixed by its terms or at the earlier death of such person, whichever shall first occur, except when a contrary intention appears.[20]

[§ 154] **9. Other Statutory Restrictions upon Future Estates[21]—a. In General.** In addition to the rules relating to suspension of alienability[22] and ownership,[23] and to postponement of vesting,[24] the creation of future interests and estates is, in New York and in a number of the jurisdictions which have copied or imitated its system,[25] made subject to other statutory restrictions,[26] which, although they have been said to have no necessary connection with the law of perpetuities,[27] are so closely related thereto that they may properly be considered

trust for four children, to continue until all have reached their majority, cannot be construed as intending a trust to be measured by the life of the youngest child, within his minority, since a contrary contention—the continuance of the trust as to the survivor, notwithstanding the earlier death of one—is made manifest by the words employed. Whitefield v. Crissman, 55 Misc. 468, 106 NYS 630 [aff 123 App. Div. 233, 108 NYS 110].

15. See supra § 146.

16. Matter of Rawitzer, 175 Cal. 585, 166 P 581; In re Haines, 150 Cal. 640, 89 P 606; In re Steele, 124 Cal. 533, 57 P 564; In re Hendy, 118 Cal. 656, 50 P 753; Berry v. Lebus, 56 Cal. A. 378, 205 P 471; Woestman v. Union Trust, etc., Bank, 50 Cal. A. 604, 195 P 944; Matlock v. Lock, 38 Ind. A. 281, 73 NE 171; Simpson v. Cook, 24 Minn. 180; Jacoby v. Jacoby, 188 N. Y. 124, 80 NE 676; Sawyer v. Cubby, 146 N. Y. 192, 40 NE 869; Roe v. Vingut, 117 N. Y. 204, 22 NE 933; Matter of Murphy, 213 App. Div. 319, 210 NYS 531; Matter of Lally, 136 App. Div. 781, 121 NYS 467 [aff 198 N. Y. 608 mem, 92 NE 1089 mem]; Coston v. Coston, 118 App. Div. 1, 103 NYS 307; Burke v. O'Brien, 115 App. Div. 574, 100 NYS 1048; Jacoby v. Jacoby, 113 App. Div. 913, 100 NYS 1122 [aff 188 N. Y. 124, 80 NE 676]; Becker v. Becker, 13 App. Div. 342, 43 NYS 17; Stehlin v. Stehlin, 67 Hun 110, 22 NYS 40; James v. Beasley, 14 Hun (N. Y.) 520; Burke v. Valentine, 52 Barb. (N. Y.) 412, 5 AbbPrNS 164 [aff 6 AlbLJ 167]; Eells v. Lynch, 21 N. Y. Super. 465; McGowan v. McGowan, 9 N. Y. Super. 57; Lang v. Ropke, 7 N. Y. Super. 363, 10 NYLeg Obs 70; Matter of Grossman, 131 Misc. 526, 227 NYS 470; Matter of Bahrenburg, 130 Misc. 196, 224 NYS 183 [aff 214 App. Div. 792, 210 NYS 824 (aff 224 N. Y. 561 mem, 155 NE 897 mem)]; Matter of Rounds, 105 Misc. 273, 172 NYS 758; Matter of Lynch, 102 Misc. 650, 169 NYS 321; Pruyn v. Sears, 96 Misc. 200, 161 NYS 58; Matter of Mikantowicz, 60 Misc. 273, 113 NYS 278, 6 Mills Surr. 516; Matter of O'Reilly, 59 Misc. 136, 112 NYS 208, 6 Mills Surr. 431; Toher v. Crounse, 57 Misc. 252, 107 NYS 990 [aff 127 App. Div. 934 mem, 111 NYS 1147 mem]; Kessler v. Friede, 29 Misc. 187, 60 NYS 891; Horndorf v. Horndorf, 13 Misc. 343, 34 NYS 560; Matter of Sands, 3 NYS 67, 1 Conn. Surr. 259; Muller v. Struppman, 6 AbbNCas (N. Y.) 343, 55 HowPr 521; Hawley v. James, 16 Wend. (N. Y.) 61; Butler v. Butler, 3 Barb. Ch. (N. Y.) 304. See In re Ward, 175 NYS 654 (apparently applying the rule stated in the text). Compare Appell v. Appell, 177 App. Div. 570, 575, 164 NYS 246 [aff 221 N. Y. 602 mem, 117 NE 1060 mem] (supporting the rule stated in the text; but where it was said by Shearn, J., in a dissent, that such construction was given where the manifest intent of the creator of the limitation was in accord with it, as it has been found to be "in practically every case where it has ever been done," but not otherwise).

"A term measured by a minority ends upon the death of the minor." Jacoby v. Jacoby, 188 N. Y. 124, 129, 80 NE 676.

[a] **Reason for rule.**—A trust for the benefit of a beneficiary to continue until he arrives at a designated age manifestly is conditional upon his arriving at that age and terminates at his death before it, under the rule that where the purpose of a trust ceases, the estate of the trustee ceases also, and that a trust terminates when there ceases to be a beneficiary capable of calling for its enforcement. Pruyn v. Sears, 96 Misc. 200, 161 NYS 58.

[b] **Rule applied.**—A trust to terminate as soon after the death or remarriage of a testator's widow as the youngest child then living should attain twenty-one years of age does not violate the statute, since the longest period of suspension would be the lifetime of the wife and the lifetime or minority of the youngest child living at the death of the wife. Matter of Bahrenburg, 130 Misc. 196, 224 NYS 183 [aff 214 App. Div. 792, 210 NYS 824 (aff 244 N. Y. 561 mem, 155 NE 897 mem)].

17. Matter of Yates, 170 Cal. 254, 149 P 555; Hillyer v. Vandewarter, 121 N. Y. 681, 24 NE 999; Farley v. Secor, 167 App. Div. 80, 152 NYS 787; Keenan v. Keenan, 122 App. Div. 435, 107 NYS 152. Compare Hause v. O'Leary, 136 Minn. 126, 161 NW 392 (where a prohibition of alienation by the devisee of property for a period of five years was held to be personal to him and so to terminate in case of his death before the expiration of such period); Tonnele v. Wetmore, 124 App. Div. 686, 109 NYS 349 [motion to dism app den 192 N. Y. 583 mem, 85 NE 1116 mem, and rev on other grounds 195 N. Y. 436, 88 NE 1068] (holding that a provision that trustees should have power to retain the trust property in their hands without selling it until a certain date, coupled with a power to sell it thereafter, was intended to be conditioned upon the trust continuing until that date, and did not extend the estate devised to the trustees).

[a] **Rule applied.**—(1) A trust for the benefit of a designated person in being, to continue ten years, with no remainder over, in trust, is construed as terminating at the earlier death of the beneficiary. Hillyer v. Vandewarter, 121 N. Y. 681, 24 NE 999. (2) Where trustees were directed to hold property for five years and pay the income to a designated person in being, and to convey the corpus to him at the end of such time, with legal remainder over in case of his death before five years should have elapsed, the trust must cease upon the death of the beneficiary, if it should occur before the end of five years, and consequently the power of alienation is not illegally suspended. Keenan v. Keenan, 122 App. Div. 435, 107 NYS 152. (3) A trust to pay the income to the testator's wife for the term of five years from his death must be construed as intending that the term should fall within her life, and if she dies before its expiration, the trust as to payment of income ceases, especially since there would be no beneficiary of the income; and consequently the trust does not violate the statute. Farley v. Secor, 167 App. Div. 80, 152 NYS 787.

18. In re Verplanck, 91 N. Y. 439.

[a] **Marriage of beneficiary.**—A trust to continue so long as the beneficiary should remain single terminates upon his marriage or his death unmarried. In re Verplanck, 91 N. Y. 439.

19. Bailey v. Bailey, 97 N. Y. 460; Crooke v. Kings County, 97 N. Y. 421; Kahn v. Tierney, 135 App. Div. 897, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem].

[a] **Rule applied.**—Where a testator created a trust to pay income to K for the use and benefit of her five children, and as each child should arrive at the age of twenty-one years to pay to such child out of the principal the sum of one thousand dollars, the share of the principal of any child dying before attaining that age to be paid upon the happening of that event to K, and when the youngest child should arrive at the age of twenty-six or at her death before reaching that age to pay the residue of the principal to K or her heirs, the trust would terminate upon the death of all the children in the lifetime of K, or would continue during the lives of all the children until the death of K and the attainment of the age of twenty-six years by the youngest child or her death before reaching such age. Kahn v. Tierney, 135 App. Div. 897, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem].

[b] **A trust "must be construed to run for a natural term** (1) except as shortened by the stipulated term; or for the stipulated term, except as shortened by the natural term," the natural term being the time when the purpose of the creation of the trust has been accomplished. Kahn v. Tierney, 135 App. Div. 897, 900, 120 NYS 663 [aff 201 N. Y. 516 mem, 94 NE 1095 mem (quot Crooke v. Kings County, 97 N. Y. 421)]. (2) Termination of trust when purpose has been accomplished see Trusts [39 Cyc 97 text and notes 61–73].

Measuring lives need not be those of beneficiaries see supra § 99.

20. Haynes v. Sherman, 117 N. Y. 433, 22 NE 938; Benedict v. Webb, 98 N. Y. 460; Matter of Lally, 136 App. Div. 781, 121 NYS 467 [aff 198 N. Y. 608 mem, 92 NE 1089 mem]; Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 NYS 228; Ahern v. Ahern, 52 App. Div. 356, 65 NYS 81; Walsh v. Waldron, 63 Hun 315, 17 NYS 829 [aff 135 N. Y. 650 mem, 32 NE 647 mem]; Titus v. Weeks, 37 Barb. (N. Y.) 136; Toher v. Crounse, 57 Misc. 252, 107 NYS 990 [aff 127 App. Div. 934 mem, 111 NYS 1147 mem]; Boynton v. Hoyt, 1 Den. (N. Y.) 53; McSorley v. Leary, 4 Sandf. Ch. (N. Y.) 414; Thompson v. Clendening, 1 Sandf. Ch. (N. Y.) 387.

21. Other statutory restrictions on trusts for accumulation see supra §§ 82–87.

22. See supra §§ 119–129.

23. See supra §§ 130–137.

24. See supra § 138.

25. See supra § 97 text and note 66.

26. See statutory provisions; and infra §§ 155–157.

27. Purdy v. Hayt, 92 N. Y. 446.

therewith.[28]

[§ 155] **b. Successive Life Estates.** Under a statute providing that successive estates for life may not be limited except to persons in being at the creation thereof,[29] a limitation to a class which may include persons subsequently born,[30] or an appointment to persons not in esse at the creation of the power,[31] is void. And under a statute providing that, where a remainder is limited on more than two successive life estates, the life estates subsequent to those of the two persons first entitled thereto are void,[32] cross remainders for life to the survivors of three or more life tenants are void as to a share which accrued to one life tenant upon the death of another.[33] In such case it is ordinarily provided[34] that on the death of the two persons first entitled[35] the remainder takes effect in the same manner as if no attempt had been made to create further life estates;[36] thus, if the remainder is still contingent at the termination of the first two life estates it fails,[37] and if it is then vested or ready to vest it is accelerated and takes effect at once.[38] Such statutory provisions, when not otherwise restricted, apply to limitations of legal estates both in realty and in personalty,[39] but have no application to beneficial interests in trusts.[40]

[§ 156] **c. Remainders on Life Estates.** Under a statute providing, either as to life estates in gen-

28. In re Wilcox, 194 N. Y. 288, 299, 87 NE 497 ("The question is whether there are not also other limitations [in addition to those relating to suspension of alienability and ownership], call them what you may").

29. See statutory provisions.

30. Seligman v. Seligman, 89 Misc. 194, 151 NYS 889, 13 Mills Surr. 564. Contra Downing v. Birney, 117 Mich. 675, 76 NW 125 (holding that the members in being at the creation of the estate take life estates, and those subsequently born take nothing, the statute making futile an attempt to limit life estates to them).

[a] **Illustration.**—A gift of income to the testator's grandchildren for life, after the termination of a preceding life estate, must be understood as a gift to a class whose members were to be determined at the end of the first life estate, and since persons answering the description may be born after the testator's death, the gift to the class is void. Seligman v. Seligman, 89 Misc. 194, 151 NYS 889, 13 Mills Surr. 564.

31. Carlisle v. Rich, 100 Misc. 305, 165 NYS 601; Salmon v. Stuyvesant, 16 Wend. (N. Y.) 321.

Statutory period computed from creation of power see supra § 115.

32. See statutory provisions; and cases infra this note.

[a] **Statute applied.**—When successive life estates are limited to three persons, the third life estate fails. Woodruff v. Cook, 61 N. Y. 638; Matter of Ryder, 41 App. Div. 247, 58 NYS 635; Matter of Perry, 48 Misc. 285, 96 NYS 879; Saxton v. Webber, 83 Wis. 617, 53 NW 905, 20 LRA 509.

[b] **Statute inapplicable to concurrent life estates.**—Where an estate is limited upon joint lives, the statute has no application, applying only to successive and not to concurrent life estates. Westerfield v. Westerfield, 1 Bradf. Surr. (N. Y.) 137.

33. Dana v. Murray, 122 N. Y. 604, 26 NE 21; Purdy v. Hayt, 92 N. Y. 446; Wells v. Rowland, 155 App. Div. 354, 140 NYS 341; In re Conger, 81 App. Div. 493, 80 NYS 933; Graham v. Graham, 49 Misc. 4, 97 NYS 779; Matter of Eldridge, 29 Misc. 734, 62 NYS 1026; Orphan Asylum v. White, 3 NYS 137, 6 Dem. Surr. 201. See Surdam v. Cornell, 116 N. Y. 305, 22 NE 450 (apparently applying the rule). Compare Kemp v. Sutton, 233 Mich. 249, 206 NW 366 (where a devise to testator's widow and three sons, providing that at the death of any of them the survivors should enjoy the whole property until their death, with remainder over at the death of the last survivor, was said to create a joint estate and not cross remainders nor successive estates; but the court did not advert to the statute).

[a] **Rule applied.**—(1) Where property was devised to A and B for life, as tenants in common, with cross remainders for life, and on the death of the survivor to C for life, with remainder in fee, three successive life estates were attempted to be created in the share of the tenant in common first dying, and accordingly the life estate of C was void as to such share, although valid as to the share of the tenant in common dying second. Purdy v. Hayt, 92 N. Y. 446; In re Conger, 81 App. Div. 493, 80 NYS 933. (2) Where land was limited to one for life with power of appointment, and the donee appointed to her husband and three daughters for life, with cross remainders for life, "the case is . . . presented, where three-fourths of the life estate devised is void under the statute whilst the other one-fourth may be valid, but it cannot be determined which is valid or which condemned until after the death of three of the life tenants. The person being unknown and the claim contingent, we incline to the view that this is also within the condemnation of the statute [relating to suspension]." Dana v. Murray, 122 N. Y. 604, 618, 26 NE 21.

34. See statutory provisions.

35. See cases infra this note; and note 36.

[a] **Two persons first entitled.**—(1) The statute providing that all life estates subsequent to those of the two persons first entitled thereto shall be void does not limit the manner in which the two life tenants that may take shall be determined, and that determination may be left to the contingency of which taker shall first die. Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561. (2) Thus, under a will giving equal life interests in property to five children with remainders to the survivors, and remainder to testator's grandchildren upon the death of the last surviving child, upon the death of the first child the surviving four children took an additional estate for life in that share of the property of which decedent had been life tenant, but upon the death of the second child the remainder to the grandchildren took effect as to that portion of the estate which had been included in the share of the first child dying. Wells v. Rowland, 155 App. Div. 354, 140 NYS 341.

36. Bailey v. Bailey, 28 Hun 603 [mod on other grounds 97 N. Y. 460]; Saxton v. Webber, 83 Wis. 617, 53 NW 905, 20 LRA 509; and cases infra notes 37, 38.

37. Dana v. Murray, 122 N. Y. 604, 29 NE 21; Purdy v. Hayt, 92 N. Y. 446; Woodruff v. Cook, 61 N. Y. 638 [aff 47 Barb. 304]; Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561; Matter of Eldridge, 29 Misc. 734, 62 NYS 1026; Saxton v. Webber, 83 Wis. 617, 53 NW 905, 20 LRA 509.

38. Woodruff v. Cook, 61 N. Y. 638; Wells v. Rowland, 155 App. Div. 354, 140 NYS 341; In re Conger, 81 App. Div. 493, 80 NYS 933; Matter of Ryder, 41 App. Div. 247, 58 NYS 635; Vandenburgh v. Vandenburgh, 85 Misc. 131, 147 NYS 244, 11 Mills Surr. 561; Matter of Eldridge, 29 Misc. 734, 62 NYS 1026; Orphan Asylum v. White, 3 NYS 137, 6 Dem. Surr. 201. See Woodruff v. Cook, 47 Barb. (N. Y.) 304 (apparently applying the rule, but relying upon the statutory provision relating to estates pur autre vie).

[a] **Remainder to a class.**—Where successive life estates were limited to testator's widow, daughter and son, with remainder to the son's children, only the first two life estates will be given effect, but the remainder is not avoided, the only result being that the class is to be ascertained at the daughter's death instead of at the death of the son. Matter of Ryder, 41 App. Div. 247, 58 NYS 635.

39. Matter of Ryder, supra; Matter of Abbey, 98 Misc. 506, 164 NYS 934 [aff 181 App. Div. 395, 168 NYS 1047]; and cases supra notes 30–33, 35–38.

40. In re Wilcox, 194 N. Y. 288, 87 NE 497; Shipman v. Rollins, 98 N. Y. 311, 15 AbbNCas 288; Woodruff v. Cook, 61 N. Y. 638; Gilman v. Reddington, 24 N. Y. 9; Amory v. Lord, 9 N. Y. 403; La Farge v. Brown, 31 App. Div. 542, 52 NYS 93; U. S. Trust Co. v. Webb, 110 Misc. 683, 181 NYS 850; Matter of Abbey, 98 Misc. 506, 164 NYS 934 [aff 181 App. Div. 395, 168 NYS 1047]; Matter of Hurlbut, 51 Misc. 263, 100 NYS 1098, 5 Mills Surr. 464.

[a] **Successive cestuis not in being.**—Where a testator devised property in trust for the benefit of his children and their issue, for a term duly limited upon lives in being, successive life estates to persons not in being were not created, although it is true that the beneficial interest of a cestui would terminate with its life, and that the issue would succeed to the same interest if the parent died during the trust term, and that in the nature of things the issue could enjoy the benefits only during life also; but such a limitation does not create a life estate in the property to which it relates and the statute is inapplicable. Gilman v. Reddington, 24 N. Y. 9.

[b] **Where a trust is limited upon more than two lives,** the lives in excess of two cannot be dropped out, so as to avoid an illegal suspension. Shipman v. Rollins, 98 N. Y. 311, 15 AbbNCas 288.

[c] **Legal life estate and trust for two lives.**—(1) A limitation of a legal life estate, with remainder in trust for a term measured by two lives, did not offend the statutory restriction as to successive life estates, because the legal estate of the trustees in the remainder is a single estate and not two life estates, although measured by two lives. Matter of Hurlbut, 51 Misc. 263, 100 NYS 1098, 5 Mills Surr. 464. (2) Where a donor gave property in trust to pay the income to his wife for life and then to his son for life, and to distribute the corpus as his son might by will direct, a testamentary gift by the son to his widow for her life with remainder to his brother in fee is not rendered invalid by Real Prop. L. § 43 prohibiting more than two successive life estates, such section applying only to legal life estates and not to trusts. U. S. Trust Co. v. Webb, 110 Misc. 683, 181 NYS 850.

eral or as to estates pur autre vie,[41] that no remainder may be created thereon except a remainder in fee, or, in case of such a life estate in a term of years, no remainder except for the whole residue of such term,[42] a remainder for life on such an estate is void.[43] And under a statute providing that, when a remainder is created on any such life estate which is dependent on more than two lives, it shall take effect on the death of the two persons first named,[44] the remainder vests at the end of such first two lives, if the remaindermen are then in being and ascertainable, in the same manner as though no succeeding life estates were intended to be created.[45] Such statutory provisions, when not otherwise restricted, are applicable to personal property as well as to real estate.[46]

[§ 157] **d. Remainders for Life on Terms of Years.** Where so provided by statute,[47] no estate for life may be limited as a remainder on a term of years except to a person in being at the creation thereof.[48]

XI. CONSTITUTIONAL PROHIBITIONS OF PERPETUITIES

[§ 158] **A. In General.** In a number of jurisdictions perpetuities are prohibited by express constitutional provisions[49] which are construed to refer to perpetuities as they are defined and exist at common law.[50]

[§ 159] **B. Effect upon Charitable Trusts.** Where an exception is made as to perpetuities for eleemosynary purposes, charitable trusts are not within a constitutional prohibition of perpetuities;[51] and even in the absence of any exception trusts for charitable purposes are ordinarily held not to be prohibited by such provisions.[52]

XII. UNDER CIVIL LAW[53]

[§ 160] **A. In General.** While it would appear that the civil law, as contradistinguished from the common law, comprehends no rule analogous to the rule against perpetuities,[54] statutes, sometimes referred to as statutes against perpetuities,[55] forbidding the creation of certain interests and estates and restricting the persons who may receive donations of property, have a purpose similar to that of the common-law rule,[56] and accordingly may properly be considered in this treatise.[57]

41. "Estate pur autre vie" defined see Estates § 66.

42. See statutory provisions.

[a] **Remainder in fee** upon a life estate is valid under such statute. Pooler v. Hyne, 213 Fed. 154, 129 CCA 506 (construing Indiana statute).

43. Matter of Bogardus, 43 Misc. 473, 89 NYS 478.

[a] **Illustration.**—Where testator attempted to create an estate in certain persons as tenants in common for the life of another, with remainder in trust for the life of testator's daughter, with remainder over in fee, the estate in trust is a remainder less than a fee and consequently is void under the statute. Matter of Bogardus, 43 Misc. 473, 89 NYS 478.

44. See statutory provisions.

[a] **Applicable only to estates pur autre vie in New York.**—The life estates referred to in the statute are those mentioned in the preceding section, namely, estates for the life of any person or persons other than the grantee or devisee of such estate. Westerfield v. Westerfield, 1 Bradf. Surr. (N. Y.) 137.

45. Bailey v. Bailey, 28 Hun 603 [mod on other grounds 97 N. Y. 460]. Compare Woodruff v. Cook, 47 Barb. (N. Y.) 304 (applying the statute to a remainder upon successive estates for the lives of the persons to whom such estates were devised, apparently failing to observe that the statute is applicable only to remainders upon estates pur autre vie; but reaching the same conclusion as if the general statute relating to remainders upon successive life estates had been properly applied).

[a] **The effect of the statute as well as its language** is to terminate the suspension at the end of the first two lives, in the same manner as though no succeeding life estates were intended to be created. Bailey v. Bailey, 28 Hun 603 [mod on other grounds 97 N. Y. 460].

46. Matter of Bogardus, 43 Misc. 473, 89 NYS 478; and cases supra notes 42–45.

47. See statutory provisions.

48. Gilman v. Reddington, 24 N. Y. 9.

49. See constitutional provisions.

50. In re McCray, (Cal.) 268 P 647 [superseding (A.) 260 P 940]; Barbee v. Jacksonville, etc., Road Co., 6 Fla. 262; Eager v. McCoy, 143 Tenn. 693, 228 SW 709; Franklin v. Armfield, 2 Sneed (Tenn.) 305. Compare McLeod v. Dell, 9 Fla. 427, 447 ("It is objected . . . that by our recognition of the rule respecting perpetuities, we come in conflict with the 24th item of our 'declaration of rights,' which declares 'that perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.' We are at a loss to comprehend the force of the objection, and do not appreciate its logic. It is a sufficient reply that the convention which ordained that declaration . . . [is] to be presumed to have understood the full import of the term used"); Griffin v. Graham, 8 N. C. 96, 130, 9 AmD 619 ("The meaning which the Law annexes to this term [perpetuities], is that of an estate tail so settled that it cannot be undone or made void. As when, if all the parties who have interest, join, they cannot bar or pass the estate; but if by the concurrence of all having the estate tail, it may be barred, it is not a perpetuity. It is in reference to estates tail, that the word is used in the Bill of Rights; for there was no other estate that had a tendency that way"); Morris v. Fisher, 8 Pa. Dist. 161, 163 ("The 37th section of the constitution of 1776 provided that 'the future legislature of this State shall regulate intails in such a manner as to prevent perpetuities.' This was merely a declaration of the principles that had prevailed in Pennsylvania since the founding of the colony. . . . With us, in Pennsylvania, the word perpetuities is used in its largest sense, including as well interests or estates that are inalienable or indestructible, as those which are bad for remoteness"); Gortario v. Cantu, 7 Tex. 35, 46 ("It must be remembered that at the adoption of this Constitution the laws of Spain were the common law of the land. Now, if we explore the jurisprudence of Spain and Mexico to ascertain the meaning which must be affixed to those terms, we shall find that the prohibitions of the Constitution are but a repetition of the inhibitions against every species of restriction on the transferability of property as contained in the decrees which we have already examined. If we look to the laws of England and to the usual signification of the terms as understood and applied in that system, the range and extent of these prohibitions will be very much limited. It is not necessary to the decision of this case that a definite construction be given to the language employed. This can be done when the question is fairly presented and is elaborated in the argument of counsel. If the terms of the Constitution be construed in the sense in which they would be understood by a Spanish jurist, then the prohibitions against restraints on the disposition of property will have been continued long after our former system of laws was swept out of existence").

"The Constitution does not define perpetuities, and we must look to the common law for the proper meaning of the term." Eager v. McCoy, 143 Tenn. 693, 703, 228 SW 709.

[a] **The term relates only to estates,** and consequently an act of incorporation providing no limit to the time of enjoyment cannot be in violation of a section of the state constitution prohibiting "perpetuities." Barbee v. Jacksonville, etc., Road Co., 6 Fla. 262.

Perpetuities at the common law see supra § 1 et seq.

51. Peo. v. Cogswell, 113 Cal. 129, 45 P 270, 35 LRA 269; Nixon v. Brown, 46 Nev. 439, 214 P 524.

[a] **"Eleemosynary" is synonymous with "charitable,"** as the latter term is used in its technical sense in law; and Const. art 15 § 4, providing that "no perpetuities shall be allowed except for eleemosynary purposes," is directed at private trusts and not at public or charitable trusts. Nixon v. Brown, 46 Nev. 439, 457, 214 P 524.

52. State v. Gerard, 37 N. C. 210; State v. McGowen, 37 N. C. 9; Griffin v. Graham, 8 N. C. 96, 9 AmD 619; Franklin v. Armfield, 2 Sneed (Tenn.) 305; Lightfoot v. Poindexter, (Tex. Civ. A.) 199 SW 1152.

Charitable trusts generally see supra §§ 78, 79.

53. Civil law generally see Modern Civil Law 40 C. J. p 1235.

54. See cases infra §§ 161–164.

Rule against perpetuities in force where common law obtains see supra § 2 text and note 18.

55. Female Orphan Soc. v. Young Men's Christian Assoc., 119 La. 278, 284, 44 S 15, 12 AnnCas 811 ("In articles 1570 and 1571 of the Civil Code . . . we have statutes against perpetuities").

56. Hall's Succ., 141 La. 860, 865, 75 S 802 ("The object of the law [prohibiting substitutions and fidei commissa] is to prevent the entailment of estates or taking them out of commerce").

Purpose and reason of rule against perpetuities see supra § 2.

57. See infra §§ 161–164.

[§ 161] **B. Substitutions[58] and Fidei Commissa.[59]** Under a statute abolishing substitutions and fidei commissa,[60] a gift to one, subject to a donation of an imperfect ownership[61] to another, to take effect upon the latter's death,[62] or upon his death before attaining his majority[63] or without leaving issue him surviving,[64] or at another fixed or determinable time,[65] is void, and the whole limitation fails;[66] and, likewise, a limitation in trust,[67] even though for charitable purposes,[68] is void and deemed as not written; but precatory provisions following an absolute gift do not invalidate the gift,[69] and a mere charge upon property given is valid.[70] For a single life,[71] however, the usufruct of property may be given to one and the naked ownership to another,[72] even where the usufructuary is given the further right to consume the corpus,[73] and the gift of the usufruct may be upon a condition;[74] but the donor cannot reserve the usufruct to himself.[75] Where a statute permits donations to be made in trust and exempts them from the general prohibition of substitutions and fidei commissa,[76] a direction that a bequest be paid to the legatee only upon his attaining his majority is valid;[77] and failure to name an executor expressly as trustee is immaterial where trust duties are imposed upon him.[78]

Agreement or estoppel of parties. The prohibition of substitutions and fidei commissa being a rule of public order,[79] such gifts cannot be created or maintained either by the conventions of the parties[80] or by estoppel or pleas of estoppel.[81]

Construction of donation or will. Substitutions and fidei commissa are never to be presumed,[82] but must either be expressed[83] or result clearly from the sense and signification of the terms of an instrument;[84] and in case of doubt the gift should be maintained.[85]

[§ 162] **C. Vulgar Substitutions.** A gift may be made to a succession of donees, each to take in case of the death or default of the other before the falling of the gift, without violating a statute prohibiting substitutions.[86]

[§ 163] **D. Right of Return to Donor.** Under a statute authorizing a stipulation that property given by donation or will shall return to the donor in case he survives the donee, or the donee and his descendants,[87] such a reservation may be made only in favor of the donor;[88] but a stipulation for return to the donor "and his heirs" is not objectionable where no substitution is in fact intended.[89]

[§ 164] **E. Donees Not in Being.** Under a statute providing that, in order to be capable of receiving by donation or will, it suffices to be conceived at the time of the donation or decease respectively,[90] children conceived after such time can take nothing by the gift.[91]

58. **Generally** see Substitution [37 Cyc 508].

59. **Generally** see Fidei Commissum 25 C. J. p 1087.

60. See statutory provisions.

61. **Imperfect ownership generally** see Modern Civil Law § 246 et seq.

62. Heft's Succ., 163 La. 467, 112 S 301; Hunter's Succ., 159 La. 492, 105 S 596; In re Courtin, 144 La. 971, 81 S 457; Reilly's Succ., 136 La. 347, 67 S 27; Marshall v. Pearce, 34 La. Ann. 557; Anderson v. Pike, 29 La. Ann. 120; Hoggatt v. Gibbs, 15 La. Ann. 700; McCutcheon v. McCutcheon, 15 La. Ann. 511; Weber v. Ory, 14 La. Ann. 537; Provost v. Provost, 13 La. Ann. 574; Murphy v. Cook, 10 La. Ann. 572; Rachal v. Rachal, 1 Rob. (La.) 115; Farrar v. McCutcheon, 4 Mart. N. S. (La.) 45; Gortario v. Cantu, 7 Tex. 35. But see McDuffie's Succ., 139 La. 910, 72 S 450; Rice v. Key, 138 La. 483, 70 S 483 (both holding that a bequest of property for life is a donation of the usufruct).

[a] **Distinguished from gift of usufruct.**—A testamentary disposition stipulating that at the death of the legatee the property shall go to another legatee named in the will is not the same thing as a gift of the usufruct to the one and the ownership of the property to the other legatee. Fidei commissa and substitutions are essentially different from such gifts of usufruct. Heft's Succ., 163 La. 467, 112 S 301.

63. McCan's Succ., 48 La. Ann. 145, 19 S 220 [disappr Strauss' Succ., 38 La. Ann. 55].

64. Ledbetter's Succ., 147 La. 771, 85 S 908; Wailes v. Daniell, 14 La. Ann. 578; Roy v. Latiolas, 5 La. Ann. 552; Beaulieu v. Ternoir, 5 La. Ann. 476; Colvin v. Nelson, 4 La. Ann. 544; Ducloslange v. Ross, 3 La. Ann. 432; Harper v. Stanbrough, 2 La. Ann. 377; Arnaud v. Tarbe, 4 La. 502; Cloutier v. Lecomte, 3 Mart. (La.) 481.

65. In re Courtin, 144 La. 971, 81 S 457.

66. See cases supra notes 62–65.

67. Heft's Succ., 163 La. 467, 112 S 301; Hunter's Succ., 159 La. 492, 105 S 596; In re Courtin, 144 La. 971, 81 S 457; Pleasants' Succ., 130 La. 267, 57 S 923; Le Blanc's Succ., 128 La. 1055, 55 S 672; Herber's Succ., 128 La. 111, 54 S 579; Beauregard's Succ., 49 La. Ann. 1176, 22 S 348; McCan's Succ., 48 La. Ann. 145, 19 S 220; Stephens' Succ., 45 La. Ann. 962, 13 S 197; Steven's Succ., 36 La. Ann. 754; Whitehead v. Watson, 19 La. Ann. 68; Partee v. Hill, 12 La. Ann. 767; State v. Martin, 2 La. Ann. 667; Clague v. Clague, 13 La. 1; Tournoir v. Tournoir, 12 La. 19. See Manthey's Succ., 159 La. 743, 106 S 289; Reilly's Succ., 136 La. 347, 67 S 27 (dicta).

68. Kernan's Succ., 52 La. Ann. 48, 26 S 749; Perin v. McMicken, 15 La. Ann. 154; Fink v. Fink, 12 La. Ann. 301; Franklin's Succ., 7 La. Ann. 395. Compare State v. McDonogh, 8 La. Ann. 171 (holding a trust for the poor of a city good under express provisions of the code).

69. Hall's Succ., 141 La. 860, 75 S 802; Reilly's Succ., 136 La. 347, 67 S 27; In re Billis, 122 La. 539, 47 S 884, 129 AmSR 355.

70. Michon's Succ., 30 La. Ann. 213.

71. McCan's Succ., 48 La. Ann. 145, 19 S 220; Franklin's Succ., 7 La. Ann. 395; and cases infra notes 72, 73. But see McCalop v. Stewart, 11 La. Ann. 106 (where successive usufructs were held valid).

72. Hunter's Succ., 159 La. 492, 105 S 596; King v. King, 155 La. 19, 98 S 742; In re Courtin, 144 La. 971, 81 S 457; McDuffie's Succ., 139 La. 910, 72 S 450; McCan's Succ., 48 La. Ann. 145, 19 S 220; Good's Succ., 45 La. Ann. 1392, 14 S 252; Auld's Succ., 44 La. Ann. 591, 10 S 877; Buissiere's Succ., 41 La. Ann. 217, 5 S 668; Williams v. Western Star Lodge No. 24, 38 La. Ann. 620; Theurer's Succ., 38 La. Ann. 510; Law's Succ., 31 La. Ann. 456; Hasley v. Hasley, 25 La. Ann. 602; Michel v. Beale, 10 La. Ann. 352; Barker's Succ., 10 La. Ann. 28; Cecile v. Lacoste, 8 La. Ann. 142; Franklin's Succ., 7 La. Ann. 395; Roy v. Latiolas, 5 La. Ann. 552; Fisk v. Fisk, 3 La. Ann. 494; Ducloslange's Succ., 4 Rob. (La.) 409. Compare Skipwith's Succ., 15 La. Ann. 209 (applying the act of 1844 giving the usufruct of community property to a surviving spouse).

Usufruct generally see Modern Civil Law §§ 261–284.

73. In re Courtin, 144 La. 971, 81 S 457.

74. Sisters of Charity of Incarnate Word v. Emery, 144 La. 614, 81 S 99; Pena v. New Orleans, 13 La. Ann. 86, 71 AmD 506. Compare New Orleans v. Baltimore, 13 La. Ann. 162 (holding that, under Civ. Code art 1223, a provision that a testator's estate be not divided for a specified time is valid).

75. Martin v. Martin, 15 La. Ann. 585; Dawson v. Holbert, 4 La. Ann. 36.

76. See statutory provisions.

77. Manthey's Succ., 159 La. 743, 106 S 289.

78. Manthey's Succ., supra.

79. Le Blanc's Succ., 128 La. 1055, 55 S 672.

80. Le Blanc's Succ., supra.

81. Le Blanc's Succ., supra.

Right to assert rule or statute against perpetuities see infra §§ 171, 172.

82. Arnaud v. Tarbe, 4 La. 502.

83. Arnaud v. Tarbe, supra.

84. Arnaud v. Tarbe, supra.

85. Cole v. Cole, 7 Mart. N. S. (La.) 414.

86. In re Courtin, 144 La. 971, 81 S 457; McCan's Succ., 48 La. Ann. 145, 19 S 220; Strauss' Succ., 38 La. Ann. 55; Law's Succ., 31 La. Ann. 456; Cochrane's Succ., 29 La. Ann. 232; Barnes v. Gaines, 5 Rob. (La.) 314. See De Bellisle's Succ., 10 La. Ann. 468 (apparently applying the principle stated in the text).

[a] **Thus** a will granting a usufruct in favor of the testator's sister, providing that the interest and a monthly sum from the principal should be withdrawn for her maintenance, and that on her death before exhaustion of the fund the balance should go to a niece, was not repugnant to Civ. Code art 1520, forbidding substitutions and fidei commissa, in view of Rev. Civ. Code art 1521, permitting what is known as a "vulgar substitution." In re Courtin, 144 La. 971, 81 S 457.

87. See statutory provisions.

88. Duplessis v. Kennedy, 6 La. 231.

89. Duplessis v. Kennedy, 6 La. 231.

90. See statutory provisions.

91. Sevier v. Douglas, 44 La. Ann. 605, 10 S 804.

XIII. WHAT LAW GOVERNS

[§ 165] **A. Laws in Force at Different Times.** The validity of a limitation of an interest or estate in property under the rule against perpetuities or statutory changes therein or modifications thereof is governed by the law as it exists at the creation of such interest or estate, without regard to laws theretofore or thereafter in force;[92] so, in the case of limitations made by will, the law in effect at the death of the testator applies, although it is different than that in force at the time the will was executed.[93]

[§ 166] **B. Conflict of Laws—1. In General.** Questions of the conflict of laws with respect to the remoteness of limitations of interests or estates in property arise where statutory changes have made the rule against perpetuities different in different jurisdictions.[94]

[§ 167] **2. Limitations of Realty.**[95] The validity or invalidity, under the rule against perpetuities and statutory modifications thereof or substitutes therefor, of a limitation of an interest or estate in realty is governed by the law of the jurisdiction in which the realty is situate;[96] and the same has been held true of a limitation of an estate for years in realty.[97]

[§ 168] **3. Limitations of Personalty.**[98] The validity or invalidity, under the rule against perpetuities and statutory modifications thereof or substitutes therefor, of a gift or limitation of an interest in personalty is ordinarily governed by the law of the jurisdiction in which is the donor's domicile;[99] and where a trust of personal property would be valid under the law of the donor's domicile, it will ordinarily be administered, on grounds of comity, by the courts of a foreign jurisdiction, although it would be invalid under the law of such foreign state.[1] On the other hand, where such a trust is valid under the law of the place where it is to be administered but would be invalid under the law of the donor's domicile, it has been held that the courts of the former jurisdiction will sustain and administer it;[2] and the courts of the jurisdiction in which is the donor's domicile have allowed the validity of such a trust to be governed by the laws of the jurisdiction in which it is to be so held, to the extent of permitting the property to vest in the trustees where that may be done without offending local law,[3] on the ground that rules against remoteness or suspension of alienation are local rules of policy and the courts of one state can have no interest in the disposition of personal property in a

92. Carnahan v. Peabody, 29 F (2d) 412; Eaton v. Eaton, 88 Conn. 286, 91 A 196.

Construction as between laws in force at different times:
Of deed see Deeds § 195 text and note 17.
Of will see Wills [40 Cyc 1385].

93. Pearce v. Pearce, 199 Ala. 491, 74 S 952; Eaton v. Eaton, 88 Conn. 286, 91 A 196; Cody v. Staples, 80 Conn. 82, 67 A 1; De Peyster v. Clendining, 8 Paige (N. Y.) 295 [aff 26 Wend. 21]; In re Kopmeier, 113 Wis. 233, 89 NW 134; Dodge v. Williams, 46 Wis. 70, 1 NW 92, 50 NW 1103.

[a] **Thus,** although a will contains provisions which were in violation of the statute against perpetuities in force at the time of its execution, it is not invalid when it conforms to the requirements of law at the testator's death, the statute having been repealed in the interim. Eaton v. Eaton, 88 Conn. 286, 91 A 196.

[b] **The repeal of a statute governing perpetuities** has no effect upon the construction and validity of wills of persons then deceased. Cody v. Staples, 80 Conn. 82, 67 A 1.

94. See infra §§ 167-170.

Statutory changes and modifications of rule see supra §§ 92-157.

95. What law governs transfers of realty in general see Conflict of Laws § 79; Deeds § 195; Trusts [39 Cyc 195 text and note 13]; Vendor and Purchaser [39 Cyc 1295]; Wills [40 Cyc 1384 text and note 75].

96. U. S.—Van Overbeck v. Dahlgren, 28 F. (2d) 936.
Cal.—Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P 184.
Conn.—Clark's App., 70 Conn. 195, 39 A 155; Wheeler v. Fellowes, 52 Conn. 238.
Hawaii.—Spreckels v. Spreckels, 21 Hawaii 556.
Mass.—Fellows v. Miner, 119 Mass. 541.
Mich.—Ford v. Ford, 80 Mich. 42, 44 NW 1057.
Minn.—In re Tower, 49 Minn. 371, 52 NW 27.
N. J.—Fischer v. Stuart, 138 A 873.
N. Y.—Lee v. Tower, 124 N. Y. 370, 26 NE 943; Hobson v. Hale, 95 N. Y. 588; Knox v. Jones, 47 N. Y. 389; White v. Howard, 46 N. Y. 144; Trowbridge v. Trowbridge, 5 App. Div. 318, 39 NYS 241 [aff 158 N. Y. 682 mem, 52 NE 1126 mem]; Bremer v. Penniman, 11 Hun 147 [aff 72 N. Y. 603 mem].
N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.
Pa.—Lawrence's Est., 136 Pa. 354, 20 A 521, 20 AmSR 925, 11 LRA 85.
Wis.—Miller v. Douglass, 192 Wis. 486, 213 NW 320; Ford v. Ford, 70 Wis. 19, 33 NW 188, 5 AmSR 117, 72 Wis. 621, 40 NW 502.
Eng.—Ellis v. Maxwell, 12 Beav. 104, 50 Reprint 1000.

Conversion to realty in another jurisdiction see infra § 169 text and note 7.

97. Freke v. Carbery, L. R. 16 Eq. 461. But see Despard v. Churchill, 53 N. Y. 192 (holding that a devise of an estate for years was governed by the laws of the testator's domicile).

98. What law governs transfers of personalty in general see Conflict of Laws § 63 et seq; Trusts [39 Cyc 194 text and notes 9-12]; Wills [40 Cyc 1384 text and note 74].

99. U. S.—Van Overbeck v. Dahlgren, 28 F. (2d) 936; Liberty Nat. Bank, etc., Co. v. New England Investors Shares, 25 F. (2d) 493.
Cal.—Whitney v. Dodge, 105 Cal. 192, 38 P 636.
Ky.—Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315.
Mass.—Fellows v. Miner, 119 Mass. 541.
N. J.—Hewitt v. Green, 77 N. J. Eq. 345, 77 A 25.
N. Y.—Dammert v. Osborn, 140 N. Y. 30, 35 NE 407; Cross v. U. S. Trust Co., 131 N. Y. 330, 30 NE 125, 27 AmSR 597, 15 LRA 606; Despard v. Churchill, 53 N. Y. 192; Knox v. Jones, 47 N. Y. 389; Bascom v. Albertson, 34 N. Y. 584; Farmers' L. & T. Co. v. Cummings, 108 NYS 882; Wood v. Wood, 5 Paige 596, 28 AmD 451.
N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.
Pa.—Fowler's App., 125 Pa. 388, 17 A 431, 11 AmSR 902; De Renne's Est., 12 WklyNC 94.
Wis.—Miller v. Douglass, 192 Wis. 486, 213 NW 320; Ford v. Ford, 70 Wis. 19, 33 NW 188, 5 AmSR 117.
Eng.—Heywood v. Heywood, 29 Beav. 9, 54 Reprint 527; Haldane v. Eckford, 24 L. T. Rep. N. S. 934.

[a] **Thus** a trust for accumulation created by a settlor domiciled in Illinois, for the benefit of a person domiciled in Colorado, in both of which states it is valid, is not invalidated by the fact that the trustee is a resident of Pennsylvania, in which state such an accumulation is prohibited by statute. Fowler's App., 125 Pa. 388, 17 A 431, 11 AmSR 902.

1. Whitney v. Dodge, 105 Cal. 192, 38 P 636; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315; Peabody v. Kent, 153 App. Div. 286, 138 NYS 32 [mod 213 N. Y. 154, 107 NE 51]; Robb v. Washington, etc., College, 103 App. Div. 327, 93 NYS 92 [mod on other grounds 185 N. Y. 485, 78 NE 359]. But see Despard v. Churchill, 53 N. Y. 192 (where the court allowed the gift to be good, but declined to carry it out and ordered the property remitted to the jurisdiction of the donor's domicile for distribution).

2. Matter of Perkins, 68 Misc. 255, 124 NYS 998.

[a] **Even where the trust is created for objects outside the state** in which it is to be held in trust, the law of that state governs its validity as to any suspension of ownership or of the power of alienation. Matter of Perkins, 68 Misc. 255, 124 NYS 998.

3. Hope v. Brewer, 136 N. Y. 126, 32 NE 558, 18 LRA 458; Chamberlain v. Chamberlain, 43 N. Y. 424; Manice v. Manice, 43 N. Y. 303; Peabody v. Kent, 153 App. Div. 286, 138 NYS 32 [mod 213 N. Y. 154, 107 NE 51]; Robb v. Washington, etc., College, 103 App. Div. 327, 93 NYS 92 [aff 185 N. Y. 485, 78 NE 359]; Stieglitz v. Atty.-Gen., 91 Misc. 139, 154 NYS 137, 15 Mills Surr. 121; Kurzman v. Lowry, 23 Misc. 380, 52 NYS 83; Fordyce v. Bridges, 2 Phil. 497, 22 EngCh 497, 41 Reprint 1035; Parkhurst v. Roy, 7 Ont. A. 614.

"A disposition of personal property made in this state, by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country, is valid, although not in compliance with our statute or the rules of law in force here in regard to trusts and perpetuities, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustee and the property when transmitted there." Hope v. Brewer, 136 N. Y. 126, 139, 32 NE 558, 18 LRA 458.

foreign jurisdiction.[4]

[§ 169] **4. Equitable Conversion.**[5] When an instrument creating or transferring an interest or estate in property directs an immediate and absolute conversion of one species of property into another,[6] or of property in one jurisdiction into property in another jurisdiction,[7] the validity of the limitations of such property will be determined, as though such conversion had taken place at their creation, by the law applicable to the property into which there has been a conversion.[8]

[§ 170] **5. Realty and Personalty in Same Limitation.** In accordance with the principles hereinabove stated, limitations of interests or estates in realty and those in personalty may be governed, so far as respects their validity under the rule against perpetuities or statutory substitutes therefor, by different laws;[9] and when interests or estates in both real and personal property are created by the same limitation, they are severable, and the validity of the limitation as to one species of property does not depend upon its validity as to the other,[10] except where the scheme of distribution is entire and its failure as to either species of property destroys the purpose of the limitation.[11]

XIV. RIGHT TO ASSERT RULE OR STATUTE

[§ 171] **A. In General.** The invalidity of a limitation of property because of its violation of the rule against perpetuities,[12] or of a statute additional thereto or substitutionary therefor,[13] can be asserted, generally speaking, only by one having an interest in the property,[14] and in the case of testamentary dispositions it has been held that the question of their validity is not one to be raised by the executor,[15] and that a residuary legatee has no standing to assert that invalidity results from the application of a remainder in a fund to specific legacies instead of its relegation to the residuary estate.[16]

[§ 172] **B. Estoppel.**[16½] While the right to question the validity of limitations may be lost, upon the ordinary principles of estoppel,[17] it appears to be settled that the acceptance of benefits under valid provisions of a will or other instrument does not preclude the recipient from asserting the invalidity of other limitations therein,[18] and that no agreement by the parties[19] and no plea of estoppel[20] can result in the creation or maintenance of an interest or estate which is prohibited by law.

***PERPETUI USUS CAUSA.** For the purpose of continuous use.[1]

PER PROCURATION.[2]

PERQUISITE.[3] Any profit or pecuniary gain from services beyond the amount fixed as salary or wages; hence, any privilege or benefit claimed as due.[4] In law, a fee that a person in office may legally receive beyond the requirements of his official

4. See cases supra note 3.
"The law of this state inhibiting . . . the suspension of the power of alienation of real estate and the absolute ownership of personal property, is founded upon a public policy of our own. . . . It is not a matter of any public concern whatever to this state whether the personal property of a person domiciled here shall pass to his heirs or next of kin in a foreign country, or to trustees in trust for charity residing there, or even to a foreign corporation for purpose of charity. Our law with respect to the creation of trusts, the suspension of the power of alienation of real estate, and the absolute ownership of personal[ty], was designed only to regulate the holding of property under our laws and in our state, and a trust intended to take effect in another state, or in a foreign country, would not seem to be within either its letter or spirit. When a citizen of this state, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purpose of a foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: First, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and second, whether the foreign trustees are competent to take the gift, for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect." Hope v. Brewer, 136 N. Y. 126, 137, 32 NE 558, 18 LRA 458.

5. Generally see Conversion 13 C. J. p 850.

6. Ala.—Goodwyn v. Cassels, 207 Ala. 482, 93 S 405.
Mich.—Penny v. Croul, 76 Mich. 471, 43 NW 649, 5 LRA 858.
Minn.—Young Men's Christian Assoc. v. Horn, 120 Minn. 404, 139 NW 805; In re Tower, 49 Minn. 371, 52 NW 27.
N. J.—Guarantee Trust, etc., Co. v. Maxwell, (Ch.) 30 A 339.
N. Y.—Hope v. Brewer, 136 N. Y. 126, 32 NE 558, 18 LRA 458; Wells v. Wells, 88 N. Y. 323; Whitefield v. Crissman, 123 App. Div. 233, 108 NYS 110; Vail v. Vail, 7 Barb. 226 [aff 10 Barb. 69]; Clark v. Goodridge, 51 Misc. 140, 100 NYS 824; Flanagan v. Flanagan, 8 AbbNCas 413; Kane v. Gott, 24 Wend. 641, 35 AmD 641; Kane v. Gott, 7 Paige 521 [aff 24 Wend. 641, 35 AmD 641].
N. D.—Penfield v. Tower, 1 N. D. 216, 46 NW 413.
W. Va.—Bible Soc. v. Pendleton, 7 W. Va. 79.
Wis.—In re Kavanaugh, 143 Wis. 90, 126 NW 672, 28 LRANS 470; Becker v. Chester, 115 Wis. 90, 91 NW 87, 650.

7. Ford v. Ford, 80 Mich. 42, 44 NW 1057; Chamberlain v. Chamberlain, 43 N. Y. 424; Ford v. Ford, 70 Wis. 19, 33 NW 188, 5 AmSR 117, 72 Wis. 621, 40 NW 502.

8. What law applies to limitations:
Of personalty see supra § 168.
Of realty see supra § 167.

9. See supra §§ 167, 168.

10. Knox v. Jones, 47 N. Y. 389; Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 18.

11. Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 NW 250; Rong v. Haller, 109 Minn. 191, 123 NW 471, 806, 26 LRANS 825.

12. Rule against perpetuities see supra §§ 2-91.

13. Statutory provisions see supra §§ 92-157, 160-164.

14. Pugh's Succ., 129 La. 415, 56 S 352.

15. Pugh's Succ., supra.

16. Matter of Farmers' L. & T. Co., 186 App. Div. 722, 175 NYS 37 [aff sub nom. Matter of Brundage, 101 Misc. 528, 167 NYS 694, and mod 226 N. Y. 691 mem, 124 NE 1].

16½. To assert invalidity of substitutions and fidei commissa under civil law see supra § 161 text and notes 79-81.

17. See Estoppel 21 C. J. p 1052.

18. Cal.—Walkerly's Est., 108 Cal. 627, 41 P 772, 49 AmSR 97.
Ill.—Schuknecht v. Schultz, 212 Ill. 43, 72 NE 37.
Mont.—In re Schmidt, 15 Mont. 117, 38 P 547.
N. Y.—Walker v. Taylor, 15 App. Div. 452, 44 NYS 446; Matter of Durand, 56 Misc. 235, 107 NYS 393, 6 Mills Surr. 269 [aff 127 App. Div. 945 mem, 111 NYS 1118 mem]; Staples v. Hawes, 24 Misc. 475, 53 NYS 860 [aff 39 App. Div. 548, 57 NYS 452]; Bowers v. Smith, 10 Paige 193.
Va.—Fifield v. Van Wyck, 94 Va. 557.
Eng.—In re Oliver, [1905] 1 Ch. 191.

19. Le Blanc's Succ., 128 La. 1055, 55 S 672; Carrier v. Carrier, 226 N. Y. 114, 123 NE 135.

20. Le Blanc's Succ., 128 La. 1055, 55 S 672.

1. See Hellawell v. Eastwood, 6 Exch. 295, 312, 155 Reprint 554, 3 Eng L&Eq 562 [quot Anne Arundel County v. Baltimore Sugar Refining Co., 99 Md. 481, 58 A 211, 212].

2. See Per § 4.

3. Perquisite:
Emolument as including see Officers §§.
Fee as see 25 C. J. p 1009 text and note 14.
"Pay" distinguished from see Pay § 1.

4. Standard D. [quot State v. Sheldon, 78 Nebr. 552, 111 NW 372, 373].
[a] **Similar definitions.**—(I) An additional emolument, profit, gain, or fee, over and above the fixed or settled income, salary, or wages. Cen-

*By WILLIAM QUINBY DEFUNIAK (Perpetui Usus Causa-Physical Training inclusive except the Spanish words and phrases).

duties;[5] a fee allowed by law to an officer for a specific service;[6] a reward, a compensation, a profit, or a gain arising out of, or received because of, the possession of a public office.[7]

Phrases: "Baggagemen's perquisites,"[8] "pay or perquisites,"[9] "perquisite of office;"[10] also, "perquisites, fees, and emoluments."[11]

PER QUOD CONSORTIUM AMISIT.[12]

PER QUOD SERVITIUM AMISIT.[13]

PER RATIONES, PERVENITUR AD LEGITIMAM RATIONEM.[14]

PER REGULAM IGITUR BREVIS RERUM NARRATIO EST; QUÆ SIMUL CUM IN ALIQUO VITIATA EST PERDIT OFFICIUM SUUM.[15]

PER RERUM NATURAM FACTUM NEGANTIS NULLA PROBATIO EST.[16]

PER SE.[17]

PERSIST.[18] To continue steadfast against opposition;[19] to continue steadily and firmly in some state, course of action, or pursuit, especially in spite of opposition, remonstrance, etc.;[20] to hold on;[21] to persevere.[22]

PERSISTENCE.[23] Steady or firm adherence to, or continuance in, a state, course of action, or pursuit that has been entered upon; perseverence notwithstanding opposition, warning, remonstrance, etc.[24]

PERSISTENT.[25] Chronic;[26] constant and continuous.[27]

Persistent policyholder.[28] As used in the life insurance business one who has not defaulted in the payment of his premiums, or, in other words, has continued to perform the duties imposed upon him by the policy.[29]

Other phrases: "Persistent cruelty,"[30] "persistent desertion;"[31] also, "persistent violator."[32]

PERSISTENT POLICYHOLDER.[33]

PERSON.[34] [§ 1] **A. In General.** Any being having life, intelligence, will, and separate individ-

tury D. [quot State v. Sheldon, 78 Nebr. 552, 111 NW 372, 373; Harris County v. Hammond, (Tex. Civ. A.) 203 SW 445, 449]. (2) An allowance paid in money or things beyond the ordinary salary or fixed wages for services rendered. Webster D. [Ware v. Battle Creek, 201 Mich. 468, 167 NW 891, 892, LRA1918E 673, 674]. (3) Something obtained in addition to, or in lieu of, regular wages or salary. Worcester D. [quot State v. Sheldon, supra]. (4) Something received incidentally and in addition to regular wages, salary, fees, etc. Century D. [quot State v. Sheldon, supra; Harris County v. Hammond, supra].

[b] **"Fees of office" distinguished.**—Harris County v. Hammond, (Tex. Civ. A.) 203 SW 445, 449.

5. Standard D. [quot State v. Sheldon, 78 Nebr. 552, 111 NW 372, 373].

[a] **Similar definitions.**—(1) An emolument or profit beyond the salary paid to an officer. Ware v. Battle Creek, 201 Mich. 468, 167 NW 891, 892, LRA1918E 673, 674; Christopherson v. Reeves, 44 S. D. 634, 184 NW 1015, 1017. (2) Emoluments or incidental profits attaching to an office or official position beyond the salary or regular fees. Black L. D. [quot Ware v. Battle Creek, supra.] (3) Something gained by place or office beyond the regular salary or fee. Bouvier L. D. [quot Vansant v. State, 96 Md. 110, 128, 53 A 711; Ware v. Battle Creek, supra; Wren v. Luzerne County, 9 Pa. Co. 22, 24, 6 Kulp 37; Christopherson v. Reeves, supra]; Webster D. [quot Wren v. Luzerne County, 9 Pa. Co. 22, 24, 6 Kulp 37]. See McCoy v. Handlin, 35 S. D. 487, 153 NW 361, 371, LRA1915E 858.

[b] **Allowance for expenses** incurred by an officer incident to the performance of his duties is neither an emolument nor a perquisite. Ware v. Battle Creek, 201 Mich. 468, 167 NW 891, 892, LRA1918E 673; Christopherson v. Reeves, 44 S. D. 634, 184 NW 1015, 1017; State v. Reeves, 44 S. D. 568, 184 NW 993, 998.

[c] **Interest received by a public officer on deposits of public money is a perquisite** within the terms of a statute requiring all perquisites received by public officers to be paid into the public treasury. Hughes v. Peo., 82 Ill. 78, 80; Lake County v. Westerfield, 196 Ill. A. 432, 440. To same effect Vansant v. State, 96 Md. 110, 53 A 711.

[d] **Not synonymous with, or inclusive of, "expenses."**—Christopherson v. Reeves, 44 S. D. 634, 184 NW 1015, 1017.

[e] **Occupancy by a governor of a mansion provided by the state** is not a "perquisite" within the meaning of the state constitution. State v. Sheldon, 78 Nebr. 552, 111 NW 372, 374.

Compensation and fees of public officers see Officers §§ 233–286.

6. Webster D. [quot Ware v. Battle Creek, 201 Mich. 468, 167 NW 891, 892, LRA1918E 673, 674; Rupert v. Chester County, 2 Pa. Dist. 688, 13 Pa. Co. 342, 344].

[a] **Similar definition.**—A fee to an officer for a specific service in lieu of an annual salary. Delaplane v. Crenshaw, 15 Gratt. (56 Va.) 457, 468.

7. Christopherson v. Reeves, 44 S. D. 634, 184 NW 1015, 1017.

8. Cantling v. Hannibal, etc., R. Co., 54 Mo. 385, 390, 14 AmR 476.

9. Christopherson v. Reeves, 44 S. D. 634, 184 NW 1015, 1017.

10. Delaplane v. Crenshaw, 15 Gratt. (56 Va.) 457, 468.

[a] **"Perquisites of office or other compensation."**—State v. Sheldon, 78 Nebr. 552, 555, 111 NW 372.

11. Lake County v. Westerfield, 196 Ill. A. 432, 439 (includes every payment to an officer which comes to him as such officer).

12. See Per § 2.

13. See Per § 2.

14. A maxim meaning "By reasoning we come to legal reason." Peloubet Leg. Max. [cit Litt. § 386].

15. A maxim meaning "A rule of law must be applied duly to the proper cases; otherwise, it loses its force and has no significance." Morgan Leg. Max. [cit L. 1 ff de Reg. Jur. Aut.].

16. A maxim meaning "It is in the nature of things that he who denies a fact is not bound to give proof." Black L. D.

[a] **Explained in** Best Evidence [quot State v. Bischoff, 146 La. 748, 84 S 41, 49].

17. See Per § 2.

18. See Persistence post this page; Persistent post this page.

19. New Standard D. [quot In re Hibler, 37 Wyo. 332, 261 P 648, 651].

"Continue" see 13 C. J. p 202.

20. Century D. [quot In re Hibler, 37 Wyo. 332, 261 P 648, 651].

21. Com. v. Coxe, 4 Dall. (Pa.) 170, 202, 1 L. ed. 786 (the correlative of attempt or endeavor).

22. Com. v. Coxe, supra.

23. See Persist ante this page; Persistent post this page.

24. Century D. See Huidekoper v. Burrus, 12 F. Cas. No. 6,848, 1 Wash. C. C. 109, 118.

25. See Persist ante this page; Persistence ante this page.

Persistent refusal of marital intercourse as desertion see Divorce § 111.

26. Blumenthal v. Berkshire L. Ins. Co., 134 Mich. 216, 219, 96 NW 17, 104 AmSR 604 (so defined when used in an application for a policy of life insurance).

"Chronic" see 11 C. J. p 761.

27. Goucher v. Goucher, 82 Cal. A. 449, 255 P 892, 894.

"Constant" see 12 C. J. p 649.

"Continuous" see 13 C. J. p 206.

28. **"Policy holder"** see [31 Cyc 904].

29. Fry v. Providence Sav. L. Assur. Soc., (Tenn. Ch. A.) 38 SW 116, 128.

30. Sweet v. Ely, [1902] 2 Ch. 508, 509.

31. Goucher v. Goucher, 82 Cal. A. 449, 255 P 892, 894.

"Desertion" see 18 C. J. p 969.

32. State v. Scheminisky, 31 Ida. 504, 174 P 611, 612; State v. Briggs, 94 Kan. 92, 145 P 866, 867; State v. Shiffler, 93 Kan. 618, 144 P 845, 846; State v. Watson, 92 Kan. 983, 142 P 956.

[a] **"Persistent violator of the Prohibition Law."**—State v. Bruno, (Utah) 256 P 109, 111.

33. See Persistent ante this page and note 29.

34. See Personal post p 1045.

Person or persons:

About the see § 8 note 33 [a].
Aggrieved see Appeal and Error §§ 491–497.
All see § 3 p 1140 notes 64–66.
Another see 3 C. J. p 224 note 49.
Any other see § 7 p 248 note 45.
Artificial see § 2.
Authorized see 6 C. J. p 866 note 17.
Black see 8 C. J. p 1113 note 80 [a].
Chiefly engaged in farming or tillage of the soil see Bankruptcy § 92.
Colored see Colored Persons 11 C. J. p 1224.
Competent see 12 C. J. p 235 note 4.
Contiguous see 13 C. J. p 111 note 59 [a].
Credible see 15 C. J. p 1347 text and notes 22–29.
Disorderly see Disorderly Person 18 C. J. p 1277.
Every see 21 C. J. p 1261 note 3.
Existing see Exist 25 C. J. p 168 note 73.
Exposure of:
  Child see Infants §§ 16, 18; Parent and Child § 202 et seq.
  Compelling as incriminating evidence see Criminal Law § 1100.
  Indecent see Obscenity §§ 5–9.
  To danger see Accident Insurance §§ 89–91, 111, 112; Negligence § 514 et seq.
  To inclemency of weather see Assault § 182.
Fictitious see 25 C. J. p 1087 notes 90, 94.
From the see 27 C. J. § 4 note 78.
Great many see 28 C. J. p 825 note 58.
Guardian of the see Guardian and Ward §§ 171–203.
In see § 8 text and note 74.
In charge see Charge 11 C. J. p 63 [b].
Infamous see 31 C. J. p 977 text and note 79.
Injured see Injure 32 C. J. pp 512, 513 notes 24, 32, 45.
Injury to the see § 18.
Insane see Insane Persons 32 C. J. p 580.
Interested see 33 C. J. p 266 notes 72, 73, 76, 79–82.
Larceny from the see Larceny § 241.
Name of see Evidence § 102; Names 45 C. J. p 365.

ual existence, distinguished from an irrational brute, an inanimate thing;[35] a human being,[36] as including body and mind;[37] an individual[38] of the human race;[39] a living human being;[40] a living person, composed of body and soul;[41] a man, woman, or child;[42] a moral agent;[43] a self-conscious being;[44] the whole man.[45] It is synonymous with "party"[46] or "party to the action,"[47] or "suit."[48] A dead man is not a "person,"[49] nor is a lunatic a "person" in the ordinary and general acceptance of the term,[50] being deemed civilly dead.[51] While, in its primary sense, it means a natural person only,[52] the term is a broad one;[53] and the sense in which it is used in any particular instance may often be ascertained from the context and intent with which it is employed.[54] Thus it has been held to include an

Natural see § 11.
Non compos mentis see Insane Persons § 158.
Of color see Colored Persons 11 C. J. p 1224.
Of unsound mind see Insane Persons 32 C. J. p 580.
Other see 46 C. J. p 1148 text and note 16.
Poor see Paupers § 1.
Private see [32 Cyc 357 note 3].
Proper see Carriers § 1063 text and notes 85–87.
Prudent see [32 Cyc 747 note 85].
Reasonable see [33 Cyc 1564 note 1].
Resident see [34 Cyc 1655 note 86].
Suitable see [37 Cyc 525 note 29].
Suspicious see Suspicious Person [37 Cyc 652].
Third see Third Persons [38 Cyc 285].
White see White Person [40 Cyc 927].

35. Webster Unabr. D. [quot Myers v. Jefferson Standard L. Ins. Co., (Tex. Civ. A.) 271 SW 217, 222].

[a] **A term used to distinguish rational from irrational beings.**—Caldwell v. Wallace, 4 Stew. & P. (Ala.) 282, 285.

[b] **Term cannot be construed to embrace animals.**—Heisrodt v. Hackett, 34 Mich. 283, 284, 22 AmR 529.

[c] **Not used in contrast to word "property."**—Brewer v. Crosby, 11 Gray (Mass.) 29, 30. See Taylor v. Bliss, 26 R. I. 16, 17, 57 A 939. "Property" see [32 Cyc 639].

[d] **Used in contradistinction from "property."**—Norris v. Kent Cir. Judge, 100 Mich. 256, 257, 58 NW 1006.

36. Standard D. [quot State v. Olson, 108 Iowa 667, 668, 77 NW 332]; Webster Unabr. D. [quot Myers v. Jefferson Standard L. Ins. Co., (Tex. Civ. A.) 271 SW 217, 222]; Com. v. Lee, 3 Metc. (Ky.) 229, 230.

37. Standard D. [quot State v. Olson, 108 Iowa 667, 668, 77 NW 332]; Webster Unabr. D. [quot Myers v. Jefferson Standard L. Ins. Co., (Tex. Civ. A.) 271 SW 217, 222].

38. Standard D. [quot State v. Olson, 108 Iowa 667, 668, 77 NW 332]; Webster Unabr. D. [quot Myers v. Jefferson Standard L. Ins. Co., (Tex. Civ. A.) 271 SW 217, 222]. See Van Dyke v. Geary, 244 U. S. 39, 37 SCt 483, 484, 61 L. ed. 973; Hine v. Wadlington, 26 Okl. 389, 109 P 301; Armstrong v. Berwick Borough, 10 Pa. Co. 337, 339; Grattan v. Ottawa Separate School Trustees, 9 Ont. L. 433, 437.

"Individual" see 31 C. J. p 885.

39. Webster D. [quot In re Ah Quan, 21 Fed. 182, 186; U. S. v. Crook, 25 F. Cas. No. 14,891, 5 Dill. 453, 459].

40. Webster D. [quot U. S. v. Crook, 25 F. Cas. No. 14,891, 5 Dill. 453, 459]; Madden v. Boston Election Comrs., 251 Mass. 95, 146 NE 280, 281; Sawyer v. Mackie, 149 Mass. 269, 270, 21 NE 307; State v. Frear, 144 Wis. 79, 128 NW 1068, 1071, 140 AmSR 992.

[a] **Every living human being included.**—Cockey v. Hurd, 45 HowPr (N. Y.) 70, 73.

[b] **Similar definition.**—A living being. Morrill v. Lovett, 95 Me. 165, 169, 49 A 666, 56 LRA 634.

41. Morton v. Western Union Tel. Co., 130 N. C. 299, 302, 41 SE 484 (does not mean simply the visible body as that would apply equally to a corpse).

[a] **Similar definition.**—(1) A living soul. Webster D. [quot U. S. v. Crook, 25 F. Cas. No. 14,891, 5 Dill. 453, 459]. (2) The person consists of both soul and body. Tute v. James, 46 Vt. 60, 63.

[b] **Soul not included.**—Person means the material person—the fleshy body and not the spiritual soul. Fay v. Parker, 53 N. H. 342, 359, 16 AmR 270.

42. Bouvier L. D. [cit In re Ah Quan, 21 Fed. 182, 186]; Standard D. [quot State v. Olson, 108 Iowa 667, 668, 77 NW 332]; Webster D. [quot In re Ah Quan, 21 Fed. 182, 186; U. S. v. Crook, 25 F. Cas. No. 14,891, 5 Dill. 453, 459]; Webster Unabr. D. [quot Myers v. Jefferson Standard L. Ins. Co., (Tex. Civ. A.) 271 SW 217, 222].

[a] **Both sexes included.**—Brown v. Hemphill, 74 Ga. 795, 796; Armstrong v. Berwick Borough, 10 Pa. Co. 337, 339.

[b] **Construed to mean "men" and not "women."**—Mashburn v. State, 65 Fla. 470, 62 S 586, 588; Glidden v. Philbrick, 56 Me. 222, 227; Robinson's Case, 131 Mass. 376, 383, 41 AmR 239; State v. Knight, 169 N. C. 333, 85 SE 418, 419, LRA1915F 898 (appearing in constitution and referring to voters); U. S. v. Cannon, 4 Utah 122, 7 P 369, 370 (used in a statute concerning rape); State v. Kelly, 102 Wash. 265, 172 P 1175, 1176 (used in a statute to refer to those living with a common prostitute); Bebb v. Law Soc., [1914] 1 Ch. 286; Re Section 24 of the B. N. A. Act, [1928] 4 DomLR 98, 112, 123; Re French, 17 B. C. 1, 1 DomLR 80, 82, 19 WestLR 847, 48 CanLJ 159; Re French, 37 N. B. 359, 362, 363 [quot Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442] (all holding word "person" as used in a statute concerning admission to practice law to refer only to men).

[c] **Does not include child prematurely born.**—Dietrich v. Northampton, 138 Mass. 14, 16, 52 AmR 242.

[d] **Illegitimate child included.**—Woolwich Union v. Fulham, [1906] 2 K. B. 240, 250

[e] **Infant or minor included.**—Erie R. Co. v. Hilt, 247 U. S. 97, 38 SCt 435, 436, 62 L. ed. 1003; In re Walrath, 175 Fed. 243, 244; In re Duguid, 100 Fed. 274, 276; Peo. v. Love, 29 Cal. A. 521, 157 P 9, 10; Madden v. Springfield, 131 Mass. 441, 442; Scherer v. Schlaberg, 18 N. D. 421, 122 NW 1000, 1006, 24 LRANS 520; Woolwich Union v. Fulham, [1906] 2 K. B. 240, 250; In re Laxon, [1892] 3 Ch. 555, 562. But see In re Kehler, 153 Fed. 235, 237 ("the bankrupt act provides that any natural person may be adjudged an involuntary bankrupt, and the word 'person' has been construed not to include an infant or lunatic"); Beckford v. Wade, 17 Ves. Jr. 88, 91, 34 Reprint 34 (holding infants not included in term as used in a statute of wills).

[f] **Married woman included.**—Peo. v. Graff, 59 Cal. A. 706, 211 P 829, 832; Binney v. Globe Nat. Bank, 150 Mass. 574, 580, 23 NE 380, 6 LRA 379; Cooper v. Indian Terr. Bank, 4 Okl. 632, 46 P 475, 476; Miller v. Peck, 18 W. Va. 75, 101. See Taafe v. Sanderson, 173 Ark. 970, 294 SW 74, 77; Belles v. Burr, 76 Mich. 1, 12, 43 NW 24.

[g] **Woman included.**—Taafe v. Sanderson, 173 Ark. 970, 294 SW 74, 77; In re Hall, 50 Conn. 131, 135, 47 AmR 625; Ritchie v. Peo., 155 Ill. 98, 112, 40 NE 454, 46 AmSR 315, 29 LRA 79; Carrithers v. Shelbyville, 126 Ky. 769, 104 SW 744, 745, 31 KyL 1166, 17 LRANS 421; Opinion of Justices, 136 Mass. 578, 580; Reisse v. Clarenbach, 61 Mo. 310, 313; Von Dorn v. Mengedoht, 41 Nebr. 525, 535, 59 NW 800. See Field v. U. S., 137 Fed. 6, 7, 69 CCA 568.

[h] **Widow included.**—Brockway v. Patterson, 72 Mich. 122, 126, 40 NW 192, 1 LRA 708.

[i] **Used in a statute forbidding walking along railroad tracks** does not include children so young as to be incapable of contributory negligence. Erie R. Co. v. Swiderski, 197 Fed. 521, 524, 117 CCA 17.

"Child" see 11 C. J. p 750.

"Man" see 38 C. J. p 521.

"Woman" see [40 Cyc 2791].

43. Webster D. [quot U. S. v. Crook, 25 F. Cas. No. 14,891, 5 Dill. 453, 459].

44. Webster D. [quot U. S. v. Crook, supra].

45. Caldwell v. Wallace, 4 Stew. & P. (Ala.) 282, 285.

[a] **Includes** not only physical and bodily members, but also every bodily sense and attribute, among which is the reputation the man has acquired. Johnson v. Bradstreet Co., 87 Ga. 79, 81, 13 SE 250 [quot Tisdale v. Eubanks, 180 N. C. 153, 104 SE 339, 11 ALR 374]; Love v. Tioga Trust Co., 68 Pa. Super. 447, 450.

46. Ex p. Bogatsky, 134 Ala. 384, 387, 32 S 727; Ex p. Lester, 77 Va. 663, 678; Culpepper County v. Gorrell, 20 Gratt. (61 Va.) 484, 519.

[a] **The term "person" includes a party.**—Cockey v. Hurd, 45 HowPr (N. Y.) 70, 73. "Party" 47 C. J. p 1320.

47. Weston Dist. Warehouse Co. v. Hayes, 97 Ky. 16, 18, 29 SW 738, 16 KyL 763.

48. Seymour v. Doull, 23 N. S. 364, 369.

49. State v. Frear, 144 Wis. 79, 128 NW 1068, 1071, 140 AmSR 992. Compare Union Bank, etc., Co. v. Wright, (Tenn. Ch.) 58 SW 755, 757, 52 LRA 469; In re Howard, 80 Vt. 489, 68 A 513, 514.

[a] **A corpse is not a person.**—"That which constitutes a person is separated from the body by death and that which remains is 'dust and ashes,'" etc. Brooks v. Boston, etc., R. Co., 211 Mass. 277, 278, 97 NE 760. "Corpse" see 14A C. J. p 1425.

50. Myers v. Jefferson Standard L. Ins. Co., (Tex. Civ. A.) 271 SW 217, 222. See In re Kehler, 153 Fed. 235, 237; Beckford v. Wade, 17 Ves. Jr. 88, 91, 34 Reprint 34.

"Lunatic" see Insane Persons § 155.

51. Myers v. Jefferson Standard L. Ins. Co., (Tex. Civ. A.) 271 SW 217, 222.

52. State v. Cincinnati Fertilizer Co., 24 Oh. St. 611, 614.

"Natural person" see Natural § 11.

53. Johnson v. Bradstreet Co., 87 Ga. 79, 81, 13 SE 250.

54. See cases infra notes 55–8.

[a] **May include the plural** (persons) although used in the singular. Pickering v. Alyea-Nichols Co., 21 F. (2d) 501, 507; Emanuel v. U. S., 196 Fed. 317, 320, 116 CCA 137; In re Mathews, 191 Cal. 35, 214 P 981, 985; Reybold v. Parker, 12 Del. 526, 556, 32 A 981; Jordan v. Thornton, 7 Ga. 517, 522; In re McGhee, 105 Iowa 9, 13, 74 NW 695; Kansas City, etc., R. Co. v. Railroad Comrs., 73 Kan. 168, 84 P 755, 756; Com. v. Adams Express Co., 123 Ky. 720, 97 SW 386, 387, 29 KyL 1280; Com. v. Gabbert, 5 Bush (Ky.) 438, 446; Hurley v. South Thomaston, 105 Me. 301, 74 A 734, 736; State v. Case, 132 Md. 269, 103 A 569, 570; Stewart v. Brown, 37 N. Y. 350, 351, 93 AmD 578; Denny v.

alien;[55] all mankind;[56] an army officer;[57] an association;[58] a bankrupt;[59] a chinaman;[60] a citizen;[61] a claim;[62] a common informer;[63] a corporate officer[64] or agent;[65] counties[66] (but not when such construction is not made imperative from the context or intent with which the term is employed);[67] a court;[68] a customs officer;[69] a depositary;[70] a druggist;[71] an employee;[72] an estate;[73] a farmer;[74] a forwarding agent;[75] an Indian;[76] an inhabitant of a Philippine province;[77] an inhabitant of the town;[78] a joint-stock company;[79] a judge or magistrate;[80] a member of a family;[81] municipal corporations[82] in their private capaci-

Smith, 18 N. Y. 567, 568; Peo. v. Donegan, 184 App. Div. 763, 172 NYS 448, 450; Peo. v. Croton Aqueduct Bd., 5 AbbPr (N. Y.) 316, 321; Brown v. Delafield, 1 Den. (N. Y.) 445, 447; Busser v. Snyder, 282 Pa. 440, 128 A 80, 84, 37 ALR 1515 (not limited to the idea of a single person but used in an inclusive sense); Dixon v. Ricketts, 26 Utah 215, 72 P 947, 949. See Chaput v. Robert, 14 Ont. A. 354, 361. But see In re Spitz, 8 N. M. 622, 631, 45 P 1122, 34 LRA 604 (where it was held that such a construction in that case would be unwarranted, although it was true that a general statute provided for the singular including the plural).

Singular as including the plural see Statutes [36 Cyc 1123 text and note 63].

55. Wong Wing v. U. S., 163 U. S. 228, 242, 16 SCt 977, 41 L. ed. 140; In re Youroveta Home, etc., Trade Co., 288 Fed. 507, 511; U. S. v. Brooks, 284 Fed. 908, 909; In re Parrott, 1 Fed. 481, 511, 6 Sawy. 349; In re Kotta, 187 Cal. 27, 200 P 957, 958; State v. Montgomery, 94 Me. 192, 202, 47 A 165, 80 AmSR 386.

[a] **British Public Trustee as a person.**—Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, 283 Fed. 746, 753.

"Alien" see Aliens 2 C. J. p 1039.

56. U. S. v. Cannon, 4 Utah 122, 125, 7 P 369.

[a] **Every living human included.**—Cockey v. Hurd, 45 HowPr (N. Y.) 70, 73.

"Mankind" see 38 C. J. p 958.

57. Neall v. U. S., 118 Fed. 699, 701, 56 CCA 31.

"Army officer" see Army and Navy §§ 50–107.

58. Corporations, etc., Comrs. v. Co-operative League of America, 246 Mass. 235, 140 NE 811, 812; Hazell v. Lund, 22 B. C. 264, 268, 25 DomLR 204, 32 WestLR 818, 9 WestWkly 749. See Pickering v. Alyea-Nichols Co., 21 F. (2d) 501, 507. But see Rex v. Master Plumbers', etc., Co-op. Assoc., Ltd., 14 Ont. L. 295, 320, 9 OntWR 450.

[a] **An unincorporated association is no person;** but when it has been organized and is conducted for profit it will be treated as a partnership. Slaughter v. American Baptist Publication Soc., (Tex. Civ. A.) 150 SW 224, 226.

[b] **An unincorporated religious body is not a person.**—Gallupville Reformed Church v. Schoolcroft, 65 N. Y. 134, 156. But see infra note 94 [c].

[c] **Mere agreement to "grubstake"** does not constitute a taxable association. Traylor Engineering, etc., Co. v. Lederer, 271 Fed. 399, 405.

"Association" see Associations 5 C. J. p 1330.

59. Worthen v. State, 189 Ala. 395, 66 S 686, 689.

"Bankrupt" see Bankruptcy § 3.

60. In re Ah Quan, 21 Fed. 182, 186; In re Parrott, 1 Fed. 481, 520, 6 Sawy. 349.

"Chinese" see 11 C. J. p 757.

61. Charlton v. Kelly, 229 U. S. 447, 465, 33 SCt 945, 57 L. ed. 1274, 46 LRANS 397; Ex p. Charlton, 185 Fed. 880, 884.

"Citizen" see Citizens § 1.

62. In re Hays, 117 Fed. 879, 880 (construing a provision of the Bankruptcy Act).

"Claim" see 11 C. J. p 816.

63. Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 59 SW 952, 954, 82 AmSR 301.

"Common informer" see 12 C. J. p 156.

64. State v. Stewart, 157 La. 494, 102 S 584, 585; State v. Weber, 31 Nev. 385, 103 P 411, 412.

"Corporate officer" see Corporations §§ 1799–2073.

65. Chrysler Sales Corp. v. Smith, 9 F. (2d) 666, 673; State v. Stewart, 157 La. 494, 102 S 584, 585.

66. Durbin v. Peo., 54 Ill. A. 101, 104; Blue Earth County v. St. Paul, etc., R. Co., 28 Minn. 503, 507, 11 NW 73; Robertson v. Monroe County, 118 Miss. 520, 79 S 184, 186; State v. Thomas, 25 Mont. 226, 64 P 503, 506; Waterbury v. Deer Lodge County, 10 Mont. 515, 516, 26 P 1002, 24 AmSR 67; Grant v. Bartholomew, 57 Nebr. 673, 690, 78 NW 314; Lancaster County v. Trimble, 34 Nebr. 752, 756, 52 NW 711; Carder v. Fayette County, 16 Oh. St. 353, 368; The Tempest v. Lucas County, 13 Oh. Cir. Ct. 263, 7 Oh. Cir. Dec. 137, 141; Harris v. Stearns, 17 S. D. 439, 442, 97 NW 361; Lyman County v. State, 9 S. D. 413, 415, 69 NW 601; Com. v. Schmelz, 116 Va. 62, 81 SE 45, 47; Buell v. Arnold, 124 Wis. 65, 73, 102 NW 338. See Lancaster County v. Rush, 35 Nebr. 119, 52 NW 837.

"A county may for some purposes be considered a 'person' in law, but it is a corporate person which can speak and act only through its appropriate officers and agents." State v. McKinney, 130 Iowa 370, 375, 106 NW 931.

"Counties" see 15 C. J. p 380.

67. Orr v. Allen, 245 Fed. 486, 497; Duval County v. Charleston Lumber, etc., Co., 45 Fla. 256, 263, 33 S 531, 60 LRA 549, 3 AnnCas 174; Osborne County v. Osborne, 104 Kan. 671, 180 P 233, 234; Cedar County v. Johnson, 50 Mo. 225, 227; Pennsylvania, etc., Canal Co. v. Portage County, 27 Oh. St. 14, 21; Buell v. Arnold, 124 Wis. 65, 102 NW 338, 340, 4 AnnCas 100. See Whittaker v. Tulomne, 96 Cal. 100, 101, 30 P 1016.

[a] **A county** is a governmental as well as a corporate entity, and in its governmental capacity is not a "person or corporation" within the meaning of a statute. State v. Peninsular Tel. Co., 73 Fla. 913, 75 S 201, 203, 10 ALR 501.

[b] **Term as used in tax laws does not include counties.**—Louisville v. Com., 1 Duv. (Ky.) 295, 297, 85 AmD 624.

68. See State v. Baker, 64 Vt. 355, 357, 24 A 98.

[a] **Does not include a court.**—Triplett v. Attwood, 133 Ark. 181, 202 SW 817, 818; State v. Fabin, 17 OhS&CP 49, 4 OhNPNS 288, 291.

"Court" see Courts §§ 1–12.

69. U. S. v. Mescall, 164 Fed. 587, 588.

70. Manny v. Wilson, 137 App. Div. 140, 122 NYS 16, 19.

"Depositary" see Depositaries § 1.

71. State v. Summers, 142 Mo. 586, 44 SW 797, 798. See State v. Stewart, 157 La. 494, 102 S 584, 585.

[a] **As used in a statute to refer to one dealing in opium.**—U. S. v. Jin Fuey Moy, 225 Fed. 1003, 1005. See U. S. v. Carney, 228 Fed. 163, 168.

"Druggist" see Druggists § 1.

72. Strait v. Rock Hill, 104 S. C. 116, 88 SE 469, 470; Quackenbush v. Wisconsin, etc., R. Co., 62 Wis. 411, 415, 22 NW 519; Le May v. Canadian Pac. R. Co., 17 Ont. A. 293, 297, 303 [dism app 18 Ont. 314, 319]. But see Rohback v. Pacific R. Co., 43 Mo. 187, 195.

[a] **"Fellow servants" not included.**—Matz v. Chicago, etc., R. Co., 85 Fed. 180, 184; Proctor v. Hannibal, etc., R. Co., 64 Mo. 112, 122; Connor v. Chicago, etc., R. Co., 59 Mo. 285, 292, 294 [dist Schultz v. Pacific R. Co., 36 Mo. 13, 18].

"Employee" see 20 C. J. p 1241.

73. Barry v. Minahan, 127 Wis. 570, 107 NW 488, 491.

[a] **Estate of bankrupt included.**—Worthen v. State, 189 Ala. 395, 66 S 686, 689.

[b] **Estate of a decedent is a person.**—Billings v. State, 107 Ind. 54, 55, 6 NE 914, 7 NE 763, 57 AmR 77.

[c] **As not including an estate.**—Irwin v. Gavit, 295 Fed. 84, 88 [aff 275 Fed. 643, 646]; Hansen v. Northwestern Nat. Bank, 175 Minn. 453, 221 NW 873, 874; Cole v. Manson, 42 Misc. 149, 150, 85 NYS 1011; Anderson v. Grand Lodge U. B. F., (Tex. Civ. A.) 248 SW 461, 466.

"Estate" see Estates § 1.

74. Worthington v. Robbins, 56 Ont. L. 285, 27 OntWN 275, 276.

75. Interstate Commerce Commn. v. Delaware, etc., R. Co., 220 U. S. 235, 31 SCt 392, 396, 55 L. ed. 448.

"Forwarding agent" see Carriers § 27; Forwarder 26 C. J. p 1002.

76. U. S. v. Miller, 105 Fed. 944, 948; U. S. v. Crook, 25 F. Cas. No. 14,891, 5 Dill. 453; U. S. v. Shaw-Mux, 27 F. Cas. No. 16,268, 2 Sawy. 364, 366; Stevenson v. Christie, 64 Ark. 72, 79, 42 SW 418; State v. McKenney, 18 Nev. 182, 189, 2 P 171; Atkins v. Davis, 38 Ont. L. 548, 11 OntWN 377, 34 DomLR 69, 72; Rex v. Hill, 15 Ont. L. 406, 412. But see Elk v. Wilkins, 112 U. S. 94, 5 SCt 41, 45, 28 L. ed. 643 (declaring that an Indian is not a person within the meaning of Const. Amendm. XIV § 1, providing that all persons born or naturalized in the United States and subject to its jurisdiction are citizens thereof).

[a] **Used in a federal statute** providing for the allotment of Indian land among certain Indian tribes includes members, citizens, and freedmen. Hancock v. Mutual Trust Co., 24 Okl. 391, 103 P 566, 569.

"Indian" see Indians 31 C. J. p 477.

77. Cariño v. Philippine Insular Govt., 212 U. S. 449, 29 SCt 334, 336, 53 L. ed. 594.

"Inhabitant" see 31 C. J. p 1194.

78. Mowry v. Blandin, 64 N. H. 3, 4, 4 A 882.

79. Kansas City, etc., R. Co. v. Railroad Comrs., 73 Kan. 168, 84 P 755, 756; Com. v. Adams Express Co., 123 Ky. 720, 97 SW 386, 387, 29 KyL 1280; Cole v. Manson, 42 Misc. 149, 85 NYS 1011; Chuter v. Freeth, [1911] 2 K. B. 832, 836; Pearks, Gunston & Lee, Ltd. v. Ward, [1902] 2 K. B. 1, 8.

"Joint-stock companies" see 33 C. J. p 877.

80. North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 315, 324; Bass v. Irvin, 49 Ga. 436, 439; State v. Baker, 64 Vt. 355, 357, 24 A 98.

"Judge" see Judges § 2.

"Magistrate" see Judges § 4.

81. Colter v. Luke, 129 Mo. A. 702, 108 SW 608, 609. See McFarlane v. Cornelius, 43 Or. 513, 73 P 325, 327, 74 P 468.

82. Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 10, 10 SCt 19, 33 L. ed. 231; Gokey v. Boston, etc., R. Co., 130 Fed. 994, 995; Anniston v. Ivey, 151 Ala. 392, 44 S 48, 49; Peo. v. Oakland, 92 Cal. 611, 614, 28 P 807; Pasadena v. Stimson, 91 Cal. 238, 248, 27 P 604; Sacramento v. Industrial Acc. Commn., 74 Cal. A. 386, 240 P 792, 795; Bray v. Wallingford, 20 Conn. 416, 418; Olathe v. Missouri, etc., R. Co., 78 Kan. 193, 96 P 42, 43; Com. v. Adams Express Co., 123 Ky. 720, 97 SW 386, 387, 29 KyL 1280; Patterson v. Baltimore City, 127 Md.

ties[83] (but not so when such construction is not made imperative from the context or intent with which the term is employed);[84] a nation;[85] natural persons composing a corporation who are the beneficial owners of the corporate property;[86] a nonresident;[87] one in charge of property under an appointment of a court;[88] an owner of land;[89] participants in forbidden acts;[90] a partnership, whether general[91] or limited;[92] a particular individual in whose favor a trust exists;[93] private corporations,[94] including foreign corporations[95] (but not when the word is taken in its ordinary import, as including only natural persons, and excluding artificial per-

233, 96 A 458, 459; St. Charles Tp. School Directors v. Goerges, 50 Mo. 194, 196; St. Louis v. Rogers, 7 Mo. 19, 21; Little Falls v. State, 198 App. Div. 488, 190 NYS 807, 809; Ackert v. New York, 156 App. Div. 836, 142 NYS 65, 68; Seneca Falls v. State, 115 Misc. 35, 187 NYS 409, 411; Matter of Jensen, 28 Misc. 378, 381, 59 NYS 653; Springfield v. Walker, 42 Oh. St. 543, 548; Tahoka v. Jackson, (Tex. Commn. A.) 276 SW 662, 663; Com. v. Schmelz, 116 Va. 62, 81 SE 45, 47; Portsmouth Gas Co. v. Sanford, 97 Va. 124, 33 SE 516, 75 AmSR 778, 45 LRA 246; Rains v. Oshkosh, 14 Wis. 372, 374; Toronto v. Grand Trunk R. Co., 37 Can. S. C. 232, 242; In re Canadian Pac. R. Co., 25 Ont. A. 65, 75. See Municipal Corporations § 7.

[a] **Agency of municipal corporation included.**—Com. v. County Treasurer, 16 Pa. Dist. 481, 482 (poor directors); Union SS. Co. v. Melbourne Harbour Trust Comrs., 9 App. Cas. 365, 370 (harbor trust commissioners); Yorkshire West Riding Council v. Holmfirth Urban Sanitary Authority, [1894] 2 Q. B. 842, 846 (urban sanitary authority); Simpson v. Belleville Local Bd. of Health, 11 OntWN 139 (local board of health).

State governmental agencies and officers as persons see infra note 5.

83. Matter of Jensen, 28 Misc. 378, 381, 59 NYS 653. See Davoust v. Alameda, 149 Cal. 69, 84 P 760, 761, 5 LRANS 536, 9 AnnCas 847.

[a] **A city is a governmental as well as a corporate entity** and in its governmental capacity is not a "person or corporation" within the meaning of a statute. State v. Peninsular Tel. Co., 73 Fla. 913, 75 S 201, 203, 10 ALR 501.

84. Orr v. Allen, 245 Fed. 486, 497; Mobile v. Rowland, 26 Ala. 498, 504; Lindsey v. Rottaken, 32 Ark. 619, 638; Atlanta v. Smith, 99 Ga. 462, 466, 27 SE 696; Baltimore v. Root, 8 Md. 95, 103, 63 AmD 692; Donahue v. Newburyport, 211 Mass. 561, 98 NE 1081, 1082, AnnCas1913B 742; Dollman v. Moore, 70 Miss. 267, 272, 12 S 23, 19 LRA 222; Cedar County v. Johnson, 50 Mo. 225, 227; Cadle v. Baker, 51 Mont. 176, 149 P 960, 961; Hollis v. Davis, 56 N. H. 74, 83; Rosenstock v. New York, 101 App. Div. 9, 91 NYS 737, 739; Memphis v. Laski, 9 Heisk. (Tenn.) 511, 512, 24 AmR 327; Ritz v. Austin, 1 Tex. Civ. A. 455, 459, 20 SW 1029; Monroe Water Co. v. Monroe, 135 Wash. 355, 237 P 996, 997.

"Municipalities in a sense are corporations, but, as generally used, the term 'corporations' means private corporations." Dallas v. Halford, (Tex. Civ. A.) 210 SW 725, 727.

[a] **Not a person within the meaning of a garnishment statute** see Welch Lumber Co. v. Carter, 78 W. Va. 11, 88 SE 1034, 1035, 2 ALR 1583.

[b] **While "person" may include any body corporate or politic** under a general interpretation act, since a justice of the peace exercises no jurisdiction over corporations in criminal proceedings, a justice cannot compel a municipal corporation to appear before him. Re Chapman 19 Ont. 33, 38 [quot Ex p. Woodstock Electric Light Co., (N. B.) 4 CanCrCas 107, 114].

85. McBride v. Pierce County, 44 Fed. 17, 18.

[a] **Foreign nation included.**—Honduras v. Soto, 112 N. Y. 310, 312, 19 NE 845, 8 AmSR 744, 2 LRA 642.

"Nation" see 45 C. J. p 391.

86. State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 S 969, 982, 32 LRANS 639.

"Natural person" see Natural § 11.

87. In re Youroveta Home, etc., Trade Co., 288 Fed. 507, 511; New Jersey Cent. R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475, 480; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 NW 821, 828, 115 AmSR 1063, 15 LRANS 1045.

[a] **Nonresident not included.**—New York v. McLean, 170 N. Y. 374, 381, 63 NE 380; Honerine Min., etc., Co. v. Tallerday Steel Pipe, etc., Co., 31 Utah 326, 88 P 9, 11.

88. Jones v. Alf. Bennett Lumber Co., 175 Mo. A. 26, 157 SW 864, 866.

89. Com. v. Tewksbury, 11 Metc. (Mass.) 55, 56 (statute providing against any person carrying off gravel, sand, etc., from certain beaches applies to an owner as well as any other person).

[a] **As including joint owners.**—State v. Blount, 85 Mo. 543, 546.

[b] **"Person owning real estate," appearing in a statute,** as not including a city see Atlanta v. Smith, 99 Ga. 462, 466, 27 SE 696, 697.

90. U. S. v. Young, etc., Co., 170 Fed. 110, 113 (construing Bankruptcy Act).

91. U. S. v. Rabinowich, 238 U. S. 78, 35 SCt 682, 684, 59 L. ed. 1211; In re McCloskey, 18 F. (2d) 311, 313; In re Sugar Valley Gin Co., 292 Fed. 508; Conetto v. U. S., 251 Fed. 42, 44, 163 CCA 292; In re Everybody's Grocery, etc., Market, 173 Fed. 492; In re Ceballos, 161 Fed. 445, 448; In re Bertenshaw, 157 Fed. 363, 368, 85 CCA 61, 17 LRANS 886, 13 AnnCas 986; Chemical Nat. Bank v. Meyer, 92 Fed. 896, 897; Goddard v. Chicago, etc., R. Co., 202 Ill. 362, 369, 66 NE 1066; Kansas City, etc., R. Co. v. Railroad Comrs., 73 Kan. 168, 84 P 755, 756; Com. v. Adams Express Co., 123 Ky. 720, 97 SW 386, 387, 29 KyL 1280; General Electric Co. v. Board of Assessors, 121 La. 116, 46 S 122, 123; National F. Ins. Co. v. Board of Assessors, 121 La. 108, 46 S 117, 118, 126 AmSR 313; Com. v. Rozen, 176 Mass. 129, 130, 57 NE 223; Clay v. Douglas County, 88 Nebr. 363, 129 NW 548, 549, LRA1915C 922, AnnCas1912B 756; State v. Omaha El. Co., 75 Nebr. 637, 643, 106 NW 979, 110 NW 874; Marion Fdy. Co. v. Landes, 112 Oh. St. 166, 147 NE 302, 303; Avery v. Goodrich, 103 Okl. 156, 229 P 577, 578; Bivins v. Bird, 31 Okl. 286, 121 P 1080, 1081; Frazier v. Cottrell, 32 Or. 614, 162 P 834; Hazell v. Lund, 22 B. C. 264, 268, 25 DomLR 204, 32 WestLR 818, 9 WestWkly 749. See In re Telfer, 184 Fed. 224, 226, 106 CCA 366; Field v. U. S., 137 Fed. 6, 7, 69 CCA 568; Terr. v. Church, 14 N. M. 226, 91 P 720, 721; Stewart v. Brown, 37 N. Y. 350, 351, 93 AmD 578; Peo. v. Kimmel, 88 Misc. 38, 41, 150 NYS 311; Hine v. Wadlington, 26 Okl. 389, 109 P 301.

[a] **Partnership not included.**—Phillips v. Holmes, 165 Ala. 250, 51 S 625, 626; Peo. v. Schomig, 74 Cal. A. 109, 239 P 413, 414; St. Louis Fdy. v. International Live-Stock, etc., Co., 74 Tex. 651, 652, 12 SW 842, 15 AmSR 870; Lasater v. Jacksboro First Nat. Bank, (Tex. Civ. A.) 72 SW 1054, 1055; Ex p. Blain, 12 Ch. D. 522, 533; Joe v. Maddox, 27 B. C. 224; Rex v. Master Plumbers', etc., Co-op. Assoc., Ltd., 14 Ont. L. 295, 320, 9 OntWR 450; Walker v. Lamoreaux, 21 Que. Super. 492, 495. See Rex v. Holden, [1912] 1 K. B. 483, 485, AnnCas1912B 700.

[b] **English law** has not yet recognized a firm as a person. In re Municipal Clauses Act, 11 B. C. 154.

[c] **Ordinarily "person" does not include a "firm"** but that fact may be overcome by the context where "person" is used in a statute. Bickerton v. Dakin, 20 Ont. 192, 197, 695.

92. Oak Ridge Coal Co. v. Rogers, 108 Pa. 147, 151.

93. General Assembly v. Gratz, 139 Pa. 497, 20 A 1041, 1043.

94. See Corporations § 30.

[a] **Bank.**—In re Cohen, [1918] W. N. 252; Hogue v. Leitch, 22 B. C. 10, 11; Toronto v. Quebec Bank, 40 Ont. L. 544, 13 OntWN 135, 38 DomLR 708, 711.

[b] **Benevolent and fraternal organization.**—In re Carthage Lodge No. 365, I. O. O. F., 230 Fed. 694, 698.

[c] **Corporations for religious purposes.**—St. Michael's Church v. Philadelphia County, Brightly 121, 124, 4 PaLJR 150, 7 PaLJ 181; Re McDonagh, 18 OntWN 154, 155 (incorporated synod of a church). See In re Muir, (Man.) [1917] 2 WestWkly 801, 802. An unincorporated religious body not included see supra note 58 [b].

[d] **Express companies and common carriers.**—Perry v. Southern Express Co., 202 Ala. 663, 81 S 619.

[e] **Incorporated college.**—State v. Nashville Univ., 4 Humphr. (Tenn.) 157, 165; Devine Independent School Dist. v. Koehler, (Tex. Civ. A.) 212 SW 238, 239; In re Fulham, 96 Vt. 308, 119 A 433, 435. But see Moscow Hardware Co. v. Colson, 158 Fed. 199, 201 (a state university, as a public corporation and a state agency, not a "person").

[f] **Incorporated social club.**—State v. Delaware Saengerbund, Inc., 28 Del. 162, 91 A 290, 293; Ada County v. Boise Commercial Club, 20 Ida. 421, 118 P 1086, 1088, 38 LRANS 101; Conococheague Club v. State, 116 Md. 317, 81 A 602, 606; State v. Minnesota Club, 106 Minn. 515, 119 NW 494, 496, 20 LRANS 1101; State v. Mudie, 22 S. D. 41, 115 NW 107, 110; State v. Country Club, (Tex. Civ. A.) 173 SW 570, 580; Soto v. State, (Tex. Civ. A.) 171 SW 279, 280; Rex v. Dominion Bowling, etc., Club, Ltd., 19 Ont. L. 107, 14 OntWR 468, 472, 15 CanCrCas 105.

[g] **Corporation engaged in plumbing business.**—Schnaier v. Grigsby, 132 App. Div. 854, 117 NYS 455, 457; Schnaier v. Grigsby, 61 Misc. 325, 113 NYS 548.

[h] **Corporation for dealing in milk.**—Wilson v. Israel, 185 App. Div. 816, 173 NYS 842, 845.

[i] **National bank.**—Central Nat. Bank v. Lynn, 259 Mass. 1, 156 NE 42, 44.

[j] **Newspaper.**—Rex v. World Newspaper Co., (Ont.) 24 CanCrCas 145, 146.

[k] **Philanthropic institution.**—In re Muir, (Man.) [1917] 2 WestWkly 801, 802.

[l] **Railroad company.**—Atchison, etc., R. Co. v. Stamp, 290 Ill. 428, 125 NE 381, 384; Bartee v. Houston, etc., R. Co., 36 Tex. 648, 650; Boyd v. Croydon R. Co., 4 Bing. N. Cas. 669, 33 ECL 916, 132 Reprint 946; Royal Canadian Bank v. Grand Trunk R. Co., 23 U. C. C. P. (Ont.) 225, 233.

[m] **Telephone company.**—Hine v. Wadlington, 26 Okl. 389, 109 P 301; State v. Milwaukee Independent Tel. Co., 133 Wis. 588, 114 NW 108, 315.

95. See Corporations § 3938.

sons);[96] a proprietor of a restaurant;[97] a public or private carrier;[98] a pupil;[99] a resident of the district;[1] school boards[2] or school districts;[3] slaves;[4] a state;[5] a town board;[6] the United States;[7] a witness.[8] Where no such construction was warranted by the context or intent with which the word was employed, it was held not to include a peace officer,[9] a receiver of a corporation,[10] or a theater ticket taker.[11]

[§ 2] **B. Any Person.**[12] Anybody; any human being.[13]

[§ 3] **C. Deceased Person or Person Deceased.** One who is dead.[14]

[§ 4] **D. Other Phrases.** "Aid, assist, or counsel any person so intending to procure a miscarriage,"[15] "all persons acting under the orders [of the court],"[16] "all persons entitled to vote,"[17] "any person by whose order such weight or traffic has been

[a] **Foreign charitable corporation.**—Farmers' L. & T. Co. v. Shaw, 56 Misc. 201, 107 NYS 337, 339.

96. See Corporations §§ 30, 3938.

[a] **As not including a railroad company.**—Michigan Cent. R. Co. v. Chicago, etc., R. Co., 1 Ill. A. 399, 403.

[b] **Incorporated club not included.**—State v. St. Louis Club, 125 Mo. 308, 317, 28 SW 604, 26 LRA 573; State v. Rose Hill Pastime Athletic Club, 121 Mo. A. 81, 97 SW 978, 980.

[c] **Railroad not included.**—Lynchburg v. Norfolk, etc., R. Co., 80 Va. 237, 248, 56 AmR 592.

[d] **In a statutory provision** that three or more persons may form a corporation the word persons does not include corporations. State v. Rutland R., etc., Co., 85 Vt. 91, 81 A 252, 253, AnnCas1914A 1305.

97. Scanlon v. Denver, 38 Colo. 401, 88 P 156, 157. See Restaurant Keeper [34 Cyc 1677].

98. State v. Wignall, 150 Iowa 650, 128 NW 935, 937, 34 LRANS 507.

"Private carrier" see Carriers §§ 4–8.

"Public carrier" see Carriers § 8 et seq.

99. State v. Packenham, 40 Wash. 403, 82 P 597, 599.

"Pupil" see [32 Cyc 1264].

1. Armstrong v. Berwick Borough, 10 Pa. Co. 337, 339.

"Resident" see [34 Cyc 1655].

2. Dalzell v. Bourbon County Bd. of Education, 193 Ky. 171, 235 SW 360, 363; Dollman v. Moore, 70 Miss. 267, 12 S 23, 24, 19 LRA 222.

"School board" see Schools and School-Districts [35 Cyc 858–919].

3. Witter v. Mission School Dist., 121 Cal. 350, 351, 53 P 905, 66 AmSR 33.

[a] **Does not include school districts** when such construction is not warranted by the context or intent with which the term is employed. Skelly v. Westminster School Dist., 103 Cal. 652, 37 P 643, 644; Klein v. Carthage School Dist., 42 Mo. A. 460, 464.

[b] **Does not include school district by reason of its being a governmental agency.**—Julander v. Reynolds, (Iowa) 221 NW 807, 808; Waddell v. Aurelia Cons. Independent School Dist., (Iowa) 175 NW 65, 67; Devine Independent School Dist. v. Koehler, (Tex. Civ. A.) 212 SW 238, 239.

"School district" see Schools and School-Districts [35 Cyc 801].

4. See Slaves [36 Cyc 472, 482, 485].

5. In re Western Impk. Co., 166 Fed. 576, 582; Ervin v. State, 150 Ind. 332, 337, 48 NE 249; In re Burk, 66 Ind. A. 435, 118 NE 540, 542; State v. Bancroft, 22 Kan. 170, 202; Moore v. Com., 92 Ky. 630, 18 SW 833, 13 KyL 738; Forrest v. Henry, 33 Minn. 434, 436, 23 NW 848; Indiana v. Woram, 6 Hill (N. Y.) 33, 38, 40 AmD 378; Martin v. State, 24 Tex. 61, 68; West Coast Mfg., etc., Co. v. West Coast Impr. Co., 25 Wash. 627, 642, 66 P 97, 62 LRA 763. See Saranac Land, etc., Co. v. Roberts, 195 N. Y. 303, 88 NE 753, 760; Phelps v. Peo., 72 N. Y. 334, 363, 2 Cow. Cr. 383.

"While the word 'person' does not ordinarily include the state, it may." Huffman v. State Roads Commn., 152 Md. 566, 584, 137 A 358.

[a] **State not included.**—U. S. v. Baltimore, etc., R. Co., 17 Wall. (U. S. 322, 329, 21 L. ed. 597; Davis v. Pringle, 1 F. (2d) 860, 863; Scott v. Frazier, 258 Fed. 669, 671; Lowenstein v. Evans, 69 Fed. 908, 911; McBride v. Pierce County, 44 Fed. 17, 18; Alabama Certificates, 12 Op. Atty.-Gen., 176, 178; Berton v. All Persons, etc., 176 Cal. 610, 617, 170 P 151 ("a sovereign state is not a person"); Whittaker v. Tuolumne, 96 Cal. 100, 101, 30 P 1016; Butler v. Merritt, 113 Ga. 238, 241, 38 SE 751, 752; Blair v. Worley, 2 Ill. 178, 180; Banton v. Griswold, 95 Me. 445, 448, 50 A 89; Osterhoudt v. State, 133 App. Div. 83, 117 NYS 809, 810 (a state is not a person, a corporation, or a municipal corporation); In re Condemnation of Certain Land, 19 R. I. 326, 336, 33 A 448; State v. Harman, 57 W. Va. 447, 50 SE 828, 830.

[b] **Used in tax laws does not include the state.**—Louisville v. Com., 1 Duv. (Ky.) 295, 297, 85 AmD 624.

[c] **While a state in its corporate capacity may be a "person"** the latter term may be so used as not to include in its meaning other than natural persons. State v. Brown, 10 Ark. 104, 107.

[d] **Governmental agencies of state included.**—(1) A state industrial board is an agency of the state government, and is entitled to bring an action on behalf of the real party in interest under a statute declaring any "person," authorized by statute, may do so. In re Burk, 66 Ind. A. 435, 118 NE 540, 542. (2) A soldiers' home established by the state is a "person." Lehnherr v. Feldman, 110 Kan. 115, 202 P 624, 626. (3) A state institution as a person see Ex p. Brooks, 85 Tex. Cr. 252, 211 SW 592, 593. (4) The provincial liquor control board is by implication a corporation and thus a person. Callow v. Hick, (B. C.) 70 DomLR 568, [1922] 3 West Wkly 1007.

[e] **Governmental agencies of state not included.**—(1) A governmental agency of the state is not included in the term, although bodies politic and corporate are included. State v. Rich, 126 Md. 643, 95 A 956, 958. (2) A state university is a public corporation and an agency of the state, and is not included within the meaning of the word "person," which is construed, as regards corporations, to include only private or business corporations. Moscow Hardware Co. v. Colson, 158 Fed. 199, 201. (3) A drainage district is a governmental agency, and in the absence of any legislative action in the matter it is not liable under the Workmen's Compensation Act making "every person firm, and private corporation" liable for injuries to employees. Rusk Farm Drain. Dist. v. Industrial Commn., 186 Wis. 232, 202 NW 204, 205. (4) A school district is an arm of the state, a part of its political organization, and is not a "person" within the meaning of any bill of rights or constitutional limitation. Julander v. Reynolds, (Iowa) 221 NW 807, 808; Waddell v. Aurelia Cons. Independent School Dist., (Iowa) 175 NW 65, 67; Devine Independent School Dist. v. Koehler, (Tex. Civ. A.) 212 SW 238, 239. School districts as persons see supra note 3. (5) The "city and county of San Francisco," as a public agency, is a representative of the state and is not a "person." Berton v. All Persons, etc., 176 Cal. 610, 618, 170 P 151.

[f] **Officers and agents of state included.**—(1) State liquor dispensing agents of the state are within the term "person." South Carolina v. U. S., 199 U. S. 437, 26 SCt 110, 111, 50 L. ed. 261, 4 AnnCas 737 [aff 39 Ct. Cl. 257]. (2) A treasurer of the province is a "person." In re Roach, 10 Ont. L. 208, 212. (3) The railway commissioner for Manitoba is a "person" and may be enjoined from prosecuting the construction of a railway. Canadian Pac. R. Co. v. Northern Pac., etc., R. Co., 5 Man. 301, 312. See Atty.-Gen. v. Ryan, 5 Man. 81.

[g] **Officers and agents of state not included.**—(1) State liquor dispensary officers and agents are not "persons" within the meaning of a local option law. Butler v. Merritt, 113 Ga. 238, 38 SE 751, 752. (2) State liquor dispensary officers are not suable under a statute giving a parent a right of action against any "person" selling liquor to his minor son. Fowler v. Rome Dispensary, 5 Ga. A. 36, 62 SE 660, 663.

"State" see States [36 Cyc 826].

6. Peo. v. Eno, 176 N. Y. 513, 68 NE 868, 870.

[a] **Member of town council not included when acting in his administrative capacity** see Therrien v. St. Paul, 23 Que. Super. 248, 254.

[b] **Selectmen of a town not included in word** see Montville v. Alpha Mills Co., 85 Conn. 1, 81 A 1051, 1052.

"Town board" see Towns [38 Cyc 618].

7. Stanley v. Schwalby, 147 U. S. 508, 517, 13 SCt 418, 37 L. ed. 259; In re Tidewater Coal Exch., 280 Fed. 648, 650; State v. Bancroft, 22 Kan. 170, 202; State v. Herold, 9 Kan. 194, 199; Giddings v. Holter, 19 Mont. 263, 267, 48 P 8. See Lehnherr v. Feldman, 110 Kan. 115, 202 P 624, 626.

[a] **United States not a person.**—U. S. v. Fox, 94 U. S. 315, 321, 24 L. ed. 192; Davis v. Pringle, 1 F. (2d) 860, 863; U. S. v. Securities Corp. Gen., 55 App. (D. C.) 256, 4 F. (2d) 619, 622.

[b] **United States not a person within the meaning of the Bankruptcy Act.**—Title Guaranty, etc., Co. v. Guarantee Title, etc., Co., 174 Fed. 385, 387, 98 CCA 603.

"United States" see [39 Cyc 689].

8. In re Bronstein, 182 Fed. 349, 353; Chartered Bank of India, etc. v. North River Ins. Co., 136 App. Div. 646, 121 NYS 399, 400; Hodgskin v. Atlantic, etc., R. Co., 3 Daly (N. Y.) 70, 73, 5 AbbPrNS 73.

"Witness" see [40 Cyc 2133].

9. Martin Fiscal Ct. v. Runyon 222 Ky. 260, 300 SW 629, 630; Salem v. Coffey, 113 Mo. A. 675, 88 SW 772, 93 SW 281.

"Peace officer" see Peace ante p 776.

10. Parker v. Dupree, 28 Tex. Civ. A. 341, 342, 67 SW 185.

11. Peo. v. Kings County Sheriff, 54 Misc. 8, 105 NYS 387. See Peo. v. Flaherty, 122 App. Div. 878, 107 NYS 415, 416.

12. See Any § 6.

13. Brewer v. Crosby, 11 Gray (Mass.) 29, 30.

14. State v. Frear, 144 Wis. 79, 128 NW 1068, 1072, 140 AmSR 992.

"Decease" see 18 C. J. p 25.

15. State v. Parm, 21 Del. 556, 557, 60 A 977.

16. Marblehead Land Co. v. Los Angeles County Super. Ct., 60 Cal. A. 644, 649, 213 P 718.

17. Simmons v. Byrd, 192 Ind. 274,

conducted,"[18] "any person dealing with the corporation,"[19] "any person offending against this enactment,"[20] "any person or kindred,"[21] "any person owning or having an interest in any land within a hamlet,"[22] "any person subject to military law,"[23] "any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods,"[24] "between two or more persons,"[25] "by the person so employed,"[26] "every person who shall live with a common prostitute,"[27] "fit persons,"[28] "for any other person,"[29] "if any person sells,"[30] "if there is any person who would have been entitled to bring an action under section four,"[31] "insured persons,"[32] "negligence of any person to whose orders the employee was bound to conform,"[33] "no person,"[34] "person accompanying the army of the United States,"[35] "person accounting,"[36] "person acting for or on behalf of the United States,"[37] "person acting in a fiduciary capacity,"[38] "person affected,"[39] "person against whom a petition has been filed,"[40] "person appearing of record as owner,"[41] "person 'appointed to perform judicial functions,'"[42] "person benefited,"[43] "person by whose act or default,"[44] "person causing the death,"[45] "person charged,"[46] "person claiming right thereto,"[47] "person claiming the ownership of,"[48] "person 'claiming the right to purchase or lease' public free school land,"[49] "person concerned in the management of the trade or business,"[50] "person dealing with the bank,"[51] "person . . . doing business in this state,"[52] "[person] engaged in the practice of veterinary surgery and medicine,"[53] "person entitled to an estate,"[54] "person entitled to bring such action,"[55] "person entitled to receive the compensation,"[56] "person entitled to take or share in the estate,"[57] "person entitled to the fund,"[58] "person entitled to the possession of the premises,"[59] "person entrusted with and exercising superintendence whose sole or principal duty is that of superintendence,"[60] "person executing any of the functions of a public office,"[61] "person for whose immediate benefit,"[62] "person fulfilling a public duty,"[63] "person having an interest,"[64] "person holding any place of profit or trust, under any law of the State,"[65] "person in authority,"[66] "person in custody charged with an indictable offense,"[67] "person in interest,"[68] "person in lawful possession,"[69] "person in the employ of the owner,"[70] "person in the lawful execution of any process against . . . goods,"[71] "person intrusted with the management,"[72] "person intrusted with the custody or control of the ballots,"[73] "person lawfully claiming under,"[74] "person likely to become a public charge,"[75] "person los-

278, 136 NE 14 (as meaning persons entitled to vote at all elections).

18. Kent County v. Gerard, [1897] A. C. 633, 640.

19. State v. Plotner, 283 Mo. 83, 92, 222 SW 767.

20. Blackpool v. Johnson, [1902] 1 K. B. 646, 650.

21. Treasurer, etc. v. Sermini, 229 Mass. 248, 252, 118 NE 331.

"Kindred" see 35 C. J. p 914.

22. Parry v. Sherwood, (Sask.) 7 WestWkly 1244, 1246.

23. Franke v. Murray, 248 Fed. 865, 868, 160 CCA 623, LRA1918E 1015, AnnCas1918D 98.

[a] **"Persons subject to military law."**—Franke v. Murray, 248 Fed. 865, 868, 160 CCA 623, LRA1918E 1015, AnnCas1918D 98.

24. Prance v. London County, [1915] 1 K. B. 688, 693 (a shop assistant as defined in a statute).

25. Atty.-Gen. v. Sullivan, 163 Mass. 446, 451, 40 NE 843, 28 LRA 455.

26. Simpson v. Bright, 257 Mass. 309, 329, 153 NE 571.

[a] **"Persons employed."**—Shockley v. King, 31 Del. 606, 610, 117 A 280.

27. State v. Kelly, 102 Wash. 265, 266, 172 P 1175 (refers only to male persons).

28. In re Indian Brewing Co., 226 Pa. 56, 59, 75 A 29.

"Fit and competent persons" see Fit 26 C. J. p 646 note 21.

29. State v. Boiselle, (N. H.) 143 A 704, 705.

30. Caldwell v. Bethell, [1913] 1 K. B. 119, 122.

31. De Marco v. Pease, 253 Mass. 499, 508, 149 NE 208.

32. Davidson v. New Tabernacle Approved Soc., [1916] 2 K. B. 80, 89.

[a] **"Person insured."**—London, etc., Assur. Co. v. Partington, 88 L. T. Rep. N. S. 732.

33. Vanorimer v. Osborn Mach. Co., 255 Pa. 47, 52, 99 A 161.

34. State v. Taylor, 106 Minn. 218, 220, 118 NW 1012, 19 LRANS 877, 16 AnnCas 487.

35. Ex p. Gerlach, 247 Fed. 616, 617.

[a] **"'Persons' accompanying or serving with the armies of the United States in the field."**—Ex p. Falls, 251 Fed. 415, 416.

36. Rex v. Roberts, [1908] 1 K. B. 407, 428 (the person who brings in accounts for audits).

37. Kellerman v. U. S., 295 Fed. 796, 799; Rembrandt v. U. S., 281 Fed. 122, 124; Heaton v. U. S., 280 Fed. 697, 699.

38. Gordon v. Holland, 108 L. T. Rep. N. S. 385, 389, 10 DomLR 734, 23 WestLR 738, 4 WestWkly 419 (one who stands in a fiduciary relation toward another person who may be entitled to call on him to pay).

39. Re Chantler, 8 Ont. L. 111, 112, 8 CanCrCas 245.

"Affected" see Affect 2 C. J. p 312 text and notes 11–16.

40. Longley v. McCann, 90 Ark. 252, 255, 119 SW 268.

41. Conners v. Lowell, 209 Mass. 111, 122, 95 NE 412, AnnCas1912B 627 (as including holder of tax deed invalid on its face).

42. Wilson v. Peo., 71 Colo. 456, 457, 208 P 479 (phrase does not include a commissioner of insurance).

[a] **"Person exercising judicial functions."**—Apartment, etc., Financing Corp. v. Will, 69 Cal. A. 276, 278, 231 P 349 (as including a referee).

43. See Benefit 7 C. J. p 1139 note 76.

44. Nathan v. Rouse, [1905] 1 K. B. 527, 531.

45. Northam v. Casualty Co. of America, 177 Fed. 981, 985.

46. Rex v. Blais, 11 Ont. L. 345, 347, 7 OntWR 380, 10 CanCrCas 354, 357.

"Charged" see 11 C. J. p 293.

47. Oliver v. Lockie, 26 Ont. 28, 35.

48. Com. v. One Ford Truck, 85 Pa. Super. 188, 194 (as including an owner who has delivered possession to another on a bailment lease or contract).

49. Henderson v. Haley, (Tex. Civ. A.) 185 SW 324, 325.

50. Thompson v. Amis, [1917] 2 Ch. 211, 224.

51. State v. Morro, 313 Mo. 114, 122, 280 SW 697; State v. Plotner, 283 Mo. 83, 92, 222 SW 767 (both holding phrase to include officials whose duty it is to examine banks).

52. Hines v. Easterly, (Tex. Civ. A.) 224 SW 943 (included director general of railroads).

53. Pfeffferkorn v. Lewis, 80 N. H. 518, 520, 119 A 368.

54. Myers v. Cann, 95 Ga. 383, 386, 22 SE 611.

55. Title Guaranty, etc., Co. v. Cowen, 71 Okl. 299, 300, 177 P 563; Title Guaranty, etc., Co. v. Burton, 67 Okl. 320, 322, 170 P 1170.

56. National City Bank v. U. S., 275 Fed. 855, 859.

[a] **"Person entitled to compensation."**—State Industrial Commn. v. Newman, 222 N. Y. 363, 369, 118 NE 794 (does not include an undertaker).

57. Matter of Albrecht, 119 Misc. 554, 555, 196 NYS 765.

58. Walsh v. State, 248 N. Y. 408, 414, 162 NE 298.

59. Re Mitchell, 40 Ont. L. 389, 392, 13 OntWN 60, 38 DomLR 597.

60. Hurley v. Olcott, 134 App. Div. 631, 636, 119 NYS 430.

61. Peo. v. Salomon, 212 N. Y. 446, 450, 106 NE 111.

62. Laumier v. Francis, 23 Mo. 181; Butler v. Patterson, 13 N. Y. 292, 293.

"Immediate benefit" see Benefit 7 C. J. p 1138 note 69.

63. Geller v. Loughlin, 24 Ont. L. 18, 24, 2 OntWN 1159, 19 OntWR 318, 18 CanCrCas 461.

64. Kristen v. Lloyd, (N. J. Ch.) 143 A 219, 220.

65. State v. Bunch, 119 Ark. 219, 223, 177 SW 932.

66. Jackson v. Com., 116 Va. 1015, 1020, 81 SE 192; Rex v. Todd, 4 CanCrCas 514, 526.

[a] **"Persons in authority."**—State v. Foster, 25 N. M. 361, 364, 183 P 397, 7 ALR 417; Hanus v. State, 104 Tex. Cr. 543, 548, 286 SW 218.

"Authority" see 6 C. J. p 864.

67. Morgan v. Malepart, (Que.) 20 RegLegNS 277, 25 CanCrCas 192, 197 (as not applying to a person already sentenced).

68. Hinton v. Winn Parish School Bd., 155 La. 666, 667, 99 S 523; Matter of Sweeney, 125 Misc. 859, 861, 213 NYS 174. See State v. Dickmann, 175 Mo. A. 543, 157 SW 1012.

69. Yasui v. Hallam, 64 Or. 366, 367, 130 P 638; Thornton v. Hallam, 64 Or. 233, 240, 129 P 1046.

70. Hirshman v. Beal, 37 Ont. L. 529, 531, 10 OntWN 411.

71. Rex v. Polsky, 27 Man. 271, 274, 31 DomLR 294, 27 CanCrCas 319, [1917] 1 WestWkly 451.

72. The City of Milford, 199 Fed. 956, 959.

73. Com. v. Goulet, 137 Ky. 464, 468, 125 SW 1083.

74. Pokross v. Champagne, 231 Mass. 391, 393, 121 NE 22.

75. Wallis v. U. S., 273 Fed. 509,

ing,"[76] "person making it so payable,"[77] "person making the declaration,"[78] "person manufacturing,"[79] "person not a party,"[80] "person not entitled to sell liquor and who sells such liquor,"[81] "person, not otherwise a party to an instrument,"[82] "person occupying,"[83] "person of African descent,"[84] "person of color,"[85] "person of foreign birth,"[86] "person of good character,"[87] "person . . . of Indian blood,"[88] "person . . . of sound mind,"[89] "person of the negro or black race,"[90] "person of unsound mind,"[91] "person or body corporate,"[92] "person or corporation,"[93] "person or passenger,"[94] "person or persons,"[95] "person other than employer,"[96] "person other than the parties to the record,"[97] "person owning the adjoining fields,"[98] "person owning the car,"[99] "person performing labor,"[1] "person placing or furnishing material,"[2] "person [or persons] primarily liable,"[3] "person residing,"[4] "person secondarily liable,"[5] "person selling,"[6] "person signing the same,"[7] "person . . . standing in a representative capacity of the employer,"[8] "person supplying labor,"[9] "person through whom an interested party derives title,"[10] "person to whom a debt is due,"[11] "person to whom it is issued,"[12] "person transporting by pipe line,"[13] "person traveling,"[14] "person undertaking to rob the bank,"[15] "person violating,"[16] "person who built it,"[17] "person who can swear positively to the facts,"[18] "person who had charge of the persons and property of the other occupants of the automobile,"[19] "person who has charge or control,"[20] "person who makes, alters, or

511 ("one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty"); Ex p. Mitchell, 256 Fed. 229, 230 ("one who for some cause or reason appears to be about to become a charge on the public, one who is to be supported at public expense, by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty, or, it might be, by reason of having committed a crime which, on conviction, would be followed by imprisonment").

[a] **"Persons likely to become a public charge."**—Gegiow v. Uhl, 239 U. S. 3, 10, 36 SCt 2, 60 L. ed. 114; Ex p. Horn, 292 Fed. 455, 457; Ex p. Mitchell, 256 Fed. 229, 230 ("those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future"); Lam Fung Yen v. Frick, 233 Fed. 393, 396, 147 CCA 329, AnnCas1917C 232 (not limited to paupers). See also Paupers §§ 1–6.

76. Zellers v. White, 208 Ill. 518, 527, 70 NE 669, 100 AmSR 243.

"Lose" see 38 C. J. p 243.

77. Mueller v. Liberty Ins. Bank, 187 Ky. 44, 48, 218 SW 465.

78. Miller-Morse Hardware Co. v. Dominion F. Ins. Co., (Can.) 65 DomLR 292, 294, [1922] 1 WestWkly 1097.

79. Carbon Steel Co. v. Lewellyn, 251 U. S. 501, 504, 40 SCt 283, 64 L. ed. 375; Carbon Steel Co. v. Lewellyn, 258 Fed. 533, 541, 169 CCA 473.

80. Chartered Bank of India, etc. v. North River Ins. Co., 136 App. Div. 646, 647, 121 NYS 399.

81. Rex v. McEwan, 41 Ont. L. 324, 30 CanCrCas 212.

82. Boston Fourth Nat. Bank v. Mead, 216 Mass. 521, 523, 104 NE 377, 52 LRANS 225.

83. National F. Ins. Co. v. McKay, 5 AbbPrNS (N. Y.) 445, 449.

"Occupy" see 46 C. J. p 898.

84. Ex p. Shahid, 205 Fed. 812, 813; Corin v. Glenwood Cemetery, (N. J. Ch.) 69 A 1083, 1084 (does not mean colored persons, but persons of African descent, including necessarily South African Boers, more remotely of Dutch descent, and many Algerians, more remotely of French descent).

85. See Colored Persons 11 C. J. p 1224.

86. Hidemitsu Toyota v. U. S., 268 U. S. 402, 409, 45 SCt 563, 565, 69 L. ed. 1016.

87. Leader v. Yell. 16 C. B. N. S. 584, 592, 111 ECL 584, 143 Reprint 1256.

"Character" see 11 C. J. p 288.

88. Drapeau v. U. S., 195 Fed. 130, 136.

[a] **"Person not of Indian blood."**—LuJa Seminole Roll No. 908 v. Powell, 64 Okl. 200, 203, 166 P 1050.

[b] **"Person of Indian descent."**—Peo. v. Gebhard, 151 Mich. 192, 195, 115 NW 54.

89. State v. Thompson, 12 Nev. 140, 149.

[a] **"Person of sound mind and memory."**—Matter of Bossom, 195 App. Div. 339, 344, 186 NYS 782.

90. State v. Treadaway, 126 La. 300, 301, 52 S 500, 139 AmSR 514, 20 AnnCas 1297 (as not including an octaroon).

91. Shafer v. Shafer, 181 Ind. 244, 249, 104 NE 507; Matter of Crouse, 140 Mo. A. 545, 557, 120 SW 666 ("said words shall be construed to mean either an idiot, or a lunatic, or a person of unsound mind and incapable of managing his own affairs, as the case may be"). See Insane Persons 32 C. J. p 580.

[a] **"Persons of unsound mind."**—Schuff v. Ransom, 79 Ind. 458, 464; Howard v. Howard, 87 Ky. 616, 621, 9 SW 411, 10 KyL 478, 1 LRA 610; Adams Oil, etc., Co. v. Hudson, 55 Okl. 386, 390, 155 P 220 ("persons of unsound mind within the meaning of this [Code] are idiots, lunatics and imbeciles"); Guthrie v. Shaffer, 7 Okl. 459, 466, 54 P 698 (in a statute relating to incompetency of witnesses means persons whose minds are so defective that they cannot correctly relate facts, and do not understand or fully realize what they are saying or doing).

92. State v. Stapel, 103 Nebr. 135, 170 NW 665.

93. State v. Peninsular Tel. Co., 73 Fla. 913, 915, 916, 917, 75 S 201, 10 ALR 501; Humbird v. State Tax Commn., 141 Md. 405, 409, 410, 411, 119 A 157; Chapman v. New York, 101 App. Div. 607, 91 NYS 1090; Rosenstock v. New York, 101 App. Div. 9, 11, 12, 91 NYS 737; Union Bank, etc., Co. v. Wright, (Tenn. Ch.) 58 SW 755, 757, 52 LRA 469; Jones v. Marrs, (Tex. Commn. A.) 263 SW 570, 577.

"Corporations" see 14 C. J. p 1.

94. Connor v. Chicago, etc., R. Co., 59 Mo. 285, 292, 294.

"Passenger" see 47 C. J. p 1374.

95. Montville v. Alpha Mills Co., 85 Conn. 1, 4, 81 A 1051; Standard Oil Co. v. State, 117 Tenn. 618, 649, 100 SW 705, 10 LRANS 1015.

[a] **"Person or persons causing such excavation to be made."**—Rosenstock v. Laue, 140 App. Div. 467, 470, 125 NYS 361.

96. State v. Benjamin F. Bennett Bldg. Co., 154 Md. 159, 165, 166, 140 A 52.

97. Underwriters' Salvage Co. v. Gilman, 299 Fed. 388, 393.

98. Robinson v. Schlitz, 135 Mo. A. 32, 34, 115 SW 472.

99. Cherry's Inc. v. Sharpensteen, (Ariz.) 265 P 90, 91.

1. Keyes v. Davie, 231 Fed. 688, 689, 145 CCA 574.

[a] **"Person performing any labor or furnishing any material or machinery, under contract with the principal contractor."**—Collins v. Davis & Elkins College, 72 W. Va. 583, 592, 79 SE 10.

2. Rosio v. Beech, 18 B. C. 73, 75, 9 DomLR 416, 23 WestLR 174, 406, 3 WestWkly 952 (held not to include a subcontractor).

[a] **"Person performing any labor or furnishing any material or machinery, under contract with the principal contractor."**—Collins v. Davis & Elkins College, 72 W. Va. 583, 592, 79 SE 10.

3. O'Neal v. Stuart, 281 Fed. 715, 716; In re Nashville Laundry Co., 240 Fed. 795, 796; Webb City Nat. Bank v. Dickinson, 102 Kan. 564, 565, 171 P 636; Vernon Center State Bank v. Mangelsen, 106 Minn. 472, 474, 208 NW 186, 48 ALR 710; Night, etc., Bank v. Rosenbaum, 191 Mo. A. 559, 567, 569, 177 SW 693; First Sav. Bank, etc., Co. v. Flournoy, 24 N. M. 256, 261, 171 P 793; Oklahoma State Bank v. Seaton, 69 Okl. 99, 102, 170 P 477; Deahy v. Choquet, 28 R. I. 338, 340, 67 A 421, 14 LRANS 847; Wolstenholme v. Smith, 34 Utah 300, 303, 305, 97 P 329.

4. In re Biron, 146 Wis. 444, 448, 131 NW 829.

[a] **"Person residing in the United Kingdom."**—De Beers Cons. Mines, Ltd. v. Howe, [1905] 2 K. B. 612, 629; Goerz v. Bell, [1904] 2 K. B. 136, 145; John Hood & Co., Ltd. v. Magee, [1918] 2 Ir. 34; Brown v. Burt, 81 L. J. K. B. 17.

[b] **"Person residing without state."**—Monteiro v. St. Just SS. Co., Ltd., 207 NYS 224.

5. Night, etc., Bank v. Rosenbaum, 191 Mo. A. 559, 569, 177 SW 693; Van De Ven v. Overlook Min., etc., Co., 146 Wash. 332, 262 P 981, 982.

6. Patenaude v. Paquet Co., (Que.) 31 DomLR 229, 231, 26 CanCrCas 204.

7. Royal Canadian Bank v. Grand Trunk R. Co., 23 U. C. C. P. (Ont.) 225, 231.

8. Kutil v. Floyd Valley Mfg. Co., 205 Iowa 967, 218 NW 613, 614.

9. Bankers' Surety Co. v. Maxwell, 222 Fed. 797, 799, 138 CCA 345.

[a] **"Person or persons supplying the contractor with labor and materials."**—Mankin v. U. S., 215 U. S. 533, 538, 30 SCt 174, 54 L. ed. 315.

10. Bishop v. Bishop, 121 Misc. 509, 201 NYS 256, 258.

11. Massasoit-Pocasset Nat. Bank v. Borden, 228 Mass. 581, 583, 117 NE 911.

12. Colton v. Delaware, etc., R. Co., 80 N. J. L. 592, 594, 77 A 1020 (as used in a commutation ticket, synonymous with "person named on its face").

13. Motter v. Derby Oil Co., 16 F. (2d) 717, 719 (phrase includes common carrier but is not limited to such).

14. State v. Starr, 24 N. M. 180, 195, 173 P 674; Shelton v. State, 27 Tex. A. 443, 444, 11 SW 457, 11 AmSR 200 (both holding that the term does not include a fugitive from justice).

"Traveling" see [38 Cyc 949].

15. U. S. Fidelity, etc., Co. v. Henderson, (Tex. Civ. A.) 293 SW 339, 340.

16. Rex v. Cienci, 24 B. C. 81, 87, 35 DomLR 164, 28 CanCrCas 107.

17. Southworth v. Perring, 71 Kan. 755, 766, 81 P 481, 82 P 785, 114 AmSR 527, 2 LRANS 87.

18. Symon v. Palmer's Stores, Ltd., [1912] 1 K. B. 259, 263.

19. Lewis v. Boston, etc., R. Co., (Mass.) 160 NE 663, 664.

20. Toronto R. Co. v. Snell, 31 Can. S. C. 241 [app dism 27 Ont. A. 161]

repairs,"[21] "person who manages the theatre,"[22] "person who shall perform labor,"[23] "person with a family,"[24] "person with whom or in whose name a contract is made for the benefit of another;"[25] also, "persons absent from the state,"[26] "persons assessed,"[27] "persons . . . bestowing skill,"[28] "persons . . . beyond seas,"[29] "persons convicted,"[30] "persons, corporation, or association,"[31] "persons designated as the beneficiaries,"[32] "persons doing contract work,"[33] "persons entitled to take or share in the personal property,"[34] "persons entitled to the benefit,"[35] "persons fleeing from justice,"[36] "persons having an interest therein,"[37] "persons holding positions,"[38] "persons holding stock as . . . trustees,"[39] "persons . . . holding the offices,"[40] "persons, houses, papers and effects,"[41] "persons in parental relation to a child,"[42] "persons interested,"[43] "persons in the employment of the company,"[44] "person lawfully naturalized,"[45] "persons maintaining buildings,"[46] "persons necessary to a complete determination of a controversy,"[47] "persons not now determined,"[48] "persons of color,"[49] "persons of the family,"[50] "persons or class of persons whose interests will in the opinion of the Court be affected by the alteration,"[51] "persons presumptively entitled to the next eventual estate,"[52] "persons prohibited by law from being employed,"[53] "persons riotously and tumultuously assembled together,"[54] "persons taking by intestacy,"[55] "persons under guardianship,"[56] "persons under interdiction,"[57] "persons voting,"[58] "persons who are or may be interested in the trust property,"[59] "persons who become creditors,"[60] "persons whose interests may be affected,"[61] "plea to the person,"[62] "qualified person,"[63] "some person other than the employer,"[64] "such persons as would inherit as heirs,"[65] "the removal of such person,"[66] "to any person or community,"[67] "to such persons,"[68] "to the person who made such entry, or to his heirs or assigns,"[69] "with every other person."[70]

PERSONA. A word which in its primitive sense was applied to the masks worn by the actors in the dramatic performances of Rome and Greece, which masks were made to represent the character which the actor performed; and in the same sense it was subsequently employed in jurisprudence to signify the role or status which a man fills in the social organization.[71]

In Spanish law, a civil being.[72]

(includes motorman of street car); McLaughlin v. Ontario Iron, etc., Co., 20 Ont. L. 335, 337, 338, 15 OntWR 284; Allan v. Grand Trunk R. Co., 4 OntWN 325, 23 OntWR 453, 454, 455, 456, 8 DomLR 697, 698, 15 CanRCas 14.

[a] **"Person in charge or control of the engine."**—Martin v. Grand Trunk R. Co., 27 Ont. L. 165, 170, 20 OntWR 600, 8 DomLR 590, 15 Can RCas 1.

21. Michaelson v. Fish, 1 Cal. A. 116, 119, 81 P 661.

22. Peo. v. Flaherty, 122 App. Div. 878, 107 NYS 415, 416 (ticket taker not included in phrase).

23. Durkheimer v. Copperopolis Copper Co., 55 Or. 37, 39, 40, 104 P 895.

[a] **"Person who shall do or perform any work or labor upon."**—Kansas City Southern R. Co. v. Wallace, 38 Okl. 233, 236, 239, 132 P 908, 46 LRANS 112.

24. Wilson v. Wilson, 101 Ky. 731, 735, 42 SW 404, 19 KyL 925.

25. Karczag Pub. Co. v. Shubert Theatrical Co., 181 App. Div. 529, 534, 169 NYS 1.

26. Wheeler v. Wheeler, 134 Ill. 522, 526, 25 NE 588, 10 LRA 613.

27. Boston v. Turner, 201 Mass. 190, 196, 87 NE 634.

"Assessed" see 5 C. J. p 814.

28. Hornlein v. Bohlig, 37 Cal. A. 646, 647, 174 P 697.

29. Hulburt v. Merriam, 3 Mich. 144, 149.

30. Peo. v. Fabrian, 192 N. Y. 443, 448, 85 NE 672, 127 AmSR 917, 18 LRANS 684, 15 AnnCas 100 (as meaning a person against whom a judgment of conviction has been rendered for an infamous crime).

"Convicted" see Convict 13 C. J. p 903.

31. Wilson v. Hudson County Water Co., 76 N. J. Eq. 543, 552, 76 A 560 (does not include a sovereign state).

[a] **"Person, corporation, or association mining from and upon mine."**—Northern Pac. R. Co. v. Musselshell County, 74 Mont. 81, 90, 238 P 872.

32. Waterman v. New York L. Ins. Co., 237 N. Y. 293, 298, 142 NE 668.

33. In re Unger, 1 Okl. Cr. 222, 224, 225, 226, 227, 98 P 999 (not embraced within the term "contractors").

"Contractor" see 13 C. J. p 211.

34. Matter of Morel, 103 Misc. 555, 556, 557, 171 NYS 759, 760 (as not including creditors).

35. British Assoc. Glass Bottle Mfrs. v. Forster, 86 L. J. Ch. 489, 499.

36. Greene v. U. S., 154 Fed. 401, 411, 85 CCA 251.

37. Gasaway v. Seattle, 52 Wash. 444, 446, 100 P 991, 21 LRANS 68.

[a] **"Person having a direct interest in the event of such action."**—Van Meter v. Goldfare, 236 Ill. A. 126, 128.

[b] **"Persons having the same interest in one cause or matter."**—Walker v. Sur, [1914] 2 K. B. 930, 934.

38. Peo. v. Chew, 68 Colo. 158, 159, 187 P 513 (means lawfully holding a position).

39. Fowler v. Gowing, 165 Fed. 891, 892, 91 CCA 569.

40. Cartright v. McDonald County, (Mo.) 5 SW (2d) 54, 56.

41. Hester v. U. S., 265 U. S. 57, 59, 44 SCt 445, 68 L. ed. 898 (does not include open fields).

42. Peo. v. Hendrickson, 54 Misc. 337, 342, 104 NYS 122.

43. In re Hayward, [1928] Ch. 367, 370.

44. Normandy v. Ind, [1908] 1 Ch. 84, 104.

45. Ex p. Grayson, 215 Fed. 449.

46. Ryan v. New York, 228 N. Y. 16, 126 NE 350, 351.

47. State v. Bandall, (Mo. A.) 299 SW 155, 157 ("those persons not parties thereto, whose rights must be ascertained and settled before the rights and liabilities of the parties to the suit can be finally determined").

48. Matter of Hathaway, 103 Misc. 360, 361, 171 NYS 190.

49. Johnson v. Norwich, 29 Conn. 407, 408; Heirn v. Bridault, 37 Miss. 209, 233; State v. Dempsey, 31 N. C. 384, 387; State v. Watters, 25 N. C. 455, 457; Davenport v. Caldwell, 10 S. C. 317, 333. See Colored Persons 11 C. J. p 1224.

"Free person of color" see Free 27 C. J. p 895 text and notes 20, 21.

50. McFarlane v. Cornelius, 43 Or. 513, 520, 73 P 325, 74 P 468. See Colter v. Luke, 129 Mo. A. 702, 108 SW 608, 609.

51. In re Hearts of Oak L., etc., Assur. Co., [1920] 1 Ch. 544, 548.

52. In re Kohler, 231 N. Y. 353, 376, 132 NE 114; Matter of Boggs, 122 Misc. 73, 81, 203 NYS 180 ("those who are entitled to the estate which is to take effect at the end of the period during which the rents and profits are undisposed of or are not validly accumulated") [both quot Matter of Grossman, 131 Misc. 526, 532, 227 NYS 470].

53. Gunnoe v. Glogora Coal Co., 93 W. Va. 636, 640, 117 SE 484, 487.

54. Field v. Metropolitan Police, [1907] 2 K. B. 853, 857.

55. Matter of White, 125 Misc. 348, 350, 211 NYS 519.

56. Porter v. Hall, (Ariz.) 271 P 411, 418.

57. Vance v. Ellerbe, 150 La. 388, 402, 90 S 735.

58. Atchison, etc., R. Co. v. Jefferson County, 17 Kan. 29, 39.

59. Johnson v. Provident Trust Co., 280 Pa. 255, 258, 124 A 436.

60. Gillard v. Bollert, 24 Ont. 147, 151.

61. Sundermann v. Peo., 148 App. Div. 124, 126, 132 NYS 68.

62. Groel v. United Electric Co., 69 N. J. Eq. 397, 405, 60 A 822.

63. In re Little, 137 Fed. 521, 522, 70 CCA 105.

[a] **"Qualified persons."**—Re Section 24 of B. N. A. Act, [1928] 4 DomLR 98, 103.

"Qualified" see [32 Cyc 1280].

64. Webster v. Stewart, 210 Mich. 13, 16, 177 NW 230.

65. Cook v. Councilman, 109 Md. 622, 638, 72 A 404.

66. Tute v. James, 46 Vt. 60, 63 ("the person consists of both soul and body, and 'the removal of such person' means the removal of the soul and body in life, and not the withdrawal of the former from the latter merely").

67. Busser v. Snyder, 282 Pa. 440, 451, 128 A 80, 37 ALR 1515 (phrase not limited to the idea of a single person or place but is used in an inclusive sense, relating to an individual or a group or class of persons).

68. Bennett v. Semmes, 287 Fed. 745, 749.

69. U. S. v. Colorado Anthracite Co., 225 U. S. 219, 222, 32 SCt 617, 56 L. ed. 1063.

70. Freudenheim v. Gutter, 201 N. Y. 94, 99, 94 NE 640.

71. Toullier Comm. [quot Brent v. New Orleans, 41 La. Ann. 1098, 1099, 6 S 793]. See Rex v. Grant, 8 L. J. K. B. O. S. 352, 354.

72. Escriche Diccionario [quot Latin maxim, Persona est homo, cum statu quodam consideratus, meaning "a person is man considered with respect to status"].

[a] **Persona incierta.**—An uncertain or unidentified person, in whose

PERSONA CONJUNCTA ÆQUIPARATUR INTERESSE PROPRIO.[73]

PERSONA DESIGNATA. A person pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character.[74]

PERSONA EST HOMO CUM STATU QUODAM CONSIDERATUS.[75]

PERSONÆ VICE FUNGITUR MUNICIPIUM ET DECURIA.[76]

PERSONA INTERPOSITA.[77]

PERSONAL.[78] [§ 1] **A. In General.** Affecting or relating to one individually;[79] belonging to an individual;[80] belonging to the person;[81] bodily;[82] corporeal;[83] of or pertaining to the person;[84] pertaining to the external bodily appearance;[85] pertaining to the person or bodily form;[86] pertaining to, or characteristic of, a particular person;[87] proper or directly applicable to a specific person or individual, or to his character, conduct, etc.;[88] relating to an individual, his character, conduct, motives, or private affairs, especially in an invidious and offensive manner;[89] springing from or belonging to oneself.[90]

[§ 2] **B. Personal Act.** One done in person, without the intervention of another.[91]

[§ 3] **C. Personal Contract.**[92] A contract for personal services;[93] a contract in which the personality of one of the parties is material;[94] a contract made by the person or corporation to be bound as distinguished from one imputed to such person or corporation.[95]

[§ 4] **D. Personal Credibility.** As applied to a witness, these words mean that which would lead a jury to believe or disbelieve what the witness has said by reason of his appearance and manner before them while testifying.[96]

[§ 5] **E. Personal Earnings.** Earnings by physical or mental labor, unaided by capital, except in so far as may be necessary to supply the means of performing such labor as a necessary incident thereof.[97]

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favor a testamentary disposition is void unless he may be identified. Spanish Civ. Code art 750; Philippine Civ. Code art 750; Porto Rico Civ. Code § 738.

[b] **Personas inhabiles.**—Disqualified persons, Spanish Civ. Code arts 237, 628, 663; Philippine Civ. Code arts 237, 628, 663; Porto Rico Civ. Code §§ 265, 636, 671.

[c] **Personas juridicas.**—(1) Corporations and other legal entities (Spanish Civ. Code art 35 et seq; Philippine Civ. Code art 35 et seq; Porto Rico Civ. Code §§ 27–31) (2) opposed to personas naturales, natural persons (Spanish Civ. Code art 15 [not in force in the Philippines. Yañez de Barnuevo v. Fuster, 29 Philippine 606]; Porto Rico Civ. Code §§ 24–26).

73. A maxim meaning "A personal connection [literally, a united person, union with a person] is equivalent to one's own interest; nearness of blood is as good a consideration as one's own interest." Black L. D. [cit Bacon Max. p 72 reg.].

[a] **Applied in:** McCormick Harvesting-Mach. Co. v. Hamilton, 73 Wis. 486, 494, 41 NW 727; Chapple v. Cooper, 13 M. & W. 252, 153 Reprint 105; Sherwood v. Ray, 1 Moore P. C. 353, 388, 12 Reprint 848, 862.

74. Black L. D. See Slocan v. Canadian Pac. R. Co., 14 B. C. 112, 113, 9 WestLR 583; Re Brennan, (B. C.) 9 WestLR 500, 501, 14 WestLR 633; Re Chambers, (Man.) 15 WestLR 694, 696. See also Re Grand Trunk Pac. R. Co., 3 Alta. L. 65, 67 ("there is doubt whether in the matter of the arbitration I was acting as persona designata, or as a Judge of the Court"); Re Wilson, 13 Ont. L. 82, 88, 8 OntWR 677 ("it is also, I think, clear that the acts of the surrogate Judge in passing the accounts were those of the Court and not of the Judge as persona designata").

75. A maxim meaning "A person is a man considered with reference to a certain status." Bouvier L. D. [cit Heineccius Elem. Jur. Civ. I, 1 tit 3 § 75].

76. A maxim meaning "Towns and boroughs act as if persons." Peloubet Leg. Max.

[a] **Applied in** Warner v. Beers, 23 Wend. (N. Y.) 103, 144.

77. See Interposita Persona 33 C. J. p 472.

78. See Individual 31 C. J. p 885. And see Personally post p 1049.

Personal:
Action see Actions § 15.
Baggage or luggage see Carriers §§ 1557–1566; Luggage 38 C. J. p 326.
Chattel see 11 C. J. p 385 text and notes 7–11, 23; Property [32 Cyc 666].
Communication see Witnesses [40 Cyc 2260 et seq].
Covenant see Covenants § 17.
Demand for payment of commercial paper see Bills and Notes §§ 774–778.
Equipment see 20 C. J. p 1302 text and note 60.
Exemption from taxation see Taxation [37 Cyc 884 et seq].
Goods see 28 C. J. p 720.
Injury see § 18 and cross references thereunder.
Knowledge see 35 C. J. p 919 and cross references thereunder.
Liability of:
Corporate officer see Banks and Banking §§ 168–212; Corporations §§ 1948–2072.
Executor or administrator see Executors and Administrators § 2531.
Military or naval officer see Army and Navy §§ 215–225.
Partner see Partnership § 300.
Public officer see Clerks of Courts §§ 86–129; Judges §§ 115–125; Justices of the Peace §§ 31–48; Municipal Corporations §§ 1198–1211; Officers §§ 326–331; Sheriffs and Constables [35 Cyc 1462–1472]; United States Marshals [39 Cyc 821–825].
Stockholders see Banks and Banking §§ 67–119; Corporations §§ 1474–1798.
Trustees see Trusts [39 Cyc 468].
Liberty see Constitutional Law §§ 445–448.
Notice see Notice § 19.
Pain see 46 C. J. p 1170 note 52 [a].
Privacy see Right of Privacy [34 Cyc 1766].
Property see Property [32 Cyc 666].
Representatives see Executors and Administrators §§ 2–4.
Servant see Domestic Servant 19 C. J. p 389 text and notes 51–56.
Service see Notice §§ 65–68; Process [32 Cyc 448–461].
Services:
As constituting consideration for contracts see Contracts § 153.
Injunction to restrain breach of contract for see Injunctions §§ 307–314.
Tax see Taxation [37 Cyc 767].
Things see Things Personal [38 Cyc 285].

79. New Standard D. [quot In re Kavanagh, 133 Misc. 399, 401, 232 NYS 308, 311]; Standard D. [quot Genung v. Best, 100 N. J. Eq. 250, 253, 135 A 514].

80. Black L. D. [quot In re Kavanagh, 133 Misc. 399, 401, 232 NYS 308].

81. Bouvier L. D. [quot In re Kavanagh, supra].

82. State v. Clayborne, 14 Wash. 622, 623, 45 P 303.

83. American Encyc. D. [quot Smith v. Buck, 119 Oh. St. 101, 162 NE 382].

84. Century D. [quot Choctaw, etc., R. Co. v. Zwirtz, 13 Okl. 411, 415, 73 P 941].

[a] **Similar definitions.**—(1) "Of or pertaining to a particular person." Webster New Int. D. [quot In re Kavanagh, 133 Misc. 399, 401, 232 NYS 308]. (2) "Appertaining to the person." Black L. D. [quot In re Kavanagh, supra].

85. Webster D. [quot Choctaw, etc., R. Co. v. Zwirtz, 13 Okl. 411, 415, 73 P 941].

86. Terre Haute Electric R. Co. v. Lauer, 21 Ind. A. 466, 475, 52 NE 703.

[a] **Similar definitions.**—(1) "Pertaining to the person, or body." Webster New Int. D. [quot Smith v. Buck, 119 Oh. St. 101, 162 NE 382]. (2) "Of or to the person or bodily form." American Encyc. D. [quot Smith v. Buck, supra].

87. New Standard D. [quot In re Kavanagh, 133 Misc. 399, 401, 232 NYS 308].

88. Century D. [quot Smith v. Buck, 119 Oh. St. 101, 162 NE 382].

89. Webster New Int. D. [quot Smith v. Buck, supra].

[a] **Similar definition.**—"Applied or relating to the person, character, conduct, manner, or habits of an individual, generally used in a disparaging sense." American Encyc. D. [quot Smith v. Buck, 119 Oh. St. 101, 162 NE 382].

90. New Standard D. [quot In re Kavanagh, 133 Misc. 399, 401, 232 NYS 308]; Standard D. [quot Genung v. Best, 100 N. J. Eq. 250, 253, 135 A 514].

91. International D. [quot Looney v. State, 156 Tenn. 337, 1 SW (2d) 782, 783].

"Act" see 1 C. J. p 911.

92. **"Contract"** see Contracts §§ 1–18.

93. Janin v. Browne, 59 Cal. 37, 44. See Lucas v. J. H. Gross Motor Car Co., (Oh. A.) 161 NE 362, 363.

94. Lucas v. J. H. Gross Motor Car Co., supra.

95. Benner Line v. Pendleton, 217 Fed. 497, 507, 133 CCA 349 [quot The Etna Maru, 20 F. (2d) 143, 145].

96. Western, etc., R. Co. v. Henderson, 6 Ga. A. 385, 65 SE 48, 50. See also Witnesses [40 Cyc 2585].

"Credibility" see 15 C. J. p 1346.

97. Kerr v. Tyler Guaranty State Bank, (Tex. Civ. A.) 283 SW 601, 603. See Wineblood v. Payne, 129 Okl. 103, 105, 263 P 669; Affleck v. Hammond, [1912] 3 K. B. 162, 165; In re Graydon, [1896] 1 Q. B. 417; Mercer v. Vans Colina, 67 L. J. Q. B. 424, 427.

[a] **Not confined to earnings from manual or menial labor.**—Beckett v. Wishon, 5 OhS&CP 257, 258, 5 OhNP 155 (included wages, compensation, or salary of superintendent of a county infirmary); Mercer v. Vans Colina, 67 L. J. Q. B. 424, 427.

[b] **Sale of cotton** not acquired by a married woman independently of

[§ 6] **F. Personal Effects.**[98] When used without qualifying words, generally includes such tangible property as is worn or carried about the person,[99] although not restricted to that meaning;[1] effects movable or chattel property of any kind;[2] effects of a personal character, especially as used in wills, tariff laws, etc.;[3] goods and items of property having a more or less intimate relation to the person;[4] personal luggage as distinguished from merchandise;[5] such property especially appertaining to one's person.[6]

As used in wills its meaning may be derived from descriptions of articles and classifications immediately preceding;[7] but when not restricted by the context it may mean everything embraced within the description "personal property."[8]

[§ 7] **G. Personal Estate.**[9] While a term of wide signification,[10] it is not ambiguous or uncertain, its common and legal meaning being entirely clear.[11] In its ordinary legal signification[12] it is understood to embrace every species of property not of a freehold nature,[13] including intangible personal property as well as tangible.[14] It may appear, however, from the surrounding circumstances that the term is used in a more restricted sense, as in the sense of personal effects,[15] or tangible personal property.[16]

community aid as compensation for her personal labor does not constitute her personal earnings. Lewisville First Nat. Bank v Davis, (Tex. Commn. A.) 5 SW (2d) 753, 754.

[c] **Earnings from ice business** in which two carts and several men are employed are not personal earnings. Mulford v. Gibbs, 9 App. Div. 490, 491, 41 NYS 273.

[d] **Money received from conduct of a saloon** is not "personal earnings." Prince v. Brett, 21 App. Div. 190, 47 NYS 402.

[e] **Tuition fees** due to a proprietor of a school are personal earnings. Miller v. Hooper, 19 Hun (N. Y.) 394, 395.

[f] **"Personal or professional earnings."**—Youst v. Willis, 5 Okl. 170, 49 P 56, 57 (money due a hotel keeper for boarding and accommodating guests not included).

"Earnings" see 19 C. J. p 853.

98. See Personal Estate infra § 7; Personal Goods infra § 7; Property [32 Cyc 666].

"Effects" see 19 C. J. p 1017.

99. Brandon v. Yeakle, 66 Ark. 377, 50 SW 1004, 1005; In re May, (Minn.) 160 NW 790, 791.

[a] **A phrase** used to designate articles associated with the person. Lippincott's Est., 173 Pa. 368, 371, 34 A. 58; Bennett v. Bradley, 149 Va. 746, 141 SE 756, 758 [quot Cyc].

1. Ellege v. Henderson, 142 Ark. 421, 424, 218 SW 831 ("We do not think that the words 'personal effects,' as a matter of law, should be restricted to such tangible property as is worn or carried about the person. In construing the meaning of these words, particular regard must be given to the connection in which they are used").

[a] **"The term** may be restricted by words of narrowed import to things ejusdem generis, or where not restricted as in a residuary legacy, may include all articles not employed in one's business." Webster D. [quot Bennett v. Bradley, 149 Va. 746, 751, 141 SE 756, 758].

2. Standard D. [quot Bennett v. Bradley, supra].

3. Webster D. [quot Bennett v. Bradley, supra].

[a] **"Personal effects of persons arriving in the United States."**—U. S. v. Bernays, 158 Fed. 792, 794, 86 CCA 52.

4. Standard D. [quot In re May, (Minn.) 160 NW 790, 791; Bennett v. Bradley, 149 Va. 746, 141 SE 756, 758].

5. Murray Oxford D. [quot U. S. v. One Trunk, 175 Fed. 1012, 1015; In re May, (Minn.) 160 NW 790, 791].

"Merchandise" see 40 C. J. p 641.

6. Webster D. [quot Bennett v. Bradley, 149 Va. 746, 141 SE 756, 758].

7. Brandon v. Yeakle, 66 Ark. 377, 50 SW 1004, 1005; In re May, (Minn.) 160 NW 790, 791; Gallagher v. McKeague, 125 Wis. 116, 103 NW 233, 234, 110 AmSR 821.

[a] **Interest in insurance business not included.**—Brandon v. Yeakle, 66 Ark. 377, 50 SW 1004, 1005.

8. In re Reimer, 159 Pa. 212, 28 A 186 [quot Gallagher v. McKeague, 125 Wis. 116, 103 NW 233, 234, 110 AmSR 821].

[a] **Automobiles as "personal effects."**—Matter of Jones, 128 Misc. 244, 218 NYS 380, 381.

[b] **Money and securities not owned at time of making will not be included.**—In re May, (Minn.) 160 NW 790, 791.

[c] **"All my personal effects"** as a good gift of residuary personalty see In re Wolfe, [1919] 2 Ir. 491, 492.

[d] **"Personal effects"** not sufficient to operate on the residuum of the personal estate by reason of being used in a restricted sense. Welman v. Neufville, 75 Ga. 124, 128.

[e] **"Other personal effects"** as passing the beneficial interest in a mortgage see Re Way, 6 Ont. L. 614, 617.

"Personal property" see Property [32 Cyc 666].

9. See Personal Effects supra § 6; Property [32 Cyc 666].

Estates in personal property see Estates §§ 242–261.

10. Maxwell v. Maxwell, 106 Nebr. 689, 184 NW 227, 230.

11. Golder v. Chandler, 87 Me. 63, 32 A 784, 786.

[a] **An ambiguous term.**—Stearns v. Stearns, 103 Conn. 213, 130 A 112, 114.

12. Golder v. Chandler, 87 Me. 63, 32 A 784, 786; Bellows v. Allen, 22 Vt. 108, 110. See Berman v. Beaudry, 118 Me. 248, 107 A 708.

13. Bellows v Allen, 22 Vt. 108, 110. See Berman v. Beaudry, 118 Me. 248, 107 A 708; Golder v. Chandler, 87 Me. 63, 70, 32 A 784 ("includes all his property other than real estate, over which he has absolute dominion and control, which he may dispose of by gift or sale, at his option, which he may change from one species of property to another, and may use and extend for his personal needs, or pleasures, or which may be subjected to the payment of his debts"); Maxwell v. Maxwell, 106 Nebr. 689, 699, 184 NW 227 ("includes everything, not real estate, which has an exchangeable value or goes to make up one's wealth or estate"); In re Wass, 95 L. T. Rep. 758, 759; In re Andrews, 50 Wkly. Rep. 471.

"It may be used to designate every species of property not coming under the denomination of real estate; in its broader meaning it embraces personal property of every description and kind." Stearns v. Stearns, 103 Conn. 213, 220, 130 A 112.

[a] **Footnote to will.**—An explanatory clause appearing in a will below the signature and declaring "personal estate includes pay, effects, money in bank, insurance policy, in fact everything except real estate" is to be taken into account in interpreting the meaning of the term "personal estate" as it appears in the will. Re Monkman, 42 Ont. L. 363, 364, 368, 46 DomLR 701.

[b] **Interest in marriage settlement trust funds** is personal estate. In re Lyne, [1919] 1 Ch. 80, 99.

[c] **Lease of real estate for years** is personal estate. Spiro v. Robertson, 57 Ind. A. 229, 106 NE 726, 728; Orchard v. Wright-Dalton-Bell-Anchor Store Co., 264 Mo. 554, 175 SW 884, 885; In re Grassi, [1905] 1 Ch. 584, 592. See In re Lyne, [1919] 1 Ch. 80, 99.

[d] **Statutory definitions.**—(1) Includes "chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate, public stocks, stocks in moneyed corporations and such portion of the capital of incorporated companies liable to taxation on their capital as shall not be invested in real estate." Matter of Althause, 63 App. Div. 252, 255, 71 NYS 445. (2) Includes "chattels, real and other estate, such as, upon the death of the owner intestate, would devolve upon his personal representative." St. § 458 [quot Due v. Bankhardt, 151 Ky. 624, 625, 152 SW 786]. (3) Includes "goods, chattels real and personal, money, credits, investments, and the evidences thereof." Code § 17 c 13 [quot Mountain State Motor Car Co. v. Solof, 97 W. Va. 196, 199, 124 SE 824]. (4) Includes "all rights, credits and choses in action." Burns St. (1881) § 6273 [quot Hathaway v. Edwards, 42 Ind. A. 22, 85 NE 28, 30]. (5) Extends to "leasehold estates and other chattels real, and also to monies, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein." Wills Act of 1837 [quot In re Lyne, [1919] 1 Ch. 80, 86].

[e] **"Personal estate arising from the land."**—In re Sidebothom, [1902] 2 Ch. 389, 392; In re Wilkinson, [1902] 1 Ch. 841, 846.

[f] **"Stocks and other personal estate"** is equivalent to "personal property." Trenton v. Standard F. Ins. Co., 77 N. J. L. 757, 73 A 606, 607.

[g] **"Visible personal estate."**—Warren Mfg. Co. v. Dalrymple, 56 N. J. L. 449, 454, 28 A 671.

14. Hurt v. Hurt, 121 Va. 413, 93 SE 672, 674. And see statutory definitions supra note 13 [d]

[a] **Includes** not only goods and chattels but (1) rights and credits (Bellows v. Allen, 22 Vt. 108, 110); and (2) choses in action (Stevens v. Meserve, 73 N. H. 293, 297, 61 A 420, 111 AmSR 612).

15. Stearns v. Stearns, 103 Conn. 213, 130 A 112, 114; Southington Bank, etc., Co. v. American Baptist Home Mission Soc., 96 Conn. 107, 113, 113 A 166.

"Personal effects" see supra § 6.

16. Hurt v. Hurt, 121 Va. 413, 93 SE 672, 675.

[a] **Right of father to services of daughter** is not "personal estate" within the meaning of a statute declaring that "actions of . . . tres-

[§ 8] **H. Personal Expenses.**[17]**—1. Of a Candidate for Office.**[18] Such outlays as are incurred by reason of his candidature which are in the nature of private expenses, as, for instance, fares while traveling, carriage hire, hotel bills, etc., in distinction from the more general election expenses.[19]

[§ 9] **2. Of a Legislator.**[20] Those expenses that must be incurred by a member of the legislature in order to be present at the place of meeting—expenses for his personal comfort and convenience, which have nothing to do with the performance of his duty as a member of the legislature.[21]

[§ 10] **I. Personal Franchise.** A franchise which creates a corporation.[22]

[§ 11] **J. Personal Freight.** Freight owned by a person individually.[23]

[§ 12] **K. Personal Immunity.**[24] The right to one's person; to be let alone.[25]

[§ 13] **L. Personal Mortgage.** While a chattel mortgage is a conveyance of some present legal or equitable right in personal property, as security for the payment of money, or for the performance of some other act,[26] a personal mortgage is more than a mere security, being a sale of the thing mortgaged and operating as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition.[27]

[§ 14] **M. Personal Remedy.** Seeking redress of a party who inflicts a wrong as opposed to seeking redress by and through the intervention of a court.[28]

[§ 15] **N. Personal Rights.**[29] Rights of personal security comprising those of life, limb, body, health, reputation, and the right of personal liberty;[30] rights which are relative and general, and embrace all the rights any person may have and all the wrongs he may suffer.[31]

[§ 16] **O. Personal Security.** A right which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.[32]

In a commercial sense, the security of personal property,[33] or of personal paper of all kinds and descriptions used in the transaction of the business of the country.[34]

[§ 17] **P. Personal Service Corporation.** A statutory term meaning "a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation and in which capital (whether invested or borrowed) is not a material income-producing factor."[35]

[§ 18] **Q. Persqnal Servitude.** A condition which consists in the subjection of one person to another.[36]

[§ 19] **R. Personal Statute.**[37] One which has principally for its object the person, and treats only of property incidentally;[38] one which directs all its attention towards the person, to provide in general for his qualifications, or his general and absolute capacity;[39] one which follows and governs the party

pass on the case for damages done to . . . personal estate shall survive," the term having reference to specific personal property. Davis v. Carpenter, 72 Vt. 259, 260, 47 A. 778.

17. **"Expense"** or **"Expenses"** see 25 C. J. p 172.

"Personal and incidental expenses" see Incidental 31 C. J. p 393 text and note 59.

[a] **"Personal expenses."**—McCaffrey v. Boston, 254 Mass. 50, 52, 149 NE 659 (as used in Pub. St. [1909] c 486 § 49 relating to members of city councils).

[b] **"Personal, living, or family expenses."**—Kornhauser v. U. S., 276 U. S. 145, 152, 48 SCt 219, 72 L. ed. 505 (as used in Revenue Act [1918] § 255 [a]).

18. **"Candidate"** see 9 C. J. p 1272.

19. Reg. v. Gay, 8 Hawaii 468, 470.

20. **"Legislator"** see 36 C. J. p 987.

21. State v. Turner, 117 Kan. 755, 757, 233 P 510 (they "are those incurred for rooms, meals, laundry, communications with their homes, and other things of like character").

[a] **"Legislative expenses" distinguished.**—State v. Turner, 117 Kan. 755, 757, 233 P 510.

22. Sandham v. Nye, 9 Misc. 541, 30 NYS 552, 555. See also Corporations § 160.

[a] **"Property franchise" distinguished.**—Sandham v. Nye, 9 Misc. 541, 545, 30 NYS 552.

"Franchise" see Franchises § 1.

23. Hurley v. Big Sandy, etc., R. Co., 137 Ky. 216, 125 SW 302, 304.

"Freight" see 27 C. J. p 901.

24. **"Immunity"** see 31 C. J. p 252.

25. Cooley Torts [quot Henry v. Cherry, 30 R. I. 13, 19, 20, 73 A 97, 136 AmSR 928, 24 LRANS 991, 18 AnnCas 1006]. See Right of Privacy [34 Cyc 1766].

26. See Chattel Mortgages § 1.

27. In re Riggs Restaurant Co., 130 Fed. 691, 693, 66 CCA 48; Butler v. Miller, 1 N. Y. 496, 500; Streeter v. Ward, 12 NYSt 333, 334.

"Chattel mortgage" distinguished from "sale" see Chattel Mortgages §§ 12–14.

28. Peo. v. Horan, 34 Colo. 336, 86 P 263, 114 AmSR 163.

"Legal remedy" distinguished see Legal § 10 note 4 [a].

"Remedies" see Actions §§ 91–109.

29. **"Rights"** see Right [34 Cyc 1762].

Injunction to protect personal rights see Injunctions §§ 430–437.

30. Wharton [quot Montreal Tramways Co. v. Sequin, 52 Can. S. C. 644, 657, 28 DomLR 494]. See Gambino v Manufacturers', etc., Coal, etc., Co., 175 Mo. A. 653, 657, 158 SW 77.

"Personal security" see infra § 16.

31. Duffies v. Duffies, 76 Wis. 374, 379, 45 NW 522, 20 AmSR 79, 8 LRA 420.

[a] **Antithesis of "personal wrongs."**—Montreal Tramways Co. v. Sequin, 52 Can. S. C. 644, 657, 28 DomLR 494.

[b] **"Rights of person" distinguished.**—Duffies v. Duffies, 76 Wis. 374, 379, 45 NW 522, 20 AmSR 79, 8 LRA 420.

32. See Constitutional Law § 449.

33. Baltimore Third Nat. Bank v. Boyd, 44 Md. 47, 53, 22 AmR 35.

[a] **Loans on personal security** used in contradistinction from real estate security see Cleveland v. Shoeman, 40 Oh. St. 176, 181; Pittsburgh Locomotive, etc., Works v. Keokuk State Nat. Bank, 19 F. Cas. No. 11,198.

34. Colorado Sav. Bank v. Evans, 12 Colo. A. 334, 56 P 981, 984.

[a] **Bills of exchange included.**—Gee v. Alabama L. Ins., etc., Co., 13 Ala. 579, 583.

[b] **Bills of exchange, promissory notes, drafts, etc., included.**—Colorado Sav. Bank v. Evans, 12 Colo. A. 334, 56 P 981, 984.

[c] **Chattel mortgage not included.**—Colorado Sav. Bank v. Evans, 12 Colo. A. 334, 56 P 981, 984.

[d] **Stocks and bonds included.**—National Bank of Commerce v. Francis, 296 Mo. 169, 246 SW 326, 334.

[e] **In equity** it has been declared that a national bank empowered by statute to loan money on personal security will not be debarred from enforcing the collection of a note by a sale of land under a mortgage accompanying the note as security where the note and mortgage were taken in good faith. Union Nat. Bank v. Matthews, 98 U. S. 621, 626, 25 L. ed. 188.

35. U. S. Comp. St. § 6336½a [quot Cuyahoga Abstract Title, etc., Co. v. Internal Revenue Comr., 29 F. (2d) 448; North American R. Constr. Co. v. Internal Revenue Comr., 27 F. (2d) 493, 494; New Orleans Shipwright Co. v. Internal Revenue Comr., 27 F. (2d) 214, 215; Tracy v. Rasmusson, 26 F. (2d) 139, 141; Mountain View Sanitarium Co. v. Huntley, 25 F. (2d) 1016; Metropolitan Business College v. Blair, 24 F. (2d) 176, 177; Harry S. Kaufman, Ltd. v. Internal Revenue Comr., 24 F. (2d) 44, 45; Alexander v. U. S., 21 F. (2d) 547, 549; Cotton Hotel Co. v. Bass, 7 F. (2d) 900, 901]. See Conklin-Zonne-Loomis Co. v. Internal Revenue Comr., 29 F. (2d) 698, 700; Hurst v. Heiner, 26 F. (2d) 734, 735; Posse-Nissen School of Physical Education v. U. S., 25 F. (2d) 748; Dreyer Commn. Co. v. Hellmich, 25 F. (2d) 408, 411; Fuller v. Routzahn, 23 F. (2d) 959, 962; U. S. v. Pann, 23 F. (2d) 714, 715; Thomas E. Basham Co. v. Lucas, 21 F. (2d) 550, 551; George B. Ricaby Co. v. Nauts, 19 F. (2d) 271, 272.

Kinds and classification of corporations under particular statutes see Corporations §§ 50–52.

36. 2 Bouvier L. D. 986 [quot U. S. v. McClellan, 127 Fed. 971, 976].

[a] **As the term is used in the Spanish law,** it includes use, usufruct, and habitation. Mulford v. Le Franc, 26 Cal. 88, 102.

"Servitude" see Slaves [36 Cyc 466 note 1].

37. **"Statute"** see Statutes [36 Cyc 929].

38. Merlin § 13 [quot Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 358, 396].

[a] **"Real statute" distinguished.**—Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 586–596, 16 AmD 212; Bank of Columbia v. Walker, 14 Lea (Tenn.) 299, 308. "Real statute" see [33 Cyc 1559].

39. Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 593, 16 AmD 212 (adopting definitions of Chancellor D'Agusseau).

[a] **"It is settled jurisprudence** in this State that laws, such as the one just referred to, regulating the privileges and prescribing the disabilities of married women are 'per-

subject to it wherever he goes.[40]

[§ 20] **S. Personal Terminable Annuity.** An annuity given for the life of the beneficiary.[41]

[§ 21] **T. Personal Tort.**[42] A tort which includes all injuries to the person, whether to reputation, feelings, or to the body.[43]

[§ 22] **U. Personal Transaction.**[44] The doing or performing of some business between parties,[45] or the management of any affair;[46] a term which describes the whole of the negotiation or treaty, between the original parties to it, out of which the cause of action arose.[47] In general, the term may be said to have reference to some business or negotiations between two or more persons.[48] A broad and liberal interpretation is given to the words.[49] They do not mean "private," as a transaction may be none the less a "personal" one because a third person is present.[50]

[§ 23] **V. Personal Wrong.**[51] An invasion of a personal right;[52] a wrong against a person as opposed to injuries to real property.[53] In its most restricted meaning, a wrong causing injury to person or reputation, as distinguished from injury to source of revenue.[54]

[§ 24] **W. Other Phrases.** "For her own personal comfort,"[55] "income derived from personal exertion,"[56] "my legal personal heirs and representatives,"[57] "personal ailment,"[58] "personal and actual presence,"[59] "personal attendance,"[60] "personal belongings,"[61] "personal benefit,"[62] "personal bias or prejudice,"[63] "personal character,"[64] "personal communication with a deceased person,"[65] "personal credit,"[66] "personal decree,"[67] "personal defense,"[68] "personal discharge,"[69] "personal enjoyment,"[70] "personal examination,"[71] "personal fitness,"[72] "personal inconvenience,"[73] "personal indignities,"[74] "personal judgment,"[75] "personal labor,"[76] "personal list,"[77] "personal necessities,"[78] "personal obligations,"[79] "personal property,"[80] "personal representatives,"[81] "personal residence,"[82] "personal responsibility,"[83] "personal rights,"[84] "personal security,"[85] "personal service,"[86] "personal use,"[87] "personal wrong,"[88] "personal wrongful act,"[89] and "personal wrongful conduct"[90] are phrases which have been defined.

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sonal' statutes, purely domiciliary in character, and do not operate to the benefit of married women domiciled elsewhere than in Louisiana." Marks v. Germania Sav. Bank, 110 La. 659, 662, 34 S 725.

40. Bank of Columbia v. Walker, 14 Lea (Tenn.) 299, 308 [cit Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 593, 16 AmD 212 (which, while discussing such definition, did not adopt it)].

[a] **In Holland and France** "a personal statute is that which follows, and governs the party subject to it, wherever he goes." Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 590, 16 AmD 212.

41. Chisholm v. Journeay, (N. S.) 15 DomLR 495, 496, 13 EastLR 575.

"Annuities for life" see Annuities § 13.

42. See Personal Wrong infra § 23.

"Tort" see Torts [38 Cyc 408].

43. Mumford v. Wright, 12 Colo. A. 214, 217, 55 P 744.

[a] **"Personal tort** or wrong . . . means a personal tort or wrong independent of any contract." Montreal v. De Montigny, 11 Que. Pr. 273, 274.

44. Personal transaction with a person since deceased about which testimony can be offered see Witnesses [40 Cyc 2314].

45. Denning v. Butcher, 91 Iowa 425, 433, 59 NW 69; Hanson v. Feisler, 49 S. D. 442, 207 NW 449, 450 [quot Cyc].

[a] **"Personal transaction or communication."**—Farrar v. Farmers' L. & T. Co., 85 App. Div. 367, 369, 83 NYS 172, 173.

[b] **"Personal transaction with the decedent."**—In re Kelly, 238 N. Y. 71, 80, 143 NE 795.

46. Denning v. Butcher, 91 Iowa 425, 433, 59 NW 69.

47. Cheatham v. Bobbitt, 118 N. C. 343, 346, 24 SE 13; Hanson v. Feisler, 49 S. D. 442, 207 NW 449, 450 [quot Cyc].

48. Martin v. Shannon, 92 Iowa 374, 377, 60 NW 645.

[a] **It includes** transactions and communications between the parties of which both must have had personal knowledge. In re Brown, 92 Iowa 379, 388, 60 NW 659; Dysart v. Furrow, 90 Iowa 59, 62, 57 NW 644, 645.

[b] **It is practical equivalent** of phrase "any transaction whatever" used in statutes. Hanson v. Feisler, 49 S. D. 442, 207 NW 449.

[c] **Preparing and signing a contract** and the negotiations and the meeting of minds as to the matters agreed upon is necessarily a personal transaction. Scott v. Brenton, 168 Iowa 201, 150 NW 56, 60.

[d] **"To be personal** the communication or transaction must have been made or had when the parties were face to face so that what was said or done in the presence of each other could not be related by one after the other had died." Moore v. Miller, 119 Kan. 666, 668, 240 P 853.

49. Hogg Eq. Proc. [quot McBride v. Kirkpatrick, 207 Fed. 893, 894]. See Freeman v. Freeman, 71 W. Va. 303, 76 SE 657, 659.

50. Howell v. Taylor, 11 Hun (N. Y.) 214, 215 [quot Byerer v. Smith, 55 App. Div. 405, 66 NYS 968, 970].

51. See Personal Tort supra § 21.

"Wrong" see [40 Cyc 2873].

52. Peo. v. Quanstrom, 93 Mich. 254, 257, 53 NW 165, 17 LRA 723 (where it is said: "It pertains to the person, the individual").

[a] **Does not include wrongs or injuries arising from contract.**—Montreal v. De Montigny, 11 Que. Pr. 273, 275.

53. Montreal Tramways Co. v. Sequin, 52 Can. S. C. 644, 657, 28 DomLR 494.

54. See Montreal Tramways Co. v. Sequin, supra.

55. Bishop v. Groton Sav. Bank, 96 Conn. 325, 330, 114 A 88 ("means for her personal support").

"Comfort" see 11 C. J. p 1233.

56. Syme v. Victoria Taxes Comr., [1914] A. C. 1013, 1018.

57. Genung v. Best, 100 N. J. Eq. 250, 253, 135 A 514 (use of word "personal" held an indication that blood relatives were intended as distinguished from relatives resulting from marriage).

[a] **"Personal and lawful heirs"** is not equivalent to "heirs of the body begotten." Webbe v. Webbe, 234 Ill. 442, 447, 84 NE 1054, 17 LRANS 1079.

"Heirs" see 29 C. J. p 287.

58. Rasicot v. Royal Neighbors of America, 18 Ida. 85, 100, 108 P 1048, 1053, 138 AmSR 180, 29 LRANS 433.

"Ailment" see 2 C. J. p 1025.

59. Greene v. Greene, 145 Ill. 264, 273, 33 NE 941.

"Presence" see [31 Cyc 1167].

60. Tucker v. Williamson, 229 Fed. 201, 209.

"Attendance" see 6 C. J. p 550.

61. Wagner v. Congress Square Hotel Co., 115 Me. 190, 195, 98 A 660 (distinguishing "personal ornaments").

"Belongings" see Belonging 7 C. J. p 1043 text and note 69.

62. In re Robinson, (Vt.) 144 A 457, 459.

"Benefit" see 7 C. J. p 1135.

63. Parker v. New England Oil Corp., 13 F. (2d) 497, 498; Saunders v. Piggly Wiggly Corp., 1 F. (2d) 582, 584; Henry v. Speer, 201 Fed. 869, 871, 120 CCA 207, 209.

[a] **"Personal prejudice."**—Craven v. U. S., 22 F. (2d) 605, 607.

"Bias" see 7 C. J. p 1150.

"Prejudice" see [31 Cyc 1161].

64. Com. v. Rentschler, 11 Pa. Dist. 203, 204, 26 Pa. Co. 39 (as distinguished from civic, public, and official character and conduct).

"Character" see 11 C. J. p 288.

65. Seabright v. Seabright, 28 W. Va. 412, 462.

66. Hibbs v. Brown, 112 App. Div. 214, 219, 98 NYS 353.

"Credit" see 15 C. J. p 1348.

67. Mesler v. Jackson Cir. Judge, 188 Mich. 195, 198, 154 NW 63 (includes an award of alimony).

"Decree" see 18 C. J. p 32.

68. Aten v. Brown, 14 Ill. A. 451, 453. See Felsenthal v. Durand, 86 Ill. 230, 232; Byers v. Vincennes First Nat. Bank, 85 Ill. 423, 425; Briggs v. Adams, 31 Ill. 486, 487.

"Defense" see 18 C. J. p 463.

69. Booth v. Kinsey, 8 Gratt. (49 Va.) 560, 568 (distinguished from "real release").

"Discharge" see 18 C. J. p 1048.

"Release" see [34 Cyc 1042].

70. Columbus v. Strassner, 124 Ind. 482, 489, 25 NE 65.

"Enjoyment" see 20 C. J. p 1264.

71. Western Union Tel. Co. v. Morris, 10 Kan. A. 61, 61 P 972, 973; Peo. v. Delaware, etc., Canal Co., 165 N. Y. 362, 366, 59 NE 138.

"Examination" see 23 C. J. p 178.

72. State v. Malo, 42 Kan. 54, 91, 22 P 349 (as applied to a candidate for an office includes his moral character, intellectual ability, social standing, habits of life, and political convictions).

"Fitness" see 26 C. J. p 646.

73. McRae v. Metropolitan St. R. Co., 125 Mo. A. 562, 570, 102 SW 1032; Ford v. Metropolitan, etc., R. Co., 17 Q. B. D. 12, 19; Re Toronto, etc., R. Co., 28 Ont. 14, 20.

"Inconvenience" see 31 C. J. p 406.

74. Schoren v. Schoren, 110 Or. 272, 279, 214 P 885, 222 P 1096; Steele v. Steele, 96 Or. 630, 633, 190 P 716; Cline v. Cline, 10 Or. 474, 475.

[a] **"Personal indignities rendering life burdensome."**—Bowers v. Bowers, 98 Or. 548, 194 P 697, 698; Sullivan v. Sullivan, 52 Wash. 160, 161, 164, 100 P 321.

"Indignity" see 31 C. J. p 884.

"Indignities to the person" distinguished see Indignity 31 C. J. p 884 note 14 [a].

75. Bardwell v. Collins, 44 Minn. 97, 100, 46 NW 315, 20 AmSR 547, 9 LRA 152; King v. National Min., etc., Co., 4 Mont. 1, 6, 7, 1 P 727.

Judgment in personam see Judgments § 19.

76. Robbins v. Rice, 18 N. H. 507, 509–510; Crofton v. Pool, 1 B. & Ad. 568, 20 ECL 602, 109 Reprint 898.

"Labor" see 35 C. J. p 922.

77. Taylor v. Moore, 63 Vt. 60, 73, 21 A 919 (the judicial determination of the listers of the amount of the taxpayer's personal estate that should enter into the annual grand list to be completed in May).

"List" see 38 C. J. p 67.

78. Whitney v. Whitney, 63 Hun

tions,"[79] "personal or individual liability,"[80] "personal ornaments,"[81] "personal privilege,"[82] "personal property not capable of manual delivery,"[83] "personal safety,"[84] "personal services,"[85] "personal solicitation,"[86] "personal transportation,"[87] "personal use,"[88] "personal warranty."[89]

PERSONAL ACT.[90]

PERSONAL CONTRACT.[91]

PERSONAL CREDIBILITY.[92]

PERSONAL EARNINGS.[93]

PERSONAL EFFECTS.[94]

PERSONAL ESTATE.[95]

PERSONAL EXPENSES.[96]

PERSONAL FRANCHISE.[97]

PERSONAL FREIGHT.[98]

PERSONAL GOODS.[99]

PERSONALIA PERSONAM SEQUUNTUR.[1]

PERSONAL IMMUNITY.[2]

PERSONALLY.[3] The word may, and often does, mean in person.[4] It also often means "in propria persona;"[5] but that is not its necessary and only meaning.[6] Its principal definition, as given by the lexicographers, is "in a personal manner."[7]

Phrases: "Personally acquainted with,"[8] "personally appear,"[9] "personally carried,"[10] "personally concerned,"[11] "personally known,"[12] "personally or by agent,"[13] "personally or by proxy,"[14] "personally paid,"[15] "personally present at the trial,"[16] "personally responsible,"[17] "personally serve,"[18] "personally unoccupied."[19]

PERSONAL MORTGAGE.[20]

PERSONAL PRESENCE.[21]

PERSONAL REMEDY.[22]

PERSONAL RIGHTS.[23]

PERSONAL SECURITY.[24]

PERSONAL SERVICE CORPORATION.[25]

PERSONAL SERVITUDE.[26]

PERSONAL STATUTE.[27]

PERSONAL TERMINABLE ANNUITY.[28]

PERSONAL TORT.[29]

PERSONAL TRANSACTION.[30]

PERSONALTY.[31]

PERSONAL WRONG.[32]

PERSONA REGIS MERGITUR PERSONA DUCIS.[33]

PERSONATE.[34] To assume or put on the character or appearance of; play the part of; pass oneself off as.[35]

PERSONATION.[36]

PERSON DECEASED.[37]

PERSONERO. In Spanish law, an agent or attorney,[38]

59, 77, 18 NYS 3 (distinguished from "individual necessities").

"Necessity" see 45 C. J. p 585.

79. See Obligation 46 C. J. p 850 note 28.

80. Weede v. Emma Copper Co., 58 Utah 524, 531, 200 P 517.

81. Wagner v. Congress Square Hotel Co., 115 Me. 190, 98 A 660, 662 (distinguishing "personal belongings").

[a] **"Goods and chattels" distinguished.**—Kennington v. Hemingway, 101 Miss. 259, 57 S 809, 810, 39 LRA NS 541, AnnCas1914B 392.

[b] **Term as not including a pocketbook and a case of instruments.**—Willis v. Curtois, 1 Beav. 189, 17 Eng Ch 189, 48 Reprint 911.

"Ornament" see 46 C. J. p 1139.

82. Myerdock v. Com., 26 Gratt. (67 Va.) 988, 990 (applied to a license means to declare that such license shall be used for the benefit of the party to whom it is issued; he cannot transfer it to another; nor can any other person sell under it).

"Privilege" see [32 Cyc 388].

83. Quarles v. Citizens' Nat. Bank, 31 F. (2d) 40, 41.

84. Peo. v. Howard, 112 Cal. 135, 142, 44 P 464 (used in a request for an instruction).

85. Millington v. Laurer, 89 Iowa 322, 56 NW 533, 534, 48 AmSR 385; McCoy v. Cornell, 40 Iowa 457, 458; Coburn v. Kerswell, 35 Me. 126, 128; Yost v. Scott County, 25 Minn. 366, 367; Dayton v. Ewart, 28 Mont. 153, 72 P 420, 422, 98 AmSR 549; Hale v. Brown, 59 N. H. 551, 558, 47 AmR 224; Hoyt v. White, 46 N. H. 45, 48; Grant County School Dist. No. 94 v. Gautier, 13 Okl. 194, 73 P 954, 957.

"Services" see [35 Cyc 1434].

86. Rose v. State, 4 Ga. A. 588, 62 SE 117, 121.

"Solicitation" see [36 Cyc 511].

87. Looney v. State, 156 Tenn. 337, 1 SW (2d) 782, 783.

"Transportation" see [38 Cyc 947].

88. Matter of Keenan, 107 App. Div. 234, 94 NYS 1099, 1100; Liquor Transp. Cases, 140 Tenn. 582, 205 SW 423, 427.

"Use" see [39 Cyc 845].

89. Flanders v. Seelye, 105 U. S. 718, 726, 26 L. ed. 1217; Bain v. Arthur, 129 La. 143, 55 S 743. See Hardy v. Pecot, 104 La. 136, 140, 28 S 936.

"Warranty" see [40 Cyc 492].

90. See Personal § 2.

91. See Personal § 3.

92. See Personal § 4.

93. See Personal § 5.

94. See Personal § 6.

95. See Personal § 7.

96. See Personal §§ 8, 9.

97. See Personal § 10.

98. See Personal § 11.

99. See Personal § 6.

1. A maxim meaning "Personal things follow the person." Black L. D.

[a] **Applied in:** Flanders v. Cross, 10 Cush. (Mass.) 514, 516.

2. See Personal § 12.

3. See Personal ante p 1045.

4. Tilton v. Herman, 109 Va. 503, 64 SE 351.

"Person" see ante p 1037.

5. Tilton v. Herman, 109 Va. 503, 64 SE 351, 353.

6. Tilton v. Herman, supra.

[a] **As employed in a statute,** it is used to denote a direct and immediate private interest as distinguished from an interest which the judge and other citizens have in public affairs resulting from liability to taxation. Brittain v. Monroe County, 214 Pa. 648, 651, 63 A 1076.

[b] **A statute forbidding a party to testify** in respect to communications had "personally" with one since deceased does not have reference only to conversations but refers to all transactions and communications. Conklin v. Yates, 16 Okl. 266, 83 P 910, 912.

[c] **Used to distinguish** from demands which were against debtors in a representative capacity, as executors and administrators. In re Hurd, 9 Wend. (N. Y.) 465, 468. See Oakley v. Aspinwall, 4 N. Y. Super. 7, 19.

7. Century D.; Webster D. [both quot Tilton v. Herman, 109 Va. 503, 507, 64 SE 351].

8. See Acquaintance 1 C. J. p 904 note 3 [a] (2).

"Acquainted" see 1 C. J. p 905.

9. Ex p. Sprague, 8 CanCrCas 109, 112.

[a] **"Personally appeared."**—Clement v. Bullens, 159 Mass. 193, 196, 34 NE 173; Campbell v. Upton, 113 Mass. 67, 71; Warder v. Henry, 117 Mo. 530, 539, 23 SW 776.

"Appear" see 4 C. J. p 1309.

10. Eagle, etc., British Dominions Ins. Co. v. Schliff, 24 F. (2d) 784, 785.

"Carry" see 10 C. J. p 1240.

11. Hicks v. Oliver, (Tex. Civ. A.) 26 SW 641, 642.

"Concerned" see Concern 12 C. J. p 383.

12. Wyllis v. Haun, 47 Iowa 614, 621; Carolan v. Yoran, 104 App. Div. 488, 93 NYS 935, 936.

[a] **"Personally known to me to be such."**—Kelly v. Calhoun, 95 U. S. 710, 713, 24 L. ed. 544.

"Known" see Know § 3.

13. Rose v. State, 4 Ga. A. 588, 595, 62 SE 117.

"Agent" see Agency § 1.

14. McMillan v. Le Roi Min. Co., Ltd., [1906] 1 Ch. 331, 13 Manson 65.

"Proxy" see [32 Cyc 746].

15. Tilton v. Herman, 109 Va. 503, 64 SE 351, 352.

[a] **"Personally pay."**—Tilton v. Herman, 109 Va. 503, 64 SE 351, 352 [quot Baca v. Belen, 30 N. M. 541, 240 P 803].

16. State v. Mortensen, 26 Utah 312, 342, 73 P 562, 572, 633.

"Present" see [31 Cyc 1167].

17. Fancher Creek Nurseries v. Loescher, 52 Cal. A. 348, 198 P 827, 828 (means "directly and primarily liable"); Fuerst v. Musical Mut. Protective Union, 95 NYS 155, 157 (does not mean "primarily liable").

"Responsible" see [34 Cyc 1674].

18. Westfall v. Farwell, 13 Wis. 504, 509.

[a] **"Personally served."**—Brooks v. Orchard Land Co., 21 Ida. 212, 121 P 101, 104; Dunkle v. Elston, 71 Ind. 585, 589; Wood v. Yearous, 159 Iowa 211, 140 NW 362, 364.

"Serve" see [35 Cyc 1432].

19. Knowlton v. Patrons' Androscoggin F. Ins. Co., 100 Me. 481, 62 A 289, 291, 2 LRANS 517.

"Unoccupied" see [39 Cyc 838].

20. See Personal § 13.

21. See Presence.

22. See Personal § 14.

23. See Personal § 15.

24. See Personal § 16.

25. See Personal § 17.

26. See Personal § 18.

27. See Personal § 19.

28. See Personal § 20.

29. See Personal § 21.

30. See Personal § 22.

31. See Personal §§ 6, 7; Property [32 Cyc 666].

32. See Personal § 23.

33. A maxim meaning "The person of duke merges in that of king." Morgan Leg. Max. [cit Jenkin Cent. 160].

34. See False Personation 25 C. J. p 576.

35. Century D.

[a] **"Personating the woman's husband."**—California v. Skinner, 33 B. C. 555, 559, [1924] 2 WestWkly 209.

36. See False Personation 25 C. J. p 576.

37. See Person § 3.

38. Escriche Diccionario. See Agency § 1; Attorney and Client § 2.

PERSON OF COLOR.[39]

PERSPICUA VERA NON SUNT PROBANDA.[40]

PER STIRPES.[41]

PERSUADE.[42] To advise;[43] argue or reason into a certain belief or course of conduct;[44] to bring the will of another to a desired decision by some influence exerted upon it short of compulsion;[45] to bring to any particular opinion;[46] commend by exposition, argument, or demonstration;[47] to counsel;[48] to incline the will;[49] to inculcate by argument;[50] to induce;[51] to influence by argument or expostulation;[52] to prevail upon by argument, advice, expostulations, or reasons;[53] urge the acceptance or practice of;[54] to win over.[55] The word conveys the idea of a completed act, of succeeding in what is attempted,[56] and has been distinguished from "solicit."[57]

Phrases: "Almost thou persuadest me to be a Christian,"[58] "by a preponderance of proof is meant that you are persuaded," etc.,[59] "persuade a seaman to refuse to join his ship,"[60] "persuaded in his own mind."[61]

PERSUASION.[62] Act of persuading, influencing, or winning over the mind or will to some conclusion, determination, or course of action.[63] In religious affairs, a creed or belief, or a sect or party adhering to a creed or system of opinions.[64]

Lawful persuasion. That which is not directed to the accomplishment of an illegal and unlawful purpose,[65] and appeals to the judgment, reason, or sentiment, leaving the mind free to act of its own volition.[66] Where there is no such freedom of action, more than mere persuasion has been exercised, and it amounts to duress, intimidation, coercion, or other like influence.[67]

PERTAIN. To be appurtenant to;[68] to be dependent upon;[69] to belong;[70] to belong or pertain, whether by right of nature, appointment, or custom;[71] have connection with;[72] to relate, as "things pertaining to life."[73]

Pertaining to.[74] Concerning;[75] relating.[76]

PERTENENCIA. In Spanish law, a right or share in something; that which is accessory to something else.[77]

PERTICULER.[78] A word supposed to mean regular or straight, in the same sense as those adjectives are sometimes applied to one wing of a political party in distinction from those who have seceded from the regular organization.[79]

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39. See Colored Persons 11 C. J. p 1224.

[a] **Applied in:** State v. Schweickardt, 109 Mo. 496, 504, 19 SW 47; Cummings v. Cummings, 51 Mo. 261, 264; Pollard's Est., 18 Pa. Dist. 636, 638.

40. A maxim meaning "Plain truths need not be proved." Bouvier L. D. [cit Coke Litt. p 16]; Simpson v. Smyth, 1 Grant Err. & App. (Ont.) 172, 177.

41. See Per § 2.

42. See Entice 20 C. J. p 1268; Inveigle 33 C. J. p 805. And see Persuasion post this page.

43. Century D. [quot U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183].

"Advise" distinguished see 2 C. J. p 296 note 21 [g].

44. Century D. [quot U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183].

45. Standard D. [quot Iron Molders' Union v. I. & E. Greenwald Co., 4 OhNPNS 161, 180, 183].

46. Reg. v. Most, 7 Q. B. D. 244, 258.

47. Century D. [quot U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183].

48. Century D. [quot U. S. v. New York Cent., etc., R. Co., supra].

"Counsel" see 15 C. J. p 352.

49. Webster D.; Worcester D. [both quot Wilson v. State, 38 Ala. 411, 413].

50. Reg. v. Most, 7 Q. B. D. 244, 258.

51. Century D. [quot U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183].

"Induce" synonymous see 31 C. J. p 887 text and note 34.

52. Reg. v. Most, 7 Q. B. D. 244, 258.

53. Webster D.; Worcester D. [both quot Wilson v. State, 38 Ala. 411, 413].

[a] **Similar definition.**—To prevail upon by demonstration, exposition, argument, entreaty, etc. Century D. [quot U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183].

54. Century D. [quot U. S. v. New York Cent., etc., R. Co., supra].

55. Century D. [quot U. S. v. New York Cent., etc., R. Co., supra].

56. U. S. v. New York Cent., etc., R. Co., supra; Respublica v. Roberts, 1 Dall. (Pa.) 39, 1 L. ed. 27.

[a] **The word has been construed to mean** to carry a persuasion into effect. Respublica v. Ray, 3 Yeates (Pa.) 65, 66.

[b] **To "persuade" a slave to leave,** is "to aid him to depart;" for, by the term "aid" is comprehended all those appliances which may be resorted to as means to induce or assist a slave in running away. Crosby v. Hawthorn, 25 Ala. 221, 223. "Aid" see 1 C. J. p 1022.

[c] **Said to be a term which imports an initial active and wrongful effort.**—Nash v. Douglass, 12 AbbPr NS (N. Y.) 187, 190.

57. U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183, 184 (pointing out that "solicit" does not convey the idea of convincing or winning over as "persuade" does).

"Solicit" see [36 Cyc 510].

58. Acts, 26:28 [quot U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183].

59. Toledo, etc., R. Co. v. Kountz, 168 Fed. 832, 839, 94 CCA 244 ("the jury could properly understand the term 'persuaded' to mean only that the proof be more persuasive, more convincing").

60. See Vickerson v. Crowe, [1914] 1 K. B. 462.

61. Clark v. Baird, 9 N. Y. 183, 198, Seld. 187 (equivalent to "satisfied," "convinced," and does not indicate a state of doubt or conjecture).

62. See Persuade ante this page.

63. Century D. [quot U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183].

[a] **The use of the word "persuasion"** instead of "threats" in the separate and apart acknowledgment of the wife to a mortgage to the homestead as a fatal defect see Marx v. Threet, 131 Ala. 340, 345, 30 S 831.

[b] **"Persuasion and promises of marriage."**—Wilson v. State, 58 Ga. 328, 330. See Cherry v. State, 112 Ga. 871, 38 SE 341, 342.

[c] **"Solicitation" distinguished.**—U. S. v. New York Cent., etc., R. Co., 232 Fed. 179, 183. "Solicitation" see [36 Cyc 511].

64. Webster D. [quot Hale v. Everett, 53 N. H. 9, 62, 16 AmR 82].

"It is also used as synonymous with the words sect and denomination." Muzzy v. Wilkins, Smith (N. H.) 1, 21.

[a] **Used in the sense of denomination.**—Atty.-Gen. v. Dublin, 38 N. H. 459, 543.

65. Barnes v. Chicago Typographical Union No. 16, 232 Ill. 424, 436, 83 NE 940, 945, 14 LRANS 1018, 13 AnnCas 54.

66. McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 SE 226, 229.

67. McMichael v. Atlanta Envelope Co., supra.

[a] **"Coercion" distinguished.**—Van Valkenburgh v. Oldham, 12 Cal. A. 572, 577, 108 P 42 ("persuasion is not coercion").

[b] **Picketing** "is a pretense for 'persuasion,' but is intended for intimidation. Gentlemen never seek to compel and force another to listen to the art of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion." Union Pac. R. Co. v. Reuf, 120 Fed. 102, 121.

"Coercion" see 11 C. J. p 945.

"Duress" see 19 C. J. p 838.

"Intimidation" see 33 C. J. p 478.

68. State v. Harnsberger, (Mo.) 14 SW(2d) 554, 557.

69. State v. Harnsberger, supra.

70. State v. Harnsberger, supra.

"Belong" see 7 C. J. p 1039.

71. Webster Int. D. [quot Chicago Theological Seminary v. Illinois, 188 U. S. 662, 673, 23 SCt 386, 47 L. ed. 641; Peo. v. Chicago Theological Seminary, 174 Ill. 177, 182, 51 NE 198].

72. State v. Harnsberger, (Mo.) 14 SW (2d) 554, 557.

73. Webster Int. D. [quot Chicago Theological Seminary v. Illinois, 188 U. S. 662, 673, 23 SCt 386, 47 L. ed. 641; Peo. v. Chicago Theological Seminary, 174 Ill. 177, 182, 51 NE 198].

"Relate" see [34 Cyc 1036].

74. See Appertaining 4 C. J. p 1376.

75. State v. Forney, 108 Oh. St. 463, 467, 141 NE 16.

[a] **Phrases.**—(1) "Election pertaining to school matters." Brown v. Phillips, 71 Wis. 239, 249, 36 NW 242. (2) "Pertaining to probate courts." State v. McDonald, 55 Or. 419, 430, 103 P 512, 104 P 967, 106 P 444. (3) "Pertaining to public improvements." Houston v. Potter, 41 Tex. Civ. A. 381, 390, 91 SW 389.

[b] **"Providing for" distinguished.**—State v. Forney, 108 Oh. St. 463, 467, 141 NE 16.

76. State v. Forney, supra.

77. Escriche Diccionario. See Mines and Minerals § 85.

78. See Particular 46 C. J. p 1387.

79. Hamlin v. Perticuler Baptist

PERTINENCY.[80] Relevancy.[81]

PERTINENT.[82] Relevant.[83]

Pertinent hypothesis.[84] A hypothesis which, if sustained, would logically influence the issue.[85]

PERTINENTE. In Spanish law, pertinent, relevant, material.[86]

PERTINENT HYPOTHESIS.[87]

PER TON.[88]

PER TOUT ET NON PER MY.[89]

PERTURBACION. In Spanish law, disturbance of one's possession.[90]

PER VARIOS ACTUS LEGEM EXPERIENTIA FECIT.[91]

PER VERBA DE FUTURO.[92]

PER VERBA DE PRÆSENTI.[93]

PERVERSE.[94] Distorted from the right;[95] not right;[96] turned away or deviating from what is right, proper, correct, etc.;[97] turned the wrong way.[98]

Perverse verdict.[99] A verdict rendered by a jury which chooses not to take the law from the judge, but acts on its own erroneous view of the law;[1] a verdict rendered in disregard of the law as given to the jury by the court;[2] a verdict whereby the jury refuse to follow the directions of the judge on a point of law.[3] It is not necessary that the jury should have acted dishonestly or from improper motives to render a verdict perverse;[4] it is sufficient that they have disregarded the judge's instructions.[5] However, a verdict which is contrary to an erroneous instruction is not perverse.[6]

PERVERSE VERDICT.[7]

PERVERSION.[8] The act of perverting; a turning from truth or propriety; a diverting from the true intent or object.[9]

PERVERSITY.[10] A term which suggests a state of being moved consciously or unconsciously, most generally the former, to look at things from a wrong standpoint.[11]

PERVOLVAT QUO PLANETA SUUM CIRCULUM ANNUS MORA MOTUS EST.[12]

PER YEAR.[13]

PESCA. In Spanish law, the right or easement of fishery.[14]

PESO.[15] The Spanish dollar; also, a modern coin of various American countries.[16]

PESOS Y MEDIDAS. In Spanish law, weights and measures.[17]

PESQUISA. In Spanish law, the judicial investigation of a crime and its author.[18]

PESQUISIDOR. In Spanish law, the judicial investigator of crime.[19]

PESSENDIDE. A Turkish word which signifies "warranted" or "approved."[20]

PESTHOUSE.[21]

PETICIÓN. In Spanish law, the petition or first pleading in a cause.[22]

PETIT.[23] In common parlance, anything petty or small.[24] Employed in a statute for the purpose of defining a crime, it means an offense of less gravity than a felony.[25]

Meeting House, 103 Me. 343, 69 A 315, 317.

80. See Pertinent post this page.

81. Matter of Smith, 80 Misc. 628, 142 NYS 151, 155.

"Relevancy" see [34 Cyc 1108].

82. See Pertinency ante this page.

83. See Matter of Smith, 80 Misc. 628, 142 NYS 151, 155.

[a] **Evidence** tending to prove any material allegation of a complaint as "pertinent" see State v. Park County Sixth Judicial Dist. Ct., 73 Mont. 297, 236 P 553, 554.

"Relevant" see [34 Cyc 1109].

84. "Hypothesis" see 31 C. J. p 234.

85. 1 Mayfield Dig. § 91 [quot Parmer v. State, 20 Ala. A. 233, 101 S 482, 483]; Wharton Evid. § 20 [quot Whitaker v. State, 106 Ala. 30, 32, 17 S 456]; White Code Cr. Proc. § 1070 [quot Lane v. State, 73 Tex. Cr. 266, 164 SW 378, 380; Belcher v. State, 71 Tex. Cr. 646, 161 SW 459, 463].

86. Escriche Diccionario. See Pertinent ante this page.

87. See Pertinent ante this page.

88. See Per ante p 806.

89. See Per ante p 806.

90. Spanish Civ Code arts 1502, 1560; Philippine Civ. Code arts 1502, 1560; Porto Rico Civ. Code §§ 1405, 1463.

91. A maxim meaning "By various acts experience formed the law." Morgan Leg. Max. [cit 4 Inst. p 50].

92. See Per § 1

93. See Per § 1.

94. See Perversion post this page; Perversity post this page.

95. Webster D. [quot Godfrey v. Godfrey, 127 Wis. 47, 61, 106 NW 814, 7 AnnCas 176].

96. Webster D. [quot Godfrey v. Godfrey, supra].

"Right" see [34 Cyc 1762].

97. Century D. [quot Godfrey v. Godfrey, 127 Wis. 47, 61, 106 NW 814].

98. Webster D. [quot Godfrey v. Godfrey, supra].

99. "Verdict" see [40 Cyc 189].

Verdict in disregard of instructions see Trial [38 Cyc 1891].

1. Bouvier L. D. [quot Godfrey v. Godfrey, 127 Wis. 47, 61, 106 NW 814, 7 AnnCas 176]; Saunders v. Davies, 16 Jur. 481, 14 EngL&Eq 532.

2. Parkes v. Lindemann, 148 Wis. 89, 90, 133 NW 580.

"This is a terse definition of the term 'perverse verdict,' but one which is not calculated to fit into all situations." Callahan v. Chicago, etc., R. Co., 161 Wis. 288, 299, 154 NW 449.

3. Rapalje & L. L. D. [quot Godfrey v. Godfrey, 127 Wis. 47, 61, 106 NW 814, 7 AnnCas 176].

4. Murphy v. Lachmund Lumber, etc., Co., 194 Wis. 119, 215 NW 822, 823; Saunders v. Davies, 16 Jur. 481, 14 EngL&Eq 532.

5. Murphy v. Lachmund Lumber etc., Co., 194 Wis. 119, 215 NW 822, 823.

6. Callahan v. Chicago, etc., R. Co., 161 Wis. 288, 154 NW 449, 453. And see Trial [38 Cyc 1891].

7. See Perverse ante text and notes 99–6.

8. See Perverse ante this page; Perversity post this page.

9. Century D.

[a] **"Perversion or obstruction of the due administration of law."**—State v. Nugent, 77 N. J. L. 84, 87, 71 A 485.

10. See Perverse ante this page; Perversion ante this page.

11. Godfrey v. Godfrey, 127 Wis. 47, 60, 106 NW 814.

12. A maxim meaning "A year is the duration of the motion by which a planet revolves through its orbit." Morgan Leg. Max. [cit Bracton p 359b].

13. See Per § 4.

14. Escriche Diccionario.

[a] **Pesca en el mar.**—Sea fishing. Escriche Diccionario; Suplemento.

15. See Centavo 11 C. J. p 72.

16. Century D.

[a] **Mexico.**—(1) The monetary unit for money in the United States of Mexico. See Carlile v. State, 96 Tex. Cr. 477, 262 SW 489, 490. (2) It means either gold or silver coin. Carlile v. State, supra.

[b] **Philippines.**—(1) P is a sign or character used as the equivalent of the words "peso (or pesos) Philippine currency." U. S. v. Wickersham, 20 Philippine 440, 443. (2) "Pesos" in the judgment of a court must be understood "pesos" in the established currency at the time when the judgment was rendered. Dougherty v. Evangelista, 7 Philippine 37, 40.

[c] **Porto Rico.**—Formerly a silver coin of Porto Rico worth sixty cents in money of the United States of America, and after the cession of Porto Rico to the United States redeemed at that rate of exchange by the United States upon retiring the Porto Rican coins and substituting its own therefor. Serralles v. Esbri, 200 U. S. 103, 111, 112, 26 SCt 176, 50 L. ed. 391.

"Coin" see 11 C. J. p 955.

"Dollar" see 19 C. J. p 385.

17. Escriche Diccionario. See Weights and Measures [40 Cyc 879].

[a] **Metric system** is now in vogue in Spain. Escriche Diccionario. See Metric System 40 C. J. p 655.

18. Escriche Diccionario. See Criminal Law § 491 et seq.

19. Escriche Diccionario. See District and Prosecuting Attorneys 18 C. J. p 1294.

20. Coats v. Shepard, 3 NYLegObs 404, 405.

"Approve" see 4 C. J. p 1462.

"Warrant" see [40 Cyc 490].

21. See Hospitals 30 C. J. p 461.

Pesthouse:

As a nuisance see Nuisances § 202 text and notes 15–20; Municipal Corporations § 482 text and notes 38–42.

Power of municipality to establish or regulate see Municipal Corporations § 482.

22. Escriche Diccionario.

[a] **Petición de herencia.**—An heir's proceeding to collect the property of the estate. Escriche Diccionario. See Petition post p 1052.

23. See Petty post p 1053.

24. Peo. v. Sprado, 72 Cal. A. 582, 237 P 1087, 1089.

"Petit jury" see Juries § 2 note 2 [a].

"Petit mal" see Insane Persons § 124.

25. Peo. v. Sprado, 72 Cal. A. 582, 237 P 1087, 1089.

PETITION.[26] [§ 1] **A. As a Noun.** An entreaty;[27] a formal written request or prayer for a certain thing to be done;[28] an instrument of writing or printing, containing a prayer from the person presenting it, called the "petitioner," to the body or person to whom it is presented, for the redress of some wrong, or the grant of some favor, which the latter has the right to give;[29] a request in writing;[30] a request or application in writing or printing, or it may be a verbal request or application;[31] a request, or supplication, from an inferior to a superior, or to a legislative or other body soliciting some favor, right, grant, or mercy;[32] a solemn or formal supplication, as one addressed to the Supreme Being or to a superior rank, or to a superior power;[33] a supplication or prayer;[34] a written address;[35] a written application requesting the granting of some benefit or privilege, the performance of some duty or doing some desired act.[36]

In law its meaning is in no wise different,[37] it being a formal application in writing made to a court requesting judicial action of some character.[38] It is a term used in judicial proceedings to describe an application in writing.[39]

[a] **"Petit embezzlement."**—Peo. v. Sprado, 72 Cal. A. 582, 586, 587, 589, 237 P 1087. And see Embezzlement § 48.

"Petit larceny" see Larceny § 4.

"Petit misdemeanor" see Criminal Law § 7.

"Petit treason" see Treason [38 Cyc 952 note 6].

26. See Application 4 C. J. p 1399; Complaint 12 C. J. p 238; Declaration 18 C. J. p 29.

"Affidavit" distinguished see Affidavits § 4.

"Bill in equity" distinguished see Equity § 389 note 25 [a].

"Motion" distinguished see Motions and Orders § 3 text and notes 22–24.

Petition:
As a pleading see Justices of the Peace §§ 227–229; Pleading [31 Cyc 92].
As a privileged communication see Libel and Slander § 230.
By electors:
For calling, ordering, notice, or holding of elections see Elections § 78.
For nomination of candidate see Elections §§ 104–108.
Cross see Cross Petition 17 C. J. p 385.
For:
Accounting see Executors and Administrators §§ 2355, 2377; Guardian and Ward § 382.
An allowance of appeal or writ of error see Appeal and Error §§ 1093–1108; Criminal Law § 3366; Justices of the Peace § 430.
Appointment of:
Administrator see Executors and Administrators §§ 153–158.
Guardian see Guardian and Ward § 67; Insane Persons §§ 254, 255.
Arrest see Arrest §§ 187–190.
Creation, alteration, or dissolution of school district see Schools and School-Districts [35 Cyc 840].
Creation, alteration, or division of county see Counties § 24.
Discharge of bankrupt see Bankruptcy § 669.
Discovery of assets see Executors and Administrators § 412.
Distribution of estate of decedent see Executors and Administrators §§ 1368–1373.
Establishment of:
Boundary see Boundaries § 291.
Highway see Highways §§ 66, 67.
Garnishment see Garnishment §§ 262–276.
Interpleader see Interpleader §§ 36–42.
License to sell liquor see Intoxicating Liquors §§ 127–130.
Local option election see Intoxicating Liquors §§ 269–274.
Mortgage foreclosure see Mortgages §§ 1604–1623.
New trial see New Trial § 246.
Particular writs:
Certiorari see Certiorari §§ 141–176.
Habeas corpus see Habeas Corpus §§ 156–160.
Injunction see Injunctions §§ 528–559.
Mandamus see Mandamus §§ 575–598.
Ne exeat see Ne Exeat § 24.
Prohibition see Prohibition [32 Cyc 625–627].
For:—Continued
Particular writs:—Continued
Quo warranto see Quo Warranto [32 Cyc 1448–1453].
Rehearing see Appeal and Error §§ 2505–2528.
Relief against judgment see Judgments §§ 767–778.
Removal of:
Cause see Removal of Causes [34 Cyc 1283–1291].
County seat see Counties §§ 71–75.
Review see Review [34 Cyc 1713].
Sale of property of:
Bankrupt see Bankruptcy § 362.
Decedent see Executors and Administrators §§ 1496–1505.
Infant see Infants §§ 113–118.
Insane person see Insane Persons §§ 466, 467.
Ward see Guardian and Ward §§ 300–307.
In equity see Equity §§ 389–452.
In particular actions or proceedings:
Adoption see Adoption of Children §§ 59–66.
Attachment see Attachment §§ 1131–1135.
Bankruptcy in:
Involuntary proceedings see Bankruptcy §§ 120–132.
Voluntary proceedings see Bankruptcy §§ 52–59.
By or against:
Insane person see Insane Persons §§ 631–634.
Municipality see Municipal Corporations §§ 4698–4700.
Trustee in bankruptcy see Bankruptcy §§ 415–426.
Condemnation see Eminent Domain §§ 357–368.
Distress see Landlord and Tenant §§ 1707, 1708.
Election contests see Elections §§ 128, 290–303.
For unpaid taxes see Taxation [37 Cyc 1249].
Insolvency in:
Involuntary proceedings see Insolvency §§ 67–70.
Voluntary proceedings see Insolvency §§ 50, 51.
Lunacy see Insane Persons §§ 183, 184.
Partition see Partition § 321 et seq.
Probate see Wills [40 Cyc 1265].
Operation and effect of as:
Commencement of lis pendens see Lis Pendens § 38 text and note 49.
Estoppel see Estoppel § 23.
Evidence see Evidence §§ 906–913.
Right of assembly and see Constitutional Law §§ 482–484.

27. Century D. [quot Enderson v. Hildenbrand, 52 N. D. 533, 547, 204 NW 356].

28. Davis v. Henderson, 104 SW 1009, 1010, 31 KyL 1252.

[a] **The term may include:** (1) A written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license. Black L. D. [quot State v. Tullock, 108 Mo. A. 32, 34, 82 SW 645]. (2) A formal request written or printed and signed by one or many, preferred to a person in authority or to a legislative or administrative body, asking for the bestowal of some benefit or privilege, the concession or restoration of a right, the redress of a grievance, or such other special action as the applicants desire. Standard D. [quot State v. Tullock, supra]. To same effect State v. Imhoff, 291 Mo. 603, 238 SW 122, 124. (3) An application made to a court ex parte, or where there are no parties in opposition, praying for the exercise of the judicial powers of the court in relation to some matter which is not the subject for a suit or action, or for authority to do some act which requires the sanction of the court; as for the appointment of a guardian, for leave to sell trust property, etc. Black L. D. [quot State v. Tullock, supra]. (4) A written application addressed to the court or judge praying for the exercise of some judicial power; or to a public officer, requesting the performance of some duty imposed on him by law, or the exercise of some discretion with which he is vested. Lawrey v. Sterling, 41 Or. 518, 525, 69 P 460. (5) As applied to liquor laws, a request by eligible citizens to a county court to grant a dramshop license to a designated applicant to keep a dramshop in a designated locality. State v. Tullock, supra.

"Prayer" see [31 Cyc 1156].

"Request" see [34 Cyc 1625].

29. Bouvier L. D. [quot Noble v. Vincennes, 42 Ind. 125, 130; Eustis v. Holmes, 48 Miss. 34, 36; Re Shoal Lake Election, 4 Man. 270, 272].

Instrument as a writing or document see Instrument §§ 2, 3.

30. Fenstermacher v. State, 19 Or. 504, 506, 25 P 142.

31. Benton Coal Min. Co. v. Industrial Commn., 321 Ill. 208, 214, 151 NE 520.

32. Century D. [quot Enderson v. Hildenbrand, 52 N. D. 533, 547, 204 NW 356].

33. Century D. [quot Enderson v. Hildenbrand, supra].

34. Century D. [quot Enderson v. Hildenbrand, supra].

35. Black L. D. [quot Albright v. Baltimore, etc., R. Co., 22 F. (2d) 832, 834].

"Address" see 1 C. J. p 1192.

36. Peo. v. Community High School Dist. No. 408 Bd. of Education, 308 Ill. 578, 140 NE 22, 24. See In re L. M. Axle Co., 3 F. (2d) 581, 582.

37. State v. Imhoff, 291 Mo. 603, 238 SW 122, 124.

38. Benton Coal Min. Co. v. Industrial Commn., 321 Ill. 208, 214, 151 NE 520; State v. Imhoff, 291 Mo. 603, 238 SW 122, 124.

39. Bergen v. Jones, 4 Metc. (Mass.) 371, 376; Shaft v. Phœnix Mut L. Ins. Co., 67 N. Y. 544, 547, 23 AmR 138. See Gibbs v. Ewing, 94 Fla. 236, 251, 113 S 730 ("a petition is always in writing"). Compare Keay v. Palmer, 5 N. H. 43, 50 (holding that "the word petition by no means implies an application in writing").

[a] **Embraces an answer or reply** in which a counterclaim or set-off is demanded. Paducah Hotel Co. v. Long, 92 Ky. 278, 279, 17 SW 853, 18

[§ 2] **B. As a Verb.** To make a request of a court in writing.[40]

PETITION OF RIGHT. In English law, a petition presented by a subject to the crown stating some infringement of the supplicant's legal rights by the crown or its officers, and praying redress therefor;[41] a process by which property of any kind, including money or damages, is recovered from the crown, whether the basis of claimant's title be legal or equitable.[42]

PETITIO PRINCIPII. A supposition of what is not granted.[43]

PETIT JURY.[44]

PETIT LARCENY.[45]

PETIT MAL.[46]

PETIT MISDEMEANOR.[47]

PETITORIO. In Spanish law, a petitory, involving title; opposed to "posesorio" which involves only possession.[48]

PETITORY ACTION OR SUIT.[49]

PETIT TREASON.[50]

PETROLEUM.[51] As its derivation indicates,[52] the word means rock oil;[53] an oily substance so named because found naturally oozing from crevices in rocks;[54] a fluid found in the porous sand rock of the earth;[55] a liquid inflammable substance exuding from the earth;[56] an oily substance of great economical importance, especially as a source of light, appearing naturally oozing from crevices in rocks or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring into the rock.[57] It is essentially composed of carbon and hydrogen.[58] It is regarded as a mineral,[59] although it differs widely from minerals which are solids and have a fixed location in the earth, like rock itself.[60]

Crude petroleum consists of a number of different oils, all more or less volatile, which are separated from each other by a process of distillation.[61]

PETTIFOGGERY.[62] Practices in the court room by a lawyer, which are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.[63]

PETTIFOGGING SHYSTER.[64] A term applied to unscrupulous legal practitioners who disgrace their profession by doing mean work, and resort to sharp practice to do it.[65]

PETTY.[66] Small; inferior.[66½]

Petty offense.[67] An offense which a justice of the peace or the mayor or other officer of a town or city may try and punish.[68]

PETTY-BAG OFFICE. An office in which were kept certain writs which related to the interest of the crown.[69]

PETTY CHAPMAN.[70]

PETTY CONSTABLE.[71]

PETTY OFFENSE.[72]

PEWS.[73] Inclosed seats in churches.[74]

KyL 531.

40. Smith v. Patton, 103 Ky. 444, 449, 45 SW 459, 20 KyL 165.

"Complained of" as equivalent to "petitioned against" see Complain 12 C. J. p 238 note 65 [b].

41. Clode Petition of Right p 1 [quot Bourinot "Petition of Right," [1928] 2 DomLR p 626].

42. 10 Halsbury L. Eng. p 26 par 61 [quot Bourinot "Petition of Right," [1928] 2 DomLR p 626].

43. Case upon Statute for Distribution, Wythe (Va.) 302, 309.

[a] **Applied in:** In re Park, 8 F. (2d) 544, 545; Erdman v. Walkerton, 22 Ont. 693, 706.

44. See Juries § 2 note 2 [a].

45. See Larceny §§ 4, 224–255.

46. See Insane Persons § 124.

47. See Criminal Law § 7 text and note 83.

48. Escriche Diccionario.

49. See Actions § 16.

50. See Treason [38 Cyc 952 note 6].

51. See Benzine 7 C. J. p 1143; Coal Oil 11 C. J. p 935; Gasoline 28 C. J. p 606; Kerosene 35 C. J. p 900; Naptha 45 C. J. p 391; Oil 46 C. J. p 1087. And see Mines and Minerals 40 C. J. p 717.

[a] **"Coal oil" distinguished.**—Bennett v. North British, etc., Ins. Co., 8 Daly (N. Y.) 471, 472.

"Kerosene" distinguished see 35 C. J. p 900 note 24 [a].

Petroleum:

As an explosive see Explosives § 1 note 1 [b].

Inspection of see Inspection § 4 text and note 47.

Keeping prohibited see Fire Insurance § 266 text and note 62.

Nature of property in see Mines and Minerals §§ 442, 443.

Pipe lines for supplying see Eminent Domain § 67.

Regulation by municipality of keeping and use see Municipal Corporations § 434.

52. Burke v. Southern Pac. R. Co., 234 U. S. 669, 676, 34 SCt 907, 58 L. ed. 1527 [quot Lovelace v. Southwestern Petroleum Co., 267 Fed. 504, 508].

53. Century D. [quot Murray v. Alfred, 100 Tenn. 100, 107, 43 SW 355, 66 AmSR 740, 39 LRA 249]; Burke v. Southern Pac. R. Co., 234 U. S. 669, 676, 34 SCt 907, 58 L. ed. 1527 [quot Lovelace v. Southwestern Petroleum Co., 267 Fed. 504, 508]. See Kier v. Peterson, 41 Pa. 357, 361.

[a] **Rock or earth oil.**—Bennett v. North British, etc., Ins. Co., 8 Daly (N. Y.) 471, 472. "Rock oil" see [34 Cyc 1814].

[b] **A statute** (1) regulating the keeping of petroleum, defined "petroleum" as including any product of petroleum giving off an inflammable vapor at a temperature of less than 100°. Beck v. Stringer, L. R. 6 Q. B. 497, 504. (2) Under such a statute a composition containing one third petroleum and one third linseed oil mixed with pigments, gum, etc., to form a paint or paste used for coating ships' bottoms was held to be "petroleum" within the meaning of an act regulating the keeping of petroleum. London County v. Holzapfels Compositions Co., 19 Cox C. C. 383.

54. Burke v. Southern Pac. R. Co., 234 U. S. 669, 676, 34 SCt 907, 58 L. ed. 1527 [quot Lovelace v. Southwestern Petroleum Co., 267 Fed. 504, 508].

55. Wagner v. Mallory, 169 N. Y. 501, 505, 62 NE 584.

56. Kier v. Peterson, 41 Pa. 357, 361.

57. Century D. [quot Murray v. Allred, 100 Tenn. 100, 107, 43 SW 355, 66 AmSR 740, 39 LRA 249].

58. Kier v. Peterson, 41 Pa. 357, 361 ("in the decomposition of vegetable substances, there are formed besides carburetted hydrogen, exhalations of which are of frequent occurrence in rock salt formations, liquid and solid hydrocarbons, such as naptha and petroleum, or mineral oil, mineral tar").

"Carbon" see 9 C. J. p 1285.

59. See Mines and Minerals § 12 text and note 89.

[a] **A mineral substance obtained from the earth by a process of mining.**—Gill v. Weston, 110 Pa. 312, 317, 1 A 921 [quot Burke v. Southern Pac. R. Co., 234 U. S. 669, 677, 34 SCt 907, 58 L. ed. 1527; Lovelace v. Southwestern Petroleum Co., 267 Fed. 504, 509].

60. Wagner v. Mallory, 169 N. Y. 501, 62 NE 584, 585 (such as coal, iron, and copper).

61. Kings County F. Ins. Co. v. Swigert, 11 Ill. A. 590, 598.

[a] **"Product of crude petroleum."**—U. S. v. Downing, 146 Fed. 56, 59, 76 CCA 376; Schoellkopf v. U. S., 139 Fed. 58.

Paraffin as a product of crude petroleum see Paraffin 46 C. J. p 1176.

62. See Pettifogging Shyster post this page.

63. State v. Kaufmann, 22 S. D. 433, 118 NW 337, 339.

64. See Pettifoggery ante this page.

65. Bailey v. Kalamazoo Pub. Co., 40 Mich. 251, 256.

66. [a] **English form of petit.**—Black L. D. "Petit" see ante p 1051.

66½. Burrill L. D.

[a] **"Court of Petty Sessions."**—Lyons v. Smart, 6 Austr. C. L. R. 285, 286. "Session" or "Sessions" see [35 Cyc 1439].

[b] **"Petty officers"** includes mates. U. S. v. Fuller, 160 U. S. 593, 595, 16 SCt 386, 40 L. ed. 549. "Mate" see 39 C. J. p 1385.

67. "Offense" see 46 C. J. p 905.

68. Ward v. White, 86 Tex. 170, 171, 23 SW 981.

Petty offenses as included in term "crime" see Criminal Law § 2 text and note 39.

69. Yates v. Peo., 6 Johns. (N. Y.) 337, 363.

[a] **"Hanaper Office" distinguished.**—Yates v. Peo., 6 Johns. (N. Y.) 337, 363. "Hanaper Office" see 29 C. J. p 210.

70. See Chapman 11 C. J. p 288 text and note 95.

71. See Constable 12 C. J. p 649 text and note 31.

72. See Petty ante this page.

73. See Religious Societies [34 Cyc 1174–1182].

74. O'Hear v. De Goesbriand, 33 Vt. 593, 606, 80 AmD 653 ("According to modern use and idea, they were not known till long after the reformation, and that enclosed pews were not in general use before the middle of the seventeenth century, being for a long time confined to the family of the patron").

[a] **Blackstone informs us** that pews in a church are somewhat of the same nature as a monument or tombstone, or a coat of armor, or ensign of honor hung in a church. They are in the nature of heirlooms, and may descend by custom immemorial from the ancestor to the heir. Newark Third Presb. Cong. v. Andruss, 21 N

PEWTER. An alloy of lead and tin.[75]

PHALANGE. In vertebrates, one of the digital bones of the hand or foot beyond the metacarpus or metatarsus;[76] a digital internode, succeeding the metacarpal or metatarsal bones, collectively constituting the skeleton of the third and distal segment of the hand or foot;[77] one of the bones of the fingers or toes.[78]

PHALARIS. A grass cultivated principally for the seeds which are used as bird food.[79]

PHARMACEUTICAL.[80] Pertaining to pharmacy, or the art of preparing drugs.[81]

Pharmaceutical preparation. Primarily, a combination of drugs compounded for medicinal uses.[82]

PHARMACEUTICAL CHEMIST.[83]

PHARMACEUTICAL PREPARATION.[84]

PHARMACEUTICS.[85] The science of preparing, using, or dispensing medicines.[86]

PHARMACIST.[87]

PHARMACY.[88] Art or practice of preserving drugs, and of compounding and dispensing medicines according to prescriptions of physicians;[89] the business of compounding and dealing in drugs and medicines;[90] the occupation of an apothecary or pharmaceutical chemist;[91] the preparation of medicine in filling the prescriptions of physicians, and the compounding and preparing of such drugs as are usually dangerous to be handled or prescribed by those not versed in the properties of drugs, and in the nature and character of the diseases for which the drugs were prescribed.[92] The practice of pharmacy is said to be a profession.[93]

PHASE.[94]

PHENACETIN.[95] An acetyl derivative of paramidophenetol, its chemical meaning being monoacetylparamidophenetol, although it is sometimes called "acetphenetidin."[96]

PHENOMENAL.[97] Pertaining to a phenomenom in appearance.[98]

PHENOMENON.[99] A term which sometimes denotes a remarkable or unusual appearance, whose cause is not obvious;[1] in a general sense, an appearance, anything visible, whatever is presented to the eye by observation or experiment, or whatever is discovered to exist.[2]

PHILANTHROPIC. A word almost, if not quite, synonymous with "charitable."[3]

Philanthropic purpose. A purpose of a charitable nature.[4]

PHILANTHROPIC PURPOSE.[5]

PHILIPPINE ISLANDS.[6]

PHILIPPINE MAHOGANY.[7] A term sprung into use since American occupation of the Philippine Islands, and used to designate certain hardwoods of the Philippine Islands,[8] although such use in commerce has fallen under the displeasure of the federal trade commission on the ground that it results in deceiving purchasers into believing that the woods are true mahogany.[9]

J. L. 325, 328 [cit 2 Blackstone Comm. p 429].

75. U. S. v. Ullman, 28 F. Cas. No. 16,593, 4 Ben. 547.

"Lead" see 36 C. J. p 972.

76. Webster D. [quot Forbes v. Evening Mail, 194 App. Div. 563, 185 NYS 592].

[a] **Loss of a phalange of a finger** is the loss of a finger bone, in accurate speech. Forbes v. Evening Mail, 194 App. Div. 563, 185 NYS 592.

77. Century D. [quot Forbes v. Evening Mail, supra].

78. Century D. [quot Forbes v. Evening Mail, supra].

79. Nordlinger v. U. S., 127 Fed. 683, 684, 62 CCA 409 ("the straw is very short. . . . It is botanically a grass in the same sense in which wheat, oats, and other seeds are grasses").

"Grass" see 28 C. J. p 823.

"Oat" see 46 C. J. p 836.

"Wheat" see [40 Cyc 920].

80. See Pharmaceutics post this page; Pharmacy post this page.

81. Century D.

"Drug" see 19 C. J. p 766.

82. State Pharmacy Bd. v. Gasau, 122 App. Div. 803, 107 NYS 409, 412.

83. See Druggists § 2 text and note 11.

84. See Pharmaceutical ante this page.

85. See Pharmaceutical ante this page; Pharmacy post this page.

86. Webster New Int. D. [quot Ballard v. Goldsby, 142 La. 15, 76 S 219].

"Medicine" see 40 C. J. p 626.

87. See Druggists § 2.

88. See Pharmaceutical ante this page; Pharmaceutics ante this page.

Pharmacy college as an educational institution see Educational 19 C. J. p 1015 note 85 [a] (4).

89. Webster New Int. D. [quot Ballard v. Goldsby, 142 La. 15, 76 S 219]. See State v. Wood, 51 S. D. 485, 215 NW 487, 489, 54 ALR 719 ("it includes compounding and dispensing medicines, which requires learning and skill").

[a] **Pharmacy** includes the sale to the public of drugs and medicines as well as meaning the science or art of preparing and compounding them. State v. Donaldson, 41 Minn. 74, 42 NW 781.

[b] **"Pharmacy" as included in "medicine."**—In re Philadelphia Medico-Chirurgical College, 190 Pa. 121, 123, 42 A 524. "Medicine" see 40 C. J. p 626.

"Drug" see 19 C. J. p 766.

90. In re Maulsby, 136 Iowa 66, 113 NW 548, 549 (declaring that the definition has been somewhat enlarged by statutory provisions).

91. Webster New Int. D. [quot Ballard v. Goldsby, 142 La. 15, 18, 76 S 219].

"Apothecary" see Druggists § 3.

"Pharmaceutical chemist" see Druggists § 2 text and note 11.

92. Redmond v. State, (Miss.) 118 S 360, 365.

93. Ballard v. Goldsby, 142 La. 15, 76 S 219; State v. Wood, 51 S. D. 485, 215 NW 487, 489, 54 ALR 719.

[a] **"The learning required, which makes the occupation a profession,** pertains to the preparation of the medicines, and not to the naked act of selling." State v. Wood, 51 S. D. 485, 215 NW 487, 489, 54 ALR 719.

Regulation of practice of pharmacy see Druggists §§ 4–19.

94. See Differing in Phase 18 C. J. p 1037.

95. See Antipyrine 3 C. J. p 230.

96. Dickerson v. Maure, 108 Fed. 233, 236 ("a valuable antipyretic and antineuralgic remedy, and so recognized by the medical profession").

97. See Phenomenon post this page.

98. Diamond State Iron Co. v. Giles, 12 Del. 557, 573, 11 A 189.

[a] **As applied to a storm.**—Diamond State Iron Co. v. Giles, 12 Del. 557, 573, 11 A 189.

99. See Phenomenal ante this page.

1. Diamond State Iron Co. v. Giles, 12 Del. 557, 573, 11 A 189.

2. Diamond State Iron Co. v. Giles, supra.

3. Thorp v. Lund, 227 Mass. 474, 116 NE 946, 949, AnnCas1918B 1204. "'Philanthropic' is not in itself widely variant from 'charitable.'" Rotch v. Emerson, 105 Mass. 431, 434.

[a] **In bequests and definitions** it has been used as not essentially different. Thorp v. Lund, 227 Mass. 474, 116 NE 946, 949, AnnCas1918B 1204.

"Charitable" see 11 C. J. p 296.

4. Thorp v. Lund, 227 Mass. 474, 116 NE 946, 949, AnnCas1918B 1204; Rotch v. Emerson, 105 Mass. 431, 434. Compare In re MacDuff, [1896] 2 Ch. 451, 464 (where the phrase "purposes charitable or philanthropic" was used in a will, the court saying: "Then what is the meaning of the word 'philanthropic'? He means by that something distinguished from charitable in the ordinary sense; but I cannot put any definite meaning on the word. All I can say is that a philanthropic purpose must be a purpose which indicates good will to mankind").

[a] **"National or philanthropic purpose"** was held to mean "national and philanthropic" and to be sufficient to create a charity. Thorp v. Lund, 227 Mass. 474, 482, 116 NE 946, Ann Cas1918B 1204.

[b] **"Philanthropic purposes,"** as used in a devise of property to trustees to be applied to the promotion of agricultural or horticultural improvements or other philosophical or philanthropic purposes, is not in itself widely variant from "charitable." The rule of interpretation which may restrict "benevolence" to the sense of a legal charity is equally applicable here. Rotch v. Emerson, 105 Mass. 431, 433.

5. See Philanthropic ante this page note 4 [b].

6. See Territories [38 Cyc 191].

7. **"Mahogany"** see 38 C. J. p 333.

8. Indiana Quartered Oak Co. v. Federal Trade Commn., 26 F. (2d) 340, 341, 343.

[a] **Caoba des Filipinos.**—"There is evidence to support the finding that the Spanish words 'Caoba des Filipinos,' which means Philippine mahogany, are used to designate native woods resembling mahogany in grain, texture, and color, but, while the term was known in the Philippines, it was not used in connection with the sale of lumber." Indiana Quartered Oak Co. v. Federal Trade Commn., 26 F. (2d) 340, 341.

9. Indiana Quartered Oak Co. v. Federal Trade Commn., supra ("it is found that many of the characteristics and virtues possessed by mahogany are lacking in the Philippine

PHILIPPINE SCOUTS.[16]

PHILOSOPHICAL.[11] Relating or belonging to philosophy or philosophers; pertaining to or used in the study of natural philosophy.[12]

Philosophical anarchist. One who does not advocate the use of force and violence.[13]

Philosophical apparatus and instruments.[14] Apparatus or instruments commonly used for the purpose of making observations and discoveries in nature and experiments for developing and exhibiting natural forces, and the conditions under which they can be called into activity;[15] instruments or apparatus involving the illustration of some principal of natural philosophy or natural science.[16]

PHILOSOPHICAL ANARCHIST.[17]

PHILOSOPHICAL APPARATUS AND INSTRUMENTS.[18]

PHILOSOPHY.[19] A term which has reference to the fundamental part of any science; to general principles connected with a science, but not forming part of it.[20]

PHLEBITIS. Inflammation of the veins.[21]

PHONE. A telephone.[22]

PHONOGRAPHIC. Pertaining to, or used in, the writing or representation of sound; of, pertaining to, or of the nature of, phonography, or phonetic shorthand.[23]

PHONY ROLL. A package chiefly composed of paper covered with a genuine bill, to give the appearance of a roll of money.[24]

PHOSPHO.[25] A descriptive word, denoting "combining forms of phosphorus."[26]

PHOSPHORATED.[27] Combined or impregnated with phosphorus.[28]

PHOTOGRAPH.[29] The paper copies taken from the original plate called the "negative," made sensitive by chemicals, and printed by sunlight through the camera;[30] a picture or likeness taken by photography.[31]

PHOTOGRAPHER.[32] A person who makes pictures by means of photography;[33] an artist, not an artisan, who takes impressions or likenesses of things and persons on prepared plates or surfaces.[34]

PHOTOGRAPHIC PRINTING.[35] The printing of photographs on prepared paper by the operation of light and the use of negatives.[36]

PHOTOGRAPHY.[37] The art of producing facsimiles, or representations of objects by the action of light on a prepared surface;[38] the art of producing images of objects by an application of chemical change produced in certain substances by the action of light or more generally by radiant energy;[39] the

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hardwood sold by the respondent as 'Philippine mahogany,' and this prevents such hardwoods from serving such uses for which mahogany is particularly adapted, and there is evidence to support the finding that such woods are not suitable for cabinet-making, because of the prevalence of wormholes, which constitute serious defects, and that they are too soft for flooring and not suitable for the construction of lamps, because they do not take the required finish; that they are not susceptible to the finish required by piano manufacturers on the exposed surfaces of pianos, nor are they suitable for carving. When used in furniture, it is necessary to fill the wormholes before the wood is stained or varnished, and such filling destroys the even appearance of the surface. They do not retain subsurface luster peculiar to mahogany, and, unlike mahogany, they do not beautify with age. The Commission has found that the general public is deceived when lauan or tanguile is sold for mahogany").

10. As part of regular standing army of United States see Army and Navy § 34.

11. See Philosophy post this page.

12. Century D.

[a] **"Philosophical purposes."**—As used in a devise of property to be "applied for the promotion of agricultural or horticultural improvements, or other philosophical . . . purposes" it must be "understood as referring to practical and useful services, and not to those which are abstract, speculative or metaphysical merely." Rotch v. Emerson, 105 Mass. 431, 432, 433. "Purpose" see [32 Cyc 1270].

13. Ex p. Pettine, 259 Fed. 733, 735. **Anarchist** see 2 C. J. p 1333.

14. "Apparatus" see 3 C. J. p 252. **"Instrument"** see 32 C. J. p 944. **Ophthalmoscope as not being a philosophical instrument** see Ophthalmoscope 46 C. J. p 1117 text and note 83.

15. Robertson v. Oelschlaeger, 137 U. S. 436, 438, 11 SCt 148, 34 L. ed. 744.

[a] **Mechanical implements distinguished** see Robertson v. Oelschlaeger, 137 U. S. 436, 438, 11 SCt 148, 34 L. ed. 744; In re Massachusetts Gen. Hospital, 95 Fed. 973, 974.

[b] **"Philosophical and scientific apparatus, utensils, instruments, and preparations."**—U. S. v. Massachusetts Gen. Hospital, 100 Fed. 932, 933, 41 CCA 114.

16. Manasse v. Spalding, 24 Fed. 86.

17. See Philosophical ante this page text and note 13.

18. See Philosophical ante this page text and notes 15, 16.

19. See Philosophical ante this page.

20. In re Massachusetts Gen. Hospital, 95 Fed. 973, 976.

[a] **Distinguished from "science."**—(1) U. S. v. Massachusetts Gen. Hospital, 100 Fed. 932, 937, 41 CCA 114; In re Massachusetts Gen. Hospital, 95 Fed. 973, 976 (where "science" is also defined). (2) Philosophy claims to be the science of the whole. The task of coördination in the broadest sense is undertaken by it. It corrects in this way the abstractions which are inevitably made by the scientific specialists. Encyc. Brit. [quot U. S. v. Massachusetts Gen. Hospital, 100 Fed. 932, 937, 41 CCA 114]. "Science" see [35 Cyc 1144].

21. Bidwell's Succ., 52 La. Ann. 744, 27 S 281, 284, 286.

22. Century D.

"Telephone" defined see Telegraphs and Telephones [37 Cyc 1607].

"Business phone" see Business 9 C. J. p 1105 text and note 74.

23. Century D.

[a] **"Phonographic report of the testimony."**—Kelley v. Clark, 21 Ida. 231, 239, 121 P 95 (means the stenographic report of the stenographer or the stenographer's notes, and not the transcription of the testimony by the stenographer). "Stenographer" see [36 Cyc 1275].

24. Peo. v. Smilie, 118 App. Div. 611, 614, 103 NYS 348, 350.

25. See Phosphorated post this page.

26. Webster New Int. D. [quot C. B. Fleet Co., Inc. v. Mobile Drug Co., 284 Fed. 813, 814].

[a] **"Phospho" and "Phospho-Soda"** as trade names see C. B. Fleet Co., Inc. v. Mobile Drug Co., 284 Fed. 813, 814.

27. See Phospho ante this page.

28. Caswell v. Davis, 58 N. Y. 223, 236, 17 AmR 233, 243.

[a] **"Ferro-phosphorated Elixir of Calisaya Bark"** as a trade name see Caswell v. Davis, 58 N. Y. 223, 229, 17 AmR 233.

29. See Photographer post this page; Photographic Printing post this page; Photography post this page.

[a] **"Photograph Commission."**—Baltimore, etc., R. Co. v. State, 72 Md. 36, 37, 18 A 1107, 20 AmSR 454, 6 LRA 706.

[b] **Right to take photographs not property** see Sport, etc., Agency, Ltd. v. Our Dogs Pub. Co., Ltd., [1917] 2 K. B. 125, 127.

Photograph:

As a copy see Copy 13 C. J. p 934 note 93 [a].

As evidence see Criminal Law § 1528; Evidence §§ 1115–1125.

As including cinematograph or moving picture film see Cinematograph 11 C. J. p 766 note 85 [a].

As subject of copyright see Copyright and Literary Property § 118.

What constitutes publication of see Copyright and Literary Property § 50.

30. Udderzook v. Com., 76 Pa. 340, 352 (where it is said: "Photographs . . . are not the original likenesses; their lines are not traced by the hand of the artist").

"Negative" see 45 C. J. p 603 text and note 9.

31. Webster D. [quot Frankel v. German Tyrolean Alps Co., 121 Mo. A. 51, 55, 97 SW 961].

"Picture" see post.

32. See Ambrotypist 2 C. J. p 1316. And see Photograph ante this page; Photographic Printing post this page; Photography post this page.

Photographer not a mechanic see Mechanic 40 C. J. p 21 text and note 75.

33. New Orleans v. Robira, 42 La. Ann. 1098, 1100, 8 S 402, 11 LRA 141.

34. Story v. Walker, 11 Lea (Tenn.) 515, 517, 47 AmR 305 [quot Mechanical Business Cases, 9 Pa. Co. 1, 3]. See Mullinnix v. State, 42 Tex. Cr. 526, 60 SW 768.

Ambrotypist or daguerreotypist as an artisan rather than an artist see Artist 5 C. J. p 597 note 80 [a].

"Artisan" see 5 C. J. p 597.

"Artist" see 5 C. J. p 597.

Photographer as one entitled to obtain copyright see Copyright and Literary Property § 153.

35. See Photograph ante this page; Photographer ante this page; Photography post this page.

"Printing" see [32 Cyc 309].

36. Wood v. Abbott, 30 F. Cas. No. 17,938, 5 Blatchf. 325.

37. See Photograph ante this page; Photographer ante this page; Photographic Printing ante this page.

38. Luke v. Calhoun County, 52 Ala. 115, 119 [quot State v. Matheson, 130 Iowa 440, 103 NE 137, 138, 114 AmSR 427, 8 AnnCas 430].

"Facsimile" see 25 C. J. p 334.

39. Century D. [quot New Orleans v. Robira, 42 La. Ann. 1098, 1100, 8 S 402, 11 LRA 141].

"Image" see 31 C. J. p 244.

science which relates to the action of the light on sensitive bodies in the production of pictures by the fixation of images and the like.[40]

PHRASE.[41] Two or more words properly arranged, not constituting an entire proposition, but performing a distinct etymological office.[42]

Prepositional phrase. A phrase introduced by a preposition and having a noun or pronoun (word, phrase, or sentence) or a participle for its object of relation.[43]

PHTHALIC ACID, ANHYDROUS. A coal-tar preparation which is commercially known as, and performs the functions of, an acid, although not an acid chemically.[44]

PHUSIS. A Greek word meaning nature.[45]

P. H. V. An abbreviation for "pro hac vice."[46]

PHYSIC. As a noun. Medicine;[47] the science of nature and of natural objects.[48]

As a verb. To evacuate the bowels;[49] to purge;[50] to treat with medicine.[51]

PHYSICAL.[52] Pertaining to the material part or structure of an organized being.[53] Used in contradistinction to "mental."[54]

Physical detention. Imprisonment.[55]

Physical force.[56] As used in relation to assaults, synonymous, and used interchangeably, with "violence."[57]

Physical pain.[58] Bodily suffering.[59]

Physical possession.[60] Used in relation to property means taking hold of the property, exercising control over it.[61]

Physical suffering. Suffering or pain that flows directly from a physical injury.[62]

Physical training. A course of training to better the physical condition and welfare.[63]

Other phrases: "Physical difficulties or obstructions,"[64] "physical disability,"[65] "physical effect,"[66] "physical facts,"[67] "physical herb,"[68] "physical inability,"[69] "physical incapacity,"[70] "physical inconvenience,"[71] "physical infirmity,"[72] "physical necessity,"[73] "physical occupancy,"[74] "physical operation of a switch,"[75] "physical record,"[76] "physical strength."[77]

PHYSICAL CONDITION.[78]

PHYSICAL DETENTION.[79]

PHYSICAL EDUCATION.[80]

PHYSICAL EXAMINATION.[81]

PHYSICAL FORCE.[82]

PHYSICAL INJURY.[83]

PHYSICALLY.[84] Actually;[85] in a physical manner according to nature.[86] It is not equivalent to

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40. Webster D. [quot New Orleans v. Robira, 42 La. Ann. 1098, 1100, 8 S 402, 11 LRA 141; Frankel v. German Tyrolean Alps Co., 121 Mo. A. 51, 55, 97 SW 961].

41. Construction of phrase:
In contract see Contracts §§ 489–492.
In deed see Deeds §§ 208–216.
In statute see Statutes [36 Cyc 1114–1128].
Of will see Wills [40 Cyc 1396–1407].

42. Bourland v. Hildreth, 26 Cal. 161, 233 (dis. op.).
"Words" see [40 Cyc 2800].

43. Bourland v. Hildreth, 26 Cal. 161, 233 (dis. op.).

44. Heller v. U. S., 124 Fed. 299, 300.
"Acid" see 1 C. J. p 738.
"Anhydrous" see 2 C. J. p 1347.

45. In re Hunter, 60 N. C. 372.
"Nature" see 45 C. J. p 396.

46. Black L. D.
"Pro hac vice" see [32 Cyc 594].

47. In re Hunter, 60 N. C. 372.

[a] **The term is not confined to drugs** administered, but includes every service or medical aid rendered by a physician to his patient. Rouse v. Morris, 17 Serg. & R. (Pa.) 328, 329.
"Medicine" see 40 C. J. p 626.

48. In re Hunter, 60 N. C. 372.

[a] **Derived from the Greek word "phusis" nature.**—In re Hunter, 60 N. C. 372.

49. In re Hunter, supra.

50. In re Hunter, supra.

51. In re Hunter, supra.
"Treat" see [38 Cyc 960].

52. See Physically post this page.

Physical:
Impossibility to perform a contract see Contracts § 176.
Inability of witness to appear as reason for taking deposition see Depositions § 18.
Pain and suffering as element of damages see Damages § 150.

53. In re Hunter, 60 N. C. 372.

54. See Austin v. Augusta Terminal R. Co., 108 Ga. 671, 709, 34 SE 852, 867, 47 LRA 755.
"Mental" see 40 C. J. p 633.

55. Egleston v. Scheibel, 113 App. Div. 798, 799, 99 NYS 969.
"Detention" see 18 C. J. p 983 and cross references thereunder.

56. **"Force"** see 26 C. J. p 794 and cross references thereunder.

57. Bouvier L. D. [quot Peo. v. Will, 79 Cal. A. 101, 248 P 1078, 1083]; State v. Wells, 31 Conn. 210, 212.

[a] **"Moral force" distinguished.**—See In re Hunter, 60 N. C. 372.
"Moral" see 41 C. J. p 211.
"Violence" see [40 Cyc 210].

58. Physical pain and suffering as element of damages see Damages § 150.
"Pain" see 40 C. J. p 1169.

59. Walker v. Kellar, (Tex. Civ. A.) 218 SW 792, 800 (distinguishing mental distress).

60. **"Possession"** see [31 Cyc 923].

61. Florea v. Schultz, 123 Misc. 77, 217 NYS 764, 766.

62. McGlone v. Hauger, 56 Ind. A. 243, 104 NE 116, 122 (distinguishing "humiliation" and "mental pain and anguish").
"Humiliation" see 30 C. J. p 476.
"Mental anguish" see Mental 40 C. J. p 633 text and notes 66–70.
"Mental and physical suffering" see Inconvenience 31 C. J. p 406 note 6 [b].

63. Rockwell v. Deschutes County School Dist. No. 1, 109 Or. 480, 220 P 142, 143.

64. Kenyon Tp. v. Charlottenburgh Tp., 53 Ont. L. 22, 23, 23 OntWN 30.
"Difficulty" see 18 C. J. p 1037.
"Obstruction" see 46 C. J. p 890.

65. McRae v. Metropolitan St. R. Co., 125 Mo. A. 562, 570, 102 SW 1032; Hillert v. Schweppe, (Tex. Civ. A.) 234 SW 152, 154.

[a] **Other "physical disability."**—Supreme Council O. C. F. v. Fairman, 10 AbbNCas (N. Y.) 162, 167, 62 How Pr 386.
"Disability" see 18 C. J. p 1046.

66. Austin v. Augusta, etc., R. Co., 108 Ga. 671, 709, 34 SE 852, 867, 47 LRA 755 (in contradistinction to mental effect).
"Effect" see 19 C. J. p 1016.

67. Schmitt v. St. Louis Transit Co., 115 Mo. A. 445, 90 SW 421, 425.
"Fact" see 25 C. J. p 335 and cross references thereunder.

68. In re Hunter, 60 N. C. 372 (distinguishing a "medical herb").

69. Kane v. Chicago, etc., R. Co., 90 Nebr. 112, 132 NW 920, 921, 36 LRANS 1145, AnnCas1913A 764.

[a] **"Physical inability to work."**—Keith v. Chicago, etc., R. Co., 82 Nebr. 12, 14, 116 NW 957, 130 AmSR 655, 23 LRANS 352.
"Inability" see 31 C. J. p 369.

70. Franke v. Franke, 3 Cal. Unrep. Cas. 656, 31 P 571, 574, 18 LRA 375 (such a physical defect or incurable disease existing at the time of marriage as will prevent sexual coition does not include pregnancy); Podkastelnea v. Michigan Cent. R. Co., 198 Mich. 321, 164 NW 418, 419.

[a] **"Physical or mental incapacity."**—Goodwin v. Fall River, 228 Mass. 529, 117 NE 796, 797. See Ledwidge v. Hathaway, 170 Mass. 348, 349, 49 NE 656.
"Incapacity" see 31 C. J. p 372.
"Physically incapacitated" see Physically post this page text and note 91.

71. McRae v. Metropolitan St. R. Co., 125 Mo. A. 562, 571, 102 SW 1032, 1035; Newell v. St. Louis Transit Co., 108 Mo. A. 530, 84 SW 195.
"Inconvenience" see 31 C. J. p 406.

72. Druhl v. Equitable L. Assur. Soc., 56 N. D. 517, 218 NW 220, 223.
"Infirmity" see 31 C. J. p 1182.

73. See Necessity 45 C. J. p 586 text and note 64.

74. State v. King, 110 La. 961, 962, 35 S 181, 184 (distinguishing "legal possession").
"Occupancy" see 46 C. J. p 893 and cross references thereunder.

75. See Operation 46 C. J. p 1115 text and note 34.

76. Bull v. International Power Co., 84 N. J. Eq. 209, 93 A 86, 89.
"Records" see [34 Cyc 577].

77. In re Hunter, 60 N. C. 372.

78. Physical condition:
As element of damages see Damages § 150.
As evidence see Evidence §§ 710–712.
Evidence of see Evidence § 617.
Of parties to an assault see Assault and Battery §§ 313, 314.
Of parties to a homicide see Homicide § 399.
Of spouse as ground of annulment of marriage see Marriage § 124.
Of witness as ground for taking deposition see Depositions § 18.

79. See Physical ante this page text and note 55.

80. See Education 19 C. J. p 1015 text and note 79.

81. Of party to action or suit for:
Annulment of marriage see Marriage § 132.
Personal injuries see Discovery §§ 100–108; Evidence § 898.
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82. See Physical ante this page text and note 56.

83. See Injury § 21.

84. See Physical ante this page.

85. Page's Succ., 149 La. 623, 89 S 876.
"Actually" see 1 C. J. p 1186.

86. Century D.

"corporeally."[87]

Phrases: "Physically able to work,"[88] "physically incapable of entering into the marriage state,"[89] "physically incapable of reading,"[90] "physically incapacitated,"[91] "physically in the state of Louisiana,"[92] "physically unfit for promotion."[93]

PHYSICAL PAIN.[94]

PHYSICAL POSSESSION.[95]

PHYSICAL SUFFERING.[96]

PHYSICAL TRAINING.[97]

87. Page's Succ., 149 La. 623, 89 S 876.

88. Perkinson v. Industrial Commn., 305 Ill. 625, 630, 137 NE 398, 399; Voight v. Industrial Commn., 297 Ill. 109, 130 NE 470, 473 (both holding it to be where one can do so without seriously endangering life or health).

89. Schroter v. Schroter, 56 Misc. 69, 70, 106 NYS 22 (means want of potentia copulandi, and not merely incapacity for procreation).

90. U. S. v. Tod, 294 Fed. 820, 822 (deaf mute may be physically incapable of reading aloud, but not thereby physically incapable of reading).

91. Hagman v. U. S. Equitable L. Assur. Soc., 214 Ky. 56, 282 SW 1112, 1113.

[a] **"Physically and incurably incapacitated from entering into the marriage state."**—The meaning of the words 'physically incapacitated,' as here used, is substantially the same as that of the word 'impotent,' frequently met within divorce proceedings." Anonymous, 89 Ala. 291, 292, 7 S 100, 18 AmSR 116, 7 LRA 425.

"Incapacitate" see 31 C. J. p 372.

"Physical incapacity" see Physical ante p 1056 text and note 70.

92. Page's Succ., 149 La. 623, 89 S 876 (means "actually in the state of Louisiana").

93. Reaves v. Ainsworth, 219 U. S. 296, 305, 31 SCt 230, 55 L. ed. 225.

94. See Physical ante p 1056 text and note 59.

95. See Physical ante p 1056 text and note 61.

96. See Physical ante p 1056 text and note 62.

97. See Physical ante p 1056 text and note 63.

PHYSICIANS AND SURGEONS

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Vaccination see **Health** § 39; **Municipal Corporations** § 594.

I. DEFINITIONS

[By William Quinby DeFuniak]

[§ 1] **A. Dentist.**[1] A dentist is a dental surgeon;[2] one who performs manual or mechanical operations to preserve teeth, to cleanse, extract, insert, or repair them;[3] one who practices dental surgery and mechanical dentistry;[4] one whose profession it is to clean and extract teeth, repair them when diseased, and replace them when necessary, by artificial ones.[5] A dentist may be included within the meaning of "mechanic,"[6] "physician,"[7] or "surgeon,"[8] as these terms are used in statutes.

"Horse dentist" may be defined as one whose practice is in the care of horses' teeth.[9]

[§ 2] **B. Doctor—1. As a Noun.** In common speech, as well as in university parlance, "doctor" or the abbreviation "Dr." as a prefix,[10] or the letter "D." in connection with other letters in certain abbreviations as a suffix,[11] signifies an academic distinction founded upon having received a degree.[12] The word is used commonly to indicate skill in the general subject of medicine,[13] and means a person who practices medicine;[14] a physician;[15] a physician who administers medicine and physic;[16] a practitioner of physic.[17]

[§ 3] **2. As a Verb.** As a verb "doctor" means to administer medicine or medical treatment;[18] to apply medicines for the cure of;[19] to prescribe or treat medically, as to doctor a sick man, to doctor a cold;[20] to treat as a doctor or physician;[21] to treat medicinally.[22]

[§ 4] **C. Physician.**[23] A word derived from the Greek word "phusis," meaning nature,[24] and defined as one authorized to prescribe remedies for and treat diseases;[25] one lawfully engaged in the practice of medicine;[26] one skilled in both medicine and surgery;[27] one versed in, or practicing the art of, medicine;[28] one who practices the art of healing

1. See cross references under Dentist 18 C. J. p 487.
"Dentistry" see 18 C. J. p 487.
Within meaning of regulatory statutes see infra §§ 16-48.

2. Century D. [quot State v. Fisher, 119 Mo. 344, 353, 24 SW 167, 22 LRA 799]; Com. v. Heller, 80 Pa. Super. 366, 369 [aff 277 Pa. 539, 121 A 558, and quot Cyc]; Peo. v. Fajardo, 16 Porto Rico 760, 763 [quot Cyc]; State v. Beck, 21 R. I. 288, 293, 43 A 366, 45 LRA 269.

3. State v. McMinn, 118 N. C. 1259, 1261, 24 SE 523; Peo. v. Fajardo, 16 Porto Rico 760, 763 [quot Cyc].

4. Century D. [quot State v. Fisher, 119 Mo. 344, 353, 24 SW 167, 22 LRA 799].

5. Century D. [quot State v. Fisher, supra]; Peo. v. De France, 104 Mich. 563, 570, 62 NW 709, 28 LRA 139.

6. See Mechanic 40 C. J. p 21 text and note 45.
Not a mechanic see Mechanic 40 C. J. p 21 text and note 60.

7. See infra §§ 4, 25.

8. See infra §§ 6, 18-34.

9. See Com. v. Palmer, 71 Pa. Super. 188, 190.

10. Com. v. New England Chiropractic College, 221 Mass. 190, 108 NE 895, 896.

11. Com. v. New England Chiropractic College, supra (as "D.D.," "LL.D.," "M.D." or "Ph.D."). See Townshend v. Gray, 62 Vt. 373, 375, 19 NE 635, 8 LRA 112.

12. See State v. MacKnight, 131 N. C. 717, 723, 42 SE 580, 59 LRA 187 ("there are many kinds of doctors, besides doctors of medicine—as doctors of laws, doctors of divinity, doctors of physics, and veterinary doctors, and others still. . . . We know from common knowledge that druggists' clerks are ordinarily addressed as 'doctor,'" etc.).
In the civil law see Doctor 19 C. J. p 382.

13. Com. v. New England Chiropractic College, 221 Mass. 190, 108 NE 895, 896.

[a] **"Cancer doctor."**—Musser v. Chase, 29 Oh. St. 577, 585.

14. Witty v. State, 173 Ind. 404, 90 NE 627, 630, 25 LRANS 1297. See Bragg v. State, 134 Ala. 165, 173, 32 S 767, 58 LRA 925.

[a] **"Itinerant doctor"** (1) as appearing in a statute, is to be classed with the phrase "itinerant physician and surgeon," also appearing therein, and both relate to those persons who in some form, or following some school, practice either medicine or surgery, or both. Cherokee v. Perkins, 118 Iowa 405, 407, 92 NW 68. (2) "Itinerant physician" see infra § 4 note 34 [a].

15. Bragg v. State, 134 Ala. 165, 173, 32 S 767, 58 LRA 925; Harrison v. State, 102 Ala. 170, 172, 15 S 563; Milling v. State, 67 Tex. Cr. 551, 150 SW 434, 436.

[a] **Use of the title "doctor" as evidence that one is a physician** see Smith v. Taylor, 1 B. & P. N. R. 196, 204, 127 Reprint 435 (where the court was evenly divided).
Assumption of title of "doctor" or "Dr." or appending letters "M.D." to name as holding out as physician see infra § 24.
"Physician" see infra § 4.

16. See In re Hunter, 60 N. C. 372, 373 [quot Waldo v. Poe, 14 F. (2d) 749, 752].

17. Corsi v. Maretzek, 4 E. D. Smith (N. Y.) 1, 5.

18. Century D. [quot Haines v. Indiana Trust Co., 75 Ind. A. 651, 131 NE 89, 92].

19. Century D. [quot Haines v. Indiana Trust Co., supra].

20. Standard D. [quot Haines v. Indiana Trust Co., supra].

21. Century D. [quot Haines v. Indiana Trust Co., supra].

22. Century D. [quot Haines v. Indiana Trust Co., supra].

23. **Physician:**
As county officer see Counties § 139 note 15 [a].
As specialist see Specialist [36 Cyc 822].
As included in term:
"Employee" see 20 C. J. p 1243 note 15.
"Laborer" see 35 C. J. p 930 note 51.
"Tradesman" see [38 Cyc 918 note 12].
Attended by a see Attend 6 C. J. p 550 note 61 [a].
City see Municipal Corporations §§ 1589, 1590.
Communications to as privileged see Witnesses [40 Cyc 2381 et seq].
Consulting see Consulting Physician 12 C. J. p 1308.
Family see Family § 6 note 34.
"Medico" in Spanish law as meaning a see 40 C. J. p 627.
Within meaning of regulatory statutes see infra §§ 16-48.

24. In re Hunter, 60 N. C. 372, 373 [quot Waldo v. Poe, 14 F. (2d) 749, 752].
"Phusis" see ante p 1056.

25. Webster D. [quot Sutton v. Facey, 1 Mich. 243, 247; State v. McMinn, 118 N. C. 1259, 1261, 24 SE 523].

[a] **Similar definitions.**—(1) "One qualified and authorized to prescribe remedies for diseases." Prowitt v. Denver, 11 Colo. A. 70, 52 P 286, 287. (2) "A prescriber of remedies for sickness and disease." State v. Beck, 21 R. I. 288, 291, 43 A 366, 45 LRA 269.

[b] **As dependent upon authorization.**—(1) "We, therefore, conclude that a physician and surgeon is one who holds an unrevoked, unlimited certificate from the board of Medical Examiners to treat the sick and afflicted." Millsap v. Alderson, 63 Cal. A. 518, 525, 219 P 469. (2) Right to practice see infra §§ 12-94.

[c] **"Naturopath" distinguished** see Millsap v. Alderson, 63 Cal. A. 518, 219 P 469, 473.

26. Bouvier L. D. [quot Harrison v. State, 102 Ala. 170, 173, 15 S 563; Terr. v. Newman, 13 N. M. 98, 79 P 813, 814, 68 LRA 783]; William Laurie Co. v. McCullough, 174 Ind. 477, 90 NE 1014, 1018, 92 NE 337, AnnCas1913A 49 [quot Cyc].

27. Goss v. Goss, 102 Minn. 346, 351, 113 NW 690, 692; Castner v. Sliker, 33 N. J. L. 507, 510.

[a] **Similar definition.**—"One who is versed in medical science, a branch of which is surgery." Goss v. Goss, 102 Minn. 346, 351, 113 NW 690; Anderson v. National Casualty Co., 151 App. Div. 439, 440, 135 NYS 889.

28. Peo. v. Siman, 278 Ill. 256, 257, 115 NE 817 [quot Waldo v. Poe, 14 F. (2d) 749, 752].

"He is presumed to be familiar with the anatomy of the human body in its entirety; to understand the science of physiology and the laws of hygiene, and to be able to minister, as

disease and preserving health;[29] one who professes or practices medicine, or the healing art;[30] one whose profession it is to prescribe and administer medicine in the treatment of disease, or the relief of the sick, after diagnosing the complaint;[31] a person skilled in physic or the art of healing;[32] a person who has received the degree of doctor of medicine from an incorporated institution.[33] The term has also been the subject of statutory definition.[34] It is the broadest term our language contains applicable to one who practices medicine, including both medicine and surgery in its original meaning.[35] It is not limited to the disciples of any particular school;[36] but is of very wide significance,[37] and may include dentists,[38] and includes the term "surgeon"[39] and many specialists within the field of medicine.[40]

Phrases: "Attended by physician,"[41] "attending physician,"[42] "duties of physician,"[43] "legally qualified physician,"[44] "physician now registered,"[45] "physician or surgeon,"[46] "physician registered to practice,"[47] "physicians and surgeons,"[48] "physicians in good standing;"[49] "physicians practicing,"[50] "physician's prescription,"[51] "regularly qualified physician,"[52] "regular physician,"[53] and "traveling physician."[54]

[§ 5] **D. Practitioner.**[55] As regards the practice of medicine, the terms "practitioner" and "physician" are synonymous.[56]

far as may be, to the relief of pain, disease, and physical ailments of all sorts and kinds whatsoever." State v. Beck, 21 R. I. 288, 292, 43 A 366, 45 LRA 269.

29. State v. Beck, supra [quot Travelers' Ins. Co. v. Bergeron, 25 F. (2d) 680, 683, 58 ALR 1127].

30. Worcester D. [quot Harrison v. State, 102 Ala. 170, 173, 15 S 563; Whitlock v. Com., 89 Va. 337, 338, 15 SE 893].

"It will not be doubted . . . that one who engages in the practice of it [medicine] is a scientist or artist, professionally known by the name of 'physician' or 'doctor.'" Bragg v. State, 134 Ala. 165, 173, 32 S 767, 58 LRA 925.

[a] **Synonymous and interchangeable term.**—"Person practicing medicine." Harrison v. State, 102 Ala. 170, 172, 15 S 563. See also Corsi v. Maretzek, 4 E. D. Smith (N. Y.) 1, 7.

31. Kansas City v. Baird, 92 Mo. A. 204, 208.

[a] **Similar definition.**—"A person who prescribes medicine for the sick." Smith v. Taylor, 1 B. & P. N. R. 196, 202, 127 Reprint 435.

32. Webster D. [quot State v. Eustace, 117 Kan. 746, 233 P 109, 110].

33. Bouvier L. D. [quot Harrison v. State, 102 Ala. 170, 173, 15 S 563; Terr. v. Newman, 13 N. M. 98, 79 P 706, 813, 814, 68 LRA 783]; William Laurie Co. v. McCullough, 174 Ind. 477, 90 NE 1014, 1018, 92 NE 337, AnnCas1913A 49 [quot Cyc].

[a] **Similar definition.**—"A doctor of medicine." Webster D. [quot Sutton v. Facey, 1 Mich. 243, 247; State v. McMinn, 118 N. C. 1259, 1261, 24 SE 523]; Worcester D. [quot Harrison v. State, 102 Ala. 170, 173, 15 S 563; Whitlock v. Com., 89 Va. 337, 338, 15 SE 893].

[b] **In England** physicians are a class of persons who have a diploma from a college of physicians and are entitled to the honorary distinction of doctor of medicine. Graham v. Gautier, 21 Tex. 111, 117; Hunter v. Clare, [1899] 1 Q. B. 635, 641.

34. See statutory provisions.

[a] **Itinerant physician.**—"Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries, by any medicine, appliance or method, who goes from place to place, is an itinerant physician." Code (1897) § 2579 [quot State v. Edmunds, 127 Iowa 333, 335, 101 NW 431]. And see Cherokee v. Perkins, 118 Iowa 405, 406, 92 NW 68.

35. Isaacson v. Wisconsin Casualty Co., 187 Wis. 25, 203 NW 918, 920.

"In common acceptation, anyone whose occupation is the treatment of diseases for the purpose of curing them is a physician, and this is the sense in which the term is used in the Medical Practice Act." Peo. v. Siman, 278 Ill. 256, 257, 115 NE 817.

36. U. S.—Waldo v. Poe, 14 F. (2d) 749, 752.

Ill.—Peo. v. Siman, 278 Ill. 256, 257, 115 NE 817, 818; Smith v. Chicago City R. Co., 165 Ill. A. 190, 196.

N. Y.—Corsi v. Maretzek, 4 E. D. Smith 1, 5.

N. C.—In re Hunter, 60 N. C. 372, 373.

Wis.—State v. Schmidt, 138 Wis. 53, 60, 119 NW 647; Raynor v. State, 62 Wis. 289, 300, 22 NW 430.

"It is a waste of time, in our judgment, to view the term 'physician' from the standpoint of members of the profession belonging to the few great schools." State v. Schmidt, supra.

[a] **"The legislature** conceived that it was dealing with the entire class of persons known as physicians, in the broadest sense of the term, not in any narrow sense, which would favor those claiming, and perhaps entitled to, superior distinction. The purpose was very far from that of creating a monopoly in favor of special schools of medicine. The term was evidently used in its proper sense, that of including any person of whatever school, and whether belonging to any known school, engaged, in good faith, in treating human ills by any remedy or remedies, however simple, so as to be known among the people as a physician." State v. Schmidt, 138 Wis. 53, 60, 119 NW 647 [partly quot Waldo v. Poe, 14 F. (2d) 749, 752].

37. In re Hunter, 60 N. C. 372, 373 [quot Waldo v. Poe, 14 F. (2d) 749, 752]; Isaacson v. Wisconsin Casualty Co., 187 Wis. 252, 203 NW 918, 920.

"[We need not] go to the lexical definitions, where we would find a wide range, down to the simple definition, 'one who administers medicine to cure disease.' That medicine includes anything, however simple, 'administered in the treatment of disease,' and that disease includes any kind of disorder of the human system, needs no support other than our common knowledge." State v. Schmidt, 138 Wis. 53, 60, 119 NW 647.

38. See infra this note.

[a] **In its broad sense** the term "physician" includes a dentist. In re Hunter, 60 N. C. 372.

[b] **But, as used in some statutes,** "physician" or "surgeon" does not include a dentist. Peo. v. De France, 104 Mich. 563, 62 NW 709, 28 LRA 139 (a statute providing that communications to persons authorized to practice medicine or surgery shall be privileged); State v. Fisher, 119 Mo. 344, 353, 24 SW 167, 22 LRA 799 (a statute exempting a practitioner of medicine or surgery from jury duty); State v. McMinn, 118 N. C. 1259, 24 SE 523 (a statute protecting one who sells intoxicating liquor on Sunday on the prescription of a physician).

39. In re Hunter, 60 N. C. 372, 373 [quot Waldo v. Poe, 14 F. (2d) 749, 752]; Isaacson v. Wisconsin Casualty Co., 187 Wis. 25, 203 NW 918, 920.

"Surgeon" see infra § 7.

40. Isaacson v. Wisconsin Casualty Co., 187 Wis. 25, 203 NW 918, 920.

Particular practitioners or specialists included in term "physician" see infra §§ 18–34.

41. See Attend 6 C. J. p 550 note 61 [a].

42. Gibson v. American Mut. L. Ins. Co., 37 N. Y. 580, 582, 5 Transcr. A. 261.

43. Wetherell v. Marion County, 28 Iowa 22, 24 (include in their general, common, and ordinary acceptation the usual cases of surgery as well as the administration of medicine).

44. Peo. v. Siman, 278 Ill. 256, 257, 115 NE 817, 819 (as used in a statute, meant a physician authorized by law to practice medicine); Isaacson v. Wisconsin Casualty Co., 187 Wis. 25, 203 NW 918, 920 (as used in an insurance policy, did not include a chiropractor).

45. State v. Carson, 231 Mo. 1, 10, 132 SW 587.

46. Le Grand v. Security Ben. Assoc., 210 Mo. A. 700, 240 SW 852, 854 (as used in insurance application, did not include an osteopath).

"Surgeon" see infra § 6.

47. In re Opinion to Governor, 42 R. I. 249, 251, 107 A 102 (as used in a statute, included an osteopath).

48. Raynor v. State, 62 Wis. 289, 300, 22 NW 430 (as used in a statute, not limited to any one school of practitioners).

[a] **"Duly licensed physician and surgeon"** as used in statute not including an osteopath see In re Rust, 35 Cal. A. 422, 169 P 1050.

49. Lawson v. Conaway, 37 W. Va. 159, 163, 16 SE 564, 38 AmSR 17, 18 LRA 627.

50. McBride v. Huckins, 76 N. H. 206, 81 A 528, 531.

51. Webb v. U. S., 249 U. S. 96, 99, 39 SCt 217, 63 L. ed. 497 (as not including an order for morphine).

52. Anderson v. National Casualty Co., 151 App. Div. 439, 135 NYS 889 (as used in an insurance policy, included an osteopath); State v. Rust, 119 Wash. 480, 488, 206 P 33, 36 [quot Waldo v. Poe, 14 F. (2d) 749, 753] (as including an osteopath).

53. Bradbury v. Bardin, 35 Conn. 577, 581.

54. Adams v. State, 45 Tex. Cr. 566, 567, 78 SW 935; Broiles v. State, (Tex. Cr.) 68 SW 685, 686. See Hairston v. State, 36 Tex. Cr. 470, 471, 37 SW 858.

55. **"Practitioner of neuropathy"** see Neuropathy 45 C. J. p 1390 note 16 [a].

56. Hostetler v. Woodworth, 28 F. (2d) 1003; New York Mut. L. Ins. Co. v. Geleynse, 241 Mich. 659, 217 NW 790, 56 ALR 702.

[a] **"Practitioner of medicine."**—State v. Fisher, (Mo.) 21 SW 446, 447, 119 Mo. 344, 348, 352, 357, 24 SW 167, 22 LRA 799.

[b] **"Practitioner of medicine and surgery** is a physician and surgeon who habitually holds himself out for the practice of the profession." Hart v. Folsom, 70 N. H. 213, 216, 47 A 603.

[c] **"General practitioner,** [is] one who practises both medicine and surgery. Formerly in England the general practitioner, also called surgeon apothecary or apothecary, was the ordinary family medical attendant,

[§ 6] **E. Surgeon.**[57] A surgeon formerly was a mere operator, who joined his practice to that of a barber,[58] and whose business was with external ailments and injuries.[59] In latter times this has been changed, and the profession has risen into great and deserved eminence.[60] Now, a surgeon is a physician who treats bodily injuries and ills by manual operations and the use of surgical instruments and appliances.[61]

[§ 7] **F. Surgery.**[62] Surgery is a branch of medical science,[63] and more specifically, that branch of medical science which treats of mechanical or operative measures for healing diseases, deformities, or injuries.[64] Also, the word may be employed as designating a place where surgical operations are performed, or where medicines are prepared.[65]

[§ 8] **G. Veterinarian.**[66] One who practices the art of treating diseases and injuries of domestic animals, surgically or medically.[67]

[§ 9] **H. Veterinary Surgeon.**[68] A veterinary surgeon is a person lawfully practicing the art of treating and healing injuries and diseases of domestic animals.[69]

[§ 10] **I. Miscellaneous Terms.** The following terms among others listed in the note below[70] have been defined or employed in adjudicated cases: "Abrasion;"[71] "accident;"[72] "adenoids;"[73] "affection;"[74] "ailment;"[75] "alienists;"[76] "allopath-

supplying drugs as well as advice to his patients. He was licensed to practise by the Apothecaries' Company (incorporated 1617), and was in rank below the physician or surgeon. This distinction is now passing away, and the word general practitioner may be applied, as in the United States, to a physician who practises also surgery and obstetrics." Century D.

57. Surgeon:

As a specialist see Specialist [36 Cyc 522].

As included in term:

"Employee" see 20 C. J. p 1243 note 15.

"Physician" see supra § 4.

Veterinary see infra § 9.

Within meaning of regulatory statutes see infra §§ 16–48.

58. Allison v. Haydon, 4 Bing. 619, 621, 130 Reprint 907.

"Chirurgeon" as ancient denomination of surgeon see Chirurgeon 11 C. J. p 758.

[a] **A minor surgeon** is no more entitled to be called a surgeon than is a veterinary surgeon, or a barber, who formerly performed the operation of flebotomy. Peo. v. Fajardo, 16 Porto Rico 760, 763.

59. Allison v. Haydon, 4 Bing. 619, 621, 130 Reprint 907.

60. Allison v. Haydon, supra.

[a] **Surgeons and barbers separated by statute.**—Sharpe v. Law, 4 Burr. 2133, 98 Reprint 112.

61. Goss v. Goss, 102 Minn. 346, 351, 113 NW 690; Anderson v. National Casualty Co., 151 App. Div. 439, 135 NYS 889, 890.

"A surgeon is one who practices surgery." Napier v. Greenzweig, 256 Fed. 196, 197, 167 CCA 412.

[a] **Similar definition.**—"A practitioner who treats injuries, deformities, or disorders by mechanical operations or surgical instruments and appliances." Peo. v. Fajardo, 16 Porto Rico 760, 763.

[b] **"The word surgeon, unqualified,** in the mind of the ordinary individual means one possessed of such knowledge of the human body, and such other knowledge as the laws of our land require, and possessed of such skill in the use of instruments, that he may be expected with reason to correct or relieve some unnatural condition of the human body." Maupin v. Southern Surety Co., 205 Mo. A. 81, 88, 220 SW 20.

[c] **"Itinerant surgeons."**—Cherokee v. Perkins, 118 Iowa 405, 406, 92 NW 68.

62. Within meaning of regulatory statutes see infra §§ 16–48.

63. U. S. v. Massachusetts Gen. Hospital, 100 Fed. 932, 938, 41 CCA 114; Peo. v. Fajardo, 16 Porto Rico, 760, 762.

[a] **"Minor surgery"** cannot be considered as coming under the term "surgery." Peo. v. Fajardo, 16 Porto Rico 760, 763.

Medicine as science see Medicine § 3.

64. Webster New Int. D. [quot State v. Eustace, 117 Kan. 746, 233 P 109, 110; State v. Johnson, 84 Kan. 411, 417, 114 P 390, 392, 41 LRANS 539 (quot Waldo v. Poe, 14 F. (2d) 749, 753)].

[a] **Other definitions.**—(1) "The art or practice of healing by manual operation." Webster New Int. D. [quot State v. Eustace, 117 Kan. 746, 748, 233 P 109; State v. Johnson, 84 Kan. 411, 417, 114 P 390, 392, 41 LRANS 539 (quot Waldo v. Poe, 14 F. (2d) 749, 753)]. (2) "The branch of the healing art that relates to external injuries, deformities and other morbid conditions to be remedied directly by manual operations or instrumental appliances." Standard D. [quot Beile v. Travelers' Protective Assoc., 155 Mo. A. 629, 647, 135 SW 497]. (3) "Therapy of a distinctly operative kind, such as cutting operations, the reduction and putting up of fractures and dislocations, and similar manual forms of treatment." Century D. [quot Napier v. Greenzweig, 256 Fed. 196, 197, 167 CCA 412]. See Stewart v. Raab, 55 Minn. 20, 21, 56 NW 256.

[b] **"In a narrow technical sense** (1) surgery may consist in the treatment of injuries, deformities, or diseases by mechanical operations only" (Maryland Casualty Co. v. McCallum, 200 Ala. 154, 156, 75 S 902 (2) limited to manual operations usually performed by surgical instruments or appliances (Nelson v. State Bd. of Health, 108 Ky. 769, 779, 57 SW 501, 22 KyL 438, 50 LRA 383 [quot Peo. v. Fajardo, 16 Porto Rico 760, 763]; Smith v. Lane, 24 Hun (N. Y.) 632, 634 [quot Peo. v. Allcut, 117 App. Div. 546, 102 NYS 678, 681 (aff 189 N. Y. 517 mem, 81 NE 1171 mem)]).

65. Century D.

[a] **Another definition.**—"A surgeon's operating room or laboratory." Webster New Int. D.

[b] **On shipboard,** a place where medicines for the use of passengers are kept by the ship's physician. See Allan v. State SS. Co., Ltd., 132 N. Y. 91, 30 NE 482, 484, 28 AmSR 556, 15 LRA 166.

66. "Veterinary surgeon" see infra § 9.

67. Century D. [quot Tucker v. Williamson, 229 Fed. 201, 210].

[a] **Statutory definition.**—"Veterinarian' includes a veterinary physician or veterinary surgeon or veterinary dentist." Act May 5, 1915 (P. L. p 248) § 4 [quot In re Veterinary Medicine, 24 Pa. Dist. 1117].

[b] **One who assumed to diagnose an ailment as cholera,** and who then assumed to administer the virus and serum treatment, was held "practicing as a veterinary" both in the diagnosis and in the treatment. Rader v. Elliot, 181 Iowa 156, 163 NW 406.

[c] **"Veterinarian" not included in term "surgeon"** see Maupin v. Southern Surety Co., 205 Mo. A. 81, 220 SW 20, 22 [Le Grand v. Security Ben. Assoc., 210 Mo. A. 700, 240 SW 852, 854].

68. "Veterinarian" see supra § 8.

Within meaning of regulatory statutes see infra §§ 16–48.

69. Lyford v. Martin, 79 Minn. 243, 244, 82 NW 479.

[a] **Analogous title.**—"The title 'doctor,' used in connection with the initials V. D. (presumably Veterinary Dentist), is likewise in our opinion an analogous title to Veterinary Surgeon." Com. v. Heller, 277 Pa. 539, 543, 121 A 558, 559 [aff and adopt op 80 Pa. Super. 366, 370].

70. [a] **"Acetanilid"** see 1 C. J. p 737.

[b] **"Albolene"** see 2 C. J. p 1026.

[c] **"Alcohol"** see 2 C. J. p 1027.

[d] **"Alkaloid"** see 2 C. J. p 1133.

[e] **"Antipyrine"** see 3 C. J. p 230.

[f] **"Argols"** see 5 C. J. p 280.

[g] **"Arnica"** see 5 C. J. p 372.

[h] **"Arrowroot"** see 5 C. J. p 535.

[i] **"Balm"** see 6 C. J. p 1175.

[j] **"Beck's paste"** see Hanson v. Harris, 44 S. D. 457, 460, 184 NW 262.

[k] **"Borax"** see 9 C. J. p 139.

[l] **"Bromo"** see 9 C. J. p 679.

[m] **"Camphene"** see 9 C. J. p 1120.

[n] **"Chloral hydrate"** see 11 C. J. p 758.

[o] **"Chloroform"** see 11 C. J. p 758.

[p] **"Chymosin"** see 11 C. J. p 764.

[q] **"Cinchona"** see 11 C. J. p 765.

[r] **"Collodion"** see 11 C. J. p 1219.

[s] **"Cordial"** see 13 C. J. p 1235.

[t] **"Creolin-pearson"** see 15 C. J. p 1453.

[u] **"Creosote"** see 15 C. J. p 1453.

[v] **"Cresylic"** see 15 C. J. p 1453.

[w] **"Decoction"** see 18 C. J. p 30.

[x] **"Deleterious"** see 18 C. J. p 472.

[y] **"Dextrine"** see 18 C. J. p 1034.

[z] **"Domestic medicine"** see Domestic 19 C. J. p 388.

[aa] **"Domestic remedy"** see Domestic 19 C. J. p 389.

[ab] **"Dover's powders"** see 19 C. J. p 447.

[ac] **"Enzyme"** see 20 C. J. p 1297.

[ad] **"Extract"** see 25 C. J. p 251.

[ae] **"Glonoin"** see 28 C. J. p 710.

[af] **"Headache wafers"** see 29 C. J. p 236.

[ag] **"Heroin"** see 29 C. J. p 349.

[ah] **"Hyoscin hydrobromate"** see 31 C. J. p 233.

[ai] **"Laudanum"** see 36 C. J. p 957.

[aj] **"Liqueur"** see 37 C. J. p 1263.

[ak] **"Listerine"** see 38 C. J. p 67.

[al] **"Mercurial"** see 40 C. J. p 649.

[am] **"Mixture"** see 40 C. J. p 1231.

[an] **"Narcotic"** see 48 C. J. p 391.

[ao] **"Nostrum"** see 46 C. J. p 497.

[ap] **"Opium"** see 46 C. J. p 1119.

[aq] **"Paraldehyde"** see 46 C. J. p 1176.

[ar] **"Pastille"** see 47 C. J. p 1375.

[as] **"Patent medicines"** see Patent 47 C. J. p 1376.

[at] **"Peptone"** see [30 Cyc 1389].

[au] **"Phenacetin"** see [30 Cyc 1536].

[av] **"Poison"** see Poisons § 1.

[aw] **"Quack medicine"** see [32 Cyc 1276].

[ax] **"Specific"** see [36 Cyc 526].

[ay] **"Tonic"** see [38 Cyc 405].

[az] **"Vaseline"** see [39 Cyc 1125].

[aaa] **"Wood alcohol"** see [40 Cyc 2793].

71. See 1 C. J. p 339.

72. See 1 C. J. p 390.

73. Evans v. Roberts, 172 Iowa 653, 656, 154 NW 923.

74. See 2 C. J. p 313 text and note 25.

75. See 2 C. J. p 1025.

76. See 2 C. J. p 1038.

ic;"[77] "almshouse;"[78] "anaërobes;"[79] "anæsthetic;"[80] "analysis;"[81] "aneurism;"[82] "animal magnetism;"[83] "ankylosis;"[84] "anthrax;"[85] "apothecary;"[86] "arterio-sclerosis;"[87] "asphyxia;"[88] "astragalus;"[89] "asylum;"[90] "autopsy;"[91] "bacteriology;"[92] "barrenness;"[93] "birth;"[94] "blood poisoning;"[95] "bodily infirmity;"[96] "bougie;"[97] "Bright's disease;"[98] "bronchitis;"[99] "bruise;"[1] "Cæsarean operation;"[2] "calcification;"[3] "cerebral atrophy;"[4] "cerebral embolism;"[5] "cerebro-spinal meningitis;"[6] "chemist;"[7] "chiropodist;"[8] "chiropractics;"[9] "chiropractor;"[10] "chirurgeon;"[11] "cholera morbus;"[12] "christian science;"[13] "chronic and incurable disease;"[14] "cicatrix;"[15] "clairvoyant;"[16] "clinical;"[17] "coccyx;"[18] "colitis;"[19] "Colles' fracture;"[20] "complicated fracture;"[21] "compound fracture;"[22] "concussion;"[23] "confinement;"[24] "consultation;"[25] "consulting oculist;"[26] "consulting physician;"[27] "contagion;"[28] "contagious disease;"[29] "contusion;"[30] "cosmopathic;"[31] "decay;"[32] "diabetes;"[33] "diagnose;"[34] "diagnosis;"[35] "diet;"[36] "dilation;"[37] "diphtheria;"[38] "disease;"[39] "disinfect;"[40] "dispensary;"[41] "dispenser;"[42] "dissection;"[43] "distillation;"[44] "druggist;"[45] "drug store;"[46] "Dugas test;"[47] "ecchymosis;"[48] "eclectic practice;"[49] "eczema;"[50] "electro-therapeutics;"[51] "embolism;"[52] "emergency;"[53] "empiricism;"[54] "endarteritis;"[55] "epizoötic;"[56] "erysipelas;"[57] "exigency;"[58] "fallopian tube;"[59] "feeble health;"[60] "floating kidneys;"[61] "fracture;"[62] "frost bite;"[63] "glanders;"[64] "headache;"[65] "healers;"[66] "healing act;"[67] "heart disease;"[68] "heat stroke;"[69] "hemiplegy;"[70] "herbalists;"[71] "hernia;"[72] "herpes;"[73] "herpetiformis;"[74] "homeopathic;"[75] "homeopathic specific;"[76] "hospital;"[77] "hygiene;"[78] "hypnotism;"[79] "hypostasis;"[80] "impotency;"[81] "infection;"[82] "infectious;"[83] "infirmary;"[84] "infirmity;"[85] "influenza;"[86] "insanity" and terms employed in connection therewith;[86½] "itinerant physician;"[87] "jock strap;"[88] "kidney trouble;"[89] "laying on of hands;"[90] "leprosy;"[91] "listerism;"[92] "liver;"[93] "locomotor ataxia;"[94] "magic healer;"[95] "malaria;"[96] "malignant pustule;"[97] "malpractice;"[98] "maltreatment;"[99] "mange;"[1] "manipulate;"[2] "massage;"[3] "masseur;"[4] "mechanotherapy;"[5] "medical;"[6] "medical advice;"[7] "medical attendance;"[8] "medical attendant;"[9] "medical certificate;"[10] "medical college;"[11] "medical degree;"[12] "medical evidence;"[13] "medical examination;"[14] "medical jurisprudence;"[15] "medical or surgical assistance;"[16] "medical or surgical attention received;"[17] "medical treatment;"[18] "medicine;"[19] "meningitis;"[20] "metaphysical healing;"[21] "midwife;"[22] "midwifery;"[23] "Morton toe;"[24] "narcosis;"[25] "naturopath or doctor of naturopathy;"[26]

77. See 2 C. J. p 1153.
78. See 2 C. J. p 1160.
79. See 2 C. J. p 1332.
80. See 2 C. J. p 1332.
81. See 2 C. J. p 1333.
82. See 2 C. J. p 1345.
83. See Magnetism 38 C. J. p 333 text and note 1.
84. Montimer v. Keppler, 3 N. J. Misc. 1036, 130 A 547, 549.
85. See 3 C. J. p 229.
86. See Druggists § 3.
87. See 5 C. J. p 589.
88. See 5 C. J. p 607.
89. McGuire v. Rix, (Nebr.) 225 NW 120, 122.
90. See Asylums § 1.
91. See 6 C. J. p 867.
92. See 6 C. J. p 879.
93. See 7 C. J. p 929.
94. See 8 C. J. p 1111.
95. See 8 C. J. p 1129.
96. See 8 C. J. p 1135.
97. See 9 C. J. p 143.
98. See 9 C. J. p 500.
99. See 9 C. J. p 679.
1. See 9 C. J. p 680.
2. See 9 C. J. p 1115.
3. See 9 C. J. p 1116.
4. See 11 C. J. p 74.
5. See 11 C. J. p 74.
6. Sherwood v. Babcock, 208 Mich. 536, 539, 175 NW 470.
7. See 11 C. J. p 748.
8. See 11 C. J. p 757.
9. See 11 C. J. p 758.
10. See 11 C. J. p 758.
11. See 11 C. J. p 758.
12. See 11 C. J. p 759.
13. See 11 C. J. p 761.
14. See Chronic 11 C. J. p 761 note 80 [a].
15. See 11 C. J. p 764.
16. See 11 C. J. p 827.
17. See 11 C. J. p 917.
18. See 11 C. J. p 938.
19. See 11 C. J. p 958.
20. See 11 C. J. p 1002.
21. See 12 C. J. p 246.
22. See 12 C. J. p 303.
23. See 12 C. J. p 396.
24. See 12 C. J. p 422.
25. See 12 C. J. p 1308.
26. See 12 C. J. p 1308.
27. See 12 C. J. p 1308.
28. See 12 C. J. p 1310.
29. See Contagious 12 C. J. p 1311.
30. See 13 C. J. p 844.
31. See 14A C. J. p 1433.
32. See 18 C. J. p 25.
33. See 18 C. J. p 1035.
34. See 18 C. J. p 1035.
35. See 13 C. J. p 1035.
36. See 18 C. J. p 1036.
37. See 18 C. J. p 1038.
38. See 18 C. J. p 1042.
39. See 18 C. J. p 1139.
40. See 18 C. J. p 1140.
41. See 18 C. J. p 1278.
42. See 18 C. J. p 1278.
43. See 18 C. J. p 1283.
44. See 18 C. J. p 1287.
45. See Druggists § 1.
46. See 19 C. J. p 790.
47. See 19 C. J. p 833.
48. See 19 C. J. p 1009.
49. See 19 C. J. p 1010.
50. McCoy v. Buck, (Ind. A.) 160 NE 46.
51. Century D. [quot Bergman v. Bond, 14 Man. 503, 506 ("the treatment of diseases by means of electricity"). See Larson v. State, 106 Tex. Cr. 261, 285 SW 317.
52. See 20 C. J. p 494.
53. See 20 C. J. p 499. See also infra § 17.
54. See Practice § 6.
55. See 20 C. J. p 1254.
56. See 20 C. J. p 1298.
57. See 21 C. J. p 823.
58. See 25 C. J. p 167.
59. See 25 C. J. p 435.
60. See 25 C. J. p 1010.
61. See 26 C. J. p 742.
62. See 26 C. J. p 1004.
63. See 27 C. J. p 911.
64. See 28 C. J. p 710.
65. See 29 C. J. p 236.
66. See 29 C. J. p 238.
67. See 29 C. J. p 238.
68. See 29 C. J. p 286.
69. See 29 C. J. p 286.
70. See 29 C. J. p 346.
71. Ex p. Chow Juyan, 235 Fed. 1014, 1015 (persons who treat others by the use of drugs, whether exclusively herbal drugs, or otherwise).
72. See 29 C. J. p 349.
73. See 29 C. J. p 349.
74. See 29 C. J. p 349.
75. See 29 C. J. p 769.
76. See 29 C. J. p 769.
77. See Hospitals §§ 1–3.
78. See 31 C. J. p 233.
79. See 31 C. J. p 233.
80. See 31 C. J. p 234.
81. See 31 C. J. p 259.
82. See 31 C. J. p 1180.
83. See 31 C. J. p 1181.
84. See 31 C. J. p 1182.
85. See 31 C. J. p 1182.
86. See 31 C. J. p 1186.
86½. See Insane Persons §§ 1–35.
87. See Itinerant 33 C. J. p 831. See also infra § 87.
88. See 33 C. J. p 835.
89. See 35 C. J. p 913.
90. Ga.—Bennett v. Ware, 4 Ga. A. 293, 297, 61 SE 546.
Ill.—Peo. v. Moser, 176 Ill. A. 625, 627.
N. Y.—Peo. v. Mulford, 140 App. Div. 716, 717, 125 NYS 680 [aff 202 N. Y. 624 mem, 96 NE 1125 mem].
Tex.—Singh v. State, 66 Tex. Cr. 156, 160, 146 SW 891.
Wash.—State v. Pratt, 80 Wash. 96, 98, 141 P 318 (distinguishing "treatment by prayer").
91. See 36 C. J. p 989.
92. See 38 C. J. p 67.
93. See 38 C. J. p 70.
94. See 38 C. J. p 135.
95. Bennett v. Ware, 4 Ga. A. 293, 304, 61 SE 546.
96. See 38 C. J. p 343.
97. See 38 C. J. p 519.
98. See infra § 100.
99. See 38 C. J. p 520.
1. See 38 C. J. p 957.
2. See 38 C. J. p 958.
3. See 38 C. J. p 1384.
4. See 38 C. J. p 1384.
5. See 40 C. J. p 625.
6. See 40 C. J. p 625.
7. See 40 C. J. p 625.
8. See Attendance 6 C. J. p 550 note 64 [d].
9. See Medical 40 C. J. p 625 text and note 21.
10. See Medical 40 C. J. p 625 text and note 22.
11. See Colleges and Universities § 1 note 8 [b].
12. See 40 C. J. p 625.
13. See Medical 40 C. J. p 625 text and note 23.
14. See 40 C. J. p 625.
15. See Medical 40 C. J. p 625 notes 24, 25.
16. See 40 C. J. p 626.
17. See 40 C. J. p 626.
18. See 40 C. J. p 626.
19. See 40 C. J. p 626.
20. See 40 C. J. p 632.
21. See Metaphysical 40 C. J. p 654 note 45 [a].
22. See 40 C. J. p 657.
23. See 40 C. J. p 657.
24. See 42 C. J. p 455.
25. See 45 C. J. p 391.
26. See 45 C. J. p 397.

"naturopathy;"[27] "necroscopy;"[28] "negligence;"[29] "neuropathy;"[30] "nightmare;"[31] "nurse;"[32] "obstetrics;"[33] "oculist;"[34] "ophthalmologist;"[35] "ophthalmology;"[36] "ophthalmometer;"[37] "ophthalmoscope;"[38] "optician;"[39] "optics;"[40] "optometrist;"[41] "optometry;"[42] "orchitis;"[43] "orthopedist;"[44] "osteomyelitis;"[45] "osteopath;"[46] "osteopathy;"[47] "ovaritis;"[48] "overdose;"[49] "palpation;"[50] "pasteurization;"[51] "pathology;"[52] "patient;"[53] "pharmaceutical chemist;"[54] "pharmacist;"[55] "pharmacy;"[56] "physic;"[57] "physiology;"[58] "potion;"[59] "Pott's fracture;"[60] "practice dentistry;"[61] "practice medicine;"[62] "practice of medicine;"[63] "practice of pharmacy;"[64] "practice of surgery;"[65] "pregnant;"[66] "prescribe;"[67] "prescription;"[68] "profession;"[69] "prolicide;"[70] "ptomaine;"[71] "quacks;"[72] "quarantine;"[73] "Rochester Tonic;"[74] "rupture;"[75] "sanipractic physician;"[76] "sanitary;"[77] "scab;"[78] "scar tissue;"[79] "sciatica;"[80] "septicæmia;"[81] "setting up in practice;"[82] "shock;"[83] "sick;"[84] "sickness;"[85] "smallpox;"[86] "specialist;"[87] "spiritualism;"[88] "strabismus;"[89] "suggestive therapeutics;"[90] "surgical operation;"[91] "synovitis;"[92] "syphilis;"[93] "therapeutics;"[94] "therapy;"[95] "throat disease;"[96] "toxicology;"[97] "trauma;"[98] "travail;"[99] "treatment;"[1] "unprofessional conduct;"[2] "vaccination;"[3] "varicose veins;"[4] "verification license;"[5] "viscera;"[6] and "wound."[7-99]

II. RIGHT TO PRACTICE MEDICINE AND SURGERY[1]

[By STANLEY A. HACKETT]

[§ 11] **A. In General.** Practicing medicine is not malum in se[2] or a nuisance per se,[3] and, when unaccompanied by acts which are in themselves evil, vicious, and criminal, is not a crime at common law.[4] While the right to practice medicine or dentistry is a valuable right,[5] and is sometimes said to be a property right[6] or to partake of the nature of both liberty[7] and property,[8] it is not an absolute,[9] unqualified,[10] or vested[11] right, but is subordinate to the police power of the state,[12] and also to the power of congress to make laws necessary and proper for carrying into execution the Eighteenth Amend-

27. See 45 C. J. p 397.
28. See 45 C. J. p 586.
29. See Negligence §§ 1–9. See also infra § 100.
30. See 45 C. J. p 1390.
31. See 46 C. J. p 478.
32. See 46 C. J. p 836.
33. See 46 C. J. p 865.
34. See 46 C. J. p 900.
35. See 46 C. J. p 1117.
36. See 46 C. J. p 1117.
37. See 46 C. J. p 1117.
38. See 46 C. J. p 1117.
39. See 46 C. J. p 1122.
40. See 46 C. J. p 1122.
41. See 46 C. J. p 1123.
42. See 46 C. J. p 1124.
43. See 46 C. J. p 1130.
44. See 46 C. J. p 1141.
45. Osborn v. Cary, 28 Ida. 89, 93, 152 P 473; Edwards v. Uland, (Ind. A.) 131 NE 240, 242.
46. See 46 C. J. p 1142.
47. See 46 C. J. p 1142.
48. Barrett v. Brand, 179 Ky. 740, 741, 201 SW 331.
49. See 46 C. J. p 1161.
50. See 46 C. J. p 1171.
51. See 47 C. J. p 1375.
52. See ante p 419.
53. See ante p 419.
54. See Druggists § 2.
55. See Druggists § 2.
56. See ante p 1054.
57. See ante p 1056.
58. See post p 1178.
59. See [31 Cyc 1029].
60. See [31 Cyc 1030].
61. See Practice § 12.
62. See Practice § 14.
63. See Practice § 6.
64. See Practice § 7.
65. See Practice § 8.
66. See [31 Cyc 1160].
67. See [31 Cyc 1165].
68. See [31 Cyc 1165].
69. See [32 Cyc 583].
70. See [32 Cyc 633].
71. See [32 Cyc 747].
72. Holtzman v. Hoy, 118 Ill. 534, 536, 8 NE 832, 59 AmR 390.
73. See [32 Cyc 1285].
74. See [34 Cyc 1814].
75. See [34 Cyc 1823].
76. State v. Maybury, 134 Wash. 641, 642, 236 P 566.
77. See [35 Cyc 792].
78. See [35 Cyc 797].
79. See [35 Cyc 798].
80. Miller v. Blackburn, 170 Ky. 263, 264, 185 SW 864.
81. See [35 Cyc 1380].
82. See [35 Cyc 1441].
83. See [36 Cyc 430].
84. See [36 Cyc 435].
85. See [36 Cyc 436].
86. See [36 Cyc 496].
87. See [36 Cyc 522]. See also infra § 101.
88. See [36 Cyc 806].
89. Feeney v. Spalding, 89 Me. 111, 35 A 1027.
90. Peo. v. Mulford, 140 App. Div. 716, 717, 125 NYS 680 [aff 202 N. Y. 624 mem, 96 NE 1125 mem]; State v. Pratt, 80 Wash. 96, 98, 141 P 318.
91. See Operation 46 C. J. p 1114 text and notes 97–2. See also Jacobs v. Bd. Dental Examiners, 189 Cal. 709, 209 P 1006; Peo. v. Fajardo, 16 Porto Rico 760.
92. See [37 Cyc 662].
93. Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512, 514.
94. Bergman v. Bond, 14 Man. 503, 508 ("that part of medicine which relates to the composition, the application, and the modes of operation of the remedies for diseases").
95. See [38 Cyc 280].
96. See [38 Cyc 301].
97. See [38 Cyc 668].
98. See [38 Cyc 948].
99. See [38 Cyc 948].
1. See [38 Cyc 983].
2. Forman v. State Bd. of Health, 157 Ky. 123, 128, 162 SW 796. See infra § 72.
3. See [39 Cyc 1107].
4. Nicholas v. Jacobson, (Cal.) 271 P 1057, 1058.
5. State Bd. of Medical Examiners v. Taylor, 103 Tex. 444, 446, 129 SW 600. See also infra § 86.
6. See [40 Cyc 211].
7–99. See [40 Cyc 2865].

1. Cross references:
Agreement not to practice in certain locality see Contracts §§ 416, 417, 419.
Right:
Of corporation to practice medicine or dentistry see Corporations § 2145.
To:
Incorporate for practice of medicine see Corporations § 119 note 99 [e].
Practice under license see infra § 63.

2. Peo. v. Cole, 219 N. Y. 98, 113 NE 790, LRA1917C 816.
[a] **"Originally** any person might legally practice medicine or dentistry." Indiana State Bd. of Dental Examiners v. Davis, 69 Ind. A. 109, 121 NE 142, 148.
[b] **"At common law** . . . the practice of medicine was open to all people who desired to practice it, subject to liability for damages for lack of skill, and to the right of the government to proceed by quo warranto to prevent incompetents from following the business." Redmond v. State, (Miss.) 118 S 360, 366.
3. Redmond v. State, supra (at common law).
Practicing without license as nuisance per se see infra § 16.
4. Peo. v. Cole, 219 N. Y. 98, 113 NE 790, LRA1917C 816.
5. Colo.—Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas 1915D 1188.
Ga.—Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 134 SE 42.
Ida.—Abrams v. Jones, 35 Ida. 532, 543, 207 P 724.
Iowa.—Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116.
W. Va.—State v. Morrison, 98 W Va. 289, 127 SE 75.
"The right to practice dentistry, like the right to practice any other profession, is a valuable personal right." Abrams v. Jones, supra.
6. Butcher v. Maybury, 8 F. (2d) 155; Bley v. Board of Dental Examiners, (Cal. A.) 261 P 1036, 1037; State Bd. of Medical Examiners v. Friedman, 150 Tenn. 152, 263 SW 75; State v. Morrison, 98 W. Va. 289, 127 SE 75.
"The right to practice dentistry, acquired by several years of study and training, is a property right." Bley v. Board of Dental Examiners, supra.
7. Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174.
8. Lawrence v. Board of Registration in Medicine, supra.
9. Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem]; Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 S 809; Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174.
10. Butcher v. Maybury, 8 F. (2d) 155; Horton v. Clark, 316 Mo. 770, 293 SW 362.
11. State v. McIntosh, 205 Mo. 616, 636, 108 SW 1071; State v. McIntosh, 205 Mo. 589, 103 SW 1078; State v. Davis, 194 Mo. 485, 92 SW 484, 4 LRANS 1023, 5 AnnCas 1000.
"The theory that an individual has a vested right to practice dentistry is a rank heresy, finding no place in the philosophy of the law." State v. McIntosh, supra.
[a] **Midwife** has no vested right to practice as such. Barresi v. Biggs, 203 App. Div. 2, 196 NYS 376 (concurring opinion of Hinman, J.).
12. Lambert v. Yellowley, 272 U.

ment.[13] No one has a right to practice medicine or dentistry without having the necessary qualifications of learning and skill.[14] It is sometimes said that the practice of medicine is a mere privilege.[15-42]

[§ 12] **B. Regulation or Prohibition[43]—1. In General.** In the proper exercise of the police power of a state,[44] the legislature thereof may control[45] and reasonably regulate[46] the practice of medicine and surgery without violating constitutional provisions.[47] Likewise, the legislature may regulate the practice of chiropody,[48] chiropractics,[49] dentistry,[50] optometry,[51] osteopathy,[52] or veterinary medicine, surgery, and dentistry,[53] it being within its power to regulate not only the practice of medicine in its most general sense,[54] but also the practice of

S. 581, 47 SCt 210, 71 L. ed. 422, 49 ALR 575 [aff 4 F. (2d) 915 (rev 291 Fed. 640)]; Butcher v. Maybury, 8 F. (2d) 155; Horton v. Clark, 316 Mo. 770, 293 SW 362; Laughney v. Maybury, 145 Wash. 146, 259 P 17, 54 A LR 393.

[a] **Paramount power of state.**— (1) The right to practice must yield to the paramount right of the government to protect the public health by any rational means. Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174. (2) "The right of a citizen to practice medicine is subject to the paramount power of the state to impose such regulations, within the limitations of the constitution, as may be required to protect the people against ignorance, incapacity, deception or fraud in the practice of that profession." Peo. v. Witte, 315 Ill. 282, 285, 146 NE 178, 37 ALR 672.

Regulation of practice under police power generally see infra § 12.

13. Lambert v. Yellowley, 272 U. S. 581, 47 SCt 210, 71 L. ed. 422, 49 ALR 575.

Federal regulation of prescriptions for intoxicants see Intoxicating Liquors § 241.

14. Dent v. West Virginia, 129 U. S. 114, 9 SCt 231, 32 L. ed. 623; Samples v. State, 19 Ala. A. 478, 98 S 211 [certiorari den and aff 210 Ala. 544, 98 S 803].

15-42. State v. Edmunds, 127 Iowa, 333, 101 NW 431; Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 S 809.

43. Cross references:
Prohibition of practice in hospital by certain class of physicians see Hospitals § 7.
Regulation of prescriptions for:
Intoxicating liquors see Intoxicating Liquors § 241.
Narcotics see Poisons.

44. U. S.—Watson v. Maryland, 218 U. S. 173, 30 SCt 644, 54 L. ed. 987.

Ala.—Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296.

Ark.—State v. McCrary, 92 SW 775; Thompson v. Van Lear, 77 Ark. 506, 92 SW 773, 5 LRANS 588; Richardson v. State, 47 Ark. 562, 2 SW 187.

Colo.—Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.

D. C.—Czarra v. Board of Medical Suprs., 25 App. 443.

Ill.—Peo. v. Witte, 315 Ill. 282, 146 NE 178, 37 ALR 672.

Ind.—State v. Webster, 150 Ind. 607, 50 NE 750, 41 LRA 212.

Iowa.—State v. Hueser, 205 Iowa 132, 215 NW 643; Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116.

La.—Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem].

Mich.—Peo. v. Cramer, 225 NW 595; Peo. v. Blair, 192 Mich. 183, 158 NW 889; Locke v. Judge Iona Cir. Ct., 184 Mich. 535, 151 NW 623; Peo. v. Reetz, 127 Mich. 87, 86 NW 396.

Minn.—State v. State Medical Examining Bd., 32 Minn. 324, 20 NW 238, 50 AmR 575.

Mont.—State v. First Judicial Dist. Ct. Dept. No. 2, 26 Mont. 121, 66 P 754.

Nebr.—Lincoln Medical College v. Poynter, 60 Nebr. 228, 82 NW 855.

N. M.—In re Roe Chung, 9 N. M. 130, 49 P 952.

N. Y.—Peo. v. Ellis, 162 App. Div. 288, 147 NYS 681.

Oh.—State v. Marble, 72 Oh. St. 21, 73 NE 1063.

Okl.—Reeves v. State, (Cr.) 253 P 510, 511 [cit Cyc]; In re Ambler, 11 Okl. Cr. 449, 148 P 1061.

Pa.—Com. v. Densten, 30 Pa. Super. 631; Com. v. Wilson, 6 Pa. Dist. 628, 19 Pa. Co. 521.

S. D.—State v. Doran, 28 S. D. 486, 134 NW 53.

Tex.—Hicks v. State, 88 Tex. Cr. 438, 227 SW 302.

Wash.—Laughney v. Maybury, 145 Wash. 146, 259 P 17, 54 ALR 393; State Bd. of Medical Examiners v. Harrison, 92 Wash. 577, 159 P 769.

W. Va.—State v. Morrison, 98 W. Va. 289, 127 SE 75.

[a] **Health and safety of people.**— The right of a state to enact such laws proceeds from its inherent power to prescribe such rules as will protect the health and safety of the people. Driscoll v. Com., 93 Ky. 393, 20 SW 431, 703, 14 KyL 376; State v. Vandersluis, 42 Minn. 129, 43 NW 789, 6 LRA 119; State v. State Medical Examining Bd., 32 Minn. 324, 20 NW 238, 50 AmR 575; Com. v. Irving, 1 LegChron (Pa.) 69; Antle v. State, 6 Tex. A. 202.

Police power generally see Constitutional Law §§ 412-443.

45. Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158; Locke v. Judge Ionia Cir. Ct., 184 Mich. 535, 151 NW 623.

46. Cal.—Bohannon v. Board of Medical Examiners, 24 Cal. A. 215, 140 P 1089.

Ida.—Barton v. Schmershall, 21 Ida. 562, 122 P 385.

Mich.—Locke v. Judge Ionia Cir. Ct., 184 Mich. 535, 151 NW 623.

N. C.—State v. Siler, 169 N. C. 314, 84 SE 1015.

Oh.—Williams v. Scudder, 102 Oh. St. 305, 131 NE 481; Nesmith v. State, 101 Oh. St. 158, 128 NE 57.

Tenn.—Tennessee v. Anderson, 6 Tenn. Civ. A. 1.

Tex.—Gay v. State, 79 Tex. Cr. 305, 184 SW 200.

Particular regulations see infra §§ 13, 14, 50-60, 64-72, 88, 91-93.

47. Ala.—Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925.

Cal.—Ex p. McNulty, 77 Cal. 164, 19 P 237, 11 AmSR 257.

Ga.—Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 134 SE 42.

Ind.—Spurgeon v. Rhodes, 167 Ind. 1, 78 NE 228.

Iowa.—State v. McAninch, 172 Iowa 96, 154 NW 399, AnnCas1918A 559; State v. Adkins, 145 Iowa 671, 124 NW 627; State v. Kendig, 133 Iowa 164, 110 NW 463; State v. Wilhite, 132 Iowa 226, 109 NW 730.

Kan.—State v. Creditor, 44 Kan. 565, 24 P 346, 21 AmSR 306.

Ky.—Wilson v. Com., 119 Ky. 769, 82 SW 427, 26 KyL 685.

Me.—State v. Bohemier, 96 Me. 257, 52 A 643.

Mass.—Davis v. Board of Registration in Medicine, 251 Mass. 283, 146 NE 708.

Minn.—State v. State Medical Examining Bd., 32 Minn. 324, 20 NW 238, 50 AmR 575.

Mont.—State v. Dodd, 51 Mont. 100, 149 P 481; State v. First Judicial Dist. Ct., 26 Mont. 121, 66 P 754.

Nebr.—Carpenter v. State, 106 Nebr. 742, 184 NW 941.

Oh.—State v. Marble, 72 Oh. St. 21, 73 NE 1063, 106 AmSR 570, 70 LRA 835; State v. Morrill, 7 OhS&CP 52, 5 OhNP 133; State v. Ottman, 6 Oh S&CP 265, 4 OhNP 195.

Okl.—In re Ambler, 11 Okl. Cr. 449, 148 P 1061.

Pa.—Com. v. Densten, 217 Pa. 423, 66 A 653; Com. v. Taylor, 2 Kulp 364.

Tenn.—O'Neil v. State, 115 Tenn. 427, 90 SW 627, 3 LRANS 762.

Tex.—Hyroop v. State, 79 Tex. Cr. 150, 179 SW 878; Herrington v. State, 73 Tex. Cr. 359, 166 SW 721.

Wash.—Laughney v. Maybury, 145 Wash. 146, 259 P 17, 54 ALR 393; State v. Bonham, 93 Wash. 489, 161 P 377, LRA1917D 996; State Bd. of Medical Examiners v. Harrison, 92 Wash. 577, 159 P 769.

Wis.—State v. Currens, 111 Wis. 431, 87 NW 561, 56 LRA 252.

Cross references:
Class legislation see Constitutional Law § 860.
Title of act see Statutes [36 Cyc 1046].

48. State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835.

[a] **Relation to public health.**— The legislature may reasonably regulate chiropody as a calling bearing some relation to the public health. State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835.

49. Peo. v. Walder, 317 Ill. 524, 148 NE 287; State v. Greiner, 63 Wash. 46, 114 P 897.

50. Ark.—Gosnell v. State, 52 Ark. 228, 12 SW 392.

Cal.—Ex p. Whitley, 144 Cal. 167, 77 P 879.

Fla.—Noble v. State, 68 Fla. 1, 66 S 153.

Ida.—Abrams v. Jones, 35 Ida. 532, 207 P 724.

Ill.—Kettles v. Peo., 221 Ill. 221, 77 NE 472.

Kan.—Winslow v. Kansas State Bd. of Dental Examiners, 115 Kan. 450, 223 P 308.

Ky.—Hogden v. Com., 142 Ky. 722, 135 SW 311.

Mich.—Peo. v. Blair, 192 Mich. 183, 158 NW 889.

Minn.—State v. Vandersluis, 42 Minn. 129, 43 NW 789, 6 LRA 119.

N. J.—State v. Chapman, 69 N. J. L. 464, 55 A 94 [aff 70 N. J. L. 339, 57 A 1133].

Okl.—State Bd. of Dental Examiners v. Pollock, 125 Okl. 170, 256 P 927.

Pa.—Com. v. Gibson, 7 Pa. Dist. 386, 21 Pa. Co. 232.

Wash.—Noble v. Dibble, 119 Wash. 509, 205 P 1049; State v. Sexton, 37 Wash. 110, 79 P 634; In re Thompson, 36 Wash. 377, 78 P 899; State v. Dental Examiners Bd., 31 Wash. 492, 72 P 110.

51. Com. v. Houtenbrink, 235 Mass. 320, 126 NE 669; Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237; Saunders v. Swann, 155 Tenn. 310, 292 SW 458; State v. Utah State Bd. of Examiners in Optometry, 37 Utah 339, 108 P 347.

52. Com. v. Moyer, 23 Pa. Dist. 164.

53. Pistole v. State, 68 Tex. Cr. 127, 150 SW 618.

[a] **History of statutory regulation** of the practice of veterinary medicine and surgery in Pennsylvania begins with the act of April 11, 1889 (P. L. p 28), which was followed, in turn, by the acts of April 29, 1891 (P. L. p 36); May 16, 1895 (P. L. p 79); April 18, 1905 (P. L. p 209); April 29, 1909 (P. L. p 277); and May 5, 1915 (P. L. p 248). Com. v. Heller, 80 Pa. Super. 366 [aff 277 Pa. 539, 121 A 558].

54. McNaughton v. Johnson, 242 U. S. 344, 37 SCt 178, 61 L. ed. 334,

any part of medicine and surgery[55] or any branch or department of the healing art.[56-99] However, to be valid, the regulations enacted by the legislature must be reasonable[1-16] and bear some relation to the service to be rendered by the practitioner,[17] as well as to the end or object to be attained,[18] which is to protect the public from being mistreated or mislead by incompetent or unscrupulous practitioners,[19] or, as sometimes stated, they must be reasonably necessary and appropriate for the accomplishment of legitimate objects within the domain of the police power.[20] Also, while the legislature may regulate practice by prohibiting a person from engaging in it unless he holds a license or certificate,[21] or is registered,[22] its power does not extend to an absolute and unqualified prohibition of practice.[23]

Congress has power to regulate the practice of medicine and surgery in the District of Columbia.[24]

In Canada the legislature of a province may regulate the practice of medicine.[25]

State board of optometry can adopt no rules and regulations which are inconsistent with the express provisions of a statute.[26]

Amendment or repeal of statutes. The rules governing the amendment[27] and repeal[28] of statutes generally are applicable in determining whether a statute regulating the practice of medicine, surgery, or dentistry have been amended[29] or repealed.[30]

Application of statutes.[31] A state statute regulating the practice of medicine and surgery may be applicable to all persons in the state who practice medicine and surgery,[32] or the art of healing,[33] regardless of the therapeutic agency employed.[34] Also, such a statute may apply to physicians or healers practicing when it takes effect.[35] However, a general medical practice act may properly provide that it shall not apply to dentists, pharmacists, and optometrists to the extent that the practice of their professions is regulated by other statutes applicable thereto.[36] In the absence of dominion legislation on the subject, a statute enacted by a Canadian province is applicable to an Indian residing on a reservation and practicing medicine outside of the reservation, with white persons as patients.[37]

Construction of statutes. Generally speaking, statutes enacted for the purpose of regulating and safeguarding the practice of medicine and surgery,[38] and thereby protecting the public health,[39] should be given a liberal construction, but, at least in some jurisdictions, this is not true of statutes creating offenses.[40] Two or more statutes relating to the same subject matter are to be read together as parts of a homogeneous body of laws;[41] and different sections of the same statute will, so far as practicable, be reconciled so as to make them harmonious and consistent.[42-56]

[§ 13] **2. Conditions—a. In General.** The state may impose conditions upon the exercise of the right or privilege of practicing medicine.[57] The only limit to the legislative power in prescribing conditions to the right to practice is that they shall be reasonable;[58] and whether they are reasonable the courts must judge.[59] The fact that the conditions may be

AnnCas1917B 801; State v. State Bd. of Medical Examiners, 209 Ala. 9, 95 S 295.

55. Williams v. Scudder, 102 Oh. St. 305, 131 NE 481.

56-99. State v. Johnson, 84 Kan. 411, 114 P 390, 41 LRANS 539.

[a] **Drugless treatment.**—(1) A state statute regulating the practice of treating diseases without the use of drugs does not violate the federal constitution. Ex p. Chow-Juyan, 235 Fed. 1014. (2) "The regulation of drugless healers is a proper exercise of the police power." Butcher v. Maybury, 8 F. (2d) 155, 158.

1-16. U. S.—Butcher v. Maybury, supra.

Colo.—Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas1915D 1188.

Ida.—State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835.

Iowa.—Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116.

Oh.—Williams v. Scudder, 102 Oh. St. 305, 131 NE 481.

Pa.—Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237.

[a] **Acquisition of business.**—(1) The legislature cannot unreasonably prevent or limit the practitioner from acquiring the business for which he was licensed, nor can it adopt, as regulations, the ethics of the profession which may limit the practice to be secured or the method of procuring it. Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237. (2) Advertising or soliciting see infra § 91.

17. Butcher v. Maybury, 8 F. (2d) 155.

18. State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835; Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237.

19. State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835.

20. Peo. v. Witte, 315 Ill. 282, 148 NE 178, 37 ALR 672.

21. See infra § 14.

22. See infra § 88.

23. State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835 (chiropody, it not being a calling inherently injurious to the public health, safety, or morals, or having a tendency in that direction); Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem] (medicine and surgery). Compare State v. Waldram, 64 Utah 406, 409, 231 P 431 (dictum that "the Legislature has the power to prohibit the practice of chiropractics").

24. Czarra v. Board of Medical Suprs., 25 App. (D. C.) 443.

25. Lafferty v. Lincoln, 38 Can. S. C. 620.

26. Davis v. California State Bd. of Optometry, 83 Cal. A. 488, 257 P 197.

Rules and regulations as to licenses and qualifications of applicants therefor see infra §§ 58, 59.

27. See Statutes [36 Cyc 1053].

28. See Statutes [36 Cyc 1068].

29. See case infra this note.

[a] **Statute held not impliedly amended.**—Peo. v. Blair, 192 Mich. 183, 158 NW 889.

30. See infra this note.

[a] **Statute held repealed.**—Webster v. State Bd. of Health, 130 Ky. 191, 113 SW 415.

31. Application:

Of particular regulatory statutes see infra §§ 16-34, 85-94.

To physicians, of laws relating to:

Intoxicating liquors see Intoxicating Liquors §§ 106, 190, 241.

Poisons see Poisons [31 Cyc 899].

32. State Bd. of Medical Examiners v. O'Neill, (N. J. Sup.) 143 A 814.

33. State v. Collins, 178 Iowa 73, 159 NW 604.

34. State v. Collins, supra.

35. Butcher v. Maybury, 8 F. (2d) 155; Peo. v. Brod, 197 Ill. A. 358.

Partial or total exemption of prior practitioners from particular requirements see infra §§ 17, 53.

36. Peo. v. Witte, 315 Ill. 282, 146 NE 178, 37 ALR 672.

37. Rex v. Hill, 15 Ont. L. 406, 11 OntWR 20.

38. State v. State Bd. of Medical Examiners, 209 Ala. 9, 95 S 295.

39. Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.

40. See infra § 15.

41. Com. v. Craig, 144 Ky. 249, 137 SW 1083.

42-56. Victor's Application, 27 Cal. A. 73, 148 P 975.

57. U. S.—Collins v. Texas, 223 U. S. 288, 32 SCt 286, 56 L. ed. 439 [aff 57 Tex. Cr. 2, 121 SW 501].

Iowa.—State v. Corwin, 151 Iowa 420, 131 NW 659; State v. Edmunds, 127 Iowa 333, 101 NW 431.

La.—Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 S 809.

Mich.—Peo. v. Cramer, 225 NW 595.

N. Y.—Peo. v. Hawker, 152 N. Y. 234, 46 NE 607 [aff 170 U. S. 189, 18 SCt 573, 42 L. ed. 1002].

[a] **General practice or single transaction.**—If the legislature may prohibit a general practice for money except on a stated condition, it may attach the same condition to a single transaction not likely to occur otherwise than as an instance of a general practice. Collins v. Texas, 223 U. S. 288, 32 SCt 286, 56 L. ed. 439 [aff 57 Tex. Cr. 2, 121 SW 501].

Conditions as not violative of rights secured by federal constitution see Constitutional Law § 841.

58. Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 77, 141 P 132, 51 LRANS 958, AnnCas 1915B 1188 [quot Cyc]; State v. Vandersluis, 42 Minn. 129, 43 NW 789, 6 LRA 119.

[a] **If condition is clearly arbitrary and capricious;** if no reason with reference to the end in view can be assigned for it; and especially if it appears that it must have been adopted for some other purpose—such as to favor or benefit some person or class of persons—it will be held unreasonable and beyond the power of the legislature to impose. State v. Vandersluis, 42 Minn. 129, 43 NW 789, 6 LRA 119; State v. Gravett, 65 Oh. St. 289, 62 NE 325, 87 AmSR 605, 55 LRA 791.

59. Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 77, 141 P 132, 51 LRANS 958, AnnCas 1915B 1188 [quot Cyc]; State v. Vandersluis, 42 Minn. 129, 43 NW 789,

rigorous does not render the legislation invalid where they are adopted in good faith,[60] operate equally upon all who desire to practice and who possess the required qualifications,[61] are appropriate to the end in view, namely, the protection of the public,[62] and are attainable by reasonable study or application.[63]

[§ 14] **b. License or Certificate—(1) In General—(a) Power To Require.** In so far as practice within a particular state is concerned, the legislature thereof has power to require a license or certificate for the practice of medicine and surgery,[64] or for the diagnosis[65] and treatment[66] of human diseases as a profession and for a livelihood;[67] to forbid or prohibit practice without a license or certificate;[68] to make practicing without a license or certificate an offense;[69] to define, or state what acts shall constitute, the practice of medicine[70] or the healing art[71] within the meaning of the requirement, prohibition, or penal provision; and to make reasonable exemptions of certain classes of persons or services from the operation of the statutes.[72] Likewise, statutes forbidding, prohibiting, or making criminal the practice of chiropractics,[73] dentistry,[74]

6 LRA 119.

60. See cases infra note 61.

61. State v. Creditor, 44 Kan. 565, 24 P 346, 21 AmSR 306; State v. Chapman, 69 N. J. L. 464, 55 A 94.

62. See cases infra note 63.

63. Dent v. West Virginia, 129 U. S. 114, 9 SCt 231, 32 L. ed. 623; State v. Vandersluis, 42 Minn. 129, 43 NW 789, 6 LRA 119; Williams v. Scudder, 102 Oh. St. 305, 314, 131 NE 481 [cit Cyc]; State v. Currens, 111 Wis. 431, 87 NW 561, 56 LRA 252.

64. U. S.—Dent v. West Virginia, 129 U. S. 114, 9 SCt 231, 32 L. ed. 623.

Ida.—State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835.

Iowa.—Fairfield v. Shallenberger, 135 Iowa 615, 113 NW 459.

La.—Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem].

N. C.—State v. Siler, 169 N. C. 314, 84 SE 1015.

Oh.—Nesmith v. State, 101 Oh. St. 158, 128 NE 57.

Okl.—Harris v. State, (Cr.) 271 P 263.

Pa.—Com. v. Densten, 30 Pa. Super. 631 [aff 217 Pa. 423, 66 A 653].

S. D.—State v. Doran, 28 S. D. 486, 134 NW 53.

Tex.—Lewis v. State, 69 Tex. Cr. 593, 155 SW 523; Ex p. Collins, 57 Tex. Cr. 2, 121 SW 501 [aff 223 U. S. 288, 32 SCt 286, 56 L. ed. 439]; Stone v. State, 48 Tex. Cr. 114, 86 SW 1029.

Wash.—State v. Pratt, 80 Wash. 96, 141 P 318.

[a] **Police power.**—A statute requiring a license to practice medicine is clearly within the police power as a regulation of public health. Nesmith v. State, 101 Oh. St. 158, 128 NE 57.

[b] **Persons who have been practicing** may be required to obtain a license before engaging in further practice. Peo. v. Fulda, 52 Hun 65, 4 NYS 945.

[c] **If statutes do not discriminate** between the different schools of medicine, but merely exact that the practitioner of whatever school shall have a certificate from the board of medical examiners, and shall exercise the skill usually possessed by practitioners in good standing of that school, they are valid. State v. Heath, 125 Iowa 585, 101 NW 429; Stone v. State, 48 Tex. Cr. 114, 86 SW 1029.

License as monopoly see Monopolies § 25.

65. Peo. v. Jordan, 172 Cal. 391, 156 P 451.

66. Ferguson v. State, 215 Ala. 244, 110 S 20; Jackson v. State, 19 Ala. A. 633, 99 S 826; McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708].

67. Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440].

68. Ark.—Thompson v. Van Lear, 77 Ark. 506, 92 SW 773, 5 LRANS 588, 7 AnnCas 154; Richardson v. State, 47 Ark. 562, 2 SW 187.

Cal.—Ex p. Whitley, 144 Cal. 167, 77 P 879, 1 AnnCas 13; Ex p. McNulty, 77 Cal. 164, 19 P 237, 11 AmSR 257.

Ind.—Orr v. Meek, 111 Ind. 40, 11 NE 787; Eastman v. State, 109 Ind. 278, 10 NE 97, 58 AmR 400.

Iowa.—Fairfield v. Shallenberger, 135 Iowa 615, 113 NW 459.

Ky.—Matthews v. Murphy, 63 SW 785, 23 KyL 750, 54 LRA 415.

Me.—Bibber v. Simpson, 59 Me. 181.

Mass.—Com. v. Jewelle, 199 Mass. 558, 85 NE 858; Com. v. Porn, 196 Mass. 326, 82 NE 31, 17 LRANS 94, 13 AnnCas 569.

Mich.—Locke v. Judge Ionia Cir. Ct., 184 Mich. 535, 151 NW 623; Peo. v. Reetz, 127 Mich. 87, 86 NW 396.

Mo.—State v. Gregory, 83 Mo. 123, 53 AmR 565.

Nebr.—In re Barnes, 83 Nebr. 443, 119 NW 662.

N. J.—State v. Chapman, 69 N. J. L. 464, 55 A 94 [aff 70 N. J. L. 339 mem, 57 A 1133 mem].

N. M.—In re Roe Chung, 9 N. M. 130, 49 P 952.

N. Y.—Finch v. Gridley, 25 Wend. 469.

N. C.—State v. Biggs, 133 N. C. 729, 46 SE 401, 98 AmSR 731, 64 LRA 139.

Or.—State v. Smith, 273 P 343; State v. Randolph, 23 Or. 74, 31 P 201, 37 AmSR 655, 17 LRA 470.

Pa.—Com. v. Seibert, 262 Pa. 345, 105 A 507.

Tenn.—O'Neil v. State, 115 Tenn. 427, 90 SW 627, 3 LRANS 762.

Tex.—Logan v. State, 5 Tex. A. 306.

Wash.—State v. Carey, 4 Wash. 424, 30 P 729.

Wis.—State v. Currens, 111 Wis. 431, 87 NW 561, 56 LRA 252.

"The power to license involves the power to prohibit and punish those attempting to practice the healing art without a license." Locke v. Judge Ionia Cir. Ct., 184 Mich. 535, 539, 151 NW 623.

Forbidding practice without license as violating guaranty of religious liberty see Constitutional Law § 454.

69. Ala.—Fason v. State, 19 Ala. A. 533, 98 S 702; Smith v. State, 8 Ala. A. 352, 63 S 28.

Colo.—Peo. v. Max, 70 Colo. 100, 198 P 150.

Ill.—Peo. v. Kane, 288 Ill. 235, 123 NE 265.

Ind.—Melville v. State, 173 Ind. 352, 89 NE 490, 90 NE 467.

La.—Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 S 809.

Mass.—Com. v. Zimmerman, 221 Mass. 184, 108 NE 893, AnnCas1916A 858.

Mo.—State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179.

Nebr.—Little v. State, 60 Nebr. 749, 84 NW 248, 51 LRA 717.

N. Y.—Peo. v. Mulford, 140 App. Div. 716, 125 NYS 680 [aff 202 N. Y. 624 mem, 96 NE 1125 mem].

[a] **Statute is valid as exercise of police power.**—Ex p. Smith, 183 Ala. 116, 63 S 70 [aff 8 Ala. A. 352, 63 S 28]; Fason v. State, 19 Ala. A. 533, 98 S 702; Peo. v. Kane, 288 Ill. 235, 123 NE 265; State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179.

[b] **Regulating statute.**—A statute making it an offense to practice without a license is regulatory, rather than prohibitive, and hence will not be declared void on the ground that it is prohibitive. Little v. State, 60 Nebr. 749, 84 NW 248, 51 LRA 717 (statute is prohibitive only as to persons who are not duly licensed).

70. Colo.—Smith v. Peo., 51 Colo. 270, 274, 117 P 612, 36 LRANS 158 [cit Cyc].

Ill.—Peo. v. Kane, 288 Ill. 235, 123 NE 265.

Iowa.—State v. Corwin, 151 Iowa 420, 131 NW 659.

Ky.—Frank v. South, 175 Ky. 416, 194 SW 375, AnnCas1918E 682.

La.—Louisiana State Bd. of Medical Examiners v. Cronk, 157 La. 321, 102 S 415.

Nebr.—Little v. State, 60 Nebr. 749, 84 NW 248, 51 LRA 717.

S. D.—State v. Yegge, 19 S. D. 234, 103 NW 17, 69 LRA 504.

Tex.—Baker v. State, 91 Tex. Cr. 521, 240 SW 924, 22 ALR 1163.

Wis.—Piper v. State, 163 Wis. 604, 158 NW 319.

Compare State v. Biggs, 133 N. C. 729, 46 SE 401, 98 AmSR 731, 64 LRA 139 (statutory definition in question is too sweeping).

71. State v. Edmunds, 127 Iowa 333, 101 NW 431.

72. Louisiana State Bd. of Medical Examiners v. Charpentier, 140 La. 405, 73 S 248 [foll Louisiana State Bd. of Medical Examiners v. Vincent, 140 La. 411, 73 S 250]; Com. v. Wilson, 6 Pa. Dist. 628, 19 Pa. Co. 521; and cases infra this note.

[a] **Particular exemptions upheld** include: (1) Treatment by prayer or spiritual means. Peo. v. Jordan, 172 Cal. 391, 156 P 451; Ex p. Bohannon, 14 Cal. A. 321, 111 P 1039; Peo. v. Witte, 315 Ill. 282, 146 NE 178, 37 ALR 672. (2) Nonitinerant opticians engaged in the practice of optometry. Parks v. State, 159 Ind. 211, 64 NE 862, 59 LRA 190. (3) Persons who practiced before a certain date. State v. Call, 121 N. C. 643, 28 SE 517 (date of enactment of prior statute). (4) A physician or surgeon who is called from another state to treat a particular case and who does not otherwise practice in the state. State v. Bohemier, 96 Me. 257, 52 A 643. (5) A physician who is duly authorized to practice under the laws of another state, does not maintain an office in the state and is either called into consultation with a legal practitioner of the state, or resides in, or on the border of, a neighboring state and has a practice extending into the state. Parks v. State, supra; State v. Smith, (Or.) 273 P 343.

Constitutionality as against particular objections see Constitutional Law §§ 836, 841, 860, 896.

73. Frutiger v. State, 215 Ala. 451, 111 S 37; Harris v. State, 215 Ala. 56, 109 S 291.

74. Ala.—Ex p. Samples, 210 Ala. 544, 98 S 803 [den certiorari and aff 19 Ala. A. 478, 98 S 211].

Cal.—Ex p. Whitley, 144 Cal. 167, 77 P 879, 1 AnnCas 13.

Minn.—State v. Crombie, 107 Minn. 171, 119 NW 660.

N. J.—Lowrie v. State Bd. of Registration, etc., 90 N. J. L. 54, 99 A 927.

N. Y.—Peo. v. Griswold, 213 N. Y. 92, 106 NE 929, LRA1915D 538.

S. D.—State v. Carlisle, 28 S. D.

optometry,[75] osteopathy,[76] or veterinary medicine and surgery,[77] without a license or certificate, and defining, or stating what acts shall constitute, the practice of these professions,[78] are generally upheld as valid and constitutional; but provisions of such a statute are void if they go beyond the proper limits of the police power[79] or violate constitutional provisions.[80] A statute exempting persons who have practiced a prescribed number of years from the requirement of obtaining a license or certificate for the practice of dentistry may be repealed.[81]

Power of municipality. It is held that the legislature may authorize a municipality to require, as a police regulation, a license to practice dentistry[82] or medicine;[83] but it is also held that, where a physician has received a license from the state to practice medicine, a city cannot require him to take out an additional license as a condition precedent to practicing his profession in the city.[84]

[§ 15] **(b) Construction of Penal Statutes Generally.**[85] Except in some jurisdictions,[86] a statute making the practice of medicine, dentistry, or optometry without a license or certificate an offense is strictly construed,[87] in accordance with the rule governing the construction of penal statutes generally.[88] However, the statute should not be construed so strictly as to defeat the obvious legislative intent.[89]

[§ 16] **(c) Necessity**[90]**—aa. In General.** In some states, early statutes relating to the practice of medicine and surgery did not require a license,[91] or required it only when the practitioner did not possess a diploma from a medical college or other prescribed evidence of qualification;[92] but at the present time there are statutes in practically all states which provide that before a person may practice medicine and surgery in the state he must apply for and receive a license or certificate of qualification[93] from the state board of medical examiners or other designated agency.[94] Also, a license or certificate for the practice of dentistry is frequently required by statute,[95] and in a number of, although not all, the states there are statutes requiring a license or certificate for the practice of chiropractics,[96] optometry,[97] osteopathy,[98] and veterinary medicine and surgery.[99] Such a statute is mandatory,[1] and, unless a person, or the services rendered by him, come within an express statutory exemption,[2] he cannot lawfully practice in the state a profession within the scope of the statute without a

169, 132 NW 686, AnnCas1914B 395. Wash.—Brown v. State, 59 Wash. 195, 109 P 802; State v. Thompson, 48 Wash. 683, 94 P 667.
Wis.—State v. Chittenden, 127 Wis. 468, 107 NW 500.

[a] **Imprisonment for nonpayment of penalty.**—"It is within the power of the legislature to make the practice of dentistry without license an offence against the public, since they may well think it involves public injury, and to punish it by fine or penalty, and to authorize imprisonment for non-payment of the penalty." Lowrie v. State Bd. of Registration, etc., 90 N. J. L. 54, 57, 99 A 927.

75. McNaughton v. Johnson, 242 U. S. 344, 37 SCt 178, 61 L. ed. 334, Ann Cas1917B 801; In re Rust, 181 Cal. 73, 183 P 548; Com. v. S. S. Kresge Co., (Mass.) 166 NE 558; Price v. State, 168 Wis. 603, 171 NW 77.

[a] **Retail sale of eyeglasses.**—A statute prohibiting the sales of eyeglasses, spectacles, and lenses at retail unless a duly licensed physician or optometrist is "in charge of and personal attendance at the booth, counter or place where such articles are sold," is not void, as rendering glasses unavailable to persons in rural districts. D. S. Kresge Co. v. Ottinger, 29 F. (2d) 762.

76. State v. Collins, 178 Iowa 73, 159 NW 604; State v. Hopkins, 54 Mont. 52, 166 P 304; Arnold v. Schmidt, 155 Wis. 55, 143 NW 1055.

77. In re Barnes, 83 Nebr. 443, 119 NW 662; Com. v. Heller, 80 Pa. Super. 366 [aff 277 Pa. 539, 121 A 558] (including veterinary dentistry); Com. v. Palmer, 71 Pa. Super. 188; Com. v. Keemer, 20 Pa. Dist 983.

78. See cases infra this note.

[a] **Rule is applicable** to statutes defining or stating what acts shall constitute the practice of: (1) Dentistry. Peo. v. Fortch, 13 Cal. A. 770, 110 P 823; State v. Crombie, 107 Minn. 171, 119 NW 660. (2) Optometry. Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237. (3) Osteopathy. Piper v. State, 163 Wis. 604, 158 NW 319.

79. See cases infra this note.

[a] **For example** (1) a statute in so far as it requires examination by and a license from, a dental board before one may "own, run, or manage" a dental office, as distinguished from the actual practice of dentistry, is not a proper exercise of the police power, and is unconstitutional. State v. Brown, 37 Wash. 97, 79 P 635, 107 AmSR 798, 68 LRA 889. (2) A statute requiring a license for the practice of optometry, and defining "optometry" as including every means for the measurement of the powers of vision and the adaptation of lenses for the aid thereof, is, as applied to the mere changing of lenses until a customer is suited, unconstitutional in that it imposes a requirement having no relation to, or tendency to promote, the public health, comfort, safety, or welfare. Peo. v. Griffith, 280 Ill. 18, 117 NE 195. (3) "To require a chiropodist to obtain the education and license of a physician and surgeon, an osteopath or a chiropractor, is not a reasonable regulation and is utterly unnecessary for the protection of the public. So far as it affects the practice of chiropody, the act is unconstitutional and void." State v. Armstrong, 38 Ida. 493, 502, 225 P 491, 33 ALR 835.

80. Bruhl v. State, (Tex. Cr.) 13 SW (2d) 93.

[a] **Illustration.**—Rev. St. (1925) art 4565e, defining "practicing optometry," forbidden without license by Pen. Code art 737, as including a merchant's sale of spectacles or eyeglasses, except by merely exhibiting them in trays or containers, and the aiding of a customer in any way, or the providing of any mechanical device for his use or for exhibition, is void as abridging a citizen's privileges and immunities, contrary to U. S. Const. Amendm. XIV, and depriving him of liberty or property otherwise than by due course of law, in violation of Tex. Const. art 1 § 19. Bruhl v. State, (Tex. Cr.) 13 SW (2d) 93.

81. Samples v. State, 19 Ala. A. 478, 98 S 211 [certiorari den and aff 210 Ala. 544, 98 S 803].

82. Johnson v. Great Falls, 38 Mont. 369, 99 P 1059, 16 AnnCas 974.

Legislative authorization of municipal privilege or occupation tax for revenue purposes see infra § 95.

83. Fairfield v. Shallenberger, 135 Iowa 615, 619, 113 NW 459.

"That the Legislature may, in the exercise of its police power, require a State license for the practice of medicine, and at the same time authorize municipalities to require a license for the practice thereof within their boundaries, we do not doubt." Fairfield v. Shallenberger, supra.

84. Savannah v. Charlton, 36 Ga. 460.

85. Construction:
As to applicability see infra §§ 18–34.
Of regulatory statutes generally see supra § 12.

86. State v. Oredson, 96 Minn. 509, 105 NW 188; State v. Etzenhouser, (Mo. A.) 16 SW (2d) 656; Rex v. Manning, 8 Sask. L. 333, 25 CanCr Cas 227.

87. State v. Gallagher, 101 Ark. 593, 143 SW 98, 38 LRANS 328; State v. Faatz, 83 Conn. 300, 76 A 295; Com. v. Gibson, 7 Pa. Dist. 386, 21 Pa. Co. 232.

88. See Statutes [36 Cyc 1183].

89. District of Columbia v. Dewalt, 31 App. (D. C.) 326.

90. Practitioner without license or certificate:
Competency of, as expert or skilled witness see Criminal Law § 1532; Evidence § 765.
Injunction against practice by see Injunctions §§ 280, 428, 438, 442.
Quo Warranto against see Quo Warranto.
Right of, to compensation for services see infra §§ 167–174.

91. White v. Carroll, 42 N. Y. 161, 1 AmR 503 (L. [1844] p 406); Com. v. Townley, 7 Pa. Dist. 413, 22 Pa. Co. 11.

92. See statutory provisions.

93. See statutory provisions.

[a] **Purpose of statute** (1) is to prevent persons who are not qualified from practicing medicine on the citizens of the state (Bailey v. Niebruegge, 211 Ill. A. 82) (2) and to protect the general public from injury which unskilled and unlearned practitioners may cause (Brown v. Shyne, 242 N. Y. 176, 151 NE 197, 44 ALR 1407).

"License" and "certificate" distinguished see Certificate 11 C. J. p 76 note 81 [1].

94. Officer or body authorized to issue license or certificate see infra § 56.

95. See statutory provisions.

[a] **Statute held not repealed.**—Com. v. Basham, 101 Ky. 170, 40 SW 253, 19 KyL 336.

[b] **In Colorado** (1) a license was not required by statute at one time. Robinson v. Peo., 23 Colo. 123, 46 P 676. (2) Under a later statute a license is necessary. L. (1921) § 4571.

96. See statutory provisions.

97. See statutory provisions.

98. See statutory provisions.

99. See statutory provisions.

1. Lynch v. Kathmann, 180 Iowa 607, 163 NW 408.

2. See infra § 17.

proper license or certificate of qualification,[8] even though he has practiced and been registered in another state,[4] is an officer, agent, or employee of a corporation and acts or purports to act for the corporation,[5] or has a legal and constitutional right to pray for the cure of sickness and disease.[6] However, practicing medicine or osteopathy without the license required by law is not a nuisance per se.[7] Also, it is not a crime at common law to practice medicine without a license;[8] but practicing without a license is frequently made an offense by statute.[9] Such an offense is to be distinguished from the offense of failing to have a license recorded,[10] and is not committed by the failure of a regularly licensed physician to file his license[11] or have it recorded.[12] Under the construction placed upon some statutes, the offense is a continuing one,[13] but this is not true under other statutes[14] which are construed to make each specific act or treatment a separate offense.[15]

In county.[16] A statute providing that a physician or dentist shall obtain a license in the county in which he resides or practices[17] will be given effect according to its terms;[18] but some statutes do not impose such a requirement,[19] and a license issued thereunder entitles the holder to practice throughout the state.[20] A person with a recorded diploma may be within a statute requiring a license or certificate from a board of medical examiners in a county,[21] and yet not be indictable for practicing without such license or certificate.[22]

[§ 17] **bb. Exemptions.**[23] In many states, the statutes requiring a license or certificate for the practice of medicine and surgery expressly except from their operation certain classes of persons, and services rendered in particular cases.[24] Thus it is commonly provided that the statute shall not apply to any commissioned medical officer of the United States army, navy, or marine service;[25] medical examiners of relief departments of railroad companies;[26] members of the staffs of hospitals and asylums;[27] physicians called from another state for consultation, or to treat a particular case, and who do not otherwise practice in the state;[28] services rendered in case of emergency;[29] the administration of family, domestic, or ordinary household medicines or remedies;[30] or the practice of the religious tenets of any church.[31] Also, some statutes provide

3. Ala.—Cummings v. State, 214 Ala. 209, 106 S 852; Robinson v. State, 212 Ala. 459, 102 S 693.
Colo.—Harding v. Peo., 10 Colo. 387, 15 P 727.
Minn.—State v. Luscher, 157 Minn. 192, 195 NW 914.
Okl.—Gobin v. State, 9 Okl. Cr. 201, 131 P 546, 44 LRANS 1089.
Pa.—Jones's Case, 42 Pa. Co. 282.
Tex.—Dowdell v. McBride, 18 Tex. Civ. A. 645, 45 SW 397; Teem v. State, 79 Tex. Cr. 285, 183 SW 1144.
4. State v. Crombie, 107 Minn. 171, 119 NW 660.
5. Norwood v. State, 70 Tex. Cr. 605, 158 SW 270.
Practicing under direction of licensed physician or dentist see infra § 31.
6. Peo. v. McTier, 184 Ill. A. 635.
7. Redmond v. State, (Miss.) 118 S 360; State v. Johnson, 26 N. M. 20, 188 P 1109.
8. Bohannon v. Board of Medical Examiners, 24 Cal. A. 215, 140 P 1089; Peo. v. Gartenstein, 248 Ill. 546, 94 NE 128.
9. See statutory provisions.
10. State v. Huxoll, 191 Mo. A. 304, 178 SW 866; Feige v. State, 23 Okl. Cr. 434, 215 P 437.
Recording or registration generally see infra §§ 88-90.
11. Grady v. State, 144 Miss. 100, 109 S 728.
12. Wilson v. State, 8 Okl. Cr. 493, 129 P 82.
13. Com. v. Heller, 80 Pa. Super. 366 [aff 277 Pa. 539, 121 A 558]; State v. Carlisle, 28 S. D. 169, 132 N W 686, AnnCas1914B 395.
Effect of one conviction see infra § 47.
14. State v. Cotner, 87 Kan. 864, 127 P 1, 42 LRANS 768; Peo. v. Devinny, 227 N. Y. 397, 125 NE 543.
15. State v. Cotner, 87 Kan. 864, 127 P 1, 42 LRANS 768; Harvey v. State, 96 Nebr. 786, 148 NW 924.
16. Registration in county see infra § 88.
17. See statutory provisions.
18. Orr v. Meek, 111 Ind. 40, 11 NE 787; Mayfield v. Nale, 26 Ind. A. 240, 59 NE 415.
19. State v. Carlisle, 28 S. D. 169, 132 NW 686, AnnCas1914B 395.
20. See infra § 63.
21. See cases infra note 22.
22. See infra this note.
[a] **Thus** in one state it was provided by statute that a graduate of a medical college in the United States, whose diploma was recorded, might practice medicine without a license in any county having only a medical board established by the county commissioners; but where there was a board of medical examiners, organized according to the constitution of the state medical association, and in affiliation with it, a license or certificate of qualification from such board was necessary. Another statute provided for the punishment of any person practicing medicine without a license, diploma, or certificate, or who was not "a regular graduate of a medical college of this State, having had his diploma legally recorded." It was held that a graduate of a medical college of another state whose diploma was recorded was not indictable for practicing without license or certificate from a board of medical examiners in the county, organized under, or in affiliation with, the state association. Stough v. State, 88 Ala. 234, 7 S 150; Brooks v. State, 88 Ala. 122, 6 S 902.
23. Constitutionality of exemptions see supra § 14.
24. See infra text and notes 25-37.
25. See statutory provisions.
[a] **Person holding commission in medical reserve corps,** but not called into active duty, is not within the exemption. Haberlin v. Englehardt, 94 Misc. 154, 157 NYS 839.
26. See statutory provisions.
27. See statutory provisions.
[a] **Interne** on the staff of a hospital is not within the exemption. In re Physicians' Licenses, 23 Pa. Dist. 50, 42 Pa. Co. 263.
28. See statutory provisions.
29. See statutory provisions.
[a] **"Emergency" means** a case in which ordinary medical practitioners are not available, as where the exigency is of so pressing a character that some kind of action must be taken before such practitioners can be found or procured. Peo. v. Lee Wah, 71 Cal. 80, 11 P 851; Peo. v. Vermillion, 30 Cal. A. 417, 158 P 504; Williams v. State, (Nebr.) 224 NW 286.
[b] **Emergency does not exist** where: (1) The patient has had the attention of regular practitioners who have failed to afford relief or have given up the case, and the services of defendant are sought, at least to some extent, as a last resort. Peo. v. Lee Wah, 71 Cal. 80, 11 P 851; Peo. v. Vermillion, 30 Cal. A. 417, 158 P 504 (patient with ailments more or less chronic). (2) Arrangements were made several days previously for the treatment in question. Peo. v. Cosper, 76 Cal. A. 597, 245 P 466. (3) Approximately twenty hours elapsed between the commencement of treatment in a confinement case and the birth of the child. Peo. v. Cosper, supra.
[c] **Person pursuing occupation of physician** is, by the express terms of some statutes, excluded from the protection of the exemption. Fraser v. State, 216 Ala. 426, 113 S 289.
30. See statutory provisions.
[a] **Statutory exemption is intended to cover** the domestic administration of medicine or the administration of medicine in one's own family. State v. Huff, 75 Kan. 585, 90 P 279, 12 LRANS 1094.
[b] **Exemption does not protect** (1) a person who, as a business, or for a fee, compensation, or consideration, prescribes, administers, advises, or recommends a family remedy or domestic medicine (State v. Huff, 75 Kan. 585, 90 P 279, 12 LRANS 1094; State v. Yee Foo Lun, 45 Utah 531, 147 P 488; Till v. State, 172 Wis. 266, 177 NW 589), (2) or a compound or concoction which is not a domestic family remedy, either in law or in fact, but is a mere subterfuge to deceive the credulous and afflicted (State v. Yee Foo Lun, supra).
Cross references:
"Domestic medicine" defined see Domestic 19 C. J. p 388.
"Domestic remedy" defined see Domestic 19 C. J. p 389.
Sale or administration of patent medicines as within statute generally see infra § 29.
31. See statutory provisions.
[a] **Such exception relates** to the tenets of a church as an organized body and does not relate to, or except, persons practicing in accordance with individual belief. Peo. v. Cole, 219 N. Y. 98, 113 NE 790, LRA1917C 816.
[b] **Necessity of good faith.**—The religious tenets of a church must be practiced in good faith in order to come within the exception; when such practice is a fraud or pretense, it is not excepted from the general prohibition of the statute. Peo. v. Cole, 219 N. Y. 98, 113 NE 790, LRA 1917C 816.
[c] **Exemption does not "authorize** one under the cover of religion or a religious exercise, to go into healing commercially for hire, using prayer as the curative agency or treatment. Religion cannot be used as a shield to cover a business undertaking. Defendant was engaged in a business venture, not a religious exercise." Smith v. Peo., 51 Colo. 270, 277, 117 P 612, 36 LRANS 158.
[d] **Osteopathy** does not come

that they shall not apply to clairvoyants who do not practice medicine;[32] a cosmopathic method of healing;[33] the practice of osteopathy;[34] opticians[35] or nonitinerant persons or manufacturers who mechanically fit or sell lenses or engage in the mechanical examination of eyes for the purpose of adjusting spectacles, eyeglasses, or lenses;[36] or to a medical student prescribing under the supervision of a preceptor;[37] and, likewise, some statutes prohibiting the practice of dentistry without a license provide that they shall not be construed to prohibit a registered student of a licensed dentist from assisting his preceptor in dental operations while in the presence, and under the direct and immediate personal supervision, of the latter;[38] and some statutes making it an offense for an uncertified woman, habitually and for gain, to attend women in childbirth except attendance under the direction of a qualified medical practitioner.[39] A statutory exemption is, of course, available to a person when, and only when, he, or the service performed by him, is within its terms.[40] A statute exempting a graduate of a medical college from taking an examination[41] does not authorize him to practice without a license.[42]

Prior practitioners.[43] While a statute exempting persons who have practiced in the state for a prescribed period of time previous to the passage thereof from the requirement of obtaining a license or certificate thereunder will be given effect in a case within its terms,[44] the exemption applies only to persons who have been engaged in lawful[45] practice in the state[46] for the prescribed period immediately prior to the date of the enactment.[47] Likewise a statutory exception or exemption of physicians "now" registered will be given effect in a case falling within its terms;[48] but a statute exempting persons legally practicing at the time of its passage does not apply to a person who was not legally practicing because he had not obtained a certificate required by prior statutes.[49]

[§ 18] **cc. Application of Requirement to Acts or Practice**[50]**—(aa) In General.** Some statutes requiring a license or certificate for the practice of medicine, but not stating what acts shall constitute such practice, are construed to use the term "practice of medicine" in its ordinary, common, and popular sense,[51] but others are construed to use the term in its technical sense.[52] Also, some statutory definitions of the term correspond substantially with the popular understanding thereof,[53] but other statutes are deemed to express a legislative intent to broaden the definition of the term so that, in addition to its generally accepted meaning, it will include acts not within the general meaning of the term.[54] The term "medicine" is used in the statutes as indicating

within a statutory exception of persons treating the sick by mental or spiritual means. Peo. v. Gordon, 194 Ill. 560, 62 NE 858, 88 AmSR 165 [rev 96 Ill. A. 456]; Peo. v. Jones, 92 Ill. A. 447.

[e] **Practice of christian science** (1) is within a general exception of the practice of the religious tenets of any church. Peo. v. Cole, 219 N. Y. 98, 113 NE 790, LRA1917C 816. (2) In some states the practice of christian science is expressly excepted by statute. See statutory provisions. (3) Christian science treatment as within general prohibition of practicing without license see infra § 21.

[f] **Lack of mention of spirits.**—Where defendant, who called himself a spiritualist, attempted to treat a patient by the laying on of hands and manipulation of her shoulders, during which time he said nothing about spirits, his acts were not within a statutory exception of treatment of the sick by spiritual means. Peo. v. Krause, 291 Ill. 64, 125 NE 726.

[g] **Religious belief and physical means.**—A statute providing that nothing contained therein shall interfere with religious belief in the treatment of diseases does not exempt a person who is diagnosing diseases and treating patients by outward physical means, such as manipulation and rubbing, although he believes that it is his duty to carry out the words of Jesus as to healing generally. State v. Peters, 87 Kan. 265, 123 P 751.

[h] **Prayer coupled with administration of patent medicines.**—A person who been commissioned by a church, one of whose tenets of faith is the practice of spiritual healing, as a spiritual healer and who in treating patients indulges in silent prayer but who also administers to his patients patent medicines is not within the exception. Peo. v. Vogelgesang, 221 N. Y. 290, 116 NE 977.

[i] **Exemption of treatment by prayer** does not apply where the use of prayer in the treatment of a particular patient is a mere subterfuge to escape the prohibitory provisions of the statute. Peo. v. Cosper, 76 Cal. A. 597, 245 P 466.

Treatment by spiritual means as within statute generally see infra § 21.

32. See statutory provisions.

[a] **Statutory exception does not authorize clairvoyant to prescribe medicines** for the cure of disease, even if the diagnosis of the disease and the kind of medicines to be prescribed were revealed to him through clairvoyance. Com. v. Lindsey, 223 Mass. 392, 111 NE 869; Com. v. De Lon, 219 Mass. 217, 106 NE 846.

33. See statutory provisions.

[a] **Exemption does not include chiropractic system.**—Com v. Zimmerman, 221 Mass. 184, 108 NE 893, AnnCas1916A 858.

"Cosmopathic" defined see 14A C. J. p 1433.

34. See statutory provisions.

[a] **Exception held applicable.**—Jones v. Peo., 52 Colo. 130, 120 P 125.

35. See statutory provisions.

[a] **Person is not optician,** within the meaning of the exemption, where he diagnoses his patient's diseases by microscopic examination of a drop of blood, and treats them by placing them under the rays of electric arc lights. O'Neil v. State, 115 Tenn. 427, 90 SW 627, 3 LRANS 762.

36. See statutory provisions.

[a] **Case held within exemption.**—Martin v. Com., 121 Va. 808, 93 SE 623, 624.

37. See statutory provisions.

[a] **Relation of consultants** on occasion is not relation of student and preceptor within the meaning of the exemption. State v. Collins, 178 Iowa 73, 159 NW 604.

38. See statutory provisions.

[a] **Exception is not one of all students in all circumstances.**—State Bd. of Registration, etc. v. Terry, 73 N. J. L. 156, 62 A 193.

[b] **Student performing dental operations independently,** on his own responsibility, and as a principal rather than as an assistant, is not within the exception. State Bd. of Registration, etc. v. Terry, 73 N. J. L. 156, 62 A 193.

39. See statutory provisions.

[a] **Direction must be real,** rather than nominal, to bring a case within the exception. Davis v. Morris, [1923] 2 K. B. 508.

Practice under licensed physician generally see infra § 31.

40. Application of exemptions see cases supra notes 25–39.

41. See infra § 53.

42. State v. McCleary, 130 Mo. A. 527, 109 SW 638.

43. Cross references:

Application of requirement to person continuing prior practice generally see infra § 33.

Exemption of prior practitioners from examination see infra § 53.

44. Harrison v. State, 102 Ala. 170, 15 S 563.

45. State v. Taylor, 140 Iowa 138, 118 NW 301; Com. v. Petry, 81 Pa. Super. 27.

46. State v. Miller, 138 Iowa 28, 115 NW 493.

47. State v. Miller, supra.

[a] **Practice after enactment of statute** for the prescribed period is not sufficient. State v. Miller, 138 Iowa 28, 115 NW 493; State v. Wilson, 61 Kan. 791, 60 P 1054; Hargan v. Purdy, 93 Ky. 424, 20 SW 432, 14 KyLR 383; Driscoll v. Com., 93 Ky. 393, 20 SW 431, 703, 14 KyL 376. Compare Wert v. Clutter, 37 Oh. St. 347 [crit State v. Ohio State Medical Bd., 60 Oh. St. 21, 53 NE 298] (decision by divided court that ten years of continuous practice might embrace time since, as well as before, the taking effect of the act).

48. State v. Carson, 231 Mo. 1, 132 SW 587.

[a] **Time referred to** is the date when the statute becomes effective rather than the date when it was approved. State v. Fenter, (Mo. A.) 204 SW 733.

49. State v. Board of Dental Examiners, etc., 26 Oh. Cir. Ct. 369.

50. Cross references:

Furnishing services of physicians by corporation as practice without license see Corporations §§ 119, 2145.

Power of legislature to declare what acts constitute practice see supra § 14.

51. Kansas City v. Baird, 92 Mo. A. 204; State v. Heffernan, 28 R. I. 20, 65 A 284.

Cross references:

"Practice of medicine" defined see Practice § 6.

"Practice of surgery" defined see Practice § 8.

52. Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925 (former statute).

53. Ex p. Greenall, 153 Cal. 767, 96 P 804 (definition stated in former statute).

54. Reeves v. State, (Okl. Cr.) 253 P 510.

a science or profession,[55] rather than a remedial agent for the cure or mitigation of disease;[56] and to be within the statutes a person must engage in practice as a business or calling,[57] or at least hold himself out as doing so.[58] It is not necessary for a person to practice generally either as a physician or surgeon to bring him within the operation of a statute requiring a license or certificate;[59] it is sufficient if he engages in the practice of a distinct department of either profession.[60] Likewise, a statute requiring a license for the practice of veterinary medicine and surgery applies to the practice of any branch of veterinary medicine or surgery.[61] Indeed, some statutes are broadly construed to apply to the practice of the healing art generally[62] and to the treatment of the sick by means not included in any department of medicine or surgery.[63]

Aiding and abetting unlicensed practice. A person who aids and abets another in practicing medicine without a license is subject to prosecution,[64] although he himself is licensed to practice.[65]

[§ 19] **(bb) Diagnosis, Prescription, or Treatment Generally.** Under the broad and comprehensive terms of some statutes requiring a license or certificate,[66] and the construction placed thereon, they apply to the treatment[67] of any human ailment, disease, disorder, pain, injury, infirmity, or deformity[68] by any system,[69] or without any system,[70] and by the employment or application of any curative or therapeutic agency,[71] whether administered internally or applied externally,[72] provided the giving or administration of the treatment is pursued as a business, calling, or profession[73] and for compensation.[74] Also, under the statutes a license or certificate is necessary to enable a person lawfully to engage in the business or practice, for fee or reward, of prescribing, or prescribing and furnishing, drugs, medicines, or other agencies or remedies for the treatment, cure, or relief of any bodily disease.[75] While a person without a license or certificate undoubtedly violates the statutes when he not only diagnoses, but also prescribes, recommends, furnishes, or applies a remedy,[76] he may also violate the statutes by diagnosing without prescrib-

55. Com. v. Seibert, 262 Pa. 345, 105 A 507 [aff 69 Pa. Super. 271].
"Medicine," as science or profession, defined see Medicine § 3.
56. Com. v. Seibert, 262 Pa. 345, 105 A 507 [aff 69 Pa. Super. 271].
"Medicine," as drug, defined see Medicine § 2.
57. Ex p. Greenall, 153 Cal. 767, 96 P 804.
[a] **Mere casual or incidental service** or suggestion is not sufficient. Ex p. Wideman, 213 Ala. 170, 104 S 440 [den certiorari 20 Ala. A. 422, 104 S 438]; Ex p. Greenall, 153 Cal. 767, 96 P 804.
Cross references:
Continuity of offense see supra § 16.
Habitual acts as practice of dentistry see infra § 25.
Necessity of:
Compensation see infra § 34.
Repeated prescriptions see infra § 19.
Sufficiency of proof of single act and surrounding circumstances see infra § 44.
58. See infra § 24.
59. Hewitt v. Charier, 16 Pick. (Mass.) 353; Com. v. Seibert, 69 Pa. Super. 271 [aff 262 Pa. 345, 105 A 507].
60. Hewitt v. Charier, 16 Pick. (Mass.) 353; Com. v. Seibert, 69 Pa. Super. 271 [aff 262 Pa. 345, 105 A 507].
[a] **Practice of surgery** (1) is not only within a statute expressly relating thereto (see statutory provisions), (2) but it is also within a statute relating to the practice of medicine in any of its branches (Com. v. Dragon, 239 Mass. 549, 132 NE 356).
[b] **Practice of setting bones** may be within a statute relating either to (1) surgery (Hewitt v. Charier, 16 Pick. (Mass.) 353) (2) or to the practice of medicine in any of its branches (Com. v. Dragon, 239 Mass. 549, 132 NE 356).
61. Com. v. Pearce, 42 Pa. Co. 409.
62. Ala.—Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925 [foll Ligon v. State, 145 Ala. 659, 39 S 662].
Colo.—Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.
Iowa.—State v. Edmunds, 127 Iowa 333, 101 NW 431.
N. M.—Terr. v. Newman, 13 N. M. 98, 79 P 706, 68 LRA 783.
Pa.—Com. v. Seibert, 262 Pa. 345, 105 A 507 (construing the act of June 3, 1911 [P. L. p 639]).
63. State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179.
Treatment as within statute generally see infra § 19.
64. Gobin v. State, 9 Okl. Cr. 201, 131 P 546, 44 LRANS 1089.
65. Gobin v. State, supra.
66. See statutory provisions.
67. Donovan v. State, 215 Ala. 55, 109 S 290; State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179; Lewis v. State, 69 Tex. Cr. 593, 155 SW 523; State Bd. of Medical Examiners v. Terrill, 48 Utah 647, 161 P 451, AnnCas1918B 1117.
[a] **Particular treatments held to be within statutes** include treatments: (1) Designed to remove the cause of disease, and the giving of which is followed as a profession for pay. Donovan v. State, 215 Ala. 55, 109 S 290. (2) Including the giving of pills, and also of some liquid substance which causes nausea. Godfrey v. New York County Medical Soc., 177 App. Div. 684, 164 NYS 846.
68. See statutory provisions.
[a] **Treatment for pain in neck** is within a statute providing that no one shall treat human diseases without a certificate of qualification from the state board of medical examiners. Fason v. State, 19 Ala. A. 533, 98 S 702.
69. Robinson v. State, 21 Ala. A. 159, 106 S 53; Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; Fason v. State, 19 Ala. A. 533, 98 S 702.
Particular systems see infra §§ 20–23.
70. Ex p. Wideman, 213 Ala. 170, 104 S 440 [den certiorari 20 Ala. A. 422, 104 S 438]; Collins v. State, 68 Tex. Cr. 354, 152 SW 1047.
71. Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925; Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296; Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.
72. Ex p. Wideman, 213 Ala. 170, 104 S 440 [den certiorari 20 Ala. A. 422, 104 S 438]; Davidson v. Bohlman, 37 Mo. A. 576.
73. See supra § 18.
74. See infra § 34.
75. See statutory provisions.
[a] **What constitutes prescription.**—(1) "Prescribe," as used in the statutes, means to direct, designate, or order the use of a remedy for an ailment or disease. State v. Hueser, 205 Iowa 132, 215 NW 643. (2) The giving of any direction to a patient for the use or application by him of any drugs, medicine, or other remedy, for the cure of any bodily disease, is prescribing a remedy within the meaning of the statute. State v. Lawson, 65 A 593, 22 Del. 395, 69 A 1066. (3) Oral prescriptions are within the statutes. State v. Lawson, supra; Peo. v. Mash, 235 Ill. A. 314. (4) "Prescribe" defined see [31 Cyc 1165]. (5) "Prescription" defined see [31 Cyc 1165].
[b] **Prescribing remedy in single instance** is not practicing medicine within a statute providing that any person shall be regarded as practicing medicine who shall repeatedly prescribe any drug, medicine, or other agency for the treatment, cure, or relief of any bodily disease. Foo Lun v. State, 84 Ark. 475, 106 SW 946.
[c] **Subject matter of prescription.**—(1) The medicine prescribed need not be a drug, so long as it is a healing agency. Redmond v. State, (Miss.) 118 S 360. (2) The fact that the substance prescribed and furnished as a remedial agent may have value as a food, and a tendency to build up and restore wasted or diseased tissue, will not deprive it of its character as a medicine, if it is administered and employed for that purpose. State v. Bresee, 137 Iowa 673, 114 NW 45, 24 LRANS 103. (3) According to the construction placed upon some statutes relating to the prescription or direction of the use of any drug, medicine, or other agency, the word "agency" is limited to substances of the same general nature, quality, and character as drugs or medicines. State v. Gallagher, 101 Ark. 593, 143 SW 98, 38 LRANS 328; Bennett v. Ware, 4 Ga. A. 293, 61 SE 546 (former statute).
[d] **In Porto Rico** (1) it is essential to a violation of the statute that the prescription shall be made knowingly and with the intention of usurping the functions of authorized physicians (Peo. v. Ruiz, 25 Porto Rico 548), (2) but where the prescription is so made it is not necessary that the offender use the letters "M. D." in connection with his name or publicly announce himself to be a physician or surgeon (Peo. v. Ruiz, supra).
76. Ala.—Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925.
Cal.—Peo. v. T. Wah Hing, 79 Cal. A. 286, 249 P 229.
Iowa.—State v. Kendig, 133 Iowa 164, 110 NW 463.
Kan.—Underwood v. Scott, 43 Kan. 714, 23 P 942.
Miss.—Redmond v. State, 118 S 360.
Mo.—State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179.
N. Y.—Peo. v. Allcut, 117 App. Div. 546, 102 NYS 678 [aff 189 N. Y. 517 mem, 81 NE 1171 mem].
Okl.—Harris v. Graham, 124 Okl. 196, 255 P 710.
Va.—Pinkard v. Com., 126 Va. 729, 100 SE 821.

ing any drug or administering any treatment,[77] or by treating, prescribing, or prescribing and furnishing, medicine, without making any diagnosis.[78] That the patient treated or prescribed for does not in fact have any ailment or disease does not prevent the application of the statutes.[79]

[§ 20] **(cc) Practice without Drugs, Medicines, or Surgical Instruments[80]—aaa. In General.** Some statutes requiring a license or certificate for the practice of medicine and surgery are construed to be limited to the mere administration of drugs or medicines and the use of surgical instruments,[81] but under the construction accorded a larger number of statutes imposing such a requirement, the prescription, administration, or employment of drugs[82] or medicines[83] or the use of surgical instruments or appliances,[84] is not necessary to bring a case within their terms and meaning.

Giving of electrical treatments is within the statutes.[85]

[§ 21] **bbb. Mental or Spiritual Means.**[86] The statutes requiring a license or certificate for the practice of medicine cover the commercial practice of healing by prayer,[87] coupled with manipulation;[88] but, where no charge is made for the service, and recourse is had merely to prayer, without the employment of material or human agencies, it cannot be said that the person invoking Divine interposition in behalf of another is within the statutes requiring a license or certificate.[89] Some statutes have been held to apply to attempts to heal diseases by mental suggestion,[90] or by a system designated as "suggestive therapeutics;"[91] but other statutes have been construed not to apply to mental therapeutics[92] or any form of treatment of the sick which makes faith the curative agency.[93]

Laying on of hands. In some cases it is held to be a violation of the statutes for an unlicensed person to treat or undertake to heal by the laying on of hands,[94] coupled with mental suggestion,[95] prayer,[96] or prayer and manipulation of the muscles and nerve control;[97] but in other cases it is held that the laying on of hands coupled with alleged healing by a direct Divine agency is not within the statutes.[98]

Treatment by hypnotism is within the statutes where it is accompanied by directions as to the use of drugs, medicines, or other remedies by the patient,[99] but not otherwise.[1]

Christian science treatment.[2] Under a statute making it unlawful to practice medicine without a license or certificate, but not attempting to define what constitutes "practicing medicine," it is held that the term does not include the giving of treatment by the system known as "christian science;"[3] but where the meaning of the term has been ex-

77. State v. Rolph, 140 Minn. 190, 194, 167 NW 553, LRA1918D 1096. See Peo. v. Jordan, 172 Cal. 391, 156 P 451 (discussing the point in passing upon the validity of a statute); Peo. v. Saunders, 61 Cal. A. 341, 215 P 120 (dictum); Bailey v. Niebruegge, 211 Ill. A. 82 (diagnosing in the state and administering treatment in another state); Peo. v. Allcut, 117 App. Div. 546, 102 NYS 678 [aff 189 N. Y. 517 mem, 81 NE 1171 mem] (discussing the point).

"The science of diagnosing human diseases and human ailments has come to be a distinct branch or department of the medical profession; the diagnostician limiting his efforts to a discovery of the disease or ailment from which a patient may be suffering, its character and location, leaving the treatment thereof to some other physician or surgeon. This is a matter of common knowledge. And it requires no discussion or argument to demonstrate that the physician who thus applies his learning and energies is performing a highly important duty of the profession, and is engaged in the practice thereof, though he prescribes no drug and administers no specific treatment." State v. Rolph, supra.

Practice without drugs, medicines, or surgery generally see infra § 20.

78. Peo. v. Willis, 62 Cal. A. 717, 217 P 771; Peo. v. Saunders, 61 Cal. A. 341, 344, 215 P 120 [expl Peo. v. Jordan, 172 Cal. 391, 156 P 451, and disappr Peo. v. Parish, 59 Cal. A. 302, 210 P 633; Peo. v. Cochran, 56 Cal. A. 394, 205 P 473]; Joe Gouy Shong v. Joe Chew Shee, 254 Mass. 366, 150 NE 225; Peo. v. Banks, 236 Mich. 8, 209 NW 935.

"The Legislature intended to denounce the act of any one who, not having a license, . . . might treat or prescribe without diagnosing. Not only so, but the enactment is based upon reason and logic. Physicians are often called as consultants in cases in which diagnosis has already been made by others. They doubtless often prescribe for cases in which they never see the patient and upon the diagnosis of others." Peo. v. Saunders, supra.

79. Peo. v. Kane, 205 Ill. A. 32 [rev on other grounds 288 Ill. 235, 123 NE 265]; Peo. v. Moser, 176 Ill. A. 625.

80. Cross references:
Diagnosis alone as violation of statute see supra § 19.
Subject matter of prescription see supra § 19.

81. Bennett v. Ware, 4 Ga. A. 293, 61 SE 546; State v. Fite, 29 Ida. 463, 59 P 1133; Nelson v. State Bd. of Health, 108 Ky. 769, 57 SW 501, 22 KyL 438, 50 LRA 383 (former statute); State v. McKnight, 131 N. C. 717, 42 SE 580, 59 LRA 187.

82. Ala.—Ex p. Wideman, 213 Ala. 170, 104 S 440 [den certiorari 20 Ala. A. 422, 104 S 338]; Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296.

Cal.—Peo. v. Cochran, 56 Cal. A. 394, 205 P 473.

Ill.—Peo. v. Barnett, 240 Ill. A. 357.

Ind.—Witty v. State, 173 Ind. 404, 90 NE 627, 25 LRANS 1297.

Mass.—Com. v. Jewelle, 199 Mass. 558, 85 NE 858.

Mich.—Locke v. Judge Ionia Cir. Ct., 184 Mich. 535, 151 NW 623.

Mo.—State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179.

N. Y.—Peo. v. Allcut, 117 App. Div. 546, 102 NYS 678 [aff 189 N. Y. 517 mem, 81 NE 1171 mem]. Contra Smith v. Lane, 24 Hun 632.

Pa.—Com. v. Seibert, 262 Pa. 345, 105 A 507.

Tex.—Newman v. State, 58 Tex. Cr. 223, 124 SW 956.

Utah.—Board of Medical Examiners v. Freenor, 47 Utah 430, 154 P 941, AnnCas1917E 1156.

Que.—Gauvreau v. Sadikbey, 25 Rev deJur 552, 32 CanCrCas 334.

83. Ill.—Peo. v. Barnett, 240 Ill. A. 357.

Mass.—Com. v. Zimmerman, 221 Mass. 184, 108 NE 893, AnnCas1916A 858; Com. v. Jewelle, 199 Mass. 558, 85 NE 858.

N. Y.—Peo. v. Mulford, 140 App. Div. 716, 125 NYS 680 [aff 202 N. Y. 624 mem, 96 NE 1125 mem].

Pa.—Com. v. Seibert, 262 Pa. 345, 105 A 507.

Utah.—Board of Medical Examiners v. Freenor, 47 Utah 430, 154 P 941, AnnCas1917E 1156.

Que.—Gauvreau v. Sadikbey, 25 RevdeJur 552, 32 CanCrCas 334.

84. Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296; Com. v. Zimmerman, 221 Mass. 184, 108 NE 893, AnnCas 1916A 858; State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179; Peo. v. Mulford, 140 App. Div. 715, 125 NYS 680 [aff 202 N. Y. 624 mem, 96 NE 1125 mem]; Peo. v. Allcut, 117 App. Div. 546, 102 NYS 678 [aff 189 N. Y. 517 mem, 81 NE 1171 mem]. Contra Smith v. Lane, 24 Hun (N. Y.) 632.

85. Davidson v. Bohlman, 37 Mo. A. 576; State Bd. of Medical Examiners v. De Young, (N. J. Sup.) 140 A 676.

86. Express exemption of:
Practice of religious tenets of church see supra § 17.
Treatment by prayer see supra § 17.

87. Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.

88. Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296.

Manipulation generally see infra § 22.

89. Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296 (dictum).

Necessity of compensation generally see infra § 34.

90. Smith v. State, 8 Ala. A. 352, 63 S 28 [aff 183 Ala. 116, 63 S 70].

91. Peo. v. Mulford, 140 App. Div. 716, 125 NYS 680 [aff 202 N. Y. 624 mem, 96 NE 1125 mem]; State v. Pratt, 80 Wash. 96, 141 P 318, 92 Wash. 200, 158 P 981.

92. Bennett v. Ware, 4 Ga. A. 293, 61 SE 546 (former statute).

93. Bennett v. Ware, supra (former statute).

94. Peo. v. Moser, 176 Ill. A. 625.

95. Peo. v. Trenner, 144 Ill. A. 275.

96. Singh v. State, 66 Tex. Cr. 156, 146 SW 891.

97. State v. Pratt, 92 Wash. 200, 158 P 981.

98. Bennett v. Ware, 4 Ga. A. 293, 61 SE 546 (former statute).

99. State v. Lawson, (Del.) 65 A 593.

1. State v. Lawson, supra.

2. Cross references:
"Christian science" defined see 11 C. J. p. 761.
Express exemption of christian science treatment see supra § 17.

3. Kansas City v. Baird, 92 Mo. A. 204; Evans v. State, 9 OhS&CP 222, 6 OhNP 129; State v. Mylod, 20 R. I. 632, 40 A 753, 41 LRA 428.

[a] **Christian science as "other agency."**—Under a statute prohibiting any person not having a certificate from the board of medical registration from prescribing, directing, or recommending any drug, medicine, or other agency for the treatment, cure, or relief of any bodily infirmity,

tended by statute to cover all treatment of whatever nature for the cure of physical or mental ailments, the giving of christian science treatment without a license is in violation of the law.[4]

[§ 22] **ccc. Adjustment or Manipulation.**[5] The treatment of a patient by manipulation of parts of his body, such as nerves, bones, and tissues, is sometimes,[6] although not always,[7] held to be within statutes requiring a license or certificate.

Osteopathy.[8] As heretofore stated, some statutes expressly require a license or certificate for the practice of osteopathy,[9] and some expressly except the practice of osteopathy from a requirement of a license or certificate for the practice of medicine and surgery.[10] Whether or not the practice of osteopathy is within statutes which require a license or certificate for the practice of medicine or the treatment of disease, but which do not expressly include or exclude the practice of osteopathy, depends upon the terms of, and the construction placed upon, the particular statute, it being held to be within the broad and comprehensive terms of, and the construction placed upon, some statutes,[11] but not to be within statutes forbidding the prescribing or applying of any drug, medicine, appliance, or other agency by an unlicensed person,[12] or statutes construed to be limited to the mere administration of drugs or medicines and the use of surgical instruments.[13]

Chiropractics.[14] As previously stated, some statutes expressly require a license or certificate for the practice of chiropractics,[15] and, according to the weight of authority, statutes requiring a license or certificate for the practice of medicine or the treatment of human diseases generally, and not expressly mentioning chiropractics, are applicable to the practice of the profession of treating human diseases by the chiropractic system,[16] but a few statutes are construed not to apply to such practice.[17]

[§ 23] **ddd. Massage.**[18] A masseur without a license or certificate to practice medicine does not violate the statutes requiring such a license or certificate where he confines himself to the particular sphere of labor of a masseur[19] and merely massages other persons[20] without reference to any pains or diseases which such persons may profess to have;[21] but the rule is otherwise where he undertakes to treat diseases[22] for pay,[23] and in doing so uses means not customarily used by a masseur in his particular sphere of labor.[24]

the term "other agency" does not include the system known as "christian science." Evans v. State, 9 OhS&CP 222, 6 OhNP 129.

4. State v. Buswell, 40 Nebr. 158, 58 NW 728, 24 LRA 68; State v. Marble, 72 Oh. St. 21, 73 NE 1062, 106 AmSR 570, 70 LRA 835.

5. Manipulation in connection with prayer or laying on of hands see supra § 21.

6. State v. Peters, 87 Kan. 265, 123 P 751; Harvey v. State, 96 Nebr. 786, 148 NW 924; Com. v. Seibert, 262 Pa. 345, 105 A 507. Contra Com. v. Thompson, 24 Pa. Co. 667.

Practice of particular systems held to be within statutes:
Chiropractics see infra text and note 16.
Osteopathy see infra text and note 11.

7. Smith v. Lane, 24 Hun (N. Y.) 632. See J. W. Samuel, Inc. v. Hams, 187 App. Div. 783, 176 NYS 378 (Public Health L. § 160 subd. 7).

8. "Osteopathy" defined see 46 C. J. p 1142.

9. See supra § 16.

Scope of practice authorized by license to practice osteopathy see infra § 63.

10. See supra § 17.

11. Ala.—Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925 [foll Ligon v. State, 145 Ala. 659, 39 S 662]; Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440].

Ill.—Peo. v. Gordon, 194 Ill. 560, 62 NE 858, 88 AmSR 165 [rev 96 Ill. A. 456]; Peo. v. Jones, 92 Ill. A. 445; Jones v. Peo., 84 Ill. A. 453; Eastman v. Peo., 71 Ill. A. 236.

Nebr.—Little v. State, 60 Nebr. 749, 84 NW 248, 51 LRA 717.

Oh.—State v. Gravett, 65 Oh. St. 289, 62 NE 325, 87 AmSR 605, 55 LRA 791 (decided under later and different statutes than State v. Liffring infra note 12 [a], and Eastman v. State infra note 12 [a]).

Tex.—Ex p. Collins, 57 Tex. Cr. 2, 121 SW 501 [aff 223 U. S. 288, 32 SCt 286, 56 L. ed. 439].

12. Hayden v. State, 81 Miss. 291, 33 S 653, 95 AmSR 471, 63 LRA 616; State v. Herring, 70 N. J. L. 34, 56 A 670 [aff 60 A 1134 mem].

[a] **"Osteopathy" is not "agency"** (1) within Act Febr. 27, 1896 (92 Oh. L. p 44), "to regulate the practice of medicine," which forbids the prescribing of any "drug or medicine or other agency" for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualification. State v. Liffring, 61 Oh. St. 39, 55 NE 168, 76 AmSR 358, 46 LRA 334; Eastman v. State, 6 OhS&CP 296, 4 OhNP 163. (2) Osteopathy as within later Ohio statute see supra note 11.

13. Nelson v. State Bd. of Health, 108 Ky. 769, 57 SW 501, 22 KyL 438, 50 LRA 383; State v. McKnight, 131 N. C. 717, 42 SE 580, 59 LRA 187; Com. v. Pierce, 10 Pa. Dist. 335.

Limited construction of statutes see supra § 20.

14. "Chiropractics" defined see 11 C. J. p 758.

15. See supra § 16.

16. Ala.—Harris v. State, 215 Ala. 56, 109 S 291; Cummings v. State, 214 Ala. 209, 106 S 852; Robinson v. State, 212 Ala. 459, 102 S 693; Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708]; Fason v. State, 19 Ala. A. 533, 98 S 702; Williamson v. State, 16 Ala. A. 392, 78 S 308.

Cal.—Peo. v. Willis, 62 Cal. A. 717, 217 P 771.

Ill.—Peo. v. Black, 211 Ill. A. 188.

Iowa.—State v. Zechman, 157 Iowa 158, 138 NW 387.

Kan.—State v. Johnson, 84 Kan. 411, 114 P 390, 41 LRANS 539.

La.—Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem]; Louisiana State Bd. of Medical Examiners v. Cronk, 157 La. 321, 102 S 415.

Mass.—Com. v. Zimmerman, 221 Mass. 184, 108 NE 893, AnnCas1916A 858.

Mo.—State v. Smith, 233 Mo. 242, 135 SW 465, 33 LRANS 179; State v. Young, (A.) 215 SW 499.

N. Y.—Peo. v. Ellis, 162 App. Div. 288, 147 NYS 681; Monohan v. Devinny, 131 Misc. 248, 225 NYS 601 [mod on other grounds 223 App. Div. 547, 229 NYS 60].

Oh.—Triplett v. State, 23 Oh. Cir. Ct. N. S. 172.

Pa.—Com. v. Jobe, 91 Pa. Super. 110; Com. v. Martindell, 82 Pa. Super. 417; Com. v. Byrd, 64 Pa. Super. 108, 24 Pa. Dist. 1031; Com. v. Saxman, 2 Pa. Dist. & Co. 560.

R. I.—Swarts v. Siveny, 35 R. I. 1, 85 A 33.

S. C.—State v. Barnes, 119 S. C. 213, 112 SE 62.

Tex.—Teem v. State, 79 Tex. Cr. 285, 183 SW 1144.

Utah.—Board of Medical Examiners v. Blair, 57 Utah 516, 196 P 221; Board of Medical Examiners v. Freenor, 47 Utah 430, 154 P 941, AnnCas 1917E 1156.

Wash.—State v. Greiner, 63 Wash. 46, 114 P 897.

W. Va.—State v. Morrison, 98 W. Va. 289, 127 SE 75.

[a] **Where there are two statutes** (1) in force in the state, one making it an offense to practice any mode or system of treating the sick or afflicted without a certificate, and the other, later in time than, but not repealing, the former, making it an offense to practice chiropractics without a certificate, a person practicing the chiropractic system without a certificate of any kind may be prosecuted under the former statute. Peo. v. Mills, 74 Cal. A. 353, 240 P 296. (2) Certificate from either medical or chiropractic board as defense see infra § 40.

[b] **Practice by person as teacher and demonstrator** of the chiropractic system before a class in a chiropractic school, the subjects of the demonstrations being the sick and afflicted who receive treatment at his hands, is within the statutes. Peo. v. Oakley, 30 Cal. A. 419, 158 P 505.

17. State v. Gallagher, 101 Ark. 593, 143 SW 98, 38 LRANS 328; State v. Fite, 29 Ida. 463, 159 P 1183.

18. "Massage" defined see 38 C. J. p 1384.

19. Milling v. State, 67 Tex. Cr. 551, 150 SW 434; Dankworth v. State, 61 Tex. Cr. 157, 136 SW 788.

"Masseur" defined see 38 C. J. p 1384.

20. State v. Lawson, (Del.) 65 A 593; Peo. v. Gordon, 194 Ill. 560, 62 NE 858, 88 AmSR 165; Peo. v. Hettiger, 150 Ill. A. 448; State Bd. of Medical Examiners v. Terrill, 48 Utah 647, 161 P 451, AnnCas1918B 1117.

21. Peo. v. Hettiger, 150 Ill. A. 448.

22. Milling v. State, 67 Tex. Cr. 551, 150 SW 434; Dankworth v. State, 61 Tex. Cr. 157, 136 SW 788; State Bd. of Medical Examiners v. Terrill, 48 Utah 647, 161 P 451, AnnCas1918B 1117; Gauvreau v. Sadikbey, (Que.) 25 RevdeJur 552, 32 CanCrCas 334.

Professing to treat or cure see infra § 24.

23. Milling v. State, 67 Tex. Cr. 551, 150 SW 434; Dankworth v. State, 61 Tex. Cr. 157, 136 SW 788.

Necessity of compensation generally see infra § 34.

24. Hyroop v. State, 79 Tex. Cr.

[§ 24] **(dd) Professing To Cure or Heal.** In many states there are statutes which, although varying considerably in phraseology, are to the same general effect that a person shall be regarded as practicing medicine, within the meaning of a provision requiring a license or certificate, where he holds himself out as a physician, or publicly professes to treat, cure, or heal, either generally or by certain designated means, such as by advertisement or other public announcement, opening an office for the practice of medicine, or using, in connection with his name, the title "Doctor," "Dr.," or "M. D.," or any other word or abbreviation indicating that he is engaged in treating human ailments or diseases;[25] and a person performing acts within such statutes is of course amenable thereto.[26] The statutes apply to advertising or professing to treat, cure, or heal without drugs, medicines, or surgery[27] and, except in some jurisdictions,[28] to the use of the word "doctor" or "physician" in connection with some qualifying word, such as "osteopathic," "magnetic," or "drugless."[29] While actual treatment or practice is not necessary to bring a case within the statutes under consideration,[30] a public profession of an ability to heal will not subject a person to the penalties of the law, unless it is made with a view of undertaking to cure the afflicted.[31] In the absence of a statute on this subject, a statute merely prohibiting the practice of medicine by any person not qualified and licensed will not prohibit the assumption of the title "Doctor" by any person whatever his profession.[32]

Professing to treat eyes or fit glasses.[33] The statutes under consideration apply to a person who holds himself out as an eye specialist[34] or claims to be an ophthalmologist and prefixes the title "Dr." to his name,[35] but not to a person who advertises or professes only to fit spectacles to the eyes.[36] A statute requiring a certificate for the practice of optometry and making it an offense for a person without such certificate either to engage in the practice of optometry or to hold himself out to the public as qualified to engage in such practice is effective to prohibit a person without a certificate, who in fact only sells spectacles without attempting to test the eyes, from holding himself out to the public as qualified to engage in the practice of optometry.[37] The conduct, in the name of the unlicensed proprietor alone, of the business of a store or establishment, or department thereof, wherein the practice of optometry is carried on by an employee who has been duly licensed as an optometrist, does not amount to a holding out of the proprietor as a licensed optometrist.[38]

[§ 25] **(ee) Dentistry Generally.**[39] Under a statute requiring a license or certificate for the practice of dentistry,[40] a license or certificate is required for the performance of such work as a dentist may be properly called upon to do,[41] or for the doing of those things about or upon the human teeth or jaws which require skill, adequate training, and understanding in their performance,[42] including not only the filling,[43] extracting,[44] treating,[45] bridging,[46] and crowning,[47] of teeth, but also the taking of an impression, the making of artificial teeth therefrom, and the actual fitting or adjustment of such teeth.[48] It is held that, when not so provided by statute, the performance of a dental operation is not necessarily engaging in the practice of dentistry.[49] However, some statutes expressly provide that a person shall be deemed or understood to be practicing dentistry when he performs an operation upon the human teeth or jaws,[50] and the word "operation," as used in such statutes, means a dental operation[51] and not necessarily a surgical opera-

150, 179 SW 878.

[a] **Directions as to use of remedies.**—Massage is within the statutes when it is accompanied by directions as to the use of drugs, medicines, or other remedies by the patient. State v. Lawson, (Del.) 65 A 593.

25. See statutory provisions.

[a] **Word "sick,"** as used in a statute providing that a person shall be regarded as practicing medicine and surgery where he represents or advertises himself so as to indicate that he is authorized to, or does, treat the sick, is a comprehensive term including all the ailments and infirmities of body and mind. State v. Douglas, 124 Kan. 482, 260 P 655.

26. Colo.—Smith v. Peo., 51 Colo. 279, 117 P 612, 36 LRANS 158.

Ill.—Peo. v. Mash, 235 Ill. A. 314.

Ind.—Witty v. State, 173 Ind. 404, 90 NE 627, 25 LRANS 1297; Parks v. State, 159 Ind. 211, 64 NE 862, 59 LRA 190; Benham v. State, 116 Ind. 112, 18 NE 454.

Iowa.—State v. Frutiger, 167 Iowa 550, 149 NW 634; State v. Zechman, 157 Iowa 158, 138 NW 387; State v. Corwin, 151 Iowa 420, 131 NW 659; State v. Adkins, 145 Iowa 671, 124 NW 627; State v. Wilhite, 132 Iowa 226, 109 NW 730, 11 AnnCas 180.

Mass.—Com. v. Dragon, 239 Mass. 549, 132 NE 356.

N. J.—State Bd. of Medical Examiners v. De Young, (Sup.) 140 A 676.

N. Y.—People v. Somme, 120 App. Div. 20, 104 NYS 946 [aff 190 N. Y. 541, 83 NE 1128].

Oh.—Triplett v. State, 23 Oh. Cir. Ct. N. S. 172.

Okl.—Reeves v. State, (Cr.) 253 P 510; Feige v. State, 11 Okl. Cr. 49, 142 P 1044, 23 Okl. Cr. 434, 215 P 437.

Pa.—Com. v. Seibert, 262 Pa. 345, 105 A 507 [aff 69 Pa. Super. 271]. And see Com. v. Palmer, 71 Pa. Super. 188 (a similar holding under a statute relating to the practice of veterinary medicine without a license).

S. D.—State v. Yegge, 19 S. D. 234, 103 NW 17, 69 LRA 504.

Tex.—Newman v. State, 58 Tex. Cr. 223, 124 SW 956.

27. Witty v. State, 173 Ind. 404, 90 NE 627, 25 LRANS 1297; State v. Corwin, 151 Iowa 420, 131 NW 659; State v. Johnson, 84 Kan. 411, 114 P 390, 41 LRANS 539 (advertising to treat by chiropractic spinal adjustment); Swarts v. Siveny, 35 R. I. 1, 85 A 33.

28. State v. Chase, 76 N. H. 553, 86 A 144.

29. State v. Pollman, 51 Wash. 110, 98 P 88. See Peo. v. Phippin, 70 Mich. 6, 37 NW 888 (a sign, "Dr. . . . Magnetic Healer," is evidence that one held himself out as a medical practitioner).

30. State v. Heath, 125 Iowa 585, 101 NW 429; Terr. v. Lotspeich, 14 N. M. 412, 94 P 1025; State v. Lindsay, 86 Vt. 201, 84 A 612.

31. State v. Heath, 125 Iowa 585, 101 NW 429.

32. State v. McKnight, 131 N. C. 717, 42 SE 580, 59 LRA 187; State v. Mylod, 20 R. I. 632, 40 A 753, 41 LRA 428.

33. Application of statutes to actual treatment of eyes or fitting of glasses see infra § 26.

34. Com. v. St. Pierre, 175 Mass. 48, 55 NE 482.

35. State v. Yegge, 19 S. D. 234, 103 NW 17, 69 LRA 504. To same effect State v. Wilhite, 132 Iowa 226, 109 NW 730 (publishing a card as "doctor of neurology and ophthalmology" is a public profession that one is a physician, and this, with the assumption of duties as such, comes within the meaning of the statute).

"Ophthalmologist" defined see 46 C. J. p 1117.

36. Peo. v. Smith, 208 Ill. 31, 69 NE 810 (advertisement expressly stating that the person does not give medical or surgical treatment).

37. Price v. State, 168 Wis. 603, 171 NW 77.

"Optometry" defined see 46 C. J. p 1124.

38. Optical Establishments, 29 Pa. Dist. 820.

39. Cross references:

"Dentistry" defined see 18 C. J. p 487.

License to practice medicine and surgery as authority to practice dentistry see infra § 63.

"Practice dentistry" defined see Practice § 4.

Practicing dentistry as assistant to authorized practitioner see infra § 31.

Sale of dental instruments see infra § 30.

40. See supra § 16.

41. Rex v. Manning, 8 Sask. L. 333, 25 CanCrCas 227. See In re Carpenter's Estate, 196 Mich. 561, 162 NW 963 (Pub. Acts [1913] No. 183 § 7).

42. Jacobs v. Board of Dental Examiners, 189 Cal. 709, 209 P 1006.

43. Rex v. Cruikshanks, 7 Alta. L. 92, 16 DomLR 536, 23 CanCrCas 23, 27 WestLR 759, 6 WestWkly 524; Rex v. Manning, 8 Sask. L. 333, 25 Can CrCas 227.

44. Rex v. Manning, supra.

45. Rex v. Manning, supra.

46. Rex v. Manning, supra.

47. Rex v. Manning, supra.

48. Jacobs v. Board of Dental Examiners, 189 Cal. 709, 209 P 1006; State v. Newton, 39 Wash. 491, 81 P 1002; Rex v. Cruikshanks, 7 Alta. L. 92, 16 DomLR 536, 23 CanCrCas 23, 27 WestLR 759, 6 WestWkly 524.

49. State v. Faatz, 83 Conn. 300, 76 A 295.

50. See statutory provisions.

51. Peo. v. Fajardo, 16 Porto Rico 760.

tion.[52] According to some authorities, the performance of a single act does not constitute the practice of dentistry,[53] but according to other authorities it is not necessary to bring a person within the statute that he shall practice dentistry habitually or frequently.[54] At any rate, a person practices as a dentist when he engages habitually in the methods or operations constituting dentistry.[55] A statute providing that a person shall be understood to be practicing dentistry when he manages or conducts as manager, proprietor, conductor, or otherwise a place where dental operations are performed is construed to apply only to a person who in some manner and to some extent, directly or indirectly, controls or directs some professional service of the kind that dentists are licensed to render.[56]

Using instruments upon teeth of horses is the practice of veterinary surgery within the meaning of some statutes.[57]

[§ 26] **(ff) Treatment of Eyes or Fitting of Glasses.**[58] A person who practices ophthalmology,[59] or who prescribes medicines[60] or gives medical treatment[61] for diseases of the eye, is within the statutes requiring a license or certificate to practice medicine; but the rule is otherwise as to a person who practices optometry,[62] or, in other words, a person who measures the powers of vision and adapts lenses for the correction and aid thereof,[63] who does not treat the eye,[64] and who, on the finding of a condition affording ground for suspicion of disease, advises the patient or customer to consult a physician.[65] As previously stated, some statutes expressly require a license or certificate for the practice of optometry[66] and exempt optometrists from the requirement of a license or certificate for the practice of medicine.[67]

[§ 27] **(gg) Chiropody.**[68] Doing the ordinary work of a chiropodist does not constitute the practice of medicine and surgery within the meaning of a valid statute making it unlawful to practice without a license;[69] but a chiropodist may be amenable to the statute where he performs acts which are without the scope of chiropody and constitute the practice of medicine and surgery.[70]

[§ 28] **(hh) Obstetrics and Midwifery.** A person practicing obstetrics[71] or midwifery[72] is within a statute requiring a license or certificate for practicing medicine or surgery.[73]

[§ 29] **(ii) Sale and Prescription of Patent Medicines.** Although the mere selling of patent medicines[74] by one who does not pretend to diagnose or cure disease, and determine what remedy is proper, is not a violation of a statute forbidding the practice of medicine by unlicensed persons,[75] still the fact that one gives his own proprietary medicine will not protect him where he attends and prescribes for sick persons and holds himself out as competent to prescribe or to treat and cure diseases.[76]

[§ 30] **(jj) Sale of Instruments or appliances.** A statute requiring a license or certificate for the practice of medicine does not apply to persons who merely advertise, puff, or sell mechanical instruments or devices,[77] although they claim that the use of

52. Jacobs v. Board of Dental Examiners, 189 Cal. 709, 209 P 1006.

53. State v. Faatz, 83 Conn. 300, 76 A 295; Rex v. Cruikshanks, 7 Alta. L. 92, 16 DomLR 536, 23 CanCrCas 23, 27 WestLR 759, 6 WestWkly 524.

54. State v. Ramsey, 31 N. D. 626, 154 NW 731.

55. Le Collège des Chirurgiens Dentistes v. Gagnon, 44 Que. Super. 216.

56. Messner v. Board of Dental Examiners, (Cal. A.) 262 P 58.

[a] **Statute does not apply** to: (1) A person who merely manages a room or building in which licensed dentists perform dental operations. Messner v. Board of Dental Examiners, (Cal. A.) 262 P 58. (2) A person who merely takes charge of business matters, such as the advertising, the arrangement with patients for credit, the accounting and collection department, the purchase of supplies as directed, and seeing to it that laboratory work is promptly delivered, as these things do not, singly or collectively, call for any of the professional skill required of a dentist. Messner v. Board of Dental Examiners, supra.

57. Com. v. Pearce, 42 Pa. Co. 409, (using instruments to file teeth to sharp edges).

58. **Professing to treat eyes or fit spectacles** see supra § 24.

59. State v. Blumenthal, 141 Mo. A. 502, 125 SW 1188.

[a] **Reason for rule** is that ophthalmology is a branch of medical science. State v. Blumenthal, 141 Mo. A. 502, 125 SW 1188.

"Ophthalmology" see 46 C. J. p 1117.

60. State v. Blumenthal, 141 Mo. A. 502, 125 SW 1188.

61. State v. Blumenthal, supra.

[a] **Application of external remedies to eyes** is said, in an early case, to be the practice of the chirurgical, rather than of the medical, art. U. S. v. Williams, 28 F. Cas. No. 16,713, 5 CranchCC 62.

62. Martin v. Baldy, 249 Pa. 253, 94 A 1091.

"Optometry" see 46 C. J. p 1124.

63. Peo. v. Smith, 208 Ill. 31, 69 NE 810 [aff 108 Ill. A. 499]; Martin v. Baldy, 249 Pa. 253, 94 A 1091; Reg. v. Harvey, 16 OntWR 433.

64. Reg. v. Harvey, supra.

65. Martin v. Baldy, 249 Pa. 253, 94 A 1091.

66. See supra § 16.

[a] **Person practices optometry,** within the meaning of such a statute, where, although he does not himself manipulate a device for testing the power or range of vision of the human eye, he furnishes the device to a customer or patient and either explains how to operate it or refers to printed directions. State v. Etzenhouser, (Mo. A.) 16 SW (2d) 656.

[b] **Person does not practice optometry** where he merely solicits and takes orders for eyeglasses, makes no examination whatever of the eye, and does not hold himself out as a practitioner of optometry. Johnson v. State, 22 Ala. A. 149, 113 S 484.

Particular licenses or certificates as authority to practice optometry see infra § 63.

67. See supra § 17.

68. **"Chiropodist"** see 11 C. J. p 757.

69. State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835.

Validity of statute requiring chiropodist to obtain license see supra § 14.

70. State v. Armstrong, 38 Ida. 493, 225 P 491, 33 ALR 835.

71. Com. v. Porn, 196 Mass. 326, 82 NE 31, 17 LRANS 94, 13 AnnCas 569; State v. Welch, 129 N. C. 579, 40 SE 120.

"Obstetrics" see 46 C. J. p 865.

72. Peo. v. Arendt, 60 Ill. A. 89.

73. **"Midwife"** see 40 C. J. p 657.

74. **"Patent medicines"** see 47 C. J. p 1376.

75. Williams v. State, 99 Ark. 149, 137 SW 927, AnnCas1913A 1056; State v. Kendig, 133 Iowa 164, 110 NW 463; State v. Van Doran, 109 N. C. 864, 14 SE 32; Le Collège des Medecins et Chirurgiens v. Tucker, 17 Que. Super. 70.

76. U. S.—Tucker v. Williamson, 229 Fed. 201 (under Ohio statutes).

D. C.—Springer v. District of Columbia, 23 App. 59.

Kan.—Underwood v. Scott, 43 Kan. 714, 23 P 942.

La.—State v. Lee, 106 La. 400, 31 S 14.

N. Y.—Thompson v. Staats, 15 Wend. 395.

N. C.—State v. Van Doran, 109 N. C. 864, 14 SE 32.

Oh.—Jordan v. Dayton Overseers of Poor, 4 Oh. 294.

Pa.—Com. v. Read, 76 Pa. Super. 202.

Ont.—Reg. v. Coulson, 27 Ont. 59; Reg. v. Howarth, 24 Ont. 561; Reg. v. Hall, 8 Ont. 407.

Que.—Le Collège des Medecins et Chirurgiens v. Blake, 2 Que. Pr. 567.

But see Harper v. State, 20 Ala. A. 324, 162 S 55 [certiorari den 212 Ala. 123, 102 S 58] (a licensed vendor of patent medicines, which he recommended to buyers as remedies for diseases specified by them, without holding himself out as a physician, charging for his services as such, or receiving compensation other than the profit from sales, is not guilty of treating the diseases without a license).

Prescribing as within statutes generally see supra § 19.

77. Peo. v. Lehr, 196 Ill. 361, 63 NE 725 [aff 93 Ill. A. 505]; Peo. v. Acha, 19 Porto Rico 461.

[a] **For example** a person was not practicing medicine within a statute requiring a certificate therefor where he was agent for the sale of an article or instrument to be attached to parts of the body, which he advertised would cure many diseases, and he urged people to buy it and try it, but he did not claim to be a physician or to practice medicine, did not examine his patrons or attempt to ascertain or tell them what their diseases were, and did not prescribe or administer drugs or remedies, nor apply the instrument to the bodies of purchasers. Peo. v. Lehr, 196 Ill. 361, 63 NE 725 [aff 93 Ill. A. 505].

such instruments or devices will cure human ills;[78] but selling and directing the application of plasters for the cure of cancer is "practicing" within the meaning of the statute.[79] A person is not practicing dentistry within the meaning of a statute where, for the purpose of selling dental instruments, he instructs licensed dentists in their use, and occasionally uses them on patients of such dentists without hire, and without holding himself out as a dentist.[80]

[§ 31] **(kk) Practice under Authorized Practitioner.** Where a person without a license or certificate performs acts constituting the practice of dentistry, medicine, or surgery, he is not relieved from liability therefor by the fact that he performs the acts as an assistant to,[81] or under the direction and supervision of,[82] a duly authorized practitioner, unless he is within an express statutory exemption.[83] However, the services of an ordinary nurse performed under the direction of a duly qualified surgeon are not within the statute.[84]

[§ 32] **(ll) Practice after Refusal or Revocation of License or Certificate.** While there is authority to the contrary,[85] it generally has been held that a person practicing medicine without a license is subject to prosecution therefor, even though the medical board has wrongfully or arbitrarily refused to issue him a license.[86] Likewise, under a statute making it penal to practice medicine without a certificate, a person whose certificate has been revoked is as much without one as a person to whom no certificate has ever been issued;[87] but under a statute prescribing a penalty for practicing "without first having procured a certificate," a conviction cannot be had for engaging in practice after the certificate has been revoked.[88]

[§ 33] **(mm) Continuance of Prior Practice.** Unless expressly exempted therefrom,[89] a person is subject to the provisions of a statute requiring a license or certificate for the practice of medicine, dentistry, or veterinary medicine and surgery, where, after the enactment of the statute, he continues a practice previously begun,[90] at least where the prior practice was illegal.[91]

[§ 34] **(nn) Practice without Reward or Compensation.**[92] As has been stated, various acts constitute the practice of medicine within the meaning of the statutes when they are done for a fee, reward, or compensation.[93] Conversely, most statutes forbidding the practice of medicine or dentistry without a license or certificate are, by their terms[94] and the construction placed thereon,[95] limited to practice for reward or compensation, at least where actual treatment or prescription is involved;[96] but it is otherwise as to a few statutes,[97] and it is also otherwise where the opening of an office for the practice of medicine[98] or a public announcement of a willingness to treat the sick[99] is involved. A case is within the statutes where some remuneration is received for acts constituting practice,[1] even though a separate fee is not charged for each service or operation performed,[2] a charge is not made immediately after the performance of the service or operation,[3] the fee or compensation is paid by a person other than the patient,[4] the remuneration consists of freewill offerings,[5] the practitioner is compensated only by a salary,[6] or he receives compensation indirectly through the medium of a religious corporation.[7]

[§ 35] **dd. Prosecutions for Practicing without License or Certificate—(aa) Who May Institute or Conduct.**[8] A statute regulating the practice of medicine and conferring power or duty to enforce its provisions upon a state bureau or department is

78. Peo. v. Lehr, supra.
79. Provincial Medical Bd. v. Bond, 22 N. S. 153.
80. Peo. v. Carr, 276 Ill. 329, 114 NE 494.
81. State v. Young, (Mo. A.) 215 SW 499; Gobin v. State, 9 Okl. Cr. 201, 131 P 546, 44 LRANS 1089; Rex v. Manning, 8 Sask. L. 333, 25 CanCrCas 227.
82. State v. Reed, 68 Ark. 331, 58 SW 40; State v. Cornelius, 200 Iowa 309, 204 NW 222; State v. Paul, 56 Nebr. 369, 76 NW 861; State v. Carlisle, 30 S. D. 475, 139 NW 127 [writ of error dism 238 U. S. 609 mem, 35 SCt 663 mem, 59 L. ed. 1487 mem].
83. **Exemption of:**
Midwives see supra § 17.
Students see supra § 17.
84. In re Carpenter, 196 Mich. 561, 162 NW 963.
[a] **Mere administration of anæsthetic** by a trained nurse in the presence, and in accordance with the directions, of a surgeon does not constitute the practice of medicine within the meaning of the statutes. Frank v. South, 175 Ky. 416, 194 SW 375, AnnCas1918E 682.
85. State v. Cooper, 11 Ida. 219, 81 P 374.
86. Melville v. State, 173 Ind. 352, 89 NE 490, 90 NE 467; State v. Doerring, 194 Mo. 398, 92 SW 489; State v. McCleary, 130 Mo. A. 527, 109 SW 638; Krowenstrot v. State, 15 Oh. Cir. Ct. 73, 8 Oh. Cir. Dec. 119.
87. Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995.
Revocation of license or certificate generally see infra §§ 64–83.
88. Ex p. McNulty, 77 Cal. 164, 19 P 237, 11 AmSR 257.
89. See supra § 17.
Exemption of prior practitioners from examination see infra § 53.
90. State v. Mosher, 78 Iowa 321, 43 NW 202; Com. v. Petry, 81 Pa. Super. 27. Contra Com. v. Pearce, 23 Pa. Dist. 1048, 42 Pa. Co. 409; Com. v. Gibson, 7 Pa. Dist. 386, 21 Pa. Co. 232.
91. Ex p. Hornef, 154 Cal. 355, 97 P 891; Kettles v. Peo., 221 Ill. 221, 77 NE 472; Hooper v. Batdorff, 141 Mich. 353, 104 NW 667.
[a] **For example,** a statute providing that no person, unless previously registered or licensed to practice medicine or dentistry, "shall begin" the practice of medicine or dentistry without obtaining a license is applicable to one who continued, after the act took effect, an illegal practice previously begun. Kettles v. Peo., 221 Ill. 221, 77 NE 472; Hooper v. Batdorff, 141 Mich. 353, 104 NW 667.
Legality of prior practice as essential to application of exemption see supra § 17.
92. **Cross references:**
Necessity of practice as business or calling see supra § 18.
Prayer without charge see supra § 21.
93. See supra §§ 19–23.
94. See statutory provisions.
95. Ala.—Nelson v. State, 97 Ala. 79, 12 S 421.
Cal.—Ex p. Greenall, 153 Cal. 767, 96 P 804. Compare Peo. v. Vermillion, 30 Cal. A. 417, 158 P 504 (stating the contrary but also stating that the evidence was sufficient to give rise to a fair inference of practice for remuneration). Contra Peo. v. Albrexstondare, 71 Cal. A. 339, 235 P 87; Peo. v. Oakley, 30 Cal. A. 419, 158 P 505.
Mo.—State v. Hale, 15 Mo. 606.
Porto Rico.—Peo. v. Acha, 19 Porto Rico 461.
R. I.—State v. Pirlot, 20 R. I. 273, 38 A 656.
[a] **Thus** (1) it is not a violation of the statute for a person who does not hold himself out as a physician to advise, or give medicine to, a sick person, merely as a neighbor or friend, where no charge is made, and no compensation is expected, for such services. Nelson v. State, 97 Ala. 79, 12 S 421. (2) Nor can a druggist's clerk who prescribes for a customer be convicted where no profit inures to him from the sale. Prust v. Rose, (Ont.) 37 CanLJNS 824.
96. Terr. v. Lotspeich, 14 N. M. 412, 94 P 1025.
97. Le Collège des Chirurgiens Dentistes v. Gagnon, 44 Que. Super. 216 (statute relating to practice of dentistry).
98. Terr. v. Lotspeich, 14 N. M. 412, 94 P 1025.
Professing to treat or cure as practice see supra § 24.
99. Terr. v. Lotspeich, 14 N. M. 412, 94 P 1025.
1. See cases infra notes 2–7.
2. State v. Thompson, 48 Wash. 683, 94 P 667; State v. Littooy, 37 Wash. 693, 79 P 1135; State v. Brown, 37 Wash. 106, 79 P 638.
[a] **It is sufficient** if a fee is collected for a series of services or operations. State v. Littooy, 37 Wash. 693, 79 P 1135; State v. Brown, 37 Wash. 106, 79 P 638.
3. State v. Littooy, 37 Wash. 693, 79 P 1135; State v. Brown, 37 Wash. 106, 79 P 638.
4. Peo. v. Keseling, 35 Cal. A. 501, 170 P 627; Terr. v. Lotspeich, 14 N. M. 412, 94 P 1025.
5. Singh v. State, 66 Tex. Cr. 156, 146 SW 891.
6. State v. Luscher, 157 Minn. 192, 195 NW 914.
7. Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296.
8. **Injunction against prosecution by board of health** see Injunctions § 389 note 48 [a] (2).

construed not to preclude the initiation or institution of a prosecution, for practicing medicine without a license, by a person, officer, or body other than the bureau or department, its members or agents,[9] such as a grand jury,[10] a county or district attorney,[11] a county detective,[12] or any person competent to take an oath in a court of justice.[13] A prosecution for practicing medicine or dentistry without a license may be conducted by the attorney-general[14] or an attorney expressly authorized by him,[15] or, under some statutes[16] and the construction placed thereon, by the district attorney of the proper county[17] with the assistance of the attorney for the board of medical examiners.[18] Under some statutes relating to veterinary medicine and surgery,[19] and the construction accorded thereto, a state board may appoint agents to carry on prosecutions thereunder.[20]

[§ 36] **(bb) Indictment, Information, Affidavit, or Complaint[21]—aaa. In General.** The indictment, information, affidavit, or complaint in a prosecution for practicing medicine, dentistry, or osteopathy without a license or certificate in violation of a statute must state a public offense[22] under the statute,[23] and inform accused of the charge against him.[24] The offense is purely a statutory one,[25] and, if the statute so far individuates the crime that the offender has proper notice of the nature of the charge against him, it is sufficient to charge it in the language of the statute[26] or in terms substantially equivalent thereto,[27] but it is not sufficient merely to employ the language of the statute where such language is so general as not to meet the requirements of general statutes as to the contents of a complaint, indictment, or information.[28] In some jurisdictions, it is sufficient, in addition to allegations of time and venue, to aver that defendant practiced medicine or dentistry, or treated diseases of human beings, as the case may be, without a license or certificate.[29] In such jurisdictions it is not necessary to allege the particular acts done by defendant,[30] the precise character of dental operations performed by him,[31] the particular branch or department of medicine practiced by him,[32] or the school to which he belongs,[33] and while the system of medicine or treatment employed by him may,[34] it need not,[35] be averred. However, in a considerable number of the jurisdictions wherein the statutes define the practice of medicine or dentistry by declaring what acts shall constitute it,[36] it is necessary to allege facts showing that defendant performed one or more of the acts stated in the statutory definition.[37] It is not sufficient to allege that accused unlawfully practiced medicine.[38] The commission of the offense may be charged in a complaint on information and belief.[39]

Actual practice, treatment, or prescription must be alleged in an indictment or information for so practicing,[40] but not in an indictment or information for advertising or holding oneself out to the

9. State v. Hueser, 205 Iowa 132, 215 NW 643; Com. v. Hamilton, 74 Pa. Super. 419; Com. v. Byrd, 24 Pa. Dist. 1031; Baldy's Query, 42 Pa. Co. 209.

10. State v. Hueser, 205 Iowa 132, 215 NW 643.

11. State v. Hueser, supra.

[a] **Indictment may be signed by district attorney.**—Com. v. Hamilton, 74 Pa. Super. 419.

12. Com. v. Byrd, 24 Pa. Dist. 1031.

13. Com. v. Hamilton, 74 Pa. Super. 419; Baldy's Query, 42 Pa. Co. 209.

14. State v. Crombie, 107 Minn. 166, 119 NW 658.

15. State v. Crombie, supra (attorney of dental board).

16. See statutory provisions.

17. See statutory provisions.

18. Piper v. State, 163 Wis. 604, 158 NW 319 (with consent of court and district attorney).

19. See statutory provisions.

20. In re Veterinary Medicine, 24 Pa. Dist. 1117.

21. Negativing statutory exceptions and provisos see Indictments and Informations §§ 269, 270.

22. Ex p. Greenall, 153 Cal. 767, 96 P 804; Feige v. State, 11 Okl. Cr. 49, 142 P 1044; State v. Hale, (Utah) 263 P 86.

[a] **Complaints, indictments, and informations held sufficient.**—Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296; Peo. v. Cochran, 56 Cal. A. 394, 205 P 473; State v. Collins, 178 Iowa 73, 159 NW 604; State v. Frutiger, 167 Iowa 550, 149 NW 634; State v. Zechman, 157 Iowa 158, 138 NW 387; State v. Wilhite, 132 Iowa 226, 109 NW 730, 11 AnnCas 180; State v. Douglas, 124 Kan. 482, 260 P 655; State v. Crombie, 107 Minn. 166, 119 NW 658; State v. Greiner, 63 Wash. 46, 114 P 897; State v. Dechmann, 57 Wash. 690, 107 P 858.

23. State v. Gallagher, 101 Ark. 593, 143 SW 98, 38 LRANS 328; Com. v. Moyer, 23 Pa. Dist. 164.

[a] **Indictment and informations held sufficient to charge statutory offense.**—Peo. v. Ratledge, 172 Cal. 401, 156 P 455; State v. Bohl, 144 Minn. 437, 175 NW 915; Harvey v. State, 96 Nebr. 786, 148 NW 924; State v. Flanagan, 25 R. I. 369, 55 A 876; Milling v. State, 67 Tex. Cr. 551, 150 SW 434; State v. Sanford, 89 Wash. 669, 154 P 1114; State v. Kirkpatrick, 88 W. Va. 381, 106 SE 887.

24. Fabry v. State, 26 OhNPNS 546.

[a] **Complaints, indictments, and informations held sufficient in this respect.**—Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296; Peo. v. Chow Juyan, 28 Cal. A. 124, 151 P 554 [foll Peo. v. Chow Juyan, 28 Cal. A. 802, 151 P 555; Peo. v. Chow Let, 28 Cal. A. 803, 151 P 555]; State v. Wilhite, 132 Iowa 226, 109 NW 730, 11 AnnCas 180; Swarts v. Siveny, 35 R. I. 1, 85 A 33.

25. See supra § 16.

26. See Indictments and Informations § 268.

27. Ala.—Harper v. State, 20 Ala. A. 324, 102 S 55 [certiorari den 212 Ala. 123, 102 S 58]; Thompson v. State, 19 Ala. A. 328, 97 S 258.

Ind.—Benham v. State, 116 Ind. 112, 18 NE 454.

Pa.—Com. v. Campbell, 22 Pa. Super. 98.

Tex.—Antle v. State, 6 Tex. A. 202.

Va.—Whitlock v. Com., 89 Va. 337, 15 SE 893.

[a] **Rule applied.**—An indictment which alleged that defendant did "practice medicine" sufficiently charges that he "practiced as a physician," within the meaning of a statute which makes it unlawful for any person to so practice without having a license. Whitlock v. Com., 89 Va. 337, 15 SE 893.

28. State v. Hale, (Utah) 263 P 86.

General statutory provisions as to contents of indictment or information see Indictments and Informations § 171 et seq.

29. Robinson v. State, 21 Ala. A. 168, 106 S 203; Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; Carter v. State, 3 Ala. A. 112, 57 S 1022; Melville v. State, 173 Ind. 352, 89 NE 490, 90 NE 467. And see Ex p. Greenall, 153 Cal. 767, 96 P 804 (dictum).

[a] **Rule is declared by statute** in some jurisdictions. Melville v. State, 173 Ind. 352, 89 NE 490, 90 NE 467; Parks v. State, 159 Ind. 211, 64 NE 862, 59 LRA 190.

30. Melville v. State, 173 Ind. 352, 89 NE 490, 90 NE 467; Peo. v. Ellis, 162 App. Div. 288, 147 NYS 681; Peo. v. Firth, 157 App. Div. 492, 142 NYS 634; State v. Morrison, 96 W. Va. 674, 123 SE 678.

31. State v. Crombie, 107 Minn. 166, 119 NW 658.

32. Singh v. State, 66 Tex. Cr. 156, 146 SW 891; Antle v. State, 6 Tex. A. 202.

33. Singh v. State, 66 Tex. Cr. 156, 146 SW 891.

34. Harper v. State, 20 Ala. A. 324, 102 S 55 [certiorari den 212 Ala. 123, 102 S 58].

[a] **Averments as to system held sufficient.**—Robinson v. State, 21 Ala. A. 159, 106 S 53; Fason v. State, 19 Ala. A. 533, 98 S 702; Peo. v. Cochran, 56 Cal. A. 394, 205 P 473; Peo. v. T. Wah Hing, 47 Cal. A. 327, 190 P 662.

35. Ex p. Wideman, 213 Ala. 170, 104 S 440 [den certiorari 20 Ala. A. 422, 104 S 438]; Robinson v. State, 21 Ala. A. 168, 106 S 203; Gullatt v. State, 18 Ala. A. 21, 88 S 371; Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296; Singh v. State, 66 Tex. Cr. 156, 146 SW 891.

36. See supra § 18.

37. Mich.—Peo. v. Watson, 196 Mich. 36, 162 NW 943 [dist Peo. v. Phippin, 70 Mich. 6, 37 NW 888 (foll White v. Judge Lapeer Cir. Ct., 133 Mich. 93, 94 NW 601) as having been decided under an earlier and differently worded statute].

Miss.—Dee v. State, 68 Miss. 601, 9 S 356.

Nebr.—O'Connor v. State, 46 Nebr. 157, 64 NW 719.

Oh.—Evans v. State, 9 OhS&CP 222, 6 OhNP 129; Fabry v. State, 26 OhNPNS 546.

Okl.—Feige v. State, 11 Okl. Cr. 49, 142 P 1044.

S. D.—State v. Carlisle, 22 S. D. 529, 118 NW 1033.

Utah.—State v. Hale, 263 P 86.

Wash.—State v. Carey, 4 Wash. 424, 30 P 729.

38. Schaeffer v. State, 113 Wis. 595, 89 NW 481.

39. Piper v. State, 163 Wis. 604, 158 NW 319.

40. Terr. v. Lotspeich, 14 N. M.

public as a physician or as willing to treat the afflicted.[41]

Allegation that accused professed to be a physician and surgeon is not necessary in an information charging him with treatment or offer of treatment for compensation.[42]

Commission of offense in different ways may be charged conjunctively in the indictment or information where the offense may be committed in such ways and they are not repugnant;[43] and it is held that an indictment which charges that defendant unlawfully "did practice or attempt to practice medicine or surgery" is not objectionable.[44]

Failure to register license or certificate. As practice by a person without having registered his license or certificate in the county of his residence and practice without having obtained a license or certificate are separate and distinct offenses,[45] allegations which are essential in an indictment or information for the former offense[46] may not be necessary in an indictment or information for the latter offense,[47] and where the latter offense is sufficiently charged, additional statements applicable to the former offense but not sufficient to charge it completely, may be rejected or disregarded as surplusage.[48]

[§ 37] **bbb. Lack of License or Certificate.**[49] It is necessary to allege,[50] in terms broad enough to meet the requirements of the applicable statute,[51] that accused did not have a license, certificate, or other authority required by the statute. Alleging that accused did not have a license from the board of health, without stating what board of health, is bad pleading,[52] but does not necessarily render the indictment fatally defective.[53]

[§ 38] **ccc. Patient or Disease Treated.** In a majority of jurisdictions a complaint, indictment, or information for practicing without a license or certificate need not state the name of the patient[54] or disease[55] treated by accused; nor need it allege that the person treated in fact had a disease[56] or that treatment was given to, or medicine was prescribed for, a human being as distinguished from a domestic animal.[57] In a few jurisdictions, however, it is necessary to name the individual treated or operated upon,[58] or give a proper excuse for not naming him;[59] and it is also necessary to make an averment as to the ailment of the patient.[60]

[§ 39] **ddd. Reward or Compensation.** Where the statute does not contain the words "fee or reward," an indictment for practicing medicine without a license need not charge that defendant practiced for "fee or reward."[61] Under statutes making compensation an element of the offense,[62] it has been both affirmed[63] and denied[64] that it is necessary to allege that accused practiced for compensation.

[§ 40] **(cc) Pleas and Defenses.** In a prosecution for practicing medicine without a license or certificate, a valid and unrevoked license or certificate, issued to accused and authorizing him to practice medicine in the state is a complete defense;[65] but a special plea in bar is insufficient where it avers only that accused presented to the board of medical examiners his diploma from a named school of osteopathy, together with the fee required by law.[66] In a prosecution for practicing chiropractics without a license, a license from either the medical or chiropractic board is a complete defense.[67] Matters held not to constitute defenses include discrimination against a particular class of practitioners,[68] the allowance of other persons, equally guilty, to escape,[69] the unlawful exclusion of accused from examination,[70] and the issuance of a charter or certificate of incorporation to certain incorporators, of whom defendant was one, authorizing the corporation to promote, teach, and practice a certain science in accordance with

412, 94 P 1025.

41. Terr. v. Lotspeich, supra; State v. Kaatz, 92 Vt. 497, 104 A 873.

42. Singh v. State, 66 Tex. Cr. 156, 146 SW 891.

43. Peo. v. Ratledge, 172 Cal. 401, 156 P 455; Peo. v. Poo On, 49 Cal. A. 219, 192 P 1090; Peo. v. T. Wah Hing, 47 Cal. A. 327, 190 P 662; State v. Wilhite, 132 Iowa 226, 109 NW 730; Hale v. State, 58 Oh. St. 676, 51 NE 154.

44. State v. Welch, 129 N. C. 579, 580, 40 SE 120; State v. Van Doran, 109 N. C. 864, 14 SE 32.

45. See supra § 16.

46. See infra § 90.

47. Stiles v. State, 66 Tex. Cr. 665, 148 SW 326.

48. State v. Frutiger, 167 Iowa 550, 149 NW 634; State v. Zechman, 157 Iowa 158, 138 NW 387; State v. Sanford, 89 Wash. 669, 154 P 1114.

49. Lack of registration see infra § 90.

50. State v. Call, 121 N. C. 643, 28 SE 517; Com. v. Moyer, 23 Pa. Dist. 164; State v. Deadwyler, 133 S. C. 75, 130 SE 332.

51. State v. Goldman, 44 Tex. 104; Carribene v. State, 3 Tex. A. 262; Schaeffer v. State, 113 Wis. 595, 89 NW 481.

[a] **Temporary certificate.**—Failure to allege that accused did not have a temporary certificate from one or more members of the state board of examiners is not fatal where it is alleged that he did not have a license or certificate from (1) the state board of examiners (State v. Carlisle, 22 S. D. 529, 118 NW 1033) (2) or any of its members (Noble v. State, 68 Fla. 1, 66 S 153).

[b] **Allegations held sufficient.**—Blalock v. State, 112 Ga. 338, 37 SE 361; State v. Welch, 129 N. C. 579, 40 SE 120; State v. Sanford, 89 Wash. 669, 154 P 1114 (allegation that accused did not have a certificate in any form, and not stating the particular form of certificate he should have possessed to entitle him to practice the particular system or mode of treatment which he actually practiced).

52. State v. Hellscher, 150 Mo. A. 230, 129 SW 1035.

53. State v. Hellscher, supra.

54. Ala.—Thompson v. State, 19 Ala. A. 328, 97 S 258.

Cal.—Peo. v. T. Wah Hing, 47 Cal. A. 327, 190 P 662.

Ill.—Peo. v. Walder, 317 Ill. 524, 148 NE 287.

Mich.—Peo. v. Phippin, 70 Mich. 6, 37 NW 888.

Mo.—State v. Doerring, 194 Mo. 398, 92 SW 489; State v. Little, 76 Mo. 52; State v. Hellscher, 150 Mo. A. 230, 129 SW 1035; State v. Smith, 60 Mo. A. 283.

N. C.—State v. Van Doran, 109 N. C. 864, 14 SE 32.

Pa.—Com. v. Moyer, 23 Pa. Dist. 164.

R. I.—State v. Martin, 23 R. I. 143, 49 A 497.

S. D.—State v. Carlisle, 30 S. D. 475, 139 SW 127 [writ of error dism 238 U. S. 609 mem, 35 SCt 663 mem, 59 L. ed. 1487 mem].

55. Thompson v. State, 19 Ala. A. 328, 97 S 258; Peo. v. T. Wah Hing, 47 Cal. A. 327, 190 P 662.

56. Frazier v. State, 19 Ala. A. 322, 97 S 251.

57. Peo. v. Ryan, 59 Cal. A. 776, 212 P 35; Peo. v. Cochran, 56 Cal. A. 394, 205 P 473; State v. Kendig, 133 Iowa 164, 110 NW 463.

58. Terr. v. Lotspeich, 14 N. M. 412, 94 P 1025; Peo. v. Devinny, 227 N. Y. 397, 125 NE 543; State v. Hale, (Utah) 263 P 86.

[a] **Reasons for rule** are that a complaint not stating whose ailments were treated by defendant (1) does not show that the ailments treated were those of another person, rather than of defendant (State v. Hale, (Utah) 263 P 86), (2) and it does not comply with a general statute requiring it to state the name of the person against whom the offense was committed (State v. Hale, supra).

59. Peo. v. Devinny, 227 N. Y. 397, 125 NE 543.

60. State v. Hale, (Utah) 263 P 86.

61. State v. Welch, 129 N. C. 579, 40 SE 120; State v. Call, 121 N. C. 643, 28 SE 517.

62. See supra § 34.

63. Terr. v. Lotspeich, 14 N. M. 412, 94 P 1025.

64. Blalock v. State, 112 Ga. 338, 37 SE 361.

65. Gobin v. State, 9 Okl. Cr. 201, 131 P 546, 44 LRANS 1089; Wilson v. State, 8 Okl. Cr. 493, 129 P 82.

Application of statutes to practice after revocation of license see supra § 32.

66. Melville v. State, 173 Ind. 352, 89 NE 490, 90 NE 467.

Application of statutes to practice after wrongful refusal of license see supra § 32.

67. Peo. v. Mills, 74 Cal. A. 353, 240 P 296.

License to practice medicine as authority to practice chiropractics see infra § 63.

68. Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925.

69. State v. Wilhite, 132 Iowa 226, 109 NW 730, 11 AnnCas 180.

70. Peo. v. Ratledge, 172 Cal. 401, 156 P 455.

law.[71]

[§ 41] **(dd) Issues, Proof, and Variance.** Evidence in support of the allegations of the complaint, indictment, or information is admissible,[72] but evidence which is not responsive to any issue in the case is not admissible,[73] and the only issue or question in the case is whether or not accused was practicing without a license or certificate.[74] Generally speaking, the allegations in the indictment or information must be substantiated by proof in order to warrant a conviction;[75] but, unless disproved by accused, a negative averment is taken as true where the subject matter thereof is peculiarly within his knowledge;[76] the subject matter of an averment which is surplusage need not be proved;[77] and it is not necessary to prove that the offense was committed on the precise date alleged.[78] It has been both affirmed[79] and denied[80] that, on an indictment or information for practicing medicine without a license from a specified board, the prosecution must show that such board was legally constituted. It is not incumbent upon the state to show that accused practiced medicine or treated diseases or disorders according to some particular system or method;[81] and although practice for compensation and reward is essential to guilt,[82] the state need not prove the actual receipt of such compensation.[83]

[§ 42] **(ee) Evidence—aaa. Burden of Proof.** The state has the burden of proving that accused practiced medicine or dentistry, as the case may be,[84] and defendant has the burden of proving that he had a license, certificate, or such other authority to practice as is required by law,[85] or that he was within an exception or exemption contained in the statute.[86]

[§ 43] **bbb. Admissibility.**[87] Any competent evidence having a material tendency to prove that accused did or did not practice the profession in question,[88] or that he did or did not have a license, cer-

71. State v. Hefferman, 28 R. I. 20, 65 A 284.

72. See cases infra this note.

[a] **Evidence of numerous treatments** is admissible under a general allegation of practicing medicine without a license or certificate of qualification. Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; Fason v. State, 19 Ala. A. 533, 98 S 702.

[b] **Evidence of actual disease** of person for whom it is alleged accused prescribed is admissible. State v. Snearly, 18 Wyo. 341, 107 P 389.

73. Peo. v. Keseling, 35 Cal. A. 501, 170 P 627; Peo. v. Walker, 291 Ill. 535, 126 NE 120.

74. Peo. v. Ratledge, 172 Cal. 401, 156 P 455.

[a] **Fairness or unfairness of board of medical examiners** is not a question before the court. Peo. v. Ratledge, 172 Cal. 401, 156 P 455.

75. State v. Morris, 45 Mont. 334, 122 P 917; Allen v. State, 10 Okl. Cr. 458, 138 P 178.

[a] **Where charge is confined to single act,** and the evidence fails entirely to sustain the charge made, a conviction cannot be sustained. State v. Morris, 45 Mont. 334, 122 P 917.

[b] **Variance between allegations and proof held fatal.**—Norwood v. State, 70 Tex. Cr. 605, 158 SW 270.

[c] **Allegations held supported by proof.**—(1) Proof that defendant acted either as a physician or surgeon is sufficient to support an information charging that he held himself out as a physician and surgeon. Com. v. St. Pierre, 175 Mass. 48, 55 NE 482. (2) So proof that defendant engaged in any branch or department of medicine sustains an allegation that he engaged in the practice of medicine. Antle v. State, 6 Tex. A. 202. (3) An indictment which alleges that defendant prescribed and furnished medicine is sufficiently sustained by proof that he prescribed medicine. State v. Bresee, 137 Iowa 673, 114 NW 45, 24 LRANS 103. (4) Evidence held sufficient to sustain charge in indictment that a named person was treated. Peo. v. Walder, 317 Ill. 524, 158 NE 287.

76. Sanford v. State, (Ala. A.) 120 S 577; State v. Hathaway, 115 Mo. 36, 21 SW 1081.

[a] **Averment that accused did not have license or certificate** (1) is within the application of the rule. Sanford v. State, (Ala. A.) 120 S 577. (2) Although the complaint, indictment, or information must allege that accused did not have a license or certificate (see supra § 37), (3) nevertheless the rule that accused has the burden of proving that he had a license or certificate (see infra § 42) (4) constitutes an exception (McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708]) (5) to the general rule that the state is required to prove every material averment in the complaint, indictment, or information (see Indictments and Informations § 438).

77. Terr. v. Takamine, 21 Hawaii 465.

78. Kettles v. Peo., 221 Ill. 221, 77 NE 472; State v. Littooy, 37 Wash. 693, 79 P 1135; State v. Brown, 37 Wash. 106, 79 P 638.

79. U. S. v. Williams, 28 F. Cas. No. 16,713, 5 Cranch C. C. 62.

80. State v. Wild, (Mo. A.) 202 SW 613.

81. Collins v. State, 68 Tex. Cr. 354, 152 SW 1047.

[a] **Evidence held sufficient to support allegations.**—An indictment alleging that accused treated a patient, and that the treatment consisted in physical manipulations with accused's hands "over" the patient, is sustained by proof that accused placed his hands "upon" the patient, and rubbed and manipulated his hands "upon" his body. Milling v. State, 67 Tex. Cr. 551, 150 SW 434.

82. See supra § 34.

83. State v. Hale, 15 Mo. 606.

84. Benham v. State, 116 Ind. 112, 18 NE 454.

85. Ala.—Jackson v. State, 19 Ala. A. 633, 99 S 826; McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708]; Samples v. State, 19 Ala. A. 478, 98 S 211 [certiorari den and aff 210 Ala. 544, 98 S 803]; Thompson v. State, 19 Ala. A. 328, 97 S 258.

Cal.—Peo. v. Boo Doo Hong, 122 Cal. 606, 55 P 402; Peo. v. Saunders, 61 Cal. A. 341, 215 P 120; Peo. v. Goscinsky, 52 Cal. A. 62, 198 P 40; Peo. v. T. Wah Hing, 47 Cal. A. 327, 190 P 662; Peo. v. Fortch, 13 Cal. A. 770, 110 P 823.

Ga.—Morris v. State, 117 Ga. 1, 43 SE 368.

Ill.—Kettles v. Peo., 221 Ill. 221, 77 NE 472; Williams v. Peo., 20 Ill. A. 92.

Ind.—Benham v. State, 116 Ind. 112, 18 NE 454.

Kan.—State v. Wilson, 62 Kan. 621, 64 P 23, 52 LRA 679.

Mass.—Com. v. St. Pierre, 175 Mass. 48, 55 NE 482.

Mo.—State v. Gardner, (A.) 231 SW 1057, State v. Fenter, (A.) 204 SW 733.

N. Y.—Peo. v. Fulda, 52 Hun 65, 4 NYS 945, 7 N. Y. Cr. 1; Peo. v. Nyce, 34 Hun 298.

Pa.—Com. v. Jobe, 91 Pa. Super. 110.

S. C.—State v. Deadwyler, 133 S. C. 75, 130 SE 332.

Wis.—Raynor v. State, 62 Wis. 289, 22 NW 430.

[a] **Reason for rule** is that the matter is peculiarly within the knowledge of accused. McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708]; Peo. v. Boo Doo Hong, 122 Cal. 606, 55 P 402; Peo. v. Goscinsky, 52 Cal. A. 62, 198 P 40; Peo. v. T. Wah Hing, 47 Cal. A. 327, 190 P 662; State v. Wilson, 62 Kan. 621, 64 P 23, 52 LRA 679.

86. State v. Hicks, 143 N. C. 689, 57 SE 441.

87. Admissibility of evidence of other offenses see Criminal Law § 1166.

88. Singh v. State, 66 Tex. Cr. 156, 146 SW 891; and cases infra this note.

[a] **Evidence of treatments** (1) by defendant is admissible. Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; Peo. v. Ratledge, 172 Cal. 401, 156 P 455; Hyroop v. State, 79 Tex. Cr. 150, 179 SW 878; Mueller v. State, 69 Tex. Cr. 158, 153 SW 1142. (2) Evidence that accused told a witness that what he was doing would relieve him is admissible as tending to show that accused knowingly treated a disease from which the witness was suffering. Thompson v. State, 19 Ala. A. 328, 97 S 258. (3) Where accused claims to be a chiropractor, books and pamphlets descriptive of the chiropractic treatment are admissible. Swarts v. Siveny, 35 R. I. 1, 85 A 33. (4) Scope of proof under allegations of complaint or indictment see supra § 41.

[b] **Prescribing or furnishing drugs or medicines.**—(1) Evidence that accused prescribed for a witness is admissible (Singh v. State, 66 Tex. Cr. 156, 146 SW 891), (2) or at least prescriptions signed by accused are admissible if they were given to patients for the purpose of having the medicine prescribed taken (State v. Cornelius, 200 Iowa 309, 204 NW 222), (3) although they are not if they were merely in the nature of orders for medicines to be kept and used as required in a hospital where accused was employed (State v. Cornelius, supra). (4) The testimony of a chemist as to the results of his analysis of medicine furnished by accused to a patient is admissible for the purpose of establishing that accused furnished drugs to the patient in order to effect a cure of his ailment. Peo. v. Banks, 236 Mich. 8, 209 NW 935.

[c] **Evidence that accused professed to cure** (1) or held himself out as a medical practitioner, as in advertisements or by using the title "Dr.," "M.D.," or any other similar title in connection with his name, is admissible. Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; Springer v. District of Columbia, 23 App. (D. C.)

tificate, or other required authority,[89] is admissible. Matters held inadmissible include the articles of incorporation of a church[90] or dental college;[91] the tenets of a church;[92] the mental attitude of complainant in making the complaint;[93] the conclusion of accused or of other witnesses that the acts done by him did not constitute the practice of medicine and surgery;[94] evidence as to whether the treatments given by accused were beneficial or harmful;[95] the treatment of the prosecuting witness by other physicians;[96] evidence that other physicians had no certificates;[97] evidence showing merely that accused had a right to obtain a license or certificate;[98] the injustice of the action of the state board in refusing to grant a certificate to accused;[99] evidence offered for the purpose of bringing the case within a statutory exception, but which, if received, would not do so;[1] and, in the absence of connecting evidence, evidence that accused had a credit on the books of a newspaper,[2] or evidence of a newspaper advertisement, disclosing his name, of a hospital or infirmary.[3] The court will not compel a witness to produce the medicine which he received from defendant.[4]

Compensation. Even though compensation may not be an essential element of the offense in the particular jurisdiction,[5] evidence that accused received payment for the treatments given or services rendered by him is admissible,[6] provided, in some jurisdictions, the payment was a part of the res gestæ of the treatment.[7] Accused is entitled to introduce evidence that the services were rendered by him without compensation.[8]

[§ 44] **ccc. Weight and Sufficiency.** Effect is accorded statutes under which certain records are prima facie evidence of the existence or nonexistence of a license,[9] or the use by a person of the title "Dr.," "Doctor," etc., or the exposure of a sign, circular, or advertisement, indicating his occupation to be that of a physician, is prima facie evidence that he is practicing medicine;[10] but aside from such statutory rules, the rules governing the weight and sufficiency of evidence in criminal prosecutions generally[11] are controlling.[12]

59; Terr v. Takamine, 21 Hawaii 465; Peo. v. Phippin, 70 Mich. 6, 37 NW 888; State v. Blumenthal, 141 Mo. A. 502, 125 SW 1188; Mayer v. State, 64 N. J. L. 323, 45 A 624; Mueller v. State, 69 Tex. Cr. 158, 153 SW 1142; Germany v. State, 62 Tex. Cr. 276, 137 SW 130, AnnCas1913C 477; State v. Hanover, 55 Wash. 403, 104 P 624, 107 P 388. (2) Such evidence is not rendered inadmissible by the rule that the state is not allowed to put in issue the general character of defendant. Antle v. State, 6 Tex. A. 202.

[d] **Acts done in another county.**—Evidence that acts done by accused at the home of a patient in a county other than the one in which accused is being prosecuted, and having a tendency to prove that he was not merely selling medicines, but professed to treat and cure human ailments, is admissible for the purpose of characterizing the business in which he was engaged in the county in which he was being prosecuted. Peo. v. Banks, 236 Mich. 8, 209 NW 935.

[e] **Defendant's acts on day of arrest** may be shown in evidence where they tend to prove that he was practicing medicine as a business, and not incidentally. Peo. v. T. Wah Hing, 79 Cal. A. 286, 249 P 229.

89. Iowa.—State v. Cornelius, 200 Iowa 309, 204 NW 222.
Minn.—State v. Luscher, 157 Minn. 192, 195 NW 914.
N. D.—State v. Ramsey, 31 N. D. 626, 154 NW 731.
Okl.—Wilson v. State, 8 Okl. Cr. 493, 129 P 82.
Wash.—State v. Littooy, 52 Wash. 87, 100 P 170, 17 AnnCas 292.
Wis.—Wendel v. State, 62 Wis. 300, 22 NW 435.

90. Fealy v. Birmingham, 15 Ala. A. 367, 73 S 296.

91. State v. Carlisle, 30 S. D. 475, 139 NW 127 [writ of error dism 238 U. S. 609 mem, 35 SCt 663 mem, 59 L. ed. 1487 mem].

92. Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.

93. Swarts v. Siveny, 35 R. I. 1, 85 A 33.

94. Triplett v. State, 23 Oh. Cir. Ct. N. S. 172.

95. Swarts v. Siveny, 35 R. I. 1, 85 A 33; Germany v. State, 62 Tex. Cr. 276, 137 SW 130, AnnCas1913C 477; State v. Snearly, 18 Wyo. 341, 107 P 389.

96. Germany v. State, 62 Tex. Cr. 276, 137 SW 130, AnnCas1913C 477. See Thompson v. State, 19 Ala. A. 328, 97 S 258 (it was proper to sustain an objection to a question whether the prosecuting witness had had medical treatment in his life, as the information sought was immaterial).

97. Brooks v. State, 146 Ala. 153, 41 S 156.

98. Com. v. Keemer, 20 Pa. Dist. 983.

[a] **Diploma and length of time of practice** cannot be shown by defendant where a license or certificate is required (1) and he has none (Com. v. Keemer, 20 Pa. Dist. 983) (2) or he has one which is insufficient (Brooks v. State, 146 Ala. 153, 41 S 156).

99. Krowenstrot v. State, 15 Oh. Cir. Ct. 73, 8 Oh. Cir. Dec. 119; State v. Littooy, 37 Wash. 693, 79 P 1135; State v. Brown, 37 Wash. 106, 79 P 638.

1. Carpenter v. State, 106 Nebr. 742, 184 NW 941.

[a] **Thus** evidence of the family use of a particular remedy in a European country, or by immigrants from Europe, would not establish that the remedy is an ordinary household remedy in this country, and hence is not admissible for the purpose of proving that the case is within a statutory exception permitting the administration of ordinary household remedies. Carpenter v. State, 106 Nebr. 742, 184 NW 941.

2. Collins v. State, 75 Tex. Cr. 534, 171 SW 729.

3. Collins v. State, supra (in the absence of evidence that accused authorized the publication of the advertisement or was connected with the infirmary or hospital).

4. U. S. v. Williams, 28 F. Cas. No. 16,713, 5 Cranch C. C. 62.

5. State v. Ramsey, 31 N. D. 626, 154 NW 731.

[a] **Reason for rule.**—The evidence is admissible to show that the services rendered were professional as distinguished from gratuitous and friendly assistance rendered by one neighbor to another. State v. Ramsey, 31 N. D. 626, 154 NW 731.

Compensation as element of offense see supra § 34.

6. Singh v. State, 66 Tex. Cr. 156, 146 SW 891.

7. Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; Fason v. State, 19 Ala. A. 533, 98 S 702.

8. Com. v. St. Pierre, 175 Mass. 48, 55 NE 482.

9. State v. Hopkins, 54 Mont. 52, 166 P 304; State v. Dodson, 54 Wash. 31, 102 P 872.

10. Mayer v. State, 64 N. J. L. 323, 45 A 624.

11. See Criminal Law §§ 1559–1999.

12. See cases infra this note.

[a] **Proof of guilt beyond reasonable doubt** is necessary to warrant a verdict of guilty. Benham v. State, 116 Ind. 112, 18 NE 454.

[b] **Existence of diploma** is prima facie evidence of a right to it. Wendel v. State, 62 Wis. 300, 22 NW 435; Raynor v. State, 62 Wis. 289, 22 NW 430.

[c] **"Diagnosis** may be established by acts and conduct as well as by any representations which might be made to a patient." Peo. v. Parish, 59 Cal. A. 302, 303, 210 P 633.

[d] **Uncorroborated testimony** of employees of a dental society may be sufficient to support a conviction. Peo. v. Stein, 112 App. Div. 896, 97 NYS 923.

[e] **Evidence of single act,** or of the treatment of a single patient, together with evidence characterizing it and tending directly to show that it was professional, may be sufficient to show, or warrant an inference, that accused engaged in practice as a business. Peo. v. T. Wah Hing, 79 Cal. A. 286, 249 P 229; Terr. v. Takamine, 21 Hawaii 465; Payne v. State, 112 Tenn. 587, 79 SW 1025; Antle v. State, 6 Tex. A. 202.

[f] **Evidence held sufficient** to: (1) Justify, warrant, or sustain a conviction, or, in other words, show that accused practiced the profession in question without the license or certificate required by law. Peo. v. T. Wah Hing, 79 Cal. A. 286, 249 P 229; Peo. v. Cosper, 76 Cal. A. 597, 245 P 466; Peo. v. Albrexstondare, 71 Cal. A. 339, 235 P 87; Peo. v. Poo On, 68 Cal. A. 756, 230 P 193; Peo. v. T. Wah Hing, 47 Cal. A. 327, 190 P 662; Peo. v. Mash, 235 Ill. A. 314; Beyer v. State, (Ind.) 158 NE 477; Ferner v. State, 151 Ind. 247, 51 NE 360; Benham v. State, 116 Ind. 112, 18 NE 454; State v. Hueser, 205 Iowa 132, 215 NW 643; State v. Collins, 178 Iowa 73, 159 NW 604; State v. Bresee, 137 Iowa 673, 114 NW 45, 24 LRA NS 103; State v. Kendig, 133 Iowa 164, 110 NW 463; Peo. v. Banks, 236 Mich. 8, 209 NW 935; State v. Graves, 161 Minn. 422, 201 NW 933; State v. Rolph, 140 Minn. 190, 167 NW 553, LRA1918D 1096; State v. Oredson, 96 Minn. 509, 105 NW 188; State v. Barbarick, (Mo. A.) 266 SW 764; State v. Evertz, (Mo. A.) 202 SW 616; State v. Wild, (Mo. A.) 202 SW 613 [retransf 190 SW 273]; Peo. v. Somme, 120 App. Div. 20, 104 NYS 946 [aff 190 N. Y. 541 mem, 83 NE 1128 mem]; Harris v. State, (Okl. Cr.) 271 P 263; Reeves v. State, (Okl. Cr.) 253 P 510, 255 P 162; Com. v. Read, 76 Pa. Super. 202; State v. Heffernan, 28 R. I. 20, 65 A 284; Payne v. State, 112 Tenn. 587, 79 SW 1025; Newman v. State, 72 Tex. Cr. 367, 163 SW 427; Mueller v. State, 69 Tex. Cr. 158, 153 SW 1142; State v. Yee Foo Lun, 45 Utah 531, 147 P 488; State v. Austin, 103 Wash. 63, 173 P 725; State v. Littooy, 52 Wash. 87, 100 P 170, 17 AnnCas 292; State v. Lawson, 40

[§ 45] **(ff) Trial.** Where the evidence is sufficient to warrant the submission of the case to the jury,[13] it is for the jury to decide whether accused violated the statutes by practicing the profession in question without a license or certificate.[14] Also, where accused claims that he was doing acts within a statutory exception, the question whether he was doing so[15] in good faith[16] is one of fact for the jury. The withdrawal of one allegation of the indictment from the jury does not necessarily result in the withdrawal of another allegation not included in the former.[17]

Instructions. The instructions must conform to the pleadings[18] and the evidence,[19] correctly state the law,[20] and not be misleading.[21] It is not necessary for the court to instruct the jury as to the law of costs in case of acquittal;[22] nor is it necessary to give a requested instruction where the subject matter thereof is covered by another instruction given by the court.[23]

Affirmative charge should be given for accused where the undisputed evidence shows that he did not engage in the practice of the profession in question,[24] and, at least in some jurisdictions, it should be given for the state where the evidence is without conflict and it shows that accused engaged in the practice of the profession without a license or certificate,[25] but not where accused has introduced evidence tending to show that he has not performed any acts within the scope of the statutory prohibition.[26]

Verdict should be in proper form.[27]

[§ 46] **(gg) Judgment, Sentence, Punishment, and Review.** The punishment assessed must be within the minimum and maximum limits fixed by law,[28] or it must be for exactly the minimum where the applicable statute prescribes the minimum, but no maximum, punishment.[29] Imprisonment on default

Wash. 455, 82 P 750 [app dism 205 U. S. 536 mem, 27 SCt 789 mem, 51 L. ed. 919 mem]; State v. Sexton, 37 Wash. 110, 79 P 634; Price v. State, 168 Wis. 603, 171 NW 77. (2) Establish a prima facie case. Rex v. Schilling, 8 Sask. L. 70, 21 DomLR 60, 23 CanCrCas 380, 7 WestWkly 1112. (3) Justify "a finding that the defendant practiced medicine within the meaning of the statute; that he, for a fee, diagnosed, treated, and operated upon a physical or abnormal ailment or condition of another." State v. Erickson, 47 Utah 452, 456, 154 P 948. (4) Warrant a finding that accused held himself out as a practitioner of medicine contrary to statute. Com. v. Houtenbrink, 235 Mass. 320, 126 NE 669. (5) Justify a "finding that the defendant did not contract for the payment to him of the one hundred dollars either as the purchase-price of the material he furnished or as compensation for his service in applying it, but that the charge was essentially one for imparting his peculiar knowledge of its curative powers, and that the transaction therefore amounted to recommending a medicine for a fee within the letter and spirit of the law." State v. Huff, 75 Kan. 585, 592, 90 P 279, 12 LRANS 1094. (6) Authorize the jury to discredit accused's testimony showing prior practice bringing him within a statutory exemption. Ranald v. State, (Tex. Cr.) 47 SW 976. (7) Sustain a finding that a certain dental operation, the performance of which was not disputed, was performed by accused rather than by another person. State v. Luscher, 157 Minn. 192, 195 NW 914. (8) Prove that the state board of health was legally constituted. State v. Evertz, (Mo. A.) 202 SW 616.

[g] **Evidence held insufficient** to: (1) Warrant or sustain conviction. Williams v. State, (Nebr.) 224 NW 286; Peo. v. Fajardo, 18 Porto Rico 452; State v. Dunham, 31 Wash. 636, 72 P 459. (2) Show that accused acted with the intent of usurping the functions of authorized physicians. Peo. v. Ruiz, 25 Porto Rico 548. (3) Show that the herbs sold by accused were domestic family remedies. State v. Yee Foo Lun, 45 Utah 531, 147 P 488.

13. State v. Booher, (Iowa) 155 N W 167; Peo. v. Banks, 236 Mich. 8, 209 NW 935.

14. Cal.—Peo. v. Goscinsky, 52 Cal. A. 62, 198 P 40.

Iowa.—State v. Collins, 178 Iowa 73, 159 NW 604.

Kan.—State v. Douglas, 124 Kan. 482, 260 P 655.

Mass.—Com. v. Lindsey, 223 Mass. 392, 111 NE 869.

N. Y.—Peo. v. Kaiser, 206 App. Div. 780, 200 NYS 835.

Okl.—Feige v. State, 23 Okl. Cr. 434, 215 P 437.

R. I.—Swarts v. Siveny, 35 R. I. 1, 85 A 33.

[a] **Effect of statutory definition or absence thereof.**—(1) Where the acts which shall constitute the practice of medicine are defined by statute, whether or not defendant has, by his conduct, brought himself within such definition, is a question for the jury. State v. Heath, 125 Iowa 585, 101 NW 429. (2) On the other hand, it is said that, where the statute does not declare what specific acts shall constitute "practicing medicine," or what it is to "publicly profess to do so," it is for the courts to determine whether the facts proved in a particular case bring it within the terms of the statute, taking these in the sense in which they are commonly understood. Springer v. District of Columbia, 23 App. (D. C.) 59 (so stating, but also holding that the charge of the court was a correct statement of the law and directly applicable to the evidence, and that a motion to direct a verdict for defendant was correctly overruled).

[b] **Jury are not bound** by a declaration, in a card signed by the patient's mother, that the services performed by accused were rendered as a matter of humanity and benevolence, but may properly find that the card and sale of medicine constituted a mere subterfuge and attempt to avoid the prohibition of the statute. Till v. State, 172 Wis. 266, 177 NW 589.

15. Peo. v. Cole, 219 N. Y. 98, 113 NE 790, LRA1917C 816 (practicing tenets of a church).

16. Peo. v. Cole, supra.

17. State v. Bresee, 137 Iowa 673, 114 NW 45, 24 LRANS 103.

18. See cases infra this note.

[a] **Instructions held not broader than information.**—State v. Fenter, (Mo. A.) 204 SW 733; Stiles v. State, 66 Tex. Cr. 665, 148 SW 326.

19. State v. Heffernan, 28 R. I. 20, 65 A 284.

[a] **Failure to state rules not rendered applicable by evidence** is not prejudicial. Peo. v. Sekelyn, 217 Mich. 341, 186 NW 479.

[b] **Requested instruction is properly refused** where there is no evidence to which it may be applied. Peo. v. Cosper, 76 Cal. A. 597, 245 P 466; Carpenter v. State, 106 Nebr. 742, 184 NW 941; State v. Littooy, 52 Wash. 87, 100 P 170, 17 AnnCas 292. See State v. Fenter, (Mo. A.) 204 S W 733 (no substantial evidence).

[c] **Instructions held warranted by evidence.**—State v. Douglas, 124 Kan. 482, 260 P 655.

[d] **Instruction to disregard evidence** (1) that treatment given by accused was beneficial to his patients or produced favorable results is properly given where such evidence has been admitted. Peo. v. Saunders, 61 Cal. A. 341, 215 P 120; State v. Miller, 146 Iowa 521, 124 NW 167. (2) Inadmissibility of evidence see supra § 43.

20. See cases infra this note.

[a] **Instructions held erroneous.**—Peo. v. Vogelgesang, 221 N. Y. 290, 116 NE 977; Aldenhoven v. State, 42 Tex. Cr. 6, 56 SW 914 (where, under the statute, either a license or a diploma would be sufficient authority to practice medicine, it is error to instruct that if accused practiced medicine without having a license and a diploma the jury should convict).

[b] **Instructions held not erroneous.**—State v. Hueser, 205 Iowa 132, 215 NW 643 (instruction defining "prescribe"); State v. Edmund, 176 Iowa 95, 157 NW 729 (instruction stating substance of Medical Practice Act); State v. Booher, (Iowa) 155 NW 167; State v. Kendig, 133 Iowa 164, 110 NW 463; State v. Oredson, 96 Minn. 509, 105 NW 188 (instruction defining term substantially in words of the statute); State v. Ramsey, 31 N. D. 626, 154 NW 731; Com. v. Dailey, 75 Pa. Super. 510; Milling v. State, 67 Tex. Cr. 551, 150 SW 434.

21. See cases infra this note.

[a] **Requested instruction held properly refused as misleading.**—Peo. v. Mash, 235 Ill. A. 314.

[b] **Instructions held not misleading.**—Peo. v. T. Wah Hing, 79 Cal. A. 286, 249 P 229; State v. Zechman, 157 Iowa 158, 138 NW 387.

22. Com. v. Clymer, 30 Pa. Super. 61.

23. State v. Booher, (Iowa) 155 N W 167.

24. Johnson v. State, 22 Ala. A. 149, 113 S 484.

25. Jackson v. State, 19 Ala. A. 633, 99 S 826; Thompson v. State, 19 Ala. A. 328, 97 S 258.

Direction of verdict of guilty in criminal prosecution generally see Criminal Law § 2301.

26. Carter v. State, 3 Ala. A. 112, 57 S 1022.

27. See cases infra this note.

[a] **Special verdict.**—Upon an indictment under a statute which makes it a misdemeanor for any person to practice medicine for fee or reward without a license, a special verdict which does not find that defendant practiced "for fee or reward" will not justify a conviction. State v. Call, 121 N. C. 643, 28 SE 517.

[b] **Verdict finding defendant guilty as charged** in the information is in proper form. Peo. v. Poo On, 49 Cal. A. 219, 192 P 1090.

[c] **Verdict held not objectionable.**—State v. Gardner, (Mo. A.) 231 SW 1057.

28. Rutherford v. State, 79 Tex. Cr. 605, 187 SW 481.

29. Peo. v. Salter, 191 App. Div. 723, 182 NYS 252, 192 App. Div. 435,

of payment of a fine and costs may be ordered;[30] but a statute providing for imprisonment as punishment does not authorize a sentence to hard labor.[31] In some Canadian provinces the conviction should specify the particular act or acts which constituted the practicing.[32]

Review. A judgment of conviction based upon a revocation of defendant's license must, after the reversal of the revocation, be also reversed.[33] The admission of incompetent evidence which could not have harmed defendant is not reversible error.[34] Likewise, error in the instructions, which was in favor of accused, and therefore harmless as to him, is not ground for reversal.[35] Where the charge of the court is not in the record, it will be presumed that the jury were properly instructed as to the offense for which defendant was on trial.[36]

[§ 47] **(hh) Effect of Conviction.** Where the offense denounced by the statute is of such a continuous nature as to subject the violator to but one conviction for the whole period of time next before the institution of the prosecution, a conviction under one indictment is a bar to proceedings under other similar indictments for previous acts,[37] although each in itself constituted the practice of medicine.[38]

[§ 48] **ee. Actions for Penalty for Practicing without License or Certificate.**[39] In a few jurisdictions it is, or at times has been, provided by statute that a penalty for violation of a statute prohibiting the practice of medicine, dentistry, or veterinary medicine without a license or certificate may be sued for and recovered by a designated board, such as the state board of health or a state board of examiners.[40] An action to recover such a penalty is a civil suit,[41] rather than a criminal prosecution,[42] and it is not subject to the rules of pleading and procedure peculiar to criminal prosecutions.[43] A sufficient complaint or statement of claim,[44] together with proper and sufficient evidence,[45] is essential to a recovery.

Where action is tried before jury,[46] the instructions to the jury must be correct[47] and not misleading.[48] A verdict for plaintiff may be directed where the admitted facts conclusively show that defendant violated the statute as charged.[49]

Judgment. It is not the duty of the trial court to make recitals of facts in the judgment.[50] Under a statute providing penalties in different amounts for the first offense and subsequent offenses, a judgment upon a first conviction cannot exceed the amount limited by statute for the first offense.[51]

Review. A reviewing court may reverse the judgment for errors of law,[52] but it will not disturb conclusions of fact based upon conflicting evidence.[53]

[§ 49] **(d) Right to, and Authority and Duty To Issue**[54]**—aa. In General.** The granting of a license or certificate to practice medicine is an exercise of the police power of the state.[55] A license or certificate may be issued to,[56] and application therefor

182 NYS 799.

30. Rex v. Schilling, 8 Sask. L. 70, 21 DomLR 60, 23 CanCrCas 380, 7 WestWkly 1112.

31. Thompson v. State, 19 Ala. A. 328, 97 S 253.

32. Rex v. Schilling, 8 Sask. L. 70, 21 DomLR 60, 23 CanCrCas 380, 7 WestWkly 1112.

Conviction of practicing without registration see infra § 90.

33. State v. Kellogg, 14 Mont. 451, 36 P 1077.

34. Raynor v. State, 62 Wis. 289, 22 NW 430.

35. State v. Yee Foo Lun, 45 Utah 531, 147 P 488.

36. Richardson v. State, 47 Ark. 562, 2 SW 187.

37. Wilson v. Com., 119 Ky. 769, 82 SW 427, 26 KyL 685.

Cross references:

Continuing offense generally see supra § 16.

Lack of bar to prosecution for subsequent practice see Criminal Law § 447.

38. Wilson v. Com., 119 Ky. 769, 82 SW 427, 26 KyL 685.

39. **Generally** see Fines, Forfeitures, and Penalties §§ 79-154.

40. See statutory provisions.

41. Peo. v. Gartenstein, 248 Ill. 546, 94 NE 128; State Bd. of Medical Examiners v. Curtis, 94 N. J. L. 324, 110 A 816 [aff 95 N. J. L. 551, 112 A 887]. See State Bd. of Medical Examiners v. Giedroyc, 91 N. J. L. 61, 102 A 906 (essentially a civil suit); Lowrie v. State Bd. of Registration, etc., 90 N. J. L. 54, 99 A 927 (in the nature of a civil suit). But see State Bd. of Medical Examiners v. Roche, 102 N. J. L. 262, 132 A 86 (the action is a special statutory proceeding).

42. Peo. v. Gartenstein, 248 Ill. 546, 94 NE 128; Peo. v. McTier, 184 Ill. A. 635; Peo. v. Klimek, 184 Ill. A. 59.

43. Peo. v. Gartenstein, 248 Ill. 546, 94 NE 128.

[a] **For example** (1) an action of debt to recover the penalty is not a criminal proceeding in which the offense is required to be proved beyond a reasonable doubt (Peo. v. Klimek, 184 Ill. A. 59), (2) or in which the venue of the offense must be proved (Peo. v. McTier, 184 Ill. A. 635). (3) Also, it is not within a constitutional provision requiring all prosecutions to be carried on "in the name and by the authority of the People of the State of Illinois," and conclude, "against the peace and dignity of the same." Peo. v. Gartenstein, 248 Ill. 546, 550, 94 NE 128.

44. Steuben County v. Wood, 24 App. Div. 442, 48 NYS 471.

[a] **It is sufficient** (1) to employ the language of the statute in charging a violation thereof (Lowrie v. State Bd. of Registration, etc., 90 N. J. L. 54, 99 A 927; State Bd. of Medical Examiners v. O'Neill, (N. J. Sup.) 143 A 814), (2) without setting forth specific instances that may be relied upon as evidence of practice (Lowrie v. State Bd. of Registration, etc., supra).

[b] **It is not sufficient** to aver that defendant practiced veterinary medicine and surgery in violation of a specified statute. Steuben County v. Wood, 24 App. Div. 442, 48 NYS 471.

[c] **It is not necessary** to state the names of the persons treated by defendant or that such names are unknown. Peo. v. Dunn, 255 Ill. 289, 99 NE 577.

[d] **Requiring or refusing to require more specific statement** of claim is discretionary with the court. Peo. v. Dunn, 255 Ill. 289, 99 NE 577.

45. See cases infra this note.

[a] **Burden of proof.**—The burden is on defendant to prove that he had a license. Peo. v. Klimek, 184 Ill. A. 59.

[b] **Admissibility of evidence.**—(1) Irrelevant and immaterial evidence is properly excluded. State Bd. of Medical Examiners v. De Young, (N. J. Sup.) 132 A 87. (2) A printed circular distributed by defendant from house to house and tending to support the charge of the commission of the offense is competent evidence. Peo. v. McTier, 184 Ill. A. 635. (3) However, where defendant has not introduced any oral testimony, a pamphlet, purporting to be signed by a third person and to be an exposition of the method of healing claimed by defendant to have been employed by him, is not admissible in his behalf. Peo. v. Trenner, 144 Ill. A. 275.

[c] **Evidence held sufficient** to: (1) Warrant a recovery, or, in other words, to show that defendant violated the statute. Peo. v. Dunn, 255 Ill. 289, 99 NE 577; Peo. v. Kane, 205 Ill. A. 32 [rev on other grounds 288 Ill. 235, 123 NE 265]; Peo. v. Brown, 202 Ill. A. 530; Peo. v. McTier, 184 Ill. A. 635; Peo. v. Powella, 176 Ill. A. 603; State Bd. of Medical Examiners v. Johnson, (N. J. Sup.) 141 A 591; State Bd. of Medical Examiners v. Walker, (N. J. Sup.) 140 A 420; State Bd. of Medical Examiners v. Hirsch, (N. J. Sup.) 140 A 312; State Bd. of Medical Examiners v. Wooding, (N. J. Sup.) 135 A 785. (2) Identify defendant as the person who conducted an office at a certain address and treated certain witnesses. State Bd. of Medical Examiners v. Buettel, 102 N. J. L. 74, 131 A 89.

[d] **Evidence held insufficient** to establish that defendant, a licensed midwife, "used any drugs or medicine" in connection with her attendance upon another person during the period of the latter's confinement. Peo. v. Weding, 147 Ill. A. 59, 61.

46. **Right to trial by jury** see Juries § 26.

47. Peo. v. Black, 211 Ill. A. 188.

48. Peo. v. Black, supra.

49. State Bd. of Medical Examiners v. Giedroyc, 91 N. J. L. 61, 102 A 906.

50. Peo. v. Moser, 176 Ill. A. 625.

51. Peo. v. Kane, 288 Ill. 235, 123 NE 265.

[a] **Reasons for rule** are that: (1) A first offense means a first conviction. Peo. v. Kane, 288 Ill. 235, 123 NE 265. (2) There cannot be a judgment for two or more first offenses. Peo. v. Kane, supra.

52. State Bd. of Medical Examiners v. Wooding, (N. J. Sup.) 135 A 785.

53. State Bd. of Medical Examiners v. Livesey, (N. J. Sup.) 140 A 444.

54. **Mandamus to compel issuance of license** see Mandamus § 223.

55. Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116.

56. Jackson v. State, 19 Ala. A. 633, 99 S 826; McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708].

may be made by,[57] a person desiring to practice any system of treatment; and the legislature may properly divide licenses or certificates into two classes, one for the practice of medicine in all its branches and the other for the treatment of human ailments, without the use of drugs and medicines and without operative surgery, by the system or method which applicant specifically designates in his application as the one he would undertake to practice;[58] but under a statute classifying different kinds of drugless healing, providing for the issuance of licenses or certificates for each kind and also authorizing the issuance of a license or certificate for any other separate and coördinate system of drugless practice, an applicant whose proposed practice falls within one of the specific classifications is not entitled to the issuance of a license describing the practice authorized by a name of his own choosing,[59] even though error may have been committed in granting other licenses under names not set forth in the statute.[60] It cannot be said, as a matter of law, that cancers, tumors, malignant growths, and cutaneous diseases are not so correlated that the treatment thereof cannot be classed as a special branch of medicine and surgery within the meaning of a statute providing for the issuance of a certificate to practice a special branch of medicine and surgery.[61]

Corporation cannot be licensed to practice medicine.[62]

[§ 50] **bb. Qualifications of Applicant and Proof Thereof[63]—(aa) In General.** It is competent for the legislature of a state not only to prescribe reasonable qualifications to be possessed by persons who desire to practice medicine and surgery,[64] chiropractics,[65] dentistry,[66] obstetrics,[67] or optometry[68] in the state, but also to provide reasonable means for ascertaining the existence of such qualifications[69] and to require an applicant for a license or certificate to furnish some substantial evidence of his qualifications.[70] Also, the legislature may raise the standard of qualification from time to time.[71] An applicant shown to possess the required qualifications is entitled to a license upon a proper and timely application therefor;[72] but a person who was qualified to receive a license or certificate under a certain statute is not entitled to a license or certificate thereunder upon an application made after its repeal.[73] A person holding a restricted license may acquire the qualifications for an unrestricted license precisely as other persons may.[74]

Person having established practice as a physician or dentist is not ipso facto exempt from complying with legislation prescribing a reasonable standard of qualification;[75] he may be required to conform to the same standard of qualification as a person contemplating practicing.[76]

[§ 51] **(bb) Education and Knowledge—aaa. In General.** The legislature may make such requirements as will qualify all persons treating human ailments thoroughly to understand their profes-

[a] **Persons other than homeopaths.**—The persons to whom certificates of qualification may be issued are not limited to those who desire to enter the profession as homeopathic doctors. Jackson v. State, 19 Ala. A. 633, 99 S 826; McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708].

57. See cases infra this note.

[a] **Chiropractor has same right as osteopath or homeopath** to apply for a certificate of qualification. Jackson v. State, 19 Ala. A. 633, 99 S 826; McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708].

58. Peo. v. Witte, 315 Ill. 282, 146 NE 178, 37 ALR 672.

[a] **California statutes as to different forms of certificates reviewed.**—Millsap v. Alderson, 63 Cal. A. 518, 219 P 469.

Respective rights of holders of different licenses or certificates see infra § 63.

59. Wells v. State Bd. of Drugless Examiners, 113 Wash. 341, 194 P 388.

60. Wells v. State Bd. of Drugless Examiners, supra.

61. Bohannon v. Board of Medical Examiners, 24 Cal. A. 215, 140 P 1089.

62. State Electro-Medical Inst. v. State, 74 Nebr. 40, 103 NW 1078.

Corporation:
Formation of, for practice of medicine see Corporations § 119.
Furnishing services of physicians by, as practice without license see Corporations §§ 119, 2145.
Practice of medicine or dentistry by, generally see Corporations § 2145.

63. Qualifications to practice in hospital see Hospitals § 7.

64. U. S.—Graves v. Minnesota, 272 U. S. 425, 47 SCt 122, 71 L. ed. 331; Butcher v. Maybury, 8 F. (2d) 155.

Ariz.—Aiton v. Board of Medical Examiners, 13 Ariz. 354, 114 P 962, LRA1915A 691.

Cal.—Bohannon v. Board of Medical Examiners, 24 Cal. A. 215, 140 P 1089.

Ill.—Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995. And see Peo. v. Graham, 311 Ill. 92, 142 NE 449 (recognizing the rule, but holding the statute in question void as to defendant on account of discrimination).

Kan.—State v. Johnson, 84 Kan. 411, 114 P 390, 41 LRANS 539; Meffert v. State Bd. of Medical Registration, etc., 66 Kan. 710, 72 P 247, 1 LRANS 811.

La.—Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem].

Mich.—Locke v. Judge Ionia Cir. Ct., 184 Mich. 535, 151 NW 623.

Pa.—Com. v. Wilson, 6 Pa. Dist. 628, 19 Pa. Co. 521.

S. D.—State v. Doran, 28 S. D. 486, 134 NW 53.

Utah.—Board of Medical Examiners v. Blair, 57 Utah 516, 196 P 221.

"It is competent for the Legislature to prescribe qualifications for those who are to practice medicine and thus to assure that they shall possess the requisite character and learning." Butcher v. Maybury, 8 F. (2d) 155, 158.

Cross references:
Denial of:
Due process of law see Constitutional Law § 1075.
Equal protection of laws see Constitutional Law § 896.
Grant of special privileges and immunities see Constitutional Law § 836.

65. Harris v. State, 215 Ala. 56, 109 S 291.

66. Graves v. Minnesota, 272 U. S. 425, 47 SCt 122, 71 L. ed. 331; Peo. v. Painless Parker Dentist, (Colo.) 275 P 928; Hodgen v. Com., 142 Ky. 722, 135 SW 311; State v. Department of Licenses, 130 Wash. 82, 226 P 275.

67. Board of Medical Examiners v. Blair, 57 Utah 516, 196 P 221.

68. Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237; State v. Utah State Bd. of Examiners in Optometry, 37 Utah 339, 108 P 347.

69. U. S.—Dent v. West Virginia, 129 U. S. 114, 9 SCt 231, 32 L. ed. 623.

Ark.—Gosnell v. State, 52 Ark. 228, 12 SW 392.

Ind.—Wilkins v. State, 113 Ind. 514, 16 NE 192.

Kan.—State v. Creditor, 44 Kan. 565, 24 P 346, 21 AmSR 306.

Pa.—Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237.

Utah.—State v. Utah State Bd. of Examiners in Optometry, 37 Utah 339, 108 P 347.

Determination by board or officer see infra §§ 56, 58, 59.

70. Williams v. Scudder, 102 Oh. St. 305, 131 NE 481.

71. Dent v. West Virginia, 129 U. S. 114, 9 SCt 231, 32 L. ed. 623; Butcher v. Maybury, 8 F. (2d) 155, 159; Samples v. State, 19 Ala. A. 478, 98 S 211; State v. Gravett, 65 Oh. St. 289, 62 NE 325, 87 AmSR 605, 55 LRA 791; Glenn v. State Bd. of Dental Examiners, 1 OhNPNS 449.

"The state may change the qualifications from time to time, making them more rigid." Butcher v. Maybury, supra.

72. Vadney v. State Bd. of Medical Examiners, 19 Ida. 203, 112 P 1046; Gosselin v. College of Physicians, etc., 19 Que. Super. 175.

73. State v. State Bd. of Dental Examiners, 1 OhNPNS 449.

74. Peo. v. Witte, 315 Ill. 282, 146 NE 178, 37 ALR 672.

75. Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 S 809; Peo. v. Fulda, 52 Hun 65, 4 NYS 945, 7 N. Y. Cr. 1; State v. Gravett, 65 Oh. St. 289, 62 NE 325, 87 AmSR 605, 55 LRA 791.

Express exemption from requirement of:
Diploma see infra § 52.
Examination see infra § 53.

76. State v. Gravett, 65 Oh. St. 289, 62 NE 325, 87 AmSR 605, 55 LRA 791.

[a] **Impossibility of qualifying.**—"The Legislature may prescribe qualifications, both as to character and learning, which will require those in practice to give up their occupation. . . . Legislation prescribing qualifications which a practitioner cannot meet because of conditions antedating the enactment of the legislation is valid. Such legislation does not constitute punishment; it

sion;[77] it may prescribe reasonable qualifications not only as to medical education,[78] but also as to preliminary or general education;[79] and while it may not require knowledge of a subject which bears no relation to the practice of medicine,[80] it may require an applicant for a license to possess knowledge of subjects deemed essential to the proper diagnosis and treatment of diseases,[81] and bearing a relation to the practice of medicine as a general science,[82] even though they may not be used by the followers of every school of medicine.[83] Likewise, the legislature may properly provide that before a person may be licensed to practice dentistry he shall have had a preliminary education equivalent to a four-year high school course,[84] and a professional education in a registered dental school[85] or partly in a medical, and partly in a dental, school.[86]

[§ 52] **bbb. Graduation or Diploma.** Statutes providing that an applicant for a license to practice medicine shall be a graduate of, or hold a diploma from, a reputable medical school in order to be eligible for a license, or to examination for a license,[87] or imposing a like requirement of a diploma from a dental college as a qualification for a license to practice dentistry,[88] are generally upheld as valid and constitutional, even though they also require an examination;[89] but particular statutes may be unconstitutional on account of discrimination in favor of the graduates of medical schools and against the graduates of schools teaching systems of treatment without the use of drugs, medicine, or operative surgery.[90] A statute requiring a diploma is not unconstitutional because it exempts persons engaged in practice at the time of the passage of the act[91] or who have practiced in the state a pre-

is legitimate regulation." Butcher v. Maybury, 8 F. (2d) 155, 159.

77. Peo. v. McGinley, 329 Ill. 173, 160 NE 186; Peo. v. Graham, 311 Ill. 92, 142 NE 449.

78. Peo. v. Ratledge, 172 Cal. 401, 156 P 455; Williams v. Scudder, 102 Oh. St. 305, 131 NE 481; Johnson v. State, (Tex. Civ. A.) 267 SW 1057.

[a] **Legislature may determine amount and quality of scientific education** necessary for an individual to possess before he may hold himself out to practice the healing art. Peo. v. Ratledge, 172 Cal. 401, 156 P 455.

[b] **Course of study** (1) may be specified and laid out by the state. Peo. v. Ratledge, 172 Cal. 401, 156 P 455. (2) Also, the time which must elapse between the beginning and completion of the course of study may be prescribed. Peo. v. Walder, 317 Ill. 524, 148 NE 287. (3) The entire time need not be spent in one college. Medical Candidates' Requirements, 17 Pa. Co. 546.

[c] **Relation of study to branch of healing art.**—"It is not necessary that to be within reason a required study must be one pertaining immediately to the branch of the healing art which an applicant for a license wishes to practice." Peo. v. Ratledge, 172 Cal. 401, 406, 156 P 455.

79. Williams v. Scudder, 102 Oh. St. 305, 131 NE 481.

[a] **High school education.**—"It is not unreasonable to exact a high school education or its equivalent as a proper standard of general education." Butcher v. Maybury, 8 F. (2d) 155, 159.

[b] **Two years' course in college of liberal arts.**—(1) A statute which imposes the same ultimate requirement of a two years' course in a college of liberal arts as a qualification for an unrestricted license does not discriminate between persons who apply for such license in the first instance and holders of restricted licenses who apply therefor. Peo. v. Witte, 315 Ill. 282, 146 NE 178, 37 ALR 672. (2) Some statutes are construed to require a two years' college course in physics, chemistry, biology, and either German or French to be taken only by persons who seek licenses to practice medicine and surgery, and not by persons who desire licenses to practice osteopathy and surgery. State v. Wisconsin State Bd. of Medical Examiners, 172 Wis. 317, 177 NW 910.

80. Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem].

81. State v. Barnes, 119 S. C. 213, 112 SE 62; Johnson v. State, (Tex. Civ. A.) 267 SW 1057; Singh v. State, 66 Tex. Cr. 156, 146 SW 891; Germany v. State, 62 Tex. Cr. 276, 137 SW 130, AnnCas1913C 477.

[a] **Reasonable requirement.**—"The requirement that every one who proposes to devote himself to the prevention, cure, or alleviation of disease and pain shall possess some knowledge of the nature of disease, its origin, its anatomical and physiological features, its causative relation, and of the preparation and action of drugs, ought not to be denounced as exacting or unreasonable." State v. Corwin, 151 Iowa 420, 424, 131 NW 659.

Subjects of examination see infra § 53.

82. Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem].

83. Louisiana State Bd. of Medical Examiners v. Fife, supra; Peo. v. Lewis, 233 Mich. 240, 206 NW 553, 42 ALR 1337.

[a] **"Were it otherwise,** the Legislature would be greatly hampered in the exercise of its power to protect the general health and the public from imposition and fraud. Every group of men who might get together and evolve some system, designed to restore health, would be entitled to recognition, and all that could be required of them would be evidence of good character and a knowledge of such subjects as their particular school seemed to require, although the Legislature might deem with reason a knowledge of such subjects wholly insufficient to entitle any one to treat the sick." Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 686, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem].

[b] **Drugless practitioners.**—(1) "It is within legislative power to require persons practicing treatment of human ailments or diseases without the use of drugs to possess knowledge of organic structure, intimate structure of tissues, embryonic evolution, functions of the body, molecular and atomic structure of bodies, micro-organisms, science of diseases, morbid processes observable in various diseases of organs, recognition of disease by its symptoms, science of health, and efforts made and measures and precautions deemed advisable for the promotion and protection of public health." Peo. v. Lewis, 233 Mich. 240, 242, 206 NW 553, 42 ALR 1337. (2) A chiropractor or other drugless practitioner may properly be required to be familiar with, or have knowledge of, anatomy, physiology, hygiene, medical jurisprudence, pediatrics, bacteriology, and pathology (State v. Barnes, 119 S. C. 213, 112 SE 62), (3) as well as toxicology (Peo. v. Ratledge, 172 Cal. 401, 156 P 455; State v. Barnes, supra) (4) and surgery (Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S 58 [aff 274 U. S. 720 mem, 47 SCt 590 mem, 71 L. ed. 1324 mem]), (5) or, at least minor surgery. (State v. Barnes, supra). (6) Also, he may be required to have knowledge of materia medica (Louisiana State Bd. of Medical Examiners v. Fife, supra), (7) at least where he desires to obtain a license to practice surgery, as the practice of surgery requires the use of antiseptics, anæsthetics, and other drugs and medicines, and no person ought to be permitted to practice surgery without possessing knowledge of drugs and medicines (Peo. v. Witte, 315 Ill. 282, 146 NE 178, 37 ALR 672).

84. Peo. v. Griswold, 213 N. Y. 92, 106 NE 929, LRA1915D 538.

85. Peo. v. Griswold, supra.

86. Peo. v. Griswold, supra.

87. Webster v. State Bd. of Health, 130 Ky. 191, 113 SW 415; State v. Heffernan, 40 R. I. 121, 100 A 55; Larson v. State, 106 Tex. Cr. 261, 285 SW 317. And see Constitutional Law §§ 334, 841.

[a] **Statutes are not unconstitutional as applied to:** (1) An osteopath. Collins v. Texas, 223 U. S. 288, 32 SCt 286, 56 L. ed. 439 [aff 57 Tex. Cr. 2, 121 SW 501] (he, like others, must begin by a diagnosis). (2) A person who claims to have originated a system of medicine or therapeutics not taught in any school or college of medicine. State v. Heffernan, 40 R. I. 121, 100 A 55.

88. Graves v. Minnesota, 272 U. S. 425, 47 SCt 122, 71 L. ed. 331 [aff 166 Minn. 496, 207 NW 560]; State v. Graves, 161 Minn. 422, 201 NW 933; State v. Littooy, 52 Wash. 87, 100 P 170, 17 AnnCas 292.

"Clearly the fact that an applicant for a license holds a diploma from a reputable dental college has a direct and substantial relation to his qualification to practice dentistry. We cannot say that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment, it determines that the holding of such a diploma is a necessary qualification for the practice of dentistry; or that the distinction made in the granting of licenses between applicants who hold such diplomas and those who do not, is a classification which has no real or substantial basis. And the constitutionality of the statute must be sustained." Graves v. Minnesota, 272 U. S. 425, 429, 47 SCt 122, 71 L. ed. 331.

89. State v. State Bd. of Dental Examiners, 48 Wash. 291, 93 P 515.

90. Peo. v. Schaeffer, 310 Ill. 574, 142 NE 248; Peo. v. Love, 298 Ill. 304, 131 NE 809, 16 ALR 703.

[a] **Thus** a statute is invalid where it requires a person desiring to practice without the use of drugs, medicine, or operative surgery to be a graduate of a professional school, college, or institution, teaching that system and requiring a four-year course of instruction as a prerequisite to graduation, but allows a person to be licensed to practice medicine and surgery in all their branches if he is a graduate of a medical school which is reputable and in good standing, regardless of whether it requires a two-year, three-year, or four-year course. Peo. v. Love, 298 Ill. 304, 131 NE 809, 16 ALR 703.

91. State v. Creditor, 44 Kan. 565, 24 P 346, 21 AmSR 306.

scribed number of years;[92] and under a statute providing for the issuance of a license to such a practitioner upon his meeting certain prescribed requirements, not including the production of a diploma, he cannot be required to furnish a diploma.[93] Where both an examination[94] and a diploma or graduation[95] are required by a valid statute, an applicant must, to be entitled to take the examination, possess a diploma or be a graduate,[96] or show that he is within a statutory exemption.[97] Not only must the school or college which granted a diploma to applicant be such a legally chartered medical institution in good standing as comes within the terms and meaning of the particular statute,[98] but applicant must furnish satisfactory proof of that fact.[99] A diploma is not per se evidence of the fact;[1] and it is held that the existence of the college at the date of the diploma must be proved by producing its act of incorporation.[2]

Certificate of graduation from high school. Under a statute requiring an applicant for a license to practice medicine to furnish a certificate of graduation from an accredited high school, a certificate must comply with the law as to its contents,[3] and be made by an authorized person,[4] before it may be accepted. The certificate of graduation is the only evidence of premedical education which may be received.[5]

[§ 53] **ccc. Examination.**[6] The legislature of a state has power to make reasonable requirements[7] and regulations[8] as to the examination of applicants for licenses to practice medicine and surgery; provide for,[9] authorize,[10] and require[11] the examination of persons desiring to engage in the practice of a limited branch of medicine; require an applicant for a license to practice dentistry to take an examination,[12] even though he is also required to present a diploma from a dental college;[13] prescribe who shall be eligible to take an examination for a license to practice dentistry;[14] and prescribe the

92. Ex p. Spinney, 10 Nev. 323.

93. State v. Cooper, 11 Ida. 219, 81 P 374; In re Christensen, 59 Wash. 314, 109 P 1040.

94. See infra § 53.

95. See statutory provisions.

[a] **Construction of statute.**—A statute which, in clear and unambiguous language, requires both an examination and a diploma or a license from an institution which grants licenses upon actual examination will not be construed to entitle an applicant to a certificate upon his passing a satisfactory examination, without producing a diploma or license. Arwine v. Board of Medical Examiners, 151 Cal. 499, 503, 91 P 319 ("The language of the provision as to production of diploma or license is such as to necessarily make it applicable to every case, and no exception thereto is declared in any other part of the act. . . . A diploma or license coming up to the requirements of the act is essential in every case to the right to a certificate, however well qualified the applicant may be in other respects").

[b] **Classification of statutes.**—(1) While some statutes prescribing the professional qualifications for a license or certificate for the general and unlimited practice of medicine and surgery require, or at least early statutes required, only the passing of an examination, others require or required only the possession of a diploma, and still others require or required a diploma or the passing of an examination in the alternative, the majority of the modern statutes require both a diploma or graduation and the passing of an examination. See statutory provisions. (2) It must be borne in mind that the requirements in particular jurisdictions have been changed and made more rigid from time to time by statute (see statutory provisions), (3) and that the qualifications for a license or certificate to practice medicine and surgery generally are sometimes more onerous than the qualifications for a license or certificate to practice a branch of medicine or an allied profession (see statutory provisions).

96. Webster v. State Bd. of Health, 130 Ky. 191, 113 SW 415.

[a] **Change in requirements.**—"Formerly the degree from the law school or the medical school in and of itself entitled the holder to admission to practice. Now in both professions it is merely a preliminary to examination." Peo. v. Somme, 120 App. Div. 20, 25, 104 NYS 946 [aff 190 N. Y. 541 mem, 83 NE 1128 mem].

97. Webster v. State Bd. of Health, 130 Ky. 191, 113 SW 415.

98. See cases infra this note.

[a] **Degree from institution approved by regents** is necessary, under some statutes, to entitle a person to admission to examination. Peo. v. Somme, 120 App. Div. 20, 104 NYS 946 [aff 190 N. Y. 541 mem, 83 NE 1128 mem].

[b] **Institution conducted without sanction of law** in a particular state is not a regularly conducted school or college of osteopathy within the meaning of a statute requiring an applicant for a license to practice osteopathy to be a graduate of such a school or college. Peo. v. Reid, 135 App. Div. 89, 119 NYS 866.

[c] **Word "reputable"** (1) as used in the statutes, means "reputable" in the general sense in which the term is ordinarily used; worthy of repute or distinction; held in esteem; honorable; praiseworthy. State v. Chittenden, 127 Wis. 468, 107 NW 500; State v. Chittenden, 112 Wis. 569, 88 NW 587. (2) "The word 'reputable' is used in the statute in the sense of worthy of a good repute rather than as indicating the actual reputation which the institution had." Mower v. State Dept. of Health, (Conn.) 142 A 473, 475. (3) The reputability of a dental college relates to that which will enable the college to do good work, and the actual accomplishment. State v. Chittenden, supra.

[d] **What is not "medical college."**—A college which teaches osteopathy, a method of treating diseases by kneading or manipulation of the body, and does not teach surgery, bacteriology, materia medica, or therapeutics, is not a "medical college," within the meaning of a statute which requires the state board of health to issue a certificate to practice medicine to any reputable physician who has a diploma from a reputable medical college chartered under the laws of the state, or from a reputable and legally chartered medical college of some other state or country, indorsed as such by the state board of health. Nelson v. State Bd. of Health, 108 Ky. 769, 57 SW 501, 22 KyL 438, 50 LRA 383.

99. State v. Gregory, 83 Mo. 123, 53 AmR 565; Hoefner's Case, 36 Pa. Co. 443.

[a] **Indorsement by dean in state.**—Under a statute requiring a medical practitioner having a diploma from an institution in another state to obtain the indorsement thereon of the dean of some medical faculty within the state, the filing of a certificate made by the secretary of a medical faculty is not sufficient, even if the institution applied to refuses to indorse any diploma. In re Bauer, 2 Pa. Cas. 69, 4 A 913.

[b] **Burden of proof rests upon applicant.**—Berkeley Chiropractic College v. Compton, (Cal. A.) 276 P 361; Horton v. Clark, 316 Mo. 770, 293 SW 362; State v. Clark, (Mo.) 230 SW 609; State v. Adcock, 225 Mo. 335, 124 SW 1100; Virella v. Carreras, 22 Porto Rico 722; State v. Chittenden, 112 Wis. 569, 88 NW 587.

[c] **Question of fact.**—(1) Except to the extent, if any, that pertinent terms are defined by statute, the question whether a particular college is reputable or in good standing is not a legal question (Peo. v. Illinois State Bd. of Dental Examiners, 110 Ill. 180), (2) but is rather a question of fact (Peo. v. Illinois State Bd. of Dental Examiners, supra; State v. North, 316 Mo. 1050, 294 SW 1012).

Determination of status of institution by state board see infra § 59.

1. Hill v. Boddie, 2 Stew. & P. (Ala.) 56.

2. Hunter v. Blount, 27 Ga. 76.

3. State v. Adcox, 312 Mo. 55, 278 SW 990.

4. State v. Adcox, supra.

5. Horton v. Clark, 316 Mo. 770, 293 SW 362.

[a] **"Length of time that the applicant attended the school** issuing the certificate can be of no possible concern to the State Board of Health; provided of course that the certificate is genuine and was granted by a school coming within the class designated by the statute." Horton v. Clark, 316 Mo. 770, 777, 293 SW 362.

6. Powers and duties of state board as to examinations see infra §§ 56, 58.

7. Peo. v. Love, 298 Ill. 304, 131 NE 809, 16 ALR 703.

Requirement as not violating federal constitution see Constitutional Law § 841.

8. Williams v. Scudder, 102 Oh. St. 305, 131 NE 481.

9. Harris v. State, 215 Ala. 56, 109 S 291 (chiropractics); Shaw v. State, 11 Oh. A. 486.

[a] **Statute construed** to make ample provision for the examination and licensing of persons desiring to practice naprapathy. Peo. v. Barnett, 240 Ill. A. 357.

10. Williams v. Scudder, 102 Oh. St. 305, 131 NE 481.

[a] **Two examinations.**—A statute providing that an applicant for a drugless license may, upon his request, be examined in obstetrics contemplates that the special examination in obstetrics shall be given at the same time as the examination for the drugless license, and not after a license has been issued to applicant. Peo. v. Heckard, 244 Ill. A. 112.

11. Meeker v. Scudder, 17 Oh. A. 210 [aff 108 Oh. St. 423, 140 NE 627].

12. State v. State Bd. of Dental Examiners, 48 Wash. 291, 93 P 515.

13. State v. State Bd. of Dental Examiners, supra.

14. Peo. v. Keseling, 35 Cal. A. 501, 170 P 627.

Diploma as necessary to eligibility

subjects of examination of all persons who desire to practice medicine,[15] without limiting the subjects to those peculiar to particular treatments which an applicant for a license proposes to give.[16]

Failure to pass, and reëxamination.[17] Where the grade received by an applicant is less than the percentage prescribed by statute, he does not pass the examination;[18] and a statute providing that an applicant who fails to make the required grade in his first examination shall be entitled to a second examination does not give him a right to a further examination after he has taken and failed to pass two examinations.[19]

Exemption from examination.[20] A proviso to the effect that a person of a certain class, upon meeting certain requirements, not including an examination, shall be granted a license will be construed to exempt from examination a person who is within the class and meets the specified requirements.[21] Sometimes a statute relating to the practice of medicine, dentistry, optometry, osteopathy, or veterinary medicine and surgery provides for the granting of a license without examination to a person who is engaged in the practice of the profession in question at the time of the passage of the act[22] or has been engaged in it for a prescribed period prior thereto.[23] In order to come within such a statute a person must have been actually[24] and legally[25] engaged in the practice of the profession in question at the prescribed time or for the prescribed period. Some,[26] but not other,[27] statutes of this nature are limited to residents of the state. Other statutes provide, subject to certain conditions, for the granting of a license without examination to a person who has been licensed in another jurisdiction;[28] and a license may and should be granted without examination under such statutes when and only when there is a fulfillment of the prescribed conditions,[29] such as the existence of requirements in the jurisdiction wherein the first license was granted, which are at least equal or equivalent to those obtaining in the jurisdiction wherein it is sought to procure the second license,[30] and practice by applicant in the jurisdiction of his residence for a prescribed period immediately prior to the date of his application.[31] Under the construction placed upon a few statutes, the indorsement, without examination of applicant, of a license issued in another jurisdiction is discretionary.[32] A statute providing for the issuance of a license without examination to any graduate of a recognized college who has passed an examination for admission to the medical corps of the army, navy, and public health services of the United States is valid;[33] and a statute recognizing different systems of treating human ailments, one of which is the practice of medicine and surgery in all their branches, and providing for separate and distinct examinations and licenses for each, is not unconstitutional on the ground that it discriminates against the chiropractor and in favor of the general practitioner by allowing the latter to practice chiropractics without examination.[34] Where a statute limits the time for applying for a license or certificate without examination, an application must be made within the time fixed in order to exempt the applicant from examination;[35] but the statute will not be given a strict construction where such construction would call for the making of application before the time fixed by law for the organization and first meeting of the board of ex-

see supra § 52.

15. Hicks v. State, 88 Tex. Cr. 433, 227 SW 302.

16. Frutiger v. State, 215 Ala. 451, 111 S 37.

[a] **As applied to chiropractor** (1) a statute prescribing subjects of examination is not unconstitutional because it includes some subjects or branches of learning not included in the science of chiropractics or not necessary in the practice of the chiropractic system. Frutiger v. State, 215 Ala. 451, 111 S 37; State v. Morrison, 98 W. Va. 289, 127 SE 75. (2) Chiropractors may be required by statute to take the examination prescribed for osteopaths. State v. Hopkins, 54 Mont. 52, 166 P 304.

17. Return of fee on failure to pass see infra § 58.

18. State v. Department of Licenses, 130 Wash. 82, 226 P 275.

19. State v. Charrier, (Wash.) 276 P 878; State v. Department of Licenses, 127 Wash. 469, 221 P 613.

[a] **Statute limiting number of examinations is not unconstitutional.** —State v. Charrier, (Wash.) 276 P 878.

20. Invalidity of provision for admission without examination as affecting remainder or statute see Statutes [36 Cyc 983].

21. Kinlin v. State Bd. of Medical Examiners, 101 N. J. L. 221, 127 A 522 (person who served in the military or naval forces of the United States in the World War, was, on a specified date, a student or in training in a legally incorporated college of chiropractic under the jurisdiction of the federal board of vocational training, and was subsequently graduated therefrom).

22. See statutory provisions.

[a] **Time referred to** is the date when the act takes effect, and not the date when it is approved. Mills v. State Bd. of Osteopathic Registration, etc., 135 Mich. 525, 98 NW 19, 3 Ann Cas 735.

23. See statutory provisions.

[a] **Construction of statute.**—A statute, providing that all persons who have made the practice of medicine and surgery their profession or business continuously for ten years within the state shall receive a license to continue the practice, is construed to exempt from examination only persons who have practiced for ten years prior to the passage of the statute. Higgins v. State Bd. of Medical Examiners, 46 Colo. 476, 104 P 953.

Prior practice, and proof thereof, as qualification for license or certificate generally see infra § 54.

24. Sherburne v. Board of Dental Examiners, 13 Ida. 105, 88 P 762; State v. State Medical Bd., 107 Oh. St. 20, 140 NE 660; In re Osteopathic Students, 36 Pa. Co. 268, 12 Dauph. Co. 127.

[a] **Meager practice** (1) consisting of the treatment of a few patients, during the prescribed five-year period, may not be sufficient to constitute continuous practice for the full period and thereby bring applicant within the exemption from examination (State v. Upham, 116 Oh. St. 606, 157 NE 20), (2) especially where, during that period, he has been engaged in another occupation as an employee (State v. Upham, supra).

[b] **Practice as student.**—(1) The language employed in a statute providing that persons engaged in the practice of osteopathy in the state at the time of the approval of the act shall be entitled to receive licenses without examination must be interpreted according to the popular meaning of the words employed, and as so interpreted the statute exempts from examination persons actually engaged in the practice of osteopathy at the time of the approval of the act, not as students in a school, but as regular graduate practitioners holding themselves out to the public as duly qualified practitioners of osteopathy. In re Osteopathic Students, 36 Pa. Co. 268, 12 Dauph. Co. 127. (2) Likewise, studying optometry at night, and occasionally assisting another person in the practice of optometry, is not the practice of optometry within a statute providing for exemption from examination for a certificate to practice optometry of a person who has been continuously engaged in the practice of optometry for at least a specified period next preceding a designated date. Innes v. Satchwell, 23 Alta. L. 495, [1928] 3 DomLR 624, [1928] 2 WestWkly 638 [aff [1928] 2 DomLR 822, [1928] 1 WestWkly 932].

25. State v. Ohio State Medical Bd., 60 Oh. St. 21, 53 NE 298; State v. Board of Dental Examiners, 31 Wash. 492, 72 P 110.

26. Vineberg v. Day, 152 N. C. 355, 67 SE 760.

27. Pffefferkorn v. Lewis, 80 N. H. 518, 119 A 368.

28. See statutory provisions.

29. See infra text and notes 30, 31.

30. Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 P 319; Levin v. Board of Medical Examiners, 74 Cal. A. 104, 239 P 410; U. S. v. Custis, 35 App. (D. C.) 247; Thiedemann v. State Bd. of Dental Examiners, 214 Mich. 369, 183 NW 228.

[a] **Equivalency is to be determined** by looking at the statutes, rather than the rules of a board. U. S. v. Custis, 35 App. (D. C.) 247.

31. U. S. v. Custis, 41 App. (D. C.) 24.

32. Ex p. Hollis, 82 S. C. 230, 64 SE 232.

[a] **Discretion held properly exercised.**—Peo. v. McKelway, 163 App. Div. 286, 148 NYS 818.

33. Peo. v. Walder, 317 Ill. 524, 148 NE 287.

34. State v. Waldram, 64 Utah 406, 231 P 431.

35. Lindsey v. Allen, 269 Fed. 656 [app dism 258 U. S. 613 mem, 42 SCt 462 mem, 66 L. ed. 791 mem]; Meads

aminers.[36]

[§ 54] **(cc) Prior Practice.**[37] Practice of such a character,[38] and at or for such a time,[39] together with such proof thereof,[40] as is prescribed by statute,[41] and the existence and proof of such other qualifications, if any, as are prescribed by statute,[42] are necessary and sufficient to entitle a person to a license or certificate under a statute providing for the granting thereof to a person who was engaged in practice at or before the date of the passage of the act or other specified date. Where proofs are filed within the time limited by statute, defects therein may be corrected by other proofs filed after the expiration of the statutory period.[43]

[§ 55] **(dd) Good Moral Character.**[44] The legislature has the same power to require, as a condition of the right to practice the profession, that applicant shall be possessed of the qualifications of honor and a good moral character, as it has to require that he shall be learned in the profession;[45] and when so required by statute, satisfactory proof of his good moral character must be produced by an applicant to entitle him to a license or certificate.[46] Some statutes requiring such proof apply to every applicant,[47] including an applicant for a reciprocity certificate;[48] but other statutes are construed not to apply to a certain class of applicants.[49] The moral character required of a physician by such statutes covers a broader sphere of conduct than that relating specifically to his profession.[50]

[§ 56] **cc. Boards or Officers—(aa) In General.** The legislature of a state has power to vest in an officer, board, or department authority and duty to ascertain and determine, by examination or otherwise, the qualifications of applicants for licenses or certificates to practice medicine in the state;[51] to grant licenses or certificates to applicants found to be qualified;[52] and, upon proper grounds, and after the taking of proper proceedings, to revoke a license or certificate.[53] For this purpose, the legislature may create a state board of medical examiners[54] and fix its powers and duties.[55] Likewise, the legislature may vest in an officer or board authority to determine whether applicants for licenses or certificates to practice dentistry in the state possess the required qualifications;[56] and it may either prescribe a test and authorize the board to conduct an examination,[57] or it may, without stating the scope and character of the examination, authorize the board to determine the subjects of examination[58] and the necessary extent of knowledge of each subject.[59]

[§ 57] **(bb) Membership and Organization of Board.** A statute creating a state medical board or board of medical examiners to be composed of members of a particular school of medicine is not unconstitutional;[60] nor is an act unconstitutional in not providing that each school of medicine shall be represented by equal numbers on the board;[61] and where the statute does not require that the different schools of medicine shall be represented on the board, its composition cannot affect its jurisdiction[62] or the legality of its acts.[63] Also, a statute providing that a majority of the members of the board shall be members of some medical society incorporated by the state is not unconstitutional.[64] The fact that the board was not regularly organized is immaterial;[65] if it is the de facto board its certificate pro-

v. Human, 84 Okl. 82, 202 P 797.

36. In re Osteopathic License, 37 Pa. Co. 218.

37. Exemption of prior practitioner from requirement of:
Diploma see supra § 52.
Examination see supra § 53.

38. In re Harold, 59 Wash. 322, 109 P 1043. See State v. State Bd. of Dental Examiners, 96 Or. 529, 188 P 960, 190 P 338 (a person is entitled to the issuance of a license to conduct, manage, and maintain a dental office or parlor where he is within a statute providing that a license for that purpose shall be issued to any individual, firm, association, or corporation engaged in the actual business of conducting, operating, or maintaining a dental office or parlor in the state on a specified date).

[a] **Reputable and honorable practice.**—A particular statute providing for the granting of certificates to persons who have been reputably and honorably engaged in the practice of medicine in the state prior to a specific date is intended to apply to physicians who, not possessing a diploma from a reputable and legally chartered medical college, indorsed as such by the state board of health, have been in practice a sufficient length of time prior to the specified date, and with sufficient success, to have acquired an honorable reputation in the community as practitioners. Paquin v. State Bd. of Health, 19 R. I. 365, 33 A 870.

39. Hart v. Folsom, 70 N. H. 213, 47 A 603.

40. Dusaw v. State Veterinary Bd., 157 Mich. 246, 121 NW 759; Ex p. Oliver, (S. C.) 134 SE 657 [foll Gregory v. McInnis, 140 S. C. 52, 134 SE 527]; State v. Utah State Bd. of Examiners in Optometry, 37 Utah 339, 108 P 347.

41. See statutory provisions.

42. See supra §§ 51–53; infra § 55.

43. Jennings v. State Veterinary Bd., 156 Mich. 417, 120 NW 785.

44. Immoral or dishonorable conduct as ground for:
Refusal of license see infra § 60.
Revocation of license see infra § 72.

45. State v. State Medical Examining Bd., 32 Minn. 324, 20 NW 238, 50 AmR 575; Wert v. Clutter, 37 Oh. St. 347; Com. v. Irving, 1 SusqLeg Chron (Pa.) 69.

Power to prescribe education and knowledge as qualifications see supra §§ 51–53.

46. Hoefner's Case, 36 Pa. Co., 443.

47. Fernel v. State Bd. of Medical Examiners, (Cal. A.) 267 P 561.

48. Fernel v. State Bd. of Medical Examiners, supra.

49. Kinlin v. State Bd. of Medical Examiners, 101 N. J. L. 221, 127 A 522 (veteran of World War who is graduate of a college of chiropractic under the jurisdiction of the federal board of vocational training).

50. Fernel v. State Bd. of Medical Examiners, (Cal. A.) 267 P 561

51. Wideman v. State, 20 Ala. A. 422, 104 S 438 [certiorari den 213 Ala. 170, 104 S 440]; Thompson v. State, 19 Ala. A. 328, 97 S 258; Barton v. Schmershall, 21 Ida. 562, 122 P 385; Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 S 809.

[a] **Nature of power.**—(1) As the power conferred by statute upon a board or department to ascertain and determine the qualifications of applicants for licenses or certificates to practice medicine is not judicial, but at the most is only quasi-judicial (see infra § 58), (2) the statute is not unconstitutional as conferring judicial power upon an administrative body (Ex p. Whitley, 144 Cal. 167, 77 P 879; State v. Waldram, 64 Utah 406, 231 P 431; Peo. v. Hasbrouck, 11 Utah 291, 39 P 918).

Delegation of power by board see infra § 58.

52. Thompson v. State, 19 Ala. A. 328, 97 S 258; State v. Shot, 304 Mo. 523, 263 SW 804; In re Shortridge, 53 N. D. 614, 207 NW 442.

53. See infra § 64.

54. Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas1915D, 1188; Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.

Creation of examining boards generally see Constitutional Law § 334.

55. Smith v. Peo., 51 Colo. 270, 117 P 612, 36 LRANS 158.

56. State v. Department of Licenses, 130 Wash. 82, 226 P 275.

57. Samples v. State, 19 Ala. A. 478, 98 S 211.

58. Douglas v. Noble, 261 U. S. 165, 43 SCt 303, 67 L. ed. 590 [rev 274 Fed. 672].

59. Douglas v. Noble, supra.

60. Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 S 809; Dowdell v. McBride, 92 Tex. 239, 47 SW 524; Kenedy v. Schultz, 6 Tex. Civ. A. 461, 25 SW 667.

61. Brown v. Peo., 11 Colo. 109, 17 P 104. See Peo. v. McGinley, 329 Ill. 173, 160 NE 186 (as applied to a chiropractor, a statute providing for examination by a board or committee composed of licensed and reputable physicians, and also authorizing, although not requiring, the designation of additional examiners for the purpose of preparing questions and rating papers on practice peculiar to any school when graduates of such school are candidates for licenses, is not unconstitutional).

62. Iowa Eclectic Medical College Assoc. v. Schrader, 87 Iowa 659, 55 NW 24, 20 LRA 355.

63. Iowa Eclectic Medical College Assoc. v. Schrader, supra.

64. State v. Heffernan, 40 R. I. 121, 100 A 55 (where there are several incorporated medical societies in the state and others may be formed by small groups of persons).

65. Bragg v. State, 134 Ala. 165,

tects the holder from prosecution.[66]

Board of chiropractic examiners. A statute dealing with the membership of a state board of chiropractic examiners is construed in connection with other related statutes to require each member to be the holder of a license or certificate to practice.[67]

Board of dental examiners. In a statute providing for the appointment of a state dental commission consisting of a specified number of persons, each of whom shall be a graduate of a reputable dental college and shall have been in the legal and reputable practice of dentistry in the state at least a specified number of years next preceding his appointment, the use of the word "reputable" does not render the statute unconstitutional.[68]

Board of veterinary examiners. A statute providing that no two members of a board of veterinary medical examiners shall be graduates of the same school does not preclude the appointment of a member who is a graduate of the same school as another member if he is also a graduate of some other school.[69] A board which has at least a de facto existence is a legal board from which a license or certificate to practice may be obtained.[70]

Superseded board. A statute providing for a state board of medical examiners to be composed in part of osteopathic physicians and authorized to issue various certificates, including certificates to practice osteopathy, has the effect of supplanting an earlier statute providing for a board of examiners to be composed wholly of osteopaths and authorized to issue certificates to practice osteopathy.[71]

[§ 58] **(cc) Authority, Powers, and Duties[72]—aaa. In General.** The powers of a state board vested with authority to grant licenses or certificates for the practice of medicine and surgery, or limited branches thereof, and to determine the qualifications of applicants therefor, extend and are limited to such express powers as are conferred upon it by statute,[73] and such implied powers as are necessary to carry into effect the express powers conferred and duties enjoined upon it by statute.[74] A board of examiners charged by law with the independent duty of ascertaining the qualifications of an applicant for a license is without authority to shift its responsibility to any medical or other association.[75] Also, an existing board has no power to review the action of a former board.[76]

Nature of authority. While a state officer, board, or department exercises a certain measure of judgment and discretion in granting or refusing licenses or certificates to practice medicine, dentistry, or osteopathy and in determining questions of fact as to the qualifications of applicants for licenses or certificates,[77] nevertheless the authority conferred upon, and exercised by the officer, board, or department is not legislative[78] or judicial,[79] but is rather executive, administrative, or ministerial,[80] or, at the most, is only quasi-judicial.[81]

Rules and regulations.[82] A state board of medical or dental examiners may prescribe reasonable

32 S 767, 58 LRA 925.

[a] **Failure to appoint members within time limited.**—Failure of the governor to appoint the members of a board of medical examiners within one month after the passage of the act creating such board, as required thereby, does not invalidate the appointments subsequently made, since the requirement as to time is merely directory. Peo. v. Hasbrouck, 11 Utah 291, 39 P 918.

[b] **Failure to notify member of time and place of organization.**—Under an act to regulate the practice of medicine, which does not impose on any member of the board of medical examiners the duty of notifying the others of the time and place of organization of the board, a failure to give such notice to a member will not afford sufficient ground to restrain the board, when organized, from discharging its proper functions under the law as a board of examiners. Howard v. Parker, 49 Tex. 236.

66. Bragg v. State, 134 Ala. 165, 32 S 767, 58 LRA 925; Brown v. Peo., 11 Colo. 109, 17 P 104. See Handfield v. College of Physicians, etc., 45 Que. Super. 140 (acts of de facto examiner are valid).

67. Peo. v. La Barre, 193 Cal. 388, 224 P 750. And see Green v. Hodges, 91 Kan. 658, 138 P 605 (adopting this construction as to three members of the board who are required to be chiropractors by a statute which provides for another member who shall be an ordained minister and still another member who shall be a school teacher).

68. Ex p. Craycroft, 24 OhNPNS 513.

69. Pistole v. State, 68 Tex. Cr. 127, 150 SW 618.

70. Pistole v. State, supra.

71. In re Gerber, 57 Cal. A. 141, 206 P 1004.

72. Power of:
Board to revoke license see infra § 64.
Legislature to delegate authority to board or officer see supra § 56.

73. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469.

[a] **Statute and amendments are to be construed together** as one and the same statute, in determining the powers of the board. Hamlin v. Carlson, 178 N. C. 431, 101 SE 22.

[b] **Powers conferred by statutes held not changed by subsequent statute.**—Meeker v. Scudder, 108 Oh. St. 423, 140 NE 627 (a subsequent statute providing that the state medical board shall be attached to the department of education, that it shall continue to exercise its functions as previously, that it shall be the duty of the department of education to make recommendations as to certain matters, and that the medical board may, but is not compelled to, delegate its powers and duties to the department of education).

74. Jones v. Kansas State Bd. of Medical Registration, 111 Kan. 813, 208 P 639; State v. State Medical Bd., 107 Oh. St. 20, 140 NE 660.

75. Hoefner's Case, 36 Pa. Co. 443.

76. Miller v. Medical Bd., 33 Or. 5, 52 P 763.

77. Cal.—Van Vleck v. State Bd. of Dental Examiners, 5 Cal. Unrep. Cas. 636, 48 P 223, 44 LRA 635.

Ida.—Barton v. Schmershall, 21 Ida. 562, 122 P 385; Raaf v. State Bd. of Medical Examiners, 11 Ida. 707, 84 P 33.

Ill.—Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995; Peo. v. Illinois State Bd. of Dental Examiners, 110 Ill. 180.

Kan.—Jones v. Kansas State Bd. of Medical Registration, 111 Kan. 813, 208 P 639.

Mo.—State v. Missouri Dental Bd., 289 Mo. 520, 233 SW 390.

N. J.—Saxenmeyer v. State Bd. of Registration, etc., 79 N. J. L. 427, 75 A 175.

N. Y.—Barresi v. Biggs, 203 App. Div. 2, 196 NYS 376.

Oh.—State v. Upham, 116 Oh. St. 606, 157 NE 20.

Wis.—State v. Chittenden, 127 Wis. 468, 107 NW 500.

Judgment and discretion in determining standing of college see infra § 59.

78. Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116; State v. Chittenden, 127 Wis. 468, 107 NW 500.

79. Ind.—State v. Webster, 150 Ind. 607, 50 NE 750, 41 LRA 212.

Iowa.—Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116.

Kan.—Meffert v. State Bd. of Medical Registration, etc., 66 Kan. 710, 72 P 247, 1 LRANS 811.

Mo.—State v. Adcock, 206 Mo. 550, 105 SW 270, 121 AmSR 681.

N. Y.—Peo. v. Reid, 135 App. Div. 89, 119 NYS 866.

Utah.—State v. Waldram, 64 Utah 406, 231 P 431; Peo. v. Hasbrouck, 11 Utah 291, 39 P 918.

Wis.—State v. Chittenden, 127 Wis. 468; 107 NW 500.

[a] **Rule applies, although appeal is provided for** (1) by statute. State v. Webster, 150 Ind. 607, 50 NE 750, 41 LRA 212. (2) Appeal generally see infra § 82.

80. Ind.—State Bd. of Dental Examiners v. Davis, 69 Ind. A. 109, 121 NE 142.

Iowa.—Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116.

Kan.—Meffert v. State Bd. of Medical Registration, etc., 66 Kan. 710, 72 P 247, 1 LRANS 811.

Mo.—State v. Adcock, 206 Mo. 550, 105 SW 270, 121 AmSR 681.

N. Y.—Peo. v. Reid, 135 App. Div. 89, 119 NYS 866.

Wis.—State v. Chittenden, 127 Wis. 468, 107 NW 500.

81. Colo.—Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas 1915D 1188.

Ida.—Raaf v. State Bd. of Medical Examiners, 11 Ida. 707, 84 P 33.

Ind.—Indiana State Bd. of Dental Examiners v. Davis, 69 Ind. A. 109, 121 NE 142.

Iowa.—Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116.

Kan.—Meffert v. State Bd. of Medical Reigstration, etc., 66 Kan. 710, 72 P 247, 1 LRANS 811.

Tenn.—Williams v. State Bd. of Dental Examiners, 93 Tenn. 619, 27 SW 1019.

Wis.—State v. Schmidt, 138 Wis. 53, 119 NW 647; State v. Chittenden, 127 Wis. 468, 107 NW 500.

See Brown v. Grenier, 73 N. H. 426, 62 A 590 (the powers vested in the board are of a judicial nature).

82. Rules and regulations as to:
Graduation from college of certain

rules and regulations as to its procedure,[83] the conduct of its work,[84] and the examination of applicants for,[85] and the grant or issuance of,[86] licenses or certificates. However, rules and regulations promulgated by the board or department are subject to judicial review as to their reasonableness.[87] It is beyond the power of the board to adopt a regulation requiring the taking of an examination by members of a profession not within the scope of the statute;[88] but a conflict between a rule of the board and a statute relative to the time of making an application for examination cannot be urged by the board in proceedings to compel it to license an applicant whose application was filed within the time permitted by the rule and rejected on another ground.[89]

Reciprocal agreement. Notwithstanding a reciprocal agreement by a board of examiners with a board of another state for the granting of licenses without examination, it is necessary for an applicant who has practiced in the other state to pass an examination where the agreement is invalid,[90] or, if it is valid, where he has not complied with its conditions.[91]

Duties as to examination. Where a statute prescribes the place, but not the date, of an examination, it is the duty of the board to fix a reasonable time therefor;[92] but when not so provided by statute, it is not the duty of the board to furnish means for examining an applicant as to his fitness to treat patients by a particular system of drugless healing.[93] In a statute prescribing the subjects of examination and providing that the board shall grant a certificate when it is satisfied as to the qualifications of an applicant, the term "qualifications of an applicant" refers to his knowledge of the subjects enumerated in the statute.[94]

Consideration of evidence. Where, in determining the qualifications of an applicant for a license, the board is not in any way limited by statute to any particular kind or character of proof, it possesses power to determine questions of fact upon such evidence as will satisfy the minds of members of the board as to whether or not applicant for a license is qualified as required by law and the rules of the board.[95] Even where the statute provides for the filing of an affidavit as to certain facts, the affidavit is not conclusive upon the board,[96] and where it is not satisfied as to the truth of the affidavit it not only may inquire into the matter[97] and receive and consider other evidence,[98] but it is its duty to make a reasonably prompt investigation[99] and satisfy itself one way or the other.[1] However, where the board is satisfied as to the truth of the affidavit, it is its duty to issue a license.[2] A board is without authority to accept the fact of membership in an association as conclusive evidence that applicant possesses the qualifications required by law.[3]

Rehearing need not be granted by the board to an applicant for a license where he has had a hearing and his application has been rejected,[4] even though no notice of the action of the board has been sent to him,[5] or, where the board's records otherwise show the rejection of the application, even though the formal written decision of the board has been lost or misplaced.[6]

Fees may be collected by a board of examiners[7] and expended for the payment of salaries, costs, and expenses,[8] in accordance with the terms of the governing statute[9] and the intent thereof to make the board self-sustaining.[10] Under the construction placed upon some statutes, the fees collected by the board may be retained by it,[11] but under the express terms of other statutes the fees are, intermediate their collection and disbursement, to be deposited in a special fund in the state treasury,[12] and the balance, if any, in the fund at the close of a fixed period is to be transferred to the general revenue fund of the state.[13] In the absence of statutory requirement a fee need not be returned to an applicant who has had the benefit of an examination or

standing see infra § 59.
Practice of medicine see supra § 12.

83. State v. Schmidt, 138 Wis. 53, 119 NW 647.

84. State v. Miller, 146 Iowa 521, 124 NW 167.

85. State v. State Bd. of Medical Examiners, 209 Ala. 9, 95 S 295; U. S. v. Custis, 37 App. (D. C.) 449; Peo. v. Kane, 288 Ill. 235, 123 NE 265; Thiedemann v. Michigan State Bd. of Dental Examiners, 204 Mich. 151, 169 NW 934.

[a] **Percentage necessary to pass examination.**—Rules of a state board requiring applicants for admission to practice dentistry to secure a general average of seventy-five per cent in examination, and stating that in practical operative, and in practical prosthetic and crown work, if applicant falls below seventy-five per cent he shall fail to pass, but may be re-examined at the next examination, are reasonable. Thiedemann v. Michigan State Bd. of Dental Examiners, 204 Mich. 151, 169 NW 934.

86. Brooks v. State, 146 Ala. 153, 41 S 156; Thomas v. State Bd. of Health, 72 W. Va. 776, 79 SE 725, 49 LRANS 150.

[a] **Licensing licentiates of other states.**—(1) Under the statutes of some states, the state board of health may make reasonable regulations as to licensing medical licentiates of other states, and refuse to grant licenses to those who have not complied with such regulations. Thomas v. State Bd. of Health, 72 W. Va. 776, 79 SE 725, 49 LRANS 150. (2) A regulation which requires a foreign medical licentiate to reside and practice his profession in his state for one year before making application for a license is reasonable. Thomas v. State Bd. of Health, supra.

87. Peo. v. Love, 298 Ill. 304, 131 NE 809, 16 ALR 703; Peo. v. Kane, 288 Ill. 235, 123 NE 265.

[a] **Regulation is unreasonable** and discriminatory where it requires an applicant for a license to practice chiropractic to produce letters of recommendation from two reputable medical men or osteopathic physicians. Peo. v. Love, 298 Ill. 304, 131 NE 809, 16 ALR 703.

88. Martin v. Bureau of Medical Education, etc., 23 Pa. Dist. 959 (optometrists).

89. State v. Clark, (Mo.) 230 SW 609.

90. Indiana State Bd. of Dental Examiners v. Davis, (Ind.) 139 NE 311.

91. Indiana State Bd. of Dental Examiners v. Davis, supra.

92. State v. State Medical Bd., 32 Oh. Cir. Ct. 687.

93. Carpenter v. State, 106 Nebr. 742, 184 NW 941.

94. Board of Medical Examiners v. Taylor, 56 Tex. Civ. A. 291, 120 SW 574.

95. Barton v. Schmershall, 21 Ida. 562, 122 P 385.

96. State v. State Medical Bd., 107 Oh. St. 20, 140 NE 660.

97. State v. State Medical Bd., supra.

98. State v. State Medical Bd., supra.

99. Stretch v. State Bd. of Medical Examiners, 88 N. J. L. 92, 95 A 623.

1. Stretch v. State Bd. of Medical Examiners, supra.

2. Stretch v. State Bd. of Medical Examiners, supra.

3. Hoefner's Case, 36 Pa. Co. 443.

4. State Bd. of Medical Examiners v. Brown, 70 Colo. 116, 198 P 274.

5. State v. Witter, 68 Wash. 356, 123 P 471.

6. State v. Witter, supra.

7. Board of Osteopathic Examiners v. Riley, 192 Cal. 158, 218 P 1018.

8. Board of Osteopathic Examiners v. Riley, supra; Kenehan v. State Bd. of Medical Examiners, 57 Colo. 504, 143 P 370.

9. See statutory provisions.

10. Board of Osteopathic Examiners v. Riley, 192 Cal. 158, 218 P 1018.

11. State v. Fullerton, 124 Minn. 151, 144 NW 755.

12. See statutory provisions.

13. See statutory provisions.

[a] **Clear intent of statute** is that the financial affairs of the board must be closed at the end of each period so that the definite amount, if any, which shall then become the property of the state may be determined and transferred to the state fund. Kenehan v. State Bd. of Medical Examiners, 57 Colo. 504, 143 P 370.

[b] **Board will not be allowed to defeat statute** by withdrawing funds near the close of one period for the purpose of again depositing them during a succeeding period to defray expenses and obligations occurring in and during such succeeding period. Kenehan v. State Bd. of Medical Ex-

investigation and has failed to qualify.[14]

[§ 59] **bbb. As to Educational Requirements.** Whether a particular medical or dental school or college is reputable or in good standing within the meaning of a statute requiring an applicant for a license or certificate to be a graduate or hold a diploma from a reputable institution, or institution in good standing, is usually a question of fact[15] left to the judgment and discretion of the state board of examiners;[16] but where the status of such schools and colleges is fixed by statute, the board of examiners has no discretion in regard to determining their reputability.[17] The discretion of the board in this respect is a reasonable,[18] rather than an arbitrary,[19] one, and when the board has once determined the question in favor of an applicant, it cannot refuse him a license for arbitrary reasons of its own.[20] The board may adjudicate the status of a medical college as to reputability either of its own motion, or on petition of the college;[21] and where the law does not define the method by which the board shall proceed to determine the reputability of a college, it may perform its duty in that regard in any reasonable way it may deem proper.[22] The board may properly prescribe certain minimum requirements for medical colleges,[23] adopt a rule providing that colleges meeting such requirements shall be deemed reputable,[24] and, according to some authorities, it may determine, upon proper investigation, that a college which does not meet the requirements is not in good standing,[25] or it may promulgate and enforce a rule that only graduates of medical colleges whose standard of excellence is denominated as class A by the American Medical Association will be permitted to take an examination;[26] but, according to other authorities, it may not provide in advance that it will not examine a person unless he presents a diploma from a medical college which conforms to a certain standard.[27] Where graduation from a recognized dental school is not required by statute as a qualification for a license or certificate to practice dentistry, a rule or regulation of the state board of dentistry making such a requirement may be changed at will,[28] or suspended in a particular case,[29] by the board. The board may not adopt a rule relating to medical colleges which is beyond the powers conferred upon it by statute;[30] nor has it power to interfere with the internal management of medical or dental colleges;[31] and where it is without statutory authority to grant a person a certificate to practice medicine and surgery upon presentation of his diploma from an association of naturopaths, it cannot do so indirectly by recognizing his certificate to practice naturopathy as one entitling him to practice medicine and surgery.[32]

[§ 60] **ccc. To Refuse License or Certificate for Cause.** Boards are sometimes authorized by statute to refuse licenses or certificates to applicants guilty of unprofessional or dishonorable conduct,[33]

aminers, 57 Colo. 504, 143 P 370.

14. In re Dentists' Licenses, 20 Pa. Dist. 928, 38 Pa. Co. 403.

15. See supra § 52.

16. Ill.—Illinois State Bd. of Dental Examiners v. People, 123 Ill. 227, 13 NE 201; Peo. v. Illinois State Bd. of Dental Examiners, 110 Ill. 180; Illinois State Bd. of Health v. People, 102 Ill. A. 614.

Iowa.—Iowa Eclectic Medical College Assoc. v. Schrader, 87 Iowa 659, 55 NW 24, 20 LRA 355.

Mo.—State v. North, 316 Mo. 1050, 294 SW 1012; State v. Adcock, 225 Mo. 335, 124 SW 1100; State v. Lutz, 136 Mo. 633, 38 SW 323.

N. J.—State v. Hudson County Bd. of Health, 53 N. J. L. 594, 22 A 226.

Oh.—State v. Hygeia Medical College, 60 Oh. St. 122, 54 NE 86.

Or.—Barmore v. State Bd. Medical Examiners, 21 Or. 301, 28 P 8.

Tenn.—Williams v. State Bd. of Dental Examiners, 93 Tenn. 619, 27 SW 1019.

Wis.—State v. Chittenden, 112 Wis. 569, 88 NW 587.

[a] **Board must determine** whether a diploma comes from a reputable source as an independent fact, considering the term "reputable" in its ordinary sense and measuring the character of the college from the standpoint of men competent to judge thereof by reason of their scientific attainments in the line of work for which such a college stands. State v. Chittenden, 112 Wis. 569, 88 NW 587.

[b] **Delegation of power.**—The discretionary power of determining on the fitness of issuing a license for the practice of dentistry to the graduates of reputable dental colleges, vested in a state board of dental examiners by a statute cannot be delegated by the board to the national association of dental examiners, an association composed mostly of men residing outside of the state. Illinois State Bd. of Dental Examiners v. Peo., 123 Ill. 227, 13 NE 201.

Judicial review of decision see infra § 61.

17. Wise v. State Veterinary Bd., 138 Mich. 428, 101 NW 562.

[a] **Statute prescribing the standard of scholarship** to be maintained by medical schools, whose diplomas the state board of medical examiners is authorized to accept, as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession, makes the standard sufficiently fixed, definite, and certain. Ex p. Gerino, 143 Cal. 412, 77 P 166, 66 LRA 249.

18. State v. North, 316 Mo. 1050, 294 SW 1012; State v. Clark, (Mo.) 230 SW 609.

[a] **Constitutionality of statute.**—(1) A statute providing that no person shall be eligible for examination by the state board of examiners who shall not furnish satisfactory evidence of having graduated from a reputable college indorsed by the board of examiners is not open to the objection of unconstitutionally conferring arbitrary power on the board of examiners to decide what colleges are reputable (Ex p. Whitley, 144 Cal. 167, 77 P 879 [foll Peo. v. Chong, 28 Cal. A. 121, 151 P 553]), (2) or to establish unreasonable rules and regulations (Kettles v. Peo., 221 Ill. 221, 77 NE 472).

[b] **When character of a school has been once fairly determined** (1) by the board, when and under what circumstances a reëxamination of the subject shall be made must necessarily rest solely in its discretion so long as it acts reasonably. State v. Chittenden, 112 Wis. 569, 88 NW 587. (2) All questions in regard thereto may be considered at rest until, by lapse of time or otherwise, some reasonable ground exists for believing that the character of the school may probably have changed. State v. Chittenden, supra.

19. Illinois State Bd. of Dental Examiners v. Peo., 20 Ill. A. 457; State v. Clark, (Mo.) 230 SW 609.

20. Illinois State Bd. of Health v. Peo., 102 Ill. A. 614; Iowa Eclectic Medical College Assoc. v. Schrader, 87 Iowa 659, 55 NW 24, 20 LRA 355; Smith v. State Bd. of Dental Examiners, 115 Ky. 212, 67 SW 999, 24 KyL 25; Boucher v. State Bd. of Health, 19 R. I. 366, 33 A 878.

21. State v. Chittenden, 127 Wis. 468, 107 NW 500.

22. State v. Chittenden, 112 Wis. 569, 88 NW 587.

23. Iowa Eclectic Medical College Assoc. v. Schrader, 87 Iowa 659, 55 NW 24, 20 LRA 355.

24. State v. Adcock, 225 Mo. 335, 124 SW 1100 [foll State v. North, 316 Mo. 1050, 294 SW 1012].

25. Iowa Eclectic Medical College Assoc. v. Schrader, 87 Iowa 659, 55 NW 24, 20 LRA 355.

26. Jones v. Kansas State Bd. of Medical Registration, etc., 111 Kan. 813, 208 P 639.

27. State v. Adcock, 225 Mo. 335, 124 SW 1100.

28. Louisiana State Bd. of Dentistry v. Hodge, 160 La. 743, 107 S 511.

29. Louisiana State Bd. of Dentistry v. Hodge, supra.

30. State v. Lutz, 136 Mo. 633, 38 SW 323.

31. State v. Chittenden, 127 Wis. 468, 107 NW 500.

[a] **Thus** the law does not authorize the board to invade the private affairs of a medical or dental college in respect of its rates of tuition, or whether it shall grant concessions from advertised rates, or by taking charge, in invitum, of its examinations as to entrance qualifications. State v. Chittenden, 127 Wis. 468, 107 NW 500.

32. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469.

Rights under license or certificate generally see infra § 63.

33. See statutory provisions.

[a] **Validity and construction of statute.**—(1) The term "unprofessional," as used in such a statute, does not contemplate matters of mere professional ethics, but is used convertibly with "dishonorable." State v. State Medical Examining Bd., 32 Minn. 324, 20 NW 238, 50 AmR 575. (2) In a statute authorizing, in one subdivision, the refusal of a license to practice medicine for a conviction of a crime of the grade of a felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion, and authorizing, in a subsequent subdivision, the refusal of a license for "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public," the use of the word "other," in the clause quoted, indicates a legislative intent that the conduct referred to therein should be

or gross malpractice;[34] but an applicant who possesses the requisite professional qualifications cannot be denied a license or certificate without a hearing on the question of his character and conduct;[35] and a statute which mandatorily requires the board to refuse a certificate and does not provide for or require notice and a hearing is unconstitutional.[36] A statute providing that the state board of examiners may refuse a certificate to any person upon palpable evidence of incompetency may be applicable where a prior practitioner applies for a certificate;[37] and under such a statute the board has power to inquire into the competency of an applicant.[38]

[§ 61] **(dd) Judicial Review of Decisions.**[39] State medical or dental laws sometimes authorize an appeal to a designated court from the action of a board of examiners in refusing a license or certificate to an applicant;[40] and in a case within such a statute applicant has a right to an appeal[41] and to a hearing thereon[42] as to the merits of his claim,[43] unless the particular statute under which the appeal is taken is construed to limit the scope of the investigation on appeal to the fairness and legality of the action of the board.[44] Where a statute authorizes an appeal, its failure to prescribe the manner of taking or perfecting it does not affect the right thereto;[45] but a right of appeal conferred by one statute may not be available to a class of applicants whose rights are conferred by another distinct statute.[46] Pending an appeal from a refusal to grant a license, the court has no power to allow applicant to practice.[47] Notice of the appeal should be served upon a member of the board,[48] and where the notice so served is sufficient, it is immaterial whether the board is or is not represented at the trial or hearing,[49] unless it is required by statute to be represented by the attorney-general and the proper prosecuting attorney.[50] The board, when aggrieved by the decision of the court, may move for a new trial,[51] or, under statutes authorizing a further appeal,[52] may appeal to a higher court.[53] When no appeal is provided for by statute, the medical or dental board, in passing on a question within its jurisdiction calling for the exercise of judgment, is supreme so long as it proceeds to a reasonable conclusion on evidence bearing on such question.[54]

On certiorari, the rules limiting the scope of review generally[55] are applicable;[56] the review is limited to the questions of whether the board kept within its jurisdiction[57] and regularly pursued its authority,[58] and does not extend to errors of law[59] or mistakes in findings of facts.[60] The court cannot direct the granting of a license,[61] even though allegations in the petition as to the qualifications of the petitioner are not denied;[62] if it finds that the board exceeded its jurisdiction, or failed regularly to exercise its authority, it is its duty to remand the cause to the board for a rehearing.[63]

Decision as to standing of college. The decision of the board as to whether a professional school or college is reputable or in good standing will not be coerced or reversed by the courts,[64] unless the board acts arbitrarily, oppressively, or unfairly,[65] or, in other words, the decision of the board will receive judicial sanction where it is reasonable[66] and clearly within the purview of its powers.[67] In a statutory action to compel a board to approve a particular medical school, evidence of the quality of the course of instruction given by the school is

similar in its nature to that designated in the preceding subdivision. Morse v. State Bd. of Medical Examiners, 57 Tex. Civ. A. 93, 122 SW 446.
(3) Such a statute is not void for uncertainty. Morse v. State Bd. of Medical Examiners, supra.
Cross references:
Good moral character as qualification see supra § 55.
Unprofessional or dishonorable conduct as ground for revocation of license see infra § 72.

34. See statutory provisions.
[a] **Violation of Harrison Narcotic Law** constitutes gross malpractice within the meaning of a statute. Gregory v. McInnis, 140 S. C. 52, 134 SE 527.

35. Mott v. State Bd. of Optometry Examiners, 148 Ga. 55, 95 SE 867; State v. State Medical Examining Bd., 32 Minn. 324, 20 NW 238, 50 AmR 575; Gage v. New Hampshire Eclectic Medical Soc., 63 N. H. 92, 56 AmR 492.

36. Mott v. State Bd. of Optometry Examiners, 148 Ga. 55, 95 SE 867.

37. State v. Mosher, 78 Iowa 321, 43 NW 202.

38. State v. Mosher, supra.

39. **Cross references:**
Injunction against board see Injunctions § 386 note 4 [a].
Mandamus against board see Mandamus § 223.
Review of revocation of license see infra §§ 79-83.

40. See statutory provisions.

41. Rutledge v. State Medical Bd., 106 Oh. St. 544, 140 NE 132.
[a] **Refusal for incompetency.**—When the right to appeal is granted in "all cases of the refusal or revocation of a certificate" by the medical board, the right exists as well where a certificate to practice medicine has been refused by the board for incompetency, as where it has been refused for unprofessional, dishonorable, or immoral conduct. State v. First Judicial Dist. Ct., 19 Mont. 501, 48 P 1104.

42. Rutledge v. State Medical Bd., 106 Oh. St. 544, 140 NE 132.

43. Rutledge v. State Medical Bd., supra.
[a] **Trial de novo** as to the merits of the case is authorized and required by the statutes of some states. In re Littlefield, 61 Wash. 150, 112 P 234.

44. Indiana State Bd. of Dental Examiners v. Davis, 69 Ind. A. 109, 121 NE 142 [dist In re Littlefield, 61 Wash. 150, 112 P 234, on the ground of a difference in the wording of the statutes].
[a] **Decision of former board.**—The refusal to grant a license by a state board of medical examiners, which has been succeeded by a new and distinct board, and which refusal was not appealed from as permitted by law, cannot be reviewed on a subsequent appeal from a decision of the new board refusing a license to the same party. Miller v. Medical Bd., 33 Or. 5, 52 P 763.

45. State v. First Judicial Dist. Ct., 19 Mont. 501, 48 P 1104; Rutledge v. State Medical Bd., 106 Oh. St. 544, 140 NE 132.

46. Williams v. Minnesota State Bd. of Medical Examiners, 120 Minn. 313, 139 NW 500.

47. State v. First Judicial Dist. Ct., Dept. No. 2, 26 Mont. 121, 66 P 754.

48. State v. First Judicial Dist. Ct., 27 Mont. 103, 69 P 710.

49. State v. First Judicial Dist. Ct., supra.

50. Indiana State Bd. of Dental Examiners v. Davis, 69 Ind. A. 109, 121 NE 142.
[a] **Lack of authority of attorney.**—A judgment on appeal to the circuit court, reversing a decision of the board of medical examiners, cannot be sustained where entered "by agreement" of an attorney acting for the prosecuting attorney without authority. In re Coffin, 152 Ind. 439, 53 NE 458.

51. State v. First Judicial Dist. Ct., 27 Mont. 103, 69 P 710.

52. See statutory provisions.

53. Indiana State Bd. of Dental Examiners v. Davis, 69 Ind. A. 109, 121 NE 142; State v. First Judicial Dist. Ct., 27 Mont. 103, 69 P 710.

54. Van Vleck v. State Bd. of Dental Examiners, 5 Cal. Unrep. Cas. 636, 48 P 223, 44 LRA 635; Kowenstrot v. State, 6 OhS&CP 467, 4 OhNP 257; State v. Chittenden, 127 Wis. 468, 107 NW 500.

55. See Certiorari §§ 341-375.

56. Raaf v. State Bd. of Medical Examiners, 11 Ida. 707, 84 P 33.

57. State Bd. of Medical Examiners v. Brown, 70 Colo. 116, 198 P 274; State Bd. of Medical Examiners v. Boulls, 69 Colo. 361, 195 P 325.

58. State Bd. of Medical Examiners v. Brown, 70 Colo. 116, 198 P 274.

59. State Bd. of Medical Examiners v. Brown, supra.

60. State Bd. of Medical Examiners v. Brown, supra.

61. State Bd. of Medical Examiners v. Brown, supra.

62. State Bd. of Medical Examiners v. Brown, supra.
[a] **Petition does not require answer;** it serves its purpose when the writ is issued, and its allegations are not to be taken as tendering an issue. State Bd. of Medical Examiners v. Brown, 70 Colo. 116, 198 P 274.

63. State Bd. of Medical Examiners v. Brown, supra.

64. Williams v. State Bd. of Dental Examiners, 93 Tenn. 619, 27 SW 1019.

65. State v. North, 316 Mo. 1050, 294 SW 1012; Williams v. State Bd. of Dental Examiners, 93 Tenn. 619, 27 SW 1019.

66. State v. North, 316 Mo. 1050, 294 SW 1012.

67. State v. North, supra.

admissible.[68]

[§ 62] **(e) Sufficiency.** Under a statute requiring a license from some chartered school, state board of medical examiners, or medical society, neither a certificate showing that the holder has passed a limited course of study,[69] nor a commission for the practice of medicine within a limited sphere,[70] is sufficient, and under a statute requiring a license from a state board or like agency, a medical school diploma conferring the title "M.D." cannot serve as a license to practice medicine.[71] Also, a receipt for money paid by an applicant as an examination fee is not a license.[72] Where a statute requiring an applicant to obtain a license or certificate further requires that such license or certificate shall be indorsed or countersigned by a particular officer before it shall become valid, a license or certificate not so indorsed or countersigned is insufficient to authorize the holder to practice medicine.[73]

[§ 63] **(f) Operation and Effect.** A license to practice medicine, drugless healing, dentistry, or optometry is not a contract,[74] but is rather a grant by the state of a privilege[75] or franchise[76] usable at the option of the licensee.[77] It is sometimes said that the right conferred by the license is a property right,[78] but in other cases it is said that strictly speaking it is neither a personal[79] nor a property[80] right, although it partakes in a measure of the nature of both.[81] At any rate the license does not confer a vested right upon the holder thereof.[82]

Conclusiveness. A proper license or certificate is conclusive evidence of the right to practice conferred thereby;[83] but a directory of persons holding licenses to practice in the state, compiled and published by the board of examiners under statutory authority, and indicating the form of license or certificate held by each person listed in the directory, is not conclusive upon the courts as to the scope of the right of a person listed in the directory.[84]

Territorial operation. Under some statutes a license will entitle the holder to practice throughout the state,[85] but in a few jurisdictions, the obtaining of a license or certificate,[86] or the recording thereof,[87] in the county where applicant or the holder resides or intends to practice is, or at times has been, required by statute.

Nature of practice permitted in general.[88] In a majority of jurisdictions a person holding a license or certificate to practice medicine and surgery, or to treat human diseases generally, has unlimited authority to prescribe for and treat the sick and afflicted,[89] practice the profession in all its branches,[90] and use any method or system of treatment or healing he may choose,[91] including the chiropractic system;[92] but under the statutes of a few jurisdictions, he is not entitled to practice osteopathy.[93] In some jurisdictions it is held that a person holding a license to practice medicine and surgery may practice dentistry without obtaining a license or certificate as a dentist,[94] where he does not advertise himself as a dentist;[95] but in other jurisdictions it is held that he may not do so,[96] or at least he may not perform dental work not falling within an express statutory exception in his favor.[97]

License or certificate to practice without drugs or surgery generally. As used in a statute providing for the issuance of two forms of certificates, one designated as a "physician and surgeon certificate" and authorizing the holder to sever or penetrate the tissues of human beings, and another designated as a "drugless practitioner certificate" and authorizing the holder to treat diseases, injuries, and deformities without in any manner severing or penetrating any of the tissues of human beings,[98] the word "sever" means severance by cutting with a knife,[99] and therefore the statute is not unconstitutional on the ground that, as it is impossible to practice osteopathy, chiropractics, or mechanotherapy without severing tissues in the course of manipulation and adjustment, it in effect prohibits the practice of such systems.[1] Under some statutes the recipient of a license for the treatment of human ailments without the use of drugs or medicine and without operative surgery is restricted to the use of the method or system designated in his application as the one he desires to practice.[2]

License or certificate to practice osteopathy.[3] The holder of a license or certificate to practice osteopathy is, of course, entitled to practice osteopathy,[4] or, in other words, to diagnose diseases[5]

68. Los Angeles College of Osteopathic Physicians, etc., v. Board of Medical Examiners, 53 Cal. A. 138, 199 P 1093.

69. Peo. v. Fulda, 52 Hun 65, 4 NYS 945.

70. Peo. v. Fulda, supra (commission as a medical officer in a regiment in a volunteer army).

71. Peo. v. Somme, 120 App. Div. 20, 104 NYS 946 [aff 190 N. Y. 541 mem., 83 NE 1128 mem].

72. Melville v. State, 173 Ind. 352, 89 NE 490, 90 NE 467.

73. Brooks v. State, 146 Ala. 153, 41 S 156; Nicholson v. State, 100 Ala. 132, 14 S 746.

Verification license see infra § 86.

74. Horton v. Clark, 316 Mo. 770, 293 SW 362; State v. McIntosh, 205 Mo. 616, 637, 103 SW 1071; State Bd. of Medical Examiners v. Friedman, 150 Tenn 152, 263 SW 75; State v. Maybury, 134 Wash. 641, 236 P 566. "A license to practice dentistry has no elements of a contract. The person receiving such license does not stipulate to use it." State v. McIntosh, supra.

75. State v. McIntosh, supra; Harris v. Thomas, (Tex. Civ. A.) 217 SW 1068; Morse v. State Bd. of Medical Examiners, 57 Tex. Civ. A. 93, 122 SW 446.

76. Harris v. Thomas, (Tex. Civ. A.) 217 SW 1068; Morse v. State Bd. of Medical Examiners, 57 Tex. Civ. A. 93, 122 SW 446.

77. State v. McIntosh, 205 Mo. 616, 103 SW 1071.

78. Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237; State v. Maybury, 134 Wash. 641, 236 P 566. See State v. Robinson, 253 Mo. 271, 161 SW 1169 (is at least a valuable privilege, and perhaps a property right).

79. Peo. v. Reid, 151 App. Div. 324, 136 NYS 428.

80. Peo. v Reid, supra.

81. Peo. v. Reid, supra.

82. State Bd. of Medical Examiners v. Friedman, 150 Tenn. 152, 263 SW 75.

Revocation of license see infra §§ 64–83.

83. Rowe v. Toon, 185 Iowa 848, 169 NW 38.

84. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469 [disappr In re Gerber, 57 Cal. A. 141, 206 P 1004].

85. State v. Carlisle, 28 S. D. 169, 132 NW 686, AnnCas1914B 395; Derrick v. State, 34 Tex. Cr. 21, 28 SW 818.

86. See supra § 16.

87. See infra § 88.

88. Right of licensed physician to sell drugs or fill prescriptions see Druggists §§ 15, 16.

89. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469

90. Stewart v Raab, 55 Minn. 20, 56 NW 256

91. Millsap v Alderson, 63 Cal. A. 518, 219 P 469; Peo. v. McGinley, 329 Ill. 173, 160 NE 186; State v. Corwin, 151 Iowa 420, 131 NW 659.

92. Jackson v. State, 19 Ala. A. 633, 99 S 826; McLosky v. State, 19 Ala. A. 544, 98 S 706 [rev on other grounds 210 Ala. 458, 98 S 708].

93. State v. Hopkins, 54 Mont. 52, 166 P 304; State v. Wood, 53 Mont. 566, 165 P 592.

94. State v. Beck, 21 R. I. 288, 43 A 366, 45 LRA 269.

95. Veilleux v. Roy, 48 Que. Super. 134 [dist Milot v. Marchildon, 47 Que. Super. 41].

96. State v. Taylor, 106 Minn. 218, 118 NW 1012, 19 LRANS 877, 16 AnnCas 487 [characterizing statements in State v. Vandersluis, 42 Minn. 129, 43 NW 789, 6 LRA 119 as dicta and not controlling].

97. Peo. v. Blair, 192 Mich. 183, 158 NW 889.

98. See statutory provisions.

99. Peo. v. Chong, 28 Cal. A. 121, 151 P 553 [foll Peo. v. Yak Q. Gine, 28 Cal. A. 801, 151 P 554].

1. Peo. v. Chong, 28 Cal. A. 121, 151 P 553 [foll Peo. v. Yak Q. Gine, 28 Cal. A. 801, 151 P 554].

2. Peo. v. McGinley, 329 Ill. 173, 160 NE 186

3. Competency of licensed osteopath to sign death certificate see Health § 67.

4. State v. Wood, 53 Mont. 566, 165 P 592.

5. Com. v. Dailey, 75 Pa. Super. 510.

and treat them according to the principles of osteopathy.[6] On the other hand, his authority is limited to the practice of "osteopathy"[7] as the term was understood at the time of the passage of the statute providing for the issuance of the license or certificate;[8] and the practice of osteopathy authorized is confined to manipulation by applying only the hands to the body of the patient;[9] he has no right to give electrical treatments,[10] or, generally speaking, to practice medicine and surgery,[11] even though medicine and surgery, or branches thereof, are taught in colleges of osteopathy;[12] but it is recognized that the practice of osteopathy and the practice of medicine and surgery overlap to a certain extent;[13] and it is held that a licensed osteopath is authorized and entitled to practice obstetrics.[14] A license or certificate to practice osteopathy does not entitle the holder to practice optometry;[15] he is not within a provision, in a statute relating to optometry, that nothing contained therein shall apply to licensed physicians and surgeons or prevent them from testing eyes and fitting glasses.[16] However, it is held that a person practicing osteopathy is a regular practicing physician within an exception of regular practicing physicians from the operation of a statute relating to the practice of podiatry.[17]

License to practice chiropractics. A licensed chiropractor exceeds his authority when he gives electrical treatments.[18]

Certificate to practice naturopathy. A holder of a certificate to practice naturopathy is limited in his treatment to his particular system,[19] and is without any right or authority to engage in the general practice of medicine and surgery.[20]

License to practice dentistry. A person licensed to practice dentistry keeps within his authority when he cleanses and treats cancer of the mouth.[21]

License to maintain dental parlor. A person holding a license to conduct, manage, or maintain a dental parlor may furnish and maintain an office and appliances for the practice of dentistry,[22] and employ competent and licensed dentists to carry on such practice,[23] but may not himself engage in the actual practice of dentistry without obtaining a license for that purpose.[24]

[§ 64] **(g) Suspension or Revocation[25]—aa. In General.** The revocation of a dentist's or physician's license is an exercise of the police power,[26] and in some jurisdictions it is deemed to be in the nature of a remedial measure[27] for the protection of the public,[28] and not to be punishment[29] or a penalty[30] or forfeiture,[31] but in other jurisdictions statutes providing for the suspension or revocation of a license are deemed to be highly penal[32] so as to come within the general rule requiring a strict construction of penal statutes;[33] and a revocation of a license is of course a part of the punishment where it is required by statute to be added to the other penalty or penalties imposed upon a physician convicted of a crime involving moral turpitude.[34]

Delegation of power.[35] The Legislature has power to invest an officer, board, or department with the power and duty to hear, investigate, and determine a complaint or charge against a person holding a license or certificate to practice medicine, drugless healing, dentistry, or optometry in the state,[36] and to revoke the license or certificate[37]

[a] **Power of diagnosis is not restricted.**—In re Opinion to Governor, 42 R. I. 249, 107 A 102.

6. Com. v. Dailey, 75 Pa. Super. 510.

7. In re Rust, 181 Cal. 73, 183 P 548; State Bd. of Medical Examiners v. O'Neill, (N. J. Sup.) 143 A 814.

8. State v. Bonham, 93 Wash. 489, 161 P 377, LRA1917D 996.

9. State Bd. of Medical Examiners v. Baudendistel, (N. J. Sup.) 140 A 886. See In re Opinion to Governor, 42 R. I. 249, 107 A 102 (in applying a remedy, the practitioner is confined to manipulation of the body, but the method and the extent of the manipulation is left to the judgment of the practitioner).

[a] **Other methods of drugless healing.**—A license to practice osteopathy does not necessarily authorize the licensee to practice every known healing art which does not involve the use of drugs or major surgery. In re Rust, 181 Cal. 73, 183 P 548.

10. State Bd. of Medical Examiners v. O'Neill, (N. J. Sup.) 143 A 814; State Bd. of Medical Examiners v. De Young, (N. J. Sup.) 140 A 676.

11. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469; State v. Sawyer, 36 Ida. 814, 214 P 222; State v. Wood, 53 Mont. 566, 165 P 592; State v. Dodd, 51 Mont. 100, 149 P 481; Com. v. Dailey, 75 Pa. Super. 510.

[a] **Giving or prescribing medicines.**—(1) A licensed osteopath is without right to give his patients medicines (State Bd. of Medical Examiners v. Baudendistel, (N. J. Sup.) 140 A 886), (2) or at least he may not give or prescribe internal curative medicines (State v. Cornelius, 200 Iowa 309, 204 NW 222).

12. State v. Sawyer, 36 Ida. 814, 214 P 222; Com. v. Dailey, 75 Pa. Super. 510; State v. Bonham, 93 Wash. 489, 161 P 377, LRA1917D 996.

13. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469.

Practicing osteopathy as practicing medicine without license see supra § 22.

14. Peo. v. Heckard, 244 Ill. A. 112; Stoike v. Weseman, 167 Minn. 266, 208 NW 993.

15. In re Rust, 181 Cal. 73, 183 P 548; State v. Eustace, 117 Kan. 746, 233 P 109; State v. Watters, (N. J. Sup.) 143 A 749.

16. In re Rust, 181 Cal. 73, 183 P 548; State v. Eustace, 117 Kan. 746, 233 P 109; State v. Watters, (N. J. Sup.) 143 A 749; State v. Rust, 119 Wash. 480, 206 P 33.

17. Howerton v. District of Columbia, 289 Fed. 628.

18. State Board of Medical Examiners v. Blechschmidt, 142 A. 549. State Bd. of Medical Examiners v. Livescy, (N. J. Sup.) 140 A 444.

19. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469.

20. Millsap v. Alderson, supra.

21. In re Carpenter, 196 Mich. 561, 162 NW 963.

22. State v. State Bd. of Dental Examiners, 96 Or. 529, 188 P 960, 190 P 338.

23. State v. State Bd. of Dental Examiners, supra.

24. State v. State Bd. of Dental Examiners, supra.

25. Erasure of name from register see infra § 88.

26. Ramsay v. Shelton, 329 Ill. 432, 160 NE 769; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995; Smith v. State Bd. of Medical Examiners, 140 Iowa 66, 117 NW 1116; Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174.

27. Kemp v. Board of Medical Suprs., 46 App. (D. C.) 173.

28. Kemp v. Board of Medical Suprs., supra; Ramsay v. Shelton, 329 Ill. 432, 160 NE 769; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995; Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534]; Blumberg v. State Bd. of Medical Examiners, 96 N. J. L. 331, 115 A 439.

29. Ramsay v. Shelton, 329 Ill. 432, 160 NE 769; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995; Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534]; Blumberg v. State Bd. of Medical Examiners, 96 N. J. L. 331, 115 A 439.

30. Kemp v. Board of Medical Suprs., 46 App. (D. C.) 173.

31. Kemp v. Board of Medical Suprs., supra.

32. Messner v. Board of Dental Examiners, (Cal. A.) 262 P 58; State Bd. of Medical Examiners, 149 Ga. 716, 102 SE 24; Abrams v. Jones, 35 Ida. 532, 207 P 724; State v. Clark, 288 Mo. 659, 232 SW 1031; State v. Robinson, 253 Mo. 271, 161 SW 1169.

33. Abrams v. Jones, 35 Ida. 532, 207 P 724; State v. Clark, 288 Mo. 659, 232 SW 1031.

Strict construction of penal statutes generally see Statutes [36 Cyc 1183].

34. Fort v. Brinkley, 87 Ark. 400, 112 SW 1084.

35. Reference to committee see infra text and note 61.

36. Green v. Blanchard, 138 Ark. 137, 211 SW 375, 5 ALR 84; Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas1915D 1188; State v. Shot, 304 Mo. 523, 263 SW 804; and cases infra note 37.

37. Ariz.—Aiton v. Board of Medical Examiners, 13 Ariz. 354, 114 P 962, LRA1915A 691.

Cal.—Hewitt v. State Bd. of Medical Examiners, 148 Cal. 590, 84 P 39, 113 AmSR 315, 3 LRANS 896.

Colo.—Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas1915D 1188.

Kan.—Meffert v. State Bd. of Medical Registration, etc., 66 Kan. 710, 72 P 247, 1 LRANS 811 [aff 195 U. S. 625, 25 SCt 790, 49 L. ed. 350].

Mo.—State v. Shot, 304 Mo. 523, 263 SW 804.

N. Y.—In re Smith, 10 Wend. 449.

N. D.—In re Shortridge, 53 N. D. 614, 207 NW 442.

for any one of certain enumerated causes.[38] Most statutes providing for the revocation of licenses are held to be free from constitutional objections,[39] but a few have been held void for uncertainty,[40] discrimination,[41] or as not affording due process of law.[42] A board or department has such power and jurisdiction as to the revocation of a license or certificate as are conferred upon it by a valid statute.[43] Under a few constitutional or statutory provisions a designated court has jurisdiction to annul, cancel, or revoke a license or certificate to practice medicine,[44] at least in certain cases,[45] as where the issuance of the license or certificate resulted from fraud,[46] perjury,[47] or error of the board,[48] or the licensee has been convicted of a crime involving moral turpitude.[49] The fact that a license is issued to one not entitled to it will not prevent the board from revoking it.[50]

Licenses or certificates issued prior to statute. Some,[51] but not other,[52] statutes providing for the revocation of licenses or certificates are construed to apply retroactively so as to authorize the revocation of licenses or certificates issued before their passage. An express provision in the statute that it shall not apply to persons lawfully engaged in practice at the time of its enactment is held to be unconstitutional as discriminating between persons of the same class.[53]

In Ontario the statutory power of the Royal College of Dental Surgeons to pass by-laws carries with it implied power to impose the penalty of suspension or cancellation of license for violation of a by-law prohibiting a licensed dentist from practicing his profession as an employee of an unlicensed person or corporation.[54]

Nature of power; not arbitrary. The board or department is not vested with arbitrary power;[55] nor is its power judicial,[56] but is rather executive, administrative, or ministerial,[57] or, at the most, quasi-judicial.[58] Sometimes a certain measure of discretion is vested in the board,[59] but the board has no discretion in a case within a statute expressly making it the duty of the board to revoke a license or certificate.[60]

Reference to committee. Also a few statutes provide that, on the filing of a complaint against the holder of a license, a committee shall be appointed to hear and determine the charges against him.[61]

[§ 65] **bb. Grounds—(aa) In General.** While it

38. See infra § 65.

[a] **Congress** has power to authorize a board to revoke for cause a license to practice medicine in the District of Columbia. Czarra v. Board of Medical Suprs., 25 App. (D. C.) 443.

39. Butcher v. Maybury, 8 F. (2d) 155 (Washington statute); Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 134 SE 42, 165 Ga. 892, 142 SE 285; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995; State v. Thurston County Super. Ct., 139 Wash. 454, 247 P 942.

[a] **Conferring judicial power upon board.**—(1) As the power to revoke licenses granted to a board is not judicial (see infra text and note 56), (2) the statutes are not unconstitutional on the ground that they confer judicial power upon the board (Suckow v. Alderson, 182 Cal. 247, 187 P 965; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995; State v. State Bd. of Medical Examiners, 34 Minn. 387, 26 NW 123; State Bd. of Health v. Roy, 22 R. I. 538, 48 A 802).

Constitutionality of provisions as to:

Grounds for revocation see infra §§ 65–72.

Proceedings see infra §§ 73, 77.

40. See infra § 72.

41. See infra text and note 53.

42. See infra §§ 73, 76, 77.

43. Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866; State Bd. of Medical Examiners v. Noble, 65 Colo. 410, 177 P 141; Thompson v. State Bd. of Medical Examiners, 59 Colo. 549, 151 P 436; Horton v. Clark, 316 Mo. 770, 293 SW 862.

[a] **Statutes construed.**—(1) A particular statute conferring powers upon a state dental board was construed generally to empower the board to revoke a certificate of registration in certain cases, to revoke both a license and a certificate of registration in other cases, and to revoke either a license or certificate of registration in still other cases. State v. Missouri Dental Bd., 282 Mo. 292, 221 SW 70. (2) As applied to the case in hand, it was held that, upon charges of deceitful advertising, the statute empowered the board to revoke either the offender's license or his certificate of registration, but not both. State v. Missouri Dental Bd., supra [foll State v. Wolfe, 283 Mo. 29, 222 SW 441]. (3) Some statutes have been construed to empower the state board of health to revoke the certificates only of persons who are not graduates in medicine. Williams v. Peo., 17 Ill. A. 274 [rev on other grounds 118 Ill. 444, 8 NE 841].

[b] **Bias and prejudice.**—(1) In the absence of a statute so providing, bias or prejudice on the part of members of a board of medical examiners does not affect the jurisdiction of the board to revoke a license to practice medicine. Dyment v. Board of Medical Examiners, (Cal. A.) 268 P 1073. (2) Right to hearing before impartial body see infra § 77.

44. Berry v. State, (Tex. Civ. A.) 135 SW 631 (constitutional provision that the district court shall have general jurisdiction over all causes of action for which jurisdiction is not otherwise provided by law or the constitution).

Judicial review of, or interference with, revocation by board see infra §§ 79–83.

45. See infra text and notes 46–49.

46. See statutory provisions. See also infra § 68.

[a] **In Oklahoma** a territorial statute clearly conferred power upon the district court to cancel a license which was fraudulently obtained. Gulley v. Terr., 19 Okl. 187, 91 P 1037.

47. See statutory provisions.

48. See statutory provisions. See also infra § 67.

49. See statutory provisions. See also infra § 72.

[a] **Mayor** of a city who has found a physician guilty of a crime involving moral turpitude has authority to revoke his license under statutes providing for such revocation as part of the punishment for the crime and also conferring upon the mayor, within certain territorial limits, the same criminal jurisdiction as is possessed by a justice of the peace. Fort v. Brinkley, 87 Ark. 400, 112 SW 1084.

50. State v. Goodier, 195 Mo. 551, 93 SW 928.

51. Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174; State v. Schaeffer, 129 Wis. 459, 109 NW 522. See State v. Thurston County Super. Ct., 139 Wash. 454, 247 P 942 (interpreting a statute expressly authorizing the revocation of licenses granted, under a statute previously enacted, to applicants without the requisite educational qualifications, as intended to authorize the revocation only of licenses obtained in violation of the other statute, and not licenses lawfully obtained thereunder).

52. Abrams v. Jones, 35 Ida. 532, 207 P 724; State Bd. of Health v. Ross, 191 Ill. 87, 60 NE 811 [aff 91 Ill. A. 281]; State v. Webster, 150 Ind. 607, 50 NE 750, 41 LRA 212 (all three cases dealing with statutes authorizing the revocation of licenses or certificates issued thereunder or in compliance therewith). See Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 134 SE 42 (statute is not retroactive as applied to the facts of the case).

53. State v. Luscher, 157 Minn. 192, 195 NW 914.

54. Gordon v. Royal College of Dental Surgeons, 23 Ont. L. 223, 2 OntWN 733, 18 OntWR 149, 18 Can CrCas 149.

55. Ramsay v. Shelton, 329 Ill. 432, 160 NE 769; Blunt v. Shepardson, 286 Ill. 84, 121 NE 263; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995; State v. Clark, 288 Mo. 659, 232 SW 1031.

56. Ill.—Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995.

Minn.—State v. State Bd. of Medical Examiners, 34 Minn. 387, 26 NW 123.

Mo.—Horton v. Clark, 316 Mo. 770, 293 SW 362.

Nebr.—Munk v. Frink, 81 Nebr. 631, 116 NW 525, 17 LRANS 439.

Oh.—State v. Gray, 114 Oh. St. 270, 151 NE 125.

R. I.—State Bd. of Health v. Roy, 22 R. I. 538, 48 A 802.

[a] **Decision after hearing.**—The mere fact that under the statute the decision of a state board of optometry as to revocation of a license "must be made after hearing does not render its function in revoking the license judicial. The hearing and determination are an incident to the executive power of revoking the license specifically conferred by the statute." State v. Gray, 114 Oh. St. 270, 275, 151 NE 125.

Nature of power to grant or refuse license see supra § 58.

57. Brein v. Connecticut Eclectic Examining Bd., 103 Conn. 65, 130 A 289; State v. Hanson, 201 Iowa 579, 207 NW 769; Munk v. Frink, 81 Nebr. 631, 116 NW 525, 17 LRANS 439; State v. Gray, 114 Oh. St. 270, 151 NE 125.

58. Suckow v. Alderson, 182 Cal. 247, 187 P 965; State v. Hanson, 201 Iowa 579, 207 NW 769.

59. State v. Missouri Dental Bd., 289 Mo. 520, 233 SW 390.

60. State Bd. of Medical Examiners v. Harrison, 92 Wash. 577, 159 P 769.

61. See statutory provisions.

[a] **Eligibility for membership.**—A hospital offering medical instruction is a "medical institution" within

is competent for the legislature of a state to declare the acts or conduct for which a license to practice medicine or dentistry in the state may be revoked,[62] the acts or conduct should be designated in the statute with certainty and definiteness[63] and be such as affect the health, morals, or safety of the community.[64] Generally speaking, the power of an officer or board to revoke the license of a physician or dentist is confined to the causes or grounds set forth in the statute conferring the power,[65] but it is said that, in addition to the express powers of revocation conferred upon it, a board has inherent power to revoke a license obtained from it by fraud.[66] Each ground of revocation specified by statute is sufficient in itself to warrant revocation.[67]

[§ 66] **(bb) Advertising.**[68] A statute providing for the revocation of the license of a physician for advertising under a name other than his own, whether that of another physician or not, and without regard to his motive, is not unconstitutional,[69] and it is not so inconsistent with a subsequent statute making it an offense for a physician, for fraudulent purposes, to practice under the name of another physician or to hold himself out as another physician, as to be repealed thereby.[70] Also, a statute, authorizing the state board of medical examiners to revoke a license to practice medicine for publicly advertising special ability to treat or cure chronic and incurable diseases, is not invalid because of indefiniteness.[71] On the other hand, a statute conferring power on the state dental board to revoke a license for advertising with a view of deceiving the public,[72] or for publishing or circulating any fraudulent or misleading statement as to the skill or method of any person or operator,[73] is void for uncertainty and indefiniteness. It has been affirmed in some jurisdictions,[74] and denied in others,[75] that a statute authorizing the revocation of the license of a physician for causing the publication and circulation of an advertisement relative to any disease of the sexual organs is within the scope of the police power. When not specifically made so by statute, advertising by a physician is not ground for revocation of his license,[76] unless the circumstances are such as to bring the case within a statute providing for revocation on the ground of unprofessional or dishonorable conduct.[77] The giving of a receipt to a patient after work has been done for him is not advertising within the meaning of a statute;[78] nor is advertising to do dental work with minimum pain,[79] or to extract teeth without pain,[80] within a statute authorizing the revocation of a license for advertising to practice dentistry without pain.

[§ 67] **(cc) Error in Issuance of License or Certificate.** In a statute providing for the annulment or revocation of a certificate where its issuance resulted from error of the board, the word "error" is used as meaning jurisdictional error[81] or error which might properly be denominated "jurisdictional" when occurring on a trial before a quasi-judicial body.[82] A license erroneously issued to a person who does not reside, and does not contemplate personally practicing his profession, in the state may be revoked.[83]

[§ 68] **(dd) Fraud, Deceit, or Misrepresentation.**[84] The statutes of a number of jurisdictions provide for the revocation of a license or certificate to practice medicine or dentistry on the ground of

a statute providing that the members of a professional committee hearing charges for the revocation of a license shall not be interested in any medical college or institution. Ramsay v. Shelton, 329 Ill. 432, 160 NE 769.

[b] **New committee for each proceeding.**—(1) Where a committee appointed under the statute met, heard the charges, dismissed the proceedings, and disbanded, the appointment of a new committee is necessary before any other or further action can be taken relative to the revocation of the license of the same or any other physician. State v. Maybury, (Wash.) 272 P 720. (2) Effect of former adjudication generally see infra § 78.

62. Green v. Blanchard, 138 Ark. 137, 211 SW 375, 5 ALR 84.

63. Green v. Blanchard, supra; Hewitt v. State Bd. of Medical Examiners, 148 Cal. 590, 84 P 39, 113 AmSR 315, 3 LRANS 896, 7 AnnCas 750.

[a] **Test of uncertainty.**—The courts cannot uphold and enforce a statute whose broad and indefinite language may apply, not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts. Czarra v. Board of Medical Suprs., 25 App. (D. C.) 443.

Particular statutes held to meet, or not to meet, requirement see infra §§ 66–72.

64. Hewitt v. State Bd. of Medical Examiners, 148 Cal. 590, 84 P 39, 113 AmSR 315, 3 LRANS 896.

65. State Bd. of Dental Examiners v. Crowell, 220 Ky. 1, 294 SW 818.

66. See infra § 68.

67. Berry v. State, (Tex. Civ. A.) 135 SW 631.

68. Advertising as:
Dishonorable or unprofessional conduct see infra § 72.
Offense see infra § 91.

69. Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995.

70. Peo. v. Apfelbaum, supra.

71. State Medical Bd., etc. v. McCrary, 95 Ark. 511, 130 SW 544, 30 LRANS 783, AnnCas1912A 631.

"Chronic and incurable disease" defined see Chronic 11 C. J. p 761 note 80 [a].

72. Green v. Blanchard, 138 Ark. 137, 211 SW 375, 5 ALR 84; Ex p. Craycroft, 24 OhNPNS 513.

[a] **Reason for rule.**—It is "a matter of opinion whether any given advertisement was done 'with a view of deceiving the public.' . . . No rule is provided whereby an advertising dentist can tell whether or not the publication he makes will bring him within the ban of the law's provision. If, in the judgment of the board, such statements are made with the view of deceiving the public, then the dentist's right to practice is forfeited. Instead of furnishing some standard by which the dentists may determine in advance what statements the board will treat as being of a character to deceive the public, it leaves that important matter in nubibus; yet the law provides that after the dentist has issued the advertisement, an ex post facto judgment of the board shall determine whether the dentist's statement is made with the view of deceiving the public, and whether or not the dentist has been guilty of any grossly immoral conduct likely to deceive or defraud the public, or whether the advertisement is of such a nature as to disqualify the applicant to practice with safety to the people." Ex p. Craycroft, 24 OhNPNS 513, 521.

73. Green v. Blanchard, 138 Ark. 137, 211 SW 375, 5 ALR 84.

74. Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 134 SE 42.

75. Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas1915D 1188.

76. Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796.

77. See infra § 72.

78. Green v. Blanchard, 138 Ark. 137, 211 SW 375, 5 ALR 84.

79. Green v. Blanchard, supra.

80. Harris v. Sims, 118 S. C. 1, 109 SE 411.

[a] **Reasons for rule.**—"The practice of dentistry includes numerous separate and distinct branches and operations. Some of the branches are conducted without pain, and some of the operations in a branch that is fraught with pain may be performed without pain. To lay claim 'to practice dentistry without pain' is universally inclusive in its character, embracing all branches and all operations, and comes within the inhibition of the statute. To profess to conduct a certain branch of dentistry, or a certain operation in a branch without pain, is not only not within the inhibition of the statute, but is susceptible of absolute demonstration as a fact. . . . It is a fact which a judicial utterance cannot make otherwise, that in the advance of the science the process of extracting teeth is daily accomplished without pain or consciousness of the fact. The fact that pain may follow the operation does not at all negative the fact that the extraction was painless." Harris v. Sims, 118 S. C. 1, 3, 109 SE 411.

81. State v. Schmidt, 138 Wis. 53, 119 NW 647.

82. State v. Schmidt, supra.

83. Griffin v. Powers, (Tenn.) 274 SW 538.

84. Fraud as immoral or unprofessional conduct see infra § 72.

fraud, deceit, or misrepresentation in obtaining it[85] or in the practice of the profession.[86] Such statutes are within the limits of the police power[87] and are not invalid for uncertainty.[88] It is said that a board has general inherent power to revoke a license obtained from it by fraud.[89]

[§ 69] **(ee) Guilt or Conviction of Crime.** The statutes of different jurisdictions variously provide for the revocation of the license of a physician who has been guilty of a felony,[90] practiced criminal abortion,[91] or has been convicted of any crime,[92] or of any crime[93] or felony[94] involving moral turpitude.

[§ 70] **(ff) Practice under Forbidden Name or Title.** Even though practicing under a name other than his own is unlawful on the part of a physician,[95] it is not ground for revocation of his license when not so provided by statute.[96] On the other hand, where the case is within a statute providing for revocation on this ground, the license of a dentist may be revoked for practicing dentistry under a name other than his own,[97] and the certificate of an optometrist may be suspended or revoked for using the title "Doctor" or "Dr." as a prefix to his name.[98]

[§ 71] **(gg) Practice without Authority.** Where a person holding a license or certificate to practice osteopathy, naturopathy, or drugless healing generally goes beyond the scope of his license or certificate[99] and engages in the general unlicensed practice of medicine and surgery, his license or certificate may revoked.[1]

Aiding and abetting. A statute providing for the revocation or suspension of the license of a dentist for aiding and abetting an unlicensed person to practice dentistry unlawfully is valid.[2] For a case to be within such a statute, it is necessary and sufficient that an unlicensed person shall be practicing dentistry,[3] and that a licensed dentist, with guilty knowledge,[4] shall do some act which renders aid to the other in his unlawful practice.[5]

[§ 72] **(hh) Unprofessional, Dishonorable, or Immoral Conduct.** The most common statutory grounds for revocation or suspension of the license or certificate of a physician, dentist, or chiropractor are unprofessional, dishonorable, or immoral conduct.[6] Similar grounds prescribed by the statutes of some jurisdictions are gross immorality,[7] malpractice,[8] gross violation of professional duties,[9] gross misconduct in the practice of the profession,[10] grossly unprofessional conduct of a character likely to deceive or defraud the public,[11] and any infamous, disgraceful, or improper conduct in a professional respect.[12] The subject matter of statutes prescribing such grounds is within the police power,[13] and, except in a few instances,[14] the statutes

85. See statutory provisions.
[a] **Matters held not to constitute fraud,** deceit, or misrepresentation warranting the revocation of a license include: (1) Failure to present such a certificate of good character as the statute requires. Slabotsky v. State Dept. of Health, (Conn.) 142 A 477. (2) Failure to impart certain information voluntarily, in the absence of exceptional circumstances. Slabotsky v. State Dept. of Health, supra. (3) Oral representations as to graduation from a dental college, where it is clear that the board does not rely upon the verbal statement of any applicant as to graduation, but requires written proof. Louisiana State Bd. of Dentistry v. Hodge, 160 La. 743, 107 S 511.

86. See statutory provisions.
[a] **Intention not to perform promise.**—(1) The making of a promise, without intent to perform it, may, in a sense at least, amount to a false statement as to an existing condition within a statute authorizing the revocation of a dentist's license where he has obtained money by false representations. Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534]. (2) In any event, it is dishonorable conduct see infra § 72.

87. Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174.

88. State v. Purl, 228 Mo. 1, 128 SW 196.

89. Simmons' Case, 38 Pa. Co. 195 (opinion of deputy attorney-general).

90. See statutory provisions.
[a] **Crime is felony** within the meaning of the statute where it is punishable by imprisonment in the penitentiary even though that penalty is not actually imposed in the particular case. Seitz v. Ohio State Medical Bd., 24 Oh. A. 154, 157 NE 304 (violation of Federal Narcotic Act).

91. See statutory provisions.
[a] **One abortion.**—The word "practice," as used in the statute, means "perform," and proof of the commission of one criminal abortion will justify revocation. Blumberg v. State Bd. of Medical Examiners, 96 N. J. L. 331, 115 A 439.

92. See statutory provisions.
[a] **"Crime," as used in statute, embraces** "the violation of any penal law of the state, and clearly includes all felonies and misdemeanors under the law of the state committed by the offender in the course of his professional conduct." Rodermund v. State, 167 Wis. 577, 582, 168 NW 390.

93. See statutory provisions.
[a] **Vagueness and indefiniteness.**—(1) The words "moral turpitude" are not so vague and indefinite as to render the statute void. Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 134 SE 42; State Bd. of Medical Examiners v. Harrison, 92 Wash. 577, 159 P 769. (2) "Moral turpitude" defined see Moral 41 C. J. p 212.
[b] **Crimes involving moral turpitude include:** (1) The distribution of obscene and indecent printed matter. Czarra v. Board of Medical Suprs., 25 App. (D. C.) 443 (dictum). (2) The mailing of a letter giving information to promote abortion. Kemp v. Board of Medical Suprs., 46 App. (D. C.) 173.
[c] **Violations of liquor laws** are not crimes involving moral turpitude, but are merely mala prohibita. Fort v. Brinkley, 87 Ark. 400, 112 SW 1084; In re Schill's License, 9 Pa. Dist. & Co. 202.
[d] **Selling morphine.**—(1) In one state it is held that the sale by a physician of morphine for other than medicinal purposes to an habitual user thereof is a crime involving moral turpitude, and a conviction thereof warrants the revocation of the physician's license. White v. Andrew, 70 Colo. 50, 197 P 564. (2) In another state, a statute of which permits a physician to prescribe as much as eight grains of morphine per day to any one patient, it is held that a physician's license may not be revoked merely because of his conviction of a violation of the Harrison Anti-Narcotic Act (State Bd. of Medical Examiners v. Friedman, 150 Tenn. 152, 263 SW 75), (3) but it is conceded that the record of conviction in a particular case may show guilt of acts involving moral turpitude, as where it shows that the convicted physician is a mere drug peddler, preying on the necessities of the unfortunate class known as "drug addicts" (State Bd. of Medical Examiners v. Friedman, supra).
[e] **Status of criminal proceedings.**—The statute does not apply, so as to authorize revocation, where (1) defendant has pleaded guilty but has not been sentenced (In re Schill's License, 9 Pa. Dist. & Co. 202), (2) or has been sentenced, but has taken an appeal and been allowed bail pending the appeal (In re Bureau of Medical Education, etc., 29 Pa. Dist. 430).

94. See statutory provisions.
[a] **Conviction of misdemeanor,** even though it involves moral turpitude, does not warrant revocation under such a statute. State Bd. of Dental Examiners v. Crowell, 220 Ky. 1, 294 SW 818.

95. See infra § 92.

96. Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796.

97. Winslow v. Kansas State Bd. of Dental Examiners, 115 Kan. 450, 223 P 308.
[a] **Statute is not to be narrowly interpreted.**—Winslow v. Kansas State Bd. of Dental Examiners, 115 Kan. 450, 223 P 308.

98. Davis v. California State Bd. of Optometry, 83 Cal. A. 488, 257 P 197.

99. **Scope of rights under license or certificates** see supra § 63.

1. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469; Harlan v. Alderson, 55 Cal. A. 263, 203 P 1014.

2. Lassen v. Board of Dental Examiners, 24 Cal. A. 767, 142 P 505.

3. Messner v. Board of Dental Examiners, (Cal. A.) 262 P 58.

4. Meagher v. Board of Dental Examiners, (Cal. A.) 261 P 1037; Osborne v. Baughman, 85 Cal. A. 224, 259 P 70.

5. Lassen v. Board of Dental Examiners, 24 Cal. A. 767, 142 P 505.
[a] **Aiding and abetting may consist** of employing a person, providing him with an office and instruments for the purpose of practicing dentistry, and receiving the reward of his illegal practice. Lassen v. Board of Dental Examiners, 24 Cal. A. 767, 142 P 505.

6. See statutory provisions.

7. See statutory provisions.

8. See statutory provisions.

9. See statutory provisions.

10. See statutory provisions.

11. See statutory provisions.
[a] **Grossly unprofessional conduct alone** does not warrant the revocation of a license under such a statute. State Bd. of Dental Examiners v. Crowell, 220 Ky. 1, 294 SW 818.

12. See statutory provisions.

13. Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174.

14. Czarra v. Board of Medical

are held not to be void for uncertainty or indefiniteness.[15] Particular matters held to be within such statutory grounds include drunkenness;[16] writing illegal liquor prescriptions;[17] prescribing drugs for addicts without any attempt or purpose to cure them;[18] obtaining a license or certificate by fraud or misrepresentation;[19] the making of a promise without any intention to perform it;[20] inducing a patient to submit to treatment by a person who is not a physician by representing him to be such;[21] maintaining different offices under different names with the intent to perpetrate a fraud on the public;[22] and causing the publication of an advertisement containing false statements, with knowledge of the falsity and an intent to deceive the public.[23] On the other hand, it is held not to be immoral, dishonorable, or unprofessional for a physician to conceal the fact that one of his patients has innocently suffered the accident of a miscarriage.[24] Also, it is held in some jurisdictions that the offer or willingness of a physician to produce an abortion is not unprofessional or dishonorable conduct;[25] but in other jurisdictions it is held that an agreement by a physician to perform, or attempt to perform, an abortion is gross misconduct in the practice of his profession.[26]

Association of words. As used in the statutes under consideration, the word "dishonorable" is deemed to qualify "unprofessional,"[27] so that the two words mean "unprofessional conduct which is dishonorable;"[28] but the statutes are not invalid because they use the word "immoral" in the disjunctive[29] and thereby provide for the revocation of a license for conduct which is unprofessional and dishonorable without being immoral also.[30] Where the words "infamous, disgraceful, or improper" are employed in a statute to characterize the conduct for which a license may be suspended, the word "improper" is included in,[31] but does not necessarily include,[32] "infamous" and "disgraceful." By applying the rule of construction known as "ejusdem generis,"[33] the general expression "or other unprofessional or dishonorable conduct," or similar language, following a statutory enumeration of specific grounds of revocation, may be limited to things of the same general nature or class as those enumerated;[34] but this rule is not applicable where the specific grounds stated are unrelated to, and materially different from, each other.[35]

Statutory definition of unprofessional conduct. Some statutes naming unprofessional conduct as a ground for the revocation of a license or certificate of a physician define the term to mean and include, among other matters: All advertising of medical business which is intended, or has a tendency, to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety;[36] the use by the holder of the license or certificate of a fictitious name, or a name other than his own, in any sign, advertisement, or announcement of, or in connection with, his practice;[37] the betrayal of a professional se-

Suprs., 25 App. (D. C.) 443; Matthews v. Murphy, 63 SW 785, 23 KyL 750, 54 LRA 415.

[a] **Matter of opinion.**—Unprofessional or dishonorable conduct is not defined by the common law, and what conduct may be of either kind is a matter of opinion only. Czarra v. Board of Medical Suprs., 25 App. (D. C.) 443.

15. Colo.—Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866.

Ill.—Ramsay v. Shelton, 329 Ill. 432, 160 NE 769; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995.

Kan.—Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534].

Mo.—State v. Purl, 228 Mo. 1, 128 SW 196.

Oh.—Rose v. Baxter, 7 OhNPNS 132.

Tex.—Berry v. State, (Civ. A.) 135 SW 631.

16. Crabb v. Kansas State Bd. of Dental Examiners, 118 Kan. 513, 235 P 829; Senior v. State Bd. of Health, (R. I.) 96 A 340.

17. State v. Hiller, 266 Mo. 242, 180 SW 538.

18. Knoop v. State Bd. of Health, 41 R. I. 283, 103 A 904, LRA1918E 1009.

[a] **Numerous violations of Harrison Narcotic Act** are gross immorality. Seitz v. Ohio State Medical Bd., 24 Oh. A. 154, 157 NE 304.

19. Peo. v. Reid, 151 App. Div. 324, 136 NYS 428; State Bd. of Health v. Roy, 22 R. I. 538, 48 A 802.

Fraud in obtaining license as specific ground of revocation see supra § 68.

20. Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534].

21. Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866.

22. Ross v. Baxter, 7 OhNPNS 132.

Practicing under forbidden name as specific ground of revocation see supra § 70.

23. State Bd. of Medical Examiners v. Spears, 79 Colo. 588, 247 P 563, 54 ALR 1498; Doran v. State Bd. of Medical Examiners, 78 Colo. 153, 240 P 335; State Bd. of Dental Examiners v. Crowell, 220 Ky. 1, 294 SW 818; Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796; State v. State Bd. of Medical Examiners, 34 Minn. 391, 26 NW 125. See Peo. v. McCoy, 125 Ill. 289, 17 NE 786 (discussing the rule and holding that the facts did not bring the case within it).

Advertising as specific ground of revocation see supra § 66.

24. State v. Kellogg, 14 Mont. 426, 36 P 957.

25. State v. Robinson, 253 Mo. 271, 161 SW 1169 (construing the statute to be limited to affirmative acts).

26. Lawrence v. Board of Registration in Medicine, 239 Mass. 424, 132 NE 174.

27. Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796.

28. Forman v. State Bd. of Health, supra.

29. Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866.

30. Dilliard v. State Bd. of Medical Examiners, supra.

31. Re Davidson, 57 Ont. L. 222, [1925] 3 DomLR 543.

32. Re Davidson, supra.

33. See Statutes [36 Cyc 1119].

34. Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796; State v. Purl, 228 Mo. 1, 128 SW 196.

35. Crabb v. Kansas State Bd. of Dental Examiners, 118 Kan. 513, 235 P 829.

36. See statutory provisions.

[a] **Validity of statute.**—(1) Such a statutory provision is not unconstitutional as constituting class legislation (Glass v. Board of Medical Examiners, 50 Cal. A. 389, 195 P 73), (2) or as denying to citizens the equal protection of the law (Glass v. Board of Medical Examiners, supra). (3) Also it is not void for vagueness, indefiniteness, or uncertainty. Glass v. Board of Medical Examiners, supra [dist Hewitt v. State Bd. of Medical Examiners, 148 Cal. 590, 84 P 39, 113 AmSR 315, 3 LR ANS 896, 7 AnnCas 750, holding that a former statute providing that all advertising of medical business in which grossly improbable statements are made constitutes unprofessional conduct is too indefinite and uncertain to be capable of enforcement]; State Bd. of Medical Examiners v. Macy, 92 Wash. 614, 159 P 801; State Bd. of Medical Examiners v. Jordan, 92 Wash. 234, 158 P 982.

[b] **Moral turpitude is not involved.**—State Bd. of Medical Examiners v. Jordan, 92 Wash. 234, 158 P 982.

[c] **Lack of actual harm** to health of patients is not material. State Bd. of Medical Examiners v. Jordan, 92 Wash. 234, 158 P 982.

[d] **Medical business.**—Conducting a medical college and fraudulently issuing diplomas therefrom constitutes medical business within the meaning of the statute. Young v. Board of Medical Examiners, (Cal. A.) 268 P 1089.

[e] **Statute does not prevent** "a practitioner from advertising cures or inviting the public to his healing, but only advertisements intended to beguile. It attacks not mere unethical conduct, but wrongful conduct." State Bd. of Medical Examiners v. Jordan, 92 Wash. 234, 239, 158 P 982.

37. See statutory provisions.

[a] **Definiteness.**—"That the provision of the law in question is neither vague nor indefinite is obvious. Every person with intelligence enough to have been granted a license to practice medicine must be presumed to know his own name. When such a person is informed in so many words that in any announcement or advertisement of his practice he may not use a name other than his own, i. e., if he uses any name at all it must be his own name, there can be no doubt that he understands precisely what is required. It would, indeed, be difficult to put it in plainer language." Berry v. Alderson, 59 Cal. A. 729, 733, 211 P 836.

[b] **"Provision is aimed** at conduct much less reprehensible than fraudulent misrepresentation. Our view is that the legislature intended that a person to whom the privilege had been granted of practicing medicine and representing himself to the world as qualified and worthy of the confidence of the sick, should, when

cret;[38] obtaining a fee on an assurance that an incurable disease can be permanently cured;[39] and a willful violation of the law as to the reporting of infectious diseases.[40]

[§ 73] **cc. Proceedings—(aa) In General.** The right to practice conferred by a license[41] can be taken away only by appropriate proceedings calling for revocation[42] or by voluntary relinquishment.[43] While a proceeding before an officer, board, or department to revoke the license or certificate of a physician or dentist is administrative,[44] rather than judicial,[45] and it need not be conducted with the exactness, formality, or technicality required before a judicial tribunal,[46] nevertheless the holder of the license or certificate cannot be deprived of it without due process of law,[47] or, in other words, without due notice[48] and full opportunity to be heard.[49] Defects in the notice may be waived by appearance by counsel and filing a motion for a continuance;[50] and an exception to the rule requiring notice exists where a license is void because issued without authority to a person not entitled thereto.[51] In most jurisdictions an action or proceeding to revoke a license is deemed to be civil,[52] rather than criminal,[53] in character, but in a few jurisdictions it is deemed to be quasi-criminal.[54] At any rate a conviction of crime in a court of competent jurisdiction is not a condition precedent to the proceeding,[55] unless conviction of crime is the ground upon which revocation is sought;[56] nor are the trial and acquittal of a physician in a court of criminal jurisdiction on the same charges exhibited against him by a medical society a bar to an inquiry under the statute for the purpose of depriving him of the right to practice.[57] Also, the proceeding is not subject to a statute limiting the time for commencing a criminal prosecution[58] or an action to enforce a statutory penalty or forfeiture.[59]

[§ 74] **(bb) Parties.**[60] The complaint or petition in an action or proceeding to revoke the license

offering his services by advertisement or announcement, do so under his own name. This simple requirement, so easily complied with, was not aimed particularly at the person who was willing to incur the odium of actual fraud, but was designed to offer a much wider protection to the public by assuring to it a reasonable certainty of knowing in every case precisely with whom it was dealing, the importance of the relation of physician and patient, and the very serious consequences which might follow improper, unskillful or negligent treatment, rendering such openness and candor particularly desirable." Berry v. Alderson, 59 Cal. A. 729, 732, 211 P 836.

[c] **Where case is within statute,** the license or certificate may be revoked. Berry v. Alderson, 59 Cal. A. 729, 211 P 836 [foll Grisso v. Board of Medical Examiners, 75 Cal. A. 385, 242 P 912].

Practice under assumed name as independent ground for revocation see supra § 70.

38. See statutory provisions.

[a] **Meaning of "betrayal."**—The word "betrayal" is used in such a statute to signify a wrongful disclosure of a professional secret, in violation of the trust imposed by the patient. Simonsen v. Swenson, 104 Nebr. 224, 177 NW 831, 9 ALR 1250.

39. See statutory provisions.

[a] **Statute is valid.**—Freeman v. State Bd. of Medical Examiners, 54 Okl. 531, 154 P 56, LRA1916D 436.

[b] **When disease regarded as incurable.**—"We are clearly of the opinion that the words 'incurable disease' in the section of the statute in question apply to the state of the disease which a patient may have at the time the treatment of it is undertaken by the physician, and that, if a physician undertakes to treat a patient who is suffering from a disease which has in its progress reached an incurable state according to the then general state of knowledge of the medical profession, and accepts a fee from the patient upon the assurance that he can effect a permanent cure of such disease, he would be guilty of unprofessional conduct as defined in that section of our statute." Freeman v. State Bd. of Medical Examiners, 54 Okl. 531, 539, 154 P 56, LRA1916D 436.

40. See statutory provisions.

[a] **Statute or ordinance.**—Where a statute states the duties of physicians as to reporting contagious or infectious diseases, a license cannot be revoked for violation of an ordinance dealing with the same subject matter but imposing greater or different duties than the statute imposes. Moorehouse v. Hammond, 60 Utah 593, 209 P 883.

41. See supra §§ 16, 63.

42. State v. Maybury, 134 Wash. 641, 236 P 566.

[a] **Statutes construed to prescribe procedure.**—Jacobs v. Board of Dental Examiners, 189 Cal. 709, 209 P 1006; Wolf v. State Bd. of Medical Examiners, 109 Minn. 360, 123 NW 1074.

43. State v. Maybury, 134 Wash. 641, 236 P 566.

Surrender of license see infra § 84.

44. Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796; In re Shortridge, 53 N. D. 614, 207 NW 442.

Nature of power of board see supra § 58.

45. Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796; In re Shortridge, 53 N. D. 614, 207 NW 442.

[a] **In Illinois** (1) the proceeding was treated in one case as being judicial in nature (Peo. v. McCoy, 125 Ill. 289, 17 NE 786), (2) but in a later case it was held that the power of the board to revoke a license is not judicial within the meaning of a constitutional provision (see supra § 64).

46. Dyment v. Board of Medical Examiners, 57 Cal. A. 260, 207 P 409; Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534]; Meffert v. State Bd. of Medical Registration, etc., 66 Kan. 710, 72 P 247, 1 LRANS 811 [aff 195 U. S. 625, 25 SCt 790, 49 L. ed. 350]; Munk v. Frink, 81 Nebr. 631, 116 NW 525, 17 LRANS 439; Freeman v. State Bd. of Medical Examiners, 54 Okl. 531, 154 P 56, LRA1916D 436.

[a] **Flexible practice.**—"Although it may, when practicable, follow somewhat the methods of the courts, yet, from the nature of the board and the character of the duties it is required to perform, a more flexible practice than that allowable in the courts must, of necessity, be followed in many cases." Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 562, 76 NW 833.

Cross references:
Informality in complaint see infra § 75.
Liberality in admitting evidence see infra § 76.

47. Brein v. Connecticut Eclectic Examining Bd., 103 Conn. 65, 130 A 289; Ramsay v. Shelton, 329 Ill. 432, 160 NE 769; Horton v. Clark, 316 Mo. 770, 293 SW 362; State v. North, 304 Mo. 607, 264 SW 678 [aff 271 U. S. 40, 46 SCt 384, 70 L. ed. 818].

[a] **Statutes** prescribing procedure held: (1) To afford due process of law. Butcher v. Maybury, 8 F. (2d) 155 (Washington statute); Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 134 SE 42 (Acts [1918] pp 173, 193, amending Acts [1913] p 101); State v. North, 304 Mo. 607, 264 SW 678 [aff 271 U. S. 40, 46 SCt 384, 70 L. ed. 818]. (2) Not to afford due process of law. State Bd. of Medical Examiners v. Lewis, 149 Ga. 716, 102 SE 24 (Acts [1913] p 101 § 13); Jewell v. McCann, 95 Oh. St. 191, 116 NE 42.

Necessity of due process of law in administrative proceedings generally see Constitutional Law § 1017.

Particular matters affording or denying due process of law see infra note 48 [a]; and §§ 76, 77.

48. Brein v. Connecticut Eclectic Examining Bd., 103 Conn. 65, 130 A 289; Blunt v. Shepardson, 286 Ill. 84, 121 NE 263; Peo. v. McCoy, 125 Ill. 289, 17 NE 786; State v. Schultz, 11 Mont. 429, 28 P 643; Peo. v. Reid, 151 App. Div. 324, 136 NYS 428.

[a] **Lack of statutory provision for notice.**—(1) In some cases it is held that a statute providing for revocation but not for notice is unconstitutional. State Bd. of Medical Examiners v. Lewis, 149 Ga. 716, 102 SE 24. (2) In other cases it is held that a statute silent as to procedure cannot be construed to clothe the board with power to revoke the certificate of a physician without a reasonable notice of the charges against him, and the time and place of the trial thereof. State v. Schultz, 11 Mont. 429, 28 P 643.

[b] **Notice held not invalid.**—Wolf v. State Bd. of Medical Examiners, 109 Minn. 360, 123 NW 1074.

[c] **Service of notice held sufficient.**—State v. Hanson, 201 Iowa 579, 207 NW 769.

49. See infra § 77.

50. State v. Hanson, 201 Iowa 579, 207 NW 769.

51. Volp v. Saylor, 42 Or. 546, 71 P 980.

52. Berry v. State, (Tex. Civ. A.) 135 SW 631.

53. Green v. Blanchard, 138 Ark. 137, 211 SW 375, 5 ALR 84; Jordan v. Alderson, 48 Cal. A. 547, 192 P 170; Lanterman v. Anderson, 36 Cal. A. 472, 172 P 625; State v. Knight, 204 Iowa 819, 216 NW 104; State v. Thurston County Super. Ct., 139 Wash. 454, 247 P 942; State Bd. of Medical Examiners v. Jordan, 92 Wash. 234, 158 P 982. See Suckow v. Alderson, 182 Cal. 247, 187 P 965 (rules governing criminal cases are not applicable). Compare Messner v. Board of Dental Examiners, (Cal. A.) 262 P 58 (proceeding is in the nature of a criminal trial).

54. Hughes v. State Bd. of Medical Examiners, 158 Ga. 602, 123 SE 879; State Bd. of Medical Examiners v. Lewis, 149 Ga. 716, 102 SE 24.

55. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17; Munk v. Frink, 81 Nebr. 631, 116 NW 525, 17 LRANS 439; Peo. v. Reid, 151 App. Div. 324, 136 NYS 428.

56. Conviction as ground of revocation see supra § 69.

57. In re Smith, 10 Wend. (N. Y.) 449.

58. Blumberg v. State Bd. of Medical Examiners, 96 N. J. L. 331, 115 A 439.

59. Kemp v. Board of Medical Suprs., 46 App. (D. C.) 173.

60. Signature to complaint see infra § 75.

of a physician or dentist may be made or filed by such a person or officer as is authorized by statute to do so,[61] or, where the statute is silent as to who may make the complaint, it may be made by any person or citizen.[62] The state is a proper,[63] but not a necessary,[64] party, unless a statute requires it to be named as plaintiff.[65] Under the statutes of some,[66] but not other,[67] jurisdictions the board of examiners is a necessary party defendant to a proceeding brought by the state or attorney-general.

[§ 75] **(cc) Complaint.** The license or certificate of a physician or dentist may be revoked or canceled only upon proper and sufficient charges.[68] A complaint is sufficient where it informs the physician or dentist not only of the nature of the wrong charged, but also of the particular instances of its perpetration;[69] it is not subject to the strict rules governing pleadings before a judicial tribunal,[70] as in actions at law[71] or criminal prosecutions;[72] certainty to a common intent is all that is required;[73] and informality is not fatal.[74] It is not necessary to specify the law under which the charges are preferred;[75] and even though the acts set out are alleged to be within a specified section of the statute, it is immaterial whether they are within that section or another if they are within some section of the statute.[76] Where revocation is sought upon the ground of procuring, or aiding in procuring, a criminal abortion,[77] it is not necessary to allege that the woman upon whom the abortion was committed had become quick.[78]

Signature and verification.[79] Some statutes require a request for the revocation of a physician's license to be signed by all members of the examining board.[80] Where the charges are signed by the board, the omission of the signature of the secretary is not necessarily fatal.[81] In the absence of a statute requiring verification, the complaint need not be verified.[82] The charges will be construed to be verified on knowledge where they purport to be so except as to matters alleged on information and belief and there are no allegations on information and belief.[83]

Demurrer or other objection. The holder of the license or certificate may demur or otherwise object, either formally or informally, to the sufficiency of the complaint,[84] even upon the hearing;[85] and even if he does not do so,[86] the board is without power or jurisdiction to revoke his license or certificate where the complaint is not sufficient;[87] but where the sufficiency of the complaint is not challenged before the board or on appeal, it will, on a further appeal to a higher court, be given a most liberal construction in order to sustain the order or judgment revoking the license.[88]

Complaint may be amended during the hearing so as to conform to evidence introduced without objection.[89]

61. State v. Knight, 204 Iowa 819, 216 NW 104.

[a] **County attorney** may institute the proceeding on his own initiative under the construction placed upon some statutes, even though the attorney-general is also authorized to commence the proceeding and the department of health is authorized to direct him to do so. State v. Knight, 204 Iowa 819, 216 NW 104.

[b] **Paid investigator of board** is not precluded from making the accusation by a statute providing that the proceeding may be "taken upon the information of another," where the statute is permissive and relates only to proceedings for revocation upon a ground other than the one involved in the present proceeding. Jacobs v. Board of Dental Examiners, 189 Cal. 709, 713, 209 P 1006.

62. Kemp v. Board of Medical Suprs., 46 App. (D. C.) 173; State v. North, 304 Mo. 607, 264 SW 678 [aff 271 U. S. 40, 46 SCt 384, 70 L. ed. 818].

[a] **Complaint may originate from any source** which the board may deem reliable. Kemp v. Board of Medical Suprs., 46 App. (D. C.) 173.

[b] **Prosecuting attorney** may make the complaint in his capacity of a citizen. State v. North, 304 Mo. 607, 264 SW 678 [aff 271 U. S. 40, 46 SCt 384, 70 L. ed. 818].

[c] **Board** (1) is not forbidden to formulate the complaint (Kemp v. Board of Medical Suprs., 46 App. (D. C.) 173), (2) nor is the making of the complaint limited to the board (Kemp v. Board of Medical Suprs., supra).

63. State v. Estes, 34 Or. 196, 51 P 77, 52 P 571, 55 P 25 (proceeding instituted by board, on relation of other parties).

64. Freeman v. State Bd. of Medical Examiners, 54 Okl. 531, 154 P 56, LRA1916D 436 [dist Gulley v. Terr., 19 Okl. 187, 91 P 1037 on the ground that it was decided under an earlier and different statute].

65. See statutory provisions.

66. Brown v. Grenier, 73 N. H. 426, 62 A 590.

67. State v. Schaeffer, 129 Wis. 459, 109 NW 522.

68. Dyment v. Board of Medical Examiners, 57 Cal. A. 260, 207 P 409; Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17.

[a] **Complaint is insufficient** where it: (1) States mere conclusions. Abrams v. Jones, 35 Ida. 532, 207 P 724; Board of Medical Examiners v. Eisen, 61 Or. 492, 123 P 52. (2) Charges fraud and misrepresentation, without any specific allegations of fact. Dyment v. Board of Medical Examiners, 57 Cal. A. 260, 207 P 409.

Certiorari to review, on jurisdictional grounds, revocation upon insufficient complaint see infra § 80.

69. Munk v. Frink, 75 Nebr. 172, 106 NW 425, 81 Nebr. 631, 116 NW 525, 17 LRANS 439; Freeman v. State Bd. of Medical Examiners, 54 Okl. 531, 154 P 56, LRA1916D 436.

[a] **Complaints, petitions, or accusations held sufficient.**—Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P 324 (sufficient to give board jurisdiction); Whetstone v. Board of Dental Examiners, (Cal. A.) 261 P 1077; Lanterman v. Anderson, 36 Cal. A. 472, 172 P 625; State v. Hanson, 201 Iowa 579, 207 NW 769; Berry v. State, (Tex. Civ. A.) 135 SW 631; State Bd. of Medical Examiners v. Jordan, 92 Wash. 234, 158 P 982.

[b] **Complaint held sufficient as to some, but not other, charges.**—Horton v. Clark, 316 Mo. 770, 293 SW 362.

70. Freeman v. State Bd. of Medical Examiners, 54 Okl. 531, 154 P 56, LRA1916D 436.

71. State Bd. of Medical Examiners v. Macy, 92 Wash. 614, 159 P 801.

Pleading in civil actions see Pleading [31 Cyc 1].

72. See cases infra this note.

[a] **Thus** (1) the complaint need not be as full and comprehensive as an indictment or information. Suckow v. Alderson, 182 Cal. 247, 187 P 965. (2) Nor need it be framed with the definiteness, precision, and certainty requisite in an indictment or information. Munk v. Frink, 75 Nebr. 172, 106 NW 425, 81 Nebr. 631, 116 NW 525, 17 LRANS 439.

Indictments and informations see Indictments and Informations 31 C. J. p 548.

73. Munk v. Frink, 75 Nebr. 172, 106 NW 425 [foll Walker v. McMahn, 75 Nebr. 179, 106 NW 427].

[a] **Motion to make charges more definite and certain held properly overruled.**—State v. Clark, (Mo.) 9 SW (2d) 635.

74. State v. Hanson, 201 Iowa 579, 207 NW 769; Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534].

75. Hughes v. State Bd. of Medical Examiners, 162 Ga. 246, 267, 134 SE 42, 49.

76. Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P 324.

77. See supra § 69.

78. Munk v. Frink, 81 Nebr. 631, 116 NW 525, 17 LRANS 439 [foll Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17].

79. Who may make complaint see supra § 74.

80. See statutory provisions.

[a] **Statute is sufficiently complied with** where a request is signed by four members of a board of five and a vacancy caused by the death of the fifth member has not been filled. Brein v. Connecticut Eclectic Examining Bd., 103 Conn. 65, 130 A 289.

81. State v. Hanson, 201 Iowa 579, 207 NW 769.

82. Horton v. Clark, 316 Mo. 770, 293 SW 362.

[a] **Other proceedings distinguished.**—Precedents as to the necessity of verification of charges in a proceeding to disbar an attorney (see Attorney and Client §§ 65, 70) are not binding, or even persuasive, in a proceeding to revoke a license to practice medicine and surgery, as the former proceeding is not, but the latter proceeding is, governed exclusively by statute. Horton v. Clark, 316 Mo. 770, 293 SW 362.

83. Lassen v. Board of Dental Examiners, 24 Cal. A. 767, 142 P 505.

84. Dyment v. Board of Medical Examiners, 57 Cal. A. 260, 207 P 409.

85. Dyment v. Board of Medical Examiners, supra.

86. Dyment v. Board of Medical Examiners, supra.

87. See supra text and note 68.

88. State Bd. of Medical Examiners v. Macy, 92 Wash. 614, 159 P 801.

89. State v. Clark, (Mo.) 9 SW (2d) 635.

[§ 76] **(dd) Evidence.**[90] In a proceeding before a board to revoke a license or certificate of a physician or dentist, the holder of the license or certificate must be given an opportunity to introduce evidence[91] and cross-examine the witnesses who testify against him;[92] and a statute governing the proceedings is unconstitutional as denying due process of law where it does not make any provision whereby the attendance of witnesses can be required or their testimony procured;[93] but a statute is not invalid as denying due process of law where, although it does not empower the board to issue subpœnas or compulsory process for witnesses, books, and papers, it does provide for the taking and reading of the depositions of witnesses who do not voluntarily appear;[94] and even affidavits may be received in the discretion of the board,[95] at least where the physician or dentist does not object.[96] A refusal of the secretary of the board to issue subpœnas requested by the physician is not fatal where the physician has not applied to the board for an order directing the secretary to comply with the request.[97] The board should not act contrary to the ordinary rules governing the admissibility of evidence.[98] While it is within the jurisdiction of the board to determine the competency of evidence submitted to it,[99] yet where all the evidence received by the board is inadmissible, it is without jurisdiction to revoke the license.[1] In some instances, articles of incorporation may be admitted in evidence,[2] and standard medical works may be consulted by members of the board as an aid to their memory and understanding,[3] although not for the purpose of using them as evidence.[4] The sufficiency[5] of evidence received by the board may[6] and must[7] be determined by it. In order to justify the revocation of the license, the evidence must give rise to more than a mere suspicion or conjecture of the existence of grounds therefor;[8] but where several acts or grounds are charged, it is not necessary that all be established by satisfactory proof;[9] and as the proceeding is not a criminal one,[10] it is not governed by the rules as to the evidence necessary to convict in a criminal prosecution,[11] especially a statutory rule forbidding a conviction upon the testimony of accomplices alone.[12] Regardless of whether it is considered to be a rule of law[13] or a rule of evidence,[14] a statute providing that the record of a conviction of an offense involving moral turpitude shall be conclusive evidence in a proceeding to revoke a license is within the power of the legislature to enact.[15]

Presumptions, inferences, and burden of proof. Where revocation of the license of a dentist is sought

90. Evidence on appeal see infra § 82.

91. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17.

92. Mathews v. Hedlund, supra.

93. Jewell v. McCann, 95 Oh. St. 191, 116 NE 42.

94. State v. North, 304 Mo. 607, 264 SW 678 [aff 271 U. S. 40, 46 SCt 384, 70 L. ed. 818].

95. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17.

[a] **Statute** authorizing the issuance of subpœnas, the administration of oaths, and the taking of depositions and the testimony of witnesses, does not provide an exclusive mode of proof. Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833; Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17.

96. Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833.

97. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17.

98. State v. Clark, 288 Mo. 659, 232 SW 1031. But see Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833 (evidence which tends to prove or disprove the point in issue may, in the absence of objection, be considered, although it is not the best evidence which might be had).

[a] **Evidence held inadmissible.**—(1) Hearsay evidence. Rinaldo v. Board of Medical Examiners, (Cal. A.) 268 P 1076; Thrasher v. Board of Medical Examiners, 44 Cal. A. 26, 185 P 1006. (2) Statement of woman, who died after making it, as to the performance of an abortion upon her by the physician, where the statement was not made under an impression of impending and immediate death. State v. Clark, 288 Mo. 659, 232 SW 1031; Board of Medical Examiners v. Eisen, 61 Or. 492, 123 P 52. (3) Testimony that the physician has the general reputation of having performed abortions. State v. Clark, supra. (4) Testimony that the person whom the dentist is accused of aiding to practice unlawfully has previously pleaded guilty to practicing without a license. Bley v. Board of Dental Examiners, (Cal. A.) 261 P 1036. (5) Where a physician is charged with false and fraudulent statements in relation to his attendance at a certain medical college, it is proper to exclude, as irrelevant and immaterial, evidence that persons who attended another medical college had been admitted to examination and granted licenses by the state board of health. State v. Clark, (Mo.) 9 SW (2d) 635.

Admissibility of evidence in civil actions generally see Evidence § 89 et seq.

99. Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833.

1. Rinaldo v. Board of Medical Examiners, (Cal. A.) 268 P 1076; Dyment v. Board of Medical Examiners, (Cal. A.) 268 P 1073.

2. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469.

[a] **Thus,** where the legislature of a state has not defined the terms "naturopath" or "naturopathy," but has given official recognition to certificates issued by an incorporated association of naturopaths, the articles of incorporation of the association, in so far as they define or shed any light upon the meaning of the terms in question, are competent evidence in a proceeding to revoke a certificate to practice naturopathy on the ground that the holder has practiced a mode and system of treating the sick and afflicted not authorized by his certificate. Millsap v. Alderson, 63 Cal. A. 518, 219 P 469.

3. State Medical Bd., etc. v. McCrary, 95 Ark. 511, 130 SW 544, 30 LRANS 783, AnnCas1912A 631 (standard medical works naming and discussing chronic and incurable diseases, where revocation is sought on the ground that the holder of the license or certificate publicly advertised special ability to treat and cure chronic and incurable diseases).

4. State Medical Bd., etc. v. McCrary, supra.

Inadmissibility of medical works generally see Evidence § 1127.

5. See cases infra this note.

[a] **Evidence held sufficient** to: (1) Warrant or sustain revocation of license. Berry v. Alderson, 59 Cal. A. 729, 211 P 836; Lanterman v. Anderson, 36 Cal. A. 472, 172 P 625; State v. Hanson, 201 Iowa 579, 207 NW 769; State v. Clark, (Mo.) 9 SW (2d) 635; Knoop v. State Bd. of Health, 41 R. I. 283, 103 A 904, LRA1918E 1009. (2) Show or warrant, or sustain finding that the holder of the license or certificate aided and abetted an unlicensed person to practice dentistry unlawfully (Homan v. Board of Dental Examiners, (Cal. A.) 262 P 324), (3) committed fraud in procuring his license (Aronson v. State Dept. of Health, (Conn.) 142 A 476), (4) or in the practice of dentistry (State v. Purl, 228 Mo. 1, 128 SW 196); (5) was an habitual user of narcotics and intoxicating liquors (State v. Hanson, 201 Iowa 579, 207 NW 769); (6) or was guilty of gross unprofessional conduct (Senior v. State Bd. of Health, (R. I.) 96 A 340) (7) or wrongful advertising (State Bd. of Medical Examiners v. Jordan, 92 Wash. 234, 158 P 982).

[b] **Evidence held insufficient** to: (1) Warrant or sustain revocation (Renwick v. Phillips, (Cal.) 268 P 368; State Bd. of Chiropractic Examiners v. Los Angeles County Super. Ct., 201 Cal. 108, 255 P 749; Meagher v. Board of Dental Examiners, (Cal. A.) 261 P 1037; Macomber v. State Bd. of Health, 28 R. I. 3, 65 A 263, 8 LRANS 585) (2) or suspension (State v. Robinson, 253 Mo. 271, 161 SW 1169) of license. (3) Establish fraud, deceit, or misrepresentation in obtaining the license or certificate Slabotsky v. State Dept. of Health, (Conn.) 142 A 477; Louisiana State Bd. of Dentistry v. Hodge, 160 La. 743, 107 S 511), (4) or that the dentist aided another person to practice dentistry unlawfully (Bley v. Board of Dental Examiners, (Cal. A.) 261 P 1036).

[c] **Particular evidence held immaterial.**—Humphreys v. Board of Dental Examiners, (Cal. A.) 262 P 60.

6. Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833.

7. Thompson v. State Bd. of Medical Examiners, 59 Colo. 549, 151 P 436.

8. Bley v. Board of Dental Examiners, (Cal. A.) 261 P 1036.

9. State v. Knight, 204 Iowa 819, 216 NW 104.

10. See supra § 73.

11. Suckow v. Alderson, 182 Cal. 247, 187 P 965; Jordan v. Alderson, 48 Cal. A. 547, 192 P 170.

Weight and sufficiency of evidence in criminal prosecutions see Criminal Law §§ 1559–1999.

12. Suckow v. Alderson, 182 Cal. 247, 187 P 965; Lanterman v. Anderson, 36 Cal. A. 472, 172 P 625.

Statutory rule see Criminal Law § 1426.

13. State Bd. of Medical Examiners v. Harrison, 92 Wash. 577, 159 P 769.

14. State Bd. of Medical Examiners v. Harrison, supra.

15. State Bd. of Medical Examiners v. Harrison, supra.

on the ground that he aided and abetted an unlicensed employee or other person to practice dentistry, he has the burden of proving that such person was duly licensed.[16] However, an inference that the dentist knew of his employee's unlawful practice cannot be drawn in the face of uncontradicted evidence to the contrary.[17] Indeed, all intendments are in favor of a dentist in a proceeding to revoke his license.[18] The burden if not upon complainant[19] or the board[20] to prove that a college which granted a physician a diploma is not one having the requirements contemplated by the statute.

Judicial notice. The board may take judicial notice of its own records.[21]

[§ 77] **(ee) Trial or Hearing.** Except in the case of a license or certificate which is void because issued without authority to a person not entitled thereto,[22] a physician or dentist cannot be deprived of his license or certificate with a full opportunity to be heard[23] before an impartial body,[24] and a statute providing for revocation is unconstitutional as denying due process of law where it does not provide for a hearing[25] or where, although it provides generally for a hearing, it does not provide or prescribe any method or means for,[26] or vest the board with any of the powers essential to,[27] the conduct of the trial or hearing. Upon request, the board should permit the taking of the testimony in shorthand[28] and its incorporation into the record.[29]

Continuance. Where its action is not arbitrary[30] or an abuse of discretion,[31] the granting[32] or refusing[33] of a continuance by the board is a proper exercise of its power.

Before court or court and jury.[34] Some statutes authorizing the revocation of a license or certificate by a court[35] provide for a jury trial of issues of fact, if requested by either party.[36] A trial de novo of the questions presented to the board is not contemplated by some statutes authorizing the revocation of a certificate by a court where its issuance resulted from fraud, perjury, or error of the board.[37]

[§ 78] **(ff) Order.** It is essential to the validity of an order revoking a license to practice medicine that it shall show the facts essential to the jurisdiction of the officer, board, or department making it.[38] The revocation cannot rest in parol;[39] a record thereof must be preserved.[40]

Effect. An order or judgment revoking a license to practice medicine is in effect one in rem;[41] it establishes the status of the former holder of the license as a person not entitled to practice medicine in the state;[42] and it is not open to him, in a subsequent prosecution for practicing medicine without a license, to relitigate the matter decided in the revocation proceeding.[43] However, the revocation of a license destroys only such rights as had their foundation in it,[44] and where a full sanipractic license, granted to a person holding a limited license to practice drugless healing, is revoked, the practitioner is entitled to a return of the limited license[45] and to continue to practice thereunder.[46] Also, charges may be preferred against a physician or midwife notwithstanding the same charges have been previously passed upon by the board and not sustained,[47] or a prior order of revocation has been rescinded because of defects in the proceedings.[48]

[§ 79] **(gg) Judicial Review or Interference—aaa. In General.** If no appeal is provided for, the findings of a board in a proceeding to revoke a physician's or dentist's license are conclusive on the courts where the board had jurisdiction,[49] and acted honestly, impartially, and not arbitrarily,[50] or, as sometimes said, in the absence of fraud, corruption, or oppression.[51] However, the action of the board is not beyond investigation by the courts;[52] where it is arbitrary, the courts will intervene to protect the rights of the physician.[53]

[§ 80] **bbb. Certiorari or Writ of Review.**[54] Certiorari, or a statutory substitute therefor known as a "writ of review," is a proper remedy to obtain a review of an order of a board revoking or suspending a license to practice medicine, dentistry, naturopathy, or chiropractics[55] where it is so provided by statute,[56] or where, although an appeal is

16. Whetstone v. Board of Dental Examiners, (Cal. A.) 261 P 1077.
17. Osborne v. Baughman, 85 Cal. A. 224, 259 P 70.
18. Messner v. Board of Dental Examiners, (Cal. A.) 262 P 58.
19. Horton v. Clark, 316 Mo. 770, 293 SW 362.
20. Horton v. Clark, supra.
21. Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P 324; Anderson v. Board of Dental Examiners, 27 Cal. A. 336, 149 P 1006.
Judicial notice by boards generally see Evidence § 2004.
22. Volp v. Saylor, 42 Or. 546, 71 P 980.
23. Brein v. Connecticut Eclectic Examining Bd., 103 Conn. 65, 130 A 289; Blunt v. Shepardson, 286 Ill. 84, 121 NE 263; State v. Missouri Dental Bd., 282 Mo. 292, 221 SW 70; Peo. v. Reid, 151 App. Div. 324, 136 NYS 428.
24. Abrams v. Jones, 35 Ida. 532, 207 P 724.
25. State Bd. of Medical Examiners v. Lewis, 149 Ga. 716, 102 SE 24.
26. Jewell v. McCann, 95 Oh. St. 191, 116 NE 42.
27. Jewell v. McCann, supra.
28. Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866.
29. Dilliard v. State Bd. of Medical Examiners, supra.
30. State v. Hanson, 201 Iowa 579, 207 NW 769.
31. Whetstone v. Board of Dental Examiners, (Cal. A.) 261 P 1077.
32. Shoults v. Alderson, 55 Cal. A. 527, 203 P 809.
33. Whetstone v. Board of Dental Examiners, (Cal. A.) 261 P 1077; State v. Hanson, 201 Iowa 579, 207 NW 769; State v. North, 304 Mo. 607, 264 SW 678 [aff 271 U. S. 40, 46 SCt 384, 70 L. ed. 818].
[a] **Hearing need not be continued until:** (1) The conclusion of a criminal prosecution. State v. North, 304 Mo. 607, 264 SW 678 [aff 271 U. S. 40, 46 SCt 384, 70 L. ed. 818]. (2) The expiration of the physician's incarceration in a penitentiary. State v. Hanson, 201 Iowa 579, 207 NW 769.
34. **Lack of right to jury trial in action or proceeding to revoke physician's license generally** see Juries § 77 note 65 [c].
35. See supra § 64.
36. See statutory provisions.
[a] **Evidence held to present question for jury.**—Berry v. State, (Tex. Civ. A.) 135 SW 631.
[b] **Verdict for defendant held properly directed.**—State v. Schmidt, 138 Wis. 53, 119 NW 647.
37. State v. Schmidt, supra.
38. Blunt v. Shepardson, 286 Ill. 84, 121 NE 263.
39. Blunt v. Shepardson, supra.
40. Blunt v. Shepardson, supra.
[a] **Board has power to correct its record,** so that it will speak the truth, even though error proceedings are pending in the district court. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17.
41. State v. Richardson, (Conn.) 142 A 406.
42. State v. Richardson, supra.
43. State v. Richardson, supra.
Practice after revocation of license as offense see supra § 32.
44. State v. Maybury, 134 Wash. 641, 236 P 566.
45. State v. Maybury, supra.
46. State v. Maybury, supra.
47. Czarra v. Board of Medical Suprs., 25 App. (D. C.) 443; In re Smith, 10 Wend. (N. Y.) 449.
48. Frascella v. Board of Medical Examiners, (N. J. Sup.) 79 A 1063.
49. Richardson v. Simpson, 88 Kan. 684, 129 P 1128, 43 LRANS 911 [reh den 90 Kan. 178, 133 P 534].
50. Richardson v. Simpson, supra.
51. Meffert v. State Bd. of Medical Registration, etc., 66 Kan. 710, 72 P 247, 1 LRANS 811 [aff 195 U. S. 625, 25 SCt 790, 49 L. ed. 350].
52. Ramsay v. Shelton, 329 Ill. 432, 160 NE 769; Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995.
53. Forman v. State Bd. of Health, 157 Ky. 123, 162 SW 796.
54. **Generally** see Certiorari 11 C. J. p 80.
55. State Bd. of Chiropractic Examiners v. Los Angeles County Super. Ct., 201 Cal. 108, 255 P 749; Suckow v. Alderson, 182 Cal. 247, 187 P 965; Millsap v. Alderson, 63 Cal. A. 518, 219 P 469; Ramsay v. Shelton, 329 Ill. 432, 160 NE 769.
56. See statutory provisions.

provided by statute, the statute is unconstitutional[57] or the appeal provided for is not an adequate and complete remedy.[58] The powers of the court are limited on certiorari or a writ of review,[59] and, with the exception of such additional questions, if any, as are contemplated by a statute governing the remedy,[60] the only question open for review is whether the board exceeded its jurisdiction;[61] the merits of the decision are not open to review,[62] and the court will consider the evidence for, and only for, the purpose of ascertaining whether the board exceeded its jurisdiction[63] or abused its discretion,[64] where a review of the latter question is permitted by statute.[65]

[§ 81] **ccc. Error Proceedings.** Under the construction placed upon the statutes of a few jurisdictions, proceedings in error are available to obtain a review of an order of a board revoking a physician's license.[66] In such error proceedings, the order of the board will be affirmed where the physician was given proper and sufficient notice of the hearing,[67] as well as opportunity at the hearing to vindicate himself from the charges preferred against him,[68] and the board had before it competent evidence of all the jurisdictional facts,[69] even though such evidence was opposed by other and weighty evidence.[70]

[§ 82] **ddd. Appeal.** In some jurisdictions it is provided by statute that, where a license of a physician has been revoked by a board, an appeal may be taken to a designated court of a county.[71] While the failure of a statute providing for such an appeal to prescribe rules of practice and procedure does not render the right to appeal nugatory,[72] it may make the remedy by appeal inadequate and incomplete[73] so as to authorize resort to certiorari.[74]

Pleadings or written charges. When not provided for by statute, the filing of a petition by appellant cannot be required,[75] and likewise where no provision therefor is made by statute, an answer filed by the board is nugatory.[76] Where a statute provides that the board shall prefer written charges on appeal, but specifies no time for doing so, the court may properly refuse to dismiss written charges because they were not preferred at the first term of court after the appeal was entered.[77]

Evidence and trial. Under the construction placed upon the statutes of some,[78] but not other,[79] jurisdictions the physician is entitled to a trial de novo on appeal. Also, some statutes are construed to entitle the physician to a trial of controverted issues before a jury;[80] and regardless of whether or not a jury trial is a matter of right, the court is not deprived of jurisdiction by allowing a jury trial with the consent of the parties.[81] The ordinary rules of evidence[82] are applied in determining the admissibility of evidence on a trial de novo on appeal.[83]

57. Grisso v. Board of Medical Examiners, 75 Cal. A. 385, 242 P 912.

58. Oliver v. State, 122 Okl. 66, 251 P 31.

59. Grisso v. Board of Medical Examiners, 75 Cal. A. 385, 242 P 912.

60. See cases infra this note.

[a] **Whether board abused its discretion** (1) may be reviewed under the statutes of a few states (see statutory provisions), (2) but that question (Doran v. State Bd. of Medical Examiners, 78 Colo. 153, 240 P 335; White v. Andrew, 70 Colo. 50, 197 P 564; Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866; State Bd. of Medical Examiners v. Noble, 65 Colo. 410, 177 P 141) (3) and the question whether the board exceeded its jurisdiction (see infra text and note 61) are the only matters reviewable in such states.

61. Whetstone v. Board of Dental Examiners, (Cal. A.) 261 P 1077; Minaker v. Adams, 55 Cal. A. 374, 203 P 806; Doran v. State Bd. of Medical Examiners, 78 Colo. 153, 240 P 335; White v. Andrew, 70 Colo. 50, 197 P 564; Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866; State Bd. of Medical Examiners v. Noble, 65 Colo. 410, 177 P 141.

[a] **Insufficient charges** constitute want of jurisdiction within the meaning of the rule. Dyment v. Board of Medical Examiners, 57 Cal. A. 260, 207 P 409.

62. State Bd. of Medical Examiners v. Noble, 65 Colo. 410, 177 P 141; Thompson v. State Bd. of Examiners, 59 Colo. 549, 151 P 436.

63. Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866.

[a] **Applications of rule.**—(1) There may be such a lack of proper evidence to sustain the order as to amount to a lack of jurisdiction justifying annulment of the order on certiorari or writ of review. Renwick v. Phillips, (Cal.) 268 P 368; Bley v. Board of Dental Examiners, (Cal. A.) 261 P 1036. See Whetstone v. Board of Dental Examiners, (Cal. A.) 261 P 1077 (recognizing rule). (2) On the other hand, the order will be affirmed where there is sufficient competent evidence to support it and fulfill jurisdictional requirements, even though incompetent evidence was also introduced (Young v. Board of Medical Examiners, (Cal. A.) 268 P 1089), (3) and in such case the court will not review a conflict of testimony (Jordan v. Alderson, 48 Cal. A. 547, 192 P 170) (4) or irregular or erroneous rulings on the admissibility of evidence (Minaker v. Adams, 55 Cal. A. 374, 203 P 806; Jordan v. Alderson, supra). (5) Certiorari will not lie to review rulings on the competency and sufficiency of evidence not objected to. Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833.

64. Dilliard v. State Bd. of Medical Examiners, 69 Colo. 575, 196 P 866.

65. See supra note 60 [a].

66. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17; Munk v. Frink, 75 Nebr. 172, 106 NW 425.

67. Munk v. Frink, 81 Nebr. 631, 116 NW 525, 17 LRANS 439.

68. Munk v. Frink, supra.

69. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17; Munk v. Frink, 81 Nebr. 631, 116 NW 525, 17 LRANS 439.

70. Mathews v. Hedlund, 82 Nebr. 825, 119 NW 17.

71. See statutory provisions.

[a] **County where hearing was had.**—Under a statute providing for an appeal to the circuit court in and for the county in which the hearing before the board was had, an appeal will not be dismissed because the record is silent as to where the hearing was had, where the motion to dismiss recites that the hearing was had in the county in which the circuit court to which the appeal was taken was located, and the decision of the board purports to have been signed in that county. State v. Estes, 34 Or. 196, 51 P 77, 52 P 571, 55 P 25.

[b] **Affidavit for change of venue does not oust court of jurisdiction** where the appeal was taken to the court of the proper county under the statute, and the statute does not provide for the transfer of the case to another county. In re Shortridge, 53 N. D. 614, 207 NW 442.

[c] **Appeal transferred to another county** while a statute authorizing the transfer was in effect may, after the repeal of the statute, be proceeded with in the county to which it was transferred. Mower v. State Dept. of Health, (Conn.) 142 A 473 [app dism 278 U. S. 570 mem, 49 SCt 82 mem].

72. State v. First Judicial Dist. Ct., 13 Mont. 370, 34 P 298.

73. Oliver v. State, 122 Okl. 66, 251 P 31.

74. See supra § 80.

75. Seitz v. Ohio State Medical Bd., 24 Oh. A. 154, 157 NE 304.

76. State Bd. of Health v. Roy, 22 R. I. 538, 48 A 802.

77. Lewis v. State Bd. of Medical Examiners, 23 Ga. A. 647, 99 SE 147.

78. State v. Knight, 204 Iowa 819, 216 NW 104; Board of Medical Examiners v. Carroll, 194 N. C. 37, 138 SE 339.

79. In re Shortridge, 53 N. D. 614, 207 NW 442.

[a] **Trial is upon record and evidence heard by board.**—In re Shortridge, 53 N. D. 614, 207 NW 442.

80. Board of Medical Examiners v. Carroll, 194 N. C. 37, 138 SE 339.

[a] **Verdict for revocation of license held properly directed.**—Hughes v. State Bd. of Medical Examiners, 165 Ga. 892, 142 SE 285 [app dism 49 SCt 36 mem].

81. State v. Dean, 123 Or. 539, 262 P 936.

82. See Evidence § 89 et seq.

83. See cases infra this note.

[a] **Criminal proceedings.**—(1) On a trial de novo on appeal from an order revoking a physician's license on the ground of his conviction of a crime involving moral turpitude, the indictment and sentence of the physician in a federal court for using the mails to defraud are properly admitted. Hughes v. State Bd. of Medical Examiners, 165 Ga. 892, 142 SE 285 [app dism 49 SCt 36 mem]. (2) The admission of a certified copy of defendant's plea, and the verdict, judgment, and sentence in a criminal case standing alone, is erroneous (Lewis v. State Bd. of Medical Examiners, 23 Ga. A. 647, 99 SE 147); (3) but the error may be cured by the subsequent admission of a certified copy of the bill of indictment showing the offense with which defendant was charged and of which he was convicted (Lewis v. State Bd. of Medical Examiners, supra). (4) Where evidence showing a conviction of selling narcotics has been admitted, other evidence explaining prescriptions for narcotics is inadmissible. Seitz v. Ohio State Medical Bd., 24 Oh. A. 154, 157 NE 304.

[b] **Pamphlets.**—(1) On appeal and trial de novo in a proceeding to revoke the license of a physician on the ground, among others, of causing the publication and circulation, by

Costs. In the absence of express statutory provision, defendant is not entitled to recover costs upon reversal.[84]

[§ 83] **eee. Further Review.** Under various constitutional or statutory provisions of different jurisdictions an appeal to a higher court may be taken from a judgment on appeal from an order by a board revoking or suspending a license,[85] and an appeal[86] or writ of error[87] may be taken from a judgment in certiorari proceedings.

[§ 84] **(h) Surrender and Restoration.**[88] Where a medical practitioner voluntarily surrendered his license to a grand jury and admitted the existence of facts which would justify the revocation of it, he cannot succeed in a suit to compel the state department of health to reinstate and restore the license,[89] as, if the surrender of the license is to be regarded as one in effect made to defendant, it was as effectual to terminate the right to practice medicine in the state as a revocation would have been,[90] and, if it is not to be regarded as a surrender to defendant, it cannot be called upon to reinstate or restore the license.[91]

[§ 85] **(2) Temporary, Annual, or Renewal License.**[92] Under the construction placed upon some statutes providing for the issuance of an annual license and a renewal thereof, the appropriate board has no discretion as to the issuance of a renewal license upon application therefor,[93] provided applicant has been previously licensed;[94] but under the construction placed upon other statutes, the old license is merely prima facie evidence of a right to the new one,[95] and does not confer an incontestable right to a renewal.[96] A statutory provision authorizing a single member of the state medical board to grant a temporary license to an applicant to practice medicine until the next meeting of the board has been construed to authorize the granting of a temporary license to an applicant from year to year,[97] provided the full board in the meantime has not refused to license applicant;[98] but after the board, as such, has refused a license to an applicant, no one member can grant him one.[99] The fact that the board of medical examiners, in issuing a temporary license, used the form of a regular license, which erroneously recited that applicant had passed a satisfactory examination in medicine and surgery before the board, and was thereby authorized to practice, and merely limited the duration of the license, does not constitute such license a regular unlimited license to practice.[1]

Revocation. A statute providing that a license to practice medicine may be revoked only for unprofessional or dishonorable conduct has no application to a temporary license issued by the board of medical examiners without authority.[2] An annual license cannot be revoked after it has expired by its own limitation.[3]

[§ 86] **(3) Verification License.** Under a statute providing for the issuance of a verification license upon the production of documents sufficient to establish the existence and validity of a license issued by a former board, the board is required to issue a verification license in a proper case,[4] and a practitioner within the scope of the statute, who does not obtain a verification license within the time limited by statute, must suffer the consequences of practicing contrary to law.[5] A mere temporary license issued by a member of the board and authorizing the practice of medicine only until the next regular meeting of the board is not a verification license within the meaning of the statute.[6]

[§ 87] **(4) License to Itinerant.**[7] The legislature may not only require an itinerant doctor, physician, or surgeon, to obtain a license from a state board to practice in the state,[8] but may also delegate po-

means of pamphlets, of an advertisement relative to diseases of the sexual organs, a pamphlet having the same contents as the pamphlet attached to the original charges against the physician is properly admitted. Hughes v. State Bd. of Medical Examiners, 165 Ga. 892, 142 SE 285 [app dism 49 SCt 36 mem]. (2) However, passages from pamphlets issued by governmental authority and similar to the contents of the pamphlets issued by the physician are properly excluded as irrelevant and immaterial. Hughes v. State Bd. of Medical Examiners, supra.

[c] **Testimony as to actual reputation of medical school** is not erroneously admitted where no objection is made upon a proper ground and the witness is peculiarly qualified to know the reputation of the school. Mower v. State Dept. of Health, (Conn.) 142 A 473 [app dism 278 U. S. 570 mem, 49 SCt 82 mem].

[d] **Evidence of physician's ability and fitness** as a practitioner is properly excluded. Hughes v. State Bd. of Medical Examiners, 165 Ga. 892, 142 SE 285 [app dism 49 SCt 36 mem].

84. State v. Estes, 34 Or. 196, 51 P 77, 52 P 571, 55 P 25.

[a] **General statute governing costs is not applicable.**—State v. Estes, 34 Or. 196, 51 P 77, 52 P 571, 55 P 25.

85. See statutory provisions.

[a] **Appeal by board** (1) may be taken from a judgment overruling its findings. State v. Estes, 34 Or. 196, 51 P 77, 52 P 571, 55 P 25. (2) A notice of appeal, signed by attorneys, in behalf of the board, which signature was authorized by the president of the board, and afterward ratified by the board, is sufficient, so far as the attorneys' authority is concerned, to give the supreme court jurisdiction. State v. Estes, supra.

86. See constitutional and statutory provisions.

[a] **Appellate court is not limited to question of jurisdiction** of the board where the writ of certiorari contemplated by the statute is somewhat broader than the common-law writ. State v. Clark, (Mo.) 9 SW (2d) 635.

[b] **Appellate court is bound by allegations in petition** regarding the evidence introduced at the hearing before the board. Dyment v. Board of Medical Examiners, (Cal. A.) 268 P 1073.

87. See statutory provisions.

[a] **Writ issued without application** therefor, as provided by statute, does not confer jurisdiction upon the supreme court. Carter v. Shelton, 326 Ill. 500, 158 NE 126.

88. Return of limited license on revocation of full license see supra § 78.

89. Gavlas v. State Dept. of Health, (Conn.) 142 A 388.

90. Gavlas v. State Dept. of Health, supra.

91. Gavlas v. State Dept. of Health, supra.

92. Annual license of itinerant practitioner see infra § 87.

93. State v. Missouri Dental Bd., 289 Mo. 520, 233 SW 390.

94. State v. Missouri Dental Bd., supra; State v. McIntosh, 205 Mo. 616, 103 SW 1071.

95. State v. Webster, 150 Ind. 607, 50 NE 750, 41 LRA 212.

96. Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237.

[a] **Applicant guilty of violation of law.**—When the board, in passing upon an application for a renewal for the ensuing year, finds applicant's record marked with a violation of law for which his license for the current year has been revoked, it is its duty to refuse the application, and it need not reëxamine the charges. Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237.

97. Wragg v. Strickland, 36 Ga. 559.

98. Wragg v. Strickland, supra.

99. Wragg v. Strickland, supra; Peterson v. Seagraves, 94 Tex. 390, 60 SW 751.

1. Volp v. Saylor, 42 Or. 546, 71 P 980.

2. Volp v. Saylor, supra.

3. Barresi v. Biggs, 203 App. Div. 2, 196 NYS 376 (per Hinman and Van Kirk, JJ.).

4. State Bd. of Medical Examiners v. Taylor, 103 Tex. 444, 129 SW 600 [aff 56 Tex. Civ. A. 291, 120 SW 574].

5. Gay v. State, (Tex. Cr.) 184 SW 200.

6. Gay v. State, supra.

Temporary licenses generally see supra § 85.

7. Occupation tax see infra § 95.

8. Fairfield v. Shallenberger, 135 Iowa 615, 113 NW 459.

[a] **Statute held not repealed.**—The act of March 24, 1877, which requires all itinerant medical practitioners to obtain an annual license, is not repealed by the act of June 8, 1881, which requires all physicians and surgeons to register their diplomas. Moore v. Bradford County, 148 Pa. 342, 23 A 896. Contra Peebles v. Wayne County, 10 Pa. Co. 69.

[b] **Indictment** for practicing as an itinerant physician without a li-

lice power to a municipality to require such a person to obtain a license to practice within the municipality;[9] and an ordinance enacted in pursuance of such delegated power is valid where it is reasonable[10] and of uniform operation;[11] but the municipality is without authority, under such statutory delegation of power, to require a dental surgeon to obtain a license.[12] An additional license for practice in a transient office is, or at times has been, required by statute.[13]

[§ 88] **c. Registration[14]—(1) In General.** Statutes authorizing or requiring registration in order to entitle a person to practice medicine and surgery or a like profession such as dentistry, optometry, midwifery, nursing, or veterinary medicine and surgery, may be broadly divided into three classes, namely, those requiring registration generally;[15] those requiring registration or recording of a license or certificate in a designated public office in the county in which the holder resides or intends to practice;[16] and those authorizing registration, within a limited period of time after their enactment, of persons engaged in practice prior thereto.[17] The necessity of complying with a statute requiring registration depends upon whether the person[18] and the act or acts[19] in question are or are not within the application of the statute or some exemption therein, and whether the requirement or exemption is valid or invalid.[20] Statutes requiring registration generally make practice without compliance therewith

cense held sufficient. State v. Edmunds, 127 Iowa 333, 101 NW 431.

9. Fairfield v. Shallenberger, 135 Iowa 615, 113 NW 459.

10. Fairfield v. Shallenberger, supra.

11. Fairfield v. Shallenberger, supra.

12. Cherokee v. Perkins, 118 Iowa 405, 92 NW 68.

13. See statutory provisions.

[a] **Where office not transient,** the statute is not applicable. Com. v. Townley, 22 Pa. Co. 11 (office rented by the year, and occupied a certain number of days each week).

[b] **Facts held to bring case within statute.**—Com. v. Larson, 37 Pa. Co. 658.

14. Cross references:

Recording license as affecting slander of physician see Libel and Slander § 74.

Registration of physician under statute relating to narcotics see Poisons.

Right of:

Registered pharmacist to practice medicine see Druggists § 42.

Unregistered physician to recover compensation for services see infra § 168.

15. See statutory provisions.

[a] **Jurisdictions in which such statutes have been enacted** include England and, in respect of some professions, the Canadian provinces and some American states. See statutory provisions.

16. See statutory provisions.

[a] **Statute held repealed and later revived.**—Friedman v. Mizell, 164 Ga. 1, 137 SE 400 [answers to certified questions conformed to 36 Ga. A. 615, 137 SE 864].

[b] **Place.**—(1) As used in a statute requiring the registration of a certificate in the county in which the holder resides, the word "reside" is to be given its ordinary meaning. Less v. State, 93 Tex. Cr. 154, 246 SW 382. (2) Unless he subsequently changes his residence or domicile to another county (State v. Zechman, 157 Iowa 158, 138 NW 387; Hilliard v. State, 7 Tex. A. 69), (3) and not even then under the construction placed upon some statutes (In re Dentists, 16 Pa. Dist. 560), (4) a person who is properly registered, or whose license or certificate is properly registered or recorded, in one county may practice in any county in the state, and additional registry in another county is not necessary to entitle him to visit or meet patients in that county (State v. Zechman, supra; Martino v. Kirk, 55 Hun 474, 8 NYS 758; Fishblate v. McCullough, 9 Pa. Super. 147; Com. v. Townley, 7 Pa. Dist. 413, 22 Pa. Co. 11; Person v. State, 53 Tex. Cr. 334, 109 SW 935). (5) Under former statutes in some jurisdictions, the rule was otherwise. Ege v. Com., 6 Pa. Cas. 583, 9 A 471.

17. See statutory provisions.

[a] **Statute construed to authorize, but not require,** registration of prior practitioners. State v. McCoy, 149 Iowa 500, 128 NW 846.

[b] **"Practice,"** as used in such statutes, does not mean a few isolated treatments, but implies a continuing occupation. Sanborn v. Weir, 95 Vt. 1, 112 A 228.

[c] **Time.**—(1) To be effective, registration, or an application therefor, must be within the time limited by the statute. Kerbs v. State Veterinary Bd., 154 Mich. 500, 118 NW 4; Com. v. Densten, 217 Pa. 423, 66 A 653; In re Wadel, 25 Pa. Co. 60. (2) The period of limitation has been held to begin to run from the time the law goes into effect, and not from the time of its approval. Patrick v. Perryman, 52 Ill. A. 514. (3) An attempt to register under an act before it goes into effect is ineffectual. State v. McIntosh, 205 Mo. 616, 103 SW 1071.

18. See cases infra this note.

[a] **Application of requirements and exemptions to persons.**—(1) Different statutes authorizing or requiring registration have been variously construed to refer to persons practicing at the time of their enactment (In re Registration of Dentists, 17 Pa. Dist. 991); (2) to apply only to persons receiving certificates thereafter (Com. v. Craig, 144 Ky. 249, 137 SW 1083; Com. v. Nevill, 92 SW 550, 29 KyL 108); (3) or to apply to all practitioners, including not only those previously engaged in practice, but also those becoming qualified thereafter (Cutty v. Carson, 125 Md. 25, 93 A 302). (4) Physicians registered under a former law are sometimes exempted from registering again. State v. Morgan, 96 Mo. A. 343, 70 SW 267. (5) An exemption of a bath attendant or proprietor of a bath does not apply to a person who maintains a portable turkish bath on the premises, but does not exercise either of the ordinary callings of bath attendant or bath proprietor. Rex v. Telford, 29 B. C. 452, 58 DomLR 593, 36 Can CrCas 195, [1921] 2 WestWkly 255. (6) In the absence of a statutory exception of a medical student, such a student is subject to the statute where he prescribes for the patients of a registered physician with whom he is associated as an assistant, and does such acts as would constitute the practice of medicine if done wholly on his own account, although he receives no remuneration from the registered practitioner for his work other than being supplied by the latter with free board and lodging. Re Wagner, (Alta.) 25 CanCrCas 406, 33 WestLR 415. (7) A statute incorporating a medical society, with such powers as pertain to other like corporations, does not exempt the members or licensees of that society from the operation of a statute requiring registration by physicians before practicing for hire. State v. Bohemier, 96 Me. 257, 52 A 643. (8) In Massachusetts, St. (1817) c 131 § 3, requiring every person licensed to practice physic and surgery to deposit a copy of the license with the clerk of the town in which he resided, did not apply to a person who had received the degree of doctor of medicine. Wright v. Lanckton, 19 Pick. (Mass.) 288.

19. See cases infra this note.

[a] **Practice without drugs generally.**—Practice which may be within the statute is not necessarily confined to that involving the prescription or administration of drugs. In re Ontario Medical Act, 13 Ont. L. 501, 8 OntWR 766, 7 AnnCas 369. Compare Reg. v. Stewart, 17 Ont. 4 (statute was not violated where, although accused attended a patient for pay, his treatment consisted merely in sitting still and fixing his eyes on the patient, and he did not prescribe or administer any medicine or give any advice).

[b] **Statutes have been held applicable** to: (1) A continuous series of acts, even though only one person was attended. Rex v. Raffenberg, (Sask.) 15 CanCrCas 295, 12 WestLR 421. (2) The maintenance of offices and treatment therein, for various and sundry disorders and diseases, of any and all persons who applied therefor. Black v. State, 86 Tex. Cr. 253, 216 SW 181. (3) Acts done in connection with the sale of patent medicine, such as examining persons, asking them to declare their symptons, diseases, or complaints, and treating them with medicine. Reg. v. Barnfield, 4 B. C. 305. (4) Treatment according to the chiropractic system. Maier v. State, 90 Tex. Cr. 459, 235 SW 576; Hicks v. State, 88 Tex. Cr. 438, 227 SW 302; Rex v. Evans, 23 B. C. 128; Rex v. McSloy, 9 Sask. L. 265, 31 DomLR 725, 26 CanCr Cas 381, [1917] 1 WestWkly 112. (5) Employment of electrotherapeutics. Larson v. State, 106 Tex. Cr. 261, 285 SW 317; Bergman v. Bond, 14 Man. 503.

[c] **Statutes have been held not applicable** to: (1) Advertisement of ability to prevent, as distinguished from ability to diagnose or treat, disease. Rex v. O'Malley, (Alta.) [1924] 3 DomLR 430, [1924] 2 WestWkly 652. (2) Massage or rubbing (Bergman v. Bond, 14 Man. 503), (3) even where it follows an inquiry as to symptoms and is accompanied or followed by a suggestion of a cure (Reg. v. Valleau, (Ont.) 3 CanCrCas 435). (4) Midwifery. Rex v. Rondeau, 5 Terr. L. 478, 9 CanCrCas 523.

20. See cases infra this note.

[a] **Statute held valid** as reasonable police regulation. State v. Brown, 64 Or. 473, 130 P 985.

[b] **Statute held unconstitutional.**—Ritter v. Rodgers, 8 Pa. Co. 451.

[c] **Reasonable exemptions upheld.**—Watson v. Maryland, 218 U. S. 173, 30 SCt 644, 54 L. ed. 987 [aff 105 Md. 650, 66 A 635].

[d] **Municipal requirement held void.**—State v. Prendergast, 8 Oh. Cir. Ct. 401, 6 Oh. Cir. Dec. 807.

[e] **By-law** of council of college of dental surgeons of a Canadian province, as to examination for registration, held reasonable and valid. Hodgson v. Cowan, 6 Sask. L. 377, 15 DomLR 236, 26 WestLR 407, 5 West Wkly 907.

Conflict between civil and penal statutes see infra text and note 26.

an offense,[21] and some also make it an offense for an unregistered person to advertise to practice medicine,[22] or to take or use any name, title, addition, or description implying that he is registered or specially qualified to practice the profession in question.[23] Also, some statutes make it an offense to file, or attempt to file, for record a certificate issued to another person.[24] It is held that a penal statute relating to registration may be considered in connection with a civil statute relating to the same subject;[25] but it is also held that, where the two are irreconcilable, the penal statute is inoperative.[26]

Right to be registered. A person may be entitled to be registered,[27] provided he possesses the qualifications required by law[28] and complies with the conditions prescribed by law as to proof thereof.[29] In some instances he or she may be entitled to registration without examination,[30] but not where the case is not within an exception to a statute requiring examination.[31]

Excuse for failure to register. Lack of registration before commencing to practice may be excused by a mistake of fact[32] or by the failure of the registration officer to have the proper book in which to make the registration.[33]

Curing invalid registration. Under the construction placed upon some statutes, a registration which is not legal because of error, misunderstanding, or unintentional omission may be validated from its date by a subsequent valid registration.[34] However, it is held that the county court has no jurisdiction to make an order directing the county clerk to enter a name nunc pro tunc in the register of physicians and surgeons.[35]

[§ 89] **(2) Cancellation.** The registration of a physician, dentist, or unlicensed assistant to a registered or licensed dentist may be canceled or revoked, or his name may be removed or erased from the register, on the grounds prescribed by statute,[36] or by a valid regulation adopted by a board,[37] such as the violation of any provision of the law regulating the profession in question,[38] conviction of a felony[39] or misdemeanor,[40] assisting an unregistered person to practice,[41] employment of an uncertified person as a substitute,[42] misconduct,[43] unprofessional conduct,[44] or infamous or disgraceful conduct in a pro-

21. See statutory provisions.
Offense of practicing without obtaining license or certificate distinguished see supra § 16.
Prosecutions see infra § 90.

22. See statutory provisions.
Corporation as "person" within statute see Corporations § 30.

23. See statutory provisions.
[a] **Words "specially qualified to practice dentistry"** (1) as used in the statute, import a professional qualification entitling the holder to registration and not merely professional skill or competence. Bellerby v. Heyworth, [1910] A. C. 377 [overr Barnes v. Barnes, [1909] 1 K. B. 38]. (2) As otherwise stated, the words refer to a qualification in the nature of a degree, diploma, etc., and do not include the case of a description implying mere personal skill or accomplishment. Byrne v. Rogers, [1910] 2 Ir. 220.
[b] **Limited company.**—(1) Although the word "person," as used in a statute relating to dentistry, does not apply to a corporation or company (Atty.-Gen. v. Myddletons, [1907] 1 Ir. 471; O'Duffy v. Jaffe, [1904] 2 Ir. 27), (2) and a company is not subject to prosecution under the statute (O'Duffy v. Jaffe, supra), (3) nevertheless a limited company is not at liberty to use the word "dentist" or its synonyms in such a way as to amount to a false representation calculated to induce the public to believe that the individuals whom it comprises or employs are registered or qualified "dentists" (Atty.-Gen. v. Myddletons, supra), (4) and the attorney-general may obtain an injunction restraining it from doing so (Atty.-Gen. v. Myddletons, supra; Atty.-Gen. v. Appleton, [1907] 1 Ir. 252).
[c] **Statutes held violated.**—Robertson v. Hawkins, [1913] 1 K. B. 57; Royal College of Veterinary Surgeons v. Collinson, [1908] 2 K. B. 248, 252 (by use of words "Canine specialist. Dogs and cats treated for all diseases"); Reg. v. Baker, 17 Cox C. C. 575; Panhaus v. Brown, 68 J. P. 435; Rex v. Pocock, 60 Ont. L. 459, [1927] 4 DomLR 483, 48 CanCrCas 124 [app dism 62 Ont. L. 113, [1928] 2 DomLR 937, 50 CanCrCas 75].
[d] **Statutes held not violated.**—Rex v. Companies Registrar, [1914] 3 K. B. 1161 (by use of words merely descriptive of acts to be performed); Royal College of Veterinary Surgeons v. Kennard, [1914] 1 K. B. 92 (by use of words descriptive of premises, rather than of person); Foster v. Rose, 37 CanLJNS 824; Reg. v. Tefft, 45 U. C. Q. B. (Ont.) 144.

24. See statutory provisions.

25. Tilley v. State, 109 Tex. Cr. 51, 2 SW (2d) 859; Compere v. State, 107 Tex. Cr. 95, 295 SW 614.

26. **French v. State, 14 Tex. A. 76.**

27. Cutty v. Carson, 125 Md. 25, 93 A 302; Pfefferkorn v. Lewis, 80 N. H. 518, 119 A 368; O'Neill's Case, 34 Pa. Co. 625.
Mandamus to compel registration see Mandamus § 223.

28. Folsom v. State Veterinary Bd., 158 Mich. 277, 122 NW 529.
[a] **Person holding license or certificate to practice osteopathy** is a physician entitled to registration under a statute or ordinance requiring every physician to register his or her name and address with a municipal department of health or local registrar of vital statistics. Peo. v. Siman, 278 Ill. 256, 115 NE 817; Bandel v. New York Health Dept., 193 N. Y. 133, 85 NE 1067, 21 LRANS 49.

29. Board of Medical Examiners v. Gulley, 41 Okl. 63, 136 P 1083; Johnson v. State Bd. of Veterinary Medical Examiners, 46 Pa. Super. 279; Binns v. Dental Bd., 40 T. L. R. 699.
[a] **Applicant for registration has burden of proving** the requisite facts. Johnson v. State Bd. of Veterinary Medical Examiners, 46 Pa. Super. 279; Sanborn v. Weir, 95 Vt. 1, 112 A 228.
[b] **Affidavits are not conclusive evidence.**—State v. Board of Examiners for Nurses, 52 Mont. 91, 156 P 124; Sanborn v. Weir, 95 Vt. 1, 112 A 228.

30. Castellini v. New Jersey State Bd. of Examiners, etc., 101 N. J. L. 245, 128 A 544; Reg. v. College of Physicians, etc., 44 U. C. Q. B. (Ont.) 564 (physician registered in England); In re Sinclair, 7 Terr. L. 178 (member of an incorporated college of physicians and surgeons of any province in the Dominion of Canada, exercising powers similar to those conferred upon the college of physicians and surgeons of the Northwest Territories).

31. Kelly's Case, 41 Pa. Co. 290.

32. Pettit v. State, 28 Tex. A. 240, 14 SW 127.

33. Parish v. Foss, 75 Ga. 439.

34. Ottaway v. Lowden, 172 N. Y. 129, 64 NE 812 [rev 55 App. Div. 410, 66 NYS 952]; New York v. Bigelow, 13 Misc. 42, 34 NYS 92 (registration with wrong officer).

35. Matter of Somme, 76 Misc. 23, 136 NYS 57.

36. See statutory provisions.

37. Tattersall v. Sladen, [1928] Ch. 318.

38. See statutory provisions.
[a] **Case held within statutory ground.**—Jones v. State Dental Commn., (Conn.) 145 A 570.

39. See statutory provisions.
[a] **Statute does not apply** where a person was convicted and his whole period of punishment elapsed before registration. Reg. v. College of Physicians, etc., 44 U. C. Q. B. (Ont.) 146.

40. See statutory provisions.
[a] **"Misdemeanour,"** as used in the statute, is not limited to misdemeanor triable on indictment. Pickup v. Dental Bd., [1928] 2 K. B. 459.

41. See statutory provisions.
[a] **Statute applied.**—Davis v. Board of Registration in Medicine, 251 Mass. 283, 146 NE 708.

42. See statutory provisions.
[a] **Statute extends** to any employment of an uncertified person as a substitute, and is not confined to employment for pay. Re Feldmann, 97 L. T. Rep. N. S. 548 (statute relating to registration of midwives).

43. See statutory provisions.
[a] **Misconduct by midwife** (1) within the meaning of a statute justifying the removal of her name from the roll of midwives, is not confined to misconduct in the discharge of her duties as a midwife, but includes misconduct which tends to unfit her for the discharge of the duties of a midwife. Stock v. Central Midwives Bd., [1915] 3 K. B. 756. (2) Living in adultery may constitute misconduct within the meaning of the foregoing rule. Stock v. Central Midwives Bd., supra.
[b] **Unbecoming or improper conduct of physician.**—A statute naming improper or unbecoming conduct of a registered physician as a ground for striking his name from the register "shews plainly, to my mind, that the unbecoming or improper conduct referred to is of the same nature, though perhaps not of the same degree, as the criminal conduct mentioned in the same paragraph, and was intended primarily to deal with the relation of physicians with their patients, and their conduct as it might affect their patients, especially as criminal conduct as it affected other people was dealt with by the previous paragraph, and not for the purpose of regulating quarrels between physicians which might be grounds for civil actions in Court, much less for the purpose of regulating and enforcing that somewhat elastic doctrine known as professional ethics." Re Bechtel, (Alta.) 10 WestLR 473, 474.

44. See statutory provisions.
[a] **Conduct prior to taking effect**

fessional respect.[45] Power to cancel the registration of a practitioner, or to cause his name to be erased from the register, is variously conferred by the statutes of different jurisdictions upon a board,[46] commission,[47] or, in some of the Canadian provinces, upon the council of the college of physicians and surgeons of the particular province,[48] after a standing committee of such council has ascertained the facts[49] and made a written report;[50] and an appeal to a designated court from the decision of the board, commission, or council is provided for by statute.[51] Where registration is with a prothonotary as an officer of a court, the court may order it canceled for fraud;[52] but a board vested with statutory power to cause a name to be expunged from the records in the office of a clerk of court cannot sue in equity for the same purpose;[53] and where, in filing a certificate of annulment of registration, a county clerk does not act in the capacity of a clerk of a particular court, that court is without authority to require him to cancel and set aside the certificate.[54] Inquiry into charges against a registered physician may be made notwithstanding the acts complained of may be the subject matter of an action at law[55] or the practitioner has been acquitted in a criminal prosecution therefor.[56]

Notice and opportunity to be heard. Notice[57] and an opportunity to be heard[58] must be accorded a person before revoking his registration or erasing his name from the register; but where notice is given, it will not be construed with technical strictness.[59]

[§ 90] **(3) Prosecutions.**[60] Proper and sufficient allegations in the indictment or information,[61] together with proper and sufficient evidence of guilt,[62] and, where the case is tried before a jury, proper and sufficient instructions,[63] are essential to a con-

of statute.—The name of a dentist may be struck off the register of practitioners for infamous or unprofessional conduct on his part before the statute took effect. G—— v. College of Dental Surgeons, 14 B. C. 129.

[b] **It is unprofessional conduct:** (1) For a dentist to violate a statute by using a trade name. In re Moody, 14 B. C. 206 ("New York Dentists"). (2) To perform a pretended operation upon a woman to enable her to conceal her real condition from her parents. In re Telford, 11 B. C. 355.

45. See statutory provisions.

[a] **What constitutes.**—Infamous or disgraceful conduct in a professional respect may consist in: (1) Doing something in regard to the medical profession which would be reasonably regarded as disgraceful and dishonorable by professional brethren of good repute and competency. Allinson v. Medical Education, etc., Gen. Council, [1894] 1 Q. B. 750. (2) Misrepresenting to a patient the character of his disease, and obtaining money from him upon the strength of such misrepresentation. Re Washington, 23 Ont. 299. (3) Violating a liquor law by supplying liquor unnecessarily. Re Cherniak, 46 Ont. L. 434, 51 DomLR 522, 33 CanCrCas 43. (4) It does not embrace mere advertising (Re Washington, **supra**), (5) but the rule is otherwise as to an advertisement which is a studied effort to impose upon the credulity of the public for gain (Re Washington, supra), (6) or which reflects upon the medical profession generally in order to induce people to come to the practitioner in question for advice (Allinson v. Medical Education, etc., Gen. Council, supra).

46. See statutory provisions.

47. See statutory provisions.

48. See statutory provisions.

49. See statutory provisions.

[a] **Discipline committee held to have jurisdiction.**—Re McLauchlan, 22 Alta. L. 553, [1927] 2 DomLR 953, 47 CanCrCas 290, [1927] 2 WestWkly 4 [rev [1927] 2 DomLR 701].

[b] **Finding of facts by committee is necessary.**—Re Stinson, 27 Ont. L. 565, 10 DomLR 699.

50. See statutory provisions.

[a] **Report must specify charges found to be proved.**—Re Church, 22 Alta. L. 560, [1927] 2 DomLR 957, 47 CanCrCas 297, [1927] 2 WestWkly 9.

51. See statutory provisions.

[a] **Scope of appeal.**—The appeal given by some statutes is not limited, but is a rehearing, and the court is absolutely unfettered in any investigation which it may think it right to make in order to ascertain the merits. Stock v. Central Midwives Bd., [1915] 3 K. B. 756; Davies v. Central Midwives Bd., [1919] W. N. 26.

[b] **Decision and disposition of cause on appeal.**—(1) In some cases the appellate court has upheld the conclusion of the board or council. Re Hanington, (B. C.) 6 WestLR 37; Re Dyas, (N. S.) 5 EastLR 545. See Hunt v. College of Physicians, etc., 20 Sask. L. 305, [1925] 4 DomLR 834, [1925] 3 WestWkly 758 (upholding conclusion on the merits, but expressing dissatisfaction with the punishment). (2) In other cases it has ordered the name of the practitioner to be erased from the register for a limited period (Re Carefoot, 20 Sask. L. 202, [1926] 1 DomLR 236, 45 Can CrCas 52, [1926] 1 WestWkly 49), (3) or has ordered the name to be restored to the register (Re Crichton, 13 Ont. L. 271, 8 OntWR 841) (4) on a specified date (Re McLauchlan, (Alta.) [1927] 3 DomLR 225, 48 Can CrCas 148, [1927] 2 WestWkly 388).

52. In re Campbell, 197 Pa. 581, 47 A 860; Simmons' Case, 38 Pa. Co. 195.

53. Bentley v. State Bd. of Medical Examiners, 152 Ga. 836, 111 SE 379.

54. Matter of Conrad, 155 App. Div. 590, 140 NYS 630 [app dism 210 N. Y. 557 mem, 104 NE 1128 mem].

Mandamus to compel county clerk to cancel registration see Mandamus § 349.

55. In re Medical Act, 10 B. C. 268.

56. Re Stinson, 22 Ont. L. 627, 2 OntWN 512, 18 OntWR 38 [dism app 2 OntWN 298, 17 OntWR 565].

57. Reg. v. College of Physicians, etc., 44 U. C. Q. B. (Ont.) 146.

58. Reg. v. College of Physicians, etc., supra.

59. Jones v. State Dental Commn., (Conn.) 145 A 570; Davis v. Board of Registration in Medicine, 251 Mass. 283, 146 NE 708.

60. Venue of prosecution for unlawfully procuring registration see Criminal Law § 284.

61. Wilson v. State, 89 Nebr. 258, 131 NW 223; Young v. State, 74 Tex. Cr. 133, 167 SW 1112; Marshall v. State, 56 Tex. Cr. 205, 119 SW 310; Person v. State, 53 Tex. Cr. 334, 109 SW 935; State v. Stanley, 82 Wash. 492, 144 P 689.

[a] **Thus** an indictment which does not allege in some form (1) a failure to register (State v. Fussell, 45 Ark. 65; Driscoll v. Com., 93 Ky. 393, 20 SW 431, 703, 14 KyL 376), (2) or to have the certificate recorded (State v. Hathaway, 106 Mo. 236, 17 SW 299), as the case may be, charges no offense.

[b] **Unnecessary allegation.**—Where a statute making it an offense to practice medicine without being registered contains in a separate section a requirement that notices of the provisions of the law shall be sent to physicians practicing without being registered, it is not necessary to state, in an indictment for a violation of the law, that the notice provided for was sent to accused. Watson v. State, 105 Md. 650, 66 A 635 [aff 218 U. S. 173, 30 SCt 644, 54 L. ed. 987].

[c] **Indictment held not duplicitous.**—State v. Yates, 145 Iowa 332, 124 NW 174.

[d] **Indictment held not bad for uncertainty.**—Byrd v. State, 72 Tex. Cr. 242, 162 SW 360.

[e] **Allegations held sufficient.**—Less v. State, 93 Tex. Cr. 154, 246 SW 382; Young v. State, 78 Tex. Cr. 305, 181 SW 472; Young v. State, 61 Tex. Cr. 440, 134 SW 736.

62. See cases infra this note.

[a] **State has burden of proving lack of registration.**—Reum v. State, 84 Tex. Cr. 225, 206 SW 523; Denton v. State, 83 Tex. Cr. 67, 201 SW 183. Compare Collins v. State, 68 Tex. Cr. 354, 152 SW 1047 (burden is on accused to show registration).

[b] **Material variance** between allegations and proof is fatal. Tilley v. State, 109 Tex. Cr. 51, 2 SW (2d) 859 (proof of treatment by accused of person with surname different from one alleged in information).

[c] **Evidence held admissible.**—(1) Testimony of a witness that accused treated his wife and received board and lodging as compensation therefor is admissible. Young v. State, 78 Tex. Cr. 305, 181 SW 472. (2) Treatment of different diseases is provable under an allegation of treatment of a named person for a disease, but not specifically naming the disease. Holder v. State, (Tex. Cr.) 7 SW (2d) 561.

[d] **Matters not properly admissible in evidence** include: (1) Benefits resulting from treatment by accused. Larson v. State, 106 Tex. Cr. 261, 285 SW 317. (2) Records showing entries made under a law subsequently repealed. Reum v. State, 84 Tex. Cr. 225, 206 SW 523. (3) An article published in a newspaper purporting to be a communication from accused, in which he referred to a former arrest for a similar offense, and stated that he should continue to do those things which he had been previously doing and for which he was arrested. State v. Yates, 145 Iowa 332, 124 NW 174 (in the absence of evidence that accused was engaged in practicing medicine prior to the publication of the article).

[e] **Evidence held sufficient** to warrant or sustain conviction, or show violation of statute. Hathaway v. State, 14 Ga. A. 415, 81 SE 260; State v. Crombie, 107 Minn. 166, 119 NW 658; Blain v. King, [1918] 2 K. B. 30; Barnes v. Brown, [1909] 1 K. B. 38; Rex v. Austin, (Man.) 25 CanCrCas 446, 33 WestLR 758.

[f] **Evidence held insufficient** to: (1) Support conviction. Reg. v. Tefft, 45 U. C. Q. B. (Ont.) 144. (2) Show that accused publicly professed to practice medicine and to cure and heal. State v. Yates, 145 Iowa 332, 124 NW 174.

63. Cousineau v. State, (Tex. Cr.) 10 SW (2d) 98; Less v. State, 93 Tex. Cr. 154, 246 SW 382; Woodson v. State, 91 Tex. Cr. 369, 238 SW 1114.

[a] **Charge held fairly to submit defense** that accused was practicing

viction of an offense created by a statute requiring registration in order to entitle a person to practice medicine or dentistry.

Residence of accused in county in which the prosecution was instituted and in which it is alleged he failed to have his license or certificate recorded or registered must be alleged[64] and proved[65] by the state in a prosecution for practicing in violation of a statute requiring registration of a license or certificate in the county in which the holder resides. However, residence may be proved by circumstantial evidence,[66] and a prima facie case of residence in the proper county is sufficient to call for affirmative proof to rebut it.[67]

Who may institute prosecution. In some jurisdictions any member of the public may institute the prosecution.[68]

Summary conviction is subject to the statutes applicable to such a conviction.[69] In some jurisdictions the record of a summary conviction for practicing medicine without registration must set out the particular act or acts which constituted the practicing,[70] and state that the practice was for hire, gain, or hope of reward.[71] On a motion to quash a summary conviction, the court will not review the evidence further than to ascertain if there was any evidence showing an offense.[72]

[§ 91] **3. Advertising or Soliciting.**[73] A statute forbidding physicians and surgeons to solicit patients through paid agents is a valid police regulation.[74] Also, the courts have upheld statutes prohibiting some, but not other, kinds of advertising by an osteopath;[75] the same is true of statutes prohibiting advertising by a physician under a name other than his own;[76] but a statute prohibiting any physician from causing the publication of any advertisement relative to any disease of the sexual organs has been declared unconstitutional.[77] In some states the statutes do not require an advertisement that the practice of optometry is being carried on in a store or other establishment to contain or set forth the name of the optometrist employed to do the work.[78] Statutes regulating advertising are to be interpreted with reference to the evils the legislature intended to remedy and prevent.[79]

[§ 92] **4. Practice under Forbidden Name.** In some jurisdictions there are statutes prohibiting the practice of medicine under a name other than that of the practitioner,[80] or prohibiting the practice of dentistry under a false, assumed, or trade name, or the name of a corporation, company, or association.[81] Exceptions in the latter class of statutes of legally incorporated dental corporations existing and in operation prior to a specified date, or of persons who have been in actual business under the name of a company, association, or corporation for a specified period of time, will be given effect in a case falling within their terms,[82] but they will not be extended by construction.[83]

[§ 93] **5. Place of Practice.**[84] A statute making it unlawful for an itinerant vendor of any drug, nostrum, ointment, or appliance publicly to profess to cure or treat diseases, injuries, or deformities is construed as intended merely to regulate the practice of medicine,[85] rather than the sale of drugs or patent or proprietary medicines,[86] and to make a public profession to cure or treat an element of the offense;[87] and, as so construed, is valid.[88]

Optometry. A statute prohibiting a licensed optometrist from peddling from door to door, establishing temporary offices, practicing outside of, or away from, his office or place of business, or operating branch offices unless each branch office is fully equipped with the instruments necessary to make an optometric examination and is in charge of a regularly licensed optometrist, is a reasonable exercise of the police power.[89] Such a statute is construed not to prohibit intermittent practice with the necessary instruments in a home or hospital,[90] or the use only occasionally or at intervals of an office regularly and permanently maintained for the practice of optometry.[91] A statute limiting the practice of

as a masseur. Newman v. State, 61 Tex. Cr. 338, 134 SW 688.

[b] **Instruction to find accused guilty** is proper where the material facts are undisputed and they establish guilt as a matter of law. Peo. v. Rose, 218 Mich. 642, 188 NW 417.

64. Jones v. State, 8 Ga. A. 411, 69 SE 315; Barrett v. State, (Tex. Cr.) 8 SW (2d) 133; Lockhart v. State, 58 Tex. Cr. 80, 124 SW 923.

65. Hathaway v. State, 14 Ga. A. 415, 81 SE 260; Barrett v. State, (Tex. Cr.) 8 SW (2d) 133; Young v. State, 59 Tex. Cr. 358, 128 SW 1103; State v. Dechmann, 57 Wash. 690, 107 P 858.

[a] **Proof beyond reasonable doubt is required.**—Cousineau v. State, (Tex. Cr.) 10 SW (2d) 98; Woodson v. State, 91 Tex. Cr. 369, 238 SW 1114.

66. Hathaway v. State, 14 Ga. A. 415, 81 SE 260; Hargett v. State, 106 Tex. Cr. 471, 293 SW 171.

67. Hathaway v. State, 14 Ga. A. 415, 81 SE 260.

68. Clarke v. McGuire, [1909] 2 Ir. 681.

69. St. Germain v. Gauvreau, 59 Que. Super. 178, 22 Que. Pr. 168, 37 CanCrCas 29.

Summary trials or convictions generally see Criminal Law §§ 636–709.

70. Reg. v. Whelan, 4 CanCrCas 277; Reg. v. Coulson, 24 Ont. 246.

71. Reg. v. Hessel, 44 U. C. Q. B. (Ont.) 51.

72. Reg. v. Coulson, 27 Ont. 59.

73. Advertising as constituting: Ground for revocation of license see supra § 66.

Practice see supra § 24.

74. State v. McCreary, (Ark.) 92 SW 775; Thompson v. Van Lear, 77 Ark. 506, 92 SW 773, 5 LRANS 588.

75. Laughney v. Maybury, 145 Wash. 146, 259 P 17, 54 ALR 393 (statute prohibiting advertising other than by a professional card or window or street sign restricted to a statement of name, address, profession, office hours, and telephone number).

76. Peo. v. Apfelbaum, 251 Ill. 18, 95 NE 995.

Practice under another name see infra § 92.

77. Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P 132, 51 LRANS 958, AnnCas1915D 1188.

78. In re Optical Establishments, 29 Pa. Dist. 820.

79. Laughney v. Maybury, 145 Wash. 146, 259 P 17, 54 ALR 393.

80. See statutory provisions.

[a] **Case held within statute.**—Peo. v. Warden of City Prison, 168 App. Div. 240, 152 NYS 977.

Evidence of offenses other than one charged see Criminal Law § 1166.

81. See statutory provisions.

[a] **Constitutionality.** — (1) A statute providing that a person practicing dentistry or dental surgery shall do so under his own name only is invalid as an improper exercise of the police power (Ex p. Craycroft, 24 OhNPNS 513), (2) but another statute prohibiting the practice of dentistry under a false name is valid when construed merely to prohibit practice under another individual name (Ex p. Craycroft, supra), (3) and not to prohibit practice under a trade name or a name other than that of an individual (Ex p. Craycroft, supra).

[b] **Single act does not constitute offense.**—Peo. v. Silver, 158 App. Div. 217, 143 NYS 43.

[c] **Statute held not violated.**—Peo. v. Hewson, 224 N. Y. 136, 120 NE 115.

82. Lewis v. Woodbury Dental Parlors Co., 106 Misc. 78, 175 NYS 269.

83. Hodgen v. Com., 142 Ky. 722, 135 SW 311.

84. License to practice as itinerant see supra § 87.

85. J. R. Watkins Medical Co. v. Hunt, 104 Nebr. 266, 177 NW 462; Kirk v. State, 126 Tenn. 7, 150 SW 83, AnnCas1913D 1239.

86. J. R. Watkins Medical Co. v. Hunt, 104 Nebr. 266, 177 NW 462; Kirk v. State, 126 Tenn. 7, 150 SW 83, AnnCas1913D 1239.

87. J. R. Watkins Medical Co. v. Hunt, 104 Nebr. 266, 177 NW 462; Kirk v. State, 126 Tenn. 7, 150 SW 83, AnnCas1913D 1239.

88. Kirk v. State, supra.

89. Harris v. State Bd. of Optometrical Examiners, etc., 287 Pa. 531, 135 A 237.

90. Harris v. State Bd. of Optometrical Examiners, etc., supra.

91. In re Optometry, 28 Pa. Dist. 67.

an itinerant optometrist to any three counties he may select is not unconstitutional.[92]

[§ 94] **6. Use of Prophylactic at Childbirth.** A statute, making it a crime for a physician to fail to use a prophylactic against inflammation of the eyes of an infant immediately after birth in a maternity home, hospital, or public or charitable institution, does not apply to a failure to use a prophylactic in any place other than the places designated in the statute.[93]

[§ 95] **C. Privilege or Occupation Taxes.**[94] The legislature may impose an occupation tax upon physicians and surgeons,[95] or upon itinerant physicians alone,[96] but, in doing so, it must not discriminate between portions of the same class of practitioners.[97] It is beyond the authority of a state board of medical examiners to agree that money paid as a fee for a license of an itinerant shall be returned in the event a pertinent statute is adjudged unconstitutional by the supreme court of the state in a pending case.[98] The liability, if any, of a physician and surgeon,[99] dentist,[1] or optician[2] for an occupation tax depends upon whether he is within the terms of a valid and unrepealed statute[3] or ordinance[4] imposing the tax.

Municipality may tax physicians or dentists practicing their professions within the corporate limits[5] where it is authorized by statute to do so,[6] and the statute is valid, as it is,[7] unless the delegation of such authority to a municipality is prohibited by a constitutional provision.[8]

III. RELATION TO PATIENT

[By MANUEL PRENNER]

[§ 96] **A. Nature of Relation.** The relation between a physician and his patient is one of trust and confidence,[9] and all dealings between them will be closely scrutinized,[10] particularly those inuring to the benefit of the physician.[11] While communications between a physician and his patient are ordinarily privileged,[12] it has been held that the question whether a breach of medical confidence is actionable depends on the character of the disclosure made.[13]

Authority of physician. While a physician may advise the removal of a patient to a hospital, he has, in an ordinary case, no authority to order such removal.[14]

[§ 97] **B. Contract of Employment[15]—1. In General.** The relation of physician or surgeon and patient is one arising out of a contract, express or implied,[16] and general rules as to the construc-

92. Saunders v. Swann, (Tenn.) 292 SW 458.

93. Noble v. State, 11 Oh. A. 495

94. License or occupation tax generally see Licenses § 3 et seq.

95. State v. Doran, 28 S. D. 486, 134 NW 53

96. State v. Doran, supra.

97. See cases infra this note.

[a] **Thus** (1) in imposing an occupation tax upon itinerant physicians, the legislature may not exempt a portion of a class conducting a professional practice as itinerant physicians in identically the same manner. State v. Doran, 28 S. D. 486, 134 NW 53. (2) A statute requiring the holders of licenses granted thereunder to pay an annual fee and not imposing the same requirement upon holders of licenses previously granted is void for discrimination. Terr. v. McDonald, 17 Hawaii 389.

98. Longstaff v. State, 35 S. D. 136, 150 NW 1100.

99. See cases infra this note.

[a] **Repeal of part of statute.**—The specific repeal of a section of a statute levying a tax upon physicians and surgeons practicing the profession locally does not operate as a repeal of another section of the same statute levying a tax upon doctors and surgeons traveling as specialists. Fouts v. State, 51 Tex. Cr. 3, 101 SW 223.

[b] **Physician who has fixed residence** is not liable for an occupation tax imposed by statute upon an itinerant or traveling physician. Rutherford v. State, 74 Tex. Cr. 617, 169 SW 1157.

1. See case infra this note.

[a] **Every dentist practicing in state.**—A statute expressly imposing an annual license tax upon every person practicing dentistry in the state and providing that no dentist shall be exempt from paying the tax will be given effect according to its terms and held applicable to every dentist practicing in the state without regard to when or how he became entitled under the laws of the state to practice dentistry. Victor's Application, 27 Cal. A. 73, 148 P 975.

2. See case infra this note.

[a] **Facts held to show liability of traveling optician for occupation tax.**—Tipton v. State, 74 Tex. Cr. 225, 168 SW 97.

3. See cases supra notes 99–2.

4. Power of municipality to impose occupation tax on physicians or dentists see infra text and notes 5–8.

5. Savannah v. Charlton, 36 Ga. 460.

Power of municipality to require license see supra § 14.

6. See statutory provisions.

[a] **Statutes construed to authorize taxes in question.**—Redding v. Dozier, 56 Cal. A. 590, 206 P 465; State v. Pensacola, 65 Fla. 120, 61 S 193; Dodge v. Guidinger, 87 Nebr. 349, 127 NW 122, 138 AmSR 494.

7. Girard v. Bissell, 45 Kan. 66, 25 P 232.

8. Johnson v. Great Falls, 38 Mont. 369, 99 P 1059, 16 AnnCas 974 (tax for purpose of raising revenue).

Delegation of power to require license as police regulation see supra § 14.

9. See Contracts § 334.

10. Cole v. Wolfskill, 49 Cal. A. 52, 192 P 549; Ulbrand v. Bennett, 83 Or. 557, 163 P 445.

Particular dealings and transactions:
Contracts § 334.
Deeds § 168.
Gifts §§ 51, 52, 72.
Release [34 Cyc 1065].
Wills [40 Cyc 1148].

Charge for services as showing procurement of contract by fraud see infra § 186 note 75 [b].

11. Ulbrand v. Bennett, 83 Or. 557, 163 P 445.

[a] **But physician's mere knowledge** of the action of a third person against whom the patient seeks relief, without his participation in such action, does not make him equally liable with such third person. Ulbrand v. Bennett, 83 Or. 557, 163 P 445.

12. See Witnesses [40 Cyc 2381 et seq].

13. A. B. v. C. D., 7 F. (Sc.) 72.

[a] **Disclosure of contagious disease.**—A physician who, in good faith and with reasonable grounds, decides upon confidential information given by his patient that he has a contagious disease, is not liable in damages to the patient for such disclosure to others as will prevent the spread of the disease. Simonsen v. Swenson, 104 Nebr. 224, 177 NW 831, 9 ALR 1250.

14. Medlin v. Bloom, 230 Mass. 201, 119 NE 773.

15. Cross references:
Contract of employment:
Affecting compensation see infra §§ 166–215
Agency § 309.
City physician see Municipal Corporations § 1589.
Corporations §§ 2286–2289.
Frauds, Statute of § 30
Health §§ 95–97.
Husband and Wife §§ 146, 627.
Parent and Child § 161 note 64 [b].
Paupers § 250.
Workmen's Compensation Acts § 97.
Evidence as to employment of physician in determining damages see Damages § 330.
Medicines and medical attendance:
As necessities see Infants § 176.
Parent's liability for see Parent and Child § 44.

16. Miller v. Blackburn, 170 Ky. 263, 185 SW 864; Parkell v. Fitzporter, 301 Mo. 217, 256 SW 239, 29 ALR 1305; Bowers v. Santee, 99 Oh. St. 361, 124 NE 238; Netzel v. Todd, 24 Oh. A. 219, 157 NE 405. See Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512, 516 ("professional relations between the physician and his patient are at most merely contractual"). But see Thaggard v. Vafes, 218 Ala. 609, 119 S 647, 649 ("the relation of physician and patient is not necessarily contractual, but may be consensual merely").

[a] **Existence of relation was shown:** (1) Where defendant called on and examined plaintiff to determine the character and extent of his injury, and after the examination prescribed for him, and gave directions to his mother, who was caring for and nursing him, regarding the treatment he should receive. Coss v. Spaulding, 41 Utah, 447, 126 P 468. (2) Where plaintiff's employer engaged defendant physicians to treat injured employees for compensation to be deducted from wages of the employees, the relation of patient and physician existed between an injured employee and the physicians. Viita v. Fleming, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas1917E 678.

[b] **Mere purchase of proprietary medicine.**—Where a physician conducting a proprietary medicine business, in order to promote sales, advertises to give free prescriptions in

tion[17] and validity or legality[18] of contracts apply. Since the duty owed to a patient is measured and determined primarily by the contract of employment,[19] a physician or surgeon may by special agreement or notice limit the extent and scope of his employment.[20]

[§ 98] **2. Actions for Breach.** General rules[21] apply to an action for breach of contract to render medical services,[22] including the pleadings,[23] and the admissibility[24] and the sufficiency[25] of the evidence, and the damages recoverable.[26]

[§ 99] **C. Duration and Termination.**[27] Unless the terms of employment, or notice, limit the services to be given,[28] the relation of physician and patient, and the physician's employment, continue until the physician's services are no longer needed,[29] or until terminated by common or mutual consent[30] or at the will of either party.[31]

IV. NEGLIGENCE AND MALPRACTICE*

[§ 100] **A. Definitions.**[32] Malpractice (mala praxis)[33] is bad practice,[34] either through lack of skill or neglect to apply it, if possessed.[36] The term has been variously defined as the negligent performance by a physician or surgeon of the duties which are devolved and incumbent upon him on account of his contractual relations with his patient;[36] bad or unskillful practice by a physician or surgeon, whereby the patient is injured;[37] the treatment by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient;[38] the bad professional treatment of disease, pregnancy, or bodily injury, from reprehensible ignorance or carelessness, or with criminal intent.[39] Malpractice is either willful,[40] negligent,[41]

reply to letters giving symptoms, and the prescriptions consist of recommendations of his remedies, there is no relation of physician and surgeon between the purchaser of the remedies and the physician or his corporate successor in the business. Dr. David Kennedy Corp. v. Kennedy, 165 N. Y. 353, 59 NE 133.

17. See Contracts §§ 481-592.

[a] **Place of rendition of services.**—A contract, stipulating that the patient contracts for the services to be rendered at any time or place during any indisposition of the patient during the remainder of her life, does not require the physician to accompany the patient to any place she may see fit to go temporarily, for the purpose of treating her professionally, but only binds him to treat her at her permanent place of abode. Zeigler v. Illinois Trust, etc., Bank, 245 Ill. 180, 91 NE 1041, 28 LRANS 1112, 19 Ann Cas. 127.

18. See Contracts § 46 et seq.

[a] **Contract for services during life of patient,** for a specified consideration, is not invalid as a wagering contract. Zeigler v. Illinois Trust, etc., Bank, 245 Ill. 180, 91 NE 1041, 28 LRANS 1112, 19 AnnCas 127.

[b] **Want of consideration.**—Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235.

19. Nash v. Royster, 189 N. C. 408, 127 SE 356.

20. Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 221, 222, 298 SW 1061 [cit Cyc]; Nash v. Royster, 189 N. C. 408, 127 SE 356.

21. See Contracts §§ 790-1034.

Nature and form of action see Actions § 155; Contracts § 790.

22. See cases infra this section.

23. See Contracts §§ 826-925.

[a] **A declaration** in an action for breach of a physician's contract to attend a patient sufficiently avers that his services were required and necessary, where it avers that the patient was suffering intensely, awaiting his attendance, and that it was necessary to call another physician. Burroughs v. Crichton, 48 App. (D. C.) 596, 4 ALR 1529.

24. See Contracts §§ 960-975.

[a] **Printed professional cards** setting forth that the physician could cure any and all chronic diseases, etc., were admissible as tending to corroborate plaintiff's claim that the promise was to remove, and not merely to treat, tumors. Gill v. Schneider, 48 Colo. 382, 110 P 62.

25. See Contracts §§ 976-986.

[a] **Held sufficient:** (1) To go to jury on the question whether a physician's contract to remove gallstones from the patient's body was actually performed by him. Schuster v. Sutherland, 92 Wash. 135, 158 P 730. (2) To show, in an action for breach of a physician's warranty that an operation would be successful, that the warranty was made after the agreement to operate and to pay therefor, was not part of the contract to operate, and was therefore without consideration. Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235.

26. See Damages 17 C. J. p 700.

[a] **Where pain results** from a physician's breach of his contract to treat a patient, damages may be recovered for the accompanying mental anguish. Hood v. Moffett, 109 Miss. 757, 69 S 664, LRA1916B 622, AnnCas1917E 410.

27. Duration of duty as to attendance see infra § 115.

28. See supra § 97.

29. Taylor v. De Vaughn, (Cal. A.) 266 P 960; Hopkins v. Heller, 59 Cal. A. 447, 210 P 975; Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 221, 222, 298 SW 1061 [cit Cyc]; Nash v. Royster, 189 N. C. 408, 127 SE 356.

30. Taylor v. De Vaughn, (Cal. A.) 266 P 960; Hopkins v. Heller, 59 Cal. A. 447, 210 P 975; Miller v. Blackburn, 170 Ky. 263, 185 SW 864; Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 221, 222, 298 SW 1061 [cit Cyc]; Nash v. Royster, 189 N. C. 408, 127 SE 356.

31. Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512.

[a] **Dismissal of physician.**—Taylor v. De Vaughn, (Cal. A.) 266 P 960; Hopkins v. Heller, 59 Cal. A. 447, 210 P 975; Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 221, 222, 298 SW 1061 [cit Cyc]; Nash v. Royster, 189 N. C. 408, 127 SE 356.

32. Cross references:

Action by employee against physician as affected by workmen's compensation acts see Workmen's Compensation Acts § 172.

Imputation of malpractice see Libel and Slander, § 83.

Liability for:

Causing death see Death § 36 et seq; Homicide § 142.

Negligence generally see Negligence 45 C. J. p 608.

Liability of hospital see Charities § 107; Hospitals §§ 13-19.

"Maltreatment" see 38 C. J. p 520.

"Negligence" defined see Negligence §§ 1-9.

33. Town v. Archer, 4 Ont. L. 383, 387.

34. Isenstein v. Malcomson, 133 Misc. 691, 234 NYS 52; Monohan v. Devinny, 131 Misc. 248, 225 NYS 601 [mod and aff 223 App. Div. 547, 229 NYS 60]; Tucker v. Gillette, 22 Oh. Cir. Ct. 664, 12 Oh. Cir. Dec. 401. See also Malpractice 38 C. J. p 519.

35. Isenstein v. Malcomson, 133 Misc. 691, 234 NYS 52; Monohan v. Devinny, 131 Misc. 248, 225 NYS 601 [mod and aff 223 App. Div. 547, 229 NYS 60].

36. Delahunt v. Finton, 244 Mich. 226, 221 NW 168, 169 [cit Cyc]; Hurlburt v. Gillett, 96 Misc. 585, 588, 161 NYS 994 [aff 176 App. Div. 893 mem, 162 NYS 1124 mem, and quot Cyc]; Tucker v. Gillette, 22 Oh. Cir. Ct. 664, 670, 12 Oh. Cir. Dec. 401.

[a] **Similar definition.**—"A negligent or unskillful performance of the duties which are incumbent upon him on account of his relations with his patients, or for the want of proper care and skill in the performance of a professional act." Wright v. Conway, 34 Wyo. 1, 13, 241 P 369, 242 P 1107 [cit Wharton & S. Med. Jur. § 499].

37. Town v. Archer, 4 Ont. L. 383, 387.

[a] **Similar definitions.**—(1) "Unskilful treatment by a physician or surgeon, in consequence of which the patient is injured more or less seriously, perhaps permanently." Anderson L. D. [quot Abbott v. Mayfield, 8 Kan. A. 387, 56 P 327]. (2) "Negligent acts on the part of a physician or surgeon in treating a patient, by means of which such patient suffers death or unnecessary injury." 1 Witthaus & B. Med. Jur. p 73 [quot Isenstein v. Malcomson, 133 Misc. 691, 692, 234 NYS 52; Tucker v. Gillette, 22 Oh. Cir. Ct. 664, 669, 12 Oh. Cir. Dec. 401]. To same effect Hurlbutt v. Gillett, 96 Misc. 585, 588, 161 NYS 994 [aff 176 App. Div. 893 mem, 162 NYS 1124 mem, and cit Cyc]. (3) "Willful acts on the part of a physician or surgeon toward a person under his care, by which such person suffers death or injury." 1 Witthaus & B. Med. Jur. p 73 [quot Tucker v. Gillette, supra].

38. Webster New Int. D. [quot Napier v. Greenzweig, 256 Fed. 196, 197, 167 CCA 412].

39. Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49.

[a] **Similar definitions.**—(1) "Mistreatment of a disease or injury through ignorance, carelessness or criminal intent." Stedman Med. D. (8th ed) p 589 [quot Isenstein v. Malcomson, 133 Misc. 691, 692, 234 NYS 2]. (2) "Improper treatment through carelessness, or ignorance, or intentionally." Gould Med. D. (2d ed) p 757 [quot Isenstein v. Malcomson, supra]. (3) "Acts forbidden by express statute, on the part of a physician or surgeon, toward a person under his care, by which such person suffers death or injury." 1 Witthaus & B. Med. Jur. p 73 [quot Tucker v. Gillette, 22 Oh. Cir. Ct. 664, 669, 12 Oh. Cir. Dec. 401].

40. 2 Bouvier L. D. p 669 [cit In re Rosenkrans, 84 N. J. Eq. 232, 241, 94 A 42].

41. 2 Bouvier L. D. p 669 [cit In re Rosenkrans, supra].

*By MANUEL PRENNER (§§ 100-144).

or ignorant.[42]

Negligence on the part of a physician has been said to consist in his doing something which he should not have done or omitting to do something which he should have done;[43] or his failure to exercise the required degree of care, skill, and diligence.[44]

[§ 101] **B. Requirement of Skill and Care[45]—1. In General.** In the absence of a special contract to do so,[46] a physician or surgeon is not required to exercise extraordinary skill and care or the highest degree of skill and care possible,[47] nor, if not a specialist, the skill and care of the specialist or expert,[48] but is only required to possess and exercise the degree of skill and learning ordinarily possessed and exercised, under similar circumstances, by the members of his profession in good standing, and to use ordinary and reasonable care and diligence, and his best judgment, in the application of his skill to the case;[49] and by statute in some juris-

[a] **"Negligent malpractice** means gross negligence and lack of the attention which the situation of the patient requires; as if a physician while in the state of intoxication should administer improper medicines." Town v. Archer, 4 Ont. L. 383, 387.

42. 2 Bouvier L. D. p 669 [cit In re Rosenkrans, 84 N. J. Eq. 232, 241, 94 A 42].

[a] **Ignorant malpractice** is "a course of treatment which was calculated to do injury, which has done harm, and which a well educated and scientific surgeon ought to know was not proper in the case." Town v. Archer, 4 Ont. L. 383, 387.

43. Perkins v. Trueblood, 180 Cal. 437, 181 P 642; Taylor v. De Vaughn, (Cal. A.) 266 P 960; Foreman v. Hunter Lumber Co., 36 Cal. A. 763, 173 P 408; Priestley v. Stafford, 30 Cal. A. 523, 158 P 776; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870; Swanson v. Wasson, 45 Ida. 309, 262 P 147; Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

44. Thaggard v. Vafes, 218 Ala. 609, 119 S 647.

Degree of skill and care required see infra §§ 101–109.

45. Cross references:
Hospitals § 18.
Instructions see infra § 159.
Presumptions and burden of proof see infra §§ 152–153.
Question of law or fact see infra § 158.

46. Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147.

47. U. S.—Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174.
Ala.—Carpenter v. Walker, 170 Ala. 659, 54 S 60, AnnCas1912D 863.
Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.
Ark.—Dunman v. Raney, 118 Ark. 337, 176 SW 339.
Cal.—Hesler v. California Hospital Co., 178 Cal. 764, 174 P 654; Houghton v. Dickson, 29 Cal. A. 321, 155 P 128.
Conn.—Landon v. Humphrey, 9 Conn. 209, 23 AmD 333.
D. C.—Sweeney v. Erving, 35 App. 57, 43 LRANS 734 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905].
Ga.—Smith v. Overby, 30 Ga. 241.
Ida.—McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 660, 156 P 115, AnnCas 1918A 380 [quot Cyc].
Ill.—Holtzman v. Hoy, 118 Ill. 534, 8 NE 832, 59 AmR 390 [aff 19 Ill. A. 459]; Fisher v. Niccolls, 2 Ill. A. 484.
Ind.—Jones v. Angell, 95 Ind. 376.
Iowa.—Almond v. Nugent, 34 Iowa 300, 11 AmR 147.
Kan.—Tefft v. Wilcox, 6 Kan. 46.
Ky.—Hoover v. McCormick, 197 Ky. 509, 247 SW 718.
La.—Roark v. Peters, 162 La. 111, 115, 110 S 106 [quot Cyc]; Lett v. Smith, 6 La. A. 248, 260 [quot Cyc].
Me.—Simonds v. Henry, 39 Me. 155, 63 AmD 611; Howard v. Grover, 28 Me. 97, 48 AmD 478.
Md.—Angulo v. Hallar, 137 Md. 227, 112 A 179; Dashiell v. Griffith, 84 Md. 363, 35 A 1094.
Mass.—Higgins v. McCabe, 126 Mass. 13, 30 AmR 642.
Mich.—Wilk v. Black, 188 Mich. 478, 154 NW 561.
Minn.—Martin v. Courtney, 75 Minn. 255, 77 NW 813.
Mo.—Telaneus v. Simpson, 12 SW (2d) 920, 929 [quot Cyc]; Seewald v. Gentry, 220 Mo. A. 367, 372, 286 SW 445 [cit Cyc]; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed on other grounds State v. Ellison, 266 Mo. 604, 182 SW 996, AnnCas1918C 1].
Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047.
Nebr.—McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296; Booth v. Andrus, 91 Nebr. 810, 137 NW 884.
N. H.—Leighton v. Sargent, 31 N. H. 119, 64 AmD 323.
N. J.—Klitch v. Betts, 89 N. J. L. 348, 98 A 427.
N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356; McCracken v. Smathers, 122 N. C. 799, 29 SE 354.
N. D.—Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666.
Oh.—Eislein v. Palmer, 7 OhS&CP 365, 5 OhNP 325; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.
Okl.—Wiley v. Wigg, 124 Okl. 30, 254 P 22; Champion v. Kieth, 17 Okl. 204, 87 P 845.
Or.—Hamilton v. Kelsey, 126 Or. 26, 268 P 750.
Pa.—Wohlert v. Seibert, 23 Pa. Super. 213.
R. I.—Bigney v. Fisher, 26 R. I. 402, 59 A 72.
Tenn.—Wood v. Clapp, 4 Sneed 65.
Tex.—Graham v. Gautier, 21 Tex. 111.
Vt.—Sheldon v. Wright, 80 Vt. 298, 67 A 807.
Va.—Fox v. Mason, 139 Va. 667, 124 SE 405.
Wash.—Corey v. Radabaugh, 143 Wash. 653, 255 P 1037; Froman v. Ayars, 42 Wash. 385, 85 P 14.
W. Va.—Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837; Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147.
Wis.—Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.
Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.
Eng.—Lanphier v. Phipos, 8 C. & P. 479, 34 ECL 844, 173 Reprint 581; Rich v. Pierpoint, 3 F. & F. 35.
Man.—Jewison v. Hassard, 26 Man. 571, 28 DomLR 584, 34 WestLR 904, 10 WestWkly 1088.
N. B.—James v. Crockett, 34 N. B. 540.
N. S.—Stamper v. Rhindress, 41 N. S. 45.
Sask.—Turriff v. King, 6 Sask. L. 37, 9 DomLR 676, 23 WestLR 149, 3 WestWkly 862.
And see cases infra note 49.

[a] **Reason for rule.**—"In this profession, as in others, natural genius and unusual industry, learning and experience, may enable some of its members to attain a preëminence that it would be vain to expect in the great majority." Getchell v. Hill, 21 Minn. 464.

[b] **Absolute accuracy not required** either in practice or judgment. Van Skike v. Potter, 53 Nebr. 28, 73 NW 295; Nash v. Royster, 189 N. C. 408, 127 SE 356; Mullinax v. Hord, 174 N. C. 607, 94 SE 426; Long v. Austin, 153 N. C. 508, 69 SE 500.

[c] **Such treatment as to attain an approximately perfect result** is not required. Hesler v. California Hospital Co., 178 Cal. 764, 174 P 654.

[d] **Treatment actually proper in all respects** is not required. Hoover v. McCormick, 197 Ky. 509, 247 SW 718.

[e] **Rule applied to:** (1) Dentists. Simonds v. Henry, 39 Me. 155, 63 AmD 611; Angulo v. Hallar, 137 Md. 227, 112 A 179; Klitch v. Betts, 89 N. J. L. 348, 98 A 427. (2) Veterinary surgeon. Barney v. Pinkham, 29 Nebr. 350, 45 NW 694, 26 AmSR 389.

[f] **Dentist in handling carbolic acid** is required to be extraordinarily careful, knowing the danger of burns. Picheloup v. Gibbons, (La.) 120 S 504.

Degrees of care or negligence see Negligence §§ 33–85.

48. Czajka v. Sadowski, 243 Mich. 21, 219 NW 660; Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262; Montgomery v. Eagon, 32 O. C. A. 503.

Skill and care required of specialists see infra text and notes 64, 65.

49. U. S.—Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240; Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174.
Ala.—Thaggard v. Vafes, 218 Ala. 609, 119 S 647; Sellers v. Noah, 209 Ala. 103, 95 S 167; Horn v. Pope, 205 Ala. 127, 87 S 161; Talley v. Whitlock, 199 Ala. 28, 73 S 976; Robinson v. Crotwell, 175 Ala. 194, 57 S 23; Carpenter v. Walker, 170 Ala. 659, 54 S 60, AnnCas1912D 863; Shelton v. Hacelip, 167 Ala. 217, 220, 51 S 937 [cit Cyc]; McDonald v. Harris, 131 Ala. 559, 31 S 548.
Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.
Ark.—Dunman v. Raney, 118 Ark. 337, 347, 176 SW 339 [cit Cyc].
Cal.—Perkins v. Trueblood, 180 Cal. 437, 181 P 642; Hesler v. California Hospital Co., 178 Cal. 764, 174 P 654; Johnson v. Clarke, (A.) 276 P 1052; Taylor v. De Vaughn, (A.) 266 P 960; Pearson v. Crabtree, 70 Cal. A. 52, 232 P 715; Markart v. Zeimer, 67 Cal. A. 363, 227 P 683; Linn v. Piersol, 37 Cal. A. 171, 173 P 763.
Conn.—Styles v. Tyler, 64 Conn. 432, 30 A 165; Landon v. Humphrey, 9 Conn. 209, 23 AmD 333.
D. C.—Cayton v. English, 57 App. 328, 23 F. (2d) 749; Cayton v. English, 57 App. 324, 23 F. (2d) 745; Levy v. Vaughan, 42 App. 146; Sweeney v. Erving, 35 App. 57, 43 LRANS 734 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905].
Ga.—Smith v. Overby, 30 Ga. 241; Grubbs v. Elrod, 25 Ga. A. 108, 102 SE 908.
Ida.—Swanson v. Wasson, 45 Ida. 309, 262 P 147; McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 156 P 115, AnnCas1918A 380; State v. Smith, 25 Ida. 541, 138 P 1107. See Cochran v. Gritman, 34 Ida. 654, 677, 203 P 289 ("the law only requires that degree of care which is ordinarily and commonly recognized as reasonable under the particular facts and circumstances of a given case").
Ill.—Holtzman v. Hoy, 118 Ill. 534, 8 NE 832, 59 AmR 390 [aff 19 Ill. A. 459]; Quinn v. Donovan, 85 Ill. 194; Hallam v. Means, 82 Ill. 379, 25 AmR 328; Kendall v. Brown, 74 Ill. 232; McNevins v. Lowe, 40 Ill. 209; Ritchey v. West, 23 Ill. 385; Bacon v. Walsh, 184 Ill. A. 377; McKee v. Allen, 94 Ill. A. 147; Sims v. Parker, 41 Ill. A. 284; Fisher v. Niccolls, 2 Ill. A. 484. See Dawson v. Allen, 191 Ill. A. 399; Kruger v. McCaughey, 149 Ill. A. 440; Goodman v. Bigler, 133 Ill. A. 301 (last two cases holding that ordinary skill is required).

Ind.—Schillinger v. Savage, 186 Ind. 189, 115 NE 321; Jones v. Angell, 95 Ind. 376; Funk v. Bonham, (A.) 151 NE 22; Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178; Thomas v. Dabblemont, 31 Ind. A. 146, 67 NE 463.

Iowa.—Ramberg v. Morgan, 218 NW 492; Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447; Furgason v. Bellaire, 197 Iowa 277, 197 NW 13; Vander Wal v. Abbott, 167 NW 132; O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755; Baker v. Langan, 165 Iowa 346, 145 NW 513; Dunbauld v. Thompson, 109 Iowa 199, 80 NW 324; Whitesell v. Hill, 101 Iowa 629, 70 NW 750, 37 LRA 830; Peck v. Hutchinson, 88 Iowa 320, 55 NW 511; Beck v. German Klinik, 78 Iowa 696, 43 NW 617, 7 LRA 566; Almond v. Nugent, 34 Iowa 300, 11 AmR 147; Bowman v. Woods, 1 Greene 441.

Kan.—Paulich v. Nipple, 104 Kan. 801, 180 P 771; Manser v. Collins, 69 Kan. 290, 76 P 851; Pettigrew v. Lewis, 46 Kan. 78, 26 P 458; Branner v. Stormont, 9 Kan. 51; Tefft v. Wilcox, 6 Kan. 46.

Ky.—Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044; Knopp v. Thornton, 199 Ky. 216, 250 SW 853; Hoover v. McCormick, 197 Ky. 509, 247 SW 718; Kirby v. Berea College, 196 Ky. 353, 244 SW 775; Stevenson v. Yates, 183 Ky. 196, 208 SW 820; Hickerson v. Neely, 54 SW 842, 21 KyL 1257.

La.—Comeaux v. Miles, 118 S 786; Roark v. Peters, 162 La. 111, 115, 110 S 106 [quot Cyc]; Lett v. Smith, 6 La. A. 248, 260 [quot Cyc].

Me.—Curran v. Holt, 117 Me. 369, 104 A 579; McCann v. Twitchell, 116 Me. 490, 102 A 740; Feeney v. Spalding, 89 Me. 111, 35 A 1027; Ballou v. Prescott, 64 Me. 305; Patten v. Wiggin, 51 Me. 594, 81 AmD 593; Howard v. Grover, 28 Me. 97, 48 AmD 478.

Md.—State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587.

Mass.—Mason v. Geddes, 258 Mass. 40, 154 NE 519; Cross v. Albee, 250 Mass. 170, 145 NE 45; Chesley v. Durant, 243 Mass. 180, 137 NE 301; Harriott v. Plimpton, 166 Mass. 585, 44 NE 992; Higgins v. McCabe, 126 Mass. 13, 30 AmR 642.

Mich.—Czajka v. Sadowski, 243 Mich. 21, 219 NW 660; Zoterell v. Repp, 187 Mich. 319, 153 NW 692; Hitchcock v. Burgett, 38 Mich. 501; Hesse v. Knippel, 1 Mich. N. P. 109.

Minn.—Lorenz v. Lerche, 157 Minn. 437, 196 NW 564; Berkholz v. Benepe, 153 Minn. 335, 190 NW 800; Clark v. George, 148 Minn. 52, 180 NW 1011; Hayes v. Lufkin, 147 Minn. 225, 179 NW 1007; Harju v. Allen, 146 Minn. 23, 177 NW 1015; Walker v. Holbrook, 130 Minn. 106, 153 NW 305; Martin v. Courtney, 75 Minn. 255, 77 NW 813; Getchell v. Hill, 21 Minn. 464.

Mo.—Telaneus v. Simpson, 12 SW (2d) 920, 929 [quot Cyc]; Owens v. McCleary, 313 Mo. 213, 281 SW 682; Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49; Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72; West v. Martin, 31 Mo. 375, 80 AmD 107; Trask v. Dunnigan, (A.) 299 SW 116; Seewald v. Gentry, 220 Mo. A. 367, 372, 286 SW 445 [cit Cyc]; Hill v. Jackson, 218 Mo. A. 210, 265 SW 859; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed on other grounds State v. Ellison, 266 Mo. 604, 182 SW 996, AnnCas1918C 1]; Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280; Hales v. Raines, 146 Mo. A. 232, 130 SW 425; Gore v. Brockman, 138 Mo. A. 231, 119 SW 1082; Robertson v. Wenger, 131 Mo. A. 224, 110 SW 663; Ghere v. Zey, 128 Mo. A. 362, 107 SW 418; Carpenter v. McDavitt, 53 Mo. A. 393; Sanderson v. Holland, 39 Mo. A. 233; McMurdock v. Kimberlin, 23 Mo. A. 523.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235; Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487; Hansen v. Fock, 57 Mont. 51, 187 P 282.

Nebr.—Stohlman v. Davis, 220 NW 247; McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296; Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889; Booth v. Andrus, 91 Nebr. 810, 137 NW 884; Van Skike v. Potter, 53 Nebr. 28, 73 NW 295; Griswold v. Hutchinson, 47 Nebr. 727, 66 NW 819; Hewitt v. Eisenbart, 36 Nebr. 794, 55 NW 252.

N. H.—Leighton v. Sargent, 31 N. H. 119, 64 AmD 323; Leighton v. Sargent, 27 N. H. 460, 59 AmD 388.

N. J.—Lolli v. Gray, 101 N. J. L. 337, 128 A 256; Smith v. Corrigan, 100 N. J. L. 267, 126 A 680; Klitch v. Betts, 89 N. J. L. 348, 98 A 427; Gramaldi v. Zeglio, 3 N. J. Misc. 669, 129 A 475.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Link v. Sheldon, 136 N. Y. 1, 32 NE 696; Antowill v. Friedmann, 197 App. Div. 230, 188 NYS 777; Brown v. Goffe, 140 App. Div. 353, 125 NYS 458; Wood v. Wyeth, 106 App. Div. 21, 94 NYS 360; Mackenzie v. Carman, 103 App. Div. 246, 92 NYS 1063; Winner v. Lathrop, 67 Hun 511, 22 NYS 516; Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem]; Bellinger v. Craigue, 31 Barb. 534; Graves v. Santway, 2 Silv. Sup. 67, 6 NYS 892 [aff 127 N. Y. 677 mem, 28 NE 256 mem]; Van Epps v. McKenny, 189 NYS 910; Rosenthal v. Hasbrouck, 161 NYS 354; Rowe v. Lent, 17 NYS 131; Gedney v. Kingsley, 16 NYS 792; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45; Wells v. World's Dispensary Medical Assoc., 9 NYSt 452 [aff 120 N. Y. 630 mem, 24 NE 276, 2 Silv. A. 575]. See Benson v. Dean, 232 N. Y. 52, 133 NE 125 (holding that a physician is bound only to have and exercise competent skill in treating a patient).

N. C.—Mullinax v. Hord, 174 N. C. 607, 94 SE 426; Long v. Austin, 153 N. C. 508, 69 SE 500; McCracken v. Smathers, 122 N. C. 799, 29 SE 354; Boon v. Murphy, 108 N. C. 187, 12 SE 1032.

N. D.—Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666; Hanson v. Thelan, 42 N. D. 617, 173 NW 457, 458 [cit Cyc].

Oh.—Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639; Musser v. Chase, 29 Oh. St. 577; Geiselman v. Scott, 25 Oh. St. 86; Grindle v. Rush, 7 Oh. Pt. II 123; Gallaher v. Thompson, Wright 466; Eislein v. Palmer, 7 OhS&CP 365, 5 OhNP 325; Moehlman v. Ransohoff, 17 OhNPNS 241. See Montgomery v. Eagon, 32 O. C. A. 503 ("the skill and care which an ordinary physician in the general practice is accustomed to employ under like circumstances").

Or.—Hamilton v. Kelsey, 126 Or. 26, 268 P 750; Langford v. Jones, 18 Or. 307, 22 P 1064; Williams v. Poppleton, 3 Or. 139; Boydston v. Giltner, 3 Or. 118; Heath v. Glisan, 3 Or. 64.

Pa.—Stemons v. Turner, 274 Pa. 228, 117 A 922, 26 ALR 727; McCandless v. McWha, 22 Pa. 261; Veit v. Hinchcliffe, 90 Pa. Super. 280; Barnard v. Schell, 85 Pa. Super. 329; Remley v. Plummer, 79 Pa. Super. 117; Krompoltz v. Hyman, 70 Pa. Super. 581; Wohlert v. Seibert, 23 Pa. Super. 213; Braunberger v. Cleis, 13 AmLReg 587; Haire v. Reese, 7 Phila. 138.

R. I.—Bigney v. Fisher, 26 R. I. 402, 59 A 72.

Tenn.—Wood v. Clapp, 4 Sneed 65; Alder v. Buckley, 1 Swan 69.

Tex.—Graham v. Gautier, 21 Tex. 111; Smith v. Farrington, (Commn. A.) 6 SW (2d) 736.

Vt.—Parker v. Bowen, 98 Vt. 115, 126 A 522; Willard v. Norcross, 86 Vt. 426, 85 A 904; Willard v. Norcross, 81 Vt. 293, 69 A 942; Sheldon v. Wright, 80 Vt. 298, 67 A 807; Wilmot v. Howard, 39 Vt. 447, 94 AmD 338.

Va.—Fox v. Mason, 139 Va. 667, 124 SE 405.

Wash.—Corey v. Radabaugh, 143 Wash. 653, 255 P 1037; Hollis v. Ahlquist, 142 Wash. 33, 251 P 871; Kemp v. McGillivray, 129 Wash. 592, 225 P 631; Howatt v. Cartwright, 128 Wash. 343, 222 P 496; Froman v. Ayars, 42 Wash. 385, 85 P 14.

W. Va.—Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837; Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147; Tompkins v. Pacific Mut. L. Ins. Co., 53 W. Va. 479, 44 SE 439, 97 AmSR 1006, 62 LRA 489.

Wis.—Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31 ALR 826; Rost v. Roberts, 180 Wis. 207, 192 NW 38; Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111; Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719; Gates v. Fleischer, 67 Wis. 504, 30 NW 674.

Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

Eng.—Lanphier v. Phipos, 8 C. & P. 475, 34 ECL 844, 173 Reprint 581; Rich v. Pierpont, 3 F. & F. 35.

Man.—Jewison v. Hassard, 26 Man. 571, 28 DomLR 584, 34 WestLR 904, 10 WestWkly 1088.

N. B.—James v. Crockett, 34 N. B. 540.

N. S.—Stamper v. Rhindress, 41 N. S. 45.

Sask.—Turriff v. King, 6 Sask. L. 37, 9 DomLR 676, 23 WestLR 149, 3 WestWkly 862; Dangerfield v. David, 17 WestLR 249.

And see cases infra § 103 notes 73–78.

[a] **"The object of the law** on the one hand is to guard the patient against the wrongful practice of ignorant or negligent men who hold themselves out as physicians or surgeons, and on the other to protect the faithful practitioner of ordinary learning, skill and ability from loss in reputation or purse on account of matters for which it would be unreasonable to hold him responsible." Loudon v. Scott, 58 Mont. 645, 655, 194 P 488, 12 ALR 1487. To same effect Heath v. Glisan, 3 Or. 64.

[b] **Degree of skill undefinable.**—"A medical man . . . was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge." Rich v. Pierpont, 3 F. & F. 35, 40.

[c] **"Skill,** in the sense in which it is here used, includes not only the knowledge or information which the surgeon has in reference to the propriety or desirability of a given operation, but also the ability to perform the operation in a proper and approved way." Akridge v. Noble, 114 Ga. 949, 958, 41 SE 78.

[d] **"Ordinary skill,"** within the meaning of the rule that a physician or surgeon is only required to exercise ordinary care and skill, means such degree of skill as is commonly possessed by men engaged in the same profession. Boon v. Murphy, 108 N. C. 187, 12 SE 1032; Heath v. Glisan, 3 Or. 64.

[e] **"Average" skill.**—(1) The word "average" means the same as "reasonable" and "ordinary." Whitesell v. Hill, (Iowa) 66 NW 894. (2) "This rule . . . does not . . . contemplate merely average merit. . . . In order to determine who will come up to the legal standard indicated, we are not permitted to aggregate into a common class the quacks, the young men who have had no practice, the old ones who have dropped out of the practice,—the good and the very best,—and then strike an average between them. This method would evidently place the standard too low." Holtzman v. Hoy, 118 Ill. 534, 536, 8 NE 832, 59 AmR 390 [aff 19 Ill. A. 459].

[f] **Rule applied to:** (1) Dentists. Black v. Bearden, 167 Ark. 455, 268

dictions reasonable skill and care are required.[50] As otherwise stated, the rule is that a physician or surgeon impliedly contracts that he possesses and will use, in the treatment of his patients, a reasonable degree of skill and learning, such as is possessed by the average of those in his profession, and that he will exercise ordinary and reasonable care;[51] and he may be held to contract impliedly that he will apply his best judgment to the case,[52] that he will bring to his aid such obtainable remedies and appliances as discovery and experience have found to be the most proper and beneficial in aiding recovery,[53] and that no injurious consequences will result from want of proper skill, care, or diligence on his part.[54] These rules are subject to qualification with respect to the state of medical science[55] and the locality of practice.[56] The best skill and care of the physician himself have been held not the proper standard.[57] The possession of proper skill by a physician is insufficient without the use of such

SW 27; Comeaux v. Miles, (La.) 118 S 786; Simonds v. Henry, 39 Me. 155, 63 AmD 611; Cross v. Albee, 250 Mass. 170, 145 NE 45; Hill v. Jackson, 218 Mo. A. 210, 265 SW 859; Klitch v. Betts, 89 N. J. L. 348, 98 A 427; Van Epps v. McKenny, 189 NYS 910; Rosenthal v. Hasbrouck, 161 NYS 354; Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666. See Dawson v. Allen, 191 Ill. A. 399. (2) "Those having in charge the treatment of patients." Kirby v. Berea College, 196 Ky. 353, 358, 244 SW 775.

[g] **Surgeon employed to assist another** at an operation owes the patient the duty of exercising reasonable care and skill. Walker v. Holbrook, 130 Minn. 106, 153 NW 305.

[h] **Oculist** must exercise the care and skill usually exercised by oculists in good standing. Stern v. Lanng, 106 La. 738, 31 S 303.

[i] **Corporation** holding itself out and undertaking to treat and cure hernia, furnishing appliance for that purpose by mail, is under the like obligation of a physician and surgeon to use due care. Weller v. Plapao Laboratories Incorporation, 197 Mo. A. 47, 191 SW 1056.

[j] **Where two physicians are employed on a case** (1) and by agreement divide the services, each is bound to use ordinary knowledge and skill, and to give the case his best personal attention and care. Morey v. Thybo, 199 Fed. 760, 118 CCA 198, 42 LRANS 785; Stokes v. Long, 52 Mont. 470, 159 P 28. (2) Under such circumstances, acquiescence by one in careless treatment by the other is a failure to give the required care and attention. Stokes v. Long, supra.

[k] **Reasonable care required to exclude hurtful foreign matter** from the wound made in the course of an operation. Prewett v. Philpot, 142 Miss. 704, 107 S 880.

[l] **Reasonable care and skill required in using silk thread** in tying off arteries and suturing ruptured intestines during an operation. Wynne v. Harvey, 96 Wash. 379, 165 P 67.

[m] **Skill and care required do not relate to nursing** and the provision of necessaries and comforts, but only to the professional duties. Graham v. Gautier, 21 Tex. 111; Fox v. Mason, 139 Va. 667, 124 SE 405.

[n] **Well considered case.**—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655.

Skill of thoroughly educated physicians see infra § 102 text and notes 68, 69.

50. See statutory provisions.

[a] **Under the Georgia statute requiring reasonable care and skill** (1) "the exercise of this degree of care and skill is the measure of professional duty in all cases." Edwards v. Roberts, 12 Ga. A. 140, 76 SE 1054 [quot Fincher v. Davis, 27 Ga. A. 494, 108 SE 905]. To same effect Pace v. Cochran, 144 Ga. 261, 86 SE 934. (2) The standard must be taken to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by the profession generally. Hughes v. Weaver, (Ga. A.) 148 SE 12; McLendon v. Daniel, 37 Ga. A. 524, 141 SE 77; Fincher v. Davis, supra. (3) The standard required by the statute is preferable to a comparison with an "average" surgeon. Pace v. Cochran, supra.

51. U. S.—Napier v. Greenzweig, 256 Fed. 196, 167 CCA 412.

Ala.—Carraway v. Graham, 218 Ala. 453, 118 S 807.

Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.

Ark.—Dorr v. Fike, 177 Ark. 907, 9 SW (2d) 318.

Cal.—Patterson v. Marcus, 265 P 222; Say v. Barber, 202 Cal. 679, 262 P 312; Ley v. Bishopp, (A.) 263 P 369; Foreman v. Hunter Lumber Co., 36 Cal. A. 763, 173 P 408; Priestley v. Stafford, 30 Cal. A. 523, 158 P 776; Houghton v. Dickson, 29 Cal. A. 321, 155 P 128.

Colo.—Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas1916C 1075; Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.

Iowa.—Osnes v. Scanlon, 189 Iowa 1364, 179 NW 869.

Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267; Pettigrew v. Lewis, 46 Kan. 78, 26 P 458.

Ky.—Dorris v. Warford, 124 Ky. 768, 100 SW 312, 30 KyL 963, 9 LRA NS 1090, 14 AnnCas 602.

Me.—Nickerson v. Gerrish, 114 Me. 354, 96 A 235; Merrill v. Odiorne, 113 Me. 424, 94 A 753; Coombs v. King, 107 Me. 376, 78 A 468, AnnCas1912C 1121; Ramsdell v. Grady, 97 Me. 319, 54 A 763; Cayford v. Wilbur, 86 Me. 414, 29 A 1117; Simonds v. Henry, 39 Me. 155, 63 AmD 611.

Md.—Angulo v. Hallar, 137 Md. 227, 112 A 179, Dashiell v. Griffith, 84 Md. 363, 35 A 1094.

Mass.—Small v. Howard, 128 Mass. 131, 35 AmR 363.

Mich.—Miller v. Toles, 183 Mich. 252, 257, 150 NW 118, LRA1915C 595 [cit Cyc].

Mo.—Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49.

Nebr.—Barney v. Pinkham, 29 Nebr. 350, 45 NW 694, 26 AmSR 389.

N. H.—McBride v. Huckins, 76 N. H. 206, 81 A 528.

N. J.—Klitch v. Betts, 89 N. J. L. 348, 98 A 427; Ely v. Wilbur, 49 N. J. L. 685, 10 A 358, 441, 60 AmR 668.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429; Brown v. Goffe, 140 App. Div. 353, 125 NYS 458; Warner v. Packer, 139 App. Div. 207, 123 NYS 725; Mackenzie v. Carman, 103 App. Div. 246, 92 NYS 1063; Boldt v. Murray, 2 NYSt 232.

N. C.—Covington v. Wyatt, 196 N. C. 367, 145 SE 673; Nash v. Royster, 189 N. C. 408, 127 SE 356; Thornburg v. Long, 178 N. C. 589, 101 SE 99.

Oh.—Bowers v. Santee, 99 Oh. St. 361, 124 NE 238; Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472; Stites v. Hier, 11 OhNP NS 161.

Okl.—Wiley v. Wigg, 124 Okl. 30, 254 P 22; Champion v. Kieth, 17 Okl. 204, 87 P 845.

Pa.—McCandless v. McWha, 22 Pa. 261; Tyson v. Baizley, 35 Pa. Super. 320.

S. D.—Warwick v. Bliss, 46 S. D. 622, 195 NW 501.

Tex.—Dunn v. Styron, (Civ. A.) 10 SW (2d) 1018; Turner v. Stoker, (Civ. A.) 289 SW 190; Lee v. Moore, (Civ. A.) 162 SW 437.

Vt.—Mullin v. Flanders, 73 Vt. 95, 50 A 813.

Wash.—Wharton v. Warner, 75 Wash. 470, 135 P 235; Wells v. Ferry-Baker Lumber Co., 57 Wash. 658, 107 P 869, 29 LRANS 426; Peterson v. Wells, 41 Wash. 693, 84 P 608; Sawdey v. Spokane Falls, etc., R. Co., 30 Wash. 349, 70 P 972, 94 AmSR 880.

W. Va.—Kuhn v. Brownfield, 34 W. Va. 252, 12 SE 519, 11 LRA 700.

Wis.—Marchand v. Bellin, 158 Wis. 184, 147 NW 1033.

Eng.—Rich v. Pierpont, 3 F. & F. 35; Dickson v. Hygienic Inst., [1910] S. C. 352.

[a] **Rule applied to:** (1) Dentist. Simonds v. Henry, 39 Me. 155, 63 AmD 611; Angulo v. Hallar, 137 Md. 227, 112 A 179; Klitch v. Betts, 89 N. J. L. 348, 98 A 427. (2) Physicians examining in lunacy. Warner v. Packer, 139 App. Div. 207, 123 NYS 725. (3) Veterinary surgeon. Conkey v. Carpenter, 106 Mich. 1, 63 NW 990; Barney v. Pinkham, 29 Nebr. 350, 45 NW 694, 26 AmSR 389.

52. Colo.—Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Iowa.—Osnes v. Scanlon, 189 Iowa 1364, 179 NW 869.

Kan.—Pettigrew v. Lewis, 46 Kan. 78, 26 P 458.

Me.—Nickerson v. Gerrish, 114 Me. 354, 96 A 235; Merrill v. Odiorne, 113 Me. 424, 94 A 753; Coombs v. King, 107 Me. 376, 78 A 468, AnnCas1912C 1121; Cayford v. Wilbur, 86 Me. 414, 29 A 1117.

N. J.—Klitch v. Betts, 89 N. J. L. 348, 98 A 427.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Warner v. Packer, 139 App. Div. 207, 123 NYS 725.

N. C.—Covington v. Wyatt, 196 N. C. 367, 145 SE 673; Nash v. Royster, 189 N. C. 408, 127 SE 356.

Okl.—Champion v. Kieth, 17 Okl. 204, 87 P 845.

[a] **Rule applied to dentist.**—Klitch v. Betts, 89 N. J. L. 348, 98 A 427.

53. Stevenson v. Gelsthorpe, 10 Mont. 563, 27 P 404; McCandless v. McWha, 22 Pa. 261.

[a] **Mere fact that instruments used were unusual** is not sufficient to show the want of care and skill. Alder v. Buckley, 1 Swan (Tenn.) 69.

54. Cayton v. English, 57 App. (D. C.) 328, 23 F. (2d) 749; Cayton v. English, 57 App. (D. C.) 324, 23 F. (2d) 745; Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178, 182 [cit Cyc]; Ballaine v. Drake, 98 Okl. 217, 224 P 947.

55. See infra § 102.

56. See infra § 103.

57. Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267.

Ky.—Dorris v. Warford, 124 Ky. 768, 100 SW 312, 30 KyL 963, 9 LRA NS 1090, 14 AnnCas 602.

Mo.—Hales v. Raines, 146 Mo. A. 232, 130 SW 425.

Mont.—Loudon v. Scott, 58 Mont. 645, 654, 194 P 488, 12 ALR 1487.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655.

Eng.—Rich v. Pierpoint, 3 F. & F. 35.

But see Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174 (holding that the obligation is to exercise his own best ability, skill, and care, as well as the ordinary skill and care); Hesse v. Knippel, 1 Mich. N. P. 109 (holding that a physician is bound to use "such skill as he has," as well as a reasonable degree of it).

"The doctrine is as illogical as the practical application of the rule would be ridiculous." Loudon v. Scott, supra.

skill in the treatment of the particular case.[58] The use of all known and reasonable means is not required, in the absence of a special contract therefor.[59] The obligation of a physician to exercise skill and care has been held to be imposed upon him even where there is no contract of employment;[60] and the fact that a contract relation exists does not require the use of more than ordinary care.[61]

Dentists, oculists, X-ray manipulators, and other practitioners are subject to the same rules that govern the duty and liability of physicians and surgeons in the performance of professional services.[62]

Specialists. A "specialist" has been defined as a physician or surgeon who applies himself to the study and practice of some particular branch of his profession[63] A physician holding himself out as having special knowledge and skill in the treatment of a particular organ, disease, or type of injury, is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who devote special study and attention to the treatment of such organ, disease, or injury, regard being had to the state of scientific knowledge at the time.[64] But it has been held that a specialist is not held to the exercise of any special or peculiar or higher degree of care.[65] The question when a physician becomes a specialist has been held to be not one of law, but of fact, primarily for his own determination.[66]

[§ 102] **2. Depending on State of Medical Science.** In determining the degree of learning and skill required of a physician or surgeon in his treatment of a particular case, regard must be had to the state of medical or surgical science at the time.[67] While there is some authority to the effect that the skill and care required are those ordinarily exercised

[a] **Reason for rule.**—"No man is always at his best. . . . This would be to introduce into the case a new and confusing issue which has never been allowed. . . . It is no defense to the physician that he used his best skill and ability if he fell short of the legal standard, and there is no liability on his part if his care and skill come up to the legal standard." Dorris v. Warford, 124 Ky. 768, 772, 773, 100 SW 312, 30 KyL 963, 9 LRANS 1090, 14 AnnCas 602 [quot Loudon v. Scott, 58 Mont. 645, 654, 655, 194 P 488, 12 ALR 1487]. To same effect James v. Grigsby, 114 Kan. 627, 220 P 267.

58. Akridge v. Noble, 114 Ga. 949, 41 SE 78; Grubbs v. Elrod, 25 Ga. A. 108, 102 SE 908; Hinkle v. Smith, 12 Ga. A. 496, 77 SE 650; Ingwersen v. Carr, 180 Iowa 988, 164 NW 217, 226 [cit Cyc]; Kline v. Nicholson, 151 Iowa 710, 130 NW 722; Fowler v. Burris, 186 Mo. A. 347, 171 SW 620; Spain v. Burch, 169 Mo. A. 94, 154 SW 172.

59. Nash v. Royster, 189 N. C. 408, 127 SE 356. Contra Thornburg v. Long, 178 N. C. 589, 101 SE 99.

60. U. S.—Napier v. Greenzweig, 256 Fed. 196, 167 CCA 412.

Conn.—Styles v. Tyler, 64 Conn. 432, 30 A 165.

Minn.—Peterson v. Phelps, 123 Minn. 319, 143 NW 793, AnnCas1915A 257.

Mo.—Parkell v. Fitzporter, 301 Mo. 217, 227, 256 SW 239, 29 ALR 1305.

N. Y.—Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429.

See Coss v. Spaulding, 41 Utah 447, 126 P 468 (the legal obligation of a physician to use ordinary skill and care is the same where he is employed by a third person as where he is employed by the patient, and an action by a patient against a physician employed by a third person is based on tort and not on contract).

"The duty of a surgeon to bring skill and care to the amelioration of the condition of his patient, does not arise from contract, but has its foundation in public considerations which are inseparable from the nature and exercise of his calling. Although the relation of physician and patient may be, and is perhaps generally, created by contract, the duty of the physician when he assumes it is fixed by rules which operate independently of its origin." Parkell v. Fitzporter, supra.

61. Wilt v. McCallum, 214 Mo. A. 321, 253 SW 156.

62. Black v. Bearden, 167 Ark. 455, 268 SW 27; Lett v. Smith, 6 La. A. 248; Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666; and cases passim §§ 100–165.

[a] **Drugless healers.**—Brooks v. Herd, 144 Wash. 173, 257 P 238.

X-ray manipulators see infra § 109; and cases passim §§ 100–165.

63. Standard D. [quot Baker v. Hancock, 29 Ind. A. 456, 63 NE 323, 64 NE 38].

64. Cal.—Hopkins v. Heller, 59 Cal. A. 447, 210 P 975.

Conn.—Slimak v. Foster, 106 Conn. 366, 138 A 153.

Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.

Me.—Feeney v. Spalding, 89 Me. 111, 35 A 1027.

Mich.—Wood v. Vroman, 215 Mich. 449, 466, 184 NW 520 [cit Cyc].

Mo.—Krinard v. Westerman, 279 Mo. 680, 693, 694, 216 SW 938 [quot Cyc]; McMurdock v. Kimberlin, 23 Mo. A. 523.

N. J.—Coleman v. Wilson, 85 N. J. L. 203, 207, 88 A 1059, AnnCas1915D 1122 [quot Cyc].

Oh.—Beach v. Chollett, (A.) 166 NE 145; Pantazatos v. Jelm, 17 Oh. A. 258, 260 [cit Cyc].

Or.—Beadle v. Paine, 46 Or. 424, 80 P 903. See Rayburn v. Day, 126 Or. 135, 268 P 1002 (holding that a greater degree of skill is exacted of the medical practitioner who specializes in any branch of his profession, such as surgery, than of the physician who engages in general practice).

Vt.—Rann v. Twitchell, 82 Vt. 79, 71 A 1045, 20 LRANS 1030.

Va.—Fox v. Mason, 139 Va. 667, 124 SE 405.

[a] **Reason for rule.**—"If he possessed no greater skill in the line of his specialty than the average physician, there would be no reason for his employment; possessing such additional skill, it becomes his duty to give his patient the benefit of it." Baker v. Hancock, 29 Ind. A. 456, 63 NE 323, 325, 64 NE 38.

[b] **Rule applied to:** (1) Eye specialist. Wood v. Vroman, 215 Mich. 449, 466, 184 NW 520 [cit Cyc]; Rann v. Twitchell, 82 Vt. 79, 71 A 1045, 20 LRANS 1030. (2) Nose specialist. Coleman v. Wilson, 85 N. J. L. 203, 207, 88 A 1059, AnnCas1915D 1122 [quot Cyc]. (3) Hernia specialist. McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.

65. Beach v. Chollett, (Oh. A.) 166 NE 145.

66. Baker v. Hancock, 29 Ind. A. 456, 63 NE 323, 64 NE 38.

67. U. S.—Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240; Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174.

Cal.—Hopkins v. Heller, 59 Cal. A. 447, 210 P 975.

Colo.—Jackson v. Burnham, 20 Colo. 532, 39 P 577.

Conn.—Force v. Gregory, 63 Conn. 167, 27 A 1116, 38 AmSR 371, 22 LRA 343.

D. C.—Cayton v. English, 57 App. 328, 23 F. (2d) 749; Cayton v. English, 57 App. 324, 23 F. (2d) 745.

Ga.—Akridge v. Noble, 114 Ga. 949, 41 SE 78.

Ida.—State v. Smith, 25 Ida. 541, 138 P 1107.

Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313; Baker v. Hancock, 29 Ind. A. 456, 63 NE 323, 64 NE 38.

Iowa.—Vander Wal v. Abbott, 167 NW 182; Ferrell v. Ellis, 129 Iowa 614, 105 NW 993; Peck v. Hutchinson, 88 Iowa 320, 55 NW 511; Beck v. German Klinik, 78 Iowa 696, 43 NW 617, 7 LRA 566; Almond v. Nugent, 34 Iowa 300, 11 AmR 147; Smothers v. Hanks, 34 Iowa 286, 11 AmR 141.

Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267; Tefft v. Wilcox, 6 Kan. 46.

Mass.—Small v. Howard, 128 Mass. 131, 35 AmR 363.

Mich.—Miller v. Toles, 183 Mich. 252, 257, 150 NW 118, LRA1915C 595 [cit Cyc]; Hitchcock v. Burgett, 38 Mich. 501; Hesse v. Knippel, 1 Mich. N. P. 109.

Minn.—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.

Mo.—Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280; McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Hansen v. Pock, 57 Mont. 51, 187 P 282; Stevenson v. Gelsthorpe, 10 Mont. 563, 27 P 404.

Nebr.—Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655.

N. C.—McCracken v. Smathers, 122 N. C. 799, 29 SE 354.

Oh.—Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639.

Or.—Heath v. Glisan, 3 Or. 64.

Pa.—English v. Free, 205 Pa. 624, 55 A 777; McCandless v. McWha, 22 Pa. 261; Barnard v. Schell, 85 Pa. Super. 329; Remley v. Plummer, 79 Pa. Super. 117; Wohlert v. Seibert, 23 Pa. Super. 213; Braunberger v. Cleis, 4 AmLRegNS 587; Haire v. Reese, 7 Phila. 138.

R. I.—Bigney v. Fisher, 26 R. I. 402, 59 A 72.

S. D.—Warwick v. Bliss, 46 S. D. 622, 195 NW 501.

Wash.—Wharton v. Warner, 75 Wash. 470, 135 P 235.

W. Va.—Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837; Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147; Tompkins v. Pacific Mut. L. Ins. Co., 53 W. Va. 479, 44 SE 439, 97 AmSR 1006, 62 LRA 489; Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

Wis.—Nelson v. Newell, 195 Wis. 572, 217 NW 723; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Mayer v. Hipke, 183 Wis. 382, 197 NW 333; Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31

by thoroughly educated physicians,[68] this requirement has been held erroneous as laying down too high a test.[69] It has been held that, in the use of a comparatively new power or force the properties of which are not fully known or understood, very great care should be exercised.[70]

[§ 103] 3. **Depending on Locality of Practice.** The general rule stated above[71] as to the degree of skill and care required of a physician or surgeon is frequently qualified by reference to a locality or localities. Thus it has been said that the locality in which a physician practices is important in determining the degree of skill and care required of him.[72] Some authorities hold that the skill and care required are those exercised by other physicians or surgeons engaged in the same general line of practice in the same locality, vicinity, community, or neighborhood,[73] or in the same general neighborhood or locality,[74] the latter phrase being held to be of much broader application than the phrase "the same neighborhood"[75] or "the same locality;"[76] while others require the degree of skill and care ordinarily exercised by physicians and surgeons in similar localities or neighborhoods.[77] There is also

ALR 826; Jaeger v. Stratton, 170 Wis. 579, 176 NW 61; Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111; Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719; Gates v. Fleischer, 67 Wis. 504, 30 NW 674.

68. McCandless v. McWha, 22 Pa. 261; Haire v. Reese, 7 Phila. (Pa.) 138.

69. Peck v. Hutchinson, 88 Iowa 320, 55 NW 511; Almond v. Nugent, 34 Iowa 300, 11 AmR 147; Smothers v. Hanks, 34 Iowa 286, 11 AmR 141 [lim and not foll McCandless v. McWha, 22 Pa. 261]; Hitchcock v. Burgett, 38 Mich. 501; Hesse v. Knippel, 1 Mich. N. P. 109.

[a] **"The true measure** is that [degree of skill and diligence] ordinarily exercised in the profession by the members thereof as a body . . . the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole. Not that exercised by the thoroughly educated; nor yet that exercised by the moderately educated, nor merely of the well educated, but the average." Smothers v. Hanks, 34 Iowa 286, 289, 11 AmR 141.

70. Baills v. Boulanger, (Alta.) [1924] 4 DomLR 1083.

71. See supra § 101.

72. Pelky v. Palmer, 109 Mich. 561, 67 NW 561; Viita v. Fleming, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas1917E 678; McBride v. Huckins, 76 N. H. 206, 81 A 528.

[a] **Reason for rule.**—"The field of inquiry must be restricted. Some reasonable territorial limit must be recognized, if the law is to furnish a rule that is just to the parties and useful to the triers of the fact. As no limit was prescribed, the instruction given . . . was of little assistance to the jury, and was as liable to result in their finding a standard that is clearly too high as in one that is too low. The logical result is perhaps the same as . . . if no instruction upon the point were given." McBride v. Huckins, 76 N. H. 206, 208, 81 A 528.

73. U. S.—Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240. But see infra note 77.

Ala.—Thaggard v. Vafes, 218 Ala. 609, 119 S 647.

Cal.—Hesler v. California Hospital Co., 178 Cal. 764, 174 P 654; Johnson v. Clarke, (A.) 276 P 1052; Taylor v. De Vaughn, (A.) 266 P 960; Markart v. Zeimer, 67 Cal. A. 368, 227 P 683.

D. C.—Sweeney v. Erving, 35 App. 57, 43 LRANS 734 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905].

Ida.—Swanson v. Wasson, 45 Ida. 309, 262 P 147; State v. Smith, 25 Ida. 541, 138 P 1107. But see infra note 77.

Ill.—Bacon v. Walsh, 184 Ill. A. 377.

Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313. But see infra note 77.

Iowa.—Baker v. Langan, 165 Iowa 346, 145 NW 513; Whitesell v. Hill, 66 NW 894; Mucci v. Houghton, 89 Iowa 608, 57 NW 305. But see infra note 77.

Ky.—Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044; Knopp v. Thornton, 199 Ky. 216, 250 SW 853; Hoover v. McCormick, 197 Ky. 509, 247 SW 718. But see infra note 77.

Mass.—Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974; Mason v. Geddes, 258 Mass. 40, 154 NE 519; Carey v. Mercer, 239 Mass. 599, 132 NE 353. But see infra note 77.

Minn.—Lorenz v. Lerche, 157 Minn. 437, 196 NW 564; Clark v. George, 148 Minn. 52, 180 NW 1011; Harju v. Allen, 146 Minn. 23, 177 NW 1015.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235; Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487; Hansen v. Pock, 57 Mont. 51, 187 P 282.

Nebr.—McGuire v. Rix, 225 NW 120; Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Brown v. Goffe, 140 App. Div. 353, 125 NYS 458; Wood v. Wyeth, 106 App. Div. 21, 94 NYS 360.

N. D.—Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666; Stoskoff v. Wicklund, 49 N. D. 708, 193 NW 312. But see infra note 77.

Oh.—Eislein v. Palmer, 7 OhS&CP 365, 5 OhNP 325.

Pa.—Krompoltz v. Hyman, 70 Pa. Super. 581; Wohlert v. Seibert, 23 Pa. Super. 213.

Tex.—Hamilton v. Harris, (Civ. A.) 223 SW 533; Lee v. Moore, (Civ. A.) 162 SW 437.

Vt.—Mullin v. Flanders, 73 Vt. 95, 50 A 813.

Wash.—Corey v. Radabaugh, 143 Wash. 653, 255 P 1037; Hollis v. Ahlquist, 142 Wash. 33, 251 P 871; Kemp v. McGillivray, 129 Wash. 592, 225 P 631; Howatt v. Cartwright, 128 Wash. 343, 222 P 496. But see infra note 77.

W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627. But see infra note 77.

Wis.—De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288; Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111; Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.

Contra Krinard v. Westerman, 279 Mo. 680, 216 SW 938.

[a] **"[The] locality** is not the place where the services are rendered, but the place where the . . . [physician] is stationed and located and where he engages in the practice of his profession." Hoover v. McCormick, 197 Ky. 509, 517, 247 SW 718.

[b] **Rule applied to:** (1) Dentists. Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281; Van Epps v. McKenny, 189 NYS 910; Rosenthal v. Hasbrouck, 161 NYS 354. (2) Physician operating X-ray machine. Sweeney v. Erving, 35 App. (D. C.) 57, 43 LRANS 734 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905].

[c] **Criticism of rule.**—"It will not do, as we think, to say, that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practises, it will be sufficient. There might be but few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say, that, because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill." Gramm v. Boener, 56 Ind. 497, 501.

74. Ala.—Torrance v. Wells, 122 S 322; Carraway v. Graham, 218 Ala. 453, 118 S. 807; Woodlawn Infirmary v. Byers, 216 Ala. 210, 112 S 831; Moore v. Smith, 215 Ala. 592, 111 S 918; Sellers v. Noah, 209 Ala. 103, 95 S 167; Talley v. Whitlock, 199 Ala. 28, 73 S 976; Robinson v. Crotwell, 175 Ala. 194, 57 S 23; Carpenter v. Walker, 170 Ala. 659, 54 S 60, AnnCas1912D 863; Shelton v. Hacelip, 167 Ala. 217, 51 S 937; McDonald v. Harris, 131 Ala. 359, 31 S 548; Peck v. Henderson, 22 Ala. A. 541, 118 S 258 [certiorari den 218 Ala. 233, 118 S 262].

Cal.—Hopkins v. Heller, 59 Cal. A. 447, 210 P 975.

Conn.—Slimak v. Foster, 106 Conn. 366, 138 A 153; Force v. Gregory, 63 Conn. 167, 27 A 1116, 38 AmSR 371, 22 LRA 343.

Ga.—Akridge v. Noble, 114 Ga. 949, 41 SE 78.

Minn.—Viita v. Fleming, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas1917E 678.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047.

Nebr.—McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296; Booth v. Andrus, 91 Nebr. 810, 137 NW 884.

Pa.—Veit v. Hinchcliffe, 90 Pa. Super. 280; Barnard v. Schell, 85 Pa. Super. 329; Remley v. Plummer, 79 Pa. Super. 117.

Vt.—Parker v. Bowen, 98 Vt. 115, 126 A 522; Willard v. Norcross, 86 Vt. 426, 85 A 904; Willard v. Norcross, 81 Vt. 293, 69 A 942; Sheldon v. Wright, 80 Vt. 298, 67 A 807; Hathorn v. Richmond, 48 Vt. 557.

Wash.—Huber v. Hamley, 122 Wash. 511, 210 P 769; Wharton v. Warner, 75 Wash. 470, 135 P 235; Peterson v. Wells, 41 Wash. 693, 84 P 608; Sawdey v. Spokane Falls, etc., R. Co., 30 Wash. 349, 70 P 972, 94 AmSR 880. But see infra note 77.

75. Sheldon v. Wright, 80 Vt. 298, 67 A 807.

76. Viita v. Fleming, 132 Minn. 128, 136, 155 NW 1077, LRA1916D 644, AnnCas1917E 678.

"If the same general locality is meant, as, for instance, the northwest, or the state, no fault could be found with such a rule" requiring the skill and learning possessed by others in the same locality. Viita v. Fleming, supra.

77. U. S.—Napier v. Greenzweig, 256 Fed. 196, 167 CCA 412. But see supra note 73.

Colo.—Jackson v. Burnham, 20 Colo. 532, 39 P 577.

Ida.—McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 660, 156 P 115, AnnCas1918A 380 [quot Cyc]. But see supra note 73.

Ind.—Schillinger v. Savage, 186 Ind. 189, 115 NE 321; Kelsey v. Hay, 84 Ind. 189; Gramm v. Boener, 56 Ind. 497; Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178; Thomas v. Dabblemont, 31 Ind. A. 146, 67 NE 463; Baker v. Hancock, 29 Ind. A. 456, 63 NE 323, 64 NE 38; Smith v. Stump, 12 Ind. A. 359, 40 NE 279; Becknell v. Hosier, 10 Ind. A. 5, 37 NE 580. But see supra note 73.

Iowa.—Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447; Van Sickle v. Doolittle, 173 Iowa 727, 155 NW 1007; Kline v. Nicholson, 151 Iowa 710, 130 NW 722; Ferrell v. Ellis, 128 Iowa 614, 105 NW 993; Dunbauld v. Thompson, 109 Iowa 199,

support for the requirement of the care and skill ordinarily exercised in the same locality or in similar localities.[78] A lesser degree of skill has been required of practitioners in rural communities than of those in urban centers;[79] but this distinction has been criticized.[80]

[§ 104] **4. Following Recognized or Professed School, System, or Treatment.** Physicians are bound to follow methods generally approved and recognized in the profession.[81] If the case is a new one, the patient must trust the skill and experience of the physician called, and likewise, if his injury or disease is attended with injury to other parts, or other diseases develop for which there is no established mode of treatment;[82] but where the settled practice allows but one course of treatment in the case, any departure of a physician therefrom may be regarded as the result of want of knowledge or attention,[83] or as an experiment;[84] and for injurious experimentation upon his patient a physician is liable.[85] While the law recognizes that there are different schools of medicine,[86] it does not favor, or give exclusive recognition to, any particular school or system of medicine, as against the others;[87] and the question whether or not a practitioner in his treatment of the case exercised the requisite degree of care, skill, and diligence is to be tested by the general rules and principles of the particular school of medicine which he follows, and not by those of other schools;[88] since he is only under the duty of

80 NW 324; Whitesell v. Hill, 101 Iowa 629, 70 NW 750, 37 LRA 830; Smothers v. Hanks, 34 Iowa 286, 11 AmR 141. But see supra note 73.

Kan.—Tefft v. Wilcox, 6 Kan. 46.

Ky.—Kirby v. Berea College, 196 Ky. 353, 244 SW 775; Stevenson v. Yates, 183 Ky. 196, 208 SW 820; Burk v. Foster, 114 Ky. 20, 69 SW 1096, 24 KyL 791, 59 LRA 277; Dorris v. Warford, 100 SW 312, 30 KyL 963, 9 LRA NS 1090. But see supra note 73.

La.—Roark v. Peters, 162 La. 111, 115, 110 S 106 [quot Cyc]; Lett v. Smith, 6 La. A. 248, 260 [quot Cyc].

Mass.—Small v. Howard, 128 Mass. 131, 35 AmR 363. But see supra note 73.

Mich.—Czajka v. Sadowski, 243 Mich. 21, 219 NW 660; Miller v. Toles, 183 Mich. 252, 257, 150 NW 118, LRA 1915C 595 [cit Cyc]; Rogers v. Kee, 171 Mich. 551, 137 NW 260; Pelky v. Palmer, 109 Mich. 561, 67 NW 561.

Mo.—Telaneus v. Simpson, 12 SW (2d) 920, 929 [quot Cyc]; Owens v. McCleary, 313 Mo. 213, 281 SW 682; Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49; Trask v. Dunnigan, (A.) 299 SW 116; McDonald v. Crider, (A.) 272 SW 980; Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280.

N. C.—McCracken v. Smathers, 122 N. C. 799, 29 SE 354.

N. D.—Hanson v. Thelan, 42 N. D. 617, 173 NW 457, 458 [cit Cyc]. But see supra note 73.

Or.—Hamilton v. Kelsey, 126 Or. 26, 268 P 750.

R. I.—Bigney v. Fisher, 26 R. I. 402, 59 A 72.

S. D.—Warwick v. Bliss, 46 S. D. 622, 195 NW 501.

Va.—Fox v. Mason, 139 Va. 667, 124 SE 405. But see supra note 74.

Wash.—Cranford v. O'Shea, 75 Wash. 33, 134 P 486. But see supra notes 73, 74.

W. Va.—Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147; Tompkins v. Pacific Mut. L. Ins. Co., 53 W. Va. 479, 44 SE 439, 97 AmSR 1006, 62 LRA 489. But see supra note 73.

Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

N. S.—Zirkler v. Robertson, 30 N. S. 61.

[a] **Rule applied to:** (1) Dentists. Hill v. Jackson, 218 Mo. A. 210, 265 SW 859. (2) X-ray operators. Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262; Evans v. Clapp, (Mo. A.) 231 SW 79.

[b] **As applied to the operation of an X-ray machine** the term "similar localities" must have a somewhat general and relative meaning so as to include other users of such machines who possess the ordinary proficiency in, and acquaintanceship with, the use of that agency which obtains in similar localities or in the same section of country, the care required not being subject to the usual distinction between ordinary medical practice in a rural, and that in a city, community. Evans v. Clapp, (Mo. A.) 231 SW 79.

78. Ark.—Dunman v. Raney, 118 Ark. 337, 176 SW 339.

Cal.—Pearson v. Crabtree, 70 Cal. A. 52, 232 P 715.

Iowa.—Ramberg v. Morgan, 218 NW 492; Vander Wal v. Abbott, 167 NW 182; O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755.

Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267.

Mo.—Hales v. Raines, 146 Mo. A. 232, 130 SW 425.

Nebr.—Stohlman v. Davis, 220 NW 247.

N. H.—McBride v. Huckins, 76 N. H. 206, 81 A 528.

Oh.—Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639.

Tex.—Dunn v. Styron, (Civ. A.) 10 SW (2d) 1018; Turner v. Stoker, (Civ. A.) 289 SW 190.

W. Va.—Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837.

Wis.—Nelson v. Newell, 195 Wis. 572, 217 NW 723; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Mayer v. Hipke, 183 Wis. 382, 197 NW 333; Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31 ALR 826; Rost v. Roberts, 180 Wis. 207, 192 NW 38; Jaeger v. Stratton, 170 Wis. 579, 176 NW 61; Marchand v. Bellin, 158 Wis. 184, 147 NW 1033.

[a] **Rule applied to:** (1) Physician operating X-ray machine. Pearson v. Crabtree, 70 Cal. A. 52, 232 P 715; Nelson v. Newell, 195 Wis. 572, 217 NW 723. But see Giles v. Tyson, (Tex. Civ. A.) 13 SW (2d) 452 (holding that the science of the X-ray has become certain and exact, and that the proper and safe mode of its application is the same in all places). (2) Physician applying radium. Furgason v. Bellaire, 197 Iowa 277, 197 NW 13.

79. Small v. Howard, 128 Mass. 131, 35 AmR 363; McBride v. Huckins, 76 N. H. 206, 81 A 528; Turner v. Stoker, (Tex. Civ. A.) 289 SW 190. See Evans v. Clapp, (Mo. A.) 231 SW 79, 86 (referring to "the distinction usually made between ordinary medical practice in a rural and in a city community").

80. Viita v. Fleming, 132 Minn. 128, 137, 155 NW 1077, LRA1916D 644, AnnCas1917E 678 ("In these days the physician or surgeon in a village like Cloquet is not hampered by lack of opportunity for advancement. Frequent meetings of medical societies, articles in the medical journals, books by acknowledged authorities, and extensive experience in hospital work, put the country doctor on more equal terms with his city brother").

81. Colo.—Jackson v. Burnham, 20 Colo. 532, 39 P 577 [rev 1 Colo. A. 237, 28 P 250].

Iowa.—Ramberg v. Morgan, 218 NW 492.

Kan.—Tefft v. Wilcox, 6 Kan. 46.

Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593.

Mich.—Hesse v. Knippel, 1 Mich. N. P. 109.

Mo.—Owens v. McCleary, 313 Mo. 213, 281 SW 682; Lewis v. McClellan, (A.) 1 SW (2d) 247.

N. Y.—Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem].

Wash.—Sweet v. Douge, 145 Wash. 142, 259 P 25; Sawdey v. Spokane Falls, etc., R. Co., 30 Wash. 349, 70 P 972, 94 AmSR 880.

82. Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem].

83. Jackson v. Burnham, 20 Colo. 532, 39 P 575 [rev 1 Colo. A. 237, 28 P 250]; Patten v. Wiggin, 51 Me. 594, 81 AmD 593; Owens v. McCleary, 313 Mo. 213, 281 SW 682; Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem].

[a] **Thus,** if writers on the treatment of dislocations, or, in the absence of such authority, practical surgeons, prescribe a mode of reducing them, and of treating the joint after the bones are replaced, it is incumbent on surgeons called to treat such an injury to conform to the system of treatment thus established, and, if they depart from it, they do it at their peril. Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem].

84. McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.

85. See infra § 112 text and note 53.

86. Floyd v. Michie, (Tex. Civ. A.) 11 SW (2d) 657.

87. Iowa.—Bowman v. Woods, 1 Greene 441.

Mo.—Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49.

N. Y.—Corsi v. Maretzek, 4 E. D. Smith 1.

Or.—Williams v. Poppleton, 3 Or. 139.

Pa.—Remley v. Plummer, 79 Pa. Super. 117, 123 [quot Cyc].

Tex.—Floyd v. Michie, (Civ. A.) 11 SW (2d) 657.

"The law . . . is not concerned so much about the school to which he claims to belong, nor where he gained the qualifications necessary to enable him to practice. It is concerned about the fidelity with which he has met his obligations, and whether he has acquitted himself and the treatment of the particular patient, according to the measure of the standard of those of recognized schools who practice in the same or similar communities." Hansen v. Pock, 57 Mont. 51, 59, 187 P 282.

88. Colo.—McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Conn.—Force v. Gregory, 63 Conn. 167, 27 A 1116, 38 AmSR 371, 22 LRA 343.

D. C.—Cayton v. English, 57 App. 328, 23 F. (2d) 749; Cayton v. English, 57 App. 324, 23 F. (2d) 745.

Ida.—State v. Smith, 25 Ida. 541, 138 P 1107.

Iowa.—Van Sickle v. Doolittle, 173 Iowa 727, 155 NW 1007; Bowman v. Woods, 1 Greene 441.

Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593.

Mass.—Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974.

Mich.—Janssen v. Mulder, 232 Mich. 183, 205 NW 159; Hesse v. Knippel, 1 Mich. N. P. 109.

Minn.—Nelson v. Dahl, 174 Minn. 574, 219 NW 941; Berkholz v Benepe,

exercising the degree of skill and care ordinarily exercised by practitioners of his school.[89] A school of medicine to be entitled to recognition under this rule must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case.[90]

[§ 105] **5. Depending on Nature of Case and Condition of Patient.** What is reasonable care, skill, and diligence depends largely upon the circumstances of the particular case and upon the duty to be performed, the degree requisite being in proportion to the nature of the case.[91] Thus it has been held that reasonable care must be proportionate to the risks and dangers to be apprehended and guarded against in the particular case,[92] and to the importance and delicacy of the undertaking;[93] and that such care and attention must be given as are required by the exigencies of the case.[94]

Ordinary care of unconscious persons requires great precaution to see that no injury occurs.[95]

Consultation with other physicians. A physician or surgeon who is in doubt regarding a case should use his best judgment as to consultation with other physicians or surgeons;[96] but the measure of skill which a physician is bound to exercise is not affected by his refusal of the proffer of assistance from other physicians.[97]

[§ 106] **6. As Affected by Gratuitousness of Services.**[98] The fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to use reasonable and ordinary care, skill, and diligence.[99]

[§ 107] **7. Insurance of Cure or Benefit.**[1] Ex-

153 Minn. 335, 190 NW 800; Martin v. Courtney, 87 Minn. 197, 91 NW 487; Martin v. Courtney, 75 Minn. 255, 77 NW 813.

Mo.—Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047.

Nebr.—Booth v. Andrus, 91 Nebr. 810, 137 NW 884.

Pa.—Remley v. Plummer, 79 Pa. Super. 117.

Tex.—Floyd v. Michie, (Civ. A.) 11 SW (2d) 657.

Vt.—Wilkins v. Brock, 81 Vt. 332, 70 A 572.

Wash.—Swanson v. Hood, 99 Wash. 506, 170 P 135; Ennis v. Banks, 95 Wash. 513, 164 P 58.

Wis.—Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.

"Practitioners of a reputable school of medicine are not to be harrassed by litigation and mulcted in damages because the course of treatment prescribed by that school differs from that adopted by another school." Remley v. Plummer, 79 Pa. Super. 117, 123.

[a] **Reason for rule.**—"Every community has its multitude of beliefs and modes of treatment of diseases and human ailments, and every citizen is absolutely free to adopt, believe or employ anyone he pleases. If the results are not what he would wish or the rest of the community think they ought to be, he can nevertheless not be hauled into court and have his method of treatment and his school of thought tested by the disciples or experts of some other school or belief. It would be disastrous to an allopath to try him by the tests the homeopath, the osteopath, the eclectic or mental science healer would apply, and it would likewise be dangerous to the osteopath to require of him an observance of the rules of treatment applied by any of the others enumerated." State v. Smith, 25 Ida. 541, 550, 138 P 1107.

[b] **"In calling a physician, a person is presumed** to elect that the treatment shall be according to the system or school of medicine to which such physician belongs." Van Sickle v. Doolittle, 184 Iowa 885, 169 NW 141. To same effect State v. Smith, 25 Ida. 541, 138 P 1107; Nelson v. Dahl, 174 Minn. 574, 219 NW 941.

[c] **Rule applied to:** (1) Chiropractor. Janssen v. Mulder, 232 Mich. 183, 205 NW 159; Nelson v. Dahl, 174 Minn. 574, 219 NW 941. (2) Osteopath. State v. Smith, 25 Ida. 541, 138 P 1107; Wilkins v. Brock, 81 Vt. 332, 70 A 572.

[d] **Physician applying X-rays, not for medical purposes,** but to locate a foreign substance in the body of his patient, is not entitled to have the question of his care and skill in the application determined by the opinion of physicians of his own school. Henslin v. Wheaton, 91 Minn. 219, 97 NW 882, 103 AmSR 504, 64 LRA 126, 1 AnnCas 19.

89. Colo.—Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814.

Ida.—State v. Smith, 25 Ida. 541, 138 P 1107.

Mass.—Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974.

Minn.—Nelson v. Dahl, 174 Minn. 574, 219 NW 941; Lorenz v. Lerche, 157 Minn. 437, 196 NW 564; Moehlenbrock v. Parke, 145 Minn. 100, 176 NW 169; Martin v. Courtney, 75 Minn. 255, 77 NW 813.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487; Hansen v. Pock, 57 Mont. 51, 187 P 282.

Nebr.—Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889; Booth v. Andrus, 91 Nebr. 810, 137 NW 884.

Wis.—Nelson v. Newell, 195 Wis. 572, 217 NW 723; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Mayer v. Hipke, 183 Wis. 332, 197 NW 333; Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31 ALR 826; Rost v. Roberts, 180 Wis. 207, 192 NW 38; Jaeger v. Stratton, 170 Wis. 579, 176 NW 61; De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288; Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111; Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.

But see Bacon v. Walsh, 184 Ill. A. 377, 379 (holding that the insertion of the words "of the school of which defendant belongs" in an instruction relating to the degree of skill and care required of a physician and surgeon is erroneous and misleading, as limiting the skill and care which he must use to that of some particular sect of physicians and surgeons in the locality).

[a] **Rule applied to chiropractor.**—Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31 ALR 826.

90. Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49; Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.

[a] **Known and recognized system.**—It is sufficient if the practitioner follow any of the known and recognized systems. Williams v. Popplelton, 3 Or. 139.

[b] **Christian science and clairvoyancy** not being recognized schools of medicine, one who professes to cure disease by those systems of treatment must be held to the standard of care of the ordinary physician in good standing. Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719. Contra Spead v. Tomlinson, 73 N. H. 46, 59 A 376, 68 LRA 432.

91. Mass.—Mallen v. Boynton, 132 Mass. 443.

Mich.—Hesse v. Knippel, 1 Mich. N. P. 109.

Minn.—Walker v. Holbrook, 130 Minn. 106, 153 NW 305.

Mo.—Hale v. Atkins, 215 Mo. A. 380, 256 SW 544. See Fowler v. Burris, 186 Mo. A. 347, 171 SW 620 (the care and diligence should be proportionate to the character of the injury treated, but skill cannot be expected to increase in proportion to the severity of the injury).

Okl.—Cassingham v. Berry, 67 Okl. 134, 150 P 139, 168 P 1020.

Pa.—Braunberger v. Cleis, 4 AmL RegNS 587.

S. C.—Sandel v. State, 115 S. C. 168, 104 SE 567, 13 ALR 1268.

Tex.—Graham v. Gautier, 21 Tex. 111.

Va.—Fox v. Mason, 139 Va. 667, 124 SE 405.

W. Va.—Young v. Jordan, 145 SE 41.

But see Utley v. Burns, 70 Ill. 162 (holding that, whatever may be the character of the injury or disease a physician is called on to treat, he is only held to employ reasonable care and skill, to exercise only that degree of skill which is ordinarily possessed by members of the profession in like localities, and he is not required to exercise care and skill proportionate to the character of the injury or disease he treats, and he is not liable if he does not treat a severe injury with such skill as its severity reasonably demands).

92. Walker v. Holbrook, 130 Minn. 106, 153 NW 305; Cassingham v. Berry, 67 Okl. 134, 150 P 139, 168 P 1020; Sandell v. State, 115 S. C. 168, 171, 104 SE 567, 13 ALR 1268 [cit Cyc].

93. Cassingham v. Berry, 67 Okl. 134, 150 P 139, 168 P 1020.

94. Young v. Jordan, (W. Va.) 145 SE 41.

95. Hale v. Atkins, 215 Mo. A. 380, 256 SW 544.

96. Mallen v. Boynton, 132 Mass. 443.

97. Potter v. Warner, 91 Pa. 362, 36 AmR 668.

98. Liability to gratuitous or charity patient see infra § 137.

99. U. S.—Napier v. Greenzweig, 256 Fed. 196, 167 CCA 412.

Ill.—McNevins v. Lowe, 40 Ill. 209.

Iowa.—Peck v. Hutchinson, 88 Iowa 320, 55 NW 511.

Minn.—Viita v. Fleming, 132 Minn. 128, 133, 155 NW 1077, LRA1916D 644, AnnCas1917E 678 [cit Cyc]; Peterson v. Phelps, 123 Minn. 319, 143 NW 793, AnnCas1915A 257.

N. H.—Burnham v. Stillings, 76 N. H. 122, 79 A 987; Edwards v. Lamb, 69 N. H. 599, 45 A 480, 50 LRA 160.

N. Y.—Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

Pa.—McCandless v. McWha, 22 Pa. 261.

Utah.—Coss v. Spaulding, 41 Utah 447, 452, 126 P 468 [quot Cyc].

Eng.—Gladwell v. Steggall, 5 Bing. N. Cas. 733, 35 ECL 391, 132 Reprint 1283.

But see Hesse v. Knippel, 1 Mich. N. P. 109, 110 (where it was said: "The law requires from all persons, including those who render gratuitous services, at least, ordinary care for the safety of life, from those who render services for compensation, great care").

1. Failure to cure:

cept in the case of a special agreement to that effect,[2] which it is competent for a physician or surgeon to make,[3] a physician or surgeon does not warrant, guarantee, or insure that he will effect a cure,[4] or even that his treatment will be beneficial.[5] A physician's guaranty that an operation will be successful must be supported by a consideration.[6]

[§ 108] **8. In Using Anæsthetics.** It has been

Liability for see infra § 110.
Presumption of negligence or want of skill see infra § 152.

2. U. S.—Ewing v. Goode, 78 Fed. 442.

Ala.—Torrance v. Wells, 122 S 322; Carraway v. Graham, 218 Ala. 453, 118 S 807; Moore v. Smith, 215 Ala. 592, 111 S 918; Knowles v. Blue, 209 Ala. 27, 95 S 481; Barfield v. South Highland Infirmary, 191 Ala. 553, 68 S 30, AnnCas1916C 1097; Peck v. Henderson, 22 Ala. A. 541, 118 S 258 [certiorari den 218 Ala. 233, 118 S 262].

Conn.—Styles v. Tyler, 64 Conn. 432, 30 A 165.

D. C.—Sweeney v. Erving, 35 App. 57, 43 LRANS 734 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905].

Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593.

Mass.—Davis v. Ball, 6 Cush. 505, 53 AmD 53.

Mo.—Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49.

Mont.—Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235.

N. H.—Leighton v. Sargent, 27 N. H. 460, 59 AmD 388.

N. J.—Smith v. Corrigan, 100 N. J. L. 267, 126 A 680; Ely v. Wilbur, 49 N. J. L. 685, 10 A 358, 441, 60 Am R 668; Gramaldi v. Zeglio, 3 N. J. Misc. 669, 129 A 475.

N. Y.—Bronson v. Hoffman, 7 Hun 674.

Oh.—Craig v. Chambers, 17 Oh. St. 253; Grindle v. Rush, 7 Oh. Pt. II 123.

Okl.—BaHaine v. Drake, 98 Okl. 217, 224 P 947; Champion v. Kieth, 17 Okl. 204, 87 P 845.

Or.—Emerson v. Lumbermen's Hospital Assoc., 100 Or. 472, 198 P 231.

Pa.—Tyson v. Baizley, 35 Pa. Super. 320.

Tex.—Turner v. Stoker, (Civ. A.) 289 SW 190; Lee v. Moore, (Civ. A.) 162 SW 437.

Wash.—Brooks v. Herd, 144 Wash. 173, 257 P 238.

W. Va.—Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147; Kuhn v. Brownfield, 34 W. Va. 252, 12 SE 519, 11 LRA 700.

Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

[a] **Thus, where a dentist** inserted in a receipted bill, given for the price of a set of teeth, the words "warranted for one year; and if on trial they cannot be made useful, the teeth to be returned and the money refunded," if the purchaser, by a fair trial of the teeth, according to the instructions given him at the time they were delivered, could not make them useful, he had a right to return them within a year and recover the price. Davis v. Ball, 6 Cush. (Mass.) 505, 53 AmD 53.

3. Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72; Leighton v. Sargent, 27 N. H. 460, 59 AmD 388; Kernodle v. Elder, 23 Okl. 743, 102 P 138; Brooks v. Herd, 144 Wash. 173, 257 P 238, 239 [cit Cyc].

4. U. S.—Ewing v. Goode, 78 Fed. 442.

Ala.—Sellers v. Noah, 209 Ala. 103, 95 S 167; Talley v. Whitlock, 199 Ala. 28, 73 S 976.

Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.

Cal.—Say v. Barber, 202 Cal. 679, 262 P 312; Hall v. Steele, 193 Cal. 602, 226 P 854; Perkins v. Trueblood, 180 Cal. 437, 181 P 642; Hesler v. California Hospital Co., 178 Cal. 764, 174 P 654; Johnson v. Clarke, (A.) 276 P 1052; Foreman v. Hunter Lumber Co., 36 Cal. A. 763, 173 P 408; Priestley v. Stafford, 30 Cal. A. 523, 158 P 776.

Colo.—Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas1916C 1075; Jackson v. Burnham, 20 Colo. 532, 39 P 577; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Ill.—Quinn v. Donovan, 85 Ill. 194; Goodman v. Bigler, 133 Ill. A. 301; McKee v. Allen, 94 Ill. A. 147; Yunker v. Marshall, 65 Ill. A. 667; Sims v. Parker, 41 Ill. A. 284.

Ind.—Edwards v. Uland, 193 Ind. 376, 140 NE 546; Jones v. Angell, 95 Ind. 376; Hoopingarner v. Levy, 77 Ind. 455; McCoy v. Buck, (A.) 157 NE 456; Adolay v. Miller, 60 Ind. A. 656, 111 NE 313; Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178; Baker v. Hancock, 29 Ind. A. 456, 63 NE 323, 64 NE 38; Smith v. Stump, 12 Ind. A. 359, 40 NE 279.

Iowa.—Ramberg v. Morgan, 218 NW 492; Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447; O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755; Baker v. Langan, 165 Iowa 346, 145 NW 513.

Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267; Pettigrew v. Lewis, 46 Kan. 78, 26 P 458; Tefft v. Wilcox, 6 Kan. 46.

Ky.—Powell v. Galloway, 16 SW (2d) 489; Kirby v. Berea College, 196 Ky. 353, 244 SW 775; Hickerson v. Neely, 54 SW 842, 21 KyL 1257.

Me.—Curran v. Holt, 117 Me. 369, 104 A 579; Merrill v. Odiorne, 113 Me. 424, 94 A 753; Coombs v. King, 107 Me. 376, 78 A 468, AnnCas1912C 1121.

Mich.—Zoterell v. Repp, 187 Mich. 319, 153 NW 692; Hesse v. Knippel, 1 Mich. N. P. 109.

Minn.—Clark v. George, 148 Minn. 52, 180 NW 1011; Harju v. Allen, 146 Minn. 23, 177 NW 1015; Martin v. Courtney, 87 Minn. 197, 91 NW 487; Martin v. Courtney, 75 Minn. 255, 77 NW 813; Getchell v. Hill, 21 Minn. 464.

Mo.—Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed on other grounds State v. Ellison, 266 Mo. 604, 182 SW 996, AnnCas1918C 1]; Logan v. Field, 75 Mo. A. 594.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235; Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487; Stevenson v. Gelsthorpe, 10 Mont. 563, 27 P 404.

Nebr.—McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296; Booth v. Andrus, 91 Nebr. 810, 137 NW 884; Van Skike v. Potter, 53 Nebr. 28, 73 NW 295; O'Hara v. Wells, 14 Nebr. 403, 15 NW 722.

N. J.—Lolli v. Gray, 101 N. J. L. 337, 128 A 256; Klitch v. Betts, 89 N. J. L. 348, 98 A 427.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281; Mackenzie v. Carman, 103 App. Div. 246, 92 NYS 1063; Winner v. Lathrop, 67 Hun 511, 22 NYS 516; Rowe v. Lent, 17 NYS 131; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45; Boldt v. Murray, 2 NYSt 232. See Link v. Sheldon, 136 N. Y. 1, 5, 32 NE 696 (where it was said: "The practice of surgery must always admit of some doubt as to ulterior complete success").

N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356; Thornburg v. Long, 178 N. C. 589, 101 SE 99.

Oh.—Bowers v. Santee, 99 Oh. St. 361, 124 NE 238; Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472; Gallaher v. Thompson, Wright 466; Bliss v. Long, Wright 351; Moehlman v. Ransohoff, 17 Oh NPNS 241.

Okl.—Kernodle v. Elder, 23 Okl. 743, 102 P 138.

Or.—Hamilton v. Kelsey, 126 Or. 26, 268 P 750; Williams v. Poppleton, 3 Or. 139.

Pa.—English v. Free, 205 Pa. 624, 55 A 777; McCandless v. McWha, 22 Pa. 261; Haire v. Reese, 7 Phila. 138.

R. I.—Bigney v. Fisher, 26 R. I. 402, 59 A 72.

S. D.—Warwick v. Bliss, 46 S. D. 622, 195 NW 501.

Tenn.—Burnett v. Layman, 133 Tenn. 323, 181 SW 157.

Tex.—Graham v. Gautier, 21 Tex. 111; Wilkins v. Ferrell, 10 Tex. Civ. A. 231, 30 SW 450.

Vt.—Smith v. Hyde, 19 Vt. 54.

Va.—Fox v. Mason, 139 Va. 667, 124 SE 405.

Wash.—Peterson v. Wells, 41 Wash. 693, 84 P 608.

W. Va.—Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837; Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

Wis.—De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288; Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111; Reynolds v. Graves, 3 Wis. 416.

Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

Eng.—Lamphier v. Phipos, 8 C. & P. 475, 34 ECL 844, 173 Reprint 581; Hancke v. Hooper, 7 C. & P. 81, 32 ECL 510, 173 Reprint 37; Rich v. Pierpont, 3 F. & F. 35.

N. B.—James v. Crockett, 34 N. B. 540.

N. S.—Stamper v. Rhindress, 41 N. S. 45.

And see cases supra note 2.

[a] **Reason for rule.**—"If the maxim, 'Res ipso loquitur,' were applicable . . . and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'" Ewing v. Goode, 78 Fed. 442, 443 [quot Sweeney v. Erving, 35 App. (D. C.) 57, 61, 43 LRANS 734 (aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905); McCoy v. Buck, (Ind. A.) 157 NE 456; Funk v. Bonham, (Ind. A.) 151 NE 22; Kernodle v. Elder, 23 Okl. 743, 102 P 138; Hills v. Shaw, 69 Or. 460, 137 P 229; Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107].

[b] **The implied contract of a physician treating an injured limb** is not to restore it to its natural condition, but to treat it with ordinary and reasonable diligence and skill. Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136; Baker v. Langan, 165 Iowa 346, 145 NW 513; Miller v. Toles, 183 Mich. 252, 257, 150 NW 118, LRA1915C 595 [cit Cyc]; McGuire v. Rix, (Nebr.) 225 NW 120; MacKenzie v. Carman, 103 App. Div. 246, 92 NYS 1063; Kernodle v. Elder, 23 Okl. 743, 102 P 138; McCandless v. McWha, 22 Pa. 261; Bigney v. Fisher, 26 R. I. 402, 59 A 72; Warwick v. Bliss, 46 S. D. 622, 195 NW 501; Hanson v. Harris, 44 S. D. 457, 184 NW 262; Dean v. Seeman, 42 S. D. 577, 176 NW 649, 650 [quot Cyc]; Wells v. Ferry-Baker Lumber Co., 57 Wash. 658, 107 P 869, 29 LRANS 426; Peterson v. Wells, 41 Wash. 693, 84 P 608.

[c] **Rule applied to:** (1) Dentist. Klitch v. Betts, 89 N. J. L. 348, 98 A 427; Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281; Wilkins v. Ferrell, 10 Tex. Civ. A. 231, 30 SW 450. (2) Physician applying X-ray. McCoy v. Buck, (Ind. A.) 157 NE 456; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455.

5. See cases supra note 4.

6. Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235.

held that a physician administering an anæsthetic is under the duty of using ordinary care;[7] but there is also authority to the effect that his skill and proficiency are not to be measured by the usual and ordinary skill possessed by other physicians, but by that of persons whose occupation and study gives them an equal or better knowledge as to its use than is possessed by general practitioners;[8] and that a dentist, in putting a patient under the influence of an anæsthetic, depriving him of the use of his faculties, is required to use the highest professional skill and diligence to avoid every possible danger.[9] But a physician or dentist in administering an anæsthetic is only bound to look to natural and probable effects,[10] and is not answerable for results arising from the peculiar condition or temperament of a patient, of which he had no knowledge.[11]

In selecting an assistant to administer an anæsthetic, a surgeon is under the duty of exercising the same degree of knowledge, skill, and care as is required in performing any part of the operation.[12]

[§ 109] **9. In Application of X-Ray, Radium, and Other Ray Therapy.** The general rules[13] requiring the exercise of ordinary and reasonable skill, care, and diligence by physicians and surgeons, subject to qualification as to locality, have been held to apply to, or have been stated with reference to, physicians and other persons operating X-ray apparatus,[14] or applying radium.[15] A physician, in applying X-rays, is not expected to anticipate results arising from peculiar characteristics and conditions of the patient,[16] such as an abnormal hypersensitiveness of the patient's skin, unascertainable before the treatment.[17] It has been held that in the use of a quartz lamp very great care should be exercised, it being comparatively new and not fully understood.[18]

[§ 110] **C. Acts or Omissions Constituting or Not Constituting[19]—1. In General.** Malpractice suits are based on negligence,[20] and have been said not to differ in their essential ingredients from any other action for damages arising from negligence.[21] While a physician or surgeon is not expected to anticipate results arising from peculiar characteristics and conditions of a patient, of which he has no knowledge,[22] for failure to possess the requisite skill, or to exercise the requisite skill, care, and diligence,[23] as a result of which the patient is injured, a physician or surgeon is liable;[24] and in some jurisdictions

[a] **Such a guaranty is without consideration** where it is made after the making of a contract for the payment by the patient of a certain sum for the surgeon's services. Wilson v. Blair, 65 Mont. 155, 211 P 289, 27 ALR 1235.

7. Wilt v. McCallum, 214 Mo. A. 321, 253 SW 156.

8. Spain v. Burch, 169 Mo. A. 94, 154 SW 172.

9. Keily v. Colton, 1 NYCityCt 439.

10. Bogle v. Winslow, 5 Phila. (Pa.) 136. See Dawson v. Allen, 191 Ill. A. 399.

11. Bogle v. Winslow, 5 Phila. (Pa.) 136.

12. Frank v. South, 175 Ky. 416, 194 SW 375, 380, AnnCas1918E 682 [cit Cyc].

13. See supra §§ 101–103.

14. U. S.—Hazen v. Mullen, 32 F. (2d) 394.

Ala.—Torrance v. Wells, 122 S 322.

Ariz.—Buhler v. Rule, 265 P 757; Butler v. Rule, 29 Ariz. 405, 242 P 436.

Ark.—Dorr v. Fike, 177 Ark. 907, 9 SW (2d) 318; Black v. Bearden, 167 Ark. 455, 268 SW 27; Runyan v. Goodrum, 147 Ark. 481, 228 SW 397, 13 ALR 1403.

Cal.—Ragin v. Zimmerman, 276 P 107; Pearson v. Crabtree, 70 Cal. A. 52, 232 P 715.

D. C.—Sweeney v. Erving, 35 App. 57, 43 LRANS 734 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905].

Ill.—Graiziger v. Henssler, 229 Ill. A. 365; Holcomb v. Magee, 217 Ill. A. 272; Polionos v. Renner, 190 Ill. A. 416.

Ind.—Stamets v. Wilson, (A.) 164 NE 300; McCoy v. Buck, (A.) 160 NE 46; McCoy v. Buck, (A.) 157 NE 456.

Iowa.—Ingwersen v. Carr, 180 Iowa 988, 164 NW 217; Shockley v. Tucker, 127 Iowa 456, 103 NW 360.

Kan.—George v. Shannon, 92 Kan. 801, 142 P 967, AnnCas1916B 338.

La.—Lett v. Smith, 6 La. A. 248.

Md.—Streett v. Hodgson, 139 Md. 137, 115 A 27.

Mich.—Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262.

Minn.—Berkholz v. Benepe, 153 Minn. 335, 190 NW 800; Hayes v. Lufkin, 147 Minn. 225, 179 NW 1007; Holt v. Ten Broeck, 134 Minn. 458, 159 NW 1073, AnnCas1918E 256; Viita v. Fleming, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas1917E 678; Jones v. Tri-State Tel., etc., Co., 118 Minn. 217, 136 NW 741, 40 LRANS 485; Henslin v. Wheaton, 91 Minn. 219, 97 NW 882, 103 AmSR 504, 64 LRA 126, 1 AnnCas 19.

Miss.—Unger v. Grimsley, 138 Miss. 591, 103 S 341.

Mo.—Girdner v. Myers, (A.) 259 SW 150; Evans v. Clapp, (A.) 231 SW 79; Gross v. Robinson, 203 Mo. A. 118, 218 SW 924; Wojciechowski v. Coryell, (A.) 217 SW 638; Hales v. Raines, 162 Mo. A. 46, 141 SW 917; Gore v. Brockman, 138 Mo. A. 231, 119 SW 1082.

Nebr.—Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889.

N. Y.—Antowill v. Friedmann, 197 App. Div. 230, 188 NYS 777.

N. D.—Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666.

Pa.—Stemons v. Turner, 274 Pa. 228, 117 A 922, 26 ALR 727.

Tenn.—Lewis v. Casenburg, 157 Tenn. 187, 7 SW (2d) 808.

Tex.—Hamilton v. Harris, (Civ. A.) 223 SW 533.

Va.—Hunter v. Burroughs, 123 Va. 113, 96 SE 360.

Wash.—Stickney v. Congdon, 131 Wash. 7, 228 P 849.

Wis.—Nelson v. Newell, 195 Wis. 572, 217 NW 723; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Kosak v. Boyce, 185 Wis. 513, 201 NW 757; Rost v. Roberts, 180 Wis. 207, 192 NW 38.

[a] **In the management of the X-ray department of a hospital** ordinary care is required to see that it is equipped with approved apparatus and to provide competent specialists, such ordinary care meaning a very high degree of care. Runyan v. Goodrum, 147 Ark. 481, 228 SW 397, 13 ALR 1403.

15. Furgason v. Bellaire, 197 Iowa 277, 197 NW 13.

16. Hamilton v. Harris, (Tex. Civ. A.) 223 SW 533.

17. Hamilton v. Harris, (Tex. Civ. A.) 204 SW 450. See Sweeney v. Erving, 35 App. (D. C.) 57, 43 LRA NS 734 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas1914D 905] (a physician is justified in relying upon the judgment of another physician, who sends a patient to him for an X-ray examination, there being nothing to show that her condition was such as to render her peculiarly liable to injury from the X-ray exposure).

18. Baills v. Boulanger, (Alta.) [1924] 4 DomLR 1083.

19. Assumption of negligence from unexplained injury see infra § 152.

20. Hanners v. Salmon, 216 Ky. 584, 288 SW 307; McDonald v. Crider, (Mo. A.) 272 SW 980; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed on other grounds sub nom. State v. Ellison, 266 Mo. 604, 182 SW 996, AnnCas1918C 1]; Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.

"Malpractice is merely a branch of the law of negligence." Whitson v. Hillis, 55 N. D. 797, 804, 215 NW 480.

21. Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.

22. Bogle v. Winslow, 5 Phila. (Pa) 136; Hamilton v. Harris, (Tex. Civ. A.) 223 SW 533; Hamilton v. Harris, (Tex. Civ. A.) 204 SW 450; Hancke v. Hooper, 7 C. & P. 81, 32 ECL 510, 173 Reprint 37.

[a] **Malpractice combined with patient's weakness.**—But where a patient had a temperamental or physical weakness which could not be foreseen, and which contributed to the failure of an operation performed by a physician sued for malpractice, the physician is liable, if he contributed to the patient's injury by a failure to exercise due care and skill, or by performing on the patient a serious operation without his consent. Robinson v. Crotwell, 175 Ala. 194, 57 S 23.

23. Degree of skill and care required see supra §§ 101–109.

24. U. S.—Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240.

Ala.—Moore v. Smith, 215 Ala. 592, 111 S 918; Sellers v. Noah, 209 Ala. 103, 95 S 167; Horn v. Pope, 205 Ala. 127, 87 S 161; Talley v. Whitlock, 199 Ala. 28, 32, 73 S 976 [cit Cyc]; Robinson v. Crotwell, 175 Ala. 194, 57 S 23; Staples v. Steed, 167 Ala. 241, 52 S 646, AnnCas1912A 480; Peck v. Henderson, 22 Ala. A. 541, 118 S 258 [certiorari den 218 Ala. 233, 118 S 262].

Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436 (recognizing rule).

Cal.—Ley v. Bishopp, (A.) 263 P 369.

Colo.—Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas1916C 1075.

Ga.—Grubbs v. Elrod, 25 Ga. A. 108, 102 SE 908.

Ida.—Swanson v. Wasson, 45 Ida. 309, 262 P 147.

Ind.—Schillinger v. Savage, 186 Ind. 189, 115 NE 321; Long v. Morrison, 14 Ind. 595, 77 AmD 72.

Iowa.—Haase v. Morton, 138 Iowa 205, 115 NW 921, 16 AnnCas 350.

Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267; Manser v. Collins, 69 Kan. 290, 76 P 851.

Ky.—Knopp v. Thornton, 199 Ky. 216, 250 SW 853; Hoover v. McCormick, 197 Ky. 509, 247 SW 718; Ste-

venson v. Yates, 183 Ky. 196, 208 SW 820.

La.—Picheloup v. Gibbons, (A.) 120 S 504; Lett v. Smith, 6 La. A. 248.

Me.—Simonds v. Henry, 39 Me. 155, 63 AmD 611.

Md.—Angulo v. Hallar, 137 Md. 227, 112 A 179; Dashiell v. Griffith, 84 Md. 363, 35 A 1094.

Mass.—Mason v. Geddes, 258 Mass. 40, 154 NE 519; Carey v. Mercer, 239 Mass. 599, 132 NE 353.

Mich.—Rogers v. Kee, 171 Mich. 551, 137 NW 260.

Minn.—Clark v. George, 148 Minn. 52, 180 NW 1011.

Miss.—Prewett v. Philpot, 142 Miss. 704, 107 S 880.

Mo.—Owens v. McCleary, 313 Mo. 213, 281 SW 682; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed on other grounds sub nom. State v. Ellison, 266 Mo. 604, 182 SW 996, Ann Cas1918C 1].

Nebr.—Stohlman v. Davis, 220 NW 247; Barney v. Pinkham, 29 Nebr. 350, 45 NW 694, 26 AmSR 389.

N. J.—Klitch v. Betts, 89 N. J. L. 348, 98 A 427.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696]; Price v. Ga Nun, 11 Misc. 74, 32 NYS 801 [aff 155 N. Y. 670 mem, 49 NE 1103 mem]; Chik v. Guilshan, 169 NYS 97; Volkell v. Wolf, 151 NYS 918.

N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356; Mullinax v. Hord, 174 N. C. 607, 94 SE 426; Long v. Austin, 153 N. C. 508, 69 SE 500; McCracken v. Smathers, 122 N. C. 799, 29 SE 354.

Oh.—Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639; Craig v. Chambers, 17 Oh. St. 253; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472; Moehlman v. Ransohoff, 17 OhNPNS 241.

Okl.—Champion v. Kieth, 17 Okl. 204, 87 P 845.

Or.—Williams v. Poppleton, 3 Or. 139.

Pa.—Krompoltz v. Hyman, 70 Pa. Super. 581; Wohlert v. Seibert, 23 Pa. Super. 213.

R. I.—Morrell v. Lalonde, 45 R. I. 112, 120 A 435.

S. C.—Thomas v. Register, 110 S. C. 173, 96 SE 517.

S. D.—Warwick v. Bliss, 46 S. D. 622, 195 NW 501.

Tenn.—Burnett v. Layman, 133 Tenn. 323, 181 SW 157.

Utah.—Harber v. Gledhill, 60 Utah 391, 208 P 1111.

Vt.—Willard v. Norcross, 86 Vt. 426, 85 A 904.

Wash.—Miles v. Hoffman, 127 Wash. 653, 221 P 316.

Wis.—Gates v. Fleischer, 67 Wis. 504, 30 NW 674.

Eng.—Seare v. Prentice, 8 East 348, 103 Reprint 376; Rich v. Pierpont, 3 F. & F. 35.

N. B.—James v. Crockett, 34 N. B. 540 (recognizing rule).

Ont.—McQuay v. Eastwood, 12 Ont. 402 (recognizing rule).

Sask.—Turriff v. King, 6 Sask. L. 37, 9 DomLR 676, 23 WestLR 149, 3 West Wkly 862; Dangerfield v. David, 17 WestLR 249.

And see cases supra § 101; and infra this note and notes 25–41.

"It can make no difference whether injury proximately results from a want of skill or from a want of its application, the physician or surgeon is, in either case, equally responsible." Nash v. Royster, 189 N. C. 408, 414, 127 SE 356. To same effect Hamrick v. Shipp, 169 Ala. 171, 52 S 932; Hinkle v. Smith, 12 Ga. A. 496, 77 SE 650; Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178.

[a] **What constitutes injury.**—"Any want of the proper skill or care which diminishes the chances of the patient's recovery, prolongs his illness, increases his suffering, or in short, makes his condition worse than it would have been if due skill and care had been used, would, in a legal sense, constitute injury." Craig v. Chambers, 17 Oh. St. 253, 261 [quot Rogers v. Kee, 171 Mich. 551, 137 NW 260]. To same effect Willard v. Norcross, 86 Vt. 426, 85 A 904.

[b] **Rule applied to:** (1) Dentists. Picheloup v. Gibbons, (La. A.) 120 S 504; Comeaux v. Miles, (La. A.) 118 S 786; Simonds v. Henry, 39 Me. 155, 63 AmD 611; Angulo v. Hallar, 137 Md. 227, 112 A 179; Klitch v. Betts, 89 N. J. L. 348, 98 A 427; Chik v. Guilshan, 169 NYS 97; Krompolz v. Hyman, 70 Pa. Super. 581. (2) Magnetic healer. Longan v. Weltmer, 180 Mo. 322, 79 SW 655, 103 AmSR 573, 64 LRA 969. (3) Optician. Price v. Ga Nun, 11 Misc. 74, 32 NYS 801 [aff 155 N. Y. 670 mem, 49 NE 1103 mem]. (4) Physician applying X-ray. Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262. (5) Veterinary surgeon. Staples v. Steed, 167 Ala. 241, 52 S 646, AnnCas1912A 480; Seare v. Prentice, 8 East 348, 103 Reprint 376.

[c] **Corporation** undertaking to treat and cure hernia is liable for negligence in failing to exercise due care, as required of a physician or surgeon. Weller v. Plapao Laboratories Incorporation, 197 Mo. A. 47, 191 SW 1056.

[d] **Even if best method is used,** surgeon is liable for negligent failure to exercise required skill and care in executing it. Talley v. Whitlock, 199 Ala. 28, 73 S 976.

[e] **Gross culpability** need not be proved to establish liability for malpractice. Hanners v. Salmon, 216 Ky. 584, 288 SW 307; Link v. Sheldon, 136 N. Y. 1, 32 NE 696; Carpenter v. Blake, 75 N. Y. 12 [aff 10 Hun 358]; Graves v. Santway, 2 Silv. Sup. 67, 6 NYS 892 [aff 127 N. Y. 677 mem, 28 NE 256 mem]. Contra Farquhar v. Murray, 38 Sc. L. Rep. 642, 644 (holding that "there must be either gross ignorance or gross negligence").

[f] **Probable consequences.**—(1) A physician is chargeable with knowledge of the probable consequences of an injury or of neglect or unskillfulness in treatment (Gerken v. Plimpton, 62 App. Div. 35, 70 NYS 793), (2) or of the probable consequences of delay (Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712; Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429; Nash v. Royster, 189 N. C. 408, 127 SE 356).

[g] **Excessive delay in performing necessary operation** is culpable negligence for injury from which a physician is liable. Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712; Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429; Nash v. Royster, 189 N. C. 408, 127 SE 356.

[h] **Pain.**—(1) That the patient suffered great pain is not proof of the physician's negligence. Moehlman v. Ransohoff, 17 OhNPNS 241; Thomas v. Register, 110 S. C. 173, 96 SE 517. (2) A physician is liable for pain resulting from a failure to use skill, care, and judgment, whether or not there is an ultimate cure. Frankel v. Wolper, 181 App. Div. 485, 169 NYS 15 [aff 228 N. Y. 582 mem, 127 NE 913 mem].

[i] **Assumption of risk by patient.**—(1) A patient assumes the risk of a burn from a proper exposure to the X-Ray. Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262. (2) Such assumption by a patient, on being informed by the physician that there is danger connected with the treatment, is limited to risks attending careful, skillful application of the X-ray by the physician, and does not include an injury caused by the latter's negligence in applying the X-ray. Hales v. Raines, 162 Mo. A. 46, 141 SW 917. (3) A patient's consent to an operation, which he was told by the physician was the proper course, does not relieve the physician of liability, if he knew or should have known that the operation was unnecessary and improper, and did not explain to the patient its purpose and possible needlessness. Theodore v. Ellis, 141 La. 709, 75 S 655.

[j] **That patient's poor condition combined with malpractice** to produce the patient's injuries and ailments does not prevent the physician from being liable for the injurious consequences of his lack of skill or care. Robinson v. Crotwell, 175 Ala. 194, 57 S 23; Mullin v. Flanders, 73 Vt. 95, 50 A 813; Gates v. Fleischer, 67 Wis. 504, 30 NW 674.

[k] **Foreign matter in wound.**—(1) If a physician, by sufficiently careful examination, could have discovered foreign particles in the wound, plaintiff could recover for damage resulting therefrom. Mullinax v. Hord, 174 N. C. 607, 94 SE 426. (2) Leaving open a window during an operation, whereby bugs got into the wound, authorizes a finding of negligence, in the absence of a reasonable explanation. Prewett v. Philpot, 142 Miss. 704, 107 S 880.

[l] **Instilling solution into eyes of newborn child.**—(1) A physician may be liable in damages for neglect or failure to instill or have instilled in the eyes of a newborn child a proper solution, as required by statute, if blindness or disease of the eyes results from such failure. Covington v. Wyatt, 196 N. C. 367, 145 SE 673. (2) Liability will not necessarily be inferred from a failure to instill the exact solution required, where an effort is made in good faith to comply with the statute. Covington v. Wyatt, supra. (3) Where the duty of complying with the statute is not absolute, the question as to the liability of a physician for injury from instilling a solution containing a larger percentage of silver nitrate than that called for is determined under the general principles of malpractice. Covington v. Wyatt, supra.

[m] **In undertaking to put patient to bed after operation,** physicians are liable for failure to see that the bed was safe, not containing harmful objects like hot water bottles, and cannot rely on plaintiff's special nurse to protect the patient. Harber v. Gledhill, 60 Utah 391, 208 P 1111.

[n] **Under an agreement to cure,** a physician is not liable for suffering and disabilities from the cause which he agreed, but failed, to cure, unless he is guilty of malpractice. Frankel v. Wolper, 181 App. Div. 485, 169 NYS 15 [aff 228 N. Y. 582 mem, 127 NE 913 mem].

[o] **Other acts or omissions held negligence or malpractice.**—(1) Failure of a physician, treating a broken arm, on being informed that cloth saturated with water had been applied, to determine whether infection had resulted from such application, and, if so, to treat it. Baute v. Haynes, 104 SW 272, 31 KyL 876, 12 LRANS 752. (2) Leaving a car, carrying an unconscious patient, close to an open elevator shaft, down which it fell, causing injury to the patient. Haase v. Morton, 138 Iowa 205, 115 NW 921, 16 AnnCas 350. (3) Burning of a patient by a hot water bottle, placed by a surgeon as an incident to the operation. Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280; (4) Burning of a patient's head by the discharge of electricity through a cap placed thereon by the physician, who thereafter left the room, no attendant being present. Frisk v. Cannon, 110 Minn. 438, 126 NW 67, 28 LRANS 262. (5) Pulling a perfectly sound tooth, without justification. Krompoltz v. Hyman, 70 Pa. Super. 581. (6) Failure of a dentist to take proper steps to protect a patient against danger from the presence in her mouth of parts of a tooth broken during extraction. Comeaux v. Miles, (La. A.) 118 S 786. (7) Spilling of part of the contents of a vial of carbolic acid by a dentist upon his patient. Picheloup v. Gibbons, (La. A.) 120 S 504. (8) Throwing of a horse by a veterinary, preparatory to cau-

this is the rule by force of statute.[25] Conversely, a physician or surgeon is not liable for injurious consequences to his patient if he exercises the required degree of skill and care.[26] A physician has also been held liable for injuries resulting from his failure to exercise his best judgment.[27] Failure to exercise the required care may be predicated upon things done by the physician that should not have been done,[28] or his negligent failure to do or cause to be done something that should have been done in the particular instance.[29] To afford a basis for an action for malpractice, under these rules, the want of skill or care must be the proximate cause of the injury or death of the patient.[30] The fact that the negligence of other physicians may also have been a contributing cause of the patient's death does not absolve the physician whose negligence was the proximate cause;[31] and bad practice or negligence on

terizing treatment, in such a manner as to cause its death. Staples v. Steed, 167 Ala. 241, 52 S 646, AnnCas 1912A 480.

[p] **Physician and employer as several tort-feasors.**—Where an employee's leg is broken through his employer's negligence, and amputation becomes necessary because of the physician's negligent treatment, the employer and the physician, while each liable for the loss of the leg, are not joint tort-feasors, each being liable only to the extent of the injury done by himself. Staehlin v. Hochdoerfer, (Mo.) 235 SW 1060.

Effect of contributory negligence on part of patient see infra §§ 130–136.

25. See statutory provisions.

26. Cal.—Hall v. Steele, 193 Cal. 602, 226 P 854; Priestley v. Stafford, 30 Cal. A. 523, 158 P 776; Houghton v. Dickson, 29 Cal. A. 321, 155 P 128.

D. C.—Levy v. Vaughan, 42 App. 146.

Ind.—McCoy v. Buck, (A.) 157 NE 456.

Iowa.—Kline v. Nicholson, 151 Iowa 710, 130 NW 722.

Ky.—Barrett v. Brand, 179 Ky. 740, 201 SW 331.

Md.—State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587.

Mich.—Hesse v. Knippel, 1 Mich. N. P. 109.

Minn.—Getchell v. Hill, 21 Minn. 464.

Mo.—Wilt v. McCallum, 214 Mo. A. 321, 253 SW 156. See Seewald v. Gentry, 220 Mo. A. 367, 286 SW 445 (however severe the patient's suffering and injury, as a result of the treatment, he cannot recover unless the physician breached a duty that he owed).

N. J.—Klitch v. Betts, 89 N. J. L. 348, 98 A 427.

Oh.—Montgomery v. Eagon, 32 O. C. A. 503.

Okl.—Kernodle v. Elder, 23 Okl. 743, 102 P 138.

Pa.—Nixon v. Pfahler, 279 Pa. 377, 124 A 130.

S. D.—Feltman v. Dunn, 217 NW 198; Dean v. Seeman, 42 S. D. 577, 176 NW 649.

Tex.—Hamilton v. Harris, (Civ. A.) 223 SW 533.

Vt.—Willard v. Norcross, 86 Vt. 426, 85 A 904.

Wash.—Hollis v. Ahlquist, 142 Wash. 33, 251 P 871.

W. Va.—Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

Que.—Marchand v. Bertrand, 39 Que Super. 49.

And see cases supra § 101; and infra this note and notes 27–41.

[a] **Rule applied to:** (1) Dentist. Klitch v. Betts, 89 N. J. L. 348, 98 A 427. (2) Physician applying X-ray. McCoy v. Buck, (Ind. A.) 157 NE 456; Hamilton v. Harris, (Tex. Civ. A.) 223 SW 533.

[b] **No insurance of safety from dangerous agencies.**—A physician is not an insurer of the safety of his patients from dangerous agencies employed, such as X-ray, electricity, radium, surgical instruments, poison, and anæsthetics. Nixon v. Pfahler, 279 Pa. 377, 124 A 130.

[c] **Reliance on other persons present.**—(1) A physician relying on an attendant, employed by the patient's husband, to wrap hot irons properly before applying them to the patient, as he directed, is not negligent. Olson v. Bolstad, 161 Minn. 419, 201 NW 918. (2) A physician whose attention is absorbed in giving urgent care to a patient in danger of death after an operation is not responsible if he relies on another person present to give hot applications, such person not being in any sense his agent. Marchand v. Bertrand, 39 Que. Super. 49.

[d] **Failure of physician to protest** against his advice and outside of his control, and in which he administered the anæsthetic, raises no inference of approval by him. Lawson v. Crane, 83 Vt. 115, 74 A 641.

[e] **Failure of drugless physician to operate** or advise an operation cannot be the basis of recovery by one who employs him knowing that he belongs to a school of healing which does not operate. Wilcox v. Carroll, 127 Wash. 1, 219 P 34.

[f] **Where explosion is caused by improper ingredients in manufacture** of containers of anæsthetic gases, by a reputable concern, physicians administering the anæsthetic are not liable for the resulting injury. Wilt v. McCallum, 214 Mo. A. 321, 253 SW 156.

[g] **Other acts or omissions held not negligence or malpractice.**—(1) A physician's temporarily absenting himself, during treatment of a patient, despite an indication on the hospital chart of a slight rise in temperature, pulse, and respiration. Browning v. Hoffman, 90 W. Va. 568, 111 SE 492. (2) Failure to take certain steps through which the existence of gangrene and the necessity of amputation might have been discovered earlier. Browning v. Hoffman, supra. (3) Not wearing sterilized gown and sterilized rubber gloves while examining a patient and delivering a child. Hammer v. Klegger, 50 S. D. 453, 210 NW 667. (4) Directing an advanced and experienced medical student to administer ether. Levy v. Vaughan, 42 App. (D. C.) 146. (5) A dentist's failure to extract the root of the tooth of a pregnant woman, broken in attempted extraction, and his request that she return next day. Gentile v. De Virgilis, 290 Pa. 50, 138 A 540. (6) A nurse's waiting for the coming of an assistant physician on his regular tour, after discovering unfavorable symptoms, and giving the appropriate treatment herself. Browning v. Hoffman, supra.

27. Owens v. McCleary, 313 Mo. 213, 281 SW 682; Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Nash v. Royster, 189 N. C. 408, 127 SE 356; Mullinax v. Hord, 174 N. C. 607, 94 SE 426; Long v. Austin, 153 N. C. 508, 69 SE 500.

28. Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178.

29. Longfellow v. Vernon, supra.

"Physician's negligence" defined see supra § 100.

30. Ala.—Peck v. Henderson, 22 Ala. A. 541, 118 S 258 [certiorari den 218 Ala. 233, 118 S 262].

Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.

Ark.—Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459.

Ind.—Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178.

Iowa.—Snearly v. McCarthy, 180 Iowa 81, 161 NW 108.

Ky.—Powell v. Galloway, 16 SW (2d) 489; Kirby v. Berea College, 196 Ky. 353, 244 SW 775; Barrett v. Brand, 179 Ky. 740, 201 SW 331; Barnett v. Brand, 165 Ky. 616, 177 SW 461.

Md.—State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587.

Nebr.—McGuire v. Rix, 225 NW 120.

N. Y.—Brown v. Shyne, 242 N. Y. 176, 151 NE 197, 44 ALR 1407.

N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356; Mullinax v. Hord, 174 N. C. 607, 94 SE 426.

N. D.—Stoskoff v. Wicklund, 49 N. D. 708, 193 NW 312.

Pa.—Braunberger v. Cleis, 13 AmLRegOS 587.

Tex.—Urrutia v. Patino, (Civ. A.) 10 SW (2d) 582.

Wash.—Harvey v. Richardson, 91 Wash. 245, 157 P 674, AnnCas1918A 881.

Wis.—Matuschka v. Murphy, 173 Wis. 484, 180 NW 821.

"Manifestly, if the condition of the patient was such that death would have ensued, notwithstanding the presence of the pad in her abdomen, there should be no recovery." Barnett v. Brand, 165 Ky. 616, 624, 177 SW 461.

[a] **If death is caused by disease not produced by operation,** a surgeon, alleged to have caused the death of the patient by unskillfully performing an operation, is not liable. State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587.

[b] **Practicing medicine without a license,** in violation of statute, can be the basis of an action for malpractice only if such violation was the proximate cause of the injury. Brown v. Shyne, 242 N. Y. 176, 151 NE 197, 44 ALR 1407.

[c] **Failure to report communicable disease,** in violation of a rule of the state board of health, while evidence of negligence, is not actionable negligence creating civil liability, unless it was the proximate cause of the injury. Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459.

[d] **Physician's direction to attendant** to place a hot iron in the patient's bed was not the proximate cause of injury arising from the burning of the patient's feet, as he could not reasonably have anticipated that an ordinarily prudent person would place the iron so as to burn the patient. Malkowski v. Graham, 169 Wis. 398, 172 NW 785, 4 ALR 1524.

[e] **Refusal of physician to attend patient at latter's home,** it being the physician's custom not to treat patients outside of his office, is not the proximate cause of the patient's death, where it is not shown that there was an emergency or that the patient would not have died if the physician had attended him. Urrutia v. Patino, (Tex. Civ. A.) 10 SW (2d) 582.

[f] **Rule applied to dentists.**—Matuschka v. Murphy, 173 Wis. 484, 180 NW 821.

Proximate cause:

Generally see Negligence §§ 477–499.

As affecting grounds of action for causing death see Death § 56.

31. Kruger v. Bossingham, 152 Minn. 243, 188 NW 324. See Talley v. Whitlock, 199 Ala. 28, 73 S 976 (holding that the subsequent act of a hospital's resident physician in dealing with a drainage tube in the patient's body is no defense for negligence chargeable to the operating physician in leaving it there, or improperly placing and securing it, unless the former's act was the sole proximate cause of the injury).

the part of a physician cannot be justified by his reliance on the diagnosis[32] or advice[33] of another physician. A mere want of due care or skill on the part of the physician or surgeon, not resulting in injury, gives no right to recover[34] even nominal damages;[35] and his ignorance is immaterial if the practice employed is correct.[36] A physician or surgeon is not liable as negligent because of the mere fact of a want of success or a poor result from his treatment,[37] unless it is shown to be due to a want of due skill or care, or of both, on his part;[38] nor is the fact that he predicted recovery sooner than it took place an element of negligence.[39]

Treatment at a particular place cannot be required of the physician by the patient, unless the former's reason for refusing is purely capricious;[40] and a physician whose custom is to treat patients only at his office is not negligent in refusing to attend a patient at the latter's home.[41]

[§ 111] **2. Refusal To Take Case.** A physician is not bound to render professional services to everyone who applies,[42] and may refuse to respond to the call of a patient unable to compensate him;[43] and he is therefore not liable for arbitrarily refusing to respond to a call, although he is the only physician available.[44]

[§ 112] **3. Following Established Practice.**[45] If a physician or surgeon follows the established and approved practice, and no gross error is shown, he is not liable for injuries caused by the treatment.[46] The adoption of one of two or more accepted and recognized methods of treatment, rather than an-

32. Thaggard v. Vafes, 218 Ala. 609, 119 S 647.

33. Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455.

34. U. S.—Ewing v. Goode, 78 Fed. 442.
Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.
Ida.—Swanson v. Wasson, 45 Ida. 309, 262 P 147.
Ind.—Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178.
Me.—Cayford v. Wilbur, 86 Me. 414, 29 A 1117.
Mich.—Hesse v. Knippel, 1 Mich. N. P. 109.
Mo.—Owens v. McCleary, 313 Mo. 213, 281 SW 682.
N. Y.—Rowe v. Lent, 17 NYS 131.
Oh.—Craig v. Chambers, 17 Oh. St. 253.
Pa.—Fowler v. Sergeant, 1 Grant 355.
Eng.—Rich v. Pierpont, 3 F. & F. 35.
N. B.—James v. Crockett, 34 N. B. 540.
Ont.—McQuay v. Eastwood, 12 Ont. 402.

[a] **Rule applied to physician applying X-ray.**—Butler v. Rule, 29 Ariz. 405, 242 P 436.

35. Ewing v. Goode, 78 Fed. 442; Craig v. Chambers, 17 Oh. St. 253.

36. Fowler v. Sergeant, 1 Grant (Pa.) 355; Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 110 SE 560, 22 ALR 323; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Marchand v. Bellin, 158 Wis. 184, 147 NW 1033.

[a] **Thus** the fact that a physician is ignorant of the proper treatment of a Potts fracture is immaterial if his treatment was the proper one under the conditions existing. Marchand v. Bellin, 158 Wis. 184, 147 NW 1033.

Wrong diagnosis not followed by improper treatment see infra § 113 text and note 67.

37. Ala.—Woodlawn Infirmary v. Byers, 216 Ala. 210, 112 S 831; Moore v. Smith, 215 Ala. 592, 111 S 918.
Ill.—Sims v. Parker, 41 Ill. A. 284.
Ind.—Edwards v. Uland, 193 Ind. 376, 140 NE 546; Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.
Iowa.—Furgason v. Bellaire, 197 Iowa 277, 197 NW 13; Thorpe v. Talbott, 197 Iowa 95, 196 NW 716; O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755; Tomer v. Aiken, 126 Iowa 114, 101 NW 769.
Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267.
Ky.—Hanners v. Salmon, 216 Ky. 584, 288 SW 307.
Me.—Curran v. Holt, 117 Me. 369, 104 A 579.
Mich.—Miller v. Toles, 183 Mich. 252, 150 NW 118, LRA1915C 595.
Minn.—Moehlenbrock v. Parke, 145 Minn. 100, 176 NW 169.
Mo.—McDonald v. Crider, (A.) 272 SW 980, 981 [cit Cyc].
Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047.
Oh.—Moehlman v. Ransohoff, 17 OhNPNS 241.
Okl.—Bungardt v. Younger, 112 Okl. 165, 239 P 469.
Or.—Hamilton v. Kelsey, 126 Or. 26, 268 P 750; Emerson v. Lumbermen's Hospital Assoc., 100 Or. 472, 198 P 231; Hills v. Shaw, 69 Or. 460, 137 P 229.
S. D.—Feltman v. Dunn, 217 NW 198; Dean v. Seeman, 42 S. D. 577, 176 NW 649.
Tex.—Graham v. Gautier, 21 Tex. 111.
Wash.—Hollis v. Ahlquist, 142 Wash. 33, 251 P 871; Howatt v. Cartwright, 128 Wash. 343, 222 P 496.
W. Va.—Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837.
Wis.—Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288; Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111.
Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.
And see cases infra note 38.
"Physicians and surgeons are not to be held responsible for results, but only for the kind of service rendered by them." Hanson v. Harris, 44 S. D. 457, 462, 184 NW 262; Dean v. Seeman, 42 S. D. 577, 581, 176 NW 649 [quot Feltman v. Dunn, (S. D.) 217 NW 198].

[a] **Reasons for rule.**—(1) "In spite of all . . . [a doctor's] skill and learning, there are many factors over which he has no control." Hollis v. Ahlquist, 142 Wash. 33, 251 P 871, 872. (2) "A surgeon may use the best judgment, skill and care, using all the recognized means available, and yet not effect a cure." Vaughan v. Memorial Hospital, 103 W. Va. 156, 163, 136 SE 837. To same effect McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

[b] **Rule applied to X-ray treatment.**—Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455.

[c] **Failure to secure a union of fractured bones** does not of itself establish, or justify an inference of, negligence. Snearly v. McCarthy, 180 Iowa 81, 161 NW 108; Feltman v. Dunn, (S. D.) 217 NW 198; Dean v. Seeman, 42 S. D. 577, 176 NW 649; Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837; Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

[d] **Mere fact that infection occurs** in reducing a fracture is not of itself proof of the physician's negligence. Lorenz v. Booth, 84 Wash. 550, 147 P 31.

Insurance of cure or benefit see supra § 107.

Presumption of negligence from failure to cure see infra § 152.

38. Ala.—Peck v. Henderson, 22 Ala. A. 541, 118 S 258 [certiorari den 218 Ala. 233, 118 S 262].
Cal.—Linn v. Piersol, 37 Cal. A. 171, 173 P 763; Foreman v. Hunter Lumber Co., 36 Cal. A. 763, 173 P 408.
Colo.—Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas1916C 1075; Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.
Kan.—Tefft v. Wilcox, 6 Kan. 46.
Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593.
Minn.—Berkholz v. Benepe, 153 Minn. 335, 190 NW 800.
Nebr.—McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296; Booth v. Andrus, 91 Nebr. 810, 137 NW 884; O'Hara v. Wells, 14 Nebr. 403, 15 NW 722.
N. Y.—Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281; Wood v. Wyeth, 106 App. Div. 21, 94 NYS 360.
Oh.—Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.
Okl.—Champion v. Kieth, 17 Okl. 204, 87 P 845.
Or.—Williams v. Poppleton, 3 Or. 139.
Pa.—Tiedeman v. Lœwengrund, 2 WklyNC 272.
S. D.—Warwick v. Bliss, 46 S. D. 622, 195 NW 501.
Wash.—Miles v. Hoffman, 127 Wash. 653, 221 P 316; Peterson v. Wells, 41 Wash. 693, 84 P 608.
See Hoover v. Buckman, 194 Ill. A. 308.

[a] **Rule applied to dentist.**—Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281.

39. Landoski v. Mueller, 193 Wis. 570, 214 NW 329.

40. Dabney v. Briggs, (Ala.) 121 S 394.

41. Urrutia v. Patino, (Tex. Civ. A.) 10 SW (2d) 582, 583 [cit Cyc]; Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512.

42. Lathrope v. Flood, 6 Cal. Unrep. Cas. 637, 63 P 1007; Hurley v. Eddingfield, 156 Ind. 416, 59 NE 1058, 83 AmSR 198, 53 LRA 135; Nash v. Royster, 189 N. C. 408, 127 SE 356; Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512.

[a] **"In obtaining the State's license** [permission] to practice medicine, the State does not require, and the licensee does not engage, that he will practice at all or on any other terms than he may choose to accept." Hurley v. Eddingfield, 156 Ind. 416, 417, 59 NE 1058, 83 AmSR 198, 53 LRA 135.

[b] **Treatment only at office.**—A physician may properly refuse to treat patients not coming to his office. Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512.

43. Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

44. Hurley v. Eddingfield, 156 Ind. 416, 59 NE 1058, 83 AmSR 198, 53 LRA 135.

45. Following recognized or professed school, system, or treatment see supra § 104.

46. Colo.—Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas 1916C 1075.
Ill.—McKee v. Allen, 94 Ill. A. 147; Sims v. Parker, 41 Ill. A. 284.
Ind.—McCoy v. Buck, (A.) 157 NE 456.
Iowa.—Whitesell v. Hill, 101 Iowa

other, is not negligence or evidence of negligence,[47] even though there is a more modern method than the one employed,[48] or a modern method is employed to the exclusion of one previously adopted as standard,[49] a physician or surgeon not being required to choose at his peril between recognized methods.[50] It has been broadly stated that any deviation from the established mode of practice is sufficient to charge a physician with liability in case of any injury arising to the patient.[51] When a particular mode of treatment is upheld by a consensus of opinion of the members of the profession, it should be followed,[52] and if a physician sees fit to experiment with some other mode, he does so at his own peril, being liable for resulting injury to the patient.[53] If, however, the character of the injury or disease is such that the patient cannot endure the most approved method of treatment in such cases, then a failure to resort to such treatment does not show a want of skill or negligence.[54] When the treatment adopted is not in accordance with established practice, but is positively injurious, the case has been said to be not one of negligence, but of want of skill.[55]

[§ 113] **4. Wrong Diagnosis.**[56] A patient is entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient, and the physician's opportunities for examination will permit,[57] and, while he does not

629, 70 NW 750, 37 LRA 830.
La.—Stern v. Lanng, 106 La. 738, 31 S 303; Lett v. Smith, 6 La. A. 248.
Mo.—McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.
Mont.—Stevenson v. Gelsthorpe, 10 Mont. 563, 27 P 404.
Nebr.—Booth v. Andrus, 91 Nebr. 810, 137 NW 884.
Oh.—Ellis v. Twiggs, 17 Oh. Cir. Ct. N. S. 172.
Pa.—Remley v. Plummer, 79 Pa. Super. 117.
S. D.—Warwick v. Bliss, 46 S. D. 622, 195 NW 501.
Wash.—Corey v. Radabaugh, 143 Wash. 653, 255 P 1037; Howatt v. Cartwright, 128 Wash. 343, 222 P 496; Dahl v. Wagner, 87 Wash. 492, 151 P 1079; Wells v. Ferry-Baker Lumber Co., 57 Wash. 658, 107 P 869, 29 LRA NS 426.
W. Va.—Browning v. Hoffman, 86 W. Va. 468, 477, 103 SE 484 [cit Cyc].
Wis.—Holton v. Burton, 222 NW 225.
Ont.—McQuay v. Eastwood, 12 Ont. 402.

[a] **Rule applied to physician applying X-ray.**—McCoy v. Buck, (Ind. A.) 157 NE 456; Lett v. Smith, 6 La. A. 248.

47. Iowa.—Cozine v. Moore, 159 Iowa 472, 141 NW 424.
La.—Lett v. Smith, 6 La. A. 248.
Mo.—McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.
Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Schumacher v. Murray Hospital, 58 Mont. 447, 193 P 397.
Nebr.—McGuire v. Rix, 225 NW 120.
Oh.—Ellis v. Twiggs, 17 Oh. Cir. Ct. N. S. 172.
Pa.—Remley v. Plummer, 79 Pa. Super. 117.
Wash.—Howatt v. Cartwright, 128 Wash. 343, 222 P 496; Swanson v. Hood, 99 Wash. 506, 170 P 135; Ennis v. Banks, 95 Wash. 513, 164 P 58; Dahl v. Wagner, 87 Wash. 492, 151 P 1079; Lorenz v. Booth, 84 Wash. 550, 147 P 31.
W. Va.—Browning v. Hoffman, 86 W. Va. 468, 103 SE 484.
Wis.—Holton v. Burton, 222 NW 225.
Ont.—Van Mere v. Farewell, 12 Ont. 285.
And see cases infra note 50.

[a] **That a respectable minority of physicians approve** of the method selected refutes a claim of negligence in the choice of methods of treatment. Howatt v. Cartwright, 128 Wash. 343, 222 P 496; Swanson v. Hood, 99 Wash. 506, 170 P 135; Dahl v. Wagner, 87 Wash. 492, 151 P 1079; Lorenz v. Booth, 84 Wash. 550, 147 P 31.

[b] **Professional judgment.**—The extent to which manipulation and extension, unsuccessfully applied in treating a fracture, should be pursued before resorting to an operation is a question of professional judgment. McGuire v. Rix, (Nebr.) 225 NW 120.

Error of judgment in selecting method see infra § 114 text and note 81.

48. Dahl v. Wagner, 87 Wash. 492, 151 P 1079.

49. Dahl v. Wagner, supra.

50. Browning v. Hoffman, 86 W. Va. 468, 103 SE 484; De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288. And see cases supra note 47.

51. Patten v. Wiggin, 51 Me. 594, 81 AmD 593; Loveland v. Nelson, 235 Mich. 623, 209 NW 835; Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655.

[a] **Injection of lysol by dentist** in a patient's jaw, instead of an anæsthetic, is malpractice. Loveland v. Nelson, 235 Mich. 623, 209 NW 835.

[b] **Advice in immaterial matter.**—In an action against a surgeon for damages caused by his unskillfulness or negligence in reducing a fracture of plaintiff's arm, the fact that defendant advised bathing the parts with a decoction of wormwood and vinegar, which the expert testimony condemned, was not such a departure from approved medical treatment as to entitle plaintiff to recover. Winner v. Lathrop, 67 Hun 511, 22 NYS 516.

52. See supra § 104 text and note 81.

53. Colo.—Jackson v. Burnham, 20 Colo. 532, 39 P 577.
Mich.—Hesse v. Knippel, 1 Mich. N. P. 109.
Mo.—Owens v. McCleary, 313 Mo. 213, 281 SW 682; McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.
Wash.—Sawdey v. Spokane Falls, etc., R. Co., 30 Wash. 349, 70 P 972, 94 AmSR 880.
Eng.—Slater v. Baker, 2 Wils. 359, 95 Reprint 860.
Ont.—McQuay v. Eastwood, 12 Ont. 402.

[a] **That the treatment is of comparatively recent origin** ought not, ipso facto, to put it in the class of innovating experiments, so as to make the physician liable for a bad result even though he displayed reasonable skill and care in applying it. McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.

54. Hallam v. Means, 82 Ill. 379, 25 AmR 328.

55. Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696].

56. Errors of judgment see infra § 114.

57. Cal.—Patterson v. Marcus, 265 P 222.
Colo.—Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136.
Ga.—Edwards v. Roberts, 12 Ga. A. 140, 76 SE 1054.
Ill.—Quinn v. Donovan, 85 Ill. 194.
Iowa.—Ramberg v. Morgan, 218 NW 492.
Ky.—Burk v. Foster, 114 Ky. 20, 69 SW 1096, 24 KyL 791, 59 LRA 277.
La.—Theodore v. Ellis, 141 La. 709, 75 S 655.
Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593.
Mass.—Carey v. Mercer, 239 Mass. 599, 132 NE 353.
Mich.—Rogers v. Kee, 171 Mich. 551, 137 NW 260.
Minn.—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.
Mo.—Trask v. Dunnigan, (A.) 299 SW 116.
Mont.—Schumacher v. Murray Hospital, 58 Mont. 447, 451, 193 P 397 [cit Cyc].
Nebr.—Kimble v. Roeder, 115 Nebr. 589, 214 NW 1.
N. Y.—Graves v. Santway, 2 Silv. Sup. 67, 6 NYS 892 [aff 127 N. Y. 677 mem, 28 NE 256 mem].
N. C.—Long v. Austin, 153 N. C. 508, 69 SE 500.
Okl.—Champion v. Kieth, 17 Okl. 204, 87 P 845.
Or.—Langford v. Jones, 18 Or. 307, 22 P 1064.
Pa.—Fowler v. Sergeant, 1 Grant 355.
Vt.—Willard v. Norcross, 86 Vt. 426, 85 A 904.
W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 110 SE 560, 22 ALR 323.
Alta.—Gibbons v. Harris, [1924] 1 DomLR 923, [1924] 1 WestWkly 674 [dism app [1923] 3 WestWkly 159].
B. C.—Thompson v. Columbia Coast Mission, 20 B. C. 115.
N. B.—James v. Crockett, 34 N. B. 540.
N. S.—Stamper v. Rhindress, 41 N. S. 45, 9 EastLR 186.

[a] **Physician cannot rely on the diagnosis of another,** no matter how skilled, in administering drugs containing poison, the patient being entitled to the judgment of his physician, formed from his own diagnosis. Thaggard v. Vafes, 218 Ala. 609, 119 S 647.

[b] **Failure to take X-ray photograph in treating injured limb** (1) is not necessarily negligence (Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107); (2) is not negligence if it is due to the patient's refusal to have the photograph taken (Carey v. Mercer, 239 Mass. 599, 132 NE 353); (3) nor if no X-ray apparatus or suitable electric current is available (De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288); (4) nor if the case may properly be diagnosed without using the X-ray (Snearly v. McCarthy, 180 Iowa 81, 161 NW 108); (5) nor where the physician correctly ascertains the location and nature of the fracture (Wright v. Conway, supra); (6) nor where the physician, by opening the joint and inserting his finger, ascertains that there is no fracture (Hanson v. Harris, 44 S. D. 457, 184 NW 262); (7) nor where the physician made fluoroscopic examinations and the taking of an X-ray photograph would be a measure of extreme care (Wells v. Ferry-Baker Lumber Co., 57 Wash. 658, 107 P 869, 29 LRANS 426); (8) nor unless it is shown to be usual and customary under like circumstances, and that ordinarily skillful and careful physicians and surgeons would have done so. (Schumacher v. Murray Hospital, 58 Mont. 447, 193 P 397). (9) But where it is shown to be the proper treatment, and facilities are available, the taking of an X-ray picture, even without the request of the patient, is part of the physician's duty. James v. Grigsby, 114 Kan. 627, 220 P 267. (10) A jury is warranted in concluding from its

insure the correctness of his diagnosis,[58] a physician or surgeon is required to use reasonable skill and care in determining through diagnosis the condition of the patient and the nature of his ailment,[59] and is liable for a failure, due to a want of the requisite skill or care, to diagnose correctly the nature of the ailment, with resulting injury or detriment to the patient.[60] So, too, it has been held that if a physician, by the exercise of reasonable care and skill, ought to discover that an ailment is incurable, that it will not yield to usual treatment, and that the patient will not be benefited, and fails to make such discovery and advise the patient thereof, he is guilty of negligence.[61] The fact that information and not medical treatment was sought does not excuse negligence in making the diagnosis.[62] On the other hand, a physician or surgeon is not responsible for a mistake in diagnosis if he uses the proper degree of skill and care.[63] A general practitioner has been held not liable for making a wrong diagnosis of a very rare disease, which can only be detected by a skilled expert.[64] Nor does a mere omission by a patient's attending physician to use ordinary skill in diagnosing his disease before reporting it to the board of health as a case of smallpox give a right of action.[65] Whether a physician was negligent in making a diagnosis must be determined in the light of conditions existing and facts known at the time thereof, and not in the light of knowledge gained through subsequent developments.[66] It has been held that unless improper treatment fol-

general knowledge of the use of the X-ray in such cases that the failure to employ it when available is negligence. Whitson v. Hillis, 55 N. D. 797, 215 NW 480. (11) See Polionos v. Renner, 190 Ill. A. 416.

[c] **Where X-ray is not ordinarily available,** as in rural communities, failure to use it in diagnosis is not negligence. Trask v. Dunnigan, (Mo. A.) 299 SW 116.

[d] **Excessive delay in taking X-ray picture,** which would have better enabled the physician to treat an injured elbow, is negligence. Hoover v. McCormick, 197 Ky. 509, 247 SW 718.

58. Edwards v. Uland, 193 Ind. 376, 140 NE 546; McCoy v. Buck, (Ind. A.) 157 NE 456; Ramberg v. Morgan, (Iowa) 218 NW 492; Clark v. George, 148 Minn. 52, 180 NW 1011; Harju v. Allen, 146 Minn. 23, 177 NW 1015.

[a] **Rule applied to X-ray expert.**—McCoy v. Buck, (Ind. A.) 157 NE 456.

59. See cases infra note 60.

[a] **Requirement of proper remedy too high.**—An instruction, in an action for mistreatment of a fracture, that if defendant could have learned the nature of the injury, and applied the proper remedy, and failed to do so, he is liable, requires too great a degree of skill. Quinn v. Donovan, 85 Ill. 194.

[b] **The mere use of approved tests** by a physician in determining whether a patient's shoulder has been dislocated is not a sufficient exercise of the required skill and care, but he must exercise such skill and care in making the tests, ascertaining from them the presence of any injury, and treating the patient. Long v. Austin, 153 N. C. 508, 69 SE 500.

[c] **Due care in determining necessity of operation.**—Theodore v. Ellis, 141 La. 709, 75 S 655.

[d] **Use of best judgment required** (1) in deciding upon nature of injury and best mode of treatment. Osnes v. Scanlon, 189 Iowa 1364, 179 NW 869. (2) Application of best judgment to case generally see supra § 101 text and note 52.

[e] **Rule applied to chiropractors.**—Kuechler v. Volgman, 180 Wis. 238, 192 NW 1015, 31 ALR 826.

[f] **Determining applicability of chiropractic treatment.**—A chiropractor, not assuming to treat infectious diseases, assumes the responsibility of determining whether his treatment may reasonably be expected to afford relief in a particular case, and hence must use reasonable care and skill to ascertain whether the patient's ailments are of the class to which his treatment applies, and if not so to advise the patient. Janssen v. Mulder, 232 Mich. 183, 205 NW 159; Gibbons v. Harris, (Alta.) [1924] 1 DomLR 923, [1924] 1 WestWkly 674 [dism app [1923] 3 WestWkly 159].

60. Colo.—Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136.

Ga.—Edwards v. Roberts, 12 Ga. A. 140, 76 SE 1054.

Ill.—Quinn v. Donovan, 85 Ill. 194.

Ind.—Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178.

Iowa.—Ramberg v. Morgan, 218 NW 492; Osnes v. Scanlon, 189 Iowa 1364, 179 NW 869; Burton v. Neill, 140 Iowa 141, 118 NW 302, 17 AnnCas 532.

Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267; Manser v. Collins, 69 Kan. 290, 76 P 851.

Ky.—Hoover v. McCormick, 197 Ky. 509, 247 SW 718; Stevenson v. Yates, 183 Ky. 196, 208 SW 820; Burk v. Foster, 114 Ky. 20, 69 SW 1096, 24 KyL 791, 59 LRA 277.

La.—Theodore v. Ellis, 141 La. 709, 75 S 655.

Me.—Lewis v. Dwinell, 84 Me. 497, 24 A 945; Patten v. Wiggin, 51 Me. 594, 81 AmD 593.

Mass.—Harriott v. Plimpton, 166 Mass. 585, 44 NE 992.

Mich.—Janssen v. Mulder, 232 Mich. 183, 205 NW 159; Rogers v. Kee, 171 Mich. 551, 137 NW 260.

Minn.—Thorkeldson v. Nicholson, 145 Minn. 491, 175 NW 1008.

Mo.—Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49; Lewis v. McClellan, (A.) 1 SW (2d) 247.

Nebr.—Kimble v. Roeder, 115 Nebr. 589, 214 NW 1.

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Boom v. Reed, 69 Hun 426, 23 NYS 421; Graves v. Santway, 2 Silv. Sup. 67, 6 NYS 892 [aff 127 N. Y. 677 mem, 28 NE 256 mem].

N. C.—Long v. Austin, 153 N. C. 508, 69 SE 500.

N. D.—Whitson v. Hillis, 55 N. D. 797, 215 NW 480.

Pa.—Fowler v. Sergeant, 1 Grant 355; Wohlert v. Seibert, 27 Pa. Co. 125 [rev on other grounds 23 Pa. Super. 213].

Vt.—Willard v. Norcross, 86 Vt. 426, 85 A 904.

Wash.—Just v. Littlefield, 87 Wash. 299, 151 P 780, AnnCas1917D 705.

W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 110 SE 560, 22 ALR 323.

Wis.—Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31 ALR 826; Allen v. Voje, 114 Wis. 1, 89 NW 924.

Alta.—Gibbons v. Harris, [1924] 1 DomLR 923, [1924] 1 WestWkly 674, 676 [dism app [1923] 3 WestWkly 159] [quot Cyc].

B. C.—Thompson v. Columbia Coast Mission, 20 B. C. 115.

Compare Hamrick v. Shipp, 169 Ala. 171, 52 S 932 (holding that, since a physician is not required to be infallible in diagnosis or treatment, the fact that the patient's disease is other than that which it was diagnosed to be is merely evidential, and not conclusive, on the question of negligence); Thorning v. Boriski, (Tex. Civ. A.) 283 SW 912 (holding that, while an erroneous diagnosis leading to an unnecessary operation is not usually a legal basis for damages, there are occasions when it may be).

"Malpractice may consist in a lack of skill or care in diagnosis as well as in treatment." Kuechler v. Volgmann, 180 Wis. 238, 242, 192 NW 1015, 31 ALR 826.

[a] **Rule applied to.**—(1) Chiropractor. Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31 ALR 826; Gibbons v. Harris, (Alta.) [1924] 1 DomLR 923, [1924] 1 WestWkly 674 [dism app [1923] 3 WestWkly 159]. (2) Veterinary surgeon. Boom v. Reed, 69 Hun 426, 23 NYS 421.

61. Logan v. Field, 75 Mo. A. 594.

62. Harriott v. Plimpton, 166 Mass. 585, 44 NE 992.

63. Cal.—Patterson v. Marcus, 265 P 222.

Ill.—Wallace v. Yudelson, 244 Ill. A. 320.

Ind.—Edwards v. Uland, 193 Ind. 376, 140 NE 546.

Me.—Nickerson v. Gerrish, 114 Me. 354, 96 A 235.

Mont.—Schumacher v. Murray Hospital, 58 Mont. 447, 193 P 397.

N. Y.—Gedney v. Kingsley, 16 NYS 792.

N. C.—Thornburg v. Long, 178 N. C. 589, 101 SE 99.

Okl.—Champion v. Kieth, 17 Okl. 204, 87 P 845.

Or.—Langford v. Jones, 18 Or. 307, 22 P 1064.

Pa.—English v. Free, 205 Pa. 624, 55 A 777.

Vt.—Willard v. Norcross, 86 Vt. 426, 85 A 904.

Wash.—Brydges v. Cunningham, 69 Wash. 8, 124 P 131; Wells v. Ferry-Baker Lumber Co., 57 Wash. 658, 107 P 869, 29 LRANS 426.

Wis.—Jaeger v. Stratton, 170 Wis. 579, 176 NW 61.

N. B.—James v. Crockett, 34 N. B. 540.

64. Wohlert v. Seibert, 23 Pa. Super. 213 (holding that a general practitioner cannot be held liable to a patient for diagnosing and treating a disease of the eye as conjunctivitis, when it was in fact glaucoma, where the evidence shows that glaucoma is a very rare disease; that its certain diagnosis could be made only by a skilled expert, of special training, skill, and experience; that it should be treated with remedies and appliances which are never expected to be within the reach of the general practitioner of medicine; and that its prominent symptoms were so nearly identical with those of conjunctivitis that the diagnosis made by defendant was one reasonably to be expected from a general practitioner).

65. Brown v. Purdy, 54 N. Y. Super. 109, 8 NYSt 143.

66. Minn.—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.

Mo.—Gottschall v. Geiger, 207 Mo. A. 89, 231 SW 87.

S. D.—Kelley v. Hollingsworth, 44 S. D. 23, 181 NW 959.

Vt.—Willard v. Norcross, 86 Vt.

lows, a wrong diagnosis gives no right of action;[67] but that it is no defense to an action for injuries resulting from an incorrect diagnosis, that the same result would have ensued from another disease of the patient, which was in its primary stages at the time of the diagnosis.[68]

[§ 114] **5. Errors of Judgment.**[69] It has been broadly held that a physician or surgeon is not liable for an honest error or mistake in judgment.[70] However, a limitation of this broad rule is recognized in cases that exempt from liability for errors of judgment only where there is a reasonable doubt as to the nature of the physical condition involved[71] or as to the proper course to be followed,[72] or where good judgments may differ.[73] Another limitation of the broad rule above stated[74] is found in cases that hold that a qualified physician[75] is not liable for an error of judgment if he applies ordinary and reasonable skill and care,[76] or his best judgment,[77]

426, 85 A 904.

N. S.—Stamper v. Rhindress, 41 N. S. 45, 2 EastLR 186.

[a] **Rule applied to advising or performing operation.**—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712; Gottschall v. Geiger, 207 Mo. A. 89, 231 SW 87; Kelly v. Hollingsworth, 44 S. D. 23, 181 NW 959.

67. Tomer v. Aiken, 126 Iowa 114, 101 NW 769; Trask v. Dunnigan, (Mo. A.) 299 SW 116, 117 [cit Cyc]; Dishman v. Northern Pac. Ben. Assoc., 96 Wash. 182, 164 P 943; Just v. Littlefield, 87 Wash. 299, 303, 151 P 780, AnnCas1917D 705 [cit Cyc]; Brydges v. Cunningham, 69 Wash. 8, 124 P 131.

68. Grainger v. Still, 187 Mo. 197, 85 SW 1114, 70 LRA 49.

69. In issuing wrongful certificate of insanity see infra § 128.

70. Colo.—Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136.

Ind.—McCoy v. Buck, (A.) 157 NE 456.

Mo.—Spain v. Burch, 169 Mo. A. 94, 154 SW 172; Gore v. Brockman, 138 Mo. A. 231, 119 SW 1082.

Mont.—Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.

N. H.—Leighton v. Sargent, 27 N. H. 460, 59 AmD 388.

N. Y.—Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429.

R. I.—Barker v. Lane, 23 R. I. 224, 49 A 963.

Tenn.—Burnett v. Layman, 133 Tenn. 323, 181 SW 157.

W. Va.—Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

"In conduct, like that of a surgeon, resting upon judgment, opinion, or theory, the ordinary rules for determining negligence do not prevail." Delahunt v. Finton, 244 Mich. 226, 221 NW 168, 169. To same effect Luka v. Lowrie, 171 Mich. 122, 136 NW 1106, 41 LRANS 290.

[a] **Reason for exception from general rule of negligence.**—The reasons for excepting malpractice cases from the rule that the exercise of defendant's best judgment is no defense to an action for negligence are to be found in the character of emergencies physicians meet which often preclude deliberation; in the nature of their undertaking which contracts for individual judgment and skill; in the peculiarity of the human constitution, which presents difficulties not arising from insensate matter; in the nature of medical science, which is based on progressive knowledge; and in the inherent uncertainty of the expert testimony involved. Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.

[b] **Rule applied to:** (1) Physician determining necessity of an operation. Burnett v. Layman, 133 Tenn. 323, 181 SW 157. (2) Nurse. Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

[c] **Judgment must be based on physician's intelligence.**—Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429.

[d] **X-ray examinations made for personal purposes.**—Where X-ray examinations were made by a physician for personal purposes after the completion of a diagnosis based on a previous X-ray examination, he cannot escape liability for X-ray burns on the ground of honest mistake in the careful application of a treatment intended to be applied. Evans v. Clapp, (Mo. A.) 231 SW 79.

71. Ala.—Torrance v. Wells, 122 S 322; McKinnon v. Polk, 121 S 539; Carraway v. Graham, 218 Ala. 453, 118 S 807; Moore v. Smith, 215 Ala. 592, 111 S 918; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas1916C 1097; Peck v. Henderson, 22 Ala. A. 541, 118 S 258 [certiorari den 218 Ala. 233, 118 S 262].

Colo.—Jackson v. Burnham, 20 Colo. 532, 39 P 577.

Ga.—Smith v. Overby, 30 Ga. 241.

Ind.—Edwards v. Uland, (A.) 131 NE 240.

Kan.—James v. Grigsby, 114 Kan. 627, 220 P 267; Manser v. Collins, 69 Kan. 290, 76 P 851; Pettigrew v. Lewis, 46 Kan. 78, 26 P 458; Tefft v. Wilcox, 6 Kan. 46.

La.—Theodore v. Ellis, 141 La. 709, 723, 75 S 655 [quot Cyc].

Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593.

Minn.—Berkholz v. Benepe, 153 Minn. 335, 190 NW 800; Clark v. George, 148 Minn. 52, 54, 180 NW 1011 [cit Cyc]; Harju v. Allen, 146 Minn. 23, 177 NW 1015; Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.

Mo.—Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed on other grounds sub nom. State v. Ellison, 266 Mo. 604, 182 SW 996, AnnCas 1918C 1].

Mont.—Schumacher v. Murray Hospital, 58 Mont. 447, 193 P 397.

N. C.—Thornburg v. Long, 178 N. C. 589, 101 SE 99; Brewer v. Ring, 176 N. C. 476, 99 SE 358; Long v. Austin, 153 N. C. 508, 69 SE 500.

Okl.—Wiley v. Wigg, 124 Okl. 30, 254 P 22; Champion v. Kieth, 17 Okl. 204, 87 P 845.

Or.—Williams v. Poppleton, 3 Or. 139.

S. D.—Kelley v. Hollingsworth, 44 S. D. 23, 181 NW 959.

Utah.—Everts v. Worrell, 58 Utah 238, 197 P 1043.

Wash.—Just v. Littlefield, 87 Wash. 299, 151 P 780, AnnCas1917D 705.

W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 238, 110 SE 560, 22 ALR 323 [quot Cyc].

[a] **Rule applied to determining upon operation.**—Edwards v. Uland, (Ind. A.) 131 NE 240; Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712; Brewer v. Ring, 176 N. C. 476, 99 SE 358; Just v. Littlefield, 87 Wash. 299, 151 P 780, 781, AnnCas 1917D 705 [cit Cyc].

72. See cases supra note 71.

73. Jackson v. Burnham, 20 Colo. 532, 39 P 577; Bailey v. St. Louis-San Francisco R. Co., (Mo. A.) 296 SW 477; Nash v. Royster, 189 N. C. 408, 127 SE 356; Mullinax v. Hord, 174 N. C. 607, 94 SE 426; Long v. Austin, 153 N. C. 508, 69 SE 500.

74. See supra text and note 70.

75. Unqualified physician see infra text and notes 88, 89.

76. Ala.—McKinnon v. Polk, 121 S 539; Carraway v. Graham, 218 Ala. 453, 118 S 807; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas1916C 1097.

Cal.—Markart v. Zeimer, 67 Cal. A. 363, 227 P 683.

Colo.—Jackson v. Burnham, 20 Colo. 532, 39 P 577; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Ill.—Fisher v. Niccolls, 2 Ill. A. 484.

Ind.—Edwards v. Uland, 193 Ind. 376, 140 NE 546.

Kan.—Paulich v. Nipple, 104 Kan. 801, 180 P 771.

La.—Theodore v. Ellis, 141 La. 709, 723, 75 S 655 [quot Cyc].

Me.—Merrill v. Odiorne, 113 Me. 424, 94 A 753; Coombs v. King, 107 Me. 376, 78 A 468, AnnCas1912C 1121; Patten v. Wiggin, 51 Me. 594, 81 AmD 593.

Minn.—Moehlenbrock v. Parke, 145 Minn. 100, 176 NW 169; Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.

Mo.—Fausette v. Grim, 193 Mo. A. 585, 186 SW 1177; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed on other grounds sub nom. State v. Ellison, 266 Mo. 604, 182 SW 996, Ann Cas1918C 1].

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Schumacher v. Murray Hospital, 58 Mont. 447, 193 P 397.

Nebr.—Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889.

N. Y.—Gerken v. Plimpton, 62 App. Div. 35, 70 NYS 793.

N. C.—Thornburg v. Long, 178 N. C. 589, 101 SE 99; Brewer v. Ring, 176 N. C. 476, 99 SE 358.

Oh.—Havens v. Hardesty, 18 Oh. Cir. Ct. 891, 9 Oh. Cir. Dec. 856.

Okl.—Bungardt v. Younger, 112 Okl. 165, 239 P 469.

Or.—Rayburn v. Day, 126 Or. 135, 268 P 1002; Emerson v. Lumbermen's Hospital Assoc., 100 Or. 472, 198 P 231; Lehman v. Knott, 100 Or. 59, 196 P 476; Hills v. Shaw, 69 Or. 460, 137 P 229; Williams v. Poppleton, 3 Or. 139; Heath v. Glisan, 3 Or. 64.

Pa.—Remley v. Plummer, 79 Pa. Super. 117.

S. D.—Kelley v. Hollingsworth, 44 S. D. 23, 181 NW 959.

Tex.—Graham v. Gautier, 21 Tex. 111; Wilkins v. Ferrell, 10 Tex. Civ. A. 231, 30 SW 450.

Utah.—Everts v. Worrell, 58 Utah 238, 197 P 1043.

Wash.—Brydges v. Cunningham, 69 Wash. 8, 124 P 131.

W. Va.—Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 238, 110 SE 560, 22 ALR 323 [quot Cyc]; Dye v. Corbin, 59 W. Va. 266, 53 SE 147.

Wis.—Rost v. Roberts, 180 Wis. 207, 192 NW 38; Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111.

Wyo.—Phifer v. Baker, 34 Wyo. 415, 244 P 637; Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

See Hesse v. Knippel, 1 Mich. N. P. 109, 110 ("not answerable for the errors of an enlightened judgment"). "If the faithful and skillful physician were liable to answer for every error of judgment, it would place the medical profession beyond the reasonable protection of the law." Heath v. Glisan, 3 Or. 64, 68.

[a] **Rule applied to:** (1) Dentist. Wilkins v. Ferrell, 10 Tex. Civ. A. 231, 30 SW 450. (2) Determining upon operation. Fausette v. Grim, 193 Mo. A. 585, 186 SW 1177.

[b] **Rule may be varied** by special circumstances or agreements. Graham v. Gautier, 21 Tex. 111.

[c] **Well considered case.**—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.

77. Ill.—Kruger v. McCaughey, 149 Ill. A. 440; McKee v. Allen, 94 Ill. A. 147.

Me.—Merrill v. Odiorne, 113 Me. 424, 94 A 753; Coombs v. King, 107 Me. 376, 78 A 468, AnnCas1912C 1121.

or keeps within recognized and approved methods[78] or the common practice;[79] or if he forms his judgment after a careful examination.[80] Thus, where there is more than one recognized and approved method of treatment applicable to the case, a physician or surgeon is not liable for an honest mistake of judgment in selecting a method.[81] Whether errors of judgment will or will not make a physician or surgeon liable in a given case depends not merely upon the fact that he may be ordinarily skillful, but on whether he has treated the case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession.[82] The exemption from liability does not extend to a case where the error occurs by reason of a physician's lack of the knowledge which he should possess or his failure to exercise proper care;[83] thus a physician is liable for the consequences if the error of judgment is so gross as to be inconsistent with the exercise of that degree of skill and care which it is his duty to apply.[84] It has been held that there is a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion, or in subsequent conduct in the selection and use of instrumentalities with which the physician may execute his judgment;[85] thus, if he omits to inform himself, by proper examination, as to the facts and circumstances, and injury results, he is not relieved of liability for errors of judgment.[86]

In operating in an emergency, a surgeon is not liable for an honest error in judgment.[87]

Unqualified or unskilled physician. A physician not possessing the requisite qualifications,[88] or one not possessing competent skill,[89] is not exempted from liability because his mistake was caused by an error of judgment.

[§ 115] **6. Attention to or Abandonment or Neglect of Case—a. Duty as to Attendance.** A physician or surgeon, upon undertaking an operation or other case, is under the duty, in the absence of an agreement limiting the service, of continuing his attendance, after the operation or first treatments, so long as the case requires attention;[90] and a surgeon, in his treatment subsequent to an opera-

Mo.—Bailey v. St. Louis-San Francisco R. Co., (A.) 296 SW 477.
Nebr.—Van Skike v. Potter, 53 Nebr. 28, 73 NW 295.
Pa.—Van den Beemt v. Pfahler, 1 Pa. Dist. & Co. 255.
Wash.—Brydges v. Cunningham, 69 Wash. 8, 124 P 131.
But see Robinson v. Crotwell, 175 Ala. 194, 57 S 23 (holding that an instruction that medical men are exempted from liability for mere errors of judgment if they give the patient the benefit of their best judgment is defective in not requiring any skill, or that the judgment shall be informed and educated).

78. Kan.—Paulich v. Nipple, 104 Kan. 801, 180 P 771.
Mo.—Bailey v. St. Louis-San Francisco R. Co., (A.) 296 SW 477.
N. Y.—Wells v. World's Dispensary Medical Assoc., 9 NYSt 452 [aff 120 N. Y. 630 mem, 24 NE 276, 2 Silv. A. 575].
Wash.—Dahl v. Wagner, 87 Wash. 492, 151 P 1079; Wells v. Ferry-Baker Lumber Co., 57 Wash. 658, 107 P 869, 29 LRANS 426.
W. Va.—Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147.
But see Fisher v. Niccolls, 2 Ill. A. 484 (holding that a modification of an instruction that a physician is not liable for a mistake in judgment if he used ordinary skill and care, by the addition of the proviso that in making his judgment he did not disregard the settled rules and principles of medical science, is improper).

79. Rost v. Roberts, 180 Wis. 207, 192 NW 38.

80. Butler v. Rule, 29 Ariz. 405, 242 P 436; Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 64 AmSR 655; MacKenzie v. Carman, 103 App. Div. 246, 92 NYS 1063; Phifer v. Baker, 34 Wyo. 415, 244 P 637.

81. Cal.—Linn v. Piersol, 37 Cal. A. 171, 173 P 763.
Minn.—Korman v. Hagen, 165 Minn. 320, 206 NW 650.
Mo.—Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72.
Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047.
Pa.—Barnard v. Schell, 85 Pa. Super. 329; Remley v. Plummer, 79 Pa. Super. 117.
Wash.—Swanson v. Hood, 99 Wash. 506, 170 P 135; Lorenz v. Booth, 84 Wash. 550, 147 P 31; Sawdey v. Spokane Falls, etc., R. Co., 30 Wash. 349, 70 P 972, 94 AmSR 880.
W. Va.—Browning v. Hoffman, 86 W. Va. 468, 103 SE 484.
Adoption of one of recognized methods not negligence see supra § 112.

82. Colo.—Jackson v. Burnham, 20 Colo. 532, 39 P 577.
Ida.—McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 660, 156 P 115, AnnCas1918A 380 [quot Cyc].
Iowa.—Kline v. Nicholson, 151 Iowa 710, 130 NW 722.
Minn.—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.
Mo.—West v. Martin, 31 Mo. 375, 80 AmD 107.
Mont.—Schumacher v. Murray Hospital, 58 Mont. 447, 451, 193 P 397 [cit Cyc].
Nebr.—Johnson v. Winston, 68 Nebr. 425, 94 NW 607.
N. C.—Brewer v. Ring, 176 N. C. 476, 99 SE 358.
W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 238, 110 SE 560, 22 ALR 323 [quot Cyc].

83. Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136; Jackson v. Burnham, 20 Colo. 532, 39 P 577; Mullinax v. Hord, 174 N. C. 607, 94 SE 426; Long v. Austin, 153 N. C. 508, 69 SE 500; Everts v. Worrell, 58 Utah 238, 197 P 1043. And see cases infra note 84.

84. Ill.—Kruger v. McCaughey, 149 Ill. A. 440; McKee v. Allen, 94 Ill. A. 147.
Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593; Howard v. Grover, 28 Me. 97, 48 AmD 478.
Minn.—Moehlenbrock v. Parke, 145 Minn. 100, 176 NW 169.
Mo.—West v. Martin, 31 Mo. 375, 80 AmD 107.
Mont.—Schumacher v. Murray Hospital, 58 Mont. 447, 193 P 397.
Nebr.—Johnson v. Winston, 68 Nebr. 425, 94 NW 607.
N. H.—Leighton v. Sargent, 27 N. H. 460, 59 AmD 388.
N. Y.—Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356.
Pa.—Van den Beemt v. Pfahler, 1 Pa. Dist. & Co. 255.
Vt.—Wilkins v. Brock, 81 Vt. 332, 70 A 572.
W. Va.—Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 SE 481; Dye v. Corbin, 59 W. Va. 266, 53 SE 147.
Wyo.—Phifer v. Baker, 34 Wyo. 415, 244 P 637.
[a] **Thus** a surgeon persisting in the use of an anæsthetic, after a warning, from the evident effect on the patient, which would impel one of reasonable prudence to desist, is liable for the resulting death. Moehlenbrock v. Parke, 145 Minn. 100, 176 NW 169.
[b] **That an operation was so palpably unnecessary** that a surgeon of ordinary care and prudence would not have advised or undertaken it must be shown by plaintiff, as well as that defendant physician was mistaken in his judgment that the operation was proper. Gottschall v. Geiger, 207 Mo. A. 89, 231 SW 87; Fausette v. Grim, 193 Mo. A. 585, 186 SW 1177.
[c] **An oculist** is liable for gross mistakes. Stern v. Lanng, 106 La. 738, 31 S 303.
Degree of skill and care required see supra §§ 101-109.

85. Colo.—Tadlock v. Lloyd, 65 Colo. 40, 173 P 200, 202 [quot Cyc].
Minn.—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.
N. C.—Brewer v. Ring, 176 N. C. 476, 99 SE 358.
Wash.—Just v. Littlefield, 87 Wash. 299, 303, 151 P 780, AnnCas1917D 705 [cit Cyc].
W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 238, 110 SE 560, 22 ALR 323 [quot Cyc].

86. Colo.—Tadlock v. Lloyd, 65 Colo. 40, 173 P 200, 202 [quot Cyc].
Mich.—Dailey v. Shaffer, 178 Mich. 574, 146 NW 192.
Minn.—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.
N. C.—Brewer v. Ring, 176 N. C. 476, 99 SE 358.
Wash.—Just v. Littlefield, 87 Wash. 299, 151 P 780, AnnCas1917D 705 [cit Cyc].
W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 238, 110 SE 560, 22 ALR 323 [quot Cyc].
[a] **Thus** a physician attending a child suffering from scarlet fever is liable for failure to make an effort to inform himself of the condition of the patient and the progress of the disease, he being guilty, not of an error of judgment, but of a failure to secure data on which to base any judgment. Tadlock v. Lloyd, 65 Colo. 40, 173 P 200.

87. Delahunt v. Finton, 244 Mich. 226, 221 NW 168; Luka v. Lowrie, 171 Mich. 122, 136 NW 1106, 41 LRANS 290.

88. Farrell v. Haze, 157 Mich. 374, 122 NW 197.

89. Carpenter v. Blake, 50 N. Y. 696 mem [rev 60 Barb. 488].

90. U. S.—Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174.
Ark.—Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 SW 703, 3 AmSR 224.
Cal.—Lathrope v. Flood, 6 Cal. Unrep. Cas. 637, 63 P 1007; Hopkins v. Heller, 59 Cal. A. 447, 210 P 975.
Colo.—Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814.

tion, is required to exercise reasonable and ordinary skill and care.[91] The obligation of continuing attention can be terminated only by the cessation of the necessity which gave rise to the relation of physician and patient,[92] or by the discharge of the physician by the patient,[93] or by the physician's withdrawing from the case, after giving the patient reasonable notice, so as to enable him to secure other medical attendance,[94] a physician having the right to withdraw from a case upon giving the proper notice.[95] As otherwise stated, the rule is that a physician is under the duty of treating a patient so long as the professional relation between them lasts.[96] But a physician called only for a specific occasion or service is under no duty to continue his visits or treatment thereafter.[97] In determining when his attendance may safely and properly be discontinued, a physician or surgeon is bound to use reasonable and ordinary care and skill.[98] A physician who contracts without qualification to treat one person cannot excuse himself for failure to attend on the ground that another patient required his attention.[99]

[§ 116] **b. Unwarranted Abandonment.** The unwarranted abandonment of a case after its assumption will render a physician or surgeon liable in damages,[1] at least where he does not give reasonable notice,[2] or provide a competent physician in his place;[3] and he is also liable for increased pain and suffering resulting therefrom.[4]

Ill.—Ritchey v. West, 23 Ill. 385.
Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.
Iowa.—Mucci v. Houghton, 89 Iowa 608, 57 NW 305.
Ky.—Blackburn v. Curd, 106 SW 1186, 32 KyL 789.
Me.—Williams v. Gilman, 71 Me. 21; Ballou v. Prescott, 64 Me. 305; Barbour v. Martin, 62 Me. 536.
Md.—Dashiell v. Griffith, 84 Md. 363, 35 A 1094.
Minn.—Nelson v. Farrish, 143 Minn. 368, 372, 173 NW 715 [cit Cyc].
Miss.—Hood v. Moffett, 109 Miss. 757, 69 S 664, LRA1916B 622, AnnCas 1917E 410.
Mo.—Marshall v. Brown, 205 Mo. A. 390, 224 SW 13.
Nebr.—Stohlman v. Davis, 220 NW 247.
N. Y.—Gerken v. Plimpton, 62 App. Div. 35, 70 NYS 793; Boom v. Reed, 69 Hun 426, 23 NYS 421; Potter v. Virgil, 67 Barb. 578; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356.
Oh.—Bowers v. Santee, 99 Oh. St. 361, 124 NE 238; Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639.
Okl.—Bungardt v. Younger, 112 Okl. 165, 239 P 469.
R. I.—Morrell v. Lalonde, 45 R. I. 112, 120 A 435.
Tenn.—Burnett v. Layman, 133 Tenn. 323, 181 SW 157.
Tex.—Lee v. Moore, (Civ. A.) 162 SW 437, 440 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc].
Va.—Fox v. Mason, 139 Va. 667, 124 SE 405.
Wash.—Huber v. Hamley, 122 Wash. 511, 210 P 769.
W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.
Ont.—Hunter v. Ogden, 31 U. C. Q. B. 132.

[a] **Rule applied to veterinary surgeon.**—Williams v. Gilman, 71 Me. 21.

[b] **Where, after discharge from hospital,** an operation became necessary to relieve the patient of pain and suffering from the ailment treated, it was the duty of the physician, under his contract to treat the patient, to perform such operation. Dahl v. Wagner, 87 Wash. 492, 151 P 1079.

[c] **Limitation of rule.**—"[This rule] is not of universal application. A Philadelphia surgeon sent for from Virginia to operate could not be expected to remain and superintend the treatment, but one who goes to Philadelphia to see a surgeon and specialist who undertakes his case has a right to look for reasonable care after the operation is performed." Fox v. Mason, 139 Va. 667, 673, 124 SE 405.

[d] **If new conditions arise after patient leaves hospital,** not the natural result of the previous conditions, the physicians are not liable for damages caused by such new conditions, unless the patient exercises due care by informing them thereof. Lemon v. Kessel, 202 Iowa 273, 209 NW 393.

91. Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174; Adolay v. Miller, 60 Ind. A. 656, 111 NE 313; Bungardt v. Younger, 112 Okl. 165, 239 P 469.

92. Ark.—Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 SW 703, 3 Am SR 224.
Cal.—Hopkins v. Heller, 59 Cal. A. 447, 210 P 975.
Me.—Ballou v. Prescott, 64 Me. 305.
Md.—Dashiell v. Griffith, 84 Md. 363, 35 A 1094.
N. Y.—Gerken v. Plimpton, 62 App. Div. 35, 70 NYS 793; Potter v. Virgil, 67 Barb. 578; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.
Oh.—Tucker v. Gillette, 22 Oh. Cir. Ct. 664, 12 Oh. Cir. Dec. 401.
Tenn.—Burnett v. Layman, 133 Tenn. 323, 181 SW 157.
W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

93. Cal.—Lathrope v. Flood, 6 Cal. Unrep. Cas. 637, 63 P 1007; Hopkins v. Heller, 59 Cal. A. 447, 210 P 975.
Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.
Nebr.—Stohlman v. Davis, 220 NW 247.
N. Y.—Gerken v. Plimpton, 62 App. Div. 35, 70 NYS 793; Potter v. Virgil, 67 Barb. 578; Gedney v. Kingsley, 16 NYS 792; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.
Oh.—Tucker v. Gillette, 22 Oh. Cir. Ct. 664, 12 Oh. Cir. Dec. 401.
Tex.—Lee v. Moore, (Civ. A.) 162 SW 437, 440 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc].
W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

[a] **Where a patient leaves physician's sanitarium** without his consent and over his objection, during his temporary absence, he is under no duty to follow the patient and be further liable for the care of the ailment. Miles v. Harris, (Tex. Civ. A.) 194 SW 839.

94. Cal.—Lathrope v. Flood, 6 Cal. Unrep. Cas. 637, 63 P 1007; Hopkins v. Heller, 59 Cal. A. 447, 210 P 975.
Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.
Me.—Williams v. Gilman, 71 Me. 21; Ballou v. Prescott, 64 Me. 305; Barbour v. Martin, 62 Me. 536.
Nebr.—Stohlman v. Davis, 220 NW 247.
N. Y.—Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356.
Oh.—Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639.
Okl.—Bungardt v. Younger, 112 Okl. 165, 239 P 469.
Tex.—Lee v. Moore, (Civ. A.) 162 SW 437, 440 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc].
W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

[a] **What is fair notice** to a patient depends upon the circumstances of each case. Burnett v. Layman, 133 Tenn. 323, 181 SW 157.

[b] **But by simply staying away without notice** to the patient a physician cannot discharge a case and relieve himself of responsibility for it. Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814.

95. Marshall v. Brown, 205 Mo. A. 390, 394, 224 SW 13 [cit Cyc].

96. Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512.

97. Tomer v. Aiken, 126 Iowa 114, 101 NW 769; Miller v. Blackburn, 170 Ky. 263, 185 SW 864; Nelson v. Farrish, 143 Minn. 368, 173 NW 715.

98. Ill.—Ritchey v. West, 23 Ill. 385.
Iowa.—Mucci v. Houghton, 89 Iowa 608, 57 NW 305.
Ky.—Miller v. Blackburn, 170 Ky. 263, 185 SW 864.
Me.—Ballou v. Prescott, 64 Me. 305.
Md.—Dashiell v. Griffith, 84 Md. 363, 35 A 1094.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356.
Oh.—Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639.
W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

99. Hood v. Moffett, 109 Miss. 757, 69 S 664, LRA1916B 622, AnnCas1917E 410; Young v. Jordan, (W. Va.) 145 SE 41, 42 [cit Cyc]. But see Smith v. Rae, 46 Ont. L. 518, 17 OntWN 253, 51 DomLR 323 (holding that a physician, on undertaking to attend a woman in childbirth, does not thereby undertake to drop all other matters to attend the patient, unless informed that the situation is critical and urgent).

1. Cal.—Lathrope v. Flood, 6 Cal. Unrep. Cas. 637, 63 P 1007.
Colo.—Tadlock v. Lloyd, 65 Colo. 40, 173 P 200.
Ky.—Miller v. Blackburn, 170 Ky. 263, 185 SW 864.
Me.—Barbour v. Martin, 62 Me. 536.
Nebr.—Stohlman v. Davis, 220 NW 247, 250 [quot Cyc].
N. Y.—Boom v. Reed, 69 Hun 426, 23 NYS 421.
N. C.—Mullinax v. Hord, 174 N. C. 607, 613, 94 SE 426 [quot Cyc].
R. I.—Morrell v. Lalonde, 45 R. I. 112, 120 A 435.
Tenn.—Burnett v. Layman, 133 Tenn. 323, 181 SW 157.
Tex.—Lee v. Moore, (Civ. A.) 162 SW 437, 440 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc].
W. Va.—Young v. Jordan, 145 SE 41.
Ont.—Hunter v. Ogden, 31 U. C. Q. B. 132.

[a] **Rule applied to veterinary surgeon.**—Boom v. Reed, 69 Hun 426, 23 NYS 421.

2. Miller v. Blackburn, 170 Ky. 263, 185 SW 864; Barbour v. Martin, 62 Me. 536; Stohlman v. Davis, (Nebr.) 220 NW 247.

[a] **Substitution of much less experienced physician** by the physician engaged, whose condition prevents the rendition of further services, without notifying the patient so as to enable him to select another physician, is in effect an utter abandonment of the case. Stohlman v. Davis, (Nebr.) 220 NW 247.

3. Young v. Jordan, (W. Va.) 145 SE 41.

4. Lathrope v. Flood, 6 Cal. Unrep.

[§ 117] **c. Frequency of Visits.** A physician is not chargeable with neglect in allowing intervals to elapse between his visits, where the patient needs no attention during the intervals,[5] but he is negligent in doing so where attention is needed.[6] It has been held that, while a physician cannot be excused for harmful neglect of some of his patients on the ground of the large number of patients taken on,[7] the frequency of the visits to be made is a question for the physician to determine, if he uses ordinary judgment.[8]

[§ 118] **d. Temporarily Leaving Practice.** A physician has a right to leave his practice temporarily if he makes provision for the attendance of a competent physician upon his patients.[9] If he notifies a patient that he is going away, and indicates who will attend him in his stead, no neglect can be imputed to him.[10] But if he remains away longer than he had informed the patient he would, he is liable for injury resulting from the lack of treatment during his absence.[11]

[§ 119] **e. Effect of Discharge.** When a physician has been discharged by a patient, he is relieved of responsibility,[12] if his treatment of the case was proper up to the time of his discharge;[13] and he cannot be held liable for injury arising from subsequent treatment by another physician.[14] A surgeon discharged by a patient cannot be held liable for an injury resulting from the surgeon's failure to take a step which properly should not have been taken until after the time at which he was discharged.[15] But if after his discharge the physician or surgeon volunteers and offers advice which deceives or misleads the patient, he is responsible for injuries arising therefrom.[16]

[§ 120] **7. Operating with or without Consent—a. In General.** Where a patient is in possession of his faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician;[17] and a surgeon who performs an operation without his patient's consent, express or implied, commits an assault for which he is liable in damages.[18] The patient's consent may be implied from circumstances;[19] thus, if he voluntarily submits to an operation, his consent will be presumed, unless he was the victim of false and fraudulent misrepresentations.[20] If the patient is for any reason not competent to consent, the consent of

Cas. 637, 63 P 1007; Mullinax v. Hord, 174 N. C. 607, 613, 94 SE 426 [quot Cyc]; Lee v. Moore, (Civ. A.) 162 SW 437, 440 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc]; Young v. Jordan, (W. Va.) 145 SE 41.

5. Tomer v. Aiken, 126 Iowa 114, 101 NW 769; Rickley v. Stratton, 3 OntWN 1341, 22 OntWR 282, 4 Dom LR 595.

[a] **Whether visits were made with sufficient frequency** depends on the custom, in similar localities, in the treatment of similar cases, and not upon the custom of any particular physician in his own practice. Tomer v. Aiken, 126 Iowa 114, 101 NW 769.

6. Tomer v. Aiken, supra; Adams v. Henry, 165 Mich. 554, 131 NW 62, AnnCas1912C 829; Miles v. Hoffman, 127 Wash. 653, 221 P 316.

7. Sinclair v. Brunson, 212 Mich. 387, 180 NW 358, 12 ALR 593.

8. Sinclair v. Brunson, supra. And see infra § 206.

9. Ewing v. Goode, 78 Fed. 442; Lee v. Moore, (Civ. A.) 162 SW 437, 440 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc]; Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

10. Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

11. Gerken v. Plimpton, 62 App. Div. 35, 70 NYS 793.

12. Ill.—Prichard v. Moore, 75 Ill. A. 553.

Ind.—Welch v. Page, 85 Ind. A. 301, 154 NE 24.

Iowa.—Tomer v. Aiken, 126 Iowa 114, 101 NW 769.

Ky.—Miller v. Blackburn, 170 Ky. 263, 185 SW 864.

N. Y.—Carpenter v. Blake, 75 N. Y. 12.

Oh.—Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.

Tex.—Urrutia v. Patino, (Civ. A.) 297 SW 512; Miles v. Harris, (Civ. A.) 194 SW 839.

Wash.—Williams v. Wurdemann, 71 Wash. 390, 128 P 639.

W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

[a] **That one of two physicians employed was negligent** in not attending his patient with sufficient frequency is immaterial on the liability of the other, who was discharged from attending after his first call. Tomer v. Aiken, 126 Iowa 114, 101 NW 769.

13. Williams v. Wurdemann, 71 Wash. 390, 128 P 639.

14. Welch v. Page, 85 Ind. A. 301, 154 NE 24; Carpenter v. Blake, 75 N. Y. 12; Link v. Sheldon, 18 NYS 815 [aff 136 N. Y. 1, 32 NE 696]; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.

[a] **Rule applied to dentist.**—Welch v. Page, 85 Ind. A. 301, 154 NE 24.

Liability for negligence or malpractice of others generally see infra §§ 139-144.

15. Kendall v. Brown, 74 Ill. 232.

16. Carpenter v. Blake, 75 N. Y. 12.

17. Ala.—Knowles v. Blue, 209 Ala. 27, 95 S 481.

Ill.—Pratt v. Davis, 224 Ill. 300, 79 NE 562, 7 LRANS 609 [aff 118 Ill. A. 161]

Kan.—Hershey v. Peake, 115 Kan. 562, 223 P 1113.

Md.—State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587.

Mass.—McClallen v. Adams, 19 Pick. 333, 31 AmD 140.

Minn.—Mohr v. Williams, 95 Minn. 261, 104 NW 12, 111 AmSR 462, 1 LRANS 439.

Mo.—Fausette v. Grim, 193 Mo. A. 585, 596, 186 SW 1177 [cit Cyc].

Nebr.—McGuire v. Rix, 225 NW 120.

N. J.—Bennan v. Parsonnet, 83 N. J. L. 20, 83 A 948.

N. Y.—Schoendorff v. New York Hospital Soc., 211 N. Y. 125, 105 NE 92, 52 LRANS 505, AnnCas1915C 581.

Oh.—Francis v. Brooks, 24 Oh. A. 136, 156 NE 609.

Okl.—Rolater v. Strain, 39 Okl. 572, 137 P 96, 50 LRANS 880.

Or.—Hively v. Higgs, 120 Or. 588, 253 P 363, 53 ALR 1052.

W. Va.—Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

Wis.—Throne v. Wandell, 176 Wis. 97, 101, 186 NW 145 [quot Cyc].

Eng.—Slater v. Baker, 2 Wils. 359, 95 Reprint 860.

"The patient must be the final arbiter as to whether he shall take his chances with the operation or take his chances of living without it. Such is the natural right of the individual which the law recognizes as a legal right." Kinkead Torts § 375 [quot Bennan v. Parsonnet, 83 N. J. L. 20, 22, 83 A 948].

[a] **Except in very extreme cases,** a surgeon has no legal right to operate upon a patient without his consent. Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

18. Kan.—Hershey v. Peake, 115 Kan. 562, 223 P 1113.

N. Y.—Schoendorff v. New York Hospital Soc., 211 N. Y. 125, 105 NE 92, 52 LRANS 505, AnnCas1915C 581.

Oh.—Francis v. Brooks, 24 Oh. A. 136, 156 NE 609.

Okl.—Rolater v. Strain, 39 Okl. 572, 137 P 96, 50 LRANS 880.

Or.—Hively v. Higgs, 120 Or. 588, 253 P 363, 53 ALR 1052. See Hamilton v. Kelsey, 126 Or 26, 35, 268 P 750 ("A physician is not generally at liberty to attend to any organ or member of the body that he may feel requires adjustment. There are some limitations upon his authority").

Wis.—Throne v. Wandell, 176 Wis. 97, 101, 186 NW 145 [quot Cyc].

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body." Schloendorff v. New York Hospital Soc., 211 N. Y. 125, 129, 105 NE 92, 52 LRANS 505, AnnCas1915C 581.

[a] **"Unauthorized operation" and "malpractice" distinguished.**—The distinction between an unauthorized operation amounting to assault and battery and negligence such as would constitute malpractice is that the former is intentional, the latter unintentional. Hershey v. Peake, 115 Kan. 562, 223 P 1113, 1114 [cit C. J.].

Assault generally see Assault and Battery 5 C. J. p 608.

19. Ala.—Knowles v. Blue, 209 Ala. 27, 95 S 481.

Md.—State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587.

Mass.—McClallen v. Adams, 19 Pick. 333, 31 AmD 140.

Nebr.—McGuire v. Rix, 225 NW 120.

Okl.—Rolater v. Strain, 39 Okl. 572, 137 P 96, 50 LRANS 880.

See Gould v. Kerlin, 192 Ill. A. 427.

[a] **Circumstances held to imply consent.**—McGuire v. Rix, (Nebr.) 225 NW 120.

20. Knowles v. Blue, 209 Ala. 27, 95 S 481; State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587; McClallen v. Adams, 19 Pick. (Mass.) 333, 31 AmD 140. See Gould v. Kerlin, 192 Ill. A. 427.

[a] **Consent presumed despite direct prohibition** of performance of operation under certain circumstances. Beatty v. Cullingworth, 44 Cent LJ 153.

[b] **Exploratory incision for diagnosis authorized.**—Directions by a patient to a physician authorizing an

some one who, under the circumstances, would be legally authorized to give it may be obtained.[21] Where an emergency arises calling for immediate action for the preservation of the life or health of the patient, and it is impracticable to obtain his consent or the consent of anyone authorized to speak for him, it is the duty of the physician to perform such operation as good surgery demands, without such consent.[22] And if, in the course of an operation to which the patient consented, the physician discovers conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life of the patient, he will, although no express consent be obtained or given, be justified in extending the operation to remove and overcome them.[23] But the removal of a bone during the course of an operation, contrary to the understanding between the surgeon and the patient, renders the surgeon liable in damages.[24] The implied appointment of the surgeon as the legal representative, during the period of unconsciousness, of a patient who has appointed no other person, does not give the surgeon a license to operate on the patient against his will or by subterfuge,[25] or to perform a different operation than that consented to, or one involving risks and results not contemplated.[26]

[§ 121] **b. Necessity of Consent of Spouse or Parent.** It has been held that a surgeon is justified in performing an operation upon a married woman with her consent, when he deems the operation necessary, whether her husband consents or not;[27] but other cases, apparently assuming that the husband's consent is necessary, hold that, by placing his wife under the care of a surgeon for treatment, a husband impliedly consents to such operations as may be found necessary or expedient.[28] A father's consent to the performance of an operation upon a child seventeen years of age has been held unnecessary;[29] and it has been held that in case of an emergency a surgeon may operate on a child without waiting for authority from the parents, where it appears impracticable to get it.[30] But in the absence of an emergency an operation performed on a child without the consent of the parents is a legal wrong;[31] and adult sisters of the child, who are its temporary custodians, have no authority to give consent under such circumstances.[32] Only a reasonable and diligent effort on the part of the physician to find the parents and advise them of the situation has been required.[33]

[§ 122] **8. Giving Instructions.** It is the duty of a physician or surgeon, in dealing with a case, to give the patient or his family or attendants all necessary and proper instructions as to the care and attention to be given to the patient and the cautions to be observed;[34] and a failure to do so is negligence which will render him liable for resulting injury.[35]

[§ 123] **9. Leaving Foreign Objects in Patient's Body.** A surgeon by permitting, through his fail-

operation for a specific ailment by clear implication authorizes him to diagnose the case to discover the cause, and to make any necessary initial exploratory incisions for that purpose. King v. Carney, 85 Okl. 62, 204 P 270.

21. Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas 1916C 1097; Moss v. Rishworth, (Tex. Commn. A.) 222 SW 225 [aff (Civ. A.) 191 SW 843].

[a] **Thus,** where the necessity is urgent and the patient is incapacitated to consent, it has been held that the surgeon is entitled to act upon the consent of the patient's mother. Barfield v South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas1916C 1097.

22. Ill.—Pratt v. Davis, 224 Ill. 300, 79 NE 562, 7 LRANS 609 [aff 118 Ill. A. 161].

La.—Short's Succ., 45 La. Ann. 1485, 14 S 184.

Mich.—Delahunt v. Finton, 244 Mich. 226, 221 NW 168; Luke v. Lowrie, 171 Mich. 122, 135, 136 NW 1106, 41 LRANS 290 [cit Cyc].

Minn.—Mohr v. Williams, 95 Minn. 261, 104 NW 12, 111 AmSR 462, 1 LRANS 439.

Nebr.—McGuire v. Rix, 225 NW 120.

N. Y.—Schloendorff v. New York Hospital Soc., 211 N. Y. 125, 105 NE 92, 52 LRANS 505, AnnCas1915C 581.

Tex.—Moss v. Rishworth, (Commn. A.) 222 SW 225 [aff (Civ. A.) 191 SW 843].

23. Minn.—Mohr v Williams, 95 Minn. 261, 104 NW 12, 111 AmSR 462, 1 LRANS 439.

N. J.—Bennan v. Parsonnet, 83 N. J. L. 20, 83 A 948.

Oh.—Harrison v. Reed, 21 OhNPNS 206.

Okl.—King v. Carney, 85 Okl. 62, 204 P 270.

Que.—Parnell v. Springle, 5 Revde Jur 74.

[a] **Thus a surgeon undertaking to perform a minor operation** is justified in performing a major operation, without the consent of the person operated upon, should such major operation be necessary to save the life of the patient. Parnell v. Springle, (Que.) 5 RevdeJur 74.

24. Rolater v. Strain, 39 Okl. 572, 137 P 96, 50 LRANS 880.

25. Bennan v. Parsonnet, 83 N. J. L. 20, 83 A 948.

26. Bennan v. Parsonnet, supra.

[a] **Rupture operation same on either side.**—Where an operation for a rupture on the left side is arranged for, and after anæsthesia the surgeons find a rupture on the right side constituting a greater menace to the patient than the other, an operation on the right side is not against the will of the patient nor one of a different sort than that which he had agreed to undergo. Bennan v. Parsonnet, 83 N. J. L. 20, 83 A 948.

27. Burroughs v. Crichton, 48 App. (D. C.) 596, 602, 4 ALR 1529; State v. Housekeeper, 70 Md. 162, 170, 16 A 382, 14 AmSR 340, 2 LRA 587.

"The husband had no power to withhold from his wife the medical assistance which her case might require. . . . The consent of the wife, not that of the husband, was necessary. State v. Housekeeper, supra [quot Burroughs v. Crichton, supra].

[a] **A wife, in the full possession of her faculties,** is as much entitled, both morally and legally, to determine whether she shall submit herself to an operation as is the husband in respect to an operation on himself." Burroughs v. Crichton, 48 App. (D. C.) 596, 602, 4 ALR 1529.

28. Pratt v. Davis, 224 Ill. 300, 79 NE 562, 7 LRANS 609, 8 AnnCas 197, McClallen v. Adams, 19 Pick. (Mass.) 333, 31 AmD 140.

[a] **But authority to perform one operation** upon his wife will not confer authority to perform a second. Pratt v. Davis, 224 Ill. 300, 79 NE 562, 7 LRANS 609 [aff 118 Ill. A. 161]

29. Bakker v Welsh, 144 Mich. 632, 108 NW 94, 7 LRANS 612.

30. Luka v. Lowrie, 171 Mich. 122, 136 NW 1106, 41 LRANS 290.

[a] **Reason for rule.**—"To hold that a surgeon must wait until perhaps he may be able to secure the consent of the parents before giving to the injured one the benefit of his skill and learning, to the end that life may be preserved, would, we believe, result in the loss of many lives which might otherwise be saved. It is not to be presumed that competent surgeons will wantonly operate, nor that they will fail to obtain the consent of parents to operations where such consent may be reasonably obtained in view of the exigency." Luka v. Lowrie, 171 Mich. 122, 135, 136 NW 1106, 41 LRANS 290.

31. Moss v. Rishworth, (Tex. Commn. A.) 222 SW 225 [aff (Civ. A.) 191 SW 843]. See Browning v. Hoffman, 90 W. Va. 568, 111 SE 492 (except in very extreme cases, a surgeon has no legal right to operate upon a child without the consent of its parent or guardian).

32. Moss v. Rishworth, (Tex. Commn. A.) 222 SW 225 [aff (Civ. A.) 191 SW 843].

33. Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

34. Ark.—Davis v. Rodman, 147 Ark. 385, 386, 387, 392, 227 SW 612, 13 ALR 1459 [cit Cyc].

Iowa.—Ramberg v. Morgan, 218 NW 492; Beck v. German Klinik, 78 Iowa 696, 43 NW 617, 7 LRA 566.

Kan.—Yard v. Gibbons, 95 Kan. 802, 149 P 422.

Me.—Feeney v. Spalding, 89 Me. 111, 35 A 1027.

Mich.—Rogers v. Kee, 171 Mich. 551, 137 NW 260.

Mo.—Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72.

Nebr.—Doty v. Lutheran Hospital Assoc., 110 Nebr. 467, 472, 194 NW 444 [cit Cyc].

N. Y.—Pike v. Honsinger, 155 N. Y. 201, 49 NE 760, 63 AmSR 655; Carpenter v. Blake, 75 N. Y. 12; Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696]: Graves v. Santway, 2 Silv. Sup. 67, 6 NYS 892 [aff 127 N. Y. 677 mem, 28 NE 256 mem].

Oh.—Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.

Utah.—Everts v. Worrell, 58 Utah 238, 197 P 1043.

Va.—Fox v. Mason, 139 Va. 667, 124 SE 405.

Wash.—Miles v. Hoffman, 127 Wash. 653, 221 P 316.

Ont.—McQuay v. Eastwood, 12 Ont. 402.

[a] **Instructions as to prevention and spread of contagious disease.**—Davis v. Rodman, 147 Ark. 385, 386, 387, 392, 227 SW 612, 13 ALR 1459 [cit Cyc].

35. See cases supra note 34.

ure to exercise requisite care or skill, a foreign substance to enter or remain in the body of the person operated upon, omits the discharge of, or violates, the duty the law imposes upon him.[36] Thus the requirement of care and skill has been held to extend to the removal by the surgeon, as part of the operation, of sponges or gauze pads used by him during the course of the operation.[37] A surgeon's failure to remove a sponge before closing an incision has been held negligence per se,[38] or necessarily negligence;[39] and leaving a gauze pad in the patient's body has been held negligence,[40] as has the unexplained leaving of a drainage tube.[41] On the other hand, there is authority for the holding that leaving a sponge is not negligence per se,[42] nor conclusively negligence,[43] and that no liability follows therefrom if reasonable and ordinary care is exercised in keeping track of and removing the sponges.[44] Where the patient's condition is critical, and the paramount duty is to complete the operation in the shortest possible time, the failure to remove a sponge has been held an accidental and excusable slip or inadvertence, and not actionable negligence.[45] The fact that part of a hypodermic needle, used in a tonsil operation, remained in the patient's body, has been held not to show malpractice;[46] and a physician has been held under no obligation to inform a patient of the leaving of part of a needle in his body during an operation, when telling would endanger the success thereof.[47] Some authorities hold that a surgeon cannot relieve himself of liability for injury to a patient caused by leaving sponges or pads, by reliance on a custom or rule requiring the attending nurse to count the sponges or pads used and removed, and on the nurse's statement as to the count;[48] but there is authority to the contrary,[49] at least where the operation is performed by the surgeon at a hospital not owned and controlled by him, assisted by nurses not his employees.[50]

An assisting physician, whose part in the operation is to insert and withdraw sponges, cannot escape liability for his negligent failure to withdraw sponges on the ground that he was an assistant.[51]

[§ 124] **10. Dealing with Contagious Diseases.** It is the duty of a physician who is attending a patient afflicted with a contagious or infectious disease to exercise care in advising and warning members of the family,[52] and others who are liable to exposure,[53] of the existence and nature of the danger from the disease; to avoid doing any act which would tend to spread the infection;[54] and to take all necessary precautionary measures to prevent its spread to other patients attended.[55] A physician who fails to give such warning[56] is negligent,[57] and is liable in damages to any person injured as the direct and proximate result of his negligence.[58] Likewise, a physician may be negligent in wrongly advising persons liable to exposure to infection or contagion that there is no such danger.[59] A physician who, knowing that he has an infectious disease, continues to visit a patient without apprising him of the fact and without proper precautions on his own part, and communicates to him this disease, is responsible for the consequent damage thus produced by his own wrongful act,[60] including the suffering, danger, and loss of time, as well as the expense necessarily occasioned by the second disease.[61]

36. Sellers v. Noah, 209 Ala. 103, 95 S 167. And see cases infra notes 37-51.

37. U. S.—Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174.

Ga.—Akridge v. Noble, 114 Ga. 949, 41 SE 78.

Ind.—Funk v. Bonham, (A.) 151 NE 22.

Ky.—Barnett v. Brand, 165 Ky. 616, 623, 177 SW 461.

Oh.—Palmer v. Humiston, 87 Oh. St. 401, 101 NE 283, 45 LRANS 640; Gillette v. Tucker, 67 Oh. St. 106, 65 NE 865, 93 AmSR 639.

Or.—Rayburn v. Day, 126 Or. 135, 268 P 1002.

Wis.—Paro v. Carter, 178 Wis. 121, 188 NW 68.

"The operation begins when the incision is made and ends when the opening has been closed in the proper way, after all the appliances necessary to a successful operation have been removed from the body. . . . The removal of the sponges or pads is a part of the operation and an operation cannot be said to be concluded until such removal takes place." Barnett v. Brand, supra.

38. Wynne v. Harvey, 96 Wash. 379, 165 P 67.

[a] **That patient's life would be endangered by further exploration** does not excuse a surgeon who testifies that he did not know the sponge had been left. Wynne v. Harvey, 96 Wash. 379, 165 P 67.

39. Moore v. Ivey, (Tex. Civ. A.) 264 SW 283.

40. Ruth v. Johnson, 172 Fed. 191, 96 CCA 643.

41. Saucier v. Ross, 112 Miss. 306, 73 S 49. See Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280 (holding that carelessly and unskillfully permitting a drainage tube to remain is negligence).

42. Roark v. Peters, 2 La. A. 448.

43. Cassingham v. Berry, 67 Okl. 134, 150 P 139, 168 P 1020; Rayburn v. Day, 126 Or 135, 268 P 1002.

44. Roark v. Peters, 162 La. 111, 110 S 106; Cassingham v. Berry, 67 Okl. 134, 150 P 139, 168 P 1020.

45. Waldon v. Archer, 20 OntWN 77.

46. Mandelbaum v. Weil, 208 App. Div. 409, 203 NYS 289.

47. Eislein v. Palmer, 7 OhS&CP 365, 5 OhNP 325.

48. Ark.—Spears v. McKinnon, 168 Ark. 357, 270 SW 524.

Ky.—Barnett v. Brand, 165 Ky. 616, 177 SW 461.

Oh.—Palmer v. Humiston, 87 Oh. St. 401, 101 NE 283, 45 LRANS 640.

Pa.—Davis v. Kerr, 239 Pa. 351, 86 A 1007, 46 LRANS 611.

Wis.—Paro v. Carter, 178 Wis. 121, 188 NW 68.

See Walker v. Holbrook, 130 Minn. 106, 153 NW 305 (evidence of such reliance, as in accord with the usual practice, is proper, but not conclusive upon the court or jury).

[a] **Reason for rule.**—"Manifestly the only purpose in introducing the approved system or practice was to reduce as far as practicable the hazards to which the one operated upon is exposed, by affording additional security against such accidents. . . . It certainly did not contemplate that the security provided was to be the only security upon which the patient could rely for the avoidance of such mishaps, displacing entirely those which had before been recognized, among these the skill and observation of the operating surgeon which had theretofore been employed and relied upon to see that all the sponges had been removed." Davis v. Kerr, 239 Pa. 351, 357, 86 A 1007, 46 LRANS 611.

49. Jewison v. Hassard, 26 Man. 571, 28 DomLR 584, 34 WestLR 904, 10 WestWkly 1088.

50. Funk v. Bonham, (Ind. A.) 151 NE 22. See Guell v. Tenney, 262 Mass. 54, 159 NE 451 (a surgeon cannot be held responsible for the failure of assisting nurses, not his employees, to keep an accurate count of sponges inserted and removed, and he cannot be charged with negligence if he did not, while operating, keep count of the sponges used).

51. Spears v. McKinnon, 168 Ark. 357, 270 SW 524.

52. Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459.

53. Davis v. Rodman, supra; Jones v. Stanko, 118 Oh. St. 147, 160 NE 456.

54. Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459.

55. Piper v. Menifee, 12 B. Mon. (Ky.) 465, 54 AmD 547.

56. See supra text 52, 53.

57. Jones v. Stanko, 118 Oh. St. 147, 160 NE 456.

58. Jones v. Stanko, supra.

59. Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459; Skillings v. Allen, 143 Minn. 323, 173 NW 663; Edwards v. Lamb, 69 N. H. 599, 45 A 480, 50 LRA 160.

[a] **Illustrations.**—(1) A physician is negligent in advising the parents of a child ill with typhoid fever to move him to their residence and telling them that he could be put among the other children, without warning them of the danger of infection to the other children. Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459. (2) Where plaintiff, under the direction of defendant, a surgeon, assisted in dressing a wound of her husband, and became infected with poison by reason of slight scratches on her fingers, defendant, knowing the danger, was guilty of negligence in assuring her there was none, since he was not justified in assuming that her hands were free from such wounds. Edwards v. Lamb, 69 N. H. 599, 45 A 480, 50 LRA 160.

60. Piper v. Menifee, 12 B. Mon. (Ky.) 465, 54 AmD 547.

61. Piper v. Menifee, supra.

[§ 125] **11. Intrusion of Unprofessional Assistant.** Where a physician takes an unprofessional, unmarried man with him to attend a confinement case, there being no emergency, both are liable in damages to the patient.[62]

[§ 126] **12. Mistake in Prescription.** Where the injury or death of the patient results from the negligence of the practitioner in writing an erroneous prescription, he is liable,[63] even though the druggist who compounds the prescription is also guilty of negligence,[64] and even though the prescription was taken to another druggist than the one to whom he had directed it.[65] But a physician is not liable for the druggist's negligence in compounding a prescription properly written by the physician.[66]

[§ 127] **13. Fraud and Deceit; Misinforming Patient.**[67] It is the duty of a physician to act with the utmost good faith toward his patient, and if he knows that he cannot accomplish a cure, or that the treatment adopted will probably be of no benefit, it is his duty to advise his patient of these facts, and if he fails to do so he is guilty of a breach of duty.[68] Likewise, if the physician represents to the patient that he can be cured, without knowledge whether the representation is true or false, and the patient accepts treatment in reliance thereon, and is not cured, the physician is liable in an action for deceit.[69] But to recover on account of deceit based on the physician's statement that he could and would cure the patient, the latter must not only prove that the representation was false, but also that it was made with a fraudulent intent.[70] While failure of a physician to warn a patient of possible danger from a remedy is not negligence per se,[71] a physician who misleads a patient by not only failing to give him such warning, after which the patient would have refused the treatment, but by affirmatively assuring him of a cure thereby, is liable for the harmful consequences of the treatment.[72] Where a physician is not guilty of malpractice in failing to remove one of the patient's organs, his false representation that he removed it is not actionable as fraud.[73]

[§ 128] **14. Wrongful Certificate of Insanity or Inebriety.**[74] A physician may be held liable for falsely certifying the insanity of a person;[75] but without statutory provisions to that effect, a civil action for damages against a physician for certifying to a person's insanity cannot be based on the insufficiency of the methods which he pursued in reaching and certifying a correct conclusion.[76] In an action for falsely certifying, through malice or negligence, to the insanity of plaintiff, the falsehood, and not the insufficiency of the certificate, is the ground of action against defendant.[77] A physician who signs a certificate of insanity which is false, without exercising ordinary care and prudence in making his examination, and without making due inquiry into the question of sanity, is liable to an action for damages.[78] Nor is he the less liable for the want of such due care and inquiry because he has acted bona fide.[79] But a physician who signs a certificate of insanity when the patient is sane is not liable therefor where the certificate was signed after making an examination, and the mistake was due merely to an error of judgment, provided the physician brings to the case the learning, care, and diligence required by law.[80] In such an action the burden is on plaintiff to show negligence,[81] and also to show that at the time the certificate of insanity was given he was in fact sane.[82] Defendant may show under what circumstances and on what information he acted in making such certificate.[83] If such evidence does not go to the extent of a justification in case the certificate is found to be false, it is proper evidence to be considered in awarding damages.[84]

Certificate of inebriety. In Massachusetts, under the statute relating to commitment for inebriety, the privilege of witnesses attaches to physicians issuing a certificate of inebriety, so that they are not liable for negligence in so doing, in the absence of bad faith or malice.[85]

[§ 129] **D. Effect of Admission of Want of Sufficient Skill or Care.**[86] If a practitioner frankly informs a patient of his want of skill, or the patient is in some other way fully aware of it, the latter cannot complain of the lack of that which he knew did not exist.[87] An admission to be sufficient must be an admission of negligence or of lack of the skill ordinarily required for the performance of the work undertaken.[88]

[§ 130] **E. Effect of Patient's Contributory Negligence—1. In General.** The general rules with regard to the effect of contributory negligence on the right to recover for personal injuries[89] apply in actions for injuries alleged to have arisen from the negligence or malpractice of a physician or surgeon, and it is uniformly held that, where negligence on the part of the patient or those acting for him proximately conduced or contributed to the injury com-

62. De May v. Roberts, 46 Mich. 160, 9 NW 146, 41 AmR 154 (holding further that it makes no difference that the patient or her husband supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence.)

63. Murdock v. Walker, 43 Ill. A. 590; Jeannotte v. Couillard, 3 Que. Q. B. 461.

64. Murdock v. Walker, 43 Ill. A. 590. See Druggists § 53.

65. Murdock v. Walker, supra.

66. Stretton v. Holmes, 19 Ont. 286.

67. Generally see Fraud 26 C. J. p 1050.

68. Logan v. Field, 75 Mo. A. 594.

69. Hedin v. Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 NW 158, 54 AmSR 628, 35 LRA 417. But see Lubbee v. Hilgert, 135 App. Div. 227, 120 NYS 387 (holding that a curative footwear company, sued upon the rule of liability applicable in a malpractice case, cannot be held liable for not curing plaintiff, even if it represented that it could do so, if the patient's disease was incurable before defendant undertook its treatment).

70. Hedin v. Minneapolis Medical etc., Inst., 62 Minn. 146, 64 NW 158, 54 AmSR 628, 35 LRA 417; Spead v. Tomlinson, 73 N. H. 46, 59 A 376, 68 LRA 432.

71. Hunter v. Burroughs, 123 Va. 113, 96 SE 360.

72. Hunter v. Burroughs, supra.

73. Netzel v. Todd, 24 Oh. A. 219, 157 NE 405.

74. Examination of insane persons in general see Insane Persons, §§ 179–242.

75. Pennell v. Cummings, 75 Me. 163; Ayers v. Russell, 50 Hun 282, 3 NYS 338; Williams v. Le Var, 141 Pa. 149, 21 A 525; Hall v. Semple, 3 F. & F. 337.

False imprisonment by issuing certificate of insanity see False Imprisonment § 18.

76. Pennell v. Cummings, 75 Me. 163.

77. Pennell v. Cummings, supra.

78. Ayers v. Russell, 50 Hun 282, 3 NYS 338; Hall v. Semple, 3 F. & F. 337.

79. Hall v. Semple, supra.

80. Warner v. Packer, 139 App. Div. 207, 123 NYS 725; Williams v. Le Bar, 141 Pa. 149, 21 A 525; Hall v. Semple, 3 F. & F. 337.

Errors of judgment generally see supra § 114.

81. Williams v. Le Bar, 141 Pa. 149, 21 A 525.

82. Pennell v. Cummings, 75 Me. 163.

83. Pennell v. Cummings, supra.

84. Pennell v. Cummings, supra.

85. Niven v. Boland, 177 Mass. 11, 58 NE 282, 52 LRA 786.

86. Liability of unqualified persons see infra § 138.

87. Morrison v. Altig, 157 Iowa 265, 138 NW 510, 134 NW 529; Lorenz v. Jackson, 88 Hun 200, 34 NYS 652; Shearman & R. Negl. § 607.

88. Markart v. Zeimer, 67 Cal. A. 363, 227 P 683 (admissions of physicians that an operation was a "misoperation" and a "wrong operation" are not admissions that it was not performed with the required degree of skill and care).

89. See Negligence §§ 500–599.

plained of, there can be no recovery.[90] But it has been held that if both the patient and the physician have been negligent, and the injuries due to the respective negligence of each can be separated, the physician is liable for the injuries due to his own want of skill or care.[91] Negligence on the part of a patient is not a bar to recovery where it did not contribute proximately to the injury caused by defendant's malpractice.[92]

Injury from patient's own act. A physician is not liable for an injury caused by the voluntary act of the patient.[93] Thus a surgeon who performs an operation on the insistence of the patient, despite his advice that it is unnecessary and improper, cannot be held liable on the ground that the operation was improper and injurious.[94]

Interference by the patient while the physician is performing his duties, which contributes to the injury, will bar a recovery.[95]

Even though no instructions are given the patient, he is required to exercise such ordinary prudence as would be expected of a person situated in his condition, and a failure on his part to exercise this prudence will prevent recovery.[96]

[§ 131] **2. Failure To Follow Instructions.** It is the duty of a patient to coöperate with his physician and conform to the necessary prescriptions and treatment, and follow all reasonable and proper instructions given,[97] and a failure on the part of the patient in this respect which contributes to injury claimed to have arisen from the physician's negligence or malpractice will bar recovery therefor,[98] even though his compliance is prevented by the pressure of pain,[99] or though his refusal to carry out the instructions is due to his ignorance of the consequences of such failure.[1]

[§ 132] **3. Refusal To Permit Proper Treatment.** A patient is bound to submit to the treatment prescribed by his surgeon, if it is such as a surgeon of ordinary skill would sanction;[2] and a surgeon who is prevented from curing an ailment by the refusal of the patient to submit to proper treatment cannot be held liable for resulting damages.[3] Where a patient is incompetent to be consulted, and the members of his family having him in charge refuse to allow an operation or other proper treatment proposed by the physician, he is relieved of liability for the course pursued or for injuries result-

90. Colo.—McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.
Ill.—Kendall v. Brown, 74 Ill. 232; Wesley v. Allen, 235 Ill. A. 322; Doyle v. Owen, 150 Ill. A. 415; Haering v. Spicer, 92 Ill. A. 449.
Ind.—Lower v. Franks, 115 Ind. 334, 17 NE 630; Jones v. Angell, 95 Ind. 376; Kelsey v. Hay, 84 Ind. 189; Gramm v. Boener, 56 Ind. 497; Young v. Mason, 8 Ind. A. 264, 35 NE 521.
Iowa.—Whitesell v. Hill, 66 NW 894; Beck v. German Klinik, 78 Iowa 696, 43 NW 617, 7 LRA 566.
Ky.—Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044.
Me.—Merrill v. Odiorne, 113 Me. 424, 94 A 753.
Md.—Dashiell v. Griffith, 84 Md. 363, 35 A 1094.
Mass.—Hibbard v. Thompson, 109 Mass. 286.
Mich.—Hitchcock v. Burgett, 38 Mich. 501.
Minn.—Chamberlain v. Porter, 9 Minn. 260.
Mo.—West v. Martin, 31 Mo. 375, 80 AmD 107; Sanderson v. Holland, 39 Mo. A. 233.
Nebr.—O'Hara v. Wells, 14 Nebr. 403, 15 NW 722.
N. Y.—Link v. Sheldon, 18 NYS 815 [aff 136 N. Y. 1, 32 NE 696]; Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.
N. D.—Hanson v. Thelan, 42 N. D. 617, 618, 173 NW 457 [cit Cyc].
Oh.—Robison v. Gary, 28 Oh. St. 241; Geiselman v. Scott, 25 Oh. St. 86; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.
Or.—Beadle v. Paine, 46 Or. 424, 80 P 903.
Pa.—Richards v. Willard, 176 Pa. 181, 35 A 114; Reber v. Herring, 115 Pa. 599, 8 A 830; Potter v. Warner, 91 Pa. 362, 36 AmR 668; McCandless v. McWha, 22 Pa. 261; Haire v. Reese, 7 Phila. 138.
Vt.—Wilmot v. Howard, 39 Vt. 447, 94 AmD 338.
Wash.—Williams v. Wurdemann, 71 Wash. 390, 128 P 639.
W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 110 SE 560, 22 ALR 323; Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.
Eng.—Farquhar v. Murray, 38 Sc. L. Rep. 642.
And see cases infra §§ 131-136.
[a] **"Directly" contributed.**—In an action for malpractice, an instruction requiring the jury to find that plaintiff's own negligence directly contributed to the injury, before they could on that ground find for defendant, is not erroneous for using the word "directly," instead of "proximately." Davis v. Spicer, 27 Mo. A. 279.
[b] **Ordinary prudence** required of patient. Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044.
[c] **Augmenting injury caused by physician's negligence.**—But the fact that a patient, by an independent act of negligence, or an omission, on his part, increases or augments the injury caused by the negligence or incompetence of the physician does not prevent a recovery for malpractice. Sauers v. Smits, 49 Wash. 557, 95 P 1097, 17 LRANS 1242.
[d] **Negligence of third person imputed to patient.**—(1) Littlejohn v. Arbogast, 95 Ill. A. 605; Chamberlain v. Porter, 9 Minn. 260; Sanderson v. Holland, 39 Mo. A. 233; Link v. Sheldon, 18 NYS 815 [aff 136 N. Y. 1, 32 NE 696]; Potter v. Warner, 91 Pa. 362, 36 AmR 668. (2) Imputed negligence generally see Negligence §§ 573-594.
[e] **Employment of a clairvoyant physician** by a parent with full knowledge of his methods of diagnosis and prescription is not such contributory negligence as will bar recovery for injuries caused to the child by the malpractice of the physician. Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900.

91. Doyle v. Owen, 150 Ill. A. 415; Hibbard v. Thompson, 109 Mass. 286.

92. Doyle v. Owen, 150 Ill. A. 415; Hibbard v. Thompson, 109 Mass. 286; Richards v. Willard, 176 Pa. 181, 35 A 114; Wilmot v. Howard, 39 Vt. 447, 94 AmD 338.
Contributory negligence after malpractice see infra § 136.

93. Dunman v. Raney, 118 Ark. 337, 176 SW 339; Richards v. Willard, 176 Pa. 181, 35 A 114.

94. Gramm v. Boener, 56 Ind. 497. See Hancke v. Hooper, 7 C. & P. 81, 32 ECL 510, 173 Reprint 37 (where the patient did not consult the surgeon as to the propriety of bleeding him, but only required the performance of the manual operation).

95. Young v. Mason, 8 Ind. A. 264, 35 NE 521.

96. Doyle v. Owen, 150 Ill. A. 415; Tish v. Welker, 5 OhS&CP 725, 7 Oh NP 472; Beadle v. Paine, 46 Or. 424, 80 P 903.

97. See cases infra note 98.
[a] **Injurious and unsanctioned treatment.**—But the patient is under no duty to submit to treatment that is injurious, painful, and such as no practitioner of ordinary skill would adopt or sanction. Potter v. Warner, 91 Pa. 362, 36 AmR 668; McCandless v. McWha, 22 Pa. 261.

98. Ill.—Littlejohn v. Arbogast, 95 Ill. A. 605; Haering v. Spicer, 92 Ill. A. 449. But see Krauss v. Ballinger, 171 Ill. A. 534 (holding that a physician may be liable for improper treatment, even though the patient did not in all respects carry out his instructions).
Ind.—Lower v. Franks, 115 Ind. 334, 17 NE 630; Jones v. Angell, 95 Ind. 376; Young v. Mason, 8 Ind. A. 264, 35 NE 521.
Me.—Merrill v. Odiorne, 113 Me. 424, 94 A 753.
Mass.—Carey v. Mercer, 239 Mass. 599, 132 NE 353.
Nebr.—O'Hara v. Wells, 14 Nebr. 406, 15 NW 722.
N. Y.—Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.
N. D.—Hanson v. Thelan, 42 N. D. 617, 618, 173 NW 457 [cit Cyc].
Oh.—Geiselman v. Scott, 25 Oh. St. 86; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.
Or.—Beadle v. Paine, 46 Or. 424, 80 P 903; Heath v. Glisan, 3 Or. 64.
Pa.—McCandless v. McWha, 22 Pa. 261.
S. D.—Feltman v. Dunn, 217 NW 198.
W. Va.—Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.
[a] **Information given to patient must be considered.**—The information given by a surgeon to his patient concerning the nature of his malady is a circumstance that should be considered in determining whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence or not. Geiselman v. Scott, 25 Oh. St. 86.
[b] **Insane patients** "are not bound to coöperate with their medical attendants in securing a cure in their own persons, as sane patients are, and their neglect or unwillingness to do so cannot be imputed to them as contributory negligence in an action for malpractice, any more than to a child." Peo. v. New York Hospital, 3 AbbNCas (N. Y.) 229, 259.
[c] **If patient leaves hospital contrary to instructions,** the physician is not liable for subsequent events. Feltman v. Dunn, (S. D.) 217 NW 198.

99. McCandless v. McWha, 22 Pa. 261; Haire v. Reese, 7 Phila. (Pa.) 138.

1. Carey v. Mercer, 239 Mass. 599, 132 NE 353.

2. McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

3. McGraw v. Kerr, supra; Littlejohn v. Arbogast, 95 Ill. A. 605; Peterson v. Branton, 137 Minn. 74, 162

ing from failure to apply the treatment.[4]

[§ 133] **4. Failure To Return for Treatment.** A patient who, after receiving treatment, fails to return to the physician or surgeon for further treatment, as instructed, is guilty of contributory negligence preventing recovery for injurious consequences from such failure.[5] But a patient's failure to return for further treatment, after discovering that he is not improving, because of the physician's negligent treatment, does not bar recovery for injuries from such improper treatment;[6] and the mere fact that a patient who believes he has been injured by the negligence of his physician discharges him or quits his care and employs another is not in itself evidence of contributory negligence.[7]

[§ 134] **5. Failure To Secure Assistance Requested.** The refusal or neglect of the patient to procure needed assistance requested by the physician is contributory negligence constituting a defense to an action for injurious treatment.[8]

[§ 135] **6. Failure To Consult Another Physician.** The patient's failure to consult another physician, after defendant physician has assured him of the propriety and success of the treatment given, is not contributory negligence, unless he is fully aware that his injury has not been, and is not being, properly treated.[9]

[§ 136] **7. Contributory Negligence after Malpractice.** Where liability for negligence or malpractice has been incurred by a physician, subsequent negligence of the patient, which aggravates the injury primarily sustained at the hands of the physician, does not discharge the latter from liability, but only goes in mitigation of damages.[10]

[§ 137] **F. Liability to Gratuitous or Charity Patient.**[11] A physician may refuse to respond to the call of a patient unable to compensate him;[12] but if he undertakes the treatment of a patient gratuitously, his liabilities for negligence or malpractice are the same as in the case of any other patient.[13] So a physician employed by a city to treat patients at the city almshouse is liable to one of such patients who is injured through the physician's negligence, although there is no contractual relation between such patient and the physician.[14]

[§ 138] **G. Liability of Unqualified Persons.**[15] One who, although not duly qualified, holds himself out as a physician to persons who believe him to be a physician and employ him as such is liable for a failure to exercise the degree of care, skill, and diligence required of qualified practitioners, and for resulting detriment,[16] whether compensated for his services or not.[17] But failure to obtain a license as required by law gives rise to no remedy, if it has

NW 895.

4. Routt v. Ready, 49 App. (D. C.) 305, 265 Fed. 455; Littlejohn v. Arbogast, 95 Ill. A. 605.

[a] **Refusal to permit administration of anæsthetic** as disproving physician's negligence in making improper diagnosis. Summers v. Tarpley, (Mo. A.) 208 SW 266.

5. Jones v. Angell, 95 Ind. 376; Dashiell v. Griffith, 84 Md. 363, 35 A 1094; Gentile v. De Virgilis, 290 Pa. 50, 138 A 540; Williams v. Wurdemann, 71 Wash. 390, 128 P 639.

[a] **Rule applied to patient of dentist.**—Gentile v. De Virgilis, 290 Pa. 50, 138 A 540.

6. Parr v. Young, 121 Kan. 47, 246 P 181; Williams v. Wurdemann, 71 Wash. 390, 128 P 639.

7. George v. Shannon, 92 Kan. 801, 142 P 967, AnnCas1916B 338.

8. Haering v. Spicer, 92 Ill. A. 449; Summers v. Tarpley, (Mo. A.) 208 SW 266.

9. Schoonover v. Holden, (Iowa) 87 NW 737.

10. Ill.—Wesley v. Allen, 235 Ill. A. 322; Doyle v. Owen, 150 Ill. A. 415; Morris v. Despain, 104 Ill. A. 452.

Ky.—Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044.

Mass.—Hibbard v. Thompson, 109 Mass. 286.

Mo.—Sanderson v. Holland, 39 Mo. A. 233.

N. Y.—Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429 [aff 4 NYS 768]; Carpenter v. Blake, 75 N. Y. 12.

N. C.—McCracken v. Smathers, 122 N. C. 799, 29 SE 354.

Or.—Beadle v. Paine, 46 Or. 424, 80 P 903.

Pa.—Richards v. Willard, 176 Pa. 181, 35 A 114; Fowler v. Sergeant, 1 Grant 355.

Vt.—Wilmot v. Howard, 39 Vt. 447, 94 AmD 338.

Wash.—Sauers v. Smits, 49 Wash. 557, 95 P 1097, 17 LRANS 1242.

W. Va.—Jenkins v. Charleston Gen. Hospital, etc., 90 W. Va. 230, 110 SE 560, 22 ALR 323; Lawson v Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

Wis.—Schultz v. Tasche, 166 Wis. 561, 564, 165 NW 292.

"It is not strictly correct to call such latter negligence on the part of a patient contributory negligence. . . . It is rather subsequent or supervening negligence that aggravates the improper condition due to the physician's prior negligence. The two do not synchronize in producing the injury as they usually do in the ordinary negligence case." Schultz v. Tasche, supra.

[a] **Refusal to permit further treatment after malpractice.**—(1) The refusal of a patient to allow a surgeon, employed subsequent to the alleged malpractice of the physician first employed, to attempt an experiment for the purpose of reducing the injury, does not lessen the physician's liability for malpractice. Chamberlin v. Morgan, 68 Pa. 168. (2) The refusal of a patient to allow the rebreaking and resetting of a limb alleged to have been unskillfully treated does not relieve the physician of liability for lack of care and skill. Morris v. Despain, 104 Ill. A. 452; Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044.

11. Degree of skill and care as affected by gratuitousness of services see supra § 106.

12. See supra § 111.

13. Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45; Coss v. Spaulding, 41 Utah 447, 126 P 468; Rickley v. Stratton, 3 OntWN 1341, 22 OntWR 282, 4 DomLR 595. And see cases supra § 106.

14. Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429.

15. Effect of physician's admission of want of skill see supra § 129.

16. Ill.—McNevins v. Lowe, 40 Ill. 209; Matthei v. Wooley, 69 Ill. A. 654.

Iowa.—Morrison v. Altig, 157 Iowa 265, 138 NW 510, 134 NW 529.

Mass.—Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974.

Mont.—Hansen v. Pock, 57 Mont. 51, 187 P 282.

N. Y.—Brown v. Shyne, 242 N. Y. 176, 151 NE 197, 44 ALR 1407; Monahan v. Devinny, 223 App. Div. 547, 229 NYS 60 [mod 131 Misc. 248, 225 NYS 601]; Monohan v. Devinny, 131 Misc. 248, 225 NYS 601 [mod 223 App. Div. 547, 229 NYS 60].

Oh.—Musser v. Chase, 29 Oh. St. 577; Glovka v. Fortun, 29 Oh. A. 278, 163 NE 309.

Okl.—Harris v. Graham, 124 Okl. 196, 255 P 710.

Or.—Boydston v. Giltner, 3 Or. 118.

Wis.—Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.

Eng.—Dickson v. Hygienic Inst., [1910] S. C. (Ct. Sess.) 352; Jones v. Fay, 4 F. & F. 525; Ruddock v. Lowe, 4 F. & F. 519.

[a] **Rule applied to:** (1) Chiropractor acting as a physician. Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974. (2) Unqualified and unlicensed chiropractor. Brown v. Shyne, 242 N. Y. 176, 151 NE 197, 44 ALR 1407; Monahan v. Devinny, 223 App. Div. 547, 229 NYS 60 [mod 131 Misc. 248, 225 NYS 601]; Monohan v. Devinny, 131 Misc. 248, 225 NYS 601 [mod 223 App. Div. 547, 229 NYS 60]. (3) Student in a school of veterinary science. Morrison v. Altig, 157 Iowa 265, 138 NW 510, 134 NW 529.

[b] **An empiric is liable is a civil action** for malpractice notwithstanding it is made a penal offense for such a person to practice medicine in any of its departments. Musser v. Chase, 29 Oh. St. 577.

[c] **Dental company doing business through assistants** (1) who were not registered dentists undertakes to supply the ordinary skill possessed by practitioners and is liable in damages, to a patient injured in an operation by one of the assistants, for its failure to do so. Dickson v. Hygienic Inst., [1910] S. C. (Ct. Sess.) 352. (2) A dental company, by reason of the contractual relations between it and a patient, is bound to furnish him with proper care and treatment, and it is liable for harmful consequences from a failure to perform this duty, in allowing him to be treated by an employee who is not a registered dentist, apart from any question of negligence. McDonald v. Dr. Knight, Inc., 248 Mass. 43, 142 NE 825.

[d] **Assent of patient** to unlawful acts of one improperly acting as a physician does not make the acts lawful as between him and the patient. Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974.

[e] **In Michigan** Comp. L. (1915) § 12765, holding empirics to the same accountability for malpractice as licensed physicians and surgeons, does not affect the common-law liability of licensed physicians and surgeons for malpractice. Leslie v. Mollica, 236 Mich. 610, 211 NW 267, 49 ALR 546.

Mistake caused by error of judgment see supra § 114 text and notes 88, 89.

17. Morrison v. Altig, 157 Iowa 265, 138 NW 510, 134 NW 529.

caused no injury;[18] and such failure is not itself a basis for an inference of negligence causing injury to the patient.[19] Likewise, failure to register in accordance with the statutory provision, coupled with a showing of the treatment given, is an insufficient basis for a charge of malpractice.[20] A person who renders aid to the sick either as a volunteer or upon request as a friend or neighbor, but without having or professing to have special qualifications, incurs no professional responsibility,[21] even though his service, if performed by one claiming to be competent, might justly be characterized as highly negligent and unskillful,[22] his duty being only to perform the service honestly and to the best of his ability.[23] If an unregistered practitioner is known to be unregistered, he must attain only the skill which he professes or announces.[24]

A street railway company, being unauthorized to practice medicine or surgery, cannot be guilty of malpractice.[25]

[§ 139] **H. Liability for Negligence or Malpractice of Others[26]—1. Partner.** Pursuant to general rules[27] partners in the practice of medicine are all liable for an injury to a patient resulting from the lack of skill or the negligence, either in omission or commission, of any one of the partners, within the scope of their partnership business;[28] but, for an injury resulting from the act of one partner outside of the common business, the offending partner is alone responsible.[29]

[§ 140] **2. Physician Employed with Another on Same Case.** Physicians employed together by the patient, and diagnosing or treating the case together, without withdrawal by, or discharge of, either, owe the same duty and are jointly liable for any negligence.[30] Where two physicians are independently employed on the same case, they may, in the absence of instructions to the contrary, make such division of the service as in their best judgment the circumstances may require.[31] Each of the physicians so employed is answerable both for his own conduct[32] and for the negligent acts or omissions of the other which he permits without objection,[33] or which, by the exercise of reasonable diligence, he should have observed.[34] A physician called specially and only for particular occasions is not liable for the negligent acts or omissions of another physician in his absence.[35]

[§ 141] **3. Physician Assisted.** A physician who merely arranges for an operation by another, not his associate, employer, or employee, and lends casual assistance at the operation, is not jointly liable for the negligence of the physician operating.[36] A physician who merely administers an anæsthetic to a patient operated upon is not liable for the negligence of the operating surgeon.[37]

[§ 142] **4. Substitute or Other Recommended Physician.** A physician who, because of intended absence or other reason, is unable or unwilling to assume or continue the treatment of a case, and recommends or sends another physician, is not liable for injuries resulting from the latter's want of skill or care,[38] unless the recommended physician is in

18. Brown v. Shyne, 242 N. Y. 176, 151 NE 197, 44 ALR 1407. See Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974 (a statute requiring one who practices as a physician to be licensed must be construed as intended to afford relief to persons suffering harm where the violation of the statute is the proximate cause of their injuries).

19. Brown v. Shyne, 242 N. Y. 176, 181, 151 NE 197, 44 ALR 1407.

"In order to show that the plaintiff has been injured by defendant's breach of the statutory duty, proof must be given that defendant in such treatment did not exercise the care and skill which would have been exercised by qualified practitioners within the State, and that such lack of skill and care caused the injury." Brown v. Shyne, supra.

20. Janssen v. Mulder, 232 Mich. 183, 205 NW 159.

21. McNevins v. Lowe, 40 Ill. 209; Ritchey v. West, 23 Ill. 385; Morrison v. Altig, 157 Iowa 265, 138 NW 510, 134 NW 529; Higgins v. McCabe, 126 Mass. 13, 30 AmR 642; McCandless v. McWha, 22 Pa. 261.

Treatment by sea captain see Seamen [35 Cyc 1200 note 16].

22. Morrison v. Altig, 157 Iowa 265, 138 NW 510, 134 NW 529.

23. Morrison v. Altig, supra.

24. Dickson v. Hygienic Inst., [1910] S. C. (Ct. Sess.) 352.

25. Youngstown Park, etc., R. Co. v. Kessler, 84 Oh. St. 74, 95 NE 509, 36 LRANS 50, AnnCas1912B 933.

26. Cross references:

Compensation of workman for negligence of physician or surgeon see Workmen's Compensation Acts § 61.

Liability for injury by other physician after discharge see supra § 119.

Liability of:

Carrier see Carriers § 1308.

Employer see Master and Servant §§ 356–360.

Hospital see Hospitals §§ 13–19; Charities § 107.

Municipality see Municipal Corporations §§ 1749–1751.

Liability of:—Continued

One voluntarily undertaking care of another see Negligence § 262.

Shipowner for negligence of ship's surgeon see Shipping [36 Cyc 338 note 46].

27. See Partnership §§ 364–369.

Representation of firm by partner generally see Partnership §§ 289–387.

28. Ind.—Hess v. Lowrey, 122 Ind. 225, 23 NE 156, 17 AmSR 355, 7 LRA 90.

Iowa.—Haase v. Morton, 138 Iowa 205, 115 NW 921, 16 AnnCas 350.

Minn.—Whittaker v. Collins, 34 Minn. 299, 25 NW 632.

S. C.—Hyrne v. Erwin, 23 S. C. 226, 55 AmR 15.

Tex.—Lee v. Moore, (Civ. A.) 162 SW 437, 440 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc].

[a] **Partners in the practice of medicine are sureties** for the faithful performance of their engagements by each of them. Hyrne v. Erwin, 23 S. C. 226, 55 AmR 15; Lee v. Moore (Civ. A.) 162 SW 437, 440, [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185, and cit Cyc].

29. Hyrne v. Erwin, 23 S. C. 226, 55 AmR 15.

[a] **Opinions expressed by one of the partners** in the absence of the other, after the employment is at an end, as to the propriety of the treatment, or the results attained, do not render the absent partner liable. Boor v. Lowrey, 103 Ind. 468, 3 NE 151, 53 AmR 519.

30. Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814; Manley v. Coleman, 19 Oh. A. 284. And see cases infra notes 31–35.

[a] **Although the actual incision is made by one physician,** the other is jointly liable if all the other acts in and about the operation were done by both jointly. Manley v. Coleman, 19 Oh. A. 284.

31. Morey v. Thybo, 199 Fed. 760, 118 CCA 198, 42 LRANS 785.

32. Morey v. Thybo, supra; Wynne v. Harvey, 96 Wash. 379, 165 P 67.

33. Morey v. Thybo, 199 Fed. 760, 118 CCA 198, 42 LRANS 785; Stokes v. Long, 52 Mont. 470, 159 P 28.

34. Morey v. Thybo, 199 Fed. 760, 118 CCA 198, 42 LRANS 785; Stokes v. Long, 52 Mont. 470, 159 P 28; Wynne v. Harvey, 96 Wash. 379, 165 P 67.

[a] **Where duties are divided** by two physicians independently engaged to attend a woman in childbirth, one administering ether and the other operating, the former is not liable for the negligence of the latter in connection with the operation, in the absence of knowledge or ground for suspicion that such acts were taking place. Morey v. Thybo, 199 Fed. 760, 118 CCA 198, 42 LRANS 785.

35. Tomer v. Aiken, 126 Iowa 114, 101 NW 769; Nelson v. Farrish, 143 Minn. 368, 173 NW 715.

36. Beckwith v. Boynton, 235 Ill. A. 469; Brown v. Bennett, 157 Mich. 654, 122 NW 305. See Wallace v. Yudelson, 244 Ill. A. 320 (holding that a physician who, although present at an operation performed by a surgeon independently employed, takes no part in it is not responsible for the negligence of the latter).

37. U. S.—Morey v. Thybo, 199 Fed. 760, 118 CCA 198, 42 LRANS 785.

Ala.—Robinson v. Crotwell, 175 Ala. 194, 57 S 23.

Iowa.—Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447.

Ky.—Jett v. Linville, 202 Ky. 198, 259 SW 43.

Vt.—Lawson v. Crane, 83 Vt. 115, 74 A 641.

[a] **Reason for rule.**—"The anæsthetist is directly chargeable with the physical condition of the patient in the operating room, and his attention must always be directed solely to administering the . . . anæsthetic." Jett v. Linville, 202 Ky. 198, 201. 259 SW 43.

38. Ala.—Robinson v. Crotwell, 175 Ala. 194, 57 S 23.

Ark.—Norton v. Hefner, 132 Ark. 18, 198 SW 97, LRA1918C 132; Keller v. Lewis, 65 Ark. 578, 47 SW 755.

his employment or is definitely his agent,[39] or is his partner,[40] or unless due care is not exercised in making the recommendation or substitution.[41]

[§ 143] **5. Assistant, Agent, or Employee.**[42] A physician is responsible for an injury done to a patient through the want of proper skill and care in his assistant,[43] apprentice,[44] agent,[45] or employee.[46]

[§ 144] **6. Nurse or Attendant Other than Employee.**[47] A physician is not liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees,[48] if he has no

Ga.—Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513.
Iowa.—Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447.
Mich.—Hitchcock v. Burgett, 38 Mich. 501.
Mont.—Stokes v. Long, 52 Mont. 470, 159 P 28, 31 [cit Cyc].
N. J.—Myers v. Holborn, 58 N. J. L. 193, 33 A 389, 55 AmSR 606, 30 LRA 345.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356.
Tex.—Moore v. Lee, 109 Tex. 391, 211 SW 214, 4 ALR 185 [rev (Civ. A.) 162 SW 437]; Floyd v. Michie, (Civ. A.) 11 SW (2d) 657.
Wis.—Mayer v. Hipke, 183 Wis. 382, 197 NW 333.
See Gould v. Kerlin, 192 Ill. A. 427.

[a] **Reason for rule.**—"A physician or surgeon . . . [cannot] engage in the practice of his profession by proxy. . . . Where a physician or surgeon sends another as his substitute, to treat or perform an operation upon a patient, and the services of the substitute are accepted, the patient will be presumed to have reposed confidence in the professional capacity of the substitute, not as an agent but as the principal, and will be taken to have relied upon him as a physician to exercise his own knowledge, skill, and discretion." Mullins v. Du Vall, 25 Ga. A. 690, 693, 104 SE 513.

39. Ala.—Robinson v. Crotwell, 175 Ala. 194, 57 S 23.
Ark.—Norton v. Hefner, 132 Ark. 18, 198 SW 97, LRA1918C 132; Keller v. Lewis, 65 Ark. 578, 47 SW 755.
Mich.—Hitchcock v. Burgett, 38 Mich. 501.
Mont.—Stokes v. Long, 52 Mont. 470, 159 P 28, 31 [cit Cyc].
N. J.—Myers v. Holborn, 58 N. J. L. 193, 33 A 389, 55 AmSR 606, 30 LRA 345.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356.
Tex.—Moore v. Lee, 109 Tex. 391, 395, 211 SW 214, 4 ALR 185 [rev (Civ. A.) 162 SW 437]; Floyd v. Michie, (Civ. A.) 11 SW (2d) 657.
But see Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513 (stating the preceding rule as applied to a physician who "recommends or even employs" another to treat a patient for him in his absence or other case of need).
"From the very nature of the employment, the physician, who takes the place of another, must while he alone is treating the patient, exercise his own judgment and his own skill; and he is truly an independent contractor." Moore v. Lee, supra.

[a] **Test of agency.**—Whether a physician put in charge of a case by another during the latter's absence is his agent is to be determined by the relations actually existing between them under their agreements or acts. Nash v. Royster, 189 N. C. 408, 127 SE 356.

[b] **The doctrine of respondeat superior does not apply** to a physician who, when employed, acts on his own initiative and without direction from others. Norton v. Hefner, 132 Ark. 18, 198 SW 97, LRA1918C 132; Gross v. Robinson, 203 Mo. A. 118, 218 SW 924.

[c] **Where the patient consents to the substitution,** the relation of master and servant or of principal and agent does not exist between two physicians one of whom has been sent to treat the patient of the other, and the rule of respondeat superior does not apply. Gross v. Robinson, 203 Mo. A. 118, 218 SW 924.

Assistant, agent, or employee see infra § 143.

40. Moore v. Lee, 109 Tex. 391, 211 SW 214, 4 ALR 185 [rev (Civ. A.) 162 SW 437].

[a] **"Partnership case."**—Where it was a long established custom among doctors where the parties resided for a doctor to send another to patients whom he was unable to attend, defendant's statement to a physician selected by him to attend to a case that it would be a partnership case cannot be construed otherwise than as meaning that defendant expected to resume charge when his other engagements would permit, and that each would be entitled to compensation for his services. Moore v. Lee, 109 Tex. 391, 211 SW 214, 4 ALR 185 [rev (Civ. A.) 162 SW 437].

41. Ark.—Norton v. Hefner, 132 Ark. 18, 198 SW 97, LRA1918C 132.
Ga.—Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513.
N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356.
Tex.—Moore v. Lee, 109 Tex. 391, 211 SW 214, 4 ALR 185 [rev (Civ. A.) 162 SW 437].
Wis.—Mayer v. Hipke, 183 Wis. 382, 197 NW 333.
Partner see supra § 139.

42. X-ray specialist as employee of physician see Master and Servant § 1454 note 52 [d].

43. Ark.—Spears v. McKinnon, 168 Ark. 357, 270 SW 524.
Cal.—Ley v. Bishopp, (A.) 263 P 369.
Ga.—Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513.
Mich.—Bishop v. Shurly, 237 Mich. 76, 211 SW 75.
Oh.—Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.
Or.—Gill v. Selling, 125 Or. 587, 267 P 812, 58 ALR 1556.
Tex.—Lee v. Moore, (Civ. A.) 162 SW 437 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185]; Wilkins v. Ferrell, 10 Tex. Civ. A. 231, 30 SW 450.
Eng.—Dickson v. Hygienic Inst., [1910] S. C. (Ct. Sess.) 352.
See Saucier v. Ross, 112 Miss. 306, 73 S 49 (holding that, where a physician performs an operation at a hospital, and the other physicians act under his direction, it is no defense to an action for negligently leaving a drainage tube in the patient's body that it may have been left by another physician).

[a] **Surgeon and assistant are jointly and individually liable** for unskillful or negligent services of the assistant. Spears v. McKinnon, 168 Ark. 357, 270 SW 524; Tish v. Welker, 5 OhS&CP 725, 7 OhNP 472.

[b] **Agreement regarding kind of anæsthetic** to be used, made with the patient by an assistant charged with the duty of administering the anæsthetic, is binding on the physician. Bishop v. Shurly, 237 Mich. 76, 211 NW 75.

44. Lee v. Moore, (Civ. A.) 162 SW 437 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185], Hancke v. Hooper, 7 C. & P. 81, 32 ECL 510, 173 Reprint 37.

45. Ley v. Bishopp, (Cal. A.) 263 P 369; Landon v. Humphrey, 9 Conn. 209, 23 AmD 333; Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513; Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 221, 222, 298 SW 1061 [cit Cyc].

[a] **Rule applied to medical student acting as school's agent.**—Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 298 SW 1061.

[b] **Where one physician retains complete control of the other,** leaving to the other no discretion, but only the manual administration of the prescribed treatment, and renouncing no part of his functions as the sole physician in the case, the relation of principal and agent exists, making him liable for negligent treatment of the patient by the other physician. Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 298 SW 1061.

Liability of principal to third person in tort generally see Agency §§ 532-540.

46. Cal.—Ragin v. Zimmerman, 276 P 107.
Ga.—Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513.
La.—Comeaux v. Miles, (A.) 118 S 786.
Mass.—McDonald v. Dr. McKnight, Inc., 248 Mass. 43, 142 NE 825.
N. J.—Klitch v. Betts, 89 N. J. L. 348, 98 A 427.
See Smith v. Swinehart, 209 Ill. A. 175.

[a] **Rule applied to dentist employee.**—Ragin v. Zimmerman, (Cal.) 276 P 107; Comeaux v. Miles, (La. A.) 118 S 786; McDonald v. Dr. McKnight, Inc., 248 Mass. 43, 142 NE 825; Klitch v. Betts, 89 N. J. L. 348, 98 A 427.

[b] **Doctrine of respondeat superior applied.**—(1) Ragin v. Zimmerman, (Cal.) 276 P 107; Comeaux v. Miles, (La. A.) 118 S 786. (2) Liability of master under doctrine of respondeat superior generally see Master and Servant §§ 1451-1510.

[c] **Physician does not delegate or renounce his functions** as the sole physician in the case, where he authorizes his employee to perform the mere physical administration of the prescribed treatment, in his absence, leaving nothing to his discretion; and the patient in accepting treatment from the employee relies on the physician's implied assurance that he may safely do so, and not on the employee's skill or discretion. Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513.

[d] **Limitation on employee's authority,** so as not to include within the scope of his employment the work negligently done on a patient, does not relieve the employing dentist of liability where the lack of authorization is not apparent to the patient. McDonald v. Dr. McKnight, Inc., 248 Mass. 43, 143 NE 825.

47. Trained nurse as not servant see Master and Servant § 1454 note 55 [b].

48. U. S.—Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174.
Iowa.—Reynolds v. Smith, 148 Iowa 264, 127 NW 192.
Md.—Hunner v. Stevenson, 122 Md. 40, 89 A 418.
Mass.—Withington v. Jennings, 253 Mass. 484, 149 NE 201.
Minn.—Olson v. Bolstad, 161 Minn. 419, 201 NW 918.
Mo.—Hale v. Atkins, 215 Mo. A. 380, 256 SW 544.
Nebr.—Broz v. Omaha Maternity, etc., Hospital Assoc., 96 Nebr. 648, 148 NW 579, LRA1915D 334.
N. C.—Covington v. Wyatt, 196 N. C. 367, 145 SE 673.
Pa.—Stewart v. Manasses, 244 Pa. 221, 90 A 574.
Wis.—Malkowski v. Graham, 169 Wis. 398, 172 NW 785, 4 ALR 1524.
Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.
Eng.—Perionowsky v. Freeman, 4 F. & F. 977.
Ont.—Armstrong v. Bruce, 4

knowledge thereof,[49] or has no connection therewith,[50] or if it is not discoverable by him in the exercise of ordinary care,[51] or unless he is negligent in permitting them to attend the patient.[52] But it has been held that, where a hospital nurse, although not in the regular employ of an operating surgeon, is under his special supervision and control during the operation, the relation of master and servant exists,[53] and that the surgeon is liable, under the doctrine of respondeat superior, for the nurse's negligence.[54]

[§ 145] **I. Actions*—1. Nature and Form.** The nature and form of an action to recover damages occasioned by the negligence or malpractice of a physician or surgeon are controlled by the principles applicable to civil actions generally.[55] Owing to the nature of the relation between a physician and surgeon and a patient,[56] the latter ordinarily may sue the former either in contract or in tort.[57] Whether the action is in contract or in tort depends upon whether it appears from a construction of the complaint that the gravamen of the action is a breach of the contract or a breach of the duty imposed by law by reason of defendant's calling, and the relation between the parties.[58] Ordinarily the gist of an action against a physician for malpractice is negligence, and not the violation of the contract of employment,[59] but where an express promise on the part of the physician to treat the patient is alleged and counted upon, the action is in contract, and not in tort.[60] It has been held that, when the action is in tort, case is the proper form of action,[61] and that, although an operation is performed with malice, the patient having consented thereto, no recovery in trespass can be had therefor.[62]

[§ 146] **2. Conditions Precedent.** Statutes sometimes require the giving of a written notice of claim as a condition precedent to the right to maintain an action to recover damages for injuries to the person.[63] Actions against physicians or surgeons for malpractice have been held to come within the provisions of such statutes.[64] It has been held that the statute applies regardless of whether the action be in tort or on contract.[65]

[§ 147] **3. Limitations.** Actions for the recovery of damages occasioned by the negligence or malpractice of a physician are, in the absence of express statutory provisions, controlled by the limitations applicable to actions for damages generally.[66] In some jurisdictions a specific limitation for the action is prescribed by statute.[67] In the absence of any valid excuse for delay,[68] the running of the statutory time bars the action.[69] It has been held that a statute limiting the time within which actions for "malpractice" must be brought applies to actions against unlicensed, as well as licensed, practitioners.[70] In determining when the cause of action is deemed to have accrued within the meaning of such statutes the rules applicable to actions for personal injuries generally apply.[71]

[§ 148] **4. Defenses.** Matters of defense involving questions of substantive law have been consid-

OntWR 327.

And see cases infra notes 49–54; and supra § 123 note 50.

But see Stanley v. Schumpert, 117 La. 255, 41 S 565, 116 AmSR 202, 6 LRANS 306 (holding that, where an attendant at a sanitarium was not sufficiently careful and did not follow the prescriptions of the physicians, and the physicians did not see to it to some extent at least that the medicines prescribed were properly administered, and to an extent neglected the patient, they are liable for resulting injuries).

[a] **Negligence of fellow employee.**—Withington v. Jennings, 253 Mass. 484, 149 NE 201; Burnham v. Stillings, 76 N. H. 122, 79 A 987.

[b] **Particular acts of negligence.**—(1) Applying hot water receptacles or hot irons. Olson v. Bolstad, 161 Minn. 419, 201 NW 918; Stewart v. Manasses, 244 Pa. 221, 90 A 574; Malkowski v. Graham, 169 Wis. 398, 172 NW 785, 4 ALR 1524; Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107; Armstrong v. Bruce, 4 OntWR 327. (2) Instilling nitrate solution in eyes of a newborn child. Covington v. Wyatt, 196 N. C. 367, 145 SE 673.

49. Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174; Hunner v. Stevenson, 122 Md. 40, 62, 89 A 418 [cit Cyc]; Perionowsky v. Freeman, 4 F. & F. 977.

[a] **Rule applied to negligent after-treatment** by nurses and internes after operation. Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174; Hunner v. Stevenson, 122 Md. 40, 62 A 418.

50. Broz v. Omaha Maternity, etc., Hospital, Assoc., 96 Nebr. 648, 148 NW 575, LRA1915D 334; Stewart v. Manasses, 244 Pa. 221, 90 A 574.

51. Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174; Hunner v. Stevenson, 122 Md. 40, 62, 89 A 418 [cit Cyc].

52. Reynolds v. Smith, 148 Iowa 264, 127 NW 192.

[a] **Presumption of nurses' competency.**—In the absence of knowledge to the contrary, or of facts sufficient to put him on inquiry, a surgeon visiting a hospital to treat a patient has a right to assume that its nurses, not hired by him, are competent. Morrison v. Henke, 165 Wis. 166, 160 NW 173.

53. Aderhold v. Bishop, 94 Okl. 203, 221 P 752.

54. Aderhold v. Bishop, supra.

55. See Actions §§ 110–187.

56. See supra §§ 96–99.

57. See Actions § 155. See also supra § 98.

58. See Actions § 155. See also supra § 98.

59. Ala.—Carpenter v. Walker, 170 Ala. 659, 54 S 60, AnnCas1912D 863.

Cal.—Hall v. Steele, 193 Cal. 602, 226 P 854.

Ill.—Peters v. Howard, 206 Ill. A. 610.

Ind.—Reinhardt v. Friederich, 58 Ind. A. 421, 108 NE 258.

Va.—Hunter v. Burroughs, 123 Va. 113, 96 SE 360.

Eng.—Edgar v. Lamont, [1914] S. C. (Ct. Sess.) 277.

[a] **Rule applied.**—A count based on defendant physician's giving positive assurance that X-ray treatment would effect a cure within a certain time is in tort, and may be united with other counts in tort. Hunter v. Burroughs, 123 Va. 113, 96 SE 360.

60. Lane v. Boicourt, 128 Ind. 420, 27 NE 1111, 25 AmSR 442; Burns v. Barenfield, 84 Ind. 43.

61. Cadwell v. Farrell, 28 Ill. 438; Mullin v. Flanders, 73 Vt. 95, 50 A 813.

Case and trespass distinguished generally see Actions § 117.

62. Cadwell v. Farrell, 28 Ill. 438.

63. See statutory provisions.

64. Klingbeil v. Saucerman, 165 Wis. 60, 160 NW 1051, 1 ALR 1311; Lotten v. O'Brien, 146 Wis. 258, 131 NW 361.

65. Klingbeil v. Saucerman, 165 Wis 60, 160 NW 1051, 1 ALR 1311.

66. See Limitations of Actions §§ 107–121.

67. See statutory provisions.

[a] **In New York** the statute limiting the time within which actions for "malpractice" must be brought applies to actions for negligent and unskilled treatment against: (1) Dentists. Hurlburt v. Gillett, 96 Misc. 535, 161 NYS 994 [aff 176 App. Div. 893 mem, 162 NYS 1124 mem]. (2) Chiropractors. Monohan v. Devinny, 131 Misc. 248, 225 NYS 601 [mod on other grounds 223 App. Div. 547, 229 NYS 60]. (3) Registered nurses. Isenstein v. Malcomson, 133 Misc. 691, 234 NYS 52.

68. See Limitations of Actions § 563.

69. Marty v. Somers, 35 Cal. A. 182, 169 P 411; Tabolosky v. Crandon, 259 Mass. 32, 155 NE 657; Town v. Archer, 4 Ont. L. 383, 1 OntWR 391; Pierce v. Strathroy Hospital, 27 Ont WN 180.

70. Monohan v. Devinny, 131 Misc 248, 225 NYS 601 [mod on other grounds 223 App. Div. 547, 229 NYS. 60].

[a] **Reason for rule.**—"The claim is made by the plaintiff that, if the two-year statute is applied to irregular practitioners, it would grant to them the same indulgence as a duly licensed physician and surgeon. I think any consideration of this kind is based upon a wrong assumption. I do not think that the two-year Statute of Limitation as to malpractice was adopted for the purpose of granting an indulgence to duly licensed physicians and surgeons, simply because they were regular and legal practitioners, but that the statute was passed because of the uncertainty of the results attending the treatment of disease in the first place, and the increasing difficulty of tracing such results as time goes on. Age, inherited traits, latent diseases, debilitated conditions, sometimes render the most skillful treatment unavailing." Monohan v. Devinny, 131 Misc. 248, 250, 225 NYS 601 [mod on other grounds 223 App. Div. 547, 229 NYS 60].

71. See Limitations of Actions § 259.

*By CHAS. W. RILEY (§§ 145–165).

ered in preceding sections,[72] as, for example, matters relating to contributory negligence,[73] and the absence of responsibility for the acts of a person not under the direction or control of defendant.[74] It is no defense to a suit for malpractice that defendant was practicing in violation of a statute making it an offense to practice without first obtaining a license.[75] Nor can a physician not belonging to one of the regular schools of medicine, such as a clairvoyant, relieve himself from liability by the contention that the patient was negligent in employing him with full knowledge of his methods of diagnosis and prescription.[76] A statute holding empirics to the same accountability for malpractice as licensed physicians and surgeons, and providing that such malpractice may be given in evidence in bar of any action for services rendered by such persons,[77] does not affect the right of a licensed physician or surgeon to set up the defense of res judicata founded upon a judgment denying plaintiff compensation for his services in an action in which the malpractice was set up as a bar.[78]

Consent to the abandonment of the case by a physician may be a defense to a subsequent action for malpractice based upon failure to give the patient the attention which his condition required.[79] This, however, is not true if such consent was obtained by false representations with respect to the necessity of further treatment.[80]

Contract exempting from liability. It has been asserted that a physician or surgeon may perhaps protect himself from liability for malpractice by a special contract that he shall not be so liable.[81]

Consent to illegal operation. It has been held that consent of the patient to the performance of an illegal operation constitutes no defense to an action to recover damages suffered from the operation,[82] or from subsequent unskilled treatment in connection therewith.[83] However, the contrary has also been held.[84]

Excessive demands upon services. The fact that the physician or surgeon had undertaken more patients than he could properly care for is no defense to an action based on neglect properly to care for one of them.[85]

Gratuitous services. The fact that the services of the physician or surgeon were rendered gratuitously is no defense to an action based on failure to exercise reasonable care and skill.[86]

Advice of other physicians. The mere fact that the physician in treating the patient acted upon the advice of another physician does not constitute a defense to an action based on unskilled treatment.[87]

[§ 149] **5. Pleading—a. Declaration, Complaint, or Petition.** The rules relating to declarations, complaints, or petitions in civil actions generally,[88] particularly those governing actions for negligence,[89] apply in an action for damages occasioned by the negligence or malpractice of a physician or surgeon.[90] Every fact necessary to constitute a cause of action must be alleged,[91] and with reasonable definiteness and certainty.[92] Thus it is essential that the duty of the physician or surgeon to the person injured be alleged with reasonable definiteness and certainty,[93] as well as the breach of duty complained of,[94] and the causal relation between the

72. See supra §§ 100–144.
73. See supra §§ 130–136.
74. See supra §§ 139–144.
75. Musser v. Chase, 29 Oh. St. 577.
76. Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.
77. See statutory provisions.
78. Leslie v. Mollica, 236 Mich. 610, 211 NW 267, 49 ALR 546.
Judgment in action for services as bar to subsequent action for negligent or unskillful treatment see Judgments § 1281.
79. Miller v. Blackburn, 170 Ky. 263, 185 SW 864; Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696].
80. Carpenter v. Blake, supra.
81. Nelson v. Harrington, 72 Wis. 591, 40 NW 228, 7 AmSR 900, 1 LRA 719.
Agreements exempting from liability for negligence generally see Contracts § 437.
82. Lembo v. Donnell, 117 Me. 143, 103 A 11; Milliken v. Heddesheimer, 110 Oh. St. 381, 144 NE 264, 33 ALR 53; Miller v. Bayer, 94 Wis. 123, 68 NW 869.
83. Lembo v. Donnell, 117 Me. 143, 103 A 11.
84. Hunter v. Wheate, 53 App. (D. C.) 206, 289 Fed. 604.
85. Sinclair v. Brunson, 212 Mich. 387, 180 NW 358, 12 ALR 593; Hood v. Moffett, 109 Miss. 757, 69 S 664, LR A1916B 622, AnnCas1917E 410.
86. Latham v. Elrod, 6 Ala. A. 456, 60 S 428.
87. Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455.
[a] **Thus,** in an action to recover damages for burns sustained during X-ray treatments, advice of other doctors to withdraw one filter is immaterial, whether practice was good or bad. Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455.
88. See Pleading [31 Cyc 92 et seq].
89. See Negligence §§ 626–707.
90. See cases infra this section.
91. See cases infra this note.
[a] **Cause of action stated.**—(1) Failure of dentist properly to fit patient with false teeth. Fairfax v. King, 21 Ala. A. 306, 107 S 722. (2) Improper administration of neosalvarsan. Thaggard v. Vafes, 218 Ala. 609, 119 S 647. (3) Improper treatment of blood poisoning following confinement. Lueke v. Senn, 165 Wis. 544, 163 NW 171. (4) Improper treatment of broken leg. Horn v. Pope, 205 Ala. 127, 87 S 161; Crowty v. Stewart, 95 Wis. 490, 70 NW 558. (5) Improper treatment of dislocated hip joint. Finch v. Bursheim, 122 Minn. 152, 142 NW 143. (6) Improper treatment of eczema by use of X-rays. Hunter v. Burroughs, 123 Va. 113, 96 SE 360. (7) Improper diagnosis of injuries, treatment, and continuance thereof. Christie v. Walton, 63 Ind. A. 234, 113 NE 750; Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178. (8) Improper diagnosis, unnecessary operation against patient's desire, and improper care following operation. Edwards v. Roberts, 12 Ga. A. 140, 76 SE 1054. (9) Improper operation. Grubbs v. Elrod, 25 Ga. A. 108, 102 SE 908. (10) Improperly advising plaintiff's wife that child treated for scarlet fever might safely be visited and taken home from hospital without danger of infection to her or to plaintiff. Skillings v. Allen, 143 Minn. 323, 173 NW 663. (11) Improperly directing hypodermic injections to be administered by an unprofessional assistant. Mullins v. Du Vall, 25 Ga. A. 690, 104 SE 513. (12) Performance of operation without patient's consent. Markart v. Zeimer, 67 Cal. A. 363, 227 P 683. (13) Pulling wrong teeth. Hershey v. Peake, 115 Kan. 562, 223 P 1113. (14) Wrong diagnosis by chiropractor. Kuechler v. Volgmann, 180 Wis. 238, 192 NW 1015, 31 ALR 826.
[b] **Fraudulent procurement of husband's consent to operation on wife.**—A declaration in an action by a husband for damages for procuring his consent to the performance of an operation on his wife which fails to allege that the wife did not consent to the operation does not state a cause of action. Burroughs v. Crichton, 48 App. (D. C.) 596, 4 ALR 1529.
92. See cases infra this note.
[a] **Complaint held too vague, uncertain, or indefinite.**—(1) Uncertainty with respect to the name and nature of the disease alleged to have been improperly treated and with respect to whether negligence in the treatment of a disease correctly diagnosed or a wrong diagnosis was relied upon. Osborn v. Carey, 24 Ida. 158, 132 P 967. (2) Uncertainty with respect to whether the drug which caused the injury was negligently and improperly prescribed for the malady, or whether, although properly prescribed for the malady, it was directed to be taken in an improper manner, or in improper quantities, or with improper frequency. Billesbach v. Larkey, 161 Cal. 649, 120 P 31.
93. Hanselman v. Carstens, 60 Mich. 187, 27 NW 18.
[a] **Employment of physician sufficiently alleged.**—Schillinger v. Savage, 186 Ind. 189, 115 NE 321.
[b] **Duty to advise parents with respect to danger of contracting infectious disease from child sufficiently alleged.**—Skillings v. Adams, 143 Minn. 323, 173 NW 663.
[c] **Professional character of defendant sufficiently alleged.**—A petition for malpractice, alleging that defendant "is a physician . . . engaged in the practice of medicine . . . and has been so engaged for several years last past," is sufficient, without alleging that he was a physician when he treated his patient. Bower v. Self, 68 Kan. 825, 75 P 1021.
94. Billesbach v. Larkey, 161 Cal. 649, 120 P 31; Foreman v. Hunter Lumber Co., 36 Cal. A. 763, 173 P 408; De Hart v. Elnire, 121 Ind. 242, 23 NE 77; Hawley v. Williams, 90 Ind. 160; Barney v. Pinkham, 29 Nebr. 350, 45 NW 694, 26 AmSR 389; Fabian v. Schinasi, 176 App. Div. 259, 162 NYS 1073.
[a] **Breach of duty sufficiently alleged.**—(1) Failure to ascertain that a tendon was severed and failure to sew it up. Dunn v. Dufficy, 194 Cal. 383, 228 P 1029. (2) Failure properly to care for patient following an op-

breach of duty and the injuries complained of.[95] Where the breach of duty relied upon is negligence in the treatment of the patient, it is not sufficient merely to state that certain acts not negligent in themselves were done or omitted by the physician or surgeon without alleging that they were negligently done or omitted,[96] even though the doctrine of res ipsa loquitur is relied upon;[97] and such a petition is insufficient under a statute prescribing the contents of a petition as a statement of facts constituting plaintiff's cause of action.[98] A complaint alleging a course of treatment entirely consistent with the physician's exercise of all necessary care and skill, but alleging nonsuccess of the treatment, is insufficient to charge negligence or malpractice.[99] The terms of the contract by which the physician or surgeon is employed need not be alleged.[1] Nor is it necessary to allege the consideration to be paid,[2] that any consideration was to be paid,[3] or that it was the physician's duty to act skillfully.[4] Nor is it necessary to aver mere underlying evidential facts.[5]

Matters of defense need not be alleged,[6] unless the facts constituting the cause of action cannot otherwise be completely alleged.[7]

Contributory negligence. In those jurisdictions wherein it is required in actions founded upon negligence generally,[8] freedom from contributory negligence must be alleged in actions founded upon the failure of a physician or surgeon to exercise ordinary care and skill.[9] It has been held that, even though such allegation is necessary, the omission is cured where the issue is fully made up by the answer and reply.[10]

Special damages. In accord with the general rule with respect to pleading special damages,[11] allegations of special damages in actions against a physician or surgeon for negligence or malpractice are sufficient where they are sufficiently definite to apprise the adverse party of the probable evidence which will be introduced by plaintiff and to enable him to prepare his defense.[12]

Amendment. A plaintiff in an action to recover damages for malpractice by a physician may be allowed to amend his complaint to correspond with the proof.[13]

[§ 150] **b. Plea or Answer.** The rules relating to pleas or answers in civil actions generally,[14] particularly those relating to actions for negligence,[15] are applicable to the plea or answer in an action for injuries sustained by reason of a breach of duty on the part of a physician or surgeon.[16] Thus matters of defense which are covered by the general issue need not be specially pleaded,[17] and a special plea of matters amounting to the general issue is subject to de-

eration. Blackburn v. Curd, 106 SW 1186, 32 KyL 789. (3) Failure properly to dress a leg wound. Zirkler v. Robertson, 30 N. S. 61. (4) Failure properly to treat a fractured leg. Carpenter v. McDavitt, 53 Mo. A. 393; Stokes v. Long, 52 Mont. 470, 159 P 28; Morrill v. Tegarden, 19 Nebr. 534, 26 NW 202; Hills v. Shaw, 69 Or. 460, 137 P 229. (5) Failure properly to treat a gunshot wound. Mullinax v. Hord, 174 N. C. 607, 94 SE 426. (6) Failure to secure drainage tube in the first instance and failure later to attach it securely after discovery that it was loose. Burris v. Titzell, 189 Iowa 1322, 177 NW 557, 179 NW 851. (7) Improper treatment of child's ear. Peck v. Henderson, 22 Ala. A. 541, 118 S 258 [certiorari den 218 Ala. 233, 118 S 262]. (8) Leaving draining tube in the cut made by a surgical operation. Talley v. Whitlock, 199 Ala. 28, 73 S 976. (9) Neglect to attend patient following an operation. Burroughs v. Crichton, 48 App. (D. C.) 596, 4 ALR 1529. (10) Performance of unnecessary operation. Markart v. Zeimer, 67 Cal. A. 363, 227 P 683. (11) Prescription of improper, inappropriate, and harmful remedies. Hunter v. Burroughs, 123 Va. 113, 96 SE 360. (12) Unnecessary cutting of sphincter and muscle while operating for hemorrhoids. Hughes v. Weaver, (Ga. A.) 148 SE 12. (13) Unskillful taking of X-ray picture. Ragin v. Zimmerman, (Cal.) 276 P 107.

[b] **Breach of duty insufficiently alleged.**—(1) Improper treatment of fractured leg. Martin v. Greer, 31 Ga. A. 625, 121 SE 688. (2) Improper treatment of strained leg ligaments. MacKeown v. Baldwin, 59 Cal. A. 674, 211 P 477.

[c] **Gross negligence insufficiently alleged.**—Lueke v. Senn, 165 Wis. 544, 163 NW 171.

95. See cases infra this note.

[a] **Causal connection sufficiently alleged.**—(1) Improper administration of neosalvarsan and subsequent death of patient. Thaggard v. Vafes, 218 Ala. 609, 119 S 647. (2) Improper treatment of fractured leg and subsequent condition of leg. Schillinger v. Savage, 186 Ind. 189, 115 NE 321. (3) Improper treatment of severed tendon and loss of use of finger and permanent crippling of hand. Dunn v. Dufficy, 194 Cal. 383, 228 P 1029.

[b] **Causal connection insufficiently alleged.**—(1) Failure to test susceptibility of patient to injurious effects of X-ray treatments and injuries resulting from X-ray treatments administered. Hunter v. Burroughs, 123 Va. 113, 96 SE 360. (2) Lack of skill and negligence in diagnosis and treatment of back and subsequent ill health, weakness, and nervousness. Merriam v. Hamilton, 64 Or. 476, 130 P 406. (3) Lack of skill and negligence in diagnosis and treatment of gastritis, and the death of patient. Sweat v. Foster, 28 Ga. A. 360, 111 SE 66. (4) Negligence in failing to prevent spread of typhoid fever and the contracting of the disease by plaintiff's children. Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459.

96. Whitmore v. Herrick, 205 Iowa 621, 218 NW 334.

97. Whitmore v. Herrick, supra.

98. Whitmore v. Herrick, supra.

99. Foreman v. Hunter Lumber Co., 36 Cal. A. 763, 173 P 408.

1. Patterson v. Howe, 102 Or. 275, 202 P 225.

2. Patterson v. Howe, supra.

3. Peck v. Martin, 17 Ind. 115.

4. Peck v. Martin, supra; Hanselman v. Carstens, 60 Mich. 187, 27 NW 18; Jones v. Burtis, 88 Wis. 478, 60 NW 785.

5. Hanselman v. Carstens, 60 Mich. 187, 27 NW 18; Hunter v. Burroughs, 123 Va. 113, 96 SE 360.

[a] **Illustrations.**—(1) In an action for malpractice, whether this or that specific prescription, medicine, or remedy should or should not have been applied need not be alleged. Hunter v. Burroughs, 123 Va. 113, 96 SE 360. (2) A count alleging failure of defendant physician to make requisite preliminary examination before subjecting plaintiff to X-ray treatment is sufficient to raise the issue whether defendant was professionally unskillful and negligent so that it was not demurrable, because not alleging in detail what examination should have been made. Hunter v. Burroughs, supra. (3) A count charging that defendant physician was negligent in subjecting plaintiff to X-ray treatment without making preliminary examination to determine plaintiff's susceptibility was not demurrable, because it did not contain an express allegation that other specialists would not have been guilty of such omission. Hunter v. Burroughs, supra.

6. Blackburn v. Curd, 106 SW 1186, 32 KyL 789.

[a] **Availability of other physicians.**—Where a petition for malpractice alleged facts showing an obligation on defendant to continue to treat deceased, and that he failed to comply therewith or render the necessary treatment, and by reason of such failure deceased received injuries and died, the petition was not objectionable for failure to allege that another physician could not have been obtained to treat deceased when defendant failed to do so. Blackburn v. Curd, 106 SW 1186, 32 KyL 789.

7. Smith v. Driscoll, 94 Wash. 441, 162 P 572, LRA1917C 1128.

[a] **Rule applied.**—A complaint against a physician for testifying to communications confidentially made to him must show that the testimony was not admissible in that case to overcome the presumption of a witness' privilege. Smith v. Driscoll, 94 Wash. 441, 162 P 572, LRA1917C 1128.

8. See Negligence § 679.

9. Wesley v. Allen, 235 Ill. A. 322; Peters v. Howard, 206 Ill. A. 610.

[a] **In Indiana** (1) under Burns Rev. St. (1901) § 359a, making contributory negligence a matter of defense, the complaint need not allege the want thereof on the part of plaintiff. Aspy v. Botkins, 160 Ind. 170, 66 NE 462. (2) Prior to the statute it was held that the rule requiring contributory negligence to be negatived did not apply to actions founded upon the negligence of physicians and surgeons. Coon v. Vaughn, 64 Ind. 89; Scudder v. Crossan, 43 Ind. 343.

Negativing contributory negligence generally see Negligence §§ 676–686.

10. Williams v. Nally, 45 SW 874, 20 KyL 244.

11. See Damages § 307.

12. Dorr v. Fike, 177 Ark. 907, 9 SW (2d) 318.

13. Wormell v. Reins, 1 Mont. 627.

Amendment of pleadings generally see Pleading [31 Cyc 359 et seq].

14. See Pleading [31 Cyc 126 et seq].

15. See Negligence §§ 688–705.

16. See cases infra this section.

17. Pratt v. Davis, 224 Ill. 300, 79 NE 562, 7 LRANS 609, 8 AnnCas 197.

[a] **Illustration.**—Where the declaration, in an action against a physician for an unauthorized surgical operation, makes it necessary for the

murrer.[18] To a complaint for malpractice, sounding in tort against two surgeons, an answer that each was separately employed is bad.[19]

[§ 151] **c. Issues, Proof, and Variance.** As in other actions,[20] the issues in an action for injuries sustained as a result of a breach of duty on the part of a physician or surgeon are confined to those raised by the pleadings;[21] every allegation of the pleadings necessary to the establishment of the cause of action or defense must be proved if put in issue;[22] and the proof must be restricted to the issues made by the pleadings,[23] and must correspond substantially with what is alleged.[24] Immaterial allegations need not

patient to prove that the operation was performed without her consent, or the consent of some one who could act for her, a plea alleging leave and license to perform the operation was unnecessary. Pratt v. Davis, 224 Ill. 300, 79 NE 562, 7 LRANS 609, 8 Ann Cas 197.

18. Peters v. Howard, 206 Ill. A. 610.

[a] **Illustration.**—In an action against a physician for negligently placing hot water bottles upon plaintiff, special pleas that the bottles "were not the property of, nor in the possession or under the control" of, defendant, and that the grievances complained of "were not committed by this defendant . . . nor by any one under the control or in the employ" of defendant, are demurrable as amounting to the general issue. Peters v. Howard, 206 Ill. A. 610.

Special plea amounting to general issue in general see Pleading [31 Cyc 153].

19. Goble v. Dillon, 86 Ind. 327, 44 AmR 308.

20. See Pleading [31 Cyc 670 et seq].

21. Ala.—Knowles v. Blue, 209 Ala. 27, 95 S 481.

Ill.—Smith v. Mammen, 164 Ill. A. 176.

Iowa.—O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755; Snearly v. McCarthy, 180 Iowa 81, 161 NW 108.

Md.—Dashiell v. Griffith, 84 Md. 363, 35 A 1094.

Minn.—Jacobs v. Cross, 19 Minn. 523.

Mo.—Summers v. Tarpley, (A.) 208 SW 266.

Nebr.—McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296.

Or.—Hills v. Shaw, 69 Or. 460, 137 P 229.

Tex.—Moore v. Lee, 109 Tex. 391, 211 SW 214, 4 ALR 185.

[a] **Illustrations.**—(1) Where the negligence charged was improper reduction of a fracture and the use of improper appliances to keep it in position, an act of defendant in his treatment of the injury, not involving such charges of negligence, afforded no basis for recovery. O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755. (2) In an action for alleged malpractice in improperly setting a broken leg, where plaintiff stated the grounds of negligence with great particularity, but failed to state that defendant failed to give him necessary constitutional treatment to aid union of the bones, such proposition must be eliminated. Snearly v. McCarthy, 180 Iowa 81, 161 NW 108. (3) Where a complaint in an action for malpractice alleged that by reason of defendant's negligence in the treatment of plaintiff's fractured limb it became necessary to amputate it, and that by reason of such negligence plaintiff suffered pain and anguish, this limited defendant's liability to neglect causing loss of the limb, and no recovery could be had for pain or anguish if such loss was not caused by his negligence. Jacobs v. Cross, 19 Minn. 523.

[b] **Allegations sufficient to raise issue of defendants' skill.**—Allegations charging that defendants held themselves out to the world as healers of diseases and physical injuries. Robertson v. Wenger, 131 Mo. A. 224, 110 SW 663.

22. See cases infra this note.

[a] **Matters to be proved.**—(1) Negligence or lack of skill. Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281. (2) Causal relation between breach of duty and injury. Searer v. Lower, 25 Oh. A. 328, 158 NE 199.

[b] **Proof of an express promise to cure** is not necessary to sustain a complaint, the language of which alleges no more than a breach of the duty imposed by law to exercise reasonable skill and care. Hoopingarner v. Levy, 77 Ind. 455.

23. Conn.—Grannis v. Branden, 5 Day 260, 5 AmD 143.

Ida.—Ruble v. Busby, 27 Ida. 486, 149 P 722, AnnCas1917D 665.

Ill.—Peters v. Howard, 206 Ill. A. 610.

Iowa.—Snearly v. McCarthy, 180 Iowa 81, 161 NW 108; Albertson v. Lewis, 132 Iowa 243, 109 NW 705.

Me.—Goodwin v. Hersom, 65 Me. 223.

Mass.—Twombly v. Leach, 11 Cush. 397.

Mich.—Mayo v. Wright, 63 Mich. 32, 29 NW 832.

Minn.—Jacobs v. Cross, 19 Minn. 523.

Mo.—West v. Martin, 31 Mo. 375, 80 AmD 107; Spain v. Burch, 169 Mo. A. 94, 154 SW 172.

Pa.—Bemus v. Howard, 3 Watts 255.

[a] **Illustrations.**—(1) In an action against a surgeon to recover damages for injuries alleged to have ensued from his want of ordinary care and skill in the treatment of a fracture, proof that he gave assurances to plaintiff that he possessed and would exercise extraordinary skill and effect a cure, is not admissible to support the declaration. Goodwin v. Hersom, 65 Me. 223. (2) The exclusion of evidence of defendant's statement that a patient was in an excellent condition to submit to an operation is proper where negligence was not charged in performing the operation when the patient was not in a proper physical condition. Ruble v. Busby, 27 Ida. 486, 149 P 722, AnnCas1917D 665. (3) Where the declaration in an action against a physician for malpractice does not allege general incompetency in defendant, plaintiff cannot recover on that ground, but must show that defendant did not properly exercise the skill which he in fact possessed. Mayo v. Wright, 63 Mich. 32, 29 NW 832. (4) Where plaintiff failed to allege negligence in not giving proper constitutional treatment to aid the bones to form the union, evidence as to such proposition was properly excluded. Snearly v. McCarthy, 180 Iowa 81, 161 NW 108. (5) On a complaint for malpractice, charging negligence and want of skill in treating a fractured limb, by reason of which it had to be amputated, evidence of the manner in which such amputation was performed is not competent, no lack of care or skill in that respect being charged. Jacobs v. Cross, 19 Minn. 523. (6) Evidence that a physician used a brass pin in opening a blister, caused by the use of a hot water bottle, is inadmissible, where the only negligence charged is in negligently placing hot water bottles on patient. Peters v. Howard, 206 Ill. A. 610. (7) Where the petition, in an action against a physician for malpractice in treating a fracture of an arm, presented a case of a permanent injury and demanded damages on that theory, evidence as to the reasonable value of the services of a surgeon in performing an operation to reset the fracture was inadmissible as outside of the issues. Albertson v. Lewis, 132 Iowa 243, 109 NW 705. (8) In an action for malpractice, plaintiff cannot give evidence that the physician abandoned the patient, and refused to prescribe, unless it is so laid in the declaration. Bemus v. Howard, 3 Watts (Pa.) 255. (9) Where, in an action against a surgeon for alleged malpractice, the petition alleged unskillfulness in the treatment of the broken limb, and the answer traversed such allegation, without averring any hereditary peculiarity as a special defense, evidence as to the weakness of the bones of plaintiff's family was inadmissible. West v. Martin, 31 Mo. 375, 80 AmD 107.

[b] **Proof within averments.**—(1) Abandonment of patient under declaration alleging that the injury resulted from the careless, negligent, improper, and unskillful treatment of the physician. Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627. (2) Availability of X-ray machines to defendants under a petition charging physicians with negligence in failing to discover that a nerve was caught between fragments of broken bone. Ingwersen v. Carr, 180 Iowa 988, 164 NW 217. (3) Bandaging a fractured arm too tightly at the time of the first treatment, under a petition charging carelessness and lack of skill in failing to make proper allowance for the swelling inevitably attendant upon fractured limbs, as well as leaving the bandage too tight thereafter. Phifer v. Baker, 34 Wyo. 415, 244 P 637. (4) Emergency requiring an operation in addition to that specifically authorized under a denial of allegations charging an unauthorized operation. King v. Carney, 85 Okl. 62, 204 P 270. (5) Failure to attend a patient subsequent to the date of her miscarriage, under an allegation charging the physician with failure to use the necessary skill and care in attending upon and treating her for that ailment. Kruger v. Bossingham, 152 Minn. 243, 188 NW 324. (6) Improper selection of point of amputation under an allegation that the amputation was unskillfully and negligently performed. Wright v. Hardy, 22 Wis. 348. (7) Lack of a filter on an X-ray machine, under a petition alleging negligence in unduly exposing plaintiff to the ray. Gross v. Robinson, 203 Mo. A. 118, 218 SW 924. (8) Payment of a certain sum for an operation may be proved under a petition which alleges the contract of employment by way of inducement and then proceeds as for an action in tort. Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280. (9) Placing patient's arm in a straight splint and subsequently in a splint slightly curved instead of placing it in a position at about right angles as required by proper surgical practice, under an allegation that defendant negligently and unskillfully failed to place the arm in splints in such position as to avoid overlapping of the fractured bones. Brooks v. Brookes, (Mo. A.) 186 SW 1105. (10) Propriety of operation, under a plea denying allegations of petition charging that the operation performed was not the operation contracted for and averring that the operation performed was done in a skillful, careful, and proper manner. Perry v. Hodgson, 37 Ga. A. 314, 140 SE 396. (11) Use of unsterilized glass, unsterilized spoon, and unsterilized water by a dentist, under an allegation that in making a hypodermic injection after extraction of teeth a solution was used which was highly septic and contaminated with germs and bacteria. Dimock v. Miller, 202 Cal. 668, 262 P 311.

24. Searer v. Lower, 25 Oh. A. 328,

be proved.[25] In accord with, and subject to, the rules governing in actions founded upon negligence generally,[26] plaintiff is not confined in his evidence to any particular acts or omissions where negligence of the physician or surgeon is alleged in general terms.[27] But where specific acts of negligence are alleged, the proof must be confined to the specific acts charged.[28] This rule, however, does not exclude proof of incidental facts and circumstances which fairly tend to establish the negligence of the primary act charged.[29] Where a plaintiff has alleged two or more acts of negligence, it is sufficient for him to prove one of them.[30]

Under a general denial, in an action against a physician or surgeon for breach of contract to perform professional services, defendant may show that he did not make the contract claimed by plaintiff,[31] and also what the contract actually was.[32]

[§ 152] **6. Evidence[33]—a. Presumptions and Burden of Proof—(1) Presumptions.** The general rules relating to presumptions,[34] particularly those which apply in actions founded upon negligence,[35] ordinarily govern and control in actions for malpractice.[36] Negligence on the part of a physician or surgeon is not presumed, but must be affirmatively proved.[37] The same is true ordinarily with respect to the possession by the physician or surgeon of the requisite skill and learning.[38] On the contrary, in the absence of evidence on the subject, it will be presumed that a physician or surgeon discharged his full duty to the patient,[39] including the exercise of reasonable care and skill in his treatment.[40] Save in those exceptional cases governed by the doctrine of res ipsa loquitur,[41] no inference of negligence or want of skill can be drawn from the result of treatment by a physician or surgeon.[42] Thus no presumption of negligence or want of skill arises from the mere fact that the treatment given was unsuccessful,[43] or failed to produce the best results.[44] Nor does any such presumption arise from the mere fact that,

158 NE 199; Williams v. Poppleton, 3 Or. 139.

[a] **There is no material variance** between an allegation that: (1) The patient was placed in a bed which contained hot water bottles and hot soap stones, and proof that the hot water bottles and soap stones were placed in the bed after the patient was put there. Fuller v. Kelso; 163 Ill. A. 516. (2) The physician failed to put the bones of a fractured clavicle in proper apposition, and proof that a false and fibrous union, shown to be the natural result of imperfect apposition, resulted from the treatment given. Duffy v. Charters, 180 Mich. 572, 147 NW 541.

25. Musser v. Chase, 29 Oh. St. 577.

[a] **Rule applied.**—The averment, in an action against a physician for malpractice, that defendant was employed at his special instance and request, is technical, and is sufficiently proved by showing that defendant held himself out as a practitioner soliciting public patronage, and that the employment was by mutual consent. Musser v. Chase, 29 Oh. St. 577.

26. See Negligence §§ 717–734.

27. Hales v. Raines, 162 Mo. A. 46, 141 SW 917; Dean v. Seeman, 42 S. D. 577, 176 NW 649.

[a] **Thus,** in an action against a surgeon for malpractice, based on the negligent setting of a broken femur, it was not error to permit plaintiff's wife to state whether any weights or extensions were applied to her husband's injured limb by defendant, notwithstanding failure to use weights was not pleaded. Dean v. Seeman, 42 S. D 577, 176 NW 649.

28. Ennis v. Banks, 88 Wash. 237, 152 P 1037.

29. Wojciechowski v. Coryell, (Mo. A.) 217 SW 638.

[a] **Rule applied.**—Although plaintiff's petition alleged specific acts of negligence on defendant's part in failing to set the broken bones of his leg in natural alignment, and in permitting them to remain in disalignment, evidence that he failed to use an anæsthetic, to take more than one X-ray photograph, to lance the wound, insert drainage tubes, elevate the leg, apply ice bags, call a consulting physician, or inform plaintiff or his family of the seriousness of his condition, were admissible to show the character of the treatment and the condition of the leg Wojciechowski v. Coryell (Mo. A.) 217 SW 638

30. Samuels v Willis, 133 Ky. 459, 118 SW 339, 19 AnnCas 188.

[a] **Thus,** where the petition alleged that defendant, in the course of an operation, negligently cut plaintiff's intestines, and negligently left in her abdomen after the operation a sponge which irritated them, causing them to ulcerate, etc., plaintiff, although failing to show that defendant negligently cut her intestines, could recover by showing that he negligently left in her abdomen a sponge causing injuries complained of. Samuels v. Willis, 133 Ky. 459, 118 SW 339, 19 AnnCas 188.

31. Schuster v. Sutherland, 92 Wash. 135, 158 P 730.

32. Schuster v. Sutherland, supra.

33. In action for false certificate of insanity see supra § 128.

34. See Evidence §§ 25–88.

35. See Negligence §§ 738–749.

36. See cases infra this section.

37. Delahunt v. Finton, 244 Mich. 226, 221 NW 168; Sheldon v. Wright, 80 Vt. 298, 67 A 807.

[a] **Negligence in administering a drug** by hypodermic injection will not be presumed. Thomson v. Virginia Mason Hospital, (Wash.) 277 P 691.

38. Priestley v. Stafford, 30 Cal. A. 523, 158 P 776.

39. Hanners v. Salmon, 216 Ky. 584, 288 SW 307, Wilt v. McCallum, 214 Mo. A. 321, 253 SW 156; Floyd v. Michie, (Tex. Civ. A.) 11 SW (2d) 657.

[a] **Negligence in administration of drug.**—If there is any presumption in such case, it is that the method employed was usual and proper. Thomson v Virginia Mason Hospital, (Wash.) 277 P 691.

40. Cal.—Houghton v. Dickson, 29 Cal. A. 321, 155 P 128.

Ga.—Fincher v. Davis, 27 Ga. A. 494, 108 SE 905.

Md.—Angulo v. Hallar, 137 Md. 227, 112 A 179

Mo.—Pate v. Dumbauld, 298 Mo 435, 250 SW 49; Wilt v McCallum, 214 Mo. A. 321, 253 SW 156

Nebr.—McGuire v. Rix, 225 NW 120.

N. D.—Schmidt v. Stone, 50 N. D. 91, 194 NW 917.

Pa.—De Rose v. Hirst, 282 Pa. 292, 127 A 776.

41. See cases infra note 49.

42. U. S.—Ewing v. Goode, 78 Fed. 442.

Ala.—Carraway v. Graham, 218 Ala. 453, 118 S 807.

Colo.—Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas1916C 1075; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

D. C.—Sweeney v. Erving, 35 App 57 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed 815, 43 LRANS 734, AnnCas 1914D 905].

Ill.—Sims v. Parker, 41 Ill. A. 284.

Minn.—Nelson v. Dahl, 174 Minn. 574, 219 NW 941.

Mo.—Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed sub nom State v. Ellison, 266 Mo. 604, 182 SW 996, AnnCas1918C 1].

N. D.—Gallagher v. Kermott, 56 N. D. 176, 216 NW 569.

Vt.—Parker v. Bowen, 98 Vt. 115, 126 A 522.

Wash.—Inglis v. Morton, 99 Wash. 570, 169 P 962.

Wis.—Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Finke v. Hess, 170 Wis. 149, 174 NW 466.

43. U. S.—Ewing v. Goode, 78 Fed. 442.

Ala.—Woodlawn Infirmary v. Byers, 216 Ala. 210, 112 S 831; Hamrick v. Shipp, 169 Ala. 171, 52 S 932; Shelton v. Hacelip, 167 Ala. 217, 51 S 937.

Cal.—Scherer v. Eidenmuller, 45 Cal. A. 372, 187 P 445.

Colo.—McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Ill.—Red Cross Medical Serv. Co. v. Green, 126 Ill. A. 214; Sims v. Parker, 41 Ill. A. 284.

Ind.—Edwards v. Uland, 193 Ind. 376, 140 NE 546; Edwards v. Uland, (A.) 131 NE 240.

Iowa.—Thorpe v. Talbott, 197 Iowa 95, 196 NW 716; Tomer v. Aiken, 126 Iowa 114, 101 NW 769; Piles v. Hughes, 10 Iowa 579.

Kan.—Pettigrew v. Lewis, 46 Kan. 78. 26 P 458.

Ky.—Hanners v. Salmon, 216 Ky. 584, 288 SW 307; Miller v. Blackburn, 170 Ky. 263, 185 SW 864.

Me.—Curran v. Holt, 117 Me. 369, 104 A 579.

Mich.—Zoterell v. Repp, 187 Mich. 319, 153 NW 692; Wood v. Barker, 49 Mich. 295, 13 NW 597.

Minn.—Sawyer v. Berthold, 116 Minn. 441, 134 NW 120; Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712

Mo.—McDonald v. Crider, (A.) 272 SW 980.

Nebr.—Barney v. Pinkham, 29 Nebr. 350, 45 NW 694, 26 AmSR 389.

N. Y.—Bellinger v Craigue, 31 Barb. 534.

N. D.—Schmidt v. Stone, 50 N. D. 91, 194 NW 917.

Oh.—Craig v. Chambers, 17 Oh. St. 253.

Pa.—Wohlert v. Seibert, 23 Pa. Super. 213; Haire v. Reese, 7 Phila. 138.

S. D.—Hanson v. Harris, 44 S. D. 457, 184 NW 262.

Va.—Fox v. Mason, 139 Va. 667, 124 SE 405

Wash.—Thompson v. Virginia Hospital, 277 P 691, Hoffman v. Watkins, 78 Wash. 118, 138 P 664.

W. Va.—Dye v. Corbin, 59 W. Va. 266, 53 SE 147.

Wis.—Wurdeman v. Barnes, 92 Wis. 206, 66 NW 111.

Ont.—Hodgins v. Banting, 12 Ont. L. 117.

44. Colo.—McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Kan.—Paulich v. Nipple, 104 Kan. 801, 180 P 771.

while under the care of the physician or surgeon, the patient dies,[45] or sustains an injury.[46] This is so, even though the injury sustained is of an unusual character.[47]

Under the doctrine of res ipsa loquitur,[48] it has been held that an inference of negligence may be permitted in the absence of explanation by the physician or surgeon where the thing which caused the injury complained of was under his management or control and the accident is such as in the ordinary course of things does not happen if proper care is exercised.[49] The doctrine of res ipsa loquitur is not applicable where the injury is one which may occur, even though proper care is exercised.[50] And there is some authority to the effect that the doctrine has no application to actions against physicians or surgeons for malpractice.[51] It has been held that, in an action for damages sustained by reason of acts or omissions constituting malpractice, no inference of incompetence on the part of defendant can be drawn from the fact that he was not duly licensed to act as a physician or surgeon.[52] It is sometimes provided by statute, however, that in such actions the fact that defendant acted as a physician or surgeon without being duly licensed shall, when the acts complained of were a proximate cause of the injuries, be deemed prima facie evidence of negligence.[53]

Consent to operation. In the absence of evidence showing that the patient was the victim of false representations his consent to an operation will be presumed from the fact that he voluntarily submitted to it.[54]

Malicious intent. If a physician apply a treatment not sanctioned by medical science which resulted in injury and which such physician was bound to know would result in injury, the law imputes a malicious intent.[55]

[§ 153] **(2) Burden of Proof.** The rules relating to burden of proof in civil actions generally,[56] particularly those governing actions for negligence,[57] are applicable in an action against a physician or surgeon for malpractice.[58] Plaintiff has the burden of establishing the breach of duty on the part of the physician or surgeon[59] and the causal connection be-

Mich.—Wood v. Barker, 49 Mich. 295, 13 NW 597.
N. Y.—Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281.
N. D.—Schmidt v. Stone, 50 N. D. 91, 194 NW 917.
Wash.—Thomson v. Virginia Mason Hospital, 277 P 691.
Wyo.—McCoy v. Clegg, 36 Wyo. 472, 257 P 484.

45. Ill.—Hoover v. Buckman, 194 Ill. A. 308.
Minn.—Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712.
Mo.—Spain v. Burch, 169 Mo. A. 94, 154 SW 172.
Mont.—Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.
N. D.—Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666.
Or.—Emerson v. Lumbermen's Hospital Assoc., 100 Or. 472, 198 P 231.

46. Cal.—Priestley v. Stafford, 30 Cal. A. 523, 158 P 776.
D. C.—Sweeney v. Erving, 35 App. 57 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, 43 LRANS 734, AnnCas 1914D 905].
Ill.—Dawson v. Allen, 191 Ill. A. 399; Blodgett v. Nevins, 189 Ill. A. 544.
La.—Lett v. Smith, 6 La. A. 248.
Md.—Streett v. Hodgson, 139 Md. 137, 115 A 27.
Mich.—Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262.
Oh.—Ault v. Hall, 119 Oh. St. 422, 164 NE 518.
Pa.—Nixon v. Pfahler, 279 Pa. 377, 124 A 130.

47. Dawson v. Allen, 191 Ill. A. 399.

48. See Negligence §§ 768–786.

49. U. S.—Vergeldt v. Hartzell, 1 F. (2d) 633.
Ala.—Sellers v. Noah, 209 Ala. 103, 95 S 167.
Cal.—Brown v. Shortlidge, (A.) 277 P 134.
Iowa.—Evans v. Roberts, 172 Iowa 653, 154 NW 923; Shockley v. Tucker, 127 Iowa 456, 103 NW 360.
Minn.—Jones v. Tri-State Tel., etc., Co., 118 Minn. 217, 136 NW 741, 40 LRANS 485; Moratzky v. Wirth, 67 Minn. 46, 69 NW 480.
Oh.—Ault v. Hall, 119 Oh. St. 422, 164 NE 518.
Pa.—Davis v. Kerr, 239 Pa. 351, 86 A 1007, 46 LRANS 611.
R. I.—Evans v. Munro, 83 A 82.
Tenn.—Lewis v. Casenburg, 157 Tenn. 187, 7 SW(2d) 808.
[a] **Rule applied.**—(1) Injuries occasioned by foreign substances introduced in body of patient during operation and not removed before closing of the wound. Sellers v. Noah, 209 Ala. 103, 95 S 167 (needle not used in operation); Ault v. Hall, 119 Oh. St. 422, 164 NE 518 (surgical sponge); Davis v. Kerr, 239 Pa. 351, 86 A 1007, 46 LRANS 611 (gauze pad); Evans v. Munro, (R. I.) 83 A 82 (drain). (2) Injuries occasioned by use of X-rays. Shockley v. Tucker, 127 Iowa 456, 103 NW 360; Jones v. Tri-State Tel., etc., Co., 118 Minn. 217, 136 NW 741, 40 LRANS 485; Lewis v. Casenburg, 157 Tenn. 187, 7 SW (2d) 808. (3) Injuries to sound and undiseased parts of the patient's person which the physician or surgeon was not called upon to treat and did not pretend to treat. Vergeldt v. Hartzell, 1 F. (2d) 633 (injury to patient's tongue while polishing a dental inlay); Evans v. Roberts, 172 Iowa 653, 153 NW 923 (cutting patient's tongue while removing adenoids). (4) Loss of patient's tooth while under anæsthetic. Brown v. Shortlidge, (Cal. A.) 277 P 134.

50. Ala.—Torrance v. Wells, 122 S 322; McKinnon v. Polk, 121 S 539; Moore v. Smith, 215 Ala. 592, 111 S 918.
Ark.—Runyan v. Goodrum, 147 Ark. 481, 228 SW 397, 13 ALR 1403.
D. C.—Sweeney v. Erving, 35 App. 57 [aff 227 U. S. 233, 33 SCt 416, 57 L. ed. 815, 43 LRANS 734, AnnCas1914D 905].
Ill.—Beckwith v. Boynton, 235 Ill. A. 469.
Ind.—McCoy v. Buck, (A.) 157 NE 456
Iowa.—Flanagan v. Smith, 197 Iowa 273, 197 NW 49.
Ky.—Miller v. Blackburn, 170 Ky. 263, 185 SW 864.
La.—Lett v. Smith, 6 La. A. 248.
Mass.—Guell v. Tenney, 262 Mass. 54, 159 NE 451; King v. Belmore, 248 Mass. 108, 142 NE 911.
Mo.—Hill v. Jackson, 218 Mo. A. 210, 265 SW 859; Wilt v. McCallum, 214 Mo. A. 321, 253 SW 156.
Mont.—Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.
N. Y.—Benson v. Dean, 232 N. Y. 52, 133 NE 125; Antowill v. Friedmann, 197 App. Div. 230, 188 NYS 777.
N. D.—Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666.
Pa.—Stemons v. Turner, 274 Pa. 228, 117 A 922, 26 ALR 727.
Wis.—Vale v. Noe, 172 Wis. 421, 179 NW 572.
[a] **Rule applied.**—(1) Cutting patient's tongue with electrically operated disk while preparing a tooth to receive a crown. Vale v. Noe, 172 Wis. 421, 179 NW 572. (2) Death following administration of anæsthetic. Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487; Dolan v. O'Rourke, 56 N. D. 416, 217 NW 666. (3) Dislocation of jaw during extraction of a tooth. Hill v. Jackson, 218 Mo. A. 210, 265 SW 859. (4) Infection following treatment. Moore v. Smith, 215 Ala. 592, 111 S 918; Flanagan v. Smith, 197 Iowa 273, 197 NW 49, King v. Belmore, 248 Mass. 108, 142 NE 911. (5) Injuries occasioned by breaking of needle used in operation. Benson v. Dean, 232 N. Y. 52, 133 NE 125. (6) Injuries occasioned by explosion of complicated machine used in connection with anæsthetizing patient. Wilt v. McCallum, 214 Mo. A. 321, 253 SW 156. (7) Injuries occasioned by sponge left in wound following operation. Quell v. Tennery, 262 Mass. 54, 159 NE 451. (8) Misplacement of vertebræ in patient's neck while removing tonsils. Beckwith v. Boynton, 235 Ill. A. 469. (9) X-ray burns. Runyan v. Goodrum, 147 Ark. 481, 228 SW 397, 13 ALR 1403; Sweeney v. Erving, 35 App. (D. C.) 57 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, 43 LRANS 734, AnnCas1914D 905]; McCoy v. Buck, (Ind. A.) 157 NE 456; Lett v. Smith, 6 La. A. 248; Antowill v. Friedmann, 197 App. Div. 230, 188 NYS 777; Stemons v. Turner, 274 Pa. 228, 117 A 922, 26 ALR 727.

51. Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455.
[a] **In Michigan,** where the doctrine is not recognized in negligence actions generally (see Negligence § 768) it is, of course, inapplicable in actions against physicians or surgeons for malpractice. Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262.

52. Brown v. Shyne, 242 N. Y. 176, 151 NE 197, 44 ALR 1407; Monohan v. Devinny, 131 Misc. 248, 225 NYS 601 [mod on other grounds 223 App. Div. 547, 229 NYS 60].

53. See statutory provisions.

54. Knowles v. Blue, 209 Ala. 27, 95 S 481; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, Ann Cas1916C 1097; State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587; Wells v. Van Nort, 100 Oh. St. 101, 125 NE 910.

55. Graham v. Dr. Pratt Inst., 163 Ill. A. 91.

56. See Evidence §§ 13–24.

57. See Negligence §§ 749–861.

58. See cases infra this section.

59. U. S.—Napier v. Greenzweig 256 Fed. 196, 167 CCA 412; Ewing v. Goode, 78 Fed. 442.
Ala.—Torrance v. Wells, 122 S 322; McKinnon v. Polk, 121 S 539; Carraway v. Graham, 218 Ala. 453, 118 S 807; Moore v. Smith, 215 Ala. 592, 111 S 918; Shelton v. Hacelip, 167 Ala. 217, 51 S 937; Fairfax v. King, 21 Ala. A. 306, 107 S 722.
Ariz.—Butler v. Rule, 265 P 757; McCarthy v. Pamsetgaaf, Inc., 20 Ariz. 460, 181 P 454.
Ark.—Runyan v. Goodrum, 147 Ark. 481, 228 SW 397, 13 ALR 1403.
D. C.—Cayton v. English, 57 App. 324, 23 F. (2d) 745, 57 App. 328, 23 F. (2d) 328.
Ga.—Georgia Northern R. Co. v. Ingram, 114 Ga. 639, 40 SE 708; Martin v. Greer, 31 Ga. A. 625, 121 SE 688; Grubbs v. Elrod, 28 Ga. A. 526, 112 SE

tween the breach of duty and the injury complained of.[60] As in civil actions generally,[61] where plaintiff introduces evidence sufficient to make out a prima facie case, it is then incumbent upon the adverse party, in order to prevent a recovery, to introduce evidence sufficient to overcome or rebut such showing.[62] But the rule that the burden of establishing a breach of duty on the part of the physician or surgeon and causal relation between the breach and the injury complained of is not affected by the fact that the duty of going forward with the testimony to overcome a prima facie case made during the trial is upon the adverse party.[63] Thus the burden of proving negligence on the part of the physician or surgeon is not affected by the fact that the doctrine of res ipsa loquitur is applicable to the facts of the case.[64]

Affirmative defenses. In accord with, and subject to, general rules[65] defendant has the burden of proving affirmative defenses.[66]

Contributory negligence. The general rules as to the burden of proving contributory negligence in negligence cases[67] are applicable in actions against physicians or surgeons for malpractice.[68]

[§ 154] **b. Admissibility.—(1) In General.** The rules governing the admissibility of evidence in civil actions generally[69] apply in an action to recover damages for malpractice.[70] In accord with, and subject to, such rules any competent evidence is admissible which tends to prove or disprove the existence at the time and place in question of the relation of physician or surgeon and patient,[71] the responsibility of defendant for the acts or omissions complained of,[72] the nature and extent of the in-

379; Fincher v. Davis, 27 Ga. A. 494, 108 SE 905.
Ida.—Swanson v. Wasson, 45 Ida. 309, 262 P 147.
Ill.—Holtzman v. Hoy, 118 Ill. 534, 8 NE 832, 59 AmR 390; Peters v. Howard, 206 Ill. A. 610; Nye v. Clark, 193 Ill. A. 505; Blodget v. Nevius, 189 Ill. A. 544; Goodman v. Bigler, 133 Ill. A. 301; McIlwain v. Gaebe, 128 Ill. A. 209; McKee v. Allen, 94 Ill. A. 147; Sims v. Parker, 41 Ill. A. 284.
Iowa.—Flanagan v. Smith, 197 Iowa 273, 197 NW 49; O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755; Robinson v. Campbell, 47 Iowa 625.
Kan.—Pettigrew v. Lewis, 46 Kan. 78, 26 P 458.
Ky.—Hanners v. Salmon, 216 Ky. 584, 288 SW 307.
La.—Gouner v. Brosnan, 155 La. 1, 98 S 681.
Me.—Coombs v. King, 107 Me. 376, 78 A 468, AnnCas1912C 1121.
Md.—Angulo v Hallar, 137 Md. 227, 112 A 179; State v. Housekeeper, 70 Md. 162, 16 A 382, 14 AmSR 340, 2 LRA 587.
Mass.—Goode v. Lothrop, 165 NE 688; Traverse v. Wing, 256 Mass. 320, 152 NE 354.
Mich.—Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262, Bishop v. Shurly, 237 Mich. 76, 211 NW 75; Janssen v. Mulder, 232 Mich. 183, 205 NW 159.
Minn.—Nelson v. Dahl, 174 Minn. 574, 219 NW 941; Getchell v. Hill, 21 Minn. 464.
Mo.—Telaneus v. Simpson, 12 SW (2d) 920; Trask v. Dunnigan (A.) 299 SW 116; Nevinger v. Haun, 197 Mo. A. 416, 196 SW 39; Fausette v. Grim, 193 Mo. A. 585, 186 SW 1177; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed sub nom. State v. Ellison, 266 Mo. 604, 182 SW 996, Ann Cas1918C 1]; Spain v. Burch, 169 Mo. A. 94, 154 SW 172.
Mont.—Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.
N. H.—Leighton v. Sargent, 31 N. H. 119, 64 AmD 323.
N. Y.—Brown v. Goffe, 140 App. Div. 353, 125 NYS 458; Warner v. Packer, 139 App. Div. 207, 123 NYS 725; Wood v. Wyeth, 106 App. Div. 21, 94 NYS 360; Van Epps v. McKenny, 189 NYS 910; Wells v. World's Dispensary Medical Assoc., 9 NYSt 452 [aff 120 N. Y. 630 mem, 24 NE 276 mem].
N. D.—Gallagher v. Kermott, 56 N. D. 176, 216 NW 569.
Oh.—Ault v. Hall, 119 Oh. St. 422, 164 NE 518; Hier v. Stites, 91 Oh. St. 127, 110 NE 252; Craig v. Chambers, 17 Oh. St. 253; Montgomery v. Eagon, 32 O. C. A. 503; Moehlman v. Ransohoff, 17 OhNPNS 241.
Okl.—Bungardt v. Younger, 112 Okl. 165, 239 P 469; Ballaine v. Drake, 98 Okl. 217, 224 P 947.
Pa.—Nixon v. Pfahler, 279 Pa. 377, 124 A 130; Van den Beemt v. Pfahler, 1 Pa. Dist. & Co. 255.
Tex.—Urrutia v. Patino, (Civ. A.) 297 SW 512.
Utah.—Peterson v. Richards, 272 P 229.
W. Va.—Dye v. Corbin, 59 W. Va. 266, 53 SE 147.
Wis.—Holton v. Burton, 222 NW 225; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455; Vale v. Noe, 172 Wis. 421, 179 NW 572.
Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.
Ont.—McQuay v. Eastwood, 12 Ont. 402; Hodgins v. Banting, 7 OntWR 707.

60. U. S.—Ewing v. Goode, 78 Fed. 442.
Ala.—McKinnon v. Polk, 121 S 539.
Ariz.—Butler v. Rule, 265 P 757.
Ark.—Runyan v. Goodrum, 147 Ark. 481, 228 SW 397, 13 ALR 1403.
D. C.—Levy v. Vaughan, 42 App. 146.
Ga.—Georgia Northern R. Co. v. Ingram, 114 Ga. 639, 40 SE 708; Martin v. Greer, 31 Ga. A. 625, 121 SE 688.
Ida.—Swanson v. Wasson, 45 Ida. 309, 262 P 147; Ruble v. Busby, 27 Ida. 486, 149 P 722, AnnCas1917D 665.
Ill.—Wallace v. Yudelson, 244 Ill. A. 320; Goodman v. Bigler, 133 Ill. A. 301; McKee v. Allen, 94 Ill. A. 147.
Iowa.—Ramberg v. Morgan, 218 NW 492.
Kan.—Pettigrew v. Lewis, 46 Kan. 78, 26 P 458.
Mich.—Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262; Bishop v. Shurly, 237 Mich. 76, 211 NW 75.
Minn.—Getchell v. Hill, 21 Minn. 464.
Mo.—Nevinger v. Haun, 197 Mo. A. 416, 196 SW 39; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed sub nom. State v. Ellison, 266 Mo. 604, 182 SW 996, AnnCas1918C 1].
Mont.—Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.
Nebr.—McGuire v. Rix, 225 NW 120.
Oh.—Ault v. Hall, 119 Oh. St. 422, 164 NE 518; Hier v. Stites, 91 Oh. St. 127, 110 NE 252; Craig v. Chambers, 17 Oh. St. 253; Moehlman v. Ransohoff, 17 OhNPNS 241.
Okl.—Ballaine v. Drake, 98 Okl. 217, 224 P 947.
Or.—Lippold v. Kidd, 126 Or. 160, 269 P 210.
Pa.—Wohlert v. Seibert, 23 Pa. Super. 213.
Tex.—Urrutia v. Patino, (Civ. A.) 10 SW (2d) 582; Urrutia v. Patino, (Civ. A.) 297 SW 512.
W. Va.—Dye v. Corbin, 59 W. Va. 266, 53 SE 147.
Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107
Ont.—McQuay v. Eastwood, 12 Ont. 402

61. See Evidence §§ 13–24.
62. Gramm v. Boener, 56 Ind. 497.
63. Niebel v. Winslow, 88 N. J. L. 191, 95 A 995.
64. Sweeney v. Erving, 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, AnnCas 1914D 905; Sweeney v. Erving, 35 App. (D. C.) 57 [aff 228 U. S. 233, 33 SCt 416, 57 L. ed. 815, 43 LRANS 734, AnnCas1914D 905].
65. See Evidence §§ 16–18; and Negligence § 749.
66. Chase v. Nelson, 39 Ill. A. 53; Ballou v. Prescott, 64 Me. 305; Hamilton v. Harris, (Tex. Civ. A.) 223 SW 533.
[a] **Discharge by patient.**—If a surgeon, called to attend one who has long been his employer, leaves his patient before he has been properly cared for professionally, or while he needs further attention, and relies on an alleged discharge by the patient as a defense to a suit brought for the abandonment, this being a new substantive matter of defense, the burden of proving it is on defendant. Ballou v. Prescott, 64 Me. 305.
67. See Negligence §§ 754–759.
68. See cases infra this note.
[a] **In Georgia** contributory negligence is a matter of defense, the burden of proving which is on defendant in actions against physicians or surgeons for malpractice. Bryant v. Anderson, 31 Ga. A. 118, 119 SE 920.
[b] **In Iowa** the burden is on plaintiff to show his freedom from negligence contributing to the result complained of in actions against physicians or surgeons for malpractice. Whitesell v. Hill, 66 NW 894.
[c] **In Missouri** the burden of proving contributory negligence is on defendant in actions against physicians or surgeons for malpractice. Connelly v. Cone, 205 Mo. A. 395, 224 SW 1011; Summers v. Tarpley, (A.) 208 SW 266.
[d] **In Washington** the burden of proving contributory negligence in actions against physicians or surgeons is on defendant. Huber v. Hamley, 122 Wash. 511, 210 P 769.
69. See Evidence §§ 89–1729.
70. See cases infra this section.
Opinion evidence as to propriety and effects of treatment see Evidence § 758.
71. Willard v. Norcross, 81 Vt. 293, 69 A 942; Sheldon v. Wright, 80 Vt. 298, 67 A 807.
[a] **Thus,** in an action against a physician for malpractice, plaintiff had the right to call defendant as a witness and show by him that he was paid a yearly salary from plaintiff's employer to treat the employees. Sheldon v. Wright, 80 Vt. 298, 67 A 807.
72. Nash v. Royster, 189 N. C. 408, 127 SE 356.
[a] **A custom prevailing among local physicians** is admissible as bearing upon the question of agency as between defendant and another physician whom he put in charge of the treatment of the patient during his temporary absence. Nash v. Royster, 189 N. C. 408, 127 SE 356.

jury or damages sustained by plaintiff,[73] or any other material fact in issue.[74] But evidence which has no tendency to establish or negative the issues joined is inadmissible.[75] Various other general rules applied include those governing declarations against interest,[76] matters constituting part of the res gestæ,[77] conclusions of witnesses,[78] hearsay evidence,[79] self-serving declarations,[80] and demonstrative evidence.[81] In accord with, and subject to, general rules[82] evidence with tends to show interest or bias on the part of any witness may be admitted to show the degree of credibility which should be accorded his testimony.[83]

[§ 155] **(2) To Show Failure To Use Requisite Skill or Care.** Any competent evidence is admissible which tends to establish or negative the issues raised in an action for malpractice with respect to whether the requisite skill and care was exercised in the treatment of the patient,[84] or with respect to whether the failure to exercise the requisite skill or

73. Colo.—Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136.
Ill.—Hubbard v. Martin, 184 Ill. A. 534.
Ind.—Walker Hospital v. Pulley, 74 Ind. A. 656, 127 NE 559, 128 NE 933.
Iowa.—Lemon v. Kessel, 202 Iowa 273, 209 NW 393.
Mont.—Stokes v. Long, 52 Mont. 470, 159 P 28.
N. D.—Zilke v. Johnson, 22 N. D. 75, 132 NW 640, AnnCas1913E 1005.
Or.—Holland v. Eugene Hospital, 270 P 784; Patterson v. Howe, 102 Or. 275, 202 P 225.
Vt.—Willard v. Norcross, 81 Vt. 293, 69 A 942; Sheldon v. Wright, 80 Vt. 298, 67 A 807.
W. Va.—Cook v. Coleman, 90 W. Va. 748, 111 SE 750.

74. See cases infra this note.
[a] **Consent to operation.**—In an action for damages for the performance of an unauthorized operation, it was not error to permit defendant to ask plaintiff, testifying in his own behalf, whether he consented to the operation if it were necessary. Knowles v. Blue, 209 Ala. 27, 95 S 481.
[b] **Propriety of withholding actual condition from plaintiff.**—In an action for malpractice in treating a cut on plaintiff's thumb, defendant may show that it is good medical treatment in some cases to withhold from a patient the extent of the disease and his actual condition. Twombly v. Leach, 11 Cush. (Mass.) 397.
[c] **Under counterclaim for legal services.**—In physician's action for balance due for professional services, wherein defendant, an attorney, interposed counterclaims for legal services, defendant's testimony that prior to the action parties had conversation in which they agreed to set off against each other the debts each owed to the other to certain date was not subject to objection that it related to account stated. Labbitt v. Bunston, (Mont.) 277 P 620.
Evidence admissible to show:
Failure to use requisite skill or care see infra § 155.
Willful, wanton, or intentional injury see infra § 156.

75. [a] **Evidence held inadmissible as irrelevant.**—(1) A course of illicit relations between the parties eight or nine months subsequent to the time of the surgical operation, upon which the action was based. Burke v. Mayland, 156 Minn. 505, 195 NW 285. (2) Charges made by defendant for his services. Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas1916C 1097; Peters v. Howard, 206 Ill. A. 610; Cozine v. Moore, 159 Iowa 472, 141 NW 424. (3) Condition of patient and the advisability of the operation performed without patient's consent where no emergency was pleaded or proved. Rishworth v. Moss, (Tex. Civ. A.) 191 SW 843 [aff (Commn. A.) 222 SW 225]. (4) Failure to demand compensation. Jones v. Angell, 95 Ind. 376; Baird v. Gillett, 47 N. Y. 186. (5) False representations of christian science "healer" not known to, or relied upon by, plaintiff. Raisler v. Benjamin, 133 App. Div. 721, 118 NYS 223. (6) Indecent proposal to plaintiff during interval between two operations complained of. Booth v. Andrus, 91 Nebr. 810, 137 NW 884. (7) Length of disability occasioned by a dissimilar fracture of a different bone from that upon which the action is based. Snearly v. McCarthy, 180 Iowa 81, 161 NW 108. (8) Letter indicating that defendant was indemnified. Terier v. Dare, 146 App. Div. 375, 131 NYS 51. (9) Subsequent extraction of the proper tooth by another physician after extraction of wrong tooth by defendant. Rosenthal v. Hasbrouck, 161 NYS 354. (10) Telegram of good wishes and a Christmas card sent defendant by plaintiff and her husband after discovery of rubber tube claimed to have been negligently left in plaintiff's body following an operation. Saucier v. Ross, 112 Miss. 306, 73 S 49. (11) Unsuccessful effort of plaintiff to obtain bill for defendant's services. McIlwain v. Gaebe, 137 Ill. A. 25. (12) Unsuccessful efforts of plaintiff to obtain X-ray plates from defendant who had nothing to do with the taking of the photographs and had never had possession of them. Bacon v. Walsh, 184 Ill. A. 377. (13) Wealth of defendant. Smith v. Corrigan, 100 N. J. L. 267, 126 A 680. (14) Whereabouts of a veterinary who had vaccinated hogs belonging to plaintiff three and four years prior to the time defendant veterinary had performed the vaccinations complained of. Phillips v. Leuth, 200 Iowa 272, 204 NW 301.

76. [a] **Evidence held admissible as a declaration against interest.**—A statement by the patient that defendant saved his foot, and that if it had not been for him his leg would have been ruined, where the claim made was that a different operation was performed from that to which the patient consented. Knowles v. Blue, 209 Ala. 27, 95 S 481.

77. [a] **Evidence held admissible as part of the res gestæ.**—(1) Declarations made at the time of administering the treatment by the surgeon charged with negligent operation. Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874. (2) A consultation held on the occasion of the alleged improper treatment. Williams v. Poppleton, 3 Or. 139. (3) Assurances made by defendant subsequent to the making of the contract of employment that any disfigurement which might result would disappear with the lapse of time, in an action for breach of an oral contract by which defendant was alleged to have warranted that his radium treatment would not leave a permanent scar. Crawford v. Duncan, 61 Cal. A. 647, 215 P 573. (4) Failure of patient to object to statement made in his presence by physician at the time of discharging patient from further treatment that the injured leg was all right. Piles v. Hughes, 10 Iowa 579. (5) Intoxication of defendant at the time of administering the treatment. Merrill v. Pepperdine, 9 Ind. A. 416, 36 NE 921. (6) Evidence that defendant charged with amputating plaintiff's leg without her cansent was told immediately before the operation that the patient had consented. Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas 1916C 1097. (7) Patient's exclamations of pain. Spaulding v. Bliss, 83 Mich. 311, 47 NW 210; Mayo v Wright, 63 Mich. 32, 29 NW 832. Hyatt v Adams, 16 Mich. 180, Link v. Sheldon. 18 NYS 815 [aff 136 N. Y. 1, 32 NE 696]. (8) Remarks of bystanders made at the time of examination of patient to the effect that they heard a grating sound on manipulation of patient's leg. Hitchcock v. Burgett, 38 Mich. 501. (9) Statements made by patient at conclusion of treatment as to the condition of his injured arm. O'Hara v. Wells, 14 Nebr. 403, 15 NW 722. (10) Statements made by physician in the presence of patient in regard to the construction and use of an instrument which he had then brought to be applied to patient's fractured thigh. Moody v. Sabin, 9 Cush. (Mass.) 505.
[b] **Evidence held inadmissible as part of the res gestæ.**—(1) Evidence of withdrawal of the patient from the hospital following an operation on account of lack of confidence in the surgeons, in an action alleged to have been occasioned by negligent injury in the performance of a surgical operation. Cook v. Coleman, 90 W. Va. 748, 111 SE 750. (2) Testimony of plaintiff as to what a nurse who assisted in an operation upon her told her subsequently as to the manner in which it was performed. Cook v. Coleman, supra.

78. Lemon v. Kessel, 202 Iowa 273, 209 NW 393; Spaulding v. Bliss, 83 Mich. 311, 47 NW 210; Mayo v. Wright, 63 Mich. 32, 29 NW 832.

79. D. C.—Levy v. Vaughan, 42 App. 146.
Iowa.—Sims v. Morse, 61 Iowa 128, 16 NW 58.
Mich.—Hitchcock v. Burgett, 38 Mich. 501.
Vt.—Baldwin v. Gaines, 92 Vt. 61, 102 A 338.
W. Va.—Cook v. Coleman, 90 W. Va. 748, 111 SE 750; Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

80. [a] **Evidence held inadmissible as self-serving.**—Statement of plaintiff that she would not submit to amputation of her leg made to another physician in the absence of defendant charged with operating without consent. Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas1916C 1097.

81. Ind.—Hess v. Lowrey, 122 Ind. 225, 23 NE 156, 17 AmSR 355, 7 LRA 90; Freeman v. Hutchinson, 15 Ind. A. 639, 43 NE 16.
Ky.—Williams v. Nally, 45 SW 874, 20 KyL 244.
Mich.—Carstens v. Hanselman, 61 Mich. 426, 28 NW 159, 1 AmSR 606.
N. Y.—Walsh v. Sayre, 52 HowPr 334.
Pa.—Fowler v. Sergeant, 1 Grant 355.

82. See Evidence § 93.

83. Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874.
[a] **Rule applied.**—In a cross action against plaintiff physician for malpractice, defendant's evidence as to whether plaintiff was a member of a county medical association was inadmissible to show whether plaintiff was indemnified against actions for malpractice; but if a question thereon was proper to show the interest or bias of the witness who was also a member, the statement of counsel as to insurance was likely to be prejudicial, and plaintiff should have been permitted to show that no such indemnity existed. Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874.

84. Ga.—Fincher v. Davis, 27 Ga. A. 494, 108 SE 905.
Ill.—Kendall v. Brown, 86 Ill. 387.
Ind.—Longfellow v. Vernon, 57 Ind.

care was a proximate cause of the injuries complained of.[85] To be admissible, however, it is essential that the evidence offered possess some tendency to prove or disprove or to throw light upon the issues raised.[86] Any competent evidence is admissible which tends to show the condition of the pa-

A. 611, 105 NE 178.

Iowa.—Ball v. Skinner, 134 Iowa 298, 111 NW 1022.

Ky.—Barnett v. Brand, 165 Ky. 616, 177 SW 461.

Md.—Hunner v. Stevenson, 122 Md. 40, 89 A 418.

Mich.—Adams v. Henry, 165 Mich. 554, 131 NW 62, AnnCas1912C 829.

Mo.—McGuire v. Amyx, 317 Mo. 1061, 297 SW 968, 54 ALR 644.

N. Y.—Brown v. Goffe, 140 App. Div. 353, 125 NYS 458.

Oh.—Bartolas v. Coleman, 27 Oh. A. 119, 161 NE 20.

Or.—Rayburn v. Day, 126 Or. 135, 268 P 1002.

Vt.—Twombly v. Piette, 99 Vt. 499, 134 A 700; Sheldon v. Wright, 80 Vt. 298, 67 A 807.

Wash.—Klodek v. May Creek Logging Co., 71 Wash. 573, 129 P 99.

W. Va.—Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

[a] **Rule applied.**—(1) Absence of circumstances preventing physician from immediately washing away bichloride of mercury used in treatment of child's head or rendering such course inadvisable, to show negligence on his part in sending her home with instructions to do so herself upon arrival. Twombly v. Piette, 99 Vt. 499, 134 A 700. (2) Competency of assistant left in charge during defendant's temporary absence, to show freedom from negligence in providing for patient's care and for emergencies during time defendant was absent. Browning v. Hoffman, 90 W. Va. 568, 111 SE 492. (3) Knowledge of defendant that a druggist held himself out and advertised himself as a manufacturing chemist, to show freedom from negligence in using a solution compounded by him on defendant's order. Ball v. Skinner, 134 Iowa 298, 111 NW 1022. (4) Premature discharge from hospital. Torrance v. Wells, (Ala.) 122 S 322. (5) Rule excluding operations by surgeons not connected with private hospital maintained by defendant, to show negligence in not sooner performing an operation which might have been performed promptly by a surgeon not connected with the hospital. Browning v. Hoffman, supra. (6) Specialization by defendant in treatment of diseases of the eye and nose, to show his lack of qualifications for the treatment of a fractured patella and tibia. Klodek v. May Creek Logging Co., 71 Wash. 573, 129 P 99.

[b] **Custom of assistants** to account for sponges used while performing an operation is admissible to show freedom from negligence in leaving a sponge in the wound. Barnett v. Brand, 165 Ky. 616, 177 SW 461; Rayburn v. Day, 126 Or. 135, 268 P 1002.

[c] **Custom of physicians** (1) to report suspected smallpox cases is admissible to disprove negligence in confining plaintiff with other persons afflicted with the disease. McGuire v. Amyx, 317 Mo. 1061, 297 SW 968, 54 ALR 644. (2) Custom of defendant as to the calling of an assistant during his absence is admissible to show freedom from negligence in temporarily leaving a patient. Browning v. Hoffman, 90 W. Va. 568, 111 SE 492.

[d] **Devotion of time to other pursuits principally** is admissible to show lack of skill and knowledge on the part of the physician or surgeon whose treatment is complained of Hess v. Lowrey, 122 Ind. 225, 23 NE 156, 17 AmSR 355, 7 LRA 90.

[e] **Difficulty of dressing postoperative wound** is admissible to show negligence of the operating physician in leaving the work of dressing the wound to the hospital staff. Hunner v. Stevenson, 122 Md. 40, 89 A 418.

[f] **Propriety of taking X-ray photographs** is admissible to show negligence in failing properly to set a fractured leg. Viita v. Dolan, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas1917E 678.

[g] **Time usually required for wound to heal** is admissible to show negligence on the part of the operating surgeon in leaving all postoperative dressings to be applied by the hospital staff. Hunner v. Stevenson, 122 Md. 40, 89 A 418.

85. Colo.—Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136.

Iowa.—Lemon v. Kessel, 202 Iowa 273, 209 NW 393; Ball v. Skinner, 134 Iowa 298, 111 NW 1022; Peck v. Hutchinson, 88 Iowa 320, 55 NW 511.

Md.—Hunner v. Stevenson, 122 Md. 40, 89 A 418.

Mich.—Janssen v. Mulder, 232 Mich. 183, 205 NW 159; Hitchcock v. Burgett, 38 Mich. 501.

Mont.—Stokes v. Long, 52 Mont. 470, 159 P 28.

Vt.—Willard v. Norcross, 81 Vt. 293, 69 A 942.

Wash.—Hoffman v. Watkins, 89 Wash. 661, 155 P 159.

[a] **Illustrations.**—(1) Where plaintiff claims defendant was negligent in the application to plaintiff's ankle of a solution, whereby it was burned, and also in failing to discover the difficulty and remove the bandage when he was first called thereafter, and the evidence authorized a finding that he was not negligent in the first instance but was on the subsequent visit, it was error to refuse to allow him, testifying as an expert, to answer the question whether, assuming the solution was as caustic as shown by its effect on plaintiff's ankle, the caustic had expended its force and done its damage by the time of the first visit subsequent to its application. Ball v. Skinner, 134 Iowa 298, 111 NW 1022. (2) In an action against an operating surgeon for damages caused by the hospital attendants in negligently leaving gauze in the wound after dressing it, causing pulmonary tuberculosis, a physician was properly asked what connection the tubercular condition of the sinus had with the operation and subsequent treatment. Hunner v. Stevenson, 122 Md. 40, 89 A 418. (3) In an action for negligently performing a surgical operation on plaintiff's eye, alleged to have caused a loss of plaintiff's sight, evidence that the disease from which plaintiff was suffering generally resulted in a loss of sight is competent. Peck v. Hutchinson, 88 Iowa 320, 55 NW 511. (4) In an action for malpractice in the treatment of plaintiff's wrists, a witness was properly permitted to testify that after plaintiff's wrists had been examined by medical experts, and she had returned from the courthouse, her wrists were disfigured and swollen, and that she complained of the pain in them, plaintiff having claimed that by reason of defendant's treatment her wrists still caused her pain, and the fact that experts had recently manipulated them not being withheld from the jury. Willard v. Norcross, 81 Vt. 293, 69 A 942. (5) In an action against a chiropractor for malpractice, resulting in the death of a child, plaintiff was entitled to show the existence of a customary well-known form of treatment used successfully by physicians professing to treat infectious and communicable human ailments, and probability that proper treatment by such person would have afforded relief and saved the child's life as bearing on the result of defendant's neglect to use reasonable care and skill to ascertain whether the child was afflicted with such disease. Janssen v. Mulder, 232 Mich. 183, 205 NW 159. (6) In an action for malpractice in the treatment of plaintiff's shoulder, alleged to have been dislocated, evidence of dislocation existing twenty-one days after treatment by defendant is competent to show a dislocation at the time of treatment. Hoffman v. Watkins, 89 Wash. 661, 155 P 159. (7) Evidence showing the course of treatment by an associated physician during defendant's absence is admissible to show that the treatment approved by defendant was continued without change for the purpose of rebutting the claim that any efficient cause intervened by reason of anything the associated physician did on his own initiative to bring about the condition of plaintiff. Stokes v. Long, 52 Mont. 470, 159 P 28. (8) In an action against a surgeon for malpractice, a physician's evidence that he examined plaintiff's limb five years after the injury, and that it then indicated that the neck of the femur had been fractured, was admissible to corroborate plaintiff's testimony that its condition immediately after the injury was such as would be caused by a fracture. Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136.

86. Ala.—Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas1916C 1097.

Cal.—Short v. Frink, 151 Cal. 83, 90 P 200.

Ida.—Osborn v. Cary, 28 Ida. 89, 152 P 473.

Iowa.—Lemon v. Kessel, 202 Iowa 273, 209 NW 393; Phillips v. Leuth, 200 Iowa 272, 204 NW 301; Cozine v. Moore, 159 Iowa 472, 141 NW 424; Reynolds v. Smith, 148 Iowa 264, 127 NW 192.

Mass.—Biancucci v. Nigro, 247 Mass. 40, 141 NE 568; Medlin v. Bloom, 230 Mass. 201, 119 NE 773.

Mich.—Farrell v. Haze, 157 Mich. 374, 122 NW 197.

Okl.—Ragan v. Shannon, 98 Okl. 289, 225 P 672.

Pa.—Goehring v. McDiarmid, 289 Pa. 193, 137 A 187.

S. D.—Feltman v. Dunn, 217 NW 198.

Vt.—Davis v. Dunn, 90 Vt. 253, 98 A 81, AnnCas1918D, 994; Willard v. Norcross, 86 Vt. 426, 85 A 904.

W. Va.—Browning v. Hoffman, 86 W. Va. 468, 103 SE 484.

Wis.—Paro v. Carter, 178 Wis. 121, 188 NW 68; Wright v. Hardy, 22 Wis. 348.

[a] **Rule applied.**—(1) Where negligence in the treatment actually given is relied upon, evidence that defendant stated to a physician subsequently called that he had not been discharged from the case and had not received payment for his services is inadmissible. Short v. Frink, 151 Cal. 83, 90 P 200. (2) Where the injury, if any, arose out of improper treatment of septicemia, and not out of defendant's incorrect diagnosis of the ailment as osteomyelitis, evidence as to what the result of the treatment would have been if it had been continued and what is the correct treatment for osteomyelitis is inadmissible. Osborn v. Cary, 28 Ida. 89, 152 P 473. (3) Evidence that ordinary practice would suggest the taking of the patient to a hospital is inadmissible where failure to take the patient to a hospital was not charged and there was no evidence that he had received improper treatment at home. Cozine v. Moore, 159 Iowa 472, 141 NW 424. (4) Where, in an action for malpractice, based on the improper treatment of a Potts fracture, necessitating amputation of a leg, the evidence showed that portions of the bones

tient at the time in question,[87] and the acts or omissions of defendant in connection with the treatment of the patient.[88] The treatment received by the patient after defendant gave up the case may be shown.[89] The mere fact that evidence is not of itself sufficient to establish improper treatment does not render it inadmissible.[90] Where negligent treatment is charged, testimony of the physician or surgeon that he exercised his best judgment is admissible.[91] Defendant may also state what, from his study and experience, he deems proper treatment of the case in question.[92] Evidence that he employed another skillful physician to assist him is competent,[93] but not to prove either skill or diligence on his part.[94]

The result of the treatment is also admissible,[95] although no inference of improper treatment can be drawn from the result alone.[96]

Treatment in other cases. The usual, ordinary, and customary treatment of similar cases may be shown.[97] But evidence that a better result is ordinarily obtained is not admissible,[98] although evidence is admissible which tends to prove that the result complained of does not occur where the requisite skill and care is exercised.[99] Nor is evidence admissible to show that another would have treated the patient in some other way,[1] or to show how defendant's treatment of like cases differed from that of other physicians.[2] Nor can freedom from negligence in adopting the treatment complained of be shown by evidence, that the treatment was the same as that used by another physician or surgeon in another case,[3] or by evidence that defendant used the same treatment in other cases with good results.[4] But where negligence in furnishing an appliance which occasioned the injury is charged,

were removed before amputation, and that the condition of the bones before and at amputation indicated a continuing disintegration from some cause long active after defendant ceased to treat the injury, the bones of the amputated limb could not be received as an exhibit. Farrell v. Haze, 157 Mich. 374, 122 NW 197. (5) The only issue in the case being whether defendant at an operation on plaintiff left gauze in her abdomen, testimony as to the proper mode of drainage subsequent to the operation is inadmissible. Paro v. Carter, 178 Wis. 121, 188 NW 68. (6) There being no claim of negligence after amputation of a leg, evidence as to matters thereafter occurring is properly excluded. Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, Ann Cas1916C 1097. (7) In a suit against a veterinary surgeon for negligent vaccination of hogs, evidence of what was done in vaccination of eight hogs delivered to plaintiff after vaccination of plaintiff's herd by defendant was properly refused. Phillips v. Leuth, 200 Iowa 272, 204 NW 301. (8) It is error to admit evidence of a method of treatment, long antedating that involved and differing materially from the method adopted in the treatment and generally approved and used at the time thereof. Browning v. Hoffman, 86 W. Va. 468, 103 SE 484.

[b] **A custom of the locality or a particular hospital** with respect to the care of patients after a surgical operation, the dressing of the wound, etc., cannot be shown to affect the right of a patient to recover for malpractice, where he was a stranger to the locality, and is not shown to have had knowledge or notice of the custom. Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRANS 1174.

[c] **In an action against physicians jointly,** testimony to show negligence in treatment before one defendant was connected with the case was inadmissible. Lemon v. Kessel, 202 Iowa 273, 209 NW 393.

87. Perkins v. Trueblood, 180 Cal. 437, 181 P 642; Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178; Lemon v. Kessel, 202 Iowa 273, 209 NW 393; Baker v. Langan, 165 Iowa 346, 145 NW 513; Willard v. Norcross, 81 Vt. 293, 69 A 942; Sheldon v. Wright, 80 Vt. 298, 67 A 807.

88. Ga.—Hughes v. Weaver, (A.) 148 SE 12.

Ind.—Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178.

Iowa.—Van Sickle v. Doolittle, 184 Iowa 885, 169 NW 141.

Minn.—Peterson v. Phelps, 123 Minn. 319, 143 NW 793, AnnCas1915A 257.

N. Y.—Brown v. Goffe, 140 App. Div. 353, 125 NYS 458.

Wash.—Packard v. Coberly, 147 Wash. 345, 265 P 1082.

[a] **Thus** (1) in an action for malpractice in treating a felon on plaintiff's finger, evidence of the actual treatment given, including the pricking of the finger with a needle, was properly admitted. Peterson v. Phelps, 123 Minn. 319, 143 NW 793, AnnCas1915A 257. (2) In an action for negligence in a surgical operation, defendant, upon a showing that it was the usual and proper practice in hospital cases to leave the care of the patient after an operation to the hospital staff, may testify in answer to a question as to what instructions he gave to the members of the hospital staff, and the exclusion of such testimony is reversible error. Brown v. Goffe, 140 App. Div. 353, 125 NYS 458.

89. Bower v. Self, 68 Kan. 825, 75 P 1021; Leisenring v. La Croix, 68 Nebr. 803, 94 NW 1009.

90. Van Sickle v. Doolittle, 184 Iowa 885, 169 NW 141.

[a] **Illustration.**—In an action for malpractice in failing to administer the proper medicine or give proper care, the fact that he did not attend the child regularly, although not alone sufficient to sustain recovery, could be considered on the issue of the physician's negligence. Van Sickle v. Doolittle, 184 Iowa 885, 169 NW 141.

91. Fisher v. Niccolls, 2 Ill. A. 484; Brown v. Goffe, 140 App. Div. 353, 125 NYS 458.

92. Link v. Sheldon, 136 N. Y. 1, 32 NE 696.

93. Jones v. Angell, 95 Ind. 376.

94. Leighton v. Sargent, 31 N. H. 119, 64 AmD 323.

95. U. S.—Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240.

Ga.—Hughes v. Weaver, (A.) 148 SE 12.

Ky.—Hickerson v. Neely, 54 SW 842, 21 KyL 1257.

La.—Lett v. Smith, 6 La. A. 248.

Or.—Patterson v. Howe, 102 Or. 275, 202 P 225.

Va.—Hunter v. Burroughs, 123 Va. 113, 96 SE 360.

96. See supra § 152.

97. Iowa.—Lemon v. Kessel, 202 Iowa 273, 209 NW 393; Baker v. Langan, 165 Iowa 346, 145 NW 513.

Md.—Hunner v. Stevenson, 122 Md. 40, 89 A 418.

Mass.—Twombly v. Leach, 11 Cush. 397.

Mich.—Spaulding v. Bliss, 83 Mich. 311, 47 NW 210.

Mo.—Spain v. Burch, 169 Mo. A. 94, 154 SW 172.

Nebr.—Leisenring v. La Croix, 68 Nebr. 803, 94 NW 1009.

N. J.—Coleman v. Wilson, 85 N. J. L. 203, 88 A 1059, AnnCas1915D 1122.

Vt.—Willard v. Norcross, 86 Vt. 426, 85 A 904.

Wash.—Klodek v. May Creek Logging Co., 71 Wash. 573, 129 P 99.

Wis.—Quinn v. Higgins, 63 Wis. 664, 24 NW 482, 53 AmR 305; Wright v. Hardy, 22 Wis. 348.

[a] **Rule applied.**—(1) Where plaintiff's expert testified that one recognized method of treatment was known as the open method, excluding evidence that the open method was not the usual method of practice was error. Lemon v. Kessel, 202 Iowa 273, 209 NW 393. (2) On an issue of negligence of a physician in administering an anæsthetic, it being shown dentists use it more often than physicians, and are often more skilled in its use, evidence of the usual and customary methods of dentists, skilled in that respect, in using it, is admissible. Spain v. Burch, 169 Mo. A. 94, 154 SW 172. (3) In an action for the death of a patient claimed to have been due to the removal of healthy tissue under the suspicion that it was a malignant growth, exclusion of the question as to whether a reasonably prudent surgeon would not have had a prompt analysis made if in doubt as to the nature of the tissue is error. Coleman v. Wilson, 85 N. J. L. 203, 88 A 1059, Ann Cas1915D 1122. (4) In an action against a surgeon for injuries caused by negligently leaving foreign matter in plaintiff's body when her wound was dressed by hospital attendants, a question to a physician whether it was the invariable custom among competent surgeons personally to apply all dressings following the operation where the patients are treated in hospitals was proper. Hunner v. Stevenson, 122 Md. 40, 89 A 418.

98. Lemon v. Kessel, 202 Iowa 273, 209 NW 393.

[a] **Rule applied.**—In an action for malpractice in treating a broken leg which became three inches shorter, excluding testimony that shortening of one or two inches would be the ordinary result was not error. Lemon v. Kessel, 202 Iowa 273, 209 NW 393.

99. Evans v. Clapp, (Mo. A.) 231 SW 79.

[a] **X-ray burns.**—Where plaintiff, as the result of defendant's X-ray examinations, was severely burned, the fact that such examinations, when carefully and properly made, do not produce burns, might be considered as showing that the degree of care and skill ordinarily exercised by persons of the medical profession using such agencies was not exercised by defendant. Evans v. Clapp, (Mo. A.) 231 SW 79.

1. Hazen v. Mullen, 32 F. (2d) 394; De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288.

2. Challis v. Lake, 71 N. H. 90, 51 A 260.

3. Viita v. Dolan, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas 1917E 678.

4. Baker v. Hancock, 29 Ind. A. 456, 63 NE 323, 64 NE 38; Ragan v. Shannon, 98 Okl. 289, 225 P 672; Sheldon v. Wright, 80 Vt. 298, 67 A 807.

[a] **Thus,** in an action for malpractice in treating a fractured leg, evidence of defendant that during his thirty-three years of experience prior to the case in question his treatment of fractures had been the same as in plaintiff's case, and the results had been good, was properly refused. Sheldon v. Wright, 80 Vt. 298, 67 A 807.

evidence that others had used the appliance in question with good results is admissible to show that defendant had no knowledge that it was unfit for the use intended.[5] Evidence of the conduct of the physician or surgeon in connection with the treatment of other cases is not admissible to prove or disprove that the requisite skill or care was exercised on the occasion in question.[6]

Reputation and professional character. In accord with general rules,[7] where an action for malpractice is founded upon negligence and the skill of the physician or surgeon is not in issue, proof of his general reputation for care is not admissible.[8] Nor is proof of his general reputation for skill admissible in such cases.[9] It has been held that proof of the general reputation of a physician or surgeon for skill is inadmissible, even though he is charged with unskillful treatment;[10] but there is some authority to the contrary.[11] There is also some authority to the effect that the general reputation of a physician or surgeon for both skill and care is admissible where both negligence and want of skill are charged.[12] The reputation of the institution where defendant received his professional training is not admissible on the issue of whether he possessed the requisite skill.[13] So, also, evidence that defendant procured his certificate of proficiency from the state board of examiners without examination, by means of diplomas irregularly obtained from medical schools, is irrelevant, as are also defendant's statements concerning such diplomas.[14] But evidence that defendant was not a regularly trained physician or surgeon is admissible for the purpose of rebutting evidence introduced by him to support his general professional character.[15]

[§ 156] **(3) To Show Willful, Wanton, or Intentional Injury.** Evidence of the reputation of defendant for care is inadmissible on the issue of willful injury.[16] The same is true of manifestations of ill will on the part of the physician or surgeon, which are so remote from the time of the treatment in question as to have no tendency to prove that the treatment rendered was intentionally improper.[17] For the purpose of negativing willful injury evidence that defendant administered the same treatment to others suffering a like affliction and with helpful results is admissible.[18]

[§ 157] **c. Weight and Sufficiency.** As in other civil actions,[19] every fact necessary to constitute a cause of action or defense in an action for malpractice must be established by a preponderance of the evidence.[20] Thus, where such facts are in issue, the party having the burden of proof thereof must establish by a preponderance of the evidence that the relation of physician or surgeon and patient existed at the time and place in question;[21] that the physician or surgeon failed to exercise proper skill or care in the treatment of the patient;[22] that

5. Weller v. Plapao Laboratories Incorporation, 197 Mo. A. 47, 191 SW 1056.

[a] **Illustration.**—In an action for death of plaintiff's intestate from the use of an appliance for hernia furnished by defendant, affidavits of others as to the use of the appliance is admissible on the question of defendant's knowledge. Weller v. Plapao Laboratories Incorporation, 197 Mo. A. 47, 191 SW 1056.

6. Iowa.—Shockley v. Tucker, 127 Iowa 456, 103 NW 360.

Miss.—Unger v. Grimsley, 138 Miss. 591, 103 S 341.

N. Y.—Link v. Sheldon, 18 NYS 815 [aff 136 N. Y. 1, 32 NE 696].

Okl.—Ragan v. Shannon, 98 Okl. 289, 225 P 672.

Or.—Rayburn v. Day, 126 Or. 135, 268 P 1002.

Wash.—Brooks v. Herd, 144 Wash. 173, 257 P 238.

[a] **Rule applied.**—In an action for burns from the negligent use of an X-ray machine, evidence that two years after the injury complained of while using a different X-ray machine defendant burned another person was inadmissible. Unger v. Grimsley, 138 Miss. 591, 103 S 341.

7. See Negligence § 821.

8. Ind.—Smith v. Stump, 12 Ind. A. 359, 40 NE 279.

Mont.—Stevenson v. Gelsthorpe, 10 Mont. 563, 27 P 404.

Or.—Williams v. Poppleton, 3 Or. 139.

Pa.—Mertz v. Detweiler, 8 Watts & S. 376.

S. C.—Green v. Shaw, 136 S. C. 56, 134 SE 226, 48 ALR 243.

9. Ill.—Holtzman v. Hoy, 19 Ill. A. 459 [aff 118 Ill. 534, 8 N. E. 832, 59 AmR 390].

Ky.—Alexander v. Menefee, 64 SW 855, 23 KyL 1151.

Mont.—Stevenson v. Gelsthorpe, 10 Mont. 563, 27 P 404.

N. Y.—Degnan v. Ransom, 83 Hun 267, 31 NYS 966.

Or.—Engstrom v. Wise Dental Co., 97 Or 634, 193 P 187.

Tex.—Hackler v. Ingram, (Civ. A.) 196 SW 279.

10. Holtzman v. Hoy, 118 Ill. 534, 8 NE 832, 59 AmR 390 [aff 19 Ill. A. 459]; Stevenson v. Gelsthorpe, 10 Mont. 563, 27 P 404; Degnan v. Ransom, 83 Hun 267, 31 NYS 966.

11. Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72.

12. Shaw v. Klein, 121 Miss. 411, 83 S 620.

13. Leighton v. Sargent, 31 N. H. 119, 64 AmD 323.

14. Bute v. Potts, 76 Cal. 304, 18 P 329.

15. Grannis v. Branden, 5 Day (Conn.) 260, 5 AmD 143.

16. Green v. Shaw, 136 S. C. 56, 134 SE 226, 48 ALR 243.

17. Willard v. Norcross, 79 Vt. 546, 65 A 755.

[a] **Illustration.**—In an action against a physician for malpractice in the treatment of plaintiff's wrist in January, evidence of manifestations of ill will toward plaintiff, commencing five months later, is inadmissible to show that any improper surgical treatment which there may have been was intentional. Willard v. Norcross, 79 Vt. 546, 65 A 755.

18. Thomas v. Register, 110 S. C. 173, 96 SE 517.

19. See Evidence §§ 1730–1806.

20. See cases infra this section.

21. [a] **Relation shown to exist.**—Haase v. Morton, 138 Iowa 205, 115 NW 921, 16 AnnCas 350; Peterson v. Phelps, 123 Minn. 319, 143 NW 793, AnnCas1915A 257.

22. Ill.—Hoover v. Buckman, 194 Ill. A. 308.

Minn.—Weeker v. Hamel, 150 Minn. 529, 184 NW 1025.

Mo.—Fausette v. Grim, 193 Mo. A 585, 186 SW 1177.

N. Y.—Wood v. Wyeth, 106 App. Div. 21, 94 NYS 360; MacKenzie v. Carman, 103 App. Div. 246, 92 NYS 1063; Winner v. Lathrop, 67 Hun 511, 22 NYS 516; Smith v. Dumont, 3 Silv. Sup. 358, 6 NYS 242; Chik v. Guilshan, 169 NYS 97.

Oh.—Ault v. Hall, 119 Oh. St. 422, 164 NE 518.

Or.—Hamilton v. Kelsey, 126 Or. 26, 268 P 750.

Pa.—English v. Free, 205 Pa. 624, 55 A 777; Veit v. Veit, 90 Pa. Super. 280.

Tex.—Urrutia v. Patino, (Civ. A.) 297 SW 512; Miles v. Harris, (Civ. A.) 194 SW 839.

Wis.—Marchand v. Bellin, 158 Wis. 184, 147 NW 1033.

And see cases infra this note.

[a] **Lack of skill or care shown.**—(1) Adjustment of splints and bandages upon injured arm of plaintiff in manner so tight that no space was left for enlargement of the arm due to swelling. Priestley v. Stafford, 30 Cal. A. 523, 158 P 776. (2) Administration of anæsthetic. Updegraff v. Gage-Hall Clinic, 125 Kan. 518, 264 P 1078. (3) Administration of cocaine unfit for use. Nisbet v. Vandiver, 24 Ga. A. 572, 101 SE 761. (4) Administration of ether unfit for use. Moehlenbrock v. Parke, 145 Minn. 100, 176 NW 169. (5) Childbirth. Kline v. Nicholson, 151 Iowa 710, 130 NW 722; Mason v. Geddes, 258 Mass. 40, 154 NE 519; Dalsgaard v. Meierding, 140 Minn. 388, 168 NW 584. (6) Diseased hip. Lubbee v. Hilgert, 135 App. Div. 227, 120 NYS 387. (7) Dislocated arm. Blex v. Flack, 121 Kan. 431, 247 P 640. (8) Dislocated elbow joint. Hoover v. McCormick, 197 Ky. 509, 247 SW 718. (9) Dislocated shoulder. Holton v. Burton, (Wis.) 222 NW 225. (10) Electrical treatment of hand. Hales v. Raines, 146 Mo. A. 232, 130 SW 425. (11) Electrical treatment of infantile paralysis. Dunn v. Styron, (Tex. Civ. A.) 10 SW (2d) 1018. (12) Erroneous diagnosis of blood poisoning as ulcers of the womb. Gates v. Fleischer, 67 Wis. 504, 30 NW 674. (13) Erroneous diagnosis of detached retina as mere cold of the eye. Smith v. Mallinckrodt Chemical Works, 212 Mo. A. 158, 251 SW 155. (14) Erroneous diagnosis of fractured arm. McCollum v. Barr, 38 Cal. A. 411, 176 P 463. (15) Erroneous diagnosis of fractured leg. Bonnet v. Foote, 47 Colo. 282, 107 P 252, 28 LRANS 136. (16) Erroneous diagnosis leading to unnecessary operation. Johns v. Pond, 38 Cal. A. 643, 177 P 293; Haskins v. Howard, (Tenn.) 16 SW (2d) 20; Thorning v. Boriski, (Tex. Civ. A.) 283 SW 912. (17) Exposure to X-rays. Ragin v. Zimmerman, (Cal.) 276 P 107; Lett v. Smith, 6 La. A. 248; Hayes v. Lufkin, 147 Minn. 225, 179 NW 1007; Evans v. Clapp, (Mo. A.) 231 SW 79; Hunter v. Burroughs, 123 Va. 113, 96 SE 360; Stickney v. Congdon, 131 Wash. 7, 228 P 849; Nelson v. Newell, 195 Wis. 572, 217 NW 723. (18) Failure to apply prompt treatment to prevent spread of infection. Torrance v. Wells, (Ala.) 122 S 322. (19) Failure of veterinary to return after admin-

the operation complained of was unauthorized;[23] | that the physician or surgeon abandoned the pa-

istering treatment to sick horse. Boom v. Reed, 69 Hun 426, 23 NYS 421. (20) Failure to administer any treatment to patient suffering from peritonitis, hemorrhage, and shock brought about by a rupture of the uterus save to give her a little water. Stejskal v. Darrow, 55 N. D. 606, 215 NW 83, 53 ALR 1096. (21) Failure to attend patient promptly upon being advised of unfavorable condition following administration of neosalvarsan. Thaggard v. Vafes, 218 Ala. 609, 119 S 647. (22) Failure to detect presence of infection earlier. Miles v. Hoffman, 127 Wash. 653, 221 P 316. (23) Failure to discover and remove uterine packer spring from patient's body. Wharton v. Warner, 75 Wash. 470, 135 P 235. (24) Failure to discover dislocation of shoulder. Burton v. Neill, 140 Iowa 141, 118 NW 302, 17 AnnCas 532; Bolar v. Browning, 168 Ky. 273, 181 SW 1109; Hoffman v. Watkins, 89 Wash. 661, 155 P 159. (25) Failure to discover that patient was being forced to lie on very hot water bottles. Grosshart v. Shaffer, 52 Okl. 204, 152 P 441. (26) Failure to employ available and well-known means of diagnosis, coupled with failure to locate fracture. Whitson v. Hillis, 55 N. D. 797, 215 NW 480. (27) Failure to keep informed of condition of scarlet fever patient. Tadlock v. Lloyd, 65 Colo. 40, 173 P 200. (28) Failure to make personal physical examination of impacted fracture of hip in addition to taking X-ray pictures. Pearson v. Crabtree, 70 Cal. A. 52, 232 P 715. (29) Failure to make timely discovery of dislocated radius. McCann v. Twitchell, 116 Me. 490, 102 A 740. (30) Failure to operate or to advise procurement of surgical relief elsewhere. Tucker v. Stetson, 233 Mass. 81, 123 NE 239. (31) Failure to relieve patient's pain where possible by slight operation. Dahl v. Wagner, 87 Wash. 492, 151 P 1079. (32) Failure to remove gauze packs or sponges used in operation. Spears v. McKinnon, 168 Ark. 357, 270 SW 524; Cochran v. Girtman, 34 Ida. 654, 203 P 289; Walker Hospital v. Pulley, 74 Ind. A. 659, 127 NE 559, 128 NE 933; Baer v. Chowning, 135 Minn. 453, 161 NW 144; Ault v. Hall, 119 Oh. St. 422, 164 NE 518; Mayberry v. Myers, 103 Okl. 175, 229 P 563; Davis v. Kerr, 239 Pa. 351, 86 A 1007, 46 LRANS 611; Moore v. Ivey, (Tex. Civ. A.) 264 SW 283. (33) Failure to remove instrument used in operation. Slimak v. Foster, 106 Conn. 366, 138 A 153; Fowler v. Scheldrup, 166 Minn. 164, 207 NW 177; Sontag v. Ude, 191 Mo. A. 617, 177 SW 659. (34) Failure to take X-ray picture of fractured leg. Polionos v. Renner, 190 Ill. A. 416; Stamets v. Wilson, (Ind. A.) 164 NE 300; Berkholz v. Benepe, 153 Minn. 335, 190 NW 800. (35) Failure to take X-ray photograph of injured eye. Kosak v. Boyce, 185 Wis. 513, 201 NW 757. (36) Failure to use extension weight in treatment of fractured leg. Berkholz v. Benepe, supra. (37) Fractured arm. Powell v. Galloway, (Ky.) 16 SW (2d) 489; McCann v. Twitchell, 116 Me. 490, 102 A 740; Scholte v. Brabec, (Minn.) 224 NW 259; Bonderson v. Hovde, 150 Minn. 175, 184 NW 853; Brooks v. Brookes, (Mo. A.) 186 SW 1105. (38) Fractured collar bone. Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas1916C 1075. (39) Fractured hip. Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814. (40) Fractured leg. Taylor v. De Vaughn, (Cal. A.) 266 P 960; Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874; McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 156 P 115, AnnCas1918A 380; Petefish v. Morrison, 110 Kan. 709, 205 P 651; Miller v. Leib, 109 Md. 414, 72 A 466; Viita v. Dolan, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas1917E 678; Davis v. Spicer, 27 Mo. A. 279; Burnham v. Stillings, 76 N. H. 122, 79 A 987; Dean v. Seeman, 42 S. D. 577, 176 NW 649; Froman v. Ayars, 42 Wash. 385, 85 P 14. (41) Granulated eyelids. Thompson v. Martin, 127 Mo. A. 24, 106 SW 535. (42) Operation for strangulated hernia. Morrell v. Lalonde, 45 R. I. 112, 120 A 435. (43) Operation for thinning patient's lip. Hall v. Steele, 193 Cal. 602, 226 P 854. (44) Performing operation without first resorting to other recognized methods of treatment. Theodore v. Ellis, 141 La. 709, 75 S 655. (45) Permitting carbolic acid to come in contact with the cornea of patient's eye, after removing a cyst from the eyelid. James v. Robertson, 39 Utah 414, 117 P 1068. (46) Permitting drill to bore into bony tissues of jaw. Hubbard v. Martin, 184 Ill. A. 534. (47) Permitting tooth to drop into patient's lung. McGehee v. Schiffman, 4 Cal. A. 50, 87 P 290. (48) Permitting a uterine packer spring to lodge in plaintiff's uterus. Wharton v. Warner, 75 Wash. 470, 135 P 235. (49) Tuberculosis. Hansen v. Pock, 57 Mont. 51, 187 P 282. (50) Unnecessary operation on wrong person. Gill v. Selling, 125 Or. 587, 267 P 812, 58 ALR 1556. (51) Use of defective X-ray machine. Holcomb v. Magee, 217 Ill. A. 272. (52) Use of instrument no longer used by surgeons of average learning and skill. Wharton v. Warner, 75 Wash. 470, 135 P 235. (53) Use of radium tube with short string in nasal treatment. Jacobs v. Grigsby, 187 Wis. 660, 205 NW 394. (54) Use of unsterilized instruments. Nisbet v. Vandiver, 24 Ga. A. 572, 101 SE 761; Helland v. Bridenstine, 55 Wash. 470, 104 P 626.

[b] **Lack of skill or care not shown.**—(1) Administration of anæsthetic resulting in patient's death. Levy v. Vaughan, 42 App. (D. C.) 146. (2) Amputation of arm. Pepke v. Grace Hospital, 130 Mich. 493, 90 NW 278. (3) Amputation of crushed foot. Martin v. Courtney, 87 Minn. 197, 91 NW 487. (4) Amputation of finger and subsequent treatment. Haskell v. Hanson, 152 Minn. 395, 188 NW 1007. (5) Amputation of leg. Staloch v. Holm, 100 Minn. 276, 111 NW 264, 9 LRANS 712. (6) Bloodless operation for correcting partial ankylosis of hip joint. Mortimer v. Keppler, 3 N. J. Misc. 1036, 130 A 547. (7) Care of eyes of newborn child. Medlin v. Bloom, 230 Mass. 201, 119 NE 773. (8) Colle's fracture of wrist. Willard v. Norcross, 86 Vt. 426, 85 A 904. (9) Crushed foot. Gallagher v. Kermott, 56 N. D. 176, 216 NW 569. (10) Diphtheria. Hrubes v. Faber, 163 Wis. 89, 157 NW 519. (11) Directing nurse to place hot irons at patient's feet. Malkowski v. Graham, 169 Wis. 398, 172 NW 785, 4 ALR 1524. (12) Erroneous diagnosis of dislocated arm as a fracture. Ballaine v. Drake, 97 Okl. 217, 224 P 947. (13) Erroneous diagnosis of infected bone. Edwards v. Uland, 193 Ind. 376, 140 NE 546. (14) Erroneous diagnosis of osteomyelitis. Edwards v. Uland, (Ind. A.) 131 NE 240. (15) Erroneous diagnosis resulting in declaring patient insane. Warner v. Packer, 139 App. Div. 207, 123 NYS 725. (16) Extraction of teeth. Hopkins v. Heller, 59 Cal. A. 447, 210 P 975; Theisen v. Nogard, 183 Ill. A. 158; Cross v. Albee, 250 Mass. 170, 145 NE 45; McCarthy v. Harvard Dental Parlors, 121 NYS 343; Goehring v. McDiarmid, 289 Pa. 193, 137 A 187. (17) Failure of X-ray specialist to discover impacted fracture. Pearson v. Crabtree, 70 Cal. A. 52, 232 P 715. (18) Failure to discover presence of foreign substance introduced in patient's body during treatment. Rogers v. Voorhees, 171 App. Div. 331, 157 NYS 330. (19) Failure to make earlier discovery of fracture of arm. Gedney v. Kingsley, 16 NYS 792. (20) Failure to make physical examination before giving anæsthetic. Eggert v. Dramburg, (Wis.) 221 NW 732. (21) Failure to order removal of patient from home to hospital. Medlin v. Bloom, 230 Mass. 201, 119 NE 773. (22) Failure to remove fragment of placenta following childbirth. Hammer v. Klegger, 50 S. D. 453, 210 NW 667. (23) Failure to remove gauze packs, sponges, and other foreign substances from wound following operation. Akridge v. Noble, 114 Ga. 949, 41 SE 78; Funk v. Bonham, (Ind. A.) 151 NE 22; Burris v. Titzell, 189 Iowa 1322, 177 NW 557, 179 NW 851; Gouner v. Brosnan, 155 La. 1, 98 S 681; Roark v. Peters, 2 La. A. 448; Cyr v. Landry, 114 Me. 188, 95 A 883; Boner v. Nicholson, 179 Mo. A. 146, 161 SW 309; De Rose v. Hirst, 282 Pa. 292, 127 A 776; Miles v. Harris, (Tex. Civ. A.) 194 SW 839; Parker v. Bowen, 98 Vt. 115, 126 A 522; Mayer v. Hipke, 183 Wis. 382, 197 NW 333; Paro v. Carter, 177 Wis. 121, 188 NW 68. (24) Failure to take X-ray pictures of injured foot and ankle. Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889. (25) Fractured arm. Thorpe v. Talbott, 197 Iowa 95, 196 NW 716. (26) Fractured astragalus. McGuire v. Rix, (Nebr.) 225 NW 120. (27) Fractured jaw. Cozine v. Moore, 159 Iowa 472, 141 NW 424. (28) Fractured leg. Perkins v. Trueblood, 180 Cal. 437, 181 P 642; Snearly v. McCarthy, 180 Iowa 81, 161 NW 108; Ayala v. King-Ryder Lumber Co., 146 La. 536, 83 S 799; Czajka v. Sadowski, 243 Mich. 21, 219 NW 660; Pate v. Dumbauld, 298 Mo. 435, 250 SW 49; Bush v. Chilcott, 64 Mont. 346, 215 P 1001; Bush v. Chilcott, (Mont.) 210 P 907; Hills v. Shaw, 69 Or. 460, 137 P 229; Bigney v. Fisher, 26 R. I. 402, 59 A 72; Warwick v. Bliss, 46 S. D. 622, 195 NW 501; Kemp v. McGillivray, 129 Wash. 592, 225 P 631; Lorenz v. Booth, 84 Wash. 550, 147 P 31; Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107. (29) Fractured wrist. Gramaldi v. Zeglio, 3 N. J. Misc. 669, 129 A 475. (30) Gunshot wounds. Scherer v. Eidenmuller, 45 Cal. A. 372, 187 P 445. (31) Impetigo. Floyd v. Michie, (Tex. Civ. A.) 11 SW (2d) 657. (32) Infected eye following chicken pox. Shelton v. Hacelip, 167 Ala. 217, 51 S 937. (33) Infected hip. Landoski v. Mueller, 193 Wis. 570, 214 NW 329. (34) Injury to eyes. Wurdemann v. Barnes, 92 Wis. 206, 66 NW 111. (35) Kneecap injury. Dougherty v. Soll, 70 Wash. 407, 126 P 924. (36) Operation for chronic sciatica. Miller v. Blackburn, 170 Ky. 263, 185 SW 864. (37) Operation for hernia. Verbitzky v. Cunningham, 207 Ill. A. 128. (38) Operation for removal of kidney. Johnson v. Clarke, (Cal. A.) 276 P 1052. (39) Operation for strabismus. Feeney v. Spalding, 89 Me. 111, 35 A 1027. (40) Permitting patient coming out of anæsthesia to be burned by contact with heat radiator. Hardy v. Meadows, (Utah) 264 P 968. (41) Permitting tooth to drop into patient's lung. Yarrington v. Pittenger, (N. J. Sup.) 142 A 565. (42) Provision for care of patient during temporary absence following reduction of fractured leg. Browning v. Hoffman, 90 W. Va. 568, 111 SE 492. (43) Radium burns in cancer treatment. Furgason v. Bellaire, 197 Iowa 277, 197 NW 13. (44) Rebreaking and resetting fractured leg. Lorenz v. Lerche, 157 Minn. 437, 196 NW 564. (45) Use of Beck's paste to hasten healing of infected knee. Hanson v. Harris, 44 S. D. 457, 184 NW 262. (46) X-ray burns. Hazen v. Mullen, 32 F. (2d) 394; Graiziger v. Henssler, 229 Ill. A. 365; Lett v. Smith, 6 La. A. 248; Kuehnemann v. Boyd, 193 Wis. 388, 214 NW 326, 215 NW 455. (47) X-ray treatment for eczema. McCoy v. Buck, (Ind. A.) 160 NE 46 [den reh 157 NE 456]. (48) X-ray treatment of pustular acne. Rost v. Roberts, 180 Wis. 207, 192 NW 38.

23. [a] **Evidence held sufficient to establish unauthorized operation.**—Luka v. Lowrie, 171 Mich. 122, 136 NW 1106, 41 LRANS 290; Francis

tient without proper notice;[24] that the physician or surgeon improperly gave to, or withheld from, the patient the facts with respect to what treatment had been given;[25] that the breach of duty charged was a proximate cause of the injuries complained of;[26] that defendant was responsible for the acts or omissions upon which the action is based;[27] or that plaintiff was guilty of contributory negligence.[28] Where the action is based upon the failure of the physician or surgeon to exercise proper skill or care in the treatment of a patient, a preponderance of the credible evidence is sufficient.[29] Proof beyond a reasonable doubt is not required.[30] Improper treatment may be established by circumstantial evidence.[31] It is not essential that the evidence be direct[32] or positive.[33] However, an inference of unskillful or negligent treatment must be based upon something more than mere conjecture or speculation.[34] Evidence which merely raises a suspicion or indicates a possibility of unskillful or negligent treatment is insufficient.[35] The same is true of evidence which is equally consistent with either the exercise or nonexercise of proper skill or care.[36]

Expert testimony. Ordinarily, where the exercise of proper skill or care on the part of a physician or surgeon is in issue, expert medical testimony is essential.[37] The reason is that in most cases a lay-

v. Brooks, 24 Oh. A. 136, 156 NE 609; Luzzi v. Priester, (Tex. Civ. A.) 295 SW 958.

[b] **Evidence held insufficient to establish unauthorized operation.**—Robinson v. Crotwell, 175 Ala. 194, 57 S 23; Bennan v. Parsonnet, 83 N. J. L. 20, 83 A 948; Brewer v. Ring, 177 N. C. 476, 99 SE 358; Eves Tall Chief v. Aaron, 87 Okl. 230, 209 P 915.

24. [a] **Evidence held sufficient to establish abandonment.**—Stohlman v. Davis, (Nebr.) 220 NW 247; Burnett v. Layman, 133 Tenn. 323, 181 SW 157.

25. See cases infra this note.

[a] **Willful concealment shown.**—Kemp v. McGillivray, 129 Wash. 592, 225 P 631.

[b] **False information not shown.**—Rich v. King, 117 Me. 64, 102 A 704.

26. Ill.—Nye v. Clark, 193 Ill. A. 505; Barton v. Southwick, 185 Ill. A. 24.

Iowa.—Ramberg v. Morgan, 218 NW 492.

Ky.—Hanners v. Salmon, 216 Ky. 584, 288 SW 307; Jett v. Linville, 202 Ky. 198, 259 SW 43.

Mass.—Tucker v. Stetson, 233 Mass. 81, 123 NE 239; Toy v. Mackintosh, 222 Mass. 430, 110 NE 1034, AnnCas 1918C 1188.

Minn.—Thorkeldson v. Nicholson, 154 Minn. 106, 191 NW 269.

Oh.—Searer v. Lower, 25 Oh. A. 328, 158 NE 199.

Or.—Hamilton v. Kelsey, 126 Or. 26, 268 P 750; Merriam v. Hamilton, 64 Or. 476, 130 P 406.

Wis.—Kosak v. Boyce, 185 Wis. 513, 201 NW 757.

[a] **Causal relation shown.**—(1) Erroneous diagnosis of injury to eye and subsequent permanent impairment of vision. Smith v. Mallinckrodt Chemical Works, 212 Mo. A. 158, 251 SW 155. (2) Extraction of teeth and subsequent infection in plaintiff's arm. Dimock v. Miller, 202 Cal. 668, 262 P 311. (3) Failure to discover dislocated radius and subsequent permanent stiffening of elbow. Warner v. Pence, 48 N. D. 979, 188 NW 167. (4) Failure to remove gauze pack or sponge following operation and subsequent condition of patient necessitating further operations. Cowan v. Bouffleur, 192 Ill. A. 21; Wynne v. Harvey, 96 Wash. 379, 165 P 67. (5) Failure to remove gauze pack or sponge used in operation and subsequent death of patient from peritonitis. Tate v. Tyzzer, 208 Mo. A. 290, 234 SW 1038. (6) Failure to remove metal clips used as sutures and subsequent hemorrhages of patient. Fowler v. Scheldrup, 166 Minn. 164, 207 NW 177. (7) Failure to remove placenta and subsequent death of patient from blood poisoning. Kruger v. Bossingham, 152 Minn. 243, 188 NW 324. (8) Treatment of broken leg and union of bones in an overlapping position. Pelky v. Kivlin, 199 App. Div. 114, 191 NYS 428. (9) Treatment of broken leg and subsequent crippled condition thereof. Donnelly v. Packard, 175 Wis. 308, 185 NW 164. (10) Use of unsterilized dental instruments and failure to wash hands before working on plaintiff and subsequent development of necrosis of patient's jaw. Norwood v. Goeddel, 58 Pa. Super. 500. (11) Use of radium tube with short string in nasal treatment and injuries resulting from tube falling into patient's mouth and being swallowed. Jacobs v. Grigsby, 187 Wis. 660, 205 NW 394. (12) X-ray treatment and burns suffered by patient. Nelson v. Newell, 195 Wis. 572, 217 NW 723.

[b] **Causal relation not shown.**—(1) Allowing scarlet fever patient to be brought home during despumation stage and subsequent death of another member of the family of patient from the same disease. Skillings v. Allen, 148 Minn. 88, 180 NW 916. (2) Erroneous diagnosis of patient's ailment and subsequent death of patient. Thorkeldson v. Nicholson, 154 Minn. 106, 191 NW 269. (3) Extraction of infected tooth and subsequent spreading of infection to other parts of the jaw. Matuschka v. Murphy, 173 Wis. 484, 180 NW 821. (4) Extraction of teeth and necessity for subsequent serious operation. Saas v. Hindmarsh, 184 NYS 467. (5) Failure of dentist to sterilize instruments used and subsequent infection of patient's gum. Nevinger v. Haun, 197 Mo. A. 416, 196 SW 39. (6) Failure to administer diphtheria antitoxin and subsequent death of patient from that disease. Hrubes v. Faber, 163 Wis. 89, 157 NW 519. (7) Failure to diagnose as cerebro-spinal meningitis the affliction with which one child of a family was suffering and subsequent contraction by another child of the family of the same disease. Sherwood v. Babcock, 208 Mich. 536, 175 NW 470. (8) Failure to discover a filling and particles of a tooth while removing teeth and injury resulting from their escape into patient's throat and lung. Krueger v. Chase, 172 Wis. 163, 177 NW 510. (9) Failure to remove a sponge used in wound during operation and subsequent death of patient. Ruble v. Busby, 27 Ida. 486, 149 P 722, AnnCas1917D 665. (10) Failure to take precaution against infection in vaccinating hogs and their subsequent death. Phillips v. Leuth, 200 Iowa 272, 204 NW 301. (11) False statement that child had been delivered and subsequent suffering experienced in delivery. Adkins v. May, 216 Ky. 785, 288 SW 735. (12) Operation for ovaritis and subsequent death of patient. Barrett v. Brand, 179 Ky. 740, 201 SW 331. (13) Removal of varicose veins and subsequent deterioration of patient's testicle. Nicholson v. Jacobson, (Cal.) 271 P 1057. (14) Treatment for syphilis and subsequent death of patient. Urrutia v. Patino, (Tex. Civ. A.) 297 SW 512. (15) Treatment of broken arm and leg and their subsequent crippled condition. Neifert v. Hasley, 149 Mich. 232, 112 NW 705. (16) Treatment of broken leg and failure of bones to unite. De Bruine v. Voskuil, 168 Wis. 104, 169 NW 288. (17) Treatment of fractured femur and its ultimate shortened condition. Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107. (18) Use of defective screen and X-ray burns sustained by patient. Runyan v. Goodrum, 147 Ark. 481, 228 SW 397, 13 ALR 1403. (19) Use of naked fingers instead of gloves to insert packing into vagina to check flooding after miscarriage and subsequent infection of womb. McKinnon v. Polk, (Ala.) 121 S 539. (20) X-ray treatment and subsequent death of patient. Butler v. Rule, (Ariz.) 265 P 757.

27. See cases infra this note.

[a] **Responsibility shown.**—(1) For acts of joint operator. Walker v. Holbrook, 130 Minn. 106, 153 NW 305. (2) For permitting drainage tube to remain in patient's body. Chesley v. Durant, 243 Mass. 180, 137 NE 301.

[b] **Responsibility not shown.**—(1) Assistant surgeon for negligence of his chief in failing to remove a sponge from an incision. Wynne v. Harvey, 96 Wash. 379, 165 P 67. (2) Physician who reduced fractured limb for subsequent treatment by another in general charge of the case. McLendon v. Daniel, 37 Ga. A. 524, 141 SE 77.

28. Kruger v. Bossingham, 152 Minn. 243, 188 NW 324.

[a] **Contributory negligence shown.**—Premature withdrawal from hospital. Richards v. Willard, 176 Pa. 181, 35 A 114.

[b] **Contributory negligence not shown.**—Directions of physician followed. Kruger v. Bossingham, 152 Minn. 243, 188 NW 324.

29. Hoener v. Koch, 84 Ill. 408; Wood v. Wyeth, 106 App Div. 21, 94 NYS 360.

30. Helland v. Bridenstine, 55 Wash. 470, 104 P 626.

31. O'Grady v. Cadwallader, 183 Iowa 178, 166 NW 755; Eichholz v. Poe, (Mo.) 217 SW 282; Peterson v. Richards, (Utah) 272 P 229.

32. Kopecky v. Hasek, 180 Iowa 45, 162 NW 828; Helland v. Bridenstine, 55 Wash. 470, 104 P 626.

33. Helland v. Bridenstine, supra.

34. Adams v. Junger, 158 Iowa 449, 139 NW 1096; Traverse v. Wing, 256 Mass. 320, 152 NE 354; Gallagher v. Kermott, 56 N. D. 176, 216 NW 569; Honaker v. Whitley, 124 Va. 194, 97 SE 808; Thomson v. Virginia Mason Hospital, (Wash.) 277 P 691; Dishman v. Northern Pac. Ben. Assoc., 96 Wash. 182, 164 P 943.

35. Mayer v. Hipke, 183 Wis. 382, 197 NW 333.

36. Farrell v Haze, 157 Mich. 374, 122 NW 197; McQuay v. Eastwood, 12 Ont. 402; Storey v. Veach, 22 U. C. C. P. (Ont.) 164; Jackson v. Hyde, 28 U. C. Q. B. (Ont.) 294.

37. U. S.—Ewing v. Goode, 78 Fed. 442.

Ala.—Carraway v. Graham, 218 Ala. 453, 118 S 807.

Cal.—Patterson v. Marcus, 265 P 222; Perkins v. Trueblood, 180 Cal. 437, 181 P 642; Taylor v. De Vaughn, (A.) 266 P 960; Houghton v. Dickson, 29 Cal. A. 321, 155 P 128.

Colo.—Norkett v. Martin, 63 Colo. 220, 165 P 256; McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

Conn.—Slimak v. Foster, 106 Conn. 366, 138 A 153.

Ill.—Phebus v. Mather, 181 Ill. A. 274.

man can have no knowledge whether the proper treatment was given.[38] Expert evidence is not required, however, where the results of the treatment are of such character as to warrant the inference of want of care from the testimony of laymen or in the light of the knowledge and experience of the jurors themselves.[39] That some facts tending to establish plaintiff's case may have been shown by nonexpert testimony is not objectionable.[40] It is not necessary, to sustain a verdict for plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper,[41] nor will the fact that all such witnesses agree that a portion of the treatment is proper under some circumstances defeat a recovery.[42] Nor is it necessary to sustain a recovery that expert testimony showing improper treatment be specific and positive.[43] In determining the relative value of the evidence of medical experts in an action for surgical malpractice, the jury are to consider their professional knowledge and experience, freedom from bias, and the reasons they are able to give for their conclusions.[44]

[§ 158] **7. Questions of Law and Fact.** General rules[45] govern in determining what are questions of law and fact in an action founded upon malpractice.[46] It is the duty of the court to determine whether any facts have been established from which malpractice may be reasonably inferred.[47] It is the province of the jury to determine whether from these facts malpractice ought to be inferred.[48] Thus, if the evidence with respect thereto is conflicting, or is such that different inferences may properly be drawn therefrom, it is for the jury to determine whether the relation of physician or surgeon and patient existed at the time and place in question;[49] whether a particular result was warranted;[50] whether an operation was performed without the consent of the patient,[51] or whether consent was to be implied from the circumstances;[52] whether proper skill or care was exercised in the treatment of the patient;[53] whether the

Ind.—Funk v. Bonham, (A.) 151 NE 22; Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.
Iowa.—Ramberg v. Morgan, 218 NW 492; Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447; Snearly v. McCarthy, 180 Iowa 81, 161 NW 108.
Kan.—Rainey v. Smith, 109 Kan. 692, 201 P 1106; Pettigrew v. Lewis, 46 Kan. 78, 26 P 458.
Me.—Feeney v. Spalding, 89 Me. 111, 35 A 1027.
Mich.—Delahunt v. Finton, 244 Mich. 226, 221 NW 168; Zoterell v. Repp, 187 Mich. 319, 153 NW 692; Miller v. Toles, 183 Mich. 252, 150 NW 118, LRA1915C 595; Farrell v. Haze, 157 Mich. 374, 122 NW 197.
Minn.—Lorenz v. Lerche, 157 Minn. 437, 196 NW 564; Berkholz v. Benepe, 153 Minn. 335, 190 NW 800; Sawyer v. Berthold, 116 Minn. 441, 134 NW 120.
Mont.—Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.
Nebr.—McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296; Tady v. Warta, 111 Nebr. 521, 196 NW 901.
N. Y.—Robbins v. Nathan, 189 App. Div. 827, 179 NYS 281; Van Epps v. McKenny, 189 NYS 910.
Pa.—De Long v. Delaney, 206 Pa. 226, 55 A 965.
R. I.—Barker v. Lane, 23 R. I. 224, 49 A 963.
Tex.—Floyd v. Michie, (Civ. A.) 11 SW (2d) 657.
Vt.—Wilkins v. Brock, 81 Vt. 332, 70 A 572; Sheldon v. Wright, 80 Vt. 298, 67 A 807.
Va.—Hunter v. Burroughs, 123 Va. 113, 96 SE 360.
Wis.—Holton v. Burton, 222 NW 225; Kuehnemann v. Boyd, 193 Wis. 388, 214 NW 326, 215 NW 455; Mayer v. Hipke, 183 Wis. 382, 197 NW 333; Holsapple v. Scofield, 176 Wis. 649, 187 NW 682; Krueger v. Chase, 172 Wis. 163, 177 NW 510.

38. Evans v. Roberts, 172 Iowa 653, 154 NW 923.

39. U. S.—Vergeldt v. Hartzell, 1 F. (2d) 633.
Iowa.—Evans v. Roberts, 172 Iowa 653, 154 NW 923.
N. H.—Leighton v. Sargent, 31 N. H. 119, 64 AmD 323.
N. Y.—Benson v. Dean, 232 N. Y. 52, 133 NE 125.
Oh.—Francis v. Brooks, 24 Oh. A. 136, 156 NE 609.
Utah.—James v. Robertson, 39 Utah 414, 117 P 1068.
Wash.—Cornwell v. Sleicher, 119 Wash. 573, 205 P 1059; Wharton v. Warner, 75 Wash. 470, 135 P 235.

[a] **Illustrations.**—(1) In an action for an injury to plaintiff's tongue while removing adenoids, it was not necessary that defendant's negligence be established by the testimony of competent experts. Evans v. Roberts, 172 Iowa 653, 154 NW 923. (2) Where a surgeon in operation loses a metallic spring, twelve inches in length, in the wound, and fails to remove it, it authorizes the jury to infer negligence without the aid of expert evidence. Wharton v. Warner, 75 Wash. 470, 135 P 235.

40. Vander Wal v. Abbott, (Iowa) 167 NW 182; Seewald v. Gentry, 220 Mo. A. 367, 286 SW 445.

[a] **Thus,** that effect of long continued pressure, producing gangrene on patient's foot, might have been relieved by use of padding, may be established by nonexpert evidence. Seewald v. Gentry, 220 Mo. A. 367, 286 SW 445.

41. Stohlman v. Davis, (Nebr.) 220 NW 247; Hewitt v. Eisenbart, 36 Nebr. 794, 55 NW 252.

42. Stohlman v. Davis, (Nebr.) 220 NW 247; Hewitt v. Eisenbart, 36 Nebr. 794, 55 NW 252.

43. Slimak v. Foster, 106 Conn. 366, 138 A 153.

44. Bennison v. Walbank, 38 Minn. 313, 37 NW 447.

45. See Trial [38 Cyc 1511 et seq].

46. See cases infra this section.

47. Fields v. Rutherford, 29 U. C. C. P. (Ont.) 113; Jackson v. Hyde, 28 U. C. Q. B. (Ont.) 294.

48. Fields v. Rutherford, 29 U. C. C. P. (Ont.) 113; Jackson v. Hyde, 28 U. C. Q. B. (Ont.) 294.

49. Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 298 SW 1061; Miller v. Collins, (N. J.) 140 A 402.

50. Crawford v. Duncan, 61 Cal. A. 647, 215 P 573, Brooks v. Herd, 144 Wash. 173, 257 P 238.

51. Hobbs v. Kizer, 236 Fed. 681, 150 CCA 13; Meek v. Loveland, (Colo.) 276 P 30; Wells v. Van Nort, 100 Oh. St. 101, 125 NE 910; Francis v. Brooks, 24 Oh. A. 136, 156 NE 609.

52. Wells v. Van Nort, 100 Oh. St. 101, 125 NE 910; Rolater v. Strain, 39 Okl. 572, 137 P 96, 50 LRANS 880.

53. U. S.—Gunning v. Cooley, 30 F. (2d) 467 [certiorari granted 49 SCt 263 mem]; Vergeldt v. Hartzell, 1 F. (2d) 633; Kalloch v. Hoagland, 239 Fed. 252, 152 CCA 240; Harris v. Fall, 177 Fed. 79, 100 CCA 497, 27 LRA NS 1174; Ruth v. Johnson, 172 Fed. 191, 96 CCA 643.
Ala.—Moore v. Holroyd, 122 S 349; Torrance v. Wells, 122 S 322; Thaggard v. Vafes, 218 Ala. 609, 119 S 647; Sellers v. Noah, 209 Ala. 103, 95 S 167; Talley v. Whitlock, 199 Ala. 28, 73 S 976.
Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.
Ark.—Black v. Bearden, 167 Ark. 455, 268 SW 27; Davis v. Rodman, 147 Ark. 385, 227 SW 612, 13 ALR 1459; Dunman v. Raney, 118 Ark. 337, 176 SW 339.
Cal.—Bailey v. Kreutzmann, 141 Cal. 519, 75 P 104; Ley v. Bishopp, (A.) 263 P 369; Scott v. Sciaroni, 66 Cal. A. 577, 226 P 827.
Colo.—Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814; Tadlock v. Lloyd, 65 Colo. 40, 173 P 200.
D. C.—Levy v. Vaughan, 42 App. 146.
Ga.—Moon v. McRae, 111 Ga. 206, 36 SE 635; Grubbs v. Elrod, 28 Ga. A. 526, 112 SE 379; Fincher v. Davis, 27 Ga. A. 494, 108 SE 905; Edwards v. Roberts, 12 Ga. A. 140, 76 SE 1054.
Ida.—Cochran v. Gritman, 34 Ida. 654, 203 P 289; McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 156 P 115, AnnCas1918A 380.
Ill.—Johnson v. Marshall, 241 Ill. A. 80.
Ind.—Schillinger v. Savage, 186 Ind. 189, 115 NE 321; Hurst v. Reeder, 86 Ind. A. 294, 157 NE 101.
Iowa.—Ramberg v. Morgan, 218 NW 492; Vander Wal v. Abbott, 167 NW 182; Ingwersen v. Carr, 180 Iowa 988, 164 NW 217; Kopecky v. Hasek, 180 Iowa 45, 162 NW 828; Van Sickle v. Doolittle, 173 Iowa 727, 155 NW 1007; Evans v. Roberts, 172 Iowa 653, 154 NW 923; Baker v. Langan, 165 Iowa 346, 145 NW 513; Haradon v. Sloan, 157 Iowa 608, 138 NW 556; Reynolds v. Smith, 148 Iowa 264, 127 NW 192; Reynolds v. McManus, 139 Iowa 242, 117 NW 667; Haase v. Morton, 138 Iowa 205, 115 NW 921, 16 AnnCas 350; Tomer v. Aiken, 126 Iowa 114, 101 NW 769; Degelau v. Wight, 114 Iowa 52, 86 NW 36.
Kan.—McMillen v. Funcannon, 127 Kan. 573, 274 P 237; Nance v. Beatie, 127 Kan. 505, 274 P 219; James v. Grigsby, 114 Kan. 627, 220 P 297; Forman v. Surber, 113 Kan. 42, 213 P 667; Rainey v. Smith, 109 Kan. 692, 201 P 1106; Hinthorn v. Garrison, 108 Kan. 510, 196 P 439; Stout v. Bowers, 97 Kan. 33, 154 P 259.
Ky.—Powell v. Galloway, 16 SW (2d) 489; Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044; Knopp v. Thornton, 199 Ky. 216, 250 SW 853; Hoover v. McCormick, 197 Ky. 509, 247 SW 718; Stevenson v. Yates, 183 Ky. 196, 208 SW 820; Mason v. Meloan, 165 Ky. 582, 177 SW 435; Acton v. Smith, 150 Ky. 703, 150 SW 854; Samuels v. Willis, 133 Ky. 459, 118 SW 339, 19 AnnCas 188.
Mass.—Curley v. McDonald, 160 NE 796; Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974; Traverse v. Wing, 256 Mass. 320, 152 NE 354; King v. Belmore, 248 Mass. 108, 142 NE 911; Chesley v. Durant, 243 Mass. 180, 137 NE 301; Medlin v. Bloom, 230 Mass. 201, 119 NE 773; Connor v. O'Donnell, 230 Mass. 39, 119 NE 446.
Mich.—Ballance v. Dunnington, 241 Mich. 383, 217 NW 329, 57 ALR 262; Loveland v. Nelson, 235 Mich. 623, 209 NW 835; Wood v. Vroman, 226 Mich. 625, 198 NW 228; Wilk v. Black, 188 Mich. 478, 154 NW 561; Dailey v.

breach of duty relied upon was a proximate cause of the injuries complained of;[54] whether defendant was responsible for the acts or omissions of others in connection with the treatment of the patient;[55] or whether plaintiff or one for whose conduct plaintiff is responsible was guilty of contributory negligence.[56] The same is true with respect to the nature and extent of the injuries sustained or damages suffered.[57] But, on the other hand, if the evidence presents no conflict on the question and is such as to furnish the basis for but a single inference, it is for the court to determine whether proper skill or care was exercised in the treatment of a patient.[58] The same is true with respect to questions of proximate

Shaffer, 178 Mich. 574, 146 NW 192; Rogers v. Kee, 171 Mich. 551, 137 NW 260; Donoghue v. Shaw, 170 Mich. 544, 136 NW 367.

Minn.—Korman v. Hagen, 165 Minn. 320, 206 NW 650; Anderson v. Satterlund, 158 Minn. 205, 197 NW 102; Singer v. Bossingham, 152 Minn. 111, 188 NW 155; Clark v. George, 148 Minn. 52, 180 NW 1011; Harju v. Allen, 146 Minn. 23, 177 NW 1015; Walker v. Holbrook, 130 Minn. 106, 153 NW 305; Swadner v. Schefcik, 124 Minn. 269, 144 NW 958; Sawyer v. Berthold, 116 Minn. 441, 134 NW 120; Bennison v. Walbank, 38 Minn. 313, 37 NW 447.

Miss.—Prewett v. Philpot, 142 Miss. 704, 107 S 880.

Mo.—Cazzell v. Scholfield, 8 SW (2d) 580; Owens v. McCleary, 313 Mo. 213, 281 SW 682; Eichholz v. Poe, 217 SW 282; Krinard v. Westerman, 279 Mo. 680, 216 SW 938; Atkinson v. American School of Osteopathy, 240 Mo. 338, 144 SW 816; Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72; Noren v. American School of Osteopathy, (A.) 2 SW (2d) 215, 298 SW 1061; Lewis v. McClellan (A.) 1 SW (2d) 247; Chilton v. Ralls, 220 Mo. A. 355, 286 SW 718; Seewald v. Gentry, 220 Mo. A. 367, 286 SW 445; Hill v. Jackson, (A.) 272 SW 105; Stratton v. Barnum, (A.) 263 SW 476; Ingram v. Poston, (A.) 260 SW 773; Hale v. Atkins, 215 Mo. A. 380, 256 SW 544; Hague v. Threadgill, (A.) 236 SW 895; Anderson v. White, 210 Mo. A. 275, 235 SW 834; Gottschall v. Geiger, 207 Mo. A. 89, 231 SW 87; Wojciechowski v. Coryell, (A.) 217 SW 638; Weller v. Plapao Laboratories Incorporation, 197 Mo. A. 47, 191 SW 1056; Fausette v. Grim, 193 Mo. A. 585, 186 SW 1177; Coffey v. Tiffany, 192 Mo. A. 455, 182 SW 495 [quashed sub nom. State v. Ellison, 266 Mo. 604, 182 SW 996, Ann. Cas1918C 1]; Sontag v. Ude, 191 Mo. A. 617, 177 SW 659; Young v. Wolff, 190 Mo. A. 48, 175 SW 248; Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280; McClarin v. Grenzfelder, 147 Mo. A. 478, 126 SW 817.

Mont.—Stokes v. Long, 52 Mont. 470, 159 P 28.

Nebr.—Kimble v. Roeder, 115 Nebr. 589, 214 NW 1; Doty v. Lutheran Hospital Assoc., 110 Nebr. 467, 194 NW 444; Van Boskirk v. Pinto, 99 Nebr. 164, 155 NW 889; Griswold v. Hutchinson, 47 Nebr. 727, 66 NW 819.

N. J.—Miller v. Collins, 140 A 402; Cappell v. Jones, 103 N. J. L. 456, 136 A 190; Kapherr v. Schmidt, 98 N. J. L. 803, 121 A 617; Coleman v. Wilson, 85 N. J. L. 203, 88 A 1059, Ann Cas1915D 1122; Kelly v. Stern, 4 N. J. Misc. 180, 132 A 234 [aff 103 N. J. L. 196, 134 A 918].

N. Y.—Benson v. Dean, 232 N. Y. 52, 133 NE 125; Link v. Sheldon, 136 N. Y. 1, 32 NE 696; Du Bois v. Decker, 130 N. Y. 325, 29 NE 313, 27 AmSR 529, 14 LRA 429 [aff 4 NYS 768]; Wells v. World's Dispensary Medical Assoc., 120 N. Y. 630, 24 NE 276; Kaminsky v. Sarnoff, 220 App. Div. 286, 221 NYS 499; Alteresko v. Phillips, 208 App. Div. 171, 203 NYS 198; Antowill v. Friedmann, 197 App. Div. 230, 188 NYS 777; Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem]; Gunn v. Robinson, 103 Misc. 547, 171 NYS 692 [rev on other grounds 188 App. Div. 948 mem, 176 NYS 901 mem]; Griffin v. Norman, 192 NYS 322; Boldt v. Murray, 2 NYSt 232; Kelly v. Colton, 1 NY CityCt 439.

N. C.—Nash v. Royster, 189 N. C. 408, 127 SE 356; Brewer v. Ring, 177 NC 476, 99 SE 358; Mullinax v. Hord, 174 N. C. 607, 94 SE 426; Long v. Austin, 153 N. C. 508, 69 SE 500.

N. D.—Schmidt v. Stone, 50 N. D. 91, 194 NW 917; Stoskoff v. Wicklund, 49 N. D. 708, 193 NW 312; Hanson v. Thelan, 42 N. D. 617, 173 NW 457; Beardsley v. Ewing, 40 N. D. 373, 168 NW 791; Fawcett v. Ryder, 23 N. D. 20, 135 NW 800; Zilke v. Johnson, 22 N. D. 75, 132 NW 640, AnnCas1913E 1005.

Oh.—Manley v. Coleman, 19 Oh. A. 284.

Okl.—Hungardt v. Younger, 112 Okl. 165, 239 P 469.

Or.—Holland v. Eugene Hospital, 270 P 784; Hamilton v. Kelsey, 126 Or. 26, 268 P 750; Rennewanz v. Dean, 114 Or. 259, 229 P 372; Engstrom v. Wise Dental Co., 97 Or. 634, 193 P 187.

Pa.—Barnard v. Schell, 85 Pa. Super. 329; Krompoltz v. Hyman, 70 Pa. Super. 581; Hawkins' App., 13 York LegRec 199.

Tenn.—Lewis v. Casenburg, 157 Tenn. 187, 7 SW (2d) 808.

Tex.—Ford v. Couch, (Civ. A.) 16 SW (2d) 869; Turner v. Stoker, (Civ. A.) 289 SW 190; Hamilton v. Harris, (Civ. A.) 223 SW 533; Lee v. Moore, (Civ. A.) 162 SW 437 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185].

Utah.—Peterson v. Richards, 272 P 229; Coss v. Spaulding, 41 Utah 447, 126 P 468.

Vt.—Baldwin v. Gaines, 92 Vt. 61, 102 A 338; Rann v. Twitchell, 82 Vt. 79, 71 A 1045, 20 LRANS 1030.

Wash.—Rae v. Nelson, 277 P 75; Griffis v. Brown, 270 P 819; Stickney v. Congdon, 140 Wash. 670, 250 P 32; Howatt v. Cartwright, 128 Wash. 343, 222 P 496; Wilcox v. Carroll, 127 Wash. 1, 219 P 34; Cornwell v. Sleicher, 119 Wash. 573, 205 P 1059; Norris v. Pedersen, 199 P 732; Reeves v. Wilson, 105 Wash. 318, 177 P 825; Swanson v. Hood, 99 Wash. 506, 170 P 135; Henline v. Southward, 99 Wash. 232, 169 P 315; Wynne v. Harvey, 96 Wash. 379, 165 P 67; Ennis v. Banks, 88 Wash. 237, 152 P 1037; Just v. Littlefield, 87 Wash. 299, 151 P 780, AnnCas1917D 705; Simon v. Hamilton Logging Co., 76 Wash. 370, 136 P 361; Taylor v. Kidd, 72 Wash. 18, 129 P 406; Williams v. Wurdemann, 71 Wash. 290, 128 P 639; Sauers v. Smits, 49 Wash. 557, 95 P 1097, 17 LRANS 1242; Peterson v. Wells, 41 Wash. 693, 84 P 608.

Wis.—Hafemann v. Seymer, 195 Wis. 625, 219 NW 375; Stenkowiczki v. Lytle, 171 Wis. 625, 177 NW 849; Schultz v. Tasche, 166 Wis. 561, 165 NW 292.

Wyo.—McCoy v. Clegg, 36 Wyo. 473, 257 P 484; Phifer v. Baker, 34 Wyo. 415, 244 P 637.

54. Ariz.—Butler v. Rule, 29 Ariz. 405, 242 P 436.

Colo.—Tadlock v. Lloyd, 65 Colo. 40, 173 P 200.

Mass.—Butler v. Layton, 164 NE 920; Drakes v. Tulloch, 220 Mass. 256, 107 NE 916.

Mich.—Wood v. Vroman, 215 Mich. 449, 184 NW 520; Rogers v. Kee, 171 Mich. 551, 137 NW 260.

Minn.—Clark v. George, 148 Minn. 52, 180 NW 1011.

Mo.—Telaneus v. Simpson, 12 SW (2d) 920; Eichholz v. Poe, 217 SW 282; Tate v. Tyzzer, 208 Mo. A. 290, 234 SW 1038.

N. J.—Miller v. Collins, 140 A 402.

Okl.—Bungardt v. Younger, 112 Okl. 165, 239 P 469.

Tex.—Hamilton v. Harris, (Civ. A.) 223 SW 533.

Wash.—Griffis v. Brown, 270 P 819; Packard v. Coberly, 147 Wash. 345, 265 P 1082; Stickney v. Congdon, 140 Wash. 670, 250 P 32; Ennis v. Banks, 95 Wash. 513, 164 P 58.

Wis.—Hafemann v. Seymer, 195 Wis. 625, 219 NW 375; Newman v. Anderson, 195 Wis. 200, 217 NW 306.

55. McDonald v. Dr. McKnight, Inc., 248 Mass. 43, 142 NE 825; Telaneus v. Simpson, (Mo.) 12 SW (2d) 920; Gross v. Robinson, 203 Mo. A. 118, 218 SW 924; Nash v. Royster, 189 N. C. 408, 127 SE 356.

56. Ark.—Dunman v. Raney, 118 Ark. 337, 176 SW 339.

Ga.—McLendon v. Daniel, 37 Ga. A. 524, 141 SE 77.

Ky.—Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044.

N. D.—Hanson v. Thelan, 42 N. D. 617, 173 NW 457.

Tex.—Lee v. Moore, (Civ. A.) 162 SW 437 [rev on other grounds 109 Tex. 391, 211 SW 214, 4 ALR 185].

57. Ind.—Walker Hospital v. Pulley, 74 Ind. A. 659, 127 NE 559, 128 NE 933.

Mo.—Cazzell v. Scholfield, 8 SW (2d) 580; Krinard v. Westerman, 279 Mo. 680, 216 SW 938.

N. Y.—Gunn v. Robinson, 103 Misc. 547, 171 NYS 692 [rev on other grounds 188 App. Div. 948 mem, 176 NYS 901 mem].

Okl.—Harris v. Graham, 124 Okl. 196, 255 P 710.

Or.—Rennewanz v. Dean, 114 Or. 259, 229 P 372.

Tex.—Hamilton v. Harris, (Civ. A.) 223 SW 533.

58. Ala.—Carraway v. Smith, 218 Ala. 412, 118 S 758; Moore v. Smith, 215 Ala. 592, 111 S 918.

D. C.—Levy v. Vaughan, 42 App. 146.

Ida.—Swanson v. Wasson, 45 Ida. 309, 262 P 147.

Ill.—Beckwith v. Boynton, 235 Ill. A. 469; Connor v. Eddy, 233 Ill. A. 20; O'Connell v. West Side Hospital, 209 Ill. A. 233; Phebus v. Mather, 181 Ill. A. 274; Moline v. Christie, 180 Ill. A. 334.

Ind.—Adolay v. Miller, 60 Ind. A. 656, 111 NE 313.

Iowa.—Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447; O'Grady v Cadwallader, 183 Iowa 178, 166 NW 755; Adams v. Junger, 158 Iowa 449, 139 NW 1096.

Kan.—Saylor v. Brady, 114 Kan. 764, 220 P 1047.

Ky.—Hanners v. Salmon, 216 Ky. 584, 288 SW 307.

Md.—Streett v. Hodgson, 139 Md. 137, 115 A 27; Angulo v. Hallar, 137 Md. 227, 112 A 179.

Mass.—Goode v. Lothrop, 165 NE 688; Mason v. Geddes, 258 Mass. 40, 154 NE 519.

Mich.—Zoterell v. Repp, 187 Mich. 319, 153 NW 692.

Minn.—Gamradt v. Du Bois, 223 NW 296; Nelson v. Farrish, 143 Minn. 368, 173 NW 715; McGray v. Cobb, 130 Minn. 434, 152 NW 262, 153 NW 736.

Mo.—Cardinale v. Kemp, 309 Mo. 241, 274 SW 437; Bailey v. St. Louis-San Francisco R. Co., (A.) 296 SW 477; Hill v. Jackson, 218 Mo. A. 210, 265 SW 859; Connelly v. Cone, 205 Mo. A. 395, 224 SW 1011; Spain v. Burch, 169 Mo. A. 94, 154 SW 172.

Mont.—Dunn v. Beck, 80 Mont. 414, 260 P 1047; Loudon v. Scott, 58 Mont. 645, 194 P 488, 12 ALR 1487.

Nebr.—McDaniel v. Wolcott, 115 Nebr. 675, 214 NW 296; Tady v. Warta, 111 Nebr. 521, 196 NW 901.

N. C.—Thornburg v. Long, 178 N. C. 589, 101 SE 99.

Oh.—Searer v. Lower, 25 Oh. A. 328, 158 NE 199; Havens v. Hardesty, 18

cause,[59] responsibility of defendant for the acts or omissions of others,[60] and contributory negligence.[61] If the treatment is in accordance with a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best, nor to decide questions of surgical science on which surgeons differ among themselves.[62] It has been asserted that what constitutes ordinary skill, care, and diligence on the part of a physician and surgeon is a question of law, in this view at least, that it must be stated by the court as defined by the books;[63] but that, when considered in connection with the facts which it is necessary for the jury to understand in order to be able to apply it to a particular case, it becomes a mixed question of law and fact.[64]

[§ 159] **8. Instructions.** The rules governing instructions in civil actions generally[65] are applicable to an action for damages founded upon malpractice.[66] It is the duty of the trial court to instruct the jury with respect to the law governing the case, explaining the precise questions at issue, and directing attention to the material evidence on both sides.[67] Where such facts are in issue, the jury should be correctly instructed as to the necessity of the existence at the time and place in question of the relation of physician or surgeon and patient;[68] the degree of skill or care to be exercised in the treatment of a patient;[69] the duty of the physician or surgeon with respect to obtaining the consent of the patient before performing an operation;[70] or with respect to giving notice of the contagious character of the disease of the patient;[71] the right of a physician or surgeon to substitute another to treat a patient without the latter's consent;[72] the necessity that the breach of duty relied upon be a proximate cause of the injuries complained of;[73] the responsibility of the physician or surgeon for the acts or omissions of others;[74] the care required of plaintiff, and the effect of his contributory negligence;[75]

Oh. Cir. Ct. 891, 9 Oh. Cir. Dec. 850.

Or.—Emerson v. Lumbermen's Hospital Assoc., 100 Or. 476, 198 P 231.

Pa.—Goehring v. McDiarmid, 289 Pa. 193, 137 A 187; De Rose v. Hirst, 282 Pa. 292, 127 A 776; Stewart v. Manasses, 244 P 221, 90 A 574; Friend v. Kramer, 236 Pa. 618, 85 A 12, AnnCas1914A 272; De Long v. Delaney, 206 Pa. 226, 55 A 965.

S. C.—Dillishaw v. Bell, 115 S. C. 258, 105 SE 410.

S. D.—Feltman v. Dunn, 217 NW 198; Warwick v. Bliss, 46 S. D. 622, 195 NW 501; Kelley v. Hollingsworth, 44 S. D. 23, 181 NW 959.

Tex.—Floyd v. Michie, (Civ. A.) 11 SW (2d) 657.

Vt.—Wilkins v. Brock, 81 Vt. 332, 70 A. 572.

Wash.—Thomson v. Virginia Mason Hospital, (Wash.) 277 P 691; Hollis v. Ahlquist, 142 Wash. 33, 251 P 871; Corfman v. De Lape, 142 Wash. 22, 251 P 873; Inglis v. Morton, 99 Wash. 570, 169 P 962; Swanson v. Hood, 99 Wash. 506, 170 P 135.

Wis.—De Sham v. Taugher, 183 Wis. 446, 198 NW 268; Jaeger v. Stratton, 170 Wis. 579, 176 NW 61; Finke v. Hess, 170 Wis. 149, 174 NW 466.

Wyo.—Wright v. Conway, 34 Wyo. 1, 241 P 369, 242 P 1107.

59. Iowa.—Ramberg v. Morgan, 218 NW 492; Studyvin v. Weston, 186 Iowa 818, 171 NW 15.

Ky.—Elam v. Botkin, 227 Ky. 517, 13 SW (2d) 507.

Md.—Angulo v. Hallar, 137 Md. 227, 112 A 179.

Mass.—Traverse v. Wing, 260 Mass. 527, 157 NE 581; Morris v. Weene, 258 Mass. 178, 154 NE 860.

Or.—Lippold v. Kidd, 126 Or. 160, 269 P 210.

S. C.—Dillishaw v. Bell, 115 S. C. 258, 105 SE 410.

Wash.—Inglis v. Morton, 99 Wash. 570, 169 P 962; Coombs v. James, 82 Wash. 403, 144 P 536.

Wis.—De Sham v. Taugher, 183 Wis. 446, 198 NW 268.

60. Nelson v. Sandell, 202 Iowa 109, 209 NW 440, 46 ALR 1447.

61. Sprouse v. Magee, (Ida.) 269 P 993.

62. Williams v. Poppleton, 3 Or. 139; Remley v. Plummer, 79 Pa. Super. 117, 123 [quot Cyc].

63. Tefft v. Wilcox, 6 Kan. 46.

64. Tefft v. Wilcox, supra; Chamberlain v. Porter, 9 Minn. 260.

65. See Trial [38 Cyc 1594].

66. See cases infra this section.

67. Richards v. Willard, 176 Pa. 181, 35 A 114; Reber v. Herring, 115 Pa. 599, 8 A 830.

68. See cases infra this note.

[a] **Instructions held correct.**—Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215, 298 SW 1061; Brooks v. Herd, 144 Wash. 173, 257 P 238; Miller v. Dumon, 24 Wash. 648, 64 P 804.

69. See cases infra this note.

[a] **Instructions held not erroneous.**—Sellers v. Noah, 209 Ala. 103, 95 S 167; Horn v. Pope, 205 Ala. 127, 87 S 161; Hamrick v. Shipp, 169 Ala. 171, 52 S 932; Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874; Jackson v. Burnham, 20 Colo. 532, 39 P 577; Carson v. Jackson, 52 App. (D. C.) 51, 281 Fed. 411; Akridge v. Noble, 114 Ga. 949, 41 SE 78; Hughes v. Weaver, (Ga. A.) 148 SE 12; Osborn v. Carey, 24 Ida. 158, 132 P 967; Blodgett v. Nevius, 189 Ill. A. 544; Aspy v. Botkins, 160 Ind. 170, 66 NE 462; Hoover v. McCormick, 197 Ky. 509, 247 SW 718; Streett v. Hodgson, 139 Md. 137, 115 A 27; Whipple v. Grandchamp, 261 Mass. 40, 158 NE 270, 57 ALR 974; Pelky v. Palmer, 109 Mich. 561, 67 NW 561; Nelson v. Farrish, 143 Minn. 368, 173 NW 715; Owens v. McCleary, 313 Mo. 213, 281 SW 682; Krinard v. Westerman, 279 Mo. 680, 216 SW 938; Ingram v. Poston, (Mo. A.) 260 SW 773; Evans v. Clapp, (Mo. A.) 231 SW 79; Wojciechowski v. Coryell, (Mo. A.) 217 SW 638; Hales v. Raines, 146 Mo. A. 232, 130 SW 425; Gore v. Brockman, 138 Mo. A. 231, 119 SW 1082; Ghere v. Zey, 128 Mo. A. 362, 107 SW 418; Schumacher v. Murray Hospital, 58 Mont. 447, 193 P 397; Mortimer v. Keppler, 3 N. J. Misc. 1036, 130 A 547; Rayburn v. Day, 126 Or. 135, 268 P 1002; Patterson v. Howe, 102 Or. 275, 202 P 225; Haskins v. Howard, (Tenn.) 16 SW (2d) 20; Peterson v. Richards, (Utah) 272 P 229; Baldwin v. Gaines, 92 Vt. 61, 102 A 338; Ennis v. Banks, 95 Wash. 513, 164 P 58.

[b] **Instructions held erroneous.**—Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874; Carson v. Jackson, 52 App. (D. C.) 51, 281 Fed. 411; Dawson v. Allen, 191 Ill. A. 399; Bacon v. Walsh, 184 Ill. A. 377; Haradon v. Sloan, 157 Iowa 608, 138 NW 556; Yard v. Gibbons, 95 Kan. 802, 149 P 422; Van Meter v. Crews, 149 Ky. 335, 148 SW 40; Viita v. Dolan, 132 Minn. 128, 155 NW 1077, LRA1916D 644, AnnCas1917E 678; Weller v. Plapao Laboratories Incorporation, 197 Mo. A. 47, 191 SW 1056; Fowler v. Burris, 186 Mo. A. 347, 171 SW 620; Gore v. Brockman, 138 Mo. A. 231, 119 SW 1082; McBride v. Huckins, 76 N. H. 206, 81 A 528; Coleman v. Wilson, 85 N. J. L. 203, 88 A 1059, AnnCas1915D 1122; Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem]; Ault v. Hall, 119 Oh. St. 422, 164 NE 518; Stemons v. Turner, 274 Pa. 228, 117 A 922, 26 ALR 727; Norris v. Pedersen (Wash.) 199 P 732.

[c] **Departure from approved methods.**—An instruction that "a departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been," is not improper, notwithstanding the rule may render a physician liable in case he adopts new methods, although improved ones. Allen v. Voje, 114 Wis. 1, 89 NW 924.

[d] **Synonymous terms.**—(1) There is no substantial difference in the use of the words "ordinary" and "reasonable" in defining the care and skill required of a surgeon or physician in his employment. Kendall v. Brown, 74 Ill. 232. (2) The words "fair" and "reasonable" are synonymous. Jones v. Angell, 95 Ind. 376. (3) An instruction that defendant was bound to use the ordinary degree of care and skill of the "profession" in his community is not objectionable because the word "profession" is used instead of the more accurate term "physician in good standing." Lawson v. Conaway, 37 W. Va. 159, 16 SE 564, 38 AmSR 17, 18 LRA 627.

70. Van Meter v. Crews, 149 Ky. 335, 148 SW 40.

[a] **Instructions as to right to perform an operation held correct.**—Mosslander v. Armstrong, 90 Nebr. 774, 134 NW 922.

71. Jones v. Stanko, 118 Oh. St. 147, 160 NE 456.

72. Ghere v. Zey, 128 Mo. A. 362, 107 SW 418.

73. Welch v. Page, 85 Ind. A. 301, 154 NE 24; Wood v. Vroman, 215 Mich. 449, 184 NW 520. And see cases infra this note.

[a] **Instructions on causal relation held not erroneous.**—Horn v. Pope, 205 Ala. 127, 87 S 161; Robinson v. Crotwell, 175 Ala. 194, 57 S 23; Barrett v. Brand, 179 Ky. 740, 201 SW 331.

[b] **Instructions on causal relation held erroneous.**—Turner v. Stoker, (Tex. Civ. A.) 289 SW 190; Brooks v. Herd, 144 Wash. 173, 257 P 238.

[c] **Refusal to charge on contributory negligence is cured** by the subsequent giving of an instruction on the subject. Link v. Sheldon, 18 NYS 815 [aff 136 N. Y. 1, 32 NE 696].

74. See cases infra this note.

[a] **Instructions held not erroneous.**—Telaneus v. Simpson, (Mo.) 12 SW (2d) 920.

[b] **Instructions held erroneous.**—Staples v. Steed, 6 Ala. A. 594, 60 S 499.

75. Iowa.—Whitesell v. Hill, 66 NW 894.

Kan.—Yard v. Gibbons, 95 Kan. 802, 149 P 422.

Nebr.—O'Hara v. Wells, 14 Nebr. 403, 15 NW 722.

N. Y.—Carpenter v. Blake, 60 Barb. 488 [rev on other grounds 50 N. Y. 696 mem].

Or.—Beadle v. Paine, 46 Or. 424, 80 P 903.

and the damages recoverable.[76] Various general rules applied include those with respect to instructing the jury on the burden of proof,[77] and the inferences to be drawn from the evidence.[78] Other general rules applied include those requiring instructions to be specific,[79] applicable to the issues raised by the pleadings and the evidence,[80] and in such form and language as not to be confusing or misleading,[81] indefinite or uncertain,[82] inconsistent, conflicting, or contradictory,[83] as well as those requiring that instructions should not ignore the evidence in the case[84] or assume the existence or nonexistence of material controverted facts.[85] As in civil actions generally,[86] it is not necessary that ordinary words, used in their usual or conventional sense, be defined.[87] Instructions that peculiar weight is to be given expert medical testimony in determining whether proper treatment was administered are proper.[88] The same is true of instructions that the jury are not to set up a standard of their own, but must be guided by medical testimony.[89]

[§ 160] **9. Damages—a. In General.** General rules[90] govern the recovery of damages in an action for malpractice.[91] In accord with, and subject to, such rules one who is injured by the malpractice of a physician or surgeon is entitled to compensation for all pecuniary losses which he has sustained as a direct and natural result thereof.[92] Particular

76. See cases infra this note.

[a] **Instructions held not erroneous.**—Dunman v. Raney, 118 Ark. 337, 176 SW 339; Haradon v. Sloan, 157 Iowa 608, 138 NW 556; Dailey v. Shaffer, 178 Mich. 574, 146 NW 192; Bonderson v. Hovde, 150 Minn. 175, 184 NW 853; Krinard v. Westerman, 279 Mo. 680, 216 SW 938; Hague v. Threadgill, (Mo. A.) 236 SW 895; Reeves v. Wilson, 105 Wash. 318, 177 P 825; Phifer v. Baker, 34 Wyo. 415, 244 P 637.

[b] **Instructions held erroneous.**—Edwards v. Uland, 193 Ind. 376, 140 NE 546; Lemon v. Kessel, 202 Iowa 273, 209 NW 393; Acton v. Smith, 150 Ky. 703, 150 SW 854; McDonald v. Crider, (Mo. A.) 272 SW 980; Fowler v. Burris, 186 Mo. A. 347, 171 SW 620; De Witt v. Schweitzer, 29 Oh. A. 327, 163 NE 563.

77. See cases infra this note.

[a] **Instructions held not erroneous.**—(1) Contributory negligence. Swanson v. French, 92 Iowa 695, 61 NW 407. (2) Want of due care, skill, or diligence on the part of defendant. Hughes v. Weaver, (Ga. A.) 148 SE 12.

[b] **Instructions held erroneous.**—(1) Giving of proper prescription. Booth v. Andrus, 91 Nebr. 810, 137 NW 884. (2) Possession and exercise of skill and care. Vanhooser v. Berghoff, 90 Mo. 487, 3 SW 72. (3) Peculiar susceptibility of patient to X-rays. Rost v. Roberts, 180 Wis. 207, 192 NW 38.

78. See cases infra this note.

[a] **Instructions held not erroneous.**—(1) Possession of required skill and learning in the absence of contrary evidence. Funk v. Bonham, (Ind. A.) 151 NE 22. (2) Negligence in use of X-ray machine from fact of injury. George v. Shannon, 92 Kan. 801, 142 P 967, AnnCas1916B 338. (3) Negligence not to be inferred from mere fact that cure was not affected. Doyle v. Owen, 150 Ill. A. 415.

[b] **Instructions held erroneous.**—That lack of skill or negligence could be inferred from the result of the treatment administered. Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874; Welch v. Page, 85 Ind. A. 301, 154 NE 24; Benson v. Dean, 232 N. Y. 52, 133 NE 125; Antowill v. Friedmann, 197 App. Div. 230, 188 NYS 777; Francis v. Brooks, 24 Oh. A. 136, 156 NE 609; Stemons v. Turner, 274 Pa. 228, 117 A 922, 26 ALR 727; Sheldon v. Wright, 80 Vt. 298, 67 A 807; Nelson v. Newell, 195 Wis. 572, 217 NW 723; Kuehnemann v. Boyd, 193 Wis. 588, 214 NW 326, 215 NW 455.

79. See cases infra this note.

[a] **Instruction held sufficiently specific.**—Where the court charged that the jury should consider what plaintiff did, or, in the exercise of ordinary care, should have done, a charge on contributory negligence was not open to the objection that it did not direct the attention of the jury to whether plaintiff omitted to disclose her sufferings or symptoms which might have suggested the cause thereof. Reynolds v. Smith, 148 Iowa 264, 127 NW 192.

[b] **Instructions held insufficiently specific.**—(1) Effect of contributory negligence. Reber v. Herring, 115 Pa. 599, 8 A 830. (2) Facts to be considered in determining question of contributory negligence. Everts v. Worrell, 58 Utah 238, 197 P 1043.

80. See cases infra this note.

[a] **Instructions held applicable.**—Peck v. Henderson, 218 Ala. 233, 118 S 262; Hamrick v. Shipp, 169 Ala. 171, 52 S 932; Jeter v. Davis, 33 Ga. A. 733, 127 SE 898; Stamets v. Wilson, (Ind. A.) 164 NE 300; Samuels v. Willis, 133 Ky. 459, 118 SW 339, 19 AnnCas 188; Williams v. Gilman, 71 Me. 21; Wilk v. Black, 188 Mich. 478, 154 NW 561; Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215; Hague v. Threadgill, (Mo. A.) 236 SW 895; Wojciechowski v. Coryell, (Mo. A.) 217 SW 638; Lehman v. Knott, 100 Or. 59, 196 P 476; Peterson v. Richards, (Utah) 272 P 229; Prahl v. Gerhard, 25 Wis. 466; Phifer v. Baker, 34 Wyo. 415, 244 P 637.

[b] **Instructions held inapplicable.**—Torrance v. Wells, (Ala.) 122 S 322; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 S 30, AnnCas 1916C 1097; Burnham v. Jackson, 1 Colo. A. 237, 28 P 250; Wenger v. Calder, 78 Ill. 275; Bacon v. Walsh, 184 Ill. A. 377; Burris v. Titzell, 189 Iowa 1322, 177 NW 557, 179 NW 851; Acton v. Smith, 150 Ky. 703, 150 SW 854; King v. Belmore, 248 Mass. 108, 142 NE 911; Telaneus v. Simpson, (Mo.) 12 SW (2d) 920; McGuire v. Amyx, 317 Mo. 1061, 297 SW 968, 54 ALR 644; Drew v. Cregar, 98 N. J. L. 150, 118 A 844; Benson v. Dean, 232 N. Y. 52, 133 NE 125; Richards v. Willard, 176 Pa. 181, 35 A 114; Kelley v. Hollingsworth, 44 S. D. 23, 181 NW 959; Payne v. Francis, 37 Tex. 75; Wilmot v. Howard, 39 Vt. 447, 94 AmD 338; Browning v. Hoffman, 86 W. Va. 468, 103 SE 484; Phifer v. Baker, 34 Wyo. 415, 244 P 637.

81. See cases infra this note.

[a] **Instructions held confusing or misleading** with respect to: (1) Acts or omissions relied upon. Spaulding v. Bliss, 83 Mich. 311, 47 NW 210; Hales v. Raines, 162 Mo. A. 46, 141 SW 917. (2) Damages recoverable. Robinson v. Crotwell, 175 Ala. 194, 57 S 23; Peters v. Howard, 206 Ill. A. 610; Beach v. Chollett, (Oh. A.) 166 NE 145; Sale v. Eichberg, 105 Tenn. 333, 59 SW 1020, 52 LRA 894. (3) Degree of skill and care required. Staples v. Steed, 6 Ala. A. 594, 60 S 499; Bacon v. Walsh, 184 Ill. A. 377; Telaneus v. Simpson, (Mo.) 12 SW (2d) 920; Seewald v. Gentry, 220 Mo. A. 367, 286 SW 445; Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280; Beach v. Chollett, (Oh. A.) 166 NE 145. (4) Duration of operation. Rayburn v. Day, 126 Or. 135, 268 P 1002. (5) Postoperative care required. Reeves v. Lutz, supra. (6) Theory of case. Adams v. Junger, 158 Iowa 449, 139 NW 1096.

[b] **Instructions held not misleading** with respect to: (1) Injuries for which recovery is sought. Mortimer v. Keppler, 3 N. J. Misc. 1036, 130 A 547. (2) Theory of case. Jackson v. Burnham, 20 Colo. 532, 39 P 577; Lewis v. McClellan, (Mo. A.) 1 SW (2d) 247.

82. See cases infra this note.

[a] **Instruction held sufficiently definite.**—The phrase "physicians practicing," in a requested instruction in a malpractice case that, if defendants possessed such skill as is ordinarily possessed by "physicians practicing" in the same line in similar localities, and that in treating plaintiff's case they used ordinary care in exercising such skill, the verdict must be for them, means only such physicians as are ordinarily recognized as reputable physicians, and the refusal to give it cannot be justified on the ground that the phrase is too indefinite, and may include quacks. McBride v. Huckins, 76 N. H. 206, 81 A 528.

[b] **Instruction held erroneous as uncertain.**—In an action for performing an operation unskillfully and without plaintiff's consent, an instruction permitting her to recover such a sum as would fairly compensate her for loss of health, was held erroneous as too uncertain. Van Meter v. Crews, 149 Ky. 335, 148 SW 40.

83. See case infra this note.

[a] **Instructions held not inconsistent** with respect to degree of skill or care required. Whitesell v. Hill, 101 Iowa 629, 70 NW 750, 37 LRA 830.

84. Twombly v. Piette, 99 Vt. 499, 134 A 700.

85. See cases infra this note.

[a] **Controverted facts assumed.**—(1) Incompetency of nurses. Browning v. Hoffman, 86 W. Va. 468, 103 SE 484. (2) Improper subsequent treatment by another. Link v. Sheldon, 18 NYS 815 [aff 136 N. Y. 1, 32 NE 696].

[b] **Controverted facts not assumed.**—(1) Existence of disease of smallpox. McGuire v. Amyx, 317 Mo. 1061, 297 SW 968, 54 ALR 644. (2) Existence of relation. Noren v. American School of Osteopathy, (Mo. A.) 2 SW (2d) 215.

86. See Trial [38 Cyc 1686].

87. Barrett v. Brand, 179 Ky. 740, 201 SW 331.

88. Vaughan v. Memorial Hospital, 103 W. Va. 156, 136 SE 837.

89. McGraw v. Kerr, 23 Colo. A. 163, 128 P 870.

90. See Damages 17 C. J. p 699 et seq.

91. See cases infra this section; and §§ 161, 162.

92. Ga.—Hughes v. Weaver, (A.) 148 SE 12.

Ky.—Dorris v. Warford, 124 Ky. 768, 100 SW 312, 30 KyL 963, 9 LRA NS 1090, 14 AnnCas 602.

La.—Picheloup v. Gibbons, (A.) 120 S 504.

Mich.—Duffy v. Charters, 180 Mich. 572, 147 NW 541.

N. H.—Challis v. Lake, 71 N. H. 90, 51 A 260.

Okl.—Harris v. Graham, 124 Okl. 196, 255 P 710.

Wash.—Reeves v. Wilson, 105 Wash. 318, 177 P 825.

elements of compensation may include loss of time,[93] impairment of earning capacity,[94] expenses actually incurred,[95] bodily pain and mental suffering[96] and the condition or circumstances of the injured party.[97] No recovery can be had for losses which do not result naturally and directly from the breach of duty proved.[98] A physician or surgeon is liable only for the loss caused by his malpractice, and not for that caused by the patient's original illness or injury,[99] or aggravation thereof caused by others than defendant.[1] Where it is impossible to distinguish between the consequences of the trouble for which a physician was called and the consequences of the maltreatment, only nominal damages can be given.[2] Recovery may be had for prospective damages which are reasonably certain to occur, as well as accrued damages.[3] In accord with the general rule[4] the duty to reduce damages does not require a person injured by malpractice to submit to a serious operation to effect a cure.[5] The person injured need only exercise his best judgment as a reasonable person.[6] In any event recovery will be prevented only to the extent the loss sustained was enhanced.[7]

The amount of damages. The jury ordinarily are the proper judges of the amount of damages to be allowed,[8] and their award will not be interfered with unless there is something in the case to show that the jury in their determination of the amount acted against the rules of law or suffered passion, prejudice, or other improper motive to mislead them.[9]

Wyo.—Phifer v. Baker, 34 Wyo. 415, 244 P 637.

[a] **Thus,** in an action against a dentist for negligence in the construction of dental work guaranteed to be satisfactory, the measure of damages is the actual compensation for loss, resulting from negligent performance of the work, instead of mere recovery of the expense of replacing the work. Reeves v. Wilson, 105 Wash. 318, 177 P 825.

93. Dorr v. Fike, 177 Ark. 907, 9 SW (2d) 318; Tefft v. Wilcox, 6 Kan. 46; Dorris v. Warford, 124 Ky. 768, 100 SW 312, 30 KyL 963, 9 LRANS 1090, 14 AnnCas 602; Piper v. Menifee, 12 B. Mon. (Ky.) 465, 54 AmD 547; McCracken v. Smathers, 122 N. C. 799, 29 SE 354.

94. Dunman v. Raney, 118 Ark. 337, 176 SW 339; Stanley v. Taylor, 160 Iowa 427, 142 NW 81; Dorris v. Warford, 124 Ky. 768, 100 SW 312, 30 KyL 963, 9 LRANS 1090, 14 AnnCas 602.

95. Kan.—Tefft v. Wilcox, 6 Kan. 46.

Mass.—Sherlag v. Kelley, 200 Mass. 232, 86 NE 293, 128 AmSR 414, 19 LR ANS 633.

Nebr.—Hewitt v. Eisenbart, 36 Nebr. 794, 55 NW 252.

N. Y.—Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

Wash.—Mullins v. Alveolar Dental Co., 97 Wash. 170, 166 P 65.

96. Ark.—Dunman v. Raney, 118 Ark. 337, 176 SW 339.

Cal.—Lathrope v. Flood, 6 Cal. Unrep. Cas. 637, 63 P 1007.

Ga.—Smith v. Overby, 30 Ga. 241.

Iowa.—Vander Wal v. Abbott, 167 NW 182; Stanley v. Taylor, 160 Iowa 427, 142 NW 81.

Kan.—Tefft v. Wilcox, 6 Kan. 46.

Ky.—Acton v. Smith, 150 Ky. 703, 150 SW 854; Dorris v. Warford, 124 Ky. 768, 100 SW 312, 30 KyL 963, 9 LRANS 1090, 14 AnnCas 602; Piper v. Menifee, 12 B. Mon. 465, 54 AmD 547.

La.—Picheloup v. Gibbons, (A.) 120 S 504.

Mich.—Rogers v. Kee, 171 Mich. 551, 137 NW 260.

Minn.—Chamberlain v. Porter, 9 Minn. 260.

N. Y.—Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

N. C.—McCracken v. Smathers, 122 N. C. 799, 29 SE 354.

Wash.—Reeves v. Wilson, 105 Wash. 318, 177 P 825; Mullins v. Alveolar Dental Co., 97 Wash. 170, 166 P 65.

Wis.—Kosak v. Boyce, 185 Wis. 513, 201 NW 757.

Wyo.—Phifer v. Baker, 34 Wyo. 415, 244 P 637.

[a] **Action by husband for wife's injury.**—For injuries inflicted on a wife during a surgical operation, which resulted in her death, the husband is entitled to recover only for the actual damage caused to him by the injury, and which accrued prior to her death; and he can have no action for his or her mental suffering, as such action must be restricted to the person who received the physical injury. Hyatt v. Adams, 16 Mich. 180.

97. Tefft v. Wilcox, 6 Kan. 46; Chamberlain v. Porter, 9 Minn. 260; Fowler v. Sergeant, 1 Grant (Pa.) 355.

98. Adams v. Junger, 158 Iowa 449, 139 NW 1096; Stewart v. Wright, 124 Kan. 612, 261 P 581; Hill v. Jackson, 218 Mo. A. 210, 265 SW 859; Hewitt v. Eisenbart, 36 Nebr. 794, 55 NW 252; Lakeside Sanitarium v. Dickens, (Tex. Civ. A.) 259 SW 1110.

99. Ida.—McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 156 P 115, AnnCas1918A 380.

Ill.—Wenger v. Calder, 78 Ill. 275.

Kan.—Stewart v. Wright, 124 Kan. 612, 261 P 581.

Mo.—Chilton v. Ralls, 220 Mo. A. 355, 286 SW 718; Fowler v. Burris, 186 Mo. A. 347, 171 SW 620; Carpenter v. McDavitt, 53 Mo. A. 393.

Nebr.—Miller v. Frey, 49 Nebr. 472, 68 NW 630.

N. Y.—Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

Wash.—Cranford v. O'Shea, 83 Wash. 508, 145 P 579, AnnCas1916C 1081; Taylor v. Kidd, 72 Wash. 18, 129 P 406.

Wyo.—Phifer v. Baker, 34 Wyo. 415, 244 P 637.

1. Carpenter v. McDavitt, 53 Mo. A. 393; Doyle v. New York Eye, etc., Infirmary, 80 N. Y. 631 mem; Phifer v. Baker, 34 Wyo. 415, 244 P 637.

2. Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

3. Ill.—Howell v. Goodrich, 69 Ill. 556.

Kan.—Tefft v. Wilcox, 6 Kan. 46.

Ky.—Dorris v. Warford, 124 Ky. 768, 100 SW 312, 30 KyL 963, 9 LRA NE 1090, 14 AnnCas 602.

Minn.—Chamberlain v. Porter, 9 Minn. 260.

Nebr.—Hewitt v. Eisenbart, 36 Nebr. 794, 55 NW 252.

N. Y.—Becker v. Janinski, 15 NYS 675, 27 AbbNCas 45.

N. C.—McCracken v. Smathers, 122 N. C. 799, 29 SE 354.

Wyo.—Phifer v. Baker, 34 Wyo. 415, 244 P 637.

4. See Damages § 104.

5. Leadingham v. Hillman, 224 Ky. 177, 5 SW (2d) 1044.

6. Leadingham v. Hillman, supra.

7. Leadingham v. Hillman, supra.

8. Chamberlain v. Porter, 9 Minn. 260; McCoy v. Clegg, 36 Wyo. 473, 257 P 484.

9. Chamberlain v. Porter, 9 Minn. 260.

[a] **Damages held not excessive.**—(1) Abandonment of confinement case. Lathrope v. Flood, 6 Cal. Unrep. Cas. 637, 63 P 1007 (two thousand dollars). (2) Abdominal burns. Gross v. Robinson, 203 Mo. A. 118, 218 SW 924 (seven thousand five hundred dollars). (3) Adhesions. Jacobs v. Grigsby, 187 Wis. 660, 205 NW 394 (three thousand dollars). (4) Injury to arm. Krauss v. Ballinger, 171 Ill. A. 534 (two thousand two hundred and fifty dollars); Wilk v. Black, 188 Mich. 478, 154 NW 561 (two thousand two hunderd and fifty dollars); Getchell v. Lindley, 24 Minn. 265 (seven thousand dollars). (5) Permanent injury to arm. McCann v. Twitchell, 116 Me. 490, 102 A 740 (four thousand nine hundred dollars). (6) Injury to collar bone causing deformity and necessitating operation. Craghead v. McCullough, 58 Colo. 485, 146 P 235, AnnCas1916C 1075 (one thousand dollars). (7) Injury to eyes. Lemoin v. Sullivan, (Ark.) 134 SW 946 (seven hundred and fifty dollars). (8) Injury to foot. Viita v. Dolan, 132 Minn. 128, 155 NW 1077, LRA1916A 644, AnnCas1917A 678 (two thousand dollars). (9) Injury to hand and arm. Scholte v. Brabec, (Minn.) 224 NW 259; Bonderson v. Hovde, 150 Minn. 175, 184 NW 853 (five thousand dollars). (10) Injuries to leg. Walker Hospital v. Pulley, 74 Ind. A. 659, 127 NE 559, 128 NE 933 (two thousand one hundred dollars); Berkholz v. Benepe, 153 Minn. 335, 190 NW 800 (one thousand eight hundred dollars). (11) Injury to nasal passage resulting from failure to remove sponge following treatment. Hurst v. Reeder, 86 Ind. A. 294, 157 NE 101 (five hundred dollars). (12) Injury to shoulder. Stanford v. Hyde, 87 Conn. 707, 87 A 738 (two thousand dollars). (13) Injury to sphincter and muscle rendering patient unable to control bowels. Hughes v. Weaver, (Ga. A.) 148 SE 12 (ten thousand dollars). (14) Injury to teeth. Prout v. Martin, 160 Ill. A. 11 (three thousand dollars). (15) Loss of prostate gland. Theodore v. Ellis, 141 La. 709, 75 S 655 (two thousand dollars). (16) Loss of services of wife for two and a half months. Reeves v. Lutz, 179 Mo. A. 61, 162 SW 280 (one thousand five hundred dollars). (17) Loss of teeth and severe pain. Knepher v. McKenney Dentists, 107 Nebr. 106, 185 NW 412 (five hundred dollars). (18) Misplaced jawbone. Francis v. Brooks, 24 Oh. A. 136, 156 NE 609 (twelve thousand five hundred dollars). (19) Permanent incapacity. Kelsey v. Hay, 84 Ind. 189 (four thousand five hundred dollars). (20) Permanent injury to hip. Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814 (six thousand two hundred and fifty dollars). (21) Serious injury to intestines caused by leaving sponge in wound. Samuels v. Willis, 133 Ky. 459, 118 SW 339, 19 AnnCas 188 (three thousand five hundred dollars). (22) Shortened leg. Hallam v. Means, 82 Ill. 379, 25 AmR 328 (one thousand dollars); Stamets v. Wilson, (Ind. A.) 164 NE 300 (three thousand one hundred and fifty dollars); Anderson v. Satterlund, 158 Minn. 205, 197 NW 102 (five thousand seven hundred and fifty dollars). (23) Severe X-ray burns. Holcomb v. Magee, 217 Ill. A. 272 (six thousand dollars). (24) Stiff elbow joint. Warner v. Pence, 48 N. D. 979, 188 NW 167 (five thousand dollars). (25) Unauthorized removal of tonsils. Hively v. Higgs, 120 Or. 588, 253 P 363, 53 ALR 1052 (one thousand dollars). (26) Unnecessary operation for cystic tumors. Just v. Littlefield, 87 Wash. 299, 151 P 780, AnnCas1917D 705 (five hundred dollars).

[§ 161] **b. Nominal Damages.**[10] Where a physician or surgeon is responsible for a breach of duty which obviously resulted in substantial injury, a verdict for merely nominal damages will not be allowed to stand.[11] Acceleration of the death of a patient is more than a mere technical injury, and demands an award of more than nominal damages.[12] Nor is recovery properly limited to nominal damages where an unauthorized operation causing some pain is proved.[13]

[§ 162] **c. Exemplary or Punitive Damages.**[14] While it has been held that exemplary damages for malpractice can be recovered only where the evidence shows an evil motive in the act complained of,[15] the weight of authority is to the effect that such damages may also be recovered where a physician has been guilty of gross negligence amounting to reckless indifference in treating a patient.[16] In the absence of evidence of malice, recklessness, or oppression, exemplary damages cannot be recovered.[17] One who is responsible for the negligent treatment of a patient by his associate is not liable for punitive damages where he was not present at the time in question and did not authorize or subsequently approve the treatment given.[18]

[§ 163] **10. Verdict and Findings.** General rules[19] apply to the verdict and findings in an action to recover damages for malpractice.[20] To control a general verdict special findings in an action founded upon malpractice must be upon a substantial material issue,[21] and must be so inconsistent with, and antagonistic to, the general verdict as to be irreconcilable with it.[22]

[§ 164] **11. New Trial.** General rules[23] are applicable to questions relating to a new trial of an action for malpractice.[24] Thus, where the verdict in a malpractice case is manifestly against the great preponderance of the evidence, it is an abuse of discretion not to grant a new trial.[25] And a new trial on account of excessive damages for malpractice will only be granted where they are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption, or were misled as to the proper measure of damages.[26]

[§ 165] **12. Review.** General rules[27] govern the review of actions to recover damages for malpractice.[28] Various general rules applied include those requiring a reviewing court to disregard any error which does not affect the subtantial rights of the party complaining,[29] to leave a verdict undisturbed where the evidence is conflicting,[30] and to set aside a verdict where it is unsupported by any evidence,[31] or where the evidence greatly preponderates against it,[32] or where errors affecting the substantial rights of the party complaining have occurred.[33]

V. COMPENSATION[34]

[By MANUEL PRENNER]

[§ 166] **A. Rights and Liabilities as to Compensation—1. In General.** In England, before the pas-

[b] **Damages held excessive.**—(1) Three months pain and no permanent injury. Hansen v. Crocker, 160 Ill. A. 514 (six thousand dollars). (2) Delay of six weeks in healing of wound. Reynolds v. Smith, 148 Iowa 264, 127 NW 192 (seven thousand dollars). (3) Burns on feet and ankles. Aderhold v. Bishop, 94 Okl. 203, 221 P 752 (twelve thousand six hundred and twenty dollars). (4) Dislocated shoulder. Hoffman v. Walkins, 89 Wash. 661, 155 P 159 (four thousand dollars). (5) Injuries to jaw requiring surgical operation for dissection of root from alveolus. Comeaux v. Miles, (La. A.) 118 S 786 (three thousand eight hundred and forty-one dollars and forty-five cents). (6) Fractured leg and paralyzed arm suffered by child at birth. Korman v. Hagen, 165 Minn. 320, 206 NW 650 (four thousand dollars). (7) Injury to child's tongue. Evans v. Roberts, 172 Iowa 653, 154 NW 923 (one thousand one hundred dollars). (8) Injuries sustained in operation for strangulated hernia. Morrell v. Lalonde, 45 R. I. 112, 120 A 435 (thirteen thousand four hundred and sixteen dollars). (9) Leg injury. Nickerson v. Gerrish, 114 Me. 354, 96 A 235 (five thousand dollars); Cranford v. O'Shea, 83 Wash. 508, 145 P 579, AnnCas1916C 1081 (seven thousand three hundred and eighty-five dollars). (10) Loss of leg. McAlinden v. St. Maries Hospital Assoc., 28 Ida. 657, 156 P 115, AnnCas1918A 380 (twelve thousand dollars). (11) Contraction of private disease resulting in no permanent disability or injury. Helland v. Bridenstine, 55 Wash. 470, 104 P 626 (more than two thousand dollars).

[c] **Damages held sufficient.**—(1) Injury to side causing scar but no other injurious consequences. Fincher v. Meyer-Greenwald Constr. Co., 2 La. A. 458 (six hundred dollars). (2) Injury to eyes. Thompson v. Martin, 127 Mo. A. 24, 106 SW 535 (one thousand five hundred dollars).

10. Nominal damages generally see Damages §§ 58–67.

11. Russell v. Newman, 116 Kan. 268, 226 P 752.

[a] **Rule applied.**—Where it was established that surgeons inadvertently left a gauze sponge within the incision after removal of a kidney, a verdict awarding only nominal damages will require a new trial, notwithstanding medical testimony that no injury resulted to the patient. Russell v. Newman, 116 Kan. 268, 226 P 752.

12. Gray v. Little, 126 N. C. 385, 35 SE 611.

13. Hively v. Higgs, 120 Or. 588, 253 P 363, 53 ALR 1052.

14. Generally see Damages §§ 268–298.

15. Hyatt v. Adams, 16 Mich. 180.

16. U. S.—Mandeville v. Courtwright, 142 Fed. 97, 73 CCA 321, 6 LRANS 1003 [rev 126 Fed. 1007].

Iowa.—Cochran v. Miller, 13 Iowa 128.

N. C.—Gray v. Little, 126 N. C. 385, 35 SE 611.

Or.—Holland v. Eugene Hospital, 270 P 784; Rennewanz v. Dean, 114 Or. 259, 229 P 372.

Tex.—Brooke v. Clark, 57 Tex. 105.

[a] **Operation by unlicensed dentist.**—Exemplary damages are recoverable from defendants who, in conducting the business of dentistry, caused plaintiff to be operated on by an employee who was unlicensed as a dentist, and through whose negligence and want of skill he suffered a severe injury. Mandeville v. Courtright, 142 Fed. 97, 73 CCA 321, 6 LRA NS 1003 [rev 126 Fed. 1007].

17. Van Meter v. Crews, 149 Ky. 335, 148 SW 40; Gill v. Selling, 125 Or. 587, 267 P 812, 58 ALR 1556; Helland v. Bridenstine, 55 Wash. 470, 104 P 626.

18. Gill v. Selling, 125 Or. 587, 267 P 812, 58 ALR 1556.

19. See Trial [38 Cyc 1868 et seq].

20. See cases infra this section.

21. Stenkowiczki v. Lytle, 171 Wis. 625, 177 NW 849.

22. Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178; Blex v. Flack, 121 Kan. 431, 247 P 640; Awde v Cole, 99 Minn. 357, 109 NW 812.

[a] **Special verdict not controlling.**—In an action for negligently placing plaintiff's swollen and inflamed leg in a plaster cast so tight as to stop circulation and produce blood poison, a general verdict for plaintiff will support a recovery, notwithstanding a special verdict that it was customary among physicians to use a plaster cast. Longfellow v. Vernon, 57 Ind. A. 611, 105 NE 178.

23. See New Trial 46 C. J. p 46.

24. See cases infra this section.

25. Martin v. Courtney, 75 Minn. 255, 77 NW 813.

26. Kelsey v. Hay, 84 Ind. 189.

27. See Appeal and Error 3 C. J. p 256.

28. See cases infra this section.

29. See cases infra this note.

[a] **Harmless error in admission of evidence.**—Torrance v. Wells, (Ala.) 122 S 322; Jones v. Angell, 95 Ind. 376; Prahl v. Gerhard, 25 Wis. 466.

[b] **Harmless error in giving instructions.**—Peters v. Howard, 206 Ill. A. 610; Robertson v. Wenger, 131 Mo. A. 224, 110 SW 663; O'Hara v. Wells, 14 Nebr. 403, 15 NW 722.

30. Colo.—Bolles v. Kinton, 83 Colo. 147, 263 P 26, 56 ALR 814.

Iowa.—Whitesell v. Hill, 66 NW 894.

Minn.—Getchell v. Lindley, 24 Minn. 265.

Nebr.—Van Skike v. Potter, 53 Nebr. 28, 73 NW 295.

Ont.—Van-Mere v. Farewell, 12 Ont. 285.

31. Red Cross Medical Serv. Co. v. Green, 126 Ill. A. 214 [aff 232 Ill. 616, 83 NE 1081].

32. Yaggle v. Allen, 24 App. Div. 594, 48 NYS 827.

33. Shelton v. Hacelip, 6 Ala. A. 564, 60 S 471.

34. Cross references:

Allowance of claim for medical services see Executors and Administrators §§ 878–886.

Award of medical, hospital, and nursing expenses see Workmen's Compensation Acts § 97.

sage of the Medical Act,[35] a physician could not, as a general rule, except under an express contract for remuneration,[36] recover for his professional services in attending or prescribing for a patient;[37] he was presumed to act with a view only to an honorary reward;[38] but the rule was not applied to surgeons.[39] Since the passage of the act, a physician may also recover without an express contract.[40] In the United States, the rule prohibiting the recovery of compensation by a physician has never been in force, and a physician has uniformly been held to be entitled to recover for his services in the same manner as any other person who performs services for another.[41] The employment of a physician, surgeon, or dentist without express agreement as to compensation raises an implied agreement on the part of the party employing him to pay him the reasonable value of his services[42] within a reasonable time after they are rendered,[43] and at the physician's place of

Compensation:
As witness see Witnesses [40 Cyc 2181 et seq.].
For services:
In public hospital see Hospitals §§ 26, 27.
Rendered on Sunday see Sunday [37 Cyc 560].
To poor persons see Paupers §§ 246–250.
Of:
City physician see Municipal Corporations § 1590.
Coroner's physician or surgeon see Coroners § 45.
Health officers see Counties § 169 text and note 55; Health §§ 27, 28.
Officer generally see Officers §§ 233–286.
Police surgeon see Municipal Corporations § 1439.
Prison physician see Prisons [32 Cyc 321].
Contracts for medical supplies and services see Health §§ 595–598; Infants § 176 text and note 52.
Preference of claim for physician's fees see Executors and Administrators § 1167.
Statute of frauds as affecting promise to pay for medical services to another see Frauds, Statute of § 30.

35. St. 21 & 22 Vict. (1858) c 90.

36. Veitch v. Russell, 3 Q. B. 928, 43 ECL 1041, 114 Reprint 764, C. & M. 362, 41 ECL 201; Gibbon v. Budd, 2 H. & C. 92, 159 Reprint 39; Atty.-Gen. v. Royal College of Physicians, 1 Johns. & H. 561, 70 Reprint 868.

[a] **Clear proof** of express contract was required. Veitch v. Russell, 3 Q. B. 928, 43 ECL 1041, 114 Reprint 764, C. & M. 362, 41 ECL 201.

37. McGuire v. Hughes, 207 N. Y. 516, 101 NE 460, 46 LRANS 577, Ann Cas1914C 585; Poucher v. Norman, 3 B. & C. 744, 10 ECL 337, 107 Reprint 909; Lipscombe v. Holmes, 2 Campb. 441, 170 Reprint 1211; Little v. Oldaker, C. & M. 370, 41 ECL 205; Battersby v. Lawrence, C. & M. 277, 41 ECL 155; Tuson v. Batting, 3 Esp. 192, 170 Reprint 584; Gibbon v. Budd, 2 H. & C. 92, 159 Reprint 39; Atty.-Gen. v. Royal College of Physicians, 1 Johns. & H. 561, 70 Reprint 868; Chorley v. Bolcot, 4 T. R. 317, 100 Reprint 1040; Chitty Contr. p 573.

[a] **Rule applied** to one holding himself out as a physician, although not fully admitted to practice. Lipscombe v. Holmes, 2 Campb. 441, 170 Reprint 1211.

[b] **Traveling expenses.**—When no special agreement is made to remunerate a physician, he cannot recover expenses out of pocket, in traveling to attend his patient, for such expenses are incidental to the attendance, and to be considered as money paid to the physician's own use in the ordinary exercise of his profession. Veitch v. Russell, 3 Q. B. 928, 43 ECL 1041, 114 Reprint 764, C. & M. 362, 41 ECL 201.

38. McGuire v. Hughes, 207 N. Y. 516, 101 NE 460, 46 LRANS 577, Ann Cas1914C 585; Poucher v. Norman, 3 B. & C. 744, 10 ECL 337, 107 Reprint 909; Gibbon v. Budd, 2 H. & C. 92, 159 Reprint 39; Atty.-Gen. v. Royal College of Physicians, 1 Johns. & H. 561, 70 Reprint 868.

39. Poucher v. Norman, 3 B. & C. 744, 10 ECL 337, 107 Reprint 909; Little v. Oldaker, C. & M. 370, 41 ECL 205; Battersby v. Lawrence, C. & M. 277, 41 ECL 155; Cooper v. Phillips, 4 C. & P. 581, 19 ECL 659, 172 Reprint 834; Handey v. Henson, 4 C. & P. 110, 19 ECL 431, 172 Reprint 629; Tuson v. Batting, 3 Esp. 192, 170 Reprint 584; Baxter v. Gray, 3 M. & G. 771, 42 ECL 402, 133 Reprint 1349; Simpson v. Ralfe, 4 Tyrw. 325.

40. Gibbon v. Budd, 2 H. & C. 92, 159 Reprint 39.

41. Ala.—Morrisette v. Wood, 128 Ala. 505, 30 S 630.
Ark.—Black v. Bearden, 167 Ark. 455, 268 SW 27.
Cal.—Heintz v. Cooper, 5 Cal. Unrep. Cas. 564, 47 P 360.
Conn.—Styles v. Tyler, 64 Conn. 432, 30 A 165.
Dak.—Ostland v. Porter, 4 Dak. 98, 25 NW 731.
Hawaii.—Byrne v. Goo Wan Hoy, 21 Hawaii 538.
Ill.—Starrett v. Miley, 79 Ill. A. 658.
Ind.—Peck v. Martin, 17 Ind. 115; Judah v. McNamee, 3 Blackf. 269.
Iowa.—Shelton v. Johnson, 40 Iowa 84.
La.—Dickey's Succ., 41 La. Ann. 1010, 6 S 798.
Me.—Pray v. Stinson, 21 Me. 402.
Mass.—Pynchon v. Brewster, Quincy 224.
Mich.—Hodgen v. Bitely, 239 Mich. 516, 215 NW 37 (recognizing rule).
Mo.—Dalton v. St. Louis, etc., R. Co., (A.) 238 SW 523.
Nebr.—Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500.
Nev.—Tucker v. Virginia City, 4 Nev. 20.
N. J.—Green v. Higenbotam, 3 N. J. L. J. 60.
N. Y.—McPherson v. Cheadell, 24 Wend. 15.
N. C.—Prince v. McRae, 84 N. C. 674.
N. D.—Semple v. Ringo, 42 N. D. 613, 172 NW 817.
Pa.—Mooney v. Lloyd, 5 Serg. & R. 416.
Porto Rico.—Garcia v. Preston, 17 Porto Rico 556.
R. I.—Parvey v. Barasch, 142 A 230 (recognizing rule).
Tex.—Graham v. Gautier, 21 Tex. 111.
Wis.—Ladd v. Witte, 116 Wis. 35, 92 NW 365.

[a] **Right to adequate compensation** for medical services rendered by a physician arises upon their rendition wherever fees are otherwise recoverable by suit at law. Ely v. Wilbur, 49 N. J. L. 685, 10 A 358, 60 AmR 668.

42. Ala.—Morrisette v. Wood, 128 Ala. 505, 30 S 630; Jonas v. King, 81 Ala. 285, 1 S 591; Cardon v. Hampton, 21 Ala. A. 438, 108 S 176.
Ark.—Black v. Bearden, 167 Ark. 455, 268 SW 27.
Cal.—Heintz v. Cooper, 5 Cal. Unrep. Cas. 564, 47 P 360.
Conn.—Styles v. Tyler, 64 Conn. 432, 30 A 165.
Dak.—Ostland v. Porter, 4 Dak. 98, 25 NW 731.
Hawaii.—Byrne v. Goo Wan Hoy, 21 Hawaii 538.
Ill.—Chicago, etc., R. Co. v. Friend, 86 Ill. A. 157; Starrett v. Miley, 79 Ill. A. 658.
Ind.—Marion County v. Chambers, 75 Ind. 409; Peck v. Martin, 17 Ind. 115.
Iowa.—Peck v. Hutchinson, 88 Iowa 320, 55 NW 511; Shelton v. Johnson, 40 Iowa 84.
La.—Dickey's Succ., 41 La. Ann. 1010, 6 S 798.
Mass.—Hewitt v. Wilcox, 1 Metc. 154.
Mo.—Dalton v. St. Louis, etc., R. Co., (A.) 238 SW 523; Herndon v. Springfield, 137 Mo. A. 513, 119 SW 467; Meisenbach v. Southern Cooperage Co., 45 Mo. A. 232.
Nebr.—Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500.
Nev.—Tucker v. Virginia City, 4 Nev. 20.
N. J.—Ely v. Wilbur, 49 N. J. L. 685, 10 A 358, 60 AmR 668.
N. Y.—McGuire v. Hughes, 207 N. Y. 516, 101 NE 460, 46 LRANS 577, Ann Cas1914C 585; Fuller v. Kemp, 138 N. Y. 231, 33 NE 1034, 20 LRA 785; Edson v. Hammond, 142 App. Div. 693, 700, 127 NYS 359 [quot Cyc]; Forbes v. Kennedy, 76 Hun 39, 27 NYS 596; Matter of Agnew, 132 Misc. 466, 230 NYS 519; Pryor v. Milburn, 51 Misc. 596, 101 NYS 34; Perry v. Woodbury, 17 NYS 530; In re Scott, 1 Redf. Surr. 234.
N. C.—Prince v. McRae, 84 N. C. 674.
N. D.—Semple v. Ringo, 42 N. D. 613, 614, 172 NW 817 [dis. op. cit Cyc].
Pa.—Klopp v. Sternberg, 76 Pa. Super. 209; Tyson v. Baizley, 35 Pa. Super. 320; Daniels' Est., 29 Pa. Dist. 131.
Porto Rico.—Garcia v. Preston, 17 Porto Rico 556, 559 [cit Cyc].
Tex.—Tarrant County Tract. Co. v. Bradshaw, (Civ. A.) 185 SW 951.
Wis.—Holsapple v. Scofield, 176 Wis. 649, 187 NW 682; Ladd v. Witte, 116 Wis. 35, 92 NW 365; Garrey v. Stadler, 67 Wis. 512, 30 NW 787, 58 AmR 877.
See Parvey v. Barasch, (R. I.) 142 A 230 (a patient contracting with a dentist for a lingual plate cannot keep the plate, refuse to have it fitted, and not pay the reasonable worth thereof).

[a] **Patient as pauper.**—(1) Negligence of hospital clerk in admitting patient as pauper does not bar claim for services rendered by surgeon in ignorance of truth as to patient's financial condition. Matter of Agnew, 132 Misc. 466, 230 NYS 519. (2) Simply removing a person affected with smallpox, who is not in indigent circumstances, to a county pesthouse against his will, by order of the county commissioners, will not render him a pauper, and he may be held liable for medicines and medical attendance furnished by a physician who was employed by the county to attend paupers, when he accepts such services without objection, and receives the benefit thereof. Ostland v. Porter, 4 Dak. 98, 25 NW 731. (3) Medical services to paupers generally see Paupers § 174 et seq.

[b] **An injured employee is not liable** (1) for medical services rendered on the order of his employer, where the physician refused to render the services without such an order, and did not rely on the employee's obligation. Hodgen v. Bitely, 239 Mich. 516, 215 NW 37. (2) Medical services to employee generally see Master and Servant §§ 348–361.

Amount of compensation generally see infra §§ 186–195.

Implied request or promise to pay for work and labor generally see Work and Labor [40 Cyc 2809].

Presumption as to promise to compensate see infra § 208.

43. Cardon v. Hampton, 21 Ala. A. 438, 109 S 176.

business.[44] It has been held that one receiving a physician's services is not released from liability to pay therefor by the fact that the physician has an agreement with a third person regarding payment, on which he relied in rendering the services.[45]

Services to unconscious or incapable person. Where a physician renders services to a person injured by an accident rendering him unconscious, or otherwise rendered incapable of making a request for, or expressing consent to, the services, the law will imply a promise from him who received the benefit of the services to pay for them.[46] The rule has been held not to apply to physician's services rendered to one accidentally injured, even if rendered unconscious, if immediate attention is not required,[47] particularly where there is free ambulance service and free hospital treatment is furnished by the municipality.[48] It has been held that there is no distinction as to the right of recovery between a case where the physician is called by a stranger or spectator and one where he proceeds to treat such a case without being asked to do so.[49]

[§ 167] **2. As Dependent on Right To Practice[50]—a. In General.** In the absence of a statute requiring a license, or prohibiting the practice of medicine without it for a fee or reward, an unlicensed physician has been held entitled to recover for his services if he complies with other statutory requirements.[51] Statutes regulating the right to practice medicine have been enacted in all the states,[52] and various statutes regulating the admission to practice of physicians, surgeons, dentists, or other practitioners, have expressly provided that, where there has been a failure to comply with the statutory requisites for admission, no recovery can be had for services rendered in a professional capacity.[53] Even where the statute in force at a particular time contains no such provision, or without reference to such a provision, the courts will refuse a recovery for medical services rendered by one who has failed to comply with the statutory requirements as to obtaining a license and as to other qualifications for practice,[54] particularly where a penalty is imposed

44. Cardon v. Hampton, supra.

45. Mitchell v. Davis, (Mo. A.) 190 SW 357.

46. Ark.—Cotnam v. Wisdom, 83 Ark. 601, 104 SW 164, 12 LRANS 1090.

Iowa.—Ahlson v. High Bridge Coal Co., 180 Iowa 302, 163 NW 219.

Me.—Pray v. Stinson, 21 Me. 402.

Mo.—Edwards v. Morehouse Stave, etc., Co., (A.) 204 SW 545, 546 [cit Cyc].

N. Y.—Edson v. Hammond, 142 App. Div. 693, 700, 127 NYS 359 [quot Cyc]; Schoenberg v. Rose, 145 NYS 831, 834, 836 [cit Cyc].

"The physician . . . is entitled to enforce . . . [his legal rights to recover] regardless of what may be considered the ethics of the medical profession in such a case, with which the court is not concerned. Duty requiring him to give his aid, and having given it, he may expect payment by reason of the promise created by law from the patient to do so, although he never asked for the aid or consented to it being given. In an emergency case, requiring immediate attention to save life, the physician when called, or when he volunteers his services, should not stop to inquire by whom he will be paid, or to make it known that he expects to be paid. . . . While the question whether or not the services were intended to be gratuitous is one of fact, the plaintiff may rest his case upon an implied promise and can recover, unless it is shown either that there was no intention to charge or that the credit was extended to a third person. Offering his aid does not establish the fact that he intended his services to be gratuitous." Schoenberg v. Rose, supra.

47. Edson v. Hammond, 142 App. Div. 693, 127 NYS 359.

48. Edson v. Hammond, supra.

49. Schoenberg v. Rose, 145 NYS 831.

50. Burden of proving qualification to practice see infra § 204.

51. Bronson v. Hoffman, 7 Hun (N. Y.) 674; Bailey v. Mogg, 4 Den. (N. Y.) 60; Wilson v. Vick, 93 Tex. 88, 53 SW 576 [dist Kenedy v. Schultz, 6 Tex. Civ. A. 461, 25 SW 667]; Carleton v. Sloan, (Tex. Civ. A.) 55 SW 753. See White v. Carroll, 42 N. Y. 161, 1 AmR 503 (the act of May 6, 1844, in effect authorized anyone, without any license, "to practice physic and surgery" and to recover for his or her services).

52. See supra § 11 et seq.

53. See statutory provisions.

[a] **In Alabama,** under the statute, notice to plaintiff physician to produce his license or authority to practice must inform him that the license or authority will be required on the trial of the cause. Jordan v. Brewin, 19 Ala. 238.

[b] **In Louisiana** Rev. St. § 2677, requiring an affidavit of graduation to be made and recorded as a condition precedent of a right to recover fees, does not apply to graduates of the state university. Czarnowski v. Zeyer, 35 La. Ann. 796.

[c] **In Maryland; notice of intention to dispute claim.**—Acts (1821) c 217, prohibiting an unauthorized practitioner "from and after the passage" thereof from recovering his fees, provided defendant gives ten days' notice of his intention to dispute the claim, embraces all cases where the attempt to recover is subsequent to its passage. Berry v. Scott, 2 Harr. & G. 92.

[d] **Construction of New York statute** (2 Rev. L. p 219), disqualifying a person practicing without a diploma from collecting any debt incurred in such practice, is that no person commencing to practice without a license after the date of the act shall be capable of suing. Timmerman v. Morrison, 14 Johns. (N. Y.) 369.

[e] **In Quebec,** under the statute, failure to pay fees to the College of Doctors does not deprive a physician of the right to a fee for his services, but only of a right of action therefor, until he has paid such fees. Gagnon v. Beaudry, 62 Que. Super. 133; Macdougall v. North Shore Power, etc., Co., 51 Que. Super. 24; Rugg v. Lewis, 17 Que. Super. 206.

[f] **Statutes held to apply to:** (1) All persons engaged in any branch of the medical or surgical profession, including those engaged solely in bonesetting and in reducing sprains, swellings, and contractions of the sinews by friction and fomentation. Hewitt v. Charier, 16 Pick. (Mass.) 353. (2) Chiropractors. Cook v. Foreman, (Man.) 9 WestWkly 470. (3) Medical clairvoyants. Bibber v. Simpson, 59 Me. 181. (4) Osteopathic physician. Holliday v. Reid, 66 Que. Super. 364, 34 RevdeJur 160. (5) Those administering only electricity. Davidson v. Bohlman, 37 Mo. A. 576 [dist Smythe v. Hanson, 61 Mo. A. 285]; Bergman v. Bond, 14 Man. 503.

[g] **Statute held not to apply to osteopath** so as to prevent a recovery of fees for treatment as distinct from diagnosis or advice. Macnaghton v. Douglas, [1927] 2 K. B. 292 [foll Hall v. Trotter, 38 T. L. R. 30].

[h] **Money paid without knowledge of violation** of statutory requirements may be recovered back. Burgess v. Zimmerli, 19 B. C. 428, 17 DomLR 708, 27 WestLR 875, 6 West Wkly 908.

54. Ala.—Harrison v. Jones, 80 Ala. 412.

Cal.—Roberts v. Levy, 3 Cal. Unrep. Cas. 653, 31 P 570; Gardner v. Tatum, 81 Cal. 370, 22 P 880.

Colo.—Riley v. Collins, 16 Colo. A. 280, 64 P 1052.

Ga.—Murray v. Williams, 121 Ga. 63, 48 SE 686.

Ill.—Patrick v. Perryman, 52 Ill. A. 514.

Iowa.—Rader v. Elliott, 181 Iowa 156, 163 NW 406.

Kan.—Underwood v. Scott, 43 Kan. 714, 23 P 942.

La.—Dickerson v. Gordy, 5 Rob. 489.

Miss.—Bohn v. Lowery, 77 Miss. 424, 27 S 604.

Mo.—O'Bannon v. Wydick, 281 Mo. 478, 220 SW 853 [overr Smythe v. Hanson, 61 Mo. A. 285]; O'Bannon v. Widick, (A.) 198 SW 432, 433 [cit Cyc and not foll Smythe v. Hanson, 61 Mo. A. 285]. Contra Smythe v. Hanson, 61 Mo. A. 285 [dist Davidson v. Bohlman, 37 Mo. A. 576] (where an unlicensed physician was allowed to recover compensation for his services, even though the statute made it a misdemeanor to practice without a license).

N. Y.—Accetta v. Zupa, 54 App. Div. 33, 66 NYS 303, 8 NYAnnCas 190; Engel v. Gerstenfeld, 102 Misc. 97, 168 NYS 434 [rev on other grounds 184 App. Div. 953 mem, 171 NYS 1084 mem]; O'Beirne v. Carey, 150 NYS 666.

Tenn.—Haworth v. Montgomery, 91 Tenn. 16, 18 SW 399.

Tex.—Wooley v. Bell, 33 Tex. Civ. A. 399, 76 SW 797; San Antonio St. R. Co. v. Muth, 7 Tex. Civ. A. 443, 27 SW 752.

Wash.—Deaton v. Lawson, 40 Wash. 486, 82 P 879, 111 AmSR 922, 2 LRA NS 392.

Eng.—De la Rosa v. Prieto, 16 C. B. N. S. 578, 111 ECL 578, 143 Reprint 1253; D'Allex v. Jones, 2 Jur. N. S. 979.

See Simons, Brittain & English, Inc. v. Union Trust Co., 3 Pa. Dist. & Co. 854 [cit Cyc] (dictum).

"It is the general and uniform holding of the courts that one who publicly professes to cure or heal, or holds himself out as a physician, without a license to practice medicine as such, cannot recover compensation for his services rendered in such capacity." Lyon v. Leet, 199 Iowa 1034, 1035, 202 NW 881.

[a] **Reasons for rule.**—(1) "It is a settled principle that one cannot recover compensation for doing an act, to do which is forbidden by law, and is a misdemeanor." Fox v. Dixon, 12 NYS 267, 268. (2) "Where a stat-

by statute for practicing without such compliance,[55] or where such practice is made a criminal offense.[56] Money paid to an unlicensed practitioner may be recovered,[57] at least so long as the agreement as to services remains executory.[58] A statute prohibiting practice as a nurse, or engaging in the care of the sick as an attendant, without a license, does not prevent a recovery for the rendering of services in the nature of nursing as incidental to general employment as a caretaker.[59]

[§ 168] **b. Failure To Register or Record License.** Where the statute further requires that the certificate of qualification be filed, registered, or recorded, together with other required information, in the office of a named public official,[60] a physician who has not complied with such requirement is not entitled to recover his fees,[61] it being so provided by some statutes,[62] unless such registration is not made a prerequisite to the right to practice.[63]

[§ 169] **c. Excuse for Failure To Qualify.** A physician has been held not prevented from recovering for attendance before he had registered, where his delay in registering was owing to the registry clerk's negligence;[64] but a failure to file a certificate has not been excused as being on account of a misapprehension as to the proper office in which to file, induced by the misunderstanding of the clerk of the district court.[65] So, also, a physician practicing without a license may maintain an action at law for his services, if, during the time of those services, there was no existing board of examiners.[66] But the illness of a physician, preventing him from attending the meeting of the licensing board, is no excuse for his failure to obtain a license.[67]

[§ 170] **d. Compliance at Time of Rendition of Services.** A physician cannot recover for services rendered before the issuance of his certificate by the board, although he made application therefor before his employment began,[68] and although he had been orally informed that he would receive a license.[69] Nor is compliance with the terms of the statute after the rendition of the services, but before the bringing of the action for compensation, sufficient to entitle a physician to recover.[70] But it has been held that an unregistered surgeon may recover for services rendered prior to the passage of a statute requiring registration.[71]

[§ 171] **e. Place of Residence or of Performance of Services.** Since the provisions of a statute regulating the practice of medicine and surgery apply to practitioners living without the state, as well as to those within it, no physician or surgeon, although he may live without the state, will be entitled to recover in the state courts fees for services rendered within it, unless previously licensed in the manner prescribed.[72] But a statute prohibiting a recovery for medical services rendered by an unlicensed physician does not prevent a recovery in that state for

ute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade, or business, except in compliance with the statute, a contract made in violation of such statute cannot be enforced." Haworth v. Montgomery, 91 Tenn. 16, 19, 18 SW 399. To same effect. Kenedy v. Schultz, 6 Tex. Civ. A. 461, 25 SW 667. (3) "A penalty, imposed by statute, implies a prohibition; and a contract founded on its violation is void, though not so expressly declared by the statute." Harrison v. Jones, 80 Ala. 412, 416. To same effect O'Bannon v. Widick, (Mo. A.) 198 SW 432.

[b] **Rule applied.**—(1) To chiropractor. Lyon v. Leet, 199 Iowa 1034, 202 NW 881. (2) To mechanotherapist. O'Bannon v. Wydick, 281 Mo. 478, 220 SW 853 [adopting op. (A.) 198 SW 432]. (3) To veterinary. Rader v. Elliott, 181 Iowa 156, 163 NW 406; Lauria v. Gaspari, 140 App. Div. 887, 125 NYS 35.

[c] **Good faith and possession of qualifications** are not sufficient where the terms of the statute are not complied with. Rader v. Elliott, 181 Iowa 156, 163 NW 406.

[d] **Certificate of good character.**—One who is not allowed by law to collect his dues for medical or surgical services as a regular practitioner cannot recover compensation therefor, unless, prior to their performance, he obtained a certificate of good moral character, in the manner prescribed by St. (1838) c 353, § 2. Thompson v. Hazen, 25 Me. 104.

[e] **Unlicensed christian scientist.**—Assumpsit lies on an express promise to pay for services rendered by one practicing the healing art according to the methods of those calling themselves "Christian Scientists," plaintiff having complied with Rev. St. c 13 § 9, requiring persons not licensed by medical associations to obtain a certificate of good moral character from the officers of the town where they then reside. Wheeler v. Sawyer, (Me.) 15 A 67.

[f] **A note given in consideration of services rendered** (1) by the payee as a physician, when he has not obtained a license, is void (Mays v. Williams, 27 Ala. 267; Holland v. Adams, 21 Ala. 680; Coyle v. Campbell, 10 Ga. 570; State Bank v. Lawrence, 177 Ind. 515, 96 NE 947, 42 LRANS 326; Lyon v. Leet, 199 Iowa 1034, 202 NW 881), (2) or is part of an illegal transaction, throwing upon an indorsee, suing upon it, the burden of showing the good faith of his indorser. (Hill v. Ward, 45 Ind. A. 458, 91 NE 38). (3) Consideration for notes where act forbidden by statute see Bills and Notes § 383.

Agreements in violation of statute:

Generally see Contracts § 351 et seq.

Requiring license to engage in profession, etc. see Contracts § 353.

55. See cases supra note 54.

56. See cases supra note 54.

57. Deaton v. Lawson, 40 Wash. 486, 82 P 879, 111 AmSR 922, 2 LRA NS 392. But see Yankowitz v. Arkin, 163 NYS 266 [rev 157 NYS 995] (holding that a dentist is not liable for the amount paid by a patient, who visited his office and was treated by an office assistant, employed as a mechanic, who was not a licensed dentist, and who was not authorized by the dentist to treat patients, and was not known by him to be doing so).

[a] **In Texas,** under the statute, to recover back payments to an unlicensed physician, plaintiff must show not only that defendant was practicing in violation of the law, but further that he was deceived by representations made by defendant as to his authority to practice, whereby plaintiff was induced to employ and pay him for his professional services. Gaither v. Lindsey, 37 Tex. Civ. A. 149, 83 SW 225.

58. Deaton v. Lawson, 40 Wash. 486, 82 P 879, 111 AmSR 922, 2 LRA NS 392.

59. Marker v. Cleveland, 212 Mo. A. 467, 252 SW 95.

[a] **The words "practice" and "engage"** as used in such a statute are synonymous, and mean frequently repeated or customary action, or habitual performance, as a profession or business. Marker v. Cleveland, 212 Mo. A. 467, 252 SW 95.

60. See supra § 88.

61. Friedman v. Mizell, 164 Ga. 1, 137 SE 400 [answers to cert questions conformed to 36 Ga. A. 615, 137 SE 864]; Murray v. Williams, 121 Ga. 63, 48 SE 686; Lynch v. Kathmann, 180 Iowa 607, 615, 163 NW 408 [cit Cyc]; Maxwell v. Swigart, 48 Nebr. 789, 67 NW 789; Paine v. Eckhardt, (Tex. Civ. A.) 203 SW 459; Wickes-Nease v. Watts, 30 Tex. Civ. A. 515, 70 SW 1001.

[a] **Correction of accidentally defective registration** validates original registration and authorizes recovery for services rendered thereafter. Ottaway v. Lowden, 172 N. Y. 129, 64 NE 812.

[b] **Failure to register under city ordinance** imposing a penalty for practicing physic in the city without having registered is immaterial in an action by a physician to recover fees for services rendered. Prietto v. Lewis, 11 Mo. A. 601.

[c] **In Georgia** a physician licensed under act of 1894, who had caused his certificate to be recorded as required by that act can recover for services rendered after date of act of 1913, which repealed by implication the act of 1894, and did not require registration, although the record of his certificate had been made prior to the date of the act of 1913. Friedman v. Mizell, 164 Ga. 1, 137 SE 400 [answers to cert questions conformed to 36 Ga. A. 615, 137 SE 864].

62. See statutory provisions.

63. Riley v. Collins, 16 Colo. A. 280, 64 P 1052; Finch v. Gridley, 25 Wend. (N. Y.) 469.

64. Parish v. Foss, 75 Ga. 439.

65. Lynch v. Kathmann, 180 Iowa 607, 163 NW 408.

66. Woodside v. Baldwin, 30 F. Cas. No. 17,995, 4 Cranch C. C. 174.

67. Bohn v. Lowery, 77 Miss. 424, 27 S 604 (so holding, even though the physician had previously procured a temporary license, which had expired).

68. Gardner v. Tatum, 81 Cal. 370, 22 P 880; Rader v. Elliott, 181 Iowa 156, 163 NW 406.

69. Rader v. Elliott, supra.

70. Thompson v. Hazen, 25 Me. 104; Leman v. Houseley, L. R. 10 Q. B. 66. Contra Turner v. Reynall, 14 C. B. N. S. 328, 108 ECL 328, 143 Reprint 472 (holding that a physician may recover for his services although not registered at the time they are rendered, if he appears to be duly registered at the time of the trial).

71. Wright v. Greenroyd, 1 B. & S. 758, 101 ECL 758, 121 Reprint 896.

72. Spaulding v. Alford, 1 Pick.

services rendered in another;[73] and a physician licensed in the state where the contract for medical services was made does not lose his right to recover thereunder in that state by the fact that he gave the patient medical attention in another state in which he was not licensed and in which he was temporarily residing.[74] It has been held that, where all the parties to a suit for compensation for medical services are residents of the state in which the action was brought, and the contract was made in that state, recovery may be had regardless of the statute of the foreign state in which the services were rendered, regulating the right to practice there.[75] A physician who fails to comply with a statute providing that a physician licensed in one county cannot practice in another county without first obtaining a new license there cannot recover for services rendered in such other county,[76] except in the case of an emergency;[77] but the right to recover is not to be extended beyond the necessity of the actual emergency.[78]

[§ 172] **f. Temporary License.** Where, by statute, provision is made for the granting of a temporary license by the individual members of the board which authorizes the physician to practice until he can obtain a permanent license,[79] a physician practicing under such authority is entitled to recover compensation for his services;[80] but not a physician practicing under an unauthorized temporary certificate.[81]

[§ 173] **g. Effect of Repeal or Amendment of Disqualifying Act.** Where a disqualifying statute not only takes away all right of action for services performed by an unlicensed physician, but renders a contract to perform such services void in its inception, the repeal of such statute does not validate prior transactions, so as to enable the physician to recover compensation for services rendered by him before the passage of the repealing act.[82] The same rule applies where the disqualifying statute is amended so as to permit a certain excepted class of physicians to practice without a license.[83] Where, however, the disqualifying statute merely deprives an unlicensed physician of legal remedy for recovering compensation for his services, without preventing the accruement of a valid debt, then when such statute is repealed, which imposes this restraint upon the physician's remedy, he may maintain his action for services rendered prior to such repeal.[84]

[§ 174] **h. Effect of Revival of Disqualifying Act.** The revival of an act which invalidates the contracts of unlicensed physicians revives also the exception of the former act as to physicians practicing at the time of its enactment; and hence a physician practicing at the time of the revival may collect his fees, although not qualified thereunder.[85]

[§ 175] **3. As Dependent on Beneficial Result of Services.** In the absence of an express agreement to the contrary,[86] the right of a physician or surgeon to be compensated for his services does not depend upon the measure of his success in effecting a cure by the means employed, but upon diligent exercise, under his employment, of the skill commonly exercised by those practicing his profession.[87]

[§ 176] **4. Under "No Cure No Pay" Contract.** A contract between a patient and his physician that the latter's right to compensation shall be dependent upon his curing the patient is valid and binding,[88] even though no specified compensation is agreed up-

(Mass.) 33.

73. Downs v. Minchew, 30 Ala. 86; Corcia v. Giuliano, 85 N. J. L. 369, 87 A 94. But see Rugg v. Lewis, 17 Que. Super. 206 (holding that a contract by a physician duly qualified to practice in the province of Quebec, where he has his domicile, to render professional services in one of the United States, by the laws of which he is prohibited from practicing, is illegal, and no recovery therefor can be had in the courts of such province).

74. Zeigler v. Illinois Trust, etc., Bank, 245 Ill. 180, 91 NE 1041, 28 LRA NS 1112, 19 AnnCas 127.

[a] **Under the New Jersey statute** providing that it shall not be construed to prevent a physician, legally qualified to practice medicine in the state of his residence, from practicing medicine in New Jersey, without being subject to the provisions of the act, if he does not open an office for the purpose, a New York physician may recover compensation for professional services rendered a New York patient in the state of New Jersey. Prentice v. Ladinski, 81 Misc. 42, 141 NYS 1005.

75. Prentice v. Ladinski, supra.

76. Orr v. Meek, 111 Ind. 40, 11 N E 787; Mayfield v. Nale, 26 Ind. A. 240, 59 NE 415.

77. Adams County v. Cole, 9 Ind. A. 474, 36 NE 912 (a physician called from another county, as being the nearest physician with the requisite skill to perform an amputation immediately necessary to save a patient's life, and who had not sufficient time to procure the license required, can recover for the amputation, but not for subsequent visits, made after he had time to procure a license). See Orr v. Meek, 111 Ind. 40, 11 NE 787 (dictum).

78. Adams County v. Cole, 9 Ind. A. 474, 36 NE 912.

79. See supra § 85.

80. Wragg v. Strickland, 36 Ga. 559.

81. Peterson v. Seagraves, 94 Tex. 390, 60 SW 751.

82. Quarles v. Evans, 7 La. Ann. 543; Bailey v. Mogg, 4 Den. (N. Y.) 60; Nicols v. Poulson, 6 Oh. 305; Warren v. Saxby, 12 Vt. 146.

83. Richardson v. Dorman, 28 Ala. 679; Mays v. Williams, 27 Ala. 267; Puckett v. Alexander, 102 N. C. 95, 8 SE 767, 3 LRA 43.

84. Hewitt v. Wilcox, 1 Metc. (Mass.) 154.

85. Maddox v. Boswell, 30 Ga. 38; Newsom v. Lindsey, 21 Ga. 365.

86. See infra § 176.

87. Ark.—Cotnam v. Wisdom, 83 Ark. 601, 104 SW 164, 119 AmSR 157, 12 LRANS 1090, 13 AnnCas 25.

Ill.—Yunker v. Marshall, 65 Ill. A. 667.

Ind.—Johnson v. Jones, 62 Ind. A. 4, 112 NE 830.

Mass.—McClallen v. Adams, 19 Pick. 333, 31 AmD 140.

Mo.—French v. Burlingame, 155 Mo. A. 548, 134 SW 1100.

N. H.—Leighton v. Sargent, 27 N. H. 460, 59 AmD 388, 31 N. H. 119, 64 AmD 323.

N. J.—Ely v. Wilbur, 49 N. J. L. 685, 10 A 358, 441, 60 AmR 668.

Oh.—Gallaher v. Thompson, Wright 466.

Pa.—McCandless v. McWha, 22 Pa. 261; Tyson v. Baizley, 35 Pa. Super. 320; Tiedeman v. Lœwengrund, 2 WklyNC 272.

Wash.—Harvey v. Richardson, 91 Wash. 245, 157 P 674, AnnCas1918A 881.

Wis.—Holsapple v. Scofield, 176 Wis. 649, 187 NW 682; Ladd v. Witte, 116 Wis. 35, 92 NW 365.

Eng.—Seare v. Prentice, 8 East 348, 103 Reprint 376; Hupe v. Phelps, 2 Stark. 480, 3 ECL 496, 171 Reprint 711; Slater v. Baker, 2 Wils. 359, 95 Reprint 860.

See Lett v. Smith, 6 La. A. 248 (recognizing rule).

But see Cate v. Hutchinson, 58 Nebr. 232, 236, 78 NW 500 (holding that "the measure of success . . . [is an element] which cannot be ignored in actions of this character").

"Such services cannot be regarded as other than beneficial. They are so in a legal sense." Ely v. Wilbur, 49 N. J. L. 685, 688, 10 A 358, 60 AmR 668. See Cate v. Hutchinson, 58 Nebr. 232, 234, 78 NW 500 (where it was said: "The services of a physician are supposed to be valuable").

[a] **The subsequent death,** without fault of the surgeon, of one upon whom he carefully and skillfully performed a necessary operation does not affect the surgeon's right to compensation. French v. Burlingame, 155 Mo. A. 548, 134 SW 1100; Harvey v. Richardson, 91 Wash. 245, 157 P 674, AnnCas1918A 881.

Degree of skill and care required see supra §§ 101–109.

88. Ala.—Mock v. Kelly, 3 Ala. 387.

Ark.—Guild v. Whitlow, 162 Ark. 108, 257 SW 383.

Ill.—Madison v. Mangan, 77 Ill. A. 651 (recognizing rule).

La.—DePoorter v. Haydel, 7 La. A. (Orleans) 107.

Mich.—Hollywood v. Reed, 57 Mich. 234, 23 NW 792.

Mo.—Davidson v. Biermann, 27 Mo. A. 655.

N. Y.—Frankel v. Wolper, 181 App. Div. 485, 169 NYS 15 [aff 228 N. Y. 582 mem, 127 NE 913 mem].

Tenn.—Fisk v. Townsend, 7 Yerg. 146.

Vt.—Smith v. Hyde, 19 Vt. 54.

Eng.—Hupe v. Phelps, 2 Stark. 480, 3 ECL 496, 171 Reprint 711.

[a] **Promise, made while sober, by a habitual drunkard** to a physician, that he would pay him one hundred dollars, in consideration of which the physician promised and undertook to cure him of his appetite for ardent spirits, is binding. Fisk v. Townsend, 7 Yerg. (Tenn.) 146.

[b] **Such a contract held not to arise** where, after the patient's re-

on.[89] If a physician commences to attend a patient, under a contract that if there is no cure there shall be no pay, he cannot recover for his services or medicines, unless he shows a performance of the terms of the contract on his part;[90] nor can he recover if he fails, as agreed, to effect a cure within a specified time.[91] Where the contract contains a condition that, if a cure is not at first effected, the patient shall submit to further treatment, the physician is entitled to the agreed compensation, even though a cure is not effected, if the patient refuses or neglects to submit to further treatment.[92]

Recurrence of same disease. When a cure has been fairly effected, the contract cannot be evaded by the fact that the patient subsequently and by his voluntary act suffers a recurrence of the same disease.[93]

[§ 177] **5. As Affected by Negligence or Want of Skill.**[94] On the question whether a physician is entitled to compensation for his services when he has failed to exercise ordinary skill or has been negligent in the treatment of a case, most authorities hold that, if a physician fails in his duty to exercise ordinary and reasonable skill and care in treating a patient, he is guilty of a default in his undertaking and can recover nothing for his services,[95] while others hold that the fact that a physician was guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily preclude him from recovering any compensation whatever for his services, and that he may recover the value of his services less the amount of damages suffered by reason of his negligence.[96] The reasonable value of the use of a room, board, and nurse hire have been held recoverable regardless of the question as to the exercise of ordinary care and skill by the physician.[97]

[§ 178] **6. As Dependent on Intention That Services Shall be Gratuitous.**[98] While there is an implied agreement to pay for the services of a physician,[99] if the services were intended to be and were accepted as a gift or act of benevolence, they cannot at the election of the physician create a legal obligation to pay.[1] But their character is not controlled by the inexpressed and revocable intentions of plaintiff physician, although his purposes subsequently asserted may aid in ascertaining it.[2] And the fact that a physician is employed by reason of the friendship between members of his and the employer's families does not excuse the employer from paying the legal obligation incurred.[3] Where a physician renders services upon an understanding between the parties that he was to be remunerated by a legacy, this amounts to an agreement that he was to make no charge;[4] but if the services are performed under the mere expectation of a legacy, the physician is entitled, on being disappointed in his expectation, to recover compensation therefor.[5] It has been held that a physician who renders gratuitous services to the children of a widow cannot, after her death, change his mind and present a claim against her estate on a quantum meruit.[6]

Services to members of physician's family. It has been held that there is a recognized custom or practice among physicians not to charge one another for services rendered to members of their respective families,[7] and therefore that, if a doctor intends to charge the widow and children of a deceased physician for attendance, he must say so, thus giving the patient the opportunity of going to another doctor who will not charge.[8]

[§ 179] **7. As Dependent on Ability of Physician or Patient To Perform.**[9] Where a patient pays a physician in advance for treatments to be received, but becomes too ill to attend the physician's office for the treatments, the physician, having incurred no preparatory expense prior to the patient's disa-

fusal to accept the surgeon's advice that she go to another surgeon, he said that if she was willing to take a chance with him, he would take a chance with her. Harvey v. Richardson, 91 Wash. 245, 157 P 674, AnnCas 1918A 881.

89. Mock v. Kelly, 3 Ala. 387.

[a] **Mere fact that no compensation is agreed on** in case the patient is cured does not transform the entire express contract into an implied one, so as to authorize recovery in case of failure to cure. Davidson v. Biermann, 27 Mo. A. 655.

90. Lyle v. Andalaft, 178 Mo. A. 172, 165 SW 1146; Smith v. Hyde, 19 Vt. 54. See Frankel v. Wolper, 181 App. Div. 485, 169 NYS 15 [aff 228 N. Y. 582 mem, 127 NE 913 mem] (dictum).

[a] **Nature of the disease** is not material. Hollywood v. Reed, 57 Mich. 234, 23 NW 792.

[b] **Independent disease.**—Where a physician agrees that his compensation for treating a disease in one part shall depend on his effecting a cure thereof, his right to compensation for treating an independent disease in another and nearby part is not affected by such agreement. De Poorter v. Haydel, 7 La. A. (Orleans) 107.

91. Hupe v. Phelps, 2 Stark 480, 3 ECL 496, 171 Reprint 711.

92. Madison v. Mangan, 77 Ill. A. 651.

93. Fisk v. Townsend, 7 Yerg. (Tenn.) 146.

94. Cross references:

Burden of proving want of skill as defense see infra § 207.

Degree of skill and care required see supra §§ 101–109.

Liability for negligence or malpractice see supra § 110 et seq.

95. Ill.—Barton v. Southwick, 171 Ill. A. 217 [rev on other grounds 258 Ill. 515, 101 NE 928, 45 LRANS 219, AnnCas1914B 643]. See De Tarnowsky v. Walker, 191 Ill. A. 610.

Kan.—Abbott v. Mayfield, 8 Kan. A. 387, 56 P 327.

Me.—Patten v. Wiggin, 51 Me. 594, 81 AmD 593.

Mich.—Vandenberg v. Slagh, 150 Mich. 225, 114 NW 72; Hesse v. Knippel, 1 Mich. N. P. 109.

Mo.—Logan v. Field, 192 Mo. 54, 90 SW 127; Logan v. Field, 75 Mo. A. 594, 603.

N. Y.—Boom v. Reed, 69 Hun 426, 23 NYS 421; Bellinger v. Craigue, 31 Barb. 534.

Pa.—Langolf v. Pfromer, 2 Phila. 17.

Tenn.—Alder v. Buckley, 1 Swan 69.

Ont.—Hume v. McCarthy, 8 OntWN 465.

"Evidence that will sustain an action against a physician for negligence or which is the same thing malpractice, will be sufficient to defeat his recovery in an action for compensation." Logan v. Field, supra.

[a] **Rule applied to veterinary surgeon.**—Boom v. Reed, 69 Hun 426, 23 NYS 421.

[b] **Highest degree of skill not required.**—A surgeon is entitled to compensation for an operation not performed with the highest degree of skill, and which might have been performed more skillfully by others, provided the operation was beneficial to the patient. Alder v. Buckley, 1 Swan (Tenn.) 69.

96. Whitesell v. Hill, 101 Iowa 629, 70 NW 750, 37 LRA 830, 66 NW 894; Ressequie v. Byers, 52 Wis. 650, 9 NW 779, 38 AmR 775.

[a] **Jury cannot reduce the claim on the theory of improper treatment** where the undisputed evidence shows proper treatment. Wood v. Barker, 49 Mich. 295, 13 NW 597.

97. Dameron v. Ansbro, 39 Cal. A. 289, 178 P 874.

98. Gratuitousness as question for jury see infra § 212.

Presumption as to promise to compensate see infra § 208.

99. See supra § 166.

1. White v. Bystrom, 109 NYS 820; Perry v. Woodbury, 17 NYS 530; Prince v. McRae, 84 N. C. 674; Nagy's Est., 64 Pa. Super. 28; Packman v. Vivian, 24 Beav. 290, 53 Reprint 369.

2. Prince v. McRae, 84 N. C. 674. But see Kinner v. Tschirpe, 54 Mo. A. 575 (holding that where a physician rendered services to a relative with the intention that such services should be gratuitous, he cannot recover compensation therefor, even though his patient expected to pay for them).

3. Nims v. Cunningham, 8 Cal. A. 250, 96 P 785.

4. Shallcross v. Wright, 12 Beav. 558, 50 Reprint 1174.

5. Baxter v. Gray, 3 M. & G. 771, 42 ECL 402, 133 Reprint 1349.

6. Nagy's Est., 64 Pa. Super. 28.

7. Corbin v. Stewart, 28 T. L. R. 99; Brisset des Nos v. Dorval, 60 Que. Super. 37. But see Madden v. Blain, 66 Ga. 49, 51 (holding that "this seems to have been a sort of courtesy among physicians and not of universal observance, or extending to all cases").

Admissibility of evidence to prove custom see infra § 210.

Custom generally see Customs and Usages 17 C. J. p 444.

8. Corbin v. Stewart, 28 T. L. R. 99.

9. Death or disability of person as

bility, will be required to return the money paid.[10] Conversely, the fact that a physician was unable, from illness, to render future professional services for which a note was given is a complete defense to an action on the note;[11] and the estate of a dentist has been held liable for the return of part of the compensation paid in advance for his services where his death prevented the completion of the services as agreed.[12] But where a patient agrees to pay a physician a certain sum for treating a disease, partial payments to be made at stated intervals until the sum is paid, and the treatment is continued during the remainder of patient's life, the physician may recover from the patient's estate the unpaid balance of the agreed sum.[13]

[§ 180] **8. For Services of Physician's Assistants and Employees.** It has been held that physicians and surgeons can recover for the services of their students in attendance on their patients,[14] and for the services of such assistants as they may require,[15] although not for the services of unqualified assistants.[16] But there is authority to the effect that a physician called in as assistant to another, who had no express authority from his employer to engage an assistant, cannot recover against the employer for his services.[17] A physician summoned by another to assist him, under an arrangement that the latter will be responsible, is entitled to recover from the summoning physician.[18]

[§ 181] **9. Fees of Consultants.** A physician or surgeon summoned in consultation by another may recover of the patient compensation for his services,[19] notwithstanding an agreement between the patient and the attending physician that the latter would pay for such services,[20] unless the consulting physician expressly or impliedly assents to the agreement.[21] Where there is a difference between the charge for a consultation and that for a simple visit, the fact that more than one physician is called in and attends regularly upon the case does not make every visit of every physician a consultation.[22]

[§ 182] **10. For Medicine and Materials Furnished.** A person who has failed to comply with statutory provisions regulating the right to practice medicine[23] cannot recover for medicines furnished by him;[24] and it is so provided in some statutes.[25] Yet if he sells drugs and medicines apart from his professional business as a physician, he may recover for them.[26] In England it has been held that one holding a certificate as a surgeon only cannot recover for medicines administered by him unless the administering of the medicines was subservient and subordinate to the discharge of his duty as a surgeon.[27] An unregistered dentist, despite a statute preventing an unregistered person from recovering any fee or charge for dental operations or dental attendance or advice, may recover for a dental bridge[28] or for false teeth[29] made and supplied,

affecting performance of contract generally see Contracts §§ 717–719.

10. Bucklin v. Morton, 105 Misc. 46, 172 NYS 344.

11. Powell v. Newell, 59 Minn. 406, 61 NW 335.

12. Mendenhall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 Ann Cas 179.

13. Smith's Est., 59 Pa. Super. 8 (the principle that in contracts for personal services it is an implied condition that the death of either party dissolves the contract does not apply, since the physician did not contract to cure the patient or to treat him for a definite period of time).

14. Peo. v. Monroe Ct. C. Pl., 4 Wend. (N. Y.) 200.

[a] **Statute prohibiting recovery by unlicensed physician** does not prevent recovery for such services. Peo. v. Monroe Ct. C. Pl., 4 Wend. (N. Y.) 200.

15. Jay County v. Brewington, 74 Ind. 7; Scanlon v. Anderson, (R. I.) 144 A 146. But see McNair v. Parr, 177 Mich. 327, 143 NW 42 (holding that, where the assisting physician is defendant's family physician, not a party to the action and not bound by the judgment, so that he may bring his own action, defendant being thus compelled to pay twice, the jury should not be permitted to take into consideration the value of the assistant's services).

[a] **Dentist** has been held entitled to recover for work done by another dentist employed by him. Jones v. Gooden, 126 Misc. 200, 213 NYS 31 (the rule as to nonassignability of personal service contracts does not apply, recovery being permitted whether the employer is viewed as the assignee or the undisclosed principal of the employee).

16. Howarth v. Brearley, 19 Q. B. D. 303; Burgess v. Zimmerli, 19 B. C. 428, 17 DomLR 708, 27 WestLR 875, 6 WestWkly 908.

17. Johnson v. Roberts, 212 Ala. 535, 103 S 563; Webb v. Porto Rico American Tobacco Co., 16 Porto Rico 378, 388; Lindsay v. Freda, 56 N. S. 210, [1923] DomLR 1180

Compare Jones v. Gooden, 126 Misc. 200, 213 NYS 31 supra note 15 [a].

"It can never be understood that the mere fact of entrusting the care of a patient to a physician includes the power to call another physician to assist him." Webb v. Porto Rico American Tobacco Co., supra.

[a] **Rule applied** (1) even where the physician originally employed was employed "to do everything necessary" and "not to leave a stone unturned in attempting to save . . . [the patient's] foot." Johnson v. Roberts, 212 Ala. 535, 537, 103 S 563. (2) A surgeon called in by an attending physician has been refused compensation for his services, as against the employer of the physician, who was given no express authority to employ plaintiff. Johnson v. Roberts, supra; Webb v. Porto Rico American Tobacco Co., 16 Porto Rico 378. (3) A physician called in by another as one of two assistants cannot recover from a patient who has authorized the employment only of the other assisting physician, and who had no knowledge of the employment of plaintiff. Lindsay v. Freda, 56 N. S. 210, [1923] 2 DomLR 1180.

18. Scanlon v. Anderson, (R. I.) 144 A 146. See Semple v. Ringo, 42 N. D. 613, 614, 172 NW 817 (a physician may recover from another for services rendered as his assistant and "all such services . . . [administration of an anæsthetic] are properly chargeable to the surgeon when he orders them without giving the name of his patient as the person to whom the charge should be made").

19. Iowa.—Shelton v. Johnson, 40 Iowa 84.

La.—Haley's Succ., 50 La. Ann. 840, 24 S 285.

Pa.—Tyson v. Baizley, 35 Pa. Super. 320; Richter's Est., 11 Pa. Dist. & Co. 485; Sherman's Est., 6 Pa. Co. 225.

Wis.—Garrey v. Stadler, 67 Wis. 512, 30 NW 787, 58 AmR 877.

Que.—Chevalier v. Girard, 48 Que. Super. 211.

[a] **Reason for rule.**—"The defendant impliedly directed the family physician to act in such a way, and to adopt such a course of treatment as in his judgment would be most likely to effect the ultimate recovery of the patient's health; and the selection of the consultant with the knowledge of the patient and . . . [her] husband, was clearly within the scope of the authority given to the physician. To this knowledge was added the defendant's consent in regard to the employment of the plaintiff, and conceding that the services were not rendered at his special instance and request at the time of the performance, nevertheless the defendant as well as his wife and the two physicians believed the services to be for the benefit and advantage of the patient, so that under the admitted facts, a promise to pay therefor was implied as an inference of law." Tyson v. Baizley, 35 Pa. Super. 320, 322.

[b] **Rule applied** where neither patient nor any member of his family can be consulted, and the physician, in the exercise of his best judgment, engages a consulting physician. Richter's Est., 11 Pa. Dist. & Co. 485.

20. Shelton v. Johnson, 40 Iowa 84; Garrey v. Stadler, 67 Wis. 512, 30 NW 787, 58 AmR 877.

21. Garrey v. Stadler, supra.

22. Haley's Succ., 50 La. Ann. 840, 24 S 285; Duclos's Succ., 11 La. Ann. 406.

23. See supra §§ 13–90.

24. Underwood v. Scott, 43 Kan. 714, 23 P 942; Smith v. Tracy, 2 N. Y. Super. 501; Bailey v. Mogg, 4 Den. (N. Y.) 60; Alcott v. Barber, 1 Wend. (N. Y.) 526; Timmerman v. Morrison, 14 Johns. (N. Y.) 369; Leman v. Fletcher, L. R. 8 Q. B. 319; Gagnon v. Beaudry, 62 Que. Super. 133; Macdougall v. North Shore Power, etc., Co., 51 Que. Super. 24.

25. See statutory provisions.

[a] **But under the Washington statute** relating to veterinarians and providing that it does not apply to persons who gratuitously treat diseased animals, one who, although not a licensed veterinarian, administered serum to hogs without charging for the administration may recover for the serum used. Pecheos v. Johnson, 106 Wash. 163, 179 P 78.

26. Holland v. Adams, 21 Ala. 680.

27. Leman v. Fletcher, L. R. 8 Q. B. 319; Allison v. Haydon, 4 Bing. 619, 13 ECL 663, 130 Reprint 907, 3 C. & P. 246, 14 ECL 550, 172 Reprint 406; Simpson v. Ralfe, 4 Tyrw. 325.

28. Seymour v. Pickett, [1905] 1 K. B. 715.

29. Hennan v. Duckworth, 90 L. T. Rep. N. S. 546.

as distinguished from fitting such materials in the patient's mouth.[30]

[§ 183] **11. Liability of Person Employing Physician for Another[31]—a. In General.** The general rule is that one who calls upon a physician to render services to another is not liable for those services in the absence of an express agreement to pay therefor,[32] if defendant is not legally bound to furnish such service to the third person.[33] The payment of prior bills for medical services rendered to another,[34] or the payment of his hospital bills,[35] or a request that the physician's bill be allowed to run until a later date,[36] will not create a liability to pay for medical services to another in one not otherwise obligated to do so; nor will payment of part of the medical bill of another create a liability to pay the remainder in one not otherwise obligated.[37]

[§ 184] **b. Under Express Agreement.** One person may by express contract make himself liable for medical services rendered to himself[38] or another;[39] and the rendering of the services is sufficient consideration to support the contract.[40] The consent of the patient is not necessary to the validity of an express contract on the part of another to be answerable for the physician's compensation.[41] The father of a married woman is liable under his promise to pay for medical services rendered to his daughter at his request, despite the legal responsibility of her husband;[42] but where an adult child has contracted to pay for medical services rendered to him, his father is not liable on an oral promise to pay.[43] Where defendant authorized another to inform a physician that defendant would pay for services to third persons, but, instead of such statement, an unauthorized and unwritten guaranty by defendant was communicated to the physician, defendant is not liable.[44]

Subsequent assumption of liability. The liability is not affected by the fact that it was not assumed until after the physician had made several visits to the patient without the knowledge or procurement of the promisor,[45] this liability being an original undertaking on his part;[46] but one who assumes liability after visits have already been made will be liable only for services rendered after such assumption, and not for those prior thereto,[47] unless the terms of the assumption are such as to indicate an intention to be liable for the entire treatment.[48]

Subsequent visits or treatment. If one engages a physician to attend an urgent case, and makes no limitation as to time, he is liable to such physician for all subsequent visits, until the physician's services are dispensed with.[49] A physician hired generally by an employer to treat an injured employee may recover for a second operation, if he finds it necessary, as for any other medical or surgical service rendered.[50]

[§ 185] **c. Under Implied Agreement.** The law does not raise an implied promise on the part of a person, who requests a physician to perform services for another, to pay for the services so rendered,[51] unless the relation of such person to the

30. Hennan v. Duckworth, 90 L. T. Rep. N. S. 546.

31. Cross references:

Authority of:
- Agent to employ physician see Agency § 309.
- Officer or agent of:
  - Corporation to bind corporation see Corporations §§ 2286-2289.
  - Railroad to bind railroad see Corporations §§ 2287-2289.

Duty of guardian to provide medical attention toward see Guardian and Ward § 182 note 96 [a].

Effect of request or promise to pay for work and labor generally see Work and Labor [40 Cyc 2810].

Existence of agreement to pay as question for jury see infra § 212.

Liability of:
- Husband for medical and dental services to wife see Husband and Wife § 146.
- Husband and wife for medical services as family expenses see Husband and Wife § 162 text and note 88.
- Parent for medical and surgical services to minor child see Parent and Child § 44 note 48 [b], [c].
- Sheriff for medical services to prisoner see Sheriffs and Constables.

Provision of medical aid to apprentice see Apprentices § 90.

Recovery from employer for services rendered employee see Master and Servant § 361.

Statute of Frauds as affecting promise to pay for medical services to another see Frauds, Statute of § 30.

32. Cal.—McClenahan v. Keyes, 188 Cal. 574, 580, 206 P 454 [cit Cyc]; McClenahan v. Keyes, 65 Cal. A. 467, 224 P 241.

Colo.—Morse v. Friend, 59 Colo. 496, 149 P 618.

Conn.—Fruin v. Glassnap, 97 Conn. 504, 117 A 547.

Del.—Knowles v. Massey, (Super.) 81 A 470.

Ga.—Becker v. Humphries, 34 Ga. A. 644, 130 SE 379.

Ill.—Dorion v. Jacobson, 113 Ill. A. 563.

Ind.—McEwen v. Hoffman, 42 Ind. A. 202, 85 NE 364.

N. Y.—Crane v. Baudouine, 55 N. Y. 256; Voorhees v. New York Cent., etc., R. Co., 129 App. Div. 780, 114 NYS 242 [aff 198 N. Y. 558 mem, 92 NE 1105 mem].

Oh.—Lind v. Zeisel, 26 Oh. A. 439, 159 NE 849.

S. D.—Shirley v. Madsen, 216 NW 601.

Vt.—Smith v. Watson, 14 Vt. 332.

Wis.—Malone v. Knickerbocker Ice Co., 88 Wis. 542, 60 NW 999.

[a] **But for services rendered during an epidemic,** when the necessity was urgent, a municipal corporation must indemnify a physician, the action not being dismissible on the sole ground that it is based neither on a contract nor on a quasi contract. Tremblay v. Baie St. Paul, 59 Que. Super. 498.

33. Fruin v. Glassnap, 97 Conn. 504, 117 A 547; Lind v. Zeisel, 26 Oh. A. 439, 159 NE 849; Shirley v. Madsen, (S. D.) 216 NW 601; Smith v. Watson, 14 Vt. 332.

34. Morse v. Friend, 59 Colo. 496, 149 P 618.

35. Lind v. Zeisel, 26 Oh. A. 439, 159 NE 849; Shirley v. Madsen, (S. D.) 216 NW 601.

36. Shirley v. Madsen, supra.

37. Morse v. Friend, 59 Colo. 496, 149 P 618.

38. See Contracts 13 C. J. p 214; cases infra this section; and § 186.

39. Ala.—White v. Mastin, 38 Ala. 147.

Ark.—Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 SW 703, 3 AmSR 224.

Cal.—Edelman v. McDonell, 126 Cal. 210, 58 P 528.

Ill.—King v. Edmiston, 88 Ill. 257.

Ind.—National Car Coupler Co. v. Sullivan, 73 Ind. A. 442, 126 NE 494.

Me.—Ferren v. S. D. Warren Co., 124 Me. 32, 125 A 392.

Mo.—Mitchell v. Davis, (A.) 190 SW 357.

Tex.—Gray v. Lumpkin, (Civ. A.) 159 SW 880.

Wash.—Hood v. Gerrick, 69 Wash. 607, 125 P 956.

40. Mitchell v. Davis, (Mo. A.) 190 SW 357.

41. White v. Mastin, 38 Ala. 147; King v. Edmiston, 88 Ill. 257.

42. Hyman v. Vitrano, 2 La. A. 59.

Liability of husband for medical and dental services to wife see Husband and Wife § 146.

43. Edelman v. McDonell, 126 Cal. 210, 58 P 528.

44. Bonime v. Hurwitz, 123 NYS 131.

45. White v. Mastin, 38 Ala. 147; King v. Edmiston, 88 Ill. 257.

46. See cases supra note 45.

"There is nothing in the ordinary relation between a physician and his patient, which would prevent the former from discontinuing his services upon the account of the latter, and entering into a contract with another for the payment of the charges for his subsequent attendance." White v. Mastin, 38 Ala. 147, 153.

47. King v. Edmiston, 88 Ill. 257.

48. Perkins v. Kilpatrick, (Mo. A.) 193 SW 876.

49. Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 SW 703, 3 AmSR 224; Chicago Cons. Tract. Co. v. Mathews, 117 Ill. A. 174; Wilson v. St. Louis Envelope, etc., Co., (Mo. A.) 190 SW 979; Gray v. Lumpkin, (Tex. Civ. A.) 159 SW 880.

50. Hood v. Gerrick, 69 Wash. 607, 125 P 956.

51. Ala.—Curry v. Shelby, 90 Ala. 277, 7 S 922.

Cal.—McClenahan v. Keyes, 188 Cal. 574, 206 P 454.

Conn.—Fruin v. Glassnap, 97 Conn. 504, 117 A 547.

Ga.—Norton v. Rourke, 130 Ga. 600, 61 SE 478, 124 AmSR 187, 18 LRANS 173; Raoul v. Newman, 59 Ga. 408.

Ill.—Dorion v. Jacobson, 113 Ill. A. 563; Starrett v. Miley, 79 Ill. A. 658.

Ind.—Vandalia R. Co. v. Bryan, 60 Ind. A. 223, 110 NE 218.

Iowa.—Valentine v. Morgan, 222 NW 412; Holmes v. McKim, 109 Iowa 245, 80 NW 329.

Minn.—Cannon v. Minneapolis, etc., R. Co., 136 Minn. 473, 162 NW 355; Bigelow v. Hill, 129 Minn. 399, 401, 152 NW 763 [cit Cyc].

Miss.—Williams v. Brickell, 37 Miss. 682, 75 AmD 88.

Mo.—Hunicke v. Meramec Quarry Co., 262 Mo. 560, 172 SW 43, LRA 1915C 789, AnnCas1915D 493; Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, 120 AmSR 660, 11 AnnCas 650; Edwards v. Morehouse Stave, etc., Co., (A.) 204 SW 545, 546 [cit Cyc];

patient is such as puts him under a legal obligation to provide medical attention for the patient,[52] or unless the circumstances, including acts and conduct, are such as to show an intention on his part to pay for the services;[53] and it is immaterial whether or not the case is one of emergency.[54] Where the physician is aware that one requesting his services for a third person is acting solely as a messenger for the latter, he cannot recover against the messenger;[55] but where there is nothing to indicate to the physician that the party calling him is acting as a messenger, he may recover,[56] as he likewise may where the party calling him gives him to understand that he himself is the employer.[57]

Services to adult child or married daughter.[58] A request by a parent to a physician to attend a child who is of age,[59] or his or her acquiescence in the physician's attendance upon such child,[60] does not

Greensfelder v. Witte Hardware Co., 189 Mo. A. 576, 175 SW 275; Ghio v. Schaper Bros. Mercantile Co., 180 Mo. A. 686, 163 SW 551; Weinsberg v. St. Louis Cordage Co., 135 Mo. A. 553, 116 SW 461; Jesserich v. Walruff, 51 Mo. A. 270.

N. Y.—McGuire v. Hughes, 207 N. Y. 516, 101 NE 460, 46 LRANS 577, AnnCas1914C 585; Van Gaasbeek v. U. S. Lace Curtain Mills, 132 App. Div. 595, 116 NYS 776; MacGuire v. Hughes, 126 App. Div. 637, 111 NYS 153; Albany Homeopathic Hospital v. Chalmers, 94 Misc. 600, 157 NYS 1000 [aff 184 App. Div. 916 mem, 170 NYS 1087 mem]; Vernaglia v. Cirota, 156 NYS 432.

N. C.—Spicer v. Williamson, 191 N. C. 487, 489, 132 SE 291, 44 ALR 1280 [quot Cyc].

N. D.—Dis. op. in Semple v. Ringo, 42 N. D. 613, 614, 172 NW 817.

Pa.—Boyd v. Sappington, 4 Watts 247.

Porto Rico.—Garcia v. Preston, 17 Porto Rico 556.

R. I.—Churchill v. Hebden, 32 R. I. 34, 78 A 337.

S. C.—Guerard v. Jenkins, 32 S. C. L. 171.

Vt.—Clark v. Waterman, 7 Vt. 76, 29 AmD 150.

Sask.—Bleecker v. Stutsman, 13 Sask. 439, 54 DomLR 662, [1920] 3 WestWkly 644.

[a] **Reason for rule.**—"A humane policy encourages the summoning by others of medical aid for those who may be stricken and unable to act for themselves. It would be quite easy in such a case for the physician to inquire if the person making the request intends to become personally bound; and when he fails to do so, he has no one to blame except himself for having acted upon a mere request without an assurance that the party making it intends to incur a personal liability. The physician should remember that persons commonly call for medical aid for the sick solely out of a spirit of kindness, irrespective of relationship, and without any expectation of becoming personally responsible." Becker v. Humphries, 34 Ga. A. 644, 650, 130 SE 379. To same effect Norton v. Rourke, 130 Ga. 600, 61 SE 478, 124 AmSR 187, 18 LRANS 173; Williams v. Brickell, 37 Miss. 682, 75 AmD 88; Meisenbach v. Southern Cooperage Co., 45 Mo. A. 232; Smith v. Riddick, 50 N. C. 342; Garcia v. Preston, 17 Porto Rico 556.

[b] **Physician requesting services of another.**—A physician operating on a patient for a nominal fee, in a private room of a hospital, is not liable under an implied promise to pay another physician, also a member of the hospital staff, for the services of the latter in completing the operation at the request of the former, the services being held to be a matter of professional courtesy or duty. Gilday v. Hennen, 79 Misc. 252, 139 NYS 934.

[c] **Superintendent** of the work in which an injured employee was engaged is not personally liable for the compensation of a physician whose employment was suggested by the physician engaged and consented to by the superintendent, he being under no legal obligation to pay for the services rendered to the injured employee. Whitney v. Holloway, 194 Iowa 1333, 190 NW 930.

[d] **Person giving bond for support.**—An action to recover for medical services rendered at the request and for the benefit of a person for whose support a bond has been given by defendants cannot be maintained against defendants, there being no implied authority on the part of such person to obtain such assistance at their expense or credit. Shaw v. Graves, 79 Me. 166, 8 A 884.

52. See cases supra note 51. See also cross references supra § 183 note 31.

53. Ala.—Curry v. Shelby, 90 Ala. 277, 7 S 922.

Conn.—Douglass v. Brandt, 99 Conn. 161, 121 A 179.

Ga.—Becker v. Humphries, 34 Ga. A. 644, 130 SE 379.

Ill.—Dorion v. Jacobson, 112 Ill. A. 563.

Iowa.—Valentine v. Morgan, 222 NW 412.

Minn.—Bigelow v. Hill, 129 Minn. 399, 401, 152 NW 763 [cit Cyc].

Mo.—Ghio v. Schaper Bros. Mercantile Co., 180 Mo. A. 686, 163 SW 551.

N. Y.—Crane v. Baudouine, 55 N. Y. 256 [rev 65 Barb. 260]; Edson v. Hammond, 142 App. Div. 693, 700, 127 NYS 359 [quot Cyc]; Schoenberg v. Rose, 145 NYS 831, 834 [cit Cyc].

N. C.—Spicer v. Williamson, 191 N. C. 487, 489, 132 SE 291, 44 ALR 1280 [quot Cyc].

Porto Rico.—Garcia v. Preston, 17 Porto Rico 556, 559 [cit Cyc].

S. C.—Guerard v. Jenkins, 32 S. C. L. 171.

Vt.—Smith v. Watson, 14 Vt. 332.

Sask.—Bleecker v. Stutsman, 13 Sask. L. 439, 54 DomLR 662, [1920] 3 WestWkly 644.

And see cases infra this section.

[a] **Agreement implied.**—(1) A telegraphic dispatch sent by defendant to an infirmary as follows: "I have just learned of L.'s accident. Show him every attention, and I will pay expenses," authorizes the procurement of a physician not connected with the infirmary, and obligated defendant to pay for whatever services were rendered by him. White v. Mastin, 38 Ala. 147, 148. (2) Where plaintiff doctor asks defendant who will pay for the treatment of a child injured by defendant's car, and defendant replies: "Doctor, I will pay all bills," defendant's oral reply is an original promise from which can be inferred a contract to pay plaintiff for the value of the services rendered. Douglass v. Brandt, 99 Conn. 161, 162, 121 A 179.

[b] **Agreement not implied.**—(1) Although, where there had been a custom on the part of an employer to call a physician to attend injured employees and to have him finish his treatment of injuries at the employer's expense, the physician would have the right to believe, on being called in the usual way, that the person injured was an employee and that the services rendered would be paid for by the employer, yet, on the physician's being notified that the injured person was not an employee, no contract can be implied on the part of defendant to pay for services thereafter rendered. Burton v. Fletcher Mfg. Co., 28 R. I. 345, 67 A 366. (2) Where defendant, a plantation physician, directs the overseer to call plaintiff physician to attend a case, but plaintiff is not told that his services are at the request of defendant, plaintiff cannot recover from defendant. Guerard v. Jenkins, 32 S. C. L. 171.

[c] **Sudden emergency.**—No liability arises where one acts for another in a sudden emergency. Raoul v. Newman, 59 Ga. 408; Starrett v. Miley, 79 Ill. A. 658.

[d] **Consideration for implied contract.**—Performance by a physician, without legal obligation, of services in treating a child injured by defendant, is valid consideration for defendant's implied contract to pay for the services. Douglass v. Brandt, 99 Conn. 161, 121 A 179.

54. Valentine v. Morgan, (Iowa) 222 NW 412.

55. Smith v. Riddick, 50 N. C. 342.

56. Foster v. Meeks, 18 Misc. 461, 41 NYS 950; Bradley v. Dodge, 45 HowPr (N. Y.) 57.

[a] **Thus** (1) the words "Doctor, I want you to come and attend my father" fairly imply that defendant was not acting as a messenger, but on his own behalf. Foster v. Meeks, 18 Misc. 461, 462, 41 NYS 950. (2) Where a person calls at the office of a physician, and in the absence of the latter leaves his business card, with this message written on it, "Call on Mrs. D, at No. 769 Broadway," and gives the card to a clerk in the office with a request to hand it to the physician and to tell him to "come as soon as possible," he becomes liable to pay the physician's bill in attending on Mrs. D in pursuant of such message. Bradley v. Dodge, 45 How Pr (N. Y.) 57.

57. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, 120 AmSR 660, 11 AnnCas 650; Clark v. Waterman, 7 Vt. 76, 29 AmD 150.

58. Liability of parent for necessaries furnished adult child generally see Parent and Child § 47.

59. McClenahan v. Keyes, 188 Cal. 574, 206 P 454; McClenahan v. Keyes, 65 Cal. A. 467, 224 P 241; Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, 120 AmSR 660, 11 AnnCas 650; Crowell v. Donoho, 168 Mo. A. 305, 310, 153 SW 1082; Rankin v. Beale, 68 Mo. A. 325; Crane v. Baudouine, 55 N. Y. 256 [rev 65 Barb. 260]; Boyd v. Sappington, 4 Watts (Pa.) 247.

"We do not say the parent of an adult child may not become bound to pay for medical services rendered the child upon an implied promise, but we do hold that such promise must rest on facts and circumstances that would be incompatible with any other inference than that the parent intended to be regarded by the physician as his employer." Crowell v. Donoho, supra. To same effect Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, 120 AmSR 660, 11 AnnCas 650.

[a] **Where one parent calls a physician without the knowledge of the other,** the latter is not liable for medical services performed for an adult child. Lind v. Zeisel, 26 Oh. A. 439, 159 NE 849.

60. Vorass v. Rosenberry, 85 Ill. A. 623; Crowell v. Donoho, 168 Mo. A. 305, 153 SW 1082; Crane v. Baudouine, 55 N. Y. 256 [rev 65 Barb. 260]; Shirley v. Madsen, (S. D.) 216 NW 601.

[a] **Reason for rule.**—"So far as legal responsibility was concerned, the defendant, though the father of the patient, was a stranger to her and to her necessities. . . . It was the duty of the plaintiff to know or to learn the true legal status of the patient, and what were her true legal relations to the defendant; and he

raise an implied promise on part of the parent to pay for the physician's services, although the child is ill at the home of the parent.[61] Similarly, a physician who at the importunity of a mother treats her married daughter, who is living with her husband, first insisting on the husband's consent, cannot recover from the mother as on an implied promise to pay for his services.[62] But the circumstances may be such as to show an intention, on the part of a parent requesting or acquiescing in the services of a physician to his adult child, to be liable therefor, and a reliance on such intention by the physician, in which case the parent is liable.[63]

Services to other relatives. It has been held that, while a child is under no legal obligation to support an aged parent, yet if he does receive him into the family he is prima facie responsible for services which he calls upon a physician to perform for such parent.[64] The law will not imply, from the mere act of one in calling a physician to attend a brother[65] or a sister,[66] a promise on his part to pay for the services rendered; but circumstances and statements may show an intention or an implied promise to be liable for services to a brother[67] or to a niece.[68] There is nothing in the relationship of father-in-law and daughter-in-law from which the law will impose on the former the liability to pay for medical treatment of the latter;[69] and the presence of a son-in-law while his mother-in-law is being attended by a physician is not sufficient to show an implied promise to pay the physician.[70] One who calls a physician for a person who, although not a relative, is regarded as a member of the family, has been held liable for services rendered without notice that he does not intend to make himself liable.[71]

[§ 186] **B. Amount of Compensation[72]—1. Under Express Contract.** Where a physician or surgeon has made an express contract[73] with the person employing him, whereby he is to receive a stipulated sum for his services, his right to compensation is limited to the amount agreed upon;[74] but only the reasonable value, and not the contract price, will be allowed where there are special circumstances from which it appears that the contract was induced by fraud or improper or undue advantage over the patient or employer.[75] Where the contract calls for the performance of services of a specified nature, additional compensation may be recovered for serv-

cannot rely upon any seeming legal and necessary dependence of her upon him. . . . [Manifestations of interest in the child's condition] are to be referred to natural affection and friendly sympathy, rather than to an acquiescence in the rendition of a personal benefit, or counted as acts done under a sense of legal obligation." Crane v. Baudouine, 55 N. Y. 256, 260 [rev 65 Barb. 260]. To same effect Crowell v. Donoho, 168 Mo. A. 305, 153 SW 1082.

[b] **Payment of previous bills** by a mother for medical services to her adult daughter, with the mother's own checks, but shown to have been at the daughter's request and charged against her inheritance, does not imply a promise on the part of the mother to pay for subsequent services by the physician to the daughter. Crowell v. Donoho, 168 Mo. A. 305, 153 SW 1082.

61. Rankin v. Beale, 68 Mo. A. 325; Crane v. Baudouine, 55 N. Y. 256 [rev 65 Barb. 260]; Lind v. Zeisel, 26 Oh. A. 439, 159 NE 849; Boyd v. Sappington, 4 Watts (Pa.) 247.

62. McGuire v. Hughes, 207 N. Y. 516, 101 NE 460, 46 LRANS 577, Ann Cas1914C 585; MacGuire v. Hughes, 126 App. Div. 637, 111 NYS 153.

63. Reinschmidt v. Dorough, 14 Ga. A. 409, 81 SE 252; Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, 120 AmSR 660, 11 AnnCas 650; Best v. McAuslan, 27 R. I. 107, 60 A 774.

[a] **Thus,** where it was understood by plaintiff physician and defendant that plaintiff would not perform further services for defendant's son, who was sui juris, unless plaintiff was employed by defendant, defendant, by accepting the contract as so understood, must be held to have assented to it in that sense, although he did not expressly contract to pay for the services. Reinschmidt v. Dorough, 14 Ga. A. 409, 81 SE 252.

64. Hentig v. Kernke, 25 Kan. 559. See Rounsevel v. Osgood, 68 N. H. 418, 44 A 535 (holding that, where parents conveyed property to their daughter in consideration of her agreement to support, and to pay for necessary medical services rendered them, a physician rendering necessary services to the parents can recover therefor from the daughter, although he first rendered his bill to the mother, without knowledge of the agreement).

65. Knowles v. Massey, (Del. Super.) 81 A 470; Churchill v. Hebden, 32 R. I. 34, 78 A 337; Smith v. Watson, 14 Vt. 332.

[a] **Reason for rule.**—"Brothers are strangers" in respect of any obligation to take care of each other. Churchill v. Hebden, 32 R. I. 34, 78 A 337. To same effect Smith v. Watson, 14 Vt. 332.

66. Knowles v. Massey, (Del. Super.) 81 A 470.

67. See infra this note.

[a] **Thus,** where a sister of a man of twenty-five, without means and away from his family, and injured, writes to the physician who is treating him, inquiring as to the patient's condition and stating that the expenses will be paid, the physician may recover against her for services rendered after the receipt of the letter. Hall v. Allen, 46 Colo. 355, 104 P 489.

68. See infra this note.

[a] **Thus,** where one requests a physician to treat his niece, who is a member of his household, not informing him that the patient is not his daughter or that he did not expect to be held liable for the services, and pays a bill for drugs and the services of a nurse, the physician at first assuming that the patient was a daughter, a promise is implied on the part of the person calling the physician to pay for his services. Bigelow v. Hill, 129 Minn. 399, 152 NW 763.

69. Dorion v. Jacobson, 113 Ill. A. 533.

70. Madden v. Blain, 66 Ga. 49.

71. Grattop v. Rowheder, 1 Nebr. (Unoff.) 660, 95 NW 679.

72. Cross references:

Amount of compensation:
- Allowed under workmen's compensation acts see Workmen's Compensation Acts § 97.
- As affected by negligence or want of skill see supra § 177.

Burden of proof as to necessity of visits see infra § 206.

Reasonable compensation under contract with health authorities see Health § 96.

Recovery for services of assistant see supra § 180.

73. [a] **Special contract is not created** by the statement of the physician to defendant, prior to an operation on defendant's wife, that it was his custom to charge a fee satisfactory to the patient, to the family doctor, and to himself. Pfeiffer v. Dyer, 295 Pa. 306, 145 A 284.

74. Ark.—Black v. Bearden, 167 Ark. 455, 268 SW 27; Guild v. Whitlow, 162 Ark. 108, 257 SW 383.

La.—Pon's Succ., 142 La. 721, 77 S 515, AnnCas1918D 939.

N. Y.—Weinreb v. Harlem Bakery, etc., 204 App. Div. 293, 197 NYS 833.

Pa.—Thomas' Est., 6 Pa. Co. 642.

S. D.—Doyle v. Edwards, 15 S. D. 648, 91 NW 322.

Man.—Mackenzie v. Newman, 12 WestLR 631.

[a] **Promise not to charge more** than a certain amount is binding. Thomas' Est., 6 Pa. Co. 642.

[b] **Two sums named.**—(1) Under a contract for the performance of an operation, which provides that the compensation therefor shall be from two hundred dollars to four hundred dollars, the physician is entitled to recover two hundred dollars in any event, and the value of the services up to four hundred dollars upon proof of such value. Doyle v. Edwards, 15 S. D. 648, 91 NW 322. (2) Where the services of physicians are engaged under a contract to pay a stipulated sum therefor, and a larger stipulated sum on a stated contingency, the larger sum cannot be recovered if the contingency does not happen. Pons' Succ., 142 La. 721, 77 S 515, AnnCas 1918D 939.

[c] **Where a sum is agreed upon with reference to the length of time** the physician estimated the treatment would continue, the amount agreed upon may be recovered, although the treatment, which continued for some weeks thereafter, did not continue for the whole period estimated. Denenholz v. Kelly, 97 NYS 389.

[d] **Average number of employees.**—Where a physician was employed by defendants to attend their employees, at a certain amount per month for each employee, defendants cannot have deducted from the amount due plaintiff, on account of the final two months, in which he failed to give service, more than would be payable for an average of fifty men, which he, with their knowledge, ascertained from their books to be the average number employed during the two months. Mackenzie v. Newman, (Man.) 12 WestLR 631.

[e] **Money or certificate of skill.**—Where a contract for medical treatment called for the receipt by plaintiff physician of five thousand dollars in cash or a certificate of his skill, it was held that the five thousand dollars was not a penalty for refusal of the certificate, and that therefore, no certificate being given, such amount could be recovered as compensation for the services. Burgoon v. Johnson, 194 Pa. 61, 45 A 65.

Recovery of unpaid balance of agreed sum on death of patient see supra § 179 text and note 13.

75. Guild v. Whitlow, 162 Ark. 108, 257 SW 383; Butler v. Oldham, (Ark.) 224 SW 985.

[a] **Thus** (1) in case of emergency, where a patient or the person making the contract for him with a physician was laboring under such great excitement or stress of mind that an unconscionable advantage has

ices of a different nature;[76] but not for services incident to the original employment,[77] or for expenses incidental thereto;[78] nor can recovery be had for services performed after the expiration of the contract.[79]

[§ 187] **2. In Absence of Express Contract—a. In General.** In the absence of an agreement as to the amount to be paid for the services of a physician, the law will imply a promise to pay the reasonable value of the services.[80] There is no presumption of law as to the value of a physician's services;[81] nor that a jury can ascertain their value without testimony from persons knowing something about such value.[82] The question as to what is a reasonable charge is one of fact.[83]

[§ 188] **b. Elements To Be Considered in Determining Proper Amount[84]—(1) Customary Charge.** A physician is entitled to recover the ordinary and reasonable charges usually made for such services as he has rendered by members of the same profession of similar standing.[85] Therefore, to prove the value of such services, customary charges of physicians for

been taken of him, the contract will be set aside on the ground of fraud and recovery for services allowed on quantum meruit. Guild v. Whitlow, 162 Ark. 108, 257 SW 383. (2) Where a patient at the time of entering into an agreement with a physician was not of sufficient mental capacity, by reason of his illness, to transact business, the physician can recover only the reasonable value of his services, and not upon the express contract. Butler v. Oldham, (Ark.) 224 SW 985.

[b] **Fraud is not shown:** (I) By the fact that plaintiff charged more than other physicians and surgeons would charge for a similar operation in the same city. Guild v. Whitlow, 162 Ark. 108, 257 SW 383. (2) Where a patient, under no coercion, and of his own volition, paid a dentist for services an amount which the dentist told him was reasonable. Black v. Bearden, 167 Ark. 455, 268 SW 27.

[c] **Adequacy of consideration for a note** given by a patient to his physician in payment of his charges is immaterial in the absence of undue influence. Cole v. Wolfskill, 49 Cal. A. 52, 192 P 549.

76. Brown v. Murrell, (Ark.) 16 S W 478; Union Pac. R. Co. v. Graddy, 25 Nebr. 849, 41 NW 809.

77. Painter Fertilizer Co. v. Boyd, 93 Fla. 354, 114 SE 444.

[a] **Thus** physicians employed at an agreed compensation to obtain information as to cause of death cannot recover additional compensation for conferences with their employers held for the purpose of obtaining such information from the physicians. Painter Fertilizer Co. v. Boyd, 93 Fla. 354, 114 S 444.

78. Lakeside Sanitarium v. Dickens, (Tex. Civ. A.) 259 SW 1110.

[a] **Thus,** in action to recover for services rendered defendant's insane wife at a sanitarium, under a contract which provided for a stipulated payment per week, but which contained no reference to any charge for board, laundry, or medicine, there can be no recovery for such items in addition to the contract price. Lakeside Sanitarium v. Dickens, (Tex. Civ. A.) 259 SW 1110.

79. American Mut. Liability Ins. Co. v. McDiarmid, 211 Ala. 127, 99 S 849.

[a] **Thus,** where a surgeon contracted with an insurance company to treat all accident cases at a factory, in return for a percentage of the premiums paid, he cannot recover additional compensation for treating, after the expiration of the contract, employees injured before the expiration. American Mut. Liability Ins. Co. v. McDiarmid, 211 Ala. 127, 99 S 849.

80. Ark.—Henderson v. Hall, 87 Ark. 1, 112 SW 171, 25 LRANS 70; Cotnam v. Wisdom, 83 Ark. 601, 104 SW 164, 119 AmSR 157, 12 LRANS 1090, 13 AnnCas 25.

Ga.—Marshall v. Bahnsen, 1 Ga. A. 485, 57 SE 1006.

Ill.—Chicago Cons. Tract. Co. v. Mathews, 117 Ill. A. 174.

Ind.—Rubin, etc., Shows v. Wagner, 86 Ind. A. 493, 158 NE 626; Johnson v. Jones, 62 Ind. A. 4, 112 NE 830.

La.—O'Ferrall v. Nashville Bridge Co., 165 La. 963, 116 S 399.

Me.—Stockbridge v. Crooker, 34 Me. 349, 56 AmD 662.

Minn.—Collins v. Joyce, 146 Minn. 233, 178 NW 503.

Mo.—Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, Wilson v. St. Louis Envelope, etc., Co., (A.) 190 SW 979; French v. Burlingame, 155 Mo. A. 548, 134 SW 1100.

N. Y.—Weinreb v. Harlem Bakery, etc., 204 App. Div. 293, 197 NYS 833; Schoenberg v. Rose, 145 NYS 831.

N. D.—Huntley v. Geyer, 43 N. D. 366, 175 NW 619.

Okl.—Eves Tall Chief v. Aaron, 87 Okl. 230, 209 P 915.

Pa.—Daniels' Est., 29 Pa. Dist. 131.

Philippine.—Imperial v. Alejandre, 14 Philippine 203.

R. I.—Scanlon v. Anderson, 144 A 146.

S. C.—Pittman v. LeMaster, 128 S. C. 98, 121 SE 677.

N. S.—McKay v. Adams, 45 N. S. 522.

Ont.—Ross v. London, 20 Ont. L. 578, 1 OntWN 612, 15 OntWR 685 [app dism 23 Ont. L. 74, 2 OntWN 583, 18 OntWR 82].

See Eddy v. Healy 209 Ill. A. 270.

And see cases supra § 166 note 42.

[a] **Rule applied** in an action by one physician against another to recover for services rendered as an assistant. Scanlon v. Anderson, (R. I.) 144 A 146.

[b] **Existence of epidemic** does not authorize exorbitant fees. Collins v. Graves, 13 La. Ann. 95.

[c] **Rendering of bill for a certain amount** (1) to a third person, who did not appear as employing the physician, at the request of defendant, who employed him, does not prevent recovery from defendant of the reasonable value of the services. Rubin, etc., Shows v. Wagner, 86 Ind. A. 493, 158 NE 626. (2) Where a physician fixes his fee at a certain amount at the conclusion of his services, and sends a bill for that amount, he can recover only that amount, and not a greater one, whatever may be the actual value of his services. Hyman v. Vitrano, 2 La. A. 59.

[d] **Fee not limited by provisions of Workmen's Compensation Act,** where a physician's treatment of employees was under a contract with the employer, who may extend his liability beyond what the law requires. O'Ferrall v. Nashville Bridge Co., 165 La. 963, 116 S 399; Collins v. Joyce, 146 Minn. 233, 178 NW 503.

[e] **Particular amounts held reasonable or not excessive.**—(1) $6,500. O'Ferrall v. Nashville Bridge Co., 165 La. 963, 116 S 399 (for medical services covering several months to seven men who fell thirty feet to steel floor). (2) $2,500. Munch's Succ., (La.) 118 S 688 (for daily attendance for thirty days, and two major operations, on a patient who left a twenty five thousand dollar estate); Young v. Von Schoeler, 151 La. 73, 91 S 551 (for constant medical attention, nursing, and medicines for various diseases, during about nine and a half months). (3) $2,000. Richter's Est., 11 Pa. Dist. & Co. 485 (for operation for removal of a kidney and of a stone in a kidney, and daily attendance, including long visits, during about a month). (4) $1,882. Lange v. Cristy, 26 Porto Rico 333 (for medical attendance to nervous patient, extending over four years and including hundreds of visits, many at night). (5) $1,000. Pizzati's Succ., 141 La. 645, 75 S 498 (for ten office conferences and one hundred ten visits to intractable patient). (6) $795. Gibson v. Mackay, 10 OntWR 1081 [app dism 11 OntWR 449] (for surgical work, attendance as physician and surgeon, and charges of assistants). (7) $500. Richter's Est., 11 Pa. Dist. & Co. 485 (for four blood transfusions, vaccine injections, blood counts, and laboratory tests). (8) $50.00. McKay v. Adams, 45 N. S. 522 (for postoperative attendance). (9) $35. Scanlon v. Anderson, (R. I.) 144 A 146 (per operation for services rendered as first assistant at approximately fifty major operations). (10) $15. Schoenberg v Rose, 145 NYS 831 (for fifteen or twenty minutes of artificial respiration to an unconscious person). (11) Financial condition of party employing as factor see infra § 193.

[f] **Particular amounts held excessive or not reasonable.**—(1) $1,500. Bouziga's Succ., 159 La. 853, 106 S 328 (for three hundred calls, and treatment, by family physician during eleven months, and reduced to $1,000). (2) $500. Gelpi v. Wilbert, (La. A.) 119 S 455 (for surgical operation, held excessive and reduced to $350, in view of evidence as to defendant's financial condition). (3) $20. Bisset v. Stewart, (N. S.) 8 EastLR 82 (for physician's service as assistant to another in a confinement case). (4) Financial condition of party employing as factor see infra § 193.

81. Wood v. Barker, 49 Mich. 295, 13 NW 597.

"Law and jurisprudence have not laid down any hard and fast rule for guidance in the matter of physicians' charges." Young v. Von Schoeler's Succ., 151 La. 73, 78, 91 S 551.

[a] **The almost infinite variety of the circumstances** surrounding the performance of professional services "precludes the establishment of any fixed rate of compensation which could be applied to more than a very restricted class of cases and the more common class of services." Heintz v. Cooper, 5 Cal. Unrep. Cas. 564, 567, 47 P 360.

[b] **In Ontario** there is no tariff or legal scale of charges for surgical or medical services. Gibson v. Mackay, 10 OntWR 1081 [app dism 11 OntWR 449].

[c] **In Quebec** there is no tariff to determine what the charges of a physician may be. Wood v. McMartin, 54 Que. Super. 391.

82. Wood v. Barker, 49 Mich. 295, 13 NW 597. See Johnson v. Jones, 62 Ind. A. 4, 112 NE 830, 831 ("such reasonable and customary fee must be shown by competent evidence").

83. See infra § 212.

84. Relevancy and materiality of evidence as to value of services generally see Evidence § 156.

85. Marshall v. Bahnsen, 1 Ga. A. 485, 57 SE 1006; Schoenberg v. Rose, 145 NYS 831; Richter's Est., 11 Pa. Dist. & Co. 485. See Percival's Succ., 139 La. 938, 72 S 467, LRA1917A 1264 (in charging the fee sanctioned by the custom of the community in which he lives, a physician is not

like services in the same locality or neighborhood may be shown;[86] but proof of what the physician charged another person for similar services is not admissible,[87] except in connection with proof that such charge was made at his usual rate, and that this rate was known to defendant.[88] Proof as to the previous charges of the physician to the same patient for similar treatment is admissible;[89] and previous charges of a physician as a family physician have been held to establish his fee per visit for treatment to another member of the family in the same capacity.[90]

[§ 189] **(2) Nature of Case; Amount of Attention Given.** The nature and difficulty of the case,[91] its duration,[92] the time devoted to it,[93] the amount of services rendered,[94] the number[95] and length[96] of the visits, and whether they are made during the day or at night,[97] are factors which may be taken into consideration in determining the compensation to which a physician is entitled.

[§ 190] **(3) Professional Standing.** A physician may show his professional standing, as bearing on the value of his professional services.[98]

[§ 191] **(4) Skill and Learning; Manner of Treatment.** Evidence of a physician's skill and learning is competent to be considered in estimating the value of his services,[99] as is his experience as a physician,[1] even though his qualifications are not in dispute.[2] It has been held that a surgeon who skillfully performs an operation is entitled to the same compensation as one more learned and skillful who could perform the same operation no better.[3] Evidence of the performance of an operation in an unfit place is competent on the question of the reasonableness of the charge therefor;[4] and evidence that a physician, after promising, as a condition upon his continued employment, not to treat smallpox cases, continued to do so, and communicated smallpox to the patient, is admissible as ground for reducing his recovery for services to the patient.[5]

[§ 192] **(5) Daily Income; Loss of Other Practice.** In determining the value of a physician's services it is immaterial what his average daily income from his profession was or had been.[6] It has been held that a contract for a physician's services should not be construed to give him compensation

obliged to rate himself below the class to which, in his opinion, he properly belongs); Huntley v. Geyer, 43 N. D. 366, 370, 175 NW 619 ("in the absence of an express agreement as to amount, the law implies a promise to pay for a physician's services as much as they are reasonably and ordinarily worth on the professional market").

[a] **Difficulty of determining.**—"But we know by the very nature of a physician's service that it is almost impossible to tell what is a usual or customary charge." Richter's Est., 11 Pa. Dist. & Co 485, 487.

Professional standing see infra § 190.

86. Ala.—Jonas v. King, 81 Ala. 285, 1 S 591.

Ill.—Weinlander v. Volkman, 153 Ill. A. 137.

La.—Percival's Succ., 139 La. 938, 72 S 467, LRA1917A 1264.

Mo.—Lorie v. Lumbermen's Mut. Casualty Co., (A.) 8 SW (2d) 81, 87 [cit Cyc].

Philippine.—Imperial v. Alejandre, 14 Philippine, 203.

N. S.—Bisset v. Stewart, 8 EastLR 82, 83 [cit Cyc].

[a] **Services of different character.**—Evidence as to the customary charge for services of a character different from those alleged in the complaint is inadmissible. Trenor v. Central Pac R. Co., 50 Cal. 222.

87. Collins v. Fowler, 4 Ala. 647; Marshall v. Bahnsen, 1 Ga. A. 485, 57 SE 1006; Bisset v Stewart, (N. S.) 8 EastLR 82.

88. Paige v. Morgan, 28 Vt. 565.

89. Sidener v. Fetter, 19 Ind 310.

90. Haas v Read, 63 Misc. 342, 117 NYS 106.

91. La.—Bouziga's Succ., 159 La. 853, 106 S 328

Me.—Stockbridge v. Crooker, 34 Me. 349, 56 AmD 662.

Nebr.—Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500.

N. Y.—Kendall v. Grey, 2 Hilt 300; Schoenberg v. Rose, 145 NYS 831.

Pa.—Richter's Est., 11 Pa. Dist. & Co. 485.

N. S.—McKay v. Adams, 45 N. S. 522.

Que.—Chevalier v. Girard, 48 Que. Super. 211.

[a] **Responsibility** (1) which a physician incurs may be considered. Stockbridge v Crooker, 34 Me. 349, 56 AmD 662; Cate v Hutchinson, 58 Nebr 232, 78 NW 500. (2) The physician in charge of a case is entitled to a higher fee than the doctor called in to assist him. Bisset v Stewart, (N. S.) 8 EastLR 82 (3) Fees of assistants generally see supra § 180.

[b] **Operations and applications of special instruments,** even operations of minor surgery, give a right to higher fees. Chevalier v. Girard, 48 Que. Super. 211.

92. Chevalier v. Girard, supra.

93. Gelpi v. Wilbert, (La. A.) 119 S 455.

94. Young v. Von Schoeler's Succ., 151 La. 73, 91 S 551; Richter's Est., 11 Pa. Dist. & Co. 485; McKay v. Adams, 45 N. S. 522.

95. Bouziga's Succ., 159 La. 853, 106 S 328; Short's Succ., 45 La. Ann. 1485, 14 S 184; McKay v. Adams, 45 N. S. 522; Chevalier v. Girard, 48 Que. Super. 211.

[a] **Where a patient requires unusual attention,** compensation for operations and time spent in addition to the regular visits is properly allowed. Short's Succ., 45 La. Ann. 1485, 14 S 184.

Burden of proof as to necessity of visits see infra § 206.

96. Chevalier v. Girard, 48 Que. Super. 211.

[a] **"Daily attendance."**—A physician cannot charge for "daily attendance" on the ground that he was all day at the disposition of the patient, without proving that this was necessary, and that he had so informed the patient. Chevalier v. Girard, 48 Que. Super. 211.

97. Lange v. Cristy, 26 Porto Rico 333; Chevalier v. Girard, 48 Que. Super 211

98. Colo.—Sills v. Cochems, 36 Colo 524, 85 P 1007

Ga.—Marshall v Bahnsen, 1 Ga. A. 485, 57 SE 1006.

La.—Gelpi v. Wilbert, (A.) 119 S 455.

N. Y.—Lange v Kearney, 4 NYS 14 [aff 127 N. Y. 676 mem, 28 NE 255 mem].

Pa.—Richter's Est., 11 Pa. Dist. & Co. 485.

Que.—Wood v. McMartin, 54 Que. Super 391; Chevalier v. Girard, 48 Que. Super. 211.

But see Morrell v Lawrence, 203 Mo. 363 101 SW 571, 120 AmSR 660, 11 AnnCas 650 (holding that the jury have no right to consider the physician s general reputation, in estimating the value of his services, unless his reputation is called into question).

[a] **The extent of a physician's practice** is admissible as tending to show his professional standing. Sills v. Cochems, 36 Colo 524, 85 P 1007.

99. Cal.—Heintz v. Cooper, 5 Cal. Unrep. Cas 564, 47 P 360.

La.—Young v. Von Schoeler's Succ., 151 La. 73, 91 S 551; Gelpi v. Wilbert, (A.) 119 S 455.

Me.—Stockbridge v. Crooker, 34 Me. 349, 56 AmD 662.

Mo.—Morrell v. Lawrence, 203 Mo. 363, 101 SW 571; Morfit v. Thompson, 219 Mo. A. 506, 282 SW 113.

Nebr.—Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500.

N. Y.—Millener v. Driggs, 10 NYSt 237.

Tex.—Mays v. Hogan, 4 Tex. 26.

[a] **Surgeon's services as physician.**—Where a physician, who was an operating surgeon of great skill, rendered professional services to one desperately ill, but did not operate himself, owing to his fatigued condition, he should be compensated rather on the scale of charges for services of a family physician, instead of on the higher scale of a surgeon. Prentice v. Ladinski, 81 Misc. 42, 141 NYS 1005.

[b] **For services not involving expert professional skill** or knowledge a physician cannot sustain a claim for larger compensation than an ordinary man would be entitled to for the same services, on the ground alone that, as an expert in his profession, his time is more valuable than that of ordinary men. Chicago, etc., R. Co. v. Friend, 86 Ill. A. 157.

1. Morfit v. Thompson, 219 Mo. A. 506, 282 SW 113; Schoenberg v. Rose, 145 NYS 831.

[a] **That a physician is comparatively fresh from seats of learning** is insufficient to excuse a refusal to pay the fee sanctioned by the custom of the community in which he lives. Percival's Succ., 139 La. 938, 72 S 467, LRA1917A 1264.

2. Morfit v Thompson, 219 Mo. A. 506, 282 SW 113.

3. Stockbridge v. Crooker, 34 Me. 349, 56 AmD 662.

[a] **But the jury may take into consideration the exhausting studies,** and the time consumed and expense incurred in acquiring professional knowledge and skill Stockbridge v. Crooker, 34 Me. 349, 56 AmD 662.

4. Sayles v FitzGerald, 72 Conn. 391, 44 A 733.

5. Piper v. Menifee, 12 B. Mon. (Ky.) 465, 54 AmD 547.

6. Marion County v. Chambers, 75 Ind. 409; Thomas v Caulkett, 57 Mich. 392, 24 NW 154, 58 AmR 369. But see Burke v Mulgrew, 127 App. Div. 733, 738, 111 NYS 899 [app dism 197 N. Y. 521 mem, 90 NE 1156 mem] (holding that "the evidence with respect to plaintiff's annual income . . . was . . . proper as tending to show the value of his time, which might be considered by the jury in estimating the compensation to be made for his services and time when absent from the city").

Extent of practice as showing professional standing see supra § 190

for loss of business while away from his office, in addition to compensation for the services, unless the language employed is susceptible of no other construction.[7] But where services have been rendered in compliance with a patient's request that they be given exclusively for a time, to the abandonment of other practice, the usual charges are not sufficient compensation, and the nature of the contract and its effect upon the physician's practice may be considered in determining the proper amount.[8]

[§ 193] **(6) Financial Condition of Person Employing Physician.** As to whether the financial condition of a person receiving the services of a physician, or at whose request they are rendered for another, or the value of the estate of such a person, may be considered as affecting the propriety and reasonableness of the physician's charge, there is a conflict in the authorities, some cases holding that these elements may be considered and evidence received as to them,[9] while others hold that evidence bearing on these elements may not be received,[10] except where there is evidence of a recognized usage, which has grown into a custom, to graduate professional charges with reference to the financial condition of the patient, so that it may be considered that the services were rendered and accepted in contemplation of it,[11] or in rebuttal of evidence from the other side attempting to show the custom of a lower standard.[12] It has been held that the financial condition of one to whom medical services were given while he was unconscious may not be considered on the question of compensation;[13] but there is authority to the contrary.[14]

[§ 194] **(7) Other Elements.** Other elements which have been held proper to consider on the question of a physician's remuneration are the inconvenience[15] and expense[16] to which he was subjected, and the previous relations between the physician and the patient or his family.[17]

[§ 195] **c. Opinion Evidence.**[18] Physicians may give their opinions as experts as to the value of the services rendered in an action for compensation.[19] But one not a physician is not competent to express his opinion as to the value of such services.[20] It has been held that, where medical witnesses disagree as to the value of medical services, the correct rule is to allow the lowest estimate.[21]

[§ 196] **C. Actions for Compensation[22]—1. Nature and Right of Action; Jurisdiction.** Indebitatus assumpsit lies on a physician's bill for medi-

note 98 [a].

7. Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [app dism 197 N. Y. 521 mem, 90 NE 1156 mem].

8. Maddin v. Head, 1 Lea (Tenn.) 664.

9. La.—Bouziga's Succ., 159 La. 853, 106 S 328; Young v. Von Schoeler's Succ., 151 La. 73, 91 S 551; Levitan's Succ., 143 La. 1025, 79 S 829, 3 ALR 1646; Haley's Succ., 50 La. Ann. 840, 24 S 285; Czarnowski v. Zeyer, 35 La. Ann. 796; Gelpi v. Wilbert, (A.) 119 S 455.

N. Y.—Schoenberg v. Rose, 145 NYS 831.

Pa.—Pfeiffer v. Dyer, 295 Pa. 306, 145 A 284; Moyer's Est., 49 Pa. Super. 187; Richter's Est., 11 Pa. Dist. & Co. 485.

Ont.—Gibson v. Mackay, 10 OntWR 1081 [app dism 11 OntWR 449].

Que.—Wood v. McMartin, 54 Que. Super. 391; Chevalier v. Girard, 48 Que. Super. 211.

[a] **Reasons for rule.**—(1) "It is true that a physician . . . is bound to give in every case his best service. But it does not follow that this service is worth the same in every case. . . . Life has a pecuniary value of variable quantity." Mortimer's Est., 13 Pa. Dist. 51, 29 Pa. Co. 387. (2) "This state of affairs the law must recognize, that physicians should not have their services valued as you would commodities in trade by a fixed standard; what would be a proper charge for the same service to a man fully able to pay would be excessive to a man of limited means, and what would be willingly done for the indigent without thought of financial reward should be compensated for by one who can afford to pay on the scale which doctors of repute measure as the proper one." Pfeiffer v. Dyer, 295 Pa. 306, 311, 145 A 284, 285.

[b] **Where a wealthy person becomes liable for services to a poor one,** out of kindness or charity, the charge should be that which the surgeon would ask if the patient were paying, rather than that which he would ask of the person liable if the services were being rendered to him. Gibson v. Mackay, 10 OntWR 1081 [app dism 11 OntWR 449]

10. Morrissett v. Wood, 123 Ala. 384, 26 S 307, 82 AmSR 127; Robinson v. Campbell, 47 Iowa 625; Anderson v. Caulk, (Tex. Civ. A.) 5 SW (2d) 816; Swift v. Kelly, 63 Tex. Civ. A. 270, 133 SW 901, 903 [cit Cyc], Bisset v. Stewart, (N. S.) 8 EastLR 82.

[a] **Reason for rule.**—"Certainly, no court would hold that the value of ordinary labor could be determined by such a test, and upon principle we can see no distinction between such a claim and one of the character now under discussion." Swift v. Kelly, 63 Tex. Civ. A. 270, 273, 133 SW 901. To same effect Anderson v. Caulk, (Tex. Civ. A.) 5 SW (2d) 816.

[b] **Manner of disposition of estate** is irrelevant. Cotnam v. Wisdom, 83 Ark. 601, 104 SW 164, 119 AmSR 157, 12 LRANS 1090, 13 AnnCas 25.

11. Morrissett v. Wood, 123 Ala. 384, 26 S 307, 82 AmSR 127; Lange v. Kearney, 9 NYSt 793.

12. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

13. Cotnam v. Wisdom, 83 Ark. 601, 608, 104 SW 164, 119 AmSR 157, 12 LRANS 1090, 13 AnnCas 25.

"While the law may admit such evidence as throwing light upon the contract and indicating what was really in contemplation when it was made, yet a different question is presented when there is no contract to be ascertained or construed, but a mere fiction of law creating a contract where none existed in order that there might be a remedy for a right." Cotnam v. Wisdom, supra.

14. Schoenberg v. Rose, 145 NYS 831.

15. Gelpi v. Wilbert, (La. A.) 119 S 455.

[a] **Distance of patient's residence.**—Chevalier v. Girard, 48 Que. Super. 211.

16. Gelpi v. Wilbert, (La. A.) 119 S 455.

17. Chevalier v. Girard, 48 Que. Super. 211.

18. As to value of services:
Generally see Evidence §§ 687, 688, 788.
Of nurse see Evidence § 788 text and note 20.

19. Ala.—Morrissett v. Wood, 123 Ala. 384, 26 S 307, 82 AmSR 127; Mock v. Kelly, 3 Ala. 387

Ind.—Marion County v. Chambers, 75 Ind. 409.

Iowa.—Tedrow v. Johnson, 167 Iowa 513, 149 NW 645

Kan.—Atchison v. Rose, 43 Kan. 605, 23 P 561.

La.—Young v. Von Schoeler, 151 La. 73, 91 S 551.

Mich.—Thomas v. Caulkett, 57 Mich. 392, 24 N. W. 154, 58 AmR 369.

Nebr.—Cate v. Hutchinson, 58 Nebr. 232, 78 P 500.

N. Y.—MacEvitt v. Maass, 64 App. Div. 382, 72 NYS 158 [aff 33 Misc. 552, 67 NYS 817].

Pa.—Richter's Est., 11 Pa. Dist. & Co. 485.

R. I.—Scanlon v. Anderson, 144 A 146.

S. C.—Ward v. Ohio River, etc., R. Co., 53 S. C. 10, 30 SE 594.

Tenn.—Camp v. Ristine, 101 Tenn. 534, 47 SW 1098.

Tex.—Rogers v. Mexico City Banking Co., 46 Tex. Civ. A. 475, 103 SW 461.

Wash.—Terrill v. Fotheringham, 103 Wash. 34, 173 P 748.

See Imperial v. Alejandre, 14 Philippine 203 (where it was said that the reasonable remuneration may be fixed either with or without expert testimony).

"Courts must of necessity, to a very great extent, rely on the opinions of reputable members of the profession as to the value and character of the services rendered." Young v. Von Schoeler, 151 La. 73, 78, 91 S 551.

[a] **Limitation of value of opinions.**—"We doubt . . . whether this opinion testimony is of much help to a court passing upon physicians' claims. . . . The apparent truth is that there is no market or current value for medical or surgical services as there is for other services. . . . We doubt indeed whether a physician's services can be measured on a monetary basis." Richter's Est., 11 Pa. Dist. & Co. 485, 487.

[b] **Basis of opinion.**—The rule is applied although the witnesses state that they have no knowledge as to what other physicians charge for such services, but base their opinions on what they think the services are worth. Marion County v. Chambers, 75 Ind. 409; Scanlon v. Anderson, (R. I.) 144 A 146.

[c] **Plaintiff physician may testify** as an expert as to the value of his services, the fact that he is an interested party having a bearing on the weight, but not the admissibility, of his testimony Brooks v. Aldrich, (R. I.) 107 A 100.

20. See Evidence § 688 text and note 46, § 788 text and notes 32, 34.

21. Duclos' Succ., 11 La. Ann. 406.

22. Cross references:
Action to compel payment for necessaries of child see Parent and Child §§ 50–62.

cines, travel, and attendance.[23] The common counts is an appropriate remedy for medical services rendered under an express employment to pay an undetermined compensation of a named value, not paid by defendant.[24] A statute prohibiting a physician or surgeon from disclosing information acquired by him in a professional capacity[25] does not deprive him of his cause of action for services if he can prove them by proper evidence.[26]

Effect of workmen's compensation acts. Where an employer expressly contracts with a physician for services to his employees, such contract is enforceable through the courts, unaffected by provisions of workmen's compensation acts as to procedure;[27] and there is no election of remedies on the part of the physician in the fact that the employee had proceeded against the employer under the Compensation Law.[28]

[§ 197] **2. Defenses.** Matters of defense involving questions as to a physician's right to recover compensation for his services have been considered in preceding sections,[29] as, for example, the effect of his failure to exercise skill and care.[30] A plea of set-off, based on a tort in giving defendant an overdose of medicine, has been held improper as matter of defense, in an action by a physician for compensation for his services.[31] One who, knowing of a physician's habits of intoxication, nevertheless continues to employ him cannot set up the intoxication as a defense in such an action.[32] A statute prohibiting an unauthorized practitioner from recovering his fees[33] may be pleaded in defense to an action therefor.[34] In jurisdictions, where it is provided by statute that one denying the physician's claim for compensation on the ground that he has not complied with the statutory prerequisites for admission to practice must give notice of his intention to dispute the claim on such grounds before the commencement of the action,[35] a failure to give such notice renders the defense on such grounds unavailable.[36] The fact that a physician, at the request of defendant, makes out his bill to a third person, who has not appeared as employing the physician, does not prevent a recovery by him against defendant.[37] To an action for compensation for the services of a physician in examining defendant and testifying, as a medical expert, as to his condition, it is a sufficient defense that the physician, through ignorance and negligence, testified that defendant was insane, which was untrue, defendant being damaged by the testimony.[38]

[§ 198] **3. Parties.**[39] Where a physician, who is in partnership in the management of a hospital with a person not licensed to practice medicine, sues for his own professional services to a patient at the hospital without joining his partner, there is no defect of parties plaintiff.[40]

[§ 199] **4. Pleading**[41]**—a. Declaration, Complaint, or Petition.** Where a physician suing for fees for his services is presumed to be qualified,[42] the complaint need not allege compliance with the statutory requirements for admission to practice;[43] but some authorities hold that qualification must be pleaded.[44] In an action for the value of services rendered by a physician, it has been held sufficient to allege that he is a physician, that he was employed as such, that he rendered the services alleged, and that the reasonable value thereof was the amount sued for.[45]

Where the action is for services to a third person,[46] the complaint must show a request by defendant for the performance of the services, a promise

Judgment for compensation as bar to action for malpractice see Judgments § 1281.

Limitations see Limitations of Actions § 72.

23. Pynchon v. Brewster, Quincy (Mass.) 224. See Clark v. Mumford, 3 Camp. 37, 170 Reprint 1298 (under a general count in indebitatus assumpsit for work, labor, and materials, plaintiff may recover for attendances as a farrier and for medicines administered in the cure of defendant's horses). But see Glover v. Le Testue, Quincy (Mass.) 225 note (holding that indebitatus assumpsit will not lie for visits and medicine where there was no contract for a certain price).

Assumpsit generally see Assumpsit, Action of 5 C. J. p 1378.

24. Douglass v. Brandt, 99 Conn. 161, 121 A 179.

25. See statutory provisions.

26. Schamberg v. Whitman, 75 Misc. 215, 135 NYS 262 [aff 151 App. Div. 939 mem, 135 NYS 1141 mem].

27. Edwards v. Centralia Coal Co., 227 Ill. A. 453; Hoyt v. London Guarantee, etc., Co., Ltd., 227 Ill. A. 92; Ferren v. S. D. Warren Co., 124 Me. 32, 125 A 392; Weinreb v. Harlem Bakery, etc., 204 App. Div. 293, 294, 197 NYS 833; Capron v. Utica Ice Co., 127 Misc. 848, 217 NYS 732; Feldstein v. Buick Motor Co., 115 Misc. 170, 187 NYS 417; Noer v. G. W. Jones Lumber Co., 170 Wis. 419, 175 NW 784, 785.

"The statute does not concern itself with the contract that the employer makes with the physician or surgeon when the employer provides the medical attendance. . . . If the employer hires the physician, it is simply a matter of contract between the physician and employer." Weinreb v. Harlem Bakery, etc., supra. To same effect Feldstein v. Buick Motor Co., supra; Noer v. G. W. Jones Lumber Co., supra [quot Hoyt v. London Guarantee, etc., Co., 227 Ill. A. 92].

Effect of workmen's compensation acts on other causes of action generally see Workmen's Compensation Acts §§ 153–173.

28. Ferren v. S. D. Warren Co., 124 Me. 32, 125 A 392.

29. See supra §§ 166–195.

30. See supra § 177.

31. McKleroy v. Sewell, 73 Ga. 657.

Recovery as affected by negligence or want of skill see supra § 177.

32. McKleroy v. Sewell, 73 Ga. 657.

33. See supra §§ 167–174.

34. Berry v. Scott, 2 Harr. & G. (Md.) 92.

35. See statutory provisions.

36. Jordan v. Brewin, 19 Ala. 238; Berry v. Scott, 2 Harr. & G. (Md.) 92; Crane v. McLaw, 46 S. C. L. 129.

37. Rubin, etc., Shows v. Wagner, 86 Ind. A. 493, 158 NE 626.

38. Coyne v. Baker, 2 Cal. A. 640, 84 P 269.

39. Generally see Parties 17 C. J. p 1.

40. Hall v. Allen, 46 Colo. 355, 104 P 489.

41. Generally see Assumpsit, Action of §§ 37–81; Pleading 49 C. J.

42. See infra § 204.

43. Becker v. Humphries, 34 Ga. A. 644, 130 SE 379; Lyford v. Martin, 79 Minn. 243, 82 NW 479; Des Mond v. Kelly, 163 Mo. A. 205, 146 SW 99; Webster v. Lamb, 15 S. D. 292, 89 NW 473.

[a] **As against objection to evidence.**—A complaint in an action for services as physician is sufficient, as against an objection to evidence, although it does not allege that plaintiff received a diploma from some medical college, or was a member of a state or county medical society, as provided by Rev. St. § 1436. Rider v. Ashland County, 87 Wis. 160, 58 NW 236.

[b] **Affidavit for arrest** in action for medical services, in the Canadian practice, must allege that plaintiff is a duly registered physician. Turner v. Connelly, 35 CanLJNS 540.

44. Bedford Belt R. Co. v. McDonald, 12 Ind. A. 620, 40 NE 821; Westbrook v. Nelson, 64 Kan. 436, 67 P 884; Swift v. Kelly, 63 Tex. Civ. A. 270, 133 SW 901.

[a] **Complaint or petition bad on demurrer** for failure to allege compliance. Bedford Belt R. Co. v. McDonald, 12 Ind. A. 620, 40 NE 821; Swift v. Kelly, 63 Tex. Civ. A. 270, 133 SW 901.

[b] **An allegation of qualification at the time of filing the pleading** is not a sufficient allegation of qualification and authority to engage in practice and recover compensation for services performed months before the commencement of the action. Westbrook v. Nelson, 64 Kan. 436, 67 P 884.

[c] **If services were performed in a state other than that** in which the action is brought, the presumption obtains that the same statutes as to qualification are in force in the former state. Swift v. Kelly, 63 Tex. Civ. A. 270, 133 SW 901.

45. Becker v. Humphries, 34 Ga. A. 644, 130 SE 379.

[a] **Averments in connection with copy of original entry.**—A statement of claim is sufficient which avers that plaintiff rendered services to defendant to an amount stated, as shown by a copy of the book of original entry attached, and that the charges were reasonable and proper, taken in connection with the copy of the book of account attached, showing the number and respective dates of plaintiff's professional visits, and the sum charged for each visit. Paist v. Spittall, 56 Pa. Super. 408.

46. Liability see supra §§ 183–185.

to pay, or the existence of facts from which a promise to pay would be inferred.[47] If the action is on an open account, it is not necessary to allege an express agreement by defendant to pay.[48] An allegation that services to defendant's son were rendered at defendant's instance and request is sufficient, whether the son was a minor or an adult;[49] likewise, in a complaint against a railroad company[50] or other employer[51] for services to an employee, a count "for services rendered at the special instance and request of the defendant" is sufficient. A physician's petition based on the theory that the third person to whom he rendered services was a dependent member of defendant's family, for whose necessities defendant was responsible, should allege the facts showing such dependency and liability.[52] A complaint for attendance and medicine furnished several persons at defendant's request should itemize as to each person the amount charged for visit or examination, for medicine, and other items of service.[53]

Where the point at issue is the amount of the fee due, an allegation in the declaration as to the notoriety of the case and the putting of plaintiff's professional reputation at stake cannot be connected with the point at issue, and will be struck out.[54]

[§ 200] **b. Plea, Answer, or Affidavit of Defense.** Want of authority to practice need not be specially pleaded in defense to an action for medical services rendered,[55] and may be availed of under a plea of the general issue in assumpsit;[56] but failure to deny an allegation in the statement of claim that plaintiff is a duly registered physician admits such registration.[57] To authorize the defense of recoupment or counterclaim, defendant should either plead the matter specially, or else plead the general issue, and, at the same time that plea is interposed, give notice of the special matter relied on.[58]

An affidavit of defense[59] which does not explicitly aver that the number of visits charged for were not made, or name a number which had not been exceeded, but only avers uncertainty as to the number of days on which two visits were made, is insufficient;[60] and an allegation that the charges are excessive, unfair, and unwarranted is indefinite, in the absence of a statement as to the rate agreed upon or, in the absence of agreement, as to the usual and ordinary rate.[61]

[§ 201] **5. Issues, Proof, and Variance**[62]**—a. Issues and Proof.** Where the answer admits the medical services, but denies the value alleged, defendant may show under such allegation that the treatment by plaintiff was unskillful.[63] Where the answer admits a contract for medical services, and alleges that the amount was not agreed upon, but should be the usual fees, it is competent for either party to introduce evidence as to the value of the services.[64] Under the common counts for a quantum meruit, it is competent for defendant to prove the real value of the services,[65] or that they were of no value;[66] and, where plaintiff produces evidence to prove the value of his services, defendant may, under a general denial, show that the services were valueless,[67] or of less value than claimed.[68] Under a plea of the general issue in assumpsit evidence may be given to show want of authority to practice.[69] Under an allegation that "plaintiff rendered professional services," he cannot prove services rendered by another physician acting for him.[70] The evidence should be confined to the services rendered within the dates as named in the issue.[71]

In an action on a note for medical services,[72] a plea of no consideration is insufficient to support proof that a payment was made to the physician under an agreement that it covered all treatments, or that the treatments were gratuitous, without such facts being pleaded.[73]

[§ 202] **b. Variance.** In an action for medical services to defendant's minor son, proof of the necessity of the services, the approval of them by defendant while they were being rendered, and a promise to pay afterward, sufficiently tends to support the allegations of the petition that the services were rendered at the instance and request of defendant and that they were necessary.[74]

[§ 203] **6. Evidence**[75]**—a. Presumptions and Burden of Proof—(1) In General.** In conformity to general rules[76] a physician or surgeon seeking to recover compensation for his services has the burden of proving the case in the first instance.[77] He has the burden of proving that he is a physician,[78] that he was employed to render professional services,[79]

47. McEwen v. Hoffman, 42 Ind. A. 202, 85 NE 364.

48. Becker v. Humphries, 34 Ga. A. 644, 130 SE 379.

49. Bailey v. Yowell, (Mo. A.) 266 SW 324.

50. Southern R. Co. v. Hazlewood, 45 Ind. A. 478, 88 NE 636, 90 NE 18.

[a] **Reasons for rule.**—(1) "Railroad companies may employ surgeons generally." Southern R. Co. v. Hazlewood, 45 Ind. A. 478, 88 NE 636, 90 NE 18. (2) "So long as there may under some state of facts be liability, the presumption is that such possible facts are relied on." Southern R. Co. v. Hazleton, supra.

51. McEwen v. Hoffman, 42 Ind. A. 202, 85 NE 364.

52. Powell v. McGee, (Tex. Civ. A.) 258 SW 257.

53. Willet v. Western Naval Stores Co., (Tex. Civ. A.) 198 SW 352.

54. Marien v. Lussier, 5 Que. Pr. 324, 22 CanLTOccNotes 418.

55. Matthews v. Turner, 2 Stew. & P. (Ala.) 239.

56. Matthews v. Turner, supra.

57. Johnston v. Halifax, 46 N. S. 474, 9 DomLR 220, 12 EastLR 251.

58. McLure v. Hart, 19 Ark. 119.

59. Affidavits of defense generally see Pleading 49 C. J.

60. Sprissler v. McFetridge, 37 Pa. Super. 607.

61. Sprissler v. McFetridge, supra.

62. Generally see Assumpsit, Action of §§ 75–81; Pleading 49 C. J.

63. Schopen v. Baldwin, 83 Hun 234, 31 NYS 581.

64. Henderson v. Hall, 87 Ark. 1, 112 SW 171, 25 LRANS 70.

65. Jonas v. King, 81 Ala. 285, 1 S 591.

66. Jonas v. King, supra.

67. Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500.

68. Cate v. Hutchinson, supra.

69. Matthews v. Turner, 2 Stew. & P. (Ala.) 239.

70. Sayles v. FitzGerald, 72 Conn. 391, 44 A 733.

71. Proto v. Chenoweth, (Ariz.) 266 P 13.

72. See generally Bills and Notes §§ 1246–1286.

73. Abdun-Nur v. Valdez, 68 Colo. 334, 189 P 853.

[a] **Such facts are not set forth** by allegations which have reference to another defense as to lack of valid execution of the note, and not that of no consideration. Abdun-Nur v. Valdez, 68 Colo. 334, 189 P 853.

74. Des Mond v. Kelly, 163 Mo. A. 205, 146 SW 99.

75. Generally see Evidence 22 C. J. p 1. See also Assumpsit, Action of § 82.

76. See Evidence §§ 13–88.

77. Marshall v. Brown, (Mo. A.) 230 SW 347; Booth v. Dougan, (Mo. A.) 217 SW 326.

78. Styles v. Tyler, 64 Conn. 432, 30 A 165; Fincher v. Davis, 27 Ga. A. 494, 108 SE 905.

79. Styles v. Tyler, 64 Conn. 432, 30 A 165; Fincher v. Davis, 27 Ga. A. 494, 108 SE 905 [cit Cyc]; Weldon v. Lehigh Valley Tract. Co., 27 Pa. Super. 257.

[a] **Thus,** where a physician brings an action against a street railway company to recover for professional services rendered to an injured passenger, and plaintiff avers that he was employed to render such service by the claim agent of defendant, the burden is on plaintiff to show that the claim agent had general authority to employ a physician, or special authority in the particular instance, or that his engagement of plaintiff was ratified by defendant, or that defendant had so held him out as its agent that it was estopped in denying his authority. Weldon v. Lehigh Valley Tract. Co., 27 Pa. Super. 257.

Burden of showing promise to pay see infra § 211.

and that the services were rendered.[80]

[§ 204] **(2) Qualification To Practice.**[81] While there is authority to the effect that a physician in an action to recover compensation for services has the burden of proving compliance with statutory requirements as to qualification for practice,[82] the rule more generally laid down is that such qualification will be presumed,[83] and that the burden of proving failure to comply and want of authority is on defendant.[84]

[§ 205] **(3) Value of Services.** Where the amount of his compensation is not fixed by agreement,[85] the burden is on the physician to prove the value of his services,[86] but the value to be proved is the ordinary and reasonable price for services of the nature of those rendered,[87] and not the value to defendant.[88] It has been held that if, in a suit by a physician upon a quantum meruit for his services, the satisfactory performance of the services at defendant's request is not disputed, plaintiff has established a prima facie right to recover the reasonable value of the services,[89] and that, if defendant contends that an express contract fixing the value was made, he has the burden of proving such contract.[90] A physician, suing for an amount alleged to be the reasonable value of the services, and testifying to the whole treatment, service, and engagement, is under no necessity of segregating for each attendance and treatment.[91]

[§ 206] **(4) Necessity of Visits.** While the person employing a physician may, by special directions, limit the number of his visits,[92] in the absence of such directions the physician is the sole and proper judge for the necessary frequency of his visits,[93] and so long as the patient is in his charge it will be presumed that the visits made were deemed necessary and were proper.[94]

[§ 207] **(5) Skill and Care.** The presumption is that such services were performed in an ordinarily skillful manner,[95] and where want of such skill in their performance is alleged as a defense, the burden of proof is on defendant.[96] Furthermore, where want of skill and care is set up in defense to the physician's action for services,[97] the burden of proof is on defendant to show that no want of care on his own part tended to consummate the injury complained of by him.[98]

[§ 208] **(6) Promise To Compensate.** Medical attendance being valuable, the law presumes a promise to pay,[99] unless it clearly appears that the services rendered were intended to be gratuitous.[1] A physician suing a sheriff for services rendered to a prisoner at the request of the sheriff has the burden of proving an express agreement by the sheriff to

80. Styles v. Tyler, 64 Conn. 432, 30 A 165; Fincher v. Davis, 27 Ga. A. 494, 108 SE 905 [cit Cyc]; Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500; Mortimer's Est., 13 Pa. Dist. 51, 29 Pa. Co. 387.

81. Right to compensation as dependent on right to practice see supra §§ 167-174.

82. Ala.—Mays v. Williams, 27 Ala. 267.

Del.—Adams v. Stewart, 5 Del. 144.

Ga.—Bower v. Smith, 8 Ga. 74.

N. J.—Dow v. Haley, 30 N. J. L. 354.

Tex.—Swift v. Kelly, 63 Tex. Civ. A. 270, 133 SW 901; Wooley v. Bell, 33 Tex. Civ. A. 399, 76 SW 797; Wilson v. Vick, (Civ. A.) 51 SW 45; Kenedy v. Schultz, 6 Tex. Civ. A. 461, 25 SW 667.

N. B.—Tozer v. McIntosh, 39 N. B. 550.

[a] **Where the statute imposes no restrictions or qualifications** on a person practicing as a veterinarian, plaintiff in an action to recover for professional services as such must prove his qualification in such profession. Conkey v. Carpenter, 106 Mich. 1, 63 NW 990.

[b] **Statutory prohibition of recovery by unlicensed practitioner.**—Where the statute expressly provides that no action shall lie in favor of any person for services as a physician unless he shall have been legally licensed prior to the rendering of the services claimed for, it is necessary for plaintiff, in an action for medical services rendered, to prove that he was duly licensed in order to make out a prima facie case. Cooper v. Griffin, 13 Ind. A. 212, 40 NE 710.

[c] **Proof required of due registration at time of rendering services.**—Tozer v. McIntosh, 39 N. B. 550.

83. Ill.—Brunswick v. Hurley, 131 Ill. A. 235; Jo Daviess County v. Staples, 108 Ill. A. 539; Good v. Lasher, 99 Ill. A. 653; Williams v. Peo., 20 Ill. A. 92 [rev on other grounds 118 Ill. 444, 8 NE 841]. But see North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 500, 29 NE 899 ("If . . . [the physician] were himself suing to recover for his professional services, he would doubtless be required to show affirmatively his compliance with the law").

Iowa.—Lacy v. Kossuth County, 106 Iowa 16, 75 NW 689.

La.—Dickerson v. Gordy, 5 Rob. 489; Prevosty v. Nichols, 11 Mart. 21.

Minn.—Lyford v. Martin, 79 Minn. 243, 82 NW 479.

Mo.—Des Mond v. Kelly, 163 Mo. A. 205, 146 SW 99.

Mont.—Leggat v. Gerrick, 35 Mont. 91, 88 P 788, 8 LRANS 1238.

Nebr.—Cather v. Damerell, 5 Nebr. (Unoff.) 490, 99 NW 35.

N. Y.—Thompson v. Sayre, 1 Den. 175; McPherson v. Cheadell, 24 Wend. 15. But see O'Beirne v. Carey, 150 NYS 666 (holding that, where it did not appear that plaintiff's assignors were duly licensed to practice their profession, as provided by the laws of the state, no cause of action was proved against defendant).

S. C.—Crane v. McLaw, 46 S. C. L. 129.

S. D.—Webster v. Lamb, 15 S. D. 292, 89 NW 473.

[a] **Reason for rule.**—"The reason why the license will be presumed where there is no evidence to the contrary, rests upon the principle that when an act is required, by positive law, to be done, the omission of which would be a misdemeanor, the law presumes that it has been done and therefore the party relying on the omission must make some proof of it though it be a negative." Chicago v. Wood, 24 Ill. A. 40, 42 [quot Leggat v. Gerrick, 35 Mont. 91, 94, 88 P 788, 8 LRANS 1238]. To same effect Des Mond v. Kelly, 163 Mo. A. 205, 146 SW 99; Golder v. Lund, 50 Nebr. 867, 70 NW 379.

[b] **Rule applied** where the question of the license or qualification of a physician arises collaterally in an action between third parties. Chicago v. Wood, 24 Ill. A. 40 [crit Chicago v. Honey, 10 Ill. A. 535].

84. See cases supra note 83

85. Huntley v. Geyer, 43 N. D. 366, 175 NW 619.

86. Conn.—Styles v. Tyler, 64 Conn. 432, 30 A 165.

Ga.—Raoul v. Newman, 59 Ga. 408; Fincher v. Davis, 27 Ga. A. 494, 108 SE 905 [cit Cyc].

Iowa.—Tedrow v. Johnson, 167 Iowa 513, 149 NW 645.

Nebr.—Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500.

N. D.—Huntley v. Geyer, 43 N. D. 366, 175 NW 619.

Pa.—Mortimer's Est., 13 Pa. Dist. 51, 29 Pa. Co. 387.

[a] **Number of consultations or visits.**—One who seeks to recover for medical services upon the basis of consultations at so much per consultation or visit should be able to show how many consultations or visits were had or made. Pons' Succ., 142 La. 721, 77 S 515, AnnCas1918D 939.

87. Styles v. Tyler, 64 Conn. 432, 30 A 165; Fincher v. Davis, 27 Ga. A. 494, 108 SE 905 [cit Cyc].

88. Styles v. Tyler, 64 Conn. 432, 30 A 165.

89. Pittman v. LeMaster, 128 S. C. 98, 121 SE 677.

90. Pittman v. LeMaster, supra.

91. Willis v. MacDougall, 127 Wash. 330, 220 P 759.

92. Ebner v. Mackey, 186 Ill. 297, 57 NE 834, 78 AmSR 280, 51 LRA 298 [aff 87 Ill. A. 306]; Ballou v. Prescott, 64 Me. 305.

93. Todd v. Myres, 40 Cal. 355; Ebner v. Mackey, 186 Ill. 297, 57 NE 834, 78 AmSR 280, 51 LRA 298 [aff 87 Ill. A. 306].

94. See cases supra note 93.

95. Conn.—Styles v. Tyler, 64 Conn. 432, 30 A 165.

Ga.—Fincher v. Davis, 27 Ga. A. 494, 108 SE 905 [cit Cyc].

Ill.—Holmes v. McKeenan, 120 Ill. A. 320. See Hoover v. Buckman, 194 Ill. A. 308.

Iowa.—Robinson v. Campbell, 47 Iowa 625.

Ont.—Hume v. McCarthy, 8 OntWN 465.

96. See cases supra note 95.

97. See supra § 177.

98. Baird v. Morford, 29 Iowa 531.

99. In re Scott, 5 NYLegObs 378, 1 Redf. Surr. 234; Brown's Est., 6 Pa. Co. 428.

[a] **Kinship of patient and physician** does not rebut this presumption. Dickey's Succ., 41 La. Ann. 1010, 6 S 798; Brown's Est., 6 Pa. Co. 428. But see Executors and Administrators § 881 et seq.

[b] **Relationship of friendship** would ordinarily tend to negative the implication that the physician was to be compensated for his services. Richter's Est., 11 Pa. Dist. & Co. 485.

Implied promise to pay see supra § 166.

1. Ross v. Ross, 6 Hun (N. Y.) 182 (where it appears that for a portion of the services included in a physician's account no charge was intended to be made, it cannot be presumed that it was intended to charge for the other portions, one part of the account not being legally distinguishable from the other).

pay him.[2]

Change of person liable. A physician who, after rendering services on his patient's sole responsibility, enters into a contract with another by which the latter is to become responsible for his subsequent services, has the burden of showing such an agreement on the part of the latter.[3]

[§ 209] **(7) Payment.** There is no presumption that the services of an attending physician have been paid for at regular stated intervals,[4] as for domestic service.[5] A physician who from time to time is paid for his services to the employees of a company out of a fund made up from their wages has the burden of showing exceptions or limitations in the contract which would relieve him of the obligation of supplying his services generally without further remuneration.[6]

[§ 210] **b. Admissibility.**[7] The general rules governing the admissibility of evidence[8] apply in an action by a physician to recover compensation for services rendered.[9] Hence, evidence that is not competent, not relevant, or not material is inadmissible,[10] as is also evidence having a tendency to prejudice the jury,[11] although evidence tending to remove such prejudice is admissible.[12] In the subjoined notes will be found particular applications of the general rules, in determining the admissibility of evidence sought to be introduced, with respect to the fact or nature of the employment of the physician or the agreement regarding his services;[13] custom as to payment for a physician's services;[14] value of

[a] **Affirmative evidence** that the services were gratuitously rendered must be produced in order to defeat a claim for compensation. In re Scott, 5 NYLegObs 378, 1 Redf. Surr. 234.

Intention that services shall be gratuitous see supra § 178.

2. Spicer v. Williamson, 191 N. C. 487, 132 SE 291, 44 ALR 1280.

3. Curry v. Shelby, 90 Ala. 277, 7 S 922.

4. Morris' Est., 76 Pa. Super. 50.

5. Morris' Est., supra.

6. McIntosh v. Cramb, (Man.) 31 DomLR 788.

7. What may be shown in determining amount of compensation see supra §§ 186-195.

8. See Evidence §§ 89-1729.

9. See cases infra notes 10-19.

Opinion evidence as to value of services see supra § 195.

Physician's books to prove account see Evidence § 1038 text and note 78.

10. Ala.—Curry v. Shelby, 90 Ala. 277, 7 S 922.

Cal.—McClenahan v. Keyes, 188 Cal. 574, 206 P 454.

Colo.—Hall v. Allen, 46 Colo. 355, 104 P 489.

Ill.—Krieger v. Chicago Carton Co., 185 Ill. A. 582.

Ind.—Molt v. Hoover, (A.) 81 NE 221.

Me.—Ferren v. S. D. Warren Co., 124 Me. 32, 125 A 392.

Mich.—Kwiecinski v. Newman, 137 Mich. 287, 100 NW 391; Hollywood v. Reed, 55 Mich. 308, 21 NW 313.

Mo.—Lorie v. Lumbermen's Mut. Casualty Co., (A.) 8 SW (2d) 81; Ghio v. Schaper Bros. Mercantile Co., 180 Mo. A. 686, 163 SW 551; Prietto v. Lewis, 11 Mo. A. 601.

Mont.—Fitzgerald v. Hanson, 16 Mont. 474, 41 P 230.

N. C.—Jeffries v. Harris, 10 N. C. 105.

S. D.—Doyle v. Edwards, 15 S. D. 648, 91 NW 322.

[a] **Thus** (1) evidence as to the result of the treatment by a physician subsequently employed is inadmissible, as his treatment cannot alter the value of plaintiff's services. Gardner v. Tatum, 81 Cal. 370, 22 P 880. (2) In an action by a physician for services rendered a third person at defendant's request, a statement filed by the injured with an insurance company in which he stated that he thought he was entitled to doctor's bills, and the amount thereof, is inadmissible, in the absence of evidence that the statement was brought to plaintiff's knowledge. Hertel v. Cuba, 186 Mo. A. 190, 171 SW 565.

[b] **A firm agreement** between plaintiff physician and another regarding the operation of the hospital where plaintiff attended defendant is immaterial to defendant and inadmissible, not being an assignment of any claim by plaintiff for his services. Hall v. Allen, 46 Colo. 355, 104 P 489.

11. Henderson v Hall, 87 Ark. 1, 112 SW 171, 25 LRANS 70; Boyd v. E. O. Painter Fertilizer Co., 83 Fla. 429, 91 S 557

[a] **Thus** to permit the introduction of a letter written after the termination of the medical services, relating solely to an offer to render future services, and containing matter that would have a tendency to prejudice the jury against the writer, and serve no purpose in throwing light on the matters in litigation, is reversible error. Boyd v. E. O. Painter Fertilizer Co., 83 Fla. 429, 91 S 557.

12. Boyd v. E. O. Painter Fertilizer Co., supra.

[a] **Thus** the exclusion of evidence of proper authority given to physicians to perform an autopsy, in a suit against a corporation alleged to be liable to pay therefor, is error, since such evidence would tend to relieve plaintiffs of the imputation of having mutilated the body without authority, which might prejudice the jury against plaintiffs. Boyd v. E. O. Painter Fertilizer Co., 83 Fla. 429, 91 S 557.

13. See cases infra this note.

[a] **Evidence held admissible:** (1) In determining whether defendant put himself under a primary or collateral liability to pay for services to a third person. May v. Roberts, 28 Okl. 619, 115 P 771. (2) To show custom of a physician, employed by a corporation at one of its plants, to treat employees of another plant. Woodward Iron Co. v. Dabney, 205 Ala. 615, 88 S 873. (3) To show the number of lodge members, on which physician's compensation was to be based, under contract, and his readiness and willingness to perform. Page v. Cohen, 80 Misc. 237, 140 NYS 935. (4) To show that entire charge of the patient was put in the physician's hands by the person employing him. Nims v. Cunningham, 8 Cal. A. 250, 96 P 785. (5) To show what operation the physician was authorized to perform, or what it was reasonably necessary to do for the patient. Hoxsey v. Murray, 84 Wash. 588, 147 P 205.

[b] **Evidence showing the interpretation the parties placed on their relation** to one another is competent to guide the jury to a determination of the real intention of the parties which it was necessary to ascertain in order to determine what contract they had made. Marshall v. Brown, (Mo. A.) 230 SW 347.

[c] **Financial condition** (1) of the person employing a physician is irrelevant on the question whether he bargained with the physician on a "no cure no pay" basis. Hollywood v. Reed, 55 Mich. 308, 21 NW 313. (2) In an action to recover on an implied contract of a father to pay for services rendered his son, where the physician knew of the financial standing of the father and son, evidence that the son was a man of considerable fortune, and amply able to pay for the services, is admissible on the question whether the physician thought the father intended to pay for the services he called him to perform. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, 120 AmSR 660, 11 AnnCas 650.

[d] **Professional standing.**—Evidence that a physician who is suing for services rendered is not of good repute is not competent to disprove his employment. Prietto v. Lewis, 11 Mo. A. 601; Jeffries v. Harris, 10 N. C. 105.

[e] **Services outside of employment.**—(1) In an action by physicians for the examining of a person injured through the negligence of another, the admission of evidence that they brought about a compromise of the claim for the injuries is erroneous, as leading the jury to assume that they should find for the value of the services in negotiating a compromise, as well as for their medical services. Henderson v. Hall, 87 Ark. 1, 112 SW 171, 25 LRANS 70. (2) Physicians rendering such services are not entitled to compensation for speculative incidents that may or may not follow from the services, and, after the settlement of the claim for the injuries, it was error to admit testimony that plaintiffs' services were worth a specified sum because they were not ordinary services, and because plaintiffs might have had to attend court as witnesses. Henderson v. Hall, supra.

[f] **Gratuitous services.**—It is competent for the opposing party to show that the services were rendered gratuitously. In re Scott, 1 Redf. Surr. (N. Y.) 234.

[g] **Previously presented bill,** not mentioning a special contract for services sued on, is inadmissible to prove that such a contract was not made. Doyle v. Edwards, 15 S. D. 648, 91 NW 322.

[h] **Unauthorized telegram.**—A telegram is inadmissible to show the employment of a physician to render services to a third person, unless it is shown to have been sent by, or by the authority of, the alleged employer. McClenahan v. Keyes, 188 Cal. 574, 206 P 454.

14. See cases infra this note.

[a] **As between physicians.**—(1) Evidence that the ethics of the profession forbid physicians from charging each other for services, and that it was the custom of physicians in a particular locality not to charge for such service, is admissible to negative an implied promise of one physician to pay for services rendered by another. Bremerman v. Hayes, 9 Pa. Super. 8. (2) The admission by plaintiff that he received a gift from defendant, that it is the custom among physicians to make no charge against a fellow physician or his family for services, and that he never rendered an account, constitutes a commencement of proof in writing permitting oral proof of defendant's offer of payment, before the gift, and plaintiff's refusal to accept payment. Brisset des Nos v. Dorval, 60 Que. Super. 37.

[b] **In an action by an assisting physician against the physician as-**

his services;[15] want of skill or care on the part of the physician;[16] lack of benefit from his treatment;[17] and rights as between a physician and an employer to whose employee he rendered services,[18] or as between a physician and a company insuring such employer.[19]

[§ 211] **c. Weight and Sufficiency.**[20] The general rules as to the weight and sufficiency of evidence[21] apply in an action by a physician to recover compensation for his services.[22] In the subjoined notes are cases in which the evidence was held sufficient to show the employment of the physician,[23] including defendant's promise to pay for the services;[24] to show skill and care in the performance of the services,[25] or a lack thereof;[26] to show the amount recoverable as compensation;[27] or, generally, to support a recovery of compensation for services.[28] Also, below are cases in which the evidence was held insufficient to show, among other things,[29] the employment of the physician;[30] to show defendant's promise to pay for the services;[31] or, generally, to support a recovery for compensation for services.[32] It is not necessary that all the items of a physician's

sisted, evidence of a local usage that the former shall look to the patient for his pay, in the absence of a special agreement to the contrary, is inadmissible, where it does not appear that such usage was known to plaintiff or was so well established as to warrant the legal presumption that the parties contracted with reference to it. Fitzgerald v. Hanson, 16 Mont. 474, 41 P 230.

15. Scanlon v. Anderson, (R. I.) 144 A 146.

[a] **Evidence as to the reasonable value** of the services of a physician who assisted another is proper, in an action by the former against the latter, where the evidence shows an arrangement as to the services, but not the terms of the arrangement. Scanlon v. Anderson, (R. I.) 144 A 146.

16. See cases infra this note.

[a] **Evidence of declarations of plaintiff** (1) as to the character of deceased's illness and directions as to its treatment, made out of the presence and hearing of deceased, is relevant to show that plaintiff was mistaken in his diagnosis, and prescribed erroneous treatment. McDonald v. Harris, 131 Ala. 359, 31 S 548. (2) Evidence by the patient's wife that plaintiff had stated that he would effect a permanent cure in three months is admissible, but only for the purpose of showing a want of ordinary skill. McDonald v. Harris, supra.

[b] **Similar acts.**—Evidence of the negligent administration of morphine by plaintiff physician to another patient is admissible to show the same administration to defendant's intestate, where both patients were administered to at the same time and place for the same disease and died within a day of each other. Kelty v. Fisher, 101 Or. 110, 199 P 188.

17. See cases infra this note.

[a] **Evidence held admissible.**—Pickler v. Caldwell, 86 Minn. 133, 90 NW 307.

[b] **Worthlessness of medicine used.**—In an action by a physician to recover an agreed fee under a contract to cure defendant "or no pay," where it is shown that defendant refused to submit to treatment, defendant may prove that the medicine used was worthless, and to do so may compel plaintiff, on cross-examination, to testify as to the ingredients of which it was composed. Jonas v. King, 81 Ala. 285, 1 S 591.

18. See cases infra this note.

[a] **Evidence held admissible:** (1) To show duration and quality of treatment of an employee by plaintiff physician, the danger of leaving him without medical care, and whether plaintiff had requested defendant's officials to furnish a surgeon in his place. Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A 278. (2) Actions of station agent, to show how plaintiff physician was induced to begin services to an injured person found on railroad tracks. Dalton v. St. Louis, etc., R. Co., (Mo. A.) 238 SW 523.

[b] **Decree of the industrial accident commission** in a proceeding between an employer and an employee is inadmissible in an action by the physician against the employer for services rendered the injured employee under an express contract. Ferren v. S. D. Warren Co., 124 Me. 32, 125 A 392.

[c] **Separate action by employee for medical expenses.**—In an action by a physician against a store for services to an injured employee, the petition in a suit by the employee against the store, in which she claims a right to recover for medical services which she alleges she paid for, and an instruction in that suit that it appeared she had paid nothing for such services, are incompetent as evidence. Ghio v. Schaper Bros. Mercantile Co., 180 Mo. A. 686, 163 SW 551.

[d] **The employer's liability insurance policy** is properly excluded. Ghio v. Schaper Bros. Mercantile Co., 180 Mo. A. 686, 163 SW 551.

19. See cases infra this note.

[a] **Insurance policy** issued by defendant insurance company to insured is admissible in an action by a physician for services to an employee of insured. Lorie v. Lumbermen's Mut. Casualty Co., (Mo. A.) 8 SW (2d) 81.

[b] **Payment of ambulance, nurse's and hospital bills** by defendant insurance company is inadmissible in evidence in an action by a specialist, to show authority of a physician employed by the company to engage plaintiff, in the absence of a showing that the physician had no express authority to contract such bills. Lorie v. Lumbermen's Mut. Casualty Co., (Mo. A.) 8 SW (2d) 81.

20. Circumstances showing agreement to pay for medical services to another see supra §§ 183–185.

21. See Evidence §§ 1730–1806.

22. See cases infra this section.

[a] **Abandonment of treatment.**—Evidence was held sufficient to warrant a finding that treatment by a physician was not abandoned until the time had expired in which a cure had been guaranteed and the failure of the treatment had been shown. Lyle v. Andalaft, 178 Mo. A. 172, 165 SW 1146.

[b] **Failure successfully to treat.**—In an action on a note executed to a physician on condition that he would effect successful treatment of the eye of defendant's wife, evidence of failure of the treatment was held sufficient to justify a verdict for defendant. Wilson v. Maddox, (Fla.) 121 S 805.

23. Montz v. American Tobacco Co., 1 La. A. (Orleans) 285; Lorie v. Lumbermen's Mut. Casualty Co., (Mo. A.) 8 SW (2d) 81; Kamenoff v. Gammon, 127 NYS 226; Klopp v. Sternberg, 76 Pa. Super. 209. See Meany v. Anglemire, 189 Ill. A. 357.

24. Harrington v. Legge, 171 Wis. 639, 177 NW 865 (promise by a railroad employee to pay personally for an operation performed on him by a surgeon receiving a salary from the railroad for treating its employees).

[a] **For services to another.**—(1) Brother-in-law. Thomas v. Boruff, 26 Cal. A. 684, 148 P 226. (2) Employee. Weinlander v. Volkman, 153 Ill. A. 137; Collins v. Joyce, 146 Minn. 233, 178 NW 503; Girdner v. Myers, (Mo. A.) 259 SW 150; Rosenthal v. Greenberg, 168 NYS 488.

25. Hume v. McCarthy, 8 OntWN 465 (dentist).

26. Boom v. Reed, 69 Hun 426, 23 NYS 421 (veterinary).

27. Merchants' Collection Agency v. Gopcevic, 23 Cal. A. 216, 137 P 609 (finding as to value). See Crowe v. Templeton, 185 Ill. A. 102.

[a] **Held sufficient** to show: (1) Charges were the usual and customary charges for similar services in the same locality. Weinlander v. Volkman, 153 Ill. A. 137. (2) Contract between a physician and an employer for services to an employee for a stated compensation. Montz v. American Tobacco Co., 1 La. A. (Orleans) 285. (3) Knowledge by the person employing a physician of an arrangement that the physician originally employed was to present an entire bill, including the charges of the assisting surgeon. Young v. Buell, 175 Ill. A. 301. (4) Reasonable value of X-ray pictures and surgical dressings. Girdner v. Myers, (Mo. A.) 259 SW 150. (5) Services were rendered gratuitously and without promise or expectation of reward. White v. Bystrom, 109 NYS 820; Perry v. Woodberry, 17 NYS 530.

28. D. C.—American Security, etc., Co. v. Kaveney, 39 App. 223.

Ga.—Hall v. Mooring, 12 Ga. A. 74, 76 SE 759.

Ill.—Moldenhauer v. Moskalczuk, 211 Ill. A. 462.

N. Y.—Bedell v. Malloy, 153 NYS 167.

Philippine.—Jimenez v. Javellana, 6 Philippine 73.

R. I.—Brooks v. Aldrich, 107 A 100.

Que.—Reader v. Calumet Metals Co., 19 RevdeJur 346, 6 DomLR 496.

[a] **Rendered to a third person.**—Gay v. Taylor, 208 Ala. 376, 94 S 473; Brown v. Murrell, (Ark.) 16 SW 478; Fruin v. Glassnap, 97 Conn. 504, 117 A 547; Thomas v. Leavy, 62 Ill. A. 34; Valentine v. Morgan, (Iowa) 222 NW 412; Head v. American Bridge Co., 88 Minn. 81, 92 NW 467; Atchison, etc., R. Co. v. Jones, 9 Nebr. 67, 2 NW 363; MacEvitt v. Maass, 64 App. Div. 382, 72 NYS 158 [aff 33 Misc. 552, 67 NYS 817]; Kamenoff v. Gammon, 127 NYS 226; McBride v. Watts, 12 S. C. L. 384; Feingold v. Lefkovitz, (Tex. Civ. A.) 147 SW 346.

29. [a] **Gratuitous services.**—Prentice v. Ladinski, 81 Misc. 42, 141 NYS 1005.

[b] **Unreasonableness of dentist's charge.**—Black v. Bearden, 167 Ark. 455, 268 SW 27.

[c] **Value of services.**—Johnson v. Jones, 62 Ind. A. 4, 112 NE 830.

30. Cannon v. Minneapolis, etc., R. Co., 136 Minn. 473, 162 NW 355.

31. McIntosh v. Cramb, (Man.) 31 DomLR 788.

[a] **Rendered to third person.**—(1) Adult daughter. McClenahan v. Keyes, 188 Cal. 574, 206 P 454; McClenahan v. Keyes, 65 Cal. A. 467, 224 P 241. (2) Employee. Van Gaasbeck v. U. S. Lace Curtain Mills, 132 App. Div. 595, 116 NYS 776. (3) Husband. Vernagelia v. Cirota, 156 NYS 432.

[b] **Insufficient to show a joint promise** by defendant and person injured to pay for medical services. Swarens v. Amel, (Mo. A.) 296 SW 849.

32. Painter Fertilizer Co. v. Boyd, 93 Fla. 354, 114 S 444; Baker v. Morrison, 204 Ill. A. 429.

[a] **Rendered to third person.**—Norton v. Rourke, 130 Ga. 600, 61 SE 478, 124 AmSR 137, 18 LRANS 173; Swan v. Warner, 197 N. Y. 190, 90 NE 430; McCoy v. Fletcher, 89 App.

account be strictly proved;[33] he may recover by establishing the fact of his habit of keeping correct books of account, and that the account sued upon had been correctly copied from his books;[34] and, where there is evidence that the items in the account were rendered and charged to defendant and were reasonable, it cannot be urged, no objection having been taken, that because the account book was not formally introduced in evidence there is no evidence on which to base a verdict.[35] But evidence that plaintiff practiced in defendant's family, and was seen going and returning from defendant's house, coupled with proof that the items, as charged, were according to customary rules, will not create a legal presumption of indebtedness by defendant.[36]

Qualification and competence. A certificate of the proper public officer, showing due registration by a physician, is prima facie evidence of his right to practice.[37] Evidence that a physician had no license to practice in the county where he rendered services and that he was a resident of another state is sufficient to prove prima facie that he was unlicensed.[38] Testimony by defendant, not a medical expert, that plaintiff physician was incompetent is insufficient to warrant a finding for defendant.[39]

Payment.[40] A receipt "in full for medical services" is prima facie a satisfaction of the claim against the patient;[41] and the presumption of payment in full thus raised is not overcome by expert testimony that the services were worth more than the account receipted for.[42]

[§ 212] **7. Trial[43]—a. Questions for Court or Jury—(1) Questions of Law and Fact in General.** General rules relating to questions of law and fact[44] govern in the trial of controverted issues of fact arising in actions by physicians to recover compensation for services.[45] Questions for the determination of the jury are whether there was an agreement to employ or pay for the services of a physician,[46] and whether the original agreement was superseded by a later one;[47] whether the contract to treat defendant's employees required the physician to treat employees in plants other than the one at which he was located,[48] and whether defendant accepted such services knowing that the physician looked to him for payment, so as to estop him from denying liability;[49] whether the services were intended to be and were accepted as gratuitous;[50] and whether the physician exercised reasonable care and skill in the treatment of his patient.[51] Where there is evidence that another person has an interest in plaintiff's bill for services, the question whether or not plaintiff is the owner of the claim in suit is one of fact.[52] The question as to the authorization of a physician to practice should not be submitted to the jury, where the undisputed testimony shows his compliance with the statutory requirements of the state in which the services were rendered.[53]

Reasonableness of charge. The question as to what is a reasonable charge for services in the absence of an agreement fixing the charge, is one for the jury,[54] or for the court passing upon questions of fact,[55] even though the testimony as to the value is undisputed;[56] but the jury have no right to ignore the testimony as to value and form an independent conclusion.[57]

[§ 213] **(2) Taking Case from Jury; Direction of Verdict.**[58] Where there is no evidence on which to submit to the jury the question whether there was

Div. 623 mem, 85 NYS 1022 mem; Sweeney v. Banham, 191 NYS 186; Abrahams v. Koch, 88 NYS 148; Abram v. Krakower, 84 NYS 529.

33. Hazlip v. Leggett, 14 Miss. 326.

34. Simmons v. Means, 16 Miss. 397; Hazlip v. Leggett, 14 Miss. 326.

35. Girdner v. Myers, (Mo. A.) 259 SW 150.

36. Simmons v. Means, 16 Miss. 397.

37. Trentham v. Waldrop, 119 Ga. 152, 45 SE 988. See Chicago, etc., R. Co. v. Smith, 21 Ill. A. 202 (where plaintiff testified, without objection, that he had practiced since 1872, and that he had a certificate, as required by the state board, and it appeared that his name appeared on the register of physicians in the county clerk's office, it is enough as against defendant, who called him, and thereby recognized his right to practice).

38. Greentown State Bank v. Lawrence, 177 Ind. 515, 96 NE 947, 42 LRANS 326.

39. Feingold v. Lefkovitz, (Tex. Civ. A.) 147 SW 346.

40. See generally Payment §§ 261-266.

41. Danziger v. Hoyt, 120 N. Y. 190, 24 NE 294 (a receipt "in full for his medical services," given by a physician to the patient's mother, at whose request the services were rendered, and who was recognized by the physician as acting in the patient's behalf in making payment, is prima facie a satisfaction of the claim against the patient, although the latter did not authorize the payment).

42. Danziger v. Hoyt, supra.

43. **Generally** see Trial [38 Cyc 1238].

44. See Trial [38 Cyc 1511 et seq].

45. See cases infra notes 46-57.

46. Geiger v. Gillespie, 207 Ala. 528, 93 S 412; Naffziger v. Illbeg, 81 Cal. A. 523, 254 P 276; Morrell v. Lawrence, 203 Mo. 363, 101 SW 571, 120 AmSR 660, 11 AnnCas 650; Ghio v. Schaper Bros. Mercantile Co., 180 Mo. A. 686, 163 SW 551; Hasler v. Ozark Land, etc., Co., 101 Mo. A. 136, 74 SW 465; Willis v. MacDougall, 127 Wash. 330, 220 P 759.

[a] **Evidence held to justify submission to jury.**—Naffziger v. Illbeg, 81 Cal. A. 523, 254 P 276; Dalton v. St. Louis, etc., R. Co., (Mo. A.) 238 SW 523 (authority of railroad claim agent to hire physician); Spicer v. Williamson, 191 N. C. 487, 132 SE 291, 44 ALR 1280; Cheek v. Boyd, (Tex. Civ. A.) 134 SW 252.

[b] **Evidence held insufficient to make a question for jury** whether a contract to pay for services to her adult daughter could be implied against defendant mother. Morfit v. Thompson, 219 Mo. A. 506, 282 SW 113.

47. MacEvitt v. Maass, 64 App. Div. 382, 72 NYS 158.

48. Woodward Iron Co. v. Dabney, 205 Ala. 615, 88 S 873.

49. Woodward Iron Co. v. Dabney, supra.

50. Prince v. McRae, 84 N. C. 674; Huston v. Barstow, 19 Pa. 169.

51. Fincher v. Davis, 27 Ga. A. 494, 108 SE 905; Chislett v. Jaros, 159 Ill. A. 120; Logan v. Field, 75 Mo. A. 594; Berlin v. Miller, 194 NYS 787.

[a] **Evidence held to justify submission to jury.**—Lyle v. Andalaft, 178 Mo. A. 172, 165 SW 1146 (issue as to whether physician was prevented from rendering services necessary to effect a cure by refusal of patient to accept services); Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899; Berlin v. Miller, 194 NYS 787.

52. Sheehy v. Nordyke, (Iowa) 188 NW 882.

53. Feingold v. Lefkovitz, (Tex. Civ. A.) 147 SW 346.

54. Cal.—MacCoy v. Gage, 38 Cal. A. 672, 177 P 296.

Ga.—Marshall v. Bahnsen, 1 Ga. A. 485, 57 SE 1006.

Ill.—Hutchinson v. Nettleton, 175 Ill. A. 277.

Iowa.—Sheehy v. Nordyke, 188 NW 882; Tedrow v. Johnson, 167 Iowa 513, 149 NW 645; Fowle v. Parsons, 160 Iowa 454, 141 NW 1049, 45 LRANS 181.

Mich.—Crumrine v. Austin, 133 Mich. 283, 94 NW 1057.

Mo.—Lorie v. Lumbermen's Mut. Casualty Co., (A.) 8 SW (2d) 81, 87 [cit Cyc].

Nebr.—Cate v. Hutchinson, 58 Nebr. 232, 78 NW 500.

N. Y.—Young v. Lichtenberg, 102 Misc. 154, 168 NYS 616.

Okl.—Eves Tall Chief v. Aaron, 87 Okl. 230, 209 P 915.

"The fair and reasonable value of plaintiff's services . . . was peculiarly a question for the jury." Morfit v. Thompson, 219 Mo. A. 506, 516, 282 SW 113. To same effect Marshall v. Bahnsen, 1 Ga. A. 485, 57 SE 1006; Lorie v. Lumbermen's Mut Casualty Co., (Mo. A.) 8 SW (2d) 81, 87 [cit Cyc].

55. Richter's Est., 11 Pa. Dist. & Co. 485; Imperial v. Alejandre, 14 Philippine 203; Wood v. McMartin, 54 Que. Super. 391.

56. Sheehy v. Nordyke, (Iowa) 188 NW 882; Tedrow v. Johnson, 167 Iowa 513, 149 NW 645; Fowle v. Parsons, 160 Iowa 454, 141 NW 1049, 45 LRA NS 181; Young v. Lichtenberg, 102 Misc. 154, 168 NYS 616.

57. Fowle v. Parsons, 160 Iowa 454, 141 NW 1049, 45 LRANS 181; Wood v. Barker, 49 Mich. 295, 13 NW 597; Ladd v. Witte, 116 Wis. 35, 92 NW 365.

Weight to be given to opinion evidence see Evidence § 823 et seq.

58. **Generally** see Trial [38 Cyc 1563 et seq].

an overcharge, as alleged, it is error to submit it.[59]

Demurrer to evidence is properly overruled where a physician, suing an insurer for services rendered at the request of another physician employed by defendant, testifies, in effect, that he expected to charge and be paid, but was not certain as to defendant's legal liability.[60]

Direction of verdict. Where there is no conflict in the evidence and no question of fact to be submitted to the jury, except as to the reasonable value of the services rendered, there is no error in instructing the jury to return a verdict for the reasonable value.[61] But the direction of a verdict, as a matter of law, for an amount based on the usual charges in the locality is error, the jury not being conclusively bound by such circumstances.[62] The direction of a verdict for plaintiff physician, in a suit on a note given by decedent for his services, is proper where decedent was in full possession of her faculties and acted freely and voluntarily, although it does not appear that she knew what he paid assisting physicians, or what services he performed.[63]

[§ 214] **b. Instructions.** In actions by physicians to recover compensation for services rendered, the general rules as to instructions in civil actions[64] apply.[65] Thus it is the duty of the court to state correctly the legal principles applicable in the particular case.[66] The instructions must conform to the pleadings and the evidence;[67] thus, where malpractice is relied upon as a defense, it is reversible error for the court to refuse to instruct the jury that, if they find as a fact that plaintiff was guilty of malpractice, he cannot recover for such services.[68] An instruction should not be given where there is no evidence before the jury to which it is applicable.[69] An instruction once given need not be repeated.[70]

[§ 215] **8. Review.** A verdict plainly against the evidence will be set aside on appeal.[71] But where the evidence at the trial shows that the bill rendered by a physician was reasonable, a judgment for the amount will be sustained on appeal.[72] Where the evidence is sufficient to raise an inference of malpractice, a verdict for defendant will not be disturbed.[73] Conceding the necessity of proof of due qualification by a physician in an action to recover for his services,[74] the question cannot be raised for the first time in the appellate court.[75]

VI. MEDICAL SOCIETIES[75½]

[§ 216] **A. In General.** Except when and to the extent that it is otherwise provided by particular applicatory statutory provision,[76] the law relating to voluntary associations[77] or to incorporated bodies,[78] as the case may be, applies to a medical society,[79] including its status,[80] its member-

59. Black v. Bearden, 167 Ark. 455, 268 SW 27.

60. Lorie v. Lumbermen's Mut. Casualty Co., (Mo. A.) 8 SW (2d) 81.

61. Eves Tall Chief v. Aaron, 87 Okl. 230, 209 P 915.

62. Lorie v. Lumbermen's Mut. Casualty Co., (Mo. A.) 8 SW (2d) 81.

63. Cole v. Wolfskill, 49 Cal. A. 52, 192 P 549.

64. See Trial [38 Cyc 1594 et seq].

65. See cases infra notes 66–70.

66. See cases infra this note.

[a] **Right to practice.**—(1) In an action for compensation for services rendered in a foreign state, if the facts as to the physician's authorization to practice in that state are in dispute, the court should charge the jury as to the requirements of the laws of that state. Feingold v. Lefkovitz, (Tex. Civ. A.) 147 SW 346. (2) Where plaintiff sues for services as a physician and nurse, not claiming separately for services as a physician, an instruction relating to his proof of license to practice as a physician is erroneous. Byrne v. Panesi, 77 Ill. A. 164.

[b] **Value of services as dependent on benefits.**—An instruction is erroneous which confines the jury, in the determination of the value of the services rendered, to a consideration of the benefits resulting to defendant therefrom. Ladd v. Witte, 116 Wis. 35, 92 NW 365.

[c] **Instructions held proper.**—Hutchinson v. Nettleton, 175 Ill. A. 277 (degree of knowledge, skill, and care required); Bailey v. Yowell, (Mo. A.) 266 SW 324 (liability of father for medical service to son as dependent on whether son was a minor or an adult).

[d] **Instructions held erroneous or properly refused.**—Guild v. Whitlow, 162 Ark. 108, 257 SW 383 (amount recoverable as affected by physician's representation to defendant as to reasonableness of charge agreed upon); Kelty v. Fisher, 101 Or. 110, 199 P 188 (negligence of physician in failing to inform relatives of patient as to patient's true condition and untruthfully informing them that he was not in a dangerous condition).

67. See cases infra this note.

[a] **Instructions held proper or erroneously refused.**—(1) Where defendant, by his failure to file exceptions to the ruling on his demurrer, is estopped to object that plaintiff had no right to practice medicine and collect for professional services, it is not error to instruct that, if plaintiff rendered and defendant accepted the services alleged, plaintiff is entitled to recover their value. Grantham v. Fleming, 13 Ga. A. 184, 78 SE 1113. (2) Where the defense is an arrangement with plaintiff physician by which he was to be paid by an insurance company for first aid to defendant's employees, and there is evidence that he requested payment of the insurance company, an instruction submitting to the jury the question of such arrangement is improperly refused. Ghio v. Schaper Bros. Mercantile Co., 180 Mo. A. 686, 163 S W 551.

[b] **Instructions held erroneous or properly refused.**—(1) The giving of an instruction holding defendant liable for the services of a consultant, if called in by the attending physician, is erroneous, where there is nothing in the pleadings or proofs to warrant it. Schrader v. Hoover, 87 Iowa 654, 54 NW 463. (2) Where defense is made on the theory that the services were worthless, there is no error in not instructing the jury on the subject of partial failure of consideration. Hinkle v. Burt, 94 Ga. 506, 19 SE 828. (3) In an action for services rendered defendant's adult son at defendant's request, and on his promise to pay therefor, based on services distinct from any rendered solely on the son's credit, an instruction requiring the jury to find that the agreement was made before rendition of any services for the son is properly refused. Mitchell v. Davis, (Mo. A.) 190 SW 357. (4) Where, by other instructions, the jury are restricted to the authority of a railroad claim agent to bind the railroad company by the employment of a physician, an instruction as to the authority of a station agent is properly refused. Dalton v. St. Louis, etc., R. Co., (Mo. A.) 238 SW 523.

Applicability of instructions to pleadings or evidence generally see Trial [38 Cyc 1612].

68. Abbott v Mayfield, 8 Kan. A. 387, 56 P 327; Vandenberg v. Slagh, 150 Mich. 225, 114 NW 72.

69. Schrader v. Hoover, 87 Iowa 654, 54 NW 463; Hertel v. Cuba, 186 Mo. A. 190, 171 SW 565.

[a] **Instructions held not warranted by evidence.**—Schrader v. Hoover, 87 Iowa 654, 54 NW 463 (liability of defendant for services of consultant called in by attending physician); Hertel v. Cuba, 186 Mo. A. 190, 171 SW 565 (limitation on amount of services which defendant agreed to pay for).

70. McKnight v. Detroit, etc., R. Co., 135 Mich. 307, 97 NW 772.

71. Wheaton v. Johnson, 55 Ill. A. 53.

[a] **Thus,** where the rendition of the services and the value thereof were not disputed, the only question raised being whether they were performed under an express contract to pay a certain sum therefor, a verdict for defendant will be reversed on appeal. Wheaton v. Johnson, 55 Ill. A. 53.

72. Salindon v. Zamora, 18 Philippine 401.

73. Brinkman v. Kursheedt, 84 NYS 575.

74. See supra § 204.

75. Durand v. Grimes, 18 Ga. 693; Dorion v. Jacobson, 113 Ill. A. 563; Hudson v. Madison, 75 Ill. A. 442.

75½. Official medical boards see supra §§ 56–61.

76. See statutory provisions.

[a] **"Association" and "society"** may be used in the statutes as convertible terms. New York County Medical Assoc. v. New York City, 32 Misc. 116, 65 NYS 531.

[b] **Right to proceeds of fines.**—By statute a medical society may be entitled to receive fines made available by reason of a conviction for practicing medicine unlawfully. New York County Medical Assoc. v. New York, 32 Misc. 116, 65 NYS 531 (construing L. [1895] c 398 § 153).

77. See Associations 5 C. J. p 1330; Beneficial Associations 7 C. J. p 1048; Clubs 11 C. J. p 921.

78. See Corporations 14 C. J. p 1. See also Associations 5 C. J. p 1330; Beneficial Associations 7 C. J. p 1048; Clubs 11 C. J. p 921.

79. See infra this section; and §§ 217–220.

80. See cases infra this note.

ship,[81] its officers,[82] its powers, duties, and liabilities,[83] its laws, rules, and regulations,[84] and the propriety and right of judicial interference with its actions and functions.[85]

[§ 217] **B. Membership—1. In General.** In accord with rules elsewhere stated,[86] a medical society may adopt by-laws or rules regulating the admission, conduct, discipline, expulsion, suspension, and reinstatement of its members.[87] But this power, even when conferred by statute,[88] is not an arbitrary or unlimited power;[89] the rules must be reasonable[90] and adapted to the purposes of the society,[91] and they cannot be made contrary to, or inconsistent with, the laws of the state.[92] On admission to membership in a society, the member assumes an obligation to conform to the rules and regulations of the society;[93] but these rules and regulations are obligatory on members alone,[94] and nonobservance previous to membership furnishes no legal cause either for exclusion or expulsion.[95]

[§ 218] **2. Termination—a. Expulsion or Suspension.** In accord with principles elsewhere stated,[96] a society may, permanently by expulsion[97] or tem-

[a] **In Alabama** the state medical association is a quasi-public corporation. Parke v. Bradley, 204 Ala. 455, 86 S 28.

[b] **In New Jersey** the state dental society is a public corporation Wilson v. Thompson, 83 N. J. L. 57, 83 A 502 (P. L. [1873] p 932 and P. L. [1898] p 120 § 2, amended by P. L. [1901] p 395 § 2).

[c] **In New York,** under 3 Rev. St. (1813) p 304, county medical societies were "bodies corporate." Fawcett v. Charles, 13 Wend. 473.

81. See infra §§ 217-221.

82. See cases infra this note.

[a] **Manner and place of election.**—Peo. v. Grant, 208 Ill. A. 235 (Corporation Act §§ 31, 32; Jones & A. pars 2449, 2450).

[b] **In New Jersey executive officers of the state dental society** are public officers. Wilson v. Thompson, 83 N. J. L. 57, 83 A 502.

83. See cases infra this note.

[a] **In Alabama** the state medical association as a quasi-public corporation is charged with duties and responsibilities which it cannot evade. Parke v. Bradley, 204 Ala. 455, 86 S 28.

[b] **In New Jersey** the state dental society as a public corporation has the power of appointing members of the state board of dentistry. Wilson v. Thompson, 83 N. J. L. 57, 83 A 502.

[c] **In New York** the powers of a society as affected by L. (1806) c 138, L. (1866) c 445, and L. (1909) c 49, are stated in Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev 70 Misc. 615, 130 NYS 1024].

84. D. C.—Bryant v. District of Columbia Dental Society, 26 App. 461.

Mass.—Gregg v. Massachusetts Medical Soc., 111 Mass. 185, 15 AmR 24.

Minn.—Penhall v. Minnesota State Medical Assoc., 126 Minn. 323, 148 NW 472; Miller v. Hennepin County Medical Soc., 124 Minn. 314, 144 NW 1091, 50 LRANS 579.

Mo.—State v. St. Louis Medical Society, 91 Mo. A. 76.

N. Y.—Peo. v. Erie County Medical Soc., 32 N. Y. 187; Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev 70 Misc. 615, 130 NYS 1024]; Peo. v. Dutchess County Medical Soc., 84 Hun 448, 32 NYS 415; Peo. v. Erie County Medical Soc., 24 Barb. 570; Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem]; Peo. v. New York Medical Soc., 3 Wend. 426.

Tex.—Brown v. Harris County Medical Soc., (Civ. A.) 194 SW 1179.

Sask.—In re Carefoot, 20 Sask. L. 202, [1926] 1 DomLR 236, [1926] 1 WestWkly 49, 45 CanCrCas 52.

85. See infra § 221.

86. See Associations § 25; Beneficial Associations § 29; Corporations § 445 et seq.

87. D. C.—Bryant v. District of Columbia Dental Soc., 26 App. Cas. 461.

Mass.—Gregg v. Massachusetts Medical Soc., 111 Mass. 185, 15 AmR 24.

Minn.—Miller v. Hennepin County Medical Soc., 124 Minn. 314, 144 NW 1091, 50 LRANS 579.

Mo.—State v. St. Louis Medical Society, 91 Mo. A. 76.

N. Y.—Peo. v. Erie County Medical Soc., 32 N. Y. 187 [aff 25 HowPr 333]; Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev on other grounds 70 Misc 615, 130 NYS 1024]; Reid v. Oneida County Medical Soc., 156 NYS 78([aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

Tex.—Brown v. Harris County Medical Soc., (Civ. A.) 194 SW 1179.

[a] **Even without express statutory authority** to do so, a society organized for the advancement of the profession and the promotion of social intercourse and kindly feeling among its members may make by-laws. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461; State v. St. Louis Medical Society, 91 Mo. A. 76; Brown v. Harris County Medical Soc., (Tex. Civ. A.) 194 SW 1179.

[b] **Eligibility.**—(1) Every physician and surgeon may be made eligible for membership. Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886] (L. [1806] c 138). (2) Where a physician having a clear presumptive title claims admission to the society, the right of immediate expulsion should be clear and unquestioned, to justify the rejection of the claim. Peo. v. Erie County Medical Soc., 32 N. Y. 187 [aff 25 HowPr 333].

[c] **Initiation fee.**—Peo. v. New York Medical Soc., 3 Wend. (N. Y.) 426.

[d] **Validity and construction of particular statute.**—Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev. 70 Misc. 615, 130 NYS 1024] (L. [1866] c 445, amending L. [1806] c 138).

88. See statutory provisions.

89. See cases infra notes 90-92. See also Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886] (society is not endowed with punitive powers of state).

90. State v. St. Louis Medical Soc., 91 Mo. A. 76; Peo. v. Erie County Medical Soc., 24 Barb. (N. Y.) 570.

[a] **Rule fixing a tariff of fees** for medical services was void, as being unreasonable and against public policy. Peo. v. Erie County Medical Soc., 24 Barb. (N. Y.) 570.

91. Peo. v. Erie County Medical Soc., 32 N. Y. 187; Peo. v. Erie County Medical Soc., 24 Barb. (N. Y.) 570. See Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886].

[a] **By-laws are limited in their scope** to the range of moral obligation, but may embrace express rules of conduct in personal, professional, and public relations. Peo. v. Erie County Medical Soc., 32 N. Y. 187 [aff 25 HowPr 333].

92. Peo. v. Erie County Medical Soc., 24 Barb. (N. Y.) 570.

93. Ewald v. New York County Medical Soc., 144 App. Div. 82, 89, 128 NYS 886 [rev on other grounds 70 Misc. 615, 130 NYS 1024]; Brown v. Harris County Medical Soc., (Tex. Civ. A.) 194 SW 1179.

94. People v. Erie County Medical Soc., 32 N. Y. 187 [aff 25 HowPr 333].

95. Peo. v. Erie County Medical Soc., supra [dist Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 (holding that the medical society of the county of New York had jurisdiction to try a member on charges which, if proved, would show that he had committed acts affecting the dignity, character, and interests of the profession, the society, and its members, although the acts did not directly involve the relations of the member to the society).

96. See Associations §§ 68-85; Beneficial Associations §§ 58-69; Clubs §§ 18-24; Corporations §§ 1280-1282.

97. D. C.—Bryant v. District of Columbia, 26 App. 461.

Mass.—Gregg v. Massachusetts Medical Soc., 111 Mass. 185, 15 AmR 24.

Minn.—Miller v. Hennepin County Medical Soc., 124 Minn. 314, 144 NW 1091, 50 LRANS 579.

Mo.—State v. St. Louis Medical Soc., 91 Mo. A. 76.

N. Y.—Peo. v. Erie County Medical Soc., 32 N. Y. 187 [aff 25 HowPr 333]; Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev on other grounds 70 Misc. 615, 130 NYS 1124]; Peo. v. Dutchess County Medical Soc., 84 Hun 448, 32 NYS 415; Reid v. Oneida County Medical Soc., 156 NYS 780 [transf 176 App. Div. 899 mem, 162 NYS 1141 mem (aff 177 App. Div. 939 mem, 163 NYS 1129 mem)]; Fawcett v. Charles, 13 Wend. 473.

Tex.—Brown v. Harris County Medical Soc., (Civ. A.) 194 SW 1179.

Sask.—Re Carefoot, 20 Sask. L. 202, [1926] 1 DomLR 236, [1926] 1 WestWkly 49, 45 CanCrCas 52.

[a] **Incorporated society** may have the power to expel its members as an incident to its constitution. Fawcett v. Charles, 13 Wend. (N. Y.) 473 (a county medical society could not, in the absence of an authorizing statute or by-law, expel, however, a member because he did not possess the requisite qualifications and obtained his admission by false pretenses).

[b] **Acquittal in criminal prosecution** for the same misconduct does not prevent the society from expelling a member therefor. Miller v. Hennepin County Medical Soc., 124 Minn. 314, 144 NW 1091, 50 LRANS 579 (where the by-laws of a voluntary association provided for the trial and punishment of a member for misconduct).

[c] **Conviction in a criminal prosecution** may be a condition precedent to expulsion by the society in some cases. Fawcett v. Charles, 13 Wend. (N. Y.) 473 (an incorporated society was held powerless to expel a member without a previous conviction or indictment in a criminal court for the offense charged, except where the offense relates merely to the official or corporate character of accused, and amounts to a breach of the conditions expressly or tacitly annexed to his franchise or office).

Injunction against expulsion see

porarily by suspension,[98] terminate membership in the society.

Investigation and hearing of charges.[99] General principles elsewhere stated[1] govern the procedure to be followed on seeking to expel or suspend a member.[2] Expulsion or suspension is in the nature of a judicial act following the investigation and hearing of the charges.[3] A member of a society whose by-laws provide for investigation before his expulsion is entitled to a fair trial before the proper tribunal.[4] The proceedings are not required to be as formal and technical as a trial at law;[5] it is sufficient if the constitution and by-laws are substantially observed,[6] notice given to accused,[7] and judgment pronounced from proper motives and in good faith.[8] The burden of proving the charges rests on the accusers.[9]

[§ 219] **b. Resignation.** In accord with general principles elsewhere stated,[10] membership may be terminated by the resignation or voluntary withdrawal of a member from the society.[11]

[§ 220] **c. Reinstatement.** Pursuant to principles elsewhere stated,[12] the reinstatement of an expelled or suspended member may be had in the circumstances and in the manner provided for by statute or by-law, if any, regulating the matter.[13]

[§ 221] **C. Judicial Interference.** With respect to interference by the courts with the internal affairs of a medical society, principles elsewhere stated[14] apply.[15] Whether or not a member has violated a by-law providing for expulsion or suspension is a question for the society to determine;[16] and courts cannot review the action taken by the society,[17] to prevent expulsion or suspension[18] or to compel reinstatement,[19] except where its authority has been transcended,[20] where fraud or injustice has been perpetrated,[21] or where authorized by

infra § 221.

98. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev on other grounds 70 Misc. 615, 120 NYS 1024].

[a] **Effect of suspension is to forbid** the suspended member from exercising rights and privileges of membership. Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886].

99. Judicial interference see infra § 221.

1. See Associations §§ 73–77; Beneficial Associations §§ 61–67; Clubs §§ 20, 21; Corporations §§ 1281, 1282.

2. See cases infra notes 3–9.

3. Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886].

4. Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

[a] **Expulsion was not justified** where accused's evidence refuting the charges was not considered and he was given no opportunity to secure further evidence. Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

[b] **Reference to committee.**—(1) where a by-law requires charges to be referred to a committee on ethics to be investigated and report made, the adoption of report of committee on expulsion makes the action that of the society and not of the committee. State v. St. Louis Medical Soc., 91 Mo. A. 76 (it is lawful for a society to vest such power in a committee). (2) When referred to a committee, the evidence on which the charges are held need not be submitted to the whole society. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461.

5. State v. St. Louis Medical Soc., 91 Mo. A. 76.

6. State v. St. Louis Medical Soc., supra; Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

[a] **Necessity of formal charge in writing.**—Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

7. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461; State v. St. Louis Medical Soc., 91 Mo. A. 76; Brown v. Harris County Medical Soc., (Tex. Civ. A.) 194 SW 1179.

[a] **Opportunity to be heard.**—Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461.

8. State v. St. Louis Medical Soc., 91 Mo. A. 76.

Judicial interference in case of bad faith see infra § 221.

9. Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

[a] **Thus,** where a member was accused of unprofessional conduct by securing the publication of articles contrary to the tenets of the society, the burden was upon the accusers to show at least by colorable evidence that he procured the publication. Reid v. Oneida County Medical Soc., 156 NYS 780 [transf 176 App. Div. 899 mem, 162 NYS 1141 mem, and aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

10. See Associations § 67; Beneficial Associations § 56; Clubs § 17; Corporations § 1279.

11. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev on other grounds 70 Misc. 615, 130 NYS 1024].

[a] **Necessity of writing.**—Ewald v. New York Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev on other grounds 70 Misc. 615, 130 NYS 1024].

[b] **Acceptance of resignation** (1) is not necessary in the absence of any statute, rule, or law to the contrary. Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886]. (2) But acceptance may be required. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev 70 Misc. 615, 130 NYS 1024]. (3) A by-law which provides that no resignation shall be accepted from a member owing dues or assessments implies that the resignation of a member who does not owe dues or assessments shall be accepted (Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886]), (4) but not, of course, when he is in arrears (Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886]). (5) Under the act of 1806 (2 Rev. L. [1813] c 94), a society had the power to adopt a by-law forbidding the acceptance of a resignation of any member while under charges. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev 70 Misc. 615, 130 NYS 1024]. (6) Charges were filed against a member for misconduct, but a copy of them was not served on him at the time, because he was then under suspension for another offense. Later his suspension was remitted, and he was restored to good standing, whereupon he immediately tendered his resignation. Three days thereafter a copy of the charges was served on him, with a notice of hearing. It was held that he was under charges when he attempted to resign within a by-law of the society prohibiting acceptance of the resignation of any member under charges. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev 70 Misc. 615, 130 NYS 1024].

[c] **Reference to committee for consideration.**—Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886.

[d] **Effect of resignation** is to sever all connection with the society. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev 70 Misc. 615, 130 NYS 1024].

12. See Associations §§ 80–85; Beneficial Associations § 69; Clubs § 24.

13. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev on other grounds 70 Misc. 615, 130 NYS 1024].

[a] **Reinstatement not justified.**—A society whose constitution provides as a qualification for membership "good moral and professional standing" may not restore to full membership one suspended for conviction of conduct that would disqualify him from membership for the sole purpose of expelling him for similar offenses. Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886].

Compelling reinstatement see infra § 221.

14. See Associations §§ 78, 81–85, 101; Beneficial Associations §§ 80–85; Clubs § 22; Corporations § 1278 et seq.

15. See cases infra notes 16–23.

16. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461; Gregg v. Massachusetts Medical Soc., 111 Mass. 185, 15 AmR 24; and cases infra notes 17–23.

17. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461; Gregg v. Massachusetts Medical Soc., 111 Mass. 185, 15 AmR 24; State v. St. Louis Medical Soc., 91 Mo. A. 76.

18. Gregg v. Massachusetts Medical Soc., 111 Mass. 185, 15 AmR 24.

[a] **Injunction refused.**—Gregg v. Massachusetts Medical Soc., 111 Mass. 185, 15 AmR 24.

19. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461; State v. St. Louis Medical Soc., 91 Mo. A. 76; Peo. v. Dutchess County Medical Soc., 84 Hun 448, 32 NYS 415.

[a] **Certiorari denied.**—Peo. v. Dutchess County Medical Soc., 84 Hun 448, 32 NYS 415.

20. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461; Peo. v. Erie County Medical Soc., 32 N. Y. 187; Peo. v. Dutchess County Medical Soc., 84 Hun 448, 32 NYS 415; Ewald v. New York County Medical Soc., 70 Misc. 615, 130 NYS 1024 [rev on other grounds 144 App. Div. 82, 128 NYS 886].

[a] **Mandamus** may lie. Peo. v. Erie County Medical Soc., 32 N. Y. 187; Peo. v. Erie County Medical Soc., 24 Barb. (N. Y.) 570. See also Associations § 82; Mandamus § 447.

21. Bryant v. District of Columbia Dental Soc., 26 App. (D. C.) 461; State v. St. Louis Medical Soc., 91 Mo. A. 76; Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem]; Brown v. Harris County Medical Soc., (Tex. Civ. A.) 194 SW 1179. See also As-

statute to do so.[22] In any event, a member of a voluntary association must resort to and exhaust the remedies provided for by the association before he can apply to a court for relief.[23]

[§ 222] **D. Obligation To Defend against Malpractice Claims.** In adopting by-laws,[24] a medical society may provide for defending claims made against its members for malpractice,[25] and the duty to defend in such cases has been held mandatory[26] on proper application made to the society to defend.[27]

Failure to defend. In an action against a medical society for failure to defend plaintiff against malpractice claims, the burden is on defendant to prove that plaintiff's demand for aid involved a claim on which he was not entitled to aid.[28]

***PHYSIOLOGY.** The science of the functions of all the different parts and organs of animals and plants, the offices they perform in the economy of the individual, their properties, etc.[1]

PIANO.[2] The short and commonly used name for pianoforte.[3]

Electric piano.[4] A pianoforte whose wires are set in vibration by electromagnets instead of by hammers.[5]

PIANOFORTE.[6] A musical instrument of the percussive group, the tones being produced by blows of hammers upon stretched strings, and the hammers being operated from a keyboard.[7]

PIAZZA.[8] A veranda; a gallery.[9]

PICCAGE.[10] In English law, a term applied where the liberty of erecting a stall in a market is secured and the soil is broken in erecting the same.[11]

PICE. A word that cannot be construed as meaning "piece."[12]

PICK.[13] Select.[14]

Pick at. To worry or set upon.[15]

Picking pockets.[16] The act of thieves in stealing by cutting off pockets and removing them, or by cutting them open so as to expose their contents, or by thrusting the hands into them;[17] a term in popular language describing theft from the person.[18]

sociations § 82; Mandamus § 447; and generally Injunctions 32 C. J. p 1.

[a] **Injunction against expulsion.**—Brown v. Harris County Medical Soc., (Tex. Civ. A.) 194 SW 1179.

[b] **Injunction premature.**—Plaintiff was suspended for misconduct and afterward reinstated, and two days thereafter tendered his resignation, which was not accepted, and three days after the tender he was served with a notice of charges filed against him, and that a meeting would be held to consider them. If plaintiff was still a member, his suit against the society to restrain them from trying him on such charges was premature. Ewald v. New York County Medical Soc., 144 App. Div. 82, 128 NYS 886 [rev 70 Misc. 615, 130 NYS 1024].

[c] **Mandamus to reinstate.**—Reid v. Oneida County Medical Soc., 156 NYS 780 [aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

[d] **Consideration of evidence.**—Although the court, in an action to compel the reinstatement of a member of a medical society, alleged to have been wrongfully expelled, cannot weigh the evidence presented against a member preliminary to his expulsion, it may say whether there was any evidence against him, and, if there was none, correct the action. Reid v. Oneida County Medical Soc., 156 NYS 780 [transf 176 App. Div. 899 mem, 162 NYS 1141 mem, and aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

[e] **State medical society is not a proper defendant** in an action for reinstatement of a member of the county society, which had wrongfully expelled him, where by membership in the county organization he was also a member of the state organization, and the only action taken in the expulsion by the state organization was to review the decision of the county organization. Reid v. Oneida County Medical Soc., 156 NYS 780 [transf 176 App. Div. 899 mem, 162 NYS 1141 mem, and aff 177 App. Div. 939 mem, 163 NYS 1129 mem].

22. See statutory provisions. See also supra § 89.

[a] **In Ontario** an appeal to the court is permitted from a decision removing a name from the society's register. Re Crichton, 13 Ont. L. 271, 8 OntWR 841.

[b] **In Saskatchewan,** where an appeal is permitted, the court will not interfere with the exercise of the discretion of the society, where there is ample evidence to support the ruling. Re Carefoot, 20 Sask. L. 202, [1926] 1 DomLR 236, [1926] 1 West Wkly 49, 45 CanCrCas 52.

23. Peo. v. Dutchess County Medical Soc., 84 Hun 448, 32 NYS 415; Brown v. Harris County Medical Soc., (Tex. Civ. A.) 194 SW 1179. See also Associations § 83.

[a] **Thus** a member of the medical society of a county who is expelled cannot resort to a court of law for relief until he has appealed to the state medical society, where such a method of procedure is provided for. Peo. v. Dutchess County Medical Soc., 84 Hun 448, 32 NYS 415.

24. Right to adopt by-laws generally see supra §§ 216, 217.

25. Penhall v. Minnesota State Medical Assoc., 126 Minn. 323, 148 NW 472.

[a] **Includes claims** arising prior to the adoption of the by-law where the only exceptions stated related to causes of action antedating membership in the association. Penhall v. Minnesota State Medical Assoc., 126 Minn. 323, 148 NW 472.

26. Penhall v. Minnesota State Medical Assoc., 126 Minn. 323, 148 NW 472.

[a] **Mere arbitrary discretion** is not permitted. Penhall v. Minnesota State Medical Assoc., 126 Minn. 323, 148 NW 472.

27. Penhall v. Minnesota State Medical Assoc., supra.

[a] **Application to secretary.**—Where the member made due application to the association's secretary as prescribed by the by-laws, he was not required to apply to the association's council. Penhall v. Minnesota State Medical Assoc., 126 Minn. 323, 148 NW 472.

[b] **New notice of second suit** after dismissal of first suit for the same claim is not necessary. Penhall v. Minnesota State Medical Assoc., 126 Minn. 323, 148 NW 472.

28. Penhall v. Minnesota State Medical Assoc., supra.

1. In re Hunter, 60 N. C. 372.

2. See Pianoforte post.

Piano as:

Furniture see 27 C. J. p 933 text and note 63.

Household furniture under exemption laws see Exemptions § 67 text and notes 1–9.

Household goods see Goods 28 C. J. p 728 note 77.

3. Nordlinger v. U. S., 24 App. (D. C.) 406, 410, 70 LRA 227 ("it is the name of a class of which several kinds are mentioned, among them cabinet, cottage, grand, pedal, square, upright, and electric pianos").

[a] **A musical instrument** answering the general definition belongs to the class called "piano." Nordlinger v. U. S., 24 App. (D. C.) 406, 411, 70 LRA 227.

4. "Electric" see 20 C. J. p 302.

5. Century D. [quot Nordlinger v. U. S., 24 App. (D. C.) 406, 410, 70 LRA 227].

[a] **"Auto-electric piano."**—Nordlinger v. U. S., 24 App. (D. C.) 406, 410, 70 LRA 227.

6. See Piano ante.

7. Century D. [quot Nordlinger v. U. S., 24 App. (D. C.) 406, 410, 70 LRA 227].

8. See Porch [31 Cyc 916]. See also Building 9 C. J. p 683 note 70 [i]; Dwelling or Dwelling House 19 C. J. p 843 note 7 [b] (19).

9. Century D. See Henry v. State, 39 Ala. 679, 681; Reardon v. Murphy, 163 Mass. 501, 40 NE 854.

10. See Stallage [36 Cyc 814].

11. Draper v. Sperring, 10 C. B. N. S. 112, 123, 100 ECL 112, 142 Reprint 392; Maydenhead's Case, Palm. 76, 81 Reprint 986.

12. Cheney Bigelow Wire Works v. Sorrell, 142 Mass. 442, 8 NE 332.

[a] **"Please send us pice of counter screen like draft."**—Such words appearing on a post card were said to present "a case of incurable uncertainty; and the court properly refused to submit it to the jury to determine whether the letters 'pice' meant 'piece' or 'price.' These letters do not mean anything, and neither the court nor the jury can construe them as meaning 'piece.'" Cheney Bigelow Wire Works v. Sorrell, 142 Mass. 442, 8 NE 332.

"Piece" see post.

13. See Picker post.

14. See Labbe v. Corbett, 69 Tex. 503, 507, 6 SW 808 ("picked ewes" means "selected ewes").

"Select" see [35 Cyc 1373].

15. Webster New Int. D.

[a] **"Picking at her."**—Denton v. State, 46 Tex. Cr. 193, 195, 79 SW 560.

"Set upon" see [35 Cyc 1446].

"Worry" see [40 Cyc 2863].

16. See Pickpocket post.

Picking pockets:

As larceny or robbing see Larceny § 63 text and notes 99, 1.

Sufficiency of indictment for see Larceny § 355 notes 64 [c] and [d].

"Pocket" see [31 Cyc 893].

17. State v. Wilson, 30 Conn. 500, 504.

18. Rex v. Morgan, 2 Ont. L. 413, 415 [app dism 3 Ont. L. 356, 5 CanCrCas 272]. See State v. Wilson,

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*By WILLIAM QUINBY DEFUNIAK (Physiology-Piloto inclusive except the Spanish words and phrases).

PICKER.[19] A tool or apparatus used in different manufacturing processes involving picking of some sort.[20]

Depressing pickers or droppers. In an automatic circular knitting machine the pickers which depress the needles.[21]

Elevating or lifting pickers. In an automatic circular knitting machine the pickers which raise the needles.[22]

Picker machine. A circular knitting machine in which the needles are shifted automatically by "pickers" instead of by hand.[23]

PICKET.[24]

PICKETING.[25]

PICKING POCKETS.[26]

PICKLED.[27] Preserved in pickle.[28]

Pickled herrings. Herrings preserved in a brine of vinegar, salt, and spices.[29]

PICKLES.[30] Some article of food preserved in pickle; usually (pl.) vegetables (as cabbage, cauliflower, onions, cucumbers, walnuts, mangoes, etc.) pickled and eaten as a relish.[31]

PICKPOCKET.[32] A thief, one who in a crowd or in other places steals from the pockets or person of another without putting him in fear.[33]

PICNIC. A word which implies in its usual and broad signification a mere pleasure trip.[34]

PICO.[35]

PICTORIAL.[36] Expressed or depicted in pictures; consisting of pictures or of pictured symbols.[37]

PICTUM.[38]

PICTURA.[39]

PICTURE.[40] Derived from the Latin "pingere," "pictum," to paint, and synonymous with the Latin word "pictura;"[41] one of the ways of representing a person or thing;[42] that which is painted, a likeness drawn in colors—hence any graphic representation.[43]

PICTURE BRIDE. A woman engaged by correspondence for a marriage to take place upon her admission to this country.[44]

PIECE.[45] A portion or fragment of some larger quantity.[46]

Piece of land.[47] A piece of property;[48] a small portion of land.[49]

Piece of property.[50] A piece of land.[51]

Other phrases: "In the piece,"[52] "pieces of

30 Conn. 500, 504 (this design may be furthered by directing or engrossing the attention of the victim, such as gathering around him in a crowd, or jostling him, or creating in some way confusion or alarm while the pocket or its contents are being secured).

19. See Pick ante.

20. Century D.

[a] **"Sill step" distinguished.—machines** the means by which the needles are shifted. This designation results from the use by the operators of the old machines of a pick or hook to raise the needles. Mayo Knitting Mach., etc., Co. v. E. Jenckes Mfg. Co., 133 Fed. 527, 529, 66 CCA 503.

[b] **In a carpet manufactory** a machine for separating wool "composed of a rotative cylinder with a number of projections—sharp steel projections—that come in contact with wool that is fed between two rollers, and that take the stock of wool from the apron. And while the rollers are holding it these flying projections of steel tear it apart and cause it to become disintegrated, so that it follows in the course of the manufacture." Creachen v. Bromley Bros.' Carpet Co., 209 Pa. 6, 7, 57 A 1101.

[c] **In cotton mills** a machine for the purpose of cleaning motes of the small quantity of cotton still attached thereto. Washington Mills v. Cox, 157 Fed. 634, 636, 85 CCA 154. "Motes" see 42 C. J. p 455.

21. Mayo Knitting Mach., etc., Co. v. E. Jenckes Mfg. Co., 133 Fed. 527, 529, 66 CCA 503.

22. Mayo Knitting Mach., etc., Co. v. E. Jenckes Mfg. Co., supra.

23. Mayo Knitting Mach., etc., Co. v. E. Jenckes Mfg. Co., supra.

24. See Injunctions § 261 note 51 [b].

25. See Injunctions § 261.

Picketing:
Civil liability for see Conspiracy § 140.
Criminal liability for see Conspiracy § 70.
Enjoining picketing see Injunctions §§ 261–275.

26. See Pick ante text and notes 17, 18.

27. See Pickles post.

28. Century D.

[a] **"Pickled capers."**—S. S. Pierce Co. v. U. S., 176 Fed. 440, 441.

[b] **"Pickled nuts."**—U. S. v. Acker, 171 Fed. 77, 78, 96 CCA 181; Microutsicos v. U. S., 2 Cust. A. 342, 345, 346.

[c] **Pickled peppers.**—Microutsicos v. U. S., 2 Cust. A. 342, 343.

29. Hausen v. Robertson, 29 Fed. 686, 687.

30. See Pickled ante.

31. Murray New Eng. D. [quot Microutsicos v. U. S., 2 Cust. A. 342, 344].

32. See Pick ante text and notes 17, 18.

33. Bouvier L. D. [quot State v. Dunn, 66 Kan. 483, 484, 71 P 811].

"Many thieves can stand right before your face and talk to you and at the same time pick your pocket, and you never suspect it. It is a sleight of hand that seems to be peculiar." Pullman Car Co. v. Gardner, 3 Pennyp. (Pa.) 78, 82, 29 AlbLJ 8.

"Thief" see [38 Cyc 283].

34. Dugan v. State, 125 Ind. 130, 133, 25 NE 171, 9 LRA 321.

35. See Gaming § 25.

36. See Picture post.

37. Century D.

[a] **"Pictorial illustrations"** as including chromolithographs see Bleisten v. Donaldson Lithographing Co., 188 U. S. 239, 251, 23 SCt 298, 47 L. ed. 460. "Chromolithograph" see 11 C. J. p 761; "Illustration" see 31 C. J. p 244.

Pictorial illustration as subject of copyright see Copyright and Literary Property § 119.

38. See Picture post text and note 41.

39. See Picture post text and note 41.

40. See Painting 46 C. J. p 1170; Photograph ante; Portrait [31 Cyc 920]. And see Pictorial ante.

Picture:
As evidence see Evidence §§ 1115–1125.
As subject of copyright see Copyright and Literary Property §§ 114–117, 119.
Common-law rights in see Copyright and Literary Property § 17.
Obscene see Obscenity §§ 16, 18–22.
Painting as a see 46 C. J. p 1170 text and notes 67–73.
What constitutes publication of see Copyright and Literary Property § 50.

"Family pictures" see Family § 6 text and note 35.

41. Webster D. [quot Parton v. Prang, 18 F. Cas. No. 10,784, 3 Cliff. 537, 544].

42. Atkinson v. Doherty, 121 Mich. 372, 381, 80 NW 285, 80 AmSR 507, 46 LRA 219.

[a] **As used in a statute** forbidding the unauthorized use of the picture of a living person for advertising or trade purposes, it means not only a photograph but any representation of such person. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, 1110, LRA1915C 839, AnnCas 1915B 1024.

43. Webster D. [quot Parton v. Prang, 18 F. Cas. 10,784, 3 Cliff. 537] (where the term is distinguished from "manuscripts").

[a] **As including paintings, drawings, and sketches.**—Com. v. Glover, 132 Ky. 588, 116 SW 769, 774.

[b] **A "negative"** is a picture. Peo. v. Ketchum, 103 Mich. 443, 445, 61 NW 776, 50 AmSR 383, 27 LRA 448. "Negative" see 45 C. J. p 603.

[c] **"Silver, bric-a-brac and pictures."**—In re Kellogg, 214 N. Y. 460, 463, 108 NE 844, AnnCas1916D 1298.

"Manuscript" see 38 C. J. p 990.

44. Matter of Tome Tanno, 4 Hawaii Fed. 266, 267.

45. See Fraction 26 C. J. p 1003; Moiety 40 C. J. p 1488; Parcel 46 C. J. p 1178; Part 46 C. J. p 1384; Portion [31 Cyc 919].

"Bailpiece" see Bail § 4.

46. Josh v. Josh, 5 C. B. N. S. 454, 466, 94 ECL 454, 141 Reprint 185.

[a] **Identifying separate article.**—"Piece" as used in a writing limiting the responsibility of a warehouse to a certain amount for each piece or package stored means an individual article with separate identity, and not a concealed portion contained in a whole. Rapp v. Washington Storage Warehouse, etc., Co., 75 Misc. 16, 134 NYS 855, 858.

47. **"Land"** see 35 C. J. p 933.

48. Held v. Houser, 53 Colo. 363, 127 P 139, 140. See State v. Kansas City, 122 Kan. 311, 252 P 714, 721.

[a] **"Each lot, piece, or tract of land."**—Canty v. Staley, 162 Cal. 379, 123 P 252, 253 (holding that "lot," "piece," and "parcel" apply peculiarly to the land itself and are never employed to describe improvements).

[b] **"Piece, or parcel of land."**—Los Angeles Pac. Co. v. Hubbard, 17 Cal. A. 646, 649, 121 P 306; State v. Baldwin Univ., 97 Tenn. 358, 362, 37 SW 1.

49. Josh v. Josh, 5 C. B. N. S. 454, 466, 94 ECL 454, 141 Reprint 185 (as separate and distinguished from other land). See Gleeson v. Martin White Min. Co., 13 Nev. 442, 458.

[a] **As used in statutes** it may be provided that it shall mean any contiguous quantity of land in the possession, owned by, or recorded as the property of the same person. Griffin v. Denison Land Co., 18 N. D. 246, 119 NW 1041, 1043; State Finance Co. v. Bowdle, 16 N. D. 193, 112 NW 76, 78.

50. **"Property"** see [32 Cyc 647–650].

51. Held v. Houser, 53 Colo. 363, 127 P 139, 140.

52. See In 31 C. J. p 368 text and

iron,"[53] "pieces of paper."[54]

PIECEWORK.[55] A certain amount of work to be done upon material supplied by the employer, for which the worker is to be paid a certain price for the finished article instead of being paid by wages.[56]

PIECEWORKER.[57] One rendering personal services who is paid by the piece.[58]

PIER.[59]

PIERCED. Penetrated; entered by force; perforated.[60]

PIERHEAD. The projecting end of a pier forming a wharf or landing place.[61]

PIETY.[62]

PIEZA DE AUTOS. In Spanish law, the collection of papers constituting the record of a cause.[63]

PIG.[64]

PIGEON.[65] Any bird of the family Columbidæ; a dove.[66] It belongs to the class of animals feræ naturæ.[67]

PIG IRON.[68] The product of a blast furnace used for the purpose of reducing iron ores, and containing, among other things, a larger proportion or percentage of carbon than either steel or puddled iron bars. The term was derived from the shape which the iron assumed in the sand beds in which it was first cast; and when first used had reference to a particular shape or form. It has since acquired a larger meaning, and as used at present includes any product of the blast furnace that is cast in any convenient form or shape, without reference to what that form or shape may be. Among ironmasters and those who are familiar with the processes by which iron ores are reduced and made into pig iron and then manufactured into wrought iron or steel, the term has come to mean and include as well that substance in a molten or liquid state.[69] But since the solid form is in general necessary to the handling of it as an article of trade and commerce, most men see it in that form, and so, in common speech, the term carries with it the meaning of something that is solid and not liquid;[70] and that is also the meaning conveyed by many of the dictionaries.[71]

PIGMENT.[72] Any substance that is or can be used by painters to impart color to bodies; technically, a dry substance, usually in the form of a powder or in lumps so lightly held together as to be easily pulverized, which after it has been mixed with a liquid medium can be applied by painters to a surface to be colored.[73]

PIGNON. In French, a gable.[74] In a restricted sense, the upper and triangular part of a wall.[75] In an ordinary and popular sense the term means not only the upper and triangular part of the wall but the whole lateral wall, including the foundation;[76] the entire gable end.[77]

PIGNORATIO. In the civil law, the contract of pledge; and also the obligation of such contract.[78-80]

PIGNUS.[81]

PIGS or PIGGIES. In electrical construction, hollow cylinders of rubber, about three feet long, which, after being clasped about live wires, render the latter innocuous to those who may touch or come in contact with them.[82]

PIKE POLE. An instrument with a handle, about five or six feet long, containing a steel point at the end, which is used, among other purposes, in undermining gravel banks.[83]

PILE.[84] [§ 1] **A. As a Noun.** A heavy pointed timber forced into the earth to form a foundation for a building, wharf, or the like.[85]

In electricity, a term synonymous with "battery."[86]

[§ 2] **B. As a Verb.** To lay or throw into a heap; heap, or heap up; collect into a pile or mass.[87]

PILE DRIVER.[88] A machine for driving piles by raising, by means of power applied to the machinery, a heavy weight and dropping it upon the pile.[89]

note 74.

53. Walker v. State, 124 Ga. 440, 442, 52 SE 738.

"Iron" see 33 C. J. p 813.

54. Com. v. Parker, 165 Mass. 526, 527, 43 NE 499.

"Paper" see 46 C. J. p 1173.

55. See Pieceworker post.

56. Beath v. Martin, 2 Austr. C. L. R. 716, 724 ("It is a term commonly used in speaking of the relation between employer and operative, and not commonly used in other connections").

57. See Piecework ante.

58. Burchett v. Department of Labor, etc., 146 Wash. 85, 261 P 802, 804, 263 P 746.

59. See Wharves [40 Cyc 894].

60. Century D.

[a] **"But after the said fault has been pierced and the normal vein recovered."**—Collins v. White Oak Fuel Co., 69 W. Va. 292, 299, 71 SE 277.

61. Webster New Int. D.

[a] **"Pierhead line."**—"These words may suggest the outer limits of piers, but we think they should in no event be construed as fixing the inner harbor line, which when established becomes the outer shore land boundary." Puget Mill Co. v. State, 93 Wash. 128, 140, 160 P 310. "Harbor Line" see Harbor § 5.

62. As synonymous with "religion" in determining the validity of a charity see Charities § 24 text and note 67.

63. Escriche Diccionario. See Appeal and Error § 611 et seq; Judgments § 223 et seq.

64. See generally Animals 3 C. J. p 1.

As cattle see Cattle 11 C. J. p 33.

65. Pigeon:

As poultry see Poultry [31 Cyc 1030].

As subject of larceny see Larceny § 14 text and note 89, § 15 text and notes 6, 7.

Property in see Animals § 10 note 72 [b].

66. Century D.

"Dove" see 19 C. J. p 447.

67. Com. v. Lewis, 25 WklyNC (Pa.) 432, 433. And see Larceny §§ 14, 15.

"Animals feræ naturæ" see Animals §§ 2, 5–18.

68. "Iron" see 33 C. J. p 813.

Pig iron as subject of customs duties see Customs Duties § 32 text and note 11.

69. Dominion Iron, etc., Co., Ltd. v. Rex, 8 Can. Exch. 107, 157.

[a] **"Le fer en gueuse."**—In French, iron in pigs. Dominion Iron, etc., Co., Ltd. v. Rex, 8 Can. Exch. 107, 142, 158 (argument of counsel).

70. Dominion Iron, etc., Co., Ltd. v. Rex, supra.

71. Dominion Iron, etc., Co., Ltd. v. Rex, supra.

72. See Paint 46 C. J. p 1170.

73. Century D.

[a] **"Ceramic color" distinguished.**—Comstock v. U. S., 12 Cust. A. 502, 506.

[b] **"Hematite iron ore" as a pigment.**—Hill v. Francklyn, 162 Fed. 880, 882, 89 CCA 570.

[c] **"Kronos titanium" as a pigment.**—Comstock v. U. S., 12 Cust. A. 502, 503.

74. Lavigne v. Nault, 59 Can. S. C. 183, 191.

75. Lavigne v. Nault, supra.

[a] **Definition.**—"Partie supérieure d'un mur qui se termine en pointe et dont le sommet porte le bout du faitage d'un comble à deux égouts." Nouveau Larousse D. [quot Lavigne v. Nault, 59 Can. S. C. 183, 186, 191, 202].

76. Lavigne v. Nault, supra.

77. Lavigne v. Nault, supra.

78–80. Black L. D. See Modern Civil Law §§ 150–155.

81. See Modern Civil Law §§ 150, 151.

Pignusas:

Bailment see Bailments § 15.

Pledge see Pledges § 1.

82. Donnelly v. Lehigh Nav. Electric Co., 258 Pa. 580, 102 A 219, 221.

83. Allen v. Logan City, 10 Utah 279, 284, 37 P 496.

84. See Pile Driver post; Pile Driving post; Pile Sheeting post; Piling post.

85. Standard D. [quot Menefee Lumber Co. v. Gamble, 119 Or. 224, 242 P 628, 630].

86. Leclanche Battery Co. v. Western Electric Co., 23 Fed. 276, 277.

[a] **"Pile-Leclanche."**—In French, the designation of Leclanche's battery. Leclanche Battery Co. v. Western Electric Co., 23 Fed. 276, 277.

87. Century D.

[a] **"Lumber piled on said premises"** meant lumber stacked in the usual way Gregory v. North Pac. Lumbering Co., 15 Or. 447, 448, 17 P 143.

88. See Pile ante; Pile Driving post; Pile Sheeting post; Piling post.

89. New York Nat. Acc. Soc. v.

Pile driver car.[90] A flat car on which is built a pile driver and an engine, which propels the car forward and backward with its own power by means of sprocket chains and wheels.[91]

PILE DRIVING.[92] Act of driving piles.[93]

PILE FABRICS.[94] In commercial usage, a generic term applied to describe certain varieties of manufactured goods, including velvets, plushes, velveteens, corduroys, etc.[95]

PILE SHEETING.[96] A structure erected along the sides or walls of an excavation to keep them from caving in and filling the excavation. It is constructed by laying a stringer upon a prepared ledge several feet below the surface, and driving upright planks into the earth back of it, thus providing a support for the walls or sides of the excavation.[97]

PILFER.[98] A word which, in its plain and popular sense,[99] means to steal;[1] to filch.[2]

PILFERAGE.[3] Filching;[4] petty larceny;[5] stealing[6] privily;[7] taking a small part only, rather than the whole.[8] In certain circumstances it is said to be a word belonging to the genus "pillage,"[9] and to mean ruin by depredations.[10]

Phrases: "Theft, robbery or pilferage,"[11] "you pilfered money out of that store."[12]

PILING.[13] The act or process of preparing piles and of driving them;[14] material from which to make piles, or that can be used as piles.[15]

PILLAGE.[16] The plundering, ravaging, or carrying off of goods, commodities, or merchandise by open force or violence.[17]

PILLAR-AND-STALL SYSTEM. In mining phraseology, a system of mining consisting in beginning at the mine opening, cutting tunnels or entries, and taking off rooms from them, leaving a roof of varying thickness, theoretically sufficient to sustain the overburden when pillars of sufficient size are allowed to remain; when the boundary of the mine is reached, the work then recedes, as much material as possible being obtained by robbing the roof and pillars coming back.[18]

PILOT.[19] A term in railway usage, applied to a person assigned to a train when the engineman or conductor, or both, are not fully acquainted with the physical characteristics, or running rules of the road or portions of the road, over which the train is to be moved;[20] also, the cowcatcher of an engine.[21]

PILOTAGE.[22]

PILOTAJE. In Spanish law, pilotage dues.[23]

PILOT ASSOCIATION.[24]

PILOTO. In Spanish law, pilot.[25]

Taylor, 42 Ill. A. 97, 102.

[a] **Pile driver and engine operating it as separate machines.**—Korander v. Penn Bridge Co., 16 Cal. A. 249, 116 P 384, 385. "Machine" see 38 C. J. p 329.

90. **"Car"** see 9 C. J. p 1283.

91. Johnson v. Great Northern R. Co., 104 Minn. 444, 116 NW 936, 18 LRANS 477.

92. See Pile ante; Pile Driver ante; Pile Sheeting post; Piling post.

93. See Mazzarisi v. Ward, 170 App. Div. 868, 156 NYS 964, 965.

94. **"Fabric"** see 25 C. J. p 332.

95. In re Herrmann, 56 Fed. 477, 479, 5 CCA 582 [aff 52 Fed. 941, 945].

Astrachan not included see Astrachan 5 C. J. p 1414 note 32[a].

"Corduroy" see 13 C. J. p 1236.

"Velvet" see [39 Cyc 1127].

96. See Pile ante; Pile Driver ante; Pile Driving ante; Piling post.

97. Volpe v. Cederstrand, 126 Minn. 355, 148 NW 119. See Mazzarisi v. Ward, 170 App. Div. 868, 156 NYS 964, 965.

98. See Pilferage post.

99. Becket v. Sterrett, 4 Blackf. (Ind.) 499, 500.

1. Hartford F. Ins. Co. v. Wimbish, 12 Ga. A. 712, 78 SE 265, 266 [quot Miller v. Phœnix Assur. Co., 221 Ill. A. 75, 80; Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576, 156 P 557, 558]; Becket v. Sterret, 4 Blackf. (Ind.) 499, 500.

"Steal" see [36 Cyc 1258].

2. See Filch 25 C. J. p 1123 text and note 50.

3. See Larceny 36 C. J. p 721; Robbery [34 Cyc 1796]; Theft [38 Cyc 272]. And see Pilfer ante.

4. Tamarin v. Insurance Co. of North America, 68 Pa. Super. 614, 617.

"Filch" see 25 C. J. p 1122.

5. Bouvier L. D. [quot Ledvinka v. Home Ins. Co., 139 Md. 434, 115 A 596, 19 ALR 167, 170]; Illinois Auto. Ins. Exch. v. Southern Motor Sales Co., 207 Ala. 265, 92 S 429, 24 ALR 734; Hartford F. Ins. Co. v. Wimbish, 12 Ga. A. 712, 78 SE 265, 266 [quot Phœnix Assur. Co., Ltd. v. Eppstein, 73 Fla. 991, 75 S 537, 538, LRA1917F 540; Miller v. Phœnix Assur. Co., 221 Ill. A. 75, 80; Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576, 156 P 557, 558].

"Petty larceny" see Larceny §§ 4, 224–228.

6. Ledvinka v. Home Ins. Co., 139 Md. 434, 115 A 596, 19 ALR 167, 170.

[a] **"Pilferage** has but one meaning and is some form of stealing." Felgar v. Home Ins. Co., 207 Ill. A. 492.

"Steal" or "stealing" see [36 Cyc 1258].

7. Tamarin v. Insurance Co. of North America, 68 Pa. Super. 614, 617.

8. Tamarin v. Insurance Co. of North America, supra [quot Goldman v. Insurance Co. of North America, 194 App. Div. 266, 185 NYS 210].

9. Henderson v. Northwest Mut. Ins. Co., (B. C.) [1925] 1 DomLR 339, 343 (distinguishing "theft and robbery" used in connection with it). Compare Felgar v. Home Ins. Co., 207 Ill. A. 492 (declaring that pillage has but one meaning and is some form of stealing).

"Pillage" see post.

10. Henderson v. Northwest Mut. Ins. Co., (B. C.) [1925] 1 DomLR 339, 343.

11. Illinois Auto. Ins. Exch. v. Southern Motor Sales Co., 207 Ala. 265, 266, 92 S 429, 24 ALR 734; Buxton v. International Indemn. Co., 47 Cal. A. 583, 587, 191 P 84; Phœnix Assur. Co., Ltd. v. Eppstein, 73 Fla. 991, 994, 75 S 537, LRA1917F 540; Gunn v. Globe, etc., F. Ins. Co., 24 Ga. A. 615, 616, 101 SE 691; Hartford F. Ins. Co. v. Wimbish, 12 Ga. A. 712, 714, 78 SE 265 [quot Miller v. Phœnix Assur. Co., 221 Ill. A. 75, 80]; Felgar v. Home Ins. Co., 207 Ill. A. 492; Michigan Commercial Ins. Co. v. Wills, 57 Ind. A. 256, 106 NE 725, 726; Weir v. Central Nat. F. Ins. Co., 194 Iowa 446, 447, 189 NW 794; Overland-Reno Co. v. International Indemn. Co., 111 Kan. 668, 670, 208 P 548, 115 Kan. 137, 222 P 122; Hill-Howard Motor Co. v. North River Ins. Co., 111 Kan. 225, 207 P 205, 24 ALR 736; Federal Ins. Co. v. Hiter, 164 Ky. 743, 745, 176 SW 210, LRA1915E 575; Bloom v. Ohio Farmers' Ins. Co., 255 Mass. 528, 530, 152 NE 345; Van Vechten v. American Eagle F. Ins. Co., 239 N. Y. 303, 307, 146 NE 432, 38 ALR 1115; Delafield v. London, etc., F. Ins. Co., 177 App. Div. 477, 479, 164 NYS 221; Schenectady Varnish Co. v. Automobile Ins. Co., 127 Misc. 751, 752, 217 NYS 504; Glens Falls Ins. Co. v. Stewart, 127 Misc. 353, 354, 216 NYS 149; Siegel v. Union Assur. Soc., Ltd., 90 Misc. 550, 551, 153 NYS 662; Royal Ins. Co. v. Jack, 113 Oh. St. 153, 157, 148 NE 923, 46 ALR 529; Brady v. Norwich Union F. Ins. Soc., 47 R. I. 416, 419, 133 A 799; Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576, 578, 156 P 557; Henderson v. Northwest Mut. Ins. Co., (B. C.) [1925] 1 DomLR 339, 343; Ouimet v. National Ben Franklin F. Ins. Co., 58 Que. Super. 299, 302, 56 DomLR 501.

"Robbery" see [34 Cyc 1796].

"Theft" see [38 Cyc 272].

12. Becket v. Sterret, 4 Blackf. (Ind.) 499, 500.

13. See Pile ante; Pile Driver ante; Pile Driving ante; Pile Sheeting ante.

14. Standard D. [quot Menefee Lumber Co. v. Gamble, 119 Or. 224, 242 P 628, 630].

Sheeting as a form of piling see Pile Sheeting ante text and note 97.

15. Standard D. [quot Menefee Lumber Co. v. Gamble, 119 Or. 224, 242 P 628, 630].

16. See Plunder [31 Cyc 891]; Robbery [34 Cyc 1796]; Theft [38 Cyc 272].

17. Merlin Rep. de Jur. art "Pillage" [cit American Ins. Co. v. Bryan, 26 Wend. (N. Y.) 563, 573, 37 AmD 278 (where it was said: "This term pillage imports latrocination, or robbery by force or violence; and not a simple larceny merely")].

[a] **In the French law,** equivalent to latrocinium, or theft with violence. King v. Shepherd, 14 F. Cas. No. 7,804, 3 Story 349, 357. "Latrocinium" see 36 C. J. p 957.

18. Marquette Cement Min. Co. v. Oglesby Coal Co., 253 Fed. 107, 109.

Subjacent support of mines see Mines and Minerals §§ 923–942.

19. **In maritime parlance** see Pilots § 1.

20. Wilson v. Southern R. Co., 73 S. C. 481, 499, 53 SE 968.

21. Century D.

22. See Pilots § 1.

23. Escriche Diccionario. See Pilots § 1.

24. See Pilots § 72.

25. Escriche Diccionário; Suplemento. See Pilots § 1.

PILOTS

By Douglas Robinson Gray

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False personation of pilot see **False Personation** § 3 text and note 7 [c].
Jurisdiction over claim for pilotage see **Admiralty** § 83.
Lights that should be displayed by pilot vessel see **Collision** § 132.
Master's duty to navigate vessel with pilot on board see **Shipping** [36 Cyc 132].
Negligence of pilot as bearing on liability of owner of vessel see **Shipping** [36 Cyc 171].
Operation of vessel while pilot is being taken aboard or discharged see **Collision** § 234.
Pilot laws as a regulation of commerce see **Commerce** § 163.
Profession of pilot as skilled employment justifying restriction to qualified persons see **Monopolies** § 45 text and note 36.

I. DEFINITIONS AND NATURE OF OFFICE

[§ 1] **A. Definitions.** A pilot is a person duly qualified, and usually licensed, to conduct a vessel into or out of ports, or in certain waters.[1] In a broad sense, the term "pilots" includes both: (1) Those whose duty it is to guide vessels into or out of ports, or in particular waters. (2) Those in-

1. Webster New Int. D.
[a] **Other definitions.**—(1) "A person taken on board at a particular place for the purpose of conducting a ship through a river, road or channel or from or into a port." The Andoni, [1918] P. 14, 18. (2) "A person whose mind dictates the course and controls the movements of a vessel in its passage through the waters of a channel, the configuration of the bottom of which, and all obstructions to navigation therein, he is presumed to know." State v. Turner, 34 Or. 173, 182, 55 P 92, 56 P 645.

trusted with the navigation of vessels on the high seas.[2] A pilot has also been defined as a "steersman"[3] or "guide."[4]

Nature of service. A pilot is such in legal contemplation when performing any duties properly falling within the scope of his employment,[5] but not when performing duties outside the scope of a pilot's employment.[6]

A "qualified pilot" within the meaning of an English compulsory pilotage statute has been defined as any person duly licensed by any pilotage authority to conduct ships to which he does not belong,[7] although his qualification will not extend beyond the limits of his license.[8]

"Pilotage" is a term that may refer either to the compensation for services performed by a pilot,[9] or to the act of a pilot in conducting a vessel.[10]

Half pilotage is compensation for services tendered and refused.[11]

A "branch" is the nautical term for a warrant or commission, authorizing the holder thereof to pilot vessels in certain waters.[12]

Cruising ground and pilot's water. In defining "pilot's cruising ground"[13] and "pilot's water" or "pilotage ground,"[14] the courts have stated that the terms are not synonymous.[15]

Pilot vessel. Even when cruising hundreds of miles from her home port, a ship is a "pilot vessel, engaged on her station on pilotage duty" within the meaning of the act of congress of March 3, 1885[16] if at the time she is looking or waiting for ships wanting pilots.[17]

[§ 2] **B. Nature of Office.** Under varying statutory provisions[18] it has been held that a pilot is a public officer[19] or not a public officer;[20] but in any event his office is so far public as to be subject to regulation.[21] There is authority holding that a pilot is not an executive officer.[22]

II. REGULATION OF PILOTS[23]

[§ 3] **A. In General.** Being engaged in public service,[24] pilots must accept public regulation.[25]

[§ 4] **B. As Incident of National Sovereignty.** Every nation has the inherent right to regulate pilotage of vessels within its waters, whether such vessels be domestic or foreign.[26]

[§ 5] **C. In United States—1. As between Congress and States.** Prior to the adoption of the federal constitution the states had the right to regulate pilotage of any vessels operating within their waters,[27] and pilot laws existed in several states prior to that time.[28] There were, however, no pilotage laws in America prior to the revolution.[29] Under the commerce clause of the federal constitu-

2. Pacific Mail SS. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; The Maren Lee, 278 Fed. 918, 920; The Wave v. Hyer, 29 F. Cas. No. 17,300, 2 Paine 131, 147; Peo. v. Francisco, 10 AbbPr (N. Y.) 30, 32, 18 HowPr 475, 4 Park. Cr. 139; State v. Turner, 34 Or. 173, 178, 55 P 92, 56 P 645; Chapman v. Jackson, 43 S. C. L. 209.

3. Dean v. Healy, 66 Ga. 503; Adams v. McCaughey, 21 R. I. 341, 345, 43 A 646.

4. Dean v. Healy, 66 Ga. 503; Adams v. McCaughey, 21 R. I. 341, 345, 43 A 646.

5. The Maren Lee, 278 Fed. 918.

[a] **Steersman of towed vessel.**— A tug master and licensed pilot who was merely trying to keep a towed schooner straight on the course of the towing tug was nevertheless acting as a pilot so as to make the schooner liable for any damage caused by his negligence. The Maren Lee, 278 Fed. 918.

"On pilotage duty" see Collision § 1 text and note 72.

6. Lea v. Alexander, 15 F. Cas. No. 8,153, 2 Paine 466; State v. Turner, 34 Or. 173, 55 P 92, 56 P 645; Beilby v. Scott, 7 M. & W. 93, 151 Reprint 692.

[a] **For example** (1) a master of a towboat engaged in the bona fide towage service is not a pilot. State v. Turner, 34 Or. 173, 55 P 92, 56 P 645; Beilby v. Scott, 7 M. & W. 93, 151 Reprint 692. (2) If a vessel has run on a shoal, not within pilot's water, and is in danger of shipwreck, a pilot rescuing the vessel is not performing the service of pilotage. Lea v. Alexander, 15 F. Cas. No. 8,153, 2 Paine 466.

7. The Carl XV, [1892] P. 132, 325 (Merchant Shipping Act [1854] § 2).

8. Stafford v. Dyer, [1895] 1 Q. B. 566.

[a] **License to pilot exempted ships** and no others cannot reasonably be held to qualify the holder to pilot unexempted ships. Stafford v. Dyer, [1895] 1 Q. B. 566.

9. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 212, 5 SCt 826, 29 L. ed. 158; Southern SS. Co. v. New Orleans Port Wardens, 6 Wall. (U. S.) 31, 18 L. ed. 749.

10. The Georgia, 31 F. (2d) 759; The Skomvaer, 286 Fed. 711.

11. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 212, 5 SCt 826, 29 L. ed. 158; Southern SS. Co. v. Port Wardens, 6 Wall. (U. S.) 31, 34, 18 L. ed. 749; Pacific Mail SS. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805.

12. Davis v. Heide, 161 N. C. 476, 77 SE 691.

"Branch pilot" see 9 C. J. p 318.

13. See cases infra this note.

[a] **"By pilot's cruising ground,** is meant that distance out in the sea along a certain extent of coast that pilots cruise for vessels bound to ports, inlets, harbors, rivers or bays into which a pilot may take them by his commission." Lea v. Alexander, 14 F. Cas. No. 8,153, 2 Paine 466, 468 [quot The Whistler, 13 Fed. 295, 298, 8 Sawy. 232].

14. See cases infra this note.

[a] **"By pilot's water or pilotage ground,** is meant the access to a bay, inlet, river, harbor or port, beginning at the exterior point, where a pilot may take leave of an outward-bound vessel, and extending to the places fixed upon by law or usage for the anchorage or mooring of inward-bound vessels." Lea v. The Alexander, 15 F. Cas. No. 8,153, 2 Paine 466, 468 [quot The Whistler, 13 Fed. 295, 298, 8 Sawy. 232].

15. The Whistler, supra; Lea v. Alexander, 15 F. Cas. No. 8,153, 2 Paine 466.

[a] **"A shoal** running out into the sea, which is not an entrance to a bay, inlet, river, harbor or port, though within the cruising ground, is not pilot's water, unless it has been made so by law." Lea v. Alexander, 15 F. Cas. No. 8,153, 2 Paine 466, 469.

16. 23 St. at L. 439 c 354 art 9.

17. The Haverton, 31 Fed. 563, 568 [app dism 137 U. S. 145, 11 SCt 35, 34 L. ed. 603].

18. See statutory provisions.

19. Peo. v. Abbott, 16 Cal. 358; Peo. v. Woodbury, 14 Cal. 43; Levine v. Michel, 35 La. Ann. 1121; State v. Follett, 33 La. Ann. 228. See Dolliver v. Parks, 136 Mass. 499 (quære).

[a] **Pilots of the harbor of San Francisco** are public officers. They are appointed by virtue of an act of the legislature for a fixed term to their employments, have definite duties prescribed, fixed rules of compensation, and are required to give bond, and are entitled to do all the business of pilots for the harbor of San Francisco. Peo. v. Woodbury, 14 Cal. 43, 46.

20. State v. Jones, 16 Fla. 306; Dean v. Healy, 66 Ga. 503; Low v. Pilotage Comrs., R. M. Charlt. (Ga.) 302; Atty.-Gen. v. McCaughey, 21 R. I. 341, 43 A 646 (dictum).

[a] **For example,** a pilot is not an officer, within the meaning of the constitution and statutes of Florida, but he is a person invested by law with peculiar powers and privileges connected with commerce, for the exercise of which a qualification is required by the state. State v. Jones, 16 Fla. 306, 310.

21. See infra § 3 et seq.

22. Petterson v. State, (Tex. Cr.) 58 SW 100 (branch pilot).

23. Pilot rules in respect of collision see Collision §§ 24 et seq passim, 132.

24. See supra § 2.

25. The Alcalde, 30 Fed. 133, 135; State v. Jones, 16 Fla. 306; Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682.

"Pilots and pilotage are beyond question rightful subjects of legislation, and were so regarded as early as the third century." The Alcalde, supra.

26. The Annapolis, Lush. 295, 167 Reprint 128.

[a] **"Parliament** has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports," and to prescribe as a condition precedent to entering a British port "the taking on board a pilot at any place in or out of British jurisdiction before entering British waters." The Annapolis, Lush. 295, 306, 167 Reprint 128.

27. Anderson v. Pacific Coast SS. Co., 225 U. S. 187, 32 SCt 626, 56 L. ed. 1047; Ex p. McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624.

28. See Ex p. McNiel, supra.

29. See Winslow v. Prince, 6 Cush. (Mass.) 368, 371.

"There was no legislation on the subject of pilotage, prior to the revolution. No trace of it is found in the colony or province laws; and perhaps, as incident to the regulations of commerce and navigation, it may have depended upon orders of the crown, or other regulations of the home government." Winslow v. Prince, supra.

tion,[30] congress was given the right to regulate pilotage of vessels engaged in foreign or interstate traffic,[31] and pilot regulations are regarded as regulations of commerce.[32] But to the extent that congress has not exercised its right, the original[33] and concurrent[34] right of the states to regulate pilotage remains in full force and effect,[35] especially under federal statutes expressly confirming the rights of the states in this respect.[36] To the extent that congress has acted, its laws are paramount over all conflicting state laws,[37] which are inoperative in so far as they conflict with federal statutes,[38] but only to the extent of such conflict.[39] Federal legislation suspends conflicting state pilotage laws without repealing them.[40] It does not, however, supersede a state law to which it is merely cumulative,[41] or have a retroactive effect.[42]

Waters wholly within a state are under the con-

30. Const. art 1 § 8.

31. See Anderson v. Pacific Coast SS. Co., 225 U. S. 187, 32 SCt 626, 56 L. ed. 1047.

32. See Commerce § 163 text and note 14.

33. O'Brien v. Ammerman, (Civ. A.) 233 SW 1016, 1019 [aff 112 Tex. 254, 247 SW 270].

"While the regulation of pilotage is within the power of Congress when that body sees fit to exercise such power, so long as that body has not entered the field of legislative regulation the original power of the state to legislate upon the subject remains unimpaired." O'Brien v. Ammerman, supra.

34. The Panama, 18 F. Cas. No. 10,702, Deady 27, 32, 1 Or. 418.

"If the power was exclusively in the National Government, Congress could not grant it to the States, and being concurrent it could not nor need not." The Panama, supra.

35. U. S.—Anderson v. Pacific Coast SS. Co., 225 U. S. 187, 32 SCt 626, 56 L. ed. 1047; Huus v. New York, etc., SS. Co., 182 U. S. 392, 21 SCt 827, 45 L. ed. 1146; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Ex p. McNiel, 13 Wall. 236, 20 L. ed. 624; Pacific Mail SS. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Cooley v. Philadelphia, 12 How. 299, 13 L. ed. 996; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; The Alcalde, 30 Fed. 133; The South Cambria, 27 Fed. 525; The Charles A. Sparks, 16 Fed. 480; The Chase, 14 Fed. 854; The Alzena, 14 Fed. 174; The Clymene, 9 Fed. 164; The Glenearne, 7 Fed. 604, 7 Sawy. 200; The George S. Wright, 10 F. Cas. No. 5,340, Deady 591; The Wave v. Hyer, 29 F. Cas. No. 17,300, 2 Paine 131. See The Queen, 186 Fed. 725, 736, 108 CCA 595 (dis. op. on a different matter).

Fla.—Cribb v. State, 9 Fla. 409.

Ga.—Low v. Pilotage Comrs., R. M. Charlt. 302.

Ky.—Dryden v. Com., 16 B. Mon. 598.

Mass.—Com. v. Kemp, 254 Mass. 190, 150 NE 172.

N. Y.—Henderson v. Spofford, 59 N. Y. 131 [aff 3 Daly 361, 10 AbbPrNS 140]; Pilot Comrs. v. Pacific Mail SS. Co., 52 N. Y. 609; Sturgis v. Spofford, 45 N. Y. 446; Cisco v. Roberts, 36 N. Y. 292, 1 Transcr. A. 297, 33 HowPr 424 [rev 19 N. Y. Super. 494]; Peo. v. Sperry, 50 Barb. 170, 1 Cow. Cr. 320; Stilwell v. Raynor, 1 Daly 47.

Or.—State v. Ring, 122 Or. 644, 259 P 780.

Pa.—Collins v. Society for Relief of Distressed, etc., Pilots, 73 Pa. 194.

Tex.—O'Brien v. Ammerman, (Civ. A.) 233 SW 1016 [aff 112 Tex. 254, 247 SW 270].

Wash.—State v. Ames, 47 Wash. 328, 92 P 137.

"It was early held that, although State laws concerning pilots and pilotage are regulations of commerce, they fall within that class of powers which may be exercised by the States until Congress acts on the subject, and such State laws are valid until displaced or abrogated by Congress." Com. v. Kemp, 254 Mass. 190, 194, 150 NE 172.

[a] **"Congress has not attempted to regulate the entire subject** of pilotage. So far it has confined itself to the regulation of pilotage as to vessels engaged in the coastwise or interior commerce of the country, making no provision at all as to pilotage of vessels engaged in strictly foreign commerce." State v. Ames, 47 Wash. 328, 330, 92 P 137.

36. U. S.—Anderson v. Pacific Coast SS. Co., 225 U. S. 187, 32 SCt 626, 56 L. ed. 1047; Huus v. New York, etc., SS. Co., 182 U. S. 392, 21 SCt 827, 45 L. ed. 1146; Spraigue v. Thompson, 118 U. S. 90, 6 SCt 988, 30 L. ed. 115; Pacific Mail SS. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Cooley v. Philadelphia Wardens, 12 How. 299, 13 L. ed. 996; The Chase, 14 Fed. 854; The William Law, 14 Fed. 792; The Clymene, 9 Fed. 164, 12 Fed. 346; The Glenearne, 7 Fed. 604, 7 Sawy. 200; Edwards v. The Panama, 18 F. Cas. No. 10,702, 1 Deady 27, 1 Or. 418.

Fla.—Cribb v. State, 9 Fla. 409.

Mass.—Com. v. Kemp, 254 Mass. 190, 150 NE 172.

N. Y.—Peo. v. Sperry, 50 Barb. 170, 1 Cow. Cr. 320; Stilwell v. Raynor, 1 Daly 47.

Tex.—O'Brien v. Ammerman, (Civ. A.) 233 SW 1016, 1019 [aff 112 Tex. 254, 247 SW 270].

"Congress has not only failed to draw this power to itself, but has expressly confirmed it in the several states." O'Brien v. Ammerman, supra.

[a] **History of law.**—(1) "When the Constitution of the United States was adopted, each State had its own regulations of pilotage. While this subject was embraced within the grant of the power 'to regulate commerce with foreign nations, and among the several States' (Art I § 8), Congress did not supersede the state legislation, but by the act of August 7, 1789" expressly confirmed the right of each state to regulate pilotage within its waters. "This was 'a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exercise its power, it should be left to the legislation of the States;' and it has long been established by the decisions of this court that, although state laws concerning pilotage are regulations of commerce, they fall within the class of powers which may be exercised by the States until Congress shall see fit to act." Anderson v. Pacific Coast SS. Co., 225 U. S. 187, 195, 32 SCt 626, 56 L. ed. 1047. (2) "At first and for many years the subject of pilots was left to the several States by the express terms of a Federal statute. . . . But later Congress acted with respect to pilots for vessels engaged in coastwise trade." Com. v. Kemp, 254 Mass. 190, 194, 150 NE 172.

37. U. S.—Spraigue v. Thompson, 118 U. S. 90, 6 SCt 988, 30 L. ed. 115 [rev 69 Ga. 409, 47 AmR 760]; Freeman v. The Undaunted, 37 Fed. 662; The Alameda v. Neal, 32 Fed. 331, 12 Sawy. 479 [aff 31 Fed. 366, 12 Sawy. 429]; The South Cambria, 27 Fed. 525; U. S. v. Spink, 19 Fed. 631; The Panama, 18 F. Cas. No. 10,702, Deady 27, 1 Or. 418. See The Queen, 186 Fed. 725, 736, 108 CCA 59 (dis. op. on a different matter).

Fla.—Cribb v. State, 9 Fla. 409.

Ky.—Dryden v. Com., 16 B. Mon. 598.

Mass.—Com. v. Kemp, 254 Mass. 190, 150 NE 172.

N. Y.—Murray v. Clark, 4 Daly 468, 474.

Tex.—Olsen v. Smith, (Civ. A.) 68 SW 320 [aff 195 U. S. 332, 25 SCt 52, 49 L. ed. 224].

Wash.—State v. Ames, 47 Wash. 328, 330, 92 P 137.

"Congress undoubtedly has paramount jurisdiction to regulate pilotage in the public waters, and in so far as it has sought to exercise that jurisdiction, its acts upon the subject are supreme and supersede all state laws." State v. Ames, supra. To same effect The Panama, 18 F. Cas. No. 10,702, Deady 27, 32, 1 Or. 418; Murray v. Clark, supra.

38. U. S.—Spraigue v. Thompson, 118 U. S. 90, 6 SCt 988, 30 L. ed. 115; The South Cambria, 27 Fed. 525; The Panama, 18 F. Cas. No. 10,702, Deady 27, 1 Or. 418.

Fla.—Cribb v. State, 9 Fla. 409.

Mass.—Com. v. Kemp, 254 Mass. 190, 150 NE 172.

Or.—State v. Ring, 122 Or. 644, 259 P 780.

Wash.—State v. Ames, 47 Wash. 328, 92 P 137.

[a] **For example,** Act (1859) § 3, prohibiting any person from acting as pilot in certain waters between Florida and Georgia, who has not a license from the authorities of Florida, is unconstitutional, being in conflict with 10 USCA § 212, which provides that a master of a vessel may employ a person to act as pilot in waters dividing two states who is licensed by either state. Cribb v. State, 9 Fla. 409.

[b] **When state statute entirely annulled.**—Where by rejecting as in conflict with the constitution and laws of the United States certain exceptions in the state statute, it is made to enact what confessedly the legislation never meant, the entire statute must be held as annulled. Spraigue v. Thompson, 118 U. S. 90, 6 SCt 988, 30 L. ed. 115.

39. State v. Ring, 122 Or. 644, 259 P 780; State v. Ames, 47 Wash. 328, 92 P 137.

[a] **Illustration.**—In so far as a state statute regulating foreign commerce also purports to regulate coastwise commerce regulated by congress, it is invalid, but only to that extent. State v. Ames, 47 Wash. 328, 92 P 137.

40. Henderson v. Spofford, 59 N. Y. 131; Pilot Comrs. v. Pacific Mail SS. Co., 52 N. Y. 609; Sturgis v. Spofford, 45 N. Y. 446; State v. Ring, 122 Or. 644, 259 P 780.

[a] **Merely dormant.**—So much of a state pilotage statute as conflicts with the federal statute "is dormant and unenforceable, but is not unconstitutional." State v. Ring, 122 Or. 644, 651, 259 P 780.

41. The George S. Wright, 10 F. Cas. No. 5,340, Deady 591 (Act Febr. 25, 1867, which requires that a seagoing steam vessel, subject to the navigation laws of the United States, when navigating any of the waters thereof, shall be in charge of a pilot licensed by the inspectors of steam vessels, is cumulative, and does not annul or supersede a state law requiring that such pilot, when piloting the such vessel within the limits of the state, should always be licensed by the pilot commissioners of the state).

[a] **State statutes relative to port and harbor pilots** were not revoked by the act of congress of 1852, which required certain steam vessels to carry a pilot for the voyage. See Chapman v. Jackson, 43 S. C. L. 209.

42. Sturgis v. Spofford, 45 N. Y. 446 (an action to recover a penalty

trol of such state and not of congress as respects the right to regulate pilotage of vessels not engaged in interstate or foreign commerce.[43]

[§ 6] **2. As between Several States.** Pilotage on waters wholly within one state cannot be regulated by the law of another state,[44] but the pilot laws of a state have sufficient effect beyond its boundaries to fix the compensation of its pilots.[45]

[§ 7] **3. Particular Federal Statutes.**[46] United States statutes forbidding and abrogating all state laws which discriminated in the rates of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states have been construed as rendering inoperative any state laws which contained such a discrimination,[47] but not those which were nondiscriminatory.[48]

[§ 8] **4. Particular State Statutes.**[49] State statutes have been upheld which require masters of vessels bound to ports within the state to accept the first licensed pilot offering his services,[50] require an applicant for a pilot's license to be a qualified voter,[51] restrict the right to pilot noncoastwise vessels to those duly appointed by the state,[52] or require a certain percentage of pilotage fees to be paid to state pilot commissioners.[53] A state statute giving officers of cities meeting certain specifications power to regulate pilots is not objectionable as a special law because only one city in the state meets such specifications where the statute is general in its terms.[54] A state statute requiring "moneys belonging to the state" to be paid into the state treasury has been construed as inapplicable to a percentage of fees collected by licensed pilots and paid to the board of pilot commissioners.[55]

[§ 9] **5. Territories.**[56] In granting to territories the power to make laws on any "rightful subject of legislation," congress by necessary implication gave to territories the power to make pilotage regulations.[57] Within the meaning of the federal statute relating to boundary waters,[58] a territory is a "state."[59]

[§ 10] **6. Boundary Waters[60]—a. In General.** Under federal statutes[61] a vessel compelled by law to take a pilot[62] upon waters boundary between two states may take a pilot licensed by either state.[63] But if it take a pilot from neither, it will be subject to pilotage or half pilotage[64] on tender and refusal of services by a pilot from either under state or territory laws so providing.[65] A state statute pro-

for violating Act [1853] c 467 § 29, regulating pilotage in the port of New York, is not barred by the act of Congress of August, 1866, regulating pilotage in harbors as well as at sea, where the act for which the penalty is sought was done before the passage of the act of congress, although the action therefor was brought afterward).

43. Barnaby v. State, 21 Ind. 450; State v. Leech, 119 La. 522, 44 S 285, 129 AmSR 336.

44. Leech v. Louisiana, 214 U. S. 175, 29 SCt 552, 53 L. ed. 956.

[a] **License to pilot in waters of another state.**—One state is not authorized to issue a license for persons to engage in piloting in waters lying wholly outside of the state and wholly inside the waters of another state. State v. Leech, 119 La. 522, 44 S 285 [dist The Clymene, 9 Fed. 164 (aff 12 Fed. 346)] (construing Miss. Code Annot. [1892] §§ 2252–2296, as amended by Acts [1896] p 140 c 128).

Rule as to boundary waters see infra § 10.

45. The Nevada, 18 F. Cas. No. 10,130, 7 Ben. 386.

Compensation see infra §§ 35–63.

46. Exemption of coastwise vessels from state pilotage laws see infra § 32.

Federal statute relating to obligation to take a pilot see infra § 30.

47. Huus v. New York, etc., SS. Co., 182 U. S. 392, 21 SCt 827, 45 L. ed. 1146; Spraigue v. Thompson, 118 U. S. 90, 6 SCt 988, 30 L. ed. 115; Freeman v. The Undaunted, 37 Fed. 662, 13 Sawy. 616; The Alameda v. Neal, 32 Fed. 331, 12 Sawy. 479 [aff 31 Fed. 366, 12 Sawy. 429].

[a] **Illustration.**—California code provisions imposing half pilotage on vessels declining a pilot's tender of service but exempting all vessels coasting between San Francisco and any other California port, or any port in Oregon, Washington, or Alaska, are void for unlawful discrimination. Freeman v. The Undaunted, 37 Fed. 662.

48. Thompson v. Darden, 198 U. S. 310, 25 SCt 660, 49 L. ed. 1064 [aff 101 Va. 635, 44 SE 755]. See Williams v. The Lizzie Henderson, 29 F. Cas. No. 17,726a (holding, however, that the Florida act of March 7, 1879, exempting vessels owned wholly in the state from the payment of any pilotage under the existing state laws, unless a pilot is actually employed, is not in contravention of such statute, but is in contravention of the United States constitutional provision that no preference shall be given to the ports of one state over those of another by way of regulation of commerce).

[a] **For example,** a state can establish a compulsory system of pilotage as to vessels coming from the sea into inland ports, and as to vessels going from her inland ports to the sea, without establishing a compulsory system of pilotage as to vessels trading between her inland ports respectively, and no discrimination in state pilotage laws forbidden by the United States statutes is thereby made. Thompson v. Darden, 198 U. S. 310, 25 SCt 660, 49 L. ed. 1064.

49. Statutes relating to:
Criminal offenses see infra § 70.
Penalties see infra § 68.
Pilot Commissioners see infra § 16 et seq.

50. Thompson v. Spraigue, 69 Ga. 409, 47 AmR 760.

51. State v. Ames, 47 Wash. 328, 92 P 137 (not an unlawful discrimination against citizens of other states).

Matters relating to pilots' licenses generally see infra §§ 22–28.

52. Olsen v. Smith, 195 U. S. 332, 25 SCt 52, 49 L. ed. 224 [aff (Tex. Civ. A.) 68 SW 320].

[a] **Rule stated.**—The exemption of coastwise steam vessels of the United States from the operation of state pilotage laws, created by 10 USCA § 215, interferes with such laws only so far as they relate to these vessels, as the section expressly declares that nothing in this title shall be construed to annul or affect any regulation established by the laws of any state, requiring all vessels leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state. Olsen v. Smith, 195 U. S. 332, 25 SCt 52, 49 L. ed. 224 [aff (Tex. Civ. A.) 68 SW 320].

53. The Queen, 206 Fed. 148, 124 CCA 214.

Not a tonnage tax see Commerce § 163.

54. O'Brien v. Amerman, 112 Tex. 254, 247 SW 270. See also Statutes [36 Cyc 985–1016].

55. Riley v. Thompson, 193 Cal. 773, 227 P 772 (holding, also, that such statute was not repealed by a budget law containing no express provision relating to pilots' moneys).

56. Generally see Territories [38 Cyc 191 et seq].

57. The Alcalde, 30 Fed. 133; The Panama, 18 F. Cas. No. 10,702, Deady 27, 1 Or. 418.

58. See statutory provisions.
Construction of statutes see infra §§ 10, 11.

59. The Abercorn, 26 Fed. 877, 28 Fed. 384; The Ullock, 19 Fed. 207, 9 Sawy. 634.

60. Right of pilot licensed under laws of another state to claim benefit of state compulsory pilotage act see infra § 36 text and note 83.

61. See statutory provisions.
Territory as state within meaning of statutes see supra § 9.

62. See infra §§ 30–34.

63. U. S.—The Swift Arrow, 292 Fed. 651; The Glenearne, 7 Fed. 604, 7 Sawy. 200.
Fla.—Cribb v. State, 9 Fla. 409.
Ky.—Dryden v. Com., 16 B. Mon. 598.
N. Y.—Brown v. Elwell, 60 N. Y. 249; Hopkins v. Wyckoff, 1 Daly, 176.
Or.—Neil v. Wilson, 14 Or. 410, 12 P 810.
Pa.—Flanigen v. Washington Ins. Co., 7 Pa. 306; Com. v. Fitzpatrick, 15 Pa. Co. 154.

[a] **Thus** (1) "the master of a vessel, sailing from Philadelphia to a foreign port, can employ a Delaware pilot, as well as one licensed under the laws of Pennsylvania. . . . A compliance with the law of Delaware would protect him against the consequences of a refusal or neglect to take a Pennsylvania pilot." Com. v. Fitzpatrick, 15 Pa. Co. 154, 156. (2) And a vessel taking a New Jersey pilot on boundary waters is exempt from penalty under New York statute for failure to employ a New York licensed pilot. Brown v. Elwell, 60 N. Y. 249.

64. See infra §§ 48–50.

65. The Alcalde, 30 Fed. 133; The Belle Hooper, 28 Fed. 928; The Charles A. Sparks, 16 Fed. 480; The Alzena, 14 Fed. 174; Virden v. The Brig Charles A. Sparks, 13 WklyNC (Pa.) 300.

[a] **Reason assigned** is that the state or territory has general power to regulate pilotage on boundary waters irrespective of the federal boundary statute. The Alcalde, 30 Fed. 133.

[b] **Illustrations.**—(1) Where a Delaware pilot tendered his services to a vessel bound from a foreign port up the Delaware Bay and River to Philadelphia, Pennsylvania, and the vessel refused him and took no other pilot, he could recover pilotage fees under a Delaware statute despite a

hibiting anyone not licensed under authority of the state from piloting a vessel to a port within the state is void so far as it interferes with the employment on public waters of pilots licensed by other states bordering thereon.[66]

[§ 11] **b. What Are Boundary Waters.** There is is early authority to the effect that waters connecting two states but not in any real sense a boundary between them are nevertheless boundary waters within the meaning of the federal statute,[67] but later authority holds that, to be within the meaning of the statute, waters must be a boundary in a real rather than a fanciful sense[68] and must have the significance of a monument on a boundary line.[69] It is settled that a port situated upon a continuation of boundary waters, but at a point where such waters lie wholly within one state, is not located on boundary waters within the meaning of the statute.[70]

[§ 12] **7. Delegation of Powers to Pilot Boards or Commissions.**[71] Congress may lawfully delegate to local boards or commissions the power to make pilotage regulations for the local district.[72] Under a similar power of delegation,[73] state legislatures may lawfully authorize local boards or commissions to make pilotage rates[74] and regulations,[75] including regulations as to the general duties of pilots,[76] their qualifications for license,[77] the suitability of pilot's boats,[78] and the limitation of cruising grounds.[79] The power of the state in this respect is inherent and not conferred by the United States.[80]

[§ 13] **D. In England.** Since April 1, 1913, pilotage in England has been regulated by the Pilotage Act.[81]

[§ 14] **E. In Canada.** Since the confederation of the provinces, the fundamental power to regulate pilotage has been vested in the central dominion government rather than in the provincial governments.[82]

III. PILOT COMMISSIONERS[83]

[§ 15] **A. Nature of Office.** Pilot commissioners have been held to be officers of the state,[84] within the meaning of the state statutory provisions.[85]

[§ 16] **B. Powers[86]—1. In General.** Where so empowered by legislative enactment,[87] pilot boards or commissioners may make reasonable[88] and enforceable[89] pilotage regulations[90] not in excess of their statutory authority,[91] which may be effective

Pennsylvania statute exempting the vessel from compulsory pilotage. The Alzena, 14 Fed. 174. (2) Where a licensed pilot of the then territory of Washington tendered his services to a vessel inward bound over the Columbia River bar from San Francisco to Astoria, Oregon, on refusal he was entitled to collect half pilotage granted by the law of Washington, even though the law of Oregon exempted the vessel from compulsory pilotage, and this was true irrespective of whether Washington was a state under the federal statute relating to boundary waters which was held not to apply because the vessel took no Oregon pilot. The Alcalde, 30 Fed. 133.

66. The Alcalde, supra; The Abercorn, 28 Fed. 384 [aff 26 Fed. 877]; The William Law, 14 Fed. 792; The Alzena, 14 Fed. 174; Dryden v. Com., 16 B. Mon. (Ky.) 598; Neil v. Wilson, 14 Or. 410, 12 P 810.

67. The South Cambria, 27 Fed. 525; The Abercorn, 26 Fed. 877; The Ullock, 19 Fed. 207, 9 Sawy. 634; The Clymene, 9 Fed. 164, 12 Fed. 346.

[a] **Illustration.**—Although the Delaware Bay and River do not constitute a boundary between the states of Delaware and Pennsylvania, these states being coterminous, and bordering on the same navigable waters, come within the spirit and meaning of the act of congress, providing that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot such vessel to or from such port, any law, usage, or custom to the contrary notwithstanding. The South Cambria, 27 Fed. 525.

68. The Swift Arrow, 292 Fed. 651.

[a] **The port of Fall River** is not situated on waters forming a boundary between Massachusetts and Rhode Island because while one may go from one state to the other by water, such water has no significance as a boundary. The Swift Arrow, 292 Fed. 651.

69. The Swift Arrow, supra.

70. Leech v. Louisiana, 214 U. S. 175, 29 SCt 552, 53 L. ed. 956 [aff 119 La. 522, 44 S 285, 129 AmSR 336]; The Swift Arrow, 292 Fed. 651, 652.

"The limit of the waters referred to [i. e., boundary waters under the statute] is the point at which they cease to be a boundary between two States. Neither continuity of water nor identity of name will carry them beyond that point." Leech v. Louisiana, 214 U. S. 175, 178, 29 SCt 552, 53 L. ed. 956 [quot The Swift Arrow, supra].

[a] **Illustration.**—Where a pilot took a foreign vessel from the Gulf of Mexico to New Orleans under a Mississippi license purporting to authorize him to pilot in Louisiana waters, it was held on appeal from a Louisiana judgment convicting him of a violation of a Louisiana criminal statute that a federal statute providing that a pilot licensed by either state could operate in or out of any port situated on boundary waters did not apply, as New Orleans was not situated on boundary waters. Although the Mississippi River is the boundary between Mississippi and Louisiana in certain sections, that portion of such river on which New Orleans is situated is wholly within Louisiana. Leech v. Louisiana, 214 U. S. 175, 29 SCt 552, 53 L. ed. 956.

71. Powers, duties, and liabilities of pilot commissioners see infra §§ 16–19.

72. Williams v. Potter, 210 Fed. 318 [aff 223 Fed. 423, 139 CCA 17 (app dism 245 U. S. 675 mem, 38 SCt 10 mem, 62 L. ed. 542 mem)].

73. See Constitutional Law §§ 330, 357.

74. The Chase, 14 Fed. 854; O'Brien v. Amerman, 112 Tex. 254, 247 SW 270.

75. Martin v. Witherspoon, 135 Mass. 175; Peo. v. Pilot Comrs., 23 Hun (N. Y.) 603; Davis v. Heide, 161 N. C. 476, 77 SE 691; Morse v. Heide, 152 N. C. 625, 68 SE 173; O'Brien v. Amerman, 112 Tex. 254, 247 SW 270.

76. Davis v. Heide, 161 N. C. 476, 77 SE 691.

77. Peo. v. Pilot Comrs., 23 Hun (N. Y.) 603.

78. Peo. v. Pilot Comrs., supra.

79. Davis v. Heide, 161 N. C. 476, 77 SE 691.

80. The Chase, 14 Fed. 854.

Respective powers of national and state governments see supra § 6.

81. 26 Halsbury L. Eng. p 596.

82. Paquet v. Quebec Harbour Pilots, [1920] A. C. 1029, 54 DomLR 323 [allowing app 27 Que. K. B. 409, and restoring 53 Que. Super. 220].

[a] **Illustration.**—Although Quebec provincial statutes required a pilot to pay his earnings to the Corporation of Pilots of Quebec Harbor, subsequent dominion legislation placing the entire control of pilots under the dominion minister of marine and fisheries, subject to the provisions of the General Canada Shipping Act, so far repealed the previously existing provincial legislation as to abolish this requirement and enable such minister to direct that payment of fees should be made to the pilot employed and to no one else. Paquet v. Quebec Harbour Pilots, [1920] A. C. 1029, 54 DomLR 323.

83. Power of congress and state legislatures to delegate regulation of pilotage to local administrative boards see supra § 12.

84. Riley v. Thompson, 193 Cal. 773, 227 P 772; Opinion of Justices, 154 Mass. 603, 31 NE 634 (within Tenure of Office Act).

Public officer generally see Officers 46 C. J. p 911.

85. See statutory provisions.

86. Regulations respecting issuance of pilot's license see infra § 25.

87. See Statutory provisions.

88. Williams v. Potter, 210 Fed. 318 [aff 223 Fed. 423, 139 CCA 17 (app dism 245 U. S. 675 mem, 38 SCt 10 mem, 62 L. ed. 542 mem)].

Regulations held reasonable or unreasonable see infra § 17.

89. Enforcement see infra § 19.

90. U. S.—Williams v. Potter, 210 Fed. 318 [aff 223 Fed. 423, 139 CCA 17 (app dism 245 U. S. 675 mem, 38 SCt 10 mem, 62 L. ed. 542 mem)]; Nash v. The Thebes, 17 F. Cas. No. 10,022.

Cal.—Peo. v. Freese, 83 Cal. 453, 23 P 378, 76 Cal. 633, 18 P 812; Downer v. Lent, 6 Cal. 94, 65 AmD 489.

Del.—State v. Virden, 18 Del. 16, 43 A 525; Morris v. State Pilot Com'rs., 7 Del. Ch. 136, 30 A 667.

Mass.—In re Opinion of Justices, 154 Mass. 603, 31 NE 634; Hunt v. Mickey, 12 Metc. 346; Heridia v. Ayres, 12 Pick. 334.

N. Y.—Sturgis v. Spofford, 45 N. Y. 446 [aff 52 Barb. 436]; Peo. v. Gunner, 124 App. Div. 153, 108 NYS 726.

N. C.—Morse v. Heide, 152 N. C. 625, 627, 68 SE 173 [cit Cyc].

Tex.—Petterson v. Galveston Pilot Comrs., 24 Tex. Civ. A. 33, 57 SW 1002.

Va.—Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682.

See Taylor v. Thomas, Dudl. (Ga.) 59 (holding that a statute requiring submission to pilot commissioners of disputes involving pilotage did not oust a justice's court of jurisdiction of a demand for pilotage).

91. In re Pilotage, 37 Pa. Co. 651 (not more than five pilot apprentices can be created by commissioners of navigation under Pennsylvania statutory provisions).

and binding in respect of acts and conduct of pilots outside of the territorial waters of the promulgating authority.[92] Under statutes or regulations limiting the jurisdiction of a board of pilotage commissioners to claims under a specified amount, such board cannot grant a pilot's claim for a larger amount.[93]

In Canada the powers of pilot boards are governed by the provisions of the Canadian Shipping Act.[94]

[§ 17] **2. Particular Regulations—a. In General.** Regulations held reasonable and within the particular statutory authorization include: Rules regulating the position of station boats;[95] the locality[96] and the circumstances[97] at or under which pilots should offer their services to incoming boats; the motive power of a pilot boat;[98] determination of the number of pilots for a port;[99] the selection of pilots' apprentices;[1] and the time and circumstances under which a pilot must return to his station boat.[2] A rule requiring submission to port wardens of disputes between two or more pilots is valid,[3] as is a rule providing that the pilotage for a particular channel shall be carried on by a single vessel.[4]

Regulations held invalid because unreasonable or in excess of the particular statutory powers of a board include: Rules requiring permission of the board for a pilot to take an apprentice,[5] or limiting the number of apprentices;[6] and regulations designed primarily for the benefit of the pilots to the detriment of the public they serve.[7]

[§ 18] **b. Regulations as to Rates.**[8] Power to fix pilotage rates[9] has been held to include the power to determine what proportion of regular rates may be collected when a pilot's services are tendered and refused.[10] A statute forbidding commissioners to fix pilot rates more often than once every two years should not be construed as preventing an earlier correction of a rate making order which contained clerical errors and which had not yet become effective because not duly entered,[11] especially where no new rights have been established or new duties imposed;[12] and the courts will review such orders irrespective of the foregoing where cross error on the merits is assigned.[13] In determining the validity of pilotage rates fixed by commissioners, the courts will consider the rates at other ports only in so far as similar conditions prevail;[14] whether pilotage is compulsory, which is an argument for reduction;[15] the physical characteristics of the harbor as affecting danger and difficulty of navigation;[16] and the necessary overhead expenses of the pilots and their association.[17] On the whole evidence the court will determine the validity of the rates.[18] Argumentative and advisory matter contained in an order or opinion fixing rates will not be considered in determining the validity of the order.[19] Where commissioners so empowered by statute fix pilot rates, they are exercising a delegated legislative function and not a judicial func-

92. The Haverton, 31 Fed. 563 [app dism 137 U. S. 145, 11 SCt 35, 34 L. ed. 603]; Virden's App., 13 Phila. (Pa.) 151, 6 WklyNC 560.

[a] **Desertion of his ship outside state waters** is cause for revocation of the license of a state pilot. Virden's App., 13 Phila. (Pa.) 151, 6 WklyNC 560.

[b] **Even though cruising hundreds of miles from her home port,** a pilot vessel must, if then looking for pilotage work, comply with regulations governing such vessels, such as the old rule requiring a masthead light. The Haverton, 31 Fed. 563 [app dism 137 U. S. 145, 11 SCt 35, 34 L. ed. 603].

93. Davis v. Heide, 161 N. C. 476, 77 SE 691 (up to sixty dollars).

Regulations respecting pilotage rates see infra § 18.

94. Can. Rev. St. (1906) c 113.

[a] **In the Pilotage District of St. Johns,** under the provisions of the Dominion Shipping Act and its amendments, the pilotage authority may make by-laws respecting the qualifications of applicants for pilots' licenses; licensing, management, and maintenance of pilot boats; distribution of the earnings of pilots and pilot boats; equipment of pilot boats; licensing of pilots and apprentices; terms and conditions of granting such licenses and fees payable therefor; number of pilots and apprentices; general government of pilots; punishment for breach of regulations by withdrawal or suspension of license; adjustment and decision of disputes respecting pilotage. Spears v. St. John Pilot Comrs., 39 N. B. 495.

95. Peo. v. Gunner, 124 App. Div. 153, 108 NYS 726; Morse v. Heide, 152 N. C. 625, 68 SE 173.

96. Virden v. Pilot Comrs., 8 Del. Ch. 1, 67 A 975; Peo. v. Gunner, 124 App. Div. 153, 108 NYS 726; Morse v. Heide, 152 N. C. 625, 68 SE 173.

[a] **Illustration.**—A rule adopted by a board of pilot commissioners forbidding pilots to go to other ports to speak vessels for the home port, instead of cruising, is reasonable and valid because if such a practice became widespread, it would tend to do away entirely with cruising pilots and thus deprive ships from distant ports of necessary pilotage. Virden v. Pilot Comrs., 8 Del. Ch. 1, 67 A 975.

[b] **Cruising ground limits** may properly be regulated by pilot commissioners. Morse v. Heide, 152 N. C. 625, 68 SE 173.

97. Peo. v. Gunner, 124 App. Div. 153, 108 NYS 726.

98. Peo. v. Pilot Comrs., 23 Hun (N. Y.) 603 (board of commissioners of pilots created by L. [1854] c 196 § 1 may prohibit the use of steam vessels for purposes of pilotage).

99. Patterson v. Pilot Comrs., 30 Or. 301, 47 P 786; Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682.

1. Pilot's Apprentices, 35 Pa. Co. 114.

[a] **For instance,** a resolution of the board of port wardens, acting pursuant to statute, providing that no pilot shall take an apprentice without first obtaining the written permission of the board, and providing that the number, age, and qualifications of apprentices shall be governed by such board is valid, and the board need not record the indenture of any apprentice decided by it to be morally, intellectually, or physically unfit. Pilot's Apprentices, 35 Pa. Co. 114.

2. Peo. v. Gunner, 124 App. Div. 153, 108 NYS 726 (upholding a rule requiring a pilot taking an inward bound vessel to return immediately to his station boat if his absence left less than three pilots on station).

3. Peo. v. Gunner, supra.

4. Peo. v. Gunner, supra (Hell Gate pilotage, New York Harbor, where the court held such a rule reasonable and not rendered invalid by a statute requiring apprentices to serve one year on a station boat and another with a pilot on duty, as the statute did not require two pilot boats, one boat within the meaning of the latter statute being the station boat and the other the boat piloted by the pilot on duty).

5. State v. Virden, 18 Del. 16, 43 A 525.

6. State v. Virden, supra (L. c 49 § 1, giving the board of pilot commissioners power to license pilots and make rules for their government, and § 3, requiring pilots' apprentices to serve an apprenticeship of six years, and conduct a square or brig-rigged vessel a stated number of times up and down the Delaware River and Bay, as a condition precedent to the right to a license, does not empower the pilot commissioners to require pilots first to obtain the permission of the board to take apprentices, and to limit the number of apprentices to two per pilot).

7. Morris v. Pilot Comrs., 7 Del. Ch. 136, 30 A 667; Wright v. St. Simons Pilotage Comrs., 69 Ga. 247.

[a] **Restricting number of pilots.**—The pilotage commissioners of a port cannot contract with the licensed pilots to restrict their number to ten for a period of three years, without regard to what may be necessary for the business of the port. Wright v. St. Simons Pilotage Comrs., 69 Ga. 247.

[b] **Requiring two pilots on one pilot boat.**—Commissioners are not authorized to order pilots who own and operate their boat, and have the same fully manned, to allow another pilot to cruise on the boat. Morris v. Pilot Comrs., 7 Del. Ch. 136, 30 A 667.

8. Pilot's compensation see infra §§ 35-63.

9. See statutory provisions.

Delegation of power to commissioners see supra § 12.

10. The Chase, 14 Fed. 854.

Compensation on tender and refusal of services generally see infra § 36.

11. Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682 (holding reduction in proposed rate proper).

12. Virginia Pilot Assoc. v. Com., supra.

13. Virginia Pilot Assoc. v. Com., supra.

Review by court of action relative to pilot's license see infra § 28.

14. Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682.

15. Virginia Pilot Assoc. v. Com., supra.

16. Virginia Pilot Assoc. v. Com., supra.

17. Virginia Pilot Assoc. v. Com., supra.

18. Virginia Pilot Assoc. v. Com., supra (holding the evidence sufficient to support an order reducing rates).

19. Virginia Pilot Assoc. v. Com.,

tion,[20] and are therefore not bound by the restrictions of a court of record as to reversal of a decision.[21]

[§ 19] **3. Enforcement of Regulations.**[22] Within the limitations imposed by statute,[23] a board of pilot commissioners may prescribe and enforce reasonable pecuniary penalties for violations of their regulations.[24] The commissioners under the various statutes as to the trial and punishment of pilots, are a court exercising punitive powers;[25] and, while they are not bound by the strict and technical rules which govern courts of justice,[26] they are ordinarily required to give an accused pilot due notice and opportunity for hearing,[27] and can try him only for the offense charged.[28] The rules of practice governing local inspectors of pilots ordinarily require such inspectors to furnish a pilot on trial with a copy of the charges against him,[29] and provide for an appeal to the supervising inspector,[30] who is required to investigate the charges under the same rules prescribed for local inspectors.[31] It has been held that, in the absence of express statutory authorization, commissioners cannot summon a pilot to trial on their own motion, but must await the filing of a complaint by a third party.[32]

[§ 20] **C. Delegation of Powers by Commission.**[33] Pilot commissioners or boards cannot delegate their powers.[34]

[§ 21] **D. Liability.** Under general rules[35] pilot commissioners are not liable in damages for discretionary acts within the scope of their authority and jurisdiction,[36] but may be liable for ministerial acts beyond their jurisdiction.[37] Pilot commissioners have been held liable in their corporate capacity for pilotage dues illegally collected,[38] and, where breaching a duty to take action against the owners of a vessel subject to, but refusing, compulsory pilotage, may be liable to a pilot for fees which he would have earned had they fulfilled such duty.[39] Pilotage authorities may be held liable for damages resulting from a breach of the duty, where imposed, of securing attendance of pilots in the waters under their charge,[40] but are not liable for damages caused by the default of a pilot licensed by them.[41]

IV. LICENSES[42]

[§ 22] **A. Authority To Require.** Congress has the power to restrict the right to pilot vessels whose pilotage is regulated by it[43] to persons who have obtained a federal license.[44] A state has the authority to compel a federal licensed pilot to take out a state license in order to pilot in state waters vessels whose pilotage is under state control.[45]

[§ 23] **B. Necessity.** Under statutory provisions and regulations it is usually necessary for every pilot to have a license.[46] The pilot of an enrolled vessel doing coastwise trade may be compelled by federal statutory provisions to have a government

supra.

20. Virginia Pilot Assoc. v. Com., supra.

21. Virginia Pilot Assoc. v. Com., supra.

22. **Criminal liability** see infra §§ 70, 71.

Liability for penalty see infra §§ 68, 69.

23. See statutory provisions.

24. Virden v. Pilot Comrs., 8 Del. Ch. 1, 67 A 975; Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682.

Revocation of license see infra § 27.

25. St. Simons Pilotage Comrs. v. Tabbott, 72 Ga. 89; State v. Nerny, 29 N. J. L. 189.

26. Low v. Pilotage Comrs., R. M. Charlt. (Ga.) 302; Snow v. Reed, 14 Or. 342, 12 P 636; State v. Courtenay, 23 S. C. 180.

[a] **Entry of a formal judgment** is not necessary to make the sentence of a pilot's suspension legal. Low v. Pilotage Comrs., R. M. Charlt. (Ga.) 302.

[b] **Not entitled to jury trial.**— Low v. Pilotage Comrs., R. M. Charlt. (Ga.) 302.

[c] **Employment of counsel.**—(1) The court will not on mandamus reverse the action of the commissioners in the removal of a pilot, because the pilot was refused the aid of counsel in cross-examining witnesses and in arguing his case. State v. Courtenay, 23 S. C. 180. (2) The commissioners may at their option employ counsel to aid them in the conduct of an investigation regarding a pilot's alleged dereliction of duty. Snow v. Reed, 14 Or. 342, 12 P 636.

27. Morris v. State Pilot Comrs., 7 Del. Ch. 136, 30 A 667; Pilotage Comrs. v. Low, R. M. Charlt. (Ga.) 298; State v. Nerny, 29 N. J. L. 189; Auger v. Montreal Harbor Comrs., 3 Que. Pr. 553. See Lunt v. Davison, 104 Mass. 498 (holding, however, that if a pilot charged with misconduct is notified of his suspension by the board of trustees of the Boston Marine Society, and has opportunity to appear before the board, and it is then decided that his commission should be revoked and the commissioners accordingly revoke it, the revocation is final).

[a] **Appearance following informal notice.**—A condemnation of a pilot by the harbor commissioners of Montreal will not be quashed on the ground that accused was summoned by letter, if he appeared and defended himself on that notice alone. Auger v. Montreal Harbor Comrs., 3 Que. Pr. 553.

28. State v. Nerny, 29 N. J. L. 189 (a pilot cited before the commissioners to answer for neglect of duty can be tried only by them upon the charge on account of which he was so cited to appear before them).

29. Bulger v. Benson, 262 Fed. 929.

30. Bulger v. Benson, supra.

31. Bulger v. Benson, supra.

32. In re Delaware Pilotage, 22 Pa. Dist. 329; In re Lawful Nav., 40 Pa. Co. 659; Long's Case, 40 Pa. Co. 304.

33. **Right of legislature to delegate its powers to pilot commissioners** see supra § 12.

34. The California, 4 F. Cas. No. 2,313, 1 Sawy. 596; Raymond v. Langlois, 22 Que. Super. 392.

[a] **Personal trust.**—The power conferred upon a pilot commissioner by the Oregon Pilot Act is a personal trust, to be exercised for the public good, and cannot be delegated to another; and therefore one of such commissioners cannot authorize another to sign his name to a pilot's license, although it has been agreed or concluded between such commissioners that such license may be granted. The California, 4 F. Cas. No. 2,313, 1 Sawy. 596.

[b] **Under Quebec statutory provisions** delegating the selection of pilot's apprentices to a corporate body, it is unlawful, even though such body sanctions the practice for individual pilots to select apprentices and receive pay therefor, and money so paid may be recovered, as the payor is not in pari delicto. Paquet v. Pepin, 22 Que. Super. 155.

35. See Judges § 115 et seq; Officers § 326 et seq.

36. Downer v. Lent, 6 Cal. 94, 65 AmD 489.

[a] **Reason for rule.**—A board of pilot commissioners is a quasi-judicial body intrusted with duties, the performance of which requires the exercise of judgment and discretion; and therefore its members are not civilly answerable for their acts as such. Downer v. Lent, 6 Cal. 94, 65 AmD 489.

37. McGillivray v. Kimber, 52 Can. S. C. 146, 26 DomLR 164 [allowing app 48 N. S. 280, 23 DomLR 189] (arbitrary revocation of pilot's license).

38. Cumberland R., etc., Co. v. Saint John Pilot Comrs., 37 N. B. 406 [app dism 38 Can. S. C. 169]. See also Payment § 293 et seq.

[a] **Payment of such dues, under protest,** is not a voluntary payment and may be recovered in an action for money had and received, although they have been paid over to the pilots, and the commissioners have no funds or resources to satisfy a judgment. Cumberland, R., etc., Co. v. Saint John Pilot Comrs., 37 N. B. 406 [app dism 38 Can. S. C. 169].

39. Hughes v. Dundalk Harbour Comrs., [1923] 1 Ir. 38.

40. Anchor Line, Ltd. v. Dundee Harbour, 38 T. L. R. 299.

41. Shaw, etc., Co. v. Timaru Harbour Bd., 15 App. Cas. 429.

[a] **Reason for rule.**—While harbor masters or a pilotage board may license pilots, they lack power under statute to enter into pilotage contracts and therefore cannot be held responsible for the default of a pilot individually contracting to conduct a vessel. Shaw, etc., Co. v. Timaru Harbour Bd., 15 App. Cas. 429.

Liability of pilot association for default of member pilot see infra § 75.

42. **Power of one state to issue license to pilot in waters wholly within another state** see supra § 6 text and note 44 [a].

43. See statutory provisions.

Respective pilotage rights of congress and the states see supra § 5.

44. Williams v. Molther, 198 Fed. 460, 117 CCA 220.

45. State v. Ring, 122 Or. 644, 259 P 780.

[a] **State statute penalizing persons** piloting a foreign vessel without a state license is constitutional, under Or. L. § 2189 and U. S. Const. Amendm. VI. State v. Ring, 122 Or. 644, 259 P 780.

46. See statutory provisions.

Acting without license as ground for:

Criminal prosecution see infra § 71.

Recovery of penalty see infra § 69.

or federal license,[47] and under state statutes is ordinarily required to have a state license if he pilots a foreign[48] or registered[49] vessel in state waters.

[§ 24] **C. Issuance—1. By Whom Issued.** By act of Congress[50] the power to issue pilots' licenses for coastwise seagoing steam vessels is vested in United States inspectors of steamboats,[51] and under state statutes[52] the power to issue pilots' licenses for classes of vessels not regulated as to pilotage by Congress[53] is ordinarily vested in boards of pilot commissioners or port wardens,[54] or in the governor of the state.[55] In England, under statutory provisions,[56] the power to issue licenses is vested in local pilotage authorities.[57]

[§ 25] **2. To whom Issued.**[58] Since the pilot board or officer has only the powers conferred by the act,[59] it must appoint pilots from the classes of persons named therein.[60] Within the limitations imposed by statute,[61] the issuing board or officer may, in the exercise of a sound discretion, make reasonable rules governing the issuance of a pilot's license,[62] including moral[63] and mental[64] qualifications, and their decision is final,[65] in the absence of unjustly discriminatory treatment.[66] Where, however, the board or officer has made an unreasonable regulation or acted in excess of statutory authority, such regulation or action is invalid.[67] Regulations have been held valid which require an applicant for license to appear personally for examination;[68] to present the written indorsement of one licensed pilot, and, where practicable, an indorsement by a master or officer under whom applicant served;[69] and to pass a written examination.[70] A regulation that no original license shall be issued to a naturalized citizen on less experience than is required of a native born citizen is valid.[71] A rule of supervising inspectors providing that an applicant for a pilot's license whose application has been refused shall not be reëxamined for one year is reasonable and valid.[72]

[§ 26] **D. Effect and Form of License.** The exhibition by a person of a warrant or license to act as pilot raises the presumption that he has the right to act as such,[73] so as to authorize a ship to receive him as its pilot,[74] and is competent court evidence of his appointment if in proper form.[75]

Form of license. Whether a pilot's license is in proper form will depend upon the particular statutory requirements and facts involved.[76]

[§ 27] **E. Revocation, Suspension, and Reduction of License.** Within the authorization of the enabling statute,[77] the board or officer having authority to issue a pilot's license may revoke,[78] suspend,[79] or

47. State v. Ring, 122 Or. 644, 259 P 780.
48. State v. Ring, supra.
49. State v. Ring, supra.
50. U. S. Code tit 46 § 214. See also U. S. Rev. St. § 4401.
51. See Huus v. New York, etc., SS. Co., 182 U. S. 392, 21 SCt 827, 45 L. ed. 1146; Joslyn v. Nickerson, 1 Fed. 133; The George S. Wright, 10 F. Cas. No. 5,340, Deady 591; Tebo v. Jordan, 147 N. Y. 387, 42 NE 191.
52. See statutory provisions.
53. **Relative powers of national and state governments** see supra § 5.
54. See The California, 6 F. Cas. No. 2,313, 1 Sawy. 596; Peo. v. Woodbury, 14 Cal. 43; State v. Virden, 18 Del. 16, 43 A 525; Jones v. Fell, 5 Fla. 510; Wright v. St. Simons Pilotage Comrs., 69 Ga. 247; Brown v. Elwell, 60 N. Y. 249; State v. Turner, 34 Or. 173, 55 P 92, 56 P 645; Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682.
55. See Barnaby v. State, 21 Ind. 450; State v. Follett, 33 La. Ann. 228; Williams v. Payson, 14 La. Ann. 7; Smith v. Swift, 8 Metc. (Mass.) 329.
56. 26 Halbury L. Eng. p 600.
57. See The Juno, 1 P. D. 135; Beilby v. Raper, 3 B. & Ad. 284, 23 ECL 130, 110 Reprint 106; Hossack v. Gray, 6 B. & S. 598, 118 ECL 598, 122 Reprint 1316; Henry v. Trinity House, 8 E. & B. 723, 92 ECL 723, 120 Reprint 269; The Earl of Auckland, Lush. 387, 167 Reprint 167, 15 Moore P. C. 304, 15 Reprint 509; The Killarney, Lush. 202, 167 Reprint 98; Mann v. Malcomson, 3 Moore P. C. N. S. 23, 16 Reprint 9; Reg. v. Trinity House, 35 Wkly. Rep. 835.
58. **Imposing voting qualifications on applicants** see supra § 8 text and note 51.
59. See supra § 16.
60. Peo. v. Woodbury, 14 Cal. 43 (pilot commissioners have discretion to appoint from among persons possessing certain qualifications as to length of service, etc., prescribed by the statute, but no power to appoint one who has not those qualifications).
61. See statutory provisions.
62. U. S.—Williams v. Pope, 215 Fed. 1000; Joslyn v. Nickerson, 1 Fed. 133.
Ga.—Healey v. Dean, 68 Ga. 514.
N. J.—Dexter v. State Pilotage Comrs., 70 N. J. L. 429, 57 A 265.
N. Y.—Cisco v. Roberts, 19 N. Y. Super. 494 [rev on other grounds 36 N. Y. 292, 33 HowPr 424, 1 Transcr. A. 297].
Tex.—Olsen v. Smith, (Civ. A.) 68 SW 320.
Validity of regulations of pilot commissioners generally see supra § 17 et seq.
63. Dexter v. Pilotage Comrs., 70 N. J. L. 429, 57 A 265.
64. Dexter v. Pilotage Comrs., supra (the commissioners are clothed with a large discretion, and when after inquiry as to an applicant's moral character, mental balance, habits of sobriety, and the like, they are not satisfied as to his fitness, they may decline to examine him as to his educational qualifications).
65. See infra § 28.
66. Williams v. Pope, 215 Fed. 1000.
67. Williams v. Molther, 198 Fed. 460, 117 CCA 220.
[a] **Rule applied.**—The qualifications of an applicant are to be determined by a personal examination of applicant and a consideration of proof presented by him, and supervising inspectors have no power under federal statutory provisions to establish rules barring all applicants from examination who have not served for a prescribed period in the deck department of some vessel. Williams v. Molther, 198 Fed. 460, 117 CCA 220.
68. Williams v. Pope, 215 Fed. 1000.
69. Williams v. Pope, supra.
70. Williams v. Pope, supra.
71. Williams v. Pope, supra.
72. Williams v. Potter, 210 Fed. 318 [aff 223 Fed. 423, 139 CCA 17 (app dism 245 U. S. 675 mem, 38 SCt 10 mem, 62 L. ed. 542 mem)] (so held under federal statute).
73. The California, 4 F. Cas. No. 2,313, 1 Sawy. 596; The Panama, 18 F. Cas. No. 10,702, Deady 27, 1 Or. 418.
74. The Panama, supra (ship pleading in defense to action for pilotage on tender and refusal that it already had a licensed pilot aboard could sustain plea by proof that such pilot had exhibited a license regular on its face).
75. The California, 4 F. Cas. No. 2,313, 1 Sawy. 596.
76. See cases infra this note.
[a] **License as master and pilot.**—A document certifying that the person named therein is qualified to act as master and pilot, and that "he is hereby licensed to act as such master," the phrase quoted being printed, and there being no room after it for the insertion of the words, "and pilot," is a sufficient license as pilot. Joslyn v. Nickerson, 1 Fed. 133.
[b] **Signatures on license.**—A pilot's license signed by only two of three of the commissioners, under the Oregon Pilot Act, is not a valid instrument, unless it further appears from the minutes of the board that the matter was acted upon and the license granted at a meeting of the commissioners when all three were present, or such license contains a direct recital or averment of such meeting and action in reference to such license. The California, 4 F. Cas. No. 2,313, 1 Sawy. 596.
[c] **Parol proof of licensing.**—Or. Pilot Act § 2, as amended by Sess. L. (1868) p 28, which provides that the pilot commissioners "may appoint a secretary" and prescribes his duties, is mandatory in its nature; and parol evidence is not admissible to prove the meeting and action of such commissioners concerning the licensing of a pilot in aid of a license improper in form, when the act requires a record of the same to be made by the secretary. The California, 4 F. Cas. No. 2,313, 1 Sawy. 596.
77. See statutory provisions.
78. U. S.—The Alcalde, 30 Fed. 133.
Del.—Morris v. Pilot Com'rs, 7 Del. Ch. 136, 30 A 667.
Mass.—Lunt v. Davison, 104 Mass. 498.
N. C.—Davis v. Heide, 161 N. C. 476, 77 SE 691.
Or.—Snow v. Reed, 14 Or. 342, 12 P 636.
Pa.—Schellenger v. Philadelphia, 19 Phila. 471; Virden's App., 13 Phila. 151, 6 WklyNC 560.
S. C.—State v. Courtenay, 23 S. C. 180; State v. Beaufort Pilotage Comrs., 23 S. C. 175.
Va.—Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682.
Eng.—Reg. v. Trinity House, 4 Wkly. Rep. 124.
Que.—Dussault v. Montreal Harbor Comrs., 12 Que. Super. 417.
[a] **Discretion.**—Under statutes or regulations providing for forfeiture of a pilot's license for failure to obey prescribed rules, it may be discretionary with the governing board to revoke or not in accordance with the circumstances of the particular case. Davis v. Heide, 161 N. C. 476, 77 SE 691.
79. Ga.—Low v. Pilotage Comrs., R. M. Charlt. 302.
N. Y.—Peo. v. Pilot Comrs., 37 Barb. 126.
Pa.—Schellenger v. Philadelphia

reduce[80] such license for adequate cause,[81] or without adequate cause where so empowered under statutes granting absolute discretion.[82] But in the absence of statutory authorization, commissioners cannot arbitrarily revoke or suspend a license without adequate cause,[83] or for an alleged violation of rules occurring previous to the date of the license;[84] nor can they refuse a renewal without first complying with statutory requirements as to notice;[85] and, where acting in excess of statutory authority, their revocation or suspension is void for lack of jurisdiction.[86] It has been held that commissioners cannot first suspend and later revoke a pilot's license for the same offense.[87] The precise cause need not be specifically set forth in the statute;[88] but as a statute providing for suspension or forfeiture of a pilot's license is penal, it must be strictly construed,[89] and has been held not to apply to a case where a lesser penalty was expressly provided by statute for a given offense.[90]

[§ 28] **F. Review by Courts.**[91] In a proper case,[92] depending on the practice of the particular jurisdiction,[93] appeal,[94] certiorari,[95] or mandamus[96] will lie to review the action of pilot commissioners respecting pilots' licenses. But where statutes intrust matters of revocation or suspension of a pilot's license to a specified administrative board, the courts will not ordinarily consider the matter prior to final action by such board,[97] and in the absence of conspiracy, failure to appeal to the supervising inspector as allowed by regulations following denial of a license by examining officials is fatal to applicant's right to a bill to restrain local inspectors from refusing him a pilot's license.[98] The findings of a pilot's board will not be reviewed in the absence of a question involving their jurisdiction[99] or the constitutional[1] or statutory[2] rights of citizens. Where a pilot seeks to set aside a suspension for alleged illegal fees collected under statutory regulation of fees, it is incumbent upon him to show a rule or statute justifying the fees collected.[3] Under some statutes it has been held that proceedings against pilots for dereliction of duty are so far criminal or quasi-criminal as to prevent a review of a court judgment in favor of defendant.[4] Individual pilots already licensed have no standing in court to oppose issuance of a license to an applicant,[5] although they may sue to restrain a pilot from acting without proper license.[6]

V. BOND

[§ 29] Under statute[7] or regulations,[8] a pilot may be required to give a bond in a stipulated amount,[9]

Wardens, 19 Phila. 471.

S. C.—State v. Courtenay, 23 S. C. 180; State v. Beaufort Pilotage Comrs., 23 S. C. 175.

Que.—Blouin v. Armstrong, 16 L. C. 225.

[a] **Suspension pending pilot's return of fees illegally collected** is permissible irrespective of whether the ship itself could maintain an action to recover them. Hand's Case, 266 Pa. 277, 109 A 692.

80. State v. Courtenay, 23 S. C. 180 (reduction from full branch to twelve-foot branch pilot).

81. See cases supra notes 78–80.

[a] **Absence from station without permission.**—State v. Beaufort Pilotage Comrs., 23 S. C. 175.

[b] **Desertion of vessel.**—Virden's App., 13 Phila. (Pa.) 151, 6 WklyNC 560.

[c] **Failure to register and number his boat** as required by regulation is an adequate cause for forfeiture of a pilot's license under North Carolina statute. Davis v. Heide, 161 N. C. 476, 77 SE 691.

[d] **Neglect of duty,** resulting in grounding ship on bar, is adequate cause. State v. Courtenay, 23 S. C. 180.

[e] **Overcharge.**—Schellenger v. Philadelphia Wardens, 19 Phila. (Pa.) 471.

82. See cases infra this note.

[a] **In England,** a pilotage authority (1) has an absolute discretion under the Merchants' Shipping Act (1854) § 341 to refuse to renew a pilotage certificate granted to the master or mate of a ship, under § 340 (Reg. v. Trinity House, 35 Wkly. Rep. 835), or (2) may withdraw a pilot's license arbitrarily (Henry v. Trinity House, 8 E. & B. 723, 92 ECL 723, 120 Reprint 269).

[b] **In New Brunswick,** under statute, it has been held that pilots are appointed only during the pleasure of the local board and that it may at will withdraw a pilot's license without adequate cause. Ex p. Langen, 8 N. B. 135.

Review by courts see infra § 28.

83. McGillivray v. Kimber, 52 Can. S. C. 146, 26 DomLR 164 [allowing app 48 N. S. 280, 23 DomLR 189].

84. Peo. v. Pilot Comrs., 54 Barb. (N. Y.) 145.

85. Patterson v. Pilot Comrs., 30 Or. 301, 47 P 786 (Hill L. Annot. § 3904 provides for the granting of licenses to pilots by the pilot commissioners, on the pilot grounds of the Columbia and Willamette Rivers, and, as amended by L. (1893) p 11, authorizes the board to limit the number of such pilots. Section 3907 provides that licenses granted shall be annually renewed unless for good cause, to be determined by the board, in which case the holder of a license shall be notified ten days before the expiration of his license, and shall be entitled to a hearing, and it was held that, without such notice, the board has no power to withhold a renewal on the ground that it has determined to reduce the number of pilots).

86. Benson v. Bulger, 251 Fed. 757 [aff 262 Fed. 929]; Virden v. Pilot Comrs., 8 Del. Ch. 1, 67 A 975.

[a] **Thus,** under a statute not expressly authorizing revocation or suspension of a pilot's license for infringement of regulations, such revocation or suspension has been held a forfeiture beyond the powers of pilot commissioners. Virden v. Pilot Comrs., 8 Del. Ch. 1, 67 A 975 (holding commissioners restricted to imposition of reasonable pecuniary penalty for infringement of regulations).

87. State v. Nerny, 29 N. J. L. 189.

88. State v. Beaufort Pilotage Comrs., 23 S. C. 175.

89. Benson v. Bulger, 251 Fed. 757 [aff 262 Fed. 929] (construing a federal statute as providing a fine and not forfeiture of license for violation of a rule). See also Statutes [36 Cyc 1183–1188].

90. Bulger v. Benson, 262 Fed. 929.

91. Review of regulations as to rates see supra § 18.

92. See Appeal and Error §§ 129–463; Certiorari §§ 14–52; Mandamus § 355.

93. See statutory provisions.

94. Hand's Case, 266 Pa. 277, 109 A 692.

[a] **Commissioners of navigation,** intrusted with regulation of pilots, may appeal from an adverse court decision denying the validity of a pilot's suspension and the appellate court, where the facts are undisputed, will reverse, affirm, or modify the lower court's judgment as if entered on a jury verdict. Hand's Case, 266 Pa. 277, 109 A 692.

[b] **Findings sustained.**—Hand's Case, 266 Pa. 277, 109 A 692.

95. Pilotage Comrs. v. Low, R. M. Charlt. (Ga.) 298; Peo. v. Pilot Comrs., 37 Barb. (N. Y.) 126; McGillivray v. Kimber, 48 N. S. 280, 23 Dom LR 189 [app allowed 52 Can. S. C. 146, 26 DomLR 164].

96. State v. Courtenay, 23 S. C. 180; State v. Beaufort Pilotage Comrs., 23 S. C. 175; McGillivray v. Kimber, 48 N. S. 280, 23 DomLR 189 [app allowed 52 Can S. C. 146, 26 Dom LR 164]. See Ex p. Langen, 8 N. B. 135 (recognizing rule but denying mandamus where appointment by statute good only at pleasure of board).

97. Peo. v. Pilot Comrs., 37 Barb. (N. Y.) 126; Davis v. Heide, 161 N. C. 476, 77 SE 691.

[a] **Application for rehearing by board,** as allowed by statute, must precede certiorari to review suspension. Peo. v. Pilot Comrs., 37 Barb. (N. Y.) 126.

98. Williams v. Pope, 215 Fed. 1000.

99. Williams v. Potter, 210 Fed. 318 [aff 223 Fed. 423, 139 CCA 17 (app dism 245 U. S. 675 mem., 38 SCt 10 mem, 62 L. ed. 542 mem)] (findings of federal steamboat inspectors as to application for pilot's license).

1. Williams v. Potter, 223 Fed. 423 [app dism 245 U. S. 675 mem, 38 SCt 10 mem, 62 L. ed. 542 mem].

2. Williams v. Potter, supra.

3. Hand's Case, 266 Pa. 277, 109 A 692.

4. St. Simons, etc., Pilotage Comrs. v. Tabbott, 72 Ga. 89. But see Low v. Pilotage Comrs., R. M. Charlt. (Ga.) 302 (where the court held that proceedings against a pilot for negligence looking to suspension of his license were not criminal within the United States constitution and that he was not entitled to a trial by jury).

[a] **In Pennsylvania,** under a statute, it has been held without discussion of the text point, that commissioners of navigation in charge of pilotage may appeal from a lower court decision, denying the validity of a pilot's suspension for exacting illegal fees. Hand's Case, 266 Pa. 277, 109 A 692.

Former jeopardy rule generally see Criminal Law §§ 259–490.

5. Healey v. Dean, 68 Ga. 514.

6. Peterson v. Smith, 30 Tex. Civ. A. 139, 69 SW 542 (the commissioned branch pilots of the port of Galveston may sue jointly to restrain a pilot who has not been created a branch pilot, from acting as such).

7. See statutory provisions.

8. See local regulations.

9. See The Panama, 18 F. Cas. No.

and upon failure to do so will forfeit the right to recover compulsory pilotage fees.[10]

Enforcement of bond. The general rule that, in the absence of statute, only the obligee of a bond, or those in privity with him, may recover thereon,[11] has been applied to an action on a pilot's bond.[12]

VI. OBLIGATION TO TAKE PILOT

[§ 30] **A. In General.**[13] Statutory provisions, federal[14] and state,[15] requiring vessels not expressly or impliedly exempted[16] to take or pay a pilot whether inward or outward bound, are mandatory and must be complied with.[17] The purpose of such statutes is to create a body of seamen thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart, and thus protect life and property from the dangers of difficult navigation.[18] The provisions of a compulsory pilotage law have been held applicable to vessels of a foreign country,[19] although there is authority to the contrary.[20] Until navigation of an outward bound vessel has actually begun there is no penalty incurred for refusal to take a pilot,[21] and absence of a pilot at high water may excuse an outward bound vessel from obligation to take a pilot.[22] A deficiency of licensed pilots arising during a voyage may be temporarily supplied by unlicensed pilots.[23] A vessel may properly refuse a pilot tendering his services beyond cruising grounds established by regulation,[24] or proceed under her master's pilotage if no licensed pilot tenders services before she has crossed the pilotage line established for the port.[25] A state statute providing that a vessel coming into a given port "without the assistance of a pilot, the wind and weather being

10,702, Deady 27, 1 Or. 418; State v. Follett, 33 La. Ann. 228.

10. Dolliver v. Parks, 136 Mass. 499; State v. Pilotage Comrs., 62 S. C. 511, 40 SE 959.

Compensation generally see infra §§ 35-63.

11. See Bonds § 151.

12. Moody v. Megee, 31 F. (2d) 117.

[a] **United States cannot recover on pilot's bond running to the governor of Texas.**—Moody v. Megee, 31 F. (2d) 117.

13. Cross references:

Compensation for services tendered and refused see infra §§ 36-47.

Effect of compulsory pilotage laws on liability of third parties for collision see Shipping [36 Cyc 150].

Obligation to take pilot in waters boundary between two states see supra § 10.

Taking or discharging pilot, care to avoid collision see Collision § 234.

14. U. S. Code tit 46 §§ 211, 212.

15. See statutory provisions.

16. See infra §§ 31-34.

17. U. S.—Huus v. New York, etc., SS. Co., 182 U. S. 392, 21 SCt 827, 45 L. ed. 1146 (New York); The China v. Walsh, 7 Wall. 53, 19 L. ed. 67 (New York); Cooley v. Philadelphia Wardens, 12 How. 299, 13 L. ed. 996 (Pennsylvania); The Carrie L. Tyler, 106 Fed. 422, 45 CCA 374, 54 LRA 236 (North Carolina); The Edmund Phinney, 80 Fed. 558, 25 CCA 641 (Maryland); Homer Ramsdell Transp. Co. v. Compaigne Generale Transatlantique, 63 Fed. 845 (New York); Weldt v. The Howden, 39 Fed. 877 (California); The South Cambria, 27 Fed. 525 (Delaware); The Abercorn, 26 Fed. 877 (Oregon); The Edith Godden, 25 Fed. 511 (New Jersey); The Alzena, 14 Fed. 174 (Delaware); The Lord Clive, 12 Fed. 81 (Pennsylvania); The Glaramara, 10 Fed. 678, 8 Sawy. 22 (Oregon); The Clymene, 9 Fed. 164, 12 Fed. 346 (Delaware); The Glenearne, 7 Fed. 604, 7 Sawy. 200 (Oregon); The America, 1 F. Cas. No. 289, 1 Lowell 176 (Massachusetts); Banta v. McNeil, 2 F. Cas. No. 966, 5 Ben. 74 (New York); The California, 4 F. Cas. No. 2,312, 1 Sawy. 463 (Oregon); Camp v. Marcellus, 4 F. Cas. No. 2,347, 1 Cliff. 481 [aff 1 Black 414, 17 L. ed. 217] (Massachusetts); The George S. Wright, 10 F. Cas. No. 5,340, Deady 591 (Oregon); Nash v. The Thebes, 17 F. Cas. No. 10,022 (Massachusetts); Smith v. The Creole, 22 F. Cas. No. 13,033, 2 Wall. Jr. 485 (Pennsylvania).

Ga.—Hagan v. Townsend, 118 Ga. 682, 45 SE 478.

Mass.—Martin v. Witherspoon, 135 Mass. 175; Josselyn v. Gleason, 103 Mass. 237; Tilley v. Farrow, 14 Mass. 17.

N. Y.—Nickerson v. Mason, 13 Wend. 64.

N. C.—Gerrish v. Johnson, 46 N. C. 335.

Va.—Virginia Pilot Assoc. v. Com., 145 Va. 757, 134 SE 682; Darden v. Thompson, 101 Va. 635, 44 SE 755.

Eng.—The SS. Lion v. The Yorktown, L. R. 2 P. C. 525; Cannell v. Lawther, [1914] 3 K. B. 1135; Hadgraft v. Hewith, L. R. 10 Q. B. 350; Tyne Impr. Comrs. v. General Steam Nav. Co., L. R. 2 Q. B. 65; Peake v. Screech, 7 Q. B. 603, 53 ECL 603, 115 Reprint 616; The Hanna, L. R. 1 A. & E. 283; The Ruby, 15 P. D. 139, 164; The Winston, 9 P. D. 85; The Vesta, 7 P. D. 240; The Hankow, 4 P. D. 197; The Juno, 1 P. D. 135; Davison v. Makibben, 3 B. & B. 112, 7 ECL 634, 129 Reprint 1224; The Lloyds, Brown. & L. 359, 167 Reprint 401; Beilby v. Shepherd, 3 Exch. 40, 154 Reprint 747; The Annapolis, Lush. 295, 167 Reprint 128; The Temora, Lush. 17, 167 Reprint 9; Williams v. Newton, 14 M. & W. 747, 153 Reprint 676; Kemler v. Blanchard, W. Bl. 690, 96 Reprint 405; The Maria, 1 W. Rob. 95, 166 Reprint 508, 21 ERC 222.

Que.—Lamarre v. Woods, 14 Que. Super. 1; Ex p. Chrysler, 14 L. C. 209.

"Ships other than coastwise vessels in charge of a licensed United States pilot and under the American flag are compelled to accept and pay for pilotage in Virginia, whether the service is needed or not." Virginia Pilot Assoc. v. Com., 145 Va. 757, 768, 134 SE 682.

[a] **Hell Gate pilots.**—The Kalmar, 14 F. Cas. No. 7,601, 10 Ben. 242.

[b] **Pilots on boundary waters.**—(1) Although the master of any vessel coming into or going out of any port situated on waters which are the boundary between two states may employ any pilot duly licensed or authorized by the laws of either of the states (USCA tit 46 § 212), it does not entitle him to refuse a pilot of one state when a pilot of the other state is not available. The Belle Hooper, 28 Fed. 928. (2) But the statute does not apply to a port in Massachusetts situated on the waters of Narragansett Bay. The Swift Arrow, 292 Fed. 651.

Failure or refusal to take a pilot as a criminal offense see infra § 70.

Liability for pilotage or half pilotage on refusal of a pilot's services see infra § 36.

Penalty for failure or refusal to take a pilot see infra § 68.

18. Pacific Mail SS. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; The Alameda, 31 Fed. 366, 12 Sawy. 429, 32 Fed. 331, 12 Sawy. 479; Winslow v. Prince, 6 Cush. (Mass.) 368; Olsen v. Smith, (Tex. Civ. A.) 68 SW 320 [aff 195 U. S. 332, 25 SCt 52, 49 L. ed. 224].

[a] **Purpose of the federal statute** requiring coastwise vessels under way elsewhere than on the high seas to be under the direction and control of a pilot licensed by the steamboat inspectors is to protect passengers, owners, and shippers by assuring the vessel of a competent and qualified pilot. Tebo v. Jordan, 147 N. Y. 387, 42 NE 191.

19. Smith v. The Creole, 22 F. Cas. No. 13,032, 4 AmLJNS 558; The Christiana, 2 Hagg. Adm. 183, 166 Reprint 211; The Annapolis, Lush. 295, 167 Reprint 128; North German Lloyd SS. Co. v. Elder, 14 Moore P. C. 241, 15 Reprint 295, 21 ERC 277; The Vernon, 1 W. Rob. 316, 166 Reprint 591; The Maria, 1 W. Rob. 95, 166 Reprint 508, 21 ERC 222.

[a] **Beyond three-mile limit.**—National jurisdiction in pilotage matters extends beyond the three-mile limit, and an English statute appointing a pilot station more than three miles off shore and in general terms requiring inward bound vessels there to take a pilot is binding on foreign vessels entering an English port. The Annapolis, Lush. 295, 167 Reprint 128.

20. The Baron Holberg, 3 Hagg. Adm. 244, 166 Reprint 396; The Girolamo, 3 Hagg. Adm. 169, 166 Reprint 368.

21. Nash v. The Thebes, 17 F. Cas. No. 10,022; Guiterman v. Liverpool, etc., SS. Co., 83 N. Y. 358; Com. v. Fitzpatrick, 15 Pa. Co. 154.

[a] **Mere clearance.**—Being actually bound for a port imposes upon the vessel the obligation to pay pilotage fees. Merely being cleared for the port imposed no such obligation. Nash v. The Thebes, 17 F. Cas. No. 10,022.

[b] **Under English statutes as construed by New York courts** an ocean steamship anchored in the river off Liverpool, England, need not take on a licensed pilot while coaling preparatory to a voyage. Guiterman v. Liverpool, etc., SS. Co., 83 N. Y. 358.

22. The Ocean Express, 22 Fed. 176 (it is the duty of the pilot to be on hand at high water, and, in his absence at that time, a vessel is justified in departing without him).

23. U. S. v. The Science, 27 F. Cas. No. 16,239 (decided under a federal statute requiring passenger vessels to have a certain complement of pilots and holding that a captain may temporarily supply a deficiency in the complement of pilots which arises during a voyage without his consent, fault, or collusion, but cannot begin a new vovage with a deficiency).

24. Morse v. Heide, 152 N. C. 625, 68 SE 173.

[a] **Reason for rule.**—It is important that pilots should not cruise too far afield as this would tend to keep pilots from the proper stations and might thus deprive incoming vessels of pilotage. Morse v. Heide, 152 N. C. 625, 68 SE 173.

25. Com. v. Ricketson, 5 Metc.

such that such assistance could have been reasonably given" shall not be liable for inward or outward pilotage "unless the service of a pilot be secured," has been construed as not changing the rule that a pilot seasonably offering his services must be accepted.[26]

[§ 31] **B. Vessels Exempt—1. In General.** Vessels expressly or impliedly exempted by statute[27] are under no obligation to take or pay a pilot,[28] provided they fall within the exemption provisions of the statute,[29] and a pilot's tender of services to such a vessel will not raise an obligation to pay[30] pilotage[31] or half pilotage,[32] unless the exempt vessel has signaled and then refused the pilot.[33] A steamship with a master licensed as a pilot may be exempted by statute from the payment of compulsory pilotage.[34]

[§ 32] **2. Coastwise Vessels.** Under federal[35] and state[36] statutes so providing, no vessel regularly employed in the coasting trade is obligated to take or pay a state pilot.[37] It has been held that the term "coastwise vessel" includes a domestic vessel sailing between Porto Rico and New York.[38] A vessel proceeding from one United States port to another is a coaster entitled to exemption from state pilotage laws even though registered, authorized, and later sailing from the second United States port to a foreign port.[39] The casual circumstance of a vessel's stopping at intermediate foreign ports from stress of weather or other nonbusiness cause will not change her character as a coastwise vessel;[40] but if her intermediate stop be periodic and on business she does lose such character so as to become subject to state pilotage laws as a vessel engaged in foreign commerce.[41] A vessel may be regularly employed in coastwise trade, even though not continuously so employed.[42]

[§ 33] **3. Towed Vessels.** The fact that a vessel is without motive power of her own, and is in tow of a tug having on board a licensed pilot, does not relieve her from the duty of taking a pilot, where all vessels of her tonnage and draft are required by a

(Mass.) 412.

Where pilot's tender of services should be made in general see infra § 43.

26. St. George v. Hardie, 147 N. C. 88, 101, 60 SE 920.

27. See statutory provisions.

28. U. S.—Joslyn v. Nickerson, 1 Fed. 133 (Massachusetts); Weaver v. McLellan, 29 F. Cas. No. 17,309, 5 Ben. 79.

Mass.—Chase v. Philadelphia, etc., R. Co., 135 Mass. 347; Wilson v. Gray, 127 Mass. 98; Hunt v. Card, 14 Pick. 135; Tilley v. Farrow, 14 Mass. 17.

N. C.—Harris v. Slater, 187 N. C. 163, 121 SE 437.

Pa.—Philadelphia Wardens v. Sears, 3 Purdon Dig. (13th ed) p 3526.

Can.—Saint John Pilot Comrs. v. Cumberland R., etc., Co., 38 Can. S. C. 169 [dism app 37 N. B. 406].

N. S.—Farquhar v. McAlpine, 35 N. S. 478.

Que.—Bogue v. Corporation Des Pilotes, 9 Que. L. 113.

[a] **A gas propelled boat not exceeding fifteen gross tons** is not required to have a licensed pilot under North Carolina or federal statutory provisions. Harris v. Slater, 187 N. C. 163, 121 SE 437.

[b] **In England** (1) under the Pilotage Act of April 1, 1913, classes of vessels specifically set forth are exempt from compulsory pilotage. 26 Halsbury L. Eng. pp 610, 611. (2) Prior to the passage of the Pilotage Act exemption was regulated by the Merchants Shipping Act. The SS. Edenbridge v. Green, [1897] A. C. 333 [aff [1896] P. 281]; Mersey Docks, etc., Bd. v. Henderson, 13 App. Cas. 595; Symons v. Baker, [1905] 2 K. B. 723; Courtney v. Cole, 19 Q. B. D. 447; General Steam Nav. Co. v. British, etc., Steam Nav. Co., Ltd., L. R. 3 Exch. 330; The Assaye, [1905] P. 289; The Cayo Bonito, [1903] P. 203 [dism app [1902] P. 216]; The Glanystwyth, [1899] P. 118; The Clymene, [1897] P. 295; The Winestead, [1895] P. 170; The Sutherland, 12 P. D. 154; Phillips v. Born, 10 Aspin. 131; Reg. v. Stanton, 8 E. & B. 445, 92 ECL 445, 120 Reprint 166; The Columbus, 80 L. T. Rep. N. S. 203; The Earl of Auckland, Lush. 164, 167 Reprint 77 [aff Lush. 387, 167 Reprint 167, 15 Moore P. C. 304, 15 Reprint 509]; Lucey v. Ingram, 6 M. & W. 302, 151 Reprint 424; The Agricola, 2 W. Rob. 10, 166 Reprint 659.

29. The Edmund Phinney, 80 Fed. 558, 25 CCA 641 (Maryland); Sturges v. Spofford, 52 Barb. 436 [mod on other grounds 45 N. Y. 446].

[a] **For example,** the provision in Acts (1896) c 40, exempting from the compulsory pilotage law vessels "laden either in whole or in part with coke or coal mined in the United States," applies only to vessels which, in a commercial sense, are coal laden, or carry a reasonable quantity to constitute a cargo, and not to one which carries only a small quantity (twenty-five tons) as ballast. The Edmund Phinney, 80 Fed. 558, 25 CCA 641.

[b] **In Washington** a statute relative to pilotage has been construed as embracing all vessels against the claim that it applied only to sailing vessels. State v. Ames, 47 Wash. 328, 92 P 137.

Coastwise vessels see infra § 32.

Towed vessels see infra § 33.

War vessels see infra § 34.

30. Weaver v. McLellan, 29 F. Cas. No. 17,309, 5 Ben. 79; Hennen v. Munroe, 11 Mart. (La.) 579; Hunt v. Card, 14 Pick. (Mass.) 135; Symons v. Baker, [1905] 2 K. B. 723.

[a] **Domestic fishing vessel.**—The New York Pilotage Law which requires "foreign vessels and vessels under register" to take pilots, and gives half pilotage on a tender of service to such vessels and a refusal, does not extend to a vessel owned by residents of Maine, sailing under a fishing license. Weaver v. McLellan, 29 F. Cas. No. 17,309, 5 Ben. 79.

[b] **Vessels engaged in plaster trade.**—Under St. (1829) c 2, exempting American vessels engaged in the plaster trade between Boston and the province of Nova Scotia from the penalty imposed for not taking a pilot, and the federal treaty with Great Britain, providing that British vessels coming from British colonial possessions, and their cargo, shall be subjected to no other duty of tonnage or charge of any description whatever than would be levied on vessels of the United States arriving from the British possessions, British vessels engaged in the plaster trade between Nova Scotia and Boston are also exempt from the penalty. Hunt v. Card, 14 Pick. (Mass.) 135.

31. Obligation to pay pilotage on tender and refusal of services see infra § 36.

32. Obligation to pay half pilotage on tender and refusal of services see infra § 36.

33. Pilots Corp. v. J. A. Horsey, 10 Que. L. 257.

34. See Joslyn v. Nickerson, 1 Fed. 133.

35. See statutory provisions.

36. See statutory provisions.

Respective control of national and state governments over pilotage see supra § 5.

37. Huus v. New York, etc., SS. Co., 182 U. S. 392, 21 SCt 827, 45 L. ed. 1146 [aff 105 Fed. 74]; Spraigue v. Thompson, 118 U. S. 90, 6 SCt 988, 30 L. ed. 115; Bigley v. New York, etc., SS. Co., 105 Fed. 74; Joslyn v. Nickerson, 1 Fed. 133; Chase v. Philadelphia, etc., R. Co., 135 Mass. 347; Wilson v. Gray, 127 Mass. 98; Tilley v. Farrow, 14 Mass. 17; Pilots Comrs. v. Pacific Mail SS. Co., 52 N. Y. 609; Cisco v. Roberts, 36 N. Y. 292, 1 Transcr. A. 297, 33 HowPr 424 [rev 19 N. Y. Super. 494]; Sturges v. Spofford, 52 Barb. 436 [rev on other grounds 45 N. Y. 446]; Peo. v. Sperry, 50 Barb. (N. Y.) 170, 1 Cow. Cr. 320.

[a] **"Coastwise vessel" defined under federal statute.**—When the federal statute "refers to a coastwise sea going steam vessel, not sailing under registry, it must mean one that is enrolled and licensed for the coasting trade in the manner provided by law, whose license is renewable annually; a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries. It certainly does not refer to a registered vessel that may trade or sail to any part of the world, as it expressly declares, 'not sailing under registry.'" Murray v. Clark, 4 Daly 468, 474 [aff 58 N. Y. 684].

[b] **Mere registry without a coasting license** is not sufficient to entitle a vessel to the exemption. Sturges v. Spofford, 52 Barb. 436 [mod on other grounds 45 N. Y. 446].

[c] **Question of fact** whether a vessel is engaged in coastwise service so as to be without the provisions of a state penalty statute. Cisco v. Roberts, 36 N. Y. 292.

38. Bigley v. New York, etc., SS. Co., 105 Fed. 74 [aff 182 U. S. 392, 21 SCt 827, 45 L. ed. 1146] (within the meaning of both USCA tit 46 § 215 and N. Y. Consol. Act [1882] § 2119, domestic steam vessels, licensed by the United States since the passage of the Porto Rico act of April 12, 1900, and entering the port of New York from Porto Rican ports, are coastwise vessels exempt from the payment of pilotage charges imposed by the state statute).

39. Tilley v. Farrow, 14 Mass. 17 (decided under United States coastwise statute and Massachusetts penalty statute).

40. Murray v. Clark, 4 Daly 468 [aff 58 N. Y. 684].

41. Anderson v. Pacific Coast SS. Co., 225 U. S. 187, 32 SCt 626, 56 L. ed. 1047.

42. Wilson v. Gray, 127 Mass. 98 ("regularly employed," in St. [1853] c 284 § 1, exempting a vessel "regularly employed in the coasting trade" from compulsory pilotage, includes the case of a vessel actually and legally so employed at the time the services of a pilot are tendered, even though the vessel is sailing under a register and is not continuously so employed).

state statute to have a licensed pilot.[43] Under statutes exempting from compulsory pilotage ships which are propelled wholly or in part by steam between designated points, a vessel capable of independent navigation by sail but in fact being towed by a steam tug is exempt from pilotage.[44] The exemption granted coastwise vessels[45] does not extend beyond a tug with a coastwise license so as to include her unlicensed tow.[46] Vessels so damaged as to be incapable of independent navigation may be towed without a pilot on board the towed vessel.[47]

[§ 34] **4. War Vessels.** United States warships are exempt from state pilotage laws.[48]

An English naval vessel is exempt from pilotage.[49]

VII. COMPENSATION[50]

[§ 35] **A. In General.** State licensed pilots are entitled to offshore pilotage, upon compliance with regulations, for services tendered or performed,[51] unless by special agreement compensation has been limited to inshore pilotage;[52] but where local regulations prescribe certain limits for cruising grounds, a pilot bespeaking a vessel beyond such limits is not entitled to compensation,[53] not even where he is accepted and acts if another pilot bespeaks the same vessel within the established cruising grounds,[54] the compensation in such case being payable to the second pilot.[55] A pilot under contract may recover for services tendered and refused,[56] or not completed because of fault of the master.[57]

One fee for pilotage "in and from." A statute providing for payment of pilotage "into or from" a certain port at specified rates according to tonnage or horse power has been construed as imposing one pilotage fee covering both inward and outward pilotage,[58] especially where past usage sanctioned such a construction.[59]

Physical disability not interfering with a pilot's performance of his duties does not deprive him of his right to compensation.[60]

In case of loss of vessel a pilot's wages are payable up to the time of loss.[61]

One hired in the dual capacity of ship's officer and port pilot and paid as officer is entitled to separate and additional compensation for services as pilot.[62]

A pilot's substitute is not entitled to pilotage unless a regular branch or deputy pilot.[63]

Pilot does not forfeit his compensation, in the absence of a statute or regulation so providing,[64] because of failure to obey regulations relative to the specifications,[65] registration,[66] or numbering[67] of his boat,[68] or because he does not keep a sufficient boat on the bar to cruise for vessels, or to supply vessels in distress with provisions and water;[69] but cannot recover for services performed after revocation of his license,[70] voluntary termination of a contract for pilotage,[71] or seizure of the vessel under protest.[72]

Under a Canadian statute prescribing pilotage rates for steamers employed in the fisheries of the colony, it has been held that English vessels so engaged are to be treated exactly as colony or provincial vessels.[73]

[§ 36] **B. For Services Tendered and Refused**[74] **—1. Right to Compensation—a. Existence of Right**

43. The Carrie L. Tyler, 106 Fed. 422, 45 CCA 374, 54 LRA 236 [rev 103 Fed. 327, and dist The Glaramara, 10 Fed. 678, 8 Sawy. 22; Flanders v. Tripp, 9 F. Cas. No. 4,854, 2 Lowell 15].

[a] **In New York** (1) under the act of 1847 relative to Hell Gate pilotage, it was held that steamboats have a right to tow vessels through Hell Gate without being subject to the law relating to pilotage, being excepted from its operation by § 10 of such act. Francisco v. Peo., 10 AbbPr 30, 18 HowPr 475, 4 Park Cr. 139. (2) Under the act of 1865 it was held that by the express requirement of § 3 of such act pilots on vessels towing others through Hell Gate must have a Hell Gate pilot on the towed vessel. Peo. v. Sperry, 50 Barb. 170, 1 Cow. Cr. 320.

44. Saint John Pilot Comrs. v. Cumberland R., etc., Co., 38 Can. S. C. 169 [dism app 37 N. B. 406].

[a] **Illustration.**—Barges used in transporting coal from Parrsboro to Saint John, registered as schooners, having a crew on board and masts rigged with sails so as to be capable under favorable circumstances of being navigated by sailing, but which are in fact navigated by being towed by tugs, are exempt from pilotage dues under Can. Rev. St. c 80 § 59, as "ships propelled wholly or in part by steam." Cumberland R., etc., Co. v. Saint John Pilot Comrs., 37 N. B. 406 [app dism 38 Can. S. C. 169].

45. See supra § 32.

46. Peo. v. Sperry, 50 Barb. (N. Y.) 170, 1 Cow. Cr. 320.

47. The Saehelm, 99 Fed. 456, 39 CCA 600; Flanders v. Tripp, 9 F. Cas. No. 4,854, 2 Lowell 15.

[a] **Illustration.**—A helpless and unnavigable vessel which has sprung a leak, so as to require the use of two steam pumps, and is without master, commander, or crew, having but a dozen laborers aboard, working the pumps, and which has only a temporary rudder, and is in tow of a steam tug, is not within the provision of Ga. Pol. Code (1895) § 1656, requiring compulsory pilotage. The Saehelm, 99 Fed. 456, 39 CCA 600.

48. Ayers v. Knox, 7 Mass. 306 (stating that this was true both under a proper construction of a Massachusetts pilotage statute and under public policy irrespective of such statute).

49. Symons v. Baker, [1905] 2 K. B. 723 (naval collier; no liability for fees even where pilot performed services).

50. Compensation for salvage see Salvage [35 Cyc 726, 727].

Failure to file bond affecting right to recover see supra § 29.

Negligence and estoppel as defenses to an action for pilotage see infra § 52.

51. Weldt v. The Howden, 39 Fed. 877; Cisco v. Roberts, 36 N. Y. 292 [rev 19 N. Y. Super. 494].

52. The Alaska, 1 F. Cas. No. 129, 3 Ben. 391 (where a pilot on going aboard a vessel assented to the proposition of the master that his employment should not commence until the vessel reaches pilot ground, he is only entitled to in-shore pilotage, where he did not actually take charge of the vessel until it reached pilot ground).

53. Morse v. Heide, 152 N. C. 625, 68 SE 173.

54. Morse v. Heide, supra.

Place and time for tendering services see infra § 43.

55. Morse v. Heide, 152 N. C. 625, 68 SE 173.

56. Beckwith v. Baldwin, 12 Ala. 720, 727.

Statutory right to compensation for services tendered and refused see infra §§ 36-47.

57. Beataugh v. Nicholson, 2 F. Cas. No. 1,194 (master wrongfully put pilot ashore).

58. Ryan v. Stephen, 6 Newfoundl. 438.

59. Ryan v. Stephen, supra.

Effect of usage on construction of statutes generally see Statutes [36 Cyc 1139, 1140].

60. Lent Traffic Co. v. Gould, 2 F. (2d) 554.

[a] **Disabled, but on hand.**—Where a pilot hired to guide a vessel was disabled during part of the period of employment but during his disability there was no demand for active service on his part so that his disability did not interfere with performance of his duties and he was always at the disposal of the employer, the pilot was entitled to pay at the agreed rate for the full period of his employment—including the time of disability. Lent Traffic Co. v. Gould, 2 F. (2d) 554.

61. Delorier v. Chaffey, 2 Revde Legis 76.

62. Bissell v. Mepham, 3 F. Cas. No. 1,450, Woolw. 225; Mansfield v. The Despatch, 3 Hawaii Fed. 287.

Lien of master for services as pilot see infra § 61.

63. Shepherd v. Mitchill, 10 Johns. (N. Y.) 112 (semble; the substitute or his principal might have an action against the shipowner on a quantum meruit for the services performed).

64. See statutory or other regulatory provisions.

65. The Alcalde, 30 Fed. 133.

66. Davis v. Heide, 161 N. C. 476, 77 SE 691.

67. Davis v. Heide, supra.

68. Effect of pilot's negligence on right to recover see infra § 52.

69. The Alcalde, 30 Fed. 133 (any failure or dereliction in this respect can be inquired into only before the commissioners who may in a proper case deprive the pilot of his warrant).

70. State v. Pilotage Comrs., 62 S. C. 511, 40 SE 959.

71. Patterson v. Haslep, 19 La. Ann. 178.

72. The Joseph Hall, 13 F. Cas. No. 7,539, 10 Ben. 246.

73. Ryan v. Stephen, 6 Newfoundl. 438.

74. Amount of compensation gen-

and Amount of Compensation. Under state compulsory pilotage laws,[75] a pilot whose services are duly tendered[76] and refused[77] becomes entitled to compensation,[78] which may be half pilotage[79] or full pilotage,[80] according to the provisions of the particular statute then in force.[81] The fact that circumstances later change so that a pilot's services are not needed will not deprive the pilot of his right to compensation.[82]

Pilot licensed under the laws of another state cannot claim the benefit of a local compulsory pilotage act.[83]

[§ 37] **b. Nature.**[84] A pilot's right to recover for services tendered but unperformed is quasi-contractual in nature,[85] not a penalty,[86] and survives repeal of the statute granting it.[87] Pilotage has been held not a toll under a state constitution.[88]

[§ 38] **c. As Affected by Acceptance of Another Pilot.** Under some statutes[89] subsequent acceptance of another pilot does not destroy the master's obligation to pay the fees of the pilot first tendering his services.[90] Under others it has been held that liability for pilotage fees on refusal of the first pilot offering his services arises only if the vessel subsequently takes no pilot at all.[91]

[§ 39] **d. Outward Bound Vessel.** Under some statutes or regulations[92] a pilot tendering his services to an outward bound vessel is entitled to no compensation if his services are refused,[93] while under others compulsory pilotage applies equally to outward bound vessels.[94] Irrespective of the rule relative to compulsory outward pilotage prevailing in the particular jurisdiction,[95] compulsory pilotage may be granted to an inward pilot offering outward services.[96]

[§ 40] **2. Tender and Refusal—a. Necessity.** To establish the right to compensation for services not performed[97] there must be due tender by the pilot and a refusal of the vessel to employ him.[98]

[§ 41] **b. Sufficiency of Refusal.** Failure of a spoken vessel to slow down or turn toward the pilot boat[99] or the keeping up of her pilot signal[1] constitutes a sufficient refusal; but a master's noncommital reply to a pilot's inquiry ashore as to whether he requires an outward pilot is not a refusal sufficient to form the basis of an action.[2]

[§ 42] **c. Sufficiency of tender—(1) In General.** Whether or not a pilot's tender of services is sufficient to raise an obligation to pay him on refusal will depend upon local statutory provisions and

erally see infra §§ 48–50.

75. See statutory provisions.

Obligation to take or pay pilot see supra §§ 30–34.

76. What constitutes due tender see infra §§ 42–47.

77. What constitutes a refusal see infra § 41.

78. U. S.—The Edith Godden, 25 Fed. 511; The William Law, 14 Fed. 792; The Whistler, 13 Fed. 295, 8 Sawy. 232; Camp v. The Marcellus, 4 F. Cas. No. 2,347, 1 Cliff. 481.

Mass.—Com. v. Ricketson, 5 Metc. 412.

N. C.—St. George v. Hardie, 147 N. C. 88, 60 SE 920; Gerrish v. Johnson, 46 N. C. 335.

Pa.—Flanigen v. Washington Ins. Co., 7 Pa. 306.

N. B.—Spears v. St. John Pilot Comrs., 39 N. B. 495.

"An offer to pilot a vessel, with a present capacity to perform the duty, which is refused by the vessel, is equivalent in point of law to the actual performance of the service, and entitles the pilot to the same compensation as if he had actually performed it." The William Law, 14 Fed. 792, 795.

[a] **Reason for rule.**—The object of the statute and regulations is to create a body of skillful seamen, thoroughly acquainted with the harbor, and thus give protection to life and property. This object would be defeated to a large degree if the master were permitted to decline the services of a pilot and refuse him compensation for the trouble and expense of sailing out to tender services. Pacific Mail SS. Co. v. Joliffe, 2 Wall. (U. S.) 450, 456, 17 L. ed. 805.

79. The William Law, 14 Fed. 792; The Glenearne, 7 Fed. 604, 7 Sawy. 200; The Traveller, 24 F. Cas. No. 14,147, 6 Ben. 280; Flanigen v. Washington Ins. Co., 7 Pa. 306.

80. Anderson v. Pacific Coast SS. Co., 225 U. S. 187, 32 SCt 626, 56 L. ed. 1047 (California); The Swift Arrow, 292 Fed. 651; Martin v. Hilton, 9 Metc. (Mass.) 371; Spears v. St. John Pilot Comrs., 39 N. B. 495 (payable to the pilotage authority of the district, which after deduction of expenses, pays balance to the pilot).

81. See statutory provisions.

82. The Traveller, 24 F. Cas. No. 14,147, 6 Ben. 280, 283.

"Half pilotage becomes due by reason of a tender made to a vessel at the time supposed by the law to require a pilot. If the vessel at the time of the tender was on a voyage bound through the (Hell) Gate, a subsequent change of voyage, or failure for any reason to attempt to pass the Gate, can have no effect upon the right of the pilot, which became fixed by the refusal of his services." The Traveller, supra.

83. Brown v. Elwell, 60 N. Y. 249; Hopkins v. Wyckoff, 1 Daly (N. Y.) 176.

[a] **New Jersey pilot speaking a vessel bound for New York,** and refused, cannot secure pilotage under the provisions of the New York statute providing for payment of fees to the first pilot speaking a vessel, even though the New Jersey pilot could properly act under the federal boundary waters statute. Brown v. Elwell, 60 N. Y. 249.

Effect of federal statute re boundary waters on state compulsory pilotage acts see supra §§ 10–11.

Pilotage laws of state as fixing compensation of its own pilots for services rendered outside the state see supra § 6.

84. Not an impost or duty see Commerce § 163 text and note 16.

85. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 212, 5 SCt 826, 29 L. ed. 158; Ex p. McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624; Southern SS. Co. v. New Orleans Post Wardens, 6 Wall. (U. S.) 31, 18 L. ed. 749; Pacific Mail SS. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; The Edith Godden, 25 Fed. 511; The Francisco Garguilo, 14 Fed. 495; Banta v. McNeil, 2 F. Cas. No. 966, 5 Ben. 74; The Kalmar, 14 F. Cas. No. 7,601, 10 Ben. 242.

[a] **Contract implied by statute.**—"The supreme court, in the cases of Pacific Mail SS. Co. v. Joliffe, 2 Wall. (U. S.) 450, 457, 17 L. ed. 805, and of Ex p. McNiel, 13 Wall. (U. S.) 236, 242, 20 L. ed. 624, has expressly declared that the obligation to pay these pilotage fees under state statutes, where the pilot's services are tendered and refused, is a liability upon a contract implied by the statute." The Edith Godden, 25 Fed. 511.

86. Banta v. McNeil, 2 F. Cas. No. 966, 5 Ben. 74.

87. Pacific Mail SS. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805.

88. Harrison v. Green, 18 Cal. 94 (referring to Const. art 6 § 4).

89. See statutory provisions.

90. The Earnwell v. Marshall, 70 Fed. 331, 17 CCA 136 [aff 68 Fed. 228]; The Lord Clive, 10 Fed. 135; The Nevada, 18 F. Cas. No. 10,130, 7 Ben. 386; Thompson v. Spraigue, 69 Ga. 409, 47 AmR 760; O'Brien v. De Larrinaga, 49 S. C. 497, 27 SE 481.

91. The Nellie Husted, 17 F. Cas. No. 10,098, 9 Ben. 42; Gillespie v. Zittlosen, 60 N. Y. 449 [dist Cisco v. Roberts, 36 N. Y. 292, 1 Transcr. A. 297, 33 HowPr. 424]. Contra The Nevada, 18 F. Cas. No. 10,130, 7 Ben. 386.

[a] **Illustration.**—The master of a foreign vessel bound to or from the port of New York from a foreign port by way of Sandy Hook is not bound by the New York pilotage law to take the first pilot offering his services, or, in case of refusal, to pay him pilotage, such liability being imposed only when no pilot is taken. Gillespie v. Zittlosen, 60 N. Y. 449.

92. See statutory provisions and local regulations.

93. Camp v. The Marcellus, 4 F. Cas. No. 2,347, 1 Cliff. 481; Meissner v. Stein, 72 Ga. 234.

94. Martin v. Witherspoon, 135 Mass. 175 (the governor and council have power under statute to require vessels which are liable to pilotage, when inward bound, to pay pilotage to a pilot offering when outward bound, whether his services are accepted or not).

95. See supra text and notes 93, 94.

96. The Francisco Garguilo, 14 Fed. 495 (New York statute); Wright v. Lake, 75 Ga. 219 (pilot whose inward services were tendered and refused entitled to outward pilotage on second tender and refusal).

[a] **Qualification of rule.**—The text rule has been held inapplicable where the vessel piloted inward was subsequently sold, rebuilt, and registered under a different nationality so that she was in effect a new vessel, in which case the inward pilot could secure no fee for tender of outward services in a jurisdiction where such fees were denied for outward services except to inward pilots. Meissner v. Stein, 72 Ga. 234.

97. See supra § 36.

98. The Australia, 36 Fed. 332, 333, 13 Sawy. 200; The Harriet S. Jackson, 32 Fed. 110; The Talisman, 23 Fed. 111; The Eldridge, 8 F. Cas. No. 4,332, Deady 176; Muller v. Trinity House, [1925] 1 K. B. 166.

"The law requires not only that the vessel be spoken, but also that the services of the pilot be declined." The Australia, supra.

[a] **Under the English Pilotage Act** if no pilot offers his services there is no obligation on the vessel to pay pilotage dues. Muller v. Trinity House, [1925] 1 K. B. 166.

99. The Yumuri, 68 Fed. 930.

1. The Earnwell, 70 Fed. 331, 17 CCA 136 [aff 68 Fed. 228].

2. The Australia, 36 Fed. 332, 13

regulations and the facts of the particular case.[3] A statute prescribing certain methods of tender does not necessarily exclude other methods.[4] Under statutory provisions and local regulations, requiring suitable boats to be attached to the pilot boat, a gasolene launch has been held proper so as to authorize collection of pilotage fees by a pilot speaking a vessel from such launch[5] and to be "attached" to the pilot boat, even though cruising at a distance of some miles.[6]

Mere inquiry of a master, as to whether he will need the pilot's services, is not a sufficient tender.[7]

Tender made on Sunday has been held valid under a state Sunday statute.[8]

[§ 43] **(2) Place and Time.** Where the matter is regulated by statute or regulation,[9] a pilot must tender his services within the territorial limits prescribed.[10] In making a tender to an outward bound vessel it is sufficient for the pilot to be present at the time and place appointed by the master without actually going on board if the master fails to meet him.[11]

Outward limits. In the absence of statutory prohibition[12] a pilot may tender his services at any reasonable distance from port,[13] the limits often being fixed by custom,[14] and a state may permit or require its pilots to tender their services to inward bound vessels at a greater distance from the shore than three miles, or the outward limit of the pilot ground,[15] it being the policy of the law to encourage an early tender of a pilot's services to inward bound vessels.[16] A tender made beyond the national[17] or state[18] territorial jurisdiction is valid so as to allow recovery of compensation under the law of the nation or state involved.[19] However, a tender of services by a pilot at an unreasonably long distance from port, and long before his services would be needed, is not such a tender as will subject the vessel to pilotage fees in case of declining his services.[20]

Inner limits. Under statutes or regulations establishing harbor lines respecting pilotage,[21] it has been held that to be entitled to compensation for services offered and refused,[22] including cases where a vessel not obligated to take a state pilot signaled for and then declined a pilot,[23] the tender must be made before the vessel passed such line, except where a sailing vessel merely tacked across and then back before finally entering.[24]

Time of tender. A tender made to an inward[25] or outward[26] bound vessel within a reasonable time before a pilot's services will be needed is sufficient. Where a vessel is due to sail at high water, the pilot must present himself at that time in order to make a tender entitling him to compensation.[27]

[§ 44] **(3) Showing Documents of Office.** Under some statutes,[28] to make a sufficient tender, the pilot must show his license or warrant to the master irrespective of the latter's demand,[29] while under others it is necessary only if demanded.[30] It is not necessary for a pilot to show his official bond.[31]

[§ 45] **(4) Presence of Master.** A statute requiring a pilot to make his offer to the master in his presence, in order to make it a sufficient tender of services,[32] ordinarily[33] is considered as mandatory and must be complied with.[34]

[§ 46] **(5) Notice of Obligation.** Where the stat-

Sawy. 200.

3. See statutes and regulations; cases infra text and notes 4–8; and §§ 43–47.

4. The Queen, 206 Fed. 148, 153, 124 CCA 214.

[a] **For example,** a statute prescribing that tender of services may be made by displaying signals does not exclude other methods of tender such as an oral offer of services on board the vessel. The Queen, 206 Fed. 148, 124 CCA 214.

5. Spears v. St. John Pilot Comrs., 39 N. B. 495.

6. Spears v. St. John Pilot Comrs., supra.

7. The Australia, 36 Fed. 332, 13 Sawy. 200 (inquiry at customhouse not sufficient tender under California half-pilotage statute).

8. Perkins v. O'Mahoney, 131 Mass. 546. See generally Sunday [37 Cyc 535].

9. See statutory provisions and local regulations.

10. The Edmund Phinney, 80 Fed. 558, 25 CCA 641 (Maryland statute); The William Law, 14 Fed. 792 (Delaware statute); The Clymene, 12 Fed. 346, 9 Fed. 164 (Delaware statute); The Glaramara, 10 Fed. 678, 8 Sawy. 22 (Oregon statute); The Glenearne, 7 Fed. 604, 7 Sawy. 200 (Oregon statute); O'Brien v. De Larrinaga, 49 S. C. 497, 27 SE 481.

11. The Francisco Garguilo, 14 Fed. 495.

12. See statutory provisions.

13. The S. & B. Small, 21 F. Cas. No. 12,291b, 8 Ben. 523.

14. Hope v. Dido, 12 F. Cas. No. 6,679, 2 Paine 243; Heridia v. Ayres, 12 Pick. (Mass.) 334.

15. Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; The Whistler, 13 Fed. 295, 8 Sawy. 232; The Georgia D. Loud, 10 F. Cas. No. 5,353, 8 Ben. 392; Horton v. Smith, 12 F. Cas. No. 6,709, 6 Ben. 264; Perkins v. Buckley, 120 Mass. 3; Hunt v. Carlisle, 1 Gray (Mass.) 257; Wilson v. Mills, 4 Daly (N. Y.) 549, 10 AbbPrNS 143; Murray v. Clark, 4 Daly 468 [aff 58 N. Y. 684]; Peterson v. Walsh, 1 Daly (N. Y.) 182, 185.

16. Peterson v. Walsh, supra.

17. The Annapolis, Lush. 295, 167 Reprint 128.

[a] **"In France** it has been adjudged, in regard to vessels bound to Havre, that the pilots may board such vessels at any time or distance out, and the liability to take a pilot has been adjudged to attach to a French ship although she was at the time in English waters, as at the Downs (Cour. Cass. D. 1866, p 393, Caumont, Traité Pilote, 31)." Horton v. Smith, 12 F. Cas. No. 6,709, 6 Ben. 264, 267 [quot The Whistler, 13 Fed. 295, 298, 8 Sawy. 232 (per Benedict, J.).

18. Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; The Swift Arrow, 292 Fed. 651; The Whistler, 13 Fed. 295, 8 Sawy. 232; The Nevada, 18 F. Cas. No. 10,130, 7 Ben. 386; Cisco v. Roberts, 36 N. Y. 292, 1 Transcr. A. 297, 33 HowPr 424; Wilson v. Mills, 4 Daly (N. Y.) 549, 10 AbbPrNS 143.

19. Compensation under law of different state see supra § 36 text and note 83.

20. The Glaramara, 10 Fed. 678, 8 Sawy. 22; The S. & B. Small, 21 F. Cas. No. 12,291b, 8 Ben. 523; The Sussex, [1904] P. 236; The Mercedes de Larrinaga, [1904] P. 215; The Holar, [1901] P. 7; The Servia, [1898] P. 36; Reed v. Goldsworthy, 9 Aspin. 529. See Peterson v. Walsh, 1 Daly (N. Y.) 182 [questioned in Wilson v. Mills, 10 AbbPrNS 143, 146, 4 Daly 549] (a tender of services three hundred miles at sea will not entitle a pilot to fees on refusal of his services, under the statute requiring the master to accept the pilot whose services are first tendered).

[a] **For example,** the tender of services by a Hell Gate pilot as far east as Block Island is not legal, and a refusal and subsequent settlement with him will not prevent a pilot, who tendered his services off Oak Neck, from recovering half pilotage, where they were refused. The S. & B. Small, 21 F. Cas. No. 12,291b, 8 Ben. 523.

21. See statutes and local regulations.

22. Perkins v. Buckley, 120 Mass. 3; Heridia v. Ayres, 12 Pick. (Mass.) 334.

23. Perkins v. Buckley, 120 Mass. 3.

24. Hunt v. Carlisle, 1 Gray (Mass.) 257.

[a] **Tender to a sailing vessel** made while she is without the harbor line is sufficient, although the vessel in tacking has previously been inside the line. Hunt v. Carlisle, 1 Gray (Mass.) 257.

25. The Swift Arrow, 292 Fed. 651 (few hours).

26. The Queen, 206 Fed. 148, 124 CCA 214 (within an hour of sailing time and before vessel left the wharf).

27. The Ocean Express, 22 Fed. 176.

28. See statutory provisions.

29. The Eldridge, 8 F. Cas. No. 4,332, Deady 176 (Washington statute); Hammond v. Blake, 10 B. & C. 424, 21 ECL 183, 109 Reprint 507; Usher v. Lyon, 2 Price 118, 146 Reprint 40.

30. The Lord Clive, 12 Fed. 81 [aff 10 Fed. 135] (Pennsylvania statute); Com. v. Ricketson, 5 Metc. (Mass.) 412; Hammond v. Blake, 10 B. & C. 424, 21 ECL 183, 109 Reprint 507.

31. The Panama, 18 F. Cas. No. 10,702, Deady 27.

Bonding of pilot generally see supra § 29.

32. See statutory provisions.

33. [a] **Tender at night** has been held sufficient where the pilot merely approached and hailed the vessel, his hail being heard but unanswered, without making an actual offer of services to the master. In Com. v. Ricketson, 5 Metc. (Mass.) 412.

34. The Francisco Garguilo, 14 Fed. 495; Chaney v. Payne, 1 Q. B. 712, 41 ECL 742, 113 Reprint 1304; Peake v. Carrington, 2 B. & B. 399, 6 ECL 201, 129 Reprint 1020; Reg. v. Chaney, 6 Dowl. P. C. 281.

ute requires the pilot to inform the vessel that she will be held to pay the regular fees whether his services are accepted or refused,[35] this information is a condition precedent to his right to hold the vessel for pilotage fees for services tendered but not accepted.[36]

[§ 47] **(6) Display of Pilot Signals.** Display of the customary pilot signals on the usual cruising ground by a visibly approaching pilot boat is ordinarily a sufficient tender of offshore pilotage to an incoming vessel,[37] although some statutes require pilot commissioners to declare by rule what shall constitute a valid offer of pilot service by a signal addressed to the eye, and in so doing may prescribe the distance within which such signal must be made.[38] Under the federal statute no particular pilot signals are prescribed.[39]

[§ 48] **C. Amount of Compensation[40]—1. Aside from Statute.** Where no rate is fixed by statute for fees payable to pilots, they are entitled to be paid a reasonable reward for the services performed by them,[41] which may be fixed by express agreement.[42]

[§ 49] **2. Under Statute.** When fixed by statute or regulation[43] a pilot is entitled to recover the amount or rate of pilotage so fixed;[44] and where rates are so fixed he cannot contract for fees at other rates.[45] The rates of pilotage within a state need not be uniform.[46]

[§ 50] **3. Extra Compensation.** Pilots may recover extra compensation for services involving unusual risk or responsibility,[47] as where a piloted vessel is in a crippled condition,[48] and may under statute be allowed designated extra compensation for services rendered in moving or transferring vessels in the harbor,[49] for detention of the vessel after engagement of the pilot,[50] or for winter pilotage.[51] Where a pilot is under a statutory duty to assist vessels in distress, he cannot by contract exact an exorbitant compensation for extra services in so doing.[52]

[§ 51] **D. Actions for Compensation—1. Jurisdiction.** Courts of admiralty have jurisdiction in rem and in personam of claims for pilotage and half pilotage.[53]

[§ 52] **2. Defenses.**[54] On a libel by a pilot for wages, where the services were rendered under several distinct contracts, the right to set up damages caused by the pilot's negligence as a defense is confined to the wages earned under the particular contract during the performance of which the negligence occurred,[55] and the defense fails if no negligence is shown.[56]

Pilot may be estopped by a bill rendered from suing for more than the amount thereby demanded.[57]

[§ 53] **3. Parties.**[58] An action to recover pilotage fees, where the pilot's services are refused, may be brought by the pilot in his own name.[59]

[§ 54] **4. Pleading.**[60] A complaint for pilotage fees must allege performance or tender of services,[61] and that no other qualified pilot was employed.[62]

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[a] **Tender held sufficient** within rule. The Francisco Garguilo, 14 Fed. 495.

35. See statutory provisions and local regulations.

36. Chandler v. Doody, 101 Mass. 267 (holding this to be true irrespective of whether the ship's master already knows of the compulsory pilotage provisions of the statute).

37. Beebe v. The Yumuri, 68 Fed. 930; Com. v. Ricketson, 5 Metc. (Mass.) 412 (under Rev. St. c 32 § 24).

38. The Mascotte, 39 Fed. 871 [mod The Alcalde, 30 Fed. 133]; The Ullock, 19 Fed. 207, 9 Sawy. 634.

39. The Ullock, supra (the running light required by the statute is not a signal but a preventive of collision, and the usual signal by which an offer of pilot service is made is the jack set at the main truck in the daytime, and "flare-ups" at night, and this jack is usually the ensign of the country in which the services are offered; in the United States it is a blue flag charged with a star of every state then in the Union, and called the "Union Jack").

40. Full or half pilotage for services tendered and refused see supra § 36.

41. Baton Rouge, etc., Packet Co. v. George, 128 Fed. 914, 63 CCA 640; The Angeline, 1 F. Cas. No. 385; Love v. Hinckley, 15 F. Cas. No. 8,548, Abb. Adm. 436. See Mepham v. Biessel, 9 Wall. (U. S.) 370, 19 L. ed. 677 (where the court below had fixed the wages of a person who had served for four months as captain and pilot at nine hundred dollars per month, and the supreme court declined to change the amount allowed).

[a] **Licensed wreckers.**—It is the duty of licensed wreckers to offer their services as pilots to vessels in need of pilotage, whether such vessels ask for a pilot or not, and, in the absence of a special agreement, recovery may be had of a reasonable compensation for such services. The Angeline, 1 F. Cas. No. 385.

42. Truesdale v. Young, 24 F. Cas. No. 14,204, Abb. Adm. 391.

43. See statutory provisions and local regulations.

44. The Cervantes, 135 Fed. 573; The Alameda, 31 Fed. 366, 12 Sawy. 429 (California statute); The Chase, 14 Fed. 854 (Florida statute); The Glenearne, 7 Fed. 604, 7 Sawy. 200 (Oregon statute); The Alaska, 1 F. Cas. No. 129, 3 Ben. 391 (New York statute); Nash v. The Thebes, 17 F. Cas. No. 10,022 (Massachusetts statute); State v. Jones, 16 Fla. 306, 310; Shepherd v. Mitchill, 10 Johns. (N. Y.) 112; The Clan Grant, 12 P. D. 139; Jones v. Bennett, 6 Aspin. 596; The Adah, 2 Hagg, Adm. 326, 166 Reprint 262. See The Lud Keefer, 49 Fed. 650 [mod 51 Fed. 44, 2 CCA 95] (where the lower court held that, where a steamboat bound from Pittsburg, Pa., to Louisville, Ky., engages pilots without the written contract required by USCA tit 46 § 574, she is liable under USCA tit 46 § 575 for the highest wages shown to have been voluntarily paid at Pittsburg for any pilot for a similar voyage during the three months preceding, and the upper court modified the judgment so as to give only customary instead of highest rate, because it did not appear that the vessel was within the tonnage specifications of the statute). And see supra §§ 30–34.

45. In re Hand, 266 Pa. 277, 109 A 692; Schellenger v. Philadelphia, 19 Phila. (Pa.) 471.

[a] **Reason for rule.**—"A licensed pilot, acting under and by virtue of the license . . . cannot have or retain any compensation not allowed by the authority under which he received the license" because "in accepting a license, he necessarily does so upon an express or implied agreement to comply with all the restrictions and limitations imposed upon him by the law under which it is granted." In re Hand, 266 Pa. 277, 282, 109 A 692.

46. The Chase, 14 Fed. 854.

47. The Cachemire, 38 Fed. 518; The Grid, 21 Fed. 423; The Champion, 5 F. Cas. No. 2,582a; Hope v. The Dido, 12 F. Cas. No. 6,679, 2 Paine 243; Love v. Hinckley, 15 F. Cas. No. 8,548, Abb. Adm. 436; The Warren, 29 F. Cas. No. 17,193; The Wave v. Hyer, Cas. No. 17,300, 2 Paine 131; 29 F. Cas. No. 17,300, 2 Paine 131; The Enterprise, 2 Hagg. Adm. 178 note, 166 Reprint 209; In re The Adventurer, 1 Stuart, Vice-Adm. (Que.) 101.

48. Flanders v. Tripp, 9 F. Cas. No. 4,854, 2 Lowell 15; Love v. Hinckley, 15 F. Cas. No. 8,548, Abb. Adm. 436; The Santiago, 9 Aspin. 147.

[a] **Illustration.**—Where a passenger ship had lost her rudder, bowsprit, fore topgallant mast, main topgallant mast, and had rigged temporary substitutes, pilot, taking charge of her sixty miles outside Sandy Hook, bearing E. S. E., and navigating her to within fifteen miles of the Hook, where a steamboat took her in tow, was entitled to one hundred dollars over and above regular off-shore pilotage, on account of the superadded responsibility, hazard, and risk resulting from the disabled condition of the vessel. The Warren, 29 F. Cas. No. 17,193.

Compensation of licensed wrecker see supra § 48 note 41 [a].

Right of pilot to claim salvage see Salvage [35 Cyc 726, 727].

49. The Cervantes, 135 Fed. 573, The Servia, [1898] P. 36. See also The Clan Grant, 12 P. D. 139 (refusing to apply rule because particular extra services designated in statute were not performed). To same effect The Cyclops, [1923] P. 80.

50. The Cervantes, 135 Fed. 573 (New York statute); The France, 50 Fed. 125 (New York statute).

51. The France, supra (New York statute).

52. Callagan v. Hallett, 1 Cai. (N. Y.) 104, Col. & C. Cas. 179 (court refused to enforce such a contract insisted upon by pilot before he would help the vessel).

53. See Admiralty § 83.

54. Failure of pilot to:
Comply with regulations see supra § 35.
Procure bond see supra § 29.

55. McDonald v. The Tom Lysle, 48 Fed. 690.

56. The Wallace, 32 Fed. 672.

57. Sorenson v. U. S., 3 Hawaii Fed. 287.

58. Generally see Admiralty §§ 145–153.

59. Wilson v. Mills, 4 Daly (N. Y.) 549, 10 AbbPrNS 143.

60. Generally see Admiralty §§ 183–229.

61. Morciglio v. South Porto Rico Sugar Co., 12 Porto Rico Fed. 27.

62. Morciglio v. South Porto Rico Sugar Co., supra.

In a suit for pilotage fees against the owner of a vessel who has refused to accept the pilot's services, the petition is not defective because it fails to allege whether the vessel was coastwise or foreign; and if the vessel is exempt from the payment of such fees, it is a matter of defense, to be set up by plea.[63]

[§ 55] **5. Evidence[64]—a. Burden of Proof.** In an action for services tendered but unperformed, the pilot has the burden of showing compliance with the statutory prerequisites to his action,[65] such as tender of services,[66] refusal of the same,[67] and, where required by statute, that no other pilot was employed.[68]

[§ 56] **b. Admissibility.** Parol evidence may be admitted to show the situation of a ship when the pilot took charge of her,[69] or the boundaries of a harbor or port.[70]

[§ 57] **c. Weight and Sufficiency.** The admiralty court determines facts upon principles which govern trials by jury,[71] and in accordance therewith evidence has been held sufficient[72] or insufficient[73] to establish particular issues.

[§ 58] **E. Persons Liable.**[74] In the absence of statute governing the matter, both owner and master may be liable for pilotage,[75] and the same may be true under statute.[76] A statute granting a pilot's lien on the vessel does not take away the pilot's right of action against the master.[77] Under particular statutory provisions[78] the agent of the vessel[79] or consignee[80] may be liable. The charterer of a vessel is not liable for extra pilotage growing out of a personal contract between the pilot and some third party.[81]

[§ 59] **F. Lien[82]—1. Existence of Lien—a. For Services Performed.** By the general maritime law a pilot has a lien upon a vessel for services actually rendered,[83] provided there is an express or implied contract between the pilot and one duly authorized to represent the vessel.[84] A pilot's lien cannot be predicated upon services performed by a pilot in some other capacity,[85] and it has been held that the lien does not arise from services rendered a boat while held under writ of execution,[86] nor when the pilot is employed to pilot a vessel on a voyage subsequently abandoned before rendition of services.[87] But when a pilot has been by express contract employed for a specified period, and wrongfully discharged after serving part of the time, he has a lien for the damages arising from breach of contract.[88]

[§ 60] **b. For Services Tendered and Refused.** There is authority holding that no lien arises for services tendered and refused,[89] but the weight of authority holds that a pilot has a lien for such services,[90] even though the statute does not ex-

63. Hagan v. Townsend, 118 Ga. 682, 45 SE 478 (where the allegations of the petition were held to be sufficient to show tender of services under circumstances which ordinarily require a vessel to accept the same).

64. Generally see Admiralty §§ 248-260.

65. See cases infra notes 66-68.

66. The Nellie Husted, 17 F. Cas. No. 10,098, 9 Ben. 42.

67. The Harriet S. Jackson, 32 Fed. 110; The Talisman, 23 Fed. 111; The Thomas Turrall, 23 F. Cas. No. 13,932, 6 Ben. 404.

68. The Nellie Husted, 17 F. Cas. No. 10,098, 9 Ben. 42 (slight circumstances, however, will be sufficient to warrant the inference that no pilot was employed. Such inference may be drawn from the fact that when the libelant presented his bill the master of the ship said it was all right, no evidence being offered to show that a pilot was employed).

69. Shepherd v. Mitchill, 10 Johns. (N. Y.) 112 (question of fact).

70. Martin v. Hilton, 9 Metc. (Mass.) 371.

71. Clark v. The Ruth, 39 Fed. 128; The Thomas Turrall, 23 F. Cas. No. 13,932, 6 Ben. 404; The Enterprise, 2 Hagg. Adm. 178 note, 166 Reprint 209; The General Palmer, 2 Hagg. Adm. 176, 166 Reprint 209, 21 ERC 289.

72. Murray v. Clark, 4 Daly (N. Y.) 468.

[a] **Evidence sufficient to support a finding of first tender.**—Plaintiff pilot's affidavit that when an incoming vessel was two and one-half miles off shore, he ran up to within one hundred feet of the vessel and offered his services as pilot, that such services were refused by the captain, and that the captain did not then have nor later take any pilot was, in the absence of contradictory evidence, sufficient proof of a first tender by plaintiff entitling him to recover pilotage. Murray v. Clark, 4 Daly (N. Y.) 468.

73. See cases infra this note.

[a] **Two witnesses contradicting one.**—Where the sole question arising on a libel by a pilot for wages is as to when the charterers informed the libelant that he was to look to one of the charterers individually for payment, and the two charterers directly contradict the libelant, there being no other witnesses on that point, the witnesses being equally worthy of credit, the weight of evidence is against the libelant. Clark v. The Ruth, 39 Fed. 128.

[b] **Evidence insufficient to show usage** of charging and paying double fees as a legal right, even for services rendered to a vessel in distress. Love v. Hinckley, 15 F. Cas. No. 8,548, Abb. Adm. 436.

[c] **Tender and refusal of services.**—A claim for pilotage for a tender and refusal of services, supported only by the oath of the pilot, and contradicted by two witnesses from the other vessel, cannot be sustained where the pilot might have produced other witnesses to corroborate his testimony, whose absence he did not account for. The Thomas Turrall, 23 F. Cas. No. 13,932, 6 Ben. 404.

74. Cross references:
Liability of vessel for services generally see Shipping [36 Cyc 156].
Pilot's lien on vessel see infra §§ 59-63.
Proceedings in rem against vessel see Admiralty § 83.

75. The Cervantes, 135 Fed. 573, 576; Hunt v. Mickey, 12 Metc. (Mass.) 346.

"In pilotage cases resort may be had to the vessel, or the owner or master." The Cervantes, supra.

[a] **Under the civil law as administered in Louisiana,** if one part owner of a steamer contract in his own name with the pilot, the others will be liable to the latter. Carlisle v. The Eudora, 5 La. Ann. 15.

76. Hunt v. Mickey, 12 Metc. (Mass.) 346.

77. Perkins v. O'Mahoney, 131 Mass. 546.

78. See statutory provisions.

79. Mason v. Ingraham, 16 F. Cas. No. 9,238, 5 Ben. 81 (holding, however, that in order to charge a person with liability as agent for half pilotage, a tender of services having been made, under a New York statute making such fee due and recoverable from the agent of the vessel, it is necessary to show that the agent had some connection with the vessel at the time).

80. Reardon v. Arkell, 59 Fed. 624 (New York); McDonald v. Prioleau, 44 Fed. 769 (South Carolina); The George S. Wright, 10 F. Cas. No. 5,340, Deady 591 (Oregon); Gillespie v. Winberg, 4 Daly (N. Y.) 318; Morteo v. Julian, 4 C. P. D. 216.

Liability of consignee as additional remedy see Admiralty § 83 note 91 [b].

81. Means v. Ross, 106 La. 175, 30 S 300.

82. Generally see Maritime Liens, 38 C. J. p 1194.

83. The Pauline, 138 Fed. 271; Flannery v. The Alexander Barkley, 83 Fed. 846; The Atlas, 42 Fed. 793; The Pirate, 32 Fed. 486; The Mystic, 30 Fed. 73; The Mary Elizabeth, 24 Fed. 379 [foll The Wanderer, 20 Fed. 655, 4 Woods 25]; Johnson v. The Anne, 13 F. Cas. No. 7,370 [rev 1 F. Cas. No. 412, 1 Mason 508]; The Maria Theresa, 16 F. Cas. No. 9,082; The Robert J. Mercer, 20 F. Cas. No. 11,891, 1 Sprague 284; Page v. Long, 4 B. Mon. (Ky.) 121; Perkins v. O'Mahoney, 131 Mass. 546.

84. The Anne, 1 F. Cas. No. 412, 1 Mason 508 [rev on other grounds 13 F. Cas. No. 7,370]. See Chapman v. The Lucerne, 5 F. Cas. No. 2,605 (denying pilot action against abandoned and towed bark where he was hired by underwriters and not owners and never went aboard the towed vessel).

85. The Morning Star, 1 F. (2d) 410.

[a] **Acting as watchman.**—The Morning Star, 1 F. (2d) 410.

86. Parker v. The Little Acme, 43 Fed. 925 (where the sheriff, by virtue of a writ of execution, seized a steamboat, and after taking actual possession, ran the boat a few days without the consent or knowledge of the owner, one who acted as master and pilot during that time must look to the sheriff for his compensation, and had no lien against the boat).

87. The Seven Sons, 69 Fed. 271.

88. Baton Rouge, etc., Packet Co. v. George, 128 Fed. 914, 63 CCA 640.

89. Leitch v. The George Law, 15 F. Cas. No. 8,223; The Robert J. Mercer, 20 F. Cas. No. 11,981, 1 Sprague 284.

90. The Earnwell v. Marshall, 70 Fed. 331, 17 CCA 136 [aff 68 Fed. 228]; The Edith Godden, 25 Fed. 511; The Charles A. Sparks, 16 Fed. 480; The Alzena, 14 Fed. 174; The Glenearne, 7 Fed. 604, 7 Sawy. 200; The California, 4 F. Cas. No. 2,312, 1 Sawy. 463; The George S. Wright, 10 F. Cas. No. 5,340, Deady 591; The Kal-

pressly create a lien,[91] and a fortiori where it does.[92]

[§ 61] **c. Services as Master and Pilot.** There are authorities holding that services rendered by the same person as master and pilot do not give a pilot's lien.[93] Some cases apply the rule only where there is no segregation of the respective duties,[94] and there is authority to the effect that on due proof of the dual hiring and segregation of services as pilot, a pilot's lien can be enforced.[95] When one person contracts expressly as pilot, and another stands as registered master, the person so contracting has a lien for his wages, although the registered master does not sail in the vessel,[96] and although such pilot has entire charge of her navigation.[97]

[§ 62] **2. Priorities.**[98] A claim against a tug for unpaid pilotage has been held superior to one for damages to her tow,[99] and there is authority that a claim for pilotage will be preferred to one founded on a previously executed bottomry bond.[1] Pilotage liens ordinarily rank equally with liens for mariner's wages.[2]

[§ 63] **3. Loss of Lien.**[3] As in the case of other maritime liens,[4] a pilot's lien may be lost by unreasonable delay in enforcement,[5] but will not be lost by a reasonable delay.[6]

Waiver. Where a pilot is employed under a special contract with the charterer of a vessel, without knowledge of the owners, he may waive his lien, or more properly speaking, never secure a lien on the vessel.[7] But in the absence of a special agreement to do so, a pilot does not waive his lien by assenting to an arrangement whereby a part owner will account to him for pilotage,[8] nor by taking a promissory note not subsequently paid,[9] nor by presenting his claim to a court of bankruptcy.[10]

VIII. POWERS, RIGHTS, AND LIABILITY[11]

[§ 64] **A. Powers and Functions.** While exercising his functions a pilot is in sole control of the navigation of the ship,[12] and his orders must be obeyed as in effect orders of the master.[13] But the master is still in command of the vessel, as distinguished from its navigation, and may properly displace an obviously incompetent or intoxicated pilot,[14] although he is not bound to do so unless the pilot is making an obvious mistake.[15] A pilot employed for a complete voyage is subject to the master's discipline, although not liable to do ship's duty except when in charge of her as pilot.[16]

Canal boat pilots may, in the absence of owners or supercargoes, exercise the general powers of a master or captain.[17]

Particular functions. While in charge the pilot must see to getting the vessel under way,[18] give orders as to setting canvas,[19] decide in bad weather whether to get under way or lie fast,[20] decide

mar, 14 F. Cas. No. 7,601, 10 Ben. 242.

91. The Queen, 206 Fed. 148, 124 CCA 214 (California).

[a] **For instance,** a statute making every inward or outward bound vessel of certain classes spoken by a pilot liable for pilotage fees has been construed as creating a maritime lien for services proffered and refused. The Queen, 206 Fed. 148, 124 CCA 214.

92. The America, 1 F. Cas. No. 289, 1 Lowell 176; Perkins v. O'Mahoney, 131 Mass. 546.

93. Bartlette v. The Viola, 2 F. Cas. No. 1,083; The Eolian, 8 F. Cas. No. 4,504, 1 Biss. 321.

94. The Willamette Valley, 76 Fed. 838; Bell v. The Florence S., 5 Alaska 298.

95. The Willamette Valley, 76 Fed. 838 (recognizing rule); Logan v. The Aeolian, 15 F. Cas. No. 8,465, 1 Bond 267; Bell v. The Florence S., 5 Alaska 298 (recognizing rule).

[a] **Clear and convincing proof** of the dual hiring is essential. Bell v. The Florence S., 5 Alaska 298 (where services not satisfactorily segregated and no clear and convincing proof of special hiring).

Right of master to lien for services as such see Shipping [36 Cyc 145].

96. The Atlas, 42 Fed. 793.

97. The Atlas, supra.

98. Priority of maritime liens generally see Maritime Liens §§ 92–114.

99. Flannery v. The Alexander Barkley, 83 Fed. 846 [aff 77 Fed. 994].

1. The St. Lawrence, 5 P. D. 250. But see The Dowthorpe, 2 W. Rob. 73, 166 Reprint 682 (pilotage and bond share rateably).

2. The Dowthorpe, supra.

3. Generally see Maritime Liens §§ 117–141.

4. See Maritime Liens §§ 122–125.

5. The Morning Star, 1 F. (2d) 410; The Seminole, 42 Fed. 924; The Artisan, 2 F. Cas. No. 567, 8 Ben. 538; Risher v. The Frolic, 20 F. Cas. No. 11,856, 1 Woods 92.

[a] **Illustration.**—The claim of a pilot who by family relationship was presumably acquainted with vessel's poor financial condition was rendered "stale" by failure to assert within six months. The Morning Star, 1 F. (2d) 410.

6. The Pirate, 32 Fed. 486; The Argo, 1 F. Cas. No. 515, 7 Ben. 304.

[a] **For example,** a claim for pilotage made six months after the last service is performed is not stale as against bona fide purchasers without notice. The Argo, 1 F. Cas. No. 515, 7 Ben. 304.

7. Clark v. The Ruth, 39 Fed. 128.

8. McAllister v. The Sam Kirkman, 15 F. Cas. No. 8,658, 1 Bond 369.

9. The Pirate, 32 Fed. 486; The Argo, 1 F. Cas. No. 515, 7 Ben. 304; The Dubuque, 7 F. Cas. No. 4,110, 2 Abb. 20.

10. The Louie Dole, 14 Fed. 862, 11 Biss. 479.

11. Cross references:
Criminal liability see infra § 70.
Duty to take a bond see supra § 29.
Penal liability see infra § 68.
Right to compensation see supra § 35 et seq.

12. Ralli v. Troop, 157 U. S. 386, 15 SCt 657, 39 L. ed. 742; Cooley v. Philadelphia Wardens, 12 How. (U. S.) 299, 13 L. ed. 996; U. S. v. Jacksonville Forwarding Co., 18 F. (2d) 39 [aff sub nom. The New Windsor, 13 F. (2d) 925]; The Dora Allison, 213 Fed. 645; Guy v. Donald, 157 Fed. 527, 85 CCA 291, 14 LRANS 1114, 13 AnnCas 947 [mod 127 Fed. 228, 135 Fed. 429, and cert questions answered 203 U. S. 399, 27 SCt 63, 51 L. ed. 245]; The Washington v. The Saluda, 29 F. Cas. No. 17,232; Yates v. Brown, 8 Pick. (Mass.) 23; Snell v. Rich, 1 Johns. (N. Y.) 305; Wood v. Smith, L. R. 5 P. C. 451; Marshall v. Moran, L. R. 3 P. C. 205; London, etc., Shipping Co. v. The Emily Fanny, L. R. 1 P. C. 426; The Tactician, [1907] P. 244; The Prins Hendrik, [1899] P. 177; The Monte Rosa, [1893] P. 23, 21 ERC 267; The Ripon, 10 P. D. 65; The Rhosina, 10 P. D. 24; The Winston, 9 P. D. 85; The Rigborgs Minde, 8 P. D. 132; The Cachapool, 7 P. D. 217; The Princeton, 3 P. D. 90; Oakley v. Speedy, 4 Aspin. 134; The Strathspey, 18 Ct. Sess. Cas. 1048; The North American, 14 L. T. Rep. N. S. 68; North German Lloyd SS. Co. v. Elder, 14 Moore P. C. 241, 15 Reprint 295, 21 ERC 277; Hammond v. Rogers, 7 Moore P. C. 160, 13 Reprint 841, 21 ERC 240; Marshall v. Moran, 6 Moore P. C. N. S. 492, 16 Reprint 812; The Northampton, 1 Spinks 152, 164 Reprint 89; The Argo, Swab. 462, 166 Reprint 1217; The Gypsey King, 2 W. Rob. 537, 166 Reprint 853; The George, 2 W. Rob. 386, 166 Reprint 800; The Agricola, 2 W. Rob. 10, 166 Reprint 659.

"It is always to be presumed, in the absence of positive evidence to the contrary, that a local pilot employed for the occasion and actually on the bridge is in charge of the navigation of the ship, subject to the authority of her master." U. S. v. Jacksonville Forwarding Co., 18 F. (2d) 39, 40 [aff sub nom. The New Windsor, 13 F. (2d) 925].

13. Camp v. The Marcellus, 4 F. Cas. No. 2,347, 1 Cliff. 481 [aff 1 Black 414, 17 L. ed. 217]; U. S. v. Forbes, 25 F. Cas. No. 15,129, Crabbe 558; U. S. v. Lynch, 26 F. Cas. No. 15,648.

14. The Oregon, 158 U. S. 186, 15 SCt 804, 39 L. ed. 943; Camp v. The Marcellus, 4 F. Cas. No. 2,347, 1 Cliff. 481; Wood v. Smith, L. R. 5 P. C. 451; The Girolamo, 3 Hagg. Adm. 169, 166 Reprint 368; The Peerless, Lush. 30, 167 Reprint 16; Pollok v. McAlpin, 7 Moore P. C. 427, 13 Reprint 945, 21 ERC 250; Hammond v. Rogers, 7 Moore P. C. 160, 13 Reprint 841, 21 ERC 240.

15. White v. The Lavergne, 2 Fed. 788 (the master of a towed boat is not chargeable with contributory negligence in acquiescing in the exposure of such boat to an unnecessary peril by the tugboat pilot, unless the danger about to be incurred is very obvious).

16. Beataugh v. Nicholson, 2 F. Cas. No. 1,194; Martin v. Farnsworth, 33 N. Y. Super. 246, 41 HowPr 59 [aff 49 N. Y. 555].

17. Marlatt v. Clary, 20 Ark. 251 (their authority over the boat and cargo is, under ordinary circumstances, limited to the mere duty of transportation and preservation; but under circumstances of great emergency, as in the case of wreck and imminent danger of an entire loss, they have authority to dispose of the boat and cargo from the very nature and necessity of the case).

18. The Peerless, Lush. 30, 167 Reprint 16; The Anglo-Saxon, 2 Stuart Vice-Adm. (Que.) 117.

19. Marshall v. Moran, L. R. 3 P. C. 205.

20. The Oakfield, 11 P. D. 34; The Strathspey, 18 Ct. Sess. Cas. 1048; Pollok v. McAlpin, 7 Moore P. C.

when, where, and how to bring up,[21] and also give orders relative to the use of warps and lines when docking,[22] as to catting, letting to, and the mode of carrying anchors,[23] and generally tend the ship at anchor, after she has started or before she has docked.[24] The pilot must also determine the scope of chain and management of the helm where the ship steers or shifts with the tide,[25] whether it is necessary to let go a second anchor,[26] and must manœuver the vessel if the cable parts[27] or she drifts from her anchorage.[28] He must determine the speed of the ship,[29] what canvas to carry,[30] whether the employment of a tug is necessary,[31] and direct the navigation of the tug when his vessel is in tow.[32] A pilot must determine whether or not it is necessary to depart from ordinary regulations in navigating the vessel.[33] It is not a part of a pilot's duties to determine what lights should be carried.[34]

[§ 65] **B. Right To Recover for Personal Injury.** As between the owners of a ship and a compulsory pilot, there is no implied contract that the pilot will take upon himself the risk of injury from the negligence of the shipowners' servants, and the shipowners are therefore liable for any injury sustained by him which is due to the negligence of such servants.[35] A pilot may recover for injuries sustained in a collision with another boat notwithstanding contributory negligence by members of the crew of the piloted boat who were not under the pilot's control.[36] Recovery may be had against the master by a pilot assaulted by him.[37]

[§ 66] **C. Liability for Damages[38]—1. In General.** A pilot is personally liable for damages, caused by his negligence or default,[39] to the owners of the vessel[40] and to third parties for damages sustained in a collision.[41] Such negligence is a marine tort within the jurisdiction of a court of admiralty.[42] A pilot is not under an insurer's liability for damages occurring without his default.[43] Nor is he

427, 13 Reprint 945, 21 ERC 250.

21. The Octavia Stella, 6 Aspin. 182; The George, 2 W. Rob. 386, 166 Reprint 800; The Agricola, 2 W. Rob. 10, 166 Reprint 659; The Lotus, 2 Stuart Vice Adm. (Que.) 58, 11 L. C. 342.

22. The Rigborgs Minde, 8 P. D. 132.

23. The Monte Rosa, [1893] P. 23; The Rigborgs Minde, 8 P. D. 132; The Gypsey King, 2 W. Rob. 537, 166 Reprint 858; The Agricola, 2 W. Rob. 11, 166 Reprint 659.

24. Wood v. Smith, L. R. 5 P. C. 451; The Princeton, 3 P. D. 90; The Northampton, 1 Spinks 152, 164 Reprint 89.

25. Wood v. Smith, L. R. 5 P. C. 451.

26. Wood v. Smith, supra; The Princeton, 3 P. D. 90.

27. Wood v. Smith, L. R. 5 P. C. 451.

28. Hammond v. Rogers, 7 Moore P. C. 160, 13 Reprint 841, 21 ERC 240.

29. Moss v. African SS. Co., L. R. 2 P. C. 238; Netherlands Steam Boat Co. v. Styles, 9 Moore P. C. 286, 14 Reprint 305; Pollok v. McAlpin, 7 Moore P. C. 427, 13 Reprint 945, 21 ERC 250; The Maria, 1 W. Rob. 95, 166 Reprint 508, 21 ERC 222.

30. Bland v. Ross, 14 Moore P. C. 210, 15 Reprint 284.

31. Bland v. Ross, supra; The Strathspey, 18 Ct. Sess. Cas. 1048; The Peerless, Lush. 30, 167 Reprint 16.

32. Spaight v. Tedcastle, 6 App. Cas. 217; Smith v. St. Lawrence Tow-Boat Co., L. R. 5 P. C. 308; The Energy, L. R. 3 A. & E. 48; Petley v. Catto, 6 Moore P. C. 371, 13 Reprint 726; Marshall v. Moran, 6 Moore P. C. N. S. 492, 16 Reprint 812; The Christina, 3 W. Rob. 27, 166 Reprint 872; The Duke of Sussex, 1 W. Rob. 270, 166 Reprint 573.

[a] **Qualifications of rule.**—There are cases holding: (1) That the pilot need not perpetually direct the tug captain as to every movement of the helm. The Sinquasi, 5 P. D. 241. (2) That the teet rule does not apply at night. The Borussia, Swab. 94, 166 Reprint 1037.

33. The Monte Rosa, [1893] P. 23, 21 ERC 267; The Argo, Swab. 462, 166 Reprint 1217.

34. The Monte Rosa, [1893] P. 23, 21 ERC 267.

35. Smith v. Steele, L. R. 10 Q. B. 125, 21 ERC 235.

[a] **Reason for rule.**—A pilot is by law compelled to serve and accordingly there is no implied contract between him and the owners that they shall not be held liable for injuries to the pilot arising from negligence of other employees of the owner, such as the officers or crew of the piloted vessel. Smith v. Steele, L. R. 10 Q. B. 125, 21 ERC 235.

Fellow servant doctrine in general see Master and Servant §§ 627–643.

36. Perry v. Lansing, 17 Hun (N. Y.) 34.

37. Beataugh v. Nicholson, 2 F. Cas. No. 1,194 (where a pilot was ordered by the master to leave the quarterdeck, and he refused to do so, and the master undertook to put him off, but he used force enough to throw him on the deck, this was a trespass for which the master is liable to the pilot in damages).

38. Liability of:
Owner for negligence of pilot causing collision see Collision § 264.
Pilot association see infra § 75.
Matters relating to liability of owner and master see Shipping [36 Cyc 150 et seq].

39. Transportes Maritimos de Estados v. Rotch, 289 Fed. 115; The Dora Allison, 213 Fed. 645; Compagnie de Navigation Francaise v. Burley, 183 Fed. 166, 171 [aff 194 Fed. 335, 115 CCA 199]; Campbell v. Williamson, 1 Phila. (Pa.) 198; Manila v. Gambe, 6 Philippine 49. See also Deering v. Targett, [1913] 1 K. B. 129 (amount of damages limited by statute to a fixed maximum sum).

"If, through the negligence of the pilot the ship suffer loss, either directly or because it commits injury to others, the pilot is liable for indemnity." Compagnie de Navigation Francaise v. Burley, supra.

[a] **Reason for rule.**—"A licensed pilot, enjoying the emoluments of compulsory pilotage, is quite in a different class from an ordinary employé. He assumes to have a skill and a knowledge in respect to navigation in the particular waters over which his license extends superior to and more to be trusted than that of the master, and from the moment he begins his duty he takes command and supersedes the master in respect to the navigation. His remuneration is fixed by law, and is proportionate to his responsibility, and his liability for neglect or want of skill must be in a similar proportion." Guy v. Donald, 157 Fed. 527, 530, 85 CCA 291, 14 LRANS 1114, 13 AnnCas 947 [mod 127 Fed. 228, 135 Fed. 429, and cert questions answered 203 U. S. 399, 27 SCt. 63, 51 L. ed. 245].

[b] **Illustration.**—Mistaking one buoy for another, ignorance that a summer can buoy had been displaced by a winter spar buoy, and proceeding when visibility was bad and prevented proper sight of buoys showed negligence rendering a pilot liable for missing the channel and running the ship on a shoal. Transportes Maritimos de Estados v. Rotch, 289 Fed. 115.

[c] **Erroneous orders of full speed ahead** when conditions demanded full speed astern show negligence rendering pilot liable. Manila v. Gambe, 6 Philippine 49.

[d] **Negligence not proved.**—The Wallace, 32 Fed. 672; The Governor Newell, 31 Fed. 362, 12 Sawy. 457.

Degree of knowledge, skill, and care required see infra § 67.

40. U. S.—Atlee v. Northwestern Union Packet Co., 21 Wall. 389, 22 L. ed. 619; The China v. Walsh, 7 Wall. 53, 68, 19 L. ed. 67; Donald v. Guy, 127 Fed. 228; Wilson v. Charleston Pilots' Assoc., 57 Fed. 227; McDonald v. The Tom Lysle, 48 Fed. 690; Sideracudi v. Mapes, 3 Fed. 873; The William Cox, 3 Fed. 645; Mason v. The William Murtaugh, 3 Fed. 404; Santiago v. Morgan, 21 F. Cas. No. 12,331.

Ga.—Pilotage Comrs. v. Low, R. M. Charlt. 298.

Ind.—Slade v. State, 2 Ind. 33.

La.—Brannan v. Hoel, 15 La. Ann. 308.

Mass.—Heridia v. Ayres, 12 Pick. 334.

Pa.—Hice v. Kugler, 6 Whart. 336; Campbell v. Williamson, 1 Phila. 198.

41. The Dora Allison, 213 Fed. 645; Campbell v. Williamson, 1 Phila. (Pa.) 198; Moss v. African SS. Co., L. R. 2 P. C. 238; Stort v. Clements, Peake 144, 170 Reprint 109.

[a] **Liability to passengers** for injuries or damages sustained in a collision may exist under statute. Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

Liability of owners of a vessel for the pilot's negligence causing collision see Collision § 264.

42. Sideracudi v. Mapes, 3 Fed. 873.

[a] **In England** there is authority holding: (1) That a court of admiralty lacks jurisdiction to entertain a suit brought by the owner of a vessel with which another vessel collided against the pilot of the latter vessel, plaintiff being confined to his remedy at common law. Alexandria, L. R. 3 A. & E. 574. (2) That an action against a pilot for any damage caused to a bark by a vessel under his charge is not an "admiralty cause" within 31 & 32 Vict. c 71, and 32 & 33 Vict. c 51, which statutes confer admiralty jurisdiction upon county courts. Flower v. Bradley, 2 Aspin. 489.

Admiralty jurisdiction over marine torts see Admiralty § 118 et seq.

43. Gypsum Packet Co. v. Horton, 68 Fed. 931; Wilson v. Charleston Pilots' Assoc., 57 Fed. 227, 55 Fed. 1000; McDonald v. The Tom Lysle, 48 Fed. 690; The Wallace, 32 Fed. 672; The Governor Newell, 31 Fed. 362, 12 Sawy. 457; Mason v. Ervine, 27 Fed. 459; The James A. Garfield, 21 Fed. 474; Martin v. Hogancamp, 9 Ky. Op. 429.

[a] **Rule applied.**—A pilot is not

liable for damages caused by mere errors of judgment.[44] A pilot is responsible only for his own personal negligence,[45] which must be affirmatively shown,[46] and cannot be held accountable for damages proximately caused by the default of others.[47] But lack of a proper crew and of equipment for a vessel will not excuse the pilot for damages proximately due to his own default.[48] A pilot is liable for damages to a vessel proximately resulting from his leaving her before completion of pilotage.[49]

[§ 67] **2. Degree of Knowledge, Skill, and Care Required.** A pilot should have a thorough knowledge of general and local regulations and physical conditions affecting the vessel in his charge and the waters for which he is licensed,[50] such as a particular harbor[51] or river.[52] He is not held to the highest possible degree of skill and care,[53] but must have and exercise the ordinary[54] skill[55] and care[56] demanded by circumstances, and usually shown by an expert in his profession.[57] Under extraordinary circumstances a pilot must exercise extraordinary care.[58]

IX. PENALTIES[59]

[§ 68] **A. In General.** Penalties imposed by statute or regulation[60] upon persons employing unliable: (1) Where the accident was caused by an unknown obstruction at the bottom of the harbor. The Sylfid, 169 Fed. 995 [aff 176 Fed. 1022 mem, 100 CCA 666 mem]. (2) Where the keel of a vessel, while being towed through the middle channel in Hell Gate, rubbed some object unknown, and subsequent examination of the boat showed no obstruction in the location where the libelant's evidence placed the course, and the evidence failed to show any negligence on the part of the pilot. Gypsum Packet Co. v. Horton, 68 Fed. 931.

44. The Dora Allison, 213 Fed. 645; McDonald v. The Town Lysle, 48 Fed. 690; Mason v. Ervine, 27 Fed. 459.

45. The Manchioneal, 243 Fed. 801, 156 CCA 313; Yap Tico v. Anderson, 34 Philippine 626.

[a] **Judicial statement of rule.**—A pilot is "responsible for a full knowledge of the channel and the navigation only so far as he can accomplish it through the officers and crew of the ship." Yap Tico v. Anderson, 34 Philippine 626, 630.

46. The Manchioneal, 243 Fed. 801, 156 CCA 313.

47. The Manchioneal, supra; Wilson v. Charleston Pilots' Assoc., 57 Fed. 227; Yap Tico v. Anderson, 34 Philippine 626. See also The Bonvilston, 30 T. L. R. 311 (owners cannot recover against a pilot for negligently running ship ashore where master guilty of contributory negligence).

[a] **Disobedience of a pilot's orders** by officers or crew of the piloted ship exempts the pilot from responsibility. Yap Tico v. Anderson, 34 Philippine 626.

[b] **Master's negligence.**—A pilot is not liable for damages resulting from a collision proximately caused by the excessive speed of a vessel under the master's direction. The Manchioneal, 243 Fed. 801, 156 CCA 313.

[c] **Default of others not shown.**—Where the pilot could have avoided a collision by dropping anchor at a certain time and gave the order to drop anchor, but at the suggestion of the master not amounting to refusal to obey, rescinded such order, he cannot avoid liability on the theory that the master's act caused the collision. The Griffdu, 25 F. (2d) 312.

48. Hice v. Kugler, 6 Whart. (Pa.) 336 (holding in an action by the owner of a canal boat against the steersman for negligence in allowing the boat to go too near a dam, whereby she was carried over and lost, it is no defense that she was not properly equipped and manned).

49. Sideracudi v. Mapes, 3 Fed. 873.

50. Transportes Maritimos de Estados v Rotch, 289 Fed. 115; The Dora Allison, 213 Fed. 645; Compagnie de Navigation Francaise v. Burley, 183 Fed. 166 [aff 194 Fed. 335, 115 CCA 199]; Harrison v. Hughes, 125 Fed. 860, 60 CCA 442 [aff 110 Fed. 545]; Marts v. The Oceanic, 74 Fed. 642, 20 CCA 574; McDonald v The Tom Lysle, 48 Fed. 690; White v The Lavergne, 2 Fed. 788; The Washington v. The Saluda, 29 F. Cas. No. 17,232; Campbell v. Williamson, 1 Phila. (Pa.) 198; Yap Tico v. Anderson, 34 Philippine 626.

[a] **Generally speaking** a pilot should "be a person of great and accurate knowledge of the difficulties and dangers of the particular navigation in which he is employed; well acquainted with the rules which arise out of the rights of others navigating the same waters, and always ready to regard those rights; cool and collected in dangerous and trying circumstances; not given to recklessness and passion in order to prove his courage; and always careful of the vessel committed to his guidance." Campbell v. Williamson, 1 Phila. (Pa.) 198, 199.

[b] **Customary seasonal changes of buoys** in local waters should be known to a pilot and he is liable for damages resulting from his ignorance thereof. Transportes Maritimos de Estados v. Rotch, 289 Fed. 115.

[c] **The ordinary action of wind and sea** on boats in his charge should be known to and anticipated by a pilot. White v. The Lavergne, 2 Fed. 788.

51. Compagnie de Navigation Francaise v. Burley, 183 Fed. 166 [aff 194 Fed. 335, 115 CCA 199]; The Washington v. The Saluda, 29 F. Cas. No. 17,232.

[a] **For example,** a harbor pilot "is selected largely on account of his personal knowledge of the local conditions affecting the safety of the vessel. He must be familiar with all such conditions. He must not only remember and avoid all the dangers of a physical nature, but he must also know and observe all the lawful regulations of the local authorities affecting the conduct of the ship." Compagnie de Navigation Francaise v. Burley, 183 Fed. 166, 170 [aff 194 Fed. 335, 115 CCA 199].

52. Atlee v. Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619; Harrison v. Hughes, 110 Fed. 545 [aff 125 Fed. 860, 60 CCA 442]; The Tom Lysle, 48 Fed. 690.

[a] **Channel, depths, and shoals** of a river bar should be known to the pilot. The Oceanic, 74 Fed. 642, 20 CCA 574.

[b] **Constant and familiar acquaintance** with the towns, banks, trees, etc., and the relation of the channel to them, and of the snags, sand bars, sunken barges, and other dangers of the river as they may arise, is essential to the character of a pilot on the navigable rivers of the interior. Atlee v Northwestern Union Packet Co., 21 Wall. (U. S.) 389, 22 L. ed. 619.

53. The Dora Allison, 213 Fed. 645; The Sylfid, 169 Fed. 995, 996 [aff 176 Fed. 1022 mem, 100 CCA 666 mem].

"The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view" The Sylfid, supra.

54. Transportes Maritimos de Estados v. Rotch, 289 Fed. 115, 117; St. Louis, etc., Packet Co. v. Keokuk, etc., Bridge Co., 31 Fed. 755; Campbell v. Williamson, 1 Phila. (Pa.) 198, 200.

"Pilots are bound to exercise ordinary skill and care according to the rules of navigation." Transportes Maritimos de Estados v. Rotch, supra.

"Ordinary skill in a pilot implies that he knows and follows the usual rules of navigation." Campbell v. Williamson, supra.

55. The Dora Allison, 213 Fed. 645, 646; Slade v. State, 2 Ind. 33; Campbell v. Williamson, 1 Phila. (Pa.) 198.

"He is chargeable for negligence if he fails in due care and skill in avoiding obstructions or difficulties known or which should have been known to him." The Dora Allison, supra.

[a] **Skill possessed but not used.**—In an action on the bond of a pilot and his sureties, it was held that evidence was properly rejected which was offered by defendant to prove that he possessed sufficient skill to pilot a boat, the question being not whether he possessed such skill, but whether in the present case he exercised it. Slade v. State, 2 Ind. 33.

56. Guy v. Donald, 157 Fed. 527, 85 CCA 291, 14 LRANS 1114, 13 AnnCas 947 [cert questions answered 203 U. S. 399, 27 SCt 63, 51 L. ed. 245]; The William Cox, 3 Fed. 645; Campbell v. Williamson, 1 Phila. (Pa.) 198; China Nav. Co. v. Vidal, 22 Philippine 121.

[a] **Passing out of the usual channel** without any compelling cause is sufficient of itself to show negligence subjecting a pilot to liability for consequent damage to the vessel. China Nav. Co., Ltd. v. Vidal, 22 Philippine 121.

[b] **Towing in a gale.**—It is negligence in both the pilot of a tug and the master of an open, loaded boat to attempt to tow such a boat across the bay of New York in a gale of wind. The William Cox, 3 Fed. 645.

[c] **Violation of rules** by pilot who could have avoided a collision had he obeyed the same may be sufficient to show negligence. Guy v. Donald, 157 Fed. 527, 85 CCA 291, 14 LRANS 1114, 13 AnnCas 947 [cert questions answered 203 U. S. 399, 27 SCt 63, 51 L. ed. 245].

57. The Dora Allison, 213 Fed. 645, 646.

"The highest possible degree of skill and care was not probably required of the pilot; but he was bound to bring to the performance of the duty he assumed reasonable skill and care, and to exercise them in everything relating to the work. The skill required of a pilot is the ordinary care of an expert in his profession." The Dora Allison, supra.

58. Campbell v. Williamson, 1 Phila. (Pa.) 198.

59. **Generally** see Fines, Forfeitures, and Penalties §§ 72–161.

Enforcing pilotage regulations see supra § 19.

60 See statutory provisions and local regulations.

licensed pilots,[61] or failing or refusing to take a pilot,[62] may be enforced as in the case of other penalties.[63]

[§ 69] **B. For Acting as Pilot without License.** A penalty imposed by statute[64] upon a person undertaking to pilot a vessel in or into particular waters, who has not been duly licensed as a pilot for such waters, may be enforced[65] in the usual manner;[66] and he may be penalized, even though he had a licensed pilot under his direction at the wheel,[67] and despite the fact that pilotage fees had been paid.[68] The penalty is imposed only upon the individual and not upon the ship,[69] and under a statute so providing may be recovered in the name of the master warden instead of in the name of the people.[70] An unlicensed pilot is not subject to a penalty for piloting a vessel exempt from the obligation to take a pilot,[71] and cannot be subjected to a penalty for performing services not amounting to pilotage under the statute.[72] Under such statutes, where no regularly licensed pilot seasonably offers his services, the master may employ any other person to pilot his vessel in, and such person may do so without incurring any penalty.[73]

Construction of statute. State statutes imposing a penalty upon persons without a state license who act as pilots after a state licensed pilot has offered his services must be construed in the light of United States statutes and United States supreme court decisions, since pilotage is fundamentally a matter of commerce falling within federal control.[74]

Master acting as pilot. Some statutes have been held to include masters without a pilot's license who bring in their own vessels,[75] while other statutes have been held inapplicable to masters piloting their own vessels.[76]

X. CRIMINAL OFFENSES[77]

[§ 70] **A. In General.** A pilot may be criminally liable under state statutes for issuing a false receipt for pilotage fees not in fact received,[78] or guilty of a misdemeanor under federal statutes for disobedience of established rules of navigation.[79]

[§ 71] **B. For Acting as Pilot without License.** Under a statute making it a criminal offense for a pilot to operate as such without a license,[80] a pilot so operating may be proceeded against by indictment or information.[81] A pilot operating under a license of one state purporting to give him authority to pilot in waters wholly within another state may be convicted of unlawful pilotage under a statute of the latter state.[82] An unlicensed pilot cannot be convicted for performing services not amounting to pilotage under the statute.[83]

Repeal of a state statute providing fine and imprisonment for operating certain vessels without a state license does not discontinue a prosecution then pending on appeal where another statute preserves the right of prosecution.[84]

As applied to ship's master. Under statute a master failing to employ a duly licensed pilot has been held subject to fine or imprisonment.[85]

Evidence.[86] In a prosecution for piloting a foreign vessel in state waters without a state license, clearance papers are competent evidence of destination,[87] entry papers of the port from which the vessel came,[88] and evidence of the name and port painted on the stern of the vessel is admissible to

61. The China v. Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67 (New York); Edwards v. The Panama, 18 F. Cas. No. 10,702, Deady 27, 1 Or. 418; Pilots Comrs. v. Pacific Mail SS. Co., 52 N. Y. 609.

62. U. S. v. The Science, 27 F. Cas. No. 16,239; State v. Penny, 19 S. C. 218.

63. See Fines, Forfeitures, and Penalties §§ 79–154.

64. See statutory provisions.

65. U. S.—The Carrie L. Tyler, 106 Fed. 426, 45 CCA 405; U. S. v. The Science, 27 F. Cas. No. 16,239.

Ind.—Cash v. Clark County Auditor, 7 Ind. 227.

Mass.—Com. v. Ricketson, 5 Metc. 412.

N. Y.—Peo. v. Deming, 13 HowPr 441, 1 Hill 271.

Pa.—Collins v. Distressed, etc., Pilots Relief Soc., 73 Pa. 194.

S. C.—State v. Penny, 19 S. C. 218.

Eng.—Thornton v. Boland, 2 Bing. 219, 9 ECL 553, 130 Reprint 290; Turner v. Peat, 53 J. P. 230; Beilby v. Scott, 7 M. & W. 93, 151 Reprint 692; Mackie v. Landon, 6 Taunt. 256, 1 ECL 603, 128 Reprint 1033; Rex v. Neale, 8 T. R. 241, 101 Reprint 1367; Rex v. Lambe, 5 T. R. 76, 101 Reprint 44.

66. See Fines, Forfeitures, and Penalties §§ 79–154.

67. Cash v. Clark County, 7 Ind. 227 (an unlicensed pilot who pilots a boat over the falls of the Ohio is subject to the penalty of twenty dollars, although there was a licensed pilot on board who acted as steersman under his direction).

68. In re Pennsylvania Pilotage Laws, 20 Pa. Dist. 832.

69. The Carrie L. Tyler, 106 Fed. 426, 45 CCA 405.

70. Peo. v. Deming, 1 Hilt. (N. Y.) 271, 13 HowPr 441.

71. Dryden v. Com., 16 B. Mon. (Ky.) 598; Hunt v. Card, 14 Pick. (Mass.) 135; Tilley v. Farrow, 14 Mass. 17.

[a] **War ship.**—The penalty imposed by St. (1796) c 85 § 3, providing for recovery of a penalty against a pilot undertaking to pilot a vessel outside of his own particular branch, does not extend to one who pilots a public vessel of war for the United States. Ayers v. Knox, 7 Mass. 306.

72. Beilby v. Scott, 7 M. & W. 93, 151 Reprint 692.

[a] **Tug boat captain,** employed merely to tow a vessel is not a pilot within the meaning of the Pilot Act (6 Geo. IV c 125 § 70), imposing a penalty on unlicensed persons acting as pilots. Beilby v. Scott, 7 M & W. 93, 151 Reprint 692.

73. Com. v. Ricketson, 5 Metc. (Mass.) 412.

74. Com. v. Kemp, 254 Mass. 190, 150 NE 172.

[a] **For example,** a statute was held not to impose a penalty on a pilot authorized under federal law to pilot steam coastwise vessels, for serving as pilot of a coastwise vessel as permitted by federal statute. Com. v. Kemp, 254 Mass. 190, 150 NE 172.

75. State v. Penny, 19 S. C. 218 (16 St. at L. p 420, prescribing the system of pilotage, makes the penalties applicable to masters bringing their own vessels into port without a pilot, as well as to pilots presuming to act without a license).

76. Beilby v. Shepherd, 3 Exch. 40, 154 Reprint 747.

77. **Generally** see Criminal Law 16 C. J. p 1.

78. Com. v. Fitzpatrick, 15 Pa. Co. 154 (pleadings held sufficient which showed a mere possibility of injury).

79. U. S. v. Greenman, 37 Fed. 64 (pilot of coastwise vessel violating rule relative to steamer overtaking and passing another).

80. See statutory provisions.

81. U. S.—The China v. Walsh, 7 Wall. 53, 19 L. ed. 67 (New York).

Ind.—Barnaby v. State, 21 Ind. 450.

Mass.—Com. v. Ricketson, 5 Metc. 412.

N. Y.—Peo. v. Sperry, 50 Barb. 170, 1 Cow. Cr. 320; Peo. v. Francisco, 10 AbbPr 30, 18 HowPr 475, 4 Park. Cr. 139.

Or.—State v. Ring, 122 Or. 644, 259 P 780.

Pa.—Com. v. The Sheriff, 13 Phila. 446; Virden's App., 6 WklyNC 560.

Wash.—State v. Ames, 47 Wash. 328, 92 P 137.

See generally Indictments and Informations 31 C. J. p 548.

[a] **A federal licensed pilot** conducting a foreign vessel of one sailing under register must by Oregon statute have a state license, and is subject to fine if so piloting without such a license. State v. Ring, 122 Or. 644, 259 P 780.

82. Leech v. Louisiana, 214 U. S. 175, 29 SCt 552, 53 L. ed. 956.

State and federal control over pilotage see supra §§ 5–1z.

83. State v. Turner, 34 Or. 173, 55 P 92, 56 P 645; Com. v. The Sheriff, 13 Phila. (Pa.) 446.

[a] **Question for jury.**—Upon the trial of an indictment against one for acting as a pilot without a state license, it is for the jury to determine whether the contract was for pilotage or towage, and, if for towage, whether the contract was a colorable one only. Com. v. The Sheriff, 13 Phila. (Pa.) 446.

84. State v. Ames, 47 Wash. 328, 92 P 137.

85. Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 21 SCt 831, 45 L. ed. 1155 (New York).

86. **In proceedings involving pilots' compensation** see supra §§ 55–57.

87. State v. Ring, 122 Or. 644, 259 P 780.

88. State v. Ring, supra.

show to what port she belongs.[89]

XI. PILOTS' ASSOCIATIONS[90]

[§ 72] **A. Nature of Organization.** A pilots' association is quasi-public.[91] Whether or not the members of a pilots' association are in legal effect a copartnership depends wholly upon the powers and duties of the members with relation to one another under the provisions of the governing statutes and regulations.[92] The relation of a pilot to his association is not that of a servant to the master, but of an associate assisting and participating in a common purpose.[93]

[§ 73] **B. Legality.** An agreement among pilots to associate together for their common purposes and business is not unlawful.[94]

[§ 74] **C. Rules.** Reasonable rules or by-laws of a pilot's association are enforceable.[95]

[§ 75] **D. Liability.** Where, under local statutes and regulations,[96] pilot associations lack the necessary legal incidents of responsibility, they have been held not liable for damages caused by the default of a member pilot.[97] Where the members of a pilots' association are in legal effect a copartnership,[98] they cannot recover against a steamship piloted by one of their members which collides with and damages a vessel owned by the association.[99] The members of a pilots' association which lacks the power to select or discharge its members, or to control or direct their activities, are not liable for damages resulting from the tort of a comember in the performance of his duties as a pilot.[1]

***PIMENTO** (Spanish, Pimiento). Allspice or the allspice tree.[1]

PIMP.[2] A "male steerer" for houses of ill fame;[3] one who provides gratification for the lust of others;[4] a pander;[5] a procurer.[6]

PIMPING.[7] Catering for the gratification or lust of another person;[8] pandering.[9]

PIN. A piece of wood, metal, etc., generally cy-

89. State v. Ring, supra.

90. Cross references:
Associations 5 C. J. p 1330.
Partnership 47 C. J. p 619.
Trade Unions.

91. Marshall v. Virden, 19 Pa. Super. 245.

92. See statutory provisions; and cases infra this note.

[a] **Held a partnership.**—The Joseph Vaccaro, 180 Fed. 272 (Louisiana).

[b] **Held not a partnership.**—Virginia Pilot Assoc. v. Com., 145 Va. 757, 760, 134 SE 682 ("The Virginia Pilot Association is not a partnership, but is a voluntary unincorporated association of pilots, each of whom is licensed and authorized by law to conduct the business of pilotage in Virginia").

93. Marshall v. Virden, 19 Pa. Super. 245.

94. Jones v. Fell, 5 Fla. 510; Levine v. Michel, 35 La. Ann. 1121.

[a] **Under the statutes of Louisiana** relative to the appointment of branch pilots of the port of New Orleans, and regulating their duties, a partnership or association of the said pilots, although state officers, for the purpose of furthering and protecting their common interests, is not illegal. Under the language of these statutes such association is authorized, and excepts the pilots from any legal principle which would forbid such an association of state officers for the purposes declared. Levine v. Michel, 35 La. Ann. 1121.

Limitations respecting those who can be pilots as not creating an unlawful monopoly see Monopolies § 25 text and note 36.

95. Marshall v. Virden, 19 Pa. Super. 245 (by-law upheld as reasonable which provided that any pilot refusing to go on a boat when his turn comes shall be considered on sick leave and receive sick-leave pay).

96. See statutory provisions.

97. The City of Dundee, 108 Fed. 679, 47 CCA. 581 [aff 103 Fed. 696]; Mason v. Ervine, 27 Fed. 459. See Wilson v. Charleston Pilots' Assoc., 57 Fed. 227 (where a libel in personam against a pilot association was dismissed because the pilot himself was held responsible for the damage caused).

[a] **No power to contract for pilotage.**—The pilots' association of the bay and river of Delaware, which is an unincorporated association of pilots, whose objects are limited to the management of pilot boats and the furtherance of the interests of its members in various ways, but which has no power to make contracts for pilotage, its members acting individually in that matter, does not stand in the relation of principal as to such contracts, and is not liable for the negligence or fault of one of its members in the performance of a contract made by him for such service. The City of Dundee, 108 Fed. 679, 47 CCA 581 [aff 103 Fed. 696].

[b] **Not a commercial partnership.**—The association of branch pilots of the port of New Orleans did not constitute what is known in Louisiana as a commercial partnership, in which the partners are liable to their creditors in solido; the association was not an insurer of the experience, skill, judgment, or conduct of any of its members; and therefore, when without fault itself, it was not liable for the negligence, want of skill, or fault of any branch pilot, belonging to the association, resulting in damage to any vessel such pilot might undertake to pilot into the Mississippi River from the sea. Mason v. Ervine, 27 Fed. 459.

98. See supra § 72.

99. The Joseph Vaccaro, 180 Fed. 272.

1. Guy v. Donald, 203 U. S. 399, 27 SCt 63, 51 L. ed. 245 [aff 127 Fed. 228]; The Griffdu, 25 F. (2d) 312; The Manchioneal, 243 Fed. 801, 156 CCA 313 [foll Guy v. Donald, 203 U. S. 399, 27 SCt 63, 51 L. ed. 245].

1. Webster New Int. D. See Von Bremen v. U. S., 12 Cust. A. 407, 408.

[a] **"Pimientos, dulces morrones."**—Von Bremen v. U. S., 12 Cust. A. 407, 408.

[b] **"Whole pimientos."**—Von Bremen v. U. S., 12 Cust. A. 407, 410.

2. See Pimping post.

3. Powell v. State, 108 Misc. 497, 66 S 979, 980.

[a] **Aspersion of character.**—As applied by the prosecuting attorney to one whom he sought to show was a "drummer" for persons engaged in the unlawful sale of intoxicants, it was said by the court to be, perhaps, an inaccurate use, but was not grossly improper and calculated to cast reflections on the character of the person addressed. Powell v. State, 108 Miss. 497, 66 S 979, 980.

4. Century D.; Webster D. [both quot Butte v. Peasley, 18 Mont. 303, 304, 45 P 210]; Webster D.; Worcester D. [both quot Peo. v. Gastro, 75 Mich. 127, 131, 42 NW 937]; Fleming v. Atlanta, 21 Ga. A. 797, 95 SE 271; U. S. v. Cruz, 38 Philippine 677, 678; Wimberly v. State, 109 Tex. Cr. 202, 4 SW (2d) 73, 74 [quot Cyc].

[a] **Similar dennitions.**—(1) "One who provides the means and opportunity for libidinous gratification." Standard D. [quot Lander v. Wald, 218 App. Div. 514, 515, 219 NYS 57]. (2) "One who provides for others the means of gratifying lust." Weideman v. State, 4 Ind. A. 397, 30 NE 920, 921; Wimberly v. State, 109 Tex. Cr. 202, 4 SW (2d) 73, 74 [quot Cyc].

[b] **A "bell boy"** in a hotel who procures a woman for a male guest of the hotel for the purpose of gratifying the latter's lust is a pimp. Fleming v. Atlanta, 21 Ga. A. 797, 95 SE 271.

[c] **A "cochero"** who solicits an American soldier to go with him in his rig to find a woman of loose morals, and having secured one for the soldier, is a pimp. U. S. v. Cruz, 38 Philippine 677, 678.

5. Standard D. [quot Lander v. Wald, 218 App. Div 514, 219 NYS 57, 58]; Weideman v. State, 4 Ind. A. 397, 30 NE 920, 921; Wimberly v. State, 109 Tex. Cr. 202, 4 SW (2d) 73, 74 [quot Cyc].

[a] **Similar definition.**—"A panderer." Century D.; Webster D. [both quot Butte v. Peasley, 18 Mont. 303, 304, 45 P 210]; Webster D.; Worcester D. [both quot Peo. v. Gastro, 75 Mich. 127, 131, 42 NW 937]; Fleming v. Atlanta, 21 Ga. A. 797, 95 SE 271; U. S. v. Cruz, 38 Philippine 677, 678; Wimberly v. State, 109 Tex. Cr. 202, 4 SW (2d) 73, 74 [quot Cyc].

"Pander" see 46 C. J. p 1171.

6. Century D.; Webster D. [both quot Butte v. Peasley, 18 Mont. 303, 304, 45 P 210]; Worcester D. [quot Peo v. Gastro, 75 Mich. 127, 131, 42 NW 937], Fleming v. Atlanta, 21 Ga. A. 797, 95 SE 271, Lander v. Wald, 218 App. Div. 514, 219 NYS 57, 58; U. S. v. Cruz, 38 Philippine 677, 678; Wimberly v. State, 109 Tex. Cr. 202, 4 SW (2d) 73, 74 [quot Cyc]. See Gouch v. Buxton, 11 Mod. 76, 77, 88 Reprint 904 (where the term was defined as one who "procured women").

[a] **Statutory definitions.**—Rev. St (1881) § 2002 [quot Fahnestock v. State, 102 Ind. 156, 157, 1 NE 372]; Pen. L. § 2460 subd 6 [quot Lander v. Wald, 218 App. Div. 514, 219 NYS 57].

[b] **In Spanish law** the corresponding term is "alcahuete." See Alcahuete 2 C. J. p 1027.

7. See Pimp ante.

8. State v. Thibodeaux, 136 La. 935, 67 S 973, 974.

[a] **"Pimping for his mother."**—Wimberly v. State, 109 Tex. Cr. 202, 4 SW (2d) 73, 74.

9. State v. Thibodeaux, 136 La.

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*By WILLIAM QUINBY DEFUNIAK (Pimento-Pipe Line inclusive except the Spanish words).

lindrical, used as a support by which one article may be suspended from another;[10] also, an ornament fastened to the clothing by a pin;[11] a stud.[12]

PINCH. To move, as a railroad car, by prying the wheels with a pinch bar.[13]

In mining. Of a vein or deposit, to narrow.[14]

In slang. To arrest.[15]

PINCH-OFF. In the culture of trees, the growing of the bud on top much more rapidly than the root or original stock, causing the trunk of the tree or new stock to be larger above the point where it has been joined or grafted than the stem of the original variety.[16]

PINE. Any tree of the genus pinus.[17]

PINEAPPLE. The fruit of the plant avanas sativa; so-called from its resemblance to a pine-cone.[18]

PINE LAND BROKER.[19]

PINELYPTUS. A combination of essential oils, namely, pine oil and eucalyptus oil, used in the manufacture of medicinal preparations.[20]

PINGERE.[21]

PING-PONG. An indoor modification of lawn tennis played with small bats, or battledores, and a very light, hollow celluloid ball, on a large table divided across the middle by a net.[22]

PINKROOT. The root of the Carolina or Indian pink, a well-known vermifuge officinal in the United States.[23]

PINKSTER or PINXTER. Whitsuntide.[24]

PIN MONEY.[25]

PIN POOL.[26]

PINT. A measure of capacity equal to half a quart.[27]

PINTURA. In Spanish law, a painting.[28]

PINXTER.[29]

PIONEER INVENTION.[30]

PIONEER PATENT.[31]

PIOUS GIFT.[32]

PIOUS USES.[33]

PIPE.[34] A conduit.[35]

Screw pipe. Pipe on the ends of which are placed threads to permit it to be screwed to the next connecting pipe.[36]

Service pipe. The pipe leading from the street main though and into the premises to be served.[37]

Standpipe. A vertical pipe erected at a well or reservoir, into which water is forced by mechanical means in order to obtain a head pressure sufficient to convey it a distance.[38]

Stovepipe. A pipe made either of sheet iron or heavy tin, which usually connects a stove with the chimney or flue.[39]

Welded pipe. A pipe in which the longitudinal break formed in the center of the pipe in the rolling of the steel plate from which the pipe is made, is welded, instead of being joined in some other manner.[40]

935, 67 S 973, 974.

[a] **Statutory definitions.**—(1) The act of a male person who cohabits with a common prostitute and lives wholly or in part upon her earnings derived from her unlawful occupation. State v Purcell, 39 Ida. 642, 228 P 796, 798 (construing the local statutes on the subject). (2) "The elements necessary to constitute the offense are· [1] Defendant must be a male person; [2] he must have knowledge· that a certain person is a prostitute; [3] there must be earnings from the prostitution; [4] the defendant must derive his support in whole or in part from such earnings knowing them to have been the proceeds from prostitution." Peo. v. Simpson, 79 Cal. A. 555, 559, 250 P 403, Peo. v. Fuski, 49 Cal. A. 4, 6, 192 P 552. (3) "One who solicits other men to go to houses or places of prostitution for immoral purposes, or who solicits men to associate with prostitutes for immoral purposes; or one who in some way procures for others the means of gratifying their passions; or one who lives wholly or in part upon the earnings of an immoral woman earned by immoral practices of prostitution." Remington & B. Code § 2440 [quot Eddy v Cunningham, 69 Wash. 544, 547, 125 P 961].

"Pandering" see 46 C. J. p 1172.

10. Webster New Int. D. [quot Peo. v. Nolan, 250 Ill 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401].

[a] **"Pins, solid-head or other."**—Robertson v. Rosenthal, 132 U. S. 460, 461, 10 SCt 120, 33 L. ed. 392.

"Pins, metallic" see Metallic 40 C. J. p 654 note 34 [a].

11. Webster New Int. D. [quot Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401].

[a] **"One diamond pin."**—Rex v. Moore, 1 Leach C. C. 335, 168 Reprint 270.

[b] **"One pin."**—Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401.

12. Peo. v. Nolan, supra.

13. Webster New Int. D. See Fassbinder v. Missouri Pac. R. Co., 126 Mo. A. 563, 567, 104 SW 1154 ("in the operation of 'pinching' the end of the crowbar is thrust between the wheel and the rail, and by lifting the free end, the operator slowly moves the load"); Street v. Norfolk, etc., R. Co., 101 Va. 746, 748, 45 SE 284 (" 'pinching' is the placing of a crowbar on the iron rail under the wheel of the car and prizing it along until the car has acquired sufficient momentum to take it down a slight grade").

14. Webster New Int. D.

[a] **"Pinching out" of ore in a mine.**—Samuels v. Black Lake Asbestos, etc., Co., Ltd., 18 OntWN 149.

15. See Peo. v. Murphy, 145 Mich. 524, 526, 108 NW 1009 ("pinched" as meaning arrested).

"Arrest" see 5 C. J. p 385.

16. Brackett v. Martens, 4 Cal. A. 249, 87 P 410, 412.

17. Century D.

[a] **"Pine growth."**—Brierley v. Brierley, 81 N. H. 133, 124 A 311, 314. "Growth" see 28 C. J. p 880.

[b] **"Pine timber."**—(1) A permit to cut "pine timber" includes "dead and down timber." State v. H. C. Akeley Lumber Co., 107 Minn. 54, 63, 119 NW 387. (2) "Pine timber" in a contract as not including spruce timber see Robbins v. Otis, 1 Pick. (Mass.) 368, 370. (3) "All the merchantable pine timber" Whitfield v. Rowland Lumber Co., 152 N. C. 211, 67 SE 512. "Timber" see [38 Cyc 305].

18. Century D.

[a] **"Pineapples preserved in their own juice."**—U. S. v. Johnson, 166 Fed. 1002, 1003; Dudley v. U. S., 153 Fed. 881, 82 CCA 627; U. S. v Johnson, 152 Fed. 164, 165, 81 CCA 416.

19. See Brokers § 1 text and note 9.

20. U. S. v. American Shipping Co., 13 Cust. A. 346, 347

21. See Picture ante p 1179 text and note.

22. Webster New Int. D.

[a] **Ping-pong balls as toys within the tariff acts.**—U. S. v. Wanamaker, 136 Fed. 266, 267; U. S. v. Strauss, 136 Fed. 185, 187, 69 CCA 201.

23. Century D.

[a] **As included in the term "vegetables and roots prepared or otherwise."**—Klett v. Delaware Ins. Co., 23 Pa. 262, 264 (construing these terms as used in a policy of insurance).

24. Century D.

[a] **"Pinxter Monday"** is a day upon which certain church corporations always elect their trustees. Peo. v. Runkle, 9 Johns. (N. Y.) 147, 157.

25. See Husband and Wife § 53.

26. See Gaming § 26.

27. Century D.

[a] **A sale of "one pint"** means a sale of that particular quantity, and not of more. State v. Bach, 36 Minn. 234, 235, 30 NW 764; State v. Lavake, 26 Minn. 526, 528, 6 NW 339, 37 AmR 415.

Necessity of alleging quantity of liquor illegally sold see Intoxicating Liquors § 467.

28. Escriche Diccionario.

"Painting" see 46 C. J. p 1170.

29. See Pinkster or Pinxter ante p.

30. See Patents § 355.

31. See Patents § 355.

32. See Charities § 2.

33. See Charities §§ 25, 26.

34. See Pipe Cutter post; Pipe Line post.

35. See Berwind-White Coal Min. Co. v. Firment, 170 Fed. 151, 153, 95 CCA 1.

[a] **Includes the flanges** which connect the sections of pipe. Berwind-White Coal Min. Co. v. Firment, 170 Fed. 151, 153, 95 CCA 1.

"Conduit" see 12 C. J. p 414.

"All pipes" see All 2 C. J. p 1140 note 67.

36. Mills v. Elsinore, (Cal. A.) 270 P 224, 230.

37. Moore v. Champlain Electric Co., 88 App. Div. 289, 292, 85 NYS 37; Dennis v. Halifax, 45 N. S. 74, 80, 9 EastLR 189, 360.

38. Century D.

[a] **"Source of water supply" distinguished.**—Carlyle Water, etc., Co. v. Carlyle, 31 Ill. A. 325, 336 ("the one is the point from which the water is supplied; the other the place from which it is distributed").

39. Fowle v. Atlantic Coast Line R. Co., 147 N. C. 491, 498, 61 SE 262 (construing a city ordinance regulating adjustment of stovepipes).

[a] **Flue not included.**—Fowle v. Atlantic Coast Line R. Co. 147 N. C. 491, 498, 61 SE 262. "Flue" see 26 C. J. p 744.

40. Mills v. Elsinore, (Cal. A.) 270 P 224, 230.

PIPE CUTTER. A tool, worked by hand, which grasps the pipe to be cut between two jaws, one or both of which is provided with a knife, and is then revolved around the pipe, the jaws being gradually brought nearer together, as the cut progresses, by means of a set screw or other device.[41]

PIPE LINE.[42] A line of pipe running upon or in the earth, carrying with it the right to the use of the soil in which it is placed.[43]

41. Saunders v. Allen, 60 Fed. 610, 9 CCA 157.

42. See Pipe ante.

Pipe line:
Appropriation of property for the purpose of laying gas or oil see Eminent Domain § 67.
As real property see Property [32 Cyc 665 note 43].
As subject of taxation see Taxation [37 Cyc 855, 856].
Laying in street before paving see Municipal Corporations § 2339.
Right of abutting property owners to compensation for laying in street see Eminent Domain § 176.
Transportation of gas or oil from one state to another by means of:
As interstate commerce see Commerce § 104.
Validity of prohibitory or regulatory acts of state in regard to see Commerce §§ 77, 104.

43. Dietz v. Missouri Transfer Co., 95 Cal. 92, 100, 30 P 380.

[a] **"Pipe-line company"** is a term which includes any person or persons, joint-stock association or corporation, wherever organized or incorporated, "when engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially, within [the] state." Bates St. Annot. Ohio (1904) § 2780—17 (a statute relating to listing personalty for taxation).

PIRACY

By Rudy J. Brossman

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

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CROSS REFERENCES

Admiralty jurisdiction and procedure generally see **Admiralty** 1 C. J. p 1241.
Averments as to place for offenses committed on vessels or high seas see **Indictments and Informations** § 199 et seq.
Boarding vessel without consent of master as offense see **Shipping** [36 Cyc 24].
Criminal law generally see **Criminal Law** 16 C. J. p 1.
Destroying or casting away vessel as crime see **Shipping** [36 Cyc 25].
Disclosure of master's trade secrets by employee see **Master and Servant** §§ 164–166.
Forfeiture of vessels burdened with liquor brought into American waters by pirates see **Intoxicating Liquors** § 364 note 70.
Insurance against pirates see **Marine Insurance** § 297.
Law of nations generally see **International Law** 33 C. J. p 384.
Piracy as extraditable offense see **Extradition** § 57.
Visit and search of vessels in maritime war see **War** [40 Cyc 344 et seq].

I. NATURE AND ELEMENTS OF OFFENSE

[§ 1] **A. Piracy Jure Gentium—1. In General.** Piracy has two aspects: (1) As a violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel only in prize courts. (2) Its liability to punishment criminally by the municipal law of the place where the offender is tried.[1] Accordingly the definitions of "piracy," aside from statutory piracy, fall naturally into two classes, according as the offense is viewed more especially as it affects the right of nations, or as amenable to criminal punishment under the municipal law.[2] Piracy, by the common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed on shore, would amount to felony there.[3] Piracy under the law of nations is a robbery or forcible depredation on the high seas without lawful authority, done animo furandi, in the spirit and intention of universal hostility.[4]

[§ 2] **2. Intent—a. In General.** It is said that

1. The Ambrose Light, 25 Fed. 408.
2. The Ambrose Light, supra.
3. Talbot v. Janson, 3 Dall. (U. S.) 133, 159, 1 L. ed. 540; U. S. v. Jones, 26 F. Cas. No. 15,494, 3 Wash. C. C. 209; U. S. v. Smith, 27 F. Cas. No. 16,318; U. S. v. Tully, 28 F. Cas. No. 16,545, 1 Gall. 247, 254; Dole v. Merchants' Mut. Mar. Ins. Co., 51 Me. 465, 467; Rex v. Dawson, 13 How. St. Tr. 451. See Bolivia Republic v. Indemnity Mut Mar. Ins. Co., Ltd., [1909] 1 K. B. 785 (opinion of Vaughan Williams, L. J.); Reg. v. McGregor, 1 C. & K. 429, 431, 47 ECL 429, 431 (a revolt on the part of a ship's crew is not a piracy at common law). But see Rex v. Morphes, 1 Salk. 85, 91 Reprint 80 (piracy no offense at common law).
4. Black L. D.; Bouvier L. D.; U. S. v. Smith, 5 Wheat. (U. S.) 153, 161, 5 L. ed. 57; The Ambrose Light, 25 Fed. 408, 416; U. S. v. Baker, 24 F. Cas No. 14,501, 5 Blatchf. 6, 12; U. S v. Chapels, 25 F. Cas. No. 14,782; Brunn. Coll. Cas. 444, 2 Wheel. Cr. (N. Y.) 205; Atty.-Gen. v. Kwok-a-Sing, L. R. 5 P. C. 179, 199; In re

the piratical act, to come within the meaning of the law, must be done animo furandi.[5] By this nothing more is meant than that, as in robbery on the land, it must be done with a felonious intent, that is, willfully, with intent to injure, and without legal authority or lawful excuse.[6]

[§ 3] **b. Commissioned Privateers.**[7] Since a felonious intent is necessary to constitute the crime,[8] it has been held that one acting in good faith under a commission from a foreign power cannot be held guilty of piracy, even though such commission is not genuine.[9] If, however, seizures are made, not jure belli, but animo furandi, a commission is no defense to a charge of piracy.[10]

Commission issued by rebels who have not obtained recognition of belligerent rights from any sovereign power is no defense to piracy, and depredations upon the high seas committed by the holders of such a commission constitute piracy by the law of nations.[11]

[§ 4] **B. Statutory Piracies—1. Murder, Robbery, etc., upon High Seas—a. Act of April 30, 1790.** By the act of April 30, 1790,[12] it was declared that every person who committed upon the high seas,[13] or in any river, harbor, basin, or bay, out of the jurisdiction of any particular state,[14] murder[15] or robbery[16] or any other offense, which, if committed within the body of a county, would be punishable by death by the laws of the United States, was a pirate, and should suffer death.[17] It extended to all persons on board all vessels which threw off their national character by committing piracy on other vessels;[18] but robbery committed on board a vessel belonging exclusively to subjects of a foreign state, sailing under the flag of a foreign state, whose authority was acknowledged, was not piracy within the intent of this act, nor punishable under it in the courts of the United States.[19]

[§ 5] **b. Act of May 15, 1820.** The act of May 15, 1820 declared the person a pirate, punishable by death,[20] who committed the crime of robbery upon the high seas, in or upon any vessel, or upon any ship's company of any vessel, or the lading thereof.[21] The interpretation given to the words of this act applied the crime to the case of depredation upon any American vessel or property, on the high seas under circumstances that would constitute robbery, if the offense were committed on land,[22]

Tivnan, 5 B. & S. 645, 117 ECL 645, 122 Reprint 971.

[a] **Another definition.**—"An assault upon vessels navigating the high seas, committed animo furandi, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury." Dole v. New England Mut. Mar. Ins. Co., 7 F. Cas. No. 3,966, 2 Cliff. 394, 419.

[b] **A pirate** is: (1) "One who renounces every country and ravages every country on its coasts and vessels indiscriminately." The Wanderer, 3 Phila. (Pa.) 527, 538, 539. (2) "One who robs on the high seas, irrespective of country or conditions—an indiscriminate plunderer for the sake of gain." Fifield v. State Ins. Co., 47 Pa. 166, 187, 86 AmD 523. (3) "One who roves the sea in an armed vessel, without commission from any sovereign State, on his own authority, and for the purpose of seizing by force, and appropriating to himself, without discrimination, every vessel he may meet." Black L. D.; Davison v. Seal-Skins, 7 F. Cas. No. 3,661, 2 Paine 324, 333; Dole v. New England Mut. Mar. Ins. Co., 7 F. Cas. No. 3,966, 2 Cliff. 394, 419; U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6, 12; In re Charge to Grand Jury, 30 F. Cas. No. 18,269a, 3 Phila. (Pa.) 527, 540; In re Charge to Grand Jury, 30 F. Cas. No. 18,277, 2 Sprague 285, 286. (4) "One who, without a commission from any public or recognized authority, shall ravage the coast or vessels of any country indiscriminately." The Wanderer, 3 Phila. (Pa.) 527, 538, 539. (5) "A person who lives by piracy, one guilty of the crime of piracy." Black L. D.; Bouvier L. D. (6) "A sea-robber, who, to enrich himself, by subtlety or open force, setteth upon merchants and others trading by sea, despoiling them of their loading, and sometimes bereaving them of life and sinking their ships." Ridley Civ. & Eccl. L. pt 2 c 1 § 3.

[b] **"Piracy is an offense against the law of nature,** which is in this respect the law of nations." Adams v. Peo., 1 N. Y. 173, 177.

5. U. S. v. Smith, 5 Wheat. (U. S.) 153, 5 L. ed. 57; Atty.-Gen. v. Kwok-a-Sing, L. R. 5 P. C. 179.

6. The Ambrose Light, 25 Fed. 408; Davidson v. Seal-Skins, 7 F. Cas. No. 3,661, 2 Paine 324; U. S. v. Jones, 26 F. Cas. No. 15,494, 3 Wash. C. C. 209; U. S. v. Tully, 28 F. Cas. No. 16,545, 1 Gall. 247; Dole v. Merchants' Mut. Mar. Ins. Co., 51 Me. 465. And see infra § 3.

7. **Cross references:**
Act of privateer as crime under federal statute see infra § 8.
Capture of vessel by belligerents see War [40 Cyc 347 et seq].

8. See supra § 2.

9. The Josefa Secunda, 5 Wheat. (U. S.), 338, 5 L. ed. 104; Stoughton v. Taylor, 13 F. Cas. No. 7,558; U. S. v. Bass, 24 F. Cas. No. 14,537, Brunn. Coll. Cas. 418; U. S. v. Smith, 27 F. Cas. No. 16,339a.

[a] **Distinction between privateering and piracy** is the distinction between captures jure belli, under color of governmental authority, and for the benefit of a political power organized as a government de jure or de facto, and mere robbery on the high seas, committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power, and in the other to the benefit of the perpetrators merely. A capture of a vessel and cargo by a Confederate privateer was held not to be within the terms of the insurance policy against perils of the sea, fires, pirates, assailing thieves, jettison, etc., but to be included in the exception "that said company shall not be liable for any claim for or loss by seizure, capture, or detention." Fifield v. State Ins. Co., 47 Pa. 166, 169, 86 AmD 523.

10. U. S. v. Klintock, 5 Wheat. (U. S.) 144, 5 L. ed. 55; U. S. v. Jones, 26 F. Cas. No. 15,494, 3 Wash. C. C. 209; 3 Op. Atty.-Gen. p 120.

11. The Magellan Pirates, Spinks 81, 164 Reprint 47. See U. S. v. Hutchings, 26 F. Cas. No. 15,429, Brunn. Coll. Cas. 489, 2 Wheel. Cr. (N. Y.) 543 (a commission issued by an unrecognized government might be given in evidence, not as a defense to piracy, but merely as a paper found on board of the vessel).

12. U. S. Rev. St. § 5372.

13. See cases infra this note.

[a] **The words "high seas"** (1) mean any waters on the sea coast which are without the boundaries of low-water mark (U. S. v. Ross, 27 F. Cas. No. 16,196, 1 Gall. 624, 627. And see 29 C. J. p 350 notes 40-42), (2) although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government (U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. v. Ross, 27 F. Cas. No. 16,196, 1 Gall. 624). (3) Foreign jurisdictional limits, although neutral to war, are not neutral to crimes. U. S. v. The Pirates, supra.

14. See cases infra this note.

[a] **The words "out of the jurisdiction of any particular state"** mean out of any one of the United States. U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 199, 5 L. ed. 64; U. S. v. Ross, 27 F. Cas. No. 16,196, 1 Gall. 624, 627.

15. See case infra this note.

[a] **To constitute murder within this section,** the death, as well as the mortal stroke, must happen on the high seas. U. S. v. McGill, 26 F. Cas. No. 15,676, 4 Dall. 426, 1 Wash. C. C. 463.

"Murder" defined see Homicide § 59 et seq.

16. See cases infra this note.

[a] **The term "robbery," as used in the statute** (1) must be understood in the sense in which it is recognized and defined at common law. U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. v. Jones, 26 F. Cas. No. 15,494, 3 Wash. C. C. 209. (2) A robbery, as defined by the common law, committed on the high seas, is piracy, by Act (1790) c 36 § 8, even if not punishable with death by the laws of the United States, if committed on land. U. S. v. Palmer, supra; U. S. v. Hutchings, 26 F. Cas. No. 15,429, Brunn. Coll. Cas. 489, 2 Wheel. Cr. (N. Y.) 543.

Robbery generally see [34 Cyc 1795].

17. See cases infra this note.

[a] **This act was not repealed** (1) by the act of June 26, 1812 (U. S. v. Jones, 26 F. Cas. No. 15,494, 3 Wash. C. C. 209), (2) or by the act of March 3, 1819, to protect the commerce of the United States, and punish the crime of piracy (U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64). (3) But see U. S. Code tit 18 § 481; U. S. Cr. Code §§ 290, 341 (punishment).

18. U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. v. Klintock, 5 Wheat. (U. S.) 144, 5 L. ed. 55.

19. U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6; U. S. v. Kessler, 26 F. Cas. No. 15,528, Baldw. 15; U. S. v. Owners of The Unicorn, 27 F. Cas. No. 15,979a.

20. But see U. S. Code tit 18 § 481; U. S. Cr. Code §§ 290, 341.

21. U. S. Rev. St. § 5370. But see U. S. Code tit 18 §§ 463, 481.

[a] **This section applied to all persons** whether citizens or foreigners. U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6.

22. U. S. v. Baker, supra.

[a] **Commission to vessel as defense.**—(1) Since a nation at war may commission private armed vessels to carry on war against the enemy on the high seas, such a commission is a good defense to a charge of

which is the felonious[23] and forcible taking from the person of another, of goods or money, to any value, by violence or putting him in fear.[24]

[§ 6] **2. Running Away with Vessel.** To constitute the offense of piracy within the act of April 30, 1790,[25] by "piratically and feloniously" running away with a vessel,[26] personal force and violence were not necessary;[27] but the intent must have been animo furandi.[28] Under an English statute,[29] deeming a pirate one who makes a revolt in a ship, an offense is committed where a crew or a part thereof combine to resist the captain, in order to force him to redress grievances,[30] although there is no intent to run away with the vessel or commit any act of piracy.[31]

[§ 7] **3. Confederating with Pirates.** The act of April 30, 1790 provided for the punishment of anyone who combined, confederated, or corresponded with pirates, knowing them to be guilty of piracy or robbery.[32]

[§ 8] **4. Piracy under Color of Commission from Foreign Power.** The act of April 30, 1790 declared that every citizen who committed any murder or robbery against the United States, or any citizen thereof, under color of a commission from a foreign power, should be considered a pirate.[33]

[§ 9] **5. Engaging in Slave Trade—a. In General.** The slave trade is not piracy, unless made so by the treaties or statutes of the nation to whom the party belongs.[34]

[§ 10] **b. Act of May 15, 1820—(1) Elements of Offense.** Under the power to define and punish piracies, given by the constitution,[35] congress may declare to be piracy the service of a citizen or resident of the United States on a vessel used in kidnapping the inhabitants of a foreign country for the purpose of making them slaves, or the use of a vessel owned in the United States in such kidnapping.[36] This power was exercised in the act of May 15, 1820.[37] There are four descriptions of the offense to be found in this act: (1) Landing and seizing the negroes. (2) Forcibly bringing or carrying them on board. (3) Decoying them. (4) Receiving them on board of the vessel.[38] The first two acts comprehend force as an ingredient;[39] the latter two do not.[40] Intent[41] and acts, tending to make some one a slave,[42] are both necessary.

[§ 11] **(2) Who May Commit.** Any citizen, being of the crew or ship's company of any vessel, whether foreign or American, may commit the crime.[43] If accused is not a citizen, ownership of the vessel by a citizen is an essential ingredient of the offense.[44]

II. PUNISHMENT

[§ 12] **A. Power To Punish—1. By Nations Generally.** As general pirates are deemed enemies of the human race, making war upon all mankind indiscriminately, the crime being one against the universal laws of society, the vessels of every nation have a right to pursue, seize, and punish them.[45] It

piracy under this act. U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6. (2) The United States courts will, however, treat as pirates all persons engaged in plundering vessels of United States citizens under authority of a government set up by insurgents against whom a civil war is being waged. U. S. v. Smith, 27 F. Cas. No. 16,318.

23. See cases infra this note.

[a] **A "felonious" taking** means a taking with a wrongful intent to appropriate the goods of another; but the taking need not be such as amounts to piracy according to the laws of nations. U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6; U. S. v. Durkee, 25 F. Cas. No. 15,009, McAll. 196.

24. U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6.

25. U. S. Code tit 18 § 497.

26. See The Ambrose Light, 25 Fed. 408.

[a] **Master must be deprived of his command.**—U. S. v. Haskell, 26 F. Cas. No. 15,321, 4 Wash. C. C. 402, 2 Wheel. Cr. (N. Y.) 101.

27. U. S. v. Tully, 28 F. Cas. No. 16,545, 1 Gall. 247 (the piratically and feloniously running away with a vessel, within the act, is the running away with a vessel with the wrongful and fraudulent intent thereby to convert it to the taker's own use and to make it his own property against the will of the owner).

28. U. S. v. Tully, supra.

29. St. 11 & 12 Wm. III c 7 § 9.

30. Reg. v. McGregor, 1 C. & K. 429, 431, 47 ECL 429, 431; Rex v. Hastings, 1 Moody C. C. 82, 168 Reprint 1194.

31. Rex v. Jones, 11 Cox C. C. 393; Rex v. Hastings, 1 Moody C. C. 82, 168 Reprint 1194.

32. U. S. Code tit 18 § 498.

[a] **Any intercourse** with pirates, however inefficient or remote, which has a reference to the offense with which they are chargeable, and which has a tendency to promote or is in any manner intended to promote their views, is an offense under this section. U. S. v. Howard, 26 F. Cas. No. 15,404, 3 Wash. C. C. 404.

[b] **An endeavor by a mariner to corrupt the master of a vessel** and to induce him to go over to pirates is within the provisions of this section. U. S. v. Howard, 26 F. Cas. No. 15,404, 3 Wash. C. C. 340.

[c] **Past confederation.**—The language of this section implies compact and association with the pirates, as well in relation to the past, as to the future. U. S. v. Howard, 26 F. Cas. No. 15,404, 3 Wash. C. C. 340.

[d] **There must be something of criminal intention** in the person who confederates and corresponds with the pirates. Something like a criminal participation must be shown. U. S. v. Howard, 26 F. Cas. No. 15,404, 3 Wash. C. C. 340.

33. U. S. Code tit 18 § 495. And see U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64.

[a] **This section is applicable only to citizens** and not to foreigners. U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6; 3 Op. Atty.-Gen. p 120.

34. The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268.

35. U. S. Const. art 1 § 8.

36. In re Charge to Grand Jury, 30 F. Cas. No. 18,269a, 3 Phila. (Pa.) 527.

[a] **Constitutionality of act.**—The act of congress declaring the slave trade to be piracy is constitutional. U. S. v. Bates, 24 F. Cas. No. 14,544.

37. U. S. Code tit 18 §§ 421, 422.

38. U. S. v. Westervelt, 28 F. Cas. No. 16,668, 5 Blatchf. 30.

39. U. S. v. Westervelt, supra.

[a] **Moral restraint and fear.**—To sustain an indictment under this act for "forcibly" confining negroes, it is not necessary to prove that there was physical or manual force. It is sufficient that the negroes were under moral restraint and fear—their wills controlled by superior power exercised over their minds and bodies; and any person participating in such forcible detention is a principal in the offense. U. S. v. Gordon, 25 F. Cas. No. 15,231, 5 Blatchf. 18.

40. U. S. v. Westervelt, 28 F. Cas. No. 16,668, 5 Blatchf. 30.

41. U. S. v. Libby, 26 F. Cas. No. 15,597, 1 Woodb. & M. 221.

[a] **It is the intent to make a slave** which constitutes the essence of the offense; neither the seizing, nor forcibly bringing, or carrying, or receiving a negro on board, is any offense without such superadded intent. U. S. v. Battiste, 24 F. Cas. No. 14,545, 2 Sumn. 240; U. S. v. Corrie, 25 F. Cas. No. 14,869, Brunn. Coll. Cas. 686.

[b] **The intent referred to is a future intent** without regard to the antecedent state or condition of the negro, whether a slave or free. U. S. v. Battiste, 24 F. Cas. No. 14,545, 2 Sumn. 240; U. S. v. Libby, 26 F. Cas. No. 15,597, 1 Woodb. & M. 221. But see U. S. v. Corrie, 25 F. Cas. No. 14,869, Brunn. Coll. Cas. 686 (the negro must have been free).

42. U. S. v. Libby, 26 F. Cas. No. 15,597, 1 Woodb. & M. 221.

43. U. S. v. Westervelt, 28 F. Cas. No. 16,668, 5 Blatchf. 30. But see U. S. v. Battiste, 24 F. Cas. No. 14,545, 2 Sumn. 240; U. S. v. Libby, 26 F. Cas. No. 15,597, 1 Woodb. & M. 221 (a person having no interest in or power over negroes so as to impress on them the future character of slaves, but being merely employed in the transportation of them for hire from port to port, cannot be guilty of the offense of piracy under the act of congress of May 15, 1820).

[a] **A passenger** is not one of the crew or ship's company within the meaning of this act. U. S. v. Libby, 26 F. Cas. No. 15,597, 1 Woodb. & M. 221.

[b] **Citizenship,** within the meaning of the act of 1820, is that unequivocal relation between every American and his country which binds him to allegiance, and pledges to him protection. U. S. v. Brown, 24 F. Cas. No. 14,656; U. S. v. Darnaud, 25 F. Cas. No. 14,918, 3 Wall. Jr. 143.

44. U. S. v. Brown, 24 F. Cas. No. 14,656; U. S. v. Darnaud, 25 F. Cas. No. 14,918, 3 Wall. Jr. 143.

45. The Marianna Flora, 11 Wheat. (U. S.) 1, 6 L. ed. 405 [aff 16 F. Cas. No. 9,080, 3 Mason 116]; U. S. v. Baker, 24 F. Cas. No. 14,501, 5 Blatchf. 6;

is by confounding general piracy with piracy by statute that indistinct ideas have been produced respecting the power to punish offenses committed on the high seas.[46] A statute may make any offense piracy, committed within the jurisdiction of the nation passing the statute, and such offense will be punishable by that nation;[47] but piracy, under the law of nations, which alone is punishable by all nations can only consist in an act which is an offense against all;[48] and no particular nation can increase or diminish the list of offenses thus punishable.[49]

[§ 13] **2. By United States.**[50] There are two distinct provisions of the constitution by which congress is empowered to punish piracy. By the first article of the constitution congress is authorized "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations."[51] Furthermore the constitution in express terms gives authority to regulate commerce and to pass all laws necessary to carry that power into effect;[52] and the authority thus conferred upon congress has been exercised by a great variety of legislative enactments, and various offenses are denominated and punished as piracy.[53]

[§ 14] **B. Seizure and Condemnation of Vessels**[54]**—1. Under Law of Nations.** Under the law of nations a vessel captured for engaging in piracy becomes a prize on account of the universal war presumed to have been declared by the pirate against commerce and human kind at large.[55]

[§ 15] **2. Under Act of March 3, 1819.** Under the act of March 3, 1819,[56] to protect the commerce of the United States and punish the crime of piracy, any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel; and such offending vessel may be condemned and sold, the proceeds whereof to be destributed between the United States and the captors, at the discretion of the court.[57] The act extends to all armed vessels which commit the unlawful acts specified therein.[58] It is not necessary that there should be either actual plunder or an intent to plunder;[59] if the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient.[60] The innocence or ignorance on the part of the owners of the prohibited acts will not exempt the vessel from condemnation.[61]

Condemnation of cargo is not authorized by this act;[62] nor does the law of nations require the condemnation of the cargo for petty offenses, unless the owner thereof coöperates in and authorizes the unlawful act.[63]

[§ 16] **3. Under Act of August 5, 1861.** The supplementary act of 1861[64] subjects to capture on the high seas, and to seizure in port, vessels built, purchased, fitted out, in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure.[65]

[§ 17] **C. Criminal Prosecutions**[66]**—1. Indictment.** A charge that the piracy was committed "on the high seas, and within the jurisdiction of the court, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state," is a sufficient statement of venue, without any other specification of place.[67] Where the offense is such that the court has jurisdiction, although the vessel has no national character, no national character need be alleged in the indictment.[68] Since the offense of piracy is one which may be committed by one or more persons, an

In re Charge to Grand Jury, 30 F. Cas. No. 18,277, 2 Sprague 285. And see Criminal Law § 216 et seq.

[a] **By becoming a pirate, a vessel loses her national character,** and a piracy committed from on board such a vessel is punishable under the laws of the United States. U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64.

46. Argument by Mr., afterward Chief Justice, Marshall, in the Jonathan Robbins case [quot The Chapman, 5 F. Cas. No. 2,602, 4 Sawy. 501].

47. The Chapman, supra.

48. The Chapman, supra.

49. The Chapman, supra.

50. Criminal jurisdiction of United States courts generally see Criminal Law § 220.

51. Const. art I § 8.

[a] **The power to define the offense** approaches so near to a right to determine what shall constitute the offense that it is not easy to subject it to precise limitations. In re Charge to Grand Jury, 30 F. Cas. No. 18,277, 2 Sprague 285.

[b] **Reference to law of nations for definition.**—The Act of March 3, 1819, § 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of congress to define and punish the crime. U. S. v. Smith, 5 Wheat. (U. S.) 153, 5 L. ed. 57.

52. Const. art I § 8.

53. In re Charge to Grand Jury, 30 F. Cas. No. 18,277, 2 Sprague 285.

54. Libels in admiralty generally see Admiralty §§ 129–351.

55. The City of Mexico, 28 Fed. 148.

Prize:
In general see War [40 Cyc 347].
Jurisdiction in prize cases see Admiralty § 104 et seq.

56. U. S. Code tit 33 § 381 et seq.

57. U. S. v. The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

58. See cases infra this note.

[a] **No distinction is taken as to the objects, purposes, or character of the armament,** it being wholly immaterial whether it be for offense or defense, legitimate or illegitimate. U. S. v. The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

[b] **The authority here given is extended over all vessels** guilty of piratical aggressions upon vessels of the United States, or the citizens thereof, or upon any other vessel. The Marianna Flora, 11 Wheat. 1, 6 L. ed. 405 [aff 16 F. Cas. No. 9,080, 3 Mason 116]; The Chapman, 5 F. Cas. No. 2,602, 4 Sawy. 501.

[c] **Vessels sailing under void commissions, and threatening neutral commerce,** may be lawfully suppressed by seizure as technically piratical, although their officers and crews, if they reasonably believed their commissions to be valid, might be acquitted. The Ambrose Light, 25 Fed. 408. See The Palmyra, 12 Wheat. (U. S.) 1, 6 L. ed. 531 (recognizing the doctrine).

[d] **Attack in good faith.**—An attack on a vessel of the United States by an armed vessel, upon a mistaken supposition that she was a piratical cruiser, but without felonious intent, is not a piratical aggression, nor does it subject the vessel, if captured, to confiscation, under the law of nations. The Marianna Flora, 11 Wheat. 1, 6 L. ed. 405 [aff 16 F. Cas. No. 9,080, 3 Mason 116].

[e] **To make the fire of one vessel into another a piratical aggression,** it must be a first aggression, unprovoked by any previous act of hostility or menace from the other side. 9 Op. Atty.-Gen. p 455.

59. See cases infra note 60.

60. U. S. v. The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

[a] **The word "piratical"** (1) in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing. U. S. v. The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239. (2) A piratical aggression, search, restraint, or seizure is as much within the act as a piratical depredation. U. S. v. The Malek Adhel, supra.

61. U. S. v. The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239.

62. U. S. v. The Malek Adhel, supra.

63. U. S. v. The Malek Adhel, supra.

64. U. S. Code tit 33 § 385.

65. The Chapman, 5 F. Cas. No. 2,602, 4 Sawy. 501.

[a] **The piratical acts contemplated** (1) in this act and the act of 1819 are the same, the only difference being that the earlier act extends only to vessels which have committed or attempted them, while the latter act includes vessels intended to be employed in committing them. The Chapman, 5 F. Cas. No. 2,602, 4 Sawy. 501. (2) The offenses referred to are such as would be deemed piratical under the law of nations. The Chapman, supra.

[b] **All vessels whether American or foreign.**—It is not necessary that the vessel should have been fitted out by American citizens, or in American ports, nor that the intended aggression should be upon American vessels or citizens. The Chapman, 5 F. Cas. No. 2,602, 4 Sawy. 501.

66. Criminal jurisdiction and procedure generally see Criminal Law 16 C. J. p 1; Indictments and Informations 31 C. J. p 548.

67. St. Clair v. U. S., 154 U. S. 134, 14 SCt 1002, 38 L. ed. 936; U. S. v. Gilbert, 25 F. Cas. No. 15,204, 2 Sumn. 19.

68. U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. v. De-

indictment charging three persons with committing the crime jointly is sufficient, and proof of the guilt of either one will authorize his conviction and the acquittal of the others.[69]

[§ 18] **2. Evidence.**[70] Upon a prosecution for piracy, where there is no proof that in the first instance any unlawful acts were meditated by the commander of a vessel and her crew, it is not sufficient to prove piratical acts committed by the commander and his crew generally;[71] but it must be proved that each defendant participated in the taking, and did it feloniously.[72] It is unnecessary, on the trial of an indictment for piracy, to produce a merchant vessel's register, or documentary evidence, to prove her national character;[73] but such evidence is admissible,[74] and is prima facie sufficient to establish the nationality of the vessel.[75]

***PIRATA.** In Spanish law, a pirate.[1]

PIRATA EST HOSTIS HUMANI GENERIS.[2]

PIRATE.[3]

PISCARIA. All fisheries, without regard to their distinctive character, or to the method of taking the fish.[4]

PISCARY.[5]

PISTOL.[6] A gun;[7] a small, light firearm;[8] a small firearm, or the smallest arm used, intended to be fired from one hand, differing from a musket chiefly in size.[9] The name is derived from Pistola, in Italy, where pistols were first made.[10] The pistol is frequently the subject of statutory regulation.[11]

Pistol cartridges. Cartridges such as are adapted to, and are or may be used for, pistols of the size and calibre in ordinary use, including especially those capable of being carried about the person.[12]

Pocket pistol.[13] Such a pistol as a man ordinarily carries, or may conveniently carry, or actually carries on his person, in his pocket.[14]

PIT.[15] A cavity or hole in the ground, natural or artificial;[16] a large hole from which some mineral deposit is dug or quarried, as a gravel pit, a stone pit;[17] a quarry;[18] a shaft coupled with the underground workings to which access is had from the shaft.[19]

Of a locomotive tender the part of the tender next to the engine in which the coal for use in the locomotive is stored.[20]

PIT BOSS.[21]

PITCH.[22] Used with respect to common lands, a term designating the right under which a proprietor selects the general location of his claim or share, by entry and occupation.[23]

PITFALL.[24] A trap set to ensnare the unwary.[25]

PIVOT.[26] A fixed shaft or hub.[27]

PIVOTAL. Of the nature of or forming a pivot;[28] belonging to or constituting a pivot, or that upon which something turns or depends.[29]

Pivotal bridge spring. Of eyeglasses, a flexible strip of resilient metal used to connect the lens frames and hold them in position on the nose, the terminals of which are connected with the lens frames by engagements with pivots seated in the upper part of the frames, the pivots, in turn, being actuated by spiral springs.[30]

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marchi, 25 F. Cas. No. 14,944, 5 Blatchf. 84.

69. St. Clair v. U. S., 154 U. S. 134, 14 SCt 1002, 38 L. ed. 936.

[a] **Forms of indictment.**—U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. v. Smith, 27 F. Cas. No. 16,339a; U. S. v. Tully, 28 F. Cas. No. 16,545, 1 Gall. 247.

70. Generally see Criminal Law §§ 947–1999.

71. U. S. v. Jones, 26 F. Cas. No. 15,496, 3 Wash. C. C. 228.

72. U. S. v. Jones, supra.

[a] **Where seamen on a privateer are on trial for piracy,** committed with the officers, it must be shown that the seamen knew or might have known that robbery and not capture as prize was contemplated. U. S. v. Jones, 26 F. Cas. No. 15,496, 3 Wash. C. C. 228.

73. U. S. v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64.

74. St. Clair v. U. S., 154 U. S. 134, 14 SCt 1002, 38 L. ed. 936.

75. St. Clair v. U. S., supra.

1. Escriche Diccionario. See Piracy § 1.

2. A maxim meaning "A pirate is an enemy of the human race." Bouvier L. D. [cit 3 Inst. p 113].

3. See Piracy § 1.

4. Caswell v Johnson, 58 Me. 164, 166; Moulton v. Libbey, 37 Me. 472, 489, 59 AmD 57.

[a] **"Piscarial rights."**—Moulton v. Libbey, 37 Me. 472, 497, 59 AmD 57.

"Fishery" see Fish §§ 2–4.

5. See Common Lands § 15.

6. See Weapons [40 Cyc 851]. And see cross references under Deadly Weapon 17 C. J. p 1152.

"Belt pistol" see Belt 7 C. J. p 1044 text and note 76.

7. State v. Christ, 189 Iowa 474, 177 NW 54, 57; State v. Barrington, 198 Mo. 23, 109, 95 SW 235; Witty v. State, (Tex. Cr.) 171 SW 229, 232. See cross references under Gun 28 C. J. p 1321.

8. Atwood v. State, 53 Ala. 508, 509.

"Firearm" see Weapons [40 Cyc 852 text and note 9].

9. Webster D. [quot Fife v. State, 31 Ark. 455, 461, 25 AmR 556].

10. Fife v. State, supra.

[a] **"The pistol** earliest in use was a matchlock arm, and yet a fire-arm, the lock containing a match for firing it. This was succeeded by the 'flint and steel' lock, and this by the percussion lock. The manner in which the weapon can be fired does not enter into its definition, however it may affect its value and utility." Atwood v. State, 53 Ala. 508, 509.

11. See statutory provisions.

[a] **Air gun included** within terms of the Pistol Act of 1903 see Bryson v. Gamage, Ltd., [1907] 2 K. B. 630. "Air gun" see Air 2 C. J. p 1026 text and note 47.

[b] **Disabled pistol:** (1) Included within the term as used in the statute see Williams v. State, 61 Ga. 417, 418, 34 AmR 102; Mitchell v. State, 99 Miss. 579, 55 S 354, 34 LRANS 1174, AnnCas1913E 512. (2) Not included within the term as used in the statute see Atwood v. State, 53 Ala. 508, 509; Evins v. State, 46 Ala. 88, 89; Underwood v. State, (Tex. Cr.) 29 SW 777; Cook v. State, 11 Tex. A. 19.

[c] **Length of barrel.**—It has been defined by statute as a firearm having a barrel less than twelve inches in length. Peo. v. Quarez, 196 Cal. 404, 238 P 363.

[d] **"Pistol toter's license."**—Sockwell v. State, 27 Ga. A. 576, 109 SE 531.

[e] **Rifle not included** within the term as used in the statute see Taylor v. Sell, 120 Wis. 32, 97 NW 498.

[f] **Toy pistol not included** within the term as used in the statute see Mathews v. Caldwell, 5 Ga. A. 336, 63 SE 250, 251; Bryson v. Gamage, Ltd., [1907] 2 K. B. 630.

12. Union Metallic Cartridge Co. v. Teague, 83 Ala. 475, 3 S 709.

13. "Pocket" see [31 Cyc 893].

14. Porter v. State, 7 Baxt. (Tenn.) 106, 108.

15. Pit:
Borrow see Borrow Pits 9 C. J. p 141.
Cinder see Cinder Pit 11 C. J. p 766.
Gravel see 28 C. J. p 824 text and note 29.

16. Webster New Int. D. [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 964].

"Hole" see 29 C. J. p 760.

17. Webster New Int. D. [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 964].

18. Guffey Petroleum Co. v. Murrel, 127 La. 466, 53 S 705, 711.

"Quarry" see [32 Cyc 1286].

19. See Mines and Minerals § 86.

"Shaft" see Mines and Minerals § 95.

20. Missouri, etc., R. Co. v. Hanson, (Tex. Civ. A.) 90 SW 1122.

"Tender" see [38 Cyc 180].

21. See Mines and Minerals § 56.

22. Control, management, and use of common lands see Common Lands §§ 38–47.

Partition of common lands see Common Lands §§ 48–55.

23. Garland v. Rollins, 36 N. H. 349, 350.

24. Duty to protect persons lawfully on premises from pitfall see Negligence § 291.

25. Hall v. Manson, 99 Iowa 698, 713, 68 NW 922, 34 LRA 207. See Hertz v. Advertiser Co., 201 Ala. 416, 78 S 794, 795, LRA1918F 137.

"Trap" see [38 Cyc 948].

26. See Pivotal post.

27. U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 191 Fed. 850, 851.

"Shaft" see [35 Cyc 1450].

28. See Pivot ante.

29. Century D.

30. Hutten v Frank Krementz Co., 231 Fed. 973, 978, 146 CCA 169 (capable of three movements, two from

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*By WILLIAM QUINBY DEFUNIAK (Pirata-Plate inclusive except the Spanish words and phrases).

Pivotal support. A rigid, nonrotating support.[31]

P. J. An abbreviation for "president" (or presiding) "judge," (or justice).[32]

P. L. An abbreviation for "Pamphlet Laws" or "Public Laws."[33]

PLACARD. An edict; a declaration; a manifesto; also an advertisement or public notification.[34]

PLACE.[35] [§ 1] **A. As a Noun—1. In General.** A very indefinite term;[36] a word of variable meaning, the particular meaning in any given instance of its use depending upon the connection and circumstances of its use.[37] In its primary and most general sense it means locality, situation, or site;[38] an area;[39] an area or portion of land marked off or regarded as marked off or separated from the rest, as by occupancy, use, or character;[40] any portion of space regarded as measured off or distinct from all other space or as appropriated to some definite object or use;[41] a definite point or locality;[42] a portion of space regarded as separate from the rest of space;[43] region;[44] space occupied by, or belonging to, a thing under consideration;[45] space regarded as abode or quarters.[46] It may be applied to any locality, limited by boundaries, however large or however

the pivots, and one from the pliant or yielding quality of the metal strip).

[a] **French double spring.**—"A pivotal bridge spring is known in the art as a French double spring." Hutten v. Frank Krementz Co., 231 Fed. 973, 978, 146 CCA 169.

31. U. S. Light, etc., Co. v. Safety Car Heating, etc., Co., 191 Fed. 850, 851.

"**Support**" see [37 Cyc 608].

32. Black L. D.

33. Black L. D. "Pamphlet Laws" in Pennsylvania; and also the same in New Jersey.

34. Black L. D.

35. **Place:**

Abiding see 1 C. J. p 303 note 25 [a].
As affecting jurisdiction or venue see Attachment §§ 134–137; Courts § 36; Divorce §§ 47, 48, 56.
As element in offense of:
  Kidnapping see Kidnapping § 12.
  Larceny see Larceny §§ 65–73.
  Violation of prohibitory liquor laws see Intoxicating Liquors §§ 195–234. And see cross references under Public Place infra § 12.
Averment of see Homicide § 277; Indictments and Informations §§ 198–208.
Burial see Cemeteries § 1.
Conspicuous see 12 C. J. p 534 note 50 [a].
Disorderly see Disorderly Houses § 5.
Duty in regard to dangerous see Negligence §§ 279–308.
Duty of master to provide safe see Master and Servant §§ 441–565.
Dwelling see Dwelling Place 19 C. J. p 848.
Foreign see 26 C. J. p 889 text and note 53.
Gambling see Disorderly Houses § 24; Gaming § 82.
In see Mines and Minerals § 39.
Landing see 35 C. J. p 936 text and note 49.
Market see Markets § 13.
Of:
  Amusement see Theaters and Shows [38 Cyc 252].
  Commitment for breach of peace see Breach of the Peace § 38.
  Contract law of see Conflict of Laws §§ 29–34.
  Disorderly conduct see Disorderly Conduct § 6.
  Disturbance of public meeting see Disturbance of Public Meetings § 21.
  Docketing judgment see Judgments § 248.
  Ejection of passenger see Carriers §§ 1191, 1192.
  Entry of judgment see Judgments § 185.
  Filing or recording:
    Attachment return see Attachments § 508.
    Chattel mortgage see Chattel Mortgages §§ 211–218.
    Deed see Deeds §§ 190–192.
    Mechanic's lien see Mechanics' Liens §§ 129, 214.
    Mortgage see Mortgages § 424.
    Written instruments generally see Records [34 Cyc 587].
  Giving notice of dishonor see Bills and Notes §§ 926–939.
  Hearing a motion see Motions § 123, New Trial § 446.
  Holding court designation of in: Notice of motion see Motions § 53. Process see Process [32 Cyc 431].
Of:—Continued
  Holding:
    Election see Elections §§ 88, 89.
    Meetings of stockholders see Corporations §§ 1355–1357.
    Terms and sessions of court see Courts §§ 264–269.
  Imprisonment see Criminal Law §§ 3240–3246; False Imprisonment § 13.
  Making:
    Chattel mortgage see Chattel Mortgages § 31.
    Contract:
      Generally see Contracts § 581.
      Between husband and wife see Husband and Wife § 252.
      Of insurance see Accident Insurance § 46; Insurance §§ 7, 8.
      Of married woman see Husband and Wife § 337.
    Motion see Motions §§ 23–25.
    Negotiable instrument see Bills and Notes §§ 147–152.
  Nominating candidate see Elections § 95.
  Payment of:
    Bond see Counties § 340; Municipal Corporations § 4220.
    Debt see Payment §§ 8, 9.
    Fare see Carriers §§ 1100–1104.
    Insurance premium see Fire Insurance § 117; Insurance § 330; Life Insurance § 106.
    Negotiable instrument see Bills and Notes § 790.
  Performance of:
    Bond see Bonds § 114.
    Contract:
      Generally see Contracts § 582.
      For sale of personalty see Sales [35 Cyc 171–175].
      For sale of realty see Vendor and Purchaser [39 Cyc 1326].
      Of insurance see Insurance § 9.
      Of married woman see Husband and Wife § 337.
  Preliminary examination see Criminal Law § 573.
  Presentment and demand see Bills and Notes §§ 762–773.
  Presentment for acceptance see Bills and Notes § 466.
  Service:
    Of process generally:
      Personal service see Process [32 Cyc 455].
      Substituted service see Process [32 Cyc 463].
    Of process on foreign corporation see Corporations § 4131.
    Of writ of garnishment see Garnishment § 306.
  Taking deposition see Depositions §§ 186, 187.
  Taxation see Taxation [37 Cyc 946–964].
Polling see Elections §§ 88, 89.
Recital in return of:
  Levy of attachment see Attachment § 485.
  Service of process see Process [32 Cyc 500].
Rock in see Mines and Minerals § 39 text and notes 23–27.
Traveled see Railroads [33 Cyc 665 note 68, 942 note 56, 963 note 70]; Travel [38 Cyc 948 note 24].

36. Law v. Fairfield, 46 Vt. 425, 432 [quot Koth v. U. S., 16 F. (2d) 59, 61].

37. Koth v. U. S., supra; State v. Ross, 160 Mo. A. 682, 143 SW 502, 506; State v. Heard, 64 Mo. A. 334, 337; Axford v. Meeks, 59 N. J. L. 502, 36 A 1036.

"The word 'place' has a very wide range of meaning, depending upon the connection in which the word is used." Henthorne v. State, (Okl. Cr.) 249 P 429, 430.

[a] **Implying engineering conditions.**—Lancashire Brick, etc., Co. v. Lancashire, etc., R. Co., 71 L. J. K. B. 141, 144 (in the phrase "in places where the communication can be made with safety to the public, and without injury to the Railway, and without inconvenience to the traffic thereon" employed in 8 Vict. c. 20 § 76).

[b] **Referring to term of office.**—State v. McGregor, 44 Oh. St. 628, 10 NE 66, 67 (Rev. St. § 1202). "Term of office" see Officers §§ 97–109.

[c] **"In place of."**—McDowell v. U. S., 74 Fed. 403, 405, 20 CCA 476.

"**Stead**" see [36 Cyc 1258].

38. Carlin v. Chicago, 262 Ill. 564, 104 NE 905, 907, AnnCas1915B 213. See Davis v. State, (Okl. Cr.) 259 P 172, 173; Wilder v. State, (Okl. Cr.) 246 P 660, 661.

[a] **Does not apply** to the person or immediate personal belongings. See Robinson v. State, 143 Miss. 247, 108 S 903, 905, 906.

[b] **There must be something more** than the mere presence of a person on the ground to indicate that measure of localization, fixity, and exclusive right of user which is necessary in order to constitute "a place" in a statute against keeping a place where gambling is carried on. Rex v. Moylett, 15 Ont. L. 348, 352, 10 OntWR 803, 13 CanCrCas 279.

"**Locality**" see 38 C. J. p 131.

"**Site**" see [36 Cyc 462].

"**Situation**" see [36 Cyc 462].

39. Webster D. [quot Prentiss v. Davis, 83 Me. 364, 371, 22 A 246].

"**Area**" see 5 C. J. p 280.

40. Century D. [quot Hammell v. State, 198 Ind. 45, 152 NE 161, 163].

"**Portion**" see [31 Cyc 919].

41. Webster D. [quot Hammell v. State, 198 Ind. 45, 152 NE 161, 163; Prentiss v. Davis, 83 Me. 364, 371, 22 A 246].

42. Audubon v. Hand, 231 Ill. 334, 83 NE 196, 197, 198; Delaware County v. Hogan, 33 Okl. 791, 127 P 492, 494. See Davis v. State, (Okl. Cr.) 259 P 172, 173; Wilder v. State, (Okl. Cr.) 246 P 660, 661.

[a] **Suitcase** is not a place as not being a fixed and definite locality. State v. Fezzette, 103 Me. 467, 69 A 1073, 1079. See State v. Pio, 111 Me. 506, 90 A 120, 121 (referring to that case, but declaring that no analogy existed between an automobile and a suitcase as a "place").

"**Point**" see [31 Cyc 894].

43. Imperial D. [quot Hammell v. State, 198 Ind. 45, 152 NE 161, 163].

44. Davis v. State, (Okl. Cr.) 259 P 172, 173; Wilder v. State, (Okl. Cr.) 246 P 660, 661.

45. Standard D. [quot Hammell v. State, 198 Ind. 45, 152 NE 161, 163].

"**Space**" see [36 Cyc 517].

46. Standard D. [quot Hammell v. State, 198 Ind. 45, 152 NE 161, 163].

"**Place of abode**" see infra § 2

small.[47] Accordingly, among other things,[48] the term may be employed as designating, including, or synonymous with, "archway,"[49] "automobile,"[50] "barber shop,"[51] "booth,"[52] "building,"[53] "city,"[54] "country,"[55] "county,"[56] "excavation,"[57] "farm,"[58] "homestead,"[59] "hotel,"[60] "hotel room,"[61] "house,"[62] "inclosure," whether covered or not,[63] "interior of a railway station,"[64] "livery stable,"[65] "parish,"[66] "park,"[67] "part of an alley,"[68] "post-office building,"[69] "receiving house for letters,"[70] "restaurant,"[71] "room,"[72] "steamboat or vessel,"[73] "street,"[74] "tent,"[75] "town,"[76] "trench,"[77] "vehicle,"[78] "weed or brush patch,"[79] "whole premises,"[80] "yard."[81] The extent of the locality designated by the term must, generally, be determined by the connection in which it is used.[82]

In a more definite sense the term may be employed as meaning a parallelogram of ground with houses on three sides only, and on the fourth, a garden cultivated and adorned for the sake of these houses but opening upon the country;[83] an open

47. Law v. Fairfield, 46 Vt. 425, 432.
"The word place expresses simply locality, not kind." Mullen v. Erie County, 85 Pa. 288, 291, 27 AmR 650.
[a] **Thus** the term may be used to designate: (1) A collection of dwellings, a village, town, or city. In re Monongahela Water Co., 9 Pa. Co. 57, 59. To the same effect Green v. Southard, 94 Tex. 470, 61 SW 705, 706 (city, town, village, or hamlet). (2) A country, state, county, town, or a very small portion of a town. Law v. Fairfield, 46 Vt. 425, 432 [Koth v. U. S., 16 F. (2d) 59, 61]. But see Onondaga Salt Co. v. Wilkinson, 21 F. Cas. No. 12,269, 8 Blatch. 30.

48. See cases infra this note.
[a] **Thus "place" may include:** (1) A depression in the ground surrounded by thick vines with a few poles nailed around it. State v. Elliott, 198 Iowa 71, 199 NW 270, 271. (2) Uncovered grounds. Eastwood v. Miller, L. R. 9 Q. B. 440, 443. "Grounds" see 28 C. J. p 830.
[b] **Synonymous with "certain territory."**—State v. Ross, 160 Mo. A. 682, 695, 143 SW 502.

49. Reg. v. Humphrey, [1898] 1 Q. B. 875, 879.

50. Allison v. Hern, 102 Kan. 48, 169 P 187, 188; State v. Pio, 111 Me. 506, 90 A 120, 121.
"Automobile" see 6 C. J. p 867.

51. See Rex v. Johnston, 15 OntWR 843, 16 CanCrCas 379, 380.

52. Com. v. Jones, 142 Mass. 573, 8 NE 603, 604; Brown v. Patch, [1899] 1 Q. B. 892, 898; Rex v. Saunders, 12 Ont. L. 615, 622, 12 CanCrCas 33, 174, 7 AnnCas 232 (app dism 38 Can. S. C. 382, 389].
"Booth" see 9 C. J. p 139.

53. Brookline v. Hatch, 167 Mass. 380, 381, 45 NE 756, 36 LRA 495; Com. v. Warren, 161 Mass. 281, 37 NE 172, 173; State v. Poull, 14 N. D. 557, 105 NW 717, 718; State v. Brown, 14 N. D. 529, 104 NW 1112.
"Building" see 9 C. J. p 683.

54. Koth v. U. S., 16 F. (2d) 59, 61; Lucas v. Taylor, 105 Md. 90, 66 A 26, 27; Palmer v. Wakefield, 102 Mass. 214, 215; State v. Ross, 160 Mo. A. 682, 143 SW 502, 506. See Pearce v. Archibald, 34 N. S. 543, 37 CanLJ 128.
"City" see 11 C. J. p 787.

55. See Clicquot's Champagne, 3 Wall. (U. S.) 114, 142, 18 L. ed. 116.
"Country" see 15 C. J. p 670.

56. State v. Thomas, 25 Mont. 226, 64 P 503, 504.
"County" see Counties § 1.

57. Com. v. Jones, 142 Mass. 573, 8 NE 603, 604.
"Excavation" see 23 C. J. p 179.

58. Judge v. Splann, 22 Ont. 409, 410.
"Farm" see 25 C. J. p 670.

59. Hodges v. Kowing, 58 Conn. 12, 18 A 979, 980, 7 LRA 87.
"Homestead" see Homesteads § 1.

60. Com. v. Purcell, 154 Mass. 388, 389, 28 NE 288.
"Hotel" see Innkeepers § 1 text and notes 4–8.

61. Wheeler v. State, 42 Md. 563, 567; State v. Nelson, 13 N. D. 122, 99 NW 1077, 1078; Greenville v. Kemmis, 58 S. C. 427, 36 SE 727, 730, 50 LRA 725.

62. Koth v. U. S., 16 F. (2d) 59, 61; Howard v. Peo., 27 Colo. 396, 399, 61 P 595.
"House" see 30 C. J. p 472.

63. Brookline v. Hatch, 167 Mass. 380, 381, 45 NE 756, 36 LRA 495. Contra Powell v. Kempton Park Racecourse Co., Ltd., [1899] A. C. 143, 161.
"Inclosure" see 31 C. J. p 394.

64. Ex p. Kippins, [1897] 1 Q. B. 1, 3.

65. Rex v. McQuarrie, 37 N. B. 374, 375.
"Livery stable" see Livery-Stable and Garage Keepers § 1.

66. Oglesby v. Turner, 127 La. 1093, 54 S 400, 402.
"Parish" see 46 C. J. p 1371.

67. Fessler v. Union, 67 N. J. Eq. 14, 24, 56 A 272.
"Park" see 46 C. J. p 1373.

68. State v. Dykes, 83 Kan. 250, 111 P 179, 180.
"Alley" 2 C. J. p 1150.

69. U. S. v. Andem, 158 Fed. 996, 1000.

70. Rex v. Pearson, 4 C. & P. 572, 19 ECL 655, 172 Reprint 830.

71. Scanlon v. Denver, 38 Colo. 401, 88 P 156, 157.
"Restaurant" see [34 Cyc 1677].

72. Malkan v. Chicago, 217 Ill. 471, 75 NE 548, 551; 2 LRANS 488, 3 Ann Cas 1104.
"Room" see [34 Cyc 1815].

73. State v. McNally, 34 Me. 210, 222, 56 AmD 650.
"Steamboat" see [36 Cyc 1270].
"Vessel" see [40 Cyc 196].

74. Carlin v. Chicago, 262 Ill. 564, 104 NE 905, 907, AnnCas1915B 213.

75. Shideler v. Sioux, 158 Iowa 417, 139 NW 897, 898.
"Tent" see [38 Cyc 183].

76. Koth v. U. S., 16 F. (2d) 59, 61; Palmer v. Wakefield, 102 Mass. 214, 215; Babcock v. Hahn, 175 Mo. 136, 75 SW 93, 94; State v. Ross, 160 Mo. A. 682, 143 SW 502, 506; Malcom v. Gardner, 1 Cow (N. Y.) 13, 14; Grove v. Haskell, 24 Okl. 707, 104 P 56, 64; Smith v. Redding, L. R. 1 Q. B. 489, 493. See Rex v. Wallis, 5 T. R. 375, 380, 101 Reprint 210.
"Town" see Towns [38 Cyc 596].

77. State v. Johnson, 200 Iowa 324, 204 NW 273, 274.

78. State v. Rogl, 100 Kan. 590, 164 P 1165, 1166 (wagon); Kansas City Breweries Co. v. Kansas City, 96 Kan. 731, 153 P 523, 524; Daly v. Webb, Ir. R. 4 C. L. 309 (cart).
"Vehicle" see [39 Cyc 1125].

79. State v. Cahalan, 204 Iowa 410, 214 NW 612, 613.

80. State v. Shackleford, 198 Iowa 752, 200 NW 192, 195; Com. v. Oldham, 125 Ky. 262, 100 SW 1184, 1185. Compare Murphey v. State, 115 Ga. 201, 41 SE 685, 686 (where a store and its surrounding premises were included in the word, but not pasture land near by).
"Premises" see [31 Cyc 1163].

81. Young v. Grattridge, L. R. 4 Q. B. 166, 168.
"Yard" see [40 Cyc 2875].

82. Law v. Fairfield, 46 Vt. 425, 432 [quot Koth v. U. S., 16 F. (2d) 59, 61].
[a] **Illustrations.**—(1) In the phrase "a house, room, set of rooms or place of any kind kept for purposes of prostitution," "place" includes a motor car. Rex v. Thompson, 48 Ont. L. 163, 34 CanCrCas 101. (2) In the phrase "[another] place or state," "place" does not include a municipality in this state. Brazier v. Philadelphia, 215 Pa. 297, 299, 64 A 508, 7 AnnCas 548, 15 Pa. Dist. 14, 15, 17. (3) In the phrase "any desert, secluded, hidden, secret or solitary place," "place" is used in the sense of the immediate neighborhood, region, or vicinity (State v. Cook, 90 W. Va. 600, 603, 111 SE 595, 597; State v. Knosky, 87 W. Va. 558, 106 SE 642, 644), (4) and does not include a particular room or apartment (State v. Knosky, supra), (5) or an open garden (State v. Cook, supra). (6) In the phrase "any of the places under the sole and exclusive jurisdiction of the United States," "places" does not include land rented to be used temporarily as a camp. U. S. v. Tierney, 28 F. Cas. No. 16,517, 1 Bond 571, 572. See U. S. v. Carter, 84 Fed. 622, 625 (battleship not included). (7) In the phrase "any room, house, building, boat, vehicle, structure or place," following the rule ejusdem generis, "place" is limited to things of the same kind, something with walls or defined tangible limits, and does not refer to a city, town, or township. Koth v. U. S., 16 F. (2d) 59, 61. (8) In the phrase "house or place," "place" is not equivalent to "premises." Humes v. Taber, 1 R. I. 464, 470. (9) In the phrase "house or place for the conduct of such business," "place" includes any arbor or structure used in the business. Whitcomb v. State, 2 Tex. Civ. A. 301, 21 SW 976, 977. (10) In the phrase "no house, office, room, or other place," under the rule of ejusdem generis, "place" cannot include an inclosure at a race track. Powell v. Kempton Park Racecourse Co., Ltd., [1899] A. C. 143, 161. (11) In the phrase "place or county," "place" means any spot within the county. State v. Arnold, 80 S. C. 383, 384, 61 SE 891. (12) In the phrase "place where spirituous liquors are retailed," in a statute forbidding playing cards in such a place, "place" does not include an unconnected room in the same building rented by another person than the retailer of liquor (Dale v. State, 27 Ala. 31; Galbreath v. State, 36 Tex. 200); (13) or occupied by one of the proprietors of the liquor business (Johnson v. State, 19 Ala. 527); (14) nor does it include a blacksmith shop (Graham v. State, 105 Ala. 130, 16 S 934, 935). (15) In the phrase "street, house, or place," "place" implies a definite locality of the same kind or nature or character. Barton v. Le Grande, 17 Or. 577, 582, 22 P 111 [quot Koth v. U. S., 16 F. (2d) 59, 61]. (16) A statute punishing the procuring of a woman to enter "any place in which prostitution is encouraged or allowed," is not applicable to procuring the woman to go out in the open country. Johnson v. State, 83 Tex. Cr. 64, 65, 201 SW 990. (17) A statute requiring a railroad to state the places from and to which the road is to be operated, etc., "is sufficiently indefinite to indicate any locality within the state." Atty.-Gen. v. Delaware, etc., R. Co., 27 N. J. Eq. 631, 644.

83. Elliott v. South Devon R. Co., 2 Exch. 725, 730, 154 Reprint 682.

space or square in a city;[84] also, a court or street, especially a short or subordinate street, as a market place.[85]

[§ 2] **2. Place of Abode.**[86] Home;[87] place of residence.[88]

Phrases: "Actual place of abode,"[89] "at his usual place of abode,"[90] "last and usual place of abode,"[91] "last place of abode,"[92] "present place of abode,"[93] "usual place of abode."[94]

[§ 3] **3. Place of Business.**[95] An agency;[96] an office;[97] a place actually occupied, either continually or at regular periods, by a person or his clerks, or those in his employment;[98] a place devoted by the proprietor to the carrying on of some form of trade or commerce;[99] a place where people generally congregate for the purpose of carrying on some sort of traffic, or where people are invited or expected to come to engage in some sort of mercantile transaction;[1] a place where a calling for the purpose of gain or profit is conducted;[2] a place where business is carried on by persons under their own control and on their own account;[3] some particular locality, appropriated exclusively to a local business, such as a farm, store, shop, or dwelling place;[4] that specific place within a city or town at which a person transacts business.[5] An occasional use or occupation of a place for business purposes is not sufficient to constitute it a place of business.[6]

Of a clerk, the place where he is employed.[7]

Of an executor or administrator, the place where he transacts the business of the estate, although he may be engaged in transacting some kind of business elsewhere.[8]

Of a school teacher, the schoolhouse where he is employed.[9]

Of a sheriff, his office in the courthouse or other public building.[10]

Phrases: "At their place of business,"[11] "established place of business,"[12] "or other place of business of another,"[13] "other place of business,"[14] "principal place of business,"[15] "regular and established place of business,"[16] "their usual place of

84. Standard D. [quot Carlin v. Chicago, 262 Ill. 564, 567, 104 NE 905, AnnCas1915B 213]. See Fessler v. Union, 67 N. J. Eq. 14, 24, 56 A 272.

"Square" see [36 Cyc 810].

85. Standard D. [quot Carlin v. Chicago, 262 Ill. 564, 567, 104 NE 905, AnnCas1915B 213].

"Court" see 15 C. J. p 679.

"Market place" see Markets § 13.

86. **"Abode"** see 1 C. J. p 304.

Place of abode:

As qualification for voting see Elections §§ 26–33.

For service of process see Process [32 Cyc 462–464, and particularly 463 note 92].

87. See Home 29 C. J. p 768 note 22.

88. Forbes v. Thomas, 22 Nebr. 541, 554, 35 NW 411; Seymour v. Street, 5 Nebr. 85, 88; State v. Toland, 36 S. C. 515, 15 SE 599, 600; Grant v. Lawrence, 37 Utah 450, 108 P 931, 933, AnnCas1912C 280; Reg. v. Hammond, 17 Q. B. 772, 780, 79 ECL 772, 117 Reprint 1477; Melbourne v. Greenfield, 7 C. B. N. S. 1, 17, 97 ECL 1, 141 Reprint 713; Rex v. Rhodes, 25 Cox C. C. 212. See Sanders v. Greenstreet, 23 Kan. 425, 431. And see Place of Residence infra § 7.

[a] **"Notorious place of abode"** synonymous with "notorious place of residence." Water Lot Co. v. Brunswick Bank, 30 Ga. 685, 686.

89. See Abode 1 C. J. p 304 note 43 [f].

90. See At 5 C. J. p 1430 note 63.

91. See Last 36 C. J. p 954 note 52.

92. See Last 36 C. J. p 955 note 74.

93. Berryhill v. Sepp, 106 Minn. 458, 459, 119 NW 404, 21 LRANS 344 (means "usual place of abode").

94. See Process [32 Cyc 463 note 92].

[a] **"Domicile" distinguished.**—Grant v. Lawrence, 37 Utah 450, 108 P 931, 933, AnnCas1912C 280.

"Dwelling house" distinguished see Dwelling or Dwelling House 19 C. J. p 848 note 64 [a].

95. **"Business"** see 9 C. J. p 1101.

Naming a municipality as sufficiently specifying a person's place of business see infra § 7 note 27 [c].

Place of business:

For presentment of bill or note for: Acceptance see Bills and Notes § 466.

Payment see Bills and Notes § 790.

For purpose of taxation see Taxation [37 Cyc 954].

For service of process see Process [32 Cyc 455].

Maintenance and designation of by foreign corporation see Corporations § 3962.

Of bank see Banks and Banking §§ 25, 26.

Of corporation see Corporations § 420.

Of national bank see Banks and Banking § 590.

96. Tuggle v. Enterprise Lumber Co., 123 Ga. 480, 51 SE 433, 434.

[a] **Illustrations of use of term.**—American Electric Welding Co. v. Lalance, etc., Mfg. Co., 256 Fed. 34, 36; In re Price, 231 Fed. 1001, 1002; In re Perry Aldrich Co., 165 Fed. 249, 251; Onondaga Salt Co. v. Wilkinson, 21 F. Cas. No. 12,269, 8 Blatchf. 30; McElreath v. State, 55 Ga. 562; Bethune v. State, 48 Ga. 505, 510; Moody v. State, 36 Ga. A. 284, 136 SE 464, 465; Redding v. State, 16 Ga. A. 315, 85 SE 278, 279; Jones v. State, 12 Ga. A. 813, 78 SE 474, 475; Frazier v. State, 11 Ga. A. 154, 74 SE 851; Keenan v. State, 10 Ga. A. 792, 74 SE 297; Boyd v. State, 10 Ga. A. 451, 73 SE 551; Flahive v. State, 10 Ga. A. 401, 73 SE 536; Landreth v. State, 10 Ga. A. 399, 73 SE 349, 350; Holland v. State, 9 Ga. A. 831, 72 SE 290, 292; Hall v. State, 8 Ga. A. 747, 70 SE 211, 213; Bashinski v. State, 5 Ga. A. 3, 62 SE 577, 578; Feigenbaum v. Ætna Casualty, etc., Co., 240 Ill. A. 502; State v. Wallace, 121 Me. 83, 115 A 609, 612; Mitchell v. State, 115 Md. 360, 80 A 1020, 1021; Barker v. Watertown, 137 Mass. 227; Schmidt v. Louis, Inc., 122 Misc. 249, 203 NYS 515, 519; State v. Gordon, 128 S. C. 422, 122 SE 501, 503; Guthrie v. State, 73 Tex. Cr. 536, 166 SW 730, 731; Lattimore v. State, (Tex. Cr.) 145 SW 588, 590.

[b] **Place at which business is transacted by agents** is a place of business. Chadeloid Chemical Co. v. Chicago Wood Finishing Co., 180 Fed. 770, 771; Terry Dairy Co. v. Parker, 144 Ark. 401, 223 SW 6, 7. But see Kingston v. Canada L. Assur. Co., 19 Ont. 453, 459 [dism app 18 Ont. 18, 29, 9 CanLTOccNotes 445].

[c] **"Place of doing business" equivalent to "agency."**—Atlanta Acc. Assoc. v. Bragg, 102 Ga. 748, 749, 29 SE 706.

97. Padrick v. M. C. Kiser Co., 33 Ga. A. 15, 124 SE 901, 902; General Reduction Co. v. Tharpe, 11 Ga. A. 334, 75 SE 339, 340. See Rocky Mountain Oil Co. v. Central Nat. Bank, 29 Colo. 129, 67 P 153, 154.

[a] **An office** or known or settled place for the transaction of a person's moneyed concerns is a place of business. Sussex Bank v. Baldwin, 17 N. J. L. 487, 488 [quot Collector of Taxes v. New England Trust Co., 221 Mass. 384, 109 NE 171, 173].

98. Stephenson v. Primrose, 8 Port. (Ala.) 155, 167, 33 AmD 281; Adam v Musson, 37 Ill. A. 501, 503. See Columbia Bank v. Lawrence, 1 Pet. (U. S.) 578 582, 7 L. ed. 269.

[a] **"Residence" not synonymous.**—Routenberg v Schweitzer, 29 Misc. 653, 654, 61 NYS 84. "Residence" see [34 Cyc 1647].

99. Jenkins v. State, 4 Ga. A. 859, 62 SE 574, 575.

[a] **A clubhouse** is not a place of business. State v. Country Club, (Tex. Civ. A.) 173 SW 570, 581.

[b] **Moving picture show** is a place of business. Dillard v. State, 104 Nebr. 209, 175 NW 668, 669.

[c] **Place where clothes are pressed for a monetary consideration** is a place of business. Jones v. State, 17 Ga. A. 118, 86 SE 284.

[d] **Power plant** is a place of business. Central Georgia Power Co. v. Parnell, 11 Ga. A. 779, 76 SE 157, 158.

[e] **Storage place for gas** is not a place of business. Greenburgh v. Westchester Lighting Co., 217 App. Div. 263, 216 NYS 677, 680.

[f] **Timber allotment** as a place of business see Hare v. State, 71 Tex. Cr. 395, 397, 160 SW 79.

1. Roberts v. State, 4 Ga. A. 207, 60 SE 1082, 1084. To same effect Brooks v. State, 19 Ga. A. 3, 90 SE 989, 991; Cantrell v. State, 8 Ga. A. 725, 70 SE 96, 97; Tooke v. State, 4 Ga. A. 495, 61 SE 917, 922.

2. Union, etc., Club v. Atlanta, 136 Ga. 721, 71 SE 1060, 1062.

3. Little v. Cambridge, 9 Cush. (Mass.) 298, 301.

4. Baird v. State, 38 Tex. 599, 601.

5. Palmer v. Kelleher, 111 Mass. 320, 321.

[a] **Farm or plantation** as a place of business see Idelett v. State, 14 Ga. A. 501, 81 SE 379, 380; Miller v. State, 12 Ga. A. 479, 77 SE 653.

6. Columbia Bank v. Lawrence, 1 Pet. (U. S.) 578, 580, 7 L. ed. 269; Stephenson v. Primrose, 8 Port. (Ala.) 155, 167, 33 AmD 281; Adam v. Musson, 37 Ill. A. 501, 503.

7. Lewis v. Davis, 8 Daly (N. Y.) 185, 186. Compare In re Lipphart, 201 Fed. 103, 105; In re Bright, 18 T. L. R. 37, 38 (both declaring that a clerk does not have a "place of business" as the term is used in a bankruptcy act).

8. Roddan v. Doane, 92 Cal. 555, 28 P 604, 605; Bollinger v. Manning, 79 Cal. 7, 21 P 375, 377.

9. Burke v. Burke, 27 Misc. 684, 58 NYS 676, 677.

10. Davenport v. State, 27 Ga. A. 284, 108 SE 131, 132.

11. Smith v. State, 11 Ga. A. 89, 92, 74 SE 711.

12. See Establish § 12 note 42.

13. See Other 46 C. J. p 1149 note 19 [a].

14. See Other 46 C. J. p 1149 note 19 [e].

15. See Principal [31 Cyc 1173 note 50].

16. Davis v. Motive Parts Corp., 16 F. (2d) 148, 149; American Electric Welding Co. v Lalance, etc., Mfg. Co., 256 Fed. 34, 36.

business."[17]

[§ 4] **4. Place of Delivery.**[18] As used in a uniform bill of lading,[19] the unloading platform or some other place customarily used for the delivery of freight, and calculated, by reason of its character, location, or care, to afford protection against the usual hazards to unstored or unguarded property.[20] Also, the place where title passes.[21]

[§ 5] **5. Place of Employment.**[22] As the subject of statutory definition a phrase meaning every place, whether indoors or out or underground, and the premises appurtenant thereto, where either temporarily or permanently any industry, trade, or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade, or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit, but not including any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power.[23]

[§ 6] **6. Place of Manufacture.**[24] A place where articles of trade are created out of raw material in its simple or some improved form.[25]

[§ 7] **7. Place of Residence.**[26] Place of abode.[27]

Phrases: "Place of residence of the owners,"[28] "principal place of residence,"[29] "usual place of residence."[30]

[§ 8] **8. Place of Shipment.**[31] As used in a bill of lading,[32] means the city, town, or locality where the shipment originated, as contradistinguished from the place of destination, and cannot be construed to mean the actual street or station from which the goods are shipped.[33]

[§ 9] **9. Place of Trade.**[34] A place devoted to the business of buying and selling, or of plying some mechanical vocation.[35]

[§ 10] **10. Place of Trust.**[36] As used in the various constitutions and statutes, an office.[37]

[§ 11] **11. Place of Worship.**[38] A church building or place devoted exclusively or primarily to worship by persons of one faith or sect banded together;[39] any place or structure where worship is statedly held;[40] a place consecrated to regular stated religious worship;[41] a place set apart for worship;[42] a place where a number of persons meet together for the purpose of worshipping God;[43] the gathering of individuals for public worship.[44] A church is not necessarily a place of public worship; nor is the term synonymous with "church;"[45] a place of worship is constituted by the congregation of numerous worshippers thereat,[46] whatever may be the nature of the place at which they assemble.[47]

17. See Usual [39 Cyc 873 note 10].

18. **"Delivery"** see 18 C. J. p 477: **Place of delivery of goods:** By bailee see Bailments § 98. Shipped: **By common carrier** see Carriers §§ 355–361. **By water** see Shipping [36 Cyc 225]. Under a contract of sale see Sales [35 Cyc 171–175].

19. **Bill of lading generally** see Carriers § 251 et seq.

20. Chicago, etc., R. Co. v. Davis, 1 F. (2d) 729, 732.

[a] **"Place of delivery."**—Louisville, etc., R. Co. v. Johnson, 182 Ky. 418, 422, 206 SW 638.

21. Setton v. Eberle-Albrecht Flour Co., 258 Fed. 905, 907, 169 CCA 625.

22. **"Employment"** see 20 C. J. p 1245.

23. Waskow v. Reisinger, 180 Wis. 537, 193 NW 357, 358; Rosholt v. Worden-Allen Co., 155 Wis. 168, 144 NW 650, 652. See Popowich v. American Steel, etc., Co., 13 F. (2d) 381, 382 (Ohio statute); Lang v. Findorff, 185 Wis. 545, 201 NW 727, 728; Kelly v. Kneeland-McLurg Lumber Co., 161 Wis. 158, 152 NW 858, 859.

24. **"Manufacture"** see Manufactures §§ 1–7.

25. Sharpe v. Hasey, 134 Wis. 618, 114 NW 1118, 1119. See State v. Whissenhunt, 98 N. C. 682, 4 SE 533.

26. **"Domicile" distinguished** see Domicile § 2.

"Residence" see [34 Cyc 1647]. **Place of residence:** For service of process see Process [32 Cyc 462]. Of corporation see Corporations §§ 408–419. Of voter see Elections §§ 26–33.

27. See Place of Abode supra § 2. See also State v Shepherd, 218 Mo. 656, 117 SW 1169, 1172, 131 AmSR 568.

[a] **"In the common law** acceptation of the term means a fixed and permanent abode and dwelling place for the time being as contra-distinguished from mere temporal local residence." Silvey v. Lindsay, 42 Hun (N. Y.) 116, 120.

[b] **"Legal settlement" distinguished.**—In re Bigelow, 17 S. D. 331, 333, 96 NW 698. See Berkshire County v. Reading Borough, [1921] 2 K. B. 787, 795.

[c] **Naming a municipality** in which a person lives is not a sufficient specification of his place of business or residence, although naming a village might be. Roche Valley Land Co. v. Barth, 67 Mont. 353, 215 P 654, 655. Compare MacLean v. Reynolds, 175 Minn. 112, 220 NW 435, 436 (the phrase, in a statute providing for service of notice by mail, meant the municipality in which the person to be served lived and not the house he occupied as a home).

28. Selden v. Hendrickson, 21 F. Cas. No. 12,639, 1 Brock. 396, 400 (as used in a marine ordinance of Louis XIV of France, that the master of a vessel could not hypothecate it in the place of residence of the owner, it comprehended the whole district but not the county).

29. Ross-Lewin v. Goold, 211 Ill. 384, 386, 71 NE 1028 (means place of residence since a person cannot in a legal sense have more than one place of residence).

30. Minnesota Thresher Mfg. Co. v. L'Heureux, 82 Nebr. 692, 693, 118 NW 565.

31. **"Shipment"** see [35 Cyc 2016].

32. **Bill of lading generally** see Carriers § 251 et seq.

33. Blessing v. New Jersey Cent. R. Co., (N. J. Sup.) 103 A 1045, 1046.

34. **"Trade"** see [38 Cyc 670].

35. Sharpe v. Hasey, 134 Wis. 618, 114 NW 1118, 1119.

36. **Constitutional or statutory provisions against holding more than one office or place of trust** see Officers §§ 46–55.

37. Wooten v. Smith, 145 N. C. 476, 59 SE 649, 650 [quot Groves v. Barden, 169 N. C. 8, 9, 84 SE 1042, LRA 1917A 228, AnnCas1917D 316]; Wilcox v. Hemming, 58 Wis. 144, 145, 15 NW 435, 46 AmR 625.

[a] **"Place of trust or profit."**—(1) A place which approximates to, but is not, an office, and yet occupies the same general level in dignity and importance. Doyle v. Raleigh, 89 N. C. 133, 136, 45 AmR 677 [quot Groves v. Barden, 169 N. C. 8, 9, 84 SE 1042, LRA1917A 228, AnnCas1917D 316]. (2) "The line between 'offices' and 'places of trust or profit' within the meaning of the Constitution has not been clearly marked, principally because they approach each other so closely, and are in all essential features identical." Groves v. Barden, supra.

[b] **"Place of public trust and emolument"** as not including the position of juror see Peo. v. Hopt, 3 Utah 396, 403, 4 P 250.

38. **Place of religious meeting** see Disturbance of Public Meetings § 11. **"Place of religious worship" as a public place** see Drunkards § 9 note 32 [f]. **"Religious worship"** see Disturbance of Public Meetings § 5. **Whether subject to tax** see Taxation [37 Cyc 943]. **"Worship"** see [40 Cyc 2863].

39. Kaplan v. Virginia Independent School Dist., 171 Minn. 142, 214 NW 18, 20, 57 LRA 185.

[a] **Phrases.**—(1) "Actual places of religious worship." See Actual 1 C. J. p 1184 note 65. (2) "Regular place of stated worship." Wood v. Moore, 1 Chest. Co. (Pa.) 265, 266; Erie County v. Bishop, 13 Phila. (Pa.) 509, 510. (3) "Stated place of worship." Mullen v. Erie County, 85 Pa. 288, 291, 27 AmR 650.

40. State v. Edgerton School-Dist. No. 8, 76 Wis. 177, 44 NW 967, 979, 20 AmSR 41, 7 LRA 330.

41. Howell v. Philadelphia, 8 Phila. (Pa.) 280, 281.

42. Peo. v. Stanley, 81 Colo. 276, 255 P 610, 615.

43. Church v. Bullock, 104 Tex. 1, 109 SW 115, 118, 16 LRANS 860.

44. Amorous v. State, 1 Ga. A. 313, 57 SE 999, 1001.

45. Amorous v. State, supra. See State v. Swink, 20 N. C. 358, 359. **"Church"** see 11 C. J. p 762.

46. State v. Swink, 20 N. C. 358, 359.

47. Amorous v. State, 1 Ga. A. 313, 316, 57 SE 999 ("the gathering of individuals for public worship, at whatever place they may be, whether in the open air, under a tent, beneath an arbor, in a warehouse, and sometimes even in an opera-house").

[a] **Bishop's residence not a place of worship.**—State v. Orleans Parish, 52 La. Ann. 223, 26 S 872, 877.

[b] **Buildings used for church purposes other than worship** are not places of worship. Mullen v. Erie County, 85 Pa. 288, 291, 27 AmR 650.

[c] **Camp meeting or temporary encampment of a denomination of christians as a place of worship.**—

[§ 12] **12. Public Place.**[48] The term is a relative one; what is a public place for one purpose is not for another.[49] It has been variously defined[50] as: Any place that the public are invited or permitted to go or congregate;[51] a place openly and notoriously public, a place of common resort;[52] a place where all persons have a right to go[53] and be;[54] a place where the public go, no matter whether they have a right to go or not;[55] a place which for the time being is made public by the attending of people, who go there with or without invitation and without restraint;[56] a place which is in point of fact public, as distinguished from private—a place that is visited by many persons, and usually accessible to the neighboring public.[57] It has been said to be the actual use by the public, and not the legal right of the public to continue in the use, that makes a place public.[58]

Phrases: "Any public place,"[59] "a public place forever for the enjoyment of the community in general,"[60] "at the public places of the county,"[61] "in three of the most public places in the settlement,"[62] "or other public places,"[63] "streets, avenues, highways, sewers and public places."[64]

[§ 13] **13. Suspicious Place.** A place in which the police suspect that the law is being violated.[65]

[§ 14] **14. Uninhabited Place.** A place where there are no houses at all, a considerable distance from town, or where the houses are scattered at a great distance from each other.[66]

[§ 15] **15. Other Phrases.** "All other places of public accommodation,"[67] "any other place,"[68] "any place,"[69] "county or place,"[70] "every place,"[71] "from

State v. Hall, 18 S. C. L. 151.

[d] **Parsonage not a place of worship.**—St. Mark's Church v. Brunswick, 78 Ga. 541, 3 SE 561; Dauphin County v. St. Stephen's Church, etc., 3 Phila. (Pa.) 189, 190; Church of Our Saviour v. Montgomery County, 10 WklyNC (Pa.) 170, 171.

[e] **School not a place of worship.**—Peo. v. Stanley, 81 Colo. 276, 255 P 610, 615; Davis v. Boget, 50 Iowa 11, 15; Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 615, 87 SW 792, 793, 117 AmSR 599, 69 LRA 592, 9 AnnCas 36; Kaplan v. Virginia Independent School Dist., 171 Minn. 142, 214 NW 18, 20, 57 LRA 185; State v. Dilley, 95 Nebr. 527, 145 NW 999, 1000, 50 LRANS 1182; Church v. Bullock, 104 Tex. 1, 109 SW 115, 118, 16 LRANS 860. See State v. Edgerton School-Dist. No. 8, 76 Wis. 177, 44 NW 967, 979, 20 AmSR 41, 7 LRA 330 (construing Const. art 1 § 18).

48. **"Public"** see [32 Cyc 747].

Public place:

As element in offense of:
- Affray § 7 text and note 22 §§ 11, 13.
- Disorderly Conduct § 6.
- Gaming § 158.
- Indecent exposure see Obscenity § 6 text and notes 27, 28.
- Intoxication in public place see Drunkards §§ 9–11.
- Profanity [32 Cyc 579, 582].

Cemetery as a see Cemeteries § 1 text and note 9.

Highways § 1.

Negligence as to condition and use of see Negligence § 281.

Of posting notice see Notice § 74.

Use and regulation of see Municipal Corporations §§ 3597–4029.

What constitutes in statutes prohibiting:
- Affray § 12.
- Allowing unmuzzled dog therein see Animals §§ 322, 323.
- Disorderly Conduct § 6.
- Disturbance of Public Meetings § 21.
- Firing weapon therein see Weapons [40 Cyc 870].
- Gaming § 92.
- Indecent exposure see Obscenity § 6.
- Insult to United States flag see Flags § 2 note 9 [a].
- Intoxication therein see Drunkards §§ 9–11.
- Keeping intoxicating liquor therein see Intoxicating Liquors § 198 note 89 [c].
- Profanity [32 Cyc 579, 582].

What constitutes in statutes providing for impounding of animals running at large see Animals § 633 text and note 54.

What constitutes in statutes requiring:
- Canvassing of election see Elections § 239.
- Posting of notice see Notice § 74 text and notes 61–65.

49. Republic of Hawaii v. Ben, 10 Hawaii 278, 280.

[a] **What constitutes public place in statutes providing for taxation of franchises of corporations occupying public places** see Atlantic, etc., R. Co. v. State Bd. of Assessors, 80 N. J. L. 83, 77 A 609 (turnpike); Peo. v. Gilchrist, 221 App. Div. 19, 221 NYS 613, 617. And see Taxation [37 Cyc 815].

[b] **Workhouse as a public place.**—Mile End Guardians v. Hoare, [1903] 2 K. B. 483, 486. "Workhouse" see [40 Cyc 2859].

50. See statutory provisions.

[a] **Statutory definitions.**—La. Act (1886) No. 31 p 40 § 2 [quot State v. Penten, 143 La. 589, 78 S 973]; Tex. Pen. Code (1911) art 1020 [quot Haverbekken v. Hollingsworth, (Tex. Civ. A.) 250 SW 261, 264]; Tex. Pen. Code (1895) § 335 [quot Austin v. Strong, 57 Tex. Cr. 611, 124 SW 639]; English Licensing Act (1902) (Imp.) c 28 § 8; Sask. Cr. Code § 197 (b) [both quot Rex v. Benson, (Sask.) 50 Can CrCas 426, 433, [1928] 3 WestWkly 605].

51. State v. Barker, 119 Kan. 853, 860, 241 P 253. See Finnem v. State, 115 Ala. 106, 108, 22 S 593.

52. Cahoon v. Coe, 57 N. H. 556, 595; Peo. v. Whitman, 178 App. Div. 193, 195, 165 NYS 148 [quot Cyc].

53. State v. Sowers, 52 Ind. 311, 312; Peo. v. Whitman, 178 App. Div. 193, 195, 165 NYS 148 [quot Cyc].

54. State v. Welch, 88 Ind. 308, 310; State v. Waggoner, 52 Ind. 481, 482; Territory v. Lannon, 9 Mont. 1, 4, 22 P 495; Peo. v. Whitman, 178 App. Div. 193, 195, 165 NYS 148 [quot Cyc]; Rex v. Benson, (Sask.) 50 Can CrCas 426, 433, [1928] 3 WestWkly 605 [quot Cyc].

55. Reg. v. Wellard, 14 Q. B. D. 63 [quot Rex v. Leitch, 36 Ont. L. 1, 2, 9 OntWN 471, 31 DomLR 93, 26 Can CrCas 149].

56. Cantrell v. State, 8 Ga. A. 725, 70 SE 96, 97.

[a] **Similar definition.**—Every place which is for the time made public by the assemblage of people. Campbell v. State, 17 Ala. 369, 371; Peo. v. Whitman, 178 App. Div. 193, 195, 165 NYS 148 [quot Cyc].

[b] **Any place may be made public** by a temporary assemblage. Peo. v. Bixby, 67 Barb. (N. Y.) 221, 222.

57. Peo. v. Whitman, 178 App. Div. 193, 195, 165 NYS 148 [quot Cyc]; Ellis v. Archer, 38 S. D. 285, 161 NW 192, 193 [cit Cyc]; Parker v. State, 26 Tex. 204, 207; Gomprecht v. State, 36 Tex. Cr. 434, 435, 37 SW 734. See State v. Penten, 143 La. 589, 78 S 973; King v. Brown, 100 Tex. 109, 111, 94 SW 328.

58. State v. Lanouette, (S. D.) 216 NW 870, 872. Compare Rex v. Benson, (Sask.) 50 CanCrCas 426, 433, [1928] 3 WestWkly 605 ("It appears to me that the essential element in the definition of a public place is that it shall be a place where the public have a right to resort as distinguished from a place where the public may habitually resort, but where they have no inherent right to go").

[a] **Farm as public place.**—In re Child Labor Law, 25 Pa. Dist. 79.

[b] **Private home as public place.**—In re Child Labor Law, 25 Pa. Dist. 79.

[c] **May not include:** (1) Canal lands. Peo. v. Moroney, 224 N. Y. 114, 120 NE 149; Peo. v. Woodbury, 167 App. Div. 535, 153 NYS 541. (2) Churches. Pamoplas v. Marinos, 98 N. J. L. 665, 121 A 727; Cavan v. Brooklyn, 5 NYS 758, 760. But see Notice § 74 text and note 63. "Church" see 11 C. J. p 762. (3) Railroad car. State v. Gross, 96 N. J. L. 401, 115 A 743, 744 [cit Cyc]. "Railroad car" see Car 9 C. J. p 1283 note 12 [b]; Rail car [32 Cyc 1470]. (4) Restaurant. Rex v. Benson, (Sask.) 50 Can CrCas 426, 434, [1928] 3 WestWkly 605. "Restaurant" see [34 Cyc 677]. (5) River. The Steam Dredge No. 6, 222 Fed. 576, 578. "River" see [34 Cyc 1792]. (6) Theaters. Cavan v. Brooklyn, 5 NYS 758, 760. "Theater" see Theaters and Shows [38 Cyc 253]. (7) Vacant lot. Fuller v. Hessler, 226 Mich. 311, 197 NW 524, 525.

59. Rex v. Cook, 27 Ont. L. 406, 408, 4 OntWN 383, 23 OntWR 425, 8 DomLR 217.

60. Spires v. Los Angeles, 150 Cal. 64, 66, 87 P 1026, 11 AnnCas 465.

61. Peterman v. Watkins, 19 Ga. 153, 155.

62. Dodge v. Baker, 24 N. S. 552, 553.

63. Madison Products Co. v. Coler, 242 N. Y. 467, 473, 152 NE 264.

64. Eisenschmidt v. Ader, 185 Ky. 280, 286, 215 SW 48.

65. Peo. v. Greene, 92 App. Div. 243, 247, 87 NYS 172 (term used in New York Police Department Rules, rule 44, requiring captains to state in their monthly reports "the location of all suspicious places;" and the rule being silent as to what constitutes a "suspicious place," the question is to "be determined by the exercise of good judgment and discretion on the part of the captain . . . . required to make the report").

66. U. S. v. Salgado, 11 Philippine 56, 58 [quot U. S. v. Balagtas, 19 Philippine 164, 173] (as is contemplated by the law that the commission of a crime in such place is an aggravating circumstance).

67. Burks v. Bosso, 81 App. Div. 530, 532, 533, 81 NYS 384 (a term said to be of more general significance than the expression "[places] of public resort"). See State v. Pratt, 34 Vt. 323, 325.

68. See Any 3 C. J. p 248 note 46.

69. See Any 3 C. J. p 241 note 2.

[a] **"At any place."**—Rex v. Brannan, 35 N. S. 106, 110, 6 CanCrCas 29 (equivalent to "anywhere").

70. Rex v. Justices of Warwickshire, [1902] 2 K. B. 101, 105.

[a] **"County, riding, division, or place."**—Reg. v. Justices West Riding, [1900] 1 Q. B. 291, 295.

71. See Every 21 C. J. p 1262 note 10.

place to place,"[72] his "place at R.,"[73] "home place,"[74] "house or place,"[75] "in a place regularly provided for passengers,"[76] "in place,"[77] "my place at Riverside,"[78] "new place,"[79] "one place,"[80] "ordinary place,"[81] "or other public passages or places,"[82] "other place,"[83] "parish or place,"[84] "piling place,"[85] "place adjacent,"[86] "place and employment,"[87] "place as inmate,"[88] "place certain,"[89] "[place] for public entertainment,"[90] "place for the regular transaction of business in person,"[91] "place having a known and defined boundary,"[92] "place having a known or defined boundary,"[93] "place lands,"[94] "place licensed,"[95] "place of a nuisance,"[96] "place of confinement,"[97] "place of danger,"[98] "place of election,"[99] "place of enrollment,"[1] "place of execution,"[2] "place of his sojourn,"[3] "place of holding,"[4] place of injury,[5] "place of parade,"[6] "place of performance,"[7] "place of public accommodation,"[8] "places of refuge,"[9] "place of starting,"[10] "place of storage,"[11] "place of the county seat,"[12] "place to be searched,"[13] "place where explosives are used,"[14] "place where gambling is carried on,"[15] "place where he happens to be,"[16] "place where made,"[17] "place where . . . they might properly be,"[18] "reasonable place,"[19] "remain in any place,"[20] "such place,"[21] "suitable place,"[22] "time and place,"[23] "time, place, and cause of injury,"[24] "visits to places of educational value or interest,"[25] "voting places,"[26] "whilst at port or ports, place or places in New Caledonia."[27]

[§ 16] **B. As a Verb—1. In General.** To arrange or make provision for;[28] to assign;[29] to dispose or arrange, as an investment;[30] to establish;[31] to fix;[32] to invest;[33] to put out at interest;[34] to sell;[35] to settle;[36] to take insurance for.[37]

72. See From 27 C. J. p 909 note 68.

[a] **"From one place to another within this state."**—State v. White, 111 Kan. 196, 206 P 903.

73. Axford v. Meeks, 59 N. J. L. 502, 36 A 1036.

74. See Home 29 C. J. p 769 note 51.

75. See House 30 C. J. p 473 note 9.

76. Groves v. Great Eastern Casualty Co., 212 Mo. A. 316, 319, 246 SW 1002.

77. See In 31 C. J. p 366 note 76.

[a] **"In the place and stead."**—Re Hunter, 25 Ont. L. 400, 411, 1 DomLR 456, 3 OntWN 529, 21 Ont WR 5.

78. Axford v. Meeks, 59 N. J. L. 502, 503, 36 A 1036.

79. See New 46 C. J. p 15 note 75.

80. See One 46 C. J. p 1104 note 78.

81. Wortham v. Com., 5 Rand. (26 Va.) 669, 675.

"Ordinary" see 46 C. J. p 1132.

82. Richardson v. Austin, 12 Austr. C. L. R. 463, 468 (means "or other public passages or public places").

83. See Other 46 C. J. p 1149 note 19.

84. Rice v. Slee, L. R. 7 C. P. 378, 382. See Reg. v. Charlesworth, 20 L. J. M. C. 181, 182.

"Parish" see 46 C. J. p 1371.

85. Doe v. Todd, 7 N. B. 261, 262.

"Pile" see ante.

86. Reg. v. Brown, 17 Q. B. 833, 837, 79 ECL 833, 117 Reprint 1500.

"Adjacent" see 1 C. J. p 1194.

87. See Employment 20 C. J. p 1245 note 65 [a].

88. Peo. v. Hirsch, 21 Cal. A. 737, 738, 132 P 1062.

89. See Certain 11 C. J. p 75 note 58.

90. Newark Athletic Club v. Newark Bd. of Adjustment, (N. J. Sup.) 144 A 167, 169.

91. De Angelli v. Dixey, 101 Misc. 606, 607, 167 NYS 663.

92. Reg. v. Northowram, L. R. 1 Q. B. 110, 114 (included a district formed for ecclesiastical purposes consisting of parts of two townships).

93. Reg. v. Local Government Bd., L. R. 8 Q. B. 227, 231.

94. Jackson v. La Moure County, 1 N. D. 238, 239, 46 NW 449 (distinguishing "indemnity lands").

95. Teoli v. Nardolillo, 23 R. I. 87, 93, 49 A 489.

"License" see 37 C. J. p 161.

96. U. S. v. Sumner, 125 Misc. 658, 659, 211 NYS 705.

"Nuisance" see Nuisances § 1.

97. State v. Betterton, 317 Mo. 307, 295 SW 545, 547 (construing applicability of statutory definitions)

"Confinement" see 12 C. J. p 422.

98. Shumate v. Wells, (Mo.) 9 SW (2d) 632, 635.

"Danger" see 17 C. J. p 1126.

99. State v. Ross, 160 Mo. A. 682, 694, 143 SW 502 ("polling place" not synonymous). See Elections §§ 88, 89.

1. Southern Pac. R. Co. v. Kentucky, 222 U. S. 63, 68, 32 SCt 13, 56 L. ed. 96.

"Enrollment" see 20 C. J. p 1265.

2. Peo. v. Brown, 59 Cal. 345, 357.

"Execution" see 23 C. J. p 278.

3. Hess v. Felt, 60 Misc. 541, 112 NYS 470.

"Sojourn" see [36 Cyc 507].

4. Moffatt v. Carleton Place Bd. of Education, 5 Ont. A. 197, 201 [disappr Malcolm v. Malcolm, 15 Grant Ch. (Ont.) 13].

5. Forseyth v. Oswego, 107 App. Div. 187, 95 NYS 33; Shoffler v. Lehigh Valley Coal Co., 290 Pa. 480, 483, 139 A 192, 193.

6. Brown v. Greenfield Congregational Soc., 203 Fed. 687, 688, 121 CCA 581.

"Parade" see 46 C. J. p 1176.

7. Davidson v. Browning, 73 W. Va. 276, 278, 80 SE 363, LRA1915C 976.

"Performance" see ante.

8. Darius v. Apostolos, 68 Colo. 323, 326, 190 P 510, 10 ALR 986; Faulkner v. Solozzi, 79 Conn. 541, 542, 65 A 947, 9 LRANS 601, 9 AnnCas 67; Burks v. Bosso, 180 N. Y. 341, 342, 73 NE 58, 105 AmSR 762; Baer v. Washington Heights Café, Inc., 168 NYS 567, 568; Babb v. Elsinger, 147 NYS 98, 99.

[a] **"Place of public accommodation, resort or amusement."**—Johnson v. Auburn, etc., R. Co., 222 N. Y. 443, 445, 119 NE 72; LRA1918F 824; Gibbs v. Arras, 222 N. Y. 332, 334, 118 NE 857, LRA1918F 826, AnnCas 1918D 1141. "Accommodation" see 1 C. J. p 518.

9. Moore v. Centralia Coal Co., 140 Ill. A. 291, 295.

10. Texas R. Commn. v. Chicago, etc., R. Co., 102 Tex. 393, 395, 117 SW 794 [quot Atchison, etc., R. Co. v. State, 27 Okl. 565, 580, 112 P 1010].

11. McReynolds v. Peo., 230 Ill. 623, 631, 82 NE 945.

"Storage" see [36 Cyc 1325].

12. Fall River County v. Powell, 5 S. D. 49, 52, 58 NW 7.

"County seat" see Counties §§ 55-91.

13. Reutlinger v. State, 29 Okl. Cr. 290, 296, 234 P 224 (as including all of a ranch).

14. Maryland Casualty Co. v. Scruggs (Tex. Civ. A.) 277 SW 768, 772.

15. State v. Shanklin, 51 Wash. 35, 97 P 969.

16. Charnock v. Court, [1899] 2 Ch. 35, 39.

17. State v. Heard, 64 Mo. A. 334, 336, 337.

18. See Nixon v. Grand Trunk R. Co., 23 Ont. 124.

19. Klopp v. Chicago, etc., R. Co., 142 Iowa 474, 119 NW 373, 376; Tucker v. Colonial F. Ins. Co., 58 W. Va. 30, 51 SE 86, 90.

"Reasonable" see [33 Cyc 1560].

20. Walters v. State, 58 Tex. Cr. 240, 242, 125 SW 11.

21. Lang v. Berrien, 77 N. J. L. 214, 216, 71 A 117.

22. See Suitable [37 Cyc 525 note 29].

23. Peck v. Fair Haven, etc., R. Co., 77 Conn. 161, 164, 58 A 757; Wright v. Omaha, 78 Nebr. 124, 127, 110 NW 754. See Audubon v. Hand, 231 Ill. 334, 83 NE 196, 197.

24. Miller v. Solvay Process Co., 109 App. Div. 135, 137, 95 NYS 1020, 1022

25. Rex v. Lyon, [1922] 1 K. B. 232, 235 (does not include attendance at theatrical performances).

26. Neal v. State, 51 Tex. Cr. 513, 515, 102 SW 1139. See Elections §§ 88, 89.

27. Maritime Ins. Co., Ltd. v. Alianza Ins. Co., [1907] 2 K. B. 660, 662.

28. Century D. [quot Heiberger v. Johnson, 34 App. Div. 66, 67, 53 NYS 1057].

"Arrange" see 5 C. J. p 373.

29. Webster D. [quot Schramm v. Gentry, 63 Tex. 583, 585].

"Assign" see 5 C. J. p 826.

30. Standard D. [quot Heiberger v. Johnson, 34 App. Div. 66, 69, 53 NYS 1057].

"Dispose" see 18 C. J. p 1279.

31. Imperial D.; Worcester D. [both quot Jessup v. Grand Trunk R. Co., 28 Grant Ch. (Ont.) 583, 587].

"Establish" see 21 C. J. p 898.

32. Imperial D.; Worcester D. [both quot Jessup v. Grand Trunk R. Co., 28 Grant Ch. (Ont.) 583, 587]; Webster D. [quot Schramm v. Gentry, 63 Tex. 583, 585].

"Fix" see 26 C. J. p 646.

33. Standard D. [quot Heiberger v. Johnson, 34 App. Div. 66, 69, 53 NYS 1057].

"Invest" see 33 C. J. p 807.

34. Standard D. [quot Heiberger v. Johnson, 34 App. Div. 66, 69, 53 NYS 1057].

35. Anderson v. Bruner, 112 Mass. 14, 15.

[a] **An agreement to place shares of stock** is simply an agreement to procure other persons to take the shares and is not an agreement to become a stockholder. In re Monarch Ins. Co., L. R. 8 Ch. 507, 515.

[b] **"Placed."**—Sold or realized. Fiske v. Joy, 141 Mass. 311, 313, 5 NE 514; Bailey v. Joy, 132 Mass. 356 [quot Sanger v. Amarillo First Nat. Bank, (Tex. Civ. A.) 170 SW 1087, 1091]. "Realize" see [33 Cyc 1558]. "Sold" see [36 Cyc 508].

"Sell" see [35 Cyc 1374].

36. Imperial D.; Worcester D. [both quot Jessup v. Grand Trunk R. Co., 28 Grant Ch. (Ont.) 583, 587]; Webster D. [quot Schramm v. Gentry, 63 Tex. 583, 585].

"Settle" see [35 Cyc 1442].

37. Standard D. [quot Heiberger v. Johnson, 34 App. Div. 66, 69, 53 NYS 1057]

[§ 17] **2. Place a Loan.**[38] A phrase meaning, if not otherwise qualified, to obtain a loan.[39]

[§ 18] **3. Place an Order.**[40] In commercial colloquialism, to make a contract.[41]

[§ 19] **4. Place in Order.** Adjust.[42]

[§ 20] **5. Other Phrases.** "Any incumbrance to be placed on the property,"[43] "place a female . . . in a house of prostitution,"[44] "placed by the carrier for loading or unloading,"[45] "placed in the hands of an attorney for collection,"[46] "placed in the plant,"[47] "placed under his care,"[48] "placed upon the footing of a bill of exchange,"[49] "placed upon trial,"[50] "place such [explosive or poisonous] substances in any waters whatever,"[51] "placing of a particular fence,"[52] "placing out" or "putting away,"[53] "properly and securely place,"[54] "we do place the value of said land at a sum not to exceed sixteen hundred dollars."[55]

PLACE A LOAN.[56]

PLACE AN ORDER.[57]

PLACE IN ORDER.[58]

PLACE OF ABODE.[59]

PLACE OF BUSINESS.[60]

PLACE OF DELIVERY.[61]

PLACE OF DESTRUCTION.[62]

PLACE OF EMPLOYMENT.[63]

PLACE OF MANUFACTURE.[64]

PLACE OF PUBLIC AMUSEMENT.[65]

PLACE OF PUBLICATION.[66]

PLACE OF PUBLIC RESORT.[67]

PLACE OF RESIDENCE.[68]

PLACE OF SALE.[69]

PLACE OF SHIPMENT.[70]

PLACE OF TRADE.[71]

PLACE OF TRIAL.[72]

PLACE OF TRUST.[73]

PLACE OF WORSHIP.[74]

PLACER.[75]

PLACER CLAIM.[76]

PLACER GOLD.[77]

PLACER LOCATION.[78]

PLACER MINE.[79]

PLACITA. The style or title of the courts at the beginning of the old nisi prius record.[80]

PLACITA DEBENT APTE CONCLUDERE.[81]

PLACITA DE TRANSGRESSIONE CONTRA PACEM REGIS, IN REGNO ANGLIÆ VI ET ARMIS FACTA, SECUNDUM LEGEM ET CONSUETUDINEM ANGLIÆ SINE BREVI REGIS PLACITARI NON DEBENT.[82]

PLACITA EX DIRECTO ESSE DEBENT, ET NIL FER INDUCTIONEM SUPPONE.[83]

PLACITA NEGATIVA DUO EXITUM NON FACIUNT.[84]

PLACITORUM ABBREVIATIO. A compilation from the earliest English judicial records.[85]

PLACITORUM ALIA DILATORIA, ALIA PEREMPTORIA.[86]

PLACITUM ALIUD PERSONALE, ALIUD REALE, ALIUD MIXTUM.[87]

PLACITUM MEMO CESSABIT, NISI MELIUS DANDO.[88]

PLACITUM MENDAX NON EST PLACITUM.[89]

PLAGA. A term said to mean both a wound and a bruise.[90]

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38. **"Loan"** see 38 C. J. p 125.

39. Heiberger v. Johnson, 34 App. Div. 66, 67, 53 NYS 1057.

40. **"Order"** see 46 C. J. p 1131.

41. See Mawhinney v. Millbrook Woolen Mills, 105 Misc. 99, 172 NYS 461, 465.

42. See Adjust 1 C. J. p 1237 text and note 30.

43. Lodge v. Capital Ins. Co., 91 Iowa 103, 58 NW 1089, 1090 (held not to include a judgment).

44. State v. Hanes, 84 Wash. 601, 602, 147 P 193 (means the furnishing of a place and opportunity).

45. Chicago, etc., R. Co. v. State, 77 Okl. 63, 186 P 234.

46. Mechanics'-American Nat. Bank v. Coleman, 204 Fed. 24, 31, 122 CCA 338; Brown v. Alabama Chemical Co., 207 Ala. 215, 216, 92 S 260.

47. Valdes v. Central Altagracia, 225 U. S. 58, 78, 32 SCt 664, 56 L. ed. 980.

"Plant" see post.

48. Abercrombie v. Edwards, 62 Okl. 54, 55, 161 P 1084.

49. Sim v. Citizens' Bank, 173 Ky. 799, 800, 191 SW 489.

50. Dufton v. Daniels, 190 Cal. 577, 580, 213 P 949.

[a] **"Unless the fugitive be returned and placed on trial."**—Larimer v. De Motte, 39 Cal. A. 599, 601, 179 P 539.

"Trial" see [38 Cyc 1267].

51. Com. v. Immel, 33 Pa. Super. 388, 391.

52. Miller v. Barnet, 5 N. J. L. 643, 646.

"Fence" see 25 C. J. p 1012.

53. Reg. v. Wainfleet, 11 A. & E. 656, 657, 39 ECL 353, 113 Reprint 563.

54. Swift Co. v. Gaylord, 229 Ill. 330, 335, 82 NE 299.

55. Schuyler v. Broughton, 76 Cal. 524, 526, 18 P 436.

56. See Place § 17

57. See Place § 18.

58. See Place § 19.

59. See Place § 2

60. See Place § 3.

61. See Place § 4.

62. See Destruction 18 C. J. p 974 text and notes 81–84.

63. See Place § 5.

64. See Place § 6.

65. See cross references under Amusement 2 C. J. p 1332 note 75.

66. See Newspapers § 20.

67. See Gaming § 88.

68. See Place § 1.

69. Place of sale:
By executor or administrator see Executors and Administrators § 1580.
By guardian see Guardian and Ward § 322.
By trustee in bankruptcy see Bankruptcy § 368.
Execution see Executions §§ 585–588.
Judicial see Judicial Sales § 47.
Mortgage:
Foreclosure by action or suit see Mortgages § 1820.
Foreclosure by exercise of power of sale see Mortgages § 1414.
Of liquor see Intoxicating Liquors § 223.
Of personalty see Sales [35 Cyc 94]. And see Conflict of Laws §§ 29–34.
Partition see Partition § 692.
Tax:
Of personal property see Taxation [37 Cyc 1239].
Of real property see Taxation [37 Cyc 1336].

70. See Place § 8.

71. See Place § 9.

72. See Criminal Law §§ 260–339; Venue [40 Cyc 10].

73. See Place § 10.

74. See Place § 11.

75. See Mines and Minerals § 87.

76. See Mines and Minerals § 66.

77. **As merchandise** see Merchandise 40 C. J. p 643 text and note 72.

"Placer" see Mines and Minerals § 87.

78. See Mines and Minerals § 42 note 34 [c].

79. See Mines and Minerals § 6.

80. Black L. D. See also Hall v. Hamilton, 74 Ill. 437, 443; Truitt v. Griffin, 61 Ill. 26, 28; Planing Mill Lumber Co. v. Chicago, 56 Ill. 304, 305.

[a] **One placita,** that of the term at which judgment is rendered or decree entered, is sufficient; the transcript need not contain a placita of each term in which proceedings of the cause are had. Leafgreen v. Leafgreen, 127 Ill. A. 184, 186.

[b] **Placita defective in not showing a properly constituted court is cured** by an additional placita showing appointment of trial judge. Moore-Bond Co. v. Attractograph Co., 181 Ill. A. 513, 514.

81. A maxim meaning "Pleas ought to conclude properly." Peloubet Leg. Max. [cit Lofft p 416].

82. A maxim meaning "Pleas of trespass against the peace of the king in the kingdom of England, made with force and arms, ought not, by the law and custom of England, to be pleaded without the king's writ." Black L. D. [cit 2 Inst. p 311].

83. A maxim meaning "Pleas ought to be directly expressed, and to suppose nothing by way of induction or inference." Morgan Leg. Max. [cit Halkerstone Max. p 124].

84. A maxim meaning "Two negative pleas do not form an issue." Bouvier L. D. [cit Lofft p 415].

85. Stephen Pl. appendix note 8.

86. A maxim meaning "Some pleas admit of delay; others are peremptory." Morgan Leg. Max. [cit Halkerstone Max. p 124].

87. A maxim meaning "Pleas are personal, real, and mixed." Peloubet Leg. Max. [cit Coke Litt. p 284b].

88. A maxim meaning "A plea in abatement must give a better plea." Peloubet Leg. Max. [cit Halkerstone Max. p 125].

89. A maxim meaning "A lying plea is no plea." Morgan Leg. Max. [cit Halkerstone Max. p 124].

90. State v. Moses, 13 N. C. 452, 467 ("If the word plaga be used, without adding dimensions, it shall

PLAGIARIO. One who commits plagio.[91]

PLAGIARISM.[92]

PLAGIO. In Spanish law, the stealing of another's children or servants to enslave them.[93]

PLAIN.[94] Apparent;[95] clear;[96] clearly or plainly apparent;[97] evident;[98] manifest;[99] obvious;[1] also, not intricate; simple; void of embellishment.[2]

Plain statement.[3] A direct and positive averment which does not leave anything to inference;[4] a statement that may be readily understood, not merely by lawyers, but by all who are sufficiently acquainted with the language in which it is written.[5]

Plain woolen goods. Those woolen goods in which the warp and woof threads cross each other at right angles.[6]

Other phrases: "In plain view,"[7] "paper envelopes, plain,"[8] "plain, adequate, and complete remedy at law,"[9] "plain and intelligible words,"[10] "plain English type,"[11] "plain glass bottles,"[12] "plain implication,"[13] "plain meaning,"[14] "plain sight,"[15] "plain, speedy, and adequate remedy."[16]

PLAIN CLOTHES MAN.[17] A police officer who does not wear his uniform or anything to call attention to his position while on his rounds.[18]

PLAINLY.[19] In a plain manner.[20]

Plainly expressed.[21] Used in regard to an instrument, "plainly expressed" means something more than an expression requiring unusually good eyesight to decipher; in addition to clarity of terms, it means legible.[22]

Plainly printed.[23] Printed so as to be read and understood.[24]

Other phrases: "Clearly or plainly apparent,"[25] "plainly, fully, and distinctly."[26]

PLAINLY BOUND COPIES.[27] While not a technical term in the publishing trade, it means the cheaper editions of published works as distinguished from more handsomely bound editions.[28]

PLAIN PLASTERING.[29]

PLAINT. A word derived from the French "plainte," the Latin "querela."[30] It seems that anciently, at common law, an original writ was issued only at Westminster, and to remove the inconvenience of procuring one when required in a distant part of the kingdom, a statute was passed dispensing with the original writ in causes of a minor nature and providing for a proceeding upon a complaint made to the judge or officer concerned and called a "proceeding by plaint."[31] The plaint, then, is declared to be the exhibiting of any action, real or personal, in writing;[32] in an inferior court, a process in the nature of an original writ;[33] the first process of an inferior court.[34]

PLAINTIFF.[35] The word "plaintiff" in a civil suit has a well defined legal and technical meaning.[36]

be taken to be a bruise, though, by itself, it mean wound as well as bruise, and thus life is taken upon an equivocal word. Indeed where it means bruise, you may prove a wound").

"Bruise" see 9 C. J. p 680.

"Wound" see [40 Cyc 2865].

91. Escriche Diccionario. See Plagio post.

92. See Copyright and Literary Property § 264 note 59 [c].

93. Escriche Diccionario. See also Abduction 1 C. J. p 281; Kidnapping 35 C. J. p 902.

94. See Open 46 C. J. p 1108. And see Plainly post.

Plain or fundamental errors apparent on record see Appeal and Error §§ 1482–1488; Criminal Law § 3472.

95. See Apparent 3 C. J. p 253 note 61.

96. See Clear 11 C. J. p 833 note 15.

97. Century D.; Webster D. [both quot Birmingham R., etc., Co. v. Lipscomb, 198 Ala. 653, 73 S 962, 964].

98. See Evident 23 C. J. p 174 note 12.

99. See Manifest 38 C. J. p 957 note 68.

1. See Obvious 46 C. J. p 892 note 68.

2. Webster New Int. D.

3. **"Statement"** see [36 Cyc 817].

4. Pender County v. McPherson, 79 N. C. 524, 526.

5. Mann v. Morewood, 7 N. Y. Super. 557, 564.

[a] **"Plain and concise statement of the facts."**—Crane v. Crane, 19 NYS 691, 693; Pender County v. McPherson, 79 N. C. 524, 525.

6. Newman v. Arthur, 109 U. S. 132, 137, 3 SCt 88, 27 L. ed. 883.

"Goods" see 28 C. J. p 720.

"Woolen" see [40 Cyc 2800].

7. McColl v. Rally, 127 Iowa 633, 636, 103 NW 972.

8. Hunter v. U. S., 126 Fed. 894, 895.

"Paper envelopes" see Paper 46 C. J. p 1174 note 68 [b].

9. Risty v. Chicago, etc., R. Co., 297 Fed. 710, 717; U. S. v. Midway Northern Oil Co., 232 Fed. 619, 628.

[a] **"Plain, speedy, and adequate remedy."**—Simpson v. Riverside Police Ct., 160 Cal. 530, 531, 117 P 553; Willman v. Alturas County Dist. Ct., 4 Ida. 11, 13, 35 P 692.

10. Jennings v. State, 7 Tex. A. 350, 358.

11. Porter v. Gilkey, 57 Mo. 235, 237.

12. Mark Cross Co. v. U. S., 150 Fed. 610, 611.

"Bottle" see 9 C. J. p 143.

13. Griffin v. Fairmont Coal Co., 59 W. Va. 480, 580, 53 SE 24, 2 LRA NS 1115.

[a] **"Necessary implication" equivalent.**—Griffin v. Fairmont Coal Co., 59 W. Va. 480, 580, 53 SE 24, 2 LRA NS 1115. "Necessary implication" see Implication 31 C. J. p 256 note 82 [c].

"Implication" see 31 C. J. p 256.

14. New Roads Oilmill, etc., Mfg. Co. v. Kline, 154 Fed. 296, 303, 83 CCA 1.

15. Case v. Chicago Great Western R. Co., 147 Iowa 747, 754, 126 NW 1037.

16. See supra note 9.

17. See Detectives 18 C. J. p 979.

18. Peo. v. Glennon, 175 N. Y. 45, 49, 67 NE 125.

"Police Officer" see [31 Cyc 902].

19. See Plain ante.

20. Century D.

21. **"Expressed"** see Express § 3.

22. Fidelity Mut. Ins. Co. v. Preuser, 195 Ky. 271, 242 SW 608, 609.

[a] **"Plainly expressed in."**—Hunt v. Preferred Acc. Ins. Co., 172 Ala. 442, 446, 55 S 201.

"Legible" see 36 C. J. p 985.

23. **"Print"** see [32 Cyc 308].

24. G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 376, 117 CCA 245.

25. Birmingham R., etc., Co. v. Lipscomb, 198 Ala. 653, 657, 73 S 962 (means "plain").

26. Brewster v. Woolridge, 100 Ga. 305, 306, 28 SE 43; Cedartown Cotton, etc., Co. v. Miles, 2 Ga. A. 79, 80, 58 SE 289.

27. **"Copy"** see 13 C. J. p 933.

28. Murphy v. Christian Press Assoc. Pub. Co., 38 App. Div. 426, 429, 56 NYS 597.

29. See Plastering post p 1223 text and note 88 [d].

30. State v. McCann, 67 Me. 372, 374 [cit Jacob L. D.].

"Querela" see [32 Cyc 1291].

31. Anderson v. Hapler, 34 Ill. 436, 438, 85 AmD 318.

[a] **"The plaint** was the private memorial presented in open court to the judge when the action was brought to recover penalties or sums under forty shillings, and the judge was bound to administer justice therein without any mandate from the king." Com. v. Winslow, 7 Pa. Co. 667, 668 [cit Abbott L. D.; 3 Blackstone Comm. p 273].

[b] **In replevin** the complaint was was made to the sheriff. Anderson v. Hapler, 34 Ill. 436, 438, 85 AmD 318.

32. Jacob L. D. [quot State v. McCann, 67 Me. 372, 374].

33. Yager v. Hannah, 6 Hill (N. Y.) 631, 634 [cit 3 Blackstone Comm. p 273; Tomlin L. D.]; Shaw v. Dutcher, 19 Wend. (N. Y.) 216, 219 [cit Jacob L. D.; Lilly Abr. tit "Plaint"]; Rowland v. Veale, 1 Cowp. 18, 19, 98 Reprint 944 [cit Lilly Pract. Reg. foll 195].

34. Yager v. Hannah, 6 Hill (N. Y.) 631, 634 [cit 3 Blackstone Comm. p 273; Tomlin L. D.]; Shaw v. Dutcher, 19 Wend. (N. Y.) 216, 219 [cit Jacob L. D.; Lilly Abr. tit "Plaint"]; State v. Mathews, 4 S. C. L. 82, 83. But see Sims v. Alderson, 8 Leigh (35 Va.) 479, 484 (declaring that the plaint "is not designed to refer to proceedings in inferior courts, but to the Court of King's Bench; for we are told that 'anciently the process of trespass in the King's Bench was founded on a plaint or queritur entered on the records of the Court,' 1 Tidd Pr. 166, 167").

35. See Parties §§ 15–137.

Plaintiff:

Equitable see 20 C. J. p 1303 text and notes 84–86.

In equity see Equity §§ 303–307.

Legal see Legal § 8.

Nominal and use see Parties §§ 12, 48–63.

36. United R., etc., Co. v. Winer, 144 Md. 235, 125 A 61, 63; Gulf, etc., R. Co. v. Scott, (Tex. Civ. A.) 28 SW 457. See Parks v. Greening, Minor (Ala.) 178 ("the term, plaintiff, has a technical meaning").

[a] **Singular includes plural.**—Citizens' Gas, etc., Co. v. Whipple, 32 Ind. A. 203, 69 NE 557, 560; Brents v. Barnett, 4 Bibb (Ky.) 251; Blanding v. Mansfield, 72 Me. 427, 428; Mc-

While it means a party,[37] it is never used as convertible with the term "defendant,"[38] meaning specifically the actor;[39] complainant;[40] the complaining party;[41] he who complains;[42] he, who, in a personal action, seeks a remedy in a court of justice for an injury to, or a withholding of, his rights;[43] he who sues another for something, which he says is due or belongs to him;[44] he who sues or prosecutes;[45] the one who complains of an injury done;[46] the one who initiates the action or proceeding by making application or filing petition in a court of competent jurisdiction, to protect some right or secure some remedy against defendant;[47] the one who invokes the aid of the law and puts its machinery in motion to establish a right or redress a grievance;[48] the party who is coming into court asking for rights which he claims;[49] a person asking any relief by any form of proceeding;[50] a person or party who brings an action, who complains or sues any person in an action and is so named on the record;[51] a person who essays to set in motion the machinery of the court;[52] the prosecutor;[53] whoever brings the suit, bill, or complaint.[54] It may mean an appellant, although he was defendant in the court below.[55] The word "plaintiff," occurring alone, means the plaintiff on record, not the real or equitable plaintiff.[56] The term includes the actor or principal for whom an applicant surety is bound;[57] all who by the record prosecute the action;[58] a claimant against an assignee for creditors;[59] a defendant demanding a set-off or counterclaim;[60] an intervener;[61] a party in interest, although not a plaintiff on the record;[62] the party in whose favor the original cause of action accrued;[63] a party who procures the removal of a cause from law to equity;[64] a plaintiff's agent, in regard to verification of an account;[65] and, also, in cases where the statutes so provide, a party in whose favor affirmative relief is granted,[66] or judgment rendered.[67] It does not include a defendant who serves notice on a third party.[68]

In condemnation proceedings[69] the word "plaintiff" is used only in an uncommon and liberal sense. Plaintiff complains of nothing. In fact, both parties are actors, one to acquire title, the other to get as large pay for the property as he can.[70]

In a garnishment proceeding,[71] the moving party or suitor.[72]

In habeas corpus proceedings,[73] the relator.[74]

Phrases: "Plaintiff claims,"[75] "plaintiff or pursuer in an action,"[76] "plaintiff's attorney,"[77] "plaintiff's costs,"[78] "plaintiff's evidence,"[79] "plaintiff's intestate,"[80] "plaintiff's title."[81]

PLAIT. Longitudinal parallel flat ruffles having angular edges.[82]

Fadin v. Simms, 309 Mo. 312, 273 SW 1050, 1053.

37. Gulf, etc., R. Co. v. Scott, (Tex. Civ. A.) 28 SW 457, 458.

"Party" defined see Parties § 1 et seq.

38. Parks v. Greening, Minor (Ala.) 178. Contra Longuemare v. Nichols, 7 NYS 672 ("the terms are convertible, however, and changeable, whenever the exigencies of the case require").

"Defendant" see 18 C. J. p 459.

39. Railway Pass, etc., Conductors' Mut. Aid, etc., Assoc. v. Robinson, 147 Ill. 138, 151, 35 NE 168; Latta v. Wiley, (Tex. Civ. A.) 92 SW 433, 437.

"Actor" see 1 C. J. p 1181.

40. Stevens v. White, 5 Hill (N. Y.) 548, 551.

[a] **"Plaintiff or complainant."**—Cornelius v. Moore, 208 Ala. 237, 238, 94 S 57.

"Complainant" see 12 C. J. p 238.

"Complainant" distinguished see 12 C. J. p 238 note 73 [a].

41. Motley, etc., Co. v. Detroit Steel, etc., Co., 161 Fed. 389, 393; State v. Newell, 13 Mont. 302, 306, 34 P 28.

42. Bouvier L. D. [quot White v. Philadelphia, 8 Phila. (Pa.) 241, 244].

43. Burrell v. U. S., 147 Fed. 44, 46, 77 CCA 308.

44. Siekmann v. Kern, 136 La. 1068, 68 S 128.

45. Stevens v. White, 5 Hill (N. Y.) 548, 551.

46. Accousi v. G. A. Stowers Furniture Co., (Tex. Civ. A.) 83 SW 1104, 1105.

47. Martin v. Columbus, 101 Oh. St. 1, 127 NE 411.

[a] **Similar definition.**—Those persons who institute actions for the recovery of their rights are called plaintiffs. Bouvier L. D. [quot Cullen v. Woolverton, 65 N. J. L. 279 281, 47 A 626].

48. Latta v. Wiley, (Tex. Civ. A.) 92 SW 433, 437.

49. State v. Newell, 13 Mont. 302, 306, 34 P 28.

50. Judicature Act [Rev. St. (1914) c 56 § 2 (r)] [quot Newcombe v. Evans, 40 Ont. L. 299, 300, 13 Ont WN 25].

[a] **Similar definition.**—Every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise. Ont. Supreme Jud. Act § 2 (5) [quot Molson Bank v. Sawyer, 19 Ont. Pr. 316, 325].

51. Black L. D. [quot United R., etc., Co. v. Winer, 144 Md. 235, 125 A 61, 63; Gulf, etc., R. Co. v. Scott, (Tex. Civ. A.) 28 SW 457, 458].

52. In re Nagao, 4 Alaska 678, 681.

53. Stevens v. White, 5 Hill (N. Y.) 548, 551.

54. Canaan v. Greenwoods Turnp. Co., 1 Conn. 1, 9.

55. Westcott v. Booth, 49 Ala. 182, 183.

"Appellant" see 4 C. J. p 1374.

56. Bouvier L. D. [quot Grant v. Davis, 8 Tenn. Civ. A. 315, 320].

[a] **Construed to mean plaintiff on the record** and not the beneficial plaintiff or real party in interest. Perry v. Kennebunkport, 55 Me. 453, 455.

57. Kincaid v. Sharp, 3 Head (Tenn.) 151, 154.

58. McFadin v. Simms, 309 Mo. 312, 273 SW 1050, 1053.

59. Hill v. Graham, 11 Colo. A. 536, 53 P 1060, 1061.

60. Ky. Codes (1877) § 732 subs 36 [quot Illinois Cent. R. Co. v. Waller, 164 Fed. 358, 361]; Paducah Hotel Co. v. Long, 92 Ky. 278, 279, 17 SW 853, 13 KyL 531. See also Walmsley v. Griffith, 11 Ont. Pr. 139, 140. Contra Kinnaird v. Field, [1905] 2 Ch. 361, 369; Irwin v. Turner, 16 Ont. Pr. 349, 354 [cit Judicature Act].

61. Grimes v. Kelloway, 204 Iowa 1220, 216 NW 953, 955; St. Charles St. R. Co. v. Fidelity, etc., Co., 109 La. 491, 497, 33 S 574.

Intervention see Parties § 185 et seq.

62. Stevens v. White, 5 Hill (N. Y.) 548, 551; Henry v. Salina Bank, 5 Hill (N. Y.) 523, 534. See Sheridan v. New York, 68 N. Y. 30, 32, 4 NY WklyDig 28.

"Party in interest" see Parties § 6.

63. Goodwin Preserving Co. v. Davis, 201 Ky. 646, 650, 258 SW 97.

64. Cornelius v. Moore, 208 Ala. 237, 94 S 57, 58.

65. Coffee v. McGaskey Register Co., 7 Ga. A. 425, 66 SE 1032, 1034.

66. Lincoln Sav., etc., Assoc. v. Anderson, 115 Nebr. 199, 212 NW 210, 212 (affirmative relief granted against property involved in redemption proceedings).

67. Allison v. Richardson, (Tex. Civ. A.) 171 SW 1021, 1022.

[a] **Plaintiff in execution.**—A statute providing that if a verdict is for the "plaintiff," in a claim proceeding, judgment shall be entered awarding a recovery by the "plaintiff," the word means the "plaintiff in execution." Strobhar v Jesse French Piano, etc., Co., 48 Fla. 158, 161, 37 S 177.

68. Toronto Gen. Trusts Corp. v. Kinzie, 11 OntWN 29, 30.

69. See Eminent Domain § 334 et seq.

70. Mason City, etc., R. Co. v. Boynton, 204 U. S. 576, 27 SCt 321, 51 L. ed. 629 [quot Metropolitan Water Co. v. Kansas City, 164 Fed. 738, 745].

71. See Garnishment § 257 et seq.

72. Esler v. Adsit, 108 Mich. 543, 544, 66 NW 485.

73. See Habeas Corpus § 151 et seq.

74. State v. Newell, 13 Mont. 302, 306, 34 P 28.

75. Douglas v. Beasley, 40 Ala. 142, 147.

76. Sinclair v. Glasgow, etc., Contract Corp., 6 F. (Ct. Sess.) 818; Starr F., etc., Ins. Co. v. Davidson, 4 F. (Ct. Sess.) 997.

77. Jones v. Conlon, 48 Misc. 172, 174, 95 NYS 255.

"Attorney" see Attorney and Client § 1.

78. Peo. v. Feraud, 45 Cal. A. 765, 766, 188 P 843.

"Costs" see Costs § 1.

79. Chaar v. McLoon, 304 Mo. 238, 249, 263 SW 174; Johnson v. Chicago, etc., R. Co., 71 Mont. 390, 395, 230 P 52.

"Evidence" see Evidence § 1.

80. King v. Mail, etc., Co., 113 App. Div. 90, 91, 98 NYS 891 (inadvertent use of word "plaintiff" in one paragraph of complaint in which elsewhere "plaintiff's intestate" is used does not render the complaint fatally defective).

"Intestate" see 33 C. J. p 477.

81. McClaskey v. Barr, 48 Fed. 130, 132.

"Title" see [38 Cyc 336].

82. Kursheedt Mfg. Co. v Naday, 107 Fed. 488, 490, 46 CCA 422.

[a] **"Straw braids or plaits."**—Schiff v. U. S., 140 Fed. 63.

PLAN.[83] A delineation;[84] a design;[85] a draft;[86] a draft or form or representation of a horizontal section of anything, as of machinery;[87] a map;[88] the representation of anything drawn on a plane, as a map or chart;[89] a scheme;[90] a sketch;[91] also, a method of action, procedure, or arrangement.[92]

As applied to streets, a plot or survey indicating number, names, and locations of streets, their lines and courses, widths, grades, etc., as they are or are to be laid out and opened on the land, including all particulars germane to the general subject.[93]

Of public improvements, the general plan or system of work;[94] a profile, drawing, or picture, showing in a general way the character of the work.[95]

Phrases: "Gross premium plan,"[96] "installment plan,"[97] "similar plan."[98]

PLANILLAS. In Spanish law, a tax schedule.[99]

PLANING MILL.[1]

PLANK.[2] As defined by the dictionaries a broad piece of sawed timber thicker than a board;[3] a broad piece of sawn lumber.[4] In familiar speech, a plank may be fairly said to be a more or less regularly shaped oblong board.[5]

Sawn plank. In familiar speech, a board reduced to a more or less oblong shape by the aid of a saw.[6]

PLANKERS.[7] As used in connection with the construction of a vessel, a term said to mean all the men who assisted in putting on the planks.[8]

PLANKING.[9] In its common and ordinary meaning, planks collectively;[10] a series of planks in place.[11]

PLANK LINOLEUM.[12] A linoleum made by running upon the burlap, which is the back of all linoleum, a paste of two colors in stripes of equal width, and subjecting it immediately to pressure. The effect produced somewhat resembles a floor laid in alternate planks of different woods.[13]

PLANK ROAD.[14]

PLANK SIDEWALK.[15]

PLANO. In Spanish law, plain, direct; without unnecessary formality.[16]

PLANT.[17] [§ 1] **A. As a Noun.**[18] In its primary meaning, the word relates to growth of a vegetable character,[19] and there is involved in it the idea, not only of attachment to the soil, but of some degree of permanency.[20]

When used in connection with a manufacturing, mercantile, or industrial establishment, it has a wider significance.[21] It has been defined to be all the matters permanently used for the purposes of a trade, as distinguished from the fluctuating stock;[22] every temporary and accessory means necessary or required by an engineer to complete works, and all temporary materials built into the

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"Flutes" distinguished see 26 C. J. p 744 note 55 [a].

83. See Building and Construction Contracts § 3.

Plan or plans:
American see 2 C. J. p 1320 note 98.
And specifications of:
Building see Building and Construction Contracts § 6.
Public improvement see Municipal Corporations §§ 2426–2428.
As evidence see Evidence § 1114.
Assessment see Assessment Plan 5 C. J. p 821.
European see European Plan 21 C. J. p 1258.
Installment premium see Installment 32 C. J. p 940 text and note 26.
Of:
Construction, improvement, or repair of highways see Highways §§ 312–316.
Municipality see Municipal Corporations §§ 133, 134.

84. Ampt v. Cincinnati, 8 Oh&SCP 624, 628, 6 OhNP 208.

[a] **"Specifications" distinguished.**—McCoy v. Randall, 222 Mo. 24, 121 SW 31, 34; Hartley-Zeiger Co. v. Bacon, 251 Pa. 87, 96 A 257, 259; Knelly v. Horwath, 208 Pa. 487, 491, 57 A 957. "Specifications" see Building and Construction Contracts § 4; Specifications [36 Cyc 527].

[b] **"System" not synonymous.**—State v. Riordan, 24 Wis. 484, 488. "System" see [37 Cyc 663].

"Delineation" see 18 C. J. p 474.

85. Ampt v. Cincinnati, 8 OhS&CP 624, 628, 6 OhNP 208.

"Design" see 18 C. J. p 970.

86. Ampt v. Cincinnati, 8 OhS&CP 624, 628, 6 OhNP 208.

"Draft" see 19 C. J. p 597.

87. Ampt v. Cincinnati, 8 OhS&CP 624, 628, 6 OhNP 208.

88. Arstill v. Fletcher, 95 Or. 308, 187 P 854, 857.

"Map" see 38 C. J. p 990.

89. Standard D. [quot Arstill v. Fletcher, 95 Or. 308, 187 P 854, 857].

90. Webster D. [quot Noice v. Schnell, 101 N. J. Eq. 252, 137 A 582, 589, 52 ALR 965].

"Scheme" see [35 Cyc 799].

91. Ampt v. Cincinnati, 8 OhS&CP 624, 628, 6 OhNP 208.

92. Webster D. [quot Noice v. Schnell, 101 N. J. Eq. 252, 137 A 582, 589, 52 ALR 965].

93. Wetherill v. Pennsylvania R. Co., 195 Pa. 156, 159, 45 A 658. See Plat post p 1224.

"Survey" see [37 Cyc 621].

94. Bowden v. Kansas City, 69 Kan. 587, 77 P 573, 575, 105 AmSR 187, 66 LRA 181, 1 AnnCas 955.

95. McCoy v. Randall, 222 Mo. 24, 121 SW 31, 34.

96. See Gross 28 C. J. p 829 note 14.

97. See Installment 32 C. J. p 940 note 27.

98. Harvey v. Electric Refrigeration Corp., 246 Mich. 235, 224 NW 443, 445.

99. See Hernandez v. Felici, 11 Porto Rico 391, 397.

1. See Mills § 11.

Planing mill as a building see Building 9 C. J. p 685 note 93 [a] (13).

2. See Plankers post this page; Planking post this page.

3. Macomb v. Jones, 158 Ill. A. 271, 273.

[a] **"Sound, strong planks."**—Macomb v. Jones, 158 Ill. A. 271, 272.

"Board" see 8 C. J. p 1130.

4. Foss Lumber Co. v. Rex, 47 Can. S. C. 130, 142, 8 DomLR 437, 23 West LR 76, 3 WestWkly 110.

"Lumber" see Logs and Logging § 3.

5. Foss Lumber Co. v. Rex, 47 Can. S. C. 130, 142, 8 DomLR 437, 23 West LR 76, 3 WestWkly 110.

[a] **Plank as a weapon.**—State v. Jones, 77 S. C. 385, 58 SE 8. "Weapon" see Weapons [40 Cyc 852].

6. Foss Lumber Co. v. Rex, 47 Can. S. C. 130, 142, 8 DomLR 437, 23 WestLR 76, 3 WestWkly 110.

[a] **"Piece of ornamental wood produced by a fret-saw" distinguished.**—Foss Lumber Co. v. Rex, 47 Can. S. C. 130, 142, 8 DomLR 437, 23 WestLR 76, 3 WestWkly 110.

7. See Plank ante this page; Planking post this page.

8. Wood v. Pittfield, 26 N. B. 210, 213.

9. See Plank ante this page; Plankers ante this page.

10. Kaherl v. Rockport, 87 Me. 527, 529, 33 A 20.

11. Kaherl v. Rockport, supra.

12. **"Linoleum"** see 37 C. J. p 1263.

13. U. S. v. Scott, 164 Fed. 285, 287.

14. **Plank road as:**
Highway see Highways § 1 text and note 27.
Paved road see Paved Road or Street ante p 557 text and note 33.
Toll road see Toll Roads [38 Cyc 362].

"Road" see Highways § 1 text and notes 12–56.

15. **Authority to pave as including the laying of a plank sidewalk** see Pave ante p 557 note 17 [a].

16. Escriche Diccionario.

17. See Plantation post this page; Planter post.

18. **Plant:**
Deciduous see Deciduous Plant 18 C. J. p 27.
Electric see 20 C. J. p 302 text and notes 12, 13.
Furnace see 27 C. J. p 930 note 48 [a].
Sawmill see [35 Cyc 796 note 78].

19. Lipstein v. Provident Loan Soc., 154 App. Div. 732, 139 NYS 799, 800. See Plant Cane post.

[a] **Hedge,** being composed of plants springing from roots in the ground, is included in the term "plants." Fezler v. Gibson, 183 Mo. A. 385, 166 SW 1096, 1098. "Hedge" see 29 C. J. p 287.

[b] **Lily of the valley roots, sprouted,** are not botanically and technically plants, but are considered so in the popular sense. McAllister v. U. S., 147 Fed. 773. "Lily of the valley" see 37 C. J. p 664.

20. Lipstein v. Provident Loan Soc., 154 App. Div. 732, 139 NYS 799, 800.

21. Lipstein v. Provident Loan Soc., supra.

[a] **Cotton compress not a manufacturing plant.**—Memphis v. St. Louis, etc., R. Co., 183 Fed. 529, 536, 106 CCA 75.

[b] **"Factory" distinguished.**—Hicks v. Swift, 101 Kan. 760, 168 P 905, 906. "Factory" see Manufactures §§ 15–17.

[c] **"Machinery" distinguished.**—Eastern Trust Co. v. Cushing Sulphite Fibre Co., Ltd., 3 N. B. Eq. 378, 382, 2 EastLR 28. "Machinery" see 38 C. J. p 330.

[d] **"Premises" distinguished.**—Martin v. Matson Nav. Co., 244 Fed. 976, 978. "Premises" see [31 Cyc 1163].

[e] **"Undertaking" distinguished.**—Maxwell v. Wilmington Dental Mfg. Co., 77 Fed. 938, 941. "Undertaking" see [39 Cyc 673].

22. Blake v. Shaw, Johns. 732, 734,

works, which cannot, in the opinion of the engineer, be removed without any injury to the works;[23] the fixtures, machinery, tools, apparatus, etc., necessary to carry on any trade or mechanical business,[24] or any mechanical operation or process;[25] property owned or used in carrying on some trade or business;[26] a set of machines, tools, etc., necessary to conduct a mechanical business, often including the building and grounds, or in case of a railroad, the rolling stock, but not including material or product;[27] whatever apparatus is used by a business man for carrying on his business—not his stock in trade which he buys or makes for sale; but all goods and chattels, fixed and movable, live or dead, which he keeps for permanent employment in his business.[28]

8 W. R. 410, 70 Reprint 615.

23. Hudson Bldg. Contr. 630 [quot Middleton v. Flanagan, 25 Ont. 417, 421] (where it was said to include all tramways fixed and movable, machinery, engines, vehicles, carts, stages, scaffolding, pumps, dams, cofferdams, timbers, planks, and all special or other appliances of every sort, kind, and description whatsoever).

24. Century D. [quot Scott Supply, etc., Co. v. Roberts, 42 Colo. 280, 93 P 1123, 1124; Southern Bell Tel., etc., Co. v. D'Alemberte, 39 Fla. 25, 37, 21 S 570; State Public Utilities Commn. v. Noble, 275 Ill. 121, 128, 113 NE 910; Cleveland, etc., R. Co. v. Austin, 127 Ill. A. 281, 285; State v. Moss, 160 La. 724, 107 S 505; Lipstein v. Provident Loan Soc., 154 App. Div. 732, 139 NYS 799, 800; Rooney v. Thomson, 84 NYS 263, 264; McCosh v. Barton, 1 Ont. L. 229, 231]; Imperial D. [quot Old Colony Trust Co. v. Standard Sugar Beet Co., 150 Fed. 677, 680; Eastern Trust Co. v. Cushing Sulphite Fibre Co., Ltd., 3 N. B. Eq. 378, 2 EastLR 28, 29]; Nelson v. Downtain, (Tex. Commn. A.) 265 SW 135, 139 [rev (Civ. A.) 249 SW 241, 242].

[a] **Similar definitions.**—Encyclopedic D. [quot Old Colony Trust Co. v. Standard Beet Sugar Co., 150 Fed. 677, 680]; Ogilvie Scientific D. [quot Middleton v. Flanagan, 25 Ont. 417, 421; Ashfield v. Edgell, 21 Ont. 195, 198]; Webster D. [quot Liberty County Land, etc., Co. v. Barnes, 77 Ga. 748, 752, 1 SE 378; Maxwell v. Wilmington Dental Mfg. Co., 77 Fed. 938, 941]; Webster Int. D. [quot Old Colony Trust Co. v. Standard Beet Sugar Co., 150 Fed. 677, 684; Lipstein v. Provident Loan Soc., 154 App. Div. 732, 139 NYS 799, 800; Clifton v. Montague, 40 W. Va. 207, 213, 21 SE 858, 52 AmSR 872, 33 LRA 449]; Wharton L. Lex. [quot McCosh v. Barton, 1 Ont. L. 229, 231]; Worcester D. [quot Maxwell v. Wilmington Dental Mfg. Co., 77 Fed. 938, 941; Eastern Trust Co. v. Cushing Sulphite Fibre Co., Ltd., 3 N. B. Eq. 378, 2 EastLR 28, 29].

25. Century D. [quot Scott Supply, etc., Co. v. Roberts, 42 Colo. 280, 93 P 1123, 1124; Southern Bell Tel., etc., Co. v. D'Alemberte, 39 Fla. 25, 37, 21 S 570; State Public Utilities Commn. v. Noble, 275 Ill. 121, 128, 113 NE 910, 913; Cleveland, etc., R. Co. v. Austin, 127 Ill. A. 281, 285; State v. Moss, 160 La. 724, 107 S 505; Lipstein v. Provident Loan Soc., 154 App. Div. 732, 139 NYS 799, 800, Rooney v. Thomson, 84 NYS 263, 264; McCosh v. Barton, 1 Ont. L. 229, 231]; Nelson v. Downtain, (Tex. Civ. A.) 249 SW 241, 242.

[a] **A word** sometimes used for installation, or for the apparatus required to carry on any manufacturing operation. Huston Electrical D. [quot Fisher Electric Co. v. Iron Works, 116 Mich. 293, 298, 74 NW 493].

26. Kiddy's App., 294 Pa. 209, 143 A 909, 910.

27. Standard D. [quot Old Colony Trust Co. v. Standard Beet Sugar Co., 150 Fed. 677, 680, State v. Moss, 160 La. 724, 726, 107 S 505; Lipstein v. Provident Loan Soc., 154 App. Div. 732, 733, 139 NYS 799; Kiddy's App., 294 Pa. 209, 210, 143 A 909].

28. Yarmouth v. France, 19 Q. B. D. 647, 658 [quot Delaware, etc., R. Co. v. Perrotta, 238 Fed. 78, 81, 151 CCA 154, Gulf States Steel Co. v. Jones, 203 Ala. 450, 83 S 356, 357, 23 ALR 702; Holland-Blow Stave Co. v. Spencer, 16 Ala. A. 227, 77 S 65, 66; Hamm v. Rockwood Sprinkler Co., 88 N. J. L. 564, 97 A 730, 732; Wiley v. Solvay Process Co., 215 N. Y. 584, 109 NE 606, 608, AnnCas1917A 314; Lipstein v. Provident Loan Soc., 154 App. Div. 732, 139 NYS 799, 802; McKeon v. Proctor, etc., Mfg. Co., 76 Misc. 599, 135 NYS 291, 294; Eastern Trust Co. v. Cushing Sulphite Fibre Co., Ltd., 3 N. B. Eq. 378, 2 EastLR 28, 29]. To same effect Sloss-Sheffield Steel, etc., Co. v. Mobley, 139 Ala. 425, 435, 36 S 181.

[a] **Held to include:** (1) Chain tongs used by a pipe fitter. McKeon v. Proctor, etc., Mfg. Co., 76 Misc. 599, 135 NYS 291, 294. (2) City streets in the case of one employed by the city to work on the streets. Shockey v. Royal Baking Powder Mfg. Co., 138 Wash. 223, 226, 244 P 549. But see Wade v. Harris, 146 Wash. 218, 262 P 234, 235 (where employee was merely traveling on the streets to and from his employment); and infra [b] (2). (3) Hammer and cleaver, used demolishing old train cars. Sloss-Sheffield Steel, etc., Co. v. Hopson, 16 Ala. A. 326, 77 S 920. (4) Horses. Yarmouth v. France, 19 Q. B. D. 647, 658; London, etc., Loan, etc., Co. v. Creasey, [1897] 1 Q. B. 442, 444 [dist Yarmouth v. France, supra]; Middleton v. Flanagan, 25 Ont. 417, 14 CanLTOccNotes 448. But see infra [b] (4). (5) House of business held under lease. Blake v. Shaw, Johns. 732, 734, 70 Reprint 615. (6) Hulk used as floating warehouse for coal. Hall v. Rickman, [1906] 1 K. B. 311, 317. (7) Jack pole and wire cable used on a coal mining machine. Tennessee Coal, etc., Co. v. Wiggins, 198 Ala. 346, 73 S 516, 517. (8) Ladder. Grasselli Chemical Co. v. Davis, 166 Ala. 471, 52 S 35, 37; Huyck v. McNerney, 163 Ala. 244, 50 S 926, 929; Sweet v. General Electric Co., 165 App. Div. 935, 149 NYS 609; Lipstein v. Provident Loan Soc., 154 App. Div. 732, 139 NYS 799; Weblin v. Ballard, 17 Q. B. D. 122, 126; Cripps v. Judge, 13 Q. B. D. 583, 585. (9) Land on which a mill is situated. Kendrick v. Lunsford, (Tex. Civ. A.) 150 SW 480. (10) Locomotives, carriages, vans, trucks, etc., of a railway (Imperial D. [quot Old Colony Trust Co. v. Standard Beet Sugar Co., 150 Fed. 677, 680]; Ogilvie Scientific D. [quot Middleton v. Flanagan, 25 Ont. 417, 421; Ashfield v. Edgell, 21 Ont. 195, 198]), (11) including rolling stock (Toronto R. Co. v. Toronto, 6 Ont. L. 187, 192, 22 CanLTOccNotes 390. But see Central Trust Co. v. Condon, 67 Fed. 84, 91, 14 CCA 314 [declaring "rolling stock is usually not referred to either as 'works' or 'plant or 'materials' "]). (12) Lumber and other materials used in building, and carts, horses, and harness used in the work. Wood v. U. S. Fidelity, etc., Co., 143 Fed. 424, 425. (13) Machinery used by a bridge builder in grinding stone to be used in the bridge. Basshor v. Baltimore, etc., R. Co., 65 Md. 99, 103, 3 A 285. (14) Motor vans. National Provincial, etc., Bank v. Charnley, [1924] 1 K. B. 431, 442. (15) Moulding patterns. McCosh v. Barton, 1 Ont. L. 229, 231. (16) Real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products. Webster Int. D. [quot Clifton v. Montague, 40 W. Va. 207, 213, 21 SE 858, 52 AmSR 872, 33 LRA 449; Old Colony Trust Co. v. Standard Beet Sugar Co., 150 Fed. 677, 680]. (17) Rope used in securing loads on wagons. Kerwin v. Long Island R. Co., 157 App. Div. 898, 142 NYS 1125 [quot Martin v. Matson Nav. Co., 244 Fed. 976, 979]. (18) Scows used in carrying the product of a mill from the mill wharf to steamers, and in lightering coal for the use of the mill, also such stores as axes, shovels, files, and other articles, complete in themselves, used in carrying on the mill business. Eastern Trust Co. v. Cushing Sulphite Fibre Co., 3 N. B. Eq. 378, 379. (19) Sewers, although not yet connected with any machinery or other apparatus. Brennan v. Sewerage, etc., Bd., 108 La. 569, 32 S 563, 569. (20) Skid or gangplank used between a freight car and a pier or platform. Delaware, etc., R. Co. v. Perrotta, 238 Fed. 78, 81, 151 CCA 154; Drury v. American Fruit Produce Co., 163 App. Div. 509, 513, 148 NYS 675, 679. (21) Street car tracks of railway operated by the city, since it has exclusive control of the streets where the tracks are laid. Murphy v. Schwartz, 142 Wash. 69, 252 P 152 [dist Carlson v. Mock, 102 Wash. 557, 173 P 637 (where the tracks were those of a private company, which did not have, therefore, exclusive control of the streets where the tracks were laid)]; Diblasio v. Hunter, 124 Wash. 98, 213 P 470. But see infra [b] (14). (22) Substance commonly used in dressing a pulley belt. Riddle v. Bessemer Soil Pipe Co., 170 Ala. 559, 54 S 525, 526. (23) Teams used in delivering output of a factory. O'Toole v. Brandram-Henderson, Ltd., 48 N. S. 293, 298, 21 DomLR 83. (24) Telegraph pole. Cleveland, etc., R. Co. v. Scott, 29 Ind. A. 519, 64 NE 896, 900. See Burns v. Johns, 125 Wash. 387, 216 P 2, 4. (25) Tools, machinery, and articles employed by a subcontractor in work of constructing a subway. McCabe v. Hunt, 40 Misc. 466, 82 NYS 664, 666. (26) Wrench used in pipe fitting. Hamm v. Rockwood Sprinkler Co., 88 N. J. L. 564, 97 A 730, 732.

[b] **Held not to include:** (1) Buildings used in housekeeping. Todd v. Gernert, 223 Pa. 103, 72 A 249. See Schively v. Rodell, 227 Pa. 434, 76 A 209, 211. (2) City streets not under the control of the employer. Mathewson v. Olmstead, 126 Wash. 269, 273, 218 P 226; Burns v. Johns, 125 Wash. 387, 216 P 2, 4. But see supra [a] (2). (3) Elevator under control of another than person in question, although latter is a tenant in the building and has place of business there. Scott v. Pacific Warehouse Co., 143 Wash. 245, 255 P 138, 140. (4) Horses. Derby v. Aylmer, [1915] 3 K. B. 374, 379 (used for breeding purposes); London, etc., Loan, etc., Co. v. Creasey, [1897] 1 Q. B. 442, 444 [dist Yarmouth v. France, 19 Q. B. D. 647, 658, 17 ERC 217]; Middleton v. Flanagan, 25 Ont. 417, 14 CanLTOccNotes 448. But see supra [a] (4). (5) Household furniture. Blake v. Shaw, Johns. 732, 734, 70 Reprint 615. (6) Machinery which is a product of a factory. Everett v. Schaake Mach. Works, Ltd., 17 B. C. 271, 275, 4 DomLR 147, 21 WestLR 525, 2 WestWkly 572. (7) Material on hand, or material in process of manufacture or in a finished state. State v. Moss, 160 La. 724, 107 S 505. (8) Office furniture, material kept on hand for repairs to machinery, a horse and carriage used for occasional errands. Eastern Trust Co. v. Cushing Sulphite Fibre Co., Ltd., 3 N. B. Eq. 378, 379, 2 EastLR 28, 29. (9) Picks, shovels, and wagons necessary to mine gravel and sand for a rock crushing plant. Nelson v Downtain, (Tex. Civ. A.) 249 SW 241, 244. (10)

Pottery plant.[29] A building supplied with tools, machinery, and appliances for the manufacture of stoneware, brick, and tile.[30]

Rolling plant. Rolling stock.[31]

Other phrases: "All such plant and material shall be considered the property of the company,"[32] "fixed and movable plant,"[33] "necessary plant,"[34] "plant and machinery at present in use in the . . . factory,"[35] "plant and rights,"[36] "plant for the delivery of water . . . for agriculture or household use,"[37] "plant or system,"[38] "rock-crushing plant,"[39] "rolling stock, plant, and appliances,"[40] "waterworks and electric light plant,"[41] "ways, works, machinery, or plant."[42]

[§ 2] **B. As a Verb.** With reference to land, to reclaim from a state of nature, and subject to the uses of husbandry.[43]

In oystermen's phraseology, to deposit oysters with the intent that they shall remain until they are fattened.[44]

[§ 3] **C. As an Adjective.** The word is sometimes used in an adjectival sense, as in the phrases "plant cane,"[45] "plant service,"[46] and "plant utility."[47]

PLANTAS. In Spanish law, plants, crops, etc., which are real property (inmuebles) until separated from the land.[48]

PLANTATION.[49] [§ 1] **A. As a Noun.** A derivative of "planting,"[50] having no precise, fixed, and definite single meaning.[51] It has been defined as a farm;[52] a cultivated estate;[53] a farm where staples are cultivated on a large scale;[54] a large farm for raising the different products of a agriculture;[55] any body of land, consisting of one or several adjoining tracts, on which is a planting establishment;[56] any part of a farm inclosed, or set

Reference books of a professional man. Daphne v. Shaw, [1926] W. N. 327. (11) Shanties and temporary stables furnished by a railroad contractor for the shelter of his men and animals on the line, and at the scene of the work. Stewart-Chute Lumber Co. v. Missouri Pac. R. Co., 28 Nebr. 39, 48, 44 NW 47 [quot Nelson v. Downtain, (Tex. Civ. A.) 249 SW 241, 243]. (12) Spur track. Black v. Northern Pac. R. Co., 66 Mont. 538, 214 P 82, 83. (13) Stock in trade. Blake v. Shaw, Johns. 732, 734, 70 Reprint 615. (14) Street car tracks of a private company not having exclusive control of streets where tracks are laid. Carlson v. Mock, 102 Wash. 557, 173 P 637. But see supra [a] (21). (15) Temporary scaffold. Gulf States Steel Co. v. Jones, 203 Ala. 450, 83 S 356, 357, 23 ALR 702; Holland-Blow Stave Co. v. Spencer, 16 Ala. A. 227, 77 S 65, 66. (16) Vessel. Martin v. Matson Nav. Co., 244 Fed. 976, 979.

[c] **Real estate as included.**—"It will be noticed that the only definition including real estate is found in Webster's International Dictionary, and there it is qualified by the word 'sometimes.' That there may be instances in which courts will hold real estate to be a part of a plant cannot be doubted. The ground occupied by the factory or mill, or even that part adjoining the factory, used for offices or warehouses, may be treated as a part of the plant; but a large tract of land hundreds of miles from the plant proper, to be used for the purpose of raising the raw material for use in the factory, has never been held to be a part of the 'plant.'" Old Colony Trust Co. v. Standard Beet Sugar Co., 150 Fed. 677, 680. And see cases supra [a], [b].

29. **"Pottery"** see [31 Cyc 1030].

30. Indiana Clay Co. v. Baltimore, etc., R. Co., 31 Ind. A. 258, 67 NE 704, 705.

31. Century D.; Standard D. [both quot Toronto R. Co. v. Toronto, 6 Ont. L. 187, 195, 22 CanLTOccNotes 390].

"Rolling stock" see [34 Cyc 1815].

32. Hart v. Porthgain Harbour Co., Ltd., [1903] 1 Ch. 690, 694.

33. National Provincial, etc., Bank v. Charnley, [1924] 1 K. B. 431, 454.

34. Nelson v. Downtain, (Tex. Commn. A.) 265 SW 135, 139.

35. McCosh v. Barton, 1 Ont. L. 229, 230 [app allowed on other grounds 2 Ont. L. 77, 78].

36. Re Chessher, 20 OntWN 75.

37. Garson v. Steamboat Canal Co., 43 Nev. 298, 306, 185 P 801, 1119 (includes a canal company).

38. Northwestern Blaugas Co. v. Guild, 169 Wis. 98, 171 NW 662, 663.

"System" see [37 Cyc 663].

39. Nelson v. Downtain, (Tex. Commn. A.) 265 SW 135, 139 [rev (Civ. A.) 249 SW 241, 244].

40. Toronto R. Co. v. Toronto, 6 Ont. L. 187, 192, 22 CanLTOccNotes 390.

"Rolling stock" see [34 Cyc 1815].

41. State v. Wilder, 200 Mo. 97, 101, 98 SW 465.

42. Delaware, etc., R. Co. v. Perrotta, 238 Fed. 78, 81, 151 CCA 154 (construing New York statute); Holland-Blow Stave Co. v. Spencer, 16 Ala. A. 227, 228, 77 S 65; Wiley v. Solvay Process Co., 215 N. Y. 584, 588, 109 NE 606, AnnCas1917A 314; Lipstein v. Provident Loan Soc., 154 App. Div. 732, 737, 139 NYS 799; McKeon v. Proctor, etc., Mfg. Co., 76 Misc. 599, 602, 135 NYS 291; Davis v. Plant, 138 NYS 145, 146.

[a] **"Place, ways, works, machinery, or plant."**—Lipstein v. Provident Loan Soc., 154 App. Div. 732, 737, 139 NYS 799.

[b] **"Works, plant, or machinery."**—Lipstein v. Provident Loan Soc., 154 App. Div. 732, 737, 139 NYS 799.

"Ways, works, and machinery" see [40 Cyc 848].

43. Wellman v. Dickey, 78 Me. 29, 31, 2 A 133, 134.

[a] **In former times,** as applied to a tract of land, the word meant to "settle" or "establish" but that meaning has since become obsolete. East Haven v. Hemingway, 7 Conn. 186, 201, 202. "Establish" see 21 C. J. p 898. "Settle" see [35 Cyc 1442].

[b] **Planted.**—Land that is seeded, or in any way prepared and used for tillage, or for the production of crops or trees, useful or ornamental. Wellman v. Dickey, 78 Me. 29, 2 A 133, 134.

44. McCready v. Virginia, 94 U. S. 391, 397, 24 L. ed. 248.

45. Viterbo v. Friedlander, 120 U. S. 707, 709, 7 SCt 962, 30 L. ed. 776 (plants that spring up from the seed sugar cane).

46. Louisiana, etc., R. Co. v. U. S., 209 Fed. 244, 256 (distinguishing "transportation service").

47. Vicksburg, etc., R. Co. v. Louisiana, etc., R. Co., 136 La. 691, 698, 67 S 553 (a railroad which is a plant utility is not a common carrier).

"Utility" see [39 Cyc 1098].

48. Spanish Civ. Code art 334 (2); Philippine Civ. Code art 334 (2); Porto Rico Civ. Code § 335(2). See Crops 17 C. J. p 378.

49. See Plant ante p 1220; Planter post p 1223.

50. East Haven v. Hemingway, 7 Conn. 186, 202.

51. Hext v. Jarrell, 34 S. C. L. 11, 15 ("it may mean the whole body of land, (wood and cultivated,) which a man uses together for agricultural purposes; or it may mean only that part which is cultivated").

"The term . . . has several significations." Stowe v. Davis, 32 N. C. 431, 433.

"This word . . . is of very extensive signification." Sanderlin v. State, 2 Humphr. (Tenn.) 315, 318.

[a] **Applied to a town,** as used in a statute prohibiting drinking liquor on premises where sold, may be taken to mean the lot, yard, adjoining room, or other houses attached to and belonging to the premises where the liquor was vended. Sanderlin v. State, 2 Humphr. (Tenn.) 315, 318.

[b] **Construed to mean an estate in fee.**—Cassell v. Cooke, 8 Serg. & R. (Pa.) 268, 289, 11 AmD 610; French v. McIlhenny, 2 Binn. (Pa.) 13, 18.

[c] **Convertible with "tract of land."**—In re Pine, etc., Tps., 32 Pa. Co. 152, 153; Nash v. Savage, 11 S. C. Eq. 50.

[d] **Held to include:** (1) Contiguous wood land or so much as is requisite to supply timber and wood. Stowe v. Davis, 32 N. C. 431, 434. (2) Slaves and other personal property on the lands, employed and useful in their cultivation. Taylor v. Harwell, 65 Ala. 1, 11. (3) Stock, implements, utensils, etc., upon it. Lushington v. Sewell, 1 Sim. 435, 479, 2 EngCh 435, 57 Reprint 641. (4) Two different tracts of land, a half mile apart, which were cultivated by the testator together as one farm. Bradshaw v. Ellis, 22 N. C. 20, 22, 32 AmD 686.

[e] **Held not to include:** (1) A coal mine. Calhoon's Road, 8 Pa. Co. 222, 223. (2) A simple inclosure of waste land. Brooks v. Kirby, 19 Ala. 72, 76. (3) Uncultivated lands. In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305. See Campbell v. Canadian Pac. R. Co., 18 Ont. L. 466, 470, 14 OntWR 144 ("'plantation' means something planted out by the hand of man").

[f] **"Nursery" distinguished.**—Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 296. "Nursery" see 46 C. J. p 836.

[g] **"Orchard" distinguished.**—Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 296. "Orchard" see 46 C. J. p 1130.

[h] **"Pine land" distinguished.**—Robertson v. Wilson, 5 S. C. Eq. 56, 65. "Pine land" see ante p.

52. Bouvier L. D. [cit Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 295; In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305]. See East Haven v. Hemingway, 7 Conn. 186, 202.

[a] **Construed to cover stock farm as well as cotton farm.**—Alabama, etc., R. Co. v. Odeneal, 73 Miss. 34, 41, 19 S 202.

"Farm" see 25 C. J. p 670.

53. Midland Timber Co. v. Pegues, 93 S. C. 82, 76 SE 32, 34. See East Haven v. Hemingway, 7 Conn. 186, 202.

54. Standard D. [quot In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305].

55. Midland Timber Co. v. Pegues, 93 S. C. 82, 76 SE 32, 34.

56. State v. Blythe, 14 S. C. L. 363.

[a] **May consist** of tracts or parcels of land. Nash v. Savage, 11 S.

apart from the rest for special use;[57] any place that is planted;[58] ground occupied by trees or vegetables which have been planted;[59] land brought under cultivation;[60] especially, in the United States and West Indies, a large estate, cultivated chiefly by negroes, either slaves or free, who live in a distinct community on the estate, under the control of the proprietor or master.[61] Formerly, it denoted also a colony;[62] a dependency;[63] an original settlement in a new country.[64]

A cotton or sugar plantation is an estate or farm devoted to the cultivation of cotton or sugar.[65]

Other phrases: "Damage caused to crops, lands, fences, plantations, or buildings and their contents,"[66] "home plantation,"[67] "messuages or plantation."[68]

[§ 2] **B. As an Adjective.** The word is also used in an adjectival sense, as in the phrases "plantation stock"[69] and "stock, plantation utensils, and household furniture."[70]

Plantation supplies.[71] Such supplies as are necessary for the prosecution of agricultural operations;[72] and whether an article falls within that class must be determined by resorting to the usages and customs of agricultural interests.[73]

PLANTER.[74] One who is engaged in the business of producing crops from the soil,[75] one who plants[76] something in the ground or sows something therein which produces fruit or increase from this planting;[77] one who owns or cultivates a plantation.[78]

PLAQUE. Any flat, thin piece of metal, or clay, or ivory, or similar material used for ornament, or for painting pictures on, and hung upon the wall.[79]

PLASMON. A trade-mark name applied to a gritty, yellowish powder, known to the trade as lactarene, casein, or milk albumen.[80]

PLASTER.[81] A mixture of lime, hair, and sand to cover lath work between timbers or rough walling;[82] a composition of lime, sand, and hair or straw, and water, employed in overlaying the interior and exterior faces of walls.[83]

PLASTERER.[84] One that overlays with plaster.[85]

PLASTERING.[86] A covering of plaster;[87] the plaster work of a building.[88] Also, the act of covering walls, ceiling, etc., with plaster.[89]

C. Eq. 50.

57. Century D. [quot In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305, 306].

58. Standard D. [quot In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305].

[a] **A similar definition.**—A place planted. Webster D. [quot Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 295; Robson v. Du Bose, 79 Ga. 721, 723, 4 SE 329; In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305; Calhoon's Road, 8 Pa. Co. 222]; Stowe v. Davis, 32 N. C. 431, 433, 434.

59. Webster D. [Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 295; Robson v. Du Bose, 79 Ga. 721, 723, 4 SE 329; In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305; Calhoon's Road, 8 Pa. Co. 222].

60. Webster D. [quot Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 295; Robson v. Du Bose, 79 Ga. 721, 723, 4 SE 329; In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305; Calhoon's Road, 8 Pa. Co. 222].

61. Webster D. [quot Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 295; Robson v. Du Bose, 79 Ga. 721, 723, 4 SE 329; In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305].

62. Bouvier L. D.; 1 Blackstone Comm. p 107 [both quot In re Calhoon's Road, 8 Pa. Co. 222]; East Haven v. Hemingway, 7 Conn. 186, 202.

63. Bouvier L. D.; 1 Blackstone Comm. p 107 [both quot In re Calhoon's Road, 8 Pa. Co. 222].

64. East Haven v. Hemingway, 7 Conn. 186, 202.

[a] **Applied to the English colonies in America.**—Bouvier L. D. [cit Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 295].

[b] **In Massachusetts** the terms "plantation," "town," and "township" seem to have been used indiscriminately to indicate a cluster or body of persons inhabiting near each other. Com. v. Roxbury, 9 Gray (Mass.) 451, 485 ("When they became designated by a name, certain powers were conferred upon them by general orders and laws, such as to manage their own prudential concerns, to elect deputies and the like, which in effect made them municipal corporations; and no formal acts of incorporation were granted till long afterwards").

65. Atty.-Gen. v. State Bd. of Judges, 38 Cal. 291, 296.

66. Campbell v. Canadian Pac. R. Co., 18 Ont. L. 466, 470, 14 OntWR 144.

67. See Home 29 C. J. p 769 note 52.

68. Orrick v. Pratt, 34 Mo. 226, 233.

69. Purnell v. Dudley, 57 N. C. 203, 205 ("cotton seed is no more a part of 'plantation stock,' than corn or wheat for seed, or, indeed, for provisions for the year").

70. Kendall v. Kendall, 5 Munf. (19 Va.) 272, 274.

71. **"Supply or supplies"** see [37 Cyc 607].

72. Wright v. Walton, 56 Miss. 1, 7.

73. Wright v. Walton, supra; Herman v. Perkins, 52 Miss. 813, 816.

74. See Plant ante; Plantation ante.

"Farmer" compared see 25 C. J. p 673 note 61 [d].

75. Butler v. Georgia, etc., R. Co., 119 Ga. 959, 963, 47 SE 320 ("It is immaterial whether he sows and reaps with his own hand, with the hand of a tenant, the hand of a cropper, or the hand of a hired laborer").

76. Standard D. [quot Butler v. Georgia, etc., R. Co., supra].

77. Roberts v. Savannah, etc., R. Co., 75 Ga. 225, 226 [quot Butler v. Georgia, etc., R. Co., 119 Ga. 959, 963, 47 SE 320].

78. Webster D. [quot Butler v. Georgia, etc., R. Co., 119 Ga. 959, 963, 47 SE 320].

[a] **Similar definitions.**—(1) An owner of a plantation. Standard D. [quot Butler v. Georgia, etc., R. Co., 119 Ga. 959, 963, 47 SE 320]. (2) One who owns a plantation. Century D. [quot Butler v. Georgia, etc., R. Co., supra].

79. Webster D. [quot Bour v. U. S., 91 Fed. 533].

[a] **Flat, rectangular porcelain panels decorated by means of mineral colors** dutiable as plaques rather than as paintings see Bour v. U. S., 91 Fed. 533. And see Altman v. U. S., 71 Fed. 393.

80. U. S. v. Corsi, 2 Cust. A. 292, 293.

"Casein industrielle" see 11 C. J. p 20.

"Lactarene" or "lactarine" see 35 C. J. p 931.

81. See Plasterer post; Plastering post.

82. Webster D. [quot Mellen v. Ford, 28 Fed. 639, 642, 643].

83. Worcester D. [quot Mellen v. Ford, supra].

84. See Plaster ante; Plastering post.

Plasterer:

As a laborer see Laborer or Labourer 35 C. J. p 929 text and note 1; Mechanics' Liens § 141 text and note 25.

As a mechanic see 40 C. J. p 21 text and note 50; Mechanics' Liens § 140 note 5 [b].

85. Fox v. Rucker, 30 Ga. 525, 527.

[a] **"Carpenter" distinguished.**—Fox v. Rucker, 30 Ga. 525, 527. "Carpenter" see 9 C. J. p 1293.

[b] **"Machinist" distinguished.**—Modern Plumbing, etc., Co. v. American Soda Fountain Co., 57 Wash. 148, 106 P 628, 629, 135 AmSR 975. "Machinist" see 38 C. J. p 331.

[c] **"Mason" distinguished.**—Fox v. Rucker, 30 Ga. 525, 527. "Mason" see 38 C. J. p 1383.

86. See Plaster ante; Plasterer ante.

87. Webster D. [quot Mellen v. Ford, 28 Fed. 639, 642, 643].

88. Webster D. [quot Mellen v. Ford, supra].

[a] **Plastering is applied directly** upon walls of brick and mortar, the joints of which are left rough, that it may the better adhere; or upon a surface of laths, which are flat narrow strips of wood securely nailed to the joists, rafters, or studs, parallel to each other, and so close together that but little space (usually ¼ inch) is left for the mortar to get between them. That which passes through spreads and hardens in lumps, which key the rest of the coating to the laths. 13 Am. Encyc. (1870) p 377 [quot Mellen v. Ford, 28 Fed. 639, 642, 643].

[b] **Ornamental and plain plastering.**—In an action on a contract it was contended by defendant that "ornamental plastering" had a technical trade meaning, and only included such ornamental work as is modeled and cast in the shop and afterward applied to the building in a dry state; and that "plain plastering" meant the plain surface and such plain mouldings and cornices as are put on in the form of wet plaster in the building, and which are distinguishable from those cornices and mouldings which are not put upon the walls until after they are made. Upon this matter, however, there was a conflict in the testimony, and in so far as the question was one of fact the finding of the court below was conclusive in the matter, the court finding for plaintiff. Woodruff v. Klee, 47 App. Div. 638, 62 NYS 350, 351.

89. Worcester D. [quot Mellen v. Ford, 28 Fed. 639, 642, 643].

[a] **"Deafening" included.**—Mellen v. Ford, 28 Fed. 639, 640.

[b] **"Lathing" included.**—Mellen v. Ford, 28 Fed. 639, 640; Higgins v. Lee, 16 Ill. 495, 501. "Lathing" see 36 C. J. p 956.

[c] **A contract for plastering** is presumed to be made in reference to

PLASTIC. Capable of being molded and pressed into form.[90]

PLASTILINA. A modeling clay so compounded as to remain moist for a considerable time, and thus dispense with frequent wetting during the progress of the work.[91]

PLAT.[92] [§ 1] **A. As a Noun.** A representation of land on paper, appealing to the eye by means of lines and memoranda, rather than by words alone;[93] a subdivision of land into lots, streets, and alleys, marked upon the earth, and represented on paper.[94]

[§ 2] **B. As a Verb.** To make a ground plan of; map or plat; lay down on paper.[95]

Platting. As applied to towns, descriptive of the means of perpetuating the evidence of the creation of a town.[96]

Phrases: "Laid out or platted portion of any incorporated town, city, or village,"[97] "platted lands,"[98] "platted property,"[99] "platted territory."[1]

PLATA. In Spanish law, plate; silver.[2]

PLATE.[3] A flat, comparatively thin, usually rigid sheet, slice, leaf, or lamina of metal or other substance, of more or less uniform thickness and even surface;[4] a flat, or nearly flat piece of metal, the thickness of which is small as compared with the other dimensions;[5] a piece of metal extended or flattened to an even surface with a uniform thickness;[6] a piece of metal with an even or horizontal surface, or nearly so, without marked prominence or depressions;[7] a sheet of metal of uniform thickness and even surface.[8] According to the foregoing definitions, uniformity of thickness and evenness of surface are the characteristics of a plate.[9] The term also means gold or silver dishes and utensils used at table or in the home, including, besides dishes, other vessels, as cups, flagons, etc., as well as spoons, knives, forks, etc.[10]

Phrases. "Circular saw plates,"[11] "copper plates,"[12] "sheets and plates and steel in all forms and shapes,"[13] "steel plates."[14]

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the usage of the trade, and usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract. Walls v. Bailey, 49 N. Y. 464, 468, 10 AmR 407.

[d] **A kalsominer** who finds it necessary to fill a little hole with plaster in order to do his work properly is not engaged in "plastering." Hungerford v. Bonn, 183 App. Div. 818, 171 NYS 280, 282.

90. Diamond Patent Co. v. Webster, 249 Fed. 155, 157, 161 CCA 207; Blair v. Jeannette-McKee Glass Works, 161 Fed. 355, 356.

[a] **As used in a patent** the word is to be construed according to the definition there given rather than altogether by reference to dictionary definitions. Blair v. Jeannette-McKee Glass Works, 161 Fed. 355, 356.

[b] **"Elastic" distinguished.**—Diamond Patent Co. v. Webster, 249 Fed. 155, 157, 161 CCA 207. "Elastic" see 19 C. J. p 1256.

[c] **"Pliable" distinguished.**—Blair v. Jeannette-McKee Glass Works, 151 Fed. 355, 356.

91. Century D. See Bancel v. U. S., 176 Fed. 132.

"Modeling clay" see Clay 11 C. J. p 832 text and notes 96, 97.

92. See Lot 38 C. J. p 282; Map 38 C. J. p 990; Plan ante; Survey [37 Cyc 621].

Plat:

As evidence:
- Generally see Evidence §§ 957, 1114.
- Of dedication see Dedication §§ 113, 114.
- Of establishment of boundaries see Boundaries §§ 333, 334.

As fixing boundaries see Boundaries § 50.

Construction and interpretation of see Dedication § 127.

Dedication:
- By leasing land with reference to see Dedication § 54.
- By sale of land with reference to see Dedication §§ 43–53.

Of municipality or addition thereto see Municipal Corporations §§ 133, 134.

Reference to:
- In deed see Deeds § 251.
- In mortgage see Mortgages § 245.

Revocation of dedication by see Dedication §§ 149–151, 156.

Statutory dedication as curing defects in see Dedication § 61.

93. Thompson v. Hill, 137 Ga. 308, 73 SE 640, 643.

[a] **As written instrument.**—Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 3, 29 NE 484. "Written instrument" see Instrument § 3.

94. Burke v. McCowen, 115 Cal. 481, 485, 47 P 367; McDaniel v. Mace, 47 Iowa 509, 510.

95. Century D.

96. Matthiessen, etc., Zinc Co. v. La Salle, 117 Ill. 411, 417, 2 NE 406, 8 NE 81.

[a] **"Subdivision" distinguished.**—Hatter v. Icenbice, (Iowa) 223 NW 527, 529. "Subdivision" see [37 Cyc 340].

97. In re Smith, 51 Minn. 316, 319, 53 NW 711 (as used in a statute refers only to that part which is already laid out and platted for city or urban purposes, and not to land divided into lots for rural or agricultural purposes).

98. State v. Johnson, 105 Wash. 93, 95, 177 P 699 (for purposes of organization of town included tracts surveyed, subdivided into smaller tracts, and designated by lot numbers, although platted for garden or agricultural purposes).

"Platted and unplatted lands" see Municipal Corporations § 71.

99. Sivyer v. Spokane, 77 Wash. 282, 286, 137 P 808 (as used in a statute refers to lands included in ordinary city blocks by the intersecting streets).

[a] **"Unplatted property."**—Sivyer v. Spokane, 77 Wash. 282, 286, 137 P 808.

1. Ernsperger v. Mishawaka, 168 Ind. 253, 256, 80 NE 543 (used in a statute in a technical signification as meaning legal plats, a platting for town purposes).

2. Escriche Diccionario. See Plate post.

3. See Disc 18 C. J. p 1141; Drawplate 19 C. J. p 763.

"Plates" as subject to customs duties see Customs Duties § 32 note 17 [c].

4. Murray New Eng. D. [quot Prosser v. U. S., 1 Cust. A. 29, 31].

5. Webster D. [quot Prosser v. U. S., supra].

6. Imperial D. [quot Prosser v. U. S., supra]; Webster D. [quot U. S. v. Sellers, 160 Fed. 518, 519].

7. Webster D. [quot Prosser v. U. S., 1 Cust. A. 29, 31].

8. Century D. [quot U. S. v. Sellers, 160 Fed. 518, 519; Prosser v. U. S., 1 Cust. A. 29, 31].

9. Prosser v. U. S., supra.

10. Century D. But see Hanover F. Ins. Co. v. Mannasson, 29 Mich. 316, 317 (holding that silver forks and spoons were not included in the word "plate" used in an insurance policy, and saying: "The term plate is not commonly understood to embrace articles of ordinary use, whatever may be the material, but only the more pretentious articles which are displayed on the tables of the wealthy or ostentatious, and which are to be considered rather as articles of luxury than as household furniture"); Moadinger v. Mechanics' F. Ins. Co., 2 N. Y. Super. 490, 492 (intimating that while certain silver spoons, tongs, etc., might not be included under the term "plate" used in an insurance policy, they might be included under the phrase "household furniture").

[a] **"Household furniture"** in a will passed plate and ornaments in the house. Field v. Peckett, 29 Beav. 573, 54 Reprint 750.

[b] **"Plate** properly so called does not include plated articles." Holden v. Rainsbottom, 4 Giffard 205, 206, 66 Reprint 680.

[c] **"Plate and china"** in a will covered snuff boxes of gold, silver, and china. Field v. Peckett, 29 Beav. 573, 54 Reprint 750.

"Jewels" not included in "plate" see Jewel 33 C. J. p 834 note 82 [a].

11. Boker v. U. S., 168 Fed. 573, 574.

12. U. S. v. Drakenfeld, 178 Fed. 258, 259, 101 CCA 618.

"Copper" see 13 C. J. p 933.

13. Morris v. U. S., 174 Fed. 656, 657, 98 CCA 410; Morris v. U. S., 169 Fed. 666; Hill v. Wood, 163 Fed. 51, 52, 89 CCA 635; U. S. v. C. Newman Wire Co., 152 Fed. 488, 489; U. S. v. Vandegrift, 142 Fed. 448, 73 CCA 564; Morris v. U. S., 140 Fed. 774; In re Vandegrift, 139 Fed. 790, 792.

14. Hill v. Wood, 163 Fed. 51, 52, 89 CCA 635; U. S. v. Sellers, 160 Fed. 518, 519.

"Steel" see [36 Cyc 1272].

PLATE-GLASS INSURANCE

By Rudy J. Brossman

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

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CROSS REFERENCES

Accident Insurance 1 C. J. p 397.
Burglary and Theft Insurance 9 C. J. p 1095.
Cyclone and Tornado Insurance 17 C. J. p 693.
Fire Insurance 26 C. J. p 1.
Hail Insurance 29 C. J. p 205.
Indemnity 31 C. J. p 417.
Insurance generally see **Insurance** 32 C. J. p 950.
Lightning Insurance 37 C. J. p 661.

I. DEFINITION AND NATURE

[§ 1] Plate-glass insurance is a contract whereby insurer, for a valuable consideration, agrees, subject to certain conditions, to indemnify insured against loss occasioned by destruction of, or injury to, plate glass.[1] It is a form of accident and casualty insurance.[2]

II. INSURANCE ORGANIZATIONS[3]

[§ 2] **A. In General.** Companies organized to insure against loss from the breaking of plate glass are insurance companies, within a statute providing for the organization of insurance companies.[4] Companies organized under the Casualty Insurance Act of Illinois are authorized to engage in the business of insuring plate glass.[5] A company engaged in the business of insuring against injuries to plate glass from causes other than fire transacts the business of "accidental insurance," within a statute imposing a license fee upon companies doing such business.[6] A business corporation, which proposed by contract to care for plate glass for a fixed term for a certain consideration and to replace the glass, if broken, within the period of the contract, was attempting to do an insurance business in violation of the statute.[7]

[§ 3] **B. Foreign Organizations.**[8] A foreign insurance company authorized to write plate-glass insurance is entitled to a certificate authorizing it to do that kind of business within the state, by a compliance with the law so far as applicable to that kind of business, without complying with provisions relating to the transaction of business within the state by foreign corporations organized for the purpose of writing other specified classes of insurance, although it also is authorized by its charter to write insurance of the kinds specified.[9] Companies organized under the laws of another state, for the purpose of

1. Weaver v. New Jersey Fidelity, etc., Ins. Co., 56 Colo. 112, 136 P 1180, 51 LRANS 414; Peo. v. Standard Plate Glass, etc., Co., 174 App. Div. 501, 502, 156 NYS 1012; State v. Fricke, 102 Wis. 117, 77 NW 734. And see cases infra §§ 4–8.
"A plate glass insurance policy . . . provides for the replacing of glass in the event of its being broken or for the payment of a given sum of money, either one or the other." Peo. v. Standard Plate Glass, etc., Co., supra.

2. Metropolitan Casualty Ins. Co. v. Basford, 31 S. D. 149, 139 NW 795; State v. Fricke, 102 Wis. 117, 77 NW 734. See also Accident Insurance 1 C. J. p 397.

3. **Generally** see Insurance §§ 44–125.

4. Peo. v McCann, 67 N. Y. 506.
[a] **Under the general laws of Massachusetts** plate-glass insurance companies may be organized. Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 NE 529.

5. Peo. v. Van Cleave, 187 Ill. 125, 58 NE 422.

6. State v. Fricke, 102 Wis. 117, 77 NW 734.

7. Peo. v. Standard Plate Glass, etc., Co., 174 App. Div. 501, 156 NYS 1012

8. **Foreign corporations generally** see Corporations §§ 3922–4159; Insurance §§ 29–31.

9. Metropolitan Casualty Ins. Co. v. Basford, 31 S. D. 149, 139 NW 795.

insuring plate glass against damage, are subject to a penalty for a failure to comply with the provision of the insurance law, requiring companies organized in another state to file a certificate with the insurance department of this state.[10]

III. CONTRACT AND POLICY[11]

[§ 4] **A. In General.** Rules applicable to the construction of insurance contracts generally[12] govern as to this particular kind of insurance.[13] In the absence of a provision in the policy that the glass must be without hole or perforation when insured, a hole through a pane of glass does not render it uninsurable under such policy.[14] Notwithstanding such a policy indemnifies insured against loss occasioned by the destruction of, or injury to, the glass,[15] the liability of insurer is primary;[16] he agrees merely to insure the property itself.[17]

Validity. Such a casualty[18] as an accident damaging plate glass, arising from causes other than fire, is a contingent event which may be the subject of legal insurance.[19]

[§ 5] **B. Insurable Interest.** The general rule that one has an insurable interest in property if, by its destruction, he will suffer a loss[20] applies to plate-glass insurance.[21] A lessee who is bound to replace all broken glass has an insurable interest in the glass.[22]

IV. RISKS AND CAUSES OF LOSS

[§ 6] **A. In General.** In order that there may be a recovery on the policy, the loss must result from the particular peril against which insured is indemnified.[23] A policy covering breakage of glass in a building covered loss by breakage by the wrongful act of a third person.[24] The breaking of plate glass by dynamite used to prevent the spread of a fire was not the result of accident within a provision of the policy requiring the breakage to be the result of accident,[25] but was the result of design.[26]

Damage caused by "civil commotion." A policy, which insured against damage to plate glass caused directly by, or arising from, civil commotion, has been held not to cover damage caused by the separate acts of suffragettes in breaking windows,[27] although done simultaneously in preconcert and in proximity to one another,[28] there being no tumult and disturbance except that arising from the acts;[29] in such case the fact that insurer had made payment to plaintiffs under a similar policy for damage arising under similar circumstances was held immaterial.[30]

[§ 7] **B. Excepted Risks—1. Loss or Damage from Fire.** Whether an insurer of plate glass is relieved from liability by operation of a clause excepting loss or damage from fire depends on the fact whether the fire was the proximate cause of the loss.[31] Where the breaking of the glass results from the explosion of gas or material of like properties, ignited by a light or the striking of a match, the loss is not an excepted one as being caused by fire,[32] or directly or indirectly caused by fire.[33] Under a clause exempting insurer from loss resulting directly or indirectly from fire, it has been held that, where the damage is caused by an explosion of dynamite resulting from a fire, both occurring at a distance from the glass, insurer is not liable, as the fire is a cause of the loss;[34] but it has also been held that in such a case the insurer is not exempted from liability,[35] on the theory that insurer broadly assumed responsibility for all loss by breakage of the insured glass, and the proviso was intended to except only a loss which would be covered by a fire policy, the loss occurring under the circumstances related not being covered by a fire policy.[36]

[§ 8] **2. Other Exceptions.** For a clause in a plate-glass policy, excepting from insurer's liability any damage "occurring before the glass is completely glazed in a workmanlike manner," to avail insurer, the break, occurring after the glazing has

10. Peo. v. McCann, 67 N. Y. 506.

11. **Generally** see Insurance §§ 175–323.

12. See Insurance §§ 257–278.

13. See cases infra text and note 13–17; and § 5.

[a] **Thus** (1) the contract is to be construed so as to ascertain and carry out the intention of the parties as expressed by its terms. New York Fidelity, etc., Co. v. Williams, 21 Colo. A. 539, 122 P 815. (2) The terms are to be given their ordinary and commonly accepted meaning. Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 NW 569, 97 AmSR 330, 60 LRA 838.

[b] **In case of ambiguity** that construction is to be given which is most favorable to insured. New York Fidelity, etc., Co. v. Williams, 21 Colo. A. 539, 122 P 815; Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 NW 569, 97 AmSR 330, 60 LRA 838.

14. McMyler v. Union Casualty, etc., Co., 84 NYS 170.

15 See supra § 1.

16. Plate Glass Underwriters' Mut. Ins. Co. v Ridgewood Realty Co., 219 Mo A. 186, 269 SW 659.

17. Plate Glass Underwriters' Mut. Ins. Co. v. Ridgewood Realty Co., supra.

18. See Casualty 11 C. J. p 30.

19. Peo. v. McCann, 67 N. Y. 506.

20. See Fire Insurance § 3; Insurance § 204.

21. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. 29, 180 NW 997.

22. Banner Laundry Co. v. Great Eastern Casualty Co., supra.

[a] **Failure of lessor to enforce covenant.**—Where a policy of insurance protected a lessee against the breakage of glass, the fact that the owner of the building had not enforced a covenant in the lease for the replacement of the broken glass did not preclude a recovery on the policy. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. 29, 180 NW 997.

23. See cases infra text and note 23–30.

24. Weaver v. New Jersey Fidelity, etc., Ins. Co., 56 Colo. 112, 136 P 1180, 51 LRANS 414.

25. Frisbie v. Fidelity Casualty Co., 133 Mo. A. 30, 112 SW 1024.

26. Frisbie v. Fidelity Casualty Co., supra.

27. London, etc., Plate Glass Ins. Co., Ltd. v. Heath [1913] 3 K. B. 411.

28. London, etc., Plate Glass Ins. Co , Ltd. v. Heath, supra.

29. London, etc., Plate Glass Ins. Co., Ltd. v Heath, supra.

30. London, etc., Plate Glass Ins. Co., Ltd. v. Heath, supra.

31. See cases infra this note; and notes 35, 36.

[a] **Fire not proximate cause of loss.**—Where the glass was destroyed by a mob, attracted by a fire on the premises, which broke the glass while trying to plunder the premises, the fire was only the remote cause of the loss, the lawless acts of the mob constituting the proximate cause, and insurer was relieved from liability under such a clause. Marsden v. City, etc., Assur. Co., L. R. 1 C. P. 232.

[b] **Fire held proximate cause.**—Under a policy which exempted insurer from liability for loss happening by, or in consequence of, any fire, whether on the insured premises or not, where the glass was broken by the use of dynamite to prevent the spread of the fire, the fire was the proximate cause of the loss so as to prevent a recovery under the policy. Frisbie v. Fidelity Casualty Co., 133 Mo. A. 30, 112 SW 1024.

32. Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 NW 569, 97 AmSR 330, 60 LRA 838.

33. Maryland Casualty Co. v. Cherryvale Gas, etc., Co., 99 Kan. 563, 162 P 313, LRA1917C 487.

34. Jones v. Metropolitan Casualty Ins. Co., 144 Wis. 66, 128 NW 280, AnnCas1912A 1091.

35. New York Fidelity, etc., Co. v. Williams, 21 Colo. A. 539, 122 P 815; Metropolitan Casualty Ins. Co. v. Bergheim, 21 Colo. A. 527, 122 P 812.

36. New York Fidelity, etc., Co. v. Williams, 21 Colo. A. 539, 122 P 815; Metropolitan Casualty Ins. Co. v. Bergheim, 21 Colo. A. 527, 122 P 812.

been completed, must have been caused by an unworkmanlike manner of installing the glass.[37] An exception for loss resulting directly or indirectly from inundation is operative as to a loss within its terms.[38] Other clauses that have been set up as exempting insurer from liability, the loss having occurred under circumstances which made the particular exception inapplicable are as follows: Loss or damage caused by acts or operations of workmen in construction of, or repairs to, the building or frames in which the glass is located;[39] loss caused by glazing;[40] loss caused by the blowing up of buildings;[41] and loss originating from breakage during removal.[42] A tornado insurance policy[43] on a building, which provides that it does not cover insurance on "plate glass in doors and windows, whereof the dimensions are nine feet or more," covers the loss by storm of an immovable and stationary plate-glass front, although larger than that specified.[44]

V. NOTICE OF LOSS[45]

[§ 9] Although notice of loss required by the policy be given to an unauthorized agent of insurer, it may be sufficient where actually communicated to insurer.[46]

VI. ELECTION OF INSURER TO REPLACE[47]

[§ 10] Where insurer elects to replace the broken glass, there is an implied obligation to perform within a reasonable time.[48] Where insurer elects to repair, and the contract of insurance is thereby superseded by the contract to repair, negligence which consists merely in the breach of the contract to repair affords no ground for an action by anyone except a party to such contract, or a person for whose benefit the contract was avowedly made.[49] An insurer electing to replace damaged glass and having the work done by an independent contractor is not responsible for the negligent acts of servants of the latter.[50]

VII. SUBROGATION[51]

[§ 11] Following the general rule,[52] an insurer paying the loss or replacing broken glass is subrogated to the rights of insured with respect to a recovery from the person whose wrongful act or default caused the loss.[53] In accordance with general rules,[54] a recovery cannot be had as for the negligence where the act was "purely accidental."[55] An insurer, insuring a tenant against the breakage of plate glass on paying for the repair of broken glass, is not subrogated to the right of the tenant against the landlord who might be liable under the lease to repair the damage.[56]

Burden of proof. The burden of proof is on the party causing damage to a plate-glass window to show that he was not in fault, the presumption being that the window was broken through his negligence.[57]

Measure of recovery. An insurer replacing plate glass, in an action against the person liable for the damage, is entitled to the reasonable cost of replacing it,[58] which is to be proved like any other question of fact.[59]

VIII. ACTIONS ON POLICIES

[§ 12] **A. In General.** General rules[60] control in actions on policies of plate-glass insurance.[61] Under a policy covering a lessee's liability for the breakage of glass, a denial by insurer of any liability entitled insured to sue without waiting for the expiration of the time allowed for the making of a settlement thereunder,[62] or without giving insurer an opportunity to replace the glass under an option reserved in the policy.[63]

[§ 13] **B. Evidence.** Proof of breakage is proof of cause of action,[64] unless there is an affirmative showing that the breakage was within an exception of the policy.[65] The sufficiency of evidence to show the existence of the subject matter of insurance,[66]

37. Carr v. International Indemn. Co., 58 Cal. A. 614, 209 P 83.

38. Feehrer v. New York Fidelity, etc., Co., 188 Ill. A. 398 (damage caused by use of rowboats during inundation).

39. Ætna Casualty, etc., Co. v. Apple, 99 Okl. 257, 226 P 1026 (where workmen engaged by insured to replace broken glass covered by the policy negligently broke another glass belonging to insured and which was covered by policy).

40. Carr v. International Indemn. Co., 58 Cal. A. 614, 209 P 83 (break occurring after the work of glazing had been completed).

41. Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 NW 569, 97 AmSR 330, 60 LRA 838 (breaking of plate glass caused by the explosion of gas in a room generated from gasoline being used to clean clothes, the gas being ignited by a match or light in the room).

42. Marsden v. City, etc., Assur. Co., L. R. 1 C. P. 232.

43. See Cyclone and Tornado Insurance 17 C. J. p 693.

44. Hale v. Springfield F. & M. Ins. Co., 46 Mo. A. 508, 510.

45. **Generally** see Insurance § 648 et seq.

46. Marsden v. City, etc., Assur. Co., L. R. 1 C. P. 232.

47. See Fire Insurance §§ 601–609.

48. Munk v. Maryland Casualty Co., 116 App. Div. 756, 102 NYS 164.

Effect of denial of liability see infra § 12.

49. Munk v. Maryland Casualty Co., 116 App. Div. 756, 102 NYS 164.

[a] **Right of lessee of insured.**—The failure of an insurer promptly to repair a glass window of a drug store is not a tort as to the lessee of the store. Munk v. Maryland Casualty Co., 122 App. Div. 487, 107 NYS 215; Munk v. Maryland Casualty Co., 116 App. Div. 756, 102 NYS 164.

50. McCauley v. Fidelity, etc., Co., 16 Misc. 574, 38 NYS 773.

51. **Generally** see Subrogation [37 Cyc 361].

52. See Insurance § 714.

53. Seattle v. Lloyds' Plate Glass Ins. Co., 253 Fed. 321, 165 CCA 103; Maryland Casualty Co. v. Cherryvale Gas, etc., Co., 99 Kan. 563, 162 P 313, LRA1917C 487; Merchants, etc., Guarantee Co. v. Brunette, (Que.) 25 RevdeJur 191; Lloyds Plate Glass Co. v. Powell, 16 Que. Super. 432.

[a] **Roofer's negligence.**—It is negligence on the part of a roofer not to protect plate-glass windows by some means when clearing a roof above from snow. Lloyds Plate Glass Co. v. Powell, 16 Que. Super. 432.

[b] **Effect of settlement between wrongdoer and insured.**—An insurer cannot recover under a subrogation clause of the contract where it indemnified insured with full knowledge of settlement between him and the persons causing damage. Weaver v. New Jersey Fidelity, etc., Ins. Co., 56 Colo. 112, 136 P 1180, 51 LRANS 414.

54. See Negligence § 126.

55. Fidelity, etc., Co. v. Cutts, 95 Me. 162, 49 A 673.

56. Plate Glass Underwriters' Mut. Ins. Co. v. Ridgewood Realty Co., 219 Mo. A. 186, 269 SW 659.

57. Lloyds Plate Glass Co. v. Powell, 16 Que. Super. 432.

58. Co-operative Furniture Co. v. Southern Surety Co., (Tex. Civ. A.) 264 SW 201.

59. Co-operative Furniture Co. v. Southern Surety Co., supra.

Relevancy and materiality of evidence generally see Evidence §§ 89–156.

60. See Insurance §§ 776–891.

61. See cases infra text and notes 62, 63.

62. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. 29, 180 NW 997.

63. Banner Laundry Co. v. Great Eastern Casualty Co., supra.

64. Banner Laundry Co. v. Great Eastern Casualty Co., supra.

65. Banner Laundry Co. v. Great Eastern Casualty Co., supra.

66. McMyler v. Union Casualty Co., 84 NYS 170.

[a] **Thus,** in an action on a policy of plate-glass insurance, evidence that the company's inspector viewed

and the cause of loss,[67] is governed by familiar | rules.[68]

***PLATE MATTER.** Reading news matter suited to the general needs of newspapers, supplemental to local items necessary for the several localities, which is set up in type and cast in stereotype plates and then distributed to the various newspapers.[1]

PLATEN. The flat part of a press which comes down upon the form, and by which the impression is made.[2]

Platen press. Any form of printing press which gives impression from a platen, in distinction from rotary or cylinder presses, which give impression from a cylinder or a curved surface.[3]

PLATFORM.[4] A raised frame or structure with a level surface.[5]

Platform end sill. On passenger cars the transverse end piece of the platform frame; also called the "end timber" and "buffer beam" on passenger equipment cars.[6]

Platform step. A part of the stairs at each end of a passenger coach or caboose car which affords the means of ingress or egress.[7] It is sometimes known as a "box step."[8]

PLATTING.[9]

PLAY.[10] [§ 1] **A. As a Noun.** A composition in which characters are represented by dialogue and action;[11] a dramatic composition, drama, tragedy, comedy, or farce;[12] a dramatic composition for scenic representation by speaking or acting, as a tragedy, comedy, farce, melodrama, or pantomime.[13] The term is now sometimes extended to include a moving picture production.[14]

[§ 2] **B. As a Verb.** To act on the stage; personate a character.[15]

Played in stock. A term having a technical meaning in the theatrical trade, referring to a play produced by some company other than the owner under a license, upon a customary compensaion of a certain percentage of the gross receipts.[16]

PLAYA. In Spanish law, seashore[17] which is of public ownership.[18]

PLAYED IN STOCK.[19]

PLAYING POLICY.[20]

PLAY RIGHT.[21] The proprietary right of the author of a dramatic or musical composition to its exclusive production or performance, as distinguished from the right to multiply copies by printing.[22]

PLAZA. A word of Spanish derivation which, in Spain, Cuba, Mexico, and parts of the United States settled by the early Spaniards, is used to designate a plat of ground in a city or village, dedicated to the use of the general public for a market place, a com-

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the glass upon the day when the policy was issued and discovered a hole near its center does not show that the glass was not in existence at the time of the issuing of the policy. McMyler v. Union Casualty, etc., Co., 84 NYS 170.

67. See cases infra this note.

[a] **That a pane of glass had a hole** in the center at the time of the issuance of insurance thereon is not evidence that a break in the glass from top to bottom one week thereafter was in consequence of or connected with such hole. McMyler v. Union Casualty, etc., Co., 84 NYS 170.

[b] **Doctrine of res ipsa loquitur held inapplicable.**—In an action under a policy covering breakage of glass in a building operated by a lessee, where it appeared that glass was broken because of the explosion of a steam boiler, due to the sticking of the safety valve, whether or not the doctrine res ipsa loquitur applied was not material as respects any question of insured's negligence, where it appeared that the sticking of the valve was due either to some unknown cause or to an unusual occurrence not likely to happen. Banner Laundry Co. v. Great Eastern Casualty Co., 148 Minn. 29, 180 NW 997.

68. See Evidence §§ 1730–1806.

1. Barr v. Essex Trades Council, 53 N. J. Eq. 101, 106, 30 A 881.

"Newspapers" see 46 C. J. p 17.

2. Century D. [quot Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440, 446].

[a] **"Platen:** (a) The part of a printing press which presses the paper against the type and by which the impression is made; (b) hence an analogous part of a typewriter on which the paper rests to receive an impression; (c) the movable table of a machine tool, as a planer, on which the work is fastened and presented to the action of the tool." Dey Time Register Co. v. Syracuse Time Recorder Co., 152 Fed. 440, 446.

3. Century D. [quot Dey Time Register Co. v. Syracuse Time Recorder Co., supra].

4. See Dagus or Dais 17 C. J. p 696.

Car or station platforms of common carriers:

Contributory negligence of person injured on see Carriers §§ 1493, 1498, 1499, 1513, 1514.

Personal injuries received on see generally Carriers §§ 1294–1480.

5. Century D.

[a] **As a scaffold.**—Herman v. P. H. Fitzgibbons Boiler Co., 136 App. Div. 286, 120 NYS 1074, 1075; Lyons v. McNulty, 77 Misc. 176, 136 NYS 39. "Scaffold" see [35 Cyc 797].

[b] **Railroad station platform as a public highway.**—(1) "The platform of a railroad company at its station or stopping-place is in no sense a public highway. There is no dedication to public use as such. It is a structure erected expressly for the accommodation of passengers arriving and departing in the train. Being unenclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so. The servants of the company, after requesting them to leave, can remove them by whatever force may be necessary." Gillis v. Pennsylvania R. Co., 59 Pa. 129, 141, 98 AmD 317. (2) "The platform was not a part of the roadbed or a bridge, as defined in the policy. It was not a legally laid out or dedicated public highway, but it was a public highway in a limited sense. It was open to the public, not for general use, but for the use of those having business transactions with the company, or having occasion to pass that way. . . . Besides, the public had acquired the privilege of using the platform as a short-cut way to another street." Rudd v. Great Eastern Casualty, etc., Co., 114 Minn. 512, 515, 131 NW 633, 34 LRANS 1205, AnnCas1912C 606.

[c] **Warehouse platform.**—Larceny from as larceny from a house see Wilson v. State, 9 Ga. A. 297, 70 SE 1125.

6. Hill v. Minneapolis, etc., R. Co., 160 Minn. 484, 200 NW 485, 486.

7. Hill v. Minneapolis, etc., R. Co., supra.

[a] **"Sill step" distinguished.**—Hill v. Minneapolis, etc., R. Co., 160 Minn. 484, 200 NW 485, 486.

8. Hill v. Minneapolis, etc., R. Co., supra.

9. See Plat § 2.

10. See Opera 46 C. J. p 1110; Theaters and Shows [38 Cyc 252].

Play:

As subject to copyright see Copyright and Literary Property §§ 107–109.

Infringement of copyright on see Copyright and Literary Property §§ 313–318.

In gambling see Gaming § 67.

Property rights in:

At common law see Copyright and Literary Property § 15.

Effect of publication on see Copyright and Literary Property § 51.

11. Juvenile Delinquents Soc. v. Diers, 10 AbbPrNS (N. Y.) 216, 220.

12. Juvenile Delinquents Soc. v. Diers, supra.

"Comedy" see 11 C. J. p 1232.

"Drama" see 19 C. J. p 761.

"Farce" see 25 C. J. p 670.

13. Standard D. [quot Peo. v. Klaw, 55 Misc. 72, 88, 106 NYS 341].

"Pantomime" see 46 C. J. p 1172.

14. See Crawford v. Pascagoula, 123 Miss. 131, 138, 85 S 181 (the phrase "plays of any kind" in a statute prohibiting their performance, showing, representation, etc., on the Sabbath included moving pictures).

"Moving picture" see 42 C. J. p 1411.

15. Century D.

16. Fitch v. Shubert Theatrical Co., 174 App. Div. 229, 160 NYS 1066, 1068.

17. Escriche Diccionario. See Sugar v. Insular Govt., 18 Philippine 378, 380. See also Sea-Shore [35 Cyc 1278].

18. Spanish Civ. Code art 339 (1); Philippine Civ. Code art 339 (1).

19. See Play § 2 text and note 16.

20. See Gaming § 28.

21. See Play ante.

22. Century D. See Webster New Int. D. ("exclusive right to represent on the stage a dramatic composition"). See also Copyright and Literary Property § 15.

[a] **"Copyright" distinguished.**—Fitch v. Young, 230 Fed. 743, 744.

By WILLIAM QUINBY DEFUNIAK (Plate Matter—Plead a Contract inclusive except the Spanish word).

mon, or a park;[23] a market place;[24] an open square;[25] a public square in a city or town;[26] also, a fortified place or town.[27]

PLEA.[28]

PLEAD.[29] At common law, to interpose matters of fact in defense in the law courts.[30]

Plead a contract.[31] A phrase which means to plead the provisions, undertakings, or engagements of a contract.[32]

Other phrases. "Plead, answer or demur,"[33] and "plead to the declaration or complaint."[34]

PLEAD A CONTRACT.[35]

23. Kelly v. Hayward, 192 Cal. 242, 219 P 749, 750 [quot Cyc]; Sachs v. Towanda, 79 Ill. A. 439, 441 ("In some places the 'plaza' is an unincloced market place and common, over which the public may drive and ride and vend the products of the farm; in other places it consists of an inclosed park, filled with trees, flowers, walks, etc., around which is a driveway, and into which the public have free access;" while in other places it consists of an open square, in the center of which is a small inclosed park with a fountain, flowers, seats and walks").

[a] **In the Philippines** (1) "it was a custom observed by all the towns established administratively in these Islands under the old Laws of the Indies, that on their creation, a certain amount of land was always reserved for plazas, commons, and special and communal property." Harty v. Victoria, 13 Philippine 152, 156. (2) A plaza destined to the public use is not subject to prescription. Civ. Code art 1936 [quot Harty v. Victoria, supra].

"Common" see Common Lands § 1.

"Market place" see Market § 13.

"Park" see 46 C. J. p 1373.

24. Webster New Int. D. [quot Kelly v. Hayward, 192 Cal. 242, 219 P 749, 750].

25. Webster New Int. D. [quote Kelly v. Hayward, supra].

"Square" see [36 Cyc 811].

26. Webster New Int. D. [quot Kelly v. Hayward, 192 Cal. 242, 219 P 749, 750].

"Public square" see [32 Cyc 1254].

27. Webster New Int. D. [quot Kelly v. Hayward, 192 Cal. 242, 219 P 749, 750].

28. Plea:

Affirmative see 2 C. J. p 381 note 52; Equity § 516.
Anomalous see 3 C. J. p 233 text and notes 19, 20; Equity § 518.
Common see Common Pleas 12 C. J. p 205.
Compound see Compound Plea 12 C. J. p 310.
Dilatory see 18 C. J. p 1038; Pleading [31 Cyc 162–188].
Double see Pleading [31 Cyc 119–121].
False or sham see False 25 C. J. p 437 note 79; Pleading [31 Cyc 623–629].
Foreign see 26 C. J. p 889 text and notes 54–57.
In:
- Abatement see Abatement §§ 569–573, 595–597; Criminal Law §§ 742–752; Pleading [31 Cyc 127, 169–185].
- Bar see Criminal Law §§ 753–773; Pleading [31 Cyc 127, 188–215].
- Civil action generally see Pleading [31 Cyc 126–221].
- Confession and avoidance see Pleading [31 Cyc 128, 215–221].
- Contempt proceedings see Contempt §§ 108, 109.
- Criminal action generally see Criminal Law §§ 711–777.
- Discharge see Pleading [31 Cyc 128].
- Equity generally see Equity §§ 505–542.
- Suspension see Pleading [31 Cyc 168].

Issuable see 33 C. J. p 817 note 3 [b].
Joint see Equity § 520.
Negative see Equity § 517.
Of:
- Agreement to turn state's evidence see Criminal Law § 759.
- Autrefois acquit see 6 C. J. p 870; Criminal Law §§ 760–773.
- Autrefois attaint see 6 C. J. p 871; Criminal Law §§ 760–773.
- Autrefois convict see 6 C. J. p 871; Criminal Law §§ 760–773.
- Contributory negligence see Negligence §§ 690–705.
- Estoppel see Estoppel §§ 248–265.
- Former acquittal, conviction, or jeopardy see Criminal Law §§ 760–773.
- Guilty see Criminal Law §§ 734–738.
- Insanity see Criminal Law § 757.
- Justification see 35 C. J. p 896; Pleading [31 Cyc 128].
- Liberum tenementum see 37 C. J. p 160.
- Limitations see Criminal Law § 756.
- Nolo contendere see Criminal Law §§ 732, 739; Nolo Contendere 46 C. J. p 483.
- Non acceptavit see Non 46 C. J. p 485 text and note 90.
- Non accrevit infra sex annos see 46 C. J. p 485 text and note 91.
- Non assumpsit see Non 46 C. J. p 485 text and note 92.
- Non assumpsit infra sex annos see Non 46 C. J. p 485 text and note 93.
- Non cepit see Non 46 C. J. p 485 text and notes 95, 96.
- Non concessit see Non 46 C. J. p 485 text and note 97.
- Non damnificatus see Non 46 C. J. p 485 text and note 1.
- Non dedit see Non 46 C. J. p 485 text and note 2.
- Non detinet see Non 46 C. J. p 485 text and note 3.
- Non dimisit see Non 46 C. J. p 485 text and note 4.
- Non est factum see Non 46 C. J. p 485 text and notes 5, 6, and cross references thereunder.
- Non fecit see Non 46 C. J. p 485 text and note 8.
- Non fecit vastum contra prohibitionem see 46 C. J. p 485 text and note 9.
- Non impedivit see Non 46 C. J. p 485 text and note 11.
- Non infregit conventionem see Non 46 C. J. p 486 text and note 13.
- Non submissit see Non 46 C. J. p 486 text and note 27.
- Non tenent insimul see Non 46 C. J. p 486 text and note 30.
- Non tenuit see Non 46 C. J. p 486 text and note 31.
- Non vult contendere see Non 46 C. J. p 486 text and note 34.
- Not guilty see Criminal Law §§ 774–777; Not 46 C. J. p 497 text and note 41, and cross references thereunder.
- Nul agard see Nul 46 C. J. p 831 text and note 3.
- Nul disseizin see Nul 46 C. J. p 831 text and note 4.
- Nul tiel corporation see Nul 46 C. J. p 832 text and notes 5–7.
- Nul tiel record see Nul 46 C. J. p 832 text and notes 8–10.
- Nul tort see Nul 46 C. J. p 832 text and notes 11, 12.
- Nul waste see Nul 46 C. J. p 832 text and notes 13, 14.
- Pardon see Criminal Law § 758.
- Payment see Limitations of Actions § 736.
- Plene administravit see Executors and Administrators § 1862; Plene Administravit [31 Cyc 890].
- Plene computavit see Accounts and Accounting § 41; Plene Computavit [31 Cyc 890].
- Puis darrein continuance see Pleading [31 Cyc 493–499]; Puis Darrein Continuance [32 Cyc 1261].
- Release see Pleading [31 Cyc 128].
- Son assault demesne see [36 Cyc 514].
- Tender see Tender [38 Cyc 166–170].
- Usury see Usury [36 Cyc 1039–1046].

Operation and effect of as appearance see Appearances § 28.
Pure see Equity § 516; Pure Plea [32 Cyc 1269].
To discovery see Equity § 521.
To the jurisdiction see Criminal Law §§ 740, 741; Pleading [31 Cyc 166–168].
Withdrawal of see Criminal Law §§ 728–733; Equity § 528; Pleading [31 Cyc 600–604].

Pleas to the crown see post.

29. See Plea ante; Pleading 49 C. J. p 1.

Pleading a statute see Statutes [36 Cyc 1237 note 49].

30. Brower v. Nellis, 6 Ind. A. 323, 33 NE 672, 673.

[a] **A term sometimes used** as the equivalent of "avers" and "says." Mylin v. King, 139 Ala. 319, 321, 35 S 998 (where it was said that the words "avers," "says," and "pleas," as used in a pleading, are equivalent terms, and the use of "the word 'pleads' . . . means no more than the preceding words . . . and signifies no more than they would, to characterize the language as a 'plea,' than if the word had not been used").

31. "Contract" see Contracts § 1.

32. McNealy v. Chicago, etc., R. Co., 119 Mo. A. 200, 203, 95 SW 312.

33. Cain v. Commercial Pub. Co., 232 U. S. 124, 132, 34 SCt 284, 287, 58 L. ed. 534; Garvey v. Compania Metalurgica Mexicana, 222 Fed. 732, 734 (includes a plea to the jurisdiction).

34. Wilson v. Winchester, etc., R. Co., 82 Fed. 15, 18.

35. See Plead ante this page text and note 32.

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